

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CLARENDON COUNTY
Court of Common Pleas

W.B. McCullough, Special Referee

Case Number: 2018-002199

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SC Court of Appeals

Wilmington Savings Fund Society, FSB, D/B/A Christina Trust as Owner Trustee of the
Residential Credit Opportunities Trust V Respondent,
v.

Leroy Hooks, II and Ford Motor Credit Company, LLC Defendants,

Of whom Leroy Hooks, II is the Appellant,

And

Patrick A Wheeler and Maria D. Williams, Respondent.

BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the Court err in failing to set aside the Order and Judgment of Foreclosure and Sale pursuant to Rule 60(b) because a Guardian *ad litem* had not been appointed for Appellant Hooks pursuant to Rule 17(c)?

STATEMENT OF THE CASE

This action commenced on February 5, 2018 with the filing of a Summons and Complaint for Foreclosure of Real Estate Mortgage on property owned by Appellant Hooks located at 1992 Jacks Creek Road, Summerton, South Carolina. (R. p. 203-216) The Plaintiff filed a Certificate of Service by Mail on Appellant Hooks stating that the pleadings were mailed to Defendant Hook on February 20, 2018 at 1992 Jacks Creek Road, Summerton, SC, 29148. (R. p. 233). The Plaintiff filed an Affidavit of Non-Service on February 21, 2018 indicating that an attempt was made to serve the pleadings on Appellant Hooks on February 7, 2018 at 1992 Jacks Creek Road, Summerton, South Carolina. (R. p. 231). A Order of Publication was signed by the Clerk of Court for Clarendon County on February 20, 2018. (R. p. 18)

The case was referred to W.B. McCollough as Special Referee by Order of the Clerk of Court dated March 3, 2018. (R. p. 16). Notice of Final Hearing was sent by mail to Appellant Hooks on April 19, 2018 to 1992 Jacks Creek Road, Summerton SC, 29148. (R. p. 218). An Affidavit of Default was filed on April 26, 2018. (R. p. 217). A Record of Hearing for Foreclosure Case was filed on May 1, 2018 and an Order and Judgment of Foreclosure and Sale was filed on May 14, 2018. (R. p. 186-193 and 4-15). The property at 1992 Jacks Creek was sold to Patricia A. Wheeler and Maria D. Williams on June 4, 2018 by public auction held by the Special Referee. (R. p. 197-200).

Appellant Hooks learned of the Foreclosure action and sale when an eviction notice by Patricia A. Wheeler and Maria D. Williams was served on him. Thereafter his family hired the undersigned to file a Motion for a New Trial and it was filed on July 17, 2018. (R. p. 20-23).

The Special Referee held a hearing on October 17, 2018 to consider Appellant Hooks' Motion for a New Trial. The hearing was held in chambers without a court reporter. At the hearing Appellant Hooks offered into evidence a group of documents and an Affidavit from Delphine Howard, the sister of Appellant Hooks. (R. p. 34-185). The Affidavit included medical records from the Department of Veteran Affairs. (R. p. 51-180). Also appearing at the hearing was Debra Williams, a social worker with the Department of Veteran Affairs to authenticate the medical records. A "Document Index" was also introduced into evidence to highlight relevant information in the Affidavit of Delphine Howard, exhibits, and Rule 17(c). (R. p. 234-235). The Respondents did not offer any evidence at the hearing to contradict the evidence presented by Appellant Hooks.

The Special Referee issued his Order on November 16, 2018 denying all relief requested by Appellant Hooks and upholding the prior Order and Judgment of Foreclosure. (R. p. 1-3). Appellant Hooks filed a Notice of Appeal on December 12, 2018.

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)).

The decision to grant or deny a motion made pursuant to Rule 60(b) is within the sound discretion of the trial judge. BB & T v. Taylor, 369 S.C. 548, 551, 633

S.E.2d 501, 502 (2006). The appellate standard of review is limited to determining whether there was an abuse of discretion. *Id.* at 551, 633 S.E.2d at 502-03. An abuse of discretion occurs when the order of the court is controlled by an error of law or where the order is based on factual findings that are without evidentiary support. Gainey v. Gainey, 382 S.C. 414, 423, 675 S.E.2d 792, 797 (Ct.App.2009).

ARGUMENT

Did the Court err in failing to set aside the Judgment of Foreclosure and Sale pursuant to Rule 60(b) because a Guardian *ad litem* had not been appointed for Appellant Hooks pursuant to Rule 17(c)?

South Carolina Rules of Civil Procedure Rule 60(b) states:

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: . . . (4) the judgment is void . . .

Rule 17(c) states:

The court shall appoint a guardian *ad litem* for a minor or incompetent person not otherwise represented in an action or shall make such order as it deems proper for the protection of the minor or incompetent person. (Emphasis added).

It is important to note that Rule 17(c) states “shall” and not “may.” “Shall” is defined as “Has a duty to: more broadly is required to.” Black’s Law Dictionary, 7th Edition (1999). The Special Referee was mandated to appoint a Guardian *ad Litem* for Appellant Hooks once evidence was presented that he was an incompetent person.

There was abundant evidence offered at the in chambers hearing to support the claim that Appellant Hooks is an incompetent person. Appellant Hooks has been found to be 100% disabled by the Department of Veterans Affairs for his “schizophrenia, chronic undifferentiated.” (R. p. 39-42). He was found disabled by the Social Security Administration and is required to have a Representative Payee to handle his financial benefits. (R. p. 43-50). In addition to the findings of disability due to schizophrenia by the Department of Veterans Affairs and Social Security

the Special Referee was also provided One Hundred and Twenty-nine pages of medical records from the Department of Veterans Affairs outlining how Appellant Hooks is affected by his schizophrenia. (R. p. 51-180).

The records can be summarized as follows:

- R. p. 52: 9/12/18 "Involuntarily admitted to Recovery East due to report of worsening psychosis."
- R. p. 53: 9/12/18 "Diagnoses: Unspecified Depressive Disorder, Schizophrenia."
- R. p. 55-56: 1/30/15 "Five-day inpatient stay. . . . Paranoia: Yes, Veteran is paranoid that his family is taking his belongings."
- R. p. 58: 9/9/18 "Veteran yelled out while laying in bed 'He keeps following me' . . . 'I know, but I just keep hearing voices.'"
- R. p. 60-62: 11/6/15 "Inpatient hospitalizations: January 2015 for paranoid thoughts, committed for 5 days. 2009 hospitalized; one-year hospitalization in Monroe, NY over 30 years ago and was diagnosed with schizophrenia at that time. . . . Schizophrenia, paranoid type. . . . He has not managed his money before and given the history of head injury and memory problems would recommend to continue with a fiduciary for his disability." (Emphasis Added).
- R. p. 65: 9/8/18 "Psychotic (hallucinations)."
- R. p. 68: 9/12/18 "Involuntarily admitted to Recovery East due to report of worsening psychosis."
- R. p. 73-74: 9/10/18 "His niece recently started helping him with payment of his bills. . . . She may be willing to assist him in the management of his affairs. . . . Provider spoke with sister of patient, Delphine Howard, who confirmed all of the above information. She reports that he was having difficulty for some time and is thankful that he is in hospital setting."
- R. p. 76: 9/8/18 "'I have been feeling depressed and I was hearing voices'. . . . He states he has been hearing voices telling him to kill himself and he knew he needed help. . . . auditory hallucinations. . . . The patient has been diagnosed with schizophrenia and schizoaffective disorder, in the past and is 100% service connected for psychiatric illness. He estimates he has been psychiatrically hospitalized 'about 10 times'."
- R. p. 78: 9/8/18 "Disheveled male appearing older than stated age. . . . Schizophrenia, Paranoid Type."

- R. p. 80: 9/7/18 "Depressive disorder has been involuntarily admitted to Recovery East on 9/7/18 . . . Said that he no longer wants to harm his brother."
- R. p. 85: 9/8/18 "Suicidal thoughts and command auditory hallucinations telling him to kill himself."
- R. p. 90: 11/19/15 "Schizophrenia . . . In January 2015 he was committed to psych hospital in Charleston, SC, because his brother made allegations he shot at him."
- R. p. 95: 9/12/18 "Does this patient lack the cognitive ability to make relevant decisions? Yes."
- R. p. 102: 9/7/18 "Exacerbation of his paranoid schizophrenia; patient is having hallucinations, some which are bizarre and reports threatening VOICES telling him that he will die, and that he should go ahead and kill himself."
- R. p. 109: 9/10/18 "Paranoid schizophrenia with (primarily) auditory hallucinations and suicidal ideation."
- R. p. 116: 2/19/10 "Bipolar Disorder".
- R. p. 118: 12/4/09 "He was impulsive and had racing thoughts. He was having auditory hallucinations that had faded away. . . He stated that he has been feeling well and the hallucinations and 'erratic' behavior had faded away."
- R. p. 121-122: 10/28/09 "Mr. Hooks arrived agitated, confused and probably delusional/paranoid. His psychosis has cleared but pt. continues to have anxiety of the 'no contact' order that his former tenant has on him. . . . Bipolar disorder vs Schizophrenia vs Schizoaffective disorder."
- R. p. 136: 10/26/09 "Patient seems to be rambling and tangential . . . Bipolar disorder vs Schizophrenia. . . Patient with pressured speech, tangentiality, grandiose presentation, racing thoughts, and describes resolving paranoia. Symptoms most consistent with bipolar disorder."
- R. p. 137: 10/26/09 "Demon lady has been blowing marijuana at me while she locks me in the bathroom."
- R. p. 140: 10/26/09 "Patient is a very poor historian. Tells stories that cannot be well correlated."
- R. p. 146: 10/26/09 "Auditory/Visual Hallucinations / Delusions / Disorganized Behavior . . . PTSD."
- R. p. 150: 10/24/09 "Schizophrenia."

R. p. 170: 10/23/09 "He is always talking about them coming to get him. . . sat in corner mumbling to himself throughout the assessment . . . hearing voices."

R. p. 172: 10/23/09 "100% SC for schizophrenia. . . Was a relatively poor historian and offers a vary disjointed story."

R. p. 174: 10/23/09 "I am hearing voice and I am afraid to go in my house."

The findings by the Department of Veterans Affairs, Social Security Administration, and the medical records demonstrate that Appellant Hooks was incompetent and a Guardian *ad litem* should have been appointed pursuant to Rule 17(c).

The Order Denying Motion states that the Affidavit of Delphine Howard includes "cherry picked statements from the attached VA medical." (R. p. 2). The Order includes a single quote from a medical record that suggests that Appellant Hooks was competent on September 12, 2018 because he "appeared alert and oriented with moderately impaired insight and judgment." (R. p. 2 and 53). The single quote from September 12, 2018 is a mischaracterization of Appellant Hooks' mental state as only being "moderately impaired insight and judgment." A complete review of the records related to the September 2018 hospitalization shows: "Admitted on SEP 7, 2018 . . . involuntarily admitted to Recovery East due to report of worsening psychosis." (R. p. 52). On September 8, 2018 the records state: "I have been feeling depressed and I was hearing voices'. . . He states he has been hearing voices telling him to kill himself and he knew he needed help. . . auditory hallucinations. . . The patient has been diagnosed with schizophrenia and schizoaffective disorder, in the past and is 100% service connected for psychiatric illness. He estimates he has been psychiatrically hospitalized 'about 10 times'." (R. p. 76). On September 9, 2018 the records state: "Veteran yelled out while laying

in bed 'He keeps following me' . . . 'I know, but I just keep hearing voices.'" (R. p. 58). On September 12, 2018 the records state: "Does this patient lack the cognitive ability to make relevant decisions? Yes." (R. p. 95). When one reads the complete medical record for Appellant Hooks it is clear that Appellant Hooks has a serious mental illness that makes him incompetent.

In the case of Rouvet v. Rouvet, 388 S.C. 301, 696 S.E.2d 204 (Ct. App. 2010) the Court was asked to review a denial of a Rule 60(b) motion in a case involving an incompetent person. Rouvet dealt with a Family Court case where one party was unrepresented and incompetent; however, an order was issued that adversely affected the incompetent person's financial position. The Court analyzed the case in light of Rule 17(c) and found that "[w]here a court adjudicates the rights of a person who is not mentally competent without appointing a Guardian *ad litem*, any judgment rendered by the court adverse to the person who is not competent is defective. Before divesting a person, who is not competent of any rights, a court must proceed in strict compliance with the law." (Citations omitted) *Id.* at 209.

In the case of Appellant Hooks he lost his home to a foreclosure sale while he was incompetent. The Special Referee did not "proceed in strict compliance with" Rule 17(c) because a Guardian *ad litem* was not appointed to protect Appellant Hooks during the action. The Special Referee was given abundant evidence at the in chambers hearing showing that Appellant Hooks was schizophrenic and the Special Referee should have granted the relief requested under Rules 60(b). Pursuant to Rule 60(b) the Special Referee should have found the Order and Judgment of Foreclosure and Sale was void because the Court

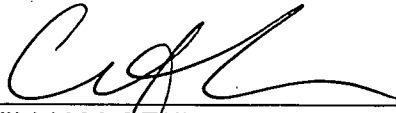
lacked personal jurisdiction over Appellant Hooks because he was an incompetent person and a Guardian *ad litem* had not been appointed.

The Special Referee notes in the Order Denying Motion that “No motion or application for the appointment of a Guardian *ad litem* was made during the pendency of this action.” (R. p. 3). This statement is factually incorrect. The Motion for New Trial or For Relief from Order states: “Defendant Hooks respectfully requests that the Court reconsider the Order and set aside the same to allow the appointing of a Guardian *ad litem* for Defendant Hooks . . .”. (R. p. 22) (Emphasis Added). A Guardian *ad litem* was requested as soon as the family of Appellant Hooks became aware of the pending action.

CONCLUSION

Appellant Hooks is an incompetent person under Rule 17(c) and the Special Referee should have appointed a Guardian *ad litem*. The medical records submitted at the hearing before the Special Referee clearly demonstrate that Appellant Hooks required the assistance of a Guardian *ad litem* to protect his interest. Because the case proceeded without a Guardian *ad litem* the Order and Judgment of Foreclosure and Sale was void for lack of personal jurisdiction over Appellant Hooks.

This Court should overturn the Order Denying Motion and remand the case for the appointing of a Guardian *ad litem* and allow additional proceedings to ensure that Appellant Hooks is protected.



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April 2, 2019

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CERTIFICATE OF COUNSEL

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



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April 3, 2019