THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas Case No. 2011-CP-10-812
The Honorable Mikell R. Scarborough, Master-in-Equity

Appellate Case No. 2013-002694

NATIONSTAR MORTGAGE, LLC — Respondents,

v.

Rhonda Lewis Meisner — Appellant.

Reply Brief of Appellant

April 17, 2015

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Appellant, Rhonda Meisner respectfully submits this reply to Respondents initial brief. Respondents have suggested some of the rulings by the Master in Equity Judge have not been properly preserved for review by the South Carolina Court of Appeals. The Appellant first addresses the arguments that some rulings have not been preserved for review. First, it is only necessary that the issues be raised and ruled on to be preserved for appellate review. Arguments raised to the Master-in-Equity via motion, memorandum, and briefing that go to the merits of the case are preserved for appellate review when ruled on via a motion for summary judgment. Filing a subsequent motion to reconsider the grant of summary judgment encompasses these arguments in a blanket denial of a Rule 59(e) motion to reconsider and are therefore preserved for appellate review.

The South Carolina Supreme Court in *Hattie Rose Elam v. South Carolina Department of Transportation,* opinion no. 25869 at 7 quoting the United States Supreme Court opinion in *Osterneck v. Ernst & Whinney* , 489 U.S. 169, 174, 109 S. Ct. 987, 990, 103 L.Ed. 2d 146,154 (1989) described a *motion* under 59(e) as one which "involves *reconsideration* of matters properly encompassed in a decision on the merits." Accordingly, when the matter is part of a decision on the merits, these arguments are properly preserved by filing a motion to reconsider via S.C. Rules of Civ. P. Rule 59(e).

A. Meisner's argument that the Master-in-Equity erred in granting summary judgment because further discovery was needed was not preserved.

It is well settled that summary judgment is inappropriate where there are material issues of fact and where further investigation into the facts of the case is desirable to clarify application of the law. *Brochbank v. Best Capital Corp.*, 341 S.C. 372, 334, S.E. 2d 688 (2000). Here, the Respondents themselves created one of the material issues of fact by suggesting multiple owners of the note and mortgage which precludes summary judgment. The denial of a motion to alter and amend via S.C. Rules of Civ. P. Rule 59(e) encompasses the *reconsideration* of matters properly encompassed in a decision on the merits which includes discovery of the disputed matters when coupled with a motion to stay pending further discovery. Here, the motion for summary judgment was heard immediately after the motion to stay and to compel further discovery which was briefed in defense of the motion for summary judgment. The motions by the Appellant were denied by the Master in Equity as was a motion to reconsider via a filed motion to reconsider under S.C. Rules of Civ. P. Rule 59(e) motion; thereby preserving the issue of whether further discovery was required for review by the Appellant Courts.**(R.p.192-193)**

Respondents also argue Appellants arguments regarding MERS, Inc's duties under agency law and how Lehman's bankruptcy affected its ability to transfer assets were not ruled on and therefore; not available for appellate review. Respondents then give evidence that the issues were presented to the lower Court by citing the Defendants Memorandum in Opposition to Summary Judgment. See: **(Respondents Initial Brief at 8 lines 1-3).** As an opposition to summary judgment, the argument goes to the merits of the decision to grant summary

judgment. Appellant also points to her memorandum in support of the motion to alter and amend where she specifically points out to the Master in Equity that MERS, Inc. represented to the Nebraska Supreme Court that it never holds notes associated with the Mortgages they register. *Mortgage Electronic Registration System, Inc. v. Nebraska Dept. of Banking and Finance* 704, N.W. 2d 784(Neb 2005). As a result, a power of attorney is necessary to assign both the note and the " bare legal title" MERS holds via its nominee status **(R.p.129-136)** This agency relationship was argued to the lower Court in the Motion to Dismiss due to lack of standing and the failure to join necessary parties. **(R.p.215-219)**The ruling by the Court at the motion to dismiss hearing was without prejudice, making it an interlocutory Order, and preserving appellants challenge to the real party in interest and standing for the trial court and then appellate review. **(R.p.21:4-12;p.54;pp.103-106:)**

The Master in Equity then said he reviewed the file prior to the hearing and ruled that Nationstar, LLC had standing to sue as the servicer based on Draper. **(R.p.96;p.111:3-24;p.114:3-25;p.115;p.119:22-24)** Here, this case is distinguished from Draper because there are assignments of the mortgage that are separate from the entity Respondent's have represented as owner's of the note and mortgage, bringing the real party in interest into question. **(R.p.111:11-25)** Respondents simultaneously represent via pleadings , assignments and filings the note and mortgage is owned by Nationstar Mortgage, LLC **(R.p.111,128)** and Wells Fargo Bank , N.A. as Trustee for Lehman Brothers Trust series 2007-11. **(R.p.87:6-25;p.91:13-20)**

A servicer cannot have standing to sue in a mortgage foreclosure action without proof that it is the servicer for the entity that owns both the note and mortgage otherwise the principal and the accessory are placed on equal footing. **(R.p.115:4-9).**

The note and the mortgage must be owned by the same entity and in the same name or conversely under South Carolina show a power of attorney and assignment of the note and mortgage reflecting the "same path" of ownership; otherwise the note is unsecured. *Landmark National Bank v. Kessler* 2009 Kansas LEXIS 834 (2009). **(R.p.215-219)** While possession of the note and mortgage give the right to foreclose, both the note and mortgage must be "titled" in the same name or under the laws of South Carolina, require a power of attorney delineating how the nominee is authorized to act on behalf of the other entity. **(R.p.216)** When a securitized trust owns the note and mortgage as is represented here; the note and mortgage become assets of the trust and subject to the servicing and pooling agreements . **(R.p.220-222;pp.66-73)** Respondents at the motion for summary judgment hearing; resisted additional discovery arguing the pooling and servicing agreement are matters of public record. **(R.p.103:10-25;104-106)** Having responded to the request for admission that Wells Fargo Bank , N.A. as Trustee for Lehman Brothers Trust series 2007-11 owns the note and mortgage and simultaneously in the same litigation filing mortgage assignments to Aurora (a Lehman Bros. subsidiary) then to Nationstar, LLC without including in the chain of title the entry and exit from the trust creates a material issue of which

entity owns the note and mortgage and therefore has standing to sue providing the Court with the required subject matter jurisdiction.

The power of attorney, real party in interest and agency relationship was argued at the motion to dismiss hearing and was part of the case file that the Master in Equity reviewed prior to the motion for summary judgment hearing. The agency relationship was re-iterated at the summary judgment hearing . **(R.p.103-104)** Also at the Motion to Reconsider hearing the Master in Equity stated he heard this argument before and has declined it. **(R.p.86:11;p.87:1-16)**These arguments are part and parcel to a decision on the merits to grant or deny summary judgment. Even if they were not part of the "merits" of the case; both arguments go to the jurisdiction of the Court given the Respondents representations to the Court that both the trust and Nationstar Mortgage. LLC own the note and mortgage. Appellants also pointed out to the Master in Equity that the original servicer was Lehman Brothers Bank, FSB who transferred the servicing rights to Aurora Loan Services, a wholly owned subsidiary of Lehman Brothers Bank. **(R.p.115)**Importantly, Lehman Brothers Bank filed for bankruptcy protection in 2008 as the Master in Equity took judicial notice at the summary judgment hearing. **(R.p.102:4-11)**

Under article 3 of the UCC, you must negotiate the mortgage notes or the note becomes bearer paper under the UCC. The physical negotiation of the note matters principally because if the note has not been negotiated by the originators (Lehman Brothers Bank, FSB) then the originator's creditors not the trust has the

ownership of the asset e.g.: the note and mortgage via the bankruptcy filing and the Bankruptcy Court has original jurisdiction over the asset.

The Respondents argued at the motion to reconsider "[A]nd while Ms. Miesner's [sic]in support of the Motion to Reconsider tries to distinguish the Carpenter case (ph)[] that's irrelevant because the statute 363301 of the South Carolina Code states that a person entitled to enforce an instrument means the holder of the instrument or non-holder in possession[] is entitled to enforce it pursuant to 36309,363418." **(R.p.85).** While this is true *in a suit on a note*; it is not true in a mortgage foreclosure action. (emphasis added). In a mortgage foreclosure action the owner of the note and mortgage must be the same entity or the servicer must service the entity that owns the note and the mortgage. *Carpenter v. Longen* 83 U.S. (16 Wall) 271, 275 (1872) .

As argued, there is no evidence of any transfers into and out of the Trust via the filings in Charleston county. **(R.p.35-38).** The only transfers noted are the transfers of the mortgage which possess only a nominee status of the original creditor and can "assign" only those nominee rights MERS, Inc possesses.**(R.p.35)**

As elucidated by the Supreme Court in Hattie Rose Elam quoting *Long v. Dunlap,* 87 S.C. 8, 68 S.E. 801 (1910) (Supreme Court will not consider any point which was not presented and considered unless it involves jurisdiction of the Court.) Here , Nationstar Mortgage, LLC assumed it's rights via the assignment from Aurora Loan Servicing, LLC which purportedly, based on Aurora's representations in the pleadings of the lawsuit owned the note and the

mortgage. It is evident from the assignments of the mortgage from Aurora Loan Servicing to Nationstar Mortgage, LLC that both Aurora and Nationstar's status in the foreclosure proceedings were not as the servicer but as the actual holder of the note and mortgage; therefore, neither have standing to initiate the foreclosure proceedings because the assignment of the mortgage happened after the filing of the lis pendens and initiation of the suit. Additionally, Neither Aurora or Nationstar could be functioning as the servicer of the entity that owns the note and the mortgage as there are no transfers of the note and mortgage from that entity to Aurora Loan Servicing for Aurora to claim in the filing of the pleadings of the lawsuit to be the owner of the note and mortgage.**(R.p.59-62)**

There is also no evidence that either Aurora or Nationstar was functioning as the servicer for the owner of the note and the mortgage because they purported to own both the note and mortgage in the pleadings of the case. Therefore, neither Aurora nor Nationstar had standing at the initiation of the lawsuit considering the pleadings and the Court was deprived of subject matter jurisdiction. *Richland County Recreation District v. City of Columbia,*290 S.C.93.348 S.E. 2d 64 (1986). Additionally, the Appellants did not waive their complaints that Respondents were not the real party of interest because they have raised and not abandoned the argument that Aurora and subsequently Nationstar did not have standing to sue as they were not the real party in interest. *WeSav Financial Corpv. v. Lingefelt,* 316, S.C. 442, 450 S.E. 2d 580 (1994) "Standing refers to a party's legal right to make a legal claim or seek judicial enforcement of a duty or right." *Powell. ex.rel Kelley*

v. Bank of Am., 379 S.C. 437, 444, 665 S.E. 2d 237, 241 (Ct. App. 2008) (alteration and internal quotation marks omitted.")

The Respondents also argue that *Bank of Am., N.A. v. Draper*, 405 S.C. 214, 222-223 (Ct. App. 2013) represents that a servicer has standing to sue based on its status as servicer. While it may be the law in South Carolina that a servicer of the owner of the note and mortgage has standing to initiate foreclosure proceedings; Draper does not stand for the proposition that "every" servicer has the right to foreclose; otherwise a servicer representing only the note holder as appears to be the case here (and not the entity that owns the note and the mortgage) would put the incident on equal footing as the principal simply by filing for foreclosure. Additionally, at the time of the filing of the Complaint, Aurora Loan Services, LLC, a wholly owned subsidiary of Lehman Bros. Bank, FSB was under the jurisdiction of the Bankruptcy Court.**(R.p.114,102)**

II. Nationstar has standing because it is, and at all relevant times has been , a real party in interest and Meisner cannot challenge assignment of the Note and Mortgage

The Court of Appeals in the Draper case noted that there have not been any cases on point as to whether the servicer has standing to initiate foreclosure proceedings and then concluded the servicer had standing as an agent for the note and mortgage holder; however, here the Respondents suggest multiple owners of the note and mortgage and provide no proof of the agency relationship. Contrary to the assertions of the Respondents, Appellant can challenge the assignment of the mortgage and note when the Respondents suggest multiple owners of the note and mortgage. It is axiomatic that if the Trust still owns the note and the mortgage

via the answers to the request for admissions; then the filings by the Respondents that Nationstar Mortgage, LLC owns the note and mortgage and has standing to file for foreclosure can be challenged .

III. The Master in Equity's comments about potential tax implications of foreclosure did not reveal a bias that could deprive Meisner of a fair hearing, nor did they improperly influence the outcome of the Summary Judgment hearing.

The Respondents argue that only in Jury trials can a Judge's comments be prejudicial because they potentially affect interference with the fact- finding. ***(Respondents initial brief*, at 13 lines 2-6).** The Respondents go on make Appellants argument for her by acknowledging it is the Judge that determines the law in a summary judgment hearing. Here, the Respondents themselves make material issues of fact by suggesting multiple owners of the note and mortgage.**(R.p.83-84;p.87).** Appellants argue the mortgage and note presented to the Court is owned by separate entities. **(R.p.87:17-25)**The Judge then states, "[I] don't care. I find it in standing and deny the Motion to Reconsider, okay." **(R.p.87:9-10)** As the Respondents suggest the impartiality of the ruling when the facts do not fit record. Here, the Respondents claims multiple owners of the same note and mortgage and the Judge denies additional discovery and does not require the Respondents to provide a verified pooling and servicing agreement for the Trust, indicating prejudice.

Additionally, the Respondents suggests that the Judge's comments did not influence the outcome of the hearing; however, Appellants upon hearing that the Judge was going to grant foreclosure either in 2013 or 2014 without additional

discovery, Appellants were convinced their arguments regarding standing because of defective assignments would not be reconsidered by the trial Judge as he had made up his mind.**(R.p.84-87)**

IV. Meisner's arguments attempting to establish that the property was her principal residence was not preserved.

Respondents suggest that the Master-in-Equity did not rule on the fact that house was Ms. Meisner's primary residence and therefore, this inquiry was not preserved for review by the Court of Appeals. The Master-in-Equity specifically ruled on this issue from the bench and his ruling in the written Order did not conflict with his Order from the bench. Judge Scarborough stated:

> "[I]t was pointed out to me by another attorney in another firm who does a substantial amount of foreclosure work that through December of 2013 presently the law is--well, I guess I made an adverse ruling that--[]. I've made the ruling that it's not her principle residence." **(R.p.116:11-15)**

The written ruling did not conflict with his earlier ruling from the bench making the question of whether or not the residence qualified as a primary residence available for review by the Court of Appeals. Issues and arguments are preserved for appellate review when they are raised and ruled on by the lower court. *Wilder Corp. v. Wilke,* 330 S.C. 71, 76, 497 S.E. 2d. 731, 733 (1998). The Supreme Court continues to explain, A party *may* wish to file such a motion when she believes the court has misunderstood, failed to fully consider , or perhaps failed to rule on an argument or issue, and the party wishes for the Court to reconsider or rule on it. A party *must* file such a motion

when an issue or argument has been raised, but not ruled on , in order to preserve it for appellate review. Hattie Rose Elam at p. 7.

In conclusion, as argued on multiple occasions, "[T]he assignment of the note secured by a mortgage carries with it an assignment of the mortgage, but ...an assignment of the mortgage alone does not carry with it an assignment of the note." *Hahn v. Smith,* 157 S.C. 157, 167, 154 S.E. 112, 115 (1930) also see: *Ballou v. Young,* 42 S.C. 170, 176 20 S.E. 84,85 (1894). Because Respondents have filed their lawsuit *prior* to the assignment of the mortgage, and at a time when Aurora was under the jurisdiction of the bankruptcy court, the Master-in-Equity Court lacks subject matter jurisdiction . For the above reasons and all references to the record, the Appellant requests the Court of Appeals to dismiss the action for lack of standing by the Respondents and therefore the Court's lack of subject matter jurisdiction. In the event, the Court determines the Respondent does have standing, the Appellant request the Court to Reverse the grant of summary judgment and submit the case back to the lower court for additional discovery.

Respectfully Submitted,

April 17, 2015

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CERTIFICATE OF APPELLANT IN FINAL BRIEF

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas Case No. 2011-CP-10-812
The Honorable Mikell R. Scarborough, Master-in-Equity

Appellate Case No. 2013-2694

NATIONSTAR MORTGAGE, LLC — Respondents,

v.

RHONDA MEISNER — Appellant.

CERTIFICATE OF APPELLANT

The undersigned certifies that this Reply Brief complies with Rule 211(b), S.C.A.C.R.

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RHONDA MEISNER — Appellant.

PROOF OF SERVICE FINAL BRIEF AND REPLY BRIEF OF APPELLANT

I hereby certify that on April 17th I served a copy of the FINAL BRIEF AND THE REPLY BRIEF by the Appellant has been served on attorneys for the Respondent Nationstar Mortgage, LLC and has been served upon the parties in this action by mailing a copy postage pre-paid to: Robert A. Muckenfuss, T. Richmond McPherson McGuire Woods, LLP 201 North Tryon Street Suite 3000 Charlotte, NC 28202

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April 17th, 2015

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