

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

The Honorable James E. Chellis
Dorchester County Master-in-Equity

RECEIVED

Nov 23 2020

SC Court of Appeals

APPELLATE CASE NO. 2020-001168

NCP PILIGRIM, LLC, Respondent,

v.

MARY LOU CERCOPELY, DAVID S. CLANCY, SOUTH CAROLINA FEDERAL CREDIT UNION, SOUTHCOAST COMMUNITY BANK, JOAN GEANURACOS and DAVID SEAN CLANCY,

of whom MARY LOU CERCOPEL, DAVID S. CLANCY and DAVID SEAN CLANCY
are the..... Appellants.

**MOTION FOR RELIEF FROM SUPERCEADAS, TO ENJOIN
MASTER'S SALE on 12/01/20 and to
TRANSFER APPEAL TO THE SUPREME COURT**

INTRODUCTION

Appellants Mary Jo Cercopely and David Clancy have raised significant constitutional questions pertaining to whether the South Carolina courts have firmly established and strictly followed rules and procedures in regard to court jurisdiction, standing and how to identify a real party in interest.

The gravamen of their appeal rests on a fundamental tenet of the Supremacy Clause of the United States Constitution providing that “[t]he States cannot, in the exercise of control over local

laws and practice, vest state courts with power to violate the supreme law of the land.” *Kalb v. Feuerstein*, 308 U.S. 433, 439 (1940). The Appellants have asserted that the Dorchester County Master-in-Equity’s Order of July 13, 2020 is not merely erroneous, but void for lack of jurisdiction.

In their Appeal Brief, Appellants are clear that their position does not apply to pre-emption claims generally, but to those federal laws that pre-empt a state’s actual adjudicatory or regulatory power. The United States Supreme Court agrees. *See Longshoremen v. Davis*, 476 U.S. 380, 391 (1986).

Because the plain language of 12 U.S.C. 1821(d)(13)(D)(i) declares “no court shall have jurisdiction over any claim or action for payment from, or any action seeking a determination of rights with respect to, the assets of any depository institution for which the [FDIC] has been appointed receiver, including assets which the [FDIC] may acquire from itself as such receiver.” 12 U.S.C. § 1821(d)(13)(D)(i), few facts are needed to appreciate the relief requested here:

FACTUAL ANALYSIS

1. Respondents concede that the promissory note and mortgage securing its repayment was “held” by Carolina Federal Savings Bank (“CFSB”) when the Federal Deposit Insurance Corporation (“FDIC” or “Corporation”) was appointed as its receiver (“FDIC-R”). [Tr. p.8, 6-7.]

2. The Master concedes that 12 U.S.C. § 1821(d)(2)(A)(i) “gives the FDIC the authority to exercise all rights, titles, powers, and privileges of the insured depository institution with respect to the assets of the institution, including the power to transfer any asset or liability of the institution. 12 U.S.C. §1821(d)(2)(A)(i) & (d)(2)(G)(i)(II).” [Order7/13/20, p.3, ¶2.]

3. The Respondent also concedes “Carolina Federal Savings Bank was taken over by the FDIC,” [Tr., p.8, 6-7], and asserts that “[t]he FDIC subsequently assigned the note to CRE/ADC Venture who subsequently assigned it to [Respondent].” [*Id.*].

4. The dispute is not over any “universally recognized principle that an assignee has all the same rights and privileges as the assignor,” but instead, whether *any court* has jurisdiction to declare an assignment occurred. Specifically, the Master’s Order of July 13, 2020 states: “First and foremost, NCP is not making a claim against the failed institution, Carolina Federal, or against the receiver, the FDIC, in this action. Instead, NCP is seeking to exercise its lawful authority to enforce the subject note and mortgage it was assigned by virtue of the assignment from CRE/ADC Venture 2012-1, LLC. Thus, I find the administrative claims process and the limitation on judicial review found in §1821(d)(13)(D) are not applicable.” [Order 7/13/20].

5. Petitioner timely moved to reconsider on July 23, 2020, citing *Ake v. Oklahoma*, 470 U.S. 68, 75 (1985), for the proposition that whether the Master had jurisdiction to declare “NCP is seeking to exercise its lawful authority to enforce the subject note and mortgage it was assigned by virtue of the assignment from CRE/ADC Venture 2012-1, LLC” is antecedent to a determination as to whether his interpretation of 12 U.S.C. § 1821(d)(13)(D)(i) was correct. [Mot. 59(e)]. The Master denied Appellants Motion to Reconsider by his order of August 5, 2020. [Order 8/5/20]. Appellants then timely appealed to the Court of Appeals on August 18, 2020. [Not. App.].

6. After denying Appellants’ claim on the merits, the Master then proceeded to pose a bar to appellate review in the form of supersedeas and sale.

ARGUMENT

As a threshold matter, whether the Master has made application of Rule 241(b)(4), SCACR to enforce his “judgment directing the sale or delivery of possession of real property as provided in S.C. Code Ann. § 18-9-170.” That procedure is dependent upon his finding he possessed jurisdiction under federal law. That much is clear.

When compliance with threshold procedural requirements is at issue, a party must be allowed exhaust his or her remedies in the state courts before a federal court can grant relief on constitutional claims. *O'Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999). To do so, the petitioner must invoke one complete round of the state's established appellate review process, fairly presenting all constitutional claims to the state courts so that they have a full and fair opportunity to correct alleged constitutional errors at each level of appellate review. *Id.* at 845. In a state that has the possibility of discretionary review in the highest appellate court, like South Carolina, the petitioner must have presented all of his federal claims to that court. *Id.* at 847.

The Appellants have met each of these requirements. Therefore, if, the South Carolina Supreme Court [or even the South Carolina Court of Appeals] would now refuse to consider it because of the state's procedural rules (i.e., the Masters Sale; Supersedeas), the claim is said to be procedurally defaulted. *Gray v. Netherland*, 518 U.S. 152, 161-62 (1996). Procedurally defaulted claims include those that the South Carolina courts have rejected on an adequate and independent state procedural ground. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991).

To constitute an "independent" state bar, such a bar must rest on a purely state law ground. *See e.g. Michigan v. Long*, 463 U.S. 1032 (1983); *Ake v. Oklahoma*, 470 U.S. 68 (1985). A state procedural rule is "adequate" if it is "firmly established" and "regularly followed." *Beard v. Kindler*, 558 U.S. 53, 60 (2009) (quoting *Lee v. Kemna*, 534 U.S. 362, 375 (2002)).

That determination, itself a federal question, *see Michigan v. Long*, 463 U.S. at 1038-1040 (1983), and already decided: "when it is clear that the Master's procedural ruling under state law implicates an underlying question of federal law, however, the state law is not an independent and adequate state ground supporting the judgment:

'[W]hen resolution of the state procedural law question depends on a federal constitutional ruling, the state-law prong of the court's holding is not independent

of federal law, and our jurisdiction is not precluded. . . . In such a case, the federal-law holding is integral to the state court's disposition of the matter, and our ruling on the issue is in no respect advisory." *Ake v. Oklahoma*, 470 U. S. 68, 75 (1985).”

Longshoremen v. Davis, 476 U.S. 380, 388. (1986).

CONCLUSION

Therefore, failure of the South Carolina Supreme Court to grant review does not end the appeal, and the supersedeas and sale have no effect on that outcome. Thus, the Master's order of supersedeas should be terminated and any sale enjoined until the completion of the appellate process

TRANSFER TO SUPREME COURT

As stated in their *Initial Brief*, Appellants' principle issue involves a constitutional challenge to the state court's adjudicatory powers, this Appeal should be transferred to the South Carolina Supreme Court, pursuant to S.C. Code Ann. § 14-8-200(b)(3) and Rule 204, SCACR.

Respectfully submitted,

/s Robert B. Varnado

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November 23, 2020
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the *Motion for Relief from Supersedeas, to Enjoin Master's Sale on 12/01/20 and to Transfer Appeal to the Supreme Court* in the above referenced case has been served upon counsel of record by mailing a copy in an envelope properly addressed with postage prepaid on this day to the following, on the 23rd Day of November 2020:

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