

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM CLARENDON COUNTY  
Court of Common Pleas

**RECEIVED**

W.B. McCullough, Special Referee

MAR 04 2019

Appellate Case No. 2018-002199

**SC Court of Appeals**

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Wilmington Savings Fund Society, FSB, D/B/A Christiana Trust as Owner Trustee of the  
Residential Credit Opportunities Trust V,

Respondent,

v.

Leroy Hooks, II; Ford Motor Credit Company, LLC,

Defendants,

Of whom Leroy Hooks, II is the Appellant.

AND

Patricia Ann Wheeler and Maria D. Williams,

Respondents.

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**INITIAL BRIEF OF RESPONDENT**

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## STATEMENT OF ISSUES ON APPEAL

1. Whether the Special Referee abused his discretion in denying Appellant's SCRCR Rule 60(b) Motion.

## STATEMENT OF THE CASE AND FACTS

The instant action is one for foreclosure of real property located in Clarendon County, South Carolina. On December 18, 2008, Appellant made, executed and delivered an Adjustable Rate Note to Beach First National Bank whereby he promised to repay the principal sum of \$239,112.00 together with interest at an adjustable rate initially of 6.5% per annum (the "Note"). (Note). To better secure the payment of the Note, Appellant made, executed and delivered a Mortgage (the "Mortgage") to Mortgage Electronic Registrations Systems, Inc. as nominee for Beach First National Bank, in writing, dated December 18, 2008, covering real property located at 1992 Jacks Creek Road, Summerton, SC 29148 in Clarendon County. (Mortgage). The property is more fully described in the Mortgage and is the same as that described in the Complaint. (Mortgage and Complaint). The Mortgage was recorded in the Clarendon County Registry on December 29, 2008 in Mortgage Book 825 at Page 160. (Id). The Mortgage constitutes a valid first lien on the subject property. (Id).

Thereafter, the Mortgage was assigned to GMAC Mortgage, LLC by assignment recorded on April 5, 2010 in Book 875 at Page 174. (Assignment 1). Thereafter, the Mortgage was assigned to Ocwen Loan Servicing, LLC by assignment recorded on May 3, 2013 in Book 981 at Page 283. (Assignment 2). Thereafter, the Mortgage was assigned to Wilmington Savings Fund Society, FSB DBA Christiana Trust as Trustee for HLSS Mortgage Master Trust

for the benefit of the holders of the Series 2014-1 Certificates issued by HLSS Mortgage Master Trust by assignment recorded on February 10, 2017 in Book 1100 at Page 105. (Assignment 3). Thereafter, the Mortgage was assigned to Secretary of Housing and Urban Development by assignment recorded on February 10, 2017 in Book 1100 at Page 106. (Assignment 4). Thereafter, the Mortgage was assigned to Wilmington Savings Fund Society, FSB d/b/a Christiana Trust, not in its individual capacity but solely in its capacity as Owner Trustee of Matawin Ventures Trust Series 2016-2 by assignment recorded on February 10, 2017 in Book 1100 at Page 107. (Assignment 5). Thereafter, the Mortgage was assigned to Respondent by assignment recorded on January 10, 2018 in Book 1130 at Page 232. (Assignment 6).

Appellant began to fall behind on the payments called for under the terms of the Note and Mortgage. In order to cure his default, Appellant entered into a Loan Modification Agreement with GMAC Mortgage, LLC (servicer for the loan at the time of the modification) on October 1, 2010, thereby amending and supplementing the Note and Mortgage. (Loan Modification Agreement). By virtue of the Loan Modification Agreement, the unpaid principal balance was modified to \$245,460.16, together with interest at the rate of 4.75% per annum on the unpaid balance. (Id).

Appellant again defaulted in making payments due under the terms of the Note and Mortgage and Respondent brought the instant foreclosure action on February 5, 2018 alleging that the payments due and owing from October 1, 2015 had not been paid. (Complaint). Respondent attempted service on Appellant at the subject property on February 7, 2018 with the process server noting, "Vacant property: overgrown, vacancy notice posted". (Affidavit of Non-Service 1). Unable to locate Appellant at the property, Respondent unsuccessfully

attempted service upon Appellant at an address in Atlanta, Georgia. (Affidavit of Non-Service 2). Respondent sought an order for service by publication. (Motion for Service by Publication). The request for service by publication was accompanied by an Affidavit of Kayci Cail of ABC Legal Services, Inc., regarding her attempts to locate and serve Appellant with the initial pleadings. (Affidavit of Kayci Cail & Exhibits). An Order for Service by Publication was entered on February 21, 2018. (Order for Service by Publication). Pursuant to the Order, the Summons and Notices was published in the Manning Times for three consecutive issues beginning March 1, 2018 and ending March 15, 2018. (Affidavit of Publication). The pleadings were also mailed to respondent at his last known address on February 20, 2018. (Certificate of Service by Mail filed February 20, 2018).

The case was referred to The Honorable W.B. McCullough as Special Referee on March 12, 2018. (Order of Reference). No answer or other responsive pleading was entered on behalf of any defendant and, as a result, counsel for Respondent submitted an Affidavit of Default and Certificate of Compliance with Supreme Court Administrative Order 2011-05-02-01 on April 26, 2018. A foreclosure hearing was scheduled for May 3, 2018 and all defendants were notified of the place, date, and time of the hearing. (Notice of Hearing and Certificate of Service by Mail).

The foreclosure hearing was held on May 3, 2018 with no appearances from any defendant. (Record of Hearing). The Special Referee's Order and Judgment of Foreclosure and Sale was filed on May 14, 2018. (Foreclosure Order). The foreclosure sale was scheduled for June 4, 2018. (Notice of Sale). The foreclosure sale took place as scheduled after due publication with Respondents Patricia Ann Wheeler and Maria D. Williams being the successful purchasers. (Affidavit of Publication of Notice of Sale). The Special Referee's

Deed into the successful purchasers was recorded on July 11, 2018 in Book 1003 at Page 837. (Special Referee's Deed).

Appellant filed a Motion for a New Trial or for Relief from Order pursuant to SCRCP Rules 59 and 60 on July 19, 2018. (Appellant's Motion). Appellant's Motion was heard on October 18, 2018. (Notice of Motion Hearing). The Special Referee denied Appellant's Motion in an Order filed November 29, 2018. (Order Denying Motion). This appeal followed.

### STANDARD OF REVIEW

Though couched as a motion under both Rules 59 and 60, Appellant's Motion is essentially a SCRCP Rule 60(b) Motion as it was made more than ten days after entry of the judgment. "A party seeking to set aside a judgment pursuant to Rule 60(b) has the burden of presenting evidence entitling him to the requested relief." *Lanier v. Lanier*, 364 S.C. 211, 215, 612 S.E.2d 456, 458 (Ct. App. 2005). Specifically, regarding Appellant's allegations that he is incompetent, "[t]he party alleging incompetence must prove by a preponderance of the evidence that he was incompetent at the time of the transaction." *Grapner v. Atlantic Land Title Co., Inc.*, 307 S.C. 549, 551, 416 S.E.2d 617, 619 (citing *Fielder & Brown v. Jennings*, 131 S.C. 256, 126 S.E. 448 (1925)). "Whether to grant or deny a motion under Rule 60(b) lies within the sound discretion of the judge. Our standard of review, therefore, is limited to determining whether there was an abuse of discretion." *Raby Const., L.L.P. v. Orr*, 358 S.C. 10, 17-18, 594 S.E.2d 478, 482 (2004). An abuse of discretion occurs when an order is controlled by an error of law or based upon factual conclusions that are without evidentiary support. *Ware v. Ware*, 390 S.C. 493, 499, 702 S.E.2d 390, 393 (Ct. App. 2010). The Court

may affirm the trial court's ruling for any ground appearing in the record. SCRAP 220(c); See also *I'On v. Town of Mt. Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000).

## ARGUMENT

### I. THE SPECIAL REFEREE DID NOT ABUSE HIS DISCRETION IN DENYING APPELLANT'S SCRPC RULE 60(B) MOTION.

Appellant's Motion is based entirely upon his allegation that he is incompetent and has been incompetent during the entirety of this action. In support of his Motion, Appellant presented the Affidavit of Delphine Howard, which incorporated four exhibits including printouts from Appellant's VA medical records. (Affidavit of Delphine Howard). The Special Referee correctly pointed out that Ms. Howard's Affidavit "mainly recites cherry picked statements from the attached VA medical records and concludes the schizophrenia causes many problems and Hooks is unable to handle his own legal and financial needs". (Order Denying Motion). The Special Referee correctly looked beyond the cherry-picked statements and determined that the evidence presented fell far short of establishing that Appellant is (or has ever been) incompetent. The evidence in the record supports a finding that Appellant is competent.

It is important to put Appellant's incompetence claims in context with respect to the subject loan and the facts of the case. Appellant asserts incompetence going back to an injury that occurred in 1989. (Affidavit of Delphine Howard, Ex. 1). The medical record progress notes only date back to 2009 and there is nothing in those records to suggest anything regarding Appellant's competence from 1989 to 2009. (Affidavit of Delphine Howard, Ex. 3). Appellant

applied, and was approved, for the subject loan in 2008 with the loan closing held on December 18, 2008. (Note and Mortgage). Appellant made payments on the loan for nearly two years before falling behind on his monthly payments and seeking loss mitigation options (Loan Modification Agreement). Appellant applied, and was approved, for a Loan Modification Agreement which he signed on September 27, 2010. (Id). Appellant continued to make payments on the loan for another five years with the instant default resulting from the October 1, 2015 payment having not been made. (Complaint, P.5, Record of Hearing, P.5, Foreclosure Order, P.4). These facts strongly support a finding that Appellant is competent.

Further, the VA medical records are replete with evidence of Appellant's competence, evidence which Ms. Howard's Affidavit ignores because they contradict her assertion that Appellant is incompetent. Appellant's September 12, 2018 Mental Health Status Exam paints an entirely different picture of Appellant's competence from that suggested by Ms. Howard:

OBJECTIVE: Mental Health Status Exam: Patient was ambulating down hallway and came to conference room for this interview. He is a short, thin small framed AA male dressed appropriately and has adequate hygiene. He appears his stated age. He is cooperative with the interview with good eye contact. He exhibits normal motor activity and speech. His mood is "good" with a constricted affect. Thought processes are more organized today. Thought content without suicidal or homicidal ideations. He does not appear to respond to internal stimuli, no overt paranoia. He is alert and oriented. He has moderately impaired insight and judgment.

(Affidavit of Delphine Howard, Ex. 3, P.2). This mental health evaluation is strong evidence in support of a finding that Appellant is competent.

Appellant's September 2018 medical records also include the following note, which was conspicuously absent from Ms. Howard's cherry-picked statements:

Alcohol and Substance Abuse: The patient reports he drinks "about a fifth of wine" per day. He denies any drug use but says he smoked marijuana,

“a long time ago.” He denies use of cocaine, *however, his UDS is positive for cocaine*. He denies a history of substance abuse treatment.

(Affidavit of Delphine Howard, Ex. 3, Pp. 25 – 26) (Emphasis Added). It is a reasonable conclusion that Appellant’s drug abuse, and not incompetence, contributed to any erratic behavior noted in his medical records.

Further evidence of Appellant’s competence can be found in Appellant’s November 6, 2015 mental status exam:

“He reports that he missed the prior appointments to reverse the colostomy bag bc he traveling taking care of his father in Tampa, Fl. He understands that he needs to get the surgery.

“He denies hearing voices; he is not having suicidal thoughts. He is not depressed, but he is “depressed” that his surgery is not done yet. He reports he missed the last appointment due to his car was flooded from the storm.”

(Affidavit of Delphine Howard, Ex. 3, Pp. 9 - 10).

The exam’s findings were listed as follows:

Appearance, Grooming, and Hygiene: neat, clean, casual

Behavior: cooperative

Psychomotor Activity: non

Speech: normal rate and tone

Mood: euthymic

Affect: appropriate, full

Thought Content (including SI/HI): no delusions, no AVH, no suicidal nor homicidal thoughts, no obsessions, no preoccupation with violence.

Hallucinations and/or Delusions: denies

Thought Processes: appropriate rate of thoughts appropriate, logical, able to reason abstractly

Associations: intact

Memory/Orientation: limitations

Concentration: distracted at times

Fund of Knowledge/Estimate of Intelligence: average

Language: able to name objects/repeat phrases

Judgment: fair

Insight: fair

(Affidavit of Delphine Howard, Ex. 3, P. 10). Based upon these findings, the following was noted, “There is no acute safety issues. There is no reason for commitment.” (Id).

Appellant presented no expert testimony regarding his competence nor any evidence that Appellant has ever been legally determined to be incompetent. When taken as a whole, the evidence presented through Ms. Howard’s Affidavit paints a picture of Appellant as a man who is competent but has encountered medical and substance abuse issues and has, at times, demonstrated erratic behavior. The Special Referee did not abuse his discretion in determining that Appellant did not meet his threshold burden of showing incompetence because there was evidence in the record to support a finding of competence. As such, the Special Referee’s denial of Appellant’s SCRCF Rule 60(B) Motion should be affirmed.

### CONCLUSION

The Special Referee did not abuse his discretion in denying Appellant’s SCRCF Rule 60(B) Motion. For the reasons stated above, Respondent respectfully requests that the Court affirm the Special Referee’s Order and deny Appellant’s appeal.

Respectfully Submitted,



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Dated: March 4, 2019

**CERTIFICATE OF SERVICE**


The undersigned certifies that, on March 4, 2019, Respondent's Initial Brief and Designation of Matter to be Included in the Record on Appeal were served on the below-listed parties by depositing a copy thereof in the United States Mail, first Class, postage prepaid, addressed to:

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