

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

SC Court of Appeals

Honorable Joseph M. Strickland, Master in Equity

Case No. 2015-CP-40-04940

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
.....Respondent,

v.

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

Of whom Regime Solutions, LLC is the.....Appellant

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

- I. Did the Court properly bind a party with a junior interest to the Order of Judgment and Sale, where the party was not initially named in the action, but joined post judgment through a Rule to Show Cause?

STATEMENT OF THE CASE

This appeal stems from a mortgage foreclosure action filed August 17, 2015. (Complaint). Deutsche Bank National Trust Company as Trustee for Indymac INDX Mortgage Loan Trust 2006-AR29, Mortgage Pass-Through Certificates Series 2006-AR29, Plaintiff, commenced a foreclosure action against the Defendant Derrick Wilson for the purpose of foreclosing on a refinance, first-lien mortgage, dated September 1, 2006, recorded September 8, 2006, in Book 1227 at Page 752, in the Office of the Richland County Register of Deeds. (Complaint). The action was referred to the Honorable Joseph M. Strickland as the Master In Equity for Richland County by order entered on January 28, 2016. (Order of Reference.). The order of reference ordered that the Master in Equity have “authority to dispose of any and all issues and enter a final judgment in the cause, without further order of the court, to order a judicial sale on any day, not just a regular judicial sales day and to hear any issues and make any orders **after sale or judgment...**” (Order of reference, emphasis added).

An Order and Judgment of Foreclosure and Sale was filed on April 19, 2016. (Foreclosure Judgment). After the entry of Judgment, but prior to holding the judicial sale, Plaintiff discovered a deed to Regime Solutions, LLC recorded August 3, 2015, in Book 2047 at Page 721. (Regime Deed). Regime Solutions’ (“Regime”) interest in the property is junior and subordinate to Plaintiff’s first-lien mortgage, which was recorded nine years prior in time to Regime’s deed.

Upon discovery of the junior interest, Plaintiff filed a Summons and Rule to Show Cause and Motion for Joinder. (Summons and RSC, Motion for Joinder RTSC). Said pleading were served on Regime Solution’s, providing them the opportunity to show cause as to why they should not be bound by the Judgment. (Acceptance of Service). In response to the Rule to Show Cause, Regime filed a Motion to Vacate Sale and Set Aside Judgment. (Regime Motion).

A hearing was held on October 21, 2016, before the Master in Equity. (Transcript). At hearing, Regime failed to show good cause as to why they should not be bound to the Judge's Order. (Transcript). The Judge allowed each side to file memorandums in support of their argument and submit a proposed order. The Plaintiff submitted a Memorandum in Support of the Rule to Show Cause on November 1, 2016. (Plaintiff's Memo In Support). The Master in Equity issued a ruling on November 14, 2016, ordering Regime joined as a Defendant to the action and bounds by the Judgment as though they had been joined as a Defendant from the commencement of the foreclosure action. (RTSC Order). The Judge also confirmed that the ownership interest of Regime is junior and subordinate to the Plaintiff's mortgage. (RTSC Order).

On December 22, 2016, this appeal was filed.

STANDARD OF REVIEW

"A mortgage foreclosure is an action in equity." Hayne Fed. Credit Union v. Bailey, 327 S.C. 242, 248, 489 S.E.2d 472, 475 (1997). "In an appeal from an action in equity, the appellate court may find facts in accordance with its own view of the preponderance of the evidence." Lowcountry Open Land Trust v. Charleston S. Univ., 376 S.C. 399, 407, 656 S.E.2d 775, 779 (Ct. App. 2008). Nevertheless, "the appellant is not relieved of his burden of convincing the appellate court the trial judge committed error in his findings." U.S. Bank Trust Nat. Ass'n v. Bell, 385 S.C. 364, 373, 684 S.E.2d 199, 204 (Ct. App. 2009) (quoting Pinkney v. Warren, 344 S.C. 382, 387-88, 544 S.E.2d 620, 623 (2001)). The Court may affirm the trial court's ruling for any ground appearing in the record. Rule 220(c) SCACR ; see also I'On v. Town of Mt. Pleasant, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000).

ARGUMENT

1. THE MASTER IN EQUITY PROPERLY JOINED REGIME VIA A RULE TO SHOW CAUSE AND PROPERLY BOUND THEM TO THE JUDGMENT OF FORECLOSURE AND SALE.

a. A Rule to Show Cause is the proper procedure for joining a party holding a subordinate interest.

The rule to show cause is based on Peeples v. Snyder, 139 S.E. 405 (1927), and Union National Bank of Columbia v. Cook, 96 S.E. 484 (1918), which are the leading cases in South Carolina dealing with the rights of omitted parties.

In Peeples, the senior mortgagee, who was the successful bidder at the foreclosure sale, failed to include a junior mortgagee as a defendant in its foreclosure action. The Court rejected the junior's argument that a merger of legal and equitable title occurred upon the senior's purchase of the real estate at the foreclosure sale, therefore propelling its lien into first position. The Court stated that there was no merger of title and held that the remedy for omitted junior lien was the same as "...if there had been no foreclosure proceeding, which would be by redeeming the property from the first mortgage and foreclosing both mortgages or foreclosing against the equity of redemption." Peeples, 139 S.E. at 409.

In Union National Bank of Columbia, a junior mortgagee not named in the senior mortgagee's foreclosure case brought a foreclosure suit against the purchaser of the real estate from the foreclosure sale. The Court stated that prior and subsequent lien holders are not necessary parties, but they are proper parties to a foreclosure action. The Court further stated that those not made parties maintain the same position they held prior to the sale - their rights are unaltered, their liens continue to encumber the land, and they retain the right of redemption from the holder of the

mortgage before the sale and from the purchaser after the sale – but “it must appear to the Court prima facie that the land is worth more than prior encumbrances and that in probability upon a resale of the land the proceeds would reach the claim of the junior incumbrancer.” Union National Bank of Columbia, 96 S.E. at 488.

As Peeples and Union National Bank of Columbia show, in the case at hand, Regime Solutions must elect to redeem the property from the Plaintiff by tendering the total amount due to Plaintiff, or it must be bound by the Judgment of Foreclosure and Sale.

Despite the clear case law, Appellant disagrees that the Respondent’s Motion for Joinder and Rule to Show Cause properly joined them to the action. To support this proposition, Appellant cites Greenwood Loan and Guarantee Ass’n v. Childs., 45 S.E. 167, 67 S.C. 251 (S.C., 1903).

In Greenwood, a property owner, Hattie Williams, mortgaged her property and then subsequently sold it to a third party. The bank initiated foreclosure and purchased the property at the foreclosure sale. Greenwood, 45 S.E. at 167-68. The new property owner was not made a party to the action. Id. at 168. The Supreme Court held that the equity of redemption is the legal estate in the realty subject to the lien of the mortgage debt. Id. “It was the duty of plaintiff in the foreclosure proceedings to make sure that the owner of the “equity of redemption” was a party to the foreclosure suit.” Id.

There are key factual differences between the present case and Greenwood. In Greenwood, the new property owner was never joined as a party and the issues arose post sale. In the present case, the property has not yet gone to sale and the current property owner, Regime, has been joined to the action. Regime has been deprived of no right as they still have the option to pay off the mortgage debt and retain title to the property. In Greenwood, the property owner was deprived of this right as the property was sold by the bank without ever making the new owner a party. In the

present case, Regime has been joined as party to the action by order of the court and has the full and fair opportunity to exercise their right of redemption and payoff the mortgage, thus retaining title to the property.

b. Regime has been deprived of no right or defense by being joined post initial judgment, because they are not a party to the note or mortgage.

Regime claims to have a right to question the amount of the debt and ownership of the mortgage indebtedness. However, Regime Solutions is not a note maker or mortgagor and their rights are limited. They only have the right to redeem the property, as would any other junior interest holder. *Peeples*, 139 S.E. at 409. Having not been a party to the contract, they have no basis on which to question the debt. *See Windsor Green Owners Ass'n, Inc. v. Allied Signal, Inc.*, 362 S.C. 12 ,17, 605 S.E.2d 750, 752 (Ct. App. 2004) (“Generally one not in privity of contract with another cannot maintain an action against him in breach of contract, and any damage resulting from the breach of a contract between the defendant and a third party is not, as such, recoverable by the plaintiff”). Only intended beneficiaries, not incidental or consequential beneficiaries, can enforce a contract. *Goode v. St. Stephens Methodist Church*, 329 S.C. 433, 445, 494 S.E.2d 827, 833 (Ct. App. 1997). South Carolina courts, when applying these basic contract principles, have held that a nonparty to a mortgage assignment lacks standing to challenge it. *See, e.g. In re McFadden*, 471 B.R. 136, 161 (Bankr.D.S.C. 2012) (“Courts addressing the standing of a borrower to object to the validity of assignments of his loan have found that a borrower lacks standing to attack assignments due to his status as a third party”); *Reese v. U.S. Bank Nat'l Ass'n*, No. 11-2990, 2012 WL 1952819, at 3 (D.S.C. Apr. 30, 2012) (reasoning that the Plaintiff is only a party to the Mortgage and, because the Assignment is a separate contract to which Plaintiff is not a party, she cannot question its validity).

The Judge has examined the evidence presented by the Plaintiff and determined the amount of debt is fair and proper. (Foreclosure Order). By Appellant's own admission, they have taken the property subject to the Respondent's mortgage and have only the right to pay off the mortgage. (Transcript). Appellant has acknowledged that they cannot make payments under the terms of the note or mortgage or assume the loan. (Transcript). The Judge reviewed the evidence, held a hearing and entered an order stating the amount required to redeem the property. Regime has been made aware of this amount and can tender the amount due. (Foreclosure Order). At any time they remain able to exercise their right of redemption. Therefore, by their own admission, they have been deprived of no valid defenses by the Court ordering them joined to the action. The Rule to Show Cause is specifically designed to provide an omitted party the opportunity to present any reasons for why they should not be bound to the judgment. (RTSC). The Appellant was unable to show any just cause why the rule should not be entered. (Transcript).

c. The Court had proper jurisdiction to join Regime to the action.

Regime cites Green Tree Servicing, LLC v. Adams, 654 S.E.2d 100 (S.C. App. 2007) for the proposition that the court no longer retained jurisdiction to join them as a party. There is a key difference in Green Tree and the present case that makes Green Tree of no relevance to the current proceeding. In Green Tree, Kenny Claxton executed a note and mortgage in favor of Green Tree Servicing which was recorded June 14, 1999. Id. at 101. On August 26, 2004, Tom Adams obtained a judgment against Claxton, which was recorded September 4, 2004. Id. Claxton defaulted on the note to Green Tree and a foreclosure action was initiated on October 26, 2004. Id. Judgment was obtained and the property was sold at auction, with the Master In Equity entering a report of confirmation of sale on February 28, 2005. Id. 101-2. Green Tree was the successful bidder at sale. Id. at 102. They discovered Adam's judgment in June of 2005 and filed a Rule to Show Cause.

Id. Because the sale had already occurred and the Master's final report was filed, the Master entered an order stating he no longer had subject matter jurisdiction to add Adams as a party to the case. Id. In the present case, the sale has not taken place and the Master has not filed his final report. Therefore, there is no question that the Master still has subject matter jurisdiction and full right and authority to add Regime as a party to the case. "Where a court of equity has assumed jurisdiction of a cause it will retain such jurisdiction to dispose of all issues within the scope of the pleadings, including the granting of whatever relief may be required to render the judgment of the court effective." Parker Peanut Co., v. Felder, 207 S.C. 63, 68, 34 S.E.2d 488, 490 (1945).

Regarding personal jurisdiction, the Court "has excused the use of the Rule to Show Cause to obtain jurisdiction when it contained the essential elements of a valid Summons." Ex Parte Citizens and Southern Nat. Bank of South Carolina v. First Palmetto State Bank and Trust Company Inc. v. Davis, 279 S.C. 252, 254, 305 S.E.2d 80 (1983); citing H.S. Chisholm, Inc. v. Klinger, 229 S.C. 8, 91 S.E.2d 538 (1956); Beard-Laney, Inc., v. Darby, 208 S.C. 313, 38 S.E.2d 1 (1946). While the purpose of the summons is to acquire jurisdiction of the person of the defendant and to give him notice of the action and an opportunity to appear and defend, it has frequently been held by the Courts, that it is not the only method by which jurisdiction may be acquired. H.S. Chisholm, Inc. v. Klinger, 229 S.C. 8, 13-14, 91 S.E.2d 538, 540-41 (1956). Where "[e]very requisite of a summons was contained in the order which was served on appellant along with the amended complaint. While this order was not subscribed by the plaintiff or his attorney, surely a notice and a command issued by the Court itself should be as efficacious as one issued by the party to an action or his attorney." Id. at 13, 540. In this case, Respondent's Summons and Rule to Show Cause contained all the essential element of a summons including 30 days to respond. (Summons and RTSC).

In Green Tree, despite the Master in Equity ruling he no longer had jurisdiction to add Adam's as a party to the foreclosure action, it was not required that the foreclosure judgment and sale be vacated. Green Tree 654 S.E.2d at 103. Instead, Green Tree filed an action to clear title. The Court of Appeals affirmed the circuit court's decision that "bound Adams to the previous foreclosure proceeding and cleared Green Tree's property from Adam's judgment lien." Id. at 102-3. In their analysis, the Court stated that an omitted lienholder retains the right of redemption which allows them the right to pay off the entire senior debt at the time of the foreclosure, therefore, Green Tree's failure to serve Adams in the foreclosure created no prejudice. Id. at 103. The same is true in the present case. Regime has been joined as a party to the action, pre-foreclosure sale, and has the opportunity to satisfy the senior lien and retain title to the property. There is no prejudice.

d. The validity of a Rule to Show Cause is firmly rooted in case law

Appellant goes through a lengthy discussion of Rule 60 in their brief and cites several cases pertaining to said rule. An analysis and discussion of this portion of Appellant's brief is unnecessary as there has been no point in time at which the Respondent has asserted or claimed reliance on Rule 60.

South Carolina case law shows the Rule to Show Cause to be the long-established vehicle for resolving issues arising after judgment and even sale in South Carolina foreclosure actions and is support by case law dating back to the 1800s. For example, in Trenholm v. Wilson, the Supreme Court held proceeding by a rule to show cause is proper to require the widow of a mortgagor to surrender possession of the mortgage premises post sale. Trenholm v. Wilson, 13 S.C. 174 (1880).

Judge Simmons, Master in Equity for Greenville County, wrote that on the occasion an attorney handling a foreclosure matter omits to name an interested junior party, the attorney "may


bring a Rule to Show Cause requiring the omitted lienholder or mortgage holder to show cause why the lienholder or mortgage holder should not be bound by the foreclosure proceedings. The omitted junior lienholder or mortgage holder can prevail only if the land is worth more than the total of the prior encumbrances and if it is established that, in all probability, a resale of the land would generate proceeds which would reach the claim of the junior lienholder or mortgage holder. See Union National Bank of Columbia v. Cook, 110 S.C. 99, 96 S.E. 484 (1918).” Charles B. Simmons Jr., A Primer for Mortgage Foreclosures in South Carolina, 6 S.C. Lawyer 29, 31 (May/Jun 1995).

As discussed above, Appellant has agreed that they have taken title subject the Respondent’s senior mortgage and as such their only remedy is the right of redemption. They are entitled to no more or no less than any other junior lienholder, making it entirely proper that they be joined to the action via a rule to show cause and bound to the foreclosure judgment. Furthermore, the Courts have the inherent power to do all things reasonably necessary to ensure that just results are reached to the fullest extent possible. Ex Parte Dibble, 279 S.C. 592, 595, 310 S.E.2d 440, 442 (Ct. App. 1983). The application of a rule to show cause clearly falls squarely within the courts discretion.

CONCLUSION

Appellant has failed to cite a single case, statute or any other authority showing that a Rule to Show cause is not a proper avenue for joining them as a party and binding them to the judgment order. Therefore, the decision of the Master in Equity should be affirmed.

May 26, 2017



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Of whom Regime Solutions, LLC is the.....Appellant

PROOF OF SERVICE

I certify that I have served the Respondent's Initial Brief on Regime Solutions, LLC, by depositing a copy of it in the United States Mail, postage prepaid, on May 26, 2017, addressed to its attorney of record, Elias Fain, Esq, P.O. Box 287, Columbia, SC 29202.

May 26, 2017

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