THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Ellis B. Drew, Jr., Master-in-Equity

Appellant Court Case Number No. 2015-001416

Lower Court Case No. 2011-CP-04-3316

Deutsche Bank National Trust Company as
Indenture Trustee for MortgageIT Trust 2004-1 — Respondent,

v.

Joseph F. DeBoskey — Appellant.

INITIAL BRIEF OF APPELLANT

Dated this 12th day of January, 2016

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STATEMENT OF THE CASE

Respondent[1] DEUTSCHE BANK sued DeBOSKEY to foreclose on his residence. The Homeowner did not answer and was defaulted. The lower court entered its Judgment of Foreclosure on September 17, 2012, setting a sale date for that December.

DeBOSKEY then applied to this State's version of the federal "hardest hit" initiative. He alerted the lender and notified the lower court of his participation in the South Carolina Homeownership and Employment Lending Program ("SC HELP"). Federal law and program guidelines require courts to stay all "final acts" against program applicants, so DeBOSKEY moved to stay the sale. The lower court heard his application on November 19, 2012; on December 3, 2012, it issued a Statement of Proceedings which stayed the sale and abated the case pending completion of the SC HELP process.

DeBOSKEY moved to dismiss the case in October of 2013 as a sanction against the Bank. He pointed to DEUTSCHE BANK's willful defiance of its duty to "gather and provide" data. The dismissal motion came on for hearing on May 12, 2015. The Bank argued that the lower court could excuse its failure to comply with program informational requirements; it also asked for relief from the stay of sale. The court below denied the Homeowner's dismissal motion.

On July 1, 2015, DeBOSKEY timely perfected his appeal from the Order Denying Relief. Jurisdiction over the matter now rests in this Court.

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[1] For convenience, the following designations are used in this Brief: Plaintiff/Respondent DEUTSCHE BANK NATIONAL TRUST COMPANY, as Indentured Trustee for MORTGAGEIT TRUST 2004-1, is referred to as "DEUTSCHE BANK" or as the "Bank." Defendant/Appellant JOSEPH F. DeBOSKEY is called "DeBOSKEY" or the "Homeowner."

STATEMENT OF THE FACTS

This appeal turns on the principles of preemption and deference, with a dollop of standing thrown in. The central and determinative question before the Court is whether the mandates of the SC HELP program trump case management concerns. The trial court overlooked program requirements and focused on case administration. This Court must reverse the Order under review and remand the cause with directions.

The facts on appeal begin with a familiar pattern: DeBOSKEY purchased his residence with borrowed money. The lender memorialized its loan by a promissory note and secured its loan with a mortgage on real property. When the Great Recession struck, the Homeowner got behind on installments and fell into payment default. DEUTSCHE BANK accelerated the note, then sued to liquidate its collateral. After DeBOSKEY was defaulted for failure to answer, the Bank obtained a foreclosure judgment.

The facts then veer off in an unusual direction: The Homeowner entered a local version of the "hardest hit" program. DeBOSKEY notified the lower court of his participation in SC HELP; he sought and obtained a stay from judicial sale pending his completion of the program. (A stay was required because the hardest hit program prohibits courts from taking "final acts" against applicants). Working through a local non-profit called NHC (the Neighborhood Housing Corporation),

DeBOSKEY assembled and submitted all his required information. The lower court properly abated the case and gave the Bank time to amass and provide its documentation.[2]

Problems arose when DEUTSCHE BANK failed to provide NHC with datasets required by the program. Troubles escalated while the Bank dragged its feet and time dragged on. NHC repeatedly found the Bank's submissions deficient. NHC repeatedly demanded for the Bank to comply with the guidelines and rules – only to find the Bank's product was still unsatisfactory. The Bank then made excuses for why it was failing to submit a complete loan itemization package, saying that some information was too hard for it to locate or assemble. But DEUTSCHE BANK never sought a program waiver, and NHC never gave it an exemption from its production duties. Meantime, DeBOSKEY contacted the plaintiff, through prior counsels, repeatedly, trying to force the Bank to "gather and provide" loan data as commanded by the SC Mortgage HELP program and the 2011 rules.[3]

Eventually, the impasse exploded. By late 2013, the Bank was inexcusably tardy in providing its loan itemization package data. The Homeowner sought sanctions against DEUTSCHE BANK for disregarding program obligations. He moved the lower court to dismiss the Bank's case for its willful failure to "gather and provide."

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[2] The SC Mortgage HELP program and the so-called "2011 rules" of court impose paperwork requirements on foreclosing parties. Lenders have to gather the information needed for the loan modification process and provide that data to the special non-profit entities that serve as program contractors. Final acts such as judicial sales are postponed for the duration of the process under program administrative regulations as well as under the court rules.

[3] Enforcement of program requirements is an administrative responsibility resting with the contractor: here, NHC. Enforcement of court rules of course is within the purview of the courts.

Hearing on the sanction motion was held on May 12, 2015. At that time, DEUTSCHE BANK made an "end-run" around the rules: it asked the lower court *ore tenemus* to dissolve the stay and to allow a sale. The court below expressed its concern over the case's status, saying that this case was "taking too long." A written order was entered under which the Anderson County Court of Common Pleas, Ellis B. Drew, Jr., Master-in-Equity, denied relief to DeBOSKEY and allowed the Bank to move to sale.

In preparing for the sanctions hearing and in the course of this appeal, DeBOSKEY learned about problems with standing here. DEUTSCHE BANK filed papers with Consumer Financial Protection Agency informing them that the Bank had no interest in the subject loan. This lately unearthed concession shakes this case up on its merits: when a party admits on the public record that it had no standing to pursue foreclosure, the underlying judgment is necessarily compromised. Indeed, relief from the judgment would be warranted under Rule 60(b)(5) if "the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, *or it is no longer equitable that the judgment should have prospective application*." This late-hour confession of error serves to vitiate the judgment itself.

As mentioned above, DeBOSKEY timely perfected an appeal to this Court from the Order below. This Court holds jurisdiction.

SUMMARY OF THE ARGUMENT

This routine case has spawned a series of serious issues on appeal. One point is preemption: federal law forbids any court from entering "final acts" against participants in a "hardest hit" program. But the lower court here is attempting to allow a sale in foreclosure to go forward while DeBOSKEY's SC HELP application was still pending. The primacy of federal authority and the Supremacy Clause of the U.S. Constitution require reversal of the order below. *Hillman v. Maretta*, 569 U.S. 141, 133 S.Ct. 1943, 186 L.Ed.2d 43 (2013)(state legislation was without power to vary or alter insurance beneficiaries as designated under federal program); *The City of Cayce v. Norfolk So. Rwy. Co.*, 391 S.C. 395, 706 S.E.2d 6((2001). In particular, where federal and state regulations are not in agreement, the requirements of the federal regulations shall prevail." *Stogssdill v. South Carolina Dep't of Health & Human Svcs.*, 410 S.C. 763 S.E.2d 638, 642 (Ct. App. 2014).

A related point concerns the principle of deference: courts generally accept agency decisions; courts usually act only after all administrative remedies are exhausted. Here NHC served as program administrator, so NHC and not any court was empowered to decide whether an application was properly pending – and to decide whether a lender had fulfilled its obligation to "gather and provide." Likewise, NHC and not any court held the authority to excuse noncompliance or to relieve a lender from its duties. But the lower court here substituted its judgment for that of the program administrator. The lower court disregarded NHC's view that the Bank and unilaterally decided a case had gone on "too long." The lower court in effect substituted its judgment for the administrator's to excuse the Bank from its duty to "gather and provide" information to

SC HELP. The principles of judicial deference to administrative actors require a reversal of the order below.

The final point is standing: South Carolina law requires complainants to be real parties in interest. It now turns out that the Bank neither holds nor claims any rights in subject loan. DEUTSCHE BANK had no right to foreclose, so it is not equitable to give the judgment prospective application. Lack of standing requires reversal.

For all these reasons, the order below must be reversed and the case remanded.

ARGUMENT

DeBOSKEY seeks reversal of a lower court's order on two separate grounds: preemption and deference. He also asks to discharge the judgment below for lack of standing. His argument and authorities are as follows:

PREEMPTION: WHAT LAW CONTROLS THE STAY OF THIS FORECLOSURE PROCEEDING?

DeBOSKEY claims that the court below erred in lifting its stay of sale.

It would seem that the power to enter or to vacate a stay would be left to the discretion of trial courts. The master had experience with this particular case and so was in position to judge the equities of granting – or, here, of dissolving – any stay. Under this line of reasoning, a decision of the trial court should not be disturbed on appeal.

The Homeowner's response is that the rights, merits and equities of the staying of foreclosure sale have already been determined by federal law.[4] State courts are forbidden from performing so-called "final acts" so long as an applicant is in the Hardest Hit program. The trial court here simply had no discretion to exercise: it cannot lift the stay or otherwise act until the administrator, determines that the Homeowner is no longer eligible for the program. Since NHC has not rejected DeBOSKEY's application, *the stay cannot be lifted* (emphasis added).

The Homeowner grounds his reasoning in the federal program itself. The U.S.

[4] DeBOSKEY has found little case law applying the Hardest Hit rules to situations like the case at hand. The Homeowner therefore grounds his argument on the federal and state rules and regulations themselves, unadorned with much judicial opinion.

Department of Treasury announced its "hardest hit" initiative on February 19, 2010. The initiative was approved and the funds allocated on June 23, 2010. The "hardest hit" initiative directs certain states most badly impacted by the foreclosure crisis to sponsor mortgage relief programs. These programs are overseen by state Housing Finance Agencies ("HFAs") and operated by private administrative contractors (called Eligible Entities, or "EEs" for short). The U.S. Department of the Treasury administers the program. In the affected states, lenders are permitted to go to court and even to judgment, but they cannot go to sale so long as a program application is pending.[5]

The Department added South Carolina to the roll of affected states on March 29, 2010. This state created the South Carolina Homeownership and Employment Lending Program (i.e., SC HELP) in accordance with the Hardest Hit directives. South Carolina courts further implemented the program by adopting a set of rules (the so-called "2011 rules" of court[6]). Together, the program and court rules impose paperwork requirements on foreclosing parties.

DeBOSKEY then applies these rules to this case on appeal. The Bank – indeed, on all foreclosing parties in this State – have a duty to cooperate with administrator EEs. In this case, the Bank had a duty to provide NHC with a loan itemization package. The original stay of the sale was thus in line with program requirements and gave DEUTSCHE BANK the time to assemble its paperwork and to submit a loan itemization

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[5] Because the program has federal authority, it can alter the terms of private contracts. Simple state action could otherwise run afoul of the contracts clause. See Art. I, §10, U.S. Const.

[6] The 2011 Rules were adopted in reaction to unhappy experience with earlier provisional rules. South Carolina courts deemed the earlier rules to be ineffective because lenders simply did not perform their duty.

package. Indeed, the trial court's stay first entered in 2012 was premised on DEUTSCHE BANK's legal duty to "gather and provide" the data required by a South Carolina's HELP program.

Time has not changed the merits of – or the law governing – a stay of sale here. The program requirements are still the same. The Bank still owes the same duty. Once DeBOSKEY entered into the federally sponsored SC HELP, the trial court lost power to make final orders. Until the program administrator reports that the application is rejected (or takes some other similar action), the stay must remain in effect. No sale date can be set. The court below was simply without power to order a sale or other final act in the face of federal program requirements. See Article VI, §2, U.S. Const. (Supremacy Clause).

Based on policy, precedent, and constitutional law, DEUTSCHE BANK cannot be heard to disregard program requirements set by the United States of America and the State of South Carolina. The Bank may not proceed to sale or to any "final act" so long as DeBOSKEY is in the SC HELP program. The supreme law of the land, the federal program, the law of this State, and the equities of this case itself all require the stay maintained in this case. The lower court's order, being contrary to this law, must be reversed.

DEFERENCE:
WHO DETERMINES WHEN A LENDER MEETS ITS "GATHER AND PROVIDE" DUTY (OR IS EXCUSED THEREFROM)?

DeBOSKEY claims that the court below erred in excusing the Bank.

It would seem that a trial court should decide whether a lender had performed its program duty. The master heard representations that the Bank had tried hard to supply data to the EE. DEUTSCHE BANK argued that the master could find its performance complete, or could find its performance "substantially" complete, or could holds its further performance in some way excused. Under this approach, the trial court's order was justified and should not be disturbed on appeal.

The Homeowner responds by pointing to administrative law. The Hardest Hit program is an administrative and not a judicial program. It vests in eligible entities like NHC and not in trial courts the status of program administrators. The program grants EEs the authority to collect data and to decide on eligibility. It grants them the power to manage and mediate the loan relief program. *Office of Reg. Staff v. South Carolina Pub. Svc. Comm'n,* 374 S.C. 46, 647 S.E.2d 223 (2007); *Furr v. Horry Cnty. Zoning Board of Appeals*, 411 S.C. 178, 767 S.E.2d 221 (Ct. App. 2014).

In this case, NHC had the authority to measure the Bank's duty to "gather and provide" data; the court below did not. NHC could have found that the Bank had discharged its duty, but it did not. Instead, the record shows that the EE repeatedly found DEUTSCHE BANK's submissions wanting. The Bank could have asked NHC for a waiver, or for a finding of "substantial compliance," or for some other remedy. It never did. The record is clear that DEUTSCHE BANK threw up its hands and went to the trial court to get a new and different referee.

And that is exactly the problem here: participants in administrative programs do not get to junk the process and head over to court instead. They must deal with the administrative authority and not with a court. NHC, not the court below, had the authority and the power to mete out justice here. DEUTSCHE BANK, disliking the agency's action, went shopping for a new forum.

Of course, a party treated unfairly by agency action can seek a judicial review. But that happens only after they first exhaust their administrative remedies. In this case, it is clear that the Bank did not exhaust such remedies; indeed, it did not start down that path at all. DEUTSCHE BANK did not diligently attempt to get relief from NHC and fail; rather, it found it annoying to deal with the program and so never tried. The string of directions to submit is telling: the Bank refused to perform its duty to the satisfaction of the EE; it now wants a court to relieve it from the consequences of its own sloth and willfulness.

Substantial policy is at stake here, too. The SC HELP program is an intentionally administrative initiative and is designed to be run by state nonprofit contractors. The aim and the process of the Hardest Hit program depend on the judgment of EEs in the first instance. Throwing the administrator overboard and resorting to adversary proceedings before a judicial tribunal is very different from the SC HELP program. To achieve the beneficial purposes of the Hardest Hit initiative, the parties have to be forced to complete the administrative process. Short-circuiting the program is not just bad for this Homeowner; it is bad for all homeowners in South Carolina who look to resort to the program as designed.

DEUTSCHE BANK cannot be allowed to jettison the program fashioned by the

federal and South Carolina governments. NHC did not deny DeBOSKEY's application. NHC did not find the Bank to be compliant with its duty to "gather and provide." NHC never excused the Bank from its required performance; indeed, the record shows the Bank never asked. Based on deference to the administrative process and with an eye toward the required exhaustion of administrative remedies, *Bone v. U.S. Food Svc.*, 399 S.C. 566, 733 S.E.2d 200 (2012); *Graves v. Horry-Georgetown Tech. Coll.*, 391 S.C. 1, 704 S.E.2d 350 (Ct. App. 2010), lenders like DEUTSCHE BANK must be compelled to stay in and complete the administrative process. The lower court's order, being contrary to this law, must be reversed.

STANDING:
IS IT EQUITABLE FOR A JUDGMENT TO HAVE PROSPECTIVE APPLICATION WHERE PLAINTIFF NEVER HAD AN INTEREST IN THE UNDERLYING LOAN?

DeBOSKEY now claims that the court below should vacate or satisfy the judgment of record for want of standing.

It would seem that an earlier decision to enter judgment should stand. Moreover, it seems unusual to consider standing issues at this late date. Under this view, the trial court's judgment stands and cannot be vacated.

The Homeowner responds by pointing to S.C.R.Civ.P. 60(b)(5). In particular, that Rule permits relief from judgment when "it is no longer equitable that the judgment should have prospective application."

After the May hearing, Plaintiff reported that it does not actually own or even claim to own the Residential Loan. In dodging certain administrative claims, it has had to declare itself a stranger to the instrument and mortgage at bar.

But South Carolina requires a claim to be pursued by a real party in interest.

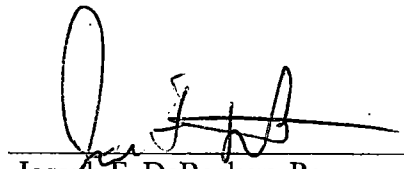
DEUTSCHE BANK, by its own admission, does not – and never has – filled the bill. It now turns out that the Bank neither holds nor claims any rights in subject loan. Since the case went to judgment on the assumption of standing, it stands to reason that this new revelation renders it improper for the Bank to enforce the judgment prospectively. It has had its fun; now it must give way to some real party in interest.

DEUTSCHE BANK had no right to foreclose, so it is not equitable to give its judgment any prospective application. Lack of standing requires reversal. The judgment, being contrary to these equities, must be vacated.

CONCLUSION

For these reasons, the lower court's order dated July 20, 2015, denominated as an Order of Continuance, should be reversed. The cause must be remanded with directions to vacate the lower court's Order rendered on July 20, 2015, or in the alternative to vacate the judgment of foreclosure or both, and to grant such other and further relief as is just and proper.

Dated this 12th day of January, 2016



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The undersigned certified that this Initial Brief complies with Rule 208, SCACR.

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PROOF OF SERVICE

I certify that I served the respondent, Deutsche Bank National Trust Company as Indenture Trustee for MortgageIT Trust 2004-1, this Initial Brief by depositing a copy of in the United States Mail, postage prepaid on January 12th, 2016 addressed as below:

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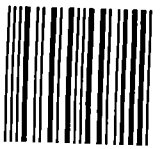

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