THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas Case No. 2012-CP-02-00695
Referee James Martin Harvey, Jr.

APPELLATE CASE NO. 2015-001119

BANK OF AMERICA, N.A., SUCESSOR BY MERGER TO BAC HOME LOANS SERVICING, LP fka COUNTRYWIDE HOME LOANS SERVICING, LP,

Respondent

v.

CAROLYN DEANER,

Appellant.

INITIAL BRIEF OF RESPONDENT BANK OF AMERICA, N.A.

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FACTUAL AND PROCEDURAL SUMMARY

This foreclosure action was instituted by Respondent Bank of America, N.A. ("BANA") on March 19, 2012. (Compl. filed Mar. 19, 2012.) Upon filing the original Complaint, BANA sent to Defendant Carolyn Deaner ("Deaner") a Notice of Foreclosure Intervention pursuant to S.C. Supreme Court Administrative Order 2011-05-02-01 (*see* Notice of Forecl. Interv.), and Deaner filed a response requesting foreclosure intervention review on May 31, 2012. (Accept. of Forecl. Interv.) Accordingly, the case was continued while Deaner underwent foreclosure intervention review. On April 9, 2013, Deaner's application for a loan modification was denied because Deaner did not qualify for a loan modification or loss mitigation due to an inability to create an affordable payment under the program requirements and guidelines. (Notice of Denial of Loan Mod. or Other Means of Loss Mit.) Thereafter, Deaner proceeded to file a series of answers and related motions and objections contesting, *inter alia*, the validity of the mortgage lien and BANA's standing to prosecute the foreclosure action. (*See, e.g.*, Ans. to Am. Compl. filed July 3, 2013; Am. Mot. to Dismiss filed Aug. 2, 2013; Memo. in Supp. of Am. Mot. to Dismiss filed Sept. 20, 2013; Ans. to Orig. Compl., Aff. Def. and Counter. filed Dec. 23, 2013.)

Prior to the filing of this foreclosure action, Deaner filed a voluntary Chapter 7 bankruptcy petition in the Southern District of Georgia on March 4, 2011, and Deaner was discharged from bankruptcy and the action closed on January 17, 2012. (*See* Order Granting Pl.'s Mot. for Summ. Judg. filed Mar. 27, 2014.) Deaner listed BANA's predecessor in interest and the Property in her bankruptcy petition, acknowledging that the mortgage loan at issue in this case was a valid first mortgage lien, and Deaner attested that she had no counterclaims or rights to setoff claims to declare in the bankruptcy action. (*See* Order Granting Pl.'s Mot. for Summ. Judg. filed Mar. 27, 2014; Aff. of V. Hartley.) Accordingly, the Special Referee granted summary judgment in favor of BANA as to the Counterclaims and Affirmative Defenses

asserted by Deaner in light of the attestation contained in Deaner's prior bankruptcy petition. (*See* Order Granting Pl.'s Mot. for Summ. Judg.)

On August 28, 2014, BANA filed an Amended Complaint. (Am. Compl. filed Aug. 28, 2014.) On September 8, 2014, Deaner filed an Answer, Affirmative Defenses and Counterclaim to the Amended Complaint, alleging, *inter alia*, that BANA lacks standing to maintain the foreclosure action; the Assignment of the Note and Mortgage by MERS to BANA was invalid; ownership of the Note and Mortgage were "split," thereby causing the debt to become unsecured and, therefore, discharged in Deaner's Chapter 7 bankruptcy; and that BANA had failed to demonstrate an agency relationship with the original lender or the owner of the Note. (Def.'s Answer, Aff. Def. and Countercl. to Am. Compl. filed Sept. 8, 2014.) BANA filed a Reply to Deaner's Counterclaim on September 17, 2014. (Pl.'s Reply to Def.'s Am. Answer and Countercl.)

On February 4, 2015, a trial on the merits was held before the Special Referee, and the Honorable J. Martin Harvey, issued a final Judgment of Foreclosure and Sale in favor of BANA as to its foreclosure action and the counterclaim asserted by Deaner on February 25, 2015. (Judgment of Forecl. and Sale.) On March 16, 2015, Deaner submitted a Motion to Reconsider Judgment. (Mot. to Reconsider.) A hearing was held on Deaner's Motion to Reconsider on March 23, 2015, and the Special Referee denied Deaner's Motion to Reconsider Judgment on April 1, 2015. (Order Denying Pl.'s Mot to Reconsider.) Deaner then filed a Notice of Appeal on May 7, 2015, from the Trial Court's April 1, 2015 Order denying Deaner's Motion to Reconsider. (Notice of Appeal.)

STATEMENT OF FACTS

On or around June 26, 2007, Deaner executed a Fixed Rate Note (the "Note") in the amount of $97,600.00 in favor of Quicken Loans, Inc. ("Quicken Loans"). (Judgment of Foreel. and Sale, Finding of Fact No. 12; Trial Ex. 1.) That same day, Deaner also executed a Mortgage (the "Mortgage") on the property located at 704 Kershaw Drive, Aiken, South Carolina 29641 (the "Property"), which secured the Note and was delivered to Mortgage Electronic Registration Systems, Inc. ("MERS") as nominee for Quicken Loans. (Judgment of Foreel. and Sale, Finding of Fact No. 12; Am. Compl. ¶ 5; Trial Ex. 5.) The Mortgage was recorded in the Office of the Register of Deeds for Aiken County in Book 4149 at Page 773. (Judgment of Foreel. and Sale, Finding of Fact No. 13.) The Note and Mortgage were subsequently assigned to BAC Home Loans Servicing, LP f/k/a Countrywide Home Loans Servicing, LP on April 29, 2011 (the "Assignment"), and the Assignment was recorded in the Office of the Register of Deeds for Aiken County in Book 4356 at Page 932 on May 9, 2011. (Judgment of Foreel. and Sale, Finding of Fact No. 13; Trial Ex. 3.) Respondent BANA is the successor by corporate merger to BAC Home Loans Servicing, LP f/k/a Countrywide Home Loans Servicing, LP. Deaner failed to make the required payments under the Note, and the loan remained in default after July 1, 2010. (Judgment of Foreel. and Sale, Finding of Fact No. 16.) As of February 4, 2015, Deaner owed $94,178.44 in principal, $30,818.90 in interest, and $21,026.15 in other associated fees and costs related to the Mortgage. (Judgment of Foreel. and Sale, Finding of Fact No. 19.)

At trial, BANA presented the testimony of Diane Deloney ("Deloney"), an assistant vice president with the Mortgage Resolution Team at BANA. (Trial T. pp. 4-5.) Deloney testified that BANA is the loan servicer for Deaner's loan, and Fannie Mae is the investor for the loan. (Trial T. p. 5.) Deloney testified that BANA and its predecessors in interest began servicing

Deaner's loan within one or two months after origination. (Trial T. p. 25.) Deloney testified that she had personal knowledge of the records kept and maintained in connection with Deaner's loan as part of her job duties. (Trial T. pp. 5-6.) Deloney also testified as to the fact that the Note was endorsed in blank and that BANA was in physical possession of the original Note, which was present in the courtroom during the trial. (Trial T. p. 7.) The Note and the Mortgage were admitted into evidence without objection. (Trial T. pp. 8-9.) Deloney further testified that the Mortgage had been assigned from the original lender to BAC Home Loans Servicing, LP and that BANA is the successor by merger to BAC Home Loans Servicing, LP, formerly known as Countrywide Home Loan Servicing, LP. (Trial T. p. 9.) A copy of the Assignment was also admitted into evidence without objection. (Trial T. p. 10.)

Deloney testified that Deaner eventually failed to make her loan payments and that the loan went into default under the terms of the loan documents. (Trial T. pp. 9-10.) Deloney testified that the loan was due and owing for the July 2010 payment and all payments due and owing thereafter. (Trial T. p. 12.) A copy of the loan payment history was then admitted into evidence without objection. (Trial T. p. 12.)

Deloney then testified that an acceleration letter dated August 16, 2010, (the "Acceleration Letter") was sent to Deaner by first-class mail according to BANA's business records. (Trial T. pp. 13-14, 20, 24.) A copy of the Acceleration Letter was admitted into evidence without objection. (Trial T. p. 14.) Deloney testified that the Acceleration Letter was mailed to the address on file for sending loan-related notices to Deaner. (Trial T. p. 34.) Deaner provided no objection to this testimony regarding her mailing address. (Trial T. p. 34.) Deloney then provided a breakdown for the Court as to what the total amount due was on the loan. (Trial T. pp. 15-16.)

In closing arguments to the Court, counsel for Deaner stated that Deaner was *not* contesting BANA's standing to bring the foreclosure action. (Trial T. p. 46.) Rather, Deaner's trial counsel argued only that BANA, as servicer of the loan, had not proved that it sustained any damages with respect to the unpaid principal and interest on the loan. (Trial T. p. 46.) Deaner's trial counsel then focused his argument on the fact that BANA had not presented satisfactory evidence that the Acceleration Letter was mailed in accordance with the terms of the Mortgage. (Trial T. pp. 47-48.) Following the trial, on March 10, 2015, the Special Referee entered a final Judgment of Foreclosure and Sale in favor of BANA, finding, *inter alia*, that BANA was the real party in interest to prosecute the foreclosure action as both servicer of the loan and holder of the Note, that the witness's testimony supported a finding that the Acceleration Letter had been sent to Deaner in compliance with the terms of the Mortgage, and that Deaner had failed to cure the default on the loan resulting in a total damages amount of $145,023.49. (Judgment of Foreel. and Sale, Finding of Fact Nos. 15-16.)

After final judgment of foreclosure was granted in BANA's favor, Deaner filed a Motion to Reconsider Judgment, asserting that BANA had failed to prove at trial that it had sent a "right to cure" letter in conformity with the terms of the Mortgage. (Mot. to Reconsider.) On April 1, 2015, the Special Referee issued an Order denying Deaner's Motion to Reconsider after finding that the evidence and testimony presented at trial met BANA's burden of proof that notice of acceleration was properly given to Deaner pursuant to the terms of the Note and Mortgage. (Order Denying Def.'s Mot. to Reconsider.) Deaner then appealed the Special Referee's Order denying her Motion to Reconsider to this Court. (Notice of Appeal.) After filing her Notice of Appeal, Deaner filed additional motions with the court below, including a Motion to discharge the judgment debt due to her alleged "tender of payment." (Mot. to Discharge Due to Tender of

Pmt. Filed May 22, 2015.) Deaner's Motion to Discharge the debt was also denied by the Special Referee by Order entered June 1, 2015. (Order of Spec. Ref. filed June 1, 2015.)

Deaner's initial brief on appeal is rambling, incoherent, and presents no specific arguments on appeal.[1] At best, Deaner's initial brief appears to challenge the Special Referee's finding of fact following the February 4, 2015, trial that BANA had standing to prosecute the foreclosure action. (*See* Appellant's In. Br. pp. 7, 9-10, 12-14, 17, 32.) However, Deaner did not appeal from the final Judgment of Foreclosure and Sale. (*See* Notice of Appeal.) Rather, the only Order from which Deaner appealed, the Special Referee's April 1, 2015 Order, addressed the single issue presented in Deaner's Motion to Reconsider Judgment regarding the sufficiency of the evidence to support the Special Referee's finding that the Acceleration Letter was properly sent. (*See* Mot. to Reconsider; Order Denying Def.'s Mot. to Reconsider.) In her Initial Brief, Deaner also appears to challenge the Special Referee's June 1, 2015 Order, which rejected Deaner's argument that the debt should be discharged based on her alleged "tender" of an "International Promissory Note." (*See* Appellant's In. Br. p. 38.) Again, however, Deaner did not appeal from the Trial Court's June 1, 2015 Order. (*See* Notice of Appeal.) Therefore, the myriad issues regarding standing, securitization, and "tender" or payment that Deaner presents in her Initial Brief are not properly before this Court.

Even assuming, *arguendo*, that Deaner had preserved such arguments for appellate review, Deaner's arguments suffer from multiple fatal defects and are easily dismissed. First, South Carolina law is clear that the servicer of a mortgage loan, as well as the Note holder, has authority to prosecute a foreclosure action, and actual "ownership" of the Note and Mortgage is not required. Second, Deaner is judicially estopped from challenging the validity of the

[1] BANA notes that Deaner's initial brief should be rejected in its entirety for multiple violations of the appellate rules, and the fact that Deaner is now appearing *pro se* does not alter this result. *See Rule 208*, SCACR.

mortgage loan, as she represented under oath in her bankruptcy action that the subject mortgage loan was a valid first lien on the Property and that she had no counterclaims or claims in setoff. Third, Deaner's contentions that securitization of the Note and Mortgage rendered the debt invalid and/or unsecured and that MERS lacked authority to assign the Note and Mortgage to BANA is contrary to well-established South Carolina law and law from throughout the country. Fourth, Deaner's arguments regarding her alleged "tender" of the debt are nothing more than a sham and were properly dismissed by the Special Referee.

Finally, although Deaner does not appear to present any cogent argument that the Trial Court erred in denying her Motion to Reconsider Judgment, the sole Order from which Deaner has actually appealed, the Special Referee's finding of fact that BANA sent a notice of acceleration to Deaner in conformity with the terms of the Mortgage is properly supported by the evidence produced at trial. Accordingly, the Special Referee's final Judgment of Foreclosure and Sale and Order denying Deaner's Motion to Reconsider Judgment should be affirmed.

ARGUMENT

I. The Special Referee's finding of fact that BANA sent a notice of acceleration to Deaner in conformity with the terms of the Mortgage is properly supported by the evidence produced at trial.

As stated herein above, the only Order from which Deaner has appealed to this Court is the Special Referee's Order entered April 1, 2015, denying her Motion to Reconsider Judgment. (*See* Notice of Appeal.) Deaner's Motion to Reconsider asserted that the Acceleration Letter introduced at trial was not sent to the Property address as required under the terms of the Mortgage and that the Special Referee erred in finding and concluding that the notice was properly sent. (*See* Mot. to Reconsider.) In considering Deaner's Motion, the Special Referee found that the evidence and testimony presented at the trial was sufficient to meet BANA's burden of proof that the acceleration notice was properly given to Deaner pursuant to the terms

of the Mortgage. (*See* Order Denying Def.'s Mot. to Reconsider.) The Special Referee's finding and conclusion was proper in light of the evidence and testimony presented in this case.

Paragraph 15 of the Mortgage governs the parties' obligations with respect to giving notices. (*See* Trial Ex. 5, ¶ 15.) Pursuant to Paragraph 15 of the Mortgage, "[a]ny notice to Borrower in connection with this Security Instrument shall be deemed to have been given to Borrower when mailed by first class mail. . . . The notice address shall be the Property Address unless Borrower has designated a substitute notice address by notice to Lender." (Trial Ex. 5, ¶ 15.) At trial, BANA's corporate witness, Deloney, testified that the Acceleration Letter dated August 16, 2010, was sent to Deaner by first-class mail according to BANA's business records. (Trial T. pp. 13-14, 20, 24.) A copy of the Acceleration Letter, reflecting a first-class mailing bar code, was admitted into evidence without objection. (Trial T. pp. 14, 24; Tr. Ex. 6.) Deloney testified that the Acceleration Letter was mailed to the address on file for sending loan-related notices to Deaner. (Trial T. p. 34.) Deaner provided no objection to this testimony regarding her mailing address. (Trial T. p. 34.) Indeed, Deaner offered no evidence to rebut BANA's evidence that the Acceleration Letter was properly sent to Deaner's mailing address of record, aside from Deaner's self-serving testimony that she simply didn't receive the letter. (Trial T. p. 39.) Although Deaner testified that she "probably" could have paid the funds to cure the default reflected in the Acceleration Letter, Deaner admitted that she made no payments on the loan since June of 2010. (Trial T. pp. 39-41.)

In light of these facts, the Special Referee properly found and concluded that the evidence and testimony presented at trial was sufficient to meet BANA's burden of proof that the Acceleration Letter was properly sent to Deaner pursuant to the terms of the Mortgage.

Accordingly, the Special Referee's Order denying Deaner's Motion to Reconsider Judgment should be affirmed.

II. This Court lacks jurisdiction to consider Deaner's issues regarding standing, securitization, and her alleged "tender" of the debt.

The vast majority of Deaner's initial brief on appeal appears to challenge BANA's standing to prosecute the foreclosure action on multiple grounds, including that BANA did not prove "ownership" of the Note and Mortgage and that securitization of the Note and Mortgage and MERS's Assignment of the loan documents somehow rendered the Note and Mortgage invalid and/or unsecured. (*See generally* Appellant's In. Br.) Indeed, Deaner's initial brief appears to be an amalgamation of multiple filings by Deaner in the foreclosure action over the last two years. (*See, e.g.*, Ans. to Am. Compl. filed July 3, 2013; Am. Mot. to Dismiss filed Aug. 2, 2013; Memo. in Supp. of Am. Mot. to Dismiss filed Sept. 20, 2013.). Deaner also raises the issue in her Initial Brief that the Special Referee improperly rejected Deaner's argument that the debt should be discharged based on her alleged "tender" of an "International Promissory Note." (*See* Appellant's In. Br. p. 38.) However, none of these issues were raised in Deaner's Motion to Reconsider Judgment. (*See* Mot. to Reconsider.) Rather, these issues were addressed either at the February 4, 2015 trial and resulting Judgment of Foreclosure and Sale entered March 10, 2015, or in the Special Referee's June 1, 2015 Order. (*See* Judgment of Forecl. and Sale; Order entered June 1, 2015.) Because Deaner has failed to notice an appeal from either the Judgment or the June 1, 2015 Order, this Court lacks jurisdiction to consider Deaner's issues.

Under South Carolina law, a party intending to appeal an order or judgment entered by a Special Referee must serve notice of their appeal within thirty (30) days after receipt of that order or judgment. *Rule 203*, SCACR. Indeed, "[t]he requirement of service of the notice of appeal is jurisdictional, *i.e.*, if a party misses the deadline, the appellate court lacks jurisdiction to

consider the appeal and has no authority or discretion to 'rescue' the delinquent party by extending or ignoring the deadline for service of the notice." *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 14-15, 602 S.E.2d 772, 775 (S.C. 2004). Furthermore, under South Carolina law, "[i]t is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (S.C. 1998). Thus, when an issue is not addressed in a trial court's judgment or order, and the appellant does not bring a motion to alter or amend the judgment or order pursuant to SCRCP Rule 59(e), the issue is not preserved for appellate review. *See, e.g., S. Carolina Farm Bureau Mut. Ins. Co. v. S.E.C.U.R.E. Underwriters Risk Retention Grp.*, 347 S.C. 333, 343, 554 S.E.2d 870, 875 (Ct. App. 2001) (holding that issue raised by appellant to trial court that was never ruled on by the trial court was not preserved for appellate review) (citing *Noisette v. Ismail*, 304 S.C. 56, 403 S.E.2d 122 (1991) (issue was not preserved for appellate review where the trial court did not explicitly rule on the appellant's argument and the appellant made no Rule 59(e), SCRCP, motion to alter or amend the judgment).

Here, Deaner's global arguments concerning standing, securitization (including the authority of MERS to assign the Note and Mortgage), and tender are predicated on the contention that the Special Referee erred by (1) finding as fact that BANA had standing as both servicer of the loan and holder of the Note to prosecute the foreclosure action, (2) finding as fact that the mortgage loan was a valid lien on the Property, and (3) rejecting Deaner's argument regarding her "tender" of payment. (*See generally* Appellant's In. Br.) None of these issues were addressed in Deaner's Motion to Reconsider Judgment or the Special Referee's April 1, 2015 Order, from which Deaner appealed. Thus, this Court lacks jurisdiction to consider these issues raised by Deaner, as Deaner has failed to notice an appeal from either the March 10, 2015

Judgment of Foreclosure and Sale or the June 1, 2015 Order, the thirty (30) day time frame for Deaner to appeal either of these rulings has expired, and ultimately, these issues were not addressed in the Order being appealed from, even if they had been raised at the hearing on Deaner's Motion to Reconsider. Therefore, to the extent Deaner's appeal is based on these issues, it should be dismissed.

III. To the extent Deaner's arguments concerning standing, securitization, and tender are preserved for review, they suffer from multiple fatal defects and are easily dismissed.

Assuming, *arguendo*, that Deaner had preserved her arguments concerning standing, securitization, and tender for appellate review, Deaner's arguments suffer from multiple fatal defects and are easily dismissed. Deaner's arguments, to the best BANA can decipher them, ultimately assert that (1) BANA lacked standing to prosecute the foreclosure action because BANA did not prove that it was "owner" of the Note; (2) the mortgage loan is invalid and/or unsecured in light of an alleged securitization of the Note and Mortgage and the "splitting" of the Note from the Mortgage; and (3) MERS lacked authority to assign the Note and Mortgage to BANA, and therefore the Assignment is invalid and fails to convey an interest in the mortgage loan to BANA. (*See generally* Appellant's In. Br.) Deaner's arguments, however, are baseless and contrary to both the evidence presented in this case and well-established law in both South Carolina and around the country.

Specifically, as discussed in more detail below, South Carolina law is clear that the servicer of a mortgage loan, as well as the Note holder, has authority to prosecute a foreclosure action, and actual "ownership" of the Note and Mortgage is not required. *See infra*, Section III.A. In addition, Deaner is judicially estopped from challenging the validity of the mortgage loan, as she represented under oath in her bankruptcy action that the subject mortgage loan was a valid first lien on the Property and that she had no counterclaims or claims in setoff. *See infra*,

Section III.B. Moreover, Deaner's contentions that securitization of the Note and Mortgage rendered the debt invalid and/or unsecured and that MERS lacked authority to assign the Note and Mortgage to BANA is contrary to well-established South Carolina law and law from throughout the country. *See infra*, Section III.C. Finally, Deaner's arguments regarding her alleged "tender" of the debt are nothing more than a sham and were properly dismissed by the Special Referee. *See infra*, Section III.D. Accordingly, the Trial Court properly entered final Judgment of Foreclosure and Sale in favor of BANA and denied Deaner's Motion to Reconsider Judgment.

A. South Carolina law is clear that the servicer of a mortgage loan, as the Note holder, has authority to prosecute a foreclosure action, and actual "ownership" of the Note and Mortgage is not required.

"'Generally, a party must be a real party in interest to the litigation to have standing.'" *Hill v. S.C. Dep't of Health & Envtl. Control*, 389 S.C. 1, 22, 698 S.E.2d 612, 623 (S.C. 2010) (quoting *Sloan v. Friends of the Hunley, Inc.*, 369 S.C. 20, 28, 630 S.E.2d 474, 479 (2006)). South Carolina law is clear that a loan servicer is a real party in interest to a foreclosure action and has the ability to prosecute a foreclosure action. *See Bank of Am., N.A. v. Draper*, 405 S.C. 214, 222-223, 746 S.E.2d 478, 482 (Ct. App. 2013) (citing *Bankers Trust (Delaware) v. 236 Beltway Inv.*, 865 F. Supp. 1186, 1191 (E.D.Va.1994) (concluding that both lender and servicer have standing to foreclose even if servicer is not the holder of the mortgage)). In addition, pursuant to S.C. Code Ann. § 36-3-301, the person entitled to enforce an instrument includes "the holder of the instrument." *Id.* Notably, this statute expressly provides that "[a] person may be a person entitled to enforce the instrument *even though the person is not the owner of the instrument* or is in wrongful possession of the instrument." *Id.* (emphasis added). A "holder" of the instrument is defined to include "the person in possession of a negotiable instrument that is

payable either to bearer or an identified person that is the person in possession." S.C. Code Ann. § 36-1-201(21).

In this case, the evidence produced at trial unequivocally proved that BANA was both the holder of the Note and the servicer of the mortgage loan. Deloney, BANA's corporate witness, testified at trial that BANA is the loan servicer for Deaner's loan and that BANA and its predecessors in interest began servicing Deaner's loan within one or two months after origination. (Trial T. pp. 5, 25.) Deloney also testified as to the fact that the Note was endorsed in blank and that BANA was in physical possession of the original Note, which was present in the courtroom during the trial. (Trial T. p. 7.) Moreover, in closing arguments to the Court, counsel for Deaner stated that Deaner was *not* contesting BANA's standing to bring the foreclosure action. (Trial T. p. 46.) Since BANA unequivocally demonstrated its standing to prosecute the foreclosure action in this case, Deaner's argument on appeal to the contrary clearly fails. Therefore, the Special Referee's Judgment of Foreclosure and Sale and Order denying Deaner's Motion to Reconsider should be affirmed.

B. Deaner is judicially estopped from challenging the validity of the mortgage loan in light of her attestations filed in the bankruptcy action.

Prior to BANA instituting the subject foreclosure action, Deaner filed a voluntary Chapter 7 bankruptcy petition in the Southern District of Georgia. (*See* Order Granting Pl.'s Motion for Summ. Judg. filed Mar. 27, 2014; Aff. of V. Hartley.) In her bankruptcy petition, Deaner confirmed BAC Home Loans Servicing, LP, BANA's predecessor in interest, as the holder of a first mortgage lien encumbering the Property, and Deaner specifically and expressly stated that she had no claims, counterclaims, or rights to setoff claims to declare as assets. (*See* Order Granting Pl.'s Motion for Summ. Judg. filed Mar. 27, 2014; Aff. of V. Hartley.) "[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that

position, [s]he may not thereafter, simply because [her] interests have changed, assume a contrary position." *Zimmerman v. Cent. Union Bank*, 194 S.C. 518, 8 S.E.2d 359, 365 (S.C. 1940) (internal quotation marks and citation omitted). The statements under oath made by Deaner in her prior bankruptcy action in which she maintained that no setoffs or counterclaims existed and acknowledging that BANA had a secured first mortgage lien on the subject Property act as a bar to her assuming a contrary position in this foreclosure action, including in this appeal. Accordingly, Deaner is judicially estopped from asserting that the mortgage lien is invalid or improper in any way. Therefore, the Special Referee did not err in dismissing Deaner's counterclaims and defenses in this action, and the Special Referee's Judgment of Foreclosure and Sale and Order denying Deaner's Motion to Reconsider should be affirmed.

C. Deaner's contentions that securitization of the Note and Mortgage rendered the debt unsecured and that MERS lacked authority to assign the Note and Mortgage to BANA is contrary to well-established South Carolina law and law from throughout the country.

Deaner's assertion that securitization of the loan wipes out the secured mortgage obligation is unsupportable under South Carolina law. As discussed *supra* in Section III.A, the holder in possession of a mortgage-backed promissory note may enforce the note and mortgage without a further showing that it is the beneficial owner of the note. *See Draper*, 405 S.C. at 220-22, 746 S.E.2d at 481-82 (finding that a loan servicer was a real party in interest with standing to enforce the note and mortgage). Accordingly, securitization of the loan cannot affect a holder's right to enforce the note and mortgage.

Furthermore, South Carolina law is clear that Deaner lacks standing to challenge an assignment to which she is not a party, and South Carolina courts have consistently recognized MERS's authority as a nominee to assign rights in mortgage loan debts. "Generally, a third person not in privity of contract with the contracting parties has no right to enforce a contract."

R.J. Griffin & Co. v. Beach Club II Homeowners Ass'n., 384 F.3d 157, 164 (4th Cir. 2004) (internal quotation marks and citations omitted) (applying South Carolina law). A mortgagor is only a party to the mortgage, and because an assignment or mortgage is a separate contract to which the mortgagor is not a party, a mortgagor cannot question its validity. *See Reese v. U.S. Bank, N.A.*, No. 3:11-2990-CMC-SVH, 2012 WL 1952819, at *3 (D.S.C. April 30, 2012). ("Plaintiff lacks standing to contest the Assignment of the Mortgage. Plaintiff is only a party to the Mortgage and, because the Assignment is a separate contract to which Plaintiff is not a party, she cannot question its validity." (citing *R.J. Griffin & Co.*, 384 F.3d at 164)); *In re Kain*, No. 08-08404-HB, 2012 WL 1098465, at *8 (Bkrtcy. D.S.C. March 30, 2012) ("*Whatever the context*, it appears that a judicial consensus has developed holding that a borrower lacks standing to (1) challenge the validity of a mortgage securitization or (2) request a judicial determination that a loan assignment is invalid due to noncompliance with a pooling and servicing agreement, when the borrower is neither a party to nor a third party beneficiary of the securitization agreement, *i.e.*, the PSA." (emphasis in original)); *see also In re MERS Litigation*, No. 09-2119-JAT, 2011 WL 4550189, at *5 (D. Ariz. Oct. 3, 2011) ("Plaintiffs, as third-party borrowers, are uninvolved and unaffected by the alleged Assignments, and do not possess standing to assert a claim based on such."); *Kriegel v. MERS*, No. PC-2010-7099, 2011 WL 4947398, at *5 (R.I. Super. Ct. Oct. 13, 2011) ("The assignment from MERS to FNMA did not cause injury in fact to the Plaintiff, as the assignment did not change his obligation to timely pay the Mortgage Note or suffer the consequences of foreclosure."). Accordingly, because Deaner was not a party to the Assignment, she therefore cannot question its validity. *See R.J. Griffin & Co.*, 384 F. 3d at 164.

Furthermore, South Carolina courts have addressed Deaner's purported arguments regarding MERS, and they have confirmed that MERS's role in assigning mortgages in no way

undermines the ability of the assignee to foreclose. *See Reese v. U.S. Bank Nat'l Ass'n*, No. 3:11-2990-CMC-SVH, 2012 WL 1952819, at *3 (D.S.C. April 30, 2012) ("Plaintiff's challenge to the Assignment is futile, as the Fourth Circuit in *Horvath v. Bank of New York*, 641 F.3d 617 (4th Cir. 2011), recently rejected a plaintiff's claim that only the original lender had the power to foreclose on a property, not the assignee of MERS."). Indeed, in loan transactions involving MERS, South Carolina courts have recognized MERS's authority to act as a nominee. *See, e.g.*, *Kotsopoulos v. Mortgage Electronic Registration Systems, Inc.*, No. 4:06-1106-TLW-TER, 2007 WL 905094 (D.S.C. March 22, 2007) (dismissing borrower's allegations that MERS had no legal or equitable interest in the note and mortgage); *In re Kain*, No. 08-08404-HB, 2012 WL 1098465 (Bkrtcy. D.S.C. March 30, 2012) (rejecting the notion that an assignment by MERS acting as nominee of the lender somehow divided and thereby rendered defective a note and mortgage, and refuting the plaintiffs' allegations that they were damaged because they were unable to determine the ownership of the mortgage.). Thus, MERS had the authority to properly transfer the Mortgage to BANA, and Deaner's arguments challenging the foreclosure action based upon securitization of the loan or the Assignment of the Note and Mortgage by MERS must be rejected as contrary to South Carolina law. Accordingly, the Special Referee's Judgment of Foreclosure and Sale and Order denying Deaner's Motion to Reconsider should be affirmed.

D. Deaner's arguments regarding her alleged "tender" of the debt are nothing more than a sham and were properly dismissed by the Special Referee.

In her Initial Brief, Deaner alleges that she made "tender" of the judgment debt due by sending BANA an "International Promissory Note" for the full balance due on the mortgage loan. (*See* Appellant's In. Br. p. 38.) However, as this Court has expressly held, "to constitute good tender, the law requires payment to be *in money*, for the proper amount due, made to the proper person, at the proper place." *Keels v. Pierce*, 315 S.C. 339, 343, 433 S.E.2d 902, 905 (Ct.

App. 1993) (emphasis added) (citing *Anderson v. Citizens Bank*, 294 S.C. 387, 365 S.E.2d 26 (Ct. App. 1987), *overruled on other grounds*, *Ward v. Dick Dyer & Associates*, 304 S.C. 152, 403 S.E.2d 310 (1991)). More specifically, "[a] check is *not* tender." *Id.* (emphasis added).

Here, Deaner's "International Promissory Note" is nothing more than a negotiable instrument and has the same legal effect as a check. *See* S.C. Code Ann. § 36-3-104. By sending BANA the "International Promissory Note," Deaner merely "tendered" a promise to pay, thereby attempting to substitute one type of evidence of indebtedness for another. Thus, because the "International Promissory Note" does not constitute a payment in money, Deaner did not "tender" the debt due so as to discharge the judgment debt. The Special Referee properly recognized Deaner's sham attempt to "discharge" the judgment debt, and accordingly, the Special Referee's Order should be affirmed.

CONCLUSION

For the foregoing reasons, the Special Referee's Order entered April 1, 2015, as well as the Judgment of Foreclosure and Sale, should be affirmed in its entirety.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT BANK OF AMERICA, N.A.

August 31, 2015

CERTIFICATE OF SERVICE

I hereby certify that the foregoing ***INITIAL BRIEF OF RESPONDENT BANK OF AMERICA, N.A.*** has been served upon the parties in this action by mailing a copy thereof, postage prepaid, to the following:

Carolyn Deaner
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North Augusta, SC 29841
Pro Se Plaintiff

This the 1st day ~~of August,~~ September 2015.

Trent Grissom (~~SC~~ Bar # 77718)

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September 1, 2015

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Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
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RE: *Bank of America, N.A. v. Carolyn S. Deaner*
Appeal from County of Aiken Court of Common Pleas
Case No. 2012-CP-02-00699
Appellate Case No. 2015-001119

Dear Clerk:

Enclosed please find the original plus one copy of the Initial Brief of Respondent Bank of America, N.A and the Designation of Matter to be Included in Record on Appeal. Please file the originals with the Court and return the conformed copies to me in the envelope provided.

By copy of this letter, I am serving the Pro Se Plaintiff the Initial Brief of Respondent Bank of America, N.A. and Designation of Matter to be Included in Record on Appeal.

If you have any questions or concerns, please do not hesitate to contact me.

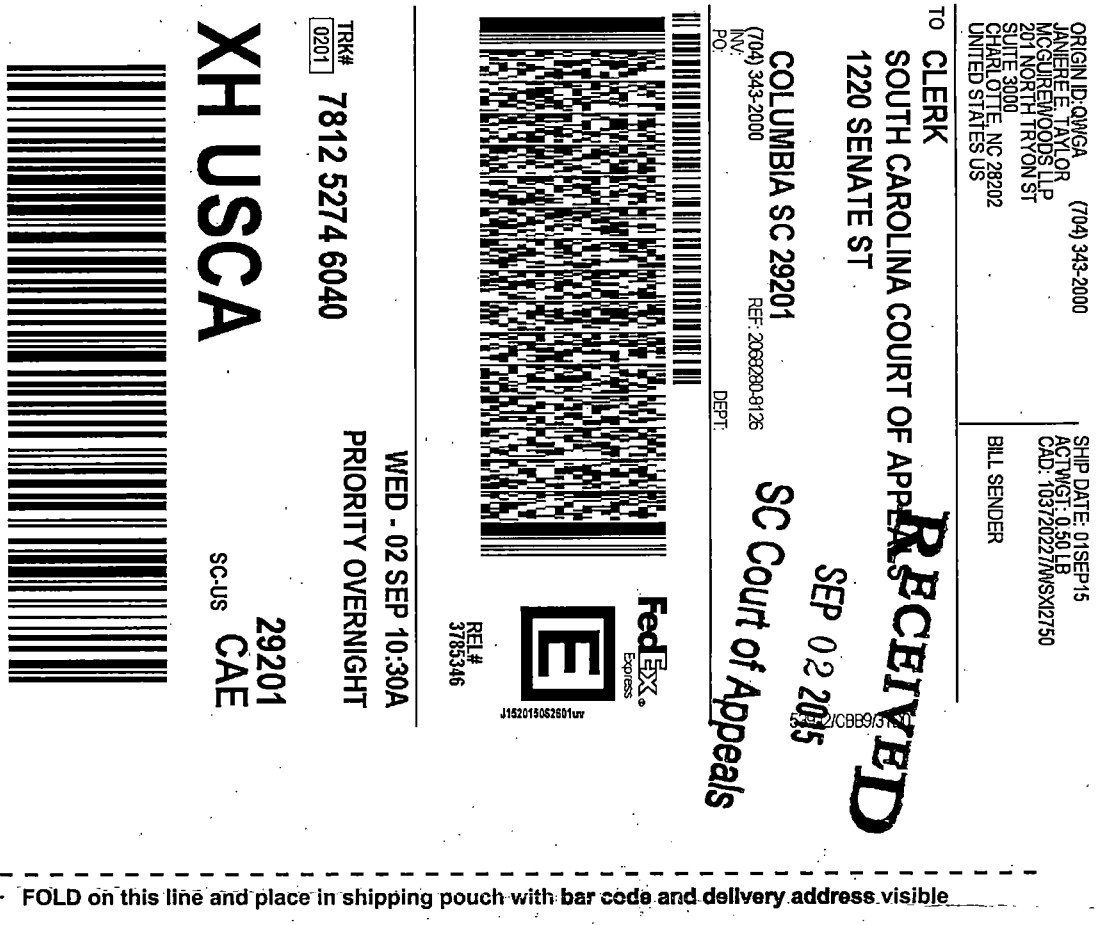
Sincerely,

Janiere Taylor

Janiere E. Taylor

JET:jl

Enclosure



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