

STATE OF SOUTH CAROLINA)

) IN THE COURT OF COMMON PLEAS

COUNTY OF CHARLESTON)

) Civil Action No. 2016-CP-10-6750

Seabrook Island Property Owners Association,

Plaintiff,

v.

Charles Kelley a/k/a Charles E. Kelley; Deborah Kelley a/k/a Deborah L. Kelley; Mortgage Electronic Registration Systems, Inc., its successors and assigns, as nominee for Chase Mortgage Company, its successors and assigns, a Delaware Corporation; and Spinnaker Beach House Owners Association,

Defendants.

Order on Defendants' Charles Kelley a/k/a Charles E. Kelley and Deborah Kelley a/k/a Deborah L. Kelley Motion to Set Aside Entry of Default and Vacate Judgment of Foreclosure Sale and Master's Deed

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FEB 20 2018

SC Court of Appeals

FILED
DEC 15 PM 2:31
CLERK OF COURT

This matter is before the Court upon motion of the Defendants, Charles Kelley and Deborah Kelley (the "Kelley Defendants") to Set Aside Entry of Default and Vacate Judgment of Foreclosure Sale and Master's Deed. A hearing was held on November 27, 2017. Present at the hearing were counsel for Plaintiff, counsel for the Kelley Defendants, and counsel for the third party bidder, 749 Spinnaker, LLC. For the reasons set forth below, the Court denies the Kelley Defendants' motion.

FACTS

Plaintiff filed the Lis Pendens, Summons and Complaint for the foreclosure of a lien on property located at 749 Spinnaker Beachhouse ("Subject Property"), with the Clerk of Court for Charleston County on December 19, 2016. The Kelley Defendants were personally served at their residence, located at 101 Alder Street, Punxsutawney, PA, (the "Alder Street Address") on December 22, 2016. The Affidavits of Service for the Kelley Defendants were filed on January

5, 2017; however, said Affidavits contained a scrivener's error in that the affiant failed to indicate that the Complaint was served along with the Certificate of Exemption from ADR, Lis Pendens, and Summons. Upon realization of this error, Plaintiff, by and through counsel, contacted the process server to verify that all of the pleadings, including the Complaint, were received and served on the Kelley Defendants. The process server submitted Amended Affidavits of Service, which were filed with the Clerk of Court for Charleston County on October 4, 2017, wherein he explained the scrivener's error and verified that the Complaint was properly served on Kelley Defendants. The Kelley Defendants failed to contact the Plaintiff, counsel for the Plaintiff, and/or formally respond to the pleadings, and as a result, they were placed in default by order of the Court on March 9, 2017.

In addition to the Summons and Complaint, the Kelley Defendants received a letter from counsel for the Plaintiff, dated August 24, 2016, sent both certified and regular mail and addressed to them at the Alder Street Address, that they had a balance due and owing the Plaintiff, and that a lien would be filed if they failed to satisfy the arrearage within the time specified. They did not respond to the letter or exercise their right to cure. The Kelley Defendants were mailed a copy of the Notice of Hearing at the Alder Street Address on March 21, 2017, and a copy of the Certificate of Service was filed with the Court on March 23, 2017. They did not respond and were not present at the hearing on April 19, 2017. The Kelley Defendants were mailed a copy of the Notice of Sale and filed Judgment of Foreclosure and Sale on May 10, 2017, and copy of the Certificate of Service was filed with the Court on May 12, 2017. The Subject Property was advertised for sale in The Post and Courier on May 30, 2017; June 6, 2017; and June 13, 2017, as indicated by the Affidavit of Publication filed with the Clerk of Court on Jun 21, 2017. The Subject Property was sold on July 20, 2017 to 749 Spinnaker,



LLC, the Master's Order of Sale and Disbursements was filed with the Clerk of Court on August 23, 2017, and the Master's Deed was recorded on September 5, 2017, in Book 0664 at page 088 in the Office of the RMC/ROD for Charleston County. The Kelley Defendants did not attempt to contact Plaintiff or counsel for Plaintiff regarding the sale of the subject property, yet they do not dispute that the Alder Street address is their home address where they reside and receive their mail.

STANDARD OF REVIEW

The determination of whether to set aside an entry of judgment and vacate a foreclosure sale is a matter within the discretion of the trial court. *Wells Fargo Bank, N.A v. Turner*, 378 S.C. 147, 150; 662 S.E.2d 424, 425 (Ct. App. 2008).

DISCUSSION

The Kelley Defendant bring their motion pursuant to Rule 60(b) alleging Plaintiff failed to effect proper service per Rule 4(b) of the South Carolina Rules of Civil Procedure, which requires that the summons and complaint be served together. It is undisputed that the Affidavits of Service for the Kelley Defendants, which were filed on January 5, 2017, contained a scrivener's error in that the affiant failed to indicate that the Complaint was served along with the Certificate of Exemption from ADR, Lis Pendens, and Summons. It is also undisputed that upon discovery of the scrivener's error, the process server submitted Amended Affidavits of Service, wherein he explained the scrivener's error and verified that the Complaint was properly served on Kelley Defendants in compliance with Rule 4 SCRPC. As a result of the Kelley Defendant failure to respond or otherwise appear in the action after receipt of the Summons and Complaint, they were placed in default, and the Subject property was foreclosed and sold to the third-party bidder, 749 Spinnaker, LLC. Although the original Affidavit contained a scrivener's error, it's



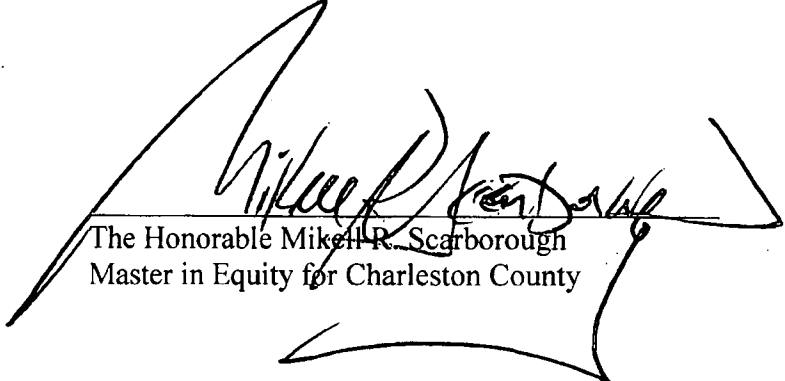
correction filed with this Court is sufficient evidence that SIPOA complied with SCRCP Rule 4. The Kelley Defendants have failed to provide any evidence contradicting the service of process other than affidavits where they admit being served with all documents, but “believe” that the Complaint was omitted.

CONCLUSION

Based on the foregoing facts, the service of the Summons and Complaint was proper, the Entry of Default as to the Kelley Defendants was proper, and the entry of the foreclosure order and subsequent foreclosure sale were properly executed pursuant to South Carolina law. Thus, the Kelley Defendants’ Motion to Set Aside Default and Vacate the Judgment of Foreclosure Sale and Master’s Deed is denied, and

IT IS SO ORDERED!

Charleston, South Carolina
12/13, 2017



The Honorable Michael R. Scarborough
Master in Equity for Charleston County