

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Daniel W. Stacy, Jr., Special Referee

Case No. 2016-CP-22-00334

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SC Court of Appeals

The Bank of New York
Mellon, f/k/a The Bank of
New York, as trustee for the
certificateholders of the
CWABS, Inc., Asset-Backed
Certificates, Series 2005-16,

Respondent,

v.

Janet M. Smith, Portfolio
Recovery Associates, LLC
and James E. Byrdic,

Defendants

Of whom Janet M. Smith is the Appellant.

REPLY BRIEF OF APPELLANT

October 15, 2019



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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ARGUMENT 1

 I. THE COURT CANNOT IGNORE THE REQUIREMENTS OF THE COURT RULES
 WHEN EXERCISING ITS EQUITABLE POWERS..... 1

CONCLUSION..... 3

TABLE OF AUTHORITIES

CASES

<u>Evans v. Gunter</u> , 294 S.C. 525, 366 S.E.2d 44 (Ct. App. 1988).....	1
<u>Green v. Lewis Truck Lines, Inc.</u> , 314 S.C. 303, 443 S.E.2d 906 (1994)	2
<u>Maxwell v. Genez</u> , 356 S.C. 617, 591 S.E.2d 26 (2003).....	2
<u>Mr. G v. Mrs. G</u> , 320 S.C. 305, 465 S.E.2d 101 (1995).....	1
<u>Santee Cooper Resort, Inc. v. South Carolina Public Service Com.</u> , 298 S.C. 179, 185, 379 S.E.2d 119, 123 (1989).....	2
<u>Turner v. Washington Realty Co.</u> , 128 S.C. 271, 122 S.E. 768 (1924).....	3
<u>United States Bank Tr. Nat'l Ass'n v. Bell</u> , 385 S.C. 364, 684 S.E.2d 199 (Ct. App. 2009).....	2

RULES

Rule 1, SCRCP.....	2
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ARGUMENT

I. THE COURT CANNOT IGNORE THE REQUIREMENTS OF THE COURT RULES WHEN EXERCISING ITS EQUITABLE POWERS.

The Respondent argues that the trial court could exercise the historical power of a court of equity to modify its decree in light of subsequent conditions. The Respondent cites Mr. G v. Mrs. G, 320 S.C. 305, 465 S.E.2d 101 (1995) for this proposition, but the holding of that case was focused on Rule 60(b)(3) and made no mention of Rule 60(b)(5) or the equivalent historical powers of the court.

The dissent in Mr. G does mention Rule 60(b)(5) and the historical powers of the court, citing Evans v. Gunter, 294 S.C. 525, 366 S.E.2d 44 (Ct. App. 1988). Evans involved an effort to set aside an ongoing order of paternity and child support (which undisputedly had prospective effect) under Rule 60(b)(5), and relied heavily on the language of the rule itself in reaching its holding. The case did not hold that the court's historical powers to modify its own orders exceed the scope of Rule 60(b)(5). At best, Evans can be read to recognize that Rule 60(b)(5) codifies the equitable procedures that existed at the time it was adopted. Nothing in the cases cited by Respondent authorizes a court to ignore the requirements of the Rule.

Further, the South Carolina Supreme Court has held that “the court's equitable powers must yield in the face of an unambiguously worded statute.” Santee Cooper Resort, Inc. v. South Carolina Public Service Com., 298 S.C. 179, 185, 379 S.E.2d 119, 123 (1989). Likewise, the trial court cannot ignore the requirements of the court rules when exercising its equitable powers. The South Carolina Rules of Civil Procedure “govern the procedure in all South Carolina courts in all

suits of a civil nature, whether cognizable as cases at law or in equity.” Rule 1, SCRPC. In interpreting the meaning of the South Carolina Rules of Civil Procedure, the Court applies the same rules of construction used to interpret statutes. Green v. Lewis Truck Lines, Inc., 314 S.C. 303, 443 S.E.2d 906 (1994). “If a rule’s language is plain, unambiguous, and conveys a clear meaning, interpretation is unnecessary and the stated meaning should be enforced.” Maxwell v. Genez, 356 S.C. 617, 591 S.E.2d 26 (2003). Therefore, the trial court did not have the inherent equitable authority to vacate the foreclosure judgment outside the scope of Rule 60(b), and abused its discretion in doing so.

The Respondent cited United States Bank Tr. Nat’l Ass’n v. Bell, 385 S.C. 364, 684 S.E.2d 199 (Ct. App. 2009) for the proposition that the remedy sought by Smith would be inequitable, though that case has no holding relevant to the point for which it was cited. To the contrary, our Supreme Court has held that, while equity may relieve a party from the effects of a mutual mistake, or a unilateral mistake accompanied by inequitable conduct by the other party, equity will not protect a party against a mistake resulting from their own negligence and failure to exercise due diligence. Turner v. Washington Realty Co., 128 S.C. 271, 122 S.E. 768 (1924). In that case, the court declined to set aside a judgment creditor’s winning bid at a foreclosure sale where the creditor mistakenly believed that the other judgment creditors were not entitled to be paid because he had failed to search for other judgments prior to seeking foreclosure. Id.

In the present case, the parties agree that the original mortgage between the parties involved a mutual mistake as to the property encumbered. Answer and Counterclaim p. 3; Affidavit of Janet Smith p. 1-2; Appellant’s Brief p. 4; Respondent’s Brief p. 10. However, after the Respondent successfully had the mortgage reformed by the 2015 Order, the Respondent’s subsequent choice to initiate foreclosure in Georgetown County was entirely the result of its own


failure to exercise due diligence. The Respondent presented no evidence of inequitable conduct on the part of Smith, who even made an effort to inform Respondent of its own mistake. Emails, p. 4. Having been placed on notice of its error, the Respondent's decision to carry the foreclosure against the Georgetown property to completion would have to be either a conscious choice or gross negligence. Therefore, it is not inequitable that Respondent be left with the results of that decision.

CONCLUSION

For the reasons stated, this Court should reverse the order of the circuit court and reinstate the judgment of foreclosure.

Respectfully Submitted,

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Date: October 15, 2019

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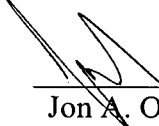
Defendants

Of whom Janet M. Smith is the Appellant.

PROOF OF SERVICE

I certify that I served the foregoing Reply Brief of Appellant in this case on the Respondent by depositing a copy of it in the United States Mail, postage prepaid, on October 15, 2019, addressed to its attorney of record, Theodore von Keller, Post Office Box 4216, Columbia, SC 29240.

October 15, 2019



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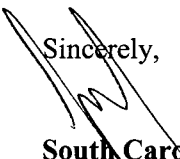
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Appellate Case No. 2019-000983

Dear Clerk:

Enclosed please find the Reply Brief of Appellant and Proof of Service to Respondent, with one copy, in the above referenced case.

If you have any questions, please do not hesitate to give me a call at 843-381-8182.

Sincerely,


South Carolina Legal Services
Jon A. Ozolins
Staff Attorney

Enclosure

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SC Court of Appeals



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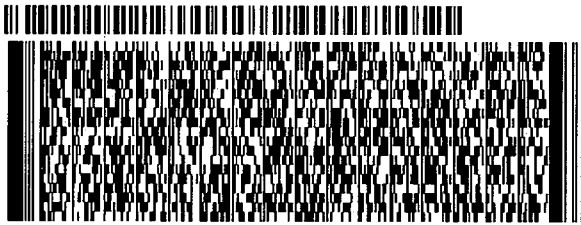
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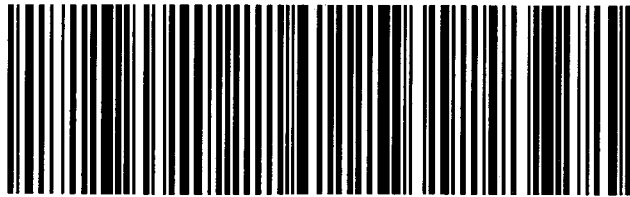


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