THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

R. Murray Hughes
Special Referee

Opinion No. 2013-UP-090
(S.C. Ct. App. filed Feb. 27, 2013)

JP Morgan Chase Bank, National Association.....Respondent,

v.

Vanessa Y. Bradley.....Petitioner.

PETITION FOR A WRIT OF CERTIORARI

Susan Ingles
South Carolina Legal Services
701 South Main Street
Greenville, SC 29601
864-679-3244
Attorney for Petitioner

Other Counsel of Record:
Mary McFarland Caskey
James Y. Becker
Samuel C. Waters
Sarah Patrick Spruill
P.O. Box 11889
Columbia, SC 29211-1889
803-540-7870
Attorneys for Respondent

INDEX

CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on April 15, 2013.

QUESTIONS PRESENTED

1. Does an administrative order of the South Carolina Supreme Court require "strict compliance" or compliance "in spirit"?
2. Do Respondent's false representations to Petitioner. i.e., that it would not proceed with foreclosure sale during a required thirty-day challenge period, constitute fraud, misrepresentation, or misconduct pursuant to Rule 60(b)(3) SCRCP?

STATEMENT OF THE CASE

On January 30, 2001, Petitioner Vanessa Y. Bradley purchased a home in Central, South Carolina. Bradley gave Respondent JP Morgan Chase Bank (Bank) a mortgage of $84,200 to finance the purchase. (R. 5). On December 30, 2008, Bank filed a mortgage foreclosure action against Bradley. (R.50). The circuit court referred the matter to R. Murray Hughes, an attorney and Pickens County Special Referee. (R.3). On March 12, 2009, the Special Referee conducted a default hearing. (R.5). Thereafter, the Special Referee entered an Order of Foreclosure and Judgment and scheduled a foreclosure sale to take place on April 6, 2009. (R. 58).

On October 8, 2008, Congress had enacted The Emergency Economic Stabilization Act (EESA). *12 U.S.C. 1509.* This Act authorized the Secretary of the Treasury to create the Making Home Affordable Program. (R. 351). One component of this program, the Home Affordable Modification Program (HAMP), became effective on March 4, 2009. (R. 351).

HAMP required lenders to consider borrowers for loan modification and to suspend foreclosure activities throughout consideration for loan modification. (R. 351-52).

In keeping with HAMP regulations, in April of 2009, Bank withdrew Bradley's property from the foreclosure sale and continued the loan modification review it had started in January 2009. (R.308, 309). On May 4, 2009, the South Carolina Supreme Court issued Order No. 2009-05-04-01, which temporarily restrained residential foreclosure sales in South Carolina while loan modification was pending. (R. 71). On May 22, 2009, the Court issued Order 2009-05-22-01, which stayed foreclosure proceedings while mortgagees pursued loan modification activity pursuant to the implementation of HAMP regulations. (R. 14, 18). Accordingly, the Court's Order of May 22, 2009 stayed this matter.

From March 12, 2009 through May 18, 2010, Bank filed no further motions in this case. On May 18, 2010, Bank revived the foreclosure action by filing an Affidavit of Non-eligibility for Modification. (R. 303). On August 19, 2010, pursuant to HAMP regulations, Bank sent Bradley a letter stating that she was ineligible for loan modification. (R.383-86). Bank's letter stated that (1) Bradley had a thirty-day period during which to challenge Bank's determination and (2) during this thirty-day period, Bradley's home would not be sold. (R. 383-86). On September 7, 2010, despite Bank's representations to the contrary, Bank placed Bradley's home in a foreclosure sale in contravention of HAMP and the Administrative Order 2009-05-22-01 and purchased the home for a bid of $60,000.[1] (R. 21, 60).

On September 20, 2010, Bradley filed a Motion to Set Aside the Sale, pursuant to Rule 60(b)(3), South Carolina Rules of Civil Procedure. (R.61). The Special Referee denied Bradley's motion and her subsequent motion for reconsideration. (R. 24, 28). This appeal followed.

[1] Bradley had no legal representation throughout the foreclosure process. (R. 167). After learning for the first time on September 14, 2010 that the foreclosure sale did occur, Bradley contacted South Carolina Legal Services seeking to set aside the sale of her home. (R.61, 161).

On February 5, 2013, The Court of Appeals heard Bradley's appeal from the Special Referee's decision. Despite finding that Bank had violated HAMP regulations and had failed to fully comply with the procedures set forth in Administrative Order 2009-05-22-01, The Court of Appeals affirmed the decision of the Special Referee. *JP Morgan Chase Bank, Nat'l Assn. v. Vanessa Y. Bradley*, Opn. No. 2013-UP-090 filed Feb. 27, 2013. Petitioner seeks a writ of certiorari to review the Court of Appeals' decision.

ARGUMENTS

1. THE COURT OF APPEALS SHOULD HAVE FOUND THE SPECIAL REFEREE ERRED IN DECLINING TO SET ASIDE THE FORECLOSURE SALE, PURSUANT TO RULE 60(b)(3) OF THE SOUTH CAROLINA RULES OF CIVIL PROCEDURE, BECAUSE RESPONDENT COMMITTED MISCONDUCT BY VIOLATING AN EXPRESS PROVISION OF ADMINISTRATIVE ORDER 2009-05-22-01 OF THE SOUTH CAROLINA SUPREME COURT.

This Petition questions the level of compliance required under an Administrative Order of the Supreme Court of South Carolina, a novel question for which there appears to be no South Carolina case law on point. In its decision, The Court of Appeals held that compliance with an administrative order "in spirit" was legally sufficient. Petitioner disagrees. In its decision, The Court of Appeals misapplied the Supreme Court's Administrative Order in two ways. First, it affirmed Bank's foreclosure sale despite finding Bank had violated the Order. Second, The Court of Appeals found it acceptable for Bank to violate HAMP, and thus the Administrative Order, because Bank's "overall actions captured the spirit of HAMP."

a. An Administrative Order of the South Carolina Supreme Court must be "strictly" enforced.

Administrative Order 2009-05-22-01 required Bank to comply with HAMP regulations before its foreclosure case against Bradley could proceed. The Court of Appeals found that Bank

"violated HAMP by holding the foreclosure sale while Bradley's reapplication for loan modification was pending". However, The Court of Appeals determined that that this "failure to fully comply with the procedures set forth in the Administrative Order did not warrant setting aside the foreclosure sale."

The Court of Appeals was required to evaluate whether strict construction should be used in determining whether a party had complied with an Administrative Order of the Supreme Court. Here, The Court of Appeals found that strict compliance with the procedures set forth in The Supreme Court's Order was not required; instead, merely "capturing the spirit" of the Order was legally sufficient. Petitioner disagrees with The Court of Appeals' conclusion and asserts that Administrative Orders of the Supreme Court must be strictly construed.

In its opinion, The Court of Appeals appears to excuse Bank's non-compliance with the Administrative Order by shifting the focus to Bradley's shortcomings. (R. 2, 3). However, the requirement of Bank's compliance with HAMP regulations, as specified in the Order, is independent of Bradley's actions or inactions. The Administrative Order is designed to provide assurance that mortgage servicers execute foreclosures in accordance with the law of HAMP with attendant consequence if they do not. That purpose is undermined where a foreclosing plaintiff is allowed to merely comply with such an order "in spirit"" only.

The Court of Appeals committed reversible error when it failed to require strict compliance with the Administrative Order by Bank and set aside the foreclosure sale herein.

b. The HAMP regulations must be strictly enforced.

The need for compliance with HAMP in concert with the South Carolina Rules of Civil Procedure prompted the issuance of the Administrative Order 2009-05-22-01. In this Order, the Chief Justice admonished mortgage servicers, such as Bank, to comply fully with HAMP

regulations prior to selling a mortgagee's home. The HAMP regulations themselves, and thus the Administrative Order, prohibited the foreclosure sale herein. (R. 352, 352). Bank's letter to Bradley on August 19, 2010 complied with HAMP regulations, which required Bank, upon denial of loan modification, to provide a thirty-day period during which Bradley could challenge Bank's denial of loan modification. (R. 384). No sale of her home could take place during this thirty-day period. Although Bank notified Bradley of the required thirty-day challenge period, it failed to comply with the foreclosure sale prohibition. Instead, Bank sold Bradley's home during the thirty-day challenge period. (R. 21). It was reversible error for The Court of Appeals to excuse Bank's violation of this HAMP regulation.

2. THE COURT OF APPEALS SHOULD HAVE FOUND THE SPECIAL REFEREE ERRED IN DECLINING TO SET ASIDE THE FORECLOSURE SALE, PURSUANT TO RULE 60(b)(3) OF THE SOUTH CAROLINA RULES OF CIVIL PROCEDURE, DUE TO BANK'S MISREPRESENTATION OF THE STATUS OF ITS FORECLOSURE PROCEEDINGS AGAINST BRADLEY.

The foreclosure sale of Bradley's home should have been set aside pursuant to Rule 60(b)(3), SCRCP. Bank failed to act in accordance with the representation to Bradley in its letter of August 19, 2010, wherein Bank stated her house would not be sold for 30 days. (R. 384). Furthermore, the subsequent actions of Bank's agents in communicating with Bradley served to reinforce her belief in Bank's false representation in this letter. (R. 145, 157, 166, 170, 171, 206). In particular, the Bank's agent informed her on the day her home was sold that it **had not been sold**. (R.158) In its opinion, The Court of Appeals clearly misapprehended the facts related to Bank's representations to Bradley. The evidence in the Record on Appeal requires that the foreclosure sale be set aside for fraud, misrepresentation, or misconduct pursuant to Rule 60(b)(3), SCRCP.

a. Bank's August 19, 2010 letter to Bradley contained a material misrepresentation sufficient to warrant setting aside the sale under Rule 60(b)(3, SCRCP.

Bank sent Bradley a letter containing a HAMP regulatory notice that her house would not be sold for thirty days from the date of the letter, yet it held a foreclosure sale nineteen days later—on September 7, 2010. (R. 21, 60). Bank's August 19, 2010 letter to Bradley stated:

> Unless otherwise specifically provided for in your denial reason description, **you have thirty (30) days from the date of this letter to contact Chase to discuss the reason for non-approval under the Home Affordable Modification Program or to discuss alternative loss mitigation options that may be available to you.** Your loan may be referred to foreclosure during this time, or any pending foreclosure action may continue. **However, no foreclosure sale will be conducted and you will not lose your home during this thirty (30) day period.**

(R. 384 (emphasis added).

Bradley challenged Bank's denial by contacting Bank as specified. (R. 166). Prior to expiration of the thirty-day challenge period, Bank placed Bradley's home in a foreclosure sale. (R. 310). On September 7, 2010, Bank purchased Bradley's home for $60,000. (R. 21). Consequently, Bradley was prevented from pursuing the recourse available under HAMP regulations or other options available to save her home. (R.134, 168, 216).

b. Repeated misrepresentations of Bank's agents to Bradley by telephone reinforced her reliance on the August 19, 2010 letter and constituted fraud, misrepresentation, or other misconduct warranting relief under Rule 60(b)(3), SCRCP.

The Court of Appeals misapprehended the facts in the record on appeal when it made the following statement regarding Bank's August 19, 2010 letter to Bradley:

> Bradley testified that after receiving the letter she contacted the Bank numerous times and was repeatedly informed the foreclosure sale had not been cancelled.

This finding of fact is not supported by the record.

A thorough review of the record reveals that Bank made no statements to Bradley that the foreclosure sale would go forward prior to expiration of the thirty-day challenge period. (R. 149, 151, 154, 155, 156, 157, 158,159, 160, 161, and 166). To the contrary, Bank's agents represented and the August 19, 2010 letter expressly stated that no sale would be held during the challenge period. (R.150, 384). Furthermore, Bank's agents repeatedly stated that the loan modification review would take 30-45 days and Bradley's home could not be sold during that time. (R. 146, 156, 157, 166, 206).

At the hearing on Petitioner's Motion to Set Aside the Sale, Bank's attorney asked Bradley whether she believed she had received misinformation or an incorrect statement from a Bank representative about the foreclosure sale. Bradley responded: "Yes. Because I called in August they said it's in review and it's going to take 30 to 45 days and nothing can be done." (R.206). This response demonstrates Bradley's reliance on the language of Bank's August 19, 2010 letter. (R. 384). Upon further inquiry, the following exchange took place:

Bank. You took that to mean the foreclosure sale had been postponed
Bradley. Right.
Bank. But no one had ever told you it had been postponed.
Bradley. Correct.
Bank. That was just your understanding?
Bradley. Right.

(R. 206).

The record does not support The Court of Appeals' finding that Bradley "was repeatedly informed that the foreclosure sale had not been cancelled". Rather, Bradley's testimony reflects she was told **repeatedly** by multiple Bank agents that Bank **had requested that the foreclosure sale be cancelled.**[1] (R. 149, 151, 154, 155, 156, 157, 158,159, 160, 161, 166). This ongoing

[1] The only evidence submitted by Bank on this point is a hearsay statement in the Affidavit of Charles Herndon which does not counter Bradley's recounting of the multiple statements by Bank representatives and merely alleges that Bradley was advised a single time, on September 4, 2010 that the sale had not been postponed. (R. 374) This is

pattern of misrepresentations by Bank agents suggested to Bradley that Bank had no intention of pursuing the foreclosure sale and, in fact, was prohibited from doing so for the thirty to forty-five days it would take Bank to review Bradley's modification application. (R. 146, 156, 157, 166, 206). At no time prior to the sale did the Bank decline to review Bradley's loan modification application. In fact, the record reflects that the Bank solicited her modification application. (R. 143, 144).

The decision of The Court of Appeals acknowledges that Bank's actions in scheduling the sale during the thirty-day challenge period violated HAMP. However, The Court of Appeals failed to acknowledge that Bank's actions justify relief pursuant to Rule 60(b)(3) SCRCP.

The August 19, 2010 letter correctly stated that HAMP prohibited the sale during the thirty-day challenge period. (R. 384). Bradley's testimony demonstrates that she reasonably believed Bank intended to cancel the foreclosure sale for this reason. (R. 146, 156, 157, 166, 206). Such a cancellation would have complied with HAMP regulations.

c. The Court of Appeals overlooked the significance of the evidence of Bank's pattern of misrepresentation when reviewing the Special Referee's exercise of discretion.

The Court of Appeals overlooked the inherent problems brought about by the dual tracking of foreclosure actions and loan modification review and how they are addressed by state and federal law. Bank engaged in dual tracking when it simultaneously conducted loan modification review and pursued foreclosure litigation and sale. The problems caused by dual tracking are referenced in Administrative Order 2011-05-02-01. Specifically, The Court of Appeals failed to acknowledge that the mortgage servicing industry standard required by HAMP

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in direct contradiction to Bradley's fact specific testimony that on September 4, 2010 Jeanette at Bank told her that the request to postpone the foreclosure sale had been submitted. (R. 157). .

and recognized by the Administrative Order prohibited the foreclosure sales that Bank scheduled in April 2009,[2] August 2010, and September 2010. Administrative Order 2009-05-04-01 (p.1)

Supreme Court Administrative Order 2009-05-04-01, requested by Federal National Mortgage Association (Fannie Mae), and the subsequent Administrative Order 2009-05-22-01 which replaced it were designed to provide for the suspension and/or termination of foreclosure litigation during loan modification review. . The procedural and substantive requirements were meant to prevent the unintended consequence of HAMP violations that occur as a result of dual tracking. The Order accomplished this by means of the operation of a stay of foreclosure actions commensurate with the one outlined in the HAMP regulations.

The failure of HAMP compliance by lenders continued to escalate and led to Administrative Order 2011-05-02-01 which outlined concerns including, 1) "difficulty in making final disposition of these actions as a result of failed or delayed loss mitigation efforts between lender-servicers and mortgagor-debtors," , and 2)"modification failures resulting from a breakdown of loss mitigation efforts largely the result of difficulty in communication between lender-servicers and debtors, and the fact that foreclosure actions are proceeding to conclusion without regard to ongoing loss mitigation efforts by the parties." Administrative Order 2011-05-02-01 (p.1)

The Chief Justice took "judicial notice of the actions of courts in other jurisdictions describing a similar breakdown in the efforts of parties to foreclosure actions to reach a resolution of defaults in payment of mortgage loans." The Order stated it was "issued so that mortgage foreclosure actions are not unnecessarily dismissed, delayed or inappropriately

[2] First Foreclosure Solutions requested modification for Bradley just after the foreclosure action was filed.(R. 178 and 179). Therefore, regarding the initial sale that was scheduled for April 2009, HAMP regulations prohibited further foreclosure action at that time. *Administrative Order 2009-05-22-01(p.3).*

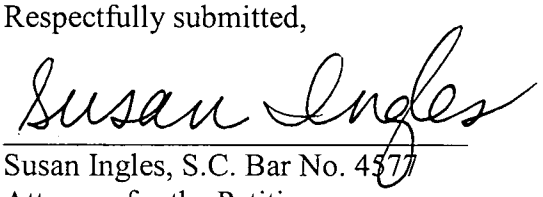
concluded while loan modification or other loss mitigation efforts are being pursued." Administrative Order 2009-05-22-01 (p.1).

Although Bradley alerted the Special Referee that this very thing had happened, the Special Referee failed to require strict adherence to the Administrative Order. (R. 61, 98). Instead, the Special Referee upheld the foreclosure sale that was conducted during the thirty-day challenge period in violation of HAMP regulations and Administrative Order 2009-05-22-01. (R.24, 28). It was error to refuse to set aside the sale pursuant to Rule 60(b)(3) SCRCP as a result of Bank's fraud, misrepresentation or other misconduct in the August 19, 2010 letter and the telephone statements of Bank's agents.

CONCLUSION

For the reasons stated, Petitioner asks the Court to grant the petition for a writ of certiorari.

Respectfully submitted,



Susan Ingles, S.C. Bar No. 4577
Attorney for the Petitioner
701 South Main Street
Greenville, SC 29601
864-679-3244

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PROOF OF SERVICE

I certify that I have served the Petition for a Writ of Certiorari and Appendix, Volume I and II on the Respondent, JP Morgan Chase Bank, National Bank by hand delivering a copy of it on May 15, 2013 at the physical address of their attorneys of record listed below:

James Y. Becker
Sarah P. Spruill
Mary M. Caskey
1201 Main Street, 22nd Floor
Columbia, SC 29201

Susan Ingles

Susan Ingles,
South Carolina Legal Services
701 South Main Street
Greenville, SC 29601
(864) 679-3244
Attorney for Appellant

May 15, 2013