THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Roger M. Young, Sr., Circuit Court Judge
Mikell R. Scarborough, Master In Equity, Charleston County

Case No. 2017-000613

U.S. Bank Trust, N.A., as
Trustee for LSF9 Master
Participation Trust Respondent,

v.

Robert E. Hammond, Appellant.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. DID THE CIRCUIT COURT ERR BY ISSUING THE ORDER SUBSTITTUTING PLAINTIFF FILED DECEMBER 1, 2016 WITHOUT GIVING APPELLANT AN OPPORTUNITY FOR HEARING?

2. DID THE CIRCUIT COURT ERR BY DENYING APPELLANT'S MOTION TO RECONSIDER IN ITS ORDER FILED JANUARY 26, 2017?

STATEMENT OF THE CASE

This is an appeal from a circuit court order in a foreclosure case substituting the Respondent as Plaintiff. This is also an appeal from a subsequent circuit court order denying Appellant's motion to reconsider that prior order. The Respondent was not the original plaintiff in this foreclosure case. On November 22, 2016, Nationstar Mortgage LLC, which was a prior plaintiff in this case, served by mail a combination motion/proposed Order Substituting Plaintiff ("Substitution Order"), which was received by Appellant's counsel on November 30, 2016. (R. pp. 2-3). No hearing was requested by Nationstar on this motion. (R. p. 2, sec. I). On December 1, 2016, Judge Roger M. Young, Sr. signed and filed the Substitution Order without a hearing. Appellant did not consent to the entry of the Substitution Order, which was filed with the court less than 10 days after it was served by mail. (R. p. 3-4). As a result of this order, Respondent became the current plaintiff in this case, and the case caption was changed accordingly. Appellant's counsel received notice of entry of the Substitution Order on December 7, 2016.

On December 19, 2016, Appellant served the Motion to Reconsider Order Substituting Plaintiff and For Sanctions ("Reconsideration Motion") on Respondent, which was filed with the court on December 22, 2016. (R. pp. 11-15). The Reconsideration Motion was heard by Judge Mikell R. Scarborough on January 23, 2017, after which he entered a Form 4 Order ("Reconsideration Order") on January 26, 2017 denying the Reconsideration Motion. (R. p. 7). The court's ruling in the Reconsideration Order was based on the court's finding that the Reconsideration Motion was not properly filed according to Rule 59(e), SCRCP

and that the Appellant did not show any prejudice as a result of the Substitution Order. Appellant's counsel received notice of entry of the Reconsideration Order on February 2, 2017.

On March 4, 2017, Appellant served a timely Notice of Appeal with this court appealing both of the circuit court orders indicated above. (R. p. 77).

ARGUMENTS

I. THE ENTRY OF THE SUBSTITUTION ORDER WITHOUT OPPORTUNITY FOR HEARING VIOLATED APPELLANT'S CONSTITUTIONAL RIGHT TO PROCEDURAL DUE PROCESS.

As can be seen from a review of the Substitution Order itself (R. 3, ¶ 1), especially the motion cover sheet attached to it (R. p. 2, sec. I), the Substitution Order was entered without notice or opportunity for hearing. This violated Appellant's right to procedural due process under both the United States Constitution and the South Carolina Constitution. The 14th Amendment to the United States Constitution guarantees to United States' citizens that no state shall "deprive any person of life, liberty, or property without due process of law." Article 1, Section 3 of the South Carolina Constitution guarantees the same right to South Carolina citizens.

The constitutional right to procedural due process has been interpreted by our courts to require several basic elements. One of those elements is sufficient notice of any judicial action that one party intends to take against another party. "The Court has consistently made plain that adequate and timely notice is the

fulcrum of due process, whatever the purposes of the proceeding. See, *e. g.*, *Roller* v. *Holly*, 176 U. S. 398, 409; *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413, 424. Notice is ordinarily the prerequisite to effective assertion of any constitutional or other rights; without it, vindication of those rights must be essentially fortuitous." In Re Gault, 387 U.S. 1 (1967). Interestingly, the *Roller* case cited above was a foreclosure case under Texas law where the statute only provided for 5 days' notice to appear in defense of a foreclosure suit, which the Supreme Court found to be insufficient to afford procedural due process. In the present case, there was no notice of any hearing, since the motion cover sheet and proposed order submitted to the court did not request one. (R. pp. 2-3). Even if this court were to consider, for purposes of objecting to the proposed order, the amount of notice of the proposed order from the time it was received by Appellant's counsel to the time the Substitution Order was entered by the court, that time period was only one day, which is clearly insufficient under the standard of the *Roller* case cited above.

Another element of procedural due process is an opportunity to be heard on any action that a party is asking the court to take. As stated by the Supreme Court in Mathews, Secretary of Health, Education, and Welfare v. Eldridge, 424 U.S. 319 (1976), "[t]his Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest. *Wolff* v. *McDonnell*, 418 U. S. 539, 557-558 (1974). See, *e.g.*, *Phillips* v. *Commissioner*, 283 U. S. 589, 596-597 (1931). See also *Dent* v. *West Virginia*, 129 U. S. 114, 124-125 (1889). The "right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction,

is a principle basic to our society." *Joint Anti-Fascist Comm.* v. *McGrath*, 341 U. S. 123, 168 (1951) (Frankfurter, J., concurring). The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." *Armstrong* v. *Manzo*, 380 U. S. 545, 552 (1965). See *Grannis* v. *Ordean*,234 U. S. 385, 394 (1914)." *See also, Powell v. Alabama*, 287 U.S. 45, 68 (1932) requiring notice and an opportunity to be heard. Since Appellant was given insufficient notice of the motion and no opportunity to be heard on the motion resulting in the proposed Substitution Order, Appellant was not even arguably provided with constitutional due process before the Substitution Order was entered.

Our South Carolina Supreme Court has acknowledged that these same elements of procedural due process as guaranteed by the United States Constitution apply in our state. In re Vora, 345 S.C. 590, 595, 582 S.E.2d 413 (2003). In addition, our Supreme Court has indicated that the due process rights of South Carolina citizens under our state constitution are identical to the rights provided for under the United States Constitution, and should be interpreted similarly. SCNB v. Central Carolina Livestock Market, 289 S.C. 309, 312, 345 S.E.2d 485 (1986). The *SCNB* case was also a foreclosure case, and the Court also stated that a "... decree of foreclosure is a property interest protected under the due process clauses." *Id at 313.*

Our state appellate courts have also indicated that in order for a violation of the due process clause to be actionable, there must be prejudice due to the alleged denial of due process. Chastain v. Hiltabidle (Ct. App. 2009) 381 S.C. 508, 673 S.E.2d 826, *rehearing denied, cert. denied.* In this case, Appellant alleges that had

he been provided with an opportunity for hearing on the motion resulting in the Substitution Order, he would have appeared and contested the motion. Appellant was therefore prejudiced by the failure to provide him with reasonable notice and opportunity to be heard on this motion. Further, Appellant is prejudiced by having to expend time and money defending Respondent's prosecution of the Complaint. In the event that Respondent is not required to establish that it is the proper party to pursue the Complaint until sometime after substitution is permitted, then even if Appellant eventually prevails in establishing that Respondent is not the proper party to pursue the Complaint, perhaps even not until the trial of this case, then Appellant will have had to incur significant unnecessary expenses to do so, which prejudice could have been avoided by requiring Respondent to establish its right to be substituted as the Plaintiff in this action at the time its motion to do so was filed. The fact that our state Supreme Court has already ruled that interlocutory orders substituting parties affect a substantial right such that they can be immediately appealed, *Neeltec Enterp., Inc. v. Long*, 397 S.C. 563, 566-7, 725 S.E.2d 926, 928-9 (2012), also establishes prejudice to the Appellant in this case, since Appellant was unable to protect this substantial right when he was not provided reasonable notice and an opportunity for hearing before the Substitution Order was entered. Indeed, if the Appellant were to have waited until after trial to have raised this issue, our Supreme Court has found that a defendant has waived the right to appeal the substitution of a plaintiff, and that this waiver was established by defendant's continued defense of the action brought by the allegedly improper plaintiff without objecting to the substitution at the time it was initially proposed. *Watts v.*

Copeland, 170 S.C. 449, 456-7, 170 S.E. 780, 783 (1933). Since Appellant would be prejudiced if his right to challenge the alleged due process violation were found to have been waived, Appellant has relied upon our Supreme Court precedent in challenging the Substitution Order at this time. Appellant therefore believes that he has been prejudiced by being denied procedural due process when the Substitution Order was entered without reasonable notice or opportunity for hearing, and that the Substitution Order should be reversed as a result.

II. THE ENTRY OF THE SUBSTITUTION ORDER WITHOUT OPPORTUNITY FOR HEARING VIOLATED THE SOUTH CAROLINA RULES OF CIVIL PROCEDURE.

Rule 7(b), SCRCP states that "[a]n application to the court for an order shall be by motion...". In this case, what was actually submitted to the court for signature was a proposed order, not really a motion. (R. p. 3). However, since at the bottom of the proposed order the words "I SO MOVE" appear above the Respondent's counsel's signature line (R. p. 3), Appellant concedes that the proposed order could possibly be construed by the court as a motion as well, so the issue of whether or not this was a proper motion is not being pursued on appeal. This particular order is not a consent order, since Appellant's consent to the proposed order was never sought nor obtained, so that is not an issue either.

However, Rule 6(d), SCRCP, provides that motions should be served not later than ten days before the hearing on the motion, other than motions which may be heard *ex parte*, and there is no indication that a motion to substitute a party is an allowed *ex parte* motion. As stated in Jackson v. Speed, 326 S.C. 289, 310, 486

S.E.2d 750, 760 (1997), "Rule 6(d), SCRCP, provides notice of a hearing 'shall be served not later than ten days before the time of the hearing, unless a different period is fixed ... by order of the court'." Also, Rule 6(d) requires "specific notice of the day certain fixed for the hearing must be furnished not later than ten days prior to such hearing unless the exceptions stated in Rule 6(d), SCRCP, apply." Summary judgment against one not receiving timely notice of the motion hearing, wrongfully denied opportunity to submit affidavits, documents, or testimony opposing moving parties motion and is prejudiced thereby is reversible error. Dedes v. Strickland, 307 S.C. 152, 154, 414 S.E.2d 132, 134 (1992). Since Appellant was not provided with an opportunity for hearing before the Substitution Order was entered, Rule 6(d), SCRCP was violated by this omission.

Rule 25(c), SCRCP is the rule that controls substitution of a party during the pendency of a case. "Rule 25(c) is applicable where there is a transfer of interest *during* the pendency of an action, whereas Rule 17 is applicable where there is a transfer of interest *prior* to the commencement of an action." Bryant v. Waste Management, Inc., 342 S.C. 159, 536 S.E.2d 380 (Ct. App. 2000)(FN 2).

Rule 25(c) provides as follows: "In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. Service of the motion shall be made as provided in Rule 25(a)(1)".

Based on the text of Rule 25(c), the Respondent appears to have had two options when deciding how to address an alleged transfer of interest. The first

option, which Respondent did not choose, would have been to have allowed Nationstar to remain as the current plaintiff in spite of the alleged transfer of interest. The other option was to serve a motion to substitute the plaintiff, which the Respondent chose to do. However, the option to serve a motion to substitute the plaintiff required the Respondent to follow the procedures for service of the motion as set forth in Rule 25(a)(1), SCRCP. Reference to that rule will show that the Respondent was required to serve the motion to substitute "... together with the notice of hearing...on the parties as provided in Rule 5...". This procedure was not followed in this case, which is why the Substitution Order is improper under the applicable rules. Rule 25(a)(1) further provides that the action may be dismissed if the party substitution is not made within a reasonable time. Whether or not an action should be dismissed due to an improper Substitution Order and insufficient compliance with the procedural rules is another issue that the appellate court may wish to consider.

Due to the Respondent's failure to comply with the procedural rules indicated above, and the resulting prejudice to the Appellant as detailed more specifically in the procedural due process section above, the Substitution Order should be reversed.

III. THE RECONSIDERATION ORDER IMPROPERLY APPLIED RULE 59(E), SCRCP.

Although an order on a motion to reconsider might ordinarily be an unappealable interlocutory order, in this case, a determination of whether or not the Reconsideration Order was proper is necessary to the resolution of this appeal. The reason for that necessity can be found in the language of the Reconsideration Order itself. The Reconsideration Order is a one-page Form 4 order. (R. p. 7). In pertinent part, this order held that "[t]he court DENIES the motion [to reconsider] finding that the Motion was not properly filed per Rule 59(e), SCRCP, and that no prejudice has been shown...". In order to determine the reasoning for the court's short order, it is necessary to consult Rule 59(e), SCRCP. That Rule provides in full as follows: "A motion to alter or amend a judgment shall be served not later than 10 days after receipt of the entry of the order". In short, the court is claiming that the Reconsideration Motion (R. pp. 11-16) was not served within ten days after Appellant's counsel received the Substitution Order. However, this allegation is simply false, apparently due to the lower court's ignorance of Rule 6(a), SCRCP concerning the computation of time. Although, if the court is correct about the Rule 59(e) violation, the Appellant's appeal is untimely and must be dismissed for that reason, which is why it is necessary for resolution of the appeal for the appellate court to also rule on whether or not the lower court was in error in its holding in the Reconsideration Order.

As reference to the Statement of the Case above will show, Appellant's counsel received notice of entry of the Substitution Order by mail on December 7,

2016, which fact was also alleged in the Reconsideration Motion (R. p. 12, at 3) and is undisputed. As is also noted in the Statement of the Case above and the certificate of service attached to the Reconsideration Motion (R. 15), the Reconsideration Motion was served on December 19, 2016, which fact is undisputed. Therefore, the initial question for the appellate court to decide in regards to the Reconsideration Order is whether or not the Reconsideration Motion was timely filed. Rule 59(e), SCRCP requires that the Reconsideration Motion had to be filed within ten days after Appellant received notice of entry of the Substitution Order on December 7, 2016. At first glance, it would appear that the service of the Reconsideration Motion on December 19, 2016 might be untimely, as the lower court held. However, the rules cannot be interpreted in isolation. Rule 6(a), SCRCP, provides that you don't count the day that the Substitution Order was received. This means that in this case the Reconsideration Motion would normally have had to have been served no later than December 17, 2016. However, reference to a standard calendar, of which the Appellant requests that the appellate court take judicial notice, will show that December 17, 2016 was a Saturday. In that regard, Rule 6(a) further provides that if the last day of the response period is a Saturday, then the response deadline is continued until the "next day which is neither a Saturday, Sunday nor such a holiday". In this case, a proper application of Rule 6(a), SCRCP, means that the deadline for Appellant to serve the Reconsideration Motion was Monday, December 19, 2016, which was in fact the date that the Reconsideration Motion was served. (R. p. 15). Therefore, the lower court's holding that the Reconsideration Motion was not timely filed pursuant to

Rule 59(e), SCRCP is in error and should be reversed.

In addition to the Rule 59(e), SCRCP holding in the Reconsideration Order, the lower court also held that Appellant was not prejudiced by the entry of the Substitution Order, although the lower court did not explain why it reached this conclusion. The lower court's failure to explain why the Appellant was not prejudiced by the entry of the Substitution Order should allow the appellate court to find that this conclusory finding is not supported by the record, especially since Appellant has specified the nature of the prejudice to the Appellant from the entry of this order in the section above regarding the due process violation. Indeed, reference to the Transcript of the January 23, 2017 hearing on the Reconsideration Motion ("Transcript"), (R. p. 56, lines 4-10) of that Transcript, will show that initially, the lower court judge was also surprised by the entry of the Substitution Order without a hearing, since that is not his normal procedure. Also, when Appellant's counsel said on the record at the hearing on the Reconsideration Motion that Appellant had been prejudiced by the entry of the Substitution Order, the lower court judge admitted that "[Appellant has] been prejudiced by failure to get notice of it. I agree with that." (R. p. 64, lines 14-17). In further distancing himself from the Substitution Order, the lower court judge said "Why I have a problem, and this is what I'm trying to telegraph to you—I didn't sign this order. It got signed by, I assume, the administrative judge, Judge Young. Back in December he was moving stuff out by the end of the year. No motion hearing was filed. It just came in, an order substituting Plaintiff." (R. p. 64, line 23 - p. 65, lines 1-4). In addition, the lower court stated "I understand the concern with substituting the

Plaintiff and not getting notice. Okay? When I first got on the bench I was real surprised at how often that went on." (R. p. 67, lines 21-24). However, after making all of these statements, the court stated inexplicably a few paragraphs later "So I'm going to allow the order to substitute the Plaintiff to remain". (R. p. 68, lines 12-13). After which, Appellant's counsel asked to be heard on the Reconsideration Motion, to which the court stated, before Appellant's counsel attempted to make his arguments, "Sure go ahead. Go ahead. I'll rule against you, but go ahead and make your record." (R. p. 68, lines 14-19). Appellant's counsel thereafter attempted to make his argument in support of the Reconsideration Motion, but was cutoff after about four sentences (R. p. 68, line 23 – p. 69, lines 1-5) and was only able to raise part of the due process argument before the lower court judge indicated his intention to let Appellant argue the Reconsideration Motion before Judge Young, who had issued the Reconsideration Order. (R. p. 69, lines 6-11). After indicating to the court that Appellant would be willing to do that, but would prefer to try to get the Respondent to offer to settle the matter by agreeing to pay for Appellant's counsel's time in pursuing the Reconsideration Motion, the lower court judge responded "I'm not going to give you the relief that you seek, Mr. Cantrell. I don't find any prejudice here. I do see that there was a cost that your client has incurred based upon this Motion, however, the transfer of the note and mortgage—I think I've been fairly clear on the record about what has happened here. I don't find any prejudice to you based on that." (R. p. 70, lines 7-14). The lower court judge went on to indicate what appears to be the real reason why he ruled against the Appellant, which was due to the fact that Appellant had

delayed to file an amended answer for six months, which answer would have added a third party complaint to the answer, not involving the parties to this appeal. (R. p. 70, line 15 – p. 71, lines 1-4). After attempting to point out to the court that any alleged prejudice to a third party for not adding them as a third party defendant sooner was not relevant to the Reconsideration Motion before the court, the court chose to deny the Reconsideration Motion outright, without sending the motion back to Judge Young, as previously indicated, and without allowing Appellant a meaningful opportunity to be heard or to actually make all of his arguments on the Reconsideration Motion. (R. p. 71, line 5 – p. 72, lines 1-6). Appellant therefore believes that he was denied procedural due process at the hearing on the Reconsideration Motion, and that the lower court's ruling was arbitrary and capricious, with its finding of lack of prejudice to Appellant being unsupported by the record. To the extent that Appellant was unable to make a complete record due to the fact that Appellant's counsel was cutoff during oral argument, Appellant respectfully requests that the appellate court allow the arguments to be more fully developed in these appeal briefs.

Therefore, due to the lower court's improper ruling in regards to compliance with Rule 59(e), SCRCP, and the lower court's unsupported finding of no prejudice to Appellant from the entry of the Reconsideration Order, Appellant respectfully requests that the appellate court reverse the Reconsideration Order and find that the Substitution Order should be reversed as well.

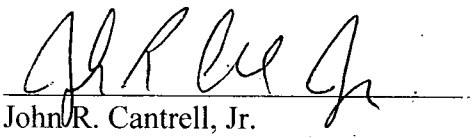
IV. CONCLUSION

The Substitution Order was improperly entered in this matter, due to both the fact that Appellant was not provided with procedural due process from the insufficient notice of the Substitution Motion and due to the lack of opportunity to be heard on that Motion, and also due to the failure of the Substitution Motion to comply with the applicable rules of civil procedure, both of which resulted in prejudice to Appellant when the Substitution Order was entered.

Likewise, the Reconsideration Motion improperly applied Rule 59(e), SCRCP, and its finding of no prejudice to Appellant was not supported by the record, which record was also limited in its development due to the lower court's refusal to allow Appellant to make a complete record.

Therefore, Appellant respectfully requests that the appellate court enter an order reversing the Substitution Order and the Reconsideration Order, and remanding the case for further proceedings to the lower court.

Dated this March 16, 2018.



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