ORIGINAL

THE STATE OF SOUTH CAROLINA
In the Court of Appeals
APPEAL FROM PICKENS COUNTY
Court of Common Pleas

R. Murray Hughes
Special Referee

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Case No. 2008-CP-39-2120

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JP Morgan Chase Bank, National Bank
Respondents,

v.

Vanessa Y. Bradley
Appellant.

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# FINAL REPLY BRIEF OF APPELLANT

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*South Carolina Supreme Court Administrative Order 2009-05-04-01 on Mortgage Foreclosures and the Home Affordable Modification Program (HMP)* ("AO")

*11 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice. & Procedure* § 2868 (2d ed.1995)

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## INTRODUCTION

The Appellant ("Bradley") was an unrepresented litigant throughout this foreclosure case until her property was prematurely sold while she was under consideration for a Home Affordable Modification Program ("HAMP") mortgage modification pursuant to the Supreme Court's Administrative Order on foreclosure proceedings. *South Carolina Supreme Court Administrative Order 2009-05-04-01 on Mortgage Foreclosures and the Home Affordable Modification Program (HMP)* ("AO"). (specifying that no foreclosure sale should occur until HAMP process has been completed)[1].

At a hearing on Appellant's Motion to Set Aside the Sale and for other relief, Appellant provided live testimony and Chase submitted the Affidavit of Charles Herndon containing his review of the business records of Chase. R.p.307, Def. Ex. 5 which consist of customer service notes.

In Appellant's Brief, she argues that it was error for the Special Referee not to set aside the sale of her home because, inter alia, 1) Chase took steps preliminary to such sale during a period of forbearance and this did not comport with the agreement of the parties; 2) During the period of forbearance Bradley secured employment and the HAMP application process had restarted and by its terms, and Chase's own notification to Appellant, prohibited the sale of her home; and 3) The HAMP process had not completed its course at the time of the sale and therefore the sale was prohibited by the AO.

## ARGUMENT

### I. Arguments in Respondent's Brief do not excuse its violations of the AO, HAMP and the SCRCP

[1] The AO states its purpose is as follows:"to insure that eligible homeowners have been afforded the benefits available under HMP".

Respondent's Brief dwells on arguments and authorities that do not apply to the central issue of its violation of this AO and therefore warrant little discussion. While attempting to rely on irrelevant procedural shortcomings of the unrepresented Bradley, Chase's Brief offers nothing more than insufficient excuses for Chase's own material misconduct in violating the AO and HAMP.

Despite these contentions and for the reasons set forth below and in Appellant's Brief, this Court should reverse the Special Referee and grant the Appellant's Motion to Set Aside the Sale, and Vacate the Judgment of Foreclosure and subsequent Supplemental Orders, and allow the Appellant to investigate the modification evaluation, present her position and defend her home from foreclosure.

**a. Chase's argument that Forbearance was Ineffective Because Not in Writing**

At page seven (7) of its Brief, Chase concedes that in June 2010 it offered Bradley a three (3) month forbearance to enable her to submit a new loan application. (R. p. 196 lines 14-17). However, the forbearance was actually granted when Bradley contacted Chase to alert them to the expiration of the unemployment benefits. She'd been using these to continue payments for 6 months after she made the 3 trial period payments on her initial HAMP modification.[2] Chase goes on to emphasize that this forbearance was "never committed to writing". (R. Brief p. 7). Chase ignores Bradley's testimony that she herself requested it in writing and never received it. (R.p.187 lines 1-8). Whether or not in writing, it is undisputed that the forbearance was in place through August 31, 2010 and that the purpose was to allow time for Bradley to secure employment so that she and Chase could continue to work out a modification. The forbearance

[2] Chase had granted Bradley a Trial Period Plan in July 2009 which they failed to make permanent. Despite Chase's failure to make the modification permanent as expected, she paid an additional 6 months of these payments until May 2010 when her unemployment benefits ceased. (R. p. 142 ines. 2-20; R.. p. 196 line 7 – p.197 line.22). The forbearance followed in June, July and August 2010.

was one of forbearance from exercise of remedy as well as of payment. [3] (R. p. 143 line 17-p.145 line 14) (where Chase telephone representative told Appellant that it could not go forward with foreclosure during the forbearance). Pursuant to the AO, no sale should have been held until this process was completed, and either a modification was entered into or a denial with detailed reasons was provided and the time period to challenge this under HAMP rules had passed.

**b. Chase's argument that suspension of the sale was discretionary because final document submission was less than seven days prior to sale does not excuse the failure to suspend the sale but also concedes they were otherwise required to suspend it because of the ongoing modification discussion.**

In an attempt to avoid it's violation of HAMP timing requirements, Chase makes an after-the-fact argument that the HAMP guidelines provide that a servicer is not required to suspend a foreclosure sale if the request for a modification is received within seven (7) business days prior to the scheduled foreclosure sale. [4] This exception is irrelevant. First, Bradley's testimony verifies that on August 31, 2010, Chase had all the necessary information and paperwork it had requested to supplement her pending HAMP application (including in particular paystubs to verify the previously submitted information on the employment she had recently secured). Def. Exhibit 8 Second, Bradley's testimony reflects ongoing contact about the pending modification application through September 7, 2010, the date of the sale and beyond.[5] The modification process was ongoing and at no time did Chase contemporaneously contend that it was exercising the discretionary 7 day window to decline to consider the loan modification. Rather even taking

[3] *Brisbin v. Aurora*, LLC 679 F 3rd 748 (11th Cir. 2012) cited by Respondent defines a forbearance as either a forbearance in exercising remedies or a forbearance of requiring payment. Bradley's forbearance was both.

[4] R. Brief p. 8 Respondent's brief. In making this argument Chase effectively concedes that they were otherwise required to suspend the sale under HAMP.

[5] Especially on R. p. 158 where she was told on September 7, 2010 the date of the sale that the postponement request was submitted and the property was not sold.

the record most favorably to Chase, its personnel were actively pursuing the modification and attempting to call off the sale.

**c. Chase argues that the August 19, 2010 letter did not constitute fraud because it was not relied on by Bradley and its key statement was about a future event**

Even if modification discussions were not ongoing and the forbearance was not in place, according to the HAMP regulations, no sale could have occurred within thirty days of Chase's letter of August 19, 2010 raising NPV as a basis for not modifying the loan. R.p. 307, Def, Ex. 2. On page 11 of its Brief, Respondent refers to the occurrence of seven conversations[6] between Bradley and Chase telephone representatives to support the allegation that she did not rely on the statement in the August 19th letter that "no sale will be conducted and you will not lose your home during this 30 day period". [7] This is a definitive statement of fact[8] quoting a HAMP rule and therefore not "an expression of intention". The content of these various telephone conversations demonstrates that both Chase and Bradley did in fact rely on the statement in the letter.[9] However, the 30 day period is prescribed by HAMP, and is not subject to the vagaries of a bank's conclusions about a homeowner's state of mind.

Moreover, in diligently pursuing the non-legal process as directed by Chase and as she had throughout, Bradley did rely on this information to submit a request for the NPV input information [10]— an action she was entitled to take during the 30 day period in which her house

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[6] Bradley's hearing testimony reflects more than twenty-one such conversations. R. p. 143 lines 2-10; p. 143 lines 18-25; p. 145 lines. 11-21; p. 147 lines. 1-16; p. 148 line 16 – p. 149line 1; R.p.149 lines 12-24; R.p. 150 lines 3-9; p. 150 lines 22-25; R. p. 151 lines 12-18; R. p. 151 lines 20-25; R. p. 154 lines 1-5; R. p..154 lines 9-17; R. p.154 line 23- p. 155 line. 2; R. p.155 lines 14-25; R. p. 156 lines 6-11; R. p.157lines. 9-20 (also see pg, 170); R. p.157 lines 21-25; R. p. 158 line 23-p. 159 line 13; R. p. 159 line 13-p.160 line7; R. p 160 line 21-p.161 line 11.

[7]; The 30 day period was the time for contesting the NPV determination.

[8] Referring to the 30 day period for contesting the denial as provided by HAMP and set forth in the letter.

[9] R. p. 150 lines 10-21.

[10] Defendant's Ex. 3 and 4 are letters she sent to Chase in response to the notice that she had 30 days to respond to denial. R.p. 130.

could not be sold, per the letter. The requested NPV information was sent by Chase on October 5, 2010 nearly a month after the sale. R. p. 307, Def. Ex. 5, (Ex.5 attached thereto).

**d. The lack of due process was not cured because certain procedural steps were not taken by Bradley**

A large swath of Respondent's Brief is peppered with references to Bradley's lack of procedural activism and acumen in the on again off again litigation.[11] First, as a practical matter and as directed by Chase and dictated by her finances, her ongoing contact with Chase was outside the litigation. Second, the fact that she did not dispute the original underlying debt renders her lack of participation in the procedural aspects of the litigation completely understandable. It provides no excuse for Chase's violations of the AO, HAMP and the SCRCP. Bradley simply sought a right provided by HAMP and safeguarded by the AO—a right to a full and fair HAMP review which necessarily rested with Chase's administrative personnel.

## II. Appellant was entitled to a HAMP review, decision and challenge opportunity before sale and therefore the sale should not have occurred

### a. Unwarranted continuation of the litigation

Chase personnel handling the modification promised to try and call off the sale as had been done previously after Bradley pointed out that her HAMP request had not been fully processed. (R. p. 149, as to Aug. 2, 2010. Chase was apparently unable to stop itself, and Chase's attorneys went ahead with the foreclosure sale. Though the Affidavit Chase presented at the Motion hearing stated that it told Bradley the sale postponement would have to be approved by FNMA, Chase provided no evidence that FNMA denied such approval. R.p. 307, Def. Ex. 5 par.

[11] See Respondents brief, pp. 2-8. The Brief alleges on Page 2 Bradley failed to appear; on Page 3 Bradley did not file a Counter Affidavit ; on Page 4 Bradley never requested a hearing nor did she object to the August Supplemental Affidavit or August Supplemental Order; on Page 8 Bradley's first appearance in this case occurred on September 20, 2010 over 21 months after she was served with the Complaint.

5. In fact, Chase offers no explanation for why the postponement of the sale did not occur, or any reason for its pursuit of the sale during the HAMP process and the forbearance.

Bradley was able to obtain pro bono legal assistance from South Carolina Legal Services and promptly sought to have the premature, baseless sale set aside. The transcript of Bradley's testimony at a hearing held after the sale, along with the course of the case, reflect that she was a typically hopeful homeowner accepting the procedure called for by Chase and awaiting confirmation that the foreclosure sale would be withdrawn, as it had previously been, while the modification process continued and due to the forbearance.[12]

Therefore, the progression of this litigation must be viewed from the perspective of one who was *pro se*. In fact, because she did not contest the underlying debt Bradley neither responded to the initial foreclosure complaint, nor appeared at the foreclosure hearing. Rather, after HAMP and the initial AO of May 4, 2009 ("TRO") halted the action, she pursued relief through the HAMP program and the ensuing application process for a modification proceeded between Bradley and Chase. When faced with the harsh reality on September 14, 2010 that, notwithstanding her conversations with Chase telephone representatives, Chase's lawyers had nonetheless proceeded with the sale, she timely took what steps she could to obtain relief. (R. p. 160 line 21- p. 161 line 11). The judicial relief was through her Motion to Set Aside the Sale and related relief and the HAMP procedural relief was directly to Chase in response to the August 19, 2010 letter. R. p. 150 lines 12-25.

This case does not involve a homeowner unwilling or unable to pay her mortgage. On the contrary, the record is clear that the Appellant sought, and still seeks, to pay her mortgage. Indeed, after being granted a Trial Period Plan ("TPP"), she made a 3 month TPP payment for 9 months. She does not seek a free house, only the right to keep the house she bought in 2000 and

[12] R. p. 146 line 2-p. 148 line 11.

pay for it with the loan modification assistance intended for her benefit and for which she qualifies.[13] The record is replete with evidence of Appellant submitting and resubmitting documents to Chase for this purpose. Bradley described her frustration as " I'm on the phone, they'll tell me I need to do this, this and this and then a couple of days later asking for something totally different and then I would send that in, what they were asking for that's totally different." (R. p. 154 lines 1-5).

The Respondent provides no reasoning in its Brief as to why it took steps to a foreclosure sale even as it was considering a modification under HAMP and no corresponding authority to support pursuing the sale when it did. Moreover, Respondent provides no justification for its failure to comply with the timing requirements of the AO and HAMP. Instead, Respondent attempts to rely on technical provisions of HAMP and evasion of its own representations to Appellant as required by HAMP[14] as support for its position that it had a right to schedule the foreclosure sale. Continuation of the litigation, and the sale in particular, was premature and prohibited.

**b. HAMP review status barred the sale according to the Administrative Order**

Chase focuses on the alleged procedural shortcomings of the unrepresented Bradley as the reason her home was prematurely sold. Chase minimizes its own far more serious procedural failings as outlined in the Brief of Appellant (failing to file a timely HAMP Affidavit, filing a vague, misleading and false HAMP affidavit, securing supplemental orders under false pretenses without setting hearings on them, continuing litigation and scheduling a foreclosure sale while it is undisputed that a period of forbearance was in place). The former (Bradley's omission) violated no law, whereas the latter violated the AO, HAMP, and the SCRCP.

[13] The grant of the TPP assumed she was qualified.
[14] Chase's August 19, 2010 letter was required by HAMP and the 30 day period it sets forth is required by HAMP.

Chase's statement in its Brief that the AO is not a legitimate defense or counterclaim[15] typifies the arrogance and disregard of procedure that permeates the litigation and resulted in the premature sale of Bradley's home in contravention of the efforts of its own telephone representatives to cancel it. As the foreclosing entity in the case, Chase was responsible for following all applicable procedure and yet would have this Court hold that Appellant is without a remedy because while acting *pro se* she failed to take certain procedural steps to protect herself from their conduct and this absolves them of responsibility for obedience to the Supreme Court's Administrative Order. The AO is designed to prevent a premature sale and its violation at a minimum constitutes misconduct warranting relief under Rule 60(b)(3).

**c. The HAMP review status barred the sale according to HAMP**

Throughout the time the foreclosure case remained pending, Bradley was clearly trying to meet the requests of the telephone representatives of Chase in order to complete her loan modification[16]. All the while, its lawyers kept the defaulted foreclosure case open and randomly kept it moving from time to time, reserving a knock out punch of the quick supplemental order and foreclosure sale if they chose to take that step later.

The Special Referee was singularly acquiescent in this course of action, only reacting to submissions and requests from Chase's attorney, never exercising procedure on his own so that rather than being dismissed as contemplated by the AO [17], the case remained pending as a silent time bomb for some 17 months after issuance of the foreclosure decree. The scheduling and cancelling of foreclosure sales by Chase's lawyers while HAMP review was pending (as well as

[15] R. brief p. 17

[16] R. p. 143 lines 2-10; R.p. 143 lines 18-25; R.p. 145 lines 11-21; R. p. 147 lines 1-16; R. p. 148 line 16 – p. 149 line 1; R. p. 149 lines 12-24; R. p. 150 lines 3-9; R. p. 150 lines 22-25; R. p. 151 lines 12-18; R. p. 151 lines 20-25; R. p. 154 lines 1-5; R. p. 154 lines 9-17; R. p. 154 line 23- p. 155 line 2; R. p.155 lines 14-25; R. p. 156 lines 6-11; R. p. 157 lines 9-20 (also see pg, 170); R. p. 157 lines 21-25; R. p. 158 line 23-p. 159 line 13; R. p. 159 line 13-p.160 line7; R. p. 160 line 21-p.161 line 11.

[17] "If the affidavit is not served within ninety (90) days of the date of this order, the foreclosure action may be dismissed", AO p. 2.

during the period of forbearance granted by Chase) lulled Appellant into a false sense that the Chase telephone representatives were running the show, rather than the attorney, and violated procedural rules governing such sales.

Chase did not file the HAMP Affidavit as required by the AO, only filing one twelve months later when it suited them to revive the moribund case. [18] Chase emphasizes that, when it finally did file a HAMP Affidavit, Bradley did not file a Counter-Affidavit within ten days.[19] While adjudging this as fatal to Bradley's case, Chase de-emphasizes its own failure to timely file the Affidavit required by the AO for twelve months as a mere irregularity that requires no review. More fundamentally, there was no need to challenge the affidavit with a counter affidavit inasmuch as forbearance was granted and the HAMP application process was not concluded. Thus, this "outside the litigation" telephone conduct of the Chase employees led Appellant not to challenge its violation of the AO, HAMP and the SCRCP in a formal way in the litigation.

**d. The 2011 AO is instructive on how the Court should rule under the first AO and provides context for the Court's intent in the first AO.**

As made clear in its most recent Administrative Order, it was precisely to avoid the dual tracking of modification reviews by telephone personnel with foreclosure litigation by attorneys that the S.C. Supreme Court adopted administrative orders to regulate foreclosure in South Carolina.[20] Although here the Chase attorneys were not subject to the additional certification responsibilities of the May 4, 2011 *South Carolina Supreme Court Administrative Order* ("2011 AO"), there is no question that Chase as a party was fully responsible for these certifications to

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[18] The AO stated the case should be dismissed if Affidavit not filed within 90 days. In addition, the servicer's attorney was ordered to apprise the court of the status every 30 days which Respondent did not do. A vague HAMP affidavit was filed in May 2010 and there is no evidence of any 30-day status letters.

[19] The AO gave the homeowner ten days to deny HAMP review was completed. However, it went on to say that if the litigation continued, the review could still become contested at a later stage. The second AO added that the homeowner could still respond to the complaint within 30 days after a HAMP denial.

[20] 2011 AO

the Court.[21] Certainly, its lawyer was equally responsible pursuant to SCRCP Rule 11. The 2011 AO clarified for attorneys that they must meet that requirement, even outlining the requirements of how it must be done in detail.

The multitude of letters and affidavits with varying statements contained therein, many of which cannot be reconciled with the facts[22], demonstrates the lack of communication between the Chase telephone representatives and Chase's lawyers in this case.[23] This lack of communication fueled Bradley's inclination to continue the usual course of dealings. Throughout the case when she received communication from Chase's lawyer, her response was to contact Chase by telephone. The routine result was that the progression of the case, such as notice of a sale ceased (R.p.148-149). She had no reason to believe otherwise in the instance of the September 7, 2010 sale.

The premature sale the administrative orders were designed to prevent is precisely what happened here. This hopeful homeowner spent 17 months waiting for Chase to get it right when, all the while, their attorneys were holding in reserve the knock-out punch.[24] Rather than get it right, Chase simply let the sale go through and now attempts to use intricate procedural arguments to insulate itself from challenge. This court, however, is not so powerless as Chase would have it. The requirements of the AO must be followed. Any defects in the initial HAMP affidavit are not cured or rendered nugatory by the lack of a counter affidavit, failure to answer a complaint filed 21 months prior or to attend a hearing held 17 months prior. Bradley did have

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[21] The second AO requires that lawyers filing foreclosure lawsuits actually know what is going on in the modification process and go forward only after swearing an oath that the applicable rules have been followed.

[22] R.p. 131, Ex.5 Hindman; R. p. 130, D. Ex. 5 Herndon; Supplemental Order Supporting Affidavit, Second Supplemental Order Supporting Affidavit

[23] See footnotes 5 and 15 above.

[24] The time between the supplemental order filing and the sale was 18 days. The Second Supplemental Order was mailed to Appellant prior to it being signed and filed with the Court. Affidavit of Service. (R.p. 130, Def. Ex. 10).

rights under the AO and the failure of the Special Referee to set aside the sale and vacate his orders as a result of Respondent's violation of the HAMP and the AO was error.

**III. Argument regarding homeowner rights as third party beneficiary is specious.**

In support of its position, the Respondent cites *Brisbin v. Aurora* [25]for the proposition that HAMP modification is not a right. This misses the point. Our Supreme Court's AO unequivocally states that a *review* for a HAMP modification is indeed a right in South Carolina.[26] Mortgagors pursuing cases under the third party beneficiary theory assert that, for the purpose of an action for breach of contract, they are a third party beneficiary of the Servicer Participant Agreement under which the Servicer contracts and operates with the U.S. Department of Treasury. Appellant has not alleged a breach of contract but has simply asserted her right under the AO, HAMP and the SCRCP.

In a blunt attempt to avoid responsibility for its misconduct, Chase relies on the *Steffens*[27] case for the proposition that no homeowner has a right to HAMP. Respondent's reliance on this breach of contract theory is misplaced. The District Court opinion in *Steffens* does not take into account the existence of our state court AO and is based on a homeowner suing a servicer for breach of contract (asserting that homeowner was a third party beneficiary of the HAMP Participant Agreement between the servicer and the U.S. Department of Treasury). Consequently, Respondent's claim that *Steffens* is right on point is erroneous. *Steffens* addressed the idea of whether a HAMP modification as a third party beneficiary contract right is actionable in S.C.

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[25] *Brisbin v. Aurora, LLC* 679 F 3rd 748 (11th Cir. 2012).

[26] HAMP does require that homeowner be given an opportunity to be reviewed for modification where their lender is a HAMP participant.

[27] *Steffens v. Am. Home Mortg. Servicing*, (D.S.C. March 15, 2011)

Whether the third party beneficiary line of cases is wrong or right, or the cause of action even available in S.C. there is a clear difference in that theory and the procedural prerequisite to foreclosure and subsequent sale outlined in the AO.

Under our Supreme Court's AO, a homeowner does have the right to be *properly reviewed* for a HAMP modification as federal law provides and it is the deprivation of this right to review that led to the premature, improper and unexpected sale of Appellant's home. The third party beneficiary theory has no bearing on the AO requirement at the center of this appeal that HAMP procedures be adhered to prior to continuation of a foreclosure case and/or sale in South Carolina. Chase's belief that the HAMP review and decision-making process is unilateral and cannot be challenged vitiates the AO.

## IV. Chase's fraud, misrepresentation, as well as misconduct warrants reversal, setting aside of the sale and vacating the judgment under Rule 60

Rule 60(b) of the South Carolina Rules of Civil Procedure sets out circumstances under which a party may obtain relief from a judgment. In particular, Rule 60(b)(3) provides for relief from a judgment on the grounds of "fraud, misrepresentation, or other misconduct of an adverse party."

Chase argues that Respondent is unable to prove fraud and therefore is not entitled to Rule 60(b) relief. However, violating the S.C. Supreme Court's Administrative Order is certainly at a minimum "misconduct" within the rule. The use of the word misconduct referred to in Rule 60(b)(3) must be different than traditional fraud and misrepresentation. To construe it any other way would render it surplusage.[28] In *Mr. T v. Ms. T,* this Court outlined the use of the

[28] *Mr. T v. Ms. T,* 378 S.C. 127, 662 S.E.2d 413 (S.C.App. 2008) Finally, aside from the five subsections mentioned above, Rule 60 explicitly indicates that it in no way limits the court's power to entertain an independent action "to relieve a party from a judgment ... '*or*' to set aside a judgment for fraud upon the court." (emphasis added). While the most common ground for an independent action is for fraud, the rule is not restricted to only that ground. The

word "or" in such a Rule. Though the later Administrative Order in May 2011 requires the attorney of record to certify compliance, the 2009 AO applicable at the operative times in this case renders the false certifications of Chase equally violative of the AO and grounds for granting Appellant's Rule 60(b)(3) motion.

The South Carolina Supreme Court held in *Davis*[29] that an erroneous affidavit of default filed by an attorney was fraud on the court sufficient to provide grounds under Rule 60(b) for relief from a default judgment even when it was a *bona fide* error. Where, as here, the homeowner can show that the AO and HAMP certifications were false and/or that the foreclosure case proceeded to judgment and sale in error, then the reasoning of *Davis* applies.

A false certification under the AO is extrinsic fraud sufficient for relief under Rule 60(b)(3). Though reliance on the false statements may be required for a finding of fraud in the traditional definition, the rule includes as lesser offenses misrepresentation and misconduct that also warrant the setting aside of the sale and vacating of the judgment. This the Appellant proved.

## V. Appellant was denied Due Process and this compounded the problem created by Respondent's AO and HAMP violations

The AO provides a safe harbor during the foreclosure process to insure that the law is complied with and homeowners' opportunity to apply for and be considered for modification are protected. Assuring due process, it acknowledges the federal requirement and requires its own stay so that the modification process can be completed without the far too common lack of coordination between a servicer's administrative personnel and its lawyers that can cause a premature sale such as the one in this case.

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structure of this rule and its use of the word "or" indicate to this court two potential independent action attacks on a judgment, order or proceeding: 1) one based on such rare, special, exceptional or unusual circumstances that may warrant equitable relief, including accident or mistake or 2) one based in equity for fraud upon the court. *See,* 11 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE. & PROCEDURE § 2868 (2d ed.1995).

[29] 236 S.C. 277 (1960)

### a. SCRCP provisions apply to HAMP review by virtue of the Administrative Order

To fulfill its intended purpose, the AO also contemplates use of the SCRCP to test whether modification review under HAMP has actually and properly been completed. [30] Not so that a denial of modification can be automatically reversed, but so that the veracity of the information and calculation used and the decision made can be verified and reviewed and, where appropriate, a denial reversed and modification granted.

Unlike Chase, our Supreme Court acknowledges in its AO that mistakes can be made or misinformation utilized in the review process. Therefore, if the servicer has made a mistake which, if corrected, changes the HAMP outcome, that mistake can be identified and corrected.[31] The discovery rules in the SCRCP do provide the path to truthful and accurate information and a proper HAMP analysis by a competent reviewer. The homeowner is not required to simply accept a denial produced by the servicer's unilateral process as a proper determination. Both HAMP and the AO acknowledge the homeowner's right to challenge the determination.[32] This interpretation was validated by the 2011 AO. [33]

Respondent also states that Appellant offers no evidentiary support regarding the HAMP modification, its calculation and the information that formed the basis for it. On the other hand, Chase claims that Appellant should not have been granted discovery under the AO. The Supreme Court realized the importance of discovery at the post-HAMP review stage of foreclosure litigation and that it was necessary to provide homeowners with a way to assure they were

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[30] The AO states that "the judge shall resolve the issues like any other contested issue in a foreclosure action".

[31] The case for this can only be made by the homeowner if she has the ability through discovery to obtain the information that reflects what the servicer did in the review process, e.g., how they applied the NPV info inputs to the HAMP waterfall. This was confirmed by the 2011 AO.

[32] For example, the US Treasury Department launched the web application "checkmynpv.com" which allows a homeowner to check the NPV inputs if the servicer provides them as required and verify the calculation. See Appellant's brief p. regarding the NPV calculation by Chased on the Bradley review.

[33] 2011 AO

provided a proper opportunity at a modification. As to contesting a denial, the AO provides that the question of denial "the judge shall resolve this issue like any other contested issue in a mortgage foreclosure action".

The only way to independently verify the servicer's decision is through discovery. Otherwise, denial of a HAMP modification would be unassailable, allowing the bare, conclusory statement of the servicer to go unchallenged. Pursuant to her Motion, Appellant should have been accorded the right to use SCRCP discovery. Therefore, the Special Referee's decision on this issue should be reversed and the Appellant should be allowed to investigate whether the denial of HAMP modification was proper. This relief is justified by the language of the 2011 AO.

**b. Failure to follow the SCRCP regarding Supplemental Orders submitted by Respondent and dismissal**

Respondent cites the supplemental orders it prepared for the Special Referee to sign without a hearing [34] stating that Chase had complied with the 2009 Administrative Order as evidence of Chase's compliance. The Respondent adds that Bradley never requested a hearing nor objected to the affidavit filed in support of the Supplemental Order. Such an omission should be distinguished from the Respondent's own affirmative acts in violation of the AO, HAMP and the SCRCP in pursuing the supplemental orders and sale. The SCRCP provide for such a hearing where affirmative relief is sought. Otherwise the Order is essentially ex parte. Chase submitted a Second Supplemental Order, Affidavit and Sale Notice to the Court while simultaneously mailing copies to the Appellant on August 13, 2010. (R.p. 131, Plaintiff's Ex. 10). Therefore, Appellant was never served with a signed order. That Order was signed August 16, 2010 and filed August 20, 2010. Sec. Supp Order (R.p. 16).

[34] Brief of Respondent p. 3.

As an unrepresented litigant, Bradley was at a distinct disadvantage in relation to the dual tracking of modification efforts and litigation. The Chase lawyer and the Special Referee are governed by the SCRCP and charged with acting in accordance therewith. Bradley and the Chase telephone representatives were operating outside of these rules. In that context, the failure of the Chase lawyers to follow the SCRCP eclipses Bradley's incognizance of the SCRCP.

Chase clings to the Special Referee's "findings" in the Order drafted by Chase based on its late and false affidavits and issued without an opportunity to be heard given to Bradley. R. Brief p. 3. Nothing in the proposed Second Supplemental Order and Affidavit or its cover letter dated August 13, 2010 suggested to this unrepresented litigant that she could request a hearing or otherwise act on the contents of the documents. (R.p. 130, Def. Ex. 10). Indeed, this was merely the submission of a proposed order that was not filed until August 20, 2010, 18 days before the sale. Signing a supplemental order some 17 months after the original decree without setting a hearing denied Appellant her due process right. If the Special Referee had scheduled and held a hearing as required by the rules it would have offered Appellant a meaningful opportunity to be heard and might have avoided the sale altogether.[35] Respondent's contention that Appellant's fate was sealed because she did not attend the original foreclosure hearing ignores that it is a structural defect which she requested the Special Referee correct. Bradley was not required to prove that the outcome would have been different in order for this defect to be cured. *LaSalle Bank National Ass'n v. Davidson*, 386 S.C. 276, 688 S.E.2d 121 (S.C. 2009),

*In Dangerfield v. State*, 376 S.C. 176, 179, 656 S.E.2d 352, 353-54 (2008) the Court held that "Due process considerations apply in contested cases or hearings which affect an individual's property or liberty interests as contemplated by the federal and state constitutions. The

[35] 30 days provided for appeal of a final order had not expired on September 7, 2010 when the house was sold and there is no evidence that the order was served on Appellant after it was signed by the Special Referee. ell here where SCt said before an appeal party shld give judge a chance to correct thru Rule 59 or 60

procedural component of the state and federal due process clauses requires the individual whose property or liberty interests are affected to have received adequate notice of the proceeding, the opportunity to be heard in person, the opportunity to introduce evidence, the right to confront and cross-examine adverse witnesses, and the right to meaningful judicial review."); *see also State ex rel. McLeod v. Brown*, 278 S.C. 281, 284, 294 S.E.2d 781, 782 (1982) ("We believe that an order substantially affecting a party's rights should not be made in a case without notice to the party prejudiced by it and an opportunity to be heard.").

Chase argues that Bradley was not entitled to a hearing because too much time had gone by and she was in default of answering the original complaint filed 21 months before. This is precisely why there should have been a hearing. In *Solley v. Navy Federal Credit Union, Inc.*, 397 S.C. 192, 723 S.E.2d 597 (S.C.App. 2012) this Court held that by defaulting, a defendant forfeits his " right to answer or otherwise plead to the complaint." In essence, the defaulting defendant has conceded liability. However, a defaulting defendant does not concede the [a]mount of liability. *Howard v. Holiday Inns, Inc.,* 271 S.C. 238, 241-42, 246 S.E.2d 880, 882 (1978) (citations omitted). At the damages hearing, the defendant may only participate by cross-examining witnesses and objecting to evidence. *Id.* at 242, 246 S.E.2d at 882. Specifically regarding a supplemental order when a final order is already in place, the Supreme Court set aside a judgment after finding the movant was entitled to due process and had not received notice of the proceeding because she represented herself after the suspension of her attorney. *Rouvet v. Rouvet,* 388 S.C. 301, 696 S.E.2d 204 (S.C.App. 2010).

In *Rouvet,* Wife did not receive any communication from either Husband's attorney, or the court, from the March 2004 hearing until the date she received a copy of a Supplemental Order in January 2005. The Court pointed out that during the year long interim, several things of

significance happened. This Court reversed the lower court's denial of a Rule 60b3 motion and held that it was error to rely solely on fraud under Rule 60b3.

Here, the Special Referee only responded to what Chase's attorney chose to do with the case at any juncture. So when the supplemental orders were sent to him well over a year after the original foreclosure decree, no hearing was held and he signed the order without further inquiry, Appellant's due process rights were violated. As in *Rouvet*, several significant things had occurred such as the AO, HAMP and the forbearance.

Chase claims that hearings on the Supplemental Orders were unnecessary because they only served to increase the amount due by "updating the amount of interest that had accrued over the past year". (R.Brief p.19) But even in default and even setting aside the issue of Respondent's failure to comply with HAMP, Bradley had the right to cross examination on the issue of any increase in the amount of the judgment. These supplemental orders have discrepancies that could have been addressed. For example, the Second Supplemental Order stated an increase in the principal balance by $10,000.

The Special Referee exercised no independent review of the documents placed before him for signature. Further, he set no calendaring and improperly allowed the cased to remain pending for 21 months with no action unless Chase requested it before issuing the Supplemental Orders. Further, a hearing on such a Supplemental Order, had it been scheduled by Respondent or held by Special Referee, would have provided an opportunity for this unrepresented litigant to address the Court on the HAMP review and perhaps avoid the sale of her home.

Respondent makes much of the length of time that passed with the case pending. That very passage of time makes the issuance of the Supplemental Orders all the more egregious. Pursuant to the AO, the case should have been dismissed on August 2, 2009 because Chase had

not filed the affidavit required by the AO. It should also have been dismissed due to Chase's failure to update the Court on the modification status every 30 days as required by the AO. Finally, pursuant to HAMP, the temporary modification should have been made permanent and the case dismissed by the end of 2009. The passage of time in this case was due to the Chase lawyer keeping the case open and the ensuing repeated untimely and erroneous representations by Respondent that HAMP had been completed when it had not. The Special Referee should have dismissed the case.

No amount of obfuscation by Chase's lawyers can change the fact that for 21 months Chase failed to properly and deliberately assess and follow through on appellant's modification options. True, at every prior juncture it called off the improperly scheduled sale just in time. But this last time it didn't. The Chase administrative personnel didn't call off their lawyers and, as a result of this false step and the misconduct described hereinabove, Appellant's home was sold.

## CONCLUSION

Chase offers no explanation of why it suddenly pursued the sale of Appellant's home before achieving the requisite completion of the HAMP review with all of the attendant challenge periods. Its attempts to excuse the failure to complete this imperative of our Supreme Court are immaterial, trivial, and pointless. After the case was pending 21 months, Chase inexplicably set its own sale date and yet could not pull itself back and withdraw the property from the sale. The relief requested by Appellant in her Brief was not only warranted, but undeniable given Chase's disregard for and intentional violation of the AO, HAMP, due process and the SCRCP.

Respectfully submitted,

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October 1, 2012
Greenville, SC

THE STATE OF SOUTH CAROLINA
In the Court of Appeals
APPEAL FROM PICKENS COUNTY
Court of Common Pleas

R. Murray Hughes
Special Referee

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Case No. 2008-CP-39-2120

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JP Morgan Chase Bank, National Bank
Respondents,

v.

Vanessa Y. Bradley
Appellant.

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## CERTIFICATE OF COUNSEL FOR APPELLANT

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The undersigned certifies that the Final Brief of Appellant and Final Reply Brief of Appellant comply with Rule 211(b).

October 1, 2012

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PROOF OF SERVICE

I certify that I have served the Final Brief of Appellant and Final Reply Brief of Appellant on JP Morgan Chase Bank, National Bank, by depositing a copy of it in the United States Mail postage prepaid on October 2, 2012 addressed to their attorneys of record at the following address:

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