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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Master-in-Equity
Marvin Dukes, Master-in-Equity

2021-UP-443
Case No. 2011-CP-07-0340
Appellate Tracking No.: 2019-000047

T. D. Bank, N. A. Successor by merger to Carolina First Bank ……Respondent,

v.

Wilbert Roller, Jr., Betty V. Roller, and James Williams, ……....Defendants,

Of whom Wilbert Roller, Jr. and Betty V. Roller are the …….Appellants/Petitioners.

PETITION FOR REHEARING

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As authorized by Rule 221 of the *South Carolina Appellate Court Rules*, the Appellants/Petitioners, Roller's, respectfully request that the Court reconsider Opinion Number 21-UP-443 and grant the Appellant/Petitioner a Rehearing to amend its December 5, 2021, Opinion because the Court overlooks and misapprehends two important, settled principles of law and improperly shifts the burden of proof from a foreclosing bank seeking the entry of a deficiency judgment.

1. THE COURT OVERLOOKS THE GENERAL PRINCIPLE OF EQUITY JURISDICTION IN SOUTH CAROLINA EQUITABLE COURTS.

Any application for foreclosure is brought before the **Master-in-Equity**, which, as the name makes clear, is an equitable court. § 14-11-80, S. C. Code, ann. "The master shall make all such sales as the circumstances may require or as the court may order him to make in granting **equitable relief** and shall execute all proper conveyances thereof." (emphasis added) § 14-11-15, S. C. Code, ann. defines the jurisdiction of the Master-in-Equity: "The equity court is considered a division of the circuit court. . ." In *Cody Discount, Inc. v. Merritt* 368 S.C. 570, 629 S.E.2d 697 (Ct. App. 2006), this Court made clear that it will not permit inequitable results in matters of foreclosure. There, a finance company sought to evict the defendant from her mobile home when she owed less than $1,000.00 in fulfilling her contract of sale. (The seller also asserted a pretext that she did not have dedicated access for ingress/egress.) This Court remanded the case for a determination of what she owed but refused to allow the finance company to take advantage of the defendant because equity does not permit either forfeitures or penalties:

> The courts of South Carolina have long held that forfeitures or penalties are not favored in either law or equity. *Lewis v. Premium Inv. Corp.*, 351 S.C. 167, 172 568 S.E.2d 361, 363 (2002); *Ducworth v. Neely*, 319 S.C. 158, 162, 459 S.E.2d 896, 899 (Ct. App. 1995); see also *Litchfield Co. of South Carolina, Inc. v. Kiriakides*, 290 S.C. 220, 349 S.E.2d 344 (Ct. App. 1986); A*lexander*

v. Herndon, 84 S.C. 181, 65 S.E. 1048 (1909). Concomitantly, "a provision in an installment land contract declaring forfeiture in the event of purchaser default can, in particular circumstances, constitute a penalty." *Lewis*, 351 S.C. at 172, 568 S.E.2d at 364.

The opinion under review overlooks this fundamental principle because the Bank clearly seeks a penalty. Moreover, this Court overlooked that the present appeal is an appeal from an equitable case from in equity court and not an appeal from "the circuit court's denial of their motion to set aside a deficiency judgment against them." (Opinion 21-UP-443 at page 2, see Record on Appeal at page 39 for the operative Order being appealed.) At oral argument on this case, this principle of equity arose in colloquy with the Court, one member of the panel expressing sympathy for the Appellants/Petitioners but indicating that the Court's options are limited. When the discussion turns to the theory of equitable remedies and the power of law to provide them, such a discussion touches on that intersection between law and the philosophy of law. Plato said the purpose of law is to provide each citizen her due, a principle that dominated legal theory for the ensuing 2,500 years. The trial lawyer, Cicero expressed the same principal as: "Justice renders to everyone his due." "*Iustitia suum cuique distribuit.*" *De Natura Deorum*, II, 38.

On this subject of justice and equity, our modern day Cicero's, Professor Stephen Spitz and Judge Roger Young, wrote a law review article on this precise intersection in 2003. See Roger Young and Stephen Spitz, "SUEM—Spitz's Ultimate Equitable Maxim: In Equity, Good Guys Should Win and Bad Guys Should Lose," *South Carolina Law Review* (Vol. 55, Issue 1, Article 7) (2003) Judge Young and Professor Spitz warn that lawyers should not cite their article as authority in litigation on the one hand, but on the other hand, they articulate a set of principles, which they label as "predictive" of case outcomes, which is, in short, good guys should win in equity. Their article discusses how South Carolina courts apply the maxims of equity to litigation, and by

applying their analysis to the facts of this record, their article illuminates how inequitable it is for a foreclosing Bank to obtain an inflated deficiency judgment, a penalty, by suppressing its evidence of the property's value, which is in its sole possession to achieve an unjust inflation of its claim as the method to an inequitable result. Professor Spitz's and Judge Young's discussion of the principles of equity have special significance here because: (1) the case is one brought in equity (not in "circuit court"), and (2) the Master-in-Equity ignored the Bank's inequitable conduct, especially where the Record contains both a written appraisal that the property is worth over two million dollars (R.O.A. page 186) and a written offer to purchase, albeit contingent on rezoning and wetland delineation, for over five million dollars (R.O.A page 167). The Master-in-Equity allowed the foreclosing bank to withhold its evidence of value when that evidence would have probably undercut its desire for an inflated judgment. In the Opinion under review, the Court of Appeals misapprehended the basis of the Appellants/Petitioners' appeal and overlooked both controlling statutes and principles of equity and should, therefore, grant the Petitioners a rehearing in order that the Opinion under Review can be reconsidered and altered.

2. THE COURT OF APPEALS MISCONSTRUED THE BASIS FOR THE APPEAL AND THE PROCEDURAL HISTORY OF THE CASE.

In the Order under review, the Court correctly sets forth the standard for appeals and correctly identifies the statute, § 20-3-750, S. C. Code, ann., granting a landowner the right to appeal an appraisal judgment. However, the Court misapprehends the factual procedural history of the case and ignores the undisputed fact that the Appraisal Report has never been reduced to judgment. The Record demonstrates the three appraisers filed their report on July 27, 2018, opining that the property was worth $900,000.00. (R.O.A. 34) On August 29, 2018, 33 days later—but before the Appraisal Report was reduced to judgment—the Appellants/Petitioners filed a motion to set aside the Bank's

application for a deficiency because it suppressed evidence, preventing the Appraisal Board from seeing all the evidence. See Record on Appeal pages 245-249. The Master-in-Equity gave the Rollers' application for relief, based on the Bank's misconduct, short shrift and entered an Order on October 26, 2018, which is in the Record on Appeal at pages 39 – 43, denying the request because it found it (1) time-barred, (2) insufficient evidence of fraud in the record, and (3) the Court's lack of discretion to order equitable relief.

Taking the Master-in-Equity's conclusions in reverse order demonstrates all three are erroneous. First, as discussed in Issue No. 1 above, it is beyond question that an equitable court has not only the statutory equitable power to grant equitable relief under § 14-11-15 cited above, but also under Rule 60 of the *South Carolina Rules of Civil Procedure*. Second, the record contains sufficient evidence of fraud because the Bank suppressed its own appraisal and the Master-in-Equity erred in allowing them to do so. The Bank's mortgage document reflects that not only does the Bank possess a written appraisal, but also it compelled the Rollers to pay for it as a condition of borrowing money. See Record on Appeal page 99, ¶ 5(A): "The following fees are earned when collected and will not be refunded if I prepay this Note before the scheduled maturity date . . . Appraisal. An appraisal fee of $1,500.00 payable from separate funds on or before today's date." This fact—the Bank's suppression of relevant evidence—alone justifies granting the Appellants/Petitioners' Petition for rehearing.

Third, and most important, the Master-in-Equity overlooked its own statutory procedure in deciding the application was time barred. Both the Master-in-Equity and this Court are correct that an appellant has ten days **from the entry of judgment** to file an appeal. However, the statutory scheme that allows for deficiency judgment does not start the clock on an Appellant until the Master-

in-Equity, through the Clerk of Court, enters the judgment, which has never occurred. See *Christy v. Christy*, 354 S.C. 203, 580 S.E.2d 444 (2003): "Until the paper has been delivered by the judge to the clerk of court, to be filed by him as an order in the case, it is subject to the control of the judge, and may be withdrawn at any time before such delivery." *Archer v. Long*, 46 S.C. 292, 24 S.E. 83 (1896); see also *e.g., Bowman v. Richland Mem. Hosp*., 335 S.C. 88, 515 S.E.2d 259 (Ct. App. 1999)(citing *Archer v. Long*); compare Rule 58 (a), *SCRCP* ("A judgment is effective only when . . . entered on the record") Until then, the Appraisal Report is nothing more than evidence. See § 29-3-740, S. C. Code, ann.: "The return of the appraisers shall be filed and recorded by the clerk as a judgment of the court and be subject to appeal as hereinafter provided." The following section, § 29-3-750 is the ten-day limitation period upon which the Master-in-Equity prematurely relied. These statutes must be harmonized, and the only rational conclusion is that the Master-in-Equity misapplied § 29-3-740 and ignored Rule 60, and this Court overlooked these controlling principles of law.

The language must also be read in a sense which harmonizes with its subject matter and accords with its general purpose. *Municipal Assn of South Carolina v. AT&T Communications of S. States, Inc.*, 361 S.C. 576, 580, 606 S.E.2d 468, 470 (2004) (citing *Hitachi Data Sys. Corp*., 309 S.C. at 178, 420 S.E.2d at 846). (City could impose 5% late fee on late payments for utilities)

See also *Hodges v. Rainey*, 341 S.C. 79, 533 S.E.2d 578 (2000) (Legislature authorized Governor or removed members of Santee Cooper Board of Directors)

The goal of statutory construction is to harmonize conflicting statutes whenever possible and to prevent an interpretation that would lead to a result that is plainly absurd. *Ray Bell Constr. Co. v. School Dist. of Greenville Co*., 331 S.C. 19, 501 S.E.2d 725 (1998).

As a result, both the Master-in-Equity and this Court misconstrued and overlooked the Appellants/Petitioners' basis for attack on the Respondent's suppression of evidence, which they brought under Rule 60 based on an allegation of the Bank's fraud. The Master-in-Equity mistook this

motion for an appeal from the Appraisal Report, for which the time period to appeal has not begun to run, and this Court compounds the error by failing to address the central issue in the case, which is: Can a Bank profit from its own wrongdoing in and equitable action in an equitable court?

As discussed throughout this Petition, both the Master-in-Equity and this Court misapprehended the thrust of the Appellants/Petitioners' August 29, 2018, Motion, which Appellants/Petitioners grounded on Rule 60(b)(3) of the *South Carolina Rules of Civil Procedure*:

> . . . the Rollers are not "appealing" a decision of the Court; they are raising an objection to the record being incomplete, and because the objection is based on an allegation of fraudulent suppression of relevant evidence, the Rollers could raise the objection for up to one year after judgment is entered. See Rule 60(b)(3) of the *South Carolina Rules of Civil Procedure*. The defendants are raising the objection at the earliest possible time and seek nothing more than the right to create a full and fair record of the Court's decision.
>
> R.O.A. page 248 [Petitioner's Motion to Vacate Demand for Deficiency]

The Master-in-Equity never addressed the Petitioners' legal issues, and when it failed to do so, the Appellants/Petitioners filed a detailed Motion for Reconsideration at Record on Appeal page 289, setting out specifically what the Master-in-Equity overlooked and misapprehended. The Master-in-Equity denied this motion by way of a form Order without explanation.

Conclusion

For the above reasons, the Appellants/Petitioners respectfully submit the Court of Appeals overlooked these important controlling legal considerations and misapplied the equitable powers of the Court and the requirement of § 27-3-740, S. C. Code, ann. to the facts in this case. The imposition of such a large deficiency penalty on property so obviously worth at least the amount of the loan is unjust and inequitable and not in keeping with the General Assembly's protection for citizens who pledge property as collateral for loans, especially where the Bank suppresses evidence as it did here. The Appellants/Petitioners therefore pray that the Court reconsider its

decision and grant the Appellants/Petitioners a rehearing in order to amend Opinion 2020-UP-238 to prevent T.D. Bank from profiting from its own wrongdoing and obtaining an unjust result, which is not a result the General Assembly intended when it devised a statutory scheme to protect South Carolina citizens from what amounts to a type of predatory lending.

Respectfully submitted,

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Of whom Wilbert Roller, Jr. and Betty V. Roller are the ……...Appellants.

PROOF OF SERVICE

I certify that I have served the Petition for Rehearing on the Respondent, T. D. Bank, N.A., by depositing a copy of it in the United States Mail, postage prepaid, on December 21, 2021, addressed to its attorney of record, Matthew Tillman, Womble Bond Dickinson (US) L.L.P., 5 Exchange Street, Charleston, S. C. 29401.

December 21, 2021

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December 21, 2021

Hon. Jenny Abbott Kitchings
Clerk of Court,
South Carolina Court of Appeals
1220 Senate Street
Columbia, S. C. 29201

Re: Petition for Rehearing
T. D. Bank v. Roller, Appellate Tracking Number: 2019-000047

Dear Ms. Kitchings,

I enclose an original and five copies of the Appellants' Petition for Rehearing. I have filed this electronically and provided a copy both electronically and by regular mail to opposing counsel. I also enclose our firm's check, No. 19777, in the amount of $50.00 to cover this filing. Please let me know if anything further is required to perfect the filing. I thank you in advance for your attention to this request. With kind regards, I am

Very truly yours,

BELK, COBB, INFINGER & GOLDSTEIN, P.A.
Thomas R. Goldstein

Enclosure: Petition for Rehearing, proof of service, check No. 19777

cc: Matthew Tillman (with enclosure)