IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

James O. Spence, Master-in-Equity

Appellate Case No.: 2016-001882

The Mill Homeowner's Association, Inc..... Plaintiff,

v.

Randall W. Cofer and Corey C. Cofer..... Respondents,

Regime Solutions LLC, Third-Party Bidder,..... Appellant.

FINAL BRIEF OF RESPONDENTS

BY: _____

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II. DID THE COURT ERR IN DETERMINING THAT THERE WERE IRREGULARITIES IN THE SALE?

STATEMENT OF THE CASE

This appeal arises from the trial court's grant of Respondent's Motion to Vacate Sale pursuant to Rule 60(b)(1), filed May 19, 2015 and amended to include a motion under Rule 60(b)(1) on July 17, 2015 to add as a party Network Solutions, LLC. On April 2, 2014 Plaintiff, the Mill's Homeowner's Association, Inc., filed a complaint for foreclosure of an HOA lien against 113 Millhaven Lane, Lexington, SC 29072. (R.p. 49; Compl.). The case was referred to the Master-in-Equity, who issued a decree of foreclosure. (R.p. 10; Judgment of Foreclosure). The Master's Deed to Regime was filed on March 9, 2015 in the Lexington County R.O.D. at Book 17498, Page 335. (R.p. 275); Master's Deed). Thereafter Regime sought to be put in possession of the property and filed a Rule to Show Cause on April 1, 2015. (R.p. 63: RTSC). Respondents' Motion to Vacate Sale and subsequent Motion to Set Aside Judgment followed. (R.p. 66; Motion, May 19, 2015; R.p. 77; Motion, July 17, 2015). Respondents' motions were heard on September 14, 2015 by the Honorable James O. Spence, Master-in-Equity for Lexington County and on February 17, 2016 Judge Spence filed and Order granting Respondents' motions. (R.p. 21; Tr.; Order Feb. 17, 2016). Appellants filed a Motion to Alter or Amend which was clocked-in on March 7, 2016 and decided by briefs filed with the court. (R.p. 98; Motion Brief-Regime Solutions; R. p. 105; Motion Brief-Cofers). Judge Spence ruled

on the Motion to Reconsider in an Order filed on July 8, 2016 and received by Regime on August 25, 2016. (R.p. 46; Order, July 8, 2016; Notice of Hearing). Appellants filed the instant appeal by Notice of Appeal dated September 9, 2016. (R.p.114;Notice of Appeal).

STATEMENT OF FACTS

Defendants Randall and Corey Cofer purchased their home located at 113 Mill Haven Lane, Lexington, South Carolina on July 31, 2006. The Cofer's purchase price was $236,388.00. (R.p. 193). As of August 13, 2015, the remaining balance of Defendants' mortgage was $124,799.32. (R. p. 23). This leaves approximately $111,000.00 of equity in the home earned by Defendants since purchasing the property in 2006. The Lexington County tax assessor's office list the "taxable land" and "taxable building" for 2015 as $30,000 and $193,857, respectively. (R.p. 195). This property was subject to homeowner's association dues, enforced by the Plaintiff in this action, The Mill Homeowner's Association, Inc. The yearly dues at all times relevant to this action were for $517.00. (R. p. 184). In the beginning of 2013, Defendants Randall and Corey Cofer failed to make the requisite $517.00 payment for homeowner's association dues and a lien was placed on their home shortly thereafter. In 2014, foreclosure was sought by Plaintiff.

The foreclosure hearing was scheduled initially for November 4, 2014, and then rescheduled for January 26, 2015. The Cofers claim that they never received the two Notice of Hearings, dated September 22, 2014 and December 19, 2014, respectively. (R. p. 68). Plaintiff has provided the Court with properly executed proof of service by US mail for both Notices.

At the January 26, 2015 foreclosure hearing, the charges sought against the Defendants were itemized by Plaintiff and a total debt of $4,619.84 was presented to the Master in Equity. (R. p. 188). The itemized debt asserted against the Defendants by Plaintiff is as follows:

a. *Principal due*.....*$1247.30*
b. *Interest from 1/1/13 through 1/15/15 at 18% per annum*.....*$294.74*
c. *Late Fees and Other Charges*.....*$460.00*
d. *Costs of collection prior to hearing(service, filing, etc.)*.....*$542.80*
e. *Attorney's fees*.....*$2075.00*

A Judgment of Foreclosure and Sale for the total debt of $4,619.84 was awarded on January 29, 2015. The Cofers argue that they did not receive notice of the sale until the afternoon of Friday, February 27, 2015, wherein they immediately attempted to contact Plaintiff's counsel regarding the impending sale, but counsel could not be reached. (R.p. 68). Plaintiff again has provided the Court with a properly executed proof of service demonstrating the Notice of Sale was sent via US mail to the Cofer's home address. The Cofers' property was sold the following Monday morning, March 2, 2014, to Regime Solutions, LLC for the sum of $4,857.00.

STANDARD OF REVIEW

The review of a judicial foreclosure sale is equitable in nature and is left to the discretion of the trial court. *Fed. Nat'l Mortgage Ass'n v. Brooks*, 304 S.C. 506, 512, 405 S.E.2d 604, 607 (Ct. app. 1001) (citing Spillers v. Clay, 233 S.C. 99, 102, 103 S.E.2d 759, 760 (1958)). Whether a judicial sale should be set aside is a matter within the discretion of the trial court. *Investors Sav. Bank v. Phelps*, 397 S.E.2d 780, 303 S.C. 15 (S.C. App., 1990). "An abuse of discretion occurs when the conclusions of the circuit court are either controlled by an error of law or are based on unsupported factual conclusions." *Carson v. CSX Transp., Inc.*, 400 S.C. 221, 229, 734 S.E.2d 148, 152 (2012).

ARGUMENT I

The Trial Court was correct in its application of South Carolina law in relation to bid amounts and setting aside sales. A judicial sale can be set aside for two reasons: (1) if the inadequacy of the price is so gross as to shock the conscience of the court; or (2) if the price is inadequate and this inadequacy is accompanied by other circumstances that warrant the interference of the court. *Wells Fargo Bank, NA v. Turner*, 378 S.C. 147. 662 S.E.2d 424 (S.C. App. 2008).

"South Carolina has not established a bright line rule for what percentage the sale value must be with respect to the actual value in order to shock the conscience of the court." Bloody *Point Prop. Owners Ass'n, Inc. v. Ashton*, 410 S.C. 62, 71, 762 S.E.2d 729, 734 (Ct. App. 2014); citing *E. Sav. Bank, FSB v. Sanders*, 373 S.C. 349, 359, 644 S.E.2d 802, 807 (Ct. App. 2007). "However, a search of South Carolina jurisprudence reveals only when judicial sales are for less than ten percent of a property's actual value, have our courts consistently held the discrepancy to shock conscience of the court." *Id.*

The key issue in this case is how to calculate the bid price as a percentage of the property value.

Respondents' position is based on *Federal Nat. Mortg. Ass'n* v. *Brooks,* 405 S.E.2d 604 (S.C. App., 1991) and the Restatement of the Law Third Property Mortgages (1996). Both support Respondents' position.

In the *Brooks* case, the Special Referee's initial Order setting aside the judicial sale found the third-party purchaser's $875 bid to constitute gross inadequacy as would shock the conscience of the court and also found additional circumstances allowing for the sale to be set aside. *Id.* at page 605.

The Court of Appeals determined the inadequacy of the judicial sale price by using a "real estate equity v. sale price" method of analysis. *Id.* at 606. The value of the foreclosed FNMA property was determined to be $52,500. *Id.* at 607. The balance of the remaining first mortgage was $24,720.00. *Id.* at 605. This left $27,780.00 of equity in the property. Even though the Appellant argued that the outstanding mortgage, *if added,* would raise his sale price to 49% of the property value, the Court of Appeals affirmed the Special Referee's decision, and stated as follows:

"It cannot be gainsaid that the payment by Brooks of $375 for equity over $27,000 was adequate, albeit, it is not so grossly inadequate as to shock the conscience of the court." *Id.* at 605-606.

The Court of Appeals found that the sale price of $875 was not adequate when compared to the established equity in the property. The Special Referee and the Court of Appeals did not add the mortgage balance to the sale price before determining the adequacy of the bid. *Id.* They instead *subtracted* the mortgage balance from the property value and evaluated the sale on the basis of the equity the third-party buyer was receiving. *Id.* at 606. The court's decision in the *Brooks* case is consistent with the Respondents' position.

Although foreclosure law has changed, two things have been consistent in foreclosure cases. One, the lender is entitled to repayment of the mortgage debt, but no more. The lender does not have a right to claim any surplus or equity in the property. Two, the owner's home and equity is guarded. Raymond J. Werner & Robert Kratovil, Modern Mortgage Law and Practice, 32, (Prentice Hall PTR, 2d, 1981). As the Trial Court set out in pages 5 and 6 of the Order of the court dated February 17, 2016, the courts in this State have a policy of protecting the home equity of homeowners, i.e. theories of liability of residential housing, equity in contracts for deeds and installment sales contracts, from judgment creditors and equity protection from tax sales. These general principles of foreclosure law favor Respondents' position as to calculating bid figures.

In this case, the question is whether the Respondents' equity should be protected from a stranger to the transaction, a third party bidder, in a sale subject to senior lien. It is important to know in this case, the third-party bidder was not personally liable for the senior lien because Respondents' property was sold "subject to a first lien mortgage". Also, there is no evidence that the Appellant paid the first mortgage or will pay the first mortgage. Why should the court add the mortgage balance to Appellant's definite obligation of $4,857.00 if there is no certainty as to whether this will ever be paid by Appellant?

An additional reason to support Respondents' position as to calculating the bid price is the nature of this dispute. In *FNMA*, the matter arose from a lawsuit by a mortgage company not mortgagors, such as the Respondents. *FNMA* was not subject to a circumstance such as the Respondents where the decision of the court would determine whether they retain their house or not. This difference is substantial. In the Brooks case, the equity in dispute was approximately $26,000.00 and in the Respondents' case it is the difference between $111,000 and $4,857.00. These differences justify the court in ruling that evidence in this case justifies setting aside the judicial sale solely on the inadequacy of the price shocking the conscious of the court without considering any warranting circumstances.

An additional basis supporting the Appellant's position is that this matter is equitable in nature and Respondents' Motion to Set Aside was addressed to the discretion of the court. *Investors Sav. Bank v. Phelps*, 397 S.E.2d 780, 303 S.C. 15 (S.C. App., 1990). The Court of Appeals agreed that "it would be most inequitable under the facts of this case to allow *Brooks* to be unjustly enriched at the expense of FNMA". As cited in the Trial Court's Order of February 17, 2016, In re Krohn, it states, "at its core, is a case about inequity on the one hand and unjust

enrichment on the other. When these factors are present, our court has been available to give relief so long as there is no statutory prohibition." Id. The Arizona Court further states:

"There are, of course, those waiting for opportunities based on individual misfortune, and we believe this makes it even more important that courts of equity are open to assure debtors receive not only procedural but fundamental fairness. Windfall profits, like those reaped by bidders paying grossly inadequate prices at foreclosure sales, do not serve the public interest and do no more than legally enrich speculators." *Id.* at 779.

This question was briefly addressed in the holding reached by the Court of Appeals in *FNMA v. Brooks.* There, the court concluded that "it would be most inequitable under the facts of this case to allow Brooks to be *unjustly enriched at the expense of FNMA." FNMA,* 762 S.E.2d at 607(emphasis added).

ARGUMENT II

Appellant contends that there are no cases that calculate adequacy of a sales price for a "shock the conscious" analysis in terms of equity. This is incorrect. The *FNMA* and the Restatement of the Law Third Property Mortgages (1996) are both authorities for Respondents' theory.

Appellant further contends that equity is simply a quantity that is unknowable by the court, the foreclosing party or the innocent purchaser for value. First of all, there are risks in buying property at a foreclosure sale and the buyer should use due diligence in learning as much as possible about the property and the process prior to placing the bid. A prudent bidder interested in buying property at foreclosure sale will spend the time and money necessary to conduct, to the extent possible, the same investigations conducted by buyers in traditional real estate transactions. Foreclosure sales may call for the clearest application of caveat emptor. Citing Clifford P. Parson and C. Joseph Roof, Prudent Bidding at a Foreclosure Sale, South Carolina Lawyer, January 2009.

Appellant contends that tax values per county records are not appropriate for determining equity. This court has held otherwise. Citing In re Barr, 170 B.R. 772 (Bank E.D.N.Y. 1994) held that ad valorem taxes could be considered as affecting value. *Arrow Bonding Co. v. Warren, 399 S.C. 603, 732 S.E.2d 622* (S.C. 2012).

Furthermore, this court has held "The price paid for property at an actual, voluntary and bona fide sale thereof is presumptive evidence of the property's value."' *South Carolina State Highway Dep't v. Estate of League*, 251 S.C. 368, 162 S.E.2d 532 (1968); *Investors Sav Bank v. Phelps*, 303 S.C. 15, 397 S.E.2d 780 (S.C. App. 1980).

The evidence in this case shows that we have the original purchase price of Respondents' property and the County tax valuation which are both admissible evidence based on the above cited cases. The payoff on Respondents' mortgage was placed into evidence. A mathematical calculation easily shows the equity in Respondents' home by subtracting from the original purchase price the mortgage balance to give you the equity that Respondents' had in their home at the time of the foreclosure sale. These figures are clearly in the record and are certain as to their amounts.

ARGUMENT III

Respondents argue that the bid figure of $4,857.00 shows only 4.35% of the equity value in the Respondents' home. Respondents believe that this percentage is way below the 10% bright line test of this court so as to constitute a gross inadequacy of sales proceeds that shocks the conscious of the court; on this basis alone warranting vacating of the sale. Also, the failure of notice of hearing issue, when coupled with the bid amount issue justified the sale to be vacated. See also 27 *SC Jurisprudence* (1996) Mortgages; Restatement of Property; *Mortgages* 3d Ed. (1996) Section 8.3(c) Adequacy of Foreclosure Sale Price coupled with other defects; 14

ALR Mortgages Section 529 and 60 *CJS Mortgages* Section 864 and case law below. *Poole v. Jefferson Standard Life Ins. Co.*, 174 S.C. 150, 177 S.E. 24 (S.C. 1934)

In the *Poole* case, the court set aside the foreclosure sale with the following circumstances. The premises being foreclosed in was $5,000 and the bid was $500. The circumstances around the foreclosure sale dealt with the stenographer's failure to provide the Master with additional bid information. There was no irregularity in the proceedings involving the foreclosure public auction sale or any malfeasance involving the conduct of any officer in making the sale. It was solely the unintentional act of the Master's aide. In the *Poole* case, citing *Farr v. Gilreath*, 23 S.C. 502, "It is the policy of the law to sustain judicial sales when it can be done *without violating principle or doing injustice*" and the court also said that "the word which we have italicized make it plain that in proper cases the court will set aside a judicial sale."

In comparison with the *Poole* case, Respondents' case has a disputed issue by the Respondents as to whether they actually received notice of two hearings even though the Appellant had complied with the statute as to service. That dispute is serious, if not more serious, than the allegation of circumstances in *Poole*. Furthermore, in the Poole case the bid figure was 10% of the property value and the bid figure in this case was 4.35% of the equity based on the equity figure of approximately $111,000.00.

Respondents believe that the *Poole* case is precedent for showing the warranted circumstances exist in Respondents' case.

ARGUMENT IV

Under South Carolina law, to claim the status of a bona fide purchaser, a party must show: "(I) he has actually paid in full the purchase money ...; (2) he purchased and acquired the legal title, or the best right to it; and (3) he purchased bona fide, i.e. in good faith and with

integrity of dealing, without notice of a lien or defect." *Spence v. Spence*, 368 S.C. 106, 117, 628 S.E.2d 869, 874-75 (2006).

There are two basic forms of notice by which a purchaser may be charged with knowledge of the rights of another in real property; actual notice and constructive/inquiry notice *Id* at 118, 628 S.E.2d 875.

Constructive notice, under South Carolina law, is a legal inference imputed to a person whose knowledge of facts is sufficient to put him on inquiry and, if these facts were pursued with due diligence, they would lead to other undisclosed facts. Id. at 199, 628 S.E.2d 876. In the context of real estate transaction, constructive or inquiry notice "is grounded in an examination of the public record because it is the proper recording of documents asserting an interest or claim in real property which gives constructive notice to the world." Id. at 119-120, 628 S.E.2d 876. The South Carolina Supreme Court has been "most exacting in determining what actions satisfy the requirements of inquiry notice .... [having] denied subsequent purchasers comfort under the umbrella of a bona fide purchaser when the exercise of prudence would have avoided the difficulty." Id. at 121, 628 S.E.2d 876.

In re Krohn, 52 P.3d 780, which was cited in the Trial Court's Order, the Arizona court states the obligation of a bona fide purchaser. Bidders are charged with the knowledge that some difficulty in dealings exists, else a property would not be set for public auction. Id. The rule of caveat emptor applies, and purchasers at such sales have already assumed the risk that some unknown procedural error may arise. Id. "Such bidders can reasonably expect to get bargains at the expense of already troubled debtors." Id. "Knowledgeable purchasers can reasonably evaluate the fair market value of a property to make an appropriate bid that is not grossly inadequate.

Appellant is on notice of both the shock the conscience case law and the filed pleadings and Order in the case, all of record before the Appellant bid. Appellant had record notice of the senior lien

on the property as well as record notice of the lien being foreclosed. Appellant could have determined the actual debt owed to the Homeowners' Association by looking at the fees. The inquiries notice obligation of the Appellant would make its bid subject to what would have been revealed by a public title examination of the property. The Appellant would have known the original purchase price of the property by the Respondents as well as the original mortgage balance and the length of the time the mortgage had been placed against the Respondents' property and should have taken further inquiry steps to determine if the bid figure would be invalid.

CONCLUSION

Vacating the sale should be upheld. First, the bid price of $4,857 for the $111,588.68 of equity value established by the Respondents only represents 4.35% of the value of the property. This is well below the established 10% threshold needed to constitute a gross inadequacy of sale proceeds that shocks the conscience of this Court; on this basis alone, vacating the sale is warranted. Secondly, while service by Plaintiff for all notices of foreclosure hearing and public sale were proper, the failure of delivery issues constitute "slight irregularities" and "additional circumstances", that then coupled with the inadequate bid price, create a circumstance that allow for the sale to be vacated.

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CERTIFICATE OF COUNSEL

I hereby certify that this Final Brief of Respondent complies with Rule 211(b) of the South Carolina Appellate Court Rules.

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