ORIGINAL

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

R. Murray Hughes
Special Referee

Case No. 2008-CP-39-2120

JP Morgan Chase Bank, National Bank
Respondents,

v.

Vanessa Y. Bradley
Appellant.

FINAL REPLY BRIEF OF APPELLANT

Susan Ingles
SOUTH CAROLINA LEGAL SERVICES
701 South Main Street
Greenville, SC 29601
Attorney for Appellant

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STATEMENT OF ISSUES ON APPEAL

I. **Did the Special Referee err as a matter of law when he denied the Appellant's motion to set aside the foreclosure sale of her property because holding the sale during the temporary suspension of the foreclosure action violated federal and state law set forth in HAMP, the TRO and the S.C. Supreme Court's Administrative Order governing foreclosures.**

II. **Did the Special Referee err as a matter of law in holding that the forbearance granted by Respondent to Appellant did not affect Respondent's rights to move forward with the Foreclosure Sale?**

III. **Did the Special Referee violate the appellant's right to procedural due process by affirming the default judgment that had lain dormant for a year and entering two (2) supplemental orders post judgment without providing a hearing and meaningful opportunity to respond?**

IV. **Did the Special Referee err as a matter of law in declining to grant discovery by Appellant and an evidentiary hearing pursuant to the 2009 AO?**

V. **Did the Special Referee abuse his discretion amounting to an error of law when he denied the Appellant's Motion under Rule 60(b)(3).**

INTRODUCTION

"No foreclosure sale will be conducted and you will not lose your home during this 30 day period" (Chase Letters dated 8-19-10 and 9-21-10 attached to 3-14-11; R. pp. 307-312). The Respondent sold Appellant's home at a foreclosure sale during the very thirty day period referred to in this letter, thus violating of The Homes Affordable Modification Program (hereinafter referred to as both "HAMP" and "HMP"), South Carolina Supreme Court Administrative Order 2009-05-04-01 on Mortgage Foreclosures and the Home Affordable Modification Program (HMP) (herein referred to as the "TRO") and the S.C. Supreme Court Administrative Order 2009-05-22-01 which rescinded and replaced the TRO (hereinafter referred to as the "2009

AO") in the process. These federal and state law imperatives required Mortgagees[1] to evaluate borrowers for loan modification and provide mortgagors the opportunity to challenge the decision on their application for modification. The Appellant's loan was subject to HAMP, the TRO and the 2009 AO. The Special Referee abused his discretion and erred as a matter of law when he denied the Appellant's Motion to Set Aside the Sale.[2] The Special Referee further erred as a matter of law in denying Appellant's Motion pursuant to Rule 59 (hereinafter referred to as "Motion to Reconsider") and failing to correct the errors outlined therein. Finally, the Special Referee erred as a matter of law in declining to vacate the orders issued in this case pursuant to Rule 60(b)(3) due to fraud, misrepresentation, misconduct, lack of due process, violation of the 2009 AO governing foreclosures in South Carolina and the TRO it replaced. If the Special Referee's judgment is allowed to stand it effectively renders the carefully crafted federal and state laws governing foreclosure unenforceable and the homeowners of this state unprotected from the arbitrary actions of mortgagees typified by this case.

STATEMENT OF THE CASE

This action commenced on December 30, 2008 with the filing of an unverified Lis Pendens, Summons and Complaint for foreclosure of a mortgage. The Appellant was served on December 30, 2008. Shortly thereafter in January 2009, the parties entered into review for a loan modification pursuant to HAMP. R. p p.307-312; Def. Ex. 5 Herndon Affidavit par. 5. Appellant did not file responsive pleadings as the parties continued to complete the HAMP

[1] Throughout this brief the term "mortgagee" is intended to refer to lenders, servicers, owners, holders and any other entity represented by the plaintiff designated in the caption of the case included, but not limited to, Federal National Mortgage Association ("Fannies Mae").

[2] The Motion to Set Aside Sale sought the following relief: 1) That the sale of the property herein and any deed arising there from be set aside; 2) That the Order and Supplemental Orders of Foreclosure be vacated and Defendant's default be set aside and the Defendant be allowed to file an Answer and Counterclaims; 3) That further action in this matter be stayed for at least 90 days or until such time as the permanent modification opportunities have been properly afforded to the Defendant. 4) That this Court order Plaintiff to supply Defendant with a sworn statement of the NPV values and of the specific facts showing that the loan is not eligible for a permanent modification under the Making Home Affordable Modification Program and state the facts showing that the modification process specified by the Guidelines has been completed properly. This should include all assumptions and calculations. 5) Grant such other and further relief as the Court deems just and proper.

evaluation, ultimately resulting in the granting of a Trial Period Plan under HAMP. R. p.131, Pl. Ex. 1. Respondent filed an Affidavit of Default on February 23, 2009.

The Respondent then had the case referred to Pickens County Attorney R. Murray Hughes as Special Referee on February 24, 2009. The Master's Order of Foreclosure and Judgment was entered on March 17, 2009 at the same time a sale date was set for April 6, 2009. The sale never transpired as the property was withdrawn from the sale by the Respondent while the parties attempted to work out a modification under the newly enacted HAMP. [3]

In light of HAMP requirements that the parties to covered mortgages attempt to workout modifications prior to any foreclosure, on May 4, 2009, the Chief Justice of the South Carolina Supreme Court issued the TRO pursuant to the petition of the Federal National Mortgage Association, known as "Fannie Mae". The TRO stayed all mortgage foreclosure actions and required an Affidavit to be filed in all pending cases of which the case at bar was one. The Chief Justice required that:

> "By May 15, 2009, the plaintiff in every mortgage foreclosure action stayed by this order shall serve on all other parties to the action (including petitioner and/or Freddie Mac as appropriate) an affidavit setting forth its belief whether the loan is subject to modification under the HMP. If the affidavit indicates that the loan is subject to modification under the HMP, the foreclosure shall be stayed pending a determination if the loan will be modified. If the loan is modified, the foreclosure action shall be dismissed. If the loan is not modified, the foreclosure may proceed.

The Respondent herein did not file the required Affidavit.

That Order was subsequently rescinded and replaced by the 2009 AO issued on May 22, 2009. The stated purpose of the order was to "insure that eligible homeowners have been afforded the benefits available under the HMP, the procedures for handling issues relating to the

[3] A HAMP modification consists of 2 stages. First a Participating Servicer is required to gather information and, if appropriate, offer the homeowner a Trial Period Plan or TPP (See US Treasury SD 09-01). The TPP defines a 3 month period in which the homeowner makes mortgage payments based on a formula that uses the initial financial information provided. Chase offers Trial Period Plans to eligible homeowners by way of a TPP Agreement which describes the homeowner's duties and obligations under the plan and contractually promises a permanent HAMP modification for those homeowners that execute the agreement and fulfill the documentation and payment requirements. If the homeowner executes the TPP Agreement, complies with objective documentation requirements and makes all 3 TPP payments, the second stage of the HAMP process is triggered, in which the homeowner is offered a permanent modification.

HMP are handled uniformly throughout the State, and mortgage foreclosure actions are not unnecessarily dismissed or delayed while HMP issues are resolved". To effectuate and harmonize these purposes, the Chief Justice promulgated specific, mandatory procedures to be followed in these cases. The 2009 AO required the filing of an Affidavit that must state:

> if the mortgage loan is owned, securitized or guaranteed by Fannie Mae or Freddie Mac, or if the servicer is participating in the HMP. If so as to either, the affidavit shall state the facts showing that the mortgage loan is not subject to modification under the HMP, or ***state the facts*** (emphasis added) showing that the HMP modification process specified by the Guidelines or Supplemental Directives has been completed without resulting in a modification. In the alternative, the affidavit may concede that the matter should be stayed until the HMP modification process is completed.

Respondent did not dismiss its action while the HAMP modification process proceeded, nor did it file any of the required Affidavits at that time. The parties entered into a temporary modification beginning in August 2009 which was performed by Appellant but not converted into a permanent modification after three months as contemplated by HAMP. R. p. 131 Pl.Tr. Ex. 1. Appellant continued making payments until April 2010 at the behest of Chase. 3-14-11 R. p.142 lines 18-19. No further filings in the dormant but un-dismissed foreclosure action occurred until May 17, 2010 when the Respondent filed an Affidavit of Non-eligibility for modification. The Affidavit simply stated:

> "The Plaintiff's servicing agent for the mortgage loan described in this foreclosure action is participating in the Home Affordable Modification Program, but the subject loan is not eligible for modification because the HMP modification process has been completed without a modification"

The Affidavit provided no explanation as to why there was no modification of the mortgage.

In June 2010, Chase offered, and Bradley accepted, a forbearance for the months of June, July and August while she tried to find employment. Despite the forbearance, a Notice of Foreclosure Sale (with sale date of August 2, 2010) was filed by the Respondent on June 25,

2010, along with Respondent's Affidavit in Support of Supplemental Judgment and a proposed Supplemental Order. The reason given in this Affidavit as authority to proceed was a reference to the outdated May 17, 2010 Affidavit. An Affidavit of Verified Statement of Account was filed by Chase on July 8, 2010. In July, Bradley notified Chase that she had obtained employment and a new loan modification application began. R. p.148 line 7- p. 149 line 19. Chase told Bradley that they would remove the property from the August 2, 2010 sale and it was in fact removed.

On August 19, 2010 Chase issued a HAMP denial notice to Bradley stating that she was denied a modification due to negative Net Present Value.[4] The letter gave Bradley 30 days to challenge the denial (as required by HAMP) and further stated "No foreclosure sale will be conducted and you will not lose your home during this 30 day period". R. p. 131 Pl. Ex. 3. This required 30 day period would expire September 18, 2010. The following day on August 20, 2010 the Respondent filed a Notice of Sale (with sale date of September 7, 2010), a Second Supplemental Order Post Judgment and an Affidavit in Support of Second Supplemental Judgment. The sale was erroneously set 11 days prior to the expiration of the 30 day HAMP procedural window.

This Affidavit referred to the May 17, 2010 Affidavit of Non-Eligibility as the authority to proceed under the 2009 AO and further stated that

> "prior to the scheduled sales date, the Plaintiff entered into a forbearance agreement with the Defendant, Vanessa Y. Bradley. The defendant has now defaulted on the terms of the forbearance agreement, and thus, the Plaintiff wished to proceed with the foreclosure and sale. . ."

The Affidavit did not explain what was meant by default on the terms of the forbearance.

[4] The Net Present Value Determination ("NPV test") is one of the eligibility factors a servicer is to determine before agreeing to contract a Trial Period Plan. Essentially, it tries to determine if the mortgagee would be better off if the mortgage loan was foreclosed as opposed to modified. Bradley had already passed the NPV test before being granted the TPP that was never made permanent.

Tthe parties continued the modification process with submission of documentation by Bradley and follow up requests by Chase during which Bradley was repeatedly told they were requesting that the foreclosure sale be postponed. R. p. 143 line 18- p.149 line 19. Nevertheless, the sale was ultimately not taken off the calendar as before and Appellant's house was sold on September 7 2010 to Chase as successful bidder and on September 14, 2010 a deed was issued by the Special Referee to Federal National Mortgage Association ("Fannie Mae") pursuant to an assignment of bid signed by Chase's attorney of record.

Appellant retained S.C. Legal Services and served and filed a Motion to Set Aside the Sale on September 20, 2010. The Master's Report of Sale, Disbursement and Order Confirming Sale were filed by the Special Referee's office on September 22, 2010 along with an Assignment of the Bid. The Affidavit 0of Publication of the Notice of the Sale was subsequently filed on September 29, 2010.

Pursuant to HAMP protocol,[5] the Appellant sent a written request for the specific details of the denial and the NPV inputs to Chase on September 20, 2011. R. p. 130, Def. Tr. Ex. 3. Though her home had been sold, Appellant received another denial of modification by letter dated September 21, 2011. Attachments to R.p.130, Def Ex. 5 this time stating that the reason was failure to complete the Trial Period Plan and giving 30 days for the Appellant to challenge the decision. Subsequently, in response to Bradley's request, the NPV inputs were provided by Chase by letter dated October 5, 2011.

On December 2, 2010 Respondent filed a Proposed Order for Substitution of Counsel that was granted and the subsequent Order filed on December 22, 2010. A hearing was held March 14, 2011 on Appellant's Motion to Set Aside Sale. The Appellant testified in person and

[5] The HAMP regulations require a 30 day challenge period after denial for modification. Specifically as to denial based on negative NPV, the borrower has the right to obtain all of the input data used to calculate the NPV, via written request during the 30 day window.

Respondent submitted the Affidavit of Charles Herndon, Vice President of the servicer Chase Home Finance, LLC in support of its position. An Order Denying the Appellant's Motion to Set Aside Sale was filed on April 29, 2011 and served on Appellant's counsel by mail from the Clerk of Court on May 9, 2011. Subsequently, the Appellant filed a Motion to Reconsider on May 24, 2011. Appellant filed a Notice of Appeal of the Order denying the Motion to Set Aside the Sale and underlying orders on May 25, 2011. An Order issued by the Special Referee was filed on Appellant's Motion to Reconsider was filed February 6, 2012 denying the Appellant's Motion to Reconsider and was served on Appellant's counsel on February 9, 2012. The appeal of that Order was filed February 22, 2012 and combined with the appeal of the April 29, 2011 order.

STATEMENT OF FACTS

Appellant was sued for foreclosure shortly after the Homes Affordable Modification Program (HAMP) came into existence, subjecting Fannie Mae, Freddie Mac or companies that accepted money under the TARP program to mandatory inclusion in HAMP. Therefore, the Respondent in this case "shall perform" the activities described in the program documentation "for all mortgage loans it services".[6] She was contacted by Respondent and led to believe modification efforts were taking place. In reality, foreclosure litigation efforts were proceeding to a quick foreclosure judgment and sale. This dual tracking of modification efforts and foreclosure litigation is a widespread practice that the Chief Justice of the S.C. Supreme Court has addressed via Administrative Orders.

In the case at bar, the foreclosure judgment was obtained in March 2009 within three months of filing the lawsuit while Respondent was simultaneously seeking documentation and information from the Appellant to comply with its obligation under HAMP beginning in January

[6] Under HAMP, the federal government incentivizes participating servicers to enter into agreements with struggling homeowners that will make adjustments to existing mortgage obligations in order to make monthly payments more affordable. Servicers receive $1,000 for each HAMP modification.

2009. R. p. 130, Def. Ex. 5 par. 8. Appellant's home was removed from a sale scheduled for April 2009. 3-14-11 R. p. 130 Def. Ex. 5 par. 9. The first 2009 AO was issued one month after the scheduled sale. There was one year between the cancellation of the sale scheduled for April 2009 and the resumption of activity in the litigation in May 17, 2010 when Respondent filed a Certificate of Non-Eligibility that was required to have been filed fully one year before.

During that year, Appellant did receive an offer of a Trial Period Plan (hereinafter "TPP") requiring three payments of $517.29 beginning July 1, 2009. R.p.131, Pl. Ex. 1. Under the HAMP regulations a TPP is required to last three months followed by permanent modification if the homeowner makes the TPP payments within the three month period. To complete a TPP, the borrower must make all of the trial payments within the three month window. Appellant made all three payments. However, her third payment was paid in 2 parts. She paid $367.23 in September 2009. She received assistance from Clemson Community Cares and that portion ($150) was received after the expiration of month three on October 19, 2009. After making the three required payments, she made six more when Respondent failed to follow up to make the TPP permanent as contemplated by HAMP.

During this time she was receiving unemployment benefits. Having not found a job when her unemployment benefits came to an end in May 2010, Appellant contacted Respondent by telephone with the assistance of a housing counselor and was verbally offered a three month forbearance of litigation and collection efforts (June, July and August of 2010) while she tried to find a job. She accepted the forbearance and continued looking for a job which she found in July 2010. Though the forbearance was granted, on May 17, 2010 the Respondent filed a Certificate of Non-Eligibility for modification that gave no reason for the denial of a modification as

required by HAMP and the 2009 AO. Appellant notified Respondent of her employment in July 2010. R. p. 148 line 7- p.149 line 19 and was told to reapply for a modification.

Despite these further modification efforts of the parties and the current forbearance, Respondent pursued the continuation of the litigation. Though it did not file a new certificate of non-eligibility (relying on the original one filed May 17, 2010 that was no longer applicable), Respondent submitted a proposed Supplemental Order and supporting Affidavit. No hearing was scheduled or held before the issuance of the Order, but it was signed and filed by the Special Referee and a sale date of August 2, 2010 was set. The property was unilaterally removed from the sale by Respondent, following the Appellant's disclosure that she had found employment.

Subsequently on August 11, 2011, and still during the forbearance period, Respondent submitted another proposed Supplemental Order and supporting Affidavit (still relying on the previous Certificate of Non-Eligibility). No hearing was scheduled or held, but the Order was signed and filed by the Special Referee on August 20, 2011. Throughout this period of forbearance in the summer of 2010 and while Respondent's attorneys were submitting further pleadings and proposed orders, and scheduling and publishing sales of the Appellant's home, the parties were working on a modification. As is often the case, the Appellant did not distinguish between the Chase modification representatives and their lawyers who were pursuing the litigation. When she did raise questions, she was told she was still in the forbearance and they would not sell her home. Appellant relied on these statements and believed Chase would be "honest and true" and "stand behind their word". R. p. 143. 1ine 1-p. 146 line 23.

Instead, Chase instructed its attorneys to continue the litigation and schedule the sale of Bradley's home. Though the forbearance period did not expire until August 31, 2010, it is clear and undisputed that Respondent's attorneys pursued the litigation throughout June, July and

August, culminating in a sale of Appellant's home one week after the expiration of the forbearance period on September 7, 2010.

Though the Respondent's agents gave varying verbal statements to Appellant over the telephone about the pending sale of her home, it is undisputed and supported by their own Affidavit of Charles Herndon that they sent a denial letter dated August 19, 2010 to Appellant that stated her home would not be sold for thirty days during which time, under the HAMP rules, she could challenge the denial. The letter stated that the denial of modification was based on a negative Net Present Value (NPV) test result, even though the granting of the original TPP presupposed a positive NPV.[7]

In fact, her home was sold during that 30 day period. Appellant retained counsel and immediately filed a Motion to Set Aside Sale and for related relief based upon, inter alia, the TRO, the 2009 Administrative Order, HAMP, due process and Rule 60(b)(3), SCRCP. That Motion, along with a later Rule 59 Motion, was denied. As set forth hereinafter, the sale should have been set aside in order for Vanessa Bradley to be accorded a full and fair opportunity to challenge the decision to deny her a loan modification under state and federal laws, as provided for in Chase's own August 19, 2010 letter to her. This was also required by the 2009 AO and HAMP itself.

STANDARD OF REVIEW

Though the standard of review in a case such as this is normally deferential, here it should be de novo. "A mortgage foreclosure is an action in equity. The scope of review of a case heard by a special referee who enters a final judgment of foreclosure is to determine the facts in accordance with the appellate court's own view of the preponderance of the evidence." *E. Sav.*

[7] The Supplemental Directives regarding HAMP issued by the U.S. Treasury Department require the NPV test prior to granting a TPP.

Bank, FSB v. Sanders, 373 S.C. 349, 354, 644 S.E.2d 802, 805 (2007) (*quoting Hayne Fed. Credit Union v. Bailey,* 327 S.C. 242, 248, 489 S.E.2d 472, 475 (1997)).

Although the determination of whether a judicial sale should be set aside is a matter left to the sound discretion of the trial court. *Investors Sav. Bank v. Phelps,* 303 S.C. 15, 17, 397 S.E.2d 780, 781 (Ct.App.1990), this is an equitable matter and is therefore to be reviewed de novo. *Citimortgage, Inc. v. Freeman,* 2012-UP-195 (SCCA) ; *Wells Fargo Bank, NA v. Turner,* 378 S.C. 147, 150, 662 S.E.2d 424, 425 (Ct. App. 2008) (although the determination of whether a judicial sale should be set aside is a matter left to the sound discretion of the trial court, we review equitable matters de novo).

ARGUMENTS

DE NOVO REVIEW BY THIS COURT IS WARRANTED

All of respondent's evidence has been via Affidavit

The decision by the Special Referee herein, in particular, should be reviewed de novo because the sole evidence submitted by the Respondent at the motion hearing was the Affidavit of Charles Herndon. The earlier orders in the case were all based solely on Affidavits of the Respondent as well. Therefore, the reliance on the principle that the trial court heard the witnesses and was in a better position to judge their credibility would be misplaced. Indeed, the Special Referee should have given more weight to the live testimony of the Appellant who testified at the hearing on the Motion to Set Aside the Sale.

Violations of recent state and federal laws governing foreclosure

While Appellant contends the Special Referee abused his discretion as described hereinafter, she also contends this Court can and should review the facts de novo. De Novo review and reversal is called for because the Respondent violated the law by scheduling and holding a foreclosure sale. This action violated HAMP, violated the Supreme Court's TRO and

2009 AO, and violated Appellant's due process rights and the S.C. Rules of Civil Procedure. In fact, they violated their own forbearance granted to the Appellant.

These are legal questions and Appellant avers that the Special Referee had a duty to independently review and determine compliance with the 2009 AO even where, as here, the homeowner was in default. He committed an error of law by not setting aside a sale that was held in violation of the law and setting aside the underlying default and subsequent orders. Therefore, this Court should review de novo the Special Referee's procedural actions, findings of fact, conclusions of law and his interpretation of the 2009 AO and its application to the undisputed facts of this case. Indeed, his refusal to acknowledge the violation of HAMP, and thus the 2009 AO, that occurred when the property was sold during the 30 day period after the August 19, 2010 HAMP denial letter, warrants reversal.

"In determining whether there has been an abuse of discretion all of the facts and circumstances must be evaluated. If the requirements to vacate a judgment are met the judgment should be opened and the defendant permitted to answer." *Edwards v. Ferguson,* 254 S.C. 278, 175 S.E.2d 224, 226 (1970). Furthermore, the case should be reviewed de novo because the Special Referee does have a duty to independently determine if there was compliance with the 2009 AO even where the homeowner is in default.

Actions such as the failure to unwind the sale, when the Court is presented with evidence that the sale violated HAMP (and therefore the 2009 AO), renders the 2009 AO unenforceable. The purpose of the 2009 AO was to assure compliance with HAMP. Here, Chase "instructed its attorneys to move forward with the foreclosure sale". Herndon Affidavit par. 16. If lender-servicers are allowed to unilaterally move forward with foreclosure sales when the HAMP and AO prohibit it, the HAMP and the 2009 AO and its progeny are meaningless. These legal

safeguards must be enforceable by *both* parties if they are to have their intended effect. Where, as here, such violations are called to the Court's attention in a timely manner, the sale should be set aside. This is true whether or not the homeowner is in default.

I.

The Special Referee erred as a matter of law in denying the Appellant's Motion to Set Aside the foreclosure sale of her property. Holding the sale during the temporary suspension of the foreclosure action and during the pendency of mandatory modification review violated federal and state law imperatives governing foreclosures.

It is well established that a foreclosure sale may be set aside under circumstances that would make it inequitable to confirm the sale. *Farr v. Gilreath,* 23 S.C. 502, (indicating that whether a judicial sale should be upheld depends on whether it was "regularly made" and upholding it " can be done without violating principle or doing injustice") quoted with approval in *Jefferson Standard Life Ins. Co. v. Standard Bldg. Co.,* 174 S.C. 150, 177 S.E. 24, 27.

It is equally as well established as a rule of law in this jurisdiction that there are other circumstances that should sustain the Motion to Set Aside the Sale. To have the requisite effect, there must be such irregularity in the proceedings as to show that the sale was not fairly made, or that Appellant was defrauded or misled to his injury and loss, and the sale should be set aside. *Cumbie v. Newberry,* 251 S.C. 33, 37, 159 S.E.2d 915, 917 (1968); *Wooten v. Seanch,* 187 S.C. 219, 222, 196 S.E. 877, 878 (1938).

All of these elements are present here. The fairness and honesty required by the cases in South Carolina revolving around problems in the bidding and consummation of the sale and deed, are applicable where, as here, the procedure that precedes and culminates in the sale violates federal and state law and due process.

The foreclosure sale herein was premature, contrary to law and not supported by proper procedure. It was initiated and consummated in violation of HAMP, the TRO, the 2009 AO and

violated the parties' own forbearance agreement. In particular, HAMP provides that no sale can occur within 30 days of the written notice of denial and the 2009 AO provides that no foreclosure action can proceed until an affidavit has been filed specifying the particulars of compliance with HAMP and the reasons for denial, all subject to discovery and further hearing as necessary.

Here the sale occurred inside the 30 day window, some 11 days after the August 19, 2010 denial letter and the final denial letter of September 21, 2010 was issued by Chase 14 days after the sale of Appellant's home had already taken place. Also, the only HAMP Affidavit of Non-Eligibility ever filed and relied on was non-specific as to the reason for denial and was never updated or replaced to comply with HAMP and the 2009 AO as subsequent modification efforts concluded. May 17, 2010 Affidavit of Non-Eligibility.

Under these circumstances, the Special Referee erred as a matter of law in denying Appellant's Motion to set Aside the Sale, Motion for Reconsideration pursuant to SCRCP Rule 59 and Motion for Relief from Judgment under SCRCP 60(b)(3) all on the basis that, in his view, the sale could not be set aside absent proof of actual fraud, which he did not find.

a. Respondent violated South Carolina Supreme Court Administrative Order 2009-05-04-01 on Mortgage Foreclosures and the Home Affordable Modification Program (HMP)

On May 4, 2009, the Chief Justice of the South Carolina Supreme Court issued the TRO pursuant to the petition of the Federal National Mortgage Association, known as "Fannie Mae". The Petition of Fannie Mae requested an injunction. Absent injunction, it asserted, mortgagors eligible under the HAMP program could be denied their right to participate because their property was sold at the foreclosure sale. Fannie Mae claimed this would qualify as an

irreparable injury for which the court should provide redress in the form of a temporary injunction.

As granted at that time, the TRO stayed all mortgage foreclosure actions, thereby preventing servicers from pursuing them, thus preventing a determination of HAMP applicability. The Affidavit procedure prescribed in the TRO required an Affidavit to be served on the homeowner stating whether the loan was subject to modification under HAMP. The Respondent herein neither served nor filed any such Affidavit as required. This is just the first in a series of violations and irregularities demonstrating that the sale was not fairly made as a matter of law.

The failure to comply with conditions precedent to a foreclosure sale required by an Administrative Order of the Chief Justice of the S.C. Supreme Court warrants setting aside the sale. Fannie Mae itself sought the injunction that it then failed to follow in this case. The irreparable injury that Fannie Mae feared did happen in this case on one of its own loans. The failure to set aside the sale in a case such as this encourages the violation of the Administrative Orders governing foreclosure.

b. Respondent violated South Carolina Supreme Court Administrative Order 2009-05-22-01 on Mortgage Foreclosures and the Home Affordable Modification Program (HMP).

The Chief Justice subsequently issued the 2009 AO rescinding and replacing the TRO. In the Affidavit rubric set forth therein, the Chief Justice clearly mandated pre-litigation as well as pre-foreclosure sale. The purpose of HAMP and the Administrative Orders issued by the Chief Justice is to encourage the resolution of mortgage modifications.

Although the case herein was pending on May 4, 2009, and Respondent was aware of the Chief Justice's order, Respondent failed to serve the required affidavit.

The 2009 AO further provided:

1) If the party seeking a foreclosure did not serve the affidavit by May 15, 2009, as required by the TRO, the matter will be stayed until the party seeking foreclosure serves and files an affidavit regarding the applicability of the HMP to the matter.

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

Again, Chase ignored the 2009 AO and did not serve an affidavit as it directed. Because Respondent failed to file or serve the affidavit within the 90 days required by 2009 AO, the case should have been dismissed. However the case and, therefore, Appellant's default status, remained pending.

Instead Chase kept the foreclosure case in place while at the same time lulling the Appellant into the belief that no action was necessary as to the foreclosure proceeding because they were working directly to achieve a loan modification. As part of this process, Respondent granted Appellant a three month Trial Period Plan under HMP beginning July 1, 2009. Under HAMP procedures, after 3 months, the temporary modification should have been converted to a permanent modification, which again would have led to dismissal of the foreclosure action. Respondent refused to convert the modification, however, but Appellant continued to make payments under this Agreement from August 2009 through April 2010 at the behest of Chase. R.p. 142 lines 2-20.

Having never filed the required affidavit with the court, having refused to convert the temporary modification to a permanent modification under HAMP procedures, Respondent ultimately filed an Affidavit of Non-Eligibility on May 17, 2010, after accepting 9 trial period payments, and nearly a year after entry of the foreclosure judgment. Not only was it filed a year

too late, Respondent's May 17, 2010 Affidavit R.p. 303 did not comply with the 2009 AO's directive in any event because it did not "state the facts" as to the application of HAMP.[8]

The 2009 AO additionally directed:

> The judge shall consider the affidavit and any counter affidavit that may be filed to determine if there is any contested issue that must be resolved regarding the eligibility of the loan for modification under the HMP or satisfaction of the requirements of the HMP if it applies. If so, as to either, the judge shall resolve this issue like any other contested issue in a mortgage foreclosure action. If a counter affidavit is not timely served, the determination of whether there are HMP issues which need to be resolved before foreclosure is ordered or the sale is commenced shall be based on the affidavit alone unless the judge allows the late service and filing of the counter affidavit or **allows the issue to become contested at some later stage of the proceeding** *(emphasis added)*. Sections (3) and (4) of this order relate to the effect of the HMP determinations made by the judge.

The case should have been dismissed because the Respondent did not follow the Affidavit procedure set forth in these first two Administrative Orders (the TRO and the 2009 AO). The irregularity in the proceedings set forth above demonstrates that the sale was not fairly and honestly made because the Respondent had not satisfied the conditions precedent to a foreclosure sale in South Carolina. At the very least, the Special Referee should have allowed the matter to "become contested at the later stage of the proceedings" when Appellant filed the Motion to Set Aside the Sale outlining Respondent's failures under HAMP, the TRO and the 2009 AO.

c. Appellant's initial default in answering the original complaint does not preclude relief for violation of HAMP, the TRO and the 2009 AO.

The fact that Appellant remained technically in default during this period neither excuses Respondent's failure to comply with the law nor precludes her from obtaining relief for these violations. After HAMP and the Administrative Orders brought the litigation to a halt, and the parties began the loan review required by HAMP and contemplated by the AO, there was no

[8] The 2009 AO required that the affidavit state: if the mortgage loan is owned, securitized or guaranteed by Fannie Mae or Freddie Mac, or if the servicer is participating in the HMP. If so as to either, the affidavit shall state the facts showing that the mortgage loan is not subject to modification under the HMP, or state the facts showing that the HMP modification process specified by the Guidelines or Supplemental Directives has been completed without resulting in a modification. In the alternative, the

basis for the Appellant to appear in the foreclosure action which, as set forth above, should have been dismissed and, at a minimum was stayed by operation of the 2009 AO. This long period of inactivity during the stay of the 2009 AO had the effect of lulling the Appellant into a sense that her ongoing contact with the servicer to obtain a modification was the appropriate avenue for contact.

When Respondent later rushed to complete the foreclosure sale, Appellant was assured, as before, that this was an error and that, as before, the sale would be called off. Moreover, even apart from the binding statements made by Respondent, the sale was premature and defective as a matter of law because Appellant was not allowed the required 30 days to contest the denial or the affidavit of compliance with HAMP. [cite and explain reg stating that get 30 days]

In fact, in the court below Respondent relied on its very denial letter of August 19, 2010 as the authority to sell the property when the letter, per HAMP regulations stated the property **could not be sold for 30 days from the date of the letter** *(emphasis added)*. P. 307 Herndon Affidavit par. 15; Ex. 5. That 30 day period did not expire until September 18, 2010, eleven days after Appellant's home was sold by the Special Referee at the Respondent's request.

d. The May 17, 2010 Affidavit of Non-Eligibility was of no force and effect

The 2009 AO required that the case had to be stayed until the required HAMP affidavit had been filed. Not only was the May 17, 2010 affidavit defective, it was irrelevant and could not serve as a basis for lifting the stay and going forward with the sale because the parties continued to pursue modification under HAMP after it was filed and so a new affidavit would have to have been filed upon the completion of that further process subsequent to Bradley's new employment. Respondent was duty bound to inform the Court of the true status of the ongoing HAMP review.

e. Respondent's violations were sufficient as reason to set aside the sale

In ruling on Appellant's Motion to Set Aside the Sale, the Special Referee ignored these plain violations of law and instead erroneously required a showing that Respondents conduct in violation of state and federal law amounted to fraud. As set forth in the Referee's ruling:

1. While the Defendant made extensive efforts to avoid foreclosure and was given varying explanations of the status of her request for a loan modification, none of the statements by Plaintiff's employees arose to the level of fraud, misrepresentation.

2. At the most critical time in August and early September 2010, Defendant was told that a request to postpone the Foreclosure Sale had been submitted, but she was never told that the sale would definitely be postponed.

Though Respondent did commit fraud, the sale should have been set aside at a minimum because of the violations of state and federal law. First, regardless of whether Respondents conduct amounted to fraud under SCRCP 60(b)(3), it was in violation of the requirements of HAMP and the 2009 AO and could not support upholding the improper sale of Appellant's home. Second, even on its own terms the order is based on factual conclusions that are without evidentiary support. *McClurg v. Deaton.* The Special Referee hangs his hat on a finding that Appellant "was never told that the sale would definitely be postponed." This single "non-statement" is belied by all of those affirmative statements indicating that the sale *would* be postponed. The record is replete with statements by the Respondent that the home "will not be sold" and the sale was "being postponed". R. pp. 22-33.

Chase did not comply with HAMP, the TRO, the 2009 AO, or its own letter when it pursued the sale of Appellant's home especially during the 30 day period. Whether or not its conduct amounted to fraud or misrepresentation (and the evidence clearly and convincingly establishes that it did) the fact that it violated the law as reflected in HAMP, the TRO and the 2009 AO is

sufficient grounds to set aside the sale. *Bowers v. Bowers,* 304 S.C. 65, 67, 403 S.E.2d 127, 129 (Ct.App.1991). (where the Court held Rule 60b movant has the burden of proving facts essential to entitle him to relief by clear and convincing evidence). The Special Referee erred in applying a stricter "fraud" standard to Appellant's motion to set aside the sale as to these violations. Because the sale of Appellant's home herein did not comply with the law and conditions precedent to a foreclosure sale, the court should have set it aside. To deny such relief constitutes an error of law and should be reversed.

II.

The Special Referee erred in holding that the forbearance granted by Respondent to Appellant did not preclude the Foreclosure Sale

The lower court found that there was a forbearance agreement in place during June, July and August 2010. This is not disputed. What is disputed by Appellant is whether the collection efforts embodied in the litigation could go forward during that period of forbearance. The Respondent's letter of August 19, 2010 defined Forbearance Plan as "a temporary reduction in your current payment to provide time for you to improve your financial circumstances".[9]

The Special Referee ruled that the forbearance granted by respondent for the months of June July and August 0f 2010 **did not affect Plaintiff's rights to move forward with the Foreclosure Sale.** (emphasis added). This referred to the sale on September 7, 2010. The court erred because the record established that the Respondent abused the forbearance by continuing to file pleadings and schedule sales during its pendency. That resulted in Appellant having insufficient time and meaningful notice to raise issues with the court once the forbearance ended, by indicating that the forbearance would continue as long as the parties continued to work

[9] In fact, Bradley did improve her financial circumstance by obtaining employment during the forbearance period. Despite this, Respondent's Affidavit stated Bradley had "defaulted" on the forbearance but failed to explain how that could be. Her new income could not have been considered until she submitted her application August 31, 2010. Therefore, they clearly did not consider it.

towards a resolution and because as contemplated by the forbearance agreement, Appellant should have been allowed to proceed with a permanent modification of her mortgage under HAMP after she regained employment during the forbearance period and submitted an application August 31, 2010. R. p. 153 lines 12-21.

As a general rule, a forbearance is granted for a limited time for a specific purpose to allow the mortgagee to return to the state in which he or she is able to carry the mortgage. Here, after having successfully performed the obligations under the original 2009 temporary modification for 6 months longer than should have been required to convert to a permanent modification, Appellant lost her job. She was given a forbearance to allow her to return to employment and allow her to continue to perform her mortgage obligations. R. p. 143 line 18- p. 150 line 12. She did, in fact, obtain employment and was prepared to move forward in paying her mortgage. She never had the opportunity to do so, because respondent simply proceeded with a foreclosure sale based on its pre-HAMP judgment of foreclosure.

The Special Referee's conclusion that the forbearance was irrelevant to the sale elevates form over substance. During the period of forbearance, Respondent should not have been able to go forward with collection efforts in the litigation, including setting sale dates.

The Respondent granted a forbearance of payment the purpose of which was to alleviate the obligation of payment while she was seeking employment. The repeated assurances given by Respondent to Appellant that the forbearance was in place and she was being reviewed for modification, defrauded and misled her, and she lost her home. In its Petition for the TRO, Fannie Mae termed such a loss to be irreparable. However, it can be repaired by this Court granting what the Special Referee should have, the complete unwinding of the sale and underlying orders. It was precisely as a result of this double tracking, allowing the foreclosure

case to move forward while the HAMP modification process was still ongoing, that the sale was prematurely scheduled and occurred prior to the required 30 day period under HAMP in which Appellant was allowed to contest Respondent's denial of a HAMP modification. In addition, Respondent's conduct of continuously pursuing and then abandoning foreclosure filings because of ongoing HAMP review lulled Appellant into believing that the threatened foreclosure sale of September 7, 2010 would not go forward.

Thus there was clear and convincing evidence of both irregular procedure and sufficient unfairness to require setting aside this sale. Indicative of this are the laundry list of Respondent's conduct during the forbearance. The following actions took place during the period of the forbearance agreement:

June 22, 2010 - Appellant received Notice of Sale with date August 2, 2010
-Chase sent a second Supplemental Order Post Judgment
- In this, they state that Appellant entered into a forbearance agreement with Chase, however, they then claim Appellant defaulted on the terms of the Forbearance agreement – but don't mention any specific facts or what term was

August 2, 2010 - Appellant called Chase about obtaining a job and getting a new modification and sends in the appropriate paperwork

August 13, 2010 -Chase sent another Supplemental Order Post Judgment

August 16, 2010 - Appellant received another Notice of Sale (dated 8-13-10)
-Appellant called Chase and was assured everything was okay and that her request was currently in underwriting
-she was also told that they would contact the foreclosure attorney

August 19, 2010 - Letter of denial – stating that NPV was inadequate
-this letter also explicitly stated her home would not be sold in 30days
-Appellant timely requested inputs

August 25, 2010 -Appellant called Chase and was told the foreclosure sale date was September 2, 2010
-then told if she paid $678 now, she could stop the foreclosure sale

August 30, 2010 -Appellant called Chase again and told sale date was 9-7-10
-also confirmed that Appellant had sent in all necessary paperwork except for paycheck stub

August 31, 2010 - Appellant faxed in paycheck stub

Further establishing the irregular procedure, unfairness and dishonesty, the Respondent took litigation action during the forbearance as set forth below, to effectuate either the sale scheduled for August 2, 2010, or the sale that took place in September 7, 2010:

> **Actions in June 2010**
> Submitted Affidavit and Proposed Supplemental Order
> for sale to be held August 2, 2010
> **Actions in July 2010**
> Filed Affidavit of Verified Statement of Account
> Cancelled August 2, 2010 sale
> **Actions in August 2010**
> Submitted Affidavit and Proposed Second Supplemental
> Order for sale to be held September 7, 2010
> Published Notice of Foreclosure Sale
> **Actions in September 2010**
> Respondent held sale, pursued assignment of bid, deed and confirmation of sale

As set forth in Appellant's Motion for Reconsideration:

> The Court misinterprets the meaning of forbearance. The Court finds there was a forbearance agreement but ignores the fact that the procedure necessary to the September 7, 2010 sale and the sale that had also been scheduled for August 2, 2010 that was cancelled took place during the period of the forbearance when Plaintiff was to be taking no action. The sale took place 7 days after the end of the forbearance period. Neither the Defendant's due process rights in the litigation, nor her rights under HAMP could have possibly been followed during that short period.

The Special Referee simply ignored the fact that the Appellant's ability to challenge the modification decision was forestalled by the abrupt timing of the sale 7 days after the expiration of the forbearance and the cutting short of the 30 day window provided by HAMP to begin a challenge after denial. The uncertainty of the occurrence of the sale also hindered her ability to address the supplemental orders, sale notice, and other procedural actions that were carried out during the forbearance that immediately preceded the sale.[10]

[10] In addition to the August 19, 2010 letter stating the negative NPV result as the reason for denial, the June 21, 2010 Affidavit in support of Supplemental Order Post Judgment simply referred to the outdated and un-replaced May 17, 2010 Affidavit of Non-Eligibility. The August 11, 2010 Affidavit in Support of Second Supplemental Order Post Judgment stated that the parties had entered into a forbearance agreement but went on to say Bradley had "defaulted" on the terms of the forbearance agreement. A September 21, 2010 letter sent by Chase after the sale stated

If Plaintiff had been given the requisite time to challenge the denial of modification, she likely would have been successful. The NPV test must be run in order to grant a Trial Period Plan ("TPP") and Appellant had already been granted one in August of 2009. There was never any showing by Respondent as to how Appellant's net present value (NPV) had changed from when she was granted a TPP in August 2009 and when she applied for modification again in August 2010. The TPP under which the Defendant paid for 9 months presupposed the requirements of the Net Present Value calculation were met.

None of the contradictory reasons offered by Respondent over the course of this litigation for going forward with the sale have merit and all should have been tested at a hearing. The action taken by Respondent in pursuit of a foreclosure sale during the promised period of forbearance violated the agreement of the parties and constituted fraud, misrepresentation and misconduct toward the Court as well as the Appellant. While he acknowledged the forbearance, the Special Referee failed to recognize the legal significance of the action taken by Chase during the forbearance period. Respondent broke the promise of the forbearance and it deprived the Appellant of the benefit of the forbearance. In light of this, it was an error of law constituting an abuse of discretion by the Special Referee to deny the Appellant's Motion and Motion to Reconsider. The sale should have been set aside and full consideration given to Appellant's modification application made after she obtained employment and the forbearance period ended.

III

The Special Referee violated the appellant's right to procedural due process by issuing the original order of foreclosure during the HAMP evaluation, entering two (2) supplemental orders post judgment without benefit of hearing and meaningful opportunity to respond and denying Appellant's request for an evidentiary hearing and discovery.

"We are unable to offer you a Home Affordable Modification because you did not make all of the required Trial Period Plan payments by the end of the trial period.

Notwithstanding that Appellant had performed a Trial Period Plan that should have led to a permanent modification, and notwithstanding that the respondent had granted Appellant a forbearance to give Appellant the opportunity to become re-employed, Respondent, for reasons never properly tested in court, pursued and obtained a foreclose sale. The Respondent pursued and obtained a foreclosure order in March 2009 while Appellant's loan was under modification review in violation of HAMP. After continued modification review, including the initiation of a Trial Period Plan under HAMP, Respondent submitted 2 Supplemental Orders Post Judgment with Supporting Affidavits which were filed on June 29, 2010 and on August 20, 2010.

No hearing was held prior to the entry of the original order or either supplemental order post judgment, nor was Appellant served with the Orders once signed by the Special Referee. Appellant had no opportunity to contest the new and additional findings of the court as established through the supplement orders. Each order was entered while Appellant was in the period of forbearance, during which time Appellant was not required to make monthly mortgage payments. Respondent was to refrain from litigation activity while Appellant tried to obtain employment.

Instead, pursuant to the first Supplemental Order Post Judgment, a second foreclosure sale date was set for August 2, 2010. It was cancelled by Respondent, ostensibly because modification review remained ongoing. Appellant continued to communicate with Respondent and send in additional information, including the final requested information that was submitted on August 31, 2010. However, pursuant to the second Supplemental Order Post Judgment, signed August 16, 2010, the sale was rescheduled for September 7, 2010. Appellant's property was in fact sold on September 7, 2010.

Had the appellant been allowed the opportunity to present information regarding the ongoing modification review to the court prior to the entry of the orders, the matter should have been stayed and not resulted in the sale of her home. For example, she could have addressed the fact that the denial that led to the sale did not take into consideration the evidence of her new income submitted August 31, 2010. This was the main reason given by Chase for granting the forbearance.

Yet, by sworn Affidavit, Respondent's Attorney stated that during May, June and July 2010, Respondent was unable to reach a workout agreement with the appellant. However, without dispute, during the months of June and July 2010, Appellant was participating in a period of forbearance. This goes unacknowledged in the Herndon Affidavit. That Affidavit leaves only the implication that there were no options available to assist Appellant. The same lack of acknowledgement and disclosure to the court continues in the Affidavit in Support of Supplemental Judgment regarding the first supplement order. Instead it states:

> "Prior to the scheduled sales date, the Plaintiff began negotiations for a potential loss mitigation workout with the Defendants, Vanessa Y. Bradley. Unfortunately, the loss mitigation workout did not occur, and the Plaintiff wishes to proceed with the foreclosure and sale and to supplement the previous Judgment of Foreclosure and Sale to reflect the amount of payments, if any, made."
>
> **Affidavit in Support of Supplemental Judgment by Michael P. Morris, June 21, 2010.**

There is no mention or recognition of the ongoing forbearance period. However, in the second Affidavit in Support of Second Supplemental Judgment, Respondent's Attorney does acknowledge the forbearance. The attorney affiant states:

> "Prior to the scheduled sales date, the Plaintiff entered into a forbearance agreement with the Defendant, Vanessa Y. Bradley. The defendant has now defaulted on the terms of the forbearance agreement, and thus the Plaintiff wishes to proceed with the foreclosure and sale and to supplement the previous Judgment of Foreclosure and Sale to reflect the payments, if any, made."

Affidavit in Support of Supplemental Judgment by Michael P. Morris, Esquire, August 11, 2010.

The Respondent's claim in the second affidavit that the "defendant has now defaulted on the terms of the forbearance agreement," was false. Appellant was denied the opportunity to address this statement. Instead, an order was issued with the finding that she had in fact violated the forbearance. The sale of her home followed, without benefit of hearing and with conflicting notices.

These constitutional guarantees are paramount. In the case of *Koester v. Citizens' Pub. Co. Carolina National Bank v. Mergenthaler Linotype Co*, 154 S.C. 157, 151 S.E. 452, 455 (S.C. 1930) the Respondent set forth the argument that once the Appellant was served with the final order "he should have at once taken action to protest." However, as the court makes clear, ". . . to sustain this contention would be equivalent to substituting mere casual notice after the event of a judgment of a court for the due process of law which is guaranteed under the Constitution." *Id.* The Special Referee violated Appellant's right to due process of law when he signed the supplemental orders within days of submission without a hearing. This failure was compounded by the lack of service of the signed order and his refusal to correct the action pursuant to Appellant's Motion to Set Aside Sale.

"It is not enough that a person may by chance have notice or that he may, as a matter of *favor or courtesy*, have a hearing." *12 Corpus Juris,* 1229 (Emphasis added). More importantly, "if a person's property rights can be confiscated, so to speak, by the unconstitutional act of a court without due process of law, and then, if a mere notice of such action after the event is equivalent to due process under the constitution, the constitutional guaranty would become a farce. *Koester* at 159-160, 457-458. Procedural due process also guarantees that one have an

"opportunity to be heard in a meaningful way" and with benefit of "judicial review." It is also critical that due process be "flexible and call for such procedural protections as the particular situation demands." *Kurschner v. City of Camden Planning Comm'n*, 376 S.C. 165, 172, 656 S.E.2d 346, 350 (2008).

To grant a hearing on these supplemental orders and the affidavits supporting them would have brought forth no great fiscal or administrative burden. Appellant's private and vested property interest demands a litigant have the ability to be heard in each stage of her case in a meaningful way. Anything less opens the door to erroneous deprivation and demotes her right to be heard as nothing more than an "empty ritual." *See*, *LaSalle Bank National Association vs. Davidson*, 386 S.C. 176, 688 S.E.2d 121 (S.C. 2009). As the foreclosure sale took place after Respondent obtained orders through empty ritual and in contravention of the forbearance and state and federal law, it should have been set aside as being in violation thereof.

IV.

The Special Referee erred as matter of law in declining to grant discovery by Appellant along with an evidentiary hearing pursuant to the 2009 AO

Discovery

The 2009 AO provides for discovery by the mortgagor so that the results of the modification review can be examined by the mortgagor for accuracy. This can be followed by an evidentiary hearing if the mortgagor believes there were flaws in the process or decision-making. The decision that a mortgagor is not eligible for a HAMP modification is not a unilateral one and the decision of the mortgagee is not conclusive by any means. As part of her request to set aside the sale, Appellant sought an order to allow discovery on the denial decision and a hearing thereon. The Special Referee declined to allow Appellant such discovery and

evidentiary hearing, even when the record revealed the Respondent had submitted incomplete and misleading affidavits to the Court. This was error.

A party is entitled to discovery in anticipation of a hearing on a motion to set aside a judgment in order to fully explain the factual issues involved. In *Graham Law Firm, P.A. v, Makawi*, 396 S.C. 290, 721 S.E.2d 430 (S.C. 2012) the S.C. Supreme Court held that the trial court erred when it failed to grant Graham's request for discovery and cross-examination of witnesses in connection with a Rule 59(e) motion. In light of the determinative nature of the court's findings regarding his motion to set aside a judgment, the court held Graham should have been granted an opportunity to fully explore the factual issues involved through further discovery and cross-examination of witnesses. Similarly, discovery as contemplated by the AO and requested in Appellant's Motion to Set Aside Sale and Motion to Reconsider would have provided Appellant the opportunity established in the 2009 AO to fully explore the factual issues involved through further discovery and cross-examination of witnesses

"Where important decisions turn on questions of fact, due process often requires an opportunity to confront and cross-examine adverse witnesses." *Brown v. South Carolina State Board of Education,* 301 S.C. 326, 329, 391 S.E.2d 866, 867 (1990) (citing *Goldberg v. Kelly,* 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970)); *see South Carolina Department of Social Services v. Holden,* 319 S.C. 72, 459 S.E.2d 846 (1995) (right to confrontation applies in civil context).

Here discovery was well warranted in light of the boilerplate assertions contained in the affidavit of Barbara Hindman used to lift the stay and proceed to the foreclosure sale. This Affidavit of Non-Eligibility filed on May 17, 2010 R. p. 303 by Respondent stated the bare and erroneous allegation that the HAMP process had been completed and that that there had been no

modification. This violated the 2009 AO because the process had not been completed. After this filing, however, as required by HAMP, the parties continued the HAMP modification process which had not in fact been concluded. This original affidavit was never supplemented with an updated Affidavit to reflect whether, when and why the process was completed without modification so as to remove the stay. Instead, the original affidavit was improperly and deceptively reiterated by Respondent as the operative Affidavit of Non-Eligibility throughout the remainder of the case. Appellant herein showed that discovery was necessary inquire into the wildly conflicting decision making reflected in the mortgagee affidavits and in order to enable her to challenge the Respondent's decisions and assure a proper analysis, as contemplated by the 2009 AO. Her testimony provided what she said and was told and what documents she received and submitted. Otherwise, the only evidence available without discovery was the Affidavit of Charles Herndon, V.P. of the servicer Chase Home Finance, LLC.

Discovery would include obtaining information about the decision making process used by Chase in her particular case and reveal whether the review was done properly. If the review and/or decision were defective or faulty in some way, Appellant would be entitled to a re-review and perhaps a modification.

Evidentiary Hearing

Not only has Appellant made a sufficient showing to entitle her to discovery on the issue of modification denials, but she must receive a full and fair opportunity to be heard on the matter, because the findings with regard to compliance with the requirements of HAMP, the TRO and the 2009 AO may determine the merits of the case in chief. *See Wetzel v. Woodside Development Limited Partnership,* 364 S.C. 589, 615 S.E.2d 437 (2005) (finding that an order granting a motion to set aside an entry of default for improper service effectively dismisses an improperly

served party from the action); *Archangel Diamond Corp. v. Lukoil,* 123 P.3d 1187 (Colo.2005) (holding that a trial court's findings related to personal jurisdiction could later be preclusive).

If the conditions precedent to a foreclosure lawsuit and sale as outlined in HAMP, the TRO and the 2009 AO were not fulfilled, then denying an evidentiary hearing prevents the inquiry into the required HAMP review.

In the case at bar, where the Special Referee was told by Respondent to go forward with a foreclosure sale without a properly supported motion and order lifting the stay. The mortgagor was unable to exercise her rights under the 2009 AO and challenge the HAMP modification denial, Appellant was deprived of the right given in the 2009 AO to confront the mortgagee, and challenge the reasons for denial (as stated in Chase's own letters, as well as the 2009 AO).

On numerous prior occasions where Respondent had asserted that the modification process was complete, it subsequently conceded that it was not and discussions continued. Given the deficiencies in the affidavits and filings discussed above, Appellant likely would have been able to demonstrate that the sale was premature if only she had been given the opportunity to effectively address the HAMP affidavit as contemplated by the 2009 AO. Thus, due process requires that Appellant receive an opportunity to conduct adequate discovery on this question and confront adverse witnesses in an evidentiary hearing.

Bradley did not bear the burden of proof on this issue, Respondent did. The record in this case is replete with instances of the Respondent's failure to comply with the 2009 AO, their wildly varying reasons for denial, the use of the same Affidavit of Non-Eligibility for all denials, their action during the three month forbearance period and their failure to properly move for and obtain an order lifting the stay. It would be inequitable to hold Appellant to a strict standard on this issue. Whereas the Respondent had both ample time and the opportunity to review

Appellant's modification application and supporting documentation, she herself was not allowed her legal right to the time and ability to challenge the denial of the application for modification. Moreover, no hearing was held in connection with the Respondent's Supplemental Order submissions, so the Supporting Affidavits which referred to the May 17, 2010 Affidavit were allowed to stand unchallenged. On this record, it cannot be said that Bradley had a full and fair opportunity to be heard on an issue that was determinative of her legal rights as required by HAMP and the 2009 AO.

V.

It was an abuse of discretion amounting to an error of law to deny the Appellant's Motion under Rule 60(b)(3)

Rule 60(b)(3) SCRCP provides that a party may be relieved of a final order or judgment based upon "fraud, misrepresentation, or other misconduct of an adverse party". The Rule establishes three grounds for relief from a final judgment or order: fraud, misrepresentation, or misconduct of an adverse party. Thus, it is clear from the language of the rule that the movant under Rule 60(b)(3) need not rely solely on a showing that an adverse party's conduct was fraudulent, nor is it necessary for the movant to prove all the elements of common law fraud. While doing so may provide a basis for relief, Rule 60(b)(3) contemplates relief for lesser misconduct as well. Proof of misrepresentation or other misconduct is also sufficient.

The Court 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. S.C. Dep't of Revenue,* 345 S.C. 506, 510-11, 548 S.E.2d 223, 226 (Ct.App.2001). " The movant in a Rule 60(b) motion has the burden of presenting evidence proving the facts essential to entitle him to relief." *Bowers v. Bowers,* 304 S.C. 65, 67, 403 S.E.2d 127, 129 (Ct.App.1991).

In the case at bar, the Court's ruling on the Motion pursuant to SCRCP 60(b)(3) was based on Appellant's statement that she was never told the September 7, 2010 sale of her home was definitely postponed. This conclusion failed to account for the remaining plethora of evidence that Respondent committed fraud, misrepresentation and misconduct toward Appellant and the Court throughout the process of the litigation which led to the sale, all in violation of the 2009 AO.

In particular, the written representation in Respondent's letter of August 19, 2010 stating the Appellant's home would not be sold for 30 days constituted fraud. When it sent this letter, the Respondent knew it would be selling Bradley's home at the September 7, 2010 foreclosure sale. It had filed the Supplemental Order and Supporting Affidavit setting the sale and mailed notice and published notice. The statements by Respondent's employees that her house would not be sold, and offering the reasons why her house would not be sold, further demonstrated a pattern of trickery and deception amounting to fraud. This trickery and deception led the Appellant not to assert herself in the litigation to present a case. R. p.153 line 12- p. 160 line 7.

After obtaining legal representation when she received the notice that the sale actually did take place, the Appellant immediately served and filed the Motion to Set Aside the Sale and for other relief. In her filings with the court, she urged the Special Referee to acknowledge the requirements of due process, HAMP and the Administrative Orders when assessing the issue of fraud in ruling on her motions. As discussed herein, the reasons for failure to act before the Motion to Set Aside the Sale were the misleading actions of the Respondent and the lengthy period of the stay after the default and 2009 AO. The Special Referee focused only on the issue of whether there was a specific verbal statement to her that the sale of her home had been

cancelled, ignoring all of the other evidence that proved Chase's misrepresentation, misconduct and outright fraud.

Rather than examining the totality of the circumstances not only of the activity in the days and weeks leading up to the sale, and the deceptive affidavits contained therein, but the entire history of the litigation, the Special Referee isolated each written and verbal representation and found none of them rose to the level of fraud or misrepresentation. **Order on Motion to Set Aside.** R.p. 23 In doing so, he completely overlooked the written fraudulent statements and all of the other verbal misrepresentations testified to by the Appellant. He further seemed oblivious to the procedural violations that he himself allowed in the litigation.[11]

Clear and convincing evidence is generally required to prove fraud and this standard has been applied to motions under Rule 60(b)(3) based on fraud. *Hagy v. Pruitt(In re Pruitt)*, 339 S.C. 425; 529 S.E.2d 714 (2000) (Citing *First State Savings & Loan v. Phelps*, 299 S.C. 441, 385 S.E.2d 821 (1989)). However, nothing in the rule indicates that this stricter standard of proof is required to establish misrepresentation or other misconduct.

It was error to hold there was no fraud by crediting Chase with not specifically telling the Appellant that the September 7, 210 foreclosure sale was cancelled, while ignoring all of the misrepresentations and fraudulent statements proven by Appellant and contained in the record in Chase's own filings. This warrants setting aside the sale, vacating the judgment, setting aside the default and allowing Appellant to file responsive pleadings and pursue discovery to determine the details of Respondent's HAMP activity in this case.

a. Because the record contains clear and convincing evidence of fraud, the Sale should have been set aside

[11] The Special Referee ignored the fact that no affidavit regarding eligibility was filed as required until one year after it was required to be filed and that one was defective. He further disregarded the fact that Affidavits in support of Proposed Supplemental Orders Post Judgment referred back to the expired May 17, 2010 Affidavit yet suggested that HAMP review had continued.

Whether the conduct of a party amounts to fraud sufficient for relief under Rule 60(b)(3) depends, in part, on the effect of that conduct on the judicial process. In essence, relief under Rule 60(b) for fraud is reserved for those situations where the conduct of an adverse party has induced the party seeking relief not to present their case. *Chewning v. Ford Motor Co.*, 354 S.C. 72 (2003). The *Chewning* Court explained the extrinsic fraud required under SCRCP 60(b)(3) is fraud that induces a person not to present a case or deprives a person of the opportunity to be heard" and that "relief is granted for extrinsic fraud on the theory that because the fraud prevented a party from fully exhibiting and trying his case, there has never been a real contest before the court on the subject matter of the action." 354 S.C. at 81 (Citing *Hilton Head Ctr. of South Carolina v. Public Serv. Comm'n,* 294 S.C. 9, 11 (1987)).

At the outset, the August 19, 2010 letter clearly constituted fraud. It stated Appellant's house would not be sold during the next 30 days when Chase had already submitted the Affidavit in Support and Proposed Supplemental Orders, and published and served Notice of Sale.

The Respondent pursued the closure of the case as one of default despite the fact that activity in the case had subsided for 15 months and Appellant had only dealt with the mortgagee, not their attorney of record. As Appellant began to receive mailings from the Chase attorney after its lengthy hiatus, the ongoing telephone conversations with Chase representatives suggested to Appellant that the modification efforts were bearing fruit. R. pp. 149-160. Consequently, the incongruous progression of affidavits introduced by the Respondent went unchallenged.

The Special Referee's ruling was controlled by error of law because it assumed that fraud alone is the basis for relief under 60b3. Rouvet v. Rouvet, 388 S.C. 301 (finding that family court erred in finding that only fraud would entitle party to relief under 60b).

The subornation of perjury or concealment of documents by an attorney has been held to be extrinsic fraud on the theory that the attorney, being an officer of the court, prevents the opposing party from presenting his case. *See* 354 S.C. at 82 (citing In the Matter of Goodwin, 279 S.C. 274, 305 S.E.2d 578 (1983); Bankers Trust Co. v. Braten, 317 S.C. 547, 455 S.E.2d 199 (Ct. App. 1995)). Even an attorney's *bona fide* error in filing an affidavit indicating that an opposing party was in default for failure to answer has been found to be extrinsic, albeit constructive, fraud sufficient to support an order vacating a judgment. *See* Davis v. Davis, 236 S.C. 277 (1960).

These cases are apropos here regarding the affidavits filed by Respondent that brought about the foreclosure sale. Simply by their being filed, the affidavits that were, on the one hand irreconcilable and, on the other hand downright false compelled the Special Referee to sell Bradley's home. In addition, the contemporaneous telephone conversations between Bradley and various non-attorney representatives of Chase prevented her from fully exhibiting and trying her case.

This failure to comply in good faith with the statutory and regulatory imperative to fully and fairly pursue loss mitigation, as required by the 2009 AO, demonstrates a sufficient negative effect on the judicial process to establish the fraud necessary to vacate the judgment under SCRCP 60(b)(3).

b. The record contains clear and convincing evidence of misrepresentation

Even in the absence of clear and convincing evidence of fraud, a party may still obtain relief under Rule 60(b)(3) for misrepresentation by an adverse party. The incongruous series of submissions to the court in this case, as well as the assurances of forbearance and claims of

postponement of the foreclosure sale up to an beyond the sale date, fully supports the misrepresentation element found in Rule 60(b)(3).

In *McClurg v. Deaton,* 380 S.C. 563, 580, 671 S.E.2d 87, 96 (Ct.App.2008) the Plaintiff was injured in a car accident with Deaton who was an employee of New Prime at the time of the accident. New Prime was insured by Zurich. Plaintiff's counsel initially contacted Zurich and began settlement negotiations. During the course of negotiations, Plaintiff's counsel sent Zurich a letter with a copy of a complaint naming Deaton and New Prime and indicating that the complaint would be filed and a courtesy copy sent to Zurich if settlement was not reached within a specified time. Unbeknownst to Zurich or New Prime, Plaintiff's counsel subsequently filed a complaint naming only Deaton and failed to send a copy to Zurich. Plaintiff obtained a default judgment against Deaton and notice of this judgment was subsequently sent to Zurich. New Prime then intervened and moved for relief from the judgment under Rules 60(b)(1) and 60(b)(3). 380 S.C. 563 (aff'd by 395 S.C. 85).

The trial court denied New Prime's Rule 60(b)(3) motion on the ground that New Prime had failed to make a showing of a meritorious defense. 380 SC at 569. The Court of Appeals affirmed on this ground. 380 SC at 573. However, the Court noted that the conduct of Plaintiff's counsel "raises serious concerns for this court and quite possibly satisfies the misrepresentation and misconduct envisioned by Rule 60(b)(3)." 380 SC at 573. Thus, the Court of Appeals has clearly recognized that a promise to do something in the future, as Chase did here, may form the basis for relief under Rule 60(b)(3) under circumstances where the failure to perform that promise results in a party being deprived of his or her day in court.

There is abundant evidence in the record that Chase representatives repeatedly advised Appellant to ignore notices in the litigation both because she was being evaluated for

modification and because her loan was subject to a forbearance agreement. Most importantly, they sent a letter that said her house would not be sold. The ruling of the Special Referee on this point was controlled by error of law. The law he cited in support of his denial of the Motion to Set Aside only dealt with fraud and suggested that these were future promises and cannot form the basis for relief. This was error under the McClurg v. Deaton analysis.

c. The record contains clear and convincing evidence of misconduct

In *McClurg v. Deaton,* 380 S.C. 563, 580, 671 S.E.2d 87, 96 (Ct.App.2008) discussed above, the court opined that the Lawyer's actions would most likely satisfy the misrepresentation and misconduct element of Rule 60(b)(3), SCRCP. as well. *Id.* at 573, 671 S.E.2d at 92-93. Much like the lawyer there who was trying to achieve his litigation goal through smoke and mirrors, the Respondent herein used a vague Affidavit of Non-Eligibility that was never updated with truthful and specific HAMP results along with a misleading pattern of conduct to achieve its litigation goal. Respondent directed its attorneys to pursue the sale in violation of HAMP, the 2009 AO, the S.C. Rules of Civil Procedure and due process of law under the state and federal constitutions. It was an abuse of discretion amounting to an error of law not to set aside the sale when faced with this undeniable fact scenario.

d. The relevant factors of (1) the promptness with which relief is sought; (2) the existence of a meritorious defense; and (4) the degree of prejudice to the other party

The *Wham* factors (1) the timing of the motion for relief; (2) whether the defendant has a meritorious defense; and (3) the degree of prejudice to the plaintiff if relief is granted, endorse the Appellant's position. *Wham v. Shearson Lehman Bros.* , 298 S.C. at 465, 381 S.E.2d at 501-02). A trial court is not required to make specific findings of fact for each factor if there is sufficient evidence in the record to support the trial court's decision. *Sundown,* 383 S.C. at 608,

681 S.E.2d at 888. The decision whether to set aside an entry of default is within the sound discretion of the trial court. *Williams v. Vanvolkenburg,* 312 S.C. 373, 375, 440 S.E.2d 408, 409 (Ct.App.1994).

The showing of a meritorious defense need not be perfect, nor one which can be guaranteed to prevail at a trial. It 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. *Thompson v. F.C. Hammond,* 99 S.C. 116 (citing *Graham v. Town of Loris, 272 S.C. 442*). "In my view, the key inquiry is merely whether the materials submitted to the trial court reflect, in any way, that a contest on the merits might render different results than the result reached by the default judgment." *McClurg v. Deaton*, 395 S.C. 85 (Toal, C.J. Dissenting).

Here the Court's ruling was based on Appellant's statement on cross examination that she never was told the September 7, 2010 sale of her home was definitely being postponed. The Special Referee focusing on this statement concluded that there was no fraud, misrepresentation or misconduct on the part of the Respondent because that particular statement was not specifically made to the Appellant. This narrow focus failed to account for the remaining plethora of evidence cited herein that Respondent committed fraud, misrepresentation and misconduct toward Appellant as well as the Court throughout the process of the litigation which led to the sale, all in violation of the 2009 AO.

The Appellant's meritorious defense is the heart of the case. The procedural failings in the litigation, coupled with the pattern of conduct in the HAMP review render this matter one worthy of a hearing or judicial inquiry because it raises a question of law deserving of some investigation and discussion. *Thompson.* The submissions to the Court and the verbal statements

by Chase representatives to the Appellant yielded real controversy as to real facts arising from conflicting or doubtful evidence. It was error as a matter of law to deny the Motions.

e. The Appellant should be relieved of her default and to be allowed to answer.

The lack of due process and adherence to HAMP and the Administrative Orders as set forth hereinabove resulted in unwarranted default judgment and supplemental orders against the Appellant. For the reasons outlined hereinabove, it was error for the Respondent to proceed with the litigation and sale in contravention of the law and it was error for the Special Referee to refuse to correct the mistakes when that relief was sought by the Appellant.

In *Howard v. Holiday Inns,* 271 S.C. 238, 246 S.E.2d 880 (1978), the Court attempted to soften the harsh impact of default judgments by holding that when there has been an appearance but no answer or demurrer filed, the defendant is entitled to participate in the ascertainment of damages by cross-examining plaintiff's witnesses and objecting to evidence. The Court held that one in default concedes liability but does not concede the amount of liability in a tort action.

Within the spirit, if not the letter, of the ruling in Howard, defendants should be notified of the default hearing in every instance. That way the Court would have the benefit of an adversary proceeding as relates to the assessment of damages, as in *Howard* and as relates to increasing the amount of the judgment and compliance with HAMP, Administrative Orders and due process in the present case. Even if the Appellant is not permitted to answer, she should have been allowed to defend and/or mitigate the damages as permitted by Howard. The Special Referee's refusal to vacate the default was therefore reversible error.

Although our statutes clearly contemplate the use of formal pleadings, the harsh result of judgment by default is not the proper tool to reprove the failure of a party to use formal

pleadings. DM Co., Inc. v. Nycoil Co., 273 S.C. 496, 257 S.E.2d 499 (S.C. 1979); Eastern Savings Bank, FSB v. Sanders, 373 S.C. 349, 644 S.E.2d 802 (S.C.App. 2007)

Our Supreme Court has held that a judgment should be vacated on general principles of equity where the award is patently and greatly out of proportion to the wrongs alleged in the complaint. *Renney v. Dobbs House, Inc.,* 275 S.C. 562, 274 S.E.2d 290 (1981); *Williams v. Vereen,* 284 S.C. 219, 325 S.E.2d 337 (Ct.App.1985). In Renney, the appellant based his motion to vacate on S.C.Code Ann. Section 15-27-130 (1976). [4] The Supreme Court, on its own motion, vacated the judgment on equitable grounds stating:

"Whether a defendant is or is not in default, it is incumbent upon the judge and/or the jury to make a judicial determination of the amount recoverable based on the proof." 275 S.C. at 567, 274 S.E.2d at 293.

This same principle of equity should be applied in the case at bar. "In determining whether there has been an abuse of discretion all of the facts and circumstances must be evaluated. If the requirements to vacate a judgment are met the judgment should be opened and the defendant permitted to answer." *Edwards v. Ferguson,* 254 S.C. 278, 175 S.E.2d 224, 226 (1970). The record abundantly shows that the Appellant met her burden of proof on the "meritorious defense" issue. The order of the lower court should be reversed, the Appellant permitted to answer, and the case should be tried on its merits in the conventional fashion.

Conclusion

Based on all of the facts that were presented to the Court at the Motion hearing, Defendant has established a meritorious defense and met the standards of timeliness to justify this Court in vacating the Judgment of Foreclosure and Sale, setting aside the sale, and for the other relief requested in the Defendant's Motion and allowing Defendant the opportunity to

investigate the modification evaluation, present her position and defend her home from foreclosure.

Respondent exhibited a pattern of not being candid with the Court and taking unilateral action that was acted on by its chosen Special Referee. Appellant established Respondent's lack of consideration for due process, violation of the Administrative Orders of the S.C. Supreme Court regarding foreclosure, unclean hands, fraud, misrepresentation and misconduct, and disregard of the HAMP guidelines. Each constitutes sufficient basis to cause this Court to vacate the default judgment, set aside the sale and grant the other relief requested in the Defendant's motion.

The Appellant requests, at a minimum, that this Court allow the issue of compliance with HAMP, the TRO and the 2009 AO to become contested. The Appellant's rights as established in these state and federal laws can be properly observed only through the evidentiary hearing process, after full discovery as Appellant requested in her Motion to Set Aside the Sale and related relief.

10-1 ,2012

Susan Ingles S.C. Bar 4577
SOUTH CAROLINA LEGAL SERVICES
701 South Main Street
Greenville, SC 29601
Attorney for Appellant

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

R. Murray Hughes
Special Referee

Case No. 2008-CP-39-2120

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Respondents,

v.

Vanessa Y. Bradley
Appellant.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that the Final Brief of Appellant and Final Reply Brief of Appellant comply with Rule 211(b).

October 1, 2012

Susan Ingles
SOUTH CAROLINA LEGAL SERVICES
701 South Main Street
Greenville, SC 29601
Attorney for Appellant Vanessa Y. Bradley
864-679-3244

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PROOF OF SERVICE

I certify that I have served the Final Brief of Appellant and Final Reply Brief of Appellant on JP Morgan Chase Bank, National Bank, by depositing a copy of it in the United States Mail postage prepaid on October 2, 2012 addressed to their attorneys of record at the following address:

James Y. Becker
Mary M. Caskey
P.O. Box 11889
Columbia, SC 29211-1889

October 2, 2012

Susan Ingles
SOUTH CAROLINA LEGAL SERVICES
701 South Main Street
Greenville, SC 29601
Attorney for Appellant