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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

Honorable S. Jackson Kimball III, Master in Equity

Case No. 2014-CP-46-02394

Appellate Case No. 2015-002253

Nationstar Mortgage LLC.....Respondent,

v.

Norman D. Lowery.....Petitioner.

RESPONDENT'S FINAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

I. Whether Lowery's direct appeal of the default judgment is proper.

II. Whether Lowery's arguments are properly before this Court when the record does not reflect that they were raised to or ruled upon by the trial court.

STATEMENT OF THE CASE

This case arises from Norman Lowery's default on a loan he obtained in 2010 to purchase a home in Clover, South Carolina. On July 13, 2010, Lowery executed a promissory note for $95,000 in favor of Coldwell Banker Mortgage ("Note"). (R. p. 4.) To secure repayment of this Note, he executed that same day, a mortgage in favor of Mortgage Electronic Registration Systems, Inc., as nominee for Coldwell Banker Mortgage, its successors, and assigns, securing an interest in the property located at 727 Sweet Meadow Lane, Clover, South Carolina 29710 ("Mortgage"). (*Id.*) This Mortgage was filed on July 15, 2010 and was recorded in the Office of Recorder of Deeds for York County in Book 11495 at Page 56. This Mortgage was subsequently assigned to PHH Mortgage Corporation and then later assigned to Nationstar Mortgage LLC ("Nationstar"). (*Id.*)

Lowery defaulted on the Note, so Nationstar proceeded to foreclose on the Property, pursuant to the Mortgage. (R. p. 3.) At a September 23, 2015 hearing, the Master-in-Equity determined that Lowery failed to answer or otherwise respond under the South Carolina Rules of Civil Procedure to the foreclosure proceeding. (*Id.*) He therefore entered default judgment in favor of Nationstar. (R. p. 11.)

Lowery now appeals from this judgment.

STANDARD OF REVIEW

"The decision whether to set aside an entry of default or a default judgment lies solely within the sound discretion of the trial judge." *Harbor Island Owners' Ass'n v. Preferred Island Props., Inc.*, 369 S.C. 540, 544, 633 S.E.2d 497, 499 (2006) (quoting *Roberson v. S. Finance of S.C., Inc.*, 365 S.C. 6, 9, 615 S.E.2d 112, 114 (2005)). That "decision will not be disturbed on appeal absent a clear showing of an abuse of that discretion." *Mitchell Supply Co., Inc. v. Gaffney*, 297 S.C. 160, 162–63, 375 S.E.2d 321, 322–23 (Ct. App. 1988). A trial court abuses its discretion only if "the order was controlled by some error of law" or a factual conclusion "is without evidentiary support." *In re Estate of Weeks*, 329 S.C. 251, 259, 495 S.E.2d 454, 459 (Ct. App. 1997).

ARGUMENT

The Master-in-Equity determined that Lowery defaulted and, therefore, ruled in favor of Nationstar on its foreclosure claim. A direct appeal of a default judgment will not lie because a party is required to seek to set aside the default judgment in the trial court before filing any appeal. Furthermore, the record on appeal is devoid of any basis upon which this Court could conclude that any of Lowery's arguments were raised to or ruled upon by the trial court. Because they are raised for the first time on appeal, these arguments are not properly before this Court.[1]

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[1] Lowery's brief fails to comply with Rule 208(b), SCACR, regarding what an appellate brief must include. These rules are "are not mere technicalities but provide the parties and [appellate courts] with an orderly mechanism through which to guide appeals in this State." *Henning v. Kaye*, 307 S.C. 436, 437, 415 S.E.2d 794, 794 (1992). These rules apply even to *pro se* litigants. *See State v. Burton*, 356 S.C. 259, 265 n.5, 589 S.E.2d 6, 9 n.5 (2003). Although this failure can result in dismissal of an appeal, *see* Rule 260(a), SCACR, Nationstar does not seek to dismiss this appeal on that basis given the fact that Lowery's arguments fail for multiple other reasons.

I. The Direct Appeal of the Default Judgment Is Improper.

As the South Carolina Supreme Court has made clear, "a direct appeal does not lie from a default judgment." *Winesett v. Winesett*, 287 S.C. 332, 338 S.E.2d 340 (1985); *see also Belue v. Belue*, 276 S.C. 120, 276 S.E.2d 295 (1981) (holding that a defendant may not immediately appeal a judgment entered by default). The proper procedure for challenging a default judgment is to move the trial court to set aside the judgment. An appeal may then be taken from the denial of this motion. *See Winesett*, 287 S.C. at 334, 288 S.E.2d at 341 ("[A] default judgment may not be appealed to this Court. The proper procedure for challenging a default judgment is to move the trial court to set aside the judgment pursuant to Rule 60(b), SCRCP."); *Sadisco of Greenville, Inc. v. Greenville Cty. Bd. of Zoning Appeals*, 340 S.C. 57, 58, 530 S.E.2d 383, 384 (2000) (holding that a party properly appealed from the denial of a Rule 60(b) motion for relief from judgment).

Lowery's direct appeal of the Master-in-Equity's default judgment is thus improper. The record does not reflect any motion to set aside the default or judgment of default in the trial court. Therefore, this Court should dismiss this appeal.

II. Lowery's Arguments Were Neither Raised to Nor Ruled Upon by the Trial Court and, Therefore, Are Not Properly Before This Court.

It is axiomatic that "[t]o preserve an issue for appellate review, the issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court." *Doe v. Doe*, 370 S.C. 206, 212, 634 S.E.2d 51, 54 (Ct. App. 2006). Even when an issue is raised by a party, if the trial court fails to rule on it, the issue is not preserved unless a motion to alter or amend is filed under Rule 59(e), SCRCP. *See S.C. Farm Bureau Mut. Ins. Co. v. S.E.C.U.R.E. Underwriters Risk Retention Grp.*, 347 S.C. 333, 343, 554 S.E.2d 870, 875 (Ct. App. 2001), *rev'd on other grounds*, 353 S.C. 249, 578 S.E.2d 8 (2003). Thus, when an issue is not

addressed in a trial court's order, this Court need only look further to whether a motion to alter or amend was filed. *See BMW of N. Am., LLC v. Complete Auto Recon Servs., Inc.*, 399 S.C. 444, 454–55, 731 S.E.2d 902, 908 (Ct. App. 2012).

Here, the issues that Lowery raises on appeal were never raised in the trial court, and Lowery never filed a post-judgment motion to have the trial court rule on these issues. The record does not reflect that Lowery ever raised any of the issues presented in his brief in this Court to the Master-in-Equity, either in a pleading or in a motion or at a hearing, nor does the record reflect that the Master-in-Equity ruled upon them.[2] Furthermore, the record does not reflect that Lowery ever moved to amend the judgment of the Master-in-Equity. Accordingly, Lowery's arguments are not properly before this Court.

CONCLUSION

Based upon the foregoing, the judgment should be affirmed.

January 30, 2017.

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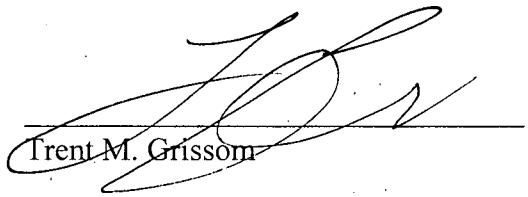
[2] Any deficiencies in the record (such as the lack of a transcript from the hearing before the Master-in-Equity) that prevent this Court from determining whether an issue was submitted to the trial court falls on Lowery, as the Appellant. *See, e.g.*, *Nowlin v. Gen. Tel. Co.*, 310 S.C. 183, 187, 426 S.E.2d 114, 116 (Ct. App. 1992) ("Finally, because there is no transcript of the summary judgment hearing and no mention of this argument in the trial judge's order, there is no evidence this issue was even submitted to him."); *Windham v. Honeycutt*, 290 S.C. 60, 63–64, 348 S.E.2d 185, 187 (Ct. App. 1986) ("The burden is on the appellant to furnish a sufficient record on appeal from which this court can make an intelligent review. This court will not consider facts that do not appear in the transcript of record." (internal citation omitted)).

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with Rule 208(b), SCACR.



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