

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM COLLETON COUNTY
Court of Common Pleas 2012-CP-15-00262
The Honorable Maité Murphy

APPELLATE CASE NO. 2013-002555

MELISSA JEAN MARKS,Appellant,

v.

NATIONSTAR MORTGAGE, LLC,Respondent.

**NATIONSTAR MORTGAGE LLC'S RESPONSE IN OPPOSITION TO
APPELLANT'S PETITION FOR REHEARING**

Respondent Nationstar Mortgage LLC ("Nationstar"), by and through counsel, pursuant to Rule 240(e) of the South Carolina Appellate Court Rules, respectfully submits this Response in Opposition to Appellant Melissa Jean Marks's ("Plaintiff") Petition for Rehearing of this Court's June 3, 2015 Opinion, and states as follows:

INTRODUCTION

1. In her Petition for Rehearing, Plaintiff seeks rulings on all eight of her issues on appeal—including those of no consequence to the determination of the action—and rehashes her baseless contention that her mortgage is invalid, this time referring to materials this Court ordered could not be included in the Record on Appeal. The Court should deny Plaintiff's Petition for Rehearing because she is not entitled to reconsideration of her Motion for Leave to Submit Supplemental Record on Appeal, because this Court need not consider non-dispositive issues once it decides the determinative issues, and because Plaintiff provides no valid basis for revisiting this

Court's Opinion affirming the Trial Court's Orders denying Plaintiff's Motion to Dismiss Nationstar as a party and granting Nationstar's Motion for Summary Judgment.

BACKGROUND

2. This lawsuit arises out of Plaintiff's desire for the South Carolina Courts to declare her home mortgage invalid. Nationstar is the current holder of the Note and servicer of the Mortgage. (R. pp. 1310–11; R. p. 12; R. p. 202) Fannie Mae owns the loan. (R. p. 1311) Nationstar has not attempted to foreclose on the Property. (R. p. 22)

3. On or about April 20, 2011, Plaintiff filed a Chapter 13 bankruptcy petition in the United States Bankruptcy Court for the District of South Carolina (the "Bankruptcy Proceeding"), which named Nationstar as a secured creditor and the servicer of the Mortgage. (R. p. 44 ¶ 34); *In re Marks*, No. 11-02619-jw, Doc. 1, Vol. Pet. & Sch. (Bankr. D.S.C. Apr. 20, 2011). On June 21, 2011, the Bankruptcy Court issued an order confirming the Bankruptcy Plan. *Id.*, Doc. 12, Order Conf. Plan (Jun. 21, 2011).

4. Without prior notice to the Bankruptcy Court or Nationstar, on April 6, 2012, Plaintiff filed a Complaint in the Colleton County Court of Common Pleas (the "Trial Court") alleging fraudulent misrepresentation and unconscionability, and seeking to invalidate her home Mortgage (the "State-Court Action"). (R. pp. 35–78) While the Complaint does not name Nationstar as a defendant, on or about August 2, 2012, the Trial Court granted Nationstar's Motion to Intervene. (R. pp. 5–6)

5. On October 9, 2013, the Trial Court granted Nationstar's Motion for Summary Judgment on the grounds that res judicata and judicial estoppel bar Plaintiff's claims, that she cannot show any damages to support her fraud claim, and that the Note and Mortgage are enforceable as a matter of law. (R. pp. 21–28) The Court denied Plaintiff's Motion to Dismiss Defendant as Intervening Party, holding that Nationstar is a

necessary party to the State-Court Action. (R. pp. 29–32) Plaintiff filed a Motion to Reconsider both of these rulings, which the Trial Court denied on November 6, 2013. (R. pp. 1117–37; R. pp. 33–34)

6. On, November 21, 2013, Plaintiff filed a Notice of Appeal from the Orders Granting Summary Judgment, Denying the Motion to Dismiss Defendant as Intervening Party, and Denying the Motion to Reconsider. (R. pp. 1201–06) On August 8, 2014, Plaintiff filed a Motion for Leave to Submit Supplemental Record on Appeal, seeking to include in the Record materials from the Bankruptcy Proceeding that postdate the Trial Court rulings from which she appealed.

7. On September 19, 2014, this Court entered an Order denying Plaintiff's Motion for Leave to Submit Supplemental Record on Appeal. On June 3, 2015, this Court issued an Opinion affirming the Trial Court's rulings in favor of Nationstar. Plaintiff has now filed a Petition for Rehearing (the "Petition"), taking issue with both of these rulings.

ARGUMENT

A. *Plaintiff is not entitled to rehearing of the Court's Order denying her Motion for Leave to Supplement Record on Appeal because the Appellate Court Rules prohibit rehearing of such rulings, and the materials Plaintiff sought to include in the Record were not before the Trial Court.*

8. Rule 221(c) of the South Carolina Appellate Court Rules provides that the Court "will not entertain petitions for rehearing on a motion or petition unless the action of the court on the motion or petition has the effect of dismissing or finally deciding a party's appeal." Rule 221(c), SCACR. The Court's September 19, 2014 Order denying Plaintiff's Motion for Leave to Submit Supplemental Record on Appeal does not dispose of the entire action, and therefore is not a proper subject of a petition for rehearing.

9. Plaintiff herself acknowledges that “the appellate rules precluded Appellant from seeking reconsideration of her motion.” (*See* Pl.’s Pet. for Reh’g ¶ 37.) Nonetheless, in her Petition, she refers repeatedly to materials outside the Record on Appeal, and asks this Court to revise its prior ruling that these materials are not properly before the Court. (*See, e.g.*, Pl.’s Pet. for Reh’g ¶¶ 27, 33–37.)

10. In its September 19, 2014 Order, this Court properly held that it cannot consider these materials. If a piece of evidence was not before the trial court, this Court may not consider it. Rule 210(c), SCACR (“The Record on Appeal shall not . . . include matter which was not presented to the lower court or tribunal.”); *see also* Rule 209, SCACR (providing that parties shall not designate for inclusion in the record material that is not relevant to the underlying order on appeal); *State v. White*, 372 S.C. 364, 387, 642 S.E.2d 607, 618–19 (Ct. App. 2007) (refusing to consider witness’s post-trial retraction of testimony because the retraction “was not presented to the lower court”). Thus, the Appellate Court Rules directly contradict Plaintiff’s position that “it does not matter that those documents were not before the trial court when it issued the final orders subject to this appeal.” (Pl.’s Pet. for Reh’g ¶ 35.)

11. Finally, a petition for rehearing “must be actually received by the appellate court no later than fifteen (15) days after the filing of the opinion, order, judgment, or decree of the court.” Rule 221(a), SCACR. Here, the Court issued its Order denying Plaintiff’s Motion for Leave to Submit Supplemental Record on Appeal over eight months before Plaintiff filed her Petition for Rehearing. Therefore, Plaintiff’s Petition for Rehearing is untimely as to the Court’s September 2014 Order.

12. Plaintiff is not entitled to a rehearing of the Court’s September 2014 Order, and the Court has already properly held that the materials Plaintiff refers to in her

Petition are not before the Court. The Court should deny Plaintiff's Petition and refuse to consider materials outside the Record or any arguments based upon them.

B. The Court properly affirmed the Trial Court's rulings without considering Plaintiff's non-dispositive issues on appeal.

13. Plaintiff objects that, while the Court decided the dispositive issues in this case, it did not consider all eight of her issues on appeal. It is well settled, however, that where a Court decides the determinative issues, it need not decide additional, non-dispositive issues raised by the appellant. *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999); *Whiteside v. Cherokee Cnty. Sch. Dist. No. One*, 311 S.C. 335, 340–41, 428 S.E.2d 886, 889 (1993); Rule 220(c), SCACR (“The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.”).

14. Here, this Court held that the Trial Court correctly denied Plaintiff's Motion to Dismiss Nationstar as a party and granted Nationstar's Motion for Summary Judgment because Nationstar is a proper party to this lawsuit, and because it was entitled to judgment as a matter of law on Plaintiff's claims. The Court's affirmation of the Trial Court's rulings on these issues disposed of this case in its entirety. Any ruling by this Court on Plaintiff's other issues—such as whether the Trial Court should have bifurcated the case—would be mere *dicta*, without consequence to the determination of the matter. *See Nash v. Tindall Corp.*, 375 S.C. 36, 40–41, 650 S.E.2d 81, 83 (Ct. App. 2007) (defining judicial *dicta* as statements that are “not essential to the decision” (quoting BLACK'S LAW DICTIONARY 465 (7th ed. 1999))).

15. The Court's Opinion rightly avoids ruling on issues unnecessary to a determination of the matter. The Court was not required to consider every one of the

eight issues on appeal raised by Plaintiff, but only those dispositive of the case.

C. *Plaintiff's Petition for Rehearing is futile because there is no valid basis for the Court to abandon its existing Opinion.*

16. Even if the Court reheard the instant case—and whether or not it reheard all eight of Plaintiff's issues on appeal or only the dispositive ones—it must nonetheless affirm the rulings of the Trial Court. Nationstar has a valid interest in the subject matter of the lawsuit, and Plaintiff's claims fail as a matter of law.

i. *This Court correctly held that the Trial Court did not abuse its discretion in denying Plaintiff's Motion to Dismiss Nationstar as a party.*

17. As this Court observed in its Opinion, “[a] motion to dismiss a party is addressed to the court’s discretion.” *Marks v. Old South Mortg. Corp.*, No. 2013-002555, 2015-UP-245, at *1 (S.C. Ct. App. Jun. 3, 2015) (citing *Glaze v. Grooms*, 324 S.C. 249, 255, 478 S.E.2d 841, 844 (1996)). The Trial Court did not abuse that discretion by denying Plaintiff's Motion to Dismiss and allowing Nationstar to intervene as a party to this action. Nationstar, as the current servicer of the Mortgage and holder of the Note, (R. pp. 1310–11; R. p. 12), “claims an interest relating to the property or transaction which is the subject of the action and . . . is so situated that the disposition of the action may as a practical matter impair or impede [its] ability to protect that interest,” Rule 24(a)(2), SCRPC.

18. Plaintiff takes issue with the fact that Nationstar is not the owner of the Note (Pl.'s Pet. for Reh'g ¶¶ 6–20); however, ownership is but one potential interest in a promissory note, *see* S.C. CODE ANN. § 36-3-301 (2014) (holding that various parties, including the holder of a note, may enforce the note even if they are “not the owner of the instrument”); *see also* *Bank of Am., N.A. v. Draper*, 405 S.C. 214, 222–23, 746 S.E.2d

478, 482 (Ct. App. 2013) (holding that a mortgage servicer is “a real party in interest” with the power to enforce a mortgage). Therefore, as this Court held, the Trial Court properly exercised its discretion in denying Plaintiff’s Motion to Dismiss Nationstar as a party to this action. The Court should deny Plaintiff’s Petition for Rehearing on this issue.

ii. *This Court properly held that the Trial Court did not err in granting Nationstar’s Motion for Summary Judgment.*

19. There is no genuine issue of fact as to any of Plaintiff’s claims, and Nationstar is entitled to judgment as a matter of law as to all of them.

20. First, Plaintiff is a party to both the Bankruptcy Proceeding and the State-Court Action, and the claims in both matters arise from the same cause of action in that both concern the validity, enforceability, and amount of Plaintiff’s Mortgage. The Bankruptcy Court confirmed Plaintiff’s Chapter 13 Plan nearly one year before Plaintiff filed the State-Court Action, finding that Nationstar is the secured creditor entitled to receive payment on the Mortgage. *In re Marks*, No. 11-02619-jw, Doc. 12, Order Conf. Plan (Jun. 21, 2011). Under 11 U.S.C. § 1327(a), the confirmed plan is a final adjudication as to any and all claims Plaintiff could have raised against Nationstar prior to confirmation of the plan. *See Nix v. Household Fin. Corp. (In re Nix)*, No. 10-01103-HB, Adv. No. 11-80062-HB, slip op., 2012 WL 27667, at *5 (Bankr. D.S.C. Jan. 5, 2012). Thus, res judicata barred the Trial Court from canceling Plaintiff’s Mortgage.

21. Second, Plaintiff suffered no damages from any alleged fraud, and the statute of limitations bars her fraud claim. While Plaintiff’s fraud allegations remain unclear, Plaintiff appears to allege that the Mortgage is fraudulent because the originating lender subsequently transferred the Mortgage ownership and servicing rights. As the

Trial Court held, and this Court affirmed; Plaintiff cannot show any injury as a result of any alleged fraud because she received all that she bargained for under the terms of the Note and Mortgage. See *First State Sav. & Loan v. Phelps*, 299 S.C. 441, 446–47, 385 S.E.2d 821, 824 (1989) (describing the elements of a fraud claim); *Sorin Equip. Co. v. The Firm, Inc.*, 323 S.C. 359, 365–66, 474 S.E.2d 819, 823 (Ct. App. 1996) (citations omitted). Plaintiff received the loan proceeds after closing, and she does not allege that she paid Nationstar (or any another party) any amounts other than those due under the Note.

22. In addition, the statute of limitations prevents Plaintiff from recovering on her fraud claim. On or about October 5, 2007, Plaintiff executed the loan closing documents, including a Notice of Transfer of Loan Servicing Rights. (R. pp. 94–108; R. pp. 142–43) She also admits receiving a “First Payment Letter” on or about October 5, 2007 informing her of the transfer of servicing. (R. p. 41 ¶ 21; R. p. 187) Thus, it is undisputed that Plaintiff discovered the alleged origination issues that form the basis for her fraud claim in 2007. The three-year statute of limitations on this claim elapsed long before she filed her Complaint in April 2012. See S.C. CODE ANN. §§ 15-3-530(5); 15-3-535 (2014).

23. Finally, the Note and Mortgage are valid and, as the loan servicer, Nationstar may enforce them. Plaintiff contends that “there are no lawful owners” of the Note and that Nationstar cannot enforce the Note because it does not own it. (Pl.’s Final Br., at 2.) However, an assignee of a mortgage “stands in the shoes of the assignor,” and has the same right to enforce the mortgage as the assignor. *BAC Home Loan Servicing, LP v. Kinder*, 398 S.C. 619, 624, 731 S.E.2d 547, 549 (2012) (citation omitted). While Plaintiff appears to contend that because the assignment of the Note was not recorded, the

Note and Mortgage are invalid, (Pl.'s Final Br. at 2; 17-21), "the assignment of a mortgage does not need to be recorded, and failure to do so has no effect on the rights of the assignee."¹ *Kinder*, 398 S.C. at 623, 731 S.E.2d at 549 (citation omitted). Instead, a mortgage simply follows the note. *Union Nat'l Bank of Columbia v. Cook*, 110 S.C. 99, 96 S.E. 484, 486 (1918).

24. For all these reasons, and for the reasons more fully set forth in Nationstar's Final Brief, the Trial Court correctly denied Plaintiff's Motion to Dismiss Nationstar as a party and granted Nationstar's Motion for Summary Judgment. Plaintiff's Petition for Rehearing is futile because there is no basis for this Court to revisit its existing Opinion affirming the Trial Court's Orders.

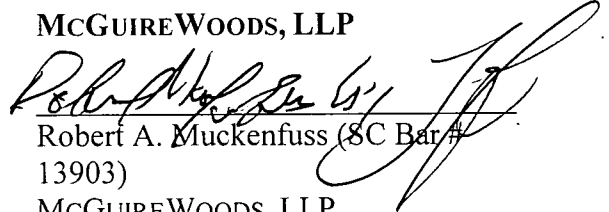
CONCLUSION

For the reasons set forth above, Nationstar respectfully requests that this Court deny Plaintiff's Petition for Rehearing.

This the 22nd day of June, 2015.

Respectfully submitted,

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¹ Indeed, Plaintiff admits that "it's true that in South Carolina, you do not have to record assignments." (Pl.'s Final Br., at 19 (quoting her statements to the Trial Court).)

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing *NATIONSTAR MORTGAGE LLC'S RESPONSE IN OPPOSITION TO APPELLANT'S PETITION FOR REHEARING* has been served upon the parties in this action by mailing a copy thereof, postage prepaid, to the following:

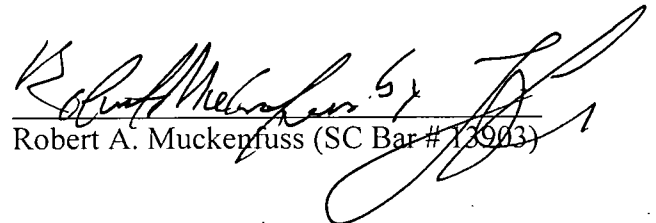
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This the 22nd day of June, 2015.


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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM COLLETON COUNTY
Court of Common Pleas 2012-CP-15-00262
The Honorable Maité Murphy

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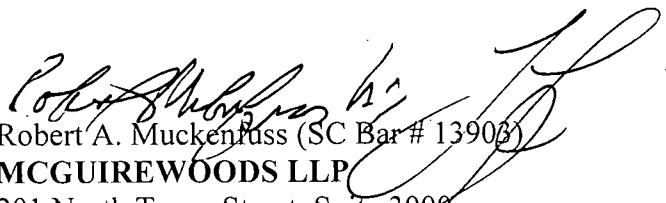
v.

NATIONSTAR MORTGAGE, LLC,Respondent.

PROOF OF SERVICE

I hereby certify that on June 22, 2015 the foregoing **NATIONSTAR MORTGAGE LLC'S RESPONSE IN OPPOSITION TO APPELLANT'S PETITION FOR REHEARING** has been served upon the parties in this action by mailing a copy thereof, postage prepaid, to the following, Melissa J. Marks, 209 Presidential Court, Round O, SC 29474, *Pro Se Appellant* and John F. Knobloch, King & Knobloch, PC, 808 Johnnie Dodds Blvd., Mt. Pleasant, SC 29464, *Attorney for Old South Mortgage Corporation*.

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