THE STATE SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
The Honorable Mikell R. Scarborough, Master-in-Equity

Case No. 2010-CP-10-6481

CitiFinancial, Inc., *Respondent*,

v.

Stella B. C. Squire, aka Stella B. Cardamone,
and Beneficial South Carolina, Inc., *Defendants*,

Of whom, Stella B. C. Squire is, *Petitioner*.

PETITION FOR WRIT OF CERTIORARI

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Certification of Counsel

The undersigned hereby certifies that Stella B.C. Squire filed a petition for rehearing with the Court of Appeals and the Court of Appeals ruled on the petition with finality on June 10, 2013. (App. 214).

Questions Presented for Review

I. Did the Court of Appeals err by concluding the failure to present a note in a foreclosure action did not warrant vacating a foreclosure judgment pursuant to Rule 60(b)(1) or (3), SCRCP for abuse of discretion?

II. Did the Court of Appeals err by failing to address the insufficiency evidence including the testimony by counsel, inadmissible affidavit and lack of note.?

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IV. Did the Court of Appeals err by affirming the lower courts application of the doctrine of laches and misapplication of Rule 8, SCRCP?

V. Did the Court of Appeals err by failing to address whether relief should have been granted under Rule 55, SCRCP, for good cause shown?

Statement of the Case

Pursuant to Rule 242 of the South Carolina Rules of Appellate Procedure, Stella B.C. Squire (hereinafter "Squire") seeks certiorari regarding the Court of Appeals' decision in *CitiFinancial, Inc. v. Stella B.C. Squire aka Stella B. Cardamone and Beneficial South Carolina, Inc., Defendants*, Op. No. 2013-UP-158 (Ct. App. filed April 17, 2013). (App. 176-177). The issues concerning this petition arise from the procedures followed with regard to the foreclosure of a mortgage on a primary residence owned by Stella B. Cardamone ("Squire"). Squire asserts that novel issues exist in this matter and that the Court of Appeal's decision endorses a procedure that runs afoul of the South Carolina Rules of Civil Procedure, Rules of Evidence and statutory provisions.

This case involves the substandard process now used in the enforcement of a mortgage. On June 17, 2002, without the supervision of an attorney, CitiFinancial Inc. ("Citi") refinanced Squire's mortgage on her primary residence. (App.75-76, 91-92). The closing of the transaction took place at Citi's place of business. (App. 75).

On August 12, 2010, Citi served Squire with an unverified Complaint. (App. 62-68). Attached to the complaint was a copy of the mortgage. (App. 69-73). No note was attached. (App. 62-73).

On October 13, 2010, an Affidavit of Default was filed with the lower court. (App. 59). No motion or application accompanied the motion. No entry of default was requested. (App. 94). On the same day a Notice of Hearing was filed. (App. 58). The Notice of Hearing does not state the purpose of the hearing. (App. 58). Nor does the Notice of Hearing state that referenced testimony will be used in accordance with S.C. Code Ann. §14-10-110. (App. 58).

On December 1, 2010, following a hearing held on November 16, 2010, a Transcript of Hearing was filed. ("Transcript") (App. 42-44). The Transcript provides "It is agreed that the signing of the testimony by the witnesses, as required by S.C. Code Ann. §14-10-110, is hereby waived." (App. 43). No evidence by a competent witness was offered. Testimony was not proffered by an employee of Citi but rather counsel for Citi was the only witness to testify. (App. 43). Citi's counsel proclaimed "I will offer a copy of the original Note into evidence before the sale date." (App. 43). Neither the original Note nor Mortgage were submitted. Indeed, the Note was never submitted as counsel's testimony stated would be done. (App. 96-97).

Filed simultaneously with the Transcript was the Master In Equity's Report and Order of Judgment of Foreclosure and Sale Decree. ("Foreclosure Decree") (App. 7-14). Without having the benefit of a Note, paragraph seven (7) of the Order states "[f]or value received, Stella B.C. Squire made, executed and delivered the Note dated June 17, 2002. Other terms and conditions are stated in the Note, which is of record herein." (Ap. 8). Paragraph four (4) of the Order states, "[t]he Defendant(s) Stella B. C. Squire . . . are in default as shown by affidavit or order herein." (App. 4). No Order of default exists in the record. No further reference to default for failing to answer is contained in the Foreclosure Decree, including within the conclusions of law section. (App. 7- 14).

On January 31, 2011, Squire filed a Notice of Appearance as well as a Notice of Motion to Vacate Foreclosure Order and Stay and Enjoin Further Sale Proceedings.("Motion to Vacate") (App. 32-39). Two supporting Affidavits were submitted into evidence at the time of the hearing on the motion. Jay Keith Larson, Squire's son opined that his mother lacked the necessary mental competency to comprehend, and maintain her household affairs. (App. 82). Larson further opined that on his return from deployment he learned of the foreclosure action and began to immediately communicate with the Citi. (App. 82-87). Larson received a communication which stated "Citi will work with the borrower and her son on the reinstatement, once the sale has been vacated." (App 85). Just days after Citi communicated loss mitigation alternatives were available to her, Squire filed for relief.

Squire raised multiple issues warranting relief including the flawed procedures followed and Citi's lack of evidentiary support and unclean hands. (App. 20-27). The Master acknowledged: "those are all good arguments if timely made." (App 97).

Notwithstanding, the Master-In-Equity denied Squire's relief denying the Motion to Vacate on the ground he could not go back in time since Squire did not answer the complaint. (App. 99). He determined that laches and equity precluded him from vacating the Foreclosure Decree. (App. 99).

Squire appealed from the Master-in-Equity's Orders in favor of Citi. (App. 16). The Court of Appeals summarily affirmed the lower court decision without addressing any particular raised by Squire. (App. 176-177). Squire petitioned the Court of Appeals for rehearing of its generic denial. (App.) This petition for writ of certiorari follows.

Summary of Arguments in Support of Petition for Writ of Certiorari

Certiorari is warranted due to Court of Appeals failure to address novel issues raised and the deviation from the Rules of South Carolina Rules of Civil Procedure, Rules of Evidence, statutory provisions and case law. The Court of Appeals and lower court should be reversed in order to protect homeowners from a process that prejudices them rather than adhere to rules adopted to protect them.

Squire raised a number of issues at the lower courts (App. 32-40) including: whether the foreclosure process employed was defective since Plaintiff never presented a Note; whether in an in rem is a party is required to request entry of default, move for a judgment of default, and submit evidence of default and of entitlement to a judgment under Rule 55, SCRCP; whether in a case where a party fails to answer, Rule 8, SCRCP, bars the party from asserting that an entry of default and/or judgment should be vacated under Rules 55 and 60, SCRCP; if no Note is provided has the foreclosing party met its evidentiary burden of proof under Rule 71, SCRCP or common law principles; whether a party seeking a foreclosure must establish evidence the party is the owner or holder of the

subject Note prior to an order of foreclosure; whether witness testimony is waivable under S.C. Code Ann. § 14-11-110; whether a party may authorize their counsel to testify on their behalf and present a qualified witness; and what the evidentiary requirements are for an affidavit to be properly admitted into evidence as testimony in a matter.

Certiorari is warranted in this matter. The Court of Appeals failed to address these issues, which are relevant to procedures occurring in this State's courts of equity.

Concise Arguments in Support of the Petition for Writ of Certiorari

I. THE ESTABLISHMENT OF THE DEBT IS AN ESSENTIAL ELEMENT IN THE BURDEN OF PROOF TO A RIGHT OF FORECLOSURE.

A. Citi failed to prove its debt by failing to offer, produce or submit into evidence a note or proof of existence of a debt therefore the lower courts erred in failing to vacate the foreclosure.

Squire sought relief from foreclosure before the lower court pursuant to Rules 52, 55, 59, 60, and 71, SCRCP. In an action for foreclosure "the party seeking foreclosure has the burden of establishing the existence of the debt and the mortgagor's default on that debt." US Bank Trust Nat. Ass'n v. Bell, 385 S.C. 364, 374-375, 684 S.E.2d 199 (Ct. App 2009); See also, S.C. Code Ann. § 29-3-630 (2007) (requiring a court of competent jurisdiction must establish "the debt for which the security is given" before any sale of the foreclosed property may be valid to pass title) To be entitled to a foreclosure judgment by way of default or contested hearing, Citi had the burden of establishing its claim under common law and Rules 55 and 71, SCRCP. Rule 71, SCRCP requires that in all foreclosure actions "proof shall be made of the facts and circumstances alleged in the pleadings. . ." Rule 71, SCRCP

Requiring that the debt be established and in that regard a note be produced or its absence accounted for has been a long established rule and a safe one. See Sheehy v.

Mandeville, 11 U.S. 208 (1812); In re David A. Simpson, 711 S.E.2d 165 (N.C. App. 2011) (establishing that a party is the holder of the note is essential to protect the debtor form the threat of multiple judgments on the same note); Bank of New York v. Faftagianis, 13 A. 3d 435, (N.J. Super Ct. 2010)(in order to foreclose under New Jersey law the plaintiff must show that it is entitled to enforce the note at the time the complaint is filed; no competent evidence was offered as to when the note was endorsed); In re Kemp, 440 B.R. 624 (Bankr. D.N.J. 2010)(no right to enforce the note under subsection of U.C.C. §3-301 could be asserted without some evidence of possession of the note by the party seeking to enforce it); Georg v. Metro Fixtures Contractors, Inc., 178 P. 3d 1209 (Colo. 2008)("possession is an element designed to prevent two or more claimants from qualifying as holders who could take free of the other party's claim of ownership); Union Sav. Bank v. Cassing, 691 S.W. 2d 513 (Mo. Ct. App. 1985)("in the case of suit on the note, presentment of the note or satisfactory proof that it has been lost or destroyed are essential elements of the case because the instrument itself is the exclusive ground for the cause of action.").

It is undisputed that Citi did not submit a verified Complaint. It is undisputed that Citi never submitted the subject Note; neither at the hearing or before the sale as represented. These two factors alone place the Foreclosure Decree in such a state of suspicion that it should be vacated. It is difficult to understand how a Foreclosure Decree could make reference to terms in a document that was never submitted, or entered into evidence. Squire contends Citi's failure to submit a verified Complaint or the Note into evidence, rendered the Foreclosure Decree lacking in evidence and necessitating its revocation.

The Court of Appeals affirming the lower court's decision summarily cited to Sundown Operating Co. v. Intedge Indus., Inc., 383 S.C. 601, 681 S.E.2d 885 (2009). The Court noted that whether to set aside an entry of default or a default judgment "lies solely within the sound discretion of the trial court and the decision will not be over turned on appeal absent a clear showing of an abuse of discretion." Id. at 606. "[A]n 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." Id. at 607. The failure of the lower court to require the one asserting a debt obligation to establish the debt by sufficient evidence as required by common law and the Rules of Civil Procedure creates an error of law mandating the Order be vacated.

B. Citi failed to offer competent testimony or admissible evidence to establish the debt amount.

Pursuant to Rule 60(b)(1), SCRCP, a court may relieve a party of a final judgment for mistake. . . "This rule is an appropriate remedy for good faith mistakes of fact if all other applicable factors are met." Williams v. Watkins, 384 S.C. 319, 324, 681 S.E. 2d 914 (Ct. App. 2009). Squire argues whether the foreclosure order is considered a default judgment or a judgment on the merits, in either case, it should be vacated due to lack of evidentiary support under Rules 71 and 55, SCRCP.

B. 1. In rem actions require evidentiary support even in a default scenario.

This was an *in rem* action, the sole purpose of which was to foreclosure on real property. See Bartles v. Livingston, 282 S.C. 448, 319 S.E. 2d 707 (Ct. App. 1984); and Perpetual Building & Loan Association v. Braum, 270 S.C. 338, 242 S.E. 2d 407 (1978).

Rule 55, SCRCP governs the prerequisites to granting a default judgment in an in rem action, stating: "in order to enable the court to enter judgment . . . it is necessary . . . **to establish the truth of any averment** by evidence or to make an investigation of any other matter." Rule 55(b)(2), SCRCP. "No judgment by default shall be entered . . . in any in rem action, unless the claimant establishes his claim to relief by evidence satisfactory to the Court." Rule 55(e), SCRCP. In an action where a defendant has defaulted and plaintiff is seeking unliquidated damages the plaintiff still bears the burden to "introduce testimony in proof of the account in order to obtain a valid default judgment[,]" and the defaulted party is still entitled to participate in the proceedings by cross-examining witnesses and objecting to evidence submitted. See Howard v. Holidays Inns, Inc., 271 S.C. 238, 246 S.E.2d 880 (1978); Roche v. Young Bros., Inc., 332 S.C. 75, 504, S.E.2d 311 (1998).

B. 2. The Affidavit of Debt failed to provide any evidentiary support for foreclosure.

Squire asserted in her Motion to Vacate that Citi failed to submit any evidence much less sufficient evidence that it was entitled to foreclosure. The lack of sufficient evidence and the nature of evidence submitted supports vacating the foreclosure decree pursuant to Rule 60(b)(1).

There are a number of rules which govern the admission of evidence in a foreclosure hearing, including but not limited to, Rules 901, 1002, 602, 801, and 803(6), SCRE. Admissibility of evidence is a matter of discretion and absent an abuse of discretion or an error of law; a trial judge's decision will not be overturned. Weir v. CitiCorp Nat. Services, Inc., 435 S.E.2d 864, 868 (1993).

In regard to affidavits it has been recognized in South Carolina courts that affidavits must be based upon personal knowledge, set forth the facts as would be admissible in evidence, and show affirmatively that the affiant is competent to testify to the matters stated therein. See Rule 11(c), SCRCP; Rule 56(e), SCRCP; Montgomery v. CSX Transport, Inc., 376 S.C. 37, 656, S.E.2d 20 (2008); Saro v. Ocean Holiday Partnership, 314 S.C. 116, 441, S.E.2d 385 (Ct. App. 1994); and See Baughman v. American Telephone & Telegraph Co, 306 S.C. 101, 410 S.E. 2d 537 (1991). More to the point, while not binding on this court, a Florida court found that an affidavit of indebtedness constitutes inadmissible hearsay when the affiant can state that the data in affidavit is accurate only insofar as it replicated the numbers derived from the company's computer system. Glarum v. LaSalle Bank Nat'l Ass'n, No, 83 So. 3d 780 (Ct. App. Fla 2011). In Glarum, the Florida Court of Appeals considered the admissibility of an affidavit of indebtedness submitted by the Bank in a foreclosure action. Id. The Florida Court applied Fla. Statute § 90.803(6)(a), which mirrors our own Rule 803(6), SCRE, and found that the affidavit was inadmissible hearsay which did not fit into the business records hearsay exception. Id. The court reasoned that "[d]espite Orsini's intimate knowledge of how his company's computer system works, he had no knowledge of how that data was produced, and he was not competent to authenticate that data." Id.

In this case, the Affidavit of Debt and Authorization to Testify, the sole piece of evidence submitted by Citi, fails to meet the requirements necessary for admissibility. The affidavit does not state the statements are based upon the personal knowledge of the affiant; the affiant does not state she is the custodian of records for Citi; the affiant does not state she is familiar with the records of Citi; the affiant does state she reviewed the

records of Citi before making the statements contain therein; nor does the affiant explain or attempt to authenticate the computer printouts accompanying the affidavit. (App. 52-57).

In an effort to establish the amount of the debt the Affidavit summarily inserts amounts. The Affiant provides no basis for where the numbers were extracted or how they are supported. Blindly attached to the Affidavit but not referenced or incorporated within are computer screen printouts. (App. 53-57). Again, there is nothing stated within the Affidavit that would provide a proper foundation for the attachments or proof of admissibility. The alleged evidence submitted is in essence no evidence, since it fails to meet necessary standards of the Rules of Evidence. See Beneficial Maine Inc., v. Carter, 25 A. 3d 96, 2001 ME 77 (2011)(Affidavit was insufficient to support foreclosure since it failed to report the basis for the knowledge.) All of the basic foundational requirements necessary to authenticate that the affiant is competent to testify are absent from the statements found in the affidavit. The affidavit on its face is hearsay and should not have been admitted into evidence. Due to the insufficient Affidavit the Foreclosure Order lacks evidentiary support, was entered under mistake, and should have been vacated.

B. 3. Counsel for Plaintiff is not competent to testify and cannot be used to proffer evidence in an effort to foreclose.

When considering whether testimony presented shall be admissible into evidence it is important to note that testimony by counsel of a party as to genuine issues of material facts is not admissible into evidence. Gilmore v. Ivey, 348, S.E.2d 180 (Ct. App. 1986); Sessions v. Withers, 327 S.C. 409, 414 488 S.E.2d 888 (Ct. App. 1997) ("trial court properly disregarded the statements of counsel that he claimed reflected testimony appearing in depositions not otherwise entered into evidence."); West v. Gladney, 341

S.C. 127, 135, 533, S.E.2d 334 (Ct. App. 2000) ("[T]his court ordinarily will not consider statements of fact presented only in an attorney's argument in determining whether a genuine issue of material fact exists. . ."). Moreover, at least one court has found where counsel submitted personal affidavits, he interjected himself as a possible witness, which was clearly improper, unless he and his office were prepared to withdraw at once. State v. Anonymous, 30 Conn. Supp. 211, 232, 309 A.2d 135,146 (1976).

It is not appropriate for counsel to testify on behalf of and in place of their client nor is counsel qualified to act as a witness. Yet, in this case Counsel for Citi submitted the only substantive testimony presented to the court as to the alleged Note that was never presented, when and how the parties entered into the agreement, and the terms of the agreement under the Note. (App. 43). Incredulous is the concept that a client can authorize a lawyer to testify on its behalf, and that a lawyer completely uninvolved in a transaction could offer sufficient testimony. Notwithstanding, that is what the Citi did in this matter and has become a standard practice in foreclosure matters. No authority in South Carolina law supports the concept that a party can authorize a lawyer to testify as to the merits of a claim on its behalf.

In the Transcript of Testimony signed by counsel for Citi, it states: "It is agreed that the signing of the testimony by the witnesses, as required under S.C. Code Ann. §14-10-110, is hereby waived." (App. 43). First, this is inaccurate as Squire did not waive any such requirement. Thus if the court relied on such, it was an error of law. Moreover, Squire asserted Citi did not meet the requirements of §14-11-110 and clearly misinterpreted the statute. See: S.C. Code Anno. §14-10-110. The statute does not speak to signing of testimony by a witness nor does it authorize a waiver of signing. Id. Rather,

it provides any written testimony submitted is subject to the "same exceptions as to the admissibility of testimony may be taken as are allowed by law upon examination before the court…" Id. Therefore, any such testimony must meet standard evidentiary requirements. As previously asserted Citi's testimony did not.

To the extent the Court or Citi relied on §14-10-110 to justify testimony by counsel in support of foreclosure, such was incorrect. S.C. Code Ann. §14-10-110 does not authorize testimony by counsel. Counsel is not an appropriate witness to testify to the terms of the agreement because Counsel lacks the requisite personal knowledge of the transaction. Counsel's statements are on their face are hearsay, as Counsel sought to call the Courts attention to terms of the Note, which was not otherwise presented into evidence. See Higgins v. MUSC, 326 S.C. 592, 486 S.E. 2d 269 (Ct. App. 1997) Testimony of Counsel should not have been considered evidence of the right to foreclose.

Squire challenged the process here asserting it was defective and fell below generally accepted standards. Completely unusual is the scenario when a lawyer for the party is the only witness. Lawyers are generally held to the role of advocate not witness. Unusual is a procedure where a party claiming a breach of contract is not put to task to prove a contract by competent witnesses and evidence. In summary Squire properly raised issues under Rule 60(b)(1) the warranted relief: (1) the Affidavit of Indebtedness and alleged evidence was insufficient and not admissible under the Rules of Evidence; (2) Counsel was incompetent to testify; (3) S.C. Code Ann. 14-11-110 was misapplied; and (4) no Note was produced. Squire contends that her Motion to Vacate the Judgment Foreclosure should have granted under Rule 60(b)(1) and (3). The lower court abused its discretion and committed an error of law in denying the Motion and Vacate and Motion

for Reconsideration and/or the factual conclusions upon which the judge based his order were without evidentiary support, therefore the Court of Appeals erred in not overturning the denial of Squire's Motion to Vacate.

II. The fact that the subject mortgage was obtained without the benefit of counsel for Squire precluded equitable relief.

In addition to the defenses asserted above Squire asserted the defense of unclean hands. Squire asserted the Order of Foreclosure should be vacated and the matter heard on the merits because the transaction was closed without a lawyer and by Citi's employees at its place of business. (App. 77). Equity provides that a party seeking redress in a court of equity must not have done any dishonest or unethical act in the transaction upon which he or she maintains the action in equity, since a court of conscience will not grant relief to one to one with unclean hands. See Regions Bank v. Wingard Properties, Inc., 394 S.C. 241, 715 S.E.2d 348 (Ct. App. 2011). In South Carolina "[a]ll real estate and mortgage loan closings must be supervised by an attorney." Doe v. McMaster, 355 S.C. 306, 585 S.E.2d 773 (2003); State v. Buyers Serv. Co., 292 S.C. 426, 357 S.E.2d 15 (1987). No person shall be permitted to acquire a right of action from their own unlawful act, and one who participates in an unlawful act cannot recover damages for the consequence of that act. See Jackson v. Bi-Lo Stores, Inc., 313 S.C. 272, 276-77, 437 S.E.2d 168, 170-71 (Ct. App. 1993) (applying this policy to a contract secured and maintained by bribery).

In Wachovia Bank v. Coffey, Wachovia closed a home equity loan without the supervision of an attorney and later instituted foreclosure proceedings. 389 S.C. 68, 698 S.E. 2d 244 (Ct. App. 2010.), aff'm Op. No. 27282 (July 10, 2013) The Court of Appeals held that Wachovia, having committed the unauthorized practice of law in closing the

loan without attorney supervision, came to the court with unclean hands, and thus was barred from seeking equitable relief. Id. (In Op. No. 27282 this Court affirmed holding the foreclosing party never had a valid mortgage and therefore could not pursue and action as to that mortgage.)

Here, just as in Coffey, Citi is not entitled to seek equity because it conducted the closing at its place of business without the involvement of an attorney in violation of the law. The Master in Equity committed an error in law when he refused to address the principle of unclean hands. The Master in Equity committed an error of law when he summarily determined he could not follow the law because he felt he could not go back in time. (App. 99).

A. The doctrine of laches did not preclude Squire from seeking relief.

The Master-In-Equity denied Squire's Motion to Vacate Default, Foreclosure Order and Enjoin Further Sale Proceedings on erroneous conclusion he could not go back in time since Squire did not answer the complaint. (App. 99). The Master committed an error of law in ruling laches precluded him from granting Squire relief. The Court of Appeals should have overturned the Master's denial. .

"Laches is a defense in equity, and one who comes to the court seeking equity must come with cleans hands." Emery v. Smith, 361 S.C. 207, 603 S.E.2d 598 (Ct. App. 2004) (precluded asserting laches due to unclean hands). "Laches is an affirmative defense. . . " Mack v. Edens, 306 S.C. 433, 436, 412 S.E.2d 431, 433 (Ct. App. 1992). "Laches is neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence to do what in law should have been done." Id. The party seeking to establish laches must show (1) delay, (2) unreasonable

delay, and (3) prejudice. Id. "[D]elay alone in assertion of a right does not, in and of itself, constitute laches." Treadaway v. Smith, 325 S.C 367, 479 S.E.2d 849, 856 (1996). "[L]aches does not operate to bar a legal claim when the applicable statute of limitations has not run. An action for breach of contract is a legal claim."

In this case Squire filed her Motion to Vacate just days after Order of Sale, in the month following the Order of Foreclosure, and unquestionably well within the one year time limit to file a motion under Rule 60, SCRCP. Within the motion Squire raised and asserted a number of issues and defenses including but not limited to: 1) the Complaint was unverified (2) Plaintiff did not present evidence by a qualified witness (3) the Mortgage is voidable because it was executed without the supervision of an attorney; (4) CitiFinancial followed a defective foreclosure process; (5) there was no testimony offered by a creditable witness to authenticate any note or mortgage; (6) Despite averring to the contrary, no version of the alleged note was submitted into evidence; (7) Plaintiff did not establish it was the owner or holder of the original note or mortgage; (8) Plaintiff claims that adherence to S.C. Code Ann. 14-11-110 was waived by agreement but Defendant did not waive any such provision; (9) and a proper hearing has not held. A number of these issues are statutory or questions at law, which are not barred by laches where the statute of limitations has not run. Further as to the Squire's equitable defenses, such as unclean hands, Citi cannot use equity to bar the defense when it came to the court with unclean hands. Citi is the party that must be barred from seeking equity under a doctrine such as laches. The Master in Equity committed an error of law by failing to rule upon 'Squires legal and equitable defenses as asserted, and thereafter erroneously held Squire was barred from the relief sought under Rule 60, by the doctrine of laches.

III. An error of law was committed in misapplying Rule 8, SCRCP.

"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. at 607 (citation omitted).

Rule 8; states in pertinent part: "Averments in a pleading to which a responsive pleading is required . . . are admitted when not denied in the responsive pleading." Generally, failure to plead an affirmative defense is deemed a waiver of the right to later assert it. Wright v. Craft, 372 S.C. 1, 20-21, 640 S.E.2d 486; 497 (Ct App. 2006). However, an affirmative defense not plead in an answer but nonetheless raised before the trial court may be preserved for Appeal. See Id. at 21, 497 (citing: Adam v. B &D, Inc., 297 S.C. 416, 419, 377 S.E.2d 315, 317 (1989)). "All pleadings are to be construed as to do substantial justice to all parties." Standard Federal Sav. & Loan v. Mungo, 306 S.C. 22, 26, 410 S.E.2d 18, 20 (Ct. App. 1991). Further, "[a]lthough Rule 8(c) requires a party to set forth affirmative defenses to a preceding pleading, this requirement applies only if the party *actually pleads responsively* to the prior pleading." Republic Contracting Corp. v. SCDHPT, 332 S.C. 197, 503 S.E.2d 761, 768 (Ct. App. 1998) [Emphasis added]. Additionally, there are exceptions to the waiver rule, such as Rule 15(b), SCRCP which allows a party to amend his pleadings to conform to the evidence. Madren v. Bradford, 378 S.C. 187, 193, 661 S.E.2d 390, 393 (Ct. App. 2008). Moreover, even where a party does not set forth affirmative defenses to a pleading, said party is still entitled to cross examine witnesses, and object to evidence presented by the opposing party in the action. See Howard, 271 S.C. 238, 246 S.E.2d 880; Roche, 332 S.C. 75, 504 S.E.2d 311.

In this case Squire failed to respond to the Complaint, but filed the appropriate motion for relief. Squire's first pleading in the matter was a Motion to Vacate the Foreclosure Order. Squire raised issues including Citi's lack of evidentiary support and unclean hands. The Master noted, that "those are all good arguments if timely made" but failed to address them. (App. 97.). Rather the Master determined that failure to answer the allegations of the complaint deemed all matters admitted pursuant to Rule 8, SCRCP, and in essence, precluded the raising of any defense or issue. Stated different, the Master's application of Rule 8, SCRCP, stripped pertinent parts of Rules 55 or 60 of their purpose. The Ruling was an error of law and resulted in the preclusion of the specific relief requested and prescribed by Rules 55 and 60, SCRCP.

First, Rule 8, SCRCP, is inapplicable to the sufficiency of evidence to support a finding. In essence, the Master concluded because Rule 8 allegedly deems matters admitted or waived, he did not need to address the sufficiency of evidence to support foreclosure or possible defenses. Citi's failure to submit sufficient evidence is not an affirmative defense as envisioned or listed by Rule 8, SCRCP, and as such cannot be deemed admitted for failure to assert it as an affirmative defense. Therefore the Master in Equity made an error of law when he ruled the assertion was barred by Rule 8, because the Squire had failed to timely respond to the Complaint in the matter.

Second, Squire contends the Court of Appeals improperly addressed the defenses and issues she raised in her Motion to Vacate and Motion for Reconsideration by summarily determining they had no merit since Rule 8, SCRCP, deems such defenses and issues waived and/or admitted. Squire's position is that neither Rule 8, SCRCP, nor the principle of laches should unilaterally defeat the issues raised under a Motion to Vacate

based upon Rules 55 and 60, SCRCP. Indeed, if in every instance where a party fails to answer the allegations of a complaint so the allegations are deemed admitted and cannot be subsequently readdressed, then such a circumstance would extinguish the intention or purpose of Rules 55 and 60, SCRCP. There would be no purpose to move to vacate an entry of default as provided for under Rule 55(c). There would be no purpose for a party to have to establish meritorious defenses pursuant to 60(b). Moreover, there would be no purpose for a Judge to even hold a hearing in the matter because as a result of the allegations of the complaint being irrevocably being deemed admitted there would be no further issues of fact or questions of law for the court to address. Squire would assert that where a party fails to answer a complaint the allegations of a complaint are not deemed admitted until the complainant moves for an entry of default under Rule 55, a hearing of default is held, and a judge orders a judgment of default. Rule, 60 SCRCP, provides for a judgment to be set aside and in so doing a court should consider the availability of meritorious defenses and issues rather than determine they are forever lost under Rule 8. Perhaps the process utilized by the Master here raises a novel issue. In summary Squire contends the Master made an error of law when he ruled that Rule 8, SCRCP barred any possible defenses raised in Squires Motion to Vacate.

IV. The Order of Foreclosure should be vacated under Rule 60(b) (3).

Although there are similarities as to the factors to be considered under Rule 60(b) (1) and (3), one clear distinction under 60(b) (3), is for a party to be entitled to relief based on fraud, or misrepresentation the moving party must demonstrate extrinsic fraud. Raby Constr., LLP v. Orr, 358 S.C. 10, 20-21, 594 S.E.2d 478, 484 (2004); Hagy v. Pruitt, 339 S.C. 425, 431, 529 S.E.2d 714, 717 (2000). Fraud is extrinsic when it is

collateral to the issues tried in a case and effectively deprives the litigant of a fair hearing. Id. (citations omitted). "Relief is granted for extrinsic fraud on the theory that because the fraud prevented a party from fully exhibiting and trying his case, there has never been a real contest before the court on the subject matter of the action." Chewning v. Ford Motor Co., 354 S.C. 72, 81, 579 S.E.2d 605, 610 (2003). The Intentional concealment of documents by an attorney constitutes extrinsic fraud. Id. at 82-83.

Here, Squire also asserts the failure to present the Note and failing never making good upon the representation to the Court that a Note would be present before the sale date should constitute extrinsic fraud. Further, Counsel's testimony before the court on behalf of his client constituted misrepresentations, and other misconduct given the inappropriate and improper nature of Counsel testifying and that counsel's statements without further evidence constituted hearsay. Squire's Motion to Vacate the Judgment Foreclosure should have granted under Rule 60(b)(1) & (3) because Squire's actions or inactions constituted mistake, inadvertence, excusable neglect or extrinsic fraud or misrepresentations.

V. The Court of Appeals erred in concluding that Squire should not have been granted relief under Rule 55, SCRCP, for good cause shown.

Squire sought relief not only under Rule 60(b), SCRCP but also under Rule 55, SCRCP. Squire did so to seek clarification and address whether Citi sought and/or received an entry of default or a judgment of default in this matter. The issue was not clarified or resolved by the lower court or the Court of Appeals.

Whether to set aside an entry of default or default judgment "lies solely within the sound discretion of the trial court, and the decision will not be over turned on appeal absent a clear showing of an abuse of discretion." Sundown Operating Co., 383 S.C.at

606, 681 S.E.2d at 888. "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." Id. 383 S.C. at 607, 681 S.E.2d at 888.

Rule 55, SCRCP provides in pertinent part as follows:

> (a) When a party against whom a judgment . . . is sought has failed to plead . . . and that fact is made to appear by affidavit or otherwise, the clerk shall enter his default.
> (b) Judgment by default may be entered as follows:
>> (2) . . . the party entitled to a judgment by default shall apply to the court therefor. . . If, in order to enable the court to enter judgment or to carry . . . it is necessary to . . . establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearing . . . as it deems necessary and proper . . . Pursuant to Rule 5(a), notice of any trial or hearing on unliquidated damages shall also be given to parties in default . . . whether or not such party has appeared in the action.
>
> (e) No judgment by default shall be entered . . . in any in rem action, unless the claimant establishes his claim to relief by evidence satisfactory to the Court.

"Rule 55(c) permits a party to move to set aside the entry of default under the standard of mere "good cause." Rule 55(c), SCRCP. This standard requires a party seeking relief to provide an explanation for the default and give reasons why vacation of the default entry would serve the interests of justice. Once a party has put forth a satisfactory explanation for the default, the trial court must also consider: (1) timing of the motion ; (2) whether meritorious defense exists; and (3) the degree of prejudice to the plaintiff if relief is granted. Sundown Operating Co., 383 S.C.at 607-608, 888-89. The court need not make specific findings of fact for each factor if there is sufficient evidence to support a lack of good cause. Id. at 608, 889 (citation omitted).

Here there are two reasons why any alleged entry of default should be overturned. First, Citi failed to comply with Rule 55, SCRCP. Second, even if an entry of default

was entered in this matter, Squire alleges she established "good cause" and met the requirements to have the entry of default set aside. The Master made an error of law in ruling Squires good cause shown was barred by laches.

As to Squire's first contention that the process followed in this matter did not meet the requirements of Rule 55, SCRCP. Here the Complaint does not seek a liquidated amount as contemplated by Rule 55, SCRCP (deficiency was waived). This is an *in rem* action. Citi's sole purpose was to foreclosure on real property. Here Citi merely filed an affidavit of default, did not apply or move for an entry of default, and no entry of default was entered of record under Rule 55(a), SCRCP. The provisions of Rule 55(b)(2) and (e), SCRCP, apply and the Court failed to apply said provisions. Rule 55(b)(2), SCRCP, require "the party entitled to a judgment by default shall apply to the court therefor." The Rule dictates that a court should hold a hearing if necessary to establish the truth of the pleadings and the right to a judgment. Id. Lastly, the Rule provides notice of a default hearing shall been given to all parties.[1] Id. Rule 55(e), SCRCP states that in an in rem action no judgment by default shall be entered "unless the claimant establishes his claim to relief by evidence satisfactory to the Court." In this case rather than adhere to the requirements of Rule 55, SCRCP and apply or for default requiring a filing fee, Citi submitted a proposed order of foreclosure decree that reads within the findings of facts that "The Defendant(s) Stella B. Squire is in default as shown by affidavit or order filed herein." (App. 7). Incredulously, the Foreclosure Order is ambivalent as to which means of default supposedly exists and this is the only mention of default in the Foreclosure Order. No citation to the rules or applicable case law relating to default is contained

[1]The only Notice of Hearing sent does not specify the type of hearing nor whether it is a hearing on default.

within the Order. There being no application or motion for a default judgment the rule requirements have not been met. There being no notice advising the parties a default hearing would be held, the proceedings do not adhere to the provisions of Rule 55(b)(2), SCRCP. Indeed there was no hearing on default as provided for in 55(b)(2), SCRCP. Lastly, there are no findings or conclusions in compliance with Rule 55(e), SCRCP that Citi proved its claim to relief by evidence satisfactory to the Court or which would meet normal evidentiary standards. The Master in Equity committed errors of law in with regard to those matters relating to default in the Foreclosure Order by failing to follow established procedural safeguards.

The practice that was followed here is like no other. Foreclosing entities have adopted a practice before the equity courts of this state wherein no application or motion for entry of default or order of default is made. This appears to be a practice adopted for the purpose of avoiding paying a motion filing fee. Squire contends the practice defies the Rules of Civil Procedure and deprives consumers of opportunities to defend and procedural safeguards. Moreover, the failure to properly move for default in foreclosure proceedings, in effect, creates an exception for foreclosure proceedings, not available in any other matter before the circuit courts. If a Plaintiff in a matter pending before the Court of Common Pleas were to seek either an entry of default or judgment of default, it would have to apply or move for such and pay a filing fee. A hearing would be held. Sufficient testimony would be required. Counsel of record would not be allowed to testify. What is happening in foreclosure proceeding and in this case specifically is not allowed in the Court of Common Pleas. The Citi and the Master erred in failing to adhere to the requirements of Rule 55, SCRCP. The same scenario was recently brought before

the Court of Appeals attention in Owens v. Regions Bank, Opinion No. 5113 (Ct. App. Filed April 10, 2013). In Owens, the Court held Owens failed to raise the argument to the master, thus the issue was not preserved on appeal. In this case Squire raised the issue before the Master in both her Motion to Vacate and her Motion to Reconsider, however, the Court of Appeals did not address the issue in its opinion in this matter. Given the indication this practice is occurring in more than a single instance in this state, Squire would kindly request this Court address the issue and hold that the Master committed an error of law by not ensuring the requirements of Rule 55 were met.

As to Squire's second argument under Rule 55, SCRCP, the Court of Appeals failed to consider that even if an entry of default had been made in this matter, the Master should have set aside the entry of default under Rule 55, SCRCP. Squire submitted affidavit's to the Master during the hearing upon her Motion to Vacate. The Affidavit's provided an explanation for Squire's alleged default, bringing into question Squire's mental competency to manage her household affairs. Citi offered nothing in contest. Squire's motion was timely filed in the month following the December 1, 2010 order, the only order which could possibly contain an alleged entry of default (again Squire contends no entry or judgment of default was filed in this matter). Further Squire raised meritorious defenses in her Motion to Vacate, including the that Citi had failed to submit any evidence establishing it was entitled to damages under Rule 55; and that Citi had come to the action with unclean hands because Citi originally closed the loan transaction without an attorney. Finally, any prejudice to the Citi would not be great because Citi would still be allowed to seek foreclosure upon submitting evidence sufficient to establish it a right to, after complying with the South Carolina Administrative Order

concerning foreclosures. By contrast, if the relief sought by Squire under Rule 55. were not granted, the prejudice to Squire would be great because Citi would be entitled to foreclose upon her house without establishing a right to do so, or following the proper procedural safe guards required in order to protect the interest of consumers in such actions.

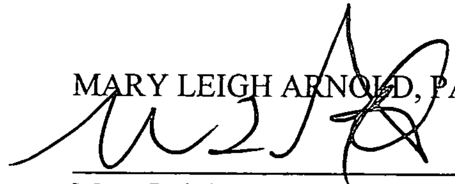
In summary the Court of Appeals failed to address whether the Master committed an error of law by not requiring the procedures established under Rule 55, SCRCP, and whether the Master committed an error of law by failing to rule whether Squire had established "good cause shown" instead ruling the relief sought was barred by laches.

Conclusion

Based on the above grounds, this Court should grant this Petition for Writ of Certiorari. The decision of the Court of Appeals should be reversed and the Orders of the Master in Equity vacated.

August 9, 2013

MARY LEIGH ARNOLD, PA



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Attorney for Petitioner

THE STATE SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
The Honorable Mikell R. Scarborough, Master-in-Equity

Case No. 2010-CP-10-6481

CitiFinancial, Inc., *Respondent,*

v.

Stella B. C. Squire, aka Stella B. Cardamone,
and Beneficial South Carolina, Inc., *Defendants,*

Of whom, Stella B. C. Squire is, *Petitioner.*

PROOF OF SERVICE

I, the undersigned do certify on this 9th day of August, 2013 I have served all counsel of record in this action with a copy of the Petitioner's Petition for Writ of Certiorari and the Appendix by mailing a copy of the same by United States Mail, postage prepaid, addressed as follows:

Nikole H. Boland
Riley Pope & Laney, LLC
P. O. Box 11412
Columbia, SC 29211

MARY LEIGH ARNOLD, PA

Mary Leigh Arnold

RECEIVED
AUG 14 2013
SC Court of Appeals

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August 9, 2013

The Honorable Daniel E. Shearouse
Clerk of Court SC Supreme Court
P.O. Box 11330
Columbia, SC 29211

RE.: CitiFinacial, Inc., v. Stella B.C. Squire aka Stella B. Cardamone and Beneficial South Carolina, Inc., Defendants
Civil Action No. 2010-CP-10-6481
Appellate Case No. 2013-000915

Dear Mr. Shearouse:

Enclosed please find the original and seven copies of a Petition for Writ of Ceriorari in regard to the above referenced matter. Also attached are three copies of Appendix. Also enclosed is the Petitioners check in the amount of $100.00 as the required filing fee.

With kind regards,

MARY LEIGH ARNOLD, PA

Mary Leigh Arnold

CC:
Nikole H. Boland, Esq. (petition only)
The Honorable Jenny Abbott Kitchings (petition only)

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SC Court of Appeals