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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Charles B. Simmons, Master in Equity for Greenville County

Opinion No. 5140 (S.C. Ct. App. filed June 5, 2013)

Appellate Case No. 2013-002048

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

v.

Todd Draper; Mortgage Electronic Registration Systems, Inc., acting as nominee for American Home Mortgage, its successors and assigns; Shawn Kephart; Matthew H. Henrikson; The United States of America, by and through its Agency, the Internal Revenue Service; South Carolina Department of Revenue; Branch Banking and Trust Company; and Linkside III Homeowners Association, Inc.;

of whom Todd Draper is
.....Petitioner.

RETURN TO PETITION FOR A WRIT OF CERTIORARI

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2. WAS THE COURT OF APPEALS CORRECT IN FINDING BANK OF AMERICA TO BE THE HOLDER OF THE NOTE?

3. DOES THIS CASE MERIT THE COURT'S REVIEW?

COUNTER-STATEMENT OF THE CASE

On August 25, 2005, the petitioner, Todd Draper (Draper), executed and delivered to Countrywide Home Loans, Inc., doing business under the trade name "America's Wholesale Lender," a promissory note for $245,000.00. (R. pp. 24-7). Draper secured the payment of the note by delivering to Mortgage Electronic Registration Systems, Inc. (MERS), acting as nominee for America's Wholesale Lender, a mortgage encumbering a real property located in Greenville, South Carolina. (R. pp. 28-46). Federal Home Loan Mortgage Corporation (Freddie Mac) invested in the loan extended to Draper. Countrywide subsequently indorsed the note in blank. (R. p. 27).

In 2008, the respondent, Bank of America, N.A. (Bank of America), through its corporate parent, Bank of America Corporation, acquired Countrywide. At that time, Draper's loan had been serviced by Countrywide's wholly-owned subsidiary, Countrywide Home Loans Servicing, LP. Following the acquisition, Countrywide Home Loans Servicing, LP was renamed BAC Home Loans Servicing, LP, and on July 1, 2011 merged into Bank of America. (R. p. 27).

On December 29, 2010, MERS assigned the mortgage securing Draper's note to BAC Home Loans Servicing, LP. Because of the merger with BAC Home Loans Servicing, LP, Bank of America became both the mortgagee and the servicer of the loan. As the servicer, Bank of

America received payments made by Draper pursuant to the terms of the note, and applied them to his account. (R. pp. 63-73).

Upon Draper's failure to make the monthly mortgage payment due on September 1, 2008, Bank of America accelerated the debt and on December 30, 2010 initiated the foreclosure action. (R. pp. 7-12). The caption of the summons and complaint showed BAC Home Loan Servicing, LP f/k/a Countrywide Home Loans Servicing, LP as the plaintiff. Following filing of the responsive pleadings, the circuit court referred the case to the master-in-equity. (R. p. 3).

In late August 2011, attorney for Bank of America moved for the amendment of the caption to correctly reflect the name of the plaintiff as Bank of America, N.A. Bank of America was the surviving entity of the merger with BAC Home Loan Servicing, LP. The master-in-equity granted the motion and the caption was amended accordingly. (R. p. 2).

On October 3, 2011, after completion of discovery, in which Bank of America obtained Draper's admission of default (R. pp. 59-60), Bank of America moved for summary judgment on the grounds that no genuine issue existed as to the fact that it held note and mortgage and that Draper was in arrears, owing the amount indicated on the affidavit of debt submitted in support of the motion. (R. Pp. 108-15) On October 19, 2011, the defendant, Mathew H. Henrikson (Henrikson), who is also Draper's attorney and lives on the property (R. p. 121), filed, *pro se*, a motion for summary judgment, arguing that Bank of America did not own the debt and therefore lacked standing. (R. p. 123).

At the hearing, held on October 24, 2011, the master-in-equity denied Henrikson's motion and granted summary judgment for Bank of America. (R. pp. 4, 99-101). Both Draper and Henrikson appealed the Order Granting Plaintiff's Motion for Summary Judgment.

By opinion filed on June 5, 2013, the Court of Appeals affirmed in part, reversed in part, and remanded the case to the master-in-equity. Draper and Henrikson's motion for rehearing was denied on August 27, 2013, and now Draper petitions this Court for a writ of certiorari to the Court of Appeals.

ARGUMENT

I. SERVICER OF A MORTGAGE LOAN IS A REAL PARTY IN INTEREST IN A FORECLOSURE ACTION OF THE MORTGAGE IT SERVICES FOR THE BENEFIT OF THE OWNER OF THE LOAN.

The Court of Appeals was correct in finding that Bank of America, as a servicer of a mortgage loan owned by another entity, had standing to seek a remedy of foreclosure in its own name. The court adopted a view held by a number of bankruptcy courts and appellate courts of other states that a servicer is a real party in interest in regard to litigation of matters involving the loan it services.

There is a consensus among bankruptcy courts that servicers are real parties in interest under the federal counterpart of Rule 17(a), SCRCP. "A servicer is a party in interest and has standing to move for relief from stay and to file proofs of claim on the owner's behalf." *In re McFadden*, 471 B.R. 136, 176 (Bankr. D.S.C 2012). "A servicer is a party in interest in proceedings involving loans which it services." *In re O'Dell*, 268 B.R. 607, 618 (Bankr. N.D. Ala. 2001), *aff'd*, 305 F.3d 1297, 1302 (11th Cir. 2002). In the case of *In re Tainan*, 48 B.R. 250 (Bankr. E.D. Pa. 1985), the court found that a servicer of a loan owned by an investor - Fannie Mae, was a real party in interest to the proceeding. According to the court, "an action may not necessarily be brought in the name of the person who ultimately will benefit from the recovery . . . ." *Id.* at 252 (citing 6 Wright & Miller, *Federal Practice and Procedure* § 1543 (1971 2d reprint 1984)). In *In re Neals*, 459 B.R. 612 (Bankr. D.S.C. 2011), the Bankruptcy Court for the District

of South Carolina concluded that "there is a general view, which has been accepted in this jurisdiction and others that a loan servicer is a 'party in interest' and has standing by virtue of its pecuniary interest in collecting payments under the terms of the note and mortgage." *Id.* at 617 (citing *In re Woodberry*, 383 B.R. 373, 379 (Bankr. D.S.C. 2008)).

Recently, in *J.E. Robert Company v. Signature Properties, LLC*, 309 Conn. 307 (Conn. 2013), the Supreme Court of Connecticut stated that "the servicer of a loan may have standing . . . to institute legal proceedings against the debtor in its own name." *Id.* at 321. The court surveyed case law of other jurisdictions and concluded that in certain circumstances "a loan servicer need not be the owner or holder of the note and mortgage in order to have standing to bring a foreclosure action . . . ." *Id.* at 327.

It should be noted that, contrary to Draper's contentions (Pet. p. 4), Bank of America did not refer to Freddie Mac in its March 22, 2010 letter as "the owner of the note" but as "the owner of the loan," (R. p. 119) a term that, unlike "assignee" or "holder," does not carry any particular significance under the law. Nowhere in the record does it appear that Bank of America acknowledged that Freddie Mac was "the owner of the note." Furthermore, even if Freddie Mac is "the owner of the note," that does not mean that Bank of America cannot enforce it. Under S.C. Code Ann. § 36-3-301 (Supp. 2012), "[a] person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument . . . ." After all, "[t]he right to enforce an instrument and ownership of the instrument are two different concepts." U.C.C. § 3-203 cmt 1 (2002). The fact that the "owning of the note" has no particular significance for one's standing was examined by the Bankruptcy Court for the District of New Jersey in *In re Kemp*, 440 B.R. 624 (Bankr. D.N.J. 2010), which decided that, despite the note being owned by

Bank of New York, the servicer, Countrywide Home Loans, Inc., which originated the loan and was the payee on the note, had standing to sue. *Id.*

Draper argues that "South Carolina should require that the owner of a mortgage-secured debt . . . bring actions to foreclose." (Pet. p. 5). In essence, he wishes he was foreclosed upon by Freddie Mac and not the bank to which he had been sending payments. However, his post-default focus on the issue of ownership of the loan, no doubt precipitated only by the revelation of Freddie Mac's investment in his loan, is misplaced in this case. Bank of America, as an entity entitled to enforce the instrument under S.C. Code Ann. § 36-3-301 (i) (Supp. 2012), has standing to seek the foreclosure of the mortgage securing Draper's note, notwithstanding Freddie Mac's ownership of the loan.

The record sufficiently establishes Bank of America's status as the servicer of Draper's loan. First, there is Draper's admission that the transaction history of his account, as compiled by Bank of America, was accurate. (R. p. 59-60). Second, Bank of America was the addressee of Draper's Qualified Written Request under 12 U.S.C. § 26059(e)(1)(B), and in its response, Bank of America identified itself as the servicer of the loan. (R. pp. 118-20). Last but not least, Draper's argument that Bank of America lacks standing to prosecute the foreclosure is solely based on its status as the servicer for the entity owning the loan. (*See* Pet. p. 4). In light of the opinions cited above, however, that status alone entails an interest in the subject matter of the action that is more than nominal, formal, or technical. *See also CWCapital Asset Mgmt., LLC v. Chi. Props., LLC*, 610 F.3d 497, 500-01 (7th Cir. 2010) ("servicer is much like an assignee for collection, who must render to the assignor the money collected by the assignee's suit on his behalf . . . but can sue in his own name without violating Rule 17(a)" (citing *Sprint*

Communications Co. v. APCC Services, Inc., 554 U.S. 269, 128 S. Ct. 2531 (2008)). Therefore, Bank of America is a real party in interest in this matter.

Draper points to the lack of a servicing agreement in the record, which could indicate whether Bank of America was contractually vested with the right to foreclose on Freddie Mac's behalf. (Pet. p. 5). This agreement would be relevant only if the note was made payable to Freddie Mac or was specifically indorsed thereto, and Bank of America's right to enforce under S.C. Code Ann. § 36-3-301(ii) (Supp. 2012) stemmed from Freddie Mac's transfer of the note to Bank of America pursuant to S.C. Code Ann. § 36-3-203 (Supp. 2012). However, Bank of America has consistently maintained that it held Draper's note. (R. pp. 10, 98).

II. ALTHOUGH THE ORIGINAL NOTE WAS NOT PRODUCED, THE COURT OF APPEALS HAD SUFFICIENT GROUNDS FOR ITS FINDING THAT BANK OF AMERICA WAS THE HOLDER.

While production of the note would have provided an ultimate proof of Bank of America's right to payment under the terms of that instrument, introduction of a photocopy into evidence, seen in the factual context transpiring from the record, allowed for the Court of Appeals' conclusion that a summary judgment was appropriate in this case.

This action was commenced by Bank of America under the name "BAC Home Loans Servicing, LP, formerly known as Countrywide Home Loans Servicing, LP." Countrywide Home Loans Servicing, LP, was a wholly owned subsidiary of Countrywide Home Loans, Inc., which under the trade name "America's Wholesale Lender," was the payee on the note executed by Draper and delivered to Countrywide. (R. pp. 7, 24-7). Following acquisition of Countrywide, Bank of America changed Countrywide Home Loans Servicing's name to "BAC Home Loans Servicing, LP," which then merged into Bank of America. (R. pp. 2, 98). It appears that by ordering amendment of the caption to show Bank of America as the plaintiff (R. p. 2), the

master-in-equity judicially noticed the fact that Bank of America was the surviving entity of the merger – a fact readily ascertainable by resort to commonly available sources.

Apart from becoming Draper's creditor by virtue of a corporate merger, Bank of America also became the holder of the mortgage executed by Draper to secure the payment of the note. Of no less import is the fact that Bank of America presented to the master-in-equity a loan transaction history statement, which bore the same number that appeared on the note (R. pp. 47-57), and Draper admitted that it accurately reflected history of his payments on the note. (R. pp. 59-60).

Against this backdrop one has to consider that under Rule 1001(4) of the South Carolina Rules of Evidence, a photocopy of an instrument would constitute its duplicate, "admissible to the same extent as an original . . . ." Rule 1003, SCRE.

In opposing Bank of America's motion for summary judgment, Draper submitted no evidence other than an affidavit, which was incapable, as a matter of law, of raising a triable issue of fact. His statement that "the Plaintiff is not the owner of the Note" is prefaced by the words "upon information and belief." (R. p. 122). Statements made "upon information and belief," however, fail the "personal knowledge" requirement of Rule 56(e), SCRCP, *Dawkins v. Field*, 354 S.C. 58, 68, 580 S.E.2d 433, 438 (2003), and cannot be considered in ruling on motion for summary judgment.

Thus, the Court of Appeals correctly found production of a copy of the note, in conjunction with the facts outlined above, to constitute sufficient grounds for affirming the decision of the master-in-equity.

III. THE CASE DOES NOT MERIT REVIEW BY THIS COURT.

Until the decision below in this matter, a mortgage servicer's standing to foreclose a mortgage, securing payment of a loan owned by another entity, had not been precisely addressed in this state. However, at their core, the issues presented here are hardly novel. This case is about the application of Rule 17(a), which, as expounded by South Carolina Jurisprudence calls for prosecution of actions "'in the name of the party who, by substantive law, has the right sought to be enforced[,]'" 4 S.C. Jur. *Action* § 23 (1991), *Bank of America v. Draper*, __ S.C. __,__, 746 S.E.2d 478, 481 (S.C. App. 2013), and whether there was enough evidence of plaintiff's holding that right to allow for summary judgment. The master-in-equity and the Court of Appeals reviewing his decision had to merely determine whether there was no genuine issue as to the fact that Bank of America was the holder of the note and thus a person entitled to enforce it, as provided by section 3-301(i) of the South Carolina Commercial Code. S.C. Code Ann. § 36-3-301(i) (Supp. 2012).

Bank of America believes this petition for a writ of certiorari has little to do with making sure Bank of America is the real party in interest to maintain this foreclosure action. Draper admits signing the note and mortgage, admits the default, and admits Bank of America's payment history is correct. (Pet. p. 1; R. pp. 59-60). The payment history attached to the requests for admissions served upon Draper set forth the principal amount of the debt, $242,237.85, so Draper admits the principal amount he owes on the loan. (R. pp. 22-60). At the hearing before the master-in-equity on Bank of America's motion for summary judgment, Draper and Henrikson could point to only one number in Bank of America's affidavit of debt to dispute: the property inspection fees that totaled only $1,485.00 out of the more than $301,000.00 set forth on the affidavit. (R. pp. 96-97).

Bank of America believes the primary goal with regard to this petition may be delay. Draper's attorney, Henrikson, admits he moved into the property at issue in this foreclosure case on September 1, 2009. (R. p. 121). *Draper,* ___ S.C. at ___, 746 S.E.2d at 483 n.1. At oral argument before the Court of Appeals, Henrikson admitted he is still a tenant on the property. Oral Argument at 5:10-7:00 *Draper,* ___ S.C. ___, 746 S.E.2d 478 (Ct. App. 2013). Henrikson also admitted he was not charging Draper any attorney's fees ("We have a fee agreement where I am not charging him. The consideration for my not charging him is that he has, in an informed manner, waived any inherent conflict that may arise out of my having a personal interest in the property by virtue of living there."). *Id.* at 7:00-7:21. Whether intended or not, Henrikson and Draper both benefit from the delay of the foreclosure action in which both Draper and Henrikson admit the monthly payments required by the note have not been made since July 30, 2008 (R. pp. 22-80).

CONCLUSION

For the reasons stated above, this Court should deny the petition for a writ of certiorari to review the decision of the Court of Appeals.

Respectfully submitted,

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October 28, 2013

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of whom Todd Draper is

Petitioner.

PROOF OF SERVICE

The undersigned attorney for Respondent, Bank of America, N.A., certifies that its Return to Petitioner's Petition for Writ of Certiorari was served on counsel for Petitioner by causing a copy of the same to be deposited into the United States Mail, addressed as follows:

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this 28th day of October, 2013

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