



THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM NEWBERRY COUNTY
Court of Common Pleas

Joseph W. Hudgens, Special Referee

Common Pleas Case No.: 2012-CP-36-103
Appellate Case No. 2013-002181

RECEIVED

SEP 29 2014

SC Court of Appeals

EverBank,.....Respondent,

v.

Lenora Scurry, Patrick Scurry, The South Carolina
Department of Revenue, Defendants,

Of Whom Lenora Scurry and Patrick Scurry are the.....Appellants.

FINAL REPLY BRIEF OF APPELLANTS

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STATEMENT OF ISSUES

- I. Does the record show that the Appellants should have been afforded relief, as the default judgment rendered exceeds the amount sought in the complaint, violates due process, and is accordingly void?
- II. Is the truly slippery slope what the Respondent advocates: that no relief from a judgment can be granted on the basis of a process server's representations to a defendant?
- III. Does the Respondent's argument against a meritorious defense require a leap that is too long for logic to make?

ARGUMENT

- I. **The record show that the Scurrys should have been afforded relief, as the default judgment rendered exceeds the amount sought in the complaint, violates due process, is clearly unlawful, and is accordingly void.**

The note at issue in this case provides that if the lender has accelerated the debt, “Lender may require Borrower to pay costs and expenses including reasonable and customary attorneys’ fees for enforcing this Note to the extent not prohibited by applicable law.” (R. p. 114, emphasis added.) The mortgage at issue in this case states that “Lender shall be entitled to collect all expenses incurred in pursuing [foreclosure], including, but not limited to, reasonable attorney’s fees[.]” (R. p. 120, emphasis added.) EverBank’s complaint in this case seeks an award of attorney’s fees, for which the complaint alleges only this language in paragraph 9 as a basis: “In and by the terms of the said Note, it is further provided that the maker thereof shall pay all collection costs, including reasonable attorneys fees, if the said Note be placed in the hands of an attorney for collection after default.” (R. p. 25, emphasis added.) The Respondent (hereinafter “EverBank”) argues that all the language just mentioned put the Appellants (hereinafter “the Scurrys”) on notice, somehow, “that their mortgage company could recover attorney’s fees against them in any amount deemed ‘reasonable’” – which even EverBank must place within quotation marks – “by a court in the event of foreclosure[.]” even if those “attorney’s fees” were never actually incurred by the plaintiff. (Final Brief of Respondent p. 5.)

It is difficult to imagine a less reasonable interpretation of this language than that proffered by EverBank.

EverBank now contends, for the first time, that the \$835 amount shown as incurred attorney's fees on EverBank's bankruptcy proof of claim "represented only 'prepetition' attorney's fees[.]" (Final Brief of Respondent p. 6.) Nothing in the record suggests that, after the bankruptcy filing, \$5,200.00 in attorney's fees was ever incurred by EverBank for having a lawyer do the work of a default residential mortgage foreclosure. EverBank never contended that below. (R. pp. 123-56.) To his credit, EverBank's counsel does not have the temerity to make such an argument now. (Final Brief of Respondent.) EverBank hopes that insinuation will suffice on this point in the place of fact-based argument.

The foreclosure judgment EverBank obtained in this case provides that "[t]he amount of the judgment shall be subject to increase" to permit EverBank to recover additional amounts not awarded in the judgment and further specifically provides for the award of still more in attorney's fees to EverBank at a later time. (R. p. 12.) The judgment provides that not even a hearing is necessary for this to occur; "[s]uch additional costs, commissions and expenses may be established by affidavit and shall be adjudicated by the court without further hearing." (R. p. 12.) Lacking a good argument for why a judgment that so provides could possibly comply with the law or comport with due process, EverBank now argues that it does not matter that the foreclosure judgment was clearly unlawful in this way, since EverBank never took advantage of this unlawful opportunity. (Final Brief of Respondent p. 23.) EverBank chooses to ignore precedent in this regard, hoping that this court will fail to notice the precedent.

EverBank now argues that the Scurrys forewent their opportunity to challenge the matters subject of their motion for relief from the judgment because they did not move for reconsideration of the foreclosure judgment or bring a direct appeal from it. (Final Brief of Respondent pp. 7, 18.) Such a motion or appeal would not have lain under South Carolina law. EverBank desires this court to rule against the Scurrys because they did not do what they could not have done.

- a. **EverBank argues as though the Supreme Court's opinion in Norris v. Heyward, 312 S.C. 67, 439 S.E.2d 264 (1993), and this court's opinion in River Road Co. v. Energy Master Products, Inc., 300 S.C. 316, 387 S.E.2d 694 (Ct. App. 1989) were never issued.**

EverBank never once cites or mentions in its brief the Supreme Court's opinion in Norris v. Heyward, 312 S.C. 67, 439 S.E.2d 264 (1993), or this court's opinion in River Road Co. v. Energy Master Products, Inc., 300 S.C. 316, 387 S.E.2d 694 (Ct. App. 1989). (Final Brief of Respondent.) The reason for failing to address this is plain: these cases are controlling precedent adverse to EverBank's position in this appeal.

As discussed above and in the Scurry's main brief, the complaint in this case nowhere apprises the Scurrys that EverBank will be asking the court to award it, as attorney's fees, thousands of dollars more than it is paying its lawyers to handle the foreclosure action. (R. pp. 24-27.) In the complaint, EverBank states "[i]n and by the terms of the said Note, it is further provided that the maker thereof shall pay all collection costs, including reasonable attorney's fees, if the said Note be placed in the hands of an attorney for collection after default." (R. p. 25.) Nothing in the complaint could have apprised the Scurrys of the risk that EverBank could be

awarded an extra amount of several thousand dollars as “attorney’s fees” when that amount bears no relation to the attorney’s fees incurred by EverBank as collection costs. (R. pp. 24-27.) The complaint does not let the reader know that EverBank will be seeking “attorney’s fees” that are not collection costs; in fact, it expressly limits what is sought in that regard to “collection costs[.]” (R. p. 25.)

River Road was a case in which a party moved for relief from a default judgment that had been granted to a plaintiff for an amount in excess of that sought in the complaint. 300 S.C. at 316-17. This court held that, since the judgment exceeded the amount sought in the complaint, it was “clearly unlawful” due to its noncompliance with Rule 54(c), SCRPC. Id. at 317. Rule 54(c) provides that a judgment rendered against a party for his default for failure to appear “shall not be different in kind from or exceed in amount that prayed for in the demand for judgment.” It is plain that the basis for finding the appellant in River Road entitled to relief from the judgment is that the judgment was void for lack of due process, since the complaint failed to provide any notice that any judgment other than what the complaint sought could be rendered in the case. It is well established that one of the touchstones of procedural due process is *adequate notice*. Moore v. Moore, 376 S.C. 467, 473, 657 S.E.2d 743 (2008). This court’s opinion in Pinckney v. Atkins (also never mentioned by EverBank) bears out that the basis for the River Road decision was that, due to lack of notice in the complaint, the judgment there was void for lack of due process. Pinckney v. Atkins, 317 S.C. 340, 343, 454 S.E.2d 339, 341. (Ct. App. 1995). In Pinckney, the court, citing River Road and Rule 54(c), stated as follows:

While we are not too concerned with the master treating the action as one in partition as pertains to the interests of those defendants who appeared at the master's hearing, we are concerned about this treatment as it pertains to the defendants in default and unknown defendants who were not on notice that the pleadings would be so treated. In cases where judgment is rendered against parties by default, a trial judge may not grant relief beyond that which is demanded in the pleadings.

Pinckney, 317 S.C. at 343 (emphasis added).

Judgments rendered without due process are void. Universal Benefits, Inc. v. McKinney, 349 S.C. 179, 183, 561 S.E.2d 659 (Ct. App. 2002). Rule 60(b)(4), SCRCP, provides for relief from a void judgment. As EverBank itself concedes (Final Brief of Respondent pp. 23-24), there is no further analysis required; if a judgment is void, relief from it must be granted. BB&T v. Taylor, 369 S.C. 548, 552 n. 1, 633 S.E.2d 501, 503 n. 1 (2006). No wonder, then, that EverBank deals with this by making a feint at an argument (but never actually arguing) that \$5,200.00 in attorney's fees were actually incurred and by hoping this court will forget about Rule 54(c) and River Road.

EverBank's omission from its brief of any mention of Norris v. Heyward seems, too, to be a stratagem of quiet misdirection. In Norris, "the master ruled the judgment would be continuing and upon submission of a Motion to Amend Judgment and affidavits, respondents could amend the judgment to reflect additional payments for reimbursement." 312 S.C. at 69. The Supreme Court found such a judgment to be violative of the Rules of Civil Procedure, holding that "[t]here is no procedure allowing a continuing judgment. The procedure in civil courts must conform to the SCRCP." Id. As noted in the Scurrys' main brief, per Rule 54(a), SCRCP, a

judgment is an order that finally determines the rights of the parties to the litigation. Because the judgment at issue here provides that EverBank has the ability to add additional amounts to the judgment (and to do so with no further hearing, in just the same way as in Norris), then the judgment does not finally determine the rights of the parties and is not a judgment at all. Another touchstone of due process is that it “requires that a person shall have a reasonable opportunity to be heard before a legally appointed and qualified tribunal before any binding decree, order, or judgment can be made affecting his rights to life, liberty, or property.” LaSalle Bank Nat’l. Ass’n. v. Davidson, 386 S.C. 276, 279, 688 S.E.2d 121, 122-23 (2009) (quoting State v. Brown, 178 S.C. 294, 300, 182 S.E. 838, 841 (1935)). The foreclosure judgment here embraced what is anathema to that principle. (R. p. 12.) It comes as no surprise that EverBank does not wish to discuss precedent that rejected such a judgment.

b. There is nothing wrong with Shawn French’s affidavit being used in this case.

EverBank argues quite forcefully (though, as discussed, unpersuasively) that this court should give short shrift to the affidavit of Shawn French, originally given in another case, that was submitted in support of the Scurry’s motion for relief from the judgment. (Final Brief of Respondent pp. 21-22.) While the Scurrys certainly understand that EverBank does not like it that this affidavit is a part of the record in this case, that does not mean that there is something wrong with the affidavit or something wrong with the Scurrys having submitted it in support of their motion.

Simply because testimony was given in another case – whether given in an affidavit, a deposition, or at trial – does not mean that it is somehow deficient or ineffective when offered in support of a motion. See Klippel v. Mid-Carolina Oil,

Inc., 303 S.C. 127, 130, 399 S.E.2d 163, 165 (Ct. App. 1990) (deposition testimony from another case should have been considered when offered in opposition to summary judgment motion). It was still given under oath; it is still testimony. Rule 603, SCRE.

EverBank argues that “[t]he Special Referee was correct in giving this affidavit no weight and not even acknowledging it in the order denying the Motion to Vacate Judgment and Sale. Mr. French gave this affidavit in a completely separate and unrelated foreclosure action in a different county concerning a different set of facts.” (Final Brief of Respondent p. 21.) Truth does not vary from county to county or from case to case. EverBank must be attempting, then, to argue that the instant case is somehow materially different from the case in which Mr. French gave his affidavit, a default residential mortgage foreclosure case in which an amount of “attorney’s fees” was awarded that exceeded any amount incurred by the foreclosure plaintiff. There is, however, no material difference between the cases.

Mr. French’s affidavit did more than “only concern[] the issue of local customary attorney’s fees.” (Final Brief of Respondent p. 22.) It *did* “analyze the amount of fees awarded in this case” and *did* “analyze the work done by EverBank’s counsel in this case[,]” since, just as in the case in which Mr. French gave that affidavit, all EverBank’s counsel did here was what would be done in *any* default residential mortgage foreclosure case. (R. pp. 71-74, 109-11.)

Perhaps most offensive about EverBank’s argument regarding Mr. French’s affidavit is EverBank’s underhanded insinuation that Mr. French was anything other than 100 percent truthful in his affidavit. EverBank has nothing to support such a

claim, so it stops short of making it, using instead its preferred argument strategy of unsubstantiated suggestion. EverBank feels it must make mention that, after the portion of Mr. French's career in which he represented foreclosure plaintiffs, "he later switched sides and has represented foreclosure defendants since 2008." (Final Brief of Respondent pp. 10-11.) So what? Does that mean that he lied in his affidavit? Oh, no. It means that he was willing to state truths that the foreclosure plaintiffs' bar usually will not.

To state those truths jeopardizes the foreclosure plaintiffs' bar's largely unnoticed position to reap occasional windfalls from foreclosure sales where a third party bids more than the judgment debt and a trumped-up "attorney's fee" award is paid, even though that money lawfully belongs to the person who owned the land before the foreclosure sale. See S.C. Code Ann. § 29-3-10; Rule 71, SCRPC; Bartles v. Livingston, 282 S.C. 448, 319 S.E.2d 707 (Ct. App. 1984). Outside of the world of the foreclosure plaintiff's bar, this would usually be considered a species of theft. Within that world, it is called collecting "reasonable attorney's fees." "[T]hat which we call a rose / By any other name would smell as sweet." William Shakespeare, Romeo and Juliet act II, scene 2.

c. The way EverBank and the special referee treated the \$5,200.00 "attorney's fee" award shows this amount was never incurred as a collection cost.

EverBank now argues (for the first time) that "none of the evidence before the Special Referee at the foreclosure hearing proved that the award of attorney's fees exceeded the amount prayed for in the Complaint or the amount permitted by the Note and Mortgage." (Final Brief of Respondent p. 21.) The way that EverBank and

the special referee treated the \$5,200.00 amount at the foreclosure hearing and in the judgment tellingly shows that the amount was not one of incurred attorney's fees and that both EverBank's attorney and the special referee understood that. Couple that with the bankruptcy proof of claim and the affidavit of Shawn French and one wonders what more proof, short of an outright admission, anyone could possibly have gathered on this point.

First of all, no evidence was ever put before special referee that EverBank ever actually incurred more than \$835 in attorney's fees for its work in obtaining a default foreclosure judgment. (R. p. 56, 83-84, p. 133 ln. 19-25, p. 190.) The opportunity for EverBank to put such evidence before the court would have been easily utilized had such evidence existed. As also discussed above, EverBank never contended below and does not now contend that it incurred \$5,200.00 in attorney's fees with regard to the default proceedings against the Scurrys.

In this state, it is unfortunately the norm for masters-in-equity and special referees to award plaintiffs in residential mortgage foreclosure actions "attorney's fees" that bear no relation to the amount of attorney's fees the plaintiff actually incurred in the case and that typically exceed that amount by several thousand dollars. (R. p. 133 ln. 12-14.) The record bears the marks of this having happened here. In the "transcript of testimony" of EverBank's counsel presented at the foreclosure hearing, "costs of collection" and "attorney's fees in the amount of \$5,200.00 based on examination of title, preparation of pleadings, correspondence, preparation of foreclosure hearing and attendance at hearing" are presented as different, separate categories. (R. p. 111.) Similarly, in the foreclosure judgment, "[c]osts of collection

before hearing” and “[a]ttorney fee” are given as separate, unrelated items. (R. p. 10.) The special referee made no finding in the order rendering the judgment to the effect that \$5,200.00 in attorney’s fees had been incurred. (R. p. 10.)

d. There is no such thing as “harmless error” where a judgment is void.

EverBank concedes that prejudice to the Scurrys is not an element of the analysis of whether they are entitled to relief from the judgment on the basis of it being void; however, EverBank goes on to argue, essentially, that the Scurrys were not entitled to relief from the judgment since they were not harmed by it in some particular ways. (E.g., Final Brief of Respondent p. 23-24.)

A void judgment “is one that, from its inception, is a complete nullity and is without legal effect.” Universal Benefits, Inc. v. McKinney, 349 S.C. 179, 183, 561 S.E.2d 659 (Ct. App. 2002). Judgments rendered in violation of due process are void. Linda Mc Company v. Shore, 390 S.C. 543, 552, 703 S.E.2d 499, 503 (2010) (internal quotation marks omitted). If a judgment is void, relief from it must be granted, period. BB&T, 369 S.C. at 552 n. 1. Prejudice to the defendant is not part of the analysis. Id. There is no such thing as a “harmless error” in rendering a void judgment. See id.

e. EverBank argues that the Scurrys must lose this appeal because they did not do things that, procedurally, they could not have done.

Per our Supreme Court in this state, there is no appeal from a default judgment. See Winesett v. Winesett, 287 S.C. 332, 334, 338 S.E.2d 340 (1985) (“default judgment may not be appealed”; correct practice is to move for relief from judgment); Belue v. Belue, 276 S.C. 120, 121, 276 S.E.2d 295 (1981) (“no appeal lies

for a default judgment”; correct practice is to move for relief from judgment); Jean Hoefler Toal, Shahin Vafai & Robert A. Muckenfuss, Appellate Practice in South Carolina 99 (2d ed. 2002). The Winesett and Belue cases specifically hold that the correct procedure is to bring a motion for relief from the judgment under Rule 60(b), SCRPC, which is what the Scurrys did. See Winesett, 287 S.C. at 334; Belue, 276 S.C. at 121. EverBank asks this court to punish the Scurrys because they failed to take utterly futile actions. That should stick in the craw of this court.

II. The truly slippery slope is where EverBank would have this court stand: on the idea that no relief from a judgment can ever be granted on the basis of a process server’s representations to a defendant.

EverBank would have this court rule that it simply does not matter what a process server tells a defendant when the summons and complaint is served; no matter what he says, this will never provide a ground for relief from the judgment. That is ridiculous.

Obviously, the plaintiff in a case puts a process server in a position to make the defendant believe that the process server has the authority to communicate about the lawsuit on behalf of the plaintiff – communicating about the lawsuit on behalf of the plaintiff is exactly what the process server is doing by serving the summons and complaint. A process server is not a mail carrier or part of a regular parcel delivery service. A process server communicates to a defendant *that a lawsuit has been commenced against him*.

EverBank would have this court adopt a rule that a process server *cannot* be perceived as speaking for the plaintiff in a case, no matter what he says. Under EverBank’s proposed rule, a process server could tell a defendant that a summons and

complaint is just trash that should be thrown away or that it is *not* a summons and complaint, and none of that would have any effect. That slope is one that is far too slippery to provide this court with a secure place to stand.

Further, it is not unreasonable to have plaintiffs be bound, or at least possibly be bound, by the statements of their process servers. Plaintiffs are in a position to vet and choose the persons who serve process for them. Unlike the absurdity suggested by EverBank, people do not simply take it upon themselves to obtain copies of pleadings and deliver them to defendants in lawsuits; this activity is done by persons selected by plaintiffs for the purpose of getting that done.

III. EverBank's argument against a meritorious defense requires a leap that is too long for logic to make.

As an initial matter, the Scurrys note that, since the judgment is void, it is not necessary for them to demonstrate a meritorious defense to the underlying foreclosure claim. BB&T, 369 S.C. at 552 n. 1. Nonetheless, they have one.

EverBank argues that transfer of the note to it before this action was brought – something suggested only by an affidavit served after the hearing on the subject motion was already held, in violation of Rule 6(d), SCRPC – somehow effectuated the transfer to EverBank of the mortgage, a transfer *from a different entity* than that which transferred the note.

The mortgage at issue here was originated with Mortgage Electronic Registration Systems, Inc. (hereinafter “MERS”) as the mortgagee, while a different entity, Primary Capital Advisors LC, was the lender to which the note was given. In a mortgage originated in the MERS system, ownership of the note and ownership of the mortgage – things we usually think of as going hand-in-hand – are vested in

different entities from the outset of the loan, as discussed in the Scurrys' main brief. Mortgage Electronic Registration Systems, Inc. v. Neb. Dept. of Banking & Finance, 704 N.W.2d 784, 270 Neb. 529 (2005) (generally describing how the MERS system operates).

Whether the note had been transferred to EverBank at the time of the commencement of this action simply does not make any difference with regard to whether the mortgage had been transferred to EverBank at that time. The mortgage at issue here was a MERS mortgage, in which the position of *mortgagee* was vested in MERS until such time as MERS transferred that status to some other entity (which had not been done when this action was commenced). (R. pp. 19-29, 116-22.)

If a note is given to A and a mortgage securing the note is given to B, if A transfers A's note to C, and B does nothing to transfer the mortgage to C, has C acquired the mortgage? No, of course not. The cases cited by EverBank for the idea that C became the owner of B's mortgage when A transferred A's note to C either 1) are from other jurisdictions, and thus are no precedent in this court or 2) address the archetypal situation in which the noteholder and the mortgagee are the same entity. (Final Brief of Respondent pp. 34-37.) If, in the example outlined above, A intends to transfer B's mortgage to C, that intent is of no moment; A does not *have* the mortgage to transfer it to C or anyone else. EverBank argues that this does not matter, but South Carolina law is to the contrary. "A mortgage and a note are separate securities for the same debt, and a mortgagee who *has a note and a mortgage* to secure a debt has the option to either bring an action on the note or to pursue a foreclosure action." U.S. Bank Natl. Trust Assn. v. Bell, 385 S.C. 364, 684 S.E.2d

199, 204 (Ct. App. 2009) (emphasis added). The mortgage instrument here makes it abundantly clear that the mortgage is given to MERS; thus, only MERS could transfer it from MERS to any other entity. (R. p. 116.) That may be an inconvenient truth for EverBank, but it is truth nonetheless.

CONCLUSION

EverBank's arguments are unconvincing. There is no "foreclosure exception" under which law, logic, right, reason, and fairness are all swept aside. The court should reverse the special referee and grant the Scurrys relief from the judgment.

Respectfully submitted,



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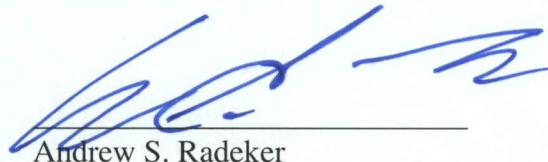
Lenora Scurry, Patrick Scurry, The South Carolina
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Of Whom Lenora Scurry and Patrick Scurry are.....Appellants.

CERTIFICATE OF COUNSEL

I certify that the foregoing brief complies with Rule 211(b), SCACR.

Respectfully submitted,



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