

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

SC Court of Appeals

Mikell R. Scarborough, Master In Equity

Appellate Case No. 2016-001054

HSBC Bank USA, National Association, as Trustee for
the Holders of the Deutsche ALT-A Securities, Inc.
Mortgage Loan Trust, Mortgage Pass-Through
Certificates Series 2007-OA4, assignee of Bank of
America N.A., successor by merger to BAC Home
Loans Servicing L.P., f/k/a Countrywide Home Loans
Servicing, Inc., ...

Appellant,

v.

Clifford L. Ryba; Beverly Ryba;
Regions Bank; First Federal Savings
and Loan Association of Charleston; Citibank (South
Dakota) N.A., and Carol Garfield Goldberg, ...

Defendants,

Of whom Carol Garfield Goldberg is the, ...

Respondent.

RECORD ON APPEAL
VOLUME II

Michael J. Anzelmo Phillips McWilliams NELSON MULLINS RILEY & SCARBOROUGH LLP 1320 Main Street / 17th Floor Columbia, South Carolina 29201 803.799.2000 Erica G. Lybrand Rogers Townsend & Thomas, PC 1221 Main Street/ 14 th Floor Columbia, South Carolina 29201 Attorneys for Appellant	J. Kevin Holmes THE STEINBERG LAW FIRM, L.L.P. 61 Broad Street Post Office Box 9 Charleston, South Carolina 29402 843.720.2800 Attorney for the Respondent
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STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Bank of America, N.A., successor by merger to
BAC Home Loans Servicing LP, f/k/a
Countrywide Home Loans Servicing LP,

Plaintiff,

v.

Clifford L. Ryba, Beverly Ryba, Regions
Bank, First Federal Savings and Loan
Association of Charleston, Citibank (South
Dakota) N.A., Carol Garfield Goldberg,

Defendants.

(511792.00392 JDW)

IN THE COURT OF COMMON PLEAS

DOCKET NO.: 2011-CP-10-7885

**NOTICE OF AND MOTION TO
SUBSTITUTE PLAINTIFF**

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JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

Plaintiff Bank of America, N.A., successor by merger to BAC Home Loans Servicing LP, f/k/a Countrywide Home Loans Servicing LP respectfully moves the Court for an Order substituting HSBC Bank USA, National Association, as Trustee for the Holders of the Deutsche ALT-A Securities, Inc. Mortgage Loan Trust, Mortgage Pass-Through Certificates Series 2007-OA4 as Plaintiff in this action. The grounds for this motion are as follows:

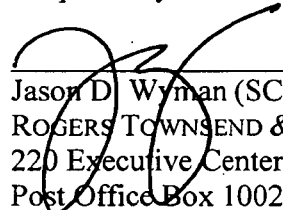
1. On May 29, 2012, an Assignment of Mortgage into HSBC Bank USA, National Association, as Trustee for the Holders of the Deutsche ALT-A Securities, Inc. Mortgage Loan Trust, Mortgage Pass-Through Certificates Series 2007-OA4 was recorded in Book 0254 at Page 536 in the Office of the Register of Mense Conveyance for Charleston County. A copy of the recorded Assignment of Mortgage is attached as Exhibit A.

2. By virtue of the Assignment of Mortgage, HSBC Bank USA, National Association, as Trustee for the Holders of the Deutsche ALT-A Securities, Inc. Mortgage Loan Trust, Mortgage Pass-Through Certificates Series 2007-OA4 is now the current owner and holder of the Mortgage and is the property party Plaintiff in this action.

3. The entry of an order substituting HSBC Bank USA, National Association, as Trustee for the Holders of the Deutsche ALT-A Securities, Inc. Mortgage Loan Trust, Mortgage Pass-Through Certificates Series 2007-OA4 as the party Plaintiff in this action will not be prejudicial to any party to this action.

WHEREFORE, Bank of America, N.A., successor by merger to BAC Home Loans Servicing LP, f/k/a Countrywide Home Loans Servicing LP respectfully requests that the Court grant its Motion to Substitute Plaintiff by substituting HSBC Bank USA, National Association, as Trustee for the Holders of the Deutsche ALT-A Securities, Inc. Mortgage Loan Trust, Mortgage Pass-Through Certificates Series 2007-OA4 as Plaintiff in this action and for such other and further relief as the Court deems just and proper.

Respectfully submitted,

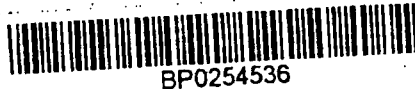


Jason D. Wyman (SC Bar # 100271)
ROGERS TOWNSEND & THOMAS, PC
220 Executive Center Drive (29210)
Post Office Box 100200
Columbia, South Carolina 29202-3200
(803) 771-7900 Tel
(803) 343-7017 Fax
jason.wyman@rtt-law.com

ATTORNEYS FOR PLAINTIFF

Rogers Townsend & Thomas, PC, and its staff are debt collectors.

Columbia, South Carolina
May 9, 2014



STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

ASSIGNMENT OF MORTGAGE
Mortgage Book E625 at Page 517

MIN# 10013370002120597-9

MERS Phone: 1-888-679-6377

FOR VALUE RECEIVED, we hereby set over, transfer and assign unto HSBC BANK USA, NATIONAL ASSOCIATION, AS TRUSTEE FOR THE HOLDERS OF THE DEUTSCHE ALT-A SECURITIES, INC. MORTGAGE LOAN TRUST, MORTGAGE PASS-THROUGH CERTIFICATES SERIES 2007-OA4, c/o Bank of America, Foreclosure Dept. 475 Cross Point Parkway, Getzville, NY 14068, its successors and assigns, all its rights, title and interest in and to a certain Mortgage, executed by Clifford L. Ryba and Beverly Ryba to Mortgage Electronic Registration Systems, Inc., as nominee for Countrywide Bank, FSB, its successors and assigns (MIN# 10013370002120597-9) dated May 2, 2007, and duly recorded in the public records of Charleston County, State of South Carolina, on May 10, 2007, in Mortgage Book E625 at Page 517.

IN WITNESS WHEREOF, Bank of America, N.A., successor by merger to BAC Home Loans Servicing LP, fka Countrywide Home Loans Servicing LP has caused this instrument to be executed in its corporate name and behalf by Jacqueline Spears-Manning, as its Assistant Vice President, duly authorized, on this 21st day of May, 2012.

Bank of America, N.A., successor by merger to BAC Home Loans Servicing LP, fka Countrywide Home Loans Servicing LP

By Jacqueline Spears-Manning
its: Assistant Vice President (AVP)

Emmanuel P. Tatum
Witness No. 1 Emmanuel P. Tatum

Lewis Wilson
Witness No. 2 Lewis Wilson

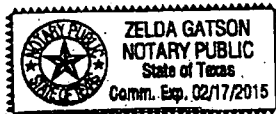
STATE OF Texas
COUNTY OF Dallas

ACKNOWLEDGMENT
S.C. Code § 30-5-30

I, the undersigned, Notary Public for the State of Texas, do hereby certify that Bank of America, N.A., successor by merger to BAC Home Loans Servicing LP, fka Countrywide Home Loans Servicing LP by Jacqueline Spears-Manning, its AVP, personally appeared before me this day and acknowledged the due execution of the foregoing instrument.

Witness my hand this 21 day of May, 2012.

Zelda Gatson
NOTARY PUBLIC FOR Texas 2012-2015
My Commission Expires: February 17, 2015



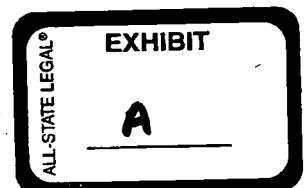
RETURN TO:
Rogers, Townsend & Thomas, P.C.
Post Office Box 100200
Columbia, South Carolina 29202
(015262-00242)

MIN# 10013370002120597-9

MERS Phone: 1-888-679-6377

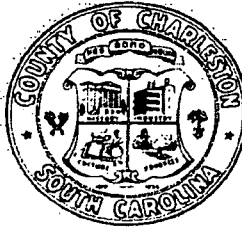
Ryba
34 Tarleton Dr
Charleston, SC 29407

ROA_0503



RECORDER'S PAGE

NOTE: This page **MUST** remain
with the original document



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ROGERS TOWNSEND & THOMAS
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COLUMBIA SC 29202-9250

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Asgt

Charlie Lybrand, Register
Charleston County, SC

MAKER:

BANK OF AMERICA AL

RECIPIENT:

HSBC BANK USA TR AL

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of Pages: 2

of References:

Note:

Recording Fee \$ 6.00

Extra Reference Cost \$ -

Extra Pages \$ -

Postage \$ -

Chattel \$ -

TOTAL \$ 6.00

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CLERK KLH



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the Defendant, Beverly Ryba, upon their promise they would obtain a mortgage in their name, rent the property back to Goldberg for the cost of the mortgage payments, and later resell the property to her for their costs when she could obtain financing. At this time, the home had an outstanding mortgage of \$199,689.75 including interest and fees and the home had a fair market appraised value of \$375,000.00.

On August 31, 2005, Goldberg, based upon the fraudulent representations that had been made by Ryba conveyed the property to Mr. and Mrs. Ryba. (Defendant's Exhibit 1). At that time Goldberg and Mr. and Mrs. Ryba had already entered into a Residential Lease Agreement for the property on August 15, 2005 for monthly rental payments of \$850.00 a month to cover the cost of the refinanced mortgage pursuant to the parties agreement. (Defendant's Exhibit 2). On the date of the conveyance Mr. and Mrs. Ryba took out three (3) mortgages, two (2) from Countrywide Bank and one (1) from Regions Bank, totaling in \$205,000.00 on the property to pay off the existing mortgage. Unbeknownst to Goldberg, on October 11, 2005, less than two (2) months from the conveyance, Mr. and Mrs. Ryba refinanced the Regions Bank mortgage increasing it to \$115,000.00. (Defendant's Exhibit 3). On May 9, 2006, approximately seven (7) months after the October 11, 2005 meeting, Mr. and Mrs. Ryba refinanced the Regions Bank mortgage using the proceeds to purchase a \$390,000.00 home on May 26, 2006. (Defendant's Exhibits 4). On May 2, 2007, Mr. and Mrs. Ryba refinanced the mortgage from Countrywide Bank increasing the amount to \$172,000.00. (Defendant's Exhibit 5). Immediately

prior to this refinance with Countrywide Bank, Regions Bank agreed to and did subordinate its mortgage to Countrywide Bank. (Defendant's Exhibit 6).

Mr. and Mrs. Ryba attempted to increase Goldberg's monthly rent from \$850.00 to \$1,600.00 to cover their increased mortgage payments. When Goldberg didn't have and refused to pay the increased rent demanded, Mr. and Mrs. Ryba tried to have her evicted so they could sell the home to pay the outstanding mortgages. They hired a real estate agent to sell the home who put a "lock box" on Goldberg's front door. Mr. and Mrs. Ryba failed to pay the property taxes and a delinquent tax notice was placed on the front door. Mrs. Goldberg paid the taxes to avoid a tax sale. Goldberg contested the eviction, and the Magistrate denied the eviction. Mr. and Mrs. Ryba simply stopped paying the mortgage payments ultimately resulting in this foreclosure action.

On August 28, 2008, Goldberg filed a Summons and Complaint against the Rybas alleging various causes of action, including fraud, Case No. 08-CP-10-4970. (Defendant's Exhibit 7). At the same time, Goldberg's attorney filed a *lis pendens* giving statutory notice of the alleged fraud and her claim to the property to all persons who subsequently might deal with the property, including the Plaintiff. (Defendant's Exhibit 8).

On September 15, 2011, more than three (3) years after the filing of the Summons and Complaint and the *lis pendens*, the Plaintiff, Bank of America, N.A., successor by merger to BAC Home Loans Servicing, LP, f/k/a Countrywide Home

Loans Servicing LP., obtained the mortgage sought to be foreclosed in this action by an assignment. (Defendant's Exhibit 9).

Mr. Ryba filed for bankruptcy listing all of the mortgagees and the Defendants, First Federal Savings and Loan Association and Citibank (South Dakota) N.A., as creditors. On October 26, 2012, as part of the settlement of Mr. Ryba's bankruptcy, he and Mrs. Ryba transferred the property back to Goldberg. The secured Countrywide Bank and Regions Bank mortgages were not discharged, but the unsecured First Federal Savings and Loan Association and Citibank (South Dakota) N.A., were discharged.

On May 9, 2014, the Plaintiff filed a Motion to Substitute HSBC Bank USA, National Association, as Trustee for the Holders of the Deutsche ALT-A Securities, Inc., Mortgage Loan Trust, Mortgage Pass-Through Certificates 2007-0A4 as the actual Plaintiff by reason of an assignment on May 29, 2012. (Defendant's Exhibit 10).

ARGUMENT

The Plaintiff argues it is entitled to partial summary judgment under the provisions of § 30-7-10, S.C. Code Anno., 1976 as amended, because it is a subsequent lien creditor on real estate for value without notice. The statute is consistent with prior South Carolina case law. In South Carolina, a purchaser may assert a plea in equity if it is a bona fide purchaser for value, without notice of defect in the title, by showing (1) he has actually paid the full purchase price (giving security for the payment is not sufficient, nor is past indebtedness a sufficient

consideration); (2) he purchased and acquired the legal title, or the best right to it; and (3) he purchased the property in good faith, with integrity of dealing, and without notice of a lien or defect. Spence v. Spence, 368 S.C. 106, 628 S.E.2d 869 (2006).

In order to qualify as a bona fide purchaser for value without notice, all three (3) conditions must exist before he had notice of a title defect or other adverse claim, lien, or asserted interest in the property. S.C.Tax Commn. v. Belk, 266 S.C. 539, 543, 225 S.E. 2d 177, 179 (1976). The burden of proving the existence of the three (3) conditions is on the Plaintiff. Smith v. Faust, 107 S.C. 37, 92 S.E. 24 (S.C. 1917).

The Plaintiff acknowledges the recording statute is a "race-notice" statute providing protection only to subsequent purchasers who "record first." Leasing Enterprises, Inc. v. Livingston, 294 S.C. 204, 363 S.E.2d 410 (S.C. App. 1987). The Plaintiff further acknowledges that a party is placed on notice of a claim concerning property when a *lis pendens* is filed. Pipkin v. Fletcher, 165 S.C. 98, 162 S.E.774 (1932).

The case of Smith v. Faust, 107 S.C. 37, 92 S.E. 24 (S.C. 1917), cited and relied upon by the Plaintiff is instructive. Ginn conveyed several lots to Faust without consideration to defraud Ginn's creditors. Faust, in turn, conveyed the lots to Smith to secure a debt and the conveyance was, therefore, considered to be a mortgage. Smith then sought to foreclose on the mortgage. The issue before the Court was whether Ginn's creditors or Smith were entitled to the property. The

Court ruled that, in order for Smith to prevail over Ginn's creditors, Smith had the burden of proving he was a bona fide purchaser for value without notice of the adverse claims. The Court stated, "The single issue is: When it was admitted that Ginn's conveyance to Faust was without consideration and fraudulent, was the burden thus shifted upon Smith to prove that he was a bona fide mortgage creditor, that he became so after the deed from Ginn to Faust was made, and that he had no notice of the character of that deed?" The Court ruled, "We are of the opinion that under the circumstances which we have stated, Smith was bound to prove that he was a bona fide mortgage creditor. The deed from Ginn to Faust was voidable, but not against Smith if Smith was a bona fide subsequent creditor. Suppose Ginn's creditors had brought the action to set aside the deed from Ginn and Faust, and the mortgage deed from Faust to Smith; in that event Smith must have alleged and proven his bona fides to save his right." As will be shown, the Plaintiff's reliance on the *Smith* case is misplaced.

The Plaintiff, as an assignee of the mortgage in question, is seeking summary judgment and, therefore, has the burden of proving the absence of a genuine issue of material fact. In this case, the Plaintiff has to prove there is no genuine issue of fact that it was a bona fide purchaser of the mortgage for value without notice of Goldberg's claim. Conversely, in a case in which the standard of proof required is by a preponderance of the evidence, in order to defeat a motion for summary judgment all the opposing party is required to show is a "mere scintilla of evidence." "Accordingly, we hold that 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..." Hancock v. Mid-South Management Co., Inc., 673 S.C. 801, 381 S.E.2d 326 (S.C. 2009).

The only evidence offered by the Plaintiff to prove it is a holder of the note and mortgage in question, for value, and without notice of Goldberg's claim, is the allegations of the Complaint and the documents attached to the Complaint as exhibits. No affidavits have been submitted. Based upon the documents attached as exhibits, the Plaintiff has not even proven it is a holder of the note and mortgage. The note securing the mortgage sought to be foreclosed originated in the name of Countrywide Bank, FSB. A stamp on the last page of the note states Countrywide Bank, FSB, assigned the note to Countrywide Home Loans, Inc. (Defendant's Exhibit 5). A stamp right next to it states the note was assigned from Countrywide Home Loans, Inc., to "_____" an unnamed assignee. (Defendant's Exhibit No. 5). No documentation has been produced showing when or how the note was ever assigned to Countrywide Home Loans Servicing, LP, or how Countrywide Home Loans Services, LP, became BAC Home Loans Servicing, LP, which was merged with the Plaintiff, Bank of America, N.A. Without a note, there can be no mortgage and without a mortgage there can be no foreclosure. 27 SC Juris Prudence, 27 Mortgages. While it may be possible for the Plaintiff to produce documentation required to show it is the assignee of the note, they have not done so to date and summary judgment should be denied because the Plaintiff has failed in its burden of proof to show it is even a holder of the note mortgage in question.

Even assuming the Plaintiff could show it is the holder of the note and mortgage in question, the Plaintiff would also have to show it is a bona fide purchaser for value. According to media reports, Countrywide Bank was one of the many financial institutions that had engaged in improper mortgage lending practices that resulted in the collapse of the housing market and the banking industry in late 2008. Rather than file for bankruptcy, Countrywide Bank was taken over by the Plaintiff, Bank of America, N.A., in what can only be described as a "fire sale." According to the Plaintiff's own corporate reports, the Plaintiff agreed to acquire Countrywide Bank in a stock for stock transaction for \$4 Billion of the Plaintiff's common stock. For this \$4 Billion, the Plaintiff acquired Country which had originated \$408 Billion in mortgages in 2007 alone and had an outstanding servicing portfolio of \$1.5 Trillion in mortgage loans. (Defendant's Exhibit 11). The Plaintiff has failed in its burden of proof to show what, if anything, it paid for the particular note and mortgage in question and summary judgment should be denied.

Even if the Plaintiff had shown it is the holder of and paid value for the note and mortgage in question, the Plaintiff cannot show it did not have notice of Goldberg's claimed interest in the property at the time of the assignment. It strains credulity to think the Plaintiff did not have at least constructive notice that many of the mortgage loans it was acquiring were fraudulently obtained. Goldberg, however, does not have to rely on constructive notice to raise a material question of fact. The mortgage to the Plaintiff was properly assigned by MERS long after

Goldberg's *lis pendens* was filed giving the Plaintiff statutory notice of her claim to the property. S.C. Code Ann § 30-7-10, states:

All deeds of conveyances of lands...including *all assignments*...are valid so as to affect the rights of subsequent creditors... or purchasers for valuable consideration without notice, only from the day and hour from they are recorded in the office of the register of deeds...In the case of a subsequent purchaser of real estate, or in the case of a subsequent lien creditor on real estate for valuable consideration without notice, the instrument evidencing the subsequent conveyance or subsequent lien must be filed for the record in order for its holder to claim under this section as a subsequent creditor or purchaser for value without notice, and the priority is determined by the time of filing for record.

The express terms of the statute provide the statutory notice applies not just at the time of the original mortgage but at all subsequent assignments of the mortgage. The Plaintiff acknowledges the recording act is a race-notice act which provide protection to a subsequent purchaser or creditor only when he records first. Leasing Enterprises, Inc. v. Livingston, 294 S.C. 204, 363 S.E.2d 410 (Ct. App. 1987). A party is placed on notice of a claim concerning property when the *lis pendens* is filed. Pipkin v. Fletcher, 165 S.C. 98, 162 S.E. 774 (1932) (a person may not rely upon purchases or encumbrance made after filing of a *lis pendens*). The assignment relied upon by the Plaintiff establish that the assignment from MERS under which the Plaintiff claims to have obtained the note and mortgage was made subsequent to the filing of the *lis pendens*, and, therefore, the motion for summary judgment should be denied because the evidence contained in the record establishes the Plaintiff had statutory notice of Goldberg's claim.

CONCLUSION

For the foregoing reasons, Goldberg respectfully requests that the Plaintiff's Motion for Partial Summary Judgment be denied because there are genuine questions of material fact whether the Plaintiff is the holder of and whether the Plaintiff paid value for. Even innocent assignee, which the Plaintiff is not, takes subject to all the infirmities in the assignors title. Singletary v. Singletary, 605 SC 219, 30 SE 462 (1910). In order to avoid claims and defenses against the assigned property, the Plaintiff must prove it was a bona fide purchases, for value without notice of Goldberg's claimed interest in the property. The Plaintiff has not established either how it became the holder of or what it paid for the note and mortgage it seeks to foreclose. Even if can establish those two elements, it had statutory notice of Goldberg's claimed interest in the property at the time of the assignment because of Goldberg's filed *lis pendens* that occurred years before the assignment. The Plaintiff has not proven "his bona fides to save his right" and summary judgment should be denied. *Id.* at 25.

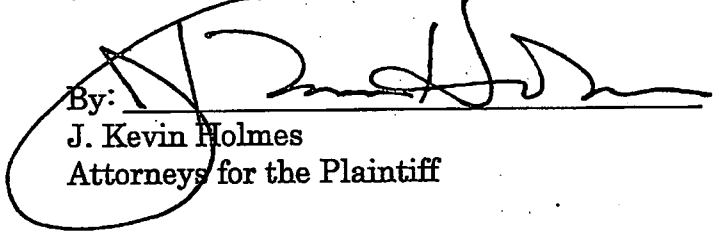
LAW OFFICES OF BENJAMIN GOLDBERG
One Carriage Lane, Bldg. H
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By: Benjamin Goldberg
Benjamin Goldberg

and

THE STEINBERG LAW FIRM, L.L.P.

61 Broad Street
Post Office Box 9
Charleston, South Carolina 29402
(843) 720-2800

By: 

J. Kevin Holmes
Attorneys for the Plaintiff

Charleston, South Carolina

5 August, 2014.

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
Civil Action No.: 2011-CP-10-7885

HSBC Bank USA, National Association, as
Trustee for the Holders of the Deutsche
ALT-A Securities, Inc. Mortgage Loan
Trust, Mortgage Pass-Through Certificates
Series 2007-OA,

Plaintiff,

vs.

Clifford L. Ryba, Beverly Ryba, Regions
Bank, First Federal Savings and Loan
Association of Charleston, Citibank (South
Dakota) N.A., Carol Garfield Goldberg;

Defendants.

**MOTION TO ALTER, AMEND OR
RECONSIDER AND FOR NEW TRIAL**

Pursuant to South Carolina Rules of Civil Procedure 59(a) and (e), Plaintiff HSBC Bank USA, National Association, as Trustee for the Holders of the Deutsche ALT-A Securities, Inc. Mortgage Loan Trust, Mortgage Pass-Through Certificates Series 2007-OA, ("Plaintiff") hereby moves the Court for a new trial and to alter, amend or reconsider its Opinion and Order dated June 19, 2015 and filed on June 22, 2015 ("Order"). Plaintiff received written notice of the Order on June 26, 2015. Plaintiff requests that the Court alter or amend its order and reverse its decision on the following grounds:

GROUND TO ALTER, AMEND OR RECONSIDER

1. **The Court failed to enter a monetary judgment against Clifford and Beverly Ryba.**

The Order does not address the Plaintiff's request for a judgment against the borrowers, Clifford and Beverly Ryba. The Plaintiff requested this relief in the Complaint and established the debt and amount owed at trial. The Rybas are in default. Therefore, the Plaintiff requests that the

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2015 JUL -6 PM 4:22
JULIE J. ARMSTRONG
CLERK OF COURT

Court enter a judgment against the Rybas in the amount of \$308,944.83, which constitutes the amount owed on the subject note as of the date of the Hearing, plus interest at the rate of \$14.1390 per day from the date of the hearing through the entry of the Order for a total of \$310,217.34.

2. The Court erred in holding that Plaintiff is not protected under S.C. Code Ann. § 30-7-10.

The Court erred in holding that the Plaintiff is not a bona fide creditor for value without notice under S.C. Code Ann. § 30-7-10. The very purpose of S.C. Code § 30-7-10 is to protect subsequent creditors and purchasers for value without notice. *Epps v. McCallum Realty Co.*, 139 S.C. 481, 138 S.E. 297 (1927). The creditor must show: (1) he has actually paid in full the purchase money (giving security for the payment is not sufficient, nor is past indebtedness a sufficient consideration); (2) he purchased and acquired the legal title, or the best right to it; and (3) he purchased bona fide, *i.e.*, in good faith and with integrity of dealing, without notice of a lien or defect. *Spence v. Spence*, 368 S.C. 106, 117, 628 S.E.2d 869 (2006). The Court erred in holding that the Plaintiff did not pay value for the subject note and mortgage and had constructive notice of Ms. Goldberg's claim.

Payment of Value

- a. The Court erred by holding that the June 1, 2007 Pooling and Servicing Agreement, by which the Plaintiff purchased the subject note and mortgage, "was not introduced into evidence." *See Exhibit 1*, Order at 7. The Court specifically instructed the Plaintiff to send the PSA to defense counsel to review and reserved the right to conduct further proceedings if defense counsel had any questions regarding the document. *See Exhibit 2*, Transcript at 134-135. Plaintiff's counsel sent the PSA to defense counsel on the day of the hearing. *See Exhibit 3*, 3/24/15 and 3/25/15 emails to Holmes. To the extent the PSA was not formally moved into evidence, the Plaintiff requests that it be placed into evidence by operation of the order granting this motion.

See Exhibit 4, PSA. The Plaintiff should not be punished for following the Court's instructions as it relates to the PSA.

- b. To the extent the Defendant objects to admission of the PSA in this format, the Plaintiff hereby moves for a new trial pursuant to South Carolina Rule of Civil Procedure 59(a). Rule 59(a) permits the Court to "open the judgment . . . , take additional testimony, amend findings of fact and conclusions of law or make new findings of fact or conclusions of law, and direct the entry of a new judgment." The Plaintiff was led to believe by specific representations of defense counsel and instructions from the Court that the admission of the PSA would be left open in the event that defense counsel had questions upon receiving the document. Therefore, the Court must open the judgment to take testimony concerning the PSA and any questions concerning the value the Plaintiff actually paid for the subject note and mortgage.
- c. The PSA clearly demonstrates that value was paid for the subject loan. The subject loan was pooled and securitized as part of an agreement, wherein the pool of loans, including the subject loan, was transferred into the Deutsche ALT-A Securities, Inc. Mortgage Loan Trust, Mortgage Pass-Through Certificates Series 2007-OA4, which then issued commercial mortgage-backed securities certificates. The PSA identifies these Certificates as well as values for each class of Certificates issued. *See Exhibit 4, PSA at pgs 6-13.* Further, the Schedule of Loans specifically identifies the subject loan as one of the loans in the pool which is the subject of the PSA.
- d. The Court erred by incorrectly applying the shelter rule. The Order states that "the payment of \$163,500.00 to fund the original mortgage being refinanced constitutes

payment of value.” See Order at 17. South Carolina recognizes the “Shelter Rule,” which provides that a successor in interest of a bona fide creditor for value without notice stands in the same position as the assignor even when the successor had notice of a lien. *Liberty Loan Corp. of Darlington v. Mumford*, 283 S.C. 134, 140, 322 S.E.2d 17, 21 (Ct. App. 1984) (“[W]henever in a succession of purchasers you reach one who is innocent and purchases in ignorance, the title is thenceforth sanctified.”); see also *Goodwin v. Harrison*, 231 S.C. 243, 98 S.E.2d 255 (1957). Therefore, the amount paid by the Plaintiff to purchase the note and mortgage is irrelevant, as Plaintiff is protected by the value paid by its predecessor in interest, and that value was specifically acknowledged and cited in the Order.

Record Notice

- a. The Court erred in holding that the Plaintiff is not protected by S.C. Code Ann. § 30-7-10 because it had statutory notice of Goldberg’s August 19, 2008 *lis pendens* at the time it filed its assignment in 2012. See Order at 7. The assignment is merely record notice of ownership and is not relevant to determining when the Plaintiff became the holder of the note and mortgage. Michael Ward testified that the Plaintiff purchased this note and mortgage as part of a securitization agreement on June 1, 2007. See Transcript at 70. Further, the PSA is dated June 1, 2007. There is no contrary testimony, and Goldberg never even attempted to conduct discovery to ascertain the accuracy of this testimony or the PSA. Therefore, it is undisputed that the Plaintiff became the holder of the note and mortgage on June 1, 2007 - prior to the date on which Goldberg filed her *lis pendens*.
- b. The Court erred in holding that the “issue of whether the Plaintiff had notice depends upon when the note and mortgage were assigned to them.” Again, an assignment is

record notice only. Based upon the evidence presented by Plaintiff and not contradicted by Goldberg, Plaintiff obtained the subject mortgage loan on June 1, 2007. When the assignments were recorded is irrelevant to the issue of notice as the loan was not sold or transferred after being deposited into the trust in 2007.

- c. Further, the Court again erred in failing to apply the shelter rule. There is no dispute that Plaintiff's predecessor, Countrywide, became holder of the note and mortgage no later than May 2, 2007 – the date of the subject refinance. This was well before Goldberg filed her *lis pendens*.

Constructive Notice

- a. The Court erred in holding that the Plaintiff or its predecessor had constructive notice of Ms. Goldberg's claim. The entire basis for the Court's conclusion is based on alleged facts not in evidence.
- b. The Court erred in finding that "Countrywide had actual notice from the loan application that [Clifford] Ryba was both the borrower and broker of the loan." *See* Order at 18. There is nothing in the loan application that indicates that Clifford Ryba brokered the 2007 loan himself. *See* Def. Ex. 14A. This is a conclusion based on no evidence.
- c. The Court erred in finding that "Michael Ward testified that he had brokered two loans on his own property." *See* Order at 18. This is incorrect. Michael Ward testified that he purchased two properties while he was a mortgage broker, but did not state that he brokered his own loans. *See* Transcript at 107. In fact, he stated that he was not allowed to broker his own loan. *Id.*
- d. The Court erred in finding that "Countrywide had actual knowledge the "no doc" loan

being applied for was not a typical mortgage loan.” There is no evidence in the record that “no doc” loans were in any way atypical during the time frame relevant to this case. On the contrary, Michael Ward testified that a “no doc” loan would not have raised any red flags. *See* Transcript at 108. This is the only actual evidence on the issue.

- e. The Court erred in finding that “Countrywide had actual knowledge that . . . although described as an investment, the property was rented at a significant net monthly loss below fair market rent.” *See* Order at 18-19. There is nothing in evidence demonstrating that Countrywide knew the amount of rent for the property or knew the amount of fair market rental value for the property. The loan application certainly does not list that information. *See* Def. Ex. 14A. Further, there is no evidence regarding what the fair market value rent for the property was at the time. Goldberg provided no expert testimony of the fair market rental value. This is another conclusion unsupported by evidence.
- f. The Court erred in finding that the “borrower was also the broker.” *See* Order at 19. There is no evidence that Clifford Ryba was the broker of the subject loan, only that he worked for First Rate Mortgage.
- g. The Court erred in finding that “[h]ad Countrywide inquired about when Ryba acquired the property, information left blank on the application, they would have discovered he acquired it immediately before the first Countrywide mortgage.” *See* Order at 19. This is wrong. The only evidence demonstrates that the Rybas used the original Countrywide financing to purchase the property from Goldberg. *See* Pl. Ex. 1. Further, the loan application asks only for the year the property was acquired.

Providing this information would not have demonstrated that Ryba acquired the property immediately before the first Countrywide mortgage, only that it was acquired the same year as the first Countrywide mortgage. Additionally, there is nothing unusual about obtaining financing to make a home purchase.

- h. The Court erred in finding that “[h]ad [Countrywide] inquired about why the property described as an investment was rented for a significant monthly loss at below fair market rent, they would have discovered it was rented back to [Goldberg] who deeded the property to Ryba.” *See* Order at 19. As set forth above, there is no evidence concerning fair market rent for the property at the time. Goldberg did not produce any expert testimony on the subject. This conclusion is unsupported by the evidence.
- i. The Court erred in failing to consider or address what the documents in evidence really demonstrate. The rental agreement states nothing about Goldberg’s alleged repurchase option, but does state, on its face, that it is “not intended for use if ‘Option to Purchase’ is in place.” *See* Def. Ex. 2. The Agreement to Buy and Sell Real Estate does not contain any reference to a repurchase option. *See* Def. Ex. 3. Goldberg signed an Owner’s Affidavit and Indemnity Agreement, in which she affirmed that there were no tenancies, occupancies, or any other leases . . . retention or reversion of title agreements” on the property. *See* Def. Ex. 3. The Court did not address this document in the Order. The Court did not address the fact that Goldberg had the opportunity to inform the closing attorney or the lender that she claimed an option to repurchase, but did not do so even though she “wished she had.” *See* Transcript at 156. Therefore, had Countrywide inquired further into this transaction, it would have discovered no indication whatsoever that Goldberg claimed an option to repurchase.

On the contrary, it would have discovered that she warranted that she did not have any claim to the property.

3. **The Court erred in holding that Ryba and First Rate Mortgage were agents of Countrywide and that Countrywide was vicariously liable for their actions.**
 - a. The Order fails to address the argument that Defendant Carol Goldberg (“Goldberg”) failed to plead agency in her answer. *See* Transcript at 182. Goldberg never pled that First Rate Mortgage or Ryba was an agent of Countrywide, and are therefore barred from asserting that claim. The Court did not address this issue.
 - b. The Court erred in finding that Plaintiff’s witness Michael Ward testified that the subject loan “was a ‘no doc’ loan, meaning Countrywide did not require the information on the loan application to be verified or documented.” *See* Order at 12. This is an incorrect statement regarding the testimony of Michael Ward. Michael Ward testified that the “no doc” loan meant that the lender did not require documents to verify income. There is no testimony which indicates that other information contained within the loan application was not required to be verified as part of a “no doc” loan.
 - c. The Court erred in finding that “Countrywide agreed to allow Ryba and First Rate Mortgage, LLC, to handle the mortgage loan application in which Ryba was both the borrower and an employee of the broker.” *See* Order at 21. There is no evidence that Ryba, as opposed to another employee of First Rate Mortgage, prepared the mortgage loan application. Michael Ward testified that it was acceptable for a brokerage to handle the loan for its employee. *See* Transcript at 107. That is the only evidence on the subject.
 - d. The Court erred in finding that “Countrywide directed and controlled what

information Ryba and First Rate Mortgage, LLC were required to obtain, verify, and submit or, perhaps more accurately, not required to obtain, verify, or submit.” *See* Order at 21. Again, there is no evidence that Ryba participated in brokering this loan. Further, there is no evidence regarding what Countrywide required of First Rate Mortgage in this transaction. The Order cites no such evidence.

- e. The Court erred in making the general conclusion that a mortgage broker is the agent for the lender. The Court did not address the scope of that agency. It did not address the facts supporting the conclusion that Countrywide controlled the actions of First Rate Mortgage and Ryba, despite reaching that conclusion in the Order. *See* Order at 20. Indeed, there is no evidence concerning the level of control Countrywide asserted over First Rate Mortgage or Ryba. It is Goldberg’s burden to prove this alleged agency relationship, and she provided no evidence to support it. Therefore, the Court’s conclusion lacks any evidentiary basis. Further, the cases cited do not support the general finding that a mortgage broker is an agent of the lender. *See* Order at 22.
- f. The Court erred in holding that Countrywide vicariously liable for the actions of First Rate Mortgage and Ryba. Goldberg did not assert claims of affirmative liability against the Plaintiff. To the extent the Court holds that the facts known by Ryba and First Rate Mortgage are imputable to Countrywide (such that it had knowledge of Goldberg’s claim), that decision was in error. First, there is no evidence that Ryba participated as the broker in this transaction. He is not an agent of Countrywide simply because he is an employee of First Rate Mortgage. Second, even if First Rate Mortgage was the agent of Countrywide (and it is not), there is no evidence concerning what the actual broker for this transaction knew about Goldberg’s claims

and therefore there is no knowledge to impute. Finally, even assuming that Clifford Ryba was an agent of Countrywide, his knowledge would not be imputable. Goldberg has alleged that Ryba was engaged in fraudulent conduct, which the Court has characterized as illegal. Under South Carolina law, this knowledge would not be imputable to Countrywide:

The rule imputing to the principal the agent's knowledge is placed by majority of courts, including our own, on the ground that it is the duty of the agent to communicate to his principal all knowledge which he possesses material to the principal's business, and the presumption that he has done that duty. Under the operation of this reason, what are sometimes called exceptions or qualifications to the rule have grown up. For example, an agent is not presumed to have communicated to his principal professional confidences received in representing a third person, or knowledge acquired while acting for himself or for a third person and not for the principal, or where the knowledge is such that, according to human nature and experience, the agent is certain to conceal, or where the agent is acting in adversary relation to the principal, or meditates a fraud against his principal or some third person in his own interest which would be defeated by disclosure.

Charleston Library Soc. v. Citizens & Southern Nat'l Bank, 201 S.C. 447, 472, 23 S.E.2d 362, 372 (1942) (internal quotations and citations omitted).

4. **The Court failed to address Plaintiff's right to be equitably subrogated to the original loan that was satisfied when the Rybas purchased the property from Goldberg.**
 - a. The Court erred by finding that Goldberg will not receive a windfall if foreclosure is denied. On the contrary, Goldberg admitted that the original Countrywide loan was used to pay an existing note owed to Carolina First Bank in the amount of \$199,689.75 in exchange for satisfaction of a mortgage on the property. See Transcript at 153; Pl. Ex. 1. Ryba then deeded the subject property back to her for no consideration. See Transcript at 154. Therefore, Goldberg will receive a windfall in

that she does not have to repay amounts she legitimately owed on the property and which were satisfied by the original loan taken out by the Rybas.

- b. The Court did not address whether Plaintiff is entitled to be equitably subrogated to the full value of the amounts paid to satisfy the Carolina First Bank mortgage in 2005. Under existing South Carolina law, the Plaintiff is entitled to be equitably subrogated to the amount of \$199,689.75 and is entitled to foreclose on that amount.
- c. The Court did not address the fact that Goldberg admitted that, even under her version of events, she was required to repurchase the subject property at a price and will essentially receive the property without paying any such price.

5. The Court did not address the legal basis on which the claim for foreclosure was denied.

The Court should address whether its holding is based on the fact that the original deed from Goldberg to the Rybas is void, or simply the original mortgage to Countrywide Bank is void.

6. The Court erred in holding that Clifford Ryba engaged in recasting.

S.C. Code Ann. § 40-58-20(9) (2005) defines recasting as “a promise for an individual to recoup a home sold to a third party with the intent of the original seller to rent back the property for a specific time at which the original seller will have the option to purchase the property back at a specific price. The specific period of time would normally be one year.” Goldberg testified that her agreement was for an indefinite period of time at no specific price. *See* Transcript at 152-155. Therefore, the alleged transaction does not qualify as recasting as defined in the statute and did not violate the statute.

7. The Court erred in holding that Ryba fraudulently induced Goldberg into selling

the property to him.

- a. The central issue in this case is Goldberg's contention that Ryba improperly induced her to deed the property to him. However, the only evidence in the record demonstrates that Goldberg knew she would sell the home to Ryba, knew he would finance the purchase price, and did not forbid him from obtaining additional loans on secured by the property. *See* Transcript at 153 (Rybas told Goldberg they were going to obtain financing to purchase the property); 154 (Parties did not discuss whether Rybas was free to refinance the property). Therefore, there is no evidence of a material misrepresentation concerning the financing or that Ryba relied on such a representation. Goldberg presented no evidence to carry her burden to prove fraud in the inducement.
- b. The Court erred in refusing to exclude Goldberg's testimony based on the parol evidence rule. Her testimony concerns terms to a contract for real estate that were not in writing. This testimony falls squarely within the statute of frauds. Further, the Court cites cases for the proposition that a stranger to the contract may not rely on the statute of frauds. However, the case cited provides that a stranger may not rely on the statute of frauds to invalidate a contract. That is not the case here. The Plaintiff is relying on the statute of frauds and parol evidence rule to exclude self-serving testimony designed to invalidate an agreement to which Goldberg was not a party.
- c. The Court erred in holding that the statute of frauds would be used as an instrument to affect a fraud. *See* Order at 15. There is no evidence that the Plaintiff defrauded Goldberg, or that its efforts to foreclose on a valid mortgage to which Goldberg was not a party perpetuates any fraudulent activity.

8. The Court improperly took judicial notice of certain facts.

- a. Initially, the facts which the Court took judicial notice of in the Order were not addressed or discussed during the trial and Plaintiff's counsel was not provided an opportunity to be heard as required by Rule 201 of the *South Carolina Rules of Evidence*.
- b. The Court erred in taking judicial notice that "Bank of America had purchased Countrywide on July 1, 2008 in what the Defendant described as a "fire sale" according to Bank of America postings. The alleged web postings were not introduced in evidence and therefore should not be considered or mentioned in the Order.
- c. The Court erred by taking judicial notice that the real estate market collapsed in late 2007 and 2008, and that Goldberg would have netted approximately \$150,000 in equity.
- d. The Court erred in citing defense counsel's unsupported argument that Countrywide was the "poster child for the mortgage loan abuses that led to the largest financial crisis of our generation." This is not evidence.

9. The Court's reliance on the ability of the Plaintiff to mitigate its losses through title insurance is irrelevant and highly prejudicial.

- a. The existence of insurance is completely irrelevant to a determining of the merits of a case and to balancing the equities in this or any other matter.
- b. There is no evidence that title insurance will cover any of Plaintiff's losses.

CONCLUSION

The Plaintiff hereby requests that this Court alter, amend, reconsider or order a new trial as to all of the issues set forth above. The actual evidence in this matter leads to only one result – a reversal

of the Court's Order. There is no actual evidence that would have placed Countrywide or the Plaintiff on notice of Goldberg's claim. Despite numerous opportunities, Goldberg failed to inform anyone, including the closing attorney or the lender who was financing the satisfaction of her \$199,500 note on the subject property, that she claimed an option to repurchase the home. Further, she signed at least two documents – the rental agreement and owner's indemnity – which clearly indicated that she did not have any such interest in the home. She also failed to prove any relevant terms of the alleged fraudulent promise made by Clifford Ryba. As such, equity requires that this Court reverse its decision.

Respectfully submitted,

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Attorneys for Plaintiff

Dated: July 6, 2014

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS

Civil Action No.: 2011-CP-10-7885

Bank of America, N.A., successor by)
merger to BAC Home Loans Servicing, LP,)
fka Countrywide Home Loans Servicing)
LP.,)

Plaintiff,)

vs.)

Clifford L. Ryba, Beverly Ryba, Regions)
Bank, First Federal Savings and Loan)
Association of Charleston, Citibank (South-)
Dakota) N.A., Carol Garfield Goldberg;)

Defendants.)

FILED

JUL - 6 2015

JULIE J. ARMSTRONG
CLERK, C.P. & G.S.

CERTIFICATE OF SERVICE

I hereby certify that on July 6, 2015, a copy of the **MOTION TO ALTER, AMEND OR RECONSIDER AND FOR NEW TRIAL** has been served upon other counsel of record, by email and/or by mailing same, postage prepaid in the United States Mail, addressed to the following:

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Carol Casey

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

THE COURT OF COMMON PLEAS
BEFORE THE MASTER IN EQUITY
CASE NO.: 2011-CP-10-7885

HSBC Bank of USA, National)
Association, as Trustee for the)
Holders of the Deutsche ALT-A)
Securities, Inc. Mortgage Loan)
Trust, Mortgage Pass-Through)
Certificates Series 2007-A4, assignee)
of Bank of America N.A., successor)
by merger to BAC Home Loans)
Servicing, L.P., f/k/a Countrywide)
Home Loans Servicing, Inc.,)

Plaintiff,)

-vs.-)

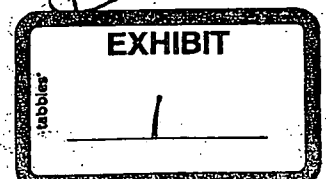
Clifford L. Ryba; Beverly Ryba;)
Regions Bank; First Federal Savings)
and Loan Association of Charleston,)
Citibank (South Dakota) N.A., and)
Carol Goldberg,)

Defendants.)

ORDER DENYING FORECLOSURE

FILED
2015 JUN 22 PM 12:11
JULIE J. ARMSTRONG
CLERK OF COURT

This matter was heard before me on March 24, 2015. Present at the hearing were the Plaintiff and their its attorneys, Matthew Tillman, of Womble, Carlyle, Sandridge & Rice, LLP, and Ericka G. Lybrand of Rogers, Townsend and Thomas, PC, as well the Defendant, Carol Goldberg, and her attorneys, Benjamin Goldberg, Esquire, and J. Kevin Holmes, of the Steinberg Law Firm, LLP. The Defendant, Regions Bank, has not sought to foreclose its second mortgage but has requested, if foreclosure is granted, any excess funds be paid over to them. The remaining



Defendants did not appear at the hearing. This was a final hearing on the merits on the Plaintiff's Amended Complaint for foreclosure.

The Plaintiff seeks to foreclose a note and mortgage entered into between Countrywide Home Loans Inc., and Clifford L. Ryba, and his wife on May 2, 2007 recorded in Book E 625 at page 517 in the Charleston County RMC Office. (Defendant's Exhibits 4 and 5). The mortgage was secured by real property located at 34 Tarleton Drive, Charleston, South Carolina 29407. There is no dispute the mortgage is in default.

The Plaintiff alleges it is a bona fide purchaser of the note and mortgage for value without notice also entitled to the protection of the shelter rule and, therefore, not subject to any claims or defenses of the Defendant. The Defendant alleges she was fraudulently induced into deeding her property to Ryba and his wife when she sought his help as a licensed mortgage broker to refinance her home, denies the Plaintiff is a bona fide purchaser for value without notice, and alleges the Plaintiff has no greater rights than its predecessor in title, Countrywide, which facilitated, turned a blind eye to, and profited from its agents' fraud and illegal recasting scheme.

The Plaintiff claims the mortgage was duly filed in accordance with § 30-7-10, S.C. Code Anno., 1976 as amended, and, therefore, valid as to all subsequent bona fide purchasers for value without notice. Section 30-7-10 is consistent with South Carolina case law providing a purchaser may assert a plea in equity if it is a bona fide purchaser for value without notice, by showing (1) he has actually paid

the full purchase price; (2) he purchased and acquired the legal title, or the best right to it; and (3) he purchased the property in good faith, with integrity of dealing, and without notice of a lien or defect. Spence v. Spence, 368 S.C. 106, 628 S.E.2d 869 (2006). In order to qualify as a bona fide purchaser for value without notice, all three (3) conditions must exist before the purchaser had notice of a title defect or other adverse claim, lien, or asserted interest in the property. S.C. Tax Commn. v. Belk, 266 S.C. 539, 543, 225 S.E. 2d 177, 179 (1976). The burden of proving the existence of the three (3) conditions is on the Plaintiff. Smith v. Faust, 107 S.C. 37, 92 S.E. 24 (S.C. 1917).

Before addressing the issues the Court feels compelled to discuss some of the procedural history of this case. This foreclosure was originally brought by Bank of America, N.A., successor by merger to BAC Home Loans Servicing L.P., f/k/a Countrywide Home Loans Servicing, Inc., which alleged it was the holder of the note and mortgage by reason of an assignment filed in the Charleston County RMC Office on September 15, 2011. (Plaintiff's Exhibit 8). The Complaint was amended substituting the Plaintiff which alleged it was the holder of the note and mortgage by reason of an assignment filed in the Charleston County RMC Office on May 21, 2012. (Plaintiff's Exhibit 6). Considerable time and effort was spent by the Court and the parties arguing the Plaintiff's motion for summary judgement based on these assignments. The Defendant raised several arguments why neither the Bank of America nor the Plaintiff were bona fide purchasers for value without notice. First, the Defendant argued the Bank of America and the Plaintiff had failed to

show they were the holder of the note because it was endorsed in blank and did not show who the note had been assigned to. Second, the Defendant argued neither the Bank of America nor the Plaintiff could be a holder in due course because they obtained their assignments after the *lis pendens* was filed giving statutory notice of the Defendant's claim on August 19, 2008. See: § 30-7-10, S.C. Code Anno., 1976 as amended; Pipkin v. Fletcher, 165 S.C. 98, 162 S.E.774 (1932). Third, the Defendant argued neither the Bank of America nor the Plaintiff could be a holder in due course because they obtained their assignments after the note and mortgage were in default. See: § 36-3-302 (1)(c), S.C. Code Anno., 1976 as amended. And, fourth, the Defendant argued Bank of America, the Plaintiff's predecessor in interest, could not be a holder in due course because it had obtained the note and mortgage as part of a bulk sale not in the regular course of Countrywide's business. See: § 36-3-302 (3)(c), S.C. Code Anno., 1976 as amended. The Defendant asked the Court to take judicial notice the real estate market collapsed in late 2007 and 2008 causing the Wall Street financial crisis and that Bank of America had purchased Countrywide on July 1, 2008 in what the Defendant described as a "fire sale" according to Bank of America's web postings. In response to these arguments, the Plaintiff filed a supplemental memorandum in support of summary judgment claiming it was entitled to the protection of the shelter rule. Under the scintilla of evidence standard, the Court ruled there remained material questions of fact and denied summary judgment. See: Hancock v. Mid-South Management Co., Inc., 673 S.C. 801, 381 S.E.2d 326 (S.C. 2009).

At trial, however, the Plaintiff introduced the testimony of Michael Ward, a vice president of the Plaintiff, to authenticate the documents and he testified the mortgage was actually assigned to the Plaintiff on June 1, 2007, long before the *lis pendens* was filed, Countrywide collapsed and was taken over by Bank of America, and the note and mortgage had gone into default. The prior assignments which were filed with the RMC Office and previously relied upon by the Plaintiff are inconsistent with the his trial testimony. If the trial testimony is to be believed, then the two prior assignments recorded in the RMC Office, referenced in pleadings, and relied upon in arguments before this Court were either the product of incompetence, the result of a total lack of accurate record keeping, or a complete sham. This Court is charged with the difficult task and responsibility of deciding cases affecting the lives of citizens whose homes are being foreclosed. Of necessity, the Court must rely on the accuracy of the documents submitted. The Court emphasizes a mortgage foreclosure is an action in equity and a party seeking to foreclose a mortgage must come before the Court with clean hands. Hayne Fed. Credit Union v. Bailey, 327 S.C. 242, 489 S.E.2d 472 (1997); Wachovia Bank, N.A. v. Coffey, 389 S.C. 68, 698 S.E.2d 244 (2010). The inconsistent testimony causes the Court to have great concern about the accuracy and reliability of the documents the Plaintiff relies upon.

The first issue to be decided is whether the Plaintiff is a bona fide purchaser of the note and mortgage for value. In response to the Defendant's argument made during the summary judgment hearing the note was endorsed in blank and did not

show to whom it had been assigned, the Plaintiff argued the blank endorsement made the note a bearer instrument and produced the original note. The Court was satisfied this proved the Plaintiff is the holder of the note. The question remained whether the Plaintiff paid value for the note. The Court would not hesitate to find that Bank of America obtained the note and mortgage as part of a bulk sale not in the ordinary course of Countrywide's business and, therefore, could not be a holder in due course. If the trial testimony is to be believed, however, it would now appear the Bank of America never was a holder of the note by merger or assignment. If the assignments are to be believed, the Court notes the assignments do not state what, if anything, of value was exchanged for the note and mortgage. The issue of whether the Plaintiff had paid value was raised during the hearing on the Plaintiff's motion for summary judgment. Other than Plaintiff's counsel saying the June 1, 2007 that was not introduced into evidence stated an unspecified consideration had been paid, there is no evidence what, if anything, the Plaintiff actually paid for the note and mortgage. When Michael Ward was asked by Defendant's counsel what the Plaintiff had paid for the note and mortgage, he replied he did not know. The Court finds the Plaintiff has failed to prove it was a bona fide purchaser for value.

The second issue to be decided is whether the Plaintiff is a bona fide purchaser of the note and mortgage without notice. The Court finds the Plaintiff is the holder of the note and mortgage but the issue of whether the Plaintiff had notice depends upon when the note and mortgage were assigned to them. The assignments that were filed with the RMC Office, cited in the pleadings, and relied

upon in arguments before the Court reflect the assignments were made after the *lis pendens* giving statutory notice of the Defendant's claim and after the note and mortgage were in default. As to the claim the Plaintiff became the holder of the note on June 1, 2007 pursuant to an agreement that was not introduced into evidence, the Court is unconvinced. The Plaintiff did not introduce a copy of the agreement and, other than representations of counsel, the Court has no way of knowing who the agreement was between, what the terms of the agreement were, or whether it included the subject note and mortgage. The Court does not suggest Plaintiff's counsel misrepresented the agreement but representations of counsel are not a substitute for evidence. For the reasons set forth above, the Court has serious concerns about the accuracy and reliability of the Plaintiff's documents. The Court finds the Plaintiff has not proven it obtained the note on June 1, 2007 pursuant to an agreement that has not been introduced. The only other evidence before the Court is that the Plaintiff obtained the assignment of the note and mortgage pursuant to the assignment dated May 21, 2012 that had been filed with the RMC Office, cited in the pleadings, and relied upon in proceedings before the Court. Under § 30-7-10, however, this assignment was made after the *lis pendens* was filed and, therefore, the Plaintiff would have had statutory notice of the Defendant's claim. Section 30-7-10 specifically applies to assignments:



All deeds of conveyances of lands...including *all assignments*...are valid so as to affect the rights of subsequent creditors... or purchasers for valuable consideration without notice, only from the day and hour from which they are recorded in the office of the register of deeds...In the case of a subsequent purchaser of real estate, or in the case of a subsequent lien



creditor on real estate for valuable consideration without notice, the instrument evidencing the subsequent conveyance or subsequent lien must be filed for the record in order for its holder to claim under this section as a subsequent creditor or purchaser for value without notice, and the priority is determined by the time of filing for record.

See: Pipkin v. Fletcher, *supra*. The Court finds the Plaintiff had statutory notice of the Defendant's claim when it became the holder of the note and mortgage pursuant to the assignments filed with the RMC Office, cited in the pleadings, and relied upon by the Plaintiff in arguments before the Court. The Court finds the Plaintiff failed to prove it was a bona fide purchaser of the note and mortgage without notice. 

Finding the Plaintiff failed to prove it was a bona fide purchaser for value without notice, however, does not end the inquiry. The Plaintiff further argues the deed between Ryba and the Defendant, if induced by fraud, was not void but voidable and, therefore, valid as any bona fide purchaser claiming through a bona fide purchaser for value without notice. Manship v. Newsome, 188 S.C. 6, 198 S.E.428 (1938); Smith v. Faust, *supra*. The Plaintiff argues an assignee stands in the shoes of the assignor and, even if they had statutory notice, they are entitled to the protection of the shelter rule. Liberty Loan Corp. of Darlington v. Mumford, 283 S.C. 134, 322 S.E.2d 17 (Ct. App. 1984) ("[W]henver in a succession of purchasers you reach one who is innocent and purchases in ignorance, the title is thenceforth sanctified."); see also: Goodwin v. Harrison, 231 S.C. 243, 98 S.E.2d 255 (1957); BAC Home Loans Serv. v. Kinder, 389 S.C. 619, 73 S.E.2d 547 (2012). The Plaintiff 

argues since its predecessor in title, Countrywide, actually funded the note and mortgage before the *lis pendens* was filed, the Plaintiff stands in Countrywide's shoes and is entitled to the protection of the shelter rule. A review of the testimony and evidence is necessary to decide this issue.

The Defendant testified she inherited 34 Tarleton Drive, Charleston, South Carolina 29407, free of encumbrances, from her grandfather. Thereafter, she and her then husband mortgaged the property because they were adopting a child and her husband wanted to open a restaurant. Subsequently, her husband was incarcerated, his restaurant closed, and the Defendant was left with insufficient income to pay the mortgage. She obtained a short term loan to keep up the payments but needed to obtain long term financing. She mentioned her situation to Ryba, who informed her he was a licensed mortgage broker with First Rate Mortgage, LLC, and offered to help her obtain refinancing.

The Defendant testified she met with Ryba at the office of First Rate Mortgage, LLC, and answered questions as he filled out what she presumed was a mortgage loan application. A short time later, however, Ryba told the Defendant she could not qualify for a mortgage loan even with a co-signor. The Defendant testified Ryba then proposed the Defendant deed her home to him so he could obtain a mortgage in his name and that he would lease the home back to her for an amount equal to the mortgage payments and give her the right to repurchase the home from him by reimbursing him for his costs. The Defendant testified she was desperate to keep from losing her home, an inexperienced borrower, and she relied

upon Ryba because he was a licensed mortgage broker and worked for a mortgage brokerage firm. ~~The~~ There is no evidence the Defendant knew the proposed scheme is called recasting and prohibited under the law regulating mortgage brokers.

In furtherance of the scheme, the Defendant testified Ryba prepared a Residential Lease Agreement on August 12, 2005 leasing the property back to her for monthly rent of \$850.00. (Defendant's Exhibit 2). Paragraph 14 of the lease agreement drafted by Ryba provided that the Defendant would be responsible for essential services and appliances because, "[t]enant is owner." The Defendant testified she understood the rent would be equal to and used to pay for the mortgage Ryba would obtain in his name to pay off her existing mortgage. The documents reveal the Defendant's mortgage had an outstanding balance of \$199,689.75, including interest and fees, at the time of the closing. (Defendant's Exhibit 5). The Defendant testified Ryba then prepared an Agreement to Buy and Sell the property on August 16, 2005 for a stated consideration of \$205,000.00 which she understood to be the amount needed to satisfy the existing mortgage and pay closing costs for the new mortgage. The Defendant testified she did not receive anything for her property which had a value of approximately \$350,000.00. The Court takes judicial notice that this transaction occurred before the collapse of the real estate market in late 2007 and 2008, the Defendant's home was marketable, and a sale would have netted her approximately \$150,000.00 in equity. The Defendant testified she did not want to sell her home and was only seeking help with refinancing. The Defendant testified she was not represented by a real estate agent in either the

lease or buy and sell agreements. The Defendant testified and the documents reveal she attended a closing at which she signed a deed transferring the property to Ryba and his wife on August 31, 2005. (Defendant's Exhibit 4). The Defendant testified she signed the deed based upon Ryba's representations. The Defendant testified she was not represented by an attorney at the closing. The lawyer who closed the loan, Roy Hutchinson, Esquire, testified he would not have closed the loan if he had he known of Ryba's representations.

The testimony of the closing attorney and the documents reveal that on that same day, Ryba and his wife obtained a mortgage from Countrywide in the principal amount of \$163,500.00. (Defendant's Exhibit 6). The Defendant was not a party to the mortgage closing. The mortgage application was handled by Ryba and his employer, First Rate Mortgage, LLC. The proceeds of the loan, together with a second mortgage of unknown origin in the amount of \$20,857.00 and cash from borrower in the amount of \$21,199.11, were used to fund the transaction and to satisfy the Defendant's outstanding mortgage as shown by the HUD Settlement Statement. (Defendant's Exhibit 15). Whatever personal funds Ryba expended were more than reimbursed six weeks later when he and his wife obtained a second mortgage on the property from Regions Bank in the principal amount of \$100,000.00 on October 11, 2005. The Defendant testified she had no knowledge of and did not participate in this second mortgage. The documents reveal that seven months later Ryba and his wife refinanced the Regions Bank second mortgage

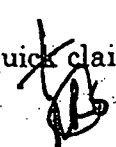
increasing the principal amount to \$115,000.00 on May 9, 2006. The Defendant testified she had no knowledge of and did not participate in this refinancing.

A year later Ryba and his wife refinanced the Countrywide mortgage increasing the principal amount to \$172,000.00 on May 2, 2007. (Defendant's Exhibit 10). This is the mortgage sought to be foreclosed in this action. Prior to this refinance, Regions Bank agreed to subordinate its second mortgage on April 24, 2007. (Defendant's Exhibit 6). The Defendant testified she had no knowledge of and did not participate in this refinancing. The documents reveal the mortgage application was again handled by Ryba and his employer, First Rate Mortgage, LLC. (Defendant's Exhibit 14). The witness, Michael Ward, on cross examination admitted Countrywide relied upon First Rate Mortgage, LLC, to gather and submit complete and accurate information about the loan, however, he also testified this was a "no doc" loan, meaning Countrywide did not require the information on the loan application be verified or documented. The Uniform Residential Loan application was completed by First Rate Mortgage, LLC., and signed by Ryba and his wife on the day of the closing. The loan application disclosed Ryba was an employee of First Rate Mortgage, LLC. The year Ryba acquired the property was left blank on the application. The application described the property as an investment and disclosed that Ryba did not live on the property. The application further disclosed the property was rented for a significant net monthly loss and, based on the appraisal performed as part of the loan, the property was rented for less than fair market value. The attorney who closed the loan, David Chard,

Esquire, testified and the documents disclosed that \$171,445.01 of the proceeds of the \$172,000.00 mortgage were used to satisfy Countywide's prior mortgage and to pay fees, including the mortgage broker fee, title insurance, and closing costs. (Defendant's Exhibit 15). The appraisal valued the property at this time, still before the collapse of the real estate market, was \$375,000.00. (Defendant's Exhibit 17).

The Defendant testified Ryba and his wife demanded she increase her rent payments from \$850.00 to \$1,600.00 a month and, when she refused, they tried to have her evicted from the property. The Defendant testified she retained Benjamin Goldberg, Esquire, who represented her before the Magistrate's Court and stopped the eviction proceedings. The Defendant testified Ryba failed to pay the property taxes and a delinquent tax notice was posted on her front door and that she paid the taxes to keep from losing the property. The Defendant testified Ryba hired a real estate agent to sell the home who put a "lock box" on her front door and for sale signs in the yard which she removed.

The documents reveal Mr. Goldberg filed a Summons and Complaint, Case No. 08-CP-10-4970, on behalf of the Defendant against the Rybas and First Rate Mortgage, LLC, alleging various causes of action, including fraud and recasting. (Defendant's Exhibit 18). At the same time, Mr. Goldberg filed a *lis pendens* giving statutory notice of the alleged fraud and the Defendant's claim. (Defendant's Exhibit 19).

The Defendant testified that Ryba filed for bankruptcy but did not list the Defendant as a creditor. Mr. Goldberg intervened in the bankruptcy and, as part of the settlement of the bankruptcy, Ryba and his wife transferred ownership of the property subject to the mortgages back to the Defendant by quick claim on October 26, 2012. 

The Court must decide whether the Defendant has proven she was fraudulently induced into deeding her property to Ryba and his wife. The elements of fraud are well established under South Carolina law. To establish her claim of fraud the Defendant was required to show: (1) a misrepresentation, (2) its falsity, (3) its materiality, (4) either knowledge of its falsity or a reckless disregard of its truth; (5) intent that the misrepresentation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance of its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury. See: Michael G. Sullivan, Elements of Civil Causes of Action, SC Bar/CLE, p. 103 (2000); Kahn Construction Co. v. S.C. National Bank of Charleston, 275 S.C. 381, 384, 271 S.E.2d 414 (1980).

The Plaintiff objected to the admission of evidence concerning the alleged fraud on the grounds the oral agreement alleged by the Defendant violated the Statute of Frauds. See: §§ 27-35-20, 32-3-10(4), S.C. Code Anno., 1976 as amended. Generally, a contract for an interest in land must be in writing and signed by the party against whom enforcement is sought. See: Player v. Chandler, 299 S.C. 101, 382 S.E.2d 891 (1989). The statute is subject to exceptions including that other

written documents can establish or confirm the existence of the oral agreement satisfying the statute or that the oral agreement has been partially performed thereby avoiding the statute. The Court does not find the written lease agreement prepared by Ryba, which included a provision the Defendant was the owner of the property, or the written buy and sell prepared by Ryba, even if considered together, contained the essential elements of the contract alleged to satisfy the statute. Neither the lease nor buy and sell agreements contained a provision that Ryba would resell the property to the Defendant, the time such resale would take place, or the amount to be paid. Player v. Chandler, *supra*. Nor does the Court find that the Defendant's continued occupancy of the home and payment of rent, which was consistent with the lease agreement, is sufficient to show part performance in avoidance of the statute. Stackhouse v. Cook, 271 S.C. 518, 248 S.E.2d 482 (1978). The Court does find, however, that the protection afforded by the Statute of Frauds is a personal privilege of the parties to the agreement and a stranger to the oral contract cannot avail himself of the fact that the statute renders the contract unenforceable. Hatcher v. Harleysville Mut. Ins. Co., 266 S.C. 548, 225 S.E.2d 181 (1976). Furthermore, the Court finds that a Court of equity will not permit a statute intended to prevent fraud to be used as an instrument to effect a fraud. Aust v. Beard, 230 S.C. 515, 96S.E.2d 558 (1957); Gardner v. Nash, 225 S.C. 303, 82 S.E.2d 123 (1954). While a Court of equity will generally not enforce contracts relating to land which are not in writing as required by the Statute of Frauds, it will cancel conveyances obtained by fraudulent misrepresentations. Gardner v.

Nash, 225 S.C. 303, 82 S.E.2d 123 (1954). The Plaintiff's objection to the introduction of evidence concerning the underlying fraudulent and illegal nature of the transaction by which Ryba obtained title to the property mortgaged is overruled.

The Court finds the representations set forth above made by Ryba were both false and material. Ryba knew the representations were false and intended for the Defendant to act on them. The Defendant was desperate to save her home, not an experienced borrower, and was neither represented by a real estate agent nor a lawyer in the transactions. The Defendant not only relied but had the right to rely on Ryba's advice because he was a licensed mortgage broker who worked for a mortgage brokerage firm. The Defendant has suffered proximate damage by Ryba mortgaging her home multiple times withdrawing a substantial portion, if not all, of the equity and by his attempts to have her evicted from and to sell her home. The Court finds the Defendant has proven she was fraudulently induced into deeding her property to Ryba by clear and convincing evidence.

Furthermore, the Court finds mortgage loan brokers are licensed and governed by the Licensing Requirements of Certain Loan Brokers of Mortgages on Residential Real Property Act, § 40-58-10, S.C. Code Anno., 1976 as amended. Section 40-58-70(6) of the Act in effect at the time of the transactions prohibited residential mortgage brokers from engaging in recasting. Section 40-58-20(9) defines recasting as a promise an individual can recoup a home sold to a third party with the intent of the original seller to rent the property for a specific time at which

the original seller will have the option to repurchase the property back at a specified price. Mortgage brokers were specifically prohibited from engaging in recasting unless the mortgage applicant obtained the advice of a licensed attorney who is independent of the transaction who provided a document advising the applicant of the potential consequences of recasting. See: §§ 40-58-20(9) and 40-58-70(6), S.C. Code Anno., as amended in 1993. No evidence the Defendant received such independent legal advice or documentation of the potential consequences was provided to her was produced. The Court finds Ryba's recasting scheme was not just fraudulent, it was illegal.

Even if the underlying transaction was fraudulent and illegal, the Plaintiff maintains its argument, first raised in its supplemental memorandum in support of summary judgment, "[t]here is no evidence that Countrywide Bank was anything but a bona fide lender for value." As set forth above, in order for Countrywide to have been a bona fide lender for value it must have acted in good faith, with integrity of dealing, and without notice of a lien or defect. Spence v. Spence, supra. The Court notes Countrywide received \$171,445.00 of the proceeds of the \$172,000.00 loan sought to be foreclosed. These proceeds of this loan were used to pay off its previous loan in the amount of \$163,500.00 with the balance used to pay broker fees, closing fees, costs, and title insurance. Nevertheless, the Court finds the payment of \$163,500.00 to fund the original mortgage being refinanced constitutes payment of value. The question remains, however, whether

Countrywide had notice of the fraudulent and illegal acts committed by Ryba to obtain title to the property mortgaged.

Notice can be either actual or constructive. When a person has knowledge of facts sufficient to put them on inquiry, the law presumes them to have knowledge of undisclosed facts such inquiry, if pursued with diligence, would have revealed. See: City of Greenville v. Washington Am. League Baseball Club, 205 S.C. 495, 32 S.E.2d 777 (1945); O'Leary-Payne v. R.R. Hilton Head, II, Inc., 371 S.C. 340, 638 S.E.2d 96 (S.C. App. 2006). Countrywide had actual notice from the loan application Ryba was both the borrower and broker of the loan and an employee of First Rate Mortgage, LLC, it relied upon to obtain and verify information about the loan. While Michael Ward testified he had brokered two mortgage loans on his own property, no details of those loans were introduced and the Court does not know what types of loans were involved, whether they were "no doc" loans, or who the lenders were. Michael Ward was not qualified as an expert and his testimony about two personal loans is insufficient to establish this was or is an accepted practice in the mortgage loan industry. Countrywide had actual knowledge the "no doc" loan being applied for was not a typical mortgage loan. When asked how the original mortgage in the principal amount \$172,000.00 could have increased so much, Michael Ward testified it was a loan that allowed the borrower to decide what payments to make and for unpaid interest to accumulate.* Countrywide had actual knowledge the date Ryba had acquired the property had been left blank on the application, Ryba did not reside on the property, and that, although described as an



* a Negative Amortization loan



investment, the property was rented at a significant net monthly loss below fair market rent. Countrywide had actual knowledge Ryba had financed and refinanced the property at least four times in two years. The Court specifically requested information from the Plaintiff regarding lending standards for multiple refinancing of property over a short period of time at the summary judgement hearing but no information in this regard was provided after the hearing or at trial. While none of these facts known to Countrywide may have been enough considered individually, when taken together the Court finds they were sufficient to have put Countrywide on inquiry.



The Court further finds, if an inquiry had been diligently conducted, Countrywide would have discovered the underlying fraudulent and illegal recasting scheme by which Ryba obtained title to the property being mortgaged. The fact that the borrower was also the broker Countrywide relied upon to produce complete and accurate information concerning the "no doc," flexible payment loan should have at least warranted a more thorough investigation. Had Countrywide inquired about when Ryba acquired the property, information left blank on the application, they would have discovered he acquired it immediately before the first Countrywide mortgage. Had they inquired about why the property described as an investment was rented for a significant net monthly loss at below fair market rent, they would have discovered it was rented back to the Defendant who deeded the property to Ryba. Had they asked for a copy of the lease, they would have discovered the lease in paragraph 14 said the Defendant was the owner of the property. Had they



inquired about how much had been paid for the property worth approximately \$350,000.00 they would have discovered it was only \$205,000.00 and the closing statement from their first loan showed the Defendant was never paid anything for her equity. The Court finds if Countrywide had asked some simple and fairly obvious questions it would have inevitably discovered Ryba had engaged in recasting that was prohibited by statute. The Court finds a diligent inquiry would have led Countrywide to the discovery the underlying transaction by which Ryba obtained title to the property mortgaged was fraudulent and illegal.

As an additional sustaining ground, the Court finds Ryba and First Rate Mortgage, LLC, were the agents of Countrywide under South Carolina law. Agency is a fiduciary relationship which results from the manifestation of consent by one person that another shall act on his behalf and subject to his control, and consent by the other to so act. See: F. Patrick Hubbard and Robert L. Felix, *The South Carolina Law of Torts*, 2nd Ed., SC Bar/CLE, p. 635 (1997); Restatement (Second) of Agency, § 1; Peoples Fed. Sav. & Loan Ass'n v. Myrtle Beach Golf & Yacht Club, 310 S.C. 132, 145-146; 425 S.E.2d 764, 773 (S.C. App. 1992). Ryba clearly had knowledge of the recasting scheme and, therefore, his employer, First Rate Mortgage, LLC, had knowledge of the scheme under the doctrine of *respondeat superior*. The treatise explains the *respondeat superior* doctrine literally means "let the master answer" and is founded on public policy:

The reason which has supported the principle of *respondeat superior*, based upon the judicial interpretation and declaration of public policy, is that the principal, by selecting and directing the manner in which he shall execute the agency, should, in

justice to third persons with the agent may deal, and who are not responsible either his selection or conduct, be held liable for his torts.

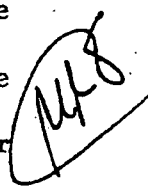
Id., at p. 635; Sams v. Arthur, 135 S.C. 123, 130, 133 S.E.2d 493 (1960). Vicarious liability is founded on fairness and the notion, "he who expects to derive advantage from an act which is done by another for him must answer for any injury that a third party may sustain from it." Vicarious liability also seeks to prevent the conduct from occurring and the injury being inflicted in the first place and recognizes the principal is often in a better position to provide an adequate remedy for the innocent victim and in a position to spread the risk. *Id.*, at p. 639; South Carolina Ins. Co. v. James C. Green & Co., 290 S.C. 171, 348 S.E.2d 617 (Ct. App. 1986).

The Court finds Countrywide agreed to allow Ryba and First Rate Mortgage, LLC, to handle the mortgage loan application in which Ryba was both the borrower and an employee of the broker. Countrywide directed and controlled what information Ryba and First Rate Mortgage, LLC, were required to obtain, verify, and submit or, perhaps more accurately, not required to obtain, verify, or submit. Countrywide benefited from the loan by receiving \$171,455.00 of the \$172,000.00 loan and paid Ryba and First Rate Mortgage, LLC, a broker's fee. Countrywide was in a position to and did protect itself from a defect in the title by requiring the purchase of title insurance as part of the loan transaction. The Court finds Countrywide was vicariously liable for the fraudulent and illegal acts committed by Ryba and First Rate Mortgage, LLC, as its agents.

The Plaintiff argues, however, that Ryba and First Rate Mortgage, LLC, were independent contractors for whose torts Countrywide would not be liable. The rule a principal is not liable for the acts of an independent contractor, however, is subject to exceptions. See: The South Carolina Law of Torts, *supra*. at p. 636. In addition to the exceptions discussed in the treatise, the Court finds South Carolina law recognizes that a mortgage broker who procures a loan and performs other services at the direction of the lender is the agent of the lender, not the borrower. See: Brown v. Brown, 38 S.C. 173, 17 S.E. 452 (1893); Land Mortgage Investment & Agency Co. of America, Ltd., 49 S.C. 345, 26 S.E. 990 (1987); Blackwell v. British American Mortgage Co., 65 S.C. 105, 43 S.E. 395 (1902); American Mortgage Co. of Scotland v. Woodward, 83 SC 54, 65 S.E. 739 (1909). While the Court recognizes § 40-58-78, has been amended and now may modify the common law rule if the broker fee agreement contains explicit disclaimers, this amendment did not become effective until January 1, 2010 and the Court further notes no such disclaimers have been produced in this case. The Court finds Ryba and First Rate Mortgage, LLC, were not independent contractors but were agents of Countrywide for whose acts Countrywide is vicariously liable.

Based on the foregoing discussion and findings, the Court finds that Countrywide was not a bona fide purchaser for value without notice. Countrywide had at least constructive knowledge of the fraudulent and illegal recasting scheme committed by its agents, Ryba and First Rate Mortgage, LLC. The Plaintiff, as their assignee, stands in their shoes. The Court wishes to emphasize this is a very

fact specific case. It involved a licensed mortgage broker and the company he worked for engaging in a fraudulent and illegal recasting scheme from which they profited. It involves Countrywide, a now defunct mortgage company the Defendant aptly described as a poster child for the mortgage loan abuses that led to the largest financial crisis of our generation, facilitating and turning a blind eye to the fraudulent and illegal recasting scheme it also profited from. And, it now involves a financial institution willing to take the risk when it agreed to purchase Countrywide's suspect mortgages seeking to profit as well. Denying foreclosure under the facts of this case does not endanger the legal underpinnings of our financial system. It is well founded under existing South Carolina law and is consistent with the public policy that holds those who facilitate, turn a blind eye to, or who are willing to assume the risk should be held responsible rather than the victims of fraud and illegal conduct.



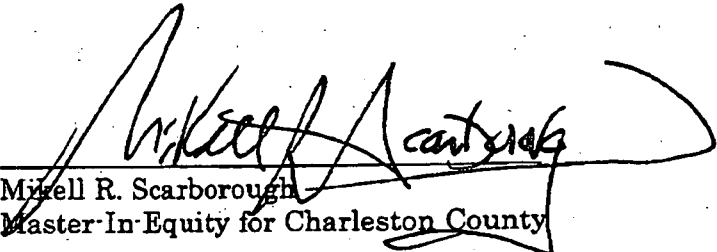
The Court is mindful of the Plaintiff's argument the Defendant will receive a windfall if foreclosure is denied but notes the Defendant's property remains subject to the Regions Bank second mortgage in the principal amount of \$115,000.00 that has also has not been paid since May of 2011. With accumulated interest, late fees, and probable attorney fees, any windfall to the Defendant is likely to be minimal. The Court further notes the Plaintiff can seek to recoup its loss by proceeding against the title insurance that was purchased as part of the loan. The facts and circumstances regarding the Regions Bank mortgage may be entirely different from this case and nothing contained in this Order should be interpreted as binding in



any foreclosure action they may bring. It is hoped, however, in light of this decision that Regions Bank and the Defendant will negotiate in good faith to restructure the loan so that the Defendant will not unfairly lose her home.

IT IS HEREBY ORDERED that foreclosure is denied.

AND IT IS SO ORDERED.


Mizell R. Scarborough
Master-In-Equity for Charleston County

Charleston, South Carolina

 day of June, 2015

STATE OF SOUTH CAROLINA
COURT OF COMMON PLEAS
COUNTY OF CHARLESTON

Bank of America, NA, successor by
merger to BAC Home Loans Servicing,
LP, fka Countrywide Home Loans
Servicing, Inc.

Plaintiff,

vs. CASE NO.: 2011-CP-10-7885

Clifford L. Ryba; Beverly Ryba;
Regions Bank; First Federal Savings
and Loan Association of Charleston;
Citibank (South Dakota), NA; Carol
Garfield Goldberg,

Defendant.

Hearing before the Honorable Mikell R.

Scarborough, reported by Christine A. Smith, Notary
Public, at 10:00 a.m. on March 24, 2015 at 100 Broad
Street, Charleston, South Carolina.

Christine A. Smith, Court Reporter
Master-in-Equity
P.O. Box 30276
Charleston, South Carolina, 29401
(843) 958-5071
casmith@charlestoncounty.org

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EXHIBIT

tabbier

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(INDEX AT REAR OF TRANSCRIPT)

P R O C E E D I N G S

THE COURT: This morning we have for trial a
case originally captioned, I think, Bank of America
but now HSBC Bank USA as trustee for some Deutsche
security holders -- anyway, versus Clifford Ryba,
Beverly Ryba, Regions Bank, First Federal, Citibank
and Carol Goldberg as the Defendants. The case
number is 2011-CP-10-7885. I have present for the
plaintiff, Mr. Tillman?

MR. TILLMAN: Yes, sir. Matt Tillman for the
Plaintiff.

MS. LYBRAND: Erica Lybrand, Your Honor.

THE COURT: And Ms. Lybrand, very good, for
the Plaintiff. And for the Defendant, Ms. Goldberg,
Mr. Goldberg and Mr. Holmes, correct?

MR. GOLDBERG: Yes, sir, correct.

THE COURT: No other Defendants present here
today on this case?

MR. GOLDBERG: Not to our knowledge.

THE COURT: I've got it. I have had a
chance -- I did get a pretrial brief on behalf of
Ms. Goldberg from Mr. Holmes and Mr. Goldberg, and I
did see an objection to that from Mr. Tillman.

Mr. Tillman, I've read the brief. I've

reviewed it. I understand you had some objections to
it both on timeliness grounds and on some of the
factual allegations in there. Of course you know all
of that is a matter of proof, so I think I can
distill between what's admissible evidence and what's
not. That's going to be one of the issues we've got
here today.

We're up for trial. I've asked my court
reporter to mark all the exhibits. Have we been able
to mark all the exhibits so far in this matter?

MR. TILLMAN: Yes, sir, on our side.

MR. HOLMES: Yes, sir.

THE COURT: And I'm sure some of them will be
contested when we get to that point in time. Are
there any matters we need to take up before we
commence?

MR. TILLMAN: I have several, Your Honor.

THE COURT: All right.

MR. TILLMAN: First of all, on the Direct
Examination of Michael Ward, who is the
representative of our client, we would like to ask
the Court to allow us to split that up between Erica
and I. I will be doing the rest of them alone, but
if that would be okay we would appreciate the Court
allowing to us do that.

1 THE COURT: Any objection on the Defense side?

2 MR. HOLMES: No, Your Honor.

3 THE COURT: That will be fine. All right,
4 Mr. Tillman?

5 MR. TILLMAN: I have also got two closing
6 attorneys under subpoena to appear to testify. One
7 is Roy Hutchinson, a local closing attorney. The
8 other is David Chard. He's not here. I sent an
9 e-mail to my paralegal. I would like for them to go
10 first so I can get Mr. Hutchinson out.

11 THE COURT: Okay. Take them out of order.
12 Any problem with that?

13 MR. HOLMES: No. In fact, we have Mr. Chard
14 under subpoena as well.

15 THE COURT: All right.

16 MR. TILLMAN: The third, I'm not sure how you
17 want to deal with this or that it even needs to be
18 dealt with, but I did want to raise it. Regions Bank
19 has a second mortgage on the property. From what I
20 can tell, the counterclaim does apply to Regions --
21 it's a counterclaim against us basically saying the
22 mortgage is void. That counterclaim hasn't been
23 asserted against the second mortgagee. I don't
24 know -- I haven't really thought through whether that
25 presents a problem or not. They're not here, but

1 they have asked to have their rights protected. We
2 just wanted to make the Court aware of that.

3 THE COURT: My understanding is they're not
4 actively defending the matter. I read this in the
5 brief, and in the event there's any surplus funds
6 over there, they would be sticking their hand out to
7 try and get any surplus funds to cover their mortgage
8 is what I understand.

9 MR. TILLMAN: Right. My only concern --

10 THE COURT: I'm not aware of any action
11 they've presented or any claims that they've
12 presented at this point in time.

13 MR. TILLMAN: Right. My only concern would
14 be -- let's say obviously I don't think this should
15 be the case, but you ruled that the mortgage is void,
16 our mortgage. You've still got another mortgage on
17 the property. It is what it is.

18 And then I did want to at least raise the
19 issue of their request for judicial notice of various
20 incendiary facts concerning Countrywide Bank that
21 were set forth in the pretrial brief. I don't know
22 whether the Court wants to take argument on that
23 right now or wait. I do contest the fact that there
24 should be judicial notice on Countrywide and the
25 bank's bad acts and the various things that were

1 placed in the media with postings and so forth. I
2 don't think that's relevant to the particular issues
3 here. They've got it showing that Countrywide acted
4 inappropriately here, and I just don't think that's
5 an appropriate scope for judicial notice.

6 THE COURT: Do you want to discuss that now or
7 when it comes up?

8 MR. HOLMES: Well, my understanding of the
9 judicial notice concept is that if the Court -- if
10 there are facts that cannot be reasonably disputed
11 the Court will take judicial notice of it. The
12 documents that we're relying upon primarily are
13 documents published by Bank of America when it
14 purchased Countrywide.

15 There's one CBS News report later when Bank of
16 America paid a very substantial fine for
17 Countrywide's unethical practices. The purpose of
18 that was raised, and the first instance was if they
19 want to just put in the documents. So these other
20 documents, we're relying on their face value, so
21 under the rules of evidence that's the way it would
22 normally happen unless there is reason to question
23 the validity of the documents based on the
24 circumstances of their preparation.

25 So if we raise the issue to say, we want you

1 to bring somebody here. He's indicated he has two
2 closing attorneys that are familiar with the
3 transaction themselves and not to stand on the
4 documents themselves. So it may be that if they
5 produce the closing attorneys then the need for those
6 transactions later is not as great as it was.

7 THE COURT: Let's take that up as it comes in
8 rather than doing that now.

9 MR. TILLMAN: And then the last issue is
10 Erica Lybrand is with child, and I think she's going
11 to need to take frequent breaks.

12 THE COURT: Ms. Lybrand, if you need a break,
13 and we're in the middle of something just raise your
14 hand.

15 MR. HOLMES: Your Honor, I object to that.
16 That's a lot to ask.

17 THE COURT: And to the extent -- if you need
18 to go out -- if you need to be here let me know and
19 we'll stop the proceeding, and if you can just
20 secrete yourself and come right back -- if we're at a
21 point where you're comfortable doing that then
22 certainly let me know about that. I'm happy to do
23 that.

24 MR. TILLMAN: Thank you.

25 MS. LYBRAND: Thank you, Your Honor.

1 THE COURT: Does that take care of your
2 matters then, Mr. Tillman?
3 MR. TILLMAN: Yes, sir.
4 THE COURT: Ms. Lybrand, do you have any other
5 separate issues I need to address?
6 MS. LYBRAND: No, Your Honor.
7 THE COURT: And from the Defense standpoint?
8 Mr. Holmes?
9 MR. HOLMES: The only unusual matter we have I
10 put in the brief. Mr. Goldberg, he's been lead
11 counsel on this case since 2008. He's here and he's
12 doing much better, but I've noticed in our dealings
13 that he does get tired. He's acquiesced. He liked
14 the judicial notice that he's hardheaded.
15 THE COURT: I think we all like that notice.
16 MR. HOLMES: His wife probably agrees, so I
17 think he's going to let me take the lead here. If he
18 tells me at some point that he's getting tired I'll
19 let you know.
20 THE COURT: Okay. That will be fine.
21 Mr. Goldberg, same issue, you raise your hand. Don't
22 throw anything at us.
23 MR. GOLDBERG: I don't want to say it, but my
24 wife has agreed with him.
25 THE COURT: I'm sure there's an alliance

1 there. Usually it's the Goldberg brothers, but today
2 it's the Goldberg cousins that are here I guess. I'm
3 sure there's no relation.
4 MS. GOLDBERG: No, sir.
5 THE COURT: I'm familiar with that one, too.
6 Anything else? If not then -- what I'd like to do --
7 we'll proceed. Generally, I run until about 12:30 or
8 so, and then take a break somewhere between noon and
9 1:00, whatever's sort of normal, and then try to get
10 back here at 2:00 today to recommence the afternoon
11 sessions. I've got this case down for the entire
12 day. I think we can try it in a day based on the
13 representations we've had in the past. Let's just go
14 from there.
15 Again, if anybody needs a break during the
16 course of the proceeding -- I'm sometimes oblivious
17 to that. You-all just make it apparent, and I'll be
18 glad to go forward from there. Okay? Very good.
19 Mr. Tillman, you may proceed, sir.
20 MR. TILLMAN: Would you like an opening
21 argument?
22 THE COURT: You know, I'm pretty familiar with
23 this one. I don't think we're going to need any
24 opening statements. Anybody here that is a 403
25 person that needs that absolute? I've got a few of

1 them. Why don't you give us about a five-minute
2 spiel then and give these people some education.
3 MR. TILLMAN: This can last 30 or 40 minutes.
4 THE COURT: If you take that long I'll gavel
5 you down. Okay?
6 MR. TILLMAN: Obviously, Your Honor, you know
7 that this is a mortgage foreclosure proceeding. I
8 think it's worth at least going through the timeline
9 for you right off the bat so we can get to that.
10 THE COURT: Speaking of which, does anybody
11 have a written timeline?
12 MR. TILLMAN: I've got it in my opening
13 argument here. I can hand it to you if you want.
14 THE COURT: Go ahead and run down it.
15 MR. HOLMES: After the Summary Judgment Motion
16 you asked that they prepare a timeline, which they
17 did. I've got a copy of it here.
18 THE COURT: Great. Great.
19 MR. HOLMES: We can stipulate to that and go
20 ahead and admit it.
21 THE COURT: That would be fine. That would be
22 fine. I think the factual aspect or the timing
23 aspect of that may be relevant here. I've been
24 handed what's marked as Defendant's 1.
25 MR. TILLMAN: So just real quickly, Your

1 Honor?
2 THE COURT: Certainly.
3 MR. TILLMAN: On August 31st, 2005,
4 Ms. Goldberg conveyed 34 Tarleton Drive to Clifford
5 and Beverly -- I'm going to say Ryba. It may be
6 Ryba.
7 THE COURT: I think it's Ryba; is it not?
8 MR. TILLMAN: Ryba.
9 THE COURT: Let's stick with that.
10 MR. TILLMAN: In May of -- during that
11 timeframe, Countrywide Bank loaned the Rybas some
12 money. They loaned them, I think, \$205,000 to
13 purchase the property. The property was purchased
14 for \$199,000 first to Carolina First and was paid
15 off. Then in 2006 Regions Bank loaned some more
16 money to the Rybas.
17 Obviously that mortgage was recorded. On
18 May 2, 2007 we get to the refinance that we're here
19 today to discuss. The Rybas executed and delivered a
20 note in the amount of 172,000 to Countrywide Bank,
21 along with that obviously a first mortgage. The
22 Regions -- the existing Regions mortgage was then
23 subordinated to our mortgage in that timeframe back
24 in 2007. In July of 2008 Bank of America acquired
25 Countrywide.

1 On August 19th, 2008 Ms. Goldberg filed a lis
2 pendens and sued the Rybas. I think you're probably
3 familiar with the general allegations, but generally
4 she says they've procured the deed by fraud. We'll
5 get more into that. That's when she filed those
6 documents. There was an assignment from MERS in
7 2011.

8 On October 27th, 2011 this suit was commenced.
9 May, 29, 2012, Bank of America assigned it to my
10 client who has it now. October 26th, 2012, I think
11 what happened is the lawsuit between Ms. Goldberg and
12 the Rybas resolved when the Rybas deeded the property
13 to Ms. Goldberg. In any event she deeded the
14 property or they deeded the property to Ms. Goldberg
15 such that she's the owner now. The Rybas remain the
16 borrowers on the note.

17 Other than her defenses -- this obviously is
18 standard in a foreclosure action. My client
19 purchased the note and mortgage and they're
20 foreclosing on it. It was assigned to them. We have
21 all those documents. Ms. Goldberg asserted some
22 counterclaims which state that the mortgage was void
23 because the deed from her to the Rybas was void. I
24 think if you look under the law of it, without
25 getting too far into it, a void deed is one that is

1 forged or granted by somebody who is incapacitated
2 and so forth, not one that wasn't procured by fraud
3 and is voidable.

4 So really the main dispute here is whether or
5 not, number one, Countrywide was a bona fide lender
6 for value without notice under SC Code 37-10. And
7 his clients, having been assigned that note and
8 mortgage after Ms. Goldberg filed a lis pendens, is
9 entitled to the protection as a bona fide lender
10 under the Shelter Rule.

11 I think you'll see -- I think the evidence
12 will show you that we can prove all of those
13 elements. Number one, that the money was loaned, the
14 mortgage was received, and it was properly assigned
15 and so forth. I think it's also undisputed, the
16 original, back in 2007 loaned the money and took a
17 mortgage at a time when there was nothing of record
18 concerning Ms. Goldberg's claim to the property. I'm
19 not really sure exactly what her claim is other than
20 pursuing some sort of equitable interest.

21 So in that situation I think it's pretty clear
22 under the law that at least Countrywide was a bona
23 fide owner for value without notice such that they
24 get to foreclose on whatever Ms. Goldberg claims to
25 have on the property. The secondary question to that

1 is, well, now that you have assigned it after she
2 filed a lis pendens does the new lender or the new
3 holder of the loan and mortgage also have the same
4 benefit of the bona fide lender defense essentially,
5 and I believe under several cases that we talk about,
6 what they call the Shelter Rule, the answer to that
7 is yes. There are a lot of reasons for that. The
8 main one being, this is a bona fide purchaser and a
9 bona fide lender rule.

10 So if a bona fide purchaser purchases property
11 and someone files a lis pendens after they purchase
12 it, adopting Ms. Goldberg's argument would mean that
13 that person couldn't sell the property because the
14 claim would attach to it. The same thing goes to the
15 lender. The lender has to be able to sell their note
16 and mortgage. Those things are marketable. It's
17 part of our lending system to be allowed to transfer
18 those documents.

19 The cases clearly state that that is the
20 purpose of the Shelter ruling. We'll talk about that
21 more, I guess, in closing. Second, I don't believe
22 Ms. Goldberg will be able to specify any interest if
23 she had the property. I don't think the Rybas are
24 going to be here. This would be hearsay. She
25 doesn't have anything in writing. There are all

1 kinds of reasons why, and I don't believe from an
2 evidentiary standpoint that her claim is going to
3 come into evidence and she's not going to be able to
4 show that this was even a voidable deed at all.

5 Finally, I do want the Court to understand
6 that a lot of this is going to be about -- because
7 this is a Court of Equity about what's fair and
8 what's not fair and how Ms. Goldberg is getting
9 shafted and so forth. I do want the Court to
10 remember as it hears the evidence. Ms. Goldberg had
11 a \$199,000 mortgage on the property when she owned
12 it. That was paid off by my client's predecessor and
13 predecessor lender and then we refinanced. What they
14 are seeking now is to have this mortgage declared
15 invalid and then basically arguing that what she has
16 is scot-free despite the fact that at the beginning
17 of all this she had \$199,000 owed on the property.
18 There was a mortgage that got paid off. There's no
19 dispute as to that.

20 So if we're looking at it from a matter of
21 equity, whether you look at it as a matter of
22 equitable subrogation or just the determination of
23 which parties should suffer the loss, I do want the
24 Court to remember that this is not a case of an
25 entirely seemingly innocent borrower or owner. She

1 did receive an extensive benefit or a significant
2 benefit from the original loan -- original loan given
3 to the Rybas to purchase the property, and that's
4 been refinanced since then.

5 So I do want the Court to be mindful of that
6 as we go through. Thank you.

7 THE COURT: All right, Mr. Tillman.
8 Mr. Holmes?

9 MR. HOLMES: Your Honor, I'm glad Mr. Tillman
10 began by talking about this being a Court of Equity.
11 Fairness, we think, does play an important role in
12 this case. This is a very fact-specific case. We do
13 not believe that a ruling in this case is going to
14 collapse our financial system. This is a case that
15 involves a licensed mortgage broker and mortgage
16 company he worked for committing a fraud, committing
17 an illegal act in talking Ms. Goldberg into
18 transferring her property to them under the guise
19 they were helping her obtain a mortgage. What they
20 were really doing was helping themselves to the
21 substantial equity in her home she inherited from her
22 grandfather.

23 It's a case that involves a now defunct
24 mortgage company, Countrywide. It didn't exercise
25 control of this loan. It had the right to exercise

1 control of the loan. We will offer some evidence
2 that they controlled what information was required.
3 They controlled what was needed to close the loan.
4 They had information that was presented to them that
5 is sufficient to put them on an inquiry as to what
6 the nature of this transaction truly is. Had they
7 diligently pursued any of that information they would
8 have discovered this loan was fraudulent and illegal.

9 It also involves Bank of America that picked
10 up Countrywide when it was going under and they
11 bought it for pennies on the dollar according to
12 their own financial statement. It appears to us, and
13 maybe we can get into that if we can get the people
14 who handle the transactions that actually there was
15 insurance on the mortgage.

16 MR. TILLMAN: Your Honor, objection.

17 THE COURT: So noted, okay.

18 MR. HOLMES: So what we take the position in
19 is that this case is not trying to undermine South
20 Carolina law. It's based on South Carolina law.
21 South Carolina law says that -- and public policy
22 that those who have the right to control a
23 transaction -- and we either facilitate or turn a
24 blind eye to fraud or illegal conduct should be the
25 ones who bear risk, bears the burden. That's what

1 we're going ask to have happen in this case.

2 We take the position that neither the current
3 Plaintiff, Deutsche Bank, is who I refer to them as,
4 or Bank of America on their own can occupy holder in
5 due course status for several reasons. The loan was
6 in default at the time they purchased it.
7 Mr. Goldberg had filed his lis pendens before they
8 obtained it by signing it. The actual transfer of
9 this mortgage was not done in the ordinary course of
10 Countrywide's business. It was done as part of a
11 bulk sale, part of a fire sale.

12 Now, we further claim that they have the
13 burden of proof that they paid value without notice
14 and that if we get into the documents and we get into
15 the transaction we take the position that they had
16 enough evidence that had they diligently searched it
17 they would have uncovered what was going on.

18 So Your Honor, that's basically our position.
19 We think that Ryba, a licensed mortgage banker was an
20 employee and the originator and the borrower of this
21 loan, of First Rate Mortgage. First Rate Mortgage,
22 under South Carolina law, absent some disclaimer is
23 the agent of the lender. There's documents that we
24 will introduce that will indicate that Countrywide
25 controlled the transaction. They decided what

1 evidence was required. They decided what had to be
2 verified.

3 So for that reason we take the position that
4 First Rate is really the agent of Countrywide, and
5 therefore Countrywide is responsible for the fraud
6 that was committed.

7 Thank you. The reasons that they're not
8 holders in due course on the loan is because they
9 were in default and because it was a fault
10 transaction out of the ordinary course in the
11 transfer of business that's based under the Uniform
12 Commercial Code. We cited the code.

13 THE COURT: Very good. Thank you, sir. All
14 right, Mr. Tillman?

15 MR. TILLMAN: I would like to call
16 Roy Hutchinson, please.

17 ROY HUTCHINSON.
18 being first duly sworn, testified as follows:

19 THE COURT: Your full and name and address for
20 the record, please?

21 THE WITNESS: LeRoy Phillips Hutchinson, and
22 the office address is: 147 Wappoo Creek Drive, Suite
23 202, Charleston, 29412.

24 THE COURT: Thank you, sir.

25 EXAMINATION

1 BY MR. TILLMAN:

2 Q. Good morning, Mr. Hutchinson. Thank you for
3 coming today. First of all, will you please let the
4 Court know what you do for a living?

5 A. I'm a South Carolina licensed lawyer. I've
6 been practicing in Charleston since 1992, mostly real
7 estate law. I would say about 90 percent of what I
8 do is real estate, residential mostly and some
9 closings.

10 Q. By that do you mean you do residential
11 closings?

12 A. Oh, exactly. Yes.

13 Q. Where do you practice?

14 A. In the Wappoo Center on James Island.

15 Q. Can you just briefly describe -- I know this
16 is the Master in Equity, but can you briefly describe
17 the process for handling a real estate closing?
18 Residential?

19 A. Sure. So we get a contract from -- in this
20 case I'm going to talk about purchase and not about
21 refinance. We get a contract from the purchaser or
22 from the purchaser's agent. I go search the title.
23 It's a public record. It reflects any liens or any
24 judgments or whatever it might be of record against
25 the seller. It would call for payoffs. We bring

1 everybody together.

2 If the loan is financed obviously we have loan
3 documents, so we have the borrower sign the loan
4 documents. The seller signs a deed of conveyance and
5 other verifications. We make payoffs to mortgage
6 companies. I take the deed down to the RMC office
7 along with the mortgage and record those documents.
8 That's pretty much it.

9 Q. Do you typically get a title search on the
10 property?

11 A. I do, yes.

12 Q. And do you prepare a HUD-1 form when closing a
13 real estate transaction?

14 A. Yes.

15 Q. And can you briefly explain the purpose of a
16 HUD-1 for me?

17 A. Well, when a settlement statement is -- a
18 HUD-1 is a Housing and Urban Development mandated
19 form that we do in real estate transactions,
20 residential real estate transaction, so what it does
21 is it's a form where a seller's costs are detailed,
22 borrower's costs are detailed. Back in 2005 we had a
23 two-page form. And so the second page is the details
24 of charges that both borrower and seller are going to
25 pay.

1 The first page is a summary page which ends up
2 at the very bottom of it -- I should know this -- the
3 left-hand side is the borrower's, what they have to
4 bring at closing. The right-hand side is what the
5 seller takes away from the closing. It's a summary
6 of the transactions.

7 Q. Do you recall performing a real estate closing
8 regarding the sale of 34 Tarleton Drive from Carol
9 Goldberg to Clifford and Beverly Ryba back in 2005?

10 A. I do.

11 Q. You were the closing attorney for that
12 transaction?

13 A. I was.

14 Q. Did you prepare a HUD-1 form for that
15 transaction?

16 A. I did.

17 Q. Would you please look at this document and
18 tell me what it is?

19 A. This is the HUD-1 settlement statement I
20 prepared for the transaction, for the sale of 34
21 Tarleton Drive, Charleston, 29407.

22 Q. Is that a document that you kept in the
23 ordinary course of your business?

24 A. Yes.

25 MR. TILLMAN: Your Honor, I would ask that

1 that be admitted as Exhibit 1.

2 THE COURT: Any objection?

3 MR. HOLMES: No objection, Your Honor.

4 THE COURT: Without objection.

5 Q. (BY MR. TILLMAN) How much was the loan -- if
6 you would refer to that Exhibit, please. How much
7 was the loan in this particular case?

8 A. Two loans. We have a first mortgage loan of
9 \$163,500 and the second mortgage loan is 20,857.

10 Q. Was an existing mortgage paid off?

11 A. It was an existing mortgage to Carolina First
12 that was paid off, yes.

13 Q. In what amount?

14 A. \$199,689.75.

15 Q. Did you also prepare the deed for this
16 transaction?

17 A. Yes, I did.

18 Q. I would ask you to look at this document,
19 and let me know if you recognize it.

20 A. I do recognize it. It's the deed I prepared
21 and is signed by Ms. Goldberg as part of our sale.

22 Q. Is that a true and accurate copy of the deed
23 kept in your ordinary course of business?

24 A. Yes. Also on record at the RMC office.

25 MR. TILLMAN: Your Honor, I would move that

1 that deed be moved into evidence as Exhibit 2,
2 please.

3 MR. HOLMES: No objection.

4 THE COURT: Without objection.

5 Q. (BY MR. TILLMAN) What kind of deed is this?

6 A. This is a general warranty deed.

7 Q. Can you briefly describe what a general
8 warranty deed is?

9 A. A general warranty deed is a deed whereby the
10 seller agrees to defend the buyer against any claims
11 whatsoever against title be they mortgages that are
12 unrecorded or unrecorded liens, anything that's a
13 claim against title that arises through the borrower,
14 or excuse me, through the seller, and not only the
15 seller but also previous owners of the prior chain of
16 title.

17 Q. Were there any reservations or reversionary
18 interests in that deed?

19 A. No.

20 Q. Do you recall having any indication that
21 Ms. Goldberg was claiming some sort of interest in
22 the property at the time she sold it?

23 A. No.

24 Q. If you had such knowledge would you have
25 prepared the deed as it is written or as it was

1 recorded?

2 A. No.

3 Q. How would it have been different?

4 A. Well, I think probably I would have prepared a
5 second document that would have been like a right to
6 purchase or something like that whereby she would
7 have a right to purchase after the closing from the
8 Rybas, maybe something like that. I didn't reflect
9 on it. It wasn't brought to my attention.

10 Q. Did you review your file?

11 A. Oh, yes.

12 Q. Did you discover any such document?

13 A. I didn't. I specifically reviewed the
14 purchase contract, and nothing. No mention of such a
15 document. No mention of such a right to reclaim or
16 have the title conveyed back.

17 Q. I'm going to hand you another document and ask
18 that you review that and let me know, number one, if
19 it came from your file, and number two, what the
20 document is?

21 A. Yes. It did come from my file. It is an
22 owner's affidavit and indemnity through date of
23 closing, August 31, 2005, signed by Ms. Goldberg. It
24 basically -- just to summarize it explores -- it's
25 for title insurance, general warranty deed purposes.

1 Are there any claims or any judgments or potential
2 liens including mechanic's liens against this
3 property that we need to take care of at closing that
4 have not been revealed by the public record, so
5 basically that's what the affidavit seeks to do.
6 That information is what we seek to explore or to
7 obtain.

8 Q. Was this document kept in your ordinary course
9 of business?

10 A. Yes.

11 Q. It was in your file?

12 A. Yes.

13 MR. TILLMAN: Your Honor, I ask that this be
14 admitted as Exhibit 3.

15 MR. HOLMES: Without objection.

16 THE COURT: Exhibit 3.

17 Q. (BY MR. TILLMAN) And Mr. Hutchinson, can you
18 please read Paragraph 4 for me?

19 A. Paragraph 4 from the Owner's Affidavit and
20 Indemnity Agreement reads as follows: "The
21 undersigned" -- this is Ms. Goldberg is the
22 undersigned -- "the undersigned affirms that there
23 are no tenancies, occupancies, or other occupations,
24 or any other leases, chattel mortgages, financing
25 statements, retention or reversion of title

1 agreements, liens or contracts (including, without
2 limitation, real and/or personal property taxes,
3 assessments, regime fees, mortgages, and/or
4 judgments) against the undersigned and/or affecting
5 the property and/or any personal property located
6 therein (including without limitation, heating and
7 air conditioning systems, fixtures, appliances,
8 furnishings or equipment) except as follows and (if
9 no mortgages or other liens outstanding, write
10 'none')."

11 Q. And again, who signed this document?

12 A. Ms. Goldberg.

13 Q. Were you a witness to her signature?

14 A. I was.

15 Q. Would you have closed this transaction in the
16 manner it was closed if you were aware of any
17 interest Ms. Goldberg claimed to the property?

18 A. No.

19 MR. TILLMAN: That's all I have. Thank you.

20 EXAMINATION

21 BY MR. HOLMES:

22 Q. Did you also close the mortgage loan on the
23 same date?

24 A. Pardon me?

25 Q. Did you also close the mortgage loan on the

1 same date?
 2 **A. I did. It's the same transaction.**
 3 **Q.** And did you bring any paperwork or a file with
 4 regards to the mortgage loan?
 5 **A. Did I today?**
 6 **Q.** Yes.
 7 **A. No, sir.**
 8 **Q.** Were you asked to produce the copies of the
 9 mortgage at closing?
 10 **A. No, sir. The mortgages are part of the public**
 11 **record now.**
 12 **Q.** But you do a closing statement when you do the
 13 mortgage transaction as well?
 14 **A. Yes. Actually Exhibit A is that settlement**
 15 **statement.**
 16 **Q.** So there's not a separate one for the mortgage
 17 that covers both the deed and --
 18 **A. Yes, sir. Both buyer and seller.**
 19 **Q.** And who hired you to be the attorney in this
 20 closing?
 21 **A. Mr. Ryba.**
 22 **Q.** Who paid you to be the attorney in this
 23 closing?
 24 **A. Mr. Ryba and Ms. Goldberg paid for deed prep,**
 25 **too.**

1 **Q.** Now, you said you start with a contract to buy
 2 and sell?
 3 **A. Yes.**
 4 **Q.** Did you have a copy of the contract to buy and
 5 sell?
 6 **A. Yes.**
 7 **Q.** And who prepared the contract to buy and sell?
 8 **A. Well, I don't know, but I didn't.**
 9 **Q.** Let me show you what we marked as Defendant's
 10 Exhibit No. 3. Is this a copy of the agreement to
 11 buy and sell?
 12 **A. It looks familiar. Let me, if I may, look all**
 13 **the way through.**
 14 **Q.** Sure.
 15 **A. I'm not sure whether the contract I have in my**
 16 **file actually has Beverly Ryba's signature on it as**
 17 **well. This one does not. In any event it --**
 18 **otherwise it looks like the one that I have in my**
 19 **file.**
 20 **Q.** Can you turn to Page 6 of 6?
 21 **A. Yes.**
 22 **Q.** And who does it indicate is the listing agent
 23 and the company representing the seller?
 24 **A. Seller representing self as the listing agent.**
 25 **Buyer representing self for selling agent.**

1 **Q.** So did Ms. Goldberg have a real estate agent
 2 advising her on this transaction?
 3 **A. Not to my knowledge.**
 4 **Q.** Did she have an attorney advising her in
 5 regards to this transaction?
 6 **A. Not to my knowledge.**
 7 **Q.** Okay.
 8 **A. Other than deed preparation and preparation of**
 9 **affidavits.**
 10 **Q.** Who prepared the deed?
 11 **A. I did.**
 12 **Q.** How much did the deed cost?
 13 **A. \$100.**
 14 **Q.** Did she actually give you a check for \$100, or
 15 did that come out of the closing?
 16 **A. It came out of the closing.**
 17 **Q.** Okay. May I see the closing statement?
 18 **A. Yes, sir.**
 19 **MR. HOLMES:** Do you have an extra copy?
 20 **MR. TILLMAN:** I don't.
 21 **Q.** (BY MR. HOLMES) All right. Now, the purchase
 22 price of the property was \$205,000?
 23 **A. I believe so. Reading off the deed I'm sure**
 24 **it was 205. That should be reflected on the subject**
 25 **statement.**

1 **Q.** As part of a mortgage transaction which you
 2 did at the same time you did the deed, was there an
 3 appraisal done of the property?
 4 **A. Well, let me look at the settlement statement**
 5 **to see if there is a fee for the appraisal. There is**
 6 **not.**
 7 **Q.** No appraisal? So the mortgage company is
 8 making a loan on a property without an appraisal of
 9 its value?
 10 **A. That's the lender's call. That's not within**
 11 **my jurisdiction to order.**
 12 **Q.** Is that usual or unusual?
 13 **A. I would say it's -- in a purchase transaction**
 14 **I would say, yes, it is unusual.**
 15 **Q.** Did you have any idea of how much the house
 16 was worth?
 17 **A. No.**
 18 **Q.** And if I represented to you the house was
 19 worth \$350,000, and the contract says she's selling
 20 it for \$205,000 would that raise a red flag to you?
 21 **A. Well, not necessarily. The reason is because**
 22 **contracts come to me signed and are assumed to be**
 23 **negotiated between the parties, and if this is their**
 24 **agreement I don't -- go behind or try to figure out**
 25 **the reasoning as to why this purchase price rather**

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master in Equity

Case No. 2011-CP-10-07885

RECEIVED

MAY 19 2016

SC Court of Appeals

HSBC Bank USA, National Association,
as Trustee for the Holders of the Deutsche
ALT-A Securities, Inc. Mortgage Loan Trust,
Mortgage Pass-Through Certificates
Series 2007-OA4.....Plaintiff/Appellant,

v.

Clifford L. Ryba; Beverly Ryba;
Regions Bank; First Federal Savings
and Loan Association of Charleston;
Citibank (South Dakota) N.A.;
Carol Garfield Goldberg Defendants,

Of whom Carol Garfield Goldberg is the Respondent.

NOTICE OF APPEAL

HSBC Bank USA, National Association, as Trustee for the Holders of the Deutsche
ALT-A Securities, Inc. Mortgage Loan Trust, Mortgage Pass-Through Certificates Series 2007-
OA4 hereby appeals the following orders:

- (1) Order Denying Foreclosure, entered on June 22, 2015, by the Honorable Mikell
R. Scarborough; and

(2) Order Denying in Part and Granting in Part Plaintiff's Motion to Alter, Amend or Reconsider or for a New Trial, entered on April 20, 2016, by the Honorable Mikell R. Scarborough.

HSBC Bank USA, National Association, as Trustee for the Holders of the Deutsche ALT-A Securities, Inc. Mortgage Loan Trust, Mortgage Pass-Through Certificates Series 2007-OA4 received written notice of entry of the Order Denying in Part and Granting in Part Plaintiff's Motion to Alter, Amend or Reconsider or for a New Trial on April 20, 2016.



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May 17, 2016

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IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master in Equity

Case No. 2011-CP-10-07885

RECEIVED

MAY 19 2016

SC Court of Appeals

HSBC Bank USA, National Association,
as Trustee for the Holders of the Deutsche
ALT-A Securities, Inc. Mortgage Loan Trust,
Mortgage Pass-Through Certificates
Series 2007-OA4.....Plaintiff/Appellant,

v.

Clifford L. Ryba; Beverly Ryba;
Regions Bank; First Federal Savings
and Loan Association of Charleston;
Citibank (South Dakota) N.A.;
Carol Garfield Goldberg Defendants,

Of whom Carol Garfield Goldberg is the Respondent.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on counsel of record by depositing a
copy of it in the United States Mail, postage prepaid, on May 17, 2016.



Erica G. Lybrand (SC Bar # 79052)

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

THE COURT OF COMMON PLEAS
BEFORE THE MASTER IN EQUITY
CASE NO.: 2011-CP-10-7885

RECEIVED

MAY 19 2016

SC Court of Appeals

HSBC Bank of USA, National)
Association, as Trustee for the)
Holders of the Deutsche ALT-A)
Securities, Inc. Mortgage Loan)
Trust, Mortgage Pass-Through)
Certificates Series 2007-A4, assignee)
of Bank of America N.A., successor)
by merger to BAC Home Loans)
Servicing, L.P., f/k/a Countrywide)
Home Loans Servicing, Inc.,)

Plaintiff,)

-vs.-)

Clifford L. Ryba; Beverly Ryba;)
Regions Bank; First Federal Savings)
and Loan Association of Charleston,)
Citibank (South Dakota) N.A., and)
Carol Goldberg,)

Defendants.)

ORDER DENYING FORECLOSURE

FILED
2015 JUN 22 PM 12:11
JULIE J. ARMSTRONG
CLERK OF COURT

This matter was heard before me on March 24, 2015. Present at the hearing were the Plaintiff and their attorneys, Matthew Tillman, of Womble, Carlyle, Sandridge & Rice, LLP, and Ericka G. Lybrand of Rogers, Townsend and Thomas, PC, as well the Defendant, Carol Goldberg, and her attorneys, Benjamin Goldberg, Esquire, and J. Kevin Holmes, of the Steinberg Law Firm, LLP. The Defendant, Regions Bank, has not sought to foreclose its second mortgage but has requested, if foreclosure is granted, any excess funds be paid over to them. The remaining

Defendants did not appear at the hearing. This was a final hearing on the merits on the Plaintiff's Amended Complaint for foreclosure.

The Plaintiff seeks to foreclose a note and mortgage entered into between Countrywide Home Loans Inc., and Clifford L. Ryba, and his wife on May 2, 2007 recorded in Book E 625 at page 517 in the Charleston County RMC Office. (Defendant's Exhibits 4 and 5). The mortgage was secured by real property located at 34 Tarleton Drive, Charleston, South Carolina 29407. There is no dispute the mortgage is in default.

The Plaintiff alleges it is a bona fide purchaser of the note and mortgage for value without notice also entitled to the protection of the shelter rule and, therefore, not subject to any claims or defenses of the Defendant. The Defendant alleges she was fraudulently induced into deeding her property to Ryba and his wife when she sought his help as a licensed mortgage broker to refinance her home, denies the Plaintiff is a bona fide purchaser for value without notice, and alleges the Plaintiff has no greater rights than its predecessor in title, Countrywide, which facilitated, turned a blind eye to, and profited from its agents' fraud and illegal recasting scheme.

The Plaintiff claims the mortgage was duly filed in accordance with § 30-7-10, S.C. Code Anno., 1976 as amended, and, therefore, valid as to all subsequent bona fide purchasers for value without notice. Section 30-7-10 is consistent with South Carolina case law providing a purchaser may assert a plea in equity if it is a bona fide purchaser for value without notice, by showing (1) he has actually paid

the full purchase price; (2) he purchased and acquired the legal title, or the best right to it; and (3) he purchased the property in good faith, with integrity of dealing, and without notice of a lien or defect. Spence v. Spence, 368 S.C. 106, 628 S.E.2d 869 (2006). In order to qualify as a bona fide purchaser for value without notice, all three (3) conditions must exist before the purchaser had notice of a title defect or other adverse claim, lien, or asserted interest in the property. S.C. Tax Commn. v. Belk, 266 S.C. 539, 543, 225 S.E. 2d 177, 179 (1976). The burden of proving the existence of the three (3) conditions is on the Plaintiff. Smith v. Faust, 107 S.C. 37, 92 S.E. 24 (S.C. 1917).

Before addressing the issues the Court feels compelled to discuss some of the procedural history of this case. This foreclosure was originally brought by Bank of America, N.A., successor by merger to BAC Home Loans Servicing L.P., f/k/a Countrywide Home Loans Servicing, Inc., which alleged it was the holder of the note and mortgage by reason of an assignment filed in the Charleston County RMC Office on September 15, 2011. (Plaintiff's Exhibit 8). The Complaint was amended substituting the Plaintiff which alleged it was the holder of the note and mortgage by reason of an assignment filed in the Charleston County RMC Office on May 21, 2012. (Plaintiff's Exhibit 6). Considerable time and effort was spent by the Court and the parties arguing the Plaintiff's motion for summary judgement based on these assignments. The Defendant raised several arguments why neither the Bank of America nor the Plaintiff were bona fide purchasers for value without notice. First, the Defendant argued the Bank of America and the Plaintiff had failed to

show they were the holder of the note because it was endorsed in blank and did not show who the note had been assigned to. Second, the Defendant argued neither the Bank of America nor the Plaintiff could be a holder in due course because they obtained their assignments after the *lis pendens* was filed giving statutory notice of the Defendant's claim on August 19, 2008. *See*: § 30-7-10, S.C. Code Anno., 1976 as amended; Pipkin v. Fletcher, 165 S.C. 98, 162 S.E.774 (1932). Third, the Defendant argued neither the Bank of America nor the Plaintiff could be a holder in due course because they obtained their assignments after the note and mortgage were in default. *See*: § 36-3-302 (1)(c), S.C. Code Anno., 1976 as amended. And, fourth, the Defendant argued Bank of America, the Plaintiff's predecessor in interest, could not be a holder in due course because it had obtained the note and mortgage as part of a bulk sale not in the regular course of Countrywide's business. *See*: § 36-3-302 (3)(c), S.C. Code Anno., 1976 as amended. The Defendant asked the Court to take judicial notice the real estate market collapsed in late 2007 and 2008 causing the Wall Street financial crisis and that Bank of America had purchased Countrywide on July 1, 2008 in what the Defendant described as a "fire sale" according to Bank of America's web postings. In response to these arguments, the Plaintiff filed a supplemental memorandum in support of summary judgment claiming it was entitled to the protection of the shelter rule. Under the scintilla of evidence standard, the Court ruled there remained material questions of fact and denied summary judgment. *See*: Hancock v. Mid-South Management Co., Inc., 673 S.C. 801, 381 S.E.2d 326 (S.C. 2009).



At trial, however, the Plaintiff introduced the testimony of Michael Ward, a vice president of the Plaintiff, to authenticate the documents and he testified the mortgage was actually assigned to the Plaintiff on June 1, 2007, long before the *lis pendens* was filed, Countrywide collapsed and was taken over by Bank of America, and the note and mortgage had gone into default. The prior assignments which were filed with the RMC Office and previously relied upon by the Plaintiff are inconsistent with the his trial testimony. If the trial testimony is to be believed, then the two prior assignments recorded in the RMC Office, referenced in pleadings, and relied upon in arguments before this Court were either the product of incompetence, the result of a total lack of accurate record keeping, or a complete sham. This Court is charged with the difficult task and responsibility of deciding cases affecting the lives of citizens whose homes are being foreclosed. Of necessity, the Court must rely on the accuracy of the documents submitted. The Court emphasizes a mortgage foreclosure is an action in equity and a party seeking to foreclose a mortgage must come before the Court with clean hands. Hayne Fed. Credit Union v. Bailey, 327 S.C. 242, 489 S.E.2d 472 (1997); Wachovia Bank, N.A. v. Coffey, 389 S.C. 68, 698 S.E.2d 244 (2010). The inconsistent testimony causes the Court to have great concern about the accuracy and reliability of the documents the Plaintiff relies upon.

The first issue to be decided is whether the Plaintiff is a bona fide purchaser of the note and mortgage for value. In response to the Defendant's argument made during the summary judgment hearing the note was endorsed in blank and did not

show to whom it had been assigned, the Plaintiff argued the blank endorsement made the note a bearer instrument and produced the original note. The Court was satisfied this proved the Plaintiff is the holder of the note. The question remained whether the Plaintiff paid value for the note. The Court would not hesitate to find that Bank of America obtained the note and mortgage as part of a bulk sale not in the ordinary course of Countrywide's business and, therefore, could not be a holder in due course. If the trial testimony is to be believed, however, it would now appear the Bank of America never was a holder of the note by merger or assignment. If the assignments are to be believed, the Court notes the assignments do not state what, if anything, of value was exchanged for the note and mortgage. The issue of whether the Plaintiff had paid value was raised during the hearing on the Plaintiff's motion for summary judgment. Other than Plaintiff's counsel saying the June 1, 2007 that was not introduced into evidence stated an unspecified consideration had been paid, there is no evidence what, if anything, the Plaintiff actually paid for the note and mortgage. When Michael Ward was asked by Defendant's counsel what the Plaintiff had paid for the note and mortgage, he replied he did not know. The Court finds the Plaintiff has failed to prove it was a bona fide purchaser for value.



The second issue to be decided is whether the Plaintiff is a bona fide purchaser of the note and mortgage without notice. The Court finds the Plaintiff is the holder of the note and mortgage but the issue of whether the Plaintiff had notice depends upon when the note and mortgage were assigned to them. The assignments that were filed with the RMC Office, cited in the pleadings, and relied



upon in arguments before the Court reflect the assignments were made after the *lis pendens* giving statutory notice of the Defendant's claim and after the note and mortgage were in default. As to the claim the Plaintiff became the holder of the note on June 1, 2007 pursuant to an agreement that was not introduced into evidence, the Court is unconvinced. The Plaintiff did not introduce a copy of the agreement and, other than representations of counsel, the Court has no way of knowing who the agreement was between, what the terms of the agreement were, or whether it included the subject note and mortgage. The Court does not suggest Plaintiff's counsel misrepresented the agreement but representations of counsel are not a substitute for evidence. For the reasons set forth above, the Court has serious concerns about the accuracy and reliability of the Plaintiff's documents. The Court finds the Plaintiff has not proven it obtained the note on June 1, 2007 pursuant to an agreement that has not been introduced. The only other evidence before the Court is that the Plaintiff obtained the assignment of the note and mortgage pursuant to the assignment dated May 21, 2012 that had been filed with the RMC Office, cited in the pleadings, and relied upon in proceedings before the Court. Under § 30-7-10, however, this assignment was made after the *lis pendens* was filed and, therefore, the Plaintiff would have had statutory notice of the Defendant's claim. Section 30-7-10 specifically applies to assignments:



All deeds of conveyances of lands...including *all assignments*...are valid so as to affect the rights of subsequent creditors... or purchasers for valuable consideration without notice, only from the day and hour from which they are recorded in the office of the register of deeds...In the case of a subsequent purchaser of real estate, or in the case of a subsequent lien

creditor on real estate for valuable consideration without notice, the instrument evidencing the subsequent conveyance or subsequent lien must be filed for the record in order for its holder to claim under this section as a subsequent creditor or purchaser for value without notice, and the priority is determined by the time of filing for record.

See: Pipkin v. Fletcher, supra. The Court finds the Plaintiff had statutory notice of the Defendant's claim when it became the holder of the note and mortgage pursuant to the assignments filed with the RMC Office, cited in the pleadings, and relied upon by the Plaintiff in arguments before the Court. The Court finds the Plaintiff failed to prove it was a bona fide purchaser of the note and mortgage without notice. 

Finding the Plaintiff failed to prove it was a bona fide purchaser for value without notice, however, does not end the inquiry. The Plaintiff further argues the deed between Ryba and the Defendant, if induced by fraud, was not void but voidable and, therefore, valid as any bona fide purchaser claiming through a bona fide purchaser for value without notice. *Manship v. Newsome*, 188 S.C. 6, 198 S.E.428 (1938); *Smith v. Faust, supra.* The Plaintiff argues an assignee stands in the shoes of the assignor and, even if they had statutory notice, they are entitled to the protection of the shelter rule. *Liberty Loan Corp. of Darlington v. Mumford*, 283 S.C. 134, 322 S.E.2d 17 (Ct. App. 1984) ("[W]henver in a succession of purchasers you reach one who is innocent and purchases in ignorance, the title is thenceforth sanctified."); *see also: Goodwin v. Harrison*, 231 S.C. 243, 98 S.E.2d 255 (1957); *BAC Home Loans Serv. v. Kinder*, 389 S.C. 619, 73 S.E.2d 547 (2012). The Plaintiff 

argues since its predecessor in title, Countrywide, actually funded the note and mortgage before the *lis pendens* was filed, the Plaintiff stands in Countrywide's shoes and is entitled to the protection of the shelter rule. A review of the testimony and evidence is necessary to decide this issue.

The Defendant testified she inherited 34 Tarleton Drive, Charleston, South Carolina 29407, free of encumbrances, from her grandfather. Thereafter, she and her then husband mortgaged the property because they were adopting a child and her husband wanted to open a restaurant. Subsequently, her husband was incarcerated, his restaurant closed, and the Defendant was left with insufficient income to pay the mortgage. She obtained a short term loan to keep up the payments but needed to obtain long term financing. She mentioned her situation to Ryba, who informed her he was a licensed mortgage broker with First Rate Mortgage, LLC, and offered to help her obtain refinancing.

The Defendant testified she met with Ryba at the office of First Rate Mortgage, LLC, and answered questions as he filled out what she presumed was a mortgage loan application. A short time later, however, Ryba told the Defendant she could not qualify for a mortgage loan even with a co-signor. The Defendant testified Ryba then proposed the Defendant deed her home to him so he could obtain a mortgage in his name and that he would lease the home back to her for an amount equal to the mortgage payments and give her the right to repurchase the home from him by reimbursing him for his costs. The Defendant testified she was desperate to keep from losing her home, an inexperienced borrower, and she relied

upon Ryba because he was a licensed mortgage broker and worked for a mortgage brokerage firm. ~~The~~ There is no evidence the Defendant knew the proposed scheme is called recasting and prohibited under the law regulating mortgage brokers.

In furtherance of the scheme, the Defendant testified Ryba prepared a Residential Lease Agreement on August 12, 2005 leasing the property back to her for monthly rent of \$850.00. (Defendant's Exhibit 2). Paragraph 14 of the lease agreement drafted by Ryba provided that the Defendant would be responsible for essential services and appliances because, "[t]enant is owner." The Defendant testified she understood the rent would be equal to and used to pay for the mortgage Ryba would obtain in his name to pay off her existing mortgage. The documents reveal the Defendant's mortgage had an outstanding balance of \$199,689.75, including interest and fees, at the time of the closing. (Defendant's Exhibit 5). The Defendant testified Ryba then prepared an Agreement to Buy and Sell the property on August 16, 2005 for a stated consideration of \$205,000.00 which she understood to be the amount needed to satisfy the existing mortgage and pay closing costs for the new mortgage. The Defendant testified she did not receive anything for her property which had a value of approximately \$350,000.00. The Court takes judicial notice that this transaction occurred before the collapse of the real estate market in late 2007 and 2008, the Defendant's home was marketable, and a sale would have netted her approximately \$150,000.00 in equity. The Defendant testified she did not want to sell her home and was only seeking help with refinancing. The Defendant testified she was not represented by a real estate agent in either the

lease or buy and sell agreements. The Defendant testified and the documents reveal she attended a closing at which she signed a deed transferring the property to Ryba and his wife on August 31, 2005. (Defendant's Exhibit 4). The Defendant testified she signed the deed based upon Ryba's representations. The Defendant testified she was not represented by an attorney at the closing. The lawyer who closed the loan, Roy Hutchinson, Esquire, testified he would not have closed the loan if he had he known of Ryba's representations.

The testimony of the closing attorney and the documents reveal that on that same day, Ryba and his wife obtained a mortgage from Countrywide in the principal amount of \$163,500.00. (Defendant's Exhibit 6). The Defendant was not a party to the mortgage closing. The mortgage application was handled by Ryba and his employer, First Rate Mortgage, LLC. The proceeds of the loan, together with a second mortgage of unknown origin in the amount of \$20,857.00 and cash from borrower in the amount of \$21,199.11, were used to fund the transaction and to satisfy the Defendant's outstanding mortgage as shown by the HUD Settlement Statement. (Defendant's Exhibit 15). Whatever personal funds Ryba expended were more than reimbursed six weeks later when he and his wife obtained a second mortgage on the property from Regions Bank in the principal amount of \$100,000.00 on October 11, 2005. The Defendant testified she had no knowledge of and did not participate in this second mortgage. The documents reveal that seven months later Ryba and his wife refinanced the Regions Bank second mortgage

increasing the principal amount to \$115,000.00 on May 9, 2006. The Defendant testified she had no knowledge of and did not participate in this refinancing.

A year later Ryba and his wife refinanced the Countrywide mortgage increasing the principal amount to \$172,000.00 on May 2, 2007. (Defendant's Exhibit 10). This is the mortgage sought to be foreclosed in this action. Prior to this refinance, Regions Bank agreed to subordinate its second mortgage on April 24, 2007. (Defendant's Exhibit 6). The Defendant testified she had no knowledge of and did not participate in this refinancing. The documents reveal the mortgage application was again handled by Ryba and his employer, First Rate Mortgage, LLC. (Defendant's Exhibit 14). The witness, Michael Ward, on cross examination admitted Countrywide relied upon First Rate Mortgage, LLC, to gather and submit complete and accurate information about the loan, however, he also testified this was a "no doc" loan, meaning Countrywide did not require the information on the loan application be verified or documented. The Uniform Residential Loan application was completed by First Rate Mortgage, LLC., and signed by Ryba and his wife on the day of the closing. The loan application disclosed Ryba was an employee of First Rate Mortgage, LLC. The year Ryba acquired the property was left blank on the application. The application described the property as an investment and disclosed that Ryba did not live on the property. The application further disclosed the property was rented for a significant net monthly loss and, based on the appraisal performed as part of the loan, the property was rented for less than fair market value. The attorney who closed the loan, David Chard,

Esquire, testified and the documents disclosed that \$171,445.01 of the proceeds of the \$172,000.00 mortgage were used to satisfy Countywide's prior mortgage and to pay fees, including the mortgage broker fee, title insurance, and closing costs. (Defendant's Exhibit 15). The appraisal valued the property at this time, still before the collapse of the real estate market, was \$375,000.00. (Defendant's Exhibit 17).

The Defendant testified Ryba and his wife demanded she increase her rent payments from \$850.00 to \$1,600.00 a month and, when she refused, they tried to have her evicted from the property. The Defendant testified she retained Benjamin Goldberg, Esquire, who represented her before the Magistrate's Court and stopped the eviction proceedings. The Defendant testified Ryba failed to pay the property taxes and a delinquent tax notice was posted on her front door and that she paid the taxes to keep from losing the property. The Defendant testified Ryba hired a real estate agent to sell the home who put a "lock box" on her front door and for sale signs in the yard which she removed.

The documents reveal Mr. Goldberg filed a Summons and Complaint, Case No. 08-CP-10-4970, on behalf of the Defendant against the Rybas and First Rate Mortgage, LLC, alleging various causes of action, including fraud and recasting. (Defendant's Exhibit 18). At the same time, Mr. Goldberg filed a *lis pendens* giving statutory notice of the alleged fraud and the Defendant's claim. (Defendant's Exhibit 19).

The Defendant testified that Ryba filed for bankruptcy but did not list the Defendant as a creditor. Mr. Goldberg intervened in the bankruptcy and, as part of the settlement of the bankruptcy, Ryba and his wife transferred ownership of the property subject to the mortgages back to the Defendant by quick claim on October 26, 2012. 

The Court must decide whether the Defendant has proven she was fraudulently induced into deeding her property to Ryba and his wife. The elements of fraud are well established under South Carolina law. To establish her claim of fraud the Defendant was required to show: (1) a misrepresentation, (2) its falsity, (3) its materiality, (4) either knowledge of its falsity or a reckless disregard of its truth; (5) intent that the misrepresentation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance of its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury. *See* Michael G. Sullivan, *Elements of Civil Causes of Action*, SC Bar/CLE, p. 103 (2000); Kahn Construction Co. v. S.C. National Bank of Charleston, 275 S.C. 381, 384, 271 S.E.2d 414 (1980).

The Plaintiff objected to the admission of evidence concerning the alleged fraud on the grounds the oral agreement alleged by the Defendant violated the Statute of Frauds. *See* §§ 27-35-20, 32-3-10(4), S.C. Code Anno., 1976 as amended. Generally, a contract for an interest in land must be in writing and signed by the party against whom enforcement is sought. *See* Player v. Chandler, 299 S.C. 101, 382 S.E.2d 891 (1989). The statute is subject to exceptions including that other

written documents can establish or confirm the existence of the oral agreement satisfying the statute or that the oral agreement has been partially performed thereby avoiding the statute. The Court does not find the written lease agreement prepared by Ryba, which included a provision the Defendant was the owner of the property, or the written buy and sell prepared by Ryba, even if considered together, contained the essential elements of the contract alleged to satisfy the statute. Neither the lease nor buy and sell agreements contained a provision that Ryba would resell the property to the Defendant, the time such resale would take place, or the amount to be paid. Player v. Chandler, *supra*. Nor does the Court find that the Defendant's continued occupancy of the home and payment of rent, which was consistent with the lease agreement, is sufficient to show part performance in avoidance of the statute. Stackhouse v. Cook, 271 S.C. 518, 248 S.E.2d 482 (1978). The Court does find, however, that the protection afforded by the Statute of Frauds is a personal privilege of the parties to the agreement and a stranger to the oral contract cannot avail himself of the fact that the statute renders the contract unenforceable. Hatcher v. Harleyville Mut. Ins. Co., 266 S.C. 548, 225 S.E.2d 181 (1976). Furthermore, the Court finds that a Court of equity will not permit a statute intended to prevent fraud to be used as an instrument to effect a fraud. Aust v. Beard, 230 S.C. 515, 96S.E.2d 558 (1957); Gardner v. Nash, 225 S.C. 303, 82 S.E.2d 123 (1954). While a Court of equity will generally not enforce contracts relating to land which are not in writing as required by the Statute of Frauds, it will cancel conveyances obtained by fraudulent misrepresentations. Gardner v.

Nash, 225 S.C. 303, 82 S.E.2d 123 (1954). The Plaintiff's objection to the introduction of evidence concerning the underlying fraudulent and illegal nature of the transaction by which Ryba obtained title to the property mortgaged is overruled.

The Court finds the representations set forth above made by Ryba were both false and material. Ryba knew the representations were false and intended for the Defendant to act on them. The Defendant was desperate to save her home, not an experienced borrower, and was neither represented by a real estate agent nor a lawyer in the transactions. The Defendant not only relied but had the right to rely on Ryba's advice because he was a licensed mortgage broker who worked for a mortgage brokerage firm. The Defendant has suffered proximate damage by Ryba mortgaging her home multiple times withdrawing a substantial portion, if not all, of the equity and by his attempts to have her evicted from and to sell her home. The Court finds the Defendant has proven she was fraudulently induced into deeding her property to Ryba by clear and convincing evidence.

Furthermore, the Court finds mortgage loan brokers are licensed and governed by the Licensing Requirements of Certain Loan Brokers of Mortgages on Residential Real Property Act, § 40-58-10, S.C. Code Anno., 1976 as amended. Section 40-58-70(6) of the Act in effect at the time of the transactions prohibited residential mortgage brokers from engaging in recasting. Section 40-58-20(9) defines recasting as a promise an individual can recoup a home sold to a third party with the intent of the original seller to rent the property for a specific time at which

the original seller will have the option to repurchase the property back at a specified price. Mortgage brokers were specifically prohibited from engaging in recasting unless the mortgage applicant obtained the advice of a licensed attorney who is independent of the transaction who provided a document advising the applicant of the potential consequences of recasting. See: §§ 40-58-20(9) and 40-58-70(6), S.C. Code Anno., as amended in 1993. No evidence the Defendant received such independent legal advice or documentation of the potential consequences was provided to her was produced. The Court finds Ryba's recasting scheme was not just fraudulent, it was illegal.

Even if the underlying transaction was fraudulent and illegal, the Plaintiff maintains its argument, first raised in its supplemental memorandum in support of summary judgment, "[t]here is no evidence that Countrywide Bank was anything but a bona fide lender for value." As set forth above, in order for Countrywide to have been a bona fide lender for value it must have acted in good faith, with integrity of dealing, and without notice of a lien or defect. Spence v. Spence, *supra*. The Court notes Countrywide received \$171,445.00 of the proceeds of the \$172,000.00 loan sought to be foreclosed. These proceeds of this loan were used to pay off its previous loan in the amount of \$163,500.00 with the balance used to pay broker fees, closing fees, costs, and title insurance. Nevertheless, the Court finds the payment of \$163,500.00 to fund the original mortgage being refinanced constitutes payment of value. The question remains, however, whether

Countrywide had notice of the fraudulent and illegal acts committed by Ryba to obtain title to the property mortgaged.

Notice can be either actual or constructive. When a person has knowledge of facts sufficient to put them on inquiry, the law presumes them to have knowledge of undisclosed facts such inquiry, if pursued with diligence, would have revealed. See: City of Greenville v. Washington Am. League Baseball Club, 205 S.C. 495, 32 S.E.2d 777 (1945); O'Leary-Payne v. R.R. Hilton Head, II, Inc., 371 S.C. 340, 638 S.E.2d 96 (S.C. App. 2006). Countrywide had actual notice from the loan application Ryba was both the borrower and broker of the loan and an employee of First Rate Mortgage, LLC, it relied upon to obtain and verify information about the loan. While Michael Ward testified he had brokered two mortgage loans on his own property, no details of those loans were introduced and the Court does not know what types of loans were involved, whether they were "no doc" loans, or who the lenders were. Michael Ward was not qualified as an expert and his testimony about two personal loans is insufficient to establish this was or is an accepted practice in the mortgage loan industry. Countrywide had actual knowledge the "no doc" loan being applied for was not a typical mortgage loan. When asked how the original mortgage in the principal amount \$172,000.00 could have increased so much, Michael Ward testified it was a loan that allowed the borrower to decide what payments to make and for unpaid interest to accumulate.* Countrywide had actual knowledge the date Ryba had acquired the property had been left blank on the application, Ryba did not reside on the property, and that, although described as an

* a Negative Amortization loan

investment, the property was rented at a significant net monthly loss below fair market rent. Countrywide had actual knowledge Ryba had financed and refinanced the property at least four times in two years. The Court specifically requested information from the Plaintiff regarding lending standards for multiple refinancing of property over a short period of time at the summary judgement hearing but no information in this regard was provided after the hearing or at trial. While none of these facts known to Countrywide may have been enough considered individually, when taken together the Court finds they were sufficient to have put Countrywide on inquiry. 

The Court further finds, if an inquiry had been diligently conducted, Countrywide would have discovered the underlying fraudulent and illegal recasting scheme by which Ryba obtained title to the property being mortgaged. The fact that the borrower was also the broker Countrywide relied upon to produce complete and accurate information concerning the "no doc," flexible payment loan should have at least warranted a more thorough investigation. Had Countrywide inquired about when Ryba acquired the property, information left blank on the application, they would have discovered he acquired it immediately before the first Countrywide mortgage. Had they inquired about why the property described as an investment was rented for a significant net monthly loss at below fair market rent, they would have discovered it was rented back to the Defendant who deeded the property to Ryba. Had they asked for a copy of the lease, they would have discovered the lease in paragraph 14 said the Defendant was the owner of the property. Had they 

inquired about how much had been paid for the property worth approximately \$350,000.00 they would have discovered it was only \$205,000.00 and the closing statement from their first loan showed the Defendant was never paid anything for her equity. The Court finds if Countrywide had asked some simple and fairly obvious questions it would have inevitably discovered Ryba had engaged in recasting that was prohibited by statute. The Court finds a diligent inquiry would have led Countrywide to the discovery the underlying transaction by which Ryba obtained title to the property mortgaged was fraudulent and illegal.

As an additional sustaining ground, the Court finds Ryba and First Rate Mortgage, LLC, were the agents of Countrywide under South Carolina law. Agency is a fiduciary relationship which results from the manifestation of consent by one person that another shall act on his behalf and subject to his control, and consent by the other to so act. *See*: F. Patrick Hubbard and Robert L. Felix, *The South Carolina Law of Torts*, 2nd Ed., SC Bar/CLE, p. 635 (1997); Restatement (Second) of Agency, § 1; Peoples Fed. Sav. & Loan Ass'n v. Myrtle Beach Golf & Yacht Club, 310 S.C. 132, 145-146; 425 S.E.2d 764, 773 (S.C. App. 1992). Ryba clearly had knowledge of the recasting scheme and, therefore, his employer, First Rate Mortgage, LLC, had knowledge of the scheme under the doctrine of *respondeat superior*. The treatise explains the *respondeat superior* doctrine literally means "let the master answer" and is founded on public policy:

The reason which has supported the principle of *respondeat superior*, based upon the judicial interpretation and declaration of public policy, is that the principal, by selecting and directing the manner in which he shall execute the agency, should, in

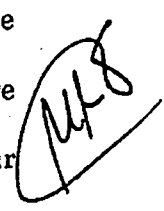
justice to third persons with the agent may deal, and who are not responsible either his selection or conduct, be held liable for his torts.

Id., at p. 635; Sams v. Arthur, 135 S.C. 123, 130, 133 S.E.2d 493 (1960). Vicarious liability is founded on fairness and the notion, "he who expects to derive advantage from an act which is done by another for him must answer for any injury that a third party may sustain from it." Vicarious liability also seeks to prevent the conduct from occurring and the injury being inflicted in the first place and recognizes the principal is often in a better position to provide an adequate remedy for the innocent victim and in a position to spread the risk. *Id.*, at p. 639; South Carolina Ins. Co. v. James C. Green & Co., 290 S.C. 171, 348 S.E.2d 617 (Ct. App. 1986).

The Court finds Countrywide agreed to allow Ryba and First Rate Mortgage, LLC, to handle the mortgage loan application in which Ryba was both the borrower and an employee of the broker. Countrywide directed and controlled what information Ryba and First Rate Mortgage, LLC, were required to obtain, verify, and submit or, perhaps more accurately, not required to obtain, verify, or submit. Countrywide benefited from the loan by receiving \$171,455.00 of the \$172,000.00 loan and paid Ryba and First Rate Mortgage, LLC, a broker's fee. Countrywide was in a position to and did protect itself from a defect in the title by requiring the purchase of title insurance as part of the loan transaction. The Court finds Countrywide was vicariously liable for the fraudulent and illegal acts committed by Ryba and First Rate Mortgage, LLC, as its agents.

The Plaintiff argues, however, that Ryba and First Rate Mortgage, LLC, were independent contractors for whose torts Countrywide would not be liable. The rule a principal is not liable for the acts of an independent contractor, however, is subject to exceptions. *See*: The South Carolina Law of Torts, *supra*. at p. 636. In addition to the exceptions discussed in the treatise, the Court finds South Carolina law recognizes that a mortgage broker who procures a loan and performs other services at the direction of the lender is the agent of the lender, not the borrower. *See*: Brown v. Brown, 38 S.C. 173, 17 S.E. 452 (1893); Land Mortgage Investment & Agency Co. of America, Ltd., 49 S.C. 345, 26 S.E. 990 (1987); Blackwell v. British-American Mortgage Co., 65 S.C. 105, 43 S.E. 395 (1902); American Mortgage Co. of Scotland v. Woodward, 83 SC 54, 65 S.E. 739 (1909). While the Court recognizes § 40-58-78, has been amended and now may modify the common law rule if the broker fee agreement contains explicit disclaimers, this amendment did not become effective until January 1, 2010 and the Court further notes no such disclaimers have been produced in this case. The Court finds Ryba and First Rate Mortgage, LLC, were not independent contractors but were agents of Countrywide for whose acts Countrywide is vicariously liable.

Based on the foregoing discussion and findings, the Court finds that Countrywide was not a bona fide purchaser for value without notice. Countrywide had at least constructive knowledge of the fraudulent and illegal recasting scheme committed by its agents, Ryba and First Rate Mortgage, LLC. The Plaintiff, as their assignee, stands in their shoes. The Court wishes to emphasize this is a very

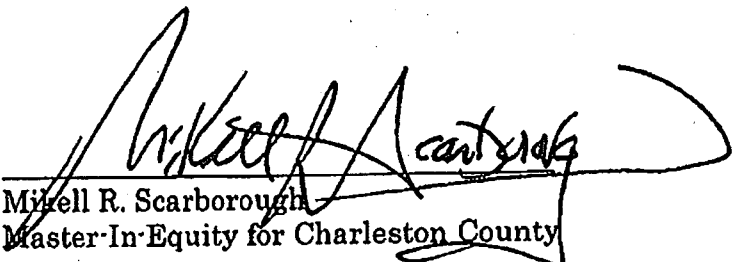
fact specific case. It involved a licensed mortgage broker and the company he worked for engaging in a fraudulent and illegal recasting scheme from which they profited. It involves Countrywide, a now defunct mortgage company the Defendant aptly described as a poster child for the mortgage loan abuses that led to the largest financial crisis of our generation, facilitating and turning a blind eye to the fraudulent and illegal recasting scheme it also profited from. And, it now involves a financial institution willing to take the risk when it agreed to purchase Countrywide's suspect mortgages seeking to profit as well. Denying foreclosure under the facts of this case does not endanger the legal underpinnings of our financial system. It is well founded under existing South Carolina law and is consistent with the public policy that holds those who facilitate, turn a blind eye to, or who are willing to assume the risk should be held responsible rather than the victims of fraud and illegal conduct. 

The Court is mindful of the Plaintiff's argument the Defendant will receive a windfall if foreclosure is denied but notes the Defendant's property remains subject to the Regions Bank second mortgage in the principal amount of \$115,000.00 that has also has not been paid since May of 2011. With accumulated interest, late fees, and probable attorney fees, any windfall to the Defendant is likely to be minimal. The Court further notes the Plaintiff can seek to recoup its loss by proceeding against the title insurance that was purchased as part of the loan. The facts and circumstances regarding the Regions Bank mortgage may be entirely different from this case and nothing contained in this Order should be interpreted as binding in

any foreclosure action they may bring. It is hoped, however, in light of this decision that Regions Bank and the Defendant will negotiate in good faith to restructure the loan so that the Defendant will not unfairly lose her home.

IT IS HEREBY ORDERED that foreclosure is denied.

AND IT IS SO ORDERED.



Mitchell R. Scarborough
Master-In-Equity for Charleston County

Charleston, South Carolina

19th day of June, 2015

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

THE COURT OF COMMON PLEAS
BEFORE THE MASTER IN EQUITY
CASE NO.: 2011-CP-10-7885

HSBC Bank of USA, National)
Association, as Trustee for the)
Holders of the Deutsche ALT-A)
Securities, Inc. Mortgage Loan)
Trust, Mortgage Pass-Through)
Certificates Series 2007-A4, assignee)
of Bank of America N.A., successor)
by merger to BAC Home Loans)
Servicing, L.P., f/k/a Countrywide)
Home Loans Servicing, Inc.,)

Plaintiff,)

-vs.-)

Clifford L. Ryba; Beverly Ryba;)
Regions Bank; First Federal Savings)
and Loan Association of Charleston,)
Citibank (South Dakota) N.A., and)
Carol Goldberg,)

Defendants.)

RECEIVED

MAY 19 2016

SC Court of Appeals

FILED
2016 APR 20 PM 4:07
JULIE J. ARMSTRONG
CLERK OF COURT

ORDER DENYING IN PART AND
GRANTING IN PART PLAINTIFF'S
MOTION TO ALTER, AMEND OR
RECONSIDER OR FOR A NEW
TRIAL

This matter came to be heard before on December 15, 2015 at Charleston, South Carolina. Present at the hearing were Matthew Tillman of Womble, Carlyle, Sandridge & Rice, L.L.P., and Ericka G. Lybrand of Rogers, Townsend, and Thomas, P.C., attorneys for the Defendants, as well as J. Kevin Holmes of the Steinberg Law Firm, L.L.P., attorney for the Defendant, Carol Goldberg. The Defendant, Clifford Ryba, was present without counsel but did not ask to be heard. The remaining Defendants were not present. The purpose of the hearing was to consider the Plaintiff's Motions to Alter, Amend or Reconsider the Court's Order Denying Foreclosure filed on June 22, 2015 or to grant a New Trial under Rule 59, S.C.R.C.P.

1. Judgment against the Rybas.

The Plaintiff moved to alter, amend, or reconsider the Court's Order on the grounds the Court failed to enter judgment in favor of the Plaintiff against the Defendants, Clifford L. Ryba and Beverly Ryba. The Defendant had no objection to this motion but noted the Defendant, Clifford L. Ryba, had filed bankruptcy. It was agreed the question of whether the Court should enter judgment against said Defendants would be held in abeyance and set for a later hearing with notice to the parties to take evidence on the issue.

2. Agency.

The Plaintiff moved to alter, amend, or reconsider the Court's Order or grant a new trial on the grounds the Plaintiff had failed to plead agency. The Defendant did not plead agency, however, the Court notes agency is not a special matter that must be plead under Rule 9, S.C.R.C.P. Preparing for trial the Defendant included in her pretrial brief South Carolina case law holding mortgage brokers are the agents of the lender, not the borrower. See: Brown v. Brown, 38 S.C. 173, 17 S.E. 452 (1893); Land Mortgage Investment & Agency Co. of America, Ltd., 49 S.C. 345, 26 S.E. 990 (1897); Blackwell v. British American Mortgage Co., 65 S.C. 105, 43 S.E. 395 (1902); American Mortgage Co. of Scotland v. Woodward, 83 S.C. 54, 65

S.E. 739 (1909).¹ The Plaintiff had notice of the case law when it received the Defendant's pretrial brief before trial. (Tr., pp. 6, and 169).

The Court did not rely on the case law cited by the Defendant in its Order. Instead, the Court found that Countrywide had constructive notice of the fraud committed to obtain title to the property based on the totality of the facts and circumstances detailed in the Court's Order but did find that the Defendants, Clifford L. Ryba, and First Rate Mortgage, LLC, were agents of Countrywide under South Carolina law as an additional sustaining ground for its Order.

The Defendant did not plead agency in her Answer but Rule 16 (b), S.C.R.C.P., allows amendments to conform to the evidence and provides, "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." A motion to amend to conform to the evidence "may be made upon motion of any party at any time, even after judgment..." "The Court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits."

The Plaintiff did not object to the agency case law cited in the Defendant's pretrial brief during the trial. No surprise witness was called to testify and no undisclosed document was produced by the Defendant. One of the issues that was

¹ The Court recognized § 40-58-78, was amended on January 1, 2010 to modify the common law rule brokers are agents of the lenders if the broker fee agreement contains explicit disclaimers. No disclaimer were introduced in this case.

tried by express or implied consent of the parties was whether Countrywide had actual or constructive knowledge of the fraud perpetrated to obtain title to the Defendant's property. The question of whether the mortgage broker was an agent of Countrywide went to issue whether Countrywide had notice of the fraud committed to obtain to the Defendant's property.

The Plaintiff alleged it was surprised and prejudiced by the Court's consideration of the agency case law. It is not clear how the Plaintiff was surprised by existing case law. The Plaintiff further argues, even if agency is considered:

The rule imputing to the principal the agent's knowledge is placed by a majority of courts, including our own, on the ground that it is the duty of the agent to communicate to his principal all knowledge which he possesses material to the principal's business, and the presumption that he has done that duty. Under the operation of this reason, what are sometimes called exceptions or qualification to the rule have grown up. For example, an agent is not presumed to have communicated to his principal professional confidences received in representing a third person, or knowledge acquired while acting for himself or for a third person and not for the principal, or where the knowledge is such that, according to human nature and experience, the agent is certain to conceal, or where the agent is acting in an adversary relation to the principal, or mediates a fraud against his principal or some third person in his own interest which would be defeated by disclosure.

Charleston Library Society v. Citizens & Southern Nat'l Bank, 201 S.C. 447, 23 S.E.2d 362 (1942); Mauldin Furniture Galleries, Inc. v. Branch Banking & Trust Co., 2012 U.S. Dist. LEXIS 121140, 2012 WL 3680426 (D.C.S.C. Aug. 27, 2012) citing Crystal Ice Co. v. First Colonial, 273 S.C. 306, 257 S.E.2d 496 (1979). The Defendant, Clifford L. Ryba, was perpetrating a fraud against the Defendant for his

own benefit and it is certain he tried to conceal that fraud from Countrywide. The Plaintiff's motion to alter, amend, or reconsider the Order on the ground the Defendant did not plead agency is granted and agency, as an alternative sustaining ground of the Court's decision, is deleted.

3. Equitable Subrogation.

The Plaintiff moved to alter, amend, or reconsider the Court's Order or grant a new trial on the grounds the Court had failed to rule that the Plaintiff was entitled to be equitably subrogated to the rights of Countrywide. Equitable subrogation was not plead by the Plaintiff and was not raised by the Plaintiff before or during trial. Equitable subrogation was not an issue tried by express or implied consent between the parties at trial. To the extent the Plaintiff's motion is a motion to amend to include a claim for equitable subrogation, the motion is denied. The Court further notes the Plaintiff's memorandum in support of its motion cites no case concerning the elements of equitable subrogation. Equitable subrogation is applicable when one jointly and severally liable for a mortgage debt is compelled to satisfy the debt to avoid foreclosure. Such a person is entitling to become equitably subrogated to the priority of the mortgagor against subsequent mortgagors. *See: Dunn v. Chapman*, 149 S.C. 163, 146 S.E. 818 (1929). Equitable subrogation is only available if the party who has paid the debt was secondarily liable for the debt. *Id.*; *see also: United Carolina Bank v. Caroprop, LTD*, 310 S.C. 1, 446 S.E.2d 415 (1994). Even if an amendment to allow a claim for equitable subrogation was granted, it

would not apply because Countrywide was not secondarily liable on the Defendant's mortgage that was satisfied with the proceeds from Countrywide's mortgage.

4. Pooling and Servicing Agreement (PSA).

The Plaintiff moved to alter, amend, or reconsider the Order or to grant a new trial on the grounds the Court should have found the Pooling and Service Agreement dated June 1, 2007 established the Plaintiff obtained title to the subject mortgage before the Defendant filed her *lis pendens* giving notice of her fraud claim and the mortgage was in default entitling the Plaintiff to the protection of the holder in due course or the shelter rules. As discussed at length in the Order, when and how the Plaintiff obtained possession of the note and mortgage was the subject of much controversy throughout these proceedings. Before trial, in the Plaintiff's pleadings and its motion for summary judgment, the Plaintiff and its predecessor in interest alleged they had obtained the subject note and mortgage by virtue of assignments filed with the Charleston County RMC Office on September 15, 2011 and May 21, 2012. (Plaintiff's Exhibits 6 and 8). At trial, however, the Plaintiff, for the first time, offered testimony it had obtained possession of the note and mortgage by virtue of the PSA agreement on June 1, 2007. Michael Ward, Vice President of Specialized Loan Servicing, who testified at trial about the PSA agreement did not bring a copy with him. (Tr. 123). At the conclusion of the Plaintiff's case, the Defendant moved for a directed verdict because the Plaintiff had failed to introduce any evidence what, if anything, the Plaintiff had paid Countrywide for the note and mortgage. Plaintiff's counsel represented to the

Court, "I think the terms of the PSA would express that there was a value associated with these loans that were securitized as part of this trust agreement." (Tr., p. 134). The Court did not rule on the Defendant's motion for a directed verdict but instead instructed the Plaintiff to forward a copy of the PSA agreement to Defendant's counsel. The Court then stated it would leave the issue open and the parties "could come back and we can argue that again if we need to." (Tr. 134 - 135). When the Plaintiff offered to submit a brief on the issue, the Court indicated that "would be great." (Tr. 135).

Plaintiff's counsel sent a copy of the PSA agreement to Defendant's counsel but it was neither offered nor admitted into evidence, no brief was submitted, and no hearing was requested. Nowhere does the transcript indicate the Court instructed the Plaintiff not to introduce a copy the PSA agreement into evidence. To the extent Plaintiff's motion is based on any claim the Court misled the Plaintiff into not introducing the PSA Agreement, the motion is denied.

A copy of the PSA agreement was attached to the Plaintiff's motion as Exhibit 4. The Court has reviewed the PSA agreement and finds it was an agreement between ACE Securities Corp., as the depositor, Wells Fargo Bank, N.A., as the master servicer and securities administrator, Clayton Fixed Income Services, Inc., as the credit risk manager, and the Plaintiff, HSBC Bank USA, National Association, as the Trustee. Countrywide was not a party to the PSA agreement. Nowhere does the PSA agreement say what, if anything, or when Countrywide was paid for the subject note and mortgage. The Schedule of Loans

included with the PSA agreement does include the subject note and mortgage but it does not say what, if anything, Countrywide was paid for the subject note and mortgage. Whatever mutual promises and covenants or other "good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged" that may have been exchanged between the parties to the PSA agreement, that consideration would not have flowed to Countrywide who was not a party to the agreement. (PSA, Exhibit 4, p. 6). The Plaintiff's motion to alter, amend, reconsider or for a new trial to allow the introduction of the PSA agreement is denied because, even if admitted, the PSA agreement does not show what or when anything of value was paid to Countrywide for the subject note and mortgage.

5. Recasting.

The Plaintiff moved to alter, amend, or reconsider the Order on the grounds the Defendant failed to establish the fraud perpetrated by the Defendant, Clifford L. Ryba, and First Rate Mortgage, L.L.C., constituted recasting prohibited by the Licensing Requirements of Certain Loan Brokers of Mortgages on Residential Real Property Act § 40-58-10, *et. seq.*, S.C. Code Anno., 1976 as amended. Section 40-58-70(6) of the Act in effect at the time of the transactions prohibited residential mortgage brokers from engaging in recasting. Section 40-58-20(9) defined recasting as a promise an individual can recoup a home sold to a third party with the intent of the original seller to rent the property for a specific time after which the original seller will have the option to repurchase the property back at a specified price. The section further provides the "specific time" would "normally"

be a year. Mortgage brokers were specifically prohibited from engaging in "recasting" a mortgage loan as a sale with a right to repurchase unless the mortgage applicant obtained the advice of a licensed attorney who is independent of the transaction who provided a document advising the applicant of the potential consequences of recasting. *See*: §§ 40-58-20(9) and 40-58-70(6), S.C. Code Anno., as amended in 1993. No evidence the Defendant received such independent legal advice or documentation of the potential consequences was provided to her was produced. There is no dispute the Defendant, Clifford L. Ryba, was a licensed mortgage broker himself and was an employee of First Rate Mortgage, LLC, the company that actually brokered the loan.

The Plaintiff argues, however, the recasting statute was not violated because the Defendant admitted there was no agreement as to when she would be permitted to repurchase her home. The primary rule of statutory construction is to ascertain and effectuate the intent of the legislature. Doe v. S.C. Dept. of Social Services, 407 S.C. 623, 757 S.E.2d 711 (2014). A statute as a whole must be given a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers. 16 Jade Street, L.L.C. v. R. Design Const. Co., 398 S.C. 338, 728 S.E.2d 448 (2012). The Court is convinced it was the intent of the legislature to prohibit mortgage brokers from engaging in precisely the type of fraud the Defendant, Clifford L. Ryba, perpetrated in this case. It seems unreasonable that the legislature would intend that the prohibited conduct could be allowed by simply eliminating a specific time thereby making the scheme more attractive to the

victim. The Court is mindful, however, of the rule of statutory construction that when a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and courts must apply the statute according to its literal construction. Miller v. Aiken, 364 S.C. 303, 613 S.E.2d 364 (2005).

Out of an abundance of caution, the Court grants the Plaintiff's motion to alter, amend, or reconsider its Order to delete the references to the scheme being perpetrated as illegal recasting, however, the Court's finding the conduct constituted fraud stands and is sufficient to sustain the Court's Order.

6. Fraud.

The Plaintiff moved to alter, amend, or reconsider the Court's Order or for a new trial on the ground the Defendant failed to prove the elements of fraud by clear and convincing evidence. The elements of fraud are well established under South Carolina law and set forth in the Court's Order. To establish her claim of fraud the Defendant was required to prove: (1) a misrepresentation, (2) its falsity, (3) its materiality, (4) either knowledge of its falsity or a reckless disregard of its truth; (5) intent that the misrepresentation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury. See: Michael G. Sullivan, Elements of Civil Causes of Action, SC Bar/CLE, p. 103 (2000); Kahn Construction Co. v. S.C. National Bank of Charleston, 275 S.C. 381, 384, 271 S.E.2d 414 (1980). The elements must be proven by "clear, cogent, and convincing evidence." Manship v. Newsome, 188 S.C. 6, 198 S.E. 428 (1938). The Court set forth its findings

regarding fraud in detail in the Court's Order but did not specifically reference the heightened standard of clear and convincing burden of proof. The Court has reviewed the findings and the record, including the testimony brought to the Court's attention by the Plaintiff's motion, and reaffirms those findings were established by clear and convincing evidence. The Plaintiff's motion to alter, amend, or reconsider its Order because the Defendant failed to prove the essential elements of fraud by clear and convincing evidence is granted in part and denied in part. The Court's Order should be amended to reflect that the elements of fraud were proved by clear and convincing evidence.

7. The Shelter Rule – Holder in Due Course.

The Plaintiff moved to alter, amend, or reconsider the Court's Order on the ground the Court misapplied the shelter rule. The Court found that the Plaintiff was the holder of the note and mortgage in question based on its actual possession of the original documents. The question remained, however, whether the Plaintiff met the requirements for protection under the holder in due course or the shelter rules. As set forth in the Court's Order, under South Carolina case law in order to be entitled to protection under the holder in due course rule, the purchaser must prove (1) he has actually paid the full purchase price; (2) he purchased and acquired the legal title, or the best right to it; and (3) he purchased the property in good faith, with integrity of dealing, and without notice of a lien or defect. Spence v. Spence, 368 S.C. 106, 628 S.E.2d 869 (2006). All three (3) conditions must exist before the purchaser had notice of a title defect or other adverse claim, lien, or asserted

interest in the property. S.C.Tax Commn. v. Belk, 266 S.C. 539, 543, 225 S.E. 2d 177, 179 (1976). The burden of proving the existence of the three (3) conditions is on the Plaintiff. Smith v. Faust, 107 S.C. 37, 92 S.E. 24 (S.C. 1917).

The Court ruled the Plaintiff was not entitled to protection under the holder in due course rule based on either the assignment dated September 15, 2011 or the assignment dated May 21, 2012 that were introduced into evidence because both assignments were made after the Defendant had filed her *lis pendens* giving statutory notice of her fraud claim, after the subject note and mortgage were in default. The PSA agreement discussed above also fails to show what or when the Plaintiff paid anything of value to Countrywide for the subject note and mortgage. The Plaintiff failed to prove it paid value and, therefore, is not entitled to the protection of the holder in due course rule in its own right. The Plaintiff argued further it is entitled to protection under the shelter rule because Countrywide, from whom it purchased the note and mortgage, paid value for the note and mortgage before the Defendant filed her *lis pendens*, and before the note and mortgage were in default and, therefore, they are entitled to the protection of the shelter rule.

The shelter rule is applicable if a note or mortgage is purchased from a holder in due course. Once someone in the chain of title purchases the note and mortgage from a holder in due course, "the title is thenceforth sanctified." In order for the Plaintiff to be entitled to the protection of the shelter rule, the Plaintiff had to prove Countrywide, in addition to proving they paid value and acquired the legal title, was a bona fide purchaser in good faith, integrity of dealing, and without

notice of a lien or defect. Thus the question became whether Countrywide had actual or constructive knowledge of the fraud committed to obtain title to the property preventing it from being a holder in due course.

As set forth in the Court's Order, notice can be either actual or constructive. When a person has knowledge of facts sufficient to put them on inquiry, the law presumes them to have knowledge of undisclosed facts such inquiry, if pursued with diligence, would have revealed. *See: City of Greenville v. Washington Am. League Baseball Club*, 205 S.C. 495, 32 S.E.2d 777 (1945); *O'Leary-Payne v. R.R. Hilton Head, II, Inc.*, 371 S.C. 340, 638 S.E.2d 96 (S.C. App. 2006). The Court considered numerous facts that are set forth in the Court's Order:

1. The borrower as an employee of the mortgage broker was information readily ascertainable from the loan application.
2. The mortgage loan was not just a subprime mortgage loan. Michael Ward testified the subject note and mortgage applied for was a "no doc," negative amortization loan. The new refinance mortgage allowed the option to pay only a fraction of the "7 or 7.5%" interest rate of the loan and to accumulate the unpaid interest. (Tr. 120).
3. It was the fourth time the property had been refinanced in just two (2) years. The Court requested information from the Plaintiff on the applicable standards for the refinancing of mortgages at the relevant time but no such evidence was introduced by the Plaintiff at trial.
4. The subject property was claimed to be investment property on the loan application but the appraisal performed as part of the loan showed it was rented at a net monthly loss at substantially below fair market value (Defendant's Exhibits 14A and 17). Simply by requesting a copy of the lease agreement Countrywide would have discovered the property was rented back to the Defendant.
5. Inquiry into why the date of the alleged purchase was left blank on the loan application would have revealed the title was obtained from the Defendant for a fraction of its value immediately before the Countrywide mortgage.

Any suggestion the original Countrywide mortgage was simply a purchase money mortgage in an arm's length transaction ignores the other evidence in the

case. The closing documents show the proceeds from the loan were used to pay off the outstanding mortgage, to pay the mortgage broker's fee, to purchase title insurance, and to pay closing costs but that the Defendant was never paid anything for her \$150,000.00 equity.

While none of these facts may have been enough considered individually to give notice of the fraud, when considered together they were sufficient to have put Countrywide on inquiry notice and that, if such an inquiry had been diligently conducted, Countrywide would have discovered the underlying fraud committed to obtain title to the property. Since the Court found Countrywide had constructive notice of the fraud, Countrywide was not a holder in due course and, therefore, the Plaintiff which purchased the mortgage from them is not entitled to the protection of the shelter rule. The Plaintiff's motion to alter, amend, or reconsider the Court's Order on the ground the Court misapplied the shelter rule is denied.

8. Other grounds to Alter or Amend.

The Plaintiff filed various additional grounds to alter, amend, or reconsider the Court's Order. Once the Plaintiff was substituted for Bank of America, there no longer was a reason to introduce the web pages describing the terms of the bank's purchase of Countrywide after it became insolvent. The Court's Order referenced the web pages only when discussing the procedural history and the arguments that had been raised at the summary judgment hearing. It is undisputed the transactions involved in this case occurred in 2005 and 2007, before the real estate market collapsed in 2008. The Court did not have to take judicial notice of this fact

to find that the Defendant had an equity of approximately \$150,000.00 in her home as that fact was evident from the appraisal done as part of the mortgage loan process. (Defendant's Exhibit 17). Defendant's counsel argued that Countrywide was one of the largest subprime mortgage lenders and that abuses by subprime mortgage lenders led to the largest financial collapse of our generation. The Court's Order, however, did not rely on this recognized fact, in reaching its decision. Rather, what the Court said was:

The Court wishes to take this opportunity to state this is a very fact specific case. It involved a licensed mortgage broker and his company engaging in a fraudulent and illegal scheme called recasting from which they profited. It involves Countrywide, now a defunct mortgage company, the Defendant aptly described as a poster child for the mortgage loan abuses that led to the largest financial crisis of our generation. And, it involves a financial institution willing to take the risk of Countrywide's suspect mortgages. Denying foreclosure under the facts of this case does not endanger the legal underpinnings of our financial system. It is well founded under existing South Carolina law and is consistent with the public policy that hold those who facilitate or turn a blind eye to or are willing to assume the risk should be held responsible rather than the victims of fraud ...

It was also undisputed that Countrywide purchased title insurance as part of the mortgage. It now further appears the Plaintiff hired a corporate credit risk manager and utilized credit default swaps as part of PSA agreement. The purchase of title insurance to protect against there being a defect in the title was a prudent business decision. The existence of title insurance was properly considered by the Court in balancing the equities in this case. The Plaintiff's motion to alter, amend, or reconsider the Court's Order on these various other grounds is denied.

IT IS HEREBY ORDERED that the Plaintiff's motion to alter, amend, or reconsider the Court's Order or grant a new trial on the ground the Court failed to enter judgment in favor of the Plaintiff against the Defendants, Clifford L. Ryba and Beverly Ryba, is held in abeyance to be heard in a separate hearing at which the Plaintiff will be permitted to introduce evidence on the issue; and

IT IS HEREBY ORDERED that the Plaintiff's motion to alter, amend, or reconsider the Order or grant a new trial on the ground the Defendant did not plead agency is granted and agency, as an alternative sustaining ground of the Court's finding Countrywide had constructive notice of the fraud committed to obtain title to the property, is deleted; and

IT IS HEREBY ORDERED that the Plaintiff's motion to alter, amend, or reconsider the Order or grant a new trial on the ground the Court failed to find the Plaintiff was equitably subrogated to the rights of Countrywide is denied; and

IT IS HEREBY ORDERED that the Plaintiff's motion to alter, amend, or reconsider the Order or grant a new trial on the ground the Court should have found the Pooling and Service Agreement dated June 1, 2007 established the Plaintiff's obtained title to the subject mortgage long the Defendant filed her *lis pendens* giving notice of her fraud claim and the mortgage was in default entitling the Plaintiff to the protection of the holder in due course or the shelter rule is denied because the PSA agreement, even if it had been admitted, does not show what or when anything of value was paid to Countrywide for the subject note and mortgage; and



IT IS HEREBY ORDERED that the Plaintiff's motion to alter, amend, or reconsider the Order or grant a new trial on the ground the Defendant failed to establish the fraud perpetrated to obtain title to the Defendant's home constituted recasting prohibited by the Licensing Requirements of Certain Loan Brokers of Mortgages on Residential Real Property Act § 40-58-10, *et. seq.*, S.C. Code Anno., 1976 as amended, is granted and references to recasting are deleted from the Court's Order, however, the Court's finding the conduct constituted fraud stands and is sufficient to sustain the Court's Order; and

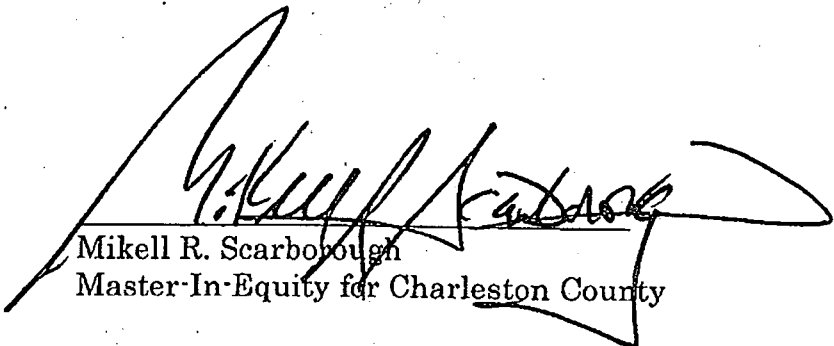
IT IS HEREBY ORDERED that the Plaintiff's motion to alter, amend, or reconsider the Order or grant a new trial on the ground the Defendant failed to prove the elements of fraud by clear and convincing evidence is denied; and

IT IS HEREBY ORDERED that the Plaintiff's motion to alter, amend, or reconsider the Order or grant a new trial on the ground the Court misapplied the shelter rule is denied; and

IT IS HEREBY ORDERED that the Plaintiff's motion to alter, amend, or reconsider the Order or grant a new trial on the various other grounds asserted is denied.

AND IT IS SO ORDERED..

Charleston, South Carolina
April 20, 2016



Mikell R. Scarborough
Master-In-Equity for Charleston County

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master In Equity

Appellate Case No. 2016-001054

RECEIVED

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SC Court of Appeals

HSBC Bank USA, National Association, as Trustee for
the Holders of the Deutsche ALT-A Securities, Inc.
Mortgage Loan Trust, Mortgage Pass-Through
Certificates Series 2007-OA4, assignee of Bank of
America N.A., successor by merger to BAC Home
Loans Servicing L.P., f/k/a Countrywide Home Loans
Servicing, Inc.,.....

Appellant,

v.

Clifford L. Ryba; Beverly Ryba;
Regions Bank; First Federal Savings
and Loan Association of Charleston; Citibank (South
Dakota) N.A., and Carol Garfield Goldberg, ...

Defendants,

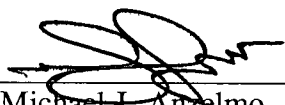
Of whom Carol Garfield Goldberg is the,.....

Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that the Record on Appeal contains all material
proposed to be included by any of the parties and not any other material.

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master In Equity

Appellate Case No. 2016-001054

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