

Motion for Ex Parte Relief: Writ of Supersedeas
CCH of Richland county v H&M Real Estate Holdings, LLC

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Master in Equity

The Honorable Joseph M. Strickland, Richland County Master in Equity

Civil Action No. 2016-CP-40-00431

CCH of Richland County, LLC

Respondent,

v.

H&M Real Estate Holdings, LLC,
JZB Group, LLC a/k/a The JZB
Group, LLC, and Mitch B. McGuirt,

of whom H&M Real Estate
Holdings, LLC,

Appellants.

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NOTICE OF MOTION AND MOTION FOR EX PARTE RELIEF: WRIT OF
SUPERSEDEAS

H&M Real Estate Holdings, LLC by and through its undersigned counsel hereby
petitions this Honorable Court, pursuant to Rule 241 of the South Carolina Appellate

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Court Rules, requesting an immediate writ of supersedeas to stay the judicial sale of the Appellant's property November 7, 2016 at 12:00 p.m. and to suspend the foreclosure proceedings during the pendency of this appeal. The Notice of Sale is attached to this motion as Exhibit 1. The Order of Foreclosure and Sale is attached as Exhibit 2. To comply with Rule 241 (d) (1), the Appellant first brought this matter to the attention of the Richland County Master in Equity by motion for relief and stay made pursuant to Rule 60 and Rule 62 (b), SCRPC. The Master in Equity's notice of hearing and Appellant's motion are enclosed to the Notice of Appeal as Exhibit A and Exhibit B respectively.

The Master in Equity denied the motion on November 4, 2016. No written order, judgment, or decree has been issued by the Master in Equity as of the date of the filing of Appellant's motion.

The Appellant now seeks a writ of supersedeas pursuant to Rule 241 (d) SCACR. The grounds for this motion are as follows:

1. The Appellant sought to bring certain newly acquired evidence to the Master in Equity's attention at the November 4, 2016 hearing and to petition for a stay of the November 7, 2016 judicial sale pending a determination by the Master in Equity as to whether the newly acquired evidence contravened the debt amount claimed by Respondent (secured by the mortgage foreclosed by the Respondent) pursuant to S.C. Code § 29-3-630 (the "Hearing").

2. In filing the Rule 60(b) SCRPC motion the Appellant was seeking to

secure equitable relief on the basis of extrinsic fraud. See *Chewning v. Ford Motor Co.*, 354 S.C. 72, 579 S.E.2d 605 (2003).

3. At the Hearing counsel for Respondent acted with such hostility and anger toward undersigned counsel and the members of Appellant (which is a limited liability company) who were in attendance to testify as to the newly acquired evidence, that the Master in Equity lost control of the proceedings. See the affidavits of Henry Massey and Mitchell B. McGuirt enclosed as **Exhibit 3** and **Exhibit 4**.

4. As set forth in his affidavit, Mr. Massey stood ready at the Hearing to provide security as required under Rule 62(b) SCRPC and was also prepared to tender payment on the debt in an amount consistent with what the newly acquired evidence indicated was actually owed.

5. Prior to the beginning of the Hearing undersigned counsel attempted to communicate with Respondent counsel addressing him directly on several occasions only to be completely ignored. In addition Respondent counsel did not provide undersigned counsel a hard copy of his response to undersigned counsel's motion prior to the Hearing.

6. During the course of the Hearing, as Respondent counsel's affect became more and more agitated and overtly hostile, the Master in Equity became visibly disturbed, shaking and appearing to lose control of his physical person. In addition, the Master in Equity's attention and focus appeared to slip significantly in response to the in extremis behavior of Respondent's counsel such that it appeared

he was unable to fully comprehend the arguments and requests undersigned counsel was making of the Court or maintain control of the proceedings. This included failing to rule on undersigned counsel's request to allow witnesses to testify and to allow undersigned counsel to speak without being shouted down by Respondent counsel. In addition, Respondent counsel referred to one of the witnesses directly while they were seated in the pews in a markedly hostile and challenging way.

7. Undersigned counsel believes Respondent's counsel conducted himself in this manner intentionally knowing full well the thoroughly disruptive effect it would have on the Master in Equity given what undersigned counsel has now come to understand are the Master in Equity's well known infirmities and physical limitations.

8. The Respondent counsel's refusal to respond to undersigned counsel when addressed directly prior to the beginning of the Hearing, and Respondent counsel's conduct directed at witnesses and undersigned counsel during the course of the Hearing was patently undignified and unprofessional, showed no respect to the Court or the moving parties and prevented the Appellant from being heard and presenting evidence on its motion. These actions taken all together, denied the Appellant due process.

9. "The requirements of due process include notice [and] an opportunity to be heard in a meaningful way." *Ogburn-Matthews v. Loblolly Partners*, 332 S.C. 551, 562, 505 S.E.2d 598, 603 (Ct. App. 1998). Procedural due process requires adequate

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notice, opportunity for a hearing, right to introduce evidence, and the right to confront and cross-examine witnesses. *Humellmantel v. Greenville Hosp. Sys.* 303 S.C. 549, 402 S.E.2d 489 (1991).

10. Respondent's counsel so disrupted the proceedings as to deny Appellant the ability to introduce evidence and testimony thus abridging Appellant's right to a fair hearing on the merits all of which is guaranteed under the Due Process Clause of the Constitution. Consider also that a moving party in a Rule 60(b) motion has the burden of presenting evidence entitling him to relief. *BB&T v Taylor*, 369 S.C. 548, 633 S.E.2d 501 (2006). As a direct result of Respondent counsel's actions Appellant and its counsel were prevented from presenting evidence to meet its burden as the moving party.

11. The Master in Equity denied Appellant's motion. In making its ruling the Master in Equity directed Respondent's counsel to prepare a simple order denying the motion. Undersigned counsel asked the Court for clarification and for the basis for denying Appellant's motion. The Master in Equity stated that the denial was based on Respondent counsel's arguments. "An order refusing to stay a judgment is immediately appealable if it affects the merits." *Dill v. Moon*, 14 S.C. 338 (1880) (see Jean Hoefer Toal et al., *Appellate Practice in South Carolina* 99 (2nd ed. 2002)). The basis for this appeal is the denial of Appellant's procedural due process rights and the Court's refusal to order a stay to maintain the status quo pending a determination as to whether the newly acquired evidence would require that the debt securing the

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mortgage being foreclosed be reduced. The amount of indebtedness secured by a mortgage being foreclosed speaks to the heart of a foreclosure action as pursuant to S.C. Code § 29-3-630, "no sale under or by virtue of any mortgage...shall be valid to pass the title of the land mortgaged unless the debt for which the security given shall be first established by the judgment of some court of competent jurisdiction." Clearly the denial of the appellant's due process rights and the Master in Equity's order refusing to stay the foreclosure and judicial sale affects the merits.

12. The service of a notice of appeal automatically stays matters decided in the order on appeal. Rule 241, SCACR. The purpose of the stay is to preserve the jurisdiction of the appeal and to prevent a contested issue on appeal from becoming moot by ongoing action in a lower court. See Rule 241 (c) (2) SCACR. Provided however that S.C. Code § 18-9-170 requires that a judgment for execution on the sale of real property shall not be stayed without a written undertaking executed on the part of the appellant. As per affidavit of Henry Massey (see Exhibit 3), he stands ready to act as surety for the Appellant H&M Real Estate Holdings, LLC and has the liquid assets necessary to support the undertaking. See Mr. Massey's personal account statements enclosed as Exhibit 5.

13. Given the exigent circumstances (Friday hearing and Monday judicial sale) going to the market to obtain an appeal bond is impossible. Accordingly, given Mr. Massey's liquid net worth, Appellant would ask the Court for an Order to allow Appellant to comply with the substance and intent of S.C. Code § 18-9-170 if not the

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form. Accordingly, in addition to the writ supersedeas, the Appellant would also move this Court for an Order setting the terms, form, and amount of Mr. Massey's undertaking as surety to comply with S.C. Code § 18-9-170 while accounting for the fact that (i) the Appellant is not contesting the validity of the mortgage, only the amount of the indebtedness secured by the mortgage, (ii) the property at issue is approximately 26 acres of unimproved land located in the City of Forest Acres, South Carolina, commonly known as the "old children's home"; and (iii) Respondent waived deficiency in the foreclosure action.

14. If the judicial sale is allowed to proceed the Appellant's will be denied redress for (i) the deprivation of their Procedural Due Process rights, and (ii) the issue of indebtedness as both issues will be moot.

15. Staying the judicial sale subject to an undertaking that comports with the substance and intent of S.C. Code § 18-9-170 will protect the interests of the Respondent during the pendency of the appeal. As such, granting the relief requested herein will not prejudice the Respondent.

16. With respect to the requirements of Rule 241 (d) (4) (C) SCACR while the Appellant did make application to the lower court and was denied the relief sought, a certified copy of the lower court's ruling is not available as the hearing was just held Friday November 4, 2016.

17. With respect to the requirements of Rule 241 (d) (6) SCACR, the Appellant would argue that they are entitled to ex parte relief due to the exigent

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circumstances of the judicial sale being scheduled for 12:00 p.m. November 7, 2016 and there is no time to schedule a hearing and, as set forth above and in the enclosed affidavits, irreparable injury, loss or damage will result before the opposing party can respond or even receive proper notice per the requirements set forth in Rule 5 SCRPC.

18. Appellant believes their appeal has a high degree of likelihood of success on the merits.

19. There is good ground to support this appeal and it is not being interposed for delay.

CONCLUSION

Based on the grounds set forth above the Appellant respectfully requests that the Court (i) immediately grant a writ of supersedeas suspending the sale of the Appellant's property at the November 7, 2016 Richland County judicial sale, (ii) set the amount and terms of the security required of Mr. Massey as surety for Appellant pursuant to S.C. Code § 18-9-170, and (iii) stay further foreclosure proceedings until this appeal is resolved.

*****SIGNATURE AND CERTIFICATION ON FOLLOWING PAGE*****

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RULE 241 (d) (6) (B) SCACR, CERTIFICATION

Undersigned counsel certifies, as an officer of the court, that the circumstances set forth above constitute exigent circumstances and that notice on opposing counsel should not be required.



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miles@adlerlaw.partners
Attorney for Appellant

November 7, 2016

SIGNATURE PAGE FOR H&M REAL ESTATE HOLDINGS, LLC NOTICE OF MOTION AND MOTION FOR
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of whom H&M Real Estate
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I certify that I have served the Notice of Appeal, Notice of Motion and Motion for Ex Parte Relief: Writ of Supersedeas with Verification addressed to the counsel of record set forth below by electronic transmission/email and by depositing a copy of same in the United States Mail, postage prepaid, on November 7, 2016. Provided

however that all personal financial information provided to the Court is not being provided to counsel of record.

J. Kershaw Spong
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F. MILES ADLER

ATTORNEY AT LAW

November 7, 2016

VIA EMAIL TO ECARTER@SCCOURTS.ORG AND U.S. MAIL

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: CCH of Richland County, LLC v H&M Real Estate Holdings, LLC et al
C/A No.: 2016-CP-40-00431

Dear Ms. Kitchings:

Enclosed for filing is a Notice of Appeal with an original and six copies of Appellant's Motion for Ex Parte Relief: Writ of Supersedeas with Verification (enclosed as Exhibit "C" to the Notice of Appeal) in the above-captioned case. **For the reasons set forth in the motion I respectfully request an expedited decision in this matter.** Also enclosed are the following:

1. Proof of Service of the Notice of Appeal with Motion and Exhibits on the Respondents.
2. Our check for the \$100.00 filing fee.
3. Our check for the \$25.00 motion filing fee.

Please advise the Court that I have not included Exhibit 5 in the copy of the pleadings that I have served on counsel of record. Exhibit 5 is personal financial information relative to the request made in the motion that is of a sensitive and confidential nature and relevant only to Appellant's motion for writ of supersedeas and therefore for the Court's eyes only.

Please return a clocked copy to us in the self-addressed, stamped envelope provided.

By copy of this letter, I hereby serve the Respondents, through counsel of record with the Notice of Appeal, Notice of Motion and Motion for Ex Parte Relief with Verification.

Thank you for your kind assistance in this matter.

Sincerely,



F. Miles Adler

Enclosures

cc w/enc.:

J. Kershaw Spong
Michael M. Beal
Kenneth E. Ormond

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