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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM NEWBERRY COUNTY
Court of Common Pleas

Joseph W. Hudgens, Special Referee

Common Pleas Case No.: 2012-CP-36-103
Appellate Case No. 2013-002181

EverBank,.....Respondent,

v.

Lenora Scurry, Patrick Scurry, The South Carolina Department of Revenue, Defendants,

Of Whom Lenora Scurry and Patrick Scurry are the.....Appellants.

FINAL BRIEF OF APPELLANTS

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II. **Did the special referee ignore that, on the undisputed facts of the case, the judgment violated Rule 54(c), SCRCP, and was accordingly void?**

III. **Did the special referee ignore that, on the undisputed facts of the case, Appellants have a meritorious defense?**

STATEMENT OF THE CASE

The Respondent (hereinafter "EverBank") commenced this mortgage foreclosure action by both filing and serving upon Appellants (hereinafter "the Scurrys") a summons and complaint on the same day, February, 27, 2012. (R. pp. 19-29, 165-66, 177-78.) The next day, February 28, 2012 – after the commencement of the action – the mortgage subject of the action was assigned to EverBank. (R. p. 122.)

The action sought foreclosure, pursuant to alleged default in payments on a note given to Primary Capital Advisors LC, of a mortgage given to Mortgage Electronic Registration Systems, Inc. (hereinafter "MERS") as nominee for Primary Capital Advisors LC, by virtue of an alleged assignment of the mortgage to EverBank. (R. pp. 24, 25, 26.) The complaint sought for the court to determine "[t]he amount due upon the said Note and Mortgage[,]" including "attorney's fees and costs of this action." (R. p. 26.)

The Scurrys did not answer the complaint within 30 days of its service upon them, and an affidavit of default was filed on March 30, 2012. (R. p. 200.) The same day, the case was referred to a special referee. (R. p. 16.)

The Scurrys filed for bankruptcy protection, which stayed the foreclosure action. (R. p. 2.) In the course of the bankruptcy, EverBank filed a proof of claim with regard to the mortgage debt subject of this case, stating that $835.00 were the attorney's fees associated with the foreclosure action. (R. p. 56.) The same law firm that represented EverBank in the foreclosure action filed the proof of claim in bankruptcy court. (R. p. 55.)

After the conclusion of the bankruptcy, a default foreclosure hearing was held on March 8, 2013. (R. p. 2.) The Scurrys did not appear at the hearing. (R. p. 2.)

At the foreclosure hearing, EverBank's attorney presented a pre-written "transcript of testimony" that noted the assignment of the mortgage after the commencement of the action and requested an award of "attorney's fees in the amount of $5,200.00 based on examination of title, preparation of pleadings, correspondence, preparation for foreclosure hearing and attendance at hearing." (R. pp. 110, 111.) Attached to the transcript of testimony was a copy of the note, the mortgage, and the mortgage assignment. (R. pp. 113-22.) The note provides that if the payee of the note has accelerated the debt, it "may require Borrower to pay costs and expenses including reasonable and customary attorneys' fees for enforcing this Note to the extent not prohibited by applicable law." (R. p. 114.)

The special referee entered an order and judgment of foreclosure and sale on March 11, 2013, which stated the February 28, 2012, date of the mortgage assignment and awarded EverBank $5,200.00 as an "[a]ttorney fee[.]" (R. pp. 9, 10.) The order also provides that:

> The amount of the judgment shall be subject to increase to permit the Plaintiff to recover additional costs, commissions and expenses not included in the judgment figures set forth herein. It may also increase to include supplemental compensation for attorney's services not contemplated by the initial fee awarded. Jurisdiction over the fee award and total debt is reserved to facilitate the assessment and payment of any such costs and/or supplemental compensation. Such additional costs, commissions and expenses may be established by affidavit and shall be adjudicated by the Court without further hearing.

(R. p. 12.)

A foreclosure sale was held on April 1, 2013, and EverBank was the successful bidder. (R. p. 2.) On April 26, 2013, the Scurrys filed a motion to vacate the foreclosure judgment and sale. (R. pp. 30-74.)

The Scurrys argued for vacation of the judgment and sale under subsections (1), (3), (4), and (5) of Rule 60(b), SCRCP. They attached affidavits of the Scurrys noting communications with the process server and personnel from EverBank's servicer that led them to believe they needed to take no action regarding the foreclosure case, attached EverBank's proof of claim (with its attachments, including the note, mortgage, and mortgage assignment), and attached an affidavit of attorney Shawn French, in which he noted his experience in plaintiff's foreclosure work, that "[t]he usual fee charged by an attorney to prosecute a mortgage foreclosure action in South Carolina is between $800.00 and $1,000.00" and that "[i]t would be unreasonable to expect a mortgagee to pay more than $1,000.00 to an attorney to prosecute an uncontested mortgage foreclosure action in this State." (R. pp. 36-74.)

The Scurry's motion and affidavits noted that EverBank's process server told them that the foreclosure pleadings were nothing for them to worry about and, thus, they did not take any action about them. (R. pp. 32-33, 36-37.) It noted that they were being processed by EverBank's servicer for a modification at the time they got the notice of hearing, and based on that and how they interpreted information they got from EverBank's law firm, they believed the hearing would be cancelled. (R. pp. 37-38.) Mrs. Scurry's affidavit attached numerous modification-related communications with Everhome Mortgage (EverBank's servicer), including a letter dated March 11, 2013 – the day the foreclosure judgment was entered – saying that Everhome would

provide the Scurrys with its decision on whether to enter into a loan modification within 30 days. (R. pp. 39-44.) Her affidavit also noted that two days after the foreclosure sale, an Everhome employee told her to fax in additional documentation needed for the modification review as soon as she received it. (R. p. 38.) The written motion noted that "the attached affidavits and other materials show that the Defendants have defenses that are worthy of inquiry. The Defendants accordingly have meritorious defenses." (R. p. 34.)

The special referee set a hearing on the motion for June 5, 2013. (R. p. 201.) Both EverBank and the Scurrys presented memoranda to the special referee. (R. pp. 173-99.) The Scurrys presented a proposed answer and counterclaim. (R. pp. 157-64.) Counsel for the Scurrys and EverBank argued their positions to the special referee. (R. p. 126 ln. 22 through p. 154 ln. 22.) He took the matter under advisement and initially notified counsel that he had decided to rule for the Scurrys, even attaching to an email to counsel a preliminary draft of an order. (R. pp. 94-97.) He asked counsel for comments and additional authorities. (R. p. 94.) EverBank's counsel sent the special referee a letter with authorities and, though the special referee never permitted the introduction of new factual material into the record, attempted to supplement the record with an affidavit. (R. pp. 203-09.) The Scurry's counsel replied, noting, among other things, that the time for creating the record with respect to the motion had already passed. (R. p. 100.)

On September 26, 2013, the special referee filed an order denying the Scurry's motion. (R. pp. 1-6.) The special referee based his decision on the Rule 60(b)(1) and (3) arguments on what he perceived as a failure to show the process server was an

agent of EverBank and on a failure of the Scurrys to show misrepresentation about the hearing date. (R. pp. 3-4.) He based his Rule 60(b)(4) and (5) rulings on the language of the note at issue and on a perceived lack of prejudice to the Scurrys. (R. p. 5.) He based his ruling as to whether the Scurrys have a meritorious defense on his perception that the Scurrys' argument of a meritorious defense is "based upon the evidence presented in support of the motion. That evidence as presented does not meet the burden of showing that they are entitled to relief." (R. pp. 5-6.)

The Scurrys moved for reconsideration. (R. pp. 75-108.) The special referee denied that motion without a hearing. (R. p. 7.)

This appeal followed.

STATEMENT OF FACTS

This case illustrates many common abuses of the mortgage foreclosure process. At the time this foreclosure action was begun and throughout its entire duration, even after the sale of the subject property, the Scurrys were engaged with EverBank's servicer in negotiations for a loan modification. (R. pp. 36-52.) It is plain from the record that EverBank was engaged in a practice known as "dual tracking," in which a foreclosure action is pursued at the same time as review for a modification is taking place. (R. pp. 36-52, p. 132 ln. 2-10, p. 132 ln. 22 through p. 133 ln. 4, p. 189.) By its very nature, such a practice very often leads foreclosure defendants to believe that they are keeping abreast of what they need to do to oppose foreclosure when, procedurally, they are not. (R. p. 132 ln. 7-10, p. 189.) The Scurrys' perception that their loan default was being taken care of through a modification and that foreclosure would not proceed was a reasonable one,

particularly in light of the process server telling them that the foreclosure pleadings were "nothing to worry about" and that "Obama was coming out with a program to help homeowners" like them. (R. p. 36.) Homeowners in the Scurrys' position, because of confusion created by the perceived reassurance that the foreclosure plaintiff is going to settle the matter with them through a modification, often miss deadlines in a foreclosure action and fail to realize that the very same plaintiff with whom they believe they are working toward a resolution to allow them to keep their home is proceeding forward with a lawsuit designed to take it away from them. That is what happened here.

Across this state, masters-in-equity and special referees routinely award plaintiffs in residential mortgage foreclosure actions "attorney's fees" that bear no relation to the amount of attorney's fees the plaintiff actually incurred in the case and usually exceed that amount by several thousand dollars. (R. p. 133 ln. 12-14.) This is so despite the fact that it is nearly universal that the notes and mortgages involved in those cases, like the ones here, provide for the recovery of attorney's fees only to the extent that they are incurred costs of collection. (R. p. 114.) This is so despite the fact that foreclosure complaints almost uniformly state that they seek the recovery of attorneys' fees as costs of collection. That is what happened here.

In fact "testimony" in general at a default foreclosure hearing is often present barely if at all. As here, it is common for plaintiffs' counsel to provide the court with prepared "testimony" of a hearing at which that lawyer acts as advocate and witness all rolled into one. (R. pp. 109-11.)

It is also routine for masters-in-equity and special referees to permit the post-judgment recovery of extra amounts by foreclosure plaintiffs. Often, as here, this is done with language in a judgment that states the judgment amount can be increased without a hearing. (R. p. 12.) As a practical matter, in the foreclosure world in this state, judgments are final as to defendants, but they are not final as to plaintiffs, who may unilaterally increase them. Due process for foreclosure defendants is usually a gesture at best and a dead letter at worst.

Further, at the time this foreclosure action was commenced – the only point in time at which this matters – the plaintiff, EverBank, did not own the mortgage. (R. pp. 19-29, 116-22, 165-66, 177-78, 194-96.) In a mortgage originated in the MERS system, ownership of the note and ownership of the mortgage – things we usually think of as going hand-in-hand – are vested in different entities from the outset of the loan. Mortgage Electronic Registration Systems, Inc. v. Neb. Dept. of Banking & Finance, 704 N.W.2d 784, 270 Neb. 529 (2005) (generally describing how the MERS system operates).

> MERS is a private corporation that administers the MERS System, a national electronic registry that tracks the transfer of ownership interests and servicing rights in mortgage loans. Through the MERS System, MERS becomes the mortgagee of record for participating members through assignment of the members' interests to MERS. MERS is listed as the grantee in the official records maintained at county register of deeds offices. The lenders retain the promissory notes, as well as the servicing rights to the mortgages. The lenders can then sell these interests to investors without having to record the transaction in the public record. MERS is compensated for its services through fees charged to participating MERS members.
>
> . . .

> Mortgage lenders hire MERS to act as their nominee for mortgages, which allows the lenders to trade the mortgage note and servicing rights on the market without recording subsequent trades with the various register of deeds throughout [the country].
>
> To execute a MERS Mortgage, the borrower conveys the mortgage to MERS, who is acting as a contractual nominee. MERS becomes the recorded [mortgagee], however, the lender retains the note and servicing right. The lender can then sell that note and servicing rights on the market and MERS records each transaction electronically on its files.

Id. at 530, 533.

The mortgage at issue here was a MERS mortgage, in which the mortgagee's rights were vested in MERS, not EverBank, at the time this action was commenced. (R. pp. 19-29, 116-22.) This was so regardless of who owned the *note* at the time the foreclosure action was brought; an entity that had the note and not the mortgage of course could not transfer the mortgage to anyone.

STANDARD OF REVIEW

The denial of a Rule 60(b) motion will be reversed where the lower court has abused its discretion in denying the motion. Tri-County Ice and Fuel Co. v. Palmetto Ice Co., 303 S.C. 237, 242, 399 S.E.2d 779 (1991). "An abuse of discretion arises where the trial judge was controlled by an error of law or where his order is based on factual conclusions that are without evidentiary support." Id.

ARGUMENT

I. A flawed analysis produced the denial of the Scurrys' motion on its 60(b)(4) ground.

a. The usually proper 60(b) analysis.

In deciding a motion under Rule 60(b), SCRCP, the court hearing the motion is charged with deciding whether the party seeking relief has shown, by the preponderance of the evidence, that the conditions of a subsection of the Rule are met and, ordinarily, that he has a meritorious defense. See Lanier v. Lanier, 364 S.C. 211, 612 S.E.2d 456, 458 (Ct. App. 2005); Bowers v. Bowers, 304 S.C. 65, 67-68, 403 S.E.2d 127 (Ct. App. 1991).

The subsections of Rule 60(b) provide relief for the following:

> (1) **mistake, inadvertence, surprise, or excusable neglect**;
> (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
> (3) **fraud, *misrepresentation*, or *other misconduct of an adverse party***;
> (4) the **judgment is void**;
> (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), SCRCP (emphasis added).

South Carolina "favor[s] the disposition of issues on their merits rather than on technicalities[.]" Mictronics, 345 S.C. at 511. 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).

b. The analysis differs where the issue is whether a judgment is void.

An exception to the usual requirement of showing of a meritorious defense exists where relief is sought under Rule 60(b)(4), SCRCP; if the judgment is void, relief must be granted, and there is no need for further analysis. BB&T v. Taylor, 369 S.C. 548, 552 n. 1, 633 S.E.2d 501, 503 n. 1 (2006). Judgments rendered without due process are void, and Rule 60(b)(4), SCRCP, provides for relief from such a judgment. Universal Benefits, Inc. v. McKinney, 349 S.C. 179, 183, 561 S.E.2d 659 (Ct. App. 2002).

A judgment rendered against a party for his default for failure to appear "shall not be different in kind from or exceed in amount that prayed for in the demand for judgment." Rule 54(c), SCRCP. A non-appearing defendant would be prejudiced by his lack of notice if the plaintiff were to be awarded relief other than that sought in the complaint; in this way, Rule 54(c) ensures due process. See id.; Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950); Pinckney v. Atkins, 317 S.C. 340, 343, 454 S.E.2d 339 (Ct. App. 1995); cf. Roche v. Young Brothers, Inc., 318 S.C. 207, 456 S.E.2d 897, 899 (1995).

Relief is proper where a default judgment renders an award in excess of the demand in the plaintiff's complaint. Pinckney, 317 S.C. at 343; River Road Co. v.

Energy Master Products, Inc., 300 S.C. 316, 316-17, 387 S.E.2d 694 (Ct. App. 1989). A default judgment in excess of the amount sought in the complaint is "clearly unlawful[.]" River Road, 300 S.C. at 317.

c. When the correct analysis is applied to the issue concerning the inflated "attorney's fees" awarded in the judgment, it is plain that the master's conclusions in this regard are grounded in errors of law.

The special referee erred in failing to recognize the issue presented by the inflated judgment in this case that awarded EverBank more than it pled it was entitled to: whether relief from the judgment should be granted because the judgment awarded relief outside the scope of EverBank's pleadings in violation of Rule 54(c), SCRCP, and was, thus, void. (R. pp. 5, 10, 26, 33-34, 56, 86-87, 113-15, p. 135 ln. 16 through p. 136 ln. 5.) Also, he applied extra, improper steps, such as determining whether there was prejudice to the Scurrys, to the analysis of whether to grant relief to the Scurrys from a void judgment. (R. pp. 5, 88); see id. His decision not to grant the Scurrys relief from the judgment on this ground is the product of erroneous analysis and legal conclusions.

The special referee's reasoning on this issue was as follows:

> Attorney's fees and costs are authorized by the note and mortgage. The defendants argue that the purpose of an action of the nature of the present one is to determine debt not to create debt. That may be true, but the note and mortgage authorize collection of fees and costs in actions to collect money because of default in payment of the initial debt. If such fees and costs are incurred in actions to collect a debt and are authorized by the agreed upon documents creating the debt they are not unauthorized additions to debt. Moreover, in the present case, since a personal deficiency against the defendants is waived, the plaintiff's remedy was recovery of the real property subject to the mortgage

> which has occurred by its successful nominal bid and acknowledgement that it has paid all fees and costs without any recourse against the defendants personally. Consequently, the defendants are not prejudiced thereabout and have no legal or equitable claim justifying the Court to vacate the judgment and sale under Rule 60(b)(4) and (5).

(R. p. 5.)

Prejudice is simply not part of the proper analysis with regard to whether the Scurrys are entitled to relief from a void judgment. If a judgment is void, relief from the judgment *must* be granted, and there is no need for further analysis. BB&T, 369 S.C. at 552 n. 1. As the Supreme Court has noted, "[T]he promptness with which relief is sought, the reasons for the failure to act promptly, the existence of a meritorious defense, and the prejudice to the other parties . . . do not apply to a motion made pursuant to Rule 60(b)(4), SCRCP." Id.

The purpose of a mortgage foreclosure is to allow the mortgagor an opportunity to exercise his right to redeem the property by paying the debt in full. Bartles v. Livingston, 282 S.C. 448, 455, 319 S.E.2d 707 (Ct. App. 1984). A mortgage foreclosure action is a proceeding to collect a debt, not to create one. See S.C. Code Ann. § 29-3-10 (2007); Bartles, 282 S.C. at 455. The foreclosure judgment in this action effectively created debt by awarding EverBank an amount as an ostensible "attorney's fee" that exceeds the amount the court could lawfully award. (R. pp. 10, 26, 33-34, 56, 86-87, 113-15, p. 133 ln. 12 through p. 136 ln. 9); see American Federal Bank, FSB v. Number One Main Joint Venture, 321 S.C. 169, 175, 467 S.E.2d 439 (1996) (attorney's fee award greater than incurred fees found to be

improper). The judgment that contains this fee award is void, and Rule 60(b)(4), SCRCP, requires the Court to grant relief to the Scurrys from the judgment.

The $5,200.00 awarded as an attorney's fee in fact bears no relationship to any obligation of EverBank to pay its attorneys. (R. pp. 10, 33, 56, 83-84, 113-15, p. 133 ln. 12 through p. 136 ln. 9.) We know how much the attorney's fees actually are, because EverBank has told us in the proof of claim it filed in the bankruptcy court (using the same law firm, by the way): $835.00. (R. pp. 56, 83-84, p. 133 ln. 12 through p. 136 ln. 9, p. 190.) No evidence that EverBank ever actually incurred more in attorney's fees in this case has ever been put before the court. (R. pp. 56, 83-84, p. 133 ln. 19-25, p. 190.) For the special referee to award EverBank an amount as attorney's fees that is more than six times greater than the only documented attorney's fees ever incurred is plainly not reasonable. (R. pp. 71-74, 85-86, p. 134 ln. 21 through p. 135 ln. 11.) A court's discretion in the amount of attorney's fees awarded is not unfettered.

Where attorney's fees are recoverable pursuant to a contract, the language of the contract controls the scope of what is recoverable as an attorney's fee. E.g., American Federal Bank, 321 S.C. at 175; West v. Gladney, 341 S.C. 127, 135-36, 533 S.E.2d 334 (Ct. App. 2000); Ralph King Anderson, Jr., Attorney's Fees: How to Get Them & Keep Them on Appeal, in 2005 Master-in-Equity Bench/Bar: "Attorneys Fees, Easements & Equitable Remedies" 3, 24 (S.C. Bar 2005) (citing Nationsbank v. Scott Farm, 320 S.C. 299, 465 S.E.2d 98 (Ct. App. 1995)). A court cannot award more in attorney's fees than are made collectable by the parties' agreement. See id. Notes and mortgages are contractual documents. See Saro Investments v. Ocean

Holiday Partnership, 314 S.C. 116, 122, 441 S.E.2d 835 (Ct. App. 1994) (construing mortgage transaction in accordance with "settled principles of contract law"). "Uniformly, the language in a Note and Mortgage providing for an award of attorney's fees and court costs provides that the lender is entitled to reimbursement for the attorney's fees and costs that it actually incurs in its efforts to collect from a non-paying borrower." Curtis L. Coltrane, Ethical Issues for Attorney Fees & Costs, in 2006 Master-in-Equity Bench/Bar 45 (S.C. Bar 2006). An award of attorney's fees "is made to the party, not to his lawyer[,]" and its purpose is to reimburse the party for his litigation expenses. Id. at 48 (citing Reid v. Reid, 280 S.C. 367, 312 S.E.2d 724 (Ct. App. 1984)).

The special referee's order implies that the documents at issue in this case authorized an attorney's fee award unconnected to what fees EverBank actually incurred. (R. p. 5.) This is not supported by the language of the documents at issue. (R. p. 114.) In this case, the object of the provisions in the note concerning attorney's fees is, by its plain language, the lender's reimbursement for money it has expended in paying an attorney to bring a foreclosure action. (R. p. 114.) The note provides that if the lender has accelerated the debt, "Lender may require Borrower to pay costs and expenses including reasonable and customary attorneys' fees for enforcing this Note to the extent not prohibited by applicable law." (R. p. 114, emphasis added.) The note provides only that the lender is entitled to recover its costs and expenses, including the money it expends to hire a lawyer, provided that amount is reasonable. (R. p. 114.) It does not authorize EverBank to "recover" more in attorney's fees than it has incurred in attorney's fees. (R. p. 114.) Moreover, such an interpretation

would be patently unreasonable: Why should the Scurrys, who have lost their house as a result of the efforts of Plaintiff's counsel, "reimburse" EverBank for more in attorneys' fees than EverBank has paid in attorneys' fees? (R. p. 85, p. 134 ln. 21-25.)

The contractual language here provides for the collection of such actual fees, provided they are reasonable. (R. p. 114); see American Federal Bank, 321 S.C. at 175. Otherwise, a mortgage foreclosure action would cease to be a suit of debt collection and become a device of debt creation.

Additionally, even if EverBank actually had incurred $5,200.00 or some greater amount in attorney's fees, the attorney's fee award would not have been reasonable. Glasscock v. Glasscock, 304 S.C. 158, 161, 403 S.E.2d 313 (1991) (setting forth reasonableness factors for attorney's fee award, among them "customary legal fees for similar services"). It is not true that the $5,200.00 "fee is in line with the fee customarily charged by counsel with similar experience in this particular locality." (R. pp. 71-74.) A fee of $5,200.00 is not what other attorneys charge clients for residential mortgage foreclosures. (R. pp. 71-74.) Ostensibly, the $5,200.00 attorney's fee award was based on EverBank's lawyers handling a default residential mortgage foreclosure. (R. pp. 109-11.)

In its complaint, EverBank nowhere states that it will be asking the court to award it, as attorney's fees, thousands of dollars more than it is paying its lawyers to handle the foreclosure action. (R. pp. 24-27.) In the complaint, EverBank states "[i]n and by the terms of the said Note, it is further provided that the maker thereof shall pay all collection costs, including reasonable attorney's fees, if the said Note be

placed in the hands of an attorney for collection after default." (R. p. 25.) Nothing in the complaint could have apprised the Scurrys of the risk that EverBank could be awarded an extra amount of several thousand dollars that is not recoverable under his loan documents. (R. pp. 24-27.) The complaint does not let the reader know that EverBank will be seeking "attorney's fees" that are not collection costs; in fact, it expressly limits what is sought in that regard to "collection costs[.]" (R. p. 25.)

The special referee failed to grasp the nature of the issue and increased the Scurrys' burden on this point beyond what the law requires of a movant seeking relief under Rule 60(b)(4). BB&T, 369 S.C. at 552 n. 1. His was a decision controlled by an error of law and, thus, an abuse of discretion.

II. The judgment was a purported "continuing judgment," which is fundamentally unlawful.

The foreclosure judgment EverBank obtained in this case provides that "[t]he amount of the judgment shall be subject to increase" to permit EverBank to recover additional amounts not awarded in the judgment and further specifically provides for the award of still more in attorney's fees to EverBank at a later time." (R. p. 12.) The judgment provides that not even a hearing is necessary for this to occur; "[s]uch additional costs, commissions and expenses may be established by affidavit and shall be adjudicated by the court without further hearing." (R. p. 12.) This does not comport with due process.

Rule 54(a), SCRCP, provides that a judgment is an order that finally determines the rights of the parties to the litigation. Just as a party to any other case cannot return to the court after prevailing upon its claim to get a still larger award, this is not permitted in a foreclosure case. (R. p. 91, p. 138 ln. 6-11.) Indeed, our

state Supreme Court has specifically rejected the idea of a "continuing judgment" in a case in which "the master ruled the judgment would be continuing and upon submission of a Motion to Amend Judgment and affidavits, respondents could amend the judgment to reflect additional payments for reimbursement." Norris v. Heyward, 312 S.C. 67, 439 S.E.2d 264 (1993). "There is no procedure allowing a continuing judgment." Id. If EverBank can add additional amounts to the judgment, then the judgment does not finally determine the rights of the parties and is not a judgment at all. Id. Relief from a clearly unlawful judgment is unquestionably warranted. See id.; River Road, 300 S.C. at 317.

Further, since the judgment allows EverBank to add additional amounts to the judgment without a hearing, the judgment runs afoul of due process. (R. p. 138 ln. 12-14.) "[D]ue process of law requires that a person shall have a reasonable opportunity to be heard before a legally appointed and qualified tribunal before any binding decree, order, or judgment can be made affecting his rights to life, liberty, or property." LaSalle Bank Nat'l. Ass'n. v. Davidson, 386 S.C. 276, 279, 688 S.E.2d 121, 122-23 (2009) (quoting State v. Brown, 178 S.C. 294, 300, 182 S.E. 838, 841 (1935)). "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." Moore v. Moore, 376 S.C. 467, 473, 657 S.E.2d 743 (2008). "The law recognizes two kinds of errors [with regard to procedural due process]: trial errors and structural defects. The former are subject to 'harmless error' analysis while the latter are not. . . . [S]tructural defects in the constitution of the trial mechanism defy analysis by harmless error standards."

LaSalle Bank, 386 S.C. at 280 (internal quotation marks omitted). Structural defects are errors in the very way that the process of deciding the issue is set up. Id. When a proceeding is structurally defective, the court administering it weighs out justice using tilted scales, and nothing but relief from the judgment produced by such a process can cure the defect. See id.

Here, the judgment is structurally defective. That this and other problems with the judgment in this case are prevalent in foreclosure judgments in this state should not stop this Court from doing something about that; it should compel this Court to do something about it.

III. The decision to deny relief to the Scurrys on the ground of mistake was flawed.

a. Mistake as a ground for relief from a judgment.

"[W]here there is a good faith mistake of fact, and no attempt to thwart the judicial system, there is a basis for relief" under Rule 60(b)(1), SCRCP. Mictronics, Inc. v. S.C. Dept. of Revenue, 345 S.C. 506, 511, 548 S.E.2d 223, 226 (Ct. App. 2001). This is not limited to mistakes about the underlying facts of the action but may extend to mistakes about procedural facts as well. Id. at 508. In Mictronics, the movant seeking relief under Rule 60(b)(1) was found to be entitled to such relief where it did not attend a hearing because its president was mistaken about the date of the hearing. Id.

b. Application of the proper mistake analysis to the Scurry's motion demonstrates that the decision below was grounded in an error of law.

If Mictronics was entitled to relief from a judgment under Rule 60(b) where its president simply wrote down the wrong hearing date and then failed to appear,

surely the Scurrys are entitled to a rehearing or new trial here, where their failure to attend was a product of more reasonable and justified confusion than that of Mictronics' president (which does not seem to have been very justified at all, but was apparently justified enough to afford relief from a judgment). (R. pp. 36-53.) Here, the process server who delivered the summons and complaint to the Scurrys told them that these documents were nothing for them to worry about, so they did not worry about them or take any action with regard to them. (R. pp. 36-37.)

EverBank presented an affidavit of the process server in which he swears he never said any such thing. (R. p. 179.) As noted in previous filings and in argument at the hearing, an affidavit of service is only "*prima facie* evidence of service which may be impeached by extrinsic evidence." Richardson Construction Co., Inc. v. Meek Engineering and Construction Inc., 274 S.C. 307, 311, 262 S.E.2d 913 (1980).

> The proof by affidavit in this case is insufficient when confronted with the other facts and circumstances attending it. When these factors are coupled with [a] counter affidavit denying service, the cumulative effect entitled the defendant to relief from judgment as a matter of right[.]

Id. (internal citation omitted). Here, whether service occurred is not the issue; rather, what is at issue is what the process server said in conjunction with service. The principle, though, is the same: here, the process server has only given an affidavit stating that things did not happen as described in the Scurrys' affidavits. Lenora Scurry's affidavit provides the only detail about what happened. In addition, the affidavits of service that Mr. Costner originally gave in this case indicate that he delivered the process to a "female" – evidence that he did have interaction with Mrs. Scurry, contrary to what he now avers. (R. pp. 165-66.) The Scurrys' detailed

showing prevails over the process server's simple blanket denial that things occurred as described in Mrs. Scurry's affidavit, particularly in light of the doubt thrown upon the issue by this discrepancy, which the Scurrys did not create.

The Scurrys' mistake in failing to attend the hearing in this case is also justified. (R. p. 131 ln. 2 through p. 132 ln. 7.) EverBank led the Scurrys to believe that the hearing would be cancelled because modification efforts were ongoing – and they were, as EverBank's own letters show. (R. pp. 39-52.)

It is plain from the record that EverBank engaged in the practice of "dual tracking," in which a foreclosure action is pursued at the same time as review for a modification is taking place. This practice very often leads foreclosure defendants to believe that they are keeping abreast of what they need to do to oppose foreclosure when, procedurally, they are not. Our Supreme Court recognized this in In re: Mortgage Foreclosure Actions, 396 S.C. 209, 210, 720 S.E.2d 908 (2011) (South Carolina Supreme Court Administrative Order 2011-05-02-01), in which Chief Justice Toal wrote that "breakdowns [in mutually beneficial loss mitigation efforts] are largely the result of difficulty in communication between lender-servicers and debtors, and the fact that foreclosure actions are proceeding to conclusion without regard to ongoing loss mitigation efforts by the parties."

The judgment at issue was the product of mistake. Mistake does not require misrepresentation or any misconduct on the part of the other party for it to provide a ground for relief from a judgment. The special referee's order seems to assume that such is required. (R. pp. 3-4.) It was error for the special referee to fail to grant relief from the judgment on that basis. As noted previously, the Scurrys had more than one

ground for their motion, and proof of any one of the grounds for relief noted in the motion would be sufficient for the special referee to have granted relief, even if all the other grounds failed.

IV. The special referee ignored evidence that EverBank misled the Scurrys.

A party may achieve relief from a final judgment where the party demonstrates "fraud, misrepresentation, or other misconduct of an adverse party." Rule 60(b)(3), SCRCP. In South Carolina, in order for a party to be entitled to relief under this subsection, the moving party must demonstrate that the fraud, misrepresentation, or other misconduct was extrinsic. Raby Constr., LLP v. Orr, 358 S.C. 10, 20-21, 594 S.E.2d 478, 484 (2005); Hagy v. Pruitt, 339 S.C. 425, 431, 529 S.E.2d 714, 717 (2000) ("A judgment may be set aside on the ground of fraud only if the fraud is 'extrinsic' and not 'intrinsic.'"). Misrepresentation and misconduct is extrinsic when it is collateral to the issues tried in a case and effectively deprives the litigant of a fair hearing or the opportunity to present its case. Id. (citing Hilton Head Ctr. of S.C., Inc. v. Pub. Serv. Comm'n of S.C., 294 S.C. 9, 362 S.E.2d 176 (1987)); Mr. G. v. Mrs. G., 320 S.C. 305, 465 S.E.2d 101 (Ct. App. 1995). "Relief is granted for extrinsic fraud on the theory that because the fraud prevented a party from fully exhibiting and trying his case, there has never been a real contest before the court on the subject matter of the action." Chewning v. Ford Motor Co., 354 S.C. 72, 81, 579 S.E.2d 605, 610 (2003) (citing Hilton Head, 294 S.C. at 11, 362 S.E.2d at 177). "Intrinsic fraud, on the other hand, is fraud which was presented and considered in the trial. It is fraud which misleads a court in determining issues and induces the court to find for the party perpetrating the fraud." Id. For example, perjury is usually intrinsic

in character. Id. Intrinsic misrepresentations are usually made in court, while extrinsic misrepresentations are usually made outside of court. See id.

Under South Carolina law, fraud is not the only species of misrepresentation or misconduct that can provide a basis to relieve a party from a judgment. Rule 60(b)(3), SCRCP. If only out-and-out actual fraud did so, there would be no reason for Rule 60(b)(3), SCRCP, to state that relief may be granted for "fraud, *misrepresentation, or other misconduct* of an adverse party." (emphasis added).

Here, EverBank and those acting on its behalf engaged in extrinsic misrepresentation and misconduct that misled the Scurrys and caused them not to appear and defend this foreclosure action. (R. pp. 36-52.) EverBank's process server misrepresented to the Scurrys that the pleadings in this case were nothing for them to be concerned about, so they took no action about them. (R. pp. 36-37.) The Scurrys' belief that this matter was being handled through the modification process and was on its way to resolution through a modification, not a court proceeding, was entirely consistent with what the process server told them and what EverBank kept telling them until after the foreclosure sale had already happened. (R. pp. 36-52.) It was EverBank's dual tracking that created the confusion and led to this foreclosure action "proceeding to conclusion without regard to ongoing loss mitigation efforts by the parties." In re: Mortgage Foreclosure Actions, 396 S.C. at 210.

The special referee's decision concerning what the process server told the Scurrys appears to turn on whether the process server was an agent or apparent agent of EverBank's, acting in that capacity when he told the Scurrys not to worry about the summons and complaint. (R. pp. 3-4.) "Under South Carolina law, the elements

which must be proven to establish apparent agency are: (1) that the purported principal consciously *or impliedly* represented another to be his agent; (2) that there was a reliance upon the representation; and (3) that there was a change of position to the relying party's detriment." Froneberger v. Smith, 406 S.C. 37, 47, 748 S.E.2d 625, 630 (Ct. App. 2013) (emphasis added, internal quotation marks and quotation-related punctuation omitted). "The first element of apparent agency can be established by either: (1) affirmative conduct or (2) conscious and voluntary inaction." Id. Under the second of these, "the principal implies authority by passively permitting another to appear to third parties to have authority to act on his behalf." Id. at 48.

Here, EverBank's acts are what put the process server in the position he was in when he served the Scurrys, and it placed him in a position that a layperson would reasonably interpret as the process server being authorized to communicate on behalf of EverBank with regard to matters subject of the mortgage foreclosure case.[1] (R. p. 82.) After all, the process server is delivering a communication about that very matter. The special referee's order decides that the fact that the process server was authorized by EverBank to deliver the summons and complaint did not give rise to an inference that the process server was authorized to speak on behalf of EverBank. (R. p. 82.) This goes against case law concerning when a person acts in the scope of his employment. The question is not whether the person is authorized to do the specific act or make the specific representation. One is "liable for the torts of his servant even when the servant acts against the express instructions of his master," and "[a]ny doubt as to whether the servant was acting within the scope of his authority when he

[1] It is fairly plain that the Scurrys relied to their detriment on the process server's representation.

[engaged in the conduct at issue] must be resolved against the master[.]" Id. at 52 (internal quotation marks omitted).

"Generally, '[a]gency is a question of fact.'" Id. at 49 (quoting Gathers v. Harris Teeter Supermarket, Inc., 282 S.C. 220, 226, 317 S.E.2d 748, 752 (Ct. App. 1984)). It was a question of fact here and, given the lack of information provided by EverBank to contradict the Scurrys' affidavit testimony, it should have been resolved in favor of the Scurrys. See Richardson Construction, 274 S.C. at 311.

To let this judgment stand rewards EverBank for tricking the Scurrys into not opposing EverBank's case. This is a result justice will not countenance.

V. The special referee ignored that the Scurrys have a complete defense to this foreclosure action.

a. The standard for determining whether a 60(b) movant has a meritorious defense.

"To establish a meritorious defense, a party is not required to show an absolute defense." Mictronics, 345 S.C. at 511. In examining whether there is a meritorious defense, the appropriate assessment of this factor is whether the defense in question "is worthy of a hearing or judicial inquiry because it raises a question of law deserving of some investigation and discussion or a real controversy as to real facts arising from conflicting or doubtful evidence." Id. (quoting Graham v. Town of Loris, 272 S.C. 442, 453, 248 S.E.2d 594 (1978)). To require more would essentially substitute the motion hearing for a trial on the merits, and one in which the burden has shifted to the defendant to disprove the plaintiff's allegations. Cf. id.

b. The Scurrys have a meritorious defense to EverBank's foreclosure claim.

Based on the evidence EverBank put before the special referee, it is not entitled to any relief at all in this case. At the time EverBank commenced this action, it did not own the mortgage it sought to foreclose. Even assuming that the mortgage assignment from MERS was valid, the assignment did not occur until after the commencement of this action. This case was filed on February 27, 2012, and the Scurrys were served the same day. The assignment to EverBank had not been done at that time. The assignment is dated – not recorded but, rather, *dated* – February 28, 2012. (R. p. 122.) EverBank has no standing in this case.

"Standing refers to '[a] party's right to make a legal claim or seek judicial enforcement of a duty or right.'" Powell ex rel. Kelley v. Bank of America, 665 S.E.2d 237, 241 (Ct. App. 2008) (quoting Black's Law Dictionary 1413 (7th ed. 1999)). In a case about whether a plaintiff had standing to prosecute an action on a judgment, the Supreme Court of South Carolina stated as follows:

> Generally, an action cannot properly be commenced until all of the essential elements of the cause of action are in existence – that is, until the cause of action is complete, the subsequent occurrence of a material fact will not avail in maintaining it. *The rights and liabilities of the parties, that is, their rights to an action for judgment or relief, depend upon the facts as they existed at the time of the commencement of the action, and not at the time of trial.*

American Agricultural Chemical Co. v. Thomas, 206 S.C. 355, 360, 34 S.E.2d 592, 594 (1945) (emphasis added).

A South Carolina Court of Appeals case supports this as well. In Brock v. Bennett, 313 S.C. 513, 518, 519, 443 S.E.2d 409, 412 (Ct. App. 1994), the Court of

Appeals vacated the trial court's order and dismissed Brock's complaint for lack of standing, analyzing whether he had standing "at the time this action was commenced." The Court of Appeals noted that "[s]tanding is a fundamental requirement for *instituting* an action." Id. at 519 (emphasis added).

Since MERS owned the mortgage at the time of the commencement of the case, even if EverBank were the holder of the note, it could not be the owner of the mortgage. Ownership of the note and mortgage did not go together; they were split at the outset of the loan, with the mortgagee being one entity (MERS) and the noteholder being another. (R. pp. 113-21); see MERS, 704 N.W.2d 784 (generally describing how the MERS system operates). By acquiring ownership of the note, EverBank could not have acquired ownership of the mortgage, which was still owned by MERS. (R. p. 149 ln. 18 through p. 150 ln. 5.) If this issue had been litigated, EverBank would have lost the case. This is surely a defense worthy of inquiry, a meritorious defense.

"A mortgage and a note are separate securities for the same debt, and a mortgagee who *has a note and a mortgage* to secure a debt has the option to either bring an action on the note or to pursue a foreclosure action." U.S. Bank Natl. Trust Assn. v. Bell, 385 S.C. 364, 684 S.E.2d 199, 204 (Ct. App. 2009) (emphasis added). A plaintiff in a foreclosure action has the burden of establishing the existence of a debt owed to it, its ownership of the mortgage securing that debt, and the debtor's default of the debt obligation. See id. at 205.

Unlike what the special referee stated in his order, this defense is *not* bound up in the evidence that supports the conclusion that at least one of the subsections of

Rule 60(b), SCRCP, is satisfied in this case. (R. pp. 5-6.) This defense would exist independently of that evidence. The special referee ignored this defense and erred in his conception of the issue.

CONCLUSION

The special referee's decision to deny the Scurry's motion for relief from the judgment and sale was an abuse of discretion, as it was grounded in errors of law. This Court should reverse that decision, which would grant the Scurrys the relief they seek, and remand for a trial on the merits.

Respectfully submitted,

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September 29, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM NEWBERRY COUNTY
Court of Common Pleas

Joseph W. Hudgens, Special Referee

Common Pleas Case No.: 2012-CP-36-103
Appellate Case No. 2013-002181

EverBank,.....Respondent,

v.

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Of Whom Lenora Scurry and Patrick Scurry are.....Appellants.

CERTIFICATE OF COUNSEL

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

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PROOF OF SERVICE

I certify that I served the Appellants' final briefs, as well as a bound copy of the record on appeal, 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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