

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Ellis B. Drew, Jr., Master in Equity

Case No. 2010-CP-04-03548

Green Tree Servicing, LLC et al
Respondent

Cornie A. Martin
Appellant

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SC Court of Appeals

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

- I. APPELLANT'S ISSUES ON APPEAL WERE NOT RAISED AND RULED UPON BY THE CIRCUIT COURT

- II. THE COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT'S MOTION TO SET ASIDE DEFAULT

STATEMENT OF THE CASE

This appeal presents two (2) questions: (1) Whether a Motion for Relief from Judgment filed almost one year to the day after the entry of an Order of Foreclosure and Sale was timely filed and (2) whether Defendant/Appellant may now argue on appeal those issues that were never presented below.

In deciding both of those questions, the issues before this Court are whether an Order denying the Motion for Relief from Judgment as untimely should be affirmed where the following facts were undisputed:

1. Defendant/Appellant was personally served with the Summons and Complaint seeking foreclosure on October 7, 2010, and defaulted under the same by failing to Answer or otherwise plead
2. Defendant/Appellant personally attended the foreclosure hearing on January 23, 2011, and was informed that foreclosure and sale were ordered.
3. Defendant/Appellant was served with the Order of Foreclosure and Sale on February 15, 2011
4. Defendant/Appellant was served with the Notice of Sale on February 15, 2011.
5. The sale was held on March 1, 2011 and a deed issued to the successful bidder on April 20, 2011.
6. The Defendant/Appellant was personally served with a Writ of Assistance evicting her on June 13, 2012
7. On January 6, 2012, one year after the sale, Defendant/Appellant filed the Motion for Relief from Judgment.

STATEMENT OF FACTS

On March 18, 1997, Appellant, executed and delivered to Green Tree Financial Servicing Corporation a Note ("Note") in the principal sum of Fifty-Eight Thousand Five Hundred Eighty-Seven and 52/100 (\$58,587.52) Dollars, with interest at the rate of 8.99 % per annum (Master in Equity's Order and Judgment of Foreclosure and Sale ¶ 8). Appellant promised to repay Respondent the amounts advanced under the Note. Simultaneously with the execution of the Note, and to secure the repayment of the Note and the debt , Appellant executed and delivered to Green Tree, a Mortgage dated March 18, 1997 ("Mortgage") (Master in Equity's Order and Judgment of Foreclosure and Sale ¶ 9). The Mortgage was recorded on March 18, 1997 in Mortgage Book 2574 at Page 189 in the Office of the Anderson County Register of Deeds. (Master in Equity's Order and Judgment of Foreclosure and Sale ¶ 9)

To further secure the repayment of the amounts due under the Note, Appellant granted Green Tree a security interest in a 1997 Omni Mobile Home, Serial #056276A&B (the "Collateral"), and pursuant to the Note, Green Tree recorded its lien on the face of the Certificate of Title of the Collateral described in the Note. (Master in Equity's Order and Judgment of Foreclosure and Sale ¶ 10)

On October 4, 2012, after Appellant's default under the terms of the Note and Mortgage, Respondent filed an Amended Lis Pendens, Summons and Complaint seeking repossession of the subject mobile home and foreclosure of the real estate mortgage. On October 7, 2010, the Amended Lis Pendens and Summons and Complaint were personally served upon Appellant (Affidavit of Service). Having received no answer, or request for extension of time to answer, Respondent filed its affidavit of default and Motion for Order

of Reference on December 2, 2010 (Affidavit of Default). On December 2, 2010, Martha D. Newton, Clerk of Court for Anderson County executed and recorded an Order of Reference under which the subject case was referred to Ellis B. Drew, Jr., Master in Equity for Anderson County (Order of Reference). Subsequently, a hearing was scheduled and the Respondent forwarded a Notice of Hearing to the Defendants on December 17, 2010 (Notice of Hearing). The Notice of Hearing and Certificate of Service were filed with the Court. The final hearing in the subject action was held on January 24, 2011 at 11:00am and on January 24, 2011 a Master in Equity's Order and Judgment of Foreclosure and Sale and a Notice of Master In Equity Sale were entered in the Office of the Clerk of Court for Anderson County (Transcript of Testimony, Master in Equity's Order and Notice of Sale).

A foreclosure sale was held on March 1, 2011 at 11:00a.m. and the deficiency sale was held on March 31, 2011. (Notice of Sale). On April 7, 2011, the Honorable Ellis B. Drew, Jr. executed a Master in Equity's Deed by foreclosure conveying the subject real property to Green Tree Servicing, LLC, the high bidder at the foreclosure sale. The deed was recorded in the Office of the Anderson County Register of Deeds on April 20, 2011, in Book 10000 at Page 107 (Master's Deed). Furthermore, on April 7, 2011, the Honorable Ellis B. Drew, Jr. executed an Order of Deficiency Judgment against Appellant in the amount of \$21,620.62. Said Order was recorded in the Office of the Clerk of Court for Anderson County on April 12, 2011 (Order of Deficiency Judgment).

Subsequently, due to the subject property still being occupied, a Writ of Assistance was issued by the Honorable Ellis B. Drew, Jr. on June 2, 2011 (Writ). The Anderson County Sheriff's Office served the Writ of Assistance on June 13, 2011 (Affidavit of Service). On or about June 27, 2011, the Respondent's attorney received a letter from Robert P. Lusk, Esquire, that there were outstanding issues that needed to be addressed and the Respondent cancelled the lock-out that had been scheduled with the Anderson County Sheriff's Office.

On or about January 6, 2012, the Defendant, by and through counsel, Andrew Gaines, filed a Motion for Relief from Judgment pursuant to Rule 60(b), SCRPC (Motion). On January 23, 2012, a hearing on Appellant's Motion for Relief from Judgment was heard by the Honorable Ellis B. Drew, Jr (Transcript). Judge Drew, after review of the pleadings and arguments of counsel, denied Appellant's Motion, finding that Appellant had failed to make the motion for relief within a reasonable time. The Supplemental Order denied Appellant's motion for relief and further ordered Appellant to vacate the subject property within thirty (30) days from the date of said Order, which was filed on March 13, 2012 (Order). This appeal followed.

ARGUMENT

I. APPELLANT'S ISSUES ON APPEAL WERE NOT RAISED AND RULED UPON BY THE CIRCUIT COURT

To preserve an issue for appeal, a matter must not be raised for the first time on appeal, but must have been both raised to and ruled upon by the trial court. *Hill v. South Carolina Dept. of Health and Environmental Control*, 389 S.C. 1, 698 S.E. 2d 612. (2010). Defendant/Appellant now asserts, for the first time, that the Court in the present action, relied on an Order which was vacated in an earlier, separate action. As evidenced by the Record on Appeal, however, Appellant did not raise this issue in any pleadings, at the foreclosure hearing, in the Motion for Relief, or in oral arguments at the Motion for Relief hearing. Equally, as it was not presented, the Court did not consider or rule on this issue. Additionally, the Orders referenced regarding Civil Action number 2008-CP-04-04162 have not been appealed and the time for appeal has long expired. Since this issue has not been preserved for appeal, the same should be dismissed.

II. THE COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT'S MOTION TO SET ASIDE DEFAULT

A. The proper test before this Court is whether the Master In Equity abused his discretion

It is well established in South Carolina that the decision of “whether to grant or deny a motion under Rule 60(b), SCRPC is within the sound discretion of the judge.” Colman v. Dunlap, 306 S.C. 491 at 494, 413 S.E.2d 15, at 16 (1991). It is also well established that the decision of the judge should be upheld on appeal absent an abuse of that discretion. Id. “An abuse of discretion arises where the trial judge was controlled by an error of law or where his order is based on factual conclusions that are without evidentiary support.” Tri-County Ice and Fuel Co. v. Palmetto Ice Co., 303 S.C. 237, 399 S.E.2d 779,782 (1990). The question before this Court, therefore, is whether Judge Drew abused his discretion in denying Appellant relief from default.

B. The lower court properly applied South Carolina Rule of Civil Procedure Rule 60 at the hearing on the Motion to Set Aside Default

At the January 23, 2012, hearing on the Appellant's Motion to Set Aside Default, Appellant sought relief from default of the January 24, 2011, Master in Equity's Order and Judgment of Foreclosure and Sale (Motion). Said Master in Equity's Order was a final judgment and Rule 60, SCRPC was the appropriate standard to apply to said motion. Rule 60, SCRPC; Roberson v. Southern Finance of South Carolina, Inc. [CITE] (2005).

Rule 60(b) provides that a party may be relieved from a final judgment or order for mistake, inadvertence, surprise or excusable neglect. In determining whether a party is entitled to an order setting aside a judgment the Court should consider the following: (1) the promptness with which relief is sought; (2) the existence of a meritorious defense; and (3) the prejudice to the nonmoving party. Hill v. Dotts, 345 S.C. 304, 547 S.E. 2d 894 (Ct. App. 2001). "The party seeking to set aside a judgment pursuant to Rule 60(b) has the burden of

presenting evidence entitling him to the requested relief." Perry v. Heirs at Law of Gadsen, 357 S.C. 42, 590 S.E.2d 502 (Ct. App. 2003).

Appellant failed to allege and/or offer any evidence of excusable neglect in her written motion for relief from default judgment and no argument regarding excusable neglect was offered at the hearing on said motion (Motion). Therefore, the trial court's refusal to vacate the default judgment is proper.

C. **The lower court properly considered the factors of the promptness with which relief was sought and Appellants reasons for the failure to act promptly**

While the South Carolina Supreme Court in McInerny v. Toler has made it clear that once the movant has failed to meet its burden of showing excusable neglect, the existence of a meritorious defense is immaterial. 260 S.C. 382, 386, 196 S.E.2d 122, 124 (1973), the lower court nonetheless considered the other factors in the present case.

In regards to the promptness in which relief was sought, the record of appeal makes it clear that the Appellant was personally served with a copy of the Lis Pendens, Summons and Complaint on October 7, 2010, was provided with Notice of Hearing for the foreclosure hearing on December 17, 2010, was provided with a filed copy of the Master's Order and Judgment of Foreclosure and Sale on February 14, 2011, and Writ of Assistance on June 13, 2011. At no point prior to January, 2012 did Appellant move for relief from default.

On June 27, 2011, Robert P. Lusk, counsel for Appellant, contacted counsel for the Respondent regarding the eviction, yet nothing was filed with the Court. Three months later, despite actual knowledge of the foreclosure proceedings, in September 2011, Appellant retained D. Andrew Gaines, as counsel. The Motion for Relief from Default, however, was not filed until January 6, 2012, some additional four months later. At the hearing, no excuse or explanation was given by Defendant/Appellant as to why she delayed in seeking relief from default for approximately one year (Transcript). This, the Court found, failed to carry her

burden of acting within a reasonable time. Based on the above, Appellant failed to convince the lower court that it had acted promptly in seeking relief and the decision to deny relief was appropriate and within the sound discretion of the Court..

CONCLUSION

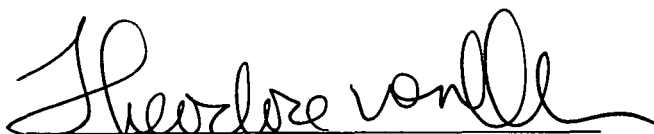
For the reasons stated, this Court should affirm the judgment.

Respectfully submitted,

November 2, 2012

CRAWFORD & VON KELLER, LLC

BY:

A handwritten signature in black ink, appearing to read "Theodore von Keller", written over a horizontal line.

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