

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable Mikell Scarborough
Master in Equity

Appellate Case No. 2019-000575
Circuit Court Case No. 2010-CP-10-7838

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SC Court of Appeals

Ditech Financial, LLC,

Respondent,

v.

Kevin G. Snyder, Individually and
as Personal Representative of the
Estate of Mary Snyder,

Appellant.

**DITECH FINANCIAL, LLC'S OPPOSITION TO
APPELLANT'S PETITION FOR REHEARING**

Respondent Ditech Financial, LLC ("Ditech") hereby responds to the Appellant's Petition for Rehearing and states as follows:

PROCEDURAL BACKGROUND

1. Ditech's predecessor-in-interest filed a foreclosure action against Appellant on September 23, 2010. The complaint was subsequently amended October 27, 2010.
2. The Appellant ultimately answered the amended pleading and asserted the following four counterclaims: (1) civil compensatory contempt (for alleged violations of South

Carolina Supreme Court Administrative Order 2011-05-02-01), (2) breach of contract, (3) unfair trade practices, and (4) quiet title.

3. In March 2019, after a period of discovery, the parties filed cross motions for summary judgment.

a. Ditech moved for summary judgment on its foreclosure action and on the Appellant's counterclaims for civil compensatory contempt and to quiet title. (The other counterclaims – breach of contract and unfair trade practices – were stayed in light of Ditech's bankruptcy.)

b. The Appellant moved for summary judgment on its counterclaims for civil compensatory contempt and to quiet title.

4. In a March 20, 2019 Order, the trial court denied the Appellant's motion for summary judgment.

5. The trial court granted Ditech's motion with regard to the counterclaim for civil compensatory contempt, but it denied Ditech's motion on its foreclosure claim and on the Appellant's quiet title counterclaim.

6. Before trial, the Appellant filed his first Notice of Appeal, seeking interlocutory appellate review of, *inter alia*, the summary judgment ruling (hereinafter, the "First Notice of Appeal").

7. A bench trial proceeded, resulting in a Judgment of Foreclosure and Sale dated April 23, 2019.

8. Thereafter, the Appellant amended his notice of appeal to include the Judgment of Foreclosure and Sale (hereinafter, the "Second Notice of Appeal").

9. On May 2, 2019, the Appellant filed a Motion for Supersedeas with the trial court, asking the trial court to “suspend[] any and all activity in this case until the appeal is resolved.”

10. Ditech submitted a response brief on June 3, 2019 requesting as follows:

- a. A bond in the amount of \$25,134.48 to stay the underlying foreclosure for a period of 18 months (calculated by multiplying the monthly mortgage payment the Appellant should be paying (\$1,396.36) by 18 months (the average length of an appeal before the South Carolina Court of Appeals)); and
- b. An additional \$1,396.36 for each additional month (beyond 18 months) that the appeal remains pending without resolution (as a condition of the continued stay).

11. On October 16, 2019, the trial court granted the Appellant’s motion conditioned on the posting of a bond in the amount of \$25,000.

12. Pursuant to SCACR 241(d)(2), in a filing styled “Petition for a Writ of Supersedeas,” the Appellant sought review in this Court of the trial court order on the Appellant’s previously filed Motion for Supersedeas. Specifically, the Appellant sought to have the bond “waived or set at a nominal amount.” The Petition for a Writ of Supersedeas did not indicate that it was directed to an individual judge of this Court.

13. On November 7, 2019, this Court denied the Appellant’s Petition for Writ of Supersedeas. Although the November 7, 2019, Order was signed by Judge McDonald, the Order indicated it was being filed “For the Court.” The effect of this Order is that the trial court order – imposing a bond requirement in the amount of \$25,000 – stands and is the controlling law of this case.

14. Now, in a filing styled “Petition for Rehearing,” the Appellant, purportedly pursuant to SCACR 241(d)(7), seeks a further review of the Court’s November 7, 2019 Order denying the Appellant’s Petition for Writ of Supersedeas.

LEGAL STANDARD

15. Because the Judgment of Foreclosure and Sale directs the sale of real property, that order is not automatically stayed by Appellant’s appeal. *See* SCACR 241(b)(4) (listing as an exception to the automatic stay rule any “Judgments directing the sale or delivery of possession of real property as provided in S.C. Code Ann. § 18-9-170”); *see also C-Sculptures, LLC, No. 3 v. Brown*, 393 S.C. 27, 32, 709 S.E.2d 705, 708 (2011) (“The foreclosure decree would be the type of order covered by section 18-9-170 . . .”).

16. “In a case subject to an exception [set forth in SCACR 241(b)], any party may move for an order imposing supersedeas of matters decided in the order, judgment, decree or decision on appeal after service of the notice of appeal.” SCACR 241(c)(1).

17. “Except where extraordinary circumstances make it impracticable, an application . . . for supersedeas must first be made to the lower court or administrative tribunal which entered the order or decision on appeal.” SCACR 241(d)(1).

18. “After the lower court or administrative tribunal has ruled, any party may petition the appellate court where the appeal is pending” to review the trial court’s order. SCACR 241(d)(2).

19. “Any party aggrieved by the decision of the lower court, the administrative tribunal, or an individual judge or justice may petition under this Rule for a review of that decision.” SCACR 241(d)(7).

ARGUMENT

20. As an initial matter, the Appellate Court Rules do not permit the filing that the Appellant has made.

- a. The rules make clear that this Court “will not entertain petitions for rehearing on a motion or petition unless the action of the court on the motion or petition has the effect of dismissing or finally deciding the party’s appeal.” SCACR 221(c).
- b. Because the November 7, 2019 Order denying the Appellant’s Petition for Writ of Supersedeas does not have “the effect of dismissing or finally deciding the party’s appeal,” this Court should not entertain the Appellant’s attempt to petition for a rehearing of that ruling. *See Owens v. Owens*, 278 S.C. 356, 356, 296 S.E.2d 338, 338 (1982) (denying petition for rehearing of petition for writ of supersedeas without considering the merits, and explaining: “We do not recognize this procedure nor do the Rules of Practice of the Supreme Court provide for a motion to rehear a supersedeas.”).

21. Even if the Appellant’s Petition for Rehearing were a proper filing – which it is not – the Petition for Rehearing should be denied.

22. Although the Appellant asks this Court to waive the bond requirement, the Appellant must “giv[e] a supersedeas bond” in order to obtain a stay, and the stay is not effective until “the supersedeas bond is approved by the court.” S.C.R. Civ. P. 62(d).

23. S.C. Code Ann. § 18-9-170 makes this point clear and explains how the Court should calculate an appropriate bond amount:

If the judgment appealed from direct[s] the sale or delivery of possession of real property, the execution of the judgment shall not be stayed unless a written undertaking be executed on the part of the appellant, with two sureties, to the effect that during the possession of such property by the appellant he will not commit or suffer to be committed any waste thereon and that ***if the judgment be affirmed he will pay the value of the use and occupation of the property from the time of the execution of the undertaking until the delivery of possession thereof*** pursuant to the judgment, not exceeding a sum to be fixed by a judge of the court by which judgment was rendered and which shall be specified in the undertaking.

(emphasis added); *see also Wachesaw Plantation E. Cmty. Serv. Ass'n, Inc. v. Alexander*, 414 S.C. 355, 362 n.6, 778 S.E.2d 898, 902 n.6 (2015) (Pleicones, J., concurring) (noting “the statutory bond *required* by § 18-9-170” (emphasis added)); *Carsten v. Wilson*, 241 S.C. 516, 522, 129 S.E.2d 431, 435 (1963) (construing predecessor statute to § 18-9-170, and finding appeal did not stay “order of sale in foreclosure” since the appellant “did not give such a bond”).

24. Ditech acknowledges that an order for supersedeas may be “necessary to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot.” SCACR 241(c)(2). However, no such order should issue without the posting of an appropriate supersedeas bond.

25. As noted above, S.C. Code Ann. § 18-9-170 instructs courts to calculate an appropriate bond amount as follows: “the value of the use and occupation of the property from the time of the execution of the undertaking until the delivery of possession thereof pursuant to the judgment.”

26. Here, the value of the use and occupation of the property from Ditech’s perspective is the monthly mortgage payment it should be, but is not, receiving. The current monthly mortgage amount is \$1,396.36.

27. In undersigned counsel’s experience, a typical appeal before the South Carolina Court of Appeals lasts 1.5 years. However, this appeal could certainly last longer.

28. Therefore, Ditech requests that this Court condition an order for supersedeas on the Appellant posting a bond equaling the monthly mortgage amount (\$1,396.36), multiplied by the anticipated life of the appeal (18 months), which equals \$25,134.48. (By imposing a bond requirement in the amount of \$25,000, the trial court appears to have agreed with this approach and to have found it reasonable.)

29. In the event that the appeal lasts longer than 18 months, Ditech request that the Court condition a continued stay on the posting of an additional \$1,396.36 for each additional month (beyond 18 months) that the appeal remains pending without resolution.

30. The Appellant continues to not even mention S.C. Code Ann. § 18-9-170, the statute that controls the calculation of an appropriate bond amount in this case. *See Brown*, 393 S.C. at 32, 709 S.E.2d at 708 (“The foreclosure decree would be the type of order covered by section 18-9-170 . . .”). Instead, the Appellant cites to two cases from the 1800’s which are not cases from South Carolina courts. (Petition at p. 7).

31. Rather than operating within the proper framework, the Appellant also argues the underlying merits of the pending appeal and contends that a bond is not necessary because of those arguments. That is not how this Court should calculate an appropriate bond amount. Indeed, this Court will determine the merits of the appeal based on the parties’ written briefs. A supersedeas bond, on the other hand, should be calculated based on “the value of the use and occupation of the property from the time of the execution of the undertaking until the delivery of possession thereof.” S.C. Code Ann. § 18-9-170. That determination has nothing to do with the underlying merits of the appeal.

32. Nevertheless, Ditech would be remiss not to address the Appellant’s contentions.

- a. Ditech expressly denies and refutes any characterization of “bungled communications.” (Petition at p. 2). Communications between the parties in the course of foreclosure intervention are outlined at length in the parties’ merits briefs filed with this Court. (*See, e.g.*, R. pp. 387, 585 (noting that Appellant’s counsel has had three separate offices throughout this case and acknowledging that the moves may have disrupted the Appellant’s counsel’s mail service)).
- b. The Appellant complains about the amendment of the case caption (Petition at p. 2), but the Appellant consented to a subsequent amendment of the case caption (R. pp. 15-16), making the argument moot, even if it were relevant, which it is not.
- c. Ditech strongly disputes that Snyder is likely to prevail on appeal. (Petition at pp. 5-7). However, Ditech does not dispute that a stay of the foreclosure judgment is necessary to “prevent a contested issue from becoming moot.” SCACR 241(c)(2). For this reason, as noted, Ditech does not necessarily oppose the issuance of an order for supersedeas. However, any such order must be accompanied by the posting of an appropriate bond.
- d. It is unclear how Ditech is not being “harmed by this appeal.” (Petition at p. 7). The requested bond is based on the payments that the Appellant originally agreed to make (but is not making) to obtain the underlying mortgage. This is the value of the use and occupation of the property from Ditech’s perspective. For every month that the Appellant delays the inevitable foreclosure in this case through the present appeal, Ditech is not

receiving those amounts. If anyone is getting a windfall, it is the Appellant, who has lived in a home for years without making a mortgage payment.

- e. It is also unclear how the posting of a bond “creates new liability for Snyder.” (Petition at p. 7). By electing to file an appeal, the Appellant (not Ditech) made it necessary to post an appeal bond in order to prevent the appeal from becoming moot. If the Appellant is so sure that he is likely to prevail on appeal (Petition at pp. 5-7), then the posting of a bond will not “allow[] Ditech to collect damages via the bond.” (Petition at p. 7). In any event, Ditech would only be collecting that to which it is entitled, namely the monthly mortgage payments that the Appellant should be, but is not, paying.
- f. Finally, the Appellant’s arguments about the immediate appealability of certain orders and the jurisdiction of the trial court (Petition at pp. 8-9) have absolutely nothing to do with determining an appropriate supersedeas bond amount. Those are the claims at issue in the appeal, which are argued at length in the parties’ briefs. Specifically, the Appellant contends – just as he does in the merits briefs pending before the Court – that the First Notice of Appeal should have operated to stay the trial proceedings and that “this Court should enforce it by ordering the proceedings below be stayed pending appeal, without a bond.” (Petition at p. 9). While this statement is confusing, the Appellant, in effect, appears to be asking the Court to agree with the merits of his appeal as a precondition to ruling on the improperly filed Petition for Rehearing. This Court should not foray into the merits of

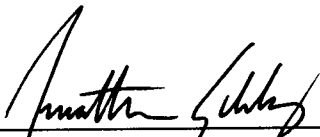
the appeal in the context of the present petition. Rather, the Court should do nothing more than calculate and impose a bond consistent with the dictates of S.C. Code Ann. § 18-9-170.

CONCLUSION

33. For the foregoing reasons, the Petition for Rehearing should be denied. Ditech does not necessarily oppose the issuance of an order for supersedeas. However, that order should be conditioned on the following:

- a. The posting of a supersedeas bond in the amount of \$25,134.48, which will stay the underlying foreclosure for a period of 18 months;
- b. An extension of the bond in the amount of \$1,396.36 per month for each additional month (beyond 18 months) that the appeal remains pending; and
- c. Such other and further relief as the Court deems just and appropriate.

This 22nd day of November 2019.



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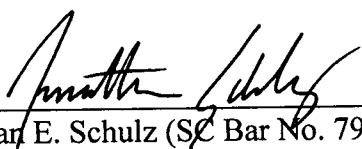
Appellant.

PROOF OF SERVICE

I hereby certify that a copy of the foregoing **DITECH FINANCIAL, LLC'S OPPOSITION TO APPELLANT'S PETITION FOR REHEARING** was sent via first-class U.S. Mail, postage prepaid, and addressed as follows:

Jason Scott Luck
Garrett Law Offices, LLC
1075 E. Montague Ave.
North Charleston, SC 29405
Attorney for Appellant

This the 22nd day of November, 2019.



Jonathan E. Schulz (SC Bar No. 79850)

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November 22, 2019

VIA FEDEX OVERNIGHT

Ms. Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

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Re: *Ditech Financial, LLC v. Kevin G. Snyder, Individually and as Personal Representative of the Estate of Mary Snyder*
Appellate Case No. 2019-000575

Dear Ms. Kitchings:

In reference to the above-captioned appellate case, enclosed for filing pursuant to SCACR 240(e), please find one (1) original and six (6) copies of Ditech Financial, LLC's Response to Appellant's Petition for Rehearing.

By copy of this letter, I am serving same upon counsel of record.

Thank you for your assistance with the above. Should you have any questions or concerns, please do not hesitate to contact me.

Best regards,



Jonathan Schulz

Enclosure

cc: Jason Scott Luck, Esq. (with encl. via US Mail)

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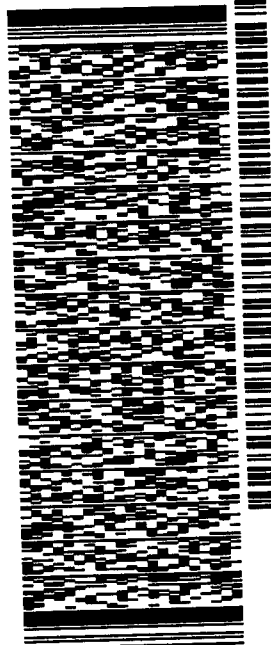
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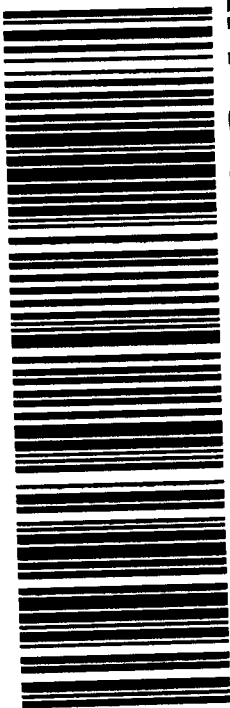
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