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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas

The Honorable J.C. Nicholson presiding judge for Charleston County

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Appellate Case No. 2016-002249

Green Tree Servicing LLC.....Appellant

v.

Paula R. Illingworth.....Respondent

Initial Brief of Respondent

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STATEMENT OF ISSUE ON APPEAL

DID THE CIRCUIT COURT CORRECTLY DISMISS THE ACTION ON THE GROUNDS THAT THE 2014 ACTION WAS ADJUDICATED ON THE MERITS?

STATEMENT OF THE CASE

This is an appeal from the Clerk of Court's Order for Granting the Respondent's Motion to Dismiss.

This case arises from a foreclosure of respondent's home initially filed in Case Number 2013-CP-10-5160. (Complaint 2013-CP-10-5160) The plaintiff in that case alleged that Mr. Illingworth owed payments from April 1, 2013. The Appellant voluntarily dismissed that action prior to receiving a response from the Defendant pursuant to Rule 41(a)(l) on January 13, 2014. (Dismissal 2013-CP-10-5160)

On March 27, 2014, Plaintiff filed Case Number 2014-CP-10-2042, again seeking to foreclose on the home of the Respondent. (Complaint 2014-CP-10-2042) This time, the Plaintiff alleged that the payments were due from June 1, 2013. (Complaint 2014-CP-10-2042) Mrs. Illingworth filed a response to the complaint, but an Order of Default was entered against her. The case was referred to the Master in Equity for Charleston County in September 2014. In October 2014, the judge entered an order stating that she was not in default.

Subsequent to the reference to the Master in Equity, there were three separate hearings scheduled where Mrs. Illingworth appeared, but the Plaintiff was not prepared to go forward. On March 18, 2015, Judge Scarborough dismissed the action. The judge issued a Form 4 Order, with a check in the box marked "ACTION DISMISSED:. . . Rule 41(a), SCRCP (Vol. Nonsuit)." The Master in Equity wrote in the section titled "Order Information," "Dismissed per Rule 41(a), Failure to Prosecute, Third Appearance by Defendant--Plaintiff not ready to

proceed." (Dismissal 2014-CP-10-2042) Neither a motion to reconsider nor an appeal was filed in that matter.

After dismissal, Plaintiff refiled the action as Case Number 2015-CP-10-2322 on April 23, 2015. (Complaint 2015-CP-10-2322). This action contained the same allegation about default as the 2014 action, with an alleged date of default of June 1, 2013. (Complaint 2015-CP-10-2322)

Defendant filed her Motion to Dismiss pursuant to Rule 12 and Rule 41 South Carolina Rules of Civil Procedure on May 26, 2015.(Motion to Dismiss 2015-CP-10-2322) The motion was granted by Order of the court on September 20, 2016. The Appellants filed a motion to Reconsider, which was denied October 13, 2016. (Motion for Reconsideration 2015-CP-10-2322)

The Notice of Appeal was filed by the Appellants on November 7, 2016.

ARGUMENTS

I. THE CIRCUIT COURT CORRECTLY RULED THAT THE ORDER DISMISSING THE 2014 FORECLOSURE WAS WITH PREJUDICE.

a. The Dismissal was properly construed by the lower court.

"As a general rule, judgments are to be construed like other written instruments. The determinative factor is the intent of the court, as gathered, not from an isolated part thereof, but from all the parts of the judgment itself. Hence, in construing a judgment, it should be examined and considered in its entirety." Doe v. Bishop of Charleston, 407 S.C. 128, 754 S.E.2d 494 (S.C., 2014) citing Weil v. Weil, 299 S.C. 84, 90, 382 S.E.2d 471, 474 (Ct.App.1989).

Construing the order from 2014 in its shows that the Master-in-Equity intended to dismiss the 2014 action for failure to prosecute.

b. The lower court correctly ruled the 2014 dismissal was with prejudice.

Rule 41 of the South Carolina Rules of Civil Procedures governs the dismissal of actions. Subsection 41(b) concerns "Involuntary Dismissals." By definition, this section contemplates times when the plaintiff has not asked for the action to be dismissed. It says, "For failure of the plaintiff to prosecute or to comply with these rules or any order of court, the Defendant may move for dismissal of an action..." It further states that "unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and **any dismissal not provided for in this rule** . . . operates as an adjudication upon the merits." (emphasis added)

The notes to this rule reinforce its clarity saying "Rule 41 (b) also makes clear when involuntary dismissal operates as an adjudication on the merits." The clear meaning of Rule 41(b) is that when a case is dismissed for failure to prosecute or when there is a dismissal not covered by the rule, this is the same as an adjudication on the merits and will act as a bar against further action. It is the same as if the plaintiff lost.

Subsection 41(b) concerns "Involuntary Dismissals." By definition, this section contemplates times when the plaintiff has not asked for the action to be dismissed. It says, "For failure of the plaintiff to prosecute or to comply with these rules or any order of court, the Defendant may move for dismissal of an action..." It further states that "unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule . . . operates as an adjudication upon the merits." The notes to this section reinforce the clarity of the rule saying "Rule 41(b) also makes clear when involuntary dismissal operates as an adjudication on the merits."

The clear meaning of Rule 41(b) is that when a case is dismissed for failure to prosecute, this is the same as an adjudication on the merits and will act as a bar against further action. It is the same as if the plaintiff lost.

In this matter, the plaintiff filed the 2013 foreclosure and voluntarily dismissed their action under Rule 41(a)(1). Then it filed again in 2014. Over the course of many months, three separate hearings were scheduled with the court where the Defendant appeared ready to defend their rights, but the Plaintiff was

not prepared to present its case. At the second hearing, the Master in Equity warned the Plaintiff that he would dismiss their action if they appeared before him again unprepared to proceed. On the third such hearing date, the court dismissed the case for failure to prosecute.

While the Appellant has not yet expressly stated as much, it can only be implying that the 2014 action was dismissed under Rule 41(a)(2). If it was dismissed under Rule 41(a)(1) then this was the second dismissal and would automatically with prejudice. However, there exists no statement by the Appellant on the record that they made such a request for a voluntary dismissal. In fact, they did not. The dismissal was not voluntary and was a sanction by the court for calling the Defendant into court and not being prepared to proceed.

The dismissal was well within the discretion of the trial court. In Collins v. Sigmud, the South Carolina Supreme Court said, "The authority of a court to dismiss sua sponte for lack of prosecution has generally been considered an "inherent power," governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." 299 S.C. 464, 385 S.E.2d 835 (S.C., 1989). It found that an order of dismissal that does not "Otherwise Specify" is on the merits.

In this matter, the Plaintiff called the defendant to court on three separate occasions and was then unprepared to proceed. This consumed the time of the court and that of the defendant. In Georganne Apparel, INC. v. Todd, the South Carolina Appellate Court said, "Plaintiff has been given abundant opportunity to

litigate. There is a limit beyond which the court should allow a litigant to consume the time of the court and to prolong unnecessarily time, effort, and costs to defending parties. The granting of the order was a discretionary matter." 303 S.C. 87, 92, 399 SE 2d 16 (Ct.App. 1990).

The Appellant attempts to argue that the Master-in-Equity had no authority to dismiss the case with prejudice and cites a string of cases to support this. The problem, however, is that each of these cases deals with fact patterns where the plaintiff moved for a dismissal under 41(a)(2). That never happened in this case. This was in no way a "voluntary dismissal." There is no way a dismissal for failure to prosecute could be. Because of this was an involuntary dismissal, the respondent does not have to show any legal prejudice.

While the dismissal of a case with prejudice is a drastic remedy, the appropriate response for the Appellant, a large and sophisticated business entity, would be to appeal the 2014 dismissal. It failed to do so and is bound by that order.

II. THE APPELLANT'S ARGUMENTS ABOUT SUCCESSIVE DEFAULTS ARE MOOT.

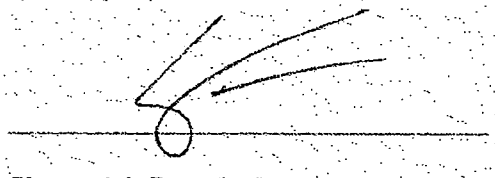
"A case becomes moot when judgment, if rendered, will have no practical legal effect upon [the] existing controversy. Mathis v. South Carolina State Highway Dep't, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973). The Appellants in this case argue that even if the 2014 foreclosure was dismissed with

prejudice, the 2015 foreclosure should not be dismissed because each month creates a new default and a new cause of action arises.

The flaw in the Appellant's argument is that the alleged defaults in the 2014 foreclosure and the 2015 foreclosure are identical. None of those arguments apply to this case. If the Court were to agree with the Appellants about their theory regarding successive defaults, it would not apply to the facts of this case and would be advisory.

III. CONCLUSION

The lower court properly reviewed the prior court's order and made the correct decision. The Appellant was attempting to re-try the exact causes of action that had already been determined on the merits against it.



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CERTIFICATE OF SERVICE

I, Shawn M. French, Sr., do hereby certify that on this date, I served a copy of **Respondent's Initial Brief** on counsel listed below, by U. S. Mail on the said date, addressed as follows:

Sara C. Hutchins or Theodore Von Keller
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Shawn M. French, Sr.

Charleston, South Carolina
July 14th, 2017

THE FRENCH LAW FIRM LLC

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VIA FACSIMILE AND US MAIL
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RE: GreenTree v. Paula Illingworth

To Whom It May Concern,

Please find enclosed the Initial Brief of Appellants along with one copy and a return envelope.
If you have any questions, you can contact me at the above number.

Sincerely,

Shawn M. French
Cc: File
Crawford & von Keller

Enclosures: Initial Brief
Designation of Matter
Certificate of Service

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