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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

Case No. 2011-CP-10-8421
Court of Appeals Docket 2015-001182

The Bank of New York Mellon f/k/a Bank of The New York as Trustee for the Certificateholders of CWALT, Inc., Alternative Loan Trust 2005-17, Mortgage Pass-Through Certificates, Series 2005-17 Respondents,

v.

Martin H. Seppala and Thomas F. True III, as Trustee of the Jate IV Trust, utd 7-7-2000, The Jate IV Trust utd 7-7-2000, David A. Collins, William J. Thrower, The United States of America, The South Carolina Department of Revenue,4th National Harbor Realty Trust, Snee Farm Lakes Homeowner's Association, Inc.

Of Whom Thomas F. True III as Trustee of the Jate IV Trust utd 7-7-2000. The Jate IV Trust utd 7-7-2000, David A. Collins and William J Thrower are Appellants,

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REPLY BRIEF OF APPELLANTS

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INTRODUCTION TO REPLY BRIEF

This Reply Brief of Appellants Thomas F. True III as Trustee of the Jate IV Trust udt 7-7-2000 and Jate IV Trust udt 7-7-2000 (hereinafter referred to as Jate IV), pursuant to 208(1) (3) SCACR is in response to the Brief of Respondent, The Bank of New York Mellon f/k/a The Bank of New York as Trustee for the Certificateholders of CWALT, Inc., Alternative Loan Trust 2005-17, Mortgage Pass Through Certificates, Series 2005-17 (hereinafter referred to as "Mellon" or "Respondent").

The Brief of Respondent, as more fully addressed, below, quite clearly and conspicuously fails to rebut the central issue of this appeal, namely: the absence of competent evidence that Mellon was in possession of or was the holder of the original promissory note when the foreclosure action was filed. Without this, summary judgment could not enter.

The other major issues addressed below in rebuttal to Respondent's Brief concern the importance of further discovery and the error of the master in equity in allowing the hearsay evidence of Respondent's alleged "servicer", Bayview Loan Servicing LLC.

I. RESPONDENT'S STATEMENT OF THE CASE CONTAINED SOME CONTESTED MATTERS

Appellants rebut one glaring issue in Respondent's Statement of the Case that Respondent claims as uncontested. That being the statement that: "Pursuant to a loan modification agreement dated February 25, 2009, the parties to the note modified its

original terms..." In fact, Respondents clearly argued in its brief that this alleged modification agreement is incomplete and lacks the signature of the mortgagee. In *U. S. Bank Trust Nat'l Ass'n v. Bell,* 385 S.C. 364, 374, 684 S.E. 2d 199,204 (Ct. App. 2009) the court stated that any modification of a written contract must satisfy all fundamental elements of a valid contract. Here, not only was the alleged modification drafted years after Seppala had conveyed his interest in the property, but also, Seppala had long been in default on the note payments.

Another statement made by the Respondent in its "Statement of the Case" that Appellants disagree is uncontested: "Neither conveyance was authorized in writing by Bank of America, N.A. (BANA), as successor by merger with Countrywide Home Loans, Inc." Appellants argue that there was no proof that the conveyance referred to was unauthorized in part because the Respondent did not make itself available for a deposition. The failure of the master in equity to permit discovery on these issues was explored in Appellants' Brief in chief (several deposition notices not complied with as well as disobeying scheduling orders).

A second issue arises from the above quoted statement. In the footnote accompanying the said quoted phrase the Respondent states that Bank of America completed its purchase of Countrywide Financial Corporation on July 1, 2008. This allegation is not uncontested nor is it part of the record from the magistrates' court. It involves another area of discovery denied the Respondents as inquiries of the chain of custody of the note could not be determined without further discovery.

There is a final issue with the recitation by the Respondent of the statement of the case. Respondent filed its motion for summary judgment with supporting affidavit on November 7, 2014. This statement is not contested.

However, Respondent continues and states that Appellants' Opposition filed on December 1, 2014 was "styled as a Motion to Dismiss." Although Appellants indeed filed a Motion to Dismiss (R96-R97), it also filed a separate Opposition to the motion for summary judgment entitled "Defendant Jate IV Trust Opposition to Plaintiff Motion for Summary Judgment" (R91-R92).

This issue is significant because the Respondent has argued in its brief that Appellants waived their right to raise certain issues on appeal because they were not objected to timely. In fact, the said Opposition to the summary judgment took specific issue with the hearsay testimony of Bayview Servicing LLC. (See Record) stating Dara Foye had no personal knowledge of the allegations contained in her affidavit.

II. RESPONDENT'S ARGUMENT FOR STANDING OF THE BANK WHEN THE FORECLOSURE WAS FILED

Respondent's first argument section sets out the basis for standing to pursue a foreclose complaint. Its argument must fail if the master in equity at the summary judgment hearing had no competent evidence presented to him that Respondent legally possessed or was the holder of the promissory note at the commencement of the foreclosure proceedings.

The Appellants argued in their brief that the master in equity had no evidence that Respondent had the subject note when the foreclosure commenced but only that the Respondent had the note at the time of the summary judgment hearing.

Although Respondent has made several references in its brief to the promissory note, it is significant that it never alleged that the note was possessed by it or held by it at the time the foreclosure was instituted. This is the crucial flaw in Respondent's argument for standing.

In its recitation in its statement of facts, Respondent states the note was presented to the master in equity at the hearing of March 12, 2015. This is over three years after the November 14, 2011 filing of the foreclosure complaint.

Also included in Respondent's argument in its brief is Respondent's admission that that "At the summary judgment hearing, Respondent's counsel presented the original note, indorsed in blank, to the Master and parties."

In Section II A. of its argument, the Respondent states: "Respondent was in possession of the original promissory note in this case...Respondent was therefore entitled under the law of this State to enforce the note." This argument may be true in general but the issue here is: when did the Respondent come into possession of the note or become a holder of the note?

The Appellants argue that it is settled law in South Carolina that the party seeking to enforce the note must have legal possession or legally hold the note at the time the foreclosure is commenced. See *Bank of America N.A. v. Todd Draper,* 405 S.C. 214, 220, 746 S.E. 2nd 478, 481(Ct.App. 2013) finding the party seeking to foreclose on a mortgage

must show that it is either: a) the mortgagee; or b) was properly assigned the mortgage at issue. The party must be the holder of the note at the time the foreclosure action is filed.

III. REGARDING RESPONDENT'S ARGUMENT THAT MASTER IN EQUITY FOUND NO FACT OR LAW ISSUES PRECLUDING RESPONDENT TO FORECLOSE

In its argument Section I, Respondent states that the master found no fact or legal issues to preclude the foreclosure from going forward and summary judgment was proper. As this matter is an action in equity, tried by a magistrate alone, the Appeals Court may find facts in accordance with its own view of the evidence. See *Lowcountry Open Land Trust v. Charleston S. Univ.*, 376 S.C.399, 407, 656 S.E. 2d. 775, 779 (Ct. App. 2008). Further, a "legal question in an equity case receives review as in law". See *Sloan v. Greenville County,* 356 S.C. 531, 546, 590 S.E. 2d. 338, 346 (Ct. App. 2003).

The Appeals Court, with no particular deference to the trial court may correct errors in law in both legal and equitable actions. See *I'On, LLC v. Town of Mt. Pleasant,* 338 S.C. 406, 411, 526 S.E. 2d 716, 719 (2000).

IV. APPELLANTS' RIGHT TO COMPLETE DISCOVERY

Appellants' in their brief in chief have argued that the master in equity wrongfully precluded them from full and fair discovery. Respondent in its argument Section I A. claimed that Appellants have not advanced any reasons why the time under the

Scheduling Order (R68-R69) was insufficient. This argument is absurd in light of the uncontested facts that Respondent repeatedly failed to attend the scheduled depositions.

Further, Respondent argues that Appellants have failed to demonstrate further discovery would uncover additional material facts.

As repeatedly pointed out, a major material fact is when Respondent came into possession of the note and the chain of custody of the note. Further numerous material facts were sought and were raised in Appellants' Motion to Dismiss, Opposition to Summary Judgment and Affidavit of John True, all timely filed in response to Respondent's Summary Judgment Motion.

Some of the facts sought and precluded by prematurely holding a summary judgment hearing include: Respondents' predecessor's relationship with Seppala; Appellants' loss of collateral that Seppala was able to alienate without Appellants' knowledge; issues of proper notice of default because Seppala had conveyed the property secured by the mortgage years prior to the mailing of the default notice (to the mortgaged property only) with the knowledge of the Respondent's predecessor; the alleged modification of the note in February of 2009 when Seppala was in default and had conveyed the subject property in 2006 all with the knowledge of the Respondent's predecessor.

Those facts would likely lead to Appellants' filing further defenses and counterclaims upon completion of discovery pursuant to the scheduling order. The said

scheduling orders all made provision for amendment of the Appellants' response to the foreclosure complaint upon completion of discovery. (R149-R161 copies of 5 deposition notices issued by Appellants to Respondent/Bank representatives)

V. REGARDING RESPONDENT'S ARGUMENT IN SECTION II B THAT APPELLANTS' FIRST RAISED THE HEARSAY ISSUE ON APPEAL

In Respondent's argument Section II B it is claimed that the first time Appellants raised the hearsay argument was in its brief. This is plainly wrong.

Appellants' in its Opposition to Plaintiff's Motion For Summary Judgment stated the following:

> Further, Plaintiff has submitted an affidavit by a Dara Foye purporting to support its motion, however, said affiant Foye has no personal knowledge of her allegations. Affiant merely regurgitates statements from documents known to the Defendants since the case was filed. Said affiant is merely an agent of the mortgage servicer, Bayview Loan Servicing that has only been involved since 2011, long after the loan was in default.

In fact, Appellants' misstated the date in the above quote regarding Bayview's entry as "servicer" stating it was 2011 when by uncontested fact it was no earlier than September of 2013. Further, the Affidavit of Verified Statement of Account of Bayview employee Randall Jackson was not made in January of 2015 and not presented at the summary judgment hearing but filed with the magistrate's court outside of the hearing.

Based on Appellants' argument that the appeals court may consider all facts

and legal issues in accordance with its own view of the evidence, the hearsay testimony of these Bayview employees should not be considered as competent evidence to support summary judgment or a proper statement of account.

In addition, in regard to the judgment amount, the court should have considered the Appellants' position that the alleged modification of the note in February of 2009 was not a valid contractual obligation and should not be used in calculating the amount of the damages.

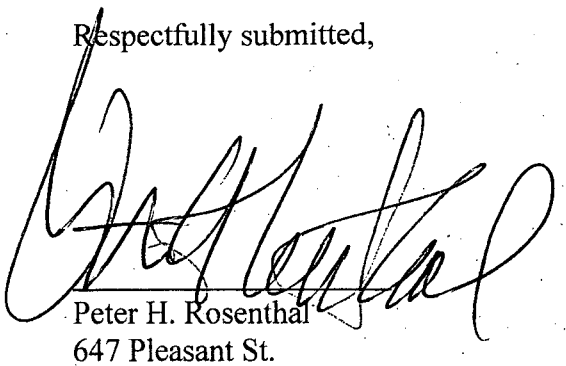
Trustworthiness of the hearsay testimony is the hallmark for the business records exception to the rule. In the instant case, Bayview has failed to establish the trust required to meet the exception requirements and should be excluded.

CONCLUSION

This court should reverse the grant of summary judgment are remand the case back to the master in equity to allow the Appellants sufficient time to complete its discovery, amend its Answer if appropriate and to bring such affirmative defenses and counterclaims to which it is entitled.

There are material questions of fact most important to this matter concerning what entity was the holder or possessor of the note on the filing date of the foreclosure complaint which clearly cannot be determined on one flawed affidavit and Respondent's possession of the note on the date of the summary judgment hearing.

Respectfully submitted,



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June 6, 2017

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Note: Appellants Collins and Thrower are not included on this brief

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CERTIFICATION OF COMPLIANCE WITH RULE 211(b) SCACR

I, Peter H. Rosenthal, hereby certify that, pursuant to Rule 211 SCACR, that the Final Briefs comply with Rule 211(b) SCACR.

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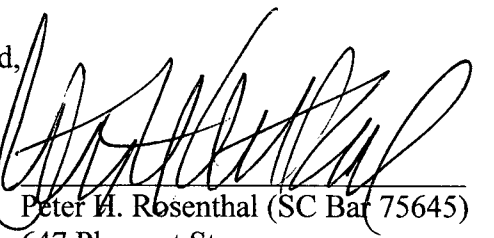
June 12, 2017

Signed,



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