THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Mikell R. Scarborough, Master In Equity

Case No. 2019-000205

The Savannah Homeowners Association, Inc., ...Respondent,

v.

Denise H. Jones and LVNV Funding, LLC, ...Defendants,

Of Whom Denise H. Jones is the Appellant.

RECEIVED
AUG 26 2019
SC Court of Appeals

FINAL BRIEF OF RESPONDENT

Derek F. Dean
SIMONS & DEAN
147 Wappoo Creek Drive, Suite 604
Charleston, SC 29412
843-762-9132
Attorneys for Respondent

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STATEMENT OF ISSUES ON APPEAL

1. DID THE MASTER-IN-EQUITY COURT ERR IN FAILING TO RELIEVE APPELLANT OF REGIME FEES BILLED FROM JUNE 17, 2016 TO MAY 12, 2017 ON THE BASIS OF ARTICLE X, SECTION 10.6 OF THE BYLAWS OF THE SAVANNAH HOMEOWNERS ASSOCIATION, INC.?

2. DID THE MASTER-IN-EQUITY COURT ERR IN FAILING TO VINDICATE THE APPELLANT IN LIGHT OF RESPONDENT'S INCONSISTENT CORRESPONDENCE AND COMMUNICATIONS TO APPELLANT, AND RESPONDENTS DISCRIMINATORY BEHAVIOR TOWARDS APPELLANT?

3. IS APPELLANT RESPONSIBLE FOR LEGAL FEES AND OTHER COSTS WHICH RESULTED FROM RESPONDENT'S NEGLIGENCE?

STATEMENT OF THE CASE

This case is the second lien foreclosure suit brought by Respondent against Appellant ("Second Foreclosure"). In the first lien foreclosure action (Case No.: 2015-CP-10-3479) ("First Foreclosure"), Respondent obtained a Decree of Foreclosure and Order of Sale filed on March 31, 2016, ("First Decree") reflecting a debt due in the amount of $27,494.58 and ordering the sale of Appellant's property located at 506 Arlington Dr. #D, Charleston, SC 29414 ("Property"). The Property was then sold by the Charleston County Master-in-Equity at a master's sale on June 7, 2016. Respondent was the prevailing bidder at the sale, and the Master issued a Master's Deed dated June 17, 2016, and recorded July 5, 2016, conveying title to the Property to Respondent. Despite notices to vacate, Appellant failed and refused to voluntarily vacate the Property, and Respondent sought a Writ of Assistance from the Master. Prior to any put out being ordered by the Master as a result of the issuance of the Writ, in September 2016 Appellant's mortgage lender intervened and made a payment in the amount of $25,000.00 as settlement of the debt owed by the Appellant. As a result of said payment, an Order Vacating Sale, Order, and Report of Receipt and Disbursement

of Funds, Deed, Judgment and Dismissing Case was filed December 31, 2016 ("Vacating Order"), [R. pp. 1-2] which was amended by that Amended Order Vacating Sale, Order, and Report of Receipt and Disbursement of Funds, Deed, Judgment and Dismissing Case filed May 16, 2017 ("Amended Vacating Order"). [R. pp. 3-6] Thereafter, Respondent provided the Charleston County Register of Deeds a copy of the Amended Vacating Order and requested the Register of Deeds' records be adjusted to show the vacation of the prior deed and ownership being held by only Appellant. The Register of Deeds changed its records, albeit incorrectly, and shows ownership of the Property returned to Appellant on May 12, 2017. Appellant remained in possession, dominion and control of the Property at all times. The effective date of the settlement of the First Foreclosure was September 1, 2016. From and after that date, Appellant failed and refused to make payment of recurring assessments and dues owed to Respondent. Based upon the accrual of the new debt owed, Respondent initiated the Second Foreclosure. On November 6, 2018, a bench trial was held and the Charleston County Master-in-Equity issued a Decree of Foreclosure and Order of Sale [R. pp. 7-11] reflecting a debt due in the amount of $8,644.55[1] and again ordering the sale of the Property. This appeal followed.

STANDARD OF REVIEW

While Appellant fails to cite the applicable standard of review in her brief, a "foreclosure action is an equitable action." Winrose Homeowners' Ass'n, Inc. v. Hale, 423 S.C. 220, 224, 813

[1] At the bench trial, Respondent sought a judgment in the amount of $11,911.89; however, the Master reduced the award to $8,644.55 ruling that all interest and late fees were not recoverable (and further reducing the award of attorney's fees to Respondent by $1,000.00) and that Appellant did owe assessments from the effective date of the settlement of the First Foreclosure which was September 1, 2016 (not May 12, 2017). Appellant paid the judgment amount in full on February 28, 2019.

S.E.2d 894, 896 (S.C. App., 2018)(quoting Wachovia Bank, Nat'l Ass'n v. Blackburn, 407 S.C. 321, 328, 755 S.E.2d 437, 440-41 (2014)).

> Thus, our standard of review is de novo. Under de novo review, we may consider two principles long recognized by our courts "(1) a trial [court] 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 finding of the trial [court]. De novo review allows us to take our own view of the evidence and make our own findings of fact.

Winrose, 423 S.C. at 224, 813 S.E.2d at 896 (internal quotations and citations omitted).

ARGUMENT

1. DID THE MASTER-IN-EQUITY COURT ERR IN FAILING TO RELIEVE APPELLANT OF REGIME FEES BILLED FROM JUNE 17, 2016 TO MAY 12, 2017 ON THE BASIS OF ARTICLE X, SECTION 10.6 OF THE BYLAWS OF THE SAVANNAH HOMEOWNERS ASSOCIATION, INC.?

Appellant contends that she should be relieved of the duty to pay assessments during the time period between June 17, 2016[2] and May 12, 2017, based upon Article X, Section 10.6 of Respondent's Bylaws, presumably because this is the time period during which the Register of Deeds shows Respondent as the owner of the Property (from the issuance and recording of the Master's Deed from the First Foreclosure to its alteration of its records based on the Amended Vacating Order).

The Master specifically rejected Appellant's argument at trial, ruling that the filing of the Amended Vacating Order was dispositive. Transcript p. 13, l. 25 - p. 19, l. 21. [R. pp. 27-33] The Master cited to the Amended Vacating Order noting that it contained language stating: "Foreclosure sale: The judgment for the sale are set aside and vacated and are void and have no force and effect."

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[2] The Master ruled that Appellant owed assessments from the effective date of the settlement of the first foreclosure suit which was September 1, 2016, not June 17, 2016.

Transcript p. 15, l. 19-24. [R. pp. 29, 33] The Master went on to elaborate: "But it's as if it never happened legally...So the legal status of vacating the deed is to say it's as if it never happened, it's gone away. And so title would not have vested in the HOA from a legal perspective." Transcript p. 16, l. 15-21. [R. p. 30] The Master further stated, "...from the Court's perspective, it would be as if it didn't happen okay?...Once it's vacated, it's removed of record as if it didn't happen, void and of no force and effect, okay?" Transcript p. 17, l. 19-24. [R. p. 31] The Master further ruled on this issue by stating, "So once they vacated the order, it's as if it didn't – legally, it's as if it didn't happen. That's really what I'm trying to get at." Transcript p. 19, l. 17-20. [R. p. 33] The Master concluded this issue by ruling "...it would be the ruling of the Court that in fact you owe the moneys from the time when legally or factually the title was in the name of the HOA....And so as a matter of law, essentially, you've never been dispossessed of the property." Transcript p. 70, l. 1-4, 15-16. [R. p. 43]

Based upon the Master's ruling, Appellant remained responsible for payment of assessments during the time period from the effective date of the settlement of the First Foreclosure (September 1, 2016) through the date when the property was deeded back to the Appellant (and thereafter). As such, Appellant's argument, which is unsupported by any case law citation, fails.

Furthermore, Appellant remained residing in the Property during the entire time period under consideration, and continued to have exclusive possession thereof and to exercise dominion and control thereover. She never vacated the Property nor was she ever forcibly put out. To argue that she should not be required to pay the monthly assessments due to Respondent while being an owner thereof at all times and continuing to live in the Property is disingenuous at best. In asserting her reliance on Article X, Section 10.6 of the Bylaws, Appellant comes to this court with unclean hands

much as she did in the lower court.

2. DID THE MASTER-IN-EQUITY COURT ERR IN FAILING TO VINDICATE THE APPELLANT IN LIGHT OF RESPONDENT'S INCONSISTENT CORRESPONDENCE AND COMMUNICATIONS TO APPELLANT, AND RESPONDENT'S DISCRIMINATORY BEHAVIOR TOWARDS APPELLANT?

Appellate contends that "inconsistent correspondence and communications" require some type of vindication by the Master. The Respondent set forth its accounting of the monies due from Appellant at the hearing. Transcript p. 23, l. 21 - p. 35, l. 22. [R. pp. 47-59] The Master then painstakingly recounted the testimony elicited to establish an accounting of the debt due. Transcript p. 38, l. 15 - p. 47, l. 19. [R. pp. 62-64][3] Appellant's cross examination of Respondent's witness did not challenge the sums due in any respect. Transcript p. 36, l. 9 - p. 38, l. 14; p. 49, l. 8-14. [R. pp. 60-62, 34] Said cross examination clarifies that Appellant's account remained on attorney status and information regarding her account would have been available from Respondent's attorney. Inasmuch as Appellant failed to adequately challenge the sums due, she cannot claim that poor communication relieves her of liability for payment of same.

Appellant recites receiving a statement of account in February 2017 indicating a zero balance from December 5, 2016 through the beginning balance on January 1, 2017 and a charge of $861.52 being applied to her account on January 31, 2017. She makes no actual argument as to why any alleged discrepancy in the charges applied to her account entitles her to a finding that the Master erred in any respect. The application of the $861.52 was clearly explained on the record during the trial. Transcript p. 6, l. 22 - p. 7, l. 20; p. 39, l. 23 - p. 40, l. 19. [R. pp. 25-26, 63-64] Furthermore,

[3] Respondent inadvertently omitted pages 41-47 from the hearing transcript in its Designation of Matter. Those pages are attached hereto as Exhibit A.

Respondent introduced exhibits detailing the balance due from Appellant at the time of trial, as well as the applicable portions of the governing documents outlining Appellant's responsibility for assessments and related charges and the Respondent's ability to charge and collect same. Respondent's Exhibits 1-4. [R. pp. 65-83]

To the extent that Appellant raised inconsistent communications at trial (Transcript p. 36, l. 9 - p. 38, l. 14), [R. pp. 60-62] the fact that the Master did not agree with Appellant or find any merit in Appellant's contentions does not constitute error. Further, Appellant abjectly fails to cite to any case law to support her position that inconsistent communications prior to trial obviate the duty to pay delinquent assessments. Certainly from the date of the Simons and Dean Letter Dated February 10, 2017, up until the date of the trial on November 6, 2018, Appellant had ample opportunity to ascertain the amount due to the Respondent. Appellant admitted at trial that even after receipt of the Simons and Dean Letter Dated February 10, 2017, [R. p. 85] she did not remit a payment until August 2017. Transcript p. 56, l. 13- p. 57, l. 13. [R. pp. 38-39]

Appellants contends that the "Homeowners Association also demonstrated discriminatory behavior towards Jones." Appellant did not elicit or provide any testimony or evidence regarding the Respondent's allegedly discriminatory behavior during the trial. "[T]o preserve an issue for appellate review, the issue must have been raised to and ruled upon by the trial court." Whaley v. CSX Transp., Inc., 362 S.C. 456, 609 S.E.2d 286, 299 (2005). "It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial [court] to be preserved for appellate review." Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). Thus, this ground for appeal should be denied and rejected.

3. IS APPELLANT RESPONSIBLE FOR LEGAL FEES AND OTHER

COSTS WHICH RESULTED FROM RESPONDENT'S NEGLIGENCE?

Appellant's argument regarding her responsibility for legal fees and other costs based upon Respondent's alleged negligence is conclusory at best. Appellant argues that Respondent failed to provide her with a statement of account in September 2016 following negotiations with Appellant's mortgage lender. Appellant fails to craft any argument for why such alleged failure constitutes negligence or why such action would relieve her of the responsibility for legal fees and costs associated with this second lien foreclosure action.

In any event, the Transcript reflects that Appellant was on actual and/or constructive notice of the monthly assessments that were due. Transcript p. 52, l. 20 - p. 53, l. 20. [R. pp. 35-36] Appellant has owned the Property since 2001, has received statements and paid in the past, and she is and has been on notice, both expressly and constructively, of the requirement to pay and she has a duty of inquiry. Spence v. Spence, 368 S.C. 106, ___, 628 S.E.2d 869, 876 (S.C., 2006)(internal citation omitted)("If there are circumstances sufficient to put a party upon the inquiry, he is held to have notice of everything which that inquiry, properly conducted, would certainly disclose; but constructive notice goes no further. It stands upon the principle that the party is bound to the exercise of due diligence, and is assumed to have the knowledge to which that diligence would lead him; but he is not held to have notice of matter which lies beyond the range of that inquiry and which that diligence might not disclose.") Appellant received correspondence from Respondent's counsel in February 2017. Simons and Dean Letter Dated February 10, 2017. [R. p. 85] And Appellant retained counsel to negotiate a payment plan. Transcript p. 52, l. 20 - p. 53, l. 20. [R. pp. 35-36] What Appellant did not do was pay the monthly assessments in a timely fashion. Appellant had actual and/or constructive knowledge and at least inquiry notice that assessments were owed and came to

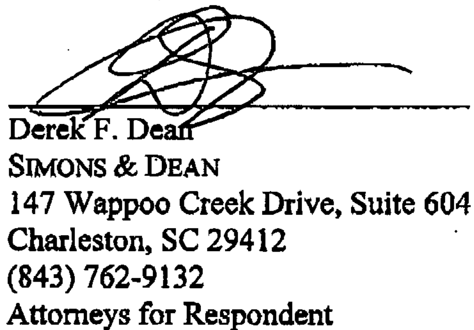
court with unclean hands having been unjustly enriched from the benefits of owning the Property without having paid any assessments.

Inasmuch as Appellant cites to no case law and makes no rational argument linking any alleged lack of notice to her claim that she should be relieved of the obligation to pay the Respondent's legal fees and costs, such argument should be rejected.

CONCLUSION

In this matter, the Master was in a superior position to assess witness credibility. Further, Appellant has not made a showing that the preponderance of the evidence is against the findings of the Master. Based upon the foregoing, Appellant's appeal should be denied.

Respectfully submitted,



Derek F. Dean
SIMONS & DEAN
147 Wappoo Creek Drive, Suite 604
Charleston, SC 29412
(843) 762-9132
Attorneys for Respondent

8/22, 2019

1 they started with Sentry Management in 2014, I
2 believe.
3 THE COURT: Okay.
4 THE WITNESS: Yeah, 2014.
5 THE COURT: So you're familiar with what was
6 going on?
7 THE WITNESS: Yes.
8 THE COURT: During this time?
9 THE WITNESS: Yep.
10 THE COURT: Okay. And then from there, it
11 looks like the regular monthly assessments of 222.15,
12 and then you've got the ongoing monthly late fee
13 charge of 30, which you've established the basis for
14 that?
15 THE WITNESS: Uh-huh.
16 THE COURT: And then the interest just
17 continues to accrue. What's the interest rate? And
18 I'm assuming it's accruing on the running balance, is
19 I assume what's being done?
20 THE WITNESS: It is on the running balance.
21 I think it's 1.8 percent per month?
22 MR. DEAN: It's 18 percent per annum, 1.5.
23 THE COURT: Eighteen per annum, one and a
24 half per month? Okay. Because that's the one thing,
25 the one figure that keeps going up?

EXHIBIT
A

1 THE WITNESS: Yes.

2 THE COURT: So that gets us -- I follow you

3 through '17. It looks like in September of '17 --

4 well, let me go back. Let me go back to the first

5 page in February of '18. There's some sort of

6 corrected review assessment adjustment of -- it says a

7 credit of 215.38 being shown? Do you see that?

8 THE WITNESS: I do.

9 THE COURT: It's about the sixth line down?

10 THE WITNESS: Yes. I'm not sure without

11 trying to search records what that was for.

12 THE COURT: Does the DW mean anything, to the

13 side?

14 THE WITNESS: Probably Dawn Wilson, an

15 employee.

16 THE COURT: Employee?

17 THE WITNESS: At our corporate office.

18 THE COURT: So that may well have been a

19 monthly assessment or something?

20 THE WITNESS: Right.

21 THE COURT: For 2000 --

22 THE WITNESS: '17.

23 THE COURT: '16, it would be a '16

24 assessment, wouldn't it?

25 THE WITNESS: '16, yes, Your Honor.

1 THE COURT: All right. Hold on a second, let
2 me just do some math so I can get my head together.
3 If you multiply 215.38 times four, you get the 861.52.
4 So it's a credit coming right back to her it looks
5 like.
6 MR. DEAN: Your Honor, I don't know why they
7 would have backed out the 215.38, but in any event, it
8 maneuvers to Ms. Jones's benefit.
9 THE COURT: Sure. It makes the assessment to
10 be three months instead of four months, right?
11 THE WITNESS: Yes.
12 THE COURT: Okay. Going back in time to '16?
13 Okay. All right. And then let's go on to Page 2, and
14 it looks like everything goes the same. They're
15 starting to accrue some legal fees over there in that
16 right-hand column. But on 9/7 of '17, it looks like a
17 payment comes in and it gets applied to all three
18 accounts is what it looks like?
19 THE WITNESS: Yes.
20 THE COURT: So, basically, 395 for the
21 assessments, 32.80 for the special assessment, and
22 then 72.75 for rent. And then same at the end of that
23 month, 9/30, $360 credit. October, $69 credit. All
24 right. Another payment, but this just -- I don't know
25 who or how that gets assessed, but when a payment

1 comes in, it gets applied.
2 THE WITNESS: It does, yes. It usually goes
3 towards interest and late fees first and then legal
4 and then towards the balance on the account.
5 THE COURT: All right. Very good. Now I'm
6 on page, I believe Page 3. So I get over to January 1
7 of '18, and once again, I see that special assessment
8 for the roofs of 750?
9 THE WITNESS: Yes.
10 THE COURT: And I'm assuming since Ms. Jones
11 is, according to y'all's records, is delinquent she
12 would have had to have requested that to be a
13 monthly -- added to her monthly assessment, but that
14 didn't get done. So it just comes as a one-time
15 charge, right? Am I correct on my --
16 THE WITNESS: They changed it a little bit,
17 when we did the books originally in 2018, they did
18 bill them for the entire year. And then if you look
19 on February 1st, they actually went and reversed it,
20 and then credited the 687.50.
21 THE COURT: Okay.
22 THE WITNESS: And then they billed it monthly
23 instead at the $62.50 per month each month instead.
24 THE COURT: Okay. So that's what that 62.50
25 reflects?

1 THE WITNESS: Yes, yes.
2 THE COURT: Okay. Got you. All right.
3 Looks like some cash came in in February, March,
4 April, May, nothing in June or July. But then in
5 August, $200 comes in. Nothing in September. October
6 is a credit. And then since that time -- let's see,
7 we've gotten to -- is that the figure we testified to,
8 the 9,772.49?
9 THE WITNESS: Yes.
10 THE COURT: Is where we are as of today,
11 yeah. I see all these special assessments going down
12 later, but that's your accountant doing that, right?
13 THE WITNESS: Right.
14 THE COURT: So the monthly assessment for the
15 month of November -- so this year's assessment is the
16 224.66 figure?
17 THE WITNESS: Correct.
18 THE COURT: And then 62.50 per month on the
19 roof, and then once again, is it true -- is it once
20 it's late, the late fee would be a charged if there's
21 any balance due; is that right?
22 THE WITNESS: Yes.
23 THE COURT: That's what I'm reading? Okay.
24 All right. And then again, interest continues to
25 accrue on the running total at the 18 percent prime?

1 THE WITNESS: Right.

2 THE COURT: All right. And that's how you

3 come up with the 9,772.49.

4 THE WITNESS: Yes.

5 THE COURT: The next thing you testified to

6 was about the roof repairs and there being the ability

7 to accelerate those in the event of default. Was the

8 acceleration, is that what got you to the 11,000

9 figure?

10 THE WITNESS: If it was accelerated, it

11 would. Those numbers are actually on every owner's

12 account, because it was passed for three years.

13 THE COURT: Okay.

14 THE WITNESS: So since it's on every owner's

15 ledger account --

16 THE COURT: That's why --

17 THE WITNESS: It's just not due until each

18 month.

19 THE COURT: That's why the 62.50 shows?

20 THE WITNESS: Right.

21 THE COURT: Right?

22 THE WITNESS: That's correct.

23 THE COURT: Okay. All right. I'm with you

24 on that.

25 MR. DEAN: And we're not seeking that, Your

1 Honor.

2 THE COURT: Got it, got it. Okay. That's

3 into the future, right?

4 MR. DEAN: Correct.

5 THE COURT: Okay. I'm with you on that. And

6 then the interest, we've covered, and late fees we've

7 covered. We've figured out what the 861.52 came from.

8 All right. Attorney's fees to be submitted. So the

9 roof is a special assessment. All right. I think I

10 understand what's going on there. I know it's been

11 explained, that one. And that current assessment,

12 roof assessment, is through December of 2020?

13 THE WITNESS: Yes.

14 THE COURT: Got it. Effective '17, or is

15 that the '18 assessment?

16 THE WITNESS: '18, that was the '18 one.

17 THE COURT: '18.

18 THE WITNESS: January 1, '18.

19 THE COURT: Okay. All right. Let me first

20 start: Mr. Dean, any questions about the followup of

21 my questions of Ms. Barnes?

22 MR. DEAN: No, not just -- not to make it any

23 more complicated, but I do want the Court to be aware

24 of the statement that's been introduced as Exhibit 1

25 does contain some of the attorney's fees.

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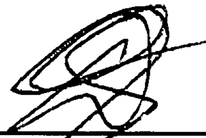
RULE 211 FINAL BRIEF CERTIFICATION

I hereby certify that the Final Brief of Respondent complies with Rule 211(b).



Derek F. Dean
SIMONS & DEAN
147 Wappoo Creek Drive, Suite 604
Charleston, SC 29412
(843) 762-9132
Attorneys for Respondent