

THE STATE OF SOUTH CAROLINA


In the Court of Appeals

APPEAL FROM AIKEN COUNTY

Court of Common Pleas

M. Anderson Griffith, Master in Equity for Aiken County

Case No. 2013-CP-02-1085



Flagstar Bank, FSB,

Respondent,

v.

Sandra Rouse,

Appellant.

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1. *Carpenter v. Longan*, 83 U.S. 271, 16 Wall. 271, 21 L.Ed. 313 (1872)

STATUTES

1. South Carolina Code of Laws
2. SCRPC Rule 17(a) and Rule 12(b)(6)
3. South Carolina Statutes and Codes- Title 15, Chapter 11

OTHER AUTHORITIES

1. Administrative Order of the South Carolina Supreme Court (2011-05-02-01) issued by Chief Justice Jean H. Toal dated May 02, 2011.
2. <http://www.sc-bankruptcy-blog.com/south-carolina-mortgage-modification/2011/05>
3. Making Home Affordable (MHA) Guidelines.

STATEMENT OF ISSUES ON APPEAL

1. DID THE LOWER COURT ERR WHEN IT ENTERED A FINAL JUDGEMENT OF FORECLOSURE?

STATEMENT OF THE CASE

On May 14, 2013, Flagstar Bank, FSB (hereinafter referred as Respondent) brought this action against Sandra Rouse (hereinafter referred as Appellant) for the foreclosure of a mortgage given by Clinton Rouse and Sandra Rouse to Mortgage Electronic Registration Systems, Inc. as nominee for Summit Capital Lending Inc. dated March 18, 2008 recorded on April 03, 2008 in the Office of the Clerk of Court/Register of Deeds for Aiken County.

Clinton Rouse died on or about May 17, 2009 leaving Sandra Rouse as the sole owner of the property. Clinton Rouse died before this action was brought to the Court.

On September 13, 2013, Master in Equity passed an order and judgement of foreclosure and sale of the property belonging to Sandra Rouse at 508 Brayboy Road, Aiken, South Carolina 29803 (hereinafter referred as Subject Property).

FACTS

Clinton Rouse and Sandra Rouse obtained loan from Summit Capital Lending Inc. of the amount One Hundred Thirty Six Thousand Nine Hundred Twenty Three & 00/100 Dollars (U.S. \$136,923.00) for which a borrower's note dated March 18, 2008 was signed by Clinton Rouse and Sandra Rouse which was secured by Mortgage dated March 18, 2008 recorded on April 03, 2008 in the Office of the Clerk Court/Register of Deeds for Aiken County, South Carolina. Mortgage Electronic Registration Systems Inc. was acting as the nominee for Summit Capital Lending Inc.

Clinton Rouse died on or about May 17, 2009 leaving Sandra Rouse as the sole owner of the Subject property. Thereafter, Appellant started having financial hardships thereby facing difficulties in making her monthly mortgage payments.

Appellant tried to contact the original lenders under Mortgage in order to get her loan modified as per the Home Affordable Mortgage Program (HAMP). Every time the Appellant contacted the lenders for loan modification, either the Appellant's call was not attended by the lenders purposely or else she was misled into doing all the

unnecessary activities which was not required to proceed for loan modification. However, after trying for several months with no results, finally the lenders answered the call of the Appellant denying the loan modification to the Appellant. Appellant requested the lenders to explain the reason for not accepting her request for loan modification. Appellant also asked the lenders that how can they deny a loan modification even without assessing her financial situation. Appellant requested the lenders to at least consider her loan modification application but the lenders rejected all the requests of the Appellant in the said appeal.

Appellant lost all hopes when all of a sudden the Plaintiff came to know of the auction sale of the subject property through newspaper advertisement by the respondents. Appellant came to know that just before the filing of the complaint by the respondents in the court of common pleas, the mortgage had been assigned to the said respondents by assignment instrument dated April 23, 2013 and recorded on May 02, 2013. Appellant believes and alleges that this assignment was done in order to mislead the Appellant and the court before the filing of the complaint in the court of common pleas.

ARGUMENTS

I. **BECAUSE THE RESPONDENT FAILED TO ASSESS THE FINANCIAL SITUATION OF THE APPELLANT WHEN THE APPELLANT WAS IN DEFAULT.**

The respondent before filing the lis pendens in the court of common pleas failed to assess the financial situation of the appellant. Appellant believes and alleges that when the respondent took over the mortgage from Summit Capital Lending Inc., it was the duty of the respondent to assess the financial situation of the appellant before proceeding for foreclosure action. But the respondent failed to perform its duty.

II. **BECAUSE THE RESPONDENT FAILED TO PROVIDE THE APPELLANT WITH A WRITTEN NOTICE OF FORECLOSURE ALTERNATIVES.**

According to MHA Guidelines, servicers must notify borrowers of "other foreclosure alternatives for which the borrower may be eligible, if any, including but not limited to other modification programs, short sale and/or

deed in lieu or forbearance, and identify the steps the borrower must take in order to be considered for those options.”

The Appellant contends that the respondent failed to notify the appellant of other foreclosure alternatives for which the borrower may be eligible thereby failing to adhere to the MHA Guidelines.

III. BECAUSE THE RESPONDENT HAS NO LEGAL STANDING TO PROSECUTE THE ACTION.

Appellant believes and alleges that the respondent has no legal standing to prosecute the action of foreclosure. Summit Capital Lending Inc. is the original lender of the mortgage. Although assignment of mortgage was done to Flagstar Bank, FSB by assignment instrument dated April 23, 2013 and recorded on May 02, 2013 but the intimation of the same was not given to the Appellant. Besides, the respondent failed to serve the notice of lis pendens and other related documents on the appellant. Therefore, the respondent bears no legal action to prosecute the action.

Further, MERS is mentioned in the mortgage and assignment of Mortgage but not in the Borrower’s note. MERS had no authority to assign the said note and therefore Flagstar Bank as holder of the note has no legal standing to prosecute the action.

Citing precedent from the United States Supreme Court’s decision in *Carpenter v. Longan*, 83 U.S. 271, 16 Wall. 271, 21 L.Ed. 313 (1872) which the Court found “clearly supports the notion that the Plaintiff must **own the Note and the Mortgage** to foreclose on the property (emphasis in the opinion).” The Court determined that “Plaintiff failed to show that it owned the Mortgage at the time the Complaint was filed”, and also noted that the Mortgage shows MERS to be the mortgagee but that “MERS is never mentioned in the Note.”

The Court stated: “It is clear that to have standing in this foreclosure case, Plaintiff must not only be the holder and owner of the original Note, but also

the Mortgage as well. Plaintiff's Complaint in this case fails to meet this criteria. Plaintiff lacks standing to initiate and prosecute the foreclosure, and dismissal pursuant to Rule 17(a) and Rule 12(b)(6) SCRPC is appropriate."

IV. BECAUSE THE RESPONDENT FAILED TO COMPLY WITH ADMINISTRATIVE ORDER OF THE SOUTH CAROLINA SUPREME COURT (2011-05-02-01) ISSUED BY CHIEF JUSTICE JEAN H. TOAL DATED MAY 02, 2011.

Appellant contends that the respondent violated the Administrative Order of the South Carolina Supreme Court (2011-05-02-01) issued by Chief Justice Jean H. Toal dated May 02, 2011. The appellant alleges that no notice of intervention has been served by the respondent. Appellant made several attempts and requested the respondents to accept her loss mitigation application and conduct the foreclosure intervention process. Despite repeated requests by the appellant, the respondents failed to send any post referral loss mitigation letter and/or acceleration warning letter to the appellant thereby violating the above mentioned Administrative Order.

The 2011 rules apply to any "foreclosure intervention," which is defined as "any policy, process or procedure employed by a Mortgagee for the purpose of seeking a resolution of a foreclosure action by loan modification or other means of loss mitigation." So, if the lender has "any" loss mitigation or internal modification procedures, it must notify the homeowner of those options. If the homeowner elects to apply for any mortgage modification—or "foreclosure intervention," to use Justice Toal's term—the foreclosure litigation has to wait on the conclusion of that application. The lender can't proceed with the foreclosure action at the same time.

The 2011 rules further states that lenders can't offer the homeowner the foreclosure intervention, deny the intervention and then foreclose, without offering the options again. If the homeowner applied for a mortgage modification through the lender, but the lender lost the application or didn't get the documents the homeowner sent and then turned down the

application. The 2011 rules seem to say that the lender can file a foreclosure action with the court, but at the same time, they have to send the homeowner information about their foreclosure intervention programs, give the homeowner the opportunity to re-apply, and this time handle all the paperwork through the lender's attorney's office.

V. BECAUSE THE SERVICER FAILED TO PROVIDE THE APPELLANT WITH A WRITTEN NOTICE OF DENIAL AND REASONS OF DENIAL OF LOAN MODIFICATION UNDER HAMP.

According to MHA Guidelines, a "servicer must send a Borrower Notice to every borrower that has been evaluated for HAMP but is not offered a Trial Period Plan, [or] is not offered an official HAMP modification [...]."

Appellant contend that the servicer of the appellant failed to provide the appellant with a written notice of denial and reasons for denial of loan modification under HAMP. The appellant was wrongfully deprived of her rights under HAMP. This wrongful deprivation followed by the failure to provide a written notice of denial and reasons of denial of loan modification thereby violating the MHA Guidelines with regard to HAMP.

CONCLUSION

For the reasons stated, this Court should reverse the judgement of the Court of Common Pleas.

Respectfully submitted,

Sandra Rouse

Sandra Rouse

2nd October, 2013

*Sandra Rouse
508 Braybry Rd.
Aiken S.C.
29803*

(803) 998-7066 cell

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