THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Charles B. Simmons, Jr., Master in Equity

Appellate Case No. 2012-213505

Wells Fargo Bank, N.A.,

Respondent,

v.

Lynn D. Simpson; Wells Fargo Bank, NA (Charlotte, NC); The Lofts at Mills Mill Condominium Owners Association, Inc.,

Defendants,

Of whom Lynn D. Simpson is the

Appellant.

AMENDED INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. Whether the Master-in-Equity erred in denying Appellant's motion for relief from order of foreclosure and sale by ruling the stay imposed by the South Carolina Supreme Court Administrative Order 2011-05-02-01 dated May 2, 2011 does not toll the time for a Defendant to file a motion for relief from order of foreclosure and sale pursuant to Rule 60(b)(5) of the South Carolina Rules of Civil Procedure.

STATEMENT OF THE CASE

On September 30, 2010 the Summons and Complaint in the above-referenced residential mortgage foreclosure action was filed in the Court of Common Pleas for Greenville County.

On or about November 18, 2010, an Affidavit of Default and Non-Military Service was filed as to Appellant in the above-captioned matter and on November 30, 2010 a hearing was held in the above-captioned matter. Appellant was not present. The Master-in-Equity issued an Order of Judgment and Foreclosure and Sale on December 5, 2011.

On January 4, 2011, the subject property was sold and Respondent was the highest bidder.

On February 1, 2011 Appellant filed a motion for relief from judgment and order of foreclosure and sale on alleging improper service.

By Order dated April 14, 2011, the Master-in-Equity for Greenville County found service on Appellant was proper but set aside the sale of January 4, 2011 and declared the resulting deed void. (Order of the Honorable Charles B. Simmons, Jr dated April 14, 2011 at p. 2). The reason given for setting aside the sale and declaring the deed void was:

> The Court is concerned relative to the behavior and actions of [Respondent] relative to Mrs. Simpson while its attorneys were proceeding, as directed by Wells Fargo, to foreclose. [...] In that Wells Fargo was directing its attorneys to take action totally inconsistent with what it was instructing Defendant Simpson to do, the Court simply cannot sanction such inconsistent behavior.

(Id. at. p. 1.) The Court further instructed the parties to engage in loss mitigation efforts. (Id.).

On May 2, 2011, while the parties were exploring loss mitigation options, the South Carolina Supreme Court issued Administrative Order 2011-05-02-01 (hereinafter the "Administrative Order").

On August 1, 2012, Respondent, by and through its counsel of record, filed an Attorney Certification stating that Appellant did not qualify for any foreclosure intervention as contemplated by the Administrative Order.

On September 25, 2012, a hearing was held and the Master-in-Equity issued a Supplemental Order Post Judgment dated September 25, 2012 ordering the property subject to the foreclosure suit be sold under the terms of the original Judgment of Foreclosure and Sale.

On October 26, 2012, Appellant filed a second Motion for Relief from Order of Foreclosure and Sale.

By Order dated November 6, 2012, Appellant's motion was denied. In the order denying Appellant's second motion for relief from order of foreclosure and sale, the Honorable Charles B. Simmons, Jr., Master-in-Equity for Greenville County, found an unreasonable delay in Appellant bringing her motion before the Court. The Order states, "I find that the Defendant Simpson failed to bring the instant motion within a reasonable time." (Order of the Honorable Charles B. Simmons, Jr. dated November 6, 2012 at p.2) The Master-in-Equity further found:

> Simpson's time to make a 60(b)(5) motion was not tolled by the Foreclosure Intervention process, and that the time during which the matter was stayed for Foreclosure Intervention should also be considered as part of Simpson's delay in seeking relief under Rule 60(b)(5).

(Id. at p.3).

On November 19, 2012, Defendant filed her Notice of Appeal with this Honorable Court and served said Notice of Appeal on Benjamin James Powell of Rogers, Townsend & Thomas, PC, attorneys for respondent and the Honorable Paul B. Wickensimer, Clerk of Court for Greenville County.

ARGUMENT

This case presents a matter of first impression for this Court to decide; specifically, whether the stay imposed by the Administrative Order tolls the time for a Defendant to file a motion for relief from an order of foreclosure and sale until the Plaintiff certifies compliance with the Administrative Order.

I. Standard of Review.

The standard of review of an order denying a motion for relief under Rule 60(b)(5) is abuse of discretion. See Thompson v. Hammond, 299 S.C. 116, 119, 382 S.E.2d 900, 902-03 (1989). "Such an abuse arises when the judge issuing the order was controlled by an error of law or when the order, based upon factual conclusions, is without evidentiary support." Id. at 119, 382 S.E.2d at 903

Appellant brought her motion for relief from order of foreclosure and sale pursuant to Rule 60(b)(5) of the South Carolina Rules of Civil Procedure ("SCRCP"), which provides that upon motion and upon such terms as are just, the court may relieve a party from a final judgment, order, or proceeding when it is no longer equitable that the judgment should have prospective application. The rule states the motion shall be made within a reasonable time.

In determining whether to grant a motion under Rule 60(b), the trial judge should consider: (1) the promptness with which relief is sought, (2) the reasons for the failure to act promptly, (3) the existence of a meritorious defense, and (4) the prejudice to the other party. Rodriguez v. Gutierrez, 705 S.E.2d 94, 100 (S.C.App. 2011).[1]

[1] In this matter, the Master-in-Equity denied Appellant's motion solely on the grounds on timeliness. The Master-in-Equity made no ruling as to the existence of a meritorious defense or as to prejudice to the other party.

II. Statement of the Facts.

On September 30, 2010 the Summons and Complaint in the above-referenced matter was filed in the Court of Common Pleas.

By letter dated October 5, 2010, Respondent informed Appellant that an initial payment of $4,200.00 must be received by October 15, 2010. (Appellant's motion for relief from order of foreclosure and sale dated Oct. 26, 2012 at Exhibit F). The October 5, 2010 letter further stated that "[f]oreclosure activity will not be suspended until you have returned the initial required payment" (Id.). On October 15, 2010, Appellant submitted payment to Respondent in the amount of $4,200.00 pursuant to the October 5, 2010 letter. (Id. at Exhibit G). After submitting the payment on October 15, 2010, Appellant believed any foreclosure action pending against her was suspended and did not retain an attorney. (Id. at ¶12).

III. The Master-in-Equity erred in ruling Appellant failed to bring her motion for relief from order of foreclosure and sale within a reasonable time as the South Carolina Supreme Court Administrative Order 2011-05-02-01 dated May 2, 2011 stayed all proceedings in the matter from April 14, 2011 until August 1, 2012.

The Administrative Order requires the following:

> In all mortgage foreclosure actions pending on May 9, 2011, before any merits hearing in the case, or if an order of foreclosure has been entered, before any foreclosure sale, the Mortgagee shall, through its attorney of record, file with the court and serve upon every Mortgagor a notice of the Mortgagor's right to foreclosure intervention. **All proceedings in the foreclosure action shall be stayed until completion of such foreclosure intervention.**

(Section B(1)Administrative Order) (emphasis added).

In the Order denying Appellant's motion for relief dated November 6, 2012, the Master-in-Equity found the definition of "proceedings" to be "[t]he regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment." (Nov. 6, 2012 Order at. p.3) (citing Black's Law Dictionary 1241 *Bryan A. Garner

ed., 8th ed., Thomson West 2004). Clearly, a motion for relief from an order would be part of the regular and orderly progression of a lawsuit.

As Rue 60(b), SCRCP provides a mechanism by which a party can seek relief from a final order or judgment, a motion for relief from an order would be part of the regular and orderly progression of a lawsuit, as would a motion to dismiss (Rule 12, SCRCP), a motion for summary judgment (Rule 56, SCRCP), or a motion for default judgment (Rule 55, SCRCP). The mere fact the motion comes after a judgment or order is rendered does not make the motion any less a part of the "orderly progression of a lawsuit".

Despite adopting the definition above, the Master-in-Equity later stated "the stay imposed in a foreclosure case in which judgment has been entered before May 9, 2011, appears to mean simply a postponement of the foreclosure sale". (Id.) This ruling contradicts the plain language of the Administrative Order which states "[a]ll proceedings in the foreclosure action shall be stayed until completion of such foreclosure intervention." (Section B(1), Administrative Order).

In fact, the Supreme Court of South Carolina addressed the mere postponement of the foreclosure sale in the preceding sentence, which provides:

> In all mortgage foreclosure actions pending on May 9, 2011, before any merits hearing in the case, or if an order of foreclosure has been entered, **before any foreclosure sale**, the Mortgagee shall, through its attorney of record, file with the court and serve upon every Mortgagor a notice of the Mortgagor's right to foreclosure intervention.

(Section (B)(1), Administrative Order). (emphasis added).

If the Administrative Order was merely meant to impose a postponement of the foreclosure sale, there would be no need for any language other than the first sentence of Section B(1) of the Administrative Order, but the Administrative Order goes further and imposes a stay in all proceedings in the action.

In the instant matter, the parties were ordered to participate in foreclosure intervention pursuant to the Master-in-Equity's order denying Appellant's motion for relief from order of foreclosure and sale dated April 14, 2011. The case was still pending on May 9, 2011, and is therefore subject to the Administrative Order.

On August 1, 2012, Respondent's counsel filed a certification of compliance with the Administrative Order. Pursuant to the Administrative Order, all proceedings in the foreclosure action were stayed from May 9, 2011 until August 1, 2012, preventing Appellant from bringing her motion for relief from order of foreclosure and sale. Appellant filed the motion for relief from order of foreclosure and sale on October 26, 2012, two (2) months and twenty-six (26) days after the stay imposed by the Administrative Order was lifted.

Mrs. Simpson promptly sought relief from the order of foreclosure and sale once the stay imposed by the Administrative Order was lifted. And as a practical matter, if Mrs. Simpson's request for foreclosure intervention had been granted, there would have been no need for a motion for relief from order of foreclosure and sale.

IV. The Master-in-Equity erred in ruling Appellant failed to bring her motion for relief from order of foreclosure and sale within a reasonable time when Appellant's property was ordered to be sold by Supplemental Order Post Judgment dated September 25, 2012 and Appellant filed her motion on October 26, 2012.

While the original order of foreclosure and sale was issued in December of 2011, the sale was set aside and the parties were ordered to participate in foreclosure intervention. The property was not ordered to be sold again until September 25, 2012, when the Supplemental Order Post Judgment ordered the property be sold "under the terms of the original judgment and sale."

The Appellant did not know her property was going to be sold at public auction until after the September 25, 2012 order was issued. She filed a motion for relief approximately one (1)

month later. The Master-in-Equity erred in ruling any delay in Appellant bring her motion was unreasonable.

CONCLUSION

Mrs. Simpson promptly filed her motion for relief from order of foreclosure and sale after the stay imposed by the Administrative Order was lifted. Any delay in bring her motion was due to the stay and the denial of her first motion for relief from order of foreclosure and sale. The Master-in-Equity issuing the order was controlled by an error of law concerning the stay imposed by the Administrative Order. Further, The Master-in-Equity's order, based upon the facts presented, is without evidentiary support as the facts indicate Appellant promptly filed a motion for relief once the property that is the subject of the underlying foreclosure was ordered to be sold on September 25, 2012. The Master-in-Equity's ruling that Appellant's motion was not brought within a reasonable time was an abuse of discretion and the order of foreclosure and sale should be vacated. Mrs. Simpson should be granted relief from default and this matter returned to the Circuit Court for a full trial on the merits.

Respectfully Submitted,

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April 11, 2013

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PROOF OF SERVICE

I hereby certify that, on this 11th day of April, 2013 a copy of ***Appellant's Lynn D. Simpson Amended Initial Brief*** served upon the below stated parties via United States Postal Service, priority delivery, with sufficient first class postage affixed thereto and addressed as follows:

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