

**THE STATE OF SOUTH CAROLINA
In the Court of Appeals
Appellate Case No. 2014-000820**

Appeal from the Circuit Court of Lexington County, South Carolina

Albert J. Dooley, Judge/ Special Referee

Case No. 2010-cp-32-00669

JPMORGAN CHASE BANK, NATIONAL
ASSOCIATION SUCCESSOR BY
MERGER TO CHASE HOME FINANCE
LLC S/B/M TO CHASE MANHATTAN
MORTGAGE CORPORATION.....Respondent

V.

Demetric Hayes.....Appellant


APPELLANT'S FINAL BRIEF

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SC Court of Appeals

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Statement of Issues on Appeal

1. The trial court erred when it issued judgment in favor of plaintiff without proof of service on the defendant.
2. The trial court erred when it failed to take into consideration that plaintiff had not complied with federal law in seeking a foreclosure.
3. The trial court and special referee erred by failure to take judicial notice that the plaintiff lacked standing and failed to consider the newly discovery evidence.
4. The trial court failed to note that JP Morgan Chase did not comply with the requirements of mortgage intervention as required by this Honorable Court.

Statement of Case

This case is based on a filing of a Complaint for foreclosure on the premises on February 16, 2010 by Chase Home Finance, LLC . In addition to filing for foreclosure, the plaintiff filed a Lis Pendens on the property. The defendant, having not been served, failed to file an answer. Upon an answer not initially being filed, the plaintiff filed an Affidavit of Default on June 16, 2010. An order of reference for the appointment of the Honorable James O. Spence as Master in Equity for Lexington County. (Page 153) This matter came before the Honorable James O. Spence, as Master in Equity for Lexington County on July 29, 2010. Hayes filed a Trustee Notice of Determination, Notice of Fraud of Charging Sheet. A Master's Order for Judgment of Foreclosure and Sale judgment was entered on behalf of JP Morgan Chase on July 29, 2010. (Record No. pages 1 – 9). In addition, Hayes filed a Complaint and Charging Sheet (Record No. pages 72 – 76) against Chase Home Finance, LLC. A hearing on damages was scheduled for July 5, 2012.

On March 16, 2012, JPMorgan Chase Bank (hereinafter “JP Morgan Chase”) filed a Motion for Successor of interest in place of Chase Home Finance, LLC. (Record No. pages 11-12)

It was the notice of the hearing set for July 5, 2012, that Hayes became first aware of the foreclosure action. It was at the hearing of July 5, 2012, Hayes informed the Court of the failure of service of process, and the accuracy of the Court's file. Hayes inquired as whether JP Morgan Chase has presented the proper documentation that entitled it to judgment and questioned its claim for damages. (Record No. page 133) The matter was continued to March 20, 2013 on the matter of damages.

Hayes filed a Motion to Dismiss in the state Court on January 11, 2013. In addition, on March 20, 2013, Hayes filed suit in federal court seeking removal of the state court case, federal case no. 3-13-cv-00731-JFA-SVH. Initially, Hayes inadvertently omitted the basis for filing in federal court, but subsequently noted that his case was based on the diversity of the parties and the failure of JP Morgan Chase's claim to comply with federal law on those mortgages guaranteed by the Veteran's Administration of the United States. (Record No. pages 67-70)

On May 28, 2013, the Honorable James O. Spence recused himself as judge in this matter. (Record No. page 10-11)

On June 3, 2013, the federal court remanded this case back to state court.

On July 3, 2013, JP Morgan Chase made a motion for the appointment of Attorney Albert J. Dooley, Jr., Esquire as a Special Referee.

On September 3, 2013, Hayes filed his Rule 60(b)(3) to vacate the judgment entered by the Court on the basis of the failure to execute proper service. (Record No. pages 31 – 36) Hearing was held on January 6, 2014, on JP Morgan Chase's Motion to Refer to a Special Referee. On January 31, 2014, by Order of Reference this case was referred to Attorney Albert J. Dooley, Jr. by the Honorable Edgar W, Dickson, Judge for the First Judicial Circuit (page 50)

A hearing on Hayes' Motion to Vacate Judgment was set for a hearing before the Special Referee for March 13, 2014.

On March 25, 2014, the Special Referee entered an Order denying Hayes' Motion to Vacate Judgment and entered a supplemental Order Post Judgment. (Record No. 14-19).

Statement of Facts

In May 2004, Demetric Hayes (hereinafter "Hayes") purchased a property whose address was 232 Edenfield Court, Gaston, South Carolina (hereinafter "premises"). This property was allegedly guaranteed by a mortgage with Chase Manhattan Mortgage Corporation. (hereinafter "mortgage"). This mortgage was to be guaranteed through the Veterans Administration.

Hayes executed a mortgage; however the property listed on the mortgage as being in the County of Richland, being show on and designated as Lot 127 on Sheet 3 of 3 on a plat of Killian Green Subdivision, the plat recorded in the Office of the R.O.D. for Richland County in Record Book 873, at Page 1566. (Record No. pages 97-117) This mortgage was recorded in Gaston County, South Carolina. Subsequent to this recording, the Mortgage was re-recorded; however, it contained a different property description. (Record No. pages 78-96) This second recording contained the legal description of 232 Edinfield Court, however, Hayes never saw this page of the mortgage and his authorization to re-record the mortgage was never obtained.

Between 2004 and 2010, said mortgage was allegedly transferred or sold to Chase Home Finance LLC (hereinafter "Chase Home Finance"). Hayes was never notified that his mortgage was transferred to Chase Home Finance LLC.

In 2010, Chase Home Finance LLC sent a letter to Hayes regarding the mortgage. Hayes sent a written request requesting proof that his mortgage had been transferred or sold from Chase Manhattan Mortgage Corporation to Chase Home Finance LLC. (Record No. pages 133-135) In addition, Hayes requested that any concerns with the loan be addressed to the Veteran's Administration pursuant to federal statutes governing Veteran's Administration loans. Neither Chase Manhattan Mortgage Corporation nor Chase Home Finance LLC addressed Hayes loan

with the Veteran's Administration pursuant to the federal statutes governing Veteran's Administration loans. (Record No. pages 67-70)

Notwithstanding the failure to follow through with the Veteran's Administration, Chase Home Finance filed a Summons and Complaint and allegedly a Lis Pendens on February 16, 2010 in order to foreclose on the property.

Although in the Complaint, Chase Home Finance alleges it was the holder on a note and the mortgage on said property, there was no paperwork filed with the Complaint demonstrating that the mortgage had been sold or transferred from Chase Manhattan Mortgage Corporation to Chase Home Finance LLC.

Hayes was never served with the Summons, Complaint or Lis Pendens. (Record No. pages 77, 126-127) Despite Hayes never being served, plaintiff filed for a Judgment in Default by Chase Home Finance. Chase Home Finance filed an affidavit by Lexington County Deputy Sheriff Terry Hite in which he alleges he served a "Karla Marshall, Fiance" (*sic*) a copy of the Complaint as the residence. There is no "Karla Marshall". There is a friend of the Hayes whose name is Carla Marshall who was not present at the residence on March 16, 2010 as alleged in the affidavit of service. (Record No. page 71)

Based on the Motion for Default Judgment and the affidavit alleging service, an order of reference was entered June 16, 2010 and a hearing was ordered for July 29, 2010. On July 29, 2010, the Court of Common Pleas granted judgment in favor of the Chase Home Finance with the order entered July 30 2010 and ordered a hearing on damages.

Hayes first heard of the Summons and Complaint after a default judgment has been entered against him. Upon hearing that a judgment has been entered against him, Hayes requested proof that the mortgage had been transferred or sold from Chase Manhattan Mortgage

Corporation to Chase Home Finance LLC and proof of representation by the law firm on the mortgage. (Record No. pages 133-135). Chase Home Finance failed to provide any documentation requested by the defendant.

In between the time of the default judgment and the notice of a hearing on damages, Hayes deeded the premises to Carla Marshall, as Trustee for the Heart to Heart Trust.

Between entry of default judgment in favor of Chase Home Finance and a hearing on damage, JPMorgan Chase Bank has entered an appearance as a substitute plaintiff in place of Chase Home Finance. (Record No. page 12-13) Hayes has requested documentation supporting the entry of JPMorgan Chase Bank in place of Chase Home Finance. To date, Hayes has never received a response to his requests for discovery in state court. The Court of Common Pleas has requested documentation from JPMorgan Chase Bank in order to determine how much damages to award to Chase Home Finance in the state claim. To date, JPMorgan Chase has failed to produce documentation of how it is the owner of the note and/or mortgage.

Argument

Standard of Review

This case represents a set of unique facts that makes this a case of first impression. Given the omission of relevant law in the decisions of the Court of Common Pleas, this Honorable Court should take it upon itself in determining the application of federal and state statutes. This Court may make its own ruling on the question of law without deferring to the circuit court. *Crossman Cmities of N.C. Inc. v. Harleyville Mut. Ins. Co.* 395 S.C. 40, 717 S.E. 2d 589 (2011); *see also Mims Amusement Co. v. S.C. Law Enforcement Div.* 366 S.C. 141, 621 S.E.2d 344 (344) (stating this Court may decide a novel question of law based on its own assessment of reasoning that best comport with the law, public policy, and the Court's sense of law, justice and right.)

1. The trial court erred when it granted default judgment without proof of service.

The trial court erred in granting default judgment when there was evidence that Hayes was never served with the Summons, Complaint or *Lis Pendens*. (Record No. pages 56 section 5-9, page 57 section 10-11, page 59 section 25-31, page 61 section 36-37

"A judgment is void if a court acts without personal jurisdiction." *BB & T v. Taylor*, 369 S.C. 548, 551, 633 S.E.2d 501, 503 (2006). "A judgment of a court without jurisdiction of the person or of the subject matter is not entitled to recognition or enforcement in another state, or to the full faith and credit provided for in the federal Constitution." 50 C.J.S. Judgments § 986 (1997). "A court generally obtains personal jurisdiction by the service of a summons." *BB & T*, 369 S.C. at 551, 533 S.E.2d at 503.

"The purpose of the summons is to acquire jurisdiction of the person of the defendant and to give him notice of the action and an opportunity to appear and defend." *State v. Sanders*, 118 S.C. 498, 502-03, 110 S.E. 808, 810 (1920).

Rule 4, SCRCPP, pertaining to proper service, "assures the defendant of reasonable notice of the action." *Roche v. Young Bros., Inc. of Florence*, 318 S.C. 207, 209, 456 S.E.2d 897, 899 (1995). To effect service on an individual such as Farina, Rule 4(a), (d)(1) SCRCPP, provides service may be made by delivering a copy of the summons and complaint to him "personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein, or by delivering a copy to an agent authorized by appointment [***9] or by law to receive service of process."

Determining whether to set aside an entry of default lies solely within the sound discretion of the circuit court and that decision will not be overturned absent a clear showing of an abuse of discretion. *Richardson v. P.V., Inc.*, 383 S.C. 610, 614, 682 S.E.2d 263, 265 (2009).

The Court has never required exacting compliance with the rules to effect service of process, but instead looks to whether the plaintiff substantially complied with the rules such that the court has personal jurisdiction over the defendant and the defendant has notice of the proceedings. *Roche v. Young Bros., Inc. of Florence*, 318 S.C. 207, 209-10, 456 S.E.2d 897, 899 (1995).

On June 16, 2010, Chase filed for default judgment on the basis Hayes did not file a response to its Complaint. The basis of filing the default judgment was an affidavit filed by the deputy sheriff stating that he served a “Karla Marshall” at the premises on March 16, 2010. However, there is no such person as “Karla Marshall”. Carla Marshall is a friend of Hayes, who was never served on the date stated in the deputy sheriff’s affidavit. (Record No. page 71) Furthermore, Carla Marshall was not present the premises on the date in question. There is some question as to whether the affidavit filed by the deputy sheriff is authentic. Even though the affidavit is dated March 19, 2010, Hayes reviewed the clerk’s file on a daily basis and did not find the deputy sheriff’s affidavit in the clerk’s file until the summer of 2012.

Since the granting of default judgment, Hayes has appeared before the Court of Common Pleas and clearly stated he never received service of the Summons, Complaint or *Lis Pendens*. Carla Marshall has stated in an affidavit that she never received the papers for service.

It was clearly within the jurisdiction of the Court of Common Pleas to have vacated its granting of the default judgment upon Hayes’ evidence that the Summons and Complaint were never served. In addition, the special referee abused his discretion in ignoring the evidence that Hayes was never served with the summons and complaint.

2. The plaintiff failed to comply with federal law in notifying the Department of Veteran's Administration of its intention to file for foreclosure.

Chase Manhattan, in filing for foreclosure, failed to notify the Veteran's Administration of its intention to file for foreclosure of the premises. Under 38 C.F.R. § 36.4317, any loan secured by the Veteran's Administration requires that the lender contact the Veteran's Administration before filing for foreclosure. (Record No. pages 67-70)

The loan taken out by Hayes in relation to the premises was secured by the Veteran's Administration. Pursuant to 38 C.F.R. § 36.4317, the lender is to notify the Veteran's Administration that the lender intends to foreclose on a loan. As part of this process, the lender, borrower and the Veteran's Administration is to work together to see if they can find an alternative to foreclose.

However, JP Morgan Chase failed to notify the Veteran's Administration of its intention to foreclose on the premises. It never notified Hayes that he had the option of going to the Veteran's Administration in order to seek an alternative to foreclosure. In fact, Hayes was totally unaware his property was under the threat of foreclosure until JP Morgan Chase secured a default judgment from the Court.

3. The trial court and special referee erred by failure to take judicial notice that the plaintiff lacked standing and failed to consider the newly discovery evidence.

The trial court failed to consider Hayes challenge to the standing of the plaintiff to bring originally bringing suit. In addition, when the case was presented to the special referee, the special referee failed to consider newly discovered evidence that Hayes produced that confirmed that the plaintiff did not have standing to bring suit. (Record No. pages 25-27)

"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) (alteration and internal quotation marks omitted). "Standing is . . . that concept of justiciability that is concerned with whether a particular person may raise legal arguments or claims." *Id.* (alteration in original) (internal quotation marks omitted). "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.* (alteration in original) (internal quotation marks omitted). "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) (internal quotation marks omitted). "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.* (internal quotation marks omitted).

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" The South Carolina rule with respect to the real party in interest requirement is patterned after the comparable federal rule, which has been regarded as embodying the concept that an action shall be prosecuted "in the name of the party who, by the substantive law, has the right sought to be enforced." 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.

4 S.C. Jur. *Action* § 23 (1991) (footnotes omitted). "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) (internal quotation marks omitted).

Rule 60, SCRPC, provides:

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud, misrepresentation, or other misconduct of an adverse party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application.

From the beginning, Hayes has always challenged whether the plaintiff had standing to bring suit. The alleged loan was originally through Chase Mortgage Corporation. The plaintiff, Chase Home Finance sued for foreclosure as a successor in interest to Chase Mortgage Corporation. The plaintiff filed to be substituted as a party, however, having failed to give notice to Hayes, the plaintiff was able to get an order entered substituting it as a party without Hayes having the opportunity to challenge that proposition that the plaintiff was the proper party. (Record No. page 61 section 39-40) Upon notice of the foreclosure proceeding, Hayes immediately challenged the plaintiff as the proper party to the suit. Hayes sent out discovery and

made numerous requests for documentation demonstrating the plaintiff as successor in interest in the various proceedings before the Court.

At no time has the plaintiff produced any evidence that it is a successor in interest to Chase Mortgage Corporation. By failure to serve Hayes, and in the granting of a default judgment in its favor, the plaintiff has ensured it would not be required to meet the required standards for standing in the foreclosure proceeding.

4. The trial court failed to note that JP Morgan Chase did not comply with the requirements on intervention as set forth by this Honorable Court.

The trial court in hearings subsequent to the granting of default judgment failed to note that the Supreme Court of South Carolina set forth guidelines for foreclosure actions noting that the mortgagee was to give the mortgagor an opportunity to rectify an existing mortgage. In *Re: Mortgage Foreclosure Actions*, 396 S.C. 209, 720 S.E.2d 908 (2011), this Court set the following guidelines:

B. Procedure in Foreclosure Actions:

The terms and conditions of this order shall apply to all mortgage foreclosure proceedings concerning Owner-Occupied dwellings in this State.

(1) Actions pending on May 9, 2011.

In all mortgage foreclosure actions pending on May 9, 2011, before any merits hearing in the case, or if an order of foreclosure has been entered, before any foreclosure sale, the Mortgagee shall, through its attorney of record, file with the court and serve upon every Mortgagor a notice of the Mortgagor's right to foreclosure intervention. All proceedings in the foreclosure action shall be stayed until completion of such foreclosure intervention.

No foreclosure hearing or foreclosure sale may be held in the foreclosure action until the Mortgagee's attorney certifies the following:

- (a) that the Mortgagor has been served with a notice of the Mortgagor's right to foreclosure intervention for the purpose of seeking a resolution of the foreclosure action by loan modification or other means of loss mitigation;

(b) that the Mortgagee, or its designated agent, has received and examined all documents and records required to be submitted by the Mortgagor to evaluate eligibility for foreclosure intervention;

(c) that the Mortgagor has been afforded a full and fair opportunity to submit any other information or data pertaining to the Mortgagor's loan or personal circumstances for consideration by the Mortgagee;

(d) that after completion of the foreclosure intervention process, the Mortgagor does not qualify for loan modification or other means of loss mitigation, in accordance with any standards, rules or guidelines applicable to the mortgage loan, and the parties have been unable to reach any other agreement concerning the foreclosure process; and,

(e) that notice of the denial of loan modification or other means of loss mitigation has been served on the Mortgagor by mailing such notice to all known addresses of the Mortgagor; provided, that such notice shall also state that the Mortgagor has 30 days from the date of mailing of notice of denial of relief to file and serve an answer or other response to the Mortgagee's summons and complaint.

If within thirty days after having been served with notice of the Mortgagor's rights, the Mortgagor has failed, refused, or voluntarily elected not to participate in any foreclosure intervention process, the Mortgagee, through its attorney, shall certify that fact to the Court, and the foreclosure action may proceed.

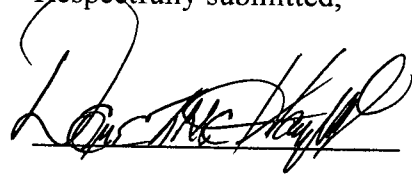
JP Morgan Chase failed to follow these guidelines in that it never notified Hayes of an foreclosure intervention. JP Morgan Chase, even when given a second opportunity to contact the Veteran's Administration concerning foreclosure intervention of the premises failed to contact the Veteran's Administration and failed to notify Hayes that he could contact the Veteran's Administration.

Due to the failure of JP Morgan Chase to comply with the directive of the Order of this Court, the trial court should have taken judicial notice of JP Morgan Chase non-compliance, and vacated its default judgment. However, the trial court failed to follow the Supreme Court, grant Hayes' Motion to Dismiss and allowed JP Morgan Chase to proceed with the hearing on damages.

Conclusion

This Honorable Court should overturn the granting of the default judgment in favor of JP Morgan Chase. This case fails on a number of grounds. The first is the trial court failed to note that JP Morgan Chase had no standing and therefore the Court was without jurisdiction to even take the case. In addition, there was a failure of service on the defendant, which would render any judgment in favor of a plaintiff void. Furthermore, assuming arguendo that either of these requirements were met, the failure of JP Morgan Chase to comply with federal regulations regarding mortgages guaranteed by the Veteran's Administration demonstrates a violation of federal law and would render any judgment in favor of JP Morgan Chase void. Therefore, Demetric Hayes prays this Honorable Court will remand this case back to the trial court and require it to issue an order of dismissal.

Respectfully submitted,



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3 November, 2014

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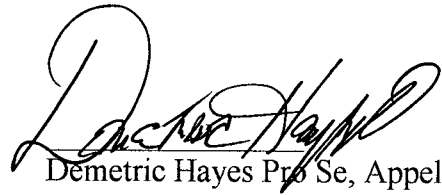
PROOF OF SERVICE

I certify that a copy of the foregoing Appellant's Final Brief has been served upon the Respondent by placing the same in the United States mail, Certified mail, addressed to the following as shown below this ~~8~~⁵ November, 2014.

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A handwritten signature in black ink, appearing to read "Demetric Hayes". The signature is written in a cursive style with a large initial "D".

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3 November, 2014