

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master In Equity

Appellate Case No. 2018-000260

RECEIVED
JUN 12 2018
SC Court of Appeals

749 Spinnaker, LLC,Respondent,

v.

Charles Kelley a/k/a Charles E. Kelley; Deborah
Kelley a/k/a Deborah L. Kelley; Mortgage Electronic
Registration Systems, Inc., its successors and assigns
as nominee for Chase Mortgage Company, its successors
and assigns, a Delaware Corporation; and Spinnaker
Beach House Owners Association,Defendants,

Of whom Charles Kelley a/k/a Charles E. Kelley and
Deborah Kelley a/k/a Deborah L. Kelley are the.....Appellants,

And of which Mortgage Electronic Registration
Systems, Inc., its successors and assigns as nominee
for Chase Mortgage Company, its successors and
assigns, a Delaware Corporation; Spinnaker
Beach House Owners Association; and Seabrook
Island Property Owners Association as also,.....Respondents.

INITIAL BRIEF OF RESPONDENT
749 SPINNAKER, LLC

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STATEMENT OF THE ISSUES ON APPEAL

- I. DID THE MASTER-IN-EQUITY PROPERLY DENY THE MOTION TO SET ASIDE THE ENTRY OF DEFAULT AND VACATE THE JUDGMENT, WHERE THE RECORD CONTAINED EVIDENCE THAT THE KELLEYS WERE SERVED WITH THE SUMMONS AND COMPLAINT AND FAILED TO RESPOND WITHIN THE ALLOWED TIME?
- II. SHOULD THE APPEAL BE DISMISSED AS UNTIMELY, WHERE THE KELLEYS FILED THEIR NOTICE OF APPEAL MORE THAN THIRTY DAYS AFTER NOTICE OF THE ENTRY OF THE ORDER ON APPEAL?

STATEMENT OF THE CASE

This appeal stems from the Respondent Seabrook Island Property Owners Association (“Seabrook”) foreclosure of the property located at 749 Spinnaker Beachhouse VI, Johns Island, SC (the “Property”), owned by Appellants Charles and Deborah Kelley (“the Kelleys”). [Order p. 1]. On August 24, 2016, Seabrook sent the Kelleys a letter informing them of a lien on the Property, requesting their payment of the lien. The Kelleys never responded to the letter or made any effort to cure. [Order, p. 2]

Seabrook then filed a Lis Pendens and Summons and Complaint and served it upon the Kelleys for foreclosure on the Property. [Order, p. 1-2]. The Kelleys made no response to the pleadings and the Property was auctioned at a Foreclosure sale, where 749 Spinnaker, LLC, purchased the property. [CITE]. The Kelleys then filed a Motion to Set Aside Entry of Default and Vacate Judgment of Sale and Master’s Foreclosure Deed on September 18, 2017. [Motion]. After their motion was denied on November 27, 2017, the Kelleys filed a Motion to Reconsider on January 8, 2018, under Rule 59(e), SCRPC. [Motion to Reconsider]. The filing of this Motion was

improper and the Master denied the Motion, after which the Kelleys filed a Notice of Appeal on February 20, 2018.

STANDARD OF REVIEW

The Movant seeking to have judgment set aside has the burden of presenting evidence proving facts essential to entitle him to relief. *Bowers v. Bowers*, 304 S.C. 65, 403 S.E.2d 127 (Ct. App. 1991). Rule 60 of the South Carolina Rules of Civil Procedure provides that “the court may relieve a party from a final judgment, order, or proceeding because the judgment is void.” *BB&T v. Taylor*, 369 S.C. 548, 551, 633 S.E.2d 501, 503 (2006). The movant in a Rule 60(b) motion has the burden of presenting evidence proving the facts essential to entitle her to relief. *Id.* at 552.

ARGUMENT

I. The Record supports the Master’s conclusion that the Kelleys were served with the necessary pleadings.

In the Record, the Master concluded that the pleadings were correctly served upon the Kelleys. This finding is not legal error and this Court should affirm the decision of the Master. Although the original Affidavits served upon the Kelleys did not include the word “Complaint,” this was simply a mistake that was corrected by serving amended Affidavits. Therefore, there is no issue that the Complaint was served upon the Kelleys and they cannot contend that the Master’s decision was legal error.

The Kelleys were on notice that there would be a foreclosure action because Seabrook sent the Kelleys a letter notifying them of the debt via Certified Mail. The Kelleys did nothing in response to the service of the Complaint, the demand letter, or Lis Pendens. The Kelleys also take issue with the Order for several reasons, including: the use of the word “undisputed,” the claim of a scrivener’s error in the original Affidavit, and the service of all documents.

The Kelleys rely on a case with entirely different facts, where the decision to foreclose was

vacated because service was not properly effectuated. *Belle Hall Plantation Homeowners Ass'n v. Murray*, 419 S.C. 605, 799 S.E.2d 310 (Ct. App. 2017). Here, the Kelleys were properly served by process server and the scrivener's error on the original Affidavit was amended and corrected, then re-submitted to Seabrook's counsel and the Master's court. Therefore, the decision by the Master was proper, and is supported by the record. Therefore, the judgment cannot be considered void, and the Master properly denied the Kelleys 60(b)(4) motion. The Kelleys had ample opportunity to respond to the foreclosure action and prevent a judgment by default. This Court should affirm the Master's Order.

II. The Kelleys appeal is untimely and should be dismissed.

According to Rule 203 of the South Carolina Appellate Court Rules, a notice of appeal shall be served on all respondents within thirty (30) days after the receipt of written notice of entry of the order of judgment. Rule 203(b)(1), SCACR. The Master filed the Order on December 15, 2017, and the Kelleys did not file the Notice of Appeal until February 20, 2018.

The Kelleys attorney filed an affidavit stating that the Kelleys did not receive notice of the order until December 28, 2017. Since the filing of the motion was untimely, this Court does not have the jurisdiction to consider the appeal. *Elan v. S.C. Dept. of Transp.*, 361 S.C. 9, 14-15, 602 S.E.2d 772, 775 (2004). For all of these reasons, this Court should dismiss this appeal.

CONCLUSION

The Respondents, 749 Spinnaker, LLC, present concurrent arguments with Respondents Seabrook Island Property Owners Association. The Kelleys were properly served with the pleadings and their appeal is considered untimely. Accordingly, the Master's decision was proper and not a legal error, which this Court should affirm.

[Signature on the Following Page.]

Respectfully Submitted,



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and assigns, a Delaware Corporation; and Spinnaker
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Of whom Charles Kelley a/k/a Charles E. Kelley and
Deborah Kelley a/k/a Deborah L. Kelley are the.....Appellants,

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for Chase Mortgage Company, its successors and
assigns, a Delaware Corporation; Spinnaker
Beach House Owners Association; and Seabrook
Island Property Owners Association as also,.....Respondents.

PROOF OF SERVICE

The undersigned, an attorney in this matter for the Respondent 749 Spinnaker, LLC (749 Spinnaker), certifies that I have on the 11 day of June, 2018, served copies of 749 Spinnaker's Initial Respondent's Brief and Designation of Matter to be Included in Record on Appeal upon all other counsel of record by causing them to be deposited in the United State mail with sufficient

postage attached, addressed to:

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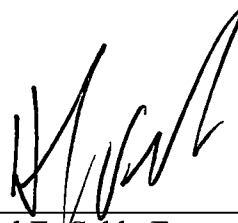
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June 11, 2018

Turner | Padget

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June 7, 2018

Via Hand Delivery

The Hon. Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: Seabrook Island v. Charles Kelley
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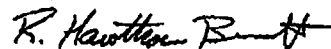
SC Court of Appeals

Dear Ms. Kitchings:

Enclosed are the originals and one copy each of the following materials from the Respondent Seabrook Island Property Owners Association: (1) Initial Respondent's Brief, (2) Designation of Matter to be Included in Record on Appeal; and (3) Proof of Service. Please file the originals and return the stamped copies to our courier. Thank you for your kind assistance.

Sincerely,

TURNER PADGET GRAHAM & LANEY P.A.



R. Hawthorne Barrett

RHB
Enclosures

cc: Jonathan Scott Altman, Esq.
Hal E. Cobb, Esq.

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