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

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SC Court of Appeals
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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,

APPELLANT'S PETITION FOR REHEARING

Appellant hereby petitions for rehearing in accordance with Rule 221 and 240 of the South Carolina Appellate Court Rules. Appellant makes this Motion on the grounds that:

I. THE COURT'S OPINION DOES NOT SATISFY THE REQUIREMENTS OF RULE 220, *SCACR.*

The court's opinion in this case is a memorandum opinion without explanation of the reasons for affirming the lower court, just a string of citations and parentheticals. The authority for doing that given in the opinion (as is given in many unpublished opinions issued by this court), is Rule 220(b), *SCACR*. That Rule states as follows:

> **(b) Decision by the Court.** In every decision rendered by an appellate court, every point distinctly stated in the case which is necessary to the decision of the appeal and fairly arising upon the record of the court must be stated in writing and must, with the reason for the court's decision, be

> preserved in the record of the case. This rule does not apply to the following:
>
> **(1)** *The Supreme Court* may file a memorandum opinion dismissing an appeal, affirming or reversing the judgment appealed from, or granting other appropriate relief when, in unanimous decision, *the Supreme Court* determines that a published opinion would have no precedential value and any one or more of the following circumstances exists and is dispositive of issues submitted to the Court for decision: (A) that a judgment of the trial court is based on findings of fact which are or are not clearly erroneous; (B) that the evidence to support a jury verdict is or is not insufficient; (C) that the order of an administrative agency is or is not supported by such quantum of evidence as prescribed by the statute or law under which judicial review is permitted; or (D) that no error of law appears.
>
> **(2)** The Court of Appeals need not address a point which is manifestly without merit.

Rule 220(b), *SCACR* (emphasis added).

Per Rule 220(b)(1), *SCACR*, it is only the Supreme Court that may issue a memorandum opinion that does not provide the reason for the appellate court's decision as to every point distinctly stated in the case. The Appellant respectfully submits that the reason it is important for the Court of Appeals to provide the reason for its decision as to every point stated in the case is that, upon the invocation of the certiorari process, our Supreme Court may well have a need to know why this court decided an issue the way it did, so that the Supreme Court can fully evaluate whether certiorari is warranted.

The memorandum opinion in this case merely recites much of the same case law cited by Plaintiff, without addressing the merits of Appellant's arguments. The Appellant therefore cannot know the precise points where the appellate court has rejected his view of the application of the same law, which prejudices him by depriving Appellant of a sufficient reference on which to base his petition for writ of certiorari. It also prevents

the Appellant from adequately targeting this Petition for Rehearing without rehashing each of the arguments set forth in his Appellate Brief(s).

II. THE TRIAL COURT'S DECISION NOT TO SET ASIDE THE ENTRY OF DEFAULT WAS CONTROLLED BY AN ERROR OF LAW AS TO WHETHER A SATISFACTORY EXPLANATION EXISTED AS TO THE REASONS FOR DEFAULT.

Certainly, it is well-settled that "[w]hether good cause is established [to set aside entry of default] is within the sound discretion of the [Master-in-Equity]." Stark Truss Co., Inc. v. Superior Const. Corp., 360 S.C. 503, 510, 602 S.E.2d 99, 102, (Ct. App. 2004). The circuit court's decision is therefore subject to an abuse of discretion standard on appeal. Regions Bank v. Owens, 402 S.C. 642, 647, 741 S.E.2d 51, 54 (Ct. App. 2013). However, "[a]n 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.* In the present case, the Master-in-Equity's refusal to set aside entry of default was based on an error of law.

Rule 55(c) of the *South Carolina Rules of Civil Procedure* provides that "[f]or good cause shown the court may set aside an entry of default . . ." Rule 55(c), *SCRCP*. As noted in this court's memorandum opinion, "[t]his 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). Then, once the party seeking relief from default has put forth a satisfactory explanation 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.

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." *See* Sundown Operating Co., Inc. v. Intedge Industries, Inc., 383 S.C. 601, 607, 681 S.E.2d 885, 888 (2009)). Had the trial court properly made this initial inquiry, it would have found that 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)**. Appellant explained exactly why the default occurred: there were numerous sincere attempts by Appellant to quickly resolve both actions amicably. The trial court also would have necessarily found that it 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.)**.

Unfortunately, the trial court did not properly make this initial inquiry. It 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 fact-specific reasoning of Regions Bank v. Owens to the Appellant's case, and the trial court determined that

Appellant had failed to "put forth a satisfactory explanation for the default" and so it determined that it need not even consider the Wham factors to determine whether good cause existed to set aside default. **(See R. p. 103, lines 1-10. See also R. pp. 411-415)**. Since the trial court did not apply the correct analysis, its ruling was controlled by an error of law.

The trial court made its error of law when it adopted Respondent U.S. Bank's argument that Appellant's circumstances were similar to the party seeking relief from default in Regions Bank and so the trial court did not need to consider the Wham factors to determine whether good cause was shown to set aside entry of default, 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 fact-specific case law addressing the good cause standard to whether there existed a satisfactory explanation for default. As a result, the trial court failed to properly apply the Wham factors to consider whether the facts specific to the present case would yield a different finding than they did in Regions Bank as to whether good cause existed to support Appellant's request for relief from entry of default. 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).

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. The appellate court's memorandum opinion also fails to set forth reasons why a proper analysis does not call for relief from entry of default.

III. IF A PROPER ANALYSIS WERE MADE, THE APPELLANT SHOWED GOOD CAUSE TO SET ASIDE DEFAULT.

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). Had the trial court correctly found that Appellant had provided a satisfactory explanation for the default, it should have applied the Wham factors to the specific facts of the case. If it had done so, it would have found that Appellant showed good cause to set aside entry of default.

In contesting Appellant's right to entry of default, Respondent U.S. Bank argued to the trial court that Appellant's default in this case 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)**. Moreover, unlike Owens, who did not move to be let out of default until just prior to the dispositive hearing, the Appellant filed his Answer in December 2012, and moved to be let out of default in January 2013, shortly after defaulting on his obligation to file an Answer to Complaints served on July 27 and August 31, 2012. The Appellant's delay in filing an Answer was insignificant considering the matter did not come to trial until November 2015.

"An abuse of discretion [not only] occurs when the judgment is controlled by some error of law [it also occurs] when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support." *Id.*, at 647, 54. For the reasons set forth in Appellant's brief, his motion for relief from default satisfies the three Wham factors, and so 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. The appellate court's memorandum opinion does not identify which facts, if any, provide a basis for the court's finding that good cause did not exist.

IV. THE APPELLATE COURT DOES NOT APPEAR TO HAVE CONSIDERED THE CLEAR EVIDENCE OF APPELLANT'S EQUITABLE INTEREST IN THE PROPERTY.

As noted in the memorandum opinion, "[i]n an action in equity, tried with reference to a [M]aster[-in-Equity], this [c]ourt reviews the evidence and determines the facts according to its own view of the preponderance of the evidence, though it is not

required to disregard the findings of the master." Fox v. Moultrie, 379 S.C. 609, 613, 666 S.E.2d 915, 917 (2008). As argued by Appellant and conceded by this court in the memorandum opinion, "courts of equity can relieve a defaulting purchaser from the strict forfeiture provision in an installment land contract and provide the opportunity for redemption when equity so demands." Lewis v. Premium Inv. Corp., 351 S.C. 167, 173, 568 S.E.2d 361, 364 (2002). The memorandum order further sets forth a number "of case-specific factors that should be considered to determine if redemption is equitable under the circumstances."

Despite having a standard of review that requires it to review the evidence and determine the facts according to its own view of the evidence, the memorandum opinion in this case does not make any findings of fact. It also does not address the application of its findings of fact to any of the case-specific factors enumerated in the order. Instead, the memorandum order disposes of Appellant's claim to an equitable right of redemption, without mention of the vast sums of money that the record reflects that Appellant paid to Respondent Otto or paid on her behalf.

Appellant respectfully submits that a fair view of the evidence in the record demonstrates beyond a preponderance that Appellant had substantial financial equity in the property. 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 by the trial court to account for the funds. Nevertheless, the trial record is clear that Appellant would forfeit at least $167,956.63 if the foreclosure of the first mortgagee and bond for title were to proceed.

The record is also clear that the trial court refused from the outset to consider the other case-specific Lewis factors set out by the appellate court in its memorandum opinion. The trial court repeatedly sustained objections to questions by Appellant's attorney designed to address the factors, on the basis that they were outside the scope of inquiry as to damages that is ordinarily available at a default hearing on damages. The trial court would not permit Appellant to examine the first mortgagee regarding bank statements sent to the borrower **(See R. pp. 117, l. 21-118, l. 22)**, which was relevant to the length of default period, the number of defaults, and the reason for delay for payment. The trial court would not even permit the Appellant to examine the first mortgagee as to specific line items of the debt claimed by the first mortgagee, such as force-placed insurance **(See R. pp. 119, l. 2-120, l. 5)**. The trial court also would not permit the Appellant to examine Otto as to terms of the Contract for Deed that were clearly relevant

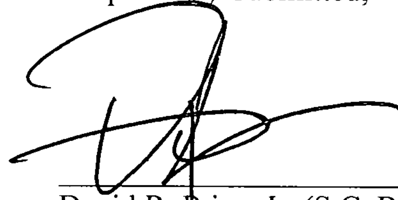
to whether Appellant was entitled to stop making payments under the terms of the Contract for Deed **(See pp. 152, l. 16-53, l. 6)**.

The trial court appears to have refused to consider evidence relating to the Lewis factors based on an erroneous belief that a party that is procedurally in default (as opposed to default under a loan) has waived its equitable right of redemption **(See p. 120, l. 4-121, l. 11; pp. 130, l. 16- 132, l. 21)**. The trial court simply ruled that "there was no equity of redemption" without considering or even allowing Appellant to present evidence addressing any of the case-specific factors set forth in the memorandum opinion **(See R p. 131, ll. 15-16)**. The Appellant would therefore respectfully submit that the trial court did not find that Appellant lacked an equitable right of redemption after a careful application of the Lewis factors to the facts of this case, but because the trial court mistakenly believed that the equity of redemption is dictated solely by comparing the amount of payments made by Appellant against the value of the property instead of against the purchase price **(See R. pp. 154, l. 16-155, l. 5)**.

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 redemption, without permitting Appellant an opportunity to present evidence addressing the Lewis factors set out in the memorandum opinion. It further appears that the appellate court also failed or refused to apply the case-specific Lewis factors to this case, since the memorandum order does not provide any reasons why Appellant's payments totaling at

least $167,956.63 were not sufficient to create an equitable right of redemption in the property.

Respectfully Submitted,



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
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Gordon G. Cooper, Master-in-Equity Judge

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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.

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SC Court of Appeals

Alyce F. Otto, Trustee, — Plaintiff,

v.

Jackson L. Munsey, Jr., — Defendant,

PROOF OF SERVICE

IT IS HEREBY CERTIFIED that a copy of the foregoing PETITION FOR REHEARING in this action was served upon: Erica Greer Lybrand, Esq., and Richard C. Keller, Esq., counsel for Respondent U.S. Bank, NA as Trustee relating to the Chevy Chase Funding, LLC Mortgage Backed Certificates, Series 2004-B; Kenneth C. Anthony, Jr., Esq., and Sarah Patrick Spruill, Esq., counsel for Respondent Alyce F. Otto; Erin Culbertson, Esq., counsel for Appellant Jackson L. Munsey, Jr., by placing copies of same in the United States Mail this date, with sufficient postage affixed thereto, addressed as follows:

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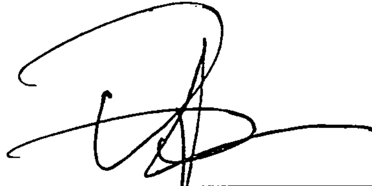

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February 21, 2018

VIA OVERNIGHT DELIVERY

Ms. Jenny Abbot Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

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SC Court of Appeals

Re: US Bank, N.A. vs. Alyce F. Otto, et al.
Appellate Case No. 2016-000099

Dear Ms. Kitchings:

Enclosed please find original and six (6) copies, 1 bound and 6 unbound, Appellant's Petition For Rehearing; and, the original and one (1) copy of the Proof of Service in the above matter along with a check for $25.00. By copy of this letter to Erin Culbertson, Kenneth C. Anthony, Jr., Sarah Patrick Spruill, Erica Greer Lybrand, Richard C. Keller, I am serving them with a copy of same. If you have any questions or concerns, please let me know.

Sincerely,

DAVID R. PRICE, JR., P.A.

David R. Price, Jr.

Cc: Erin Culbertson, Esq.
Kenneth J. Anthony, Jr. Esq.
Sarah Patrick Spruill, Esq.
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SHIP TO:
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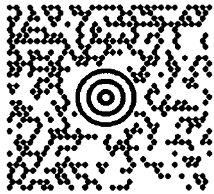

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