

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Hon. Mikell R. Scarborough
Master in Equity

Case No.: 2014-CP-10-07484
Appellate Case No.: 2018-002228

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SC Court of Appeals

Bayview Loan Servicing, LLC, a Delaware Limited Liability Company, Respondent

v.

Isabell Murray, William Murray, Bernard Murray, Roland Murray, County of Charleston
and the South Carolina Department of Revenue, Defendants,

Of Whom Bernard Murray and Roland Murray are the Appellants

FINAL BRIEF OF APPELLANTS

January 27, 2020

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TABLE OF CONTENTS

Table of Authorities.....1
Statement of the Issues on Appeal.....1
Statement of the Case2
Facts.....2
Arguments.....3
Conclusion.....6

TABLE OF AUTHORITIES

1. Wells Fargo Bank, Na v. Turner, 662 S.E.2d 424, 378 S.C. 147 (S.C. App., 2008)
2. Carsten v. Wilson, 129 S.E.2d 431, 241 S.C. 516 (S.C., 1963)
3. EX PARTE MOORE, 352 S.C. 508, 575 S.E.2d 561 (S.C., 2003).
4. Duncan v. Little, 384 S.C. 420, 682 S.E.2d 788 (S.C., 2009)
5. South Carolina Probate Code Section 62-3-713
6. South Carolina Probate Code Section 62-3-714

STATEMENT OF THE ISSUES ON APPEAL

- I. DID THE MASTER HAVE JURISDICTION TO SELL REAL PROPERTY AT A FORECLOSURE SALE WITHOUT PROPER NOTICE TO APPEALLANTS?
- II. IS RESPONDENT BANK A “PROTECTED PERSON” PURSUANT TO SOUTH CAROLINA PROBATE CODE SECTION 62-3-714?

STATEMENT OF THE CASE

A Summons and Complaint was filed on December 9, 2014 to foreclose on a parcel of real property located in the City of Charleston, Charleston County South Carolina.(p. 1) The filing Plaintiff in this foreclosure action being the holder of the Note and Mortgage, CitiFinancial Servicing, LLC, (hereinafter “CitiFinancial”) until substituted as Plaintiff. Respondent, Bayview Loan Servicing, LLC, (hereinafter “Bayview”) was substituted as the Plaintiff in this action, upon its own Motion, on April 25, 2017. (R. p. 18)

A prior quiet title action concerning the same real property and encumbered by the same Note and Mortgage was filed on April 10, 2009, by the sister of the Appellants, Isabelle Murray. Neither CitiFinancial nor Bayview were made parties to that action. The quiet title action, captioned; Isabelle Murray vs, Roland Murray, Bernard Murray and William Murray and State of South Carolina Department of Revenue; Case Number 2009-CP-10-2245; (R. p,66) was fully adjudicated before the Honorable Mikell R. Scarborough. The order quieting title in this action stated that the Appellants were vested interest with an in the subject property. (R. p.68)

The Appellants answered the Complaint and filed a Counter-Claim on May 18, 2009, alleging that Isabelle Murray and her brother, William Murray, solely encumbered the subject property with a mortgage. (R. p.10) The Citibank Mortgage and Note were presented as exhibits showing the Appellants were not signatories to the Note nor the Mortgage. Bayview now asserts Res Judaica as a defense against the Master’s prior quiet title order and also asserts that they are a “protected person,” pursuant to South Carolina Probate Code Section 62-3-714. (R. p. 5)

FACTS

The present court order upon which this appeal lies, granted the Respondent, Bayview, a 100% fee simple interest in the parcel of real property pursuant to the foreclosure sale on October 2, 2018 and confirmed Respondent's claim of Res Judicata and its defense of protection from the claims of Appellants pursuant to South Carolina Probate Code Section 62-3-714. (R. p. 5) The real property that is the subject of this action is the family home in which the Appellants were reared and where the Appellant, Bernard Murray still resides.

STANDARD OF REVIEW

"A mortgage foreclosure is an action in equity. Our scope of review of a case heard by a master who enters a final judgment is to determine facts in accordance with our own view of the preponderance of the evidence." *E. Sav. Bank, FSB v. Sanders*, 373 S.C. 349, 354, 644 S.E.2d 802, 805 (2007) (quoting *Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 248, 489 S.E.2d 472, 475 (1997)). However, the determination of whether a judicial sale should be set aside is a matter left to the sound discretion of the trial court. *Investors Sav. Bank v. Phelps*, 303 S.C. 15, 17, 397 S.E.2d 780, 781 (Ct. App.1990).

ARGUMENTS

I. DID THE MASTER ERR IN SELLING THE REAL PROPERTY AT A FORECLOSURE SALE WITHOUT PROPER NOTICE TO APPELLANTS?

Respondents failed to timely serve the foreclosure order of sale, filed October 23, 2018, by

the Honorable Mikell R. Scarborough, Master In Equity for Charleston County, on the attorney for the Appellant's before the sale of the real property that is the subject of the underlying action. Appellant Bernard Murray was served at 833 5th Ave. Charleston, South Carolina, which is the address of the house that is the subject of this action. (R. p.104)

Appellant's counsel then petitioned the court for relief pursuant to a Rule 59(b) Motion, for relief from the foreclosure sale date. Appellant's only opportunity to contest the order was through their Ex Parte Motion to Set Aside the sale. Appellant Bernard Murray, informed Appellant's counsel that he received a copy of the order of sale in the four days prior to the sale. The court issued its final order without benefit of a full adjudication on the merits of Appellant's motion to set-aside the foreclosure sale.

Appellants were conveyed an equitable interest in the subject property by the prior quiet title order but was divested of same before the sale because the order, by its terms, stated that the sale sold a 100% interest in the property. Beyond the requirements of notice the judicial foreclosure is governed by various mandates. See; EX PARTE MOORE, 352 S.C. 508, 575 S.E.2d 561 (S.C., 2003).

The courts have addressed the Res Judicata doctrine in various cases, see; Plum Creek Dev. Co. v. City of Conway, 334 S. C. 30, 512 S.E. 2d 106 (1999) and Rogers v. Kunja Knitting Mills, U.S.A., 336, S.C. 537, 520 S.E. 2d 817 (Ct. of App. 1999) as representative of the doctrine of Res Judicata in South Carolina. Bayview claims that they are not bound by prior quiet title order because they were not parties. This position fails because they had notice since their

predecessor in interest, CitiFinancial, either had constructive notice through the public record or the filed Lis Pendens.(R. p.7) A title search certainly would have shown the prior order and litigation both filed prior to Bayview's substitution. The Personal Representative of the Estate of James Murray, whom is one of the title-holders in the subject property, conveyed all of the property to herself, knowing that she only had a partial interest. (R. p.70) Bayview now asserts that they know nothing of this act by the mortgagee and relied on the Deed of Distribution. None of the proceeds from the mortgage benefited the Appellants. (R. p.70)

II. IS RESPONDENT BANK A "PROTECTED PERSON" PURSUANT TO SOUTH CAROLINA PROBATE CODE SECTION 62-3-714?

Respondent contends that they are protected from the acts of the personal representative.

The probate code states in pertinent part:

SECTION 62-3-714. Persons dealing with personal representative; protection.

A person who in good faith either assists a personal representative or deals with him for value is protected as if the personal representative properly exercised his power. The fact that a person knowingly deals with a personal representative does not alone require the person to inquire into the existence of a power or the propriety of its exercise. Except for restrictions on powers of personal representatives under Part 5 [Sections 62-3-501 et seq.] which are endorsed on letters as provided in Section 62-3-504, no provision in any will or order of court purporting to limit the power of a personal representative is effective except as to persons with actual knowledge thereof. A person is not bound to see to the proper application of estate assets paid or delivered to a personal representative. The protection here expressed extends to instances in which some procedural irregularity or jurisdictional defect occurred in proceedings leading to the issuance of letters, including a case in which the alleged decedent is found to be alive. The protection here expressed is not by substitution for that provided by comparable provisions of the laws relating to commercial transactions and laws simplifying transfers of securities by fiduciaries.

This appears to ratify any conveyance to third-parties by the Personal Representative without

giving any recourse to the other beneficiaries. However there still remains the requirement of good faith. A further look into the actions by the personal representative then makes voidable any transactions or encumbrances that specifically benefit the Personal Representative because of a conflict of interest.

SECTION 62-3-713. Sale, encumbrance, or transaction involving conflict of interest; voidable; exceptions.

Any sale or encumbrance to the personal representative, his spouse, agent or attorney, or any corporation or trust in which he has a substantial beneficial interest, or any transaction which is affected by a substantial conflict of interest on the part of the personal representative, is voidable by any person interested in the estate except one who has consented after fair disclosure unless:

- (1) the will or a contract entered into by the decedent expressly authorized the transaction; or
- (2) the transaction is approved by the court after notice to interested persons.

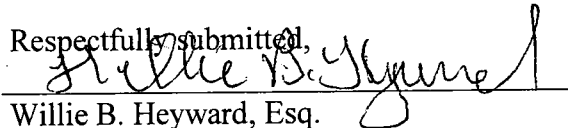
Given the prior posture of this matter it would be imperative for Bayview to give additional scrutiny to the prior order, probate proceeding and circumstances involving the deed of distribution ecuing the underlying encumbered asset.

CONCLUSION

In conclusion, both Citi Financial and Bayview cannot retreat behind a statue intended to protect third-parties who acted in good faith, when both have notice and knowledge that the mortgagee did not have the entire interest in the subject property.

January 27, 2020

Respectfully submitted,


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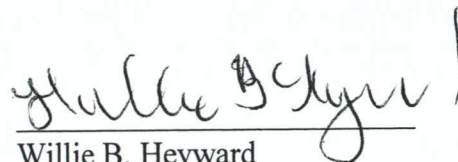
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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Appellant's Final Brief complies with Rule
211(b) SCACR.

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