THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Greenville County
Charles B. Simmons, Jr., Master in Equity

Docket No.: 2010-CP-23-10468

Bank of America, N.A. ..... Respondent

v.

Todd Draper, Mortgage Electronic Registration Systems, Inc., acting, Shawn Kephart, Matthew H. Henrikson, The United States of America, by and Through its Agency, South Carolina Department of Revenue, Branch Banking and Trust Company, and Linkside III Homeowners Association, Inc.,

Of Whom Todd Draper is .....Petitioner.

PETITION FOR A WRIT OF CERTIORARI

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Other Counsel of Record:

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CERTIFICATION OF COUNSEL

Counsel for petitioners certifies pursuant to SCACR 242 (d) (1) that a petition for rehearing was made and finally ruled on by the Court of Appeals on August 27, 2013.

QUESTIONS PRESENTED

I. WHETHER THE COURT OF APPEALS ERRED IN FINDING THAT THE BANK HAS STANDING TO SUE.

II. WHETHER THE COURT OF APPEALS ERRED IN FINDING THAT THE BANK WAS A HOLDER OF THE NOTE.

III. WHETHER THE ISSUES PRESENTED BY THIS CASE MERIT A WRIT OF CERTIORARI.

STATEMENT OF THE CASE

This is a mortgage foreclosure action arising out a Note and Mortgage executed in August 2005, by Todd Draper for residential property in Greenville County, South Carolina. The lower court, Greenville County Master in Equity, granted Respondent's motion for summary judgment. The Petitioner Draper admits that he is in default on the Note, but denies that Respondent has the right to prosecute the foreclosure action and asserts that Respondent failed to present any evidence which would entitle it to summary judgment.

FACTS

On August 25, 2005, Todd Draper (Draper) executed a Note to America's Wholesale Lender in the amount of $245,000.00 which was secured by a Mortgage given on the same date by Draper to Mortgage Electronic Registrations Systems, Inc. (MERS). The Mortgage was recorded in the Greenville County Register of Deeds office at Book 4424 at Page 1799 on August 30, 2005. BAC Home Loans Servicing, L.P., f/k/a Countrywide Home Loans Servicing, L.P. (BAC) filed suit on December 30, 2010 against Appellants and others with an alleged interest in the property seeking a deficiency judgment. Appellant Draper filed an Answer on March 7, 2011. On April 8, 2011 the case was referred to the Master in Equity for Greenville County. Thereafter the Master signed an Order changing the Plaintiff from BAC to Bank of America, N.A. (Respondent). After some written discovery between the parties respondent filed a motion for summary judgment (R.p. 108) based on an affidavit of Lisa M. Byers, an

employee of Bank of America, N.A. (R.p. 110). In documents produced in discovery Respondent disclosed that it was the Respondent was only a servicer of the loan which was owned by another entity, Freddie Mac. The Petitioner filed and served a motion for Summary Judgment (R.p. 123) and affidavits in opposition to the Respondent's motion on October 19, 2011 (R.p. 116 and R.p. 121). At the hearing Respondent did not have in its possession the original Note nor did it proffer a Lost Note Affidavit or provide any evidence as to why the original Note was not available or that it had made a search of any kind for the original note. The motions were heard by the Master on October 24, 2011 and the Master granted the Respondent's motion and denied Petitioner's motion in an Order dated January 24, 2012. The Appellants filed their Notice of Intent to Appeal on February 28, 2012. The Court of Appeals filed an Order on June 5, 2013 affirming in part, reversing in part, and remanding. Petitioners filed a timely petition for rehearing which was denied August 27, 2013 and this petition for Writ of Certiorari timely followed.

ARGUMENTS

I. THE COURT OF APPEALS ERRED IN FINDING THAT THE BANK HAS STANDING TO SUE.

The Petitioner contends that the Court of Appeals erred in affirming the lower court's granting of Respondent's motion for summary judgment on the issue of standing to sue because the Respondent failed to offer any evidence that it was the owner of the subject Note or Mortgage. Respondent is not the real party in interest and as such lacks standing to maintain the foreclosure action. Standing to sue is a fundamental requirement in instituting an action. Joytime Distribs. & Amusement Co. v. State, 338 S.C. 634, 639, 528 S.E.2d 647, 649 (1999). No justiciable controversy is presented unless the plaintiff has standing to maintain the action. Flast v. Cohen, 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968). To have standing, a party must have an interest in the subject matter of the action. Furman University v. Livingston, 244 S.C. 200, 136 S.E.2d 254 (1964). In South Carolina, a party must also be the "real party in interest." S.C.Code of Laws Section 15-5-70 (1976); Richbourg's Shoppers Fair, Inc. v. Stone, 249 S.C. 278, 153 S.E.2d 895 (1967); 59 Am.Jur.2d Parties Section 38 at 394 (1971); see S.C.R.CIV.P. 17(a) and 86. "A real party in interest ... ordinarily is one who has a real, actual, material, or substantial interest in the subject matter of the action, as distinguished from one who has only a nominal, formal, or technical interest in, or connection with, the action." 67A C.J.S. Parties Section 18 at 673-74 (1978); 59 Am.Jur.2d Parties Section 40 at 397

(1971). Dockside Ass'n, Inc. v. Detyens, et al. 285 S.C. 585, 330 S.E. 2d 537 (Ct.App. 1985).

By its own admission, Respondent is not the owner of the loan, debt, or Note. In a letter to Appellant Draper dated March 22, 2010, respondent advises that "[T]he owner of the note is Freddie Mac..... Bank of America services the loan on behalf of the owner." (R.p. 119). As servicer, Respondent merely receives payments from a mortgagor on a loan owned by another entity, its interest is not real, actual, material, or substantial but rather is only nominal, formal, or technical. Respondent did not offer any evidence of its connection with the subject debt other than to state that it did not own the loan but that it "serviced" the loan for the actual owner. Its role as servicer or any other connection with the loan or owner of the loan was not developed in the record.

In U.S. Bank Trust National Association v. Bell, 385 S.C. 364, 684 S.E. 2d 199 (Ct. App. 2009) in which the Court of Appeals observed that "[G}enerally, the party seeking foreclosure has the burden of establishing the existence of the debt and the mortgagor's default on that debt" (385 S.C. at 374) and in support of that proposition cited cases from Connecticut and New York which suggest that ownership of the instruments controls the ability to maintain an action for foreclosure:
See, e.g., Franklin Credit Mgmt. Corp. v. Nicholas, 73 Conn.App. 830, 812 A.2d 51, 57–58 (2002) ("In a mortgage foreclosure action, to make out its prima facie case, the foreclosing party had to prove by a preponderance of the evidence that it was the owner of the note and mortgage and that the [defendant] had defaulted on the note.") (internal quotations omitted) (internal citations omitted); Campaign v. Barba, 23 A.D.3d 327, 805 N.Y.S.2d 86, 86 (N.Y.App.Div.2005) ("To establish a prima facie case in an action to

foreclose a mortgage, the plaintiff must establish the existence of the mortgage and mortgage note, ownership of the mortgage, and the defendant's default in payment.") ... (S.C. 385 at 380).

Moreover, while it was admitted that Respondent was a servicer of the loan, servicing rights originate from a servicing contract which was not in evidence so the scope of Respondent's rights as servicer may or may not have included the right to foreclose such that Respondent failed to make a prima facie case that it any right to foreclose deriving from the owner of the note. The Court overlooked the lack of evidence that even as servicer Respondent may or may not have a contractual right to foreclose on behalf of the owner. The Court should not have affirmed the grant of summary judgment in light of such undeveloped facts. There was no evidence at trial that Freddie Mac, the acknowledged owner of the Note, had assigned any right to foreclose to Respondent.

South Carolina should require that the owner of a mortgage secured debt or its established and proven assignee bring actions to foreclose.

II. THE COURT OF APPEALS ERRED IN FINDING THAT THE BANK WAS A HOLDER OF THE NOTE.

The original Note and Mortgage were never produced (R.p. 87) and were not offered at the hearing or put in the record. Respondent has never asserted that it is in possession of the original Note or Mortgage nor has it ever asserted that the original documents have been lost, destroyed or stolen.

The Note is a negotiable instrument subject to the UCC. At the time of the closing and issuance of the Note and Mortgage, the former version of the UCC, S.C.

Code § 36–1–101 (2003) et seq. ("Former Article 3"), was the applicable law and should be applied to this case. Former Article 3 governs commercial paper, see S.C. Code § 36–3–101 (2003), which includes a note secured by a mortgage on real property. Swindler v. Swindler, 355 S.C. 245, 251, 584 S.E.2d 438, 441 (Ct.App.2003) ("Thus, even when executed simultaneously with a mortgage, a note remains subject to the provisions of Article 3." (citing Northwestern Bank v. Neal, 271 S.C. 544, 546–47, 248 S.E.2d 5)). Under Former Article 3, "The holder of an instrument whether or not he is the owner may transfer or negotiate it and ... discharge it or enforce payment in his own name." S.C. Code § 36–3–301 (2003). A holder of a negotiable instrument is defined as "a person who is in possession of ... an instrument ... drawn, issued, or indorsed to him or to his order or to bearer or in blank." S.C. Code § 36–1–201(20) (1976).

S.C. Code § 36-3-804 (2003) provides that the owner of an instrument (not the servicer) which is lost destroyed or stolen may maintain an action "in his own name" with proof of ownership and facts which prevent the production of the instrument and its terms. The Official Comment to that Section observes that such an owner is not a holder because he is not in "possession of the paper." Logically, as the General Assembly clearly intended, in order to be a holder of a Note, one must be in possession of the *original paper*. In the absence of the production of the original note by a holder, then the owner of the Note should proceed as required by 36-3-804 (2003) by affirmatively proving ownership and right to recover.

Clearly the Respondent was not a holder of the Note under the applicable statutory language and it was error to affirm the grant of summary judgment based on Respondent's mere possession of a photocopy of the Note which it acquired at some

unknown point in time with absolutely no evidence or attempt to explain the absence of the original or that any genuine search had even been undertaken.

South Carolina should require, as the General Assembly envisioned, that original documents must be produced to proceed on a foreclosure action.

III. THE ISSUES PRESENTED BY THIS CASE MERIT A WRIT OF CERTIORARI.

The Court should grant a writ of certiorari in this matter because of the important and novel issues presented. The issues of standing to sue by mortgage servicers and the requirement of the original documents to proceed are at the heart of many of the hundreds of pending and anticipated mortgage foreclosure cases across the state. The South Carolina Supreme Court has not yet spoken on these fundamental issues, but by affirming, reversing or modifying the ruling below, this Court will give clear guidance to the bench and bar as well as the mortgage and foreclosure industries in the state.

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September 26, 2013

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PROOF OF SERVICE

Counsel for the Petitioners hereby certifies that a copy of Petition for Writ of Certiorari has been served on counsel for Respondent by regular U.S. mail, postage prepaid, on this 26th day of September, 2013, addressed as follows:

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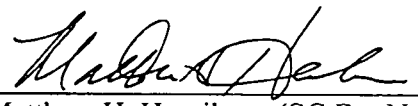

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