

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM YORK COUNTY

Court of Common Pleas

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SC Court of Appeals

S. Jackson Kimball, Special Circuit Court Judge

Case No. 2007-CP-46-04305

SunTrust Mortgage, Inc.Respondent,

v.

Mark Ostendorff,.....Appellant.

APPELLANT'S FINAL BRIEF

Mark Ostendorff
135 Cedar Creek Circle
Central, SC 29630
(864) 640-3340
Appellant, Pro Se

Brian S. Tatum
Tatum Law Firm
PO Box 11250
Charlotte, NC 28220
(704) 307-4305
Attorney for Respondent

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STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT ERR IN ALLOWING THE HEARING TO PROCEED WITHOUT DEFENDANT OSTENDORFF'S APPEARANCE AS WAS NOT NOTIFIED OF THE FORECLOSURE HEARING?
2. DID THE TRIAL COURT ERR IN ALLOWING A SURPRISE WITNESS TO TESTIFY ?
- 3 DID THE TRIAL COURT ERR IN CONSIDERING SUNTRUST'S WITNESS AS CREDIBLE IN REACHING A JUDGMENT?
- 4.DID THE COURT ERR IN PUTTING UP THE PROPERTY UP FOR SALE WHEN OSTENDORFF WAS NOT GIVEN NOTICE OF SALE?
5. DID THE COURT ERR IN ALLOWING THE HEARING TO PROCEED WITHOUT REQUIRING SUNTRUST TO PROVIDE A BOND ON THE PROPERTY ?
6. DID THE COURT ERR IN ALLOWING THE HEARING TO PROCEED WITHOUT TAKING THE APPELLANT'S POSITION , AS APPELLANT WAS NOT PRESENT?
7. DID THE COURT ERR IN GRANTING FORECLOSURE WHEN PLAINTIFF NEVER PROVIDED DISCOVERY ?
8. DID THE COURT ERR IN ALLOWING THE FORECLOSURE HEARING TO COMMENCE WHILE THE COMPULSORY COUNTERCLAIM WAS IN THE S.C. SUPRME COURT ?

9. DID THE COURT ERR IN DETERMINING THE JUDGMENT AMOUNT WHEN THE COMPULSORY COUNTERCLAIM WAS STILL UNDER APPEAL ?

10. DID THE COURT DENY OSTENDORFF DUE PROCESS AS HE WAS NOT PRESENT AT THE HEARING ?

11. DID THE COURT DENY OSTENDORFF EQUAL PROTECTION OF THE LAW AS HE WAS NOT PRESENT AT THE HEARING ?

12. DID THE COURT DENY OSTENDORFF DUE PROCESS AS HE WAS ORDERED TO PROVIDE DISCOVERY WHILE SUNTRUST WAS NOT ORDERED TO PROVIDE DISCOVERY ?

13. DID THE COURT DENY OSTENDOREFF EQUAL PROTECTION OF THE LAW AS HE WAS ORDERED TO PROVIDE DISCOVERY WHILE SUNTRUST WAS NOT ORDERED TO PROVIDE DISCOVERY ?

STATEMENT OF CASE

On October 1, 2013 a hearing was held for foreclosure on Mark Ostendorff's property located at 1207 Cabin Creek Ct., Fort Mill, SC. That judgment is in this appeal.

Nature of action or manner: Foreclosure by SunTrust Mortgage Inc.

Nature of defense: Ostendorff was not notified of the hearing and thus did not appear in his behalf.

Also, Ostendorff's compulsory counterclaim is still under appeal under same case number.

Action of Court: Judgment of Foreclosure

Date of Trial: October 1, 2013

Mode of Trial: Master-In- Equity , no jury trial

The amount of the appeal: Residence at 1207 Cabin Creek Ct., Fort Mill, SC

Judgment appealed from: Master-in-Equity Court foreclosure dated October 9, 2013.

However, Ostendorff only found out of the trial on October 29, 2013.

Date of service of notice of appeal: November 1, 2013

ARGUMENTS

1. BECAUSE APPELLANT (DEFENDANT) OSTENDORFF WAS NOT NOTIFIED OF THE HEARING OF FORECLOSURE, THEREFORE THE HEARING SHOULD NOT HAVE BEEN HEARD.

-NOTICE

Rule 71, SCRPC, provides:

Only parties who have appeared and filed pleadings in the action shall be entitled to the usual notice of hearings and other proceedings, unless pleadings state an unliquidated claim .

By inference, in any foreclosure action where pleadings make a claim for unliquidated damages as opposed to liquidated damages, notice to all parties is required. Thus any foreclosure hearing where the plaintiff seeks recovery of the usual escrow and other expenses advanced to protect its interest in the property, which are typically unliquidated, requires notice to all parties. This is the usual practice in all actions anyway without regard to the type of damages sought.

Concerning time, plaintiff's attorney should give a minimum of ten (10) days notice of the foreclosure hearing, which is the time specified in Rule 6. SCRPC, for hearings on motions, unless the court has fixed a different period for notice.

Ref: South Carolina Foreclosure Law Manual pg 39, Foreclosure Hearings, authored by Judge Kimball.

Ostendorff has provided an affidavit that he never received the Notice of Hearing from SunTrust's attorney.

Rule 5 (a) SCRPC - " in short, every party not in default is to receive notice of each step taken

in the action.” 4A C. Wright & Miller, Federal Practice and Procedure 1143(1987)

Any reasonable person would conclude that Ostendorff never got notice of hearing nor notice of sale from just that Ostendorff had never missed a hearing before , the date of filing an appeal, the date of filing Chapter 7, and emails to clerk of court asking for copies, etc.

2. BECAUSE THE WITNESS WAS SRPRISE WITNESS, HIS TESTIMONY SHOULD NOT HAVE BEEN HEARD.

SCRCP

Rule 33 (b) requires other party to “..give names and addresses of persons known to the parties or counsel to be witnesses concerning the facts of the case...”.

Per Judge Kimball’s Order, a Rich Willits, VP at SunTrust Mortgage, Inc. appeared at the hearing. (It may also be noted that the Order also indicated that Mark Ostendorff, Defendant pro se appeared at the hearing, but I did not). Willits’s name has never been mentioned in this case or name on any written document or discovery at all. Only an affidavit by Susan Walker has provided anything and that was an affidavit by her in the counterclaim by Ostendorff.

The trial court is under a duty to delay the trial for the purpose of ascertaining the type of witness involved and the content of his evidence, the nature of the failure or neglect or refusal to furnish the witness’s name, and the degree of surprise to the other party, including prior knowledge of the name by that party. Callen v. Callen, 365 S.C. 618, 620 S.E. 2wd 59(2005).

3. BECAUSE THE WITNESS FOR SUNTRUST WAS NOT A CREDIBLE WITNESS , HIS TESTIMONY SHOULD NOT HAVE BEEN CONSIDERED IN REACHING A JUDGMENT.

A witness may be tested concerning bias, prejudice, interest, credibility, and the accuracy of his or her memory. *Martin v. Dunlap*, 266 S.C. 230, 222 S.E. 2d 8 (1976).

A jury need not accept the uncontradicted testimony of a witness, however. *Black v. Hodge*, 306 S.C. 196, 410 S.E. 2d 595 (Ct Appl 1991). Such testimony is not necessarily undisputed because there remains the question of its inherent probability and the credibility and interests of the witness. *Black v. Hodge*, 306 S.C. 196, 410 S.E. 2d 595 (Ct Appl 1991). See also *Vereen v. Liberty Life Ins. Co.*, 306 S.C. 423, 412 S.E. 2d 425 (Ct Appl 1991) (the same is true for uncontradicted evidence in general).

The rule also applies to testimony by expert witnesses; if the jury has reason to question the expert's veracity; it need not accept the testimony , even if the testimony is not directly refuted. *Sauers v. Poulin Bros. Homes, Inc.*, 328 S.C. 601, 493 S.E. 2d 503 (Ct Appl 1997).

If Ostendorff had been given notice of hearing, he would object to the surprise witness Willits. If allow to testify, Ostendorff would have cross examined Willits to show he did not understand how SunTrust securitized its mortgages. In fact, securitizing mortgages before they were even made was industry common place practice.

Further more ,Ostendorff would show the court that , through Willits cross examination ,there was no due date on Ostendorff's construction loan. This issue is the heart of Judge Kimball's findings of fact to justify Ostendorff's compulsory counterclaim dismissal through summary judgment under Rule 56(c).

4. BECAUSE OSTENDORFF WAS NOT GIVEN NOTICE OF SALE, THE FORECLOSED PROPERTY SHOULD NOT BEEN PUT UP FOR SALE

Ostendorff would have lost any right to appraisal under SC Code 29-3-680

5. BECAUSE SUNTRUST NEVER PROVIDED A BOND ON THE PROPERTY, SUNTRUST SHOULD NOT HAVE BEEN ALLOWED TO PROCEED WITH THE FORECLOSURE HEARING.

SC CODE Section 18-9-130(A) (2), which requires "A plaintiff may not enforce a sale of property After a notice of appeal is filed without giving an undertaking or bond to the defendant, with two good sureties, in double the appraised value of the property or double the amount of the judgment, conditioned to pay all damages the defendant may sustain by reason of the sale in case the judgment is reversed..."

Ostendorff has never received any bond from SunTrust.

Ostendorff has already appealed two summary judgments from Judge Kimball. Any reasonable person would conclude that Ostendorff would also appeal any judgment from Judge Kimball from a hearing in which Ostendorff was never notified of.

The notice of sale was dated October 9, 2013. Judge Kimball should have waited at least 30 days after the judgment to see if Ostendorff would appeal.

As it stood, SunTrust could have sold the property without providing the bond as required in SC Code Section 18-9-130(A) (2), even though Ostendorff appealed Judge Kimball's order.

As it stands now, SunTrust must provide the bond if it wants to sell Ostendorff's property.

6. BECAUSE APPELLANT WAS NOT AT THE HEARING AT PROCEEDED WITH THE HEARING , THE COURT SHOULD HAVE TAKEN THE POSITION AS IF IT WERE THE APPELLANT.

If the Trial Court cross examines any witnesses presented by Plaintiff, then it should do so

as if it was the Defendant. The Court should be competent in knowing the correct questions to ask the Plaintiff's witness. The Court did not competently question the witness as to his knowledge of securitization process within his employer (SunTrust). The court did not question the witness as to his personal knowledge of this case as the material facts are prior to March of 2007. The Court did not question the witness as to his understanding of the due date issue of making monthly construction interest payments.

7. BECAUSE THE PLAINTIFF REFUSED TO PROVIDE DISCOVERY, FORECLOSURE SHOULD NOT HAVE BEEN GRANTED.

The hearing was akin to a summary judgment. Recent South Carolina case law suggests that "[s]ummary judgments is not appropriate where further inquiry into the facts.... Is desirable to clarify the application of the law. Summary judgment should not be granted even where there is no dispute as to the evidentiary facts if there is dispute as to the conclusion to be drawn from those facts." *Clyburn v. Sumter County School District* S.C. 429 S.E. 2d 862 (Ct Appl 1993). Accord *Metropolitan Life ins. Co. v. Fogle* S.C. , 419 S.E. 2d 825 (Ct Appl 1992).

8. BECAUSE THE CASE HAD AN EXISTING COMPULSORY COUNTERCLAIM IN THE SC SUPREME COURT , THE FORECLOSURE PART OF THE CASE SHOULD NOT HAVE BEEN ALLOWED TO COMMENCE.

Ostendorff demanded a jury trial on the compulsory counterclaim. "..... if there are common factual issues, the legal claim should be tried to the jury first, absent" the most imperative circumstances," and the court is bound by the jury's determination of the factual issues in the equitable action" *Johnson v. South Carolina Nat'l Bank*, 292 S.C. 51 , 354 S.E. 2d 896(1987).

The counterclaim issue is still alive, thus the foreclosure is pending upon a jury trial findings.

9,BECAUSE THE COMPULSORY COUNTERCLAIM WAS IN APPEAL , THE JUDGMENT AMOUNT
COULD NOT HAVE BEEN DETERMINED.

A jury must determine the facts of the counterclaim and the foreclosure is pending upon
the jury trial findings.

(see #8 argument for authorities)

10. BECAUSE THE HEARING WAS ALLOWED TO PROCEED WITHOUT OSTENDORFF,
HE WAS DENIED DUE PROCESS:

Article I, Section 3 of the South Carolina Constitution provides that no" person be deprived
of life, liberty, or property without due process of law, nor shall any person be denied the equal
protection of the law..."

The procedural due process component of this constitutional provision guarantees that a person
have an "opportunity to be heard `at a meaningful time and in a meaningful manner`" before he
is deprived of any life, liberty or property right. Tall Tower, Inc. v. South Carolina Procurement
Review Panel,294 S.C. 225, 232, 363 S.E.2d 683, 686-87 (1987).

This due process guarantee ensures a fair " decision-making process" before the government
impairs a person's life , liberty or property rights. J. Nowak , R. Rotunda and J. Young , Constitutional
Law, 10.6 (3rd ed. 1986).

Any reasonable person would find it highly suspect that the Notice of Hearing was even sent
to Ostendorff. SunTrust's same attorney withheld vital information from Ostendorff's discovery
request but presented a favorable aspect of it in the Court of Appeals hearing for the Summary
Judgment of Ostendorff's counterclaim.

Any reasonable person would find it highly suspect that a judge that has communicated ex parte with the opposing attorney. Also that a judge found a due date in a mortgage note where there was no due date to be found.

11. BECAUSE THE HEARING WAS ALLOWED TO PROCEED WITHOUT OSTENDORFF , HE WAS DENIED EQUAL PROTECTION OF THE LAW.

The equal protection clause of the South Carolina Constitution parallels that of the United States Constitution. Article I , Section 3 of the South Carolina Constitution provides that no person shall be denied the equal protection of the laws. S.C. Const. art I, § 3.

Although the Supreme Court of South Carolina has stated that the concept of equal protection of the laws is “ difficult to define and not susceptible of exact delimitation,” it has provided general guidance on the subject:

[T]he constitutional guaranty of equal protection of the laws requires that all persons shall be treated alike under similar circumstances and conditions, both in the privileges conferred and in the liabilities imposed....The equal protection guaranty is intended to secure equality of protection not only for all, but against all similarly situated. *Thompson v. South Carolina Comm’n on Alcohol and Drug Abuse*, 267 S.C. 463, 471, 229 S.E. 2d 718, 722 (1976). , *Marley v. Kirby*, 271 S.C. 122, 245 S.E. 2d 604 (1978)., *Thompson* , 267 S.C. at 471, 229 S.E. 2d at 722.

12 . BECAUSE OSTENDORFF'S MOTION TO COMPEL DISCOVERY WAS DENIED (WHILE OSTENDORFF WAS VERBALLY THREATENED WITH CONTEMPT OF COURT IF HE DID NOT FINISH SUNTRUST'S DISCOVERY REQUESTS WITHIN 30 DAYS OF THE HEARING OF SUNTRUST'S MOTION TO COMPEL), THAT OSTENDORFF WAS DENIED DUE PROCESS.

(see # 10 above for argument and for authorities)

13. BECAUSE OSTENDORFF'S MOTION TO COMPEL DISCOVERY WAS DENIED (WHILE OSTENDORFF WAS VERBALLY THREATENED WITH CONTEMPT OF COURT IF HE DID NOT FINISH SUNTRUST'S DISCOVERY REQUESTS WITHIN 30 DAYS OF THE HEARING OF SUNTRUST'S MOTIONB TO COMPEL), THAT OSTENDORFF WAS DENIED EQUAL PROTECTION OF THE LAW.

(see # 11 above for argument and authorities)

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the circuit court.

Respectfully submitted,



Mark Ostendorff
135 Cedar Creek Circle
Central, SC 29630
(864)540-3340
Appellant, Pro Se

July 6, 2014

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM YORK COUNTY

Court of Common Pleas

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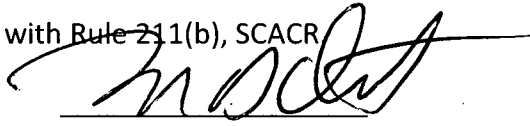
SunTrust Mortgage, Inc.,.....Respondent,

v.

Mark Ostendorff,.....Appellate.

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR
September 25, 2015



Mark Ostendorff
135 Cedar Creek Circle
Central, SC 29630
(864) 640-3340
Appellate, Pro Se