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JUL 31 2017

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA COURT OF APPEALS

Appellate Case Number: 2017-001424

Belle Hall Plantation Homeowner's Association, Inc. Plaintiff,

v.

John A. Murray, Trustee of the John E. Murray &
Gloria C. Murray Family Trust, Respondent,

David Conor Keys & Karen Keys, Appellants .

Petitioners

RETURN OF RESPONDENT

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Attorney for Respondent

ASSERTIONS OF THE RESPONDENT

The Respondent responds to the relevant issues raised by the appellants by way of this return and asserts that the Court of Appeals properly decided that Appellants are not bona fide purchasers for value and do not deserve the protections. The Respondent further asserts that the Court of Appeals properly held that the foreclosure judgment obtained by way of service by publication was void. The trial court lacked personal jurisdiction over the defendant as a result of the Plaintiff's presentation of a facially defective affidavit to the court in obtaining its order for publication. The Respondent further asserts that Appellants are incorrect that the issue of the sufficiency of the affidavit was not preserved for appellate review.

I. The Appellants are not Bona Fide Purchasers for Value.

The Court of Appeals properly ruled that Appellants did could not claim the status of bona fide purchasers for value and therefore cannot be afforded the protections of §15-39-870 of the South Carolina Code (2005) which provides: “[u]pon the execution and delivery by the proper officer of the court of a deed for any property sold at a judicial sale under a decree of a court of competent jurisdiction the proceedings under which such sale is made shall be deemed res judicata as to any and all bona fide purchasers for value without notice, notwithstanding such sale may not be subsequently confirmed by the court.”

The Court of Appeals further relied upon and cited directly to the same case law as Appellants, Respondent, and the trial court in ruling that the Appellants are not bona fide purchasers:

“To qualify as a bona fide purchaser, a party must show "(1) actual payment of the purchase price of the property, (2) acquisition of legal title to the property, or the best right to it, and (3) a bona fide purchase, 'i.e., in good faith and with integrity of

dealing, without notice of a lien or defect.” Robinson v. Estate of Harris, 378 S.C. 140, 146, 662 S.E.2d 420, 423 (Ct. App. 2008) (quoting Spence v. Spence, 368 S.C. 106, 117, 628 S.E.2d 869, 874-75 (2006)). “In addition, “[t]he 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.” Id. (quoting Spence, 368 S.C. at 117, 628 S.E.2d at 875).” (R. p. 560)

In disqualifying Appellants from the status of bona fide purchasers under *Robinson* and *Spence*, the Court of Appeals held that “before (Appellants) paid the entire purchase price, they received actual knowledge that there could be a claim or defect that would affect title to the property.” *Id.* The Court’s narrative of the facts references the August 18th, 2014, motion hearing held by the master. (R. p 553) At this particular hearing, Lead Appellant, acknowledged that he discovered from another attorney in his firm on May 15th, 2014 that the Respondent retained counsel to file a motion to vacate the judgment of foreclosure and sale.

The Court of Appeals did not overrule the rationale of the trial court in ruling that Appellants are not bona fide purchasers. The master, with emphasis on the fact that the May 16th, 2014 “rush to the courthouse to pay the balance due” (by the Lead Appellant) ruled Appellants were not bona fide purchasers as they “*did not, in good faith and with integrity of dealing acquire the deed*” as required under *Robinson* and *Spence*. (R. pp. 53, 207)¹

¹ The record reflects that the Lead Appellant physically retrieved the deed from personnel at the Master’s office on May 23rd, 2014 and that the motion had been served by USPS mail on May 15th, 2014. (R. p. 84)

The claim of Appellants that a motion to vacate a judgment of foreclosure does not constitute a defect in title should fall on deaf ears in this Court just as it has on those of the lower courts. Appellants previously asserted that this appeal “*would cloud the title (and likely prevent the ability) to sell the property*” (R. p. 75) in Motion to Stay the Master’s Order Vacating the Sale and Judgment of Foreclosure. Respondents concur with Appellants and assert that a Motion to Vacate in the trial court has the same effect.

**II. THE AFFIDAVIT OFFERED IN SUPPORT OF THE ORDER OF PUBLICATION
WAS FACIALLY DEFECTIVE AS EVIDENCED BY THE RECORD AND
RENDERED THE JUDGMENT AND DEED VOID UNDER S.C.R.C.P. RULE 60(b)(4)**

The Court of Appeals properly ruled that the affidavit of due Diligence as facially defective. (R. p. 556). The Court of Appeals observed that affidavit in support of its order for publication specifically stated “After due diligence, as demonstrated by the attached Exhibit A, which is incorporated herein by reference, Plaintiff’s counsel has been unable to ascertain the location defendant, John A. Murray”. (R. p. 216) The exhibit included a Westlaw address search of John E. Murray who is not a party to this action.

“Generally, absent fraud or collusion, once the issuing officer is satisfied with the supporting affidavit, the decision to order service by publication is final unless the order of publication is premised upon a facially defective affidavit. Wachovia Bank of S.C. v. Player, 334 S.C. 200, 204, 512 S.E.2d 129, 131 (Ct. App. 1999), 341 S.C. 424, 535 S.E.2d 128 (2000), reversed on other grounds; Yarbrough v. Collins, 293 S.C. 290, 292, 360 S.E.2d 300, 301 (1987); Montgomery v. Mullins, 325 S.C. 500, 506, 480 S.E.2d 467, 470 (Ct. App. 1997); Miles v. Lee, 319 S.C. 271, 274, 460 S.E.2d 423, 425 (Ct. App.

1995). (“The affidavit supporting publication was facially defective because it purported to show due diligence in ascertaining the whereabouts of someone other than the person to be served.”)

Unlike the instant action, in *Player* the Court of Appeals ruled was not facially defective and “that (the court) could not presume that due diligence was exercised in any way other than as shown in the record”. *Id.*, citing to *Miles*, 319 S.C. at 274, 460 S.E.2d at 425 (citing *Fouche v. Royal Indem. Co. of N.Y.*, 217 S.C. 147, 154, 60 S.E.2d 73, 76 (1950)).

“A judgment may be collaterally attacked if the court lacked jurisdiction and it appears on the face of the record”. *Yarbrough Supra* at 292 (citing to *Turner v. Malone*, 24 S.C. 398 (1886)).

The Court of Appeals properly affirmed the lower court’s decision to void the judgment under 60(b)(4) as the facially defective affidavit as evidence by the record and the affidavit itself left the trial court without jurisdiction over the Respondent at the time the judgment was rendered.

III. ISSUE OF FACIALLY DEFECTIVE AFFIDAVIT WAS PRESERVED

The Appellants assert that the issue regarding the sufficiency of the affidavit was not preserved by the Respondent for review by the Court of Appeals under Rule 220 of the South Carolina Appellate Court Rules.

This Court has ruled “Error preservation rules do not require a party to use the exact name of a legal doctrine in order to preserve an issue for appellate review” *State v. Brannon*, 388 S.C. 498, 502, 697 S.E.2d 593, 595 (2010); *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003). Instead, a litigant is only required to fairly raise the issue to the trial court, thereby giving it an opportunity to rule on the issue.”

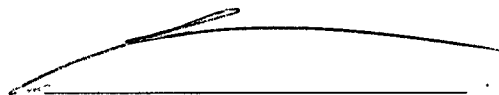
Respondent's original motion for relief under S.C.R.C.P. (60)(b) on the grounds "*the plaintiff presented a false, misrepresentative or fraudulent, and fatally defective affidavit of due diligence to the court in obtaining the court's order for service of the summons and complaint by publication*". (R. p. 68)²

Respondent asserts that the unfortunate reference to a "fatally" defective affidavit in lieu of a "facially" defective does not render the issue of the sufficiency of the affidavit unpreserved for appellate review.

CONCLUSION

For the reasons contained herein, the Respondent respectfully request that this Honorable Court deny Appellants Petition for Writ of Certioari.

July 31st, 2017



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² The admittedly unfortunate use of the word "fatally" in lieu of facially by Respondent's counsel was taken from *Caldwell v. Wiquist* pursuant to the rhetoric in the opinion relating North Carolina law. 402 S.C. 565, 577, 741 S.E.2d 583, 588 (S.C. Ct. App. 2013)

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David Conor Keys & Karen Keys, Third-Party Plaintiff, *Petitioners*
Appellants


PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel for the Appellants and the counsel for the Plaintiff, with a copy of the *Defendant's Return to Appellants' Petition for Writ of Certiorari* by mailing copies of the same by United States Mail with first class postage pre-paid to the following addresses:

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