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SC Court of Appeals

THE STATE OF SOUTI-I CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Joseph P. Strickland, Master in Equity Court Judge

Case Nn. 2020-CP-000069

U.S. Bank, National Association, as trustee for the Holders of the Banc nf America Funding Corporation, 2008-FTI, Respondent,

V

Rhonda Lewis Meisner a/k/a Rhonda L, Meisner, Bank of America, N.A. and SCBT of whom Rhonda L. Meisner is the Appellant.

PETITION FOR REHEARING AND REHEARING ENBANC

August 25, 2022

s/Rhonda L. Meisner
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Appellant

Table of Authorities

Cases

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The appellant, Rhonda Meisner, respectfully Petitions this Honorable Court of Appeals for a re-hearing and re-hearing *en banc* pursuant to SCACR Rule 221 based on the fact the court may have overlooked the appellant's declaration submitted under penalty of perjury attached to her memorandum in opposition to summary judgment and may have overlooked her argument with regard to (1) subject matter jurisdiction (2) Summary Judgment (3) attorney's fees for the reasons as explained below.

To the extent this Honorable Court did not attribute the appellant's testimony in the hearings as testimony evidence, the appellant respectfully requests the Court to review its ruling by considering the appellant's testimony during the hearings and remand the case. As a self-represented party, the appellant avers, she was also the defendant witness who testified in response to questions asked by the Master in Equity. As such, her arguments also contained testamentary facts as the defendant witness when she answered the questions of the Master in Equity regarding the facts of the case.

The appellant requests this Honorable Court to review the entire record on appeal including the affidavits submitted prior to the Summary Judgment hearing that also reflected the in Court Testimony of the Appellant.

I. This Court Determined the Master in Equity had Subject Matter Jurisdiction to hear the Motion for Summary Judgment.

In Bardoon Properties, the South Carolina Supreme Court explained the difference between standing and subject matter jurisdiction and determined the two issues were separate and apart from each other. Bardoon Properties, NV, v. Eidolon Corp., 326 S.C. 166, 169; 485 S.E.2d 371, 373 (citing 21 C.J.S. Courts § 16 (1990)) In this case, both Subject Matter Jurisdiction and standing are at issue.

The Master in Equity derives his jurisdiction from his Order of Appointment from the Circuit Court. The underlying appeal associated with this case is the "Order striking Jury Demand and for Mandatory Reference" which was an appeal from the circuit court and involved the "mode of trial."

The appellant avers the "motion" for summary judgment was filed *prior* to the circuit court regaining jurisdiction via receipt of the remittitur and because the summary judgment hearing cannot proceed without a properly filed and served motion, the Master did not have jurisdiction to entertain the motion for summary judgment because the motion itself was filed prior to the circuit court regaining jurisdiction and a subsequent motion for summary judgment was not filed after the remittitur was received. Bunkum v. Manor Props.,321 S.C. 95, 98-99, 467 S.E. 2d758, 760 (Ct. App. 1996) (jurisdiction to entertain motion for costs against an appeal bond was properly in the circuit court, *not with the master*, after the remittitur was issued) (*emphasis by the appellant*)

The appellant avers when the "mode of trial" is contested and on appeal, the appellant argues neither the circuit court nor the Master in Equity have jurisdiction to accept the filing of a "motion for summary judgment" until the remittitur is filed because the "motion" is a requisite part of the summary judgment proceeding. That is, a summary judgment hearing *cannot* proceed without the appropriate "motion for summary judgment" being filed and served. At the time the motion was filed and served on the appellant, the circuit court did not have jurisdiction of the case, the South Carolina Supreme Court had jurisdiction.

As such, the appellant argues the circuit court did not have jurisdiction over the case for matters involved in the appeal that included substantive motions like summary judgment because the "mode of trial" issue was still in the appellate courts. The South Carolina Supreme Court had not yet determined whether a jury trial was available, as such the circuit court did not have

jurisdiction to accept a motion for summary judgment and neither did the Master in Equity, until the remittitur was received. Further, the appellant avers because the appeal itself was from the circuit court, a new referral was required because the appeal was the circuit court may have had to confer jurisdiction for a summary judgment hearing to the Master in Equity after receipt of the remittitur.

As such, the appellant avers *all acts* that are subparts of substantive motions like filing the motion itself, paying the fee associated with the motion, and serving the motion are included in those items held in abeyance by the notice of filing the appeal and require the remittitur prior to filing a motion for summary judgment.

In this case, the "motion" for Summary Judgment was filed when the circuit court did not have subject matter jurisdiction over a substantive motion when the mode of trial had not yet been determined. Respondents concede that they filed for summary judgment April 15, 2014, and the case was scheduled to be heard in the Master in Equity in July of 2014 but was rescheduled for October of 2014. However, the remittitur was not issued until June 28, 2014.

A. A Foreclosure Action is an action involving the Note *and* the Mortgage and US BANK did not own the note and mortgage on March 31, 2014, when they filed for foreclosure as the plaintiff.

The Respondents acknowledged this was an action for foreclosure and U.S. Bank filed a "Foreclosure" Action as the title suggests as the plaintiff and not the servicer and did *not file a suit on a note*.

U.S. Bank stated in the *foreclosure hearing* that it proved standing to foreclose because it *possessed* the Bank of America note endorsed in blank that was executed in 2007 (BANA 2007). However, the assignment of the mortgage occurred after U.S. Bank filed the complaint as the plaintiff.

U.S. Bank claimed the foreclosure action was filed as a result of the appellant's "breach" of the (BANA 2007) note. Respondent's also reference an additional note between the Appellant and Bank of America's 2005 note (BANA 2005) that the appellant previously paid off. Respondents claim the BANA 2005 note was the reason BANA was named as a Defendant. **Rspdnt's Initial Brief p.1:1-9.** The Respondent's alleged that they were the holder of the Note and the Mortgage *at the time they filed the foreclosure action* as a result of default by the appellant of the BANA2007 note. **Rspdnt's Initial Brief p.10-12.**

However, U.S. Bank did *not* own the note or the mortgage on March 31, 2014, when U.S. Bank filed the foreclosure action. As evidenced by the affidavit of the transfer of the mortgage on April 2, 2014, which follows the note, BANA was the owner of the note and mortgage on March 31, 2014. Additionally, Respondent's acknowledge that the trial Court did not decide whether the plaintiff had standing to sue for foreclosure on BANA's 2007 note and mortgage, after the appellant made an oral motion at the June 10, 2014, motion to dismiss. (**Rspdnt's Initial Brief p. 2:25:1-4) (T. June 10, 2014, p. 9:7-8.)**

The appellant avers because U.S. Bank did not have standing *at the time they filed the foreclosure action*, neither the Master in Equity, nor the circuit court had the ability to provide the relief requested in the summary judgment action as evidenced by the fact the assignment of the mortgage to U.S. Bank from Bank of America (BANA) occurred *after* U.S. Bank filed the foreclosure action. **(R.p.311)**

As such, the issue of standing in the summary judgment hearing should have provided the "scintilla" of evidence to avoid summary judgment because it was the *plaintiff's own documents* that contradicted its pleadings. For U.S. Bank to have standing to file the foreclosure action, U.S. Bank was required, *at the time of filing* for foreclosure to own or possess *both* the note and

mortgage, but U.S. Bank did not own the note or mortgage when the foreclosure action was filed. The assignment of the mortgage, which follows the note, was notarized on April 3, 2014, by a notary, in a different state. **(2014-CP- 40 02063) (T. July 10, 2014, p. 295:23-2$, 6:1-12).**

B. U.S. Bank did not file a suit on a note.

This appeal involves the grant of summary judgment for the foreclosure action and not a suit on a note. The appellant avers, it is absolutely irrelevant that the Respondents proved standing for a suit on a note at the summary judgment hearing or that they could have filed the foreclosure action as the servicer because that was not the action or capacity U.S. Bank filed for foreclosure. Any of the "other" reasons that U.S. Bank *may* have had standing are also irrelevant *at* the summary judgment hearing because they were seeking summary judgment on the foreclosure action as the possessor of the note and mortgage, which was endorsed in blank. It is clear, by reviewing the assignment of the mortgage that U.S. Bank did not own the note and mortgage *prior* to filing the foreclosure action despite their pleadings otherwise. The assignment of the mortgage was completed on April 2, 2014, which was two days *after* the foreclosure action was filed. At the time U.S. Bank filed for foreclosure, as argued by the appellant and BANA, BANA owned the note and mortgage because the assignment of the mortgage occurred on April 2, 2014, but BANA was not present at the foreclosure hearing which should have precluded foreclosure or summary judgment on a case that was filed prior to receipt of the mortgage and note as the real party in interest appeared to be BANA as evidenced by the assignment.

Bank of America and SCBT now South State Bank (South State Bank) were also named defendants. Previously, SOUTH State Bank, a junior lien holder, (in the same property), filed a foreclosure action and named both Bank of America and Meisner as defendants. In the earlier case (2013-CP-40-07144), Bank of America answered the suit and claimed ownership of the BANA 2007 note that is the subject of this appeal. **(T. hearing July 10, 2014, R. p. 289:111-15) (p. 292: 8-20).** The appellant testified to this fact in the summary judgment hearing. **(R. p.175:18-22)**

This Honorable Court found in Swindler, there is a rebuttable presumption that the possessor of the note is the entity entitled to enforce the instrument or that the instrument has been discharged. Here, U.S. Bank did not possess the note at the time the lawsuit was filed as evidenced by the assignment of the mortgage.

> Columbia Sav. v. Zelinger, 794 P.2d 231, 234 (Colo. 1990) (Possession of the instrument by the debtor . . . is normally sufficient to create a rebuttable presumption of discharge.). Therefore, only if the obligee can show the obligor is in possession of the instrument unintentionally, or under a mistake, or without [] authority can the presumption be overcome, and the discharge proven to be without effect. Peoples Bank of S.C. v. Robinson, 272 S.C. 155, 158, 249 S.E.2d 784, 785 (1978) (quoting 11 Am. Jur. 2d Bills & Notes 906(1964))
>
> Swindler v. Swindler, Opin. No. 4658 Heard March 11, 2003, filed July 7, 2003.

Here, U.S. Bank alleged they possessed the note and mortgage on March 31, 2014 when they filed for foreclosure by their pleadings, but the assignment of mortgage actually occurred 2-3 days later which evidenced U.S. Bank did *not* own the note and mortgage at the time the foreclosure action was filed and therefore, did not have standing to pursue the foreclosure action and as such did not have a justiciable controversy with the defendant because they were not injured by the purported breach of contract of the BANA 2007 note.

II. This Court Determined there was not a "Scintilla of Evidence" that Summary Judgement should not be Granted.

This Court determined not a scintilla of evidence was presented that defeated the motion for Summary Judgment; however, the fact U.S. Bank was not the real party in interest at the time the mortgage foreclosure was filed is a "scintilla of evidence" because the transfer from Bank of America unto U.S. Bank did not occur until after the lawsuit was filed by U.S. Bank, making BANA the owner of the BANA 2007 note, not U.S. Bank., in two different lawsuits.

U.S. Bank, in its lawsuit, claimed the default occurred on April prior to the assignment of the note and mortgage based on the date of the filings, U.S. Bank would be considered a third-party creditor because they purchased the note and mortgage after US Bank said Meisner defaulted. **(R. 305: 6-16).** This Court determined in Swindler that a note associated with a mortgage was governed by the UCC. As such, whether BANA breached the BANA2007 note or the appellant breached the BANA2007 note is a question of material fact because the mandatory terms of the BANA2007 note required that BANA draft the payments and the appellant testified that she had adequate funds to cover the draft, but BANA sold the note to U.S. Bank which included the requirement to draft the payments.

As such, U.S. Bank suffered no injury to require redress, which the appellant avers is a scintilla of evidence that the owner of the note and mortgage was in fact BANA, and not U.S. Bank. Respondents concede this fact in their initial brief. **Rspndt's Initial Brief p.5 at E**.

A. The appellant's arguments at the Summary Judgment Hearing and the Motion to Reconsider hearing are also evidence in the form of testimony because unlike an attorney, arguing the case before the court, the appellant is also testifying as the defendant witness as to the facts.

This Court determined:

> On appeal, Meisner cites only to the complaint, the answer, her memorandum in opposition of summary judgment, her motion to reconsider, and her arguments during the summary judgment hearing. See West v. Gladney, 341 S.C. 127, 135, 533 S.E.2d 334, 338 (Ct. App. 2000) ("[T]his 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."). Therefore, we hold the master did not err in granting summary judgment to U.S. Bank as Meisner failed to present any evidence creating a genuine issue of material fact.

B. The Appellant's answers to the Master in Equity's questions contains both evidence in the form of testimony as the defendant and argument as the self-represented defendant. The facts are also supported by the declaration submitted under penalty of perjury attached to her memorandum in opposition to summary judgment.

This Honorable Court perhaps overlooked the declaration submitted under penalty of perjury filed on August 2, 2019 and attached to the appellant's memorandum in opposition to summary judgment. **(R. p. 349)** Importantly, the declaration submitted under penalty of perjury affirmed that the Appellant never requested cessation of the debits, had adequate money in the account to cover the debits as agreed and that the agreement to debit the account was contained within the note itself. **(R. p. 365)** As such, the answers to the Master in Equity's questions also contain evidence in the form of testimony as it relates to BANA's requirement to debit her account that was contained in the note itself, the fact the appellant did not request the debits to cease and the fact there was adequate money in the account to cover the debits.

The appellant urges this Honorable Court to consider her arguments in the Motion for Summary Judgment and the Motion to Alter and Amend as evidence in the form of testimony because as a self- represented defendant, the appellant avers her arguments were also evidence in the form of testimony, particularly because the Master in Equity questioned the appellant on the facts throughout the hearing, to which the appellant replied, in most if not all cases stating "I":

1. the Appellant testified that she did not default on the BANA2007 note because she had elected automatic drafting and had adequate funds in her checking account. **(R. p. 129: 12-21) (R.p.182:2-18)**
2. BANA's requirement to draft the funds, if elected, was a *mandatory* term of the *note*. **(R. p. 129:(R.128:14-25; 129:1-4).**
3. The automatic draft provision was placed *inside* of the note itself and not as a separate document, rider, or otherwise contained *outside* of the terms of the requirement to pay the note. (R. **p. promissory note)**
4. The mandatory drafting terms of the note were written by BANA in the BANA2007 note, that is the subject of the appeal. **(R.p.169:4-25; 170:1-4)**
5. The obligation to draft the payments by BANA transferred to US Bank because the obligation was contained within the BANA2007 note, if sold, transferred, or otherwise disposed of. **(R. p. 169:20-24) (R. p. 365 note p. 2).**
6. The obligations to draft by BANA were even preserved if the appellant made a payment, outside of the draft. **(R. p. 169:19-20)**

As such, the appellant avers, whether BANA failed to draft the payment, as alleged by the appellant and then BANA subsequently found the appellant in default is a material issue of fact. **(R. p. 169:24-5; 170:1-4)** The appellant avers she complied with the note requirements because she had adequate funds in the account at the time the drafting was to have occurred.

7. The appellant informed the Master in Equity the mandatory language included in the note required for BANA to draft the payments. **(R. p. 166:3-6)**

8. Because the requirement to draft the funds from the appellant's bank account were included inside the note itself, BANA could *not* change the terms of the note unilaterally, outside of the agreement between the parties. **(R. p. 183:18-20)**
9. The appellant informed the Court that U.S. Bank is not the real party in interest based on the assignment of the mortgage and BANA, the party to the contract, was not present at the hearing which precluded summary judgment. **(R. p. 164: 18-22)**
10. The appellant informed the Master in Equity that U.S. Bank was a third- party debt collector based on the fact the assignment of the mortgage occurred after the alleged breach of the contract. **(R. p. 143:1-6)**
11. The Respondent argued the contract could not be changed due to the parol evidence rule which the appellant avers includes the requirement to draft the payments that were contained in the note agreement. **(R.p.146:20-25)** The drafting terms are in the note itself. **(R.p.365)**
12. The appellant informed the Master in Equity that the deposition excerpts attached indicate I stated BANA was the real party in interest and not US Bank. **(R.p. 150: 4-8)**
13. The appellant informed the Master in Equity that US Bank did not file the lawsuit as the servicer. **(R.p.150:8-9)**
14. The appellant also pointed out that the attorney's fees affidavit was also submitted as the "servicer" but U.S. BANK as the plaintiff did not hold the note and mortgage at the time of the filing, BANA did. **(R. p. 150:10-14)**
15. The Master in Equity, at the Motion for Summary Judgment questioned the appellant about making payments to which the appellant informed the Court that BANA did not

draft the account and the appellant did not realize the drafts had stopped until two months later, at which time, BANA would no longer accept payments and returned checks to her. BANA breached the note contract by failing to draft her account, as agreed *in the terms of the note*. **(R. p. 184: -8-12.)**

16. As argued in the summary judgment hearing, BANA not attending the hearing made all of the claims in U.S. Bank's summary judgment motion incapable of being resolved because BANA did not evidence nor did U.S. Bank evidence, they attempted to draft the account and were unable to because the appellant testified that funds were available. **(R. p.131:14-21)**
17. The appellant also informed the Master in Equity in response to his question about Rule 11 that U.S. Bank was not the owner of the note and mortgage at the time they filed the foreclosure action and as such it was a wrongful foreclosure **(R.p.139:18-25; p.140:1-5)**
18. Additionally, the appellant also informed the court that because the requirement to draft her payments were made part of the note by BANA, then US Bank was obligated to perform this and other requirements of the note when they received the assignment of the note and mortgage. **(R. p. 141:1-13).**
19. as argued in the Summary Judgment Hearing and in the Motion to Reconsider, the crossclaims against BANA for its failure to satisfy the BANA 2005, as well as the counterclaims, if successful would change the amounts owed to BANA before the foreclosure. As such as argued in the because if BANA failed to draft the payments (and they did) then the appellant would have rights related to the fraudulent foreclosure.

20. The appellant argued because BANA was not at the motion for summary judgment all the claims could not be adjudicated with the appellant avers is a scintilla of evidence that summary judgment is not proper. **(R. p. 181:9-14)**
21. The appellant informed the Court that BANA breached the contract with the appellant in 2013 when if failed to perform the frank terms of the contract. **(R.p.184:4-12)**
22. The appellant informed the Court that BANA failed to draft the payment as agreed in the note and then fraudulently stated the appellant was in default only 40 days later. **(R.P. 184:19-25; 185:1-2)**

C. The Appellant avers because the summary judgment grant did not address all the claims, the grant of summary judgment was improper because BANA was not present at the hearing. (R. p. 185:9-23)

D. The Appellant avers because discovery was still outstanding, summary judgment was not proper.

The Circuit Court regained jurisdiction over the case on June 28, 2019. As such, the appellant believes this Honorable Court misapprehended the appellant's argument regarding subject matter jurisdiction. The Petition for Certiorari involved whether or not the appellant was entitled to a jury trial, a determination that she was entitled to a jury trial would preclude the Master in Equity from hearing a summary judgment motion. The appellant avers that because the South Carolina Rules of Civil Procedure require that summary judgment motions require which is related to whether the Master in Equity could hear the summary judgment motion. As such, a Motion for Summary Judgment has certain prerequisites that must be

III. **This Court Determined Attorney's Fees were proper.**

The attorney fee affidavit was submitted as the servicer of the note; however, it is U.S. Bank that filed the foreclosure action. Because the note governs the availability of attorneys' fees, the note

states the "lender" is able to collect attorney's fees not the servicer. **(R. p. 365)** The note allows for others to be hired to collect, but specifically reserves the payment of attorney's fees to the "lender." As such, since no affidavit of attorney's fees was submitted by BANA, the award of attorney's fees outside of the contract is improper and the appellant avers this amounts to an abuse of discretion.

Additionally, this Court found U.S. Bank had standing to pursue the foreclosure action; however, the record reflects that BANA owned the note and mortgage at the time the foreclosure was filed based on the assignment of the mortgage. (R.p.)

To the extent the servicer submitted an affidavit that purports to have knowledge of the loan origination that is simply not possible because BANA serviced the account at inception who was also the lender. Additionally, a review of the documents attached indicate a new loan was initiated on 7/5/2013 and designated (no cash) prior to the purported breach; however, I never had a new loan, and those documents of the new loan were not subject to this foreclosure action. **(R. p. 392)** Further a review of the payments, evidence the loan was on auto-draft by BANA as argued and testified to by the appellant. **(R.p. 393-396).**

Finally, In Carpenter, the United States Supreme Court determined that to pursue foreclosure a plaintiff must possess the note and the mortgage. Carpenter v. Longen, 83, U.S. 16 Wall 271 (1872). The assignment of the mortgage *after* the filing of the appeal in contrary to the United States ruling in Carpenter. Id.

For the above reasons and all references to the Record on Appeal, the arguments in the Appellant's Final Brief, her Reply Brief, and this Petition for re-hearing and rehearing en banc. The Appellant respectfully requests this Court to issue the Rehearing and Remand the case for trial so that all issues can be addressed.

SIGNATURE BLOCK NEXT PAGE

Respectfully Submitted,

August 25, 2022

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PETITION FOR REHEARING AND REHEARING ENBANC PROOF OF SERVICE-

The appellant certifies she served a copy of her petition for re-hearing and re-hearing en banc by emailing a copy to cstevenson@mcguirewoods.com. The appellant also mailed a check for $50.00 to the Court of Appeals and once filed will mail a copy to Colby Stevenson at McGuireWoods LLP
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August 25, 2022

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