THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Master in Equity
The Honorable Mikell R. Scarborough, Master in Equity Judge

RECEIVED
JUL 28 2016
SC Court of Appeals

Case No. 2013-02694

Nationstar Mortgage, LLC,

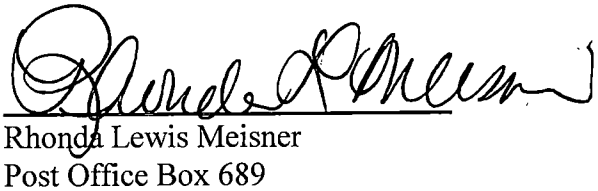
Respondent,

v.

Rhonda Lewis Meisner Petitioner

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

JULY 27, 2016



Rhonda Lewis Meisner
Post Office Box 689
Columbia, South Carolina 29016
(803) 206-3402
PETITIONER

QUESTIONS PRESENTED

1. Did the Court of Appeals err in finding the plaintiff had standing to foreclose?
2. Did the Court of Appeals err in finding the petitioner conceded the summary judgment?
3. Did the Court of Appeals err in finding the fact the Master in Equity gave legal and tax advice during the summary judgment hearing was not preserved for appellate review?
4. Did the Court of Appeals err in finding the house was not the petitioners primary home pursuant to the administrative Order?

STATEMENT OF THE CASE

This is an appeal of a foreclosure proceeding. A promissory note was given to Lehman Brothers and a mortgage was given to Mortgage Electronic Registration Systems as a nominee for Lehman Brothers. The mortgage documents specifically state MERS is a separate legal entity and is the mortgagee solely as a nominee. The servicing of the loan was initially serviced by Lehman Brothers and then subsequently transferred to a wholly owned subsidiary Aurora Loan Services, LLC. On September 15, 2008 Lehman Brothers and its wholly owned subsidiary Aurora Loan Servicing, LLC filed for bankruptcy protection. In August of 2010 the petitioner lost her job and stopped making payments on the note.

On February 3, 2011 Aurora Loan Services, LLC initiated foreclosure proceedings and filed a lis pendens. On February 10, 2011, MERS purported to assign its mortgage to Aurora Loan Services, LLC. The petitioner answered by filing a motion to dismiss pursuant to SCRCP Rule 12 (b) (6) and 12 (b) (7). The motion to dismiss was denied by the Circuit Court. Aurora Loan Services was forced to cease operations and purported to assign the note and mortgage to Nationstar in June of 2012. The case was subsequently transferred to the Master in Equity. Nationstar was substituted as a plaintiff via a motion pursuant to SCRCP Rule 17(a) 35(c) and 25(e). The Master in Equity ruled the plaintiff had standing to initiate the foreclosure of the home based on Bank of America v. Draper. This appeal follows.

ARGUMENT

1. **The Court of Appeals should have held that the plaintiff did not prove it had the requisite standing as the servicer or the mortgagee prior to filing the foreclosure action.**

The Court of Appeals affirmed the Master in Equity's ruling that the plaintiff had standing to initiate the mortgage foreclosure proceeding as the servicer of the loan pursuant to the South Carolina Court of Appeals opinion in Bank of America v. Draper and that the petitioner waived her objections to the plaintiff's status as real party in interest and standing. Bank of America v. Draper 405 SC 214, 222-223 (Ct. App. 2013).

The petitioner avers that she did not waive her objections to real party in interest and/or standing of the plaintiff to *initiate* the foreclosure proceeding because the objections to real party in interest and standing were raised and ruled on by the Circuit Court Judge *prior* to the referral to the Master in Equity. **(R p. 54).** The Circuit Court Judge denied the petitioners motion to dismiss that was filed pursuant to SCRCP Rule 12 (b)(6) and Rule 12(b)(7). Id. In the motion to dismiss, the petitioner argued that the plaintiff (1) was not the real party in interest (2) that the plaintiff did not have standing to bring a justiciable controversy to the Court (3) the plaintiff was not the owner of the note and the mortgage and (4) the plaintiff did not provide evidence of a recorded power of attorney to act on behalf of another legal entity as required by South Carolina law pursuant to S.C. Code Ann §62-5-501. Therefore, the plaintiff failed to state a claim upon which relief could be granted. **(R pp.215-219).** The issue of standing, actual injury to the plaintiff and therefore a justiciable controversy upon which relief could be granted was raised and ruled on by the Circuit Court prior to referral to the Master in Equity which the

petitioner avers preserved the ruling for appellate review. **(R pp.215-219).** The plaintiff's possession of the note at the summary judgment hearing does not evidence the plaintiff's lack of standing at the inception of the case.

The Court of Appeals affirmed the Master in Equity's ruling that the plaintiff had standing to pursue the foreclosure action as the servicer pursuant to Draper. In Draper, the Court of Appeals, having not found a South Carolina case on point, relied on in re McFadden for the proposition that a servicer can initiate foreclosure proceedings as a party in interest. in re McFadden 471 B.R. 136, 176 (Bankr. D. S.C. 2012). However, in McFadden, the McFadden Court used the pooling and servicing agreement of the securitization trust and two successive affidavits as evidence that the servicer was specifically authorized, on behalf of its principal, to foreclose on the property. Id. at EXHIBITS G, P, Q. Likewise, in Woodberry the pooling and servicing agreement authorized the servicer to foreclose. in re Woodberry, 383 B.R. 373 (Bankr. D.S.C. 2008). Id. * 376 at 20. Banker's Trust also stands for the proposition that the servicer must derive its authority from the principal, who owns the note and mortgage. In Banker's Trust, the authority to foreclose was derived from the pooling and servicing agreement of the securitized trust. Bankers Trust v. 236 Beltway Inv. 865 F. Supp. 1186, 1191 (E.D. Va. 1994). Additionally, in some cases, a servicers failure to show the ability to enforce the note can lead to a finding that the plaintiff is not a real party in interest.in re Wilhelm, 407 B.R. 392 Bankr. D. Idaho 2009 (denying stay to group of servicers and securitization trustees because they provided insufficient proof that they owned the notes in question.); in re Mims 438 B.R. 52, 57 (Bankr. S.D.N.Y.2010) (servicer that held mortgage but did not provide evidence that it had not been assigned the note was not a

"real party in interest" in the proceeding to lift stay). Aurora loan services, the plaintiff in this case, did not submit any evidence, that it had the authority as the servicer, to act on behalf of its principal, as required by South Carolina law.

Here, the plaintiff Aurora Loan Services, LLC ("Aurora") asserted in the complaint that it was the servicer and/or mortgagee. **(R p. 59).** As explained above, the petitioner avers Aurora did not have authority as the servicer, nor did it have the authority as the mortgagee, to foreclose. South Carolina law requires some evidence that an agent is entitled to act on behalf of its principal as was argued in the motion to dismiss. South Carolina law also requires the injured party to bring the claim in order to invoke the jurisdiction of the court.

Here, Aurora also did not have standing or bring a justiciable controversy before the Court as the mortgagee. At the time of the filing of the lawsuit (February 3, 2011) Aurora had not yet received an assignment of the mortgage from MERS unto itself which it received on February 1, 2011. **(R. pp. 35, 57)** Therefore, before the inception of the lawsuit, Aurora contrary to its complaint, had not received an assignment of the mortgage and was therefore not a mortgagee as required under South Carolina law to enforce the promissory note via the mortgage.

Additionally, the evidence reflects Aurora knew an assignment of the note and mortgage or another instrument such as an affidavit authorizing it to act on behalf of its principal was necessary because *after the commencement of the action*, Mortgage Electronic Registration Services ("MERS") purported to assign its mortgage to Aurora. **(R. p. 35)** However, MERS only had status as a nominee of the lender and not a full mortgagee that is entitled to enforce the note. "[A]n assignee stands in the shoes of its

assignor" Draper quoting Twelfth RMA partners, LP v. Nat'l Safe Corp.335 S.C. 635, 639 518 S.E. 2d 44,46 (Ct. of App.1999). see also: S. C. Code Ann. § 26-3-203 (b) (Supp. 2012) (providing a transfer of the instrument vests any rights in the transferee the transferor had). In fact, there is nothing in the documents entered into evidence that suggest the servicer (Aurora and then Nationstar) had any rights to enforce the note. In fact, the mortgage specifically states the servicer can change with or without a change in the ownership of the note and mortgage which suggests the servicer possesses at best only a nominal interest in the outcome of the foreclosure action and does not have any ownership interest in the note or mortgage. **(R. Pp. 30, 31 at #20).**

Aurora, as the mortgagee, also did not have standing to initiate the foreclosure proceeding. Typically, a mortgagee has the right to enforce the security instrument and therefore, foreclose because the mortgagee also holds the promissory note that secures the debt via the mortgage. However, here, Aurora received only a nominee status as the mortgagee via the assignment from MERS. The assignor transfers only the rights it possesses prior to the transfer. S.C. Code Ann. § 36-3-203(b).

MERS corporate representative testified before the Nebraska Supreme Court that it does not own or hold the notes associated with the mortgages it records. Therefore, the transfer of the mortgage from MERS to Aurora does not represent an ownership interest in the note by the mortgagee. Mortgage Electronic Registration Systems, Inc. v. Nebraska Dept. of Banking and Finance 270 Neb. 529, 704 N.W. 2d 784, 787 (Neb. 2005). The petitioner argues if the mortgagee does not own or hold the note, then as a mortgagee MERS is not able to foreclose, only the principal note holder with an assignment of the note (which evidences ownership of the mortgage) *prior* to the initiation of the action is

able to foreclose. The Tennessee Supreme Court recently evaluated MERS as a real party in interest and whether or not MERS had standing to set aside a tax sale.

The Tennessee Supreme Court ruled that MERS is not a real party in interest and could not set aside a tax sale because MERS had no ownership interest in the property and therefore no constitutionally protected right of notice. Mortgage Electronic Registration Services v. Carlton J. Ditto et al. No. E2012-02292-SC-R11-Filed December 11, 2015. The Tennessee Supreme Court and the Tennessee Court of Appeals relied on Sharon M. Horstcamp, MERS Case Law Overview, 64 Consumer Finance L.Q. Rep. 458 458 (Winter 2010) (author is Vice President and general counsel for MERSCORP, Inc. (MERSCORP) explaining the MERS model. The Supreme Court of Tennessee also noted that MERSCORP argued in a previous case that it was "contractually prohibited from exercising any rights with the mortgage...without authorization from its members." Nebraska Dept. of Banking and Finance 270 Neb. 529, 787 (Neb 2005). Therefore, without a power of attorney on file to give the authorization MERS cannot assign the mortgage to Aurora.

Here, MERS, Aurora or Nationstar did not submit any evidence of acting on behalf of the note holder in making the assignments as was argued in the motion to dismiss. Aurora or Nationstar never presented an affidavit and/or pooling and servicing agreement for entry into evidence that the original note holder authorized Aurora to initiate foreclosure proceedings. The four corners of the note and mortgage offer no assistance to help Aurora establish that it possessed standing prior to foreclosure. Here, as was argued in the motion to dismiss before the circuit court and prior to referral to the Master in Equity, an affidavit from the note holder that it authorized MERS to assign the

mortgage to Aurora (as evidence that the promissory note was assigned) was required to transfer the beneficial interest in the mortgage to Aurora as opposed to the nominal interest possessed by MERS. **(R. pp.215-219)** The petitioner also made this argument in the final brief of appellant to the South Carolina Court of Appeals. South Carolina law requires an affidavit to be on file that authorizes one legal entity to act for another and no such authorization existed nor was one entered into evidence in this case. Equitable remedies such as foreclosure are not available for parties that do not follow South Carolina law. Matrix Financial Serv. Corp. v. Frazer Opinion No. 26859 (S.C. Sup. Ct. Filed Aug 16, 2010). Additionally, this Court has not considered whether the MERS model conforms to our State law.

For over 100 years, the petitioner avers South Carolina as well as the Supreme Court of the United States requires plaintiffs to own both the promissory note and the mortgage to initiate a foreclosure action. The promissory note is the principal and the mortgage the accessory. Hahn v. Smith 157 S.C. 157, 167, 154 S.E. 112, 115 (1930); also Ballou v. Young 42 S.C. 170, 176 20 S.C. 84, 85 (1894). Carpenter v. Longan 83 U. S. 16 Wall. 271 (1872). "No justiciable controversy is presented unless the plaintiff has standing to maintain the action." Lennon v. South Carolina Coastal Council, 330 S.C. 414, 415, 498 S.E. 2d 906, 906 (Ct. App. 1998) (citations omitted). The United States Supreme Court and several State Supreme Courts have ruled that to have standing to initiate a mortgage foreclosure proceeding the plaintiff must be the owner of the note and the mortgage. Carpenter v Longan, 83 U. S. 16 Wall. 271 (1872). Additionally, South Carolina has long recognized that "[A]ssignment of the note carries with it assignment of the mortgage.... but assignment of the mortgage does not carry with it assignment of the

note." Hahn v. Smith 157 S.C. 157, 167, 154 S.E. 112, 115 (1930); also Ballou v. Young 42 S.C. 170, 176 20 S.C. 84, 85 (1894).

"A plaintiff establishes standing by showing that it is the holder or assignee of the underlying note and the holder or assignee of the underlying mortgage "either by physical delivery or by execution of a written assignment *prior* to the commencement of the action." (Aurora Loan Services, LLC v Weisblum, 85 AD 3d 95, 108) (emphasis added by petitioner). In this case, the plaintiff concedes it acquired the mortgage after the commencement of the foreclosure. The fact the plaintiff possessed the note at the summary judgment hearing is too late to establish it possessed the note at the time it filed the foreclosure action. At all times it is the obligation of the plaintiff to prove standing. This cannot be accomplished when the plaintiff concedes there are two owners of the note and mortgage in the pleadings and request for production.

2. THE COURT OF APPEALS SHOULD HAVE RULED THE PLAINTIFF DID NOT MEET ITS BURDEN OF PROOF REQUIRED TO GRANT SUMMARY JUDGMENT.

Summary judgment is only appropriate when the pleadings, depositions, affidavits, discovery on file indicate there are no genuine issues such that the moving party must prevail as a matter of law. SCRCP Rule 56 (c) Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002) (citation omitted). The plaintiff, at the summary judgment stage is first required to meet its burden that there are no genuine issues of material fact. Here, the plaintiff simultaneously argues that they are the owners of the note and

mortgage and that another entity owns the note and mortgage. **(R. p. 83) (R. pp.15-34; 113-115)** Additionally, at the summary judgment hearing the Master in Equity took judicial notice of the anniversary of the bankruptcy of both Lehman Brothers and its affiliate Aurora Loan Servicing, LLC. **(R.pp.102-111)** Indeed, the plaintiff, in its motion for summary judgment, acknowledged that Aurora was defunct (while it did not identify the bankruptcy as the reason). **(R. p.140)** The note in favor of Lehman Brothers could be erroneously before the Circuit Court based on the timing of the mortgage assignments and the filing of the bankruptcy of Lehman Brothers because the Aurora assignment from MERS was filed three years into the bankruptcy of Lehman Brothers and its affiliate Aurora Loan Services, LLC and could represent fraudulent pleadings. Therefore, the federal bankruptcy court in New York would have subject matter jurisdiction over the promissory notes that Lehman Brothers owned.

The Master then referenced that the servicers had standing to pursue the foreclosure; however, there is no evidence the servicer had a power of attorney to act on its behalf. The plaintiff noted the servicing agreement is public information; however, the servicing agreement was not entered into evidence by the plaintiff at any time during the proceedings. **(R. p. 85).** The plaintiff then suggested that because it holds the note, the plaintiff should be

to foreclose. However, the petitioner avers ownership of the note and mortgage must be in place prior to filing a foreclosure action. The Court should clarify what evidence is required to allow a non- party to the mortgage and note contract such as a servicer to foreclose.

3. The Court of Appeals should have found the Master in Equity's legal and tax advice interfered with the summary judgment proceedings.

The Court of Appeals ruled the legal and tax advice given by the Master in Equity was not preserved for appellate review. The petitioner avers the actions of judiciary that may affect the decisions of the defendants should not be waived when the appellate courts do a de-novo review of summary judgment proceedings and the transcript gives evidence of the events. The Master in Equity was going to rule for summary judgment in this year or next year and conveyed this when he said

> "so you might want to discuss you're your client whether this will be a taxable transaction if she gets foreclosed on in this year as opposed to next year.... $900,000 is going to be substantial from a tax standpoint. Put that into the mix". **(R. pp.116-117).**

The comment from the Master in Equity was not only erroneous but confusing and made the petitioner think she had overlooked something that gave the plaintiff the right to foreclose notwithstanding the previous arguments that the plaintiffs lacked standing at the inception of the case. Because the Supreme Court

is the sole authority on the actions of attorneys and judges, the petitioner avers this issue can be reviewed as part of the de-novo summary judgment review.

4. The Court of Appeals should have ruled the house was the petitioners primary home for the purposes of the administrative Order.

The petitioner testified and presented an affidavit that the home that was in foreclosure was the only home the petitioner both owned and lived in. **(R.p.97, 98)**

Conclusion reason for granting the petition for certiorari

Mortgage foreclosure is an important topic that affects thousands of South Carolina residents. Many State Supreme Courts have found the plaintiff must be the owner of the note and mortgage *prior* to initiating a lawsuit to have standing, and cannot subsequently cure the lack of standing at the inception of the case by a subsequent assignment. Additionally, other State Supreme Courts have required an actual injury to both the note and the mortgage to have standing which allows the plaintiff to bring a justiciable controversy into the jurisdiction of the Court. Here, the plaintiff (1) did not hold the note and mortgage at the inception of the case (2) did not have an affidavit or any other evidence the plaintiff could act on behalf of its the principal when the MERS contract does not allow transfers of the mortgage (3) as servicers did not submit any evidence that it could act to foreclose.

As such, the petitioner avers the Supreme Court should rule whether standing in a mortgage foreclosure action must be proved prior to the initiation of the

foreclosure proceeding. For the above reasons and references to the record on appeal the petitioner respectfully requests for the Supreme Court to issue a writ of certiorari to review the Court of Appeals decision.

Respectfully Submitted,

Rhonda Meisner
Post Office Box 689
Blythewood, South Carolina
Pegasus333@icloud.com
(803)206-3402

July 27, 2016

PROOF OF SERVICE OF A PETITION FOR WRIT OF CERTIORARI

THE STATE OF SOUTH CAROLINA
In the SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Master in Equity

The Honorable Mikell R. Scarborough, Master in Equity Judge

Case No. 2013-02694

Rhonda Meisner,

Appellant,

v.

Nationstar Mortgage, LLC Respondent.

RECEIVED
JUL 28 2016
SC Court of Appeals

PROOF OF SERVICE PETITION FOR WRIT OF CERTIORARI

I certify that I have served the PETITION FOR ~~RE-HEARING~~ WRIT of Certiorari on Nationstar Mortgage by depositing a copy of it in the United States Mail, postage prepaid, on May 12, 2016 addressed to his attorney of record, Robert Muckenfuss, McGuire Woods, LLP 201 N. Tryon Street suite 3000 Charlotte, NC 28202 AND Magalie Arcure Finkel Law Firm LLC PO Box 41489 Charleston, SC 29423. Additionally, I hand delivered a copy of the petition to the South Carolina Court of Appeals.

July 27, 2016

Rhonda Meisner
Post Office Box 689
Columbia, South Carolina 29016
(803) 206-3402
Petitioner