IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Mikell R. Scarborough, Master in Equity

Case No. 2013-CP-10-4248

Belle Hall Plantation Homeowner's Association.....Respondent,

v.

John A. Murray, Trustee of the John E. Murray and
Gloria C. Murray Family Trust, Defendant

Of whom David Conor Keys & Karen Keys, Third Party Plaintiffs.....Appellants.

FINAL REPLY BRIEF OF APPELLANTS

November 22, 2015
Charleston, SC

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INTRODUCTORY STATEMENT

In this Reply Brief, Appellants address and reply only to those allegations and issues raised directly in the substance of Respondent's Initial Brief. Appellants would assert that any issue or allegation raised in Appellants' Initial Brief, but not address by Respondent in the body of its initial brief, or addressed with only conclusory remarks is deemed conceded to and abandoned. First Savings Bank v. McLean, 314 S.C. 361, 444 S.E.2d 513 (1994) ("issues not argued in the brief are deemed abandoned); R& G Construction, Inc. v. Lowcountry Regional Transportation Authority, 343 S.C. 424, 437, 540 S.E.2d 113 (Ct. App. 2000) ("An issue is deemed abandoned if the argument in the brief is only conclusory."); Fields v. Fields, 342 S.C. 182, 536 S.E.2d, 684 (Ct. App 2000) (fn. 8: "she fails to argue the issue in the body of the brief and it is therefore deemed abandoned."); Jinks v. Richland County, 355 S.C. 341, 585 S.E.2d 281 (2003) (fn. 3: "Since the County failed to argue this issue in the body of its brief, the issue deemed abandoned."); Muir v. CR Bard, Inc., 336, S.C. 266, 519 S.E.2d 583 (Ct. App.1999) (conclusory arguments are deemed abandoned); Fields v. Melrose Limited Partnership, 312 S.C. 102, 439 S.E.2d 283 (Ct. App. 1993) (an issue is deemed abandoned on appeal and therefore, not presented for review, if it is argued in a short, conclusory statement without supporting authority).

I. APPELLANTS ARE BONA FIDE PURCHASERS FOR VALUE.

A. It was an error for the Master to decline to rule on Appellants' BFPV status prior to the Order of April 9, 2015.

Respondent asserts in its brief: "[t]he Master had initially declined to rule on the issue of Appellant's contested status as a Bona Fide Purchaser for Value. He reiterated this in his Amended Order of February 5, 2015, when he ruled that he did not find it necessary to reach this issue in light of his having ruled the judgment and sale void." (Resp. In. Br., page 3) However,

statute and case law make clear: "[u]pon the execution and delivery by the proper officer of the court of a deed for any property sold at a judicial sale under a decree of a court of competent jurisdiction the proceedings under which such sale is made shall be deemed res judicata as to any and all bona fide purchasers. . ." S.C. Code Ann. § 15-39-870.

In this case Appellant's asserted they are Bona Fide Purchasers for Value ("hereinafter BFPV") in their initial Memo in Opposition to the Motion to Vacate filed on July 3, 2014 (R. pp. 321-334); during the July 3, 2014, hearing on the Motion to Vacate (R. p. 138, lines 5-9); in a Motion to Reconsider the Order filed July 22, 2014 (R. pp. 79-91); during the hearing on August 18, 2014 (R. p. 157, line 18- R. p. 163, line. 4); in a Motion to Reconsider the Order filed August 20, 2014 (R. pp. 99-117); in a Motion to Reconsider the Order filed February 10, 2015 (R. pp. 118-126); in Appellants second memorandum on the subject filed April 7, 2015 (R. pp. 380-390); and during a hearing on April 9, 2015 (R. p. 194, line 4 – R. p. 199, line 19). However, it was not until the Order filed April 9, 2015, that the Master finally relinquished and ruled as to Appellants BFPV status. The statute makes clear that a ruling of BFPV is dispositive. Appellants asserted they are BFPV, and the Master should not have refused to rule on it for nearly a year, given that the ruling could have had a dispositive outcome in a matter.

B. Appellants acquired the deed in good faith.

The Masters April 9, 2015, Order found Appellants met two of three criteria for BFPV, but did not meet the third criteria namely purchase before notice of a title defect or lien. (R. pp. 51-53). Respondent asserts that Appellants did not purchase in good faith because over a week after the sale on May 15, 2015, Appellants learned Respondent intended to file a motion, and then Appellants tendered the *balance* of the purchase price on May 16, 2015. Respondent asserts Appellants had a duty to immediately inform the Court of this knowledge, or to present that fact

at the hearing on July 3, 2015. Appellants did not do so on the opinion and belief that the fact was a not issue which needed to be raised. Further Respondent never raised the fact either, though respondent knew or should have known the relevant facts with regard to the alleged issue. Without, Respondent raising the issue Appellants were unaware it was a subject which Respondent believed should be addressed. Respondent and/or their counsel new the date of the phone call in question and had the ability to look at the online public record or ledger for the case to see that Appellant's tendered the balance on May 16, 2015[1].. (R. pp. 396-399). Respondent could have easily raised the alleged issue at the original hearing on July 3, 2015, when Appellant's asserted they were BFPV, nonetheless Respondent did not raise the alleged issue to Appellants or the Court.

Respondent asserts "[t]he law on this issue is quite clear" but then simply reiterates the statutory language without further support or citation to the assertion the law is clear. Appellants, however would contend that our state Courts of Appeal have not addressed the issue before this Court. The issue before the Court is two-fold. First, when is the date of notice determined from? Is it the date of sale, or the date of payment of the remainder of the balance due from the judicial sale, or as the Master contends the date of execution of the deed? Second,

[1] At the August 18, 2015 hearing, Respondent's Counsel stated with regard to this issue: "To the extent that this should have been addressed at the last hearing I would argue that it was newly discovered evidence. While I attempted to find out when Mr. Keys had actually paid for the deed some people in your office might be able to tell you that. I could not obtain that. I obviously could tell when it was executed, but the timing is highly suspect." (8/18/14 Trans. p. 21, lns 16-25). Again Respondent had the means and the knowledge to raise this alleged issued on July 3, 2015, but did not do so. Additionally it is disconcerting Respondent beginning on the July 3, 2014, and thereafter has continued to call attention to the fact that the public record or ledger for this case contains a notation dated 3/31/14, which states as a caption or description: Hearing held – "No Sale before May 20, 2014" but failed to acknowledge that the same record or ledger that she called to the Courts attention on July 3, 2014, also contains a caption or description dated May 16, 2014, which states: "Keys, David Conor: Master/Sale Amount Paid in Full" (See public record/ledger screen shoot; 7/3/14 Trans.: p. 6, lns 16 – 24).

what constitutes notice of a lien or defect in the title to real property, or put another way, does a motion to vacate an order of foreclosure and sale constitute notice of a lien or defect in title to real property? Appellants would assert that there are a number of South Carolina District Court Cases which can provide guidance upon the subject.

1. The date of sale should be the date for determining when notice was required for the BFPV statute.

May 6, 2014 is the date of sale and the relevant date for determining whether the Appellants' met the payment prior to notice of a title defect element of BFPV. Bankruptcy Courts in South Carolina as well as the District Court of South Carolina have held "the actual foreclosure sale as the cut-off date for curing mortgage defaults." In re Watts, 273 B.R. 471, 476 (Bankr. D.C. 2000). *In re Watts*, speaking of the debtors right to cure or redemption noted: "The Court acknowledges that the foreclosure process may require steps following the auction sale in order to conclude the sale and make it effective; however, . . . [p]recedent in this Court and this District has found that upon the falling of the gavel, the debtor is left with bare legal title; thus, the fact that the sale procedure has yet to be completed does not alter the fact that the only right that debtor is left with is the right to raise questions regarding the sale procedure.[2]" Id. The court went on to state: "[a]s the court in In re Bobo emphasized, [w]hatever process is used to bid up the property, the property is sold at the foreclosure sale once the rights and obligations vest in an entity to acquire the property as a result of making the highest bid. The additional steps of obtaining court approval . . .paying the purchase price, and recording the deed may be necessary to consummate the sale, but that does not alter the fact that the purchaser's right to acquire the property has intervened - - that the property has been sold at a foreclosure sale - - to the detriment of the debtor." Id. (quoting In re Bobo, 246 B.R. 453, 456 (Bankr. D.C. 2000). Our

[2] No allegations of an improper sale procedure have been raised in this matter.

Bankruptcy Court has continually held "the sale is over when the hammer falls." In re Riverfront Props., LLC, 405 B.R. 570, 573 (Bankr. D.C. 2009) (Citing : In re Watts; In re Holmes, C/A No. 99-08796-W (Bankr, D. S.C. 11/23/1999); In re Brown, C/A No. 87-02507-B, Adv. Pro. 87-0281-B (Bankr. D. S.C. 1/28/1988); In re Agripen Grain Co., C/A No. 83-03606; Adv. Pro. 86-0413-D (Bankr. D.S.C. 7/31/1987).

In this case Appellants purchased the property from the Master at a public judicial auction on May 6, 2014, at which time Appellants tendered the initial required purchase-money deposit to the Court. On May 6, 2014, Appellants had no knowledge of an adverse claim to title, that the Trust intended to file a motion to vacate, or knowledge of any other alleged defect in the Appellants' title to the subject property[3]. The Master in response to the Appellants assertion that May 6, 2014, was the date notice should be determined from stated: "[Appellants] argues that the sales date – not the deed issuance date – determines when notice of a defect should be known; however, this court finds, based upon its experience that no fixed date can determine when the interests of justice dictate a sale should be overturned." (R. pp. 51-53) As to the BFPV statute this Court has stated that "The rationale for the statute is the well established public policy of protecting good faith purchasers and upholding the finality of a judicial sale." Robinson v. Estate of Harris, 378 S.C. 140 662 S.E.2d 420 (Ct. App. 2008). This rationale would be further promoted by a bright line rule that a potential purchaser only be responsible for knowing what is in the public record up to the point of sale. To do otherwise as the Respondent and the Master contend would create a bizarre result that a potential bidder must fend against matters that may arise after the point of public sale. That is a result that defeats the well-grounded public policy

[3] The Trust did not even retain counsel until May 9, 2014. (7/3/14 Aff. Mur)

supporting the finality of a judicial sale. The Master erred by stripping the concept of finality of judicial sales and penalizing the successful bidder as a result of after sale events.

2. Notice of an intent to file the Motion to Vacate did not constitute notice of a defect or lien in the title to the real property.

The Master's Order states: "[t]he record establishes that the Purchasers, with notice of a potential claim from the defaulting owner, rushed to the court to pay the balance due. . . Therefore, the Court finds the [Appellants] did not act in good faith and with integrity of dealing." (R. pp. 51-53). Appellants would assert that pursuant to this Court's findings in Ashton, notice of an intent to file a Motion to Vacate did not constitute notice of a lien or defect in the title to the real property. Bloody Point Property Owners Association, Inc. v. Ashton, 410 S.C. 62, 762 S.E.2d 729 (Ct. App. 2014). Respondent contends that the motion which was subsequently served upon Appellants provided Appellants with notice that the Defendant had not been properly served with notice of the matter, which therefore constituted notice of a defect in Appellant's title to the real property. Respondent asserts its Motion to Vacate served as a notice to Appellants of a defect in Appellants title because it alleged the Trust had never properly been served. Appellants assert there is a distinction between a defect in title to real property and an alleged defect in the procedure of a civil action, and in support of that assertion Appellants cited Ashton which states:

> "It must be presumed from the judgment rendered that the Court considered and adjudicated the regularity and sufficiency of each and every step in the proceedings leading up to it, including the sufficiency of the complaint, the issuance and service of process upon the defendants, and the rights and interests of the parties to the action under the allegations and evidence; and although the conclusions with respect to those matters, or any them, might have been erroneous, so that they would have been reversed on appeal they do not make the judgment void collaterally." Ashton, at 68 (quoting: Gladden v. Chapman, 106 S.C. 486, 91 S.E. 796, 797 (1917).

Appellants as purchasers at a judicial sale are entitled to rely upon the Courts rulings in the foreclosure action as to a potential claim of defective service asserted by the Trust. The Clerk of Court issued an Order of Publication and the Court determined in the Order of Foreclosure that the Trust had properly been served by publication when the Court stated service had been properly achieved. (R. pp. 9-19) The Trust's Motion did not constitute a notice of and adverse claim or defect of title to Appellants.

C. Appellants testimony and pleadings were not false and misleading.

Respondent in its brief asserts "The facts and history of the case support the Master's findings. Sadly they demonstrate a persistent pattern of false and misleading pleadings and testimony by the lead Appellant. . . Had the lead Appellant been forthcoming with the facts at the initial hearing in regards to the circumstances under which the Appellants had acquired title to Respondent's property, the Respondent would have then been afforded the opportunity to object to their status and the Master would have ruled on that objection. The sole reason this case required multiple hearings and orders is that the Appellants failed his duty to be candid with the court and the facts were disclosed in piecemeal fashion. The situation did not become clear to the Master until the final hearing, which occurred on April 9th, 2015." (Resp. Brf, p. 5, 8).

Appellants' affirmatively dispute the veracity and accuracy of Respondent's statements. As stated above Appellants asserted at the hearing on July 3, 2015, that they were BFPV, and Respondent had the means and knowledge to raise objection to that assertion but elected not to do so. Thereafter, as Respondent noted in its brief, on August 7, 2015, Respondent's counsel, contact Appellants and asked for the first time when Appellants' learned Respondent intended to file a motion, to which Appellant's responded May 15, 2015, and stated how they learned the information. That was the first time Respondent elected to question or raise the alleged issue to

Appellants. Then on August 14, 2014, Respondent filed an affidavit of Respondent's counsel proffering testimony on the May 15, 2014, and August 7, 2014, phone conversations. Not till the hearing August 18, 2014, was the alleged issue presented before the Court wherein Appellants stated:

> "The big fact that we disagree as to the meaning of is that on May 15th [Respondent's counsel], contacted [Appellant's Employer], for whom I work. They discussed a number of different things. In the course of it [Respond's Counsel] mentioned to [Appellant's Employer] this matter. [Appellant's Employer] recognized what was she was talking about and said, the gentlemen who works for me is the purchaser. They stopped talking about it. That's May 15th. I had knowledge on May 15th. May 16th, I received the motion. On May 16th I also tendered the remainder of the money. *I would assert that again that it goes back to the date of sale.* If you look at Spence v. Spence which is one of the commonly cited cases as to bona fide purchaser. . .page 119 – it's an old case, 1916, Walker v. Taylor, and they're referencing that it's not a bona fide purchaser because they had actual knowledge prior to the sale. They didn't have any actual knowledge prior to the sale, your Honor. Again, I would assert that it is not a defect in title if they filed a motion." (R. p. 162, line. 1 – R. p. 163, line 5.)

Respondent's assertion the Appellants have made false statements and misrepresentations to the Court is completely inaccurate as exemplified by record before this Court. Upon the first instance of this alleged issue being raised by Respondent, to Appellants and the Court, Appellants openly and honestly presented all the facts within their knowledge regarding the alleged issue.

Additionally, Respondent was incorrect in stating that due to Appellants' alleged misleading statements to the Court, the Master was unable to make a determination as to Appellant's BFPV status until April 9, 2011. Respondent incorrectly asserts "[t]he sole reason this case required multiple hearings and orders is that the Appellants failed his duty to be candid with the court and the facts were disclosed in piecemeal fashion. The situation did not become clear to the Master until the final hearing, which occurred on April 9th, 2015" (Resp. Brf, p. 5, 8). August 18, 2014, was the first time Respondent raised this alleged BFPV issue before the Court.

On August 18, 2014, Appellants provided all their knowledge on the subject to the Court as quoted above. On August 18, 2014, both sides had presented the Court the facts and arguments regarding the alleged BFPV issue. However, the Court did address the issue on August 18, 2014; nor by its Order denying reconsider filed August 20, 2014; nor by is Order filed September 19, 2014, denying a subsequent motion to reconsider; nor by its Order filed February 10, 2015, amending the Order of July 22, 2014. Between August 18, 2014, and prior to April 9, 2015, the Court could have addressed, the alleged BFPV issue asserted by Respondent. The Court's failure to address whether Appellants were BFPV, was not the result of false or misleading statements by Appellants.

II. THE MASTER ERRED IN RULING THE DEED, SALE AND ORDER OF FORECLOSURE WERE VOID.

A. The Master Erred in granting Respondent's Motion to Amend the Order pursuant Rule 60(b)(4), SCRCP.

1. Respondent failed to timely move pursuant to Rule 60(b)(4).

"It is well settled that ordinarily a party may not receive relief not contemplated in his pleadings. While it is true that pleadings in the [ ] court must be liberally construed, this rule cannot be stretched so as to permit the judge to award relief not contemplated by the pleadings. Due Process requires that a litigant be placed on notice of the issues which the court is to consider." Heins v. Heins, 344 S.C. 146, 152, 543 S.E.2d 224 (Ct. App. 2001). A party cannot use Rule 59(e) to present an issue the party could have raised prior to judgment but did not. "Rule 59(e) motions are not vehicles for bringing before the court theories or arguments that were not advanced earlier." Hickman v. Hickman, 301 S.C. 455, 392 S.E.2d 481 (quoting: Natural Resources Defense Council, 705 F. Supp. 698, 701 (D.D.C. 1989), vacated on other grounds, 707 F. Supp. 3 (D.D.C. 1989)). A party cannot request the Master amend his Order to

make findings of fact and conclusions of law on issues not previously raised before the Master issued the Order. Id. A party cannot raise a defense to an asserted issue by way of a Rule 59(e) motion which could been raised prior to the order See Patterson v. Reid, 318 S.C. 183, 456 S.E. 2d 436 (Ct. App. 1995); In re Beard, 359 S.C. 351, 597 S.E.2d 835 (Ct. App. 2004); Gainey v. Gainey, 382 S.C. 414, 675 S.E.2d 792 (Ct. App. 2009)

Here the Trust did not assert that the Order of Foreclosure and Sale should be vacated pursuant to Rule 60(b)(4) SCRCP, until after the Master had filed the Order of July 22, 2014. The Trust's August 4, 2014, Motion to Amend is the only time the Trust ever made a reference to Rule 60 (b)(4), SCRCP. The Motion simply makes an unsupported conclusory remark stating: "Conclusions of Law: 1) The Order of Judgment and Foreclosure dated [sic] is Void under SCRCP 60 (b)(4)."[4] (R. pp. 92-98) The Trust did not cite any facts or case law to support the assertion. The Trust's August 18, 2014, Memorandum does not reference Rule 60(b)(4), nor did the Trust ever reference Rule 60(b)(4) during *any* hearing in this matter. Additionally, Trust never asserted an issue as to personal jurisdiction or due process in any motion, memorandum, or hearing before the Court in this matter. In conclusion the Trust did not timely and appropriately move pursuant to Rule 60(b)(4), SCRCP and the Master abused his discretion in granting the Trust's Motion pursuant to Rule 60(b)(4).

2. Negligence is not an appropriate basis for granting a Motion Pursuant to Rule 60 (b)(4), SCRCP.

"The definition of void under the rule [60(b)(4)] only encompasses judgments from courts which failed to provide proper due process, or judgments from courts which lacked subject matter jurisdiction or personal jurisdiction. . . The requirements of due process not only

[4] The Motion also states as conclusions of law that the Order of foreclosure should be granted pursuant to Rule 60(b)(1),(3), and (5) as well.

include notice, but also include an opportunity to be heard in a meaningful way, and judicial review." Universal Benefits, Inc. v. McKinney, 561 S.E.2d 659 (Ct. App. 2002).

In this case the Court amended its Order of July 22, 2014, to include the additional finding of gross negligence. Gross negligence is not a finding that the court lacked subject matter or personal jurisdiction in this action. Therefore it was an error for the Master to grant, the Respondent's motion to Amend the Order of July, 22 2014 to find that the Order of Foreclosure and sale should be vacated under Rule 60(b)(4), based upon the Courts finding of gross negligence on the part of the Plaintiff.

3. Respondent slept upon its rights therefore the Master erred in granting relief pursuant to Rule 60(b)(4), SCRCP.

The Courts findings in McKinney are analogous to this matter. In McKinney the Court found that the order should not have been vacated under Rule 60(b)(4), SCRCP, based upon due process or personal jurisdiction because it was undisputed the party was afforded notice of the order, an opportunity to be heard and to receive judicial review of the order. The Court found the party received notice in time to move for reconsideration pursuant to Rule 59(e), SCRCP, and the party could have filed an appeal, but did not timely avail itself of either procedural remedy. The same is true in this case. On or about March 26, 2014, the Trust had actual notice that a foreclosure hearing had been held. (R. pp. 258-263) The Master did not file the Order of Foreclosure until April, 8, 2014 (R. pp. 9-19). The Trust had plenty of time to avail itself of the procedural remedy provided by Rule 59, SCRCP, and if the Master denied the motion for reconsideration, the Trust could have sought further judicial review through the Court of Appeals. However, the Trust did not timely avail itself of these remedies. Therefore the Master abused his discretion to Master when he amended his Order to state that Order of Foreclosure was void pursuant to Rule 60(b)(4).

B. The Master erred in finding the Clerk of Courts Order of Publication was a structural defect in the case.

1. The Master cannot ignore binding precedent

In this case, as Appellants described in great detail in their initial brief, the Master lacked the authority to overturn the Clerk of Court's factual findings with regard to the Order of Publication. Appellants' cited the controlling case law and precedent to the Master at every opportunity. Thereafter the Master in his Amended Order of February 10, 2015, stated "The Court is mindful of the standard set forth in *Yates v. Gridley*, 16 S.C. 496, 500 (1882) and subsequent cases regarding the finality of the finding of due diligence of the Officer issuing the Order of Publication in the absence of fraud or collusion. . . To the extent that the Clerk of Court might have and did not discover the grossly negligent efforts to effectuate service, the Court views this as a "structural defect in the constitution of the trial, (defying) analysis by harmless error standards This defect "effectuated the trial from beginning to end" and resulted in a default judgment of foreclosure. [(citations omitted)]. (R. pp. 42-50). The Master's finding that Clerk of Court's findings in the Order of Publication constituted a structural defect in the case is a theory not recognized by the Courts of Appeals of this state, nor supported by the case law of those Courts.

Additionally, though the Master stated that the Plaintiff's attempted service of the Respondent constituted gross negligence and did not involve fraud, nonetheless given the Master's finding of that the actions and/or inactions of Plaintiff resulted in a structural defect of the case, it is worth discussing the distinction between intrinsic and extrinsic fraud in a matter, if only for purposes of analogy.

As Appellants noted in their July 3, 2014, memorandum and during the July 3, 2014, hearing on the motion to vacate there is a distinction between intrinsic and extrinsic fraud.

"Historically this Court has held that in order to obtain equitable relief from a judgment based on fraud, the fraud must be extrinsic." Raby Construction, L.L.P. v. Orr, 358 S.C. 10, 594 S.E.2d 478 (2004); Bryan v. Bryan, 220 S.C. 164, 66, S.E.2d 609 (1951); Chewning v. Ford Motor Co., 354 S.C. 72, 579 S.E.2d 605 (2003). "Extrinsic fraud is fraud that induces a person not to present a case or deprives a person of the opportunity to be heard. Intrinsic Fraud, on the other hand, is fraud which, misleads a court in determining issues and induces the court to find for the party perpetrating the fraud. The classic case of intrinsic fraud is perjured testimony or presenting forged documents at trial. Allegations that a party failed to disclose documents also generally amount to intrinsic, rather than extrinsic fraud. Relief is granted for extrinsic but not intrinsic fraud on the theory that the latter deceptions should be discovered during the litigation itself, and to permit such relief undermines the stability of all judgments." Orr, 358 S.C. at 20 (Citations Omitted).

In this case Respondent asserted "Plaintiff presented a false, misrepresentative or fraudulent, and fatally defective affidavit of due diligence to the court." (R. pp. 67-70). The key words in the assertion are *presented to the court*, the Affidavit of Publication about which Defendant complains was filed with the Court, and was one of the documents within the Court's purview when the court gave its Order of Publication, and wells as the Order of Foreclosure and Sale. It was within the Courts means and ability to discovery any misrepresentation, deception, or defective nature within the affidavit. If fraud is present as to the Affidavit (which the Appellants would contend it is not), then it is intrinsic fraud and not extrinsic. A motion under Rule 60(b) cannot be granted for instances of intrinsic fraud. Therefore, by way of analogy a the Master erred in determining that *Yate v. Gridley* and its progeny could be disregard because

Plaintiff's actions or inactions with regard to attempted service could not have been discovered by the Clerk of Court and therefore constitute a structural defect in the case.

2. The Master erred in ruling that Plaintiff failed to comply with South Carolina Code Ann. § 15-9-740.

"It is well settled that ordinarily a party may not receive relief not contemplated in his pleadings. While it is true that pleadings in the [ ] court must be liberally construed, this rule cannot be stretched so as to permit the judge to award relief not contemplated by the pleadings. Due Process requires that a litigant be placed on notice of the issues which the court is to consider." Heins at 152. A. party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not." "Rule 59(e) motions are not vehicles for bringing before the court theories or arguments that were not advanced earlier." Hickman, 301 S.C. 455, 392 S.E.2d 481 (quoting: Natural Resources Defense Council, 705 F. Supp. at 701, vacated on other grounds, 707 F. Supp. 3 (D.D.C. 1989)). A party cannot request that the Master amend his order to make findings of fact and conclusions of law not previously raised before the Master issued his order. Id. A party cannot raise a defense to an asserted issue by way of a Rule 59(e) motion which could been raised prior to the order See Patterson, 456 S.E. 2d 436; In re Beard, 359 S.C. 351, 597 S.E.2d 835; Gainey, 382 S.C. 414 675 S.E.2d 792.

In this case it was not until after the Order of July 22, 2014, after Respondent's Motion to Amend filed August 4, 2014, and not until Plaintiff's Memorandum filed on August 18, 2014, that Respondent first asserted that Plaintiff violated the publication statute. The Respondent cannot raise this issue for the first time after the Order and for that matter after it filed its motion to Amend. Additionally Respondent does not contend, that the Plaintiff did not publish the Summons and Complaint or that it did not mail a copy to the Respondent at a last known address, rather Respondent contends only that Plaintiff after the Order of Publication had been

granted failed to mail the summons and complaint to the correct last known address for Respondent. Therefore the Master erred in granting the untimely and incorrect request for relief.

III. RULE 60(B)(1), SCRCP, IS NOT AN APPROPRIATE ALTERNATIVE SUSTAINING GROUND IN THIS ACTION.

Respondent asserts that if this Court were to overturn the Master's rulings, then the Order Vacating the Order of Foreclosure and Sale should be affirmed under the additional sustaining ground of Rule 60(b)(1). "[R]espondent may raise an additional sustaining ground that was not even presented to the lower court, but the appellate court is likely to ignore it." I'On, LLC v. Town of Mt. Pleasant, 338 S.C. 406, 526, S.E.2d 716 (2000). Here, Respondent appears to argue that it should be excused from not promptly making an appearance in the action upon discovering on March 26, 2014, it had missed a foreclosure hearing on the merits a week prior. Further Respondent appears to assert that after attempting to contact Plaintiff unsuccessfully on or about March 26, 2014, it was reasonable for Respondent to wait until May 12, 2014 to retain an attorney though Respondent was aware a foreclosure hearing on the Merits had been held on March 18, 2014.

"Under Rule 60(b)(1), SCRCP, a party may be relieved from a final order for "mistake, inadvertence, surprise, or excusable neglect. In determining whether to grant a motion under Rule 60(b), the trial judge should consider (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." Mictronics, Inc., v. South Carolina Department of Revenue, 345 S.C. 506, 510-11, 548, S.E.2d 223 (Ct. App. 2001). "A party must make a showing that failure to avoid the mistake was justified." Coleman v. Dunlap, 306 S.C. 491, 495, 413 S.E.2d 15 (1992). "[A] party may not generally use Rule 60(b)(1) as a vehicle for relief from a mistake of law. Hillman v. Pinion, 347 S.C. 253, 256, 554 S.E.2d 427 (2001).

In this case Respondent did not Raise Rule 60(b)(1), SCRCP, as a grounds for vacating the Order, in either its Motion to Vacate or at the July 3, 2014, hearing upon the motion to vacate. It is not until Respondent's Motion to Amend that Order of July 22, 2014, that Respondent first makes a conclusory statement that the Court should grant Respondent relief under Rule 60(b)(1), for failing to answer and for failing to file a motion to reconsider the order after acquiring actual knowledge before the order of foreclosure had been filed. Additionally Respondent did not meet the elements for determining whether it is appropriate to grant relief pursuant to Rule 60(b)(1), SCRCP.

As to the first, element respondent asserts that upon learning of the foreclosure action Respondent was prompted file a motion to vacate. However, Respondent's actions evidence a continued inaction and/or dilatory action for a period of years. As Respondent stated in its brief it took title to the property on October 26, 2011 (Resp. Brief p. 11). Respondent does not contest that it failed to pay the assessments due to Plaintiff for a period of years, though as Respondent states it had the ability to pay. (R. pp. 258-263). On March 26, 2014, Respondent learned that a foreclosure hearing on the merits had been held March 18, 2014, and attempted to contact Plaintiff, unsuccessfully. (R. pp. 258-263). Respondent made no further attempt to pay the debt it admitted was owed until after the sale. An Order of foreclosure was filed on April 8, 2014, giving Respondent plenty of time to file a Motion to Reconsider after learning of the foreclosure. Respondent did not file a Motion to reconsider and in fact waited for more than a month after the Order of Foreclosure until retaining counsel to file the Motion to Vacate. (R. pp. 258-263). As Respondent stated: "When the tenants put it on my doorstep and I looked at it, the next day I contact the [Plaintiff's Counsel]. . . I just waited for some kind of response. And when it didn't come that's when I went out and got lawyers. I was not aware –the date on the letter that I

received had already passed, *so I assumed that everything had already happed and just waited for her to come back to me.* And when she did not it was a couple weeks and I contacted lawyers." (R. p 145, line 17 – R. p. 146, line 1). The sale was held on May 6, 2014. On May 9, 2014, Respondent retained counsel, and on May 19, 2014, Respondent's Motion to Vacate was filed with the court. After Respondent learned a foreclosure hearing on the merits had occurred Respondent was dilatory in taking available actions to protect Respondent's interest in the Property.

As to the second element, the reasons for the failure to act promptly, Respondent asserts that its dilatory actions were the result of attending to the probate estates of the Trustee's parents. However unfortunate events of the Trustee's parents passing, they are too far removed and remote from the relevant events with regard to this action to be a proper basis for the Respondents dilatory inaction. The July 3, 2014, Affidavit of John A. Murray states that Respondent *took title to the property on* October 26, 2011, thereafter after the Trustee's parents passed in November of 2011 and June of 2012. Though Respondent failed to make assessment payments to Plaintiff in 2012 and 2013, this action was not initiated until July of 2013, and Respondent upon gaining knowledge of the action did not fail to act in protection of Respondent's rights in the action until after March 26, 2014.

As to the third element, the existence of a meritorious defense, Respondent states: "On information and belief, the Respondent had meritorious defenses amongst which were Plaintiff's failure to mitigate damages, violations of collections statutes, payment." With regard to all of the asserted meritorious defenses, Respondent failed to raise the defense prior to this appeal and fails state anything more than a conclusory remark with regard to each. Wilder Corp v. Wilke, 330 S.C. 71, 497 S.E.2d 731 (1998). (A party cannot raise an argument for the first time on appeal);

Construction, Inc. v. Lowcountry Regional Transportation Authority, 343 S.C. 424, 437, 540 S.E.2d 113 (Ct. App. 2000) ("An issue is deemed abandoned if the argument in the brief is only conclusory.");

With regard to the mitigation of damages Plaintiff's "only duty was to take reasonable steps to avoid those damages which were avoidable once the contract was breached." Bannon v. Knauss, 282 S.C. 589, 594, 320 SE2d 470 (Ct. Appeals 1984). In this case Respondent admittedly failed to pay assessments to Plaintiff for a period of years. Plaintiff sought to limit further damage by initiating foreclosure to recover payment of the amounts owed. Therefore Plaintiff did mitigate its damages.

With regard to the to the assertion that Plaintiff violated collection statutes, the statement is ambiguous at best. However, to the extent Respondent is referring to the Fair Debt Collection Practices Act and/or the South Carolina Consumer protection code, neither are applicable causes of action to assert against Plaintiff. See 15 U.S.C 1692(a)(6) (A person or entity attempting to collect a debt owed to itself is not a debt collector for purposes of the FDCPA.), S.C. Code Ann. § 37-1-201(1)(a) (This title only applies where a consumer of this state was issued credit.).

Finally with regard to the assertion that the Master's Order could be affirmed on alternative sustaining grounds pursuant Rule 60(b)(1), SCRCP, Respondent states: "[t]he "other part in the action" being the Plaintiff has not been prejudiced. . ." Respondent fails to recognize that Appellants by purchasing the property at sale and being deeded the property by the Master, are a party to this action with standing to dispute Respondent's claims and appeal the Master's ruling. Appellants would assert that they have been greatly prejudiced by the Master vacating the sale and Appellants deed, stripping Appellants of their possession and control of the property,

and affirmation of the Master's Order on any additional sustaining grounds would prejudice Appellants further.

Additionally, Respondent asserts that when he initially consulted with his counsel, counsel reviewed the record for this case and saw an alleged notation that the sale should not take place prior to May 20, 2014 (Resp. Brief, p. 15; R. p. 132, lines 16-24). However, there is no evidence that Respondent actually mistakenly relied upon this alleged notation in failing to act prior to the sale, and further the evidence appears to show that Respondent and/or his counsel were unaware of the May 20th notation until May 9, 2014, when Respondent's counsel examined the public record or ledger or for the case, which also noted that a sale occurred on May 7, 2014. (See Resp. Brief, p. 15; R. p. 132, lines 16-24; R. pp. 258-263; R. pp. 396-399).

Therefore for all of the reasons stated above the Master's Order should not be affirmed by this Court under the alternative sustaining ground of Rule 60(b)(1), SCRCP.

IV. THE MASTER IMPROPERLY DENIED APPELLANTS MOTION TO STRIKE CERTAIN AFFIDAVITS.

"An issue is deemed abandoned if the argument in the brief is only conclusory." Construction, Inc. v. Lowcountry Regional Transportation Authority, 343 S.C. 424, 437, 540 S.E.2d 113 (Ct. App. 2000). Additionally an argument raised only in a footnote rather than the body of a brief is deemed abandoned. Fields v. Fields, 342 S.C. 182, 536 S.E.2d, 684 (Ct. App). A party cannot use Rule 59(e) to present an issue the party could have raised prior to judgment but did not. "Rule 59(e) motions are not vehicles for bringing before the court theories or arguments that were not advanced earlier." Hickman, 301 S.C. 455, 392 S.E.2d 481 (quoting: Natural Resources Defense Council, 705 F. Supp. 698, 701 (D.D.C. 1989), vacated on other grounds, 707 F. Supp. 3 (D.D.C. 1989)). A party cannot request the Master amend his Order to make findings of fact and conclusions of law on issues not previously raised before the Master

issued the Order. Id. A party cannot raise a defense to an asserted issue by way of a Rule 59(e) motion which could been raised prior to the order See Patterson, 456 S.E. 2d 436; In re Beard, 359 S.C. 351, 597 S.E.2d 835; Gainey, 382 S.C. 414 675 S.E.2d 792.

In this case, Respondent did not file the affidavits in question until after the Order of July 22, 2014, Vacating the Order of Foreclosure and Sale. Additionally in its brief Respondent's sole dispute of Appellants Appeal of the Master's Order Denying Appellant's Motion to Strike certain affidavits comes in footnote two on page seven of Respondent's brief. The footnote is conclusory and failed to cite any authority to support Respondents assertions. Finally, though it is unclear, to the extent Respondent is asserting that Appellant's Motion to Reconsider filed on August 1, 2014, was a motion under 59(c), SCRCP, for a new trial based upon affidavits, that assertion is not correct. As Appellants stated to the Court during the August 18, 2014, hearing on the Motion, Appellants Motion was a standard Rule 59(e), SCRCP, Motion to Reconsider. No new arguments, evidence or allegations of fact were presented in the Motion and Appellants did not file affidavits with the Motion. (R. p. 164, lines. 8-20).

CONCLUSION

Based on the foregoing, the arguments contained in Appellant's Amended Brief and the lack of arguments in Respondent's initial brief this Court should reverse Master's Orders Vacating the Order of Foreclosure and Sale, Granting Respondent's Motion to Amend the Order of July 22, 2014, Denying Appellant's Motion for Stay and a Supercedeas Bond, and Denying Appellant's Motion to Strike Certain Affidavits.

RESPECTFULLY SUBMITTED,

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November 24, 2015
Charleston, SC

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Mikell R. Scarborough, Master in Equity

Case No. 2013-CP-10-4248

Belle Hall Plantation Homeowner's Association.....Respondent,

v.

John A. Murray, Trustee of the John E. Murray and
Gloria C. Murray Family Trust, Defendant

Of whom David Conor Keys & Karen Keys, Third Party Plaintiffs.....Appellants.

PROOF OF SERVICE

I certify that on this 25 day of November 2015, I have served the Final Brief and Final Reply Brief of Appellants upon all counsel of record by depositing a copy in the United States Mail, postage prepaid addressed as follows:

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