

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appeal from the Court of Common Pleads Richland County, South Carolina,
Honorable Ben N. Miller, III Special Referee for Richland County

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Case No. 2010-CP-40-1571

SEP 21 2016

Appellate Case No. 2016-000969

SC Court of Appeals

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

vs.

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

Of Whom Bruce W. Gardner is theAppellant.

APPELLANT'S INITIAL BRIEF

Bruce W. Gardner LS
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- A. The Trial Judge erred in his order granting foreclosure for the Respondent who never produced the original note and therefore lacked standing.

- B. The Trial Judge failed to compel the production of the requested original note and therefore leaving grounds to order foreclosure of the property secured by the mortgage that was collateral to the note.

- C. Respondent failed to produce requested evidence to establish that both the promissory note and mortgage were legally executed, delivered, and transferred from the MERS to the plaintiff because evidence was never produced that MERS was ever the owner of the promissory note.

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TABLE OF AUTHORITIES

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STATEMENT OF ISSUES ON APPEAL

- A. Did the Trial Judge err in granting foreclosure for the Respondent who never produced the original note and therefore lacked standing?3

- B. Did the Trial Judge err in failing to compel the production of the requested original note and therefore leaving no grounds to order foreclosure?.....3

- C. Was the failure of the Respondent to produce the requested evidence that both the promissory note and mortgage were legally executed, delivered, and transferred from the MERS to the Respondent, grounds for dismissal?.....3

STATEMENT OF THE CASE

Respondent, CitiMortgage, Inc. never established a basic chain of ownership for Foreclosure. Additionally, respondent, CitiMortgage, Inc. never established that both the promissory note and mortgage were legally executed, delivered, and transferred from the MERS to Respondent.

Respondent, CitiMortgage, Inc. never produced a note establishing the MERS was the legal holder of the promissory note. Respondent, CitiMortgage, Inc. therefore was not a real party of interest and lacked standing to sue Appellant. Respondent, CitiMortgage, Inc. failed to offer evidence it was the owner or holder of the note as required by Section 35-3-301 of the South Carolina Code (Supp.). Appellant contend foreclosure was therefore illegal.

Respondent, CitiMortgage, Inc. filed a Lis Pendens on March 9, 2010 and a summons and complaint was filed on March 9, 2010. The filing of the Lis Pendens and a summons and complaint on March 9, 2010 was the initiation of a foreclosure action against the Appellant.

FACTS

Appellant, Bruce W. Gardner is a resident of the county of Lexington, State of South Carolina. Respondent, CitiMortgage, Inc. N.A. is a Corporation organized and existing by virtue of the laws of the United States of America, with its principal office in the City of New York, State of New York.

On or about December 14, 2007, Appellant, Bruce W. Warren purchased property located at 104 Abraham Street, Columbia, South Carolina 29203 from Wachovia Bank of Delaware, N.A. and the deed was recorded December 28, 2007 in Record Book 1370, Page 1498.

On or about December 14, 2007, Appellant, Bruce W. Gardner executed a Mortgage on property located at 104 Abraham Street, Columbia, South Carolina 29203 to Mortgage Electronic Registration Systems, Inc. (MERS) recorded December 28, 2007 in Record Book 1388, Page 1416.

A mortgage was assigned to the Respondent, CitiMortgage, Inc. on April 17, 2009 and recorded on May 13, 2009 in Record Book 1520, Page 3794, listing

CitiMortgage, Inc. as the assignee and assignor. There is no record of an assignment of the mortgage on property located at 104 Abraham Street, Columbia, South Carolina 29203 to Mortgage Electronic Registration Systems, Inc. (MERS) recorded December 28, 2007 in Record Book 1388, Page 1498 by Mortgage Electronic Registration Systems, Inc. (MERS) assignor to Respondent, CitiMortgage, Inc. as assignee.

Appellant, Bruce W. Gardner made a request that Respondent, CitiMortgage, Inc. produce the note of CitiMortgage, Inc. and a mortgage on property located at 104 Abraham Street, Columbia, South Carolina 29203 to Mortgage Electronic Registration Systems, Inc. (MERS) recorded December 28, 2007 in Record Book 1388; Page 1498 demonstrates the Respondent's lack of ownership of the debt.

Respondent, CitiMortgage, Inc. did not produce the note for Appellant Bruce W. Gardner. CitiMortgage, Inc. has a mortgage on the property located at 104 Abraham Street, Columbia, South Carolina 29203. Mortgage Electronic Registration Systems, Inc. (MERS) was recorded December 28, 2007 in Record Book 1388, page 1498, which demonstrates the Respondent's lack of securitization of the property.

ARGUMENTS

A. Did the Trial Judge err in granting foreclosure for the Respondent who never produced the original note and therefore lacked standing?

Appellant argues that the Trial Judge erred in granting foreclosure for the respondent that lacked standing. "Standing refers to a party's right to make legal claim or seek judicial enforcement of a duty or right." *Powell ex rel. Kelley v. Bank of Am.*, 379 S.C. 437. (Ct. App. 2008). "Generally, a party must be a real party in interest to the litigation to have standing." *Hill v. S.C. Dep't of Health & Env'tl. Control*, 389 S.C. 1, 22. (2010).

The Appellant realizes that the requirement of standing is not an inflexible one. *Sloan v. Sch. Dist. Of Greenville Cnty.*, 342 S.C. 515, 524. (Ct., App. 2000).

Regardless, standing is required. The Respondent did not have standing.

"A mortgage and a note are separate securities for the same debt, and a mortgagee who has a note and a mortgage to secure a debt has the option to either bring an action on the note or to pursue a foreclosure action." U.S. Bank

Trust Nat'l Ass'n v. Bell, 385 S.C. 364, 374. (Ct. App. 2990). The Respondent chose to pursue a foreclosure action. The Respondent was therefore required to meet all necessary requirements of foreclosure.

“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.” *Id.* The Respondent never established the debt, and subsequently unsuccessful in establishing the default.

CONCLUSION

WHEREFORE, the Appellant prays that the Respondent judgment granting foreclosure of the property owned by Appellant, Bruce Warren Gardner and located 104 Abraham Street, Columbia, South Carolina 29203 is reversed, remanded and denied.

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Of Whom Bruce W. Gardner is theAppellant.

CERTIFICATE OF COMPLIANCE

The undersigned certify that this Initial Brief complies with the South Carolina Court's Order.

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Of Whom Bruce W. Gardner is theAppellant.

PROOF OF SERVICE

I, Bruce W. Gardner certifies that I served the following individual a copy of the foregoing Appellant's Initial Brief by depositing a copy of the same in the United States mail, postage prepaid, addressed as follows on July 18, 2016: Riley Pope & Laney, LLC, Peter M. Balthazor, 2838 Devine Street, Post Office Box 11412 (29211) Columbia, South Carolina 29205.

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