THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Charles B. Simmons, Master-in-Equity

Appellate Case No. 2012-213505
Circuit Court Case No. 2010-CP-23-8152

Wells Fargo Bank, N.A., ... Respondent,

v.

Lynn D. Simpson; Wells Fargo Bank, N.A. (Charlotte, NC); The Lofts at Mills Mill Condominium Owners Association, Inc., ... Defendants,

of whom

Lynn D. Simpson is the ..... Appellant.

RESPONDENT'S INITIAL BRIEF

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May 9, 2013

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STATEMENT OF ISSUES

This case presents four issues for the Court's consideration:

1. May a party obtain relief on appeal under Rule 60(b), SCRCP, if it failed to preserve an essential element of its Rule 60(b) claim for appellate review?

2. May a party obtain relief under Rule 60(b)(5), SCRCP, when the facts supporting its motion were known to the party at the time that the underlying judgment was entered, but the party failed to bring those facts to the lower court's attention?

3. May a party obtain relief under Rule 60(b)(5), SCRCP, when the underlying judgment does not have any prospective application?

4. Did the Master-in-Equity abuse his discretion by holding Appellant's motion under Rule 60(b)(5), SCRCP, to be untimely when the facts underlying the motion were known to Appellant, and Appellant stayed silent about the facts for over a year and a half after first appearing in the case?

STATEMENT OF THE CASE

This case involves the foreclosure of a condominium unit that, because of Appellant's repeated failure to participate in the proceedings and singular reliance on improper post-judgment motions, has spanned over two and a half years. It presents a case study in the equitable maxim: "Equity aids the vigilant, not those who slumber on their rights." *Eldridge v. Eldridge*, 398 S.C. 113, 121, 728 S.E.2d 24, 28 (2012).

Wells Fargo commenced this case on September 30, 2010. (R. p. ___, Compl.) Though Appellant was properly served with process, she failed to appear in the matter or otherwise responsively plead. (R. p. ___, Aff. of Default.) On November 30, 2010, Judge Simmons, the Master-in-Equity for Greenville County, held a default hearing; Appellant again failed to appear. (R. p. ___, Judgment of Foreclosure and Sale.) Accordingly, on December 3, 2010, the Master-in-Equity entered an order (1) directing that the condominium unit be sold and (2) awarding Wells Fargo the full amount due on the note and its expenses and fees associated with this matter. (R. pp. ___–___, *id.*) Appellant never appealed the judgment of foreclosure.

The condominium unit was sold at a public auction on January 4, 2011. (R. p. ___, Order.) On February 2, 2011, Appellant made her first appearance in the case and filed a motion for relief from the December 3, 2010 judgment, citing Rule 60(b)(4), SCRCP. (R. p. ___, Appellant's First Mot. for Relief.) At that time, Appellant's sole argument was that she had not been properly served with process. (R. pp. ___–___, *id.*)

Judge Simmons heard Appellant's motion on March 29, 2011. On April 14, 2011, Judge Simmons denied Appellant's Rule 60(b) motion on its merits, but he also vacated the earlier sale in order to give the parties an opportunity to discuss loss-

mitigation issues. (R. pp. ___-___, Order.) Appellant never appealed the denial of her first Rule 60(b) motion.

As directed by Judge Simmons, and consistent with the Supreme Court's May 9, 2011 Administrative Order regarding foreclosure matters, the parties engaged in negotiations regarding loss mitigation. When those discussions proved unsuccessful, Wells Fargo returned to court on August 1, 2012 and sought to update the December 3, 2010 judgment to account for additional costs and fees incurred in this matter. (R. p. ___, Attorney Certification.) On September 25, 2012, Judge Simmons convened a hearing regarding Wells Fargo's request. Appellant never objected to or appeared at that hearing.

By order dated September 25, 2012, Judge Simmons entered a "Supplemental Order Post Judgment" that (1) updated the amount owed to Wells Fargo from $240,269.17 to $253,234.02; and (2) directed that the condominium unit be sold pursuant to the terms of the prior order. (R. p. ___, Supplemental Order Post Judgment.) Appellant never appealed this supplemental post-judgment order.

On October 26, 2012, Appellant filed a second motion for relief from the first judgment. This time, Appellant relied on Rule 60(b)(5) and argued—for the first time—that the December 3, 2010 judgment was invalid for equitable reasons based on alleged events that took place between the Fall of 2010 and February 2011. (R. pp. ___-___, Appellant's Second Mot. for Relief.) Judge Simmons denied Appellant's second motion for relief by order dated November 5, 2012. (R. p. ___, Order Den. Mot. for Relief.) Appellant filed her notice of appeal on November 19, 2012. (R. p. ___, Not. of Appeal.) Only the November 5, 2012 order has been appealed. (*Id.*)

STANDARD OF REVIEW

South Carolina has a strong policy favoring the finality of judgments. *Bowman v. Bowman*, 357 S.C. 146, 152, 591 S.E.2d 654, 657 (Ct. App. 2004). Therefore, the power to modify or vacate a judgment "is possessed solely by the court that rendered that judgment," *Coleman v. Dunlap*, 306 S.C. 491, 494, 413 S.E.2d 15, 17 (1992), and it is limited to the grounds outlined in Rule 60(b) of the South Carolina Rules of Civil Procedure.

This case involves an appeal of the Master-in-Equity's denial of a motion to set aside a judgment pursuant to Rule 60(b)(5). That rule authorizes trial courts to exercise their equitable discretion, under limited circumstances, to relieve a party of a previously-entered judgment. It provides as follows:

> 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.

Decisions about whether to grant or deny a Rule 60(b) motion lie within the trial court's sound discretion. *Se. Hous. Found. v. Smith*, 380 S.C. 621, 636, 670 S.E.2d 680, 688 (Ct. App. 2008). Therefore, an appellate court should review the trial court's decision to deny a Rule 60(b) motion for an abuse of discretion. *Id.*

ARGUMENTS AND AUTHORITIES

Rule 60(b) is designed to provide a party with relief from a judgment when it has diligently protected its rights, but circumstances have changed such that the party should no longer bear the judgment. This case falls far outside of this paradigm, as Appellant has refused to fulfill even basic obligations to defend herself in this litigation.

Appellant never answered Wells Fargo's Complaint. Appellant never appeared at the default hearing. Appellant never appeared at a subsequent hearing designed to update the monies owed to Wells Fargo. Appellant never appealed the denial of Appellant's first Rule 60(b) motion. After commencing this appeal, Appellant never moved this Court for an order staying the foreclosure sale. Appellant never even posted a bond sufficient to stay the foreclosure sale. Even when Appellant moved for relief pursuant to Rule 60(b)(5) in October 2012, the factual basis for the motion actually predated the circuit court's order denying her first Rule 60(b) motion nearly a year and a half earlier.

Under these circumstances, Rule 60(b)(5) simply cannot apply. ***First***, any claim for relief under Rule 60(b) requires the existence of a meritorious defense, yet Appellant did not preserve this issue for appellate review. ***Second***, Rule 60(b)(5) cannot revive a claim when the motion's factual basis existed and was known to the movant, but was not disclosed to the trial court, when the order from which relief is sought was entered. ***Third***, this rule can be used only to avoid the prospective application of an order. However, because Appellant failed to take any steps to protect her rights pending appeal, the circuit court's order no longer has any prospective applicability. ***Finally***, any determination regarding the timeliness of a Rule 60(b)(5) motion is committed to the circuit court's sound discretion. Each basis for rejecting this appeal is discussed below.

I. Relief under Rule 60(b) requires proof of a meritorious defense, but Appellant failed to preserve this issue for appellate review.

The sole relief Appellant seeks in this appeal is the reversal of the Master-in-Equity's denial of her Rule 60(b)(5) motion. However, this Court will only rule on issues that are properly preserved for its review, which requires that an issue be presented to and ruled upon by the trial court. *See Elam v. S.C. DOT*, 361 S.C. 9, 23–24, 602 S.E.2d 772, 779–80 (2004) ("Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court."). If a party raises an issue, but the trial court does not rule on it, the issue is not preserved for appellate review unless the party first files a motion to alter or amend the judgment. *See, e.g.*, *Great Games, Inc. v. S.C. DOR*, 339 S.C. 79, 85, 529 S.E.2d 6, 9 (2000) (holding that issues were not preserved for appellate review because "they were not ruled upon below").

Here, Appellant concedes in her opening brief that "[t]he Master-in-Equity made no ruling as to the existence of a meritorious defense or as to prejudice to the other party." (Am. Initial Br. of Appellant at 3 n.1.) Appellant never filed a Rule 59 motion to amend the judgment. Critically, though, the Supreme Court has been clear that "[a] meritorious defense is necessary in order for a judgment to be set aside under Rule 60(b)." *McClurg v. Deaton*, 395 S.C. 85, 86–87, 716 S.E.2d 887, 887–88 (2011).

Because there is no ruling below regarding an essential element of Appellant's claim for relief under Rule 60(b), the only issue on which Appellant seeks relief is not preserved for appellate review. *See id.* at 86–87, 716 S.E.2d at 888 (rejecting an appeal of the denial of a Rule 60(b) motion because Appellants had failed to preserve arguments regarding the "meritorious defense" element). Her appeal fails for this fundamental threshold reason.

II. Rule 60(b)(5) does not apply when the basis for the motion existed and was known to the movant at the time the underlying judgment was entered.

In addition to failing for issue-preservation reasons, this appeal fails because Rule 60(b)(5) does not provide an escape hatch when a party has knowingly rested on her rights, and the case's circumstances have not changed after entry of the judgment. As this Court has explained, 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 v. Mrs. G*, 320 S.C. 305, 316, 465 S.E.2d 101, 107 (Ct. App. 1995) (Hearn, J., dissenting)) (emphasis added).

If Rule 60(b)(5) were construed otherwise, a party who missed its opportunity to appeal an adverse judgment could invoke the rule in order to restart the clock for commencing an appeal, an outcome that South Carolina's courts have rejected. *See, e.g.*, *Tench v. S.C. Dep't of Educ.*, 347 S.C. 117, 121, 553 S.E.2d 451, 453 (2001) ("A party may not invoke this rule where it could have pursued the issue on appeal. When the Department failed to petition the Court of Appeals for rehearing, it effectively abandoned its right to relitigate under Rule 60(b)(5) the issues raised in that appeal."); *Smith Cos. of Greenville v. Hayes*, 311 S.C. 358, 359, 428 S.E.2d 900, 902 (Ct. App. 1993) ("Relief from judgment under Rule 60 should not be considered a substitute for appeal from a final judgment, particularly when it is clear the party seeking relief could have litigated at trial and on appeal the claims he now makes by motion.").

Here, Appellant's Rule 60(b)(5) motion was not based on anything that happened after the Master-in-Equity entered judgment against her. Rather than citing a single "subsequent condition," Appellant's motion identified only telephone calls and

correspondence exchanged between herself and Wells Fargo from the Fall of 2010 through February 2011 as the alleged grounds for relief from judgment. (R. pp. ___-___, Appellant's Second Mot. for Relief.) But this evidence already existed when Appellant filed her first motion for relief from judgment in February 2011 (R. p. ___, Appellant's First Mot. for Relief); when the Master-in-Equity heard arguments on that motion in March 2011 (R. p. ___, Order); and when the Master-in-Equity denied that motion on April 14, 2011. (R. p. ___, *id.*).

The record does not reflect that Appellant raised any of the issues discussed in her Rule 60(b)(5) motion in her first Rule 60(b) motion. Indeed, in denying Appellant's Rule 60(b)(5) motion, the Master-in-Equity highlighted the fact that Appellant previously knew of, but remained silent about, the claims on which she based her later motion:

> In reaching this conclusion, I note the fact that all of the information shown by the exhibits attached to Simpson's present motion appears to have been in her possession and known to her since at least February of 2011.

(R. p. ___, Order Den. Mot. for Relief.)[1] Accordingly, Rule 60(b)(5) cannot apply here, as Appellant based the Rule 60(b)(5) motion solely on information of which she was aware before the trial court entered its April 14, 2011 order, rather than on any new information that came into being after entry of judgment.

Similarly, Appellant could have, but did not, appeal the Master-in-Equity's April 14, 2011 order. *See Winesett v. Winesett*, 287 S.C. 332, 334, 338 S.E.2d 340, 341 (1985) ("The proper procedure for challenging a default judgment is to move the trial court to set

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[1] Appellant does not challenge this aspect of the Master-in-Equity's order in her opening brief. She has, therefore, abandoned the ability to dispute this finding. *See First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) ("Appellant fails to provide arguments or supporting authority for his assertion. Thus, he is deemed to have abandoned this issue.").

aside the judgment pursuant to Rule 60(b), SCRCP. An appeal may then be taken from the denial of this motion."). Consequently, her subsequent invocation of Rule 60(b)(5) almost a year and a half after her deadline expired for appealing that judgment violates the norm of appellate procedure that Rule 60(b) cannot be used to appeal an issue out-of-time. *Tench*, 347 S.C. at 121, 553 S.E.2d at 453; *Smith Cos. of Greenville*, 311 S.C. at 359, 428 S.E.2d at 902.[2] The Court should affirm the trial court's order as a result.

III. Because Appellant failed to take any steps to preserve the status quo pending appeal, the order from which she seeks relief no longer has any prospective applicability, rendering Rule 60(b)(5) inapplicable.

Similarly fatal to this appeal is the fact that, by its express terms, Rule 60(b)(5) only permits trial courts to grant equitable relief from judgments that have "prospective application." This Court has recognized that the rule's scope is generally limited to injunctions, as such orders "involve[] the supervision of changing conduct or conditions by the court." *Saro Invs. v. Ocean Holiday P'ship*, 314 S.C. 116, 120 n.3, 441 S.E.2d 835, 838 n.3 (Ct. App. 1994). On the other hand, orders that only "mandate a one-time change in the ownership of property" fall "wholly outside the scope of Rule 60(b)(5)." *Perry*, 357 S.C. at 49, 590 S.E.2d at 505–06.

This case falls into the latter category. It is a foreclosure action, and the Master-in-Equity ordered a one-time sale of property to satisfy a debt owed by Appellant. (R. p.

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[2] Rule 203(b)(1), SCACR, requires a putative appellant to serve a notice of appeal on all respondents within thirty days after receiving written notice of entry of the appealable judgment. The Supreme Court has been clear that this time limit is a jurisdictional matter; accordingly, no court has any discretion to extend such a deadline. *See, e.g.*, *Elam*, 361 S.C. at 14–15, 602 S.E.2d at 775 ("The requirement of service of the notice of appeal is jurisdictional, *i.e.*, if a party misses the deadline, the appellate court lacks jurisdiction to consider the appeal and has no authority or discretion to 'rescue' the delinquent party by extending or ignoring the deadline for service of the notice."). The Court should reject Appellant's efforts to use Rule 60(b)(5) as a vehicle to bypass this Court's jurisdictional boundaries.

___, Judgment of Foreclosure and Sale; R. p. ___, Supplemental Order Post Judgment.) That sale has already occurred, as noted in Footnote 3 of Wells Fargo's Motion to Dismiss Appeal, and Wells Fargo has waived any deficiency judgment. (R. p. ___, Supplemental Order Post Judgment.)[3]

Accordingly, there is nothing for the Master-in-Equity to monitor or supervise between the parties on an ongoing basis. Because the judgment does not have any prospective applicability, it is beyond the scope of any relief that could be afforded under Rule 60(b)(5). The Master-in-Equity's rulings should be affirmed for this third reason.

IV. The trial court did not abuse its discretion when holding that Appellant's Rule 60(b)(5) motion was untimely.

Finally, Appellant argues that the Master-in-Equity erred when it held that the Rule 60(b)(5) motion was untimely. A motion pursuant to Rule 60(b)(5) must be "made within a reasonable time," and this determination is committed to the trial court's sound discretion. *See McDaniel v. U.S. Fid. & Guar. Co.*, 324 S.C. 639, 644, 478 S.E.2d 868, 871 (Ct. App. 1996) ("Whether or not McDaniel made his Rule 60 motion within a reasonable time is a matter addressed to the trial judge's sound discretion, and an appellate court will not disturb that determination absent abuse of discretion."). Nothing in the record suggests anything that could amount to an abuse of discretion here.

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[3] Likewise, as explained in Wells Fargo's motion, the sale of the property through foreclosure has rendered this appeal moot. *See, e.g., Oh v. Wells Fargo Bank, NA*, 473 F. App'x 807, 808 (9th Cir. 2012) ("Because the foreclosure sale has been completed, Plaintiffs no longer have any potential remedy. We therefore dismiss Plaintiffs' appeal as moot."); *Cotton v. First Nat'l Bank*, 220 S.E.2d 132, 132–33 (Ga. 1975) (dismissing as moot an appeal to enjoin foreclosure proceedings because they had already occurred despite the fact that the respondent bank had purchased the property through the foreclosure sale).

The information presented in Appellant's Rule 60(b)(5) motion was known to Appellant for at least two months ***before*** the Master-in-Equity denied Appellant's ***first*** Rule 60(b) motion. Despite this, Appellant remained silent and did not disclose the information to the court for nearly another year and a half, a point that Judge Simmons highlighted when denying Appellant's motion. (R. p. ___, Order Den. Mot. for Relief.) Determining that Appellant failed to speak up about this information in a timely fashion was certainly within the Master-in-Equity's discretion.

In her opening brief, Appellant argues that the Supreme Court's May 9, 2011 Administrative Order governing foreclosure actions should absolve her of all dereliction in this case. Respectfully, it is incredible to suggest that the Administrative Order was designed to let a borrower do virtually nothing to protect his or her rights for more than two years of litigation without any consequence. Therefore, to the extent the Court believes it must construe the Administrative Order, Wells Fargo submits that the Master-in-Equity's interpretation of the Administrative Order was correct. However, Wells Fargo further submits that there is no need for the Court to construe the Administrative Order in order to resolve this appeal.

Assuming *arguendo* that Appellant is correct in her reading of the Administrative Order's "stay" provision, that order was not in place until May 9, 2011—six months ***after*** Appellant defaulted in this case (R. p. ___, Judgment of Foreclosure and Sale); three months ***after*** she made her first Rule 60(b) motion (R. p. ___, Appellant's First Mot. for Relief); and three weeks ***after*** the trial court denied her first Rule 60(b) motion (R. p. ___, Order). Appellant should have identified the information contained in her Rule 60(b)(5) motion at any of those points. Instead, she remained silent.

Following the parties' loss-mitigation efforts, Appellant still did not raise any of her Rule 60(b)(5) issues until almost three months ***after*** the automatic stay was lifted in August 2012 (R. p. ___, Attorney Certification); and over one month ***after*** the trial court convened a new hearing to update the monies owed to Wells Fargo, at which Appellant did not appear (R. p. ___, Supplemental Order Post Judgment).

Even if the Administrative Order's stay provision could have bridged these time periods, there is no excuse for Appellant's failure to point out the grounds on which she ultimately based her Rule 60(b)(5) motion at the very first moment she appeared in the litigation. Nor does Appellant offer any legitimate explanation in her opening brief. At bottom, scores of public and private resources have been wasted addressing Appellant's second Rule 60(b) motion, all of which could have been conserved if she had simply presented her arguments in ***February 2011*** rather than ***October 2012***.

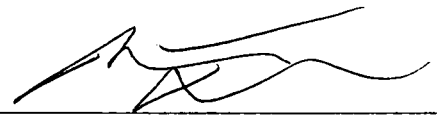
Accordingly, the Master-in-Equity was well within his discretion to hold that Appellant's Rule 60(b)(5) motion was untimely. The Court should affirm that ruling for this fourth and final reason.

CONCLUSION

At every turn, Appellant has sat on her rights. Appellant failed to answer the complaint. Appellant failed to appeal adverse rulings. Appellant failed to preserve issues for this Court's review. And Appellant failed to bring facts known to her to the Master-in-Equity's attention until over a year and a half after making her first appearance in this case. Under these circumstances, Wells Fargo respectfully submits that the trial court did not abuse its discretion when it denied Appellant's Rule 60(b)(5) motion, and that the trial court's order should be affirmed accordingly.

Respectfully submitted,

WOMBLE CARLYLE SANDRIDGE & RICE, LLP

By: 

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May 9, 2013

PROOF OF SERVICE

I, the undersigned Legal Secretary of the law offices of Womble Carlyle Sandridge & Rice, LLP, Attorneys for Respondent, Wells Fargo Bank, N.A., do hereby certify that I have served the below parties in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same to the following address(es):

RETURN BRIEF OF WELLS FARGO BANK, N.A.

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WOMBLE CARLYLE SANDRIDGE & RICE, LLP

By: _____
Todd Mathis

Columbia, South Carolina
May 9, 2013

THE STATE OF SOUTH CAROLINA
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of whom

Lynn D. Simpson is the ..... Appellant.

RESPONDENT'S DESIGNATION OF MATTER

The Respondent proposes the following be included in the Record on Appeal:

1. Summons and Complaint;
2. Affidavit of Default and Non-Military service as to Lynn D. Simpson;
3. Order of Judgment and Foreclosure and Sale;
4. Appellant's first Motion for Relief from Master's Order and Judgment of Foreclosure and Sale and to Vacate Sale;
5. Order denying first Motion for Relief from Master's Order and Judgment of Foreclosure and Sale and to Vacate Sale;
6. Attorney Certification of Compliance with Supreme Court Administrative Order 2011-05-02-11;
7. Supplemental Order Post Judgment;
8. Appellant's second Motion for Relief Order of Foreclosure and Sale;
9. Order denying second Motion for Relief from Order of Foreclosure and Sale; and

10. Appellant's Notice of Appeal.

I certify that this designation contains no matter which is irrelevant to this appeal.

Respectfully submitted,

WOMBLE CARLYLE SANDRIDGE & RICE, LLP

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PROOF OF SERVICE

I, the undersigned Legal Secretary of the law offices of Womble Carlyle Sandridge & Rice, LLP, Attorneys for Respondent, Wells Fargo Bank, N.A., do hereby certify that I have served the below parties in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same to the following address(es):

DESIGNATION OF MATTER OF WELLS FARGO BANK, N.A.

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By: _____
Todd Mathis

Columbia, South Carolina
May 9, 2013