

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Charles B. Simmons, Master-in-Equity

Case No. 2010-CP-23-10468

Appellate Case No. 2012-208806

RECEIVED
JUL 09 2013
SC Court of Appeals

Bank of America, N.A.,

Respondent,

v.

Todd Draper, Mortgage Electronic Registration Systems, Inc., acting as nominee for American Home Mortgage, its successors and assigns, Shawn Kephart, Mathews H. Henrikson, The United States of America, by and through its Agency, the Internal Revenue Service, South Carolina Department of Revenue, Branch Banking and Trust Company, and Linkside III Homeowners Association, Inc.,

of whom Todd Draper and Matthew H. Henrikson are

Appellants.

RETURN TO APPELLANTS' PETITION FOR REHEARING

Appellants' petition for rehearing should be denied because in ruling to affirm, in part, the summary judgment, this Court neither misapprehended nor overlooked any salient point of Appellants' argument regarding the issue of Respondent's standing to pursue foreclosure action.

Under South Carolina Rules of Civil Procedure, only a real party in interest may prosecute an action. Rule 17(a), SCRPC. Contrary to Appellants' assertion, this Court's reference to the opinions of the United States Bankruptcy Court for the District of South

Carolina in *In re Woodberry*, 383 B.R. 373 (Bankr. D.S.C. 2008), and *In re Neals*, 459 B.R. 612 (Bankr. D.S.C. 2011), was appropriate, because they expound the term “a real party in interest” in regard to mortgage loan servicers. The fact that the servicers in those cases were parties to bankruptcy proceedings, and not foreclosures, has no bearing on the validity and applicability of the bankruptcy court’s analyses to the case at bar.

In their petition, Appellants contend that “[i]n *Woodberry* the dispositive issue was whether a loan servicer was a party in interest within the meaning of the Bankruptcy Code such that it could seek relief from a bankruptcy stay.” (Appellants’ Memorandum, p. 2). They fail to mention, however, that Rule 7017 of the Federal Rules of Bankruptcy Procedure adopts, for contested matters, Rule 17 of the Federal Rules of Civil Procedure, on which Rule 17, SCRPC, is patterned. See *In re Woodberry*, 383 B.R. at 378. Thus, the distinction that Appellants draw between a contested matter in bankruptcy – motion for relief from stay, – and a foreclosure, is immaterial; both are “actions” under the federal, and the South Carolina, Rule 17(a).

In *Neals*, the court cited the Fourth Circuit Court of Appeals opinion in *Va. Elec. & Power Co. v. Westinghouse Elec. Corp.*, 485 F.2d 78 (4th Cir. 1973), defining a “real party in interest” under Rule 17, as “a ‘person who possesses the right to enforce the claim and who has a significant interest in the litigation.’” *Neals*, 459 B.R. at 617. Similarly, in the instant case, the Court found, quoting South Carolina Jurisprudence, that a real party in interest is the one “who, by substantive law, has the right sought to be enforced.” *Bank of America v. Draper*, Op. No. 5140 (S.C. Ct. App. filed June 5, 2013) (Shearouse Adv. Sh. No. 25 at 53, 57) (quoting 4 S.C. Jur. Action § 23 (1991)). In finding that “a mortgage servicer has standing by virtue of its pecuniary interest in collecting payments under the terms of the note and mortgage[.]” *id.* at 59 (quoting *Neals*, 459 B.R. at 617), this Court chose to follow a national trend of recognizing

servicers as real parties in interest, be it in foreclosure actions or contested matters in bankruptcy. This Court cited bankruptcy cases from Alabama and Pennsylvania as well as opinions from the Eleventh Circuit and the U.S. District Court for the Eastern District of Virginia. *Draper*, at 59. *See also CWC Capital Asset Mgmt., LLC v. Chi. Props., LLC*, 610 F.3d 497, 500-01 (7th Cir. 2010) (holding that there could be no doubt about a servicer's standing, as it had a personal stake in the outcome of the case because it received a percentage of the proceeds of a defaulted loan).

These cases stand for the proposition that a “[a] servicer is a party in interest in proceedings involving loans which it services.” *In Re O’Dell*, 268 B.R. 607, 618 (N.D. Ala. 2001) *aff’d* 305 F.3d 1297, 1302 (11th Cir. 2002). One’s status as a servicer of a loan implies an interest in the outcome of the litigation involving the loan; an interest that is real, substantial, and material. Here, Appellants admitted Respondent’s status as the servicer. Accordingly, they cannot question Respondent’s having a significant interest in the litigation.

Appellants point to the absence from the record of the servicing agreement between Respondent and Freddie Mac, which they argue, could have provided for Respondent’s right to initiate the foreclosure on behalf of the owner of the loan. (Appellants’ Memorandum, p. 3). This agreement is irrelevant, however, because Respondent had, by substantive law, the right sought to be enforced in the foreclosure action. Respondent was entitled, under Section 36-3-301 of the South Carolina Code of Laws, to enforce the right to payment embodied in the Draper’s note, because Respondent was the holder of that instrument.

While possession of the note bearing specific or in-blank indorsement is the *sine qua non* of one’s status as the holder, S.C. Code Ann. § 36-3-301 (Supp. 2010), production of the note is not the *sine qua non* for proving possession and establishing one’s right to enforce the note under S.C. Code § 36-3-301(i). Respondent’s status as the holder was evidenced by the fact that the


note was issued to Countrywide Home Loans, Inc. (CHL), acting under the trade name America's Wholesale Lender, which was later acquired by Respondent. The payments were collected by Countrywide Home Loans Servicing, LP, a subsidiary of CHL renamed BAC Home Loans Servicing, LP following the acquisition of CHL by Respondent, and later merged into Respondent. Also, the payment of the note was secured by a mortgage held by Respondent. In other words, by virtue of mergers and acquisitions, Respondent was the payee on the note. Respondent exercised right to payment under the note from its origination and was the party that initiated the foreclosure. These facts, coupled with the introduction of the ledger of payments and the duplicate of the note, along with Appellants' failure to question authenticity of the note executed by Draper, or to indicate any circumstances making admission of the duplicate unfair, allowed the master-in-equity, and then this Court, to conclude that there was no genuine issue as to Respondent's status as the holder of the note, and thus, as a party with standing to pursue the foreclosure.

Appellants maintain that the Court overlooked their argument that introduction of the duplicate, instead of the original of the note, "[left] open the possibilities of any number of subsequent endorsements and transfers of ownership." (Appellants' Memorandum, p. 4). Although this argument could be seen as one raising an issue of fact, it does not create an issue requiring the services of a fact finder. "The issue raised by a party opposing motion for summary judgment must be genuine." *Saluda Motor Lines*, 300 S.C at 45, 386 S.E.2d at 292 (citing *Witt v. Poole*, 182 S.C. 110, 188 S.E. 496 (1937)). "It is not sufficient that evidence create a farfetched inference. . . . Either motion should be granted or denied based on the whole of the evidence, and in making the determination the judge should not select any one morsel of testimony and attach significance to it unless it be genuine or reasonable." *Id.* In light of the

totality of circumstances transpiring from the record, Appellants' argument that an introduction of the duplicate could not eliminate possibilities of there being further indorsements or transfers, constitutes nothing but a "farfetched inference" incapable of precluding summary judgment. In the words of this Court in *Saluda Motor Lines, Inc. v. Crouch*, 300 S.C. 43, 46, 386 S.E.2d 290, 292 (Ct. App. 1989) (quoting 73 Am. Jur. 2d *Summary Judgment* § 27), "the court [was] convinced that the issue [was] not genuine but feigned and that there [was] in truth nothing to be tried."

In view of the foregoing, Respondent asks for denial of Appellants' petition for rehearing.

Respectfully submitted,



Dean A. Hayes
P.O. Box 12369
Columbia, SC 29211-2369
(803) 252-5817
Attorney for Respondent

July 9, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Charles B. Simmons, Master-in-Equity

Case No. 2010-CP-23-10468

Appellate Case No. 2012-208806

RECEIVED
JUL 09 2013
SC Court of Appeals

Bank of America, N.A.,

Respondent,

v.

Todd Draper, Mortgage Electronic Registration Systems, Inc., acting as nominee for American Home Mortgage, its successors and assigns, Shawn Kephart, Mathews H. Henrikson, The United States of America, by and through its Agency, the Internal Revenue Service, South Carolina Department of Revenue, Branch Banking and Trust Company, and Linkside III Homeowners Association, Inc.,

of whom Todd Draper and Matthew H. Henrikson are


Appellants.

PROOF OF SERVICE

The undersigned attorney for Respondent, Bank of America, N.A., certifies that Return to Appellants' Petition for Rehearing was served on Appellants by causing a copy of the same to be deposited into the United States Mail, addressed as follows:

Mathew H. Henrikson
P.O. Box 26554
Greenville, SC 29616
Attorney for Appellants

this 9th day of July, 2013



Dean A. Hayes
P.O. Box 12369
Columbia, SC 29211-2369
(803) 252-5817
Attorney for Respondent

July 9, 2013