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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 FINAL BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUES ON APPEAL 1

STATEMENT OF THE CASE 2

SUMMARY OF THE FACTS 3

STANDARD OF REVIEW 6

ARGUMENT 7

CONCLUSION 11

TABLE OF AUTHORITIES

Cases

Atwood Agency v. Black, 374 S.C. 68, 72, 646 S.E.2d 882, 884 (2007)..... 6

Bartles v. Livingston, 282 S.C. 448, 459, 319 S.E.2d 707, 714 (Ct. App. 1984)..... 8

Curtis v. State, 345 S.C. 557, 549 S.E.2d 591 (2001)..... 6

Hughes v. Slater, 209 S.C. 168, 179-80, 39 S.E.2d 509, 513 (1946) 8

Wells v. Sutton, 299 S.C. 19, 22, 382 S.E.2d 14, 16 (Ct. App. 1989)..... 8

White v. Douglas, 128 S.C. 409, 123 S.E. 259 (1924) 8

Statutes

S.C. Code Ann. § 15-39-20..... 6

S.C. Code Ann. § 15-39-30..... 6

S.C. Code Ann. § 15-39-80..... 9

S.C. Code Ann. § 29-3-650..... *passim*

S.C. Code Ann. § 29-3-660..... *passim*

STATEMENT OF ISSUES ON APPEAL

- I. Did the lower court err in concluding that the judgment at issue was entered against Respondent in the August 16, 2010 Foreclosure Order, as opposed to the December 8, 2010, Order for Deficiency Judgment, and enjoining Appellant from enforcing it on the basis that it was stale?**

STATEMENT OF THE CASE

The primary question raised by this appeal is whether the effective date of a deficiency judgment arising out of a foreclosure action and sale, for purposes of determining when the judgment becomes stale, is the date the foreclosure sale was ordered or the date the Order of Deficiency Judgment was entered following the foreclosure sale.

On August 28, 2020, Respondent initiated this action by filing a Verified Complaint seeking a declaratory judgment and injunctive relief. Specifically, the Complaint seeks an order declaring that a judgment sought to be enforced by Appellant against Respondent is stale and requests a preliminary and permanent injunction prohibiting Appellant from attempting to enforce that judgment.

On August 31, 2020, Respondent filed a Motion for Preliminary Restraining Order and Injunction and Memorandum in Support seeking an order “prohibiting the advertising, sale, and transfer of property which is the subject of the Complaint and otherwise stay Defendants from executing, enforcing or otherwise acting on the judgment at issue.” (R. p. 172) Respondent argued that she was likely to succeed on the merits of her underlying claim that the judgment was stale.

Appellant filed a Memorandum in Opposition to the Motion and the matter was heard on September 4, 2020. The lower court issued a form order, filed September 4, 2020, ordering the following:

Plaintiff’s Motion for Temporary Injunction is Granted in part. Advertising and sale postponed. Another hearing will be held the week of September 14 to determine the issue of the date of judgment.

(R. p. 1)

Appellant and Respondent both filed supplemental memoranda of law (Respondent's in the form of a proposed order), and a second hearing was held on September 15, 2020. At the outset of the hearing, the Court indicated as follows:

[W]e are kind of reconvened today I believe on the sole issue of when the judgment was actually considered to be in place for purposes of the ten year statute of limitations.

(R. p. 418, ll. 17-20) After hearing arguments from counsel for Respondent and Appellant, the Court stated:

I'm sticking with [] my first sort of inclination that the August date really is the controlling date.

(R. p. 434, ll. 15-17) The Court entered an Order on September 16, 2020, as follows:

Based on the memoranda submitted and the arguments of counsel at the hearing dated 9/15/2020, Plaintiff's Motion for Injunctive Relief is hereby GRANTED. Plaintiff is instructed to post a civil bond in the amount of \$75,000 with the Clerk of Court within 10 days of the date of this Order. All other claims contained within the pleadings are still pending.

(R. p. 4) Appellant's Notice of Appeal was served on October 5, 2020.

STATEMENT OF THE FACTS

The judgment at issue arises out of a 2010 foreclosure action filed against Respondent and others in the Charleston County Court of Common Pleas titled Tidelands Bank v. Southrail Enterprises, LLC, et. al. (C/A No. 2010-CP-10-139). (R. p. 46, ¶ 9) The Master-in-Equity ("MIE") issued an "Order (Deficiency Demanded)" which was dated August 13, 2010 (and filed August 16, 2010) (the "Foreclosure Order"). (R. pp. 7-40) In the Foreclosure Order, the MIE found that Southrail Enterprises, LLC, had defaulted on a promissory note given to Tidelands Bank which was secured by a mortgage on certain real property. (R. p. 8) In his Findings of Fact, the MIE further found that Respondent, and another individual, Valmar Nunes, had personally guaranteed the note, and that:

Tidelands Bank is entitled to judgment against the Defendants, Valmar Nunes and [Respondent], for the full amount found to be due to the Plaintiff on the Note and Mortgage held by the Plaintiff, with the right to enter personal judgment against the Defendants, Valmar Nunes and [Respondent], for any deficiency in this action remaining after the sale of the mortgaged premises.

(R. pp. 11-12) The MIE ordered that the mortgaged property be sold at public auction and that:

[I]f the proceeds of sale are insufficient to pay the amounts hereinabove authorized to be paid out of said proceeds, with the interest, costs and expenses as aforesaid, the parties hereto entitled to such deficiency have judgment therefore against the Defendants, Southrail Enterprises, LLC, Valmar Nunes, and [Respondent].”

(R. pp. 12-14) While the Foreclosure Order, in its “Findings of Fact”, does calculate the “Total Debt” which is stated to be the “amount of the judgment debt entered herein”, and also finds that the creditor was demanding judgment against Respondent “for the full amount found to be due”, there is no language in the Foreclosure Order specifically entering a money judgment against Respondent. (R. pp. 10, 12, ¶¶ 23, 29-30) Rather, in its “Conclusions of Law”, the Foreclosure Order concludes that “[Tidelands Bank] should have judgment of foreclosure of its Mortgage” and, as cited above, that *if* the proceeds of sale were insufficient to satisfy the debt, the bank would be entitled to a deficiency judgment against Respondent. (R. p. 14)

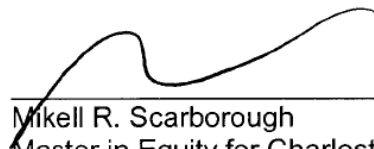
Following the sale of the mortgaged property at public auction, the MIE entered an “Order for Deficiency Judgment”, dated December 6, 2010, and filed/entered on December 8, 2010. (R. pp. 41-42) The Order for Deficiency Judgment states:

THIS MATTER came before the undersigned upon referral for foreclosure and the Plaintiff reserving its right to a deficiency judgment; and

IT APPEARING TO THE COURT that upon consideration of the Master's Order of Sale and Disbursement in the above case, and upon the Order of Foreclosure entered August 13, 2010;

IT IS ORDERED that the Plaintiff have judgment against the Defendant, Southrail Enterprises, LLC., Valmar Nunes, and Genevieve Stratos, in the sum of \$55,297.74, plus interest accruing thereon from and after November 18, 2010, at the legal rate of interest for judgments.

AND IT IS SO ORDERED.



Mikell R. Scarborough
Master in Equity for Charleston County

Charleston, South Carolina

6 day of December, 2010

(R. p. 41)

By a Non-Recourse Assignment of Judgment filed November 7, 2019, the Order for Deficiency Judgment was assigned to Appellant. (R. pp. 227-231) Additionally, Appellant was substituted as the Plaintiff in the foreclosure action. (R. p. 87) Appellant filed an Execution of Judgment directed to the Sheriff of Charleston County on November 22, 2019. (R. pp. 354-357) The Execution of Judgment, which referenced and attached the \$55,297.74 judgment against Respondent that was docketed on December 8, 2010, was endorsed by Julie J. Armstrong, Charleston County Clerk of Court, on November 25, 2019. (R. p. 355)

After real property titled in Respondent's name was identified, the Sheriff's office notified Respondent that a public auction of that property, by virtue of the Execution of Judgment, would take place on October 5, 2020. (R. pp. 93-94)

After receiving notice of the planned public auction of her real property to satisfy the Order for Deficiency Judgment, Respondent filed her Verified Complaint, seeking a declaration that the judgment was stale¹ and an injunction prohibiting Appellant from taking any steps to enforce that judgment. Respondent also filed a Motion for Preliminary Restraining Order and Injunction which was heard on September 4, 2020, and September 15, 2020. Respondent argued to the lower court that the August 2010 Foreclosure Order was the “final judgment”, and that the December 2010 Order for Deficiency Judgment was nothing more than a reduction in the amount owed following the foreclosure sale. (R. pp. 174-178) As such, Respondent argued, the ten-year period in which a judgment creditor is permitted to enforce the judgment lapsed in August 2020, rendering the judgment at issue stale. Appellant argued that the effective date of the judgment was December 8, 2010, the date the Order for Deficiency Judgment was entered. (R. pp. 186-189) The lower court granted Respondent’s Motion, and this appeal followed.

STANDARD OF REVIEW

An order granting a temporary injunction is directly appealable. Curtis v. State, 345 S.C. 557, 549 S.E.2d 591 (2001). The decision to grant injunctive relief is discretionary, and therefore, a reviewing court will not disturb the grant or denial of an injunction by the trial court absent an abuse of discretion demonstrating that the order is clearly erroneous. Atwood Agency v. Black, 374 S.C. 68, 72, 646 S.E.2d 882, 884 (2007). The appellate court must decide whether the facts support the temporary injunction and whether the injunction is reasonably necessary to protect the rights of the moving party. Id. The reviewing court may assess the merits of the action only to the

¹ See S.C. Code Ann. § 15-39-20 (“Writs of execution for the enforcement of judgments shall conform to this Title. The party in whose favor judgment has been given and, in case of his death, his personal representative duly appointed, may at any time within ten years after the entry of the judgment proceed to enforce such judgment as prescribed by this Title.”); S.C. Code Ann. § 15-39-30 (“Executions may issue upon final judgments or decrees at any time within ten years from the date of the original entry thereof...”).

extent necessary to determine if there is a *prima facie* showing to support the temporary injunction.

Id.

ARGUMENT

- I. **The lower court erred in enjoining Appellant from collecting the judgment at issue because the personal judgment against Respondent was entered on December 8, 2010, not August 16, 2010, and therefore was not stale at the time Appellant sought to enforce it.**

The lower court erred in finding that Respondent was likely to succeed on the merits of her claim that the personal money judgment against her was entered in August 2010 and not in December 2010. This error stems from the lower court's failure to recognize that there are two methods by which a creditor may obtain a deficiency judgment in a foreclosure action and that the MIE in this matter utilized the second method, delaying the entry of a deficiency judgment against Respondent until after the foreclosure sale occurred. The first method is set forth in S.C. Code Ann. § 29-3-650 which allows the court to grant a money judgment against a debtor for the entire amount due on the debt and, in the same order, direct that the mortgaged property be sold. S.C. Code Ann. § 29-3-650 provides:

The court may also render judgment against the parties liable for the payment of the debt secured by the mortgage and direct at the same time the sale of the mortgaged premises. Such judgment so rendered may be entered and docketed in the clerk's office in the same manner as other judgments. Upon the sale of the mortgaged premises the officer making the sale under the order of the court shall credit upon the judgment so rendered for the debt the amount paid to the plaintiff from the proceeds of the sale.

The second method for obtaining a deficiency judgment is set forth in S.C. Code Ann. § 29-3-660, which allows the court to order that the property be sold and to order that the mortgagor/guarantor pay any part of the debt remaining unsatisfied after the sale. Under this second method, after the sale, the court determines the amount of the deficiency and enters it as a money judgment against the debtor. S.C. Code Ann. § 29-3-660 provides:

In actions to foreclose mortgages the court may adjudge and direct the payment by the mortgagor of any residue of the mortgage debt that may remain unsatisfied after a sale of the mortgaged premises in cases in which the mortgagor shall be personally liable for the debt secured by such mortgage 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 residue 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.

It is up to the court's discretion whether to render personal judgment against a debtor before or after a foreclosure sale. See Bartles v. Livingston, 282 S.C. 448, 459, 319 S.E.2d 707, 714 (Ct. App. 1984) (setting forth a history of South Carolina's foreclosure procedures and statutes); White v. Douglas, 128 S.C. 409, 123 S.E. 259 (1924) (statute gives discretion to grant personal judgment at time of foreclosure decree or after sale); Hughes v. Slater, 209 S.C. 168, 179-80, 39 S.E.2d 509, 513 (1946) ("it is discretionary with the trial judge making the decree whether or not he will order a personal judgment in the decree of foreclosure and sale").

A review and comparison of the four-corners of the August 2010 Foreclosure Order and the December 2010 Order for Deficiency Judgment compels the conclusion that, in this particular foreclosure action, the MIE utilized the method provided by S.C. Code Ann. § 29-3-660. "A judgment represents a judicial declaration that a judgment debtor is personally indebted to a judgment creditor for a sum of money." Wells v. Sutton, 299 S.C. 19, 22, 382 S.E.2d 14, 16 (Ct. App. 1989). The MIE entered a personal money judgment against Respondent in only one of those orders: the December 2010 Order for Deficiency Judgment. The Order for Deficiency Judgment, on its face, is clearly a stand-alone judicial declaration ordering "that the [creditor] have judgment against ... [Respondent] in the sum of \$55,297.74, plus interest accruing thereon from and after November 18, 2010², at the legal rate of interest for judgments." Moreover, the Order for

² This is the date the foreclosure sale took place.

Deficiency Judgment is devoid of any indication that it was crediting or revising any prior judgment. This is for good reason: no prior order, specifically, the August 16, 2010, Foreclosure Order, entered a money judgment against Respondent.

Review of the Foreclosure Order also shows that it does not enter a personal judgment against Respondent for any sum certain. It orders foreclosure, and orders that, should the foreclosure sale result in a deficiency, a judgment against Respondent for that deficiency would then be entered. It does not contain or enter a money judgment against Respondent upon which an execution could even issue. This is because an execution must contain “the amount of the judgment if it be for money” and no judgment against Respondent in any amount or sum certain is set forth in the Foreclosure Order. See S.C. Code Ann. § 15-39-80 (contents of executions). It also contains no language to the effect that the proceeds of the foreclosure sale would be applied to pay the indebtedness.

Respondent argued to the lower court that the foreclosure complaint requested judgment be entered against Respondent for the full amount found to be due. (R. p. 401, l. 19-24.) That the creditor requested the judgment for the “Total Debt” be entered against Respondent is acknowledged by the MIE in the Foreclosure Order. (R. p. 12) However, what the creditor requested in its foreclosure complaint is irrelevant because, as set forth above, it is ultimately left to the court’s discretion as to whether it will proceed under S.C. Code Ann. § 29-3-650 or § 29-3-660, and in this case, the MIE elected the latter.

In support of her argument, Respondent cites to the Foreclosure’s Order calculation of the “Total Debt” and its determination that this is the total amount due to the Plaintiff. (R. p. 403, l. 7 – p. 404, l. 1.) The inclusion of these determinations is not tantamount to a personal judgment

being entered against Respondent for a sum certain, just as a finding that Respondent is *liable* for the total amount is not the *entry* of a judgment against Respondent for that total amount.

Respondent also relies on the Charleston County Clerk of Court's Affidavit, which she submitted prior to the second hearing. In her affidavit, Mrs. Armstrong states that the "official public record of the Charleston County Clerk of Court" reflects that a judgment in the amount of \$345,024.13 was entered against Respondent on August 16, 2010, and that pursuant to the Order for Deficiency Judgment filed on December 8, 2010, the judgment amount was amended to \$55,297.74. (R. p. 260, ¶ 4.) Curiously, Mrs. Armstrong also endorsed the Execution of Judgment, ordering the Charleston County Sheriff's Office to execute the December 8, 2010, Order for Deficiency Judgment. (R. p. 355) Regardless, how the judgment(s) were characterized by the clerk cannot alter what the judgments actually state.

For purposes of comparison, in Appellant's Supplemental Memorandum of Law in Opposition to Plaintiff's Motion for Preliminary Restraining Order and Injunction, language from foreclosure orders in other cases in which the courts utilized the procedure set forth in S.C. Code Ann. § 29-3-650 and entered a judgment against the debtor for the total amount due at the same time foreclosure was ordered was included. One example was from the Wells Fargo Bank, N.A. v. Singleton, et. al. (Chas. Cty. 2012-CP-10-4235) matter:

<p>62. Plaintiff shall be granted judgment against Borrower in the amount of \$507,467.17, the Total Debt. Such judgment shall be entered and docketed in the Clerk of Court's office immediately and in the same manner as other judgment pursuant to South Carolina Code Ann. § 29-3-650. Upon sale of the subject property, this judgment shall be credited the amount paid to Plaintiff from the proceeds of the sale.</p>
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(R. pp. 264, 279, ¶ 62.) Another example is the Judgment of Foreclosure and Order for Sale in the matter of Security Federal Bank v. Galleria Irmo, LLC, et. al. (Richland County, 2014-CP-40-4329):

12. That Plaintiff shall have judgment of foreclosure. That Plaintiff shall have judgment against Defendant Galleria Irmo, LLC for the full amount found to be due Plaintiff on the Notes and Mortgages, which judgment shall be reduced by the net proceeds of sale pursuant to S.C. Code Ann §29-3-650, as amended, as determined by this Court in a subsequent Order for Deficiency Judgment. Plaintiff may waive any of its rights prior to sale, including its right to a deficiency judgment in accordance with Rule 71, South Carolina Rules of Civil Procedure. Plaintiff's waiver shall be made in writing.

(R. pp. 265, 296, ¶ 12) A final example from Bank of S.C. v. Knight-Truesdell, et al. (Kershaw County, 2012-CP-28-1170):

5. That pursuant to S.C. Code Ann. § 29-3-650 (1976) Plaintiff is entitled to an immediate personal judgment, against Defendant Betsy Olivia Knight-Truesdell as Personal Representative of Estate of David Jeffrey Truesdell, Deceased, for the total amount shown in Paragraph 17, *supra*, with said judgment subject to a credit in an amount equal to the proceeds from the sale of the mortgaged property described below.

(Supp. Memo., pp. 266, 317, ¶ 5.) No such language can be found anywhere in the August 2010 Foreclosure Order at issue in this case, further compelling the conclusion that the MIE used the procedure provided by S.C. Code Ann. § 29-3-660 and did not enter a deficiency judgment, or any judgment, against Respondent for a sum certain until the December 2010 Order for Deficiency Judgment following the sale of the mortgaged property. Pursuant to S.C. Code Ann. § 29-3-660, Appellant is entitled to “enforce such judgment as in other cases.”

CONCLUSION

In conclusion, no personal judgment for a sum certain was entered against Respondent until the December 2010 Order for Deficiency Judgment. As such, Respondent is not likely to succeed on the merits of her claims that the August 2010 date of the Foreclosure Order is the date from

which the ten-year enforcement period began to run or that the judgment against Respondent was stale at the time Appellant sought to enforce the same. Therefore, the lower court erred in issuing the injunction to stop the enforcement of the judgment.

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that Appellant’s Final Brief complies with Rule 211(b),
SCACR.

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