

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY

Robert E. Watson, Master In Equity

Case No. 2012-CP-00-3119

Deutsche Bank National Trust Company,
as Trustee for Long Beach Mortgage Loan Trust 2006-7.....Respondent,

v.

Clayton McBride.....Appellant.

INITIAL BRIEF OF RESPONDENT

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2006-7

August 19, 2014

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STATEMENT OF THE ISSUES ON APPEAL

- I. WHETHER THE TRIAL COURT ERRED WHEN IT GRANTED RESPONDENT'S MOTION FOR SUMMARY JUDGMENT?**
 - A. WHETHER THE ISSUE CONCERNING AN ALLEGED FORGED SIGNATURE ON THE NOTE AND MORTGAGE WAS PROPERLY PRESERVED ON APPEAL?**
 - B. WHETHER RESPONDENT HAD STANDING TO FORECLOSE ON THE NOTE AND MORTGAGE?**

STATEMENT OF THE CASE

This case arises from Respondent Deutsche Bank National Trust Company, as Trustee for Long Beach Mortgage Loan Trust 2006-7's ("Respondent") filing of a foreclosure action against Appellant Clayton McBride ("Appellant"). On October 29, 2012, Respondent filed its Lis Pendens, Summons, and Complaint seeking foreclosure on its real estate mortgage. An Order of reference was filed on May 24, 2013.

At a hearing on March 19, 2014, the Honorable Robert E. Watson as Master-in-Equity for Berkley County, heard Respondent's Motion for Summary Judgment, Respondent's Motion to Strike, and Appellant's Motion to Strike Respondent's Summary Judgment Motion. By Order filed April 1, 2014, the court granted Respondent's Motion for Summary Judgment and Motion to Strike, and denied Appellant's Motion to Strike Respondent's Motion for Summary Judgment. The Court further found Respondent was entitled to a judgment of foreclosure and sale and set a sale date of May 7, 2014 for the subject property. Appellant did not file a Rule 59(e), SCRCF motion to alter or amend the judgment of foreclosure and sale.

On April 11, 2014, Appellant, proceeding pro se, filed his Notice of Appeal to Overturn Foreclosure Decree.

The Berkley County Master-in-Equity held a foreclosure sale of Appellant's property on May 7, 2014. A deficiency sale was then held on June 6, 2014. On July 1, 2014, the Master filed its Order and Report of Receipts and Disbursements and its Order for Deficiency Judgment.

On July 7, 2014, the South Carolina Court of Appeals received the Initial Brief of Appellant. On July 16, 2014 the Court of Appeals mailed a Deficiency Notice to Appellant and allowed him ten days to correct his initial brief. A corrected Initial Brief of Appellant and Designation of Matter dated July 21, 2014 was received thereafter.

STATEMENT OF THE FACTS

This appeal arises from Respondent's efforts to collect amounts due under a mortgage loan made to Appellant. On or about October 29, 2012, Respondent filed its Lis Pendens, Summons, and Complaint seeking foreclosure of the subject property.

On or about July 10, 2006, Appellant made, executed, and delivered a Note and real estate Mortgage promising to pay \$207,000.00 with interest at 8.400% per annum. (Compl. ¶ 4). This Mortgage was filed on July 28, 2006, and is of record in the Office of Register of Deeds for Berkeley County in Book R, Volume 5822, and page 189. Further, it constitutes a first priority lien on the subject property. (Compl. ¶ 5). This Mortgage was assigned to Respondent on August 31, 2012. (Compl. ¶ 6(a)). Respondent is in possession of the original note and mortgage. (J. Foreclosure and Sale ¶ 7).

Due to Appellant's default and failure to make his monthly mortgage payment, Respondent sought the usual foreclosure of the purchase money first mortgage. (Compl. ¶ 11). On October 29, 2012, Respondent filed its foreclosure action against Appellant. (Compl.) Instead, he submitted various pro se filings to the court. In this matter, Appellant raised issues related to Respondent's standing to prosecute the action. (J. Foreclosure and Sale ¶ 7). However, at the hearing on March 19, 2014, Respondent submitted the original Note for the court's inspection. (Id.) The court found the Note was endorsed in blank and constituted bearer paper under Article 3 of the Uniform Commercial Code. (Id.) Because Respondent was in possession of the original Mortgage and Note, the court found that Respondent had standing to prosecute the action. (Id.) The court further found Respondent was entitled to summary judgment and was entitled to a judgment of foreclosure and sale. A sale date was set for May 7, 2014. (J. Foreclosure and Sale).

On April 11, 2014, Appellant, proceeding pro se, filed his Notice of Appeal to Overturn Foreclosure Decree.

The Berkley County Master-in-Equity held a foreclosure sale of Appellant's property on May 7, 2014. (J. Foreclosure and Sale). A deficiency sale was then held on June 6, 2014. Following the deficiency sale, Respondent was deemed the successful bidder and was issued a foreclosure deed, which is recorded in Volume 10843 at Page 337 in the Office of the Register of Deeds for Berkeley County. (Foreclosure Deed).

STANDARD OF REVIEW

When reviewing a grant of summary judgment, appellate courts apply the same standard applied by the trial court pursuant to Rule 56(c), SCRPC. *Turner v. Milliman*, 392 S.C. 116, 121-22, 708 S.E.2d 766, 769 (2011) (citing *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002)). Summary judgment is appropriate when the pleadings, depositions, affidavits, and discovery on file show there is no genuine issue of material fact such that the moving party must prevail as a matter of law. *Id.*; Rule 56(c), SCRPC. “When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party.” *Fleming*, 350 S.C. at 493–94, 567 S.E.2d at 860 (citation omitted). In order to withstand a motion for summary judgment in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence. *Hancock v. Mid-South Mgmt. Co., Inc.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). In cases requiring a heightened burden of proof, the non-moving party must submit more than a mere scintilla of evidence to withstand a motion for summary judgment. *Id.* at 330–31, 673 S.E.2d at 80.

ARGUMENT

- I. **This Court should affirm the grant of Respondent’s Motion for Summary Judgment.**
 - A. **Appellant’s appeal of the issue concerning a forged signature on the Note and Mortgage was not properly preserved for appellate review where it was not raised in a Rule 59(e) motion.**

It is well settled that, but for a very few exceptional circumstances, an appellate court cannot address an issue unless it was raised to and ruled upon by the trial court. *Lucas v. Rawl Family Ltd. P’ship*, 359 S.C. 505, 510-511, 598 S.E.2d 712, 715 (2004). When an issue is raised

to but not ruled upon by the trial court, the issue is preserved for appeal only if the party raises the same issue in a Rule 59(e) motion. *See Wilder Corp. v. Wilkie*, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998)(noting the proper use of a Rule 59(e) motion is to preserve issues raised but not ruled upon by the trial court); *Walsh v. Woods*, 371 S.C. 319, 325, 638 S.E.2d 85, 88 (Ct. App. 2006) (finding issue on appeal was not preserved because the trial court did not rule on the issue and it was not raised in a Rule 59(e) motion).

In the present case, Appellant did not file an Answer or Counterclaim against Respondent. At the hearing on March 19, 2014, the Appellant asserted, for the first time, that the signature on the Note and Mortgage presented to the court was not his. Appellant offered to show before the court that the signature on his driver's license was different from the signature on the Note and Mortgage. Having not raised this issue prior, the court declined to view the driver's license or make a ruling on whether the signature was in fact forged. Following this hearing, Appellant did not file a 59(e) motion challenging the admissibility of his driver's license or the validity of his signature. Thus, because the judge did not rule on the issue and it was not raised in a 59(e) motion, this issue on appeal has not been preserved.

B. Appellant has standing to foreclose on the subject property.

In addition, Appellant continues to argue that Respondent does not have standing to go forward with the foreclosure action. "Standing refers to a party's right to make a legal claim or seek judicial enforcement of a duty or right." *Powell ex rel. Kelley v. Bank of Am.*, 379 S.C. 437, 444, 665 S.E.2d 237, 241 (Ct.App. 2008). "Standing is ... that concept of justiciability that is concerned with whether a particular person may raise legal arguments or claims." *Id.* "It concerns an individual's sufficient interest in the outcome of the litigation to warrant consideration of [the person's] position by a court." *Id.* "Standing is a fundamental requirement

for instituting an action.” *Brock v. Bennett*, 313 S.C. 513, 519, 443 S.E.2d 409, 412 (Ct.App.1994).

“Generally, a party must be a real party in interest to the litigation to have standing.” *Hill v. S.C. Dep’t of Health & Env’tl. Control*, 389 S.C. 1, 22, 698 S.E.2d 612, 623 (2010). “A real party in interest for purposes of standing is a party with a real, material, or substantial interest in the outcome of the litigation.” *Id.*

“Rule 17(a) of the South Carolina Rules of Civil Procedure requires that every action be prosecuted “in the name of the real party in interest.” *Bank of Am., N.A. v. Draper*, 405 S.C. 214, 219-20, 746 S.E.2d 478, 480-81 (S.C. Ct. App. 2013). “It is ownership of the right sought to be enforced which qualifies one as a real party in interest, rather than absolute ownership of specific property.” *Id.* “The requirement of standing is not an inflexible one.” *Sloan v. Sch. Dist. of Greenville Cnty.*, 342 S.C. 515, 524, 537 S.E.2d 299, 304 (Ct. App. 2000).

The legal standard for determining who is entitled to enforce a promissory note is set forth in Section 36-3-301 of the South Carolina Code. This section provides that:

“Person entitled to enforce” an instrument means

- (i) the holder of the instrument,
- (ii) a nonholder in possession of the instrument who has the rights of a holder, or
- (iii) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to Section 36-3-309 or 36-3-418(d).

A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument.

S.C. Code Ann. § 36-3-301

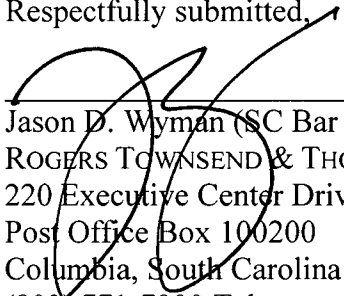
In this appeal, the Note and Mortgage have been endorsed and assigned to Respondent. Moreover, Respondent has possession of the original Note and presented it to the Master in Equity at the foreclosure hearing. As such, Respondent is a “person entitled to enforce” the Note,

as defined by Section 36-3-301. Appellant has not presented even a mere scintilla of evidence to show that Respondent is not in possession of the original Note and Mortgage. Therefore, Respondent had standing to bring its foreclosure action because it is a real party in interest with a right to make this legal foreclosure claim.

CONCLUSION

Based on the foregoing and any additional sustaining grounds appearing in the record, Respondent would respectfully submit that the Master-in-Equity's Order on April 1, 2014, should be affirmed.

Respectfully submitted,



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APPEAL FROM BERKELEY COUNTY

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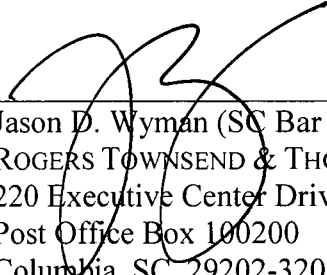
Deutsche Bank National Trust Company,
as Trustee for Long Beach Mortgage Loan Trust 2006-
7.....Respondent,

v.

Clayton McBride.....Appellants.

PROOF OF SERVICE

I certify that I have served the **Initial Brief of Respondent** on Appellant by depositing a copy in the United States Mail, postage prepaid, on August 19, 2014, addressed to Appellant at 1447 Old Whitesville Road, Moncks Corner, South Carolina 29461.



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LICENSED IN SOUTH CAROLINA



August 19, 2014

The Honorable Jenny A. Kitchings
Clerk of Court for Appeals Court
P.O. Box 11629
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Re: Deutsche Bank National Trust Company as Trustee for Long Beach Mortgage
Loan Trust 2006-7 v. Clayton McBride and G.E. Money
Appellate Case No.: 2014-000752
RTT File No.: 015122.00089

Dear Madam Clerk:

Please find enclosed an original and seven copies of the *Initial Brief of Respondent and Designation of Matter to Be Included in Appeal*, in the above referenced matter. Please file the original and six copies and return the clocked copy in the envelope provided for your convenience.

By copy of this letter, I am hereby serving the Appellant with copy of same.

Sincerely,

A handwritten signature in black ink, appearing to be "JW", is written over the typed name "Jason D. Wyman".

Jason D. Wyman

JDW:rd

Enclosure

cc:

Clayton McBride
1447 Old Whitesville Road
Moncks Corner, SC 29461

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