THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM LEE COUNTY

Richard Booth, Master-In-Equity

Case No. 05-CP-31-169

LaSalle Bank National Association, as Trustee for
The registered holders of Structured Asset Securities
Corporation, Structured Asset Investment Loan
Trust, Mortgage Pass-Through Certificates, Series
2004-11.

Respondent,

Vs.

Laura Toney,

Appellant.

# APPELLANT LAURA TONEY FINAL BRIEF

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## STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT ERR IN FAILING TO GIVE THE APPELLANT DUE PROCESS TO PRESENT HER CASE AND EVIDENCE OF FORGERY AND VIOLATION OF FEDERAL DISCLOSURES DOCUMENTS?

2. DID THE TRIAL COURT ERR IN FORECLOSING AND ORDERING THE SALE OF MY HOME WHEN THERE WAS A VALID LETTER OF RECISSION AND THE RESPONDENT FAILED TO RESPOND IN THE MANDATORY (20) DAYS MANDATED BY LAW?

3. DID THE TRIAL COURT ERR IN CONDUCTING THE FORECLOSURE HEARING ON A LEGISLATIVE DAY WHEN THE ATTORNEY FOR THE APPELLANT IS A MEMBER OF THE SOUTH CAROLINA GENERAL ASSEMBLY AND COULD NOT ATTEND AND WHEN NOTIFICATION WAS GIVEN TO THE COURTS AND RESPONDENT?

4. DID THE TRIAL COURT ERR IN NOT ALLOWING THE APPELLANT TO PROVE THROUGH DOCUMENTATION THAT RESCISSION WAS DOCUMENTED IN THE BANKRUPTCY.

5. DID THE TRIAL COURT ERR IN NOT RECOGNIZING THAT THE HEARING ON MARCH 2007, WAS AN INDEPENDENT ACTION TO ENFORCE A RESCISSION AND THE APPELLANT HAD THE RIGHT TO RETAIN ANOTHER ATTORNEY?

6. DID THE TRIAL COURT ERR IN ADDRESSING THE ISSUE OF JUDICIAL ESTOPPEL BEFORE ALLOWING THE APPELLANT THE OPPORTUNITY TO PRESENT HER EVIDENCE ABOUT THE BANKRUPTCY FILE BEING THAT THE APPELLANT FILED PRO SE?

## STATEMENT OF THE CASE

On October 6, 2004, I received a mortgage loan from the Respondent. Later the Appellant discovered that there were violation of the Truth-In-Lending Act. None of the required federal disclosure documents were given to the Appellant prior to the loan closing. The Appellant did not receive a Good Faith Estimate nor the Attorney/Insurance Preference Form.

On June 14, 2005, the Appellant mailed a certified returned receipt letter to the Respondent rescinding the loan. The Respondent failed to acknowledge the Appellant's letter of rescission in the (20) days mandated by law.

In August of 2005, the Respondent foreclosed on my home which is situated in Lee County.

The Appellant retained Mr. David Weeks to represent her since the Respondent did not accept the letter of rescission and proceeded with the foreclosure. The case was referred to a Master-In-Equity in Clarendon County by Judge Cooper, a Circuit Judge.

In fear of losing my home, the Appellant filed bankruptcy Pro Se. Being unfamiliar with bankruptcy procedures and laws, the Appellant made several mistakes during the bankruptcy filings. The Appellant kept making honest mistakes that was interpreted as bad faith by the bankruptcy court. The Appellant was simply trying to save her home because the Respondent ignored her letter of rescission.

On February 6, 2007, a foreclosure hearing was held in Manning, South Carolina. The hearing was held without me or my attorney, Mr. David Weeks present. Mr. Week's, who is a member of the South Carolina General Assembly was in session on this day and informed the courts and the Korn Law Firm.

The Appellant retained another attorney to file an Independent Action with Judge Clifton Newman presiding on March 27, 2007. There was a conflict about my attorney on record during this hearing. The purpose of this motion was to enforce rescission.

A 59e was filed by Mr. Joseph Henry after the March 27, 2007, hearing. Later, Mr. Weeks filed a Motion 60 for a new trial. We were not given the opportunity to present any issues until the sale of my home.

After the sale of my home, my case was transferred to Judge Richard Booth, Master-In-Equity of Sumter County. This hearing took place October 18, 2007. In November of 2007, Judge Booth ruled not to give the Appellant an opportunity to present her case.

The Appellant filed a motion for an appeal with the South Carolina Court of Appeals on January 8, 2008.

## ARGUMENTS

**I. BECAUSE THE APPELLANT RESCINDED THE MORTAGE LOAN ON JUNE 14, 2005, FOR THE FAILURE OF THE RESPONDENT TO PROVIDE THE MANDATORY FEDERAL DISCLOSURE FORMS BEFORE CONSUMMATION OF THE MORTAGE LOAN AS MANDATED BY THE TRUTH-IN-LENDING AND THE RESPONDENT FAILED TO RESPOND TO THE LETTER TO RESCIND THE LOAN IN THE MANDATORY (20) DAYS, THE RESPONDENT'S SECURITY INTEREST WAS NULL AND VOID, TAKING AWAY THE REPONDENT'S LEVERAGE TO FORECLOSE.**

On October 14, 2004, I received a mortgage loan and later discovered that there were several violations during the processing of the loan. I did not receive the Good Faith Estimate, an Attorney and Insurance Preference Form in violation of S.C. Code 37-10-102; and S.C. Code 37-10-105 or none of the federal disclosures prior to the closing of the loan. In addition to the mandatory Notice of Rescission rights, each consumer must be given a copy of the disclosure statement with all "material" information correctly disclosed, see 15 U.S.C. 1635(a); Regulation Z 226.15(a);226.23(a);

226.15(b)-1; and 226.23(b)-1. If these material disclosures are not properly supplied, the consumer has an extended right to rescind. The following material disclosures must be provided as required by Regulation Z:

1. The annual percentage rate.
2. Applicable variable-rate disclosures.
3. The finance charge.
4. The amount financed.
5. The total of payments
6. The payment schedule.

Regulation Z requires that the above disclosures be made before credit is extended. Regulation Z uses the phrase "Before Consummation." The requirement is important because the disclosures are supposed to guide the consumer in making a rational economic choice about the financial attractiveness of the transaction prior to entering into it, and to facilitate comparison shopping. The Respondent clearly verified the fact that these disclosures were not provided in the transcript of the Foreclosure Hearing that was held

without me or my attorney being present. (R. p.261, lines 10-21). Here the Respondent clearly states that these disclosures were not provided until the day of the loan closing. Also, from the foreclosure hearing on February 6, 2007, is the copy of the HUD statement (R. pp. 91-92) provided to the courts by the Respondent clearly proves that the disclosures were not provided prior to the closing. Also, the Affidavit of Mr. Michael May, the closing attorney,(R. pp.332-333), from the Foreclosure Hearing on February 6, 2007, that was admitted into evidence proves that these disclosures were not provided prior to the loan closing, and (R. p. 261 lines 10-21) from the transcript of the Foreclosure Hearing on February 6, 2007. Also, admitted into evidence by the Respondent is the Attorney and Insurance Preference Form provided by the Loan Broker, Mrs. Benjamin, is a forgery. (R. pp. 95-96; and R. pp.357-358). The Appellant did not sign this form. The forgery report which will be provided will verify this.(R. pp. 344-365). The Appellant would also like to inform the courts that this same document (forgery report) with other documents were admitted into evidence at a prior case by the Loan Broker. She is no longer licensed to make loans according to

the South Carolina Consumer Affairs Commission. The Appellant filed a complaint with the Commission about this incident.

Violation of the timing requirement entitles the consumer to statutory damages and attorney's fees as well as actual damages. In transactions subject to the right of rescission, violation of the timing requirement may be a ground for rescinding the transaction.

On June 14, 2005, the Appellant rescinded the loan by mailing Ocwen National Bank (2) certified letters (R. pp.324-326). The bank ignored my rescission notice and did not respond within the (20) days mandated by law. Once a valid notice of rescission is given, the lien on the consumer's home becomes void, taking away the creditor's foreclosure remedy and its leverage. The creditor's failure to perform its statutory obligation to respond properly to a cancellation notice may be a separate violation, entitling the consumer to actual damages and attorney's fees. 15 U.S.C. 1640 also states that a consumer may recover statutory damages for the creditor's failure to rescind. Please see Aquino v. Public Fin. Consumer Discount Co., 606 F. Supp. 504 (E.D.PA 1985). Perhaps the most important aspect of Truth-In-Lending extended rescission right for consumers is its value as a defense to foreclosure. If the transaction is one subject to

the rescission right, and there are valid grounds for exercising the extended right, rescission is a complete defense to foreclosure. Please see Family Financial Services v. Spencer, 677 A. 2d 479 (Conn. App. 1996)(creditor's failure to accept rescission letter nullified the mortgage, barring creditor from foreclosure.) Since a valid rescission voids the security interest as well as eliminating the obligation to pay finance or other charges, the creditor is unsecured; it has no interest in the property upon to foreclose. Also, Yslas v. D.K. Guenther Builders, Inc., 342 S. 2d 859 (Fla. Dist. Ct. App. 1977); Community National Bank and Trust v. McClammy, 525 N.Y. S. 2d 629 (App.div. 1988)(If rescission claim established, would be a defense to a foreclosure on a nine year old mortgage). See Dotter v. Texas Commerce Bank National Ass'n, 679 So. 2d 1215 (Fla District Court App. 1996)(Reversing lower court's grant of summary judgment for foreclosure due to consumer's defense raised by way of recoupment under Truth-In-Lending which the creditor had not refuted); FDIC v. Ablin, 532 N. 2d 379(Ill App. 1988)(reversing lower court's grant of summary judgment for foreclosure based on non payment, since possibility exists that transaction may be rescinded. Also see Lopez v. Delta Funding Corp. Clearinghouse No. 52140, No.

CV 98-7204 (CPS) E.D.N.Y. Dec. 23, 1998)(foreclosure sale enjoined); Thomas v. F.F.Financial Inc., 1989 WL 37658 (S.D.N.Y. Apr. 12 1989)(preliminary injunction granted against foreclosure where homeowner-plaintiff alleged she had rescinded, the creditor-defendant had failed to tender back to borrower fees and costs collected as required and mortgage was null and void.

When a creditor fails to make any of the specified material disclosures, the consumer has the extended rescission right. Please se Williams v. Gelt Financial Corp. (In re Williams), 232 B.R. 629 Bankr. E.D. Pa. 19990, Aff'd 1999 U.S. Dist. Lexix 12512 (E.D. Pa. 1999)(debtor has three (3) years to rescind where creditor failed to give disclosure statement or notice of right to rescind).

When the consumer rescinds, the security interest or lien arising by operation of law on the property becomes automatically void. The promissory note is also voided since it is part of the "transaction." The creditor's interest in the property in automatically negated regardless of its status and whether or not it was recorded or perfected. Please see Regulation Z 226.15(d)(1), 226.23(d)(1). See Semar v. Platte Valey Fed. Sav. and Loan Ass'n 791 F. Ed 699, 704-05 (9th Cir. 1986)(Courts do not have equitable discretion to alter substantive

provisions of Truth-In-Lending, so cases on equitable modification are irrelevant; at issue was the portion of Step 1 automatically eliminating the consumer's obligation to pay charges).

Noncompliance is a violation of the act which gives rise to a claim for actual and statutory damages under 15 U.S.C. 1640. The potential for damages against a noncompliant creditor in a rescission case is greater than in nonrescission Truth-In-Lending. Simplication made it clear that if a creditor violates any of the requirements of the rescission provisions, a court may award statutory and actual damages for the disclosure violations in addition to rescinding the transaction. Moreover, violations which themselves give rise to statutory and actual damages. 15 U.S.C. 1640(a). Thus violations of the rescission notice requirement would give rise to a damage claim under 15 U.S.C. 1640, as could violations of the delay of performance rule. See Newton v. United Companies Financial Corp, 24 F. Supp. 2d 444 (E.D. PA. 1998); In re Kenderdine, 118 B.R. 258 (Bankr. E.D. PA. 1990)(failure to correctly disclose on the rescission note the date the right to rescind expired violated 15 U.S.C. 1635(a) and Regulation Z 226.23(b)(5) and gave rise to claim for statutory damages).

## II. BECAUSE THE FORECLOSURE HEARING WAS HELD ON A LEGISLATIVE DAY AND THE APPELLANT'S ATTORNEY OF RECORD, MR. DAVID WEEKS, WHO IS A REPRESENTATIVE IN THE GENERAL ASSEMBLY WAS NOT ABLE TO APPEAR, THE FORECLOSURE HEARING VIOLATED SOUTH CAROLINA CODE OF LAWS AND THE DUE PROCESS OF THE APPELLANT TO PRESENT HER CASE.

A Foreclosure Hearing was held on this case in Judge Coffey's Court, Master-In-Equity, on February 6, 2007, in Clarendon County. This hearing was conducted without me or my attorney, Mr. David Weeks, who was in the South Carolina General Assembly performing his legislative duties, being present. Please see Affidavit of Ms. Cheryl Scott Jones (R. p.328) who called the Korn Law Firm and Judge Coffey's court to notify them that Mr. Weeks was in the General Assembly and to please reschedule the hearing. The hearing went forward. This is violation of South Carolina Code of Laws Section 2-1-150 which states in part that ***"Notwithstanding any other provisions of law or rule of court, no member of the General Assembly shall be required to appear in court as an attorney,***

***who is an attorney of record, witness or otherwise during any regular day...."*** This statute clearly states that the courts should have rescheduled the hearing to another day. On (R. 304, pp.1-10) from the hearing on October 28, 2007), Mr, Weeks admitted into evidence that the Court and the Respondent were notified of his responsibility as a South Carolina Representative. The Affidavit (R. p.328) proves that both the court and the Korn Law Firm were notified. Mr. Weeks further explained why the foreclosure should have been re-scheduled on (R. p. 305, lines 3-25). Mr. Weeks quoted S.C. Code 2-1-150. Mr. Weeks also continued to explain why the Foreclosure hearing should have been re-scheduled on the following pages (R. p. 306, lines 1-25). The Respondent deliberately and conveniently left this out of his final order. On (R. 320, lines 2-4), the Respondent made a false statement concerning the three (3) day right of rescission. The Truth-In-Lending states that a consumer has an extended (3) years to rescind a loan if there were violations. On (R. p. 321, lines 15-22), from the transcript on the same hearing, Respondent again pretends that he does not understand the provisions of the Truth-In-Lending. The Appellant wrote a letter of rescission on June 12, 2005. The Respondent had twenty (20) days

to respond, but failed to do so. The Respondent has lost its interest in the Appellant's property. Also, the Appellant was is Bankruptcy awaiting a decision for an automatic stay. (R. p. 298, lines 23-25; and p. 299 lines 1-20) from the same transcript in the October 18, 2007, hearing, the attorney for the Appellant clearly explained why the Foreclosure hearing should have been re-scheduled. The Appellant was in bankruptcy court awaiting a decision for an automatic stay. (R. p. 300, lines 1-14), the Respondent made false statements as to the nature of the hearing on March 27, 2007. The nature of the hearing was to enforce the letter of rescission. The Respondent, as he has done in every court proceeding, misled the court in focusing on Appellant's bankruptcies instead of focusing on the facts of the case. On (R. p.301, lines 20-25), from the hearing on October 18, 2007, the Respondent stated the reasons for the Foreclosure Hearing being transferred to Clarendon County. Respondent transferred my case all the way to Clarendon County to be presided over by Judge Coffey. The Circuit Court Judge Cooper referred the case, but the property is located in Lee County. He stated that no Judge in Lee County, where the property is situated, would hear the case. Lee County's Master-In-Equity, Mr. Robert Jennings, refused to hear the case because of

previous work he has done for the Appellant and her family, but Lee County has a Special Referee, Mr. James Segars, who could have presided over the case. The Appellant was amazed when she found out that the Respondent retained Mr. Segars, the Special Referee, from Lee County to purchase the Appellant's home. The Respondent failed to respond within the twenty (20) day mandatory time. In the hearing from March 27, 2007, Mr. Henry stated this (R. p. 290, lines 1-9). They did not have any security in my home in which to foreclose because of the Respondent's failure to respond to the letter of rescission in the mandatory (20) days mandated by the Truth-In-Lending Act. **15 U.S.C. 1635(g). See also S. Rep. No. 368, 96th Congress, 2d Sess. 28 at 29 reprinted in 1980 U.S.C.C.A.N. 236, 265 ("the bill explicitly provides that a consumer who exercises his right to rescind may also bring suit under the act for other violations not relating to rescission.** The statute provides for an initial three-day period during which the consumers have an unconditional right to change their minds and cancel the transaction for any reason. However, if the creditor does not meet the required delivery of the mandatory disclosures, the consumer has an extended (3) years to rescind the transaction.

In the October 18, 2007, hearing, (R. p. 302, lines 3-9), Mr. David Weeks, the attorney for the Appellant, explained that he could not speak for the Appellant concerning the bankruptcies. The Appellant filed bankruptcies Pro Se and only the Appellant can present and defend the bankruptcy proceedings. On (R. p. 322, lines 10-15), Mr. Weeks admitted into evidence the Affidavit that was documented in bankruptcy that the Appellant did include rescission in her bankruptcy filings (R. p.330). This is only one of the documents that the Appellant documented in the Bankruptcy Court that she stated that she had rescinded the loan. On (R.p 303, lines 12-25), Mr. Weeks again stated that the Foreclosure Hearing should have been re-scheduled because the Appellant was in Bankruptcy Court awaiting a decision about an automatic stay. In the hearing on October 18, 2007, Mr. Weeks also admitted into the record the forged Attorney/Insurance preference Form (R. p.314, lines 18-25). Mr. Weeks also eluded to this on (R. p. 317, lines 15-25) and (R. p.318, lines 1-3 and lines 14-23), from the same transcript. The Appellant did not sign this document. The Appellant feels that she should have had an opportunity to present her case and prove that she did not sign this document.

**III. BECAUSE THE RESCISSION OF THE LOAN WENT INTO EFFECT BEFORE THE BANKRUPTCY PROCEEDINGS, THE RESPONDENT'S SECURITY INTEREST WAS NULL AND VOID SINCE JULY 6, 2007, WHICH WAS (20) DAYS AFTER THE RECEIPT OF THE LETTER OF RESCISSION BY THE RESPONDENT.**

The Respondent had no security interest in my home in which to foreclose. **Step 1** of the rescission process is automatic by operation of law. The courts have no discretion in Step 1 of the rescission process. The courts have no power to direct an obligor to pay interest or any security interest. According to U.S.C. 1635, "When an obligor exercises his rights to rescind under subsection (a) of this section, he is not liable for any finance or other charges, and any security interest given by the obligor. Within (20) days after receipt of a notice of rescission, the creditor shall return to the obligor any money or property given as earnest money, down payment, or otherwise, and shall take any necessary or appropriate steps to reflect the termination of any security interest created under the transaction. If the creditor has delivered any property to the obligor, the obligor may retain possession of it. Upon the performance of the creditor's

obligations under this section, the obligor shall tender the property to the creditor, except that if the property in kind would be impracticable or inequitable, the obligor shall tender its reasonable value. Tender shall be made at the location of the obligor. If the creditor does not take possession of the property within (20) days after the tender by the obligor, ownership of the property vests in the obligor without obligation on his part to pay for it. " In this case, the creditor did not complete **Step 1** in the rescission process and has forfeited all security interest in my home." **Step 1** in the rescission process is automatic by operation of law. The courts can only modify **Steps 2 and 3.** The Truth-In-Lending Act grants the court power to modify certain aspects of the Statutory rescission process. **Regulation Z** enables the courts to modify the second and third steps only of the rescission process. **Regulation Z 226.15(d), 226.23(d).** Neither statutes or cases give courts **equitable discretion** to alter the Truth-In-Lending substantive provisions. Please see Semar v. Platte Valley Federal Savings and Loan Association 791F 2d 699, 705-06 (9th Circuit 1986). Courts do not have authority to alter substance of Truth-In-Lending and order consumer to pay interest, which is the other consequence of rescission which works automatically by

operation of law. Also, U.S.C. 1635(f), **An obligor's right shall expire (3) years after the date of consummation of the transaction.** The Appellant rescinded the loan in June of 2005, so the rescission rights still remain eventhough the Respondent has illegally foreclose and sold my home.(R. pp.324-326).

**The South Carolina Supreme Court explained:**

**"When a party elects and is granted resecission as a remedy, he is entitled to be returned to Status Quo Ante, Kent Homes Inc. v. Frankel, 128 A. 2d 444,446 (DC CT. App, 1957),** Rescission entitles the party to a return of the consideration paid as well as any additional sums necessary to restore him to the position occupied prior to the making of the contract. Bank of Johnston v. Jones, 141 S.C. 98, 115-116, 139 S.E. 190, 196(1927); Baeza v. Robert E. Lee Chrysler, Plymouth, 279 S.C. 468, 472-473, 309 S.E. 2d 763, 766 (Ct. App. 1983); Jennings v. Lee, 461 P. 2d 161, 167 (Ariz. 1969)."

**Also the South Carolina Supreme Court explained: "First Equity Investment Corp., 299 S.C. AT 496-97, 386 S.E. 2d at 248.**

**Rescission, as a remedy, returns the parties to the status quo ante. Government Employees Insurance Co., Supra. A return to the status quo ante necessarily requires any party damaged to be compensated, See Ebner v. Haverty Furniture Co., 128 S.C. 151, 122 S.E. 578 (1924) (Remedy of rescission is insufficient if parties cannot be returned to status quo ante)."**

In Family Financial Services v. Spencer, 677 A. 2d 479 (Conn. App. 1996)(Creditor's failure to accept rescission notice nullified the mortgage, barring creditor from foreclosure).

Once a valid notice of rescission is given, the lien on the consumer's home becomes void, taking away the creditor's foreclosure remedy and its leverage.

## IV. BECAUSE THE HEARING HELD BEFORE JUDGE CLIFTON NEWMAN WAS AN INDEPENDENT ACTION TO ENFORCE RESCISSION, THE APPELLANT HAD THE RIGHT TO HIRE ANOTHER ATTORNEY SINCE THIS WAS A SEPARATE ACTION.

The SCRCP under rule 60 states, "***This rule does not limit the power of a court to entertain an Independent Action to relieve a party from a judgment, order, or proceeding, to set aside a judgment for fraud upon the court." Mr. Joseph Henry reminded the court that this hearing was a separate action to enforce a rescission on (R. 283, lines 9-23 and R. 284, lines 1-19, R. 286, lines 3-7).*** As aforementioned above, the Respondent clearly admitted during the foreclosure hearing in Manning, South Carolina with the Judge Coffey presiding, (R. p.261, lines10-20), from the transcript of the hearing that the disclosures were not provided until the day of the closing. The attorney for the Appellant, Mr. Joseph Henry, stated the reasons for this hearing on (R. p. 263, lines 13-25, p.264, lines 1-22; p. 265, lines 1-25; p. 266, lines 1-14 and p. 267, lines 6-18), which was to enforce a rescission. The Appellant mailed a certified returned receipt letter to the Respondent requesting rescission (R. pp.324-326), the Appellant admitted documents into evidence. One (1) document in particular was the Affidavit of Mr. Michael May (R. pp. 332-333), the closing attorney. The Respondent clearly stated that the Appellant received copies of the mandatory documents at the loan closing. The Respondent has nothing in the

record to verify the fact that the Appellant received any of the mandatory documents at the loan closing. In fact, the Respondent has verified the fact that the Appellant did not get these documents until the day of the closing (R. pp.332-333). Again on (R. 269, lines 19-25 and p. 270, lines 1-2), the Respondent verified that the Appellant did not get a copy of any of the documents until the day of the closing. Also, on (R. p.274, lines 10-23), it is clear that the Appellant did not get a copy of any of the documents until the day of the closing. Also (R. p. 275, lines 24-25; p. 276, lines1-24 and p.277, lines 5-18 and p.279, lines 8-12), Mr. Joseph Henry stated that all of the loan documents were given to the Appellant on the day of the closing. He again raised the issue of the letter of rescission (R. pp.324-326), that was mailed to the Respondent and their lack of response. On (R. p. 279, lines 8-12; and p.281, lines 6-25), Mr. Henry reminded the court that the Appellant should have received the loan package before the day of the closing. On (R. p. 270, lines 13-24), the Respondent admitted into evidence a document from my bankruptcy filings. The Appellant rescinded the loan which has been documented throughout the bankruptcy fiings. The mortgage was cancelled. Recoupment or set-off should be irrelevant since the

mortgage was cancelled in July of 2005. The Respondent had no security interest in my home in which to foreclose. My home was listed as an asset with the exception when I inadvertently listed it incorrectly and notified the courts. On (R. 282, lines 3-16). Mr. Henry reminded the court that the Appellant did not have representation in the bankruptcy court. Also, in the transcript in the October 18, 2007, hearing, an Affidavit was admitted into evidence that the Appellant did state that she rescinded the loan in bankruptcy court (R. p. 330). In (R. p. 271, lines 5-11) the Respondent admitted the Affidavit of Ms. Benjamin along with an Attorney/Insurance Preference Form. These forms were forged (R. pp.344-365). Also. (R. p.272. lines 1-23), it is noted that certain requirements under Truth-In-Lending, the three-day clock never stops ticking, and so the right to rescind can extend for three years. The Respondent transferred my case all the way to Clarendon County, but the property is located in Lee County to be presided over by Judge Coffey. Circuit Judge Cooper referred this case when the Lee County's Master-In-Equity, Mr. Jennings refused to hear the case, but Lee County has a Special Referee that would have presided over the case by the name of Mr. James Segars. Again, the Appellant found it quite confusing when she learned that

Mr. James Segars was retained by the Respondent to purchase the Appellant's house. The Respondent failed to respond within the twenty (20) day mandatory time. On (R. p. 290 lines 1-9), Mr. Henry stated this. They did not have any security in my home in which to foreclose because the Respondent's failure to respond to the letter of rescission in the mandatory (20) days mandated by the Truth-In-Lending Act. **15U.S.C. 1635(g) See also S. Rep.No.368, 96th Congress, 2d Sess.28 at 29 reprinted in 1980 U.S.C.C.A.N. 236, 265 ("the bill explicitly provides that a consumer who exercises his right to rescind may also bring suit under the act for violations not relating to rescission.** The Respondent has nothing in the record to verify the fact that the Appellant received any of the mandatory documents before the closing of the loan. Again on (R. p. 269, lines 19-25; p.270, lines 1-2), the Respondent verified that the Appellant did not get these documents until the day of the closing. Also, on ( R.p. 275, lines 24-25; p. 276, lines 1-24 and p. 277, lines 5-18; and p.279, lines 8-12). Mr. Joseph Henry stated that all of the loan documents were given to the Appellant on the day of the closing. He again raised the issue of the letter of rescission (R. pp. 324-326) that was mailed to the Respondent and their lack of response. On (R.

p.279, lines 8-12; and p.281, lines 6-25), Mr. Henry reminded the court that the Appellant should have received the loan package before the day of the closing. The Respondent had no security interest in my home in which to foreclose. In the hearing (R. p.282, lines 3-16), Mr. Henry reminded the court that the Appellant did not have representation in the bankruptcy court. Also, in the transcript in the October 18, 2007, hearing, an Affidavit was admitted into evidence that the Appellant did state that she rescinded the loan in bankruptcy court (R. 330). It is noted that certain requirements under Truth-In-Lending, the three-day clock never stops ticking, and so the right to rescind can extend for three years. Moreover, if a creditor ignores a rescission notice for more than (20) days and instead proceeds with a foreclosure action or foreclosure action or foreclosure sale, that should give rise to claims available for the creditor's noncompliance.

See **15 U.S.C. 1640 1640(g).** If the transaction is one subject to the rescission right, and there are valid grounds for exercises extended right, rescission is a complete defense to foreclosure. See Family Financial Services v. Spencer, 677 A.2d 479 (Conn. App. 1996). Also, Yslas v. D.K. Guenther Builders, Inc., 342 So. 2d 859 So. 2d

859 (Fla. Dist. Ct. app, 1977); Community National Bank and Trust v. McClammy, 525 N.Y.S. 2d 629 (App. Div. 1998)(If rescission claim established, would be a defense to foreclosure on a nine year old mortgage. Also see Dotter v. Texas Commerce Bank National Ass'n, 679 So. 2d 1215(Fla. Dist. Ct. App. 1996)(reversing lower court's grant of summary judgment for foreclosure). See FDIC v. Ablin, 532, N.E. 2d 379 (Ill. App. 1988) In Thomas v. F.F. Financial, In., 1989 WL 37658 (S.D.N.Y. Apr. 12, 1989)(preliminary injunction granted against foreclosure where homeowner alleged she had rescinded and the creditor failed to respond). See Rioux v. C.F. Investment, Inc., clearinghouse No. 46178, Civ. No. 89-573-L (D.N.H.. 21, 1989(order granting TRO). Please also see Jones v. Saxon Mortgage, Inc., 161 F.2d 2 (table), 1998 WL 614150 (4th Cir. 1998).

When the consumer rescinds , the security interest or lien arising by operation of law on the property becomes automatically void. The promissory note is also void because it is a part of the transaction. See Arnold v. W.D.L. Investments, Inc., 703 F.2d 848, 849 (5th Cir. 1983) Also, Elsner v. Albrecht, 185 Mich. App. 72, 460 N.W.2d 232 (1990). Other cases: Gerasta v. Hibernia National Bank, 575 F2d 580 (5th Cir. 1978); Abel v. Knickerbocker Realty Co., 846 F. supp. 445

(D.Md. 19940; Elliott v. ITT corp. 764 F. Supp. 102 (N.D. Ill. 1991); In re Wright, 133 B.R. 704 (E.D. PA, 1991); Williams v. Homestake Mortgage, Clearinghouse no. 44,817, Civ. No. 87-1754 (S.D. Fla. July 29, 1988); Gill v. Mid-Penn Consumer Discount, 671 F. supp. 1021 (E.D. PA 1987, AFF'D MEM, 853 F.2D 917 (3RD Cir 1988); Hunter v. Richmond Equity Corp. Clearinghouse No. 43060, No. CV-P 2734-5 (N.d. Ala. Nov. 23m 1987); Ralls v. Bank of New York (In re Ralls)230 B.R. 508 (Bankr E.D. Pa. 1999); Gombosi v. Carteret Mortgage Corp., 894 F. Supp. 176 (E.D. Pa. 1995)(failure to honor a rescission request is a separate violation, giving rise to a separate claim for damages).

## V. BECAUSE THE APPELLANT WAS DENIED THE OPPORTUNITY TO PRESENT HER CASE BEFORE A COURT OF LAW, THE RESPONDENT HAS MISLED THE COURTS INTO BELIEVING THAT THE APPELLANT IS BARRED BY JUDICIAL ESTOPPEL.

The Appellant filed bankruptcy pro se. Only the Appellant can defend or present evidence that the Respondent has misled the courts into believing that the Appellant did not make a claims to the Truth-In-Lending violations. The Appellant made several claims during the

bankruptcy proceedings. The affidavit admitted during the hearing before Judge Booth during a hearing on a motion 60 for a new trial is only (1) document in the files of the Appellant that clearly proves that the Appellant made a claim (R. p. 330). The Appellant's due process was violated and the courts just relied on the evidence admitted by the Respondent. "Where there is a good faith mistake of fact and not attempt to thwart the judicial system, there is a basis for relief under SCRCP, Rule 60(b). "Columbia Pools, Inc v Galvin, 288 S.C. 59. 339 S.E. (2d) 524 (1986). Pursuant to Mictronics, Inc. v. South Carolina Department of Revenue, 345 S.C. 506; 548 S.E. 2d 223 (2001), a trial judge in determining whether to grant a motion to set aside a final order pursuant to SCRCP. Rule 60(b) shall consider the following factors:

1. the promptness with which relief is sought.
2. the reasons for the failure to act promptly.
3. the existence of a meritorious defense.
4. the prejudice to the other party.

In this case, there is no question that the Appellant's motion under Rule 60 is timely and therefore, the Appellant has satisfied the first prong of the test under

**Mictronics.** The Appellant's reason for not appearing at the Foreclosure Hearing on February 6, 2007, and not properly asserting her Defenses and Counterclaims in response to the Respondent's Motion for Summary Judgment are twofold:

1. The Appellant believed that she was protected under Federal Bankruptcy Laws,

2. The Appellant's Counsel as a State Representative could not have appeared in court as the South Carolina General Assembly was in session.

It is clear that the Respondent and Master-In-Equity were aware of the Appellant's Counsel legislative schedule and duty, the Appellant failed to secure a continuance in the case due to misunderstandings and miscommunications. South Carolina Code of Laws Section 2-1-150 states in part that "***Notwithstanding any other provision of law or rule of courts, no member of the General Assembly shall be required to appear in court as an attorney, who is an attorney of record, witness or otherwise during a regular legislative day...***" Counsel for the Appellant is a member of the South Carolina General Assembly. The motion for summary judgment hearing was scheduled on a legislative day when counsel for the Appellant was at the session, therefore, the Appellant should be granted a new hearing on this basis alone.

The issue of whether or not the Appellant was protected by Federal Bankruptcy Laws is a question of law and not of fact. It is clear that the Appellant in this case was not protected by the automatic stay and such mistake of law is basis for relief under **SCRCP, Rule 60(b)(1).** The foreclosure Hearing was scheduled on a legislative day when counsel for the Appellant was at the session, therefore, the Appellant should be granted a new hearing on this basis alone.

Not unlike in **Mictronics**, where due to interoffice miscommunications and poor scheduling a party failed to appear and was subsequently granted relief under **SCRCP, Rule 60(b)(1),** the Appellant's finds that the Appellant's counsel failure to appear at the Foreclosure Hearing was a result of mistake and neglect, which are excusable and satisfies the second prong of the **Mictronics** test.

The third prong in the **Mictronics** test is whether or not a meritorious defense exist. "To establish a meritorious defense, a party is not required to show absolute defense." **Mictronics, Inc v. South Carolina Department of Revenue,** 345 S.C. 506; 548 S.E. 2d 223 (2001); see also **Thompson v. Hammon,** 299 S.C. 116; 382 S.E. 2d 900 (1989) Furthermore, A meritorious defense need not be perfect nor one which can be guarantee to prevail at trial. It need be only one which is worthy of a hearing or judicial inquiry because it raises a question of law deserving of some investigation and discussion or a real controversy.

In this case, the Appellant raised many defenses and counterclaim. Therefore, if one or more of those defenses genuinely meets the status of meritorious defense, the Appellant will have satisfied the third prong of the test.

The Appellant raised various defenses and counterclaim centering on issues with the process of closing and regarding her rescission of the mortgage. The Appellant did not receive all of the federally mandated disclosures required for real estate transactions, the Appellant was not offered the opportunity of choosing her own attorney, and the Appellant made a legal and procedurally correct overture to the Respondent to have her loan rescinded, but the Respondent failed to respond to the Appellant's demand within the statutorily mandated time frame of twenty (20) days.

The Appellant has also contended that she did not execute certain documents pertaining to the closing and that any execution of her signature was done by someone else, therefore constituting forgery ( R. pp. 343-365).

The question presented is not if the Appellant would prevail on the merits of the defenses, but whether or not such defenses in prima facie could warrant a decision in the favor of the Appellant. It is clear that if the Appellant is successful in proving that she did not receive all of the disclosures mandated by Federal and State Laws, she would be entitled to some damages. Furthermore, if the rescission was timely under **U.S.C. 1635,** the Respondent would have the duty to respond within (20) days of the receipt of the rescission. Furthermore, if the rescission was timely, the Respondent would have effectively lost any security interest in the transaction and the mortgage would have become null and void. **15 U.S.C. 1635.**

**Again (R. p. 261, lines 10-21) clearly verify the fact that the federal disclosures were not provided to the Appellant until the day of the closing.**

**These disclosures should have been given to the Appellant three (3) days after the application for the loan. Good Faith Estimates and other disclosures must be made prior to consummation or delivered or mailed within (3) days after the consumer's written application is received, whichever is earlier. See Regulation A 226.17(c)(2); Also see 226.19(a)(1)-2.**

## CONCLUSION

**The evidence of forgery, violation of the federal disclosure documents, and the violation of the Appellant's due process makes it clear that the Appellant should be granted the opportunity to present her case.**

**Also, the violation of South Carolina Code 2-1-150 which states that "Notwithstanding any other provisions of law or rule of court, no member of the General Assembly shall be required to appear in court as an attorney who is an attorney of record, witness or otherwise during any regular legislative day." Mr. David Weeks, the attorney for the Appellant was in the South Carolina General Assembly on the day of the Foreclosure Hearing. The Respondent and the courts were informed of this and still went forward with the hearing.**

**The Respondent has misled every court proceeding in preventing this from happening. The Respondent has even committed fraud on the Appellate Courts in concealing the evidence of forgery. The Respondent stated in a Motion before the courts that the forgery report was never ruled upon in the lower courts, but the Appellate submitted evidence that not only was the forgery report ruled upon, but the Respondent actually wrote the order that the Honorable Booth signed verifying forgery was addressed. The Appellant feels that the Respondent should have exercised candor to the courts.**

**Also, the rescission of the mortgage took place before any of the bankruptcy filings. The Appellant feels that the Respondent did not have any security interest in her home to foreclose because of its failure to respond to the letter of rescission.**

**The Respondent has misled the courts in stating that the Appellant is barred by Judicial Estoppel. The Respondent ignored the numerous schedules that the Respondent mentioned rescission and took one (1) schedule where the Appellant made a mistake on and presented it to the courts.**

**The Appellant prays that she is given the opportunity to properly present her case and justice will prevail in this case.**

April 2, 2010

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THE STATE OF SOUTH CAROLINA

APPEAL FROM LEE COUNTY
Common Pleas Court

Richard L. Booth, Special Referee

Case No. 2005-CP-31-169

LaSalle Bank National Association, as Trustee for the Registered Holder of Structured Asset Securities Corporation, Structured Asset Investment Loan Trust, Mortgage Pass-Through Certificates, Series 2004-11,

Respondent,

v.

Laura Toney,

Appellant.

## CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

April 2, 2010

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P.O. Box 722
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## CONCLUSION

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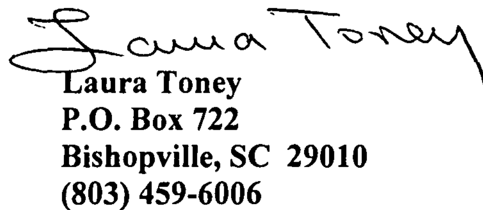
**The Appellant prays that she is given the opportunity to properly present her case and justice will prevail in this case.**

**For the reasons stated, this court should reverse the judgment of the Master-In-Equity and grant the Appellant a new trial.**



**April 2, 2010**

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THE STATE OF SOUTH CAROLINA

APPEAL FROM LEE COUNTY
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**Appellant.**

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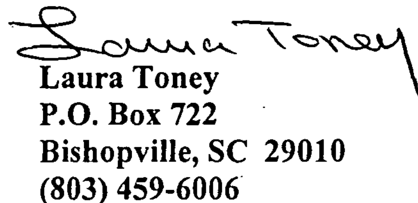
**The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.**

**April 2, 2010**



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

---

APPEAL FROM LEE COUNTY
Common Pleas Court

Richard L. Booth, Special Referee

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Case No. 2005-CP-31-169

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LaSalle Bank National Association, as Trustee for the Registered Holders of Structured Asset Securities Corporation, Structured Asset Investment Loan Trust, Mortgage Pass-Through Certificates, Series 2004-11 .......... Respondent

v.

Laura Toney .......... Appellant

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# RESPONDENT LASALLE BANK'S FINAL BRIEF

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## STATEMENT OF ISSUES ON APPEAL

I. DOES THE APPELLANT'S SWORN STATEMENTS IN HER BANKRUPTCY CASES BAR HER COUNTERCLAIMS AND DEFENSES IN THE FORECLOSURE UNDER THE DOCTRINE OF JUDICIAL ESTOPPEL?

II. WAS THE DENIAL OF APPELLANT'S RULE 60(B) MOTION BY THE TRIAL COURT AN ABUSE OF DISCRETION?

III. DOES THE APPEAL IMPROPERLY INCLUDE ALLEGED EVIDENCE NOT OF RECORD AND LEGAL ARGUMENTS NOT MADE BEFORE THE TRIAL COURT?

## STATEMENT OF THE CASE

The statement of the case in Appellant's brief does not present an objective summary of the case and states as fact matters that are in dispute. The statement of the case in Respondent's brief shall only state those matters that are not in dispute.

This is an action for foreclosure as to property in Lee County. The Appellant Laura Toney obtained the loan to refinance the debt encumbering the property. Appellant signed an adjustable rate note on October 6, 2004 for a loan in the amount of $76,500.00. The Appellant also signed a mortgage designating the property as collateral for the debt. The mortgage was subsequently assigned to Respondent LaSalle Bank. Appellant made the monthly payments required under the note for December 2004, January 2005, February 2005 and March 2005. Appellant made no further payments on the loan.

This case was commenced with the lis pendens, summons and complaint filed on July 21, 2005. In her pro se answer filed August 18, 2005, Appellant Laura Toney admitted that she signed the subject note and mortgage and admitted that she had failed to make the payments required under the note. The Appellant denied that the mortgage provided for the loan to be accelerated upon a default, denied that the loan documents

provided for a deficiency judgment and denied that any notice of breach was provided. By way of counterclaim, Appellant alleged that she had not been provided a good faith estimate. She also disputed being provided an opportunity to select her own attorney to perform the closing. Additionally, she alleged an entitlement to rescind the loan pursuant to a letter of recession sent June 12, 2005. Respondent filed a reply on September 19, 2005 and an amended reply October 20, 2005. Appellant subsequently hired an attorney who notified the court and Respondent's counsel of his representation in a letter dated January 11, 2006. Respondent filed and served a motion for summary judgment with supporting affidavit on March 29, 2006 and a memorandum of law in support of the motion on September 22, 2006. Appellant did not file or serve any opposing affidavits or other evidence prior to the hearing on Respondent's motion for summary judgment.

During the pendency of the foreclosure, the Appellant Laura Toney filed four pro se Chapter 13 Bankruptcy petitions. Under the provisions of the Bankruptcy Abuse Prevention and Consumer Protection Credit Act of 2005, no automatic stay was in effect during the Appellant's fourth Chapter 13 case and the Appellant filed a pro se motion requesting that the Bankruptcy Court impose a stay. A hearing on the Respondent's motion for summary judgment was held on February 6, 2007 with notice of the motion hearing in the foreclosure action mailed to Appellant's attorney on January 24, 2007. Neither the Appellant nor her attorney appeared at the motion hearing.

The Appellant's motion for the Bankruptcy Court to impose a stay was denied by order filed February 15, 2007 and the Appellant's Chapter 13 case was subsequently dismissed by order filed February 26, 2007. The order of dismissal made a finding that the Appellant Laura Toney had filed the case in bad faith and sanctioned the Appellant

Laura Toney with a one year ban on filing any further Chapter 13 cases.

A decree of foreclosure was subsequently filed on March 15, 2007. The Appellant then filed a pro se Chapter 7 Bankruptcy Petition on April 13, 2007. The Appellant's Chapter 7 case was dismissed by order filed May 15, 2007. The dismissal order made a finding that Laura Toney had filed the Chapter 7 case in bad faith and sanctioned her by barring any further bankruptcy filings for one year. None of the bankruptcy orders were appealed.

The Appellant Laura Toney filed a separate civil action through different attorneys on March 23, 2007 seeking to vacate the foreclosure decree. The Appellant Laura Toney also obtained an ex parte order filed March 23, 2007 granting an injunction as to the foreclosure sale. A hearing on the Appellant's application for a temporary restraining order was held before the Honorable Clifton Newman on March 27, 2007. By order filed April 2, 2007, Judge Newman dissolved the ex parte temporary restraining order and dismissed the injunction action as improperly filed. The order found that the request for an injunction was intrinsically related to the foreclosure action and exclusive jurisdiction remained with the trial judge under the order of reference. The order further found that the Appellant and her attorneys appearing at the injunction hearing had not complied with Rule 11 of the South Carolina Rules of Civil Procedure pertaining to substitution of counsel. The order dissolving the ex parte temporary restraining order and dismissing the action for an injunction was not appealed.

The Appellant Laura Toney filed a notice of motion and motion for reconsideration of decision and for stay of enforcement of the foreclosure order pursuant to Rule 60 through her foreclosure attorney on April 25, 2007.

A supplemental order of reference referred the matter to the Honorable Richard Booth as the original trial judge in the foreclosure action had recused himself due to a judicial grievance filed against him by the Appellant. Respondent's counsel also filed a motion to amend and supplement the foreclosure decree with the additional fees and costs incurred subsequent to the entry of the decree. A hearing was held before Judge Richard Booth on October 18, 2007. By order filed December 3, 2007, Judge Booth denied the Appellant's motion for relief under Rule 60(b). Respondent's motion to amend the decree was granted. The order also included a deficiency judgment against the Appellant. The Appellant filed a notice of appeal as to the order denying her motion for relief under Rule 60(b). This appeal was stayed by another Chapter 13 Bankruptcy filed by the Appellant on December 30, 2008. That bankruptcy case was dismissed by order filed April 21, 2009.

STANDARD OF REVIEW

Neither the foreclosure decree nor the order dismissing the request for an injunction was appealed and the only order on appeal is the order denying appellant's request for relief under Rule 60(b) SCRCP. Whether to grant or deny a motion under Rule 60(b) lies within the sound discretion of the trial court. Coleman v. Dunlap, 306 S.C. 491, 494, 413 S.E.2d 15, 17 (1992). Therefore, the standard of review is limited to determining whether there was an abuse of discretion. Raby Const., L.L.P. v. Orr, 358 S.C. 10, 594 S.E.2d 478, 482 (2004). An abuse of discretion arises when the order was controlled by an error of law or when the order is based on factual conclusions that are without evidentiary support. Tri-County Ice & Fuel Co. v. Palmetto Ice Co., 303 S.C. 237, 242, 399 S.E.2d 779, 782 (1990).

## ARGUMENTS

### I THE APPELLANT'S SWORN STATEMENTS IN HER BANKRUPTCY CASES BARRED HER COUNTERCLAIMS AND DEFENSES IN THE FORECLOSURE UNDER THE DOCTRINE OF JUDICIAL ESTOPPEL

As previously stated, the Respondent repeatedly filed serial bankruptcy petitions during the pendency of this foreclosure action. As part of the required declaration of assets in the bankruptcy cases, the Respondent was required to affirmatively state her assets and liabilities in her schedules. The petition and schedules are sworn statements by a debtor made under penalty of perjury. In Schedule B of her third bankruptcy petition, the Appellant affirmatively stated that she possessed no "contingent and unliquidated claims of every nature, including tax refunds, ***counterclaims of the debtor, and rights to setoff claims***" (emphasis added) (R.p. 191). Upon the filing of the Chapter 13 Bankruptcy petition, all the legal and equitable interests of the debtor become the property the bankruptcy estate. See Section 541 U.S. Bankruptcy Code. The bankruptcy petition submitted by this debtor, as with all bankruptcy debtors, is submitted under oath and under penalty of perjury. A person who knowingly and fraudulently conceals any of his property or assets in a bankruptcy case is subject to fine, imprisonment of not more than 5 years or both. In the foreclosure, Respondent submitted into evidence Schedule B of the Chapter 13 Plan from the Appellant's third bankruptcy filing. The trial court made a finding that the doctrine of judicial estoppel barred the Appellant from asserting claims and defenses in the foreclosure that were not declared as assets in her bankruptcy. (R.pp. 18 - 19).

Judicial estoppel precludes a party from adopting a position in conflict with one

taken in the same or related litigation. See Colleton Reg. Hosp. V. MRS Med. Rev. Syst., 866 F. Supp 896 (D.S.C. 1994). The purpose or function of the doctrine is to protect the integrity of the judicial process or the integrity of the courts rather than to protect litigants from allegedly improper or deceitful conduct by their adversaries. 31 C.J.S. *Estoppel & Waiver* Section 139, at 593 (1996). See also Zimmerman v. Central Union Bank, 194 S.C. 518, 532, 8 S.E.2d 359, 365 (1940)("Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position."). See also Hayne Federal Credit Union v. Bailey, 327 S.C. 242, 489 S.E.2d 472 (1997) ("Although parties may vigorously assert their version of the facts, they may not misrepresent those facts in order to gain advantage in the process. When a party has formally asserted a certain version of the facts in litigation, he cannot later change those facts when the initial version no longer suits him").

The trial court correctly ruled that the Appellant's statements under oath in her bankruptcy case expressly confirming that no setoffs or counterclaims existed to declare as assets acted as a bar to her assuming a contrary position in the foreclosure. Therefore, the Appellant lacked a meritorious defense to the foreclosure not only due to her failure to submit any opposing affidavits or other evidence prior to hearing, but more importantly due to her sworn statements in her bankruptcy cases that she had no counterclaims or setoffs to declare as assets. It is anathema to the principles of equity for the appellant to make a sworn statement under penalty of perjury to the Bankruptcy Court for the purpose of obtaining the jurisdiction and protection of the Bankruptcy Court and then attempt to disavow such statements and avoid the consequences of such sworn

statements in the foreclosure action. The granting of this appeal would encourage perjury and severely denigrate the integrity of the judicial system for the benefit of a litigant who has been repeatedly found by various courts to have acted in bad faith.

## II THE DENIAL OF APPELLANT'S RULE 60(B) MOTION BY THE TRIAL COURT WAS NOT AN ABUSE OF DISCRETION.

### A. A RULE 60(B) MOTION REQUIRES A MISTAKE OF FACT AND NOT A MISTAKE OF LAW

Rule 60(b)(1), SCRCP provides that the court may relieve a party from a final judgment or order if the judgment was induced by mistake, inadvertence, surprise, or excusable neglect. This rule is an appropriate remedy for good faith mistakes of fact if all other applicable factors are met. See Columbia Pools, Inc. v. Galvin, 288 S.C. 59, 61, 339 S.E.2d 524, 525 (Ct. App. 1986). However, a party may not generally use Rule 60(b)(1) as a vehicle for relief from a mistake of law. See Savage v. Cannon, 204 S.C. 473, 30 S.E.2d 70 (1944); see generally 11 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* §2858 (1973)(stating that an appellant is not entitled to relief under Rule 60(b)(1) for ignorance of the rules or ignorance of the law).

In this case, the mistake alleged by the Appellant Laura Toney is a mistake of law that an automatic stay was in effect pursuant to her fourth Chapter 13 Bankruptcy. Therefore, Rule 60(b) would be inapplicable. "Lack of familiarity with legal proceedings is unacceptable and the court will not hold a layman to any lesser standard than is applied to an attorney." Goodson v. Am. Bankers Ins. Co., 295 S.C. 400, 403, 368 S.E.2d 687, 689 (Ct. App. 1988). Moreover, the contention by the Appellant Laura Toney that she believed an automatic stay to be in effect is not credible as demonstrated by her actions at

the time. The Appellant Laura Toney filed four pro se Chapter 13 Bankruptcy petitions prior to the hearing on Respondent's motion for summary judgment. The Appellant demonstrated sufficient knowledge and familiarity with bankruptcy law and procedures in her fourth Chapter 13 case to realize that no automatic stay was in effect. The Appellant filed a motion requesting the Bankruptcy Court to impose a stay. The Appellant's motion for a stay was denied by Order of the Honorable John Waites, United States Bankruptcy Judge for the District of South Carolina filed February 15, 2007. (R.pp. 193 - 197). The order set forth with specificity the factors giving rise to an assumption that the Appellant had filed the case in bad faith. By Order of the Honorable John Waites filed February 26, 2007, the United States Bankruptcy Court made a specific finding of fact that the Appellant's fourth Chapter 13 Bankruptcy case was filed in bad faith and reserved jurisdiction to impose sanctions. (R.pp. 198 - 201). The United States Bankruptcy Court subsequently sanctioned the Appellant with a bar on any further filings under Chapter 13 for one year. (R.p. 203).

The Appellant subsequently filed a Chapter 7 case that was also dismissed with a finding of bad faith as the Appellant had filed a total of five bankruptcy petitions within the space of nine months. The order of dismissal also imposed a sanction barring the Appellant from any bankruptcy filings for one year. (R.pp. 204 - 205). After the one year ban lapsed, the Appellant filed another Chapter 13 Bankruptcy Petition that stayed this appeal until that case was also dismissed. None of the bankruptcy orders were appealed.

The lower court judge who heard the Appellant's post-trial Rule 60 motion correctly noted that either an automatic stay was in effect or it wasn't and in the present

case there is absolutely no doubt that no automatic stay was in effect. (R.p. 177, line 6 – p.180, line 10). Therefore, the evidence clearly established that no stay existed, Laura Toney fully understood that a stay was not in effect due to her bankruptcy filing and her claim that she mistakenly believed a stay to be in effect is disingenuous and not credible.

B. THE APPELLANT LACKED A MERITORIOUS DEFENSE

Furthermore, even if the mistake were a mistake of fact rather than a mistake of law, the appellant Laura Toney lacked a meritorious defense to the foreclosure. In determining whether a default judgment should be set aside under Rule 60(b)(1), "[t]he promptness with which relief is sought, the reasons for the failure to act promptly, the existence of [a] meritorious defense, and the prejudice to the other parties are relevant." New Hampshire Ins. Co. v. Bey Corp., 312 S.C. 47, 50, 435 S.E.2d 377, 379 (Ct. App. 1993)(quoting Harry M. Lightsey & James F. Flanagan, *South Carolina Civil Procedure* 82 (1985)).

Respondent submitted sworn affidavits from the mortgage broker and the closing attorney that they personally witnessed Laura Toney sign the requisite documents and a copy of the signed documents was attached to the affidavits. (R.pp. 60 – 73, 94 – 96, 144; See Also Second Supplemental Record p. 12). The HUD Settlement Statement reflects that the proceeds were used to payoff a prior mortgage on the subject property. Additionally, the Appellant directly received proceeds of Twenty Thousand Nine Hundred Seventy Four and 19/100ths ($20,974.19) Dollars from the loan. (R.pp. 65 & 66, 91 & 92, 342)

The Respondent filed and properly served upon opposing counsel the motion for summary judgment, supporting affidavits and a memorandum of law. (R.pp. 60 – 79, 97

– 130, 144 – 146). In the eleven months between service of the Respondent's motion for summary judgment and the subsequent hearing, the Appellant did not file any pleading, affidavit or memorandum opposing the motion. Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. Regions Bank v. Schmauch, 354 S.C. 648, 582 S.E.2d 432 (Ct. App. 2003). Rather, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial. Ellis v. Davidson, 358 S.C. 509, 595 S.E.2d 817 (Ct. App. 2004); Peterson v. West American Ins. Co., 336 S.C. 89, 518 S.E.2d 608 (Ct. App. 1999); Rule 56(c), SCRCP.

Appellant has referenced in her brief the statement of a supposed handwriting "analyst" questioning the validity of her signature on certain documents. This is an issue that the Appellant did not raise before the trial court despite almost a year elapsing between the filing of the summary judgment motion with supporting affidavits and the subsequent hearing. The only mention made of a forgery claim is a passing reference by her attorney at the Rule 60 motion hearing. (R.p. 188, lines 1 - 8). This outrageous claim by Appellant was only made after she had delayed the foreclosure for as long as possible through multiple bad faith bankruptcy filings, an improperly filed separate action for an injunction and a judicial grievance against the trial judge. (R.pp. 151 & 152). This issue is dealt with more fully in the following portion of Respondent's brief. But it was not an issue before the trial court when respondent was granted summary judgment despite Appellant having ample time and opportunity to plead what was clearly a compulsory counterclaim pursuant to Rule 13(a) SCRCP. If it was an issue before the court at the

time of the Rule 60(b) motion, it was defective in not having been presented by way of proper affidavit per Rule 6(d) SCRCP. Given the Appellant's failure to raise the issue timely and properly in her pleadings, coupled with her well-established penchant for bad faith litigation and dilatory tactics, the court presumably viewed the claim as yet another desperate attempt delay the foreclosure action at any cost and by any means necessary.

The Appellant also now attempts to manufacture an issue for the first time on appeal as to whether certain documents were provided to her prior to the loan closing rather than at loan closing. A comparison between the Appellant's answer and counterclaim in the foreclosure and her appeal brief demonstrates her constant shifting of positions and arguments. Her answer and counterclaim makes some fairly ridiculous allegations, such as the loan documents not providing for the mortgagee's right to a deficiency judgment or the loan documents not providing for the loan to be accelerated upon a default or breach of its terms. The loan documents speak for themselves and the Appellant's denial of these express provisions of the loan documents is an example of her disregard for candor and truthfulness. The Appellant's answer and counterclaim makes no claim whatsoever as to any required documents not being provided prior to closing. The pleading only makes the general statements the "Plaintiffs failed to provide a good faith estimate" and "Plaintiffs did not provide Defendant an opportunity to select the representative of her choice to act in her behalf at the closing of the loan". (R.pp. 4 – 12, 14 - 15). It should also be noted that the Appellant's answer does not allege a failure to provide her the three day right of rescission at closing. Her pleading merely states that she rescinded the loan by letter dated June 12, 2005.

Respondent's counsel investigated and responded to the allegations in the most expedient and cost efficient manner possible. The mortgage broker was contacted and she provided an attorney preference form executed by the Appellant at the time of loan application along with the broker's notes from their initial meeting. The attorney preference form and notes were attached to an affidavit executed by the mortgage broker. (R.pp. 95 & 96). The closing attorney also provided a form executed by the Appellant confirming she had previously been given the opportunity to select the attorney of her choice. The closing attorney also provided a copy of the executed Good Faith Estimate form, Truth-in-Lending form and a Notice of three (3) day right of Rescission form. The closing attorney also signed an affidavit with those forms and other pertinent documents attached along with his sworn statement that he personally witnessed the Appellant sign those documents at closing. (R.pp. 63 - 73). If the Appellant had truly disputed whether certain documents had been provided to her prior to closing rather than at closing, then her pleadings should have stated that distinction. Her pleadings merely stated that she had never been provided those documents and Respondent's counsel was able to produce signed copies with supporting affidavits.

The lack of merit in this argument is further evidenced by a careful reading of Appellant's improperly filed action for an injunction. The complaint in that action, verified to be true and correct by the Appellant, states that "**during the closing** on Plaintiff's loan, Plaintiff was not provided the disclosures mandated by the federal Truth In Lending Act". (emphasis added)(R.pp. 41 & 45). Likewise, the application for an injunction alleges "Plaintiff was not provided the disclosures as required by the Truth in Lending Act **at the time of the closing** of the transaction that is the subject of this

action". (emphasis added)(R.p. 38). The distinction that Appellant now seeks to draw between documents required but allegedly not provided prior to closing rather than at closing, is part of Appellant's pattern of having a different "defense du jour" rather than adhering to the allegations of her pleadings. The evidence shows Appellant will allege anything she believes will frustrate the Respondent's case, regardless of whether such allegations are untrue and regardless of whether such allegations are not even set forth in her pleadings.

The Appellant further seeks to conceal her lack of a meritorious defense by misstating the applicable law pertaining to rescission of mortgage loans. Appellant's numerous statements in her appeal brief that her unilateral pronouncement of rescission more than eight months after the loan closing automatically made the mortgage null and void are not in accordance with the clearly established caselaw and statutes. A rescission must not only be timely, but must also be accompanied by a debtor's tender of the loan proceeds. When the facts of this case are applied to the correct legal standard, the Appellant's lack of a meritorious defense is apparent.

The equitable goal of rescission under TILA is to restore the parties to the "status quo ante." See Yamamoto v. Bank of New York, 329 F.3d 1167, 1172 (9th Cir. 2003); Williams v. Homestake Mortgage Co., 969 F.2d 1137, 1140 (11th Cir. 1992). The Fourth Circuit follows the majority view that "unilateral notification of cancellation does not automatically void the loan contract." Moore v. Wells Fargo Bank, N.A., 597 F.Supp.2d 612 (4th Cir. 2009)(quoting American Mortgage Network, Inc. v. Shelton, 486 F.3d 815, 821 (4th Cir. 2007). "The natural reading of [§ 1635(b)] is that the security interest becomes void when the obligor exercises a right to rescind that is available in the

particular case, either because the creditor acknowledges that the right of rescission is available, or because the appropriate decision maker has so determined ... Until such decision is made, the [borrowers] have only advanced a claim seeking rescission." Large v. Conseco Fin. Servicing Corp., 292 F.3d 49, 54-55 (1st Cir.2002). In a scenario involving a contested rescission ... if the trial judge determines that the plaintiff seeking rescission is "unable to tender the loan proceeds, the remedy of unconditional rescission [i]s inappropriate." *Id.*

The evidence submitted clearly established that the Appellant had received the notice of the standard three day right of rescission at the loan closing and therefore did not qualify for an expanded three year right of rescission. But even assuming that the Appellant had an expanded right of rescission, the evidence also clearly shows that Appellant did not and could not make an offer to tender the loan proceeds.

The United States Court of Appeals, Fourth Circuit, adjudicated a somewhat similar case in American Mortgage Network, Inc. v. Shelton, 486 F.3d 815 (4th Cir. 2007). In that case, the debtor timely notified the creditor of his desire to rescind the loan contract. The creditor (Amnet) confirmed that it was prepared to unwind the transaction upon receipt of confirmation from the debtor (Shelton) that he was prepared to return the net loan proceeds. The debtor's position in that case, like the Appellant Laura Toney in this case, was that the notice of rescission automatically voided the security interest and no offer to tender the net loan proceeds to the creditor was required. This rationale was unequivocally rejected by the 4th Circuit in *Shelton*:

"The Sheltons construe § 1635(b) as requiring Amnet to unconditionally release the security interest on the Sheltons' residence within 20 days of notification of cancellation, regardless of the Sheltons' admitted inability to tender the balance due on the loan, or reasonable value thereof. In fact, the Sheltons argue that the trial court erred

in not declaring the entire loan balance forfeited by reason of Amnet's refusal to unconditionally remove the mortgage lien. In essence, the Sheltons claim the right to simply walk away with a windfall of $313,468 without any further obligation. This construction not only offends traditional notions of equity, but misinterprets the procedural requirements of § 1635(b)."

In *Shelton*, the 4th Circuit also noted its previous decision in Powers v. Sims & Levin, 542 F.2d 1216 (4th Cir. 1976), rejecting the argument that § 1635 compelled a creditor to remove a mortgage lien in the absence of the debtor's tender of the loan proceeds. Id at 1220. "When rescission is attempted under circumstances which would deprive the lender of its legal due, the attempted rescission will not be judicially enforced unless it is so conditioned that the lender will be assured of receiving its legal due." Id at 1222.

The issue of Appellant's unwillingness and inability to return the net loan proceeds was not reached by the trial court in the present case because the evidence established that Appellant received notice of the three day right of rescission and did not rescind the loan during the requisite period. However, Schedule B of Appellant's third Bankruptcy petition states that she has zero funds to declare as assets. (R.p. 190) Appellant did not even have the $20,974.19 she received from the loan proceeds, much less the remaining sum she would be required to tender in a bona fide rescission. (R.p. 91). Therefore, rescission was not an option available to the Appellant due to her failure to timely rescind the loan and her inability to make an offer to tender the net loan proceeds.

## III THE APPEAL IS IMPROPERLY BASED UPON ALLEGED EVIDENCE NOT OF RECORD AND LEGAL ARGUMENTS NOT MADE BEFORE THE TRIAL COURT

Issues cannot be raised for the first time on appeal, but must be raised to and ruled upon by the trial court to preserve it for appellate review. Wilder Corp. v. Wilkie, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998); See also Durham v. Vinson, 360 S.C. 639, 653-54, 602 S.E.2d 760, 767 (2004) (holding to preserve an issue for appellate review, the issue must have been raised to and ruled upon by the trial court, and a party may not argue one ground for objection at trial and another ground on appeal). The appellate court is confined to the record in deciding issues on appeal. Timms v. Timms, 286 S.C. 291, 294, 333 S.E.2d 74, 75 (Ct. App. 1985) (refusing to review evidence of insurance coverage outside the record on appeal). A litigant who fails to offer proof on an issue may not be heard to complain about the court's resolution of that issue. Hough v. Hough, 312 S.C. 344, 347, 440 S.E.2d 387, 389 (Ct. App. 1994); Hudson v. Hudson, 294 S.C. 166, 169, 363 S.E.2d 387, 389 (Ct. App. 1987); Honea v. Honea, 292 S.C. 456, 458, 357 S.E.2d 191, 192 (Ct. App. 1987).

### A. POST-TRIAL FORGERY CLAIMS

The Respondent's motion for summary judgment and the affidavit of the closing attorney, Michael May, were served on the Appellant's counsel by mail on March 28, 2006. The closing attorney's affidavit included as attachments a Good Faith Estimate signed by Laura Toney, a Truth in Lending Disclosure Statement signed by Laura Toney, an Attorney Preference Disclosure signed by Laura Toney, an Attorney/Insurance Preference Checklist signed by Laura Toney and a Notice of Right to Cancel signed by Laura Toney. The affidavit also included a picture of Laura Toney's drivers license used

to confirm her identity at the closing. Despite the affidavit and accompanying documents being served nearly a full year prior to the motion hearing, the Appellant had not raised any claims of forgery prior to the hearing on Respondent's motion for summary judgment or submitted any opposing affidavits. The Appellant did not even serve any discovery requests during the pendency of the foreclosure case. It cannot be over emphasized that Appellant and her attorney were properly noticed of the motion hearing and elected not to attend. (R.pp. 208, 291, lines 3 – 5; R.p. 258, lines 10 - 16).

A motion for reconsideration under Rule 59(e) dated March 23, 2007 and improperly filed by another attorney for Appellant made no mention of any supposed forgery (R.pp. 49 - 51). The Appellant's motion for reconsideration under Rule 60 filed April 25, 2007 by her counsel of record also made no mention of forgery whatsoever. (R.pp. 80 - 82). The claims of forgery were not raised until after her five bankruptcy cases were dismissed, her grievances against Respondent's counsel were dismissed, a grievance against the trial judge prompted his recusal from the case, and her improperly obtained ex parte temporary restraining order in a separate action was dissolved and dismissed. It is noteworthy that the improperly filed action for an ex parte temporary restraining order also contained no allegations of forgery whatsoever. (R.pp. 36 - 43).

Subsequent to dismissal of the Appellant's improperly filed separate action for a temporary restraining order, a motion dated July 23, 2007 through her counsel of record seeking an injunction raised the issue of a supposed forgery for the first time. (R.pp. 54 - 56). An "analysis" performed almost two (2) months previously, but not previously provided to opposing counsel, accompanied the motion sent to Respondent's counsel. The "analysis" was not in the form of an affidavit as required by Rule 6(d) SCRCP. The

motion for an injunction did not include a certificate of service, so it is unknown to Respondent's counsel if the "analysis" was ever filed with the court. The supposed expert who performed the analysis did not appear at the subsequent hearing on Appellant's Rule 60 motion. Appellant's counsel made only a passing reference to the forgery claims at the motion hearing and no evidence was submitted by Appellant's counsel in support of the contention. (R.p. 311, lines 1 – 8). The Appellant's counsel was provided a copy of the proposed order denying the Rule 60 motion and her counsel was duly served with the subsequent filed order. (R.pp. 153 & 156). No request was ever made by Appellant or her counsel to revise the proposed order to include reference to the forgery claim when the proposed order was presented. No motion for reconsideration as to the order denying the Appellant's Rule 60 motion was ever filed by Appellant.

It is well settled that, but for a very few exceptional circumstances, an appellate court cannot address an issue unless it was raised to and ruled upon by the trial court. Lucas v. Rawl Family Ltd. P'ship, 359 S.C. 505, 510-511, 598 S.E.2d 712, 715 (2004). When an issue is raised to but not ruled upon by the trial court, the issue is preserved for appeal only if the party raises the same issue in a Rule 59(e) motion. See Wilder Corp. v. Wilkie, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998)(noting the proper use of a Rule 59(e) motion is to preserve issues raised but not ruled upon by the trial court); Walsh v. Woods, 371 S.C. 319, 325, 638 S.E.2d 85, 88 (Ct. App. 2006) (finding issue on appeal was not preserved because the trial court did not rule on the issue and it was not raised in a Rule 59(e) motion).

At the hearing on the Appellant's Rule 60 motion, forgery was only mentioned in passing and no evidence or testimony in support of the contention was submitted by Appellant. This is understandable as the forgery claims were only raised in a motion for an injunction that was subsequently abandoned as moot by Appellant. (R.pp. 181, line 23 – p. 183, line 9). Therefore, Appellant's inclusion in her appeal brief of an argument as to supposed forgery is improper.

B. ORDER OF REFERENCE

In her appeal brief, Appellant contests the propriety of the order of reference filed June 16, 2006 referring the foreclosure action to the Honorable William Coffey, Clarendon County Master in Equity. This is an issue that also was not properly raised at trial or preserved for appeal. Furthermore, the facts establish that this argument is entirely without merit.

This is an action for foreclosure and the case was properly referred to a master or special referee pursuant to Rule 53(b) and Rule 71(a) SCRCP. The case was initially referred to the Honorable Robert Jennings, Lee County Master in Equity. (R.pp. 29 & 30; See Also Second Supplemental Record pp. 2 - 4). By letter dated April 19, 2006, Judge Jennings recused himself from serving in the case. (R.p. 142). As noted in the letter dated May 31, 2006, Respondent's attorney attempted to communicate with Appellant's attorney as to a supplemental order of reference for over a month before finally submitting a supplemental order of reference referring the matter to the closest master willing to hear the case. (R.p. 143). Appellant's attorney was copied with the letter and proposed order of reference and no objections to the reference order were

raised at the time. The Appellant also did not appeal the order of reference when it was served on her attorney of record. (R.p. 155).

An objection to the supplemental order of reference was not raised until a post-trial Rule 59(e) motion filed by attorneys Nathaniel Roberson and Joseph Henry at approximately the same time they applied for an ex parte temporary restraining order from Judge Clifton Newman through false insinuations that Respondent's counsel had violated an automatic stay. (R.pp. 49 - 51). Pursuant to Judge Newman's bench ruling and the subsequent order dissolving the ex parte injunction and dismissing the injunction action with prejudice, the lower court made a finding that those two attorneys were not properly substituted as counsel. (Second Supplemental Record pp. 16, line 17 – p. 21, line 11; Second Supplemental Record pp. 25, line 20 – p. 26, line 4). Therefore, the Rule 59(e) motion filed by those attorneys was also improper.

Furthermore, the argument made by those attorneys at the hearing was that the case should have been referred to the master in a closer county, such as Florence County or Sumter County. (Second Supplemental Record pp. 14, line 25 – p. 15, line 23). As Respondent's counsel noted at the hearing, the Clarendon County Master in Equity was the nearest available sitting master as Florence County does not have a master and the Sumter County Master in Equity was under suspension at the time. (Second Supplemental Record pp. 13, line 21 – p. 14, line 23; Second Supplemental Record pp. 22, line 17 – p. 23, line 11). The lack of merit in this argument was amply demonstrated by Appellant's counsel expressly abandoning the argument at the subsequent Rule 60 motion hearing. (Second Supplemental Record p. 30, lines 7 – 16). Respondent would

argue that inclusion of this issue on appeal is frivolous because it was expressly abandoned by Appellant's counsel at the prior motion hearing.

C. POST-TRIAL CLAIM OF REQUEST FOR CONTINUANCE

The most troubling aspect of Appellant's pro se appeal is her contention that the hearing on Respondent's motion for summary judgment was conducted despite her counsel's request for a continuance. This allegation should be viewed critically in light of Appellant being determined by multiple courts to have engaged in bad faith litigation. Also, the facts and circumstances of the present case seriously undermine this allegation.

The record contains no correspondence from Appellant's counsel ever advising the trial judge or opposing counsel of any scheduling requirements due to his legislative duties or of a specific conflict with the date and time of the motion hearing held on February 6, 2007. The record does reflect that Respondent's counsel had previously extended the professional courtesy of consenting to a continuance due to Appellant's counsel having a doctor's appointment. (R.pp. 147, 148 & 207). The record also contains correspondence showing Respondent's counsel granted Appellant's counsel the professional courtesy of an extension to respond to discovery. (R.p. 141). The record also contains correspondence whereby the proposed order from the motion hearing was sent to Appellant's counsel at the same time and manner as the trial judge (R.p. 149). The proposed foreclosure decree was subsequently revised and again forwarded to the trial judge and Appellant's counsel (R.p. 150). Appellant's counsel raised no objection to the proposed foreclosure decrees and specifically no objection or motion based upon an alleged scheduling conflict was raised at that time.

The Appellant did not raise any issue of an alleged scheduling conflict with her attorney until almost three months after the motion hearing and after her attempt to frustrate the foreclosure through filing an improper action for a restraining order proved unsuccessful. The Appellant filed a separate action through different attorneys seeking an injunction staying the foreclosure sale. The pleadings in that action made no mention of her attorney in the foreclosure having an alleged scheduling conflict with the motion hearing. To the contrary, Appellant claimed in her improperly filed action for an injunction that attorney Weeks did not formally represent her. (Second Supplemental Record pp. 16, line 8 – p. 21, line 8).

It is uncontested that the Appellant and her attorney of record had received proper notice of the hearing. (R.p. 208). For the Appellant to now claim that neither she nor her attorney attended the foreclosure hearing because of his legislative duties is a blatantly false statement as evidenced by her previous sworn statements. At the hearing on Appellant's improperly filed action for an injunction, Laura Toney testified that "He told me … Mr. Weeks said there was no point in going to the foreclosure proceedings because the loan was rescinded, and, plus, I was in bankruptcy." (R.p. 291, lines 3 – 5). It was only after Judge Newman chastised the Appellant and her subsequent attorneys in the improperly filed injunction action that any claim of a scheduling conflict with her attorney of record was raised. (R.pp. 33 - 35; Second Supplemental Record pp. 25, line 20 - p. 28, line 7).

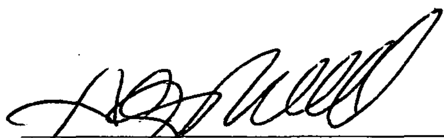
When the issue was finally raised in a subsequent Rule 60 motion filed April 25, 2007, the motion only made a general statement that "Defendant's counsel made numerous attempts to postpone the foreclosure hearing" (R.p. 81). At the hearing on the

Rule 60 motion, Appellant's counsel referred to an affidavit executed by an employee of his office that allegedly contacted the judge's office and the office of Respondent's counsel to request a continuance. Respondent's counsel denied having ever been served or otherwise provided a copy of any such affidavit. The cover letter serving the motion and the accompanying certificate of service made no mention of any supporting affidavit. (Second Supplemental Record pp. 5 – 11). The transcript from the subsequent motion hearing shows that Appellant's counsel conceded that the affidavit had not been served and no further mention of any such affidavit was made at the motion hearing. (R.pp. 184, line 21 – p.187, line 4).

Respondent's counsel is at a supreme disadvantage in trying to respond to an affidavit that was never served upon or otherwise provided to him. The record does not reflect any request by Appellant or her attorney for a continuance. Appellant's claim that such request was not only made but ignored by the Respondent's attorney and the trial judge is patently false. The actual trial judge was in the best position to confirm or deny whether a request for continuance had ever been made to his office but the trial judge recused himself due to the judicial grievance filed by the Appellant. If the motion had contained cogent and specific allegations of any supposed request for continuance, the Respondent's counsel would have had the opportunity to investigate and disprove such allegations. Although the record reflects that Appellant apparently had no qualms as to committing perjury before the trial court, the lack of any testimony or other evidence in the record to corroborate her allegation of a request for a continuance speaks volumes as to this claim's lack of merit.

CONCLUSION

The record in this action, the ex parte injunction action and the related bankruptcy cases are replete with evidence of the Appellant Laura Toney's bad faith litigation and dilatory tactics. If the relief sought by the Appellant were granted, it would impugn the integrity of the court and seriously prejudice the interests of the Respondent. It would also encourage further bad faith actions in a case where no meritorious defense exists. He who comes into equity must come with clean hands. It is far more than a banality. It is a self-imposed ordinance that closes the door of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief. Precision Instrument Mfg. Co. v. Automotive Co., 324 U.S. 806, 814 (1945). The evidence shows that this appeal is without merit and is a continuation of the Appellant's frivolous litigation. She has failed to show any mistake, inadvertence, excusable neglect or newly discovered evidence that would justify this appeal. But more importantly, the Appellant's actions have demonstrated a disregard for the concepts of civility and fairness that are essential to our judicial system. Accordingly, Respondent requests that lower court's order denying Appellant's Rule 60 motion be affirmed and the appeal be dismissed.



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23 March, 2010
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

---

APPEAL FROM LEE COUNTY
Common Pleas Court

Richard L. Booth, Special Referee

---

Case No. 2005-CP-31-169

---

LaSalle Bank National Association, as Trustee for the Registered Holders of Structured Asset Securities Corporation, Structured Asset Investment Loan Trust, Mortgage Pass-Through Certificates, Series 2004-11....................................Respondent,

v.

Laura Toney ...........................................................Appellant.

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CERTIFICATE OF COUNSEL

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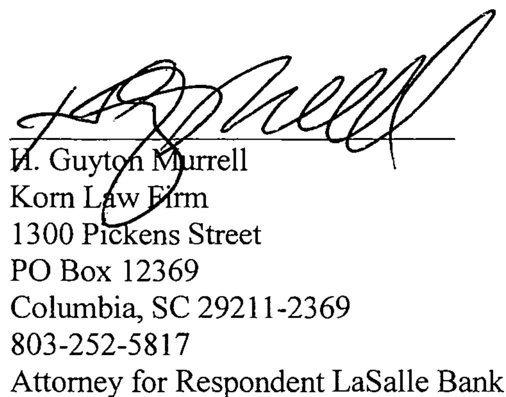
The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

March 23, 2010



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**v.**

**Laura Toney.............................................Appellant.**

# APPELLANT'S FINAL REPLY BRIEF

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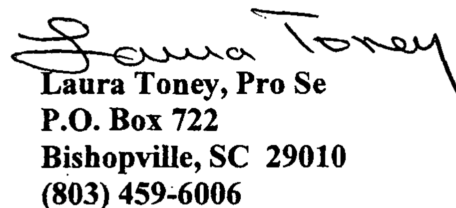

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v.

## STATEMENT OF ISSUES ON APPEAL

I. DOES THE APPELLANT'S SWORN STATEMENTS IN HER BANKRUPTCY CASES BAR HER COUNTERCLAIMS AND DEFENSES IN THE FORECLOSURE UNDER THE DOCTRINE OF JUDICIAL ESTOPPEL?

II. WAS THE DENIAL OF APPELLANT'S RULE 60(B) MOTION BY THE TRIAL JUDGE AN ABUSE OF DISCRETION?

III. DOES THE APPEAL IMPROPERLY INCLUDE ALLEGED EVIDENCE NOT OF RECORD AND LEGAL ARGUMENTS NOT MADE BEFORE THE TRIAL COURT?

## FACTS

## REPLY TO THE RESPONDENT'S ISSUES ON APPEAL

**The Appellant is respectfully requesting the courts to not allow the Respondent to use the name "Peter Korn" in his Initial Brief. The Korn Law Firm should have been sufficient. The Respondent has attempted to manipulate the courts by submitting a photograph of the Appellant, stating his personal problems with his children, his professional affiliations, and other information that has nothing to do with this case other than to gain favor with the courts. Why does the Respondent feel the necessity to write Peter Korn's name on the front cover of his Initial Brief? The Appellant is very concerned about the above manipulative tactics by the Respondent to mislead the courts. The Appellant is not an attorney and does not own a large law firm, but has faith that justice will prevail in this case.**

**I. DOES THE APPELLANT'S SWORN STATEMENTS IN HER BANKRUPTCY CASE BAR HER COUNTERCLAIMS AND DEFENSES IN THE FORECLOSURE UNDER THE DOCTRINE OF JUDICIAL ESTOPPEL?**

**The Appellant counterclaims and defenses should not be barred by the doctrine of judicial estoppel because the forgery report that was completed by a Forensic Document Examiner was after the bankruptcy filings. (r. pages 343-355). The Appellant was denied due process by the trial court in proving that the Federal Disclosures were forgeries.(r. p. 226).**

**In the Respondent's desire to mislead the courts, the Respondent has submitted only one document from numerous documents in the Appellant bankruptcy file. If the Appellant had been given the due process to present her case, the Appellant would have been able to present these documents that the Respondent conveniently disregarded.**

**The elements of judicial estoppel are as follows: (1) two inconsistent positions taken by the same party or parties in privity with one another; (2) the positions are taken in the same or related proceedings involving the same party or parties in privity with one another; (3) the party taking the position must have been successful in maintaining that position and received some benefit; (4) the inconsistency must be part of an intentional effort to mislead the court; and (5) the two positions must be totally inconsistent. Cothran v. Brown, 357 S.C. 210, 215-16, 592 S.E. 2d 629, 632 (2004). As aforementioned the forgery report was completed after the bankruptcy filings. The Appellant prays that the Court will give her the opportunity to prove that the Respondent has misled the Court with his repeated use of "Doctrine of Judicial Estoppel and her bankruptcy filings.**

**II. THE DENIAL OF APPELLANT'S RULE 60(B) MOTION BY THE TRIAL COURT WAS NOT AN ABUSE OF DESCRETION.**

**The Appellant believes that the denial of Appellant's Rule 60(b) motion by the trial court was an abuse of discretion.**

On October 14, 2004, I received a mortgage loan and later discovered that there were several violations during the processing of the loan. I did not receive the Good Faith Estimate, an Attorney and Insurance Preference Form or none of the federal disclosures prior to the closing of the loan. In addition to the mandatory Notice of Rescission rights, each consumer must be given a copy of the disclosure statement with all "material" information correctly disclosed, see 15 U.S.C. 1635(a); Regulation Z 226.15(a); 226.23(a); 226.15(b)-1; and 226.23(b)-1. If these material disclosures are not properly supplied, the consumer has an extended right to rescind. The following material disclosures must be provided as required by Regulation Z:

1. The annual percentage rate.
2. Applicable variable-rate disclosures.
3. The finance charge.
4. The amount financed.
5. The total of payments
6. The payment schedule.

Regulation Z requires that the above disclosures be made before credit is extended. Regulation Z uses the phrase "Before Consummation." The

requirement is important because the disclosures are supposed to guide the consumer in making a rational economic choice about the financial attractiveness of the transaction prior to entering into it, and to facilitate comparison shopping. The Respondent clearly verified the fact that these disclosures were not provided in the transcript of the Foreclosure Hearing, that was held without me or my attorney being present in (r. p. 261, lines 10-21). Here the Respondent clearly states that these disclosures were not provided until the day of the loan closing. Also, (R. pp. 91-92) from the foreclosure hearing is the copy of the HUD statement provided to the courts by the Respondent clearly proves that the disclosures were not provided prior to the closing. The date on the HUD statement is the date of the loan closing. Also, the affidavit of Mr. Michael May, the closing attorney, that was admitted into evidence proves that these disclosures were not provided prior to the loan closing (r. pp. 332-333). Also, into evidence by the Respondent is the Attorney and Insurance Preference Form provided by the Loan Broker, Mrs. Benjamin is a forgery (r. pp. 95-96) The Appellant did not sign this form. The forgery report (r. 344-365), which is included will verify this. The Appellant would also like to inform the courts that this same document with other documents were admitted into evidence at a prior case by the Loan Broker. She is no longer license to make loans according to the South Carolina Consumer Affairs Commission. The Appellant filed a complaint with the Commission about this incident.

Violation of the timing requirement entitles the consumer to statutory damages and attorney's fees as well as actual damages. In transactions subject

to the right of rescission, violation of the timing requirement may be a ground for rescinding the transaction.

On June 14, 2005, the Appellant rescinded the loan by mailing Ocwen National Bank (2) certified letters (r. pp. 324-326). The bank ignored my rescission notice and did not respond within the (20) days mandated by law. Once a valid notice of rescission is given, the lien on the consumer's home becomes void, taking away the creditor's foreclosure remedy and its leverage. The creditor's failure to perform its statutory obligation to respond properly to a cancellation notice may be a separate violation, entitling the consumer to actual damages and attorney's fees. 15 U.S.C. 1640 also states that a consumer may recover statutory damages for the creditor's failure to rescind. Please see Aquino v. Public Fin. Consumer Discount Co., 606 F. Supp. 504 (E.D.PA 1985). Perhaps the most important aspect of Truth-In-Lending extended rescission right for consumers is its value as a defense to foreclosure. If the transaction is one subject to the rescission right, and there are valid grounds for complete defense to foreclosure.

Exercising the extended right, rescission is a complete defense to foreclosure. Please see Family Financial Services v. Spencer, 677 A. 2d 479 (Conn. App. 1996)(creditor's failure to accept rescission letter nullified the mortgage, barring creditor from foreclosure.) Since a valid rescission voids the security interest as well as eliminating the obligation to pay finance or other charges, the creditor is unsecured; it has no interest in the property upon to foreclose. Also, Yslas v. D.K. Guenther Builders, Inc., 342 S. 2d 859 (Fla. Dist. Ct. App. 1977); Community

National Bank and Trust v. McClammy, 525 N.Y. S. 2d 629 (App.div. 1988)(If rescission claim established, would be a defense to a foreclosure on a nine year old mortgage). See Dotter v. Texas Commerce Bank National Ass'n, 679 So. 2d 1215 (Fla District Court App. 1996)(Reversing lower court's grant of summary judgment for foreclosure due to consumer's defense raised by way of recoupment under Truth-In-Lending which the creditor had not refuted); FDIC v. Ablin, 532 N. 2d 379(Ill App. 1988)(reversing lower court's grant of summary judgment for foreclosure based on non payment, since possibility exists that transaction may be rescinded. Also see Lopez v. Delta Funding Corp. Clearinghouse No. 52140, No. CV 98-7204 (CPS) E.D.N.Y. Dec. 23, 1998)(foreclosure sale enjoined); Thomas v. F.F.Financial Inc., 1989 WL 37658 (S.D.N.Y. Apr. 12 1989)(preliminary injunction granted against foreclosure where homeowner-plaintiff alleged she had rescinded, the creditor-defendant had failed to tender back to borrower fees and costs collected as required and mortgage was null and void.

When a creditor fails to make any of the specified material disclosures, the consumer has the extended rescission right. Please se Williams v. Gelt Financial Corp. (In re Williams), 232 B.R. 629 Bankr. E.D. Pa. 19990, Aff'd 1999 U.S. Dist. Lexix 12512 (E.D. Pa. 1999)(debtor has three (3) years to rescind where creditor failed to give disclosure statement or notice of right to rescind).

When the consumer rescinds, the security interest or lien arising by operation of law on the property becomes automatically void. The promissory note is also voided since it is part of the "transaction." The creditor's interest in the property in

automatically negated regardless of its status and whether or not it was recorded or perfected. Please see Regulation Z 226.15(d)(1), 226.23(d)(1). See Semar v. Platte Valey Fed. Sav. and Loan Ass'n 791 F. Ed 699, 704-05 (9th Cir. 1986)(Courts do not have equitable discretion to alter substantive provisions of Truth-In-Lending, so cases on equitable modification are irrelevant; at issue was the portion of Step 1 automatically eliminating the consumer's obligation to pay charges).

Noncompliance is a violation of the act which gives rise to a claim for actual and statutory damages under 15 U.S.C. 1640. The potential for damages against a noncompliant creditor in a rescission case is greater than in nonrescission Truth-In-Lending. Simplication made it clear that if a creditor violates any of the requirements of the rescission provisions, a court may award statutory and actual damages for the disclosure violations in addition to rescinding the transaction. Moreover, violations which themselves give rise to statutory and actual damages. 15U.S.C. 1640(a). Thus violations of the rescission notice requirement would give rise to a damage claim under 15 U.S.C. 1640, as could violations of the delay of performance rule. See Newton v. United Companies Financial Corp, 24 F. Supp. 2d 444 (E.D. PA. 1998); In re Kenderdine, 118 B.R. 258 (Bankr. E.D. PA. 1990)(failure to correctly disclose on the rescission note the date the right to rescind expired violated 15 U.S.C. 1635(a) and Regulation Z 226.23(b)(5) and gave rise to claim for statutory damages). The Appellant raised these issues in her answer to the foreclosure. The disclosures mandatory before the loan closing were not provided. The Respondent again is trying to mislead the courts in

stating that the Appellant stated that she never received the federal disclosure forms.

**The trial court nor the Respondents addressed the issue of South Carolina Code 2-1-150 in his final orders. The Appellant believes that the Respondent is barred from raising this issue now on appeal. This issue was addressed by the Appellant's counsel, but disregarded by the trial court and the Respondent. The Respondent is raising for the first time that he checked the front desk to see if the attorney for the Appellant had called to inform the court of his Legislative duties.**

A Foreclosure Hearing was held on this case in Judge Coffey's Court, Master-In-Equity, on February 16, 2007, in Clarendon County. This hearing was conducted without me or my attorney, Mr. David Weeks, who was in the South Carolina General Assembly performing his legislative duties, being present. Please see Affidavit of Ms. Cheryl Scott Jones (r. p. 328) who called the Korn Law Firm and Judge

Coffey's court to notify them that Mr. Weeks was in the General Assembly and to please reschedule the hearing. The hearing went forward. This is violation of South Carolina Code of Laws Section 2-1-150 which states in part that ***"Notwithstanding any other provisions of law or rule of court, no member of the General Assembly shall be required to appear in court as an attorney, who is an attorney of record, witness or otherwise during any regular day...."*** This statute clearly states that the courts should have rescheduled the hearing to another day. The Respondent deliberately and

conveniently left this out of his final order. Also, the Appellant was is Bankruptcy awaiting a decision for an automatic stay.

**THE RESPONDENT'S SECURITY INTEREST WAS NULL AND VOID SINCE JULY 6, 2007, WHICH WAS (20) DAYS AFTER THE RECEIPT OF THE LETTER.**

**II. THE DENIAL OF APPELLANT'S RULE 60(B) MOTION BY THE TRIAL COURT WAS NOT AN ABUSE OF DESCRETION.**

The denial of Appellant's Rule 60(b) motion by the trial court was an abuse of discretion. Again, the Respondent is using the Appellant's bankruptcies to mislead the courts. The Federal disclosures admitted by the closing attorney, Michael May and the broker, Letia Benjamin were forgeries. The Respondent received a copy of the forgery report, but decided to ignore it.

The Respondent had no security interest in my home in which to foreclose. **Step 1** of the rescission process is automatic by operation of law. The courts have no discretion in Step 1 of the rescission process. The courts has no power to direct an obligor to pay interest or any security interest. According to U.S.C. 1635, "When an obligor exercises his rights to rescind under subsection (a) of this section, he is not liable for any finance or other charges, and any security interest given by the obligor, within (20) days after receipt of a notice of rescission, the creditor shall return to the obligor any money or property given as earnest money, down payment, or otherwise, and shall take any necessary or appropriate steps to reflect the termination of any security interest created under the transaction. If the creditor has delivered any property to the obligor, the obligor may retain possession of it. Upon the performance of the creditor's

obligations under this section, the obligor shall tender the property to the creditor, except that if the property in kind would be impracticable or inequitable, the obligor shall tender its reasonable value. Tender shall be made at the location of the obligor. If the creditor does not take possession of the property within (20) days after the tender by the obligor, ownership of the property vests in the obligor without obligation on his part to pay for it. " In this case, the creditor did not complete **Step 1** in the rescission process and has forfeited all security interest in my home." **Step 1** in the rescission process is automatic by operation of law. The courts can only modify **Steps 2 and 3.** The Truth-In-Lending Act grants the court power to modify certain aspects of the Statutory rescission process. **Regulation Z** enables the courts to modify the second and third steps only of the rescission process. **Regulation Z 226.15(d), 226.23(d).** Neither statutes or cases give courts **equitable discretion** to alter the Truth-In-Lending substantive provisions. Please see Semar v. Platte Valley Federal Savings and Loan Association 791F 2d 699, 705-06 (9th Circuit 1986). Courts do not have authority to alter substance of Truth-In-Lending and order consumer to pay interest, which is the other consequence of rescission which works automatically by operation of law. Also, U.S.C. 1635(f), **An obligor's right shall expire (3) years after the date of consummation of the transaction.** The appellant rescinded the loan in June of 2005, so the rescission rights still remain eventhough the Respondent has illegally foreclose and sold my home.

**The South Carolina Supreme Court explained:**

**"When a party elects and is granted rescission as a remedy, he is entitled to be returned to Status Quo Ante, Kent Homes Inc. v. Frankel, 128 A. 2d 444,446 (DC CT. App, 1957), Rescission entitles the party to a return of the consideration paid as well as any additional sums necessary to restore him to the position occupied prior to the making of the contract. Bank of Johnston v. Jones, 141 S.C. 98, 115-116, 139 S.E. 190, 196(1927); Baeza v. Robert E. Lee Chrysler, Plymouth, 279 S.C. 468, 472-473, 309 S.E. 2d 763, 766 (Ct. App. 1983); Jennings v. Lee, 461 P. 2d 161, 167 (Ariz. 1969)."**

**Also the South Carolina Supreme Court explained: "First Equity Investment Corp., 299 S.C. AT 496-97, 386 S.E. 2d at 248. Rescission, as a remedy, returns the parties to the status quo ante. Government Employees Insurance Co., Supra. A return to the status quo ante Necessarily requires any party damaged to be compensated, See Ebner v. Haverty Furniture Co., 128 S.C. 151, 122 S.E. 578 (1924) (Remedy of rescission is insufficient if parties cannot be returned to status quo ante)."**

In Family Financial Services v. Spencer, 677 A. 2d 479 (Conn. App. 1996)(Creditor's failure to accept rescission notice nullified the mortgage, barring creditor from foreclosure).

Once a valid notice of rescission is given, the lien on the consumer's home becomes void, taking away the creditor's foreclosure remedy and its leverage.

The SCRCP under rule 60 states, ***This rule does not limit the power of a court to entertain an Independent Action to relieve a party from a judgment,***

***order, or proceeding, to set aside a judgment for fraud upon the court.*** As aforementioned above, the Respondent clearly admitted during the foreclosure hearing in Manning, South Carolina with the Judge Coffey presiding, on (r. p. 261, lines 10-21) from the transcript of the hearing that the disclosures were not provided until the day of the closing. Also, the Respondent did not have any security in my home in which to foreclose because of the Respondent's failure to respond to the letter of rescission in the mandatory (20) days mandated by the Truth-In-Lending Act. **15 U.S.C. 1635(g) See also S. Rep. No. 368, 96th Congress, 2d Sess. 28 at 29 reprinted in 1980 U.S.C.C.A.N. 236, 265("the bill explicitly provides that a consumer who exercises his right to rescind may also bring suit under the act for other violations not relating to rescission.** The statute provides for an initial three-day period during which the consumers have an unconditional right to change their minds and cancel the transaction for any reason. However, if the creditor does not meet certain requirements under Truth-In-Lending, the three-day clock never stops ticking, and so the right to rescind can extend for three(3) years. Moreover, if a creditor if a creditor ignores a rescission notice for more than (20) days and instead proceeds with a foreclosure action or foreclosure sale, that should give rise to claims available for the creditor's noncompliance. See **15 U.S.C. 1640 1640(g).** If the transaction is one subject to the rescission right, and there are valid grounds for exercises extended right, rescission is a complete defense to foreclosure. See Family Financial Services v. Spencer, 677 A.2d 479 (Conn. App. 1996). Also, Yslas v. D.K. Guenther Builders, Inc., 342 So. 2d 859 So. 2d 859 (Fla. Dist. Ct. app,

1977); Community National Bank and Trust v. McClammy, 525 N.Y.S. 2d 629 (App. Div. 1998)(if rescission claim established, would be a defense to foreclosure on a nine year old mortgage. Also see Dotter v. Texas Commerce Bank National Ass'n, 679 So. 2d 1215(Fla. Dist. Ct. App. 1996)(reversing lower court's grant of summary judgment for foreclosure). See FDIC v. Ablin, 532, N.E. 2d 379 (Ill. App. 1988) In Thomas v. F.F. Financial, In., 1989 WL 37658 (S.D.N.Y. Apr. 12, 1989)(preliminary injunction granted against foreclosure where homeowner alleged she had rescinded and the creditor failed to respond). See Rioux v. C.F. Investment, Inc., Clearinghouse No. 46178, Civ. No. 89-573-L (D.N.H.. 21, 1989(order granting TRO). Please also see Jones v. Saxon Mortgage, Inc., 161 F.2d 2 (table), 1998 WL 614150 (4th Cir. 1998).

When the consumer rescinds , the security interest or lien arising by operation of law on the property becomes automatically void. The promissory note is also void because it is a part of the transaction. See Arnold v. W.D.L. Investments, Inc., 703 F.2d 848, 849 (5th Cir. 1983) Also, Elsner v. Albrecht, 185 Mich. App. 72, 460 N.W.2d 232 (1990). Other cases: Gerasta v. Hibernia National Bank, 575 F2d 580 (5th Cir. 1978); Abel v. Knickerbocker Realty Co., 846 F. supp. 445 (D.Md. 19940; Elliott v. ITT corp. 764 F. Supp. 102 (N.D. Ill. 1991); In re Wright, 133 B.R. 704 (E.D. PA, 1991); Williams v. Homestake Mortgage, Clearinghouse no. 44,817, Civ. No. 87-1754 (S.D. Fla. July 29, 1988); Gill v. Mid-Penn Consumer Discount, 671 F. supp. 1021 (E.D. PA 1987, AFF'D MEM, 853 F.2D 917 (3RD Cir 1988); Hunter v. Richmond Equity Corp. Clearinghouse No. 43060, No. CV-P 2734-5 (N.d. Ala. Nov. 23m 1987); Ralls v. Bank of New York (In re Ralls)230

B.R. 508 (Bankr E.D. Pa. 1999); Gombosi v. Carteret Mortgage Corp., 894 F. Supp. 176 (E.D. Pa. 1995)(failure to honor a rescission request is a separate violation, giving rise to a separate claim for damages.

The Appellant filed bankruptcy pro se. Only the Appellant can defend or present evidence that the Respondent has misled the courts into believing that the Appellant did not make a claims to the Truth-In-Lending violations. The Appellant made several claims during the bankruptcy proceedings. The affidavit admitted during the hearing before Judge Booth during a hearing on a motion 60 for a new trial is only (1) document in the files of the Appellant that clearly proves that the Appellant made a claim (r. p. 330). The Appellant's due process was violated and the courts just relied on the evidence admitted by the Respondent. "Where there is a good faith mistake of fact and not attempt to thwart the judicial system, there is a basis for relief under SCRCP, Rule 60(b). "Columbia Pools, Inc v Galvin, 288 S.C. 59. 339 S.E. (2d) 524 (1986). Pursuant to Mictronics, Inc. v. South Carolina Department of Revenue, 345 S.C. 506; 548 S.E. 2d 223 (2001), a trial judge in determining whether to grant a motion to set aside a final order pursuant to SCRCP. Rule 60(b) shall consider the following factors:

1. the promptness with which relief is sought.
2. the reasons for the failure to act promptly.
3. the existence of a meritorious defense.
4. the prejudice to the other party.

In this case, there is no question that the Appellant's motion under Rule 60 is timely and therefore, the Appellant has satisfied the first prong of the test under

**Mictronics.** The Appellant's reason for not appearing at the Foreclosure Hearing on February 6, 2007, and not properly asserting her Defenses and Counterclaims in response to the Respondent's Motion for Summary Judgment are twofold:

1. The Appellant believed that she was protected under Federal Bankruptcy Laws,
2. The Appellant's Counsel as a State Representative could not have appeared in court as the South Carolina General Assembly was in session.

The issue of whether or not the Appellant was protected by Federal Bankruptcy Laws is a question of law and not of fact. It is clear that the Appellant in this case was not protected by the automatic stay and such mistake of law is basis for relief under **SCRCP. Rule 60(b)(1).**

It is clear that the Respondent and Master-In-Equity were aware of the Appellant's Counsel legislative schedule and duty, the Appellant failed to secure a continuance in the case due to misunderstandings and miscommunications. South Carolina Code of Laws Section 2-1-150 states in part that ***"Notwithstanding any other provision of law or rule of courts, no member of the General Assembly shall be required to appear in court as an attorney, who is an attorney of record, witness or otherwise during a regular legislative day..."*** Counsel for the Appellant was a member of the South

Carolina General Assembly. The motion for summary judgment hearing was scheduled on a legislative day when counsel for the Appellant was at the session, therefore, the Appellant should be granted a new hearing on this basis alone.

Not unlike in **Mictronics**. Where due to interoffice miscommunications and poor scheduling a party failed to appear and was subsequently granted relief under **SCRCP, Rule 60(b)(1),** the Appellant's finds that the Appellant's counsel failure to appear at the Foreclosure Hearing was a result of mistake and neglect, which are excusable and satisfies the second prong of the **Mictronics** test.

The third prong in the **Mictronics** test is whether or not a meritorious defense exist. "To establish a meritorious defense, a party is not required to show absolute defense." **Mictronics, Inc v. South Carolina Department of Revenue,** 345 S.C. 506; 548 S.E. 2d 223 (2001); see also **Thompson v. Hammon,** 299 S.C. 116; 382 S.E. 2d 900 (1989) Furthermore, A meritorious defense need not be perfect nor one which can be guarantee to prevail at trial. It need be only one which is worthy of a hearing or judicial inquiry because it raises a question of law deserving of some investigation and discussion or a real controversy.

In this case, the Appellant raised many defenses and counterclaim. Therefore, if one or more of those defenses genuinely meets the status of meritorious defense, the Appellant will have satisfied the third prong of the test.

The Appellant raised various defenses and counterclaim centering on issues with

the process of closing and regarding her rescission of the mortgage. The Appellant did not receive all of the federally mandated disclosures required for real estate transactions, the she was not offered the opportunity of choosing her own attorney, and the Appellant made a legal and procedurally correct overture to the Respondent to have her loan rescinded, but the Respondent failed to respond to the Appellant's demand within the statutorily mandated time frame of twenty (20) days.

The Appellant has also contended that she did not execute certain documents pertaining to the closing and that any execution of her signature was done by someone else, therefore constituting forgery ( r. pp. 344-365).

The question presented is not if the Appellant would prevail on the merits of the defenses, but whether or not such defenses in prima facie could warrant a decision in the favor of the Appellant. It is clear that if the Appellant is successful in proving that she did not receive all of the disclosures mandated by Federal and State Laws, she would be entitled to some damages, furthermore, if the Appellant all the disclosures her rescission would have been timely under **15 U.S.C. 1635,** and the Respondent would have the duty to respond within twenty (20) days of receipt of the rescission. Furthermore, if the rescission was timely, the Respondent would have effectively lost any security interest in the transaction and the mortgage would have become null and void. **15 U.S.C. 1635. Again in (r. p. 261, lines 10-21) clearly verify the fact that the federal disclosures were not provided to the Appellant until the day of the closing.**

**These disclosures should have been given to the Appellant three (3) days after the application for the loan.**

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## III. THE APPEAL IS IMPROPERLY BASED UPON ALLEGED EVIDENCE NOT OF RECORD AND LEGAL ARGUMENTS NOT MADE BEFORE THE TRIAL COURT.

The Respondent again is attempting to mislead the court by including the documents admitted by Michael May. The Appellant did not receive these documents prior to the closing of the loan as mandated by federal law. These documents were forgeries. (r. p. 226).

The Appellant questions the validity of the transcript of the hearing before Judge Newman. The Appellant made numerous attempts to get the official transcript from Ms. Roland, but there was no response after the Appellant mailed the requested deposit for the transcript. After months of repeated attempts to secure the transcript from Ms. Roland, the Respondent, who is the only one who had privy to the transcript, provided one to the courts. The Appellant does not remember making the statement: "Mr. Weeks said there was no point in going to the foreclosure proceedings because the loan was rescinded, and plus, I was in bankruptcy." (Case No. 07-CP-31-66, Alleged transcript of March 27, 2007 hearing).

## POST-TRIAL FORGERY CLAIMS

The Appellant did not receive the forgery report until after the foreclosure hearing. The Respondent was provided a copy of the forgery report. The

documents referenced by the Respondent were not provided until the day of the closing. These documents should have been provided three days after the loan application.

The purpose of the Rule 59(e) Reconsideration Motion was to enforce the Appellant's rescission rights. The Appellant's counsel of record did raise the issue of the forgery during the hearing before Judge Booth, but it was ignored. **Again, the Appellant did not receive evidence of the forgeries until later.**

**ORDER OF REFERENCE**

The Appellant's house is situated in Lee County, but the Respondent conveniently transferred the foreclosure hearing to Clarendon County. Mr. Robert Jennings did recuse himself, but Lee County had a Special Referee, Mr. Segars, who could have presided over the foreclosure hearing. It was very upsetting to the Appellant when the foreclosure hearing was transferred out her jurisdiction from Lee County to Clarendon County. The Appellant soon discovered that the Special Referee of Lee County, Mr. Segars, was retained by the Respondent to sell the Appellant's house in the foreclosure sale. The Appellant has never seen such lack of integrity on the part of an officer of the court.

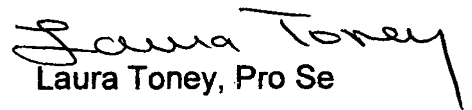
**POST-TRIAL CLAIM OF REQUEST FOR CONTINUANCE**

The Appellant is not going to waste the courts time in responding to this other than to state that the Respondent is raising these issues for the first time and these issues were not in the Respondent's final orders. The trial court did not address the issue of Mr. David Weeks, who was serving in the South Carolina General Assembly during the foreclosure hearing. The Appellant believes that this is violation of South Carolina Code 2-1-150. The Respondent is barred from raising it now. The Appellant's attorney did raise these issues that will be proven in the Record on Appeal.

## CONCLUSION

The Appellant respectfully request that the Respondent's attempt to mislead the courts by raising the issue of violation of South Carolina Code 2-1-150. Mr. Weeks, who is a member of the South Carolina General Assembly, did address this issue before Judge Booth, but the issue was not addressed in the final orders. The Respondent should not be allowed to raise these issues now. The fact is that the trial court ignored this issue in the final orders and the Respondent should not be allowed to use this as a defense.

The Appellant respectfully prays that the court will grant the Appellant an opportunity to present her case and the due process she is entitled to so that the integrity of the court can be maintained.



June 14, 2010

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**APPEAL FROM LEE COUNTY**
**Common Pleas Court**

**Richard L. Booth, Special Referee**

**Case No. 2005-CP-31-169**

**LaSalle Bank National Association, as Trustee for the Registered Holder of Structured Asset Securities Corporation, Structured Asset Investment Loan Trust, Mortgage Pass-Through Certificates, Series 2004-11.......................................................Respondent,**

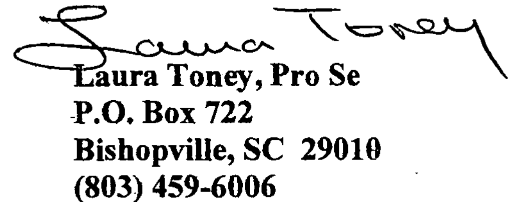
**v.**

**Laura Toney................................................Appellant.**

**CERTIFICATE OF COUNSEL**

**The undersigned certified that this Final Reply Brief complies with Rule 211(b), SCACR.**

**June 14, 2010**



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