ORIGINAL

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable Marvin H. Dukes, III

Case No. 2011-CP-07-2176
Appellate Case No. 2013-000222

Bloody Point Property Owners Association, Inc., David L. Fingerhut, and Patricia M. Santry .....Respondents,

v.

William A. Ashton, Jr. and Michele C. Ashton.....Appellants.

APPELLANTS' FINAL REPLY BRIEF TO RESPONDENT'S INITIAL BRIEF

October 29, 2013

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STATEMENT OF FACTS

Although certainly not controlling on the valuation issue discussed below, Respondents, in their Initial Brief, on page 3, mistakenly state that the lot in question, Lot 42 Fuskie Lane, was a "Golf Lot" comparable to such lots in their appraisal, when in fact it was a "Second Row Ocean/Golf Lot," the same as Lot 75 Fuskie Lane, and thus, much more valuable than any of the properties included in Respondents' appraisal. Similarly, contrary to Footnote 2 in Respondent's Initial Brief, wherein Respondents argue that the Appellants did not maintain continuous ownership of the property due to the fact that the property was offered for sale at a tax sale, such does not constitute a break in the ownership of the property when the property is in fact redeemed during the one (1) year redemption period following its initial offering for sale. A tax sale deed transferring ownership does not issue until the expiration of the one (1) year redemption period, such that when the property is redeemed, as was the case with the subject property, no break in ownership has occurred.

ARGUMENTS

I. THE MASTER-IN-EQUITY DID ABUSE HIS DISCRETION IN HOLDING THAT THE APPELLANTS WERE PROPERLY SERVED.

Without conceding the point, it appears that the Respondent may be correct in its assertion that the standard of review for setting aside or vacating a judicial Order is an abuse of discretion. Notwithstanding the same, it is equally clear from the holding in Caldwell v. Wiquist, 402 S.C. 565 (Ct.App. 2013), 741 S.E.2d 583 (2013), that the Court has clearly stated, when it comes to cases where jurisdiction is being conferred upon the Court by virtue of service of process upon the Defendants pursuant to Orders of Publication, a failure to strictly comply with the requirements of the statute by either the Clerk of Court, Probate

Judge, or Master-in-Equity, in issuing said Order of Publication, deprives the Court of jurisdiction, such that it is an abuse of discretion by a judge when they fail to vacate a judgment based upon the same. Respondents attempt to skirt this very clear requirement of Caldwell by trying to distinguish Caldwell from the case *sub judice*. In doing so, they argue that reading the Petition of the attorney for the underlying Plaintiff, in conjunction with the Affidavits of Non-Service from Pennsylvania, somehow meets the requirements in Montgomery v. Mullins, 325 S.C. 500, 480 S.E.2d 467 (Ct. App. 1997) and Wachovia Bank of South Carolina, N.A. v. Player, 341 S.C. 424, 535 S.E.2d 128 (2000). Such simply is not the case, as there is nothing within the Affidavits of Non-Service in Pennsylvania which in any way, shape, or form can be construed as saying that after a diligent search, the Defendants could not be found **within** the State of South Carolina. (Emphasis added.) (R. pp. 132-134). If efforts to serve in another state, which proved unsuccessful, could suffice to meet the requirement of a diligent search to locate the Defendant within the State of South Carolina, there would be no logical basis for the specific requirement of the statute that the Affidavit must state the person on whom service of the Summons is to be made **cannot, after due diligence**, be found within the state. To construe the statute as not requiring that due diligence be made to locate the person within the state of South Carolina before seeking an Order of Publication would be tantamount to making a mockery of the plain language of the statute. By way of example, if a would-be Defendant were to have worked on the north slope of Alaska ten (10) years prior to the time a person desired to institute a suit against them and had, for the last five (5) years, lived at various addresses throughout the Low Country of South Carolina, where he was living at the time when the incident giving rise to the action arose, then, under the construction suggested by the Respondent, the Plaintiff

could simply choose to send the service documents to Alaska for service and, upon receiving an Affidavit of Non-Service back, would be entitled to seek an Order of Publication. Obviously, such would be an absurdity. Nothing the Respondents can say or do can get around the fact that the Petition and Affidavit submitted to the Clerk of Court was deficient on its face for the issuance of an Order of Publication, thus, the Court lacked jurisdiction over the Respondents in the underlying action.

II. THE MASTER-IN-EQUITY DID ABUSE HIS DISCRETION IN HOLDING THAT THE APPELLANTS' DUE PROCESS RIGHTS WERE NOT VIOLATED.

Respondents assert in their Initial Brief that the Master-in-Equity did not abuse his discretion in ordering that the Appellants' due process rights were not violated. They also attempt to claim that the matter is not preserved for appeal on the basis that the Master-in-Equity failed to rule on the matter, in both his Order denying Appellant's Motion to Vacate the Judgment and his Order denying the Appellant's Motion for Reconsideration. (R. pp. 1-13). Respondents David L. Fingerhut's and Patricia M. Santry's reliance on Herron v. Century BMW, 395 S.C. 461, 719 S.E.2d 640 (2011), for the proposition that Appellant's due process arguments are not preserved, is misplaced. (Page 20 of their Brief). The Herron Court "carefully re-examined the record. In all the submissions, memoranda, and hearings before the trial court, not once was there a single mention of," the issue that the Herron Court ultimately ruled was first raised on appeal. Herron at 644. The Herron Court further set forth that issue preservation rules should be approached, "with a practical eye, and not in a rigid, hyper-technical manner." Herron at 644. As to the latter issue, while the Respondents are correct that the Master-in-Equity failed to rule specifically on the issue, the law is clear that the failure of the trial judge to rule on an issue does not preclude the issue from being

heard on appeal, so long as the issue is raised before the trial judge in a proper post-trial motion, which in this case it was in Appellant's Motion for Reconsideration.

In the case *sub judice*, the Appellants in fact argued that their due process rights were violated at the trial level, and briefed same (including respective headings labeled "Violation of Due Process" in their written trial level briefs), yet the trial court did not rule upon any due process issues even when presented with the issues a second time at the Motion for Reconsideration. (R. pp. 20-21; R. p. 43). Appellants, therefore, respectfully assert that due process violation arguments are not being raised for the first time on appeal herein, that Appellant's arguments are in fact preserved, and that the facts of Herron are clearly distinguishable. Therefore, this Court has authority to review the matter.

As to the first issue, that the Appellants' due process rights were violated, the Appellants would submit, that as the South Carolina Court of Appeals has already recognized, "service by publication is constitutionally insufficient where actual notice by mail is feasible." Caldwell, *402 S.C.* at 576, 741 S.E.2d at 589 (Citing United States v. Borromeo, 945 F.2d 750, 752, (4th Cir. 1991)(internal quotation marks omitted). Due process requires that where actual notice by mail is feasible, an effort must be made to accomplish the same. If the name and address of an individual is reasonably ascertainable, then notice by publication is insufficient to satisfy due process." *Id.* (Citing Montgomery v. Scott, 802 F. Supp. 930, 935 (W.D.N.Y. 1992). In South Carolina, in order to accomplish service by mail which satisfies the requirements of due process one must follow the guidelines of such service as outlined in Rule 4(d)(8) of the South Carolina Rules of Civil Procedure. *Id.*

In the case *sub judice*, the facts are undisputed that after attempting service through a Sheriff's Deputy in Pennsylvania, no further efforts of any type (including, but not limited to a certified mailing, return receipt requested, restricted delivery) were made to effect service on the Appellants, other than publishing notice in a local paper in Beaufort County, South Carolina. (R. p. 276). The record is replete with proof that the Respondents, Bloody Point Property Owners Association, had the mailing address of the Appellants on file at all times, which address had not changed in over ten (10) years. Thus, service of the Appellants in the underlying action by publication was a clear denial of their due process rights and the Master-in-Equity abused his discretion in not setting aside the prior Order of the Court on those grounds.

III. THE MASTER-IN-EQUITY DID ABUSE HIS DISCRETION IN HOLDING THAT THE RESPONDENTS WERE GOOD FAITH PURCHASERS FOR VALUE.

Respondents, in their Brief, rely heavily on the cases of Robinson v. Estate of Harris, 378 S.C. 140, 662 S.E.2d 420 (Ct. App. 2008), and Cumbie v. Newberry, 251 S.C. 33, 159 S.E.2d 915 (1968), in their assertion that under those cases the Respondent Fingerhut is a good faith purchaser for value entitled to protection from the setting aside of the Order, even in the event that procedural irregularities existed in relation to the underlying proceedings which gave rise to the Order of Foreclosure and Sale. While in large part their reliance on those cases is misplaced due to the factual dissimilarities between those cases and the underlying case, as more fully discussed below, one aspect of the Cumbie case is particularly relevant. Specifically, in Cumbie the Court unequivocally states that, a purchaser in good faith at a judicial sale is not affected by irregularities in the proceedings, or even error in the judgment, under which the sale was made; **but is required, at his peril,** only to make

inquiry as to the jurisdiction of the Court which ordered the sale, and whether all proper parties were before the court when the Order was made. Citing Wingard v. Hennessey, 206 S.C. 159 (1942); Brownlee v. Miller, 208 S.C. 252, 37 S.E.2d 658 (1946); and Bennett v. Floyd, 237 S.C. 64, 115 S.E.2d 659 (1960). (Emphasis added.) In this case, the facts are undeniable as Respondents state, in Footnote 5 of their Initial Brief in reference to the Affidavit of the Respondent, Fingerhut, at paragraph 3, that the only inquiry made prior to the sale was to look at the notice of sale and then attend the sale. (R. p. 256). Such does not amount to the inquiry required to be a good faith purchaser for value as stated in Cumbie. Thus, at his peril, the Respondent, Fingerhut, failed to make the inquiry required of him. Not being a good faith purchaser for value, without notice due to having failed to make that inquiry required of him, the sale must be set aside. While the parties differ as to what degree of inquiry must be made by an individual purchasing property at a foreclosure sale to qualify as a good faith purchaser for value, such need not be ruled on by this Court, because of the Respondent's own admission that they made **no inquiry** beyond looking at the Notice of Sale and attending the sale, which in no way complies with the elements set forth in Robinson to be a good faith purchaser for value. (R. pp. 256-257).

While the Respondents, at pages 9 and 10 of their Initial Brief, argue that the Master's Report of Judgment and Foreclosure sale filed on December 6, 2011, recited that appellants had been properly served, **such is moot** because the Respondents admit they never inquired of the file and therefore were unaware of what any underlying Order said. (R. pp. 256-257). Moreover, what else would an underlying Order say when the Order is prepared by counsel for the party seeking foreclosure and, due to an improper service by publication, no notice of the proceeding was ever received by the Appellants, such that no one was

present to inform the Court that jurisdiction did not properly exist.

Appellants would further respectfully assert that Respondents David L. Fingerhut's and Patricia M. Santry's reliance on Cumbie v. Newberry, 251 S.C. 33, 159 S.E.2d. 915 (1968), as cited on pages five (5) and six (6) of their brief, is misplaced as Cumbie is clearly distinguishable from the facts of the case *sub judice*. Cumbie arose as a partition action wherein it appears that both owners of record were clearly active parties in the case. This assertion is supported by the fact that the parties in Cumbie presented a Consent Order to the Presiding Judge setting forth that the property at issue would be sold and the proceeds held until further Order of the Court. In short, both parties were already actively litigating a case, both were without a doubt proper parties before the Court and properly before the Court, and they set forth in a Consent Order that was eventually signed exactly how the presiding judge would proceed with selling the property at issue. The Consent Order, of which both parties almost certainly had absolute actual notice due to the very fact that it was an Order with the consent of both parties, set forth essentially that if the initial highest bidder did not complete the sale within ten (10) days, the property would be resold in the same fashion. Mr. Cumbie, as Respondent in Cumbie, later asserted, about three (3) years after the resale was completed, that he did not have proper notice of the resale, though he had actual notice of the method of sale and the initial sale. The case *sub judice* is clearly distinguishable, as the Appellants herein assert that they were not parties properly before the Court to the original action, even though they were necessary and proper parties as owners of the property, and it is clear that they certainly did not have actual legal notice of the Master-in-Equity's Order directing the sale and manner of the Daufuskie Island property at issue in the same fashion as the parties

in Cumbie.

At a minimum Cumbie is distinguishable because the Appellants herein had no part whatsoever in preparing, presenting, or otherwise taking part in the drafting of the Master-in-Equity's Order selling the subject property. Appellants respectfully assert that Cumbie, at best as to Respondent's position, sets forth that an active party litigant in a case cannot come back to court three years later to try to set aside a judicially ordered sale when one had actual legal notice as an active participant in a lawsuit via a signed consent order making that party fully aware of the entire sales procedure and those procedures that would be followed should any resale be necessary due to the default of any initial high bidder in completing the purchase.

Respondents David L. Fingerhut's and Patricia M. Santry's reliance on Robinson v. Estate of Harris, 378 S.C. 140, 662 S.E.2d 420 (Ct. App. 2008), is similarly misplaced, as Robinson is distinguishable due to its misapplication and misreading of facts from Cumbie, which it used to justify much of the opinion, and by the fact that the Court of Appeals did not have an opportunity to rule on several arguments presented, such as newspaper publication issues, due to improper issue preservation stemming from failure to raise issues at trial or on a motion to reconsider, alter, and/or to amend. Additionally, the Robinson Court was presented with the issue of essentially un-doing two (2) sales, specifically a judicial sale that was followed by one of the parties deeding her interest to another winning bidder, and a later second sale by the remaining winning bidder to someone totally uninvolved with the initial action. The case *sub judice* does not have a later second sale to a party uninvolved with the initial action, such that any public policy arguments supporting the Robinson Court's ruling are substantially diminished in this matter.

IV. THE MASTER-IN-EQUITY DID ABUSE HIS DISCRETION IN HOLDING THAT THE FORECLOSURE SALE PRICE WAS NOT SO INADEQUATE AS TO SHOCK THE CONSCIENCE OF THE COURT.

Respondents David L. Fingerhut and Patricia M. Santry have perhaps misinterpreted the Accent Appraisal's statements set forth at page 5, as argued in their Brief at page 13, regarding the January 12, 2012, "announcement" in the Bloody Point Property Owners Newsletter. (R. p. 143). The Accent Appraisal sets forth at page 5 that Bloody Point was sold at auction in June of 2011, which is approximately seven months before the January 12, 2012, newsletter "announcement" cited in the Accent Appraisal. (R. p. 143). Furthermore, the Accent Appraisal clearly sets forth that the golf course was "currently under rehabilitation" (it appears that the source of this data was the January 12, 2012, Bloody Point Property Owners Newsletter) under its new ownership, and that the "Spa" building is "being renovated." (R. p. 143). The terms "currently" and "being" tend to indicate that improvements began sometime between June of 2011 and the publication of the newsletter, as opposed to the red herring language set forth in Respondent's brief, which tends to make it seem as if January of 2012 is when announcements were first made about potential future community improvements. The initial foreclosure action that eventually leads to the case *sub judice* was filed in the middle of May of 2011; June of 2011 brought new ownership of Bloody Point and the beginning of substantial community improvements.

However, far more importantly, is the fact that Respondents, on page 13 of their Initial Brief, correctly state that Lot 70 Fuskie Lane sold for $126,650 in September 2012, yet was appraised at only $107,000 in the appraisal submitted by the Appellant as part of their Motion to Vacate or Set Aside the Judgment and Sale. (R. p. 174; R. p. 141).

Respondents argue that since the subject Lot in this action is almost 20% smaller, its proper value should be 20% less than the $126,650 which was paid for Lot 70. Their argument is misplaced in that it fails to take into account that the subject Lot actually appraised for $140,000, which is a great deal more than the $107,000 for Lot 70 in the appraisal. (R. pp. 140-141). This was due to the fact that it has a far more accessible view of the golf course which directly borders it as compared with Lot 70, which sits a significant distance away from the golf course while both have basically the same ocean view. Logically speaking, if the subject Lot were of greater value than Lot 70 in the appraisal, which specifically took into account the differences between the Lots including their respective size and accessibility to the golf course, you would not discount the subject Lot in comparison with Lot 70's sale price by 20%, as suggested by Respondents. Instead, the ratio of their respective values would remain the same, such that the subject Lot arguably would be worth significantly more than the $140,000 at which it was appraised. Even if you simply valued the subject Lot the same as Lot 70, the value of the subject Lot at $126,650 exceeds the amount paid by the Respondents at the foreclosure sale significantly, so as to mandate that the sale be set aside as shocking the conscience. The line of cases on which both sides rely as concerns the standard for setting aside a sale on the grounds that the value paid shocks the conscience all state that although there is no specific threshold, the Courts have uniformly stated that a value paid of less than 10% of the value of the property would, clearly, be deemed to shock the conscience. The trial judge abused his discretion in failing to set aside the subject sale on the grounds that the value paid of $11,593.20 was less than 10% of the value of the property, and thus, so grossly insufficient as to shock the conscience of the Court.

CONCLUSION

For the foregoing reasons, in accordance with applicable law, the Appellants respectfully submit that this Court should reverse the Beaufort County Master-in-Equity's July 24, 2012, Order Denying Defendants' Motion to Vacate/Set Aside Foreclosure Sale, Void Master-in-Equity Deed and Vacate/Set Aside Order, and should further reverse the Master-in-Equity's December 28, 2012, Order Denying Appellants' Motion for Reconsideration.

Respectfully submitted:

October 29, 2013

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CERTIFICATE AND PROOF OF SERVICE

I hereby certify that the Appellants' Final Reply Brief to Respondent's Initial Brief complies with Rule 211(b), and that I have served a copy of the Final Reply Brief to Respondent's Initial Brief upon the Respondents, by depositing a copy thereof in the United States Mail, postage prepaid, on this 24th day of October, 2013, addressed to: Matthew E. Tillman, Esquire, Womble, Carlyle, Sandridge & Rice, LLP, P.O. Box 999, Charleston, SC 29402, (843) 720-4629, Counsel of Record for Respondents, David L. Fingerhut and Patricia Fingerhut (a/k/a Patricia M. Santry).

October 24, 2013

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