STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
The Honorable Marvin H. Dukes, Master-in-Equity

Case No.: 2011-CP-07-0340
Appellate Case No.:2019-000047

TD Bank N.A.....Respondent,

v.

Wilbert Roller, Jr., Betty V. Roller and James Williams.....Defendants.

Wilbert Roller, Jr., Betty V. Roller are the.....Appellants.

INITIAL BRIEF OF RESPONDENT

Respectfully submitted,

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STATEMENT OF THE CASE

This is a foreclosure matter on real property in Beaufort County. The Complaint was originally filed on January 24, 2011 against mortgagors Wilbert and Betty Roller. (Complaint). The Respondent discovered a potential title defect related to the subject property. On October 26, 2011, the Court entered a Consent Order to Amend Caption and Amend Complaint, in which the name of the Plaintiff was changed to reflect that TD Bank N.A. was the successor to the original Plaintiff and to add claims against James Williams, who claimed an ownership interest in the subject property. (Consent Order to Amend Caption and Amend Complaint). On January 6, 2014, the case was referred to the Beaufort County Master in Equity. (Order of Referral).

On April 29, 2014, the Master in Equity conducted a contested hearing related to the foreclosure portion of the case. (April 29, 2014 Transcript). During the hearing, the Master in Equity denied Appellants' motion for involuntary non-suit. (April 29, 2014 Transcript p. 62-64). On July 3, 2014, the Master in Equity entered and Order of Bifurcation and Judgment of Foreclosure and Sale (Judgment of Foreclosure and Sale). In this order, the Master in Equity noted that he held the trial of the foreclosure portion of the lawsuit and bifurcated the title dispute portion of the lawsuit to provide Defendant James Williams (not a party to this appeal) an opportunity to retain counsel for the title dispute. (Judgment of Foreclosure and Sale p. 1). The Master in Equity held that the Respondent was the current holder of the subject note as successor to Carolina First Bank. (Judgment of Foreclosure and Sale p. 7). He denied Appellant's motion for involuntary non-suit. (Judgment of Foreclosure and Sale pp. 6-7.). He also found for the Respondent on the foreclosure action, awarded the Respondent $2,563,396.24 in damages and ordered that the subject property be sold at a foreclosure sale to be held on an undetermined date. (Judgment of Foreclosure and Sale pp. 9-10). The Order notes that the

Respondent "does not waive the right to a personal or deficiency judgment against the [Appellants]." (Judgment of Foreclosure and Sale p. 10). Finally, the Master in Equity also noted that the title portion of the lawsuit would be tried on June 26, 2014. (Judgment of Foreclosure and Sale p. 9). Because the title dispute impacted the marketability of the subject property, the foreclosure sale could not occur until the title dispute was resolved. The Master in Equity subsequently denied the Appellants' motion to reconsider. (Motion to Reconsider Master in Equity's Order of Bifurcation and Judgment of Foreclosure and Sale; Order Denying Motion).

On December 3, 2014, the Appellants served a Notice of Appeal of the Master in Equity's Judgment of Foreclosure and Sale and subsequent denial of the motion to reconsider. (2014 Notice of Appeal). This notice was filed on December 17, 2014.

The parties settled the disputes related to the title issue and placed the terms of the settlement on the record during a hearing on October 19, 2015 (transcript unavailable). The parties negotiated a written settlement agreement to resolve the title claim. In accordance with the parties' agreement, the Appellants dismissed the original appeal on January 26, 2016. (Dismissal of Appeal). Respondent was then forced to file a Motion to Enforce the Settlement Agreement on March 18, 2016. (Motion to Enforce Settlement Agreement). The Court entered an order enforcing the settlement agreement on April 8, 2016. (Order Enforcing Settlement Agreement). Defendant James Williams was dismissed as a party. The Master in Equity then entered a consent order increasing the amount of the deficiency judgment to $2,924,228.70. (May 25, 2016 Consent Order).

The subject property was sold at foreclosure sale on June 6, 2016 to a third party buyer for $421,000. (Master's Report on Sale). The Master in Equity subsequently issued a deed to the assignee of the third party buyer.

On June 29, 2017, the Respondent and Appellants entered into Consent Order for Appraisal, which governed Appellants' request for an appraisal rights determination pursuant to S.C. Code Ann. § 29-3-680 et seq. (Consent Order for Appraisal). After a long period of delay caused by the appraiser retained by the Appellants, the board of appraisers filed their return pursuant to S.C. Code Ann. § 29-3-740 on July 17, 2018 (Return of Appraisal Board). In the return, the appraisal board determined the value of the subject property on the date of sale to be $900,000.

The Appellants then began a confusing series of procedural maneuvers. On August 20, 2018, the Appellants filed an affidavit of Appellant Wilbert Roller which purports to describe the history of the subject property and his opinion of value. (Affidavit of Wilbert Roller). Respondent filed a brief in opposition to this affidavit. (Memorandum in Opposition to Affidavit of Wilbert Roller). On August 29, 2018, the Appellants filed a Motion to Vacate Deficiency Judgment, a document which was captioned with the appraisal rights statute. (Motion to Vacate Deficiency Judgment p. 1). It was unclear from the motion whether it was an appeal of the appraisal rights board or a Rule 60(b)(3) motion. On September 5, 2018, the Respondent filed a Memorandum in Opposition to the Motion to Vacate. (Memorandum in Opposition to Motion to Vacate). On October 26, 2018, the Master in Equity entered an Order Denying Defendants' Motion to Vacate the Deficiency Judgment. (Order Denying Motion to Vacate). The grounds for denial were: (1) the motion was an untimely appeal of the return of the appraisal board; the Appellants failed to show any evidence of fraudulent conduct to support a vacation under Rule 60; and (3) the Master in Equity did not have the discretion to vacate the deficiency judgment as a matter of equity under South Carolina law. (Order Denying Motion to Vacate). In addition, the Master in Equity reduced the deficiency judgment against the Appellants by the difference

between the appraisal return value ($900,000) and the foreclosure sales price ($421,000). (Order Denying Motion to Vacate p. 5)

The Appellants then filed a motion to reconsider the Order Denying Motion to Vacate, and yet another affidavit of Appellant Wilbert Roller. (Motion to Reconsider Order Denying Motion to Vacate; Affidavit of Wilbert Roller). The Master in Equity denied this motion by order filed on December 12, 2018. (December 12, 2018 Order). This appeal followed.

STANDARD OF REVIEW

This appeal relates to three different orders of the Beaufort County Master in Equity, including: (1) Master in Equity's verbal order denying Appellant's motion for involuntary non-suit ("Non-Suit Order"), which was subsequently explained in the order of judgment; (2) Master in Equity's Order of Bifurcation and Judgment of Foreclosure and Sale dated July 3, 2014 and form order denying Motion to Reconsider dated November 18, 2014 ("Judgment of Foreclosure and Sale"); and (3) Master in Equity's Order Denying Defendant's Motion to Vacate Deficiency Judgment dated October 26, 2018 and Order Denying Motion for Reconsideration dated December 12, 2018 ("Order Denying Motion to Vacate"). As set forth herein, the only ruling that is not waived and time-barred is the denial of the Order Denying Motion to Vacate, and the Court need not consider the other orders. However, the standard of review will be addressed for all orders.

In deciding whether to grant or deny a motion for involuntary nonsuit, the trial court must view the evidence and all reasonable inferences in the light most favorable to the plaintiff – in this case, the Respondent. *Bullard v. Ehrhardt*, 283 S.C. 557, 324 S.E.2d 61 (1984).

In reviewing the Judgment of Foreclosure and Sale, the Court may determine facts in accordance with its own view of the preponderance of the evidence. *Fox v. Moultrie*, 379 S.C.

609, 666 S.E.2d 915 (2008). However, the court is not required to disregard the Master in Equity's findings, as the master is in the better position to assess the witness' credibility. *Fox*, 379 S.C. at 613, 666 S.E.2d at 917. The Appellant is not relieved of the burden of convincing the appellate court that the Master in Equity committed error in his findings. *Id.*

The Master in Equity's determination regarding Appellant's Motion to Vacate Deficiency Judgment is in the nature of a Rule 60 motion, lies within his sound discretion, and will not be disturbed on appeal absent an abuse of discretion. *RRR, Inc. v. Toggas*, 378 S.C. 174, 662 S.E.2d 438 (Ct. App. 2008). Therefore, the ruling on the Order Denying Motion to Vacate must be reviewed using an abuse of discretion standard. An abuse of discretion occurs when the judge issuing the order was influenced by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support. *In Re Estate of Weeks*, 329 S.C. 251, 259, 495 S.E.2d 454, 459 (Ct. App. 1997). Therefore, unless the Master-in-Equity made an error of law or his ruling was made without evidentiary support, his ruling must be affirmed.

ARGUMENT

I. THE APPEAL OF THE NON-SUIT ORDER AND JUDGMENT OF FORECLOSURE AND SALE IS UNTIMELY.

The Master in Equity's Non-Suit Order was verbally delivered on April 29, 2014 with counsel present. (April 29, 2014 Transcript p. 62-64). The Judgment of Foreclosure and Sale was entered on July 3, 2014 and the denial of the motion to reconsider the Judgment of Foreclosure and Sale was entered on November 18, 2014. (Judgment of Foreclosure and Sale; Order Denying Motion to Reconsider). These orders were received by Appellants' counsel no later than November 24, 2014, as evidenced by the original Notice of Appeal filed in this action.

(2014 Notice of Appeal, page 1). This 2014 appeal was dismissed by the Appellants on January 26, 2016. (Dismissal of Appeal).

The Appellants now seek to appeal the Master in Equity's denial of the Non-Suit Order and the Judgment of Foreclosure and Sale five years after those orders were entered and despite the fact that the Appellants previously appealed those orders and then dismissed the appeal. This present appeal of judgments rendered in 2014 is clearly time-barred.

Rule 203(b)(1), SCACR provides:

> A notice of appeal shall be served on all respondents within thirty (30) days after receipt of written notice of entry of the order or judgment. When a timely motion for judgment n.o.v. (Rule 50, SCRCP), motion to alter or amend the judgment (Rules 52 and 59, SCRCP), or a motion for a new trial (Rule 59, SCRCP) has been made, the time for appeal for all parties shall be stayed and shall run from receipt of written notice of entry of the order granting or denying such motion. When a form or other short order or judgment indicates that a more full and complete order or judgment is to follow, a party need not appeal until receipt of written notice of entry of the more complete order or judgment.

Rule 203(b)(1), SCACR sets forth the procedures for appealing a decision of the court of common pleas and, by way of Rule 203(b)(4), SCACR, a decision of a master-in-equity. *Wells Fargo Bank, N.A. v. Fallon Props. S.C., LLC*, 422 S.C. 211, 214, 810 S.E.2d 856, 857 (2018). Timely service of the notice of intent to appeal is a jurisdictional requirement, and the Court has no authority to extend or expand the time in which the notice of intent to appeal must be served. *Mears v. Mears*, 287 S.C. 168, 337 S.E.2d 206 (1985). As set forth in the 2014 Notice of Appeal, the Appellants' counsel received notice that the motion to reconsider the Judgment of Foreclosure and Sale and order denying motion for involuntary non-suit were denied on

November 24, 2014 (2014 Notice of Appeal, page 1). Therefore, the appeal of the Non-Suit Order and Judgment of Foreclosure and Sale must be dismissed as untimely.[1]

II. THE MASTER IN EQUITY HAD SUBJECT MATTER JURISDICTION OVER THE ACTION, AND THE MASTER IN EQUITY CORRECTLY HELD THAT RESPONDENT WAS THE REAL PARTY IN INTEREST.

The Appellants' attempt to rehash an argument made to the Court as a motion for involuntary non-suit and ruled upon in the 2014 trial of this action must be rejected for the same reasons it was rejected at the trial. The Appellants argue that the Respondent produced insufficient evidence that the Respondent was the holder of the subject note and mortgage by virtue of a merger with Carolina First Bank and therefore the Court lacked subject matter jurisdiction over the claim.

A. The Master in Equity Had Subject Matter Jurisdiction Over This Lawsuit.

The Appellants' argument does not go to subject matter jurisdiction. Subject matter jurisdiction refers to the court's power to hear and determine cases of the general class to which the proceedings in question belong. *Dove v. Goldkist*, 314 S.C. 235, 442 S.E.2d 598 (1994). There is no question that the Master in Equity had the power to hear this foreclosure action by virtue of the order of referral. The Appellants' argument is actually that the Respondent is not a real party in interest. "[T]he issue of whether a party is a real party in interest does not involve subject matter jurisdiction." *Bardoon Props., NV v. Eidolon Corp.*, 326 S.C. 166, 170-171, 485 S.E.2d 371 (1997).

[1] The dismissal of the appeal as to the Non-Suit Order and Judgment of Foreclosure and Sale renders arguments II and III in this brief moot. However, Respondent will include those arguments to ensure that the issue is briefed in the event the Court does not deem the appeal untimely.

B. To the Extent the Appellants Argue That Respondent Was Not a Real Party in Interest, That Argument Was Waived.

"The purpose of a real party in interest provision is to assure that a defendant is required only to defend an action brought by a proper party and that such an action need be defended only once." Id. at 169, 485 S.E.2d at 373 (citations omitted). "The right of a plaintiff to maintain a suit, while frequently treated as going to the question of jurisdiction, goes, in reality, to the right of the plaintiff to relief rather than to the jurisdiction of the court to afford it." *Id.* "A challenge to a party's status as real party in interest must be made promptly or the court may conclude the point has been waived." *Id.*

The Appellants consented to substituting the Respondent as the Plaintiff in the lawsuit "as successor to Carolina First Bank" and to an Amended Complaint in which the Respondent was the named Plaintiff. (Consent Order to Amend Caption and Amend Complaint). The Appellants then answered the Amended Complaint (using an incorrect caption) and did not raise subject matter jurisdiction, real party in interest or any other defense related to the Respondent's standing. (Answer to Amended Complaint). The Appellants never raised the real party in interest by name, and only made an argument at the time of trial. Because the Appellants failed to object to the amendment adding the Respondent and failed to otherwise raise the real party in interest argument promptly, they have waived the argument.

C. The Respondent Is Clearly the Real Party in Interest and Had Standing to Enforce the Note and Mortgage.

As set forth above, the Master in Equity substituted the Respondent as the plaintiff by virtue of a consent order filed on October 26, 2011. (Consent Order to Amend Caption and Amend Complaint). The Master in Equity found that the Respondent was the real party in interest, and substituted it as the plaintiff. *See Bryant v. Waste Mgmt., Inc.*, 342 S.C. 159, 165,

536 S.E.2d 380, 383 (Ct. App. 2000) ("A trial court has the sound discretion to substitute parties when some act has affected the capacity of a named party to be sued, and its decision will not be reversed on appeal absent a showing of an abuse of discretion."). Under South Carolina law, "[w]hen a corporate defendant is absorbed by merger during the pendency of an action against it, the plaintiff is entitled to have the absorbing corporation substituted as a party defendant." *Id.* at 164, 536 S.E.2d at 383. Likewise, where the plaintiff is absorbed by merger, the absorbing corporation is entitled to be substituted as a plaintiff.

Respondent's trial witness testified that the Respondent became the successor in interest by merger to Carolina First Bank on June 17, 2010, and that Respondent was the present holder of the subject note and mortgage on the day of trial. (April 29, 2014 Transcript p. 17). Further, the trial witness produced the original note in the Respondent's possession, causing Appellant's counsel to withdraw an objection to the introduction of the note as evidence. (April 29, 2014 Transcript p. 21). The Respondent is not required to provide proof anything more than that information, as the Master in Equity correctly decided. Therefore, the Master in Equity's Denial of the Appellant's motion for involuntary non-suit must be affirmed.

III. THE MASTER IN EQUITY PROPERLY DENIED APPELLANTS' MOTION FOR INVOLUNTARY NON-SUIT BECAUSE THE RESPONDENT PROVED THE DEBT AND THE APPELLANTS' DEFAULT ON THE DEBT.

At trial, the Respondent proved the debt owed through the testimony of Benjamin Jenkins, and officer of the Respondent. Mr. Jenkins testified that he was familiar with the loan documents, that the Appellants were in default on the note, that Respondent sent notice of default, that the Appellants had not cured the default and that the Appellants owed $2,538,396.24 as of the date of trial. (April 29, 2014 Transcript pp. 15-38). This testimony was supported by the introduction of the relevant notes, mortgages, demand letters and payoff statements related to

the loan.[2] (April 29, 2014 Transcript pp. 15-38). The Master in Equity determined that this evidence was sufficient to prove that the Respondent was the holder of the subject note, was owed $2,538,396.24 by the Appellants, and was entitled to foreclose on the subject mortgage. (Judgment of Foreclosure and Sale pp. 9-12).

The Master in Equity denied the Appellants' motion for involuntary non-suit. In so doing, he held that possession of the original note is sufficient evidence of the Respondent's ownership of the loan and that Mr. Jenkins' testimony concerning the accounting of the loan was also sufficient. (April 29, 2014 Transcript p. 64).

"When the defendant makes a motion for an involuntary nonsuit, it is incumbent upon the trial judge, and [the appellate court], to view the evidence and all inferences arising therefrom in the light most favorable to the plaintiff. *Fielding Home for Funerals v. Public Sav. Life Ins. Co.*, 271 S.C. 117, 119-120, 245 S.E.2d 238, 239 (1978). "If the inferences from the plaintiff's evidence, when viewed in the light most favorable to him, are such as would support a verdict, a nonsuit is improper." *Id.* The Appellants complain that the Master in Equity gave their evidence "no weight." Appellant's Brief at 20. That may or may not be true, but it is the court's prerogative whether or not to give weight to evidence presented by the parties. Respondent established the debt and the Appellants' default. That is all that is required in a foreclosure action. *United States Bank Trust Nat'l Ass'n v. Bell*, 385 S.C. 364, 374-375, 684 S.E.2d 199, 205 (Ct. App. 2009) ("Generally, the party seeking foreclosure has the burden of establishing the existence of the debt and the mortgagor's default on that debt. Once the debt and default have been established, the mortgagor has the burden of establishing a defense to foreclosure such as

[2] The Appellant dismissed the original appeal in this action on January 16, 2016. (Dismissal of Appeal). For this reason, Respondent's counsel assumed there would be no further appeal of the 2014 Judgment of Foreclosure and Sale. As such, counsel did not secure the trial exhibits from the Clerk of Court.

lack of consideration, payment, or accord and satisfaction."). Viewing the evidence in the light most favorable to the Respondent, it is clear that the Master in Equity properly denied the Appellants' motion for involuntary non-suit, and his ruling should be affirmed.

IV. THE APPELLANTS' CLAIM THAT THE DEFICIENCY JUDGMENT SHOULD BE SET ASIDE DUE TO AN INADEQUENT FORECLOSURE SALE PRICE FAILS BECAUSE THE APPELLANT FAILED TO RAISE THE ISSUE TO THE MASTER IN EQUITY AND BECAUSE THE APPEAL IS UNTIMELY.

The Appellants assert that the deficiency judgment entered against them should be vacated because the foreclosure sales price was so low as to "shock the conscience of the court." While the argument made by Appellants is to set aside the deficiency judgment, the law related to this issue has been applied to vacate foreclosure sales, not to vacate the deficiency judgment. *Am. Gen. Fin. Servs. v. Brown*, 376 S.C. 580, 658 S.E.2d 99 (2008); *Bloody Point Prop. Owners Ass'n v. Ashton*, 410 S.C. 62, 762 S.E.2d 729 (Ct. App. 2014). The distinction is important to the timing of this appeal, as set forth below.

A. The Appellant Failed to Raise the Issue of Price Inadequacy to the Master in Equity.

The Appellants did not raise a claim to vacate the foreclosure sale due to an allegedly inadequate sales price before the Master in Equity. (Motion to Vacate Demand for Deficiency; Motion for Reconsideration; Memorandum in Support of Motion for Reconsideration). They attempt to raise the argument for the first time on appeal. Since this issue has not been preserved, it must not be considered on appeal. *State v. Carlson*, 363 S.C. 586, 597, 611 S.E.2d 283, 288 (Ct. App. 2005) ("Arguments not raised to or ruled upon by the trial court are not preserved for appellate review.").

B. The Appellant Did Not Timely Appeal the Amount of the Foreclosure Sale Price.

As set forth above, the appellate courts have vacated foreclosure sales, and not deficiency judgments, when the sales price was so low as to shock the conscience of the court. *Bloody Point Prop. Owners Ass'n v. Ashton*, 410 S.C. 62, 70, 762 S.E.2d 729, 733-734 (Ct. App. 2014) ("A judicial sale will be set aside when either: (1) the sale price is so gross as to shock the conscience[;] or (2) the sale is accompanied by other circumstances warranting the interference of the court.") (citations omitted); *Am. Gen. Fin. Servs. v. Brown*, 376 S.C. 580, 584, 658 S.E.2d 99, 101 n. 2 (2008) ("Furthermore, there are guidelines for an equity court to set aside a foreclosure sale."). The foreclosure sale in this matter took place on June 6, 2016, and the Master in Equity issued a Report on Sale on August 29, 2016. (Report on Sale). To the extent the Appellants seek to vacate the foreclosure sale due to inadequacy of sales price, the time to file that motion and appeal the ruling would have been at the time the Report on Sale was issued. Therefore, to the extent the issue is preserved, the Appellants failed to timely serve the Notice of Appeal. *See* Rule 203(b)(1), SCACR.

V. TO THE EXTENT THE MASTER IN EQUITY RULED THAT THE FORECLOSURE SALE PRICE WAS NOT LEGALLY INADEQUATE, HE DID NOT ABUSE HIS DISCRETION.

As set forth above, the Plaintiff failed to preserve the issue for appellate review and also failed to timely serve the Notice of Appeal of the Master in Equity's Report on Sale. However, assuming, arguendo, that the issue is properly before the Court, the Master in Equity did not abuse his discretion in denying an effort to vacate the foreclosure sale.

"A judicial sale will be set aside when either: (1) the sale price is so gross as to shock the conscience[;] or (2) the sale is accompanied by other circumstances warranting the interference of the court." *Bloody Point Prop. Owners Ass'n v. Ashton*, 410 S.C. 62, 70, 762 S.E.2d 729, 733-734 (Ct. App. 2014). "South Carolina has not established a bright line rule for what percentage

the sale value must be with respect to the actual value in order to shock the conscience of the court." *Id. (citing E. Sav. Bank, FSB v. Sanders*, 373 S.C. 349, 359, 644 S.E.2d 802, 807 (Ct. App. 2007). "However, a search of South Carolina jurisprudence reveals only when judicial sales are for less than ten percent of a property's actual value, have our courts consistently held the discrepancy to shock conscience of the court." *Id.*

The subject property sold at the foreclosure sale for $421,000. (Master's Report on Sale). Based on the information provided by appraisers hired to value the subject property pursuant to S.C. Code Ann. § 29-3-740, the Master-in-Equity determined the value of the subject property as $900,000.00. (Return of Appraisal Board; Order Denying Motion to Vacate Deficiency Judgment p. 5). Therefore, the subject property sold at the foreclosure sale for approximately 46% of appraised value, far greater than the less than 10% required to vacate a foreclosure sale.

The Appellants contend that a June 10, 2008 unconsummated contract to sell the subject property to Bi-Lo provides the valuation by which the foreclosure sales price should be measured. (Bi-Lo Contract). That contention is absurd. The contract was never completed, is dated eight years prior to the foreclosure sale and contains numerous conditions that the seller could never meet. It is completely irrelevant to the determination of the appraised value of the subject property on the date of the foreclosure sale. As set forth above, that appraised value was $900,000, and the foreclosure sales price of $421,000 cannot, as a matter of law, shock the conscience of the Court.

VI. THE MASTER IN EQUITY DID NOT ABUSE HIS DISCRETION IN DENYING APPELLANTS' MOTION TO VACATE DEFICIENCY JUDGMENT.

The Appellants fail to provide clarity regarding the nature of the Motion to Vacate Deficiency Judgment filed on August 29, 2018. Indeed, the motion is captioned with a reference to S.C. Code Ann. § 29-3-680 – the appraisal rights statute. On one hand, the Appellants argue

that the Master in Equity misconstrued their legal position by treating the Motion to Vacate as an appeal of the return of the appraisal board rather than a Rule 60 motion challenging the deficiency judgment. However, on the other hand, the Appellants argue that their due process rights were violated because the Respondent violated Rule 60(b)(3) by ***depriving the appraisal panel*** of the ability to see the 2007 pre-loan appraisal of the subject property when evaluating the value of the subject property pursuant to S.C. Code Ann. § 29-3-680 *et seq.* In reality, the Appellants realized they had missed the ten-day deadline to appeal the appraisal board return set forth in S.C. Code Ann. § 29-3-750 and attempted to salvage an argument by mischaracterizing their Motion to Vacate as a Rule 60 motion. However, regardless of whether the Motion to Vacate is deemed to be an appeal pursuant to S.C. Code Ann. § 29-3-750 or a Rule 60(b)(3), SCRCP motion, it is untimely. Further, the Master in Equity did not abuse his discretion in denying the Motion to Vacate on substantive grounds.

A. The Motion to Vacate Was Untimely Pursuant to S.C. Code Ann. § 29-3-750.

S.C. Code Ann. § 29-3-750 provides:

> The petitioner or the judgment creditor may appeal from the return of the appraisers upon notice stating the ground of such appeal served upon the other party ***within ten days after notice of the filing of the return***, such appeal being to the court having jurisdiction of the action or any judge thereof, who shall hear the appeal without a jury in open court or at chambers upon affidavits or oral testimony as he deems advisable. Such court may confirm the return or order a new appraisal upon such terms as he may deem equitable and an appeal from his order or decree shall lie as in other equity cases.

(emphasis added). The return of the appraisal board was filed on July 27, 2018. (return of appraisal board). Counsel for appellants received electronic notice of the return on that day. (case docket p. 2). The appellants did not file the motion to vacate deficiency judgment until August 29, 2018. (Motion to Vacate Deficiency Judgment). This was more than ten days after

the appellants received notice of the appraisal board return. Therefore, the master in equity correctly held that the motion to vacate was untimely pursuant to S.C. Code Ann. § 29-3-750.

B. The Motion to Vacate Was Untimely Pursuant to Rule 60(b), SCRCP.

To the extent the Appellants argue that the Motion to Vacate is a Rule 60(b)(3) motion, the motion was untimely. The Motion to Vacate Deficiency Judgment attempts to do just that – vacate the deficiency judgment based on alleged fraud by the Respondent in failing to provide the 2007 pre-loan appraisal of the subject property for the appraisal board's review. The deficiency judgment was entered at the time of the Judgment of Foreclosure and Sale on July 3, 2014. (Judgment of Foreclosure and Sale). The deficiency judgment was then increased, ***by consent***, on May 25, 2016. (Consent Order to Supplement and Amend Judgment). The Appellants now contend that this deficiency judgment should be vacated due to alleged fraudulent conduct by the Respondent. It is too late. Rule 60(b) provides that a motion to vacate a court order due to "fraud, misrepresentation or other misconduct of an adverse party" must be made "not more than one year after the judgment, order or proceeding was entered or taken." At the latest, the deficiency judgment was entered on May 25, 2016. The Appellants did not file their Motion to Vacate until August 29, 2018. The motion was untimely.

C. The Master in Equity Did Not Abuse His Discretion in Denying the Motion to Vacate on Substantive Grounds.

The Appellants contend that the Respondent engaged in misconduct by failing to provide the 2007 pre-loan appraisal that was commissioned at the time the Respondent's predecessor provided the subject loan to the Appellants. They contend that the failure to provide the 2007 pre-loan appraisal deprived the appraisal board and the Master in Equity of relevant information to ascertain when determining the value of the subject property. This contention is absurd, and is made despite the fact that the Appellants never requested the appraisal (or anything else) in

discovery. (Order Denying Defendants' Motion to Vacate p. 3). The Master in Equity was right to reject the argument.

The appraisal rights statute provides:

> The board of appraisers as so constituted shall proceed to view and value the mortgaged property and all or a majority thereof shall make a sworn return within thirty days from their appointment of the ***true value of the property as of the date of sale***, taking into consideration sale value, cost and replacement value of improvements, income production and all other proper elements which, in their discretion, enter into the determination of true value.

S.C. Code Ann. § 29-3-720. The statute plainly provides the appraisal panel with authority to determine the value on the date of sale using information that the panel deems relevant. There is no evidence that the appraisal panel or the Master in Equity ever requested the 2007 pre-loan appraisal. That is not surprising. A 2007 appraisal has no relevance to a determination of the value of the subject property on the date of the foreclosure sale in 2016. Therefore, the Master in Equity properly held that the Respondent did not engage in any fraud or misconduct sufficient to vacate the deficiency judgment.

D. The Master in Equity Has No Authority to Vacate the Deficiency Judgment Based on Principles of Equity.

The right to a deficiency judgment is provided by statute. S.C. Code Ann. § 29-3-660. "Absent grounds to set aside the decree of foreclosure, there is no discretion to cut off the right to a deficiency after sale where (1) the complaint in the foreclosure action asks for personal judgment, (2) the amount of the debt is fixed in the foreclosure decree, and (3) the sale is insufficient to satisfy the entire debt." *Am. Gen. Fin. Servs. v. Brown*, 376 S.C. 580, 584, 658 S.E.2d 99, 101 (2008) (citations omitted). In *Brown*, the trial court refused to enter a deficiency judgment because doing so "would not be equitable." *Id.* The Supreme Court of South Carolina held that a Master-in-Equity does not have the discretion to deny a deficiency judgment unless

the creditor expressly waived the claim for a deficiency. *Id.* at 583, 658 S.E.2d at 100. The Plaintiff did not waive its right to the deficiency judgment, so the Master in Equity was correct in holding that he had no power to vacate the deficiency judgment as requested by the Appellants.

VII. THE MASTER IN EQUITY DID NOT ABUSE HIS DISCRETION IN HOLDING THAT THE APPELLANTS' DUE PROCESS RIGHTS WERE NOT VIOLATED.

A. The Appellants Failed to Preserve their Due Process Argument.

The Appellants did not argue that their due process rights were violated in the Motion to Vacate Deficiency Judgment. (Motion to Vacate Deficiency Judgment). They included this argument in the Motion for Reconsideration of the Master in Equity's Order Denying Motion to Vacate Deficiency Judgment. Therefore, this argument is not preserved for review. *Patterson v. Reid*, 318 S.C. 183, 185, 456 S.E.2d 436, 437 (Ct. App. 1995) (party cannot use a motion to reconsider, alter, or amend a judgment to present an issue that could have been raised prior to the judgment but was not).

B. The Master in Equity Did Not Abuse His Discretion in Holding that the Appellants' Due Process Rights Were Not Violated.

The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S. Ct. 1187, 1191, 14 L. Ed. (2d) 62 (1965). The Appellants claim that the Respondent suppressed the 2007 pre-loan appraisal, thereby depriving the Appellants the opportunity to present the appraisal to the appraisal board or the court. Appellants' Brief at 33. First, the Appellants never requested the appraisal prior to the return of the appraisal board. (Order Denying Motion to Vacate Deficiency Judgment p. 3). Further, the appraisal board determines the value of the subject property as of the date of the foreclosure sale using the board's own discretion regarding what information is relevant. S.C. Code Ann. § 29-3-720. There is no evidence that the

appraisal board requested the 2007 pre-loan appraisal, which was 9 years old at the time of the foreclosure sale. Further, the Master in Equity does not have discretion to alter the determination of the appraisal board. S.C. Code Ann. § 29-3-740. Even if he did, the Master in Equity held that a pre-loan appraisal would have no bearing on the determination. (Order Denying Motion to Vacate Deficiency Judgment p. 3). Therefore, there is no evidence that the Appellant was not provided an opportunity to be heard at a meaningful time in a meaningful manner.

VIII. THE APPELLANTS FAILED TO PRESERVE A SPOLIATION ARGUMENT OR AN ARGUMENT THAT THE DEFICIENCY JUDGMENT SHOULD BE SET ASIDE PURSUANT TO RULE 60(B)(3), SCRCP.

The Appellants did not raise a claim that the 2007 pre-loan appraisal had been spoliated by the Respondent to the Master in Equity at any time. They attempt to raise the argument for the first time on appeal. Since this issue has not been preserved, it must not be considered on appeal. *State v. Carlson*, 363 S.C. 586, 597, 611 S.E.2d 283, 288 (Ct. App. 2005) ("Arguments not raised to or ruled upon by the trial court are not preserved for appellate review.").

The Appellants argued that the deficiency judgment should be set aside pursuant to Rule 60(b)(5) for the first time in the Motion for Reconsideration of the Master in Equity's Order Denying Motion to Vacate Deficiency Judgment. (Motion for Reconsideration p. 3). Therefore, this argument is not preserved for review. *Patterson v. Reid*, 318 S.C. 183, 185, 456 S.E.2d 436, 437 (Ct. App. 1995) (party cannot use a motion to reconsider, alter, or amend a judgment to present an issue that could have been raised prior to the judgment but was not).

CONCLUSION

For the reasons set forth above, Respondent TD Bank, N.A., as successor to Carolina First Bank respectfully requests that this Court affirm the Beaufort County Master-in-Equity's order denying Appellants' motion for involuntary non-suit, July 3, 2014 Order of Bifurcation and

Judgment of Foreclosure and Sale and October 26, 2018 Order Denying Defendant's Motion to Vacate Deficiency Judgment, including all orders denying motions for reconsideration.

Respectfully submitted,

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October 10, 2019
Charleston, South Carolina

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
The Honorable Marvin H. Dukes, Master-in-Equity

Case No.: 2011-CP-07-0340
Appellate Case No.:2019-000047

TD Bank N.A.....Respondent,

v.

Wilbert Roller, Jr., Betty V. Roller and James Williams.....Defendants.

Wilbert Roller, Jr., Betty V. Roller are the.....Appellants.

PROOF OF SERVICE

I do hereby certify that on the 11th day of October 2019, I served a copy of the within Initial Brief of Respondent on all counsel of record via First Class Mail, postage pre-paid and addressed as follows:

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South Carolina Court of Appeals
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Re: TD Bank v. Roller
Appellate Case No.: 2019-000047
WBD Ref: 77222.0022.0

Dear Ms. Kitchings:

Enclosed please find the original and one copy of Respondent's Initial Brief and Designation of Matter, with Proof of Service. Please file the original and return the filed copy to me via the enclosed, self-addressed stamped envelope.

By copy of this letter with enclosure, we are serving same on all counsel of record.

Yours very truly,

Womble Bond Dickinson (US) LLP

Matthew E. Tillman

MET/cbc
Enclosures

cc: Thomas R. Goldstein, Esq.

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