

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

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SC Court of Appeals

Case No. 2010-CP-10-6060

Appellate Case No. 2023-000819

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

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.

APPELLANT'S FINAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

1. DID THE MASTER IN EQUITY ERR IN GRANTING SUMMARY JUDGMENT TO RESPONDENT BECAUSE IT (i) WAS NOT THE HOLDER OF APPELLANT'S NOTE AND MORTGAGE AND (ii) WAS NOT THE PERSON ENTITLED TO ENFORCE THE INSTRUMENT UNDER SOUTH CAROLINA LAW?
2. DID THE MASTER IN EQUITY ERR IN GRANTING SUMMARY JUDGMENT TO RESPONDENT BY RELYING ON BANKRUPTCY COURT'S JANUARY 15, 2019 INVALID ORDER THAT AS *OWNER OF THE NOTE*, RESPONDENT HAD THE RIGHT TO ENFORCE THE INSTRUMENT?
3. DID THE MASTER IN EQUITY ERR IN GRANTING SUMMARY JUDGMENT TO RESPONDENT BY FRAUDULENTLY ALTERING THE BANKRUPTCY COURT'S SEPTEMBER 28, 2018 *MOOT ORDER* FROM SERVICER TO NOTEHOLDER TO FAVOR DITECH AND, IN TURN, RESPONDENT?
4. DID THE MASTER IN EQUITY ERR IN CONCLUDING AS LAW THAT RES JUDICATA BARRED APPELLANT FROM RAISING RESPONDENT'S STANDING IN ITS FORECLOSURE CASE?

STATEMENT OF THE CASE

On February 20, 2004, appellant Johnson D. Koola ("Koola" or "appellant") purchased a condominium in Cambridge Lakes subdivision in Mt. Pleasant, Charleston County, South Carolina and executed a Note in favor of Countrywide Home Loans, Inc., ("Countrywide") for \$136,192.00 with interest accruing at 5.75% per annum (R. p. 090, lines 8-16) and a Mortgage in favor of Mortgage Electronic Registration Systems, Inc., ("MERS"). (R. pp. 202-220).

Due to financial difficulties caused by loss of employment since the end of 2005, economic recession of 2007 – 2009, and inability to sell the condominium to pay off mortgage- related dues, Koola filed Chapter 7 Bankruptcy in March 2009 which was closed in July 2009. Shortly thereafter, Koola fell behind on his mortgage related payments.

In July 2010, BAC Home Loans Servicing, LP *fka* Countrywide Home Loans Servicing, LP filed a foreclosure action against Koola. Koola filed a counterclaim in the foreclosure case

alleging violation of Federal Real Estate Appraisal Guidelines, Public Law 101.73. Because of Countrywide's Bankruptcy and Federal charges against Bank of America, N.A., alleging fraud in its acquisition of the assets of bankrupt Countrywide, the foreclosure action was not prosecuted until 2014. On September 9, 2013, The Master in Equity dismissed the foreclosure case stating nonsuit pursuant to R. 41(a), SCRCF. Based on a Motion by Koola to Reinstate the Foreclosure action, the Master in Equity reinstated the case on January 28, 2014. On March 26, 2014, the Master in Equity granted Summary Judgment to plaintiff dismissing Koola's counterclaims. The appeal of the dismissed counterclaims was not successful. Thereafter, Koola unsuccessfully removed the counterclaims to the District Court alleging Federal Question Jurisdiction. Subsequent Appeals were also unsuccessful.

In March 2018, Koola filed Chapter 13 Bankruptcy petition as a means to pay off the mortgage related dues by selling his condominium during Bankruptcy, which was possible because condominium had appreciated considerably. In the Petition, Koola named Bank of America, N.A., as the creditor. However, on April 19, 2018, Ditech Financial, LLC ("Ditech") filed Proof of Claim and became Koola's "*creditor*" in the Bankruptcy. (R. pp. 127-129). Claiming that on June 10, 2018, Ditech transferred a "claim other than for security," (R. p. 136), and on July 10, 2018, Ditech sold ownership of the loan to U.S. Bank Trust, N.A., as Trustee for LSF10 Master Participation Trust ("U.S. Bank Trust/respondent"), (R. p. 135), U.S. Bank Trust became Koola's creditor in Bankruptcy since July 2018. On November 13, 2018, U.S. Bank Trust filed Proof of Claim stating: (i) it was the current creditor, and (ii) it acquired the claim from Federal National Mortgage Association ("Fannie Mae"). (R. pp. 137-139). Koola unsuccessfully challenged Ditech's and U.S. Bank Trust' standing in Koola's Bankruptcy because of their failure to produce the original Note duly indorsed to them. Nevertheless, the Bankruptcy Court dismissed Koola's Chapter 13 Petition.

In March 2021, Koola filed the second Chapter 13 Bankruptcy Petition as a means to pay off the mortgage related dues by selling his condominium during Bankruptcy. In April 2021, U.S. Bank Trust filed a Proof of Claim in Koola's 2021 Bankruptcy stating that it was the current creditor, and it did not acquire the claim from someone else. (R. pp. 140-141). *U.S. Bank Trust had filed three different claims in Koola's two Bankruptcies*. Koola challenged U.S. Bank Trust's standing because it did not produce the original Note to substantiate its standing. Nevertheless, the Bankruptcy Court dismissed Koola's second Chapter 13 Petition with prejudice.

On February 14, 2023, U.S. Bank Trust filed Motion for Summary Judgment, (R. p. 086). After a Hearing on the Motion, the Master in Equity filed an Order on April 13, 2023, granting Summary Judgment to U.S. Bank Trust, (R. pp. 006-023). On May 17, 2023, Koola filed Notice of Appeal.

ARGUMENT I

BECAUSE GENUINE ISSUES OF MATERIAL FACTS EXISTED AS TO WHETHER: (i) THE RESPONDENT: (1) WAS THE HOLDER OF APPELLANT'S NOTE AND MORTGAGE AND (2) HAD *STANDING* IN THE FORECLOSURE CASE, AND (ii) THE MASTER IN EQUITY HAD *JURISDICTION* OVER RESPONDENT AND ITS CLAIMS, SUMMARY JUDGMENT WAS NOT APPROPRIATE IN THE FORECLOSURE CASE.

FACTS OF THE CASE

On February 15, 2023, U.S. Bank Trust filed Motion for Summary Judgment, (R. p. 086), in its foreclosure case against Koola, and the Motion Hearing was set for March 6, 2023, and later reset for March 22, 2023. In support of the Motion, it filed, *inter alia*:

(i) an "Affidavit of Indebtedness," (R. pp. 087-089), in which the affiant stated that Koola obtained a mortgage loan from Countrywide Home Loans, Inc. and signed a promissory note in favor of Countrywide, (R. p. 088, lines 1-6), and

(ii) a copy of the Note, (R. pp. 090-091), executed by Koola in favor of the original lender Countrywide, which was not indorsed to U.S. Bank Trust.

In response, Koola filed:

(i) Affidavit of Defendant Johnson D. Koola filed on March 2, 2023, (R. p. 092), in which he stated that the Note contained, *inter alia*, a provision according to which only the Noteholder is entitled to receive payments from the debtor. (R. p. 092, lines 19-23).

(ii) “Brief of Defendants against Summary Judgment of the Plaintiff” filed on March 2, 2023, (R. p. 093-097), in which Koola stated that U.S. Bank Trust lacked standing and is not the person entitled to enforce the instrument. (R. pp. 093-095).

(iii) “Supplemental Brief of Defendants against Summary Judgment of the Plaintiff” filed on March 21, 2023, (R. pp. 098-111), in which Koola argued, *inter alia*, that: (i) U.S. Bank Trust lacked standing in Koola’s foreclosure case and (ii) Consequently, the Master in Equity lacked jurisdiction over U.S. Bank Trust and its claims against Koola, (R. pp. 101-108).

During the Hearing on March 22, 2023, U.S. Bank Trust did not defend its foreclosure case as to whether it was (i) the Holder of Koola’s Note and Mortgage, (ii) entitled to enforce the instrument under South Carolina law, and (iii) had standing in its foreclosure case against Koola. Instead, it argued that it should be granted Summary Judgment relying on Bankruptcy Court’s Orders in Koola’s Bankruptcy. (R. pp. 027-044, pp. 45-58, pp. 059-085). Without finding from the records whether U.S. Bank Trust was the Noteholder, the Master in Equity concluded that U.S. Bank Trust produced the Note, (R. p. 017, line 20) and relying on the Bankruptcy Court’s September 28, 2018, and January 15, 2019 Orders, (R. pp. 059-085, pp.045-058), the Master in Equity granted Summary Judgment to U.S. Bank Trust. On April 13, 2023, the Master in Equity filed the formal Order, (R. pp. 06-023). On April 21, 2023, Koola filed Motion for Reconsideration,

(R. 112-120), which the Court denied in its Form 4 Order filed on May 8, 2023, (R. p.3-5), stating that the Court adopted U.S. Bank Trust’s “Plaintiff’s Return to Motion for Reconsideration,” filed on April 27, 2023, (R. 121-125), as the basis of the Court’s Order.

ARGUMENTS

U.S. Bank Trust’s claims in the Motion for Summary Judgment

In the “Affidavit of Indebtedness” filed on February 15, 2023, (R. pp. 087-089), attached to U.S. Bank Trust’s Motion for Summary Judgment, (R. p. 086), the affiant stated,

“My review of the Servicing Records reveals that on February 20, 2004, Johnson D. Koola (“Borrower”) obtained a mortgage loan from Countrywide Home Loans, Inc. and signed a promissory note (the ‘Note’) in the amount of One Hundred Thirty-Six Thousand Nine-Two and 00/100 (\$136,192.00) dollars, with interest accruing at 5.75% per annum, *payable to Countrywide Home Loans, Inc., its successors, and assigns*. A true and accurate copy of the Note is attached and incorporated herein as Exhibit A.” (R. p. 088, lines 1-6).

Koola could not find a provision in the Note stating that the Note was payable to *Countrywide’s successors and assigns*.” Instead, the Note contained a provision: The Lender or anyone *who takes this Note by transfer, and who is entitled to receive payments under this Note* is called the “Note Holder,” (R. p. 090, lines 12-13). U.S. Bank Trust is not Countrywide’s successor and assignee of the Note.

During the Motion Hearing, U.S. Bank Trust did not produce the original Note duly indorsed and conveyed to it by the original lender Countrywide. Koola brings to the kind attention of this Court that U.S. Bank Trust had claimed in the “Reissued Order Substituting Plaintiff” filed on December 21, 2021, (R. pp. 024-025), that (i) the Note and Mortgage are the subject of the foreclosure action and held by U.S. Bank Trust and (ii) pursuant to Rule 17(a), SCRPC, it is the real party in interest in whose name this suit should be prosecuted. U.S. Bank Trust lied in the document filed in the Court on December 21, 2021, when it claimed that it is the holder of Koola’s Note and Mortgage and committed perjury.

In summary, U.S. Bank Trust U.S. Bank Trust is not the Holder of Koola's Note and Mortgage.

Koola's Responses to the Motion for Summary Judgment

The Note

In the Supplemental Brief filed on March 21, 2023, (R. p. 103, lines 2-3), Koola argued: The Mortgage Note is a promissory Note and is a contract under S.C. law. *Citizens & Nat'l Bank v. Lanford*, 313 S.C. 540, 544; 443 S.E. 2d 549, 551 (S.C. 1994). "Basic contract law provides that when a contract is clear and unambiguous, the language alone determines the contract's force and effect." *Lewis v. Premium Inv. Corp.*, 351 S.C. 167, 171; 568 S.E.2d 361, 363 (S.C. 2002). (Internal citation omitted). Under the provisions of the Note, only the Noteholder is entitled to receive payments. (R. p. 090, lines 12-13). The Master in Equity ought to have denied the Summary Judgment Motion because U.S. Bank Trust *did not prove that it was the Noteholder and was entitled to payment under the contractual provision of the Note*. Disregarding the contractual provision of the Note, the Master in Equity granted Summary Judgment to U.S. Bank Trust, which should be reversed upon Appellate Review.

South Carolina Law: The Person entitled to enforce the instrument.

Under South Carolina law:

"Person entitled to enforce" an instrument means the holder of the Note, S.C. Code Ann. § 36-3-301(i)¹;

S.C. Code Ann. § 36-30-301: "Person entitled to enforce" an instrument means (i) the holder of the instrument, (ii) a nonholder in possession of the instrument who has the rights of a holder, or (iii) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to Section 36-3-309 or 36-3-418(d). A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument."

“Holder” means the person in possession of a negotiable instrument that is payable either to bearer or an identified person that is the person in possession, S.C. Code Ann. § 36-1-201(21);

“Negotiation” means a transfer of possession, whether voluntary or involuntary, of an instrument by a person other than the issuer to a person who thereby becomes its holder, S.C. Code Ann. § 36-3-201(a); (Emphasis added).

An instrument is transferred when it is delivered by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument, S.C. Code Ann. § 36-3-203(a);

[N]egotiation of the instrument does not occur until the indorsement is made, S.C. Code Ann. § 36-3-203(c).

In Bank of America v. Draper, 405 S.C. 214, 223; 746 S.E.2d 478, 482 (S.C. Ct. App. 2013), the Court of Appeals of South Carolina has interpreted the statutory provisions of S.C. Code Ann. § 36-3-301(i): “A holder is a person in possession of instrument drawn, issued, transferred, or indorsed to him. S.C. Code Ann. § 36-3-201(2003).” This Court has ruled who can institute a foreclosure action: “A mortgage and a note are separate securities for the same debt, and a mortgagee who has a note and a mortgage to secure a debt has the option to either bring an action on the note or to pursue a foreclosure action.” *Id.*, 405 S.C. at 220-21; 746 S.E.2d at 481. (Internal citation omitted). Under (i) the provisions of the Note, (ii) South Carolina substantive law, S.C. Code Ann. § 36-3-301(i), and (iii) *Bank of America v. Draper, Id.*, U.S. Bank Trust was not entitled to enforce the instrument and bring the foreclosure action against Koola.

The Court of Appeals has determined what are the evidences necessary to institute a foreclosure action:

“Draper originally executed the note to America’s Wholesale Lender. Through a series of transactions and mergers, the Bank became the holder of the note...Because the evidence indicates the Bank did hold the note, the master did not err in granting summary judgment on this issue.” (Emphasis in italics added).

Id., 405 S.C. at 223-24; 746 S.E.2d at 483.

Real Party in Interest

“Rule 17(a) of the South Carolina Rules of Civil Procedure requires that every action be prosecuted “in the name of the real party in interest.” ... The South Carolina rule ...has been regarded as embodying the concept that an action shall be prosecuted “in the name of the party who, by the substantive law, has the right sought to be enforced.” *It is ownership of the right sought to be enforced* [holder of the Note] *which qualifies one as a real party in interest, rather than absolute ownership of specific property* [owner of the Note].”

Id., 405 S.C. at 220; 746 S.E.2d at 481. (Emphasis added).

[T]he burden of compliance with Rule 17(a) and its real party in interest requirement falls to the plaintiff. *Fisher v. Huckabee*, 422 S.C. 234, 237-38; 811 S.E.2d 739, 740 (S.C. 2018). U.S. Bank Trust did not prove that it has the *ownership of the right to be enforced*, and therefore, that it is not a real party in interest in Koola’s foreclosure case.

U.S. Bank Trust lacked standing in Koola’s Foreclosure case.

“Standing refers to a party’s right to make a legal claim or seek judicial enforcement of a duty or right...Standing is...that concept of justiciability that is concerned with whether a particular person may raise legal arguments or claims...Standing is a fundamental requirement for instituting an action.”

405 S.C. at 220; 746 S.E.2d at 481.

In the foreclosure case, U.S. Bank Trust did not produce the original Note that was delivered to it after indorsement, either to the Order or in blank, by the original lender or any subsequent Noteholders and did not defend its standing.

“A plaintiff must have standing to institute an action.” (i) “Standing refers to a party’s right to make a legal claim or seek judicial enforcement of a duty or right.” (ii) “To have standing...one must be a real party in interest. A real party in interest is one who has a real, material, or substantial interest in the subject matter of the action, as opposed to one who has only a nominal or technical interest in the action.” (iii) The burden of compliance with Rule 17(a) and its real party in interest falls to the plaintiff.”

Murray v. Estate of Murray, 436 S.C. 99, 111; 871 S.E.2d 173, 179-180 (S.C. Ct. App. 2022). (Internal citations omitted).

“In order to have standing to prosecute an action, a plaintiff must have a personal standing or interest in the subject matter of the lawsuit...Standing is a fundamental requirement for instituting an action...No justiciable controversy is presented unless the plaintiff has standing to maintain an action.”

Brock v. Bennett, 313 S.C. 513, 517, 519; 443 S.E.2d 409, 411, 412 (S.C. Ct.App. 1994). (Internal citations omitted).

“As the party moving for summary judgment, the initial burden was on Bank to prove standing.... In support of its motion for summary judgment, Bank submitted copies of the original note and mortgage, copies of allonges to the note and assignments of the mortgage, and the affidavit of Joseph G. Devine, Jr., an authorized signer with JP Morgan Chase (“Chase”)...Accordingly, we find Bank established that it is a holder of the note and mortgage and, as a result, met its initial burden of demonstrating standing.” (Emphasis added).

Bank of N.Y. Mellon v. Lanier, 2019 S.C. App. Unpub. LEXIS 288, *5-*6, 2019 WL 3714838 (S.C. Ct. App. 2019),

“Plaintiffs bear the burden of establishing standing.” *S. Walk at Broadlands Homeowner’s Ass’n v. Openband at Broadlands, LLC*, 713 F.3d 175, 181 (4th Cir. 2013) citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

The “irreducible constitutional minimum of standing” has three components:

First, the plaintiff must have suffered an “injury in fact” – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) “actual or imminent, not ‘conjectural’ or ‘hypothetical.’” Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be “fairly...trace(able) to the challenged action of the defendant, and not...th[e] result [of] the independent action of some third party not before the court.” Third, it must be “likely” as opposed to merely “speculative” that the injury will be redressed by a favorable decision.”

Smiley v. S.C. Dep’t of Health & Envtl. Control, 374 S.C. 326, 329; 649 S.E.2d 31, 32-33 (S.C. 2007). (Internal citations omitted). (Alterations in the original).

For a plaintiff to possess standing, he must have suffered an injury-in-fact, which is a concrete, particularized, and actual or imminent invasion of a legally protected interest. *Sea Pines Ass’n for the Port. Of Wildlife v. S.C. Dept. of Natural Res.*, 345 S.C. 594, 600-01; 500 S.E.2d 287, 291-92 (2001).

“The Court is obligated to raise an issue implicating standing *sua sponte*, even if the parties fail to raise it, because it implicates the Court’s subject matter jurisdiction.” *Densmore v. Litton Loan Servicing, LP. (In re Densmore)*, 445 B.R.307, 312 (Bankr. D. Vt., 2011) (Internal citations omitted). “Once it is determined that a plaintiff has no standing to prosecute, the court must dismiss the action.” *Brock v. Bennett*, 313 S.C. at 519; 443 S.E.2d at 413. The Master in Equity did not ascertain whether the U.S. Bank Trust had standing on foreclosure case and should have dismissed U.S. Bank Trust’s foreclosure case upon finding that U.S. Bank Trust lacked standing. Disregarding the mandates of the Supreme Court of South Carolina found in *Brock v. Bennet, Id.*, the Master in Equity granted summary judgment to U.S. Bank Trust.

U.S. Bank Trust did not prove that it has standing in the foreclosure case. The Master in Equity also failed to ascertain whether U.S. Bank Trust had standing in the foreclosure case.

The Master in Equity lacked jurisdiction over U.S. Bank Trust and its claims against Koola

The Supreme Court of South Carolina has determined, “[J]urisdiction is composed of three elements: (1) personal jurisdiction, (2) subject matter jurisdiction, and (3) the court’s power to render the particular judgment requested.” *Limehouse v. Hulsey*, 404 S.C. 93, 104; 744 S.E.2d 566, 572 (S.C. 2013). (Internal citation omitted). “The Court is obligated to raise an issue implicating standing *sua sponte*, even if the parties fail to raise it, because it implicates the Court’s subject matter jurisdiction.” *Densmore v. Litton Loan Servicing, L.P. (In re Densmore)*, 445 B.R. at 312. “Standing poses the potential for a domino effect. If a party lack standing to bring a matter before the court, the court lacks jurisdiction to decide the merits of the underlying case.” *United States v. AVX Corp.* 962 F.2d 108 (1st Cir. 1992). (Internal citation omitted).

In the “Affidavit of Indebtedness,” (R. p. 88, lines 1-6), the affiant on behalf of U.S. Bank Trust stated that on February 24, 2004, Koola obtained a mortgage loan from Countrywide and signed a promissory in the amount of \$136,192.00. In support of its claim, it attached a true copy of the Note that was originally given to Countrywide. *The said copy of the Note did not show indorsement, either to Order or in blank, by Countrywide to U.S. Bank Trust.* In the Affidavit, U.S. Bank Trust didn’t say that it had a claim against Koola; *it just confirmed that Countrywide had a claim against Koola.* The Master in Equity’s Court lacked *in rem jurisdiction* (subject matter jurisdiction) because U.S. Bank Trust did not prove that it has a claim against Koola and right to payment from Koola. Further, U.S. Bank Trust is prosecuting Countrywide’s claim rather than its own claim; therefore, the Court lacked *in personam* jurisdiction over U.S. Bank Trust. Here, *the question is whether the Master in Equity had jurisdiction to hear U.S. Bank Trust’s foreclosure case against Koola.* The answer is no.

The Supreme Court of South Carolina has ruled: “Without jurisdiction, a court cannot proceed at all in any case; jurisdiction is the power to declare law, and when it ceases to exist, the only function remaining to a court is that of announcing the fact and dismissing the cause.” *Limehouse v. Hulsey*, 404 S.C. at 104; 744 S.E.2d at 572. (Internal citation omitted). “A judgment of a court without subject matter jurisdiction is void and constitutes grounds for the court to vacate the judgment under Rule 60(b)(4)...A void judgment is one that, from its inception, is a complete nullity and is without legal effect and must be distinguished from one which is merely ‘voidable.’” *Gainey v. Gainey*, 382 S.C. 414, 424; 675 S.E.2d 792, 797 (Ct. App. S.C. 2009). (Internal citations omitted). “A judgment is void if a court acts without personal jurisdiction.” *BB&T v. Taylor*, 369 S.C. 548, 551; 633 S.E.2d 501, 503 (S.C. 2006). (Internal citations omitted). Subject matter jurisdiction cannot be forfeited or waived, and can be raised by a party, or by the court *sua sponte*,

at any time prior to final judgment. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514; 163 L. Ed.2d 1097 (2006).”

In *Bunkum v. Manor Properties*, 311 S.C. 95, 99-100; 467 S.E.2d 758, 761 (S.C. Ct. App. 1996), the creditor brought a declaratory judgment action to determine claims against the debtor and to quiet title in property. The action was referred to a master in equity, who entered a judgment in favor of the creditor and ordered the debtor to post an appeal bond. Upon remitter, the master entered a supplemental order assessing appellate costs, fees, interest, and attorney’s fees against the debtor for a total of \$34,666.71 instead of commencing an action against the debtor on the appeal bond. *The debtor neither attended the Hearing nor appealed the Order.* Subsequently, the creditor presented the Sheriff with an Execution against the real property, which was appealed to the Circuit Court. The Circuit Court denied the Appeal. On Appeal, the Court of Appeals ruled:

“We are mindful of Bunkum’s [debtor’s] failure to appear before the master at the hearing on the motion, and her failure to directly appeal the master’s order. Ordinarily, she should have been procedurally barred from challenging the order. However, issues relating to subject matter jurisdiction may be raised at any time, cannot be waived even by consent, and should be taken notice of by this court on our own motion.” (Internal citations omitted.)

Accordingly, the Court of Appeals reversed the lower courts.

Under the Authority in *Bunkum v. Manor Properties, Id.*, and case laws related jurisdiction cited in this section, this Court, upon Appellate Review, should reverse the Judgment of the Master in Equity memorialized in his April 13, 2023 Order for lack of jurisdiction, (R. pp. 6-23).

In *Paramount Fund, Inc. v. Cusaac*, 282 S.C. 497, 499-500; 319 S.E. 2d 354, 355 (S.C. Ct. App. 1984) (Internal citations omitted), the mortgagee, Paramount Fund, Inc., initiated a foreclosure action on Cusaac. The instrument giving rise to this action was the mortgage executed on behalf of Cusaac in 1966. Cusaac died before the initiation of the case. The instrument giving rise to this action was the Mortgage executed on behalf of Cusaac in 1966. The instrument was

signed in Cusaac's name, but the handwriting was not hers. Paramount's complaint alleged that an unknown agent or child of Cusaac executed the Note and Mortgage on behalf of Cusaac. Cusaac's heirs denied this allegation. Nevertheless, the Circuit Court ordered foreclosure.

Upon Appellate Review, the Court of Appeals ruled, *inter alia*:

1. "In an action to foreclose a mortgage on real property, the mortgagee has the burden of proving a disputed mortgage by the preponderance of the evidence." *Id.*
2. "Failure to prove the signature on the mortgage is fatal to the mortgagee's claim." *Id.*
3. "[A] mortgage cannot be established by conjecture or presumption." *Id.* (Internal citations omitted).

Accordingly, the Court of Appeals reversed the Circuit Court. In the instant case, the Master in Equity established mortgage by conjecture or presumption, which should be reversed by this Court.

"In an action to foreclose a mortgage on real property, the mortgagee has the burden of proving a disputed mortgage by the preponderance of the evidence." *Paramount Fund, Inc. v. Cusaac, Id.*, at 499; 310S.E.2d at 355. (Internal citations omitted). In the instant case, U.S. Bank Trust did not prove the disputed mortgage even by a scintilla of evidence.

The Master in Equity's March 22, 2023, Order

In the April 13, 2023 Order, (R. p. 008, lines 12-18), the Master in Equity *acknowledged* Koola's arguments that (i) U.S. Bank Trust and Fay Servicing "lack standing in Koola's foreclosure case; (ii) they have not established that they have claims against Koola and have a right to enforce the claim against Koola in the foreclosure case under substantive law of South Carolina;" (iii) they are not the real party in interest under South Carolina Rule of Civil Procedure; (iv) Koola cited "Lack of an indorsement on the promissory note conveying the promissory note to the U.S. Bank

Trust.” The Master in Equity did not categorically state that U.S. Bank Trust produced the Note, and it was Koola’s Noteholder.

Instead of making a judicial determination on Koola’s arguments, the Master in Equity concluded as law:

“With the production of the Note, Mortgage, applicable Assignment(s), and affidavit of indebtedness and Affidavit of Attorney fees, Plaintiff has provided ample evidence that it is entitled to foreclosure in this matter and has properly established its damages due to the Defendant’s breach of the terms and conditions of the Note and Mortgage.”

April 22, 2023, Order, (R. p. 017, lines 20-23.

In coming to the above conclusion of law, the Master in Equity erred on multiple grounds:

1. Under Findings of Fact, the Mater in Equity did not find that U.S. Bank Trust is the holder of Koola’s Note. Therefore, *the Court’s conclusion that U.S. Bank Trust produced the Note is an erroneous conclusion of law, which is not supported by the evidence in the record and an abuse of judicial power.* In fact, the Court fabricated evidence when it concluded as law that U.S. Bank Trust produced the Note and Mortgage.
2. The United States Supreme Court and the Supreme Court of South Carolina have ruled that the assignment of the mortgage as distinct from the debt, which it secures is nugatory and confers no rights upon the assignee. *Carpenter v. Longan*, 83 U.S. 271, 274 (1872); *Hahn v. Smith*, 157 S.C. 157; 154 S.E. 112; 1930 S.C. LEXIS 150***, ***7 (S.C. 1930). Therefore, the Court’s conclusion that the Assignments of Mortgage entitled U.S. Bank Trust to foreclosure is a collateral attack on the supremacy and authority of the Supreme Courts.
3. In the Affidavit of Indebtedness filed on February 15, 2023, (R. p. 088, lines 1-6), the affiant didn’t state that Koola received a mortgage loan from U. S. Bank Trust. It only stated that Koola received a mortgage loan from Countrywide. Therefore, the Master in

Equity's conclusion that Affidavit of Indebtedness entitled U.S. Bank Trust to foreclose on Koola's property is an erroneous conclusion of law.

4. Under South Carolina law, S.C. Code Ann. § 36-3-301(i), Affidavit of Attorney fees does not entitle U.S. Bank Trust to the right to enforce the instrument. Therefore, the Master's Conclusion of Law that Affidavit of Attorney fees entitled U.S. Bank Trust the right to foreclose on Koola's property is erroneous.
5. The Master in Equity is a Court of Equity and has a duty to uphold the equity law of the State related to foreclosure, which is S.C. Code Ann. § 36-3-301(i): the Person entitled to enforce the instrument is the Holder of the Note. The Court did not cite the relevant South Carolina law anywhere in the 17-pages long Order. The Master in Equity rendered the State law irrelevant in the Master's Court room.

Summary

U.S. Bank Trust is not the Holder of Koola's Note and Mortgage. In the Affidavit of Indebtedness, it *just confirmed that Countrywide had a claim against Koola*. It lacked standing in the foreclosure case. The Master in Equity lacked jurisdiction over U.S. Bank Trust and its claims. The Master in Equity should have dismissed U.S. Bank Trust's foreclosure case for lack of standing and the Master in Equity's lack of jurisdiction over U.S. Bank Trust and its claims but didn't. The Master in Equity's conclusion of law that U.S. Bank Trust produced the Note is a fabrication of evidence. Upon Appellate Review, this Court should reverse the judgment of the Master in Equity and void the foreclosure sale.

ARGUMENT II

BECAUSE THE MASTER IN EQUITY RELIED ON BANKRUPTCY COURT'S VOID AND INVALID ORDER THAT AS OWNER OF THE NOTE AND MORTGAGE, U. S. BANK TRUST WAS THE PROPER PARTY TO ENFORCE THE DEBT, SUMMARY JUDGMENT WAS NOT APPROPRIATE IN THE FORECLOSURE CASE.

FACTS OF THE CASE

On October 5, 2018 and November 13, 2018, U.S. Bank Trust claimed that Ditech: (i) transferred a *claim other than for security* to U.S. Bank Trust on June 8, 2018 under the provisions of Fed. R. Bankr. P. 3001(e)(2), (R. p. 136) and (ii) transferred *ownership of Ditech's claim* to U. S. Bank Trust on July 25, 2018, respectively, (R. p. 135).

In the Proof of Claim filed in the Bankruptcy Court on November 13, 2018, (R. p.p. 137-139), U.S. Bank Trust stated that: (i) U.S. Bank Trust was the current creditor; and (ii) The claim had been acquired from Fannie Mae, (R. p. 137).

In spite of Koola's objections to U.S. Bank Trust's claims, the Bankruptcy Court filed an Order on January 15, 2019, (R. pp. 045-058), in favor of U.S. Bank Trust, (R. p. 058, lines 8-13), which the Master in Equity adopted in its April 13, 2023 Order: "*By Order filed January 15, 2019, the United States Bankruptcy Court...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 Trust,*" (R. p. 008, line 33-p. 009, lines 1-2).

ARGUMENTS

U.S. Bank Trust lacked standing in Koola's Bankruptcy, and consequently, the Bankruptcy Court lacked subject matter jurisdiction over U.S. Bank Trust and its claims.

Pursuant to 11 U.S.C. §§101(10)(A), (5)(A) and South Carolina law, S.C. Code Ann. § 36-3-301(i) (2018), a creditor would have standing in Bankruptcy only if it is the holder of the Note on or before the date when the Bankruptcy Petition is filed.

On October 5, 2018, U.S. Bank Trust claimed that Ditech transferred a *claim other than for security* to U.S. Bank Trust on June 8, 2018, under Fed. R. Bankr. P. 3001(e)(2). (R. p. 136). Under 11 U.S.C. §101(49)(A)(i), the term security includes “note”. Thus, transfer of a claim other than for security means transfer of a claim without transfer of the note.

In the Proof of Claim filed in the Bankruptcy Court on November 13, 2018, (R. pp. 137-139), U.S. Bank Trust stated that: (i) U.S. Bank Trust was the current creditor; and (ii) The claim had been acquired from Fannie Mae. *It did not file any proof to prove that it had acquired the claim from Fannie Mae and received the Note.*

Since U.S. Bank Trust had no claim – right to enforce the instrument – that arose at the time of or before the order for relief concerning the debtor, it was not a creditor under 11 U.S.C. §§101(10)(A), (5)(A), and it was not the holder of Koola’s Note under S.C. Code Ann. §36-3-301(i). Therefore, it lacked standing in Koola’s Bankruptcy.

In Bankruptcy, “[A] “person entitled to enforce the note,” as defined in U.C.C. 3-301 [corresponding to S.C. Code Ann. § 36-3-301] has the requisite standing to file a proof of claim in a bankruptcy case.” *Allen v. U.S. Bank NA (In re Allen)*, 472 B.R. 559, 565 (BAP, 9th Cir. 2012). “In order to have standing to prosecute an action, a plaintiff must have a personal stake or interest in the subject matter of the lawsuit.” *Brock v. Bennett*, 313 S.C. at 517; 443 S.E.2d at 411. “A plaintiff must have standing to institute an action.” *Murray v. Estate of Murray*, 436 S.C. at 111; 871 S.E.2d at 179. “Plaintiffs bear the burden of establishing standing.” *S. Walk at Broadlands Homeowners’s Ass’n v. Openband at Broadlands, LLC*, 713 F.3d at 181 citing *Lujan v. Defenders of Wildlife*, 504 U.S. at 561. In summary, U.S. Bank Trust lacked standing in Koola’s Bankruptcy.

“The Court is obligated to raise an issue implicating standing *sua sponte*, even if the parties fail to raise it, because it implicates the Court’s subject matter jurisdiction.” *Densmore v. Litton Loan Servicing, L.P. (In re Densmore)*, 445 B.R. at 312. “Standing poses the potential for a domino effect. *If a party lack standing to bring a matter before the court, the court lacks jurisdiction to decide the merits of the underlying case.*” *United States v. AVX Corp.* 962 F.2d at 108. (Emphasis added).

“Without jurisdiction, a court cannot proceed at all in any case; jurisdiction is the power to declare law, and when it ceases to exist, the only function remaining to a court is that of announcing the fact and dismissing the cause.” *Limehouse v. Hulsey*, 404 S.C. at 104; 744 S.E.2d at 572. (Internal citation omitted). ““A judgment of a court without subject matter jurisdiction is void and constitutes grounds for the court to vacate the judgment under Rule 60(b)(4)...A void judgment is one that, from its inception, is a complete nullity and is without legal effect and must be distinguished from one which is merely ‘voidable.’” *Gainey v. Gainey*, 382 S.C. at 424; 675 S.E.2d at 797 (Ct. App. S.C. 2009). “A judgment is void if a court acts without personal jurisdiction.” *BB&T v. Taylor*, 369 S.C. at 551; 633 S.E.2d at 503 (S.C. 2006). (Internal citations omitted). In summary, the Bankruptcy Court lacked jurisdiction over U.S. Bank Trust and its claims, and therefore, the Bankruptcy Court’s January 15, 2019 Order is void.

Bankruptcy Court’s January 15, 2019 Order in favor of U.S. Bank Trust conflicts with South Carolina substantive law, and is not valid in South Carolina Jurisdiction

Although U.S. Bank Trust lacked standing, and the Bankruptcy Court lacked jurisdiction over U.S. Bank Trust and its claims, the Bankruptcy Court filed an Order in favor of U.S. Bank Trust on January 15, 2019 Order, (R. pp. 045-058), which the Master in Equity *adopted* in its the April 13, 2023 Order, (R. p. 058, lines 8-13): “*U. S. Bank Trust was the owner of Note and*

mortgage and the proper party to enforce the debt,” (R. p. 008, line 33-p. 009, lines 1-2). The Court erred in granting Summary Judgment to U.S. Bank Trust on two grounds.:

First, for lack of U.S. Bank Trust’s standing in Koola’s 2018 Bankruptcy and the Bankruptcy Court’s lack of jurisdiction over U.S. Bank Trust and its claims, the Bankruptcy Court’s Order was void, which was also void in South Carolina. “Without jurisdiction, a court cannot proceed at all in any case; jurisdiction is the power to declare law, and when it ceases to exist, the only function remaining to a court is that of announcing the fact and dismissing the cause.” *Limehouse v. Hulsey*, 404 S.C. at 104; 744 S.E.2d at 572. (Internal citation omitted). “A judgment of a court without subject matter jurisdiction is void and constitutes grounds for the court to vacate the judgment under Rule 60(b)(4)...A void judgment is one that, from its inception, is a complete nullity and is without legal effect and must be distinguished from one which is merely ‘voidable.’” *Gainey v. Gainey*, 382 S.C. 414, 424; 675 S.E.2d 792, 797 (Ct. App. S.C. 2009). (Internal citations omitted). “A judgment is void if a court acts without personal jurisdiction.” *BB&T v. Taylor*, 369 S.C.at 551; 633 S.E.2d at 503. (Internal citations omitted). In summary, the Bankruptcy Court lacked jurisdiction over U.S. Bank Trust and its claims, and therefore, the Court’s January 15, 2019 Order is void. The Bankruptcy Court’s void Order is also void in South Carolina.

Second, The Bankruptcy Court’s order that “U.S. Bank Trust was the owner of Note and Mortgage and the proper party to enforce the debt” conflicts with South Carolina substantive law, S.C. Code Ann. § 36-3-301(i): “The person entitled to enforce the instrument” [“the Note”] is the “holder of the Note.” The owner of the Note is not entitled to enforce the Note. Official comments to S.C. Code Ann. § 36-3-203 have made it abundantly clear the difference between the holder of the note and owner of the Note:

“[A] person who has an ownership right in an instrument might not be a person entitled to enforce the instrument. For example, suppose X is the owner and holder of an instrument payable to X. X sells the instrument to Y but is unable to deliver immediate possession to Y. Instead, X signs a document conveying all of X’s rights, title, and interest in the instrument to Y. Although the document may be effective to give Y a claim to ownership of the instrument, Y is not a person entitled to enforce the instrument until Y obtains possession of the instrument. No transfer of the instrument occurs under Section 3-203(a) until it is delivered to Y.”

The owner of the Note has no right to enforce the instrument as explained in the Official comments to S.C. Code Ann. § 36-3-203.

“Judgments of the bankruptcy courts are normally immune to collateral attack. They can be relied upon by state courts. And when the judgment is final and valid, it is given appropriate effect as res judicata or as collateral estoppel in subsequent proceedings in the state courts, where it is there entitled to full faith and credit.” *McNaughton-McKay Elec. Co. of N.C. v. Andrich*, 324 S.C. 275, 280; 482 S.E.2d 564, 567 (Ct. App. 1997); *Marks v. Old S. Mortg. Corp.*, 2015 S.C. App. Unpub. LEXIS 289 *4 (S.C. Ct. pp. 2015). The Bankruptcy Court’s Order under reference conflicted with South Carolina law, S.C. Code Ann. § 36-3-301(i), and is invalid in South Carolina, and therefore, cannot be given “full faith and credit” under U.S. Const. art. 4. §1.

In *Limehouse v. Hulsey*, 404 S.C. 93; 744 S.E.2d 566, (S.C. 2013), the South Carolina Supreme Court explained, “Although federal and state courts form one system of jurisprudence, federal courts have no general supervisory power over the state courts, and there is nothing a state court can do to affect federal practice and procedure...The United States Supreme Court has explained that “courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent.” *Id.*, 404 S.C. at 104; 744 S.E.2d at 572. In *this case*, the issue was the United States District Court’s Order remanding the underlying case from the District Court to the State Court without certifying as mandated under 28 U.S.C.S §1447(c), and therefore, the District Court’s

Order *contradicted with the federal law*. Based on these jurisdictional considerations, the South Carolina Supreme Court reversed the lower court's proceedings on the ground that it has no obligation to honor a federal court's Order when that Order contradicted with the federal law. Accordingly, the South Carolina Supreme Court ruled that the State court proceedings conducted after the federal court's entry of the remand were void. *Id.* 404 S.C. at 109-110; 566 S.E.2d at 575.

Applying the Conclusions of law in *Limehouse v. Hulsey*, 404 S.C. at 109-10; 744 S.E.2d at 575 to the instant case, the Master in Equity should have determined that the Bankruptcy Court's Order conflicted with State law and is invalid in South Carolina Jurisdiction. The South Carolina Courts have no obligation to honor and accord full faith and credit to the Bankruptcy Court's Order. Pursuant to *Ware and Ware* 404 S.C. 1, 12; 743 S.E.2d 817, 823 (S.C. 2013), the South Carolina Court has no obligation to honor and accord full faith and credit to the Bankruptcy Court's Order, which is invalid in South Carolina.

Summary

Upon Appellate Review, this Court should rule that the Bankruptcy Court's January 15, 2019 Order that as owner of Koola's Note and Mortgage, U.S. Bank Trust was the proper party to enforce the debt/instrument/Note is invalid in South Carolina Jurisdiction, cannot be given "full faith and credit" of the U.S. Constitution and reverse the Master in Equity's March 22, 2023 Order granting Summary Judgment to U.S. Bank Trust and void the foreclosure sale.

ARGUMENT III

BECAUSE THE MASTER IN EQUITY FRAUDULENTLY ALTERED THE BANKRUPTCY COURT'S SEPTEMBER 28, 2018, MOOT ORDER FROM SERVICER TO NOTEHOLDER TO FAVOR DITECH AND, IN TURN, RESPONDENT, SUMMARY JUDGMENT WAS NOT APPROPRIATE IN THE FORECLOSURE CASE.

FACTS OF THE CASE

In Koola's 2018 Bankruptcy, Ditech filed Objection to Confirmation of Koola's Chapter 13 Plan on April 4, 2018, (R. p. 126), on the ground that it was the Holder of Koola's Note and Mortgage. In spite of Koola's request and the Bankruptcy Court's Order, Ditech never produced the original Note and Mortgage in the Court.

In the Proof of Claim filed in the Bankruptcy Court on April 19, 2018, (R. p. 127-129), Ditech claimed that: (i) It was the current creditor; and (ii) *The claim had not been acquired from someone else*. In support of the Proof of Claim, it filed, *inter alia*, a copy of the Note originally executed by Koola in February 2004 in favor of the original lender Countrywide. Koola filed Objections to Proof of Claim on the ground that it was not the Holder of Koola's Note and Mortgage. Ditech refiled the Proof of Claim on June 8, 2018, (R. pp. 130-132), in which it reiterated its claims in the April 19, 2018, Proof of Claim.

During the Hearing on June 21, 2018, Ditech did not produce the original Note and Mortgage to support its claims against Koola. Instead, it *produced* an Affidavit of Lost Note dated January 15, 2015, during the Hearing, (R. pp. 133-134). [The Affidavit was not filed in the Bankruptcy Court before Hearing but presented to the Court during Hearing].

On June 10, 2018, Ditech transferred a "claim other than for security" under the provisions of Fed. R. Bankr. P. 3001(e)(2), (R. p. 136) and on July 10, 2018, Ditech sold ownership of the loan to U.S. Bank Trust, N.A., (R. p. 135).

ARGUMENTS

Ditech lacked standing in Koola’s Bankruptcy, it ceased to be a real party in interest and became a *moot party* in Koola’s Bankruptcy after the transfer of the alleged ownership of its claims to U.S. Bank Trust on July 25, 2018.

Pursuant to 11 U.S.C. §§101(10)(A), (5)(A) and South Carolina law, S.C. Code Ann. § 36-3-301(1) (2018), *a creditor would have standing in Bankruptcy only if it is the holder of the Note on or before the date when the Bankruptcy Petition is filed.* In the Proof of Claim filed in the Bankruptcy Court on April 19, 2018, (R. pp. 127-129), Ditech claimed that: (i) It was the current creditor; and (ii) *The claim had not been acquired from someone else.* In support of the Proof of Claim, it filed, *inter alia*, a copy of the Note originally executed by Koola in February 2004 in favor of the original lender Countrywide, which was not indorsed to it. The said copy of the Note *did not prove* that (i) Ditech had a claim against Koola; and (ii) Ditech was the Holder of Koola’s Note. Since Ditech had no claim – the right to enforce the instrument – *that arose at the time of or before the order for relief concerning the debtor*, it was not a creditor under 11 U.S.C. §§101(5)(A), (10)(A), and it was not the holder of Koola’s Note S.C. Code Ann. § 36-3-301(i). Therefore, it lacked standing in Koola’s bankruptcy.

In Bankruptcy, “[A] “person entitled to enforce the note,” as defined in U.C.C. 3-301 [corresponding to S.C. Code Ann. § 36-3-301] has the requisite standing to file a proof of claim in a bankruptcy case. *Allen v. U.S. Bank N. A (In re Allen)*, 472 B.R. at 565. Ditech lacked standing in Koola’s 2018 Bankruptcy because it was not the holder of Koola’s Note.

“Standing poses the potential for a domino effect. If a party lack standing to bring a matter before the court, the court lacks jurisdiction to decide the merits of the underlying case.” *United States v. AVX Corp.* 962 F.2d 108 (1st Cir. 1992). (Internal citation omitted). “Plaintiffs have the burden of establishing standing. If they cannot do so, their claims must be dismissed for lack of

subject matter jurisdiction...Because standing involves the federal court's subject matter jurisdiction, it can be raised sua sponte." *HSBC Bank United States v. Rayford*, 2007 U.S. Dist. LEXIS 86215 *2 (D. S. D. Ohio, 2007). (Internal citation omitted). Consequently, the Bankruptcy Court lacked subject matter jurisdiction (lack of *in rem* and *in personam* jurisdictions) over Ditech and its claims.

Ditech's Lost Note Affidavit

Instead of producing the original Note and Mortgage during the Hearing on June 21, 2018 to support its claims against Koola, Ditech produced an Affidavit of Lost Note dated June 15, 2018, (R. pp. 133-134), during the Hearing. In the Affidavit of Lost Note, Ditech claimed, inter alia, "*Ditech acquired the right to enforce the Note from Bank of America, N.A., [("BAC")] which was entitled to enforce the instrument when the loss of possession occurred.*" Upon Appellate Review, this Court should take notice of the following:

1. Ditech's claim that it acquired the right to enforce the Note from BAC contradicts with its claim in the Proof of Claim filed on April 19, 2018, (R. pp. 127-129), that it did not acquire its claim from somebody else, which invalidated its Lost Note Affidavit claim.
2. Pursuant to Fed. R. Bank. P. 3001(c)(1), Ditech was required to file a statement of the circumstances of the loss or destruction of the Note along with the Proof of Claim. It failed to do so; therefore, it is not entitled to make a Lost Not Affidavit claim.
3. Under S.C. Code Ann. § 36-3-804, only the owner of an instrument which is lost, *may maintain an action in his own name and recover from the party liable upon the lost instrument*. Since Ditech was not the owner of Koola's Note, it was not entitled to file the Affidavit of Lost Note under S.C. Code Ann. § 36-3-804.

After Ditech’s (i) alleged Transfer of Claim other than for Security to U.S. Bank Trust on June 8, 2018 and (ii) alleged transfer of ownership of claim to U. S. Bank Trust on July 25, 2018, Ditech ceased to be a real party in interest and became a moot party in Koola’s Bankruptcy.

On June 8, 2018, Ditech transferred a *claim other than for security* to U.S. Bank Trust under the provisions of Fed. R. Bankr. P. 3001(e)(2). (R. p. 136). On July 25, 2018, Ditech transferred ownership of the loan to U. S. Bank Trust, (R. p. 135). As a result, Ditech ceased to be a real party in interest and became a *moot party* in Koola’s 2018 Bankruptcy.

“The doctrine of mootness flows from the constitutional limitation of federal court jurisdiction to actual “Cases” or “Controversies.” U.S. Cons. Art. III, § 2, cl. 1. “To qualify as a case fit for federal court adjudication, an actual controversy must be extant at all stages of review, not merely at the time the complaint filed.” ... Thus, “a case is moot when issues presented are no longer ‘live’ or the parties lack a legally cognizable interest in the outcome....” *White Tail Park, Inc., v. Stroube*, 413 F.3d 451, 457 (4th Cir. 2005).

“A case is moot where a judgment rendered by the Court will have no practical legal effect upon an existing controversy because an intervening event renders any grant of effectual relief impossible for the Court.” *S.C. Ret. Sys. Inv. Comm’n v. Loftis*, 402 S.C. 382, 384; 741 S.E.2d 757, 758 (2013).

Bankruptcy Court’s September 28, 2018 Order in favor of Ditech

In Summary, (i) Ditech lacked standing in Koola’s Bankruptcy, and consequently, the Bankruptcy Court had no jurisdiction over Ditech and its alleged claims, (This Brief, pp.23-24); (ii) Ditech was not entitled to file the Lost Note affidavit, (This Brief p. 24); and (iii) Ditech became a moot party in Koola’s Bankruptcy after it transferred a claim other than for security to U.S. Bank Trust on June 8, 2018, (R. p. 136); and sold ownership of the loan to U.S. Bank Trust on July 25, 2018, (R. p. 135). Nevertheless, the Bankruptcy Court issued an Order in favor of Ditech in

September 2018, (R. PP. 059-085), in which the Court concluded as law: (i) *Ditech was the servicer of Fannie Mae*; (ii) Ditech, which was allowed a ‘secured claim’ in the amount of \$173,580.30, shall administer any funds paid on the debt for the benefit of the owner of the debt, Fannie Mae, (R. p. 085, lines 5-11). *The Bankruptcy Court’s Order is a moot Order and is jurisdictionally void.*

The Master in Equity’s April 13, Order

In the Master in Equity’s Order filed on April 13, 2023, (R. pp. 006-023) the Court concluded as law: “*The United States Bankruptcy Court issued an Order filed on 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,*” (R. p. 008, lines 27-30), and granted Summary Judgment in favor of U. S. Bank Trust. The Master in Equity erred in granting Summary Judgment to U.S. Bank Trust on the following grounds:

(i) The Master in Equity modified Bankruptcy Court’s Order. The Master in Equity modified the Bankruptcy Court’s Oder from *Ditech was the servicer of the owner of the debt Fannie Mae*, (R. p. 085, lines 5-11), to *Ditech was the holder of the Note and Mortgage and was the proper party authorized to enforce the debt*, (R. p. 008, lines 27-30). Koola alleges that this modification was the result of Fraud upon the Court. Fraud upon the Court is “fraud which...subvert[s] the integrity of the Court itself, or is a fraud perpetrated by officers of the Court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication.” *Chewing v. Ford Motor Co.*, 346 S.C. 28, 34; 550 S.E.2d 584, 587 (S.C. Ct. App. 2001).

(ii) The Master in Equity’s reliance on the Bankruptcy Court’s jurisdictionally void *moot Order* made the Master’s Order moot, and it is invalid in South Carolina Jurisdiction. Pursuant to

McNaughton-McKay Elec. Co. of N.C. v. Andrich, 324 S.C. 275, 280; 482 S.E.2d 564, 567 (Ct. App. 1997) and *Marks v. Old S. Mortg. Corp.*, 2015 S.C. App. Unpub. LEXIS 289 *4 (S.C. Ct. pp. 2015), the Master in Equity has no obligation to honor the Bankruptcy Court's moot Order and give full faith and credit. Pursuant to *Limehouse v. Hulsey*, 404 S.C. 93; 744 S.E.2d 566 (S.C. 2013), the South Carolina Courts have no obligation to honor and accord full faith and credit to the Bankruptcy Court's jurisdictionally void moot Order. Pursuant to *Ware and Ware* 404 S.C. 1, 12; 743 S.E.2d 817, 823 (S.C. 2013), the South Carolina Courts have no obligation to honor and accord full faith and credit to the Bankruptcy Court's jurisdictionally void and moot Order.

Summary.

The Bankruptcy Court's September 28, 2018 Order in favor of Ditech was a moot Order. That moot Order is void in South Carolina Jurisdiction. The Master in Equity fraudulently altered the Bankruptcy Court's Order from Ditech was the servicer of the owner of the debt Fannie Mae to Ditech was the holder of the Note and Mortgage and was the proper party authorized to enforce the debt. Koola alleges that this modification was the result of Fraud upon the Court. Upon Appellate Review, this Court should reverse the Master in Equity's April 13, 2023 Order granting Summary Judgment to U.S. Bank Trust, reverse the Judgment of the Master in Equity and void the foreclosure sale.

ARGUMENT IV

BECAUSE THE BANKRUPTCY COURT'S ORDER THAT RES JUDICATA BARRED KOOLA FROM RAISING U.S. BANK TRUST'S STANDING IN KOOLA'S BANKRUPTCY WAS AN *ORDER WITHOUT MERIT AND RENDERED BY A COURT WHICH HAD NO JURISDICTION*, SUMMARY JUDGMENT IN FAVOR OF RESPONDENT WAS NOT APPROPRIATE.

FACTS OF THE CASE

In Koola's 2021 Bankruptcy, U.S. Bank Trust filed Proof of Claim on April 9, 2021, under Claim Register 1-1, (R. pp. 140-141), in which it claimed, *inter alia*, that: (i) It is the current creditor; and (ii) The claim has not been acquired from someone else. To '*perfect*' the proof of claim, it filed, *inter alia*, a copy of the Note given by Koola to Countrywide in February 2004.

On October 5, 2018 and November 13, 2018, U.S. Bank Trust claimed that Ditech: (i) transferred a *claim other than for security* to U.S. Bank Trust on June 8, 2018 under the provisions of Fed. R. Bankr. P. 3001(e)(2), (R. p. 136), and (ii) transferred *ownership of Ditech's claim* to U.S. Bank Trust on July 25, 2018, (R. p.135), respectively.

On November 13, 2018, U.S. Bank Trust filed a Proof of Claim in the Bankruptcy Court in which it stated that: (i) U.S. Bank Trust was the current creditor; and (ii) The claim has been acquired from Federal National Mortgage Association. (R. pp. 137-139).

In summary, U.S. Bank Trust had filed three different claims in Koola's 2018 and 2021 Bankruptcies.

During the Confirmation Hearing on July 29, 2021, Koola raised U.S. Bank Trust's lack of standing in Koola's 2021 as well as 2018 Bankruptcies. Spontaneously, the Bankruptcy Court ruled *sua sponte* from the Bench and in its August 17, 2021, Order, (R. pp. 031-044) that: (i) In the 2018 case, Koola could have – but did not – object to the Transfer of Claim other than for

Security pursuant to Fed. R. Bankr. P. 3001(e)(2); and res judicata or claim preclusion barred Koola from raising the issue of standing in the 2021 case. (R. p. 042, lines 3-10).

In the April 13, 2023 Order, the Master in Equity ruled that Koola cannot raise U.S. Bank trust's standing in the foreclosure case. (R. p. 011, lines 13-27).

ARGUMENTS

Res judicata applies where three conditions are met: (1) *there is a prior judgment which was final, on the merits, "and rendered by a Court of competent jurisdiction in accordance with the requirements of due process;"* (2) the parties to the second matter are identical to, or in privity with, the parties in the first action; and (3) "the claims in the second matter are based upon the same cause of action involved in the earlier proceeding."

LVNV Funding, LLC v. Harling, 852 F.3d 367, 371 (4th Cir. 2017). (Emphasis added).

U.S. Bank Trust's Proof of Claim in Koola's 2021 Bankruptcy did not establish that it was Koola's creditor which had a claim against Koola that arose on or before the day the Bankruptcy Petition was filed as mandated by 11 U.S.C. §§ 101(10)(A), (5)(A), and it was not the holder of Koola's Note and was not the person entitled to enforce the instrument under South Carolina law, S.C. Code Ann. § 36-3-301(1) (2018). "[A] "person entitled to enforce the note," as defined in U.C.C. 3-301 [corresponding to S.C. Code Ann. § 36-3-301] has the requisite standing to file a proof of claim in a bankruptcy case." *Allen v. U.S. Bank NA (In re Allen)*, 472 B.R. at 565. Therefore, U.S. Bank trust lacked standing in Koola's 2021 Bankruptcy.

In Koola's 2018 Bankruptcy U.S. Bank Trust filed Notice entitled "TRANSFER OF CLAIM OTHER THAN FOR SECURITY on October 5, 2018, in which it claimed that on June 8, 2018, Ditech transferred a *claim other than for security* to U.S. Bank Trust under the provisions of R. 3001(e)(2), Fed. R. Bankr. P., (R. p. 136). Under 11 U.S.C. §101(49)(A)(1), the term security means "note.". Thus, transfer of a claim other than for security means transfer of a claim without the transfer of the note – an unsecured claim. This transfer of an unsecured claim did not confer

standing on U.S. Bank Trust because only the Noteholder has standing in Bankruptcy. *Allen v. U.S. Bank, N.A.* (In re Allen), 472 B.R. at 565.

On November 13, 2018, U.S. Bank Trust filed a Proof of Claim in the Bankruptcy Court in which it stated that: (i) U.S. Bank Trust was the current creditor; and (ii) The claim has been acquired from Federal National Mortgage Association. It did not attach a proof to the Proof of claim to show that it was Koola's Noteholder. Therefore, the Proof of Claim filed on November 13, 2018 did not confer standing on U.S. Bank Trust in Koola's 2018 Bankruptcy.

“Standing poses the potential for a domino effect. If a party lack standing to bring a matter before the court, the court lacks jurisdiction to decide the merits of the underlying case.” *United States v. AVX Corp.* 962 F.2d 108 (1st Cir. 1992). (Internal citation omitted). “Plaintiffs have the burden of establishing standing. If they cannot do so, their claims must be dismissed for lack of subject matter jurisdiction...Because standing involves the federal court's subject matter jurisdiction, it can be raised sua sponte.” *HSBC Bank United States v. Rayford*, 2007 U.S. Dist. LEXIS 86215 *2 (D. S.D. Ohio, 2007). (Internal citation omitted). Consequently, the Bankruptcy Court had no subject matter jurisdiction (lack of *in rem* and *in personam* jurisdictions) over U.S. Bank Trust and its claims.

During the Confirmation Hearing on July 29, 2021, Koola raised U.S. Bank Trust's lack of standing in Koola's 2021 as well as 2018 Bankruptcies. Spontaneously, the Bankruptcy Court ruled *sua sponte* from the Bench and in its August 17, 2021 Order, (R. pp. 031-044), that: (i) In the 2018 case, Koola could have – but did not – object to the Transfer of Claim other than for Security pursuant to Fed. R. Bankr. P. 3001(e)(2), and res judicata or claim preclusion barred Koola from raising the issue of standing in the 2021 case.

Fed. R. Bankr. P. 3001(e)(2) has provided:

Transfer of Claim other than for Security after Proof filed. If a claim other than the one based on publicly traded note...has been transferred other than for security after the proof of claim has been filed, *evidence of the transfer shall be filed by the transferee*. The clerk shall immediately notify the affected transferor by mail of the filing of evidence of transfer and *objection thereto, if any, must be filed within 21 days of the mailing of the notice or within any additional time allowed by the court. If the alleged transferor files a timely objection* and the court finds, after notice and hearing, that the claim has been transferred other than for security, it shall enter an order substituting the transferee for the transferor. *If a timely objection is not filed by the alleged transferor the transferee shall be substituted for the transferor.*" (Emphasis by italics added).

First, Fed. R. Bankr. P. 3001(e)(2) has emphatically stated that the transferor must object to the transfer of claim filed by the transferee. Second, Courts, which have interpreted R. 3001(e)(2), have ruled that only the transferor of the claim has standing to object to the transfer of a claim. *In re Moehring*, 485 B.R. 571, 577 (Bankr. S.D. Ohio, 2013).

The Bankruptcy Court's assertion that "Debtor could have – but did not – object to the transfer of the claim in the 2018 case" is an egregious misrepresentation of the Rule. *In plain words, the Bankruptcy Court lied from the Bench and in the August 17, 2021 Order*. The Bankruptcy Court's Order egregiously misrepresenting or lying about R. 3001(e)(2) was an Order without merit. Further, it was shown above that the Bankruptcy Court lacked jurisdiction over U.S. Bank trust and its claims. *Res judicata* applies only to Orders with Merit issued by a Court of competent jurisdiction. Therefore, *res judicata* did not bar Koola from raising U.S. Bank Trust's standing in the 2021 Bankruptcy. In the April 13, 2023 Order, (R. p.006-026), the Master in Equity defined *res judicata* incorrectly by omitting the key provision of the doctrine: "*Orders with merit issued by courts of competent jurisdiction.*"

In the April 13, 2023 Order, (R. p. 011, lines 13-20), the Master in Equity also ruled that *res judicata* barred Koola from raising U.S. Bank Trust's standing in the foreclosure case. The Master in Equity grossly misunderstood the concept of standing. As defendant, Koola has no

burden of establishing standing in the foreclosure. “A plaintiff must have standing to institute an action.” *Murray v. Estate of Murray*, 436 S.C. at 111; 871 S.E. 2d at 179. “Plaintiffs bear the burden of establishing standing.” *S. Walk at Broadlands Homeowner’s Ass’n v. Openband at Broadlands, LLC*, 713 F.3d at 181 citing *Lujan v. Defenders of Wildlife*, 504 U.S. at 561.

SUMMARY:

Upon Appellate Review, this Court should reverse the Master in Equity’s grant of Summary Judgment to U.S. bank Trust on the ground that U.S. Bank Trust has not established its standing in the case, and the Master in Equity failed to determine whether U.S. bank Trust had standing in the case.

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the Master in Equity.

Respectfully submitted,



Signature

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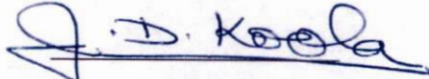
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CERTIFICATE OF COMPLIANCE

The appellant, Johnson D. Koola, certifies that Appellant's Final Brief complies with Rule 211(b), SCACR.



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