

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Marvin H. Dukes, III, Master in Equity

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SC Court of Appeals

Case No. 2015- 001869

The Bank of New York Mellon,
FKA The Bank of New York,
as Trustee for the certificate
holders of CWALT, Inc.,
Alternative Loan Trust 2006-
0A16, Mortgage Pass Through
Certificates, Series 2006-0A16

Respondent

v.

Hiltrud Steimel and the Steimel
Family Trust

Appellant

BRIEF OF APPELLANT

Hiltrud Steimel
563 Argent Way
Bluffton, SC 29909
Tel. 952-649-2200
Appellant pro so

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Cases/Statutes Cited:

South Carolina Rules of Civil Procedure, Rule 55(c).
South Carolina Commercial Code ann. 36-3-110
Anders v. S.C. Parole and Comm. Corrections Board, 279 S.C. 206, (1983).
Carpenter v. Longan, 83 US 271, 21 L.Ed 313 (1872).
Dove v. Goldkist, 314 S.C. 235, 442 S.E.2d 598 (1994).
Ex Parte Jackson, 672 S.E.2d 585 (2009).
Frank Ulmer Lumber Co., Inc. v. Patterson, 250 S.E.2d 121 (1978).
GNOC Corp. v. Estate of Rhyne, 312 S.C. 86, 439 S.E.2d 274 (1994).
Haines v. Kerner, 404 U.S. 519 (1972).
Johnson v. State, 319 S.C. 62, 459 S.E.2d 840 (1995).
Richland County Recreation District v. City of Columbia 290 S.C. 93 (1986).
State v. Gorie, 256 S.C. 539, 183 S.E.2d 334 (1971).
Tobias v. Rice, 688 S.E.2d 552 (2010).
Watson v. Watson, 319 S.C. 92, 460 S.E.2d 394 (1995).

Statement of Issues on Appeal

Was Default against Appellant justified? (Court records show that Hiltrud Steimel filed documents in response to the Complaint in December, 2013, within the time given in the Summons for an Answer to be filed, and therefore default against her was improper).

Does Respondent have standing to foreclose in this action? (The foreclosure sought by Respondent cannot presently be supported, inasmuch as evidence of standing by Respondent to foreclose is lacking).

Statement of the Case

1. On July 19, 2006, Appellant Hiltrud Steimel executed a Note and Mortgage pertaining to property located at 563 Argent Way, Bluffton, South Carolina. The note was for \$210,400.00. The lender was identified as Countrywide Bank, but the mortgagee was identified as Mortgage Electronic Registration Systems, Inc. ("MERS").

2. The note was subsequently sold (and apparently resold) to an unknown party and/or parties. Apparently because of confusion as to who was the proper party to make payments to, Appellant Steimel ceased making mortgage payments in December, 2012. No payments on the mortgage have been made since that time.

3. Prior to that time, in 2009, Steimel had filed for bankruptcy in Minnesota and received a discharge. The debt on the property in question was included in the bankruptcy.

4. On May 8, 2013, there was a purported transfer of the mortgage from MERS to Respondent, the Bank of New York Mellon, fka The Bank of New York as Trustee for the Certificate Holders of CWALT, Inc., Alternative Loan Trust 2006-OA16, Mortgage Pass-Through Certificates, Series 2006-OA16. This purported transfer was recorded at Beaufort County on May 17, 2013.

5. On June 14, 2013, Hiltrud Steimel conveyed the property by Warranty Deed to the Steimel Family Trust, an Irrevocable Business Trust. This conveyance was recorded at Beaufort County on July 19, 2013.

6. On December 11, 2013, Respondent commenced the present action by filing a Complaint for Foreclosure and Lis Pendens on the property at the Beaufort County Court of Common Pleas.

7. On December 26, 2013, Hiltrud Steimel filed a number of documents in response to the Complaint on behalf of herself and the Steimel Family Trust.

8. On Oct. 3, 2014, notwithstanding the documents filed more than 9 months earlier, Plaintiff submitted a Certificate of Default for the clerk's signature, purporting to default Appellant and other the Steimel Family Trust and other defendants.

9. On January 6, 2015, Appellant filed a Rule 12(b)5 and 12(b)(6) Motion to Dismiss Respondent's Complaint. This motion was denied on Feb. 11, 2015.

10. On April 24, 2015, mortgage servicer Shellpoint Mortgage Servicing issued a letter indicating that the mortgage on the property was not held by Plaintiff, but was in fact held by Bank of America under a different identifying number.

11. In June and July, 2015, Appellant served discovery requests on Respondent. Appellant, who at all times in these proceedings was acting pro se, inadvertently failed to identify the proper case number on these requests. These requests were never answered by Respondent.

12. On July 22, 2015 Appellant filed an Emergency Motion for Continuance of Final Hearing, seeking to continue a final hearing scheduled for July 24, 2015.

13. On July 24, 2015, a hearing was held on Appellant's Emergency Motion for Continuance, and on Respondent's Complaint for foreclosure. The Motion for Continuance was denied, in part due to Appellant' purported default. The court also

granted Respondent's requested foreclosure, setting the date for such to occur on Oct. 5, 2015.

14. On Aug. 14, 2015, the court issued an order, prepared by counsel for Respondent, memorializing its decisions at the hearing on July 24.

15. On Aug. 21, 2015, Appellant filed a timely Notice of Appeal of this matter, and served the same on all parties.

Argument

Was Default Against Appellant Justified?

On December 26, 2013, 15 days after Respondent filed its Complaint and well within the time limit given in the Summons to Answer the Complaint, Appellant filed a number of documents at the trial court on behalf of herself and the Steimel Family Trust, which currently is the titled owner of the property. While these documents are not in the traditional form of an Answer, these documents nonetheless served as an answer to the Complaint by Appellant and the Steimel Family Trust inasmuch as they demonstrate Appellant and the Steimel Family Trust were aware of the case, were responding to the same, and were not in agreement with the claims in Plaintiff's Complaint. *See Frank Ulmer Lumber Co., Inc. v. Patterson*, 250 S.E.2d 121 (1978). It should not be forgotten that Appellant was acting pro se, and South Carolina law accords greater leniency toward pro se litigants. *Tobias v. Rice*, 688 S.E.2d 552 (2010); *Ex Parte Jackson*, 672 S.E.2d 585 (2009); *Haines v. Kerner*, 404 U.S. 519 (1972), stating that a non attorney appearing pro se cannot be held to the standards of an attorney. Because of this Answer which was timely filed by Defendants, any attempt by Respondent to obtain a default was improper. Notwithstanding this Answer by Appellant and the Steimel Family Trust, over 9 months

later on October 3, 2014, Respondent submitted to the court clerk a Certificate of Default for signature, purporting to default Appellant, the Steimel Family Trust, and other defendants.

Because Appellant made a timely response to Respondent's Complaint on behalf of herself and the Steimel Family Trust, default against these parties was improper and cannot stand. (See Rule 55, SCRCP) In keeping with this, this case should be remanded to the trial court, where these defendants should be permitted to pursue discovery and litigate their case. Furthermore, since there is still a pending controversy, the Oct. 5, 2015 foreclosure date should be continued without date, until after trial; or, in the event such sale has occurred before this Appellate Court issues its opinion, Respondent should be compelled to forfeit its bond on the property to Appellant or to restore the property to the Steimel Family Trust, pending resolution of all issues at the trial court.

Does Respondent have standing to foreclose in this action?

The record confirms that the foreclosure sought by Respondent cannot be supported or granted inasmuch as sufficient evidence to support standing by Respondent to foreclose is lacking. Respondent has failed to produce evidence adequate to support its right to foreclose. The sole "proof" of its right to foreclose that Respondent ever produced was a copy of the note and the May 8, 2013 transfer of mortgage. However, the letter issued by Shellpoint Mortgage Servicing on April 24, 2015 demonstrates that the mortgage may actually be held not by Plaintiff, but by Bank of America under a different identifying number. Furthermore, the original mortgage was held by a completely different party, namely Countrywide Loans, which no longer exists. In addition, the Note and mortgage must not be separated, see *Carpenter v. Longan*, 83 US 271, 21 L.Ed 313.

(1872). The separate ownership of the note by one party and the mortgage by another also demonstrates that the Plaintiff lacks standing under South Carolina law. It appears that the Note and Mortgage are separated and that the note was not endorsed to the assignee, as required under North Carolina Commercial Code, see SC Code ann. § 36-3-110 (c)(2)(A), which requires the note to be endorsed to the trustee where there is an assignment to a trust. SC Code Ann. §§ 36-3-301, 36-3-203, and 3-204 also require the Note to be endorsed. Section 36-3-110(c)(2)(A) states as follows:

(2) If an instrument is payable to:

(i) a trust, an estate, or a person described as trustee or representative of a trust or estate, the instrument is payable to the trustee, the representative, or a successor of either, whether or not the beneficiary or estate is also named;

The note is not endorsed to the trustee and, therefore cannot be relied upon as a documented enforceable interest in the note, therefore the Plaintiff lacks standing and the judgment is void since the lower court lacked jurisdiction to issue a judgment because the Plaintiff has no standing. Jurisdiction can be challenged at any time even for the first time on appeal. It is well-settled that issues relating to subject matter jurisdiction may be raised at any time. *See Johnson v. State*, 319 S.C. 62, 459 S.E.2d 840 (1995); *GNOC Corp. v. Estate of Rhyne*, 312 S.C. 86, 439 S.E.2d 274 (1994); *State v. Gorie*, 256 S.C. 539, 183 S.E.2d 334 (1971). Subject matter jurisdiction refers to the court's power to hear and determine cases of the general class to which the proceedings in question belong. *Dove v. Goldkist*, 314 S.C. 235, 442 S.E.2d 598 (1994); *Watson v. Watson*, 319 S.C. 92, 460 S.E.2d 394 (1995).

The South Carolina Supreme Court has previously indicated that a party's lack of standing as a real party in interest deprives a court of subject matter jurisdiction. *Richland County Recreation District v. City of Columbia* 290 S.C. 93, 348 S.E.2d 64 (1986); *Anders v. S.C. Parole and Comm. Corrections Board*, 279 S.C. 206, 305 S.E.2d 229 (1983).

While Plaintiff purports to have received the mortgage by assignment on May 8, 2013, New York Trust law--which governs whether it could validly receive such an assignment--required that any such assignment must occur no later than 90 days after execution of the original mortgage, see Title 26 US Code, §§ 860D and 860G. The May 8, 2013 transfer occurred fully 7 years after execution of the mortgage. For all of these reasons, Respondent lacks standing to foreclose on the subject property.

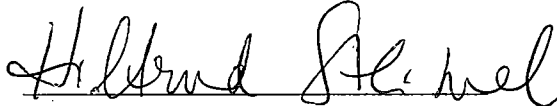
In addition, the mortgage was not closed by an attorney as required by South Carolina law, since the act of closing a mortgage by a non-attorney is unlawful practice of law. This means that the alleged lender cannot foreclose, see *Matrix Financial Services Corp. v. Frasier*, 394 S.C. 134, (2011).

For all of the foregoing reasons the Plaintiff lacks the standing to initiate and prosecute the foreclosure and dismissal pursuant to Rule 17(a) and Rule 12(b)(6) of SCRCF is appropriate.

Conclusion

For the reasons given above, the trial court's order of Aug. 14, 2015 should be vacated. It should be found that Respondent currently lacks sufficient support for its right to foreclose. Appellant and the Steimel Family Trust should be found to have sufficiently answered Respondent's Complaint, and therefore should be found to not be in default. This matter should then be remanded to the trial court so that the case can be dismissed with prejudice, and in connection therewith, the foreclosure scheduled for Oct. 5, 2015 should be continued without date; or, in the alternative the case should be dismissed with prejudice for the lack of subject matter join the event such sale has occurred before this Appellate Court issues its opinion, Respondent should be compelled to forfeit its bond on the property to Appellant or to restore the property to the Steimel Family Trust, pending resolution of all issues at the trial court.

DATED this ____ day of September, 2015.

A handwritten signature in cursive script, appearing to read "Hiltrud Steimel", written over a horizontal line.

Hiltrud Steimel, individually and also
on behalf of the Steimel Family Trust

DECLARATION OF SERVICE BY MAIL

I, Hiltrud Steimel, declare as follows

That I am domiciled in Beaufort county, I am over the age of eighteen years old and not a party to the within action. My mailing location is:

563 Argent Way, Bluffton, S.C. 29909.

On the _____ (date), I served by mail a true copy of

Appellants Brief on Appeal for Case number 2015 -001869 in the South Carolina Court of

Appeals, upon the following Agent for the Respondent:

John J. Hearn, Esq.
Attorney for Respondent
P.O. Box 100200
Columbia, SC 29202
(803) 744-4444

I declare under penalty of perjury under the Law the State of South Carolina that the foregoing is true and correct. Executed on the _____ (date.)

By: Hiltrud Steimel

Notice to the Principal is Notice to the Agent Notice to the Agent is

Notice to the Principal