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IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FORM CHARLESTON COUNTY
The Honorable Mikell R. Scarborough, Master-in-Equity

Case No. 2010-CP-106481

CitiFinancial,
Inc.,.....Respondent,

v.

Stella B. C. Squire aka Stella B. Cardamone
and Beneficial South Carolina, Inc.....Defendants,

of whom Stella B. C. Squire is
Appellant.....Appellant.

PETITION FOR REHEARING

The Appellant, Stella B. C. Squire (hereinafter "Appellant"), by and through her undersigned counsel, hereby moves this Court pursuant to Rule 221, SCACR, for rehearing of the above referenced matter originally heard by this Court on April 3, 2013, followed by an order affirming the lower court's decision on April 17, 2013. The grounds for said petition are that this Court overlooked or misapprehended the applicability of Rules 8, 55, 60 and 71, SCRPC, in regards to the particulars of this matter. More specifically, Appellant would state as follows:

- A. THE LOWER COURT ABUSED ITS DISCRETION IN FAILING TO VACATE FORECLOSURE UNDER RULE 60(b) (1) or (3), SCRPC.

Appellant sought relief from foreclosure before the lower court pursuant to Rules 52, 59, 60, and 71, SCRCP.¹ It its determination to affirm the lower court's decision this Court cited to the case of Sundown Operating Co. v. Intedge Indus., Inc., 383 S.C. 601, 681 S.E.2d 885 (2009). This Court noted that under Rule 60, SCRCP, it "lies solely within the sound discretion of the trial court" whether to vacate an order of default and that "the decision will not be over turned on appeal absent a clear showing of an abuse of discretion." Id. at 606. "[A]n abuse of discretion occurs when the judge issuing the order was controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support." Id. at 607 (citation omitted). In this instance this Court overlooked both errors of law committed by the lower court and the fact that the right to foreclose was without evidentiary support.

¹ The delineated basis for the Motions to Vacate and Reconsider were as follows: (1) The Plaintiff was not entitled to seek equity because it came to the court with unclean hands; (2) improper Process; (3) there was no hearing on default as provided for in Rule 55 (b)(2), SCRCP; (4) the Plaintiff did not provide sufficient evidence for its claim (Squire cited the following reasons: 1) the Complaint was unverified; 2) a proper hearing was not held; 3) as noted in the Order of December 1, 2010, Plaintiff did not present evidence by a qualified witness; 4) no note was presented and Plaintiff's counsel merely stated it would offer a copy of the Note prior to the Sale date which did not occur; 5) the original mortgage was not presented, or entered into evidence and is not contained in the court record, 6) there was no testimony offered by a credible witness for Plaintiff that could authenticate any note or mortgage; 7) Plaintiff did not establish it was the owner or holder of the original note or mortgage; 8) Plaintiff claims that adherence to S.C. Code Ann. 14-11-110 was waived by agreement of Defendant when Defendant did not waive any such provision); (5) any claimed entry or judgment of default as to Defendant should be vacated pursuant to Rules 55 and 60. The Standard for granting relief from an entry of default is good cause under Rule 55(c), SCRCP which is shown from Defendant's presented meritorious defenses as well as Affidavits indicating that Defendant was not of such sufficient mental capacity to handle her financial affairs; (6) Alternatively based on the same grounds previously stated and additional grounds, if Rule 60 is the applicable rule, the Court erred in denying relief pursuant to Rule 60 as a party may obtain relief under Rule 60(b)(1), SCRCP if it shows excusable neglect which was shown. Additionally, the misconduct of the Plaintiff in failing to adhere to South Carolina law with regard to the transaction and seeking relief from the Court without making such known to the Court when the law would not allow Plaintiff to foreclose meets the provisions of Rule 60(b)(3), SCRCP; (7) The foreclosure proceedings were not performed or conducted in accordance with law in that testimony was not taken in writing as required by S.C. Code Ann. § 14-11-110; and (8) Plaintiff's counsel is not competent to testify on behalf of Plaintiff nor does Plaintiff's counsel have the necessary personal knowledge of the subject transaction or account to testify. (R. p. 18-27).

Rule 60(b), SCRPC states: “ 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: (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. “Our courts have noted, in determining whether to set aside a default judgment under Rule 60(b) the trial judge should consider the following relevant factors: (1) the promptness with which relief is sought, (2) the reasons for the failure to act promptly, (3) the existence of a meritorious defense, and (4) the prejudice to the other parties.” McClurg v. Deaton, 380 S.C. 563, 573, 671 SE 2d 87 (2008). “ [A] meritorious defense need not be perfect nor one which can be guaranteed to prevail at a trial. It need be only one which 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. at 575 (quoting: Thompson v. Hammond, 299 S.C. 116, 120, 382 S.E.2d 900, 903 (1989)).

1. The motion for relief was promptly filed therefore the relief to vacate should have been granted.

Here the Master in Equity’s Report and Order of Judgment of Foreclosure and Sale Decree was filed December 1, 2010. (R. pp. 5-12). The sale was conducted on January 18, 2011. On January 31, 2011, a Notice of Appearance as well as a Notice of Motion to Vacate Foreclosure Order and Stay and Enjoin Further Sale Proceedings was

filed on behalf of Squire. (R. pp. 28-29; R. pp. 30-38). The relief sought was promptly filed and well within the one year limitation. See *Evans vs. Gunter*, 294 S.C. 525, 366 S.E. 2d 879 (Ct. App. 1988)(“Rule 60(b) provides the motion shall be made within a reasonable time and for subsections (10, (2) and (3) of the rule, not more than one year after the judgment was entered.”)

Moreover, the Appellant’s failure to act after service of the complaint was explained by the affidavit of her son, Jay Keith Larson, which was submitted into evidence at the hearing upon the Motion to Vacate. (R. p. 80). Mr. Larson opined that his mother, Appellant, lacked the necessary mental competency and ability at the time to grasp, comprehend, and maintain her household affairs. (R. p. 80-81). Upon Appellant’s son returning to the country after being deployed, he was able to assist his elderly mother with her financial affairs and then learned of the foreclosure action. He began to immediately communicate with the Respondent. In contrast to paragraph 12 of the Complaint he was told by Respondent “Citi will work with the borrower and her son on the reinstatement, once the sale has been vacated.” (R. pp. 82-83). The Appellant filed the Motion to vacate days after Respondent informed her there could be loss mitigation alternatives available to her.

2. Respondent would suffer no prejudice by Appellant being able to defend the foreclosure action.

There would be no prejudice to the Respondent/Plaintiff to enjoin further proceedings and permit Appellant to defend the matter. The sale had not been consummated. Respondent would continue to have the opportunity to establish its right to foreclosure. In fact, by vacating the Order and allowing Appellant the opportunity to defend would only require Respondent to do what it had the burden of doing by filing the

complaint: prove by sufficient evidence it had the right to foreclose. However, by contrast, by denying Appellant the relief she sought, she suffered irreparable damage by not being able to protect her home from foreclosure where the circumstances indicate she had meritorious defenses.

3. The Foreclosure Decree lack evidentiary support therefore it should have been vacated due to abuse of discretion and the existence of a meritorious.

Pursuant to Rule 60(b)(1), SCRPC, a court may relieve a party of a final judgment for mistake, inadvertence, surprise, excusable neglect. “This rule is an appropriate remedy for good faith mistakes of fact if all other applicable factors are met.” Williams v. Watkins, 384 S.C. 319, 324, 681 S.E. 2d 914 (Ct. App. 2009). When determining whether a basis existed to vacate an order under the specifics of Rule 60(b)(1), the lower court must look to the particulars of the Rule and also consider whether a meritorious defense exists.² See McClurg v. Deaton, 380 S.C. 563, 671 S.E. 2d 87 (Ct. App. 2008) (“To establish a meritorious defense, the party does not have to show he would prevail on the merits. Rather, a meritorious defense “need be only a real controversy as to real facts arising from conflicting or doubtful evidence.”). This Court in reviewing the lower court’s determination has the additional consideration of determining whether an abuse of

² Appellant argued and showed she had a meritorious defense on the grounds, including but not limited to: (1) the Complaint was unverified (2) as noted in the Order of December 1, 2010, Plaintiff did not present evidence by a qualified witness (3) the Mortgage is void because it was executed without the supervision of an attorney; (4) CitiFinancial followed a defective foreclosure process; (5) there was no testimony offered by a creditable witness for Plaintiff that could authenticate any note or mortgage; (6) Despite averring to the contrary, CitiFinancial has failed to submit any version of the alleged note into evidence; (7) Plaintiff did not establish it was the owner or holder of the original note or mortgage; (8) Plaintiff claims that adherence to S.C. Code Ann. 14-11-110 was waived by agreement but Defendant did not waive any such provision; (9) a proper hearing has not held. See McClurg v. Deaton, 380 S.C. 563, 671 S.E. 2d 87 (Ct. App. 2008) (“To establish a meritorious defense, the party does not have to show he would prevail on the merits. Rather, a meritorious defense “need be only a real controversy as to real facts arising from conflicting or doubtful evidence.”). (Appellant Brief, p. 25).

discretion occurred and whether “the order was controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support.” Sundown Operating Co. v. Intedge Indus., Inc., 383 S.C. 601, 681 S.E.2d 885 (2009). Here, in some instances, the arguments made by Appellant touch on all three issues: (1) the particulars of Rule 60(b); (2) meritorious defense; and (3) abuse of discretion. Thus for the attempted sake of brevity they will be addressed jointly at times herein.

A. Neither this Court nor the lower court addressed the lack of evidentiary requirements for granting a default judgment or judgment for foreclosure.

Appellant argued whether the foreclosure order is considered a default judgment or a judgment on the merits, in either case, it should be vacated due to lack of evidentiary support. Neither this Court nor the lower court addressed the lack of evidentiary support that is required under Rules 71 and 55. The failure to do so warrants vacating the Foreclosure Decree under Rule 60, SCRPC. See McClurg v. Deaton, 380 S.C. 563, 671 S.E. 2d 87 (Ct. App. 2008)(“W]e believe the trial court committed error in finding the evidence did not, at least, support relief based on mistake, inadvertence, surprise or excusable neglect.”)

A.1. In rem actions require evidentiary support even in a default scenario.

An action for foreclosure is an action in personam as well as *in rem*. Perpetual Building & Loan Association v. Braum, 270 S.C. 338, 242 S.E. 2d 407 (1978). The action here is an *in rem* action, the sole purpose of which was to foreclosure on real property and take away Squire’s home. See Bartles v. Livingston, 282 S.C. 448, 319 S.E. 2d 707 (Ct. App. 1984) (In consequence, an action for strict foreclosure was an action in

rem. Foreclosure adjudicated the rights of the parties in the property only. Its purpose was not to recover the indebtedness, which could be made the subject of a separate action at law, but to establish the right of the mortgagee to the property free from the equity of redemption).

Rule 55, SCRPC establishes requirements for granting a default judgment for unliquidated damages, stating: “in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages **or to establish the truth of any averment** by evidence or to make an investigation of any other matter.”³ Rule 55(b)(2), SCRPC. “No judgment by default shall be entered . . . in any in rem action, unless the claimant establishes his claim to relief by evidence satisfactory to the Court.” Rule 55(e), SCRPC. In an action where a defendant has defaulted and plaintiff is seeking unliquidated damages the plaintiff still bears the burden to “introduce testimony in proof of the account in order to obtain a valid default judgment[,]” and the defaulted party is still entitled to participate in the proceedings by cross-examining witnesses and objecting to evidence submitted. See Howard v. Holidays Inns, Inc., 271 S.C. 238, 246 S.E.2d 880 (1978); Roche v. Young Bros., Inc., 332 S.C. 75, 504, S.E.2d 311 (1998).

A. 2. The Affidavit of Debt failed to provide any evidentiary support for foreclosure.

Appellant asserted that Respondent failed to submit any evidence much less sufficient evidence to establish it was entitled to foreclosure upon her home, and properly

³ Appellant affirmatively contests that she was ever properly held in default as required by Rule 55, SCRPC, as will be more specifically addressed below. However, for sake of argument assuming a judgment of Default had been entered against Appellant under Rule 55, SCRPC, Appellant still contends the judgment of default and/or judgment of foreclosure should have been set aside based upon her motion to vacate under Rule 60(b), SCRPC.

raised the issue in both her Motion to Vacate and Motion for Reconsideration. The lack of sufficient evidence and the nature of evidence submitted supports vacating the Foreclosure Decree pursuant to Rule 60(b)(1).

There are a number of rules which govern the admission of evidence in a foreclosure hearing. Admissibility of evidence is a matter of discretion and absent an abuse of discretion or an error of law; a trial judge's decision will not be overturned. Weir v. CitiCorp Nat. Services, Inc., 435 S.E.2d 864, 868 (1993). All evidence must be authenticated before it is admissible by the Court. Rule 901, states "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. Rule 901, SCRE. Rule 1002 states: "To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute. Rule 1002, SCRE. Rule 602 states; "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony." Rule 602, SCRE. Rule 801 precludes from the admission into evidence, as hearsay, any statement whether oral or written which is a statement, other than one made by the declarant which is offered as testimony to prove the truth of the matter asserted. Rule 801, SCRE. However, Rule 803(6), SCRE, states: "[a] memorandum, report, record, or data compilation, in any form, of acts, events, conditions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that

business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness; provided, however, that subjective opinions and judgments found in business records are not admissible. The term "business" as used in this subsection includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit." Rule 803(6), SCRE.

In regard to affidavits it has been recognized in South Carolina courts that affidavits must be based upon personal knowledge, set forth the facts as would be admissible in evidence, and show affirmatively that the affiant is competent to testify to the matters stated therein. See Rule 11(c), SCRCF; Rule 56(e), SCRCF; Montgomery v. CSX Transport, Inc., 376 S.C. 37, 656, S.E.2d 20 (2008) (applying the personal knowledge requirement of Rule 56(e)); and Saro v. Ocean Holiday Partnership, 314 S.C. 116, 441, S.E.2d 385 (Ct. App. 1994)("facts stated in affidavits must be admissible evidence."). Generally affidavits are to be made on personal knowledge setting forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify to the matters stated. See Baughman v. American Telephone & Telegraph Co., 306 S.C. 101, 410 S.E. 2d 537 (1991). More to the point, while not binding on this court, a Florida court found that an affidavit of indebtedness constitutes inadmissible hearsay when the affiant can state that the data in affidavit is accurate only insofar as it replicated the numbers derived from the company's computer system. Glarum v. LaSalle Bank Nat'l Ass'n, No. 83 So. 3d 780 (Ct. App. Fla 2011). In Glarum, the Florida Court of Appeals considered the admissibility of an affidavit of

indebtedness submitted by the Bank in a foreclosure action. *Id.* To establish the amount of indebtedness in their motion for summary judgment, LaSalle Bank filed an affidavit of a “specialist” at the loan servicer claiming that Appellants was in default in excess of \$340,000 on the note. *Id.* The Florida Court applied Fla. Statute § 90.803(6)(a),⁴ which mirrors our own Rule 803(6), SCRE,⁵ and found that the affidavit was inadmissible hearsay which did not fit into the business records hearsay exception. *Id.* The court reasoned that “[d]espite Orsini's intimate knowledge of how his company's computer system works, he had no knowledge of how that data was produced, and he was not competent to authenticate that data.” *Id.*⁶

The Affidavit of Debt and Authorization to Testify, which is the sole piece of attempted evidence submitted by Respondent, fails to meet the requirements of authentication of a witness’s ability to testify. The affidavit does not state the statements

⁴ “We find that Orsini's affidavit constituted inadmissible hearsay and, as such, could not support LaSalle's motion for summary judgment. Pursuant to section 90.803(6)(a), Florida Statutes, documentary evidence may be admitted into evidence as business records if the proponent of the evidence demonstrates the following through a record's custodian: (1) the record was made at or near the time of the event; (2) was made by or from information transmitted by a person with knowledge; (3) was kept in the ordinary course of a regularly conducted business activity; and (4) that it was a regular practice of that business to make such a record.” *Glarum*, 4D10-1372, 2011 Fla. App. WL 3903161 at *1.

⁵ S.C. R. Evid. 803(6) provides: “**Records of Regularly Conducted Activity.** A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness; *provided, however*, that subjective opinions and judgments found in business records are not admissible. The term “business” as used in this subsection includes Rule 803, SCRE business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.”

⁶ “Orsini did not know who, how, or when the data entries were made into Home Loan Services's computer system. He could not state if the records were made in the regular course of business. He relied on data supplied by Litton Loan Servicing, with whose procedures he was even less familiar. Orsini could state that the data in the affidavit was accurate only insofar as it replicated the numbers derived from the company's computer system. Despite Orsini's intimate knowledge of how his company's computer system works, he had no knowledge of how that data was produced, and he was not competent to authenticate that data. Accordingly, Orsini's statements could not be admitted under section 90.803(6)(a), and the affidavit of indebtedness constituted inadmissible hearsay.” *Glarum*, 4D10-1372, 2011 Fla. App. WL 3903161 at *1.

are based upon the personal knowledge of the affiant. (R. pp. 50-55). The affidavit does not state that affiant is the custodian of records for Respondent, nor does it state that the affiant is familiar with the records of Respondent (R. pp. 50-55). Likewise the Affidavit does not even state that the affiant reviewed the records of Respondent before making the statements found in the affidavit; nor does it state that the statements in the affidavit are based upon any records.

In an effort to establish the amount of the debt the Affidavit of Debt summarily inserts amounts. The Affiant provides no basis for where the numbers were extracted or how they are supported. Blindly attached to the Affidavit but not referenced within or incorporated within are several computer screen printouts. (R. pp. 51-55). Again there is nothing stated within the Affidavit that would provide a proper foundation for the attachments or proof of admissibility. The alleged evidence submitted is in essence no evidence at all since it fails to meet the necessary standards of the Rules of Evidence. See Beneficial Maine Inc., v. Carter, 25 A. 3d 96, 2001 ME 77 (2011)(Affidavit was deficient to support summary judgment for foreclosure since it failed to report the basis for the knowledge.) Quite simply, all of the basic foundational requirements necessary to authenticate that the affiant is competent to testify are absent from the statements found in the affidavit, and therefore the affidavit on its face constitutes nothing more than hearsay and should not have been admitted into evidence. There being an insufficient Affidavit there is a lack of evidentiary support for the Foreclosure Order and the Order at least was entered under mistake and should have been vacated.

A. 3. Counsel's testimony is not evidence and cannot support the right to foreclosure.

When considering whether testimony presented shall be admissible into evidence it is important to note that testimony by counsel of a party as to genuine issues of material facts is not admissible into evidence. Gilmore v. Ivey, 348, S.E.2d 180 (Ct. App. 1986); and Sessions v. Withers, 327 S.C. 409, 414 488 S.E.2d 888 (Ct. App. 1997) (“trial court properly disregarded the statements of counsel that he claimed reflected testimony appearing in depositions not otherwise entered into evidence.”); West v. Gladney, 341 S.C. 127, 135, 533, S.E.2d 334 (Ct. App. 2000) (“Not only will we not consider Gladney’s untimely affidavit, this court ordinarily will not consider statements of fact presented only in an attorney’s argument in determining whether a genuine issue of material fact exists sufficient to preclude summary judgment”). Moreover, at least one court has found that where counsel submitted personal affidavits, he interjected himself as a possible witness, which was clearly improper unless he and his law office were prepared to withdraw at once from the case. State v. Anonymous, 30 Conn. Supp. 211, 232, 309 A.2d 135,146 (1976).

It is not appropriate for counsel to testify on behalf of and in place of their client nor is counsel qualified to act as a witness. Yet, that is exactly the situation present in this matter. The only substantive testimony presented to the court which describes the Note, when and how the parties entered into an agreement under the Note, and the terms of that agreement as found in the Note was presented to the court through the testimony of counsel for the Respondent, when he states:

WHEREUPON, the undersigned, being duly sworn, testified as follows:

I am one of the attorneys for the Plaintiff in this action.
From the original records in my possession, from the complaint and from examination of the records of in the office of the Clerk of Court/Register of Mesne

Conveyances/Register of Deeds for Charleston County, *I find* that on June 17, 2002, Stella B. C. Squire gave a certain written promissory note (“Note”) to Citifinancial, Inc., . . .

I will offer a copy of the original Note into evidence before the sale date.

I call attention to the provision to the provisions of the Note with reference to default. I call the Court’ attention to the provisions in the Note with references to payments of costs and attorney’s fees.

ON the same date, Stella B. Cardamone gave a certain mortgage (“Mortgage”) to CifiFinacial, Inc., which contains the terms and provisions consistent *with the Note just offered in evidence.* . . (R. p. 41).

Incredulous is the concept that a client can authorize a lawyer to testify on its behalf. Notwithstanding, that is what the Respondent did in this matter in Respondent’s Affidavit of Debt and Authorization to Testify which states: “(S)he further states that *this* firm of Riley Pope & Laney, LLC has been retained to initiate and complete this action and the Riley Pope & Laney, LLC are authorized to testify on the Plaintiff’s behalf as to the debt and any other issue related to this action.” (R. p. 50). There is no authority in South Carolina law that supports the concept that a party can authorize a lawyer to testify as to the merits of a claim on its behalf.

In the Transcript of Testimony signed by counsel for Respondent, it states: “It is agreed that the signing of the testimony by the witnesses, as required under S.C. Code Ann. §14-10-110, is hereby waived.” (R. p. 41). First this is inaccurate. Appellant did not waive any such requirement. Thus, to the extent the lower court relied on such, it was an error of law.

Moreover, as argued by Appellant the Respondent did adhere to the requirements of Section 14-11-110 and clearly miss interrupted the statute. S.C. Code Anno. §14-10-110 provides:

The master shall, upon the application of either party to any cause or proceedings in which equitable relief is demanded pending and at issue in his county, take in writing the testimony of any witness who may be produced before him by any party to the cause, ten days' notice of such application having been given to the opposite party. Such witness shall be subject to the same examination, cross-examination and reply and the same exceptions as to the admissibility of testimony may be taken as are allowed by law upon examination before the court except that in case any testimony be objected to the master shall receive the same subject to the exceptions, reporting the exceptions and his ruling thereon.

The statute does not speak to signing of testimony of witness nor does it authorize a waiver of signing. Additionally, the statute does not authorize testimony by counsel as Respondent appears to contend. In fact, contrary to the testimony submitted, it provides any written testimony submitted is subject to the “same exceptions as to the admissibility of testimony may be taken as are allowed by law upon examination before the court...” This supports as argued by Appellant that any such testimony must meet standard evidentiary requirements: which it did not.

To the extent the Court or Respondent relied on S.C. Code Anno. §14-10-110 to justify testimony by counsel to support the right to foreclosure, such was incorrect. S.C. Code Anno. §14-10-110 does not authorize testimony by counsel. Counsel is not an appropriate party to testify to the terms of the agreement when clearly they do not possess the requisite personal knowledge of the transaction. It is clear that Counsel’s statement are on their face hearsay as Counsel is seeking to call the Courts attention to statement made in the terms of the Note. See Higgins v. MUSC, 326 S.C. 592, 486 S.E. 2d 269 (Ct. App. 1997) (factual statements of attorneys, whether made during argument or in written

briefs or memoranda, ordinarily may not be considered by the court in determining whether a genuine issue of material fact exists.) Testimony of Counsel should not have been considered in support of the right to foreclose.

A. 4. The debt was not established because no Note was produced.

Appellant argues Respondent's failure to submit a verified Complaint or the Note into evidence, rendered the Foreclosure Decree lacking in evidence and necessitating its revocation. The lower court's and this Court's failure to address the significant importance of presenting one of the essential documents to establish the Respondent's right to relief renders both determinations flawed.

In an action for foreclosure "the party seeking foreclosure has the burden of establishing the existence of the debt and the mortgagor's default on that debt." US Bank Trust Nat. Ass'n v. Bell, 385 S.C. 364, 374-375, 684 S.E.2d 199 (Ct. App 2009). In order to be entitled to default judgment or a foreclosure judgment, the Respondent had the burden of establishing its claim under both Rule 55 and 71, SCRPC. At a minimum the Plaintiff in an action for foreclosure must present clear evidence of "the principal due upon default, the rate of interest and interest from date of default to hearing date, any other relevant interest charged, any amounts due or to be credited on escrow items, the taxable costs of collection prior to hearing, and the amount of allowable attorney's fees due and anticipated through conclusion of the action. Also included shall be the rate of interest to accrue until the date of the judgment and the post judgment interest rate." Rule 71, SCRPC. "In all cases proof shall be made of the facts and circumstances alleged in the pleadings and evidence given as to any payments which have been made or credits due." Id.

It is recognized in this state that a mortgage generally follows the note it secures but an assignment of the mortgage alone confers no rights on the transferee. South Carolina Nat'l Bank v. Halter, 293 S.C. 121, 128, 359 S.E.2d 74, 77 (Ct. App. 1987). In order for a Plaintiff seeking foreclosure to meet its burden it must produce a note. "The practice of this country is to require that the note be produced, or its absence accounted for, and the rule is a safe one. Sheehy v. Mandeville, 11 U.S. 208 (1812); In re David A. Simpson, 711 S.E.2d 165 (N.C. App. 2011) (establishing that a party is the holder of the note is essential to protect the debtor from the threat of multiple judgments on the same note); Perry v. Federal National Mortgage Ass., Op. N. 2100235 (Ala. Ct. App. March 9, 2012) (affidavit submitted in foreclosure proceedings inadmissible due to the failure to state how knowledge was gained and documentation not attached); Bank of New York v. Faftagianis, 13 A. 3d 435, (N.J. Super Ct. 2010)(in order to foreclose under New Jersey law the plaintiff must show that it is entitled to enforce the note at the time the complaint is filed; no competent evidence was offered as to when the note was endorsed); In re Kemp, 440 B.R. 624 (Bankr. D.N.J. 2010)(no right to enforce the note under subsection of U.C.C. §3-301 could be asserted without some evidence of possession of the note by the party seeking to enforce it); Georg v. Metro Fixtures Contractors, Inc., 178 P. 3d 1209 (Colo. 2008)("possession is an element designed to prevent two or more claimants from qualifying as holders who could take free of the other party's claim of ownership); Union Sav. Bank v. Cassing, 691 S.W. 2d 513 (Mo. Ct. App. 1985)("in the case of suit on the note, presentment of the note or satisfactory proof that it has been lost or destroyed are essential elements of the case because the instrument itself is the exclusive ground for the cause of action.").

It is undisputed that Respondent never submitted the subject Note. It is undisputed that Respondent did not submit a verified Complaint. Thus, Respondent's failure to submit the Note coupled with the deficiency of the Affidavit of Debt, place the Foreclosure Decree in such a state of suspicion that it should be vacated.

In summary the Appellant properly raised a issues under Rule 60(b)(1) and meritorious defenses on the grounds that: (1) the Affidavit of Indebtedness and alleged evidence was insufficient and not admissible under the Rules of Evidence; (2) Counsel was incompetent to testify; (3) S.C. Code Ann. 14-11-110 was misapplied; and (4) no Note was produced. Appellant contends that her Motion to Vacate the Judgment Foreclosure should have granted under Rule 60(b)(1) because Appellant's actions or inactions constituted mistake, inadvertence, or excusable and this Court misapprehended the arguments proffered. The lower court abused its discretion and committed an error of law in his reasoning for denying the Motion and Vacate and Motion for Reconsideration and/or the factual conclusions upon which the judge based his order were without evidentiary support.

B. The unclean hands defense asserted by Appellant is a meritorious defense which supports vacating the Foreclosure.

In addition to the defenses asserted above, Appellant also asserted the defense of unclean hands. Appellant asserted that the Order of Foreclosure should be vacated and the matter heard on the merits because available to her was the defense of unclean due to the undisputed fact that the closing took place at CitiFinancial's place of business without offering her the opportunity to have counsel to protect her interests. (R. pp. 73-79). Although the Master in Equity acknowledged the validity of the argument proffered by

Appellant, he ignored the fact that Respondent came to the court with unclean hands and denied the relief on a defense neither asserted by Respondent nor available under law.

One of the maxims of equity embodying the principle that a party seeking redress in a court of equity must not have done any dishonest or unethical act in the transaction upon which he or she maintains the action in equity, since a court of conscience will not grant relief to one guilty of unconscionable conduct, i.e., to one with unclean hands. See Regions Bank v. Wingard Properties, Inc., 394 S.C. 241, 715 S.E.2d 348 (Ct. App. 2011). In South Carolina “[a]ll real estate and mortgage loan closings must be supervised by an attorney.” Doe v. McMaster, 355 S.C. 306, 585 S.E.2d 773 (2003); State v. Buyers Serv. Co., 292 S.C. 426, 357 S.E.2d 15 (1987). No person shall be permitted to acquire a right of action from their own unlawful act, and one who participates in an unlawful act cannot recover damages for the consequence of that act. See Jackson v. Bi-Lo Stores, Inc., 313 S.C. 272, 276-77, 437 S.E.2d 168, 170-71 (Ct. App. 1993) (applying this policy to a contract secured and maintained by bribery). “This rule applies at both law and in equity and whether the cause of action is in contract or in tort.” Jackson, 313 S.C. at 276, 437 S.E.2d at 170.

“As early as 1987, lending institutions doing business in South Carolina were on notice that they could not prepare legal documents in connection with a mortgage loan without review by an independent attorney and that the loan closing had to be supervised by an attorney.” Wachovia Bank v. Coffey, 389 S.C. 68, 698 S.E. 2d 244 (Ct. App. 2010.), citing State v. Buyers Serv. Co., 292 S.C. 426, 431-434, 357 S.E.2d 15, 18-19 (1987) (holding that a commercial title company's employment of attorneys to review mortgage loan closing documents did not save the company's preparation of those

documents from constituting the unauthorized practice of law and that Real Estate closings should be conducted only under an attorney's supervision), modified by Doe v. McMaster, 355 S.C. 306, 585 S.E.2d 773 (2003); see also Doe Law Firm v. Richardson, 371 S.C. 14, 17, 636 S.E.2d 866, 868 (2006) (citing Buyers and McMaster) (clarifying that a lender may prepare legal documents for use in financing or refinancing a real property loan as long as an independent attorney reviews them and makes any corrections necessary to ensure their compliance with the law and reaffirming that mortgage loan closings should be conducted only under an attorney's supervision).

In Wachovia Bank v. Coffey, Wachovia closed a home equity loan without the supervision of an attorney and later instituted foreclosure proceedings. 389 S.C. 68, 698 S.E. 2d 244 (Ct. App. 2010.) This Court held that Wachovia, having committed the unauthorized practice of law in closing the loan without attorney supervision, came to the court with unclean hands, and thus was barred from seeking equitable relief. In so holding, this Court said:

The unauthorized practice of law is inherently prejudicial to not only the parties involved in the instant transaction but also to the public at large for the reason so cogently stated in Buyers:

The reason preparation of instruments by lay persons must be held to constitute the unauthorized practice of law is not for the economic protection of the legal profession. Rather, it is for the protection of the public from the potentially severe economic and emotional consequences which may flow from erroneous advice given by persons untrained in the law.

Coffey, at * 3 (citing State v. Buyers Serv. Co., 292 S.C. 426, 431, 357 S.E.2d 15, 18 (1987)).

In Coffey, relying on South Carolina precedent, the court found that Wachovia's legal causes of action were also barred. Id. at *3.⁷ Applying the doctrine of unclean hands the court in Coffey found that Wachovia was not entitled to seek equity there because Wachovia conducted the closing, upon information and belief without a lawyer in violation of South Carolina law. Id.

Here, the Master in Equity failed to recognize that Respondent may not entitled have been able to foreclosure and the Order to Foreclose should be vacated and the sale set-aside on the grounds of unclean hands. Just as in Coffey, Respondent is not entitled to seek equity here because it conducted the closing at its place of business without the involvement of an attorney in violation of the South Carolina law. The Master in Equity committed an error in law when he refused to address the principle of unclean hands. The Master in Equity committed an error of law when he summarily determined he could not follow the law because he felt he could not go back in time. (R. p. 97, lines 21-23). The Master in Equity should be reversed and the Order vacated.

4. The Master in Equity's decision was controlled by an error of law and should be vacated.

4.A. The Master committed an error of law in ruling that the Appellant's Motion was barred by the doctrine of laches.

The basis the Master-In-Equity gave for denial of Appellant's Motion to Vacate Default, Foreclosure Order and Enjoin Further Sale Proceedings was not based on law but rather on his erroneous conclusion he could not go back in time since Appellant did not answer the complaint. (R. p. 97, lines 3-7). Indeed, the Master in Equity committed an

⁷ In Linder v. Ins. Claims Consultants, Inc., our supreme court refused to allow a public insurance-adjusting business to be compensated for the value of its performance attributable to the unauthorized practice of law., 348 S.C. 477, 496, 560 S.E.2d 612, 622 (2002).

error of law when he determined laches precluded him from granting Appellant relief. (R. p. 97, lines 21-23).

As this Court has stated, “[l]aches is a defense in equity, and one who comes to the court seeking equity must come with clean hands.” Emery v. Smith, 361 S.C. 207, 603 S.E.2d 598 (Ct. App. 2004) (held a party was precluded from asserting laches due to his own unclean hands). “Laches is an affirmative defense which must be raised by the pleadings.” Mack v. Edens, 306 S.C. 433, 436, 412 S.E.2d 431, 433 (Ct. App. 1992). “Laches is neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence to do what in law should have been done.” Id. Laches is an equitable doctrine which arises upon the failure to assert a known right. The party seeking to establish laches must show (1) delay, (2) unreasonable delay, and (3) prejudice. Id. Importantly, “delay alone in assertion of a right does not, in and of itself, constitute laches.” Treadaway v. Smith, 325 S.C. 367, 479 S.E.2d 849, 856 (1996). “[L]aches does not operate to bar a legal claim when the applicable statute of limitations has not run. An action for breach of contract is a legal claim.” Id. citing, Edens v. Edens, 312 S.C. 488, 435 S.E. 2d 851 (1993).

“The doctrine of unclean hands precludes a plaintiff from recovering in equity if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the defendant.” First Union Nat'l Bank of S.C. v. Soden, 333 S.C. 554, 568, 511 S.E.2d 372, 379 (Ct. App. 1998). “The expression 'clean hands' means a clean record with respect to the transaction with the defendants themselves and not with respect to others.” Arnold v. City of Spartanburg, 201 S.C. 523, 532, 23 S.E.2d 735, 738 (1943). The rule must be

understood to refer to some misconduct concerning the matter in litigation of which the opposing party can, in good conscience, complain in a court of equity. Id.

The Master-In-Equity committed an error of law when he denied the Appellants Motion to Vacate based upon laches. The Appellant filed her Motions to Vacate just days after Order of Sale, in the month following the Order of Foreclosure, and unquestionably well within the one year time limit to file a motion under Rule 60, SCRPC. The Appellant asserted a number of defenses to the Respondents breach of contract action in the Appellant's Motion to Vacate, including but not limited to, 1) the Complaint was unverified (2) as noted in the Order of December 1, 2010, Plaintiff did not present evidence by a qualified witness (3) the Mortgage is void because it was executed without the supervision of an attorney; (4) CitiFinancial followed a defective foreclosure process; (5) there was no testimony offered by a creditable witness for Plaintiff that could authenticate any note or mortgage; (6) Despite averring to the contrary, CitiFinancial has failed to submit any version of the alleged note into evidence; (7) Plaintiff did not establish it was the owner or holder of the original note or mortgage; (8) Plaintiff claims that adherence to S.C. Code Ann. 14-11-110 was waived by agreement but Defendant did not waive any such provision; (9) a proper hearing has not held. A number of these issues are statutory or questions at law which are not barred by laches where the statute of limitations has not run. Further as to the Appellant's equitable defenses, such as unclean hands, Respondent cannot use equity to bar the defense when it did not come to the court with equity. Thus, Respondent is the party that must be barred from seeking equity under a doctrine such as laches. It is also important to note the though the Master in Equity raised the issue of laches himself, the Respondent never actually raised the issue as a

defense to the Appellants Motion to Vacate, instead choosing to assert that the Appellant's unclean hands allegations were barred by Rule 8, SCRPC (R. p. 95-98).

In summary the Master in Equity committed an error of law by failing to rule upon the Appellants legal and equitable defenses as asserted, and thereafter erroneously holding that the Appellant was barred from relief the relief sought under Rule 60, do the doctrine of laches.

4.B. The Master in Equity committed an error of law by misapplying Rule 8, SCRPC.

“An abuse of discretion occurs when the judge issuing the order was controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support.” Sundown. at 607 (citation omitted).

Rule 8; states in pertinent part:

(c) Affirmative Defenses; Reply. In pleading to a preceding pleading, a party shall set forth affirmatively the defenses: accord and satisfaction, arbitration and award, assumption of risk, condonation, contributory negligence, discharge in bankruptcy, duress, fraud, illegality, injury by fellow servant, laches, license, misrepresentation, mistake, payment, plene administravit or the administration of the estate is closed, recrimination, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense.

(d) Effect of Failure to Deny. Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

Generally, failure to plead and affirmative defense is deemed a waiver of the right to later assert it. Wright v. Craft, 372 S.C. 1, 20-21, 640 S.E.2d 486, 497 (Ct App. 2006). However, an affirmative defense not plead in an answer but nonetheless raised before the

trial court may be preserved for Appeal. See Id. at 21, 497 (citing: Adam v. B &D, Inc., 297 S.C. 416, 419, 377 S.E.2d 315, 317 (1989)). “All pleadings are to be construed as to do substantial justice to all parties.” Standard Federal Sav. & Loan v. Mungo, 306 S.C. 22, 26, 410 S.E.2d 18, 20 (Ct. App. 1991). Further, “[a]lthough Rule 8(c) requires a party to set forth affirmative defenses to a preceding pleading; this requirement applies only if the party *actually pleads responsively* to the prior pleading.” Republic Contracting Corp. v. SCDHPT, 332 S.C. 197, 503 S.E.2d 761, 768 (Ct. App. 1998) [Emphasis added]. Additionally, there are exceptions to the waiver rule, such as Rule 15(b), SCRCP which also a party to amend his pleadings to conform to the evidence. Madren v. Bradford, 378 S.C. 187, 193, 661 S.E.2d 390, 393 (Ct. App. 2008). Moreover, even where a party does not set forth affirmative defenses to a pleading, said party is still entitled to cross examine witnesses, and object to evidence presented by the opposing party in the action. See Howard v. Holidays Inns, Inc., 271 S.C. 238, 246 S.E.2d 880 (1978); Roche v. Young Bros., Inc., 332 S.C. 75, 504, S.E.2d 311 (1998).

In this case Appellant failed to respond to the Complaint. Notwithstanding, she filed the appropriate motion for relief. Appellant’s first pleading in the matter came in the form of a Motion to Vacate the Foreclosure Order pursuant to Rules 52, 55, 60 and 71, SCRCP. (R. pp. 33-38). Appellant raised a number of issues including but not limited to the Respondents lack of evidentiary support (as discussed above) and unclean hands. Thereafter, the Master in Equity noted, that “those are all good arguments if timely made” but failed to address them. (R. pp. 95.)

Rather the Master determined that the failure to answer the allegations of the complaint deemed all matters admitted pursuant to Rule 8, SCRCP and, in essence,

precluded the raising of any defense. Stated different, the Master's application of Rule 8, SCRCF stripped pertinent parts of Rules 55 or 60 from their very purpose. The ruling by the Master was an error of law and resulted in the preclusion of any relief, despite the specific relief prescribed by Rules 55 and 60, SCRCF.

First, Rule 8, SCRCF, is inapplicable to the sufficiency of evidence to support a finding. In essence, the Master concluded because Rule 8 allegedly deems matters admitted or waived he did not need to address the sufficiency of evidence to support foreclosure or possible defenses. Respondent's failure to submit sufficient evidence is not an affirmative defense as envisioned or listed by Rule 8, SCRCF and as such cannot be deemed admitted for failure to assert it as an affirmative defense. Therefore the Master in Equity made an error of law when he ruled the assertion was barred by Rule 8, because the Appellant had failed to timely respond to the Complaint in the matter.

Second, Appellant contends this Court improperly addressed the defenses and issues she raised in her Motion to Vacate and Motion for Reconsideration by summarily determining they had no merit since Rule 8, SCRCF, deems such defenses and issues waived and/or admitted. Appellant's position is that neither Rule 8, SCRCF, nor the principle of laches should unilaterally defeat the issues raised under a Motion to Vacate based upon Rules 55 and 60, SCRCF, as the lower court did here. Indeed, if in every instance where a party fails to answer the allegations of the complaint are thereafter deemed admitted and cannot be subsequently readdressed then such a circumstance would extinguish the intention or purpose of Rules 55 and 60, SCRCF as they exist. There would be no purpose under Rule 55 to move to vacate an entry of default as provided for under Rule 55(c). There would be no purpose for a party to have to establish

meritorious defenses pursuant to 60(b). There would be no purpose, if Rule 8 is applied in the manner it was done so here, for a Judge to even hold a hearing in the matter because as a result of the allegations of the complaint being irrevocably being deemed admitted there would be no further issues of fact or questions of law for the court to address. Appellant would assert that where a party fails to answer a complaint the allegations of a complaint are not deemed admitted until the complaint moves for an entry of default under Rule 55, a hearing of default is held, and a judge orders a judgment of default. Rule, 60 SCRPC, provides a judgment to be set aside and in so doing a court should consider the availability of meritorious defenses and issues rather than determine they are forever lost under Rule 8. Perhaps the process utilized by the Master here raises a novel issue. In summary Appellant contends that the Master in Equity made an error of law when he ruled that Rule 8, SCRPC controlled and therefore any possible defenses, including but not limited to unclean hands were barred by Rule 8, and/or laches.

5. The Order of Foreclosure should be vacated pursuant to Rule 60(b) (3).

Although there are similarities as to the factors to be consider under Rule 60(b) (1) and (3), one clear distinction under 60(b) (3), is that in order for a party to be entitled to relief based on fraud, the moving party must demonstrate extrinsic fraud. Raby Constr., LLP v. Orr, 358 S.C. 10, 20-21, 594 S.E.2d 478, 484 (2004); 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.’”). Fraud 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). The intentional concealment of documents by an attorney constitutes extrinsic fraud, because it stops the opposing party from receiving his day in court. Id. at 82-83.

Here, again for reasons asserted to support vacating the Foreclosure Order under Rule 60(b)(1) which will not be restated, Appellant also asserts the failure to present the Note and failing never making good upon the representation to the Court that a Note would be present before the sale date should constitute extrinsic fraud. Further, Counsel's testimony before the court on behalf of his client constituted misrepresentations, and other misconduct given its inappropriate and improper nature of Counsel testifying and that the content of counsel's statements without further evidence constituted hearsay. Appellant would allege unto this Court that Appellant's Motion to Vacate the Judgment Foreclosure should have granted under Rule 60(b)(1) & (3) because Appellant's actions or inactions constituted mistake, inadvertence, excusable neglect or extrinsic fraud.

B. APPELLANT PROPERLY REQUESTED AND SHOULD HAVE BEEN GRANTED RELIEF UNDER RULE 55, SCRPC, FOR GOOD CAUSE SHOWN

Appellant sought relief not only under Rule 60(b), SCRPC but also under Rule 55, SCRPC. Appellant did do because due to the process employed by Respondent, it is not clear if the Foreclosure Decree was intended to be a judgment of default under Rule

55 or the lesser mechanism of an entry of default. An issue raised before the lower court but not clarified.

The determination to set aside an entry of default or a default judgment “lies solely within the sound discretion of the trial court, and the decision will not be overturned on appeal absent a clear showing of an abuse of discretion.” Sundown Operating Co. v. Intedger Indus., Inc., 383 S.C. 601, 606, 681 S.E.2d 885, 888 (2009). “An abuse of discretion occurs when the judge issuing the order was controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support.” Id. 383 S.C. at 607, 681 S.E.2d at 888. (citation omitted).

Rule 55, SCRCP provides in pertinent part as follows:

(a) Entry. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter his default upon the calendar (file book).

(b) Judgment. Judgment by default may be entered as follows:

(1) Cases Involving Liquidated Damages or Sum Certain Amounts. When the claim of a party seeking judgment by default is for a liquidated amount, a sum certain or a sum which can by computation be made certain, the judge, upon motion or application of the party seeking default, and upon affidavit of the amount due, shall enter judgment for that amount and costs against the party against whom judgment by default is sought, if that party has been defaulted for failure to appear and if such party is not a minor or incompetent person. A verified pleading may be used in lieu of an affidavit when the pleading contains information sufficient to determine or compute the sum certain.

(2) All Other Cases. In all other cases, the party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against a minor or incompetent person unless represented in the action by a guardian ad litem who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, the party (or, if appearing by representative, the party's representative) shall

be served with written notice of the motion or application for judgment at least 3 days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearing or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties if a proper demand therefor has been made pursuant to Rule 38 and not withdrawn, or when and as required by any statute. Pursuant to Rule 5(a), notice of any trial or hearing on unliquidated damages shall also be given to parties in default by first class mail to the last known address of such party whether or not such party has appeared in the action.

(c) For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

(e) Judgment Against the State and Certain Other Parties. No judgment by default shall be entered against the State of South Carolina or an officer or agency thereof, against minors, incompetents, or parties to a suit for divorce or annulment of marriage or against a party upon whom service of summons was made by publication, and who did not subsequently make appearance in the action, or in any in rem action, unless the claimant establishes his claim to relief by evidence satisfactory to the Court.

“Rule 55(c) permits a party to move to set aside the entry of default. The standard for granting relief from an entry of default under Rule 55(c) is mere "good cause." Rule 55(c), SCRPC. This standard requires a party seeking relief from an entry of default under Rule 55(c) to provide an explanation for the default and give reasons why vacation of the default entry would serve the interests of justice. Once a party has put forth a satisfactory explanation for the default, the trial court must also consider: (1) the timing of the motion for relief; (2) whether the defendant has a meritorious defense; and (3) the degree of prejudice to the plaintiff if relief is granted.” Sundown Operating Co., 383 S.C.at 607-608, 888-89. (Citing: Wham v. Shearson Lehman Bros., Inc., 298 S.C. 462, 465, 381 S.E.2d 499, 501-02 (Ct.App. 1989). “The trial court need not make specific

findings of fact for each factor if there is sufficient evidentiary support on the record for the finding of the lack of good cause.” Id. at 608, 889 (citation omitted).

In this case there are two reasons why any alleged entry of default under rule 55 should be overturned. First, the Respondent failed to comply with the procedural requirements of rule 55 and therefore Appellant would contend that No Entry of Default or even Judgment of Default was ever made in this matter. Second, even if the Court were to find an Entry of Default had been entered in this matter, Appellant would contend that she established “good cause” shown and met the requirements to have such an entry of default set aside, and the Master committed an error of law in ruling that her good cause shown was barred by laches.

As to the first of Appellant’s contentions, that the process followed in this matter did not meet the requirements of Rule 55, SCRCF, in this case the Complaint does not seek a liquidated amount as contemplated by Rule 55, SCRCF (deficiency was waived). Rather this is an *in rem* action the sole purpose of which was to foreclosure on real property and take away Squire’s home. The process followed here was defective for purposes of securing either an entry of default or order of default. Here CitiFinancial merely filed an Affidavit of Default. CitiFinancial did not apply for or move for an entry of default and no entry of default was in fact entered of record pursuant to Rule 55(a), SCRCF. Thus due to the nature of the case the provisions of Rule 55(b)(2) and (e), SCRCF apply. The Court failed to apply the provisions of Rule 55(b)(2) and (e), SCRCF. Rule 55(b)(2), SCRCF specifically requires “the party entitled to a judgment by default shall apply to the court therefor.” The Rule further dictates that to enable a court to enter a judgment it should hold a hearing if necessary to establish the truth of any

avertment by evidence or to make an investigation of any other matter. Lastly Rule 55(b)(2), SCRCF provides notice of a default hearing shall be given to all parties.⁸ Rule 55(e)(2), SCRCF requires in an in rem action that no judgment by default shall be entered “unless the claimant establishes his claim to relief by evidence satisfactory to the Court.”

CitiFinancial did not move or apply for a Judgment of default as required by Rule 55(b)(2), SCRCF. Rather than adhere to the requirements of Rule 55, SCRCF and apply or move for default requiring a filing fee, CitiFinancial and its counsel submitted a proposed order of foreclosure decree that reads within the findings of facts that “The Defendant(s) Stella B. Squire is in default as shown by affidavit or order filed herein.” (R. p. 5). Incredulously, the Foreclosure Order is ambivalent as to which means of default supposedly exists. Moreover, this is the only mention of default in the Foreclosure Order. No citation to the rules or applicable case law relating to default is contained within the Order. There being no application or motion for a default judgment the rule requirements have not been met. There being no notice advising the parties a default hearing would be held, the proceedings do not adhere to the provisions of Rule 55(b)(2), SCRCF. Indeed there was no hearing on default as provided for in 55(b)(2), SCRCF. Lastly, there are no findings or conclusions in compliance with Rule 55(e), SCRCF that CitiFinancial established its claim to relief by evidence satisfactory to the Court or what would typically meet normal evidentiary standards.⁹ Thus, this Court failed consider that the

⁸The Notice of Hearing does not specify what type of hearing was to be held. It does not state the hearing will be a hearing on default. Moreover, the Notice of Hearing does not state whether testimony will be taken in writing as required by S.C. Code Ann. Section 14-11-110 (Law Co-op. 1976).

⁹ Squire argued that the Plaintiff did not provide sufficient evidence in its claim for the following reasons: (1) the Complaint was unverified; (2) a proper hearing was not held; (3) as noted in the Order of December 1, 2010, Plaintiff did not present evidence by a qualified witness; (4) no note was presented and Plaintiff's

Master in Equity committed errors of law in with regard to those matters relating to default in the Foreclosure Order by failing to follow established procedural safeguards.

In fact, the practice that was followed here is like no other. Foreclosing entities have adopted a practice before the equity courts of this state that is not followed or allowed in the circuit courts. As stated repeatedly herein no application or motion for entry of default or order of default is made. This appears to be practice adopted for the purpose of avoiding having to pay a filing fee for a motion. It is a practice that Squire contends defies the requirements of the Rules of Civil Procedure and deprives consumers of the opportunity to defend and procedural safeguards. Moreover, the failure to properly move for default used in foreclosure proceedings with regard to default, in effect, creates an exception for foreclosure proceedings that is not available in any other matter before the circuit courts. If a Plaintiff in a matter pending before the Court of Common Pleas were to seek either an entry of default or judgment of default, it would have to apply or move for such and pay a filing fee. A hearing would be held. Sufficient testimony would be required. Counsel of record would not be allowed to testify. What is happening in foreclosure proceeding and in this case specifically would not be allowed in the Court of Common Pleas. The Respondent and the Master in Equity erred in failing to adhere to the requirements of Rule 55, SCRCF. This same or similar scenario was recently also brought before the Courts attention in Owens v. Regions Bank, Opinion No. 5113 (Ct. App. Filed April 10, 2013). However, in Owens, this Court held that the

counsel merely state it would offer a copy of the Note prior to the Sale date which did not occur; (5) the original Mortgage was not presented, nor entered into evidence and is not contained in the court record; (6) there was no testimony offered by a creditable witness for Plaintiff that could authenticate any note or mortgage;(7) Plaintiff did not establish it was the owner or holder of the original Note or Mortgage;(8) Plaintiff claims that adherence to S.C. Code Ann. 14-11-110 was waived by agreement but Defendant did not waive any such provision.

Appellant failed to raise this argument to the master, and therefore the issue was not preserved before the Court. This case is distinguishable from Owens, in that the Appellant did raise the issue before the Master in Equity in both her Motion to Vacate as well as her Motion to Reconsider, however, subsequently this Court did not address the issue when it entered an opinion in this matter. Given that there is some indication that this practice is occurring in more than a single instance in this state, Appellant would kindly request that this Court address the issues and find that the Master Committed an error of law in not ensuring the requirements under Rule 55, SCRCP were met as stated above.

As to the Appellant's second argument under Rule 55, SCRCP. Appellant would contend that this Court failed to consider that even if for the sake of argument an entry of default had been made in this matter, the Master should have set aside the entry of default under Rule 55, SCRCP. Appellant submitted affidavits to the Master during the hearing upon Appellant's Motion to Vacate. The Affidavits provided an explanation for Appellant's alleged default, bringing into question Appellant's mental competency at the time in being able to manage her own household affairs. Respondent offered nothing in contest. Further, Appellant's motion was timely in that it was filed in the month following the December 1, 2010 order, the only order which could possibly contain an alleged entry of default, though again Appellant would contend no entry or judgment of default were ever filed in this matter. Further Appellant raised a number of meritorious defenses in her Motion to Vacate, including but not limited to, the fact that the Respondent had failed to submit any evidence to meet its burden of establishing it was entitled to damages under Rule 55, SCRCP; and Appellant alleged that the Respondent had come to the action with unclean hands because the Respondent had originally closed

the loan transaction without an attorney present. Finally, the degree of prejudice to the Plaintiff/Respondent would not be great because Respondent would still be allowed to seek foreclosure upon submitting evidence sufficient to establish it was entitled to, and after meeting the requirement of the South Carolina Administrative Order concerning foreclosures. However, by contrast, if the Appellant's relief sought under Rule 55, SCRPC, were not to be granted, the prejudice to Appellant would be even greater because Respondent would be entitled to foreclose upon her house without establishing a right to do so, or following the proper procedural safe guard required in order to protect the interest of consumers in such actions.

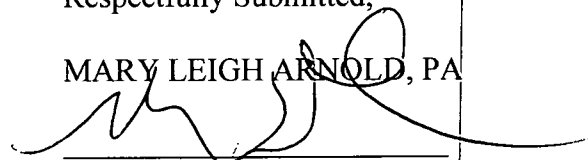
In summary this Court failed to address whether the Master committed an error of law by not requiring the procedures established and by Rule 55, SCRPC, and further the Master committed an error of law by failing to Rule whether Appellant had established "good cause shown" under Rule 55, SCRPC instead simply ruling that Appellant's relief sought was barred by laches.

CONCLUSION

For the reasons stated above, Appellant requests this Court reconsider its decision of April 17, 2013 and that the decision of the lower court be vacated and reversed.

Respectfully Submitted,

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May 2, 2013

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**THE STATE SOUTH CAROLINA
In the Court of Appeals**

APPEAL FROM CHARLESTON COUNTY
The Honorable Mikell R. Scarborough, Master-in-Equity

Case No. 2010-CP-10-6481

CitiFinancial, Inc.,

Respondent,

v.

Stella B. C. Squire, aka Stella B. Cardamone,
and Beneficial South Carolina, Inc.,

Defendants,

Of whom, Stella B. C. Squire is,

Appellant.

PROOF OF SERVICE

I, the undersigned do hereby certify that I have on this 2nd day of May, 2013
mailed a true and correct copy of the Appellant's Petition for Rehearing to the following
counsel of record:

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