THE STATE OF SOUTH CAROLINA
In the Supreme Court

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JUN 25 2018

S.C. SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Gordon G. Cooper, Master-in-Equity

Appellate Case No. 2018-000830

U.S. Bank, NA, as trustee relating to the Chevy Chase Funding, LLC Mortgage Backed Certificates, Series 2004-B, ...Plaintiff,

v.

Alyce F. Otto, Individually; Alyce F. Otto Trustee Under Declaration of Trust of Alyce F. Otto dated the 17th of November 2009; TD Bank, NA; The United States of America, acting by and through its agency, the Internal Revenue Service; Laura Kerhulas Giese, as Co-Trustee of the Theodore Ernest Kerhulas Trust Under Declaration of Trust dated May 25, 2004; Mark Warner Kerhulas, as Co-Trustee of the Theodore Ernest Kerhulas Trust Under Declaration of Trust dated May 25, 2004; Jackson L. Munsey, Jr.; Citibank, NA, ...Defendants,

Of whom Jackson L. Munsey, Jr. is the.....Petitioner,

and

U.S. Bank, NA and Alyce F. Otto are the.....Respondents.

Alyce F. Otto, Trustee.....Plaintiff,

v.

Jackson L. Munsey, Jr.....Defendant.

REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI

Petitioner (hereinafter "Munsey") hereby submits this reply to the return of the Respondents (hereinafter, sometimes, "Otto" and "U.S. Bank," as applicable) to Munsey's petition seeking a writ of certiorari in this case.

I. The Respondents give short shrift to discussing whether Munsey had a right of redemption, since they have little to offer that would support their position.

In their return, Otto and U.S. Bank spend a single paragraph on the issue of whether the Court of Appeals erred in upholding the master-in-equity's determination that Munsey has no equitable interest in the property. That is because this issue is not a good one for the Respondents. As discussed in Munsey's petition, if the Court of Appeals had actually gone through the analysis and assessed the factors noted in Lewis v. Premium Investment Corporation, 351 S.C. 167, 568 S.E.2d 361 (2002), it would have determined, even on the basis of a record that the master refused to allow to be fully developed, that Munsey has an equity of redemption in this property or, at the very least, that a remand to assess these factors is needed. Id. at 173 n. 4. (A remand to assess whether the purchaser had an equitable right of redemption was how the Supreme Court dealt with the Lewis case. Id. at 174.)

The Court of Appeals, however, did no analysis, declining its responsibilities as an appellate court sitting in equity to "review[] the evidence and determine[] the facts according to its own view of the preponderance of the evidence[.]" Fox v. Moultrie, 379 S.C. 609, 613, 666 S.E.2d 915, 917 (2008). It is not as though the Court of Appeals found some other reason why Munsey had no right of redemption; it simply upheld the master's legally untenable determination that Munsey has "no equitable right of redemption in the mortgaged property ... based upon the fact that he is not a junior lienholder." (Appx. p. 97.)

And whether Munsey has an equitable right of redemption is most certainly an important issue. The existence of the equitable right of redemption is the fundamental principle at the root of all foreclosure law in South Carolina. See Lewis, 351 S.C. at 172 ("we conclude it would be inequitable to enforce the forfeiture provision without first allowing the purchaser an opportunity to redeem the installment contract by paying the entire purchase price"); Bartles v. Livingston, 282 S.C. 448, 455-56, 319 S.E.2d 707 (Ct. App. 1984) (discussing evolution of foreclosure as method providing final opportunity to exercise equity of redemption); S.C. Code Ann. § 29-3-10.

As the purchaser under an installment land sale contract, Munsey equitably occupies the position of landowner with regard to the property here at issue. Brooks v. Council of Co-Owners of Stone Throw Horizontal Property Regime I, 315 S.C. 474, 476, 445 S.E.2d 630 (1994); Dempsey v. Huskey, 224 S.C. 536, 541, 80 S.E.2d 199 (1954). The master, and now the Court of Appeals, have denied Munsey the most basic right that someone in his position has in foreclosure proceedings, regardless of whether the person is in default or not: the right to exercise the equity of redemption. Bartles, 282 S.C. at 455-56. Recognition of the equitable right of redemption is the very essence of foreclosure law in this state. Id.; S.C. Code Ann. § 29-3-10.

At the very least, Munsey is entitled to a remand to assess the Lewis factors and determine whether he holds this equitable right.

II. Munsey put forth a satisfactory explanation for why he did not serve an answer earlier than he did.

Munsey is not, as Otto and U.S. Bank would have the Court believe, contending that any explanation for a default would be sufficient under the first prong of the analysis under Sundown Operating Co., Inc. v. Intedge Industries, Inc., 383 S.C. 601, 607-08, 681 S.E.2d 885 (2009). Munsey, rather, has a good explanation for his default.

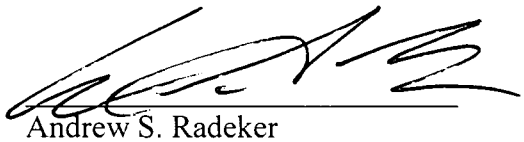
While Otto and U.S. Bank make much of differences between the level of communication about Otto's action and U.S. Bank's action, an examination of the situation as a whole shows that Munsey was working with Otto to resolve the financial problem that occasioned the existence of U.S. Bank's foreclosure action in the first place. If, through cooperation and resolution by settlement with Otto, the default in payments under U.S. Bank's note and mortgage had been cured – Munsey's principal objective in his negotiations with Otto – U.S. Bank's cause of action for foreclosure would cease to exist, and it almost certainly would have dismissed its foreclosure action.

Further, it is always possible for this Court to reach different determinations as to whether to set aside Munsey's default with regard to Otto's action and U.S. Bank's action. Despite consolidation, consolidated actions retain their separate identities. Sarvghad v. Sitton Buick Co., 312 S.C. 429, 440 S.E.2d 894, 895 (Ct. App. 1994).

What is rather startling about U.S. Bank and Otto's return, though, is their invocation of Rule 6(b), SCRCP. Otto's counsel agreed in writing to an indefinite extension of Munsey's time to plead in that action. (Appx. pp. 460-61.) Otto's counsel then broke his word. Otto argues that Otto's lawyer's dishonesty should be rewarded, relying on the technicality of the length of the agreed extension. This Court should not countenance such an underhanded tactic.

WHEREFORE, the Petitioner prays for an order granting a writ of certiorari to review the final decision of the Court of Appeals in this case.

Respectfully submitted,



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PROOF OF SERVICE

I certify that I served the foregoing reply to return to petition for writ of certiorari by depositing a copy of it on the date shown below in the United States Mail, postage prepaid, addressed as follows:

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