

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

MIKELL R. SCARBOROUGH, MASTER IN EQUITY

Case No.: 2016-001201

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JUL 31 2018

SC Court of Appeals

Harold Simmons, Jr.....Appellant,

v.

Allen Livingston.....Respondent.

INITIAL BRIEF OF RESPONDENT

TABLE OF CONTENTS

Table of Authorities.....	3
Statement of Issues on Appeal.....	3
Statement of the Case.....	4
Arguments.....	5-6
I. THE MASTER IN EQUITY HEARD THE TESTIMONY AND EVIDENCE OF THE CASE, AND AS THE TRIER OF FACT, PROPERLY RULED IN FAVOR OF PLAINTIFF.	
II. THE MASTER IN EQUITY DID NOT ERR IN NOT HOLDING A JURY TRIAL.	
III. THE MASTER IN EQUITY DID NOT ERR IN UPHOLDING THE ORDER OF JUDGE NICHOLSON.	
Conclusion.....	6-7

TABLE OF AUTHORITIES

CASES

Townes Associates, Ltd. v. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (SC 1976)
..... 5, 6

Tiger Inc. v Fisher Agro Inc. 301 S.C. 229, 391 S.E.2d 538 (1989)
..... 5

Buffington v TOE Enterprises 383 S.C. 388, 680 S.E.2d 289 (SC 2009)
..... 5

STATEMENT OF ISSUES ON APPEAL

1. THE MASTER IN EQUITY HEARD THE TESTIMONY AND EVIDENCE OF THE CASE, AND AS THE TRIER OF FACT, PROPERLY RULED IN FAVOR OF PLAINTIFF.
2. THE MASTER IN EQUITY DID NOT ERR IN NOT HOLDING A JURY TRIAL.
3. THE MASTER IN EQUITY DID NOT ERR IN UPHOLDING THE ORDER OF JUDGE NICHOLSON.

STATEMENT OF THE CASE

This Case is the foreclosure of an installment sales contract on property located in Charleston County, South Carolina.

For background purposes, Honorable J.C. Nicholson, Jr. entered an Order in a case involving the same parties (2010-CP-10-8027) in which he ruled that the Lease to Buy Agreement between Respondent and Appellant was to be considered an installment sales contract setting payments to be \$500.00 and establishing the balance due, giving credit for all payments made, at \$37,460.00. That Order was appealed to the South Carolina Court of Appeals and that appeal was dismissed making Judge Nicholson's Order the final order in that case.

The Respondent failed to make the monthly payments required under Judge Nicholson's Order and the Respondent brought an action to foreclose the Installment Sales Contract on March 11, 2014.

The Respondent did file an answer requesting a jury trial but the claims of Respondent entitling him to a jury trial were stricken and no appeal of that Order was filed. With all claims stricken, the only issue remaining was foreclosure, which is a matter in equity, not entitling Appellant to a jury trial.

The trial took place on December 17, 2014, and Judge Scarborough, Charleston County Master in Equity, issued an Order dated December 2, 2015, Nun Pro Tunc to December 31, 2014, and thereafter, a second hearing on April 25, 2016, issued an Order of Foreclosure and Sale dated May 6, 2016.

The Respondent participated, with counsel, in all hearings before Judge Scarborough.

ARGUMENTS

I. THE MASTER IN EQUITY HEARD THE TESTIMONY AND EVIDENCE OF THE CASE, AND AS THE TRIER OF FACT, PROPERLY RULED IN FAVOR OF PLAINTIFF/RESPONDENT.

This case is an action in equity seeking foreclosure of an installment sales contract.

On appeal from an equitable action, an Appellate Court may find facts in accordance with its own view of the evidence. Townes Associates, Ltd. v. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (SC 1976). While this standard permits a broad scope of review, an Appellate Court will not disregard the findings of the trial court, which saw and heard the witnesses and was in a better position to evaluate their credibility.

Tiger Inc. v Fisher Agro Inc. 301 S.C. 229, 391 S.E.2d 538 (1989); Buffington v TOE Enterprises 383 S.C. 388, 680 S.E.2d 289 (SC 2009).

In the case at bar, the court found that the Appellant/Defendant through his own testimony and admission made no payments on the installment sales contract since the dismissal of the appeal in the first case filed December 3, 1016. The Court further found that no reimbursement for taxes were made either. Further, the Master in Equity gave the Appellant the opportunity to reinstate the contract in his August 2, 1015 Order but Appellant failed to reinstate resulting in the May 6, 2016 Order of Foreclosure and Sale.

II. DID THE MASTER IN EQUITY ERR IN NOT HOLDING A JURY TRIAL?

Appellant initially appeared pro se. His legal claims were dismissed by Order filed August 11, 2014, leaving only the equitable action of foreclosure, which is a non-jury claim.

The Appellant, with counsel, appeared at both hearings on December 17, 2014, and April 25, 2016, and participated having never requested a jury trial.

It is well settled that issues not raised in the lower court cannot be raised for the first time at the appellate level.

III. DID THE MASTER IN EQUITY ERR IN UPHOLDING THE ORDER OF JUDGE NICHOLSON?

In the case at bar, Appellant contends that the Master in Equity did not take all payments into account. However, the Master had to adhere to the Final Order in the previous case (2010-CP-10-8027) by Judge Nicholson establishing the balance of the outstanding debt and the future monthly payments.

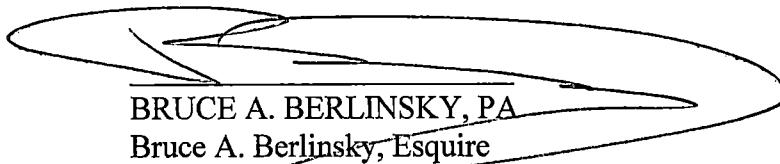
Once the Order of Judge Nicholson became the final order, the Master in Equity in the current case is not free to go behind Judge Nicholson's Order.

CONCLUSION

In an action in equity, an appellate court may find facts in accordance with its own view of the evidence Townes Associates, Ltd. v. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976). By Appellant's own testimony, he has not made any payments on the installment sales contract since Judge Nicholson's appeal was dismissed by Order filed December 3, 2013. Further, Appellant participated in two hearings before the Master in Equity effectively waiving his request for jury trial by not raising the issue at the trial level and by fact that equitable matters are non-jury. Finally, all of Appellant's arguments at the lower level were seeking to go behind the final order of Judge Nicholson. For the

aforementioned reasons stated, the Court should affirm the judgment and orders of the lower court and allow for such further relief deemed appropriate.

Respectfully submitted,

A handwritten signature in black ink, which appears to be "Bruce A. Berlinsky", is enclosed within a large, hand-drawn oval. The signature is written in a cursive style.

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Bruce A. Berlinsky, Esquire
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Attorney for Respondent

July 30th, 2018

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CERTIFICATION

The undersigned certifies that this Designation contains no matters which are irrelevant to the Appeal.

Respectfully submitted,



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July 30th, 2018

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PROOF OF SERVICE

I, Betsy Scott, legal assistant to Bruce A. Berlinsky, Esquire, do hereby certify that I have this date mailed a true and correct copy of the foregoing and **INITIAL BRIEF OF RESPONDENT and DESIGNATION OF MATTERS TO BE INCLUDED IN THE RECORD ON APPEAL**, postage prepaid, and deposited with the United States Postal Service as follows:

Harold Simmons, Jr.
3042 North Carolina Ave.
North Charleston, SC 29405
PRO SE

Dated this 30th day of July, 2018.


Betsy Scott

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July 30, 2018

VIA FEDEX

South Carolina Court of Appeals
Honorable Jenny Abbott Kitchings
Clerk of Court
1220 Santee Street
Columbia, SC 29201

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SC Court of Appeals

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Case No.: 2016-001201

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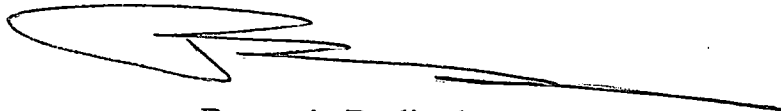
1. Initial Brief of Respondent
2. Designation of Matters to be Included in the Record on Appeal
3. Proof of Service for each of the above.

Please return the filed copies to us in the enclosed, postage paid envelope.

If you need anything further, please do not hesitate to contact me.

With kind regards, I am

Sincerely,



Bruce A. Berlinsky

BAB/bs

Enclosures

CC: Harold Simmons, Jr.
3042 North Carolina Ave.
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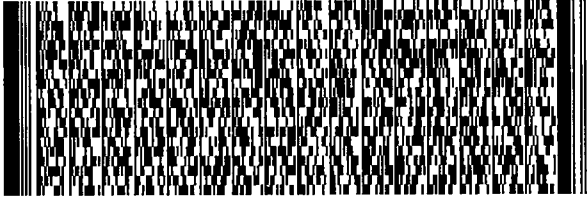
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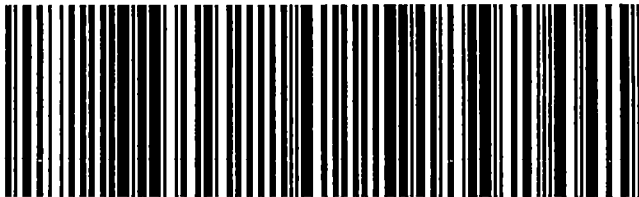
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