STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

R. Murray Hughes, Special Referee

Opinion No. 2013-UP-090
S.C. Ct. App. Filed February 27, 2013

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

v.

Vanessa Y. Bradley..... .....Petitioner.

APPENDIX
VOLUME II

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v.

Vanessa Y. Bradley

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

This appeal arises out of a foreclosure action filed on December 30, 2008, by Respondent JPMorgan Chase Bank, National Association (the "Bank") against Appellant Vanessa Y. Bradley ("Bradley"), following her default on a mortgage loan. (R. pp. 50-

53) Bradley was personally served with the Lis Pendens, Summons, and Complaint (the "Pleadings") on December 30, 2008, as evidenced by the Affidavit of Service filed on December 31, 2008. (R. p. 55) Bradley failed to answer. (R. p. 302)

Bradley was held in default and on February 24, 2009, the matter was referred to the Special Referee for Pickens County, the Honorable Murray R. Hughes ("Special Referee"). (R. p. 3) A final foreclosure hearing was held on March 2, 2009, and Bradley failed to appear. (R. pp. 5, 56-57) On March 17, 2009, the Special Referee entered a Judgment of Foreclosure and Sale, offering the subject property for sale on April 6, 2009. (R. pp. 4-11) The Bank did not seek a deficiency judgment against Bradley. (R. pp. 4-11)

Prior to the scheduled foreclosure sale, Bradley requested the opportunity to apply for a loan modification, and the Bank agreed to postpone the April 6th foreclosure sale. (R. pp. 52-54; 308-309) The Bank offered Bradley a trial plan ("Trial Plan") under the Home Affordable Modification Program ("HAMP"), which Bradley accepted. (R. pp. 52-54) After Bradley failed to comply with the terms of the Trial Plan and after subsequent workout negotiations failed, on May 17, 2010, the Bank's attorneys filed an affidavit ("HAMP Affidavit") concerning Bradley's non-eligibility for a loan modification under HAMP pursuant to the Supreme Court's Administrative Order No. 2009-05-22-01 ("Administrative Order"). (R. pp. 303-304) Bradley did not file a counter affidavit to dispute the testimony in the HAMP Affidavit. (R. p. 194)

The Bank filed an Affidavit in Support of Supplemental Judgment on June 25, 2010 ("June Supplemental Affidavit"), stating that no workout had occurred and detailing the interest and fees that had accrued since the Foreclosure Decree was entered on March

17, 2009. (R. pp. 296-297) The Court entered a Supplemental Order Post Judgment on June 23, 2010 ("June Supplemental Order"), amending the previous judgment debt and finding that the Bank had complied with the 2009 Administrative Order. (R. pp. 13-15) A second foreclosure sale of the property was scheduled for August 2, 2010, and Bradley was served with a copy of the Supplemental Order. (R. pp. 15, 59) Bradley never requested a hearing nor did she object to the June Supplemental Affidavit or the June Supplemental Order.

Prior to the second scheduled foreclosure sale, Bradley requested that the Bank again postpone the sale to afford her time to complete a possible workout of her loan. (R. pp. 310-311) Although the Bank agreed to the postponement of the sale, the Bank and Bradley were unable to agree upon a workout and on August 19, 2010, the Bank notified Bradley that she had been denied a loan modification under HAMP. (R. pp. 187-188, 310) In preparation for rescheduling the foreclosure sale, the Bank filed an Affidavit in Support of Second Supplemental Judgment on August 20, 2010 ("August Supplemental Affidavit"), referencing the loss mitigation efforts, and detailing the interest and fees that had accrued since the June Supplemental Order. (R. pp. 299-301) The Special Referee entered a Second Supplemental Order Post Judgment on August 20, 2010 ("August Supplemental Order"), amending the previous judgment debt and again finding that the Bank had complied with the 2009 Administrative Order. (R. pp. 17-18) (The June Supplemental Order and August Supplemental Orders are sometimes herein referred to collectively as the "Supplemental Orders.") A third sale of the property was scheduled for September 7, 2010, and Bradley was served with a copy of the August Supplemental

Order. (R. pp. 19, 310-311) Again, Bradley never requested a hearing nor did she object to the August Supplemental Affidavit or August Supplemental Order.

Prior to the third foreclosure sale, Bradley again requested that the Bank reconsider her request for a loan modification, but the Bank informed Bradley that the foreclosure sale had not been cancelled and that approval to cancel the sale would have to be approved by the Federal National Mortgage Association, the investor on the loan. (R. pp. 188-189, 310-311) The subject property was sold via judicial sale on September 7, 2010, and the bid was assigned to the Federal National Mortgage Association. (R. p. 311)

Bradley filed a Motion to Set Aside Sale on September 20, 2010 (the "Motion"), alleging that the Bank "failed to properly review [her] for a permanent modification after she completed her trial modification period, prematurely continued the foreclosure before the HAMP process was completed, and failed to provide proper notice of their decision . . . on permanent modification." (R. p. 62)

In opposition to the Motion, the Bank served the Affidavit of Charles Herndon on March 10, 2011. At the hearing on the Motion on March 14, 2011, Bradley's attorney stated that her request in the Motion seeking to have Bradley's default set aside was a "mistake," and that she was seeking only to have the foreclosure sale set aside or in the alternative, to have the Special Referee require the Bank to engage Bradley in discovery concerning its review of her loan for a modification. (R. p. 133, lines 14-22) The Special Referee issued an order denying the Motion on April 29, 2011 (the "Order"), finding that Bradley failed to meet her burden of showing "fraud, misrepresentation, or other misconduct of an adverse party," as required by Rule 60(b)(3), SCRCP. (R. p. 25) The

Special Referee further found that a three-month forbearance period beginning on June 1, 2010, ended on August 31, 2010, and did not affect the Bank's rights to move forward with the September 7th foreclosure sale. (R. p. 25)

On May 24, 2011, Bradley filed a Motion to Reconsider in Light of May 2, 2011 S.C. Supreme Court Administrative Order on Mortgage Foreclosure and Additional Reasons ("Rule 59(e) Motion"). (R. pp. 98-106) On May 16, 2011, Bradley filed a Motion to Stay Time Limits in this Court to allow the Special Referee to hear the Rule 59(e) Motion. On May 26, 2011, Bradley served a Notice of Appeal. (R. p. 108) This Court granted Bradley's Motion to Stay Time Limits on June 21, 2011.

In her Rule 59(e) Motion, Bradley argued for the first time that the Bank's HAMP Affidavit was insufficient because it was based on a "previous denial," and that the Bank should have filed a new affidavit after it denied Bradley for a modification for the third time in August 2010. (R. p. 102) Bradley also argued for the first time, without any evidentiary support, that the Bank failed to properly complete the Net Present Value ("NPV") calculation with respect to the loan. (R. p. 102)

Following a hearing on August 24, 2011, the Special Referee denied the motion by order entered on February 6, 2012 ("Rule 59(e) Order"), adhering to his previous ruling and finding that the record was devoid of evidence of fraud or misconduct by the Bank:

> [T]he evidence before me shows that despite no legal or contractual obligation to do so, [the Bank] postponed two foreclosure sales and worked with [Bradley] for seventeen months to try to modify [Bradley's] delinquent loan. After it exhausted its loss mitigation efforts and after the case had been pending for almost two years, [the Bank] determined it could not offer [Bradley] a permanent loan modification and properly moved forward with the sale of the Property.

(R. p. 32)

Bradley filed an Amended Notice of Appeal on February 22, 2012, appealing both the April 29, 2011 Order and the Rule 59(e) Order.

FACTS

The Bank commenced this foreclosure action to collect on a residential mortgage loan given to Bradley on January 30, 2001 (R. p. 50). The loan was secured by a mortgage encumbering real property located in Pickens County, South Carolina (the "Property"). (R. p. 51) Following an entry of default judgment against Bradley on March 17, 2009, a foreclosure sale of the Property was scheduled to occur on April 6, 2009. (R. p. 11)

Prior to the foreclosure sale scheduled for April 6th, the servicer of the loan was contacted by a representative of Bradley who requested a loan modification on her behalf and requested that the April 6th foreclosure sale be postponed. (R. pp. 308-309) The Bank agreed to postpone the foreclosure sale and extended a Trial Plan under HAMP. (R. pp. 308-309) Bradley accepted the terms of the Trial Plan and made the first and second payments according to its terms. (R. p. 309) However, she failed to submit the full balance owed for the third payment due on September 1, 2009, and instead, submitted a partial payment three weeks later on September 22, 2009. (R. pp. 180-184, 308-309) Bradley did not submit the remainder due for September until October 19, 2009, over 45 days late. (R. p. 183, lines 18-20; 183)

On March 4, 2010, the Bank notified Bradley that her loan was not eligible for a modification because the net present value (or "NPV") of her loan did not meet HAMP guidelines for a modification. (R. pp. 183-184, 309) On May 17, 2010, the Bank's

counsel filed the HAMP Affidavit pursuant to the Administrative Order, stating that the loan had not been modified. (R. p. 303)

From May to July 2010, the Bank continued to work with Bradley to attempt to reach a workout agreement, but due to Bradley's lack of income, the Bank was unable to offer her any type of loss mitigation workout. (R. p. 310) Although the Bank could not offer Bradley a loan modification at that time, it orally offered her a three-month forbearance for June, July, and August 2010 ("Forbearance Period"), to enable her to submit a new loan modification application. (R. pp. 186-187, 196-197) The terms of the agreement were never committed to writing. (R. p. 187, lines 2-8) During the Forbearance Period, Bradley again applied for a loan modification, but on August 19, 2010, the Bank notified her that she had again been denied a modification under HAMP due to the NPV of her loan. (R. pp. 187, line 21-p. 188, line 1, 310) At Bradley's request, the Bank later provided her with detailed information about the NPV calculations that were used in determining that her loan was not eligible for a modification under HAMP. (R. p. 311)

After notifying Bradley that she was ineligible for a loan modification, the Bank attempted to move forward with the foreclosure sale scheduled for September 7, 2010. (R. p. 310) Immediately prior to the third scheduled foreclosure sale, Bradley again requested that the Bank reconsider her for a loan modification and postpone the foreclosure sale. (R. p. 310) Between August 25, 2010, and August 31, 2010, the Bank and Bradley communicated about the updated financial information needed to process Bradley's request. (R. pp. 150-152) The Bank specifically informed Bradley that it could not consider postponing the foreclosure sale until it had received all of the required

information. (R. pp. 153-156, 310) The Bank also informed Bradley that the request to postpone the sale would have to be approved by the Federal National Mortgage Association. (R. p. 311) HAMP guidelines provide that a servicer is not required to suspend a foreclosure sale if the request for a modification is received within seven business days prior to the scheduled foreclosure sale. (R. p. 334)

On September 1, 2010—four business days prior to the third scheduled foreclosure sale on September 7, 2010—Bradley provided the Bank with the missing documentation required to consider her request for a modification. (R. pp. 188, lines 6-23; 310) The following day, on September 2, 2010, the Bank advised Bradley that her request for a modification was under review and that it would request that the foreclosure sale be postponed, but again, that any postponement of the sale had to be approved by the investor on the loan. (R. p. 155, lines 6-14) On September 4, 2010, Bradley contacted the Bank to inquire about the status of her modification request and foreclosure sale, and the Bank told her that the modification request was under review, but that the foreclosure sale had not been postponed. (R. pp. 157, 190-191) The foreclosure sale proceeded as scheduled and the Property was sold on September 7, 2010. (R. p. 311) Thereafter, the Bank informed Bradley that her loan still was not eligible for a modification under HAMP. (R. p. 311)

Bradley's first appearance in this case occurred on September 20, 2010—over 21 months after she was served with the Complaint—when she filed a motion to set aside the foreclosure sale. (R. pp. 55, 61-65)

ARGUMENT

The Special Referee's orders should be affirmed since Bradley has not demonstrated a clear abuse of discretion in the Special Referee's decision. *See BB&T v. Taylor*, 369 S.C. 548, 551, 633 S.E.2d 501, 502-503 (2006) ("Whether to grant or deny a motion under Rule 60(b) lies within the sound discretion of the trial judge."); *Investors Sav. Bank v. Phelps*, 303 S.C. 15, 17, 397 S.E.2d 780, 781 (Ct. App. 1990) (holding that the determination of whether a judicial sale should be set aside is a matter left to the sole discretion of the trial court). "An abuse of discretion occurs when the judge issuing the order was controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support." *Sundown Operating Co. v. Intedge Indus.*, 383 S.C. 601, 607, 681 S.E.2d 885, 888 (2009) (citing *In re Estate of Weeks*, 329 S.C. 251, 259, 495 S.E.2d 454, 459 (Ct. App. 1997)). Further, "it is well-settled that the moving party in a Rule 60(b) motion has the burden of presenting evidence entitling him to relief." *McClurg v. Deaton*, 395 S.C. 85, 86-87, 716 S.E.2d 887, 887-88 (2011).

I. The evidence in the Record supports the Special Referee's refusal to set aside the foreclosure sale because the Bank's statements did not amount to fraud and Bradley never relied on any statements from the Bank about the timing of the foreclosure sale.

South Carolina courts have long held that to obtain equitable relief from a judgment under Rule 60(b)(3), SCRCP, based on fraud, the fraud must be extrinsic. *Raby Constr., LLP v. Orr*, 358 S.C. 10, 19, 594 S.E.2d 478, 482-483 (2004). "Extrinsic fraud is fraud that induces a person not to present a case or deprives a person of the opportunity to be heard." *Chewning v. Ford Motor Co.*, 354 S.C. 72, 81, 579 S.E.2d 605, 610 (2003). In comparison, intrinsic fraud "misleads a court in determining issues and induces the

court to find for the party perpetrating the fraud." *Raby Constr., LLP*, 358 S.C. at 19, 594 S.E.2d at 483 (noting that the "classic case of intrinsic fraud is perjured testimony or presenting forged documents at trial").

South Carolina courts have also recognized that when considering whether to grant relief from final judgments, "a court must balance the interest of finality against the need to provide a fair and just resolution of the dispute [because] important benefits are achieved by the preservation of final judgments." *Chewning*, 354 S.C. at 80, 579 S.E.2d at 609. As such, "'[a] judicial sale should not be set aside except for cogent reasons. The purpose of the law and of the proceedings in which a sale has been decreed is that it shall be final.'" *E. Sav. Bank, FSB v. Sanders*, 373 S.C. 349, 355, 644 S.E.2d 802, 806 (Ct. App. 2007) (quoting *Spillers v. Clay*, 233 S.C. 99, 104, 103 S.E.2d 759, 761-62 (1958)).

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

In her brief, Bradley argues that the Special Referee erred in denying her Motion to set aside the foreclosure sale under Rule 60(b)(3), SCRCP, because the Bank's August 19, 2010, letter indicating that no foreclosure sale would occur for 30 days from the date of the letter evidences fraud. However, to maintain a claim that a particular statement amounted to fraud, a party must prove that she relied on the truth of the statement and that she had a right to rely on the statement. *McLaughlin v. Williams*, 379 S.C. 451, 665 S.E.2d 667, 670 (Ct. App. 2008). In this case, the statement that the foreclosure sale would not occur cannot amount to fraud because under South Carolina law, an allegedly fraudulent representation "must relate to a present or pre-existing fact" and it cannot ordinarily be based on an unfulfilled promise to perform in the future or statements as to future events. *Bishop Logging Co. v. John Deer Indus. Equip. Co.*, 317 S.C. 520, 527,

455 S.E.2d 183, 187 (Ct. App. 1995). "As a general rule, fraud cannot be predicated on a statement that constitutes an expression of intention." *Osborn v. Univ. Med. Assocs.*, 278 F. Supp. 2d 720, 732 (D.S.C. 2003). Because the statement in the August 19th letter contains a statement about a future event—a foreclosure sale in the future—the Special Referee correctly determined that the letter could not support a claim for fraud and was not a valid basis to set aside the foreclosure sale.

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

It is manifest from the evidence in the record that Bradley never relied on the statement in the August 19 letter concerning the timing of the foreclosure sale. During the March 14, 2011 hearing, Bradley testified that after receiving the letter, she contacted the Bank on August 25, 2010 to request a new modification application because she "knew [her] forbearance was going to be up at the end of August." (R. p. 150, lines 24-25) In fact, between August 25, 2010, and September 7, 2010, Bradley had at least seven conversations with the Bank's representatives to inquire as to the status of the foreclosure sale and her loan modification application. (R. pp. 150-158) Bradley repeatedly admitted under oath that the Bank did not tell her that the September 7 foreclosure sale had been postponed:

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

Ms. Caskey: They just told you they requested it, correct?

Ms. Bradley: Right.

(R. p. 191, lines 1-10) Defendant later confirmed her prior testimony:

Ms. Caskey: But no one had ever told you that it had been postponed.

Ms. Bradley: Correct.

Ms. Caskey: That was just your understanding?

Ms. Bradley: Right.

(R. pp. 206, 79, 157, lines 15-18 ("And Jeanette had confirmed that the request had been postponed [sic] for the foreclosure sale had been submitted, but she didn't say what other actions had been taken."); p.158, lines 20-21 ("[T]hey sent the postpone [sic], but they hadn't got a response or reply of whether or not if it had been or had not been.")).

Thus, the evidence in the Record shows that although Bradley received the August 19th letter, she did not wait 30 days to inquire as to the status of the foreclosure sale and she did not rely on any statement in the letter stating that the foreclosure sale would not occur. (R. p. 151, lines 13-15 (Bradley admitting that she knew that making her monthly payment would not stop the foreclosure sale because of the large delinquency balance owed).) Instead, the only time Bradley discussed the August 19th letter in her testimony was to refer to the letter's statements informing her that the reason her loan could not be modified was because the NPV did not meet HAMP requirements. (R. pp. 150, 162-165, 187-188, 202-206) Bradley further acknowledged that she was not given any misinformation about the foreclosure sale. (R. p. 204, lines 7-8 ("I didn't say I got incorrect information about the foreclosure sale.").) Bradley's testimony corroborated that of Charles Herndon, who testified that Bradley was informed that a request to postpone the foreclosure sale was submitted but was never told that the foreclosure was cancelled. (R. p. 311) Bradley admitted that her claims of fraud

concerned the calls she had with Chase in August 2010, and not the statement from the August 19th letter, and that she was never told in any of the phone calls that the sale had been cancelled. (R. p. 206, lines 7-21)

Notably, Bradley also admitted that despite being told repeatedly that the foreclosure sale had not been cancelled, she still took no action to consult an attorney, appear in the foreclosure action, or attend the foreclosure sale. (R. p. 167, lines 7-11) When asked what she would have done if she had known the foreclosure sale was going to occur, Bradley stated, "I would have obtained a lawyer sooner. And either, you know, went and talked to someone else that knew more about what was going on than rely on my own understanding." (R. p. 191, line 22-p. 192, line 1)

In *Brisbin v. Aurora Loan Servs., LLC*, 679 F.3d 748 (11th Cir. 2012), a lender promised a borrower that a foreclosure sale of the borrower's property would not occur while the borrower was being considered for a loan modification under HAMP. The borrower alleged claims for negligent and intentional misrepresentation, claiming that had she known that the foreclosure sale was going to occur, she would have attempted to borrow money from friends or obtained a loan. *Id.* at *14. In granting summary judgment in favor of the lender, the district court reasoned that the borrower admitted to being thousands of dollars behind on her payments and that if she had the ability to borrow a large enough sum to reinstate her loan, she would have done so long before the foreclosure sale was imminent. *Id.* The Eleventh Circuit Court of Appeals affirmed the district court's decision, noting that there was no evidence in the record to support her claims that she could have reinstated her loan, and that her claims were "mere speculation, conjecture, or fantasy" and insufficient evidence to "contradict the

overwhelming evidence that reinstatement of the mortgage was impracticable . . . ." *Id.* at *15.

Like the borrower in *Brisbin*, Bradley has offered nothing more than conjecture and speculation as to what she might have done differently had she known sooner that the foreclosure sale would occur. There is no evidence in the Record to establish that Bradley would have been able to reinstate her loan, purchase the Property, or otherwise take action to prevent the sale of the Property. Additionally, although she claims she would have consulted a lawyer, she had over 21 months to consult an attorney concerning the foreclosure. As a result, Bradley's statements about what she might have done are insufficient to show reliance on any statement by the Bank concerning the foreclosure sale, which certainly do not amount to fraud.

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

Bradley argues that the August 19, 2010 letter and other actions by the Bank amount to "misconduct" under Rule 60(b)(3), SCRCP, and warrant setting aside the foreclosure sale and all prior orders in the case. However as set forth above, only misconduct amounting to "extrinsic fraud" justifies setting aside a final judgment. *Chewning*, 354 S.C. at 80, 579 S.E.2d at 610.

In this case, all of the alleged misrepresentations concern whether Defendant was ever told that the September 7th foreclosure sale had been postponed. Even if the Bank had told Bradley that the foreclosure sale had been postponed, which it did not, Bradley still should have answered the Complaint, responded to affidavits, and appeared at the foreclosure hearing. Bradley admitted that she was served with the Complaint, but nevertheless chose not to hire an attorney or even attend a hearing. (R. p. 177, lines 2-20)

Instead, she sought assistance from a company named "First Foreclosure Solutions," and testified she was told by the representative of First Foreclosure not to answer the complaint and not to attend the hearings. (R. p. 177, line 22-p. 178, line 5) It is thus clear from Bradley's own testimony that she did not litigate the issues in the case because she was advised not to, and not as a result of any actions by the Bank.

Bradley also claims that the Bank is guilty of misconduct because it did not properly consider her for a permanent loan modification. Even if true, the Bank's actions did not affect Bradley's ability to adjudicate the issues in the foreclosure action. The foreclosure hearing occurred on March 12, 2009, which was 17 months before Bradley's last request for a loan modification on August 31, 2010. It is thus impossible that the Bank's actions in August 2010 could have affected Bradley's ability to fully litigate the matter before the court in March 2009.

II. The evidence in the Record supports the Special Referee's denial of Bradley's Motion to set aside the Foreclosure Decree because it shows that she never properly requested the relief and has no meritorious defense.

Bradley argues that the Special Referee erred in failing to set aside the Foreclosure Decree and the two Supplemental Orders. She argues that she should be relieved from the entry of default in the Foreclosure Decree and that the Supplemental Orders should be set aside because they were entered into without a hearing and based on false affidavits.

As an initial matter, at the hearing on March 14, 2011, Bradley's counsel stated on the record that Bradley was not seeking relief from default and that paragraph 1 of the Motion was a "mistake." (R. p. 133, lines 14-22) As such, the Special Referee properly determined that Bradley withdrew her request to be relieved from default and instead

sought leave to file an answer and counterclaim. (R. pp. 24-25, 38-39) Despite her counsel's prior statement that she was not seeking relief from default and admission that she had never filed a motion for relief from default, in her Rule 59(e) Motion, Bradley again requested that the court set aside the default judgment in the Foreclosure Decree, which the Special Referee properly denied. (R. pp. 38-39)

Even if Bradley had properly requested relief from default, there is ample evidence in the Record to support the Special Referee's denial of her request to have her default set aside. First, Rule 60(b)(1), SCRCP, requires that a motion for relief from a final judgment must be made within a reasonable time but not later than one year after the entry of judgment. *Southeastern Hous. Found. v. Smith*, 380 S.C. 621, 670 S.E.2d 680 (Ct. App. 2008). Bradley's Motion for relief from the Foreclosure Decree was not filed until September 20, 2010, over 18 months after the Foreclosure Decree was entered on March 17, 2009.

Second, even if Bradley had properly and timely requested relief from the Foreclosure Decree, she failed to satisfy the standard under Rule 60(b), SCRCP, which requires a showing of mistake, inadvertence, or excusable neglect, and generally, a meritorious defense. *Sundown Operating Co. v. Intedge Indus.*, 383 S.C. 601, 608, 681 S.E.2d 885, 888 (2009) ("Once a default judgment has been entered, a party seeking to be relieved must do so under Rule 60(b), SCRCP. The standard for granting relief from a default judgment under Rule 60(b) is more rigorous than the 'good cause' standard established in Rule 55(c)."). The rigorous standard under Rule 60(b) is intended to "make it more difficult for a party to avoid default once the court has entered a judgment, which carries greater finality." *Id.* at 608, 681 S.E.2d at 889.

There is no evidence in the Record to support Bradley's request that her default be set aside. Bradley admitted that she received the Complaint and notice of the foreclosure hearing, and yet failed to appear on the advice of a non-lawyer. (R. pp. 177-178) She offered no evidence of any neglect or mistake, instead admitting that she made an informed choice not to participate in the litigation. Bradley also offered no evidence that she has a meritorious defense. On the contrary, the evidence showed that Bradley was in default under the terms of the loan documents when the Complaint was filed. (R. pp. 308, 17) Furthermore, the Record is devoid of any evidence that Bradley had the ability to reinstate her loan in March 2009 when the Foreclosure Decree was entered, or that any of the amounts in the Foreclosure Decree are incorrect. Additionally, the Administrative Order on which Bradley bases her Motion was not issued until May 22, 2009—two months after the Foreclosure Decree was entered.

Similarly without merit is Bradley's argument that the Bank failed to comply with the Administrative Order, which is not a legitimate defense or counterclaim. First, Bradley failed to argue in the trial court that the foreclosure action should have been dismissed as a result of the Bank's failure to file the HAMP Affidavit within 90 days of the Administrative Order, and as a result, the issue of whether the HAMP Affidavit was timely filed is not preserved for appellate review. *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 734 (1998) (requiring that an argument must have been raised to and ruled on by the trial court to be preserved for appellate review).

Timing issues aside, the Administrative Order provides that once a lender files an affidavit stating that it has complied with the Administrative Order, a borrower has ten days to file a counter affidavit. Bradley admitted that after receiving the Bank's HAMP

Affidavit, she did not file a counter affidavit challenging the Bank's statements. (R. p. 192, line 13-p. 194, line 11) Thus, the evidence in the Record supports the Special Referee's finding that the Bank complied with the Administrative Order.

III. The Special Referee did not violate Bradley's procedural due process rights by affirming the Supplemental Orders without a hearing because Bradley never requested a hearing and had no property interest in a loan modification.

For the first time on appeal, Bradley contends that she has been denied due process by not having an opportunity to be heard prior to the entry of the Supplemental Orders.[1] However, Bradley never requested a hearing concerning the Supplemental Orders, and the Special Referee never ruled on whether a hearing was required prior to the entry of each Supplemental Order. Bradley also argues that the Supplemental Orders were not properly served on Bradley, but this issue was not raised until the hearing on Bradley's Rule 59(e) Motion. As such, this argument is not preserved. *See Allen v. Allen*, 347 S.C. 177, 189, 554 S.E.2d 421, 427 (Ct. App. 2001). The requirement that matters be presented to the trial court was explained in *I'On, LLC*:

> Imposing this preservation requirement on appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments. The requirement also serves as a keen incentive for a party to prepare a case thoroughly. It prevents a party from keeping an ace card up his sleeve—intentionally or by chance—in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case.

[1] In her brief, Bradley also claims that no hearing was held before the Foreclosure Decree was entered on March 17, 2009. Notwithstanding the fact that the issue was not preserved because it was never raised before the Special Referee, a hearing was held on March 12, 2009. Bradley was notified of the hearing by letter from the Bank's prior counsel dated February 19, 2009. (R. p. 56-57)

I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (citation omitted). This rule is particularly fitting here where during two hours of testimony and argument, Bradley never once complained of the substance of the Supplemental Orders or the manner in which they were entered by the Special Referee.

Moreover, even if Bradley had requested an evidentiary hearing prior to the entry of the Supplemental Orders, nothing in the South Carolina Rules of Civil Procedure or the South Carolina Code requires an evidentiary hearing following the foreclosure hearing held by the Court on March 12, 2009. Bradley admitted she received notice of the foreclosure hearing and that she voluntarily chose not to attend. Because Bradley voluntarily failed to respond to the Complaint, a default judgment was entered against her in the Foreclosure Decree. Her default resulted in the admission of the well-pleaded facts of the Complaint and waives all defenses that have not been previously asserted, except to the amount of unliquidated damages. *Harbor Island Owner's Ass'n v. Preferred Island Props., Inc.*, 369 S.C. 540, 633 S.E.2d 497 (2006); *Howard v. Holiday Inns, Inc.*, 271 S.C. 238, 246 S.E.2d 880 (1978); *State v. LoveShop, Ltd.*, 286 S.C. 486, 334 S.E.2d 528 (Ct. App. 1985). In this case, there were no unliquidated damages, and it is undisputed that the Supplemental Orders entered after the foreclosure hearing were merely to update the amount of the judgment based on interest that had accrued over the past year while the Bank attempted to assist Bradley in avoiding a judicial sale of the Property. To date, Bradley has never disputed the amount of the debt in the Supplemental Orders. Therefore, the Special Referee correctly held that the Supplemental Orders did not violate Bradley's due process rights.

IV. **The Special Referee did not abuse his discretion in finding that the three-month forbearance period did not prevent the September 7th foreclosure sale because the parties never entered into a loan modification.**

Bradley contends that the Special Referee erred by finding that the three-month Forbearance Period ended on August 31, 2010, and did not affect the Bank's right to move forward with the foreclosure sale. However, there is ample evidence in the Record to support the Special Referee's conclusion that the Forbearance Period did not prevent the September 7th foreclosure sale or any of the intervening actions by the Bank. The evidence in the Record shows that the purpose of the Forbearance Period was "to give [Bradley] three months forbearance, which would be for June, July and August of 2010, for [her] to resubmit [her] modification package." (R. p. 143, lines 22-25) The agreement to forbear from selling the property was never committed to writing and the only thing the Bank agreed to forbear from was actually selling the Property during this time period. (R, p. 187, lines 5-11) No foreclosure sale occurred during the Forbearance Period, and although the Bank and Bradley tried to modify the loan, the Bank determined that Bradley was still ineligible for a loan modification and promptly notified Bradley. (R. pp. 187-188, 310) As a result, the undisputed evidence before the Special Referee proved that as of the end of the Forbearance Period on August 31, 2010, Bradley had been considered for and denied a loan modification.

Bradley claims a due process right to challenge each denial of her application for a loan modification, including after the Bank's August 19th letter, but the August 19th letter did not create any due process rights for Bradley to challenge the modification decision or to prevent foreclosure. To prevail on a due process claim, Bradley must first show a deprivation of a protected liberty or property interest. *See Steffens v. Am. Home*

Mortg. Servicing, Case No. 6:10-cv-01788-JMC, 2011 U.S. Dist. LEXIS 26709, *5 (D.S.C. Mar. 15, 2011).

In *Steffens*, the District Court of South Carolina addressed an almost identical due process claim. There, the borrower alleged that she had "a protected property interest in a process of decision-making that complies with Treasury Department rules" concerning HAMP. *Id.* (internal citations omitted). The district court expressly rejected the borrower's due process claims, holding that HAMP does not create a property interest in permanent modification for borrowers. *Id.* at *7. The district court emphasized that "a protected property interest arises if a person has more than an abstract need or desire for [a benefit.] He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Id.* at *6 (quoting *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972)). "When a statute or policy grants to the decisionmaker discretionary authority in its implementation, a protected property interest is not created." *Id.*

Noting that HAMP does not create a private right of action, and that the compliance authority for HAMP is delegated solely to Federal National Mortgage Association ("Freddie Mac"), the district court held that HAMP does not create a property interest in permanent modification for borrowers. *Id.* at *7; *see also Williams v. Geithner*, Civil No. 09-1959 ADMM/JJG, 2009 U.S. Dist. LEXIS 104096, at *6 (D. Minn. Nov. 9, 2009) (determining that the HAMP regulations "did not intend to create a property interest in loan modifications for mortgages in default," and thus finding no likelihood of success on the merits of the borrower's due process claim).

As in *Steffens* and *Williams*, Bradley's due process claims are similarly without merit and were properly rejected by the Special Referee.

V. The Special Referee did not abuse his discretion in refusing to grant post-trial discovery to Bradley.

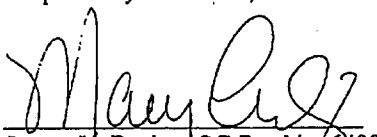
Bradley claims that the Administrative Order affords her the opportunity to conduct discovery on the Bank's underwriting procedures. (R. pp. 213, lines 23-25; 215, lines 6-13) However, the Administrative Order does not provide for any type of discovery concerning the HAMP process or anything else, and the South Carolina Rules of Civil Procedure do not allow for discovery after a determination on the merits of an action. *See* Rule 26, SCRCP (discovery only available for "relevant" matters in a "pending" action). In any event, Bradley waived her rights to raise any defenses to the foreclosure action because she declined to timely respond to the Complaint. *Harbor Island Owners' Ass'n*, 369 S.C. 540, 633 S.E.2d 497; *Howard*, 271 S.C. 238, 246 S.E.2d 880. Moreover, the Special Referee correctly ruled that there is no evidence "relevant to the subject matter" that could be discovered in post-foreclosure sale discovery and no basis to grant Bradley such relief.

CONCLUSION

Based on the foregoing, the Special Referee correctly determined that Bradley did not meet her burden of showing that she was entitled to have the September 7th foreclosure sale set aside. Accordingly, it is submitted that the Court affirm the Special Referee's Orders in their entirety.

[signature on following page]

Respectfully submitted,



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October 1, 2012

THE STATE OF SOUTH CAROLINA
In the Court of Appeals
APPEAL FROM PICKENS COUNTY
Court of Common Pleas

R. Murray Hughes
Special Referee

Case No. 2008-CP-39-2120

JP Morgan Chase Bank, National Bank
Respondents,

v.

Vanessa Y. Bradley
Appellant.

FINAL REPLY BRIEF OF APPELLANT

Susan Ingles
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INTRODUCTION

The Appellant ("Bradley") was an unrepresented litigant throughout this foreclosure case until her property was prematurely sold while she was under consideration for a Home Affordable Modification Program ("HAMP") mortgage modification pursuant to the Supreme Court's Administrative Order on foreclosure proceedings. *South Carolina Supreme Court Administrative Order 2009-05-04-01 on Mortgage Foreclosures and the Home Affordable Modification Program (HMP)* ("AO"). (specifying that no foreclosure sale should occur until HAMP process has been completed)[1].

At a hearing on Appellant's Motion to Set Aside the Sale and for other relief, Appellant provided live testimony and Chase submitted the Affidavit of Charles Herndon containing his review of the business records of Chase. R.p.307, Def. Ex. 5 which consist of customer service notes.

In Appellant's Brief, she argues that it was error for the Special Referee not to set aside the sale of her home because, inter alia, 1) Chase took steps preliminary to such sale during a period of forbearance and this did not comport with the agreement of the parties; 2) During the period of forbearance Bradley secured employment and the HAMP application process had restarted and by its terms, and Chase's own notification to Appellant, prohibited the sale of her home; and 3) The HAMP process had not completed its course at the time of the sale and therefore the sale was prohibited by the AO.

ARGUMENT

I. Arguments in Respondent's Brief do not excuse its violations of the AO, HAMP and the SCRCP

[1] The AO states its purpose is as follows:"to insure that eligible homeowners have been afforded the benefits available under HMP".

Respondent's Brief dwells on arguments and authorities that do not apply to the central issue of its violation of this AO and therefore warrant little discussion. While attempting to rely on irrelevant procedural shortcomings of the unrepresented Bradley, Chase's Brief offers nothing more than insufficient excuses for Chase's own material misconduct in violating the AO and HAMP.

Despite these contentions and for the reasons set forth below and in Appellant's Brief, this Court should reverse the Special Referee and grant the Appellant's Motion to Set Aside the Sale, and Vacate the Judgment of Foreclosure and subsequent Supplemental Orders, and allow the Appellant to investigate the modification evaluation, present her position and defend her home from foreclosure.

a. Chase's argument that Forbearance was Ineffective Because Not in Writing

At page seven (7) of its Brief, Chase concedes that in June 2010 it offered Bradley a three (3) month forbearance to enable her to submit a new loan application. (R. p. 196 lines 14-17). However, the forbearance was actually granted when Bradley contacted Chase to alert them to the expiration of the unemployment benefits. She'd been using these to continue payments for 6 months after she made the 3 trial period payments on her initial HAMP modification.[2] Chase goes on to emphasize that this forbearance was "never committed to writing". (R. Brief p. 7). Chase ignores Bradley's testimony that she herself requested it in writing and never received it. (R.p.187 lines 1-8). Whether or not in writing, it is undisputed that the forbearance was in place through August 31, 2010 and that the purpose was to allow time for Bradley to secure employment so that she and Chase could continue to work out a modification. The forbearance

[2] Chase had granted Bradley a Trial Period Plan in July 2009 which they failed to make permanent. Despite Chase's failure to make the modification permanent as expected, she paid an additional 6 months of these payments until May 2010 when her unemployment benefits ceased. (R. p. 142 ines. 2-20; R. p. 196 line 7 – p.197 line.22). The forbearance followed in June, July and August 2010.

was one of forbearance from exercise of remedy as well as of payment. [3] (R. p. 143 line 17-p.145 line 14) (where Chase telephone representative told Appellant that it could not go forward with foreclosure during the forbearance). Pursuant to the AO, no sale should have been held until this process was completed, and either a modification was entered into or a denial with detailed reasons was provided and the time period to challenge this under HAMP rules had passed.

b. Chase's argument that suspension of the sale was discretionary because final document submission was less than seven days prior to sale does not excuse the failure to suspend the sale but also concedes they were otherwise required to suspend it because of the ongoing modification discussion.

In an attempt to avoid it's violation of HAMP timing requirements, Chase makes an after-the-fact argument that the HAMP guidelines provide that a servicer is not required to suspend a foreclosure sale if the request for a modification is received within seven (7) business days prior to the scheduled foreclosure sale. [4] This exception is irrelevant. First, Bradley's testimony verifies that on August 31, 2010, Chase had all the necessary information and paperwork it had requested to supplement her pending HAMP application (including in particular paystubs to verify the previously submitted information on the employment she had recently secured). Def. Exhibit 8 Second, Bradley's testimony reflects ongoing contact about the pending modification application through September 7, 2010, the date of the sale and beyond.[5] The modification process was ongoing and at no time did Chase contemporaneously contend that it was exercising the discretionary 7 day window to decline to consider the loan modification. Rather even taking

[3] *Brisbin v. Aurora*, LLC 679 F 3rd 748 (11th Cir. 2012) cited by Respondent defines a forbearance as either a forbearance in exercising remedies or a forbearance of requiring payment. Bradley's forbearance was both.

[4] R. Brief p. 8 Respondent's brief. In making this argument Chase effectively concedes that they were otherwise required to suspend the sale under HAMP.

[5] Especially on R. p. 158 where she was told on September 7, 2010 the date of the sale that the postponement request was submitted and the property was not sold.

the record most favorably to Chase, its personnel were actively pursuing the modification and attempting to call off the sale.

c. Chase argues that the August 19, 2010 letter did not constitute fraud because it was not relied on by Bradley and its key statement was about a future event

Even if modification discussions were not ongoing and the forbearance was not in place, according to the HAMP regulations, no sale could have occurred within thirty days of Chase's letter of August 19, 2010 raising NPV as a basis for not modifying the loan. R.p. 307, Def, Ex. 2. On page 11 of its Brief, Respondent refers to the occurrence of seven conversations[6] between Bradley and Chase telephone representatives to support the allegation that she did not rely on the statement in the August 19th letter that "no sale will be conducted and you will not lose your home during this 30 day period". [7] This is a definitive statement of fact[8] quoting a HAMP rule and therefore not "an expression of intention". The content of these various telephone conversations demonstrates that both Chase and Bradley did in fact rely on the statement in the letter.[9] However, the 30 day period is prescribed by HAMP, and is not subject to the vagaries of a bank's conclusions about a homeowner's state of mind.

Moreover, in diligently pursuing the non-legal process as directed by Chase and as she had throughout, Bradley did rely on this information to submit a request for the NPV input information [10]— an action she was entitled to take during the 30 day period in which her house

[6] Bradley's hearing testimony reflects more than twenty-one such conversations. R. p. 143 lines 2-10; p. 143 lines 18-25; p. 145 lines. 11-21; p. 147 lines. 1-16; p. 148 line 16 – p. 149line 1; R.p.149 lines 12-24; R.p. 150 lines 3-9; p. 150 lines 22-25; R. p. 151 lines 12-18; R. p. 151 lines 20-25; R. p. 154 lines 1-5; R. p..154 lines 9-17; R. p.154 line 23- p. 155 line. 2; R. p.155 lines 14-25; R. p. 156 lines 6-11; R. p.157lines. 9-20 (also see pg, 170); R. p.157 lines 21-25; R. p. 158 line 23-p. 159 line 13; R. p. 159 line 13-p.160 line7; R. p 160 line 21-p.161 line 11.

[7]; The 30 day period was the time for contesting the NPV determination.

[8] Referring to the 30 day period for contesting the denial as provided by HAMP and set forth in the letter.

[9] R. p. 150 lines 10-21.

[10] Defendant's Ex. 3 and 4 are letters she sent to Chase in response to the notice that she had 30 days to respond to denial. R.p. 130.

could not be sold, per the letter. The requested NPV information was sent by Chase on October 5, 2010 nearly a month after the sale. R. p. 307, Def. Ex. 5, (Ex.5 attached thereto).

d. The lack of due process was not cured because certain procedural steps were not taken by Bradley

A large swath of Respondent's Brief is peppered with references to Bradley's lack of procedural activism and acumen in the on again off again litigation.[11] First, as a practical matter and as directed by Chase and dictated by her finances, her ongoing contact with Chase was outside the litigation. Second, the fact that she did not dispute the original underlying debt renders her lack of participation in the procedural aspects of the litigation completely understandable. It provides no excuse for Chase's violations of the AO, HAMP and the SCRCP. Bradley simply sought a right provided by HAMP and safeguarded by the AO—a right to a full and fair HAMP review which necessarily rested with Chase's administrative personnel.

II. Appellant was entitled to a HAMP review, decision and challenge opportunity before sale and therefore the sale should not have occurred

a. Unwarranted continuation of the litigation

Chase personnel handling the modification promised to try and call off the sale as had been done previously after Bradley pointed out that her HAMP request had not been fully processed. (R. p. 149, as to Aug. 2, 2010. Chase was apparently unable to stop itself, and Chase's attorneys went ahead with the foreclosure sale. Though the Affidavit Chase presented at the Motion hearing stated that it told Bradley the sale postponement would have to be approved by FNMA, Chase provided no evidence that FNMA denied such approval. R.p. 307, Def. Ex. 5 par.

[11] See Respondents brief, pp. 2-8. The Brief alleges on Page 2 Bradley failed to appear; on Page 3 Bradley did not file a Counter Affidavit ; on Page 4 Bradley never requested a hearing nor did she object to the August Supplemental Affidavit or August Supplemental Order; on Page 8 Bradley's first appearance in this case occurred on September 20, 2010 over 21 months after she was served with the Complaint.

5. In fact, Chase offers no explanation for why the postponement of the sale did not occur, or any reason for its pursuit of the sale during the HAMP process and the forbearance.

Bradley was able to obtain pro bono legal assistance from South Carolina Legal Services and promptly sought to have the premature, baseless sale set aside. The transcript of Bradley's testimony at a hearing held after the sale, along with the course of the case, reflect that she was a typically hopeful homeowner accepting the procedure called for by Chase and awaiting confirmation that the foreclosure sale would be withdrawn, as it had previously been, while the modification process continued and due to the forbearance.[12]

Therefore, the progression of this litigation must be viewed from the perspective of one who was *pro se*. In fact, because she did not contest the underlying debt Bradley neither responded to the initial foreclosure complaint, nor appeared at the foreclosure hearing. Rather, after HAMP and the initial AO of May 4, 2009 ("TRO") halted the action, she pursued relief through the HAMP program and the ensuing application process for a modification proceeded between Bradley and Chase. When faced with the harsh reality on September 14, 2010 that, notwithstanding her conversations with Chase telephone representatives, Chase's lawyers had nonetheless proceeded with the sale, she timely took what steps she could to obtain relief. (R. p. 160 line 21- p. 161 line 11). The judicial relief was through her Motion to Set Aside the Sale and related relief and the HAMP procedural relief was directly to Chase in response to the August 19, 2010 letter. R. p. 150 lines 12-25.

This case does not involve a homeowner unwilling or unable to pay her mortgage. On the contrary, the record is clear that the Appellant sought, and still seeks, to pay her mortgage. Indeed, after being granted a Trial Period Plan ("TPP"), she made a 3 month TPP payment for 9 months. She does not seek a free house, only the right to keep the house she bought in 2000 and

[12] R. p. 146 line 2-p. 148 line 11.

pay for it with the loan modification assistance intended for her benefit and for which she qualifies.[13] The record is replete with evidence of Appellant submitting and resubmitting documents to Chase for this purpose. Bradley described her frustration as " I'm on the phone, they'll tell me I need to do this, this and this and then a couple of days later asking for something totally different and then I would send that in, what they were asking for that's totally different." (R. p. 154 lines 1-5).

The Respondent provides no reasoning in its Brief as to why it took steps to a foreclosure sale even as it was considering a modification under HAMP and no corresponding authority to support pursuing the sale when it did. Moreover, Respondent provides no justification for its failure to comply with the timing requirements of the AO and HAMP. Instead, Respondent attempts to rely on technical provisions of HAMP and evasion of its own representations to Appellant as required by HAMP[14] as support for its position that it had a right to schedule the foreclosure sale. Continuation of the litigation, and the sale in particular, was premature and prohibited.

b. HAMP review status barred the sale according to the Administrative Order

Chase focuses on the alleged procedural shortcomings of the unrepresented Bradley as the reason her home was prematurely sold. Chase minimizes its own far more serious procedural failings as outlined in the Brief of Appellant (failing to file a timely HAMP Affidavit, filing a vague, misleading and false HAMP affidavit, securing supplemental orders under false pretenses without setting hearings on them, continuing litigation and scheduling a foreclosure sale while it is undisputed that a period of forbearance was in place). The former (Bradley's omission) violated no law, whereas the latter violated the AO, HAMP, and the SCRCP.

[13] The grant of the TPP assumed she was qualified.
[14] Chase's August 19, 2010 letter was required by HAMP and the 30 day period it sets forth is required by HAMP.

Chase's statement in its Brief that the AO is not a legitimate defense or counterclaim[15] typifies the arrogance and disregard of procedure that permeates the litigation and resulted in the premature sale of Bradley's home in contravention of the efforts of its own telephone representatives to cancel it. As the foreclosing entity in the case, Chase was responsible for following all applicable procedure and yet would have this Court hold that Appellant is without a remedy because while acting *pro se* she failed to take certain procedural steps to protect herself from their conduct and this absolves them of responsibility for obedience to the Supreme Court's Administrative Order. The AO is designed to prevent a premature sale and its violation at a minimum constitutes misconduct warranting relief under Rule 60(b)(3).

c. The HAMP review status barred the sale according to HAMP

Throughout the time the foreclosure case remained pending, Bradley was clearly trying to meet the requests of the telephone representatives of Chase in order to complete her loan modification[16]. All the while, its lawyers kept the defaulted foreclosure case open and randomly kept it moving from time to time, reserving a knock out punch of the quick supplemental order and foreclosure sale if they chose to take that step later.

The Special Referee was singularly acquiescent in this course of action, only reacting to submissions and requests from Chase's attorney, never exercising procedure on his own so that rather than being dismissed as contemplated by the AO [17], the case remained pending as a silent time bomb for some 17 months after issuance of the foreclosure decree. The scheduling and cancelling of foreclosure sales by Chase's lawyers while HAMP review was pending (as well as

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[15] R. brief p. 17

[16] R. p. 143 lines 2-10; R.p. 143 lines 18-25; R.p. 145 lines 11-21; R. p. 147 lines 1-16; R. p. 148 line 16 – p. 149 line 1; R. p. 149 lines 12-24; R. p. 150 lines 3-9; R. p. 150 lines 22-25; R. p. 151 lines 12-18; R. p. 151 lines 20-25; R. p. 154 lines 1-5; R. p. 154 lines 9-17; R. p. 154 line 23- p. 155 line 2; R. p.155 lines 14-25; R. p. 156 lines 6-11; R. p. 157 lines 9-20 (also see pg, 170); R. p. 157 lines 21-25; R. p. 158 line 23-p. 159 line 13; R. p. 159 line 13-p.160 line7; R. p. 160 line 21-p.161 line 11.

[17] "If the affidavit is not served within ninety (90) days of the date of this order, the foreclosure action may be dismissed", AO p. 2.

during the period of forbearance granted by Chase) lulled Appellant into a false sense that the Chase telephone representatives were running the show, rather than the attorney, and violated procedural rules governing such sales.

Chase did not file the HAMP Affidavit as required by the AO, only filing one twelve months later when it suited them to revive the moribund case. [18] Chase emphasizes that, when it finally did file a HAMP Affidavit, Bradley did not file a Counter-Affidavit within ten days.[19] While adjudging this as fatal to Bradley's case, Chase de-emphasizes its own failure to timely file the Affidavit required by the AO for twelve months as a mere irregularity that requires no review. More fundamentally, there was no need to challenge the affidavit with a counter affidavit inasmuch as forbearance was granted and the HAMP application process was not concluded. Thus, this "outside the litigation" telephone conduct of the Chase employees led Appellant not to challenge its violation of the AO, HAMP and the SCRCP in a formal way in the litigation.

d. The 2011 AO is instructive on how the Court should rule under the first AO and provides context for the Court's intent in the first AO.

As made clear in its most recent Administrative Order, it was precisely to avoid the dual tracking of modification reviews by telephone personnel with foreclosure litigation by attorneys that the S.C. Supreme Court adopted administrative orders to regulate foreclosure in South Carolina.[20] Although here the Chase attorneys were not subject to the additional certification responsibilities of the May 4, 2011 *South Carolina Supreme Court Administrative Order* ("2011 AO"), there is no question that Chase as a party was fully responsible for these certifications to

[18] The AO stated the case should be dismissed if Affidavit not filed within 90 days. In addition, the servicer's attorney was ordered to apprise the court of the status every 30 days which Respondent did not do. A vague HAMP affidavit was filed in May 2010 and there is no evidence of any 30-day status letters.

[19] The AO gave the homeowner ten days to deny HAMP review was completed. However, it went on to say that if the litigation continued, the review could still become contested at a later stage. The second AO added that the homeowner could still respond to the complaint within 30 days after a HAMP denial.

[20] 2011 AO

the Court.[21] Certainly, its lawyer was equally responsible pursuant to SCRCP Rule 11. The 2011 AO clarified for attorneys that they must meet that requirement, even outlining the requirements of how it must be done in detail.

The multitude of letters and affidavits with varying statements contained therein, many of which cannot be reconciled with the facts[22], demonstrates the lack of communication between the Chase telephone representatives and Chase's lawyers in this case.[23] This lack of communication fueled Bradley's inclination to continue the usual course of dealings. Throughout the case when she received communication from Chase's lawyer, her response was to contact Chase by telephone. The routine result was that the progression of the case, such as notice of a sale ceased (R.p.148-149). She had no reason to believe otherwise in the instance of the September 7, 2010 sale.

The premature sale the administrative orders were designed to prevent is precisely what happened here. This hopeful homeowner spent 17 months waiting for Chase to get it right when, all the while, their attorneys were holding in reserve the knock-out punch.[24] Rather than get it right, Chase simply let the sale go through and now attempts to use intricate procedural arguments to insulate itself from challenge. This court, however, is not so powerless as Chase would have it. The requirements of the AO must be followed. Any defects in the initial HAMP affidavit are not cured or rendered nugatory by the lack of a counter affidavit, failure to answer a complaint filed 21 months prior or to attend a hearing held 17 months prior. Bradley did have

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[21] The second AO requires that lawyers filing foreclosure lawsuits actually know what is going on in the modification process and go forward only after swearing an oath that the applicable rules have been followed.

[22] R.p. 131, Ex.5 Hindman; R. p. 130, D. Ex. 5 Herndon; Supplemental Order Supporting Affidavit, Second Supplemental Order Supporting Affidavit

[23] See footnotes 5 and 15 above.

[24] The time between the supplemental order filing and the sale was 18 days. The Second Supplemental Order was mailed to Appellant prior to it being signed and filed with the Court. Affidavit of Service. (R.p. 130, Def. Ex. 10).

rights under the AO and the failure of the Special Referee to set aside the sale and vacate his orders as a result of Respondent's violation of the HAMP and the AO was error.

III. Argument regarding homeowner rights as third party beneficiary is specious. In support of its position, the Respondent cites *Brisbin v. Aurora* [25]for the proposition that HAMP modification is not a right. This misses the point. Our Supreme Court's AO unequivocally states that a *review* for a HAMP modification is indeed a right in South Carolina.[26] Mortgagors pursuing cases under the third party beneficiary theory assert that, for the purpose of an action for breach of contract, they are a third party beneficiary of the Servicer Participant Agreement under which the Servicer contracts and operates with the U.S. Department of Treasury. Appellant has not alleged a breach of contract but has simply asserted her right under the AO, HAMP and the SCRCP.

In a blunt attempt to avoid responsibility for its misconduct, Chase relies on the *Steffens*[27] case for the proposition that no homeowner has a right to HAMP. Respondent's reliance on this breach of contract theory is misplaced. The District Court opinion in *Steffens* does not take into account the existence of our state court AO and is based on a homeowner suing a servicer for breach of contract (asserting that homeowner was a third party beneficiary of the HAMP Participant Agreement between the servicer and the U.S. Department of Treasury). Consequently, Respondent's claim that *Steffens* is right on point is erroneous. *Steffens* addressed the idea of whether a HAMP modification as a third party beneficiary contract right is actionable in S.C.

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[25] *Brisbin v. Aurora, LLC* 679 F 3rd 748 (11th Cir. 2012).

[26] HAMP does require that homeowner be given an opportunity to be reviewed for modification where their lender is a HAMP participant.

[27] *Steffens v. Am. Home Mortg. Servicing*, (D.S.C. March 15, 2011)

Whether the third party beneficiary line of cases is wrong or right, or the cause of action even available in S.C. there is a clear difference in that theory and the procedural prerequisite to foreclosure and subsequent sale outlined in the AO.

Under our Supreme Court's AO, a homeowner does have the right to be *properly reviewed* for a HAMP modification as federal law provides and it is the deprivation of this right to review that led to the premature, improper and unexpected sale of Appellant's home. The third party beneficiary theory has no bearing on the AO requirement at the center of this appeal that HAMP procedures be adhered to prior to continuation of a foreclosure case and/or sale in South Carolina. Chase's belief that the HAMP review and decision-making process is unilateral and cannot be challenged vitiates the AO.

IV. Chase's fraud, misrepresentation, as well as misconduct warrants reversal, setting aside of the sale and vacating the judgment under Rule 60

Rule 60(b) of the South Carolina Rules of Civil Procedure sets out circumstances under which a party may obtain relief from a judgment. In particular, Rule 60(b)(3) provides for relief from a judgment on the grounds of "fraud, misrepresentation, or other misconduct of an adverse party."

Chase argues that Respondent is unable to prove fraud and therefore is not entitled to Rule 60(b) relief. However, violating the S.C. Supreme Court's Administrative Order is certainly at a minimum "misconduct" within the rule. The use of the word misconduct referred to in Rule 60(b)(3) must be different than traditional fraud and misrepresentation. To construe it any other way would render it surplusage.[28] In *Mr. T v. Ms. T,* this Court outlined the use of the

[28] *Mr. T v. Ms. T,* 378 S.C. 127, 662 S.E.2d 413 (S.C.App. 2008) Finally, aside from the five subsections mentioned above, Rule 60 explicitly indicates that it in no way limits the court's power to entertain an independent action "to relieve a party from a judgment ... *'or'* to set aside a judgment for fraud upon the court." (emphasis added). While the most common ground for an independent action is for fraud, the rule is not restricted to only that ground. The

word "or" in such a Rule. Though the later Administrative Order in May 2011 requires the attorney of record to certify compliance, the 2009 AO applicable at the operative times in this case renders the false certifications of Chase equally violative of the AO and grounds for granting Appellant's Rule 60(b)(3) motion.

The South Carolina Supreme Court held in *Davis*[29] that an erroneous affidavit of default filed by an attorney was fraud on the court sufficient to provide grounds under Rule 60(b) for relief from a default judgment even when it was a *bona fide* error. Where, as here, the homeowner can show that the AO and HAMP certifications were false and/or that the foreclosure case proceeded to judgment and sale in error, then the reasoning of *Davis* applies.

A false certification under the AO is extrinsic fraud sufficient for relief under Rule 60(b)(3). Though reliance on the false statements may be required for a finding of fraud in the traditional definition, the rule includes as lesser offenses misrepresentation and misconduct that also warrant the setting aside of the sale and vacating of the judgment. This the Appellant proved.

V. Appellant was denied Due Process and this compounded the problem created by Respondent's AO and HAMP violations

The AO provides a safe harbor during the foreclosure process to insure that the law is complied with and homeowners' opportunity to apply for and be considered for modification are protected. Assuring due process, it acknowledges the federal requirement and requires its own stay so that the modification process can be completed without the far too common lack of coordination between a servicer's administrative personnel and its lawyers that can cause a premature sale such as the one in this case.

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structure of this rule and its use of the word "or" indicate to this court two potential independent action attacks on a judgment, order or proceeding: 1) one based on such rare, special, exceptional or unusual circumstances that may warrant equitable relief, including accident or mistake or 2) one based in equity for fraud upon the court. *See,* 11 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE & PROCEDURE § 2868 (2d ed.1995).

[29] 236 S.C. 277 (1960)

a. **SCRCP provisions apply to HAMP review by virtue of the Administrative Order**

To fulfill its intended purpose, the AO also contemplates use of the SCRCP to test whether modification review under HAMP has actually and properly been completed. [30] Not so that a denial of modification can be automatically reversed, but so that the veracity of the information and calculation used and the decision made can be verified and reviewed and, where appropriate, a denial reversed and modification granted.

Unlike Chase, our Supreme Court acknowledges in its AO that mistakes can be made or misinformation utilized in the review process. Therefore, if the servicer has made a mistake which, if corrected, changes the HAMP outcome, that mistake can be identified and corrected.[31] The discovery rules in the SCRCP do provide the path to truthful and accurate information and a proper HAMP analysis by a competent reviewer. The homeowner is not required to simply accept a denial produced by the servicer's unilateral process as a proper determination. Both HAMP and the AO acknowledge the homeowner's right to challenge the determination.[32] This interpretation was validated by the 2011 AO. [33]

Respondent also states that Appellant offers no evidentiary support regarding the HAMP modification, its calculation and the information that formed the basis for it. On the other hand, Chase claims that Appellant should not have been granted discovery under the AO. The Supreme Court realized the importance of discovery at the post-HAMP review stage of foreclosure litigation and that it was necessary to provide homeowners with a way to assure they were

[30] The AO states that "the judge shall resolve the issues like any other contested issue in a foreclosure action".
[31] The case for this can only be made by the homeowner if she has the ability through discovery to obtain the information that reflects what the servicer did in the review process, e.g., how they applied the NPV info inputs to the HAMP waterfall. This was confirmed by the 2011 AO.
[32] For example, the US Treasury Department launched the web application "checkmynpv.com" which allows a homeowner to check the NPV inputs if the servicer provides them as required and verify the calculation. See Appellant's brief p. regarding the NPV calculation by Chased on the Bradley review.
[33] 2011 AO

provided a proper opportunity at a modification. As to contesting a denial, the AO provides that the question of denial "the judge shall resolve this issue like any other contested issue in a mortgage foreclosure action".

The only way to independently verify the servicer's decision is through discovery. Otherwise, denial of a HAMP modification would be unassailable, allowing the bare, conclusory statement of the servicer to go unchallenged. Pursuant to her Motion, Appellant should have been accorded the right to use SCRCP discovery. Therefore, the Special Referee's decision on this issue should be reversed and the Appellant should be allowed to investigate whether the denial of HAMP modification was proper. This relief is justified by the language of the 2011 AO.

b. Failure to follow the SCRCP regarding Supplemental Orders submitted by Respondent and dismissal

Respondent cites the supplemental orders it prepared for the Special Referee to sign without a hearing [34] stating that Chase had complied with the 2009 Administrative Order as evidence of Chase's compliance. The Respondent adds that Bradley never requested a hearing nor objected to the affidavit filed in support of the Supplemental Order. Such an omission should be distinguished from the Respondent's own affirmative acts in violation of the AO, HAMP and the SCRCP in pursuing the supplemental orders and sale. The SCRCP provide for such a hearing where affirmative relief is sought. Otherwise the Order is essentially ex parte. Chase submitted a Second Supplemental Order, Affidavit and Sale Notice to the Court while simultaneously mailing copies to the Appellant on August 13, 2010. (R.p. 131, Plaintiff's Ex. 10). Therefore, Appellant was never served with a signed order. That Order was signed August 16, 2010 and filed August 20, 2010. Sec. Supp Order (R.p. 16).

[34] Brief of Respondent p. 3.

As an unrepresented litigant, Bradley was at a distinct disadvantage in relation to the dual tracking of modification efforts and litigation. The Chase lawyer and the Special Referee are governed by the SCRCP and charged with acting in accordance therewith. Bradley and the Chase telephone representatives were operating outside of these rules. In that context, the failure of the Chase lawyers to follow the SCRCP eclipses Bradley's incognizance of the SCRCP.

Chase clings to the Special Referee's "findings" in the Order drafted by Chase based on its late and false affidavits and issued without an opportunity to be heard given to Bradley. R. Brief p. 3. Nothing in the proposed Second Supplemental Order and Affidavit or its cover letter dated August 13, 2010 suggested to this unrepresented litigant that she could request a hearing or otherwise act on the contents of the documents. (R.p. 130, Def. Ex. 10). Indeed, this was merely the submission of a proposed order that was not filed until August 20, 2010, 18 days before the sale. Signing a supplemental order some 17 months after the original decree without setting a hearing denied Appellant her due process right. If the Special Referee had scheduled and held a hearing as required by the rules it would have offered Appellant a meaningful opportunity to be heard and might have avoided the sale altogether.[35] Respondent's contention that Appellant's fate was sealed because she did not attend the original foreclosure hearing ignores that it is a structural defect which she requested the Special Referee correct. Bradley was not required to prove that the outcome would have been different in order for this defect to be cured. *LaSalle Bank National Ass'n v. Davidson*, 386 S.C. 276, 688 S.E.2d 121 (S.C. 2009),

In Dangerfield v. State, 376 S.C. 176, 179, 656 S.E.2d 352, 353-54 (2008) the Court held that "Due process considerations apply in contested cases or hearings which affect an individual's property or liberty interests as contemplated by the federal and state constitutions. The

[35] 30 days provided for appeal of a final order had not expired on September 7, 2010 when the house was sold and there is no evidence that the order was served on Appellant after it was signed by the Special Referee. ell here where SCt said before an appeal party shld give judge a chance to correct thru Rule 59 or 60

procedural component of the state and federal due process clauses requires the individual whose property or liberty interests are affected to have received adequate notice of the proceeding, the opportunity to be heard in person, the opportunity to introduce evidence, the right to confront and cross-examine adverse witnesses, and the right to meaningful judicial review."); *see also State ex rel. McLeod v. Brown*, 278 S.C. 281, 284, 294 S.E.2d 781, 782 (1982) ("We believe that an order substantially affecting a party's rights should not be made in a case without notice to the party prejudiced by it and an opportunity to be heard.").

Chase argues that Bradley was not entitled to a hearing because too much time had gone by and she was in default of answering the original complaint filed 21 months before. This is precisely why there should have been a hearing. In *Solley v. Navy Federal Credit Union, Inc.*, 397 S.C. 192, 723 S.E.2d 597 (S.C.App. 2012) this Court held that by defaulting, a defendant forfeits his " right to answer or otherwise plead to the complaint." In essence, the defaulting defendant has conceded liability. However, a defaulting defendant does not concede the [a]mount of liability. *Howard v. Holiday Inns, Inc.*, 271 S.C. 238, 241-42, 246 S.E.2d 880, 882 (1978) (citations omitted). At the damages hearing, the defendant may only participate by cross-examining witnesses and objecting to evidence. *Id.* at 242, 246 S.E.2d at 882. Specifically regarding a supplemental order when a final order is already in place, the Supreme Court set aside a judgment after finding the movant was entitled to due process and had not received notice of the proceeding because she represented herself after the suspension of her attorney. *Rouvet v. Rouvet*, 388 S.C. 301, 696 S.E.2d 204 (S.C.App. 2010).

In *Rouvet*, Wife did not receive any communication from either Husband's attorney, or the court, from the March 2004 hearing until the date she received a copy of a Supplemental Order in January 2005. The Court pointed out that during the year long interim, several things of

significance happened. This Court reversed the lower court's denial of a Rule 60b3 motion and held that it was error to rely solely on fraud under Rule 60b3.

Here, the Special Referee only responded to what Chase's attorney chose to do with the case at any juncture. So when the supplemental orders were sent to him well over a year after the original foreclosure decree, no hearing was held and he signed the order without further inquiry, Appellant's due process rights were violated. As in *Rouvet*, several significant things had occurred such as the AO, HAMP and the forbearance.

Chase claims that hearings on the Supplemental Orders were unnecessary because they only served to increase the amount due by "updating the amount of interest that had accrued over the past year". (R.Brief p.19) But even in default and even setting aside the issue of Respondent's failure to comply with HAMP, Bradley had the right to cross examination on the issue of any increase in the amount of the judgment. These supplemental orders have discrepancies that could have been addressed. For example, the Second Supplemental Order stated an increase in the principal balance by $10,000.

The Special Referee exercised no independent review of the documents placed before him for signature. Further, he set no calendaring and improperly allowed the cased to remain pending for 21 months with no action unless Chase requested it before issuing the Supplemental Orders. Further, a hearing on such a Supplemental Order, had it been scheduled by Respondent or held by Special Referee, would have provided an opportunity for this unrepresented litigant to address the Court on the HAMP review and perhaps avoid the sale of her home.

Respondent makes much of the length of time that passed with the case pending. That very passage of time makes the issuance of the Supplemental Orders all the more egregious. Pursuant to the AO, the case should have been dismissed on August 2, 2009 because Chase had

not filed the affidavit required by the AO. It should also have been dismissed due to Chase's failure to update the Court on the modification status every 30 days as required by the AO. Finally, pursuant to HAMP, the temporary modification should have been made permanent and the case dismissed by the end of 2009. The passage of time in this case was due to the Chase lawyer keeping the case open and the ensuing repeated untimely and erroneous representations by Respondent that HAMP had been completed when it had not. The Special Referee should have dismissed the case.

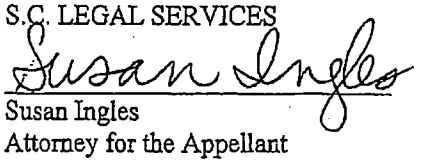
No amount of obfuscation by Chase's lawyers can change the fact that for 21 months Chase failed to properly and deliberately assess and follow through on appellant's modification options. True, at every prior juncture it called off the improperly scheduled sale just in time. But this last time it didn't. The Chase administrative personnel didn't call off their lawyers and, as a result of this false step and the misconduct described hereinabove, Appellant's home was sold.

CONCLUSION

Chase offers no explanation of why it suddenly pursued the sale of Appellant's home before achieving the requisite completion of the HAMP review with all of the attendant challenge periods. Its attempts to excuse the failure to complete this imperative of our Supreme Court are immaterial, trivial, and pointless. After the case was pending 21 months, Chase inexplicably set its own sale date and yet could not pull itself back and withdraw the property from the sale. The relief requested by Appellant in her Brief was not only warranted, but undeniable given Chase's disregard for and intentional violation of the AO, HAMP, due process and the SCRCP.

Respectfully submitted,

S.C. LEGAL SERVICES



Susan Ingles
Attorney for the Appellant

October 1, 2012
Greenville, SC

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

JP Morgan Chase Bank, National Association,
Respondent,

v.

Vanessa Y. Bradley, Appellant.

Appellate Case No. 2011-193386

Appeal From Pickens County
R. Murray Hughes, Special Referee.

Unpublished Opinion No. 2013-UP-090
Heard February 5, 2013 – Filed February 27, 2013

AFFIRMED

Susan P. Ingles, of South Carolina Legal Services, of Greenville, for Appellant.

Samuel C. Waters, of Rogers Townsend & Thomas, PC, of Columbia; Mary M. Caskey and James Y. Becker, both of Haynsworth Sinkler Boyd, PA, of Columbia; and Sarah P. Spruill, of Haynsworth Sinkler Boyd, PA, of Greenville, for Respondent.

PER CURIAM: In this foreclosure action, Vanessa Y. Bradley seeks review of the Special Referee's order denying her motion to set aside the foreclosure sale of her property. We affirm.

1. As to whether JP Morgan Chase Bank, National Association (Bank) violated its obligations under the Home Affordable Modification Program (HAMP) and Administrative Order 2009-05-22-01, we find the Special Referee did not abuse his discretion in declining to set aside the foreclosure sale on these grounds. *See Wells Fargo Bank, NA v. Turner*, 378 S.C. 147, 150, 662 S.E.2d 424, 425 (Ct. App. 2008) (stating the determination of whether a judicial sale should be set aside is a matter left to the sound discretion of the trial court). Although Bank violated HAMP by holding the foreclosure sale while Bradley's reapplication for loan modification was pending, we find Bank's overall actions captured the spirit of HAMP given that it postponed two foreclosure sales and worked with Bradley for seventeen months in attempts to modify her loan. *See id.* ("A judicial sale will be set aside when either: (1) the sale price 'is so gross as to shock the conscience[;]' or (2) the sale 'is accompanied by other circumstances warranting the interference of the court.'" (citation omitted)). Additionally, because Bradley failed to file a counter affidavit and testified that Bank had a sufficient basis to deny her permanent modification under HAMP, i.e., her failure to timely make the last Trial Period Plan payment, we find that Bank's failure to fully comply with the procedures set forth in the Administrative Order did not warrant setting aside the foreclosure sale. *See In re Mortgage Foreclosures and the Home Affordable Modification Program (HMP)*, 2009-05-22-01 (May 22, 2009) (stating "if a counter affidavit is not timely served, the determination of whether there are [HAMP] issues which need to be resolved before foreclosure is ordered shall be based on the affidavit alone, unless the judge allows the late service and filing of the counter affidavit or allows the issue to become contested at some later stage in the proceeding").

2. As to whether the Special Referee erred in finding the forbearance agreement between the parties did not preclude Bank from continuing to file pleadings and scheduling the foreclosure sale, we affirm. Here, the specific terms of the forbearance agreement are unclear because the agreement was never committed to writing. However, based on the facts in the record, we find the parties did not share a meeting of the minds regarding what actions Bank was to forbear. *See Player v. Chandler*, 299 S.C. 101, 105, 382 S.E.2d 891, 893 (1989) ("South Carolina common law requires that, in order to have a valid and enforceable

contract, there must be a meeting of the minds between the parties with regard to *all* essential and material terms of the agreement.").

3. As to whether the Special Referee violated Bradley's right to procedural due process, we affirm. Bradley failed to raise her argument regarding the service of the supplemental orders until the hearing on the Rule 59(e) motion; therefore, this argument is not preserved for appellate review. *See Godfrey v. Heller*, 311 S.C. 516, 520, 429 S.E.2d 859, 862 (Ct. App. 1993) (holding an issue was not preserved when the party failed to raise the issue in a Rule 59(e) motion to alter or amend the judgment). Moreover, Bradley failed to show she has a protected interest in a loan modification, which is a prerequisite to prevail on a due process claim. *See Seabrook v. Knox*, 369 S.C. 191, 197, 631 S.E.2d 907, 910 (2006) ("'Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.'" (quoting *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976))).

4. As to whether the Special Referee erred in declining to grant Bradley's request for discovery and an evidentiary hearing, we affirm. Here, Bradley specifically sought post-foreclosure sale discovery in order to review Bank's decision to deny her a loan modification. However, the South Carolina Rules of Civil Procedure do not allow for discovery after the determination of the merits of an action. *See* Rule 26, SCRCP (stating parties may engage in discovery regarding "relevant" matters in a "pending" action). Furthermore, Administrative Order 2009-05-22-01 does not provide for any discovery concerning the HAMP process, nor does it entitle Bradley to a hearing.

5. As to whether the Special Referee erred in denying Bradley's motion to set aside the foreclosure judgment under Rule 60(b)(3), SCRCP, we find the Special Referee did not abuse his discretion in denying her motion. Bradley contends that Bank's August 19, 2010, letter indicating that no foreclosure sale would occur for 30 days from the date of the letter evidences fraud, misrepresentation, or other misconduct. *See* Rule 60(b)(3), SCRCP (providing that a party may be relieved of a final order or judgment based upon "fraud, misrepresentation, or other misconduct of an adverse party"). However, Bradley testified that after receiving the letter she contacted Bank numerous times and was repeatedly informed the foreclosure sale had not been cancelled. She further testified that in spite of the representations that the foreclosure sale had not been cancelled, she took no action to consult an attorney, appear in the foreclosure action, or to attend the foreclosure sale.

Accordingly, we do not believe the Special Referee erred in declining to set aside the foreclosure sale under Rule 60(b)(3). *See Auto-Owners Ins. Co. v. Rhodes*, 385 S.C. 83, 93, 682 S.E.2d 857, 863 (Ct. App. 2009) (stating that the decision to grant or deny a motion to set aside a judgment is within the sound discretion of the trial court); *see also Raby Constr., L.L.P. v. Orr*, 358 S.C. 10, 21, 594 S.E.2d 178, 484 (2004) (stating a party may not prevail on a Rule 60(b)(3) motion on the basis of fraud when he or she has access to disputed information or has knowledge of inaccuracies in an opponent's representations at the time of the alleged misconduct).

AFFIRMED.

FEW, C.J., and GEATHERS and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals
APPEAL FROM PICKENS COUNTY
Court of Common Pleas

R. Murray Hughes
Special Referee

Case No. 2008-CP-39-2120
Appellate Case No. 2011193386

JP Morgan Chase Bank, National Bank
Respondents,

v.

Vanessa Y. Bradley
Appellant.

PETITION FOR REHEARING

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rights in the truncated procedure used by Chase in the last stages of the foreclosure prior to the sale.

b. The court overlooked misconduct as a separate ground under rule 60(b)(3) that is distinct from both fraud and misrepresentation.

c. Equity favors at least equal treatment of litigants in this process.

INTRODUCTION

Appellant Vanessa Bradley seeks rehearing of the Court's opinion issued February 27, 2013. The basis of the request is misapprehension of the requirement of strict adherence to and full compliance with the Administrative Orders of the Chief Justice of the South Carolina Supreme Court should be strictly enforced. The Court found that Chase captured the spirit of the 2009 Administrative Order. However, that threshold is insufficient where, as here, the Administrative Order addresses a broad problem affecting the state (and nation), is intended to be comprehensive, and outlines rights and duties for both sides in residential foreclosure litigation.

The same is true of the Home Affordable Modification Program (HAMP) which gave rise to the Administrative Orders on Foreclosure issued by the Chief Justice. The purpose of HAMP is to address the mortgage crisis on a national level with the intention, *inter alia*, of borrowers remaining in their homes.

Though the unpublished opinion has no precedential value, if lower courts, especially masters in equity and special referees, are asked to find it persuasive it will seriously dilute the ability of homeowners to be treated fairly in the modification review process by mortgagees, as it does for Bradley. The Chief Justice's Administrative Order is rendered ineffective where it is enforced only to the extent that lenders choose to follow it. As here, the result will be modification effort only as determined desirable by mortgagees without regard to the rights and perspective of homeowners in the process. Homeowners like Bradley have no recourse other than their right to rely on full and fair consideration through the carefully crafted rules and regulations of the modification process and the Administrative Order that supports its administration in our state.

1. THE DECISION HEREIN OVERLOOKS THE DISPARITY OF THE PARTIES' POSITIONS AND THE EFFECT OF REWARDING THE MISCONDUCT OF CHASE IN FAILING TO FOLLOW HAMP AND THE ADMINISTRATIVE ORDER.

a. Imbalance in the parties' positions

The Court's view of the two sides in this case was as if the communication between the parties was one on one. However, the record excerpts referenced in Appellant's briefs reveals that Bradley could never reach the "one" that was supposed to be her specific contact. Instead, she spoke with a different person each time she called. Therein lies the root of the misconduct that caused Bradley's home to be sold without modification. Thus, the facts evidenced by Bradley's contact with Chase representatives should have been considered as an overall pattern of disregard of the homeowner in the intersection of the litigation and the modification efforts.

The Court accepts Chase's summary of the contact regarding cancellation of the sale, i.e., Bradley being "repeatedly informed that the sale had not been cancelled". The focus on this summary statement overlooks the specifics of the Bradley testimony outlined by Appellant which reveal the following distinction: She was repeatedly and alternatively told that the sale had been cancelled and/or that a request that the sale be cancelled had been sent. She was even told on the day of sale that the sale had not taken place. Prior to the sale, she was only told once that the sale "had not been cancelled". When asked by counsel for Chase if they ever told her the sale was actually cancelled, Bradley indicated that no, they told her they asked for the sale to be cancelled. This representation to Bradley by Chase representatives suggested that Chase had no intention of pursuing the sale, when in fact someone in their ranks had authorized counsel to pursue it. It is clear that Bradley thought that Chase controlled the cancellation and the representatives she dealt with intended for it to be stopped. In fact they do control cancellation of sales but here did not cancel as promised, both orally and in writing. It is never explained why

the cancellation that Chase desired never took place. Nor is it explained why Chase did not take the action its loss mitigation representatives requested. If Chase did not desire it, then its representatives were engaging in a pattern the totality of which constituted fraud, misrepresentation and/or misconduct.

b. Misconduct of Chase in failing to follow HAMP and the Administrative Order

If the right to challenge a lender's HAMP denial is not upheld then it is imperative that courts require strict adherence to HAMP rules by mortgagees like Chase. Otherwise, reliance on lenders to police themselves removes the judicial system from the litigation picture.

The conduct of Chase in this case as outlined in the briefs and the record amounts to misconduct at a minimum. The Court summarizes the testimony of Bradley, as did Chase in its brief, to say that "no one told her the sale was cancelled". But when the total testimony is reviewed, it is the overall impression she was given and the history of their dealings that caused her to believe that the requesting of cancellation was synonymous with the sale being cancelled. Her foresight in following up is here used against her. Whereas the Court would have Bradley be more attentive to the stale litigation, her attentiveness, where the pattern of Chase did not really call for it, is found to be her downfall.

Each of the issues outlined and argued on appeal arise out of the imbalance in the positions of the parties to a residential foreclosure such as the one herein. When viewed from the perspective of adherence to HAMP rules and regulations as well as to the substance and procedure of the Administrative Order, the Court overlooked the positions and resources of the parties as a factor when it required strict adherence by the self represented appellant and not by Chase. The effect was as follows:

a. Chase pursued a foreclosure sale when an application for modification was pending in violation of HAMP.

b. Chase pursued a foreclosure sale during the 30 day window where is prohibited by HAMP to allow the borrower to challenge denial of modification. This violation of the right to the challenge period was important because Chase's reasons for denial were invalid on their face. The failure to follow procedure that allowed for the challenge was fatal.

2. THE COURT FOUND THE FORBEARANCE AGREEMENT DID NOT PRECLUDE CHASE FROM ADVANCING THE LITIGATION TO A SALE BECAUSE OF AN INSUFFICIENT MEETING OF THE MINDS. THE FINDING ON THIS ISSUE SHOULD APPLY EQUALLY TO THE USE OF FAILURE OF THE FORBEARANCE AGREEMENT AS A BASIS TO DISCONTINUE THE REQUIRED MODIFICATION COMPLIANCE.

The end of the forbearance period was utilized by Chase in its pleading and procedure as 1) supporting its denial of modification and 2) supporting the advancement of the litigation. The Court finds that there was no meeting of the minds with regard to *all* essential and material terms of the agreement. It should follow that if the forbearance agreement that the Special Referee found to exist does not preclude further litigation activity by Chase, then it should likewise not be allowed to support Chase's denial of modification and affidavits, including those pursuant to the Administrative Order. The Order herein does not take this into consideration and results in a contradictory standard.

3. THE ISSUE OF DUE PROCESS REGARDING THE SUPPLEMENTAL ORDERS WAS PRESERVED FOR REVIEW PRIOR TO THE HEARING ON THE RULE 59(e) MOTION AND THEREFORE SHOULD BE CONSIDERED AND RULED ON.

The Court found that the issues regarding the Supplemental Orders were not raised until the hearing on the Rule 59(e) motion and were therefore not preserved for review.

However, in the body of the Motion to Set Aside the Sale, Bradley asserted that Chase obtained Supplemental Orders despite the HAMP violations that precluded the sale. (Record p. 63 lines 1-2). In Section B of the Motion's prayer for relief, Bradley requested that "the Order and Supplemental Orders of Relief be vacated and the Defendant's default be set aside". (Record p.63). The Supplemental Orders were also addressed in the written version of the Rule 59(e) motion prior to the hearing. (Record p. 98 No. 3; p. 102 lines 11-14 and p. 100 Section III). Therefore, having preserved this issue at the outset, Appellant requests that the Court review the issues as they relate to the Orders in the case, including the Supplemental Orders.

4. A RULE 59(e) MOTION CONTINUES THE PENDENCY OF THE ACTION AS WELL AS THE RIGHT TO DISCOVERY AND A HEARING WHICH ARE AT A MINIMUM IMPLIED IN THE ADMINISTRATIVE ORDER SUCH THAT THE SPECIAL REFEREE'S ORDER DENYING THEM SHOULD BE OVERTURNED.

Bradley's initial motion was filed within 13 days of the foreclosure sale (Record p. 61) and two days prior to the Court's Report and Order Confirming Sale (Record p. 20-21) which was also prior to the issuance of the Master's Deed. The Rules of Civil Procedure allow for further proceedings after a foreclosure merits hearing, especially in cases where, as here, the action is not concluded and issues can arise out of the proceeding that follow a final order. In this case, the proceedings continued some 19 months after the initial order of foreclosure. After a long period of inactivity, multiple pleadings, affidavits and supplemental orders were filed in the case.

Due process requires that an opposing party be allowed to challenge the veracity and appropriateness of these documents and the representations contained therein. The denial of the right to challenge the documents that Respondent now claims support the

ultimate sale of the property renders the procedure contained in the SCRCP as well as the Administrative Order unilateral, allowing only Chase to determine the appropriateness of its own actions.

Bradley should have been allowed to fully challenge Chase's unilateral decision that they had complied with applicable law and the foreclosure could be continued. If the failure to allow any discovery or further hearing to inquire into and challenge the action and inaction of Chase after 19 months is to be confirmed as an appropriate procedure under HAMP and the AO, it should be considered as an important factor in review of the entire case.

5. THE COURT SHOULD REVIEW ITS AFFIRMANCE OF THE SPECIAL REFEREE'S RULING AS TO RULE 60(b)(3) IN APPLYING THE LEGAL PRINCIPLES INVOLVED IN EACH OF THE ISSUES ON APPEAL.

   a. **The Court's ruling does not take into account the staleness of the litigation and Bradley's lack of capacity to protect her rights in the truncated procedure used by Chase in the last stages of the foreclosure prior to the sale.**

The Court minimizes the efforts of the self represented Bradley to communicate with the Chase representatives. The second AO (2011-05-02-01) sets forth the problems the Chief Justice observed in the parallel tracks of communicating with lenders while litigation is pending and the advance of the case through the procedural rules and requirements. The Court herein overlooked the staleness of the case as caused by Chase when it faulted Bradley because she took no action "to consult an attorney, appear in the foreclosure action, or to attend the foreclosure sale".

The procedure in the last days of the litigation was truncated by Chase and acquiesced in by the Special Referee. Bradley's testimony reflects that she thought she was participating in the foreclosure case through her direct communication with Chase. Her attempts as a layperson to represent herself in the process were held to a higher standard by this Court whereas the acts and

omissions of the many Chase representatives involved in the communication were held to a lower standard by the Court. This unbalanced standard lacks consideration of the homeowner's perception of what was going on and her inability to participate in the truncated process.

b. The court overlooked misconduct as a separate ground under rule 60(b)(3) that is distinct from both fraud and misrepresentation.

The Court concludes its opinion with a quote from *Raby Constr. L.L.P. v. Orr,* 358 S.C. 10; 594 S.E.2d 178 (2004) that reflects that the Court does not make a distinction between fraud and misconduct when reviewing a decision under Rule 60(b)(3). If no distinction was intended, there would only be one element stated in the rule.

Misconduct by a party can take forms other than fraud. *McLurg v. Deaton* 380 S.C. 563; 671 S.E.2d 87 (Ct. App. 2008). In most situations, self represented litigants have little hope of navigating the justice system. This is particularly true with mortgage foreclosure due to the traditional desire to shortcut the process by allowing unchallengeable references, minimal requirements of proof, and exemption from mediation to name a few. However in the mortgage foreclosure area, the foreclosure crisis has yielded the advent of methods of assistance to bring arrearage current and this has slowed the rush to judgment and sale, as it should. This development, along with state and federal level recognition of a grossly uneven playing field, calls for a revised perspective on the interaction of these unique rules, regulations, and orders as well as on the economic crisis and resulting programs. That perspective is not present in the Court's decision herein.

The courts and foreclosure firms are historically inclined to, and prefer to, use a blanket approach that gives little if any attention to the specific facts of a case or the SCRCP. The truncated procedure used here is a prime example. The existence of the unpublished opinion in

this case will no doubt give way to an analysis of whether lenders, servicers, holders and others in the securitization chain of residential mortgages have complied with the *spirit* of the Chief Justice's Order as opposed to the *letter* of it. If that determination can be made unilaterally by Chase and go unchallenged, then the AO has no real effect. Mortgage lenders sought the intervention of the Chief Justice into this process and did not challenge any of her subsequent administrative orders related to mortgage foreclosure. (AO 2009-05-22-01; AO 2011-05-02-01). The Administrative Orders of the Chief Justice should be followed.

c. Equity favors at least equal treatment of litigants in this process.

The same analysis applies to HAMP which has strict rules. As with the Administrative Orders, the rules are there to preclude lenders like Chase from attempts to excuse its non-compliance in a given case. On the other hand, if strict compliance with rules is to be required of unrepresented litigants, then fully represented litigants like Chase should not be allowed to circumvent the rules by misleading unrepresented litigants and subsequently relying on their response to a pattern of behavior exhibited by lenders in the loss mitigation process for the purpose of denying the requested relief. This amounts to misconduct and warrants reversal.

Likewise, Chase should not be allowed to violate HAMP and the AO with impunity while great emphasis is placed on the failure of a self represented borrower to fully utilize the judicial process in the defense of a stale foreclosure lawsuit. The Court held that Chase complied with the spirit of HAMP and the AO and did not require strict adherence to those rules that were made to avoid what happened in this case. The overall attitude of keeping citizens in their homes is not present in this opinion.

The Court does appear however to require strict adherence by the self represented Bradley in finding it to be significant that she failed to file a counter affidavit (though Chase

failed to file affidavits and notices required early in the case) and failed to make the full third trial period payment timely (though the payment which was being made by Clemson Community Cares was made within days and was followed by at least six more payments by Bradley herself). The juxtaposition of the Court's deference to the fully represented Chase and the lack thereof to the self represented Bradley raises the bar for the self represented far above that of the fully represented. This results in an unbalanced analysis that misapprehends the level of compliance that is required of both parties as to HAMP and the AO.

CONCLUSION

This attitude of deference to mortgagees who clearly have the upper hand over borrowers and none toward self represented borrowers is not supported by HAMP, the language of the AO that was operative at the time of the sale, nor the 2011 AO which was issued during the pendency of Bradley's Rule 59(e) Motion. The overall message of the AO and HAMP is one of deference to the plight of borrowers who can no longer go to a brick and mortar office and are at the mercy of telephone communication with multiple mortgagee representatives each of whom has their own practices and methods. When the lender assigns a particular representative to the borrower with whom, as demonstrated here, communication fails, the deference should go to the borrower at least as much as to the lender.

If anything, it is deference to the borrower's position that should rule the analysis here, especially where the borrower is self represented. This overarching concern is what has yielded further programs beyond HAMP such as the SCHelp Hardest Hit funds and local housing funds targeting employed homeowners (such as Bradley) that have mortgage arrearages but could continue with mortgage payments on their home with the assistance available to cure the arrearage.

Since relief under HAMP relies on strict adherence to the rules, so too should rulings under it and the Administrative Orders of the Chief Justice. The Appellant therefore requests that this Court grant a rehearing in light of the points enumerated above and grant the relief requested in the Appellant's Briefs, most importantly the right to a full, fair and timely review for modification with stgrict adherence to the rules of procedure related thereto.

Respectfully submitted,

March 14, 2013

Susan Ingles
Attorney for the Appellant

The South Carolina Court of Appeals

JP Morgan Chase Bank, National Association,
Respondent,

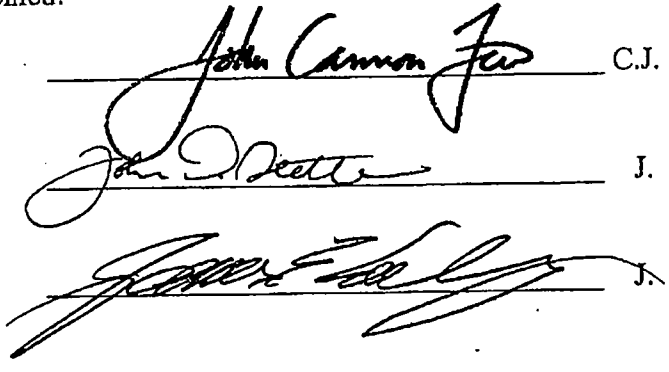
v.

Vanessa Y. Bradley, Appellant.

Appellate Case No. 2011-193386

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and, hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



C.J.

J.

J.

Columbia, South Carolina

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