THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Charleston County Master in Equity

Appellate Case No. 2018-000118

Bayview Loan Servicing, LLC, Appellant,

v.

Patrick A. Oden, Suzanne Oden,
and Hickory Hill Plantation Community Association, Respondents,

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FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

Chase Home Finance, LLC ("Chase") commenced a foreclosure action against Suzanne Oden and Patrick A. Oden by the filing of a Lis Pendens, Summons, and Complaint on February 8, 2010. (R. pp. 3-15.). The Complaint alleged that on September 27, 2007, Suzanne Oden ("Respondent Borrower") executed a note in the amount of $182,000.00 ("Note") and a corresponding mortgage securing the debt under the Note ("Mortgage") was executed by Suzanne Oden and Patrick A. Oden (together, "Respondents"). (R. p. 7 at ¶¶ 4-5). The Complaint alleged that the Mortgage constitutes a first lien against the subject property. (R. p. 8 at ¶ 8). The Complaint further alleged that the payments due under the Note and Mortgage were in default since October 1, 2009, and that Respondents owed an unpaid principal balance of $178,454.61 together with interest at the rate of 7.250% *per annum*. (R. p. 9 at ¶ 14). Hickory Hill Plantation Community Association, Inc. was named as a defendant by virtue of any liens or assessments it may have against the subject property. (R. p. 8 at ¶ 9).

Sometime between January and March of 2010, there was a flood at the subject property. (R. p. 74). Chase contacted Respondent Borrower by letter dated March 9, 2010, advising that it had received a check covering payment for a homeowner's insurance claim. (R. pp. 99-104). The letter provided that due to the delinquency status of the payments on the Note and Mortgage,

Chase was unable to endorse the insurance check to her. The letter further instructed Respondent Borrower to contact Chase's loss draft department regarding the specific requirements to process the claim. Chase notified Respondent Borrower by letters dated March 10, 2010, March 15, 2010, March 18, 2010, March 25, 2010, March 26, 2010, April 9, 2010, and April 14, 2010 of the specific documentation needed to proceed with the processing of the loss draft claim funds. (R. pp. 105-112). By letter dated April 16, 2010, an initial disbursement check in the amount of $7,965.85 was issued to Respondent Borrower and deposited. (R. pp. 113-115). The letter accompanying the check provided that a ninety percent inspection would need to be completed before the remaining $15,931.70 could be disbursed. (R. p. 113).

Chase sent Respondent Borrower five letters between April 26, 2010 and July 20, 2010 requesting additional documentation and/or proof of repair completion. (R. pp. 116-120). By letter dated August 9, 2010, Chase informed Respondent Borrower that it was still holding the insurance claim funds of $15,931.70 and requested an update on the status of the repairs. (R. pp. 121-122). The letter further specified that an inspection needed to be completed and that multiple documents, including the contactor's estimate, needed to be submitted to Chase to make future disbursements of the claim funds. Over the next year and a half, Chase continued to send letters to Respondent Borrower stating that a ninety percent inspection would need to be completed before the remaining $15,931.70 could be disbursed. (R. pp. 123-136). There is no indication any inspection of the repairs occurred or that the required documents were submitted by Respondent Borrower.

In the interim, Affidavits of Default as to Respondents and Hickory Hill Plantation Community Association, Inc. were filed on March 29, 2010 and the case was referred in its entirety to the Honorable Mikell R. Scarborough as Master in Equity by Order of Reference

entered on March 29, 2010. (R. pp. 16-18). An Affidavit of Non-Eligibility for the Home Affordable Modification Program was filed on September 28, 2010, and corresponding Affidavit as to No Receipt of Counter-Affidavit was filed on October 1, 2010 pursuant to the 2009-05-22-01 Administrative Order of the Supreme Court. (R. pp. 19-20). A Notice of Foreclosure Intervention pursuant to the 2011-05-02-01 of the Supreme Court was filed on May 27, 2011. (R. pp. 21-24). Thereafter, a Denial of Foreclosure Intervention was filed on April 12, 2012. (R. p. 25).

Respondents filed an Answer demanding a jury trial on May 29, 2012.[1] (R. pp. 26-33). While the Answer raised a number of affirmative defenses and challenged Chase's standing to foreclose, it set forth no factual allegations regarding the flood or insurance claim. (R. p. 26 at ¶¶ 6-53). Chase then filed two Motions to Compel Discovery on August 27, 2012 and January 28, 2013, respectively, based on Respondents' failure to respond to Chase's Interrogatories and Requests for Production. (R. pp. 34-63). On March 22, 2013, Chase filed a Motion to Strike Respondents' Answer and Supporting Affidavit based on their failure to cooperate in discovery. (R. pp. 64-71). By Order entered on October 15, 2014, Bayview Loan Servicing, LLC ("Bayview") was substituted as Plaintiff in place of Chase, pursuant to an Assignment of the Mortgage. (R. pp. 72-73).

Respondents filed a Motion on November 14, 2014, seeking an Order compelling Chase and/or Bayview to remit insurance proceeds to Respondents. (R. pp. 74-75). Respondent's' Motion states that in 2010, an insurance claim was filed due to a flood at the subject property, and alleges that Chase was wrongfully in possession of the claim funds and had refused to remit them to Respondents. This Motion is the first pleading before the trial court mentioning the

[1] The Denial of Foreclosure Intervention was dated April 10, 2012, and Respondents' Answer was served on May 24, 2012. Under the 2011-05-02-01 Administrative Order, the deadline for Respondents to serve a responsive pleading expired on May 10, 2012. It is unknown to Appellant whether Respondents obtained an extension.

flood or the claim, and did not state the amount of the claim. The Motion makes no mention of Chase's loss draft procedure. The Master granted Respondents' Motion to Compel Insurance Proceeds by form Order entered on December 4, 2014, which provided that Bayview and/or Chase were ordered to return the insurance proceeds to Respondents "ASAP," and if not returned within thirty days, the foreclosure cause of action would be stricken. (R. p. 76). The Order did not state the amount of the proceeds to be returned.

A hearing was held on January 20, 2015 at which counsel for Bayview and Respondents were present. Respondents' counsel stated that forty-two days after the Order Granting Respondents' Motion to Compel the Insurance Proceeds was entered, he received a check payable to Respondent Borrower in the amount of $15,931.70. (R. p. 79 lns. 20-23). Respondents' counsel argued the check should have been received within thirty days, been made payable only to Respondent Patrick Oden, and in the amount of $23,897.57. (R. p. 79 lns. 20-23; R. p. 80 lns. 13-17). Respondents' counsel claimed that Chase was aware of the Respondents' divorce, and should have known to issue the check to Respondent Patrick Oden only. (R. p. 79 ln. 24 – p. 80 lns. 1-14). Counsel for Bayview was unable to provide an explanation regarding the check amount or payee and stated, "We've done everything in our power to get [our client] to comply with [the order]." (R. p. 82 lns. 16-20). Counsel for Bayview did not point out that Respondent Patrick Oden was not the obligor on the Note, or that a prior disbursement had been issued to Respondent Borrower which together with the second check for $15,931.70 [2] represented the entire claim amount. Bayview's counsel did not acknowledge that despite the twelve day delay, Bayview had substantially complied with the Order Compelling Insurance Disbursement.

[2] It is unknown whether this check was negotiated.

The Master then ruled that the foreclosure action was dismissed and could only be revived as a debt action, explaining:

> "There is no foreclosure here. There is no equity here. We're going to have an accounting trial over how much the debt is. At that point in time we'll find out what happened to the $8,000.00. That will be a judgment case and not a foreclosure. There will be no foreclosure in this case."

(R. p. 83 ln. 21- p. 84 ln. 2). A form Order dismissing the foreclosure with prejudice was entered on February 4, 2015.[3] (R. p. 87). Respondents' delinquency status at the time of the claim, Chase's loss draft procures, and Respondent Borrower's status as the sole obligor on the loan were not mentioned at any point during the hearing.

After extensive research of the loan history and in efforts to resolve the insurance claim, Bayview tendered the remaining $15,931.70 of the insurance disbursement by check payable to Respondents on August 16, 2016. (R. pp. 137-139). Thereafter, by Assignment dated January 18, 2017 and recorded February 6, 2017, Bayview assigned the Mortgage to U.S. Bank Trust, N.A., as Trustee for LSF9 Master Participation Trust. (R. pp. 90-91). On April 14, 2017, U.S. Bank Trust, N.A., as Trustee for LSF9 Master Participation Trust, as successor in interest to Bayview Loan Servicing, Inc. ("Appellant") filed a Motion for Relief from Entry of Judgment pursuant to Rule 60(b)(5), SCRCP in conjunction with a Motion to Substitute it as Plaintiff. (R. p. 93; R. pp 88-92). Both Motions were heard on May 10, 2017, and denied by Order entered on July 18, 2017. (R. pp. 167-168). Appellant filed a Motion for Reconsideration which was heard on November 29, 2017, and denied by form Order entered on January 17, 2018. (R. pp. 169-173; R. pp. 174-175).

[3] It is unclear why a form order was entered despite the Master's request for a formal order from Respondents at the January 20, 2015 hearing.

Appellant filed a Notice of Appeal of the Order denying its Rule 60(b)(5) Motion and Motion to Substitute, and Order denying its Motion for Reconsideration on January 24, 2018. (R. pp. 176-177).

STANDARD

"The decision whether to grant to deny a motion for relief from judgment lies within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion." *Smith v. Fedor*, 809 S.E.2d 612, 615 (Ct. App. 2017) (*citing Stearns Bank Nat'l Ass'n v. Glenwood Falls, LP*, 373 S.C. 331, 336, 644 S.E.2d 793, 795 (Ct. App. 2007)). "An abuse of discretion arises where the judge issuing the order was controlled by an error of law or where the order is based on factual conclusions that are without evidentiary support." *Tri-Cnty. Ice & Fuel Co. v. Palmetto Ice Co.*, 303 S.C. 237, 242, 399 S.E.2d 779, 782 (1990)).

ARGUMENT

I. THAT THE MASTER IN EQUITY ERRED IN DENYING APPELLANT'S MOTION TO SUBSTITUTE PLAINTIFF.

Appellant brought its Motion for Relief under Rule 60(b)(5), SCRCP, in conjunction with a Motion to Substitute it as Plaintiff, based on its position as the current mortgagee and assignee of Bayview. Bayview was the captioned Plaintiff in the prior foreclosure dismissed with prejudice, and was previously substituted in the place of Chase, the original Plaintiff and mortgagee in the action. The trial court's order found that the Motion to Substitute was inappropriate to file in a closed case and accordingly denied it. (R. pp. 167-168). The trial court also found that the cited rules in the Motion to Substitute, specifically Rules 17(a), 25(c), and 25(e), SCRCP, were inapplicable. (R. pp. 167-168).

"Every action shall be prosecuted in the name of the real party in interest ." Rule 17(a), SCRCP. "In case of any transfer of interest, the action may be continued by or against the

original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party." Rule 25(c), SCRCP. "Substitution of parties under the provision of this rule may be made by the trial court either before *or after judgment, or pending appeal, by the appellate court.*" Rule 25(e), SCRCP (emphasis added). "Standing refers to a party's right to make a legal claim or seek judicial enforcement of a duty or right." *Bank of Am., N.A. v. Draper*, 405 S.C. 214, 219, 746 S.E.2d 478, 480 (Ct. App. 2013). "An assignee stands in the shoes of its assignor." *Twelfth RMA Partners, L.P. v. Nat'l Safe Corp.*, 335 S.C. 635, 639, 518 S.E.2d 44, 46 (Ct. App. 1999); *see also* S.C. Code Ann. § 36-3-203(b) (Supp. 2012) (providing a transfer of an instrument vests in the transferee any rights the transferor had). "[T]he assignment of a mortgage does not need to be recorded, and failure to do so has no effect on the rights of the assignee." *BAC Home Loan Servicing, L.P. v. Kinder*, 398 S.C. 619, 623, 731 S.E.2d 547, 549 (2012).

Appellant was the proper party to bring this Motion because it now stands in the shoes of Bayview as its assignee, present lienholder, and mortgagee. Neither Chase nor Bayview possess any interest in the subject property, and there is nothing in the applicable rules cited which establishes a time period or statute of limitations in which a motion to substitute must be filed. Indeed, the rules specifically permit substitution of a party after judgment or pending appeal. There is no question that Appellant is the real party in interest and has standing to pursue relief under Rule 60(b), SCRCP.

Therefore, the trial court's denial of the Motion to Substitute was an error of law and should be reversed by this Court.

II. THAT THE MASTER IN EQUITY ERRED IN DENYING APPELLANT'S RULE 60(B)(5) MOTION FOR RELIEF FROM JUDGMENT.

The trial court committed error in failing to give due consideration to equitable principles in its review and denial of Appellant's Rule 60(b)(5) Motion for Relief from Judgment. Rule 60(b) provides in relevant part:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
> ....
> (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)(5), SCRCP (emphasis added). *See Fedor*, 809 S.E.2d 612 (finding no abuse of discretion in grant of Rule 60(b)(5) motion despite competing evidence as to amounts paid under confession of judgment). "Rule 60(b)(5) is based on the historical power of a court of equity to modify its decree in light of subsequent conditions." *Perry v. Heirs at Law of Gadsden*, 357 S.C. 42, 48, 590 S.E.2d 502, 505 (Ct. App. 2003) (*quoting Mr. G and Mrs. G*, 320 S.C. 305, 311, 465 S.E.2d 101, 107 (Ct. App. 1995).

The equitable relief contemplated by Rule 60(b)(5) is appropriate here because the factual basis upon which the trial court dismissed the foreclosure with prejudice was undeveloped and the stated grounds for dismissing the foreclosure are no longer present. The conditions which gave rise to the trial court's order dismissing the underlying foreclosure action with prejudice were subsequently remedied when Bayview paid the remaining balance of the claim proceeds to Respondents. This coupled with the Respondents' prior delinquency and failure to comply with the loss draft procedure of Appellant's predecessor, which was not made known to the trial court, render prospective application of the dismissal order with prejudice no longer equitable. Moreover, Appellant's predecessors were deprived an opportunity to litigate these issues due to

Respondents' refusal to cooperate in discovery and the trial court's premature ruling on Respondents' Motion to Compel the Insurance Disbursement. The resulting inequity to Appellant, as the present lienholder with no involvement in any perceived wrongdoings of its predecessors, warrants relief from the dismissal order based upon the longstanding equitable principles recognized by South Carolina. And, as further shown below, Appellant's Rule 60(b)(5) Motion was both timely and an appropriate vehicle to seek the relief requested.

A. The standard for prospective application is applicable.

"The test typically applied to determine whether an order has prospective application is whether it is executory or involves supervision of changing conduct or conditions by the court." *Perry*, 357 S.C. at 49, 590 S.E.2d at 505; *Saro Invs. v. Ocean Holiday P'Ship*, 314 S.C. 116, 120, 441 S.E.2d 835, 838 n. 3 (Ct. App. 1994). Injunctions ordinarily have prospective application. *See, e.g., Binkley v. Rabon Creek Watershed Conservation Dist. of Fountain Inn*, 348 S.C. 58, 558 S.E.2d 902 (Ct. App. 2001). Conversely, partition orders are executed orders because they mandate a one-time change in ownership of the property and thus fall outside the scope of Rule 60(b)(5). *Perry*, 357 S.C. at 49, 590 S.E.2d at 505-06.

Saro involved a prior judgment on promissory notes Saro obtained against Ocean Holiday Partnership (OHP). *Saro*, 314 S.C. at 122, 441 S.E.2d at 839. OHP sought relief under Rule 60(b)(5), SCRCP on the grounds it was no longer equitable that the judgment on the notes should have prospective application where it was subsequently relieved of the underlying indebtedness. This Court acknowledged the discretionary nature of relief under Rule 60(b), but reasoned that the facts of *Saro* presented "at least a prima facie case of inequity." *Id.* at 122, 441 S.E.2d at 839. Given the trial court's failure to consider OHP's motion with the view of determining whether or not it was equitable for the judgment to have prospective application,

this Court reversed the denial of OHP's 60(b)(5) motion and remanded the case for further consideration of the potential inequity to OHP. *Id.* at 124-25, 441 S.E.2d at 840.

Saro is instructive because it addressed the right of the trial court to modify a final judgment on promissory notes in light of subsequent conditions that make it inequitable for the judgment to have prospective application. Here also, the trial court's dismissal of the foreclosure with prejudice has prospective application because the effect of the order is an ongoing, permanent bar to equitable relief as opposed to a one-time application envisioned by an executed order. The dismissal prohibits the equitable remedy of foreclosure of the mortgage to Appellant and any subsequent assignees of the mortgage instrument, and under the rationale in *Saro*, the subsequent change in conditions presented here warrants the exercise of the trial court's historical power of equity to modify its decrees. Albeit belatedly, Bayview complied with the trial court's order to remit the balance of the insurance disbursements to Respondents, notwithstanding that the only obligor on the subject loan account to which any payment should have been made was Respondent Borrower. The subsequent Assignments of the Mortgage and corrective action taken, despite the utterly one-sided presentation of facts before the trial court and lack of opportunity to develop the record, are subsequent conditions which render prospective application of the dismissal with prejudice no longer equitable. At minimum, the facts of this case justify further consideration by the trial court of the resulting inequity to Appellant, and the taking of additional evidence.

For these reasons, the relief afforded under Rule 60(b)(5), SCRCP is applicable to this action.

B. The Motion was filed within a reasonable time.

The court may grant a party from relief from judgment under Rule 60(b)(5), SCRCP if the party makes a motion seeking relief within a reasonable time. Rule 60(b)(5), SCRCP. "[A]lthough motions under Rule 60(b)(5) are not subject to the requirement that they be filed within one year of the judgment, they still must be filed within a reasonable time." *Perry,* 357 S.C. at 48, 590 S.E.2d at 505; *see, e.g., McDaniel v. United States Fidelity & Guar. Co.*, 324 S.C. 639, 478 S.E.2d 868 (Ct. App. 1996) (affirming denial of Rule 60(b)(4) motion as not filed within a reasonable time where motion was filed nearly four years after settlement order entered, party participated in settlement, and received substantial benefits from it); *Smith Cos. of Greenville, Inc. v. Hayes*, 311 S.C. 358, 428 S.E.2d 900 (Ct. App. 1993) (finding motion filed eighteen months after entry of judgment under Rules 60(b)(4) and (5) untimely where party could have litigated claims raised in motion at trial and on appeal); *contra, Simmons v. Simmons*, 392 S.C. 412, 709 S.E.2d 666 (2011) (reversing denial of Rule 60(b)(5) motion and holding family court has jurisdiction to revisit over twenty year old divorce settlement agreement under basic equitable principles).

Appellant filed its Rule 60(b)(5) Motion two months and eight days after the Assignment of the Mortgage from Bayview to Appellant was recorded. The filing date of the Motion fell less than three months from the date of the execution of the Assignment of the Mortgage from Bayview to Appellant, and less than eight months from the date Bayview tendered the remaining insurance disbursement to Respondents. The passing of less than eight months after Bayview's payment of the claim is a reasonable time in which to file the Motion given the subsequent transfer of the Mortgage to Appellant and its recording. Even when considering: the interim transfer of the Mortgage from Chase to Bayview during the foreclosure, Chase and Bayview's

lack of an opportunity investigate and litigate the insurance claim, the trial court's premature dismissal of the action, and Respondents' refusal to cooperate in discovery and comply with loss draft procedures, it was not unreasonable for a year and a half to elapse between the dismissal of the foreclosure with prejudice and Bayview's payment of the funds. Moreover, the law firm which represented both Chase and Bayview in the foreclosure ceased its operations sometime in early 2015, and was appointed a Receiver by Order of the Richland County Court of Common Pleas just four months after the dismissal of the foreclosure.[4] Taken together as a whole, all these factors which may have contributed to any perceived delay in Bayview's payment of the claim funds, demonstrate that Appellant's Motion for Relief from Entry of Judgment was made within a reasonable time.

For these reasons, the trial court erred by failing to find Appellant's Motion was filed within a reasonable time.

C. The Court's equitable powers should have been exercised.

When considering whether to grant relief from final judgments, "a court must balance the interest of finality against the need to provide a fair and just resolution of the dispute." *Raby Constr., L.L.P. v. Orr*, 358 S.C. 10, 20, 594 S.E.2d 478, 483 (2004) (*citing Chewning v. Ford Motor Credit Co.*, 354 S.C., 72, 80, 579 S.E.2d 605, 609 (2003). "Courts have the inherent power to do all things reasonably necessary to insure that just results are reached to the fullest extent possible." *Ex Parte Dibble*, 279 S.C. 592, 595, 310 S.E.2d 440, 442 (Ct. App. 1983). "Equitable maxims are not binding legal precedent but represent notions and concepts of equity in various situations." *Regions Bank v. Wingard Properties, Inc.*, 394 S.C. 241, 249, 715 S.E.2d 348, 352 (Ct. App. 2011). "[T]hese maxims have evolved over a long period of time from prior

[4] Under Rule 201, SCRE, this Court may take judicial notice of the commencement of civil action number 2015-CP-40-02017 on April 7, 2015 and the Order entered therein on June 4, 2015 appointing GGG Partners, LLC as Receiver of the Korn Law Firm, P.A. pursuant to S.C. Code Ann. § 15-65-10(1).

cases to assist a court in applying and balancing equitable considerations." *Id.* at 253, S.E.2d at 355.

In reviewing the case law addressing relief under Rule 60 as well as the application of equitable theories in fashioning relief thereunder, the instant appeal presents a *prima facie* case of inequity. While this matter does not involve allegations of fraud, it does concern a piecemeal initial presentation of facts and subsequent change of conditions after the dismissal of the foreclosure which divests Appellant of the equitable remedy of foreclosure of its mortgage through no fault of its own. Importantly, the trial court's denial of relief under Rule 60(b)(5) deprives Appellant the opportunity to litigate these issues on the merits, and works a forfeiture that is disfavored under South Carolina law.

In *Evans v. Gunter*, a former husband brought an action against his former wife to set aside a portion of their divorce decree ordering him to pay child support for a child he claimed he had not fathered. *See Evans v. Gunter*, 294 S.C. 525, 366 S.E.2d 44 (Ct. App. 1988). The husband alleged that when he was intoxicated, his wife induced him to execute an affidavit waiving his right to appear in the divorce action. *Id.* at 526-27, 366 S.E.2d at 45. A paternity test taken subsequent to the divorce decree revealed the child was not the husband's. *Id.* at 527, 366 S.E.2d at 45. The family court dismissed the husband's action alleging fraud and deceit by the wife for failure to state facts sufficient to constitute a cause of action. *Id.* at 527, 366 S.E.2d at 45. On appeal, this Court relied upon the equitable relief afforded under Rule 60(b)(5) in its reversal of the family court's decision, stating "[i]f the allegations presented by Evans are true, he was denied the opportunity to present his case." *Id.* at 529, 366 S.E.2d at 47. This Court further found the allegations of the husband's complaint were sufficient to entitle him to relief under Rule 60(b) where the wife's actions in denying him an opportunity to be heard were such

as could be considered extrinsic fraud. *Id.* This Court's analysis rested upon the concept that "Rule 60(b)(5) is based on the historical power of a court of equity to modify its decree in light of subsequent conditions," and held it was error to dismiss the case because, if true, the allegations made out a case such that it would no longer be equitable that the judgment have prospective application. *Id.*

Here, Appellant's Motion for Relief from Judgment brought Respondents' well-documented failure to comply with Chase's loss draft procedures and the prior loan delinquency which occasioned these loss draft procedures to the trial court's attention for the first time. The Motion also established Respondent Borrower's receipt and deposit of the initial claim disbursement by check in April of 2010, and need for an inspection of the repairs to disburse further claim funds. Without any of this information at the trial court's disposal and relying solely upon Respondents' unsubstantiated allegations that the claim funds were wrongfully being withheld, the court dismissed the foreclosure with prejudice and effectively denied Appellants' predecessors the opportunity to litigate these issues and present their case like the appellant in *Evans*. Bayview's payment of the remaining funds to Respondents in August of 2016 and the transfer of the Mortgage to Appellant are the subsequent conditions which render prospective application of the dismissal order no longer equitable, in view of the circumstances surrounding the insurance claim as presented for the first time to the trial court by Appellant's Motion.

The Supreme Court addressed the *Evans* decision in its opinion in *Chewning v. Ford Motor Co.* *See Chewning*, 354 S.C. 72, 579 S.E.2d 605. There, the Supreme Court held that allegations of subornation by perjury and the concealment of documents by an attorney during litigation constitutes extrinsic fraud upon the court which, if true, would have prevented Chewning from fully exhibiting and presenting his case. *Id.* at 85-86, 579 S.E.2d at 612. The

Supreme Court concluded Chewning's complaint sufficiently stated a claim for fraud on the court so as to survive dismissal under Rule 12(b)(6), SCRCP. *Id.* at 86, 579 S.E.2d at 612. While Chewning was not a Rule 60 matter, the Supreme Court relied upon the relief it affords in setting aside a judgment more than a year after it was entered. *Id.* at 50, 578 S.E.2d at 609-10. Similarly, the Supreme Court found its analysis of extrinsic and intrinsic fraud in *Chewning* instructive in its examination of *Raby Const., L.L.P. v. Orr*. *See Orr*, 358 S.C. at 24, 594 S.E.2d at 485 fn. 4. The Supreme Court held Orr was not entitled to relief under Rules 60(b)(2) and (3) because Orr's allegations amounted to intrinsic fraud only, regardless of whether the motion was brought within a year from the entry of judgment. *Id.* at 20-21, 594 S.E.2d at 483.

While this is not a matter involving allegations of fraud, *Evans* and *Chewning* both permitted relief from judgments more than one year after their entry under the equitable enquiry of Rule 60(b). As a result of the denial of its Motion, Appellant is unable present to its case or fully investigate the facts regarding the insurance claim and defenses to the foreclosure asserted by Respondents. Through no fault of its own, the denial of the Motion for Relief prevents Appellant from resurrecting the equitable remedy of foreclosure. The resulting inequity to Appellant is a forfeiture warranting this Court's intervention.

"A court of equity abhors forfeitures, and will not lend its aid to enforce them." *Regions*, 394 S.C. at 256, 715 at 356. "Equity does not favor forfeitures or penalties and will relieve against them when practicable in the interest of justice." *Lane v. New York Life Ins. Co.*, 145 S.E. 196, 209 (1928) (holding equity should prevent forfeiture of life insurance policy for nonpayment of premium notes on due date). "Forfeitures will be enforced by courts in clear cases, but they are not regarded with favor, and their prevention is within the protecting care of equity whenever wrong or injustice will result from their enforcement." *Id.* This Court relied

upon this equitable maxim, amongst others, in affirming the trial court's award of a first priority equitable lien over a mortgage in *Regions Bank v. Wingard Properties, Inc.* 394 S.C. 241, 715 S.E.2d 348. *Regions* involved the consideration and balancing of several equitable maxims: equity regards as done that which out to have been done; equity applies substance over form; equity abhors a forfeiture; equity follows the law; and one who seeks equity must do equity. *Id.* at 249-250, 715 S.E.2d at 352-53. Using these equitable maxims as guidance, this Court concluded that ". . . whether an equitable lien exists that would take priority over a mortgage must be considered with other well-recognized equitable principles." *Id.* at 250, 715 at 353. In a fact-intensive analysis, this Court reviewed the trial court's balancing of the substantial likelihood of forfeiture to the purchaser and the resulting harm to the bank, who already obtained a judgment. *Id.* 257-58, 715 at 356-57. This Court found no error in the trial court's equitable analysis and resulting award of an equitable lien in the purchaser's favor. *Id.* at 258-59, 715 at 357.

Unlike *Regions*, the trial court here conducted no equitable analysis and gave no consideration to the forfeiture suffered by Appellant. The trial court disregarded its "inherent power to do all things reasonably necessary to ensure that just results are reached to the fullest extent possible," and therefore committed error by failing to give any consideration to the inequity to Appellant. *See Dibble*, 279 S.C. 592, 310 S.E.2d 440. Indeed, the trial court declined to address any of the equitable arguments presented by Appellant at hearing as established by the following exchange:

> Court: At that time, there was nothing going on. That was in January of '15. I don't remember when the prior hearing to that was held.
>
> Respondents counsel: Your Honor, it was December 4th. I asked for ten days and you have me 30.

Court: That was December of '14?

Respondents counsel: [sic] Yes, sir. December 4th of 2014.

Court: I've got you. So we still had gotten nowhere in that time period? So if you look at Page 7 where I said, I'm going to do it. I'm going to dismiss the case, and they can proceed on the debt alone.

Respondents counsel: And you told them the same thing in December of 2014 as well.

Court: That's what I did. It's my right to foreclose, and that's what I'm going to do. I'm not going to change my mind. Okay? They have a right to proceed, but they're going to have to do that in a separate action. Okay? I don't think you can bring it as a foreclosure action. I think it's just an action on the debt. You'll have to do an accounting and figure out what that debt is."

(R. p. 159 lns. 1-24). The trial court abused its discretion in exclusively relying upon its prior decision granting Respondents' Motion to Compel the Insurance Disbursement and the perceived failure of Appellant's predecessors to comply when, in fact, the record reveals that Bayview may have overpaid on this claim by issuing two checks in the amount of $15,931.70. No consideration was given to these claim payments to Respondent Borrower, the subsequent change in conditions, the Mortgage assignment, the lack of wrongdoing on Appellant's part, or the grossly misleading factual basis upon which the dismissal was based.

Based on the foregoing, the trial court abused its discretion in failing to exercise its equitable powers to prevent a forfeiture to Appellant.

CONCLUSION

For all the reasons set forth herein, this Court should reverse the trial court's order denying Appellant's Motion for Relief from Judgment and Motion to Substitute Plaintiff.

(SIGNATURE PAGE FOLLOWS)

Respectfully submitted,

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August 17, 2018

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Charleston County Master in Equity

Appellate Case No. 2018-000118

Bayview Loan Servicing, LLC, Appellant,

v.

Patrick A. Oden, Suzanne Oden,
and Hickory Hill Plantation Community Association, Respondents,

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CERTIFICATE OF COUNSEL

The undersigned counsel hereby certifies that the foregoing *Final Brief of Appellant* complies with Rule 211(b), SCACR.

Respectfully submitted,

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August 17, 2018