THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Gordon G. Cooper, Master-in-Equity Judge

Case No.: 2012-CP-42-3549
2012-CP-42-2874

Appellate Case No. 2016-000099

U.S. Bank, NA, as trustee relating to the Chevy Chase Funding, LLC Mortgage Backed Certificates, Series 2004-B,

Plaintiff,

v.

Alyce F. Otto, Individually; Alyce F. Otto Trustee Under Declaration of Trust of Alyce F. Otto dated the 17th of November 2009; TD Bank, NA; The United States of America, acting by and through its agency, the Internal Revenue Service; Laura Kerhulas Giese, as Co-Trustee of the Theodore Ernest Kerhulas Trust Under Declaration of Trust dated May 25, 2004; Mark Warner Kerhulas, as Co-Trustee of the Theodore Ernest Kerhulas Trust Under Declaration of Trust dated May 25, 2004; Jackson L. Munsey, Jr.; Citibank, NA,

Defendants,

Of whom Jackson L. Munsey, Jr., is the Appellant.

and

U.S. Bank, NA and Alyce F. Otto are the Respondents.

Alyce F. Otto, Trustee, Plaintiff,

v.

Jackson L. Munsey, Jr., Defendant,

INITIAL REPLY BRIEF OF APPELLANTS

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ARGUMENTS IN REPLY

The arguments supporting Appellant's Issues on Appeal have already been adequately briefed, thus further reply to Respondents' rebuttal arguments as to the Issues on Appeal is not necessary. Without restating the issues or making redundant arguments that have been thoroughly set forth in their opening brief, the Appellant offers the following points of clarification and rebuttal to the arguments raised by Respondents that Appellant was required to seek relief pursuant to Rule 60, SCRP, before filing this appeal and that Appellants' arguments were not preserved for appeal.

I. APPELLANT WAS NOT REQUIRED TO SEEK RELIEF PURSUANT TO RULE 60, SCRP, TO APPEAL THE TRIAL COURT'S RULINGS AND ORDERS.

Respondents argue that Appellant's appeal should be barred because Appellant did not move to set aside the trial court's judgment pursuant to Rule 60(b) of the South Carolina Rules of Civil Procedure. Respondents rely exclusively on Winesett v. Winesett, 287 S.C. 332, 338 S.E.2d 340 (1985) to support this argument and fail to acknowledge that Balloon Plantation, Inc. v. Head Balloons, Inc distinguishes cases like Appellant's from the circumstances contemplated by the Court in Winesett.

In Balloon Plantation, Inc. v. Head Balloons, Inc., 303 S.C. 152, 399 S.E.2d 439 (Ct. App. 1990), the South Carolina Court of Appeals ruled on circumstances nearly identical to those in the instant matter and determined that despite the respondent's argument that the appellant should have filed a Rule 60(b) motion to set aside default to preserve appellant's issues on appeal, a Rule 60(b) motion was unnecessary as there existed a sufficient record for the purpose of the appeal and "there [was] no point in

requiring [the appellant] to ask the circuit court judge to rule on the same question twice." Id. at 157, 399 S.E.2d at 442.

The trial court sanctioned the defendant in Balloon Plantation for failing to satisfy a previous order by striking the defendant's answer and granting a default judgment in favor of the plaintiff. Id. at 153-154, 399 S.E.2d at 440. The defendant requested relief, and the trial court "explicitly ruled on the question of whether the defendants should be in default." Id. at 157, 399 S.E.2d at 442. The Court of Appeals was "not being asked to rule on an issue not first presented [to the trial court]." Id. The Court of Appeals determined that it is unnecessary to request the trial court to rule on the same issue multiple times as "the appellants [were] able to provide [the Court of Appeals] with a sufficient record on appeal." Id.

The circumstances in Balloon Plantation are easily distinguishable from those in Winesett. In Winesett, the family court entered a default order terminating the respondent's responsibility to pay the appellant alimony. Winesett v. Winesett, 287 S.C. 332, 333, 338 S.E.2d 340, 341 (1985). The appellant, who had not appeared at all during the course of the family court litigation, then appealed the trial court's order. Id. The Supreme Court reasoned that "a party appealing a default judgment will ordinarily be precluded from raising any issues on appeal because they were not first presented below." Id. In addition, the Supreme Court noted that "the appellant will often not be able to meet his burden of providing this Court with a record sufficient to permit an adequate review." Id.

The Appellant's case is very much analogous to the circumstances in Balloon Plantation and readily distinguishable from those in Winesett. There is ample record in

this case, including motions, affidavits, exhibits, and oral arguments, creating a record sufficient for the Court of Appeals to permit an adequate review of the issues on appeal. Likewise, the issues on appeal were those same issues raised by Appellant, addressed by Respondents, and ruled on by the trial court.

Appellant filed responsive pleadings. **(See Appellant's Motion for Relief from Entry of Default, Stephanie Munsey Aff. ¶¶ 12-20 and Appellant's Answer, Counterclaims, and Cross-Claims Against Defendant Alyce F. Otto, Individually and as Trustee).** Appellant filed a Motion to Set Aside Default and Leave to File Answer Outside of Time. **(See Appellant's Motion to Set Aside Default and Leave to File Answer Outside of Time).** The trial court permitted counsel for Appellant to argue the merits of Appellant's motion based on the documents submitted and ruled that Appellant was in default and denied Appellant's Motion to Set Aside Default. **(See Order Denying Defendant Jackson L. Munsey, Jr.'s Motion to Set Aside Default and Leave to File Answer Outside of Time and Transcript of Testimony from May 6, 2013).**

After litigation continued for two and a half years following the initial order denying relief from entry of default, Appellant again moved the court for relief from default and submitted exhibits in support of his motion, and the trial court again heard arguments, on the record, before ruling on Appellant's second motion to be relieved from default. **(See Motion for Relief from Entry of Default, Affidavit of Stephanie Munsey, and Exhibits and Transcript of Testimony from November 24, 2015).** On November 24, 2015, the trial court heard arguments from Appellant's counsel and Respondents regarding Appellant's motion for relief, Appellant's equitable rights in the

property, and Appellant's equitable right to redeem the property. **(See Transcript of Testimony from November 24, 2015).** The trial court then issued a judgment ruling on these issues. **(See Judgment of Foreclosure and Sale).**

Appellant subsequently filed a motion to alter or amend the court's ruling, requesting clarification from the trial court. **(See Motion to Alter or Amend and Transcript of Testimony, February 15, 2016).** The trial court again heard oral arguments and ruled on Appellant's motion. **(See Id.).** The trial court then issued an order ruling on Appellant's motion to alter or amend. **(See Order on Jackson L. Munsey, Jr.'s Motion to Alter or Amend).**

Appellant's answer, counterclaims, motions, exhibits, affidavits, and oral arguments all distinguish the circumstances in the instant matter from those contemplated by the court in Winesett. In Appellant's case, unlike Winesett, Appellant appeared and filed an answer and counterclaims. In Winesett, the appellant failed to appear or file responsive pleadings, and her alimony was terminated by the court. Winesett at 332, 338 S.E.2d 341. She then appealed the termination of her alimony after having failed to appear at any stage before the trial court. Id.

Appellant Munsey, like the appellant in Balloon Plantation, had the trial court explicitly rule on the question of whether he should be in default, so the Court of Appeals "is not being asked to rule on an issue not first presented below." Balloon Plantation at 157, 399 S.E.2d at 442. As the Court acknowledges in Balloon Plantation, "[t]here is no point in requiring the [Appellant] to ask the circuit judge to rule on the same question twice," so in this case a Rule 60 motion would not have been appropriate. Id. In addition, Appellant Munsey is "able to provide this Court with a sufficient record on

appeal" for all issues under appeal. Id. As Appellant's circumstances and trial and trial record sufficiently mirror those in Balloon Plantation and are obviously divergent from the facts of Winesett "the procedure required by the Court in Winesett [should not be] required in the instant case." Id.

II. APPELLANT'S ISSUES ON APPEAL WERE PRESERVED.

Respondents further argue that Appellant failed to preserve all his arguments for appeal. "[T]o preserve an issue for appellate review, the issue must been raised to and ruled upon by the trial court." Whaley v. CSX Transp., Inc., 362 S.C. 456, 609 S.E.2d 286, 299 (2005). It is important to remember, too, that issue preservation "is not a 'gotcha' game aimed at embarrassing attorneys or harming litigants." State v. Haygood, 409 S.C. 420, 430, 762 S.E.2d 69, 74 (Ct. App. 2014). When an issue is clearly unpreserved, our appellate courts should adhere to longstanding precedent and resolve an issue on preservation grounds; however "it is good practice for [appellate courts] to reach the merits of an issue when error preservation is doubtful." Id. Our courts have further held that:

> Error preservation rules do not require a party to use the exact name of a legal doctrine in order to preserve an issue for appellate review. Instead, a litigant is only required to fairly raise the issue to the trial court, thereby giving it an opportunity to rule on the issue.

State v. Brannon, 388 S.C. 498, 502, 697 S.E.2d 593, 595-96 (2010).

The fundamental issues on appeal are whether the trial court should have let the Appellant out of default and whether the trial court should have concluded that the Appellant not only had an equitable interest in the subject property but that he had an equitable right to redeem the property.

Appellant's trial counsel twice requested the trial court to relieve the default judgment entered against the Appellant. **(See Appellant's Motion for Relief from Entry of Default and Appellant's Motion to Set Aside Default and Leave to File Answer Outside of Time).** Appellant, in both written motion and oral argument, requested that the court consider whether the circumstances in Appellant's case were such that relief from default was appropriate. **(See Id. See also Transcript of Testimony from May 6, 2013 and Transcript of Testimony from November 24, 2015).** Appellant's counsel twice argued that Appellant had shown good cause to warrant setting aside the original entry of default. **(See Id.).** The trial court twice declined to grant Appellant's motions for relief despite Appellant's arguments. **(See Order Denying Defendant Jackson L. Munsey, Jr.'s Motion to Set Aside Default and Leave to File Answer Outside of Time and Order on Defendant Jackson L. Munsey's Motion for Relief from Entry of Default).**

Appellant also argued both orally and in written motion that Appellant had an equitable interest in the subject property. **(See Transcript of Testimony from November 24, 2015 and Appellant's Motion to Alter or Amend).** The trial court concluded, over Appellant's objections, that Appellant did not possess an equitable interest in the property and was not entitled to redeem the property before it was sold at foreclosure sale. **(See Order on Jackson L. Munsey, Jr.s Motion to Alter or Amend).**

The issues raised on appeal were argued by trial counsel and ruled on by the trial court repeatedly over the course of the litigation of Appellant's case. Respondents' issue preservation argument is an attempt to skirt around Respondents' improper articulation of and the trial court's improper reliance on the law as expressed in Regions Bank v.

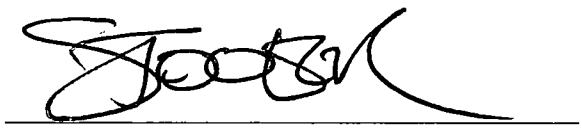
Owens, 402 S.C. 642, 741 S.E.2d 51 (Ct. App. 2013). Rather than seeking a judicial determination on the merits, Respondents prefer a 'gotcha' game to a fair adjudication of the issues.

CONCLUSION

Appellant did not need to seek relief pursuant to Rule 60(b) of the South Carolina Rules of Civil Procedure as the trial court had twice heard and twice ruled on the merits of Appellant's request for relief from default. Because Appellant filed an answer and counterclaims, participated in litigation, made several motions before the court, provided the trial court supporting exhibits and affidavits, and obtained from the court specific rulings regarding each motion for relief, there exists a record sufficient for appeal and this Court is not being asked to rule on an issue not first presented below.

In addition, because Appellant actively participated in the process as much as the trial court permitted and created a record from which an appeal could be taken, the issues articulated in Appellant's initial brief were fairly raised before the trial court, and the trial court had an opportunity to rule on each of the issues raised by Appellant on appeal. The issues before this Court are, therefore, sufficiently preserved to warrant a review of the legal and factual questions presented by Appellant.

Respectfully Submitted,



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Defendants,

Of whom Jackson L. Munsey, Jr., is the Appellant.

and

U.S. Bank, NA and Alyce F. Otto are the Respondents.

Alyce F. Otto, Trustee, Plaintiff,

v.

Jackson L. Munsey, Jr., Defendant,

PROOF OF SERVICE

I certify that I have served the INITIAL REPLY BRIEF OF APPELLANT, on the Respondents by depositing a copy of it in the United States mail, postage prepaid, on October 31, 2016, addressed to the counsels of record and unrepresented parties at the following addresses:

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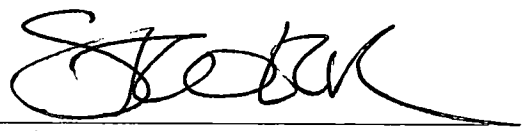

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RE: U.S. Bank, NA vs. Alyce F. Otto, et. al.
Appellate Case No.: 2016-000099

Dear Counsel:

Please find enclosed herewith one (1) copy of the following documents: Initial Reply Brief of the Appellant in connection with the above referenced matter along with the Proof of Service of same.

With kindest regards, I remain

Sincerely,

Sam Tooker

Enclosures
Cc: Client

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October 31, 2016

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South Carolina Court of Appeals
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Columbia, SC 29201

RE: U.S. Bank, NA vs. Alyce F. Otto, et al.
Appellate Case No.: 2016-000099

Dear Ms. Kitchings:

Enclosed you will find an original and two (2) copies of the ***Initial Reply Brief of Appellant and the Proof of Service*** in connection with the above referenced appeal.

I would ask that you please file the original and return the clocked copies to me in the envelope provided for same.

By copy of this letter to Respondents' Counsel, Erica Greer Lybrand, Richard C. Kelley, Kenneth C. Anthony, and Sarah Patrick Spruill, I am serving them a copy of same.

Thank you for your assistance. Please feel free to contact my office with any questions or concerns you may have.

Sincerely,

Sam Tooker

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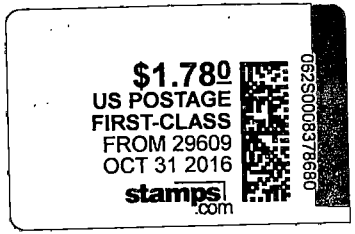

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