

THE STATE OF SOUTH CAROLINA
In The South Carolina Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

Hon. S. Jackson Kimball III
Master in Equity

Case no. 2011-CP-46-250

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JAN 27 2016

SC Court of Appeals

Bank of America, N.A., as successor by merger to BAC Home Loans
Servicing, LP, f/k/a/ Countrywide Home Loans Servicing, LP f/k/a
Countrywide Home Loans Servicing, LP.....RESPONDENT

vs.

Michelle Minardi and Ameris Bank,
of whom Defendant Michelle Minardi is theAPPELLANT

APPELLANT RETURN TO RESPONDENT
MOTION TO STRIKE

Appellant here files its Return and Memorandum in Opposition to Respondent Bank of America's Motion to Strike. Appellant would respectfully show the court the following in Reply :

BACKGROUND

By its motion Respondent seeks to strike *any portion* (sic) and *all related exhibits* (sic) from the Rule 30(b)(6) deposition of Bank of America ("BANA") designee Diane Deloney (and Michelle Minardi). BANA appeared in South Carolina through its Rule 30(b)(6) designee, Diane Deloney. Deloney is the assistant vice president with BANA's

mortgage resolution team. In complying with a deposition subpoena Deloney appears in York County from BANA's corporate offices in Plano Texas. Deloney responds to a subpoena *duces tecum*. The deposition occurs April 15, 2015. Deloney testified to a list of Rule 30(b)(6) topics propounded by Minardi's counsel and confirmed she was responding to subpoena for BANA without documents. She appeared without any despite having reviewed the Rule 30(b)(6) notice of deposition beforehand. At no time prior has BANA objected to complying with subpoena, the topics propounded, or the manner in which the deposition was utilized before the master in equity court. The motion is attempted procedural circumvention of substantive record testimony in the case relevant to compulsory conduct.

LAW

Rule 32(a) SCRCF provides how deposition testimony may be used at trial or upon the hearing of a motion or interlocutory proceeding. It so provides that "*any part*" or "*all*" of a deposition, so far as admissible under the rules of evidence applied "*as though the witness were then present and testifying*" may be "*used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof....*" Id. The rule provides that "*Any*" deposition may be used *...for any other purpose permitted by the rules of evidence.*"

Further, the rule specifically addresses Rule 30(b)(6) deponent testimony may "used by an adverse party for *any* purpose". Rule 32(a)(2), SCRCF. Appellant counsel utilized the deposition testimony and quoted from the same in oral argument, attempting to illustrate documentary evidence of the parties' claims and defenses, specifically whether Minardi's counterclaims were legal and compulsory vs. permissive. The issue

had been raised before master in previous argument. The court record evidences – *without dispute* - that BANA responded (reluctantly) designating its 30(b) (6) deponent, an assistant vice president, under threat of Defendant’s motion to compel deposition. BANA then sends the designee to South Carolina without objection in compliance with a subpoena *Duces Tecum*.¹ BANA then provided sworn, binding testimony responding to a list of deposition topics never objected to. The topics were pertinent to the claims and defenses in this action and illustrate relevant compulsory conduct. BANA, through appeals/respondent counsel, now seeks simply to un-bind BANA from relevant and material sworn testimony. Both depositions facilitate appellate review. Both illustrate the claims and defenses relevant to Minardi’s case that she is entitled to jury trial on compulsory legal counterclaims. Moreover, striking the BANA deposition of Diane Deloney (in particular) prejudices Minardi’s claims at trial should this court remand. BANA has never, *before now*, objected to the depositions, topic listing, or utilization of the deposition in court. The deposition transcripts and exhibits constitute the preserved record of sworn testimony in this case. Therefore, this court should respectfully deny Respondent’s motion to strike.

ARGUMENT

Appellant would first point out for the court that issue currently before the court is Respondent effort to strike, specifically, a Rule 30(b)(6) deposition of BANA designee that was properly noticed with attached list of topics *via deposition subpoena*. Neither

¹ BANA’s Rule 30(b)(6) designee appeared for oral exam without providing any documents whatsoever pursuant to the duces tecum notice, testifying to business records produced by Minardi which were never provided in discovery yet mailed to the debtor. The documents are HAMP modification offers and HAMP rejection notices predicated upon “Special Forbearance” agreement, which Minardi never applied for. The documents evidence BANA filing and maintaining a foreclosure action in York County in violation of the Administrative Order of the South Carolina Supreme Court 2011-05-02-01.

was objected to by BANA or its counsel. The Rule 30(b)(6) deposition occurs, finally, under threat of motion to compel filed by Plaintiff, almost argued on April 14, 2015. The deposition occurs, literally, next day. Despite being noticed and re-noticed for months (thru two (2) plaintiff firms) the Rule 30(b)(6) designee deposition occurred finally on August 15, 2015. Despite months of notice, BANA never files an objection to appearing.

Having now had the benefit of three (3) law firms, Bank of America has never (a) objected to the deposition notice or topics, (b) voluntarily produced its designee --an assistant vice president --without objection in compliance with the subpoena, and (c) never objected during the depositions to form of question. Finally, BANA did not object at oral argument before the master to utilization of the testimony. The chief grievance by Respondent counsel is that no portions of either deposition's pages were admitted into evidence. As the deposition testimony equates to sworn trial testimony it now properly serves as a relevant and material part of the preserved record in this case. The real issue pending before this court turns not on the procedural application of South Carolina Appellate Court Rules, but substantive testimony and BANA failure, below, to object pursuant to Rule 32(b) SCRCF. Because no objections were made, BANA should not now be permitted to raise the objections for the first time on appeal; particularly not after sending its designee from Texas to South Carolina in compliance with subpoena *Duces Tecum*. BANA never filed objections, never filed motions to quash the subpoena per Rule 45 SCRCF, and BANA bound itself via designee when it appeared in York County and provided sworn testimony in response to subpoena.

In this matter, Minardi appeals from the master in equity court's order of July 31, 2015 denying her Rule 59(e) Motion to Reconsider the May 20, 2015 Order. The May 20

2015 Order denied Defendant's motion to bifurcate and remand legal counterclaims to the jury roster. Counsel for Appellant referred extensively to the deposition testimony of BANA's Rule 30(b)(6) deponent in hearings, and has done so in Appellant's Initial Brief before this court. The testimony largely centers over BANA business records evidencing compulsory conduct.

Months earlier on February 18, 2015 Minardi argued her motion for summary judgment before the Master-in-Equity S. Jackson Kimball. It is true that the lower court admitted no portion of the transcripts, and that no portions of the transcript was admitted into evidence. Deposition exhibits in the form of BANA business records were admitted. They were both referenced in oral argument before the court as quickly as the transcripts could be obtained by the court reporters.

1. BANA did not object to the notice, taking or use of Rule 30(b)(6) deposition and Respondent made no SCRCF 32(b) Objection to use of the deposition before the master in equity.

Rule 30(b)(6) SCRCF provides "a party may in his notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which he will testify." A subpoena shall advise a non-party organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. In the case sub judice, BANA responded to subpoena duces tecum by sending its assistant vice president of mortgage resolution.

It is important to note in this case that BANA via designee Diane Deloney appeared under Rule 30(b)(6) deposition subpoena noticed *Duces Tecum*. The designee appeared without any records, whatsoever, at the April 15, 2015 deposition. No Rule 45 Objection or Motion to Quash was filed by BANA. By appearing in South Carolina BANA's designee provided *binding* testimony, which is the real crux of Respondent's grievance and motion. The designee testified as to BANA business records.

2. Quotations from Sworn Testimony were entered into the record, including deposition transcript exhibits, which were relevant and material to the parties' claims and defenses.

The crux of Respondent's argument implies that Minardi's counsel is attempting to present a Record on Appeal to this court having omitted presentation of matters to the trial court by admission. The argument is without merit, as the deposition testimony is sworn binding testimony taken of the designee as if procured at trial. BANA (through its counsel) failed to object to the 30(b)(6) deposition subpoena. No Rule 45 SCRPC Motion to Quash was filed. To be clear, BANA appeared in South Carolina from Texas without objection. BANA provided binding testimony by its designee of matters properly noticed (and never objected to) which were relevant and material to the claims and defenses, particularly compulsory counterclaims. Thus, BANA should not now be able to un-bind itself where it did not timely interpose objection and where it voluntarily appeared and testified on the record.

The real question becomes admissibility and relevance, and whether the testimony and related deposition transcript exhibits are material to the parties' claims and defenses. Here they are. Both facilitate appellate review in this court. Both illustrate for this court and the court below (should this case be remanded), the claims and defenses in Minardi's

defense of her home and right to jury trial of compulsory counterclaims. The testimony illustrates exhibits attached to memorandums provided to the trial court—BANA's own business records.

3. BANA seeks to strike relevant sworn testimony and exhibits in a future trial proceeding by *implication* where exclusion would work prejudice upon the case of the Appellant.

At issue in this appeal, specifically, is whether Appellant was denied jury trial upon compulsory legal counterclaims or whether the counterclaims were permissive. Were the court to strike out *any and all* deposition testimony or deposition transcript exhibits, it would work prejudice as against the Appellant should this court grant Appellant's prayer for relief and Remand. The depositions contain relevant sworn testimony that are material to both the claims and defenses in the case, particularly compulsory legal counterclaims. Michelle Minardi has defended her home from BANA's foreclosure action for over five (5) years. She alleged that BANA violated the administrative order of the South Carolina Supreme Court 2011-05-02-01 and filed a *wrongful* foreclosure. Should a jury trial be granted and BANA appear, again via live witness, Minardi is entitled to have available and be able to rely upon the depositions for all purposes permitted under Rule 30 and Rule 30(b)(6) including, without limitation, impeachment. Appellant therefore prays the court deny the motion as both depositions constitute vital parts of the record in this case.

CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons, Appellant prays that the court deny Respondent's Motion to Strike any and all deposition testimony and related deposition exhibits. By way of prayer for alternate relief, should the court deny Appellant's request to deny, Appellant

prays that the court strictly limit or restrict strike to only those parts of the deposition(s) not directly referenced before the lower court by way of implication, oral argument or exhibits admitted as part of memorandums.

Respectfully submitted this 24th day of January, 2016.



J. Cameron Halford
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ATTORNEY FOR APPELLANT

THE STATE OF SOUTH CAROLINA
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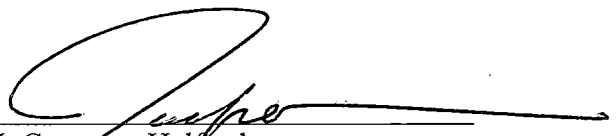
AFFIDAVIT OF APPELLANT COUNSEL IN SUPPORT
OF APPELLANT REPLY TO RESPONDENT MOTION TO DISMISS
PURSUANT TO SCACR 240(C)(3)

NOW COMES Appellant counsel J. Cameron Halford (SC Bar Id: 17184) who
first being duly sworn deposes and states:

I am counsel for Appellant Michelle Minardi and I am filing this affidavit in
response to Respondent Motion to Strike matters from inclusion in the Record on Appeal.
The Record on Appeal has not been published in this case to date. The case is a contested
foreclosure action and the issue on appeal is whether Appellant was denied jury trial as to
compulsory counterclaims. Respondent's motion seeks to strike all deposition testimony
and all exhibits related to a Rule 30(b)(6) deposition subpoena noticed duces tecum. The
deposition testimony was utilized by the undersigned before the master in equity for York

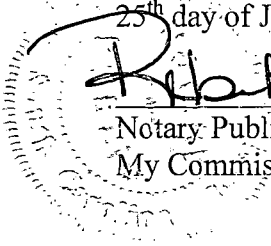
County and the exhibits constitute business records were admitted as part of memorandums to the court. The deposition transcript pages were not, however, admitted into evidence but rather referenced in oral argument before the master. The undersigned is informed and believes that both constitute the record in this case pertinent to relevant and material facts and documentary evidence.

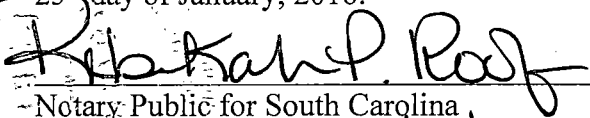
Further, affiant sayeth naught.



J. Cameron Halford
S.C. Bar Id. # 17184

SWORN TO and subscribed before me this
25th day of January, 2016.




Notary Public for South Carolina
My Commission Expires: 3/13/23

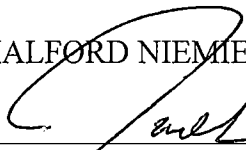
CERTIFICATE OF SERVICE

The undersigned certifies that Appellant's Return and Reply to Respondent's Motion to Strike and Rule 240(c)(3) Affidavit was served on Respondent counsel by depositing a copy of the same in the United States mail, first class, postage prepaid, and addressed as follows:

Brian A. Calub, Esq.
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201 N. Tryon Street, Suite 3000
Charlotte, North Carolina 28202
Attorneys for Respondent Bank of America

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January 25, 2016

Jenny Abbott Kitchings, Clerk of Court
The South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

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SC Court of Appeals

Re: Court of Appeals Case No. 2015-001857
Bank of America, N.A., as successor by merger to BAC Home Loans
Servicing, LP, f/k/a Countrywide Home Loans Servicing, LP f/k/a
Countrywide Home Loans Servicing, LP vs. Michelle Minardi and
Ameris Bank

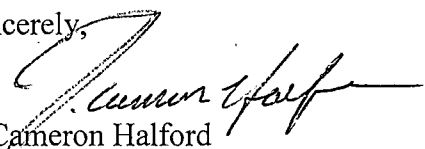
Dear Ms. Kitchings:

Enclosed please find an original and seven (7) copies of the Appellant's Return to Respondent's Motion to Strike and Affidavit in Support. In this regard, I would appreciate your filing these documents and returning a clocked copy to my office in the envelope provided.

If you have any questions regarding the enclosed or this matter, please do not hesitate to contact my office.

With kind personal regards, I am

Sincerely,


J. Cameron Halford

JCH:tml

Enclosures

cc: Ms. Michelle Minardi
w/enclosure
Brian Calub, Esquire
w/enclosure

^ MEDIATOR AND ARBITRATOR

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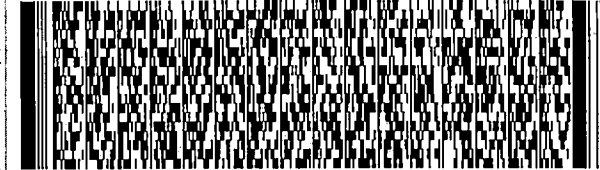
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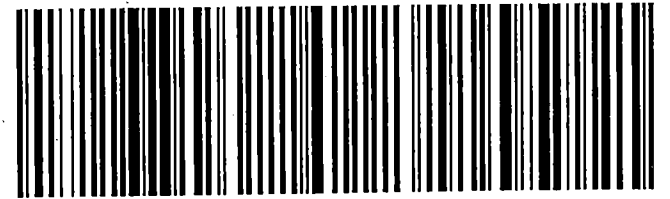
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