IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Mikell R. Scarborough, Master in Equity

Case No. 2010-CP-10-5825

Selene RMOF REO Acquisition, LLC.....Respondent,

v.

Melissa Furmanchik; Masonborough at Park West Association, Inc.
and Wells Fargo Bank, N.A.,.....Defendants,

Of whom Melissa Furmanchik is the.....Appellant.

FINAL BRIEF OF APPELLANT

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STATEMENT OF CASE

PROCEDURAL AND FACTUAL HISTORY

On July 20, 2010, Wachovia Mortgage Corporation initiated the within foreclosure action alleging that on September 7, 2006, David Furmanchik, now deceased, entered into a loan transaction with it secured by a mortgage in the amount of $464,000.00. Wachovia Mortgage Corporation further asserted that the mortgage was made to Mortgage Electronic Registration Services, Inc., as nominee. (R. pp. 68-74). On September 16, 2010, an Order of Reference was filed. (R. pp. 3-5). On December 2, 2011, a Consent Order granting leave to Defendant, Melissa Furmanchik (hereinafter "Furmanchik") to file a responsive pleading was filed. (R. p. 6). Furmanchik then timely filed an Answer and Counterclaim which included but was not limited to the following defenses: lack of standing; failure to provide notices required by federal and state law; and unclean hands. (R. pp. 89-94).

On September 10, 2012, an Order of Substitution of parties was filed that specifically states "the subject mortgage was subsequently transferred to Selene Finance LP, by assignment dated October 7, 2010, thereafter transferred to SRMOF-2009-1

Trust, by assignment dated March 29, 2011, thereafter transferred to Selene RMOF REO Acquisition, LLC, by assignment dated March 29, 2011." (R. p. 7-10). The Order permitted Selene RMOF REO Acquisition, LLC to proceed as the named plaintiff. (hereinafter "Selene" or "Respondent").

On March 28, 2013, Furmanchik filed a Motion to Dismiss or in the Alternative for Summary Judgment for lack of proof of standing. (R. pp. 95-118). On May 20, 2013, the Master in Equity filed an Order denying the relief sought by Furmanchik. (R. pp. 11-15).

On June 20, 2013, a hearing of foreclosure was held wherein live testimony was taken. No Order of Foreclosure was issued at the close of the case. On July 11, 2013, the Master in Equity *sua sponte* issued and Order pursuant to Rule 50(d), SCRCP finding "that the matter should be reopened for the express purpose of taking additional testimony with regards to the note and subsequent modification agreement. This is done pursuant to Rule 50(d), SCRCP. This matter is to be reset for Monday, August 12 at 10:00 a.m." (R. pp. 16-17).

Hearing Testimony

At the time of the first hearing held on June 20, 2013, Plaintiff offered as a witness Mamie Clark. No other witness was offered to testify.

Ms. Clark is an employee of Selene Finance, L. P. who holds the job title of Contested Default Case Manager. (R. p. 184, lines 24-25). Ms. Clark testified she was authorized to testify on behalf of her company (R. p. 185, lines 7-9), a company which is different from the named Plaintiff, Selene RMOF REO Acquisitions, LLC. (R. p. 186, lines 12-20). Ms. Clark further testified as follows: she was not an employee of the

originally named Plaintiff, Wachovia Mortgage Corporation (R. p. 209, lines 20-25); she is not an employee of the substituted Plaintiff, Selene RMOF REO Acquisitions, LLC. (R. p. 210, lines 4-11); the allonge presented was not affixed to the Note offered as Plaintiff's Exhibit 1 (R. p. 210, line 16 – R. p. 211, line 3); the allonge was not prepared by her or anyone at Selene (R. p. 214, lines 4-24); she was not the custodian of records for Selene Finance L. P. (R. p. 211, lines 4-16); the current owner of the note and mortgage was Selene RMOF REO Acquisition, LLC (R. p. 203, lines 5-6); that she did not know the person who signed the note, David Furmanchik, nor could she identify his signature (R. p. 212, lines 5-13); the Note presented, on the fifth page, has several endorsements one of which is marked void (R. p. 211, line 24 – R. p. 212, line 25); a second endorsement is marked canceled and she has no knowledge as to why it is marked canceled (R. p. 211, line 24 – R. p. 213, line 12); she had no knowledge or documentation that showed how the Note came into Selene's possession (R. p. 213, line 14- R. p. 214, line 3); there is no endorsement on the Note from MERS (R. p. 215, lines 14-17); there is no endorsement on the Note to Selene Finance L.P. (R. p. 215, lines 19-20); there is no endorsement on the Note to SRMOF 2009-1 Trust (R. p. 215, lines 21-23); there is no endorsement on the Note to Selene RMOF REO Acquisitions, LLC (R. p. 215, line 24- R. p. 216, line 1); that the Note identified as Exhibit 1 does not provide an interest rate (R. p. R. p. 216, line 9 – R. p. 217, line 1); that no interest would be owed under the Note identified as Exhibit 1 due to zero being specified as the interest rate (R. p. 217, line 25 – R. p. 218, line 13); the principle amount due is $464,000 (R. p. 207, lines 15-17); late charges assessed were $1,232.42 (R. p. 207, lines 18-19); interest from December 1, 2009 through June 20, 2013 is $105,069.78 (R. p. 207, lines 20-22); total tax charges are

$3,932.21 (R. p. 202, line 23 – R. p. 208, line 2); flood insurance chargers were $11,727.77 (R. p. 208, lines 3-7); property inspections totaled $169 (R. p.208, lines 8-11); and charges for BPO's and appraisals were $200.00 (R. p. 208, lines 12-16).

Over the objections of Furmanchik, Ms. Clark was allowed to testify (R. p 188, line 23 – R. p. 192, line 16) and the following documents were entered into evidence. Exhibit 1, Note 1 (R. p. 198, lines 4-25); Exhibit 2, Mortgage (R. p. 199, lines 2-9); Exhibit 3, Assignment dated 7/15/2010 (R. p. 200, line 22 – R. p. 201, line 16); Exhibit 4, Assignment dated 3/18/2011 (R. p. 201, line 17 – R. p. 202, line 1); Exhibit 5, Assignment dated 5/3/2011(R. p. 202, lines 2-21); Exhibit 6, Assignment dated 5/3/2011 (R. p. 202, lines 10-21); Exhibit 7, Payment history (R. p. 203, line 9 – R. p. 205, line 12); Exhibit 8, Demand Letter (R. p. 205, line 13 – R. p. 206, line 23; Exhibit 9, Judgment Figures (R. p. 207, line 7 – R. p. 209, line 14); Exhibit 10, (R. p. 208, line 17 – R.p. 209, line 14); and Exhibit 2A, (Note 2)(R. p. 199, line 17 – R. p. 200, line 3). After the close of Ms. Clark's testimony and over Furmanchik' s continued objection, the lower court entered into evidence Exhibit 2B which are attachments to Exhibit to 2A (R. p. 241, line 7 – R.p. 250, line 5).

At time of the second hearing held on August 12, 2013 due to the Master in Equity's *sua sponte* relief, Ms. Clark was the only offered witness. Ms. Clark testified that Exhibit 2A was a mortgage modification dated August 31, 2006 (R. p. 261, lines 8 - 16). She further testified that Exhibit 2C was a combination of Exhibits 2A and 2B. (R. p. 265, lines 9-12); that Mr. Furmanchik signed the mortgage modification but Mrs. Furmanchik had not (R. p. 266, line 24 – R. p. 267, line 9); that the document starting on Page 265 is identified as and entitled as a Fixed Adjustable Rate Note which is not signed

by Mrs. Furmanchik (R. p. 267, lines 10-17); that the Fixed Adjustable Rate Note is a brand new note (sometimes hereafter referred to as "New Note")(R. p. 267, line 25 – R. p. 268, line 3); the New Note has no allonge (R. p. 267, line 25 – R. p. 268, line 8); the New Note has no endorsement (R. p. 267, line 25 – R. p. 268, line 21); and that Wachovia never endorsed or assigned the New Note to any other entity. (R. p. 267, line 25 – R. p. 268, line 21).

On February 7, 2014, the Master in Equity entered an Order of Foreclosure. (R. pp. 18-33) On, February 21, 2014, Furmanchik filed a Motion for Reconsideration. (R. pp. 129-154). On March 28, 2014, the Master in Equity denied the Motion for Reconsideration (R. pp. 34-62) wherein Furmanchik timely filed a Notice of Appeal on April 24, 2014.

STANDARD OF REVIEW

Two standards of review govern this appeal: *de novo* as to the granting of foreclosure and abuse of discretion as to the lower court's evidentiary rulings.

"An action to foreclose a real estate mortgage is an action in equity." *BB&T of South Carolina v. Kidwell,* 350 S.C. 382, 387, 565 S.E.2d 316, 319 (Ct. App. 2002). On appeal from an action in equity, this Court may "find facts in accordance with its views of the preponderance of the evidence." *Townes Assocs., Ltd. v. City of Greenville,* 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976).

A decision about the "admissibility or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion." *Allegro Inc. v. Scully*, 400 S.C. 33, 733 S.E.2d 114 (Ct. App. 2012), *quoting State v. Byers,* 392 S.C. 438, 444, 710 S.E.2d 55, 57–58 (2011). "An abuse of

discretion occurs when the trial court's ruling is based on an error of law." *Id.* Further, to warrant reversal, appellant must show prejudice in addition to the error of the ruling. *Id.*

ARGUMENT

I. THE MASTER IN EQUITY LACKED THE POWER TO GRANT *SUA SPONTE* RELIEF.

On June 20, 2013 a hearing was held before the Master in Equity for Charleston County. On July 11, 2013, approximately 20 days later, the Master in Equity sua *sponte* issued an Order stating "this court finds that the matter should be reopened for the express purpose of taking additional testimony with regards to the note and subsequent modification agreement. This is done pursuant to Rule 50(d), SCRCP. This matter is to be reset for Monday, August 12 at 10:00 a.m." (R. p. 16-17).

The Master in Equity improperly relied on Rule 50(d), SCRCP. First no motion for directed verdict was made by Plaintiff pursuant to Rule 50, SCRCP. Nor, at the time the Court had decided to act *sua sponte,* had relief been granted or verdict entered in favor of Plaintiff from which it could have moved for a judgment notwithstanding the verdict. In order for Rule 50(d), SCRCP to be applicable here the Court would have had to of ruled in favor of the Defendant at the time of the June 20, 2013 hearing. That had not occurred.

Moreover under Rule 50, SCRCP, *sua sponte* relief is not available. See *State v. Dicapua*, 680 S.E.2d 292, 383 S.C. 394 (S.C. 2009)(citing *Southern Railway Co. v. Coltex, Inc.*, 285 S.C. 213, 214, 329 S.E.2d 736, 736 (1985) (" The sole issue is whether a trial judge *ex mero motu* can grant a new trial on a ground not raised by a party. We hold he cannot.")): *See also*, *Heins v. Heins,* 543 S.E.2d 224, 344 S.C. 146 (Ct. App. 2001)(a

Family Court judge does not have the authority to alter or amend a judgment, *sua sponte,* once the judgment is more than 10-days-old); and *Ellis v. Niles*, 316 S.C. 516, 459 S.E. 2d 631, 634 n.5 (Ct. App. 1994), vacated in part, reversed in part, 324, S.C. 223, 479 S.E. 2d 47 (1996)("Rule 50(a), SCRCP provides that a motion for directed verdict may be made at the close of an opponent's evidence. Moreover, the rule apparently does not give a trial judge authority to direct a verdict *sua sponte*. Compare Rule 19, SCrimP (specifically providing that court shall direct a verdict on motion of the defendant or on its own motion if there is a failure of evidence.))." Thus Rule 50(d), SCRCP, had no application and it was error for the court to grant the unrequested relief.

Even in the event the lower court inadvertently referenced Rule 50(d), SCRCP, when it intended to cite Rule 59(d), SCRCP, the relief granted was not available. "Rule 59(d), SCRCP, provides that the court, upon its own initiative, may order a new trial 'not later than 10 days after entry of judgment...[a]fter giving the parties notice an opportunity to be heard on the matter.' This time limitation may not be extended." *C&S National Bank v. Easton,* 310 S.C. 447, 427 S.E. 2d 640, 641 (1993). The relief granted by the lower court *sua sponte* was well past 10 days from the hearing. The Court lacked the authority to grant the relief and the decision based on the second hearing should be reversed.

A. The lower court not only exceeded its authority but strayed from its role as a neutral.

A fundamental concept in the process of justice is that all parties are entitled to a fair and impartial trial, and that a judge will act with neutrality. See, *State v. K.C. Langford*, 400 S.C. 421, 735 S.E. 2d 471 (2012), citing, *Schweiker v. McClure*, 456 U.S. 188, 195, 102 S. Ct. 1665, 72 L.Ed.2d 1 (1982) (" [D]ue process demands impartiality on

the part of those who function in judicial or quasi-judicial capacities."). Here, and with all due respect to the lower court, the lower court by acting on its own accord and providing the Plaintiff with an opportunity to correct evidentiary issues and present additional evidence after Plaintiff had closed its case and had not sought such relief, removed itself from being a neutral and placed itself in the role of an advocate. The Master as with other tribunals is charged with making determinations and rulings based upon what the parties present. It is not charged with advocating for a party or providing a party with an opportunity for a new hearing for the benefit of one party to the detriment of another. Here the Plaintiff had not sought to reopen the matter or moved by any means to present additional evidence or to correct evidentiary deficiencies. By acting *sua sponte* the court appears to have ventured down the road of advocating, doing for a party what the party failed to do, elected not to do or chose not to do itself. The Master erred as a matter of law by granting a second trial.

II. THE PLAINTIFF FAILED TO ESTABLISH ITS RIGHT TO PROSECUTE THE FORECLOSE ACTION.

A. THE NOTE AND MORTGAGE TOOK SEPARATE PATHS MAKING THE TRANSFER OF THE MORTGAGE A NULITY.

In South Carolina, "generally, the party seeking foreclosure has the burden of establishing the existence of the debt and the mortgagor's default on that debt." *U. S. Bank Trust Nat'l Ass'n v. Bell,* 385 S.C. 147, 662 S.E. 2d 424 (Ct. App. 2008); *see also Cleveland v. Bomar*, 178 S.C. 455, 183 S.E. 2d 34 (1936)(dismissing a foreclosure action because it was not brought in the name of the real owners of the note and mortgage.) Plaintiff asserts it is the holder of the subject Note(s) and therefore entitled to pursue the within matter.

Where a negotiable note is secured by mortgage, the note and mortgage are inseparable, and the assignment of the note carries the mortgage with it, while an assignment of the mortgage alone is a nullity. *Carpenter v. Longan*, 83 U.S. 271, 21 L. Ed. 313, (1872); *In re Leisure Time Sports, Inc.* 194 B.R. 859, 861 (9th Cir. 1996) (stating that "[a] security interest cannot exist, much less be transferred, independent from the obligation which it secures" and that, "[i]f the debt is not transferred, neither is the security interest"); *Kelley v. Upshaw*, 39 Cal. 2d 179, 192 (1952) (stating that assigning only the deed without a transfer of the promissory note is completely ineffective); *see also* Restatement (3d) of Property (Mortgages) § 5.4 (stating that "[a] mortgage may be enforced only by, or in behalf of, a person who is entitled to enforce the *obligation* that the mortgage secures"); *South Carolina Nat. Bank v. Halter*, 293 S.C. 121, 359 S.E.2d 74 (S.C. App. 1987) (The assignment of a mortgage as distinct from the debt it secures is nugatory and confers no rights upon the transferee, *Hahn v. Smith,* 157 S.C. 157, 154 S.E. 112 (1930), absent some indication that the parties also intended to transfer the debt. 59 C.J.S. Mortgages Section 359 (1949)).

Note 1, (R. pp. 280-289) demonstrates on its face that the originator of the Note was

Wachovia Mortgage Corporation which endorsed it to Wachovia Bank, N.A. Thereafter, by allonge to Note 1 (which was unattached and raises questions as to its validity raised below) Note 1 was endorsed in blank by Wells Fargo Bank, N.A. as successor by merger to Wachovia Bank N.A.

Here it is undisputed and the evidence shows the Assignments of Mortgage do not follow the endorsements of Note 1. The sequential transfers of Note 1 and Mortgage admitted into evidence are illustrated below:

NOTE 1	**MORTGAGE**	
Wachovia Mortgage Corp.	MERS	
↓	↓	**(Assignment 1)**
Wachovia **Bank, N.A.**	Wachovia **Mortgage**	
↓	↓	**(Assignment 2)**
Blank	Selene Finance LP	
	↓	
	SRMOF 2009-1 Trust	
	↓	
	SELENE RMOF REO Acquisition, LLC	

Assignment 1 appears to convey the Mortgage from MERS to the original Plaintiff Wachovia Mortgage Corporation. Thereafter, several months after this action was initiated, .Assignment 2 appears to convey the Mortgage from Wachovia Mortgage Corporation to Selene Finance, LP. This second assignment conflicts with the chain of title depicted by the indorsements to Note 1. The first indorsement on Note 1 purports to transfer the Note from Wachovia Mortgage Corporation to Wachovia Bank, N.A. Then an indorsement by way of an unaffixed allonge reveals Wells Fargo Bank, N.A., successor by merger to Wachovia Bank, N.A. indorses Note 1 in blank (potentially to

Selene Finance, LP). The Mortgage and Note depart from each other at the second Assignment of Mortgage. Wachovia **Bank** and Wachovia **Mortgage** are two separate entities. Moreover, the Mortgage appears to have been assigned from Wachovia Mortgage Corporation directly to Selene Finance, LP, however at the time Wachovia Mortgage Corporation did not hold an interest to assign the mortgage because it had already transferred Note 1 to Wachovia Bank, N.A.

The departure of these two instruments deepens with the Assignments of Mortgage that have no parallel transfer of the Note. The two instruments take completely separate paths. As stated above a mortgage must follow the note it secures, without a transfer of the Note an assignment of the Mortgage alone is a nullity. *See South Carolina Nat'l Bank v. Halter*, 293 S.C. 121, 128, 359. S.E.2d 74, 77 (Ct. App. 1987). The independent transfers of the Mortgage are nugatory. The Plaintiff here has not established a right to enforce the Mortgage since a number of the assignments it relies upon are void as a matter of law. Consequently the mortgage stopped in its path not following the note and never making its way to the Plaintiff. The Plaintiff under these circumstances never received an assignment of the mortgage and was not entitled to foreclosure.

B. POSSESSION OF A NOTE DID NOT ESTABLISH SELENE'S RIGHT TO PROSECUTE THE FORECLOSURE ACTION.

Separate from the path of the Note and Mortgage is the proper transfer of the Note. The lower court erred in determining Plaintiff had a right to enforce the negotiable instrument and had standing as the real party in interest as to the subject Note. (R. p. 18-33).

S.C. Code Anno. §36-3-301 (2008) provides: "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." A holder is "a person who is in possession of a document or title or an instrument or a certificated investment security drawn, issued or indorsed to him or to his order or to bearer or in blank". S.C. Code Anno. §36-1-201(20)(2003); *see also* Frederick M. Hart & William F. Willier, *Negotiable Instruments Under the Uniform Commercial Code,* § 12.02(1) at 12-13 to 12-15 (2012) ("The first requirement of being a holder is possession of the instrument. However, possession is not necessarily sufficient to make one a holder.").

Possession is not necessarily sufficient to make one a holder, as the Plaintiff postulates and the lower court determined. Selene was required to prove both physical possession and the right to enforcement through either a proper indorsement or a transfer of negotiation. S.C. Code Ann. §36-3-201(a) (2008) ("Negotiation" means a transfer of possession, whether voluntary or involuntary, of an instrument by a person other than the issuer to a person who thereby becomes its holder."); *See Bank of New York vs. Romero*, Op. No. 2014-NMSC-007, 320 P. 3d 1 (Feb. 13, 2013, S. Ct. N. M.). Selene failed in its burden of proof.

Note 1 presented as Exhibit "1" was initially made in favor of Wachovia Mortgage Corporation. As testified by Plaintiff's witness, the last page of the Note contains several indorsements which are either cancelled or marked void. The one indorsement not altered is undated and from Wachovia Mortgage to Wachovia Bank,

N.A. Selene's witness further testified there is no indorsement on the Note from MERS (R. p. 215, lines 14-17); there is no endorsement on the Note to Selene Finance L.P. (R. p. 215, lines 18-20); there is no indorsement on the Note to SRMOF 2009-1 Trust (R. p. 215, lines 21-23); and there is no indorsement on the Note to Selene RMOF REO Acquisitions, LLC (R. p. 215, line 24 – R. p. 216, line 1). There being no indorsement on the Note to Selene, Selene lacked standing and right to enforce the note.

C. THE ALLONGE WAS INVALID THEREFOR E THE NOTE WAS NOT ENDORSED IN BLANK.

On the last page of Note 1 reference is made to an allonge. An unaffixed page is entitled "Allonge for the Purpose of Endorsement." The allonge however was not affixed to the Note. (R. p. 210, line 12 – R. p. 211, line 3)[1]. No testimony was offered to suggest that at any time the allonge was affixed to the Note. The allonge not being affixed renders it invalid and inconsequential. The allonge not being affixed means Note 1 is specially endorsed and not in blank. (i.e. the last page of Note 1 specially indorsement was to Wachovia.); See S.C. Code Ann. §36-3-205(a) (2008)(If an indorsement is made by the holder of an instrument, whether payable to an identified person or payable to bearer, and the indorsement identifies a person to who it makes the instrument payable, it is a "special indorsement.") The Note is not bearer paper and remained with the last entity to which it was indorsed, Wachovia. Note 1 by indorsement never made its way to Selene; therefore the Court erred in determining Selene was the real party in interest.

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[1] "Affixed" to the instrument demands that the paper be actually attached to the instrument, meaning some form of physical connection securing the paper to the instrument. See. S.C. Code Anno. §36-3-204 (2008); *See also, In re McFadden*, 471 B .R. 136, 173 (D.S.C. 2012). The attachment requirement serves two purposes: preventing fraud and preserving the chain of title to an instrument. *See Southwestern Resolution Corp. v. Watson,* 964 S.W.2d 262 (Tex.1997).

D. SELENE HAD NO EVIDENCE OF A TRANSFER OF THE NOTE.

As an alternative to simply saying I am in possession, one could attempt to establish pursuant to S.C. Code Anno. §36-3-301(ii) (2008) that it was given the rights as a holder. In order to establish rights as a nonholder, Selene would have had to prove both possession and the transfer of such rights. This argument is not available to Selene however. Here, as discussed infra there was no proper indorsement; the testimony of Selene's witness was that she had no knowledge or documentation that showed how the Note came into Selene's possession (R. p. 213, line 1 – R. p. 214, line 3). Selene lacked standing.

E. THE LACK OF ANY INDORSEMENT ON NOTE 2 DEPRIVED SELENE OF ANY RIGHT TO ENFORCE THE NOTE.

In addition to Note 1 (R. p. 280-289), Plaintiff submitted testimony relating to Note 2 at the time of the second hearing. (R. p. 337-352). At the second hearing held on August 12, 2013, again Ms. Clark was the only offered witness. Ms. Clark testified that Exhibit 2A was a mortgage modification dated August 31, 2006 (R. p. 261, lines 13-16). She further testified that Exhibit 2C was a combination of Exhibits 2A and 2B.(Sometimes referred herein as "New Note or Note 2") (R. p. 267, line 25 – R. p. 268, line 3); that Mr. Furmanchik signed the mortgage modification but Mrs. Furmanchik had not (R. p. 266, line 20 – R. p. 267, line 24); that the document starting on Page 265 is identified as and entitled as a Fixed Adjustable Rate Note which is not signed by Mrs. Furmanchik (R. pp. 337-352)(R. p. 267, lines 10-17); that the Fixed Adjustable Rate Note is a brand new note (R. pp. 342-346)(R. p. 267, line 25 – R. p. 268, line 3); the new Fixed Adjustable Rate Note has no allonge (R. pp. 342-346)(R. p. 267, line 25 – R. p. 268, line 8); the new Fixed Adjustable Rate Note has no endorsement (R. pp. 342-346)(R. p. 267,

line 25 – R. p. 268, line 21); and that Wachovia never endorsed or assigned the new Fixed Adjustable Rate Note to any other entity (R. pp. 342-346)(R. p. 267, line 25 – R. p. 268, line 21). There being no assignment of mortgage or indorsement of Note out of Wachovia, Selene never received any interest in Note 2. Selene had no right of enforcement as to Note 2.

III. NO ADMISSIBLE EVIDENCE WAS OFFERED.

A. THE WITNESS PRESENTED LACKED SUFFICIENT KNOWLEDGE TO TESTIFY.

Rule 602, SCRE, states: "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony..." Plaintiff's witness lacked sufficient knowledge to testify.

In this case Plaintiff's witness did not testify in such a manner as to establish personal knowledge or to lay a proper foundation for the admission of Plaintiff's Exhibits. The witness offered to testify, testified she was an employee of Selene Finance, LP, and held the title of Contested Default Case Manager. (R. p. 184, lines 19-25). The witness acknowledged she was not an employee of the presently named Plaintiff, Wachovia, or Wells Fargo (R. p. 209, line 20- R. p. 210, line 11). The witnessed acknowledged the Note and Mortgage were originated by Wachovia Mortgage Corporation. The witness testified that that the signature page of the Note contains several endorsements, such of which are marked void and/or cancelled, but she did not know why the endorsements were marked void and/or cancel. The witness testified that the documents in question were not created by Selene Finance, LP or Plaintiff. The witness testified she had no evidence or testimony that established the chain of title of

testimony which would establish how or when Plaintiff became in possession of the Note. Upon direct examination the witness testified that she is a default case manager whose duties include "review loans where there are differences to attempt to resolve those issues" and testify at trials. Upon cross-examination the witness testified that see is not the custodian of records for Selene Finance, LP, but also equivocated changing her testimony to state that her duties and functions do include custodian of records for the documents in question. (R. p. 211, lines 4-23). Notably the witness never testified how records were retained; the means of retention of records by Plaintiff or her employer; computer systems used by Plaintiff or her employer; the reliability of any computer system of Plaintiff or her employer; how data is entered or maintained by Plaintiff or her employer; or procedures used for obtaining records. Plaintiff failed to establish the witness had the required personal knowledge as required by Rule 602, SCRE to testify or authenticate the documents. See *Hundley ex rel. Hundley v. Rite Aid of South Carolina Inc.*, 339 S.C. 285, 529 S.E. 2d 45 (Ct. App. 2000)("generally under Rule 602, SCRE [a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."). The lower court erred by admitting Ms. Clark's testimony.

B. Plaintiff failed to establish and exception to the hearsay rule.

Rule 803(6), SCRE, states "A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by

the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness." Rule 901, SCRE, states "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."

Plaintiff failed to a lay a proper foundation for the documents to be considered business records pursuant to Rule 803(6), SCRE, or that Plaintiff's witness could testify a custodian of records or other qualified witness pursuant to 803(6), SCRE. "A business record without evidence about the manner in which it is prepared or the source of its information does not meet the requirements in S.C. Code Section 19-5-510 or Rule 803(6), SCRE. Business records entries must have been made at or near the time of the act to which they relate; the purpose of this mandate is to aid in establishing that the record was honestly and fairly kept..." *State v. Rice*, 375 S.C. 302, 652 S.E. 2d 409 (Ct. App. 2007). The Court erred in admitting the exhibits offered by Plaintiff in contradiction to the provisions of Rule 803, SCRE. Neither a proper foundation nor an exception to hearsay was established by Plaintiff for any document entered into evidence. Plaintiff's witness admitted that neither the Note nor Mortgage was originated by her employer or the entity for which she was testifying. (R. pp. 280-318). She had no knowledge as the assignments entered into evidence. (R. pp. 319-326). She offered no evidence of how the records were created or maintained, the source of the information, where maintained or when they were created. She certainly offered not a single shred of evidence that allowed for the admission of documents clearly created by Wells Fargo an entity with which she testified she had absolutely no relationship. (R. pp. 335-336 (Wells Fargo Demand

letter), and R. pp. 327-334) (Wells Fargo Account History)).The Court erred by admitting these documents into evidence.

The Court further erred in allowing Exhibits 2 A, B and C into evidence at the continuation hearing or reopening hearing. Notwithstanding assuming for the sake of argument that Plaintiff did seek to admit the Exhibit 2C through evidence of a proper witness at the August 12, 2013 hearing, said evidence should not have been admitted because Plaintiff did not produce the original. Rule 1002, SCRE, states "[t]o prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute." Rule 1003, SCRE, states "A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original." In this case both a genuine question as to authenticity of the original and circumstance that it would be unfair to admit the duplicate in lieu of the original are both present. The Court erred by admitting Note 2 which Plaintiff's witness did not testify to in the original hearing.

Finally as the court noted in the August hearing "Did we go into the document 2B then? That was the one in issue? . . . 2B is the one I let in and we never did talk about. That's the only reason I reopened this thing, is to talk about 2B." However, then the Court asks "Is that the original?" Plaintiff states that it is not, saying "The original we're waiting on in West Columbia." Here there are clearly questions as to authenticity, it would be highly prejudicial to accept a duplicate, Plaintiff was well aware the documents

were the remaining issue, and yet with over a month in between the two hearing Plaintiff failed to present the original documents at the second hearing.

IV. THE COURT ERRED IN AWARDING INTEREST WHEN NOTE 1 DID NOT PROVIDE FOR SUCH.

"The law in this state regarding the construction and interpretation of contracts is well settled." *ERIE Ins. Co. v. Winter Constr. Co.*, 393 S.C. 455, 461, 713 S.E.2d 318, 321 (Ct. App. 2011). "In construing a contract, it is axiomatic that the main concern of the court is to ascertain and give effect to the intention of the parties." *D.A. Davis Constr. Co. v. Palmetto Props., Inc.*, 281 S.C. 415, 418, 315 S.E.2d 370, 372 (1984). "If its language is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required and the contract's language determines the instrument's force and effect." *Ellie, Inc. v. Miccichi,* 358 S.C. 78, 93, 594 S.E.2d 485, 493 (Ct. App. 2004). "A court has no authority to rewrite a contract and impose unwanted obligations and terms under the guise of specific performance or judicial construction." *Lowcountry Open Land Trust v. Charleston Southern University*, 376 S.C. 399, 656 S.E. 2d 775 (Ct. App. 2008).

Note 1 provides for zero interest. (No interest would be owed under the Note identified as Exhibit 1 due to zero being specified as the interest rate (R. p. 217, line 25 – R. p. 218, line 13)). To award interest under Note 1, the lower court, in essence, rewrote the terms of the contract to which the parties agreed. The Court was not at liberty to award interest when Note 1 failed to provide for such. Thus, the Court erred by awarding interest to Plaintiff.

CONCLUSION

For the reasons given, this Court should reverse the decision of the lower court and determine the Plaintiff lacked standing to prosecute the matter and failed to proffer sufficient evidence to proceed with foreclosure.

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December 31, 2014

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Mikell R. Scarborough, Master in Equity

Case No. 2010-CP-10-5825

Selene RMOF REO Acquisition, LLC.....Respondent,

v.

Melissa Furmanchik; Masonborough at Park West Association, Inc.
and Wells Fargo Bank, N.A.,.....Defendants,

Of whom Melissa Furmanchik is the.....Appellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Appellant's Final Brief complies with Rule 211(b), SCACR.

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December 31, 2014

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PROOF OF SERVICE

I certify that on this 2 day of January 2015, I have served Appellant's Final Brief and Appellant's Final Reply Brief on opposing counsel of record by depositing a copy a in the United States Mail, postage prepaid, addressed as follows:

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