

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM MARION COUNTY
COURT OF COMMON PLEAS

Honorable W. Haigh Porter, Special Referee

CASE NO. 2018-CP-33-00653
APPELLATE CASE NO. 2020-000139

RECEIVED

Dec 23 2020

SC Court of Appeals

Ex Parte Beullah Belin and James Belin, Appellants.

In re Wilmington Savings Fund Society, FSB, as trustee of Stanwich
Mortgage Loan Trust A, Plaintiff,

v.

Bertha Dunham a/k/a Bertha E. Dunham and Ernest L. Dunham Defendant(s)

Of which Wilmington Savings Fund Society, FSB, as trustee of Stanwich Mortgage
Loan Trust A, Respondent.

FINAL SUPPLEMENTAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE SPECIAL REFEREE ABUSE HIS DISCRETION IN DENYING MRS. BELIN'S MOTION TO INTERVENE?
- II. DOES PUBLIC POLICY FAVOR INTERVENTION, IN THIS CASE, TO SERVE THE INTERESTS OF JUSTICE?

STATEMENT OF CASE

On September 20, 2018, the Plaintiff filed its Lis Pendens, Summons, and Complaint for Foreclosure. (R. pp. 40-64) Bertha E. Dunham failed to answer the Summons and Complaint. By Order filed March 12, 2019, this matter was referred to the Honorable Haigh Porter as Special Referee for Marion County to hear any issues, including motions after sale or judgment. (R. pp 1-2) On April 25, 2019, a Special Referee's Order of Judgment of Foreclosure and Sale Decree was filed along with a Notice of Sale directing the subject real property to be sold at public auction. (R. pp. 3-11) On June 11, 2019, the subject real property was sold at public auction with foreclosing bank being the high bidder. (R. pp. 3-11) Thereafter, a deed was issued conveying the subject real property to the bank, and it was recorded with the Marion County ROD's office on August 28, 2019 in Book 466 at Page 309. (R. pp. 76-78) On October 25, 2019, the Belin's filed a motion to intervene and motion to set aside judgment pursuant to South Carolina Rule 24 and asserted a senior interest to that of the foreclosing bank by way of adverse possession. (R. pp 81-82) The Belin's sought to set the Order of Judgment of Foreclosure and Sale Decree based upon Rule 24 and Rule 55. (R. pp. 81-82) On December 29, 2019, Special Referee Porter denied the motion to intervene and motion to set aside judgment. (R. pp. 12-27) This appeal followed.

STATEMENT OF FACTS

Mr. and Mrs. Dunham purchased 1701 W. Highway 378, Gresham, South Carolina on October 15, 1975. Thereafter, William Dunham, Jr. conveyed his interest in the subject property to Bertha E. Dunham by deed dated May 10, 1983. Beullah Belin and James Belin moved their mobile home on the property without the consent of Mr. William Dunham Sr. or Mrs. Dunham. Thereafter, on April 13, 2006, the Defendants, Bertha E. Dunham executed a

Mortgage Note ("Note") and delivered to CitiFinancial, Inc. a certain Promissory Note ("Note") in writing wherein and whereby the Defendants promised to pay to the Plaintiff, the principal sum of \$37,970.54, together with interest at an adjustable interest rate with an initial interest rate of 10.63% per annum. A mortgage was issued by Mrs. Dunham to CitiFinancial on April 13, 2006 covering real property located in Marion County, South Carolina that is the subject of this action. The Mortgage of Defendant was recorded April 13, 2006 in the ROD's Office for Marion County in Book 819 at page 146. Thereafter, the Mortgage was assigned to CitiFinancial Servicing, LLC by assignment recorded on December 21, 2017 in Book 401 at Page 5. Thereafter, the Mortgage was assigned to Plaintiff by assignment recorded on December 21, 2017 in Book 401 at Page 6. The Mortgage evidences and secures the repayment of money advanced by the Mortgagee to, or on behalf of, the mortgagor(s) and constitutes a mortgage on the subject property.

STANDARD OF REVIEW

The standard of review for a Rule 24(a)(2) motion is whether the special referee abused his discretion in granting or denying the motion. S.C. Tax Comm'n v. Union County Treasurer, 295 S.C. 257, 260, 368 S.E.2d 72, 74 (Ct.App.1988) (citation omitted). "On reviewing the trial judge's decision as to whether adequacy of representation exists, we must appraise all of the circumstances of a particular case as to whether interests sufficiently overlap so as to deny intervention." Berkeley Electric Co-op., Inc. v. Town of Mt. Pleasant, 302 S.C. 186, 191, 394 S.E.2d 712, 715 (1990).

Moreover, the power to set aside a default is exercised within the sound discretion of the trial court whose decision will not be disturbed on appeal absent a clear showing of an abuse of that discretion. See Estate of Weeks, 329 S.C. 251, 495 S.E.2d 454 (Ct. App. 1997). "An abuse of

discretion in setting aside a default judgment occurs when the judge issuing the order was controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support." Estate of Weeks, 329 S.C. at 259, 495 S.E.2d at 459.

LAW/ANALYSIS

Intervention is a procedural device whereby a third party who is not a named party in an existing lawsuit, but who has an interest in its outcome, may become a party to the action. See Black's Law Dictionary 826 (7th ed. 1999). Intervention may be of right or permissive; intervention of right is governed by Rule 24(a), SCRCP, which is modeled after the federal rule. Intervention should be liberally granted, particularly where judicial economy will be promoted by the declaration of rights of all parties who may be affected. See Berkeley Electric at 189, 394 S.E.2d at 714. However, this does not mean intervention should always be granted. Instead, "we must consider the pragmatic consequences of a decision to permit or deny intervention and avoid setting up rigid applications of Rule 24(a)(2)." Id. "Each case will be examined in the context of its unique facts and circumstances." Id.

Rule 24(a) provides:

Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Thus, a party seeking intervention under Rule 24(a)(2) must: (1) establish timely application; (2) assert an interest relating to the property or transaction which is the subject of the action; (3) demonstrate that it is in a position such that without intervention, disposition of the action may impair or impede its ability to protect that interest; and (4) demonstrate that its interest is inadequately represented by other parties. Ex Parte Reichlyn, 310 S.C. 495, 427 S.E.2d 661 (1993).

In Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525 (9th Cir.1983), the leading case on intervention of right, the court articulated a set of factors for determining when an absent party's interest is adequately represented. The court considered "whether the [existing party] will undoubtedly make all of the intervenor's arguments, whether the [existing party] is capable of and willing to make such arguments, and whether the intervenor offers a necessary element to the proceedings that would be neglected." Id. at 528 (citations omitted). Subsequently, in Berkeley Electric, our supreme court adopted the following Sagebrush factors for determining the adequacy of representation:

(1) whether the existing parties will undoubtedly make all of the intervenor's arguments; (2) whether the existing parties are capable and willing to make such arguments; and (3) whether the intervenor offers different knowledge, experience, or perspective on the proceedings that would otherwise be absent.

Id. at 498, S.E.2d at 663; Berkeley Electric Coop., Inc. v. Mount Pleasant, 302 S.C. 186, 189, 394 S.E.2d 712, 714 (1990).

ARGUMENT

I. THE SPECIAL REFEREE ABUSED HIS DISCRETION BY NOT ALLOWING THE BELIN'S TO INTERVENE AS OF RIGHT IN THIS MATTER.

In this case, Rule 24 allowed intervention as of right based upon Rule 71 (b) of the South Carolina Rules of Civil Procedure. Appellant is aware that as the foreclosure sale order was already issued in this matter and the mechanism to obtain relief for the Belin's is to set aside the Order of Sale and then move to intervene. However, as the Belin's were not a party to the instant action, they have no standing in the action. Nonetheless, the Order of Sale should be set aside as it contained errors and did not identify the senior adverse claim of ownership by the Belin's. Rule 71 of the South Carolina Rules of Civil Procedure states, "The judgment shall direct that the mortgaged premises...be sold...and [t]he judgment shall also contain...notice of any senior liens...or other rights to which the property to be sold is subject." Here, it is undisputed that the Belin's have had a mobile home on the property via hostile occupation for a period in excess of ten (10) years. As such, the Belin's had an unconditional right to intervene in the instant action. Clearly, Special Referee Porter abused his discretion by not considering Rule 71.

Further, Rule 24(a)(2) allowed the Belin's to intervene as all four (4) elements were established. 1.) Application for intervention was timely considering the one-year period limitation as established by Rule 60; 2.) The claimed interest of the Belin's was the same property as the subject foreclosure action; 3.) Clearly the Belin's position, such that without intervention, was impaired or impeded as their home property interest was being foreclosed; and 4.) Finally, the Belin's demonstrated and asserted that their interest was inadequately represented by the defaulted Mrs. Dunham. Further evidence that the Special Referee Porter abused his discretion, as the elements 3 and 4 are established by the Special Referee's failure to recognize

that Bertha Dunham's interest in the property was different than Mr. and Mrs. Belin's interest. Specifically, Mrs. Dunham interests may have been to avoid personal liability on the underlying debt whereas, Mr. and Mrs. Belin interests were to establish their senior priority claim to the property.

Finally, the Sagebrush factors were not considered by the Special Referee. Here, Mrs. Dunham was already held in default. As such, she was unable to adequately protect any interest that Mr. and Mrs. Belin had. The Special Referee's lack of application of Sagebrush was a further abuse of discretion in denying the motion to intervene.

Based upon the foregoing, the Special Referee abused his discretion in failing to allow Mr. and Mrs. Belin to intervene in this case.

II. PUBLIC POLICY FAVORS INTERVENTION IN THIS CASE TO SERVE THE INTEREST OF JUSTICE.

Appellant is keenly aware that the Special Referee has the discretion to allow intervention and to allow an Order of Sale to be set aside per Rule 60. However, Appellant asserts that an exception to intervention based upon public policy exists in this case. Importantly, the foreclosing bank was the high bidder at the sale. As such, there are no res judicata implications that might have otherwise existed. 27 S.C. Jur. Mortgages § 125 (1996) Robinson v. Estate of Harris, 662 S.E.2d 420, 378 S.C. 140 (S.C. App. 2008) Moreover, in this matter, the intervenor is not attempting to expand the scope of the action but merely to establish their primary homeowner property interest in the subject foreclosure action. The motion to intervene showed such an interest in the res, in the motion concerns the primary residence status of Mr. and Mrs. Belin, that the ends of justice require that it be granted. Nothing is more sacred to one than his

home, and the Appellants should have been permitted to come in and bring their rights in this to the attention of the court. The home often has intrinsic and other values that no one knows of but the owner. Finally, it would be contrary to every element of due process to hold that the owner should not be permitted to intervene and bring or help bring these factors to the attention of the court.

CONCLUSION

For the foregoing reasons, Appellants respectfully request this Court to allow intervention by the Belin's and remand the matter back to the Special Referee to make findings of fact as to priority per Rule 71.

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