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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Greenville County
Charles B. Simmons, Jr., Master in Equity

Docket No.: 2010-CP-23-10468

Bank of America, N.A. ..... Respondent,

v.

Todd Draper, Mortgage Electronic Registration Systems, Inc., acting, Shawn Kephart, Matthew H. Henrikson, The United States of America, by and Through its Agency, South Carolina Department of Revenue, Branch Banking and Trust Company, and Linkside III Homeowners Association, Inc.,

Of Whom Todd Draper and Matthew H. Henrikson are .....Appellants.

APPELLANTS' PETITION FOR REHEARING

Appellants petition this Court for a rehearing based on the grounds that the Court overlooked numerous questions of fact in its affirmation of the trial court's grant of summary judgment; that it misapprehended the applicability of cited Bankruptcy Court cases which were clearly distinguishable; and that it failed to consider Appellants' arguments that Respondent was not a holder of the note and that without possession of the original note, the owner of the note must proceed under S.C. Code §36-3-804.

Respectfully submitted,

Matthew H. Henrikson
Henrikson Law Firm, LLC
Post Office Box 26554
Greenville, South Carolina 29616
864-672-7106
Attorney for Appellants

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MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING

I. THE COURT MISAPPREHENDED THE LAW IT CITED AND OVERLOOKED APPELLANTS' ARGUMENTS THAT RESPONDENT LACKED STANDING TO SUE

The Court misapprehended the holdings in In Re Woodberry, 383 B.R. 373 (Bankr. D.S.C. 2008) and In Re Neals, 459 B.R. 612 (Bankr. D.S.C. 2011) and overlooked Appellants' arguments that those cases were fatally distinguishable from the case at bar and should be limited to their facts. The Woodberry and Neals bankruptcy cases do not stand for the categorical proposition that a loan servicer has standing to sue

on a note. Instead, those courts applied the UCC's definition of a "person entitled to enforce" the note and determined that the loan servicers met that definition under the facts of those particular cases. In Woodberry the dispositive issue was whether a loan servicer was a party in interest within the meaning of the Bankruptcy Code such that it could seek relief from a bankruptcy stay. The promissory note in that case had been endorsed in blank converting it to a bearer instrument, the original note was delivered to the servicer, and the servicer was in possession of the original note and mortgage. The Woodberry court basically held the loan servicer had standing in that case because it was a "holder" of the note within the meaning of the UCC. In Neals, although the servicer was not the holder of the note because it had not been indorsed to it, possession of the original note had been delivered to the servicer for the purpose of giving it the right to enforce the note. Therefore, the servicer was "a nonholder in possession of the instrument who has the rights of a holder" within the meaning of the UCC. However, unlike the situations in Woodberry and Neals (and in In Re Burretto, C/A No. 05–07146–JW, 2008 WL 8895361, ((Bankr. D.S.C. July 23, 2008)) and In Re McFadden, 471 B.R. 136 (Bankr. D.S.C. 2012)) also cited by the Court), Respondent did not have the original note and cannot meet the definitions applied in those cases.

Woodberry and Neals and the other bankruptcy cases cited by the Court held only that servicers had the right to move for relief from a stay and to file proof on an owner's behalf, which is not at all the same as finding that servicers have standing to prosecute foreclosure actions in South Carolina state courts. The Court overlooked Appellants' arguments that Respondent's role in as servicer of the note was only a nominal, formal,

or technical interest in, or connection with, the action and not a real, actual, material, or substantial interest.

The Court also overlooked the case cited in Appellants' Reply Brief, U.S. Bank Trust National Association v. Bell, 385 S.C. 364, 684 S.E. 2d 199 (Ct. App. 2009) in which this Court observed that "[G}enerally, the party seeking foreclosure has the burden of establishing the existence of the debt and the mortgagor's default on that debt" (385 S.C. at 374) and in support of that proposition cited cases from Connecticut and New York which suggest that ownership of the instruments controls the ability to maintain an action for foreclosure:

> See, e.g., Franklin Credit Mgmt. Corp. v. Nicholas, 73 Conn.App. 830, 812 A.2d 51, 57–58 (2002) ("In a mortgage foreclosure action, to make out its prima facie case, the foreclosing party had to prove by a preponderance of the evidence that it was the owner of the note and mortgage and that the [defendant] had defaulted on the note.") (internal quotations omitted) (internal citations omitted); Campaign v. Barba, 23 A.D.3d 327, 805 N.Y.S.2d 86, 86 (N.Y.App.Div.2005) ("To establish a prima facie case in an action to foreclose a mortgage, the plaintiff must establish the existence of the mortgage and mortgage note, ownership of the mortgage, and the defendant's default in payment.") ...

(S.C. 385 at 380).

Moreover, while it was admitted that Respondent was a servicer of the loan, servicing rights originate from a servicing contract which was not in evidence so the scope of respondents rights as service may or may not have included the right to foreclose such that Respondent failed to make a prima facie case that it any right to foreclose deriving from the owner of the note. The Court overlooked the lack of evidence that even as servicer Respondent may or may not have a contractual right to foreclose on behalf of the owner. The Court should not have affirmed the grant of summary judgment in light of such undeveloped facts.

II. THE COURT DID NOT ADDRESS APPELLANTS' SALIENT ARGUMENTS REGARDING THE ORIGINAL NOTE ISSUE AND OVERLOOKED THE LACK OF EVIDENCE TO SUPPORT THE TRIAL COURT'S RULING

A. The Court Failed to Address the Applicability of S.C. Code § 36-3-804 and Misapplied Rule 1003, SCRE

The Court overlooked and failed to consider Appellants' argument that without the original note in possession of the Plaintiff, the *owner* of the note must proceed under provisions of S.C. Code § 36-3-804. Instead, the Court relied on Rule 1003, SCRE, which does not specifically apply to duplicates of Notes in foreclosure or other commercial paper cases and in any event would not trump a statute. Even in its reliance on 1003, the Court overlooked the provision that 1003 would not apply if a genuine question was raised as to the authenticity of the original and that under the circumstances (i.e. summary judgment as opposed to a full merits hearing) it would be unfair to admit the duplicate. The Court overlooked Appellants' argument that there was no evidence in the record that the duplicate accurately reflected the note at the time of its entry into evidence but only as of the time that the duplicate was rendered (no evidence was offered as to when the duplicate was rendered) leaving open the possibilities of any number of subsequent endorsements and transfers of ownership and that there was no evidence of authenticity of the duplicate offered below other than the bare submission to the Court by counsel. All of which leave genuine issues of material fact on which the grant of summary judgment

was improper. The Court should not have affirmed the grant of summary judgment in light of such undeveloped facts.

B. The Court Misapprehended the Requirements of S.C.Code §36-3-301 as to Who is Entitled to Enforce an Instrument and S.C. Code §36-3-201 as to What Constitutes a Holder

The Court erroneously held that the Respondent did hold the note because it produced a ledger of payments prepared before the hearing showing payments and activities from September 2005. From this the Court concluded that there was evidence that Respondent did hold the note. The Court misapprehended the value of the ledger evidence, which if anything is evidence of servicing the loan, but the producing the ledger and a copy of the note do not establish that Respondent was the holder of the note under S.C Code §36-3-301. The Court cited "a series of transfers and mergers" as a path to Respondent becoming a holder, but overlooked the absence of any such evidence in the record specifically evidence of *delivery* of the note attending transfers as required by S.C Code §36-3-201 and 203 which require "transfer of possession". The transfer of a note requires negotiation of the note, which involves delivery of possession of the instrument and its indorsement by the holder. Absent possession of the instrument there can be no delivery; without delivery an instrument cannot be transferred. The only evidence established regarding the note's path to Respondent was that Respondent was in possession of a copy of the note which had been rendered at some unknown time, which does not even establish that Respondent was ever in possession of the original note at any time, but only of a copy. The Court overlooked the complete lack of evidence that Respondent was either the owner of the note, the holder of the note, in possession the

note, or that the note had been lost, destroyed or damaged. Without actual possession of the original note Respondent cannot be a holder. At the very least, questions of fact existed as to whether or not Respondent, admittedly not the owner of the note, was a holder or otherwise had the rights to enforce the note. The Court should not have affirmed the grant of summary judgment in light of such undeveloped facts.

III. SUMMARY JUDGMENT

The Court overlooked the standard for granting summary judgment and failed to take all reasonable inferences from the evidence (or lack thereof) in the light most favorable to the Appellants. Summary judgment is appropriate only where there is no genuine issue of material fact and it is clear the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP. In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. Koester v. Carolina Rental Ctr., 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994). In cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment. Summary judgment should be denied where the non-moving party submits a mere scintilla of evidence. Hancock v. Mid-South Mgmt. Co., Inc., 381 S.C. 326, 673 S.E.2d 801 (2009). As argued above, there was at the very least a mere scintilla of evidence as to the factual issues surrounding Respondents standing to sue and its status as a holder of the instrument. The Court should not have affirmed the grant of summary judgment in light of such undeveloped facts.

IV. CONCLUSION

Once the Court reconsiders the Appellants' arguments which it overlooked and the law and evidence which it misapprehended, the Court should determine that genuine issues of material fact exist as to the standing and original note issues and the Court should determine that the trial court's grant of summary judgment must be reversed and remanded for a full merits trial.

Matthew H. Henrikson
Post Office Box 26554
Greenville, South Carolina 29616
864-672-7106
Attorney for Appellants

June 20, 2013

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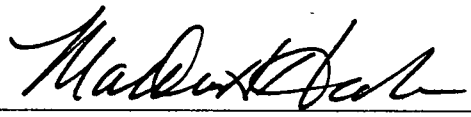
PROOF OF SERVICE

Counsel for the Appellants, hereby certifies that a copy of Appellants' Petition for Rehearing and memorandum in support of Petition for Rehearing has been served on counsel for Respondent by regular U.S. mail, postage prepaid, on this 20th day of June, 2013, addressed as follows:

Dean A. Hayes, Esq.
Korn Law Firm
P.O. Box 11264
Columbia, SC 29211



Matthew H. Henrikson (SC Bar No.: 7897)
Henrikson Law Firm, LLC
Post Office Box 26554
Greenville, South Carolina 29616
864-672-7106
Attorneys for Appellants