

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Gordon G. Cooper, Master-In-Equity

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SC Court of Appeals

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 BRIEF OF RESPONDENT
SPARTANBURG COUNTY TAX COLLECTOR**

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QUESTIONS PRESENTED

1. Whether the tax sale should be set aside because it was held during the pendency of the homeowner's bankruptcy action when the mortgage holder failed to act to protect its interest in the Property.
2. Whether the trial court erred in holding that laches barred Appellant's action to overturn the tax sale because the other parties were prejudiced by Appellant's unreasonable delay.
3. Whether the trial court erred in holding that Appellant was barred from relief because it acted with unclean hands.

STATEMENT OF THE CASE

On November 1, 2010, Appellant Wells Fargo filed a Complaint in Spartanburg County to set aside the tax sale of 327 Palmetto Circle, Greer, South Carolina 29651 (the "Property"). *See* Complaint, (R. pp. 20-30). Mooring Security Liquidity ("Mooring"), a defendant and the tax sale purchaser, filed a counterclaim to quiet the title to the Property. *See* Mooring Answer, (R. pp. 40-45). The Tax Collector was joined as a party pursuant to Rule 19, SCRPC, by the trial court's April 20, 2012 order. The Tax Collector filed an answer raising the following defenses: statute of limitations; laches; waiver; and lack of notice of bankruptcy. *See* Tax Collector Answer, (R. pp. 49-56). The Tax Collector also filed a counterclaim, for the overage, against Randy S. Rutherford and Tara P. Rutherford (the "Rutherfords"), another defendant and the defaulting taxpayers.

A final hearing before the Master-in-Equity was held on February 12, 2013. By Order entered March 6, 2013, the trial court found Appellant's action to void the tax sale was barred by laches and upheld the validity of the tax sale based on the principles of equity and quieted title in favor of Mooring. *See* Order p. 8, (R. p. 12). The amount involved on appeal for the Tax Collector is the amount of the overage paid to the Rutherfords or \$28,440.88. Appellant filed a timely Motion to Alter or Amend the Judgment, which the trial court denied by Order dated June 11, 2013. *See* 59(e) Order p. 5, (R. pp. 14-19). The date of service of the Notice of Appeal is July 12, 2013.

STATEMENT OF THE FACTS

This is an appeal from an order of the Spartanburg County Master-in-Equity that found Appellant's cause of action to set aside a tax sale was barred by laches. The facts in this case are largely undisputed. Appellant filed a foreclosure action against the Rutherfords on January 4, 2007, in the Spartanburg County Court of Common Pleas in Civil Action No. 2007-CP-42-00039. The foreclosure action sought to foreclose on the Property. On February 27, 2007, a Judgment of Foreclosure and Sale was entered in that case. *See* Plaintiff's Trial Exhibit 3, (R. pp. 103-108).

On March 29, 2007, the Rutherfords filed for Chapter 13 Bankruptcy in the United States Bankruptcy Court, District of South Carolina, in Case No. 2007-016120-hb. *See* Plaintiff's Trial Exhibit 4, (R. pp. 110-164). On May 9, 2008, the Bankruptcy Court issued an order granting Appellant (via its servicer) relief from the automatic stay provision of 11 U.S.C. § 362. *See* Plaintiff's Trial Exhibit 12, (R. pp. 208-210). On April 7, 2010, a Supplemental Order Post Judgment was entered in the foreclosure action. *See* Plaintiff's Trial Exhibit 11, (R. pp. 204-207). The Rutherfords' bankruptcy action was dismissed on January 19, 2010. [Appellant's Initial Brief incorrectly refers to January 26, 2010.] *See* Plaintiff's Trial Exhibit 9, (R. pp. 199-200).

On March 17, 2008, the Spartanburg County Treasurer issued an execution commanding Respondent Spartanburg County Tax Collector ("Tax Collector") to levy by distress and then sell the Property for unpaid county taxes for tax year 2007. *See* Plaintiff's Trial Exhibit 7, (R. p. 191). On November 3, 2008, the Tax Collector sold the Property at tax sale to Respondent Mooring Secured Liquidity ("Mooring") for \$30,000. During the period of the automatic stay provision of 11 U.S.C. § 362, Wells Fargo

received a notice of the End of Redemption, which provided Appellant notice of its right to redeem the Property. This Notice of End of Redemption was sent certified mail, return receipt requested as required by S.C. Code Ann. § 12-51-120 and the green return receipt card was signed for by Wells Fargo on October 9, 2009.

Following the end of the redemption period, the Tax Collector executed the tax deed for the Property on January 15, 2010. Pursuant to S.C. Code Ann. § 12-51-130, the overage is payable ninety (90) days after execution of the deed unless a judicial action is instituted during that time by another claimant. The Appellant did not file any action to make a claim for the overage. Respondent Tax Collector's counsel represented at the hearing that the County paid overage to the Rutherfords in the amount of \$28,440.88 on June 21, 2010. *See* Transcript p. 19, lines 14 and 20-21, (R. 76, lines 14 and 20-21). Based on this representation, the trial court found that the overage from the proceeds of the tax sale had been distributed by the Tax Collector to the Rutherfords. *See* Order entered March 6, 2013, p. 6, (R. p. 10). *See also* Transcript p. 19, lines 2-3 and 19-21, (R. p. 76, lines 2-3 and 19-21).

ARGUMENT

I. WHETHER THE TAX SALE SHOULD BE SET ASIDE BECAUSE IT WAS HELD DURING THE PENDENCY OF THE HOMEOWNER'S BANKRUPTCY ACTION WHEN THE MORTGAGE HOLDER FAILED TO ACT TO PROTECT ITS INTEREST IN THE PROPERTY.

A. Tax Collector was without Knowledge of the Bankruptcy.

The Tax Collector sold the Property during the pendency of the Rutherfords' bankruptcy petition. However, the Tax Collector was not listed as a creditor in the bankruptcy petition and did not have notice of the bankruptcy. "Ordinarily, any action taken in violation of the stay is void and without effect, even where there is no actual notice of the existence of the stay." *In re Calder*, 907 F.2d 953, 956 (10th Cir. 1990) (internal citations omitted). "Nevertheless, equitable and due process considerations apply in the exercise of bankruptcy jurisdiction." *In re Smith Corset Shops, Inc.*, 696 F.2d 971, 976 (1st Cir. 1982).¹ Additionally, the Bankruptcy Code provides:

an entity that has neither actual notice nor actual knowledge of the commencement of the case concerning the debtor may transfer property of the estate, ... in good faith ... to an entity other than the trustee, with the same effect as to the entity making such transfer or payment as if the case under this title concerning the debtor had not been commenced.

11 U.S.C. § 542(c)

Furthermore, "case law indicates that courts will apply equitable considerations at least where the creditor was without actual knowledge of a bankruptcy petition and the

¹ A trustee may under 11 U.S.C. § 549(a) record a copy or notice of the bankruptcy petition where a transfer of an interest in real property may be recorded, but nothing prohibits the holder of the mortgage from recording the petition to protect its interest in the property. *See In re Howard*, 391 B.R. 511, 516 (N.D. Ga. 2008).

In the present case, Appellant Wells Fargo did not record a copy of the Rutherfords' bankruptcy petition so as to protect its interest.

bankrupt's unreasonable behavior contributed to the creditor's plight." *In re Calder*, 907 F.2d 953, 957 (10th Cir. 1990). In this case, the debtors exhibited unreasonable behavior by not notifying the Tax Collector of the pending bankruptcy and claiming the overage. The Appellant, as a creditor, also displayed unreasonable behavior as it sat by and did not notify the Tax Collector of the pending bankruptcy² and failed to seek relief from the bankruptcy court for violation of the automatic stay during the pendency of the bankruptcy case.³

B. Equitable Considerations Apply Where Creditor is without Knowledge of a Pending Bankruptcy and Other Creditors and Debtors Remain Silent.

The Tax Collector lacked both actual notice and knowledge of the Rutherfords' bankruptcy. In contrast, the Appellant had both actual notice and knowledge of the bankruptcy as it obtained relief from the automatic stay on May 9, 2008. Complaint Par. 12, (R. p. 26, Par. 12). Furthermore, the Appellant had actual notice and knowledge of the tax sale of the Property as it signed the return receipt card on October 9, 2009 for the End of Redemption Notice sent by the Tax Collector. Trial Exhibit 7, (R. p. 187).

A debtor "[can] not remain stealthily silent when it knew that the goods were being moved pursuant to court order and then turn around and successfully sue the [creditor] for the alleged conversion of the goods." *In re Smith Corset Shops, Inc.*, 696

² The court *In re Howard*, declined to accept the contention of the mortgage holder that the County or tax sale purchaser "were under a general duty to search the records in the bankruptcy court to determine whether any property subject to tax sale was property of a bankruptcy estate, an argument for which [the mortgage holder] offered no legal support..." *In re Howard*, 391 B.R. 511, 517 (N.D. Ga. 2008)

³ The Appellant received the Notice of the End of Redemption on October 9, 2009. The debtors' bankruptcy case was not dismissed until January 19, 2010

F.2d 971, 977 (1st Cir. 1982). Likewise, a creditor cannot remain stealthily silent when it knew the Property had been sold at tax sale and was available for redemption. The creditor cannot wait until after the Tax Collector had deeded the property to the tax sale purchaser and paid the overage to the owner at the end of redemption to file an action to void the tax sale. Since, at that point, all the other parties involved in the transaction had changed their respective positions. The Court went on to state that “[w]e do not think Congress envisioned any such misuse of the automatic stay.” *Id.* In this case, the creditor “must bear some responsibility for [its] unreasonable delay in asserting [its] rights under section 362(a).” *In re Calder*, 907 F.2d 953, 956 (10th Cir. 1990). To allow Wells Fargo to use the automatic stay provision as a trump card played after it failed to redeem the property or perfect its foreclosure action would be inconsistent with the underlying purpose of the automatic stay. *Id.* at 956-957.

II. WHETHER THE TRIAL COURT ERRED IN HOLDING THAT LACHES BARRED APPELLANT’S ACTION TO OVERTURN THE TAX SALE BECAUSE THE OTHER PARTIES WERE PREJUDICED BY UNREASONABLE DELAY.

The trial court correctly held that laches barred Appellant’s action to overturn the tax sale because the defaulting taxpayer, the tax sale purchaser and tax collector would all be prejudiced by Appellant’s unreasonable delay. The Appellant obtained relief from the automatic stay on May 9, 2008 approximately six (6) months before the tax sale. *See* Plaintiff’s Exhibit 12, (R. pp. 208-210). Then, on October 9, 2009, the Appellant signed for the End of Redemption notice sent by the Tax Collector certified mail return receipt requested, which was approximately seventeen (17) months after the Appellant obtained relief from the automatic stay. *See* Plaintiff’s Exhibit 7, (R. p. 187). Not only did the Appellant fail to move forward with its foreclosure action during the seventeen (17)

months after receiving relief from the automatic stay, it also sat quietly and did not notify the Tax Collector that the property was a part of the Rutherfords' bankruptcy estate and subject to the provisions of the automatic stay.

After having received the Notice of the End of Redemption six (6) months earlier, the Appellant sought and obtained a Supplement Order Post Judgment from the trial court apparently in order to move forward with its foreclosure while knowing the property had already been sold at tax sale and which it had not redeemed. Then, in November 2010, thirty (30) months after having obtained relief from the automatic stay provisions, knowing the property had been sold at tax sale and the tax deed issued, all while remaining stealthily quiet, the Appellant filed the present action in an attempt to overturn the tax sale.

A. Equitable Principles Such As Laches Protect Creditors from Unwarranted Liability Resulting From The Application of Section 362.

Similar to the equitable ruling by the court in the *In re Smith Corset Shops, Inc.* case (discussed above), “[t]he equitable doctrine of laches can apply in a similar manner in this case to defeat” Appellant Wells Fargo’s claims. *Matthews v. Rosene*, 739 F.2d 249, 251 (7th Cir. 1984). The underlying purpose of Section 362 is to benefit a debtor by preventing creditors from pursuing individual actions. *Id.* “Suspension of Section 362 automatic stay provisions may be consonant with the purposes of the Bankruptcy Act when equitable considerations weigh heavily in favor of the creditor and the debtor [and creditor Appellant] bears some responsibility for creating the problems. *Id.* As in the *Matthews* case, the record supports the finding by the master-in-equity that Appellant “unreasonably and inexcusably delayed asserting [its] claim ... and that [the Tax

Collector and tax sale purchaser] would be seriously prejudiced if the state court order is voided. *Id.* The Appellant has failed to offer any argument that its delay in moving forward with its foreclosure or objecting to the tax sale was reasonable. In this case, “the property ... sold years ago; some prejudice plainly would arise if the state court order was voided.” *Id.*

B. Elements of Laches Established by County.

At the hearing, the trial court found that equity rewards the diligent. *Collins v. Sigmon*, 299 S.C. 464, 468, 385 S.E.2d 835, 837 (1989). The Appellant, Wells Fargo, was not diligent. Transcript p. 31, line 10, (R. p. 88, line 10). The court also found “[u]nder the doctrine of laches, if a party, knowing his rights, does not seasonably assert them, but by unreasonable delay causes his adversary to incur expenses or enter into obligations or otherwise detrimentally change his position, then equity will ordinarily refuse to enforce those rights.” *King v. James*, 388 S.C. 16, 28, 694 S.E. 2d 35, 41 (2010). “The party seeking to establish laches must show: (1) a delay, (2) that was unreasonable under the circumstances, and (3) prejudice.” *Id.* The trial court found that each Defendant established that Appellant Wells Fargo delayed pursuing its right to challenge the tax sale, that this delay was unreasonable given the Appellant’s notice of the Rutherfords’ bankruptcy and of the tax sale of the subject property and that the delay resulted in prejudice to the Defendants. Order entered March 6, 2013, pp. 6-8, (R. pp. 5-13).

(1) A Delay

In fact, “Appellant concedes that there was a delay in filing its action to vacate the tax sale.” Initial Brief of Appellant p. 13. In addition to the facts contained in the record

and the delay detailed in the subsequent subsection below, this concession by Appellant establishes the first prong of the test for a finding of laches.

(2) Unreasonable Under the Circumstances

The Appellant knew of the Rutherfords' bankruptcy at least as of March 29, 2007, when it sent a letter to the court advising of the same. Order entered March 6, 2013, p. 2, (R. p. 6). Thus, upon receipt of the Notice of End of Redemption, Appellant Wells Fargo had knowledge of the tax sale and could have asserted at that time that the tax sale was in violation of the automatic stay even if it did not intend to redeem the property. Instead, as discussed above, the Appellant remained stealthily silent.

Additionally, S.C. Code Ann. § 12-51-130 provides that the overage is "payable ninety days after execution of the deed unless a judicial action is instituted during that time by another claimant." Thus, if the Appellant objected to the property being sold at tax sale because of the Rutherfords' bankruptcy, the Appellant could have filed a judicial action within ninety (90) days of the execution of the deed. By taking such action, the Appellant would have been able to prevent the situation that is now before the court where the overage has already been paid to the owner at the end of redemption. Finally, the Appellant could have moved forward with its foreclosure action in a timely manner as it obtained relief from the automatic stay on May 9, 2008 months prior to the tax sale.

The "analysis of [Appellant's] conduct from an equitable standpoint clearly requires consideration of its failure to protect its own legal and financial stake in the Property." *In re Howard*, 391 B.R. 511, 519 (N.D. Ga. 2008). In light of the pending foreclosure action for which Appellant sought relief from the automatic stay, "[i]t is not a great leap to think that if mortgage payments are not being made, then taxes are not being

paid either. As a sophisticated mortgage lender and/or servicer, [Appellant Wells Fargo] should have been aware that annual post-petition property taxes were an issue.” *Id.* at 520. However, Appellant failed to act for a period of thirty (30) months (from May 9, 2008 when it obtained relief from the automatic stay until November 1, 2010, when it filed the present action) to protect its interest in the Property and waited until after all of the other parties had changed their positions.

(3) Prejudice

Respondent Tax Collector’s counsel represented at the hearing that the County paid overage to the Rutherfords in the amount of \$28,440.88 on June 21, 2010, which was not challenged by the Appellant. *See* Transcript p. 19, lines 14 and 20-21, (R. p. 76, lines 14 and 20-21). Based on this representation, the trial court found that the overage from the proceeds of the tax sale had been distributed by the Tax Collector to the Rutherfords. *See* March 6, 2013 Order p. 6, (R. p. 10). The trial court had also previously found, in its April 20, 2012 order, that the Tax Collector paid the overage to the Rutherfords and thus, the County was a necessary party under Rule 19, SCRPC. *See* April 20, 2012 Order, p.1, (R. p. 1).

The Appellant’s argument that the *King* case, *supra*, is identical to the case at bar is disingenuous. Appellant’s Initial Brief, p. 15. In the *King* case, the County was still in possession of the overage funds as the funds had been transferred to the County’s general fund. In the case at hand, the County through its Tax Collector paid those funds to the owner at the end of redemption in accordance with S.C. Code Ann. § 12-51-130. Furthermore, in the *King* case, the Tax Collector failed to strictly comply with statutory requirements for a tax sale. In the case at bar, the Tax Collector unintentionally and

without notice or knowledge of the bankruptcy sold the property. The Tax Collector has “done nothing more than engage in appropriate conduct under applicable non-bankruptcy law with no reason to believe that any bankruptcy law was applicable. *In re Howard*, 311 B.R. 511, 519 (N.D. Ga. 2008). In fact, the Appellant could have easily informed the County of the Rutherfords’ bankruptcy upon receipt of the Notice of End of Redemption, but instead remained silent and created the situation that is now before the court.

Where all three elements required to establish laches have been proven, the doctrine of laches bars the Appellant’s action to overturn the tax sale. Appellant Wells Fargo should have taken action prior to the Tax Collector, Tax Sale Purchaser and Owner at the end of redemption all changing their positions as a result of and in reliance upon Appellant Wells Fargo’s inaction. Order entered March 6, 2013, p. 7, (R. p. 11). The inaction of Appellant misled the other parties resulting in prejudice to them. These other parties would not have changed their positions if the Appellant had been diligent in challenging the tax sale. Due to the misleading behavior of the Appellant, it would be unjust and inequitable to now permit the Appellant to have the tax sale voided.

III. WHETHER THE TRIAL COURT ERRED IN HOLDING THAT APPELLANT WAS BARRED FROM RELIEF BECAUSE IT ACTED WITH UNCLEAR HANDS.

As the Appellant indicated in its Initial Brief, there is a three part test that must be satisfied for the court to find unclean hands.⁴ The defendant must establish (1) the plaintiff acted unfairly, (2) in a matter that is the subject of the litigation, (3) to the prejudice of the Defendant. *Wilson v. Landstram*, 281 S.C. 260, 266, 315 S.E.2d 130 (Ct. App. 1984). Here, the Appellant knew that the Rutherfords had filed a bankruptcy and

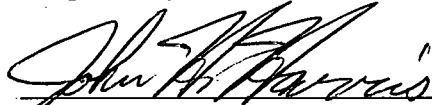
⁴ The defense of unclean hands was properly before the trial court as it was an affirmative defense pled by the Rutherfords. *See* Rutherfords’ Answer, Par. 10, (R. 32, Par. 10).

failed to object to the tax sale of the property at the time it received the Notice of the End of Redemption. The validity of the tax sale in light of the Rutherfords' bankruptcy petition is the subject of the litigation before the court. The failure of the Appellant to notify the County of the Rutherfords' bankruptcy, object to the tax sale or institute an action within ninety (90) days with respect to the overage all results in prejudice to the Tax Collector upon the Tax Collector's payment of the overage to the Rutherfords.

CONCLUSION

For the aforementioned arguments, the Tax Collector respectfully requests the Court affirm the trial court's judgment that the Appellant's action is barred by laches and that upholding the tax sale is proper.

Respectfully submitted,



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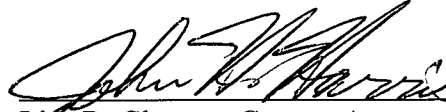
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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Final Brief complies with Rule
211(b) of the South Carolina Appellate Court Rules.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have served the Respondent Spartanburg County Tax Collector's Final Brief on January 8, 2014, by depositing a copy in the United States Mail, postage prepaid, addressed to the following parties of record:

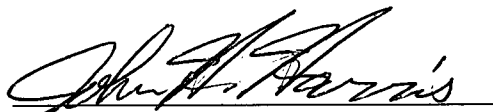
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