

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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APPEAL FROM RICHLAND COUNTY
COURT OF COMMON PLEAS
THE HONORABLE JOSEPH M. STRICKLAND
MASTER IN EQUITY

S.C. SUPREME COURT

APPELLATE CASE NO. 2018-001653
CIVIL ACTION NO. 2008-CP-40-8887

Opinion No. 2018-UP-183 (S.C. Ct. App. May 2, 2018)

South Carolina Community Bank,

RESPONDENT,

versus

Carolina Procurement Institute, Inc., Gary A. Washington,
Michele A. Washington, First Palmetto Savings Bank, F.S.B.,
Branch Banking and Trust Company of South Carolina,
Palmetto Health Alliance, State of South Carolina Department
of Revenue,

DEFENDANTS,

Of whom Gary A. Washington, and Michele A. Washington are the

PETITIONERS,

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COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

The Chapter 11 bankruptcy of Carolina Procurement Institute, Inc. did not void the foreclosure sale of the properties owned by Petitioners Gary A. Washington and Michele A. Washington because (1) Carolina Procurement was dismissed as a party to the foreclosure action prior to the foreclosure sale; (2) Carolina Procurement did not own the foreclosed properties; and (3) Carolina Procurement was not a party to the mortgage upon which South Carolina Community Bank foreclosed.

COUNTERSTATEMENT OF THE CASE

Respondent South Carolina Community Bank (“SCCB”) initiated this foreclosure action against Carolina Procurement Institute, Inc.¹ and Petitioners Gary A. Washington, and Michèle A. Washington on December 17, 2008 in the Richland County Court of Common Pleas seeking to foreclose on a mortgage given by the Washingtons on certain real properties located at 1811 and 1815 Gervais Street, Columbia, South Carolina in Richland County. [R.pp. 1-35; Foreclosure Summons and Complaint.] On July 31, 2009, the case was referred to Joseph M. Strickland, the Master-In-Equity for Richland County. [R.pp. 37-38; Order of Reference.] Petitioners failed to respond to the foreclosure action, and thereafter, on July 31, 2009, SCCB filed an Affidavit of Default. [R.pp. 39-42; Aff. of Default; Aff. of Nonmilitary Service.]

Following Petitioners’ default, the Master-In-Equity issued its Report and Judgment of Foreclosure on October 8, 2009. [R.pp. 43-54; Judgment of Foreclosure.] The Judgment noted that Petitioners were in default for failure to respond to the suit.

¹ Carolina Procurement Institute, Inc. (“Carolina Procurement”) was dismissed pursuant to a Stipulation of Dismissal filed on September 30, 2015. [R.p. 66; Stipulation.] The dismissal of Carolina Procurement was not appealed; therefore, Carolina Procurement is not a party to this appeal. Furthermore, Carolina Procurement did not join in the Motion to Set Aside the Foreclosure Sale filed on January 27, 2016 or the Motion to Reconsider filed on April 14, 2016. [R.pp. 87-92; 104-107; Mtn. to Set Aside; Mtn. to Reconsider.]

[R.p. 45; Id. at p. 2.] The Master-In-Equity ordered that SCCB was entitled to foreclose on the mortgaged properties and further ordered the properties to be sold, after due advertisement, at a public auction at the Richland County Judicial Center on a convenient sales day thereafter. [R.pp. 49-50; Id. at pp. 6-7.]

The foreclosure action was stayed on multiple occasions by various bankruptcy filings by Petitioners. Supplemental orders to the Master-In-Equity's Judgment of Foreclosure were issued by the court for the limited purpose of updating and adjusting the judgment debt figures. [R.pp. 55-56; 60-61; 64-65; Supplemental Order filed December 20, 2010; Second Supplemental Order filed September 10, 2014; Third Supplemental Order filed July 17, 2015.] Petitioners neither moved to set aside or reopen the Judgment of Foreclosure and the supplemental orders nor appealed such orders.

The judicial sale of the mortgaged properties at issue was scheduled for November 2, 2015 at 12:00 p.m. at the Richland County Judicial Center before the Master-In-Equity. [R.p. 70; Notice of Sale.] The Notice of Sale was advertised in The Columbia Star, a weekly newspaper of general circulation published in the City of Columbia, for three consecutive weeks preceding the sales day (October 16, 23, and 30, 2015). [R.p. 70; Aff. of Publication filed November 4, 2015.] In addition, on October 1, 2015, counsel for SCCB mailed the Notice of Sale to Petitioners at their 1815 Gervais Street, Columbia, South Carolina address which was the address of one of the properties subject to the foreclosure sale. [R.pp. 67-69; October 1, 2015 Letter.] The letter was also mailed to Robert H. Cooper, an attorney representing Petitioners in a bankruptcy proceeding at the time, as well as to the Master-In-Equity. [R.p. 67; Id.]

The mortgaged properties were sold on November 2, 2015 to SCCB which entered the highest bid in the amount of \$370,000.00. [R.pp. 77-78; Master's Report on Sale and Disbursements and Order of Confirmation.] The Master-In-Equity's Deed conveying the properties at issue to SCCB was recorded on December 18, 2015. [R.pp. 81-83; Deed.] An order of deficiency judgment was also filed by the Master-In-Equity on December 18, 2015 ordering that SCCB was entitled to a deficiency judgment in the amount of \$187,365.21 through December 3, 2015. [R.pp. 84-85; Order.]

On January 27, 2016, Petitioners Gary and Michele Washington moved to set aside the foreclosure sale. [R.pp. 87-92; Mtn. to Set Aside.] In this motion, the Washingtons argued that the sale was accompanied by other circumstances warranting the interference of the court, in particular, allegations that the Washingtons' bankruptcy counsel was deficient in the bankruptcy proceedings with respect to valuation of the properties resulting in the lifting of the automatic stay by the bankruptcy court so that SCCB could proceed with the foreclosure. [R.pp. 90-91; Id. at pp. 4-5.] The Washingtons furthered argued that the Judgment of Foreclosure and the Third Supplemental Order, neither of which had ever been challenged or appealed, failed to meet the requirements of Rule 71 of the South Carolina Rules of Civil Procedure. [R.pp. 91-92; Id. at pp. 5-6.] Finally, the Washingtons contended that Gary Washington did not receive notice of the sale date. [R.pp. 91-92; Id.]

On February 1, 2016, SSCB filed a Petition for Writ of Assistance to remove Appellants and their tenants from the properties after Petitioners and their tenants refused

to vacate the properties following the sale. [R.pp. 93-95; 96; Petition for Writ of Assistance; Rule to Show Cause.]

A hearing was held before the Master-In-Equity on February 19, 2016.² Following the hearing, the Master-In-Equity issued an order on March 23, 2016 finding (1) the Washingtons were in default; (2) the sales price of \$370,000.00 was not so gross as to shock the conscience to warrant setting aside the judicial sale previously consummated; (3) no other circumstances existed warranting the interference of the court into the judicial sale; (4) the Washingtons' argument as to deficient bankruptcy counsel was appropriately addressed by the United States Bankruptcy Court for the District of South Carolina and was not grounds for setting aside the judicial sale; (5) the notice of the November 2, 2015 sale date of the properties was appropriately published and noticed to the Washingtons; and (6) the Master-In-Equity's Judgment of Foreclosure, filed October 8, 2009, as supplemented by the Third Supplemental Order, filed July 17, 2015, complied with the requirements of Rule 71, SCRPC. The Master-In-Equity therefore denied the Washingtons' motion to set aside the foreclosure sale. [R.pp. 97-100; Order.] On March 28, 2016, the Master-In-Equity also granted SCCB's Petition for a Writ of Assistance to remove Petitioners and their tenants from the properties. [R.pp. 101-102; Order for Writ of Assistance.]

On April 14, 2016, the Washingtons filed a motion requesting reconsideration of the Order Denying the Motion to Set Aside the Foreclosure Sale and Order for Writ of Assistance. The motion reargued that the judicial sale should be set aside because of the

² To SCCB's knowledge, the February 19, 2016 hearing was not transcribed. [R.p. 114; April 28, 2016 Hearing Tr., p. 7, ll. 10-12.]

circumstances attendant to the bankruptcy proceeding, the alleged failure of the Judgement of Foreclosure and Third Supplemental Order to comply with Rule 71(b), SCRCF, and the alleged failure of Gary Washington to receive notice of the foreclosure sale date. [R.pp. 104-107; Mtn. to Reconsider.]

A hearing was held on the motion for reconsideration on April 28, 2016 before the Master-In-Equity. [R.pp. 108-157; Hearing Tr.] The Master-In-Equity thereafter issued an order denying the motion for reconsideration on June 1, 2016 and additionally ordered that the Sheriff of Richland County be authorized to remove Petitioners and their tenants from the properties any time after 5:00 p.m. on June 6, 2016 and that any rent by tenants should be paid and delivered to SCCB. [R.pp. 159-160; Order Denying Mtn. to Reconsider.]

Petitioners did not file their Notice of Appeal with the South Carolina Court of Appeals until July 12, 2016, stating that the appeal deadline was stayed due to an automatic bankruptcy stay which expired on June 30, 2016. Petitioners appealed only the June 1, 2016 order of the Master-In-Equity denying the motion for reconsideration.

In their appeal to the Court of Appeals, Petitioners argued: (1) the Master-in-Equity's order denying the motion for reconsideration failed to comply with Rule 52(a), SCRCF; (2) the Notice of Sale did not comply with the requirements of Rule 71, SCRCF; and (3) Gary A. Washington allegedly did not receive notice of the sale. [App. 65-75; Final Appellants' Brief.]

On May 2, 2018, the Court of Appeals affirmed the Master-in-Equity's denial of Petitioners' motion to set aside the foreclosure sale and the order denying Petitioners'

motion for reconsideration, holding (1) findings of fact and conclusions of law are not required under Rule 52(a) for decisions on motions; (2) Petitioners' argument regarding the Notice of Sale not complying with Rule 71 was not preserved for appellate review; and (3) parties to a suit for foreclosure are not required to be given personal notice of a judicial sale. [App. 62-64; Opinion.]

On or about May 17, 2018, Petitioners filed a Petition for Rehearing with the Court of Appeals. They did not challenge any of the holdings in the Court of Appeals' Opinion, but rather argued that the judgment below was not valid because Carolina Procurement was in bankruptcy and subject to the automatic stay provided under 11 U.S.C. § 362 from September 2015 and the subsequent months when the foreclosure proceedings occurred. [App. 9-61; Petition for Rehearing.]

The Court of Appeals denied the Petition for Rehearing on August 16, 2018. [App. 3-5; Order.] Petitioners have now filed a Petition for Writ of Certiorari with this Court to review the decision of the Court of Appeals to which Respondent SCCB hereby responds.

ARGUMENT

The Chapter 11 bankruptcy of Carolina Procurement Institute, Inc. did not void the foreclosure sale of the properties owned by Petitioners Gary A. Washington and Michele A. Washington because (1) Carolina Procurement was dismissed as a party to the foreclosure action prior to the foreclosure sale; (2) Carolina Procurement did not own the foreclosed properties; and (3) Carolina Procurement was not a party to the mortgage upon which South Carolina Community Bank foreclosed.

In their Petition for a Writ of Certiorari, Petitioners do not challenge any of the holdings in the Court of Appeals' Opinion affirming the Master-in-Equity's denial of Petitioners' motion to set aside the foreclosure sale and the order denying Petitioners' motion for reconsideration. Rather, Petitioners exclusively argue that the foreclosure proceedings were void because Carolina Procurement had filed a Chapter 11 bankruptcy and relief from the automatic stay provided in 11 U.S.C. § 362 had not been sought by SCCB as to Carolina Procurement.

This argument, which was never raised to the Master-in-Equity or to the Court of Appeals until after the Court of Appeals issued its Opinion, is entirely without merit. According to the documents submitted by Petitioners with their Petition for Rehearing, Carolina Procurement filed a Chapter 11 bankruptcy with the Bankruptcy Court for the District of South Carolina on or about September 1, 2015. [App. 13.]

In the state foreclosure action, Carolina Procurement was then dismissed as a party pursuant to a Stipulation of Dismissal filed on September 30, 2015. [R.p. 66; Stipulation.] The foreclosure sale did not occur until November 2, 2015. [R.pp. 70; 77-78.] The Master-in-Equity's Deed conveying the properties at issue to SCCB was recorded on December 18, 2015. [R.pp. 81-31; Deed.]

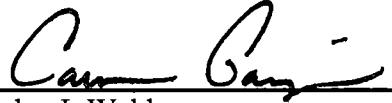
When these proceedings in the foreclosure action occurred, including the foreclosure sale, Carolina Procurement was no longer a party and its pending bankruptcy did not require a stay of the foreclosure proceedings. Carolina Procurement did not own the foreclosed properties, and Carolina Procurement was not a party to the mortgage upon which SCCB foreclosed. Only Petitioners owned the foreclosed properties and were parties to the mortgage. [R.pp. 16-23; 45, ¶ 8; 49, 53, ¶ 13; Mortgage; Property Description; Judgment of Foreclosure.] See also In re Geris, 973 F.2d 318 (4th Circ. 1992) (holding automatic stay does not prevent foreclosure on deed of trust where real estate involved is not owned by debtor, even if debtor is liable for indebtedness underlying the deed of trust).

Carolina Procurement's bankruptcy therefore does not void the foreclosure proceedings and sale in this action. Having raised no other challenge to the Court of Appeals' Opinion affirming the Master-in-Equity's denial of Petitioners' motion to set aside the foreclosure sale and the order denying Petitioners' motion for reconsideration, Petitioners' Petition for Writ of Certiorari should be denied.

CONCLUSION

For the reasons set forth herein, Respondent South Carolina Community Bank respectfully requests this Court to deny the Petition for Writ of Certiorari filed by Petitioners.

Respectfully submitted,



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September 27, 2018.

CERTIFICATE OF SERVICE

I, the undersigned, attorney for Respondent South Carolina Community Bank, do hereby certify that I have this date served a copy of the foregoing Return to Petition for Writ of Certiorari, dated September 27, 2018, by causing the same to be deposited in a United States Postal Service mailbox, postage prepaid, addressed to counsel of record as indicated below:

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Dated: September 27, 2018.

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