THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Gordon G. Cooper, Master-in-Equity Judge

Civil Action Nos. 2012-CP-42-3549 and 2012-CP-42-2874
Unpublished Opinion No. 2018-UP-075 (S.C. Ct. App. filed February 7, 20158)
Appellate (S. Ct.) Case No. 2018-000830

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~~ Petitioner

and

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

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

v.

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

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INTRODUCTION

This Petition arises from a unanimous, unpublished *per curiam* opinion of the Court of Appeals. (App. at 1-3). It does not present any novel question, does not raise a substantial constitutional issue, and is not in conflict with any prior decision of this Court or the Court of Appeals. Given the foregoing, this case does not warrant discretionary review by this Court pursuant to Rule 242, SCACR.

The Court of Appeals routinely issues opinions pursuant to Rule 220, SCACR, in cases such as this one that reflect a run of the mill review of trial court decisions. The South Carolina Supreme Court has blessed the use of unpublished opinions in the format of the opinion here in *In re Memorandum Decisions by Court of Appeals*, 322 S.C. 53, 55, 471 S.E.2d 456, 457 (1993) (discussing Rule 220 and providing a sample format addressing each issue by way of citation or citations and providing "the Court of Appeals may use a similar format and still comply with the requirement of § 14–8–250."). No additional findings are required in this case to satisfy any court rule or statute.

QUESTIONS PRESENTED

1. Did the Court of Appeals properly find that the Master did not abuse his discretion in denying Jackson Munsey's motions for relief from the entry of default due to Munsey's failure to provide a satisfactory explanation for the default?

2. Did the Court of Appeals properly review the Master's ruling that Munsey did not have an equitable right of redemption in the property?

STATEMENT OF THE CASE[1]

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). 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

[1] Respondents present nearly the same statements of the case and facts here as in their Respondent's Brief before the Court of Appeals. Petitioner has similarly included his earlier statement of the case, albeit with slightly different nomenclature for the parties and other minor editorial changes.

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. 1720). 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.[2] (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 and continues to remain in possession. *(See* R. p. 302; R. p. 312; R. p. 409).

ARGUMENT

I. The Court of Appeals correctly affirmed the Master's determination of default.

Munsey agrees that the Court of Appeals applied the correct standard of review in considering the Master's default ruling—an abuse of discretion. The standard 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 Indus., Inc., 383 S.C. 601, 606-607, 681 S.E.2d 885, 888 (2009) (citations omitted).

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[2] Respondents disagree with Munsey's recitation of payments made pursuant to the Contract for Deed and the facts leading up to the default here; however, those facts are largely irrelevant to this Court's review of the Petition given the applicable standards of review and Munsey's status as a party in default.

Munsey, however, argues the Master abused his discretion because (i) Munsey provided a satisfactory explanation for his default, and (ii) the Master failed to properly apply the factors set forth in *Wham v. Shearson Lehman Bros., Inc.,* 298 S.C. 462, 465, 381 S.E.2d 499, 501-02 (Ct. App. 1989). Both of these contentions are incorrect, and Munsey's writ should be denied. With respect to the merits of this argument, Respondents incorporate the arguments made in their Respondent's brief, including their argument relating to preservation of error and appealability.

A. The Master did not abuse his discretion in finding that Munsey had not provided a satisfactory explanation for default.

Munsey contends that the master "elevated the standard under the first prong of the analysis to a much higher bar than this Court has ever set." (Petition, p. 17). This argument is belied by the record, as the Master correctly determined that Munsey was not entitled to relief from the entry of default as he failed to provide a satisfactory explanation for the default. Presumably, Munsey essentially contends that any explanation for default is satisfactory, but numerous decisions by this Court demonstrate this assertion is incorrect.

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. This Court noted the standard for granting relief under Rule 55(c) requires a party "to provide an explanation for the default, and give reasons why vacation of the default entry would serve the interests of justice." Based upon this standard, this Court determined the party failed to provide a satisfactory explanation for the default, and stated that solely relying upon an insurance agent to file an answer did not establish good cause.

Here, the record reflects that Munsey was served with the complaint filed by US Bank on August 31, 2012, (R. p. 405), but 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 between Otto and Munsey. (R. p. 302; R. pp. 314-315). However, there is no assertion or any evidence Munsey or his wife ever contacted counsel for US Bank to discuss settlement or an extension of time to file a responsive pleading. (*Id.*). Furthermore, and perhaps most significantly, Munsey never responded to the Complaint in the Otto action. (R. p. 407).

Although Munsey now contends in his Petition "there were numerous sincere and involved attempts by Munsey to resolve both actions quickly and amicably," (Petition, p. 16), there is no evidence in the record to support this contention. The explanation offered 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 US Bank. (R. pp. 297-305; R. 306-401). Munsey has never produced evidence, and cannot produce evidence that he ever attempted to contact counsel for US Bank. The argument that the bank itself would not speak with Munsey is a red herring since US Bank had counsel throughout the case, and the request for extension or other relief could and should have been made to its counsel. Further, the argument that counsel for Otto promised "not to call time" on Munsey is irrelevant to the issue of whether he put forth a satisfactory explanation for the default in the US Bank's action. Otto's counsel had no authority to speak on behalf of US Bank.

In addition, counsel cannot agree to indefinite extensions of time to respond to a pleading. As set forth in Rule 6(d), SCRCP,

> When by these rules or by notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, *the time may be extended by written agreement of counsel for an additional period not exceeding the original time provided in these rules*, or the court for cause shown may at any time in its discretion (1) with or without written motion or notice order the period enlarged if request therefor is made before the expiration of the period as

> originally prescribed or extended or (2) upon motion made after the expiration of the specified period, for good cause shown, permit the act to be done. . . .

(Emphasis added). Thus, the explanation provided with respect to the communication with Otto's counsel would only provide an excuse for thirty days as an outside limit, not for months or years as argued by Munsey.

Munsey never alleged that he or his attorney attempted to contact counsel for US Bank to protect himself from default judgment, nor does he allege any factors that would give rise to an indefinite enlargement of time under Rule 6 with respect to the Otto action. (Appellant's Brief at Section I). 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 Petition must be denied.

B. Because Munsey failed to provide a satisfactory explanation for his default, the Master was not required to consider the *Wham* factors.

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 abused his discretion by failing to examine the factors outlined in *Wham,* 298 S.C. at 465, 381 S.E.2d at 501-02 (Ct. App. 1989). This assertion is contrary to the well-settled rule that the *Wham* factors are only considered after a court determines that a satisfactory explanation for the default has been provided. *See Sundown Operating Co.,* 383 S.C. at 607, 681 S.E.2d at 888; *Dixon v. Besco Eng'g, 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). Thus, the Master's denial of the motions for relief from the entry of default was supported by the law and the evidence and was not an abuse of discretion. Consequently, the Petition is due to be denied.

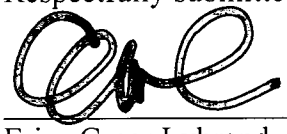
II. The Court of Appeals correctly affirmed the Master's determination that there was no equitable right to redeem in this case.

As discussed above, there was nothing improper about the disposition of this issue by the Court of Appeals pursuant to Rule 220, SCACR. The Court of Appeals addressed this issue by reference to its equitable standard of review and by citation to *Lewis v. Premium Unv. Corp.*, 351 S.C. 167, 568 S.E.2d 361 (2002)—the same case argued by the Petitioner here. Petioner does not dispute the standard applied by the Court of Appeals or the rule in *Lewis*, but is instead disappointed by the conclusion reached by the Court of Appeals. With respect to the merits of this argument, Respondents incorporate the arguments made in their Respondent's brief. For all of these reasons, the Petition should be denied.

CONCLUSION

Munsey has failed to present any argument in his Petition that implicates the considerations listed in Rule 242(b), SCACR. Nothing about the opinion of the Court of Appeals is inconsistent with binding precedent, nor does the Petition present any question of exceptional importance. Simply, Munsey wishes the outcome had been different and wants to drag the appellate process as long as possible so that he can remain in possession of the Property. Therefore, the Petition must be denied.

Respectfully submitted,



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PROOF OF SERVICE

I HEREBY CERTIFY that I have served a copy of the **RETURN TO PETITION FOR WRIT OF CERTIORARI** upon counsels of record by depositing copies of it in the United States Mail, postage prepaid, on June 4, 2018 at the following addresses:

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