THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

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SC Court of Appeals

The Honorable Gordon G. Cooper

Case No. 2015-CP-42-2482

ATCF REO HOLDINGS LLC, Respondent,

v.

James K. Hazel, Jr., Prime Asset Fund III, LLC, John Doe and Mary Roe, representing all unknown persons having or claiming to have any right, title, or interest in or to, or lien upon, the real estate described as 517 Wildwood Drive, Spartanburg County, SC, their heirs and assigns, and all other persons, firms, or corporations entitled to claim under, by or through the above-named Defendant(s), and all other persons or entities unknown claiming any right, title, interest, estate in, or lien upon, the real estate described as 517 Wildwood Drive, Spartanburg County, SC, Defendants,

Of whom James K. Hazel, Jr. is the Appellant.

BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. DID THE MASTER CORRECTLY DETERMINE THAT THERE IS NO RIGHT TO A JURY TRIAL IN AN ACTION TO QUIET TAX TITLE?

2. DID THE MASTER CORRECTLY ISSUE AN ORDER DECIDING THIS CASE, WHICH WAS REFERRED TO HIM "TO TAKE TESTIMONY ARISING UNDER THE PLEADINGS, TO MAKE FINDINGS OF FACT AND CONCLUSIONS OF LAW, WITH AUTHORITY TO DISPOSE OF ANY AND ALL ISSUES, AND ENTER A FINAL JUDGMENT IN THE CASE, PURSUANT TO RULE 53, SCRCP"?

3. DID THE MASTER ABUSE HIS DISCRETION WITH RESPECT TO THE CROSS EXAMINATION OF THE SOLE WITNESS PRESENTED AT THE HEARING IN THIS CASE?

Statement of the Case

This appeal arises from an action to quiet tax title following a tax sale of property located at 517 Wildwood Drive, Spartanburg, South Carolina (the "Property") and the expiration of the redemption period. At the time of the tax sale, the Property was owned by James K. Hazel ("Hazel") and subject to a mortgage held by Prime Asset Fund III, LLC ("Prime"). (R. at 8-17).

ATCF REO Holdings, LLC ("ATCF") filed its complaint on June 4, 2015, seeking title to the Property pursuant to S.C. Code Ann. §§ 12-61-10 through -60 and S.C. Code Ann. §§ 15-67-10 through -100. (R. at 21-29). In the alternative and only in the event the tax sale was set aside, ATCF sought to recover the amount paid at the tax sale plus statutory interest. ATCF did not demand a jury trial.

The complaint named as defendants Hazel, Prime, and John Doe and Mary Roe (to represent any unknown interests in the Property). (*Id.*). ATCF served Hazel with the pleadings on June 19, 2015. (R. at 30). On June 26, 2015, Hazel filed a motion for enlargement of time to which ATCF consented. (Consent, R. at 31-34). Hazel timely served a motion to dismiss, filed on August 13, 2015, and an answer, filed on August 14, 2015.[1] (R. at 35-41). In his answer, Hazel alleged that he was not informed that any taxes were due on the Property and sought to set aside the tax sale. (R. at 38-41). The answer does not separately state any counterclaim, nor does it demand a jury trial. (*Id.*).

The motion to dismiss was denied by order filed on November 3, 2015. (R. at 3-4). On December 10, 2015, ATCF served an affidavit of default and motion for order of default as to Prime, together with a motion for reference to the Master in Equity ("Master"). (R. at 43-48).

[1] The accompanying certificates of service are not dated, so for purposes of this Brief, ATCF is applying the date of filing.

On February 12, 2016, the clerk of court entered an order finding Prime in default and referring the action to the Master pursuant to Rule 53, SCRCP. (R. at 5-6).

On March 22, 2016, ATCF served a notice of hearing upon all named defendants. (R. at 47-48). On March 31, 2016, Hazel filed a motion for trial by jury, citing as authority S.C. Const. art. I, 3 & 14 and Rule 38(a)-(b), SCRCP. (R. at 49). ATCF filed a response in opposition dated April 6, 2016, arguing that no right to a jury trial attached in this case based on the holding of *Rosenbaum v. S-M-S 32*, 311 S.C. 140, 427 S.E.2d 897 (1993). (R. at 50-51).

The merits hearing occurred on April 12, 2016. Hazel appeared and represented himself *pro se*. (R. at 54). Prior to proceeding on the merits, the Master heard Hazel's motion for a jury trial. (R. at 55-56). At that time, Hazel did not raise any legal argument as to the basis for his demand for a jury trial, nor did he raise any response to ATCF's argument regarding *Rosenbaum*.[2] (*Id.*). The Master denied the motion. (R. at 56).

From there, the Master heard the case on the merits and on April 15, 2016 signed an order providing, "This Court hereby quiets and confirms marketable, fee simple title to the Property in Plaintiff, ATCF REO HOLDINGS LLC, and the marketable, fee simple title of Plaintiff, ATCF REO HOLDINGS LLC, to the Property is certain and free from all reasonable doubt." (R. at 16). The order further provides ancillary relief relating to the title determination. (R. at 15-16). This appeal followed. (R. at 52-53).

FACTS

MTAG, as custodian for ATCF, purchased the Property for $38,000 at the Spartanburg County tax sale conducted on November 18, 2013. (R. at 84-86). The tax sale bid of $38,000

[2] Hazel made reference to "statutory information" and stated he had "a right to a jury trial based on the statute" (R. at 56), but he did not identify any statutes at the hearing other than S.C. Code Ann. § 12-45-75 regarding redemption payment. (R. at 70).

left an overage of $36,324.87. (R. at 68). Hazel admitted that he claimed and received the overage. (R. at 76-77).

Spartanburg County conveyed title to MTAG by tax deed recorded on March 24, 2015. (R. at 84-86). MTAG subsequently conveyed the Property to ATCF by deed dated April 20, 2015 and recorded on May 14, 2015. (R. at 88-90).

ARGUMENT

I. There was no right to a jury trial in this case, nor was there a timely demand for a jury trial pursuant to Rule 38, SCRCP.

A. The arguments Hazel presents on appeal were not raised before the Master.

To be preserved for appellate review, an argument must have been raised to and ruled on by the trial court. *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 734 (1998). In this case, Hazel made no arguments to the Master in support of his motion for a jury trial. Therefore, there is no argument preserved for this Court's review.

B. Hazel was not entitled to a jury trial in this action to quiet tax title of the Property following a tax sale.

An action to quiet tax title or to set aside a tax sale sounds in equity. *Fox v. Moultrie*, 379 S.C. 609, 613, 666 S.E.2d 915, 917 (2008) ("An action to quiet title is one in equity."); *Johnson v. Arbabi*, 355 S.C. 64, 68, 584 S.E.2d 113, 115 (2003) ("Initially, we note this is an action in equity."). Hazel did not plead any counterclaim, nor did he argue to the Master that he had. ATCF further notes that the Master's order does not refer to a counterclaim. Instead, the order summarizes the answer as follows: "Hazel contends that he was not informed that any taxes were due on the Property and sought to set aside the Tax Sale of the Property." (R. at 12). Given this basic framework, there was no right to a jury trial in this case.

Moreover, as argued by ATCF and found by the Master, a party challenging a tax sale is not entitled to a jury trial, even if that party asserts a counterclaim stating a cause of action at law. *Rosenbaum v. S-M-S 32*, 311 S.C. 140, 143, 427 S.E.2d 897, 898 (1993). As set forth in *Rosenbaum*,

> Considering the unique circumstances existing in a tax forfeiture acquisition, and the prevailing statutory provisions governing suits to clear tax titles, we conclude that the appellant may not evade the intent of the legislature and obtain the right to a jury trial by interposing a counterclaim designed to thwart the reasonable and practical implication of Chapter 61.

Id. Thus, even if Hazel had asserted a counterclaim at law (which he did not), he would have no right to a jury trial. Therefore, the Master correctly denied the motion for a jury trial.

Lastly, even if Hazel's answer could be construed to contain a counterclaim, such action would be to set aside the tax sale, which is an equitable matter as set forth above. As such, no right to a jury trial would attach. *See C&S Real Estate Servs., Inc. v. Massengale*, 290 S.C. 299, 300, 350 S.E.2d 191, 192 (1986) ("The trial judge held that two of the counterclaims were equitable in nature. Appellant clearly had no right to a jury trial on these claims."), *modified on other grounds by Johnson v. S. Carolina Nat. Bank*, 292 S.C. 51, 354 S.E.2d 895 (1987).[3] Quite simply, there was no claim at law asserted in this case.

C. As an alternate sustaining ground, Hazel waived any possible right to a jury trial by failing to make a timely demand.

This Court may affirm the Master's order for any reason appearing in the record. Rule 220, SCACR. Rule 53(b), SCRCP, expressly provides that any request for a jury trial made after the issuance of an order of reference must be made in compliance with Rule 38, SCRCP. As an

[3] Argument I of Hazel's brief references fraudulent conveyance, breach of contract, and breach of fiduciary duty. However, these terms were not used in the answer, and no part of the answer can be read to allege such a counterclaim as between Hazel and ATCF, the tax sale purchaser. (R. at 38-41). In addition, Hazel did not mention any such claims at the hearing.

alternate sustaining ground, ATCF respectfully submits that Hazel waived any possible right to a jury trial by operation of Rule 38, which provides in part:

> Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action ***and not later than 10 days after the service of the last pleading directed to such issue***.

Rule 38(b), SCRCP (emphasis added). Under Rule 38(d), "[t]he failure of a party to serve a demand as required [by Rule 38(b)] and to file it as required by Rule 5(d) constitutes a waiver by him of a trial by jury." Thus, if a party does not demand a jury trial in its last pleading or within ten days after service of the last pleading, the party waives its right to a jury trial.

As shown in the Statement of the Case above, the last pleading in this action was filed on August 14, 2015. Therefore, any jury demand was required to be made no later than August 24, 2015. *See* James F. Flanagan, *South Carolina Civil Procedure* 316 (1996). Hazel did not seek a jury trial until March 31, 2016. Thus, Hazel's demand was not timely, and he waived any right to a jury trial.

II. The Master had jurisdiction in this matter because the case was referred to him.

A. This case was referred to the Master "to take testimony arising under the pleadings, to make findings of fact and conclusions of law, with authority to dispose of any and all issues, and enter a final judgment in the case, pursuant to Rule 53, SCRCP."

On motion of ATCF, this matter was referred to the Master. As provided in the order of reference, "this action is referred to the Honorable Gordon G. Cooper, Master in Equity for Spartanburg County, to take testimony arising under the pleadings, to make findings of fact and conclusions of law, with authority to dispose of any and all issues, and enter a final judgment in the case, pursuant to Rule 53, SCRCP." (R. at 5-6).

This order of reference has not been appealed. (R. at 52-53). An unappealed order, right or wrong, is the law of the case and requires affirmance. *ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche*, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997). For this reason, Hazel cannot challenge the underlying reference in this case.

The equity court is considered a division of the circuit court. S.C Code Ann. § 14-11-15. Upon reference, a master "shall exercise all power and authority which a circuit judge sitting without a jury would have in a similar matter." Rule 53(c), SCRCP. Therefore, when a case is referred to a master under Rule 53, the master has the power to conduct hearings in the same manner as the circuit court unless the order of reference limits the master's powers. *Smith Cos. of Greenville, Inc. v. Hayes,* 311 S.C. 358, 360, 428 S.E.2d 900, 902 (Ct. App. 1993). As set forth above, there was no such limit in this case. Therefore, the Master was acting within the scope of the reference in issuing his order and there is no basis for overturning that order on appeal.

B. Nothing about the order of reference deprived the Master of subject matter jurisdiction.

Hazel has argued that the Master lacked subject matter jurisdiction because the clerk of court executed the order of reference rather than a judge. Hazel contends that he did not consent to the reference and he was not in default; therefore, the order should have been signed by a judge to comply with Rule 53(b), SCRCP. This rule section provides:

> In an action where the parties consent, in a default case, or an action for foreclosure, some or all of the causes of action in a case may be referred to a master or special referee by order of a circuit judge or the clerk of court. In all other actions, the circuit court may, upon application of any party or upon its own motion, direct a reference of some or all of the causes of action in a case. Any party may request a jury pursuant to Rule 38 on any or all issues triable of right by a jury and, upon the filing of a jury demand, the matter shall be returned to the circuit court. A case shall not be referred to a master or special referee for the purpose of making a report to the circuit court. The clerk shall promptly provide the master or special referee with a copy of the order of reference.

In this case, the clerk of court was authorized to issue the reference under Rule 53(b) for two reasons: (1) there was a finding of default as to Prime, and (2) this action was in the nature of a foreclosure.

Prime's default is discussed in the Statement of the Case. With respect to the argument that this was a foreclosure action, it is important to consider the nature of the relief sought by ATCF in its complaint, which essentially seeks to foreclose all interests in the Property other than those of the tax sale purchaser. (R. at 21-29). The term "foreclosure" is broader than simply an action relating to a mortgage. Instead, "foreclosure" means "[t]o shut out, to bar, to destroy an equity of redemption." *Black's Law Dictionary* 646 (6th ed. 1990).

Here, ATCF seeks to destroy any right of redemption in the property following a tax sale and the expiration of the redemption period. South Carolina courts have recognized that an action to quiet tax title seeks to foreclose all interests of the defaulting taxpayer in the subject property, and as a practical matter, an action to quiet tax title accomplishes the same result as an action to foreclose a mortgage. *See Good v. Kennedy*, 291 S.C. 204, 207, 352 S.E.2d 708, 711 (Ct. App. 1987) ("Although we can locate no South Carolina case dealing with the point raised in this appeal, the general law is that where a statute ***requires as a condition precedent to foreclosing a taxpayer's rights in property sold for taxes*** that he be given notice of his right to redeem . . . .") (emphasis added).

This is consistent with the statutory scheme covering suits to clear tax titles found in Title 12, Chapter 61 of the South Carolina Code of Laws. *See* S.C. Code Ann. § 12-61-10 (providing that a party "which has purchased at or acquired through a tax sale and obtained title to any real or personal property, may bring an action in the court of common pleas of such county for the purpose of barring all other claims thereto"); S.C. Code Ann. § 12-61-20 ("Such action shall be

commenced, conducted and concluded by decree as are similar actions in such court . . . to the end that such rights, titles, interests, claims or liens may be adjudicated in such action and forever barred by the judgment and decree of the court if such are found to be junior or subsequent to the title of the county or any person purchasing at or acquiring title to property through a tax sale."); S.C. Code Ann. § 12-61-30 ("The proceeding authorized in this chapter shall be subject to the rules and laws governing the procedure and conduct of similar proceedings . . . ."); S.C. Code Ann. § 12-61-60 ("This chapter shall be liberally construed to the end that it shall afford a complete remedy to any plaintiff claiming property by forfeiture unto him for nonpayment of taxes or by acquisition at or through a tax sale, so that he can under this chapter obtain a final and complete adjudication of the nature and extent of the title thereto and, in any event, procure a valid sale of the property from the proceeds of which the unpaid taxes shall be paid."). It is also consistent with the requirement under the title governing recovery of real property that any action be referred to the Master. S.C. Code Ann. § 15-67-60.

Given the nature of the relief sought and the applicable statutory provisions, this action may be fairly characterized as an action for foreclosure. ATCF's purpose in filing suit was to bar or extinguish any claim another party might have to the Property. Like a mortgage foreclosure, the action in this case seeks to confirm forfeiture for nonpayment. Therefore, the clerk of court complied with the provisions of Rule 53(b) in signing the order of reference as there was a default and this was an action for foreclosure.

Moreover, Hazel cannot raise this argument for the first time on appeal. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 734 (1998). A defect in an order of reference, much like the right to a jury trial, may be waived and does not implicate subject matter jurisdiction. As noted in James F. Flanagan, *South Carolina Civil Procedure* 422 (1996),

"[f]ailure to object to the reference, participation in the proceedings, and the failure to object to entry of a final order by the master may waive any objections to the procedure." This has long been the law of this state. *See Cudd v. Williams*, 39 S.C. 452, 456, 18 S.E. 3, 4–5 (1893) (finding argument relating to propriety of order of reference not available on appeal based on following recitation: "[W]hile the defendants did object to the order of reference when made, we fail to find in the record that they gave notice of appeal therefrom, which they might have done; but, on the contrary, they seem to have acquiesced in the order, by attending references under it, examining witnesses, and arguing the case at every state down to the final decision below, when for the first time they gave notice of appeal, not only from the judgment . . . on the merits, but also from [the] previous order of reference.").

In a more recent case, this Court found a party waived any objection to having a matter decided by the master where "it made no motion to revoke the order of reference and it participated in the reference proceedings without objecting or excepting to the order of reference or to the master's appointment, authority, or jurisdiction." *Karl Sitte Plumbing Co. v. Darby Dev. Co. of Columbia*, 295 S.C. 70, 72–74, 367 S.E.2d 162, 163–65 (Ct. App. 1988). In reaching this result, this Court noted that the requirement that objections to the form of a reference be raised before the trial court makes practical sense because the matter could be easily addressed at any time prior to judgment. *Id.* ("Had East Coast at the reference hearing objected to the master's authority to enter final judgment in the cause because it had not consented to the reference and to the entry of final judgment by the master, the question could have been resolved quickly by the master's allowing Karl Sitte, pursuant to Rule 53(e)(1) and with notice to East Coast, to apply to the circuit court for an order authorizing the master to enter final judgment.").

Similarly, in this case, the only alleged defect is that the order was signed by the clerk of court rather than a judge. It was incumbent on Hazel to raise that issue below.

Lastly, there is no prejudice to Hazel. As discussed above, Hazel's motion was heard and decided by the Master and there was no right to a jury trial in this case. Further, S.C. Code Ann. § 15-67-60 directs that all cases brought under the chapter of the South Carolina Code of Laws governing actions for the recovery of real property be referred to a master. Thus, nothing about the order of reference to the Master deprived Hazel of any right.

III. The Master was within his discretion in the management of the hearing in this case, including the examination of ATCF's witness.

A. Hazel did not proffer anything relating to the allegedly excluded testimony or otherwise indicate to the Master that he had not completed his cross examination.

On appeal, this Court will not consider issues not raised to and ruled on by the trial court. *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 734 (1998). Here, Hazel did not make any proffer of the allegedly excluded testimony, nor did he indicate to the Master that he had not completed his examination of the witness or that he wanted to call any other witnesses.[4] Therefore, the Master was not given the opportunity to address Hazel's concerns and this Court cannot do so on appeal.

As a rule, failing to make a proffer of excluded evidence precludes review on appeal. *State v. Simmons*, 360 S.C. 33, 46, 599 S.E.2d 448, 454 (2004); *TNS Mills, Inc. v. South Carolina Dep't of Revenue*, 331 S.C. 611, 628, 503 S.E.2d 471, 480 (1998). Here, Hazel made no proffer of any evidence he contended might have shown that the tax sale was improper, and there is

[4] ATCF notes that Hazel's argument on this issue appears to be broader than his stated issue on appeal. To the extent the argument raises issues in addition to the cross examination of ATCF's witness, those issues are not before the Court and should not be considered. *See* Rule 208(b)(1)(B), SCACR; *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003); *Gamble v. Int'l Paper Realty Corp. of S.C.*, 323 S.C. 367, 370 n.1, 474 S.E.2d 438, 440 n. 1 (1996).

nothing in the record indicating what that evidence might have been. In the absence of a proffer, this Court cannot ascertain any prejudice to Hazel relating to the Master's alleged refusal to admit the testimony into evidence. *See Greenville Mem'l Auditorium v. Martin*, 301 S.C. 242, 244, 391 S.E.2d 546, 547 (1990) ("An alleged erroneous exclusion of evidence is not a basis for establishing prejudice on appeal in absence of an adequate proffer of evidence in the court below."). Therefore, the Court should not consider this argument.

B. The Master did not abuse his discretion with respect to the admission of evidence in this case.

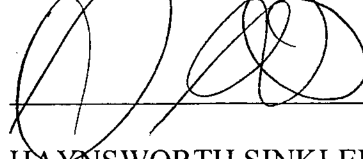
On appeal, a trial court's evidentiary rulings will be subject to an abuse of discretion standard. *State v. Fripp*, 396 S.C. 434, 438, 721 S.E.2d 465, 467 (Ct. App. 2012). To find an abuse of discretion, this Court must determine that there was an error resulting in prejudice to the appellant. *Crowley v. Spivey*, 285 S.C. 397, 410, 329 S.E.2d 774, 782 (Ct. App. 1985).

Here, Hazel has not asserted that there was either a legal error or prejudice. He simply points to the Master's discretionary powers with respect to the admission of evidence with no elaboration. As such, this argument is conclusory and should not be considered by the Court. *See South Carolina Dep't of Soc. Servs. v. Sims*, 359 S.C. 601, 606, 598 S.E.2d 303, 306 (Ct. App. 2004) (conclusory nature of arguments and lack of supporting authority could lead to finding that issues on appeal have been abandoned); *Hunt v. South Carolina Forestry Comm'n*, 358 S.C. 564, 573, 595 S.E.2d 846, 851 (Ct. App. 2004) (issues raised in a brief but not supported by authority are deemed abandoned and will not be considered on appeal). In addition, as discussed above, the absence of a proffer leaves this Court unable to determine prejudice and a review of the record shows that Hazel did not ask for additional cross-examination. Therefore, there is no basis for overruling the Master on this basis.

CONCLUSION

For all of the above reasons, the Master's order must be affirmed.

Respectfully submitted,



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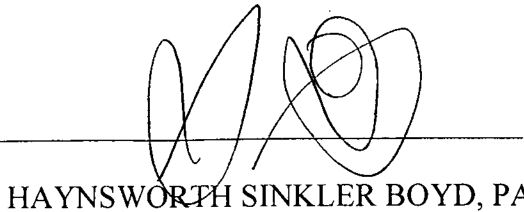
James K. Hazel, Jr., Prime Asset Fund III, LLC, John Doe and Mary Roe, representing all unknown persons having or claiming to have any right, title, or interest in or to, or lien upon, the real estate described as 517 Wildwood Drive, Spartanburg County, SC, their heirs and assigns, and all other persons, firms, or corporations entitled to claim under, by or through the above-named Defendant(s), and all other persons or entities unknown claiming any right, title, interest, estate in, or lien upon, the real estate described as 517 Wildwood Drive, Spartanburg County, SC, Defendants,

Of whom James K. Hazel, Jr. is the Appellant.

CERTIFICATE OF COMPLIANCE

I certify that the Brief of Respondent in this matter complies with Rule 211(b), SCACR and the April 15, 2014 Order of the South Carolina Supreme Court relating to personal data identifiers.

(Signature Page Follows)



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