THE STATE OF SOUTH CAROLINA

In The Court of Appeals

Appellant Case No. 2015-000942

APPEAL FROM GREENVILLE COUNTY

Court of Common Pleas

Charles B. Simmons, Master in Equity Judge

Case No. 2010-CP-23-8330

Joel Clay Bracken, Appellant.

v.

Green Tree Servicing, LLC., Respondent.

APPELLANT'S INITIAL BRIEF

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II. THE CLERK OF COURT ERRED AND ABUSED ITS DISCRETION BY ITS ORDER OF REFERRAL JANUARY 18, 2011 OF AN UNCOMMENCED ACTION VOID PERSONAL JURISDICTION BY PLAINTIFF'S FAILED PERSONAL SERVICE AND ADHERENCE TO THE PUBLICATION ORDER, THEREFROM NULL AUTHORITY OR POWER TO REFER THIS CASE AND PARTIES TO THE BELOW COURT PURSUANT TO STATUTES AS A MATTER OF LAW.

III. PLAINTIFF COUNSEL FAILED TO PROPERLY COMMENCE IT'S ACTION PURSUANT TO S.C. CODE ANN. § 15-3-20(B) AND SCRCP RULE 3(a) BY THE FEBRUARY 4, 2011 STATUTE OF LIMITATIONS DEADLINE.

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STATEMENT OF ISSUES ON APPEAL

1. Is Bank of America, N.A. currently a relevant party with any beneficial interest in the subject property or this foreclosure lawsuit?

2. Did Finkel Law Firm accurately comply and fulfill it's duties pursuant to S.C. Code Ann. § 15-9-740 and the Order of Publication filed November 19, 2010?

3. Should Finkel's form motion for referral January 7, 2011 have been denied by the Circuit Court or Clerk of Court from the material facts on the record of non personal service and defect of the publication evidenced by Ms. Mullinax's affidavit pursuant to compliance with the publication Order and S.C. Code Ann. § 15-9-740?

4. Did the clerk of court err, abuse its discretion resulting prejudice by Order referring this uncommenced action pursuant statute, without personal jurisdiction over Appellant, from a form motion by Plaintiff counsel on January 18, 2011?

5. Did the statute of limitations for commencement of this action by personal service or publication of the Summons and Complaint expire on or around February 4, 2011?

6. Did Appellant ever receive proper Notice of Default and Acceleration from the alleged Lenders BAC, BOANA or GREEN TREE pursuant the Mortgage Security contract of Lines No. 15 and 22 as claimed by Plaintiff BAC and Respondent within Lines No. 14 and 15 of the Complaint?

7. Did Appellant ever receive proper Notices of assignments and transfers from the alleged Lenders BAC, BOANA or GREEN TREE pursuant the Mortgage Security contract of Lines No. 15 and 20 as claimed by Plaintiff BAC and Respondent within Lines No. 14 and 15 of the Complaint?

8. Does the Lis Pendens properly described the Appellant's property as defined by the original Mortgage Security and Title Deed?

9. Does the Lis Pendens claims that an action was commenced, accurate as a matter of fact and pursuant to statute?

10. Is there a commenced action for an South Carolina court to proceed and rule judgment, if Plaintiff party has failed to personally serve the Summons, Complaint and Lis Pendens, failed its duty to comply with an Order of Publication and failed to effect any such service on the defending party within (120) days of filing the action pursuant to S.C. Code Ann. § 15-3-20(B) and SCRCP Rule 3(a)?

11. Was the Master not with knowledge from it's findings of facts and law June 24, 2011, Finkel had not complied with the publication Order, Appellant had not been served and the statute of limitations had expired to commence this action?

12. Was the below court's June 24, 2011 Order and finding an error, abuse of discretion and prejudice to Appellant?

13. Does a Master court have powers and authority outside it's referral to restart and proceed uncommenced dead actions that have expired under S.C. Code Ann. § 15-3-20(B) and SCRCP Rule 3(a)?

14. Did the below court have statutory power and authority to proceed the foreclosure action and further rule an Order at hearing June 24, 2011, denying Defendant's Motion to Quash

Service of Summons and was this an err, abuse of discretion and that prejudiced Appellant's rights of due process under statute?

15. Did the below court err, abuse its discretion and prejudice the Appellant, by failing to hear, address and otherwise act upon Appellant's formal notice motion for relief from Plaintiff BAC Home Loans Servicing, LP and counsel Finkel Law Firm, declining to mediate in good faith with Appellant homeowner pursuant to Administrative Order 2011-05-02-01 of the South Carolina Supreme Court and further granting the Plaintiff's counter-motion Striking the Case from the Active Docket on November 15, 2011?

16. Did BAC Home Loans Servicing LP, Bank of America, N.A., Green Tree Servicing, LP or its counsel Finkel, properly disclose itself to Appellant and mediate as the "Mortgagee" openly, fairly, timely in good faith pursuant to Administrative Order 2011-05-02-01?

17. Does Respondent have *unclean hands* in regards to disclosure as Mortgagee and mediation with Appellant in good faith pursuant to Administrative Order 2011-05-02-01?

18. Does Finkel Law Firm have *unclean hands* in regards to disclosure and mediation with Appellant in good faith pursuant to Administrative Order 2011-05-02-01?

19. Did the lower court err, abuse its discretion and prejudice Appellant at hearing April 8, 2015, verbally ruling Appellant had *waived* all defenses to all nonservice failures of the Plaintiff before the statute of limitations expired?

20. Does an later special appearance for purposes to dispose of an uncommenced action some (3) months after the statute of limitations has tooled invoke an Master court to restart the action and proceed to judgment?

21. Did the lower court err, abuse its discretion and prejudice Appellant at hearing April 8, 2015, verbally denying Appellant's verbal motion for dismissal pursuant the statute of limitation had expired to commence the action before special appearance by Appellant?

22. Did the below court ignore the prior raised affirmative defenses that were never disputed or countered by Plaintiff and counsel and stand before the court?

23. Does an assignment of a Mortgage Security only and not the Promissory Note, provide for an below court to Order an foreclosure auction of property and eviction of Appellant in South Carolina?

24. Did the below court err, abuse his discretion and prejudice Appellant by ruling a judgment of foreclosure auction upon the Appellant and his property, upon an flawed hearsay affidavit of debt and an copy of an purported Assignment of Mortgage from Bank of America, NA to Green Tree Servicing LLC dated May 16, 2013, that never transferred the original promissory note?

STATEMENT OF THE CASE

Appellant Joel Clay Bracken is an lifelong citizen and resident property owner in the state of South Carolina. Respondent Green Tree Servicing LLC, ("Green Tree") is a mortgage servicer and debt collector conducting foreclosure debt collection activity throughout South Carolina. October 7, 2010, mortgage servicer BAC Home Loan Servicing, LP ("BAC") through its counsel, the Finkel Law Firm LLC ("Finkel"), filed a foreclosure suit against Appellant in the local Court of Common Pleas of Greenville County. Due to failure of personal service, BAC motioned on November 5, 2010 and affidavit dated November 8, 2010, for an Order of service by publication. Circuit Judge Edward Miller granted Order of publication on November 11, 2010 under specific conditions.

On January 7, 2011 Finkel form motioned for an Order of Reference to a Master in Equity and on January 17, 2011 filed an Affidavit of Default against Appellant. On May 2, 2011, the Supreme Court of South Carolina Administrative Order 2011-05-02-01 stayed all pending foreclosure actions for mediation. Appellant motioned the below court to Quash Service of Process for failure of service on May 19, 2011. Judge Simmons denied the motion at hearing on June 13, 2011 ruling the publication was valid.

Appellant moved to dismiss the case on multiple counts on July 18, 2011. Judge Simmons at hearing on August 15, 2011, denied the motion on grounds the action was stayed because it was filed during the imposed stay. October 27, 2011, Appellant filed notice and motion with the below court that Finkel had declined to participate in any foreclosure intervention. Judge Simmons instead granted Finkel's motion Striking the Case from the Active Docket on November 15, 2011.

On March 10, 2015, Finkel entered a motion with the Clerk of Court's, moving with an Order restoring the foreclosure case to active status on the grounds its client BAC "wants to proceed with its foreclosure action." At hearing April 8, 2015, Finkel substituted Green Tree as Plaintiff with only an assignment of interest of a Mortgage and the below court ruled foreclosure action sale of Appellant property. On April 29, 2015, the below court issued an Order Denying Appellant's Motion to Stay or Otherwise Dismiss on all previously raised issues, defenses and objections. This Appeal followed these decisions.

STANDARD OF REVIEW

All issues of this Appeal have been previously raised by one or more parties and/or the below courts or officers and have been ruled upon. "At a minimum, issue preservation requires that an issue be raised to and ruled upon..."; See *Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011). "Error preservation rules do not require a party to use the exact name of a legal doctrine in order to preserve an issue for appellate review" See *State v. Brannon*, 388 S.C. 498, 502, 697 S.E.2d 593, 595 (2010) and *Delta Apparel, Inc. v. Farina*, Op. No. 5180 (S.C. Ct. App. October 30, 2013).

A party need not raise an issue before a tribunal that lacks jurisdiction to adjudicate the claim in order to preserve the issue for appeal. See *Travelscape, LLC v. South Carolina Dept. of Rev.*, 391 S.C. 89, 705 S.E.2d 28 (2011); *Video Gaming Consultants, Inc. v. South Carolina Dep't of Rev.*, 342 S.C. 34, 535 S.E.2d 642 (2000).

A finding concerning notice must be reviewed to determine if it is supported by the preponderance of the evidence. See *Cf. Anderson v. Buonforte*, 365 S.C. 482, 492, 617 S.E.2d 750, 755 (Ct.App.2005) (upholding a special referee's finding concerning actual notice as "supported by the weight of the evidence within the record").

"An appellate court may dismiss an appeal or error proceeding on its own motion where it appears from the record that the court is without jurisdiction or that the judgment sought to be reviewed is not final, among numerous other reasons, even though no objection is raised by the opposite party." See *Berry v. Zahler*, 220 S.C. 86, 89, 66 S.E.2d 459, 460 (1951) "An appellate court may determine the question of appealability of a decision from a lower court as a matter of law." See *Ashenfelder v. City of Georgetown*, 389 S.C. 568, 571, 698 S.E.2d 856, 858 (Ct.App.2010) "Even if not raised by the parties, this court may address the issue of appealability ex mero motu." Id.; See also *St. Francis Xavier Hosp. v. Ruscon/Abco*, 285 S.C. 584, 586, 330 S.E.2d 548, 549 (Ct.App.1985) (providing this court can raise the issue of appealability *ex mero motu* even when no party raises any question concerning the appealability of an order).

Additionally, "[a] legal question in an equity case receives review as in law." See *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. See *I'On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 411, 526 S.E.2d 716, 719 (2000).

"A void judgment is one that, from its inception, is a complete nullity and is without legal effect." See *Thomas & Howard Co. v. T.W. Graham & Co.*, 318 S.C. 286, 291, 457 S.E.2d 340, 343 (1995). "The definition of void under the rule only encompasses judgments from courts which failed to provide proper due process, or judgments from courts which lacked subject matter jurisdiction or personal jurisdiction." See *Universal Benefits, Inc. v. McKinney*, 349 S.C. 179, 183, 561 S.E.2d 659, 661 (Ct.App.2002). See also *BB & T*, 369 S.C. at 551, 633 S.E.2d at 503 ("A judgment is void if a court acts without personal jurisdiction.").

ARGUMENTS

I. PLAINTIFF ERRED WITHIN ITS MANY PLEADING CAPTIONS AND LINES NO. 3 AND 17 OF THE COMPLAINT, THAT BANK OF AMERICA, N.A. IS STILL AN RELEVANT PARTY WITH ACTIONABLE INTEREST TO THE PROPERTY OR SUIT IN SUCH RELIANCE THE COURT ERRED IN ITS RULINGS THEREFROM.

The Complaint and all subsequent pleadings, list Bank of America, N.A. ("BOANA") as an Defendant due to an previous HELOC second mortgage of Appellant. However, the corporation satisfied the debt and canceled the lien January 17, 2013 and recorded such in the Greenville County Register of Deeds January 22, 2013, found in Book SAT 412, Page 4380-4382. Further, BOANA purportedly transferred the only interest it claimed, the Mortgage Security, to mortgage servicer Green Tree Servicing LLC on May 16, 2013. (See Exhibit A)

From said date, BOANA had no standing claim as an party, servicer or otherwise with any interest in this suit as a matter of law. "Generally, a party must be a real party in interest to the litigation to have standing." See *Hill v. S.C. Dep't of Health & Envtl. Control*, 389 S.C. 1, 22, 698 S.E.2d 612, 623 (2010) "A real party in interest for purposes of standing is a party with a real, material, or substantial interest in the outcome of the litigation." Id. "Standing is ... that concept of justiciability that is concerned with whether a particular person may raise legal arguments or claims." Id. "It concerns an individual's sufficient interest in the outcome of the litigation to warrant consideration of [the person's] position by a court." Id. An assignee stands in the shoes of its assignor. See *Twelfth RMA Partners, L.P. v. Nat'l Safe Corp.*, 335 S.C. 635, 639, 518 S.E.2d 44, 46 (Ct.App.1999); See also S.C.Code Ann. § 36-3-203(b) (Supp.2012) (providing a transfer of an instrument vests in the transferee any rights the transferor had).

II. THE CLERK OF COURT ERRED AND ABUSED ITS DISCRETION BY ITS ORDER OF REFERRAL JANUARY 18, 2011 OF AN UNCOMMENCED ACTION VOID PERSONAL JURISDICTION BY PLAINTIFF'S FAILED PERSONAL SERVICE AND ADHERENCE TO THE PUBLICATION ORDER, THEREFROM NULL AUTHORITY

OR POWER TO REFER THIS CASE AND PARTIES TO THE BELOW COURT PURSUANT TO STATUTES AS A MATTER OF LAW.

ProVest, LLC server Rhonda Ackerman affirmed to have failed to personally serve Appellant on behalf of Plaintiff, at his home property on dates October 7th, 9th, 11th and 12th 2010. (Affidavit filed Oct. 13, 2010) Finkel, by an motion dated November 5, 2010 and affidavit dated November 8, 2010, requested the Circuit Court for an Order of service by publication. Honorable Circuit Judge Miller "Ordered that service of the Summons, Complaint and Lis Pendens, in this action be made upon the above named defendant, by publication of the Summons, together with the Notices, once a week for three (3) consecutive weeks in *The Greenville News*...and that a copy of the Summons, Complaint and Lis Pendens be mailed to said defendant at the last known address" on Date November 11, 2010. Ms. White of the Finkel Law Firm further motioned in agreement with that said Order. Finkel failed it's duty to comply with said District Order on multiple grounds:

1. Appellant holds from inception, he never received any Summons documents from anyone and thus Finkel's Certificate of Service claim was farcical. The certificate of mailing filed November 19. 2010 by an Finkel Paralegal certifies to have mailed copies of the ordered documents by "United States Mail, postage prepaid, by certified mail, return receipt requested, with delivery restricted to the addressee..." However, that certification fails to certify what dates, times or results of said service after said Order date, it was indeed mailed or any other proof to the court such mailing actually occurred. (See Certificate of Tracy Girona materially differs from other Finkel filed Certificates of Service filings with actual dates)

2. The publication was erroneous, incomplete and insufficient to the terms of the Order and S.C. Code Ann. § 15-9-740. On January 7, 2011, Legal Advertising Agent Susan F. Mullinax for the *Greenville News* swore by affidavit the publication had only run from December 2, 2010 to December 16, 2010. (only 2 weeks, not once a week for three weeks as ordered)

3. Ms. Mullinax sworn copy of the publication ad also exhibits materially different wording from the originally filed Lis Pendens, Summons and Notices ordered for publication. Specifically the sections referencing "TO THE DEFENDANTS ABOVE NAMED" where the original Summons states "TO THE ABOVE NAMED DEFENDANT(S):" The first sentence of the ad strays in stating the Defendants may serve a copy to said Complaint upon "the subscribers" where the original Summons clearly designates the term as "the plaintiff's attorneys". The last paragraph of Page one of the original Summons, a Notice is given "that pursuant to Rule 53(b) of the South Carolina Rules of Civil Procedure" regarding moving for Order of Reference. The Ad erroneously abbreviates that reference as "Rule 53(b) SCRCP" which is not the exact language of the original. Finally, the last few lines of the Publication ad, fail to include the signee's name of Susan S. White as well as the declared attorneys Thomas A Shook, Joseph T. Merli, Andrew M. Wilson and Elizabeth S. Moore as Attorneys of Plaintiff, expressly designated by the original filed Lis Pendens. (See Affidavit and Ad)

On January 7, 2011 Finkel's counsel Susan S. White raised an issue by form motion for an Order of Reference to an Master in Equity despite prior noncompliance with the publication Order. Anyone whom would have intelligently reviewed the records, could see the adequacies. The motion should have been denied as a matter of law and the rules. However, Clerk of Court Paul B. Wickensimer signed the Order of Reference for the uncommenced "action for foreclosure of mortgage, upon motion of plaintiff's counsel..." to the Master in Equity court January 18, 2011. The Clerk's referral is erroneous, null and void without an prior commenced action in which the Summons and Complaint must first be personally served or an publication effected by statute. The records clearly evidence neither was.

S.C. Code Ann. § 15-3-20(B) clearly provides as law:

> "A civil action is commenced when the Summons and Complaint are filed with the Clerk of Court if actual service is accomplished within one hundred twenty days after filing."

S.C. Rules of Civ. Proc. Rule 3(a) clearly defines:

> "A civil action is commenced when the Summons and Complaint are filed with the Clerk of Court if (1) the Summons and Complaint are served within the statute of limitations in any manner prescribed by law; or (2) if not served within the statute of limitations, actual service must be accomplished not later than one hundred twenty days after filing."

S.C. Code Ann. § 15-9-740 clearly provides as law,

> "[t]he order of publication shall direct the publication to be made in one newspaper, to be designated by the officer before whom the application is made, most likely to give notice to the person to be served and for such length of time as may be deemed reasonable not less than once a week for three weeks. The court, judge, clerk, master or judge of probate shall also direct that a copy of the summons be forthwith deposited in the post office directed to the person to be served at his place of residence, unless it appears that such residence is neither known to the party making the application nor can, with reasonable diligence, be ascertained by him."

South Carolina has held for over a hundred years that "the statutory requirements as to constructive service by publication must be strictly carried out." See *Du Bose v. Du Bose*, 90 S.C. 87, 89, 72 S.E. 645, 646 (1911). See also *Tenney v. Am. Pipe Mfg. Co.*, 96 F. 919, 919 (D.S.C. 1899) (service by publication is in derogation of the common law, and the statute must be strictly construed) The South Carolina Supreme Court recently still holds "Since service was not perfected...according to statute, the judgment entered...must be reversed." See *Gause v. Smithers*, 742 SE 2d 644 – (S.C. 2013).

This Court mirrors the same recently, in *Caldwell v. Wiquist*, 402 S.C. 565, 741 S.E.2d 583 (Ct. App. 2013) provides "South Carolina courts have repeatedly required strict compliance with publication statutes", recognizing *Montgomery v. Mullins*, 325 S.C. 500, 505-06, 480 S.E.2d 467, 470 (Ct.App.1997), affirming dismissal when Plaintiff "did not effect service by publication within a reasonable time after filing of the pleadings and delivery of the pleadings to the sheriff for service...". "The Statement of the Case reflects no summons was ever filed or served...", "Therefore, no original action was properly instituted." See also *Trico Engineering Consultants v. Kozlowski*, SC: Court of Appeals 2010 and *Estate of Corley v. Harring*, 386 SE 2d 264 - SC: Ct. App. (1989).

The state enactors of § 15-3-20 and § 15-9-740 never included language, for good reason, permitting officers, courts and would be plaintiffs to *skirt around* the mandatory service of process or its timespans, indefinitely prolonging uncommenced cases, burdening dockets and circumventing defending parties due process of service and notice. "The cardinal rule of statutory interpretation is to determine the intent of the legislature." See *Bass v. Isochem*, 365 S.C. 454, 469, 617 S.E.2d 369, 377 (Ct.App. 2005). See also *Gordon v. Phillips Utils., Inc.*, 362 S.C. 403, 406, 608 S.E.2d 425, 427 (2005) "The primary purpose in construing a statute is to ascertain legislative intent."

Statutory terms that are clear and unambiguous on their face leave no room for statutory construction, and must be applied according to its literal meaning. See *Miller v. Aiken*, 364 S.C. 303, 307, 613 S.E.2d 364, 366 (2005); "All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute." See *McClanahan v. Richland Cnty. Council*, 350 S.C. 433, 438, 567 S.E.2d 240, 242 (2002). "An appellate court cannot construe a statute without regard to its plain meaning and may not resort to a forced interpretation in an attempt to expand or limit the scope of a statute." See *Brown v. S.C. Dep't of Health & Envtl. Control*, 348 S.C. 507, 515, 560 S.E.2d 410, 414 (2002).

Therefore, by the legislature's intent, the above statutes terms are distinctly clear and unambiguous on their face, leaving no room for statutory construction, that a civil action is commenced by Plaintiff effecting personal service or by publication, that an officer, clerk or otherwise below court may rule Order's of Reference, devoid proper service and personal

jurisdiction. Certainly not, when the Plaintiff and counsel have utterly failed its obligation to comply with a previous standing Order of Publication.

The issue here is of personal jurisdiction, not to be confused as an Appellant argument of subject matter jurisdiction. "The concept of jurisdiction refers to the authority of a court over a particular person (personal jurisdiction) or the authority of a court to entertain a particular action (subject matter jurisdiction)." See *Boan v. Jacobs*, 296 S.C. 419, 421, 373 S.E.2d 697, 698 (Ct. App. 1998). A Plaintiff's "Proper service of process on a defendant ... confers personal jurisdiction over the defendant." See *Whaley v. CSX Transp., Inc.*, 362 S.C. 456, 474, 609 S.E.2d 286, 295 (2005). "The purpose of the summons is to acquire jurisdiction of the person of the defendant. . . .".

The Circuit Court, Clerk Of Court as officer and Master Court were still without personal jurisdiction on January 18, 2011, when the Clerk erred in its due diligence of the records, subsequent Plaintiff affidavits and form motion for referral. The court has a duty and must inquire whether the plaintiff has sufficiently complied with the rules such that the court has personal jurisdiction of the defendant and the defendant has notice of the proceedings. A presumption of proper service by an officer or court may not exist when the rules governing service are not followed. See *Roche v. Young Bros.*, 318 S.C. 207, 456 S.E.2d 897 (1995).

"A judgment is void if a court acts without personal jurisdiction." See BB&T v. Taylor, 369 S.C. 548, 551, 633 S.E.2d 501, 503 (2006). Without personal jurisdiction, an Order rendered by any officer or court is void. See *Universal Benefits, Inc. v. McKinney*, 349 S.C. 179, 561 S.E.2d 659 (Ct. App. 2002).

The Clerk of Court and Master Court, are creatures of statutory law. Unlike district judges, they are not Article III judicial officers, and they may only incur personal jurisdiction power and authority granted to them by the S.C. Legislature. The statute is very clear:

S.C. Rules of Civ. Proc. Rule 53(b) defines:

> In an *action* where the parties consent, in a default case, or an action for foreclosure, some or all of the causes of action in a case may be referred to a master or special referee by order of a circuit judge or the clerk of court.

> In all other actions, the circuit court may, upon application of any party or upon its own motion, direct a reference of some or all of the causes of action in a case. Any party may request a jury pursuant to Rule 38 on any or all issues triable of right by a jury and, upon the filing of a jury demand, the matter shall be returned to the circuit court. A case shall not be referred to a master or special referee for the purpose of making a report to the circuit court. The clerk shall promptly provide the master or special referee with a copy of the order of reference.

S.C. Rules of Civ. Proc. Rule 71(a) states:

> *Actions* to foreclose liens or obtain partition of real property shall be tried by the court, and shall ordinarily be referred to a master pursuant to Rule 53.

The clear distinction of these rules of the court is that first there must first be an commenced *action* pursuant to S.C. Code Ann. § 15-3-20(B), S.C. Rules of Civ. Proc. Rule 3(a) or S.C. Code Ann. § 15-9-740 to give rise to an referral of an pending case. This Appeals Court in *Chabek v. Nationwide Mutual Fire Ins. Co.*, 397 SE 2d 786 - SC: (Ct. of App 1990) has long settled "Until an action is commenced, there is no proceeding pending and, thus, nothing to refer".

This Court founded in *Chabek*, because the plaintiff had not filed and served their summons and complaint in the action when the circuit court referred the matter to the master, there was no action involving issues then pending, therefore, the circuit court had nothing to refer to the master at that time. See also *First Palmetto State Bank and Trust Co. v. Boyles*, 302 S.C. 136, 394 S.E. (2d) 313 (1990) (wherein the Supreme Court vacated a reference to a master as depriving the defendants of a jury trial where the reference was made four days prior to the filing of the answer and without the defendants' consent); See also *Holladay v. Holladay*, 27 S.C. 622, 3 S.E. 80 (1887) (wherein the Supreme Court set aside a reference to a master where the

defendants had not consented thereto, holding that a reference cannot properly be made until the defendants had answered the complaint).

The Clerk's reference Order was an abuse of discretion and plaintiff's form motion for referral should have been denied or at the least not granted based on the clear evidentiary facts on record. "An abuse of discretion occurs when the conclusions of the circuit court are either controlled by an error of law or are based on unsupported factual conclusions." See *Carson v. CSX Transp., Inc.*, 400 S.C. 221, 229, 734 S.E.2d 148, 152 (2012).

The reference is prejudice to Appellant's due process of notice and inherent right by statute to be given proper notice to respond to any such claims and action upon him timely. See *Brown v. Malloy*, 345 S.C. 113, 126-27, 546 S.E.2d 195, 201-02 (Ct. App. 2001) (finding notice would be insufficient for due process purposes when order of publication erroneously designated county where defendant did not reside as the proper county for publication and when notice was published in a newspaper of general circulation in the improper county). In comparison to ours, many other jurisdictions hold the same. See *McGloon v. Gwynn*, 100 P.3d 621, 625 (Idaho 2004) (finding failure to comply with mailing requirement of rules of civil procedure in effecting service by publication required default judgment be set aside as service was invalid); In re *Marriage of Wilson*, 502 N.E.2d 447, 449 (Ill. App. 1986) (holding failure to mail a copy of the publication to respondent's last known address as stated in the affidavit and required by relevant statute rendered service by publication invalid when strict compliance with the statute mandated mailing of the notice as a relevant part of the publication process); See also *Sink v. Easter*, 202 S.E.2d 138, 141 (N.C. App. 1974) (finding plaintiff's failure to mail defendant a copy of the notice of divorce when the service was by publication, as required by the statute, rendered service of process by publication invalid); See also *Sanders v. Sanders*, 278 A.2d 615, 618 (Md. App. 1971) (stating in divorce proceeding "[w]here a statute requires not only a publication but also that a copy of the petition be mailed by registered mail to the defendant at his or her last known address, the mailing is as much a part of the service as the publication, and where there is a publication but there is no mailing, or the plaintiff causes a notice to be mailed to a false address, the service is void. The mere fact that the defendant has actual notice of the institution of the proceedings against him is not sufficient to give the court jurisdiction where the plaintiff has not complied substantially with the statutes on constructive service.") (quoting 24 Am. Jur.

2d, Divorce and Separation § 286); See also *Anderson v. Anderson*, 82 N.E. 311, 311 (Ill. 1907) (finding failure to mail notice of publication to the last known residence when notice mailed to 5857 State Street, Chicago, IL, rather than 5559 State Street, as stated in the affidavit, was insufficient to confer jurisdiction).

Therefore, upon the above issues of non personal service and Plaintiff's disobedience of the publication Order are all dispositive issues as a matter of law and all other subsequent issues are moot and null. See *Donohue v. Ward*, 378 SE 2d 261 - SC: Court of Appeals 1989, (holding failure to give the required notice is a fundamental defect in proceedings which renders the proceedings absolutely void.) Also *Rives v. Bulsa*, 325 S.C. 287, 293, 478 S.E.2d 878, 881 (Ct.App.1996). "A moot case exists where a judgment rendered by the court will have no practical legal effect upon an existing controversy. . . ." See *Sloan v. Friends of the Hunley, Inc.*, 369 S.C. 20, 26, 630 S.E.2d 474, 477 (2006).

III. PLAINTIFF COUNSEL FAILED TO PROPERLY COMMENCE IT'S ACTION PURSUANT TO S.C. CODE ANN. § 15-3-20(B) AND SCRCP RULE 3(a) BY THE FEBRUARY 4, 2011 STATUTE OF LIMITATIONS DEADLINE.

The last day to serve the Appellant, comply with its standing Order of Publication and commence this action pursuant to S.C. Code Ann. § 15-3-20(B) and SCRCP Local Rule 3(a) expired on or around February 4, 2011. The SC Supreme Court heard these same issues in *Mims v. Babcock Center*, 399 S.C. 341, 732 S.E.2d 395 (2012), that in order for an action to be commenced when filed, it does need to be served within 120 days. The high Court contemplated the legislative intent and properly conferred the General Assembly Rule 3, SCRCP in 2004 "to reflect the legislative intent expressed in § 15-3-20 as amended by 2002 S.C. Act No. 281, § 1."

This Appeals Court repeatedly establishes proper service of the Summons and Complaint within the specified time, are paramount to commence any civil case according to the literal language, meaning and intent of statutory law. "It is fundamental to our system of justice that a civil action must be commenced within the applicable statute of limitations." Further, "Statutes of limitations are not simply technicalities. On the contrary, they have long been respected as fundamental to a well-ordered judicial system." Ultimately, "The law imposes upon a

prospective plaintiff the duty of commencing a civil action within the applicable statute of limitations." See *Ranucci v. Crain*, 723 SE 2d 242 - SC: (Ct.App. 2012). The purpose of a statute of limitations is to relieve the courts of the burden of trying stale claims when a plaintiff has slept on his or her rights. See *McKinney v. CSX Transp., Inc.*, 298 S.C. 47, 49-50, 378 S.E.2d 69, 70 (Ct.App. 1989).

Due to the material facts on case record reflecting personal service, compliance with the Order of Publication, personal jurisdiction and commencement of an action within the statute of limitation pursuant to S.C. Code Ann. § 15-3-20(B) and SCRCP Rule 3(a) were all never effected as a matter of law, this uncommenced action must be reversed and remanded for dismissal and all other claims irrelevant and declined for review. "Due to our disposition of Appellant's first issue, we need not address the remaining issues on appeal." See *Fowler v. Fowler*, SC: Court of Appeals 2009; "Because we find his first issue dispositive of this appeal, we decline to address his remaining issues." See *Kunst v. Loree*, 746 S.E.2d 360 (Ct. App. 2013); "Based upon our decision to reverse the circuit court as to this issue, we need not address the remaining issues on appeal." See *Centennial Casualty Co., Inc. v. Western Surety Company*, SC: (Ct of App. 2014).

IV. THE BELOW COURT ERRED, ABUSED ITS DISCRETION AND PREJUDICED APPELLANT PROCEEDING THIS CASE AND RULING AGAINST THE APPELLANT'S MOTION TO QUASH SERVICE JUNE 24, 2011, BY HIS ORDER UPON FACTS AND CONCLUSIONS OF LAW, IT KNEW THE AFFIDAVIT OF PUBLICATION AFFIRMED THEY WERE INADEQUATELY PUBLISHED ONCE A WEEK FOR (2) WEEKS INSTEAD OF THE CIRCUIT COURT'S ORDER MANDATING PUBLICATION FOR (3) CONSECUTIVE WEEKS AND RULED THAT SAID PUBLICATION EXECUTED IS VALID.

In an attempt to deceive and further its agenda, On January 17, 2011 counsel Ms. White filed an Affidavit of Default against both Defendants because "the summons and complaint were served upon the defendant(s) on the following dates: Bank of America, N.A. on October 8, 2010;", counsel Ms. White makes no reference to the Appellant being personally served or

publication being completed as required by said previous standing Order. Instead, Ms. White invoked the court to "enter a default judgment against Joel Clay Bracken..." on the mere grounds their searches concluded he "is not in the Military Service of the United States..."

Via an BAC collection phone call on April 29, 2011, Appellant became briefly aware of the foreclosure suit. To prevent an needless court auction sales of his property and for purposes to make the below court aware of the issues of non-service to him and dismiss the uncommenced action as a matter of law, Appellant motioned the below court to Quash Service of Process regarding said failure of service on May 19, 2011. An hearing was held on June 13, 2011, requiring both parties give arguments, despite the action being null 129 Days after the statute of limitations as argued above and material in the records.

Judge Simmons denied Defendant's Motion to Quash Service of Process on all grounds and signed within his "Findings of Facts and Conclusions of Law", he was keen Plaintiff was previously ordered "to serve the Documents on the Defendant by publishing the Documents once a week for three consecutive weeks in the Greenville News..." and "Affidavit of Publication was filed in the Office of the Clerk of Court for Greenville County on May 23, 2011 affirming that the Documents were published in the Greenville News once a week for a period beginning December 2, 2010 and ending on December 16, 2010." Although he was aware of such inadequacies, "Defendant offered no facts to demonstrate why the Order of Publication filed November 19, 2010 was invalid".

Later, the below court again erred and abused its discretion and prejudiced Appellant within another Order, September 1, 2011 Denying Defendant's Emergency Motion to Dismiss Complaint for Lack of Standing and Fraud Upon the Court which he parrots same said findings.

Appellant raised many pertinent issues relating to lack of service, jurisdiction and statute limitations pursuant with SCRCP Rule 12(h). The issues were plain and on the record for the Master to decide. This high Court confers a party needs not "invoke the exact name of the legal doctrine of personal jurisdiction..." to find pertinent portions of an "argument were sufficiently clear for an court to decide the issue." See *Delta Apparel, Inc. v. Farina*, 750 SE 2d 615 - SC: Court of Appeals 2013; See also *S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 641 S.E.2d 903 (2007) (finding that although SCDOT did not phrase objection in the exact terms used in the issues on appeal, the objection was sufficiently specific to allow the trial court

to rule on the issue). Also *State v. Russell*, 345 S.C. 128, 546 S.E.2d 202 (Ct.App.2001) (finding issue was preserved even though defendant did not use exact words "*corpus delicti*" in his request for a directed verdict).

A Master in Equity is not granted special powers or authority to "resurrect" dead and null actions that have previously long expired by the statute of limitations, even when a party later appears to dispose of the case. "Pursuant to Rule 53, SCRCP, a master has no power or authority except that which is given to him by the order of reference." See *Bunkum v. Manor Props.*, 321 S.C. 95, 98, 467 S.E.2d 758, 760 (Ct. App. 1996). And "Because the master lacked authority to refer the case to the special referee, the order of reference is void. The special referee, therefore, lacked jurisdiction over Ms. Bailey's action." See *Bailey v. Bailey*, 498 SE 2d 891 - SC: Court of Appeals 1998. It is only bestowed what may be given by reference pursuant to statute.

S.C. Code Ann. § 14-11-80 clearly provides a Master:

> "shall execute and perform all orders of the court upon references to him conformably to the practice of the court."

S.C. Code Ann. § 29-3-360 provides:

> "Any person who is indebted by mortgage on real estate may apply to the presiding judge or any court of general sessions and common pleas to be held in the county in which the mortgage on real estate is recorded for a rule to show cause why satisfaction must not be entered thereon."

If Appellant would have appeared before the 120 days statute of limitations ceased it may be proper, however he did not. In *Smith v. Ocean Lakes Family Campground*, 433 S.E.2d 909 (S.C. Ct. App. 1993), this Court vested when "the authority of the master or referee to act within a certain time frame, the parties themselves should ensure that the case is properly disposed of within the specified time, or obtain an amended order from the circuit court extending the time

for the master or referee to act. Otherwise, the reference terminates pursuant to the order of reference and the power to dispose of the case returns to the circuit court." Thus, from said opinion, Appellant is in the right pursuant § 29-3-360 to notify the court and otherwise dispose of the case. Appellant's motion and appearance at hearing to dispose it, does not re-toll an personal jurisdiction of an uncommenced action and the statute of limitations. In 2014, the SC Supreme Court discerns "We have never tolled the statute of limitations by the date on which a party subjects himself to the personal jurisdiction of the court..." See *Holmes v. Haynsworth, Sinkler & Boyd, PA*, 760 SE 2d 399 - SC: Supreme Court 2014.

The below court's June 13, 2011 findings of facts and law, clearly evidence it had knowledge of the record by Ms. Mullinax's affidavit the Order of Publication was in error and inadequate. As the Clerk was required to forward a copy of the reference under SCRCP Rule 53(b), any cursory review by the below court and its offices of the record and details of the case would brief the Plaintiff's errors and commencement deadlines. The Master prejudiced Appellant with its erred findings and abused his discretion Appellant could offer no facts why the publication was invalid, when he indeed did already know the failings before him. (See Order Denying Defendant's Motion to Quash Summons.) The below court's discretions are an injustice to the values of our legal system, that prejudiced Appellant's due process of notice and corresponding rules of an court's purposed perception of impartiality to the parties.

V. APPELLANT WAS NEVER GIVEN A DEFAULT NOTICE OF ACCELERATION WITH OPPORTUNITY TO CURE STRICTLY REQUIRED BY PARAGRAPHS NO. 20 AND 22 OF THE MORTGAGE SECURITY FROM THE LENDER AS CLAIMED BY PLAINTIFF ON LINES NO. 14 AND 15 OF ITS COMPLAINT AND NEVER GIVEN NOTICE OF AN TRANSFER UNDER LINE NO. 20.

"Notice of default and right to cure are standard contractual rights found in many promissory agreements. Therefore, a reasonable expectation arguably exists in the minds of many, if not most, makers that they will be entitled to notice of default and right to cure should they become delinquent." Re; *Southern Atlantic Financial Services, Inc. v. Middleton*, 349 S.C. 77, 562 S.E.2d 482 (S.C.App. 2002). Both Plaintiff BAC and Respondent Green Tree, raised

claims within it's Complaint Lines No. 14 " The monthly payments due on said note and mortgage are in default..." and "demand for payment thereof has been made...". And on Line No. 15, "*Any* notice of right to cure has been given as required." Appellant has firmly contended and noticed the below court that assertion is false. Appellant never received or was ever *given* this required Notice by the Lender. (See Defendant's Emergency Motion to Dismiss July 20, 2011 and later filed Answer with affirmative defenses.)

The original "Lender" is defined within the Note and Mortgage Security as the entity Coastal Mortgage Services, Inc., while a third-party registry database, known as Mortgage Electronic Registration Systems, Inc. ("MERS"), is referenced to be "acting solely as an nominee for Lender and Lender's successors and assigns" for the Mortgage security instrument only. (See Mortgage) Thus, Coastal by operation of contractual law would only be able to negotiate the Note and Mortgage together. Under dubious circumstances, an BAC employee purporting to be an "Assist. Secretary" for MERS, whom has only a nominee capacity for Coastal, alleges to assigned "that certain mortgage, and the Note..." on date September 7, 2010 to BAC. (See Assignment) Then BAC filed suit October 7, 2010. Later on February 2012, 49 state attorneys general, the District of Columbia and the federal government announced a historic joint state-federal settlement with the country's five largest mortgage servicers barring such fraudulent *robosigning* actions and documents of Ally (formerly GMAC), Bank of America, Citi, JPMorgan Chase and Wells Fargo. (See www.nationalforeclosuresettlement.com/about)

According to the original Promissory Note on condition Paragraph 10:

> "Lender *shall* give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date of the notice is given in accordance with Section 15..."And only then "Lender may invoke any remedies permitted by the Security Instrument without further notice on demand on Borrower."

Pursuant to the original Mortgage Security contract on condition Paragraph 15:

> "*All* notices given by Borrower or Lender in connection with this Security Instrument must be in writing. Any notice to the Borrower in connection with this Security Instrument shall be deemed to have been given to Borrower when mailed by first class mail or when actually delivered to Borrower's notice address if sent by other means...The notice address shall be the Property Address unless Borrower has designated a substitute notice address by notice to the Lender." And "If any notice required by this Security Instrument is also required under Applicable Law, the Applicable Law requirement will satisfy the corresponding requirement under this Security Instrument."

And on Paragraph 18, if the Borrower transfers interest in the Property without Lender's prior written consent and Lender exercises it's option to require immediate payment of all sums secured by the Security Interest, the Lender *shall* give Borrower notice of Acceleration. Further, condition Paragraph 22 of the Mortgage clearly mandates:

> "Lender *shall* give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument..." And "If the default is not cured on or before the date specified in the notice, Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may foreclose this Security Instrument by judicial proceedings. Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this Section 22..."

The Mortgage clearly sets out conditions precedent that must be followed before any other actions may result by either party. The Complaint alleged on Line No. 10, that as a nominee, MERS on September 7, 2010 assigned the "*subject note and mortgage to BAC...*"

together for value received. (See Assignment and Mortgage) According to Line No. 20 of the Security, if MERS had obtained any interest in the Note together with the Security Instrument as an Lender or Loan Servicer performing obligations under the Note, MERS was required to give Borrower notice of said change. MERS may not have been required to give "prior" notice of the sale or change, but *notice* as defined under condition Paragraph 15 all the same thereafter was a requisite by terms of the agreement. As stated above, ALL sale, transfer or servicing notices in connection with the Security agreement must be in writing, mailed first class by the Lender to the Borrower's property address. The contract is clear and unambiguous on condition Paragraph. 15, that notice is effected from the Lender, not by or through third parties, servicers or local land records. MERS never complied with said terms.

In response to Appellants motion to dismiss, BAC counsel responded August 12, 2011 by claim "Plaintiff mailed a Notice of Intent to Accelerate to defendant, on November 18, 2009" with an attachment as it's Exhibit A. That evidence fails to support the claims and is riddled with inconsistencies. The suspect mailing is absent of any postage stamp or mailing date that would verify proof what date it was mailed. The date on the Letter is not any proof of when the postage service received and mailed it. (See BAC exhibit notice)

Most significant, the alleged notice is not from the *Lender* pursuant to the conditions precedent of the Security. Coastal was the Lender. The Greenville County Register of Deeds ("GCROD") records certify this as well. On said date of the supposed letter of November 18, 2009, BAC was not a Lender, servicer or otherwise party with interest in the Instruments according to its own Complaint. By it's own claims and admissions of facts in it's Complaint, BAC was not the claimed purchaser for value of an Appellant Note and Mortgage until September 7, 2010. Therefore, it was impossible for BAC to have had given Appellant proper notice of acceleration with opportunity to cure, some (293) Days before it had ANY claimed interest in the subject Mortgage and Note as the Lender. BAC was never a servicer of the debt on behalf of Coastal. The alleged notice introduced by Finkel is a failed fabrication to hood wink the Appellant and court, to further the agenda of stealing Appellant's property out from under him with utterly incompetent and fraudulent documentation.

Further, BAC would also have had to comply with an condition Paragraph 20 notice if it became purchaser of the Note and Mortgage September 7, 2010. The record shows they did not.

Green Tree would also as well, if it later became purchaser or servicer of the Mortgage as claimed on May 16, 2013. (See BOA to Green Tree Assignment) The record shows they did not. Fundamentally, due to the failure of notices and conditions precedent to the contract, BAC was *ab initio* and currently Green Tree is barred by condition Paragraph 20 of the Security from commencing or joining:

> "Any judicial action...that arises from the other party's actions pursuant to this Security Instrument or that alleges that the other party has breached any provision of, or any duty owed by reason of , this Security Instrument, until such Borrower of Lender has notified the other party (with such notice given in compliance with the requirements of Section 15) of such alleged breach and afforded the other party hereto a reasonable period after the giving of such notice to take corrective action."

The SC Supreme Court has provides when language of a "provision is susceptible of a construction that the note sets forth that the Note Holder may accelerate, but that if it decides to do so, it must give at least 30 days notice prior to accelerating." See *Collins v. Doe*, 352 S.C. 462, 574 S.E.2d 739 (2002)(use of words such as "shall" or "must" indicates a mandatory requirement). Such a construction is consistent with caselaw that ambiguous language in a contract should be construed liberally and interpreted strongly in favor of the non-drafting party. See *Myrtle Beach Lumber Co., Inc. v. Willoughby*, 276 S.C. 3, 274 S.E.2d 423 (1981). The parties' intention must, in the first instance, be derived from the language of the contract. See *Jacobs v. Service Merchandise Co.*, 297 S.C. 123, 375 S.E.2d 1 (Ct.App.1988). Courts are without authority to alter an unambiguous contract by construction or to make new contracts for the parties. See *C.A.N. Enters., Inc. v. S.C. Health & Human Servs. Fin. Comm'n*, 296 S.C. 373, 378, 373 S.E.2d 584, 587 (1988). "A court must enforce an unambiguous contract according to its terms regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully." See *S.C. Dept. of Transp. v. M & T Enters. of Mt. Pleasant, LLC*, 379 S.C. 645, 655, 667 S.E.2d 7, 13 (Ct.App.2008).

"Generally, the party seeking foreclosure has the burden of establishing the existence of the debt and the mortgagor's *default on that debt.*" See *US Bank Trust Nat. Ass'n v. Bell*, 684 SE 2d 199 - SC: (Ct.App. 2009);

Plaintiff's have failed to establish on record, it complied with conditions precedent that it is a Lender pursuant to the Note and Mortgage, that provided Appellant notices of all sales, transfers, assignments and servicer changes after such actions occurred under to Paragraph 15 and 18, failed to give an notice of default and acceleration pursuant S.C. Code Ann. § 37-5-110, § 37-5-111, Paragraph 10 of the Note and Paragraph 22 of the Mortgage, that a there was a breach of an debt is indeed in default upon the Appellant before commencing suit, and any such action is barred by condition Paragraph 20 of the agreement.

Therefore, on the preserved material facts of the court record, issues raised pertaining to notices by both parties and arguments above, later ruled upon by the Master at hearing April 8, 2015 and filed April 15, 2015 were in error, an abuse of discretion and a prejudice to Appellant's rights pursuant the original contract as a matter of law. Thus, this Court must reverse the lower court's judgment of foreclosure auction and dismissal pursuant to SCRCP Rule 60(b)(4). All other remaining issues are null when this issue is dispositive of the case. See *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999).

VI. THE LIS PENDENS AND COMPLAINT ARE FATALLY FLAWED DUE TO AN INACCURATE STATEMENT AN ACTION HAD COMMENCED AND IN THE COURT AS A MATTER OF LAW AND BOTH ARE INCOMPLETE ERRONEOUS PROPERTY DESCRIPTIONS AS SPECIFIED BY THE RECORDED ORIGINAL MORTGAGE SECURITY AND PROPERTY DEED.

The original BAC filed Lis Pendens language filed October 7, 2010 raises an false issue and inaccurate assertion "an *action has been commenced* and is now pending in this court upon Complaint of the above-named Plaintiff..." (To save time and space herein, please refer to Argument II herein this appeal regarding an uncommenced action pursuant to statute and case law.) "Since the filing of a lis pendens is an extraordinary privilege granted by statute, strict compliance with the statutory provisions is required." A lis pendens "is premised upon and must

be filed in time in conjunction with an underlying complaint involving an issue of property." See *Pond Place Partners, Inc. v. Poole*, 351 S.C. 1, 17, 567 S.E.2d 881, 889 (Ct.App. 2002). The Lis Pendens must be purely identical to a filed action, in effect, "a republication of the proceedings in the action," See *DR. Horton, Inc. vs. Wescott Land Co, LLC*, 398 S. C. 528, 730 S.E.2d 340 (Ct. App. 2012).

The Lis Pendens is not exact to the Complaint in its own language to its claim. The notice only states it is "for foreclosure of a *certain mortgage* of real estate given by Joel Clay Bracken to Mortgage Electronic Registration Systems, Inc. as nominee for Coastal Mortgage Services Inc..." This is only language from the Mortgage Security. It definitively fails to state it is for foreclosure of the Note at issue. The Complaint makes the assertion clearly on Line 10, but the Lis Pendens does not in comparison. Further, the essential property description is lacking its entirety from the Complaint, Mortgage Security and property Deed. Notably left out is "on the corner of Lanewood Drive and Dalegrove Drive..." which is an special description of the property's location within a precise corner of the streets and surrounding lands. If a description of the land does not include the location or boundaries, it is inadequate. See *Fici v. Koon*, 372 S.C. 341, 346-47, 642 S.E.2d 602, 604-605 (2007).

As in the former, the property description within Line No. 7 of the Complaint is in error and incomplete as well. The words "comer of Lanewood Drive..." had been substituted in Plaintiff's Complaint from the original term "corner" . *Webster's New College Dictionary 2011* defines *comer* as:

> "a person who goes to a place to take part in an activity; a person who arrives at a place; someone who is making progress quickly and is likely to be successful"

This added name, person or description is in conflict with the original property of the Security Instrument and Deed. Even if by error, it is detrimental to the property's criteria in the land records and could therefrom result in issues of clear and proper title. "As a general rule, when maps, plats, or field notes are referred to in a grant or conveyance they are to be regarded

as incorporated into the instrument and are usually held to furnish the true description of the boundaries of the land...") See *Holly Hill Lumber Co. v. Grooms*, 198 S.C. 118, 135, 16 S.E.2d 816, 823 (1941). "The description itself must clearly identify the particular parcel of land."

A properly executed Lis Pendens and Complaint with the correct property address is not before the court and Plaintiff has bungled its compliance with the deadlines set in S.C. Code Ann. § 15-11-10. Ultimately, the Master had a duty under SCRCP RULE 71(a) before "final order of judgment, the judge or master shall assure that the plaintiff and all other claimants have complied with the statutes pertaining to the filing of notices of lis pendens." The below court erred and abused its discretion it was proper. This case should be remanded and all other issues are moot due to the dispositive nature of theses findings.

VII. THE BELOW COURT ERRED, ABUSED ITS DISCRETION AND PREJUDICED APPELLANT BY DENYING FORMAL NOTICE AND MOTION REGARDING PLAINTIFF'S NONCOMPLIANCE WITH THE ADMINISTRATIVE ORDER ON NOVEMBER 15, 2011, WITHOUT HEARING AND DETERMINING ALL RAISED CLAIMS AND EVIDENCES OF SUCH COMPLIANCE REQUIRED WITHIN THE GENERAL CONDITIONS OF ADMINISTRATIVE ORDER 2011-05-02-01 TITLE C.

Both parties were obligated to mediation pursuant the SCSC Administrative Order 2011-05-02-01. After several weeks of no contact regarding mandated mediation, Appellant contacted Finkel by email on or around August 31, 2011. A paralegal named Kim Beacham responded by email and later by letter confirmation dated September 1, 2011, purporting "Currently, your mortgage lender has placed all loans with owner occupied properties on hold in the state of South Carolina." (See Finkel's Letter) By October 27, 2011, Appellant frustrated with BAC and Finkel's lack of mediation compliance, filed notice and formal motion with the Equity Court that "Plaintiff has refused, declined and/or voluntarily elected not to participate in any foreclosure intervention. Over 100 days have passed since Notice of Intervention was served and 70 days since Defendant complied, thus far surpassing the 30 day limiting compliance and eligibility." (See court record Oct. 27, 2011) However, the below court ignored the appeal for justice and

instead granted Finkel's Order Striking the Case from the Active Docket November 15, 2011, without reference or concern to the Plaintiff's noncompliance.

Administrative Order (Order No. 2009-05-22-01) Title C mandates:

> "Throughout the foreclosure intervention process and the foreclosure action, the Mortgagee *shall* communicate with and otherwise *deal* with the Mortgagor through the Mortgagee's attorney, and the Mortgagor shall have the right to deal with the Mortgagee through the Mortgagee's attorney. This includes, *without limitation*, submission of all required information, *negotiations, and consummation* of any loan modification or other loss mitigation agreement."

The law firm's unwillingness to abide with the ordered mediation and attempt to steer Appellant away from there offices for said mediation purposes September 1, 2011 was in direct violation with the above said condition of the supreme Order. (See Finkel's Letter) Neither Finkel or BAC had power from the high Court to deny or suspend mediation under current conditions or refer them away. Ultimately, BAC and Finkel failed to comply for 2 Years, 8 Months 16 Days, then on April 7, 2014, Appellant received an envelope via postal mail, from Finkel and BAC unethically purporting "*Your loan has been reviewed for the foreclosure intervention options you requested... Unfortunately you are ineligible... Borrower failed to submit requested information.*" (See Exhibit B) There never was an correspondence of any actual mediation prior to April 7, 2014 and the record show as much. Title C of the Order directs:

> "The Court having jurisdiction over the foreclosure action *shall hear and determine any dispute* concerning any party's compliance with this order, including *without limitation*, the failure of any party to act in good faith in complying with the terms of this order. In the event the Court determines that any party to the foreclosure

> action, or their acting agent, has failed to comply with the terms of this order, or has not attempted to reach an agreement for foreclosure intervention in good faith, the Court may, in its discretion, impose such sanctions as it determines to be reasonable and just under the circumstances, including without limitation, the assessment of reasonable attorneys' fees and costs against the culpable party. The Court having jurisdiction over the action *shall* have the authority, and may in its discretion, order the parties to submit to mediation. In such event, the mediation shall proceed in accordance with the ADR Rules."

Unquestionably, the Master had a fundamental duty under the supreme Order to act upon disputes from mediation delays or abuses from the Plaintiff and its counsel and utterly failed to care, inquire and otherwise act with fair impartiality to compel Finkel to do anything it was required to do. The below court erred in judgment, abused its discretion and prejudiced Appellant of fair and timely mediation in good faith provided by supreme Order. Upon these abuses and delays, the case must be remanded and counsel shamefully sanctioned accordingly.

VIII. NO MORTGAGEE PLAINTIFFS, SERVICERS OR CLAIMED SUCCESSORS IN INTEREST EVER MEDIATED TIMELY AND IN GOOD FAITH PURSUANT TO ADMINISTRATIVE ORDER 2011-05-02-01.

Appellant holds in arguments above and herein below from filing the required Notice of Intervention with the court on July 19, 2011 to the present date, neither Plaintiffs BAC, successor in merger BOA, Green Tree or Finkel ever mediated in any manner with the Appellant as strictly defined within the Administrative Order. And never attempted to contact Appellant by any means after that letter until it's April 7, 2014 denial of loss mitigation. (See notice to the court) The below court turned a blind eye with the abuse with Appellant and the intent of the supreme Order. Appellant attempted to compel the below court to act, but Judge Simmons struck

the case from the active docket, pretending there was nothing he could do during the stay. (See court Orders 2011)

The April 7, 2014, Appellant denial from Finkel and it's alleged client BAC purported:

> *"Your loan has been reviewed for the foreclosure intervention options you requested... Unfortunately you are ineligible... Borrower failed to submit requested information."* And *"this letter shall serve as BAC Home Loans Servicing, LP f/k/a Countrywide Home Loans Servicing LP's denial of your eligibility for foreclosure intervention pursuant to the May 2, 2011, Administrative Order 2011-05-02-01 of the South Carolina Supreme Court. Please be advised that you have thirty (30) days from the mailing of this letter to file and serve an answer ot other response*." Signed by Susan S. White attorney for Finkel. (See Exhibit B)

On May 11, 2014, Appellant received another letter from Finkel via USPS mail, stating:

> *"The undersigned attorneys for BAC Home Loans Servicing, LP f/k/a Countrywide Home Loans Servicing LP certify... That Mortgagee, or its designated agent (i.e servicer) has received and examined all documents and records required to be submitted by the Mortgagor to evaluate eligibility for foreclosure intervention; ...Based on the foregoing the undersigned is informed and believes that it has afforded Mortgagor a full and fair opportunity to submit any other information or data pertaining to the Mortgagor's loan or personal circumstances for consideration by the Mortgagee."* Signed by Elizabeth S. Moore attorney for Finkel. (See Exhibit B)

On May 13, 2014 at 11:37am, Defendants filed the above Certificate of Compliance with the Administrative Order with the Greenville County Clerk of Court's office, moving forward the foreclosure case on behalf of BAC. On March 10, 2015, at 1:03pm, Finkel entered a motion into the Greenville County Clerk of Court's office, moving forward with an Order restoring the foreclosure case to active status on the grounds its alleged client BAC "Plaintiff wants to proceed with its foreclosure action." On March 27, 2015, Appellant received an Notice of Foreclosure Hearing from Finkel on behalf of its client BAC, that an hearing was scheduled April 8, 2015 at 2pm. (See Exhibit B)

Finkel associate Mr. Truluck came to the foreclosure hearing wanting the court to recognize a new Plaintiff of Green Tree and filed as its evidence an assignment purporting Bank of America, N.A. transferred its interest to Green Tree way back on a date of May 16, 2013. (See assignment) However, that introduced evidence greatly conflicts and defeats the counsel's claims it mediated as the Mortgagee in good faith. Perceptively, all their communications and pleadings regarding mediation to Appellant and the master purport to be on behalf of BAC as the Plaintiff and Mortgagee. As founded in Argument I herein and by Respondent's claim of assignment, BAC was no longer a party with interest and irrelevant to the case since May 16, 2013, yet Finkel continued to pretend and act unethically by false disclosure (4) separate occasions unto the Appellant and the court, declaring it was still Mortgagee and mediation was performed and completed by BAC. (See court records) See *First Union Nat'l Bank of S.C. v. Soden*, 333 S.C. 554, 568, 511 S.E.2d 372, 379 (Ct.App.1998) (observing the doctrine of unclean hands precludes a party from recovering in equity if the party acted unfairly in the matter that is the subject of the litigation to the prejudice of the opposing party). "The doctrine of *in pari delicto* is `[t]he principle that a plaintiff who has participated in wrongdoing may not recover damages resulting from the wrongdoing." See *Myatt v. RHBT Fin. Corp.*, 370 S.C. 391, 395, 635 S.E.2d 545, 547 (Ct. App. 2006). The Administrative Order Title A(2) is very clear:

> "Mortgagee" *shall* include the owner and holder of the note and mortgage, any party acting on behalf of the owner and holder of the note and mortgage for the purpose of receiving payments, dealing with the mortgagor, or administering the loan evidenced by

> the note and mortgage, and any party seeking foreclosure of the subject mortgage, or otherwise acting as the agent of the owner and holder of the note in connection with the loan or the foreclosure of the note and mortgage, *except for the mortgagee's attorney*."

The egregious dishonesty and *unclean hands* of the Finkel Law Firm goes even further on the record, the firm was with complete knowledge on or before February 5, 2015 that interest had allegedly transferred to Green Tree some long time ago, it was in contact and corresponding with Green Tree and preparing to substitute them as Plaintiff, meanwhile still deceiving the Appellant and the Master court for some 73 Days or more with its sudden announcement at hearing it is now representing Green Tree as current Plaintiff. (See Green Tree Affidavit of Merna McAlevy dated February 5, 2015 filed April 8, 2015.) The affidavit is the exact template used by Finkel in all other filings on record and drafted by Finkel for its purpose. The affidavit's caption has Green Tree already substituted without notice to Appellant or the court.

Our highest Court demands the doctrine of *unclean hands* precludes a party from recovering in equity if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the defendant. See *Wachovia Bank, N.A. v. Coffey*, 389 S.C. 68, 75, 698 S.E.2d 244, 247 (Ct. App. 2010). See also *Bank of New York v. Salone*, SC: Court of Appeals 2011.

Finkel's mediation claims are farcical theater to the court, an falsehood of deception. Communications with Appellant after April, 2013 regarding mediation and the foreclosure hearing were in bad faith misrepresenting the true Mortgagee. Said before in above Appeal Argument IV, BAC never mediated at all or in a timely manner, then transferred its interest May 16, 2013. Green Tree as the new holder of the interest, failed to pursue any mediation within the Administrative Order either. On or around April 1, 2015 Appellant received notice of denial for foreclosure relief from Finkel claiming it had somehow mediated previously and still posing BAC as Plaintiff. On or around March 26, 2015 Plaintiff receives a notice of foreclosure hearing for April 8, 2015 from Finkel that still deceives Appellant and the court, BAC is Plaintiff with interest and to "take notice that the Plaintiff' attorney will submit written testimony on behalf of the Plaintiff..." The SC Supreme Court holds in the finding of *unclean hands* "a party cannot

violate the law and expect not to bear the consequences of its actions. This Court will not grant a discretionary, equitable remedy to a party who refused to follow the laws of this state." Re: *Matrix Financial Services Corp. v. Frazer*, 394 S.C. 134, 714 S.E.2d 532 (2011).

At hearing April 8, 2015, the Master inquired directly unto Respondents counsel Mr. *i.e truly lucky*, Truluck, "And from my review of the file, there appears to have been an loss mitigation agreement? Mr. Truluck responded stating he was not even familiar with the loss mitigation details and only that he knew "it didn't work out." (See Transcript, Page No. 16-22) Mr. Truluck'ss testimony as an attorney was hearsay and false in his conclusions the Plaintiff was an Mortgagee, that had mediated in good faith with the Appellant and *it did not work out.* Judge Simmons further pressed counsel Truluck to make clear if it had complied with the supreme Administrative Order and by what conditions because Finkel was representing BAC when it claimed "The Mortgagors have breached the terms of the parties' loss mitigation agreement and the *Plaintiff* wishes to proceed with its foreclosure." (Transcript, Page 11, Lines 23-25 and Page 12, Lines 1-2) Mr. Truluck replied "I am not aware...I will see if I can find it." (Transcript, Page 12, Lines 3-4) Well, he never found it and never had any personal knowledge to support a claim anyone mediated with Appellant as a matter of law.

The Master preposterously went on to deem Respondent's an Finkel's compliance with mediation pursuant to the high Court's Order was irrelevant, stating on record "Well, and substantively, I don't know that makes any difference at this point." (See Transcript Page 12, Lines 5-6) The below court erred in its discretion and findings the Respondent's duties under Administrative Order of mediation does not make any difference in the nature of the proceedings and Appellant's due process of said Order. It's findings above is a clear abuse of discretion that prejudiced Appellant homeowner's afforded benefits of loan modification or other loss mitigation insuring that the procedures for handling issues relating to such efforts are handled uniformly, so this mortgage foreclosure action was not delayed or inappropriately concluded while loan modification or other loss mitigation efforts are being pursued according to the Order.

For the failures to mediate timely and in good faith as the Mortgagee, failure to notify, disclose and substitute the proper Plaintiff Mortgagee in a timely manner with Appellant and the court and in accordance with Administrative Order 2011-05-02-01 of the South Carolina Supreme Court, the below court erred in its conclusions mediation was proper and had

concluded by an abuse of discretion from the law firm's deceptions of material facts. Finkel and Respondent are barred from relief by the doctrine of *in pari delicto.* Such Order and issues around said mediation that did prejudice Appellant's due process of the supreme Order for the true Mortgagee to offer assistance. This case must be remanded on the facts and evidence of the records and the opposing counsel sanctioned for it's unconscionable actions of *unclean hands*.

IX. THE BELOW COURT ERRED, ABUSED ITS DISCRETION AND PREJUDICED APPELLANT OVERRULING APPELLANT'S OBJECTION TO ITS AUTHORITY UNDER STATUTE AND PROCEEDING AND RULING JUDGMENT FOR FORECLOSURE AUCTION AT HEARING APRIL 8, 2015, APPELLANT HAD WAVED ALL DEFENSES TO NONSERVICE AND JURISDICTION.

Appellant previously raised issues of Plaintiff's nonservice of the Summons and Complaint since May 19, 2011 before appearance. At foreclosure hearing April 8, 2015, Appellant again raised said issues to the Master that the Plaintiff had failed personal service, failed to comply with the Order of Publication evidenced by Ms. Mullinax affidavit and the statute of limitations had expired for commencing the action pursuant to S.C. Code Ann. § 15-3-20(B) and SCRCP Rule 3(a) on February 4, 2011. (See Transcript, beginning Page No. 4, Line 19).

The Master's initial Order in this case from hearing held on June 13, 2011 on record, was he was precisely aware Plaintiff was previously been ordered "to serve the Documents on the Defendant by publishing the Documents once a week for three consecutive weeks in the Greenville News..." and under his review the "Affidavit of Publication was filed in the Office of the Clerk of Court for Greenville County on May 23, 2011 affirming that the Documents were published in the Greenville News once a week for a period beginning December 2, 2010 and ending on December 16, 2010." But because would deny his dismissal because "Defendant offered no facts to demonstrate why the Order of Publication filed November 19, 2010 was invalid". (See Order and Appellant's Arguments No. IV). This time around, Inconsistent to his previous holding, Judge Simmons did not disagree again and overrule the publication was proper. (See Transcript) Even though Appellant had not discovered the issues of the publication

till recently upon a backward review of the records, the evidence on it face in the records from affidavits of nonpersonal service and incomplete publication were before the court, June 13, 2011 an the subsequent Order an abuse of discretion.

The below court being irritated, specifically opinioned by its discretion "if there was a service issue, that your filling and making any number of voluntary appearances is deemed a *waiver* of any service defect." (Transcript Page No. 6, Line 21) Appellant was prepared for that scenario with pertinent South Carolina case law clarifying waiver for the below court to examine before a rush to judgment, but Judge Simmons angrily cut him off with "I've already ruled. You can take that issue to Columbia as well." (Transcript Page No., Line 3) Later, after Respondents counsel made its claims, Appellant again raised further arguments regarding waiver and jurisdiction and the statute of limitations for this uncommenced action. (Transcript, Page No., Line 14) Appellant handed the bailiff paper printouts including statutes S.C. Code Ann. § 15-3-20(B), SCRCP Rule 3(a), S.C. Code Ann. § 15-9-740 and this Appeals Court's findings and decisions of *Trico Engineering Consultants v. Kozlowski*, No. 2010-UP-511, Nov. 23, 2010 S.C. (Court App. 2010) and *Chabek v. Nationwide Mutual Fire Ins. Co.*, 397 SE 2d 786 - SC: (Ct. of App 1990), on issues of the exact nature argued. (See Transcript, Page No. 9, Line 18 and Master reviewing this Appeals Court findings and deeming them irrelevant to his ruling. (Page No. 12, Line 7))

Appellant further briefed the below court pursuant S.C. Code Ann. § 15-3-20(b) and SCRCP Rule 3(a) the action had expired long before any appearances pursuant limitation intent of the statutes. (Transcript Page No. 11, Line 5) The Master made an initial verbal acknowledgement of agreement stating "OK" and "Alright" but then contradictorily ruled "I am denying all the motions you have raised here...but you are protected for appeal purposes." (Transcript Page No. 11, Lines 8-12) Master Simmons verbally ruled at hearing April 8, 2015, "So what's going to happen, Mr. Bracken, is the property is going to set for a foreclosure sale." (Transcript Page No. 12, Lines 12-20)

"The word `jurisdiction' does not in every context connote subject matter jurisdiction, but rather, is `a word of many, too many, meanings." See *Limehouse v. Hulsey*, 404 S.C. 93, 104, 744 S.E.2d 566, 572 (2013). In *Chabek*, 303 S.C. at 29, 397 S.E.2d at 788, "Because the Chabeks had not filed and served their summons and complaint in the action for reformation

when the circuit court referred the matter to the master, there was no action involving reformation issues then pending" And this Court deemed "irrelevant the fact that both parties consented to the reference of the matter and, indeed, tried the matter before the master." See *Harden v. South Carolina State Highway Department*, 266 S.C. 119, 124, 221 S.E. (2d) 851, 853 (1976) ("Lack of jurisdiction of the subject matter cannot be waived even by consent and therefore such lack can and should be taken notice of by this Court *ex mero motu.*"); See *Morrill v. Johnson*, 152 Me. 150, 152, 125 A. (2d) 663, 664 (1956) ("Reference of cases is authorized by provisions of statute. The jurisdiction of referees cannot be conferred by consent."); See *Ford v. Inhabitants of Town of Whitefield*, 137 Me. 125, 126, 15 A. (2d) 857, 857 (1940) ("The parties cannot by agreement confer jurisdiction on the referee to determine any matter which may arise between them."); See 76 C.J.S. supra § 11 at 190 ("[C]onsent alone cannot confer jurisdiction on the referee."); cf. *Karl Sitte Plumbing Co., Inc. v. Darby Development Company of Columbia, Inc.*, 295 S.C. 70, 367 S.E. (2d) 162 (Ct. App. 1988) (where the circuit court had referred an action and a party participated in the reference proceedings, the party waived any objection the party might have had to the action being referred and to the master's authority to enter a final judgment).

A court is without jurisdiction, as are those powers and authority granted to a Master upon a referral, when there has been no appearance and personal jurisdiction before the statute of limitations expires on an uncommenced action. In South Carolina, "[a] civil action is commenced by filing and serving a summons and complaint." S.C.R. CIV. P. 3(a). Until an action is commenced, there is no proceeding pending and, thus, nothing to refer. See *State v. McQuillan*, 252 Mo. 334, 338-9, 158 S.W. 652, 653 (1913) ("Before there can be a reference there must be an action pending."); 66 Am. Jur. (2d) References § 1 at 477 (1973) ("A reference is the trial and determination of questions arising in litigation by a person appointed for that purpose by the court wherein the cause is pending.'); id. at 478 ("[A] reference ... is always in a pending cause and rests upon the constitutional and statutory powers of the court which appoints the referee as its officer and upon which his entire authority depends.")

"Pursuant to Rule 53, SCRCP, a master has no power or authority except that which is given to him by the order of reference." See *Bunkum v. Manor Props.*, 321 S.C. 95, 98, 467 S.E.2d 758, 760 (Ct. App. 1996). Also *Smith v. Ocean Lakes Family Campground*, 315 S.C. 379,

381, 433 S.E.2d 909, 910 (Ct.App.1993). "When a case is referred to a master, Rule 53(c) gives the master the power to conduct hearings in the same manner as the circuit court, unless the order of reference specifies or limits his powers." See *Smith Cos. of Greenville, Inc. v. Hayes*, 311 S.C. 358, 360, 428 S.E.2d 900, 902 (Ct. App. 1993). See S.C. Code Ann. § 14-11-80, A Master in Equity may only "*execute and perform all orders of the court upon references to him conformably to the practice of the court.*"

A later appearance to an court for the sole purposes of disposing of an dead uncommenced action pursuant to statute limitations does not empower a Master to raise an action "from the dead" like the movie Frankenstein or "from the ashes", like a phoenix. The lower court had no case to proceed clearly by the record and timespans and had no power to rule other that to close the case. Once action is null as matter of statutory law, its done. See *Holmes v. Haynsworth, Sinkler &. Boyd, P.A.*, 2014 S.C. Lexis 182 (2014) ("Regardless, Appellant failed to accomplish service within 120 days after filing". The below court's ruling Appellant had *waived* any defect in Plaintiff's service is only substantive if Appellant had appeared giving jurisdiction before the tolling of the statute of limitations to commence this action. Randolph M. James, PC v. Oconee County, SC: Court of Appeals 2015 (See also Arguments III herein)

Waiver is a voluntary and intentional abandonment or relinquishment of a known right. In order for a party to waive a right, the party must have known of the right and known that the right was being abandoned. See *Eason v. Eason*, 384 SC 473, 479, 682 SE2d 804, 807 (2009). Appellant motioned the below court with the express intention to dispose of a dead action for purposes of clearing it from the docket. Appellant did not revive a dead action for purposes of defending it and never waived jurisdiction by consent as the Master opines.

Due to the below court's erred rulings at hearing and within it's signed Order April 8, 2015 and subsequent follow up Order around April 25, 2015, an abuse of discretion has prejudiced Appellant's due process of fair defense of his home and property, the below court attempts to *rewrite* statutory laws from it's bench and disregard mandated compliance with supreme Administrative Orders. Upon the preponderance of the facts of the record, the plethora of law and cases fully set forth herein and those the Court may further review, this Court must remand and void its judgments.

X. THE BELOW COURT ERRED, ABUSED ITS DISCRETION AND PREJUDICED APPELLANT RULING JUDGMENT FOR AN FORECLOSURE AUCTION AT HEARING APRIL 8, 2015 UPON APPELLANT AND HIS PROPERTY, IN FAVOR OF RESPONDENT UPON HEARSAY AFFIDAVIT OF DEBT AND NOTICE OF ASSIGNMENT OF MORTGAGE THAT CLEARLY DOES NOT CLAIM TRANSFER OF THE ORIGINAL PROMISSORY NOTE.

On April 8, 2015, at 1:47pm, moments before the foreclosure hearing, Finkel filed an Affidavit of Account of Respondent foreclosure representative Merna McAlevy dated February 5, 2015. The Affidavit is captioned for Green Tree as the Plaintiff party some 62 days before the hearing date, in which Finkel requests to substitute Plaintiff. Mr. Truluck also filed an assignment of mortgage as evidence purporting Bank of America, N.A., as successor by merger of BAC, assigning only it's "beneficial interest under that certain Mortgage" absence any language or reference to the Note, to Green Tree on a date of May 16, 2003 "*for value received...*".

The record of the case shows Respondent may only be holder of an unsecured instrument of debt and foreclosure and auction of Appellant's home is improper as a matter of law. An assignment of the Note carries the Mortgage with it, while an assignment of the latter alone is a nullity. See *Carpenter v. Longan*, 83 U.S. 271, 274, 21 L. Ed. 313 (1872). In South Carolina, a mortgage has always been a mere security for a debt. See *Patterson v. Rabb*, 38 S.C. 138, 17 S.E. 463 (1893); Also *Williams v. Lawrence*, 194 S.C. 1, 8 S.E. (2d) 838 (1940). Care must be taken to remember that a security instrument is not a debt; at most it is evidence of a debt. See *Rabb v. Patterson*, 42 SC 528, 20 SE 540, 46 Am. St. R. 743 (1894) "A mortgage and a note are separate securities for the same debt, and a mortgagee who has a note and a mortgage to secure a debt has the option to either bring an action on the note to pursue a foreclosure action." See *U.S. Bank Trust Nat'l Ass'n v. Bell*, 385 S.C. 364, 374, 684 S.E.2d 199, 204 (Ct.App.2009) and *Bank of America, N.A. v. Draper*, 746 S.E.2d 478, 481 (S.C. Ct. App. 2013). South Carolina recognizes the familiar and uncontroverted proposition that the assignment of a note secured by a mortgage carries with it an assignment of the mortgage. See S.C. Nat'l Bank v. Halter, 293 S.C. 121, 128, 359 S.E.2d 74, 77 (Ct. App. 1987) ("The assignment of a mortgage as distinct from the debt it

secures is nugatory and confers no rights upon the transferee absent some indication that the parties also intended to transfer the debt." (The Note is the debt not the Mortgage Security) "[T]he assignment of a note secured by a mortgage carries with it an assignment of the mortgage, but ... the assignment of the mortgage alone does not carry with it an assignment of the note." See *Hahn v. Smith*, 157 S.C. 157, 167, 154 S.E. 112, 115 (1930); Only ("The transfer of a note carries with it a mortgage given to secure payment of such note."). See *Ballou v. Young*, 42 S.C. 170, 176, 20 S.E. 84, 85 (1894).

There is no mistake or error, BOANA, specifically drafted and executed the assignment to transfer the only interest it claimed to have to Respondent and nothing more. Further, Respondent failed to allege any different in its Affidavit of Account. Ms. McAlevy only references debt "secured by the mortgage being foreclosed...". The affidavit is void any reference or claims Respondent is in possession and holder of the Note to enforce the foreclosure. The Order of Judgment and Foreclosure Sale drafted by Finkel and signed by the Master raised issue on Page 2, Line 13(b) purporting only Appellant's Mortgage was assigned to Respondent and not the Note. The Order and the court record is missing any claim and proof Respondent is holder or enforcer of the Note.

At most, Respondent makes a claim for judgment to an unsecured debt. But the high Court finds "if the note was without consideration, then there was no debt, and if no debt, then there could be no valid mortgage." See *Duckworth v. McKinney* 58 S.C. at 426, 36 S.E. at 733. The Mortgage Security is governed by and subject to South Carolina "applicable law" as defined within its language.

An assignee can only stand in the shoes of its assignor. See *Twelfth RMA Partners, L.P. v. Nat'l Safe Corp.*, 335 S.C. 635, 639, 518 S.E.2d 44, 46 (Ct.App.1999). "An `adequate' remedy at law is one which is as certain, practical, complete and efficient to attain the ends of justice and its administration as the remedy in equity." See *Santee Cooper Resort, Inc. v. S.C. Pub. Serv. Comm'n*, 298 S.C. 179, 185, 379 S.E.2d 119, 123 (1989). Also *Barrett v. Flowers*, SC: Court of Appeals 2011. "It is well settled that ordinarily a party may not receive relief not contemplated in his or her pleadings." See *Heins v. Heins*, 344 S.C. 146, 152, 543 S.E.2d 224, 227 (Ct. App. 2001).

Respondent's affidavit of debt is flawed without any material facts from Respondent business records sustaining an loan number or account, acquisition date, escrow dates and disclosure of whom is servicer of the loan and whom is original creditor. Respondent representative Ms. McAlevy fails to base swear and base her testimony on her personal knowledge of the debt, her personal knowledge is on business records in the normal course of business and include such records prepared near or around the time the event occurred as an qualified witness to the mode of preparation of such records. See *Deep Keel, LLC v. Atlantic Private Equity Ground*, LLC, SC: Court of Appeals 2015; Citing *Ex parte Dep't of Health & Envtl. Control*, 350 S.C. 243, 249-50, 565 S.E.2d 293, 297 (2002) (explaining business records are admissible under Rule 803(6) and section 19-5-510 "as long[] as they are (1) prepared near the time of the event recorded; (2) prepared by someone with or from information transmitted by a person with knowledge; (3) prepared in the regular course of business; (4) identified by a qualified witness who can testify regarding the mode of preparation of the record; and (5) found to be trustworthy by the court"). We hold Rule 803(6) does not apply to admit live testimony offered to prove the contents of a record containing hearsay when that record is not offered in evidence. See *Thompson v. State*, 705 So. 2d 1046, 1048 (Fla. Dist. Ct. App. 1998) ("While the business-records exception to the hearsay rule allows the admission of `[a] memorandum, report, record, or data compilation,' it does not authorize hearsay testimony concerning the contents of business records which have not been admitted into evidence." (citation omitted)); *State v. Watkins*, 224 P.3d 485, 492 (Idaho 2009) (finding written notes relied on by the witness "were not offered into evidence' and "[i]n the absence of any document . . . there was simply no `business record' that might fall within this hearsay exception"); *Bass v. Washington Kinney Co.*, 457 N.E.2d 85, 96 (Ill. App. Ct. 1983) ("[I]t is only the business record itself which is admissible, and not the testimony of a witness who makes reference to the record."). The qualified witness must then lay the foundation to meet the requirements of Rule 803(6) and section 19-5-510. See *State v. Davis*, 371 S.C. 170, 178-79, 638 S.E.2d 57, 62 (2006) (stating the proponent of evidence has the burden of establishing that a record falls within a hearsay exception).

Because Respondent failed to establish on the record before and at hearing, it received the original Appellant Note from its assignment, failed to establish any business records that would

support Respondent's existence, accuracy and ownership of the Note, Respondent's affidavit is nothing more than hearsay of an debt, because an Security Instrument is not the debt but at most evidence of a debt pursuant case *Rabb* above, because only an mortgagee who has the Note and Mortgage to secure a debt has the option to either bring an action on the note to pursue an foreclosure action for an sale pursuant cases above *U.S. Bank Trust, Bank of America, N.A.* and S.C. Code Ann. § 36-3-301, remedy at law is not certain, practical, complete and efficient to attain the ends of justice and its administration as the remedy in equity *re; above Santee Cooper Resort, Inc.* and *Barrett v. Flowers* and well settled a party may not receive relief not contemplated in the pleadings *re; above Heins v. Heins.*

Therefore, on the arguments above and fully set forth herein, the below court ruled in error by an abuse of discretion of the facts and as a matter of law. The abuse of discretion prejudiced the Appellant's ownership and defense of his home property, due process of law, and justice. This Court must reverse it's finding of facts and law.

CONCLUSION

For the reasons stated, this Court should reverse the judgments of the Master court.

Today's Date: June 22, 2015.

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THE STATE OF SOUTH CAROLINA

In The Court of Appeals

Appellant Case No. 2015-000942

APPEAL FROM GREENVILLE COUNTY

Court of Common Pleas

Charles B. Simmons, Master in Equity Judge

Case No. 2010-CP-23-8330

Joel Clay Bracken, Appellant.

v.

Green Tree Servicing, LLC., Respondent.

I HEREBY CERTIFY, a true and correct copy of the aforementioned pleading has been delivered to Respondent's counsel by US postal mail with verifiable delivery confirmation to:

The Finkel Law Firm LLC
Attn: Associate Chris S. Truluck
Office: 803-765-2935
Fax: 803-252-0786
1201 Main Street, Suite 1800
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Respectfully submitted,

Today's Date: July 22, 2015.

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