

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Ralph P. Stroman, Special Referee
Trial Court Case No. 2014-CP-26-04835

APPEAL FROM GEORGETOWN COUNTY
Ralph P. Stroman, Special Referee
Trial Court Case No. 2014-CP-22-00685

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Appellate Case No. 2016-000329

JUN 15 2017

SC Court of Appeals

First Citizens Bank and Trust Company, Inc.,.....Respondent,

v.

Beck Holding Company, LLC, C.J.B Holding & Trust
Company, LLC, Cornelius J. Beck, Jr., Andrews Dental
Center, Inc., Inlet Dental Center, Inc., Seaside Surgical,
Inc., Georgetown Dental Center of South Carolina, Inc.
And South Beach Dental Center, Inc.,..... Defendants,

Of whom Cornelius J. Beck, Jr. is the.....Appellant.

INITIAL BRIEF OF RESPONDENT

Robert A. Kerr, Jr.
Lesley A. Firestone
MOORE & VAN ALLEN, PLLC
78 Wentworth Street
Charleston, SC 29401
(843) 579-7000

Attorneys for Respondent

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STATEMENT OF ISSUES ON APPEAL

- I. Whether Appellant has failed to timely serve the notices of appeal?
- II. Whether Appellant's argument that the foreclosure statute is unconstitutional is not preserved and without merit?

STATEMENT OF THE CASE

This appeal results from mortgage foreclosure cases. On April 10, 2013, Beck Holding Company, LLC, executed promissory notes to Respondent First Citizens Bank and Trust Company, Inc. in the principal amount of \$505,000.00. *See* Special Referee's Report and Judgment of Foreclosure and Sale, entered on March 26 & 31, 2015, ¶ 9 ("Foreclosure Orders"). To secure these notes, Beck Holding Company, LLC mortgaged to Respondent certain property owned by C.J.B Holding & Trust Company, LLC and located in Georgetown and Horry County (the "Property"), and various defendants, including Appellant Cornelius J. Beck, Jr. entered into commercial guaranties. *See* Foreclosure Orders, ¶ 10. Subsequently, the mortgages and commercial guaranties went into default because of the defendants' failure to make payments required by the mortgages and commercial guaranties. *See* Foreclosure Orders, ¶¶ 18-20.

In July 2014, Respondent filed a complaint in the Horry County Court of Common Pleas and a complaint in the Georgetown County Court of Common Pleas seeking foreclosures of the Property and deficiency judgments against Appellant, Beck Holding Company, LLC, Andrews Dental Center, Inc., Inlet Dental Center, Inc., Seaside Surgical, Inc., Georgetown Dental Center of South Carolina, Inc., and South Beach Dental Center, Inc, after the sale of the mortgaged Property. *See* Foreclosure Orders, ¶¶ 1 & 26. The matters were referred to Ralph P. Stroman, as special referee for Horry and Georgetown County. *See* Foreclosure Orders, pg. 1. The orders referring the matters directed the special referee to make findings of fact and conclusions of law and to enter a final judgment in both actions. *See* Foreclosure Orders, pg. 1.

The special referee held foreclosure hearings in both actions and entered the Special Referee's Report and Judgment of Foreclosure and Sale on March 26, 2015, in the Horry County case and on March 31, 2015, in the Georgetown County case (the "Foreclosure Orders"). *See*

Foreclosure Orders, p. 1. The Foreclosure Orders found at that time that defendants owed \$527,281.66 to Respondent and that Respondent was entitled to judgments of foreclosure and a bar of the equity of redemption of defendants. *See* Foreclosure Orders, ¶¶ 27-28. The Foreclosure Orders further provided for judicial sales of the Property and that the bidding would remain open after the date of the sales due to deficiency judgments being sought against certain defendants, including Appellant. *See* Foreclosure Orders, ¶ 9 of Decree. The Foreclosure Orders each provided that “[p]ursuant to Rule 53(e) of the South Carolina Rules of Civil Procedure this Order shall constitute a Final Judgment.” *See* Foreclosure Orders, ¶ 1 of Decree. Appellant did not file an appeal of either of the Foreclosure Orders.

After due advertisement, the mortgaged Property was offered for public sale on May 4, 2015, and Respondent bid \$315,000.00 for the property located in Horry County and \$160,000.00 for the property located in Georgetown County. *See* Horry County Special Referee Order, filed February 11, 2016, and Georgetown County Special Referee Order, filed February 12, 2016, p. 1 (the “Orders”). On May 27, 2015, prior to the upset sales being held¹, C.J.B. Holding & Trust Company, LLC, the owner of the mortgaged Property, filed a petition under Title 11 of the U.S. Code in the Bankruptcy Court for the District of South Carolina staying the foreclosure cases. *See* Orders, p. 1. The bankruptcy case was dismissed by order of the Bankruptcy Court on October 30, 2015. *See* Orders, p. 1.

After the public sales of the Property and while the foreclosure cases were stayed, Appellant filed a Motion to Vacate Judgment and Sale, on July 13, 2015, and Notice of Third Party Intervention to Settle Judgment on September 1, 2015, in the Georgetown County case and a

¹ The bidding must remain open for a period of thirty days following a public sale to allow for additional bids when a deficiency judgment is sought. *See* S.C. Code Ann. § 15-39-720.

Motion to Vacate Judgment and Sale, on July 8, 2015, and Notice of Third Party Intervention to Settle Judgment on August 17, 2015, in the Horry County case. *See* Orders, pp. 1-2. Once the bankruptcy case was dismissed, Respondent, out of an abundance of caution, requested a hearing before the special referee to ensure that all of Appellant's open filings were considered prior to the deficiency sales. *See* January 28, 2016 Transcript, p. 4 (the "Transcript"). The special referee scheduled a status conference hearing for January 28, 2016, to address the open matters. *See* Orders, p. 1. Two days prior to the status conference hearing, Appellant filed other various motions in both the Georgetown and Horry County cases, including: Objection to Motion to Strike Filings Scheduled for 1/28/16, Notice of Citizenship, Judicial Notice, and Affidavit of Facts Concerning American Citizen. *See* Orders, p. 2; Transcript, pp. 4-6. During the status conference hearing, Appellant offered no argument or authority for any of his open filings in the foreclosures cases and agreed to all of the terms that were ultimately set forth in the orders addressing the matters raised during the status conference hearing. *See* Transcript, pp. 3-13.

The special referee entered orders in the Horry County case on February 11, 2016, and in the Georgetown County case on February 12, 2016 (the "Orders"), denying all of Appellant's open filings before it on the basis that Appellant had offered no argument or authority in support of any of his filings. *See* Orders, p. 2. The Orders further ordered that Respondent would provide Appellant a payoff on the obligation secured by the mortgaged Property within five days of the entry of the Orders and that the deficiency sales for the Property would be scheduled for March 2, 2016, terms which Appellant agreed to during the status conference hearing. *See* Orders, pp. 2-3; Transcript, pp. 12-13. On February 22, 2016, Appellant filed a notice of appeal of the order entered in the Georgetown County case (Trial Court Case No. 2014-CP-22-00685) and a notice of appeal

of the order entered in the Horry County case (Trial Court Case No. 2014-CP-26-04835) with this Court. On February 24, 2016, the Court consolidated these appeals.

ARGUMENT

I. Appellant’s appeal challenging the Foreclosure Orders should be dismissed because Appellant has failed to timely serve the notices of appeal.

Appellant attempts to challenge the merits of the Foreclosure Orders, entered on March 26 and 31, 2015, by filing notices of appeal of the special referee’s Orders on February 22, 2016. This appeal should be dismissed because it is not timely.

“When some or all of the causes of action in a case are referred to a . . . special referee, the . . . referee shall enter final judgment as to those causes of action, and an appeal from an order or judgment of the . . . referee must be to the Supreme Court or the court of appeals as provided by the South Carolina Appellate Court Rules.” S.C. Code Ann. § 14-11-85. The appellate court rules provide that a notice of appeal from a final order or judgment issued by a special referee must be served on all respondents within thirty days after receipt of the written notice of entry of the order or judgment. Rule 203(b)(1) & (4), SCACR. The timely service of the notice of appeal is an absolute jurisdictional requirement, and upon the failure of an appellant to timely serve the notice, an appellate court must dismiss the appeal. *Elam v. S.C. Dep’t of Transp.*, 361 S.C. 9, 14-15, 602 S.E.2d 772, 775 (2004).

Appellant’s Initial Brief challenges the “final judgment for foreclosure and sale” of the Property on the basis that the foreclosure statute is unconstitutional. *See App. Int. Br.*, p. 4. The Foreclosure Orders entered on March 26, 2015, in the Horry County case and on March 31, 2015, in the Georgetown County case were final judgments as to the foreclosures and sales of the Property. This is evidenced by the Foreclosure Orders, which each explicitly provided that “[p]ursuant to Rule 53(e) of the South Carolina Rules of Civil Procedure this Order shall constitute

a Final Judgment.” See Rule 53(e), SCRPC (“When a matter has been referred, any appeal from any order or judgment issued by the . . . special referee shall be to the Supreme Court or the Court of Appeals as provided by the South Carolina Appellate Court Rules.”). Once the foreclosures and sales were ordered, there was nothing else left to be done in the foreclosure actions but to enforce the original judgments of foreclosure and sale. See *Kriti Ripley, LLC v. Emerald Invs., LLC*, 404 S.C. 367, 379, 746 S.E.2d 26, 32 (2013) (“A final judgment is an order that dispose[s] of the cause, . . . reserving no further questions or directions for future determination. It must finally dispose of the whole subject-matter or be a termination of the particular proceedings or action, leaving nothing to be done but to enforce by execution what has been determined.” (citations and internal quotation marks omitted)). Therefore, as final judgments, the Foreclosure Orders were immediately appealable.

If Appellant wanted to challenge the judgments of foreclosure and sale in this matter, he would have needed to appeal the Foreclosure Orders within thirty days of receiving notice of the entry of the Foreclosure Orders, which were entered on March 26 and 31, 2015. Respondent believes that Appellant either received written notice of entry of the Foreclosure Orders on the date that they were entered by the special referee or shortly thereafter.² Appellant now attempts to challenge the judgments of foreclosure and sale in this matter by filing notices of appeal almost a year after entry of the Foreclosure Orders. Because Appellant failed to timely file notices of appeal, Appellant’s appeal challenging the foreclosures and sales of the Property should be

² While Respondent is not certain of the exact date that Appellant received written notice of entry of the Foreclosure Orders, Respondent knows that Appellant had written notice of the entry of the Foreclosure Orders at the latest by early April 2015. On April 7, 2015, Respondent sent a letter to Appellant enclosing the Notices of Sale of the Property, which both referenced entry of the Foreclosure Orders. See Letter dated April 7, 2015, enclosing Notices of Sale. Additionally, Respondent acknowledged that he received notice of entry of the Foreclosure Orders in his bankruptcy case filings. See United States Bankruptcy Court Filing dated May 27, 2015, p. 22.

dismissed. *See Elam*, 361 S.C. at 14-15, 602 S.E.2d at 775 (2004) (“The requirement of service of the notice of appeal is jurisdictional, i.e., if a party misses the deadline, the appellate court lacks jurisdiction to consider the appeal and has no authority or discretion to “rescue” the delinquent party by extending or ignoring the deadline for service of the notice.”).

II. APPELLANT’S ARGUMENT THAT THE FORECLOSURE STATUTE IS UNCONSTITUTIONAL IS NOT PRESERVED AND IS WITHOUT MERIT.

The argument(s) Appellant raises in his brief on appeal, if any, are inscrutable. *See App. Br. pp. 3-4.* Accordingly, for purposes of addressing Appellant’s argument, Respondent assumes that the crux of Appellant’s argument on appeal is that the foreclosure statute is unconstitutional. Appellant’s argument is not preserved and is wholly meritless.

“Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide [the appellate court] with a platform for meaningful appellate review.” *Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) (citations and internal quotation marks omitted). “At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial [court].” *Id.* (citation and internal quotation marks omitted). “It is axiomatic that an issue cannot be raised for the first time on appeal.” *Id.* (citation and internal quotation marks omitted). “Imposing such a requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments.” *Id.* (citation and internal quotation marks omitted).

“Constitutional arguments are no exception to the preservation rules, and if not raised to the trial court, the issues are deemed waived on appeal.” *Id.* at 465-66, 719 S.E.2d at 642; *see also Glover v. Cnty. of Charleston*, 361 S.C. 634, 641, 606 S.E.2d 773, 777 (2004) (providing equal protection argument is not preserved for appellate review); *Grant v. S.C. Coastal Council*, 319 S.C. 348, 356, 461 S.E.2d 388, 392 (1995) (holding that a due process claim raised for the first

time on appeal was not preserved); *Merriman v. Minter*, 298 S.C. 110, 111, 378 S.E.2d 441, 441-42 (1989) (refusing to consider an equal protection challenge to a statute on appeal where it was not raised to the trial court).

During the status conference hearing, Appellant made no arguments with respect to the constitutionality of the foreclosure statute. *See* Transcript, pp. 3-13. Additionally, Appellant's filings, which prompted the status conference hearing, did not contain any arguments regarding the constitutionality of the foreclosure statute.³ Moreover, the special referee did not rule on the constitutionality of the foreclosure statute in the Orders. *See* Orders. Therefore, Appellant's argument regarding the constitutionality of the foreclosure statute is not preserved for appellate review because it was neither raised to nor ruled upon by the special referee. *See Herron*, 395 S.C. at 465, 719 S.E.2d at 642 ("At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial [court].").

Furthermore, during the status conference hearing, Appellant agreed to all of the terms that were ultimately set forth in the Orders. *See* Transcript, p. 8, 1:25-p. 13, 1:11. Appellant now challenges those Orders on appeal. Any argument by Appellant challenging the terms of the Orders is not properly before this Court because Appellant agreed to those terms during the status conference hearing. *See First S. Bank v. S. Causeway, LLC*, 414 S.C. 434, 449, 778 S.E.2d 493, 501 (Ct. App. 2015) ("An issue conceded in a lower court may not be argued on appeal.").

Moreover, Appellant's argument concerning the constitutionality of the foreclosure statute is abandoned on appeal. Appellant's constitutional argument on appeal consists of short,

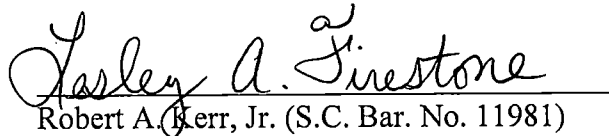
³ *See* Appellant's Motion to Vacate Judgment and Sale, filed July 13, 2015, in Georgetown County and filed July 8, 2015, in Horry County; Notice of Third Party Intervention to Settle Judgment, filed September 1, 2015, in Georgetown County and filed August 17, 2015, in Horry County; Objection to Motion to Strike Filings, Notice of Citizenship, Judicial Notice, and Affidavit of Facts Concerning American Citizen, all filed January 26, 2016, in Georgetown and Horry County.

conclusory statements without citation to the record or supporting legal authority. *See App. Int. Br.*, pp. 3-4. *See Video Gaming Consultants, Inc. v. S.C. Dep't of Rev.*, 342 S.C. 34, 42 n.7, 535 S.E.2d 642, 647 n.7 (2000) (deeming conclusory arguments in appellate brief abandoned); *Fields v. Melrose Ltd. P'ship*, 312 S.C. 102, 106 n.3, 439 S.E.2d 283, 285 n.3 (Ct. App. 1993) (“[A]n issue is deemed abandoned on appeal and, therefore, not presented for review, if it is argued in a short, conclusory statement without supporting authority.”). While Appellant does cite a federal rule of civil procedure and a federal statute in his Initial Brief, this legal authority has no bearing on and no relevance to the foreclosure actions. *See Bryson v. Bryson*, 378 S.C. 502, 510, 662 S.E.2d 611, 615 (Ct. App. 2008) (holding issue that special referee erred in ordering appellant to repay proceeds from sale of property was abandoned on appeal because appellant failed to cite any authority in support of his assertion). Accordingly, Appellant’s appeal should be dismissed because his argument concerning the constitutionality of the foreclosure statute on appeal is not preserved for appellate review.

CONCLUSION

For the foregoing reasons, the Orders should be affirmed and this appeal should be dismissed. Additionally, Respondent requests that the Court affirm the special referee’s Orders for any ground appearing on the record as provided by Rule 220(c), SCACR.

Respectfully submitted,



Robert A. Kerr, Jr. (S.C. Bar. No. 11981)
Lesley A. Firestone (S.C. Bar No. 100080)
MOORE & VAN ALLEN, P.L.L.C.
78 Wentworth Street
Charleston, SC 29401
(843) 579-7000

Attorneys for Respondent

June 13, 2017

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Inc., Georgetown Dental Center of South Carolina, Inc.
And South Beach Dental Center, Inc.,..... Defendants,

Of whom Cornelius J. Beck, Jr. is the.....Appellant.

PROOF OF SERVICE

This is to certify that I have this day served the Appellant in the foregoing matter with a copy of the foregoing **INITIAL BRIEF OF RESPONDENT** and **COUNTER DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL** by depositing same in the United States Mail with adequate postage affixed thereon to ensure delivery, addressed as follows:

Cornelius J. Beck, Jr.
34 Old Evergreen Lane
Pawley's Island, SC 29585

Lesley A. Firestone

Robert A. Kerr, Jr. (S.C. Bar. No. 11981)

Lesley A. Firestone (S.C. Bar No. 100080)

MOORE & VAN ALLEN, P.L.L.C.

78 Wentworth Street

Charleston, SC 29401

(843) 579-7000

Attorneys for Respondent

June 13, 2017

Moore&VanAllen

June 13, 2017

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Lesley A. Firestone
Attorney at Law

T 843 579 7027
F 843 579 8720
lesleyfirestone@mvalaw.com

Moore & Van Allen PLLC

78 Wentworth St.
Charleston, SC 29401-1428

Mailing Address:
Post Office Box 22828
Charleston, SC 29413-2828

**RE: First Citizens Bank and Trust Co., Inc., Respondent
Cornelius J. Beck, Jr., Appellant
Appellate Case No. 2016-000329**

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SC Court of Appeals

Dear Ms. Kitchings:

Enclosed for filing, please find an original and one copy of the following:

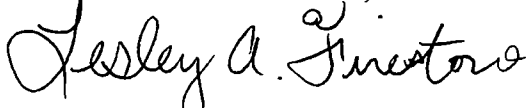
1. **Respondent's Initial Brief;**
2. **Respondent's Counter Designation of Matter to be Included in the Record on Appeal;** and
3. **Proof of Service.**

Please return a filed copy of each to this office in the enclosed stamped, self-addressed envelope.

Thank you for your assistance in this matter and please call me with any questions.

Yours very truly,

MOORE & VAN ALLEN, PLLC



Lesley A. Firestone

LAF/wss

Enclosures

cc (w/encl.): Cornelius J. Beck, Jr.



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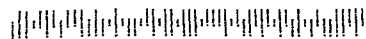
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Moore & Van Allen

Moore & Van Allen PLLC
78 Wentworth Street
Post Office Box 22828
Charleston, SC 29413-2828

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211



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