

ORIGINAL

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Master in Equity

The Honorable Ellis B. Drew, Jr., Master in Equity

C.A. No. 2011-CP-04-02157

Pinnacle Bank of SC,

Respondent,

v.

Marsha P. Wright and Richard A. Wright,

Appellants,

FINAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE MASTER IN EQUITY ERR IN DENYING APPELLANTS' MOTION FOR RELIEF FROM ORDER/JUDGMENT PURSUANT TO RULE 60(b)(4) WHEN THE RESPONDENT'S COMPLAINT MADE NO MENTION OF "ADDITIONAL PROPERTY" THEREBY DEPRIVING THE MASTER IN EQUITY OF IN REM SUBJECT MATTER JURISDICTION OVER ANY "ADDITIONAL PROPERTY."

STATEMENT OF THE CASE

Respondent, Pinnacle Bank SC ("Pinnacle") filed this action for foreclosure against Appellants on July 11, 2011. (R. p. 17). Appellants did not answer the Summons and Complaint and an Order of Default was entered against Defendants. Although the mortgage being foreclosed upon contained two contiguous parcels of land in Anderson County as the secured collateral, Respondent's Complaint only sought foreclosure on one parcel of land, PARCEL 1, and contained no mention of PARCEL 2 whatsoever within the four corners of its Complaint. Pinnacle completed its foreclosure on PARCEL 1 on or about September 13, 2011 with the Master in Equity signing his Order and Judgment of Foreclosure and Sale on PARCEL 1. The sale was conducted on or about October 4, 2011 with upset bids remaining open for thirty (30) days for which none were received. The Deed for PARCEL 1 was executed by the Master in Equity on January 27, 2012 and recorded in the Register of Deeds Office for Anderson County on February 13, 2012 in Deed Book 10329, Page 33. (R. p. 142). An Order for Deficiency Judgment against Marsha P. Wright in the amount of \$ 411,000.10 was signed by the Master in Equity on January 27, 2012 and registered with the Clerk of Court on February 2, 2012. (R. p. 15).

The Master's Order contained a Footnote which reads, "The mortgage also encumbers additional property that is not included in this foreclosure action. Accordingly, the Mortgage shall remain a lien on the property not included in this

foreclosure action. The Plaintiff reserves the right to pursue the remaining property at a later date.” (R. p. 4, Footnote 1).

Defendants filed a Motion for Relief from Judgment/Order on August 23, 2012 claiming that the Master in Equity did not have subject matter jurisdiction over any parcel of land other than PARCEL 1 and the Master’s reserving of rights with respect to other properties was without *in rem* subject matter jurisdiction and therefore void pursuant to Rule 60(b)(4), SCRPC. (R. p. 49). The Master in Equity heard the motion arguments on October 4, 2012 without a jury. (R. p. 29). The Master in Equity denied Defendants’ Motion and issued an Order to that effect on November 7th, 2012 which was entered by the clerk of court on November 9th, 2012. (R. p. 11). A Notice of Appeal was filed and served on November 15th, 2012.

FACTS

On January, 31, 2007, Marsha P. Wright executed and delivered a Note in favor of Pinnacle Bank (hereinafter “Pinnacle”) in the amount of \$468,912.00 (the “Note”). As security for the Note, the Wrights also executed and delivered a Mortgage on those certain two (2) parcels of land both of which were in Anderson County, South Carolina to wit:

PARCEL 1

All that certain piece parcel or lot of land situate, lying and being in the State of South Carolina, County of Anderson, and being shown as a major portion of Tract 2 containing 8.033 acres according to a plat prepared by Kevin E. Gaines, P.L.S. dated January 27, 2007 and recorded in Plat Book 1676, Page 9 in the Register of Deeds Office of Anderson County, SC, reference being made to said plat for a more complete metes and bounds description thereof.

Anderson County TMS# 188-00-11-033

PARCEL 2

All that certain piece parcel or lot of land situate, lying and being in the State of South Carolina, County of Anderson, and being DESIGNATED AS Tract 3, containing 9.684 acres, more or less, located on the Northwest side of Old Mill Road according to a plat prepared by Robert R. Spearman, surveyor dated 12/16/97 and recorded in Plat Book 876, Pages 3 and 4 in the Register of Deeds Office of Anderson County reference to said plat being made for a more complete metes and bounds description thereof.

LESS: 1.00 Acres as shown on a plat recorded in Plat Slide 1249, Page 6-B.

Anderson County TMS# 188-00-11-020

The Mortgage was recorded in Mortgage Book 7917, Page 36 on March 22, 2007 (the "Mortgage"). The Note was modified various times with the Wrights eventually defaulting, not having the ability to pay. Pinnacle filed a foreclosure action thereafter with a deficiency demanded (this "First Action"). In this First Action, the only Parcel that was pled to be foreclosed upon was PARCEL 1. Neither the Lis Pendens nor the Complaint contained the legal description of PARCEL 2. (R. p. 17). Pinnacle completed this foreclosure on PARCEL 1 on or about September 13, 2011 with the Master in Equity signing his Order and Judgment of Foreclosure and Sale on PARCEL 1. (R. p. 2). The Sale was conducted on or about October 4, 2011 with upset bids remaining open for thirty (30) days for which none were received. The Deed for PARCEL 1 was executed by the Master in Equity on January 27, 2012 and recorded in the Register of Deeds Office for Anderson County on February 13, 2012 in Deed Book 10329, Page 33. (R. p. 142). An Order for Deficiency Judgment against Marsha P. Wright in the amount of \$411,000.10 was signed by the Master in Equity on January 27, 2012 and registered with the Clerk of Court on February 2, 2012. (R. p. 15).

On November 7, 2011, the Plaintiff filed a second action bearing the Case Number 2011-CP-04-03285, seeking foreclosure on PARCEL 2 along with the demand for deficiency and additional attorney's fees and costs on the same Note and Mortgage that had already been litigated in the First Action. The Wrights were served on December 26, 2011 and an extension to Answer was granted until February 3, 2012. On January 19, 2012, the Wrights answered the Summons and Complaint in the Second Action raising the affirmative defense, *inter alia*, of *res judicata*.

The Wrights filed a Motion to Dismiss this Second Action and a hearing was held by the Honorable R. Lawton McIntosh on July 30th 2012. Appellants argued that the Plaintiff is barred from re-litigating any matter that it had an opportunity to litigate in the First Action based on the premise of *res judicata*.

In that motion hearing, counsel for Respondents argued that it was entitled to the benefit of two exceptions contained in The Restatement (Second) of Judgments § 26 wherein *res judicata* did not apply. Respondents relied on the dicta contained in Judy v. Judy wherein the Supreme Court recognized the exceptions of the Restatement (Second) of Judgments § 26 (1982 & Supp. 2011). Judy v. Judy 393 S.C. 160, 168, 712 S.E. 2d 408, 412 (2011) (rehr'g denied Aug 5th, 2011).

The germane exception that Respondents relied on is found in The Restatement (Second) of Judgments § 26, Subsection (1)(b) which provides an exception to the application of the defense of *res judicata* where a court in a first proceeding expressly reserves a plaintiff's right to maintain a second action (emphasis added). Respondent argued this Subsection (1)(b) was an exception to a *res judicata* bar to the second action in that there was a Footnote on Page 3 of the Master's First Order which reserved the

Plaintiff's right to file another action on PARCEL 2 which reads, "[t]he mortgage also encumbers additional property that is not included in this foreclosure action. Accordingly, the Mortgage shall remain a lien on the property not included in this foreclosure action. The Plaintiff reserves the right to pursue the remaining property at a later date." (R. p. 4, Footnote 1).

Judge McIntosh denied the Appellants' Motion to Dismiss based on the affirmative defense of *res judicata*, citing the two exceptions to the application of *res judicata* as argued by Respondent and reserved the Appellants' right to re-file after discovery had taken place.

Thereafter, Appellants filed a Motion for Relief from Judgment/Order in this First Action claiming that the Master in Equity did not have subject matter jurisdiction over any parcel of land other than PARCEL 1 and his reserving of rights with respect to other properties was without jurisdiction and therefore void pursuant to Rule 60(b)(4), SCRPC. (R. p. 49). The Master in Equity denied Defendants' Motion and issued an Order on November 7th, 2012 which was entered by the Clerk of Court on November 9, 2012. (R. p. 11). This is the Order and issue on appeal.

ARGUMENT

- A. The Footnote of The Master's Order Referring To Additional Property Is Void Because The Respondent did not Plead for Any Relief with Respect to "PARCEL 2" And/Or The "Additional Property" Thereby depriving the Master In Equity of In Rem Subject Matter Jurisdiction Over "PARCEL 2" And/Or The "Additional Property" and the denial of Appellants' Motion for Relief from Judgment was in Error.**

Appellants contend that the Court should have granted Appellants' motion pursuant to Rule 60(b)(4), SCRPC thereby striking the language of Footnote 1 from the Master's Order. Since the Respondent's Complaint in this matter did not contain the

property description of any “additional property” or any allegations regarding any “additional property” as referred to in Footnote 1 of the Master’s Order, the Master in Equity did not have jurisdiction to make any rulings on any such additional property.

In rem jurisdiction is a form of subject matter jurisdiction. In Campbell v. Jordan, the South Carolina Supreme Court ruled that in a partition action, “[t]he court must have both *in rem* jurisdiction and personal jurisdiction....” Campbell v. Jordan, 382 S.C. 445, 455, 675 S.E.2d 801, 806 (S.C. 2009)(reh’g denied May 5, 2010). The Court cited Hisle v. Lexington-Fayette Urban County Gov’t, 258 S.W.3d 422, 431 (Ky.Ct.App. 2008) (citing 68 C.J.S. *Partition* §67(2007); 59A Am.Jur.2d *Partition* § 108)(finding that although a partition action is in the nature of an *in rem* proceeding, it also has the characteristics of a quasi *in rem* because it deals with the title to realty and operates as to the parties in the proceeding, thus requiring both *in rem subject matter jurisdiction* and personal jurisdiction) (emphasis added). An action for foreclosure adjudicates and cuts off the mortgagor's interest in real property. It is a proceeding in personam as well as *in rem*. Perpetual Building & Loan Association v. Braun, 270 S.C. 338, 242 S.E.2d 407 (1978); Anderson v. Pilgram, 30 S.C. 499, 9 S.E. 587 (1889).

In order for the Court to gain *in rem* subject matter jurisdiction over any “additional property,” Respondent must have plead for such relief in its Complaint and Respondent did not do so. (R. p. 17). It is a generally recognized principle of equity jurisprudence that where court of equity obtains jurisdiction of a controversy on any ground it will, to avoid a multiplicity of suits, administer complete relief by the adjustment of all equities connected with the subject of the suit, *which may be authorized by the pleadings and proofs*, and may thus establish purely legal rights and grant legal remedies which would

otherwise be beyond the scope of its authority. Parker Peanut Co. v. Felder, et ux, 207 S.C. 63, 68, 34 S.E.2d 488, 490 (S.C. 1945) (emphasis added). But, the *incidental or auxiliary relief granted must be within the limits of the issues made by the pleadings* and be of the same general nature. *Id* citing Holly Hill Lumber Co. v. McCoy, 203 S.C. 59, 26 S.E.2d 175, 148 A.L.R. 285; Mortgage Loan Co. v. Townsend, 156 S.C. 203, 152 S.E. 878; Brockington v. Lynch, 119 S.C. 273, 112 S.E. 94 (emphasis added). *A judgment or decree, whether in law or equity, must conform to both the pleadings and the proofs, and be in accordance with the theory of the action upon which the pleadings are framed and the case was tried.* *Id.* (emphasis added). Because the Respondent pled nothing about PARCEL 2 or any “additional property” in this action, the Court lacked jurisdiction to render an Order concerning PARCEL 2 or any other “additional property” and the Appellants are entitled to relief on any matter concerning PARCEL 2 or any other “additional property” in the Footnote of the Order of Foreclosure and Sale.

Furthermore, property does not fall within the Court’s jurisdiction simply by referring to the tract of land in a legal description buried within an Exhibit to the Complaint as the Respondent may contend. Matthews, et al. v. Monts, holds that Exhibits may be used to cure a lack of definiteness and certainty within a Complaint. However, “an exhibit to a complaint may not be used to supply a material allegation or cure a fatal defect in the complaint.” Matthews, et al. v. Monts, 61 S.C. 385, 388, 39 S.E. 575, 576, (quoted with approval in National L. & E. Bank v. Argo Development Co. et al., 141 S.C. 72, 80, 139 S.E. 183, 186.) Because the Respondent pled nothing about PARCEL 2 or any other “additional property” in this action, the Court lacked jurisdiction to render an order concerning PARCEL 2 or any other “additional property” and the Appellants were

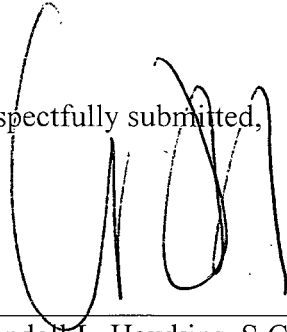
therefore entitled to relief from the Order of Foreclosure and Sale on any matter concerning PARCEL 2 or any other “additional property.”

Because the Respondent’s Complaint contained no request for relief as to “additional property,” the Court had no jurisdiction to make rulings as to “additional property” and the Court’s denial of Appellants’ Motion for Relief from Judgment or Order with respect to reservation of rights to any “additional property” was in error. SCRCF Rule 60(b)(4) provides, “On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons . . . (4) the judgment is void” “Definition of ‘void,’ under rule which allows court to relieve a party or his legal representative from a final judgment, order, or proceeding if the judgment is void, only encompasses judgments from courts which failed to provide proper due process, *or judgments from courts which lacked subject matter jurisdiction or personal jurisdiction.*” Linda Mc Co., Inc. v. Shore, (S.C. 2010) 390 S.C. 543, 703 S.E.2d 499 (emphasis added). Because the court had no *in rem* subject matter jurisdiction over any parcel of land other than PARCEL 1, any portion of the Master’s Order of Foreclosure and Sale is void as a matter of law.

CONCLUSION

The Master in Equity’s denial of Appellants’ Motion for Relief from Judgment/Order pursuant to Rule 60(b)(4) was in error and should have been granted because the Master in Equity lacked subject matter jurisdiction over any “additional property” rendering that portion of the Order which referred to “additional property” void as a matter of law. Appellants pray this Court reverse the ruling of the Master in Equity.

Respectfully submitted,



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February 14, 2013

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In the Court of Appeals**

**APPEAL FROM ANDERSON COUNTY
Master in Equity**

The Honorable Ellis B. Drew, Jr., Master in Equity

C.A. No. 2011-CP-04-02157

Pinnacle Bank of SC,

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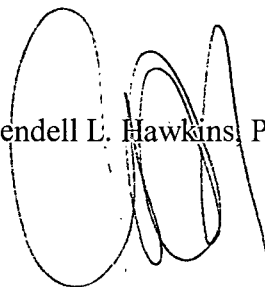
Marsha P. Wright and Richard A. Wright,

Appellants,

CERTIFICATE OF COUNSEL

The undersigned, Wendell L. Hawkins certifies that this Final Brief of Appellant complies with Rule 211(b).

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APPEAL FROM ANDERSON COUNTY
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The Honorable Ellis B. Drew, Jr., Master in Equity

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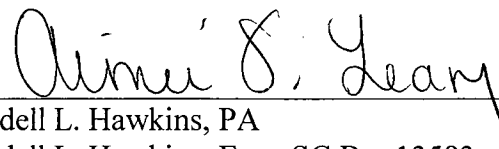
v.

Marsha P. Wright and Richard A Wright,Appellants.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of **Appellants' Final Brief** with this Certificate of Service was served upon counsel on February 19, 2013 by First Class Mail as follows:

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