

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM COLLETON COUNTY
Court of Common Pleas

Harris Beach, Special Referee

Case No. 92-CP-15-508

Nancy R. Beach,

Respondent,

v.

Gresham Communications of
Walterboro, Inc., a/k/a
Gresham Communications,
Inc., Gresham Broadcasting,
Inc. and Rudi H. Gresham,

Appellants.

Respondent's Brief

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COURT OF APPEALS

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Statement of Issues on Appeal

I. The judicial sale should not be set aside for purportedly violating the ten-year limitation period to execute on a judgment

II. The Special Referee properly rejected Gresham's attempt to "redeem" the judicial sale of Gresham's assets

III. The Special Referee properly held Gresham and Saunders in contempt

VI. The Special Referee did not violate federal law in ordering Gresham's assets sold at a judicial sale, with the sale of the license subject to FCC approval

V. The Special Referee did not err "by failing to direct proper distribution of excess value of license"

Statement of the Case

This case has a rather complicated procedural history involving proceedings in the present action and a separate case pending before the Federal Communications Commission ("FCC"). For this reason, this "Statement of the Case" contains a "bare bones" procedural outline of the matter, with the "Facts" section of this brief "fleshing out" the actual controversy and issues between the parties.

Respondents Caswell Communications, Inc. and Caswell Capital Partners, LP (collectively "Caswell") are the successors-in-interest to a judgment obtained by Nancy R. Beach against, among others, Appellant Gresham Communications of Waltherboro, Inc., a/k/a Gresham Communications, Inc. ("Gresham"). (R. p.391). As such, Caswell filed a petition for a supplemental hearing against Gresham on August 24, 2006. (R. pp.85-86).

On September 22, 2006, the Special Referee filed an order requiring a broadcast license held by Gresham, identified by Gresham's principal as Gresham's sole asset, to be sold at a judicial sale, with the proceeds used to satisfy the above-referenced judgment. (R. pp.4-6). Gresham appealed this order, and the appeal was dismissed and remitted for Gresham's failure to perfect the appeal. (R. p.374; R. p.10; R. p.67).

On February 21, 2007, the Special Referee addressed several issues raised by each party in a second order. **(R. pp.11-14)**. This order specified that the broadcast license and associated documents and records (including the stations' public file and advertiser lists) should be sold subject to approval of the sale by the FCC, which has jurisdiction over such licenses as a matter of federal law. **(R. pp.11-14)**. This order also required Gresham, its principals and agents, to cooperate in filing the application for FCC approval of the sale. **(R. p.13)**. Gresham never appealed this order.

On March 26, 2007, the Special Referee ordered that Charles Cherry, II, be appointed as a receiver over Gresham's property because Gresham had not cooperated in filing the application for FCC approval, as required in the February 21, 2007 order. **(R. pp.15-19)**. The Special Referee held that the receiver should take possession of the broadcast license and associated documents and records (including the stations' local public file and advertiser lists) only upon the FCC's approval of the transfer of the broadcast license to the receiver. **(R. pp.15-16, §§1-2)**. Gresham appealed this order. **(R. p.376)**. This Court affirmed the Special Referee and remitted the case. **(R. pp.70-71; R. p.72)**.

On April 3, 2007, the FCC approved the transfer of the broadcast license from Gresham to the receiver. **(R. p.68)**. The receiver then applied to the FCC for approval of the transfer to Caswell, the successful bidder at the public judicial sale of the license. **(R. pp.105-116)**. On or around May 11, 2007, Gresham filed a petition to reconsider the FCC's decision to approve the transfer of the radio station's broadcast license to the receiver and a petition to deny the receiver's application to transfer the license to Caswell. **(Supp. R. pp.5-57; R. pp.117-179)**. In support of these petitions, Gresham contended such transfer was against the public interest because (1) the Special Referee was purporting to compel a transfer of the license without the

FCC's consent (which is untrue) and (2) the attempted transfer ignored other assets belonging to Gresham which could be used to satisfy the judgment and purported to convey a "bare" license (which is also untrue). **(Supp. R. p.17; R.p.130)**. In support of the latter argument, Gresham attached a written affidavit of its principal, William Saunders, which stated that Gresham owned other assets besides the broadcast license. **(R. p.137, ¶3)**.

Caswell filed a petition for rule to show cause before the Special Referee, pointing out that Saunders testified in the supplemental hearing on September 20, 2006 before the Special Referee that Gresham owned only a broadcast license, but that Saunders had also submitted a written affidavit to the FCC that Gresham owned other assets. **(Supp. R. p.4:20-25; R. p. 215:1-4)**. After issuing a rule to show cause and holding a hearing, the Special Referee held Gresham and Saunders in contempt of court for their contradictory filings and testimony. **(R. pp.23-34)**. Gresham did not timely appeal this order, and its untimely notice of appeal was remitted by this Court. **(R. p.377; R. p.69)**.

On or around April 8, 2008, Gresham filed a "Notice of Redemption and Tender of Payment," which Gresham later amended. **(R. pp.378-386; R. pp.386-388)**. Simultaneously, Gresham deposited \$106,268.78 with the Clerk of Court to "redeem" the judgment. **(R. p.380)**. Caswell filed a return, questioning the origin of any right to "redeem" the license and associated radio station assets and further questioning why Gresham had not previously disclosed \$106,268.78 in purported assets in the supplemental proceeding. **(R. pp.490-504)**. Based on the March 26, 2007 order appointing a receiver over Gresham and giving the receiver full authority over Gresham's assets, Caswell also requested that these funds be released to the receiver as an undisclosed asset of Gresham. **(R. pp.490-504)**. Finally, upon the belief that the notice was filed solely to delay the FCC's pending consideration of the receiver's application for approval

of the transfer, Caswell moved that Gresham and Saunders once again be held in contempt of court. **(R. pp.490-504).**

On June 10, 2008, the Special Referee entered an order rejecting Gresham's motion to "redeem" the broadcast license and associated assets of the radio station on several grounds, including that (1) Gresham failed to comply with certain preconditions required to exercise its purported right to "redeem" the assets; (2) the March 26, 2007 order appointing a receiver revoked any such right to "redeem"; (3) the doctrine of unclean hands prevented Gresham from exercising this purported right to "redeem"; and (4) upon FCC approval of the transfer of the broadcast license to the receiver, the receiver became the sole owner of all of Gresham's property, including any surviving right to "redeem." **(R. pp.36-50).** In addition, the Special Referee ordered the funds deposited by Gresham to be disbursed to the court-appointed receiver as an asset of Gresham. **(R. pp.36-50).**

Gresham moved to reconsider the June 10, 2008 order. **(R. pp.222-224).** On June 20, 2008, Gresham served and filed a memorandum in support of its motion for reconsideration. **(R. pp.399-406).** Neither Gresham's motion for reconsideration, nor Gresham's memorandum in support of its motion raised the issues of (1) whether the judicial sale should be set aside because the judgment allegedly had expired and lacked active energy; or (2) whether the judicial sale should be set aside because the final bid was purported to be "shockingly inadequate." **(R. pp.222-224; R. pp.399-406).**

At the subsequent hearing on June 23, 2008, Gresham orally moved, for the first time, to set aside the judicial sale because the Beach judgment had allegedly expired and lacked active energy. After the hearing, on or around August 12, 2008, Gresham confirmed that a third party had deposited the monies tendered to "redeem" Gresham's assets. **(R. pp.392-393).** On or

around October 30, 2008, Gresham moved, for the first time, to set aside the judicial sale for purportedly “shockingly” inadequate consideration. (R. pp.225-228).

On December 3, 2008, the Special Referee entered an order modifying the June 10, 2008 order in only one particular: The Special Referee ordered that the money Gresham deposited as a “tender” of its right to “redeem” be released to the third party depositor. (R. pp.51-54). The Special Referee did not address Gresham’s subsequent motions to set aside the judicial sale. On December 31, 2008, Gresham filed a notice of appeal of the June 10, 2008 and December 3, 2008 orders of the Special Referee. (Suppl. R. p.1). These are the only orders currently on appeal. (Suppl. R. p.1).

Subsequently, Gresham withdrew its tendered monies with the Clerk of Court. (R. p.394). Moreover, on March 3, 2009, the FCC issued a decision *denying Gresham’s petitions* before the FCC; affirming the transfer of the broadcast license from Gresham to the receiver; and approving the transfer of the broadcast license from the receiver to Caswell. (R. pp.73-78). For the first time on appeal, Gresham raised this *adverse* decision to support its argument that the transfers should be set aside as violations of federal law. (App.’s Br.).

Facts

I. Introduction

Initially, this appeal should solely consider the June 10, 2008 and December 3, 2008 orders, which are the only orders on appeal. Collectively, these orders rejected Gresham’s attempt to tender monies to “redeem” the judicial sale of Gresham’s assets (Issue II in Gresham’s initial brief) and held Gresham in continuing contempt for withholding Gresham’s assets from the receiver and inexcusably delaying the present proceeding and the FCC proceeding (Issue III in Gresham’s initial brief). (R. pp.36-49; R. pp.50-54). Importantly, Gresham withdrew its

tendered deposit, so there is nothing left to decide with respect to the first of these issues. (R. p.394). Moreover, Gresham had no right to “redeem” its assets; any such right expired upon the appointment of the receiver or, alternatively, upon FCC approval of the transfer of the broadcast license to the receiver; and, in any event, Gresham may not exercise any such right due to unclean hands.

Further, the Special Referee properly held Gresham and Saunders in contempt for failure to deliver all of Gresham’s assets to the receiver. The receiver’s testimony revealed that Gresham withheld a control board belonging to the radio station and continued to impede the receiver’s collection of assets after the November 27, 2007 order (R. pp.268:15-269:22), notwithstanding Gresham’s failure to report the funds deposited with the Special Referee as an asset of Gresham and its failure to disclose that a third party contributed these funds upon their deposit. (R. pp.392-393).

The remaining issues on appeal are collateral attacks on previous orders which were not ruled upon by the Special Referee and, in at least one case, have been previously disposed of by this Court. With respect to Gresham’s attempt to set aside the transfer of the license due to expiration of the underlying judgment (Issue I in Gresham’s initial brief), it is beyond dispute that the court, through its appointed receiver, obtained possession of Gresham’s assets (including FCC approval of the transfer to the receiver) prior to expiration of the 10-year deadline. (R. pp.15-19; R. pp.73-78). Moreover, Gresham failed to timely raise this issue, and the Special Referee never ruled upon it.

With respect to Gresham’s argument that the judicial sale should be set aside for violating federal law (Issue IV in Gresham’s initial brief), this Court has already rejected such argument in a previous appeal (R. pp.520-523; R.pp.70-71); Gresham did not raise the issue to the Special

Referee or obtain a ruling thereon; and, in any event, the Special Referee fully complied with federal law.

With respect to Gresham's argument that the Special Referee "erred by failing to direct proper distribution of excess value of license" (Issue V in Gresham's initial brief), Gresham did not properly raise this issue to the Special Referee or obtain a ruling thereon and failed to comply with the procedural preconditions necessary to make such a motion. Furthermore, the equitable doctrine of laches precludes Gresham from waiting until the statute of limitations for execution on the judgment has expired before raising this issue.

II. The September 22, 2006 Order

Caswell is the assignee of a judgment obtained by Nancy R. Beach against, among others, Gresham. (R. p.391). On August 24, 2006, Caswell filed a petition for a supplemental hearing requiring Gresham or its designee to appear before the Court and answer questions under oath regarding Gresham's property. (R.pp.85-89). As a result, Gresham was ordered to appear before the Honorable Harris L. Beach, Jr., for a supplemental hearing to take place on September 20, 2006. (Order filed 08/26/06).

At the supplemental hearing, William Saunders appeared on behalf of Gresham and was called as a witness. (R. pp.202:25-203:19). Saunders testified that he had been the president of Gresham since 1996 and was its majority shareholder. (R. p.195:14-19, p.204:2-5). Saunders further testified that Gresham's only asset was a radio station license for WPAL-FM issued by the FCC:

Q. I mean, Mr. Saunders would you answer a question regarding what are the assets of Gresham Communications, Inc.?

A. You've got the answer. *It's the license. That's all it owns.*

Q. Are there any other assets?

A. *No, that's all it owns.*

Q. Does Gresham Communications, Inc., hold the license, the FCC license for the station?

A. Yes.

(emphasis added). (Suppl. R. p.4:20-25; R. p.215:1-4)

By order filed September 22, 2006 (the "September 22, 2006 Order"), Judge Beach ordered the license sold at a judicial sale and the proceeds of the license applied to satisfy the judgment. (R. pp.4-6). Gresham subsequently retained counsel and appealed the order. (R. p.374). Gresham's appeal was dismissed and remitted because Gresham never served a designation of matter. (R. p.10; R. p.67).

III. The February 21, 2007 Order (which was never appealed and remains the law of this case)

More or less simultaneously upon the filing of its appeal, Gresham moved to stay the September 22, 2006 Order. (R. pp.90-91). In return, Caswell requested that Judge Beach appoint a receiver to facilitate the transfer of the license. (R. pp.395-398). Caswell explained, in relevant part:

[Alt]hough a license holder, its creditor[,] or a buyer cannot take rights in a license contrary to those of the Federal Communications Commission which issues it, a federal license may be bought and sold and a creditor may obtain a security interest in and attach the proceeds of the sale of a license, *subject to the FCC's approval of that sale Accordingly, this Court may order the sale of such license, subject to FCC approval, with the proceeds to be used to satisfy the judgment of the judgment creditor.*

(emphasis added). (R. p.396).

After a hearing, by order filed on February 21, 2007 (the "February 21, 2007 Order"), Judge Beach denied Gresham's motion to stay as moot and negated Gresham's complaints with respect to the September 22, 2006 Order, in pertinent part:

Though a license holder, its creditors[,] or a buyer cannot take

rights in a license contrary to those of the Federal Communications Commission (FCC) which issues it, a federal license may be bought and sold and a creditor may obtain a security interest in and attach the proceeds of the sale of a license, subject to the FCC's approval of that sale.

In this case, the Court has recognized that the judgment debtor is a holder of such a license, together with its associated documents and records, the sale of the License and the associated records which accompany it will produce proceeds and those proceeds of the sale, once approved by the FCC, may be attached by the judgment creditor. Accordingly, this court may order the sale of such License, subject to FCC Approval, with the proceeds which have been attached by order of this court, subject to collection by the judgment creditor in satisfaction of its judgment.

Accordingly, this Court will sell the License and associated documents and records (including the stations' local public file and advertiser lists) at a public judicial sale schedule[d] for this date. That judgment debtor, as assignee, and the Successful Bidder, as assignor will promptly and without delay apply for FCC Approval of the assignment of that License to the Successful Bidder. *The sale will be final upon the FCC Grant of consent to the assignment.* If the judgment debtor satisfies the full amount of the underlying judgment in this matter, together with all interest, fees and costs due under the judgment before the FCC grant of assignment of License, then the FCC assignment application will be withdrawn.

(R. p.12). In the February 21, 2007 Order, Judge Beach also denied Caswell's request for the appointment of a receiver:

I decline to appoint a receiver at this time, but instead ORDER THAT THE JUDGMENT DEBTOR MUST FULLY AND TIMELY COOPERATE WITH THE PREPARATION AND FILING OF THE APPLICATION FOR FCC APPROVAL OF THE ASSIGNMENT OF THE LICENSE TO THE SUCCESSFUL BIDDER, AND, PENDING EFFECTIVE TRANSFER OF THE LICENSE TO THE SUCCESSFUL BIDDER, MAINTAIN AND EFFECT THE LICENSE AND OPERATE RADIO STATION WPAL-FM [IN] ACCORDANCE WITH THE LICENSE, APPLICABLE LAWS, REGULATIONS AND POLICIES, on pain of contempt of this Court.

(emphasis in original) **(R. p.13).** Gresham never appealed this order.

IV. The March 26, 2007 Order (which was appealed, affirmed and remitted by this Court and also constitutes the law of this case)

Caswell Capital Partners, LP, was the successful bidder at the subsequent judicial sale. **(R. p.15)**. However, Gresham failed to cooperate with the transfer application to obtain FCC approval of the sale. **(R. p.15)**. As a result, by order filed on March 26, 2007 (the “March 26, 2007 Order”), Judge Beach appointed Charles Cherry II as the receiver “subject to issuance by the FCC of consent of the involuntary assignment of the Gresham license to the Receiver” **(R. p.15)**. Judge Beach also once again ordered Gresham to cooperate in the application for FCC approval of the license transfer. **(R. p.17)**. Gresham appealed this order to the South Carolina Court of Appeals **(R. p.376)**, making an identical argument on appeal that it does now, in pertinent part:

Even though a court has the authority to grant interests relative to a broadcast station’s personal property, the court may not treat a broadcast license as physical property; and a lien, mortgage, security interest, or reversionary interest in a broadcast license is not permitted. **(R. p.520)**.

.....

Accordingly, the objective of the Receiver contravenes the rules and policies of the [FCC] and is not permitted under the law that guides the [FCC]. The appointment of a Receiver to execute the order to sell the FCC license of Gresham is as unlawful as the initial rulings and cannot be enforced. **(R. p.521)**.

....

The appointment of the Receiver is merely another step in the enforcement of the judicial sale first authorized by the September [22], 2006 Order and is illegal and unlawful. The appointment of the Receiver herein must be set aside, stayed, and this collection action dismissed. **(R. pp.522-523)**.

....

This Order and the Receiver are outside of the law, rules, and policies of the [FCC]. This action and all its beginnings in September [22], 2006 order are unlawful and must be dismissed, set aside, or stayed. (R. p.523).

Notably, this Court affirmed Judge Beach's order appointing a receiver, rejecting Gresham's arguments on this point, and remitted the appeal, making this the law of this case. (R. pp.70-71; R. p.72).

On April 3, 2007, the FCC consented to the involuntary assignment of the broadcast license of WPAL-FM (together with its associated assets) to Charles Cherry, II, the appointed receiver. (R. p.68). At this point, the receiver (and, through the receiver, the court) took possession of Gresham's assets associated with the radio station. (R. pp.15-16). It is therefore clear that, from this point on: (1) the execution on the Beach judgment was complete and (2) Gresham retained no further interest in the FCC license, whether cognizable under state or federal law.

V. Gresham's Petition to Deny the FCC Application

On May 11, 2007, Gresham filed a petition before the FCC to deny the receiver's application to transfer the license of WPAL-FM to Caswell. (R. pp.117-179). Attachment 1 to this petition contained a written declaration by William Saunders stating, among other things: "The WPAL-FM tower, transmission equipment, studio equipment, files, tower land lease, programming rights, and trademark and other intellectual property, all continue to be under the ownership and control of Gresham Communications, Inc." (R.pp.136-137; R. p.137, ¶3). Notably, this sworn declaration, taken "under penalty of perjury," completely contradicts Saunders's previous, sworn testimony that the FCC license was "all it [Gresham] owns" (R. p.137; Supp. R. p.4:20-25; R. p.215:1-4). In its petition, Gresham used this declaration to contend the September 22, 2006 Order should be ignored or treated as void by the FCC because

the September 22, 2006 Order purported to transfer a “bare license” despite the existence of other assets. **(R. p.130)**. As Gresham does in this appeal, Gresham downplayed the Special Referee’s express instructions that any sale or other transfer of the license would be subject to approval by the FCC. **(R. pp.123-27; R. p.12)**.

VI. The November 27, 2007 Order (which was not timely appealed and which therefore also constitutes the law of this case)

As a result of the disparity between Saunders’ oral testimony before the Special Referee and his written declaration to the FCC, Caswell petitioned for a rule to show cause why Saunders and Gresham should not be held in contempt of court. **(R. pp.180-189)**. The Special Referee granted the petition and held a hearing on the matter. **(R. pp.20-21)**. During such hearing, Saunders answered questions under oath and testified:

- Gresham does own assets, including real estate assets, which Saunders did not disclose at the supplemental proceeding; and
- Saunders meant to include all of the assets involved in operation of the radio station in the term “license” at the September 20, 2006 hearing

(R. p.26). By order filed November 27, 2007 (the “November 27, 2007 Order”), the Special Referee found Saunders and Gresham in contempt of court. **(R. p.29)**. The Special Referee explained that he had relied upon Saunders’ sworn testimony on September 20, 2006 to issue the February 21, 2007 Order requiring the license and associated documents and records be sold subject to FCC approval. **(R. pp.24-25)**. The Special Referee found that, to the extent Gresham did own any of the assets listed in Saunders’ May 11, 2007 declaration (which Caswell denies), they had been sold to Caswell during the judicial sale. **(R. pp.31-32)**. The Special Referee further held that Saunders committed perjury through his September 20, 2006 testimony,

refusing to believe his after-the-fact explanation that, in Saunders' parlance, "license" meant the license and all other assets owned by Gresham at the time of the September 20, 2006 hearing. (R. p.27, ¶3).

Based on Saunders' perjured testimony, the Special Referee judicially estopped Saunders and Gresham from contending the term "license" as used in previous and future orders meant the FCC license exclusive of the other station assets. (R. p.30). Moreover, the Special Referee held: "As a direct result of their contempt of this court, Saunders and Gresham are hereby ordered to pay Plaintiff all attorney's fees and costs incurred by the Plaintiff since the date of the contempt: September 20, 2006, as well as the Receiver's fees and costs incurred since his appointment." (R. pp.32, ¶3). Saunders and Gresham untimely appealed the November 27, 2007 order, and the appeal was dismissed and remitted by this Court. (R. p.377; R. p.35; R. p.69).

VII. The Present Appeal

The foregoing procedural history involved other orders of the Special Referee which were either effectively un-appealed or affirmed by this Court. As previously discussed, the February 21, 2007 Order contained the following language: "If the judgment debtor satisfies the full amount of the underlying judgment in this matter, together with all interest, fees and costs due under the judgment before the FCC grant of assignment of License, then the FCC assignment application will be withdrawn." (R. p.12). However, the February 21, 2007 Order also denied Caswell's initial request for the appointment of a receiver and expressly required Gresham to cooperate in applying for FCC approval of the transfer of the license. (R. p.13). Further, the Special Referee ultimately appointed a receiver because Gresham FAILED TO COMPLY WITH THE FEBRUARY 21, 2007 ORDER. (R. p.15). Moreover, neither the March 26, 2007 Order nor the November 27, 2007 Order permit Gresham's right to "redeem" the

license to continue—in fact, they are completely inconsistent with any alleged continuing right for Gresham to “redeem” the license. **(R. pp.15-19; R. pp.23-34)**. Finally, to the extent such a right survived the March 26, 2007 Order (which it clearly did not), the right would have been extinguished when the FCC approved the transfer of the license to the receiver. **(R. p.68)**.

Not to be put off, however, on or around April 8, 2008, more than a year after the FCC had approved of the transfer of the FCC license to the court-appointed receiver, Gresham filed a “Notice of Redemption and Tender of Payment” with the Colleton County Clerk of Court, together with \$106,268.78 in funds purportedly belonging to Gresham (despite Saunders’ previously sworn, oral testimony in *two* previous hearings before the Special Referee identifying Gresham’s assets and neglecting to mention \$106,268.78 in cash, accounts receivable, or similar liquid assets). **(R. pp.378-386; R. pp.387-388)**.

After a hearing, the Special Referee issued an order filed on June 10, 2008 (the “June 10, 2008 Order”), denying Gresham’s motion to “redeem” the license on several grounds and, upon Caswell’s motion, attaching the \$106,268.78 in proceeds deposited with the Clerk of Court as an asset of Gresham which belonged to the receiver. **(R. pp.36-50)**. The Special Referee also held Gresham and Saunders in contempt for failing to disclose the tendered money and other assets of Gresham and for delaying the present proceeding and the FCC proceeding. **(R. pp.36-50)**.

Gresham moved for reconsideration, revealing to the Special Referee for the first time that the monies deposited with the Clerk of Court were not tendered by Gresham, but were, in fact, tendered by a third party entity which had not appeared in this action and which undisputedly had no right to “redeem” the FCC license. **(R. pp.22-224; R. pp.392-393)**.

At the subsequent hearing on Gresham’s motion for reconsideration, Gresham contended, for the first time, that the applicable statute of limitations on the execution of a judgment had

expired. (R. p. 326:11-17). The Special Referee carefully considered both parties' position over the ensuing months and, on December 3, 2008, issued an order (the "December 3, 2008 Order") holding that Gresham's tender of the "redemption" payment was an unsolicited offer to settle the case; that Caswell had rejected the offer by filing a motion objecting to the tender; and that, therefore, the parties should be left as they were. (R. pp.51-54). The *only issue* the Special Referee addressed in the December 3, 2008 Order was the following: "Should the order of June 6, 2008, being reconsidered hereunder be modified in any way[?]" (R. p.51). The Special Referee answered this question in the affirmative in only one respect: The Special Referee held that the judgment through which Caswell claimed the \$106,268.78 deposited with the Clerk of Court was now void due to the expiration of the statute of limitations and, therefore, could not be used by Caswell to claim these funds. (R. p.53). The Special Referee also recognized that the judgment had been satisfied by the proceeds from the sale of the license and, therefore, was extinguished. (R. p.53).

In the orders on appeal, the Special Referee did not address the following: (1) Gresham's untimely and unnoticed motion that the judicial sale of the license and other assets of WPAL-FM, subject to FCC approval, should be set aside because the judgment allegedly lacked active energy; (2) Gresham's argument, raised for the first time by motion shortly before the December 3, 2008 Order, that the judgment should be set aside for consideration purported to be "shockingly" inadequate; and (3) Gresham's argument, previously raised to this Court, that the judicial sale of the license and other assets of WPAL-FM, subject to FCC approval, should be set aside for violating federal law. This appeal followed.

VIII. Subsequent events

Two events occurred after the December 3, 2008 Order and after Gresham filed a notice

of appeal which will be addressed here by Caswell.¹ Initially, Gresham requested and received the amount Gresham tendered to the Clerk of Court on behalf of a previously unidentified third party. (R. p.394). This action mooted any continued consideration of whether the Special Referee properly rejected the amount tendered—there is no more “deposit” and this Court would therefore engage in a pointless exercise if this Court addressed the issue.

Secondly, on March 3, 2009, the FCC issued a decision *approving* the transfer of the license from the receiver to Caswell and *denying* Gresham’s motion to reconsider the decision to approve the transfer of the license from Gresham to the receiver. (R. pp.73-78). On appeal, Gresham glosses over the crucial matter that the FCC approved of the transfer of the license from Gresham to the receiver and from the receiver to Caswell. Moreover, Gresham also fails to note that the FCC did not purport to void the Special Referee’s orders of February 21, 2007; March 26, 2007; November 27, 2007; or June 6, 2008. (R. pp.73-78). Instead, the FCC approved of the Special Referee’s procedures for permitting a sale of the license and other assets of WPAL-FM subject to FCC approval, while noting that the attachment of a license (without consideration of FCC approval) and the sale of a bare license (without consideration of FCC approval) are prohibited under federal law. (R. pp.73-78).

Arguments

I. The judicial sale should not be set aside for purportedly violating the ten-year limitation period to execute on a judgment

Gresham first contends the judicial sale should be set aside because the ten-year statute of

¹ Caswell addresses the second of these matters—the FCC’s approval of the transfer of the license from the receiver to Caswell only in response to Gresham’s unilateral injection of this decision, which was not presented to the lower court in determining the appealed orders as required by the South Carolina Appellate Court Rules and to which Caswell objected in a motion prior to submitting this brief. Caswell continues to object to the manner in which Gresham raised this issue, which violates the South Carolina Appellate Court Rules.

limitations has run on the judgment acquired by Caswell. Initially, this issue was not ruled upon by the Special Referee and, therefore, was not preserved. See Lucas v. Rawl Family Ltd. P'ship, 359 S.C. 505, 510-11, 598 S.E.2d 712, 715 (2004) ("It is well settled that, but for a very few exceptional circumstances, an appellate court cannot address an issue unless it was raised to and ruled upon by the trial court.").

On the merits, the ten-year limitations period for execution on a judgment has no application to the present case. Section 15-39-30 of the South Carolina Code provides as follows:

Executions may issue upon final judgments or decrees at any time within ten years from the date of the original entry thereof and shall have active energy during such period, without any renewal or renewals thereof, and this whether any return may or may not have been made during such period on such executions.

There are two possible definitions of "execution" in Black's Law Dictionary which are relevant in this context to determine what the General Assembly intended when it used the term "execution" in the foregoing statute. First, execution may mean "[j]udicial enforcement of a money judgment, usu. by seizing and selling the judgment debtor's property" Black's Law Dictionary p.609 (8th ed. 2004). Second, "execution" may mean "[a] court order directing a sheriff or other officer to enforce a judgment, usu. by seizing and selling the judgment debtor's property" Id. In either case, however, execution on the judgment assigned by Nancy R. Beach to Caswell was complete on April 3, 2007, when the FCC approved the transfer of the broadcast license for WPAL-FM to the receiver. (R. p.68). Pursuant to the March 26, 2007 Order, upon the FCC's approval of this initial transfer, the receiver had the absolute right to take possession of Gresham's assets. (R. pp.15-16). Accordingly, execution on the judgment was complete by April 3, 2007, well before the ten-year expiration of the judgment, which Gresham

contends occurred on June 2, 2008.

II. The Special Referee properly rejected Gresham's attempt to "redeem" the judicial sale of Gresham's assets

Gresham next contends that the Special Referee erred in rejecting its purported "redemption" of the judicial sale of its assets.

A. The appeal of this issue is moot

Once more, Gresham failed to clear all procedural hurdles associated with this argument. "This Court will not pass on moot and academic questions or make an adjudication where there remains no actual controversy." Sloan v. Greenville County, 356 S.C. 531, 552, 590 S.E.2d 338, 349 (Ct. App. 2003). "A case becomes moot when judgment, if rendered, will have no practical legal effect upon the existing controversy." Id. "This is true when some event occurs making it impossible for the reviewing Court to grant effectual relief." Id. "The function of appellate courts is not to give opinions on merely abstract or theoretical matters, but only to decide actual controversies injuriously affecting the rights of some party to the litigation." Id. "Accordingly, cases or issues which have become moot or academic in nature are not a proper subject of review." Id.

In this case, Gresham withdrew its deposit of the amount Gresham claims was necessary to satisfy the judgment. **R. p.394.** As a result, any decision on this issue would be academic only.

B. The receiver is the only person or entity with standing to tender money on behalf of Gresham

Section 15-39-430 of the South Carolina Code provides a judge the discretion to appoint a receiver of property of the judgment debtor in a supplemental proceeding. See also S.C. Code

Ann. § 15-65-10(2) and (3) (recognizing the court's authority to appoint a receiver after judgment). The appointment of a receiver may be made even if the judgment debtor has sufficient property to pay the judgment, and, when the receiver is appointed, he should be the receiver of all of the debtor's property. Dilling Baker & Co. v. Foster, 21 S.C. 334 (1884). "Under statutes providing for the appointment of a receiver in proceedings supplementary to execution, the general rule is that such receiver is not the mere agent or representative of the debtor, but occupies the relation of a trustee for the creditors, and may institute actions in his own name to set aside fraudulent conveyances made by the debtor with a view to defeating his creditors." Gardner v. Kirven, 173 S.C. 302, ___, 175 S.E. 637, 639 (1934) (emphasis added). "The judge may also, by order, forbid a transfer or other disposition of the property of the judgment debtor not exempt from execution and any interference therewith." S.C. Code Ann. § 15-39-440.

On March 26, 2007, the Special Referee appointed the receiver to take possession of all of Gresham's business and assets upon the FCC's approval of the transfer of Gresham's license to the receiver. (R. pp.15-16). The FCC approved this transfer on April 3, 2007. (R. p.68). On November 27, 2007, the Special Referee reconfirmed the receiver's authority to take possession of all of Gresham's assets and ordered Gresham, Saunders, and all of their agents to cooperate in this transfer. (R. pp.30-31). Accordingly, the receiver is the only entity with standing to tender or otherwise dispose of any assets held by Gresham, and, to the extent any other person or entity purports to tender property belonging to Gresham, such tender is void and of no effect.

C. Gresham's option to pay the judgment and stay the license transfer is extinguished, expired, and waived

In South Carolina, there is no statutory right of redemption following an execution on a

judgment. See 33 C.J.S. Executions §265 (“The right of redemption is a substantive right; and there is no right of redemption following execution sales in general.”); 30 Am.Jur.2d Executions §359 (“In general, there is no right of redemption following execution sales.”). Accordingly, Gresham’s only basis for asserting a right to pay the judgment and stay the license transfer is the Special Referee’s order of February 21, 2007. No other order from the Special Referee gives rise to such a right.

The February 21, 2007 order prescribing the right provides, in pertinent part:

The sale will be final upon the FCC consent to the assignment. If the judgment debtor satisfies the full amount of the underlying judgment in this matter, together with all interest, fees and costs due under the judgment before the FCC grant of assignment of License, then the FCC assignment application will be withdrawn.

(R. p.12, §2). The order further compels Gresham to cooperate with the preparation and filing of the application for FCC approval in lieu of appointing a receiver. **(R. p.12, §2).** Importantly, the Special Referee retained jurisdiction to enter “such further orders as are just under the circumstance.” **(R p.14).**

On March 26, 2007, the Special Referee properly exercised this jurisdiction and extinguished any right of Gresham to pay the judgment. Between February 21 and March 26, 2007, Gresham failed to cooperate with the transfer despite repeated attempts by the successful bidder. **(R. p.15).** As a result, the Special Referee appointed a receiver over all of Gresham’s assets. **(R. p.15).** This order is completely inconsistent with any continuing right by Gresham to pay the judgment and stay the transfer of the license. As such, the order clearly extinguishes any such right.

Further, on April 3, 2007, the FCC granted the receiver’s application to transfer the license to himself. **(R. p.68).** Thus, even if Gresham’s right under the February 21, 2007 order

was not extinguished by the March 26, 2007 order, such right expired after this approval, per the plain terms of the February 21, 2007 order.

Finally, Gresham's conduct between February 21 and March 26 exhibits Gresham's intent to completely disregard this order and is inconsistent with an intent to exercise a right under the order. "Waiver is an intentional relinquishment of a known right and may be implied from circumstances indicating an intent to waive." Bonnette v. State, 277 S.C. 17, 18, 282 S.E.2d 597, 598 (1981). "Acts inconsistent with the continued assertion of a right, such as a failure to insist upon the right, may constitute waiver." Id. Accordingly, Gresham waived any right it obtained through the February 21, 2007 Order.

D. Gresham's attempt to exercise any option to pay the judgment and stay the license transfer is barred by the doctrines of unclean hands, estoppel, and laches

"[I]f a party has unclean hands, the party is precluded from recovering in equity." Anderson v. Buonforte, 365 S.C. 482, 493, 617 S.E.2d 750, 756 (Ct. App. 2005). "The doctrine of unclean hands precludes a plaintiff from recovering in equity if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the defendant." First Un. Nat. Bank v. Soden, 333 S.C. 554, 568, 511 S.E.2d 372, 379 (Ct. App. 1998).

"The doctrine of estoppel applies if a person, by his actions, conduct, words or silence which amounts to a representation, or a concealment of material facts, causes another to alter his position to his prejudice or injury." Hubbard v. Beverly, 197 S.C. 476, 480, 15 S.E.2d 740, 741 (1941). With regard to the party estopped, the elements of equitable estoppel are: (1) conduct amounting to a false representation or concealment of material facts, "or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert;" (2) the intention or expectation that such

conduct shall be acted upon by the other party; and (3) actual or constructive knowledge of the real facts: S. Dev. Land & Golf Co., v. S.C. Pub. Serv. Auth., 311 S.C. 29, 33, 426 S.E.2d 748, 750 (1993). “As related to the party claiming the estoppel, the essential elements are: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question, (2) reliance upon the conduct of the party estopped, and (3) prejudicial change in position.” Id.

“Laches is an equitable doctrine defined as ‘neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done.’” Strickland v. Strickland, 375 S.C. 76, 83, 650 S.E.2d 465, 469 (2007) (citation omitted). “In order to establish laches as a defense, a defendant must show that the complaining party unreasonably delayed its assertion of a right, resulting in prejudice to the defendant.” Id.

Here, Gresham and Saunders have sought, from the beginning of this supplementary proceeding, to stall the judicial sale and transfer of the license and other assets of Gresham to the receiver, and from the receiver to Caswell. The earliest evidence of such actions is Saunders’s perjured testimony at the supplemental hearing on September 20, 2006. Since that time, Caswell has spent over \$100,000.00 in total attorneys’ fees and costs through continued motions, hearings, and other requests for relief from the Special Referee in an attempt to address these actions, not to mention prosecuting four separate appeals. **(R. p.14:1-5)**. Further, Gresham’s actions before the FCC have necessitated hiring special counsel to seek FCC approval of the license transfer, to the tune of well over \$50,000.00 in additional attorneys’ fees and costs. Moreover, the receiver has expended at least \$40,000.00 in costs and fees to acquire Gresham’s property and operate its business since his appointment on March 26, 2007. **(R. p.13:24-14:25)**. Under these circumstances, Caswell has suffered overwhelming prejudice from Saunders’ and

Gresham's improper actions. As a result, Saunders and Gresham should be barred by the doctrines of unclean hands, estoppel, and laches from asserting any option to pay the judgment in lieu of transfer of the license. See Ingram v. Kasey's Assocs., 340 S.C. 98, 107 n.2, 531 S.E.2d 287, 291-92 n.2 (2000) (applying the doctrines of unclean hands and estoppel to bar equitable relief to party attempting to exercise option).

E. Gresham failed to tender sufficient payment to exercise his option

The February 21, 2007 order provides the appropriate method to calculate a proper tender: The judgment debtor, Gresham, must tender the full amount of the underlying judgment, together with all interest, fees and costs. The judgment includes \$56,276.10 in principal with interest at 8% per annum from June 1, 1998, as well as an award of fees and costs of \$5,627.00, which carries interest at the legal rate of 14% per annum. See S.C. Code Ann. § 34-31-20(B) (Supp. 1998) ("All money decrees and judgments of courts enrolled or entered shall draw interest according to law. The legal interest shall be at the rate of fourteen percent per annum."); Collins Music Co., Inc. v. IGT, 365 S.C. 544, 553, 619 S.E.2d 1, 5 (Ct. App. 2005) ("We rule the fourteen percent (14%) rate applies to all causes of action arising between June 9, 1982 and December 31, 2000 . . ."). As a result, Gresham owed \$130,794.83 on the judgment as of June 1, 2007, to say nothing of the interest accruing on the judgment since this time.

Notwithstanding the foregoing, as stated above, Caswell has also incurred substantial attorneys' fees and costs in prosecuting this action, which the Special Referee has also ordered be paid as a contempt sanction and part of any exercise of Gresham's option. Despite the plain terms of the February 21, 2007 order requiring these expenses be included in an exercise of the option, Gresham did not tender this amount. Accordingly, Gresham failed to properly exercise this option. See Ingram v. Kasey's Assocs., 340 S.C. 98, 108, 531 S.E.2d 287, 292 (2000) ("[I]f

the option requires performance in a certain manner, time is of the essence and exact compliance with the terms of the option are required.”).

III. The Special Referee properly held Gresham and Saunders in contempt

Pursuant to section 15-39-490 of the South Carolina Code: “If any person, party or witness disobeys an order of the judge or master, duly served, such person, party or witness may be punished by the judge or master as for a contempt.” The Special Referee’s order of March 26, 2007 and another order filed on April 25, 2007 compel Gresham and its officers to transfer all of Gresham’s assets to the receiver and to fully and timely cooperate in applying for the transfer of the FCC license to Caswell. (R. p.17; R. pp.20-21). The Special Referee’s Order of November 27, 2007, compels Saunders and Gresham to transfer all of Gresham’s assets to the Receiver and to fully and timely cooperate in the application to transfer the FCC license to Caswell. (R. pp.30-31). In willful violation of the foregoing, Saunders and Gresham failed to transfer at least \$106,268.78 in Gresham’s cash assets to the receiver. (R. pp.378-386; R. pp.387-388). In willful violation of the foregoing, as the receiver testified, Saunders and Gresham withheld or actively impeded the receiver from obtaining a radio sounding board and other equipment which were assets of the radio station. (R. pp.268:15-269:22). Further, as the receiver explained, Saunders physically threatened the receiver during his efforts to collect these assets. (R. p.262:15-25). As a result, Gresham and Saunders are unequivocally in violation of the Special Referee’s previous orders and, in fact, have physically threatened an officer appointed by the court. Accordingly, the Special Referee’s decision in this regard should also be affirmed.

IV. The Special Referee did not violate federal law in ordering the broadcast license and associated documents and records sold at a judicial sale subject to FCC approval

To reiterate, this issue was not raised to or ruled upon by the Special Referee in

conjunction with the orders on appeal. See Lucas v. Rawl Family Ltd. P'ship, 359 S.C. 505, 510-11, 598 S.E.2d 712, 715 (2004) ("It is well settled that, but for a very few exceptional circumstances, an appellate court cannot address an issue unless it was raised to and ruled upon by the trial court."). Moreover, Gresham raised these issues in a previous appeal. (R. p.523). This Court affirmed the Special Referee's order and remitted the appeal. (R. pp.70-71; R. p.72). This Court's ruling is therefore the law of the case. See Judy v. Martin, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009) ("Under the law-of-the-case doctrine, a party is precluded from relitigating, after an appeal, matters that were either not raised on appeal, but should have been, or raised on appeal, but expressly rejected by the appellate court.").

Gresham also loses on the merits of this argument, however. Simply put, the Special Referee did not violate federal law. In MLQ Investors L.P. v. Pacific Quadracasting, Inc., 146 F.3d 746, 749 (9th Cir. 1998), the Ninth Circuit Court of Appeals edified:

Government licenses, as a general rule, are considered to be "general intangibles" under the Uniform Commercial Code, "i.e., personal property interests in which security interests may be perfected." In re Ridgely, 139 B.R. at 379. As discussed supra, In re Ridgely makes it clear that license holders have no property rights in the "actual broadcast frequencies themselves as against the federal government," 139 B.R. at 376, (citing In re Bill Welch, 3 F.C.C.R. 6502 (1988)). However, In re Ridgely and In re Cheskey stand for the proposition that licensees do have a proprietary right in the proceeds from a sale of a license, and may grant a security interest in those proceeds.

Further, in In re Media Props., Inc., 311 B.R. 244, 249 (Bkrtcy. W.D. Wis. 2004), the court explained:

While this proprietary interest does not allow any party to assert any rights contrary to the FCC's regulatory powers, the holder of a license may receive proceeds from the transfer of the license to a third party. The right to receive the proceeds of an approved sale is a private right that a party can give to its creditors. This limited interest allows for the enforceability of a security interest in the

proceeds of an FCC approved sale. A contrary outcome would mean that the distinction between private and public interests in FCC license proceeds would have no meaning, and the private interests would be devoid of value.

(internal citations and quotation marks omitted); see also In re Beach Television Partners, 38 F.3d 535, 537 (11th Cir. 1994) (recognizing a security interest in the proceeds from the sale of an FCC broadcasting license does not contravene the FCC's authority to regulate broadcast frequencies); Aceribo Radio Corp., Memorandum Opinion and Order, 101 FCC 2d: 545 (1985) (honoring court order requiring licensee to execute assignment application in favor of another party).

The Special Referee ordered an involuntary sale of Gresham's license and associated documents and records (including public files and advertiser lists) subject to approval by the FCC. (R. p.12). The Special Referee then appointed a receiver to facilitate the transfer and seek FCC approval of the successful bidder for the license. (R. p.15). As even the FCC recognized, the March 26, 2007 order "is a valid exercise of the Court's authority under state law." (R. p.77). Accordingly, this Court should not set aside the judicial sale.

V. The Special Referee did not err "by failing to direct proper distribution of excess value of license"

Again, this issue was not properly raised to or ruled upon by the Special Referee and, accordingly, is not preserved for review. See Lucas v. Rawl Family Ltd. P'ship, 359 S.C. 505, 510-11, 598 S.E.2d 712, 715 (2004) ("It is well settled that, but for a very few exceptional circumstances, an appellate court cannot address an issue unless it was raised to and ruled upon by the trial court.").

Moreover, Gresham has not deposited sums with the Court sufficient to satisfy the judgment, a required prerequisite to attempting to exercise this right. See 30 Am.Jur.2d

Executions §445 (“A judgment debtor should tender to the sheriff conducting the execution sale, rather than the judgment creditor, sufficient sums to satisfy the judgment as stated in the writ of execution in order to have the sale set aside.”).

Finally, Gresham is judicially barred by the equitable doctrine of laches from raising this issue after expiration of Caswell’s judgment against Gresham. “Laches is an equitable doctrine defined as ‘neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done.’” Strickland v. Strickland, 375 S.C. 76, 83, 650 S.E.2d 465, 469 (2007) (citation omitted). “In order to establish laches as a defense, a defendant must show that the complaining party unreasonably delayed its assertion of a right, resulting in prejudice to the defendant.” Id. In this case, Gresham attempts, for the first time, to set aside an execution which occurred, at the latest, on April 3, 2007. At the same time, Gresham contends, also for the first time, that Caswell’s judgment against Gresham expired on June 2, 2008. Gresham never explained why it waited more than a year to challenge the sale or waited until the applicable limitations period expired before raising the issue. During the interim, Caswell has invested a significant amount of time and money battling Gresham’s litigation activities before the Special Referee and the FCC. **(R. pp.269:23-270:5)**. To set aside the execution now would work a grave injustice on Caswell.

Finally, Gresham again loses on the merits of this argument. Gresham does not object to the notice or the public nature of the judicial sale, at which the highest bidder was Caswell. Under these circumstances, the *per se* value of Gresham’s assets is the amount bid therefore.

Conclusion

Based on the foregoing, this Court should AFFIRM the Special Referee’s orders filed on June 10, 2008 and December 3, 2008.

Respectfully submitted,


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Certificate of Counsel

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.


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January 27, 2011
Charleston, South Carolina

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM COLLETON COUNTY
Court of Common Pleas

Harris Beach, Special Referee

Case No. 92-CP-15-508

RECEIVED
JAN 28 2011
SC Court of Appeals

Nancy R. Beach

Respondent,

v.

Gresham Communications of
Walterboro, INC., a/k/a
Gresham Communications
INC., Gresham Broadcasting,
INC., and Rudi H. Gresham.

Appellant.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the **Respondent's Final Brief** in the above-referenced matter has been served upon counsel listed below by mailing copies properly addressed with sufficient postage affixed thereto via United States Mail to:

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4592 Durant Avenue
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Done this 27th day of January 2011.



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