

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

SC Court of Appeals

Ben N. Miller, III, Special Referee for Richland County

Case No.: 2010-CP-40-01571

Appellate Case No. 2016-00969

CitiMortgage, Inc.,.....Respondent,

v.

Bruce W. Gardner and First Citizens Bank and Trust Company, Inc.,.....Defendants,

Of whom Bruce W. Gardner is the.....Appellant.

INITIAL BRIEF OF RESPONDENT

RILEY, POPE & LANEY, LLC

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STATEMENT OF THE ISSUES ON APPEAL

- I. DID THE TRIAL COURT CORRECTLY FIND THAT PLAINTIFF HAD STANDING TO BRING THIS FORECLOSURE ACTION AND THAT PLAINTIFF ESTABLISHED THE EXISTENCE OF THE DEBT AND BORROWER'S DEFAULT?

STATEMENT OF THE CASE

This matter involves the foreclosure of a mortgage secured by real property owned by the Appellant (hereinafter "Borrower"), which is located in Richland County. Respondent (hereinafter "Lender") filed a *Lis Pendens*, Summons and Complaint on March 9, 2010. Borrower filed an Answer on April 5, 2010. Borrower's Answer generally denied the allegations of the Complaint and requested to see the original mortgage.

On May 14, 2010, this matter was referred to the Master-in-Equity pursuant to Rule 53(b), SCRPC. [Order of Reference] However, Judge Strickland recused himself from hearing this matter by an order filed on May 19, 2011. [Order of Recusal] Thereafter, this matter was referred to a special referee by order filed September 29, 2011. [Order of Reference]

On July 20, 2011, Lender's counsel filed with the trial court a Certification of Exemption from Administrative Order 2011-05-02-01 regarding foreclosure intervention. The Certification of Exemption indicated that the subject real property was not owner-occupied and that the Administrative Order of the Supreme Court of South Carolina (Order 2011-05-02-01) would not apply. [Certification]

On July 20, 2015, Lender's counsel filed a Motion for Summary Judgment with supporting affidavit and exhibits. [Summary Judgment Motion]. The special referee held a hearing on Lender's summary judgment motion on March 9, 2016. Borrower appeared at the hearing. The special referee issued an Order on April 28, 2016, granting summary judgment in favor of Lender and ordering foreclosure and sale of the real property. [Summary Judgment Order].

On May 9, 2016, Borrower filed a Notice of Appeal with this Court.

FACTS

This case involves the foreclosure of a mortgage involving real property located in Richland County. Borrower executed a Note with Lender on December 14, 2007 in the principal amount of \$82,800.00. [Note]. Borrower promised to repay the debt at a yearly interest rate of 6.375% with monthly payments, until the debt was paid in full, of \$516.56. The debt was secured by a Mortgage executed on the same date on real property located at 104 Abraham Street, Columbia, South Carolina, 29203-5002 (hereinafter the Note and Mortgage, unless referred to individually, will be “the Loan”). [Mortgage]. The Mortgage was recorded with the Richland County Register of Deeds on December 28, 2007, in Book R1388 at page 1494. [Mortgage].

Under the Mortgage, the “Borrower” was the Defendant in this matter, the “Lender” was the Plaintiff in this matter, and Mortgage Electronic Registration Systems, Inc. (“MERS”), was the mortgagee, and acting solely as a nominee for Lender. By instrument dated April 17, 2009, and recorded on May 13, 2009, in Book R1520 at page 3794, MERS assigned the Mortgage to Lender. [Assignment]

It is uncontested that by September 1, 2008, Borrower had defaulted on the terms and conditions of the Loan by failing to make the required monthly payments to Lender. [Aff. 10]. Lender sent Borrower a notice of default on November 3, 2008, informing Borrower that he must pay all past due amounts, and that if he failed to do so it may result in the acceleration of the amount due under the Loan, and that the property may be sold in foreclosure. [Exh. D to affidavit].

STANDARD OF REVIEW

“A mortgage foreclosure is an action in equity.” *U.S. Bank Trust Nat’l Ass’n v. Bell*, 385 S.C. 364, 373, 684 S.E.2d 199, 204 (Ct.App. 2009). “In an appeal from an action in equity, tried by a judge alone, [the appellate court] may find facts in accordance with [its] own view of the preponderance of the evidence.” *Id.* Moreover, the appellate court “may correct errors of law in both legal and equitable actions[,]” with no particular deference to the trial court. *Id.*

Summary judgment is warranted only if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRPC. “In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the non-moving party.” *Bloom v. Ravoira*, 339 S.C. 417, 529 S.E.2d 710 (2000). The moving party has the initial burden of demonstrating the absence of a genuine issue of material fact. However, once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent’s case, the opponent must come forward with specific facts showing there is a genuine issue for trial.” *Garvin v. Bi-Lo, Inc.*, 337 S.C. 436, 523 S.E.2d 481 (Ct. App. 1999). The opponent cannot merely rely upon the pleadings, but must submit some additional evidence creating a genuine issue of material fact.

ARGUMENT

I. THE TRIAL COURT CORRECTLY FOUND THAT LENDER HAD STANDING TO PURSUE THIS ACTION AND THAT LENDER ESTABLISHED THE EXISTENCE OF THE DEBT AND BORROWER’S

DEFAULT.

In support of its motion for summary judgment, Lender submitted an Affidavit from a Vice President - Document Control for the Lender. The Affidavit and attachments thereto presented evidence as follows:

1. That the Lender is the owner and holder of a Note and Mortgage securing the real property at issue in this action between Borrower and Lender;
2. That Borrower defaulted on the terms of the Loan as of September 1, 2008;
3. That Borrower had failed to apply for relief under HAMP;
4. That a Notice of Right to Cure and Acceleration of Debt letter was mailed to Borrower on November 3, 2008;
5. That the amounts due and collectable under the Note and Mortgage as of April 5, 2015, exclusive of court costs and attorney fees, totals \$144,092.87, along with a *per diem* interest amount of \$14.36640. [Summary Judgment Affidavit].

In response to Lender's motion for summary judgment, Borrower did not file any affidavits or exhibits addressing or contesting the existence of the Note and Mortgage, Borrower's default on the Loan, Lender's notice of the default and acceleration of the debt, compliance with the HAMP certification, or the debt figures and amount. Moreover, no objections were made prior to or at the motion hearing regarding the admissibility of Lender's affidavit in support of summary judgment. *Holroyd v. Requa*, 361 S.C. 43, 60, 603 S.E.2d 417, 426 (Ct. App. 2004) (failure to object to the introduction of evidence at the time the evidence is offered constitutes a waiver of the right to have the issue considered on appeal).

Based upon the lack of a counter-affidavit or any other evidence disputing or creating an issue of fact as to any of the matters set forth above, the lower court correctly granted Lender's motion for summary judgment as to the foreclosure. *Garvin*, 337 S.C. 436, 523 S.E.2d 481 (stating once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent must come forward with specific facts showing there is a genuine issue for trial).

"Generally, the party seeking foreclosure has the burden of establishing the existence of the debt and the mortgagor's default on that debt. Once the debt and default have been established, the mortgagor has the burden of establishing a defense to foreclosure such as lack of consideration, payment, or accord and satisfaction." *Bell*, 385 S.C. at 374-75, 684 S.E.2d at 205 (internal citations omitted). The evidence submitted by Lender without dispute establishes the existence of the debt and Borrower's default on that debt. The trial court correctly granted summary judgment in this matter.

Borrower contends in this appeal that Lender lacked standing because Lender never produced the original note. The sole argument briefed by Borrower queries whether the trial court erred in "granting foreclosure for the Respondent who never produced the original note and therefore lacked standing?"

Borrower's Statement of Issues on Appeal also contains two additional issues. The second issue framed by Borrower is similar to the issued briefed by Borrower, and asks whether the trial court erred in failing to compel the production of the original note. The third issue set forth by Borrower asserts that Lender's alleged failure to produce evidence that the Note and Mortgage were "legally executed, delivered, and transferred from the MERS to the [Lender]" was grounds for dismissal of the foreclosure action.

All of the issues stated by Borrower should be deemed abandoned. The only issue addressed by Borrower is whether the trial court erred in granting foreclosure where Lender did not produce the original note. Borrower's argument on this issue is completely conclusory, and simply states that "[Lender] did not have standing." *R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 540 S.E.2d 113 (Ct. App. 2000) (declaring an issue is deemed abandoned if argument in appellate brief is only conclusory). The second and third issues asserted by Borrower were not briefed and therefore they should also be deemed abandoned. *See State v. Lindsey*, 394 S.C. 354, 364, 714 S.E.2d 554, 559 (Ct. App. 2011) (stating an issue is abandoned on appeal if listed in the statement of issues but not addressed in the brief). In any event, Lender will address what appears to be Borrower's main contention in all of the stated issues on appeal - that Lender lacked standing to pursue this action because it failed to produce the original Note and Mortgage and because Borrower failed to show transfer of the mortgage to Lender.

Initially, it was not necessary for Lender to produce the original Note and Mortgage. Lender submitted an uncontested affidavit that established that Lender was the holder of the Note, and that the Mortgage had been assigned to Lender. The affidavit establishes the authenticity of the copies of the Note and Mortgage attached to the affidavit. A duplicate is admissible to the same extent as an original unless a genuine question is raised as to the authenticity of the original. Rule 1003, SCRE. Borrower objected at the hearing to the authenticity of the Note, but he did not produce any evidence to support this position. In addition, Borrower acknowledged that he signed the Note and that his signature was on the Note. [Transcript, p. 15-16]

Despite not being required to produce the original Note and Mortgage, Lender did

just so at the summary judgment hearing on this matter. At the hearing, Lender's counsel was in possession of and presented the original Note and Mortgage for review by the court and Borrower. [Transcript p. 11-12, 20]

The holder of a note has standing to seek enforcement of the note. A holder is a person in possession of an instrument drawn, issued, transferred or indorsed to him. S.C. Code Ann. 36-1-201. Pursuant to S.C. Code Ann. 36-3-301, the holder of an instrument is a person entitled to enforce an instrument. Plaintiff is in possession of the original Note, and is therefore entitled to enforce the Note. *See Bank of America, N.A. v. Draper*, 405 S.C. 214, 746 S.E.2d 478 (2013). The Note was given to Lender and the Mortgage was assigned to Lender. There is no question that Lender is a real party in interest with standing to sue. *See id.*; Rule 17(a), SCRCP (requiring every action to be prosecuted in the name of the real party in interest).

It also appears that Borrower is attempting to argue that the assignment of the Mortgage from MERS to Lender was ineffectual and that the foreclosure action could not proceed. Borrower also asserts that Lender failed to establish MERS was the legal holder of the Note. Borrower misapprehends the loan documents. Lender has never contended that MERS has ever owned or held the Note. The Mortgage was initially issued to MERS as mortgagee but MERS subsequently assigned the Mortgage to Lender.

In any event, any issues or alleged irregularities with the assignment of the Mortgage from MERS to Lender, which are denied, do not have any bearing on this matter. It is undisputed that Lender is in possession of the original Note (and Mortgage). It is well-settled that the holder of a note also holds the mortgage. *See Scheider v. Deutsche Bank Nat'l Trust Co.*, 572 Fed. Appx. 185 (4th Cir. 2014) (applying South Carolina law

and stating that the holder of the note is also the holder of the mortgage). It is undisputed that Lender is in possession of the Note, and that Lender is entitled to enforce the Note and Mortgage.

South Carolina recognizes the 'familiar and uncontroverted proposition' that 'the assignment of a note secured by a mortgage carries with it an assignment of the mortgage.' *Hahn v. Smith*, 157 S.C. 157, 154 S.E. 112 (1930); *Ballou v. Young*, 42 S.C. 170, 20 S.E. 84 (1894). 'The assignment of a mortgage as distinct from the debt it secures is nugatory and confers no rights upon the transferee' *South Carolina Nat'l Bank v. Halter*, 293 S.C. 121, 128, 359 S.E.2d 74, 77 (Ct. App. 1987) (citing *Hahn*, 157 S.C. 157, 154 S.E. 112); see also 55 Am.Jur.2d *Mortgages* § 1317 (1971).

Midfirst Bank, SSB v. C.W. Haynes & Co., Inc., 893 F.Supp. 1304 (D.S.C. 1994). The note carries with it the security, without any formal assignment or delivery. *Carpenter v. Longan*, 83 U.S. 271 (1872) (stating that "the debt is principal thing and the mortgage an accessory").

CONCLUSION

Lender undoubtedly had standing to pursue this action. Lender is in possession of the original Note and Mortgage. Therefore, the trial court correctly allowed the action to proceed to foreclosure.

For the reasons stated herein, Lender requests that this Court should affirm the trial court's judgment of foreclosure.

SIGNATURE BLOCK APPEARS ON FOLLOWING PAGE

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September 16, 2016

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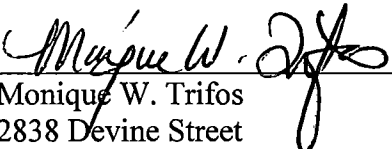
I certify that I have served the **INITIAL BRIEF OF RESPONDENT and DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL** and this proof of service by depositing a copy of the same in the United States Mail, postage prepaid on September 16, 2016, at the addresses below:

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The Honorable Jenny Abbott Kitchings
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SC Court of Appeals

Re: CitiMortgage, Inc. vs. Bruce W. Gardner and First Citizens Bank and Trust Company,
Inc.
Appellate Case No. 2016-00969 (C/A No.: 2010-CP-40-01571)
Our File No. 4088.01014

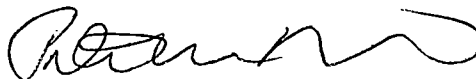
Dear Ms. Kitchings:

Please find enclosed for filing the original and one (1) copy of Initial Brief of Respondent, Respondent's Designation of Matter to be Included in the Record on Appeal as well as Proof of Service in the above referenced action.

Please return with my courier the filed copies.

Thank you for your kind assistance in this matter.

Sincerely,



Peter M. Balthazor

PMB/mwt

Enclosures

cc: Bruce W. Gardner (w/enclosures)