THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Daniel W. Stacy, Jr., Special Referee

Case No. 2016-CP-22-00334

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

Respondent,

v.

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

Defendants

Of whom Janet M. Smith is the Appellant.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

On April 20, 2016, 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 (hereinafter "The Bank") brought the present action for mortgage foreclosure against Janet M.

Smith (hereinafter "Smith") in the Court of Common Pleas for Georgetown County. Smith did not file an answer. The Bank obtained a default judgment of foreclosure (hereinafter referred to as "the 2016 order") and waived their right to a deficiency judgment. The foreclosure sale was held on November 7, 2016, and The Bank was the successful bidder. A deed transferring the Georgetown property to The Bank was recorded on November 28, 2016. The Bank obtained a Writ of Assistance from the Special Referee on January 10, 2017, which was served on Smith on February 28, 2017. An Order Setting Aside Sale, Vacating Judgment, and Dismissing Case *Nunc Pro Tunc* was filed by the Special Referee on January 16, 2019 (hereinafter referred to as "the Order Vacating Judgment"). Smith first learned of this order on January 17, 2019.

Smith filed an answer and counterclaim to the current foreclosure action (2018-CP-26-45-00472) on December 18, 2018. The Order Vacating Judgment appears to be in response to defenses she raised in that answer and counterclaim. Smith filed a Notice of Motion and Motion to Set Aside Order Vacating Judgment in the 2016 action on February 21, 2019. That motion was heard by the Special Referee in his office on April 18, 2019. The Special Referee then issued an Order denying that motion dated May 1, 2019, and recorded May 6, 2019 (hereinafter referred to as the "Order Denying Motion"). On June 4, 2019, Smith filed and served her Notice of Appeal on the Plaintiff, The Bank; the Special Referee Daniel W. Stacy, Jr.; and co-Defendants James E. Brydic and Portfolio Recovery Associates, LLC.

There are two other court proceedings of note that affect the current action. In 2014, The Bank filed an action in the Court of Common Pleas for Williamsburg County, case number 2014-CP-45-00445, seeking foreclosure and reformation of the mortgage. Smith did not file an Answer. The Bank obtained a Judgment of Foreclosure and Sale by default, which also granted The Bank's request to reform the mortgage. The Judgment was signed by Special Referee G.

Wells Dickson, Jr. on April 5, 2015, and filed April 8, 2015 (hereinafter referred to as "the 2015 order"). Smith reinstated the mortgage in 2015, before the sale could be held, and G. Wells Dickson, Jr. later issued an order dated November 27, 2018, and recorded December 5, 2018, vacating the cause of action for foreclosure and sale, but leaving the parts of the order granting the reformation of the mortgage in effect.

On November 13, 2018, The Bank filed a new action for foreclosure in the Court of Common Pleas for Williamsburg County, case number 2018-CP-45-00472. Smith filed an Answer and Counterclaim in that action on December 18, 2018, raising as a defense the prior completed foreclosure. That action remains pending.

STANDARD OF REVIEW

Decisions on a motion under Rule 60(b) are within the sound discretion of the trial court, and will not be set aside on appeal absent abuse of discretion. Coleman v. Dunlap, 306 S.C. 491, 495, 413 S.E.2d 15, 17 (1991). "An abuse of discretion arises where the trial judge was controlled by an error of law or where his order is based on factual conclusions that are without evidentiary support." Id. (*quoting* Tri-County Ice and Fuel Co. v. Palmetto Ice Co., 303 S.C. 237, 399 S.E.2d 779, 782 (1990)).

FACTS

On November 15, 2005, Smith signed a Note and Mortgage to Countrywide Home Loans, Inc., predecessor in interest to The Bank of New York. (R. p. 94, pp. 103-104.) At the time, Smith owned two pieces of land located in Andrews, South Carolina. Her home is located at 5301 County Line Road, which is in Williamsburg County (hereinafter referred to as "the Williamsburg Property"). The other piece of land is located at 72 Grape Drive, which is in

Georgetown County (hereinafter referred to as "the Georgetown Property"). (R. p. 56.)

The parties agree that the original intent of both parties was for the mortgage to encumber the Williamsburg Property. (R. p. 46, p. 56.) However, due to an error, the mortgage was instead recorded in Georgetown County with the property description for the Georgetown Property. (R. p. 44, p. 94, p. 105.)

In 2014, Smith fell behind on the mortgage payments, and The Bank initiated an action in Williamsburg County, case number 2014-CP-45-00445, seeking foreclosure and reformation of the mortgage to correct the error as to which property was encumbered. Smith did not file an answer in that action, and The Bank obtained a default judgment against her. The order was signed by Special Referee G. Wells Dickson and filed April 8, 2015, reforming the mortgage to encumber the Williamsburg Property and granting foreclosure of the mortgage. (R. p. 69, p. 73, p. 76.) Smith was able to reinstate the mortgage, so the foreclosure sale was never completed. (R. p. 56, p. 77.)

In 2016, Smith fell behind on her mortgage again, and The Bank filed a new foreclosure action in Georgetown County, in the present case, number 2016-CP-22-00334. (R. pp. 27-34.) In its foreclosure pleadings, The Bank listed the property description and tax map number of the Georgetown Property, but the property address of the Williamsburg Property. (R. pp. 29-31.) The case was referred to a special referee, Daniel W. Stacy, Jr. (R. p. 10.) Smith did not file an answer in this action either, and The Bank obtained a default judgment against her. The order was filed by Special Referee Daniel W. Stacy, Jr. on September 20, 2016. (R. pp. 11-12.) On September 28, 2016, Smith sent an email to The Bank's attorney notifying them that they were foreclosing on the incorrect property. (R. p. 64.) The Bank postponed the foreclosure sale briefly, but then continued to hold the sale on November 7, 2016. (R. p. 48.) The Bank was the

successful bidder, and a deed transferring the Georgetown Property to the Bank was recorded November 28, 2016. (R. p. 23, p. 50.) The Bank obtained a Writ of Assistance on January 10, 2017, which was served on Smith on February 28, 2017, and The Bank took possession of the Georgetown Property. (R. p. 25, p. 55.)

Smith testified in her affidavit that servicers for The Bank continued debt collection activity with regards to Smith's mortgage loan, even ignoring a letter from an attorney requesting they stop debt collection activity on the satisfied debt. (R. p. 57.)

On November 13, 2018, The Bank filed a new foreclosure action against Smith in Williamsburg County, case number 2018-CP-45-00472. (R. p. 5.) Smith filed an answer in that action raising, among other things, a defense of res judicata based on the 2016 order. (R. p. 5.) In response, The Bank sought and obtained (without filing a motion, giving notice to Smith, or holding a hearing) an Order Setting Aside Sale, Vacating Judgment and Dismissing Case Nunc Pro Tunc from Special Referee Daniel W. Stacy, Jr., which is not fully dated but was filed on January 16, 2019. (R. pp. 8-9.) That order vacated the 2016 order, including the judicial sale, release of lien, recorded deed from the Special Referee, dismissed the foreclosure without prejudice, and reinstated the note and mortgage retroactive to April 19, 2016.

Smith filed a motion to set aside the Order Vacating Judgment on February 21, 2019. (R. p. 36.) A hearing was held on April 18, 2019. The Special Referee then issued an Order denying that motion dated May 1, 2019, and recorded May 6, 2019. (R. p. 3, p. 7.)

ARGUMENTS

I. BECAUSE THE COMPLETED FORECLOSURE JUDGMENT DOES NOT HAVE PROSPECTIVE APPLICATION, THE LOWER

COURT ABUSED ITS DISCRETION BY SETTING ASIDE THE JUDGMENT UNDER RULE 60(B)(5)

A. The trial court erred in setting aside the foreclosure judgment under Rule 60(b)(5) because the completed foreclosure judgment did not have prospective application.

The trial court erred in holding that the foreclosure judgment had prospective application under Rule 60(b)(5) based on the continuing jurisdiction of the Special Referee to hear and dispose of issues after sale or judgment, and that the dissolution of the writ of assistance requires further supervision or acts of the court. (R. p. 6.)

Rule 60(b)(5) of the South Carolina Rules of Civil Procedure allows a court to relieve a party or his legal representative from a final judgment, order, or proceeding where "the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application."

The trial court relied on several federal cases interpreting Rule 60(b)(5) of the Federal Rules of Civil Procedure in its order. (R. pp. 5-6.) The trial court relied on Comfort v Lynn School Comm., 541 F. Supp.2d 429 (D.C. Mass. 2008), for the proposition that in order for Rule 60(b)(5) to apply, the judgment from which relief is sought must have prospective application. In Comfort, the plaintiffs sought to set aside an order dismissing their case, arguing that they "face arguments based on res judicata." Id. at 433. The court rejected that argument,

reasoning that every judgment would then fall within the scope of Rule 60(b)(5), and noted that a dismissal order does not impose any future legal obligations or have any future effects whatsoever beyond the usual preclusion. Id. Comfort does not apply here.

The trial court cited Twelve John Does v. District of Columbia, 841 F.2d 1133, 1139 (D. C. Cir. 1988), for the definition of prospective application, which it held the standard to be "whether it is 'executory' or involves 'the supervision of changing conduct or conditions." That court examined the meaning of those quoted terms in great detail, and reasoned that the order of dismissal "did not compel him to perform, or order him not to perform, any future act; it did not require the court to supervise any continuing interaction between him and the other parties to the case," and therefore did not have prospective application. Id. The court in Twelve John Does also rejected an argument that a res judicata effect could have "prospective application" if there was a change in applicable law. Id. at 1140. Twelve John Does does not apply here.

The trial court then gave examples of orders with prospective application from In re Northwest Airlines Corp., 366 B. R. 270 (Bankr.S.D. N. Y 2007), as those that "require any further alteration or provide for any future supervision by the Court." In finding that an order authorizing rejection of a debt did not have prospective application, that court explained that it did not "contain an injunction or incorporate a declaratory judgment or consent decree." Id. at 273. Northwest does not apply here.

With regards to Rule 60(b)(5) of the South Carolina Rules of Civil

Procedure, the South Carolina Court of Appeals in Perry v. Heirs at Law & Distributees of Gadsden, 357 S.C. 42, 49 (Ct. App. 2003), *quoting* Saro Invs. v. Ocean Holiday P'ship, 314 S.C. 116, 120, 441 S.E.2d 835, 838 n.3 (Ct. App. 1994), noted that the test to determine whether an order has prospective application is "whether it is executory or involves supervision of changing conduct or conditions by the court." Specifically, the Perry court held that a partition order does not have prospective application because it "mandate[s] a one-time change in the ownership of property." Id.

In the present action, the foreclosure judgment is very closely analogous to a partition order. Both resulted from an action in equity to mandate a one-time change in the ownership of property. Once the foreclosure was completed, the judgment does not impose any duty to perform (or refrain from performing) any future acts, or require any ongoing supervision of changing conduct or conditions. To the extent that there is some prospective application in the form of continuing jurisdiction by the Special Referee, this was a result of the Order of Reference, rather than the judgment of foreclosure that the trial court vacated. As the partition order in Perry was issued by a master-in-equity, it follows that an order of reference must have existed to place it before the master, yet the Perry court did not consider the master's continuing jurisdiction when discussing the potential prospective application of the order. Id. The Respondent's position in this action that the continuing jurisdiction created by the Order of Reference has "prospective application" would essentially make all foreclosure judgments, or even all judgments issued by a master in equity or special referee, subject to

attack under Rule 60(b)(5).

However, the trial court did not find the prospective application of continuing jurisdiction to be inequitable, but instead specifically found that the prospective application it sought to relieve the Respondent of was its preclusive effect on the subsequent litigation. (R. p. 5.) This is in direct conflict with the specific holdings of Perry, as well as the holdings of the Comfort and Twelve John Does cases that were cited in the order, that the effects of res judicata do not constitute prospective application for the purposes of Rule 60(b)(5).

As the trial court's findings of fact and conclusions of law were based on errors of law, the trial court abused its discretion in vacating the foreclosure judgment and denying Appellant's motion to set aside the order vacating the judgment, and therefore the trial court's order should be reversed.

B. The lower court did not have authority to vacate the foreclosure judgment nunc pro tunc because it was not amending the record to reflect what actually occurred.

The trial court went beyond relieving the Respondent of the prospective application permitted under Rule 60(b)(5), and instead vacated the judgment *nunc pro tunc*, retroactively seeking to set aside the foreclosure judgment as though it had never happened, so that the Respondent could proceed with subsequent litigation. The trial court abused its discretion in doing so.

It is well-settled in South Carolina that, "*nunc pro tunc* orders can only be used to place in the record evidence of judicial action that has actually taken place." Ex Parte Strom, 343 S. C. 257, 264-265, 539 S.E. 2d 699 (2000). A *nunc*

pro tunc order "cannot be made to serve the office of correcting a decision, however erroneous, or of supplying non-action on the part of the court." Id., *quoting* Simmons v. Atl. C. L. R. Co., 235 F. Supp. 325, 330 (D.S.C. 1964).

The trial court's Order filed May 6, 2019, stated that the *nunc pro tunc* order "properly places into the record evidence of Judge Dickson's Order filed April 8, 2015 that had actually taken place." (R. p. 6.) However, Judge Dickson's Order filed April 8, 2015, which had been issued in the prior foreclosure action in Williamsburg County, had not actually been filed with the trial court or presented as evidence before the court issued its Order Setting Aside Sale, Vacating Judgment, and Dismissing Case *Nunc Pro Tunc*. Therefore, the trial court lacked the authority to issue a *nunc pro tunc* order in this case, as the trial court attempted to supply a non-action in the form of undoing a foreclosure judgment, rather than simply to correct errors in the record to reflect what actually happened.

Because the trial court lacked authority to issue the Order Setting Aside Sale, Vacating Judgment, and Dismissing Case *Nunc Pro Tunc*, it abused its discretion in doing so and denying Appellant's motion to set aside that order, and therefore the trial court's order should be reversed.

II. BECAUSE THERE WAS A RECORDED MORTGAGE IN GEORGETOWN COUNTY, THE LOWER COURT HAD SUBJECT MATTER JURISDICTION TO GRANT THE FORECLOSURE AND THE JUDGMENT WAS NOT VOID UNDER RULE 60(B)(4).

A. The lower court had subject matter jurisdiction over the foreclosure

action because there was a recorded mortgage encumbering property located in Georgetown County.

The trial court erred in holding that the foreclosure judgment was void on the grounds that the court lacked subject matter jurisdiction because the case had been filed in the wrong county.

Rule 60(b)(4) of the South Carolina Rules of Civil Procedure allows a court to relieve a party or his legal representative from a final judgment, order, or proceeding where the order is void.

In ruling that the foreclosure judgment was void, the trial court relied on Silcox & Co. v. Jones, 80 S.C. 484, 601 S. E. 948(1908), for the proposition that the court lacks subject matter jurisdiction over a foreclosure action that was not brought in the county where the property in question is located. The plaintiff in Silcox filed an action in Florence County to foreclose on land located in Williamsburg County. Although the defendant consented to jurisdiction in Florence County, the court held that the parties cannot confer subject matter jurisdiction by consent, and therefore the foreclosure judgment was void for lack of jurisdiction. Id. at 488-489. The court in Silcox reaches this result by interpreting Sections 144 -146 of the then-existing Code of Procedure of South Carolina. Id. at 488. These code provisions are equivalent to the current S.C. Code § 15-7-10, which states, in relevant part, "An action for the following causes must be tried in the county in which the subject of the action or some part of the property is situated, subject to the power of the court to change the place of trial in certain cases as provided in Section 15-7-100: [...] (3) for the foreclosure of a

mortgage of real property". S.C. Code Ann. § 15-7-10 (2006).

Silcox can be distinguished from the current case because there was, in fact, a mortgage recorded in Georgetown County against a property located in Georgetown County. Therefore, Georgetown County would have jurisdiction to determine the validity of that mortgage and grant the foreclosure against the property located in Georgetown.

B. The trial court erred in ruling that the foreclosure judgment was barred by res judicata because it was not raised as a defense.

The trial court reasoned that because the 2014 order of Special Referee G. Wells Dickson reforming the mortgage to encumber the property located in Williamsburg County was a final, unappealed order, it was *res judicata*. (R. p. 6.) The trial court then reasoned that this meant that the Respondent's mortgage only covered the Williamsburg property as a matter of law. (R. p. 6.)

However, *res judicata* is not automatic, but is instead an affirmative defense that must be raised. Liberty Mut. Ins. Co. v. Emp'rs Ins. of Wausau, 284 S.C. 234, 237, 325 S.E.2d 566, 568 (Ct. App. 1985). Where *res judicata* would apply, but it is not raised as a defense, it is possible to end up with two conflicting judgments. In such cases, the Restatement (Second) of Judgments, § 15 (1982), explains,

> "The considerations of policy which support the doctrine of res judicata are not so strong as to require that the court apply them of its own motion when the party himself has failed to claim such benefits as may flow from them. Accordingly, when a prior judgment is not relied upon in a pending

> action in which it would have had conclusive effect as res judicata, the judgment in that action is valid even though it is inconsistent with the prior judgment. It follows that it is this later judgment, rather than the earlier, that may be successfully urged as res judicata in a third action, assuming that other prerequisites are satisfied. Indeed, the later of the two inconsistent judgments is ordinarily held conclusive in a third action even when the earlier judgment was relied on in the second action and the court erroneously held that it was not conclusive."

South Carolina follows the Restatement approach. *See* Middleborough Horizontal Prop. Regime Council of Co.-Owners v. Montedison S.p.A., 320 S.C. 470, 476, 465 S.E.2d 765, 769 (Ct. App. 1995) (agreeing that Restatement approach is correct but declining to apply it for other reasons). Because the Appellant did not raise *res judicata* in the present case, the trial court was not barred from entering a new judgment of foreclosure inconsistent with the prior order from 2014. As these two orders conflict, the later order (from Georgetown County) is therefore conclusive, and may be raised as *res judicata* as to any subsequent litigation, including the new foreclosure action currently pending in Williamsburg County.

Because there was an unsatisfied mortgage recorded in Georgetown County encumbering a property located in Georgetown County, the trial court was controlled by an error of law in ruling that the Georgetown County Court of Common Pleas lacked subject matter jurisdiction to hear the foreclosure action. Therefore, the trial court abused its discretion in denying Appellant's motion to

set aside the Order Setting Aside Sale, Vacating Judgment, and Dismissing Case Nunc Pro Tunc, and the trial court's order should be reversed.

CONCLUSION

For the reasons stated, this Court should reverse the order of the circuit court and reinstate the judgment of foreclosure.

Respectfully Submitted,

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Date: November 4, 2019

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CERTIFICATE OF COUNSEL

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

November 4, 2019

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