THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Mikell R. Scarborough, Master In Equity

Case No. 2019-000205

The Savannah Homeowners Association, Inc., ...Respondent,

v.

Denise H. Jones and LVNV Funding, LLC, ...Defendants,

Of Whom Denise H. Jones is the Appellant.

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SC Court of Appeals

INITIAL BRIEF OF RESPONDENT

Derek F. Dean
SIMONS & DEAN
147 Wappoo Creek Drive, Suite 604
Charleston, SC 29412
843-762-9132
Attorneys for Respondent

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2. DID THE MASTER-IN-EQUITY COURT ERR IN FAILING TO VINDICATE THE APPELLANT IN LIGHT OF RESPONDENT'S INCONSISTENT CORRESPONDENCE AND COMMUNICATIONS TO APPELLANT, AND RESPONDENTS DISCRIMINATORY BEHAVIOR TOWARDS APPELLANT?

3. IS APPELLANT RESPONSIBLE FOR LEGAL FEES AND OTHER COSTS WHICH RESULTED FROM RESPONDENT'S NEGLIGENCE?

STATEMENT OF THE CASE

This case is the second lien foreclosure suit brought by Respondent against Appellant ("Second Foreclosure"). In the first lien foreclosure action (Case No.: 2015-CP-10-3479) ("First Foreclosure"), Respondent obtained a Decree of Foreclosure and Order of Sale filed on March 31, 2016, ("First Decree") reflecting a debt due in the amount of $27,494.58 and ordering the sale of Appellant's property located at 506 Arlington Dr. #D, Charleston, SC 29414 ("Property"). The Property was then sold by the Charleston County Master-in-Equity at a master's sale on June 7, 2016. Respondent was the prevailing bidder at the sale, and the Master issued a Master's Deed dated June 17, 2016, and recorded July 5, 2016, conveying title to the Property to Respondent. Despite notices to vacate, Appellant failed and refused to voluntarily vacate the Property, and Respondent sought a Writ of Assistance from the Master. Prior to any put out being ordered by the Master as a result of the issuance of the Writ, in September 2016 Appellant's mortgage lender intervened and made a payment in the amount of $25,000.00 as settlement of the debt owed by the Appellant. As a result of said payment, an Order Vacating Sale, Order, and Report of Receipt and Disbursement

of Funds, Deed, Judgment and Dismissing Case was filed December 31, 2016 ("Vacating Order"), which was amended by that Amended Order Vacating Sale, Order, and Report of Receipt and Disbursement of Funds, Deed, Judgment and Dismissing Case filed May 16, 2017 ("Amended Vacating Order"). Thereafter, Respondent provided the Charleston County Register of Deeds a copy of the Amended Vacating Order and requested the Register of Deeds' records be adjusted to show the vacation of the prior deed and ownership being held by only Appellant. The Register of Deeds changed its records, albeit incorrectly, and shows ownership of the Property returned to Appellant on May 12, 2017. Appellant remained in possession, dominion and control of the Property at all times. The effective date of the settlement of the First Foreclosure was September 1, 2016. From and after that date, Appellant failed and refused to make payment of recurring assessments and dues owed to Respondent. Based upon the accrual of the new debt owed, Respondent initiated the Second Foreclosure. On November 6, 2018, a bench trial was held and the Charleston County Master-in-Equity issued a Decree of Foreclosure and Order of Sale reflecting a debt due in the amount of $8,644.55[1] and again ordering the sale of the Property. This appeal followed.

STANDARD OF REVIEW

While Appellant fails to cite the applicable standard of review in her brief, a "foreclosure action is an equitable action." Winrose Homeowners' Ass'n, Inc. v. Hale, 423 S.C. 220, 224, 813 S.E.2d 894, 896 (S.C. App., 2018)(quoting Wachovia Bank, Nat'l Ass'n v. Blackburn, 407 S.C. 321,

[1] At the bench trial, Respondent sought a judgment in the amount of $11,911.89; however, the Master reduced the award to $8,644.55 ruling that all interest and late fees were not recoverable (and further reducing the award of attorney's fees to Respondent by $1,000.00) and that Appellant did owe assessments from the effective date of the settlement of the First Foreclosure which was September 1, 2016 (not May 12, 2017). Appellant paid the judgment amount in full on February 28, 2019.

328, 755 S.E.2d 437, 440-41 (2014)).

> Thus, our standard of review is de novo. Under de novo review, we may consider two principles long recognized by our courts "(1) a trial [court] is in a superior position to assess witness credibility, and (2) an appellant has the burden of showing the appellate court that the preponderance of the evidence is against the finding of the trial [court]. De novo review allows us to take our own view of the evidence and make our own findings of fact.

Winrose, 423 S.C. at 224, 813 S.E.2d at 896 (internal quotations and citations omitted).

ARGUMENT

1. DID THE MASTER-IN-EQUITY COURT ERR IN FAILING TO RELIEVE APPELLANT OF REGIME FEES BILLED FROM JUNE 17, 2016 TO MAY 12, 2017 ON THE BASIS OF ARTICLE X, SECTION 10.6 OF THE BYLAWS OF THE SAVANNAH HOMEOWNERS ASSOCIATION, INC.?

Appellant contends that she should be relieved of the duty to pay assessments during the time period between June 17, 2016[2] and May 12, 2017, based upon Article X, Section 10.6 of Respondent's Bylaws, presumably because this is the time period during which the Register of Deeds shows Respondent as the owner of the Property (from the issuance and recording of the Master's Deed from the First Foreclosure to its alteration of its records based on the Amended Vacating Order).

The Master specifically rejected Appellant's argument at trial, ruling that the filing of the Amended Vacating Order was dispositive. Transcript p. 13, l. 25 - p. 19, l. 21. The Master cited to the Amended Vacating Order noting that it contained language stating: "Foreclosure sale: The judgment for the sale are set aside and vacated and are void and have no force and effect." Transcript p. 15, l. 19-24. The Master went on to elaborate: "But it's as if it never happened legally...So the

[2] The Master ruled that Appellant owed assessments from the effective date of the settlement of the first foreclosure suit which was September 1, 2016, not June 17, 2016.

legal status of vacating the deed is to say it's as if it never happened, it's gone away. And so title would not have vested in the HOA from a legal perspective." Transcript p. 16, l. 15-21. The Master further stated, "...from the Court's perspective, it would be as if it didn't happen okay?...Once it's vacated, it's removed of record as if it didn't happen, void and of no force and effect, okay?" Transcript p. 17, l. 19-24. The Master further ruled on this issue by stating, "So once they vacated the order, it's as if it didn't – legally, it's as if it didn't happen. That's really what I'm trying to get at." Transcript p. 19, l. 17-20. The Master concluded this issue by ruling "...it would be the ruling of the Court that in fact you owe the moneys from the time when legally or factually the title was in the name of the HOA....And so as a matter of law, essentially, you've never been dispossessed of the property." Transcript p. 70, l. 1-4, 15-16.

Based upon the Master's ruling, Appellant remained responsible for payment of assessments during the time period from the effective date of the settlement of the First Foreclosure (September 1, 2016) through the date when the property was deeded back to the Appellant (and thereafter). As such, Appellant's argument, which is unsupported by any case law citation, fails.

Furthermore, Appellant remained residing in the Property during the entire time period under consideration, and continued to have exclusive possession thereof and to exercise dominion and control thereover. She never vacated the Property nor was she ever forcibly put out. To argue that she should not be required to pay the monthly assessments due to Respondent while being an owner thereof at all times and continuing to live in the Property is disingenuous at best. In asserting her reliance on Article X, Section 10.6 of the Bylaws, Appellant comes to this court with unclean hands much as she did in the lower court.

2. DID THE MASTER-IN-EQUITY COURT ERR IN FAILING TO VINDICATE THE APPELLANT IN LIGHT OF RESPONDENT'S INCONSISTENT CORRESPONDENCE AND COMMUNICATIONS TO APPELLANT, AND RESPONDENT'S DISCRIMINATORY BEHAVIOR TOWARDS APPELLANT?

Appellate contends that "inconsistent correspondence and communications" require some type of vindication by the Master. The Respondent set forth its accounting of the monies due from Appellant at the hearing. Transcript p. 23, l. 21 - p. 35, l. 22. The Master then painstakingly recounted the testimony elicited to establish an accounting of the debt due. Transcript p. 38, l. 15 - p. 47, l. 19. Appellant's cross examination of Respondent's witness did not challenge the sums due in any respect. Transcript p. 36, l. 9 - p. 38, l. 14; p. 49, l. 8-14. Said cross examination clarifies that Appellant's account remained on attorney status and information regarding her account would have been available from Respondent's attorney. Inasmuch as Appellant failed to adequately challenge the sums due, she cannot claim that poor communication relieves her of liability for payment of same.

Appellant recites receiving a statement of account in February 2017 indicating a zero balance from December 5, 2016 through the beginning balance on January 1, 2017 and a charge of $861.52 being applied to her account on January 31, 2017. She makes no actual argument as to why any alleged discrepancy in the charges applied to her account entitles her to a finding that the Master erred in any respect. The application of the $861.52 was clearly explained on the record during the trial. Transcript p. 6, l. 22 - p. 7, l. 20; p. 39, l. 23 - p. 40, l. 19. Furthermore, Respondent introduced exhibits detailing the balance due from Appellant at the time of trial, as well as the applicable portions of the governing documents outlining Appellant's responsibility for assessments and related charges and the Respondent's ability to charge and collect same. Respondent's Exhibits 1-4.

To the extent that Appellant raised inconsistent communications at trial (Transcript p. 36, l. 9 - p. 38, l. 14), the fact that the Master did not agree with Appellant or find any merit in Appellant's contentions does not constitute error. Further, Appellant abjectly fails to cite to any case law to support her position that inconsistent communications prior to trial obviate the duty to pay delinquent assessments. Certainly from the date of the Simons and Dean Letter Dated February 10, 2017, up until the date of the trial on November 6, 2018, Appellant had ample opportunity to ascertain the amount due to the Respondent. Appellant admitted at trial that even after receipt of the Simons and Dean Letter Dated February 10, 2017, she did not remit a payment until August 2017. Transcript p. 56, l. 13- p. 57, l. 13.

Appellants contends that the "Homeowners Association also demonstrated discriminatory behavior towards Jones." Appellant did not elicit or provide any testimony or evidence regarding the Respondent's allegedly discriminatory behavior during the trial. "[T]o preserve an issue for appellate review, the issue must have been raised to and ruled upon by the trial court." Whaley v. CSX Transp., Inc., 362 S.C. 456, 609 S.E.2d 286, 299 (2005). "It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial [court] to be preserved for appellate review." Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). Thus, this ground for appeal should be denied and rejected.

3. IS APPELLANT RESPONSIBLE FOR LEGAL FEES AND OTHER COSTS WHICH RESULTED FROM RESPONDENT'S NEGLIGENCE?

Appellant's argument regarding her responsibility for legal fees and other costs based upon Respondent's alleged negligence is conclusory at best. Appellant argues that Respondent failed to provide her with a statement of account in September 2016 following negotiations with Appellant's

mortgage lender. Appellant fails to craft any argument for why such alleged failure constitutes negligence or why such action would relieve her of the responsibility for legal fees and costs associated with this second lien foreclosure action.

In any event, the Transcript reflects that Appellant was on actual and/or constructive notice of the monthly assessments that were due. Transcript p. 52, l. 20 - p. 53, l. 20. Appellant has owned the Property since 2001, has received statements and paid in the past, and she is and has been on notice, both expressly and constructively, of the requirement to pay and she has a duty of inquiry. Spence v. Spence, 368 S.C. 106, ___, 628 S.E.2d 869, 876 (S.C., 2006)(internal citation omitted)("If there are circumstances sufficient to put a party upon the inquiry, he is held to have notice of everything which that inquiry, properly conducted, would certainly disclose; but constructive notice goes no further. It stands upon the principle that the party is bound to the exercise of due diligence, and is assumed to have the knowledge to which that diligence would lead him; but he is not held to have notice of matter which lies beyond the range of that inquiry and which that diligence might not disclose.") Appellant received correspondence from Respondent's counsel in February 2017. Simons and Dean Letter Dated February 10, 2017. And Appellant retained counsel to negotiate a payment plan. Transcript p. 52, l. 20 - p. 53, l. 20. What Appellant did not do was pay the monthly assessments in a timely fashion. Appellant had actual and/or constructive knowledge and at least inquiry notice that assessments were owed and came to court with unclean hands having been unjustly enriched from the benefits of owning the Property without having paid any assessments.

Inasmuch as Appellant cites to no case law and makes no rational argument linking any alleged lack of notice to her claim that she should be relieved of the obligation to pay the Respondent's legal fees and costs, such argument should be rejected.

CONCLUSION

In this matter, the Master was in a superior position to assess witness credibility. Further, Appellant has not made a showing that the preponderance of the evidence is against the findings of the Master. Based upon the foregoing, Appellant's appeal should be denied.

Respectfully submitted,

Derek F. Dean
SIMONS & DEAN
147 Wappoo Creek Drive, Suite 604
Charleston, SC 29412
(843) 762-9132
Attorneys for Respondent

6/12, 2019

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Denise H. Jones and LVNV Funding, LLC, ...Defendants,

Of Whom Denise H. Jones is the Appellant.

PROOF OF SERVICE

I certify that I have served the Initial Brief on Appellant Denise H. Jones by depositing a copy of it in the United States Mail, postage prepaid on June 12, 2019, addressed to her at 506-D Arlington Drive, Charleston, SC 29414.

Brenda Casey, Paralegal
Simons & Dean
147 Wappoo Creek Road, Suite 604
Charleston, South Carolina 29412
(843) 762-9132
Attorneys for Respondent

6/12, 2019
Charleston, South Carolina

SIMONS & DEAN
ATTORNEYS AT LAW

147 WAPPOO CREEK DRIVE, SUITE 604 | CHARLESTON, SC 29412 | 843.762.9132 | FAX: 843.406.9913

Keating L. Simons, III klsimons@simonsanddean.com
Derek F. Dean dfdean@simonsanddean.com
I. Sonja Taylor istaylor@simonsanddean.com

June 12, 2019

VIA REGULAR MAIL & FACSIMILE (803-734-1839)
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: *The Savannah Homeowners Association, Inc. v. Jones, et al.*
Appellate Case No.: 2019-000205

Dear Ms. Kitchings:

Enclosed is the original and one copy of the Initial Brief of Respondent; Proof of Service of Initial Brief of Respondent; Respondent's Designation of Matter and Proof of Service of Respondent's Designation of Matter in the above case. Upon filing, I would appreciate it if you would return the clocked-in copies to me within the self-addressed stamped envelope.

By copy of this letter, I am serving Appellant with copies of the aforementioned Initial Brief of Respondent, Respondent's Designation of Matter and Proofs of Service.

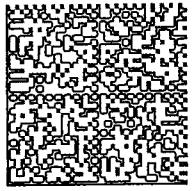
With kind regards, I remain

Yours very truly,

Derek F. Dean

DFD/bdc
Enclosures
cc: Ms. Denise H. Jones (w/enc.)

SIMONS & DEAN
147 Wappoo Creek Drive
Suite 604
Charleston, SC 29412



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