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

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 RESPONDENTS

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Alyce F. Otto, Trustee .... Plaintiff,

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Jackson L. Munsey, Jr., ... Defendant.

FINAL BRIEF OF RESPONDENTS

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STATEMENT OF ISSUES ON APPEAL

1. Is Munsey's appeal barred because he cannot directly appeal from a default judgment and he never sought relief pursuant to Rule 60, SCRCP?

2. Did Munsey fail to preserve any argument regarding the standard used by the Master in denying the Motions for Relief from Entry of Default by failing to raise them to the Master?

3. Did the Master properly deny Munsey's motions for relief from the entry of default due to Munsey's failure to provide a satisfactory explanation for the default?

4. Did the Master properly decline to consider the factors set forth in *Wham v. Shearson Lehman Bros., Inc.*, 298 S.C. 462, 381 S.E. 2d 499 (Ct. App. 1989) because Munsey failed to provide a satisfactory explanation for his default?

5. Did the Master correctly determine that Munsey did not have an equitable right of redemption in the property?

STATEMENT OF THE CASE

This appeal results from two consolidated cases relating to real property located at 1825 Fairview Farms Road, Campobello, South Carolina ("Property"): a mortgage foreclosure action filed by U.S. Bank, NA as trustee relating to the Chevy Chase Funding, LLC Mortgage Backed Certificates, Series 2004-B ("US Bank") on August 21, 2012 ("mortgage foreclosure" or "foreclosure action") (R. pp. 37-46), and an action to cancel or foreclose a contract for deed filed by Alyce F. Otto, Trustee Under Declaration of Trust of Alyce F. Otto dated the 17th of November 2009 (hereinafter referred collectively with Alyce F. Otto, individually, as "Otto") on July 6, 2012 ("Otto action") (R. pp. 31-36). Jackson L. Munsey, Jr. ("Munsey") was named as a Defendant in both actions. (*See generally* R. pp. 31-36; R. pp. 37-46).

Munsey was served with the Otto action on July 27, 2012. (R. p. 407). He did not file an answer nor has he sought leave to do so. (*Id.*). Munsey was served with the mortgage foreclosure on August 31, 2012. (R. p. 405). Munsey also failed to answer the mortgage foreclosure Complaint. (R. p. 406). On October 15, 2012, a Certificate of Default and Non-Military Service was filed in the mortgage foreclosure, holding Munsey in default. (*Id.*). The Otto action was referred to the Master in Equity ("Master") on July 6, 2012, (R. p. 1), and the mortgage foreclosure was referred October 15, 2012, (R. p. 2).

Thereafter, Munsey attempted to file an Answer, Counterclaims, and Crossclaims as to the mortgage foreclosure on December 27, 2015. (*See* R. pp. 47-79). US Bank's counsel submitted a letter to the court on January 14, 2013, wherein it objected to the filing of the late Answer due to Munsey's default. (R. p. 410). Munsey filed a Motion to Set Aside Default and Leave to File Answer (R. pp. 297-303) and a Motion to Consolidate the Otto action and the mortgage foreclosure on February 4, 2013 (R. pp. 304-305).

These motions were heard on May 6, 2013. (R. pp. 7-8; R. pp. 9-10). In orders filed on May 6, 2013, the Master granted the Motion to Consolidate (R. pp. 9-10), but denied the Motion to Set Aside Default and Leave to File Answer Outside of Time (R. pp. 7-8). The Motion to Set Aside Default and Leave to File Answer was accompanied by an affidavit indicating that Munsey claimed he failed to answer the mortgage foreclosure because he was attempting to negotiate a resolution with counsel for Otto (R. p. 302). The Master found this to be an unsatisfactory reason for default and ruled that Munsey had therefore failed to meet the initial burden of the "good cause" standard pursuant to Rule 55(c), SCRCP. (R. p. 88, lines 10-14; R. pp. 7-8). On May 8, 2013, Otto filed an Affidavit of Default as to Munsey's default in the Otto action. (R. p. 407).

The actions were tried by the Master on November 24, 2015. (R. p. 22). The day prior to the trial, Munsey's counsel filed a second Motion for Relief from Entry of Default (R. pp. 306-310) this time accompanied by an affidavit of Munsey's wife (R. pp. 311-401). Mrs. Munsey's affidavit detailed her efforts to resolve the default of the mortgage loan with counsel for Otto, but did not present any new evidence or basis for setting aside the default. (*See Id.*). The Master addressed the renewed Motion for Relief from Entry of Default prior to the non-jury trial. (R. pp. 101-103). At that time, Munsey did not raise any argument objecting to the reasoning of the previous Order Denying Motion to be Relieved from Default but simply restated his earlier argument that an answer was not filed because the Munseys were negotiating a resolution with counsel for Otto. (*Id.*). The Master denied the renewed Motion orally (R. p. 103, lines 1-10) and by written order filed on December 22, 2015 (R. pp. 15-16).

After hearing the evidence, the Master directed that judgment be entered in favor of US Bank and Otto in the respective cases. (R. pp. 21-30; R. pp. 11-14). The Order as to the Otto

action was filed on December 15, 2015. (R. pp. 11-14). The Judgment of Foreclosure and Sale in the US Bank matter was filed on December 22, 2015. (R. pp. 21-30).

Munsey filed a Motion to Alter or Amend Order on January 7, 2016, seeking clarification as to certain portions of the order in the Otto action. (R. pp. 402-404). A hearing on the Motion to Alter or Amend Order was held on February 15, 2016, and certain portions of the Order in the Otto action were amended, but the ultimate result of both cases remained the same. (R. pp. 17-20). The Order as to the Motion to Alter or Amend was filed on April 19, 2016. (*Id.*). Munsey has not sought relief pursuant to Rule 60, SCRCP from any default judgment entered against him.

FACTS

The Property was conveyed to Otto and her husband in July 2004. (R. pp. 281-283). In August 2004, they made, executed and delivered a Promissory Note and Mortgage to US Bank's predecessor in interest in the principal sum of $999,500.00. (R. pp. 220-226; R. pp. 227-248). Subsequently, Otto and her husband conveyed their respective interests in the Property to trusts. (R. pp. 284-291). Mr. Otto died testate on December 2, 2009, (R. p. 43), and Otto, as substitute trustee of his trust, conveyed his interest in the Property to her trust, (R. pp. 292-296). As such, Otto, as sole trustee of her trust ("Otto trust"), became the sole owner of the Subject Property. (*Id.*).

On March 4, 2011, the Otto trust entered a Contract for Deed with Munsey, (R. pp. 249-268), for which the Memorandum of Contract for Deed was recorded March 9, 2011, (*see* R. p. 44). Pursuant to the terms of the Contract for Deed, Munsey was to pay the US Bank mortgage in monthly installments until April 1, 2016, when the remaining balance became due and payable. (R. pp. 250-251). Munsey was also required to pay monthly mortgage installments for the second

and third mortgages, pay the homeowner association dues and assessments, and pay the real estate taxes. (*Id.* at pp. 251-252).

Munsey failed to timely pay the amounts due to US Bank. (R. p. 35; R. p. 12). As a result, on November 2, 2011, US Bank issued a demand letter to Otto, advising her of the default of the mortgage obligation. (R. pp. 269-272). When the default was not cured pursuant to the terms of the demand letter, the mortgage loan was accelerated. (R. p. 43). The Otto action and mortgage foreclosure were then filed. (R. pp. 31-36; R. pp. 37-46). Notwithstanding his default, Munsey has been in possession of the Property for the duration of this litigation. (*See* R. p. 302; R. p. 312; R. p. 409).

ARGUMENT

I. As an initial matter, there is not an appealable order in this case and Munsey's arguments relating to the Master's denial of Munsey's requests that the entry of default be set aside are not preserved.

Munsey's appeal is barred because he did not seek relief under Rule 60, SCRCP. Munsey cannot directly appeal from a default judgment because his "sole remedy is to move to set aside the judgment under Rule 60(b), SCRCP." *Winesett v. Winesett*, 287 S.C. 332, 334, 338 S.E.2d 340, 341 (1985). A party in default "'has no status in court which will enable him to appeal from the judgment rendered.'" *Id.* at 333, 338 S.E.2d at 341 (quoting *Washington v. Hesse*, 56 S.C. 28, 29, 33 S.E. 787,787 (1899)). Further, a party attempting to appeal a default judgment is precluded from raising any issues on appeal because they were not raised to the trial court below. *Id.* (citing *American Hardware Supply Co., Inc. v. Whitmire*, 278 S.C. 607, 300 S.E.2d 289 (1983); *Murphy v. Hagan*, 275 S.C. 334, 271 S.E.2d 311 (1980)).

In addition, Munsey's arguments that the Master applied the wrong standard in considering his motions for relief from the entry of default are not preserved because they were

never raised to the Master, either by way of the motions themselves or in the form of a 59(e), SCRCP motion. To be preserved for appellate review, an argument must have been raised to and ruled on by the trial court. *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 734 (1998).

II. The Master correctly determined that the entry of default against Munsey should not be set aside because Munsey failed to provide a satisfactory explanation for the default.

The standard of review governing the granting of relief from the entry of default is well settled and has been stated as follows:

> The decision whether to set aside an entry of default or a default judgment lies solely within the sound discretion of the trial judge. The trial court's decision will not be disturbed on appeal absent a clear showing of an abuse of that discretion. An abuse of discretion occurs 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.

Sundown Operating Co. v. Intedge Industries, Inc., 383 S.C. 601, 606-07, 681 S.E.2d 885, 888 (Ct. App. 2009) (citations omitted).

In this case, the Master did not abuse his discretion in denying Munsey's motions to set aside the entry of default. In his brief, Munsey contends that the Master abused his discretion by (1) determining that Munsey failed to provide a satisfactory explanation for the default, and (ii) failing to determine that Munsey was entitled to relief based upon the factors outline in *Wham v. Shearson Lehman Bros., Inc.*, 298 S.C. 462, 465, 381 S.E.2d 499, 501-02 (Ct. App. 1989).

Munsey's argument that good cause existed to set aside the default judgment is fatally flawed as Munsey assumes that any excuse for failure to respond to the complaint satisfies the good cause standard. This notion is rejected by numerous decisions, discussed more fully below, which state that a party seeking relief from default must first provide a satisfactory explanation for the default.

In *Regions Bank v. Owens,* 402 S.C. 642, 647-48, 741 S.E.2d 51, 55 (Ct. App. 2013), the trial court refused to set aside an entry of default on facts very similar to those in this matter. In *Owens*, one of the defendants argued he had established good cause to set aside the entry of default because he claimed another co-defendant had misled him into believing an attorney had been hired to file an answer on his behalf. However, the co-defendant disputed that contention, and provided evidence that he had retained an attorney to represent only himself. Additionally, the trial court determined the defendant against whom the default had been entered took no additional steps to protect himself by confirming an answer would be filed. On appeal, this Court affirmed the trial court's decision that Mr. Owens failed to show a good cause and a substantial explanation for failing to file an answer.

Additionally, in *Sundown Operating Co.*, 383 S.C. at 606-07, 681 S.E.2d at 888, the party seeking to set aside an entry of default contended the default should be set aside due to the negligence of its insurance agent in failing to file an answer. The trial court and this Court rejected this argument, and stated that solely relying upon an insurance agent to file an answer did not establish good cause.

Likewise, in this matter the evidence in the record supports the Master's ruling that Munsey did not provide a satisfactory explanation for the default. The record reflects that Munsey was served with the complaint filed by U.S. Bank on August 31, 2012, (R. p. 405), yet failed to attempt to file any responsive pleading until December 27, 2012, (*See* R. p. 410; R. pp. 47-81). In affidavits submitted in support of both motions for relief from default, Munsey and his wife contend they contacted counsel for Otto with respect to resolution of the case. (R. p. 302; R. pp. 314-315). However, there is no contention or any evidence they ever contacted counsel for

U.S. Bank to discuss settlement, or an extension of time to file a responsive pleading. (*Id.*). Moreover, Munsey never responded to the Complaint in the Otto action. (R. p. 407).

The explanation proffered by Munsey in both his motions for relief from default is that Munsey relied solely upon discussions with counsel for Otto regarding settlement of a foreclosure action filed by U.S. Bank. (R. pp. 297-305; R. 306-401). In fact, Munsey states in his brief that "Appellee maintained constant contact with Respondent Otto's counsel in relation to both claims." (Appellant's Brief at 15). Munsey has never produced evidence, and cannot produce evidence that he ever attempted to contact counsel for U.S. Bank.[1] Consequently, the Master's determination that Munsey did not provide a satisfactory explanation as to why the default occurred is supported by evidence in the record; thus, the Master's decision must be affirmed.

III. Once the Master determined that Munsey had not provided a satisfactory explanation for his default, the Master was not required to consider the *Wham* factors.

In addition to asserting that he provided a satisfactory explanation for the default, Munsey also asserts that the Master failed to determine that Munsey demonstrated good cause to set aside the entry of default. Specifically, Munsey contends that the Master erred by failing to examine the factors outlined in *Wham v. Shearson Lehman Bros., Inc.*, 298 S.C. 462, 465, 381 S.E.2d 499, 501-02 (Ct. App. 1989).

Munsey's argument is contrary to the well-settled rule that the factors set forth in *Wham* only are considered after a court determines that a satisfactory explanation for the default has been provided. For example, in *Regions Bank*, 402 S.C. at 647-48, 741 S.E.2d at 55, one of the

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[1] In his brief, Munsey alleges that U.S. Bank would not speak with him regarding Otto's loan, but he never alleges that he or his attorney attempted to contact counsel for U.S. Bank to protect himself from default judgment. (Appellant's Brief at Section I).

co-defendants never provided a satisfactory explanation for the failure to file an answer, yet argued that he was entitled to relief from the entry of the default judgment pursuant to the criteria set forth in *Wham.* This Court disagreed with the argument, instead holding that because the mortgagor failed to show good cause for failing to file an answer, the Court did not have to consider the factors in *Wham. See also, Sundown Operating Co.,* 383 S.C. at 607, 681 S.E.2d at 888 (determining that a court only needs to analyze *Wham* factors after a party has provided a satisfactory explanation for the default), *Dixon v. Besco Engineering, Inc.*, 320 S.C. 174, 179, 463 S.E.2d 636, 639 (Ct. App. 1995) (trial court not required to make specific findings on each *Wham* factor for the record if the record contains sufficient evidentiary support that the party in default failed to establish good cause).

For the same reasons set forth in *Owens*, *Sundown,* and *Dixon*, the Master was not required to consider the *Wham* factors because Munsey failed to provide a satisfactory explanation for the default. However, even though the Master was not required to consider the *Wham* factors, the record reflects that he did consider them. (R. pp. 6-7). After a discussion of the *Wham* factors, the Master stated "[a]s far as the motion filed by Mr. Munsey to set aside default and leave to file an answer. I am going to deny that Motion. I don't feel like that there has been enough showing of the requirements of why he did not timely file an answer. There has been no excuse offered. Mr. Anthony did not represent Mr. Munsey. And I don't see that there is any good cause showing why he did not respond." (*Id.*). For these reasons, the Master's denial of the motions for relief from the entry of default were supported by the law and the evidence and were not an abuse of discretion.

IV. The Master correctly found that Munsey did not have an equitable right of redemption in the Property.

A. As discussed above, Munsey was in default and thus did not assert any defense to the foreclosure of the Property.

Munsey was not an omitted junior lien holder in these actions. (R. pp. 31-36; R. pp. 37-46). Instead, he was a named party in default. (R. p. 407; R. p. 406). For that reason, any cases relating to the rights of omitted junior lien holders are inapplicable. *See e.g., Green Tree Servicing, LLC v. Adams*, 375 S.C. 583, 585, 654 S.E.2d 100, 101 (Ct. App. 2007); 27 S.C. Jurisprudence § 109 ("The foreclosure is void against omitted junior lienholders.").

As a result of his default, Munsey did not assert any defense to the foreclosure of the Property. *See Roche v. Young Bros., of Florence*, 332 S.C. 75, 81, 504 S.E.2d 311, 314 (1998) ("It is well settled that by suffering a default, the defaulting party is deemed to have admitted the truth of the plaintiff's allegations and to have conceded liability."); *State ex rel. Medlock v. Love Shop, Ltd.*, 286 S.C. 486, 488, 334 S.E.2d 528, 530 (Ct. App. 1985) ("[E]ntry of an order of default is an admission by the defaulting party of the well-pleaded allegations of the complaint[.]"). This includes any claim that he had an equitable interest in the property and an equitable right of redemption in the Property. Thus, the Master correctly found in both actions that Munsey did not have an equitable right of redemption.

B. The Master preserved Munsey's right to pursue a claim against any surplus funds following the sale of the Property.

The Master did not strip Munsey of all rights in the foreclosure order.[2] Instead, he found that Munsey "has no equitable right of redemption in the mortgaged property described hereinafter, based upon the fact that he is not a junior lienholder." (R. p. 28). However, the

[2] The order in the *Otto* action is not a foreclosure order, but rather a "judgment against Munsey for amounts due under the Contract for Deed." (R. p. 12, ¶ 4). Thus, the applicable order for purposes of any right of redemption is the order in the foreclosure action.

Master found that Munsey "may claim a subordinate lien upon or subordinate legal interest in the subject property" and that Munsey may present a claim to any surplus following the sale in Paragraph 20 of the foreclosure order. (R. pp. 29-30). Munsey's claim is listed in subsection (f), following other creditors, including mortgagees and lien and judgment holders. (*Id.*). Thus, the Master has preserved Munsey's ability to pursue a claim for any surplusage following the sale.[3] For this reason, Munsey has not presented a basis for reversal in Section II(A) of his brief.

C. The Master correctly concluded no equitable right to redeem existed due to Munsey's conduct and the absence of any evidence that the Property was worth more than the prior encumbrances or that Munsey had the ability to buy the Property.

As previously argued, Munsey's default should serve to resolve this issue. In the event the Court is inclined to reach the merits, Munsey has failed to establish any equitable right of redemption. Again, Munsey was not an omitted lienholder and he retains the ability to make a claim against any surplusage.

This Court may affirm the Master's ruling for any reason appearing in the record. Rule 220, SCACR. In this case, Munsey should be barred from any equitable relief based on his own

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[3] The finding in the April 19, 2016 Order relating to Munsey's interest in the Property was only directed to the *Otto* action and does not have any impact on the Master's rulings in the foreclosure action. (R. pp. 17-20). This is confirmed in the following exchange at the February 16, 2016 hearing:

> Ms. Culbertson: It is Your Honor's ruling then that Mr. Munsey does not have an equitable interest and therefore no right of redemption?
>
> The Court: I think that is what I said at the hearing.
>
> Ms. Culbertson: Okay. I just wanted to make sure I had the language.
>
> The Court: As far as the Otto, that was in the Otto portion of it, correct?

(R. p. 8, lines 5-9). Thus, to the extent Munsey suggests that both cases include a finding that Munsey did not have an equitable interest in the Property, that characterization is in error.

unclean hands in allowing the Property to go into default in breach of his obligations under the Contract for Deed and in remaining in possession of the Property notwithstanding that default for the pendency of this litigation. Courts have long recited "[h]e who seeks equity must do equity." *Provident Life and Acc. Ins. Co. v. Driver*, 317 S.C. 471, 479, 451 S.E.2d 924, 929 (Ct. App. 1994). Therefore, in considering this claim, the Court must balance the equities between the parties to determine what relief, if any, is appropriate. *Anderson v. Buonforte*, 365 S.C. 482, 493, 617 S.E.2d 750, 755 (Ct. App. 2005). As found by the Master in the *Otto* action, "Munsey has failed to make all payments required by the Contract for Deed, which has resulted in foreclosure of the property by the first mortgage[] holder and default on the other obligations." (R. p. 12, ¶ 3). Munsey cannot now assert an equitable right of redemption as to a default he caused.

Moreover, there is no evidence in the record that the Property will sell for more than the amount of the respective liens on it. Nor is there any evidence that Munsey stands ready, willing, and able to satisfy those encumbrances. As such, the Master correctly declined to extend an equitable right of redemption. As set forth in *Union National Bank of Columbia v. Cook,* 110 S.C. 99, 115, 96 S.E. 484, 488 (1918):

> But it should appear to the Court that the junior incumbrancer has a substantial right in the land to be protected and his lien enforced for some practical purpose, and not merely the prosecution of a fictitious cause of action. In other words, it must appear to the court prima facie that the land is worth more than prior incumbrances and that in probability upon a resale of the land the proceeds would reach the claim of the junior incumbrancer.

Id. at 115, 96 S.E. at 488 (quoted in *Green Tree Servicing,* LLC, 375 S.C. at 587-88, 654 S.E.2d at 102-03). *Green Tree Servicing* further found that an omitted junior lienholder had no right of redemption in a case where he stipulated that the property value was less than the debt and that "he had neither the ability nor the willingness to buy the property." *Id.* In this case, the right of redemption was raised at the hearing, but there was no evidence that the Property would bring

more than the amount owed, nor was there any evidence that Munsey had the ability to redeem the property if given the chance. (*See* R. pp. 26-38). Therefore, there was no prejudice stemming from the Master's ruling that Munsey did not have an equitable right of redemption.

For all of these reasons, the Master's ruling that Munsey does not have an equitable right of redemption must be affirmed.

CONCLUSION

As shown above, Munsey's appeal is barred as he did not seek relief pursuant to Rule 60, SCRCP, and a party cannot directly appeal a default judgment. Moreover, the issues raised in the appeal regarding the standards the Master used in deciding Munsey's motions for relief from the entry of default are not properly before the Court as they were never raised to the Master. Notwithstanding the foregoing, the Master properly exercised his discretion in denying Munsey's motions to set aside the entry of default judgment and properly found that Munsey did not have an equitable right of redemption in the Property. Accordingly, Respondents respectfully request that the decision and orders of the Master be affirmed and that all of Munsey's challenges in this appeal be denied in their entirety.

Respectfully submitted,

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