THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

R. Murray Hughes – Special Referee

Common Pleas Case No. 2008-CP-39-2120
Appellate Case No. 2013-001021

JP Morgan Chase Bank, National Association ..... Respondent,

v.

Vanessa Y. Bradley..... Petitioner.

RETURN OF RESPONDENT JP MORGAN CHASE BANK, NATIONAL ASSOCIATION TO VANESSA Y. BRADLEY'S PETITION FOR WRIT OF CERTIORARI

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INDEX

INTRODUCTION

This Petition arises from an unpublished, *per curiam* opinion issued by the Court of Appeals. It does not present any novel question, does not raise a substantial constitutional issue, and it is not in conflict with any prior decision of this Court or the Court of Appeals.

Respondent JPMorgan Chase Bank, National Association ("Chase") brought this action in 2008 against Petitioner Vanessa Y. Bradley ("Bradley"), following her default on a mortgage loan. After Bradley was reviewed and re-reviewed for a modification for almost two years, and after two foreclosure sales were postponed to assist Bradley in avoiding foreclosure, Bradley's property was sold at a foreclosure sale in September 2010. The Special Referee correctly determined that Bradley did not meet her burden of showing that she was entitled to have the foreclosure sale set aside because she did not prove that Chase committed fraud or engaged in misconduct that prevented Bradley from participating in the foreclosure process.

Bradley does not present any preserved argument as to why this Petition should be granted, and instead presents very nearly the same arguments and facts submitted to the Court of Appeals with no new analysis. Given all of the foregoing, this is not a case that warrants discretionary review by this Court pursuant to Rule 242, SCACR.

QUESTION PRESENTED

1. Did the Court of Appeals correctly hold that the Special Referee did not abuse his discretion in denying Bradley's Motion under Rule 60(b)(3), SCRCP, to set aside the foreclosure sale?

COUNTER-STATEMENT OF THE CASE

Chase filed this foreclosure action on December 30, 2008 to collect on a residential mortgage loan given to Bradley on January 30, 2001. (App. at 51). The loan was secured by a mortgage encumbering real property located in Pickens County, South Carolina (the "Property"). (App. at 52) Following an entry of default judgment against Bradley on March 17, 2009, a foreclosure sale of the Property was scheduled to occur on April 6, 2009. (App. at 12)

Prior to the foreclosure sale scheduled for April 6th, a representative of Bradley contacted the loan's servicer and requested a loan modification on Bradley's behalf and a postponement of the April 6th foreclosure sale. (App. at 309-310) Chase agreed to postpone the foreclosure sale and extended a trial period payment plan ("Trial Plan") under the Home Affordable Modification Program ("HAMP"). (App at 309-310) Bradley accepted the terms of the Trial Plan and made the first and second payments according to its terms. (App. at 310) However, she failed to submit the full balance owed for the third payment due on September 1, 2009, and instead, submitted a partial payment three weeks later on September 22, 2009. (App. at 181-185, 309-310) Bradley did not submit the remainder due for September until October 19, 2009, over 45 days late. (App. at 184, ll. 18-20)

On March 4, 2010, Chase notified Bradley that her loan was not eligible for a modification because the net present value of her loan did not meet HAMP guidelines for

a modification. (App. at 184-185, 310) On May 17, 2010, Chase's attorneys filed an affidavit ("HAMP Affidavit") pursuant to the Supreme Court's Administrative Order No. 2009-05-22-01 ("Administrative Order"), informing the Special Referee and Bradley that the loan had not been modified. (App. at 304) Bradley did not file a counter-affidavit to dispute the testimony in the HAMP Affidavit. (App. at 195)

From May to July 2010, Chase continued to work with Bradley to attempt to help her avoid foreclosure, but due to Bradley's lack of income, Chase was unable to offer her a loan modification. (App. at 311) However, although Chase could not offer Bradley a loan modification at that time, it orally offered her a three-month forbearance for June, July, and August 2010 ("Forbearance Period"), to enable her to submit a new loan modification application. (App. at 187-188, 197-198) The terms of the forbearance agreement were never committed to writing. (App. at 188, ll. 2-8)

A second foreclosure sale of the Property was scheduled for August 2, 2010, and Bradley was served with a supplemental order evidencing an updated debt amount from the original foreclosure order. (App. at 16, 60.) Bradley never objected to any of the findings in the supplemental order. Chase agreed to postpone the scheduled foreclosure sale to afford Bradley another opportunity to apply for a loan modification. (App. at 311-312) Although Chase agreed to postpone the sale, Chase and Bradley were unable to agree upon a workout and on August 19, 2010, Chase notified Bradley that she had been denied again for a loan modification under HAMP. (App. at 188-189, 311) At Bradley's request, Chase later provided her with detailed information about the NPV calculations that were used in determining that her loan was not eligible for a modification under HAMP. (App. at 312)

After notifying Bradley that she was ineligible for a loan modification, Chase attempted to move forward with the foreclosure sale scheduled for September 7, 2010. (App. at 311) Immediately prior to the third scheduled foreclosure sale, Bradley again requested that Chase reconsider her for a loan modification and postpone the foreclosure sale. (App. at 311) Between August 25, 2010, and August 31, 2010, Chase and Bradley communicated about the updated financial information needed to process Bradley's request. (App. at 151-153) Chase specifically informed Bradley that it could not consider postponing the foreclosure sale until it had received all of the required information. (App. at 154-157, 311) Chase also informed Bradley that the request to postpone the sale would have to be approved by the Federal National Mortgage Association. (App. at 312) HAMP guidelines provide that a servicer is not required to suspend a foreclosure sale if the request for a modification is received within seven business days prior to the scheduled foreclosure sale. (App. at 335)

On September 1, 2010—four business days prior to the third scheduled foreclosure sale on September 7, 2010—Bradley provided Chase with the missing documentation required to consider her request for a modification. (App. at 189, ll. 6-23; 311) The following day, on September 2, 2010, Chase advised Bradley that her request for a modification was under review and that it would request that the foreclosure sale be postponed, but again, that any postponement of the sale had to be approved by the investor on the loan. (App. at 156, ll. 6-14) On September 4, 2010, Bradley contacted Chase to inquire about the status of her modification request and foreclosure sale, and Chase told her again that the modification request was under review, but that the foreclosure sale had not been postponed. (App. at 158, 191-192) The Property was sold

on September 7, 2010, and the Property is now owned by the Federal National Mortgage Association. (App. at 312) Thereafter, Chase informed Bradley that her loan still was not eligible for a modification under HAMP. (App. at 312)

Bradley's first appearance in this case occurred on September 20, 2010—over 21 months after she was served with the Complaint—when she filed a motion to set aside the foreclosure sale under Rule 60(b)(3), SCRCP. (App. at 56, 62-66) The Special Referee denied Bradley's motion, finding that she had failed to prove that Chase had committed fraud or engaged in misconduct that prevented Bradley from participating in the foreclosure process. (App. at 25) The Court of Appeals affirmed the Special Referee's decision, finding that he had not abused his discretion in refusing to set aside the foreclosure sale. (App. at 531-534)

ARGUMENTS

I. Bradley abandoned any argument that the Administrative Order required strict compliance.

As an initial matter, Bradley failed to preserve any argument relating to the Court of Appeals' ruling that Chase complied with the spirit of the Administrative Order because she failed to raise that argument in her petition for rehearing or in this Petition. *Mazloom v. Mazloom*, 392 S.C. 403, 403, 709 S.E.2d 661, 661 (2011) (holding "this portion of the question is not preserved for review because it was not raised in the petition for rehearing to the court of appeals"); *Camp v. Springs Mortg. Corp.*, 310 S.C. 514, 516, 426 S.E.2d 304, 305 (1993) ("The Court of Appeals did not address this issue nor did [Petitioner] petition for rehearing for the court to consider it. We therefore decline to address this issue."). Because they are not preserved, the Court should not consider any arguments concerning the standard of compliance under the Administrative Order.

II. The Court of Appeals correctly found that the Special Referee did not abuse his discretion in refusing to set aside the foreclosure sale.

The Court of Appeals was required to affirm the Special Referee's order unless it found there was a clear abuse of discretion. *Fassett v. Evans*, 364 S.C. 42, 49-50, 610 S.E.2d 841, 845 (Ct. App. 2005); *Mitchell Supply Co. v. Gaffney*, 297 S.C. 160, 162-63, 375 S.E.2d 321, 322-23 (Ct. App. 1988). "An abuse of discretion occurs when the judge issuing the order was controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support." *Sundown Operating Co. v. Intedge Indus.*, 383 S.C. 601, 607, 681 S.E.2d 885, 888 (2009) (citing *In re Estate of Weeks*, 329 S.C. 251, 259, 495 S.E.2d 454, 459 (Ct. App. 1997)). A finding of service will not be disturbed unless "there is no evidence reasonably supporting the finding." *Richardson Constr. Co. v. Meek Engineering & Constr., Inc.*, 274 S.C. 307, 310, 262 S.E.2d 913, 915 (1980). In addition, the party seeking relief bears the burden of proving the facts entitling him to relief under Rule 60(b), SCRCP. *BB&T v. Taylor*, 369 S.C. 548, 552, 633 S.E.2d 501, 503 (2006). Here, the Special Referee's findings were legally correct and supported by evidence in the record. Simply, the Record reveals that none of Chase's actions amounted to fraud or prevented Bradley from participating in the foreclosure process, and Bradley did not rely on any of Chase's statements or representations about the foreclosure sale to her detriment.

A. The alleged fraudulent statements by Chase concerned future events and cannot amount to fraud.

In her Petition, Bradley argues that the Special Referee erred in denying her Motion to set aside the foreclosure sale under Rule 60(b)(3), SCRCP, because Chase's August 19, 2010, letter indicating that no foreclosure sale would occur for 30 days from

the date of the letter evidences fraud. However, to maintain a claim that a particular statement amounted to fraud, a party must prove that she relied on the truth of the statement and that she had a right to rely on the statement. *McLaughlin v. Williams*, 379 S.C. 451, 665 S.E.2d 667, 670 (Ct. App. 2008). In this case, the statement that the foreclosure sale would not occur cannot amount to fraud because under South Carolina law, an allegedly fraudulent representation "must relate to a present or pre-existing fact" and it cannot ordinarily be based on an unfulfilled promise to perform in the future or statements as to future events. *Bishop Logging Co. v. John Deer Indus. Equip. Co.*, 317 S.C. 520, 527, 455 S.E.2d 183, 187 (Ct. App. 1995). "As a general rule, fraud cannot be predicated on a statement that constitutes an expression of intention." *Osborn v. Univ. Med. Assocs.*, 278 F. Supp. 2d 720, 732 (D.S.C. 2003). Because the statement in the August 19th letter contains a statement about a future event—a foreclosure sale in the future—the Court of Appeals correctly affirmed the Special Referee's decision that the letter could not support a claim for fraud and was not a valid basis to set aside the foreclosure sale.

B. Bradley did not rely on the August 19th letter in failing to appear at or participate in the September 7th foreclosure sale.

It is manifest from the evidence in the Record that Bradley never relied on the statement in the August 19th letter concerning the timing of the foreclosure sale. During the March 14, 2011 hearing, Bradley testified that after receiving the letter, she contacted Chase on August 25, 2010 to request a new modification application because she "knew [her] forbearance was going to be up at the end of August." (App. at 151, ll. 24-25) In fact, between August 25, 2010, and September 7, 2010, Bradley had at least seven conversations with Chase's representatives to inquire as to the status of the foreclosure

sale and her loan modification application. (App. at 151-159) Bradley repeatedly admitted under oath that Chase did not tell her that the September 7th foreclosure sale had been postponed:

> **Ms. Caskey: Did anyone –so no one at the attorney's office ever told you that the foreclosure sale had been postponed, is that right?**
>
> **Ms. Bradley: No.**
>
> **Ms. Caskey: I think you testified earlier that no one at Chase told you that it had been postponed, right?**
>
> **Ms. Bradley: Right.**
>
> Ms. Caskey: They just told you they requested it, correct?
>
> Ms. Bradley: Right.

(App. at 192, ll. 1-10) Defendant later confirmed her prior testimony:

> Ms. Caskey: But no one had ever told you that it had been postponed.
>
> Ms. Bradley: Correct.
>
> Ms. Caskey: That was just your understanding?
>
> Ms. Bradley: Right.

(App. at 207, 80 (emphasis added); 158, ll. 15-18 ("And Jeanette had confirmed that the request had been postponed [sic] for the foreclosure sale had been submitted, but she didn't say what other actions had been taken."); 159, ll. 20-21 ("[T]hey sent the postpone [sic], but they hadn't got a response or reply of whether or not if it had been or had not been.")). Bradley even admits in her Petition that she was simply told that a request to postpone the foreclosure sale had been submitted, but never told that the sale was cancelled. (Pet. at 7.)

Thus, the evidence in the Record shows that although Bradley received the August 19th letter, she did not wait 30 days to inquire as to the status of the foreclosure sale and she did not rely on any statement in the letter stating that the foreclosure sale would not occur. (App. at 152, ll. 13-15 (Bradley admitting that she knew that making

her monthly payment would not stop the foreclosure sale because of the large delinquency balance owed).) Instead, the only time Bradley discussed the August 19th letter in her testimony was to refer to the letter's statements informing her that the reason her loan could not be modified was because the NPV did not meet HAMP requirements. (App. at 151, 163-166, 188-189, 203-207) Bradley further acknowledged that she was not given any misinformation about the foreclosure sale. (App. at 205, ll. 7-8 ("**I didn't say I got incorrect information about the foreclosure sale.**") (emphasis added).) Bradley's testimony corroborated that of Chase's representative, Charles Herndon, who testified that Bradley was informed that a request to postpone the foreclosure sale was submitted but was never told that the foreclosure was cancelled. (App. at 311) Bradley admitted that her claims of fraud concerned the calls she had with Chase in August 2010, and **not** the statement from the August 19th letter, and that she was never told in any of the phone calls that the sale had been cancelled. (App. at 207, ll. 7-21) Bradley's actions show that she did not believe that the foreclosure sale was cancelled—she called Chase almost every single day leading up to the September 7, 2010, sale to determine whether the sale had been cancelled, and was told each time that the sale had not been cancelled. (App. at 207, ll. 17-21)

Notably, Bradley also admitted that despite being told repeatedly that the foreclosure sale had not been cancelled, she still took no action to consult an attorney, appear in the foreclosure action, or attend the foreclosure sale. (App. at 168, ll. 7-11) When asked what she would have done if she had known the foreclosure sale was going to occur, Bradley stated, "I would have obtained a lawyer sooner. And either, you know,

went and talked to someone else that knew more about what was going on than rely on my own understanding." (App. at 192, ll. 22-193, line 1)

In *Brisbin v. Aurora Loan Servs., LLC*, 679 F.3d 748 (11th Cir. 2012), a lender promised a borrower that a foreclosure sale of the borrower's property would not occur while the borrower was being considered for a loan modification under HAMP. The borrower alleged claims for negligent and intentional misrepresentation, claiming that had she known that the foreclosure sale was going to occur, she would have attempted to borrow money from friends or obtained a loan. *Id.* at 753. In granting summary judgment in favor of the lender, the district court reasoned that the borrower admitted to being thousands of dollars behind on her payments and that if she had the ability to borrow a large enough sum to reinstate her loan, she would have done so long before the foreclosure sale was imminent. *Id.* The Eleventh Circuit Court of Appeals affirmed the district court's decision, noting that there was no evidence in the record to support her claims that she could have reinstated her loan, and that her claims were "mere speculation, conjecture, or fantasy" and insufficient evidence to "contradict the overwhelming evidence that reinstatement of the mortgage was impracticable . . . ." *Id.* at 754.

Like the borrower in *Brisbin,* Bradley has offered nothing more than conjecture and speculation as to what she might have done differently had she known sooner that the foreclosure sale would occur. There is no evidence in the Record to establish that Bradley would have been able to reinstate her loan, purchase the Property, or otherwise take action to prevent the sale of the Property. Additionally, although she claims she would have consulted a lawyer, she had over 21 months to consult an attorney concerning

the foreclosure. As a result, Bradley's statements about what she might have done are insufficient to show reliance on any statement by Chase concerning the foreclosure sale, which certainly do not amount to fraud.

C. Chase's statements concerning the foreclosure sale did not prevent Bradley from participating in the foreclosure action.

Bradley argues that the August 19, 2010 letter and other actions by Chase amount to "misconduct" under Rule 60(b)(3), SCRCP, and warrant setting aside the foreclosure sale and all prior orders in the case. However, South Carolina courts have long held that to obtain equitable relief from a judgment under Rule 60(b)(3), SCRCP, based on fraud, the fraud must be extrinsic. *Raby Constr., LLP v. Orr*, 358 S.C. 10, 19, 594 S.E.2d 478, 482-483 (2004). "Extrinsic fraud is fraud that induces a person not to present a case or deprives a person of the opportunity to be heard." *Chewning v. Ford Motor Co.*, 354 S.C. 72, 81, 579 S.E.2d 605, 610 (2003). In comparison, intrinsic fraud "misleads a court in determining issues and induces the court to find for the party perpetrating the fraud." *Raby Constr., LLP*, 358 S.C. at 19, 594 S.E.2d at 483 (noting that the "classic case of intrinsic fraud is perjured testimony or presenting forged documents at trial").

In this case, all of the alleged misrepresentations concern whether Bradley was ever told that the September 7th foreclosure sale had been postponed. Even if Chase had told Bradley that the foreclosure sale had been postponed, which it did not, Bradley still should have answered the Complaint, responded to affidavits, and appeared at the foreclosure hearing. Bradley admitted that she was served with the Complaint, but nevertheless chose not to hire an attorney or even attend a hearing. (App. at 178, ll. 2-20) Instead, she sought assistance from a company named "First Foreclosure Solutions," and testified she was told by the representative of First Foreclosure not to answer the

complaint and not to attend the hearings. (App. at 178, l. 22-179, l. 5) It is thus clear from Bradley's own testimony that she did not litigate the issues in the case because she was advised not to, and not as a result of any actions by Chase. Thus, the Court of Appeals correctly affirmed the Special Referee's refusal to set aside the foreclosure sale.

CONCLUSION

Bradley has failed to present any argument for this Court that implicates the considerations listed in Rule 242(b), SCACR. Therefore, her Petition must be denied.

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June 12, 2013

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PROOF OF SERVICE

I, Mary M. Caskey, an attorney with Haynsworth Sinkler Boyd, P.A., counsel for Respondent JPMorgan Chase Bank, National Association, hereby certify that on June 12, 2013, I served the Respondent's Return to Petitioner's Writ of Certiorari in the above-referenced matter on the Appellant, Vanessa Y. Bradley, by mailing a copy of the same, by United States Mail, postage prepaid, and addressed to counsel of record as follows:

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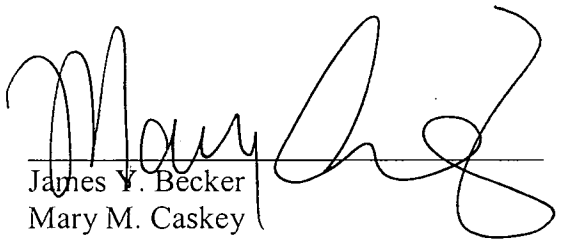
[signatures on following page]



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