THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Gordon G. Cooper, Master-In-Equity

Appellate Case No. 2013-001508

Wells Fargo Bank, N.A. as Trustee for Option One Mortgage Loan Trust 2000-D, Asset Backed Certificate, Series 2000-D,

Appellant,

v.

Mooring Secured Liquidity; Randy S. Rutherford; Tara P. Rutherford; Spartanburg County Tax Collector; Sherman Acquisitions LP,

Respondents.

FINAL REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

ARGUMENT IN REPLY

I. INTRODUCTION.

Respondent Tax Collector and Mooring Secured Liquidity's ("Respondents") initial briefs focus on Wells Fargo Bank, N.A. as Trustee for Option One Mortgage Loan Trust 2000-D, Asset Backed Certificate, Series 2000-D's ("Wells Fargo") allegedly "stealthy" conduct as it relates to the void tax sale, ignoring the fact that Wells Fargo's conduct was wholly proper and lawful. Despite the controlling case law holding that the tax sale here is void, Respondents argue that equity demands that the tax sale be upheld. Equity should not and cannot favor the Tax Collector, where it sold the property in violation of the bankruptcy stay, over Wells Fargo, who abided by the stay and timely asserted its rights in this action.

Appellant adopts and incorporates by reference the Statement of Case presented in the initial brief and offers the following points of clarification and rebuttal to the arguments raised by Respondents.

II. TAX COLLECTOR HAD NOTICE OF THE RUTHERFORDS' BANKRUPTCY.

Contrary to the Tax Collector's position that it "was not listed as a creditor in the [Rutherfords'] bankruptcy petition and did not have notice of the bankruptcy," (Br. of Resp. Tax Collector at 6.) the Rutherfords listed "Spartanburg County, P.O. Box 5807, Spartanburg, SC" as a creditor on their bankruptcy petition. (R. pp. 110-164.) This is the address of the Spartanburg County Treasurer. (R. p. 66, lines 12-15.)

Because the Rutherfords listed Spartanburg County as a creditor in their bankruptcy petition and gave notice of their bankruptcy to the Treasurer, an officer of Spartanburg County, notice was given to the county as a whole and all of its officers, including the Tax Collector. *See Riverchase Apartments, Ltd. P'ship v. Campbell Cty. (In re Riverchase Apartments, Ltd. P'ship),*

184 B.R. 35 (Bankr. M.D. Tenn. 1995) (a county was bound by notice it received from the debtor regarding a bankruptcy petition because although it could choose to organize its business by dividing activities into various departments, it couldn't use that method of operation as a shield against notice properly sent to it in its name and place of business). Furthermore, Wells Fargo is an intended beneficiary of the automatic stay. *Hillis Motors, Inc. v. Hawaii Auto. Dealers' Ass'n,* 997 F.2d 581, 586 (9th Cir.1993) (the stay "also protects creditors as a class from the possibility that one creditor will obtain payment on its claims to the detriment of all others."); *Ostano Commerzanstalt v. Telewide Systems, Inc.,* 790 F.2d 206, 207 (2d Cir.1986) ("the purpose of the stay is to protect creditors as well as the debtor.")

Respondent Tax Collector's argument that it need not comply with the automatic stay is unsupported by the law or equity. In order to seek equity, Respondent Tax Collector must do equity. *See Provident Life & Accident Ins. Co. v. Driver*, 317 S.C. 471, 479, 451 S.E.2d 924, 929 (1994). Therefore, Respondent Tax Collector's failure to comply with the Bankruptcy Code once it had notice of the bankruptcy action should bar any equitable relief sought.

III. THE TAX SALE IS *VOID AB INITIO.*

Appellant proved in its initial brief that the tax sale is void because it was held during the pendency of the automatic stay, which Respondents do not dispute.[1] Effectively asking this court to make new law, Respondents argue that the tax sale should be upheld solely based on equity. To support this position, Respondents cited several cases in which a bankruptcy court modified or annulled the automatic stay to validate transfers of property that occurred in violation of the automatic stay. *See, e.g., In Re Howard*, 391 B.R. 511 (Bankr. N.D. Ga 2008).

[1] "Ordinarily orders issued in violation of the stay are void" (Br. of Resp. Mooring at 10); "Ordinarily, any action taken in violation of the stay is void and without effect..." (Br. of Resp. Tax Collector at 5.)

Respondents, however, never moved the bankruptcy court to modify or annul the stay in this matter.

Instead, Respondents ask this state court to annul the automatic stay and validate the tax sale, despite the fact that the bankruptcy court has "exclusive jurisdiction to annul the automatic stay." *In re Killmer,* 2013 Bankr. LEXIS 4842, 17 (Bankr. S.D.N.Y. Nov. 15, 2013). "[S]tate courts cannot issue orders interfering with the bankruptcy court's exclusive jurisdiction over the property of a bankrupt estate." *Bragg v. Bragg*, 347 S.C. 16, 24-25, 553 S.E.2d 251, 256 (Ct. App. 2001). It is questionable whether this court even has jurisdiction to do so, given that "the Supreme Court of South Carolina has held that the automatic stay deprives state court judges of subject matter jurisdiction to take any action inconsistent with the stay." *Weatherford v. TIMMARK Carey Holdings, Inc. (In re Weatherford)*, 413 B.R. 273, 284-285, (Bankr. D.S.C. 2009) (internal quotations omitted) *citing Ex Parte Reichlyn*, 310 S.C. 495, 499, 427 S.E.2d 661, 664 (1993).

Despite Respondents equitable arguments, the Bankruptcy Code and controlling South Carolina precedent require that the tax sale be declared void *ab initio*. Once this court determines that the tax sale is void, the affirmative defenses are moot as "it is well-known that equity follows the law." *Regions Bank v. Wingard Props., Inc.*, 394 S.C. 241, 715 S.E.2d. 348 (Ct. App. 2011).

IV. THERE IS NO EVIDENCE OF PREJUDICE TO SUPPORT A FINDING OF LACHES OR UNCLEAN HANDS.

Appellant argued in its initial brief that there is no evidence to support the trial court's finding of laches or unclean hands because, among other things, Respondents cannot prove prejudice as a result of Appellant's actions. In response to Appellant's arguments, Respondents urge this Court to consider facts that are unsupported by the evidence at trial. Respondents urge

this court to consider bare assertions made by counsel as evidence, even though such statements are inadmissible. *See, e.g.*, *Ex parte Morris*, 367 S.C. 56, 64, 624 S.E.2d 649, 653 (2006) ("[i]t is well established that counsel's statements regarding the facts of a case and counsel's arguments are not admissible evidence."); *McManus v. Bank of Greenwood*, 171 S.C. 84, 89, 171 S.E. 473, 475 (1933) (appellate courts repeatedly have held "that statements of fact appearing only in arguments of counsel will not be considered"); *S.C. Dept. of Transp. v. Thompson*, 357 S.C. 101, 105, 590 S.E.2d 511, 513 (Ct. App. 2003) ("arguments made by counsel are not evidence").

First, Respondents state that the County paid out the overage to the Rutherfords, based on counsel's statement at trial that the County "paid the overage to the Rutherfords in the amount of $22,440.88 on June 21, 2010." (Br. of Resp. Tax Collector at 11.) Counsel's inadmissible statement is the only evidence of this alleged payment. No admissible evidence, such as receipts, affidavits, or testimony, were admitted into evidence at trial to support this statement. Similarly, Mooring states that "the Tax Collector paid out the overage, pursuant to statute, on June 21, 2010, based upon a petition for the same of May 2, 2010." (Br. of Resp. Mooring at 16-17.) Mooring also has never offered any evidence to support this assertion and this alleged May 2, 2010 petition is not in the record.

Second, Mooring has asserted for the first time on appeal that it would suffer prejudice because it "has changed its financial position by expending monies, like any other landowner, for the payment of taxes, insurance, and routine maintenance on the property." (Br. of Resp. Mooring at 17-18.) However, Mooring did not present any evidence supporting this alleged change in financial position to the trial court.

This Court has the authority in an equity case to "resolve questions of fact in accordance with its own view of the preponderance of the evidence." *Fesmire v. Digh*, 385 S.C. 296, 683

S.E.2d 803 (Ct. App. 2009), *citing Wilder Corp. v. Wilke*, 324 S.C. 570, 577, 479 S.E.2d 510, 513 (Ct. App. 1996). In this instance, the only facts demonstrating prejudice are inadmissible statements made by counsel for Respondents. Because these statements are not admissible evidence, this Court should overturn the trial court's finding of fact that Respondents suffered prejudice. *Morris* at 64, 624 S.E.2d at 653.

Additionally, both Respondents have misstated a key holding in *King v. James,* 388 S.C. 16, 694 S.E.2d 35 (Ct. App. 2010). In attempting to distinguish the prejudice alleged by the Tax Collector in *King* from the prejudice alleged by the Tax Collector in the instant action, both Respondents have claimed that the overage in *King* was available to be reimbursed to the Tax Collector when the tax sale was overturned; therefore, they argue the prejudice to the Tax Collector in the instant action is greater because the overage has allegedly been paid out to the Rutherfords. (Br. of Resp. Mooring at 17; Br. of Resp. Tax Collector at 11.)

Notwithstanding the complete lack of evidence to support the allegation that the overage has been paid in the instant action, the *King* case clearly states that the county claimed prejudice because of its "inability to refund the purchase price." *King* at 29, 695 S.E.2d at 42 (emphasis added). The county did not state that it was impractical, inconvenient, or difficult to refund the purchase price; it was unable to refund the purchase price. The court in *King* was obviously not dissuaded by the county's inability to refund the overage when it overturned the tax sale; likewise, the alleged loss of the overage in the instant action, to the extent it actually happened, should not prevent this Court from overturning the tax sale.

V. CONCLUSION.

For the foregoing reasons, as well as those addressed in Appellant's Initial Brief to this Court, Appellant respectfully requests the Court to reverse the judgment of the trial court and to set aside the tax sale.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned attorney hereby certifies that this Final Reply Brief of Appellant complies with Rule 211(b), SCACR.

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Reply Brief of Appellant in the above-referenced case has been served upon opposing counsel by mailing a copy in an envelope properly addressed with postage pre-paid this 10th day of January, 2014.

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