

NOTICE OF APPEAL IN A CIVIL CASE

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

D. Garrison Hill, Circuit Court Judge

Case No. 2012-CP-23-2080

Edward J. Rivera and Michele L. Rivera,

Appellants,

vs.

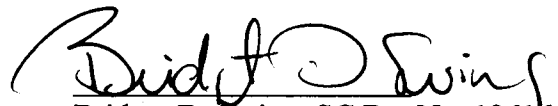
BAC Home Loans Servicing, L.P.

Respondent.

NOTICE OF APPEAL

Edward J. Rivera and Michele L. Rivera appeal the order of the Honorable D. Garrison Hill dated August 8, 2012. Appellants received written notice of entry of this order on August 13, 2012.

September 5, 2012


Bridget D. Swing, SC Bar No. 13616
Foreclosure Defense Law Firm, LLC
PO Box 8246
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Attorney for Appellants

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Appellants,

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BAC Home Loans Servicing, L.P.

Respondent.

CERTIFICATE OF SERVICE

The undersigned attorney of record for Appellants Edward J. Rivera and Michele L. Rivera hereby certifies that the foregoing Notice of Appeal was personally served upon the following addressee:

Chad Burgess
Brock and Scott, PLLC
380 Fernandina Road, Suite 110
Columbia, SC 29210

RECEIVED
SEP 06 2012
SC Court of Appeals

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

Edward J. Rivera and Michele L. Rivera,

Plaintiff,

v.

BAC Home Loans Servicing, L.P.,

Defendant(s)

THIRTEENTH JUDICIAL CIRCUIT
IN THE COURT OF COMMON PLEAS
C/A No.: 2012-CP-23-2080

**ORDER GRANTING THE DEFENDANT'S
MOTION TO DISMISS AND DENYING THE
PLAINTIFF'S MOTION FOR JUDGMENT ON
THE PLEADINGS**

CLERK OF COURT
GREENVILLE, SOUTH CAROLINA
JUN 11 2012 10:00 AM

FILED IN COURT
GREENVILLE, SOUTH CAROLINA
JUN 11 2012 10:00 AM

THIS MATTER came before me on May 29, 2012 on the Defendant's Motion to Dismiss pursuant to SCRCF Rule 12(b)(6) and the Plaintiff's Motion for Judgment on the Pleadings. Present at the hearing were Chad W. Burgess, counsel for the Defendant, and Bridget D. Swing and Keary B. Warner, counsels for the Plaintiff. After careful review of the pleadings, arguments of the parties, the applicable rules of civil procedure and the applicable law, the court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

The Defendant initiated foreclosure proceedings against the Plaintiff concerning the subject property on August 20, 2009 (Civil Action Number 2009-CP-23-7123). As shown by the Affidavits of Service filed in that action, Plaintiffs were served on August 20, 2009. No Answer or other responsive pleading was filed by the Plaintiffs as shown on the Affidavit of Default filed on April 5, 2010. The case was referred to the Honorable Charles B. Simmons, Jr. as Master in Equity for Greenville County. A final foreclosure hearing was held on September 3, 2010. Although being duly notified of the hearing as is shown by the Notice of hearing filed August 23, 2010, the Plaintiffs did not attend. The Master in Equity's Report and Judgment of Foreclosure and Sale was filed on September 7, 2010 and a judicial sale of the subject property was held on October 4, 2010. The Defendant (Plaintiff in the foreclosure action) was the successful bidder at the foreclosure sale. The Court's records do not reflect any SCRCF Rule 59 or 60(b) motions

ENTERED COMPUTER

filed regarding the Master in Equity's Report and Judgment of Foreclosure and sale nor do the records reflect any appeal from the Master in Equity's ruling.

The instant action was filed by the Plaintiffs on March 23, 2012 alleging a quiet title action as to the subject property and that the Defendant lacked standing to bring the prior foreclosure action. With leave of the Court, the Plaintiffs submitted a Memorandum in support of their Motion for Judgment on the Pleadings outlining their position that standing to sue confers subject matter jurisdiction and cannot be waived.

A determination as to whether or not standing to sue is tantamount to subject matter jurisdiction is not necessary in considering the motions before me. Each motion will be taken up in turn with the Plaintiff's Motion for Judgment on the Pleadings being addressed first.

The granting of a Motion for Judgment on the Pleadings is a drastic measure and should be granted only where the pleadings are so defective that, even when taking the facts alleged as admitted, no cause of action or defense could be sustained. Lydia v. Horton, 343 S.C. 376, 540 S.E.2d 102 (Ct. App. 2000).

Plaintiffs allege that the Defendant did not have standing to bring the prior foreclosure action because the filing of an Assignment of Note and Mortgage into BAC Home Loans Servicing, L.P. f/k/a Countrywide Home Loans Servicing, L.P. occurred after the filing of the foreclosure action and, as such, the Defendant did not own the subject Note and Mortgage until after it filed its foreclosure action. The filing of an assignment of mortgage of public record serves to put the world at large on record notice of the transfer and is not indicative of the date of transfer of a negotiable instrument. As such, this Court cannot take the date of filing of the assignment as indicative of the Defendant's lack of standing at the filing of the prior foreclosure action. Quite the contrary, the filing of the Assignment of Note and Mortgage serves as evidence of the prior transfer and evidence of the Defendant's standing to enforce the Note. As such, when the pleadings are taken in the light most favorable to the Defendant, a defense to the

Plaintiff's action could be sustained and the Plaintiff's SCRPC 12(c) Motion for Judgment on the Pleadings should be denied.

Conversely, the facts alleged and inferences reasonably deducible therefrom do not afford the Plaintiff any relief on any theory of the case as the Plaintiff's action is barred by the doctrine of res judicata.

The doctrine of res judicata bars a litigant from raising any issues that were adjudicated in a prior suit and any issues which might have been raised in the former suit. Plum Creek Development Co., Inc. v. City of Conway, 334 S.C. 30, 512 S.E.2d 106 (1999). The doctrine of res judicata is comprised of three elements: 1) the parties must be identical, 2) the subject matter must be identical, and 3) the subject issue must have been litigated in the former suit. Id.

The aforementioned foreclosure action involved the identical parties and subject matter as the instant action. The subject issue, BAC Home Loans Servicing, L.P.'s standing to bring the foreclosure action, was decided in the former suit. It should be noted that no challenge to the Master in Equity's Report and Judgment of Foreclosure and sale and resulting foreclosure sale were made in the previous foreclosure action.

CONCLUSIONS OF LAW

Based upon the foregoing, the Plaintiff's Motion for Judgment on the Pleadings should be denied as a matter of law. The Plaintiff's action is barred by the doctrine of res judicata and, as such, the Defendant's Rule 12(b)(6) Motion to Dismiss should be granted.

NOW, THEREFORE, IT IS HEREBY ORDERED that the Plaintiff's Motion for Judgment on the Pleadings is denied. The Defendant's Rule 12(b)(6) Motion to Dismiss is granted and the action is hereby dismissed with prejudice.

IT IS SO ORDERED.



D. Garrison Hill
Circuit Judge

Dated: 8/7/12, _____
Greenville, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NO: 2012CP2302080

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER

Edward J Rivera vs. Bac Home Loans Servicing Lp

2012 AUG -3 P 2:59

CHECK ONE:

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j) SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
 Other: _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded;
 Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order; Statement of Judgment by the Court:

NOTICE

This is a notice to you that an Order Granting Defendant's Motion to Dismiss in this case has been filed in the Clerk of Court's Office. To obtain a certified copy, you may contact our office by phone (864) 467-8551 or email a request to dajones@greenvillecounty.org.
If you would like a copy via email, please provide a valid email address.

Dated at Greenville, South Carolina, this .

Court Reporter:

PRESIDING JUDGE -

Bridget Davis Swing PO Box 8246 Greenville, SC 29604

Chad Burgess Brock And Scott Pllc 380 Fernandina Road Ste 110 Columbia, SC 29210

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Paul B. Wickensimer Greenville County Clerk Of Court
- Clerk of Court