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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

Joseph M. Strickland, Master-In-Equity

Case No. 2019-CP-40-03054

Appellate Case No. 2021-000852

Ex Parte: Alecia Havens.. Plaintiff/Appellant,

vs.

State Street Holdings, LLC...Respondent,

In Re:

AltaMonte Homeowners Association, Inc...Respondent,

vs.

Alecia Havens...Appellant.

REPLY BRIEF OF APPELLANT

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ARGUMENT

1. THE TRIAL COURT ERRED IN DENYING THE MOTION TO VACATE SALE BECAUSE THE APPELLANT DID NOT RECEIVE PROPER NOTICE OF THE PROCEEDINGS.

The Respondent State Street takes a flawed position when it posits in its brief that a good faith purchase for value erases the fundamental right to proper service of process. A good faith purchaser doesn't get a free pass or "get out of jail free" card because it was a "good faith purchaser for value."

The Respondent argues that §15-39-870 is the admission to the above-mentioned free pass, but that statute doesn't give a purchaser at a judicial sale a claim that anything that happened at or *during the underlying proceeding* is cured by a sale.

Havens, like any litigant, is entitled to contest service of process when appropriate. There is no excuse for a failure to give proper notice.

The Appellant contests service. Her affidavit and testimony are in the record. She did not receive the suit papers. When she did not receive her rent check in early 2020, she learned the home had been sold. She hired counsel and as part of that, she filed for the excess funds on January 21, 2020. She then prepared the Motion to Vacate the sale.

The Respondent's brief also ignores the fact that service of the Notice of Hearing pursuant to Rule 6(d) was not followed. The Notice of Hearing was allegedly sent to the Appellant on October 22, 2019, for a hearing scheduled for October 29, 2019, allowing only seven days' notice instead of the required ten days.

Furthermore, the Respondent's brief fails to address the fact that the Notice of Sale

wasn't filed until February 28, 2020, four months *after* the Notice was allegedly sent to the Appellant.

These glaring deficiencies in service of process show the flaws in the Respondent's brief. Service of process, all of it, including notices of hearings and sending Notices of Sale, is important. It was not followed here. The Respondent should not be rewarded for that failure.

ARGUMENT

II. THE TRIAL COURT ERRED IN DENYING THE MOTION TO VACATE SALE BECAUSE THE SALE PRICE SHOCKS THE CONSCIENCE OF THE COURT.

The Respondent completely ignores the holding in *Winrose vs. Hale* (428 S.C. 563, 837 S.E.2d 47 (2019) regarding the debt vs. equity methods of determining what would shock the conscience of the court. Rather than acknowledge that the Supreme Court has adopted the "equity method" in HOA foreclosures, the Respondent argues the "debt method" in an effort to show that the property had more debt than the Respondent expected.

Moreover, *Winrose* doesn't give a bright-line ruling on what shocks the conscience of a court. The standard before *Winrose* was an unwritten threshold of ten percent of the equity in a property. While *Winrose's* facts were well under the ten percent bid of the equity, the Supreme Court discussed the fact that ten percent of the equity may not be the threshold in the future:

> "South Carolina courts have not established a bright-line rule for what percentage of the sale price must be met with respect to the actual value of the property in order to shock the conscience of the court. However, as the court of appeals recently noted in an unrelated case, "a search of South Carolina jurisprudence reveals only when judicial

sales are for less than [10%] of a property's actual value have our courts consistently held the discrepancy to shock the conscience of the court." *Bloody Point Prop. Owners Ass'n, Inc. v. Ashton,* 410 S.C. 62, 70, 762 S.E.2d 729, 734 (Ct. App. 2014) (citation omitted). Because the parties have not argued for us to either formally adopt this threshold or choose a different threshold (as other states have done), we will analyze the sale of the Property using the 10% threshold as the measure of whether the sale shocked the conscience. *But see* Restatement (Third) of Prop.: Mortgages § 8.3 cmt. b ("Generally, a court is warranted in invalidating a sale where the sale price is less than 20[%] of fair market value and, absent other foreclosure defects, is usually not warranted in invalidating a sale that yields in excess of that amount."); *id.* at Reporter's Note cmt. b (collecting cases from other jurisdictions that use different thresholds, ranging from 10% to 40% of the value of the foreclosed property)." (*Winrose*, pages 50, 51)

The value of the property is disputed by the Respondent, but the Appellant testified that the home was worth One Hundred Thousand Dollars. Even after the post-sale payment of a judgment and tax lien not named in the foreclosure action which totaled Fourteen Thousand Two Hundred Thirty-One Dollars, Ms. Havens' equity would have been Eighty-Five Thousand Seven Hundred Sixty-Nine Dollars. If the Restatement of Mortgages quoted above in *Winrose* carries any weight, a bid of twenty percent would be over Seventeen Thousand Dollars. The bid here of Nine Thousand Three Hundred Dollars should shock the conscience of this court.

Another failure in the Respondent's brief is its refusal to discuss the unique nature of an HOA foreclosure and its inherent failure to name other creditors. It behooves an investor to examine the title before bidding. The *bid* at the auction and the *value* of the property are the important elements, not what the bidder has to pay *after* the bid.

HOA foreclosure properties are sold with a warning to the potential buyers. The Master's Report and Judgment of Foreclosure and Sale states in its Conclusions of Law:

" C. The sale shall be **subject to any mortgages representing prior liens** to that of the Plaintiff, taxes, and assessments, existing easements and restrictions of record, and any

senior encumbrances." (Emphasis added)

In a typical foreclosure of a *mortgage* lien, the creditor, usually a bank or mortgage company, names any superior or junior lienholders as *parties*. The reason for that is to clean the title when the property is sold. Therefore, when the auction is held, the buyer can count on a title that no longer has underlying liens.

The Respondent, an experienced investor, could have checked the title to the property. As stated above, an HOA foreclosure is sold subject to any liens. The truth is the payment of any lien by a bidder after the sale is part of the process. It is at the bidder's peril that liens are missed and lien holders are not named as parties. The sale is subject to those liens.

The Respondent's attempt to counter the Appellant's Motion to Vacate was to file an affidavit stating that the property was diminished in value because of needed repairs. Two things are in error with that argument. First, the bidder is a sophisticated risk taker. It knows, or should know, when a property is in poor condition. Second, that argument is questionable given Ms. Havens' live testimony and affidavit. She put eight thousand dollars of her funds into the property. She had been leasing it for a few months when the HOA foreclosure took place. There is no evidence of complaints by the tenant or a reduction of rent. Respondent's argument goes against the uncontested fact that Appellant's tenant was paying eight hundred dollars a month and the property management company identified and handled one problem with plumbing for which the Appellant paid to repair. (Trans. Nov. 12, 2020, Page 10-lines 18-25)

The first time she knew something was wrong was when the rent check in early 2020 didn't arrive. When learning the reason for no payment, she hired counsel and filed for

relief on January 21, 2020. Respondent received notice of that filing. It is interesting to note that by February 4, 2020, only fifteen days after her filing an appearance, the Respondent signed a contract to sell the property to a third party-- the very day that Havens filed her affidavit and Motion to Vacate. (Record)

While the Respondent claims the diminution of value on the property, the Appellant takes issue with that. The truth is HOA bidders are risk takers. HOA foreclosures have created a gambler's business. To diminish the value is the Respondent's weak attempt to avoid vacating of the sale because it discovered liens after the bid.

ARGUMENT

III. THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO VACATE THE SALE ON EQUITABLE GROUNDS.

Finally, the Respondent glosses over the equitable grounds for vacating the sale because the Respondent sold the property to a third party for less than it hoped while the Motion to Vacate was being heard.

It ignores the fact that the Appellant has lost ninety thousand dollars in equity. She has lost monthly income, been forced to abandon her educational goals, and has moved into a cheaper place to rent. To quote Chief Justice Beatty: "to allow the hard-earned equity to be confiscated by a bidder's minimal investment is unconscionable." *Winrose vs. Hale, id.*

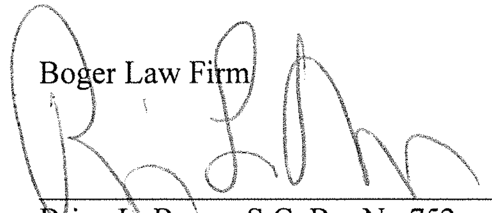
As mentioned in the Appellant's Initial Brief, there are processes now in place with some Masters-in-Equity revisiting the foreclosure with the possibility of saving homeowner's homes and equity before the sale is final. *(South Carolina Foreclosure Law Manual Fourth Edition*) Equitable remedies should be followed here.

CONCLUSION

The lower court erred when it denied the Appellant's Motion to Vacate the Sale because the Appellant was unaware of the lawsuit until after the sale. The sale price shocks the conscience of the court, and equity demands that the decision be overturned.

Respectfully submitted,

Boger Law Firm



December 3, 2021

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PROOF OF SERVICE

I certify that I have served Appellant's Initial Reply Brief on counsel for all parties in this case by depositing a copy in the United States Mail. Postage prepaid addressed as follows:

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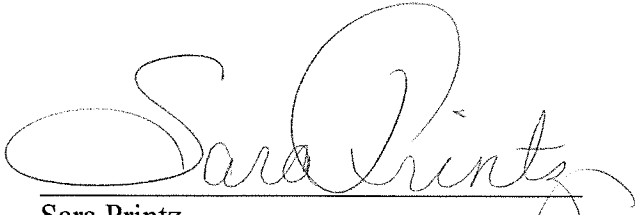
SIGNATURE PAGE TO FOLLOW



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