THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM JASPER COUNTY
Darrell Thomas Johnson, Jr., Special Referee

Case No. 2015-002049

Bank of Walterboro, ... Plaintiff,

v.

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

Of which Mortgage Electronic Registration Systems, Inc., As nominee for BNC Mortgage, Inc., is the .....Appellant,

and

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

INITIAL BRIEF OF RESPONDENT BANK OF WALTERBORO

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STATEMENT OF ISSUES ON APPEAL

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II. Whether the Special Referee's compliance with the law on default where MERS failed to appear at a foreclosure hearing for which it received proper notice constitutes a clerical mistake under Rule 60(a).

STATEMENT OF THE CASE

This is an appeal from an order denying Appellant Mortgage Electronic Registration Systems, Inc. ("MERS") Rule 60, SCRCP, motion for relief from a foreclosure decree involving real property in Jasper County, South Carolina. MERS chose not to answer, investigate, or monitor the case for over two years and then sought to set aside the foreclosure decree.

On May 13, 2013, Respondent Bank of Walterboro (the "Bank") filed a foreclosure action against numerous defendants, including MERS, Charles Bush, and Respondent Rosemelle M. Shuler ("Shuler"). (Cmplt.). The foreclosure arose out of a March 1, 2007 mortgage and note executed by Bush and Shuler in favor of the Bank. (Cmplt. ¶ 5). The Bank properly served MERS. MERS failed to answer or respond to the Complaint and, on September 5, 2014, the circuit court entered an order of default as to MERS and referred the case to a Special Referee. (Order of Def.). The Bank served MERS with three Notices of Hearing, as to the foreclosure hearing. (Nots.). Two of those hearings were postponed or continued. MERS failed to appear at the May 20, 2015 hearing. On May 21, 2015, the Special Referee filed a Decree for Final Judgment for Foreclosure, finding the Bank has a first priority lien on the property and ordering its sale. (Foreclosure Order).

On July 17, 2015, MERS filed a Motion to Vacate and Set Aside Final Judgment of Foreclosure and Sale Filed May 21, 2015, Pursuant to Rule 60(b), SCRCP. (Mot.). MERS argued that the Foreclosure Order contained an error of fact in finding the Bank had a first priority lien because MERS is the assignee of an allegedly unsatisfied and unsubordinated mortgage filed prior

to the Bank's mortgage. The Special Referee held a hearing on MERS' motion on July 23, 2015, and issued an order denying the motion on August 26, 2015. (Order). MERS now appeals.

FACTS

Shuler obtained title to the property at issue in 2001. (Cmplt. p. 3). Thereafter, Shuler took out multiple loans on the property. (Exhs. to Cmplt.). The loans and mortgages at issue in this Appeal are those held by the Bank and MERS.

On May 15, 2006, Lexington Capital loaned Shuler $102,800.00, secured by a mortgage on the property. (Exh. F to Cmplt.). Lexington Capital recorded the mortgage on June 20, 2006. *Id.* On March 1, 2007, Shuler and Bush executed a mortgage for the tract of land acquired by Shuler in 2001, which was described in the Lexington Capital mortgage, and a tract acquired by Bush and Shuler in 2007. The Bank's mortgage secured a $69,302.00 note. (Exh. B. to Cmplt.). The Bank recorded the mortgage on October 29, 2007. *Id.* Prior to closing on the mortgage, the Bank obtained a title insurance commitment from a closing attorney. (Aff. of James M. Bunton, Exh. Title Commit.). The title commitment did not show the 2006 Lexington Capital mortgage. *Id.*

On June 22, 2007, Lexington Capital assigned its 2006 mortgage to BNC Mortgage, Inc., which then assigned it to MERS on June 25, 2007. (Exhs. G-H to Cmplt.). On May 27, 2009, Bush and Shuler executed a renewal note in favor of the Bank for $69,186.92. (Exh. C to Cmplt.).

On May 13, 2013, after Bush and Shuler defaulted on the Bank's mortgage, the Bank filed a foreclosure action against Bush, Shuler, MERS, and other parties believed to have an interest in the property. (Cmplt.). As to MERS, the Complaint states in part:

> Upon information and belief, the Defendant, **MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.**, . . . may, **AS NOMINEE FOR BNC MORTGAGE, INC.**, have or claim to have some interest in or lien on [the property] . . . and on information and belief, the interest of Mortgage Electronic

> Registration Systems, Inc. as Nominee for BNC Mortgage, Inc., . . . have been paid in full and satisfied or are subordinate to the interest of Plaintiff.

(Cmplt. ¶ 12). The exhibits to the Complaint included the Lexington Capital mortgage and assignments to BNC and MERS. (Cmplt. Exhs. F-H). Further, the Complaint states MERS' mortgage was "recorded on June 20, 2006" and the Bank's mortgage was "recorded on October 29, 2007." (Cmplt. ¶¶ 12.a., 5). Therefore, MERS knew exactly what mortgage the Bank referred to in the Complaint and that its mortgage was recorded prior to the Bank's mortgage.

The Bank believed the MERS mortgage was satisfied or subordinate because it was not listed on the title commitment the Bank received before it made the loan to and took the mortgage from Bush and Shuler, but was listed on the title abstract the Bank obtained prior to filing the foreclosure action. (Aff. of James M. Bunton, Exh. Title Commit.; Aff. of Linda C. Jordan, Exh. A). Notably, the Bank's Complaint did not assert MERS' mortgage was satisfied as of record, but alleged its subordination or satisfaction on information and belief.

It is undisputed that, on May 28, 2013, the Bank properly served MERS with the Summons and Complaint but MERS failed to answer or otherwise respond. (Br. of App. p. 3). MERS provided no evidence, by affidavit, testimony, or otherwise, as to why it did not answer the Complaint. Counsel for MERS stated that it relied on the Complaint allegations regarding its subordinate lien position as accurate without conducting any investigation into the accuracy of the allegations. (Tr. pp. 24-25, 30-31). Counsel did not explain how such alleged reliance is legally or factually justified given that the Complaint and its accompanying exhibits show that MERS' mortgage was recorded prior to the Bank's mortgage. (Cmplt.).

On September 5, 2014, the circuit court entered an order of default as to MERS and referred the case to Special Referee Darrell Thomas Johnson, Jr. (Order). The default has been a matter of public record, available on the sccourts.org website, since its filing on September 5, 2014. On

September 16, 2014, the Bank served a Notice of Hearing with Finality on MERS, but that hearing was postponed. (Not. & Cert. of Svc.). On October 15, 2014, the Bank served a Notice of Re-Scheduled Hearing with Finality on MERS, but that hearing was also postponed. (Not. & Cert. of Svc.). On May 6, 2015, the Bank served a third Notice of Hearing with Finality on MERS for the foreclosure hearing scheduled for May 20, 2015 at 2:00 p.m. (Not.). All three Notices of Hearing state: "IF YOU ARE NOT PRESENT, THE PLAINTIFF MAY BE AWARDED THE RELIEF PRAYED FOR WITHOUT YOUR CONSENT OR APPROVAL." (Notices). MERS did not inquire into the status of the case or contact the Bank's counsel after receipt of the first two Notices of Hearing.

On May 19, 2015, an employee of Ocwen loan servicing, the MERS mortgage servicer, called counsel for the Bank. (Aff. of L. Jordan p. 3, Exh. B to Aff.). Counsel for the Bank returned the call but did not receive an answer. *Id.* On May 20, 2015, at 11:06 a.m., counsel for the Bank sent the Ocwen employee an email stating MERS had received service of the foreclosure action and is in default, and that the final hearing was scheduled for later that afternoon, as stated in the notice previously served on MERS. *Id.*

On May 20, 2015, the Special Referee held a hearing on the foreclosure action, and filed a Decree for Final Judgment for Foreclosure on May 21, 2015. (Foreclosure Order). The Special Referee entered judgment against Shuler and Bush and ordered the sale of the property. *Id.* at p. 4. The Special Referee found all defendants, except Shuler, Bush, and the South Carolina Department of Revenue, "have also been properly served and are in default." *Id.* at p. 1.

Over two weeks later, on June 6, 2015, an attorney for MERS, Lee Lott, called counsel for the Bank, who returned the call on June 8, 2015, but could not speak with Mr. Lott. (BOW Memo. in Opp. Rule 60 Mot. p. 15; Tr. p. 55; Aff. of L. Jordan p. 3). Mr. Lott called back over a week

later, on June 16, 2015, and notified the Bank's counsel that MERS would have its South Carolina counsel initiate contact about the case. *Id.* Three weeks later, on July 7, 2015, MERS' counsel contacted the Bank's counsel. (Aff. of L. Jordan p. 3).

The Special Referee scheduled the foreclosure sale for July 9, 2015. (Not. of Sale). On the eve of the sale, the Special Referee held a telephone conference with counsel for the Bank and MERS, and agreed to postpone the sale. (Order denying Mot. to Reopen Judg. p. 4). On July 15, 2015, MERS filed a Motion to Vacate and Set Aside Final Judgment of Foreclosure and Sale Filed May 21, 2015 Pursuant to Rule 60(b), SCRCP. The motion stated MERS moved pursuant to only Rule 60(b), SCRCP. (Mot. p. 1). In a subsequently filed memorandum in support of the motion, MERS stated it moved pursuant to Rule 60(a) and (b). (Memo. p. 1). At the hearing on the motion, MERS explained that it sought relief not only from the foreclosure decree regarding its lien priority but also from the order of default. (Tr. pp. 5-6, 14-15).

The Bank filed a memorandum in opposition to MERS' motion, along with two affidavits. James M. Bunton, the Vice President of the Bank of Walterboro, submitted an affidavit and title commitment attesting to the fact that the original title insurance binder provided to the Bank prior to the Bank taking its mortgage did not show the MERS mortgage. (Aff. of Bunton). Based on that information, the Bank believed it received a first mortgage on the property acquired by Bush and Shuler in 2007, with Shuler's separate property subject to a mortgage from Shuler to The CIT Group/Consumer Finance, Inc., recorded on December 29, 2003. (Aff. of Jordan, Exh. A pp. 37-39). Linda C. Jordan, a legal assistant for the Bank's counsel, submitted an affidavit attesting to the Bank's receipt of a title abstract prior to the foreclosure and all contact with MERS representatives. (Aff. of Jordan). The CIT Group/Consumer Finance, Inc., mortgage was shown

as satisfied at the time the Bank filed the foreclosure complaint, and The CIT Group/Consumer Finance, Inc., was not made a party to the foreclosure. (Aff. of Jordan, Exh. A, p. 41; Cmplt.).

The Special Referee held a hearing on MERS' motion on July 23, 2015. MERS presented no witnesses or affidavits. As to Rule 60(a), SCRCP, which requires proof of a clerical mistake to set aside a judgment, MERS argued the mistake "is that of a title abstractor and of the title company" in providing incorrect information to the Bank's closing attorney for the mortgage. (Tr. p. 20 lns. 10-14). As to Rule 60(b)(1), SCRCP, which requires proof of "mistake, inadvertence, surprise, or excusable neglect", MERS argued "the mistake by Investor's Title" in performing the title commitment "was a contributing and significant factor" in MERS' failure to answer. (Tr. p. 25 lns. 6-13).

As to proof of the status of its mortgage, MERS presented only the original, filed mortgage and subsequent assignments of the mortgage. (Mot.). These documents were attached to the Bank's Complaint. (Cmplt. Exh. F-H). MERS did not present evidence showing its mortgage is unsatisfied or superior to the Bank's mortgage.

On August 26, 2015, the Special Referee filed an Order denying MERS' motion to reopen the judgment. (Order). The Special Referee found "[r]ather than arising out of mistake, inadvertence, surprise or excusable neglect, MERS' situation here arises out of their own failure to take reasonable steps to protect their position." (Order pp. 6-7). The Order further holds "MERS whole argument rests upon the explanation that it, for two years, accepted and assumed that the Complaint was accurate. This argument presumes that it was somebody else's responsibility to verify the allegations of the Complaint and not MERS' responsibility." *Id.* at p. 7. MERS appeals from that order.

STANDARD OF REVIEW

"The decision to grant or deny a motion to set aside a judgment for excusable neglect lies within the sound discretion of the trial court." *Gainey v. Gainey*, 382 S.C. 414, 430, 675 S.E.2d 792, 800 (Ct. App. 2009). "An appellate court's standard of review, therefore, is limited to determining whether there was an abuse of discretion." *RRR, Inc. v. Toggas*, 378 S.C. 174, 181, 662 S.E.2d 438, 441 (Ct. App. 2008). "Such an abuse arises when the circuit court issuing the order was controlled by an error of law or when the order, based upon factual conclusions, is without evidentiary support." *Id.* at 181, 662 S.E.2d at 441 (internal quotation marks omitted). "[I]n reviewing a decision with respect to Rule 60(b), this Court utilizes a deferential standard of review." *Auto-Owners Ins. Co. v. Rhodes*, 405 S.C. 584, 594, 748 S.E.2d 781, 786 (2013).

ARGUMENT

The Special Referee court correctly denied MERS' motion for relief from judgment under Rule 60(a) and (b)(1), SCRCP. Under Rule 60(b)(1), a party may seek relief from judgment upon a showing of "mistake, inadvertence, surprise, or excusable neglect." Rule 60(b)(1), SCRCP. Under Rule 60(a), a party may seek relief from judgment if there is a "clerical mistake . . . arising from oversight or omission." Rule 60(a), SCRCP.

I. MERS' VOLUNTARY CHOICE NOT TO ANSWER, INVESTIGATE, OR APPEAR IN THIS ACTION FOR OVER TWO YEARS IS NOT A BASIS FOR RELIEF UNDER RULE 60(b)(1), SCRCP

"It is incumbent upon the party seeking relief pursuant to Rule 60(b)(1) to show the applicability of one of the qualifying grounds." *Paul Davis Sys. v. Deepwater of Hilton Head, LLC*, 362 S.C. 220, 225, 607 S.E.2d 358, 360-61 (Ct. App. 2004). MERS seeks relief based on alleged mistake of fact and excusable neglect. (Br. of App. pp. 9, 11). The Special Referee correctly denied MERS' Rule 60(b)(1) motion because it failed to prove either mistake of fact or excusable neglect. As another, independent basis for affirming, MERS also fails to meet the other required

elements for relief under Rule 60(b). "In determining whether to grant a motion under Rule 60(b), the circuit 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." *Rodriguez v. Gutierrez*, 391 S.C. 323, 331, 705 S.E.2d 94, 99 (Ct. App. 2011).

"A party making a motion under Rule 60(b) has the burden of presenting evidence proving the facts essential to entitle him to relief." *McClurg v. Deaton*, 380 S.C. 563, 575, 671 S.E.2d 87, 94 (Ct. App. 2008). MERS does not satisfy this burden.

A. The Special Referee Correctly Held That MERS Failed to Prove Mistake or Excusable Neglect When it Chose Not to Answer or Investigate the Complaint Allegations

The Special Referee correctly held that "[r]ather than arising out of mistake, inadvertence, surprise, or excusable neglect, MERS' situation here arises out of their own failure to take reasonable steps to protect their position." (Order pp. 6-7). The evidence and law support this holding.

i. MERS Cannot Show Excusable Neglect

MERS failed to show excusable neglect. Where a "cursory examination of [pleadings] would readily have disclosed the fallacy of the assumption" made by a party, the party "has shown neglect, but no excuse for it." *Mitchell Supply Co. v. Gaffney*, 297 S.C. 160, 165, 375 S.E.2d 321, 324 (Ct. App. 1988) (internal quotation marks omitted) (holding a party not entitled to relief from judgment under Rule 60(b)(1), where the attorney mistakenly assumed two complaints were for the same action rather than for separate foreclosure and mechanic's lien actions). MERS argues it relied on the allegations of the Bank's Complaint as accurately stating MERS' priority as to the property and, therefore, the fact that MERS did not timely answer is someone else's fault because it was misled by the Complaint. (Tr. p. 30 lns. 10-13, 22-24). The facts of this case present a different version of events.

The Complaint stated as an allegation and contained as exhibits the fact that MERS' mortgage was filed prior to the Bank's mortgage. It is solely attributable to MERS that it somehow ignored those allegations and relied solely on the allegation that its mortgage was subordinate to the Bank's mortgage, which was pled upon information and belief. (Cmplt. ¶ 12). MERS' counsel admitted at the hearing that "It's not in dispute" that "they [MERS] neglected to investigate when they were served" with the Summons and Complaint. (Tr. p. 63 lns. 4-12). MERS neglected its obligation to investigate the allegations of the Complaint, but such neglect is not excusable.

"[A] party has a duty to monitor the progress of his case" regardless of whether the party decided to file an answer. *Goodson v. American Bankers Inc. Co.*, 295 S.C. 400, 403, 368 S.E.2d 687, 689 (Ct. App. 1988) (affirming the trial court's decision to deny a Rule 60(b)(1) motion). In *Goodson*, the defendant served and filed an answer, but its agent, rather than an attorney, signed the answer and it did not state an address for the defendant. *Id.* at 401, 368 S.E.2d at 688. The plaintiff sent notice of trial to the agent but no one appeared at the trial, and the jury returned a verdict in the plaintiff's favor. *Id.* at 401-02, 368 S.E.2d at 689. The Court of Appeals held "[l]ack of familiarity with legal proceedings is unacceptable and the court will not hold a layman to any lesser standard than is applied to an attorney." *Id.* at 403, 368 S.E.2d at 689. The Court affirmed the trial court's decision to deny the defendant's Rule 60(b)(1) motion for relief from judgment because "[a]ny neglect resulted from [defendant] using [its agent], a layman, in defending the case." *Id.*

In this case, MERS received proper service of every document as to which the Rules of Civil Procedure require service. MERS received service of the Summons and Complaint, which it consciously chose not to answer. "It is always a matter of regret that a party should not have his day in court. However, where the appellant was duly served with the summons and complaint, it

was his duty to answer the complaint. Therefore, he must suffer the consequence of his failure to answer." *Hill v. Dotts*, 345 S.C. 304, 310, 547 S.E.2d 894, 897 (Ct. App. 2001) (internal quotation marks, ellipses, and brackets omitted) (affirming the trial court's decision to deny a Rule 60(b) motion). A result of MERS' intentional failure to answer is that "[n]o service need be made on parties in default for failure to answer, except . . . notice of any trial or hearing on unliquidated damages."[1] Rule 5(a), SCRCP; Tr. pp. 52-53. The Bank served MERS with Notice of Hearing for the foreclosure hearing. Therefore, MERS received all required service and notice but neglected its obligation to respond and monitor the progress of the case.

MERS' counsel admitted at the hearing that, in a situation in which a client holds a mortgage that has higher priority than the foreclosing plaintiff, it is customary to "answer it, but we're not in default. But then we just monitor it, we don't go to the hearings." (Tr. p. 24 lns. 11-16). In this case, MERS did neither. Despite allegations and documentation showing its mortgage was recorded prior to the foreclosing party's mortgage and an allegation that the foreclosing party's mortgage is superior to MERS' mortgage, MERS ***chose to purposely not answer, investigate, or monitor*** this case. Therefore, its own neglect and failure to read or investigate a lawsuit caused it to end up in default. Such neglect is not excusable.

Finally, MERS' un-excusable neglect is further illustrated by the terms of its mortgage. The mortgage lists as an event of default "any action or proceeding, whether civil or criminal, . . . that, in Lender's judgment, could result in forfeiture of the Property or other material impairment of Lender's interest in the Property or rights under this Security Instrument." (Cmplt. Exh. F p. 9,

[1] MERS appears to attach significance to the fact that it did not receive service of an affidavit of default. (Br. of App. p. 11). Not only is such service not required, but it is also something MERS should have expected when it intentionally chose not to answer the Complaint. One natural consequence of that voluntary inaction is default.

¶ 11). The mortgage also states if "there is a legal proceeding that might significantly affect Lender's interest in the Property . . . then Lender may do and pay for whatever is reasonable or appropriate to protect Lender's interest in the Property and rights under this Security Instrument . . . , [including] appearing in court." *Id.* at p. 7, ¶ 9. Given service of a civil foreclosure proceeding asserting the subordination of MERS' mortgage and the likelihood of the sale of the property in which MERS claims a right or interest, both of which trigger certain rights under the terms of the Mortgage, MERS' unsupported argument that it accepted allegations pled upon information and belief is insufficient to constitute excusable neglect.

ii. MERS Cannot Show a Mistake

MERS also failed to prove a mistake. The only mistake that occurred is MERS' failure to fully read and investigate the allegations of and exhibits attached to the Complaint. A party "will not be heard to complain on appeal of an error he voluntarily committed before the trial court." *Hillman v. Pinion*, 347 S.C. 253, 257, 554 S.E.2d 427, 430 (Ct. App. 2001) (denying a Rule 60(b)(1) motion for relief from judgment).

The mistake alleged by MERS—that its mortgage is subordinate to the Bank's mortgage—is a legal matter. The determination of mortgage or lien priority is a legal, not a factual, issue. "[A] party may not generally use Rule 60(b)(1) as a vehicle for relief from a mistake of law." *Hillman*, 347 S.C. at 256, 554 S.E.2d at 429. MERS' allegedly mistaken understanding that its mortgage was subordinate to the Bank's mortgage is a mistake of law that is not appropriate for relief under Rule 60(b)(1). *See* Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.").

"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, 17 (1992) (holding the proponents of a will had no

reason to know of the mistaken testimony of two ascribing witnesses to the will until their depositions were taken in the legal malpractice case). In this case, the information MERS claims is a "mistake" was plainly stated and attached as exhibits to the Complaint. MERS' failure to avoid the "mistake" is not justified. It should not be permitted to blame its own mistake on the Bank when MERS admits it failed to conduct any investigation into the accuracy of the allegations.

The Complaint states MERS' mortgage on the Shuler property was recorded in 2006 and the Bank's mortgage was recorded in 2007. (Cmplt. ¶¶ 5, 12). The recorded mortgages are attached as exhibits B and F to the Complaint. Therefore, MERS was on notice that the Bank claimed a mortgage it recorded after the MERS mortgage had a priority lien. Yet, MERS chose to do nothing, make no inquiry, conduct no investigation, and ignore the lawsuit. MERS admitted it "neglected to investigate when they were served." (Tr. p. 63 lns. 9-12). The only information MERS submitted to the Special Referee to show a mistake of fact is the same information that was attached to the Complaint—the Bank's and MERS' mortgages. There is no "mistake" when all of the information upon which the alleged mistake is based was properly served on and supposedly read by the party claiming a mistake.

If MERS is now granted relief from judgment, then any defendant may simply refuse to take part in the judicial process, avoiding the cost of a defense, and then seek to set aside the judgment later because it failed to check the accuracy of the allegations of the complaint. A decision in MERS' favor would have the perverse effect of rewarding a party who fails to comply with the Rules of Civil Procedure and fails to engage in even the slightest investigation upon receipt of a summons and complaint.

MERS presented no evidence, by way of testimony or affidavit, as to why it chose to not (1) investigate or verify the allegations of the Complaint, (2) answer the Complaint, (3) monitor

the status of the litigation naming it as a defendant, and (4) inquire as to the first two Notices of Hearing with Finality. MERS simply presented argument of counsel.[2] (Tr. p. 30). *See McClurg v. Deaton*, 395 S.C. 85, 86 n.1, 716 S.E.2d 887, 887 n.1 (2011) ("[I]t is well-settled that the moving party in a Rule 60(b) motion has the burden of presenting **evidence** entitling him to relief. Memorandum in support of a motion is not evidence." (emphasis in original)). "Arguments of counsel are also not evidence." *Bowers v. Bowers*, 304 S.C. 65, 68, 403 S.E.2d 127, 129 (Ct. App. 1991) (finding party failed to present evidence to entitle him to relief under Rule 60(b)).

Finally, MERS incorrectly relies upon *Williams v. Watkins*, 384 S.C. 319, 681 S.E.2d 914 (Ct. App. 2009), as supposedly holding that a party's reliance on allegedly "incorrect court documents can constitute a good faith mistake of fact." (Br. of App. p. 10). This is a mischaracterization of *Williams*. In that case, the "incorrect court document" was a notice sent ***by the court*** to a litigant that stated an incorrect hearing time and resulted in the litigant failing to appear. 384 S.C. at 323-25, 681 S.E.2d at 916-17. This case does not involve a document sent by the court but, rather, involves complaint allegations made on information and belief. MERS cites no precedent indicating that a defendant is permitted to rely on complaint allegations as true and correct.

B. The Special Referee Correctly Held MERS Failed to Show the Complaint Allegations are Untrue

The Special Referee's holding that the priority between the Bank's and MERS' mortgages is refutable is supported by the law and evidence. (Order pp. 8-9). The Complaint alleges "on information and belief" that MERS' "interests . . . have been paid in full and satisfied or are subordinate to the interest" of the Bank. (Cmplt. ¶ 12).

[2] The Bank objected to the statements by MERS' counsel regarding why MERS did not timely answer the Complaint as inadmissible hearsay. *See* Tr. pp. 29, 31, 35.

The Special Referee held MERS failed to present any evidence "as to the current status of MERS' mortgage."[3] (Order p. 9). MERS does not appeal that finding. The Bank relied upon "both the commonplace occurrence of paid, but unsatisfied [as of record], mortgages and the title opinion of the closing attorney." (Order p. 9). These provide good faith bases to allege "on information and belief" that MERS' mortgage is satisfied or subordinate. *See, e.g.*, S.C. Code Ann. § 29-3-310 ("Any holder of record of a mortgage who has received full payment or satisfaction . . . shall, ***at the request*** . . . of the mortgagor . . . enter satisfaction . . . ."). The Bank explained at the hearing that the allegations in the Complaint

> were not based on a mistake of fact, but were made to allow the holders of those mortgages [to] come forward in their answers to the Complaint and assert that their interest, including their interest under the mortgages, had not been paid in full and satisfied, and were not subordinate to the interest of Plaintiff.

(Tr. p. 67 lns. 1-8). MERS presented no evidence to prove its priority as a matter of law aside from what the Bank specifically alleged in the Complaint—MERS' mortgage was recorded first. There is no "false statement" in the Complaint but rather, only the dates of recordation and a good faith allegation of priority. (Br. of App. p. 6). Further, as explained above, MERS' reliance on the allegations of the Complaint pled "on information and belief" is not a valid ground for relief from judgment.[4]

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[3] The Special Referee also stated at the hearing that he took "judicial notice that not every mortgage that is satisfied gets marked satisfied." (Tr. p. 64 lns. 16-18).

[4] MERS discusses a separate mortgage previously held by CIT Group and speculates that the Bank confused the CIT mortgage with the MERS mortgage. (Br. of App. p. 6). The Court should disregard this argument. (Br. of App. pp. 6-7). At the hearing, the Special Referee specifically asked the parties if the issue of confusion of those mortgage was before him. (Tr. p. 57 lns. 20-24). MERS responded, "***I don't have any evidence of that***" and described that assertion as "speculat[ion] that they might have been confused." (Tr. p. 58 lns. 12-21) (emphasis added). Therefore, the issue is neither supported by the evidence nor properly before this Court.

MERS' citation to Rule 407-3.3, RPC, Rule 407, SCACR, is misplaced and inapplicable. (Br. of App. p. 10). There is not a false statement in the Bank's Complaint. The Complaint states, "***on information and belief***, the interest of [MERS] . . . have been paid in full and satisfied ***or*** are subordinate to the interest of Plaintiff." (Cmplt. ¶ 12) (emphasis added). There is no evidence before this Court as to the status of the MERS' mortgage and whether it is paid in full and satisfied. The Special Referee held:

> I have no evidence or testimony as to the current status of [MERS'] mortgage, except the title abstract. I have no information as to the balance remaining. Sometimes mortgages are paid off, but not satisfied of record. That was the assumption which the Plaintiff made since 2007 and that assumption was backed up by MERS' failure to participate in the action despite repeated notice for two years.

(Order denying Mot. to Reopen Judg. p. 6). MERS does not appeal the finding that it failed to present evidence as to the status of mortgage. Therefore, that is the law of the case. *See Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013) ("An unappealed ruling is the law of the case and requires affirmance."). Considering the absence of any evidence as to the status of the mortgage, the pleading of the MERS' mortgage priority upon information and belief, and MERS' admission of the Complaint allegations by failing to answer, the Complaint does not contain a "false statement" that requires correction. (Br. of App. p. 10).

C. The Special Referee Correctly Held MERS Failed to Promptly Seek Relief

The Special Referee correctly found MERS failed to act promptly by not responding, investigating, or taking any action on a properly served Complaint for over two years. MERS is incorrect that the only relevant time period in determining promptness is the time between the entry of the judgment and the filing of the Rule 60(b) motion. (Br. of App. p. 12). MERS did file its motion within a year from entry of the judgment. However, that does not mean it promptly sought relief from the alleged mistake—the Complaint allegations. *See Coleman v. Dunlap*, 306

S.C. 491, 495, 413 S.E.2d 15, 17 (1992) ("When a SCRCP 60(b) motion is made within one year of the original judgment, whether the motion was made within a reasonable time after discovery of the mistake is within the sound discretion of the trial judge.").

In *Rodriguez v. Gutierrez*, 391 S.C. 323, 705 S.E.2d 94 (Ct. App. 2011), this Court found the defendant failed to promptly seek relief under Rule 60(b), even though the motion for relief was filed within one year of the default judgment. *Id.* at 331-32, 705 S.E.2d at 99. In that case, the complaint was served on June 14, 2007, a notice of damages hearing was served on September 19, 2007, and the lower court entered a default judgment for the plaintiff on October 25, 2007. *Id.* at 327, 705 S.E.2d at 97. On October 25, 2007, the same day as the entry of the default judgment, the defendant filed a motion to set aside the default judgment. *Id.* On September 15, 2008, the court denied the motion to set aside the default judgment. *Id.* at 328, 705 S.E.2d at 97. On September 25, 2008, the defendant filed a Rule 60(b) motion for reconsideration of the order refusing to set aside the default judgment. *Id.* Despite the fact that the defendant filed for relief within the one-year time period stated in Rule 60(b), this Court held he "failed to act promptly in seeking relief." *Id.* at 332, 705 S.E.2d at 99.

The same result is warranted in this case. MERS failed to promptly seek relief when it admits it could have "discovered the error in time to prevent the Foreclosure decree." (Br. of App. p. 9). Given this admission, MERS' argument that it "became aware of the situation the day before the May 20, 2015 hearing" is incorrect. (Br. of App. p. 12). MERS had actual knowledge of the prior recordation of its mortgage on the day it received service of the Complaint—May 28, 2013. Yet, it failed to seek relief from such allegation for over two years. As the Special Referee noted "MERS basically ignored the Complaint and ignored the action for two years until the eve of

foreclosure sale." (Order p. 7). The law and the evidence support the Special Referee's finding that MERS failed to act promptly.

D. The Special Referee Correctly Held MERS Did Not Provide a Reason for its Failure to Act Promptly

MERS does not address this element in its brief. The Special Referee correctly found that MERS did not even attempt to answer the question of why it accepted the Complaint as accurate for two years but questioned the foreclosure decree after a few weeks. (Order p. 8). MERS presented only argument of counsel that it did not answer the Complaint because it relied on the allegations as true. The insufficiency of this argument is discussed above.

There is no adequate explanation for MERS' failure to acknowledge, investigate, or monitor a legal proceeding filed against it for over two years. *See Hill v. Dotts*, 345 S.C. 304, 310-11, 547 S.E.2d 894, 897 (Ct. App. 2001) (holding a party failed to satisfy the factor of a reason for the failure to act promptly where a party argued his failure to understand the legal process excused "his tardy reply"). The Bank properly served the Complaint and all required notices. In the absence of any argument or evidence from MERS on this issue, and the fact that the law and evidence support the Special Referee's holding, this Court should affirm the Special Referee's finding that MERS did not provide a reason for its failure to act promptly.

E. MERS Has Not Proven a Meritorious Defense

The Special Referee did not rule on the existence of a meritorious defense. (Order p. 6). However, there is evidence in the Record to support a finding that MERS failed to prove a meritorious defense. *See* Rule 220(c), SCACR (stating the court "may affirm . . . upon any ground(s) appearing in the Record on Appeal").

MERS' asserted meritorious defense is that its mortgage "was recorded prior to" the Bank's mortgage "and the MERS Mortgage has not been satisfied." (Br. of App. p. 13). This is incorrect.

First, the Bank pled the respective mortgage recordation dates in the Complaint but it triggered no response from MERS. Prior recordation also does not automatically mean MERS' mortgage is in a first priority position because there are numerous exceptions to the first-to-record rule. *See, e.g.*, *Suntrust Bank S/B/M Nat'l Bank of Commerce v. Bryant*, 392 S.C. 264, 268, 708 S.E.2d 821, 823 (Ct. App. 2011) (stating that a purchase money mortgage "is accorded priority over all other claims or liens arising through the mortgagor although they are prior in time" (internal quotation marks omitted)); S.C. Code Ann. § 29-3-40 (stating a mortgage holder's payment of taxes on the property "shall be a first lien . . . regardless of the rank and priority of the mortgage"); S.C. Code Ann. § 29-3-50 (stating future advances relate back to the mortgage recordation priority date).

Second, there is no evidence that MERS' mortgage has not been satisfied. As the Special Referee found, it received "no information as to the balance remaining. Sometimes mortgages are paid off, but not satisfied of record." (Order p. 6).

MERS failed to present a meritorious defense. The Court should reject MERS' request for it to find a meritorious defense exists based upon the same information MERS determined was not worthy of a response in the underlying litigation.

F. The Law and Evidence Support the Special Referee's Holding that the Bank Will Suffer Prejudice if MERS is Relieved from Judgment

The final element for the Court to consider in ruling on a Rule 60(b) motion is the prejudice to the Bank—the party opposing the motion. The Bank will suffer prejudice if the Court grants MERS relief. "Prejudice" is defined as "[d]amage or detriment to one's legal rights or claims." *Black's Law Dictionary* 1218 (8th ed. 2004). The Bank complied with the law in its pleadings, service, and notice throughout this action. It spent time and money to obtain a foreclosure judgment in a matter as to which MERS expended no effort or investigation despite proper service. The Special Referee correctly found the Bank will suffer prejudice in the form of lost attorney's

fees, administrative fees, and foreclosure costs. (Order p. 9). If MERS is granted relief, permitted to defend the action, and is successful in its defense, the Bank could lose its first priority lien found by the Special Referee. If a properly served defendant in a foreclosure action may file a Rule 60(b) motion within a year of the hearing based on the same information that it received with the summons and complaint, then a foreclosing party such as the Bank could not safely sell or pass clear title to a subsequent purchaser until a year after the foreclosure decree is entered. MERS should not be permitted to appear over two years later asserting a mistake based on the same information the Bank provided to it with the Complaint.

MERS changes the focus of the prejudice element by arguing the alleged prejudice it will suffer outweighs the prejudice the Bank will suffer, citing to *Williams v. Watkins*, 384 S.C. 319, 681 S.E.2d 914 (Ct. App. 2009). (Br. of App. p. 14). *Williams* is, again, distinguishable from this case and supports the Bank's position. In *Williams*, this Court held the degree of prejudice Williams, the non-moving party, "will suffer if relief is granted is not so high as to outweigh the other factors" for consideration. 384 S.C. at 327, 681 S.E.2d at 918. *Williams* does not state that the Court is to weigh the prejudice each party will suffer. Rather, this Court held that, although the non-moving party would suffer prejudice, it was not enough to outweigh the Court's finding that the other three factors for consideration under Rule 60(b) weighed in favor of granting relief. *Id.* Further, the facts of *Williams* are distinguishable from this case. The non-moving party was "on notice of Watkins' denial of the allegations and was therefore on notice to gather evidence against Watkins", therefore, the Court found "little prejudice in requiring Williams to proceed with a trial on the merits." *Id.* In this case, the Bank was not on notice of MERS' denial of the allegations because MERS ***chose*** not to respond. Therefore, the Bank was not on notice to gather

evidence or that it may proceed with a trial on the merits against MERS. *Williams* supports a finding that the Bank will suffer prejudice.

MERS' speculative discussion of the possibility that it "will have no recourse to recover the loan debt owed to it" is irrelevant. (Br. of App. p. 15). If MERS wanted to protect any alleged interest in recovering its loan, the time to take such action was when it received service of a summons and complaint. After the Bank's foreclosure sale, MERS will still hold its note and could also seek recovery from any surplus from the foreclosure sale.

Finally, MERS cites to equity principles because the underlying action is one in foreclosure. *Id.* However, "[e]quity aids the vigilant, not those who slumber on their rights." *Eldridge v. Eldridge*, 398 S.C. 113, 121, 728 S.E.2d 24, 28 (2012). The doctrine of laches should bar any belated equity argument. "Laches is defined as 'neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done.'" *Id.* at 121, 728 S.E.2d at 28 (quoting *Hallums v. Hallums*, 296 S.C. 195, 198, 371 S.E.2d 525, 527 (1988)). "Under the doctrine of laches, if a party, knowing his rights, does not seasonably assert them, but by unreasonable delay causes his adversary to incur expenses or enter into obligations or otherwise detrimentally change his position, then equity will ordinarily refuse to enforce those rights." *Eldridge*, 398 S.C. at 121-22, 728 S.E.2d at 28 (internal quotation marks omitted). "MERS acknowledges that it might have discovered the [alleged] error in time to prevent the Foreclosure Decree." (Br. of App. p. 9). Therefore, MERS equity argument, made for the first time on appeal, actually supports the Bank's argument that it suffered prejudice by MERS' failure to respond to or investigate the Complaint allegations for over two years.

II. THE SPECIAL REFEREE'S COMPLIANCE WITH THE LAW ON DEFAULT IS NOT A CLERICAL MISTAKE UNDER RULE 60(a), SCRCP

The law and evidence support the Special Referee's holding that this case does not involve a clerical mistake under Rule 60(a). The Special Referee explained at the hearing:

> [T]he Order is not a clerical mistake. It may be wrong but it's not a clerical mistake. The order is based upon the pleading rules that a court accepts the well-pleaded allegations of a complaint that aren't denied or contradicted so it may be a mistake, but it's not a clerical mistake.

(Tr. p. 18 lns. 19-25). The Special Referee complied with the law on default by finding MERS admitted the allegations in the Complaint when it failed to answer. That is not a clerical error.

"Generally, a clerical error is defined as a mistake in writing or copying. As applied to judgments and decrees, it is a mistake or omission ***by a clerk, counsel, judge or printer*** which is not the result of exercise of judicial function." *Dion v. Ravenel*, 316 S.C. 226, 230, 449 S.E.2d 251, 253 (Ct. App. 1994) (internal citation omitted) (emphasis added). "While a court may correct mistakes or clerical errors in its own process to make it conform to the record, it cannot change the scope of the judgment." *Id.* at 230, 449 S.E.2d at 253-54.

The mistake alleged by MERS does not fit within the definition of a clerical mistake. MERS argued at the hearing that the mistake "is that of a title abstractor and of the title company" in providing incorrect information to the Bank's closing attorney for the mortgage. (Tr. p. 20 lns. 10-14). A clerical error is one "by a clerk, counsel, judge, or printer." *Dion*, 316 S.C. at 230, 449 S.E.2d at 253. Rule 60(a) does not encompass an alleged mistake by a third party entity wholly uninvolved with the litigation.

Dion involved a foreclosure in which, after the foreclosure hearing and sale, the foreclosing party filed a Rule 60(a) motion to amend the property description to include a causeway across marshland that provided access to the property. *Id.* at 228, 449 S.E.2d at 253. The master in equity granted the motion, finding "it 'obvious' that the causeway was meant to be included in the

mortgage." *Id.* at 230, 449 S.E.2d at 254. The Court of Appeals reversed. It reasoned that the issue of whether the causeway should have been part of the property description "was neither raised nor addressed at the foreclosure proceeding" and, therefore, "[t]here is no evidence of an 'oversight' or 'omission' resulting in the exclusion of the causeway from the description." *Id.* at 230, 449 S.E.2d at 254. The Court further explained: "To have been an 'oversight' or 'omission', by definition, it could not have been left out as the result of exercise of judicial function. Yet, the record clearly shows it was left out by exercise of judicial function, because the issue of whether or not it was included was never contemplated at the foreclosure proceeding." *Id.* at 230, 449 S.E.2d at 254.

This case is analogous to *Dion* in that, the issue of the priority of MERS' mortgage was not raised at the foreclosure hearing. Rather, given MERS' default, the Special Referee complied with the law regarding admission of pleadings, and correctly accepted the Complaint allegations as true. *See Roche v. Young Bros.*, 332 S.C. 75, 81, 504 S.E.2d 311, 314 (1998) ("[B]y suffering a default, the defaulting party is deemed to have admitted the truth of the plaintiff's allegations."). This was not a clerical mistake. *See Brown v. Brown*, 392 S.C. 615, 622, 709 S.E.2d 679, 683 (Ct. App. 2011) (stating a clerical error is an error "such as a misspelling, a misplaced decimal, or a miscalculation").

MERS' assertion that the Special Referee's action in signing and filing a proposed order is not a judicial fact finding function is not supported by the law and MERS cites none. (Br. of App. p. 17). Submitting proposed orders is a common practice in circuit court in this State. The review, signing, and filing of a proposed order is the exercise of a judicial function. MERS chose not to appear at the hearing, thus leaving the Court to exercise a judicial function in making findings of fact and legal conclusions based upon the information presented to it. Finally, MERS' request for

relief asks the Court to change the scope of the judgment, which is not permitted under Rule 60(a). *Dion*, 316 S.C. at 230, 449 S.E.2d at 253-54.

CONCLUSION

For the reasons stated above, Respondent Bank of Walterboro requests this Court affirm the decision of the Special Referee and remit the case to the circuit court to continue with the foreclosure sale.

Respectfully submitted,

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May 23, 2016

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM JASPER COUNTY
Special Referee
The Honorable Darrell Thomas Johnson, Jr.

Case No. 2015-002049

Bank of Walterboro, ... Plaintiff,

v.

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

Of which Mortgage Electronic Registration Systems, Inc., As nominee for BNC Mortgage, Inc., is the .....Appellant,

and

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

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing *Initial Brief of Respondent Bank of Walterboro* and *Respondent Bank of Walterboro's Designation of Matter to be Included in the Record on Appeal* have been served upon the following counsel of record by mailing one copy by United States Mail, addressed as shown below this 23 day of May, 2016.

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May 23, 2016

Via U.S. Mail

The Honorable Jenny Abbott Kitchings
Clerk of Court for the Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: *Bank of Walterboro v. Charles Bush, et al.*
Appellate Case No. 2015-002049

Dear Ms. Kitchings:

Enclosed for filing please find the original and one copy of Bank of Walterboro's Initial Brief of Respondent and Designation of Matter to be Included in the Record on Appeal in the above-referenced case. Also enclosed is proof of service of the Brief and Designation of Matter.

Please file the documents and return one file-stamped copy to me in the enclosed self-addressed, stamped envelope. By copy of this letter, I am serving all counsel of record with a copy of the same.

If you have any questions, please do not hesitate to contact me. Thank you.

With kind regards, I am,

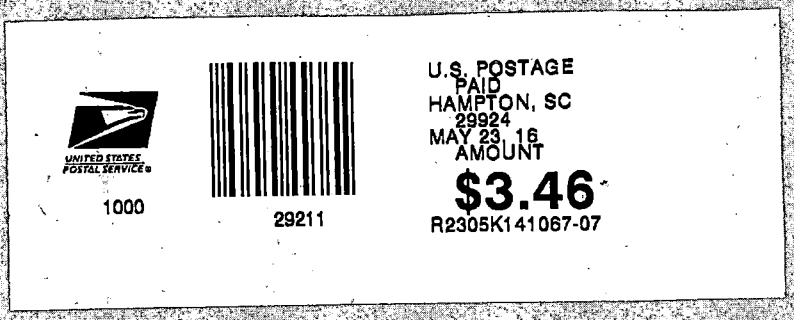
BARNES LAW FIRM, LLC

Kathleen C. Barnes

Kathleen C. Barnes

Enclosures

cc: Sean A. O'Connor
R. Thayer Rivers, Jr.
George W. Cone (via e-mail)



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