

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

The Honorable James O. Spence,
Lexington County

Opinion No. 5113 (S.C. Ct.App. filed April 10, 2013)

Regions BankPlaintiff

vs.

William S. Owens, David S. Hostetler,
Roland G. Paddy and Greer State Bank..... Defendants

OF WHOM:

William S. Owens is.....Petitioner
and

Regions Bank, Roland G. Paddy
and Greer State Bank are.....Respondents

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for the Petitioners certifies that the Petition for Rehearing was made and finally ruled upon by the Court of Appeals on June 11, 2013.

QUESTIONS PRESENTED

- I. Did the Court of Appeals err in refusing to allow a late Answer?
- II. Did the Court of Appeals err in refusing to find Appellant proved good cause as is required under SCRCP 55(c)?
- III. Did the Court of Appeals ruling lack evidentiary support as is required under SCRCP 55(c)?
- IV. Did the Court of Appeals err as a matter of law by refusing to allow Appellant to answer under SCRCP 55(c)?
- V. Did the Court of Appeals err in not deciding the jurisdictional issue of whether the trial court could rule on Owens' case?
- VI. Did the Court of Appeals err in affirming the Master's finding of good cause had not been demonstrated?

STATEMENT OF THE CASE

This is a foreclosure of a mortgage action which was filed by Plaintiff on December 1, 2009. Defendant Owens was served on January 26, 2010. The Plaintiff filed an Affidavit of Default as to Owens on March 19, 2010. No entry of default was entered by the Clerk or the trial court. This case was subsequently referred without consent of Owens to the Master-in-Equity on March 2, 2010 with a hearing set on July 19, 2010. The Order of Reference was signed without notice to or consent by Owens, and no civil motion/order coversheet appears in the records of the Clerk of Court. The trial court, after hearing arguments, denied Owens' motion to set aside default and/or leave to file an answer despite the fact no formal default had been signed by the Court. Owens thereafter filed a motion for

reconsideration which was heard on March 4, 2011 with the trial court denying Owens' motion. The Court of Appeals denied Petitioner's appeal in a written Opinion on April 10, 2013. Owens filed a Petition for Rehearing which was denied on June 11, 2013. This Petition was filed in a timely manner.

REASONS FOR GRANTING CERTIORARI

The Petitioner requests this Court grant certiorari because this case concerns novel issues of law which have never been ruled upon by this Court, but which occur in mortgage foreclosures heard throughout the state. Defendant Owens was served with a foreclosure action. Thereafter, an Affidavit of Default was filed, but no Order of Default was signed by the Court. Also, the Clerk did not sign an entry of default. Further, the Affidavit of Default was not filed until 17 days after the Order of Reference referred this case to the Master-in-Equity without the consent of Owens (R. pp. 30-31, pp. 44-45). If this procedure is being followed around the state, then thousands of defendants are not being notified prior to default being entered of the referral to the Master.

The Petitioner believes this case involves weighty and substantial issues of jurisdiction and procedure. Those include (1) Can an Order of Reference be executed prior to the Affidavit of Default being filed? (2) Did the Master-in-Equity have jurisdiction to act without the Affidavit of Default being filed? (3) Can a party be held in default when no Order of Default has been signed? (4) What is the standard for filing a late Answer? (5) Did the Court of Appeals err in citing *Pilgrim v. Miller*, 350 S.C. 637, 567 S.E.2d 529 (Ct.App. 2002) for the proposition that the *Wham* factors need not be considered if the reason for the default was not acceptable? Counsel submits this case involves novel issues which the highest court in this state ought to consider.

ARGUMENTS

I. The Court of Appeals erred as a matter of law in ruling that Owens did not raise the issue of the entry of default before the trial court.

The Court of Appeals found that Owens should have raised the issue that the Lexington County Clerk of Court did not formally enter a default against Owens at the proceeding before the Master-In-Equity. Plaintiff's counsel put the "cart before the horse." He had the case referred to the Master before holding Owens in default or filing an affidavit of Default. Appellant believes that this was a jurisdictional issue which can be raised at any time either in the Court of Appeals, the Master-in-Equity's Court or in the Supreme Court. The facts of this case are compelling since an Entry of Default/Order of Default was never entered prior to the referral to the Master and Owens was not given notice by the court.

On March 2, 2010, Judge William P. Keesley signed an Order of Reference referring this matter to the Lexington County Master-in-Equity, James O. Spence. In his Order, Judge Keesley noted:

AND IT FURTHER APPEARING that Defendant William[s] S. Owens and Defendant David S. Hostetler have failed to file responsive pleadings to the Summons and complaint herein and are in default, pursuant to the Affidavits of Default and Non-Military Service filed herein or that shall be filed soon. (R. pp. 30-31).¹

It is undisputed that at the time the Order of Reference to the Master-in-Equity was executed and filed neither the Clerk of Court of Lexington County nor Plaintiff's counsel had entered a default against Owens. Further, the Affidavit of Default signed by Regions Bank's counsel was not filed until March 19, 2010 -- 17 days after the Order of Reference referred this case to the Master in Equity without the consent of Owens. This procedural

¹ This appears to be a form order, thus, one might surmise that the same procedure is being followed in other cases.

error deprived the Master of jurisdiction to hear this case and violated Owens due process rights to notice. (R. pp. 30-31; R. pp. 44-45).²

Counsel believes those such actions created a lack of subject matter jurisdiction in that the case could not be referred to the Master-in-Equity because there was no official entry of default and there had been no consent by Owens to refer it to the Master-in-Equity. (See SCR 53(b) References. In an action where the parties consent, in a default case, or in an action for foreclosure, some or all of the causes of action in a case may be referred....).

If there is lack of jurisdiction, there is no power to act. Accordingly, the Master-in-Equity's Default Order was a complete nullity and had no legal effect. This lack of jurisdiction cannot be waived by consent and can be raised for the first time on appeal. See *Petroleum Transportation Co. v. Public Service Commission*, 255 S.C. 419, 179 S.E.2d, 326 (1971). Further, if there is a lack of jurisdiction there is no power to issue a ruling. See *S.C. Dept. of Motor Vehicles v. Holtzclaw*, 382 S.C. 344, 675 S.E. 2d 756 (S.C.App. 2009). See, also, *Thomas and Howard v. T.W. Graham*, 318 S.C. 286, 457 S.E.2d 340 (Ct.App. 1995) (a void judgment is a complete nullity and has no legal effect).

In this case, the due process defects in the procedure caused prejudice and warrant reversal. *Chastain v. Hiltabidle*, 781 S.C. 501, 673 S.E.2d 826 (Ct.App. 2009). It is axiomatic that in order for the circuit court to refer a matter to the Master-in-Equity, an entry of default must have been filed prior to the Order of Reference. This Court has stated on numerous occasions that judgments are void where an itemized verified statement of account was not attached to a complaint which made it so deficient as to not

² It seems elementary that a default must be entered prior to Order of Reference or at the very least Appellant had the right to be notified and heard prior to Judge Keesley referring the case to the Master. (Due process demands it.)

entitle the plaintiff to a judgment. (That situation is analogous to this one.) See *Knight v. Martin*, 230 S.C. 460, 96 S.E. 2d 473 (1957) and *H.W. Carriker Co. v. Johnson*, 286 S.E.2d 140 (S.C. 1982).

Finally, Owens was entitled to relief from the Order as a matter of right. In *Richardson Construction Co. v. Meek Engineering & Construction, Inc.*, 313 S.C. 360, 262 S.E. 2d 913 (1980), this Court noted: “Relief from default judgment when grounded upon a lack of jurisdiction is not discretionary but a matter of right.”

Here, the Master-in-Equity lacked jurisdiction (subject matter and otherwise) to hear this case because no entry of default had been filed in the Lexington County Clerk of Court’s Office and the Order of Reference had been signed 17 days prior to the Affidavit of Default being entered. (A serious procedural defect.) Finally, Owens had not consented to such an Order of Reference. This lack of jurisdiction is not waivable and may be raised at any time. (See Order of Reference, R. pp. 30-31; and Affidavit of Default as to Defendant William Owens, R. pp. 44-45).

Also, these same issues were raised by Owens when he filed a request for a late Answer. Such request for a late Answer was encompassed in Defendant Owens’ Memorandum in Support of His Motion to Set Aside Default and Leave to File Answer because no default was ever entered. (R. pp. 54-61). Owens requested he be allowed to file a late Answer before being held in default.³ Further, there is no legal standard set forth as to when a trial court should allow a late answer in South Carolina.

In sum, Appellant suggests to the Court that it was erroneous for the Court of Appeals to find that the issue of the entry of default had not been raised when such issue was

³ Neither the court nor Plaintiff’s counsel had filed an entry of default or affidavit of default prior to the Order of Referral.

raised and can be raised at any time because of the subject matter jurisdiction of the Master-in-Equity to be referred a case prior to the filing of an Affidavit of Default. It follows, if there is no entry of default filed with the Clerk, and the Order of Reference filed by the circuit judge was prior to the Affidavit of Default, there cannot be an order holding an individual in default. This procedural defect cannot be over looked. The Master lacked jurisdiction to hear this case and as a result the Court of Appeals decision should be overturned because it is void as a matter of law.

II. The Court erred in finding that Owens did not demonstrate good cause.

In its Opinion, the Court of Appeals found that good cause had not been shown because Owens had executed a Power of Attorney to a co-Defendant. In the instant case. Owens, a 79 year old high school graduate and welder, was served with the Summons and Complaint in this action at his welding business in Myrtle Beach, South Carolina. (Depo. of Owens, R. p. 390, lines 1-10). Owens immediately contacted Paddy who had previously convinced Owens to invest in the subject property. (Depo. of Owens, R. p. 396, lines 20-25). (Owens had previously given Paddy \$100,000 for investment since the property had drinkable water on it that Paddy planned to bottle and sell). (Depo. of Owens, R. p. 368, lines 10-20). Once suit was filed, Paddy told Owens that he had hired a lawyer in Columbia and that he would take care of the lawsuit. Paddy stated in his deposition that, "I was looking out for him and myself." (Depo. of Paddy, R. p. 517, line. 3). Paddy also admitted that he told Owens that he had a lawyer in Columbia. (Depo. of Paddy, R. p. 515, lines 24-25). Owens asserts that Paddy told him that he "didn't have to worry" and that he and his lawyer would "take care of it." (Depo. of Owens, R. p. 394, line 25 and R. p. 395, line 1). More specifically, Owens has stated that Paddy indicated to him that he would have his

attorney answer the Plaintiff's Complaint on both their behalves. (Affidavit of William Owens, R. p. 49).

Further, when Owens moved for reconsideration of the order before the Master, the Court found: "The facts indicate Owens made a unilateral mistake in assumption that Paddy would file an Answer on Owens' behalf." (Order Denying Defendant's Motion for Reconsideration dated March 9, 2011, R. p. 18). Appellant asserts to this Court that a unilateral mistake does constitute good cause for a late Answer (especially when there has been no entry of default under SCRCP 55(c)) and that the Court of Appeals committed an error of law in failing to find that a unilateral mistake was good cause under the more liberal standard allowed under SCRCP 55(c). Appellant points to *Limehouse v. Hulsey*, 397 S.C. 49, 723 S.E.2d 211 (Ct. App. 2011). (A party should give a reason why the vacation of the default entry would serve the interest of justice).⁴ See also, *ITC Commercial Funding, LLC v. Crerar*, 393 S.C. 487, 713 S.E.2d 335 (2011). (Appellant's reason for not answering was appropriate under SCRCP 55(c) but not under SCRCP 60(b).)

In sum, because Appellant had a reason (and there was no entry of default), the Court of Appeals should have applied the *Wham* factors and was legally required to do so under the law. See *Sundown Operating Co., Inc. v. Intedge Industries, Inc.*, 383 S.C. 601, 607, 681 S.E.2d 885, 888 (2009). The failure to do so is error and this Court should reverse the Court of Appeals because the *Wham* factors must be considered once a reason is given by the defaulting party.

⁴ Here, there was never an entry of default, thus, the vacating of the Order is in the interest of justice.

If the *Wham* factors had been considered, those factors would have required reversal of the Master. Since there was never an entry of default by the Clerk, the timing of the motion for relief was thus open. Owens had a meritorious defense and the prejudice to Owens was extreme in that an Order of Default was entered against him without a trial or a motion ever being filed. It follows that in order for the *Wham* factors to be even considered, the entry of default must have been entered first by the court. (This did not happen in this case.) Finally, when it became apparent to Owens that he was late in answering, he immediately took action upon notice by the Master-in-Equity that a hearing was to be held -- he hired counsel.⁵

III. The citation of *Pilgrim v. Miller*, 350 S.C. 637, 567 S.E.2d 529 (Ct. App. 2002) was an error of law.

The Court of Appeals noted that the Master cited *Pilgrim* for the proposition that a defendant's mistaken belief that a fellow defendant would file an answer on his behalf does not meet the good cause standard. Appellant believes this to be error since once a reason is given for the default, then the *Wham* factors must be considered regardless of the reason.

The Court of Appeals in affirming the Master's Order denying Owens' Motion to set aside the default cited *Pilgrim v. Miller*, 350 S.C. 637, 567 S.E.2d 529 (Ct. App. 2002) as good law. Appellant suggests this was an error of law. This Court vacated *Pilgrim* on July 23, 2009 in the case of *Bage LLC v. Southeastern Roofing Co. of Spartanburg*, 383 S.C. 49, 681 S.E.2d 867 (2009). Further, the citation of *Pilgrim* is wholly inappropriate because Owens was not an attorney or an insurance company as was cited in *Pilgrim*. In fact, Owens is an elderly man with limited experience and education in legal matters who relied

⁵ There has never been a standard established by this Court in filing a late answer.

on Paddy to assist him with this lawsuit. Imputing negligence to a defaulting Defendant because of his attorney or insurance company is vastly different than a man of limited education such as Owens relying upon his friend and business partner to assist him. Insurance companies and attorneys are sophisticated in the matter of litigation and understand that Answers must be filed promptly. Owens did not understand this, nor as has been indicated before, did he ever get served with an entry of default. He took action immediately after being advised of a hearing. South Carolina Rule of Civil Procedure 55(c) provides that good cause should be liberally constructed to promote justice and have cases decided on the merits. The citation of a case (*Pilgrim*) that was vacated by this Court was error, especially in an attempt to draw an analogy to Owens who was neither an attorney nor an insurance company and as a result, *Pilgrim, supra* had no application in this case.

IV. The Court should reverse the Court of Appeals and allow a late Answer of Owens.

This Court has never set a bright line standard for allowing a late Answer when a defendant has not been held in default. There are significant public policy issues in answering this question for the bench and bar. First, public policy favors cases being heard on their merits rather than technicalities. (*Micronics, Inc. v. S. C. Dept. of Revenue*, 548 S.E.2d 223, 225 (Ct. App. 2001); see, also, *Dixon v. Bescoe Eng. Inc.*, 320 S.C. 174, 463 S.E.2d 636 (Ct.App. 1995). Second, it follows that if an Entry of Default under SCR 55(c) should be liberally construed to promote justice, then a late Answer should at least be that standard or more liberal because there has been no default.

The issue of a late Answer has been discussed in many cases but without a definitive answer by this Court. See *Jefferson v. Gene's Used Cars, Inc.*, 295 S.C. 317, 368 S.E.2d 456 (1988) (holding order denying SCR 6(b) motion to be allowed to file a late

Answer is interlocutory and unappealable). See, also, *Moore v. Sullivan*, 123 N.C. App. 647, 473 S.E.2d 659, 660 (1996) (after an Answer has been filed, even if the Answer is untimely filed, a default may not be entered.) It should be noted the Court of Appeals has held in another case this is not the law in this state. However, this Court has not passed on this issue. *Stark Truss Co. v. Superior Construction Corp.*, 360 S.C. 503, 602 S.E.2d 99 (S.C.App. 2004). For this reason the Court should issue an opinion on this important substantive point of law.

CONCLUSION

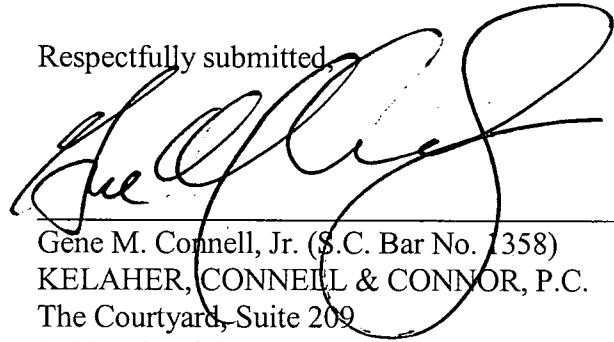
In this case, the trial court was without jurisdiction to decide this matter because the Order of Reference was issued prior to the Affidavit of Default being filed by counsel for the Bank. In fact, the Order of Reference clearly noted the Defendant Owens might not be in default when the case was referred to the Master. Further, because there was no jurisdiction, the Master-in-Equity was without authority to hear the case. A case may only be referred to the Master in this state under two conditions: (1) consent by the parties; or (2) default by the defendants. Owens gave no consent nor was he consulted about the Order of Reference and an entry of default had not been entered. Accordingly, the Court of Appeals did not have jurisdiction and the Order holding Owens in default was void.⁶

Further, Owens showed good cause and the Order of the Court of Appeals finding *Pilgrim* was applicable was an error of law in that *Pilgrim* had been withdrawn by this Court.

⁶ It follows to be held in default you must have been declared in default by the Clerk of Court or Circuit Court Judge, which simply didn't happen in this case.

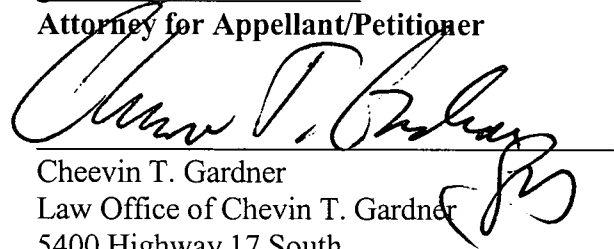
Finally, this Court should issue a bright line legal standard for filing a late answer in this state to guide the bench and the bar.

Respectfully submitted,



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July 9, 2013

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William S. Owens is.....Appellant
and

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and Greer State Bank are.....Respondents

PROOF OF SERVICE

PERSONALLY appeared before me, Shelia Y. McCumbee, who being duly sworn, deposes and says that she is an employee of KELAHER, CONNELL & CONNOR, P.C., Attorneys at Law, and that she has served the **Petition for Writ of Certiorari** on the Respondents, through their attorneys of record, by depositing a copy of same in the United States Mail, postage prepaid, to:

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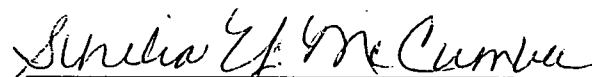
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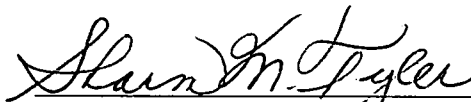
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DATE OF MAILING: July 9, 2013



Shelia Y. McCumbbee

SWORN AND SUBSCRIBED before me,
this 9th day of July, 2013



Notary Public for South Carolina
My Commission Expires: 2-25-19

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