

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Joseph M. Strickland, Master in Equity

Appellate Case No. 2018-001238

Winrose Homeowners
Association, Inc. and Regime
Solutions, LLC,

Respondents,

v.

Devery A. Hale and Tina T.
Hale,

Petitioner .
Appellant.

BRIEF OF RESPONDENT WINROSE HOMEOWNERS ASSOCIATION, INC.

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STATEMENT OF ISSUES ON APPEAL

- I. **WHETHER THE TRIAL COURT COMMITTED AN ABUSE OF DISCRETION IN DETERMINING REGIME SOLUTIONS, LLC'S FORECLOSURE SALE BID DID NOT SHOCK THE CONSCIENCE OF THE COURT.**
- II. **WHETHER THE EQUITABLE PRINCIPLES ARGUED BY APPELLANTS IN THIS APPEAL WERE PROPERLY PRESERVED FOR APPEAL AND, IF SO, WHETHER THE TRIAL COURT COMMITTED ERROR IN DECLINING TO VACATE THE FORECLOSURE SALE ON EQUITABLE GROUNDS.**

STATEMENT OF THE CASE

Respondent Winrose Homeowners' Association, Inc. ("HOA") filed suit against Appellants Tina T. Hale and Devery A. Hale ("Hales") on February 11, 2014 seeking foreclosure of an unpaid homeowners' association assessment lien. (App. pp. 100-101.) The Hales were served February 14, 2014 and subsequently failed to submit any responsive pleading. (App. pp. 102-104.) A default damages hearing was held June 30, 2014 and the Hales did not appear. (App. p. 90.) Judgment was entered in favor of HOA on July 21, 2014. (App. pp. 90-96.) The foreclosure sale was held August 4, 2014. (App. p. 109). Respondent Regime Solutions, LLC ("Regime Solutions") was the winning bidder at \$3,036.00. (Id.) The sale was confirmed on October 17, 2014 and a deed was issued to Regime Solutions. (Id.)

On November 4, 2014 the Hales filed a Motion to Vacate Sale on the ground the sale price was so grossly inadequate it shocked the conscience. (App. pp. 116-130.) A hearing on the Hale's motion was held on February 6, 2015. At this hearing Tina Hale submitted an affidavit admitting that she received notice of the foreclosure suit and that she "put [the papers] in a drawer and forgot about them." (App. p. 133.) The Hales also presented evidence that the subject property is currently worth \$128,000 and the current mortgage balance was \$66,004.00. (App. pp. 114-130; 132.)

On April 21, 2015 the Master in Equity entered an order denying the Hales' motion, holding the amount of the senior encumbrances should be added to the bid amount to determine the aggregate sales price. (App. pp. 96-98.) On August 21, 2015 the Hales served the Notice of Appeal on both Respondents. (App. p. 139.)

In a decision filed April 4, 2018, the Court of Appeals affirmed the trial court, holding that the proper method of determining the sales price in a junior lien foreclosure was by adding

the bid amount to the outstanding senior encumbrances. (App. pp. 1-11). The Hales filed a timely petition for rehearing on April 19, 2018. (App. p. 12-16). The Court of Appeals denied the petition for rehearing on June 1, 2018 and this Court granted the Petition for a Writ of Certiorari on February 1, 2019. (App. p. 17).

STANDARD OF REVIEW

“A mortgage foreclosure is an action in equity. Our scope of review of a case heard by a master who enters a final judgment is to determine facts in accordance with our own view of the preponderance of the evidence.” E. Sav. Bank, FSB v. Sanders, 373 S.C. 349, 354, 644 S.E.2d 802, 805 (2007) (quoting Hayne Fed. Credit Union v. Bailey, 327 S.C. 242, 248, 489 S.E.2d 472, 475 (1997)). However, the determination of whether to set aside a foreclosure sale is a matter within the discretion of the trial court. Wells Fargo Bank, N.A. v. Turner, 378 S.C. 147, 150, 662 S.E.2d 424, 425 (Ct. App. 2008). “An abuse of discretion occurs when the conclusions of the circuit court are either controlled by an error of law or are based on unsupported factual conclusions.” Carson v. CSX Transp., Inc., 400 S.C. 221, 229, 734 S.E.2d 148, 152 (2012).

ARGUMENTS

I. THE TRIAL COURT CORRECTLY UPHELD THE JUDICIAL SALE BECAUSE THE PURCHASE PRICE WAS MORE THAN 53% OF THE VALUE OF THE PROPERTY

“A judicial sale should not be set aside except for cogent reasons. The purpose of the law and of the proceedings in which a sale has been decreed is that it shall be final.” E. Sav. Bank, FSB v. Sanders, 373 S.C. 349, 355, 644 S.E.2d 802, 805 (Ct. App. 2007) (quoting Spillers v. Clay, 233 S.C. 99, 104, 103 S.E.2d 759, 761-62 (1958)). “[I]t is the long-established policy in South Carolina that ‘[t]he courts should be particularly jealous of the integrity of judicial sales.’” Ex parte Johnson, 371 S.C. 614, 618, 640 S.E.2d 887, 890 (Ct. App. 2006) (citing In re Wilson, 141 S.C. 60, 63, 139 S.E. 171, 172 (1927)). “[A]ny conduct on the part of those actively engaged in the selling or bidding [at a judicial sale] that tends to prevent a fair, free, open sale, or stifle or suppress free competition among bidders, is contrary to public policy[.]” Id. (citing Ex parte Keller, 185 S.C. 283, 291, 194 S.E. 15, 19 (1937)).

A. The Trial Court Correctly Calculated the Purchase Price by Adding the Outstanding Senior Encumbrances to the Foreclosure Sale Bid.

“When addressing the value paid in the context of a foreclosure sale, the winning bid should be considered cumulatively with any encumbrances to which it would be subjected.” In re Cerrato, 504 B.R. 23, 35 (Bankr. E.D.N.Y. 2014) (citing In re Barr, 170 B.R. 772, 777 (Bankr. E.D.N.Y. 1994)(applying South Carolina law in holding the aggregate bid price included senior mortgages and taxes due on the property)). This Court has clearly stated that courts must analyze what impact the senior encumbrances have on the true value of the property. Where a buyer takes property at a judicial sale subject to senior liens, the court must also consider the amount of those senior encumbrances “in determining the true value of the properties to the buyer at [the judicial] sale.” Arrow Bonding Co. v. Warren, 399 S.C. 603, 607, 732 S.E.2d 622, 624 (2012).

The Master in Equity correctly held that the effective sales price is the bid amount plus the encumbrances against the property. This calculation is the most logical calculation where a purchaser takes title at a foreclosure sale and must expend additional sums to obtain clear title to the property. In Arrow Bonding this Court held that the trial court’s focus is on the “value of the properties to the buyer”, and not the value of the purchaser’s bargain or the cost to the foreclosed property owner as the Hales argue. While the Hales allege that Regime Solutions does not pay off the mortgages when they purchase properties by referencing the Richland County public records, those facts were never presented to the trial court or made a part of the record before the Court of Appeals or this Court. The only evidence presented to the trial court was Regime Solutions’ statement that it intended to satisfy the senior encumbrance. (App. p. 144, l. 17-18.) The Court of Appeals correctly noted that “there is no evidence in the record to dispute or contradict Regime’s assertion to the master that it would satisfy the senior encumbrance once the foreclosure sale was finalized.” (App. p. 7).

Here, the outstanding mortgage of \$66,000 cuts the fair market value in half. The outstanding mortgage, coupled with Regime Solutions’ \$3000 bid, creates an aggregate bid of \$69,000. The aggregate bid is more than 53% of the fair market value of the property, well above the 10% routinely required by our courts.

B. To Base the “Shock the Conscience” Analysis on the Owners’ Equity in the Property Would Impermissibly Chill Bidding at Judicial Sales

The Hales argue the court should divide the bid amount by the equity in the property to properly determine whether the successful bid “shocks the conscience” of the court. The Hales’ position is problematic in that it requires any potential bidder to somehow divine the amount of equity in the property so as to formulate a bid high enough to overcome the “shock the conscience” threshold. A bidder could likely estimate the fair market value of the property based on the tax assessed amount and other public information. However, a bidder has no way of knowing the current amount of any mortgage, judgment, or other lien encumbering the property at the time of the sale.¹ The public record would only indicate the amount of the senior mortgage, judgment, or other lien at the time that lien was filed. Because senior lienholders are not necessary parties in the underlying foreclosure suit they are often not named as parties. Accordingly, the judgment of foreclosure and sale often does not disclose the current balance of any senior encumbrances. There are a multitude of the federal privacy acts that would forbid a senior lienholder from disclosing the payoff amount to an interested bidder prior to the sale.² In fact, because South Carolina does not require servicers to record assignments of mortgages, the public record may not even disclose to any interested bidder the current holder of the note or servicer of the loan. See BAC Home Loan Servicing, L.P. v. Kinder, 398 S.C. 619, 623, 731 S.E.2d 547, 549 (2012).

The Hales’ argument that the HOA has alternate remedies available is misplaced. While the HOA could elect to seek payment of its debt by suing for a personal money judgment, so could any senior mortgage holder. See Lever v. Lighting Galleries, Inc., 374 S.C. 30, 647 S.E.2d 214 (2007). The fact that a lender could choose to sue on its note instead of foreclosing its mortgage has never been considered by our courts when reviewing the conduct at a foreclosure sale and should not be considered now.

¹ The Hales incorrectly allege that bidders can easily determine the amount of equity in the property because “[t]he mortgage states its amount, the interest rate, and the minimum monthly payment.” (App. Br. p. 15.) However, the mortgage does not, in fact, state the interest rate or monthly payment. Those terms are found in the Note, which is not filed of public record.

² See Fair Debt Collection Practices Act, 15 U.S.C.A. § 1692c; Gramm-Leach-Bliley Act 15 U.S.C.A. § 6801 et seq.

Because the trial court's analysis was supported by the case law and public policy of this state, the Court of Appeals properly affirmed the trial court's decision upholding the foreclosure sale.

II. THE PRINCIPLES OF EQUITY REQUIRE THE SALE BE UPHELD

A. Appellants' Equitable Arguments Are Not Preserved for Appellate Review because Appellants Failed to Raise the Arguments to the Trial Court

"In order for an issue to be properly preserved for appeal, it must have been both raised to and ruled upon by the trial court." Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 372, 628 S.E.2d 902, 919 (Ct. App. 2006). "There are four basic requirements to preserving issues at trial for appellate review. The issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) *raised to the trial court with sufficient specificity.*" Jean Hoefler Toal et al., Appellate Practice in South Carolina 57 (2d ed. 2002) (emphasis added). "Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide [the appellate court] with a platform for meaningful appellate review." Id.

The Hales argue this Court should set aside the sale because equity favors doing so. (App. Br. p. 18.) However, the Hales never raised any equitable arguments in their Motion to Vacate. The Hales' counsel only mentions the idea of equity once in his entire argument before the trial court. (App. pp. 165-166, l. 24-1.) Specifically, the Hales merely asked the trial court to "do equity where perhaps equity should be done." (App. p. 166, l. 1.) Now, on appeal, the Hales seek to raise several different equitable maxims in support of their arguments.

The Hales argue these maxims are properly preserved because they asked the trial court to do equity and the trial court subsequently denied their motion. However, it is not enough that the Hales ask for some vague relief; instead they must have raised the arguments to the trial court with enough specificity such that the trial court understood the arguments propounded in favor of the relief sought. While it is true the Hales need not use the exact name of the legal doctrine in order to preserve their argument, they are required to at least set forth the facts and legal arguments that support their request for relief. It is not enough to merely remind the trial court that it sits in equity and equitable maxims are available.

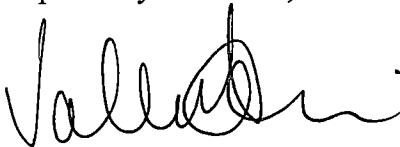
B. Appellants are not Entitled to Equity Because Equity Rewards the Diligent

“Equity aids the vigilant, not those who slumber on their rights.” Eldridge v. Eldridge, 398 S.C. 113, 121, 728 S.E.2d 24, 28 (2012) (quoting Hemingway v. Mention, 228 S.C. 211, 89 S.E.2d 369 (1955)). The Hales were personally served with the Summons and Complaint in this matter on February 14, 2014 but failed to make any response to the HOA’s suit. The Hales similarly failed to appear at the final foreclosure hearing in August 2014. In fact, the Hales failed to make any appearance or attempt to pay for over eight months. The Hales have provided no explanation for their failure to participate in the foreclosure suit other than that Tina Hale forgot about the lawsuit paperwork. (App. pp. 132-133.) Nonetheless, the Hales argue extensively that the trial court violated principles of equity by failing to vacate the sale. Essentially the Hales have admitted that they failed to participate in the underlying foreclosure suit or foreclosure sale but are asking the court to save them from their negligence and allow them to pay the debt now, over a year after the original sale. The principles of equity are not used to save a litigant from his own failure to protect his interests and should not be used to overturn a sale that followed all the statutory requirements.

CONCLUSION

For the reasons stated, this Court should affirm the decision of the Court of Appeals.

Respectfully submitted,

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April 18, 2019

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The Honorable Joseph M. Strickland, Master in Equity

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PROOF OF SERVICE

I certify that I served Respondent Winrose Homeowners' Association, Inc.'s Brief on the following counsel by depositing a copy of it in the United States Mail, postage prepaid, on April 22, 2019 as follows:

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