

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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Jan 27 2021

SC Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

James O. Spence, Master-in-Equity

Trial Court Case No.: 2016-CP-32-04163
Appellate Case No.: 2019-002042

Valerie Drafts; Veronica Drafts; and
Tarance F. Drafts, III.....Respondents.

vs.

R.O. Levy, South Carolina Department
Of Revenue; The United States of America;
Batesville Casket Co.,Defendants.

Of whom R.O Levy is the Appellant

FINAL BRIEF OF RESPONDENTS

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STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT ERR WHEN IT ALLOWED RESPONDENTS TO PROCEED WITH A FORECLOSURE ACTION IN THE ABSENCE OF APPELLANT AND HIS COUNSEL WHEN RESPONDENTS' COUNSEL WAS AWARE OF APPELLANT COUNSEL'S INVOLVEMENT IN THE CASE FROM CORRESPONDENCE BETWEEN HIS OFFICE AND APPELLANT COUNSEL'S OFFICE AND RESPONDENTS' COUNSEL FAILED TO NOTIFY APPELLANT'S COUNSEL OF THE HEARING?
2. DID THE TRIAL COURT ERR WHEN IT ALLOWED RESPONDENTS TO GIVE INCOMPLETE ANSWERS TO APPELLANT'S REQUESTS FOR ADMISSIONS BY FAILING TO STATE WITH SPECIFICITY THE BASIS FOR ANY DENIALS MADE AND PROVIDING THE DOCUMENTS REQUIRED BY THE ACCOMPANYING INTERROGATORY, AND INTERGAL COMPONENT OF THE REQUEST FOR ADMISSIONS, AND FAILING TO DECLARE THE INCOMPLETE ANSWERS ADMISSIONS?

STATEMENT OF THE CASE

This matter for mortgage foreclosure was instituted by Respondents. The Summons and Complaint were filed December 9, 2016. Appellant R.O. Levy was served December 20, 2016. Appellant's attorney Thomas Levy filed an answer on January 19, 2017. The case was referred to James O. Spence, Master-in-Equity for Lexington County by order filed February 9, 2017. That order was not appealed. On June 18, 2018 Appellant served Respondents with his Request to Admit and Accompanying Interrogatory. Respondents responded to the discovery request on July 13, 2018.

On October 17, 2018 the Master's office notified by e-mail attorney Thomas Levy and Respondents' counsel of the January 24, 2019 trial date. On October 23, 2018 attorney Joseph Henry sent a letter to Respondents' counsel, in essence, questioning the adequacy of the discovery response to attorney Levy. Respondents' counsel responded by letter of October 30, 2018 by enclosing certain account documentation and asserting that the response to the discovery was adequate. No Rule 37, SCRPC motion to compel discovery was filed. There was no other correspondence between attorney Henry and Respondents' counsel until March 29, 2019. Attorney Joseph Henry failed to e-file a notice of appearance prior to the trial.

On January 14, 2019, Respondents' counsel mailed a letter to all attorneys of record including Appellant's attorney Thomas Levy of the trial date of January 24, 2019.

Trial was held on January 24, 2019. Appellant's attorney Thomas Levy did not appear at the trial. The court issued its foreclosure order on March 7, 2019. Appellant filed its Motion to Rescind Foreclosure Order on March 29, 2019. The motion was heard

September 30, 2019 and Appellant's motion was denied by the trial judge. Judge Spence's order was filed November 12, 2019.

STATEMENT OF THE FACTS

Appellant R.O. Levy, for value received gave two mortgages to Tarance Drafts, father of the Respondents. Said mortgages were secured by real property in Lexington County. Tarance Drafts died testate on August 2, 2004 bequeathing the mortgages to his wife Willie Mae Drafts. Willie Mae Drafts assigned the mortgages to Respondents. Payments were not timely made to Respondents and after demand to Appellant, suit was filed on December 9, 2016. Appellant R.O. Levy was served December 20, 2016. Appellant's attorney Thomas Levy filed an answer on January 19, 2017. The case was referred to the Master by order filed February 9, 2017. Said order was not appealed. The Master's office notified attorney Thomas Levy and Respondents' counsel of the January 24, 2019 trial date by e-mail on October 17, 2018. Five days after the October 18, 2018 notice from the court, attorney Joseph Henry sent Respondents' counsel a letter questioning Respondents' response to Mr. Thomas Levy's earlier discovery requests. Respondents' counsel responded to attorney Joseph Henry's letter by letter of October 30, 2018 which contained letter enclosures previously sent to attorney Levy. There was no response by Mr. Henry to the October 30, 2018 letter. Appellant did not file a motion pursuant to Rule 37, SCRPC. Prior to the trial Mr. Henry failed to electronically file a notice of appearance and neither the Clerk nor the Respondents' counsel received any written notification of Mr. Henry's appearance as an attorney of record.

On January 14, 2019, Respondents' counsel mailed a letter to all attorneys of record including attorney Thomas Levy of the trial date of January 24, 2019.

Trial was held on January 24, 2019. Attorney Thomas Levy did not attend the trial. The court issued its foreclosure order on March 7, 2019. Appellant filed its Motion to Rescind Foreclosure Order on March 29, 2019. This was the first electronic filing by attorney Henry in the case. The motion was heard September 30, 2019 and Appellant's motion was denied by the trial judge. Judge Spence's order was filed November 12, 2019.

STANDARD OF REVIEW

A foreclosure action is an equitable action. *Wachovia Bank, Nat'l Ass'n v. Blackburn*, 407 S.C. 321,328,755, S.E.2d 437, 440-41 (2014). Thus, the standard of review is de novo. *Stoney v. Stoney*, 421 S.C. 528,530,809 S.E. 2d 59 (2017); see S.C. Const. art V, § 5 (stating in equity cases, the supreme court "shall review the findings of facts as well as the law, except in cases where the facts are settled by a jury and the verdict not set aside"). Under de novo review, the appellate court may consider two principles long recognized by our courts "(1) a trial judge is in a superior position to assess witness credibility, and (2) an appellant has the burden of showing the appellate court that the preponderance of the evidence is against the findings of the trial judge." *Stoney*, 421 S.C. at 350, 809 S.E. ed at 59.

ARGUMENT 1

Appellant argues that he was not afforded an opportunity to defend the foreclosure action due to failure of Respondents' counsel to notify attorney Joseph Henry of the January 24, 2019 trial date. That argument overlooks service by Respondents' counsel upon attorney Thomas Levy by letter of January 14, 2019. Transcript pages 13-14. Attorney Thomas Levy answered the Complaint on behalf of R.O. Levy. It further fails to account for the trial Court's e-mail to all attorneys of record on October 17, 2018 advising them of the court date. Transcript, Plaintiff's Exhibit 3.

Appellant objects to the fact that although attorney Thomas Levy was notified of the hearing, attorney Joseph Henry was not noticed with the trial date. It is without dispute that attorney Henry failed to electronically file an appearance until March 29, 2019. Transcript, page 30 (R. p 060, line 20.) He failed to effectively send written communication to the court and Respondents' counsel. Transcript, page 29. At the time of the October 17, 2018 notice from the court, Lexington County's court system was an e-file system and thus all attorneys were under a duty to file notices electronically. The trial judge on page two of his order filed November 12, 2019 referred to the Supreme Court E-Filing Guidelines, particularly ARG-10. Appellant's

counsel stated that he was not sure of his electronic filing so he sent a hard copy. Transcript, page 29. The ability to verify e-filing is virtually immediate by merely checking the website. Appellant's counsel has demonstrated no excuse for failing in his duty to insure proper filing.

Appellant relies on his argument that the letter of attorney Henry to Respondents' counsel amounted to an appearance so as to entitle him to notice of the proceedings. The October 23, 2018 letter stated that the writer had been "retained to assist in the defense of your action..." Transcript, Plaintiffs Exhibit 2 (R. p 41.) This is certainly not an appearance, especially since no court filing followed.

Respondents' notice letter of January 14, 2019 as well as the court's October 17, 2018 e-mail effectively notified Appellant of the trial date and the notification duties set out in Rule 5, SCRCF were met by Respondent.

ARGUMENT 2

Appellant argues that at the motion hearing, the trial court should have ruled that Respondents' responses to Appellant's discovery requests were inadequate. Respondents assert that such matters can only be raised pursuant to Rule 37, SCRCF. Appellant's counsel Mr. Henry admitted so much in his October 23, 2018 letter to Respondents' counsel when he stated "We are requesting that you provide supplemental responses to these requests within the next 10 days in order that we may avoid the necessity of filing a Motion to Compel." Transcript, Plaintiff's Exhibit 2 (R. p. 041.) No motion was ever filed. At the motion hearing Mr. Henry asserted that appellant could unilaterally determine the effectiveness of discovery without a court hearing pursuant to Rule 37 (SCRCF). Transcript, page 19-20 (R. p. 053, lines 11-19.) The Court dismissed this assertion in the order.

It is clear that Respondents' counsel responded on October 30, 2018 to attorney Joseph Henry's letter. Transcript, Plaintiff's Exhibit 2 (R. p. 042.) Until Mr. Henry's Notice of Appearance was filed March 29, 2019 there is no record of any pleadings or other motions in response to the October 30, 2018 letter.

Appellant failed to properly raise his objections to Respondents' discovery response.

CONCLUSION

Appellant was properly notified of the trial date by e-mail from the Master's office as well as the January 14, 2019 letter to Appellant's attorney of record; therefore Respondents complied with the requirements of Rule 5, SCRPC.

Appellant failed to timely object to the adequacy of Respondents' discovery requests and was therefore not entitled to argue the merits at the post-foreclosure motion hearing.

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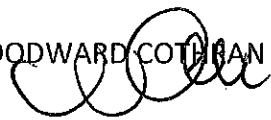
R.O. Levy, South Carolina Department
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CERTIFICATE OF COUNSEL

I hereby certify that this Brief of Respondents complies with Rule 211(b) of the South Carolina Appellate Court Rules.

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