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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Joseph M. Strickland, Master-in-Equity

Appellate Case No. 2018-001238

Winrose Homeowners' Association, Inc. and Regime Solutions, LLC, ...Respondents,

v.

Devery A. Hale and Tina T. Hale, ...Petitioners,

RESPONDENT WINROSE HOMEOWNERS' ASSOCIATION RETURN TO PETITION FOR A WRIT OF CERTIORARI

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TABLE OF AUTHORITIES

CASES

QUESTIONS PRESENTED

I. Did the Court of Appeals err in adopting the debt method, rather than the equity method, to determine the adequacy of the sale price at a foreclosure sale in which a senior lien is not extinguished?

II. Did the Court of Appeals err in finding Petitioners' equitable arguments were unpreserved?

STATEMENT OF THE CASE

Respondent Winrose Homeowners' Association, Inc. ("HOA") filed suit against Appellants Tina T. Hale and Devery A. Hale ("Hales") on February 11, 2014 seeking foreclosure of an unpaid homeowners' association lien. (App. pp. 100-101). The Hales failed to make any appearance and a default judgment was entered in favor of the HOA on July 21, 2014. (App. pp 90-95). The Foreclosure Sale was held on August 4, 2014. (App. p. 109). Respondent Regime Solutions, LLC ("Regime Solutions") was the winning bidder with a bid of $3,036.00. Id. A deed was issued to Regime Solutions after the sale was confirmed on October 17, 2014. Id.

On November 4, 2014 the Hales filed a Motion to Vacate Sale alleging the sale price was grossly inadequate. (App. pp. 113-116). In support of the motion, Tina Hale submitted an affidavit admitting she received the notice of the foreclosure suit and that she "put [the papers] in a drawer and forgot about them." (App. p. 133). The Hales also presented evidence that the subject property was currently worth $128,000 and the outstanding mortgage balance was $66,004.00. (App. pp. 114-130, 132). The Master in Equity denied the Hales' motion on April 21, 2015. (App. pp 96-98).

An appeal followed in which the Court of Appeals upheld the Master's denial of the Hales' motion. (App. pp. 1-11). The Majority found "the Debt Method is the proper method for considering a senior encumbrance." (App. p. 4). The Majority also noted that the court will not set aside a judicial sale aside from cogent reasons. Id. (citing E. Sav. Bank, FSB v. Sanders, 373

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S.C. 349, 355, 644 S.E.2d 802, 805 (Ct. App. 2007)). The Majority further found that the effective bid under the Debt Method was 53.94% of the market value. (App. p. 4). On July 3, 2018 the Hales served the Petition for Writ of Certiorari on both Respondents.

ARGUMENTS

I. THE COURT OF APPEALS CORRECTLY HELD THE DEBT METHOD WAS THE PROPER METHOD FOR DETERMINING WHETHER A SALE PRICE SHOCKS THE CONSCIENCE.

"A judicial sale should not be set aside except for cogent reasons. The purpose of the law and of the proceedings in which a sale has been decreed is that it shall be final." E. Sav. Bank, FSB v. Sanders, 373 S.C. 349, 355, 644 S.E.2d 802, 805 (Ct. App. 2007) (quoting Spillers v. Clay, 233 S.C. 99, 104, 103 S.E.2d 759, 761-62 (1958)). "[I]t is the long-established policy in South Carolina that '[t]he courts should be particularly jealous of the integrity of judicial sales.'" Ex parte Johnson, 371 S.C. 614, 618, 640 S.E.2d 887, 890 (Ct. App. 2006) (citing In re Wilson, 141 S.C. 60, 63, 139 S.E. 171, 172 (1927)). "[A]ny conduct on the part of those actively engaged in the selling or bidding [at a judicial sale] that tends to prevent a fair, free, open sale, or stifle or suppress free competition among bidders, is contrary to public policy [.]" Id. (citing Ex parte Keller, 185 S.C. 283, 291, 194 S.E. 15, 19 (1937)).

A. The Court of Appeals Correctly Calculated the Purchase Price by Adding the Outstanding Senior Encumbrances to the Foreclosure Sale Bid.

"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. 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." E. Sav. Bank, FSB at 359, 644 S.E.2d at 807 (emphasis added).

Where a buyer takes property at a judicial sale subject to senior liens, the court must also consider the amount of those senior encumbrances "in determining the true value of the properties to the buyer at [the judicial] sale." Arrow Bonding Co. v. Warren, 399 S.C. 603, 607, 732 S.E.2d 622, 624 (2012). The Supreme Court specifically held that Wells Fargo Bank, N.A. v. Turner, 378 S.C. 147, 662 S.E.2d 424 (2008) and Investors Sav. Bank v. Phelps, 303 S.C. 15, 397 S.E.2d 780 (Ct. App. 1990) were inapplicable in considering a sale in execution of a judgment because in the former the mortgage foreclosure removes the encumbrance and in the latter case the "buyer takes the property subject to the mortgage as well as other liens." Id. The Court in Arrow Bonding unequivocally held that senior encumbrances must be part of the calculation. Id.

South Carolina's most recent appellate decision involving the sufficiency of the bid in a homeowners' association case can be found in Bloody Point Prop. Owners Ass'n, Inc. v. Ashton, 410 S.C. 62, 762 S.E.2d 729 (Ct. App. 2014). In their briefs before the Court of Appeals the Appellants cited Bloody Point in favor of their argument that senior mortgage should not be considered in determining adequacy of the bid in a homeowners' association foreclosure. (App. pp. 28-29). However, a review of the trial court proceedings in Bloody Point demonstrates the trial court did, in fact, add the bid price to the outstanding liens on the property to obtain the sale price of $11,593.20. (App. p. 44.). After realizing their reliance on Bloody Point was misplaced, Appellants now urge this Court to grant their petition of certiorari by arguing the Court of Appeals incorrectly relied on Bloody Point in adopting the Debt Method.

Just as the trial court reasoned in Bloody Point, a court must take senior encumbrances into consideration because the purchaser at sale must pay those senior encumbrances if it wants clear title to the property. Whether it assumes regular payments of the mortgage, pays the

outstanding balance immediately, or pays the balance at a subsequent transfer of the property, in order to exercise full ownership of the property it must clear those encumbrances.

At the January 2015 hearing Regime Solutions indicated it intended to pay off the senior mortgage if the Hales' motion was denied. (App. p. 144.) Nonetheless, the Hales' urge this court not to consider the senior encumbrances because Regime Solutions is not personally liable to pay the balance owed on the senior mortgage. However, this argument confuses an obligor's personal liability under a note and a property owner's interest in real property secured by a mortgage. As the new owner of the subject property, Regime Solutions must pay the senior encumbrances if it wants to maintain ownership of the property. Regime Solutions' lack of personal liability in no way diminishes the effect of the lien on the value of the real property in Regime Solutions' hands. The question before the court is whether the consideration given by Regime Solutions for the real property is so low that is shocks the conscience. The evidence before the trial court was that Regime Solutions took the property subject to a senior mortgage and that Regime Solutions intended to payoff that senior mortgage to clear title to the property. That consideration was clearly more than 10% of the fair market value of the property.

It is simply inequitable to require a purchaser at foreclosure sale to pay at least 10% of the fair market value of the property free and clear of any encumbrances and then also payoff the senior encumbrances with no credit for the diminution in value caused by those same encumbrances.

B. To Adopt the Equity Method Would Impermissibly Chill Bidding at Judicial Sales

The Equity Method would impermissibly discourage bidding at judicial sales because potential purchasers have virtually no way of knowing the amount of any mortgage, judgment, or other lien encumbering the property at the time of the sale. The Hales cite Regime

Solutions'representation that they "believe there is significant equity in the property and [it] stand[s] to profit from getting the property and paying the mortgage off" as evidence that potential purchasers could figure out the equity in the home. (App. p. 144.) The Hales further argue that potential bidders have access to the mortgage in the county's public records. However, this argument fails for a number of reasons. First, the public record would only indicate the amount of the senior mortgage, judgment, or other lien at the time the lien was filed. Because senior lien holders are not necessarily parties to the underlying foreclosure suit, they are often not named as parties. Therefore, the judgment of foreclosure and sale often does not disclose the current balance of any senior encumbrances. Next, there are a multitude of federal privacy acts that would forbid a senior lienholder from disclosing the payoff amount to an interested bidder prior to the sale.[1] In fact, because South Carolina does not require servicers to contemporaneously record assignments of mortgages, the public record may not even disclose to any interested bidder the current mortgage holder or servicer of the loan.

The Hales are essentially asking a potential bidder to either blindly guess as to the amount of equity in the property or convince the lender to violate federal law to provide that information. This process would not only impermissibly chill the bids at every foreclosure sale of a junior lien, it is impossible in practice.

II. APPELLANTS' EQUITABLE ARGUMENTS ARE NOT PROPERLY PRESERVED FOR APPELLATE REVIEW BECAUSE THEY WERE NOT RAISED TO THE TRIAL COURT

The Court of Appeals correctly found the "arguments regarding equitable maxims unpreserved because they did not properly raise them to the master and the master did not rule on them." (App. p. 9). "In order for an issue to be properly preserved for appeal, it must have been

[1] *See* Fair Debt Collection Practices Act, 15 U.S.C.A. § 1692c; Graham-Leach-Bliley Act 15 U.S.C.A. § 6801 et seq.

both raised to and ruled upon by the trial court." Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 372, 628 S.E.2d 902, 919 (Ct. App. 2006).

The Hales argue that the Court of Appeals erred in failing to take up their argumenst regarding five equitable maxims. (Pet. Br. pp. 13-14). However, the Hales never raised any equitable arguments in their Motion to Vacate. The only mention of equity in their entire argument was before the trial court in which they ask the court to "do equity where perhaps equity should be done." (App. p. 166). This mention was not sufficient to preserve those arguments for appeal.

A. Petitioners are not Entitled to Equity Because Equity Rewards the Diligent

"Equity rewards the diligent, not those who sleep on their rights." In re Houston, 409 B.R. 799, 811 (D.S.C. 2009). The Hales were personally served with the Summons and Complaint in this matter on February 14, 2014 but failed to make any response to the suit. The Hales also failed to appear at the final foreclosure hearing in August 2014. The Hales have provided no explanation for this failure to appear other than Tina Hale forgot about the lawsuit and stuck the paperwork in a drawer. (App. pp. 132-133). Essentially the Hales asked the trial court to save them from their own negligence and allow them to pay the debt over a year after the original sale. The principles of equity are not used to save a litigant from his own failure to protect his interests and should not be used to overturn a sale that followed all the statutory requirements.

CONCLUSION

For the reasons stated, this Court should deny Petitioner's Petition for a Writ of Certiorari.

Respectfully Submitted,

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PROOF OF SERVICE

I certify that I have served Respondent's Return to Petition for Certiorari on the following counsel by depositing a copy of it in the United States Mail, postage prepaid, on August 16, 2018:

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