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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Jennifer B. McCoy, Circuit Court Judge

Appellate Case No.: 2020-001335

Genevieve Stratos, ……………………..……………………………………….Respondent,

v.

Charleston County Sheriff's Office and Karmatic, LLC,……………..……………………………………………………..……………Defendants.

of which

Karmatic, LLC, is the...………………………………………………….……………Appellant.

APPELLANT'S INITIAL REPLY BRIEF

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ARGUMENT

I. Appellant has sufficiently argued that the lower court's issuance of the preliminary injunction was clearly erroneous.

Respondent argues that Appellant failed to sufficiently argue how the lower court abused its discretion in issuing the preliminary injunction. An abuse of discretion occurs when the trial court's decision is unsupported by the evidence or controlled by an error of law. Strategic Res. Co. v. BCS Life Ins. Co., 367 S.C. 540, 544, 627 S.E.2d 687, 689 (2006). Appellant's Initial Brief, pp. 7-12, sets forth how the lower court abused its direction. In sum, in issuing the preliminary injunction, the lower court committed an error of law by determining that Respondent was likely to succeed on the merits of her claim that the August 16, 2010, order granting foreclosure ("Foreclosure Order"), as opposed to the December 8, 2010, Order for Deficiency Judgment ("Deficiency Judgment"), entered a personal judgment against Respondent against which the ten-year enforcement period began to run. Doe v. Bishop of Charleston, 407 S.C. 128, 134, 754 S.E.2d 494, 498 (2014) (the interpretation of a judgment is a question of law for the court). Based on that erroneous interpretation of the Foreclosure Order, the lower court issued a preliminary injunction restraining Appellant from making any collection attempts.

As argued by Appellant to the lower court during both hearings on Respondent's Motion for Preliminary Injunction and in its legal memoranda filed in connection with those hearings[1], there are two methods by which a deficiency judgment can be entered against a debtor in a foreclosure action, either at the time the foreclosure is ordered (S.C. Code Ann. § 29-3-650) or, following the foreclosure sale (S.C. Code Ann. § 29-3-660). The lower court's error in interpreting

[1] See 9/4/20 Trans., pp.13-15; 9/15/20 Trans., pp. 10-14; Karmatic Memo. of Law in Opp. to Motion for Prelim. Injunction (filed 9/4/20), pp. 4-5; Karmatic Supp. Memo. of Law in Opp. to Motion for Prelim. Injunction (filed 9/15/20), pp. 2-4, 8.

the judgments in question is made evident by reference to these two statutes and by examination of the four corners of the two orders at issue. Notably, Respondent argues that these statutes are inapplicable to any determination involving Respondent because "no foreclosure action was filed against [Respondent]" and "judgment was entered against her on the guaranty". (Resp. Brief, p. 21). This is incorrect. S.C. Code Ann. § 29-3-660, which allows the court to delay the entry of a deficiency judgment until after the foreclosure sale, and which Appellant contends is what happened here, specifically includes guarantors. See S.C. Code Ann. § 29-3-660 ("…and if the mortgage debt be secured by the covenant or obligation of any person other than the mortgagor the plaintiff may make such person a party to the action and the court may adjudge payment of the reside of such debt remaining unsatisfied after a sale of the mortgaged premises against such other person and may enforce such judgment as in other cases.").

Respondent argues that Appellant cites "no law or authority to support why the trial court abused its discretion or erred by not basing its decision on ***orders in other matters***." Resp. Brief, p. 22 (emphasis in original). To be clear, Appellant does not argue that the lower court erred in this respect. Rather, just as in Appellant's Initial Brief, foreclosure orders and orders entering deficiency judgments from other cases were included solely as examples and to illustrate the difference in language used in foreclosure orders that also enter personal judgments against a debtor at the time foreclosure is ordered and those in which personal judgment is not entered until after a foreclosure sale.

II. Appellant has not made concessions contradictory to its arguments on appeal.

Respondent attempts to lead the Court to believe that Appellant somehow conceded that the Foreclosure Order entered a personal judgment against Respondent and/or that the personal judgment against Respondent was stale at the time Respondent's Complaint was filed.

Specifically, Respondent argues: "[Appellant] has now admitted at the time [Respondent's] Complaint in this matter was filed, 'more than 10 years had passed since the entry of the August 16, 2010, judgment.'' (Resp. Brief, pp. 15, 26).

First, there is no question that more than ten years elapsed between August 16, 2010 (when the Foreclosure Order was entered) and August 28, 2020 (when Plaintiff's Complaint was filed). However, ten years had not elapsed from the entry of the Deficiency Judgment on December 8, 2010, and either the filing of the Complaint or the lower court's issuance of the preliminary injunction, which prevented Appellant from enforcing the personal judgment against Respondent.

Second, Appellant does not deny that the Foreclosure Order constituted a "judgment", it just denies that it ordered that a personal money judgment be entered against Respondent at that time. The Foreclosure Order gave the debtor bank the judgment of foreclosure, calculated the "Total Debt" due (which pursuant to S.C. Code Ann. § 29-3-630 is a prerequisite to any foreclosure sale), and found that the bank was entitled to judgment against Respondent, as a guarantor, for the full amount due, leaving the bank "with the right to enter personal judgment against…[Plaintiff]… for any deficiency in this action remaining after the sale of the mortgaged premises." (Foreclosure Order, p. 6, ¶ 29). Again, the determinative issue here, and the error committed by the lower court in issuing a preliminary injunction, is that the Foreclosure Order is devoid of any indication that it was entering a personal money judgment against Respondent at that time. Rather, it states twice in the "Conclusions of Law":

> If the proceeds of sale are insufficient to pay the amounts hereinabove authorized to be paid out of said proceeds, with the interest, costs and disbursements as aforesaid, the parties hereto entitled to such deficiency have judgment therefor against…[Respondent.]

(Id. p. 6, ¶ E & p. 8). The language of the order is clear: a personal money judgment against Respondent was not to be entered until after the foreclosure sale and only if there was a deficiency.

See 59A C.J.S. Mortgages § 1291 ("A judgment which merely finds the amount due, orders its payment by a defendant personally liable, and provides that in default of such payment the land shall be sold and the proceeds applied in satisfaction of such amount is not a personal judgment that supports an action or a creditor's bill or authorizes a general execution. Under such a judgment, the mortgagee is not entitled to relief thereon until her or she has sold the mortgaged property so that the amount of the deficiency can be determined.").

III. The expiration of the judgment lien does not render this appeal moot.

Respondent argues that even if the lower court erred in issuing the injunction based on its mistaken conclusion that the ten year enforcement period began to run with the entry of August 16, 2010, Foreclosure Order as opposed to the December 8, 2010, Deficiency Judgment, that even the latter is now stale and thus this appeal moot. What Respondent overlooks is the fact that a decision by this Court will have a very real practical legal effect upon this controversy. See Mathis v. S.C. State Highway Dep't, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973) ("A moot case exists where a judgment rendered by the court will have no practical legal effect upon an existing controversy because an intervening event renders any grant of effectual relief impossible for the reviewing court."). Specifically, the lower court required Respondent to post a bond in the amount of $75,000 at the time it ordered the issuance of the preliminary injunction pursuant to Rule 65(c), SCRCP. (9/16/20 Order). Appellant's entitlement to enforce and collect the bond posted by Respondent should this Court determine that the lower court's issuance of the injunction was in error gives this Court's judgment a very real practical legal effect upon this controversy. See Rule 65(c), SCRCP ("…no restraining order shall issue except upon the giving of security by the applicant, in sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully restrained.").

At a minimum, a decision as to whether the lower court's issuance of the injunction was in error will have collateral consequences as to Appellant's right to enforce that bond. See Curtis v. State, 345 S.C. 557, 568, 549 S.E.2d 591, 596 (2001) (if a decision by the trial court may affect future events, or have collateral consequences for the parties, an appeal from that decision is not moot, even though the appellate court cannot give effective relief in the present case); Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 314 (1999) (holding that appeal regarding propriety of preliminary injunction was not rendered moot by conversion of temporary relief into permanent injunction because determination of whether preliminary injunction relief was proper had collateral consequences as to defendants' right to make claim on bond posted as security for injunction); Farren v. Autoviable Servs. Inc., 1973 OK 4, 508 P.2d 646, 648 (Ok. 1973) (although one-year period of non-compete clause in employment agreement had expired during pendency of appeal, appeal not moot because of the existence of injunction bond); Lewis v. Head, 238 Ala. 151, 152, 189 So. 886, 887 (Ala. 1939) ("Of course, it is not a moot case if there are important existing rights dependent upon the result, as for instance liability on an injunction bond"); Pruett v. State ex rel. Colbert Cty., 283 Ala. 33, 37, 214 So. 2d 310, 313 (Ala. 1968) (appeal determining the question of liability on bond not moot); Wyckoff v. Painter, 145 W. Va. 310, 310, 115 S.E.2d 80 (W.Va. 1960) (in a case concerning a non-compete, held that case was not moot, even though the one-year period of the restrictive covenant had expired during appeal of issuance of injunction, because a cause of action potentially existed on the injunction bond in favor of the person enjoined).

Additionally, even if moot, the issue raised is capable of repetition but generally will evade review. See Byrd v. Irmo High Sch., 321 S.C. 426, 468 S.E.2d 861 (1996) (an appellate court can take jurisdiction if the issue raised is capable of repetition but generally will evade review). The

issue is whether the deficiency judgment against Respondent became stale prior to Respondent's lawsuit as a result of the ten-year limitation to execute judgments. This issue turns on a determination of whether the judgment was entered at the time the foreclosure sale was ordered (in this case, August 2010) or at the time the deficiency judgment was entered following the sale (in this case, December 2010). Absent an order from this Court confirming that, in situations such as this where the Master-in-Equity utilizes the procedure set forth in S.C. Code Ann. § 29-3-660, the ten year enforcement period does not begin to run until the deficiency judgment is entered following the foreclosure sale, it is foreseeable that other courts will restrain debtors from collection efforts based on the erroneous conclusion that the ten years began to run at the time foreclosure is ordered. Given that the time period between when foreclosure is ordered, the sale takes place, and the deficiency judgment is entered is typically short (here, four months), it is likely that this issue will continue to evade review.

Additionally, it is evident that even amongst the court personnel there is some confusion as to this issue. Specifically, the Charleston County Clerk of Court signed/ endorsed an Execution of the December 8, 2010, Deficiency Judgment, on which the Sheriff's Office scheduled a public sale of Respondent's property, but then also filed an affidavit in this case stating that the August 16, 2010, Foreclosure Order entered the personal judgment against Respondent. (Execution, p. 2; Armstrong Aff., ¶4(a)).

This appeal is not moot and, alternatively, even if moot, it is capable of repetition but likely to evade review.

IV. No prior order "held" that personal judgment was entered against Respondent in the August 16, 2010, Foreclosure Order.

Respondent alleges that the Order Vacating Supplemental Proceedings, which was entered in the separate foreclosure/supplemental proceedings lawsuit titled *Karmatic, LLC v. Southrail*

Enterprises, LLC, et. al. (C/A No. 2010-CP-10-139), "found the judgment at issue was 'entered August 16, 2010.'" (Resp. Brief, p. 14). This is not the case. The only time that the August 16, 2010, Foreclosure Order is mentioned in the Order Vacating Supplemental Proceedings is in the following excerpt, taken from the section titled "General Background":

> The matter was referred to the Master in Equity. A judgment was entered on August 16, 2010 and a sale of the property relating to the mortgage took place. A deficiency judgment was entered against the defendants.

(3/9/20 Order Vacat. Supp. Proceedings, ¶ 1). First, there is no "finding" that "the judgment at issue was 'entered August 16, 2010'" as represented by Respondent. It simply states that a judgment was entered, which, of course, was the judgment of foreclosure. Second, the order actually acknowledges that the deficiency judgment was not entered until after the foreclosure sale. Third, the issue before that court was whether Appellant had satisfied certain procedural requirements in initiating the supplemental proceedings. The court found that it had not and vacated the order of reference. (Id., pp. 3-4). The Order Vacating Supplemental Proceedings is immaterial to this appeal and certainly carries no precedential value. See Weil v. Weil, 299 S.C. 84, 90, 382 S.E.2d 471, 474 (Ct. App. 1989) (this court has refused to hold parties bound by language in a lower court order that we found was not necessary to the decision of the issues presented).

CONCLUSION

In conclusion, the lower court's issuance of a preliminary injunction was clearly erroneous and, although the personal judgment entered against Respondent in the December 8, 2010, Deficiency Judgment is now stale, the existence of the injunction bond against which Appellant may take action renders this appeal justiciable.

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