

IN THE SOUTH CAROLINA COURT OF APPEALS

STATE OF SOUTH CAROLINA

Appellate Case No. 2026-001103

Trial Court Case No. 2024-CP-32-01094

RECEIVED

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SC Court of Appeals

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,

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 Nunnally,

Defendants,

of which Timothy Allen Nunally and Mark Anthony Nunnally are the Appellants.

REPLY BRIEF OF APPELLANTS

TIMOTHY ALLEN NUNALLY AND MARK ANTHONY NUNNALLY

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INTRODUCTION

Respondent's Initial Brief narrows this appeal but does not answer its central question. Appellants do not contend that a defect in recordation, standing alone, extinguished the underlying debt. Nor do Appellants seek contractual rights under assignments to which they were not parties. The preserved question is more basic: whether this Respondent proved that it was the real party in interest and a person entitled to enforce the Note and Mortgage when it commenced this foreclosure action on March 8, 2024. (Complaint p. 1; Final Order pp. 8-9.)

Respondent now asserts that it possessed a blank-endorsed Note, that the assignments provided an independent basis for enforcement but were also unnecessary, and that Rule 17(a), SCRCP, would permit ratification or substitution even if the Note had been transferred after commencement. Resp. Br. 6-8. Yet Respondent identifies no record citation establishing when it obtained possession of the Note. Its brief repeatedly states that the Note was possessed by Respondent but leaves the record references blank. The trial testimony identified the Note, allonges, endorsements, servicing records, assignments, and debt figures, but Appellants specifically questioned the endorsement sequence, witness foundation, entity authority, and timing of possession. (Tr. pp. 45-49, 85-97; Pl.'s Ex. 4.)

The Court need not decide every subsidiary dispute to resolve this appeal. If Respondent relies on holder status, the record must support its possession of a properly enforceable instrument at the legally relevant time. If it relies on transfer or assignment, the record must support the transfer of the enforcement right, not merely a mortgage assignment. If it relies on servicer status, the record must establish that relationship and the right being serviced. And if Respondent invokes Rule 17(a) as a cure, it must identify the ratification, joinder, or substitution on which it relies. Respondent's brief does not bridge those alternatives.

ARGUMENT

I. RESPONDENT'S FIRST ARGUMENT DOES NOT CURE THE CENTRAL EVIDENTIARY GAP: PROOF THAT RESPONDENT WAS THE REAL PARTY IN INTEREST AND ENTITLED TO ENFORCE WHEN THIS ACTION COMMENCED

A. RESPONDENT'S HOLDER/POSSESSION THEORY STILL REQUIRES PROOF AT COMMENCEMENT.

South Carolina's Uniform Commercial Code defines a “person entitled to enforce” an instrument as the holder, a nonholder in possession with the rights of a holder, or a person entitled to enforce under specified non-possession provisions. S.C. Code Ann. § 36-3-301. A “holder” includes the person in possession of a negotiable instrument payable to bearer. S.C. Code Ann. § 36-1-201(b)(21)(A). Rule 17(a), SCRCP, separately requires every action to be prosecuted in the name of the real party in interest.

Appellants' first two issues did not rest on the proposition that Respondent must own the Note. They challenged whether Respondent proved one legally sufficient path to enforcement at commencement. Before trial, Appellants filed and served a Rule 16(c) notice and motion requesting that Respondent identify and elect the standing theory on which it intended to proceed. At trial, Respondent's witness testified concerning the Note, allonges, and a stamped endorsement ending in blank, and Respondent relied on possession as proof of enforcement authority. (Tr. pp. 45-49, 91-97; Pl.'s Ex. 4; Final Order p. 9.) Appellants then cross-examined the witness concerning the endorsement sequence, the distinction between NovaStar Home Mortgage, Inc. and NovaStar Mortgage, Inc., the allonges, the basis for the witness' knowledge, and whether Respondent proved possession and enforcement authority at the relevant time. (Tr. pp. 85-94.)

Respondent's answer is that “[b]ecause Respondent possessed the blank-endorsed Note, Respondent was the holder.” Resp. Br. 7. The record does support possession at trial: Plasse testified that the Note was “subsequently transferred to the plaintiff” and that Plaintiff possessed the original Note in this case. (Tr. pp. 45-46, 93, 96.) But neither that testimony nor the Final Order identifies when BONY obtained possession. Thus, the evidence establishes possession in February 2026; Respondent's Brief identifies no record evidence fixing possession as of March 8, 2024. The question is therefore not whether a blank endorsement may make an instrument payable to bearer, but whether the record establishes that this Respondent possessed the enforceable instrument when it filed the Complaint.

Draper does not eliminate that evidentiary requirement. In *Bank of America, N.A. v. Draper*, 405 S.C. 214, 746 S.E.2d 478 (Ct. App. 2013), the Court recognized that a servicer may have standing and separately examined evidence indicating the bank held the note. The borrower in *Draper* acknowledged the bank's servicing role, and the record included the instrument and evidence of the transfers and account history. *Id.* at 222-24, 746 S.E.2d at 482-83. *Draper* therefore does not stand for the proposition that production of the original, blank-endorsed Note at the February 2026 trial automatically proves possession by the named plaintiff when the action commenced in March 2024.

Respondent also invokes Rule 17(a) by arguing that even a post-commencement transfer would not require dismissal because a reasonable time must be permitted for ratification, joinder, or substitution. Resp. Br. 6. But Rule 17(a) is a procedural cure; it is not evidence that the original plaintiff was already the real party in interest. The Rule states that ratification, joinder, or substitution may be allowed and will relate back. Respondent simultaneously says no such

cure occurred because none was necessary. Resp. Br. 6. That leaves the original factual question untouched: what record evidence established Respondent's enforcement right on March 8, 2024?

The final order compounded the problem by accepting multiple theories together. It found Respondent to be a holder/person entitled to enforce, while also relying on assignments and then characterizing those assignments as unnecessary because transfer of the Note carries the Mortgage. (Final Order pp. 8-9.) Appellants do not contend that every foreclosure plaintiff must formally “elect” a single label as an abstract procedural matter. The point is evidentiary: where the asserted theories depend on different predicates, the judgment must be supported by evidence satisfying at least one complete theory. A conclusion that the assignments are both independent support and legally unnecessary does not supply missing proof of possession at commencement.

Accordingly, Respondent's first argument does not answer Issues I and II. At minimum, the judgment should be vacated and the matter remanded for findings identifying the enforcement theory supported by the record and the evidence establishing entitlement to enforce when the action commenced.

Respondent next argues within its first heading that Appellants “lacked standing to challenge the transfer of the Note and Mortgage because they were not parties to those transfers.” Resp. Br. 8. That characterization is broader than Appellants' preserved argument. Appellants are not suing for breach of an assignment, seeking to rescind an assignment, or claiming rights as third-party beneficiaries. They challenge the use of those documents as proof that Respondent itself possessed the right to foreclose.

That distinction matters. Draper reiterates that an assignee stands in the shoes of its assignor, and South Carolina law recognizes that transfer of the note carries the mortgage while assignment of the mortgage alone does not necessarily transfer the note. Bank of America, N.A.

v. Draper, 405 S.C. 214, 220, 746 S.E.2d 478, 481 (Ct. App. 2013); Hahn v. Smith, 157 S.C. 157, 167, 154 S.E. 112, 115 (1930). Thus, when Respondent offers an assignment as evidence of its enforcement right, Appellants may test whether that evidence proves what Respondent says it proves.

The record reflects an original assignment and a corrective assignment recorded in 2023. (Final Order p. 3; Tr. pp. 58-60; Assignments pp. 1-2.) Respondent now argues those assignments were unnecessary because holder status alone sufficed. Resp. Br. 7-8. If so, the assignments cannot substitute for proof of possession at commencement. Conversely, if Respondent relies on the assignments as an independent route to enforcement, the court must determine whether the evidence connects the transfer of the Note and the right to enforce it to Respondent, rather than merely showing a recorded mortgage assignment.

The same is true of Respondent's reliance on Draper's servicer discussion. Plaintiff introduced a limited power of attorney establishing PHH's authority to act as servicer for BONY. (Tr. pp. 34-35; Pl.'s Ex. 1.) Appellants therefore do not dispute that a servicing relationship was placed into evidence. But PHH did not bring this foreclosure in its own name, and the Final Order did not rest on PHH's independent status as the plaintiff; it expressly found BONY itself to be the holder and a person entitled to enforce the Note. (Final Order pp. 8-9.) The servicing evidence therefore does not resolve the separate temporal question whether BONY possessed the Note, or otherwise qualified as a person entitled to enforce it, when the action commenced.

Appellants therefore do not ask this Court to invalidate a private assignment merely because they dispute it. They ask the Court to require Respondent to prove its own right to obtain the extraordinary equitable remedy of foreclosure. The authorities barring a stranger from enforcing or rescinding another party's contract do not eliminate that burden.

II. RESPONDENT'S SECOND ARGUMENT DOES NOT SHOW THAT APPELLANTS' RECORD-NOTICE/RACE-NOTICE ISSUES RESOLVE RESPONDENT'S ENTITLEMENT TO FORECLOSE

Respondent's second heading is correct about one limited proposition: S.C. Code Ann. § 30-7-10 principally protects subsequent creditors and purchasers for valuable consideration without notice, and Appellants received their interests through inheritance rather than a purchase for value. Resp. Br. 9-10. Appellants' Issues III and IV, however, were not limited to claiming bona-fide-purchaser status. They challenged the legal effect of an admitted acknowledgment defect, the use of that instrument as record-notice and first-lien proof, and the relationship between the Mortgage, assignments, and Respondent's claimed enforcement authority. (Filed Apr. 14 Packet pp. 4, 11-12, 15-16.)

Respondent's own pleading alleged that the Mortgage acknowledgment was improperly executed and sought declaratory and equitable relief concerning that defect. (Complaint ¶¶ 5-9, 10-26; Final Order p. 7.) At trial, attorney Brian L. Boger acknowledged that the Mortgage acknowledgment contained his name where the mortgagors' names should have appeared. (Tr. pp. 16-18, 26-30.) South Carolina law requires an instrument to be acknowledged or proved before it may be recorded. S.C. Code Ann. § 30-5-30. Respondent therefore did not proceed on a simple theory that an unquestionably recordable legal mortgage had always existed in perfect form; it affirmatively requested equitable relief to address the defect.

The Master ultimately granted that equitable relief, declaring the Mortgage an equitable lien or equitable mortgage and a first lien. (Final Order pp. 10-13.) But the fact that equity may recognize a mortgage despite an execution or acknowledgment defect does not answer who may enforce the resulting lien. Nor does Appellants' actual knowledge of the debt establish that this

Respondent held the enforcement right. The race-notice discussion and the standing/enforcement discussion are separate inquiries.

This is why Respondent's argument that the Mortgage was recorded before the Deed of Distribution is incomplete as a response to the appeal. Even if that chronology defeats a claim to bona-fide-purchaser priority under § 30-7-10, it does not prove that Respondent possessed the Note at commencement, that a mortgage assignment transferred the Note, or that Respondent otherwise qualified under § 36-3-301. The Court should not permit record notice to become a substitute for proof of enforcement authority.

Appellants accordingly narrow their requested relief on this point. They do not ask the Court to hold that the admitted acknowledgment defect automatically extinguished the debt or that inheritance converted them into purchasers for value. They ask the Court to reject Respondent's contention that notice alone resolves the threshold enforcement defects raised in Issues I-IV. If the Mortgage is enforceable in equity, it is enforceable only by a party that proves the right to enforce it.

III. RESPONDENT'S THIRD ARGUMENT OVERSTATES RULE 59(e): ISSUES I-IV WERE ACTUALLY RULED UPON

Respondent's third heading asserts that Appellants failed to preserve issues concerning the adequacy of the Master's findings because no Rule 59(e) motion was filed. That argument has force only to the extent Appellants complain that the Master omitted a ruling altogether. South Carolina law distinguishes between an issue that was raised but never ruled upon and an issue that was raised and decided adversely. When an issue is raised but the court fails to rule, a Rule 59(e), SCRCF, motion is ordinarily required to obtain a ruling. *On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000); *Staubes v. City of Folly Beach*, 339

S.C. 406, 412, 529 S.E.2d 543, 546 (2000). But “[p]ost-trial motions are not necessary to preserve issues that have been ruled upon at trial.” *Wilder Corp. v. Wilke*, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998). See also *Eubank v. Eubank*, 347 S.C. 367, 373 n.2, 555 S.E.2d 413, 416 n.2 (Ct. App. 2001).

Appellants therefore do not rely on the Rule 16(c) pretrial brief as if it were itself part of the appellate record. Respondent correctly notes that Rule 16(c) says the pretrial brief is solely for the use of the court and shall not be filed or made part of the record. Resp. Br. 11. The preservation record, however, extends beyond that document. The trial transcript independently demonstrates that Appellants placed standing and enforcement before the court, and the Master expressly identified standing and race-notice as the principal disputed issues before directing the parties' proposed-order submissions. (Tr. pp. 178-81, 196-97.)

More importantly, the Final Order actually ruled on the principal issues now presented in Issues I-IV. It found Respondent was the holder and a person entitled to enforce the Note. (Final Order pp. 8-9.) It found the assignments valid but unnecessary. (Final Order p. 9.) It rejected Appellants' record-notice and race-notice defenses. (Final Order pp. 9-12.) And it granted Respondent declaratory and equitable mortgage relief. (Final Order pp. 10-13.) These are rulings. Appellants were not required to file a Rule 59(e) motion merely to ask the same court to rule against them a second time on matters it had already decided.

Respondent's authorities regarding omitted findings therefore do not supply an “additional basis to affirm” the entire judgment. At most, they limit Issue V to the extent that Issue V seeks appellate review of a matter the Master never addressed. Appellants acknowledge that distinction and do not use Issue V to resurrect a wholly unruled-upon argument. The Court

may resolve Issues I-IV based on the rulings the Master actually made and the record supporting—or failing to support—those rulings.

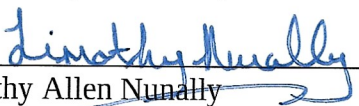
This treatment respects the purpose of preservation doctrine. The Master was repeatedly presented with the disputed enforcement framework and decided it. The Court of Appeals therefore has a ruling to review. *Staubes*, 339 S.C. at 412, 529 S.E.2d at 546. Rule 59(e) should not be expanded from a mechanism for obtaining omitted rulings into a requirement that a losing party re-argue every adverse ruling after judgment.

CONCLUSION

Respondent's Initial Brief does not identify record evidence establishing that The Bank of New York Mellon possessed the blank-endorsed Note or otherwise qualified as the person entitled to enforce it when this foreclosure action commenced on March 8, 2024. Its reliance on assignments does not cure that gap if those assignments are unnecessary to holder status, and its reliance on race-notice principles does not establish Respondent's enforcement right. Finally, Respondent's Rule 59(e) argument cannot erase Issues I-IV because the Final Order expressly ruled on standing, entitlement to enforce, assignments, record notice, and equitable mortgage relief.

For those reasons, Appellants respectfully request that this Court reverse the Order and Judgment of Foreclosure and Sale and Reformation of Mortgage. In the alternative, Appellants request that the Court vacate the judgment and remand for findings and application of the correct legal standards concerning Respondent's entitlement to enforce at commencement, the evidentiary effect of the Note and assignments, and the relationship between the admitted Mortgage defect and the equitable relief awarded.

Respectfully submitted,



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Appellant, Pro Se



Mark Anthony Nunnally
Appellant, Pro Se
Date: September 14, 2026