

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Benjamin H. Culbertson, Circuit Court Judge

Appellate Case No. 2013-000712

Bonnie N. Charlton, Ronald L. Charlton, and Bayside Property, Inc. Plaintiffs,

v.

South Bay Properties, LLC, Stantec Consulting Services, Inc. f/k/a Trico Engineering Consultants, Inc., Milone & MacBroom, Inc., John Steven Goodwin, Louise C. Goodwin, Thomas I. Puckett, Brenda C. Puckett, Robert Nahama, Jeanne E. Nahama, Thomas Holland Sharon Louise Holland, Joyce K. Sobel, Robert W. Waruszewskiu, Richard N. Taylor, Robert K. Spillers (a/k/a Robert Spillers) Deborah T. Spillers (a/k/a Deborah Spillers), Patrick A. DiAngelo, Deborah A. DiAngelo, Gary E. Owens, and Joyce M. Owens, Fount L. Shults, Lynda M. Shults, Dennis Ridgeway, Teresa Lynn Ridgeway and Georgetown County Forfeited Land Commission Defendants,

Of Whom

John Steven Goodwin, Louise C. Goodwin, Gary E. Owens, and Joyce M. Owens are Appellants,

and

Bonnie N. Charlton, Ronald L. Charlton, Bayside Property, Inc., South Bay Properties, LLC, Stantec Consulting Services, Inc. f/k/a Trico Engineering Consultants, Inc., Milone & MacBroom, Inc., Patrick A. DiAngelo, Deborah A. DiAngelo, and Georgetown County Forfeited Land Commission are Respondents.

BRIEF OF RESPONDENTS
BONNIE N. CHARLTON, RONALD L. CHARLTON,
AND BAYSIDE PROPERTY, INC.

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SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

1. WHEN THE MASTER IN EQUITY RETURNED THIS ACTION TO THE CIRCUIT COURT, DID THE APPEAL OF THE ORDER OF REFERENCE BECOME MOOT?
2. WHERE UNAPPEALED FINDINGS AND CONCLUSIONS FULLY JUSTIFY AN ORDER OF REFERENCE, DOES THE TWO ISSUE RULE REQUIRE AFFIRMATION OF THE ORDER OF REFERENCE?
3. WHERE A PARTY FAILS TO SERVE A DEMAND FOR A TRIAL BY JURY NOT LATER THAN TEN DAYS AFTER SERVICE OF THE LAST PLEADING, HAS THE DEADLINE FOR REQUESTING A JURY TRIAL EXPIRED AND HAS THE PARTY WAIVED THE RIGHT TO A JURY TRIAL?

STATEMENT OF THE CASE

On August 31, 2012, the Plaintiffs (hereinafter “the Charltons”) commenced this action to foreclose a purchase money mortgage on real property located in Georgetown County, South Carolina. (Complaint, R. pp. 65-73) The borrower, South Bay Properties, LLC, was the record owner of the subject property. (Lis Pendens pp. 1-2, R. pp. 74-75) The other Defendants had, or might claim, an interest in the subject property.

The Appellants (hereinafter “the Goodwins and Owenses”) and seventeen other individuals were named as Defendants because they filed a lis pendens against the subject property and alleged that they have an equitable lien on the property. (Complaint paragraph 14, R. p. 69) The Goodwins and Owenses along with Patrick A. DiAngelo and Deborah A. DiAngelo filed answers and did not demand a jury trial. (Answer of Steven Goodwin and Louise C. Goodwin and Answer of Gary E. Owens and Joyce M. Owens, R. pp.76-78 and pp. 79-81) All the other Defendants either failed to answer the Complaint or consented to referring this action to the Georgetown County Master in Equity.

On November 19, 2012, the Charltons filed and served a motion for an order referring this action to the Georgetown County Master in Equity. (Motion for Order of Reference, R. pp. 83-85) The motion was set for hearing on January 22, 2013. The day of the hearing, the Goodwins and Owenses filed and served a motion to amend their answers to add numerous defenses, counter-claims, cross-claims and third party defendants and they filed and served a motion in Civil Action No. 2009-CP-22-1045 to reinstate/restore

that action to the roster and to consolidate that action with the present action. (Motion to Amend, R. pp. 117-172)

At the hearing, counsel for the Charltons noted that this is an appropriate action to refer to the Master in Equity because it is an action to foreclose a mortgage on real property and all parties have consented to the reference or are in default or waived the right to a jury trial by not timely demanding a jury trial. (Transcript pp. 3-6, R. pp. 90-93) As to the Motion to Amend that was filed and served that morning, counsel suggested that the motion could be heard by the Master in Equity. (Transcript p. 6, R. p. 93 lines 6-8)

Counsel for the Goodwins and Owenses confirmed that the Motion to Amend had been filed and served that morning and acknowledged that the motion could be heard by the Master in Equity. (Transcript p. 10-11, R. pp. 97-98)

The Circuit Court orally ruled:

All right, since that was just filed this morning those issues aren't before the Court. So, in the present posture I'm going to go ahead and allow the referral. The master-in-equity can hear those motions. Certainly if he grants the motions and there are factual issues that are to be heard by a jury then he can send those back and to the circuit court and we'll set them up for trial but since the motion to restore and the motion to amend were just filed this morning I'm going to go ahead in its present structure since there's been no request for a jury trial and since it is a foreclosure action allow it to go to the master-in-equity. (Transcript p. 11, R. p. 98)

On January 28, 2013, the Circuit Court issued its Order of Reference. (Order of Reference, R. pp. 175-177) The Order was consistent with the Circuit Court's oral ruling and provided:

Nothing herein should be construed as a ruling on the Defendants' Goodwin and Owens recently filed Motions referred to above. These Motions are to be heard and ruled upon by the appropriate Court. (Order of Reference p. 3, R. p. 177)

On February 6, 2013, the Goodwins and Owenses moved for reconsideration of the Order of Reference on the grounds that they were entitled to amend their answers to add numerous defenses, counter-claims, cross-claims and third party defendants and they were entitled to consolidate Civil Action No. 2009-CP-22-1045 with this action. As stated in the Motion for Reconsideration: "These two motions were not heard by the Court as they had been filed less than ten days prior to the hearing, and were not yet scheduled for hearing." (Motion for Reconsideration paragraph 1, R. p. 183) The Circuit Court denied the Motion for Reconsideration by an Order dated February 22, 2013. (Order dated February 22, 2013, R. pp. 188-189)

On February 25, 2013, in accordance with the Order of Reference, the Georgetown County Master in Equity was scheduled to hear arguments on the Motion to Amend by the Goodwins and Owenses. At the start of the hearing the Master in Equity *sua sponte* observed that one effect of granting the motion would be to add the City of Georgetown as a third party defendant. Since Elis Freeman Crosby is the City Attorney for the City of Georgetown and she is also the law partner and spouse of the Master in Equity, the Master in Equity refrained from ruling on the Motion to Amend and returned this action to the Circuit Court. (Order Returning Action to Circuit Court, R. pp. 193-195)

Rather than asking the Circuit Court to schedule a hearing on their Motion to Amend, the Goodwins and Owenses moved for reconsideration of the Order denying their

prior motion for reconsideration. (Motion for Reconsideration, R. pp. 191-192) The Circuit Court denied the second Motion for Reconsideration by an Order dated March 26, 2013. (Order dated March 26, 2013, R. pp. 198-199)

ARGUMENTS

1. THIS APPEAL IS MOOT.

This appeal is from an Order of Reference, however the Master in Equity's Order Returning Action to Circuit Court has already had the effect of vacating the Order of Reference. No purpose is served by this appeal other than to stay the circuit court proceedings and thereby obstruct and delay the Charltons' mortgage foreclosure. Any objection to the Order of Reference is moot and has no practical legal effect upon the existing controversy. In *Sloan v. Greenville County*, 380 S.C. 528, 535, 670 S.E.2d 663, 667 (Ct. App. 2008), this Court stated:

The court does not concern itself with moot or speculative questions. *Sloan v. South Carolina Dep't of Transp.*, 379 S.C. 160, 167-68, 666 S.E.2d 236, 239-40 (2008). An appellate court will not pass judgment on moot and academic questions; it will not adjudicate a matter when no actual controversy capable of specific relief exists. *Curtis v. State*, 345 S.C. 557, 567, 549 S.E.2d 591, 596 (2001). A case becomes moot when judgment, if rendered, will have no practical legal effect upon the existing controversy. *Id.*

The three exceptions to the mootness doctrine are not applicable to the present action.

Interestingly, the Appellants' Brief says very little about the Order of Reference. Instead, the Appellants' Brief argues the merits of the motion filed in this action to allow the Goodwins and Owenses to amend their answers and the motion filed in Civil Action No. 2009-CP-22-1045 to reinstate/restore that action to the trial docket and to consolidate Civil Action No. 2009-CP-22-1045 with the present action. Neither of the motions was

properly before the Circuit Court and neither of the motions was ruled on by the Circuit Court. Accordingly, the merits of the two motions are not properly before this Court.

This appeal should be dismissed because the Master in Equity's Order Returning Action to Circuit Court has rendered the Order of Reference moot and this appeal will have no practical legal effect upon the existing controversy.

2. THE TWO ISSUE RULE REQUIRES THAT THE ORDER OF REFERENCE BE AFFIRMED.

The Circuit Court found and concluded that this is an action to foreclose a mortgage on real property located in Georgetown County, South Carolina; that the Defendants Stantec Consulting Services, Inc. f/k/a Trico Engineering Consultants, Inc., Milone & MacBroom, Inc. and Georgetown County Forfeited Land Commission signed consents to an order of reference; that the Defendants John Steven Goodwin, Louise C. Goodwin, Gary E. Owens, Joyce M. Owens, Patrick A. DiAngelo and Deborah A. DiAngelo filed answers and did not request a jury trial; and that the other Defendants did not plead or otherwise make an appearance within the time prescribed by statute and are in default. (Order of Reference p. 2, R. p. 176)

The Circuit Court also found and concluded that, on the day it heard the Motion for Order of Reference, the Goodwins and Owenses filed and served a motion to amend their answers and a motion to reinstate/restore and consolidate another action (Civil Action Number 2009-CP-22-1045) with the present action. Since the time required by Rule 6(d), SCRCF, had not run, these motions were not considered by the Circuit Court. Based upon the state of the pleadings on the day the Motion for Order of Reference was decided, the Circuit Court found that, as of that date, this was a proper matter to refer to the Master in Equity for Georgetown County. (Order of Reference p. 2, R. p. 176)

The Appellants' Brief does not appeal the foregoing findings and conclusions. Instead the Appellants' Brief argues the merits of the motions filed and served the day of the hearing and not considered or ruled on by the Circuit Court. Because the Appellants'

Brief fails to address the the matters the Circuit Court actually heard and decided, the Circuit Court's findings and conclusions in the Order of Reference are now the law of the case.

"Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court." *Elam v. South Carolina Department of Transportation*, 361 S.C. 9, 23, 602 S.E.2d 772, 779-80 (2004) (citations omitted).

"Under the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case. *Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010)." *Atlantic Coast Builders and Contractors, LLC v. Lewis*, 398 S.C. 323, 328, 730 S.E.2d 282, 284 (2012).

"Actions to foreclose liens or obtain partition of real property shall be tried by the court, and shall ordinarily be referred to a master pursuant to Rule 53." Rule 71(a), SCRPC. Rule 53(b), SCRPC, provides in part:

References. In an action where the parties consent, in a default case, or an action for foreclosure, some or all of the causes of action in a case may be referred to a master or special referee by order of a circuit judge or the clerk of court. In all other actions, the circuit court may, upon application of any party or upon its own motion, direct a reference of some or all of the causes of action in a case. Any party may request a jury pursuant to Rule 38 on any or all issues triable of right by a jury and, upon the filing of a jury demand, the matter shall be returned to the circuit court.

The Order of Reference should be affirmed under the two issue rule because the Circuit Court's unappealed findings and conclusions are sufficient to fully justify the Order of Reference.

3. APPELLANTS' DEADLINE FOR REQUESTING A JURY TRIAL HAD EXPIRED AND APPELLANTS HAD WAIVED THEIR RIGHT TO A JURY TRIAL.

The Goodwins and Owenses filed and served answers on October 26, 2012. The answers did not demand a jury trial. The Goodwins and Owenses did not serve and file a demand for a jury trial within the time required by Rule 38, SCRCP, and Rule 5(d), SCRCP. “The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(d) constitutes a waiver by him of trial by jury.” Rule 38(d), SCRCP.

The Appellants’ Brief argues that the Goodwins and Owens anticipate that their motion to amend their answers and their motion in Civil Action No. 2009-CP-22-1045 to reinstate/restore that action to the trial roster and to consolidate that action with the present action will be successful therefore it was error for the Circuit Court not to grant the requested relief before the motions were heard. (Appellants Brief p. 6) However, footnote 6 in the Appellants Brief undermines this argument by acknowledging that the motion in Civil Action No. 2009-CP-22-1045 to reinstate/restore that action to the trial roster and to consolidate that action with the present action has been heard and denied.

The Circuit Court did not accept the argument that merely filing a motion to amend an answer prevents the issuance of an order of reference or entitles a party to a jury trial. The Circuit Court’s ruling on the motion for reconsideration, like the Circuit Court’s ruling on the motion for an order of reference, was, “[b]ased upon the present pleadings in this action....” (Order of Reference p. 2, R. p. 176) The Circuit Court correctly stated in the Order denying the motion for reconsideration: “Even though the

defendants have a pending Motion to Amend Answer so that they can assert counterclaims, the deadline for requesting a jury trial has expired and, therefore, the defendants have waived their right to a jury trial.” (Order p. 1, R. p. 188)

Obviously, if the pleadings change in the future so as to raise an issue triable of right by a jury, a party may then demand a trial by jury by serving a demand in writing not later than ten days after the service of the last pleading directed to such issue. Rule 53(b), SCRCF. However, the mere filing of a motion does not create a right to a jury trial where the deadline for requesting a jury trial has expired and the parties have waived their right to a jury trial by failing to timely serve a demand.

The Order of Reference should be affirmed because, in the present posture of the pleadings, the deadline for the Goodwins and Owenses to request a jury trial has expired and they have waived their right to a jury trial.

CONCLUSION

For the reasons stated herein, this appeal should be dismissed or, in the alternative, the Circuit Court's Order of Reference should be affirmed.

Respectfully submitted,

A handwritten signature in black ink, reading "Charles T. Smith", is written over a horizontal line.

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February 18, 2014

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CERTIFICATE OF COMPLIANCE

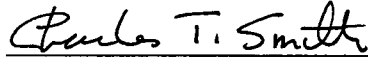
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I hereby certify that the Brief of Respondents Bonnie N. Charlton, Ronald L. Charlton and Bayside Property, Inc. complies with Rule 211(b) of the South Carolina Appellate Court Rules.



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I hereby certify that on the 18th day of February, 2014, I served the Brief of Respondents Bonnie N. Charlton, Ronald L. Charlton and Bayside Property, Inc. by depositing copies in the United States Mail, postage prepaid, addressed to:

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