

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

The Honorable Joe M. Crosby, Master-in-Equity

Case No. 2011-CP-22-00342

Appellate Case No. 2015-000295

RECEIVED

AUG 05 2015

SC Court of Appeals

TD Bank, N.A., successor by merger to Carolina First
Bank, N.A., ... Respondent,

v.

Sunil V. Lalla and Sharon W. Lalla, ... Appellants.

**FINAL BRIEF OF RESPONDENT TD BANK, N.A., SUCCESSOR BY MERGER
TO CAROLINA FIRST BANK, N.A.**

Thomas William McGee, III
A. Mattison Bogan
Tara C. Sullivan
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

Attorneys for Respondent

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

The Honorable Joe M. Crosby, Master-in-Equity

Case No. 2011-CP-22-00342

Appellate Case No. 2015-000295

TD Bank, N.A., successor by merger to Carolina First
Bank, N.A., ... Respondent,

v.

Sunil V. Lalla and Sharon W. Lalla, ... Appellants.

**FINAL BRIEF OF RESPONDENT TD BANK, N.A., SUCCESSOR BY MERGER
TO CAROLINA FIRST BANK, N.A.**

Thomas William McGee, III
A. Mattison Bogan
Tara C. Sullivan
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

Attorneys for Respondent

TABLE OF CONTENTS

COUNTER-STATEMENT OF ISSUES ON APPEAL	1
COUNTER-STATEMENT OF THE CASE	2
ARGUMENT	10
I. The Master-in-Equity properly found that TD Bank met its burden of proof on its claim for relief	10
A. The Master-in-Equity properly admitted a copy of the Note	10
B. TD Bank sufficiently established the existence of Dr. Lalla's Note	12
C. TD Bank sufficiently established that it is the owner and holder of the Note	13
D. TD Bank sufficiently established Dr. Lalla's payment history on the Note	16
E. TD Bank did not waive its claim for a deficiency judgment	17
II. The Master-in-Equity properly found that Appellants failed to meet their burden of proving their counterclaim	18
III. The Master-in-Equity properly considered matters of public record submitted before the issuance of a final order in this foreclosure action	19
A. The Motion to Alter or Amend did not present new issues to the Master-in-Equity	19
B. The Motion to Alter or Amend did not present new evidence to the Master-in-Equity	19
CONCLUSION	21

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Bank of America, N.A. v. Draper, et al.</i> , 405 S.C. 214, 746 S.E.2d 478 (Ct. App. 2013)	11
<i>Boyd v. Bellsouth Tel. Tel. Co.</i> , 369 S.C. 410, 633 S.E.2d 136 (2006)	20
<i>Brown v. Allstate Ins. Co.</i> , 344 S.C. 21, 542 S.E.2d 723 (2001)	10, 16, 20
<i>Gadberry v. Rental Serv. Corp.</i> , No. CA 0:09-3327-CMC, 2011 WL 767034 (D.S.C. Jan. 21, 2011) <i>report and recommendation adopted sub nom. Gadberry v. Rental Sers. Corp.</i> , No. CA 0:09-3327-CMC-PJG, 2011 WL 766991 (D.S.C. Feb. 24, 2011)	12
<i>Johnson v. Johnson</i> , 288 S.C. 270, 341 S.E.2d 811 (Ct. App. 1986)	20
<i>Lucas v. Vanover</i> , No. 2006-UP-233, 2006 WL 7286027 (S.C. Ct. App. Apr. 27, 2006)	11
<i>PPG Indus., Inc. v. Orangeburg Paint & Decorating Ctr., Inc.</i> , 297 S.C. 176, 375 S.E.2d 331 (Ct. App. 1988)	19
<i>Pizarro v. McDonald's Rest.</i> , No. CA 6:12-1440-JMC-KFM, 2012 WL 2675442, at *4 (D.S.C. June 20, 2012) <i>report and recommendation adopted</i> , No. 6:12-CV- 01440-JMC, 2012 WL 2675358 (D.S.C. July 6, 2012) <i>aff'd</i> , 491 F. App'x 426 (4th Cir. 2012)	20
<i>State v. Fripp</i> , 396 S.C. 434, 721 S.E.2d 465 (Ct. App. 2012)	11
<i>Steffens v. Am. Home Mortg. Serv., Inc.</i> , 2011 U.S. Dist. LEXIS 26586, at *5-6 (D.S.C. Jan. 5, 2011), <i>report and recommendation adopted by</i> 2011 U.S. Dist. LEXIS 26709 (D.S.C. Mar. 15, 2011)	18
<i>United States v. Harris</i> , 898 F.2d 148 (4th Cir. 1990) (unpublished table decision)	12

<i>Watkins v. Flagstar Bank, FSB</i> , 2012 U.S. Dist. LEXIS 67978 (D.S.C. Apr. 12, 2012).....	18
---	----

<i>Wilder Corp. v. Wilke</i> , 330 S.C. 71, 497 S.E.2d 731 (1998)	19
--	----

Rules

Fed. R. Evid. 1003	12
Rule 201(b), SCRE	20
Rule 220(c), SCACR.....	21
Rule 602, SCRE.....	16
Rule 803(6), SCRE	16
Rule 1001(3), SCRE.....	16
Rule 1003, SCRE	11
Rule 2001(b), SCRE.....	14

Statutes

12 U.S.C. § 215(a)	15
S.C. Code § 19-5-610	11
S.C. Code § 34-3-850(D).....	6, 14, 15

Other Authorities

32A C.J.S. Evidence § 1357.....	12
---------------------------------	----

COUNTER-STATEMENT OF ISSUES ON APPEAL

- I. Did the Master-in-Equity properly conclude that TD Bank is entitled a judgment for foreclosure and sale of the mortgaged property and a deficiency judgment against Appellant Sunil V. Lalla for any balance remaining after the foreclosure sale?**
- II. Did the Master-in-Equity properly find in favor of TD Bank on Appellants' counterclaim for allegedly failing to comply with the Home Affordable Modification Program?**
- III. Did the Master-in-Equity properly consider matters of public record submitted before the issuance of a final order in this foreclosure action?**

COUNTER-STATEMENT OF THE CASE

This is a foreclosure matter before the Master-in-Equity. No jury demand has been made in this matter. On March 15, 2011, TD Bank, N.A., successor by merger to Carolina First Bank, N.A. (“TD Bank”), brought this action seeking foreclosure and sale of the mortgaged property and a deficiency judgment against Dr. Sunil V. Lalla (“Dr. Lalla”). [Complaint; R. 23]. TD Bank alleged that:

- On November 13, 2006, Dr. Lalla executed a Commercial Promissory Note in favor of Carolina First Bank in the original principal amount of \$680,000 with interest thereon (“Note”). [Complaint ¶ 7; R. 31];
- Also on November 13, 2006, Dr. Lalla and Sharon W. Lalla (“Mrs. Lalla”) executed a mortgage (“Mortgage”) in favor of Carolina First Bank on property they own at 744 S. Waccamaw Drive, Garden City, SC 29731 (“Property”) to secure the Note. [Complaint ¶ 8; R. 31];
- Dr. Lalla subsequently failed to make the required monthly payments. [Complaint ¶ 17; R. 34]; and
- Carolina First Bank subsequently merged into TD Bank, making TD Bank the successor-in-interest to the Note and Mortgage. [Complaint p. 1; R. 30].

In Appellants’ Answer and Counterclaim, they inexplicably and contradictorily denied Dr. Lalla’s execution of the Note but admitted they executed the Mortgage to secure the Note. [Answer and Counterclaim ¶¶ 5-6; R. 62]. Appellants also denied that TD Bank is the owner and holder of the Mortgage and that Dr. Lalla defaulted on the loan. [Complaint ¶¶ 17, 25; R. 34-35; Answer and Counterclaim ¶¶ 7, 9; R. 63].

Appellants asserted a counterclaim, alleging that TD Bank had not complied with regulations regarding loan modification. [Answer and Counterclaim ¶¶ 13-16; R. 63-64].¹

Dr. Lalla subsequently submitted an Affidavit in this matter. [Affidavit of Lalla; R. 228]. Contrary to the denials in the Appellants' Answer and Counterclaim, Dr. Lalla's Affidavit confirms the existence of the Note, his liability thereon, and TD Bank's role as owner and holder of the Note. [Affidavit of Lalla; R. 228]. Specifically, Dr. Lalla's Affidavit provides as follows:

4. The property serves as a second residence for my family, and when we are not residing there we rent the property out to third parties to assist in paying the bank.

5. Due to the current economic downturn, my income level has decreased. When I became aware of this issue I contacted the Plaintiff, T.D. Bank, in an attempt to speak to them about the promissory note on the property beginning in 2009.

6. I have always been forthcoming and cooperative in attempting to resolve this matter with the Plaintiff. . . .

7. . . . As late as last week I attempted to contact the Plaintiff to resolve this matter.

¹ Appellants asserted a counterclaim based on South Carolina's appraisal statutes but Appellants did not raise any issue as to this counterclaim on appeal and, therefore, have waived any ability to challenge the issue on appeal.

8. The Plaintiff has refused to modify the interest rate on the loan, refused to amortize the note and reduce the amount of the loan payments, and has refused to assist in short sales.

9. While the Plaintiff has refused to cooperate, I have always complied with the Plaintiff's requests in turning over tax documents and taking the property off the market at the Plaintiff's request.

10. Based on my current economic situation, my family and I may be forced to move into the home and use it as our primary residence on a full-time basis.

[Affidavit of Lalla ¶¶ 4-10; R. 228-29].

Three Affidavits were also submitted by Jason Bristol ("Bristol"), an employee of TD Bank, prior to the initial hearing on the matter on appeal before the Master-in-Equity. [Affidavit of Bristol; R. 209; Supplemental Affidavit of Bristol; R. 226; Second Supplemental Affidavit of Bristol; R. 230]. Bristol's Affidavits set forth his former role as a vice president and commercial loan officer with Carolina First Bank, his current role as Vice-President and manager of the subject loan with TD Bank, Dr. Lalla's execution of the Note, the Appellants' execution of the Mortgage, the default on the loan, and TD Bank's status as owner and holder of the Note and Mortgage as successor by merger with Carolina First Bank. [Affidavit of Bristol ¶¶ 1-2 and 5-8; R. 209-10; Supplemental Affidavit of Bristol ¶¶ 1 and 3; R. 226-27; Second Supplemental Affidavit of Bristol ¶¶ 1 and 3; R. 230].

On December 12, 2012, a foreclosure hearing was held before The Honorable Joe M. Crosby, as Master-in-Equity for Georgetown County, without a jury. Bristol testified on TD Bank's behalf. Specifically, Bristol testified that:

- He is a vice-president and regional workout officer for TD Bank. [Transcript 4:25-5:4 and 13:2-3; R. 72-73 and 81]. As part of his role with TD Bank, he has overseen and managed the Lalla loan since June 2011. [Transcript 4:25-5:15 and 70:21-23; R. 72-73 and 138];
- Dr. Lalla executed the Note in favor of Carolina First Bank on November 13, 2006. [Transcript 21:24-22:12; R. 89-90]. The loan was in the amount of \$680,000 and had an interest rate of 6.94%. [Transcript 31:21-32:2, 37:3-7, and 37:14-16; R. 99-100 and 105];
- TD Bank is in possession of the original Note. [Transcript 22:10-16; R. 90]. TD Bank moved to introduce a copy of the Note into evidence but it was excluded on Appellants' objection based on the best evidence rule because the original is in existence but was not placed into evidence. [Transcript 22:17-30:8; R. 90-98]. The copy of the Note was admitted as a court's exhibit for identification purposes. [Transcript 30:20-24; R. 98];
- Dr. and Mrs. Lalla executed the Mortgage in favor of Carolina First Bank for the Property to secure the Note. [Transcript 30:10-15, 31:19-25, 33:12-14, and 42:14-18; R. 98-99, 101, and 110]. A copy of the Mortgage was admitted into evidence without objection. [Transcript 30:16-31:17; R. 98-99];

- Dr. Lalla made regular monthly payments in the amount of \$5,250 on the loan for approximately four years with his last monthly payment being made July 9, 2010. [Transcript 37:8-25 and 39:11-13; R. 105 and 107]. A copy of Dr. Lalla's payment history was admitted into evidence over Appellants' objection. [Transcript 33:18-36:25; R. 101-04];
- Carolina First Bank merged with TD Bank in September 2010, at which time Carolina First ceased to exist and TD Bank became the owner and holder of the Note and Mortgage. [Transcript 7:7-14, 13:4-5, 19:16-18, 20:10-13, and 75:18-20; R. 75, 81, 87-88, and 143]. Bristol has dealt with Dr. Lalla concerning this loan, and Dr. Lalla has never expressed any concern to him about TD Bank being the owner and holder of the Note and Mortgage. [Transcript 70:24-71:18; R. 138-39]. The Master-in-Equity was asked to take judicial notice of the effect of the merger pursuant to S.C. Code § 34-3-850(D). [Transcript 69:21-70:7; R. 137-38];
- The loan subsequently matured November 13, 2011, and would have been due and payable in full at that time. [Transcript 32:3-13 and 38:12-15; R. 100 and 106];
- Because Dr. Lalla has not made any payment since July 9, 2010, and the loan matured November 13, 2011, the loan is in default. [Transcript 37:23-38:2 and 39:5-13; R. 105-07];

- As of December 10, 2012, Dr. Lalla owed \$740,267.44 in principal, interest, late fees, and appraisal fees, as well as \$25,584.40 in attorneys' fees and costs. [Transcript 39:14-40:13; R. 107-08]; and
- TD Bank sought a judgment for the full amount of the debt and attorneys' fees and costs, the foreclosure sale of the Property, and the entry of a deficiency judgment in the event the foreclosure sale did not satisfy the indebtedness. [Transcript 40:14-41:21; R. 108-09]. Appellants' counsel admitted that a deficiency judgment "has in fact been requested." [Transcript 40:24-41:6; R. 108-09].

Appellants did not appear at the hearing, and Appellants' counsel did not present any witnesses, introduce any exhibits, or present any evidence at all. [Transcript 77:25-78:2; R. 145-46].

At the conclusion of the hearing, the Master-in-Equity asked the parties to submit additional information on the ability of TD Bank to proceed on the Note. [Transcript 78:14-21, 79:8-11, and 85:20-88:14; R. 146-47 and 153-56]. TD Bank's post-hearing Memorandum noted TD Bank had presented sufficient testimony to establish its claim for relief and Appellants had not put forward any witnesses or evidence to contradict that testimony. [Post-Trial Memorandum; R. 234]. The post-hearing Memorandum noted that the introduction of a promissory note is not required to enforce the note; that a borrower's signature on a note is presumed to be genuine; and that a borrower lacks standing to challenge the assignment of a loan. [Post-Trial Memorandum; R. 234].

On May 10, 2013, the Master-in-Equity issued a Final Order. [Final Order; R. 3]. The Master-in-Equity found that because the copy of the Note had been excluded based

on the best evidence rule, he could not consider the terms of the Note or determine Appellants' liability on the Note. [Final Order pp. 3-4; R. 5-6].² The Master-in-Equity further found that TD Bank had not established that it is the owner and holder of the Note. [Final Order pp. 4-7; R. 6-9]. Specifically, the Master-in-Equity noted that "there is nothing to indicate there has been a lawful merger of [TD] and the entity known as Carolina First Bank." [Final Order p. 5; R. 7]. However, Appellants—again, contradictorily—advised the Master-in-Equity that they consented to the foreclosure of the Mortgage "in satisfaction of all claims of [TD] and in satisfaction of any claims of any of its affiliated companies such as Carolina First Bank" but "object to any deficiency judgment." [Final Order pp. 7-8; R. 9-10]. As a result, the Master-in-Equity ordered the foreclosure sale of the Property but refused to enter any deficiency judgment against Dr. Lalla. [Final Order pp. 7-8; R. 9-10].

On June 7, 2013, TD Bank timely filed a Motion to Alter or Amend the Final Order, submitting that the Master-in-Equity had failed to appropriately consider certain facts before him and also misapplied the governing law. [Motion to Alter or Amend; R. 239]. As it did in the post-hearing Memorandum, TD Bank again noted it had presented sufficient testimony to establish its claim for relief and Appellants had not put forward any witnesses or evidence to contradict that testimony. [Motion to Alter or Amend; R. 239]. Again, TD Bank noted that the introduction of a promissory note is not required to enforce the note; that a borrower's signature on a note is presumed to be genuine; and that a borrower lacks standing to challenge the assignment of a loan. [Motion to Alter or

² Although the Note was not admitted into evidence, the Master-in-Equity noted it had reviewed the Note. [Final Order p. 4; R. 6].

Amend; R. 239]. Finally, TD Bank noted that in addition to Bristol's testimony, the Master-in-Equity could take judicial notice of the public records available at the Secretary of State's Office demonstrating that Carolina First Bank merged into TD Bank and attached the documentation of same. [Motion to Alter or Amend; R. 239].

An additional hearing was held by telephone on the Motion to Alter or Amend on October 13, 2014. On February 4, 2015, the Master-in-Equity granted TD Bank's Motion to Alter or Amend and vacated his Final Order entirely ("Amended Order"). [Amended Order; R. 12]. The Amended Order held that a copy of the Note was admissible and Dr. Lalla's signature was presumed to be genuine, which was not contradicted. [Amended Order p. 3; R. 14]. The Amended Order also held that TD Bank established it is the holder of the Note by introducing a copy of the Note and Bristol's testimony which was not contradicted. [Amended Order p. 2; R. 13]. The Master-in-Equity noted the additional supporting public records from the Secretary of State's office regarding the merger of Carolina First Bank into TD Bank. [Amended Order p. 2; R. 13]. Finally, the Amended Order found that TD Bank established Dr. Lalla had defaulted on the Note. [Amended Order pp. 4-5; R. 15-16]. Accordingly, the Master-in-Equity ruled that TD Bank is entitled to a judgment for foreclosure and sale of the mortgaged property and the entry of a judgment against Dr. Lalla. [Amended Order pp. 4-7; R. 15-18].

On February 19, 2015, the Master-in-Equity signed a Form 4 Judgment entering judgment in the amount of \$765,851.84 against Dr. Lalla. [Form 4; R. 21].³

³ The Form 4 also mistakenly entered judgment against Mrs. Lalla. This was a clerical error. The judgment is only against Dr. Lalla per the Amended Order. Accordingly, a corrected Form 4 has been submitted to the Master-in-Equity to remedy this clerical error. [Letter to Crosby dated June 18, 2015; R. 250].

On February 17, 2015, Appellants filed their Notice of Appeal of the Amended Order. On May 28, 2015, Appellants filed their initial brief. This brief follows.

ARGUMENT

The Master-in-Equity correctly ruled that TD Bank is entitled to a judgment for foreclosure and sale and a deficiency judgment in this matter. TD Bank met its burden of proof on its claim at trial, and Appellants failed to put forth any evidence to refute TD Bank's claim or to support their counterclaim. Dr. Lalla's Affidavit corroborates TD Bank's allegations. Further, TD Bank's post-hearing Memorandum, requested by the Master-in-Equity, did not contain any new issues or evidence which had not yet been raised to the Master-in-Equity—only matters of indisputable public record. Therefore, this Court should affirm the Master-in-Equity's order granting TD Bank's request for a judgment of foreclosure and sale and a deficiency judgment against Dr. Lalla.

I. The Master-in-Equity properly found that TD Bank met its burden of proof on its claim for relief.

A. The Master-in-Equity properly admitted a copy of the Note.

Appellants argue the Master-in-Equity ignored the best evidence rule by admitting a copy of the Note into evidence. Appellants' Brief pp. 5-8. However, the Master-in-Equity properly admitted a copy of the Note into evidence pursuant to South Carolina law.

Because the foreclosure hearing in this matter was heard by the Master-in-Equity without a jury, all evidence introduced should have been admitted and evaluated. "A trial judge's role in a bench trial is to admit all evidence and then evaluate it in a non-jury setting." *Brown v. Allstate Ins. Co.*, 344 S.C. 21, 27, 542 S.E.2d 723, 726 (2001). "[U]nder *Brown v. Allstate*, the role of the circuit court [in a bench trial is] to admit all

evidence, admissible or inadmissible, and then evaluate it as the fact finder.” *Lucas v. Vanover*, No. 2006-UP-233, 2006 WL 7286027, at *4 (S.C. Ct. App. Apr. 27, 2006). Therefore, the Master-in-Equity properly admitted a copy of the Note—and all other evidence or testimony objected to by Appellants’ counsel in this matter—into evidence as the fact-finder in a bench trial setting.

Moreover, South Carolina Code § 19-5-610 provides that any “photographic, photostatic, microfilm, microcard, miniature photographic or other process which accurately reproduces or forms a durable medium” is “as admissible in evidence as the original itself in any judicial or administrative proceeding whether the original is in existence or not.” S.C. Code Ann. § 19-5-610. South Carolina courts have specifically held that a copy of a note is competent evidence to establish the existence of the note. *See Bank of America, N.A. v. Draper, et al.*, 405 S.C. 214, 746 S.E.2d 478 (Ct. App. 2013) (relying on the copy of the note to establish its existence). Hence, the copy of the note provided at trial was properly admitted into evidence.

As Appellants admit, the best evidence rule only prohibits the admission of a duplicate in lieu of an original where “a **genuine** question is raised as to the authenticity of the original.” Rule 1003, South Carolina Rules of Evidence (emphasis added); *see also* Appellants’ Brief p. 6. Appellants did not put forth any evidence at trial to raise an issue as to the authenticity of the Note. Instead, Appellants rely on their denial of the execution of the Note in their Answer. Appellants’ Brief p. 6. However, Appellants’ mere denial in their pleadings is insufficient to raise a genuine question as to the authenticity of the Note. *See State v. Fripp*, 396 S.C. 434, 439, 721 S.E.2d 465, 467 (Ct. App. 2012) (“Federal authority construing the identical...Federal Rule[] of Evidence is

instructive.”); *United States v. Harris*, 898 F.2d 148, *5 (4th Cir. 1990) (unpublished table decision) (The opponent to the admissibility of the duplicate “bears the burden of demonstrating a genuine issue as to the trustworthiness of the duplicate.”); *Gadberry v. Rental Serv. Corp.*, No. CA 0:09-3327-CMC, 2011 WL 767034, at *2 (D.S.C. Jan. 21, 2011) *report and recommendation adopted sub nom. Gadberry v. Rental Servs. Corp.*, No. CA 0:09-3327-CMC-PJG, 2011 WL 766991 (D.S.C. Feb. 24, 2011) (holding that, under Fed. R. Evid. 1003, the opponent to the admissibility of the duplicate must raise a “genuine question as to the authenticity of the original” and cannot rely on an “unsupported attack on the authenticity”); 32A C.J.S. Evidence § 1357 (“The burden of showing that a genuine issue as to the authenticity of the original writing or document exists . . . is on the party opposing the duplicate’s admission into evidence. An opponent to the admissibility of a duplicate must make more than a mere allegation regarding a lack of authenticity of an original writing or document; instead, the party opposing admission must show specific facts or circumstances that raise a reasonable question regarding the authenticity of the original.”). In addition, Dr. Lalla subsequently submitted an Affidavit in which he confirmed the existence of the Note. [Affidavit of Lalla; R. 228]. Therefore, there was no genuine question as to the authenticity of the original Note and the best evidence rule did not bar the admission of a copy of the Note in lieu of the original.

B. TD Bank sufficiently established the existence of Dr. Lalla’s Note.

Appellants seem to argue TD Bank failed to prove the existence of Dr. Lalla’s Note because the original was not presented at the final foreclosure hearing. Appellants’ Brief pp. 5-8. However, as set forth above, a copy of the Note was properly admitted in

lieu of the original and considered by the Master-in-Equity. Further, TD Bank sufficiently established the existence of the Note by Bristol's testimony at trial. As set forth in more detail in the Counter-Statement of the Case above, Bristol testified as to Dr. Lalla's execution of the Note and Dr. Lalla's four-year payment history on the Note. [Transcript 21:24-22:12; 37:8-25, and 39:11-13; R. 89-90, 105, and 107]. Again, Appellants did not put forth any evidence at trial to refute Bristol's testimony, and Dr. Lalla's own Affidavit establishes the existence of the Note. [Affidavit of Lalla; R. 228]. Therefore, TD Bank sufficiently proved the existence of Dr. Lalla's Note.

C. TD Bank sufficiently established that it is the owner and holder of the Note.

Appellants next argue TD Bank failed to prove its ownership of the Note. Appellants' Brief pp. 8-10. Appellants incorrectly assert that there was no documentation of any merger between Carolina First Bank and TD Bank nor any assignment of the Note or Mortgage offered at trial. Appellants' Brief pp. 8-10. Appellants mischaracterize Bristol's testimony and assert that he testified there was no such merger and that he did not have knowledge of such merger. Appellants' Brief pp. 8 and 11-12. This is not accurate and is not supported by the record.

Bristol testified Carolina First Bank merged with TD Bank in September 2010, at which time Carolina First Bank ceased to exist and TD Bank became the owner and holder of the Note and Mortgage. [Transcript 7:7-14, 13:4-5, 19:16-18, 20:10-13, and 75:18-20; R. 75, 81, 87-88, and 143]. Bristol's testimony refers to the public nature of the merger of Carolina First Bank into TD Bank, and he specifically testified that he has seen the merger certificates and titles associated with the merger. [Transcript 52:4-8 and 55:23-56:4; R. 120 and 123-24]. Bristol testified that he has overseen and managed the

Lalla loan since June 2011 as part of his role with TD Bank. [Transcript 4:25-5:15 and 70:21-23; R. 72-73 and 138]. Finally, Bristol testified that TD Bank is in possession of the original Note. [Transcript 22:10-16; R. 90]. This testimony is sufficient to establish that Carolina First Bank merged into TD Bank and that TD Bank is now the owner and holder of the Note as a result. Again, Appellants did not put forth any evidence at trial to refute Bristol's testimony, and Dr. Lalla's own Affidavit establishes TD Bank's role as owner and holder of the Note. [Affidavit of Lalla; R. 228].

Additionally, the Master-in-Equity was asked to take judicial notice of the merger's legal effect pursuant to S.C. Code § 34-3-850(D), which provides that the rights of the merging bank are transferred to and vested in the surviving bank at the time of merger "without any deed or other transfer." [Transcript 69:21-70:7; R. 137-38]. The fact of the merger was established before the Master-in-Equity as the merger is "not subject to reasonable dispute" because it is both "generally known within the territorial jurisdiction of the trial court" and is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Rule 2001(b), South Carolina Rules of Evidence. The merger is a matter of public record on file with the Office of the Secretary of State for South Carolina,⁴ the Federal Reserve,⁵ and the Federal

⁴ See <http://www.sos.sc.gov/index.asp?n=18&p=4&s=18&corporateid=157053>; see also Articles of Merger filed September 30, 2010, with the South Carolina Secretary of State's Office with Agreement and Plan of Merger, stating in part:

Agreement and Plan of Merger, dated as of August 26, 2010, between Carolina First Bank (the "Bank") and TD Bank, National Association ("TD Bank, N.A.").

...

Deposit Insurance Corporation.⁶ Additionally, there are over 100 foreclosure actions pending by or foreclosure judgments entered in favor of TD Bank, N.A., as successor by merger to Carolina First Bank, in Georgetown, Horry, Charleston, Richland, and Greenville Counties alone. The Master-in-Equity properly found that TD Bank is the successor in interest by merger with Carolina First Bank and, as such, has the right to enforce the Note pursuant to S.C. Code § 34-3-850(D) without the need for any assignment of the Note or Mortgage.

1. The Merger. Subject to the terms and conditions of this Agreement and Plan of Merger, at the Effective Time . . . , the Bank shall merge with and into TD Bank, N.A. (the “Merger”) under the laws of the United States and the State of South Carolina, the separate corporate existence of the Bank shall cease and TD Bank, N.A. shall survive and continue to exist as a corporation incorporated under the laws of the United States (TD Bank, N.A., as the surviving corporation in the Merger, sometimes being referred to herein as the “Surviving Bank”).

...

7. Effects of the Merger.

(a) Upon consummation of the Merger, and in addition to the effects under applicable law, including without limitation 12 U.S.C. § 215(a),

(1) all rights, franchises and interests of the Bank in and to every type of property (real, personal and mixed), tangible and intangible, and choses in action shall be transferred to and vested in the Surviving Bank by virtue of the Merger without any deed or other transfer, and the Surviving Bank, without any order or other action on the part of any court or otherwise, shall hold and enjoy all rights of property, franchises and interests . . . in the same manner and to the same extent as such rights, franchises and interests were held or enjoyed by the Bank immediately prior to the Effective Time . . .

⁵See

https://www.ffiec.gov/nicpubweb/nicweb/InstitutionHistory.aspx?parID_RSSD=310727&parDT_END=99991231.

⁶ See https://www2.fdic.gov/idasp/confirmation_outside.asp?inCert1=26849.

D. TD Bank sufficiently established Dr. Lalla's payment history on the Note.

Finally, Appellants assert it was an error of law for the Master-in-Equity to have admitted Bristol's testimony regarding the payment history based on his alleged lack of knowledge. Appellants' Brief p. 11. Again, "[a] trial judge's role in a bench trial is to admit all evidence and then evaluate it in a non-jury setting." *Brown v. Allstate Ins. Co.*, 344 S.C. 21, 27, 542 S.E.2d 723, 726 (2001). Further, the Master-in-Equity properly found Bristol qualified to testify regarding the payment history because Bristol testified that he is a regional workout officer for TD Bank, which involves managing a loan portfolio including the subject loan, and the custodian of records for the subject loan. [Transcript 5:2-18; R. 73]. Bristol's testimony was sufficient to demonstrate his personal knowledge of the payment history for the loan, and his testimony was admissible pursuant to Rule 602 of the South Carolina Rules of Evidence.

Appellants also assert it was an error of law for the Master-in-Equity to admit the payment history for the Note into evidence because it was printed from a computer. Appellants' Brief p. 11. Again, because this was a bench trial, the Master-in-Equity should have admitted all evidence for him to evaluate as the fact-finder. *See Brown v. Allstate Ins. Co.*, 344 S.C. 21, 27, 542 S.E.2d 723, 726 (2001). Furthermore, the Master-in-Equity properly admitted this evidence pursuant to Rules 803(6) and 1001(3) of the South Carolina Rules of Evidence because Bristol authenticated the payment history and testified it was a print copy of an electronic database maintained in the regular course of business. [Transcript 33:18-36:25; R. 101-04].

E. TD Bank did not waive its claim for a deficiency judgment.

Appellants argue TD Bank waived its request for a deficiency judgment and mischaracterize Bristol's testimony at trial to support their argument. Appellants' Brief pp. 14-15. TD Bank's Complaint sought a monetary judgment against Dr. Lalla. [Complaint ¶¶ 19-22 and 27; R. 34-35]. Bristol specifically testified at trial—and Appellants' counsel confirmed—that TD Bank sought a deficiency judgment in this matter:

Q. And in the event that the foreclosure sale of that property does not bring enough to satisfy the bank's indebtedness, is the bank asking that a deficiency judgment be entered against Dr. Lalla?

MR. MOORE: Objection, please, Your Honor. I believe the documents - - the complaint speaks for itself and has in fact been requested.

THE COURT: Well, I think he can answer that question.

A. The bank has, yes.

[Transcript 40:24-41:9, 41:18-21, and 74:13-75:16; R. 108-09 and 142-43]. Therefore, the Master-in-Equity properly entered a deficiency judgment against Dr. Lalla in this matter, and this Court should affirm the Master-in-Equity's ruling.

As argued throughout Section I, TD Bank met its burden of proof at trial on its claim for foreclosure of its Mortgage and entry of a deficiency judgment against Dr. Lalla. Bristol's testimony established the existence of Dr. Lalla's Note, TD Bank's ownership of the Note, and Dr. Lalla's default on the Note. This testimony was without contradiction or any competing evidence from Appellants. In fact, the existence of the Note and TD Bank's ownership of the Note was corroborated by Dr. Lalla's Affidavit. Therefore, the Master-in-Equity properly found that TD Bank is entitled to a judgment

for foreclosure and sale of the mortgaged property and a deficiency judgment against Dr. Lalla, and this Court should affirm the Master-in-Equity's ruling.

II. The Master-in-Equity properly found that Appellants failed to meet their burden of proving their counterclaim.

Appellants next argue that the Master-in-Equity failed to consider the basis for their counterclaim—namely, that “[t]he property in question is residential and the Plaintiff has not complied with the regulations in regard to negotiating a modification of the note and mortgage.” Appellants’ Brief p. 12 (*citing* Answer and Counterclaim ¶ 15). Appellants assert that the subject property is a primary residence and, therefore, is protected under the Home Affordable Modification Program. Appellants’ Brief p. 13.

However, Appellants did not put forth any evidence at trial to support this counterclaim or their allegation that the subject property is their primary residence. Bristol’s trial testimony established that the subject property is rental property. [Transcript 32:20-33:11, 61:3-7, and 72:14-74:12; R. 100-01, 129, and 140-42]. In fact, Dr. Lalla’s own Affidavit establishes that the property is *not* Appellants’ primary residence. [Affidavit of Lalla ¶¶ 4 and 10; R. 228-29].

In any event, there is no private cause of action to enforce HAMP. *See, e.g., Steffens v. Am. Home Mortg. Serv., Inc.*, 2011 U.S. Dist. LEXIS 26586, at *5-6 (D.S.C. Jan. 5, 2011), *report and recommendation adopted by* 2011 U.S. Dist. LEXIS 26709 (D.S.C. Mar. 15, 2011) (“The defendant first argues that plaintiff’s claims should be dismissed because they are all based upon HAMP and related legislation and laws, and borrowers have no private cause of action under those statutes. This court agrees.”); *see also Watkins v. Flagstar Bank, FSB*, 2012 U.S. Dist. LEXIS 67978 (D.S.C. Apr. 12, 2012) (recognizing that “HAMP does not provide for a private cause of action”).

Therefore, the Master-in-Equity properly entered judgment in favor of TD Bank, and this Court should affirm the Master-in-Equity's ruling.

III. The Master-in-Equity properly considered matters of public record submitted before the issuance of a final order in this foreclosure action.

A. The Motion to Alter or Amend did not present new issues to the Master-in-Equity.

Appellants argue TD Bank improperly raised the issues of presumption, standing, and estoppel for the first time in its Motion to Alter or Amend. Appellants' Brief pp. 3-4. However, presumption and standing were expressly addressed in the post-hearing Memorandum submitted by TD Bank at the Master-in-Equity's request at the conclusion of the foreclosure hearing and prior to the Master-in-Equity's entry of any ruling. [Post-Trial Memorandum pp. 2 and 3; R. 235-36]. Therefore, the Master-in-Equity properly considered these arguments in issuing his ruling in this matter. *See PPG Indus., Inc. v. Orangeburg Paint & Decorating Ctr., Inc.*, 297 S.C. 176, 183, 375 S.E.2d 331, 334-35 (Ct. App. 1988) ("A trial judge, until final judgment, controls the trial of the case before him, and as a general rule may amend, correct, modify, or otherwise change its findings of fact and conclusions of law before entry of judgment or decree.").

Moreover, the Master-in-Equity did not rely upon TD Bank's estoppel argument in its Amended Order. Therefore, Appellants have not been aggrieved by any ruling on this issue and there is no ruling on the issue from which to appeal. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (holding that an issue must have been "ruled upon by the trial court to be preserved for appellate review.").

B. The Motion to Alter or Amend did not present new evidence to the Master-in-Equity.

Appellants also argue TD Bank improperly submitted additional evidence in its

Motion to Alter or Amend. Appellants' Brief pp. 4-5. Presumably, Appellants refer to the public documentation from the Office of the Secretary of State for South Carolina showing that TD Bank merged with Carolina First Bank which was attached to TD Bank's Motion to Alter or Amend. [Motion to Alter or Amend p. 4 and Ex. A; R. 242 and 246].

Again, the Master-in-Equity properly considered this documentation as the fact-finder in a bench trial setting. *Brown v. Allstate Ins. Co.*, 344 S.C. 21, 27, 542 S.E.2d 723, 726 (2001). Furthermore, the Master-in-Equity properly took judicial notice of this public record as TD Bank had requested prior to its Motion to Alter and Amend. [Transcript 69:21-70:7; R. 137-38]. Because this is public information available on the Secretary of State's website,⁷ it is subject to judicial notice. Rule 201(b), South Carolina Rules of Evidence; *see also Pizarro v. McDonald's Rest.*, No. CA 6:12-1440-JMC-KFM, 2012 WL 2675442, at *4 (D.S.C. June 20, 2012) *report and recommendation adopted*, No. 6:12-CV-01440-JMC, 2012 WL 2675358 (D.S.C. July 6, 2012) *aff'd*, 491 F. App'x 426 (4th Cir. 2012) (taking judicial notice of business filings on the S.C. Secretary of State's website); *see also Boyd v. Bellsouth Tel. Tel. Co.*, 369 S.C. 410, 423, 633 S.E.2d 136, 143 (2006). The Master-in-Equity was not considering any new evidence; he was merely considering publicly filed information of which he is permitted to take judicial notice.

Appellants cite *Johnson v. Johnson* for the proposition that "[a] judge may not, after all testimony has been taken, receive additional *contested evidence* without reopening the case." 288 S.C. 270, 274, 341 S.E.2d 811, 814 (Ct. App. 1986) (emphasis

⁷ See <http://www.sos.sc.gov/index.asp?n=18&p=4&s=18&corporateid=157053>.

added). However, the public records of our Secretary of State cannot be considered “contested evidence.” To the contrary, the merger of Carolina First Bank into TD Bank is not subject to reasonable dispute and, therefore, the Master-in-Equity properly took judicial notice of the merger.

Moreover, the Master-in-Equity did not rely solely on the merger documentation from the Secretary of State. The Master-in-Equity relied mainly on Bristol’s testimony regarding the merger and noted the documentation as an additional basis for its ruling. [Amended Order p. 2; R. 13]. Because Bristol’s testimony is sufficient to establish the merger of Carolina First Bank into TD Bank, this Court may affirm the Master-in-Equity’s ruling on that ground alone. *See* 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.”).

CONCLUSION

For the foregoing reasons, TD Bank respectfully requests this Court affirm the Master-in-Equity’s ruling that TD Bank is entitled to foreclosure and sale of the subject mortgage and a deficiency judgment against Dr. Lalla.

<signature block next page>

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: Tara C. Sullivan

Thomas William McGee, III, SC Bar No. 11317

E-Mail: billy.mcgee@nelsonmullins.com

A. Mattison Bogan, SC Bar No. 72629

E-Mail: matt.bogan@nelsonmullins.com

Tara C. Sullivan, SC Bar No. 79806

E-Mail: tara.sullivan@nelsonmullins.com

1320 Main Street / 17th Floor

Post Office Box 11070 (29211-1070)

Columbia, SC 29201

(803) 799-2000

Attorneys for Respondent TD Bank, N.A., successor
by merger to Carolina First Bank, N.A.

Columbia, South Carolina

August 5, 2015.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

The Honorable Joe M. Crosby, Master-in-Equity

Case No. 2011-CP-22-00342

Appellate Case No. 2015-000295

RECEIVED

AUG 05 2015

SC Court of Appeals

TD Bank, N.A., successor by merger to Carolina First
Bank, N.A., ... Respondent,

v.

Sunil V. Lalla and Sharon W. Lalla, ... Appellants.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with
Rule 211(b), SCACR.

[Signature Page Follows]

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: Tara C. Sullivan
Thomas William McGee, III, SC Bar No. 11317
E-Mail: billy.mcgee@nelsonmullins.com
A. Mattison Bogan, SC Bar No. 72629
E-Mail: matt.bogan@nelsonmullins.com
Tara C. Sullivan, SC Bar No. 79806
E-Mail: tara.sullivan@nelsonmullins.com
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

Attorneys for Respondent TD Bank, N.A., successor
by merger to Carolina First Bank, N.A

Columbia, South Carolina

August 5, 2015.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas
Honorable Joe M. Crosby, Master-in-Equity

Case No. 2011-CP-22-00342
Appellate Case No. 2015-000295

RECEIVED

AUG 05 2015

SC Court of Appeals

TD Bank, N.A., successor by merger to Carolina First
Bank, N.A., ... Respondent,

v.

Sunil V. Lalla and Sharon W. Lalla, ... Appellant.

PROOF OF SERVICE

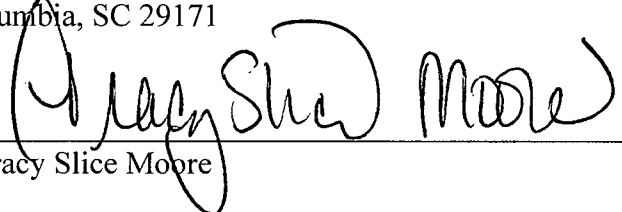
I, the undersigned Paralegal of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for TD Bank, N.A., successor by merger to Carolina First Bank, N.A., do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings:

Final Brief of Respondent
Certificate of Counsel, Rule 211(b), SCACR

Counsel Served:

S. Jahue Moore, Esquire
Moore Taylor & Thomas, PA
Post Office Box 5709
West Columbia, SC 29171


Tracy Slice Moore

August 5, 2015