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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

James Spence, Master in Equity

Appellate Case No. 2026-001103

The Bank of New York Mellon, f/k/a The Bank of New York as successor in interest to JP Morgan Chase Bank, N.A. as Trustee for NovaStar Mortgage Funding Trust, Series 2004-1, NovaStar Home Equity Loan Asset-Backed Certificates, Series 2004-1,

Respondent,

v.

Timothy Nunally, as Personal Representative for the Estate of Carl Alvin Nunally, Sr., deceased; Timothy Allen Nunally, as Trustee for the CAN Irrevocable Trust; Carl Alvin Nunally, Jr.; Mark Anthony Nunally,

Defendants,

Of which, Timothy Nunally and Mark Nunally are the Appellants.

RESPONDENT'S INITIAL BRIEF

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COUNTERSTATEMENT OF ISSUES ON APPEAL

1. DID THE MASTER IN EQUITY ERR IN RULING THAT RESPONDENT IS THE REAL PARTY IN INTEREST WITH STANDING TO ENFORCE THE NOTE AND MORTGAGE?

2. DID THE MASTER IN EQUITY ERR IN RULING APPELLANTS' RACE-NOTICE ARGUMENTS DID NOT CONSTITUTE A DEFENSE TO RESPONDENT'S FORECLOSURE ACTION?

3. DID THE MASTER IN EQUITY ERR IN ADDRESSING APPELLANTS' PURPORTED RULE 16(C) OBJECTIONS, TRIAL OBJECTIONS, POWERPOINT PRESENTATION, AND POST-TRIAL PROPOSED ORDER?

STATEMENT OF THE CASE AND FACTS

This matter is a foreclosure of a mortgage on real property in Lexington County, South Carolina. Carl A. Nunally executed and delivered to NovaStar Home Mortgage, Inc. a Note dated January 30, 2004 (the "Note"), by which he promised to repay the principal sum of $121,500.00, with interest at 6.99% per annum on the unpaid balance. [R. pp. _____]. The Note bears three endorsements including two allonges affixed to the document. The Note was endorsed from NovaStar Home Mortgage, Inc. to Novastar Mortgage, Inc. The Note was further endorsed from NovaStar Mortgage, Inc. to JPMorgan Chase Bank, as Trustee of the NovaStar Mortgage Funding Trust, Series 2004-1, relating to the NovaStar Home Equity Loan Asset-Backed Certificates, Series 2004-1. Each of the Novastar endorsements reference the same trust. Finally, the Note is endorsed in blank by JPMorgan Chase Bank N.A. f/k/a JPMorgan Chase Bank, as Trustee of the NovaStar Mortgage Funding Trust, Series 2004-1, relating to the NovaStar Home Equity Loan Asset-Backed Certificates, Series 2004-1. [R. pp. ____].

To secure payment of the Note, Carl A. Nunally and Frankie L. Nunally made, executed and delivered a mortgage ("Mortgage") to Mortgage Electronic Registration Systems, Inc., as mortgagee, as nominee for NovaStar Home Mortgage, Inc., dated January 30, 2004. The Mortgage encumbered the following real property and improvements located in Lexington County, South Carolina (the "Property"):

> All that certain piece, parcel or lot of land, with the improvements thereon, situate, lying and being in the County of Lexington, State of South Carolina, the same being shown and designated as Lot No. 283, Block W, on a plat of Murraywood II by Heaner Engineering Co., dated October 27, 1972, revised July 1, 1975, and recorded in the Office of the ROD for Lexington County in Plat Book 139-G at Page 23. Also being shown on a plat prepared for Dane C. Frost and Terri L. Frost by Belter & Associates, Inc., dated June 14, 1993, and recorded in Plat Book 262 at Page 70. Reference being made to said latter plat which is incorporated herein for a more complete and accurate description; all measurements being a little more or less.
>
> This being the same property conveyed to Carl A. Nunally and Frankie L. Nunally by deed of Dane C. Frost and Terri L. Frost dated August 8, 1994, and recorded March 12, 1999, in Book 5145 at Page 97 in the Office of the Register of Deeds for Lexington County, South Carolina. Thereafter, Frankie L. Nunally passed away on January 14, 2019, leaving the subject property to her heirs Carl Alvin Nunally, Sr., Carl Alvin Nunally, Jr., Mark Anthony Nunally, and Timothy Allen Nunally, as is more fully preserved in Probate File No. 2019-ES-32-01345 in said Records. Subsequently, Carl A. Nunally passed away on September 4, 2021, leaving the subject property to his devisee, Timothy Allen Nunally, as Trustee of the CAN Irrevocable Trust, as is more fully preserved in Probate File No. 2022-ES-32-01253. See also the Deed of Distribution dated May 30, 2023, and recorded September 6, 2023, in Book 21073 at Page 1408 and re-recorded September 27, 2023, in Book 21075 at Page 5539 in said Records.

CURRENT ADDRESS OF PROPERTY: 1759 Willow Creek Drive, Columbia, SC 29212

TMS: 002734-01-003

The Mortgage was recorded in the Lexington County Registry on February 20, 2004, in Book 9041 at Page 4. [R. pp. ____]. The Mortgage evidences and secures the repayment of money advanced by the Lender to, or on behalf of, the Mortgagors and constitutes a valid first lien on the

Property. Any record reference to the Mortgage being recorded February 28, 2004 appears to be a typographical error arising from the font of the Recorder's stamp and does not affect the substance of the parties' arguments or the enforceability of the Mortgage.

Carl A. Nunally, Sr. and Frankie L. Nunally made, executed, and delivered to JPMorgan Chase Bank, as Trustee for the NovaStar Home Equity Loan Asset-Backed Certificates, Series 2004-1, its successors and assigns, a certain Loan Modification Agreement, dated September 2, 2009, amending and supplementing the Note and Mortgage described above. By virtue of the Loan Modification Agreement, the unpaid principal balance was modified to $104,168.20, together with interest at the rate of 1.5% per annum on the unpaid balance. [R. pp. ____].

Thereafter, the Mortgage was assigned to The Bank of New York Mellon, f/k/a The Bank of New York as successor in interest to JPMorgan Chase Bank, N.A. as Trustee for NovaStar Mortgage Funding Trust, Series 2004-1, NovaStar Home Equity Loan Asset-Backed Certificates, Series 2004-1 by assignment recorded on July 28, 2023 in Book 21067 at Page 4146. [R. pp. ____]. Thereafter, a Corrective Assignment of Mortgage to The Bank of New York Mellon, f/k/a The Bank of New York as successor in interest to JPMorgan Chase Bank, N.A. as Trustee for NovaStar Mortgage Funding Trust, Series 2004-1, NovaStar Home Equity Loan Asset-Backed Certificates, Series 2004-1 was recorded on October 3, 2023 in Book 21076 at Page 4337. [R. pp. ____].

Frankie L. Nunally passed away on January 14, 2019, as evidenced by the information found in Estate File 2019-ES-32-01345 in the probate records for Lexington County, South Carolina, indicating the heirs/devisees of the Property as Carl Alvin Nunally, Sr., Carl Alvin Nunally, Jr., Mark Anthony Nunally, and Timothy Allen Nunally. Carl A. Nunally, Sr., passed away on September 4, 2021, as evidenced by the information found in Estate File 2022-ES-32-

01253 in the probate records for Lexington County, South Carolina, indicating the heirs/devisees of the Property as Timothy Allen Nunally as Trustee of the CAN Irrevocable Trust.

The installments of principal and interest due from and after May 1, 2023, have not been paid although demand for payment was made. Respondent filed this foreclosure action on March 8, 2024. [R. pp. ____]. Included in Respondent's Complaint is a cause of action for declaratory judgment whereby Respondent alleged that, due to inadvertent error or mistake, the Acknowledgment Section of the Mortgage was improperly executed. [R. pp. ____]. Defendant Carl Alvin Nunally, Jr. was served with process on March 16, 2024. Appellants were served with process pursuant to an order allowing publication. [R. pp. ____].

The case was referred to the Honorable James O. Spence, as Master in Equity for Lexington County, on May 23, 2024. [R. pp. ____]. Appellants filed a motion to dismiss Respondent's Complaint on July 17, 2024 and a motion titled "motion for judicial notice of will and common Law Resident Trust" on December 5, 2024. [R. pp. ____]. Appellants' motions were heard on January 28, 2025, and denied in an order filed February 12, 2025. [R. pp. ____]. In conjunction with the denial of Appellants' motion to dismiss, the Master in Equity entered a scheduling order addressing the remainder of the litigation. [R. pp. ____].

Following a denial of a prior motion to dismiss, Appellants failed to answer or otherwise plead and, as a result, counsel for the Plaintiff filed an Affidavit of Default on March 24, 2025. [R. pp. ____]. Respondent filed a motion for summary judgment on May 23, 2025. [R. pp. ____]. The Master in Equity heard and denied the motion June 3, 2025. [R. pp. ____].

Beginning on June 5, 2025, Appellants engaged in a string of motion filings including a motion to take judicial notice filed June 5, 2025, a motion in limine filed June 19, 2025, motion to accept late-filed answer filed July 3, 2025, and motion to dismiss filed July 8, 2025. [R. pp. ____].

All of these motions were filed after the May 30, 2025 motion filing deadline set forth in the Master in Equity's February 12, 2025 trial scheduling order. [R. pp. ____]. On July 24, 2025, the Master denied Appellant's motion in limine. Following a hearing on August 27, 2025, the Master denied Appellants' remaining motions on September 30, 2025.

A bench trial was held on February 10, 2026. [R. pp. ____]. Following the trial, the Master in Equity issued an order regarding the post-trial process for the parties to submit proposed orders. On April 24, 2026, the Master in Equity entered an order granting judgment in favor of Respondent. [R. pp. ____]. This appeal followed.

STANDARD OF REVIEW

"A mortgage foreclosure is an action in equity." *Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 248, 489 S.E.2d 472, 475 (1997). When an action in equity is appealed, the appellate court "may find facts in accordance with its own view of the preponderance of the evidence." *Lowcountry Open Land Trust v. Charleston S. Univ.*, 376 S.C. 399, 407, 656 S.E.2d 775, 779 (Ct. App. 2007). Nevertheless, "the appellant is not relieved of his burden of convincing the appellate court [that] the trial judge committed error in his findings." *U.S. Bank Trust Nat'l Ass'n v. Bell*, 385 S.C. 364, 373, 684 S.E.2d 199, 204 (Ct. App. 2009) (quoting *Pinkney v. Warren*, 344 S.C. 382, 387–88, 544 S.E.2d 620, 623 (2001)). The Appellate Court may affirm the trial court's ruling for any ground appearing in the record. Rule 220(c), SCRAP; *see also I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000).

ARGUMENT

1. THE MASTER IN EQUITY CORRECTLY RULED RESPONDENT WAS THE REAL PARTY IN INTEREST WITH STANDING TO BRING THE FORECLOSURE ACTION.

Appellants' first three issues turn on Respondent's status as the real party in interest with standing to enforce the Note and Mortgage. The Master in Equity correctly rejected those arguments because the evidence established Respondent's entitlement to enforce the blank-endorsed Note, and the Mortgage follows the Note under South Carolina law. Appellants' attempt to require Respondent to elect between holder-status enforcement and assignment-based enforcement is therefore misplaced.

Respondent's standing and real-party-in-interest status are supported by Rule 17(a), SCRCP, and South Carolina foreclosure precedent. Respondent maintains, and the evidence supports, that it was the real party in interest when this action commenced. Even if the Note had been transferred following the commencement of the action, Rule 17(a) directs that an action should not be dismissed on real-party-in-interest grounds until a reasonable time has been allowed for ratification, joinder, or substitution. No such ratification, joinder, or substitution was necessary in this case because it was brought originally by the real party in interest. Further, in *Bank of America, N.A. v. Draper*, 405 S.C. 214, 220, 746 S.E.2d 478, 481 (Ct. App. 2013), this Court held in the mortgage-foreclosure context that "[t]he requirement of standing is not an inflexible one." *Id.* (quoting *Sloan v. Sch. Dist. of Greenville Cnty.*, 342 S.C. 515, 524, 537 S.E.2d 299, 304 (Ct. App. 2000)). The Court further explained as follows:

> An assignee stands in the shoes of its assignor. *Twelfth RMA Partners, L.P. v. Nat'l Safe Corp.*, 335 S.C. 635, 639, 518 S.E.2d 44, 46 (Ct. App. 1999); see also S.C. Code Ann. §36-3-203(b) (Supp. 2012) (Providing a transfer of an instrument vests

> in the transferee any rights the transferor had). "[T]he assignment of a note secured by a mortgage carries with it an assignment of the mortgage, but…the assignment of the mortgage alone does not carry with it an assignment of the note." *Hahn v. Smith*, 157 S.C. 157, 167, 154 S.E. 112, 115 (1930); *see also Ballou v. Young*, 42 S.C. 1710, 176, 20 S.E. 84, 85 (1984) ("The Transfer of a note carries with it a mortgage given to secure payment of such note.").
>
> Id. at 220.

Thus, a holder of a note has standing as the real party in interest to bring a foreclosure action. In *Draper*, this Court also acknowledged that a mortgage servicer has standing to initiate a foreclosure action. "Several bankruptcy courts and federal district courts, including those in South Carolina, have recognized the servicer of a loan to be a real party in interest and able to initiate a foreclosure. We agree with this view." *Id*. at 223.

The record facts satisfy that rule. The Note bears an endorsement chain ending in a blank endorsement: from Novastar Home Mortgage, Inc. to Novastar Mortgage, Inc.; from Novastar Mortgage, Inc. to JPMorgan Chase Bank, as Trustee of the NovaStar Mortgage Funding Trust, Series 2004-1, relating to the NovaStar Home Equity Loan Asset-Backed Certificates, Series 2004-1; and then in blank by JPMorgan Chase Bank N.A. f/k/a JPMorgan Chase Bank, as Trustee of the same trust. [R. pp. ____]. On its face, the Note is a negotiable instrument under S.C. Code Ann. § 36-3-104 (1976), as amended. Because Respondent possessed the blank-endorsed Note, Respondent was the holder under S.C. Code Ann. § 36-1-201(b)(21)(A) (1976), as amended, and a "person entitled to enforce" the Note under S.C. Code Ann. § 36-3-301 (1976), as amended.

The assignment evidence provides an independent and consistent basis for the Master's ruling, but the recorded assignments were not necessary to Respondent's right to enforce the Note and Mortgage. In *BAC Home Loans Servicing, L.P. v. Kinder*, 398 S.C. 619, 623, 731 S.E.2d 547, 549 (2012), the Supreme Court confirmed that "[t]he assignment of a mortgage does not need to be recorded, and failure to do so has no effect on the rights of the assignee" (quoting *Singleton v.*

Singleton, 60 S.C. 216, 235, 38 S.E. 462, 469 (1901)). Because the transfer of the Note carries the Mortgage with it, the timing of recording the assignments only bolster Respondent's standing to foreclose.

The Master in Equity also correctly concluded Appellants lacked standing to challenge the transfer of the Note and Mortgage because they were not parties to those transfers. *In re McFadden*, 471 B.R. 136 (Bankr. D.S.C. 2012); *see also Reese v. U.S. Bank Nat'l Ass'n*, No. 3:11-2990-CMC-SVH, 2012 U.S. Dist. LEXIS 75652, at *8–9 (D.S.C. Apr. 30, 2012) ("Plaintiff is only a party to the Mortgage and, because the Assignment is a separate contract to which Plaintiff is not a party, she cannot question its validity"); *Windsor Green Owners Ass'n, Inc. v. Allied Signal, Inc.*, 362 S.C. 12, 17, 605 S.E.2d 750, 752 (Ct. App. 2004) ("Generally, one not in privity of contract with another cannot maintain an action against him for breach of contract."). Appellants were named in this action to foreclose any ownership interest they may claim in the Property, not because they were parties to the Note, Mortgage, or assignments.

Appellants made no cognizable argument sufficient to overcome the evidence supporting Respondent's status as a real party in interest with standing to enforce the Note and Mortgage.

2. THE MASTER IN EQUITY CORRECTLY FOUND APPELLANTS' RACE-NOTICE ARGUMENTS DID NOT CONSTITUTE A DEFENSE TO RESPONDENT'S FORECLOSURE ACTION.

The Master correctly analyzed Appellants' arguments related to the South Carolina Race-Notice Recording statute. The common law holds that an unrecorded mortgage is valid against the world entire. *South Carolina Nat. Bank v. Guest,* 232 S.C. 367, 102 S.E.2d 215 (1958). South Carolina has adopted the common law in full except to the point modified by S.C. Code Ann. §

30-7-10 (1976), as amended.[1] However, this modification only protects *bona fide* purchasers for value **without notice**. In all applications other than in regard to *bona fide* purchasers for value without notice, the common law rule remains effective. See *United States v. Anders Contracting Co.*, 111 F.Supp. 700 (D.S.C. 1953) stating that ("[u]nder the South Carolina law, **the common law rule that a …mortgage over real estate is good against the world, though unrecorded, remains in effect except as changed by the Recording Act**." (all emphasis added).

The recordation statutes have **modified** the common law rule, but have not done away with it. The relevant enactment is found at S.C. Code Ann. § 30-7-10 (1976), as amended. This provision states in relevant portion:

> All … mortgages or instruments in writing in the nature of a mortgage of any real property … **are valid so as to affect the rights of subsequent … purchasers for valuable consideration without notice,** only from the day and hour when they are recorded in the office of the register of deeds or clerk of court of the county in which the real property affected is situated… . (Emphasis added)

Thus, it is clear from this provision that the race-notice statute does not abrogate the common law rule entirely. It modifies it only to the degree of protecting subsequent purchasers for valuable consideration without notice. *Goodrich Silvertown, Inc. v. Rogers*, 189 S.C. 101, 200 S.E. 91 (1938).

Here, the evidence established that Appellants took title to the subject property, without consideration, as an inheritance following the passing of their last living parent, Carl Alvin Nunally, Sr., a mortgagor herein on September 4, 2021. A Deed of Distribution into the Appellants

[1] S.C. Code Ann. § 14-1-50 (1976), as amended states:

> all, and every part, of the common law of England, where it is not altered by the Code or inconsistent with the Constitution or laws of this State, is hereby continued in full force and effect in the same manner as before the adoption of this section.

was signed by Timothy Nunally as Personal Representative of the Estate of Carl Alvin Nunally, Sr. on May 30, 2023, and recorded in the Lexington County Registry on September 6, 2023, in Book 21073 at Page 1408. At the time Appellants received their respective interests in the Subject Property, the Mortgage was present in the Lexington County land records, having been recorded in the Lexington County Registry on February 20, 2004, in Book 9041 at Page 4. Therefore, the Appellants had record notice of the subject Mortgage prior to receiving their respective interests in the Subject Property.

Appellant Timothy Allen Nunally testified at trial that, as Personal Representative of the Estate of Carl Alvin Nunally, Sr., he made several payments on the subject Mortgage after his father's death. [R. pp. ____]. Neither Appellant denied actual knowledge of the Mortgage. Instead, Appellants argue that the Mortgage should not have been recorded and therefore should not provide record notice. The Master correctly rejected that position because Appellants had both actual knowledge and record or inquiry notice of the Mortgage before receiving their interests in the Property.

Appellants also misstate the purpose of Respondent's declaratory-judgment cause of action. Respondent sought an order confirming that the recorded Mortgage constituted a valid and subsisting lien on the Property despite an inadvertent notarial-acknowledgment error. [R. pp. ____]. The Master concluded:

> Attorney Brian L. Boger testified at trial regarding his role as the attorney who supervised the closing of the loan as well as his serving as a witness and notary regarding the signatures of Carl A. Nunally, Sr. and Frankie L. Nunally on the Mortgage. Mr. Boger testified that, due to inadvertent error and mistake, the Acknowledgment Section of the Mortgage was improperly executed as he inadvertently listed himself as the party whose signature was being acknowledged instead of the Mortgagors, Carl A. Nunally, Sr. and Frankie L. Nunally. Mr. Boger testified that he intended to properly execute the Acknowledgment Section, and that the clear intent of the parties to the Mortgage was to execute and record a valid Mortgage to secure repayment of the Note described herein. Mr. Boger's

> testimony was unrefuted and unequivocal. Therefore, I find and conclude that the Plaintiff is entitled to an order declaring that the Mortgage is an equitable lien or equitable mortgage on the subject property as of the date of its execution and that the Mortgage represents a valid and subsisting first lien on the subject property.

[R. pp. ____]. Appellants' recording statute arguments have no bearing on Respondent's declaratory judgment action and do not constitute a defense to Respondent's foreclosure of the Mortgage. The Master's ruling that the Mortgage constitutes a continuing lien over the Subject Property is an acknowledgment that the notarial-acknowledgment error is not fatal to the recorded Mortgage. Because Appellants had both actual and record notice of the Mortgage before they received their inherited interest in the subject property, the Master correctly found that the Mortgage is enforceable against them.

3. APPELLANTS FAILED TO PRESERVE ANY ISSUE RELATED TO THE ADEQUACY OF THE MASTER IN EQUITY'S FINDINGS BECAUSE THEY DID NOT FILE A SCRCP RULE 59(E) MOTION.

Appellants contend the Master in Equity "failed to make adequate findings addressing Appellants' preserved Rule 16(c) objections, trial objections, PowerPoint presentation, post-trial proposed order, and revised proposed findings." It is unclear from Appellants' brief which findings or objections they believe were not adequately addressed. In any event, Rule 16(c), SCRCP, does not preserve objections through a pretrial brief because the rule provides that "[t]he pre-trial brief is solely for the use of the court, and shall not be filed with or made part of the record in the action." Appellants' references to their PowerPoint presentation and proposed post-trial order likewise do not identify any preserved ruling, objection, or omitted finding that would support reversal.

Any claimed inadequacy in the Master's findings of fact or conclusions of law is unpreserved because Appellants did not file a SCRCP Rule 59(e) motion asking the Master to address any allegedly unruled-upon issue or objection:

> Under South Carolina Rule of Civil Procedure 52(a), "[i]n all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon." This Court has previously determined this requirement to be directory and that noncompliance would not form the basis for invalidating a judgment. *May v. Cavender*, 29 S.C. 488, 7 S.E. 489 (1888) (interpreting Section 291 Code of Laws of South Carolina); *see* also *Borg Warner Acceptance Corp. v. Darby*, 296 S.C. 275, 372 S.E.2d 99 (Ct.App.1988). Rather, where a trial court substantially complies with Rule 52(a) and adequately states the basis for the result it reaches, the appellate court should not vacate the trial court's judgment for lack of an explicit or specific factual finding. *See Pawley's Island Civic Ass'n. v. Johnson*, 292 S.C. 208, 355 S.E.2d 541 (Ct.App.1986) (interpreting Section 15–35–110 Code of Laws of South Carolina 1976).
>
> The record reflects the circuit court did not explicitly rule on Penn National's argument that Noisette failed to prove Ismail was a permissive user. Penn National has failed to show it made a Rule 59(e), SCRCP motion to amend or alter judgment on this ground. We hold the issue was thus not properly before the Court of Appeals and should not have been addressed. *Halbersberg v. Berry*, 302 S.C. 97, 394 S.E.2d 7 (Ct.App.1990).

Noisette v. Ismail, 304 S.C. 56, 58, 403 S.E.2d 122, 123-124 (1991).

Here, the Master in Equity made detailed findings of fact and conclusions of law in favor of Respondent on both the declaratory-judgment and foreclosure causes of action, and the order addressed Appellants' asserted defenses. To the extent Appellants believed any issue or objection required additional findings, they were required to raise that omission through a Rule 59(e) motion. Because they did not do so, the preservation argument provides an additional basis to affirm.

CONCLUSION

For the reasons stated above, this Court should affirm the judgment of the Master in Equity.

[SIGNATURE PAGE TO FOLLOW]

Respectfully submitted,

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