

BRIEF OF APPELLANT

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LANCASTER COUNTY
Court of Common Pleas

Philip E. Wright, Special Referee

Case No. 2013-002-373

H & R Block Bank, FSB

Respondent,

v.

Ziraili M Elbey, a/k/a Ziraili
Mohassan El Bey

Appellant.

[INITIAL] BRIEF OF APPELLANT

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SC Court of Appeals

January 22, 2014

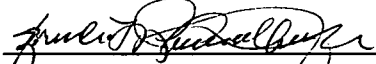
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CASES

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Carpenter v. Logan, 83 U.S. 271 (1873)

Chet Adams Co. v. James F. Pederson Co., 413 SE 2D 827- S.C.: SUPREME Court (1992)

Deutsche Bank Nat. Trust Co., v. Heinrich, Dt 2011-CP-10-1060, Ninth Judicial Circuit Ct. Charleston, S.C., (July 2013)

Dearman v. Trimmier, 26 S.C. 506, 513, 2 S.E. 501, 505 (S.C. 1887)

Doe v. Marion, 361 S.C. 463, 470, 605 S.E.2d 556, 560 (Ct. App. 2004),

Duckworth v. McKinney, 58 S.C. 418, 36 S.E. 730 (1900)

Farmers and Miners Bank v. Bluefield Nat Bank 11 F 2d 83, 271 U.S. 669

Fina Supply, Inc. v. Abilene Nat. Bank, 726 S.W. 2d 537, (1987)

Hodges v. Lake Summit Co., 155 S.C. 436, 447, 152 S.E. 658, 662 (S.C. 1930)

Patterson v. Rabb, 38 S.C. 138, 17 S.E. 463 (1893)

Talbert v. Talbert, 97 S.C. 136, 145, 81 S.E. 644 (S.C. 1914)

Williams v. Condon, 347 S.C. 227, 233, 553 S.E.2d 496, 499 (Ct. App. 2001).

Williams v. Lawrence, 194 S.C. 1, 8 S.E.2d 838 (S.C. 1940)

STATUTES

S.C. Code Ann § 29-3-330

S.C. Code Ann § 33-15-101(a)

S.C. Code Ann § 33-15-102

S.C. Code Ann § 33-15-102(a)

S.C. Code Ann § 33-15-102(d)

S.C. Code Ann § 33-23-140(B)

S.C.UCC Code § 36-3

S.C. Code Ann §36-3-603(1)

OTHER AUTHORITIES

Barnsdall Refining Corn. F. Birnam Wood Oil. Co. 92 26 817 S.C. 435, 357 S.E. 2d 20 (1987)

Cost of Wisconsin v. Shaw, 292 S.C. 435, 357 S.E. 2d 20 (1987),

GILBERTO SALDIVAR, SANDRA CANALES SALDIVAR, Chapter 13, Debtor(s). GILBERTO T SALDIVAR, et al., Plaintiff(s), v. JPMORGAN CHASE BANK, N.A., et al., Defendant(s). Case No. 11-10689, Adversary No. 12-01010. United States Bankruptcy Court, S.D. Texas, Brownsville Division (June 5. 1913)

H & H Glass Co. v. Wynne, 289 S.C. 389 S.E. 2d 523 346 (1986)

Hoover v. Hoover, 271 S.C. 177, 246 S.E. 2d 179 (1978)

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U.S. v. Throckmorton, 98 U.S. 61, at pg. 65

Video Engineering Co. b. Foto-Video Electronics, Inc., 207 Va. 1027, 154 S.E. 2d 7 (1967)

WELLS FARGO BANK, N.A., AS TRUSTEE FOR ABFC 2006-OPT3 TRUST, ABFC ASSET-BACKED CERTIFICATES, SERIES 2006-OPT3, Plaintiff, v. ROTIMI EROBOBO, THE CITY OF NEW YORK ENVIRONMENTAL CONTROL BOARD, "JOHN DOE" AND "JANE DOE" SAID NAMES BEING FICTITIOUS, IT BEING THE INTENTION OF Plaintiff TO DESIGNATE ANY and ALL OCCUPANTS OF THE PREMISES BEING FORECLOSED HEREIN, Defendants. 31648/2009. Supreme Court, Kings County. (April 29, 2013)

Whipp v. Iverson, 43 Wis 2d 166.

STATEMENT OF ISSUES ON APPEAL

- 1 DID THE LOWER COURT ERR IN GRANTING, NOT CHALLENGING, PLAINTIFF'S, H & R BLOCK BANK, FSB, JURISDICTION and STANDING TO FILE A LAWSUIT ACTION IN THE STATE OF SOUTH CAROLINA?
- 2 BECAUSE DEFENDANT WAS DENIED DUE PROCESS TO RAISE AFFIRMATIVES DEFENSES TO INCLUDE RULE 12(b)(6) and FED RULE 17(a) WAS PRESERVED ON RECORD.

STATEMENT OF THE CASE

On January 14 ,2011 H & R Block Bank, FSB, brought this action of foreclosure of real estate mortgage against Ziraili M Elbey, I am woman a natural, indigenous member of the Family of Nations. Ziraili M Elbey answered the alleged national bank's final judgment sale order for foreclosure on August 22, 2012.

Further, on August 24, 2012, Ziraili M Elbey filed for Chapter13 and later converted to a Chapter 7 in US Bankruptcy Court in in the District of South Carolina. December 3, 2012, Chapter 7 closed as "No Asset" case.

On July 24, 2013 H & R Block Bank, FSB through Block & Scott Law Firm filed a Motion and Order to Restore case#2011-CP-29-00035, pursuant to the Chief Justices' Administrative Order issued June 5, 1992. On October 24, 2013, in lower court ordered final judgment for foreclosure sale. On October 29,2013, Ziraili M Elbey served the Notice of Appeal on H & R Block Bank, FSB.

FACTS

That in the initial summons, notices, documented in B&S No. 10-19401 pg 3, and complaint Respondent, H & R Block Bank,FSB stated that Appellant's loan was owned by H & R Block Bank, FSB, owned or guaranteed by Fannie Mac or owned by FHLMC see Record of Appeal,[hereafter 'R'], 'R' line 13-23, pg 25 and [Appellant's exhibit no.2 in 'R'].

That in the initial summons, notices, documented in B&S No. 10-19401 pg 3-4, that Respondent, H & R Block Bank, FSB as holder of Appellant's mortgage and note. And, on the same document B&S No. 10-19401 pg 2, that Respondent held an assignment drafted [see Appellent's exhibit no. 3] and signed March 29, 2006, but never recorded in Lancaster County, SC with Register of Deeds until August 5, 2010 in Bk 2265 and Pg. 129. [see 'R' line 6-25, pg. 28.]

That in the 'R' line 9-18, pg 24 H & R Block Bank, FSB, a foreign corporation has not yet obtained a certificate of authority to transact business in this state, and did not such a certificate of authority at the time its lawsuit was originally filed in the Lancaster

Court of Common Pleas, 14th January 2011. The 'R' as taken judicial notice of the records of the South Carolina Secretary of State in this regard to South Carolina Code 33-15-102(d) [see Appellant's exhibit no. 1].

H & R Block Bank, FSB, its assigns nor third party debt collectors or its attorneys appeared in the Federal bankruptcy or any of the 241 hearing as debt collectors or owners of creditors of mortgage or note. In lower court case 2011-CP-29-00035, H & R Block Bank, a national bank claimed to be the holder of the security instrument. Once the original mortgage and note have been monetized any obligation that may have existed no longer exist. Explanation hereto is incorporated hereto the final brief as an affidavit. H & R Block Bank, FSB failed to state a claim to collect a debt relating to a mortgage. Any mortgage or note indebtedness was dismissed under Chapter 7 as a no asset case on December 3, 2013. [see US Bankruptcy Court Order – District of South Carolina Chapter 7, dated 01/14/13 filed with Respondent's Motion to Restore case 2011-CP-29-00035, dated July 24, 2013 with Foreclosure Order]

That Appellant's note was securitized and sold to investors [see 'R' line 21-25 pg.25 and lines 1-25, pg.26. Plaintiff did not file the original mortgage and note with the Lancaster County Recorder's office in which it was recorded and returned to the Original Bank, Option One Mortgage to invoke Fed Rule 17(a). Plaintiff have now involved the lower court and the Lancaster County recorder in actions that are unbecoming of a public office, as all elected and appointed officials have/of should have taken an oath of office to uphold the Constitution of the United States and also the Constitution of South Carolina. By placing a copy of a securities instrument within this claim and not having or being the holder in due course as required under the South Carolina UCC's have violated Title 18 section 470 to 473 and 474.

That lawyers for Respondent, H & R Block Bank, FSB moved in the lower court to restore previous court order dated August 22, 2012 based on the following:

1. Appellant's was discharged by order of Bankruptcy Court dated January 14, 2013, and
2. Pursuant to a Family Court Order issued by Chief Justices' Administrative Order issued June 5, 1992 stating in the interest of judicial economy, justice and equity and for the good cause. [see 'R' lines 1-25 on pgs. 36-41].

That lawyers for Respondent knowingly file a frivolous complaint in violation of Rule 11, SCRPC. [see 'R' lines 1-25 on pgs.44-46]

That Special Referee denied the hearing of Appellant's amended motion to dismiss on the grounds of Rule 12(b)(6), SCRPC as Plaintiff lacked the necessary standing to file lawsuit, plus Mortgage Assignment was signed by nationally known Robo Signers, further, Appellant denied due process.[see 'R' line 2-25, pgs.47-49.

ARGUMENTS

- I. It has been previously held by the court of appeal in *Postal v. Mann*, 308 S.C. 385, 418 S.E. 2d 322 (S.C. App. 1992), it was well settled that parties are judicially bound by their pleadings, and by any allegations, statements, or admissions contained therein. Plaintiff admitted in its Complaint that it is doing business in South Carolina, but did not indicate that they are “transacting business in interstate commerce”. See Carolina Code 33-15-101(a) states that “[a] foreign corporation may not transact business in this State until it obtains a certificate of authority from the Secretary of State”. [see Defendant’s “R” exhibit no. 1] Plaintiff placed a copy of a securities instrument within this claim and not have or being the holder in due course as required under the South Carolina UCC’s code violated Title 18 sections 470 to 473 and 474. In *Fina Supply, Inc. v. Abilene Nat. Bank*, 726 S.W. 2d 537, (1987), it says “Party having superior knowledge who takes advantage of another’s ignorance of the law to deceive him by studied concealment or misrepresentation can be held responsible for that conduct.” “In the federal courts, it is well established that a national bank has no power to lend its credit to another by becoming surety, indorser, or guarantor for him.” *Farmers and Miners Bank v. Bluefield Nat’l Bank*, 11 F.2d 83, 271 U.S. 669: “a National Bank has no power to lend its credit to any person or corporation.” *Bowen v. Needles Nat. Bank*, 94 F.2d 925, 36 CCA 553, certiorari denied in 20 S. Ct 1024, 176 U.S. 682, 44 LED 637.
- II. In South Carolina, a mortgage is a mere security for a debt. *Williams v. Lawrence*, 194 S.C. 1, 8 S.E. 2d 838 [S.C. 1940]; *Patterson v. Rabb*, 38 S.C., 138, 17 S.E. 463 (1893); *Blackwell v. Blackwell*, 289 S.C. 470, 346 S.E.2d 731 [S.C. Ct. App. 1986]. A mortgage is different from other instruments in that, in order for it to be a valid instrument, there must be a debt or obligation of the mortgagor for which it is given as security. *Williams v. Lawrence, supra*. If there is no debt, then there is no valid mortgage. *Duckworth v. McKinney*, 58 S.C. 418, 36 S.E. 730 [1900]. In *Carpenter v. Deutsche Bank National Trust v. Heinrich* in the Ninth Judicial Circuit, docket no.: 2011-CP-10-1060, It is clear that to have standing in a foreclosure case, a Plaintiff must not only be the holder and owner of the original Note, but also the Mortgage as well.

Plaintiff claimed possession of the original Note with an Allonge which is indorsed in blank, at the time of the Summary Judgment August 2013. Plaintiff claims that the note is a negotiable instrument under the South Carolina Uniform Commercial Code §36-3 et seq. which would entitle them sue in foreclosure action. However, Plaintiff according to the Summons, Notices, and the Complaint is seeking foreclosure on the mortgage that is attached to real property as opposed to simply

suing on the promissory note. The idea that the Mortgage follows the Note is one which has been repeatedly confirmed by the "South Carolina recognizes the 'familiar and uncontroverted proposition' that the assignment of a note secured by a mortgage carries with it an assignment of mortgage. *Plaintiff in its claims at the final hearing, October 24, 2013 clearly stated that it own the Note and the Mortgage, and presented so called original copies of the Mortgage and so called original copies of the Note.* However, in *Carpenter v. Longan*, 83 U.S. 271, 16 Wall. 271, 21 L.Ed. 313 (1872), clearly support the notion that the Plaintiff must clearly **own the Note and the Mortgage** to foreclose on the property. This holding has long been recognized in state of South Carolina law as well. *Talbert b. Talbert*, 97 S.C. 136, 145, 81 S.E. 644, 647 (S.C. 1914); *Patterson v. Rabb*, 38 S.C. at 467; and *Dearman v. Trimmier*, 26 S.C. 506, 513, 2S.E. 501, 505 (S.C. 1887).

Plaintiff failed to show that it owned the Mortgage at the time the initial Complaint was filed, January 14, 2011. Plaintiff merely contends to be the holder and has the right to enforce the Mortgage and the Note in the Summons, and Notices, pgs 3-4, but not in the initial Complaint. The state court of appeals made a recent decision in *BAC home Loan Servicing, L.P. v Kinder*, 398 S.C. 19, 731 S.E.2d 547 (Ct.App. 2012). "[T]he assignment of the mortgage does not need to be recorded, and failure to do so has no effect on the rights of assignee." The Assignment in this case was colorable, having been made without consideration, of bank authorities signing the Assignment, and for the purpose of evading a disability of the assignor to sue, or of enabling H & R Block Bank, FSB, to confer jurisdiction on a particular Court and ask specifically for a Special Referee.

Hodges v. Lake Summit co., 155 S.C. 436, 447, 152 S.E. 658, 662 (S.C. 1930-quoting from 5TH C.J.,, 940). One might distinguish the facts of *Kinder* from this case as the Assignment of Mortgage was defective and ineffective with Robo-signers as bank officials, *Kinder* was after the foreclosure was already complete and the issue at dispute in that case was surplus funds going to the Assignee. Filing ineffective assignment is not the issue in this case, but ownership of the Note. Let it be clear, that to have standing in this foreclosure case, Plaintiff must not only be the holder and owner of the original Note, but also the Mortgage as well. Plaintiff failed in its Complaint in this case to meet this criteria. Plaintiff lacks the standing to initiate and prosecute the foreclosure, and dismissal pursuant to Rule 17(a) and Rule 12(b)(6) SCRCP in law appears to be appropriate.

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the lower court and remand with instructions to dismiss this case with prejudice.

Respectfully submitted

January 22, 2014

By: _____
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PROOF OF SERVICE OF MOTION TO DISMISS

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LANCASTER COUNTY
Court of Common Pleas

Philip E. Wright, Special Referee

Case No. 2013-002-373

H & R Block Bank, FSB,

Respondent

v.


Ziraili M Elbey, a/k/a/ Ziraili
Mohassan El Bey,

Appellant

PROOF OF SERVICE

I certify that Brock & Scott, PLLC, Attn: Chad Burgess, 3800 Fernandina Rd., Ste 110, Columbia, South Carolina, 29210 received a copy of the Motion to Dismiss An Appeal by depositing a copy of it in the U.S. Mail, postage prepaid, on January 22nd, 2014 addressed to H & R Block Bank, FSB, its attorneys of record, Brock & Scott.

January 22nd, 2014

By: 
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