THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Charles B. Simmons, Jr., Master-in-Equity

Common Pleas Case No. 2010-CP-23-1622
Appellate Case No. 2012-212447

JP Morgan Chase Bank, National Association,.....Respondent,

v.

Brian Adrian Tucker, Jessica C. Tucker, and Half Mile Lake Homeowner's Association, Inc., Defendants,

Of whom Brian Adrian Tucker and Jessica C. Tucker are.....Appellants.

FINAL REPLY BRIEF OF APPELLANTS

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STATEMENT OF ISSUES

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II. **Are the arguments in the Respondent's brief grounded in a flawed analysis, like the master's decision below?**

III. **Do the Respondent's arguments ignore the facts of the record?**

ARGUMENT

I. The Tucker's compliance with the master's order has not made any issue moot.

A case is nonjusticiable for mootness where, if the party prevails, it has become impossible for the court to grant him any "effectual relief" that would have "practical legal effect upon the existing controversy." Curtis v. State, 345 S.C. 557, 567, 549 S.E.2d 591, 596 (2001) (internal quotation marks omitted). None of the issues in this case are moot.

The Respondent (hereinafter "Chase") argues that "the Tuckers voluntarily vacated the mortgaged property" and that "[c]onsequently, the order for ejectment is moot, and there is no basis for this Court to review it." (Initial Brief of Respondent p. 9). First of all, Appellants (hereinafter "the Tuckers") did *not* "voluntarily vacate[] the mortgaged property"; rather, they left their home because they were ordered to do so. (Initial Brief of Respondent p. 9); (R. pp. 8-9). Second, the Tuckers' compliance with the master's order does not make any issue in this case moot.

The master's order below directed the Tuckers to deliver possession of the property to Fannie Mae within 45 days of the order and commanded the Sheriff of Greenville County to put Fannie Mae in possession of the property if the Tuckers did not leave. (R. pp. 8-9.) An appeal does not stay a judgment that "direct[s] the sale or delivery of possession of real property." S.C. Code Ann. § 18-9-170; Rule 241(b)(4), SCACR; see Carsten v. Wilson, 241 S.C. 516, 521-22, 129 S.E.2d 431, 434-35 (1963); C-Sculptures v. Brown, 393 S.C. 27, 32, 709 S.E.2d 705, 707-08 (Ct. App. 2011); S.C. Natl. Bank v. Devine Blossom, 321 S.C. 110, 467 S.E.2d 767 (Ct. App. 1996). Accordingly, the master's order was operative in this regard despite the

Tucker's appeal. Id. The Tuckers chose not to traumatize their children, pets, and Mr. Tucker's mother by having to leave their home at the point of a gun or by being forcibly dragged from it by sheriff's deputies. That is not "voluntarily vacat[ing] the mortgaged property." (Initial Brief of Respondent p. 9.)

For this Court to adopt Chase's assumption that the Tuckers voluntarily left their home under these circumstances (and, furthermore, to do so without any factual record[1]) would lead to a result that public policy would deem absurd. In a case concerning a prescriptive easement claim, our Supreme Court held that to require a landowner to physically stop the party claiming an easement from accessing it "would encourage wrongful or potentially violent behavior that is contrary to sound public policy considerations and the peaceful resolution of disputes." Pittman v. Lowther, 363 S.C. 47, 610 S.E.2d 479, 481 (2005). Those same considerations require that a person who complies with an order not be deemed to have relinquished his right to seek review of it. The Tuckers did not relinquish any such right here.

In any event, the Tuckers not being in their home does not make moot the issue of whether the master was correct in putting Fannie Mae in possession of their home. This Court can grant "effectual relief" that would have "practical legal effect upon the existing controversy." Curtis, 345 S.C. at 567. The Court can reverse the master's ruling, whereupon the Tuckers would be entitled to go back into possession of the property.

Further, the Tuckers may be entitled to restitution upon the reversal of the master's order. "A person who has conferred a benefit upon another in compliance

[1] See Sanders v. Salley, 283 S.C. 458, 460, 322 S.E.2d 829, 831 (Ct. App. 1984) (Court of Appeals "does not sit as a trial court to receive evidence on disputed issues of fact").

with a judgment, or whose property has been taken thereunder, is entitled to restitution if the judgment is reversed or set aside, unless restitution would be inequitable." Restatement (First) of Restitution § 74 (1937). A New Jersey court has noted that "[r]estitution on reversal of a judgment is dictated by principles of fairness to the parties and public policy concerns." Bernoskie v. Zarinsky, 394 N.J.Super 421, 425, 927 A.2d 149, 152 (N.J. Super A.D. 2007). That same court, quoting the Restatement, noted that "[a]s a matter of policy, there is a 'need to remedy [a] misapplication of the coercive force of legal process' and to avoid discouraging compliance with lawful orders not stayed pending appeal." Id. at 426. The Supreme Court of Texas has stated that "[r]estitution after reversal has long been the rule in Texas and elsewhere." Miga v. Jensen, 53 Tex. Sup. Ct. J. 49, 299 S.W.3d 98, 101 (2009). The Supreme Court of the United States has recognized such a right to restitution, noting that "[t]he right to recover what one has lost by the enforcement of a judgment subsequently reversed is well established." Baltimore & Ohio R. Co. v. U.S., 279 U.S. 781, 786 (1929); accord Bank of U.S. v. Bank of Wash., 31 U.S. 8, 17 (1832) ("On the reversal of the judgment, the law raises an obligation in the party to the record, who has received the benefit of the erroneous judgment, to make restitution to the other party for what he has lost").

As one author has recently noted, South Carolina law is consistent with the precedent of these other courts. Robert Hill, Supersedeas on a Money Judgment, S.C. Lawyer (S.C. Bar May 2012). In a 1960 case concerning a worker's compensation award, the South Carolina Supreme Court assumed that if money had been paid to the worker per the award that was being reversed, the worker would have been "obligated

to make restitution of the amount so received." Case v. Heritage Cotton Mills, 236 S.C. 515, 534, 115 S.E.2d 57, 68 (1960).

Chase cites no authority for its mootness argument. See S.C. Dept. of Probation, Parole and Pardon Servs. ex. rel. State v. Reynolds, 343 S.C. 465, 540 S.E.2d 480, 482 n. 1 (Ct. App. 2000) (declining "to consider argument because there is no citation of authority, and it is so conclusory as to be an abandonment of this issue on appeal"). That is because there is none. It also means that Chase has abandoned this argument. See id.

A reversal by this Court would entitle the Tuckers to go back into possession of the property and may entitle them to restitution. That would be "effectual relief" for the Tuckers that would have "practical legal effect upon the existing controversy." Curtis, 345 S.C. at 567. Accordingly, Chase is incorrect to argue that the issue is moot.

II. Chase's arguments, like the master's reasoning below, ignore facts in the record.

When Chase encounters a fact in the record that illustrates a flaw in the master's reasoning or that does not jibe with its arguments on appeal, its go-to solution in its brief is to ignore the fact and hope that this Court will do the same thing. When that fails, Chase simply mischaracterizes the record where it contains a fact Chase has to deal with on appeal.

a. Chase's arguments are dependent on highlighting some facts and acting like the other facts in the record do not exist.

For example, Chase tells this Court that "the Tuckers have failed to explain why they did not respond to the letter notifying them of the foreclosure hearing."

(Initial Brief of Respondent p. 8.) Chase was never able to contradict the Tuckers' affidavits and testimony that they never received any notice of this hearing. (R. p. 46 ln. 3-5, p. 64 ln. 20 – p. 65 ln. 8, pp. 94, 99-100, 153-54.) The reason the Tuckers did not attend the hearing is because they did not receive notice of it. (R. p. 46 ln. 3-5, p. 64 ln. 20 – p. 65 ln. 8, pp. 94, 99-100, 153-54.) The record shows why the Tuckers did not attend the hearing, but the record is at odds with Chase's argument, so Chase pretends the record does not contain this fact.

Chase hopes that this Court will look favorably on the master's conclusion that the Tuckers did not act promptly in making a motion for relief from the judgment. (Initial Brief of Respondent pp. 7-8.) Chase knows it has a problem here because the record contains no evidence to contradict the Tuckers' testimony that Chase told them there was no foreclosure and contains no evidence to contradict the Tuckers' testimony about when they discovered that Chase had been untruthful with them about this. It is uncontradicted that when Mrs. Tucker got a phone call from a friend saying that a notice of foreclosure sale had been published in the newspaper, Chase personnel told her it was a mistake, that Chase had a modification in place for the Tuckers, and for the Tuckers to "wait on them" to get the modification processed because "[t]hey were so backed up" that "[i]t could take up to six months" to implement the modification. (R. p. 49 ln. 10-13, p. 50 ln. 18-19, p. 52 ln. 8-20, p. 53 ln. 10-16, p. 97.) There is also nothing in the record that tends to show that the Tuckers received any contrary information from Chase or became aware a foreclosure judgment had been rendered until the master's ejectment order was served. (R. p. 54 ln. 23 – p. 55 ln. 1, pp. 94, 99-100, 113.) Chase's solution to deal with these facts is

to argue this case as though these facts were not in it. (Initial Brief of Respondent pp. 7-8.) Chase does not try to explain these facts away because Chase has no explanation.

Like the master, Chase pins its argument that the Tuckers were served with the summons and complaint on the process server "specifically identif[ying] Brian Tucker in the courtroom as being the person he served," and, like the master, Chase simply chooses not to account for or even address the fact that the process server only made this identification after Mr. Tucker had taken the stand and been identified by the Tuckers' counsel. (Initial Brief of Respondent pp. 5-6); (R. p. 5, p. 63 ln. 11-21, p. 76 ln. 15 – p. 77 ln. 1, p. 79 ln. 20-23). Chase calls the process server's testimony "clear and convincing[.]" (Initial Brief of Respondent p. 5.) The reality of the record, though, is that the process server could not make his testimony fit the facts as they were on the ground; for example, the eruption of dog barking that universally accompanied someone coming to the Tuckers' door was entirely absent from the process server's tale. (R. p. 81 ln. 11 – p. 82 ln. 1, p. 83 ln. 2 – p. 84 ln. 6.) To support its argument, Chase just ignores this, hoping this Court will do the same thing. (Initial Brief of Respondent pp. 5-6.) That the master also ignored it illustrates that the master's analysis was driven to achieve the result of denying the Tucker's motion, not to result in its just adjudication. (R. pp. 1-9.)

Also, Chase mischaracterizes the testimony about the Half Mile Place/Half Mile Way confusion. (Initial Brief of Respondent pp. 5-6.) Mr. Tucker's affidavit testimony was that the Tuckers "constantly get mail delivered to [them] at Half Mile *Place*; mail meant for Half Mile *Way*." (R. p. 99.) Jessica Tucker's testimony on this

was that there are similarly numbered addresses on this similarly named street and that mail and UPS packages are routinely misdelivered as a result. (R. p. 45 ln. 5-18, p. 59 ln. 4-16.) Such confusion does not depend on there being identical street numbers for addresses on these two streets. The Tuckers' testimony was not "inconsistent[,]" as Chase characterizes it. (Initial Brief of Respondent p. 5.)

Chase argues that "[t]o support their motions for relief from the judgment, the Tuckers rely solely on statements that representatives of Chase allegedly made to them" and says "[t]he earliest such statement the Tuckers have identified with any specificity was allegedly made on August 23, 2010, in response to a telephone call the Mrs. Tucker placed to Chase." (Initial Brief of Respondent p. 6.) This is not true.

The Tuckers' communications with Chase about being processed for a loan modification began in 2008 and continued after this foreclosure action was filed and after the foreclosure judgment was filed. (R. p. 47 ln. 5-13, p. 48 ln. 2-18, p. 49 ln. 10-15, p. 50 ln. 14 – p. 52 ln. 21, p. 53 ln. 10-18, p. 56 ln. 5 – p. 58 ln. 25, p. 61 ln. 19 – p. 62 ln. 25, p. 68 ln. 19 – p. 69 ln. 1, pp. 96-98, 101-03.) Chase personnel told the Tuckers that they should stop making payments in order to get a loan modification. (R. p. 58 ln. 2 – p. 59 ln. 3, pp. 97, 101.) Chase's statement to Mrs. Tucker that the Tuckers' house was not in foreclosure and that the modification process was ongoing was simply consistent with everything Chase had told the Tuckers before. (R. p. 49 ln. 10-13, p. 50 ln. 18-19, p. 52 ln. 8-20, p. 53 ln. 10-16, p. 97.) The only logical explanation for why Chase has written its brief as though Chase made no relevant statement to the Tuckers before August of 2010 is that what the record contains about Chase's earlier representations would not fit with a decision to affirm the master's

order. Like the master did, Chase acts like the facts in the record that do not support its desired result simply do not exist.

b. The Tuckers qualify for a modification, Chase violated the Supreme Court's Administrative Order, and these issues are not moot.

Chase argues that "the point . . . is not whether the Tuckers are *eligible* for a modification but whether they can *qualify* for a modification." (Initial Brief of Respondent p. 8.) This is wholly an argument of semantics. Moreover, when we brush past the semantics and use Chase's favored terminology, the facts in the record show that the Tuckers did qualify for a modification – Chase just did not honor its obligation to provide them with one.

As discussed in the Tuckers' Appellants' Brief, the master's own factual findings show that the Tuckers qualify for a modification. But that is not all that shows that the Tuckers qualify. Probably the most telling evidence in the record that the Tuckers qualified for a modification was that Chase entered into a trial period plan with them under the Home Affordable Modification Program (hereinafter "HAMP" or "the HMP"). (R. p. 56 ln. 20 – p. 57 ln. 3, pp. 129-33.)

Under HAMP, a trial modification is not offered to a borrower unless a determination has already been made that the borrower qualifies for the modification. Wigod v. Wells Fargo Bank, N.A., 673 F.3d 547, 557 (7th Cir. 2012). The Seventh Circuit Court of Appeals described this part of the HAMP process as follows:

> A. The Home Affordable Mortgage Program
>
> . . .
>
> The Secretary [of the Treasury of the United States] negotiated Servicer Participation Agreements (SPAs)

with dozens of home loan servicers . . . . Under the terms of the SPAs, servicers agreed to identify homeowners who were in default or would likely soon be in default on their mortgage payments, and to modify the loans of those eligible under the program. In exchange, servicers would receive a $1,000 payment for each permanent modification, along with other incentives. The SPAs stated that servicers "shall perform the loan modification ... described in ... the Program guidelines and procedures issued by the Treasury ... and ... any supplemental documentation, instructions, bulletins, letters, directives, or other communications ... issued by the Treasury." In such supplemental guidelines, Treasury directed servicers to determine each borrower's eligibility for a modification by following what amounted to a three-step process:

First, the borrower had to meet certain threshold requirements, including that the loan originated on or before January 1, 2009; it was secured by the borrower's primary residence; the mortgage payments were more than 31 percent of the borrower's monthly income; and, for a one-unit home, the current unpaid principal balance was no greater than $729,750.

Second, the servicer calculated a modification using a "waterfall" method, applying enumerated changes in a specified order until the borrower's monthly mortgage payment ratio dropped "as close as possible to 31 percent."

Third, the servicer applied a Net Present Value (NPV) test to assess whether the modified mortgage's value to the servicer would be greater than the return on the mortgage if unmodified. The NPV test is "essentially an accounting calculation to determine whether it is more profitable to modify the loan or allow the loan to go into foreclosure." Williams v. Geithner, No. 09-1959 ADM/JJG, 2009 WL 3757380, at *3 n. 3 (D.Minn. Nov. 9, 2009). If the NPV result was negative – that is, the value of the modified mortgage would be lower than the servicer's expected return after foreclosure – the servicer was not obliged to offer a modification. **If the NPV was positive, however, the Treasury directives said that "the servicer MUST offer the modification."** Supplemental Directive 09-01.

B. The Trial Period Plan

> **Where a borrower qualified for a HAMP loan modification, the modification process itself consisted of two stages. After determining a borrower was eligible, the servicer implemented a Trial Period Plan (TPP) under the new loan repayment terms it formulated using the waterfall method.** The trial period under the TPP lasted three or more months, during which time the lender "must service the mortgage loan ... in the same manner as it would service a loan in forbearance." Supplemental Directive 09-01. **After the trial period, if the borrower complied with all terms of the TPP Agreement – including making all required payments and providing all required documentation – and if the borrower's representations remained true and correct, the servicer had to offer a permanent modification. See Supplemental Directive 09-01 ("If the borrower complies with the terms and conditions of the Trial Period Plan, the loan modification will become effective on the first day of the month following the trial period....").**

Id. at 556-57 (emphasis added).

If the Tuckers had not qualified for a modification at all three steps of the determination process, Chase would not have offered or implemented a trial period payment plan – but Chase did do that. (R. pp. 129-33.) Plainly, as discussed in the Appellants' Brief, the Tuckers do qualify for a modification. Chase cannot get around its obligations simply by failing to process the Tuckers for a modification correctly, as Chase now argues. (Initial Brief of Respondent pp. 8-9.)

Chase now contends that "[w]hether the Tuckers are eligible for a modification is thus a moot issue[.]" (Initial Brief of Respondent p. 9.) Not only does Chase fail to cite any authority for this proposition, thus abandoning this argument on appeal, S.C. Dept. of Probation, Parole and Pardon Servs., 540 S.E.2d at

482 n. 1, this contention does not make sense. If the Tuckers qualify for a HAMP modification, Chase is obligated under HAMP to offer them one. See Wigod, 673 F.3d at 557. A modification would mean the foreclosure is undone and dismissed. That would be "effectual relief" for the Tuckers that would have "practical legal effect upon the existing controversy." Curtis, 345 S.C. at 567.

Chase states that it "complied with the . . . provisions of the 2009 Administrative Order by including [a] . . . statement in the Complaint" that "the HMP process as specified by the U.S. Treasury Department's Supplemental Directive 09-01 has been completed without resulting in a modification because the borrower(s) failed to respond to the servicer's inquiry within 30 days as set forth in the applicable guidelines." (Initial Brief of Respondent p. 15); (R p. 35). The Tuckers proved that allegation was false. (R. p. 47 ln. 5-13, p. 48 ln. 2-18, p. 49 ln. 10-15, p. 50 ln. 14 – p. 52 ln. 21, p. 53 ln. 10-18, p. 56 ln. 5 – p. 58 ln. 25, p. 61 ln. 19 – p. 62 ln. 25, p. 68 ln. 19 – p. 69 ln. 1.) Chase seems to be arguing that it complied with the requirements of In re: Mortgage Foreclosures and the Home Affordable Modification Program (HMP), 2009-05-22-01 (S.C. Sup. Ct. dated May 22, 2009), by making an allegation it knew to be untrue. That is not a tenable argument. See Rule 11(a), SCRCP.

Chase further argues that this was not a case that involved an agreement between a lender and borrower that was enforceable under state law and, thus, that it is distinguishable from cases the Tuckers cite. (Initial Brief of Respondent p. 12.) This case does, however, involve such an agreement between the parties. The Tuckers made all three of the HAMP trial period payments. (R. p. 56 ln. 20 – p. 57

ln. 3.) That obligated Chase to offer a permanent HAMP modification, which Chase failed to do. Wigod, 673 F.3d at 557.

III. Just as the master's analysis was flawed, so is Chase's analysis of the arguments in this appeal.

a. The Tuckers are not arguing inconsistent factual positions.

Chase contends in its brief that the Tuckers are arguing "alternative and inconsistent statements of facts within their own knowledge." (Initial Brief of Respondent p. 8.) This mischaracterizes the Tuckers' position.

The Tuckers were never served with the summons and complaint in this case. (R. p. 46 ln. 3-5, p. 64 ln. 20 – p. 65 ln. 8, p. 68 ln. 7-16, pp. 94, 99-100, 153-54.) They have never wavered from that position. Their argument on Rule 60(b)(1) and (3) grounds, however, could stand independently of whether this Court were to resolve the question of whether they were served for or against them. The Tuckers' position on those issues is that even if they had been served (which they were not), Chase's representations to them would *still* provide an independent reason for why they did not appear and contest the foreclosure, since Chase repeatedly told them there was no foreclosure. (R. p. 49 ln. 10-13, p. 50 ln. 18-19, p. 52 ln. 8-20, p. 53 ln. 10-16, pp. 87, 89-92, 97, 107, 111.) The Tuckers are not arguing alternative versions of the facts – they are simply pointing out that, in addition to the lack of service, they have other grounds for relief from the judgment that do not depend on a finding that the Tuckers were not served.

b. Chase recognizes the master's prejudice analysis had no factual basis.

On appeal, Chase's argument to support the master's finding that Chase would be prejudiced if the Tuckers were granted relief from the judgment is quite different from the master's reasoning below. Chase, at least tacitly, recognizes that there is no factual support in the record below for the master's findings with regard to prejudice.

The master's reasoning that Chase would be prejudiced was that "since the [master's] deed was delivered to Fannie Mae, the judicial sale is *res judicata* under the provisions of S.C. Code Ann. § 15-39-870." (R. p. 6.) The Tuckers have pointed out that the Code section cited by the master provides that where the court has jurisdiction to issue the foreclosure decree, a judicial sale "shall be deemed res judicata as to any and all bona fide purchasers for value without notice," S.C. Code Ann. § 15-39-870 (2005), and that the master simply assumed that Fannie Mae was a bona fide purchaser of the property for value and without notice, even though there were no facts in the record to support that. (R.. 6.)

Chase now does not argue that the master was right about this; rather, Chase now summarily argues only that "[g]ranting the Tuckers relief from the judgment against them would impose on Chase the expense and delay of another foreclosure process and would thus unduly prejudice Chase." (Initial Brief of Respondent p. 9.) If simply the incidental expense and delay of litigating the underlying case was sufficient prejudice to defeat a motion for relief from a judgment, no motion for relief from a judgment could ever be properly granted, because "prejudice" would be present in every case in which a motion for relief from a judgment was made. We know that is not the law. Rule 60(b), SCRCP.

c. The Tuckers were not trespassers.

Chase makes an interesting (but wrong) argument that the writ of assistance "procedure that the Master followed also conforms to the South Carolina statute governing summary ejectment of trespassers from real property." (Initial Brief of Respondent p. 10.) The Tuckers were not trespassers.

"The unwarrantable *entry* on land in the peaceable possession of another is a trespass[.]" Snow v. City of Columbia, 305 S.C. 544, 552, 409 S.E.2d 797, 802 (Ct. App. 1991) (emphasis added). It is the entry that constitutes the trespass. Id. ("[t]he entry itself is the wrong"). Trespass is an intentional invasion into another's exclusive possession of property. Cedar Cove Homeowners Assn. v. DiPietro, 368 S.C. 254, 264, 628 S.E.2d 284, 289 (Ct. App. 2006).

The Tuckers were on the property involved in this case because they had entered it lawfully. When they went into possession of the property, they owned it. They were not trespassers, since they had made no unlawful entry onto the property. Indeed, the trespasser ejectment statute cited by Chase provides that it applies where a person "go[es] into possession of any lands or tenements of another[.]" S.C. Code Ann. § 15-67-610. Further, the Tuckers could not have invaded Fannie Mae's exclusive possession of the property, since Fannie Mae had not gone into possession of the property. The fact that a former mortgagor is not a trespasser is one of the reasons why proceedings concerning writs of assistance are not treated like proceedings for the summary ejectment of trespassers. See Griggs, 205 S.C. 272; James, 114 S.C. 107; S.C. Code Ann. § 15-67-610.

Whether the summary trespasser ejectment statute passes constitutional muster is not at issue here, but, in any event, it is inapplicable. The Tuckers were not trespassers.

d. Chase hopes this Court will overlook that Fannie Mae never sought to have the Tuckers ousted from the property.

Chase never once brings up in its brief that Fannie Mae never sought for the master to issue a writ of assistance against the Tuckers. Chase's entire argument simply ignores that no one who was even arguably entitled to petition the court for a writ of assistance against the Tuckers ever tried to get one in this case. See Sea Pines Assn. for the Protection of Wildlife, Inc. v. S.C. Dept. Natural Resources, 345 S.C. 594, 601, 550 S.E.2d 287 (2001) (discussing elements of standing); Powell ex rel. Kelley v. Bank of America, 665 S.E.2d 237, 241 (Ct. App. 2008) (describing standing). One wonders why it is that Chase even wants this part of the master's order affirmed.

e. Chase ignores the master's improper shifting of the burden of proof.

Chase argues that, in issuing an order for the Tuckers' ejectment with no hearing and no proof, "[t]he requirements of due process were clearly satisfied in this case because the order for ejectment gave the Tuckers notice that they could contest the order and demand a hearing at any time within 21 days after the order was served on them." (Initial Brief of Respondent p. 11.) Chase's argument ignores that the procedure the master used shifted the burden of proof from Chase (the party that sought the writ of assistance) to the Tuckers (the opposing party).

Possession of real property is a constitutionally protected interest that triggers the requirements of due process. Moore v. Moore, 376 S.C. 467, 474-75, 657 S.E.2d 743, 747 (2008). "Procedural due process requires (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses." Id. at 473. Chase argues that the master's ejectment procedure met these requirements. Chase ignores the fact that the master never required any proof from Chase for his ejectment order to issue, nor, of course, did he allow the Tuckers to introduce evidence or confront and cross-examine witnesses when he determined whether he should issue the ejectment order in favor of Chase. (R. pp. 8-9, 12-16, 115-17.) By the time the Tuckers had any opportunity to contest the order, it had already been issued, and the burden had been placed on them to "challenge Plaintiff's right to possession." (R. p. 13.) Basic, fundamental legal principles provide that it was not up to the Tuckers to prove that Chase was not entitled to possession of the property; it was up to Chase to prove that Chase was entitled to possession. See Baugh & Sons Co. v. Graham, 150 S.C. 398, 401, 148 S.E. 220 (1926) (plaintiff bears burden of proof in civil case). Furthermore, it was not up to the Tuckers to prove that Fannie Mae was not entitled to possession of the property; it was up to Fannie Mae to prove that it was – something it never undertook to do.

f. Chase uses the same circular logic the master did.

Chase argues that because the Tuckers did not serve an answer to the complaint, all the allegations of the complaint are deemed admitted by them for the purpose of a motion for relief from the judgment. (Initial Brief of Respondent p. 15.)

As discussed in the Appellants' Brief, South Carolina courts have never deemed the allegations of a plaintiff's complaint as admitted for the purpose of analyzing a motion for relief from a default judgment. See, e.g., Sundown Operating Co., Inc. v. Intedge Industries, Inc., 383 S.C. 601, 608-09, 681 S.E.2d 885, 888-89 (2009) (discussing 60(b) analysis); Lowe's of Georgia, Inc. v. Costantino, 288 S.C. 106, 107-11, 341 S.E.2d 382 (Ct. App. 1986) (relief from default judgment with no mention of deeming plaintiff's allegations admitted in motion's analysis). The availability of a challenge to a default judgment under Rule 60(b), SCRCP, is one of the primary reasons the Rule exists. See Winesett v. Winesett, 287 S.C. 332, 334, 338 S.E.2d 340 (1985) ("default judgment may not be appealed"; correct practice is to move for relief from judgment); Belue v. Belue, 276 S.C. 120, 121, 276 S.E.2d 295 (1981) ("no appeal lies for a default judgment"; correct practice is to move for relief from judgment); Jean Hoefer Toal, Shahin Vafai & Robert A. Muckenfuss, Appellate Practice in South Carolina 99 (2d ed. 2002). Chase, however, seeks for this Court to declare a rule that would make relief from a default judgment all but impossible. This Court should reject that request.

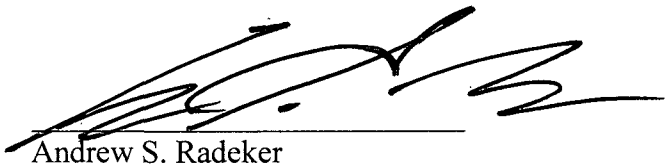
CONCLUSION

Chase's arguments in its brief cannot avoid the truth: that the master did not apply the correct analysis to the Tucker's motions. A correct analysis of the record shows the Tuckers were entitled to prevail on their motions. The lower court's analysis prevented that from happening. That is the essence of prejudicial error.

This Court should reverse the decision below, vacate the foreclosure judgment and ejectment orders, and remand this case with leave for the Tuckers to serve a

responsive pleading to the complaint. In the alternative, the Court should remand for a new hearing on the motions or a new decision by the master in which he must apply the correct analysis.

Respectfully submitted,



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January 17, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Charles B. Simmons, Jr., Master-in-Equity

Common Pleas Case No. 2010-CP-23-1622
Appellate Case No. 2012-212447

JP Morgan Chase Bank, National Association,.....Respondent,

v.

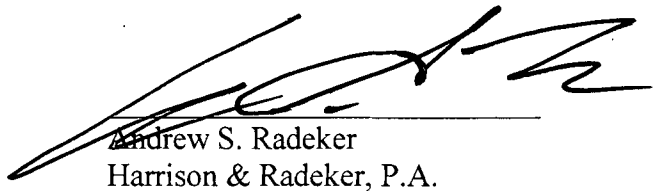
Brian Adrian Tucker, Jessica C. Tucker, and Half Mile Lake Homeowner's Association, Inc., Defendants,

Of whom Brian Adrian Tucker and Jessica C. Tucker are.....Appellants.

CERTIFICATE OF COUNSEL

I certify that the foregoing brief complies with Rule 211(b), SCACR.

Respectfully submitted,



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PROOF OF SERVICE

I certify that I served the Final Reply Brief of Appellants on counsel for the Respondent by depositing a copy of it on the date shown below in the United States Mail, postage prepaid, addressed as follows:

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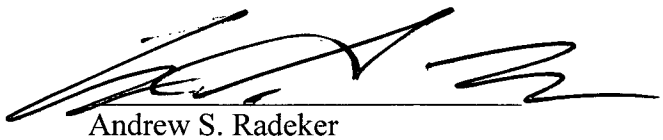

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