THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Ralph P. Stroman, Special Referee

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SC Court of Appeals

Appellate Case No. 2019-001682
Trial Court Case No. 2011-CP-26-01809

Leticia LLC .... Movant,

In Re:

M&T Bank .... Plaintiff,

v.

Tyrone Davis; Bobby J. Bellamy; BC Fund and Management LLC d/b/a BC Fund, LLC and The United States of America .... Defendants.

And

Bobby J. Bellamy .... Third-Party Plaintiff,

v.

William O. Smith .... Third-Party Defendant.

Of whom Bobby J. Bellamy is the .... Appellant,

And

M&T Bank; Tyrone Davis; BC Fund and Management LLC d/b/a BC Fund, LLC; The United States of America; and William O. Smith are the .... Respondents.

INITIAL BRIEF OF RESPONDENT M&T BANK

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STATEMENT OF ISSUES ON APPEAL

1. Has the Appellant failed to perfect the appeal?

2. Did the Lower Court comply with the statutory process for real estate foreclosure sales?

3. Does Appellant provide sufficient argument and supporting authority for his Arguments numbered two (2) through five (5)?

4. Is the Appellant precluded from challenging the Order Allowing Amended Complaint, the Order Dismissing Civil Conspiracy Counterclaim, and the Foreclosure Order?

5. Is the Lower Court precluded from issuing a deed to the foreclosure sale purchaser?

STATEMENT OF THE CASE

Respondent M&T Bank ("Respondent") filed a Summons and Complaint on February 25, 2011, asking the Lower Court to reform a mortgage given to the Respondent by Tyrone Davis ("Davis") and to foreclose that mortgage. [Complaint]. Respondent requested the reformation to correct a mistake in the property description in the mortgage, and in two deeds in the chain of title. The correction that Respondent requested concerned the description of the eastern boundary of the mortgaged property as North Pointe Development. Respondent alleged that North Pointe Development is the western boundary of the described property.

The two deeds for which Respondent requested reformation were:

(1) Quitclaim Deed dated June 29, 2007 and recorded on July 18, 2007 in the Register of Deeds Office for Horry County, State of South Carolina, in Book 3261 at page 2091 (the "BC Fund Deed") conveying property from the Appellant to the Respondent BC Fund and Management, LLC dba BC Fund, LLC ("BC Fund")[1] [BC Fund Deed]; and

(2) General Warranty Deed dated November 16, 2007 and recorded on December 19, 2007 in the Register of Deeds Office for Horry County, State of South Carolina, in Book 3294 at page 817 conveying property from BC Fund to Davis (the "Davis Deed") [Davis Deed].

Respondent named Appellant and BC Fund as parties to the Reformation Action because it requested reformation of the BC Fund Deed and the Davis Deed.

Appellant, appearing *pro se*, responded by filing a pleading titled "Notice of Intent to Enforce Forfeiture Provisions of Contract for Deed" on August 30, 2011 and filed an Answer to

[1] Respondent named BC Fund, LLC as a Defendant in the Reformation Action. By later order of the Lower Court, the name of the party was changed to BC Fund and Management, LLC, dba BC Fund, LLC.

the Complaint on October 31, 2011. Appellant also filed a responsive pleading titled "Summons and Notice" on November 8, 2011.

On April 18, 2012, with consent from all parties, Respondent amended its Complaint to add the United States of America as a defendant.

On May 16, 2012, Appellant, then represented by counsel, served an Amended Answer, Counterclaim and Cross-Claim asking the court to declare the BC Fund Deed, Davis Deed, and mortgage void on the grounds that: (1) these instruments lacked an existing grantor/grantee because BC Fund LLC was not an entity with a legal existence; (2) Appellant did not receive consideration for the BC Fund Deed; and (3) fraud occurred based on BC Fund LLC's lack of legal existence.

Respondent filed its Reply to Appellant's Amended Answer, Counterclaim and Cross-Claim on May 29, 2012.

On August 29, 2013, Respondent filed a Motion to Amend its Complaint to include a request that the Lower Court reform the BC Fund Deed and Davis Deed to designate "BC Fund and Management, LLC" as the grantee and grantor therein, respectively. [August 29, 2013 Motion].

On November 6, 2013, the Lower Court issued an Order granting Respondent's Motion to Amend its Complaint ("Order Allowing Amended Complaint"). [November 6, 2013 Order].

Respondent filed its Second Amended Complaint on December 4, 2013, adding BC Fund and Management, LLC d/b/a BC Fund, LLC ("BC Fund") as a party to the action and seeking reformation of the BC Fund Deed and Davis Deed to designate BC Fund as the grantee and grantor therein, respectively. [Second Amended Complaint].

Appellant filed a Second Amended Answer, Counterclaims, and Cross-Claims on December 31, 2012.

On February 19, 2014, Appellant filed a Third (titled "Second") Amended Answer, Counterclaims and Cross-Claims and Third Party Complaint in which Appellant asserted a variety of defenses, including:

(1) Estoppel, laches, unclean hands;

(2) Lack of evidence to support the Plaintiff's reformation request;

(3) Lack of standing to reform the BC Fund Deed;

(4) No consideration for the BC Fund Deed;

(5) Negligence for failing to verify the existence of BC Fund, LLC; and

(6) Names of the parties to a deed may not be reformed;

As a further defense, asserted as a counterclaim against Respondent, and a cross claim against Davis, Appellant requested a declaratory judgment that BC Fund, LLC was not a legal entity at the time of the BC Fund Deed and Respondent had constructive notice of that fact; that the BC Fund Deed is null and void because BC Fund, LLC did not exist; that BC Fund held the Subject Property in trust under the BC Fund Deed for purposes of development; that the development contract between BC Fund and Appellant was null and void; that there was no mutual mistake in the creation of the BC Fund Deed or the Davis Deed; that the mortgage was null and void and should be cancelled of record; and that Appellant was the owner and holder of title to the real property at issue. Additionally, Appellant asserted a counterclaim against Respondent, a cross-claim against Davis, and a third-party complaint against William O. Smith ("Smith"), requesting actual, special and punitive damages for civil conspiracy. [Second (Third) Answer, Counterclaims and Cross Claims].

Respondent filed a Reply to Appellant's February 19, 2014 pleading on March 4, 2014.

On March 18, 2015, with the consent of Appellant and the other parties, the Lower Court referred the case to the Master in Equity for Horry County and dismissed Appellant's counterclaim for civil conspiracy with prejudice ("Order Dismissing Civil Conspiracy Counterclaim"). [Order Dismissing Civil Conspiracy Counterclaim].

Trial in the Lower Court began on February 8, 2016, continued on February 9 and 10, and April 11, 2016, and concluded on April 12, 2016.

The Lower Court issued its Master's Order and Judgment of Foreclosure and Sale (the "Foreclosure Order") on May 4, 2018 determining:

(1) Appellant, BC Fund, and Davis considered BC Fund, LLC and BC Fund and Management, LLC as the same entity; no party was misled or prejudiced by using the name BC Fund, LLC interchangeably with BC Fund and Management, LLC; and failure to use the full corporate name on the documents at issue was an inadvertence;

(2) Appellant should not recover on his counterclaims;

(3) The property description in the BC Fund Deed, the Davis Deed and the mortgage should be reformed to correct the designation of North Pointe Development as the eastern boundary to show that North Pointe Development is the western boundary;

(4) The BC Fund Deed should be reformed to reflect that the grantee was BC Fund and Management, LLC, d/b/a BC Fund, LLC;

(5) The Davis Deed should be reformed to reflect that the grantor was BC Fund and Management, LLC, d/b/a BC Fund, LLC; and

(6) Respondent was entitled to the foreclosure of its mortgage.

[Foreclosure Order].

On May 7, 2018, Respondent filed a Waiver of Deficiency through which it waived the right to pursue a deficiency judgment against its borrower, Davis, on the debt established by the Foreclosure Order. [Waiver of Deficiency].

Appellant filed his Motion to Reconsider on May 14, 2018. The Lower Court conducted a hearing on the Motion to Reconsider on July 3, 2018. On July 23, 2018 the Lower Court issued its Order Denying the Defendant Bobby J. Bellamy's Motion to Reconsider, Alter, and Amend The Master's Order and Judgement of Foreclosure and Sale Pursuant to Rules 52 and 59(e), SCRCP (the "Order Denying Motion to Reconsider"). [July 23, 2018 Order].

The Lower Court held the foreclosure sale on September 4, 2018, at which it sold the foreclosed property to Coastal Resort Properties, LLC ("Coastal") for the price of One Hundred and Five Thousand and 00/100 Dollars ($105,000.00). The Notice of Sale indicated that Respondent waived its right to a deficiency judgment [Notice of Sale], and the Lower Court published the Notice of Sale indicating the deficiency waiver. [Affidavit of Publication for September 4, 2018 Sale].

Prior to the foreclosure sale, on August 17, 2018, Appellant filed a *pro se* Notice of Appeal as to the Foreclosure Order and the Order Denying Motion to Reconsider, and the Court of Appeals assigned Appellate Case Number 2018-00523 to the matter (the "2018 Appeal"). [Notice of Appeal in Appellate Case Number 2018-001523]. On August 23, 2018 Appellant ordered the transcript of the July 3, 2018 hearing on his Motion to Reconsider. [August 23, 2018 Letter Ordering Transcript]. Appellant did not order the transcript of the underlying trial.

On December 3, 2018, Respondent filed a Motion to Dismiss Appellant's 2018 Appeal on the basis that Appellant failed to timely order the trial transcript. [December 3, 2018 Motion to Dismiss].

On January 24, 2019, the Court of Appeals issued its order denying the December 3, 2018 Motion to Dismiss, but ordered Appellant to order the transcript "from the correct court reporting service, Prestige Court Reporting Service." [January 24, 2019 Order] within twenty (20) days of the Order. [January 24, 2019 Order].

By letter dated January 31, 2019 and filed February 1, 2019, Appellant again ordered the transcript of the July 3, 2018 hearing on Appellant's Motion to reconsider from Prestige Court Reporting Service. Appellant did not order the transcript from the trial.

On April 8, 2019, Respondent filed a second Motion to Dismiss asking this Court to Dismiss the 2018 Appeal because Appellant had failed to order the trial transcript. [April 8, 2019 Motion to Dismiss].

By Order dated May 30, 2019 this Court directed Appellant to provide proof that he ordered the transcript of the trial within 10 days of the date of the Order. [May 30, 2019 Order]. Appellant failed to provide proof that he ordered the trial transcript within the time set out in the Order, and on July 1, 2019, the Court of Appeals issued an Order granting Respondent's April 8, 2019 Motion to Dismiss. [July 1, 2019 Order]. On July 15, 2019 the Court of Appeals issued a Remittitur remitting the matter to the Lower Court. [Remittitur].

On August 1, 2019 Appellant filed his Motion to Recall Remitter (sic) with the Court of Appeals [August 1, 2019 Motion]. This Court entered an Order denying the motion on September 17, 2019. [September 17, 2019 Order].

On September 3, 2019, Coastal, assigned its foreclosure sale bid to Leticia, LLC ("Leticia") by Assignment of Bid recorded September 3, 2019. [Assignment of Bid]. On September 3, 2019, the Lower Court entered its Master in Equity's Report on Sale and Disbursements (the "Report")

reporting that Leticia complied with the bid. The Lower Court subsequently issued a deed to the foreclosed property to Leticia. [Master in Equity's Report on Sale and Disbursements].

On September 9, 2019, on Leticia's motion, the Lower Court issued a Writ of Assistance ("Writ of Assistance"), placing Leticia in possession of the foreclosed property. [Writ of Assistance].

On October 8, 2019 Appellant filed a Notice of Appeal as to the Report and the Writ of Assistance. On October 17, 2019 Appellant filed his Amended Notice of Appeal. The Proof of Service filed by Appellant indicates that he served the Notice of Appeal on Leticia by serving John B. Kelchner, its attorney. Mr. Kelchner is not Leticia's attorney. [November 26, 2019 Affidavit of John B. Kelchner].

STANDARD OF REVIEW

"A mortgage foreclosure is an action in equity." *Wachovia Bank, Nat. Ass'n v. Blackburn*, 407 S.C. 321, 328, 755 S.E.2d 437, 440 (2014) (*quoting Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 248, 489 S.E.2d 472, 475 (1997)). "In an appeal from an action in equity tried by a judge, appellate courts may find facts in accordance with their own views of the preponderance of the evidence. *Wachovia Bank, Nat. Ass'n,* 407 S.C. at 328, 755 S.E.2d at 441 (citing *Townes Assoc., Ltd v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775-776 (1976) (abrogated on other grounds by *In the Matter of the Estate of Kay*, 423 S.C. 476, 816 S.E.2d 542 (2018)).. The opinion in *Townes Assoc, Ltd.* cites *Crowder v. Crowder*, 246 S.C. 299, 143 S.E.2d 580 (1965) as authority for the standard of review for an appellate court considering an appeal of a decision entered in an action in equity tried by a judge. *Townes Assoc., Ltd.*, 266 S.C. at 86, 221 S.E.2d at 775-776. The *Crowder* decision makes an obvious point clear: Before the appellate court can make findings of fact in accordance with its own view of the preponderance of the evidence, it must find that the lower court's findings are against the preponderance of the evidence. *Crowder*,

246 S.C. at 301, 143 S.E.2d at 581 (citing *Forester v. Forester*, 226 S.C. 311, 85 S.E.2d 187 (1954)).

This standard of review does not require the appellate court to disregard the findings of the trial court. Appellate courts should recognize that the trial judge who saw and heard the testimony of witnesses is in a superior position to make determinations on credibility. *Lewis v. Lewis*, 392 S.C. 381, 385, 709 S.E2d 650, 652 (2011) (citing *Inabinet v. Inabinet*, 236 S.C. 52, 55-56, 113 S.E.2d 66, 67 (1960)).

ARGUMENT

1. <u>The Appellant failed to perfect the appeal.</u>

The manner in which the Appellant frames this appeal directs that Leticia should be designated a respondent. Rule 202(a), SCACR, designates any parties adverse to the appellant as a respondent. Appellant challenges the validity of the Deed issued by the Lower Court to Leticia. The Writ of Assistance identifies Leticia as the "Movant" – the party that requested the Writ. By challenging the validity of the deed to Leticia set out in the Report and the relief given to Leticia under the Writ of Assistance, Appellant has made Leticia an adverse party and, consequently, a respondent.

Rule 203(b)(1), SCACR, requires that Appellant serve the Notice of Appeal on each respondent within thirty (30) days of written notice of entry of the Report and the Writ. The Lower Court entered the Report on September 3, 2019 and the Writ on September 9, 2019. Appellant filed his Notice of Appeal on October 4, 2019 and his Amended Notice of Appeal on October 16, 2019. In his proof of service of the Notice of Appeal and the Amended Notice of Appeal, Appellant states that he served Leticia by serving John B. Kelchner, its attorney of record. Mr. Kelchner is attorney of record for Respondent M&T Bank. He has not appeared as counsel for Leticia. [Affidavit of John B. Kelchner].

The requirement that Appellant timely serve all respondents with the Notice of Appeal is jurisdictional. *Elam v. S.C. Dep't of Transp.,* 361 S.C. 9, 602 S.E.2d 772 (2004). Because Appellant failed to timely serve all respondents, the Court of Appeals lacks the authority to hear and decide this case. *Id.* Accordingly, this Court does not have jurisdiction, and the Appellant's challenges should be denied on that ground alone.

2. The Lower Court complied with the statutory process for real estate foreclosure sales.

Appellant suggests that the Lower Court did not conduct the judicial sale of real estate for the foreclosed mortgage as required by statute. Specifically, Appellant points to S.C. Code Ann. § 15-39-720 (2005) and assigns error to the process because the Lower Court did not hold bidding open for thirty (30) days after the date of sale for the purpose of receiving upset bids. Appellant also challenges the judicial foreclosure sale because he believes the Lower Court failed to allow petitions for appraisals pursuant to S.C. Code Ann. § 29-3-680 (2007).

The provisions of S.C. Code Ann. § 15-39-720 do not apply to judicial mortgage foreclosure sales in which the owner of the mortgage does not seek a personal or deficiency judgment as long as the advertisement of sale states that no deficiency or personal judgment is demanded and the sale will be final and not remain open following the initial sale. S.C. Code Ann. § 15-39-760 (2005).

In this matter, Respondent did not seek a deficiency judgment against its borrower, Davis. Respondent waived the right to pursue a deficiency by filing the Waiver of Deficiency on May 7, 2018. [Waiver of Deficiency]. The Lower Court sold the foreclosed property pursuant to a published Notice of Sale that clearly indicated: (1) no deficiency or personal judgment was demanded, and (2) bidding at the foreclosure sale would be final and not remain open for 30 days

following the opening of the sale. [Notice of Sale; Affidavit of Publication for September 4, 2018 Sale].

Appellant's invocation of S.C. Code Ann. § 29-3-680 is also misplaced. The appraisal process, of which S.C. Code Ann. § 29-3-680 is a part, allows defendants in mortgage foreclosure proceedings against whom a personal or deficiency judgment has been requested to determine the amount of that personal or deficiency judgment based on the fair market value of the property in lieu of it being determined based on the foreclosure sale proceeds. *See generally*, S.C. Code Ann. §§ 29-3-660 to -770 (2007). Applications for an Order of Appraisal are only available to defendants in foreclosure proceedings against whom a personal or deficiency judgment has been requested. S.C. Code § 29-3-680(A). Appellant was not an obligor on the debt on which Respondent foreclosed, and Respondent never requested judgment against Appellant for the debt. Further, Respondent waived deficiency as to any party. As such, the appraisal process and S.C. Code § 29-3-680 do not apply to Respondent's foreclosure action.

The Lower Court conducted the judicial foreclosure sale as required by statute. The procedures that Appellant suggests should have been invoked are not applicable to the foreclosure sale at issue in this appeal.

3. <u>The Appellant fails to appropriately identify the basis of his appeal and does not provide sufficient or supporting authority for his Arguments numbered two (2) through five (5).</u>

In his Arguments two (2) through five (5), Appellant hurls a disjunctive assortment of arguments at a collection of Lower Court orders in an effort to reach one goal – the voiding of the Lower Court's deed to the foreclosure sale purchaser. His arguments simply do not make sense. For example, in his second argument, Appellant challenges the reformation of the property description ordered in the Foreclosure Order with allegations of title defects and adverse claims

that raise red flags in granting clauses, property descriptions, incorporation of plats, and a right of reversion. However, the only change to the property description directed by the Foreclosure Order was the change of a property boundary designation from "east" to "west."

In his third argument, Appellant states in the heading that he challenges the Order Dismissing Civil Conspiracy Counterclaim; but there is no mention of that Order in the actual argument. Similarly, in the fifth argument, the heading announces a challenge to the Order Allowing Amended Complaint; but the substance of the argument lacks any such challenge. Failure to provide argument or supporting authority is deemed an abandonment of the issue. *First Savings Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) Although Appellant appears *pro se*, he is held to the same standard as an attorney licensed to practice before this Court. *Rouvet v. Rouvet*, 388 S.C. 301, 696 S.E. 2d 204 (Ct. App. 2010).

In *First Savings Bank v. McLean*, the borrower appealed from a mortgage foreclosure order entered in favor of the mortgage holder. Among his arguments on appeal, the borrower stated that the special referee abused its discretion by failing to grant him all the relief the borrower requested in his motion to reconsider. 314 S.C. at 363, 444 S.E.2d at 514. Citing State ex rel. McLeod v. Wilson, 279 S.C. 562, 310 S.E.2d 818 (Ct.App.1983), the *McLean* Court determined that "[m]ere allegations of error are not sufficient to demonstrate an abuse of discretion" and "[o]n appeal, the burden of showing abuse of discretion is on the party challenging the trial court's ruling." *Id.*

Appellant has the burden of setting out his arguments and providing supporting authority. The statements Appellant set out as Arguments two (2) through (5) fail to meet either of these burdens. As such, whatever positions the Appellant attempted to take in those arguments should be deemed abandoned.

4. The Order Allowing Amended Complaint, the Order Dismissing Civil Conspiracy Counterclaim, and the Foreclosure Order cannot be challenged now.

Although ostensibly challenging the Report and the Writ of Assistance, Appellant's arguments numbered two (2) through five (5) actually question the validity of the Order Allowing Amended Complaint, the Order Dismissing Civil Conspiracy Counterclaim, and the Foreclosure Order.

Chronologically, the Order Allowing Amended Complaint is the earliest of the challenged orders issued by the Lower Court. An order permitting a party to amend pleadings is generally not appealable until a final judgment is issued. *Schein v. Lamar*, 284 S.C. 252, 255, 325 S.E.2d 573, 574 (Ct. App. 1985). Therefore, although the Lower Court issued the Order Allowing Amended Complaint on November 6, 2013, Appellant's right to appeal that order did not occur until the Lower Court issued final judgment.

March 18, 2015 is the date of the Order Dismissing Civil Conspiracy Counterclaim. An order granting a motion to dismiss or a motion for summary judgment as to one, but not all, counterclaims can be immediately appealed because it is a decision "involving the merits." *Link v. Sch. Dist. of Pickens Cnty.*, 302 S.C. 1, 6, 393 S.E.2d 176, 179 (1990). However, when an order dismisses one, but not all, of a party's claims, the nonmoving party is entitled to wait until final judgment as to all claims to appeal the ruling. *Id.* Thus, Appellant had the choice to immediately appeal the Order Dismissing Civil Conspiracy Counterclaim or wait to appeal that order after the entry of final judgment. Because he did not immediately appeal the Order Dismissing Civil Conspiracy Counterclaim, the right of appeal extended to the time of the issuance of final judgment.

Once the Lower Court entered final judgment, the appeal of the final judgment encompasses any intermediate orders issued prior to and affecting the final judgment, including the Order Allowing Amended Complaint and the Order Dismissing Civil Conspiracy Counterclaim. *Flexon v. PHC-Jasper, Inc.*, 413 S.C. 561, 571-74, 776 S.E.2d 397, 403-04 (Ct. App. 2015); *Montgomery & Crawford v. Arcadia Mills*, 173 S.C. 464, 176 S.E. 589, 589 (1934).

Here, the May 4, 2018 Foreclosure Order was the "final judgment," and any previous orders issued before then as part of the case could have been appealed with the Foreclosure Order. An order is a final judgment if there is no further act that must be done by a court prior to a determination of the rights of the parties. *Hooper v. Rockwell*, 334 S.C. 281, 513 S.E.2d 358 (1999). "In other words, a final judgment is one that operates to divest some right in such a manner as to put it beyond the power of the Court making the order to place the parties in their original condition after the expiration of the term; that is, it must put the case out of Court, and must be final in all matters within the pleadings." *Good v. Hartford Acc. & Indem. Co.,* 201 S.C. 32, 21 S.E.2d 209, 212 (1942).

Although the Foreclosure Order contains provisions incident to its administration and for disposition of the proceeds of the sale, the Foreclosure Order is conclusive as to all matters that were, up until then, at issue between the parties, including the reformation of the mortgage, the validity of the mortgage, the existence of the debt, the right to foreclose, and the right to recover a deficiency. The case of *Bartles v. Livingston*, 282 S.C. 448, 319 S. E. 2d 707 (Ct. App. 1984) supports the proposition that an order for foreclosure and sale constitutes a "final judgment," even if the sale has yet to occur and the amount of the deficiency remains uncertain. The Court of Appeals held in *Bartles* that a decree of foreclosure and a finding that a party is entitled to a deficiency constitutes a final adjudication thereof, and unless an appeal is taken of the foreclosure

order, the lower court's findings as to the debt are binding in any subsequent proceedings between the parties. *Id.* at 461, 319 S.E.2d at 715.

Appellant's back door efforts to appeal the Order Allowing Amended Complaint, the Order Dismissing Civil Conspiracy Counterclaim, and the Foreclosure Order are not proper because it is beyond the time for such an appeal and because Appellant has waived or exhausted his opportunity to appeal those decisions.

Rule 203(b)(1), SCACR requires that a Notice of Appeal must be served on all respondents within 30 days after receipt of written notice of entry of the order or judgment. In his Notice of Appeal filed in the 2018 Appeal, Appellant states that he received written Notice of the Foreclosure Order on July 23, 2018. Appellant filed and served his Notice of Appeal in this appeal on October 8, 2019, over a year after receipt of written notice of entry of the Foreclosure Order. Accordingly, the Notice of Appeal was not timely served, depriving this Court of jurisdiction to consider the matters raised by the Appellant. *See Elam v. South Carolina Dept. of Transp.*, 361 S.C. at 14-15, 602 S.E.2d at 775. ("The requirement of service of the notice of appeal is jurisdictional, *i.e.*, if a party misses the deadline, the appellate court lacks jurisdiction to consider the appeal and has no authority or discretion to 'rescue' the delinquent party by extending or ignoring the deadline for service of the notice.").

Further, Appellant has exhausted his ability to appeal the Foreclosure Order. The 2018 Appeal was an appeal of the Foreclosure Order. The Court of Appeals dismissed that appeal on July 1, 2019 and issued a Remittitur on July 15, 2019. That dismissal made the Foreclosure Order the law of the case, precluding Appellant's further challenge to the Foreclosure Order and any orders that were, or could have been, decided on the Appellant's appeal of the Foreclosure Order. "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 [were] raised on appeal, but [were] expressly rejected by the appellate court." *Judy v. Martin,* 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009) (citing 5 C.J.S. *Appeal & Error* § 991 (2008)). The doctrine applies where subsequent appeals are taken from the same case, so an issue that was ruled upon and rejected in a previous appeal cannot be raised in a subsequent appeal. Similarly, an issue that could have been raised in a previous appeal, but was not, cannot be raised in a subsequent appeal. *See Flexon v. PHC-Jasper, Inc.*, 413 S.C. at 571-74, 776 S.E.2d at 403-04 ("While the 'law of the case' doctrine is not an inexorable command, a decision of a legal issue or issues by an appellate court establishes the 'law of the case' and must be followed in all subsequent proceedings in the same case in the trial court or on a later appeal in the appellate court, unless the evidence on a subsequent trial was substantially different, controlling authority has since made a contrary decision of the law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice." (citing *White v. Murtha*, 377 F.2d 428, 431-32 (5th Cir.1967) (footnotes omitted))); *City of Columbia v. Ervin*, 330 S.C. 516, 500 S.E.2d 483 (1998) ("The law of the case applies both to those issues explicitly decided and to those issues [that] were necessarily decided in the former [appeal]."); *Ross v. Medical Univ. of South Carolina,* 328 S.C. 51, 62, 492 S.E.2d 62, 68 (1994); *see also In re Grossinger's Assocs.,* 184 B.R. 429, 434 (Bankr. S.D.N.Y 1995) ("The doctrine applies to all issues decided expressly or by necessary implication.").

An involuntary dismissal of an appeal is the same as an order on the merits. Rule 260(a), SCACR provides: "Whenever it appears that an appellant or a petitioner has failed to comply with the requirements of these Rules, the clerk shall issue an order of dismissal, which shall have the same force and effect as an order of the appellate court." Furthermore, once a remittitur is issued on an appeal, as it was in this case, the appellate court is deprived of jurisdiction to hear any matters

raised in the appeal. *Ackerman v. McMillan*, 324 S.C. 440, 443 477 S.E.2d 267, 268 (Ct. App. 1996) ("After remittitur is sent down from appellate court, trial court acquires jurisdiction to enforce judgment and take any action consistent with appellate court ruling," but "[m]atters decided by [the] appellate court cannot be reheard, reconsidered, or relitigated; decisions of the appellate court are final as to all questions decided"); *Wise v. S.C. Dep't of Corr.*, 372 S.C. 173, 174, 642 S.E.2d 551, 551 (2007) ("When the remittitur has been properly sent, the appellate court no longer has jurisdiction over the matter and no motion can be heard thereafter."). The effect of Rule 260(a) is to bar any matters that were or could have been raised in the first appeal.

The last four (4) arguments advanced by the Appellant do not challenge the substance of the Report or the Writ of Assistance. Instead, the Appellant attempts to challenge the Order Allowing Amended Complaint, the Order Dismissing Civil Conspiracy Counterclaim, and the Foreclosure Order. The time for challenging those Orders has expired and they are the law of the case. Accordingly, the Appellant's challenges are not appropriate and should be denied.

5. The Lower Court properly issued a deed to the foreclosure sale purchaser.

Should this Court decide to overlook Appellant's jurisdictional problems, it is faced with the challenge of determining exactly what issues Appellant raises. In the second and fourth arguments set out in the Appellant's Brief, Appellant suggests that the Lower Court was in error issuing the "Order of reformation in Master's Report and Order of Foreclosure and Sale [Foreclosure Order] of property description in the quit claim deed of BC Fund LLC member, Bobby Bellamy's property..." (App. Brief, p. 1, 4-7). Appellant points to the Lower Court's alleged failure to inquire about potential title defects in the public records and failure to inquire about adverse claims in the public records as legal errors. Those adverse claims and title defects appear to include "granting clauses that referred to an attached property description, which, in turn,

incorporates a plat" (App. Brief, p. 4.); "description of property" (App. Brief, p. 4.); "a clause 'right of reversion'" (App. Brief, p. 4.); and allowing BC Fund to use its trade name as opposed to its formal name (App. Brief, p.6-7.).

The Foreclosure Order contains two reformation provisions. In paragraph 3 of the Foreclosure Order the Lower Court reformed the property description in the foreclosed mortgage, the BC Fund Deed and the Davis Deed by changing the designation of North Point Development as the eastern boundary of the real property to the western boundary. [Foreclosure Order]. In paragraphs 5 and 6 of the Foreclosure Order, the Lower Court reforms the name of the grantee in the BC Fund Deed and the grantor in the Davis Deed from BC Fund, LLC to BC Fund and Management, LLC, d/b/a BC Fund, LLC. [Foreclosure Order]. In his arguments numbered 2 and 4, Appellant only challenges the "reformation in Master's Report and Order of Foreclosure and Sale in the property description..." (App. Brief, p. 1-2, 4-7.). He does not object to the reformation of the name BC Fund, LLC.

At trial, Respondent offered the deeds in the chain of title to the subject property to demonstrate the misstatement of North Point Development as the property's eastern border and requested reformation of the property description to reflect that North Pointe Development as the property's western boundary. [Trial Transcript, February 8, 2016, page 141, line 2 to page 143, line 2; Plaintiff's Trial Exhibits 5, 6, and 7]. Appellant offered no evidence or testimony at trial to challenge this evidence and did not object to Respondent's request. [Foreclosure Order, p.18]. Appellant has offered nothing to contest the stated reformation of the property description and provided no reason for the Court of Appeals to reverse the property description reformation in the Foreclosure Order.

Appellant may be arguing that the Lower Court erred in the reformation of the name BC Fund, LLC in the Foreclosure Order. If that is his argument, he claims that the Lower Court's failure to inquire about the listed adverse claims or title defects is a valid reason for reversing the decision of the Lower Court. However, the record establishes that the Lower Court either considered the identified claims or defects, or the matters identified were not before the Lower Court.

a. The "granting clauses that referred to and attached property description, which, in turn, incorporates a plat."

Appellant does not specifically identify the granting clause that he claims the Lower Court failed to adequately consider; but he identifies "plat" as one prepared by Harry F. Bruton Ass. for BC Fund, LLC. Mr. Bruton appeared at trial and testified as to a plat he prepared of the property for BC Fund [Trial Transcript, April 11, 2016, p.16, line 23 to page 17, line 9; page 18, line 12 to page 19, line 2; and page 32, line 21 to page 34, line 6; Plaintiff's Exhibit 29], and Appellant provided testimony as to that plat. [Trial Transcript, February 10, 2016, page 113, line 10 to page 115, line 12; Plaintiff's Exhibit 29]. There is nothing in the record to suggest that the Lower Court did not consider Mr. Bruton's plat.

b. The "description of property."

Appellant fails to identify the property description referenced in his argument. As argued above, the property description in the mortgage, the BC Fund Deed and the Davis Deed contained a small error in the description of its western boundary that the Lower Court corrected, noting that no party objected to the correction. It is clear that the Lower Court considered the property description in the BC Fund Deed.

c. <u>The "clause 'right of reversion.'"</u>

Appellant appears to be arguing that the Lower Court should have determined that his transfer of real property to BC Fund through the BC Fund Deed was subject to a right of reversion and, given what Appellant alleges to have transpired, the Lower Court should have determined that title should pass back to Appellant. In other words, the BC Fund Deed conveyed title to the subject property from Appellant to BC Fund in fee simple determinable. *See Purvis v. McElveen*, 234 S.C. 94, 98-99, 106 S.E.2d 913, 915 (1959) ("A fee simple determinable is an estate in fee 'with a qualification annexed to it by which it is provided that it must determine whenever that qualification is at an end.'") (citing 19 Am.Jur., Estates, Par. 28, p.486). To establish a fee simple determinable, the language in the deed must be certain as to its creation. *Batesburg –Leesville School Dist. No. 3. v. Tarant*, 293 S.C. 442, 361 S.E. 2d 343 (1987).

Appellant did not allege that the BC Fund Deed conveyed title to BC Fund in fee simple determinable with right of reverter in Appellant, and that was not asserted at trial. Appellant cannot make this argument for the first time on appeal. *Herron v. Century BMW,* 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) ("At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge.").

Further, there is no language in the BC Fund Deed that could be interpreted to be a grant of a fee simple determinable interest. The words "right of reversion" appear in the BC Fund Deed in one place - the granting clause. The relevant portion of the BC Fund Deed provides that Appellant conveyed to BC Fund "in fee simple, together with every contingent remainder and *right of reversion*, the following described property, to wit...." [BC Fund Deed (emphasis added)]. That language does not reference a right of reversion in Appellant. Rather, it describes the complete fee simple interest being transferred by stating that the interest conveyed includes any of

Appellant's rights of reversion. If Appellant's argument is that the identified language created a right of reversion, his argument is misplaced.

d. BC Fund's use of its trade name.

It is clear from the Foreclosure Order that the Lower Court inquired into Respondent's allegations that BC Fund, LLC was a trade name used by BC Fund and Management, LLC and that it addressed each of Appellant's challenges to those allegations. In its Findings of Fact, the Lower Court noted Respondent's allegations [Foreclosure Order, Finding of Fact paragraph 16] and Appellant's defenses. [Foreclosure Order, Finding of Fact paragraph 19]. The Lower Court also made several findings of fact based on its review of the testimony provided at trial as to the use of the trade name. [Foreclosure Order, Finding of Fact paragraphs 27-38]. Finally, in the first five (5) paragraphs of the Conclusions of Law the Lower Court provided a detailed analysis of Respondent's claim and Appellant's defenses before deciding that the BC Fund Deed should be reformed to change the name of the grantee to BC Fund and Management, LLC, dba BC Fund, LLC. The Lower Court clearly inquired into the trade name issue, and Appellant offers nothing to suggest otherwise.

Appellant's argument is confusing. He does not succinctly state his challenge to the action taken by the Lower Court and his reason for the present appeal. However, despite giving Appellant's argument every reasonable interpretation, it fails to state an appealable challenge to the Orders Appellant cites.

6. The Lower Court properly dismissed the Civil Conspiracy Counterclaim.

Understanding the positions that Appellant attempts to set out in his Argument 3 is a challenge. The heading to the argument suggests that he takes issue with the Order Dismissing Civil Conspiracy; but his argument does not discuss that Order. Rather, his argument appears to

focus on the substance of his civil conspiracy claim, the operations of BC Fund, the authority of Smith to act on behalf of BC Fund, and the conduct of Scott Umstead ("Umstead"), the attorney who closed the mortgage loan on which Respondent foreclosed.

Appellant's assertions set out in Argument 3 should fail for several reasons. (App. Brief, p. 5-6). First, Appellant, through his legal counsel, consented to the Order Dismissing Civil Conspiracy Counterclaim. That consent is noted on the Order. [Order Dismissing Civil Conspiracy Counterclaim]. By consenting to dismiss the claim, Appellant waived his right of appeal the dismissal. *See Calcutt v Calcutt*, 282 S.C. 565, 573, 320 S.E.2d 55, 59 (1984) ("It is well settled an appeal will not be entertained from an order by consent.").

Second, the Lower Court did not receive evidence on the civil conspiracy claim and, therefore, made no ruling on it. It is "axiomatic" that issues must be raised and ruled upon by a trial court to be preserved for appellate review. *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 734 (1998).

Finally, Appellant has included matters not received in evidence in the proceedings before the Lower Court as part of the Record on Appeal. Appellant includes documentation indicating the existence of an entity known as BC Fund LLC that was organized in North Carolina on December 6, 2002 [Appellant's Designation of Matter To Be Included in the Record on Appeal, Document Number 7]. The Appellant's argument is not clear, but he seems to suggest that the Lower Court's actions allowed Smith to act on behalf of a North Carolina entity to transfer the property of a South Carolina entity. Regardless, this documentation is being presented for the first time in this matter on appeal. For that reason it should not be allowed. *Id.*; *Herron*, 395 S.C. at 466, 719 S.E.2d at 642.

Appellant's consent to the Order Dismissing Civil Conspiracy Counterclaim, the failure of the Lower Court to rule on the civil conspiracy claim, and the required disregard of new evidence should direct this Court to reject Appellant's third argument.

7. The Lower Court properly allowed the amendment of the Complaint.

Appellant's last argument appears to be that the Court should not have allowed the Respondent to change the identity of BC Fund, LLC to BC Fund and Management, LLC, dba BC Fund, LLC in its pleadings. Appellant asserts that because of this change, the Lower Court allowed a North Carolina entity to do business without authority in South Carolina and enabled Umstead to misappropriate the proceeds of the mortgage loan that Respondent made to Davis. Without citing any authority, Appellant also suggests that "Umstead failed to secure a Certificate of Authority for BC Fund LLC to sell real property as required by the State of South Carolina..."

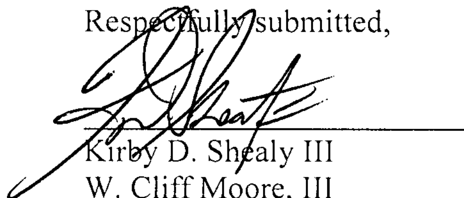
The Lower Court did not receive evidence on the alleged misappropriation of funds by Umstead and therefore made no ruling on such allegations. Matters must be raised and ruled upon by the Lower Court to be preserved for appellate review. *Wilder Corp.* at 76 (it is "axiomatic that an issue cannot be raised for the first time on appeal").

Similar to the suggestions made in his Argument 3, Appellant relies on records not in evidence from the State of North Carolina to suggest that the BC Fund, LLC involved in this matter is the same entity as the BC Fund, LLC entity organized in North Carolina on December 6, 2002. Documentation cannot be presented for the first time on appeal and should not be considered. Regardless, this documentation is being presented for the first time in this matter on appeal. For that reason, it should not be allowed. *Id.* (it is "axiomatic that an issue cannot be raised for the first time on appeal").

CONCLUSION

There are myriad reasons why Appellant's efforts to upset the Report and the Writ of Assistance should fail. He did not include the party that received the challenged deed and that requested the Writ of Assistance as a Respondent and did not serve that party with his Notice of Appeal. He misstates the foreclosure sale process and attempts to reverse the established law of the case. His arguments are not lucid and does not provide acceptable support for the positions he takes. In short, Appellant has stated no reason to set aside or modify the Report or the Writ of Assistance. This Court should reject all of Appellant's arguments and affirm the Report and the Writ of Assistance.

Respectfully submitted,



April 15, 2020

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM HORRY COUNTY
Ralph P. Stroman, Special Referee

Appellate Case No. 2019-001682
Trial Court Case No. 2011-CP-26-01809

Leticia LLC .... Movant,

In Re:

M&T Bank .... Plaintiff,

v.

Tyrone Davis; Bobby J. Bellamy; BC Fund and Management LLC d/b/a BC Fund, LLC and The United States of America .... Defendants.

And

Bobby J. Bellamy .... Third-Party Plaintiff,

v.

William O. Smith .... Third-Party Defendant.

Of whom Bobby J. Bellamy is the .... Appellant,

And

M&T Bank; Tyrone Davis; BC Fund and Management LLC d/b/a BC Fund, LLC; The United States of America; and William O. Smith are the .... Respondents.

PROOF OF SERVICE

I certify that I have caused the Initial Brief of Respondent M&T Bank and Respondent M&T Bank's Designation of Matter to be Included in the Record on Appeal to be served on Bobby B. Bellamy by having a copy deposited in the United States Mail, postage prepaid, on

April 15, 2020 addressed to Bobby J. Bellamy, PO Box 1674, Little River, SC 29566.

I further certify that I have caused the Initial Brief of Respondent M&T Bank and Respondent M&T Bank's Designation of Matter to be Included in the Record on Appeal to be served on all parties to this appeal by having a copy deposited in the United States Mail, postage prepaid, on April 15, 2020 as follows:

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April 15, 2020

Via U.S. Mail

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

RE: *M&T Bank v. Tyrone Davis, et al.*
Appellate Case No. 2019-001682
A&R File No. 050168-000223

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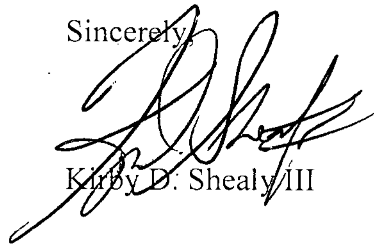
APR 16 2020
SC Court of Appeals

Dear Ms. Kitchings:

I have enclosed the original and two (2) copies of the Respondent M&T Bank's Initial Brief, Designation of Matter to be Included in the Record on Appeal and Proof of Service for filing in the referenced case. I would appreciate your returning a received copy to me via U.S. Mail at your convenience using the return envelope.

Sincerely,



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Enclosure(s)

cc: *via U.S. Mail w/encl.*
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