THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Joseph M. Strickland, Master-In-Equity

Case No. 2015-CP-40-02203

Appellate Case No. 2017-002164

Wells Fargo Bank, N.A .....Appellant,

v.

Gwendolyn Ladson a/k/a Gwendolyn H. Ladson.....Respondent.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES

I. Did the Master in Equity err in denying Appellant's motion for relief from the Master in Equity's Order and Judgment of foreclosure and sale where there was clear evidence of mistake and inadvertence?

II. Did the Master in Equity err in finding that Respondent was a bona fide purchaser for value without notice?

STATEMENT OF THE CASE AND FACTS

On September 4, 2003, John L. Ladson and Gwendolyn H. Ladson executed and delivered to Wachovia Bank, National Association a certain Home Equity Line of Credit Agreement Note ("Note") in writing wherein and whereby John L. Ladson and Gwendolyn H. Ladson promised to pay to Wachovia Bank, National Association, the principal sum of $20,000.00, together with an interest rate of 5.25% per annum on the unpaid balance; said principal and interest being payable in monthly installments thereafter until the said Note is fully paid.

In order to secure the payment of said Note, John L. Ladson and Gwendolyn H. Ladson, made, executed, and delivered to Wachovia Bank, National Association, its successors and assigns, a certain real estate Mortgage covering real property located in Richland County, South Carolina as is more fully described as follows:

> All that certain piece, parcel, or lot of land, together with improvements thereon, situate, lying near Columbia, Richland County, South Carolina, the same being designated as Lot No. 7, Block "D", on Plat of Riverview Terrace, by William Wingfield, dated December 20, 1962, revised December 5, 1963, and recorded in Plat Book "U", Page 191 in the Records for Richland County, South Carolina ; further shown on a plat prepared for John Ladson and Gwendolyn Ladson by Cox and Dinkins, Inc., dated June 17, 1988, recorded in Plat Book 52, Page 2174 in the Records for Richland County, South Carolina; reference is craved to such plat for a more particular description of the subject property.
>
> This property subject to easements and restrictions of record as shown on the recorded plats above in the Records for Richland County, South Carolina.
>
> This being the same property conveyed to John Ladson and Gwendolyn Ladson by Deed of Equitable Bank, N.A. dated June 24, 1988 and recorded July 5, 1988 in Book D894, Page 605 in the Records for Richland County, South Carolina. Thereafter, being the same property conveyed to Gwendolyn H. Ladson by Deed

of Distribution of the Estate of John Ladson dated February 15, 2007 and recorded February 28, 2007 in Book 1286, Page 2851 in said Records.

TMS No. 09201-01-13
Property Address: 4226 Chesterfield Drive, Columbia, SC 29203

The Mortgage was recorded September 16, 2003 in the ROD's Office for Richland County in Book 852 at page 964. Thereafter, the Mortgage was transferred to Appellant by corporate merger.

Subsequently, the Ladson's defaulted on their obligations to make payments under the terms of the Note and Mortgage and Appellant brought the instant foreclosure action on April 10, 2015.

Appellant's Complaint seeks foreclosure of its Mortgage and asserts that the Mortgage is a second lien on the property subject to that certain senior mortgage given to Wells Fargo Bank, N.A. s/b/m to Wachovia Bank, N.A., by John Ladson and Gwendolyn Ladson recorded on September 16, 2003 in Book 852 at Page 958 (Complaint, p. 4). Gwendolyn Ladson appeared in the action and contested the foreclosure.

The case was referred to the Honorable Joseph M. Strickland as the Richland County Master in Equity by an Order filed July 9, 2015. (Order of Reference). Appellant filed a motion for summary judgment on January 26, 2016. Appellant's motion for summary judgment was heard on March 29, 2016 and granted via an Order filed June 22, 2017.

Appellant's counsel presented a record of hearing and proposed order of foreclosure at the summary judgment hearing. Those documents contained a drafting error regarding the status of the senior lien. (Master in Equity's Order, order, p. 4, Paragraph 19(c), Record of Hearing, p. 3) While both documents correctly noted that the Mortgage Appellant sought to foreclose constituted

a valid second lien on the property, consistent with the allegations of the complaint, through mistake and inadvertence both documents also included language indicating that the senior lien was paid but not satisfied. *Id.* The erroneous assertion in the Record of Hearing and Order, regarding the status of Appellant's senior Mortgage, is inconsistent with the assertion in those same documents that the subject Mortgage constituted a valid second lien on the property.

The Order and Record of Hearing also erroneously referenced Wells Fargo Bank, N.A. s/b/m to Wachovia Bank, N.A. as a Defendant, when in fact, Wells Fargo was not a named defendant in the action. No evidence has been presented to support the erroneous assertion that the senior mortgage was paid but not satisfied, nor was there any other acknowledgment by Court or counsel, that either was aware of the internal contradictions.

The foreclosure sale was held on July 5, 2016. Respondent, Stuart Arnold was the successful purchaser. Respondent's winning bid was $5,001.00. An Order confirming the sale was filed on August 2, 2016 (Master's Report on Sale and Disbursements and Order of Confirmation). Unaware of any error contained in the instant action, Appellant referred the first lien foreclosure to the firm of Rogers, Townsend and Thomas and on November 16, 2016 a foreclosure was filed as to the first lien. Respondent Answered and challenged the validity of the first lien. (First lien Summons and Complaint. Answer of Stuart Arnold).

Within 40 days of discovering the contradicting language, on February 27, 2017, Appellant filed, and served on Arnold a SCRCP Rule 60(b) Motion for Relief from the underlying foreclosure judgment on the grounds of mistake, inadvertence, or excusable neglect. A hearing on Appellant's motion for relief was held on April 19, 2017 and an Order denying the motion was filed May 8, 2017. (Order denying Motion for Relief). The Order specifically indicated that there was no ruling as to the validity and enforceability of Appellant's first mortgage. Appellant timely filed a motion

to alter or amend the order denying appellant's motion for relief which was heard on August 8, 2017. Appellant's motion to alter or amend was denied via an Order filed September 19, 2017. (Order denying Motion to Reconsider). This appeal followed.

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)). Appellant asserts that the Master in Equity abused his discretion in failing to correct the erroneous assertions in the foreclosure Order and finding that Respondent "is a bona fide purchaser for value without notice of any lien (defect) affecting the title to the subject property" (Order denying Plaintiff's Motion for Relief from Judgement, P. 3, Paragraph 8). "An abuse of discretion occurs when the judge is controlled by some error of law or where the order, based upon findings of fact, is without evidentiary support." *Stoney v. Stoney*, 417 S.C. 345 790 S.E.2d 31 (Ct. App. 2016). "The burden is on the party appealing from the order to demonstrate the trial court abused its discretion." *Halverson v. Yawn*, 328 S.C. 618 493 S.E.2d 883 (Ct. App. 1997).

ARGUMENT

1. The Master erred in failing to correct the facially inconsistent statements in the foreclosure Order.

A Rule 60(b) motion provides relief to a party from final judgment on the grounds of mistake, inadvertence, surprise, or excusable neglect. Relief from a final judgment must be had through Rule 60 which is the mechanism for relief from a judgment or order. *Thompson v. Ballentine*, 298 S.C. 289, 291, 379 S.E.2d 896, 898 (1989).

It is unchallenged that the assertions contained in Paragraph 19(c) of the Foreclosure Order related to the first lien held by Wells Fargo are in error. Wells Fargo is not a defendant in the action and no evidence has been presented to the Court, nor is there any evidence in the public land records, that the first lien has been "paid but not satisfied." Paragraph 19 of the foreclosure order does not contain subsections labeled (a) or (b) which is a further indication that the paragraph was mistaken or contained an error.

Respondent asserts that he had the right to rely on Paragraph 19 in spite of the "red flags" that the Paragraph was in stark contrast to the allegations of the Complaint as well as the findings in Paragraph 11 of the Foreclosure Order that indicate that the subject Mortgage constitutes a second lien on the property. No party, including Respondent, has presented any evidence that the first lien held by Wells Fargo had indeed been paid but not satisfied.

Failing to correct the inconsistent statements in the Foreclosure Order leaves open a glaring and irreconcilable contradiction between Paragraphs 11 and 19(c) of the Order and constitutes reversible error. Since there was no evidentiary support to maintain a finding that the Wells Fargo

mortgage was paid but not satisfied, the Master abused his discretion in denying Respondent's motion for relief from the Foreclosure Order.

2. The Master erred in declaring Respondent a bona fide purchaser for value without notice.

The Order Denying Plaintiff's motion for relief concludes that, "Based on these findings, I conclude that, in equity, Mr. Arnold is a bona fide purchaser for value without notice of any lien (defect) affecting the title to the subject property." (Order Denying Plaintiff's Motion for Relief, P. 3, Paragraph 8). This conclusion is an error of law.

A purchaser may assert a plea in equity of a bone fide purchaser for value, without notice of a defect in his title, by showing (1) he has actually paid in full the purchase money (giving security for payment is not sufficient, nor is past indebtedness a sufficient consideration); (2) he purchased and acquired the legal title, or the best right to it; and (3) he purchased bone fide, i.e., in good faith and with integrity of dealing, without notice of a lien or defect. The bona fide purchaser must show all three conditions "actual payment, acquiring of legal title, and bona fide purchase" occurred before he had notice of a title defect or other adverse claim, lien or interest in the property" *Spence v. Spence*, 368 S.C. 106, 116, 628 S.E.2d 869, 874 (2006). There are two basic types of notice 1) actual and 2) constructive or inquiry notice. *Id.*

Respondent had both actual and constructive notice that the instant foreclosure was one of a second lien as it was alleged that the instant foreclosure was one of a mortgage in second lien position specifically subject to a senior mortgage also held by Appellant. (Complaint, P. 2, Paragraph 8 and P. 4, Paragraph 17). The Master's Order also acknowledges the second lien position of the instant mortgage. Respondent admitted, and it was included as a finding of fact in

the Order denying Appellant's Request for Relief, that he "performed appropriate due diligence with regard to investigating the foreclosure suit and the Judgment prior to bidding on the property and complying with his bid." (Order Denying Plaintiff's Motion for Relief, p. 3, Paragraph 7). As such, Respondent had actual notice, both from Appellant's Complaint and the Foreclosure Order itself that the instant foreclosure was one of a second lien. Even if Respondent had not conducted a diligent search of the foreclosure records before appearing at the sale, he would have none the less had constructive notice that the foreclosure was a second lien. "[c]onstructive or inquiry notice in the context of a real estate transaction also may arise when a party becomes aware or should have become aware of certain facts which, if investigated, would reveal the claim of another". *Id* at 120. "A purchaser at a judicial sale is deemed to have notice of all things disclosed by the record." *Wells Fargo Bank, NA v. Turner*, 378 S.C. 147, 151, 662 S.E.2d 424, 426 (Ct. App. 2008), citing *Ex parte Keller*, 185 S.C. 283, 293, 194 S.E. 15, 19 (1937).

Respondent contends that his review of the foreclosure order and notice of sale led him to a conclusion that the sale of the property was not subject to a senior lien. The Foreclosure Order does not support Respondent's position as it clearly states that Appellant's lien is in second position. (Foreclosure Order, p. 2). Furthermore, had the senior lien in fact been paid and not satisfied, the Order would have stated that Appellant's lien was in first position. The inconsistencies of Paragraph 11 and 19(c) of the Foreclosure Order would at least alert Respondent that the Foreclosure Order contained an error and that further investigation of the status of the first lien was needed. Respondent's decision to ignore the clear notation that the foreclosure was that of a second lien was at his own peril and defeats his claim of not having notice of the senior lien.

In the case of *Poco-Grande Investments vs. C&S Family Credit, Inc.* 301 S.C. 323, 391 S.E.2d 735 (Ct. App. 1990), an appellant's right to rely on the representations made in the Master's

notice of sale was discussed. "Where there is no confidential or fiduciary relationship, and an arm's length transaction between mature, educated people is involved, there is no right to rely. This is especially true in circumstances where one should have utilized precaution and protection to safeguard his interests." *Id* at 325. The Notice of Sale was silent as to lien position and does not support Respondent's conclusion that the sale was as to a first lien. The Court in *Poco Grande* also indicated that a bidder had no right to rely on a notice of sale that erroneously stated the amount of a senior lien and the foreclosure sale was upheld and subject to the entirety of the senior lien amount and not the amount stated on the notice of sale. This Court noted that "A party must avail himself of the knowledge or means of knowledge open to him. The Court will not protect the person who, with full opportunity to do so, will not protect himself". *Id* at 325, citing *King v. Oxford*, 282 S.C. 307, 312, 318 S.E.2d 125, 128 (Ct. App. 1984). Respondent was fully aware that there was a contradiction in the Foreclosure Order as to the status of the first lien and, in spite of that knowledge, chose not to investigate the status of the first lien any further. A simple phone call to counsel for Appellant would have uncovered the mistake prior to the sale and confirmed that the first lien was indeed not paid off. The Court should not protect Respondent where he did not protect himself by further investigating the status of the senior lien.

The Master in Equity seemingly either contradicted himself or intentionally left the door open for another Court to address this issue in ruling that Respondent is a bona fide purchaser for value but also ruling that, "[t]he matter of the validity and enforceability of Wells Fargo Bank's senior mortgage is not before the court in this case, and I decline to make any ruling with respect to that mortgage" (Order Denying Respondent's Motion for Relief). If Respondent is a bona fide purchaser for value, as the Master concluded, then the enforceability of Wells Fargo Bank's senior lien has been determined as to Respondent. This is a conclusion that the Master expressly indicated

that he did not wish to reach in this case and a conclusion that is not necessary in addressing Appellant's request to correct the erroneous notation that the first lien was paid but not satisfied. In fact, any reference to the existence or status of a first mortgage is not necessary or essential in a foreclosure action as to a second lien, implicit in this standard is a duty of a bidder to investigate the title status prior to bidding. A foreclosure decree cannot affect the rights of a party having priority over the plaintiff's mortgage whether it is made a party to the action or not. 27 S.C. Jur. Mortgages § 108 (citing S.C. Code Ann. § 15-39-880). Obviously, the existence of a surviving lien impacts the value of a foreclosed property, hence, it is extremely important for a potential bidder to fully investigate any contradictions in a Foreclosure Order relating to lien priority.

Due to mistake, inadvertence, or excusable neglect, Respondent became the owner of the subject parcel, free and clear of the senior lien, resulting in a windfall. South Carolina law and public policy do not support windfalls. *Williamson v. U.S. Fire Ins. Co.*, 314 S.C. 215, 442 S.E.2d 587 (1994); see also *Edwards v. Columbia, S.C., Teachers Fed. Credit Union*, 276 S.C. 89, 275 S.E.2d 879 (1981).

CONCLUSION

Based on the foregoing, the Order denying Appellant's motion for relief should be reversed and the case remanded to the Master in Equity with instruction to enter an Order granting the Appellant's motion for relief.

{Signature Page to Follow}

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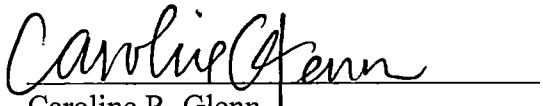

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January 17, 2018
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PROOF OF SERVICE

The undersigned certifies that the **INITIAL BRIEF OF APPELLANT** was served on the below listed parties by depositing copy thereof in the United States Mail, first class, postage prepaid, addressed to:

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