

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
) NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON) CIVIL ACTION NO. 2010-CP-10-2432

RREF RB-SC Folly Beach, LLC,)
)
Plaintiff,)

vs.)

BDT Projects, LLC, et al.,)
)
Defendants.)

ORDER

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SC Court of Appeals

BY

JULIE J. ARHSERON
CLERK OF COURT

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FILED

BEFORE THE COURT are motions filed by the plaintiff RREF RB-SC Folly Beach, LLC's ("RB-SC") and intervenor Thomas Calcote ("Calcote") pursuant to Rule 59(e) and 52(b), requesting that the Court alter or amend the Order Denying Petition to Foreclose filed on July 14, 2016 (the "July Order"). The petition is fully briefed and oral argument was held on October 11, 2016. Present at the hearing were Merritt G. Abney, Esq. for RB-SC, H. Brewton Hagood, Esq. for Calcote, Patrick R. Watts, Esq. for defendant Barry M. Stephens ("Stephens"), and G. Hamlin O'Kelley, Esq. for intervenor Eric Wade.

Having considered all of the arguments and submissions of counsel, for the reasons stated below, the Court grants RB-SC and Calcote's motions to alter or amend, vacates the July Order, and grants RB-SC's petition to foreclose its charging lien on Stephens' 50% distributional interest in Peacock Investments, LLC ("Peacock").

FACTUAL BACKGROUND & PROCEDURAL HISTORY

Regions Bank obtained a deficiency judgment in the amount of One Million Fourteen Thousand Four Hundred Eighty-Four and 54/100 (\$1,014,484.54) Dollars against Stephens and other defendants in the above-titled case, which judgment is recorded in the Office of the Clerk of Court of Charleston County as Judgment Roll Number 2010-CP-10-2432 (the "Judgment").

As set forth in the Assignment of Order for Deficiency Judgment filed December 11, 2011, the Judgment was subsequently assigned to RB-SC.

On May 20, 2013, this Court awarded RB-SC a charging order, pursuant to S.C. Code Ann. § 33-44-504, against Stephens' distributional interests in certain limited liability companies described in the order (the "Charging Order"), including Peacock, a limited liability company jointly owned by Stephens and Thomas D. Calcote ("Calcote"), a non-debtor third party. Stephens holds a 50% distributional interest in Peacock (the "Interest").

Since the entry of the Charging Order, RB-SC has not received any distributions from any of the entities subject to the Charging Order towards payment of the Judgment and the Judgment remains outstanding. Accordingly, RB-SC petitioned to foreclose its lien on the Interest which is subject to the Charging Order. The Court initially denied RB-SC's petition in the July Order on the ground that it would be inequitable to Stephens to allow a foreclosure to proceed. Upon reconsideration of the July Order, however, the Court concludes that RB-SC is entitled to foreclosure by statute and no inequity will result from permitting RB-SC to foreclose under the present circumstances.

LEGAL STANDARD

Rule 59(e) allows a trial court the opportunity to reconsider matters encompassed within a decision on the merits. *Elam v. South Carolina Dept. of Transp.*, 361 S.C. 9, 21, 602 S.E.2d 772, 778 (2004). Consequently, a party is permitted under Rule 59(e) to ask the court to reconsider its decision even if it means rehashing all or part of an argument previously presented. *Id.*

ANALYSIS

Upon reconsideration of the arguments presented in support of RB-SC's petition to foreclose its charging lien, the Court concludes that RB-SC is entitled to an order of foreclosure.

The South Carolina Limited Liability Company Act (the "Act") provides that "[a] charging order constitutes a lien on the judgment debtor's distributional interest. S.C. Code Ann. § 33-44-504(b). The Act defines "distributional interest" as "all of a member's interest in distributions by the limited liability company." S.C. Code Ann. § 33-44-101(6).

A court may order a foreclosure of a lien on a distributional interest subject to the charging order at any time. *Id.* Section 33-44-504 "provides the exclusive remedy by which a judgment creditor of a member or a transferee may satisfy a judgment out of the judgment debtor's distributional interest in a limited liability company." S.C. Code Ann. § 33-44-504(f); *see also, Kriti Ripley, LLC v. Emerald Investments, LLC*, 404 S.C. 367, 381, 746 S.E.2d 26, 33 (2013). Although the decision whether to order foreclosure is discretionary, the South Carolina Supreme Court has held that denial of a request for foreclosure constitutes an abuse of discretion where there is no evidence that payment through distributions is likely to occur within a reasonable amount of time. *Kriti Ripley, LLC*, 404 S.C. at 382, 746 S.E.2d at 34. In this case, the evidence in the record established, and the Court expressly found, that RB-SC will not be paid through distributions within a reasonable amount of time. RB-SC's charging order has been in existence for more than 3 years and has yielded no funds towards satisfaction of the Judgment. Stephens' own testimony established that RB-SC likely will not receive distributions toward payment of its debt in the near future. The Court concludes RB-SC is therefore entitled to foreclose its lien against the Interest in accordance with S.C. Code Ann. § 33-44-504(b).

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Upon reconsideration, the Court also concludes that any purchaser of the Interest at a foreclosure sale will be entitled to all of the distributions from Peacock to which Stephens would have been entitled but for the foreclosure sale. The Act expressly provides that the purchaser of a distributional interest at a foreclosure sale “has the rights of a transferee.” S.C. Code Ann. § 33-44-504(b). Section 33-44-503(e) expressly and unequivocally provides that a transferee who does not become a member “shall” receive the distributions to which the transferor would otherwise be entitled. S.C. Code Ann. § 33-44-502. Thus, pursuant to the express language of the Act, if a member’s distributional interest is sold at a foreclosure sale, the purchaser-transferee becomes entitled to all of the distributions to which the member-transferor would have been entitled but for the foreclosure. *See id.* The rights of a purchaser of a distributional interest at a foreclosure sale are precisely the same rights held by a transferee who purchases a distributional interest pursuant to a voluntary transfer by a willing transferor. Moreover, the Supreme Court has expressly held that the purchaser at a foreclosure sale of a distributional interest subjected ^{to} a charging lien obtains the rights of a transferee, which include the right to receive all of the distributions to which the debtor would have been otherwise entitled. *Levy v. Carolinian, LLC*, 410 S.C. 140, 145-146, 763 S.E.2d 594, 596-597 (2014). Thus, the amount of distributions to which the purchaser of the Interest at the foreclosure sale is entitled will not be limited by the amount of RB-SC’s debt.

The Court also disagrees with Stephens’ argument that S.C. Code Ann. § 33-44-504 contemplates the sale of “only enough of a distributional interest as would satisfy the judgment.” Section 33-44-504(b) of the Act provides “[o]n application by a judgment creditor of a member of a limited liability company or of a member’s transferee, a court having jurisdiction may charge the distributional interest of a judgment debtor to satisfy the judgment.” As previously

noted, the Act defines “distributional interest” as “all of a member’s interest in distributions by the limited liability company.” S.C. Code Ann. § 33-44-101(6) (emphasis added). Pursuant to these provisions, the Court entered the Charging Order in this case and thereby imposed a charging lien against Stephens’ entire distributional interest in Peacock and certain other limited liability companies. The statute does not authorize the Court to make a determination, in advance of a foreclosure sale, of the value of the distributional interest or to order a sale only of that portion of the interest alleged by the debtor to equal the debt. Rather, the statute provides for foreclosure of the entire interest subjected to a charging lien, and it is the foreclosure sale that determines the value of the interest.

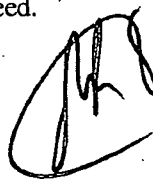
Further, upon reconsideration, the Court finds no inequity in allowing foreclosure to proceed in this case. In *Kriti Ripley*, the Supreme Court held that, although foreclosure is certainly a more drastic remedy than simply charging a member’s distributional interest in a limited liability company, eliminating the debtors’ interest in property via foreclosure is a remedy “routinely used in this state for the satisfaction of debts.” 404 S.C. at 381, 746 S.E.2d at 32. This Court, for example, routinely conducts foreclosure sales of real estate in which a buyer (who is often the creditor) purchases the debtors’ property and thereby obtains the ability, if the buyer is lucky, to sell the property for a price that may one day exceed the amount of the debt. Although the type of property being transferred via foreclosure in the instant case is different (personal property, as opposed to real property), the equities and the policies underlying the foreclosure remedy are the same. As the Supreme Court explained in *Kriti Ripley*, there is nothing unfair in conveying a debtor’s distributional interest in an LLC via foreclosure—it “is simply the ultimate remedy for collection of a debt owed.” *Id.* at 382, 746 S.E.2d at 34. The foreclosure will result in discharge of Stephens’ debt to RB-SC up to the amount of the purchase price and, in the event the purchase price at the foreclosure sale exceeds the amount of



RB-SC's debt, then any surplus will be paid to Stephens. No inequity results from either outcome.

Moreover, foreclosure should not be denied based upon Stephens' unsupported allegation that the value of the Interest exceeds the amount of the debt and that the buyer at a foreclosure sale will eventually receive distributions from Peacock that will exceed the amount of the debt. Stephens produced no evidence whatsoever regarding the Interest or the value of the real estate owned by Peacock. Nor did he produce any evidence regarding the amount of distributions Peacock is likely to pay in the future. Thus, there is no factual or legal basis whatsoever for this Court to deny foreclosure on the ground that the buyer at the foreclosure sale might someday receive distributions that exceed the amount of the debt.

The Court also disagrees that foreclosure would be inequitable to Stephens because he would remain obligated to Peacock as a member of the company after foreclosure. The Act expressly provides that "whether or not a transferee of a distributional interest becomes a member . . . the transferor is not released from liability to the limited liability company under the operating agreement or this chapter." S.C. Code Ann. § 33-44-503(c). Thus, the debtor/transferor remains liable to the company in the case of every foreclosure of a distributional interest. If Stephens were correct that this outcome justifies denial of foreclosure, then foreclosure would never be appropriate in any case. That is clearly not the law. Moreover, consistent with § 33-44-503(c), the Operating Agreement for Peacock expressly provides that if the transferee of a member does not become a member, then the transferor remains a member. (Operating Agreement at ¶ 3.4.) As evidenced by his signature, Stephens expressly agreed to this provision in the Operating Agreement. It cannot be inequitable to enforce against Stephens the provisions of an agreement to which he expressly agreed.



The Court also rejects Stephens' argument that foreclosure should be denied on the basis that Stephens would remain obligated after foreclosure on his personal guaranty of Peacock's debt. The fact that Stephens guaranteed Peacock's debt to its lender has no bearing whatsoever on whether RB-SC is entitled to foreclose its charging lien.

Foreclosure also would not be inequitable to the other member of Peacock, Thomas Calcote ("Calcote") or to a potential buyer at the foreclosure sale. Calcote intervened in this action, and he has not objected to RB-SC's motion to foreclose. Presumably, Calcote can determine for himself whether the foreclosure would be inequitable to him, and he has made no such allegation in this case despite adequate opportunity to do so. Likewise, any potential buyer is in the best position to decide the pros and cons of purchasing the Interest via foreclosure. If a potential buyer foresees any prejudice, he will price the Interest accordingly or decide not to purchase it.

CONCLUSION

For the reasons stated above, the Court grants RB-SC and Calcote's motions to alter or amend the Court's July Order. The July Order, including all findings of fact and conclusions of law, is vacated in its entirety. The Court grants RB-SC's petition to foreclose its lien on Stephens' 50% distributional interest in Peacock which is subject to the Charging Order, and the Court hereby orders the sale of Stephens' 50% distributional interest in Peacock.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:


1. That RB-SC and Calcote's motions to alter or amend are hereby granted;
2. That the Court's order Denying Petition to Foreclose dated July 14, 2016 is hereby vacated in its entirety;
3. That RB-SC's Petition to Foreclose Charging Lien is hereby granted;



4. That there is due to RB-SC the sum of One Million Four Hundred Forty-Seven Thousand Three Hundred Seventy-Six and 42/100 (\$1,447,376.42) Dollars representing the Judgment held by RB-SC, as referenced above, together with interest at the rate provided under law on the balance of principal from the date of the Judgment through October 17, 2016.¹ The per diem is Two Hundred Sixty-Seven and 27/100 (\$267.27) Dollars.

5. That the Interest be sold by the undersigned Master In Equity, at public auction, at the Charleston County Courthouse, 100 Broad Street, Charleston, South Carolina, Charleston County and State aforesaid, on **January 3, 2017**, on the following terms:

(a) The undersigned Master in Equity will require a deposit of 5% on the amount of the bid (in cash or equivalent) same to be applied on the purchase price only upon compliance with the bid, but in case of non-compliance within ~~twenty~~ ⁽³⁰⁾ days same to be forfeited and applied to the costs and RB-SC's debt.

(b) ~~Interest on the balance of the bid shall be paid to the day of compliance at the legal rate.~~ 

(c) Should RB-SC or RB-SC's attorney or agent fail to appear on sales day, the Interest shall not be sold, and in that event any such sale shall be null and void and of no force and effect; the Interest shall be re-advertised and sold at some convenient sales day thereafter when the RB-SC or RB-SC's attorney or agent is present.

6. If RB-SC is the successful bidder at the said sale, for a sum not exceeding the amount of costs, expenses and the indebtedness of RB-SC in full, RB-SC may pay to the

¹ RB-SC's counsel informed the Court at the hearing on this motion that it received a single payment toward the Judgment from a co-guarantor in the amount of \$45,000 on October 29, 2012.

undersigned Master In Equity, only the amount of the costs and expenses crediting the balance of the bid on RB-SC's indebtedness.

7. That the undersigned Master in Equity will, by advertisement according to law, give notice of the time and place of sale and the terms thereof, and will execute to the Purchaser, or Purchasers, a bill of sale. RB-SC, or any other party to this action, may become a purchaser at such sale, and that if upon such sale being made, the Purchaser, or Purchasers, should fail to comply with the terms thereof within ⁽³⁰⁾~~twenty (20)~~ days after date of sale, then the undersigned Master In Equity may advertise the said Interest for sale on the next, or some other subsequent salesday, at the risk of the highest bidder and so from time to time thereafter until a full compliance shall be secured.

8. That the undersigned Master In Equity will apply the proceeds of the sale as follows:

FIRST: To the payment of the amount of the costs and expenses of this action, including any fees of attorneys appointed under Order of Court;

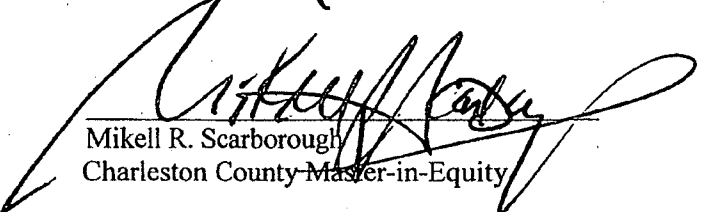
NEXT: To the payment to RB-SC or RB-SC's attorney of the amount of RB-SC's Judgment and interest or so much thereof as the purchase money will pay on the same.

NEXT: Any surplus will be held pending further Order of this Court.

9. IT IS FURTHER ORDERED that, to the extent any deficiency remains with respect to the Judgment following application of the proceeds from the foreclosure sale, RB-SC may petition the Court for foreclosure of the Charging Order as to any other distributional interests charged therein.

10. IT IS FURTHER ORDERED that the undersigned Master In Equity will retain jurisdiction to do all necessary acts incident to this foreclosure including, but not limited to, disposing of any surplus funds.

IT IS SO ORDERED, this 21 day of October, 2016.


Mikell R. Scarborough
Charleston County Master-in-Equity