THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Charleston County Master in Equity

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JUL 05 2018
SC Court of Appeals

Appellate Case No. 2018-000118

Bayview Loan Servicing, LLC, Appellant,

v.

Patrick A. Oden, Suzanne Oden,
and Hickory Hill Plantation Community Association, Respondents,

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REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Rules:

ARGUMENT

I. This Court should reverse the decision of the Master in Equity denying Appellant's Rule 60(b)(5) Motion for Relief from Judgment.

Rule 60(b)(5) is based on the historical power of a court of equity to modify its decrees "in light of subsequent conditions." *Mr. G v. Mrs. G*, 320 S.C. 305, 311, 465 S.E.2d 101, 107 (Ct. App. 1995). The Rule provides in relevant part:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
> . . .
>
> (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application.

Rule 60(b)(5) is appropriate here for two reasons. First, Appellant's Motion for Relief from Judgment was made within the time limits set forth in Rule 60(b)(5). Rule 60(b)(5) does not place a time limit on when motions are to be brought, but rather provides that such motions must be made "within a reasonable time." Rule 60(b)(5), SCRCP. Appellant's Motion was filed within a reasonable time following the change in circumstances warranting relief pursuant to subsection 5 of Rule 60(b). Second, it is no longer equitable that the Order of dismissal with prejudice have prospective application based upon equitable considerations which the trial court erred in disregarding. The trial court here was presented with undeveloped facts, limited discovery, and a subsequent change of circumstances which, together, entirely transform the underlying premise upon which the Order of dismissal was based. Specifically, Appellant complied with a prior order requiring its predecessor to remit flood insurance proceeds to Respondents, notwithstanding contradictory contractual obligations of the parties under the subject loan instruments. The subsequent assignment of the mortgage to Appellant and

Appellant's compliance with the prior order constitute a change in conditions warranting this Court to reverse the trial court's denial of Appellant's Rule 60(b)(5) Motion.

A. Appellant's Rule 60(b)(5) Motion was made within a reasonable time.

Subsection (5) of Rule 60(b) "is notably not limited by the one year provision, but only that of a reasonable time." *Evans v. Gunter*, 294 S.C. 525, 528, 366 S.E.2d 44, 46 (Ct. App. 1988). The court may grant a party relief from judgment under Rule 60(b)(5), if the party makes a motion seeking relief within a reasonable time. Rule 60(b)(5), SCRCP.

Respondents make the blanket assertion that Appellant's only argument is, "It wasn't us, don't blame us!" This mischaracterized oversimplification is an obvious attempt by Respondents to gloss over the actual circumstances surrounding any purported delay in filing the Rule 60(b)(5) Motion. The Rule 60(b)(5) standard is "within a reasonable time," and each inquiry into reasonableness is on a case by case basis. Here, the law firm representing Appellant's predecessors in the foreclosure, Chase Home Finance, LLC ("Chase") and Bayview Loan Servicing, LLC ("Bayview"), ceased its operations at about the same time as the Master-in-Equity issued an Order declaring the equitable remedy of foreclosure no longer available. Bayview then assigned the mortgage to Appellant, who filed its Rule 60(b)(5) Motion two months and eight days after the recording of the Assignment of the Mortgage and, importantly, *after* remitting the insurance disbursement to Respondents. These circumstances render the timing of the Motion reasonable and justify any perceived delay in its filing. Respondents miss the mark when they state that Appellant seeks to be rewarded in asking this Court to reverse the Master's Order. Appellant does not seek to be rewarded, but instead asks this Court to do what is equitable and just based upon the facts of this case and applicable law of Rule 60(b).

B. Rule 60(b)(5) is applicable because conditions have changed and prospective application of the Master in Equity's order is no longer equitable.

Generally, the standard to be applied in determining whether a judgment has "prospective application", within the meaning of Rule 60(b)(5), is whether the judgment from which relief is sought is executory or involves supervision of changing conduct or conditions by court. *Saro Investments v. Ocean Holiday Partnership*, 314 S.C. 116, 441 S.E.2d 835 (Ct. App. 1994). For example, injunctions ordinarily have prospective application. *See, e.g., Binkley v. Rabon Creek Watershed Conservation Dist. Of Fountain Inn*, 348 S.C. 58, 558 S.E.2d 902 (Ct. App. 2001). Partition orders, on the other hand, do not because they are executed orders that mandate a one-time change in the ownership of property. *Perry v. Heirs at Law of Gadsden*, 357 S.C. 42, 49, 590 S.E.2d 502, 505–06 (Ct. App. 2003).

Respondents predictably rely on *Perry*, which declined to characterize a partition order as having prospective application because such a ruling would be "inappropriate and an affront to the commonly understood meaning of the term 'prospective application.' " *Perry*, 357 S.C. at 49, 590 S.E.2d at 505. However, Respondents' reliance on *Perry* is misplaced. *Perry* was an action in which Gadsden, an heir with an interest in a partitioned property, sought to reopen the judgment of partition on the grounds that the value assigned to the property by the partition commissioners was "so incorrect as to amount to fraud upon the Court." *Id.* at 45-46, 590 S.E.2d at 504. In addition to finding that Gadsden's allegation of insufficiency of value was so deficient that the Court would have been compelled to find the trial court abused its discretion had it granted Gadsden's 60(b)(5) motion, the Court held that the four-year delay in filing the motion was untimely and that Gadsden failed to satisfy his burden to show the propriety of his motion. *Id.* at 48, 590 S.E.2d at 505. Unlike the present case, where a significant subsequent change in

conditions existed and the motion was made within a reasonable time following that change, the motion in *Perry* failed to satisfy any of the requisites under Rule 60(b)(5). *Id.* at 49, 590 S.E.2d at 506.

Conversely, this Court should take guidance from *Saro*. In *Saro*, this Court found "at least a *prima facie* case of inequity," where a party was subsequently relieved of indebtedness and therefore prospective application of a previous judgment would be inequitable. *Saro*, 314 S.C. at 122, 441 S.E.2d at 839. A change in conditions warranted this Court to instruct the trial court in *Saro* to take a closer look at the potential inequity present. *Id.* at 124, 441 S.E.2d at 840. The case was remanded for the lower court to determine the potential inequity involved. *Id.* Similarly to *Saro*, the Master's Order eliminating the equitable remedy of foreclosure has prospective application. The effect of this order is not a one-time change like the partition order in *Perry*, but is instead an ongoing prohibition to equitable relief to Appellant and any successors in interest to the mortgage.

Here, it is no longer equitable that Order of Dismissal with prejudice have prospective application. First, Appellant issued the insurance proceeds to Respondents, constituting a clear change in conditions. Second, an order barring the equitable remedy of foreclosure is certainly prospective, because Appellant and any other successors in interest to the mortgage cannot foreclose on the subject property in the future. Rule 60(b)(5) specifically seeks to remove the injustice caused when the application of a judgment against a party is no longer equitable based on a change in subsequent conditions. In this limited context permitted under Rule 60(b)(5), the lower court's Order of Dismissal with prejudice was an abuse of discretion.

II. Appellant should be substituted as the Plaintiff in this action.

Rule 25(e), SCRCP states "[s]ubstitution of parties under the provision of this rule may be made by the trial court either before or after judgment, or pending appeal, by the appellate court." Rule 25(e), SCRCP. "In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party." Rule 25(e), SCRCP. Upon an assignment of interest, the "assignee stands in the shoes of its assignor." *Twelfth RMA Partners, L.P. v. Nat'l Safe Corp.*, 335 S.C. 635, 639, 518 S.E.2d 44, 46 (Ct. App. 1999).

Appellant is the current mortgagee and assignee of Bayview, however Bayview remains the currently captioned Plaintiff in this action after previously being substituted in place of Chase, the original mortgagee. Appellant's Motion to substitute is based on basic concepts of standing that students are taught in their first year of law school. Respondents' assertion that allowing U.S. Bank Trust to be substituted as Plaintiff "would open the flood gates to making dismissals with prejudice meaningless" is utterly without merit. This facts of this case are unique, and the narrow application of Rule 60(b)(5) together with its mandated case-by-case inquiry prevent the "flood" of reversals Respondents argue would ensue.

Respondents do concede that Rule 25(e), SCRCP permits post-judgment substitution of parties, as is the case here. However, Respondents argue that it is only relevant when there is still something for the court to do and, therefore, is improper when the action is considered concluded. While Appellant's Motion to Substitute Plaintiff may be mooted by a denial of the 60(b)(5) Motion, that by no means renders it inapplicable or improper. Rule 60(b)(5) permits relief by the filing of a motion in an existing action, as Appellant chose to do here. There is no

reason a form motion to correct the caption cannot be filed in conjunction with a Rule 60 motion, and there is certainly nothing in the Rules of Civil Procedure which precludes it.

CONCLUSION

For all the reasons set forth herein, this Court should reverse the trial court's order denying Appellant's Motion for Relief from Judgment and Motion to Substitute Plaintiff.

Respectfully submitted,

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June 29, 2018

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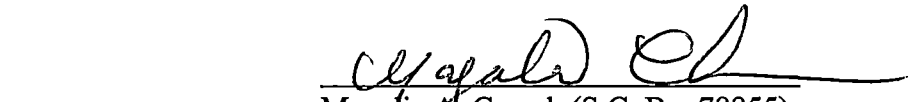
PROOF OF SERVICE

I certify that I have served the *Appellant's Reply Brief* by depositing a copy of same in the United States Mail, postage prepaid, on June 29, 2018, addressed to Respondents' counsel of record, Paul Doolittle, Esquire, P.O. Box 2579, Mt. Pleasant, South Carolina 29465-2579.

FINKEL LAW FIRM LLC



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REPLY TO:
CHARLESTON LITIGATION

June 29, 2018

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
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RE: Bayview Loan Servicing, LLC v. Patrick A. Oden, Suzanne Oden, and Hickory Hill Plantation Community Association
Appellate Case No.: 2018-000118
Our File No.: 74975.50100

Dear Ms. Kitchings:

Enclosed for filing, please find the *Appellant's Reply Brief* and related *Certificate of Service* in regards to the above captioned matter.

Should you have any questions concerning this matter, please do not hesitate to contact our office at your earliest convenience.

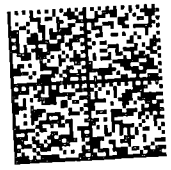
With kind personal regards, we are

Yours very truly,

FINKEL LAW FIRM

Magalie A. Creech

CC: Paul Doolittle, Esquire



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