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

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SC Court of Appeals

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,

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err by ruling that Appellant failed to put forth a satisfactory explanation for default and therefore err in failing to analyze whether good cause existed to set aside default?

2. Did the trial court err by failing to determine that Appellant showed good cause to set aside default?

3. Did the trial court err by finding that Appellant did not have an equitable interest in the property?

4. Did the trial court err by finding that Appellant did not have an equitable right to redeem the property?

STATEMENT OF CASE

Appellant Jackson Munsey, Jr. (hereinafter "Appellant") and Respondent Alyce F. Otto, individually and as trustee under declaration of trust of Alyce F. Otto, dated November 17, 2009 (hereinafter "Respondent Otto") entered into an installment land contract (hereinafter "Contract for Deed") for the purchase of a piece of property in Campobello, South Carolina (hereinafter "subject property") in March of 2011. **(See R. pp. 249-268)**. Respondent Otto was the seller of the subject property, and Appellant was the purchaser of the subject property. **(R. pp. 249-268.)**.

The terms of the Contract for Deed required that Appellant pay Respondent Otto a deposit payment of $10,000.00; pay the monthly installments due to the subject property's first mortgagee, which totaled $1,061,968.32; pay the monthly installments due to the subject property's second mortgagee, which totaled $193,665.68; pay an IRS lien in the amount of $14,601.71; pay real property taxes for calendar year 2010 in the amount of $5,978.87; pay other assessments totaling $5,090.47; pay for reinstatement of the arrears, penalties and fees due to the first mortgagee totaling $50,839.96; pay Respondent Otto $43,076.84 with adjustments for Respondent's pro rata portion of the 2011 taxes and assessments and deposit credit; and pay additional payments to Respondent Otto on a principal sum in the amount of $13,000.00. **(R. pp. 249-268. See also R. pp. 273-277)**.

Pursuant to the terms of the Contract for Deed, Appellant made monthly installment payments to the first mortgagee, Respondent U.S. Bank, NA, as trustee relating to the Chevy Chase Funding, LLC, Mortgage Backed Certificates, Series 2004-B (hereinafter "Respondent U.S. Bank") as well as to the second mortgagee. **(R. pp. 47-81)**. As the mortgagor subject to Respondent U.S. Bank's mortgage, Respondent Otto had access to information and monthly statements related to the first mortgage, but Respondent Otto refused to give Appellant access to

this information. **(Id.)**. Respondent U.S. Bank inexplicably began returning Appellant's payments on the first mortgage to Respondent Otto. **(Id.)**. Respondent Otto failed to notify Appellant that his mortgage payments to Respondent U.S. Bank had been returned, or attempt to resolve the returned funds with U.S. Bank. **(Id.)**.

Respondent Otto and Appellant met on April 15, 2012 to discuss the Appellant's repeated requests for tax information that Appellant needed regarding the first, second and third mortgages, and how Appellant could gain access to or monthly account statements regarding the first and second mortgage accounts. **(See R. pp. 312-313,¶¶ 5-6)**. At that point, Appellant learned that the first mortgage was in default. **(R. pp. 311-317.)**. Respondent Otto and Appellant called the first mortgagee together and were told that Appellant's payments had been received by the first mortgagee, misallocated to principal, and certain payments had been returned by check to Respondent Otto. **(Id.)**. The first mortgagee, Respondent U.S. Bank, agreed to reallocate the principal reduction payments to regular monthly payments and to properly apply the refunded payments once the payments were returned to the first mortgagee by Respondent Otto. **(Id.)**.

Respondent Otto again failed to provide Appellant the requested tax and account information for any of the mortgages, which concerned Appellant and prompted him to search the Spartanburg County public index where he discovered several new liens filed against Respondent Otto. **(See R. p. 313 ¶ 7)**. Pursuant to the Contract for Deed, Respondent Otto agreed that the subject property was not and would not become encumbered by any liens or judgments other than those acknowledged in the contract. **(See R. pp. 47-81)**. Despite the terms of her contract with Appellant, Respondent Otto had permitted three IRS tax liens, totaling approximately $58,000.00; a judgment against Respondent Otto in the amount of $571,329.90;

and another judgment against Respondent Otto in the amount of $12,396.66 to encumber the subject property, which directly contravened the Contract for Deed. **(R. pp. 52-53.).**

Appellant, now aware of Respondent Ottos' breach of the Contract for Deed, withheld the third mortgage payments due from Appellant directly to Respondent Otto until the encumbrances were cleared as allowed under the Contract for Deed. **(See R. p. 313, ¶ 8. See also R. pp. 249-268).** Appellant continued making payments on the first and second mortgage. **(See R. p. 313, ¶ 9).**

Respondent Otto served a Summons and Complaint on Appellant Munsey on July 27, 2012 **(R. p. 314, ¶ 10).** Respondent U.S. Bank served a Summons and Complaint on Appellant Munsey on August 31, 2012. **(See R. p. 302 ¶ 4).** Respondent U.S. Bank named Respondent Otto as a party to its action, as well. At that point, Appellant had been named a defendant in two separate actions related to the same piece of real property: Respondent Otto's action, 2012-CP-42-2874, and Respondent U.S. Bank's action, 2012-CP-42-3549.

Appellant began communicating with counsel for Respondent Otto with regards to a resolution of Otto's action on August 3, 2012. **(See R. p. 314 ¶ 11).** Regarding Respondent Otto's Complaint, Appellant's wife, who is a licensed attorney, asked Otto's counsel for an extension to file an Answer to Otto's Complaint on August 20, 2012. **(See R. p. 315. ¶ 14, and R. pp. 349-401).** Otto's counsel agreed to the extension on August 24, 2012 and said "I am not going to call time on you." **(See R. pp. 371-372).**

After being served by Respondent U.S. Bank, Appellant began communicating with Respondent Otto's counsel about amicably resolving U.S. Bank's case, as well. **(See R. pp. 314-316, ¶¶ 12-20).** Appellant and Respondent Otto, both Defendants in Respondent U.S. Bank's action, cooperated in an attempt to settle U.S. Bank's foreclosure action, as U.S. Bank would

not deal directly with Appellant regarding the mortgage loan without authorization from Otto, which Otto would not give. **(See R. p. 312, ¶ 5, R. pp. 315-316, ¶ 17)**. Working through Respondent Otto's counsel, Appellant obtained a reinstatement amount from the original mortgagee to avoid litigation with Respondent U.S. Bank that was good through October 31, 2012. **(See R. pp. 314-316, ¶¶ 12-20.)**. However, when it became apparent that Respondent Otto could not account for all payments made to first mortgagee by Appellant and subsequently refunded to Respondent Otto, Otto's counsel ceased communicating with Appellant in November 2012. **(See Id.)**.

Appellant, realizing that the matter could not be resolved prior to litigation, contacted an attorney in November of 2012. **(See R. p. 316 ¶ 20)**. Appellant was able to meet with and retain an attorney in December 2012, and filed responsive pleadings to both actions on December 21, 2012. **(See R. pp. 316-317, ¶¶ 20-21)**.

On October 9, 2012, while Appellant was working to obtain a reinstatement amount, Respondent U.S. Bank filed a Certificate of Default and Non-Military Service affirming that Appellant Munsey was served with the Summons and Complaint in 2012-CP-42-3549. **(See R. p. 406)**. Appellant filed his Answer, Counterclaims, and Cross-Claims on December 21, 2012 and served copies of the same on Respondent U.S. Bank, as Plaintiff, and Respondent Otto as cross-claim Defendant. **(See R. pp. 297-303 and R. pp. 47-81)**. Appellant then moved to set aside default on January 29, 2013. **(See R. pp. 297-303)**. In his Motion to Set Aside Default, the Appellant provided the court with background as to the circumstances surrounding the case and his default. **(Id.)**

Appellant's Motion to Set Aside Default was held simultaneously with his Motion to Consolidate the two pending cases. **(See R. pp. 82-92)**. At that hearing, the Honorable Gordon

G. Cooper, Master-in-Equity for Spartanburg County, South Carolina, consolidated Respondent Otto's action with Respondent U.S. Bank's action. However, the trial court denied Appellant's Motion to Set Aside Default in the U.S. Bank action. **(See R. pp. 7-8)**. The next day, Otto's counsel filed an Affidavit of Default in the Otto action, despite Otto's counsel's previous representation to Appellant that he was "not going to call time." **(See R. p. 407. See also R. p. 371).**

For two and a half years, the case remained pending before there was an adjudication on the merits. During this period of time, Respondent U.S. Bank deposed Appellant and Respondent Otto, and Appellant participated in the discovery process. The matter was set for final hearing on November 24, 2015, and so Appellant filed a renewed Motion for Relief from Entry of Default on November 23, 2015. **(See R. pp. 306-317)**. In his motion, Appellant further explained the circumstances surrounding his default and provided a myriad of documentary evidence to the court evidencing the lengths to which Appellant went in an attempt to amicably resolve both cases. **(R. pp. 306-317, Motion and Affidavit and R. pp. 319-401, Exhibits A-D)**. The trial court denied this motion as well and again refused to let Appellant out of default, issuing an Order on December 22, 2015 finding that the motion should "be denied on the grounds of *res judicata*." **(See R. pp. 15-16)**.

During the foreclosure hearing, Appellant argued that he had an equitable right to redeem the property. **(See R. pp. 120-121 and R. pp. 130-132)**. Pursuant to the terms of the Contract for Deed, Appellant had paid in aggregate a deposit of $10,000.00 and $43,076.84 to Respondent Otto **(See R. pp. 273-277)**; $14,601.71 to the IRS on Respondent Otto's behalf **(See R. pp. 273-277. See also R. p. 145 line 18-p. 146 line 3)**; $5,978.87 in real property taxes for calendar year 2010 on Respondent Otto's behalf **(See R. pp. 273-277 and R. pp. 249-268)**; $5,590.47 for

other assessments on Respondent Otto's behalf **(See R. pp. 273-277 and R. pp. 249-268)**; $50,839.96 for reinstatement of the arrears, penalties and fees due the first mortgagee **(See R. pp. 273-277 and R. pp. 249-268)**; at least $15,723.00 on the first mortgage, which was subsequently returned to Respondent Otto, held by her counsel and not returned to Appellant **(See Three Checks);** $6,044.10 to Respondent Otto's counsel to be held in trust during the negotiation process **(See R. p. 20)**; and approximately $16,101.68 in principal on the second mortgage **(see R. pp. 249-268 and R. p. 20)**. Appellant may have even paid a greater amount to the first mortgagee, but Otto was never required to account for the funds.

Despite the considerable sums paid by Appellant to acquire the property pursuant to the Contract for Deed, the trial court concluded that Appellant had no equitable right of redemption over objection by Appellant. **(See R. pp. 120-121, 130-132, and 172)**. The trial court issued its Judgment of Foreclosure and Sale on December 22, 2015, which provided that Appellant may claim a subordinate lien or legal interest in the subject property and present a claim to any surplus in the event there is a surplus after the sale of the subject property. **(See R. pp. 25-26)**. However, the court ruled that Appellant had "no equitable right of redemption in the mortgaged property ... based upon the fact that he is not a junior lienholder." **(See R. p. 8)**.

Appellant subsequently filed a motion to alter or amend the court's ruling, requesting that the court clarify whether Appellant had an equitable interest in the subject property and if so, whether Appellant had an equitable right to redeem the defaulted mortgage. **(See R. pp. 402-404, and R. pp. 208-219)**. In its order dated April 19, 2016, the Court again held that the Appellant had no equitable interest in the subject property, ruling that "[Appellant] has no equitable interest in the property, and consequently, no equitable right of redemption, because he is not a junior lienholder." **(See R. pp. 17-20)**. While the trial court acknowledged that

Appellant was to receive notice of surplus funds, it refused to recognize the Appellant's equitable interest in the property or his equitable right to redeem the property. **(See R. pp. 17-20)**.

Appellant respectfully appeals the trial court's Order dated May 6, 2013, denying Appellant's Motion to Set side Default, the trial court's Order dated December 22, 2015 denying Appellant's Motion for Relief from Default, the trial court's Judgment of Foreclosure and Sale dated December 22, 2015, and the trial court's Order dated April 19, 2016 on Appellant's Motion to Alter or Amend.

ARGUMENTS

I. THE TRIAL COURT ERRED BY REFUSING TO RELIEVE APPELLANT FROM ENTRY OF DEFAULT

STANDARD OF REVIEW

The rule governing relief from default "is liberally construed to promote justice and dispose of cases on the merits." Dixon v. Besco Engineering, Inc., 320 S.C. 174, 178, 436 S.E.2d 636, 638 (Ct. App. 1995). "The decision whether to set aside an entry of default or a default judgment lies solely within the sound discretion of the circuit court." Regions Bank v. Owens, 402 S.C. 642, 647, 741 S.E.2d 51, 54 (Ct. App. 2013). The circuit court's decision is subject to an abuse of discretion standard on appeal. *Id.* "An abuse of discretion occurs when the judgment is controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support." *Id.*

A. The Trial Court Erred by Ruling that Appellant Failed to Put Forth a Satisfactory Explanation for Default and Therefore Erred in Failing to Analyze Whether Good Cause Existed to Set Aside Default.

In denying Appellant's motion to set aside default, the trial court concluded that because Appellant "failed to put forth a satisfactory explanation for his default," the court did not need to "consider the factors as set forth in Wham v. Shearson Lehman Brothers." **(See R. pp. 7-8).**

Rule 55(a) of the South Carolina Rules of Civil Procedure requires that the clerk of court for the county where a complaint is filed to record an entry of default when the party served with that complaint fails to respond to it. However, Rule 55(c) provides that "[f]or good cause shown the court may set aside an entry of default and, if a judgment by default has been entered may likewise set it aside in accordance with Rule 60(b)." Rule 55(c), SCRP.

"This standard requires a party seeking relief from an entry of default under Rule 55(c) to provide an explanation for the default and give reasons why vacation of the default entry would

serve the interests of justice." Sundown Operating Co., Inc. v. Intedge Industries, Inc., 383 S.C. 601, 607, 681 S.E.2d 885, 888 (2009). Once the party seeking relief from default has explained the reason for default, the trial court must consider whether good cause exists to set aside the default, which can include an analysis of the factors outlined in Wham v. Shearson Lehman Bros., Inc. *Id.*, at 607-608, 681 S.E.2d at 888.

In finding that Appellant was not entitled to relief from default, the trial court conflated two separate issues that affect a litigant's ability to be relieved from default: (1) the initial explanation for the default; and (2) whether good cause exists to set aside default. As a result, the trial court incorrectly applied the facts specific to Regions Bank v. Owens to the Appellant's case in determining that Appellant had failed to "put forth a satisfactory explanation for the default" and determining that the court need not consider the Wham factors to determine whether good cause existed to set aside default. *Id.* (*citing* Wham v. Shearson Lehman Bros., Inc., 298 S.C. 462, 465, 381 S.E.2d 499, 501-502 (Ct. App. 1989)). **(See R. p. 103, lines 1-10. See also R. pp. 411-415)**. The court adopted Respondent U.S. Bank's argument that Appellant's circumstances were similar to the party seeking relief from default in Regions Bank and that the trial court did not need to consider the Wham factors based the Court of Appeals' ruling in Regions Bank. **(See R. p. 86, lines 4-25)**. In so doing, the trial court incorrectly applied the law in Regions Bank to the Appellant's case by relying on facts specific to a finding that good cause did not exist to set aside default in Regions Bank, to determine that Appellant had failed to satisfactorily explain his default. **(See R. pp. 85-88)**. Simply put, the trial court inappropriately applied case law addressing the good cause standard to whether there existed a satisfactory explanation for default.

The trial court did not rule that Appellant had failed to show good cause to warrant setting aside default. **(See R. pp. 7-8)**. Instead, it ruled that Appellant failed to meet the initial burden of providing a satisfactory explanation for the default. **(Id.)**. By virtue of this determination, the trial court concluded that it did not need to consider the Wham factors to determine whether good cause existed to let Appellant out of default **(Id.)**.

As the threshold question for the trial court should have been whether the Appellant could "provide an explanation for the default and give reasons why vacation of the default entry would serve the interests of justice," the trial court erred by relying on the Regions Bank case in making that threshold determination. *See* Sundown Operating Co., Inc. v. Intedge Industries, Inc., 383 S.C. 601, 607, 681 S.E.2d 885, 888 (2009)). As the court's order refusing to grant Appellant relief from an entry of default is controlled by an error of law, it must be vacated. *See* Wham v. Shearson Lehman Bros., Inc., 298 S.C. 462, 465, 381 S.E.2d 499, 501 (Ct. App. 1989).

There is ample evidence in the record that the Appellant provided an explanation for the default. Appellant filed two motions requesting relief from default and attached affidavits and supporting documentation to each. **(See R. pp. 297-303, and R. pp. 306-401)**. After being served process in each case, Appellant was diligent in his attempts to resolve each pending matter. **(See R. p. 302, ¶ 5)**.

In Respondent Otto's action, Appellant communicated with Respondent Otto's attorney immediately after being served process and delivered to Respondent Otto's counsel evidence of the Appellant's payment history to Respondent Otto. **(See R. p. 314, ¶ 11)**. Appellant maintained regular contact with Respondent Otto's counsel and ascertained that the first mortgagee had returned mortgage payments made by Appellant to Respondent Otto. **(See R. p.**

314, ¶ 12). Respondent Otto's counsel told Appellant, in response to concerns about default, "I am not going to call time on you." **(See R. p. 315, ¶ 14 and R. pp. 349-401)**.

In Respondent U.S. Bank's action, Appellant was in contact with Respondent Otto's attorney, who was in the process of negotiating a settlement with Respondent U.S. Bank. **(See R. p. 302, ¶ 5)**. Appellant, learning that the first mortgage was in default, sought to reinstate it, which he could only do through Respondent Otto because U.S. Bank refused to deal with Appellant directly. **(See R. p. 314, ¶ 12)**. Appellant was so convinced that a settlement between all parties was imminent that he deposited settlement funds with Respondent Otto's counsel, which continues to be held by Otto's counsel. **(See R. pp. 314-315, ¶ 13)**. Appellant and Respondent Otto even successfully obtained a reinstatement amount from the first mortgagee, and Appellant was prepared to pay the reinstatement once Respondent Otto accounted for the amount and disposition of funds returned from the first mortgagee to Respondent Otto. **(See R. pp. 315-316, ¶¶ 15-19)**.

When Respondent Otto would not account for all of the funds, her counsel ceased communicating with Appellant, and so Appellant hired an attorney and filed responsive pleadings. **(See R. pp. 314-316, ¶¶ 10-15, 20)**. These were promptly provided to Respondents' counsel, and Appellant thereafter filed a Motion to Set Aside Default and Leave to File Answer Outside of Time. **(See R. pp. 297-303)**.

The initial question for the trial court was whether the Appellant provided a satisfactory explanation for the default. Appellant explained exactly why the default occurred: there were numerous sincere attempts by Appellant to quickly resolve both actions amicably. It would have served the interests of justice to grant Appellant's requested relief as his Answer, Counterclaims, and Cross-Claims enumerated factual allegations that, if true, would indicate that Appellant did

not default on his obligations pursuant to the Contract for Deed. **(See R. pp. 47-81)**. In addition, Appellant's Answer, Counterclaims, and Cross-Claims alleged that Respondent Otto's conduct warranted a judicial accounting and an award of damages. **(Id.)**.

As "Rule 55(c) should be liberally construed to promote justice and dispose of cases on the merits," the trial court erred by failing to rule that Appellant's actions constituted a satisfactory explanation for default and that it would have served the interests of justice to see the multitude of disputes in the Appellant's cases resolved by an impartial factfinder and on the merits. *See* Melton v. Olenik, 379 S.C. 45, 54, 664 S.E.2d 487, 492 (Ct. App. 2008). The trial court should have determined that there existed a satisfactory explanation for Appellant's default in the combined action. It then should have ruled on whether good cause existed to let Appellant out of default. This failure to correctly apply the facts to the appropriate inquiry constitutes an error of law and should be reversed.

B. The Trial Court Erred by Failing to Determine that Appellant Showed Good Cause to Set Aside Default.

The trial court also erred in concluding the Appellant failed to show good cause sufficient to warrant setting aside default.

Respondent U.S. Bank argued to the trial court that Appellant's default was sufficiently analogous to the defendant's default in Regions Bank v. Owens for the trial court to refuse to set aside the default. **(See R. pp. 411-415)**. The trial court appeared to rely on Respondent U.S. Bank's arguments in denying Appellant's requested relief. **(See R. p. 86, line 5-p.88 line 16)**. However, the facts in Regions Bank are readily distinguishable from the facts in the instant matter.

In Regions Bank, the defendant Owens and his co-defendant Paddy were served with a mortgage foreclosure action, and Owens failed to file an answer. Regions Bank v. Owens, 402

S.C. 642, 645, 741 S.E.2d 51, 53 (Ct. App. 2013). Owens subsequently moved to be let out of default just prior to the foreclosure hearing. Id. Owens claimed that he failed to file responsive pleadings because he believed Paddy was going to file an answer on his behalf. Id., at 646, 53. The Court of Appeals concluded that Owens did not meet the "good cause" standard set forth in Rule 55(c) because he failed to monitor the progress of his case by merely relying on an alleged agreement he had with Paddy that Paddy would file an answer on his behalf. Id., at 648, 54. The Court of Appeals in Regions Bank noted that Owens "presented no evidence he took any steps to protect himself by contacting either Paddy or Paddy's attorney to confirm an answer would be filed on his behalf." Id.

In the instant matter, Appellant maintained constant contact with Respondent Otto's counsel in relation to both actions. Appellant's systematic and sustained attempts to amicably resolve the pending actions, by negotiating with Respondent Otto's counsel and by obtaining a reinstatement amount from Respondent U.S. Bank, are clear evidence that Appellant was diligent in his attempt to protect himself and resolve the pending actions. **(See R. pp. 311-318 and R. pp. 349-401)**. Furthermore, unlike Owens who was a borrower on the subject mortgage loan, Appellant was reliant on Respondent Otto to work towards a solution to the mortgage foreclosure, because Respondent U.S. Bank would not communicate with Appellant. **(See R. pp. 315-316, ¶ 17)**.

While the trial court is not required to "make specific findings of fact on the record for each factor," the three Wham factors, if established, demonstrate good cause exists to set aside default. Dixon v. Besco Engineering, Inc., 320 S.C. 174, 179, 463 S.E.2d 636, 639 (Ct. App. 1995). The aforementioned Wham factors include "(1) the timing of [the defaulting party]'s motion for relief; (2) whether [the defaulting party] has a meritorious defense; and (3) the degree

of prejudice to [the other party] if relief is granted." Wham v. Shearson Lehman Bros., Inc., 298 S.C. 462, 465, 381 S.E.2d 499, 501 (Ct. App. 1989).

The Appellant's Motion to Set Aside Default and Leave to File Answer Outside of Time in these combined actions was filed within a reasonable amount of time after pleadings were initially served on Appellant, which satisfies the first prong of Wham. Respondent Otto served a Summons and Complaint on Appellant Munsey on July 27, 2012. **(See R. p. 407)**. Respondent U.S. Bank served a Summons and Complaint on Appellant Munsey on August 31, 2012. **(See R. p. 302, ¶ 4)**. Appellant filed his responsive pleadings in December of 2012 and his Motion to Set Aside Default in January of 2013, but the Respondents' consolidated actions were not heard by the court until November, 2015. **(See R. p. 95, 100)**. The timing of the Appellant's original motion was sufficiently contemporaneous with when his responsive pleadings were due, particularly in light of the gross delay between the dates the matters were originally filed and consolidated, and the date the cases were finally heard, for the Appellant's motion for relief to satisfy the first prong of Wham.

The Appellant had numerous meritorious defenses as well as multiple meritorious compulsory counterclaims related to the consolidated actions in the instant case. Pursuant to the Contract for Deed that created Appellant's rights to the subject property and his obligation to the Respondents, Appellant was to make payments on Respondent Otto's mortgages encumbering the subject property. **(See R. pp. 49-59)**. Appellant made the payments required of him, but some of those payments were returned from the mortgagee, Respondent U.S. Bank, to Respondent Otto. **(Id.)**. Respondent Otto failed to advise Appellant of this fact or return those payments to Appellant or U.S. Bank. **(Id.)**. Respondent Otto failed to provide Appellant the access necessary to communicate directly U.S. Bank and would not even provide monthly

statements from the mortgagee, both of which were requested numerous times by Appellant. **(Id.)**. Respondent Otto failed to advise Appellant that there were additional liens on the subject property that were not acknowledged in the original Contract for Deed, and Otto allowed additional liens to attach to the property after the closing of the Contract for Deed. **(Id.)**. The first mortgagee, Respondent U.S. Bank, inappropriately applied Appellant's mortgage payments to principal and refused to provide information directly to Appellant, requiring Appellant to go through Respondent Otto to attempt to resolve the case with Respondent U.S. Bank. **(Id.)**. In addition, the Contract for Deed contained an indemnification provision requiring Respondent Otto to indemnify and hold harmless the Appellant for any and all costs, expenses, fees, and/or damages related to the mortgages encumbering the property. **(Id.)**. On top of general denials, Appellant asserted defenses of waiver and estoppel, unclean hands, and prior breach; as well as counterclaims of negligent and intentional misrepresentation, accounting, and negligence and gross negligence; and cross-claims of breach of contract, fraud, breach of contract accompanied by a fraudulent act, breach of fiduciary duty, and conversion. **(Id.)**. Because Appellant had meritorious defenses available to him in each cause of action, his request for relief satisfies the second prong of Wham.

Neither Respondent would have been prejudiced had the trial court set aside Appellant's default. Appellant's Motion to Set Aside Default was heard in May of 2013. **(See R. pp. 82-85)**. The trial court denied Appellant's requested relief, but the case was not heard until November of 2015. **(See R. pp. 306-310 and R. pp. 95-103)**. For two and a half years, the case remained pending before there was an adjudication on the merits. During this period of time, Respondent U.S. Bank deposed Appellant and Respondent Otto, and Appellant participated in the discovery process. **(See R. pp. 306-310)**. Respondent U.S. Bank argued to the court that it

would prejudice U.S. Bank to set aside default because the value of the subject property might decline if the process were prolonged. **(See R. p. 87, lines 14-23)**. However, delay associated with a decision to set aside Appellant's default would not have extended the delay between the dates of filing in the combined action and the date the case was finally called to trial. Any decline in the subject property's value between September 2012 and December 2012 is moot in light of the failure of the case to be called for trial until November 2015. Therefore, neither Respondent would have suffered any prejudice if the trial court had decided to set aside Appellant's default.

As Appellant's motion for relief from default satisfies the three Wham factors, there was no factual basis to support a finding that good cause did not exist to warrant setting aside default. Therefore, the trial court erred in refusing to grant Appellant's Motion to Set Aside Default and Appellant's Motion for Relief from Default in the consolidated action.

II. THE TRIAL COURT ERRED BY FINDING THAT APPELLANT HAD NO EQUITABLE INTEREST IN THE PROPERTY AND, THEREFORE, NO EQUITABLE RIGHT OF REDEMPTION

STANDARD OF REVIEW

"If the essential character of the petitioner's cause of action is grounded on equitable rights and equitable relief is sought, the case is regarded as equitable and the appellate court has jurisdiction to make findings in accordance with its own view of the preponderance of the evidence." Dean v. Kilgore, 313 S.C. 257, 259, 437 S.E.2d 154, 155 (Ct. App. 1993). "In an action in equity, the appellate court has jurisdiction to find facts in accordance with its views of the preponderance of the evidence." Green Tree Servicing, LLC v. Adams, 375 S.C. 583, 586, 654 S.E.2d 100, 102 (Ct. App. 2007).

A. The Trial Court Erred by Finding that Appellant Did Not Have an Equitable Interest in the Property.

Appellant acquired his rights the property at issue in this case from Respondent Otto by means of an installment land contract. **(See R. pp. 249-268)**. As the evidence before the court established the nature of Appellant's interest in the subject property and the amount of money he paid pursuant to the Contract for Deed, it was error to conclude that Appellant did not have an equitable interest in the subject property.

The terms of the Contract for Deed required that Appellant pay Respondent Otto a deposit payment of $10,000.00; pay the monthly installments due to the subject property's first mortgagee, which totaled $1,061,968.32; pay the monthly installments due to the subject property's second mortgagee, which totaled $193,665.68; pay an IRS lien in the amount of $14,601.71; pay real property taxes for calendar year 2010 in the amount of $5,978.87; pay other assessments totaling $5,090.47; pay for reinstatement of the arrears, penalties and fees due to the first mortgagee totaling $50,839.96; pay Respondent Otto $43,076.84 with adjustments for Respondent's pro rata portion of the 2011 taxes and assessments and deposit credit; and pay additional payments to Respondent Otto on a principal sum in the amount of $13,000.00. **(Id. See also R. pp. 273-277)**.

Pursuant to the terms and conditions of the Contract for Deed, in addition to the monies paid at the time of the agreement, Appellant made all payments to the first mortgage holder and second mortgage holder in a timely fashion, from April 2011 through August 2012. **(See R. pp. 52-53)**. An undetermined amount of sums paid to the first mortgagee, Respondent U.S. Bank, were subsequently returned to Respondent Otto. **(See Id.)**. The undisputed amount of funds paid by Appellant on the first mortgage, and, subsequently, returned by Respondent U.S. Bank to Respondent Otto by means of three (3) checks held by Respondent Otto's counsel are noted in the eighth line item in Exhibit A to the Court's Order dated April 19, 2016 and total $15,723.00.

(See R. pp. 278-280. See also R. pp. 17-20). According to Respondent Otto, Appellant also made six payments to her which she paid on the second mortgage totaling $11,052.00, but this amount was never verified as Otto was not required to account for all of the funds returned by U.S. Bank. **(See R. p. 149 line 10-p.151 line 7)**. It actually appears from comparing the sum to be paid on the second mortgage pursuant to the Contract for Deed and the sum found by the trial court to be owed on the second mortgage in 2016 amounts to approximately $16,101.68. **(See R. pp. 249-268 and R. p. 20)**. In aggregate, Appellant paid a deposit of $10,000.00 and $43,076.84 to Respondent Otto **(See R. pp. 273-277)**; $14,601.71 to the IRS on Respondent Otto's behalf **(See R. pp. 273-277. See also R. p. 144, line 21-p. 145 line 3);** $5,978.87 in real property taxes for calendar year 2010 on Respondent Otto's behalf **(See R. pp. 273-277 and R. pp. 249-268)**; $5,590.47 for other assessments on Respondent Otto's behalf **(See R. pp. 273-277 and R. pp. 249-268)**; $50,839.96 for reinstatement of the arrears, penalties and fees due the first mortgagee **(See R. pp. 273-277 and R. pp. 249-268)**; at least $15,723.00 on the first mortgage, which was subsequently returned to Respondent Otto, held by her counsel and not returned to Appellant **(See R. pp. 278-280);** $6,044.10 to Respondent Otto's counsel to be held in trust during the negotiation process **(See R. p. 20)**; and approximately $16,101.68 in principal on the second mortgage **(see R. pp. 249-268 and R. p. 20)**. Appellant may have even paid a greater amount to the first mortgagee, but Otto was never required to account for the funds.

In the court's Judgment of Foreclosure and Sale dated December 22, 2015, the Court concluded that Appellant Munsey, "by virtue of that memorandum of Contract for Deed dated March 4, 2011 and recorded March 9, 2011 in Book 97-Z at Page 748" may claim "a subordinate lien upon or subordinate legal interest in the subject property and in the event there is a surplus from the sale of the subject property … may present through any such lien or legal interest a

claim to the surplus at a hearing subsequent to the sale." **(See R. pp. 25-26)**. However, in its Order dated April 19, 2016, the Court concluded that Appellant Munsey "has no equitable interest in the property." **(See R. p. 18)**. The court did acknowledge that "as a party to the action, of course, [Appellant] will receive notice of any surplus funds to make a claim," **(R. p. 214 line 25-p. 215 line 4.)** but the trial court erroneously refused to recognize the Appellant's equitable interest in the property.

Installment land contracts are typically structured so that the vendor or seller retains legal title to the property until the entirety of the purchase price is paid, and the vendee or purchaser is entitled to immediate possession of the property. Lewis v. Premium Inv. Corp., 351 S.C. 167, 170, 568 S.E.2d 361, 363 (Ct. App. 2002). A vendee in possession of the land under a contract for sale is the owner of an equitable interest in the property. Southern Pole Bldgs., Inc. v. Williams, 289 S.C. 521, 524, 347 S.E.2d 121, 122 (Ct. App. 1986). Appellant Munsey took possession of the property when the Contract for Deed was executed and at that point of time, he acquired an equitable interest in the property. Therefore, Appellant has an equitable interest in the property and an equitable lien on any surplus from the sale.

Based on the foregoing, Appellant respectfully requests that this Court overrule the trial court's Judgment of Foreclosure and Sale and Order on Jackson L. Munsey, Jr.'s Motion to Alter or Amend as the trial court erroneously determined that Appellant did not have an equitable interest in the subject property. The order of foreclosure should be remanded to the trial court for the trial court to make a specific finding that Appellant has an equitable interest in the property.

B. The Trial Court Erred by Finding that Appellant Did Not Have an Equitable Right to Redeem the Property.

During the foreclosure hearing, the trial court heard arguments from counsel for Respondent U.S. Bank, Respondent Otto, and Appellant Munsey regarding Appellant's equitable right of redemption, and the trial court ruled that Appellant did not have an equitable right to redeem the mortgages in default. **(See R. pp. 120-121 and R. pp. 130-132)**. Counsel for the Appellant again raised the issue of Appellant's equitable right of redemption during the trial, and the court reaffirmed its decision that the Appellant had no equitable right of redemption in the property. **(See R. p. 172)**. In the Judgment of Foreclosure and Sale, the court concluded that Appellant had "no equitable right of redemption in the mortgaged property described hereinafter, based upon the fact that he is not a junior lienholder." **(See R. p. 28, ¶ 7)**. The trial court further explained its reasoning in a subsequent hearing on Appellant's Motion to Reconsider, ruling that the Appellant had no equitable interest in the property and, therefore, no equitable right to redeem. **(See R. p. 215)**. The Court's ruling was formalized in an order dated April 19, 2016, in which the court found that "[Appellant] Munsey has no equitable interest in the property, and consequently, no equitable right of redemption, because he is not a junior lienholder." **(See R. p. 18)**.

Historically, the equity of redemption was created to afford mortgagors a reasonable time to cure default and facilitate reconveyance of property from the mortgagee to the mortgagor. Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 578-579 (1935). The mortgagee, however, "would be compensated for the default by a later payment, with interest, of the debt for which the security was given; and the protection afforded the mortgagor was, in effect, the granting of a stay." *Id.*, at 579. Once the mortgagor pays the mortgagee the sums the mortgagee is rightfully owed, the mortgagor is "entitled to possession of the mortgaged premises, freed and

discharged of the liens created by said mortgages." Ham v. Flowers, 214 S.C. 212, 221, 51 S.E.2d 753, 757 (1949).

"An omitted junior lienholder retains his right of redemption, giving him the right to tender to the buyer at the senior foreclosure sale the balance which was owed on the senior lien at the time of the foreclosure." Green Tree Servicing, LLC v. Adams, 375 S.C. 583, 587, 654 S.E.2d 100, 102 (Ct. App. 2007) (*citing* 27 S.C. Jurisprudence § 109, at 248). To redeem, the junior lienholder must pay the entire debt accrued upon the senior mortgage. *Id.* See also Peoples v. Snyder, 141 SC 152, 139 S.E. 405 (1927). The mortgagor's right to redeem was an equitable interest in the land, which afforded the mortgagor the "right to redeem the property in defiance of the mortgage." Bartles v. Livingston, 282 S.C. 448, 454, 319 S.E.2d 707, 711 (Ct. App. 1984). "A junior mortgagee had the right to bring a suit for the redemption of the premises from a senior mortgagee, and by so doing could tack his junior mortgage to a senior mortgage and cut out an intervening mortgage." Union Nat. Bank of Columbia v. Cook, 110 S.C. 99, 96 S.E. 484, 487 (1918).

As "the common law recognized an equitable right of redemption in the context of mortgages well before any statutory right was granted," "[t]here is no equitable reason why the right of redemption should not likewise be afforded to vendees in an installment land contract in appropriate circumstances." Lewis v. Premium Inv. Corp., 351 S.C. 167, 173, 568 S.E.2d 361, 364 (2002). *See also* Dempsey v. Huskey, 224 S.C. 536, 80 S.E.2d 119 (1954). "The Court of Appeals has specifically held that in an installment land contract, the vendee in possession of the land is considered the owner of an equitable interest in the property." *Id.*, fn 4, citing Southern Pole Bldgs., Inc. v. Williams, 289 S.C. 521, 347 S.E.2d 121 (Ct. App. 1986). And, "[f]or years,

in an executory contract for the sale of land our Court has equated the vendor with the mortgagee and the vendee with the mortgagor." Id. at 173, 568 S.E.2d at 364.

Appellant entered into an installment land contract, otherwise known as a Contract for Deed, with Respondent Otto, which made Appellant a junior lienholder to the first mortgage and second mortgage on the property. **(See R. pp. 319-338)**. Appellant paid tens of thousands of dollars to Respondent Otto directly and to others on behalf of Respondent Otto, including the first mortgagee and the second mortgagee in accordance with the terms of the Contract for Deed. South Carolina law recognizes an equitable right of redemption of defaulted installment land sales contracts when equity so requires. *See* Lewis v. Premium Inv. Corp, at 173, 568 S.E.2d at 364. Even counsel for Defendants Laura Kerhulas Giese and Mark Warner Kerhulas noted his agreement with Appellant's position at trial, acknowledging that "a right of redemption is merely an equitable right that allows a junior lien holder or owner ... to cough up the money," and "I don't think that a foreclosure [proceeding] would wipe out [Appellant Munsey's] ability to cough up the money." **(See R. p. 131 line 23-p.132 line 4)**. To terminate Appellant's rights to the property without first allowing him an opportunity to redeem the Contract for Deed by paying the entire amount due would be inequitable and would amount to an unlawful deprivation of a substantial right. It was therefore error for the trial court to deny Appellant his equitable right to redeem.

CONCLUSION

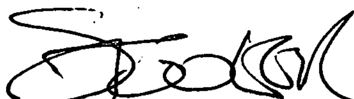
The rule governing relief from default should be liberally construed to promote justice and dispose of cases on the merits. The trial court therefore abused its discretion in inappropriately applying Regions Bank v. Owens in finding that Appellant failed to provide a satisfactory explanation for his default. Had the court considered whether good cause existed to

warrant setting aside default pursuant to Rule 55(c), the court would have found ample evidence in the record justifying Appellant's requested relief, as Appellant's case satisfies each of the three Wham factors.

Furthermore, the evidence in this case demonstrates that the trial court erred in determining that Appellant did not have an equitable interest in the subject property or an equitable right to redemption by virtue of his Contract for Deed.

For all of these reasons, Appellant respectfully requests that this Court overrule the trial court's Judgment of Foreclosure and Sale and Order on Jackson L. Munsey, Jr.'s Motion to Alter or Amend as the trial court inequitably denied Appellant his redemption rights.

Respectfully Submitted,



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Greenville, South Carolina
Date: December 16, 2016

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,

Of whom Jackson L. Munsey, Jr., is the		Defendants,
and		Appellant.
U.S. Bank, NA and Alyce F. Otto are the		
		Respondents.
Alyce F. Otto, Trustee,		
		Plaintiff,
Jackson L. Munsey, Jr.,		
	v.	
		Defendant,

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellant complies with Rule 211(b), SCACR.

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