

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,

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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 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, SCR, 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, SCR, 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 R. pp. 314-316, ¶¶ 12-20 and R. pp. 47-81).** Appellant filed a Motion to Set Aside Default and Leave to File Answer Outside of Time. **(See R. pp. 297-303).** 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 R. pp. 7-8).**

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 R. pp. 306-310 and R. pp. 100-103).** 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 R. pp. 100-103, 130-133).** The trial court then issued a judgment ruling on these issues. **(See R. pp. 21-30).**

Appellant subsequently filed a motion to alter or amend the court's ruling, requesting clarification from the trial court. **(See R. pp. 402-404 and R. pp. 208-219).** The trial court again heard oral arguments and ruled on Appellant's motion. **(See R. pp.**

208-219). The trial court then issued an order ruling on Appellant’s motion to alter or amend. (See R. pp. 17-20).

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 be 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 **R. pp. 297-303** and **R. pp. 306-318**). 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 **R. pp. 84-11** and **R. pp. 100-106**). 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 **R. pp. 7-8** and **R. pp. 15-16**).

Appellant also argued both orally and in written motion that Appellant had an equitable interest in the subject property. (See R. pp. 130-133 and R. pp. 402-404). 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 R. pp. 17-20).

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.

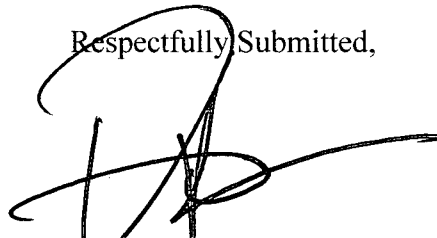
CONCLUSION

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,

A handwritten signature in black ink, appearing to be 'DR', with a long horizontal stroke extending to the right.

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Date: December 16, 2016

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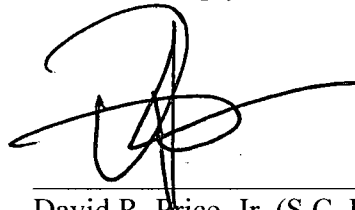
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CERTIFICATE OF COUNSEL

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



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