THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Gordon G. Cooper, Master-in-Equity

Appellate (Court of Appeals) 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.....Petitioner,

and

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

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

v.

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

PETITION FOR WRIT OF CERTIORARI

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Petitioner Jackson L. Munsey, Jr. who was the appellant below and is hereinafter referred to as "Munsey," hereby moves and petitions this Court, pursuant to Rule 242, SCACR, as well as all other applicable law, for the issuance of a writ of certiorari to review the final decision of the Court of Appeals in this case. Petitioner respectfully submits that this is a proper case for such review by this Court.

In this case, the Court of Appeals' decision disregarded this Court's jurisprudence concerning what is called the equity of redemption or right of redemption. The Court of Appeals upheld the master-in-equity's erroneous ruling that Munsey, the purchaser under an installment land sale contract, had no equitable right of redemption in these consolidated foreclosure actions. (Appx. pp. 2, 3.) Apparently, the master ultimately based his ruling on Munsey not being a lienholder in this subject property. As discussed herein, the master's ruling flies in the face of this Court's precedent in this regard. Should decisions by the Court of Appeals or trial courts along similar lines continue to be made, they would threaten the fundamental premise that lies at the root of all of this state's foreclosure law: the existence of the equity of redemption.

The Court of Appeals' decision also deviated from this Court's precedent concerning relief from default and upheld the application of an incorrectly, prejudicially high standard to the first prong of the analysis of whether to relieve a defendant from default. This Court should reverse the Court of Appeals and bring its jurisprudence, and that of the lower courts, in line with our state's consistent jurisprudence that the paramount consideration in determining whether to set aside default is "to see that justice is promoted and to strive for the disposition of cases on their merits." Ricks v. Weinrauch, 293 S.C. 372, 374-75, 360 S.E.2d 535 (Ct. App.

1987). The Court of Appeals upheld a ruling that did not do that, and this Court should accept this invitation to promote sound and wise jurisprudence in this area.

CERTIFICATE OF COUNSEL

The Court of Appeals issued its opinion in this case on February 7, 2018. (Appx. p. 2.) Counsel for the Petitioner certifies that the petition for rehearing was served fourteen days later, on February 21, 2018, and was received by the Court of Appeals and filed the next day, February 22, 2018. (Appx. pp. 5, 19-20.) The petition for rehearing was finally ruled on by the Court of Appeals by an order filed on April 4, 2018. (Appx. pp. 21-22.) This petition for a writ of certiorari is timely served and filed.

QUESTIONS PRESENTED

The questions presented for review in this case may be succinctly stated as follows:

1) Did the Court of Appeals err in upholding the master's determination that Munsey, a purchaser of the subject property under an installment sales contract who had paid over $167,000.00 toward the purchase price of the property, had no equitable right of redemption in these consolidated foreclosure cases?

2) Did the Court of Appeals err in upholding the master's decision to deny Munsey relief from default where that decision was based on an error of law and where proper application of the analysis would have resulted in the opposite decision?

STATEMENT OF THE CASE

Munsey and Respondent Alyce F. Otto, individually and as trustee under declaration of trust of Alyce F. Otto, dated November 17, 2009 (hereinafter "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. (Appx. pp. 338-57). Otto was the seller of the subject property, and Munsey was the purchaser of the subject property. (Appx. pp. 338-57).

The terms of the Contract for Deed required that Munsey pay 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 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 Otto on a note at 2.5 percent interest on a principal sum of $13,000.00. (Appx. pp. 338-57, 362-66).

Pursuant to the terms of the Contract for Deed, Munsey 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 "U.S. Bank") as well as to the second mortgagee. (Appx. 136-70). As the mortgagor under U.S. Bank's mortgage, Otto had access to information and monthly statements related to the first mortgage, but Otto refused to give Munsey access to this information. (Appx. 136-70). U.S. Bank inexplicably began refunding Munsey's payments on the first mortgage, but it sent checks for the refunded payments to Otto, not Munsey. (Appx. 136-70). Otto failed to notify Munsey that his mortgage payments to U.S. Bank had been returned, and Otto did not attempt to resolve the situation with U.S. Bank. (Appx. 136-70).

Otto and Munsey met on April 15, 2012, to discuss Munsey's repeated requests for tax information that Munsey needed regarding the first, second and third mortgages, as well as how Munsey could gain access to or monthly account statements regarding the first and second mortgage accounts. (Appx. pp. 401-02.) At that point, Munsey learned that U.S. Bank was taking the position that the first mortgage was in default. (Appx. pp. 400-06.) Otto and Munsey called the first mortgagee's servicer together and were told that Munsey's payments had been received by the first mortgagee, misallocated to principal, and certain payments had been returned by check to Otto. (Appx. pp. 400-06.) The first mortgagee, 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 it by Otto. (Appx. pp. 400-06.)

Otto again failed to provide Munsey the requested tax and account information for any of the mortgages, which caused Munsey some concern and prompted him to search the Spartanburg County public index, where he discovered several new liens filed against Otto. (Appx. p. 402.) Pursuant to the Contract for Deed, Otto had agreed that the subject property was not and would not become encumbered by any liens or judgments other than those acknowledged in the contract. (Appx. pp. 136-70.) Despite the terms of her contract with Munsey, Otto had permitted three new Internal Revenue Service tax liens, totaling approximately $58,000.00, a judgment against Otto in the amount of $571,329.90, and another judgment against Otto in the amount of $12,396.66 to encumber the subject property, which directly contravened the Contract for Deed. (Appx. pp. 141-42.)

Munsey, now aware of Otto's breach of the Contract for Deed, began to withhold the third mortgage payments that were to be paid directly from Munsey to

Otto until the encumbrances were cleared, as was allowed under the terms of the Contract for Deed. (Appx. pp. 338-57, 402.) Munsey continued making payments toward Otto's first and second mortgages. (Appx. p. 402.)

Otto served a summons and complaint on Munsey on July 27, 2012. (Appx. p. 403.) U.S. Bank served a summons and complaint on Munsey on August 31, 2012. (Appx. p. 391.) U.S. Bank named Otto as a party to its action, as well. At that point, Munsey had been named a defendant in two separate actions related to the same piece of real property: Otto's action, 2012-CP-42-2874, and U.S. Bank's action, 2012-CP-42-3549.

Munsey began communicating with counsel for Otto about reaching a resolution of Otto's action on August 3, 2012. (Appx. p. 403.) Regarding Otto's complaint, Munsey's wife, who is a licensed attorney, asked Otto's counsel for an extension to answer Otto's complaint on August 20, 2012. (Appx. pp. 404, 438-90.) Otto's counsel agreed in writing to the extension on August 24, 2012, stating "I am not going to call time on you." (Appx. pp. 460-61.)

After being served by U.S. Bank, Munsey began communicating with Otto's counsel about amicably resolving U.S. Bank's case, as well. (Appx. pp. 403-05.) Munsey and Otto, both defendants in U.S. Bank's action, cooperated in an attempt to settle U.S. Bank's foreclosure action, since U.S. Bank would not deal directly with Munsey regarding the mortgage loan without authorization from Otto, which Otto would not give. (Appx. pp. 401, 404-05.) Working through Otto's counsel, Munsey obtained a reinstatement amount to avoid litigation with U.S. Bank that was good through October 31, 2012. (Appx. pp. 403-05.) When it became apparent, however, that Otto could not or would not account for all payments made toward the first

mortgage by Munsey and later refunded to Otto, Otto's counsel ceased communicating with Munsey in November 2012. (Appx. pp. 403-05.)

Munsey, realizing that the matter could not be resolved without litigation, contacted an attorney in November of 2012. (Appx. p. 405.) Munsey was able to meet with and retain an attorney in December of 2012, and he filed responsive pleadings to both actions on December 21, 2012. (Appx. pp. 405-06.)

On October 9, 2012, while Munsey was working to obtain a reinstatement amount, U.S. Bank filed a certificate of default and non-military service affirming that Munsey was served with the summons and complaint in 2012-CP-42-3549. (Appx. p. 495.) Munsey filed his answer, counterclaims, and cross-claims on December 21, 2012, and served copies of the same on U.S. Bank, as plaintiff, and on Otto as cross-claim defendant. (Appx. pp. 136-70, 386-92.) Munsey then moved to set aside default on January 29, 2013. (Appx. pp. 386-92.) In his motion, Munsey provided the court with background as to the circumstances surrounding the case and his default. (Appx. pp. 386-92.)

A hearing on Munsey's motion to set aside default was held simultaneously with a hearing on his motion to consolidate the two pending cases. (Appx. pp. 171-81.) At that hearing, the master-in-equity consolidated Otto's action with U.S. Bank's action but denied Munsey's motion to set aside default in the U.S. Bank action. (Appx. pp. 96-97.) The next day, Otto's counsel filed an affidavit of default in the Otto action, despite Otto's counsel's previous written representation to Munsey that he was "not going to call time" on him. (Appx. pp. 460, 496.)

For two and a half years, the case remained pending before there was an adjudication on the merits. During this period of time, U.S. Bank deposed Munsey and

Otto, and Munsey participated in the discovery process. The matter was set for final hearing on November 24, 2015, and so Munsey filed a renewed motion for relief from entry of default on November 23, 2015. (Appx. pp. 395-406.) In his motion, Munsey further explained the circumstances surrounding his default and provided a great deal of documentary evidence to the court showing the lengths to which Munsey went in an attempt to resolve both cases amicably. (Appx. pp. 395-490.). The trial court denied this motion as well and again refused to let Munsey out of default, issuing an order on December 22, 2015 finding that the motion should "be denied on the grounds of *res judicata*." (Appx. pp. 104-05.)

During the foreclosure hearing, Munsey argued that he had an equitable right to redeem the property. (Appx. pp. 209-10, 219-21.) Pursuant to the terms of the Contract for Deed, Munsey had paid at least $167,956.63 toward the purchase price by paying either Otto directly or paying on lien debts and other expenses on her behalf, as called for under the contract. (Appx. p. 234 ln. 18 through p. 235 ln. 3, pp. 338-57, 362-69.)

Despite the considerable sums paid by Munsey to acquire the property pursuant to the Contract for Deed, the trial court concluded that Munsey had no equitable right of redemption over objection by Munsey. (Appx. pp. 209-10, 219-21, 261.) The master issued a judgment of foreclosure and sale on December 22, 2015, which provided that Munsey 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. (Appx. pp. 114-15.) The master, however, had already ruled that Munsey had "no equitable right of redemption in the mortgaged property ... based upon the fact that he is not a junior lienholder." (Appx. p. 97.)

Munsey filed a motion to alter or amend the court's ruling, requesting that the court clarify whether Munsey had an equitable interest in the subject property and if so, whether Munsey had an equitable right to redeem the defaulted mortgage. (Appx. pp. 297-18, 491-93.) In his order dated April 19, 2016, the master again held that Munsey had no equitable interest in the subject property, ruling that "[Munsey] has no equitable interest in the property, and consequently, no equitable right of redemption, because he is not a junior lienholder." (Appx. pp. 106-09.) While he acknowledged that Munsey was to receive notice of surplus funds, the master refused to recognize Munsey's equitable interest in the property or his equitable right to redeem the property. (Appx. pp. 106-09.)

Munsey appealed the master's orders denying his motions to set aside default, the order granting the judgment of foreclosure and sale, and the order denying Munsey's motion to alter or amend. The Court of Appeals issued a memorandum opinion without any analysis, affirming the master's rulings. (Appx. p. 2-3.) Munsey petitioned for rehearing. (Appx. pp. 5, 19-20.) The Court of Appeals denied that petition. (Appx. pp. 21-22.)

ARGUMENT

Munsey's argument in this petition centers on two points, 1) whether the Court of Appeals should have upheld the master's ruling that Munsey has no equity of redemption in the property and 2) whether the Court of Appeals should have upheld the master's rulings refusing to set aside Munsey's default. These points may be analyzed separately and independently. In other words, Munsey's victory or defeat on one argument does not predetermine the outcome of the other argument. Munsey is, however, entitled to reversal by this Court on both points.

I. Munsey has an equitable right of redemption, and the Court should grant certiorari to protect it and the similar rights of others by reversing the Court of Appeals.

As noted in the case of Lewis v. Premium Investment Corporation, 351 S.C. 167, 568 S.E.2d 361 (2002), this Court has recognized that a purchaser under an installment sales contract may have a right of redemption, also called an equity of redemption. Id. at 172, 173-174. From the text of Lewis, it is apparent that this right arises because "[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 (citing Dempsey v. Huskey, 224 S.C. 536, 541, 80 S.E.2d 199 (1954)). But just what is the equity of redemption?

Early mortgages were contracts that operated automatically; that is, if the mortgage debt was not paid when due, all the mortgagor's title to the land transferred immediately from the mortgagor to the mortgagee. Bartles v. Livingston, 282 S.C. 448, 455, 319 S.E.2d 707 (Ct. App. 1984). The origins of the right or equity of redemption are as described by former Court of Appeals Judge Randall Bell:

> Equity, however, looked to the substance of the mortgage, not its form. Even if the debt was past due, equity compelled the mortgagee to reconvey the property to the mortgagor upon payment of the principal with interest and costs. In other words, the mortgagor was given an equitable right to redeem the property in defiance of the terms of the mortgage. If the mortgagee wished to realize his security, he had to cut off the equity of redemption. This was accomplished by bringing an action for strict foreclosure, which resulted in a decree of the court declaring that the equitable right to redeem was at an end. Once a decree of foreclosure was entered, the mortgagee held the fee simple free from the right of the mortgagor to redeem.
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> The mortgagor's right to redeem was an equitable interest in the land. It was assignable, descendable, and devisable. Its release to the mortgagee operated to

> convey title. In consequence, an action for strict foreclosure was an action in rem. Foreclosure adjudicated the rights of the parties in the property only. Its purpose was not to recover the indebtedness, which could be made the subject of a separate action at law, but to establish the right of the mortgagee to the property free from the equity of redemption. Thus, in a strict foreclosure there was no sale of the property and no deficiency to be enforced by personal judgment.

Id. at 455-56 (internal citations omitted). The right of redemption was a right written into mortgages by courts of equity, and the right afforded the mortgagor an opportunity to avoid the forfeiture to which he and the mortgagee had agreed; in other words, to redeem from that forfeiture his interest in the property. Id. at 455. It existed specifically for a situation in which the mortgage was in default. Id. Over the years, the scope of who holds the right of redemption has extended to junior lienors, see, e.g., Ex parte Deloach, 159 S.C. 345, 157 S.E. 1 (1929); Peeples v. Snyder, 141 S.C. 152, 139 S.E. 405 (1927), but the right was created to be for those who were in the position of owning land subject to a defaulted mortgage. Bartles, 282 S.C. at 455.

This is to what this Court referred in Lewis when it invoked the right of redemption. Lewis, 351 S.C. at 172 ("we conclude it would be inequitable to enforce the forfeiture provision without first allowing the purchaser an opportunity to redeem the installment contract by paying the entire purchase price"). For the purposes of analysis in Lewis, the major difference between the original, automatic mortgage at common law and the installment sales contract is that under the former the mortgagor automatically forfeits his legal title, while under the latter the purchaser automatically forfeits his ability to get such title. See id. at 172, 173; Bartles, 282 S.C. at 455.

"[U]nder an executory contract for the sale of real estate, the equitable estate passes to the purchaser and the bare legal title for security purposes remains in the

vendor." Brooks v. Council of Co-Owners of Stone Throw Horizontal Property Regime I, 315 S.C. 474, 476, 445 S.E.2d 630 (1994). Under the Lewis rubric, though, a purchaser under an installment land sale contract may have a right of redemption even if he does *not* have equitable title. Lewis, 351 S.C. at 173 n. 4. In Lewis, this Court noted that "[a] variety of case-specific factors should be considered to determine if redemption is equitable under the circumstances." Id. at n. 5. The Court then cited cases from other jurisdictions for this proposition, with parenthetical notes for each citation setting forth factors noted in that case for determining whether a right of redemption exists. Id. Those factors are:

1) The amount of the purchaser's "equity" (in the lay or business sense) in the property;
2) The length of the period the purchaser has been in default;
3) The number of times the purchaser has defaulted the contract;
4) The amount of the monthly payments in relation to the property's rental value;
5) The value of improvements made to the property;
6) The adequacy of the property's maintenance;
7) The amount that the purchaser would forfeit;
8) The amount that the purchaser would forfeit compared to the purchase price;
9) The reason for the delay in payment; and
10) The speed with which equity is sought.

Id.

Judicial sales in mortgage foreclosures are required by S.C. Code Ann. § 29-3-10 (2007), the present-day successor to the Act of 1791, which mandated judicial sales

in South Carolina mortgage foreclosures for the first time. Bartles, 282 S.C. at 456. That act provided that "the mortgagor shall be forever barred and foreclosed by such sale from his equity of redemption, in as complete a manner as if the same had been foreclosed in a court of chancery." Id. (internal quotation marks omitted). Where the owner of mortgaged property has also entered into a contract to sell that property, particularly an installment contract under which part of the purchase price has already been paid, the person who in equity stands in the position of mortgagor, i.e., landowner, is the contract purchaser. Brooks, 315 S.C. at 476; Dempsey, 224 S.C. at 541.

In an equitable action tried to a master-in-equity, an appellate court "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). Here, the Court of Appeals' opinion made no findings of fact, in violation of Rule 220(b), SCACR, which permits memorandum opinions without analysis only for this Court, as the highest court of appellate review in this state. 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:
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> **(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.
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> **(2)** The Court of Appeals need not address a point which is manifestly without merit.

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

This is not a harmless departure from the requirements of Rule 220(b). By failing to make any findings of fact, the Court of Appeals failed to conduct its required review of the evidence. Fox, 379 S.C. at 613. The Court of Appeals stated the standard of review, but it did not follow it.

The Court of Appeals did not make any findings of fact, much less address the application of its findings of fact to any of the Lewis factors. Nor does the Court of Appeals' opinion undertake any analysis of why Munsey, who was the purchaser under an installment contract to purchase land and who had paid over $167,000.00 toward the purchase price, was not in the position of the mortgagor-landowner for whom the equity of redemption was created. Brooks, 315 S.C. at 476; Dempsey, 224 S.C. at 54; Bartles, 282 S.C. at 455. This brings the Court of Appeals' decision squarely into conflict with this Court's precedent.

The only fair view of the evidence in the record demonstrates beyond a preponderance that Munsey had substantial equity in the property and had a right of redemption, just as one would expect him to under Lewis, Brooks, and Dempsey. Munsey paid a deposit of $10,000.00 and $43,076.84 to Otto, $14,601.71 to the IRS on Otto's behalf, $5,978.87 in real property taxes for calendar year 2010 on Otto's behalf, $5,590.47 for other assessments on Otto's behalf, $50,839.96 for reinstatement of the arrears, penalties and fees due the first mortgagee (as the first mortgage was in default at the time Munsey entered into the purchase contract), at least $15,723.00 on the first

mortgage debt that was subsequently returned to Otto, held by her counsel, and not returned to Munsey, $6,044.10 to Otto's counsel to be held in trust during the negotiation process, and approximately $16,101.68 in principal on the second mortgage. (Appx. p. 234 ln. 18 through p. 235 ln. 3, pp. 338-57, 362-69.) Munsey 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 Munsey would forfeit at least $167,956.63 if the foreclosure of the first mortgage and bond for title were to proceed.

The master refused from the outset to consider the Lewis factors. The trial court repeatedly sustained objections to questions by Munsey's attorney designed to address the factors. The trial court would not permit Munsey to examine the first mortgagee regarding bank statements sent to the borrower, which was relevant to the length of default period, the number of defaults, and the reason for delay for payment. (Appx. p. 206 ln. 21 through p. 207 ln. 22.)

The master's reasoning that Munsey not being a junior lienholder is what means that he does not have a right of redemption further reveals tellingly that the lower court was operating under an incorrect conception of the law about whom is vested with the equity of redemption. Brooks, 315 S.C. at 476; Dempsey, 224 S.C. at 54; Bartles, 282 S.C. at 455.

To terminate Munsey's rights to the property without first allowing him an opportunity to redeem is contrary to fundamental principles of foreclosure law. It was error, and highly prejudicial error, for the master to deny Munsey his equitable right to redemption, especially without permitting Munsey an opportunity to present evidence addressing the Lewis factors.

This Court should grant certiorari to review the Court of Appeals' decision to uphold the master's prejudicially erroneous ruling, which runs counter to this Court's well-reasoned precedent.

II. The Court of Appeals' decided to uphold the master's flawed decision to deny Munsey relief from default, and this Court should grant certiorari to allow this issue to at least be heard on remand.

The master's decision to deny Munsey relief from his procedural default is 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). It is well established that "[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's refusal to set aside default was based on an error of law.

The standard that a party seeking for his default to be set aside must meet is "good cause." Rule 55(c), SCRCP. 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. Once a party has put forth a satisfactory explanation for the default, the trial court must also consider: (1) the timing of the motion for relief; (2) whether the defendant has a meritorious defense; and (3) the degree of prejudice to the plaintiff if relief is granted." Sundown Operating Co., Inc. v. Intedge Industries, Inc., 383 S.C. 601, 607-08, 681 S.E.2d 885 (2009). This standard is less rigorous then the applicable standard when a party seeks to be relieved from a judgment under Rule 60(b), SCRCP. Id.; Wham v. Shearson Lehman Bros., Inc., 298 S.C. 462, 465, 381 S.E.2d 499 (Ct. App. 1989). The paramount consideration under the good cause standard is "to see that justice is

promoted and to strive for the disposition of cases on their merits." Ricks, 293 S.C. at 374-75; accord Dixon v. Besco Engineering, Inc., 320 S.C. 174, 178, 463 S.E.2d 636 (Ct. App. 1995). It is "the policy of our state to resolve cases on the merits" and "[t]o avoid resolving litigation by default[.]" Caldwell v. Wiquist, 402 S.C. 565, 741 S.E.2d 583, 588 (Ct. App. 2013).

The threshold question for the master should have been whether Munsey could "provide an explanation for the default and give reasons why vacation of the default entry would serve the interests of justice." Sundown Operating, 383 S.C. at 607. Had the court properly made this initial inquiry, it would have found that there was ample evidence in the record that Munsey provided an explanation for the default. Munsey filed two motions requesting relief from default and attached affidavits and supporting documentation to each. (Appx. pp. 386-92, 395-490.) Munsey explained exactly why the default occurred: there were numerous, sincere, and involved attempts by Munsey to resolve both actions quickly and amicably. Also, Otto's attorney made an explicit written assurance that he would not hold Munsey in default.

The master also would have necessarily found that it served the interests of justice to grant Munsey's requested relief as his pleading enumerated factual allegations that, if true, would indicate that Munsey did not default on his obligations under the Contract for Deed. (Appx. pp. 136-70.)

Unfortunately, master did not properly make this initial inquiry. The master's reasoning 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 never got past the initial inquiry – which it

did not correctly analyze. 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 U.S. Bank's argument that Munsey's circumstances were similar to the party who sought relief from default in Regions Bank and, accordingly, that 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. (Appx. p. 89 ln. 4-25.) The trial court conflated Regions Bank's analysis of whether good cause – the *second* prong of the Sundown Operating analysis – had been shown with a part of the *first* prong of that analysis, whether Munsey had satisfactorily explained his default. (Appx. pp. 174-77.)

Under Sundown Operating, the explanation for why the default occurred does not have to be so good that it *alone* would provide good cause to set aside default; otherwise, there would be no two-pronged inquiry, only analysis of the reason for the default. 383 S.C. 601, 607-08. The master, however, elevated the standard under the first prong of the analysis to a much higher bar than this Court has ever set. 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 Munsey's request for relief from entry of default. As the court's order refusing to grant Munsey 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).

The master erred by failing to rule that Munsey's diligent efforts, largely thwarted by Otto, coupled with Otto's counsel's written promise not to hold Munsey in default, constituted a satisfactory explanation for default and that it would have

served the interests of justice to see the multitude of disputes in Munsey'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 Munsey's default in the combined action. It then should have ruled on whether good cause existed to let Munsey out of default. That is what Sundown Operating requires, and the master's failure to correctly apply the facts to the appropriate inquiry constitutes an error of law and should be reversed.

The rule governing relief from default "is liberally construed to promote justice and dispose of cases on the merits." Dixon, 320 S.C. at 178. Had the trial court correctly found that Munsey had provided a satisfactory explanation for the default and moved on to the second prong of the analysis, it should have applied the Wham factors to the specific facts of the case. If it had done so, it would have found that Munsey showed good cause to set aside entry of default.

U.S. Bank argued that Munsey'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. (Appx. pp. 500-04.) The trial court appeared to rely on U.S. Bank's arguments in denying Munsey's requested relief. (Appx. p. 175 ln. 5 through p. 177 ln. 16.) 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 answer. 402 S.C. at 645. Owens later moved to be let out of default just before 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. 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. The Court of Appeals in Regions Bank observed 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, Munsey maintained constant contact with Otto's counsel in relation to both actions and maintained contact, albeit limited by Otto, with U.S. Bank's servicer. Munsey's sustained attempts to resolve the pending actions, by negotiating with Otto's counsel and by obtaining a reinstatement amount from U.S. Bank, are strong evidence that Munsey was diligent in his attempt to protect himself and resolve the pending actions. (Appx. pp. 400-07, 438-490.) Unlike Owens, who was a borrower on the subject mortgage loan, Munsey was reliant on Otto – as he had to be – to work towards a solution to the mortgage foreclosure, because U.S. Bank would not communicate with Munsey. (Appx. pp. 404-05.) Moreover, unlike Owens, who did not move to be let out of default until just prior to the dispositive hearing, Munsey served pleadings in December of 2012 and moved to be let out of default in January 2013 with regard to complaints that were served on July 27 and August 31, 2012. Munsey's delay in answering was insignificant – particularly when one considers that the suits did not come to trial until November of 2015.

The Wham factors are "(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." 298 S.C. at 465. As discussed

above, the timing of the default and Munsey's actions weighs in favor of lifting the default.

"To establish a meritorious defense, a party is not required to show an absolute defense." Mictronics, Inc. v. S.C. Dept. of Revenue, 345 S.C. 506, 511, 548 S.E.2d 223, 226 (Ct. App. 2001). In examining whether there is a meritorious defense, the appropriate assessment is whether there is something in the case "worthy of a hearing or judicial inquiry because it raises a question of law deserving of some investigation and discussion or a real controversy as to real facts arising from conflicting or doubtful evidence." Id. (quoting Graham v. Town of Loris, 272 S.C. 442, 453, 248 S.E.2d 594 (1978)). To require more would essentially substitute the motion hearing for a trial on the merits, and one in which the burden has shifted to the defendant to disprove the plaintiff's allegations. Cf. id.

Munsey had numerous meritorious defenses. Under the Contract for Deed, Munsey was to make payments on Otto's mortgages encumbering the subject property. Munsey made the payments required of him, but some of those payments were returned from the mortgagee, U.S. Bank, to Otto. Otto failed to advise Munsey of this fact or return those payments to Munsey or U.S. Bank. Otto failed to provide Munsey 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 Munsey. Otto failed to advise Munsey 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. (Appx. pp. 138-48.) The first mortgagee, U.S. Bank, inappropriately applied mortgage payments and inappropriately refunded them. In addition, the Contract for

Deed contained an indemnification provision requiring Otto to indemnify and hold harmless the Munsey for any and all costs, expenses, fees, and/or damages related to the mortgages encumbering the property. On top of general denials, Munsey 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. Because Munsey had meritorious defenses available to him in each cause of action, his request for relief satisfies the second prong of Wham.

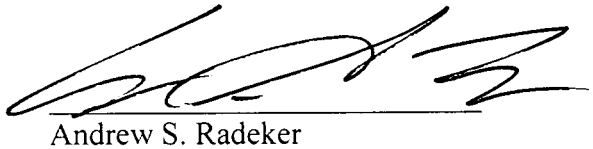
Neither Respondent would have been prejudiced had the trial court set aside Munsey's default. For two and a half years, the case remained pending before there was an adjudication on the merits. During this period of time, U.S. Bank deposed Munsey and Otto, and Munsey participated in the discovery process. (Appx. pp. 184-92, 395-99.) 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. (Appx. p. 176 ln. 14-23.) Delay associated with a decision to set aside Munsey's default would not have extended the delay between the dates of filing and the date the case was finally called to trial, since Otto was an active litigant in the case and was not in default. Any decline in the subject property's value between September 2012 and December 2012 is moot in light of the failure of either plaintiff to push for the case to be called for trial until November 2015. Neither Respondent would have suffered any prejudice if the trial court had decided to set aside Munsey's default.

The master erred prejudicially and abused is direction in denying Munsey's motions for relief from default, and the Court of Appeals erred by upholding the

master's decision. The Court of Appeals' opinion departs from precedent and ignores the policy of this state regarding setting aside default. This Court should do something about it and grant certiorari.

WHEREFORE, the Petitioner prays for an order granting a writ of certiorari to review the final decision of the Court of Appeals in this case.

Respectfully submitted,



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May 4, 2018

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Gordon G. Cooper, Master-in-Equity

Appellate (Court of Appeals) 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.....Petitioner,

and

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

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

v.

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

PROOF OF SERVICE

I certify that I served the foregoing petition for writ of certiorari, along with the appendix, by depositing a copy of each of them on the date shown below in the United States Mail, postage prepaid, addressed as follows:

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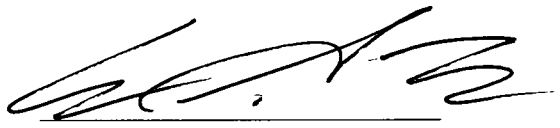
May 4, 2018



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