STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

HSBC Bank of USA, National Association, as Trustee for the Holders of the Deutsche ALT-A Securities, Inc. Mortgage Loan Trust, Mortgage Pass-Through Certificates Series 2007-A4, assignee of Bank of America N.A., successor by merger to BAC Home Loans Servicing, L.P., f/k/a Countrywide Home Loans Servicing, Inc.,

Plaintiff,

-vs.-

Clifford L. Ryba; Beverly Ryba; Regions Bank; First Federal Savings and Loan Association of Charleston, Citibank (South Dakota) N.A., and Carol Goldberg,

Defendants.

THE COURT OF COMMON PLEAS
BEFORE THE MASTER IN EQUITY
CASE NO.: 2011-CP-10-7885

ORDER DENYING FORECLOSURE

This matter was heard before me on March 24, 2015. Present at the hearing were the Plaintiff and their its attorneys, Matthew Tillman, of Womble, Carlyle, Sandridge & Rice, LLP, and Ericka G. Lybrand of Rogers, Townsend and Thomas, PC, as well the Defendant, Carol Goldberg, and her attorneys, Benjamin Goldberg, Esquire, and J. Kevin Holmes, of the Steinberg Law Firm, LLP. The Defendant, Regions Bank, has not sought to foreclose its second mortgage but has requested, if foreclosure is granted, any excess funds be paid over to them. The remaining

Defendants did not appear at the hearing. This was a final hearing on the merits on the Plaintiff's Amended Complaint for foreclosure.

The Plaintiff seeks to foreclose a note and mortgage entered into between Countrywide Home Loans Inc., and Clifford L. Ryba, and his wife on May 2, 2007 recorded in Book E 625 at page 517 in the Charleston County RMC Office. (Defendant's Exhibits 4 and 5). The mortgage was secured by real property located at 34 Tarleton Drive, Charleston, South Carolina 29407. There is no dispute the mortgage is in default.

The Plaintiff alleges it is a bona fide purchaser of the note and mortgage for value without notice also entitled to the protection of the shelter rule and, therefore, not subject to any claims or defenses of the Defendant. The Defendant alleges she was fraudulently induced into deeding her property to Ryba and his wife when she sought his help as a licensed mortgage broker to refinance her home, denies the Plaintiff is a bona fide purchaser for value without notice, and alleges the Plaintiff has no greater rights than its predecessor in title, Countrywide, which facilitated, turned a blind eye to, and profited from its agents' fraud and illegal recasting scheme.

The Plaintiff claims the mortgage was duly filed in accordance with § 30–7–10, S.C. Code Anno., 1976 as amended, and, therefore, valid as to all subsequent bona fide purchasers for value without notice. Section 30–7–10 is consistent with South Carolina case law providing a purchaser may assert a plea in equity if it is a bona fide purchaser for value without notice, by showing (1) he has actually paid

the full purchase price; (2) he purchased and acquired the legal title, or the best right to it; and (3) he purchased the property in good faith, with integrity of dealing, and without notice of a lien or defect. Spence v. Spence, 368 S.C. 106, 628 S.E.2d 869 (2006). In order to qualify as a bona fide purchaser for value without notice, all three (3) conditions must exist before the purchaser had notice of a title defect or other adverse claim, lien, or asserted interest in the property. S.C.Tax Commn. v. Belk, 266 S.C. 539, 543, 225 S.E. 2d 177, 179 (1976). The burden of proving the existence of the three (3) conditions is on the Plaintiff. Smith v. Faust, 107 S.C. 37, 92 S.E. 24 (S.C. 1917).

Before addressing the issues the Court feels compelled to discuss some of the procedural history of this case. This foreclosure was originally brought by Bank of America, N.A., successor by merger to BAC Home Loans Servicing L.P., f/k/a Countrywide Home Loans Servicing, Inc., which alleged it was the holder of the note and mortgage by reason of an assignment filed in the Charleston County RMC Office on September 15, 2011. (Plaintiff's Exhibit 8). The Complaint was amended substituting the Plaintiff which alleged it was the holder of the note and mortgage by reason of an assignment filed in the Charleston County RMC Office on May 21, 2012. (Plaintiff's Exhibit 6). Considerable time and effort was spent by the Court and the parties arguing the Plaintiff's motion for summary judgement based on these assignments. The Defendant raised several arguments why neither the Bank of America nor the Plaintiff were bona fide purchasers for value without notice. First, the Defendant argued the Bank of America and the Plaintiff had failed to

show they were the holder of the note because it was endorsed in blank and did not show who the note had been assigned to. Second, the Defendant argued neither the Bank of America nor the Plaintiff could be a holder in due course because they obtained their assignments after the *lis pendens* was filed giving statutory notice of the Defendant's claim on August 19, 2008. *See*: § 30–7–10, S.C. Code Anno., 1976 as amended; Pipkin v. Fletcher, 165 S.C. 98, 162 S.E.774 (1932). Third, the Defendant argued neither the Bank of America nor the Plaintiff could be a holder in due course because they obtained their assignments after the note and mortgage were in default. *See*: § 36-3-302 (1)(c), S.C. Code Anno., 1976 as amended. And, fourth, the Defendant argued Bank of America, the Plaintiff's predecessor in interest, could not be a holder in due course because it had obtained the note and mortgage as part of a bulk sale not in the regular course of Countrywide's business. *See*: § 36-3-302 (3)(c), S.C. Code Anno., 1976 as amended. The Defendant asked the Court to take judicial notice the real estate market collapsed in late 2007 and 2008 causing the Wall Street financial crisis and that Bank of America had purchased Countrywide on July 1, 2008 in what the Defendant described as a "fire sale" according to Bank of America's web postings. In response to these arguments, the Plaintiff filed a supplemental memorandum in support of summary judgment claiming it was entitled to the protection of the shelter rule. Under the scintilla of evidence standard, the Court ruled there remained material questions of fact and denied summary judgment. *See:* Hancock v. Mid-South Management Co., Inc., 673 S.C. 801, 381 S.E.2d 326 (S.C. 2009).

At trial, however, the Plaintiff introduced the testimony of Michael Ward, a vice president of the Plaintiff, to authenticate the documents and he testified the mortgage was actually assigned to the Plaintiff on June 1, 2007, long before the *lis pendens* was filed, Countrywide collapsed and was taken over by Bank of America, and the note and mortgage had gone into default. The prior assignments which were filed with the RMC Office and previously relied upon by the Plaintiff are inconsistent with the his trial testimony. If the trial testimony is to be believed, then the two prior assignments recorded in the RMC Office, referenced in pleadings, and relied upon in arguments before this Court were either the product of incompetence, the result of a total lack of accurate record keeping, or a complete sham. This Court is charged with the difficult task and responsibility of deciding cases affecting the lives of citizens whose homes are being foreclosed. Of necessity, the Court must rely on the accuracy of the documents submitted. The Court emphasizes a mortgage foreclosure is an action in equity and a party seeking to foreclose a mortgage must come before the Court with clean hands. Hayne Fed. Credit Union v. Bailey, 327 S.C. 242, 489 S.E.2d 472 (1997); Wachovia Bank, N.A. v. Coffey, 389 S.C. 68, 698 S.E.2d 244 (2010). The inconsistent testimony causes the Court to have great concern about the accuracy and reliability of the documents the Plaintiff relies upon.

The first issue to be decided is whether the Plaintiff is a bona fide purchaser of the note and mortgage for value. In response to the Defendant's argument made during the summary judgment hearing the note was endorsed in blank and did not

show to whom it had been assigned, the Plaintiff argued the blank endorsement made the note a bearer instrument and produced the original note. The Court was satisfied this proved the Plaintiff is the holder of the note. The question remained whether the Plaintiff paid value for the note. The Court would not hesitate to find that Bank of America obtained the note and mortgage as part of a bulk sale not in the ordinary course of Countrywide's business and, therefore, could not be a holder in due course. If the trial testimony is to be believed, however, it would now appear the Bank of America never was a holder of the note by merger or assignment. If the assignments are to be believed, the Court notes the assignments do not state what, if anything, of value was exchanged for the note and mortgage. The issue of whether the Plaintiff had paid value was raised during the hearing on the Plaintiff's motion for summary judgment. Other than Plaintiff's counsel saying the June 1, 2007 that was not introduced into evidence stated an unspecified consideration had been paid, there is no evidence what, if anything, the Plaintiff actually paid for the note and mortgage. When Michael Ward was asked by Defendant's counsel what the Plaintiff had paid for the note and mortgage, he replied he did not know. The Court finds the Plaintiff has failed to prove it was a bona fide purchaser for value.

The second issue to be decided is whether the Plaintiff is a bona fide purchaser of the note and mortgage without notice. The Court finds the Plaintiff is the holder of the note and mortgage but the issue of whether the Plaintiff had notice depends upon when the note and mortgage were assigned to them. The assignments that were filed with the RMC Office, cited in the pleadings, and relied

upon in arguments before the Court reflect the assignments were made after the *lis pendens* giving statutory notice of the Defendant's claim and after the note and mortgage were in default. As to the claim the Plaintiff became the holder of the note on June 1, 2007 pursuant to an agreement that was not introduced into evidence, the Court is unconvinced. The Plaintiff did not introduce a copy of the agreement and, other than representations of counsel, the Court has no way of knowing who the agreement was between, what the terms of the agreement were, or whether it included the subject note and mortgage. The Court does not suggest Plaintiff's counsel misrepresented the agreement but representations of counsel are not a substitute for evidence. For the reasons set forth above, the Court has serious concerns about the accuracy and reliability of the Plaintiff's documents. The Court finds the Plaintiff has not proven it obtained the note on June 1, 2007 pursuant to an agreement that has not been introduced. The only other evidence before the Court is that the Plaintiff obtained the assignment of the note and mortgage pursuant to the assignment dated May 21, 2012 that had been filed with the RMC Office, cited in the pleadings, and relied upon in proceedings before the Court. Under § 30–7–10, however, this assignment was made after the *lis pendens* was filed and, therefore, the Plaintiff would have had statutory notice of the Defendant's claim. Section 30-7-10 specifically applies to assignments:

> All deeds of conveyances of lands...**including *all assignments***...are valid so as to affect the rights of subsequent creditors... or purchasers for valuable consideration without notice, only from the day and hour from which they are recorded in the office of the register of deeds...In the case of a subsequent purchaser of real estate, or **in the case of a subsequent lien**

> **creditor on real estate for valuable consideration without notice, the instrument evidencing the subsequent conveyance or subsequent lien must be filed for the record in order for its holder to claim under this section as a subsequent creditor or purchaser for value without notice, and the priority is determined by the time of filing for record.**

See: Pipkin v. Fletcher, *supra*. The Court finds the Plaintiff had statutory notice of the Defendant's claim when it became the holder of the note and mortgage pursuant to the assignments filed with the RMC Office, cited in the pleadings, and relied upon by the Plaintiff in arguments before the Court. The Court finds the Plaintiff failed to prove it was a bona fide purchaser of the note and mortgage without notice.

Finding the Plaintiff failed to prove it was a bona fide purchaser for value without notice, however, does not end the inquiry. The Plaintiff further argues the deed between Ryba and the Defendant, if induced by fraud, was not void but voidable and, therefore, valid as any bona fide purchaser claiming through a bona fide purchaser for value without notice. Manship v. Newsome, 188 S.C. 6, 198 S.E.428 (1938); Smith v. Faust, *supra*. The Plaintiff argues an assignee stands in the shoes of the assignor and, even if they had statutory notice, they are entitled to the protection of the shelter rule. Liberty Loan Corp. of Darlington v. Mumford, 283 S.C. 134, 322 S.E.2d 17 (Ct. App. 1984) ("[W]henever in a succession of purchasers you reach one who is innocent and purchases in ignorance, the title is thenceforth sanctified."); *see also*: Goodwin v. Harrison, 231 S.C. 243, 98 S.E.2d 255 (1957); BAC Home Loans Serv. v. Kinder, 389 S.C. 619, 73 S.E.2d 547 (2012). The Plaintiff

argues since its predecessor in title, Countrywide, actually funded the note and mortgage before the *lis pendens* was filed, the Plaintiff stands in Countrywide's shoes and is entitled to the protection of the shelter rule. A review of the testimony and evidence is necessary to decide this issue.

The Defendant testified she inherited 34 Tarleton Drive, Charleston, South Carolina 29407, free of encumbrances, from her grandfather. Thereafter, she and her then husband mortgaged the property because they were adopting a child and her husband wanted to open a restaurant. Subsequently, her husband was incarcerated, his restaurant closed, and the Defendant was left with insufficient income to pay the mortgage. She obtained a short term loan to keep up the payments but needed to obtain long term financing. She mentioned her situation to Ryba, who informed her he was a licensed mortgage broker with First Rate Mortgage, LLC, and offered to help her obtain refinancing.

The Defendant testified she met with Ryba at the office of First Rate Mortgage, LLC, and answered questions as he filled out what she presumed was a mortgage loan application. A short time later, however, Ryba told the Defendant she could not qualify for a mortgage loan even with a co-signor. The Defendant testified Ryba then proposed the Defendant deed her home to him so he could obtain a mortgage in his name and that he would lease the home back to her for an amount equal to the mortgage payments and give her the right to repurchase the home from him by reimbursing him for his costs. The Defendant testified she was desperate to keep from losing her home, an inexperienced borrower, and she relied

upon Ryba because he was a licensed mortgage broker and worked for a mortgage brokerage firm. The There is no evidence the Defendant knew the proposed scheme is called recasting and prohibited under the law regulating mortgage brokers.

In furtherance of the scheme, the Defendant testified Ryba prepared a Residential Lease Agreement on August 12, 2005 leasing the property back to her for monthly rent of $850.00. (Defendant's Exhibit 2). Paragraph 14 of the lease agreement drafted by Ryba provided that the Defendant would be responsible for essential services and appliances because, "[t]enant is owner." The Defendant testified she understood the rent would be equal to and used to pay for the mortgage Ryba would obtain in his name to pay off her existing mortgage. The documents reveal the Defendant's mortgage had an outstanding balance of $199,689.75, including interest and fees, at the time of the closing. (Defendant's Exhibit 5). The Defendant testified Ryba then prepared an Agreement to Buy and Sell the property on August 16, 2005 for a stated consideration of $205,000.00 which she understood to be the amount needed to satisfy the existing mortgage and pay closing costs for the new mortgage. The Defendant testified she did not receive anything for her property which had a value of approximately $350,000.00. The Court takes judicial notice that this transaction occurred before the collapse of the real estate market in late 2007 and 2008, the Defendant's home was marketable, and a sale would have netted her approximately $150,000.00 in equity. The Defendant testified she did not want to sell her home and was only seeking help with refinancing. The Defendant testified she was not represented by a real estate agent in either the

lease or buy and sell agreements. The Defendant testified and the documents reveal she attended a closing at which she signed a deed transferring the property to Ryba and his wife on August 31, 2005. (Defendant's Exhibit 4). The Defendant testified she signed the deed based upon Ryba's representations. The Defendant testified she was not represented by an attorney at the closing. The lawyer who closed the loan, Roy Hutchinson, Esquire, testified he would not have closed the loan if he had he known of Ryba's representations.

The testimony of the closing attorney and the documents reveal that on that same day, Ryba and his wife obtained a mortgage from Countrywide in the principal amount of $163,500.00. (Defendant's Exhibit 6). The Defendant was not a party to the mortgage closing. The mortgage application was handled by Ryba and his employer, First Rate Mortgage, LLC. The proceeds of the loan, together with a second mortgage of unknown origin in the amount of $20,857.00 and cash from borrower in the amount of $21,199.11, were used to fund the transaction and to satisfy the Defendant's outstanding mortgage as shown by the HUD Settlement Statement. (Defendant's Exhibit 15). Whatever personal funds Ryba expended were more than reimbursed six weeks later when he and his wife obtained a second mortgage on the property from Regions Bank in the principal amount of $100,000.00 on October 11, 2005. The Defendant testified she had no knowledge of and did not participate in this second mortgage. The documents reveal that seven months later Ryba and his wife refinanced the Regions Bank second mortgage

increasing the principal amount to $115,000.00 on May 9, 2006. The Defendant testified she had no knowledge of and did not participate in this refinancing.

A year later Ryba and his wife refinanced the Countrywide mortgage increasing the principal amount to $172,000.00 on May 2, 2007. (Defendant's Exhibit 10). This is the mortgage sought to be foreclosed in this action. Prior to this refinance, Regions Bank agreed to subordinate its second mortgage on April 24, 2007. (Defendant's Exhibit 6). The Defendant testified she had no knowledge of and did not participate in this refinancing. The documents reveal the mortgage application was again handled by Ryba and his employer, First Rate Mortgage, LLC. (Defendant's Exhibit 14). The witness, Michael Ward, on cross examination admitted Countrywide relied upon First Rate Mortgage, LLC, to gather and submit complete and accurate information about the loan, however, he also testified this was a "no doc" loan, meaning Countrywide did not require the information on the loan application be verified or documented. The Uniform Residential Loan application was completed by First Rate Mortgage, LLC., and signed by Ryba and his wife on the day of the closing. The loan application disclosed Ryba was an employee of First Rate Mortgage, LLC. The year Ryba acquired the property was left blank on the application. The application described the property as an investment and disclosed that Ryba did not live on the property. The application further disclosed the property was rented for a significant net monthly loss and, based on the appraisal performed as part of the loan, the property was rented for less than fair market value. The attorney who closed the loan, David Chard,

Esquire, testified and the documents disclosed that $171,445.01 of the proceeds of the $172,000.00 mortgage were used to satisfy Countywide's prior mortgage and to pay fees, including the mortgage broker fee, title insurance, and closing costs. (Defendant's Exhibit 15). The appraisal valued the property at this time, still before the collapse of the real estate market, was $375,000.00. (Defendant's Exhibit 17).

The Defendant testified Ryba and his wife demanded she increase her rent payments from $850.00 to $1,600.00 a month and, when she refused, they tried to have her evicted from the property. The Defendant testified she retained Benjamin Goldberg, Esquire, who represented her before the Magistrate's Court and stopped the eviction proceedings. The Defendant testified Ryba failed to pay the property taxes and a delinquent tax notice was posted on her front door and that she paid the taxes to keep from losing the property. The Defendant testified Ryba hired a real estate agent to sell the home who put a "lock box" on her front door and for sale signs in the yard which she removed.

The documents reveal Mr. Goldberg filed a Summons and Complaint, Case No. 08-CP-10-4970, on behalf of the Defendant against the Rybas and First Rate Mortgage, LLC, alleging various causes of action, including fraud and recasting. (Defendant's Exhibit 18). At the same time, Mr. Goldberg filed a *lis pendens* giving statutory notice of the alleged fraud and the Defendant's claim. (Defendant's Exhibit 19).

The Defendant testified that Ryba filed for bankruptcy but did not list the Defendant as a creditor. Mr. Goldberg intervened in the bankruptcy and, as part of the settlement of the bankruptcy, Ryba and his wife transferred ownership of the property subject to the mortgages back to the Defendant by quick claim on October 26, 2012.

The Court must decide whether the Defendant has proven she was fraudulently induced into deeding her property to Ryba and his wife. The elements of fraud are well established under South Carolina law. To establish her claim of fraud the Defendant was required to show: (1) a misrepresentation, (2) its falsity, (3) its materiality, (4) either knowledge of its falsity or a reckless disregard of its truth; (5) intent that the misrepresentation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance of its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury. *See*: Michael G. Sullivan, Elements of Civil Causes of Action, SC Bar/CLE, p. 103 (2000); Kahn Construction Co. v. S.C. National Bank of Charleston, 275 S.C. 381, 384, 271 S.E.2d 414 (1980).

The Plaintiff objected to the admission of evidence concerning the alleged fraud on the grounds the oral agreement alleged by the Defendant violated the Statute of Frauds. *See*: §§ 27-35-20, 32-3-10(4), S.C. Code Anno., 1976 as amended. Generally, a contract for an interest in land must be in writing and signed by the party against whom enforcement is sought. *See:* Player v. Chandler, 299 S.C. 101, 382 S.E.2d 891 (1989). The statute is subject to exceptions including that other

written documents can establish or confirm the existence of the oral agreement satisfying the statute or that the oral agreement has been partially performed thereby avoiding the statute. The Court does not find the written lease agreement prepared by Ryba, which included a provision the Defendant was the owner of the property, or the written buy and sell prepared by Ryba, even if considered together, contained the essential elements of the contract alleged to satisfy the statute. Neither the lease nor buy and sell agreements contained a provision that Ryba would resell the property to the Defendant, the time such resale would take place, or the amount to be paid. Player v. Chandler, *supra*. Nor does the Court find that the Defendant's continued occupancy of the home and payment of rent, which was consistent with the lease agreement, is sufficient to show part performance in avoidance of the statute. Stackhouse v. Cook, 271 S.C. 518, 248 S.E.2d 482 (1978). The Court does find, however, that the protection afforded by the Statute of Frauds is a personal privilege of the parties to the agreement and a stranger to the oral contract cannot avail himself of the fact that the statute renders the contract unenforceable. Hatcher v. Harleysville Mut. Ins. Co., 266 S.C. 548, 225 S.E.2d 181 (1976). Furthermore, the Court finds that a Court of equity will not permit a statute intended to prevent fraud to be used as an instrument to effect a fraud. Aust v. Beard, 230 S.C. 515, 96S.E.2d 558 (1957); Gardner v. Nash, 225 S.C. 303, 82 S.E.2d 123 (1954). While a Court of equity will generally not enforce contracts relating to land which are not in writing as required by the Statute of Frauds, it will cancel conveyances obtained by fraudulent misrepresentations. Gardner v.

Nash, 225 S.C. 303, 82 S.E.2d 123 (1954). The Plaintiff's objection to the introduction of evidence concerning the underlying fraudulent and illegal nature of the transaction by which Ryba obtained title to the property mortgaged is overruled.

The Court finds the representations set forth above made by Ryba were both false and material. Ryba knew the representations were false and intended for the Defendant to act on them. The Defendant was desperate to save her home, not an experienced borrower, and was neither represented by a real estate agent nor a lawyer in the transactions. The Defendant not only relied but had the right to rely on Ryba's advice because he was a licensed mortgage broker who worked for a mortgage brokerage firm. The Defendant has suffered proximate damage by Ryba mortgaging her home multiple times withdrawing a substantial portion, if not all, of the equity and by his attempts to have her evicted from and to sell her home. The Court finds the Defendant has proven she was fraudulently induced into deeding her property to Ryba by clear and convincing evidence.

Furthermore, the Court finds mortgage loan brokers are licensed and governed by the Licensing Requirements of Certain Loan Brokers of Mortgages on Residential Real Property Act, § 40–58–10, S.C. Code Anno., 1976 as amended. Section 40–58–70(6) of the Act in effect at the time of the transactions prohibited residential mortgage brokers from engaging in recasting. Section 40-58-20(9) defines recasting as a promise an individual can recoup a home sold to a third party with the intent of the original seller to rent the property for a specific time at which

the original seller will have the option to repurchase the property back at a specified price. Mortgage brokers were specifically prohibited from engaging in recasting unless the mortgage applicant obtained the advice of a licensed attorney who is independent of the transaction who provided a document advising the applicant of the potential consequences of recasting. *See*: §§ 40–58–20(9) and 40–58–70(6), S.C. Code Anno., as amended in 1993. No evidence the Defendant received such independent legal advice or documentation of the potential consequences was provided to her was produced. The Court finds Ryba's recasting scheme was not just fraudulent, it was illegal.

Even if the underlying transaction was fraudulent and illegal, the Plaintiff maintains its argument, first raised in its supplemental memorandum in support of summary judgment, "[t]here is no evidence that Countrywide Bank was anything but a bona fide lender for value." As set forth above, in order for Countrywide to have been a bona fide lender for value it must have acted in good faith, with integrity of dealing, and without notice of a lien or defect. Spence v. Spence, *supra*. The Court notes Countrywide received $171,445.00 of the proceeds of the $172,000.00 loan sought to be foreclosed. These proceeds of this loan were used to pay off its previous loan in the amount of $163,500.00 with the balance used to pay broker fees, closing fees, costs, and title insurance. Nevertheless, the Court finds the payment of $163,500.00 to fund the original mortgage being refinanced constitutes payment of value. The question remains, however, whether

Countrywide had notice of the fraudulent and illegal acts committed by Ryba to obtain title to the property mortgaged.

Notice can be either actual or constructive. When a person has knowledge of facts sufficient to put them on inquiry, the law presumes them to have knowledge of undisclosed facts such inquiry, if pursued with diligence, would have revealed. *See:* City of Greenville v. Washington Am. League Baseball Club, 205 S.C. 495, 32 S.E.2d 777 (1945); O'Leary-Payne v. R.R. Hilton Head, II, Inc., 371 S.C. 340, 638 S.E.2d 96 (S.C. App. 2006). Countrywide had actual notice from the loan application Ryba was both the borrower and broker of the loan and an employee of First Rate Mortgage, LLC, it relied upon to obtain and verify information about the loan. While Michael Ward testified he had brokered two mortgage loans on his own property, no details of those loans were introduced and the Court does not know what types of loans were involved, whether they were "no doc" loans, or who the lenders were. Michael Ward was not qualified as an expert and his testimony about two personal loans is insufficient to establish this was or is an accepted practice in the mortgage loan industry. Countrywide had actual knowledge the "no doc" loan being applied for was not a typical mortgage loan. When asked how the original mortgage in the principal amount $172,000.00 could have increased so much, Michael Ward testified it was a loan that allowed the borrower to decide what payments to make and for unpaid interest to accumulate.* Countrywide had actual knowledge the date Ryba had acquired the property had been left blank on the application, Ryba did not reside on the property, and that, although described as an

* a Negative Amortization loan

investment, the property was rented at a significant net monthly loss below fair market rent. Countrywide had actual knowledge Ryba had financed and refinanced the property at least four times in two years. The Court specifically requested information from the Plaintiff regarding lending standards for multiple refinancing of property over a short period of time at the summary judgement hearing but no information in this regard was provided after the hearing or at trial. While none of these facts known to Countrywide may have been enough considered individually, when taken together the Court finds they were sufficient to have put Countrywide on inquiry.

The Court further finds, if an inquiry had been diligently conducted, Countrywide would have discovered the underlying fraudulent and illegal recasting scheme by which Ryba obtained title to the property being mortgaged. The fact that the borrower was also the broker Countrywide relied upon to produce complete and accurate information concerning the "no doc," flexible payment loan should have at least warranted a more thorough investigation. Had Countrywide inquired about when Ryba acquired the property, information left blank on the application, they would have discovered he acquired it immediately before the first Countrywide mortgage. Had they inquired about why the property described as an investment was rented for a significant net monthly loss at below fair market rent, they would have discovered it was rented back to the Defendant who deeded the property to Ryba. Had they asked for a copy of the lease, they would have discovered the lease in paragraph 14 said the Defendant was the owner of the property. Had they

inquired about how much had been paid for the property worth approximately $350,000.00 they would have discovered it was only $205,000.00 and the closing statement from their first loan showed the Defendant was never paid anything for her equity. The Court finds if Countrywide had asked some simple and fairly obvious questions it would have inevitably discovered Ryba had engaged in recasting that was prohibited by statute. The Court finds a diligent inquiry would have led Countrywide to the discovery the underlying transaction by which Ryba obtained title to the property mortgaged was fraudulent and illegal.

As an additional sustaining ground, the Court finds Ryba and First Rate Mortgage, LLC, were the agents of Countrywide under South Carolina law. Agency is a fiduciary relationship which results from the manifestation of consent by one person that another shall act on his behalf and subject to his control, and consent by the other to so act. *See*: F. Patrick Hubbard and Robert L. Felix, The South Carolina Law of Torts, 2nd Ed., SC Bar/CLE, p. 635 (1997); Restatement (Second) of Agency, § 1; Peoples Fed. Sav. & Loan Ass'n v. Myrtle Beach Golf & Yacht Club, 310 S.C. 132, 145–146; 425 S.E.2d 764, 773 (S.C. App. 1992). Ryba clearly had knowledge of the recasting scheme and, therefore, his employer, First Rate Mortgage, LLC, had knowledge of the scheme under the doctrine of *respondeat superior*. The treatis explains the *respondeat superior* doctrine literally means "let the master answer" and is founded on public policy:

> The reason which has supported the principle of *respondeat superior*, based upon the judicial interpretation and declaration of public policy, is that the principal, by selecting and directing the manner in which he shall execute the agency, should, in

> justice to third persons with the agent may deal, and who are not responsible either his selection or conduct, be held liable for his torts.

Id., at p. 635; Sams v. Arthur, 135 S.C. 123, 130, 133 S.E.2d 493 (1960). Vicarious liability is founded on fairness and the notion, "he who expects to derive advantage from an act which is done by another for him must answer for any injury that a third party may sustain from it." Vicarious liability also seeks to prevent the conduct from occurring and the injury being inflicted in the first place and recognizes the principal is often in a better position to provide an adequate remedy for the innocent victim and in a position to spread the risk. *Id.*, at p. 639; South Carolina Ins. Co. v. James C. Green & Co., 290 S.C. 171, 348 S.E.2d 617 (Ct. App. 1986).

The Court finds Countrywide agreed to allow Ryba and First Rate Mortgage, LLC, to handle the mortgage loan application in which Ryba was both the borrower and an employee of the broker. Countrywide directed and controlled what information Ryba and First Rate Mortgage, LLC, were required to obtain, verify, and submit or, perhaps more accurately, not required to obtain, verify, or submit. Countrywide benefited from the loan by receiving $171,455.00 of the $172,000.00 loan and paid Ryba and First Rate Mortgage, LLC, a broker's fee. Countrywide was in a position to and did protect itself from a defect in the title by requiring the purchase of title insurance as part of the loan transaction. The Court finds Countywide was vicariously liable for the fraudulent and illegal acts committed by Ryba and First Rate Mortgage, LLC, as its agents.

The Plaintiff argues, however, that Ryba and First Rate Mortgage, LLC, were independent contractors for whose torts Countrywide would not be liable. The rule a principal is not liable for the acts of an independent contractor, however, is subject to exceptions. *See:* The South Carolina Law of Torts, *supra.* at p. 636. In addition to the exceptions discussed in the treatise, the Court finds South Carolina law recognizes that a mortgage broker who procures a loan and performs other services at the direction of the lender is the agent of the lender, not the borrower. *See:* Brown v. Brown, 38 S.C. 173, 17 S.E. 452 (1893); Land Mortgage Investment & Agency Co. of America, Ltd., 49 S.C. 345, 26 S.E. 990 (1987); Blackwell v. British-American Mortgage Co., 65 S.C. 105, 43 S.E. 395 (1902); American Mortgage Co. of Scotland v. Woodward, 83 SC 54, 65 S.E. 739 (1909). While the Court recognizes § 40–58–78, has been amended and now may modify the common law rule if the broker fee agreement contains explicit disclaimers, this amendment did not become effective until January 1, 2010 and the Court further notes no such disclaimers have been produced in this case. The Court finds Ryba and First Rate Mortgage, LLC, were not independent contractors but were agents of Countrywide for whose acts Countrywide is vicariously liable.

Based on the foregoing discussion and findings, the Court finds that Countrywide was not a bona fide purchaser for value without notice. Countrywide had at least constructive knowledge of the fraudulent and illegal recasting scheme committed by its agents, Ryba and First Rate Mortgage, LLC. The Plaintiff, as their assignee, stands in their shoes. The Court wishes to emphasize this is a very

fact specific case. It involved a licensed mortgage broker and the company he worked for engaging in a fraudulent and illegal recasting scheme from which they profited. It involves Countrywide, a now defunct mortgage company the Defendant aptly described as a poster child for the mortgage loan abuses that led to the largest financial crisis of our generation, facilitating and turning a blind eye to the fraudulent and illegal recasting scheme it also profited from. And, it now involves a financial institution willing to take the risk when it agreed to purchase Countrywide's suspect mortgages seeking to profit as well. Denying foreclosure under the facts of this case does not endanger the legal underpinnings of our financial system. It is well founded under existing South Carolina law and is consistent with the public policy that holds those who facilitate, turn a blind eye to, or who are willing to assume the risk should be held responsible rather than the victims of fraud and illegal conduct.

The Court is mindful of the Plaintiff's argument the Defendant will receive a windfall if foreclosure is denied but notes the Defendant's property remains subject to the Regions Bank second mortgage in the principal amount of $115,000.00 that has also has not been paid since May of 2011. With accumulated interest, late fees, and probable attorney fees, any windfall to the Defendant is likely to be minimal. The Court further notes the Plaintiff can seek to recoup its loss by proceeding against the title insurance that was purchased as part of the loan. The facts and circumstances regarding the Regions Bank mortgage may be entirely different from this case and nothing contained in this Order should be interpreted as binding in

any foreclosure action they may bring. It is hoped, however, in light of this decision that Regions Bank and the Defendant will negotiate in good faith to restructure the loan so that the Defendant will not unfairly lose her home.

IT IS HEREBY ORDERED that foreclosure is denied.

AND IT IS SO ORDERED.

Mikell R. Scarborough
Master-In-Equity for Charleston County

Charleston, South Carolina
4th day of June, 2015