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 REPLY BRIEF OF APPELLANT

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December 31, 2014

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RULES:

I. THE MASTER IN EQUITY ERRED BY GRANTING SUA SPONTE RELIEF.

The Master in Equity cited to Rule 50(d), SCRCP, when he granted sua sponte relief for a new trial for the benefit of Respondent. Respondent does not address any argument relating to Rule 50 or the case authority cited supporting the proposition that Rule 50, SCRCP, does not provided for sua sponte relief. There being no response to the argument, the argument should be deemed resolved. R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth., 343 S.C. 424, 437, 540 S.E.2d 113, 120 (Ct. App.2000) (deeming an issue abandoned if the appellant's brief treats it in a conclusory manner).

Likewise, in the event the Court's reference to Rule 50(d), SCRCP is considered a clerical error and the proper citation was to Rule 59(d), SCRCP Respondent fails to address the time limitations imposed under Rule 59(d), SCRCP. Respondent having failed to respond to the argument, the issue should be concluded. Lastly, Respondent failed to address the argument that the lower court strayed from its role as acting as a neutral. Thus, the Master in Equity erred by acting outside his allowed authority under Rule 50(d), SCRCP or outside the allowed time period under Rule 59(d), SCRCP.

II. STANDING DID NOT EXIST AT THE TIME OF FILING OF THE COMPLAINT OR AT THE TIME OF TRIAL.

Respondent, in essence, limited its responsive arguments relating to standing by making the conclusory remark that the original Plaintiff had standing at the time the case was filed. This is nothing more than a conclusory remark, in light of the fact that Respondent offered no testimony or qualified witness that could testify as to

Wachovia's standing at the time of filing. The only witness offered was an employee for a servicer of the subsequent holder. Thus, no meaningful response has been offered.

Additionally the argument relating to the divergent paths taken by the Note and Mortgage was not addressed. The Mortgage never reached the Respondent because the assignment of mortgage ended when it went in a different direction from the Note. Respondent lacked standing and the foreclosure should be reversed.

Interesting is the assertion by Respondent that it is the servicer of the subject note and mortgage and therefore has standing under the holdings of Bank of America, N.A. v. Draper, 405 S.C. 214,746 S.E. 2d 478 (Ct. App. 2013). At the time of trial Respondent did not contend it was the servicer but rather the holder. Therefore this argument not having been raised it is not properly before this Court. Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998)("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.")

A recent case just decided by the Florida Court of Appeals in the past several months provides guidance on the issue of standing. In the case of Daniel v. Nationstar Mortgage, 2014 Fla. App. LEXIS 16734, (October 13, 2014) the Court determined that Nationstar failed to establish that the original plaintiff, Auora Loan Services LLC, had standing to foreclose at the time it filed the original complaint, and reversed the foreclosure. The Court noted that in order to prove standing to foreclose a mortgage, a plaintiff must show that it is the holder both of the mortgage and of the note the mortgage secures. Id. (citations omitted) "The plaintiff must

prove it is a holder in due course of the note and mortgage both as of the time of trial and also [*2] that the (original) plaintiff had standing as of the time the foreclosure complaint was filed. Id. (citations omitted). "The plaintiff must prove not only physical possession of the original note but also, if the plaintiff is not the named payee, possession of the original note endorsed in favor of the plaintiff [*3] or in blank (which makes it bearer paper)." Id. If the foreclosure plaintiff is not the original, named payee, the plaintiff must establish that the note was endorsed (either in favor of the original plaintiff or in blank) before the filing of the complaint. Id.

The appellate court reversed the lower court finding that Nationstar failed to establish standing to foreclose at the time the original complaint was filed having only entered into evidence the original of the note which had been attached to the amended complaint. The note contained two endorsements neither of which were dated and neither which established the endorsement in blank antedated the filing of the original complaint. The only evidence Nationstar presented on the question of standing was the testimony of one witness, Mr. Hyne, an employee of Nationstar who only testified that Aurora was in possession of the note at the time the complaint was filed, not that the note had been endorsed at the time the complaint was filed.

Here, as in Daniel the evidence as to standing was lacking. Respondent offered nothing to support when any of the alleged endorsements were made. Respondent offered nothing about Wachovia's ownership at the time the Complaint was filed. Respondent failed to establish the Respondent had an interest at the time of trial. Moreover, Respondent failed to address the impact of the note and mortgage

taking separate paths. As in Daniel, Respondent failed in its burden and foreclosure should be reversed.

CONCLUSION

Based on the foregoing, the arguments contained in Appellant's initial brief and the lack of arguments in Respondent's initial brief, the foreclosure should be reversed.

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CERTIFICATE OF COUNSEL

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

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