THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Robert A Smoak, Jr , Master-in -Equity for Aiken County

Case No 2010-CP-02-172

BAC Home Loan Servicing, L P
f/k/a Countrywide Home Loan Servicing, L P ,
successor in interest to Defendant
Mortgage Electronic Registration Systems Inc
MIN# 100039032108093192

Appellant

v

Debra Kinder, Personal Representative of
The Estate of George William Brelsford, IV
a/k/a George W Brelsford and Debra Kinder
Personal Representative of the Estate of
Patricia M Brelsford

Respondent(s)

FINAL BRIEF OF RESPONDENTS

James L Verenes, SC Bar No 5703
P O Drawer 328
Aiken, South Carolina 29802-0328
Telephone 803-649-6281
Facsimile 803-641-1216
jimverenes@aol com
Attorney for Respondents

RECEIVED
NOV 3 0 2011
SC Court of Appeals

TABLE OF CONTENTS

Table of Authorities	ii
Statement of Issues on Appeal	1

I The trial court correctly found that execution/recording of the assignment subsequent to the foreclosure sale did not allow recovery of the surplus funds by Appellant BAC Home Loan Servicing, L P f k a Countrywide Home Loan Servicing, L P , successor in interest to Mortgage Electronic Registration Systems, Inc , MIN# 100039032108093192 (“BAC”)

II The trial court correctly found that no attorney participated in the closing of the $149,000 00 loan, which was closed on March21, 2007

III The trial court correctly found lack of attorney supervision of the closing on March 21, 2007 conducted by original lender Quicken Loans barred BAC from its claim to the surplus funds

IV The trial court correctly found BAC was not a lien holder at the time it filed its claim to the surplus funds

Statement of the Case	2-4
Argument	5-11
Conclusion	11

TABLE OF AUTHORITIES

Cases	Pages
Clardy v Sorvereıgn Camp, W O W , 193 S C 444, 8 S E 2d 748 (1940)	7
Hardın v Horger, 252 S C 298, 166 S E 2d 215 (1969)	7
Lıtchfield Co of S Carolına, Inc v Kırıakıdes, 290 S C 220, 224-25, 349 S E sd 344, 347 (Ct App 1986)	7
Matrıx Fınancıal Svcs Corp v Frazer, Op No 26859, 2011 WL 3452078 (S C , August 8, 2010)	7, 9
Sıngletary v Aetna Cas & Sur Co , 316 S C 199, 201 447 S E 2d 869, 870 (Ct App 1994)	9
South Carolına Tax Comm'n v Metropolıtan Lıfe Ins , Co, 266 S C 34, 221 S E 2d 522 (1975)	7
Twelfth RMA Partners, L P V Natıonal Safe Corp , 335 S C 635, 639-40-518 S E 2d 44 (Ct App 1999)	9
Wachovıa Bank, N A v Coffey, 389 S C 68, 698 S E 2d 211 (Ct App , May 6, 2010)	7, 9

Statutes and Court Rules	Pages
Rule 59 (e,) SRCP	4, 8
Rule 71(c), SCRCP	6, 10
Rule 210(c), SCRCP	8
S C Code Ann § 15-39-880	5, 6, 11
S C Code Ann § 30-7-10	10
S C Code Ann § 36-3-305 (a) (1)(ıı)	9

STATEMENT OF ISSUES ON APPEAL

I The trial court correctly found that execution/recording of the assignment subsequent to the foreclosure sale did not allow recovery of the surplus funds by Appellant BAC Home Loan Servicing, L P f k a Countrywide Home Loan Servicing, L P , successor in interest to Mortgage Electronic Registration Systems, Inc , MIN# 100039032108093192 ("BAC")

II The trial court correctly found that no attorney participated in the closing of the $149,000 00 loan, which closed on March 21, 2007

III The trial court correctly found lack of attorney supervision of the closing on March 21, 2007 conducted by original lender Quicken Loans barred BAC from its claim to the surplus funds

IV The trial court correctly found BAC was not a lien holder at the time it filed its claim to the surplus funds

STATEMENT OF THE CASE

On July 2, 2004, Dr George Wılliam "Jeff" Brelsford, VI ("Borrower") executed and delivered a promıssory note and mortgage ("Mortgage 1") ın prıncıpal sum of Thırty Seven Thousand Dollars and Zero Cents ($37,000 00) to Cıtızens Bank of Effingham ("CBE") CBE caused Mortgage 1 to be recorded on July 6, 2004 at the Aıken County Regıster of Mesne Conveyance ("RMC") The real property encumbered by Mortgage 1 was known as 117 Club Vılla Drıve, Aıken, SC 29803

On March 21, 2007, Borrower delıvered a separate and subsequent promıssory note to Quıcken Loans ın the prıncıpal sum of One Hundred Forty Nıne Thousand Dollars and Zero Cents ($149,000 00) ("the Note") To better secure the Note, Borrower concomıtantly executed and delıvered a mortgage ("Mortgage 2") to Mortgage Electronıc Regıstratıon Systems, Inc ("MERS"), as Nomınee for Quıcken Loans The real property encumbered by Mortgage 2 was lıkewıse known as 117 Club Vılla Drıve, Aıken, SC 29803 The $149,000 00 loan ın connectıon wıth Mortgage 2 was closed on March 21, 2007 On Aprıl 20, 2007, MERS caused Mortgage 2 to be recorded at the Aıken County RMC

Borrower dıed on August 11, 2009

After default occurred on the loan associated wıth Mortgage 1 due to payments not beıng tımely receıved, CBE ınıtıated a cıvıl actıon agaınst Borrower's estate seekıng foreclosure of Mortgage 1, Cıvıl Actıon No 2010-CP-02-00172 The orıgınal summons and complaınt was filed on January 26, 2010, an amended summons and complaınt (R pp 26-33) was filed on February 4, 2010

Both the estate of Borrower and MERS were duly served with a copy of CBE's summons and complaint Neither timely filed or served an answer or other response and both were held to be in default A dispositive hearing was held on May 26, 2010 The Master in Equity for Aiken County ("Master") awarded a judgment of foreclosure and sale by order dated June 15, 2010 (R pp 1-7) The judgment determined that the mortgage lien held by MERS was junior and subordinate to the CBE mortgage lien The judgment further stated, "The Defendants claim or may claim a lien upon or legal interest in subject property and in the event there is a surplus from the sale of the subject property, such Defendant may present any such lien or legal interest at a hearing subsequent to the sale, in accordance with Rule 71(c), South Carolina Rules of Civil Procedure" (R pp 3-4)

The foreclosure sale occurred on July 6, 2010 The subject property was sold at auction on that date to a third party bidder, one Matthew Fry The Master issued a Master's Report on Sale (R pp 22-25) filed July 21, 2010 reflecting that the subject property sold for $116,000 00 and that following disbursement of costs, a surplus remained in the amount of $79,405 25 (the "surplus funds")

On July 30, 2010, MERS executed a document purporting to assign Mortgage 2 to BAC (R p 65) That document was recorded on August 20, 2010 in Book 4320, at Page 1877 n the Aiken County RMC

On or about August 12, 2010, after a default occurred on the loan associated with Mortgage 2 due to payments not being timely received, BAC initiated a civil action seeking foreclosure of Mortgage 2, Civil Action No 2010-

CP-02-1951 (R pp 34-43) Case no 2010-CP-02-1951 was not adjudicated and was dismissed on August 30, 2010

On or about September 3, 2010, BAC filed a Verification of Claim for Surplus Funds (R pp 44-45) in connection with the CBE mortgage foreclosure The amount of BAC's outstanding debt on Mortgage 2 at the time of filing the claim was $144,157 94

On October 28, 2010, the Master conducted a hearing in regards to disposition of the surplus funds in the amount of $79,405 25 On December 6, 2010, the Master filed an Order Disposing Of Surplus Funds (R pp 44-45) The Master awarded the surplus funds to the estate of Borrower and Borrower's heirs

On December 21, 2010, BAC filed a motion under Rule 59(e), SCRCP seeking to have the Master alter or amend his Order Disposing Of Surplus Funds dated December 7, 2010 (R pp 46-53) A hearing was held on the motion on January 31, 2011 The Master denied BAC's Rule 59(e), SCRP motion via order filed February 3, 2011 (R pp 14-21) The Aiken County Clerk of Court records show that a certified copy of the Master's Order was mailed to the Finkel Law Firm, Attorney for BAC, on February 4, 2011 (R p 21)

On April 21, 2011, BAC filed a Notice of Appeal with the South Carolina Court of Appeals (R pp 54-58)

ARGUMENT

I The trial court correctly found that execution/recording of the assignment subsequent to the foreclosure sale did not allow recovery of the surplus funds by Appellant BAC Home Loan Servicing, L P f k a

Countrywide Home Loan Servicing, L P , successor in interest to Mortgage Electronic Registration Systems, Inc , MIN# 100039032108093192 ("BAC")

The Master sold the property that was the subject of this foreclosure action on July 6, 2010 The property was sold to a third party bidder The bidder made the required deposit the next day and balance due was paid July 19, 2010 The Court then executed and delivered a Master's deed to the bidder On July 30, 2010, MERS, the named Defendant in the foreclosure action, executed what is purported to be an assignment of Mortgage 2 and note to BAC (R p 65) The document was recorded on August 20, 2010 in the records of the Aiken County RMC Pursuant to the provisions of S C Code Ann § 15-39-880, the lien that was held by MERS at the time of the sale and the delivery of the Master's deed was extinguished S C Code Ann § 15-39-880, provides

> "No lien created by operation of law or agreement of the parties whether of record or authorized by law to be entered of record in any office of any clerk of court or register of mesne conveyance in this state or any transcript, extension, renewal or revival thereof shall constitute a lien or attach or reattach as a lien on real property of the lien debtor or real property in which the lien debtor has an interest after a public sale of such real property at any execution or judicial sale in any action or special proceeding to which the lien creditor is duly made a party as provided by law "

Because the lien held by MERS pursuant to Mortgage 2 was extinguished by the sale, there was no lien to be assigned to BAC by the purported assignment that was recorded August 20, 2010 and relied upon by BAC

Rule 71(c), SCRCP governs the disposition of surplus funds resulting from a foreclosure sale That rule provides in part

> "any party to the action or any person who had a lien on the mortgaged premises at the time of the sale upon filing with the Master

or any officer conducting the sale a claim of entitlement to the surplus funds may have a hearing to determine such entitlement "

Therefore, this rule provides that as a prerequisite to being entitled to any surplus funds BAC had to either be a party to the action or someone who had a lien on the mortgaged premises at the time of the sale It is apparent from the foreclosure pleadings that BAC was not a party to the action Therefore, BAC's claim to the surplus funds must rely on its claimed status as a lien holder at the time of the sale

BAC was not a lien holder at the time of the sale It is undisputed that the purported assignment to BAC was executed July 30, 2010 and recorded on August 20, 2010, after the sale of July 6, 2010 The requirement of Rule 71(c), SCRCP that a claimant to surplus funds hold a lien as of the date of the sale makes sense when read together with S C Code Ann § 15-39-880 Anyone who has a lien on the date of the sale loses that status as a lien holder after the sale Therefore, the purported assignment executed by MERS did not convey status as a lien holder upon BAC Since BAC was clearly not a party to the foreclosure preceding and was not a lien holder on July 6, 2010, the Master was correct in ruling that BAC was barred from any claim to the surplus funds

Appellant has argued that to bar BAC from its claim to the surplus funds would constitute a forfeiture The Master's ruling in this matter does not constitute a forfeiture BAC did have a lien on the property at the time that it filed its claim to the surplus funds The cases relied upon by the Appellant are distinguishable from the present case Litchfield Co of S Carolina, Inc v Kiriakides, 290 S C 220, 224-25, 349 S E 2d 344, 347 (Ct App 1986) deals with

an alleged forfeiture pursuant to the terms of a lease South Carolina Tax Comm'n v Metropolitan Life Ins , Co, 266 S C 34, 221 S E 2d 522 (1975) deals with an alleged forfeiture pursuant life insurance policies and the cash value accumulated thereunder Hardin v Horger, 252 S C 298, 166 S E 2d 215 (1969) deals with an alleged forfeiture pursuant to the terms of a trust Clardy v Sorvereign Camp, W O W , 193 S C 444, 8 S E 2d 748 (1940) deals with an alleged forfeiture pursuant to the terms of a life insurance policy and constitution and by-laws of an organization In all of those cases, it was alleged that a party forfeited rights pursuant to some written document or money paid In the instant case, the lien that was held by MERS was extinguished by the Master's sale therefore to affirm the Master's ruling would not constitute a forfeiture For these reasons, the Court's Order is correct and should be affirmed

II The trial court correctly found that no attorney participated in the closing of the $149,000 00 loan, which was closed on March 21, 2007

The Master ruled that BAC was also barred from receiving any of the surplus funds pursuant to the principals established in the cases of Wachovia Bank, N A v Coffey, 389 S C 68, 698 S E 2d 211 (Ct App , May 6, 2010), and Matrix Financial Svcs Corp v Frazer, Op No 26859, 2011 WL 3452078 (S C , August 8, 2010) These cases provided that a lender would be barred from equitable and legal relief if the closing of the loan was not supervised by a South Carolina licensed attorney The only evidence presented to the Court was the settlement statement from the closing of March 21, 2007 (R p 64) In its Initial Brief, the Appellant has attempted to introduce additional evidence on this point

To do so clearly violates the provisions of Rule 210(c), SCRCP, which provides in part "the record shall not however include matter which was not presented to the lower Court or tribunal" In its Order of February 3, 2011, the Master stated,

> "However as mentioned herein above, in its prior Order this Court gave notice that in the event of a Rule 59 (e) motion, the Court intended to revisit the issue concerning the possible unauthorized practice of law in association with the closing of BAC's loan and would afford counsel the opportunity to supplement the record concerning this aspect of the matter No one has proffered any further evidence concerning the circumstances of the closing (the original mortgagor, of course, is deceased) and the Court accordingly finds and holds based on the only evidence in the record (a copy of the HUD-1 closing statement) that no attorney participated in the closing" (R p 17)

In its Order of December 6, 2010, the Master stated, "since there was insufficient evidence at the hearing for the Court to make a conclusive finding as to this issue (referring to lack of attorney supervision) and because the Court has ruled herein on other grounds, the Court declines to rule on this issue at this time Should however a Motion on Rule 59 (e), SRCP be made on any ground, the Court proposes to revisit this issue and on its on Motion will notify counsel to be prepared to submit evidence as to the circumstances of the closing at that Motion hearing" (R p 10) Both parties were on notice that they would be able to submit any evidence concerning attorney supervision at the hearing on January 31, 2011 The Respondent relied on the settlement statement (R p 64) that was produced at the October 28, 2010 hearing The Appellant certainly had ample opportunity to review its file to submit any further evidence at the January 31 hearing, but did not do so Since there was no further evidence submitted, the Master was

certainly free to make a decision based on the only evidence presented to the Court

Therefore, the only evidence presented to the lower Court clearly shows that the principals espoused in Coffey and Matrix was violated and therefore BAC should be barred from any equitable or legal remedy

III The trial court correctly found lack of attorney supervision of the closing on March 21, 2007 conducted by original lender Quicken Loans barred BAC from its claim to the surplus funds

The Appellant argues that the rulings in Coffey and Matrix should not be extended to an assignee of the mortgage However, "in South Carolina, it is well established that an assignee stands in the shoes of its assignor " Twelfth RMA Partners, L P V National Safe Corp , 335 S C 635, 639-40-518 S E 2d 44 (Ct App 1999), Singletary v Aetna Cas & Sur Co , 316 S C 199, 201 447 S E 2d 869, 870 (Ct App 1994) Therefore, if MERS would be barred from recovery due to its illegal or unlawful conduct and/or unclean hands, BAC would likewise be barred

The Appellant argues that by being a holder in due course it is not barred by this defense To allow BAC to use its standing a holder in due course to avoid the rulings of Coffey and Matrix would run contrary to S C Code Ann § 36-3-305 (a) (1)(ii) which preserves as a defense against a holder in due course the illegality of a transaction which renders the obligation a nullity

The Appellant argues that Coffey and Matrix were cases involving the original lender It is true that both cases did involve the original lender however there is no language in either opinion that would indicate that the principals

espoused by the Court would not be extended to an assignee The presence of an attorney to supervise and participate in the closing is required in order to protect and/or benefit the borrower To allow an assignee to escape that requirement would defeat one of the principals stated by the Court It would not matter whether the mortgage was assigned or not The issue to be addressed is the protection of the borrower by the presence of an attorney whether the matter involves the original lender or an assignee

The Court therefore was correct in ruling that the BAC should be barred from claiming the surplus funds as a result of the absence of attorney supervision and participation in the closing of March 21, 2007

IV The trial court correctly found BAC was not a lien holder at the time it filed its claim to the surplus funds

BAC is attempting to claim status as a lien holder in order to assert its claim to the surplus funds in this matter The Master correctly ruled that BAC is not entitled to that status <u>S C Code Ann</u> § 30-7-10 requires that any document creating a lien on any real property must be recorded in order to be valid The mortgage that was signed as a part of the closing held on March 21, 2007 was recorded and therefore did constitute a lien on the property, which was sold by the Master As pointed out by the Appellant in its Initial Brief, there was a lien on the mortgaged premises at the time of the point of sale However, that lien was held by MERS Rule 71(c), SCRCP does not merely require that a lien exist, the rule requires that the person who files the claim to surplus funds be the person or entity that holds the lien Clearly, BAC did not hold a lien on the foreclosed property at the time of sale The purported assignment (R p 65) was not executed

by MERS until July 30, 2010 That assignment (R p 65) was therefore executed after the sale and after the delivery of the Master's deed to the successful bidder In the Order of February 3, 2011, the Master stated, "a review of the above dates will reveal that at no time did BAC ever own or hold a lien on the subject property" (R p 17) When MERS executed the purported assignment (R p 65) on July 30, 2010, there was no lien to assign That lien was extinguished on July 19, 2010 upon the Court's execution and delivery of the deed to the successful bidder at the foreclosure sale S C Code Ann § 15-39-880

Therefore, the Master correctly ruled that BAC was not a lien holder at the time it filed its claim to the surplus funds

CONCLUSION

For the foregoing reasons, the Order of the Master should be affirmed and the surplus funds in the amount of $79,405 25 should be declared the property of the Respondents

Respectfully submitted,

FOX & VERENES

James L Verenes, SC Bar No 5703
P O Drawer 328
Aiken, South Carolina 29802-0328
Telephone (803) 649-6281
Facsimile (803) 641-1216
jimverenes@aol com
Attorney for Respondents

November 23, 2011

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Robert A Smoak, Jr , Master-in –Equity for Aiken County

Case No 2010-CP-02-172

BAC Home Loan Servicing, L P ,
f/k/a Countrywide Home Loan Servicing, L P ,
successor in interest to Defendant
Mortgage Electronic Registration Systems, Inc
MIN# 100039032108093192

Appellant,

v

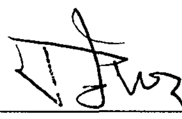
Debra Kinder, Personal Representative of The Estate
of George William Brelsford, IV a/k/a George
W Brelsford, and Debra Kinder, Personal Representative
of the Estate of Patricia M Brelsford,

Respondent(s)

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211 (b), SCACR

FOX & VERENES



James L Verenes, SC Bar No 5703
P O Drawer 328
Aiken, South Carolina 29802-0328
Telephone (803) 649-6281
Facsimile (803) 641-1216
jimverenes@aol com
Attorney for Respondents

November 23 2011

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Robert A Smoak, Jr , Master-in –Equity for Aiken County

Case No 2010-CP-02-172

BAC Home Loan Servicing, L P ,
f/k/a Countrywide Home Loan Servicing, L P ,
successor in interest to Defendant
Mortgage Electronic Registration Systems, Inc
MIN# 100039032108093192

Appellant,

v

Debra Kinder, Personal Representative of
The Estate of George William Brelsford, IV
a/k/a George W Brelsford, and Debra Kinder,
Personal Representative of the Estate of
Patricia M Brelsford,

Respondent(s)

PROOF OF SERVICE

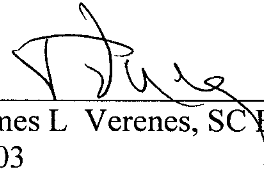
I certify that I have served the *Final Brief of Respondent* on Appellant(s) by depositing a copy of same in the United States Mail, postage prepaid, on November 29, 2011 addressed to Appellant's attorney of record, Sean A O'Connor, Post Office Box 225, Charleston, South Carolina 29402, Charleston, SC 29402

RECEIVED
NOV 3 0 2011
SC Court of Appeals

BAC Home Loan Servıcıng, L P v Debra Kınder, et al
Case No 2010-CP-02-172
PROOF OF SERVICE

Respectfully submıtted,

FOX & VERENES



James L Verenes, SC Bar No 5703
P O Drawer 328
Aıken, South Carolına 29802-0328
Telephone (803) 649-6281
Facsımıle (803) 641-1216
jımverenes@aol com

Attorney for Respondents

November 29, 2011