

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM SPARTANBURG COUNTY
COURT OF COMMON PLEAS

Gordon G. Cooper, Master in Equity

Case No.
2013-CP-42-0362

US Bank National Association as Trustee on behalf of Manufactured Housing
Contract Senior/Subordinate Pass-Through Certificates 1996-6 by Green Tree
Servicing LLC, as Servicer with delegated authority under the transaction
documents

Respondent

v.

Kim Byrd and the South Carolina Department of Revenue
Of whom Kim Byrd is the

Appellant

[INITIAL] BRIEF OF APPELLANT

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SC Court of Appeals

TABLE OF CONTENTS

Table of Authorities	iii
Statement of Issue on Appeal	1
Statement of the Case	2
Facts	2
Argument	
BECAUSE THE NOTE WAS NOT INDORSED, RESPONDENT WAS NOT THE OWNER AND HOLDER OF THE MORTGAGE NOTE. WITHOUT BEING THE OWNER OR HOLDER, RESPONDENT DID NOT HAVE STANDING TO PURSUE FORECLOSURE.	4
Conclusion	6

TABLE OF AUTHORITIES

CASES

<i>Bank of America v Draper</i> , 405 S.C. 214, 746 S.E.2d 478 (Ct. App. 2013)	5
<i>Hayne Fed. Credit Union v. Bailey</i> , 327 S.C. 248, 489 S.E.2d 472, 475 (1997).	4
<i>I'On, LLC v. Town of Mt. Pleasant</i> , 338 S.C. 406, 411, 526 S.E.2d 716, 719 (2000)	4
<i>Lowcountry Open Land Trust v. Charleston S. Univ.</i> , 376 S.C. 399, 407, 656 S.E.2d 775 (Ct. App. 2008)	4
<i>Pinckney v. Warren</i> , 344 S.C. 382, 387, 544 S.E.2d 620, 623 (2001).	4
<i>Sloan v. Greenville County</i> , 356 S.C. 531, 546, 590 S.E.2d 338, 346 (Ct.App.2003)	4
<i>U.S. Bank Trust National Association v. Bell</i> , 385 S.C. 364, 373, 684 S.E. 2d 199, 204 (Ct. App. 2009)	5

STATUTES

S.C.C.A. §36-1-201	5
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STATEMENT OF ISSUE ON APPEAL

DID THE TRIAL COURT ERR IN FINDING THAT RESPONDENT WAS THE OWNER AND HOLDER OF THE MORTGAGE NOTE AND THUS HAD STANDING TO PURSUE FORECLOSURE?

STATEMENT OF THE CASE

Respondent filed this foreclosure action on January 29, 2013. Kim Byrd properly answered the complaint. Kim Byrd filed a motion to dismiss for lack of standing. A hearing on Kim Byrd's motion to dismiss was held on August 12, 2014. The Judge ruled that Respondent was the owner and holder of the subject note. The Judge denied Kim Byrd's motion to dismiss. At the foreclosure hearing, the Judge again ruled that Respondent was the owner and holder of the note. The Judge again denied Kim Byrd's motion to dismiss.

STATEMENT OF FACTS

Travis Dill executed a promissory note payable to Green Tree Financial Servicing Corporation on June 15, 1999. (Note, page 4). On the same day Travis Dill executed a mortgage to secure that note. (Mortgage, page 6) Travis Dill died. His estate was probated. This property is now owned by Kim Byrd by inheritance. (Order dated November 4, 2014, page 1).

Respondent filed this foreclosure action on January 29, 2013. (Order dated November 4, 2014 page 1) Kim Byrd filed an answer on June 21, 2013. (Answer, page 1).

Kim Byrd filed a motion to dismiss based on the lack of an indorsement on the note from Green Tree Financial Servicing Corporation to Respondent. (Motion to Dismiss). At the hearing on the motion to dismiss, Respondent presented the original note. (Transcript August 12 hearing, page 3, lines 13-15). The note did not have an indorsement. (Transcript August 12 hearing, page 3 lines 21-22). The Judge ruled that Respondent was the holder and thus entitled to foreclose. (Transcript August 12 hearing,

page 4 lines 14-16). The order confirming that ruling stated that “Plaintiff as owner and holder of the subject original note and assignee of the subject mortgage, has the requisite standing to bring this action.” (Order dated August 18, 2014, page 3).

At the foreclosure hearing, Kim Byrd renewed her motion to dismiss. (Transcript of October 21 hearing, page 3, lines 13-15). The Judge denied the motion on the same basis as the earlier ruling. (Transcript of October 21 hearing, page 3, line 24). The Judge’s ruling was formalized in the order dated November 4, 2014. (Order dated November 4, 2014, page 2). The Judge stated that “. . .it was previously determined by this Court that Plaintiff is the owner and holder of the subject note and mortgage and has requisite standing to prosecute this action.” (Order dated November 4, 2014, page 2 paragraph 10) The Judge cited *Bank of America v Draper*, 405 S.C. 214, 746 S.E.2d 478 (Ct. App. 2013). (Order dated August 18, 2014, page 3)

ARGUMENTS

- I. BECAUSE THE NOTE WAS NOT INDORSED, RESPONDENT WAS NOT THE OWNER AND HOLDER OF THE MORTGAGE NOTE. WITHOUT BEING THE OWNER OR HOLDER, RESPONDENT DID NOT HAVE STANDING TO PURSUE FORECLOSURE.

STANDARD OF REVIEW

"A mortgage foreclosure is an action in equity." *Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 248, 489 S.E.2d 472, 475 (1997). In an appeal from an action in equity, tried by a judge alone, we may find facts in accordance with our own view of the preponderance of the evidence.⁸ *Lowcountry Open Land Trust v. Charleston S. Univ.*, 376 S.C. 399, 407, 656 S.E.2d 775, 779 (Ct.App. 2008). "However, this broad scope of review does not require an appellate court to disregard the findings below or ignore the fact that the trial judge is in the better position to assess the credibility of the witnesses." *Pinckney v. Warren*, 344 S.C. 382, 387, 544 S.E.2d 620, 623 (2001). "Moreover, the Appellant is not relieved of his burden of convincing the appellate court the trial judge committed error in his findings." *Id.* at 387-88, 544 S.E.2d at 623.

Additionally, "[a] legal question in an equity case receives review as in law." *Sloan v. Greenville County*, 356 S.C. 531, 546, 590 S.E.2d 338, 346 (Ct.App.2003). Because questions of law may be decided with no particular deference to the trial court, this court may correct errors of law in both legal and equitable actions. *I'On, LLC v. Town of Mt. Pleasant*,

338 S.C. 406, 411, 526 S.E.2d 716, 719 (2000) (citing S.C. Code Ann. § 14-8-200 (Supp.1998)).

U.S. Bank Trust National Association v. Bell, 385 S.C. 364, 373, 684 S.E. 2d 199, 204 (Ct. App. 2009).

RESPONDENT IS NOT A HOLDER

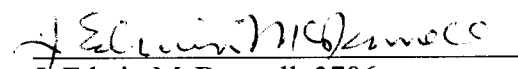
It is clear that the originator of the subject note was Green Tree Financial Servicing Corporation. The original note presented to the court did not have an indorsement. To satisfy the real party in interest requirement, the Judge held that Respondent was the owner and holder of the subject note. S.C.C.A. §36-1-201 defines holder as “a person who is in possession of a document of 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.C.A. §36-1-201 (20) (2014). The note was not drawn to, issued to, or indorsed to Respondent. The note was not indorsed to bearer or in blank. Respondent is not the owner or holder of the subject note.

In *Bank of America v Draper*, 405 S.C. 214, 746 S.E.2d 478 (Ct. App. 2013) (*Draper*), the court stated: “. . .the general proposition that the plaintiff in a foreclosure suit should be the real, beneficial owner of the mortgage debt.” (*Draper* 746 S.E.2d at 481) Respondent is not the real, beneficial owner of the note. The Judge cited *Draper* in his August 18, 2014 order. (Order, page 3) *Draper* specifically refers to the fact that the note was indorsed in blank. (*Draper*, 746 S. E. 2d page 479) Such is not the case here. The Judge’s finding that Respondent is the owner and holder of the note is clearly wrong. The Judge’s decision should be reversed and the case dismissed.

CONCLUSION

Respondent is not the owner or holder of the subject note. The Judge's decision should be reversed and this case dismissed.

Respectfully submitted,


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January 26, 2015

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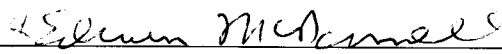
Kim Byrd and the South Carolina Department of Revenue
Of whom Kim Byrd is the

Appellant

CERTIFICATE OF SERVICE

Appellant's Initial Brief and the Designation of Matter for the Record on
Appeal was served by mailing a copy of the same, on the date below, postage pre-
paid, to the attorney stated below at the address given:

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January 26, 2015

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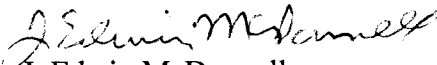
Dear Clerk:

Enclosed is the following: appellant's initial brief, designation of matter for record on appeal, certificate of service. Please return a clocked copy of the certificate of service in the envelope provided.

Your cooperation is appreciated.

If anything further is necessary, please let me know.

Sincerely Yours,


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