The State of South Carolina

In The Supreme Court

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SC Court of Appeals

BARBARA A. GIBBS, MELVIN E. GIBBS, And WESTBROOK PHASE IV HOMEOWNERS' ASSOCIATION

Petitioners,

vs.

NATIONSTAR MORTGAGE, LLC,

Respondent,

Court of Appeals Case No: 2015-001873

CASE NO. _____

PETITION FOR WRIT OF CERTIORARI

I. CERTIFICATION

Petitioners hereby certify a petition for rehearing or reinstatement was made and ruled on by the Court of Appeals, to wit: the Remittitur was issued on the 25th day of 2016: Out of state Petitioners failed to sign and re-submit their $25 check within 7 days; cost for Petitioners' Motion for Rehearing.

II. STATEMENT OF ISSUES

1. Whether a foreclosure suit may be prosecuted in violation of the US Supreme Court's holding requiring a mortgage note. The absence of a mortgage note deprives the court of personal and subject matter jurisdiction.

   a. The absence of jurisdiction is immediately appealable.

2. Whether the Appeals Court may ignore the exception this Honorable Court "carved out" as to an immediately appealable issue: a party's right to a particular mode of trial.

3. Whether the Respondent may falsely certify Petitioners' Mortgagor Non-Compliance and file for an order of reference prior to complying with Administrative Order 2011-05-02-01 [South Carolina Supreme Court].

4. Whether Respondent having been granted a motion to substitute counsel, after notice to Petitioners and a hearing, may substitute counsel a second time with no notice to Petitioners and hearing.

III. STATEMENT OF THE CASE

Petitioner built their custom home in 2005: paying half the cost in cash and taking a mortgage with Bank of America to cover the balance. In 2013 Respondent [Nationstar Mortgage] filed for foreclosure alleging Petitioners owed Nationstar $300,000. Nationstar failed and neglected to file a mortgage note evidencing an amount borrowed; an amount paid; an amount due monthly; an amount past due including but not limited to months not paid; and rights and obligations "stated" in the mortgage note.

Petitioners filed a motion to dismiss based on lack of standing. Additionally, Petitioners filed a counter-claim and demanded a trial on each and every issue. Petitioners filed the required

application and documents in 2009 requesting mortgage modification under HAMP. Bank of America apologized for the manner in which the application and promised a reviewed of the case and asked Petitioners' patience during the process. While waiting for the results: Nationstar filed this foreclosure.

MEMORANDUM OF LAW

V. ARGUMENT

There are 330 million people in the United Stated; each person has the same ***standing*** to file this foreclosure litigation as Nationstar Mortgage!

The US Supreme Court resolved the issue Petitioners presented 143 years ago. The Supreme Court decision "clearly states Respondent [Plaintiff] must own the **Note** and **Mortgage** at the time the Complaint is filed. The most basic elements of standing are deliberately violated. *See*, **Carpenter v. Longen**, 83 U.S. 271, 16 Wall. 271, 21 L. ed. 313 (1872).

Standing is a fundamental requirement for instituting an action, **Brock v. Bennett**, 313 S.C. 513, 519, 443 S.E.2d 409, 412 (Ct.App.1994). "Generally, a party must be a real party in interest to the litigation to have standing. **Hill v. S.C. Dep't of Health & Envtl. Control**, 389 S.C. 1, 22, 698 S.E.2d 612, 623 (2010) (internal quotation marks omitted).

Unless a claimant can colorably assert a loss, it lacks standing. See, **Lujan v. Defenders of Wildlife**, 504 U.S., 560 (1992) (noting that an injury is a required element of constitutional standing))... "[T]he assignment of a note secured by a mortgage carries with it an assignment of the mortgage, but . . . the 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); *see* also **Ballou v. Young**, 42 S.C. 170, 176, 20 S.E. 84, 85 (1894) ("The transfer of a note carries with it a mortgage given to

secure payment of such note."). "A mortgage and a note are separate securities for the same debt, and a ***mortgagee who has a NOTE and a MORTGAGE*** to secure a debt has the option to either bring an action on the note or to pursue a foreclosure action." **U.S. Bank Trust Nat'l Ass'n v. Bell**, 385 S.C. 364, 374, 684 S.E.2d 199, 204 (Ct. App. 2009). The party seeking foreclosure has the burden of establishing the existence of the debt and the mortgagor's default on that debt. Id. at 374-75, 684 S.E.2d at 205.

Standing and ***pleading a sum certain*** are hallmarks of our judicial system. The court's jurisdiction is based on ***standing***; when ***standing*** is lacking, where; as here, the court cannot adjudicated the case. Pleading a sum certain requires more than saying, "They owe me $300,000." [I]t requires the production of a mortgage note; evidencing the terms of repayments; rights and obligations; and the breach – when there was a failure to pay; the amount, etc. When; as here, there is not a breach of the contact, even if Respondent was the proper party, Respondent does not have ***standing***.

Petitioners' submission, supra, is designed as persuasive rather than controlling authority:

> Judge Posner authored a unanimous opinion at the close of 2010 holding that a denial of a Rule 12(b)(6) motion to dismiss based on Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007), raised a "controlling question of law" suitable for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). Judge Posner found the appeal to concern a controlling question of law, which was the legal significance of the facts as alleged, rather than the resolution of disputed facts. A question of law under 1292(b) includes the "question of the meaning of a . . . common law doctrine . . ." 630 F.3d at 626. The legal standard set forth in Twombly was not settled, but instead had placed pleading standards "in ferment." Thus, the case did not concern the "routine application of well-settled legal standards to facts alleged in a complaint . . ." (630 F.3d at 626), which would not meet the requirements for a Section 1292(b) interlocutory appeal. Instead, the "question requires the interpretation, and not merely the application, of a legal standard – that of Twombly." 630 F.3d at 625.
>
> Granting an appeal would promote the "main task of an appellate court, which is to maintain the coherence, uniformity and predictability of the law . . ." Id. In addition, concerns underlying the holding in Twombly supported empowering the district court and court of appeal to authorize an interlocutory appeal. Twombly is "designed to spare

> defendants the expense of responding to bulky, burdensome discovery unless the complaint provides enough information to enable an inference that the suit has sufficient merit to warrant putting the defendant to the burden of responding to at least a limited discovery demand." 630 F.3d at 625. Permitting a complex case of extremely dubious merit to proceed would place defendants in a "discovery swamp," and create "unjustifiable harm to a defendant that only an immediate appeal can avert." Id. at 626.

The Court of Appeals asked Petitioners to answer a single question: "Explain why this [C]ourt has jurisdiction." Petitioners provided the South Carolina Supreme Court's statement as to why jurisdiction is MANDATED:

JUSTICE BURNETT: We granted a writ of certiorari to review the Court of Appeals' opinion in Hagood v. Sommerville, S.C. Ct. App. Order dated May 22, 2003 (unpublished order). We reverse....

> ***In a well-established exception to the general rule***, we repeatedly have held that the denial of a party's right to a particular mode of trial is immediately appealable as a substantial right under Section 14-3-330(2). See Flagstar Corp. v. Royal Surplus Lines, 341 S.C. 68, 72, 533 S.E.2d 331, 333 (2000) ("Pursuant to § 14-3-330(2), this Court has held on numerous occasions that when a trial court's order deprives a party of a mode of trial to which it is entitled as a matter of right, such order is immediately appealable.") (listing cases); Creed v. Stokes, 285 S.C. 542, 331 S.E.2d 351 (1985) (**order referring case to master in equity affects the mode of trial, a substantial right, and party waived his objection to the reference and his right to jury trial by failing to immediately appeal the order**); Bateman v. Rouse, 358 S.C. 667, 675, 596 S.E.2d 386, 390 (Ct. App. 2004) (**purpose of immediate appeal on right to particular mode of trial is to preserve party's constitutional right to trial by jury which would otherwise be lost**.)

The illegal foreclosure action filed by Respondent destroyed Petitioners' peace and tranquility: and destroyed Petitioner's [Barbara Gibbs] credit rating; the emotional strains forced Petitioners to leave the State of South Carolina. Petitioners filed a counter-claim and demanded a jury trial. An order of "reference" would deny Petitioners of their right to a jury trial.

Respondent filed for an order of reference prior to complying with Administrative Order 2011-05-02-01 [South Carolina Supreme Court. At all times relevant to this Foreclosure the Plaintiff and Plaintiff's attorney were/are aware they are committing fraud on the court, to wit: a default did

not occur; falsely claiming Gibbs did not apply for mortgage modification [9/2011]; falsifying certification that Gibbs failed to request mortgage modification within 30 days after service **[CERTIFICATION OF MORTGAGOR NON-COMPLIANCE,** filed December 17, 2013]: Request for Foreclosure Intervention – filed by Gibbs the 19th day of November.

When Respondent, after notice to Petitioners and a hearing was granted a substitution of counsel, Respondent cannot have the clerk issue a different substitution of counsel 30 days after the prior order without notice to Petitioners.

VI. CONCLUSION

Respondent does not have privity with Petitioners; Bank of America is the true party of interest. Unless and until Bank of America transfer the mortgage note to Respondent, Respondent has the same interest as 330 million other Americans.

Absent Certiorari, Petitioners will be forced to assert their right to a jury trial before the Master-in-Equity. By law the motion must be denied and this appeal will begin a third time!

WHEREFORE, Petitioners pray this Honorable Court grant their Petition for Writ of Certiorari.

Respectfully Submitted,

Barbara A. Gibbs, Pro-se & M. Eugene Gibbs, [Esq.] Pro-se
3108 Hidden Falls Drive
Buford, Georgia 30519

March 18, 2016

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