THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Master in Equity

Case No. 2010-CP-46-4307

James L Dennis and Enid Dennis

Appellants,

vs.

HSBC MORTGAGE SERVICES, INC.

Respondent.

FINAL BRIEF ON APPEAL

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Statement of Issues on Appeal

1. Did the trial court err in refusing to permit the Appellants to represent themselves at the hearing, pursuant to an order of reference, in a matter seeking to foreclose a mortgage?

2. Did the trial court err in precluding the Appellants from showing that the unnotarized assignment was fraudulent, and delivered after the foreclosure proceeding was commenced, that the promissory note was separated from the mortgage, and that the debt had been discharged in bankruptcy, as a defense to the foreclosure action?

Statement of the Case

This is an action to foreclose a mortgage on property located in York County, South Carolina. The lis pendis was filed on October 1, 2010, and an amended lis pendis was filed on October 6, 2010 **(R. p10)**. The summons and complaint was filed on October 6, 2010 **(R. p14)**, and waived any deficiency. An answer was filed on February 6, 2012 **(R. pp. 42 - 54)**. A hearing was conducted on March 6, 2012, following which the Master in Equity granted a judgment of foreclosure and sale **(R. p 59)**. A notice of appeal was timely filed on March 8, 2012 **(R. p 1)**.

Facts

On November 30, 2006, the defendants executed a note and a mortgage covering real property located in York County, South Carolina, that is the subject of this foreclosure action **(R. p 4 line 4 - 8)**. The note was for $225,710.00, with an initial interest rate of 8.36%, and was in favor of Decision One Mortgage Company, LLC ("Decision One") **(R. p 4 line 9 - 15)**. The mortgage was issued in favor of Mortgage Electronic Registration, Inc. ("MERS") as nominee for Division On **(R. p 4 line 9 - 15)**. In the complaint, plaintiff alleges that the mortgage was assigned to it, but does not set forth the date of assignment or attach a copy of the assignment itself, **(R p 28)**, and that the mortgage became due and owing on March 1, 2010, in the total sum of $203,238.86 **(R. p 12 line 12 - 21)**.

At the hearing, defendants sought to represent their living estates *pro se*, but the court refused to let them do so **(R. p 106 line 18 - 24)**. Rather the Master in Equity ruled that they were in default **(R. p 109 line 7)**. It found that the answer was a nullity and would not hear them in defense **(R. p 108 line 21 - 23)**.

Received into evidence were the note dated November 30, 2006; the mortgage dated November 30, 2006; an assignment of mortgage from MERS to plaintiff, dated October 12, 2010, *after this action had been commenced*; the denial

of foreclosure intervention; a certification; and affidavits concerning the account and attorney fees **(R. p 4 - 6)**.

Defendants contended that the assignment was "fraudulent. It is not notarized. It was filed after the foreclosure proceeding was placed into motion. The promissory note was separated from the mortgage **(R. p 109 line 2 – 4)**. The plaintiff indicated in interrogatories that they could not locate the note **(R. p 32 – 33 line 7, line 11)**. This has been discharged in bankruptcy. . . ." **R. p 29)**.

In response, the court said that "the Defendants Dennis have not appeared in court in this action. You have no authority to appear on their behalf. There has been no objection raised to any of the documents offered by the Plaintiff in support of its claim to foreclose the mortgage. . . . [Y]ou have no standing to present them as far as I know." **R. p 118 line 13 – 14)**.

Argument

I. Appellants Should Have Been Permitted to Act *Pro Se*

The trial court refused to hear from the defendants because they presented themselves as executors of their living estates. In essence, they contended that the real property was held in a trust and they were proceeding to represent that trust. Under South Carolina law, they had an absolute right to do so.

S.C. Code Ann. § 40-5-80 (2011) specifically provides "This chapter may not be construed so as to prevent a citizen from prosecuting or defending his own cause, if he so desires." The South Carolina has construed this provision broadly: "[A]ny individual may represent another individual before any tribunal, if (1) the tribunal approves of the representation and (2) the representative is not compensated for his services." *In re Unauthorized Practice of Law Rules*, 309 S.C. 304, 422 S.E.2d 123 (S.C. 1992). So, too, a business may be represented by a nonlawyer officer, agent or employee, including attorneys licensed in other jurisdictions and those possessing Limited Certificates of Admission pursuant to S.C. App. Ct. R. 405 in civil magistrate's court proceedings. *Ibid.*

In essence, the Appellants were representing themselves and were, accordingly, statutorily entitled to act *pro se*. The error vitiates the entire

proceeding.

II. Appellants Had Viable Defenses to Foreclosure

In South Carolina, a mortgage is a mere security for a debt. *Williams v. Lawrence*, 194 S.C. 1, 8 S.E.2d 838 (S.C. 1940); Patterson *v. Rabb*, 38 S.C. 138, 17 S.E. 463 (1893); *Blackwell v. Blackwell*, 289 S.C. 470, 346 S.E.2d 731 (S.C. Ct. App. 1986). A mortgage is different from other instruments in that, in order for it to be a valid instrument, there must be a debt or obligation of the mortgagor for which it is given as security. *Williams v. Lawrence, supra.* If there is no debt, then there is no valid mortgage. *Duckworth v. McKinney*, 58 S.C. 418, 36 S.E. 730 (1900).

In *Carpenter v. Longan*, 83 U.S. 271 (1873), the United States Supreme Court held that "[t]he note and mortgage are inseparable; the former as essential, the latter as an incident. An assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity." This holding has long been recognized to state South Carolina law as well. *See Talbert v. Talbert*, 97 S.C. 136,145, 81 S.E. 644, 647 (S.C. 1914); *Patterson v. Rabb*, 38 S.C. at 152, 17 S.E. at 467; *Dearman v. Trimmier*, 26 S.C. 506, 513, 2 S.E. 501, 505 (S.C.1887).

Moreover, the assignment was made *after* suit had been commenced. "'[U]nder statutes authorizing suit by a bona fide assignee, or by the real party in

interest, it is a good defence to an action by an assignee against a debtor that the assignment was merely colorable, having been made without consideration, and for the purpose of evading a disability of the assignor to sue, or of enabling him to testify, or to confer jurisdiction on a particular Court.'" *Hodges v. Lake Summit Co.*, 155 S.C. 436, 447, 152 S.E. 658, 662 (S.C.1930) (quoting from 5 C. J., 940).

In *Matthews & Co. v. Cantey*, 48 S.C. 588, 26 S.E. 894 (S.C. 1897), followed in *Hodges* as controlling decisional law, plaintiff brought suit to foreclose a note and mortgage, which had been assigned to them as collateral by the holders of the note and mortgage, who were not made parties to the suit. After suit was brought the debt for which the security had been pledged was paid in full. This appearing as a conceded fact, on motion of the defendant, the complaint was dismissed and the plaintiff appealed. In sustaining this ruling the Court said: "It cannot be said that plaintiffs, as trustees, are accountable to the parties entitled to the proceeds of the collateral, and had a right to proceed in their own name to collect the collateral, and pay over proceeds to party entitled, for this would be inconsistent with the conceded fact that they no longer had any interest whatsoever in the notes and mortgage. Under circumstances of this kind we must give effect to the imperative requirement of Section 132 (now 354), which requires that 'every action must be prosecuted in the name of the real party in interest, except as

otherwise provided in Section 134,' etc."

Norwood v. Chase Home Fin. LLC, 2011 U.S. Dist. LEXIS 5147 (W.D. Texas), is instructive. In that case, plaintiff filed suit seeking a declaratory judgment that Chase Home Finance (CHF) lacked the authority to foreclose on her mortgage. Norwood signed a Note and Deed of Trust with Chase Bank USA, N.A., and after she stopped making her monthly payments on the loan, CHF sought to enforce the lien on her home through its agents at Barrett DaffinFrappier Turner & Engel, LLP. Norwood conceded that she defaulted on the loan, and argued that only Chase Bank, not CHF, had the authority to foreclose on her home. Whether the Court could grant summary judgment hinged on a single question: Whether CHF had the requisite authority to enforce the lien.

The Court denied summary judgment to CHF. "Because CHF has not produced evidence when, if ever, it had possession of the Note, or that the instrument was lost, destroyed, or stolen, or that any other recognized exception to the requirement of possession exists, it has failed to carry its burden in demonstrating an entitlement to summary judgment. CHF denies Norwood's contention that a physical transfer was not made from Chase Bank to CHF, but it does not affirmatively demonstrate that the Note was in fact transferred. CHF, as movant, bears the burden of demonstrating its entitlement to summary judgment. It

has failed to carry this burden."

The possibility of so-called "robo-signing" cannot be ignored. There has been substantial media attention on that issue. NICK TIMIRAOS, Banks Hit Hurdle to Foreclosures,Wall Street Journal, June 1, 2011. 60 Minutes ran a piece entitled Mortgage Paperwork Mess: Next Housing Shock? in which it was revealed that mortgage lenders have used an agency known as Docx, which forged documents; the purported vice president, Linda Green, was not the vice president of any bank. 60 minutes/main20049646.shtml?tag=currentVideoInfo;segmentTitle http://www.cbsnews.com/stories/2011/04/01/.

Thus, the invalidity of the assignment was a good defense that should not have been ignored by the court below. The defects mirror those in *HSBC Mortgage Services v. Murphy*, 2011 ME 59, 19 A.3d 815 (2011), where the Court said that the examination of the documents required further inquiry.

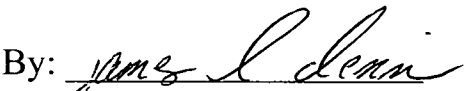
So, too, the trial court should have examined the bankruptcy issue. Appellants filed a bankruptcy and received a discharge of the debt on August 18, 2010. *In re Dennis*, 7:10-bk-03500 (Bankr. D. S.C. 2010). This information is available on PACER and judicial notice should have been taken of it.

Conclusion

For the reasons stated, this Court should reverse the judgment of the circuit court.

Respectfully submitted,

October 24, 2012

By: 

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PROOF OF SERVICE

We certify that We have served the original Appellant's Brief upon the South Carolina Court of Appeals via Hand delivery with copies sent to the attorney of record for the Respondent by depositing a copy of it in the United States Mail, postage prepaid, on the date set forth below, addressed to the attorneys of record for HSBC MORTGAGE SERVICES, Riley, Pope and Laney, LLC 2838 Devine Street, Columbia, SC 29205.

Dated: October 25, 2012

By: James L Dennis
james l. dennis, Appellant in propria persona

By: Enid L Dennis
enid dennis, Appellant in propria persona