

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM CHALESTON COUNTY

MASTERS-IN-EQUITY LAW COURT

Mikell R. Scarborough, Master-In-Equity law Judge

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SEP 04 2018

SC Court of Appeals

Case No. 2016-001201

Allen Livingston.....Respondent,

V.

Harold Simmons, Jr.....Appellant.

AMEND OF THE INTIAL BRIEF

Harold Simmons, Jr. Pro Se
3042 North Carolina Ave
North Charleston, SC 29405
(843) 480-8694

Bruce A. Berlinsky, P.A.
One Carriage Lane Bldg. F.
Charleston, SC 29407
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Attorney for Respondent

appeared throughout the litigation, both pro se and with counsel, and participated in all trials and hearings before the court never raising the issue until June 10, 2016, which is after all Orders, including the Final Order, in the matter had been issued.

I find that Defendant's appearance and participation in all trials and hearing before this court, without raising the issue of jury trial during said trials and/or hearings, results in a waiver of the same.

Thereafter, I took up Defendant's Motion to Alter or Amend Order.

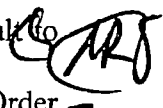
After consideration of the testimony and the evidence, this Court makes the following Findings of Fact and Conclusions of Law:

1. The Rule to Show Cause was properly before this court and concerned my Order. Defendant asserts that any Rule needed to be filed pursuant to Judge Nicholson's Order in the 2010 case. Judge Nicholson's Order dealt with the issue establishing that the Agreement between the parties amounted to an Installment Sales Contract, as opposed to a Lease with option to purchase. Judge Nicholson's Order also established the remaining debt and the monthly payments to be made. Judge Nicholson's Order was appealed but the appeal was dismissed and Judge Nicholson's Order became the final Order in the 2010 case. The Rule to Show Cause that came before me was based on noncompliance with the Order of this court filed April 8, 2015, and to establish the foreclosure of the Installment Sales Contract. Therefore, the Rule to Show Cause was properly filed with this Court.

2. I find that the amortization schedule submitted attempted to go behind Judge Nicholson's February 23, 2013, Order, which became the law of the case and this court is not free to go behind Judge Nicholson's Order. The amortization schedule



required by both Judge Nicholson's Order and by my Order was intended to illustrate the outstanding indebtedness established by Judge Nicholson's Order and reestablished by my April, 2015 Order. Based on the foregoing, Defendant failed to satisfy the requirements of providing a proper amortization schedule pursuant to the terms and conditions of both Judge Nicholson's Order and my Order.

3. I find that there is no justification to adjust the property tax claim as the obligation to pay property taxes ^{remains} was still due and Defendant did not go into default ^{to} make the claim "ripe" until he failed to pay pursuant to Judge Nicholson's Order resulting in the filing of this action. 

4. This action was not filed prematurely and the court does have jurisdiction to issue any and all Orders herein. The 2010 case heard by Judge Nicholson which established the agreement between the parties as an Installment Sales Contract and established the balance due and the monthly payments to be made going forward from Judge Nicholson's February 27, 2013, Order became the final Order in the case upon the dismissal and Order issued by the Court of Appeals filed December 3, 2013. The Defendant, by his own admission and testimony, indicated that he had not made any payments on the Installment Sales Contract other than the Four Thousand Five Hundred and 00/100 (\$4,500.00) Dollars for which he has been given due credit under my April 8, 2015 Order. Again, Defendant continues to argue that he has prepaid on the Installment Sales Contract. The fact that Defendant may have prepaid towards the total purchase price prior to Judge Nicholson's Order becoming final does not relieve Defendant from his monthly obligations. Mr. Simmons's own testimony was that he has not made any payments since the appeal was dismissed on December 3, 2013.

The Court being satisfied with its findings of fact and conclusions of law, it is the opinion that judgment should be entered thereon.

Therefore, it is hereby,

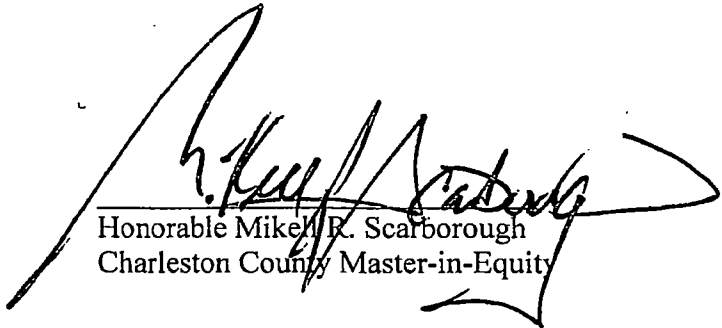
ORDERED, ADJUDGED AND DECREED that Defendant's Motion to Alter and Amend Order is hereby denied; and, it is further

ORDERED, ADJUDGED AND DECREED that the Master's Sale on the foreclosure of the Installment Sales Contract shall take place as scheduled on September 6, 2016 at 11:00 a.m. pursuant to the terms and conditions of my May 18, 2016 Order; and, it is further

ORDERED, ADJUDGED AND DECREED that the Defendant has the option to avoid the foreclosure sale by payment to the Plaintiff of the sum of Fifty Two Thousand One Hundred Seventy Four and 32/100 (\$52,174.32) Dollars prior to the sale; and it is further

ORDERED, ADJUDGED AND DECREED pursuant to *SC Code* § 18-9-170 (2014) and pursuant to Order of SC Court of Appeals filed July 29, 2016, the Defendant can post a bond to stop the Master's Sale of foreclosure, said bond being set in the amount of Fifty Thousand and 00/100 (\$50,000.00) Dollars.

AND IT IS SO ORDERED!



Honorable Mikel R. Scarborough
Charleston County Master-in-Equity

Charleston, South Carolina

Aug. 31 2016.

2. ~~That~~ That on or about February 27, 2014, the Honorable J.C. Nicholson, Jr. entered an Order in a case involving the same parties hereto (2010-CP-10-8027) in which he ruled that the Lease to Buy Agreement between Plaintiff and Defendant referenced hereinabove was to be considered an Installment Sales Contract and that the Defendant was to make payment of \$500/month under the Installment Sales Contract until the balance of \$37,460.00 was paid in full. Further, the aforesaid Order of Judge Nicholson was appealed and the appeal was dismissed thereby rendering the February 27, 2013, Order referenced hereinabove the Final Order in this case, as evidenced by Order of the Court of Appeals filed December 3, 2013. As such, Judge Nicholson's February 23, 2013, Order became the ^{law of the case} ~~Final Order~~ and this Court is not free to go behind Judge Nicholson's Order, which Order is res judicata and which found Defendant, Simmons was entitled to a credit of \$87,540.00 in payments on the Installment Sales Contract.

3. I further find that my Order filed April 8, 2015, in this case reset the debt due under the Installment Sales Contract giving Defendant Simmons credit for nine payments of \$500.00 each leaving a balance of \$32,960.00 due on the Installment Sales Contract (see Order for details) and that the said Order was Nunc Pro Tunc to December 3, 2013.

4. I find that Simmons again argued that he has prepaid; the same argument put forth in the trial before Judge Nicholson and in the December 17, 2014 hearing before me. While he may have prepaid prior to Judge Nicholson's Order, the Installment Sales Contract, as well as Judge Nicholson's Order, require Simmons to make monthly payments. The fact that Simmons may have prepaid towards the total purchase price prior to Judge Nicholson's Order does not relieve Simmons from his monthly obligation.

5. That pursuant to Mr. Simmons testimony, not only has he made no payments since the appeal was dismissed on December 3, 2013, but he has made no payments since my April, 2015 Order. Further, Mr. Simmons testified that he has made no payments towards taxes either under the April, 2015 order or for tax year 2015 as required under the April, 2015 Order.

6. I find that the total outstanding debt due and owing to the Plaintiff is as follows:

Outstanding balance	\$32,960.00
2001-2014 Charleston County Property Taxes	\$16,540.54
2015 Charleston County Property Taxes	\$1,448.78
TOTAL DEBT	<u>\$50,949.32</u>

7. I find that the Defendant was required to provide an amortization schedule based on the outstanding indebtedness established by Judge Nicholson's Order and by my April, 2015 Order and failed to do so instead of providing an amortization schedule that went back prior to the establishment of the debt by Judge Nicholson's Order nor has Defendant made any monthly payments and, therefore, did not comply with either Judge Nicholson's Order nor my April, 2015 Order.

8. That Defendant's actions in failing to comply with either Judge Nicholson's Order or my April, 2015 Order is in direct violation of those aforesaid Orders resulting in Plaintiff having to bring this Rule to Show Cause and, as a result thereof, Plaintiff is entitled to recovery of his costs for this rule in the amount of \$1,225.00.

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9. I conclude that since the Defendant did not reinstate the Installment Sales Contract pursuant to my April, 2015 Order nor has he made any payments on the Installment Sales Contract since December, 2013 the property will be sold at the July 5, 2016 sales date if he has not paid all indebtedness more fully set forth in paragraph 6 hereinabove and reimbursed Plaintiff's attorney the sum of \$1,225.00 for Rule to Show Cause prior to the July 5, 2016, sale. *the* *MS*

10. I order that Defendant's prior Motion to Alter or Amend my April, 2015 Order is denied.

11. I confirm that Plaintiff's Motion to Amend the pleadings to conform to the evidence was granted at the December 17, 2014, hearing entitling Plaintiff to recover taxes paid and evidence of the amount of taxes paid was presented and introduced into evidence at that hearing.

The Court being satisfied with its findings of fact and conclusions of law, it is the opinion that judgment should be entered thereon.

NOW, THEREFORE, IT IS HEREBY

ORDERED, ADJUDGED AND DECREED, there is due to the Plaintiff on the Installment Sales Contract the sum of \$50,949.32; and, it is further

ORDERED, ADJUDGED AND DECREED, that the Defendant is in breach of the Installment Sales Contract and has failed to comply with the terms and conditions of Order filed in this case, April 8, 2015 and that the Plaintiff is entitled to foreclosure of the Installment Sales Contract pursuant to South Carolina Law and the customs and practices of this Honorable Court with regard to sales of foreclosed properties; and, it is further

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ORDERED, ADJUDGED AND DECREED, that on default of payment, the premises, described in the Complaint, as hereinafter set forth, shall be sold by the Master in Equity, or his agent under the direction of the Master in Equity, at public auction, at the Charleston County Courthouse, Charleston, South Carolina, on the July 5, 2011 sales day hereafter (and should the regular day of judicial sales fall on a legal holiday, then and in such event, the sales day shall be on Tuesday next succeeding such holiday), on the following terms, that is to say:

a. FOR CASH: The Master in Equity shall require a deposit of five (5%) percent on the amount of the bid (in cash or equivalent) the same to be applied on the purchase price only upon compliance with the bid, but in case of non-compliance within thirty (30) days the deposit may be forfeited without further hearing and applied to the costs and Plaintiff's debt.

b. The sale shall be subject to taxes and assessments, existing easements and easements and restrictions of record.

c. This Installment Sales Contract constitutes a first priority lien on the subject property.

d. Purchaser to pay for deed preparation and costs of recording the Deed, and transfer taxes; and, it is further

ORDERED, ADJUDGED AND DECREED, if Plaintiff is the successful bidder at the said sale, for a sum not exceeding the amount of costs, disbursements and expenses and the indebtedness of the Plaintiff in full, Plaintiff may pay to the Master In Equity only the amount of the costs, disbursements and expenses crediting the balance of the bid on Plaintiff's indebtedness; and, it is further

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ORDERED, ADJUDGED AND DECREED, that the Master in Equity will, by advertisement according to law, give notice of the time, date, place of sale, and the terms thereof, which Notice of Sale is incorporated herein by reference; and will execute to the Purchaser, or Purchasers, a deed to the premises sold. Plaintiff, or any other party to this action, or any other person may become a purchaser at such sale, and that if, upon such sale being made, the Purchaser, or Purchasers, should fail to comply with the terms thereof within thirty (30) days after date of sale, then the Master in Equity may advertise the said premises for sale on the next, or some other subsequent sales day, at the risk of the highest bidder, and so from time to time thereafter until a full compliance shall be secured; and, it is further

ORDERED, ADJUDGED AND DECREED, that the undersigned Master in Equity shall apply the proceeds of the sale as follows:

FIRST: To payment of the amount of the costs and expenses of this action, including any Guardian Ad Litem fee or fees of attorneys appointed under Order of Court.

NEXT: To the payment of Plaintiff, or Plaintiff's Attorneys, of the amount of the Plaintiff's debt and interest, so much thereof as the purchase money will pay on the same.

NEXT: Any surplus funds will be held pending further order of this Court; and, it is further

ORDERED, ADJUDGED AND DECREED, that in the event the successful bidder is other than the Defendant(s) in possession herein and the occupant(s) have voluntarily vacated the premises or have been ejected from the premises leaving



furnishings, fixtures and items not subject to Plaintiff's Mortgage in said premises, upon full compliance with the bid, Purchaser is authorized to remove therefrom all furnishings, fixtures and items not subject to the lien of Plaintiff's mortgage, which personal property, being deemed abandoned, shall be removed by Purchaser or its agents from the subject property by placing said personal property on the public street or highway or by any other means; and, it is further

ORDERED, ADJUDGED AND DECREED, that the Master in Equity shall retain jurisdiction to do all necessary acts incident to this foreclosure including, but not limited to, issuing a Writ of Assistance and hearing any issues involving appraisal proceedings under Section 29-3-680 *et seq.*, South Carolina Code of Laws (1976), as amended; and, it is further

ORDERED, ADJUDGED AND DECREED, that Plaintiff does not warrant its title search to purchasers at foreclosure sale or other third parties, who should have their own title search performed on the subject property; and, it is further

ORDERED, ADJUDGED AND DECREED, that out of the proceeds of the said sale, after payment of all Court costs involved in this action, that the net proceeds be disbursed to those persons whom this Honorable Court declares to have an interest in the subject property and that they be paid according to their interest and proportionate share in the subject property; and it is further

ORDERED, ADJUDGED AND DECREED, that Bruce A. Berlinsky is awarded an attorney's fee in the amount of \$1,225.00 which includes costs and expenses incurred in bringing the Rule to Show Cause; and it is further

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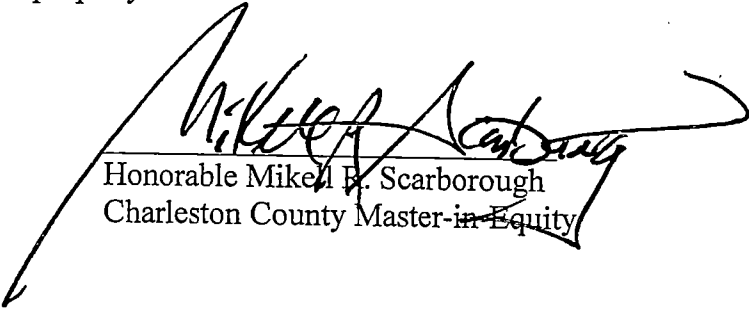
ORDERED, ADJUDGED AND DECREED, that the Defendant has the option to avoid the foreclosure sale by payment to the Plaintiff the sum of \$52,174.32 prior to the sale; and it is further

ORDERED, ADJUDGED AND DECREED, that the Sherriff^{MR} of Charleston County put the Plaintiff or the successful bidder in possession of the said premises and that the Defendant, or anyone claiming by, through, or under him be forever barred and foreclosed of any equity of redemption of said property

AND IT IS SO ORDERED

Charleston, South Carolina

May 6 2016.


Honorable Mikel E. Scarborough
Charleston County Master-in-Equity

Aug 30, 2018

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SC Court of Appeals

Court of Appeal (Find S)

1 copy of order of Fore Closure And
Sale Filed MAY 18, 2016

1 copy of order on motion to Alter And
Amend Filed Sept 1, 2016

Filing
Fee
\$ 25.00

Harold Simmons
Harold Simmons Jr.