

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM BEAUFORT COUNTY  
Court of Master In Equity

**SC Court of Appeals**

Marvin H. Dukes III, Master In Equity For Beaufort County

Appellate Case No. 2013-001412

HSBC Bank USA,, National Association, As Trustee of MLCC 2007-2,  
Respondent,

v.

S. Russell Fielden, Deborah M. Fielden, Coastal States Bank, Defendants

Coastal States Bank, Cross-Claim Plaintiff

v.

S. Russell Fielden and Deborah M. Fielden, Cross Claim Defendants,

Of whom S. Russell Fielden and Deborah M. Fielden are the Appellants..

**Appellant's Reply Brief To Respondent's Initial Brief**

**Appellants**

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## **Assignment Of The Mortgage And Ownership Of The Note**

The Respondent states in their brief (page 18 & 19) that an assignment of the mortgage was not needed since the “mortgage follows the note”. The mortgage and note were separated when the original loan documents the Appellants signed named Coastal States Bank on the note and assigned ownership of the mortgage to MERS Corp. (Mortgage Electronic Corporation). MERS was not named on the note. PHH Mortgage and the Respondent’s law Firm attempted to correct this separation by creating a mortgage assignment from MERS directly to the Respondent and recording it two months after filing their complaint. The original lender Coastal States Bank conveyed the Note to Merrill Lynch Credit Corp. If the Appellants note and mortgage had in fact been made a part of the Respondent’s Trust in 2007 then public Trust Documents, including a loan schedule, on file with the Securities And Exchange Commission would show the note and mortgage would have flowed through to the Respondent’s Trust from Merrill Lynch Credit Corp, Merrill Lynch Mortgage Lending, and Merrill Lynch Mortgage Investors as the Depositor of the Loans to go into the Respondent Trust. No such documents were presented by the Respondent.

It is clear that to have standing to enforce the note and mortgage in this foreclosure case Respondent must be the holder & owner of the original Note as well as the Mortgage at the time the complaint is filed. The Respondent failed to show that it owned either the Note or the Mortgage at the time the complaint was filed. Simply claiming to be the holder of the note and mortgage in the complaint does not make it true. Attempts by the Respondent to correct this after the fact are part of the case record exhibits in the form of the aforementioned late MERS Assignment, an allonge altered by the Respondent, and a copy of an undated and unverified “endorsement in blank”, all filed or produced after the date of the foreclosure complaint.

## **The Note And Mortgage At The Time The Complaint Was Filed**

The respondent notes in their brief (page 9 and 10) that Mr. Fielden testified as to his requests to PHH Mortgage (who was the servicer for Merrill Lynch Credit Corp) for information relating to the ownership of his loan during his request for a loan modification in 2009. The Respondent did not include in their brief the fact Mr. Fielden testified that PHH Mortgage named Wells Fargo as the owner of the note and mortgage in 2009, two years after the Respondent Trust was formed and closed for new loans to be included. Mr. Fielden also testified that the MERS online tracking system for banks showed the Well Fargo Home Mortgage as the owner of the Note and Mortgage just prior to the trial date.

## **Holder Of The Note And Mortgage**

The respondent states (Respondents Brief Page 8) Mr. Turner of PHH Mortgage testified at trial that PHH Mortgage was the custodian of the records for the loan. Respondent's counsel stated at trial that PHH Mortgage was in possession of the original Note and delivered the note to the Respondents Attorney. The Respondent's public trust documents for the MLCC 2007-2 Respondent's Trust, on file with the Securities And Exchange Commission, states that the Master Servicer of the Trust shall be the custodian of the documents. PHH Mortgage is not named as the Master Servicer in the Public Trust Documents. The reason PHH Mortgage may have been in possession of the Note at the time the complaint was filed, if the loan was not in the Trust, is that they were the servicer for Merrill Lynch Credit Corporation at the beginning of the loan. They never delivered the note to the Respondent Trust. Merrill Lynch Credit Corp was the entity that funded the original loan through Coastal States Bank. Evidence presented at trial by Mr. Turner of PHH Mortgage shows that all payments were still going to Merrill Lynch Credit

Corp well after the date of the formation of the Respondents Trust and up until the date the Appellant stopped making payments to PHH Mortgage as servicer for Merrill Lynch Credit Corp. If the loan had been transferred to the Respondent's Trust prior to the filing of foreclosure, the Master Servicer for the Trust (not PHH Mortgage) would have held the Trust Documents and been able to forward them to the Respondent's Attorney for foreclosure. The Note and Mortgage were never transferred to the Respondents Trust prior to their filing foreclosure action. Physical delivery of the note and mortgage was never made to the Respondent HSBC Bank as Trustee for MLCC-2007. PHH Mortgage was not named as servicer in the complaint.

### **The Controlling Document For The Trust**

The respondent's states (Respondent's Brief Page 9) Mr. Turner testified that he was not personally familiar with the requirements of the PSA for the Trust. The Respondent failed to mention in their brief that Mr. Turner did testify that he agreed the PSA for the Respondent's Trust (Pooling And Servicing Agreement) was the controlling document for the Trust. Mr. Turner, when asked by the Appellant's counsel at trial if the Appellant's loan was a part of the Respondent's Trust, refused to state that the loan was a part of the Trust.

### **Late Assignments Of The Note And Mortgage In The Judgment Order**

(Respondents Brief Page 10) The Respondent outlines the Master In Equity's finding of fact which states that "the court finds that the Plaintiff is in possession of the original Note endorsed in blank and therefore has standing to bring this action". The blank endorsement the Master refers to was not in the complaint and therefore could not be used to show standing to file foreclosure action. The Respondent also omits in their brief the fact that a reference to the late Assignment Of Mortgage to the Respondent, dated approximately two months after the date of

the filing of the foreclosure action by Respondent, was also included and made a part of the Order. The Respondent used the late MERS mortgage assignment and the late copy of the undated blank endorsement to attempt to establish standing after they filed the complaint. It seems the lower court did as well by including both in the Summary Judgment Order.

### **The Appellant's Motion To Reconsider**

The Respondent (Respondent's Brief Page 11) does not summarize the Appellant's position fully and accurately. The Appellant argued the following in their Motion To Reconsider;

- The Note was never accompanied by an endorsement or allonge prior to the Respondent's filing of the foreclosure action.
- No endorsement or allonge was ever affixed to the Note as to be made a part of the Note.
- The original allonge belonging to Coastal States Bank and Merrill Lynch was altered by the Respondent.
- The endorsement "In Blank" provided by the Respondent two years after their filing the foreclosure action was not dated, notarized, or verified.

### **The Notice Of Foreclosure**

The respondent's brief (Respondent's Brief Page 8) states the Appellant was sent the notice of intent to foreclose. The notice the Appellant received was from PHH Mortgage on Merrill Lynch Letterhead, with no mention of the Respondent HSBC BANK. The Appellants confirmed they received the Notice and assumed it was from PHH Mortgage acting as servicer for Merrill Lynch. Once the Appellant received the foreclosure complaint from HSBC Bank, they were

surprised that it was from a bank they had never heard of. This is why the Appellant began investigating the ownership of their note and mortgage.

The Respondent's brief (Respondent's Brief Page 12) mentions the Appellant argued in their Motion To Reconsider that there could be no distinct difference between the notice and the terms of Paragraph 22 of the Mortgage. The Appellants actually argued that the Notice is required to comply with bank's own contract, it was not in compliance with paragraph 22 of the mortgage, and terms were added that could burden the Appellant if acted upon. The fact that the Appellant did not choose to follow the additional language in the notice (bring a court action to assert the non-existence of a default) but chose to defend the foreclosure (as the Respondent states in their brief) is irrelevant to the fact that the Appellant's notice and language did not strictly comply with the terms of the lender's Mortgage.

There is a world of difference between bringing a court action to assert the non-existence of a default and the right to defend the foreclosure proceeding. To equate the two or disregard the language of the former is to ignore both the terms of the Appellant's mortgage and the potential economic burden of the added language.

### **Issues Raised In The Lower Court**

The Respondent claims (Respondent Brief Pages 13-15) the Appellant did not properly raise certain issues, they were not ruled upon, and therefore not preserved for appellate review. All of the arguments stated by the Appellant in the initial brief were raised in the lower court, are part of the case record, were considered by the lower court to make a final ruling, and they are important for a full review by the appellate court.

- (Respondent Brief page 13) “The Respondent filed a “limited Power Of Attorney” almost two years after the date of the foreclosure action in an attempt to validate the “Notice Of Foreclosure”. This was an argument in the Appellant’s initial brief and raised in the lower court supporting main issues regarding both the Respondent’s “Lack Of Standing To Foreclose” and “Failure To Provide Proper Notice”. The late filing of the “Limited Power Of Attorney” also supports the Appellants position that PHH Mortgage was not the servicer of the loan for the Respondent at the time the Respondent filed foreclosure action. The above arguments are supported by evidence submitted by the Respondent in the lower court and are part of the record.
- (Respondent Brief Page 13) “The Respondent did not receive the Appellant’s Mortgage Payments Prior to filing their foreclosure action.” This was an argument in the Appellant’s initial brief supporting their main issue of the Respondent’s “Lack Of Standing To Foreclose”, and is supported with evidence submitted by the Respondent to the lower court and is on record.
- (Respondent Brief Page 14) “The Lower Court’s Decision to deny the Appellant’s “Counter Claim” and “Motion To Dismiss” affected the marketability of the Appellants property (including subparts)”. The Appellant raised the issue of marketability of their property early on in the lower court and is on the record. The Appellant is on record advising the Judge in the lower court that they had been advised by the SC Realtor’s Association legal counsel they are required by SC State law to disclose any potential title conflicts to a potential buyer. With a legal claim pending in court by an entity they considered to not be the legal loan owner, the Appellants felt they could not provide marketable title to the property as called for in their SC real

estate sales contract or sell the property at fair market value. They immediately took the property off the market.

### **Preservation Of Issues For Appeal**

(Respondent Brief Page 14) Respondent claims some issues raised by the Appellant were not preserved for appeal since they did not cite any supporting authority in support of them. The Respondent cites “out of context” in the cases they present. The Appellant’s initial brief in this case did not raise any new arguments, all of the arguments referred to are supported by the record and the evidence presented in the lower court. The Appellants arguments are not conclusory, they are concise, meritorious, and important to support the Appellant’s issues that were ruled on by the lower court.

### **Respondent Claims They Were The Holder Of The Original Note**

The Respondent states (Respondent Brief Page 16) they had possession of the original note endorsed in blank at the time of the foreclosure. That statement is not true.

The Respondent also states (Respondent Brief Page 16) that the Respondent was in possession of the Note with two allonges attached thereto. This is also not true. There were no allonges or endorsements included in the original complaint and no allonges or endorsements were ever “attached” to the Note during the entire trial. Two allonges were produced in discovery and both were from Coastal States Bank to Merrill Lynch Credit Corp. One was a copy of the original Coastal States allonge and one was a copy of the same Coastal States Allonge that had been fraudulently altered by the Respondent with a stamp payable to themselves. A copy of an

Endorsement "In Blank" was produced in discovery sometime after the two above allonges surfaced. The copy of the Endorsement "In Blank" was not dated, notarized or verified.

The Respondent states (Respondent Brief Page 16) that "An Allonge is a 'paper annexed to a negotiable instrument, for endorsements too numerous or lengthy to be contained in the original'. This is also not true. An allonge is required to be "attached" to a negotiable instrument so as to be made a part of the document.

The Appellant has made the argument that "Holder" status of the Note by the Respondent prior to commencing their foreclosure action was never proven. PHH Mortgage was a prior servicer for the loan and the Respondent's counsel confirmed on record that all documents needed for this foreclosure action were sent to them from PHH Mortgage (not by the Respondent). No assignment of the Note or Mortgage to the Respondent was present in the Respondent's complaint. Coastal States Banks was named on the Note and MERS (Mortgage Electronic Corporation) was named on the Mortgage in the complaint.

All of the Respondent's claims that PHH Mortgage, acting as servicer, is sufficient to prove they gave proper notice and were in possession of the Note are faulty. PHH Mortgage may have been acting as a Servicer prior to the foreclosure action, but they were acting as servicer for an entity other than the Respondent.

No Trust Documents were ever presented in this case by the Respondent that show PHH Mortgage as the servicer for the Respondent's MLCC-2007-2 Trust prior to the Respondent's complaint. A "Limited Power Of Attorney" from the Respondent for PHH Mortgage to act as servicer was produced in discovery by the Respondent two years after the Respondent filed their complaint.

## **Conclusion**

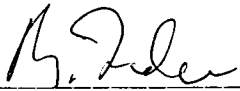
1. The “Notice Of Foreclosure” was sent to the Appellants by PHH Mortgage who was the servicer for Merrill Lynch. No authorization for PHH Mortgage to act as servicer or send documents on behalf of the Respondent was produced by the Respondent until well after the case began. The notice did not comply with the terms of paragraph 22 of the Appellant’s Mortgage.
2. The Respondent did not include any endorsements or allonges to the appellants note or mortgage when they filed the foreclosure complaint. The Respondent, with assistance of their legal counsel, drafted, recorded and submitted to the lower court, a robo-signed mortgage assignment two months after filing their complaint.
3. The respondent produced an altered allonge, which they did not own, with a stamp in an attempt to endorse the Appellant’s note to themselves. The Respondent produced a copy of an undated, unverified endorsement in blank of the note two years after the case began.
4. The Respondent makes false claims stating that they were in possession of the note and mortgage with endorsements when they filed their complaint, and makes false statements that endorsements or allonges were attached to the note..

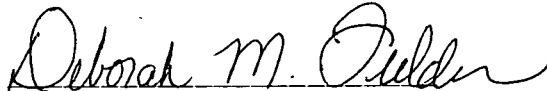
The Appellants ask that the Appellate Court consider any or all of the Appellant’s arguments in their appeal to be valid and determine that the lower court’s decision be reversed, vacate the sale, dismiss the case, and apply damages and or sanctions at their discretion. This Appellate Court has the ability to grant relief.

**Signature**

Respectfully submitted,

Appellants

  
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