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 REPLY BRIEF OF APPEALLANTS

Wendell L. Hawkins, Esq., S.C. Bar No.13583
Aimee V. Leary, Esq., S.C. Bar No. 100657
Wendell L. Hawkins, PA
103-C Regency Commons Drive
Greer, SC 29650
(864) 848-9370 Ph (864) 848-9759 Fax

Attorneys for Appellants

Table of Contents

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

Appellants received Respondent's Initial Brief on January 14, 2012. Appellants timely filed this Reply Brief. 208(a)(3), SCACR.

DISPUTED STATEMENT OF THE FACTS

Appellants dispute the existence of any agreement between Pinnacle Bank and the Wrights as to the sale of Parcel 2 in order to resolve the Wrights indebtedness to Pinnacle as claimed on Page 3, Footnote 1 of Respondent's Initial Brief. Conclusions and determinations related to the alleged agreement is a question to be resolved by a jury.

ARGUMENTS

I. APPEALLANTS APPEALED ON THE BASIS THAT THE MASTER DID NEED JURISDICTION OVER PARCEL 2 AND THE MASTER'S FINDING THAT HE DID NOT IS EXACLTY THE ISSUE ON APPEAL.

In this appeal, Appellants simply argue that the Master's Order, which denied Appellants' Rule 60(b)(4) motion, holding that *in rem* jurisdiction was neither needed nor required over Parcel 2 in the initial foreclosure action of Parcel 1, was improper. Appellants assert that the preservation of matters pertaining to Parcel 2 contained in the Footnote of the Master's Order in the foreclosure of Parcel 1 and subsequent implications thereof required *in rem* jurisdiction over the property which could not have ever been obtained because nothing regarding Parcel 2 was ever pled by Respondents in the Complaint. To assert that Appellants did not raise the issue is utterly wrong. The Master states in his Order, "[i]t was, therefore, not necessary for this Court to acquire jurisdiction over Parcel 2 in the Parcel 1 action. This court merely acknowledged the Plaintiff's reservation of rights as to Parcel 2." (R. p. 13-14). Appellant has extensively briefed the fact that its basis for appeal was that the Master in Equity did need jurisdiction over Parcel 2, and it did not have jurisdiction because the Plaintiff failed to plead anything in

regard to Parcel 2. (Initial Brief of Appellants). Appellants argue in their Initial Brief, "[s]ince 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." (Initial Brief of Appellants, p.6). No court needs to "grope in the dark" to ascertain that the Appellants are contending that the Master in Equity did need jurisdiction over Parcel 2 in order to make findings as to it.

II. THE MASTER DID ERR IN DENYING THE WRIGHTS' RULE 60(b)(4) MOTION

A. The authority in South Carolina that holds a mortgage lender must foreclose on all parcels securing a mortgage at the same time is the affirmative defense of Res Judicata.

Appellants have extensively briefed the law of Res Judicata. Respondent has further bolstered its case in reliance on Restatement (Second) of Judgments §26 (1982). What an Appellate Court may find persuasive is that Res Judicata does apply to the foreclosure of a mortgage on parcels in the same county because Restatement (Second) of Judgments §26(b)(3) (1982) provides an exception to the defense of Res Judicata only when, "[t]he plaintiff was unable to rely on a certain theory of the case or seek a certain remedy or form of relief in the first action because of the limitations on the subject matter jurisdiction of the courts...." A plaintiff in a foreclosure action would necessarily have to rely on this "carve out" when there is one Note with a contemporaneous Mortgage on parcels located in different counties because an Anderson Court could not acquire *in rem* subject matter jurisdiction over multiple parcels used for collateral if one or more of those parcels was in a different county. Otherwise, the law in South Carolina that bars multiple

actions that could have been brought together, whether a foreclosure or otherwise, is Res Judicata.

B. In the Parcel 1 action, the Master included a Footnote in the Order that is now affecting the substantive rights of Appellants because it is being used by Respondent as a defense to the affirmative defense of Res Judicata.

Appellants' point is precisely that Respondent is using the contents of the Footnote to bar the affirmative defense of Res Judicata. Respondent asserts that "Pinnacle Bank's foreclosure action as to Parcel 1 did not subject Parcel 2 to any claims or affect the status, ownership, or liabilities with respect to Parcel 2." (Initial Brief of Respondent, p.9). If the Footnote has no affect, then Respondent should not be allowed to claim it has no affect, and then attempt to use it as a bar to an affirmative defense. Respondent's arguments in the totality of the circumstances lack a proper logical basis. "Courts have the inherent power to do all things reasonably necessary to ensure that just results are reached to the fullest extent possible." Jones v. Leagan, 384 S.C. 1; 19, 681 S.E.2d 6,16 (Ct App. 2009). *Also see*, Robinson v. Estate of Harris, 388 S.C. 616, 698 S.E.2d 214 (S.C. Ct. App 2010). To fail to see beyond Respondent's circular logic is simply unfair and unjust.

C. The additional sustaining grounds articulated by Respondent should not be considered by this Court because the purpose of an appeal is to determine whether the trial judge erroneously acted or failed to act and it is impossible to determine from the record whether the Master did anything erroneous with respect to the "additional sustaining grounds."

The purpose of an appeal is to determine whether the trial judge erroneously acted or failed to act. *See* Roche v. South Carolina Alcoholic Beverage Control Comm'n, 263 S.C. 451, 211 S.E.2d 243 (1975). The Master specifically stated, [h]aving so concluded,

it is not necessary to rule upon the additional grounds cited by the Plaintiff in its brief...." (R. p. 14).

1. The Wrights' Rule 60(b)(4) motion was proper because it was based on a lack of jurisdiction and is therefore not time barred.

SCRCP Rule 59 contains no provision for amending an Order for "lack of jurisdiction." SCRCP Rule 60(b)(4) is the only applicable rule in this scenario and provides, "[o]n 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. There is no case law in South Carolina that holds that Orders cannot be partially void.

2. Respondent's assertion that Appellants cannot meet the "upon terms that are just" requirement of Rule 60(b) is flawed in that it assumes the basis of Respondent's claim of an "Agreement" between Appellants and Respondent is a matter of fact.

Respondent based this argument solely on principles of equity. Respondent erroneously relies on a matter of fact that is in contention. Respondent claims that Pinnacle Bank allowed Appellants "every chance to sell Parcel 2 and resolve their debt."

(Initial Brief of Respondent, p. 12). That assertion is based on the contested fact that the affidavit of Jim Stewart is true.

3. Appellants' motion does meet the "judgment is void" standard of Rule 60(b)(4) because Appellants' motion challenged the Court's lack of *in rem* jurisdiction and that is the entire crux of Appellants' appeal.

Once again, the Respondent's argument is logically flawed. Respondent asserts that, "the Master did not need jurisdiction over Parcel 2." (Initial Brief of Respondent, p. 13). This conclusory statement, being the basis of Respondent's argument and the crux of Appellants' appeal, is in direct conflict and logically flawed and therefore the Court should dismiss the same.

4. Appellants' Rule 60(b)(4) motion was made within a reasonable time and is not barred.

SCRCP Rule 60(b)(4) is the proper provision for voiding an Order due to lack of subject matter and personal jurisdiction. Rule 59(e) does not afford a party relief from an Order due to lack of jurisdiction. Instead Rule 59(e) is a rule preserved for "Amendment of Judgments" and does not provide the remedy that the Appellants were seeking. There are two situations where a party may file a Rule 59(e) motion:

> "[First], a party may wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. [Second], a party must file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review." Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 14, 602 S.E.2d 772, 775 (2004).

A Rule 60(b)(4) motion, however, is the only Rule by which a party may assert a lack of subject matter or personal jurisdiction. The Master's Order was signed on September 13, 2011 and Defendants filed their Motion for Relief from Judgment / Order

on August 21, 2012. (R. p. 2 and R. p. 11, respectfully). The filing requirements for a 60(b)(4) motion are as follows:

> "Rule 60(b)(4) [permits relief] after one year, but within a 'reasonable time' when the judgment is void or the judgment has been satisfied, avoiding the necessity of bringing a new action to set aside the judgment in such cases after one year." SCRCP Rule 60(b)(4), editor's note.

If the commentary carves out a specific rule allowing parties to file a 60(b) motion within one year and thereafter extends such a time restraint to a "reasonable standard," surely a 60(b)(4) motion filed within one year will comply with the Rule's "reasonableness" standard. Further, Thomas & Howard Co., Inc. v. T.W. Graham and Co., states that,

> "A judgment may be set aside more than one year after its entry only if it is 'void'... A void judgment is one that, from its inception, is a complete nullity and is without legal effect and must be distinguished from one which is merely 'voidable.' Generally, a judgment is void only if a court acts without jurisdiction." Thomas & Howard Co., Inc. v. T.W. Graham and Co., 318 S.C. 286, 457 S.E.2d 340, 343 (1995).

In this case, the Appellants assert that the court lacked jurisdiction to render an Order concerning Parcel 2. Therefore, the Appellants are entitled to relief from the portion of the Master's Order which refers to Parcel 2 for lack of jurisdiction.

Further, the "reasonable time" requirement in Rule 60 raised by the Respondent does not apply to Rule 60(b)(4).

> "Because a void judgment is a nullity, it may be attacked at any time and, for this reason, the provision of the rule which requires a motion for relief from a judgment to be made within a reasonable time does not apply to motions made on the ground the judgment is void." Gatling v. Beach Palace, Inc., 294 S.C. 464, 35 S.E.2d 736 (Ct. App. 1988).

For the foregoing reasons, this argument raised by Respondent should be disregarded.

CONCLUSION

For the reasons set forth above and in Appellants' Initial Brief, the Order of the Master in Equity denying Appellants' Rule 60(b)(4) was in error and should have been granted. Therefore, Appellants' pray this Court reverse the ruling of the Master in Equity and remand the matter to the Master with direction to void Footnote 1 of the Parcel 1 Order.

Respectfully submitted,

Wendell L. Hawkins, SC Bar No. 13583
Aimee V. Leary, S.C. Bar No. 100657
Wendell L. Hawkins, P.A.
103-C Regency Commons Drive
Greer, SC 29650
864-848-9370 (P) 864-848-9759 (F)
wlh@wlhawkinslawfirm.com
avl@wlhawkinslawfirm.com
Attorneys for the Appellants

Greer, South Carolina
February 14, 2013

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,

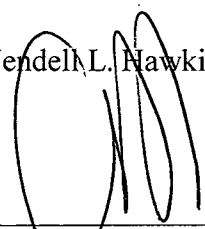
v.

Marsha P. Wright and Richard A. Wright, Appellants,

CERTIFICATE OF COUNSEL

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

Wendell L. Hawkins, PA



Wendell L. Hawkins, Esq., SC Bar 13583
Aimee V. Leary, Esq., S.C. Bar 100657
103-C Regency Commons Drive
Greer, SC 29650
(864) 848-9370 Phone (864) 848-9759 Fax
wlh@wlhawkinslawfirm.com
Attorneys for the Appellants

Greer, South Carolina
February 14, 2013

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. 2012-CP-04-02157

Pinnacle Bank, SC, ...Respondent,

v.

Marsha P. Wright and Richard A Wright,.....Appellants.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of **Appellants' Final Reply Brief** with this Certificate of Service was served upon counsel on March 8, 2013 by First Class Mail as follows:

Val Stieglitz, Esq.
Jennifer J. Hollingsworth, Esq.
Tanya A. Gee, Esq.
Nexsen Pruet, LLC
1230 Main St., Ste 700
Columbia, South Carolina 29201

Wendell L. Hawkins, PA
Wendell L. Hawkins, Esq., SC Bar 13583
Aimee V. Leary, Esq., S.C. Bar 100657
103-C Regency Commons Dr. Greer, SC 29650
(864) 848-9370 Phone (864) 848-9759 Fax
wlh@wlhawkinslawfirm.com
avl@wlhawkinslawfirm.com
Attorneys for the Appellants