

STATE OF SOUTH CAROLINA
COUNTY OF GEORGETOWN

IN THE COURT OF COMMON PLEAS

CASE NO. 2016-CP-22-00334

The Bank of New York Mellon, f/k/a The
Bank of New York, as trustee for the
certificate holders of the CWABS, Inc.,
Asset-Backed Certificates, Series 2005-16,

ORDER

RECEIVED
JUN 14 2019
SC Court of Appeals

Plaintiff,

-vs-

Janet M. Smith, Portfolio Recovery
Associates, LLC and James E. Brydic

Defendant(s)

This matter came before me on Thursday, April 18, 2019 pursuant to Defendant Janet M. Smith's Motion to Set Aside Order Vacating Judgment. Present were Jon A. Ozolins, attorney for Defendant Janet M. Smith and Theodore von Keller, attorney for Plaintiff Bank of New York Mellon. After consideration of the Court filings, the submissions of the parties and argument of counsel, the Motion to Set Aside the Order Vacating Judgment is denied.

FINDINGS OF FACT

1. Defendant owns two tracts of land: 1) her home at 5301 County Line Rd. in Andrews, SC bearing Williamsburg County bearing tax map number 45-435-009 (hereinafter referred to as the "WILLIAMSBURG PROPERTY"), and 2) a lot at 72 Grape Drive in Andrews, SC bearing Georgetown County tax map 02-0134-028 (hereinafter referred to as the "GEORGETOWN PROPERTY"). (See Defendant's Answer and Counterclaim, paragraphs 7 and 8).

2. On November 15, 2005, Defendant executed a note to Countrywide Home Loans, Inc., Plaintiff's predecessor in interest, in the amount of \$73,000 and provided a mortgage to secure the debt.

3. Prior to the execution of the Mortgage, the lender, Countrywide Home Loans Inc., conducted an appraisal over the WILLIAMSBURG PROPERTY to determine whether to extend credit and accept a mortgage over the WILLIAMSBURG PROPERTY.

4. The appraisal is clear that it was the intention of the parties to mortgage the WILLIAMSBURG PROPERTY (also described as Defendant's residence). (See September 27, 2005 appraisal attached to affidavit of Randall Jackson).

5. Additionally the settlement statement from the November 17, 2005 loan closing reflects that the parties intended that the property to be secured by the mortgage was solely to be the WILLIAMSBURG PROPERTY (see HUD-1 Settlement Statement, attached to affidavit of Randall Jackson)

6. Defendant concedes in her Answer that no mortgage was intended to encumber the GEORGETOWN PROPERTY (See paragraph 11, Defendant's Answer and Counterclaim).

7. Defendant further concedes in her affidavit in support of the Motion to Vacate that the GEORGETOWN PROPERTY was not the proper property for the mortgage. (See paragraph 5, affidavit of Janet M. Smith).

8. In error, however, Exhibit A to the recorded Mortgage erroneously described the Defendant's GEORGETOWN PROPERTY.

9. The mortgage (the "Mortgage") with the incorrect Exhibit A property description was recorded with the Georgetown Registry of Deeds on December 28, 2005 at Book 2836 at Page 109.

10. The Court finds as a fact that the parties never intended for the Mortgage between the parties to encumber the GEORGETOWN PROPERTY.

11. The Court finds as a fact that the real property intended to be encumbered by the Mortgage was the WILLIAMSBURG PROPERTY.

12. The Court finds as a fact that the recording of the Mortgage in Georgetown County was a mutual mistake by the Plaintiff and Defendant.

13. The account of the Defendant subsequently went into default and on September 8, 2014 in case 2014-CP-45-00445 a foreclosure was commenced by Bank of New York Mellon, the assignee of Countrywide Home Loans, Inc. in Williamsburg County. The foreclosure was not completed and the loan was reinstated.

14. By order dated April 8, 2015, the Special Referee Wells Dickson issued an order in case 2014-CP-45-00445 reforming the Mortgage to reflect that the correct property securing the Mortgage was the WILLIAMSBURG PROPERTY. (See order dated April 8, 2015).

15. No appeal was taken by Defendant of the Order dated April 8, 2015.

16. On December 5, 2018, Judge Dickson issued a further order in case 2014-CP-45-00445 in which Plaintiff's third cause of action for foreclosure and sale was vacated and the order reforming the mortgage was reaffirmed. (See Order filed December 5, 2018).

17. No appeal was taken by Defendant of the Order dated December 5, 2018.

18. On September 20, 2016, a second mortgage foreclosure was commenced by Plaintiff in Georgetown County in case 2016-CP-22-00334. This mortgage foreclosure sought foreclosure of the land with the property address of the WILLIAMSBURG PROPERTY. However, the tax map number and metes and bounds utilized in the foreclosure action was that of the GEORGETOWN PROPERTY as that was the property description in the incorrect Exhibit A attached to the Mortgage.

19. Case number 2016-CP-22-00334 was referred to The Honorable Daniel W. Stacy, Jr. as Special Referee with authority to make findings of fact and conclusions of law; dispose of any and all issues and enter a final judgment in the case; order a judicial sale on any day, not just the regular judicial sale day; hear and dispose of any issues after sale or judgment, including, but not limited to, issuance of a Writ of Assistance and any issues involving appraisal under Code Section 29-3-680, et seq.

4. An example of prospective application is an order which requires further alteration or further supervision by the court. In re Northwest Airlines Corp., 366 B. R. 270 (Bankr.S.D. N. Y 2007).

5. In the present case, the Order of Reference gives the Special Referee continuing jurisdiction to hear and dispose of any issues after sale or judgment. (See Order of Reference filed August 17, 2016 in 2016-CP-22-334).

6. A Writ of Assistance was issued in case 2016-CP-22-334 on January 10, 2017 which was served on the Defendant on February 28, 2017. The dissolution of this Writ of Assistance requires the further supervision and acts of this Court. (See Writ of Assistance filed April 16, 2019 and Affidavit of Personal Service in case 2016 – CP – 22 – 00334).

7. Rule 60(B) is an equitable provision and should be exercised in the interest of justice. Northwest Airlines supra, 360 6B. R. 270 at 276 and Elgin supra 213 F. 2d 776 at 780.

8. In the present case, Defendant admits that her residence is the WILLIAMSBURG PROPERTY located at 5301 County Line Rd., Andrew, SC in Williamsburg County is her residence and was the correct property to be foreclosed. (See paragraphs 1 and 9 - Affidavit of Defendant Janet M. Smith).

9. It is well settled that "Equity regards that is done which ought to be done." Wilkie v. Philadelphia Life Ins. Co., 187 S. C. 382, 197S. E. 375 (1938)).

10. The April 8, 2015, Order of Special Referee Dickson reformed the Mortgage to establish that it encumbered the WILLIAMSBURG PROPERTY and said Order is a final, unappealed order. An order not appealed from is binding on all parties before the court, constitutes law of the case and, when questioned, is res judicata. Walker v. Hannon, 191S. C. 14, 3 S. E. 2d 243 (1939). This Order established as a matter of law that Plaintiff's Mortgage covered the WILLIAMSBURG PROPERTY.

11. The Order Setting Aside Sale, Vacating Judgment, and Dismissing Case Nunc Pro Tunc properly places into the record evidence of Judge Dickson's Order filed April 8, 2015 that had actually taken place. Ex Parte Strom, 343 S. C. 257, 539 S.E. 2d 699(2000)

12. It is well-established in South Carolina that a foreclosure action must be brought where the property is located or the court lacks subject jurisdiction. Silcox & Co. v. Jones, 80 S. C. 484, 601 S. E. 948(1908).

13. It is also well established that," the definition 'void' under the rule only encompasses judgments from courts which failed to provide proper due process, or judgments from court which lacks subject matter jurisdiction or personal jurisdiction" Belle Hall Plantation Homeowner's Ass'n v. Murray, 419 S. C. 605, 799 S. E. 2d 310, 317(Ct. App. 2017).

14. Under Rule 60 (B) (4) South Carolina Rules of Civil Procedure, a court is empowered to relieve a party from a final judgment when "the judgment is void".

15. The Order of foreclosure in case 2016-CP-22-00334 was void as the court lacked subject matter jurisdiction to adjudicate a foreclosure where there was no mortgage covering property in Georgetown County. The Order Setting Aside Sale, Vacating Judgment, and Dismissing Case Nunc Pro Tunc was therefore also proper pursuant to Rule 60(b) (4) SCRPC.

16. The Order of foreclosure in case 2016-CP-22-00334 was void as the filing of the Mortgage in Georgetown County was based on a mutual mistake. The Order setting Aside Sale, Vacating Judgment, and Dismissing case Nunc Pro Tunc was therefore also proper pursuant to Rule 60(b) (4) SCRPC.

CONCLUSION

In sum, at all times relevant herein, the Defendant intended to grant a mortgage only over WILLIAMSBURG PROPERTY. Defendant never intended to grant a mortgage over the GEORGETOWN PROPERTY. Judge Dickerson's Order reforming the Mortgage dated April 8, 2015 established that the Mortgage covered the WILLIAMSBURG PROPERTY only. To now deny Plaintiff its right to foreclose on the WILLIAMSBURG PROPERTY is inequitable and leaves Plaintiff with no remedy.

Defendant's motion is denied.



Daniel W. Stacy, Jr.
Special Referee for Georgetown County

Parley Is, South Carolina

May 1, 2019