

FORM 18
PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS

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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
MASTERS AND SPECIAL REFEREES

Gordon G. Cooper, MASTER-IN-EQUITY

Case No. 2012-CP-42-0899

Bayview Loan Servicing, L.L.C. Respondent,

v.

Scott A. Schledwitz, Roxanne J. Schledwitz a/k/a Roxanne Johnson Schledwitz,
Mortgage Electronic Registration Systems, Inc. (MERS) as nominee for Taylor,
Bean & Whitaker Mortgage Corp., The United States of America, by and through
its agency, the Internal Revenue Service, and The South Carolina Department of
Revenue, Defendants,

Of whom Scott A. Schledwitz and Roxanne Johnson Schledwitz are the ~~Appellants.~~
petitioners.

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on June 8, 2016.

SUMMARY OF ARGUMENT

The Court overlooks and misapprehends the errors of Bayview Loan Servicing having standing to file a Foreclosure Action against the Appellant. The Court's decision overlooks and misapprehends because it lacks legal analysis and interpretation of the questions this case presents. The Court affirms the Respondents right to file the Foreclosure Action without consideration or analysis of Respondents assignment of mortgage and note and its ownership, contrary to Rule 17(a) and Rule 12(b) (6) SCRCF.

Additionally, the Court overlooked Rule 56(c), SCRCF. "In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party." Evidence presented in the objections and responses by the Appellants, including those which were presented and favorable in outcome to the Appellants in Federal Court, were overlooked and misapprehended. The Appellants' answer and objection to the Respondent's claim was a compulsory counterclaim based on Rule 13(a) SCRCF.

QUESTIONS PRESENTED

- I. BECAUSE RESPONDENT FAILED TO PROVIDE PROOF IT WAS THE ASSIGNEE TO THE NOTE, IT HAS NO RIGHT TO FORECLOSE ON THE APPELLANT PROPERTY BASED ON RULE 12 (b)(6), SCRPC.

The Respondent presented bankruptcy orders for blanket assignment of loan servicing from Taylor, Bean and Whitaker to several Loan Servicers covering more than 4,200 mortgages throughout the United States. This original order provided detail of required account information for transfer of servicing. Detail would include the documentation of the Appellants' Mortgage, Note, RESPA, Order from The United States Bankruptcy Court of Middle Florida approving transfer of ownership of the Mortgage and Note to Bayview Loan Servicing and other related information. Respondent asserted the order covered its' legal holding and/or ownership of the Appellants' mortgage but never presented the supporting documentation that validates the aforementioned order is applicable and provides the Respondent with adequate evidence it had standing to foreclose. If the original note was lost or destroyed, the Respondent failed to file a Lost Note Certificate in its original filing of the LIS PENS and Complaint or in an amendment.

Furthermore, Taylor, Bean and Whitaker was shut down as a mortgage lender and servicer due to criminal activity involving the bundling and sales of mortgages to more than one buyer. The top six executives of TBW were convicted of fraud related to the pooling of mortgages and selling to multiple buyers. This fact

That the Note follows the Mortgage has repeatedly been confirmed by South Carolina courts. However, *Carpenter v. Longan*, 83 U.S. 271, 21 L.ED 313 (1872), clearly supports the notion that Respondent must clearly own both the Note and Mortgage to foreclose on the property. Respondent failed to show it owned the Mortgage at the time the complaint was filed, and only contended that is the holder and has the right to enforce. Further, the mortgage of this case shows Mortgage Electronic Registration Systems, Inc (MERS) to be the mortgagee. MERS is never mentioned in the note and therefore the Note and Mortgage have been separated permanently.

It is clear to have standing in this foreclosure case, Respondent must not only be the holder of the mortgage but the note as well. Respondents' Complaint in this case fails to meet that criteria. Respondent lacks the standing to initiate and prosecute the foreclosure, and dismissal pursuant to Rule 17(a) and Rule 12 (b)(6) SCRCF is appropriate.

The Assignment of Mortgage original mortgage holder, Taylor, Bean and Whitaker, is under Chapter 11 Bankruptcy protection, authentication of the Assignment of Mortgage specific to the Appellant through the Bankruptcy Court of Middle Florida by judge signature and court seal is a reasonable and defined by South Carolina Civil Court Procedure Rule 44 Proof of Record –

Rule 44(a) Authentication.

(1) Domestic. An official record or an entry therein, when admissible for any purpose, may be evidenced by an official

publication thereof or by a copy attested by the officer having legal custody of the record, or by his deputy, and accompanied with a certificate that such officer has the custody. If the office in which the record is kept is within the United States or within a territory or insular possession subject to the dominion of the United States, the certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of his office. If the office in which the record is kept is in a foreign state or country, the certificate may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent or by any officer in the foreign service of the United States stationed in the foreign state or country in which the record is kept and authenticated by the seal of his office.

Respondent failed to provide authentication, while other servicers for mortgages in similar proceedings have sought Motion for Relief from Automatic Stay for the mortgage and title or have been granted Limited Power of Attorney, with similar filings in

Spartanburg County. The Appellant has demonstrated numerous challenges to the Respondents' status as holder or owner of the mortgage in question in timely responses in this case as well as in the Appellant filings in the Bankruptcy Court of South Carolina. (Record on Appeal Exhibit 1, page 63, Exhibit 2, page 69 and Exhibit 4, page 77) This is a violation of UCC Laws § 9-406 (c) DISCHARGE OF ACCOUNT DEBTOR; NOTIFICATION OF ASSIGNMENT; IDENTIFICATION AND PROOF OF ASSIGNMENT; RESTRICTIONS ON ASSIGNMENT OF ACCOUNTS, CHATTEL PAPER, PAYMENT INTANGIBLES, AND PROMISSORY NOTES INEFFECTIVE –

(c) [Proof of assignment.]

Subject to subsection (h), if requested by the account debtor, an assignee shall seasonably furnish reasonable proof that the assignment has been made. Unless the assignee complies, the account debtor may discharge its obligation by paying the assignor, even if the account debtor has received a notification under subsection (a) (subsection (a) - [Discharge of account debtor; effect of notification.]).

Subject to subsections (b) through (i), an account debtor on an account, chattel paper, or a payment intangible may discharge its obligation by paying the assignor until, but not after, the account debtor receives a notification, authenticated by the assignor or the assignee, that the amount due or to become due has been assigned and that

payment is to be made to the assignee. After receipt of the notification, the account debtor may discharge its obligation by paying the assignee and may not discharge the obligation by paying the assignor.

(h) [Rule for individual under other law.]

This section is subject to law other than this article which establishes a different rule for an account debtor who is an individual and who incurred the obligation primarily for personal, family, or household purposes.

II. COURT ERRED IN DENYING APPELLANTS' TIMELY AND REPEATED REQUEST FOR A TRIAL TO HEAR ARGUMENTS, TESTIMONY AND EVIDENCE AS A REASON FOR REMAND

Appellant requested a trial by jury to present a proper defense, conduct discovery, depose witnesses and request documentation from the Bankruptcy Courts of South Carolina and Middle Florida in its Objections and Motion for Continuance. This violates South Carolina Civil Procedure Rule 38 –

Rule 38(a) Right Preserved.

The right of trial by jury as declared by the Constitution or as given by a statute of South Carolina shall be preserved to the parties inviolate. Issues of fact in an action for the recovery of money only or of specific real or personal

property must be tried by a jury, unless a jury trial be waived.

(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be endorsed upon a pleading of the party.

As with all responses, Appellant made this request in a timely fashion and was not granted the trial. The complexity of this case, requiring documentation from the United States Bankruptcy Court, testimony from the Chapter 13 Trustee for the Appellants' bankruptcy case, testimony from the Chapter 11 Trustee for TBW and discovery of the role and employment of the MERS signers on the Assignment of Mortgage as well as the accounting practices of Bayview Loan Servicing, removes it from consideration of being a matter of simple equity.

The Court also erred in respect to the Appellants' right to a jury trial. In Rule 13(a), SCRCF, a counterclaim is compulsory if it arises out of the same transaction or occurrence as the party's claim. *Id.* In a foreclosure action, a counterclaim arises out of the same transaction or occurrence and is thus compulsory, when there is a "logical relationship" between the counterclaim and the enforceability of the guaranty agreement.

Cf. N.C. Fed. Sav. & Loan Ass'n, 298 S.C. at 518–19, 381 S.E.2d at 905–06 (finding a foreclosure defendant was entitled a jury trial because his counterclaims that the bank breached subsequent oral contracts to arrange additional financing were compulsory because they bore a logical relationship to the enforceability of the note). The Appellants' countered the Respondent's initial

The Master did not apply the appropriate Standard of Review, as defined by South Carolina Rules of Civil Procedure, Rule 56 –

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set

forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

In *Quail Hill, LLC v. Cnty. of Richland*, 387 S.C. 223, 235, 692 S.E.2d 499, 505 (2010) the South Carolina Supreme Court held that "An appellate court reviews the granting of summary judgment under the same standard applied by the trial court under Rule 56, SCRPC." Rule 56, SCRPC provides that summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRPC. "In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party." Given that TBW, the mortgage originator and note holder, was under Chapter 11 Bankruptcy protection, the Appellant had successfully proven the Respondent had no standing to assume TBW's position as a secured creditor in the Appellants' Chapter 13 Bankruptcy in the Federal Bankruptcy Court of South Carolina (case number 07-00666) and criminal activity clouded the ownership of both mortgage and note. The Appellant, as the non-moving party, was not given this consideration by the Master-in-Equity.

In this case, the Master ignored the two Objections, Motion for Continuance and Motion for a Hearing for Evidentiary Review filed by the Appellant where genuine issues of

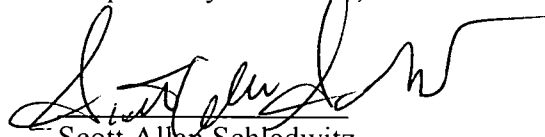
material fact were raised regarding the Respondent's standing to foreclose, citing filings in a Federal Criminal Court, two Federal Bankruptcy Courts and referencing documents filed by the Respondent as well as documents on file with the Spartanburg County Register of Deeds. Additionally, the Master set aside a previously signed Final Motion for Quiet Title order in part, to review in hearing the standing of TBW and any John Doe Defendant. In the Quiet Title case, the Master acted without response from any named or unnamed Defendant, contrary to Rule 56.

CONCLUSION

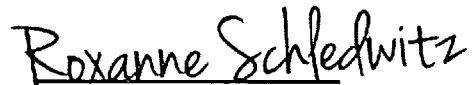
WHEREFORE, the Appellants Scott and Roxanne Schledwitz seek and Order for Rehearing, and concluding that the Respondent had failed to file the LIS PENS and Complaint with any standing due to the disparity in the filing of the Assignment of Mortgage, which had not been filed at the time of the Respondent filing, and the Note makes no mention of MERS, therefore it is severed from the Mortgage permanently. The Court of Appeals erred in not remanding the case based on Rule 13(a), Rule 17(a) and Rule 12 (b)(6) SCRCF. Finally, the Court erred in not remanding the case back to the Court of Common Pleas, subsequently denying the Appellants their right and timely demand to present a defense based on evidence and testimony, contrary to Rule 56(c), SCRCF. The Appellants pray upon this court to remand this case for a new trial, allowing the Appellants their right to a proper defense.

September 15, 2016

Respectfully submitted,



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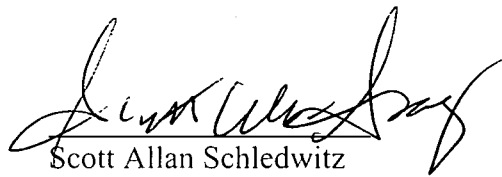
Scott Allan Schledwitz;
Roxanne Johnson Schledwitz

~~Appellant.~~
Petitioners.

PROOF OF SERVICE

I certify that I have served the Petition For A Writ Of Certiorari on Bayview Loan Servicing, L.L.C. by depositing a copy of it by United States Postal Service, postage prepaid, on September 28, 2016, addressed to the attorneys of record, Damon Christian Wlodarczyk and Heidi Carey, Riley, Pope and Laney, LLC, 2838 Devine Street, Columbia, SC 29205.

September 28, 2016



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