IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM JASPER COUNTY

Darrell Thomas Johnson, Jr., Special Referee

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

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

v.

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

Of Whom Mortgage Electronic Registrations Systems, Inc., is the Appellant,

And

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

INITIAL BRIEF OF RESPONDENT ROSEMELLE M. SHULER

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STATEMENT OF ISSUES ON APPEAL

1. Did the Appellate show any entitlement to relief under Rule 60(b)?

2. Is there any clerical error as defined under Rule 60(a), SCRCP, which would entitle the appellant to have the foreclosure decree set aside?

STATEMENT OF THE CASE

This is an appeal from the Special Referee's Order denying Appellant Mortgage Electronic Registration Systems, Inc., as nominee for BNC Mortgage, Inc. (MERS) Motion to Vacate and Set Aside a Final Judgment of Foreclosure pursuant to Rule 60, SCRCP.

On May 13, 2013, Respondent Bank of Walterboro (BOW) filed a complaint seeking to foreclose on the Property pursuant to a mortgage dated March 1, 2007, and recorded in the real property records for Jasper County, South Carolina, on October 29, 2007 (the BOW Mortgage). The mortgage had been closed by a licensed attorney and further had a title insurance binder which showed this to be the first mortgage on the premises. Out of an abundance of caution, BOW plead, "all on information and belief", all other mortgages or title impediments to the premises.

MERS was served with a Summons and Complaint on May 28, 2013, but did not file an answer, make an appearance or otherwise plead in the matter. As per the affidavit of Linda C. Jordan (TR___), the following documents were served and received by MERS: The Appellant MERS was served with and received the Summons and Complaint May 28, 2013. They thereafter received a Notice of Hearing September 19, 2014. They received a notice of rescheduled foreclosure hearing October 23, 2014. They were then served with another Notice of Hearing on May 11, 2015 and were sent the Special Referee's Report and Order of Sale and the Notice of Sale on May 27, 2015. MERS was apprised of the judicial foreclosure sale on May 20, 2015. Only on July 7, 2015, some seven weeks after being apprised of the foreclosure, did counsel for MERS make an appearance. (Jordan Affidavit TR____). Each of these mailings had the Civil Action Number on them which was the exact same Civil Action Number as the Summons and Complaint for Foreclosure. Thus MERS was notified, re-notified and re-notified, that the original matter was proceeding to a final judgment. MERS thereafter retained counsel after a delay of several weeks who prevailed upon the Special Referee to halt the proceedings pending MERS Motion to file and

have heard a Rule 60 Motion to Vacate. The Special Referee held a hearing on MERS Motion to Vacate on July 23, 2015, and on August 25, 2015, issued an Order denying the Motion to Re-Open Judgment. This appeal thereby followed.

ARGUMENT

1. **Standard of Review**

The decision of whether to grant relief of an entry of default is solely within the sound discretion of the trial court Bag, LLC v. Southeaster Roofing Company of Spartanburg, Inc. 646 SE2d 153, 373 SC 457.

An abuse of discretion in setting aside an entry of default arises when the Judge issuing the Order was controlled by some error of law or when the Order, based upon factual, as distinguished from legal conclusions, is without evidentiary support.

II. **When did the Special Referee abuse his discretion in failing to set aside the judgment under Rule 60(b)?**

Rule 60 (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On Motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceedings for the following reasons:

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

This motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment order, or proceeding, or to set aside a judgment for fraud upon the court. During the pendency of an appeal, leave to make the motion must be obtained from the appellate court. Writs of coram nobis, coram vobis, audita querela and bills of review and bills in the nature of a bill of review, are abolished and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

The evidence presented to the Special Referee both prior to and after to the Motion to Vacate Judgment establishes the following:

1. The Bank of Walterboro had a valid mortgage on the premises.
2. The Bank of Walterboro had a title insurance binder showing it was the first mortgage on the premises.
3. The Bank of Walterboro had a title abstract showing other prior mortgages.
4. The Bank of Walterboro plead on information and belief that the prior mortgages were satisfied and not an impediment to this mortgage.
5. The Bank of Walterboro had an attorney do the closing.
6. The Appellant was served with the pleadings and numerous other notices of the proceedings on this foreclosure matter and did nothing.
7. Even after being apprised of the situation, MERS did not have an attorney make an appearance in the matter until some seven (7) weeks after being notified of the status of the foreclosure.
8. No mistake, inadvertence, surprise or excusable neglect was shown by the Appellant in its attempt to seek relief under Rule 60(b).

The Appellant takes great comfort in, and in fact, its only comfort that it had a mortgage that was recorded prior to the mortgage of the Bank of Walterboro. It thereafter without a scintilla of evidence (i.e. no affidavit) asserts that MERS was mislead by the lack of placing its mortgage in a higher priority over that of the Respondent, Bank of Walterboro. There is nothing in the record to show that MERS even READ (emphasis added) the Complaint, much less was mislead by it. The evidence is irrefutable that MERS was properly served with the foreclosure and served with numerous notices thereafter as to its progress. All of the notices had the Civil Action Number that related back to the original foreclosure. All were served by Certified Mail and signed for by MERS. To blandly assert that MERS was "mislead" by the pleadings allows them to ignore the entire proceedings until after the battle was over.

The Appellant further states, restates and again states that they should be relieved of the repeated defaults on the grounds that the pleadings had a factual inaccuracy, i.e., order of priorities of the mortgages. The abstract shows that there were other mortgages prior to that of the mortgage of the Appellant (TR ____ - Jordan affidavit and abstract), and they, after being duly served, did not file an answer or participate in the foreclosure. One would assume was because they in fact had

been paid but no satisfaction had been filed. The same assumption applies to MERS having been made a part Defendant out of an abundance of caution. MERS has refused to participate on that ground (if it actually existed and for which there is no showing) is somewhat akin to one having been sued in an automobile wreck and smugly refusing to participate on the grounds that while they were accused of running a red light, they in fact knew the light was green and therefore was not going to be a party to the litigation.

III. Were there any clerical errors allowing relief under Rule 60(a)?

As noted by the Special Referee in his final report, "clerical mistake" is exactly what it says, a mistake by the scrivener who drew the Order. Here the Appellant tries to bootstrap the pleadings into a "clerical mistake" when they were adopted by the Judge in the final order. This nowhere resembled the "clerical mistake" as envisioned by Rule 69(a) and was clearly rejected by the Special Referee.

CONCLUSION

For the foregoing reasons, the Respondent Rosemelle Shuler respectfully submits that the Special Referee's hearing was properly made and there was not abuse of discretion sufficient to allow the relief prayed for by the Appellant and this matter should be dismissed.

Respectfully Submitted,

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