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..... Defendant,

Stuart Arnold..... Respondent.

FINAL REPLY BRIEF OF APPELLANT

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

ARGUMENT

This case is simple. Appellant foreclosed its second mortgage which was subject to a first mortgage also held by the Appellant. The underlying foreclosure judgment contained a scrivener's error, that indicated that the senior mortgage was "paid, but not satisfied" while also making clear that this was a second lien foreclosure. The South Carolina Rules of Civil Procedure provide an avenue for correcting the mistake; however, Appellant was denied that avenue. In failing to correct the mistake, the Master in Equity made a ruling that was not supported by any evidence and contained errors of law, thereby abusing his discretion.

I. THE MASTER IN EQUITY'S RULING THAT NO RELIEF WAS AVAILABLE TO APPELLANT WAS NOT SUPPORTED BY ANY EVIDENCE AND CONTROLLED BY ERRORS OF LAW.

With respect to the evidence, Respondent has not, at any time, argued that the statement regarding the status of the senior lien being paid, but not satisfied, is true nor has any evidence been presented at any time to support that erroneous statement. Instead, Respondent has focused on trying to obtain a windfall and prevent the correction of an error in the foreclosure judgment.

The appealed Orders contained errors of law as pointed out in Appellant's initial brief. For example, the finding that the Judge "intended for the deed to be good, unencumbered title." (R. pp. 21-22, Paragraph 5.) Master's deeds are not warranty deeds and are not intended to convey unencumbered title. To wit, a purchaser at a foreclosure sale would only be entitled to receive title "free from equities and incumbrances of which he had no notice". *People's Bank v. Bramlett*, 58 S.C. 477, 36 S.C. 912, 914 (1900). The record from the foreclosure case was sufficient to put Respondent on notice that the foreclosure was subject to Appellant's first mortgage. The Master in Equity committed an error of law in finding that Respondent had no notice of the senior lien, while also acknowledging that Respondent had knowledge of the foreclosure record. (R. pp. 20-

22.) The Master in Equity's error has the net effect of allowing Respondent to ignore the clear and unambiguous notation in the foreclosure Order that the subject mortgage constituted a second lien.

Respondent seeks to sow confusion with the Court by arguing that the fact that Wells Fargo was the holder of both mortgages is relevant, when in fact it has no bearing on the circumstances of the error made. Respondent appears to acknowledge that SCRCP Rule 60(b) would allow the correction of an error in the nature of the present one if the senior lien were held by someone other than Appellant. This distinction is not sensible as the correction of an error under SCRCP Rule 60(b), once a proper motion for such has been made, is not dependent upon the status of the parties.

The Respondent's argument related to nunc pro tunc orders is irrelevant. Appellant's motion for relief to correct the mistake could be issued without nunc pro tunc affect. Counsel for Appellant's request that the Order be issued nunc pro tunc has no impact on the errors made by the Master in Equity in denying Appellant's motion for relief. While arguing that nunc pro tunc relief is inappropriate, Respondent insinuated that he has a right to a bargain. A foreclosure sale is a public auction, there is no bargain that Respondent is entitled to. Again, Respondent made his bid with the full knowledge of all pleadings contained in the foreclosure action. (R. pp. 20-22.)

As a practical matter, by requesting relief nunc pro tunc, counsel for Appellant was simply trying to resolve the error in the most equitable fashion. This would allow Respondent to keep the property that he purchased and invested money into, subject to the valid first mortgage. The appealed Orders leave open the matter of determining the validity and enforceability of the first mortgage although erroneously declaring Respondent to be a bona fide purchaser for value. (R. pp. 20-22.)

It is not necessary to address Respondent's argument regarding nunc pro tunc relief violating S.C. Code Ann. §29-1-30 as the relief that Appellant sought could have been granted without nunc pro tunc designation. Further, this statute is not applicable to this circumstance at hand, the Code section specifically states that "But the penalties enumerated in this section shall not apply to public officers in the discharge of their official duties." Furthermore, the Notice of Sale included the language that indicated that the sale was "SUBJECT TO ASSESSMENTS, RICHLAND COUNTY TAXES, EXISTING EASEMENTS, EASEMENTS AND RESTRICTIONS OF RECORD, AND OTHER SENIOR ENCUMBRANCES." (R. p. 72.)

Respondent's portrayal of himself as an innocent purchaser who was misled to believe that he purchased the property free of encumbrances at the foreclosure sale is erroneous. Respondent was not an innocent purchaser. He was negligent in failing to perform appropriate due diligence to determine the status of the first lien in the face of the unambiguous notation in the foreclosure Order (and throughout the record) that Appellant's foreclosure was one of a second lien.

There is no authority to support Respondent's assertion that "it was instrumental upon Appellant in seeing that the purchaser at the foreclosure sale acquired good title." As the Master correctly pointed out at the hearing "A foreclosure sale is not necessarily the best way to buy property. And when you buy it, you kind of – you know, there are pitfalls to buying property as a foreclosure sale and this may be one of them." (R. p. 116, lines 21-25.) Indeed, it is common knowledge in the foreclosure practice that a foreclosure sale does not guarantee good title. As stated by the Honorable Charles B. Simmons, Master in Equity for Greenville County in his South Carolina Lawyer article: *A primer on Mortgage Foreclosure in South Carolina,* "[t]his is not a general warranty deed but is a Master's Deed. In other words, the Master's Deed conveys whatever title is represented by the property interests properly before the court. If there is a defect in the

foreclosure action itself, the Master's Deed may not even convey clear, marketable title." 6-JUN S.C. Law. 29.

Respondent provides no authority to support the argument that Appellant is the party most responsible for inadequate performance of due diligence and is purely basing this on opinion. This is another attempt by the Respondent to shirk his responsibilities as a purchaser at a foreclosure sale. While counsel for Appellant candidly admitted that the error sought to be corrected by the SCRCP Rule 60(b) motion was their fault, said admission does not constitute grounds to deny relief. Again, SCRCP Rule 60(b)(1) is the vehicle by which errors (mistakes, inadvertences, surprise, and excusable neglect) are corrected. Appellant's SCRCP Rule 60(b)(1) motion was timely filed pursuant to the SCRCP.

Contrary to Respondent's assertions, Appellant is not now nor have they ever argued that the language of the foreclosure judgment was ambiguous rather than contradictory. The language in the foreclosure Order (and throughout the record) that Appellant's foreclosure was as to a second lien is completely contrary to the language in the foreclosure Order that Appellant was a Defendant (they were not) and that the first lien was paid but not satisfied. These contradictory statements silence any argument that Respondent was without notice. Further, there was no contract made so the mention of how to treat ambiguous language in a contract is irrelevant.

Respondent's attempt to liken the relationship of a buyer at a foreclosure sale and Plaintiff to that of a typical sales contract relationship is erroneous. No such relationship exists and there is no authority for this Court to find such a relationship.

Appellant has not asked for the judicial sale to be overturned, Appellant is simply seeking an Order to correct a mistake. Respondent's reliance on *Brownlee v. Miller*, 208 S.C. 252, 263,

S.E.2d 658,663 (1946) amongst other cases, as an attempt to nullify his admitted notice as to the existence of a first lien is misplaced. These cases do not address situations where the Order itself gives notice as to the existence of a senior encumbrance. Further, these cases specifically state that "a purchaser **in good faith** at a judicial sale is not affected by irregularities in the proceedings or even error in the judgment." *Cumbie v. Newberry*, 251 S.C. 33,37,159 S.E.2d 915, 917 (1968). Status as a good faith bona fide purchaser requires that the purchase be without notice of lien or defect. As discussed, the Master in Equity made an error of law in ruling that Respondent was a bona fide purchaser for value as Respondent had ample notice of the existence of the first lien.

The parties agree that Appellant was not seeking a resale of the property, as such the Betterments statute is inapplicable.

II. THE MASTER IN EQUITY'S FINDING THAT RESPONDENT WAS A BONA FIDE PURCHASER FOR VALUE WITHOUT NOTICE WAS AN ERROR OF LAW.

Appellant has previously addressed the error of law that was made by the Master in Equity in finding that Respondent was a bona fide purchaser for value without notice. There is overwhelming evidence on the face of the document itself that the foreclosure is one of a second lien which constituted notice to Respondent and the world. The Master's Order found that Respondent had performed appropriate due diligence with regard to investigating the foreclosure suit and the Judgment. (R. p. 22, Paragraph 7.) Neither Appellant nor Respondent challenged this finding.

III. RESPONDENT HAD NO RIGHT TO RELY ON THE ERRONEOUS STATEMENT IN THE FORECLOSURE JUDGMENT REGARDING THE SENOIOR MORTGAGE HAVING BEEN SATISFIED AND, TO THE EXTENT THAT ANY RIGHT TO RELY EXISTS, RESPONDENT ALSO HAS A DUTY TO NOTICE AND RELY UPON THE CLEAR STATEMENT THAT THE FORCLOSURE WAS A SECOND LIEN.

Respondent's assertion that the "red flags" pointed out by Appellant with respect to the foreclosure record would not prompt a reasonable person to conduct further inquiry is simply without merit. The Complaint and foreclosure judgment both assert that the foreclosure is of a second lien and the Complaint further specifies that it is subject to a senior mortgage also held by Appellant. The foreclosure judgment's continued assertion that the foreclosure is of a second lien is more than sufficient to prompt a reasonable person to conduct further inquiry. The case law and arguments Respondent sets forth to support the assertion that Respondent had a right to rely on the representations in the foreclosure judgment are all predicated on the fact that Respondent was a purchaser in good faith, which he was not.

With respect to Appellant's reliance on *Poco-Grande*, 301 S.C. 323, 391 S.E.2d 735 (Ct. App. 1990), Respondent correctly points out a factual distinction between the *Poco-Grande* case and the instant case in that the mortgages at issue in *Poco-Grande* were held by two separate entities, whereas the first and second mortgages in the subject action are both held by Appellant. This factual distinction does not create a *legal* distinction with respect to the right to rely of the successful purchaser. Respondent had knowledge that Appellant's foreclosure was that of a second lien and the fact that Appellant was the holder of both mortgages does not negate Respondent's notice. The mere fact that Appellant owned both mortgages does not create a right to rely in contravention of the principle set forth in *Poco-Grande*. The instant foreclosure sale was still an arm's length transaction and thus there was no right to rely. In support of this premise, Appellant would point out that foreclosing attorneys are hired to handle specific mortgage loans and not necessarily every mortgage loan from a particular mortgagee to a mortgagor. Indeed, the foreclosure of the first mortgage was placed with a different counsel than foreclosure of the second (subject) mortgage. Hence, a mortgagee's counsel in a second mortgage foreclosure would not

necessarily have any inside knowledge or authority to make assertions related to a first mortgage held by the same mortgagee. The Respondent's indication that *Poco-Grande* would have had a different result if the same entity had owned both mortgages does not ring true in the face of this reality.

IV. APPELLANT'S MOTION FOR RELIEF ADDRESSED ALL OF THE FACTORS NECESSARY TO GRANT RELIEF PURSUANT TO SCRCP RULE 60(B).

Citing *Rouvet v. Rouvet*, 388 S.C. 301, 309, 696 S.E.2d 204, 208 (Ct. App. 2010) (internal citations omitted), Respondent correctly points out the factor's necessary to obtain relief pursuant to SCRCP Rule 60(b). To wit,

> The movant in a SCRCP Rule 60(b) motion has the burden of presenting evidence proving the facts essential to entitle (it] to relief...In determining whether to grant relief under SCRCP Rule 60(b)(1), the court must consider the following factors: (1) the promptness with which relief is sought; (2) the reasons for the failure to act promptly; (3) the existence of a meritorious defense; and (4) the prejudice to the other party.

Appellant's motion for relief satisfactorily addressed the factors for obtaining relief under SCRCP Rule 60(b)(1) and the Master in Equity did not rule that those factors had not been met. Appellant pled the existence of a mistake and filed the motion promptly within the guidelines set forth under the Rules, within one year of judgment. With respect to a "meritorious defense" it is uncontroverted that Appellant's first lien is not "paid but not satisfied of record." Respondent would not be prejudiced by granting this relief, as it is not prejudicial for a purchaser to take title subject to encumbrances of which he had notice. (i.e., second lien position as contemplated throughout the duration of this case).

CONCLUSION

For the reasons stated, this Court should remand this action to the lower Court with an Order directing the Court to grant Appellant's motion.

Respectfully submitted,

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May 24, 2018
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CERTIFICATE OF COUNSEL

I certify that the foregoing brief complies with Rule 211(b), SCACR.

Respectfully submitted,

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May 24, 2018