

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

29504

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Special Circuit Court Judge

RECEIVED

AUG 21 2013

Case No. 2012-CP-46-03040

SC Court of Appeals

Deutsche Bank National Trust Company, as Trustee for
J.P. Morgan Mortgage Acquisition Trust 2007-CH1,
Asset Backed Pass Through Certificates, Series 2007-
CH1, Respondent,

v.

Cora B. Wilks, David C. Wilks, Chase Bank USA,
N.A., and Midland Funding, LLC, Defendants.

Of whom Cora B. Wilks and David C. Wilks are Appellants

Motion to Dismiss Appeal

Pursuant to Rules 203 and 240 of the South Carolina Appellate Court Rules,
Respondent Deutsche Bank National Trust Company, as Trustee for J.P. Morgan
Mortgage Acquisition Trust 2007-CH1, Asset Backed Pass Through Certificates, Series
2007-CH1 (“Deutsche Bank”) moves this Court to dismiss the above-captioned appeal.
This matter warrants dismissal because Appellants, Cora B. Wilks and David C. Wilks
(“Appellants”), failed to serve Deutsche Bank with a Notice of Appeal as mandated by
Rule 203(a), SCACR. As a result, this Court lacks jurisdiction over this appeal.

Our Appellate Court Rules mandate that the “notice of appeal shall be served
on all respondents within thirty (30) days after receipt of written notice of entry of the

order or judgment.” Rule 203(b), SCACR (emphasis added).¹ The Notice of Appeal “shall” include all information set forth in Rule 203(e), SCACR.²

“The requirement of service of the notice of appeal is jurisdictional, i.e., if a party misses the deadline, the appellate court lacks jurisdiction to consider the appeal. . . .” Coker v. Cummings, 381 S.C. 45, 52, 671 S.E.2d 383, 387 (Ct. App. 2008) (citing Elam v. S.C. Dept. of Transp., 361 S.C. 9, 14-15, 602 S.E.2d 772, 775 (2004)). Our appellate courts have no authority to rescue the delinquent party or extend or expand the time in which the notice of appeal must be served. Id.; Connor v. City of Forest Acres, 348 S.C. 454, 461, 560 S.E.2d 606, 609 (2002) (dismissing parties who had not been timely served with a notice of appeal); Rule 263, SCACR (“The time prescribed by these Rules for performing any act **except the time for the service of the notice of appeal** under Rules 203 and 243 may be extended . . . by the appellate court . . .”) (emphasis added).

Appellants failed to serve the Notice of Appeal on Deutsche Bank. On July 15, 2013, Appellants sent a letter to this Court purporting to enclose: (1) “a notice of appeal in the above case,” (2) a “[p]roof of service of the notice of appeal on the respondents,” (3) the order on appeal, and (4) the required filing fee. *See* Letter dated July 15, 2013, attached hereto as Exhibit A.³ Despite these statements, Appellants **failed to serve** any Notice of Appeal or Proof of Service on Deutsche Bank. The only

¹ This matter is an appeal from the Court of Common Pleas in York County.

² The cover letter dated July 15, 2013, cannot substitute for the Notice of Appeal because it does not comply with the mandatory requirements of Rule 203(e), SCACR.

³ Exhibit A contains a complete copy of the materials received from Appellants. *See* Affidavit of Michael J. Anzelmo, Esquire, attached hereto as Exhibit B.

documents received by Deutsche Bank were (1) the cover letter to this Court, (2) the cover letter to the trial court, and (3) the order on appeal. See Affidavit of Michael J. Anzelmo, Esquire, attached hereto as Exhibit B. Appellants did not serve any Notice of Appeal or Proof of Service of the Notice of Appeal on Deutsche Bank. Id. As of the date of this letter, more than thirty (30) days have elapsed since the Appellants received notice of the entry of the trial court's order, and Deutsche Bank has yet to be served with a Notice of Appeal in this matter. Id. Thus, by failing to serve Deutsche Bank with the Notice of Appeal, Appellants did not comply with the mandatory requirement of Rule 203(b), SCACR. This Court lacks jurisdiction to consider the appeal and must dismiss the appeal.⁴

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

Michael J. Anzelmo
SC Bar No. 72933
E-Mail: michael.anzelmo@nelsonmullins.com
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, South Carolina 29201
803.799.2000

Attorneys for Respondent Deutsche Bank

Columbia, South Carolina
August 21, 2013

⁴ This is not a situation where a minor or clerical error exists in a notice of appeal. Rather, Appellants have wholly failed to serve any Notice of Appeal on Deutsche Bank. Our rules mandate service of the Notice of Appeal and require dismissal when an appellant fails to do so. See Rule 203(b), SCACR.

JOHN MARTIN FOSTER

Attorney at law

EXHIBIT

A

The Guardian Building PO Box 106 803 324 8100
223 East Main Street Suite 520 Rock Hill SC 803 324 8109 Fax
Rock Hill South Carolina 29730 29731-6106 jmfoster@comporium.net

July 15, 2013

The Honorable Jenny Abbott Kitchings
Clerk of the South Carolina Court of Appeals
1015 Sumter Street
Post Office Box 11629
Columbia, SC 29211

Re: Deutsche Bank National Trust Company, Respondent
v. Cora B. Wilks and David C. Wilks, Appellants
Docket No. 12-CP-46-03040


Dear Ms. Kitchings:

Enclosed for filing is a notice of appeal in the above case. Also enclosed are the following

- (1) Proof of service of the notice of appeal on the respondents,
- (2) A copy of the order which is to be challenged on appeal, and
- (3) Our check for the filing fee of \$100.00

Please return a stamped copy of the above in the enclosed self-addressed envelope. Thank you, as always, for your cooperation and that of your staff.

Sincerely,


John Martin Foster
Post Office Box 106
Rock Hill, South Carolina 29731
803 324-8100
Attorney for Appellants

jmf/
enclosures

Other counsel of record:

Michael J. Anzelmo
Benjamin Rush Smith, III
Nelson Mullins Riley & Scarborough, LLP
Attorneys for Deutsche Bank
Post Office Box 11070
Columbia, S.C. 29211
803 255-9312

Wylie Westmoreland Clarkson
Korn Law Firm, PA
Attorneys for Midland Funding, LLC
Post Office Box 12369
Columbia, S.C. 29211
803 252-5817

JOHN MARTIN FOSTER

Attorney at law

The Guardian Building	PO Box 106	803 324 8100
223 East Main Street Suite 520	Rock Hill SC	803 324 8109 Fax
Rock Hill South Carolina 29730	29731-6106	jmfooster@comporium.net

July 15, 2013

The Honorable David Hamilton
Clerk of the Circuit Court
Post Office Box 649
York, SC 29745

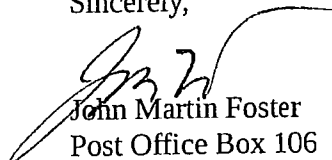
Re: Deutsche Bank National Trust Company, Respondent
v. Cora B. Wilks and David C. Wilks, Appellants
Docket No. 12-CP-46-03040

Dear Mr. Hamilton:

Enclosed for filing is a notice of appeal in the above case. Also enclosed is proof of service of the notice of appeal on counsel for the other parties.

Thank you and your staff, as always, for your help in these matters.

Sincerely,



John Martin Foster
Post Office Box 106
Rock Hill, South Carolina 29731
803 324-8100
Attorney for Appellants

jmf/
enclosures

Other counsel of record:

Michael J. Anzelmo
Benjamin Rush Smith, III
Nelson Mullins Riley & Scarborough, LLP
Attorneys for Deutsche Bank
Post Office Box 11070
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803 255-9312

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Attorneys for Midland Funding, LLC
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Columbia, S.C. 29211
803 252-5817

FORM 4

STATE OF SOUTH CAROLINA
 COUNTY OF YORK
 IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
 CASE NUMBER 2012CP4603040

Deutsche Bank National Trust Company	Cora B Wilks	David C Wilks
	Chase Bank USA NA	Midland Funding LLC

Submitted by: _____

PLAINTIFF(S) DEFENDANT(S)

Attorney for: Plaintiff Defendant
 Self-Represented Litigant

- DISPOSITION TYPE (CHECK ONE)**
- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
 - DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
 - ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRCP; Rule 41(a), SCRCP (Vol. Nonsuit);
 Rule 43(k), SCRCP (Settled); Other: _____
 - ACTION STRICKEN (CHECK REASON):** Rule 40(j) SCRCP; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other: _____
 - DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order; (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

ORDER GRANTING PLAINTIFF'S MOTION TO DISMISS

This order ends does not end the case.
 Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "NA" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

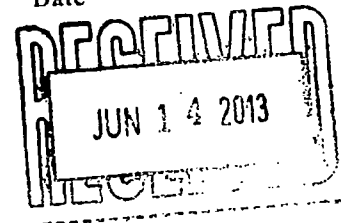
If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

s/ S. Jackson Kimball
 Circuit Court Judge
 CPFORM4Cm
 SCCA SCRCP Form 4C (Revised 3/2013)

3063
 Judge Code

6/6/2013
 Date



STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
 COUNTY OF YORK) SIXTEENTH JUDICIAL CIRCUIT

Deutsche Bank National Trust) Case No. 2012-CP-46-03040
 Company, as Trustee for J.P. Morgan)
 Mortgage Acquisition Trust 2007-CH1,)
 Asset Backed Pass Through Certificates,)
 Series 2007-CH1,)

Plaintiff,)

vs.)

Cora B. Wilks, David C. Wilks, Chase)
 Bank USA, N.A., and Midland Funding,)
 LLC,)

Defendants.)

Order Granting Plaintiff's
Motion to Dismiss

FILED RECEIVED
 2013 JUN 12 AM 10:09
 DANIEL R. HAMILTON
 CC, CP, & GS
 YORK COUNTY, SC

This matter came before me on May 16, 2013, upon Plaintiff's motion pursuant to Rule 12(b)(6), SCRPC, to dismiss the counterclaim filed by Defendants Cora B. Wilks and David C. Wilks ("the Wilks") in this action. Michael J. Anzelmo appeared on behalf of Plaintiff. John Martin Foster appeared on behalf of the Wilks. Based on the record presented, I make the following findings and conclusions.

DISCUSSION

Plaintiff initiated this action to foreclose on the Wilks' mortgage executed on May 23, 2005, and recorded on June 1, 2005 at Book 7128, Page 288 in the York County Register of Deeds Office. The Wilks counterclaimed, and the counterclaim centered on allegations that the closing of that mortgage was not supervised by an attorney. They alleged that, as a result, Deutsche Bank was precluded from foreclosing pursuant to *Matrix Financial Services, Corp. v. Frazer*, 394 S.C. 134, 714 S.E.2d 532 (2011), and *BAC Home Loan Financing, LP v. Kinder*, 398 S.C. 619, 731 S.E.2d 547 (2012). Thereafter, Deutsche Bank filed the motion to dismiss the counterclaim pursuant to Rule 12(b)(6), SCRPC. Deutsche Bank asserts that the counterclaim failed to state a claim as a matter of law because the rule announced in *Matrix* had prospective application only.

A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of a claim, and must be granted if the claim does not set forth sufficient allegations entitling the party to relief. *Williams v. Condon*, 347 S.C. 227, 232–33, 553 S.E.2d 496, 499 (Ct. App. 2001). A motion to dismiss a counterclaim must be based solely on the allegations set forth in the counterclaim. *Chas. Cnty. Sch. Dist. V. Laidlaw Transit, Inc.*, 348 S.C. 420, 424, 559 S.E.2d 362, 364 (Ct. App. 2001). The question is whether, in the light most favorable to the complainant, and with every doubt resolved on his behalf, the counterclaim states any valid claim for relief. *Toussaint v. Ham*, 292 S.C. 415, 416, 357 S.E.2d 8, 9 (1987). The “motion must be granted if the facts and inferences reasonably deducible from them show that the [defendant] could not prevail on any theory of the case.” *Gray v. State Farm Auto Ins. Co.*, 327 S.C. 646, 650–51, 492 S.E.2d 272, 274–75 (Ct. App. 1997).

I find and conclude that the counterclaim based on *Matrix* cannot survive as a matter of law. The Supreme Court’s holding in *Matrix* has prospective application only from the date of the issuance of the opinion. The Court stated that the rule announced therein only applied “. . . to all filing dates after the issuance of this opinion.” *Matrix*, 394 S.C. at 140, 714 S.E.2d at 535. The court issued the *Matrix* opinion on August 8, 2011. The prospective application of *Matrix* is confirmed in the *BAC v. Kinder* opinion. The Court stated:

In *Matrix*, we reiterated that the closing of a loan without attorney supervision constitutes the unauthorized practice of law. Furthermore, we held that engaging in this unlawful behavior would preclude a lender from obtaining equitable relief. *Id.* at 140, 714 S.E.2d at 535. However, in a substitute opinion issued on rehearing, we explained that this holding would be prospective only, stating we would “apply this ruling to all filing dates after the issuance of this opinion,” which was August 8, 2011. *Id.* To the extent some confusion apparently exists as to what filing date *Matrix* referred to, we clarify now that it is the date the document a party seeks to enforce was filed. *Kinder*, 398 S.C. at 624, 731 S.E.2d at 549-50.

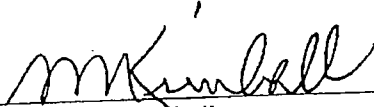
The Court then applied that rule to the claims presented and allowed BAC’s claims to proceed, stating “the mortgage was recorded on April 20, 2007, well before the issuance of *Matrix*. Thus, regardless of whether an attorney participated in the closing of [the mortgage], BAC would not be barred from recovery by the illegality.” *Id.*

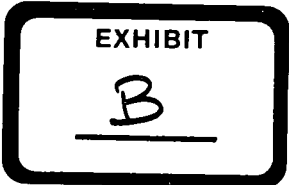
This case is governed by that holding. The mortgage in this case was recorded on June 1,

Handwritten signature and initials, possibly 'M' and '#2'.

2005, more than six years before the decision in *Matrix*. Accordingly, the Wilks' counterclaim cannot state a claim upon which relief can be granted, and fails as a matter of law. Therefore, I find and conclude that the counterclaim must be dismissed with prejudice.

AND IT IS SO ORDERED.

 6/6/13
S. Jackson Kimball
Special Circuit Court Judge
York County



THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Special Circuit Court Judge

Case No. 2012-CP-46-03040

Deutsche Bank National Trust Company, as Trustee for
J.P. Morgan Mortgage Acquisition Trust 2007-CH1,
Asset Backed Pass Through Certificates, Series 2007-
CH1, Respondent,
v.
Cora B. Wilks, David C. Wilks, Chase Bank USA,
N.A., and Midland Funding, LLC, Defendants.
Of whom Cora B. Wilks and David C. Wilks are Appellants

Affidavit of Michael J. Anzelmo

I, Michael J. Anzelmo, Esquire, of the law firm of Nelson Mullins Riley &
Scarborough LLP, after being duly sworn, depose and say:

1. I am a citizen of the State of South Carolina, and I am of sound mind
and over the age of twenty-one years.
2. I am competent to testify as to the matter stated herein and do so on my
own free will.
3. The statements in the affidavit are true and based on my own personal
knowledge.

4. I am licensed to practice law in the State of South Carolina, bar number 72933, and am an associate at the law firm of Nelson Mullins Riley & Scarborough LLP.

5. I represent Respondent Deutsche Bank National Trust Company, as Trustee for J.P. Morgan Mortgage Acquisition Trust 2007-CH1, Asset Backed Pass Through Certificates, Series 2007-CH1 in the above-captioned matter.

6. On July 16, 2013, my office received correspondence from Appellant's counsel dated July 15, 2013.

7. This correspondence stated it enclosed: (1) "a notice of appeal in the above case," (2) a "[p]roof of service of the notice of appeal on the respondents," (3) the order on appeal, and (4) the required filing fee.


8. Despite these statements, the correspondence did not include any Notice of Appeal or Proof of Service of the Notice of Appeal on Deutsche Bank.

9. The only documents received by Deutsche Bank were (1) the July 15, 2013, cover letter to this Court, (2) the cover letter to the trial court dated July 15, 2013, and (3) the order on appeal. Exhibit A to the Motion to Dismiss contains these documents and is a complete copy of the materials received from Appellants.

10. Appellants did not serve Deutsche Bank with any Notice of Appeal or Proof of Service of the Notice of Appeal.

11. More than thirty (30) days have elapsed since the Appellants received notice of the entry of the trial court's order, and Deutsche Bank has yet to be served with a Notice of Appeal in this matter.

Further affiant sayeth not.



Michael J. Anzelmo, Esquire

August 20, 2013

SWORN to and subscribed before me

this 20th day of August, 2013





Notary Public for South Carolina (L.S.)

My Commission Expires: 7-14-15

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Special Circuit Court Judge

Case No. 2012-CP-46-03040

Deutsche Bank National Trust Company, as Trustee for
J.P. Morgan Mortgage Acquisition Trust 2007-CH1,
Asset Backed Pass Through Certificates, Series 2007-
CH1, Respondent,

v.

Cora B. Wilks, David C. Wilks, Chase Bank USA,
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Of whom Cora B. Wilks and David C. Wilks are Appellants

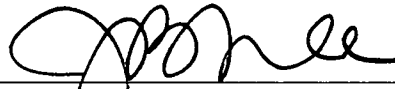
PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Deutsche Bank National Trust Company, as Trustee for JPMorgan Acquisition Trust 2007-CH1, Asset Backed Pass Through Certificates, Series 2007-CH1, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings: Motion to Dismiss Appeal

Counsel Served:

John Martin Foster
Post Office Box 106
Rock Hill, SC 29731



Jennifer B. Lee
Administrative Assistant

August 21, 2013

Nelson Mullins

Nelson Mullins Riley & Scarborough LLP
Attorneys and Counselors at Law
1320 Main Street / 17th Floor / Columbia, SC 29201
Tel: 803.799.2000 Fax: 803.255.9024
www.nelsonmullins.com

Michael J. Anzelmo
Tel: 803.255.9312
Fax: 803.255.9024
michael.anzelmo@nelsonmullins.com

August 21, 2013

Hand Delivered

The Honorable Jenny Abbott Kitchings
Clerk of Court
SC Court of Appeals
1015 Sumter Street - 5th Floor
Columbia, SC 29201

RECEIVED
AUG 21 2013
SC Court of Appeals

RE: Deutsche Bank v. Wilks, Cora and David, et al.
Appellate Case No. 2013-001524
Our File No.: 11281.01675

Dear Ms. Kitchings:

Enclosed please find an original and seven copies of a Motion to Dismiss Appeal in the above-referenced matter. Please file the original and return a clocked-in copy to me via our courier. Should you have any questions, please do not hesitate to contact me.

By copy of this letter, I am hereby serving opposing parties.

Very truly yours,



Michael J. Anzelmo

MJA:jlee
Enclosures

cc: John Martin Foster