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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Ralph P. Stroman, Special Referee

RECEIVED

MAY 09 2018

SC Court of Appeals

Appellate Case No. 2018-000531
Common Pleas Case No. 2017-CP-26-05357

Habitat for Humanity of Horry County, Inc.,.....Respondent,

v.

Candice A. Simmons; Waccamaw Regional Council of Governments d/b/a Waccamaw
Home Consortium; Village of Dreams Homeowners Association, Inc.; SC Housing
Corp.; and Bank of North Carolina.....Defendants,

Of whom Candice A. Simmons is the.....Appellant.

MOTION FOR LEAVE TO MOVE FOR RELIEF FROM WRIT OF ASSISTANCE
UNDER RULE 60(b), SCRPC, OR FOR CLARIFICATION THAT SUCH LEAVE
IS NOT REQUIRED

Andrew S. Radeker
S.C. Bar No. 73743
Harrison, Radeker & Smith, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
Attorney for Appellant

Appellant hereby moves pursuant to Rule 60(b), SCRCF, and Rules 205 and 241, SCACR, as well as pursuant to all other applicable law, for an order that does one of two things: 1) grants leave for Appellant to make a motion under Rule 60(b), SCRCF, for relief from a writ of assistance issued in the action that produced the order on appeal in this case or 2) clarifies that Appellant is not required to obtain such relief to make her 60(b) motion.

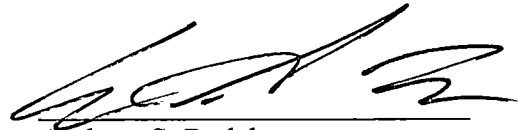
The background and grounds for this motion are as follows:

1. The exhibits attached to this motion are offered to show the relevant proceedings in the lower court.
2. Within the last paragraph of Rule 60(b), SCRCF, is the statement that “[d]uring the pendency of an appeal, leave to make the motion [for relief from the judgment, under Rule 60(b)] must be obtained from the appellate court.”
3. This is an appeal of an order granting judgment of foreclosure. Appellant, *pro se*, brought successive motions seeking to stay the foreclosure sale; however, since her filings did not meet the requirements of S.C. Code Ann. § 18-9-170, this court denied her motions. The foreclosure sale was held, and the Respondent was the successful bidder at that sale.
4. As is more particularly noted in the attached documents, the lower court, without notice having been provided by anyone to Appellant and without holding a hearing, issued a writ of assistance in this case, directing that Appellant be removed from her house.

5. On May 8, 2018, Appellant retained the undersigned counsel. Appellant's counsel immediately reached out to Respondent's counsel concerning a stay of the writ of assistance and communicated with him the next morning about the void nature of the writ of assistance. Having reached no resolution as to those matters, the undersigned today filed the attached motions for relief from the writ of assistance and to stay its execution.
6. While the writ of assistance is not the order that Appellant appealed, it is related to the appealed order. The foreclosure sale directed by the appealed order had to have occurred in order for the lower court to entertain a petition for a writ of assistance.
7. Accordingly, it is unclear whether the words of Rule 60(b) stating that "[d]uring the pendency of an appeal, leave to make the motion [for relief from the judgment, under Rule 60(b)] must be obtained from the appellate court" are applicable to Appellant's 60(b) motion directed at the writ of assistance.
8. Appellant thus seeks for this court either to grant her the required leave associated with her 60(b) motion or to issue an order stating that no such leave is required.

WHEREFORE Appellant prays for an order that does one of two things: 1) grants leave for Appellant to make the motion she has made under Rule 60(b), SCRCPP, for relief from a writ of assistance issued in the action that produced the order on appeal in this case or 2) clarifies that Appellant is not required to obtain such relief to make her 60(b) motion.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'A. S. Radeker', written over a horizontal line.

Andrew S. Radeker
S.C. Bar No. 73743
Harrison, Radeker & Smith, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
Attorney for Appellant

May 9, 2018

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2017-CP-26-05357

Habitat for Humanity of Horry County, Inc.,)
)
Plaintiff,)

vs.)

Candice A. Simmons; Waccamaw)
Regional Council of Governments d/b/a)
Waccamaw Home Consortium; Village of)
Dreams Homeowners Association, Inc.; SC)
Housing Corp.; and Bank of North Carolina,)
)
Defendants.)

ORDER OF WRIT OF ASSISTANCE

Pursuant to Circuit Court Rule 53 of the South Carolina Rules of Civil Procedure, the above-entitled matter was referred to the undersigned to make appropriate findings of facts and conclusions of law with authority to enter a final judgment in the case.

Pursuant to the Special Referee’s Report and Judgment of Foreclosure and Sale filed on March 6, 2018, the property was sold to Habitat for Humanity of Horry County, Inc. (“Plaintiff”), who was the Grantee of the Special Referee’s Deed dated April 10, 2018, and is entitled to possession of the subject property.

Plaintiff is informed and believes that the subject property sold under Judicial Order is and continues to be occupied by persons unauthorized and unrelated to Plaintiff as the successful bidder.

The Special Referee for Horry County executed a Special Referee’s Deed conveying title of the subject property to Plaintiff, said Special Referee’s Deed being recorded on April 16, 2018, in Deed Book 4098 at Page 2793.



All valid tenant rights shall be protected pursuant to Protecting Tenants at Foreclosure Act of 2009.

Pursuant to the aforementioned Special Referee's Report and Judgment of Foreclosure and Sale dated March 5, 2018, and filed on March 6, 2018, it is hereby

ORDERED, ADJUDGED AND DECREED that the Sheriff of Horry County is herein and hereby ordered and directed to, with whatever force necessary, eject and remove from the premises the Defendant Candice A. Simmons and/or any other occupants and their personal possessions from the real property located at 1045 Mistletoe Court, Myrtle Beach, South Carolina 29579 with the individuals occupying the property to be removed by a date and time to be determined by the Horry County Sheriff.

(Judge's Signature Page to Follow)

ON MOTION OF:

s/Douglas M. Zayicek
Douglas M. Zayicek, Esquire
S.C. Bar No. 11304
Attorney for Plaintiff
BELLAMY, RUTENBERG, COPELAND,
EPPS, GRAVELY & BOWERS, P.A.
1000 29th Avenue North (29577)
P.O. Box 357
Myrtle Beach, SC 29578-0357
(843) 448-2400
(843) 448-3022 (Facsimile)
dzayicek@bellamylaw.com



Horry Common Pleas

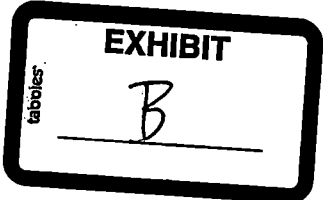
Case Caption: Habitat For Humanity Of Horry County Inc VS Candice A Simmons ,
defendant, et al
Case Number: 2017CP2605357
Type: Master/Order/Writ of Assistance

So Ordered

s/Ralph P. Stroman, 2098, Special Referee for
Horry County

Certificate of Electronic Notification

Recipients
Douglas Zayicek - Notification transmitted on 04-18-2018 01:14:21 PM.
Henry Murrell - Notification transmitted on 04-18-2018 01:14:21 PM.
James Gilliam - Notification transmitted on 04-18-2018 01:14:21 PM.
Tracey Easton - Notification transmitted on 04-18-2018 01:14:21 PM.



***** IMPORTANT NOTICE - READ THIS INFORMATION *****

NOTICE OF ELECTRONIC FILING [NEF]

-

A filing has been submitted to the court RE: 2017CP2605357

Official File Stamp: 04-18-2018 01:14:13 PM

Court: CIRCUIT COURT

Common Pleas

Horry

Case Caption: Habitat For Humanity Of Horry County Inc VS
Candice A Simmons , defendant, et al

Document(s) Submitted: Master/Order/Writ of Assistance
Master/Order/Writ of Assistance

Filed by or on behalf of: Susan Stone

This notice was automatically generated by the Court's auto-notification system.

-

The following people were served electronically:

Henry Guyton Murrell for SC Housing Corp

Douglas Michael Zayicek for Habitat For
Humanity Of Horry County Inc

Tracey C. Easton for SC Housing Corp

James Keith Gilliam for Waccamaw Regional
Council Of Governments, Waccamaw Home
Consortium

The following people have not been served electronically by the Court. Therefore, they must be served by traditional means:

Village Of Dreams Homeowners Association Inc

Bank Of North Carolina

Candice A Simmons

ELECTRONICALLY FILED - 2018 Apr 18 1:14 PM - HORRY - COMMON PLEAS - CASE#2017CP2605357

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY)	CIVIL ACTION NO. 2017-CP-26-05357
Habitat for Humanity of Horry County, Inc.,)	
)	
Plaintiff,)	
)	
vs.)	
)	
Candice A. Simmons; Waccamaw)	
Regional Council of Governments d/b/a)	
Waccamaw Home Consortium; Village of)	
Dreams Homeowners Association, Inc.; SC)	
Housing Corp.; and Bank of North Carolina,)	
)	
Defendants.)	
_____)	

PETITION FOR WRIT OF ASSISTANCE

Habitat for Humanity of Horry County, Inc. ("Plaintiff") would respectfully show unto the Court as follows:

1. This is an action for foreclosure of a mortgage of real property located in Horry County, South Carolina, and is designated as 1045 Mistletoe Court, Myrtle Beach, South Carolina 29579.
2. Pursuant to the Special Referee's Report and Judgment of Foreclosure and Sale filed on March 6, 2018, the subject property was sold at judicial sale.
3. Plaintiff was the successful bidder at the judicial foreclosure sale.
4. The Honorable Ralph P. Stroman, Special Referee for Horry County, executed a Special Referee's Deed conveying title of the subject property to the Plaintiff, said Special Referee's Deed being recorded on April 16, 2018, in Deed Book 4098 at Page 2793.



5. As of the date of filing of this Petition, upon information received from the Plaintiff, the subject property continues to be occupied by the Defendant Candice A. Simmons, or other occupants.

WHEREFORE, Plaintiff prays that the Writ of Assistance requested herein be granted, and that the Honorable Ralph P. Stroman, Special Referee for Horry County, issue an Order requiring the Sheriff of Horry County to commence eviction of the Defendant Candice A. Simmons and/or other occupants from the subject property, and to remove all personal property therein.

s/Douglas M. Zayicek, Esquire
S.C. Bar No. 11304
Attorney for Plaintiff
BELLAMY, RUTENBERG, COPELAND,
EPPS, GRAVELY & BOWERS, P.A.
1000 29th Avenue North (29577)
P.O. Box 357
Myrtle Beach, SC 29578-0357
(843) 448-2400
(843) 448-3022 (Facsimile)
dzayicek@bellamylaw.com

Dated: April 16, 2018

Certificate of Electronic Notification

Recipients

Douglas Zayicek - Notification transmitted on 04-18-2018 10:53:06 AM.

Henry Murrell - Notification transmitted on 04-18-2018 10:53:05 AM.

James Gilliam - Notification transmitted on 04-18-2018 10:53:06 AM.

Tracey Easton - Notification transmitted on 04-18-2018 10:53:06 AM.

EXHIBIT

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***** IMPORTANT NOTICE - READ THIS INFORMATION *****
NOTICE OF ELECTRONIC FILING [NEF]

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A filing has been submitted to the court RE: 2017CP2605357

Official File Stamp: 04-18-2018 10:52:44 AM

Court: CIRCUIT COURT

Common Pleas

Horry

Case Caption:

Habitat For Humanity Of Horry County Inc VS
Candice A Simmons , defendant, et al

Document(s) Submitted:

Petition/Petition

Proposed Master/Order/Writ of Assistance

Filed by or on behalf of:

Douglas Michael Zayicek

This notice was automatically generated by the Court's auto-notification system.

-

The following people were served electronically:

Henry Guyton Murrell for SC Housing Corp

Douglas Michael Zayicek for Habitat For
Humanity Of Horry County Inc

Tracey C. Easton for SC Housing Corp

James Keith Gilliam for Waccamaw Regional
Council Of Governments, Waccamaw Home
Consortium

The following people have not been served electronically by the Court. Therefore, they must be served by traditional means:

Village Of Dreams Homeowners Association Inc

Bank Of North Carolina

Candice A Simmons

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF HORRY

Case No. 2017-CP-26-05357

Habitat for Humanity of Horry County, Inc.,

Plaintiff,

vs.

MOTION FOR RELIEF FROM WRIT OF ASSISTANCE

Candice A. Simmons; Waccamaw Regional Council of Governments d/b/a Waccamaw Home Consortium; Village of Dreams Homeowners Association, Inc.; SC Housing Corp.; and Bank of North Carolina,

Defendants.

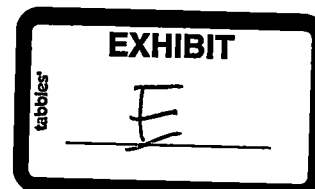
YOU WILL PLEASE TAKE NOTICE that Defendant Candice A. Simmons (hereinafter "the Defendant" or "Ms. Simmons") moves before this court pursuant to Rule 60(b), SCRPC, and U.S. Const. Amd. XIV, as well as pursuant to all other applicable law, for an order vacating and/or granting her other relief from the writ of assistance issued in the above-captioned action.

The Defendant so moves on the following grounds:

1. Rule 60(b), SCRPC, provides that:

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

- (1) mistake, inadvertence, surprise, or excusable neglect;
- (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
- (3) fraud, misrepresentation, or other **misconduct of an adverse party**;
- (4) **the judgment is void**;
- (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been



reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application.

(emphasis added).

2. The court, without notice having been provided by anyone to the Defendant and without holding a hearing, issued a writ of assistance in this case.
3. As the record reflects and as will be further noted in an affidavit of Ms. Simmons that the undersigned will file as soon as possible, Ms. Simmons unquestionably had appeared in this case at the time that the Plaintiff, without notice to Ms. Simmons, filed a petition seeking a writ of assistance and provided a proposed order to the court that would grant that petition, which writ was issued a little over two hours following the filing of the petition, all without Ms. Simmons having any opportunity to have any input whatsoever about whether the writ of assistance should issue.
4. The Defendant was entitled to be served with the petition at the time it was provided to the court. Rule 5(a), SCRCPL. The Defendant was entitled to be provided a copy of all proposed orders in this action at the time they were submitted to the court for consideration, at the same time and by the same means as they were submitted to the court. Rule 5(b)(3), SCRCPL. The Defendant unquestionably appeared in this action but was not provided with a copy of the petition or the proposed writ of assistance. If she had, she could have brought to the court's attention reasons why it should not be granted, including the pendency of her appeal of the judgment of foreclosure in this case.

5. The Plaintiff did not comply with Rule 5(b)(3), SCRCPP, in providing the proposed writ of assistance to the court. The Plaintiff did not provide Ms. Simmons with any notice of the application for the writ.
6. The application for and issuance of the aforesaid order were performed *ex parte*, without notice to the Defendant. It is fundamental that no order affecting the rights of a party to an action shall be rendered without notice to the party.
7. The undersigned believes that the failure to comply with Rule 5(b)(3) and provide a copy of the proposed writ was most likely not the product of a design to deprive Ms. Simmons of her rights but, rather, was probably a mistake by Plaintiff's counsel's law firm. It was, however, conduct by the Plaintiff that violated the Rules of Civil Procedure and the rights of the Defendant; thus, it was "misconduct of an adverse party" that led to the issuance of the writ of assistance. Rule 60(b)(3), SCRCPP.
8. Judgments rendered without due process are void, and Rule 60(b)(4), SCRCPP, provides for relief from such a judgment. Universal Benefits, Inc. v. McKinney, 349 S.C. 179, 183, 561 S.E.2d 659 (Ct. App. 2002). If a judgment is void, relief from the judgment must be granted regardless of whether a movant for relief from that judgment has a meritorious defense; if a judgment is determined to be void, it is a nullity, and there is no need for further analysis. BB&T v. Taylor, 369 S.C. 548, 552 n. 1, 633 S.E.2d 501, 503 n. 1 (2006).
9. "[D]ue process of law requires that a person shall have a reasonable opportunity to be heard before a legally appointed and qualified tribunal before any binding decree, order, or judgment can be made affecting his rights to life, liberty, or

property.” LaSalle Bank Nat’l. Ass’n. v. Davidson, 386 S.C. 276, 279, 688 S.E.2d 121, 122-23 (2009) (quoting State v. Brown, 178 S.C. 294, 300, 182 S.E. 838, 841 (1935)).

10. Possession of real property is a constitutionally protected interest that triggers the requirements of due process. See Moore v. Moore, 376 S.C. 467, 474-75, 657 S.E.2d 743, 747 (2008).
11. “Procedural due process requires (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses.” Id. at 473.
12. “The law recognizes two kinds of errors [with regard to procedural due process]: trial errors and structural defects. The former are subject to ‘harmless error’ analysis while the latter are not. . . . [S]tructural defects in the constitution of the trial mechanism defy analysis by harmless error standards.” LaSalle Bank, 386 S.C. at 280 (internal quotation marks omitted). Structural defects are errors in the very way that the process of deciding the issue is set up. Id. When a proceeding is structurally defective, the court administering it weighs out justice using tilted scales, and nothing but relief from the judgment produced by such a process can cure the defect. See id.
13. Our state Supreme Court has noted the following concerning writs of assistance:

A writ of assistance is undoubtedly an appropriate process to issue from a court of equity to place a purchaser of mortgaged premises under its decree in possession after he has received the commissioner’s or master’s deed . . . *It is a rule as old as the law that no man shall be condemned in his rights of property, as well as in his rights of person, without his day in Court – that is, without being duly cited to answer*

respecting them, and being heard or having an opportunity of being heard thereon.

James v. Graham, 114 S.C. 107, 78 S.E. 82 (1912) (emphasis and ellipsis added, internal citations and quotation marks omitted).

14. Our Supreme Court has also stated:

It is commonly declared that the issuance of a writ of assistance rests in the sound discretion of the Court, *and that it is issued only when the right is clear and free from doubt*—when there is no equity or appearance of equity in defendant, and when the decree, and the sale and proceedings thereunder, are beyond suspicion; and *it is certainly not customary to issue the writ where there is a bona fide contest as to the right to the possession of the land under the sale*, or where the occupant claims by a new and independent right or title, or where the rights of the respective parties have not been fully and finally adjudicated in the principal suit.

...

It will never be issued when there is any reasonable prospect that the party in possession may make a successful defense of his possession, either at law or by the aid of a court of equity. *And it will never be exercised in a case of doubt[.]*

Griggs v. Griggs, 205 S.C. 272, 31 S.E.2d 505 (1944) (emphasis added, internal citations and quotation marks omitted).

15. In other words, particularly since a foreclosure sale brings about a change in ownership, not possession, a writ of assistance ordinarily may not issue without a hearing first being held on whether it should issue. Indeed, this has usually been the process followed across this state for quite some time.
16. While it is a summary process, it does adjudicate a right that has not been determined by the underlying foreclosure action: the right of possession. Griggs, 205 S.C. 272; James, 114 S.C. 107. When a foreclosure action is brought, as

well as when a foreclosure judgment is rendered, there is no way to know who the successful purchaser at the foreclosure sale will be. The identity of that purchaser, along with any right that purchaser may have to possession of the property, only manifests itself once the purchaser has bought the property.

17. “The rights and liabilities of the parties, that is, their rights to an action for judgment or relief, depend upon the facts as they existed at the time of the commencement of the action,” American Agricultural Chemical Co. v. Thomas, 206 S.C. 355, 360, 34 S.E.2d 592, 594 (1945), and, at the commencement of a foreclosure action, the mortgagee plaintiff has no right to possession of the premises. It is only after the property has been purchased at the foreclosure sale that there can be any live controversy for a court to decide about whether the foreclosure sale purchaser or (former) owner is entitled to possession of the land.
18. Hearings are required to be held about whether writs of assistance should issue because such a writ decides, for the first time, a new controversy: the issue of who among the parties involved – the one who seeks the writ and the one against whom the writ is sought – has the right to possession of the land. See Griggs, 205 S.C. 272; James, 114 S.C. 107.
19. Here, this new controversy was decided within a procedural mechanism that did not satisfy due process. The procedure under which this writ was issued did not meet due process’ requirement “that a person shall have a reasonable opportunity to be heard before a legally appointed and qualified tribunal before any binding decree, order, or judgment can be made affecting his rights to life, liberty, or property.” LaSalle Bank, 386 S.C. at, 279 (quoting Brown, 178 S.C. at 300). It

did not afford the Defendant “(1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses.” Moore, 376 S.C. at 473.

20. The writ of assistance is void.
21. Furthermore, this motion is not so much “sound and fury, signifying nothing.” William Shakespeare, Macbeth Act V, scene 5 (internal capitalization omitted). Ms. Simmons has a pending appeal that may invalidate the sale that produced the Plaintiff’s title to the property by ending with reversal of that judgment. Such a reversal can happen even though the foreclosure sale has already occurred; the foreclosure sale does not moot the appeal. See Wachesaw Plantation E. Cmty. Servs. Assn., Inc. v. Alexander, 414 S.C. 355, 778 S.E.2d 898) (2015).
22. Having a hearing on whether and on what terms a writ of assistance should issue allows a court to explore issues that may have nothing to do with the underlying judgment’s validity that bear upon those things.
23. The undersigned has just gotten involved in this matter yesterday afternoon. The Defendant reserves the right to present additional grounds for this motion as the undersigned becomes aware of them.
24. This motion is also based upon all applicable statutory law, case law, common law, and the record in this action.

The undersigned has consulted with opposing counsel in an effort to resolve matters subject of this motion but no resolution was reached.

Respectfully submitted,

/s/ Andrew S. Radeker

Andrew S. Radeker

S.C. Bar No. 73743

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drew@harrisonfirm.com (email)

ATTORNEY FOR DEFENDANT

CANDICE A. SIMMONS

Columbia, South Carolina
May 9, 2018

COPY

STATE OF SOUTH CAROLINA

FILED

IN THE COURT OF COMMON PLEAS

COUNTY OF LEXINGTON

2014 FEB -4

P 1:10

Case No. 2011-CP-32-750

Ready America Funding Corp.,

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON, SC

Plaintiff,

vs.

Holli Tindal; South Carolina Department of Motor Vehicles; Blizzard Properties, Inc.; Federal National Mortgage Association; Kimberly M. Blizzard; Christine M. Martin; Broker on Wheels, Inc.; Kelly Ahrens; H&S Real Estate Solutions, LLC; and Automotive Finance Corporation d/b/a AFC,

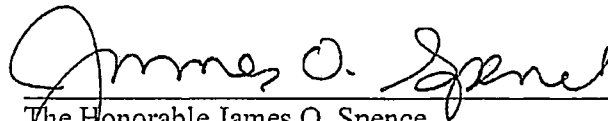
Defendants.

ORDER GRANTING
DEFENDANT TINDAL'S MOTION
FOR RELIEF FROM WRIT OF
ASSISTANCE

This matter came before me on January 16, 2014, at a hearing on Defendant Tindal's motion for relief from a writ of assistance that was issued without a hearing and without a copy of the proposed writ having been provided to her counsel as required by Rule 5(b)(3), SCRPC. As the failure to provide a copy of the proposed writ to Defendant Tindal's counsel is dispositive of the motion and requires that it be granted, the Court must grant the motion on this ground and has no need to decide the remaining issues subject of Defendant Tindal's motion.

Accordingly, it is therefore hereby ORDERED that the previously issued writ of assistance in this case is void and is hereby vacated.

And IT IS SO ORDERED.



The Honorable James O. Spence
Master-in-Equity for Lexington County

Lexington, South Carolina

February 4, 2014

ELECTRONICALLY FILED - 2018 May 09 11:25 AM - HORRY - COMMON PLEAS - CASE#2017CP2605357

1125

STATE OF SOUTH CAROLINA

COUNTY OF SUMTER

Wells Fargo Bank, NA,

Plaintiff,

v.

Laura W. Dinkins; Kathy Dinkins English
a/k/a Kathy English a/k/a Kathy A. D.
English; SC Housing Corp.; Kathryn W.
Mitchell a/k/a Katheryn Mitchell;

Defendant(s).

IN THE COURT OF COMMON PLEAS

DOCKET NO. 2014-CP-43-00088

**ORDER ON DEFENDANT'S MOTION
FOR RELIEF FROM JUDGMENT AND
FROM WRIT OF ASSISTANCE**

(513263.1894 CSG)

FACTS

The property which is the subject of this foreclosure action is located at 4618 Easy Street, Rembert, SC 29128. On June 7, 2006, Kathy English ("Defendant") and Laura W. Dinkins ("Ms. Dinkins") made, executed and delivered a certain Fixed Rate Note ("Note") in the principal sum of \$138,852.00, payable in monthly installments. To secure the payment of the Note according to its terms and conditions, Defendant and Ms. Dinkins made, executed and delivered a real estate mortgage ("Mortgage") covering the previously described property to Mortgage Electronic Registration Systems, as nominee for American Home Mortgage, its successors and assigns (MIN # 100024200012490096). This Mortgage was recorded in the office of the RMC/ROD for Sumter County on June 12, 2006, in Mortgage Book 1032 at Page 445. This Mortgage was assigned to Plaintiff herein by assignment dated March 3, 2009 and recorded March 23, 2009 in Book 1120 at Page 1307. This Mortgage is subject to a loan modification

agreement dated July 27, 2007. As of August 1, 2013, Defendant has been in default on this Mortgage.

PROCEDURAL HISTORY

On January 15, 2014, Plaintiff filed the Summons and Complaint with this Court. On October 2, 2014, a Judgment of Foreclosure and Sale was entered by the Court. The Defendant and Ms. Dinkins were held in default. Subsequently, several Supplemental Orders Post-Judgment were entered to account for accrued interests and attorneys' fees post-judgment. The property was sold at a foreclosure sale on July 5, 2016 to the Plaintiff. The Master in Equity's Deed to Plaintiff was executed by this Court on September 7, 2016. On October 26, 2016, Plaintiff was granted a writ of assistance to take possession of the property. On November 15, 2016, Defendant filed a Motion for Relief from Judgment and from Writ of Assistance ("Motion").

In her Motion, Defendant argues Plaintiff failed to comply with 5(b)(3), SCRCP, by not providing Defendant with any notice of the application for the writ of assistance. Defendant also argues that because the amount of the judgment in this case has been increased several times through supplement orders, there is a fundamental defect in the judgment and the judgment is void.

DEFENDANT'S MOTION FOR RELIEF FROM WRIT OF ASSISTANCE

This Court does not believe that the manner utilized by the Plaintiff in requesting the writ of assistance only in the prayer of the foreclosure complaint is procedurally sound; therefore, it is not sufficient to cause the defendant to be held in default as to that issue for failure to respond to the summons and complaint.

Any person who is sought to be made subject to a writ of assistance is entitled to due process though proper service of process and a right to legally respond to the allegations entitling the movant to a writ of assistance, prior to the issuance of the writ of assistance. The writ of assistance is not a pleading to be responded to, it is an order to be summarily carried out.

There were no allegations of fact set forth in the body of the complaint which give notice as to the basis for entitlement to issuance of a writ of assistance, and therefore nothing to which the Defendant could respond. While the Defendant was certainly subject to the jurisdiction of the court in the foreclosure action, which was properly pled, without factual allegations that assert the basis for issuance of the writ of assistance being included in the complaint, the Defendant has not had an opportunity to be heard on that issue and default as to the actual allegations of the complaint would not extend to the right to a writ of assistance. To do so without proper process therefore denies that right of due process to the Defendant in that regard.

This Court therefore dissolves and voids the writ of assistance that was issued on October 26, 2016. If the Plaintiff desires to continue to pursue eviction, it shall rule the Defendant in to show cause why a writ of assistance should not issue with all proper notice and time limits and a hearing shall be held in that regard.

Due to this issue being disposed of on a procedural basis, this Court makes no finding or ruling on whether a mortgagee, with a mortgage lien interest in real property in foreclosure, has sufficient interest in the real property so as to give standing to sue for writ of assistance in the foreclosure action in main prior to becoming the actual owner of the property if the lender were the successful bidder.

DEFENDANT'S MOTION FOR RELIEF FROM JUDGMENT

This Court finds that the foreclosure judgment as issued back in 2014 was issued with proper due process and the court had both subject matter and personal jurisdiction. Therefore, it is not void within the meaning of void as used in Rule 60(b).

The defendant has raised the issue of the language of the original judgment which allows for continual updating of the amounts due as additional expenses are incurred by the Plaintiff after the issuance of the judgment. Based on this the Defendant argues the judgment is not a final judgment and has requested that the original judgment be declared void. In support, Defendant has proffered the Norris case in which the Court reversed the entry of a money judgment which allowed the money judgment to be later amended for an increase by future capital contributions, and remanded the case for accounting. See Norris v. Heyward, 312 S.C. 67, 439 S.E.2d 264 (1993) Defendant maintains that this case essentially makes the judgment in this matter likewise outside the standards for judgments provided in the SCRPC, and therefore void. Further, in light of the most recent supplemental judgment issuing from the original, Defendant argues very little time has passed, and therefore the time period for the 60(b)4 motion is not excessive.

In response, the Plaintiff argues that Norris merely reversed and remanded the continuing judgment in that case and made no ruling that it was void, looking instead to the Universal Benefits case for the proper definition for "void" under 60(b)4. See Universal Benefits, Inc. v. McKinney, 349 S.C. 179, 561 S.E.2d 659 (Ct. App. 2002). That case limits "void" to judgments issued without proper due process or lack of jurisdiction. Plaintiff also seeks to distinguish Norris on other grounds, relying on the different underlying factual situations and the inherent

right under Rule 71 for the Plaintiff to attempt to be made whole through its rights under its note and mortgage contracts in foreclosure, also referencing legislative intent in formulating Rule 71.

The Court recognizes that in the Norris case the entire judgment was reversed and not just the offending language being stricken with the rest of the judgment left standing. The Court notes that in another case on appeal, Brown, the Court stated that generally the reversal of a judgment has the effect of vacating the judgment as if it had never been rendered. See Brown v. Brown, 286 S.C. 56, 331 S.E.2d 793 (Ct. App. 1985). If this case is valid precedent for such judgments in all situations, then if the foreclosure judgment in this instant matter, which contains language that allows it to be "amended" to include additional amounts due, had been appealed, it would perhaps be reversed on appeal. But, in the instant case, we are not dealing with an appeal of the rendered judgment

IT IS THEREFORE ORDERED THAT:

1. This Court dissolves and voids the writ of assistance that was issued on October 26, 2016. If the Plaintiff desires to continue to pursue eviction, it shall rule the Defendant in to show cause why a writ of assistance should not issue with all proper notice and time limits and a hearing shall be held in that regard.

2. The foreclosure judgment as issued in 2014 was issued with proper due process and the court had both subject matter and personal jurisdiction. Therefore, it is not void within the meaning of void as used in Rule 60(b)4. Too much time and action has elapsed between the issuance of the judgment in 2014 and the present motion to be considered reasonable. While supplemental judgments have periodically fairly recently issued due to the expense of additional amounts by the Plaintiff, none of them affect the basic right of the Plaintiff to foreclosure as previously adjudicated, and to vacate the judgment at this late date relative to the date of the

judgment that actually adjudicated Defendant's rights in foreclosure would be unduly prejudicial to the Plaintiff.

2. The Court does not believe that Defendant's assertion of a violation of the Consumer Protection Code at this late date, without any verification or documentation as to its violation during her loan procurement process, rises to the level of a showing of a meritorious defense.

3. While the Defendant, had she appealed the original judgment on the basis of its "continuing" language as being controlled by the Norris case, might perhaps have been able to obtain a reversal of judgment as in Norris, no appeal was taken. Therefore, the judgment previously issued in this matter is the law of the case.

4. Defendant's Motion for Relief from Judgment and from Writ of Assistance is DENIED.

AND IT IS SO ORDERED.

The Honorable Richard L. Booth
Master-in-Equity for Sumter County



Sumter Common Pleas

Case Caption: Wells Fargo Bank NA VS Laura W Dinkins
Case Number: 2014CP4300088
Type: Master/Order/Other

AND IT IS SO ORDERED!

The Honorable Richard L. Booth, Sumter County
Master in Equity, Judge Code 3067

Electronically signed on 2017-04-18 23:32:52 page 7 of 7

ELECTRONICALLY FILED - 2017 Apr 19 8:57 AM - SUMTER - COMMON PLEAS - CASE#2014CP4300088
ELECTRONICALLY FILED - 2018 May 09 11:25 AM - HORRY - COMMON PLEAS - CASE#2017CP2605357

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF HORRY

Case No. 2017-CP-26-05357

Habitat for Humanity of Horry County, Inc.,

Plaintiff,

MOTION TO STAY EXECUTION OF WRIT OF ASSISTANCE

vs.

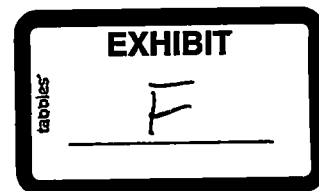
Candice A. Simmons; Waccamaw Regional Council of Governments d/b/a Waccamaw Home Consortium; Village of Dreams Homeowners Association, Inc.; SC Housing Corp.; and Bank of North Carolina,

Defendants.

YOU WILL PLEASE TAKE NOTICE that Defendant Candice A. Simmons (hereinafter “the Defendant”) moves before this court pursuant to Rule 62(b), SCRCPP, as well as pursuant to all other applicable law, for an order staying the execution of the writ of assistance issued in the above-captioned action until further ruling upon a decision of the court on the Defendant’s motion for relief from the writ of assistance.

The Defendant so moves on the following grounds:

1. The court should grant a stay of the execution of the writ of assistance issued in this case. There is a pending motion under Rule 60(b), SCRCPP, that is directed at the validity of that writ of assistance and may result in it being vacated.
2. The court should do so immediately, to prevent the writ from being carried out. The order to stay needs to issue forthwith in order to prevent people who are attempting to carry out the writ today from doing so.



3. A proposed order that would grant this motion is being provided with the filing hereof and is being sent to Plaintiff's counsel at that same time.
4. The court has the authority to issue this stay under Rule 62(b), SCRPC.
5. No prejudice of any significance would be done to the Plaintiff by issuing such a stay.
6. The court may provide for reasonable conditions for the stay.
7. This motion is also based upon all applicable statutory law, case law, common law, and the record in this action.

The undersigned has consulted with opposing counsel in an effort to resolve matters subject of this motion but no resolution was reached.

Respectfully submitted,

/s/ Andrew S. Radeker
Andrew S. Radeker
S.C. Bar No. 73743
HARRISON, RADEKER & SMITH, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
(803) 779-6700 (facsimile)
drew@harrisonfirm.com (email)
ATTORNEY FOR DEFENDANT
CANDICE A. SIMMONS

Columbia, South Carolina
May 9, 2018

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF HORRY

Case No. 2017-CP-26-05357

Habitat for Humanity of Horry County, Inc.,

Plaintiff,

vs.

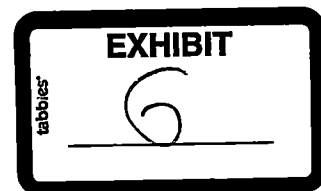
AFFIDAVIT OF
CANDICE A. SIMMONS

Candice A. Simmons; Waccamaw Regional Council of Governments d/b/a Waccamaw Home Consortium; Village of Dreams Homeowners Association, Inc.; SC Housing Corp.; and Bank of North Carolina,

Defendants.

Personally appeared before me Candice A. Simmons, who, first being duly sworn, deposes and says as follows:

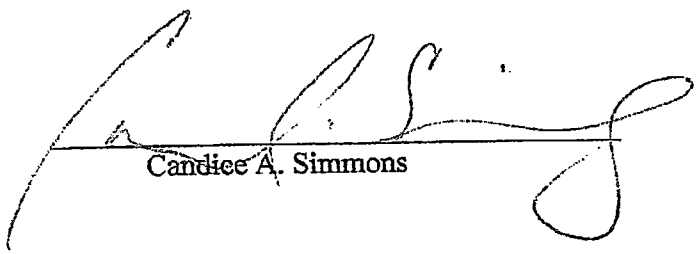
1. My name is Candice A. Simmons. I am a defendant in the above-captioned case. I have personal knowledge of the facts set forth in this affidavit and am competent to testify about them.
2. I live in the house on the property that is involved in this foreclosure case.
3. I appeared *pro se* in this case, as is shown by my answer filed on October 30, 2017. I also appeared by attending two hearings in this case, including the trial that produced the order granting a judgment of foreclosure, which I am currently appealing.
4. I now know that on April 18, 2018, the plaintiff submitted a petition for a writ of assistance and a proposed order for writ of assistance to have me removed from the house involved in this case. I was not provided with a copy of that petition or proposed order and did not know at the time that they were being submitted to the court. I know of no hearing being held or even scheduled on that petition.
5. I never got a copy of the order for writ of assistance until April 26, 2018, and I never found out before that about such an order being sought by the Plaintiff.
6. My appeal of the foreclosure decree is still going on, and I think that would be a good reason for the court not to have issued a writ of assistance. If a hearing on the petition



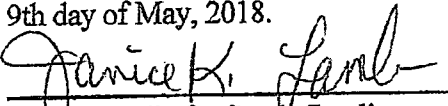
for writ of assistance had been held and I had been given notice of it, I would have appeared at the hearing and told the judge that.

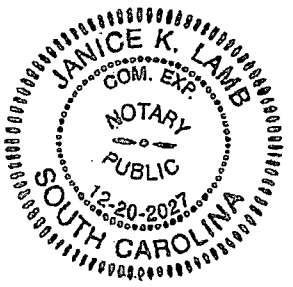
- 7. A sheriff's deputy and some people from the Plaintiff have been at my house today, and they are seeking to carry out the writ of assistance. I really need to stay in this house.
- 8. I have been making payments to the Plaintiff in the amount of \$336.00 a month, which was my regular payment to them, including this month. (There were times before this that I made higher payments to catch up on arrearage that they claimed.) The Plaintiff always accepted the payments.
- 9. To prevent a writ of assistance from being carried out during the process of my appeal, I am certainly willing to continue making payments in this amount to the Plaintiff.

FURTHER AFFIANT SAYETH NOT.


Candice A. Simmons

SWORN to before me this
9th day of May, 2018.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: 12/20/2027



THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Ralph P. Stroman, Special Referee

Appellate Case No. 2018-000531
Common Pleas Case No. 2017-CP-26-05357

RECEIVED
MAY 09 2018
SC Court of Appeals

Habitat for Humanity of Horry County, Inc.,.....Respondent,

v.

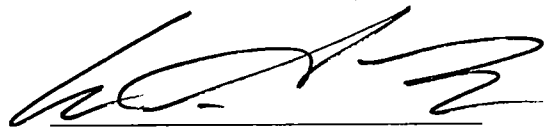
Candice A. Simmons; Waccamaw Regional Council of Governments d/b/a Waccamaw Home Consortium; Village of Dreams Homeowners Association, Inc.; SC Housing Corp.; and Bank of North Carolina.....Defendants,

Of whom Candice A. Simmons is the.....Appellant.

PROOF OF SERVICE

I certify that I served the foregoing motion for leave or clarification in this case by depositing a copy of it on the date shown below in the United States Mail, postage prepaid, addressed as follows:

Douglas M. Zayicek, Esq.
Bellamy, Rutenberg, Copeland, Epps, Gravely & Bowers, P.A.
P.O. Box 357
Myrtle Beach, SC 29578-0357



Andrew S. Radeker
S.C. Bar No. 73743
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Columbia, South Carolina 29250
(803) 779-2211
Attorney for Appellant

May 9, 2018