THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM LEXINGTON COUNTY
IN THE COURT OF COMMON PLEAS
THE HONORABLE JAMES O. SPENCE
MASTER IN EQUITY

CASE NO. 2011-CP-32-1781

APPELLATE CASE NO. 2015-002048

RECEIVED
MAY 21 2018
SC Court of Appeals

Charles E. Strickland, III, Latisha D. Strickland and Justin R. Dillon,

Appellants

v.

Marjorie E. Temple,

Respondent,

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. Did the Master in Equity Err in failing to award attorney fees to the Plaintiffs when the contract provided for recovery of attorney fees for the enforcement of the contract and attorney fees are recoverable in an action for injunctive relief if allowed by the contract? 3

2. Did the Master in Equity impair the parties' contract when he found the Plaintiffs were entitled to attorney fees but did not award them in conjunction with terminating the contract in violation of the South Carolina and U.S. constitutions? 4

3. Did the Master in Equity err in failing to grant Rule 11 sanctions against the Defendant and her counsel because there were no good grounds for bringing and litigating the defenses and counterclaims of fraud, misrepresentation, rescission, unconscionability and Unfair Trade Practices and the Circuit Court found no basis in fact or in law for these claims? 4

4. Did the Master in Equity err in failing to make sufficient findings of fact and conclusions of law to enable the appellate court to ascertain what the basis was for denying Rule 11 sanctions against the Defendant and her counsel? 5

STATEMENT OF THE CASE

This is an action to foreclose a document entitled "Conditional Sales Agreement Bond For Title (Fixed Rate Payments)." Despite its fancy title, the document creates an Installment Land Contract.

The Respondent adopts the Statement of the Case filed by the Appellant with the following additions.

In July, 2014, the Respondent conceded that there was no equity in the property. Pursuant to Lewis v. Premium Investment Corporation, 351 S.C. 167, 568 S.E.2d 361 (2002) and Cody Discount, Inc. v. Merritt, 368 S.C. 570, 629 S.E.2d 697 (Ct.App. 2006), on August 5, 2014, the Master signed an Order terminating the Respondent's interest in the Contract because there was no equity in the property.

On April 17, 2014, the Appellants filed a motion seeking a separate award of attorneys fees as a money judgment.

On June 4, 2015, the Master signed and filed an Order stating that pursuant to Rule 71, SCRCP, the attorney fees must be added to the contractual debt to determine whether there is equity in the property. The Master ruled that the Appellants were not entitled to a separate judgment for an award of attorneys fees and in addition, there was no right to obtain a deficiency judgment in the foreclosure of an Installment Land Contract..

The Judge also declined to impose sanctions pursuant to Rule 11.

The Appellants filed a Motion to Alter Judgment on June 26, 2015.

The Judge denied the Motion on September 1, 2015.

On September 28, 2015, the Appellants filed this appeal.

ARGUMENT

1. Did the Master in Equity Err in failing to award attorney fees to the Plaintiffs when the contract provided for recovery of attorney fees for the enforcement of the contract and attorney fees are recoverable in an action for injunctive relief if allowed by the contract?

The Appellants has confused their Cause of Action with the remedies available to them. The appropriate cause of action for breach of an installment sale contract is foreclosure. Cody Discount, Inc. v. Merritt, 368 S.C. 570, 629 S.E.2d 697 (Ct.App. 2006). As the Trial Judge stated in his Order terminating the Contract, if there is no equity, the appropriate remedy is termination of the contract. If there is equity, the appropriate remedy is sale of the property.

The Trial Judge's order denying attorney fees pursuant to the Agreement clearly indicates that had there been equity in the property, the Court would have considered awarding fees.

Since this is foreclosure action, Rule 71(a), SCRCP controls:

> In foreclosure actions the judge or master shall compute the amounts due the plaintiff and any other claimants, which amounts when determined shall be the total debt due to each. The total debt shall as a minimum set forth clearly the principal due upon default, the rate of interest and interest from date of default to hearing date, any other relevant interest charged, any amounts due or to be credited on escrow items, the taxable costs of collection prior to hearing, and the amount of allowable attorneys fees due and anticipated through conclusion of the action.

Had there been equity in the property, it would have been appropriate to determine a fee award. Since there was no equity in the property, there was no source from which the fees could be paid.

If the Trial Judge had made an award of attorney fees as a separate judgment, it would have been tantamount to granting a deficiency judgment. Deficiency judgments are governed by statute. §29-3-660. This statute allows a deficiency judgment for mortgage foreclosures but not for foreclosure of installment land contracts nor any other type of lien.

The Order of the Court to deny an award of attorney fees was correct.

2. Did the Master in Equity impair the parties' contract when he found the Plaintiffs were entitled to attorney fees but did not award them in conjunction with terminating the contract in violation of the South Carolina and U.S. constitutions?

The Judge found that this argument had been raised for the first time in Appellants' motion pursuant to Rule 59(e). In their brief, the Appellants have not cited any reference in the Record to a prior presentation of the issue.

A party cannot for the first time raise an issue by way of a Rule 59(e) motion which could have been raised at trial. Patterson v. Reid, 318 S.C. 183, 456 S.E.2d 436 (Ct. App. 1995).

This argument is without merit.

3. Did the Master in Equity err in failing to grant Rule 11 sanctions against the Defendant and her counsel because there were no good grounds for bringing and litigating the defenses and counterclaims of fraud, misrepresentation, rescission, unconscionability and Unfair Trade Practices and the Circuit Court found no basis in fact or in law for these claims?

Although the Appellate Court has the right to review the Record and make its own determination of the facts, the decision of whether or not to impose sanction is in the sound discretion of the trial judge. The Appellate Court should not reverse the Trial Judge unless it can find an abuse of discretion. Culbertson v. Clemens, 322 S.C. 20, 471 S.E.2d 163 (1996)

The Appellants have not cited any case in which a Trial Court decision not to impose sanctions was reversed by an appellate court.

This action was commenced on May 11, 2011. The Respondent raised several defenses relating to the alleged failure of the Appellants to disclose facts about the property. On May 20, 2013, Judge Addy granted summary judgment on those defenses.

On April 17, 2014, the Appellants filed the motion for sanctions. Appellants have cited only the Answer as the basis for their application for sanctions.

Although Rule 11 does not contain a specific time limitation for filing a Motion for sanctions, relief under Rule 11 is closely related to relief under the South Carolina Frivolous Civil Proceedings Sanctions Act, §15-36-10, et seq. This act does have a ten day filing requirement. Had the Respondent elected to file a Motion for Reconsideration under Rule 59(e), that motion would have had to be served within ten days of the order. Had the Respondent decided to appeal, the appeal would have had to be filed within 30 days of the Order.

Even if none of these time periods apply, the Appellants should have filed the motion within a reasonable time. Nearly a year later is not reasonable.

In addition, the Appellants should have applied to Judge Addy for relief because he granted the Appellants' motion for summary judgment.

Since the Appellants based their application solely on the filing of an alleged frivolous Answer, only fees incurred prior to Judge Addy's order could have been considered. Appellants failed to provide the Trial Court an accounting of fees "necessarily incurred in pursuing the motion for summary judgment."

In addition, just because a claim is dismissed pursuant to a motion for summary judgment does not make the claim frivolous. As the Trial Judge noted, not raising these defenses could well have been malpractice.

This argument is without merit.

4. Did the Master in Equity err in failing to make sufficient findings of fact and conclusions of law to enable the appellate court to ascertain what the basis was for denying Rule 11 sanctions against the Defendant and her counsel?

The Trial Judge's order denying Rule 11 sanctions does make adequate findings of fact and conclusions of law. It is clear that the Court considered the issues in detail as evidenced by the Court's letter to Counsel dated March 26, 2015, as well as the Court's Order.

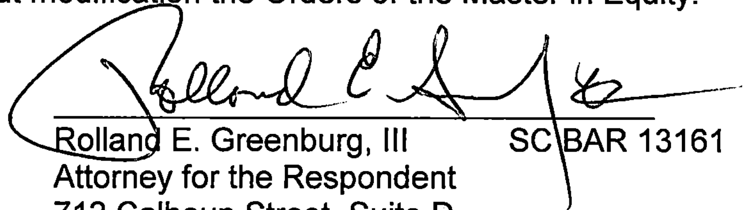
It was up to the Appellants to provide the Trial Court with an adequate record from which to find facts. The Court made its ruling based on Appellants' submission. If the fact finding by the Court is insufficient, the Appellants have only themselves to blame.

In addition, a remand to the Trial Judge for additional findings of fact would not change the Court's ruling nor make it any more likely that the Appellate Court would reverse the Trial Court's ruling.

This argument is without merit.

CONCLUSION

The Court should affirm without modification the Orders of the Master in Equity.



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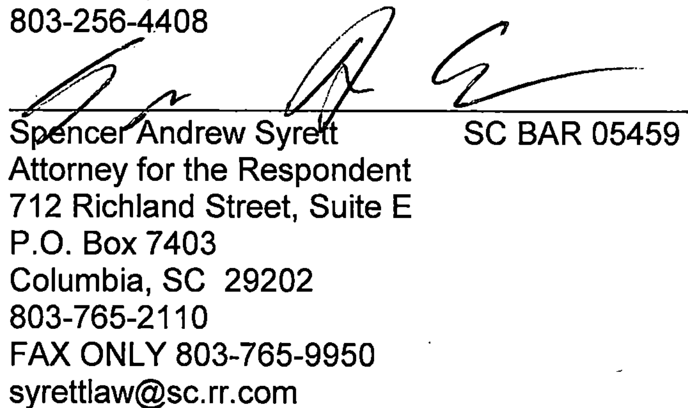

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May 18, 2018

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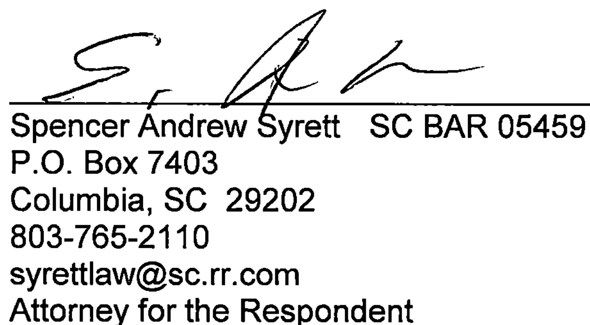
PROOF OF SERVICE

I certify that I have served the Respondent's Initial Brief and Designation of Additional Matter to be Included in Record on Appeal, by depositing a copy of them in the United States Mail, postage prepaid, on May 21, 2018, addressed to the attorney of record, Frederick I. Hall, III, P.O. Box 1898, Lexington, SC, 29071.



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