

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

S.C. Supreme Court

Gordon G. Cooper, Master in Equity for Spartanburg County

Opinion No. 4815 (S.C. Ct. App. Filed April 6, 2011)

SunTrust Bank s/b/m National Bank of Commerce,
including its Division, Central Carolina Bank..... Respondent,

v.

Brandy K. Bryant a/k/a Brandy K. McGarthy, Arnold L. Bryant,
Phyllis W. Davis, and Stephen Ford, as Spartanburg County
Tax Collector, Defendants, of Whom Phyllis W. Davis is the..... Petitioner.

RETURN TO PETITION FOR A WRIT OF CERTIORARI

Dean A. Hayes
Korn Law Firm, P.A.
1300 Pickens Street (29201)
Post Office Box 12369
Columbia, South Carolina 29211-2369
Telephone: (803) 252-5817
Attorney for Respondent

Other Counsel of Record:
Daniel R. Hughes
John B. Duggan
P.O. Box 449
Greer, SC 29652-0449
Telephone: (864) 879-0144
Attorney for Petitioner

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COUNTER-STATEMENT OF THE CASE

On August 28, 2008, the Respondent, SunTrust Bank, commenced an action in the Spartanburg County Court of Common Pleas seeking the overage remaining after the tax sale of real property encumbered by Respondent's purchase money mortgage. (R. p. 6). The summons and complaint were served on all the parties having an interest in the realty according to the records of the Spartanburg County Register of Deeds.

Phyllis Davis, the Petitioner, was named a party defendant by virtue of holding a judgment against one of Respondent's co-mortgagors; the judgment was entered a couple of months prior to recording of the mortgage. (R. p. 8). In her answer, Petitioner admitted most of the allegations of the complaint but denied that Respondent's purchase money mortgage was entitled to priority over the judgment. (R. pp. 9, 10).

Upon referral of the case to Gordon G. Cooper, Master-in-Equity for Spartanburg County, Respondent moved for summary judgment, asserting that it was entitled, as a matter of law, to an award of the remaining proceeds of the tax sale. (R. p. 11). The mortgage secured a purchase money loan and therefore enjoyed priority over the judgment despite its seniority.

The Master-in-Equity denied Respondent's motion for summary judgment and issued an order splitting the overage between the parties. (R. pp. 2-4). The order found that Respondent's interest in the property was extinguished by the tax sale, resulting in Respondent becoming an unsecured creditor like the Petitioner, "[losing] any basis that it was entitled to proceeds of the tax sale." (R. p. 4). The Master-in-Equity sustained his order by denying Respondent's subsequent motion to alter or amend judgment. (R. p. 5).

Respondent appealed the order. In Opinion No. 4815, filed on April 6, 2011, the Court of Appeals reversed the Master's order and held that SunTrust was entitled to the entire overage

because its mortgage had priority over Davis's judgment. SunTrust Bank v. Bryant, Op. No. 4815 (S.C. Ct. App. filed April 6, 2011). It found that "purchase money mortgages are accorded priority over all other liens arising through mortgagor," because purchase money loans make attachment of other liens possible. Id. The Court of Appeals emphasized that but for SunTrust's loan "there would have been no property to be sold at the tax sale, and therefore, no overage." Id.

Petitioner unsuccessfully sought rehearing before the Court of Appeals and now seeks a writ of certiorari from this Court to review the decision of the Court of Appeals.

ARGUMENT

According to South Carolina Appellate Court Rules, the Supreme Court is not bound to review final decisions of the Court of Appeals. Rule 226(b) states that "[a] writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are *special and important reasons*." Rule 226(b), SCACR (emphasis added). When considering a petition for the writ of certiorari, the Court would take into account: (1) whether the case posed a novel question of law; (2) whether there was a dissent in the decision of the Court of Appeals; (3) whether the decision to be reviewed conflicts with any prior opinion of the Supreme Court; (4) the presence of constitutional issues; and (5) a conflict with a decision of the United States Supreme Court, if a federal question was involved in the case. Rule 226(b)(1)-(5), SCACR.

The instant case does not merit review by this Court because no special or important reasons exist for granting the writ of certiorari. The decision of the Court of Appeals reversed an order in an action seeking an overage remaining after a tax sale of real property located in Spartanburg County. It did not involve any constitutional issues or include federal questions. The case was decided without a dissent and the opinion did not conflict with any prior decision of this Court.

Furthermore, it does not present a novel question of law. As this Court stated in Crystal Ice Co. of Columbia, Inc., 273 S.C. 306, 257 S.E.2d 496 (1979), “[t]he rule that the equities favor granting priority to a purchase money mortgage is longstanding.” Id. at 311, 257 S.E.2d at 498. The South Carolina Court of Appeals, in its opinion in Hursey v. Hursey, 284 S.C. 323, 326 S.E.2d 178 (Ct. App. 1985), summarized this principle as follows: “[a] purchase money mortgage is recognized at common law and in equity where a purchaser of land, contemporaneous with the acquisition of the legal title or afterward, but as a part of the same transaction, executes a mortgage to secure the purchase money. . . . It is accorded priority over all other claims or liens arising through the mortgagor although they are prior in time to the execution of the purchase money mortgage.” Id. at 327, 326 S.E.2d at 180. According to the Court of Appeals, “[t]he rationale for this special priority is that the mortgagor's interest in the property is made possible by the purchase money loan, so that the mortgage should come ahead of other interests that attach merely because the mortgagor acquires the property.” South Carolina Federal Sav. Bank v. San-A-Bel Corp., 307 S.C. 76, 80, 413 S.E.2d 852, 855 (Ct. App. 1992).

In Friarsgate, Inc. v. First Fed. Savings & Loan, the Court of Appeals further explained that rationale by stating that “under common law principles, the purchase money mortgage . . . is deemed in law to have been simultaneously transmitted with the conveyance of the interest in the property to the purchaser. The deed and purchase money mortgage take effect at the same time.” 317 S.C. 452, 456, 454 S.E.2d 901, 904 (Ct. App. 1995). Thus “[t]he common law recognition of the simultaneous effect of the conveyance to the purchaser of an interest capable of being encumbered with the conveyance by the purchaser of the purchase money mortgage establishes the priority.” Id. at 457, 454 S.E.2d at 905.

The principle of priority of purchase money mortgages over all other claims is reflected in opinions of courts in other jurisdictions. See, e.g. ALH Holding Co. v. Bank of Telluride, 18 P.3d 742, 746 (Colo. 2000) (“mortgages, given in exchange for money applied to the purchase of the property have priority over all other liens [;] [t]he rationale for the rule derives . . . from the fact that execution of the deed and mortgage are considered simultaneous acts, such that the title never rests in the buyer unencumbered by the mortgage. . . . ”); American General Financial Services, Inc. v. Carter, 184 P.3d 273 (Kan. Ct. App. 2008) (“[o]ne who executes a purchase money mortgage is not regarded as obtaining the title and then placing an incumbrance on it[;] [h]e is deemed to take the title charged with the incumbrance, which has priority even over preexisting claims. . . .[.]” Mortgage Co. v. Winters, 94 Kan. 615, 619, 146 Pac. 1012 (1915)).

The Court of Appeals was correct in finding that Respondent was entitled to the entire overage because its purchase money mortgage enjoyed priority over Petitioner’s judgment lien. In the Respondent’s view, the character of sale of the encumbered property does not affect the order of disbursement of the excess proceeds to parties who had liens on it. Whether property is sold through foreclosure or by the tax collector for unpaid property taxes has no bearing on the priorities of lien holders as to the proceeds from such sale. In the present case, the Court of Appeals reversed the order of the Master-in-Equity without having to address the nature of the sale involved, and whether a tax sale, specifically, somehow reshuffles positions of creditors. The Court of Appeals declined to consider Petitioner’s argument that Respondent “was not entitled to the same priority as to the proceeds from the sale of the property as to the property itself” because Petitioner failed to cite any authority in support of her argument. See SunTrust Bank v. Bryant, Op. No. 4815 n.2 (S.C. Ct. App. filed April 6, 2011). Petitioner argued that by not redeeming the property Respondent lost its right to assert priority of its mortgage over the previously recorded judgment. The Court of Appeals deemed

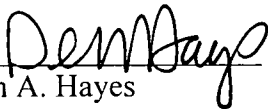
this argument abandoned because of lack of citation to any authority. Id. Petitioner reiterated that argument in her petition, but yet again failed to cite to any sources in support of her argument.

The Court of Appeals found correctly that Respondent was entitled to the entire overage. To hold otherwise would cause injustice to the Respondent because it was its loan that created, as it were, the property to which Petitioner's judgment could attach.

CONCLUSION

For the reasons stated above, this Court should deny Davis's petition for a writ of certiorari to review the final decision of the Court of Appeals.

Respectfully submitted,



Dean A. Hayes
Korn Law Firm, P.A.
1300 Pickens Street (29201)
Post Office Box 12369
Columbia, South Carolina 29211-2369
Telephone: (803) 252-5817
Attorney for Respondent

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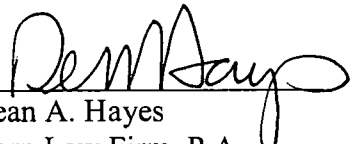
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PROOF OF SERVICE

I certify that I have served the Return to Petition for a Writ of Certiorari by depositing a copy of the same in the United States Mail, postage prepaid, on July 25, 2011, addressed to the following:

John B. Duggan, Esq.
Daniel R. Hughes, Esq.
Love, Thornton, Arnold, and Thompson, P.A.
P.O. Box 449
Greer, SC 29652-0449
Attorneys for Petitioner

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Dean A. Hayes
Korn Law Firm, P.A.
1300 Pickens Street (29201)
Post Office Box 12369
Columbia, South Carolina 29211-2369
Telephone: (803) 252-5817
Attorney for Respondent SunTrust Bank