

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Hon. Joseph M. Strickland, Master-In-Equity

Appellate Case No. 2016-002546

RECEIVED
APR 28 2017
SC Court of Appeals

Deutsche Bank National Trust Company as Trustee for Indymac INDX Mortgage Loan Trust
2006-AR29, Mortgage Pass-Through Certificates Series 2006-AR29, Plaintiff

v.

Derrick Wilson a/k/a Derrick P. Wilson; Branch Banking and Trust Company of South Carolina;
Rolling Creek Community Association of Irmo, Defendants

Regime Solutions, LLC, Third Party Bidder

of which

Regime Solutions, LLC.....Appellant

Deutsche Bank National Trust Company, et. al.....Respondent

INITIAL BRIEF OF APPELLANT, REGIME SOLUTIONS, LLC

Eric C. Hale, S.C. Bar # 71768
Elias Fain, S.C. Bar #101193
Post Office Box 287
Columbia, SC 29202
(803) 726-3558 (Tel)
eric.hale@clarksonlawllc.com
elias.fain@clarksonlawllc.com
Attorneys for Appellant

TABLE OF CONTENTS

Contents

TABLE OF CONTENTS..... i

TABLE OF REFERENCES ii

STATEMENT OF ISSUES ON APPEAL 1

STATEMENT OF THE CASE..... 1

STANDARD OF REVIEW 2

ARGUMENT 2

1. Regime Solutions, LLC was a necessary party to the foreclosure action and must be added in accordance with the South Carolina Rules of Civil Procedure. 2

2. A Rule to Show Cause is not the proper vehicle to adjudicate an omitted homeowner’s interest in a property. 7

a. The Motion for Rule to Show Cause was based on Rule 60, which is not a proper method for binding a party to a judgment..... 7

b. Allowing Plaintiff to join Regime by Rule to Show Cause would have sweeping unjust public implications 9

CONCLUSION..... 10

TABLE OF REFERENCES

Cases

Bayview Loan Servicing, LLC v. Sulyman, 2015 Slip Op 5989 (N.Y. App. Div., 2015) 9

Boddie v. Scott, 15 S.E.2d 122, 197, S.C. 251 (S.C., 1941) 3

Carson v. CSX Transp., Inc., 400 S.C. 221, 229, 734 S.E.2d 148, 152 (2012). 2

Charleston County Parents for Public School, Inc. v Moseley, 343 S.C. 509, 514, 541 S.E.2d 533, 535-36 (2001). 3

Citibank, N.A. v. Villanueva No. 4D15-239 (Fla. App., 2015)..... 9

Dion v. Ravenel Eiserhardt Associates, 449 S.E.2d 251, 316 S.C. 226 (S.C. App., 1994). 8

Douthit v. Hipp, 23 S.C. 205, 208 (S.C., 1885). 3

Ex parte TLC Laser Eye Ctrs. (Piedmont/Atlanta), LLC, 404 S.C. 385, 392, 745 S.E.2d 105, 109 (2013)..... 2

Galvanizer’s Co. v. Highway Comm’n, 807 8 Wn. App. 804, 509 P.2d 73 9

Green Tree Servicing, LLC v. Adams. Green Tree Servicing, LLC v. Adams, 654 S.E.2d 100 (S.C. App. 2007)..... 5, 6

Greenwood Loan and Guarantee Ass’n v. Childs, 45 S.E. 167, 168, 67 S.C. 251 (S.C., 1903). ... 3

Greenwood Loan and Guarantee Ass’n v. Williams, 71 S.C. 421, 51 S.E. 272 (S.C., 1905)..... 3

MI Co., Ltd. v. McLean, 325 S.C. 616, 482 S.E.2d 597 (Ct. App. 1997). 2

Peoples v. Snyder, et. al. 141 S.C. 152,139 S.E 405..... 6, 7

Rules

SCRCP Rule 19(a) 5

SCRCP Rule 60(a) 10

SCRCP Rule 60(b)..... 9, 10

STATEMENT OF ISSUES ON APPEAL

1. **Did the Court err in upholding the Judgment and Sale even when a necessary party was not named in the action?**
2. **Did the Court err in allowing Regime to be bound to the Judgment of Foreclosure and Sale by way of a Rule to Show Cause hearing?**

STATEMENT OF THE CASE

This appeal arises from the lower court granting Respondent's Motion for Rule to Show Cause and denying Plaintiff's Motion to Vacate Judgment and Sale. (R.p. ____;Order). Regime Solutions became the owner of the subject property on August 3, 2015 by Master's Deed from a homeowner's association foreclosure sale wherein they were the highest bidder. (R.p. ____;Master's Deed). On August 17, 2015 Respondent filed a Lis Pendens, Summons and Complaint in order to foreclosure on the property pursuant to a mortgage executed in their favor by Derrick Wilson and Kristina K. Thompson. (R.p. ____;S&C , LP). The August 17 complaint named Derrick Wilson, Branch Banking and Trust Company of South Carolina and Rolling Creek Community Association of Irmo. (R.p. ____;Complaint). However, the complaint did not name the owners of the property, Regime. (R.p. ____;Complaint). Respondent was granted a Judgment and Order for Foreclosure on April 12, 2016. (R.p. ____;Judgment). Thereafter, Appellant received a Motion for Joinder and Rule to Show Cause. (R.p. ____;Motion;RTSC). Regime promptly filed a Motion to Vacate the Judgment and Sale, along with a memorandum in support. (R.p.____;Motion/Memo). A hearing was held on October 21, 2016 before the Richland County Master-in-Equity, Joseph M. Strickland. (R.p.____;Transcript). Judge Strickland ruled via an Order Pursuant to Rule to Show Cause on November 14, 2016. (R.p.____;Order). That

Order was never mailed to Appellant, but Appellant became aware of the order on November 30, 2016 and this appeal was filed December 22, 2016. (R.p. ____; Notice of Appeal).

STANDARD OF REVIEW

“A real estate foreclosure is an action in equity.” *MI Co., Ltd. v. McLean*, 325 S.C. 616, 482 S.E.2d 597 (Ct. App. 1997). The South Carolina Court of Appeals “review[s] factual findings and legal conclusions in an equitable action de novo.” *Id.* In addition, the interpretation of an order is a question of law subject to de novo review. *See Ex parte TLC Laser Eye Ctrs. (Piedmont/Atlanta), LLC*, 404 S.C. 385, 392, 745 S.E.2d 105, 109 (2013). “An abuse of discretion occurs when the conclusions of the circuit court are either controlled by an error of law or are based on unsupported factual conclusions.” *Carson v. CSX Transp., Inc.*, 400 S.C. 221, 229, 734 S.E.2d 148, 152 (2012).

ARGUMENT

1. Regime Solutions, LLC was a necessary party to the foreclosure action and must be added in accordance with the South Carolina Rules of Civil Procedure.

Rule 19(a) of the South Carolina Rules of Civil Procedure provides that :

a person who is subject to service of process and whose joinder will not deprive the court of jurisdiction of the subject matter of the action shall be joined in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the person already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

“If [an indispensable party] has not been so joined, *the court shall order that he be made party.*”

[emphasis in original] *Charleston County Parents for Public School, Inc. v Moseley*, 343 S.C.

509, 514, 541 S.E.2d 533, 535-36 (2001).

Here, Regime was not named in an action for foreclosure. (R.p.____;S&C). At the commencement of the action, Regime was the fee simple owner of the property, having received the property via a foreclosure of the previous homeowner's interest. (R.p.____;Master's Deed). Importantly, Regime was the *homeowner* not a *lienholder*. "If the object of the proceeding is to adjudicate the right of the encumbrancers, as well as to foreclose for the benefit of the immediate plaintiff, then such encumbrancers are necessary parties, because their rights cannot be determined in their absence." *Douthit v. Hipp*, 23 S.C. 205, 208 (S.C., 1885). While the *Douthit* quote contemplates encumbrancers in that scenario to be necessary parties, it would seem to be even more evident that a homeowner has to be a necessary party in the case of foreclosure. "The holder of the "equity of redemption," so called, is a necessary party to the action to foreclose the mortgage, and, unless made a party is in no wise concluded by the proceedings. *Greenwood Loan and Guarantee Ass'n v. Childs*, 45 S.E. 167, 168, 67 S.C. 251 (S.C., 1903). In *Greenwood* a foreclosure was brought against a Hattie Williams, who previously conveyed her interest in the subject property to a Rhoda Childs. *Id.* Ms. Childs was not made a party to the foreclosure proceedings. *Id.* The Court held that Ms. Childs remained the owner of the legal title the property because she was not named in the foreclosure. *Id.* In a subsequent appeal encompassing the same facts, the South Carolina Supreme Court noted with approval that the Greenwood Loan and Guarantee, the plaintiff, obtained an order vacating the foreclosure and amended the complaint to add Ms. Childs. *Greenwood Loan and Guarantee Ass'n v. Williams*, 71 S.C. 421, 51 S.E. 272 (S.C., 1905) (*See also: Boddie v. Scott*, 15 S.E.2d 122, 197, S.C. 251 (S.C. 1941) Judgment of foreclosure reversed and leave granted to amend pleadings adding

necessary party). Regime believes this to be the proper solution to the matter at hand. The Judgment of Foreclosure and Sale granted in Respondent's favor named who they believed to be the homeowner (erroneously) and purported to give Respondent free and clear title to the property having, supposedly, foreclosed any opposing claims to the property. (R.p. ___;Judgment). The Order issued in this case ordered that Regime be joined to the action and bound to the judgment as if they had been named in the matter. (R.p. ___;Order). However, it is clear that complete relief could not have been afforded to Respondent. The judgment of foreclosure and sale did not affect the rights of the actual owner of the property, thereby granting to Respondent, if anything, a property clouded by the rights of Regime that were not adjudicated. Regime asserts that, because they were a necessary party to the foreclosure, the proper action for the court upon this fact being brought to its attention would have been to order Respondent to amend their Summons and Complaint to include Regime, adding them as a party.

Regime, as a homeowner, has unaddressed defenses and concerns that a rule to show cause cannot satisfy. Regime has to be given an opportunity to engage in the judicial process with Plaintiff concerning the foreclosure action. For instance, at this time Regime has a right to have the indebtedness and ownership of alleged indebtedness proved by a preponderance of the evidence. They have the right to question the debt figures before determining whether to exercise their right of redemption. It is unknown how much of any proved debt would be objectionable, as Regime would dispute any amount that included attorney's fees and costs that were accrued as a result of a foreclosure action in which they were not a party. However, they are not privy to this information as they have not been afforded the opportunity to raise this defense and engage in discovery on that issue. This is just one example of a legitimate defense

that would be lost to them if they were attached to the prior judgment. In fact, no real rights of ownership or otherwise were adjudicated in the underlying foreclosure since no named parties had any rights. Derrick Wilson lost any interest he had in the property to the homeowners' association foreclosure, and the homeowners' associations' existing lien was paid via the Master's sale wherein Regime was the highest bidder. As such, Regime was the only *necessary* party to the foreclosure as they were the only party that had any claim of rights in the property. Therefore, the foreclosure was a nullity as the underlying judgment foreclosed on the right of persons claiming no ownership interest in the property foreclosed upon. Why then should the rightful homeowner not be afforded the same access to discovery, etc. as was afforded parties who had no ownership interest? Regime has the right to due process of the law before their property can be taken from them.

A similar issue was ruled on by the South Carolina Court of Appeals in *Green Tree Servicing, LLC v. Adams*. *Green Tree Servicing, LLC v. Adams*, 654 S.E.2d 100 (S.C. App. 2007). In *Green Tree* a Plaintiff lender sought to clear title by requesting a rule to show cause hearing to add an omitted lienholder, Mr. Adams, to the foreclosure action. *Id.* at 204. The master in equity declined to do so, issuing an order indicating that he no longer had subject matter jurisdiction to enter Mr. Adams as a party to the case. *Id.* The Court of Appeals agreed and stated that "the circuit court cannot bind [an omitted lienholder] to a foreclosure action to which he was not a party thereby extinguishing his lien." *Id.* A rule to show cause is not an appropriate avenue for Respondent to add Regime as a party because a judgment has been rendered in the foreclosure proceeding. The Master no longer had jurisdiction to add Regime as a party or to bind Regime to a judgment arising from an action to which they were not a party.

The proper remedy for Respondent was to vacate the judgment and sale and amend to properly dispose of Regime's fee ownership of the property or bring a quiet title action.

In addition, Regime is not an omitted lienholder as Mr. Adams was. Regime is the owner of the home by deed. Their position is analogous to any other homeowner in this state. It is highly unlikely that Respondent would attempt to foreclose by a rule to show cause the rights an omitted homeowner who was also a borrower under the mortgage being foreclosed. Similarly, just because Regime was not a borrower did not diminish their rights to due process of law before foreclosing its interest in the property.

The plaintiff in *Green Tree*, after having their request for a rule to show cause denied, went on to file a quiet title action against Mr. Adams. *Green Tree Servicing, LLC v. Adams*, 654 S.E.2d at 102. The *Green Tree* court stated that a foreclosure without naming a junior lienholder was proper because a junior lienholder is a *permissive* party, and thus the underlying foreclosure is valid. *Id.* The court noted, however, that the junior lienholder's lien was still open and effective absent him being named and his lien adjudicated in the foreclosure proceeding. *Id.*

Respondent argues that South Carolina Jurisprudence allows an omitted homeowner to be subjected to a judgment by way of a rule to show cause hearing. Regime disagrees. All cases cited to bolster Respondent's position concern omitted *lienholders*, not persons with legal title to the property as Regime currently holds. Another distinction between Regime and the cases relied upon by Respondent is, again, that Regime is a necessary party and the underlying foreclosure is void. Respondent relies on the Supreme Court Case *Peeples v. Snyder* wherein a second mortgagee was found to not be a necessary party. *Peeples v. Snyder, et. al.* 141 S.C. 152, 139 S.E. 405. However, as above, Regime is not a second mortgagee, or any other type of lienholder- they

hold legal title to the property. A fee owner of a property has other indelible rights superior to those of a junior lienholder. As set forth in the *Peeples* case cited by Respondent:

“[t]he first mortgagee had the *legal right* to foreclose his mortgage without making the second mortgagee a party to the action. While the second mortgagee, under the circumstances, was a *proper* party, she was not a *necessary* party; and however expedient it may have been, and was, to have made her a party, as this case has demonstrated, in order that all questions might be determined in the one action, the omission did not affect the validity of the foreclosure proceedings; it only affected the *effectiveness* of it in leaving open, undetermined, the rights of the second mortgagee.”[emphasis in original]. *Id.* at 139 S.E. 406.

In the present case we have the inverse relationship and therefore the inverse result. Plaintiff failed to name a necessary party, and that omission did affect the validity of the foreclosure proceedings rendering them void.

Finally, binding Regime to the Order of Judgment and Sale would appear to do nothing. This is due to the fact that the Order erroneously states that the Wilsons are the homeowners whose rights in the property are being terminated. (R.p. ___; Order). The underlying foreclosure did not adjudicate similar rights to Regime’s, as the alleged title holders were in default, and Regime was not given an opportunity to defend itself in the matter.

2. A Rule to Show Cause is not the proper vehicle to adjudicate an omitted homeowner’s interest in a property.

- a. *The Motion for Rule to Show Cause seems to be based on Rule 60, which is not a proper method for binding a party to a judgment*

Respondent filed a motion for rule to show cause which would seem to be based on Rule 60(a) or (b), due to the implication that the Court would modify a judgment if Regime could not

show cause as to why they should not be bound to the Judgment of Foreclosure and Sale.

(R.p.____;Motion).

First, Rule 60(a) is not a proper vehicle for Respondent to add Regime to the judgment obtained in their absence. In *Dion v. Ravenel*, the South Carolina Court of Appeals overturned a Master-in-Equity's Supplemental Order in which he purported to add a descriptive language to an easement in the property description. *Dion v. Ravenel Eiserhardt Associates*, 449 S.E.2d 251, 316 S.C. 226 (S.C. App., 1994). The Court went on to say "While a court may correct mistakes or clerical errors in its own process to make it conform to the record, it cannot change the scope of the judgment." *Id.* at 253-54, 316 S.C. 230. In the present case, "adding" Regime would change the scope of the judgment. Regime is not mentioned anywhere in the Judgment of Foreclosure and Sale. (R.p.____;Judgment). This is not merely a clerical error wherein Regime's name is misspelled; Regime is not considered or mentioned in the judgment in any way. *Id.*

Additionally, Rule 60(b) cannot be used to subject Regime to the judgment of foreclosure and sale. Rule 60(b) is a construct of the rules for a defendant subjected to a judgment to seek relief from said judgment. SCRCF Rule 60(b). It is unclear how this Rule is supposed to function in Respondent's favor. For one, when a Rule 60(b) motion is granted the judgment is typically vacated. That is not what happened in the instant case. The Order merely purported to bind Regime to the Order of Foreclosure and Sale previously filed. (R.p.____; Order). The Order cited no case law in which an omitted homeowner can be bound by a foreclosure judgment in this manner. *Id.* In fact, while researching this issue for the brief, counsel for the Appellant could find no instances in which a homeowner was subjected to a foreclosure judgment by way of a rule to show cause. However, research into persuasive law provided multiple examples of foreclosure

judgments being found void for failing to add a necessary party. (*See; Citibank, N.A. v. Villanueva* No. 4D15-239 (Fla. App., 2015) (“The fee simple title holder is an indispensable party in an action to foreclose a mortgage on property”). *Galvanizer’s Co. v. Highway Comm’n*, 807 8 Wn. App. 804, 509 P.2d 73 (“A lien foreclosure action is absolutely void absent service of process upon a necessary party....”). *Bayview Loan Servicing, LLC v. Sulyman*, 2015 Slip Op 5989 (N.Y. App. Div., 2015). (Reversing judgment wherein a necessary party was not named in the foreclosure)).

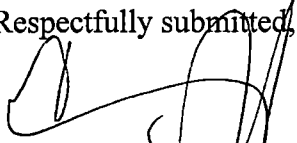
b. *Allowing Plaintiff to join Regime by Rule to Show Cause would have sweeping unjust public implications*

South Carolina is a judicial foreclosure state. This means that homeowners must be served and given an opportunity to engage in meaningful litigation to defend their rights and save their homes. The judicial system takes this very seriously and goes above and beyond to protect homeowners in this state by taking strong actions such as Administrative Order No. 2009-05-22-01. What the plaintiff is asking this Court to do is, in essence, allow for a non-judicial method of foreclosure. Sell the property first, ask questions later, and shift the burden to a homeowner to assert defenses without direct claims or allegations against them. It would go against the very spirit of South Carolina foreclosure law to allow the plaintiff to dispose of a homeowner by a rule to show cause, as they are attempting to do in this case.

CONCLUSION

For the reasons set forth above, the Judgment and Order of Foreclosure and Sale should be vacated with leave for Respondent to amend their pleadings.

Respectfully submitted,



Eric C. Hale, S.C. Bar #71768

Elias Fain S.C. Bar #101193

Clarkson Law Firm, LLC

P.O. Box 287

Columbia, SC 29202

(803) 726-3558

Attorneys for Appellant

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

APR 28 2017

SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Hon. Joseph M. Strickland, Master-In-Equity

Appellate Case No. 2016-002546

Deutsche Bank National Trust Company as Trustee for Indymac INDX Mortgage Loan Trust 2006-AR29,
Mortgage Pass-Through Certificates Series 2006-AR29, Plaintiff

v.

Derrick Wilson a/k/a Derrick P. Wilson; Branch Banking and Trust Company of South Carolina; Rolling
Creek Community Association of Irmo, Defendants

Regime Solutions, LLC, Third Party Bidder

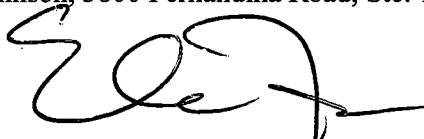
of which

Regime Solutions, LLC.....Appellant

Deutsche Bank National Trust Company, et. al.....Respondent

Proof of Service

I certify that I have served the Appellant's Designation of Matter to Be Included in the Record on Appeal and Appellant's Initial Brief on Respondents by depositing a copy of it in the United States Mail, postage prepaid, on April 28, 2017, addressed to their attorney of record, Geneieve Johnson, 3800 Fernandina Road, Ste. 110, Columbia, SC 29210.



Eric C. Hale, S.C. Bar # 71768
Elias Fain, S.C. Bar # 101193
Post Office Box 287
Columbia, SC 29202
(803) 726-3558 (Tel)
eric.hale@clarksonlawllc.com
elias.fain@clarksonlawllc.com
Attorneys for Appellant