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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM NEWBERRY COUNTY
Court of Common Pleas
Joseph W. Hudgens, Special Referee

Appellate Case No. 2013-002181

EverBank.....Respondent,

v.

Lenora Scurry, Patrick Scurry,
The South Carolina Department of Revenue,..... Defendants,

Of whom Lenora Scurry and Patrick Scurry are the..... Appellants.

FINAL BRIEF OF RESPONDENT

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July 8, 2014

INDEX

TABLE OF AUTHORITIES

CASES

STATUTES AND COURT RULES

OTHER

STATEMENT OF ISSUES ON APPEAL

I. **DID THE SPECIAL REFEREE ABUSE HIS DISCRETION IN DENYING THE SCURRYS RELIEF FROM THE FORECLOSURE JUDGMENT PURSUANT TO RULE 60(B)(4)?**

II. **DID THE SPECIAL REFEREE ABUSE HIS DISCRETION IN DENYING THE SCURRYS RELIEF FROM THE FORECLOSURE JUDGMENT PURSUANT TO RULE 60(B)(1)?**

III. **DID THE SPECIAL REFEREE ABUSE HIS DISCRETION IN DENYING THE SCURRYS RELIEF FROM THE FORECLOSURE JUDGMENT PURSUANT TO RULE 60(B)(3)?**

IV. **DID THE SPECIAL REFEREE ABUSE HIS DISCRETION IN DENYING THE SCURRYS RELIEF FROM THE FORECLOSURE JUDGMENT PURSUANT TO RULE 60(B)(1) AND (3) WHERE THEY FAILED TO SHOW THE EXISTENCE OF A MERITORIOUS DEFENSE TO THE FORECLOSURE?**

STATEMENT OF THE CASE

On February 27, 2012, Respondent EverBank ("EverBank") filed a Complaint for mortgage foreclosure against Appellants Lenora Scurry and Patrick Scurry ("Scurrys"). (R. pp. 24-27.) On February 27, 2012, a process server personally served the Scurrys with copies of the Summons and Complaint. (R. pp. 165-66, 177-78.)

EverBank filed an Affidavit of Default on March 30, 2012, because the Scurrys failed to answer or otherwise respond to the Complaint within the time required by the South Carolina Rules of Civil Procedure. (R. p. 200.)

On March 30, 2012, the Clerk of Court entered an Order of Reference referring the case to The Honorable Joseph W. Hudgens as Special Referee. (R. p. 16.)

On November 5, 2012, the Scurrys filed for Chapter 13 bankruptcy in the United States Bankruptcy Court for the District of South Carolina. *In re Scurry*, Case # 12-06918 (Bankr. D.S.C. filed Nov. 5, 2012). On January 3, 2013, Everhome Mortgage, EverBank's servicer, filed a Proof of Claim concerning the Scurrys' loan. (R. pp. 54-70.) On January 17, 2013, the bankruptcy court dismissed the bankruptcy case due to the Scurrys' Chapter 13 Plan failing to comply with the requirements of the bankruptcy code. (R. p. 37, ¶7.)

On March 8, 2013, the Special Referee held a foreclosure hearing in this case. (R. p. 45.) The Scurrys received notice of this hearing (R. pp. 9, ¶ 5-p. 45.), but failed to appear and defend at the hearing. (R. p. 38, ¶ 10.)

On March 11, 2013, the Special Referee entered a Special Referee's Order and Judgment of Foreclosure and Sale (hereinafter the "Foreclosure Judgment") against the Scurrys. (R. pp. 8-15.) On April 1, 2013, the Special Referee sold the Scurrys' property at

a foreclosure sale. (R. p. 210.) EverBank was the successful bidder at the foreclosure sale. *Id.*

On April 26, 2013, the Scurrys filed a Motion to Vacate Judgment and Sale. (R. pp. 30-35.) On June 5, 2013, the Special Referee held a hearing on the Scurrys' Motion to Vacate Judgment and Sale. (R. pp. 123-172.) On September 6, 2013, the Special Referee entered an Order denying the Scurrys' Motion to Vacate Judgment and Sale. (R. pp. 1-6.)

On September 19, 2013, the Special Referee entered a Report on Sale and Disbursements confirming the foreclosure sale and reflecting that he issued a deed to the Secretary of Housing and Urban Development. (R. p. 210, ¶¶ 1-5.)

On September 26, 2013, the Scurrys filed a Motion to Reconsider concerning the Order denying the Motion to Vacate Judgment and Sale. (R. p. 75.) On October 4, 2014, the Special Referee entered an Order denying the Motion to Reconsider. (R. p. 7.)

STATEMENT OF THE FACTS

This appeal involves an attempt by two foreclosure defendants to obtain relief from a default foreclosure judgment entered against them after they neglected to read or respond to the foreclosure pleadings properly served on them or appear at the foreclosure hearing of which they were properly notified.

On February 12, 2010, the Scurrys gave a promissory note ("Note") in the amount of $152,192.00 to Primary Capital Advisors LC. (R. p. 9, ¶ 7.) To secure the Note, the Scurrys gave to Mortgage Electronic Registration Systems, Inc. ("MERS"), acting solely as nominee for Primary Capital Advisors LC, a first priority lien real estate mortgage ("Mortgage") covering the property that is the subject of this foreclosure action ("subject property"). (R. p. 9, ¶ 8.) The Mortgage was dated February 12, 2010, and properly recorded on February 16, 2010, with the Clerk of Court of Newberry County in Book 1482 at Page 181. (R. p. 9, ¶ 8.)

Both the Note and the Mortgage contained provisions permitting the bank to recover reasonable attorney's fees and costs from the Scurrys in the event of their loan default. Specifically, the Note stated:

> If Lender has required immediate payment in full, as described above, Lender may require Borrower to pay costs and expenses including reasonable and customary attorneys' fees for enforcing this Note to the extent not prohibited by applicable law.

(R. p. 181, ¶ 6(C).) The Mortgage stated:

> Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this Paragraph 18, including, but not limited to, reasonable attorneys' fees and costs of title evidence, all of which shall be additional sums secured by this Security Instrument.

(R. p. 120, ¶ 18.) This language in the Note and Mortgage, which they signed and agreed to, placed the Scurrys on notice that their mortgage company could recover attorney's fees against them in any amount deemed "reasonable" by a court in the event of foreclosure.

MERS, as nominee for Primary Capital Advisors LC, executed an Assignment of Mortgage to EverBank c/o Everhome Mortgage Company on February 28, 2012. (R. p. 9, ¶ 8(a).) However, EverBank had possession of the Note and Mortgage before that date. (R. p. 207.) The Note had previously been endorsed in blank, making it bearer paper. (R. pp. 61-63.) Therefore, the Assignment of Mortgage did not reflect the date on which EverBank became the holder of the Note and Mortgage. EverBank already had possession of the Note on the date that it filed the Complaint. (R. p. 207.)

The Scurrys admittedly defaulted on the repayment of the loan after only one year of making payments (R. p. 36, ¶ 2; R. p. 152, line 14), and EverBank thereafter commenced this foreclosure. The loan was due for the September 1, 2011, payment at the time of foreclosure. (R. p. 26, ¶ 11; R. p. 10, ¶ 12.)

EverBank's Complaint for foreclosure against the Scurrys sought unliquidated damages, including "reasonable attorney's fees." (R. pp. 25-26, ¶¶ 9, 11, Prayer for Relief subsection (a).) Nowhere in the Complaint did EverBank limit its request for attorney's fees to a specific amount. (R. pp. 24-27.) EverBank waived its right to a deficiency judgment against the Scurrys in the Complaint. (R. p. 26, ¶ 14.)

EverBank's foreclosure counsel contracted with Jeff Costner, a local process server with ProVest, to serve the foreclosure pleadings on the Scurrys. (R. pp. 177-178; R. p. 179.) The Scurrys do not dispute being personally served with the Lis Pendens,

Summons, and Complaint on February 27, 2012. (R. pp. 177-178; R. p. 36, ¶ 3; R. p. 53, ¶ 2.)

After being properly served with the foreclosure pleadings, the Scurrys "did not worry about the papers, examine them, or take them to a lawyer." (R. p. 37, ¶ 4.) The Scurrys never answered or otherwise responded to the Complaint, and were therefore in default. (R. p. 200.)

On November 5, 2012, the Scurrys filed for Chapter 13 bankruptcy in the United States Bankruptcy Court for the District of South Carolina. *In re Scurry*, Case # 12-06918 (Bankr. D.S.C. filed Nov. 5, 2012). In the Proof of Claim filed by Everhome Mortgage in the bankruptcy action, it stated that it had incurred $835.00 in attorney fees with respect to the Scurrys' mortgage debt. (R. pp. 54-70.) However, this amount in the Proof of Claim represented only "prepetition" attorney's fees through November 5, 2012—the date of filing of the Scurrys' bankruptcy petition. *Id.*

After the bankruptcy court dismissed the Scurry's bankruptcy action on January 17, 2013, due to their Chapter 13 Plan failing to comply with the requirements of the bankruptcy code (R. p. 37, ¶ 7), EverBank resumed the foreclosure action.

The Special Referee scheduled a final foreclosure hearing for March 8, 2013. (R. p. 45.) The Scurrys do not dispute receiving timely notice of the foreclosure hearing. *Id.*

The Scurrys failed to appear and defend at the foreclosure hearing.

At the foreclosure hearing on March 8, 2013, EverBank supported its foreclosure claim with a "Transcript of Testimony," which was a sworn affidavit from its foreclosure counsel setting forth a breakdown of the mortgage debt. (R. pp. 109-122.) This affidavit supported EverBank's request for attorney's fees in the amount of $5,200.00 for work

done in the case. *Id.* Neither the Scurrys nor anyone else contested the attorney's fees at the hearing or offered any evidence in opposition to the amounts stated in the Transcript of Testimony.

There being no dispute or counter evidence presented to him, the Special Referee entered the Foreclosure Judgment in favor of EverBank. (R. pp. 8-15.) In the Foreclosure Judgment, the Special Referee made a finding that $5,200.00 was a reasonable amount to award as attorney's fees for the services of EverBank's foreclosure counsel. (R. p. 10, ¶ 11.) The Special Referee also reserved jurisdiction to consider any subsequent requests by EverBank to recover additional fees, costs, and expenses incurred post-judgment, such as unanticipated expenses related to the foreclosure sale. (R. p. 12, ¶ 2.) However, EverBank never made any such request and the Special Referee never exercised this reserved jurisdiction.

The Scurrys do not dispute receiving written notice of the entry of the Foreclosure Judgment, but they never filed a motion to reconsider pursuant to Rule 59(e), SCRCP, or directly appealed from the Foreclosure Judgment.

After the foreclosure sale on April 1, 2013, the Scurrys further neglected their foreclosure case for almost another month before filing the Motion to Vacate Judgment and Sale on April 26, 2013. (R. pp. 30-35.) Despite having been properly served with the foreclosure pleadings over a year prior, this was the first appearance by the Scurrys in this foreclosure case. Through this motion, the Scurrys for the first time asserted any kind of challenge to the foreclosure. *Id.* For the first time, they alleged that they were misled by the process servicer into not answering the Complaint. *Id.* ¶ 6. For the first time, they alleged that they were misled by the servicer into not appearing at the final foreclosure

hearing. *Id.* ¶ 7. They also claimed that they had a meritorious defense to the foreclosure, but did not specifically identify that defense in the motion. *Id.* ¶ 13.

In support of vacating the Foreclosure Judgment and sale pursuant to Rules 60(b)(1) (mistake, inadvertence, surprise, or excusable neglect) and 60(b)(3) (fraud, misrepresentation, or other misconduct of an adverse party), the Scurrys offered their own affidavits. (R. pp. 36-38; R. p. 53.)

In her affidavit, Mrs. Scurry claimed that the Scurrys did not answer the Complaint because Jeff Costner, the process server, allegedly came inside their house, sat at their dining room table, and told them that the foreclosure papers "were nothing to worry about." (R. p. 35, ¶ 3.) Mrs. Scurry claimed that she "did not worry about the papers, examine them, or take them to a lawyer" solely because of these alleged statements by Mr. Costner. *Id.* ¶ 4. Yet nowhere in her affidavit did Mrs. Scurry state that she believed Mr. Costner to be an employee of EverBank or authorized to act or speak on behalf of EverBank. *Id.* Nothing in her affidavit justified her blind reliance on Mr. Costner's alleged statements. *Id.*

Mrs. Scurry also claimed that the Scurrys did not attend the foreclosure hearing because they believed it would be cancelled due to their ongoing loss mitigation correspondence with Everhome Mortgage. (R. p. 38, ¶ 10.) Nothing in the affidavit identified any communications with Everhome Mortgage other than a series of letters she received concerning loss mitigation opportunities. *Id.* The only letter the Scurrys received from Everhome Mortgage in the weeks before the foreclosure hearing was one dated February 21, 2013. (R. pp. 43-44.) While the letter solicited them to complete a Loss

Mitigation Qualification package and return it to Everhome Mortgage, the letter clearly explained that during the loss mitigation process:

> Normal servicing of your loan will continue. This includes, but is not limited to, telephone calls, correspondences and notices, late charges or other fee assessment, and possible foreclosure. Please note that a modification program is not guaranteed and is subject to approval.

Id. Nowhere in this letter did Everhome state or even imply that the foreclosure hearing set for March 8, 2013, would be cancelled. After that letter, the Scurrys admitted receiving a letter from EverBank's foreclosure counsel confirming that the hearing was still scheduled. (R. p. 45.) Mrs. Scurry admitted that EverBank's foreclosure counsel told her over the telephone that the foreclosure hearing would not be cancelled without EverBank's approval. (R. pp. 37-38, ¶ 9.)

Other than the notice of hearing from EverBank's foreclosure counsel (which clearly stated that a foreclosure hearing was scheduled), the letter from Everhome Mortgage of February 21, 2013 (which stated nothing about cancellation of the foreclosure hearing), and the telephone call with EverBank's foreclosure counsel (which confirmed that the hearing had not been cancelled), the Scurrys did not allege the existence of any other communications with EverBank or its agents between the dismissal of their bankruptcy action and the date of the foreclosure hearing in which they were told that the foreclosure hearing had been cancelled. (R. pp. 36-38.; R. p. 53.) All of the other letters[1] cited to in Mrs. Scurry's affidavit either pre-dated her November

[1] Lenora Scurry also attached the following letters to her affidavit: Letter from Everhome Mortgage dated April 24, 2012; Letter from Everhome Mortgage dated March 11, 2013; Letter from Everhome Mortgage dated March 16, 2013; and Letter from Everhome Mortgage dated March 29, 2013. (R. pp. 36-38, 46-52.) The first letter was received by the Scurrys almost a year before the foreclosure hearing, and the others were received after the foreclosure hearing had already taken place.

2012 bankruptcy filing or post-dated the foreclosure hearing, and could therefore not have been a valid basis for believing that the foreclosure hearing would be cancelled.

Next, Mr. Scurry gave an affidavit agreeing with his wife's affidavit, but adding no factual averments and confessing that he never had any communications with Everhome Mortgage himself. (R. p. 53.)

In support of vacating the judgment and sale pursuant to Rules 60(b)(4) (the judgment is void) and 60(b)(5) (it is no longer equitable that the judgment should have prospective application), the Scurrys submitted an affidavit from Shawn M. French, Esquire, purportedly in support of their challenge to the amount of attorney's fees awarded to EverBank. (R. pp. 71-74.) However, Mr. French gave this affidavit in a completely separate and unrelated foreclosure action in a different county concerning a different set of facts. *Id.* Mr. French's affidavit opined only as to the reasonableness of the amount of attorney's fees that should have been awarded in that other case. *Id.* The affidavit was based on his analysis of the specific affidavit of attorney's fees submitted by the plaintiff's counsel in that other case. *Id.* ¶¶ 4-5.) The affidavit did not analyze the amount of fees awarded in *this* case and did not analyze the work done by EverBank's counsel in *this* case—it did not concern this case at all. *Id.* The affidavit was over three years old when the Scurrys offered it to the Special Referee in this case and it had never been supplemented or updated to discuss whether customary attorney's fees in South Carolina foreclosure actions have changed in the meantime. *Id.* Mr. French's affidavit claimed that he gained his knowledge of customary attorney's fees from his one year and two months of experience as a foreclosure plaintiff's attorney, *Id.* ¶ 3, but failed to

disclose that he later switched sides and has represented foreclosure defendants since 2008.

Also in support of vacating the judgment and sale pursuant to Rules 60(b)(4) and 60(b)(5), the Scurrys offered a copy of the Proof of Claim filed by Everhome Mortgage in their bankruptcy action on January 3, 2013. (R. pp. 54-70.) The Scurrys attempted to rely on the amount of attorney's fees stated in the Proof of Claim as evidence of the total amount of attorney's fees incurred by EverBank in this foreclosure action. Yet, by its terms, this document evidenced only the "prepetition" attorney's fees incurred by Everhome Mortgage through November 5, 2012—the date of filing of the Scurrys' bankruptcy petition. *Id.* Other than the Proof of Claim and the Affidavit Shawn M. French, the Scurrys presented no other evidence to refute the reasonableness of the amount of the Special Referee's award of attorney's fees.

In opposition to the Scurrys' Motion to Vacate Judgment and Sale, EverBank submitted an Affidavit of Jeff Costner, the process server, refuting the Scurrys' allegations that he misled them into not answering the Complaint. Mr. Costner stated that he did nothing more than hand the documents to Mr. Scurry at the front door of the house and left without conversation. (R. p. 179, ¶ 4.) The Affidavit of Jeff Costner is consistent with the Affidavits of Service he gave at the beginning of the foreclosure stating that he handed the documents to Mr. Scurry, not Mrs. Scurry.[2] (R. pp. 177-178.)

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[2] The Scurrys attempted to rely on a scrivener's error in the first set of Affidavits of Service filed on February 28, 2012, to corroborate Lenora Scurry's affidavit stating that the process server spoke with her at the time of service.

In the first Affidavit of Service for Lenora Scurry, the process server noted that he served her through substitute service on Patrick Scurry and described him as being six feet tall and 212 pounds. (R. pp. 165-166) However, the process server made a scrivener's error

EverBank also submitted an Affidavit from Lorri Beltz, an Assistant Vice President with EverBank, establishing that EverBank had possession of the Note and Mortgage on the date that it filed the Complaint.[3] The purpose of this affidavit was to refute the Scurrys' standing defense set forth in the proposed Answer and Counterclaim that was first produced at the motion hearing on June 5, 2013. (R. pp. 157-164.) The Scurrys' proposed defense alleged that EverBank lacked standing to foreclose when it filed the Complaint because it did not yet have an Assignment of the Mortgage from MERS on that date. *Id.*

After considering the arguments from the motion hearing, the briefs submitted by the parties, and the affidavits, the Special Referee entered an Order denying the Scurrys' Motion to Vacate Judgment and Sale. (R. p. 1-6.)

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in the "sex" field of the affidavit by typing in "female" instead of "male." This same scrivener's error was in the first Affidavit of Service for Patrick Scurry. The affidavit stated that the process server personally served Patrick Scurry and described him as being six feet tall and 212 pounds. But again, it listed him as a female.

Both Affidavits of Service were quickly amended to state that the papers were served on a male rather than a female and refiled on March 6, 2012. (R. pp. 177-178.) No other changes were made to the Affidavits of Service upon amendment.

The Scurrys conceded that Lenora Scurry is not 6 feet tall and 212 pounds. (R. p. 151, lines 9-11.) Therefore, the scrivener's errors in the first Affidavits of Service do not corroborate her affidavit.

[3] The Scurrys complain that this affidavit was submitted to the Special Referee after the June 5 hearing on their Motion to Vacate Judgment and Sale, and therefore should not have been considered. Yet the need for this affidavit was prompted by the Scurrys' untimely Proposed Answer and Counterclaim being presented for the first time at the June 5 hearing. (R. pp. 157-164.) EverBank had no notice of the specifics of the Scurrys' standing defense before that time because the motion itself did not identify this defense. The proposed pleading should have been attached and served with the motion itself to give EverBank adequate notice of the specifics of the Scurrys' proposed defense. Since the Special Referee considered the Scurrys' untimely Proposed Answer and Counterclaim, it was only equitable for the Special Referee to consider the Affidavit of EverBank addressed to the defense raised in the proposed pleading.

As to the Scurrys' claim that they were misled by the process server into not answering the Complaint, the Special Referee correctly concluded that

> There is no evidence, or even indication, that the process server ... had any authority to speak on behalf of the plaintiff bank, or its attorneys, or that anything occurred in the conversation as related by Ms. Scurry that would indicate to her or her husband that he knew what he was talking about or that the Scurrys would be justified in relying on what he may have said with respect to the significance of the papers being served upon them ... [n]othing in the items supporting the defendant's motion indicates that the process server was any thing [sic] more than that.

(R. p. 3.)

As to the Scurrys' claim that they were misled by Everhome Mortgage into believing the foreclosure hearing would be cancelled, the Special Referee correctly concluded that "[a] reading of those exhibits [attached to Lenora Scurry's affidavit] does not support or justify her belief that the hearing was going to be cancelled or that the foreclosure action was not proceeding." (R. p. 4.) The Special Referee found "nothing in [the exhibits attached to Lenora Scurry's affidavit] suggesting intentional or even unintentional misrepresentation of a cancellation of the foreclosure reference hearing." *Id.*

Additionally, the Special Referee disagreed that the Scurrys had a meritorious defense to the foreclosure. (R. pp. 5-6.)

As to the Scurrys' claim that the Foreclosure Judgment was void due to the amount of the attorney's fee awarded and the clause reserving jurisdiction over the fee award, the Special Referee correctly found that both provisions of the Foreclosure Judgment were authorized by the terms of the Note and Mortgage. (R. p. 5.) He also noted that since EverBank waived its right to a deficiency judgment against the Scurrys, they had not shown prejudice. *Id.*

The Scurrys' filed a Motion to Reconsider the Special Referee's Order denying their Motion to Vacate Judgment and Sale (R. p. 75.), but the Special Referee found no basis to alter or amend his prior Order and therefore denied the motion. (R. p. 7.)

The Scurrys now appeal the denial of their Motion to Vacate Judgment and Sale pursuant to the Rule 60(b)(1),(3), and/or (4) and the denial of their Motion to Reconsider. The Scurrys have apparently abandoned their argument that the Foreclosure Judgment and sale should have been vacated under Rule 60(b)(5) as it is not argued in their appellate brief.

STANDARD OF REVIEW

The Court may affirm for any ground appearing in the record. Rule 220(c), SCAR; *see also I'On v. Town of Mt. Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000)).

"The decision to deny or grant a motion made pursuant to Rule 60(b), SCRCP, is within the sound discretion of the trial judge." *Ware v. Ware*, 404 S.C. 1, 10, 743 S.E.2d 817, 822 (2013). "An abuse of discretion occurs when the order of the court is controlled by an error of law or where the order is based on factual findings that are without evidentiary support." *Id.*

"[W]hen 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." *Raby Const., L.L.P. v. Orr*, 358 S.C. 10, 20, 594 S.E.2d 478, 483 (2004). The courts of this state have recognized a "longstanding policy towards final judgments and that important benefits are achieved by the preservation of final judgments." *Id.*

ARGUMENT

The Special Referee did not abuse his discretion in denying the Scurrys relief from the Foreclosure Judgment pursuant to Rule 60(b)(1),(3), and/or (4), or in denying their Motion to Reconsider. His Orders of September 6, 2013, and October 4, 2013, were based on factual findings supported by the evidence presented to him and were not controlled by any errors of law.

A court may relieve a party from a default judgment for the following reasons:

> (1) "mistake, inadvertence, surprise, or excusable neglect;
>
> (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
>
> (3) fraud, misrepresentation, or other misconduct of an adverse party;
>
> (4) the judgment is void;
>
> (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application."

Rule 60(b), SCRCP. In determining whether to set aside a default judgment under Rule 60(b), a court should consider the following relevant factors: "(1) the promptness with which relief is sought, (2) the reasons for the failure to act promptly, (3) the existence of a meritorious defense, and (4) the prejudice to the other parties." *McClurg v. Deaton*, 380 S.C. 563, 573, 671 S.E.2d 87, 93 (Ct. App. 2008).

"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)." *Sundown Operating Co., Inc. v. Intedge Industries, Inc.*, 383 S.C. 601, 608, 681 S.E.2d 885, 888

(2009). "Rule 60(b) requires a more particularized showing of mistake, inadvertence, excusable neglect, surprise, newly discovered evidence, fraud, misrepresentation, or 'other misconduct of an adverse party.'" *Id.* "The different standards under the two rules underscore the clear intent to make it more difficult for a party to avoid a default once the court has entered a judgment, which carries greater finality..." *Id.* at 608, 681 S.E.2d at 888-89.

"The movant in a Rule 60(b) motion has the burden of presenting evidence proving the facts essential to entitle him to relief ... [s]uch evidence is usually provided through affidavits." *Bowers v. Bowers*, 304 S.C. 65, 67-68, 403 S.E.2d 127, 129 (Ct. App. 1991). Statements of counsel and allegations in unverified pleadings are not enough. *Id.*

I. THE SPECIAL REFEREE DID NOT ABUSE HIS DISCRETION IN DENYING THE SCURRYS RELIEF FROM THE FORECLOSURE JUDGMENT PURSUANT TO RULE 60(B)(4).

The Special Referee was within his discretion in refusing to vacate the Foreclosure Judgment under Rule 60(b)(4) because he had subject matter and personal jurisdiction over the case and the parties, and because the Scurrys were afforded the full due process to which they were entitled throughout the foreclosure case.

"[T]he court may relieve a party or his legal representative from a final judgment, order, or proceeding [if] ... the judgment is void ..." Rule 60(b)(4), SCRCP. However, "[a] void judgment is one that, from its inception, is a complete nullity and is without legal effect[.]" *Ware*, 404 S.C. at 11, 743 S.E.2d at 822 (internal citation omitted)(emphasis added).

"The definition of void under the rule only encompasses judgments from courts which failed to provide proper due process, or judgments from courts which lacked subject matter jurisdiction or personal jurisdiction." *Id.* "A judgment is not rendered void

by irregularities which do not involve jurisdiction." *Id.* "There is a difference between a want of jurisdiction, in which case the court has no power to adjudicate, and a mistake in the exercise of undoubted jurisdiction, in which case the court's action is not void, but is subject to direct attack on appeal." *Universal Benefits, Inc. v. McKinney*, 349 S.C. 179, 184, 561 S.E.2d 659, 662 (Ct. App. 2002). Rule 60(b)(4) "may not be used to attack a judgment on the grounds that the judgment is legally incorrect." Prof. James F. Flanagan, South Carolina Civil Procedure 512 (3rd ed. 2010).

There is no dispute that the Special Referee had subject matter jurisdiction over the foreclosure action and personal jurisdiction over the Scurrys. The Scurrys do not dispute that they were personally served with the Summons and Complaint. (R. pp. 177-178; R. p. 36, ¶ 3; R. p. 53, ¶ 2.) The Scurrys never challenged the Order of Reference granting jurisdiction to the Special Referee.

The Scurrys were afforded full due process in the foreclosure action. The requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review. *McKinney*, 349 S.C. at 183, 561 S.E.2d at 661. The Scurrys do not dispute that they received notice of the final hearing at which the damages were determined. (R. p. 45.) The Scurrys do not dispute that they received written notice of the entry of the Order and Judgment of Foreclosure and Sale. The Scurrys had the opportunity to timely move for reconsideration of the foreclosure judgment under Rule 59(e) or appeal from the Foreclosure Judgment, but failed to avail themselves of these opportunities.

The Scurrys' only argument as to why the Foreclosure Judgment is void pursuant to Rule 60(b)(4) is that the Special Referee made mistakes of law by 1) awarding too

much in attorney's fees and 2) retaining jurisdiction to award unanticipated post-judgment fees and costs. The Scurrys do not challenge any other portion of the Foreclosure Judgment.

Unfortunately for the Scurrys, the inquiry on appeal is not whether the Foreclosure Judgment was controlled by an error of law, but whether the order denying the Rule 60(b)(4) motion was controlled by an error of law. Even if the Special Referee made a mistake of law in the Foreclosure Judgment itself (which EverBank denies), it would not render the foreclosure judgment void or entitle the Scurrys to relief under Rule 60(b)(4) because 1) the Special had subject matter jurisdiction and personal jurisdiction over them, and 2) they were afforded full due process throughout the foreclosure action.

a. The Scurrys were afforded full due process in the Special Referee's determination of the amount of attorneys' fees awarded to EverBank.

The Scurrys argue that the provision of the Foreclosure Judgment awarding attorney's fees amounted to a deprivation of their right to due process, and thus falls within the purview of Rule 60(b)(4), because the fees awarded 1) exceeded the amount prayed for in the Complaint, and 2) exceeded the amount permitted by the Note and Mortgage. This argument fails for several reasons.

First, the amount of attorney's fees awarded in the Foreclosure Judgment was not outside of the scope of the relief requested within EverBank's pleadings. EverBank's Complaint stated that it was seeking "reasonable attorneys' fees" against the Scurrys. (R. pp. 25-26, ¶ 9, 11, Prayer for Relief subsection (a).) Nowhere in the Complaint did EverBank limit this request for attorney's fees to a specific amount. (R. pp. 24-27.)

Second, the Note and Mortgage expressly permitted EverBank to recover "reasonable attorneys' fees" from the Scurrys in the event of a loan default. (R. p. 63, ¶ 6(C); R. p. 68, ¶ 18.)

Between EverBank's pleadings and the terms of the Note and Mortgage, the Scurrys had more than sufficient notice that EverBank would be seeking attorney's fees in whatever amount was deemed "reasonable" by the Special Referee. Therefore, there was no due process violation in determining and awarding the attorney's fees.

Even if the amount of recoverable attorney's fees were limited to the fees actually incurred by EverBank (which is denied), the burden was on the Scurrys to put forth evidence to show that the attorney's fees incurred by EverBank were less than the $5,200 awarded by the Special Referee. *Bowers*, 304 S.C. at 67-68, 403 S.E.2d at 129 ("The movant in a Rule 60(b) motion has the burden of presenting evidence proving the facts essential to entitle him to relief ..."). The Scurrys failed to satisfy this burden.

At the foreclosure hearing, EverBank supported its request for $5,200 in attorney's fees with a sworn affidavit signed by its foreclosure counsel. (R. p. 111.) There was no other evidence before the Special Referee at the foreclosure hearing to refute this amount. Even in default, the Scurrys could have appeared at the hearing to contest the amount of fees sought by EverBank. *See Howard v. Holiday Inns, Inc.*, 271 S.C. 238, 241, 246 S.E.2d 880, 882 (1978). Instead, they ignored the notice of hearing and squandered their opportunity to be heard on the attorney's fees issue. The Special Referee correctly based his award of attorney's fees on the only evidence in front of him at the foreclosure hearing.

Therefore, none of the evidence before the Special Referee at the foreclosure hearing proved that the award of attorney's fees exceeded the amount prayed for in the Complaint or the amount permitted by the Note and Mortgage.

Later, through their Motion to Vacate Judgment and Sale, the Scurrys offered a copy of the Proof of Claim filed by Everhome Mortgage in their bankruptcy action to argue that it reflected the total amount of attorney's fees actually incurred by EverBank. (R. pp. 54-70.) However, the Proof of Claim only stated the amount of "pre-petition" attorney's fees incurred by EverBank before November 5, 2012—the date of filing of the Scurrys' bankruptcy petition. *Id.* It would have been an abuse of discretion for the Special Referee to simply assume that this amount also covered post-petition attorney's fees incurred from November 5, 2012, through the foreclosure hearing on March 8, 2013, when the affidavit from EverBank's counsel stated otherwise. Even if this was good evidence of the amount of fees incurred by EverBank, the Scurrys failed to present it at the foreclosure hearing despite being afforded notice and the opportunity to do so.

The Scurrys argue that even if the attorney's fees were actually incurred, the amount awarded is still too high based on local custom. However, the only evidence offered to support this argument was an affidavit from Shawn M. French, Esquire. (R. pp. 71-74.) The Special Referee was correct in giving this affidavit no weight and not even acknowledging it in the order denying the Motion to Vacate Judgment and Sale. Mr. French gave this affidavit in a completely separate and unrelated foreclosure action in a different county concerning a different set of facts. *Id.* The affidavit opined only as to the reasonableness of the amount of attorney's fees that should have been awarded in that other case. *Id.* The affidavit was based on his analysis of the specific affidavit of

attorney's fees submitted by the plaintiff's counsel in that other case. *Id.* ¶¶ 4-5.) The affidavit did not analyze the amount of fees awarded in this case and did not analyze the work done by EverBank's counsel in this case—it did not concern this case at all. *Id.* The affidavit was over three years old when the Scurrys offered it to the Special Referee in this case and it had never been supplemented or updated to discuss whether customary attorney's fees in South Carolina foreclosure actions have changed in the meantime. *Id.*

Further, the French Affidavit only concerned the issue of local customary attorney's fees. Local custom is only one factor that a trial court may consider in awarding attorney's fees. The trial court may consider all of the following:

1. The nature, extent and difficulty of the legal services rendered;
2. The time and labor necessarily devoted to the case;
3. The professional standing of counsel;
4. The contingency of compensation;
5. The fee customarily charged in the locality for similar legal services; and
6. The beneficial results obtained.

Dedes v. Strickland, 307 S.C. 155, 160, 414 S.E.2d 134, 137 (1992); *see also* Rule 1.5(a), RPC, Rule 407, SCACR. As such, this affidavit was insufficient to show that the Special Referee abused his discretion in determining the reasonableness of the attorney's fees awarded to EverBank. The Scurrys presented no other evidence to refute that the Special Referee's award of attorney's fees was reasonable under the six *Dedes* factors.

Even if the French Affidavit had any weight with respect to the issue, the Scurrys failed to present it at the foreclosure hearing despite being afforded notice and the opportunity to do so.

For these reasons, the Scurrys were afforded full due process with respect to the Special Referee's determination of the amount of attorneys' fees awarded to EverBank.

b. The Scurry's dispute as to the Special Referee's reserve of the jurisdiction over the award of attorneys' fees is not ripe for review.

For the reasons discussed previously, whether the Special Referee made a mistake of law in the Foreclosure Judgment by reserving jurisdiction to award additional attorney's fees is irrelevant to Court's inquiry into whether he abused his discretion in denying the Scurrys' Rule 60(b)(4) motion. But even if it was relevant, the issue is not justiciable because the Special Referee never exercised this jurisdiction and EverBank never requested additional fees and costs pursuant to that provision of the Foreclosure Judgment.

"A justiciable controversy is a real and substantial controversy which is ripe and appropriate for judicial determination, as distinguished from a dispute or difference of a contingent, hypothetical or abstract character." *Rainey v. Haley*, 404 S.C. 320, 331, 745 S.E.2d 81, 87 (2013).

The subject property was sold at a foreclosure sale on April 1, 2013. On September 19, 2013, the Special Referee entered a Report on Sale and Disbursements confirming the foreclosure sale and reflecting that a deed had been issued to the Secretary of Housing and Urban Development. (R. p. 210.) The judgment has already been carried out and EverBank never requested additional fees and costs pursuant to that provision of the Foreclosure Judgment. We do not know whether the Special Referee would have employed this provision in a manner that violated the Scurrys' right to due process because it never happened. Therefore, the issue is not ripe for review.

c. The Special Referee's analysis of the prejudice to the parties in ruling on the Rule 60(b)(4) motion constitutes harmless error.

The Scurrys also argue that the Special Referee made an error of law with respect to his denial of the Rule 60(b)(4) motion by analyzing the prejudice to the parties.

EverBank concedes that this extra step in the analysis is not required for motions made pursuant to Rule 60(b)(4). However, to the extent that this was an error of law, it does not show that the Special Referee abused his discretion because it was not a controlling error of law. *Ware*, 404 S.C. at 10, 743 S.E.2d at 822 ("An abuse of discretion occurs when the order of the court is *controlled* by an error of law ...")(emphasis added).

"[N]o error or defect in any ruling or order or in anything done or omitted by the court ... is ground for ... vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice." Rule 61, SCRCP.

Before reaching that extra step in the analysis, the Special Referee had already concluded that the award of attorney's fees in the Foreclosure Judgment was proper. (R. p. 5.) He was going to deny their Rule 60(b)(4) motion regardless of the additional "prejudice" analysis. The motion could not have been properly granted because 1) the Special had subject matter jurisdiction or personal jurisdiction over the Scurrys, and 2) they were afforded full due process throughout the foreclosure action. Therefore, to the extent it was an error for the Special Referee to analyze the prejudice to the parties, this was a harmless error and is not grounds for reversal on appeal.

II. The Special Referee did not abuse his discretion in denying the Scurrys relief from the foreclosure judgment pursuant to Rule 60(b)(1).

The Special Referee was within his discretion in refusing to vacate the Foreclosure Judgment under Rule 60(b)(1), SCRCP, because the Scurrys' failure to respond to the Complaint or appear at the foreclosure hearing did not result from a good faith mistake.

"[T]he court may relieve a party or his legal representative from a final judgment, order, or proceeding for ... mistake, inadvertence, surprise, or excusable neglect ..." Rule 60(b)(1), SCRCP. "In order to gain relief under Rule 60(b)(1), SCRCP, a party must first show a good faith mistake of fact has been made ..." *Williams v. Watkins*, 384 S.C. 319, 324, 681 S.E.2d 914, 917 (Ct. App. 2009)(emphasis added). "This rule is an appropriate remedy for good faith mistakes of fact if all other applicable factors are met." *Hillman v. Pinion*, 347 S.C. 253, 256, 554 S.E.2d 427, 429 (Ct. App. 2001).

"However, a party may not generally use Rule 60(b)(1) as a vehicle for relief from a mistake of law," including ignorance of the rules or ignorance of the law. *Id.* (*citing* 11 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice & Procedure § 2858 (1973)). "[A] party has a duty to monitor the progress of his case." *Hill v. Dotts*, 345 S.C. 304, 310, 547 S.E.2d 894, 897 (Ct. App. 2001). "Lack of familiarity with legal proceedings is unacceptable and the court will not hold a layman to any lesser standard than is applied to an attorney." *Id.*

a. The Scurrys' failure to respond to the Complaint did not result from a good faith mistake.

The Scurrys did not establish any good faith mistake on their part in failing to answer the Complaint. (R. pp. 36-38; R. p. 53.) They admitted to being properly served with the foreclosure pleadings, but then "did not worry about the papers, examine them, or take them to a lawyer." (R. p. 37, ¶ 4.) Mrs. Scurry claimed that she ignored the pleadings solely because of alleged statements by Mr. Costner that the papers were nothing to worry about. *Id.* ¶ 4. Yet nowhere in her affidavit did Mrs. Scurry state that she believed Mr. Costner to be an employee of EverBank or authorized to act or speak on

behalf of EverBank. *Id.* Nothing in her affidavit justified her blind reliance on Mr. Costner's alleged statements. *Id.*

The argument that the process server would have appeared to them to be acting on behalf of EverBank was raised by their counsel, not by their affidavits. (R. pp. 32-26, ¶ 6.) This was not sufficient evidence. *Bowers*, 304 S.C. at 67-68, 403 S.E.2d at 129 (finding that statements of counsel and allegations in unverified pleadings are not enough to satisfy the movant's burden of proof on a Rule 60(b) motion; rather, the evidence usually must come from affidavits).

Therefore, even if Mrs. Scurrys' affidavit is to be believed, the failure to answer did not result from a good faith mistake, but rather a conscious decision by the Scurrys to ignore the pleadings due to their unwarranted reliance on the advice of a complete stranger who did not work for Everbank. The Scurrys had a duty to monitor the progress of their case or at least hire a lawyer to do so for them. At the bare minimum, they should have read the pleadings served on them, rather than throwing them to the side and ignoring them. This was no good faith mistake.

Considering the above, in conjunction with the Affidavit of Jeff Costner denying everything in Mrs. Scurry's affidavit (R. p. 179), the Special Referee was well within his discretion in finding that the Scurrys' failure to answer the Complaint did not result from a good faith mistake.

b. The Scurrys' failure to attend the foreclosure hearing did not result from a good faith mistake.

The Scurrys did not establish any good faith mistake on their part in failing to attend the foreclosure hearing. They claimed that they did not attend the foreclosure hearing because they believed it would be cancelled due to their ongoing loss mitigation

correspondence with Everhome Mortgage. (R. pp. 36-38; R. p. 53.) Nothing in the affidavits identified any communications with Everhome Mortgage other than a series of letters she received concerning loss mitigation opportunities. *Id.* The only letter that the Scurrys received from Everhome Mortgage in the weeks before the foreclosure hearing was one dated February 21, 2013. (R. pp. 36-38; R. pp. 43-44.) While the letter solicited them to complete a Loss Mitigation Qualification package and return it to Everhome Mortgage, the letter clearly explained that during the loss mitigation process:

> Normal servicing of your loan will continue. This includes, but is not limited to, telephone calls, correspondences and notices, late charges or other fee assessment, and possible foreclosure. Please note that a modification program is not guaranteed and is subject to approval.

Id. Nowhere in this letter did Everhome state or even imply that the foreclosure hearing set for March 8, 2013, would be cancelled. After that letter, the Scurrys admitted to receiving a letter from EverBank's foreclosure counsel confirming that the hearing was still scheduled. (R. pp. 36-38; R. p. 45.) Mrs. Scurry admitted that EverBank's foreclosure counsel told her over the telephone that the foreclosure hearing would not be cancelled without EverBank's approval. (R. pp. 37-38, ¶ 9.)

Other than the notice of hearing from EverBank's foreclosure counsel (which clearly stated that a foreclosure hearing was scheduled), the letter from Everhome Mortgage of February 21, 2013 (which stated nothing about cancellation of the foreclosure hearing), and the telephone call with EverBank's foreclosure counsel (which confirmed that the hearing had not been cancelled), the Scurrys did not allege the existence of any other communications with EverBank or its agents between the dismissal of their bankruptcy action and the date of the foreclosure hearing in which they were told that the foreclosure hearing had been cancelled. (R. pp. 36-38; R. p. 53.) All of

the other letters cited to in Mrs. Scurry's affidavit either pre-dated her November 2012 bankruptcy filing or post-dated the foreclosure hearing, and could therefore not have been a valid basis for believing that the foreclosure hearing would be cancelled. *Id.*

The Scurrys' conduct in this case is nothing like the mistaken default in *Mictronics, Inc. v. South Carolina Department of Revenue*, 345 S.C. 506, 548 S.E.2d 223 (Ct. App. 2001). In *Mictronics,* the court rescheduled a hearing and telephoned the president of the plaintiff company to tell him of the new hearing date. *Id.* at 508, 548 S.E.2d at 224. The president misheard the telephone conversation and wrote down the wrong hearing date, and subsequently the plaintiff company failed to appear at the hearing. *Id.* This Court affirmed the granting of relief from judgment to the plaintiff company because it "made an error with respect to the hearing date and immediately sought relief from the dismissal." *Id.* at 511, 548 S.E.2d at 226 (emphasis added). The plaintiff's "speed in asking the [court] for relief" was critical. *Id.*

In this case, the Scurrys actively ignored a properly served summons that clearly told them they needed to respond to the Complaint within 30 days. They did not ignore the pleadings because of anything the Special Referee's office told them or that EverBank told them. They threw the pleadings to the side without even examining them because of what a stranger allegedly told them. (R. p. 37, ¶ 4.) They did not move for relief for well over a year after being served with the pleadings despite having notice that the foreclosure case was proceeding during that time.

With respect to the foreclosure hearing, the Scurrys did not miss it because of any rescheduling confusion. The foreclosure hearing was set forth March 8, 2013, and never rescheduled. They admit receiving notice of the hearing clearly stating the date and time.

They never received any communications or correspondence telling them that the hearing would be cancelled. Yet they skipped the hearing anyway because they just "believed Everhome would instruct the law firm not to go forward" (R. p. 38,¶ 10), despite the law firm having told them otherwise. *Id.* ¶ 9. Again, the Scurrys did not move immediately for relief after the hearing or the entry of the Foreclosure Judgment like the plaintiff in *Mictronics*. They waited almost two more months.

Further, the plaintiff company in *Mictronics* only failed to respond once, whereas the Scurrys did it twice—they failed to respond to both a pleading and a hearing notice. Therefore, *Mictronics* is distinguishable from this case.

Based on the evidence before the Special Referee, it was unreasonable for the Scurrys to believe that the hearing would be cancelled. Therefore, the Special Referee was within his discretion in finding that the Scurrys' failure to attend the foreclosure hearing did not result from a good faith mistake.

III. The Special Referee did not abuse his discretion in denying the Scurrys relief from the foreclosure judgment pursuant to Rule 60(b)(3).

The Special Referee was within his discretion in refusing to vacate the Foreclosure Judgment under Rule 60(b)(3), SCRCP, because the Scurrys' failure to answer the Complaint and attend the foreclosure hearing did not result from any fraud, misrepresentation, or other misconduct on the part of EverBank.

"[T]he court may relieve a party or his legal representative from a final judgment, order, or proceeding for ... fraud, misrepresentation, or other misconduct of an adverse party..." Rule 60(b)(3), SCRCP.

"Historically, this Court has held that in order to obtain equitable relief from a judgment based on fraud, the fraud must be extrinsic." *Orr,* 358 S.C. at 19, 594 S.E.2d at

482. "Extrinsic fraud is 'fraud that induces a person not to present a case or deprives a person of the opportunity to be heard." *Id.* at 19, 594 S.E.2d at 483. "[F]raud is intrinsic and not a valid ground for setting aside a judgment when [a] party has been given notice of the action and has had an opportunity to present his case and to protect himself from any mistake or fraud of his adversary but has unreasonably neglected to do so." *Mr. G v. Mrs. G*, 320 S.C. 305, 308, 465 S.E.2d 101, 103 (Ct. App. 1995).

The Scurrys argue that the alleged conduct of Jeff Costner, the process server, misled them into not answering the Complaint and that the loss mitigation letters from Everhome Mortgage misled them into not attending the foreclosure hearing.

a. The Scurrys' failure to respond to the Complaint did not result from any fraud, misrepresentation, or other misconduct of EverBank because the process server was not its agent.

Even if the alleged conduct of the process server alleged in Mrs. Scurrys' affidavit was to be believed and amounted to fraud, misrepresentation, or other misconduct (which is denied), it still would not entitle the Scurrys to relief under Rule 60(b)(3) because the process server was not an agent of EverBank with authority to make representations on its behalf. The alleged fraud, misrepresentation, or other misconduct was therefore not committed by the "adverse party" as required for relief under the rule.

There was no evidence before the Special Referee that Jeff Costner was anything more than an independent contractor hired by EverBank's counsel for the sole purpose of serving the foreclosure pleadings on the Scurrys. "Where an independent contractor is not controlled or subject to the control of another in the performance of a contract, but only as to the result, the independent contractor is not an agent." 23 S.C. Jur. *Agency* § 5. There was no evidence before the Special Referee that EverBank had any control over

Jeff Costner with respect to the performance of his job, and the Scurrys do not contend that Mr. Costner was an actual agent of EverBank.[4]

Yet the Scurrys contend that there was apparent agency between Mr. Costner and EverBank. "Under South Carolina law, the elements which must be proven to establish apparent agency are: (1) that the purported principal consciously or impliedly represented another to be his agent; (2) that there was a reliance upon the representation; and (3) that there was a change of position to the relying party's detriment." *Froneberger v. Smith*, 406 S.C. 37, 748 S.E.2d 625, 630 (Ct. App. 2013). "Apparent authority to do an act is created as to a third person by written or spoken words or any other conduct of the principal which, reasonably interpreted, causes the third person to believe the principal consents to have the act done on his behalf by the person purporting to act for him." *Id.* (emphasis added). However, "an agency may not be established solely by the declarations and conduct of an alleged agent." *Id.*

"The first element of apparent agency can be established by either: (1) affirmative conduct or (2) conscious and voluntary inaction." *Id.* "Under the first of these two scenarios, the principal makes direct representations to a third party that another has authority to act on his behalf." *Id.* "Under the second, the principal implies authority by passively permitting another to appear to third parties to have authority to act on his behalf." *Id.*

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[4] At one point in their appellate brief, the Scurrys appear to go off-track and begin arguing the law governing agents who are also "servants", i.e., employees. (App. Br. p. 27.) Yet they never claim in their affidavits or briefs that they believed that Mr. Costner was an actual employee of EverBank. Mr. Costner was not an employee of EverBank, he was an independent contractor of its foreclosure counsel. The only issue is whether there was apparent agency between the process server and EverBank. Therefore, the citation to the law governing the liability of masters for the conduct of servants is misplaced and inappropriate.

First, the Scurrys' apparent agency argument fails because the Scurrys never alleged that they believed that Mr. Costner had authority to act or speak on behalf of EverBank. (R. pp. 36-38; R. p . 53.) The argument that the process server would have appeared to be working on behalf of EverBank was raised by their counsel, not by their affidavits. (R. pp. 32-33, ¶ 6.) As explained previously, arguments of counsel alone could not have satisfied the Scurrys' burden of proof on their Rule 60(b) motion. *Bowers*, 304 S.C. at 67-68 403 S.E.2d at 129.

Second, there was no evidence before the Special Referee showing that EverBank consciously or impliedly represented Mr. Costner to be its agent. The Scurrys argue that the mere act of EverBank's foreclosure counsel hiring a process server to deliver its foreclosure pleadings "placed [the process server] in a position that a layperson would reasonably interpret as the process server being authorized to communicate on behalf of EverBank with regard to matters subject of the mortgage foreclosure case." (App. Br. p. 26.) Not only is this an unsupportable leap in logic, but such a rule would render every process server in every case an agent of every named plaintiff. The Special Referee correctly held that the hiring of the process server to deliver papers was not an implied representation of agency by EverBank.

Because the Scurrys failed to meet their burden of proof in establishing apparent agency between the process server and EverBank, the Special Referee did not abuse his discretion in denying their motion pursuant to Rule 60(b)(3).

b. The Scurrys' failure to attend the foreclosure hearing did not result from any fraud, misrepresentation, or other misconduct of EverBank.

The Scurry's do not allege in their appellate brief that EverBank's conduct during the loss mitigation process amounted to fraud or misrepresentation. (App. Br. 25.) Rather,

at most, their brief implies that EverBank's loss mitigation communications to them confused them into thinking the foreclosure hearing would be cancelled. *Id.*

Other than the notice of hearing from EverBank's foreclosure counsel (which clearly stated that a foreclosure hearing was scheduled), the letter from Everhome Mortgage of February 21, 2013 (which stated nothing about cancellation of the foreclosure hearing), and the telephone call with EverBank's foreclosure counsel (which confirmed that the hearing had not been cancelled), the Scurrys do not allege the existence of any other communications with EverBank or its agents between the dismissal of their bankruptcy and the date of the foreclosure hearing in which they were told the foreclosure hearing had been cancelled. (R. pp. 36-38; R. p . 53.)

If the Scurrys were in fact confused by these letters into thinking the hearing would be cancelled, such confusion was unwarranted. Further, the Scurrys cite to no law in effect at the time that prohibited a mortgage lender from continuing to work with delinquent borrowers during the foreclosure process to reach a resolution that would allow them to stay in their home. Therefore, these loss mitigation letters, which were clear on their face, did not amount to "misconduct" on the part of EverBank. The Special Referee did not abuse his discretion in denying relief to the Scurrys under Rule 60(b)(3).

IV. The Special Referee did not abuse his discretion in denying the Scurrys relief from the foreclosure judgment pursuant to Rule 60(b)(1) and (3) where they failed to show the existence of a meritorious defense to the foreclosure.

Even if the Scurrys had not failed to meet their burden of proof in showing mistake and fraud under Rules 60(b)(1) and (3), the Special Referee did not abuse his discretion in denying their motion because they failed to show the existence of any meritorious defense to the foreclosure.

A meritorious defense is one "which is worthy of a hearing or judicial inquiry because it raises a question of law deserving of some investigation and discussion or a real controversy as to essential facts arising from conflicting or doubtful evidence." *Graham v. Town of Loris*, 272 S.C. 442, 453, 248 S.E.2d 594, 599 (1978).

The Scurrys claim to have a meritorious "standing" defense to this foreclosure. Specifically, they claim that because the Assignment of Mortgage into EverBank was executed one day after EverBank filed this foreclosure action, EverBank did not own the Mortgage at the time of filing and therefore had no standing to foreclose. (App. Br. p. 28.)

The Scurrys' proposed standing defense would fail as a matter of law because ownership of the mortgage is not a prerequisite for standing to file a foreclosure action.

"Standing refers to a party's right to make a legal claim or seek judicial enforcement of a duty or right." *Bank of America, N.A. v. Draper*, 405 S.C. 214, 219, 746 S.E.2d 478, 480 (Ct. App. 2013). "Generally, a party must be a real party in interest to the litigation to have standing." *Id.* at 220, 746 S.E.2d at 481.

Because a mortgage automatically follows the promissory note that it secures,[5] a foreclosure plaintiff can show standing by proving that it has the right to enforce the underlying promissory note secured by the mortgage. *See Bank of New York v.*

[5] *Union Nat'l Bank v. Cook*, 110 S.C. 99, 96 S.E. 484 (1918) ("The note is the principal and the mortgage is the incident and follows the note in its delivery from one person to another."); *Draper*, 405 S.C. at 220, 746 S.E.2d at 481("[T]he assignment of a note secured by a mortgage carries with it an assignment of the mortgage..."); *see also Carpenter v. Longan*, 83 U.S. 271, 275 (1872)("All the authorities agree that the debt is the principal thing and the mortgage an accessory."). This is why "[n]o written assignment of the mortgage is required under state law." *In re Woodberry*, 383 B.R. 373, 377 (Bkrtcy. D.S.C. 2008).

Raftogianis, 13 A.3d 435, 438 (N.J. Super. Ch. 2010)("As a general proposition, a party seeking to foreclose a mortgage must own or control the underlying debt.").

A person or entity is entitled to enforce a negotiable promissory note if they are "(i) the holder of the instrument, (ii) a nonholder in possession of the instrument who has the rights of a holder, or (iii) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to Section 36-3-309 or 36-3-418(d)."[6] S.C. Code Ann. § 36-3-301. A "holder" is a person or entity "who is in possession of a document or title or an instrument or a certificated investment security drawn, issued, or indorsed to him or to his order or to bearer or in blank," i.e., someone who takes the promissory note through the process of "negotiation." S.C. Code Ann. § 36-1-201(20); S.C. Code Ann. § 36-3-201. "When indorsed in blank, an instrument becomes payable to bearer and may be negotiated by transfer of possession alone until specially indorsed." § 36-3-205(b).

Whether a mortgage company is also the owner of the promissory note is irrelevant to its right to enforce it. "A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument ..." S.C. Code Ann. § 36-3-301. "The right to enforce an instrument and ownership of the instrument are two different concepts ... [m]oreover, a person who has an ownership right in an instrument might not be a person entitled to enforce the instrument." § 36-3-203 cmt. 1. "[U]nder the current statute a person can be a holder of an instrument but not the owner and a person can be the owner of an instrument but not a holder." South Carolina Reporter's Comment to § 36-3-203.

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[6] S.C. Code Ann. § 36-3-309 deals with the enforcement of instruments which have been lost, destroyed, or stolen, and S.C. Code Ann. § 36-3-418(d) deals with circumstances where an instrument has been paid or accepted by mistake and the payor or acceptor recovers payment or revokes acceptance. Neither is applicable here.

In this case, EverBank presented evidence that it had possession of the original Note (which was endorsed in blank) on the date that it filed the foreclosure action. (R. p. 207.) When EverBank took possession of the promissory note indorsed in blank, it immediately became the "holder" with the right to enforce the Note, and by extension, the Mortgage. Therefore, EverBank had standing to foreclose on the date it filed the Complaint.

The failure of MERS to execute a formal assignment of mortgage to EverBank prior to the initiation of the foreclosure action is a red herring because "[n]o written assignment of the mortgage is required under state law." *In re Woodberry*, 383 B.R. 373, 377 (Bkrtcy. D.S.C. 2008). If assignments of mortgage were required to transfer ownership of a mortgage, then surely state law would require them. But it does not.

The Scurrys incorrectly believe that the Note and Mortgage were somehow split at the time of origination when the Mortgage was given to MERS as nominee for the original lender. This argument has been tried and tested in other jurisdictions, but has ultimately failed as explained below:

> The argument is creative, but not convincing. It ignores the most basic circumstance presented. It should be obvious to anyone with any basic understanding of the circumstances that there was no real intent to "separate" the note and mortgage. The debt in question was clearly payable to [the lender]. The designation of MERS as nominee on the mortgage was simply intended to permit the recording of the mortgage in a way that would facilitate subsequent transfers through MERS without the recording of additional documents. One could debate the propriety and efficacy of using MERS in terms of policy. It is clear, however, that there was no real intent to separate ownership of the note and mortgage at the time those documents were created.

Bank of New York v. Raftogianis, 13 A.3d 435, 448 (N.J. Super. Ch. 2010). "MERS, as nominee, does not have any real interest in the underlying debt, or the mortgage which

secured that debt." *Id.* "It acts simply as an agent or 'straw man' for the lender." *Id.*; *see also Landmark Nat. Bank v. Kesler*, 216 P.3d 158, 166 (Kan. 2009)("The relationship that MERS has to [the lender] is more akin to that of a straw man than to a party possessing all the rights given a buyer ... [a]lthough MERS asserts that, under some situations, the mortgage document purports to give it the same rights as the lender, the document consistently refers only to rights of the lender, including rights to receive notice of litigation, to collect payments, and to enforce the debt obligation. The document consistently limits MERS to acting 'solely' as the nominee of the lender.")

Even the case relied upon by the Scurrys in support of their "split note-mortgage" argument confirms that "MERS has no independent right to collect on any debt because MERS itself has not extended credit, and none of the mortgage debtors owe MERS any money ... we conclude that MERS does not acquire mortgage loans ..." *Mortgage Electronic Registration Systems, Inc. v. Nebraska Dept. of Banking and Finance*, 704 N.W.2d 784, 788 (Neb. 2005).

Therefore, the Special Referee did not abuse his discretion in finding that the Scurrys had no meritorious defense to this foreclosure.

CONCLUSION

For these reasons, the Special Referee did not abuse his discretion in denying the Scurrys' Motion to Vacate Judgment and Sale or their Motion to Reconsider. EverBank respectfully requests that the Court affirm the Special Referee's Orders of September 6, 2013, and October 4, 2013, for these reasons or any others appearing in the record.

Respectfully submitted,

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July 8, 2014

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM NEWBERRY COUNTY
Court of Common Pleas
Joseph W. Hudgens, Special Referee

Appellate Case No. 2013-002181

EverBank.....Respondent,

v.

Lenora Scurry, Patrick Scurry,
The South Carolina Department of Revenue,..... Defendants,

Of whom Lenora Scurry and Patrick Scurry are the..... Appellants.

CERTIFICATE OF COUNSEL

The undersigned attorney hereby certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR.

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM NEWBERRY COUNTY
Court of Common Pleas
Joseph W. Hudgens, Special Referee

Appellate Case No. 2013-002181

EverBank.....Respondent,

v.

Lenora Scurry, Patrick Scurry,
The South Carolina Department of Revenue,..... Defendants,

Of whom Lenora Scurry and Patrick Scurry are the..... Appellants.

PROOF OF SERVICE

I HEREBY CERTIFY that I have served the Final Brief of Respondent on July 8, 2014, by depositing a copy in the United States Mail, postage pre-paid, addressed to the following party of record:

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