

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

Habitat for Humanity of Horry County, Inc.,)
)
Plaintiff,)
)
vs.)
)
Candice A. Simmons; Waccamaw)
Regional Council of Governments d/b/a)
Waccamaw Home Consortium; Village of)
Dreams Homeowners Association, Inc.; SC)
Housing Corp.; and Bank of North Carolina,)
)
Defendants.)
)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2017-CP-26-05357

RECEIVED
AUG 27 2018
SC Court of Appeals

ORDER DENYING DEFENDANT SIMMONS'
MOTION FOR RELIEF FROM WRIT OF ASSISTANCE

This matter was before the Court on Monday, June 18, 2018, at 9:00 a.m. Present were: Douglas M. Zayicek, attorney for Plaintiff; Andrew s. Radeker, attorney for Defendant Simmons; and Robin K. Reibold, Court Reporter. Based on the argument of Counsel, and the Affidavits filed by Plaintiff, Defendant Simmons' Motion is DENIED.

The only matters before the Court were the two grounds specifically listed in Defendant Simmons' Motion: (1) misconduct of an adverse party; and (2) the judgment being void. Both of those issues related to the issuance of the Writ of Assistance. The Rule 60(b) grounds were stated: (1) in the Rule 60(b) Motion filed in Horry County Clerk's office, on May 9, 2018; (2) in Defendant Simmons' "Motion For Leave To Move For Relief From Writ Of Assistance Under Rule 60(b), SCRCPP, Or For Clarification That Such Leave Is Not Required" filed in the S.C. Court of Appeals on May 9, 2018 (Exhibit E); and (3) in the S.C. Court of Appeals' Order dated May 11, 2018.

Although Defendant Simmons' Counsel sent an email the afternoon of June 17, 2018, to the undersigned and Plaintiff's Counsel, stating Defendant Simmons' intent to make an oral motion, no written Motion was made (nor filing fee paid), the required 10-day notice prior to hearing any such motion was not given, Plaintiff's Counsel did not consent to those matters being heard, nor were those issues authorized to be heard in the Court of Appeals' Order dated May 11, 2018. Therefore, the Court did not consider, and makes no rulings on the matters raised in the email dated June 17, 2018, or any other issue outside of the two issues listed above.

I. NO SEPARATE HEARING IS REQUIRED TO OBTAIN A WRIT OF ASSISTANCE AGAINST A DEFENDANT IN POSSESSION.

Defendant Simmons' first argument is that the Writ of Assistance should be set aside because she was entitled to a separate hearing as to whether a Writ of Assistance should be issued against her. The Court disagrees.

A Defendant in a foreclosure action who is in possession of the premises has its rights adjudicated in the underlying foreclosure action and is not entitled to a separate hearing prior to the issuance of a Writ of Assistance. Defendant Simmons accepted service of the Summons & Complaint and went into default. The Court therefore had personal and subject matter jurisdiction as to Defendant Simmons.

Defendant Simmons' right of possession, as well as those who were in possession through Defendant Simmons, were extinguished by the foreclosure sale. Plaintiff's Complaint states Plaintiff was seeking to foreclose against Defendant Simmons, and to place the successful bidder at the foreclosure sale in possession of the mortgaged premises. (Complaint, pp. 9-10). The Special Referee's Report contains findings and conclusions saying the successful purchaser at the foreclosure sale would be put into possession of the mortgaged premises. (Special

Referee's Report, pp. 9-10). Defendant Simmons was in default in this action. More importantly, and even if Defendant Simmons were not in default, she had the full right and opportunity to be present at the foreclosure sale and could have been the successful purchaser if she so desired.

Rule 70, SCRPC, expressly states that when an order or judgment is for the delivery of possession, the party in whose favor it is entered is entitled to a writ of assistance upon application. The Special Referee's Report is such an order. Thus, Plaintiff in this case, as the successful bidder, was entitled to the Writ of Assistance. Rule 70 is very clear and ends Defendant Simmons' argument.

In addition, Rule 81, SCRPC states that where there is no provision made by statute or rule, the procedure shall be as heretofore existed in the South Carolina courts. Even if Rule 70 did not exist, the existing procedure in South Carolina is that no hearing for a writ of assistance is required as to a defendant in possession. The Court takes judicial notice that this has been the procedure in Horry County, and this procedure for obtaining a writ of assistance is announced at every sale by the Horry County Master-in-Equity.¹ The cases cited by Plaintiff unequivocally reject Defendant Simmons' argument that a defendant in possession is entitled to a separate hearing before a writ of assistance can issue. *See, e.g., Ex parte Jenkins*, 26 S.E. 686 (S.C. 1897) (*holding* "A writ of assistance is undoubtedly an appropriate process to issue from a court of equity to place a purchaser of mortgaged premises under its decree in possession after he has received the master's deed, *as against parties who are bound by the decree....*") (Italics in original); *Ex parte Qualls*, 71 S.C. 87 (S.C. 1905) (*holding* "The purchaser at a judicial sale has a

¹ Defendant Simmons alleges in her Motion that the practice in this State is otherwise. However, she offers no proof or evidence whatsoever to support that wholly-conclusory allegation.

clear right of possession of the property sold, *as against all parties to the proceedings in which the sale is made, and this right the court will summarily enforce by writ of assistance...*,” and “the court has full power to enforce its sale by putting the purchaser into possession of the premises *against the possession of the party to the suit, or anyone holding under such party...*”) (Emphasis added); *Griggs v. Griggs*, 31 S.E.2d 272 (S.C. 1944) (*holding* “The object of the writ [of assistance] and the consideration in which it is granted is that, when the court makes a sale and transfers the title, *it will take possession from a party whose rights have been determined by the suit in which the sale was ordered.*”) (Emphasis added.); *Pipkin v. Fletcher*, 162 S.E. 774 (S.C. 1932) (*holding* “Writ of assistance is appropriate process to issue to place purchaser of mortgaged premises in possession *as against parties bound by the decree.*”) (Emphasis added.) Finally, *Murchison v. Miller*, 42 S.E. 177 (S.C. 1902) expressly provides that a writ of assistance can be issued by a court in chambers; thus, no separate hearing is needed to take possession from a party in possession, who’s rights were decided in the underlying action, as in this case.

II. THE WRIT OF ASSISTANCE WAS PROPERLY SERVED ON DEFENDANT SIMMONS.

Defendant Simmons was served with the clocked Petition for Writ of Assistance, and the clocked, signed Writ of Assistance. Defendant Simmons’ second argument is that the Writ is void because she alleges she was denied due process by the way the writ was handled. Per Defendant Simmons’ Motion, she alleges she should have received a copy of the Writ in a different manner under Rule 5, SCRPC, to give her notice and opportunity to be heard. Defendant waived this argument at the hearing. In addition, the court disagrees.

Defendant Simmons is not an e-filer under the current e-filing system. Under the e-filing system, documents must be uploaded to the Court through the e-filing system. Because

Defendant is not an e-filer on the S.C. Judicial filing system, she does not get electronic notice when a document is uploaded into the system. Plaintiff offered proof the clocked Petition for Writ of Assistance, and clocked Writ of Assistance, were served on Defendant Simmons via regular mail, with a Certificate of Service. The fact that the Court signed the Writ of Assistance prior to Defendant receiving the original Petition is irrelevant, because as stated above Plaintiff as the successful bidder was entitled to the Writ of Assistance as to Defendant Simmons, without further hearing. It has long been held that “whatever doesn’t make any difference, doesn’t matter.” *See, e.g., McCall v. Finley*, 362 S.E.2d 26 (S.C. Ct. App. 1987).

Defendant Simmons did not provide any explanation whatsoever as to how she should have otherwise received notice under the current e-filing system, when Plaintiff was required to e-file the materials with the Court. Thus, the Court deems this ground abandoned by Defendant.

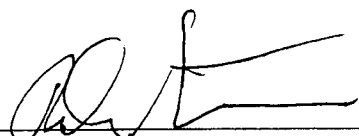
Even considering Defendant Simmons’ argument, Defendant Simmons was not denied due process because of the manner in which the documents were e-filed, executed, and served. It is axiomatic that to avoid the Writ of Assistance, Defendant Simmons’ remedy was to avoid the sale that lead to the Writ of Assistance.² Defendant Simmons does not deny having the opportunity to avoid the sale and thus the effect of the Writ of Assistance. The S.C. Court of Appeals issued three orders in response to Motions filed by Defendant Simmons. Defendant Simmons clearly had notice and the opportunity to be heard as to whether a writ of assistance would ultimately be issued in this case. In fact, Defendant Simmons was specifically told by the S.C. Court of Appeals exactly what to do to avoid a sale, and thus avoid the very Writ of Assistance she complains of. She chose not to follow those instructions.

² As stated above, the issuance of a writ of assistance is merely a perfunctory, ministerial act by the Court to carry out the terms of its sale.

In addition, under Rule 60(b), a judgment can only be attacked as void if it involves irregularities related to jurisdiction. Universal Benefits, Inc. v. McKinney, 561 S.E.2d 179 (S.C. Ct. App. 2002); Thomas & Howard Company, Inc. v. T.W. Graham and Co., et al, 457 S.E.2d 340 (S.C. 340). As stated above, the Court had personal jurisdiction over Defendant Simmons, and clearly has subject matter jurisdiction of foreclosures matters.

For the reasons stated above, Defendant Simmons' Motion is denied.

IT IS SO ORDERED.



HONORABLE RALPH P. STROMAN
SPECIAL REFEREE FOR Horry COUNTY

Conway, South Carolina.
Dated: 7-3-18.