

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM MARION COUNTY
Court of Common Pleas

Haigh Porter, Special Referee for Marion County

Case No. 2013-CP-33-306

Anderson Brothers Bank, Respondent,

v.

Dazarhea Monique Parson, a/k/a Dazarhea
D. Parson, a/k/a Dazarhea Monique Daniels
Parson, A. Tyrone Parson, Jr. a/k/a Arnold
Tyrone Parson, Jr., S.C. Department of
Revenue, and S.C. Department of Motor
Vehicles, Defendants,

Of whom

Dazarhea Monique Parson and
A. Tyrone Parson, Jr., are the Appellants.

INITIAL BRIEF OF RESPONDENT

Kirsten E. Small
Suzanne Grigg
Nexsen Pruet, LLC
Post Office Drawer 10648
Greenville, SC 29603
(864) 370-2211

Attorneys for Respondent
Anderson Brothers Bank

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STATEMENT OF ISSUES ON APPEAL

1. Did the lower court have subject matter jurisdiction over this routine foreclosure proceeding?
2. Did Respondent Anderson Brothers Bank, holder of the Note, Mortgage, and Security Agreement, have standing to institute this foreclosure action?
3. Was the evidence sufficient to support foreclosure?

STATEMENT OF THE CASE

Respondent Anderson Brothers Bank (“ABB”), through counsel, instituted the underlying foreclosure proceeding by filing a *lis pendens*, summons and complaint, and a notice of mortgagor’s intervention rights¹ on April 26, 2013. (Lis pendens; Summons and Complaint; Notice of Intervention Rights, R. pp. __.) Appellants Dazarhea Parson and Tyrone Parson were properly served on May 1, 2013. (Affidavits of Service, R. p. __.) Appellants did not respond to the Complaint, and accordingly on June 10, 2013, ABB’s counsel filed an affidavit of default and a notice of nonparticipation in the foreclosure intervention process. (Affidavit of Default; Notice of Nonparticipation, R. pp. __.)

On June 27, 2013, the matter was referred to Haigh Porter, the Special Referee for Marion County. (Order of Reference, R. pp. __.) Special Referee Porter conducted a hearing on July 29, 2013, at which counsel for ABB appeared and Appellants appeared on their own behalf. Following the hearing, the Special Referee granted judgment in favor of ABB. The property was thereafter sold at auction, resulting in a deficiency of \$1,304.30, as to which the Special Referee granted a deficiency judgment. (Deficiency Judgment, R. p. __.)

¹ See *In re Mortgage Foreclosure Actions*, 396 S.C. 209, 720 S.E.2d 908 (Admin. Order May 2, 2011).

FACTS

This foreclosure action arises out of a promissory note executed by Appellants, and payable to Respondent Anderson Brothers Bank (“ABB” or “the bank”), on April 3, 2012, in the principal amount of \$20,900. (Note, R. p. __.) To secure the Note, Appellants executed a mortgage on a piece of real property located in Marion County, South Carolina. (Mortgage, R. p. __.) ABB duly recorded the Mortgage. To further secure the debt, Appellants executed a security agreement granting ABB a lien on a mobile home located on the property. (Security Agreement, R. p. __.) ABB perfected its security interest in the mobile home by recording its lien on the face of the certificate of title for the mobile home. (Title, R. at __.) Consequently, ABB held a first mortgage lien upon the property and a first lien upon the mobile home. (Order and Judgment of Foreclosure and Sale (“Order”) p. 4, R. p. __.)

Appellants made regular payments on the Note through January 2013. (Hrg. Ex. E, R. p. __.) At that point, Appellants apparently came to the belief that the Note was actually a “bill of exchange,” not a loan, and therefore no money was owed to ABB. (Hrg. Tr. pp. 50-52, R. pp. __.) Appellants sent ABB “some type of documentation that said they were not going to continue to pay” on the Note. (Hrg. Tr. p. 15, R. p. __.) Thomas

Rivers Anderson, ABB's commercial loan officer and special asset administrator, contacted Appellants and warned them that if they did not resume payments the bank would have to foreclose. (Hrg. Tr. p. 24, R. p. _ ("I told [Appellants] on the phone ... [O]nce this loan goes into default, once it hits 60 days past due, we'd have no choice but to ... move forward with foreclosure.")) Appellants did not resume payments, and thus the loan remained in default.

Under the terms of the Note and Mortgage, Appellants' default caused the whole amount of the debt to become immediately due and payable. ABB sent Appellants written notice of the default in accordance with the law. (Order p. 5, R. p. _) ABB thereafter filed this action to foreclose on the Mortgage and the Security Agreement. (Complaint, R. p. _) Appellants were properly served (Affidavits of Service, R. p. __) but did not file an answer.² (Hrg. Tr. p. 7, R. p. _) The matter was referred to the Special Referee for Marion County, who conducted a hearing on July 29, 2013. (Notice of Hearing, R. at _)

Appellants represented themselves at the hearing. (Hrg. Tr. pp. 3-4,

² The South Carolina Department of Revenue and Department of Motor Vehicles were also named as defendants in the foreclosure action. Both Departments answered and consented to reference to a special referee. (Answers, R. pp. _) Neither Department is a party to this appeal.

R. pp. _) Mr. Anderson appeared at the hearing as ABB's corporate representative and testified regarding the loan, Appellants' payment history, and Appellants' nonpayment and default. With respect to the Note and Mortgage, Mr. Anderson testified that the documents presented in court were photocopies of the originals, which were in ABB's possession. (Hr. Tr. p. 13, R. p. _) The loan documents were admitted into evidence over Appellants' objection. (Hrg. Tr. pp. 13-14, 29, R. pp. _)

Appellants admitted that they signed the Note and the Mortgage. (Hrg. Tr. pp. 32, 54, R. pp. _ _) Through cross-examination of Mr. Anderson and their own testimony, Appellants presented their position that they did not owe any money because the Note was actually a "bill of exchange" that itself had value, and that Appellants had exchanged this value for the property. (Hrg. Tr. pp. 57-59, 64, R. pp. _ _) The Special Referee rejected this argument (Hrg. Tr. pp. 59-69, R. pp. _), and concluded that the total amount owed to ABB, including interest, late fees, and attorney's fees and costs, was \$27,592.93 (Order p. 5, R. p. _)

On August 26, 2013, Appellants filed their notice of appeal and a motion to proceed *in forma pauperis*. Because Appellants did not post a bond as required by S.C. Code Ann. § 18-9-170 (1985), the foreclosure sale proceeded as scheduled on September 10, 2013. The property sold for

\$19,000.00, leaving a deficiency of \$1,304.30. (Deficiency Judgment, R. p. _.)

ARGUMENT

I. THE CIRCUIT COURT HAD JURISDICTION OVER THIS FORECLOSURE ACTION.

Appellants first maintain that the Circuit Court lacked subject matter jurisdiction because ABB's counsel failed to send the notice required by the Fair Debt Collection Practices Act. (Appellants' Br. p. 5, citing 15 U.S.C. § 1692g(a)(3).) However, the required notice was served upon Appellants as Exhibit A to the foreclosure complaint. (Complaint Ex. A, R. p. __.) Accordingly, Appellants' jurisdictional challenge is without basis.

II. ABB HAS STANDING TO PURSUE FORECLOSURE.

Relying on New Jersey law, Appellants contend that ABB lacks standing to pursue foreclosure unless it can prove that it has the original Note in its possession. This argument fails because the record contains such proof.

This Court recently explained, in the context of another foreclosure appeal, "Standing refers to a party's right to make a legal claim or seek judicial enforcement of a duty or right." *Bank of America, N.A. v. Draper*, 405 S.C. 214, 219, 746 S.E.2d 478, 480 (Ct. App. 2013) (internal quotation marks omitted). To have standing, "a party must be a real party in interest to the litigation." *Id.* at 220, 746 S.E.2d at 481 (internal quotation marks omitted). The settled law of South Carolina is that the owner of a mortgage and a

note is entitled to bring a foreclosure action. *See, e.g., U.S. Bank Trust Nat'l Ass'n v. Bell*, 385 S.C. 364, 374, 684 S.E.2d 199, 204 (Ct. App. 2009).

In this case, the evidence is that ABB made the loan to Appellants that was secured by the Note and the Mortgage, and that ABB was the owner and holder of the Note and the Mortgage at the time of the foreclosure action. Moreover, the evidence established that ABB has the originals of the Note and Mortgage in its possession. During the foreclosure hearing, Mr. Anderson identified the loan documents and testified that the documents presented in court were photocopies of the originals. (Hrg. Tr. pp. 13-14, 29-30, R. pp. 1 1.) The photocopies were properly admitted into evidence. *See* Rule 1003, S.C.R.C.P. (providing that “[a] duplicate is admissible to the same extent as an original”); *State v. NV Sumatra Tobacco Trading Co.*, 379 S.C. 81, 86-87, 666 S.E.2d 218, 221 (2008). Therefore, Appellants’ standing argument is without merit.

III. THE EVIDENCE SUPPORTS THE JUDGMENT.

Finally Appellants maintain that the evidence does not support foreclosure. Specifically, Appellants claim that there was no “factual basis” for the foreclosure and that the evidence did not establish the amount owed. (Appellants’ Br. pp. 5, 7-8.) This argument, too, is without merit.

“Generally, the party seeking foreclosure has the burden of

establishing the existence of the debt and the mortgagor's default on that debt." *U.S. Bank Trust*, 385 S.C. at 374-75, 684 S.E.2d at 205. In this case, the evidence established that ABB made the loan to Appellants that was secured by the Note and the Mortgage; that ABB was still the owner and holder of the Note and Mortgage at the time of foreclosure; and that Appellants were in default on the Note. This evidence was sufficient to carry ABB's burden of proof as to foreclosure.

ABB also presented evidence of its damages. Without objection from Appellants, the Special Referee admitted into evidence a ledger showing the payment history on the Note. (Ex. E, R. p. __.) The ledger showed that Appellants made their last payment on the Note on January 3, 2013. Other evidence showed that the total amount owed to ABB as of July 25, 2013 was \$20,935.93. (Affidavit of Statement of Account, R. p. __.)

The foregoing evidence was sufficient to prove ABB's entitlement to foreclosure.

CONCLUSION

In light of the foregoing, Respondent Anderson Brothers Bank respectfully asks the Court to affirm the judgment of foreclosure.

Kirsten Small

Kirsten E. Small

Nexsen Pruet, LLC

55 East Camperdown Way (29601)

Post Office Drawer 10648

Greenville, SC 29603-0648

PHONE: 864.370.2211

FACSIMILE: 864.282.1177

KSmall@nexsenpruet.com

Attorneys for Respondent

Anderson Brothers Bank

November 18, 2013

Greenville, South Carolina

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Of whom

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A. Tyrone Parson, Jr., are the Appellants.

CERTIFICATE OF COUNSEL

I certify that the foregoing **Initial Brief of Respondent** complies with the
Supreme Court of South Carolina's order of August 13, 2007.

November 18, 2013


Kirsten E. Small
Nexsen Pruet, LLC
P.O. Drawer 10648
Greenville, SC 29603
864.370.2211
KSmall@nexsenpruet.com
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PROOF OF SERVICE

I certify that I have served the foregoing **Initial Brief of Respondent** on Appellants, who are not represented by counsel, by depositing a copy of it in the United States Mail, postage prepaid, addressed to Appellants as follows:

Dazarhea Monique Parson
3546 Quail Roost Road
Mullins, SC 29574

Arnold Tyrone Parson, Jr.
3546 Quail Roost Road
Mullins, SC 29574

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Kirsten E. Small
Nexsen Pruet, LLC
P.O. Drawer 10648
Greenville, SC 29603
864.370.2211
KSmall@nexsenpruet.com
*Attorneys for Respondent
Anderson Brothers Bank*

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