

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

S. Jackson Kimball, Special Circuit Court Judge

Case No. 2012-CP-46-03040
Opinion No. 2013-001524

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SC Court of Appeals

DEUTSCHE BANK NATIONAL TRUST COMPANY
as Trustee for J.P. Morgan Mortgage Acquisition Trust
2007-CH1, Asset Backed Pass Through Certificates
Series 2007-CH1,Respondent,

v.

CORA B. WILKS,
DAVID C. WILKS,
CHASE BANK, N.A., and
MIDLAND FUNDING, LLC,,

of whom:

CORA B. WILKS and
DAVID C. WILKS areAppellants.

PETITION FOR WRIT OF *CERTIORARI*

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Other Counsel of Record:

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Pursuant to Rules 242 and 244, S.C.A.C.R, the Petitioners petition for the issuance of a writ of *certiorari* to review the final decision of the Court of Appeals in the matter above.

This Petition is based upon those certain points, factual and legal, which the Petitioners believe the Court of Appeals to have overlooked or misapprehended, as set out herein.

This Petition does not attempt to discuss each point raised on appeal, or addressed by the Court of Appeals in its decision. To the extent allowed, the Petitioners restate and by this reference reargue all matter set out in their Brief and referenced in their Record on Appeal and in the Appendix submitted herewith.

CERTIFICATE OF COUNSEL

Counsel for Petitioners certifies that the Petition for Rehearing herein was made and finally ruled on by the Court of Appeals on April 24, 2015.

QUESTIONS PRESENTED FOR REVIEW

- I. HAS THE ISSUE IN QUESTION BEEN PRESERVED FOR APPELLATE REVIEW?
- II. HAVE THE PETITIONERS STATED ADEQUATE GROUNDS FOR EQUITABLE RELIEF FROM FORECLOSURE?

STATEMENT OF THE CASE

On May 23, 2005, the Appellants WILKS executed a note and mortgage to Chase Bank USA, N.A. for \$100,000.00, secured by their home. That note and mortgage are now held by Respondent as assignee. This action for foreclosure, for \$89,483.68 plus allowable costs, was commenced on August 23, 2012. The Appellants filed their Answer and Counterclaim alleging, *inter alia*, that the execution was before an attorney suspended from practice, and in the presence of only one person as a witness. The Appellants' Counterclaim invoked the precedent of this State under which such actions are void and the foreclosing bank is barred from equitable relief.

The Respondent bank moved to dismiss the counterclaim, invoking the holding of *Matrix Financial Services Corp. v. Frazer*, 394 S.C. 134, 714 S.E.2d 532 (2011), as limiting such a defense to matters after that decision, which was rendered on August 8, 2011.

The Honorable S. Jackson Kimball, as Master in Equity for York County, dismissed the Appellants' Counterclaim by Order dated June 6, 2013 and filed June 12, 2013. This appeal

followed.

The Court of Appeals filed its Opinion herein, dismissing the appeal, on March 4, 2015. The Petitioners' Memorandum and Petition for Rehearing was denied by Order of the Court of Appeals filed April 24, 2015.

ARGUMENT: GROUNDS OF APPELLATE DECISION

PRESERVATION OF THE ISSUE:

The Petitioners raised below, by their verified Answer and Counterclaim, the issue of the closing attorney at their mortgage loan having been previously suspended by the South Carolina Supreme Court. [RECORD ON APPEAL, p.20-22; Exhibits, p.22-47.] By its Motion to Dismiss this defense and Counterclaim, the Respondent cited the holding of our Supreme Court in *Matrix Financial Services Corp. v. Frazier*, 294 S.C. 134, 714 S.E.2d 532 (2011), which would limit such equitable relief to those mortgages filed after the issuance of that opinion, *i.e.*, in 2011. The Petitioners' mortgage was filed in 2005. The Circuit Court agreed, citing *Matrix, supra*, and *BAC Home Servicing, L.P. v. Kindler*, 398 S.C. 619, 731 S.E.2d 547 (2012) as confirming only a prospective application of equitable relief. [RECORD ON APPEAL, p. 4-5.] This appeal followed.

At the motion hearing [RECORD ON APPEAL, p.55, l.11-25], and in Appellants' Brief, the Petitioners argued that the seriousness of the Respondents' violation of the procedures mandated by South Carolina created a distinction between their facts and those dealt with in *Matrix* and *BAC*.

The Court of Appeals dismissed the argument of the Appellants and found that the Appellants have raised an argument that has not been ruled on by the trial court. The Petitioners assume this finding to refer to their attempts, cited above, to distinguish *Matrix* and *BAC*.

Petitioners do not understand the Court to have cited the precedent on preservation of issues properly. The Court below clearly dealt with the issue at hand, citing the language of *Kindler* stating:

“ . . . Thus, regardless of whether an attorney participated in the closing of [the mortgage], BAC would not be barred from recovery by the illegality.” *Id.*

This case is governed by that holding.

[RECORD ON APPEAL, p. 4.]

The Petitioners argue that the issue at hand was properly raised, dealt with by the Circuit Court, and preserved for review. They further understand, and argue, that it is one matter for an appellant to overlook a lower Court's failure to deal with an issue; it is another matter entirely to state that the lower Court has failed to deal with an argument for the appellant's position on that issue.

The issue at hand was properly preserved. This Court should deal with that issue squarely in any decision rendered on this matter.

ADEQUATE GROUNDS FOR EQUITABLE RELIEF:

The Petitioners set forth their argument for equitable relief, in full, in their Brief herein. The cases on which the Circuit Court relied dealt with actions in apparent ignorance of our law, or inadvertent violation, by lenders. The use of an attorney suspended from practice to close the mortgage loan rises to the level of a willful violation. Willful violation of law raises an issue in equitable jurisprudence which should preclude the Respondent Bank from its relief. At the least, its existence entitles the Petitioners to a full consideration of the issues raised by such behavior.

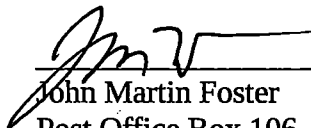
ARGUMENT: OTHER GROUNDS

As recited above and to the extent allowed, the Petitioners also restate and reargue by this reference all matter set out in their Brief.

CONCLUSION

For all the reasons set out and referenced above, the Petitioners request that this Court issue its writ of *certiorari* to review the final decision of the Court of Appeals, and for any other relief to which they may be entitled in law or equity.

Respectfully submitted,



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May 21, 2015

Rock Hill, South Carolina

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CERTIFICATE OF SERVICE

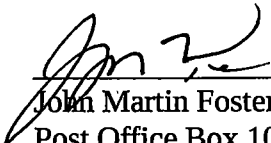
I certify that on May 21, 2015, I served the Petition for Writ of *Certiorari*, and this Certificate of Service on the following counsel of record, parties or persons:

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Benjamin Rush Smith, III
Nelson Mullins Riley & Scarborough, LLP
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by depositing the same with the United States mail, with sufficient first class postage attached, properly addressed to the clerk of the Court, and with a copy also directed to the respective last known address(es) of those attorney(s) and/or persons set out below; or

by hand delivering copies of the same to the following persons, or by leaving the same at that person's office with that person's clerk or some other person in charge thereof, or by leaving it in a conspicuous place therein; of if the office was closed or the person to be served has no office, by leaving a copy at that person's dwelling place or usual place of abode with some person of suitable age and discretion then residing therein, all pursuant to Rule 233(b), S.C.A.C.R.

May 21, 2015



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