

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM JASPER COUNTY

FEB 11 2016

Darrell Thomas Johnson, Jr., Special Referee

SC Court of Appeals

Appellate Case No. 2015-002049
Civil Action No. 2013-CP-27-00253

Bank of Walterboro,.....Plaintiff/Respondent,

v.

Charles E. Bush aka Charles Bush, Rosemelle M. Shuler, First
Family Financial Services of Georgia, Inc., EquiFirst Corporation,
Mortgage Electronic Registration Systems, Inc. as nominee for BNC
Mortgage Inc., and South Carolina Department of Revenue.....Defendants,

of whom Mortgage Electronic Registration Systems, Inc. is the Appellant,

and

Bank of Walterboro and Rosemelle M. Shuler are the Respondents.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. Did the Special Referee err in failing to set aside the final decree of foreclosure under Rule 60(b), SCRCP, when the plaintiff made false statements in its pleadings regarding the defaulting party's interests in the action?

II. Did the Special Referee err in failing to set aside the final decree of foreclosure under Rule 60(a), SCRCP, when the decree included a clerical mistake?

STATEMENT OF THE CASE

This is an appeal from the Special Referee's order denying Appellant Mortgage Electronic Registration Systems, Inc., as nominee for BNC Mortgage Inc.'s ("MERS") Motion to Vacate and Set Aside a Final Judgment of Foreclosure pursuant to Rule 60, SCRPC. (See Order Denying Motion to Reopen Judgment). MERS is the holder of a valid mortgage lien on real property located in Jasper County, South Carolina, identified as TMS # 062-00-05-017 and commonly known as 1519 Taylor Mill Road, Ridgeland, South Carolina 29936 (the "Property") through a mortgage dated May 15, 2006, and recorded in the real property records for Jasper County, South Carolina on June 20, 2006 (the "MERS Mortgage"). (Motion to Vacate and Set Aside Final Judgment of Foreclosure and Sale ("Mot. to Vacate") Exs. B-D). The MERS Mortgage has not been satisfied. (See Motion to Vacate Exs. B-E; Aff. of Linda C. Jordan ("Jordan Aff.") Ex. A; Opposition to Motion to Vacate pp. 12-14).

On May 13, 2013, Respondent Bank of Walterboro ("BOW") filed a complaint seeking to foreclose on the Property pursuant to a mortgage dated March 1, 2007, and recorded in the real property records for Jasper County, South Carolina on October 29, 2007 (the "BOW Mortgage"). (See Complaint). The BOW Mortgage was recorded after the MERS Mortgage and, therefore, was in junior lien position. (See Motion to Vacate Ex. B; Jordan Aff. Ex. A). The complaint identified the BNC Mortgage and assignments conveying the BNC Mortgage to MERS but falsely alleged, without any factual support, that the MERS Mortgage had had been paid in full and satisfied or was subordinate to BOW's interest in the Property. (Complaint pp. 5-6).

MERS was served with the summons and complaint on May 28, 2013, but no one appeared in the action to answer or otherwise respond to the complaint within the timeframe set forth in Rule 12, SCRCF. (Motion to Vacate p. 3; Jordan Aff. p. 2). As a result, default was entered against MERS on September 5, 2014. (Jordan Aff. p. 2). BOW did not notify MERS of the default. (Jordan Aff. p. 2).

The case was referred to the Special Referee for Jasper County. (Jordan Aff. p. 2). On May 11, 2015, BOW sent MERS a Notice of Hearing with Finality (the "Hearing Notice") on May 20, 2015. (Notice of Hearing with Finality pp. 1-2). MERS does not deny that it received the Hearing Notice. (Motion to Vacate p. 3). The Hearing Notice, however, did not specify the nature of the hearing or notify MERS that the hearing would prejudice the MERS Mortgage's lien priority and MERS' right, title and interest in the Property. (Notice of Hearing pp. 1-2). The Hearing Notice instead stated only that "a hearing with finality will be held ... on Wednesday, May 20, 2015, at 2:00 p.m. and that said Special Referee is authorized to enter a final judgment in this case." (Notice of Hearing p. 1).

MERS, through its loan servicer, contacted counsel for BOW upon receiving the Hearing Notice. (Jordan Aff. p. 3 & Ex. B). MERS learned, three hours before the hearing was to take place, that default had been entered against MERS and its lien on the Property was in peril. (Jordan Aff. p. 3 & Ex. B). Counsel could not be obtained for MERS in advance of the May 20, 2015 hearing. (See Special Referee's Decree for Final Judgment of Foreclosure).

The Special Referee entered a Decree of Final Judgment and Foreclosure on May 21, 2015 (the "Foreclosure Decree"), which authorized BOW to conduct a foreclosure

sale of the Property. (See Special Referee's Decree for Final Judgment of Foreclosure).¹ The Foreclosure Decree erroneously found that the BOW Mortgage constituted a first lien on the Property and entitled BOW to the proceeds from the foreclosure sale. (Special Referee's Decree for Final Judgment of Foreclosure p. 4). The Foreclosure Decree stated further that "Defendants, and all persons claiming under, by or through them [were] barred and forever foreclosed of all right, title, interest and equity of redemption in and to the [Property] so sold, or any part thereof." (Special Referee's Decree for Final Judgment of Foreclosure p. 6).

MERS' loan servicer escalated the matter, and counsel for MERS was obtained. (Hearing Transcript pp. 9-10). MERS' attorney requested that the Special Referee postpone the foreclosure sale so that MERS could pursue relief from the Foreclosure Decree, and the Special Referee granted the request after a telephone conference. (Hearing Transcript p. 10). MERS filed its Motion to Vacate and Set Aside Final Judgment of Foreclosure and Sale pursuant to Rule 60, SCRCF (the "Motion to Vacate") on July 15, 2015 and its Memorandum in Support on July 20, 2015. (See Memorandum in Support of Motion to Vacate).

The Special Referee held a hearing on MERS' Motion to Vacate on July 23, 2015. (See Hearing Transcript). On August 25, 2015, the Special Referee entered his Order Denying Motion to Reopen Judgment. (See Order Denying Motion). This appeal then followed. (See Notice of Appeal).

¹ The Foreclosure Decree also authorized BOW to conduct a foreclosure sale of a second tract identified as TMS# 046-32A-03-008, which is located at 186 Dogwood Drive, Ridgeland, South Carolina. (See Complaint). MERS claims no right, title or interest in the second tract.

ARGUMENT

I. Standard of Review

Whether to grant or deny a motion under Rule 60(b) lies within the sound discretion of the trial judge. Raby Constr., L.L.P. v. Orr, 358 S.C. 10, 17, 594 S.E.2d 478, 482 (2004). As a result, the appellate court's standard of review is limited to determining whether there was an abuse of discretion. Id. at 18, 594 S.E.2d at 482. An abuse of discretion occurs when the order was controlled by an error of law or when the order is without evidentiary support. Tri-County Ice & Fuel Co. v. Palmetto Ice Co., 303 S.C. 237, 242, 399 S.E.2d 779, 782 (1990).

II. The Special Referee Erred in Denying the Motion to Vacate Pursuant to Rule 60(b), SCRPC Because BOW's Allegations in the Complaint Had No Factual Basis.

Rule 60(b), SCRPC states that a court "may relieve a party or his legal representative from a final judgment, order, or proceeding for ... mistake, inadvertence, surprise, or excusable neglect." The moving party has the burden of presenting evidence that entitles it to relief. Bowers v. Bowers, 304 S.C. 65, 67, 403 S.E.2d 127, 129 (Ct. App. 1991). In determining whether the relief is appropriate, courts consider the following factors: "(1) the promptness with which relief is sought; (2) the reasons for the failure to act promptly; (3) the existence of a meritorious defense; and (4) the prejudice to the other party." Rouvet v. Rouvet, 388 S.C. 301, 309, 696 S.E.2d 204, 208 (Ct. App. 2010).

A. BOW's Allegations in the Complaint Had No Factual Basis and Were, in Fact, Untrue.

Before turning to the Rule 60(b), SCRPC factors, it is essential to note that BOW, by its own admission, had no factual basis for the complaint's allegation that the MERS

Mortgage had been paid in full and satisfied, or was subordinate to the BOW Mortgage. Yet the Special Referee overlooked BOW's false statement because the allegations were made upon BOW's "best information and belief." (Order Denying Motion to Reopen Judgment pp. 3, 8). Neither BOW nor the Special Referee had any grounds for reaching such a conclusion, which constitutes reversible error.

In the Complaint, BOW makes the following allegations with respect to MERS:

Upon information and belief, the Defendant, Mortgage Electronic Registration Systems, Inc., is a corporation not organized under the laws of the State of South Carolina but subject to the jurisdiction of this Court and may, **AS NOMINEE FOR BNC MORTGAGE, INC.**, have or claim to have some interest in or lien on Parcel B described above which is the subject of this action by virtue of and as evidenced by the following:

- a. Mortgage from Rosemelle Shuler to Lexington Capital dated May 15, 2006 and recorded June 20, 2006, in M.R.E. Book 439 at page 138, in the Office of the Clerk of Court for Jasper County, South Carolina;
- b. Assignment of Mortgage from Lexington Capital to BNC Mortgage, Inc. dated June 22, 2007 and recorded August 13, 2007 in M.R.E. Book 577 at page 226, in the office of the Clerk of Court for Jasper County, South Carolina ...;
- c. Assignment of Mortgage from BNC Mortgage, Inc. to Mortgage Electronic Registration Systems, Inc. as Nominee for BNC Mortgage, Inc. dated June 25, 2007 and recorded August 13, 2007 in M.R.E. Book 577 at page 228 ...

and on information and belief, the interest of Mortgage Electronic Registration Systems, Inc. as Nominee for BNC Mortgage, Inc., including the interests created by the foregoing, have been paid in full and satisfied or are subordinate to the interests of Plaintiff [BOW].

(Complaint p. 6) (emphasis in original)). MERS' written arguments in the Motion to Vacate were based on the assumption that BOW did not intentionally misstate the lien priority of the MERS Mortgage in the complaint. (Motion to Vacate pp. 3-4). MERS instead believed that BOW merely confused the MERS Mortgage with a separate

mortgage held by Mortgage Electronic Registration Systems, Inc., as Nominee for CIT Group/Consumer Finance, Inc., for which a satisfaction had been recorded in the Jasper County land records. (Motion to Vacate pp. 3-4). As BOW made clear in its brief and during the hearing before the Special Referee, however, BOW apparently knew that this satisfaction did not apply to the MERS Mortgage. (Opposition to Motion to Vacate pp. 13-14).

There can be no question that, even with the qualifying language “upon information and belief,” BOW’s allegations in the Complaint regarding MERS were false. There is no evidence that BOW had any basis for assuming that the MERS Mortgage had been satisfied or was subordinate to the BOW Mortgage. The evidence offered by MERS, as well as BOW’s own title search obtained in connection with the foreclosure, shows that there are three outstanding mortgages on the Property: (i) a mortgage from Rosemelle Shuler to EquiFirst Corporation dated June 15, 2001 and recorded on June 21, 2001;² (ii) the MERS Mortgage dated May 15, 2006 and recorded on June 20, 2006; and (iii) the BOW Mortgage dated March 1, 2007 and recorded on October 29, 2007. (See Motion to Vacate Exs. B-D). BOW’s own title search identifies the MERS Mortgage as unsatisfied. (See Jordan Aff. Ex. A). As a result, there were no grounds for BOW to allege any understanding or belief that the MERS Mortgage was paid in full or satisfied.

Nor was there any basis for BOW to allege that the MERS Mortgage was subordinate to the BOW Mortgage. There is no provision in the MERS Mortgage whereby the lender or its successors (including MERS) agreed to subordinate its lien on

² MERS is making no representations regarding the priority of the MERS or BOW Mortgage with respect to the 2001 EquiFirst mortgage.

the Property to any other lien. (See Motion to Vacate Ex. B). Nor has any subordination agreement been recorded in the Jasper County land records. (See Jordan Aff. Ex. A).

In opposing MERS' Motion to Vacate, BOW claimed that it included MERS in the complaint, not because it had any factual basis for its "understanding and belief" that MERS Mortgage had been satisfied or was subordinate to the BOW Mortgage, but because it was the burden of MERS and other lienholders to "come forward in their answers to the complaint and assert that their interests including their interests under their mortgage had not been paid in full and satisfied and were not subordinate to the interests of [BOW]." (Opposition to Motion to Vacate pp. 12-13).

The Special Referee committed reversible error when he found that MERS' failure to answer BOW's false allegations in the complaint meant that MERS could not dispute those allegations and rejected evidence demonstrating the MERS Mortgage's priority over the BOW Mortgage. (Order Denying Motion to Reopen Judgment p. 8). South Carolina courts have never deemed the allegations in a plaintiff's complaint as admitted for the purpose of analyzing a motion for relief from a judgment under Rule 60(b), SCRPC. See, e.g., Sundown Operating Co., Inc. v. Intedge Industries, Inc., 383 S.C. 601, 608-09, 681 S.E.2d 885, 888-89 (2009) (discussing 60(b) analysis). Indeed, the availability of a challenge to a default judgment under Rule 60(b), SCRPC is one of the primary reasons the rule exists. See Winesett v. Winesett, 287 S.C. 332, 334, 338 S.E.2d 340 (1985) (finding that proper procedure for challenging default judgment is to move trial court to set aside judgment pursuant to Rule 60(b), SCRPC). The Special Referee had no grounds for accepting at face value BOW's false allegations in the complaint and

denying MERS' Motion to Vacate under Rule 60(b), SCRCPP, which constitutes an abuse of discretion and requires reversal.

B. MERS' Reliance on the False Statements in the Complaint Was a Good Faith Mistake Entitling MERS to Relief from the Foreclosure Decree.

The Special Referee erred when he found that MERS failed to provide evidence of mistake, inadvertence, surprise or excusable neglect in connection with its Motion to Vacate. Pursuant to Rule 60(b)(1), SCRCPP, a court may relieve a party of a final judgment for mistake, inadvertence, surprise, or excusable neglect. Excusable neglect is defined as:

[A] failure – which the law will excuse – to take some proper step at the proper time ... not because of the party's own carelessness, inattention or willful disregard of the court's process, but because of some unexpected or unavoidable hindrance or accident or because of reliance on the care and vigilance of the party's counsel or on a promise made by the adverse party.

Black's Law Dictionary 1055 (7th ed. 1999) Mistake in the context of Rule 60(b), SCRCPP means relief from a judgment due to "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). The purpose of this rule is to avoid inequity when the mistake is genuine and not an "attempt to thwart the judicial system." Columbia Pools, Inc. v. Galvin, 288 S.C. 59, 61, 339 S.E.2d 524, 525 (Ct. App. 1986). South Carolina courts "favor trial of issues on merit over securing judgment by slight technicalities." Id.

MERS acknowledges that it might have discovered the error in time to prevent the Foreclosure Decree. It made a good faith mistake, however, in not immediately seeking to contest BOW's false allegations in the complaint that the MERS Mortgage was satisfied or subordinate to the BOW Mortgage. (Motion to Vacate pp. 2-3). As this Court

has noted, reliance on incorrect court documents can constitute a good faith mistake of fact. See, e.g., Williams v. Watkins, 384 S.C. 319, 324, 681 S.E.2d 914, 917 (Ct. App. 2009) (finding party's reliance on erroneous hearing notice constituted good faith mistake).

MERS should not be penalized for the false statements in BOW's complaint. Rule 407-3.3 of the South Carolina Rules of Professional Conduct requires that a lawyer not make a knowingly false statement of fact or law to a court and further requires that a lawyer correct any previously false statement inadvertently made. As a result, it was not unreasonable for MERS to rely upon the false assertions of BOW in the complaint and to expect that the false assertions would be acknowledged and affirmatively corrected once the issue was brought to BOW and the court's attention. It was instead inequitable for BOW to take the position that MERS had no right to demonstrate the MERS Mortgage's superior lien position and claim the attendant rights.

Moreover, it is not unusual or surprising that the holder of a mortgage lien who believes it is in second lien position behind a senior mortgage lien would assign lesser urgency to committing the resources necessary to defend the foreclosure action. On the other hand, it is quite unusual and uncommon for a lienholder to falsely misrepresent its lien priority in a complaint and then for that lienholder to persuade the court to ratify and confirm the error so as to award the lienholder an undeserved windfall, especially after the error was revealed.

In his Order, the Special Referee admonished MERS' perceived failure to appear in this action for two (2) years based on the presumption that the allegations in the complaint were correct. (Order Denying Motion to Reopen p. 8). This issue is not so

black and white. MERS never received an affidavit of default or any notice that default had been entered against it. (Jordan Aff. p. 2). The only pleadings that MERS received after the complaint were three notices of hearings with finality, two of which were continued. (Jordan Aff. p. 2). Those notices gave no indication that any hearing would prejudice the priority of the MERS Mortgage or MERS' interest in the Property. (See Notice of Hearing with Finality). Indeed, when MERS' servicing agent contacted BOW's attorney the day before the May 20, 2015 hearing, the agent appeared to believe that the hearing involved tax escrow issues, and not the extinguishment of MERS' lien on the Property . (See Memorandum in Support of Motion to Vacate Ex. A). Importantly, though MERS failed to answer the complaint or appear at the May 20, 2015 hearing, once it realized its mistake, it did not sit on its rights. Rather, it promptly engaged outside counsel to review its position. (Memorandum in Support of Motion to Vacate p. 4; Jordan Affidavit pp. 2-3).

For these reasons, the evidence before the Special Referee, combined with BOW's affirmatively false statements in the complaint, demonstrated that a good faith mistake of fact caused MERS's failure to answer or otherwise respond to the complaint. This mistake constitutes excusable neglect sufficient to set aside the Foreclosure Decree pursuant to Rule 60(b), SCRCF. The Special Referee's failure to take these facts into account in ruling on MERS' Motion to Vacate was an abuse of discretion that, when combined with the other elements, justifies reversal.

C. The Special Referee Erred When He Found that the Motion to Vacate Was Not Timely.

As to the timing of the motion for relief, a party is required to make the motion "within a reasonable time, and ... not more than one year after the judgment ... was

entered....” Rule 60(b), SCRPC. MERS pursued its Motion to Vacate well within the one year period set forth in Rule 60(b). The Foreclosure Decree was entered on May 21, 2015. (See Special Referee’s Decree for Final Judgment of Foreclosure). Counsel was promptly engaged to review MERS’ position. (Memorandum in Support of Motion to Vacate p. 4; Jordan Affidavit pp. 2-3). MERS’ counsel made initial contact with BOW’s attorney on June 8, 2015, and, after a short period of investigation, contacted the Special Referee on July 8, 2015 to request a postponement of the foreclosure sale pending a hearing and ruling on MERS’ forthcoming motion to vacate. (Hearing Transcript pp. 9-11). MERS filed its Motion to Vacate on July 13, 2015, less than two months after entry of the Foreclosure Decree and within the allotted time period. (See Motion to Vacate).

The Special Referee erred in focusing not on the time between entry of the Foreclosure Decree and the filing of MERS’ Motion to Vacate, but the time that had passed since MERS failed to answer or otherwise respond to the complaint. The time limit at issue on a Rule 60(b) motion, however, runs from the date of the judgment’s entry. Southeastern Housing Foundation v. Smith, 380 S.C. 621, 639, 670 S.E.2d 680, 690 (Ct. App. 2008). Whether the motion was brought within a reasonable time of the judgment’s entry is determined under the facts and circumstances of each case. Id.

Here, the evidence before the Special Referee shows that MERS became aware of the situation the day before the May 20, 2015 hearing, acted promptly to investigate the issue, and advised the Special Referee of MERS’ intention to file the Motion to Vacate less than two (2) months after entry of the Foreclosure Decree. MERS submitted its Motion to the Special Referee less than a week later. The Special Referee admonished MERS for not availing itself of Rule 59, SCRPC by moving to alter or amend the

Foreclosure Decree within ten (10) days of the Foreclosure Decree, (Order Denying Motion to Reopen Judgment pp. 7-8), but there is no legal authority requiring a defaulting party to do so. See Winesett, 287 S.C. at 334, 338 S.E.2d at 340 (finding proper procedure for challenging default judgment is motion to set aside pursuant to Rule 60(b)). As a result, the Special Referee clearly erred in finding that MERS failed to file its Motion to Vacate within a reasonable time as required by Rule 60(b), SCRCF.

D. MERS Made a Prima Facie Showing of a Meritorious Defense.

The third factor under Rule 60(b), SCRCF, is the existence of a meritorious defense. Mitchell Supply Co., Inc. v. Gaffney, 297 S.C. 160, 163, 375 S.E.2d 321, 323 (Ct. App. 1988). The moving party need not show that its defense will ultimately be successful, only that it is meritorious. Thompson v. Hammond, 299 S.C. 116, 120, 382 S.E.2d 900, 903 (1989). The defense “need be only one which is worthy of a hearing or judicial inquiry because it raises a question of law deserving of some investigation and discussion or a real controversy as to real facts arising from conflicting or doubtful evidence.” Williams v. Watkins, 384 S.C. at 326, 681 S.E.2d at 918

The Special Referee assumed *arguendo* that MERS has a meritorious defense. (Order Denying Motion to Reopen Judgment p. 6). Had the Special Referee reviewed the evidence, it would have shown that MERS presented evidence showing that it actually had a viable defense to BOW’s claimed priority over the MERS Mortgage. (Motion to Vacate Ex. B-D; see also Jordan Aff. Ex. A). The Jasper County land records, as well as BOW’s own title search, clearly show that the MERS Mortgage was recorded prior to the BOW Mortgage and the MERS Mortgage has not been satisfied. (See Jordan Aff. Ex. A).

As such, MERS has a viable defense and is virtually certain to prevail based on the facts and the publicly recorded document, thereby satisfying Rule 60(b)'s third factor.

E. Any Degree of Prejudice to BOW Is Outweighed by the Harm to MERS.

The final factor in determining whether to grant the Motion to Vacate under Rule 60(b) is the presence or absence of prejudice to the non-moving party. Stearns Bank Nat'l Ass'n v. Glenwood Falls, LP, 373 S.C. 331, 341, 644 S.E.2d 793, 798 (Ct. App. 2007). The issue is not whether vacating the judgment would cause any prejudice to the non-moving party, but whether that prejudice would outweigh other factors. Williams, 384 S.C. at 327, 681 S.E.2d at 918.

The Special Referee found that BOW was prejudiced because "MERS simply waited too long to assert its rights and [BOW] should be given credit for the two plus years in which it was led to believe it had a first mortgage." (Order Denying Motion to Reopen Judgment p. 9). The public records show, however, that BOW had no factual basis upon which to believe that it had a first mortgage on the Property. (See Motion to Vacate Ex. B; Jordan Aff. Ex. A). While BOW might argue that vacating the Foreclosure Decree would be prejudicial to its position because the Decree is already in hand, BOW was never entitled to the Foreclosure Decree to begin with and should not receive a windfall as a result.

The Special Referee also pointed to "attorney's fees, administrative fees and costs of foreclosure that it would likely not recover should MERS be allowed to foreclose on a first mortgage. (Order Denying Motion to Reopen Judgment p. 9). While BOW has likely incurred fees and costs, those fees and costs were precipitated by BOW's decision to pursue foreclosure against the Property despite having no basis for asserting that the

MERS Mortgage had been paid in full, satisfied, or subordinated to the BOW Mortgage. The more prudent course would have been to contact MERS to confirm whether the MERS Mortgage had been paid off (and if so, request a satisfaction) and/or make a claim under BOW's title policy for the BOW Mortgage. BOW instead pled allegations that had no factual basis, presumably with the hope that the allegations would turn out to be true or that MERS would fail to respond and its earlier recorded lien would be extinguished.

More importantly, a foreclosure action is an action in equity, and equity abhors forfeiture. Hayne Fed. Credit Union v. Bailey, 327 S.C. 242, 248, 489 S.E.2d 472, 475 (1997); Regions Bank v. Wingard Props., Inc., 394 S.C. 241, 256, 715 S.E.2d 348, 356 (Ct. App. 2011). Although MERS made a mistake in not realizing its superior lien position, that error was first precipitated and then exacerbated by BOW's false allegations in the complaint. Borrower is current on the MERS Mortgage. (Memorandum in Support of Motion to Vacate pp. 12-13). If the Foreclosure Decree is not vacated, MERS will lose its mortgage lien on the Property and Borrower will almost certainly stop paying her loan.

BOW claims that MERS could pursue a claim on the promissory note. Borrower, however, is already in default on the BOW Mortgage and, assuming the Property and a second tract subject to the BOW Mortgage are sold by BOW, there would be no significant assets against which MERS could execute any judgment that it receives. (See Jordan Aff. Ex. A). As a result, MERS will suffer a forfeiture and will have no recourse to recover the loan debt owed to it. This result would be a remarkable windfall for BOW, one which was set into motion by BOW's failure to confirm the status of the MERS Mortgage prior to filing suit and by the false statements in the Complaint.

For these reasons, MERS met the requirements for setting aside the Foreclosure Decree under Rule 60(b), SCRPC. The Special Master, in failing to consider all of the facts before him, including the false statements in the complaint, committed reversible error in denying the Motion to Vacate.

III. The Special Referee Erred in Denying the Motion to Vacate Because the Evidence Showed that the Foreclosure Decree Contained Clerical Errors that Could Be Corrected Pursuant to Rule 60(a), SCRPC.

The Special Referee also committed reversible error by not granting MERS' Motion to Vacate pursuant to Rule 60(a), SCRPC, which provides in part:

Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders.

For purposes of Rule 60(a), a clerical error "is a mistake or omission by a clerk, counsel, judge or printer, which is not the result of exercise of judicial function." Ex parte Strom In Re: Collins Entertainment Corp. v. Columbia "20" Truck Stop, Inc., 343 S.C. 257, 264, 539 S.E.2d 699, 702 (2000). A judgment entered by default may be corrected under Rule 60(a). See Tri-County Ice & Fuel, 303 S.C. at 241, 399 S.E.2d at 782.

The Special Referee erred in treating MERS' Rule 60(a) and 60(b) arguments together and not conducting a separate analysis regarding Rule 60(a)'s applicability to the facts before him. (Order Denying Motion to Reopen Judgment p. 6). In his Order denying the Motion to Vacate, the Special Referee stated in passing that "the only clerical error here was MERS just assuming the Complaint was accurate without any due diligence or investigation for two years." (Order Denying Motion to Reopen Judgment p. 8).

The Special Referee did address Rule 60(a) during the hearing on the Motion to Vacate, stating: "I am going to go ahead and rule that 60(a) relative to clerical mistakes

means clerical mistakes by the judge. And so I don't think that's germane whether it's clerical mistakes by the title company, and clerical mistakes by Plaintiff, clerical mistakes by the Defendant under 60(a)." (Hearing Transcript pp. 72-73). The Special Referee, however, misstated South Carolina law on this issue, which clearly states that Rule 60(a) covers clerical errors by the clerk, counsel for the parties, or the judge not related to a judicial function. Ex parte Strom, 343 S.C. at 264, 539 S.E.2d at 702.

The clerical mistake at issue in this case did not result from judicial function. While fact finding is a judicial function, see Jennings v. Sawyer, 182 S.C. 427, 189 S.E. 746, 749 (1937), here the Special Referee merely adopted the proposed decree presented by BOW's counsel, which contained false representations regarding lien priority. (Special Referee's Decree for Final Judgment of Foreclosure p. 4). Had MERS and BOW made competing presentations to the Special Referee that required the Special Referee to make a decision and rule, then there would have been an exercise of judicial function. Because the Special Referee merely adopted BOW's uncontested and false presentation of the BOW Mortgage's priority, the incorrect priority of the liens can be properly and accurately characterized as the kind of clerical mistake that can and should be corrected through Rule 60(a), SCRCF. Accordingly, the Special Referee's failure to address MERS' separate grounds for its Motion to Vacate is reversible error.

CONCLUSION

For the foregoing reasons, MERS respectfully requests that the Court overrule the Special Referee and vacate the Special Referee's Order denying the Motion to Vacate as well as the Foreclosure Decree.

Case No. 2013-CP-27-00253
Appellate Case No. 2015-002049
INITIAL BRIEF OF APPELLANT

Respectfully submitted,

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February 8, 2016

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM JASPER COUNTY

Darrell Thomas Johnson, Jr., Special Referee

Appellate Case No. 2015-002049
Civil Action No. 2013-CP-27-00253

RECEIVED
FEB 11 2016
SC Court of Appeals

Bank of Walterboro,.....Plaintiff/Respondent,

v.

Charles E. Bush aka Charles Bush, Rosemelle M. Shuler, First
Family Financial Services of Georgia, Inc., EquiFirst Corporation,
Mortgage Electronic Registration Systems, Inc. as nominee for BNC
Mortgage Inc., and South Carolina Department of Revenue,.....Defendants,

of whom Mortgage Electronic Registration Services, Inc. is the Appellant,

and

Bank of Walterboro and Rosemelle M. Shuler are the Respondents.

PROOF OF SERVICE

I hereby certify that on this, the 8th day of February, 2016, a copy of both the *Initial Brief of Appellants* and *Designation of Matter to be Included in the Record on Appeal* were served upon the following individual(s) by mailing a copy of the same with sufficient first class postage affixed thereto and addressed as follows:

Bank of Walterboro v. Charles Bush, et al.

PROOF OF SERVICE

Appellate Case No.: 2015-002049

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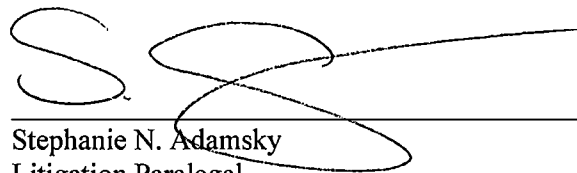
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REPLY TO:
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February 8, 2016

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The Honorable Jenny Abbott Kitchings
Clerk of Court, South Carolina Court of Appeals
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FEB 11 2016

SC Court of Appeals

**Re: Bank of Walterboro v. Charles E. Bush aka Charles Bush, Rosemelle M. Shuler, First Family Financial services of Georgia, Inc., EquiFirst Corporation, Mortgage Electronic Registration Systems, Inc., as nominee for BNC Mortgage, Inc., and SC Department of Revenue Appellate Case No. 2015-002049
Case No.: 2013-CP-27-00253
Our File No.: 52310.49481**

Dear Ms. Kitchings:

Enclosed please find the *Initial Brief of Appellants, Designation of Matter to be Included in the Record on Appeal* and the related *Proof of Service* which we have prepared in connection with the above referenced appeal. It would be greatly appreciated if you would please file same and return the file-stamped copies in the enclosed envelope.

If you have any questions or concerns, please contact me at your convenience.

With warmest regards, I am

Yours very truly,



Stephanie N. Adamsky
Litigation Paralegal

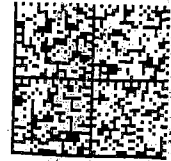
/sna

cc: The Honorable Darrell Thomas Johnson, Jr.
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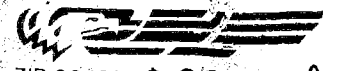
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