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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Joseph M. Strickland, Master-In-Equity

Case No. 2017-CP-40-06634

The Homestead Property Owners Association, Inc.,Respondent,

v.

Wanda J. Miller & Orlando F. Miller,Appellants.

PETITION FOR REHEARING

Pursuant to Rules 221 and 240, SCACR, Respondent The Homestead Property Association, Inc. (“Respondent”) hereby petitions this Court to rehear its Unpublished Opinion No. 2021-UP-124, filed April 21, 2021 (“the Opinion”).

This Court overlooked or misapprehended the facts concerning Appellants’ default when the Opinion stated “it is undisputed the Master gave the Millers leave to file an answer.” This Court also overlooked or misapprehended relevant and controlling precedent that requires, at minimum, sufficient evidence in the record to support the trial court’s decision that Appellants’ default had been lifted where the record is devoid of any such evidence.

Finally, Respondent submits this Court erred by discussing the merits of the foreclosure proceeding in the Opinion when it was not before the Court, and the Court never addressed the Order Granting Respondent's Motion for Summary Judgment as to Appellants' Counterclaims.

ARGUMENTS

I. This Court overlooked or misapprehended the facts when the Court found it was "undisputed" Appellants' default was set aside when the record is devoid of any evidence this occurred.

A. Appellants' default was certainly disputed by Respondent at the initial hearing, briefs presented to this Court, and at Oral Argument.

The Opinion in this case provided "it is undisputed the Master gave the Millers leave to file an answer." However, the fact that Appellants are in default has been asserted by Respondent since the hearing on its Motion for Summary Judgment that was heard by the Master on July 30, 2018. (R. p. 114: ll. 6-20; pp.126-127 ll. 18-18).

Further, Respondent's first argument in its brief presented to this Court was titled: "Appellants incorrectly assume default was set aside despite a lack of evidence in the record to support such a conclusion." In this section, Respondent argued as follows:

As set forth in their Initial Brief, Appellants' first and second statements of the issues on appeal erroneously assume default was lifted. Appellants' sole basis for this belief is the Master's *sua sponte* statement that they could file an Answer made during a hearing that occurred without a court reporter; therefore, there is no record of those proceedings for this Court to review. While Respondent does not dispute this *sua sponte* statement was made, no evidence exists in the record supporting that this statement, in and of itself, was intended by the Master and/or effectively set aside the default originally entered against Appellants. Further, no evidence in the record (or lack thereof) supports such a finding. At worst, the record is unclear as to whether or not the default was lifted.

Amended Final Brief of Respondent p. 7

Finally, Respondent presented the default issue as an additional sustaining ground during the Oral Argument in this case that occurred on March 4, 2021.

Based on the above, Respondent believes the Court overlooked or misapprehended Respondent's arguments when it found "it is undisputed the Master gave the Millers leave to file an answer" as the Appellants' default has certainly been in dispute. As a result, Respondent submits the default should still be in effect, and the matter should be returned to the Master to finalize the foreclosure proceedings. In the alternative, the case should be remanded to the Master to determine if the default should be set aside pursuant to Rule 55(c), SCRCF.

B. South Carolina precedent requires a formal Order or enough evidence in the record to support the trial court's decision to set aside a default. Neither exist in this Record on Appeal.

Respondent believes the Court overlooked or misapprehended Respondent's arguments and the record when it found "it is undisputed the Master gave the Millers leave to file an answer" as there is no order from the lower court nor is there enough information in the record from the lower court to support the assertion that Appellants' default was set aside. In fact, the hearing where the default was allegedly set aside was not recorded; therefore, there are no findings that are available to support such an assertion.

The standard for granting relief from an entry of default is "good cause" as prescribed by the South Carolina Rules of Civil Procedure. Rule 55(c), SCRCF ("For good cause shown the court may set aside an entry of default"); see Wham v. Shearson Lehman Bros., Inc., 298 S.C. 462, 465, 381 S.E.2d 499, 501 (Ct. App. 1989) (explaining the standard for granting relief under Rule 55(c) is "good cause"). "This standard requires a party seeking relief from an entry of default . . . to provide an explanation for the default and give reasons why vacation of the default entry would serve the interests of justice." Sundown Operating Co. v. Intedgen Indus., Inc., 383

S.C. 601, 607, 681 S.E.2d 885, 888 (2009). "Once a party has put forth a satisfactory explanation . . . the trial court must also consider [the Wham factors]: (1) the timing of the motion for relief; (2) whether the defendant has a meritorious defense; and (3) the degree of prejudice to the plaintiff if relief is granted." Id. at 607-08, 681 S.E.2d at 888 (citing Wham, 298 S.C. at 465, 381 S.E.2d at 501-02). However, a trial court is not required to make specific findings of fact for each factor if there is sufficient evidence in the record to support the trial court's decision. Sundown, 383 S.C. at 608, 681 S.E.2d at 888. The decision whether to set aside an entry of default is within the sound discretion of the trial court. Williams v. Vanvolkenburg, 312 S.C. 373, 375, 440 S.E.2d 408, 409 (Ct. App. 1994).

While case law does provide that a trial court is not required to make specific findings of fact for each Wham factor if there is sufficient evidence in the record to support the trial court's decision, here, the trial court never even believed it had lifted the default and there is insufficient evidence in the record to support such a belief. (R. p. 105, ll. 5-14).

The Order of Reference and Affidavit of Default for each Appellant were filed on January 23, 2018. (R. p. 32; p. 25). However, Appellants did not attempt to set aside the default until May 14, 2018 which was also their first appearance in the case, and an answer was not filed until June 1, 2018. (R. pp. 47-51). Notably, no Order was or has been issued by the Master concerning the default.

For the Appellants' jury trial demand to be proper and Appellants' case to be restored to the general docket in circuit court, the default would still have to be lifted. However, no evidence in the record suggests this occurred.

As the default was never lifted, Appellants could not file a timely or effective jury trial demand or a valid answer. As no Order or transcript from the hearing where the default was allegedly lifted exists, Appellants are still in default.

As such, this case should be remanded to the Master-In-Equity to allow him to proceed with the foreclosure proceedings because Appellants are still in default or, in the alternative, the case should be remanded to the Master to hold a hearing on whether Appellants are relieved from default pursuant to Rule 55(c), SCRCF.

II. The Court overlooked and/or did not address Respondent's Motion for Summary Judgment as the Master had the authority to hear Respondent's Motion because the referral was proper.

Appellants rely on S.C. Cmty. Bank v. Salon Proz, LLC, 420 S.C. 89, 800 S.E2d 488 (Ct. App. 2017), to support the assertion that the Order of Reference to the Master-in-Equity was improper; however, the facts presented to this Court in Salon Proz are easily distinguishable to those at issue in the present case.

In Salon Proz, a bank filed a foreclosure action against a salon for defaulting on a note and a mortgage. In response, the salon filed an Answer which raised several counterclaims in addition to a timely jury trial demand. The bank filed a Motion to refer the case to the local Master-in-Equity under Rule 53, SCRCF, and the Clerk of Court incorrectly signed and filed an Order which referred the case to the Master despite the salon's timely filed answer, legal counterclaims and jury trial demand. See id. at S.C. 92. However, this Court held that the case should not have been referred due to the salon's jury trial demand in its Answer that was timely filed to begin with.

Here, the Order of Reference and Affidavit of Default for Appellants assert they were not afforded an adequate amount of time to conduct discovery; however, no additional amount of

time for discovery would have led to any materials, affidavits or other documents that could refute the direct testimony of Appellants. Appellants unequivocally testified they owed a debt to Respondents and made no payments to Respondent to satisfy or reduce the amount of the debt owed. (See R. p. 214, ll. 12-25; p. 216, ll. 16-23; p. 329, ll. 10-15).

Unlike the salon in Salon Proz, Appellants did not have a timely jury trial demand or an answer that was timely filed when the Order of Reference was signed by the Clerk; therefore, the referral was proper. As the referral was proper, the South Carolina Rules of Civil Procedure conferred jurisdiction the lower court to hear Respondent's motion, which was granted. ("[T]he master...shall exercise all power and authority which a circuit judge sitting without a jury would have in a similar matter." Rule 53, SCRCP).

Therefore, the lower court's Order should be affirmed as to Appellants counterclaims against Respondent because the matter was properly before the Master, and the Rules of Civil Procedure provided him the ability to hear Respondent's Motion. As a result, the Court should affirm the Master's ruling on Respondent's Motion and return the case to the Master to proceed with the foreclosure hearing.

III. The Court erred by including dicta from the Winrose case as the foreclosure is not and was not before the Court

Respondent respectfully states that the Court's inclusion of the dicta from Winrose Homeowners' Ass'n v. Hale, 425 S.C. 563, 837 S.E.2d 47 (2019) in the Opinion is improper because the foreclosure action is not before the Court because it is still pending before the Master-In-Equity.

To the extent the Court believes the foreclosure is before it, the Appellants did not make the argument the foreclosure was initiated “to exploit property owners” to the trial court.

Further, Respondent was not given the opportunity to develop a complete record regarding other methods it used to attempt to collect this debt before resorting to foreclosure because the foreclosure is still pending. Despite the inability to develop a full record on the foreclosure, the evidence in the record would still indicate this foreclosure suit was not “swiftly invoked” or initiated for any purpose other than to collect a debt the Appellants admit they owed.

While the Court correctly noted that the restrictive covenants authorize Respondent to file a lien and foreclosure for any debt not paid within thirty days, the opinion fails to recognize that the Appellants were over three years in arrears to Respondent at the time it filed the lien and over four years in arrears at the time it filed suit. (R. pp. 18, 70).

The opinion also states that Appellant attempted to pay the principal debt, however the record demonstrates that Appellant Orlando Miller admitted he never attempted to pay the full balance due (R. p. 343 l. 15-17). While Mr. Miller originally claimed he offered to pay \$800, he was unable to present any evidence to support that claim, admitted the emails in evidence did not show any offer to pay \$800, and ultimately conceded that he was unaware of any offer to pay the assessment balance in a lump sum. (R. p. 346, l. 11-23; R. p. 351, l. 18-25).

Finally, while the opinion states that the Appellants offered several repayment plans to Respondent, it fails to acknowledge that Respondent similarly offered its own repayment plans to Appellants without success. (R. p. 347, l. 8-15; R. p. 351, l. 4-17; R. p. 353 l. 1-2).

The concerns noted in Winrose simply aren’t present in this case. The “business model” discussed in Winrose centered around the practices of the third-party bidder, Regime Solutions, whose stated practices were to purchase properties at homeowners’ association foreclosure sales

and sell them back to the original owners for a profit. There is no similar allegation in the case before the Court. Instead, the only evidence in the record is that a non-profit homeowners' association levied annual assessments of \$180 against all of its members. The Appellants admittedly did not pay their fair share for over three years before the Respondent retained legal counsel to assist in collection. When the Appellants continued to not pay for an additional 18 months, Respondent authorized foreclosure of its lien.

In the suit Respondent merely sought the charges authorized by the contract between the parties. While Respondent was under no legal obligation to accept anything less than the full balance due, Respondent offered several repayment options to Appellants in an attempt to resolve the matter, however the Millers refused those offers. Rather than coming to an agreement for a repayment plan with Respondent, the Appellants retained counsel to file an Answer and Counterclaim with factual allegations the Millers admit are completely false. (R. p. 214, ll. 12-25; R. p. 216, ll. 16-23; R. p. 329, ll. 10-15; R. p. 341, ll. 18-23).

Based on the evidence in the record, it cannot be said that Respondent was engaged in some improper business model designed to exploit its homeowner members. Nor can it be said that initiating suit after four years of collection attempts was "swiftly" invoked.

For this reason, Respondent submits it was improper to include references to the foreclosure action because the record for the foreclosure action is undeveloped and it was not before the Court. As a result, Respondent requests the Court remand the case the Master to conclude the foreclosure proceedings.

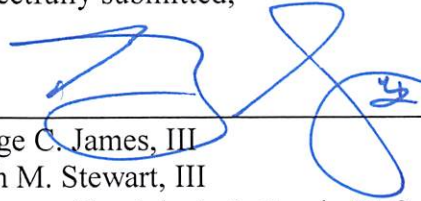
CONCLUSION

The Opinion overlooked or misapprehended the fact that the Appellants are still in default. Respondent disagrees with the Opinion's finding "it is undisputed the Master gave the Millers leave to file an answer" as this has been in dispute throughout nearly the entirety of this case. Further, the Court failed to address the Respondent's Motion for Summary Judgment when it was properly before the Master. Finally, the Court erred by addressing the pending foreclosure action in this case when it was not before it.

Based on the foregoing, the lower court's order should be affirmed, and the matter should be returned to the Master-In-Equity to proceed with the foreclosure. In the alternative, the Court should determine the Appellants' default was never set aside, and return the matter to the Master-In-Equity to proceed with the foreclosure and to determine whether the default was set aside.

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Respectfully submitted,

A handwritten signature in blue ink, appearing to be "G. James, III", written over a horizontal line.

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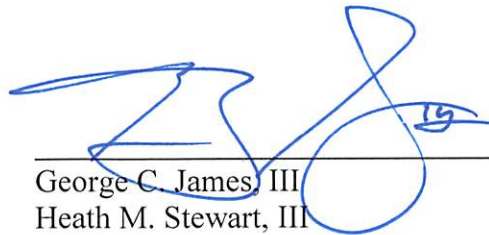
PROOF OF SERVICE

I certify that I have served the Petition for Rehearing on the attorneys of record, by depositing a copy of the same in the United States Mail, postage prepaid, on the 6th day of May, 2021 addressed as noted below,

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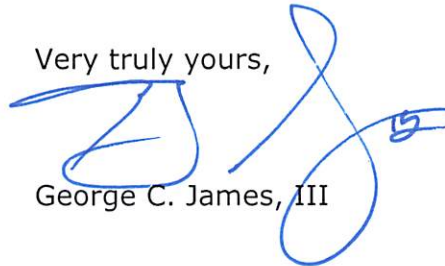
The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

RE: The Homestead Property Owners Association, Inc. vs. Wanda J. Miller &
Orlando F. Miller
Civil Action No.: 2017-CP-40-06634 (Richland)
Carrier Claim No.: 559765-GH
MGC File No.: 20302.18123

Dear Ms. Kitchings:

I hope you are doing well. Please find enclosed for filing an original and 7 copies of the Petition for Rehearing in the above-referenced matter. Also enclosed please find the filing fee in the amount of \$50.00 along with proof of service to Opposing Counsel.

Very truly yours,



George C. James, III

GCJ/_abb