

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Daniel W. Stacy, Jr., Special Referee

Appellate Case No.: 2019-000983

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SC Court of Appeals

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

v.

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

Of whom Janet M. Smith is the Appellant.

FINAL BRIEF OF RESPONDENT

B. LINDSAY CRAWFORD, III SC BAR # 6510
THEODORE VON KELLER SC BAR # 5718
SARA C. HUTCHINS SC BAR # 72879
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November 21, 2019

Columbia, South Carolina

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STATEMENT OF ISSUES ON APPEAL

1. Did the Special Referee abuse his discretion in vacating the foreclosure judgment pursuant to Rule 60 (B)(5) where there was no error of law and the order was based on factual conclusions with evidentiary support?
2. Did the Special Referee err in vacating the foreclosure judgment nunc pro tunc when the order had prospective application and involved supervision of changing conditions and otherwise required further acts in the future?

STATEMENT OF THE CASE

On September 8, 2014, Respondent, 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 “Bank”) commenced foreclosure proceedings in Williamsburg County in case 2014 – CP – 45 – 00445 (“the Williamsburg Action”) against Appellant Janet W. Smith (hereinafter “Smith”). **(Appendix to ROA p. 1-8)**

In the Williamsburg Action, the Bank foreclosed on property identified as 5301 County Line Rd., Andrew, SC bearing tax map number 45 – 435 – 0009. The property description however gives the metes and bounds of the property at 72 Grape Dr. in Georgetown County which has tax map number 02 – 0134 – 02. **(Appendix to ROA p. 4)**. Smith did not file an answer.

The foreclosure was not completed and the loan was reinstated. By order dated April 8, 2015, the Special Referee, Judge Wells Dickson, issued an order reforming the Mortgage to reflect that the property securing the Mortgage was Smith’s homestead at 5301 County Line Rd., Andrew, SC bearing tax map number 45 – 435 – 009 in Williamsburg County and not the property identified in Georgetown County. **(ROA - p. 66-76)**.

On November 27, 2018, Special Referee, Judge Dickson, issued a further order in the Williamsburg Action, case 2014 – CP – 45 – 00445, in which the Bank’s Third Cause of Action for foreclosure and sale case was vacated and the earlier order reforming the mortgage was reaffirmed as being in “full free and effect”. **(ROA - p. 77).**

Bank recommenced foreclosure on April 20, 2016 in case 2016 – CP – 22 – 0334 in Georgetown County (the “Georgetown Action”). Smith defaulted in this foreclosure action and on September 20, 2016, the Special Referee, Daniel W. Stacy, entered an order foreclosing the property identified as tax map number 02 – 0134 – 028 at 72 Grape Dr., Georgetown County, SC. **(ROA – p. 11-22).** The foreclosure sale was held on November 7, 2016 and Bank was the successful bidder. A deed transferring the foreclosed property to the Bank was recorded on November 28, 2016. The Bank subsequently obtained a Writ of Assistance from the Special Referee on January 10, 2017, which was served on Smith on February 28, 2017. **(ROA – p. 25-26).**

In 2018, the Bank, realizing that the intent of both parties was to obtain a Mortgage on the Williamsburg property only, commenced a foreclosure against Smith in Williamsburg County on November 13, 2018 in case 2018 – CP – 45 – 00472 seeking foreclosure of the property located at 5301 County Line Rd., Andrew, SC bearing tax map number 45 – 435 – 009 (the “Current Action”). **(ROA – p. 27-35).** Smith filed an Answer and Counterclaim on December 18, 2018. **(Appendix to ROA - p. 9-14).**

On January 16, 2019, an Order Setting Aside Sale, Vacating Judgment, and Dismissing Case nunc pro tunc was filed by Special Referee Stacy in Georgetown Action, case 2016 – CP – 22 – 0334. **(ROA – p. 8-9).** Smith filed a Notice of Motion and Motion to Set Aside Order Vacating Judgment in case 2016 – CP – 22 – 0334 on February 22, 2019. **(ROA - p. 36-40).**

On April 18, 2019, the Bank filed a Memorandum of Authorities in Opposition to Motion to Set Aside Order Vacating Judgment with exhibits and affidavit. **(ROA - p. 41-43; p. 66-76; p. 77; p. 8-9; p. 10; p. 25-26; p. 81-92; p. 93, p. 94-105; p. 59.)** Smith's motion was heard by the Special Referee Stacy in his office on April 18, 2019, who then issued an order denying the motion dated May 1, 2019 and recorded May 6, 2019. **(ROA - p. 77).**

Smith filed and served a Notice of Appeal on June 4, 2019 of the Order Denying the Motion to Set Aside Order Vacating Judgment on June 5, 2019. **(ROA - p. 60).**

STATEMENT OF FACTS

Appellant Smith owns two tracts of land: 1) her home at 5301 County Line Rd. in Andrews, SC in Williamsburg County bearing tax map number 45-435-009 (the "Williamsburg property"), and 2) a vacant lot at 72 Grape Drive in Georgetown County, South Carolina, bearing tax map number 02-0134-028 (the "Georgetown property"). **(Appendix to ROA p. 9&10, ¶ 7&8).**

On November 15, 2005, Smith executed a note to Bank in the amount of \$73,000 and provided a mortgage over property at 5301 County Line Rd., Andrew, SC (the "Williamsburg property"), to secure the debt. The parties agree that the Williamsburg property is the property intended by Defendant to be covered by the mortgage. **(ROA - p. 56-57, ¶ 3, 5 & 13; p. 59 Appellant's Brief at 4).** This is confirmed by the Bank's residential appraisal dated September 27, 2005 obtained as a precondition of the loan by Bank, and which was the basis of extending the mortgage loan to Defendant. That appraisal was only of the property at 5301 County Line Rd., Andrew, SC in Williamsburg County, the Williamsburg property. **(ROA - p. 59; p. 81-92).** Additionally, as shown in the HUD-1 Settlement Statement dated November 17, 2005, the Mortgage was intended to encumber the Defendant's home of 5301 County Line Rd., Andrew,

SC in Williamsburg County. **(ROA - p. 93)**. This is also verified by the property address in the Mortgage. **(ROA - p. 95 & 105)**.

In error, however, the property description attached to the Mortgage as Exhibit A, while listing the physical address of 5301 County Line Rd., Andrews, SC. (The Williamsburg property) also incorrectly gives the metes and bounds and tax map number of the Georgetown property and was recorded with the Georgetown Register of Deeds on December 28, 2005 in Book 2836 at Page 109 and not with the appropriate governmental authority of the Williamsburg property. **(ROA-p. 95 & 105)**. The Mortgage, therefore, describes two different tracts of land in two different counties.

Subsequently, Smith failed to make the payment called for in the subject loan and went into default. On September 8, 2014, a foreclosure was commenced by the Bank in Williamsburg County in case 2014-CP-45-00445. The foreclosure was not completed as the loan was reinstated. By order dated April 8, 2015, the Special Referee, Judge Wells Dickson, issued an order reforming the Mortgage to reflect that the property securing the Mortgage was in Williamsburg County. **(ROA - p. 66-76)**. The Order was served on Smith as reflected in the Form 4 Order and no appeal was taken. **(ROA - p. 66-76)**. On November 27, 2018, Judge Dickson issued a further order in case 2014- CP-45-00445 in which Bank's Third Cause of Action for foreclosure and sale was vacated and the order reforming the mortgage was reaffirmed. **(ROA - p. 77)**.

On April 20, 2016, a second mortgage foreclosure was commenced by Bank in Georgetown County in case 2016-CP-22-00334. The Mortgage which was being foreclosed upon reflects that it is against Smith's home and land at 5301 County Line Rd. in Andrew, SC, in Williamsburg County. Exhibit A to the Mortgage, however, listed the tax map number as 02-

0134- 028, which is the tax map number of 72 Grape Dr. in Georgetown County, South Carolina. **(ROA – p. 105)**. The case was referred to the Honorable Daniel W. Stacy, Jr. as Special Referee with authority to dispose of any and all issues and enter a final judgment in the case, hear and dispose of any issues after sale or judgment. **(ROA - p. 10)**.

Smith defaulted in this foreclosure action and on August 30, 2016, Special Referee Stacy entered an order foreclosing the property identified as tax map number 02-0134-028, which, as stated above, is the property at 72 Grape Dr., Georgetown County, South Carolina. (The Georgetown property). **(ROA – p. 11-22)**.

The foreclosure sale was held on September 20, 2016 and the Bank was the successful bidder. **(ROA – p. 23-24)**.

On November 13, 2018, the Bank realized its error that it had foreclosed on property in Georgetown County upon which the parties never intended to encumber and commenced a foreclosure in Williamsburg County in case 2018-CP-45-00472 while concurrently moving to vacate the earlier Georgetown foreclosure. That foreclosure properly sought foreclosure of the Williamsburg County property at 5301 County Line Rd., Andrew, SC bearing tax map number 45 – 435 – 009. Smith appeared in this action and asserted an Answer and Counterclaims raising, among other things, the defense of res judicata based on the 2016 order and that the Georgetown foreclosure resulted in a satisfaction of the Mortgage and the cancelation of the Note and debt. **(Appendix to ROA - p. 9-14)**. The Bank filed its Reply to the Answer and Counterclaim on January 16, 2019. **(Appendix to ROA - p. 15-21)**.

To correct the error of the previous incorrect foreclosure in the Georgetown Action, Special Referee Stacy executed an order on December 10, 2018 vacating the foreclosure in case 2016-CP-22-00334, vacating the judicial sale, vacating the release of lien, vacating the recorded

deed from the special referee and dismissing the foreclosure without prejudice and reinstating the note and mortgage to April 19, 2016. (ROA - p. 8-9).

Smith filed a Motion to Set Aside the Order Vacating Judgment on February 21, 2019. (ROA - p. 36-40). A hearing was held on April 18, 2019 and the Special Referee then issued an order denying the motion recorded May 6, 2019. (ROA - p. 3-7). Smith filed her Notice of Intent to Appeal of the Order Denying the Motion to Vacate on June 4, 2019. (ROA - p. 3-7).

ARGUMENTS

I.

The Special Referee did not abuse his discretion in vacating the foreclosure judgment pursuant to Rule 60(B)(5) based on his finding that it was no longer equitable that the judgment should have prospective application.

A. Standard of review.

Under Rule 60(B)(5), South Carolina Rules of Civil Procedure, a court is empowered to relieve a party from a final judgment when "it is no longer equitable that the judgment should have prospective application." The relief of a party from final judgment under Rule 60(B)(5) is within the sound discretion of the trial court to be exercised in the interest of justice and such a determination will not be disturbed on appeal if consistent with accepted legal principles, except for abuse of discretion. *Elgin Nat'l Watch Co. v Barrett*, 213 F.2d 776 (5th Cir. 1954).

Whether to grant or deny a motion under Rule 60(B) is within the sound discretion of the trial judge. *Coleman v. Dunlap*, 306 S. C. 491, 494, 413 S. E. 2d 15, 17 (1992). On review, the Court is limited to determining whether the trial court abused its discretion in granting or denying such a motion. *Saro Invs. v. Ocean Holiday P'ship.*, 314 S. C. 116, 441 S. E. 2d 835, 840 (Ct. App. 1994). An abuse of discretion arises where the trial judge was controlled by an

error of law or his order is based on factual conclusions that are without evidentiary support. *Coleman v. Dunlap*, 306 S. C.491, 413 S. E.2d 15 (1992).

In order to apply Rule 60 (B)(5), the judgment from which relief is sought must have prospective application. *Comfort v Lynn School Comm.*, 541 F. Supp.2d 429 (D.C. Mass. 2008). Prospective application has been defined as a judgment which involves the supervision of changing conditions or otherwise requires further acts in the future. *Twelve John Does v. District of Columbia*, 841 F.2d 1139 (D. C. Cir. 1988). An example of prospective application is an order which requires further alteration or further supervision by the court. *In re: Northwest Airlines Corp.*, 366 B. R. 270 (Bankr. S.D. N. Y 2007).

B. The Special Referee did not abuse his discretion in vacating the foreclosure judgment pursuant to Rule 60(B)(5) as the vacated order had prospective application.

In the present case, the Order of Reference gives the Special Referee continuing jurisdiction to hear and dispose of any issues after sale or judgment. (ROA - p. 10). Based on that on-going authority, a Writ of Assistance was issued in the subject case on January 10, 2017 which was served on the Defendant on February 28, 2017. (ROA - p. 25-26). The Special Referee retained jurisdiction under the Order of Reference to evict Smith from the Georgetown property and/or to hold Smith in contempt for failing to vacate. In her affidavit in support of her Motion to Set Aside Order Vacating Judgment, Smith stated, "I had also considered putting campers on my property in Georgetown, to rent them out and generate income. However, I was unable to do so once the Plaintiff obtained a writ of assistance against me regarding the property located in Georgetown" (ROA - p. 57, ¶ 8). Based on Smith's own affidavit, the Special

Referee has executory functions to complete regarding the continuation or dissolution of the writ of assistance and thus the order has prospective application.

Also, as set forth herein, if the Mortgage foreclosure in the Georgetown Action is void, or if the Order Setting Aside Sale, Vacating Judgment and Dismissing Case Nunc Pro Tunc is affirmed, the writ of assistance must be dissolved. The dissolution of this writ of assistance requires the further supervision and acts of the Special Referee and therefore the Order has prospective application.

C. The Special Referee did not abuse his discretion in vacating the foreclosure judgment pursuant to Rule 60(B)(5) pursuant to a court of equity's historic power to modify the decree in light of subsequent conditions.

Rule 60(B)(5) is also based on the historical power of a court of equity to modify its decree 'in light of subsequent conditions' *Mr. G. v. Mrs. G.*, 320 S. C. 305, 311, 465 S. E. 2d 101, 107 (Ct. App. 1995). On November 27, 2018, the Special Referee, Wells Dickson, in the initial foreclosure case 2014-CP – 45 – 0445 issued an order vacating the cause of action for foreclosure and reaffirming the Order reforming the Mortgage to reflect that it covered property only in Williamsburg County. (ROA - p. 77). This order was subsequent to the August 30, 2016, therefore, order of foreclosure in the Georgetown Action and represented a subsequent condition. The vacating of the August 30, 2016 order was within the Special Referee's discretion to modify the earlier foreclosure decree in light of this subsequent condition.

The filing of the Smith's Answer and Counterclaim in the subsequent Williamsburg county foreclosure case number 2018 – CP – 45 – 00472, in which she asserts that the foreclosure in the present case resulted in the satisfaction of the underlying Mortgage and the cancellation of the note and debt, is also a subsequent condition compelling the Special Referee

to vacate the foreclosure. The Special Referee, when confronted with the possibility raised by Smith's Answer and Counterclaim in case 2018 – CP – 45 – 00472 that the Bank would have no enforceable note, mortgage or debt, exercised the historical power of a court of equity to vacate the foreclosure decree. Smith's subsequent filing of the Answer and Counterclaim argued that she would be entitled to enjoy the benefit of the loan (i.e., ownership of the property) without repaying it, which would be an inequitable result and would violate public policy. *United States Bank Trust National Association v. Bell*, 385 S. C. 364, 373 684 S. E. 2d 199, 204 (Ct. App 2009).

In sum, both the November 27, 2018 Order and Smith's Answer & Counterclaim were subsequent events which permitted the Special Referee to execute his discretion under Rule 60(B)(5) and vacate the foreclosure judgment. The Special Referee's decision was not an abuse of discretion.

D. The Special Referee's did not abuse his discretion in vacating the foreclosure judgment as Rule 60(B) is an equitable provision and should be exercised in the interest of justice.

As set forth herein, it is undisputed between the parties that the Mortgage was done improperly. Smith admits that she never intended to grant a mortgage over the Georgetown Property. (Appendix to ROA p. 11, ¶ 11; p. 58, ¶ 13; Appellate's Brief at 4). The Bank's documents also confirm that the intention of the parties was to extend a mortgage only over the Williamsburg Property. (ROA - p. 59, ¶ 4, 5 &6).

It is uncontroverted, therefore, that the mortgage is a product of a mutual mistake in that it purportedly encumbers property in Georgetown County, which was never the intent of either party.

Rule (60)(B) is an equitable provision. *In re Northwest Airlines Corp.* 366 B. R. 270, 2007 Bankr. LEXIS 1170 (Bankr. S.D.N.Y. 2007). More specifically, as stated by the Fifth Circuit in *Elgin National Watch Co. v Barrett*, 213 F. 2d 776 (5th Circuit 1954), "under Rule 60 (B)(5), supra, the district court is empowered to relieve a party from a final judgment 'when it is no longer equitable that the judgment should have prospective application'. Although appellees were not entitled to such relief as a matter of right, if equitable grounds for such relief were established, it was within the sound discretion of the trial court, exercised in the interest of justice, to dissolve the injunction. Such a determination of that court will not be disturbed on appeal, if consistent with accepted legal principles, except for abuse of discretion".

In the present case, the Bank extended monies based on an appraisal of the value of Smith's property in Williamsburg County. (ROA - p. 81-92). Smith agreed to encumber the property as security for the loan. Neither party intended for the Georgetown property to be the security for the loan. (ROA - p. 56, ¶ 3, 5 & 13; p. 59, ¶ 3, 4, 5 & 6). "Equity regards that as done which ought to be done". *Wilike v. Philadelphia Life insurance Company*, 187 S. C. 382, 197 S. E. 375 (1938). Equally here, principles of equity support the vacating of the order of foreclosure to allow Bank to proceed against the proper security intended by both parties.

In sum, the Special Referee's vacating of the Order of Foreclosure of property neither property agreed to encumber was the proper exercise of his equitable discretion and is the type of situation for which Rule 60(B)(6) is intended to provide a remedy.

II.

The Special Referee properly vacated the judgment nunc pro tunc to place into the record evidence of the judicial action that had already taken place.

Under South Carolina law, “a nunc pro tunc entry is for the purpose of recording some action that was taken or judgment rendered previously to the making of the entry, which is to take effect as of the former date.” *Simmons v. Atlantic C.L.R. Co*, 235 F. Sup. 325 (D.S.C 1964) “A prerequisite for a nunc pro tunc order... Is some previous action by the court that is not adequately reflected in its record” *Ex parte Strom*, 340 3 S. C. 257, 539 S. E. 2d 699 (2000) citing *Deweese v. Sweeney*, 947 S. W. 2d 861 (Tenn. Ct. App.1996).

In the present case, Special Referee Stacy signed the Order Setting Aside Sale, Vacating Judgment, and Dismissing Case Nunc-Pro Tunc on December 18, 2018. **(ROA - p. 8-9)**. At the time of the execution of that order, Special Referee Stacy was confronted with 2 orders executed by Special Referee Wells Dickson in the earlier Williamsburg Action by the Bank against Smith, case 2014 – CP – 45 – 0445.

The first of those Orders was the April 8, 2015 Order of Foreclosure and Sale which ordered the reformation of the Mortgage to correct the legal descriptions to read that the Mortgage covered the property in Williamsburg County at 5301 County Line Rd., Andrew, SC bearing tax map number 45 – 435 – 009 instead of the property at 72 Grape Dr., Andrew, SC in Georgetown County. **(ROA – p. 66-76)**.

The second Order was the December 5, 2018 Order of Special Referee Dickson. **(ROA – p. 77)**. In 2018, when the Bank brought the foreclosure action in Williamsburg County in case 2018 – CP – 45 – 00472 they discovered that the original Williamsburg foreclosure from 2014 had never been dismissed. The Special Referee, Wells Dickson, then executed the Order Setting Aside Judgment of Foreclosure As to the 3rd Cause of Action Only on December 5, 2018. This Order vacated the Judgment of Foreclosure and Sale in the Williamsburg Action and left the

Cause of Action for Reformation and Declaratory Judgment in full force and effect. (ROA - p. 77).

By making the Order Setting Aside Sale, Vacating Judgment and Dismissing Case nunc pro tunc, Special Referee Stacy effectively placed into the record evidence of the judicial actions of Special Referee Dickson that had already taken place and that were not adequately reflected in the record of the Georgetown action. The nunc pro tunc order was appropriate as it properly placed into the record evidence of a judicial action that had already taken place.

III.

The judgment of foreclosure was void and the Special Referee did not err in vacating same pursuant to Rule 60 (B)(4).

B. The judgment of foreclosure was void as it was brought in a county that lacked subject matter jurisdiction.

It is well-established in South Carolina that a foreclosure action must be brought where the property is located or the court lacks subject jurisdiction. *Silcox & Co. v. Jones*, 80 S. C. 484, 60 1S. E. 948(1908). It is also well established that, "the definition 'void' under the rule only encompasses judgments from courts which failed to provide proper due process, or judgments from court which lacks subject matter jurisdiction or personal jurisdiction" *Belle Hall Plantation Homeowner's Ass'n v. Murray*, 419 S. C. 605, 799 S. E. 2d 310, 317(Ct. App. 2017).

As stated before, on April 8, 2015, Special Referee Dickson entered a judgment of foreclosure and sale in case 2014 – CP – 45 – 0445, the first foreclosure action by Bank against Smith. That judgment reformed the Mortgage by correcting the legal description to reflect that the property that was encumbered by the Mortgage was 5301 County Line Rd., Andrew, S.C. in Williamsburg County, South Carolina bearing tax map number 45 – 435 – 009. (ROA - p. 66-

76). This judgment was served on Smith and no appeal taken. The order is a final order. This Court has consistently held that an order not appealed from is binding on all parties, constitutes the law of the case and, when questioned, is res judicata. *Walker v. Hanno* 191 S.C. 14 3 S.E. 2d 243 (1939). See also, *Johnson v. Board of Comm'rs of Police Ins & Annuity Fund* 221 S.C. 23, 68 S.E. 2d 629 (1952). As a result of this order, as of April 8, 2015 the Mortgage between the parties only encumbered property in Williamsburg County and the recorded Mortgage in Georgetown County was a nullity as a matter of law.

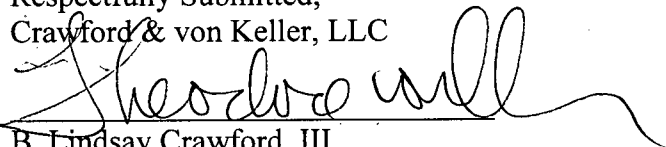
The Order of Foreclosure in case 2016 – CP – 22 – 00334 was therefore void as the court lacked subject matter jurisdiction to adjudicate a foreclosure where there was no mortgage governing property in Georgetown County. The Special Referee's decision to vacate such order was proper pursuant to Rule 60(B)(4) SCRPC.

CONCLUSION

The Special Referee properly exercised his discretion in vacating the foreclosure judgment as there was no error of law and the order was based on factual conclusions with evidentiary support and his order should be affirmed.

Date: November 21, 2019

Respectfully Submitted,
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