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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Honorable Mikell R. Scarborough
Master In Equity for Charleston County

Case No. 2010-CP-10-6060

Appellate Case No. 2023-000819

U.S. Bank Trust, N.A., as Trustee for LSF10 Master Participation Trust……. Appellee

v.

Johnson D. Koola, First Citizens Bank and Trust Company, Inc. f/k/a First Citizens Bank and Trust Company of South Carolina, and Cambridge Lakes Condominium Homeowners Association, Inc. f/k/a Cambridge Lakes Horizontal Property Regime…… Defendants

Of whom Johnson D. Koola is the Appellant.

APPELLEE'S INITIAL BRIEF

T. Richmond McPherson, III
(SC Bar ID #80432)
MCGUIREWOODS LLP
201 North Tryon Street, Suite 3000
Charlotte, North Carolina 28202
Telephone: (704) 343-2038
Facsimile: (704) 444-8783
rmcpherson@mcguirewoods.com
Attorneys for Plaintiff/Appellee
U.S. Bank Trust, N.A., as Trustee for LSF10 Master Participation Trust

Date: October 20, 2023

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STATEMENT OF THE CASE

On or about February 20, 2004, Johnson D. Koola (hereinafter "Koola"), executed, and delivered to Countrywide Home Loans, Inc. a certain Note ("Note") whereby the Defendant Koola promised to repay, the original principal sum of $136,192.00, together with interest at a rate of 5.7500% per annum on the unpaid balance; said principal and interest being payable in monthly installments initially of $794.78, commencing on April l, 2004, and continuing each month thereafter until the Note is fully paid. In order to secure the payment of said Note, the said Defendant, did on the same date, make, execute and deliver to Mortgage Electronic Registration Systems, Inc. as nominee for Countrywide Home Loans, Inc., its successor and assigns, a certain real estate Mortgage ("Mortgage") covering real property located at 1587 Cambridge Lakes Drive, Mount Pleasant, SC 29464, in Charleston County, as more fully described in said Mortgage. The mortgage was recorded February 24, 2004 in the Register of Mesne Conveyances for Charleston County in Book 485 at Page 11.

Thereafter, said Mortgage was assigned to BAC Home Loans Servicing, LP f/k/a Countrywide Home Loans Servicing LP by assignment instrument recorded September 9, 2010 in Book 142 at Page 770. During the pendency of the action, the Mortgage was reassigned to Green Tree Servicing LLC by assignment instruments recorded May 28, 2013 in Book 333 at Page 773 and on June 17, 2013 in Book 338 at Page 879. Thereafter, the Mortgage was reassigned to U.S. Bank Trust, N.A., as Trustee for LSFl0 Master Participation Trust (hereinafter "U.S. Bank") by assignments filed January 31, 2019 in Book 775 at Page 105 and on February 22, 2019 in Book 779 at Page 35.

This is an action for *in rem* foreclosure under the instruments described above. On July 27, 2010, the Lis Pendens, Summons, and Complaint for Foreclosure was filed. Koola filed an Answer and Crossclaim on November 29, 2010, and an Amended Answer and Counterclaim on

March 3, 2011, and March 24, 2011. Plaintiff filed a Reply on April 22, 2011 and a Motion for Summary Judgment on February 15, 2023.

Although the history of this matter spans more than a decade, the most relevant period begins after Koola filed a Chapter 13 Bankruptcy Petition in the Bankruptcy Court for the District of South Carolina on March 20, 2018 as Case No. 18-01372-jw. Bankr. Order, September 28, 2018, p 5. Ditech Financial, LLC ("Ditech"), as loan servicer for Fannie Mae, filed a proof of claim. Bankr. Order, September 28, 2018, p 5. Koola objected to Ditech's claim. Bankr. Order, September 28, 2018, p 5. Subsequently, Ditech notified the Bankruptcy Court that the Note had been lost. Bankr. Order, September 28, 2018, p 6.

A hearing was held on Koola's objection, at which, Ditech made the following presentation:

> At the hearing Ditech introduced into evidence an Affidavit of Lost Note ("Lost Note Affidavit") executed by Teresa G. Harris, an Assistant Vice President of Ditech, on June 15, 2018. The Lost Note Affidavit stated that "Ditech acquired the right to enforce the Note from Bank of America, N.A., which was entitled to enforce the Note when the loss of possession occurred[,]" that "[t]he original Note has been inadvertently lost, misplaced, or destroyed, or is in the wrongful possession of an unknown person or a person who cannot be found or is not amendable to service of process[,]" and that "[t]he original Note is not in the custody and control of Ditech." The testimony of Ms. Gostebski echoed the information provided in the Lost Note Affidavit. In addition, Ms. Gostebski testified that Ditech was not aware that the Note was lost until June 15, 2018 and that it is Ditech's belief that Bank of America, acting as the servicer for Federal National Mortgage Association ("Fannie Mae"), lost the Note. She also testified that Fannie Mae is the owner of the Debt and that Ditech is only the servicer of the Debt.

Bankr. Order, September 28, 2018, p 6.

By Order filed September 28, 2018, the Bankruptcy Court found that "to determine the proper party with standing to file the Proof of Claim in this case, the Court must determine who has standing to prosecute an *in rem* foreclosure action of the Mortgage under South Carolina law." Bankr. Order, September 28, 2018, p 13. The Bankruptcy Court ultimately found that

Ditech was a party authorized to collect the debt had standing to file the proof of claim, and, therefore, overruled Koola's objection. Bankr. Order, September 28, 2018, p 16.

Due to the account being transferred and assigned to U.S. Bank during the pendency of the bankruptcy, U.S. Bank filed a proof of claim on November 13, 2018. Bankr. Order, January 15, 2019, p 1. The Defendant Koola moved for a new trial. In its order denying Koola's motion for a new trial, the Bankruptcy Court noted that, "while the majority of Debtor's Motion is merely a restatement of the assertions and arguments he made as part of the Proof of Claim Objection, it appears he is asserting that a new trial is necessary because of his allegation that the Court committed an error in law in not requiring the presentment and enforcement of the original note when considering Ditech's standing to file the claim…" . Bankr. Order, January 15, 2019, p 2. Ultimately, after substantial analysis, the Bankruptcy Court held as follows:

> …U.S. Bank is now the owner of the debt with the right to payment under the lost note, it is in compliance with the requirements of S.C. Code Ann. § 36-3-804, and therefore, is the proper party to maintain the proof of claim against Debtor.

Bankr. Order, January 15, 2019, p 7.

SUMMARY OF THE ARGUMENT

Koola's Initial Brief attacks the integrity of Trial Court and the Bankruptcy Court, ignores the entire history of his litigation of these issues, confuses and conflates principles of law and fails to address the actual proceedings below. The Trial Court did not err in granting U.S. Bank summary judgment. The Trial Court correctly concluded U.S. Bank's authority to enforce the Note was litigated and decided in the Bankruptcy Court. Koola cannot collaterally attack the Bankruptcy Court's Orders and, even if he could, has asserted no basis to challenge the Bankruptcy Court's jurisdiction. The Bankruptcy Court fully and finally decided that U.S. Bank

is authorized to enforce the Note, the Trial Court accurately recognized this holding and any discrepancies in the Trial Court's Order are inconsequential and do not support reversible error.

STANDARD OF REVIEW

"When reviewing the grant of a summary judgment motion, appellate courts apply the same standard that governs the trial court under Rule 56(c), which provides that summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *USAA Prop. & Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 653, 661 S.E.2d 791, 796 (2008).

ARGUMENT

I. The Trial Court Did Not Err in Concluding U.S. Bank Has Standing to Foreclose.

Koola's initial argument in this appeal that U.S. Bank lacked authority to foreclose because a fully indorsed note was not adduced. Koola also challenges the Trial Court's subject matter jurisdiction, an issue his counsel expressly waived in the Trial Court. And, as he has throughout the litigation of this affair, Koola ignores and misrepresents the Trial Court's ruling.

Naturally, the Trial Court provided a thorough summation of this issue stating:

> An assignment of mortgage conveying the subject debt to U.S. Bank, N.A., as Trustee for LSF10 Master Participation Trust (hereinafter U.S. Bank) was recorded January 31, 2019 in Book 775 at Page 105 and on February 22, 2019 in Book 779 at Page 35. An Order Substituting U. S. Bank as Plaintiff in this action was filed on October 25, 2019. On March 3, 2023, Defendant Koola filed a Motion to Strike the Order Substituting Plaintiff. Defendant Koola filed a Supplemental Brief opposing Plaintiff's Motion for Summary Judgment which also discussed his motion to vacate the Order Substituting Plaintiff. In his memorandum, Defendant Koola alleged (in bold print) that U.S. Bank and its servicer Fay Servicing "**lack standing in Koola's foreclosure case as they have not established that they have claims against Koola and have a right to enforce a claim against Koola in the foreclosure case under substantive laws of South Carolina; they are not the real party in interest under South Carolina Rules of Civil Procedure.**" Defendant Koola cites the lack of an endorsement on the promissory note conveying the promissory note to U.S. Bank and the assignment of mortgage allegedly being defective and invalid. A review of the previous litigation in Defendant Koola's Chapter 13 case 18-01373-jw,

> shows that this issue was previously adjudicated between the parties during that action. At the time the Chapter 13 case was filed, the subject Note and Mortgage were held by Ditech Financial LLC (Ditech), who filed a proof of claim on April 19, 2018. Defendant Koola filed a motion to require Ditech to produce the original Note and Mortgage on April 18, 2018, as well as an Objection to Ditech's proof of claim filed on May 7, 2018. Ditech filed an amended proof of claim on June 8, 2018 stating that the original promissory note had been lost during the extended litigation over the previous eight (8) years. A hearing was held on the matter with extensive testimony taken as to the original promissory note being in the physical possession of previous litigation counsel but lost when that firm ceased operations. The United States Bankruptcy Court issued an Order filed September 28, 2018, making a finding that Ditech was the holder of the Note and Mortgage and was the proper party authorized to enforce the debt. The order also required any subsequent holder of the debt and/or its servicer to notify the court upon any transfer or conveyance of the debt. U.S. Bank filed an amended proof of claim on November 13, 2019 as the new assignee of the mortgage and current holder of the debt. Defendant Koola filed a motion for a new trial based upon the amended proof of claim filed by U.S. Bank. By Order filed January 15, 2019, the United States Bankruptcy Court denied Defendant's motion and made a specific finding that U.S. Bank was the owner of the Note and mortgage and the proper party to enforce the debt and expressly approved the proof of claim filed by U.S. Bank. The United States Bankruptcy Court issued an Order filed February 13, 2019, overruling a second objection to the proof of claim of U.S. Bank by Defendant. Therefore, Defendant's claim in his motion that U.S. Bank lacks standing is barred under res judicata and judicial estoppel.

Order, April 13, 2023, Findings, Sec. 7.

a. Koola's Challenge to U.S. Bank's Standing to Foreclose Is Irrelevant.

The Bankruptcy Court unmistakably found that Section 36-3-804 of the South Carolina Code[1] provides that "the owner of an instrument which is lost, whether by destruction, theft or

[1] As the Bankruptcy Court noted, § 36-3-804 was replaced by S.C. Code Ann. § 36-3-309 in July 2009 but remained applicable to Koola's bankruptcy.

> Subsequently, the South Carolina Legislature adopted a revised version of Article 3 of the South Carolina Commercial Code in July of 2008, which included S.C. Code Ann. § 36-3-309 and replaced § 36-3-804. However, the July 2008 Act adopting the amendments indicated that "[a] transaction occurring before the effective date [July 1, 2008] of this act and the rights, obligations, and interests flowing from that transaction are governed by any statute or other law amended or repealed by this act as if repeal or amendment had not occurred and may be terminated, completed, consummated, or enforced under that statute or other law." "Transaction" is not defined in the South Carolina Commercial Code, and it does not appear South Carolina case law has directly addressed what constitutes a "transaction" as intended by the South Carolina Legislature. For the purposes of this Motion, the Court accepts the view that S.C. Code Ann. § 36-3-804 is applicable to this matter.

otherwise, may maintain an action in his own name and recover from any party liable upon due proof of his ownership, the facts which prevent his production of the instrument and its terms" and that U.S. Bank demonstrated it was such an "owner."[2] The Trial Court found the issue had been litigated and decided and the Bankruptcy Court's Orders carried preclusive effect. Order, April 13, 2023, Findings, Sec. 7. This finding well-supported in South Carolina law. *See*, e.g., *McNaughton-McKay Elec. Co. of N.C. v. Andrich*, 324 S.C. 275, 281, 482 S.E.2d 564, 567 (Ct. App. 1997) (debtor barred from relitigating issue decided in bankruptcy).

At least with respect to his Argument I, Koola's Initial Brief does not dispute, or even recognize,[3] the trial court's reliance on preclusion[4] and estoppel. Koola does not dispute that his arguments against U.S. Bank's authority to enforce the Note were, in fact, litigated and fully and finally decided in the Bankruptcy Court. He also does not dispute that, as a result, he is precluded

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Bankr. Order, January 15, 2019, p 4.

[2] The Bankruptcy Court held as follows:

> Therefore, based on this evidence, the Court finds that Fannie Mae was the owner of the debt, including the subject note, with a right to payment at the time of the filing of the proof of claim, that Ditech acted as its servicer in filing the proof of claim, and that Fannie Mae thereafter transferred ownership of the debt to U.S. Bank on July 25, 2018. Because U.S. Bank is now the owner of the debt with the right to payment under the lost note, it is in compliance with the requirements of S.C. Code Ann. § 36-3-804, and therefore, is the proper party to maintain the proof of claim against Debtor.

Bankr. Order, January 15, 2019, p 7.

[3] What is more, Koola's Initial Brief fails to acknowledge that the Bankruptcy Court's Orders reached a conclusion that U.S. Bank is entitled to enforce the Note as the "owner" of the lost instrument. Instead, he impliedly contends that a lost note simply cannot be enforced because it cannot be produced in court, which is plainly contrary to South Carolina law.

[4] U.S. Bank respectfully submits that by *res judicata* the Trial Court intended to convey reliance on either issue or claim preclusion, whichever is most applicable. In *Andricht*, *supra*, the South Carolina Supreme Court addressed a similar issue and referred to *res judicata* when applying collateral estoppel as a bar to the plaintiff's action. The court held that, with respect to bankruptcy matters, the elements required for collateral estoppel to apply are: (1) the same issue; (2) was actually litigated; (3) determined by a valid and final judgment; and (4) such determination was essential to the prior judgment. *Andrich*, 324 S.C. at 279. Koola does not dispute that each of these elements are present here, therefore, any challenge to its applicability has been waived. In any case, the issue of U.S. Bank's authority to enforce the lost Note was undeniably litigated, finally decided and that decision was integral to the Bankcuptcy Court's approval of U.S. Bank's claim.

from contesting that result. Rather, Koola ignores the trial court's holding and reargues the same issues. Consequently, Koola's Argument I is simply irrelevant to the proceedings below and does not support any finding of error.

b. Koola's Challenge to the Trial Court's Jurisdiction Was Not Preserved and Is Frivolous.

Koola's Argument I also asserts the Trial Court lacked subject matter jurisdiction over U.S. Bank's action for foreclosure because, according to Koola, U.S. Bank is not the holder of the Note. This subsidiary argument is not well-taken.

As an initial matter, while this argument was raised in Koola's brief in opposition to summary judgment, it was also expressly waived by Koola's counsel at the hearing in response to direct questioning from the Trial Court in the following colloquy:

THE COURT: All right. Let's talk about jurisdiction.

Y'all question the **Court's** jurisdiction. Do you not?

MR. SLOAN: No. No. No, **Your Honor.**

THE COURT: Okay.

MR. SLOAN: I -- I -- I will --

THE COURT: Do you agree -- you agree we're properly before the Court?

MR. SLOAN: Oh, absolutely.

THE COURT: Okay.

MR. SLOAN: I -- I

THE COURT: All right.

Transcript of March 22, 2023 Hearing, p 33.

It is well-settled that, "[i]n order to preserve an issue for appellate review, the issue must have been raised to and ruled upon by the trial court." *Holy Loch Distributors, Inc. v. Hitchcock*, 340 S.C. 20, 24, 531 S.E.2d 282, 284 (2000). Based on this record, while the issue was raised in the briefing, it was also conceded and waived in open court.

Furthermore, Koola is laboring under a monumental misunderstanding of subject matter jurisdiction. Subject matter jurisdiction is "the power to hear and determine cases of the general class to which the proceedings in question belong." *Dove v. Gold Kist, Inc.*, 314 S.C. 235, 237–38, 442 S.E.2d 598, 600 (1994) (internal quotations omitted). Koola does not, and cannot, argue the Trial Court lacked the power to hear foreclosure cases. Arguments as to the merits of allegations or claims are irrelevant to the Trial Court's jurisdiction of those claims. *See, generally, Watson v. Watson*, 319 S.C. 92, 93, 460 S.E.2d 394, 395 (1995) (holding failure to satisfy requirements of claim goes to merits, not subject matter jurisdiction).

II. Koola May Not Collaterally Attack the Bankruptcy Orders.

In Arguments II, III and IV, Koola attempts to collaterally attack the Bankruptcy Court Orders on which the Trial Court relied by contending the Bankruptcy Court lacked jurisdiction and/or that U.S. Bank lacked Article III standing. These Orders are not amenable to collateral attacks.

Generally, collateral attacks on federal court orders in state court proceedings are disfavored and extremely limited. *See Santora v. Miklus*, 199 Conn. 179, 189, 506 A.2d 549, 554 (1986) ("courts of this state should decline to afford litigants the opportunity to launch collateral attacks on orders issued by federal courts…"). More specifically, collateral attacks on bankruptcy orders present unique circumstances. In *Stoll v. Gottlieb*, 305 U.S. 165, 170, 59 S. Ct. 134, 137, 83 L. Ed. 104 (1938), the Supreme Court held that states have no power to deny the effect of *res judicata* to Orders issued by a United States Court pursuant to a federal statute.

In *Stoll*, a state court refused to apply *res judcata* to a bankruptcy Order because the claimant asserted the court lacked jurisdiction over the matter. *Id.* The Court, however, held that, "[u]nder [28 U.S.C. § 687], the judgments and decrees of the Federal courts in a state are declared to have the same dignity in the courts of that state as those of its own courts in a like case and under similar circumstances. But where the judgment or decree of the Federal court determines a right under a Federal statute, that decision is 'final until reversed in an appellate court, or modified or set aside in the court of its rendition.'" *Stoll,* 305 U.S. at 170, 59 S. Ct. at 137, (internal cites and quotations omitted.) Based on this conclusion, *Stoll* reversed state court and found the state court's application *res judicata* mandatory. *Id.*

Koola is, in essence, making the same argument rejected in *Stoll*, *i.e.*, that the Bankruptcy Court erred in concluding it had subject matter jurisdiction and/or that U.S. Bank had jurisdictional standing. However, because the Bankruptcy Orders were issued under the Bankruptcy Act, they can only be challenged in federal court. Koola cannot even raise a collateral attack against the Bankruptcy Orders in this action.

In any event, even if Koola could collaterally attack the Bankruptcy Orders, his attack would fail. A collateral attack on a judgment from a separate action must fail, "unless it affirmatively appears upon the face of the record that the court had no jurisdiction of the subject of the action, or of the parties." *Gladden v. Chapman*, 106 S.C. 486, 91 S.E. 796, 797 (1917). Koola does not raise any facial challenges to the Bankruptcy Court's jurisdiction.

Rather, as he did with respect to the Trial Court's jurisdiction, Koola primarily argues[5] the Bankruptcy Court lacked subject matter jurisdiction because he believes it should have decided the matters differently. Koola appears to conflate a foreclosing lender's burden to

[5] Koola also asserts the Bankruptcy Court lacked personal jurisdiction over U.S. Bank, even though U.S. Bank filed a proof of claim in Koola's Chapter 13 case. Koola does not explain how he arrived at this conclusion and no further argument is necessary.

demonstrate "standing" to foreclose with the burden to demonstrate jurisdictional standing to assert a claim.[6] As already discussed, Koola's arguments on the merits of the Bankruptcy Orders do not implicate subject matter jurisdiction, which requires a showing by Koola that the Bankruptcy Orders, on their face, do not belong to the "general class" of matters the Bankruptcy Court is empowered to decide. *Dove v. Gold Kist, Inc.*, 314 S.C. 235, 237–38, 442 S.E.2d 598, 600 (1994); *see also Coleman v. Daniel*, 253 S.C. 363, 365, 170 S.E.2d 665, 666 (1969) (attack on the underlying merits of a decision is not a permissible collateral attack).

Koola does not, and cannot, contend that the Bankruptcy Court lacked the power to decide claims submitted by his creditors. Indeed, such matters are within the exclusive jurisdiction of bankruptcy courts. *See* 28 U.S.C. § 1334; 11 U.SC. §§ 101, 105; Fed. R. Bankr. P. 3001. His myriad contentions concerning the merits of the Bankruptcy Orders are neither accurate nor reviewable by this Court.

III. Koola's Reckless Accusation that the Trial Court Fraudulently Altered the Bankruptcy Court's Order is Not Well-Taken.

In addition to the arguments discussed above, in Argument III, Koola accuses the Trial Court of fraudulently altering the Bankruptcy Court's Order of September 28, 2018. The gravamen of this contumacious allegation is that the Trial Court misstated a conclusion that Ditech was the "holder" of the lost Note in order to bolster U.S. Bank's argument for the application of *res judicata.* Not surprisingly, this allegation is baseless.

Koola is correct that the Bankruptcy Court did not find that Ditech was the holder of the Note. This discrepancy is of no moment, however. U.S. Bank, not Ditech, is the foreclosing

[6] Koola also appears to conflate a foreclosing lender's burden to demonstrate "standing" to foreclose with a litigant's burden to demonstrate jurisdictional standing. Jurisdictional "[s]tanding refers to a party's right to make a legal claim or seek judicial enforcement of a duty or right." *Pres. Soc'y of Charleston v. S.C. Dep't of Health & Env't Control*, 430 S.C. 200, 209, 845 S.E.2d 481, 486 (2020). Koola cannot deny U.S. Bank's right to make a "claim," in its own name, in Bankruptcy court, or to request a judgment of foreclosure. This is not the same burden a lender must show to subsequently prevail on said claims.

lender and the Trial Court correctly found the Bankruptcy Court had already held that "U.S. Bank was the owner of the Note and mortgage and the proper party to enforce the debt" and found that Koola was barred from relitigating these issues. Furthermore, the Bankruptcy Court also unequivocally found that Ditech had been entitled to enforce the Note.[7]

The Bankruptcy Court explained every aspect of its holdings in painstaking detail. On January 15, 2019, the Bankruptcy Court noted that its September 28, 2019 Order concerning Ditech's proof of claim had been eclipsed by subsequent events, namely, the transfer of Fannie Mae's ownership to U.S. Bank, which "somewhat mooted" the "issue of Ditech's standing." Bankr. Order, January 15, 2019, p 7. The Bankruptcy Court further stated:

> Therefore, based on this evidence, the Court finds that Fannie Mae was the owner of the debt, including the subject note, with a right to payment at the time of the filing of the proof of claim, that Ditech acted as its servicer in filing the proof of claim, and that Fannie Mae thereafter transferred ownership of the debt to U.S. Bank on July 25, 2018. Because U.S. Bank is now the owner of the debt with the right to payment under the lost note, it is in compliance with the requirements of S.C. Code Ann. § 36-3-804, and therefore, is the proper party to maintain the proof of claim against Debtor.

Bankr. Order, January 15, 2019, p 7.[8]

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[7] In it Order of September 28, 2019, the Bankruptcy Court held that:

> based on the record, including but not limited to the Mortgage assignment from Bank of America to Green Tree, the Lost Note Affidavit, and the testimony presented at hearing, the Court finds there was a transfer of the right to collect the underlying Debt on behalf of Fannie Mae from Bank of America to Ditech. Further, Ditech, by testimony of its agent indicated that it is acting on behalf of the owner of the Debt, Fannie Mae, to collect the payments on the Debt. Ditech is, by assignment, the holder of the Mortgage, as the security for the Debt that remains enforceable. The Court finds Ditech is a party with the rights to collect the Debt on behalf of Fannie Mae.

Bankr. Order, September 28, 2018, p 16.

[8] As the Bankruptcy Court noted, § 36-3-804 was replaced by S.C. Code Ann. § 36-3-309 in July 2009 but remained applicable to Koola's circumstances.

> Subsequently, the South Carolina Legislature adopted a revised version of Article 3 of the South Carolina Commercial Code in July of 2008, which included S.C. Code Ann. § 36-3-309 and replaced § 36-3-804. However, the July 2008 Act adopting the amendments indicated that "[a] transaction occurring before the effective date [July 1, 2008] of this act and the rights, obligations, and interests flowing from that transaction are governed by any statute or other law amended or repealed by this act as if repeal or amendment had not occurred and may be terminated, completed, consummated, or enforced under that statute or other law."

Finally, in that same Order, the Bankruptcy Court explained its use of the term "owner" as the person entitled to enforce a lost note stating:

> "Owner" is not defined under the prior version of Article 3 of the South Carolina Commercial Code. That version of the South Carolina Commercial Code permitted parties other than the owner of the note to be the holder of the note for collection and enforcement of the note. See S.C. Code Ann. § 36-3-301 (2004) ("The holder of an instrument whether or not he is the owner may transfer or negotiate it and discharge it or enforce payment in his own name." (emphasis added)). However, under the plain reading of § 36-3-804, it is clear that the party to collect on and enforce the note after it is lost is the "owner" and not the holder of the note when it was lost. In the present matter, considering the servicing relationship between Bank of America and Fannie Mae, it would appear that Fannie Mae, as owner of the debt, was the owner of the note when it was lost, and that Bank of America was only the holder of the note for purposes of servicing the debt. Based on this determination, it would appear that while Bank of America was entitled to enforce the note as the holder prior to it becoming lost, Fannie Mae, as the owner of the note/instrument, became the party to enforce it under S.C. Code Ann. § 36-3-804 when the note was lost.

Bankr. Order, January 15, 2019, p 4.

Koola has not and cannot demonstrate any reversible error from the above. Despite the Trial Court's imprecise language, its understanding of the Bankruptcy Court's determinations was correct. The Note was lost. Previously, Ditech held the power to enforce the lost Note. Currently, U.S. Bank is the owner of the instrument and the party entitled to enforce it under S.C. Code Ann. § 36-3-804. This could not be clearer.

> "Transaction" is not defined in the South Carolina Commercial Code, and it does not appear South Carolina case law has directly addressed what constitutes a "transaction" as intended by the South Carolina Legislature. For the purposes of this Motion, the Court accepts the view that S.C. Code Ann. § 36-3-804 is applicable to this matter.

Bankr. Order, January 15, 2019, p 4.

CONCLUSION

For the reasons and authorities stated above, this Court should affirm the Trial Court's Order Granting Summary Judgment.

This the 20th day of October, 2023.

T. Richmond McPherson, III
T. Richmond McPherson, III
(SC Bar ID #80432)
MCGUIREWOODS LLP
201 North Tryon Street, Suite 3000
Charlotte, North Carolina 28202
Telephone: (704) 343-2038
Facsimile: (704) 444-8783
rmcpherson@mcguirewoods.com
Attorneys for Plaintiff/Appellee
U.S. Bank Trust, N.A., as Trustee for LSF10 Master Participation Trust

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with Rule 211(b), SCACR.

T. Richmond McPherson, III
T. Richmond McPherson, III
(SC Bar ID #80432)

CERTIFICATE OF SERVICE

The undersigned certified that *Respondent U.S. Bank's Initial Brief* was served on the parties to this action by depositing a copy thereof in the United States Mail, first class, postage prepaid, addressed to:

H. Guyton Murrell, Esq.
Scott and Corley, P.A.
2712 Middleburgh Drive, Suite 200
Columbia, SC 29204
Attorneys for Plaintiff

Mr. S. Nelson Weston, Jr. Esq.
1900 Barnwell Street
Columbia, SC 29202
Attorneys for First Citizens Bank and Trust Co., Inc.
s/b/m to First Citizens Bank and Trust Company of South Carolina

Ms. Lydia P. Davidson, Esq.
Krawcheck & Davidson, LLC
9 State Street
Charleston, SC 29401
Attorneys for Cambridge Lakes
Condominium Homeowner's Association Inc.

Johnson D. Koola
1587 Cambridge Lakes Drive
Mt. Pleasant, SC 29464
Pro Se

This the 20th day of October, 2023.

T. Richmond McPherson, III
T. Richmond McPherson