THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master In Equity

Appellate Case No. 2016-001054

HSBC Bank USA, National Association, as Trustee for the Holders of the Deutsche ALT-A Securities, Inc. Mortgage Loan Trust, Mortgage Pass-Through Certificates Series 2007-OA4, 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., ... Appellant,

v.

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

Of whom Carol Garfield Goldberg is the, ... Respondent.

Amended Initial Brief of Appellant

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Introduction

This case illustrates the folly of fashioning a remedy where none exists in order to assist a sympathetic party. In so doing, the master-in-equity punished a party—Appellant—that had no involvement in the inappropriate actions that harmed Respondent Carol Goldberg ("Goldberg") merely because the master-in-equity could not order relief against the at-fault party—Defendants Clifford and Beverly Ryba ("Ryba")—that would stop the foreclosure on the property. As a result, the master-in-equity issued an order controlled by numerous errors of law.

The facts demonstrate that Appellant neither had any role in the transaction that injured Goldberg nor did Appellant, as found by the master-in-equity, have an agency relationship with the at-fault party, Defendants Clifford and Beverly Ryba. The facts established that the Rybas took advantage of Goldberg in 2005 to obtain a deed to her property, which is at issue in this litigation. {Goldberg's Brief in Opposition to Appellant's Motion for Summary Judgment p. 1-2, R. ___}. After acquiring the deed, the Rybas encumbered the property in 2007 with a mortgage given to Appellant's predecessor in interest. {Id.}. Goldberg was not named on the notes or mortgages; rather, the Rybas encumbered the property in their names alone. {2007 Note, R. ___; 2007 Mortgage, R. ___}.

Goldberg discovered the fraudulent actions of the Rybas and brought suit against them to recover her property. {Goldberg's Brief in Opposition to Appellant's Motion for Summary Judgment p. 3, R. ___}. Goldberg settled her action against the Rybas in exchange for the Rybas deeding the property back to Goldberg. {Def. Ex. 18, R. ___}. That settlement, however, had no effect on the 2007 note and mortgage. The Rybas remained contractually obligated to Appellant on the 2007 note and mortgage.

In the meantime, the Rybas became delinquent on the 2007 note and mortgage, and Appellant initiated a foreclosure action on the property. The master-in-equity precluded Appellant from foreclosing on the property on the grounds that the Rybas defrauded Goldberg back in 2005 and because Appellant was not a holder in due course of the 2007 mortgage. The master granted such relief despite the fact that (1) Goldberg did not plead a fraud claim against Appellant, (2) no agency relationship existed between the Rybas and Appellant, (3) Appellant was holder of the 2007 mortgage, and (4) SLS, as servicer for Appellant, could maintain the foreclosure action even if Appellant did not hold[1] the note and mortgage. While it is unfortunate that Goldberg fell victim to the Rybas scheme, the master erred as a matter of law in barring Appellant from obtaining a foreclosure judgment on the property. This Court should reverse this matter and remand it to allow the foreclosure to proceed.

Statement of the Case

Appellant initiated this foreclosure action against the Rybas in the Court of Common Pleas for Charleston County. {Complaint dated October 27, 2011, R. ___}. Respondent Carol Goldberg ("Goldberg") filed a motion to intervene in this matter on January 31, 2012. {Motion to Intervene, R. ___}. On February 8, 2012, Appellant filed a Second Amended Complaint, which is the operative pleading. {Second Amended Complaint, R. ___}. The court granted Goldberg's motion to intervene on March 1, 2012. {Order Granting Motion to

[1] The master found that Appellant was in fact the holder of the 2007 note and mortgage. The master found that Appellant "argued that the blank endorsement made the note a bearer instrument and produced the original note. The Court was satisfied this proved [Appellant] is holder of the note." {Order dated June 22, 2015 p. 6, R. ___}. The master reaffirmed this finding, noting "[Appellant] was the holder of the note and mortgage in question based on its actual possession of the original documents." {Order on Motion to Alter or Amend p. 11, R. ___}.

Intervene, R. ___}. Goldberg filed her Answer to the Second Amended Complaint on March 9, 2012. {Answer to Second Amended Complaint, R. ___}.

The circuit court referred this matter to the master-in-equity on March 6, 2013. {Order of Reference, R. ___}. On July 31, 2013, Goldberg filed her Amended Answer and Counterclaims to the Second Amended Complaint. {Amended Answer and Counter Claim, R. ___}. The master-in-equity held a hearing in this matter on March 24, 2015 and issued its order on June 22, 2015, holding Appellant could not foreclose on the mortgage. {Order dated 6/22/15, R. ___}. Appellant timely filed a motion to alter, amend, or grant a new trial on July 6, 2015. {Motion to Alter or Amend, R. ___}. After a hearing on Appellant's motion, the master issued an order denying in part and granting in part the motion. {Order dated 4/20/16, R. ___}. Appellant timely filed notice of appeal. {Notice of Appeal, R. ___}. Goldberg did not appeal any ruling by the master.

Statement of the Facts

On August 31, 2005, Goldberg conveyed real property located at 34 Tarleton Drive, Charleston, South Carolina that she owned to Defendants Clifford and Beverly Ryba. {Pl. Ex. 3, R. ___}. At the time of that conveyance, Goldberg owed $199,689.75 on a mortgage encumbering the property. {Trans. dated 3/24/15 p. 24:10-14, 153:9-13, R. ___; Pl. Ex. 1, R. ___}. In consideration for the property, the Rybas paid off the remaining balance on Goldberg's mortgage. {Trans. dated 3/24/15 p. 24:5-14, 153:9-13, R. ___; Pl. Ex. 2; R. ___}. The Rybas paid the balance of Goldberg's mortgage by providing $21,199.11 cash at the closing and obtaining two loans totaling $184,357.00 secured by a mortgage (the "2006 loan") on the property. {Trans. dated 3/24/15 p. 23:7 - 24:14, 35:9 - 36:5. R. ___; Def. Ex. 6, R. ___; Def. Ex. 16, R. ___}. Thereafter, on May 10, 2006, the Rybas received a loan for

$115,000.00 from Regions Bank secured by a mortgage (the "subordinated Regions mortgage") on the Property. {Trans. dated 3/24/15 p. 68:12 - 69:10, R. ___; Pl. Ex. 6, R. ___}.[2] The 2006 loan was not at issue before the master or in this appeal.

A year later, on May 2, 2007, the Rybas executed a note and mortgage (the "2007 loan") on the property in the amount of $172,000.00 in favor of Countrywide Home Loan.[3] {Trans. dated 3/24/15 p. 65:14-68:11, R. ___; Pl. Ex. 4, R. ___; Pl. Ex. 5, R. ___}. Goldberg was not a party to the 2007 loan. {2007 Note, R. ___; 2007 Mortgage, R. ___}. In fact, at the time the 2007 mortgage was filed, the Rybas were, according to the public record, the record sole owners of the property. {Goldberg's motion for partial summary judgment dated May 5, 2014 ¶ 4, R. ___}. There were no documents filed in the public record to indicate that Carol Goldberg ("Goldberg") claimed any interest in the Subject Property. {Id.}.

The 2007 loan refinanced the 2006 loan. {Trans. dated 3/24/15 p. 45:12-15, R. ___}. As a result, Regions Bank agreed to subordinate its mortgage on the property, giving the 2007 loan first priority. {Trans. dated 3/24/15 p. 68:16-69:10, R. ___; Pl. Ex. 6, R. ___}. The 2007 Mortgage remains the sole subject of this litigation.

Subsequently, the Rybas fell behind on their payments on the 2007 loan {Pl. Ex. 9, R. ___; Pl. Ex. 11, R. ___}. As a result of the Rybas' failure to make their required payments, Bank of America, as the then-servicer of the 2007 loan, instituted this foreclosure action

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[2] The Master-in-Equity's order denying foreclosure incorrectly asserts that on October 11, 2005, the Rybas took a $100,000 loan from Regions Bank on the Property secured by a Mortgage. {Order p. 11, R. ___}. The Order clarifies this error thereafter by finding that the Rybas increased the $100,000 to $115,000 on May 10, 2006. {Id.}.

[3] Bank of America is the successor by merger to BAC Home Loans Servicing, L.P. f/k/a Countrywide Home Loans Servicing, Inc. {Trans. dated 3/24/15 p. 70-72, R. ___; Order dated Jun 22, 2015 p. 3, R. ___}. Bank of America serviced the loan prior to the current servicer, Specialized Loan Servicing LLC.

against the Rybas in September 2011. {Complaint, R. ___; Amended Complaint, R. ___}. Those actions only named the Rybas and other lienholders because Goldberg had not been record owner of the property since 2005.

While this foreclosure was pending, Goldberg settled her previously filed lawsuit against the Rybas. {Def. Ex. 18, R. ___}. Goldberg had sued and claimed the Rybas defrauded her back when Goldberg transferred the deed in 2005 {Id.}. As part of that settlement, the Rybas deeded the property back to Goldberg on October 26, 2012. {Trans. dated 3/24/15 p. 154:15-25, R. ___}.

After her settlement with the Rybas, Goldberg sought to intervene in the foreclosure action as a result of her acquiring the property from the Rybas as part of the settlement of her action against the Rybas. {Trans. dated 3/24/15 p. 154:15-155:12, R. ___}. The trial court allowed intervention on June 22, 2012. {Order granting intervention, R. ___}. Appellant thereafter filed a second amended complaint naming Goldberg. {Second Amended Complaint, R. ___}.

Goldberg answered the second amended complaint and alleged counterclaims as follows:

- "The deed from Mrs. Goldberg to the Rybas conveying title to 34 Tarleton Drive, being void, the Rybas could not execute a valid mortgage. There is no mortgage and the case should be dismissed."
- "Plaintiff has no standing to institute this action."

{Answer and Counterclaim dated July 31, 2013 p. 7, R. ___}. Goldberg did not plead, or even mention, a fraud claim against Appellant. {Id.}. Goldberg also failed to plead that the 2007 mortgage was fraudulently obtained or executed. {Id.}.

After the foreclosure action was filed, Specialized Loan Servicing ("SLS") became, and still is, the servicer for the 2007 loan. {Trans. dated 3/24/15 p. 64:13-15, R. ___}. SLS also held the original 2007 note and 2007 mortgage. {Trans. dated 3/24/15 p. 65:14-24, 130:14 - 131:4, R. ___; Pl. Ex. 4, R. ___; Pl. Ex. 5, R. ___}. SLS then moved to allow substitution of Appellant as plaintiff in the foreclosure. {Motion for Substitution, R. ___}. The master granted the motion. {Order granting Motion for Substitution, R. ___}.

Goldberg alleged at trial that Appellant could not foreclose on the 2007 mortgage because (1) the Rybas fraudulently induced her to deed the property to them in 2005, (2) the Rybas were the agent for Appellant's predecessor and was vicariously liable for the fraud, (3) Appellant had constructive notice of the fraud due to the Rybas recasting scheme, and (4) Appellant lacked standing to foreclose because it was not a holder in due course of the 2007 note and mortgage. {Trans. dated 3/24/15 p. ___, R. ___}. Goldberg presented these arguments despite her failure to plead fraud against Appellant or plead the existence of an agency relationship between Appellant and the Rybas.

After the trial, the master ruled that Appellant could not foreclose on the property. {Order dated June 22, 2015, R. ___}. The master found that Goldberg successfully proved that the Rybas' fraud induced her to transfer the deed in 2005 and for the Rybas to obtain the 2007 loan. {Id.}. The master found Appellant could not foreclose based on this fraud (1) because the Rybas were the agents of Countrywide, the loan originator, and (2) because Appellant had constructive notice of the fraud due to the Rybas' illegal recasting scheme related to the 2007 loan. {Id.}. The master further found that Appellant lacked standing to pursue the foreclosure because it did not qualify as a holder in due course of the note;

therefore, Goldberg's defense of fraud precluded Appellant from foreclosing on the mortgage. {Id.}.

Appellant timely filed a motion to reconsider. {Motion to alter or amend dated July 6, 2015}. After a hearing on the motion, the master granted Appellant's motion in part and deleted certain rulings from the initial order. {Order dated 4/20/16, R. ___}. The master ultimately found that the Rybas had no agency relationship with Appellant or any of Appellant's predecessors in interest. {Id. p. 5, R. ___}. The master also deleted the section of the initial order addressing recasting as a basis for relief. {Order dated 4/20/16, R. ___}. The master denied the remainder of the motion, finding the Rybas' fraud precluded Appellant from foreclosing (despite the fact that no agency relationship existed between those parties) because Appellant was not a holder in due course of the 2007 note and mortgage. {Order dated 4/20/16, R. ___}.[4] This appeal followed.

Argument

The master's order can be distilled in two main rulings. First, the master found that Goldberg successfully proved that the Rybas' fraud induced her to transfer the deed in 2005 and for the Rybas to obtain the 2007 loan. As a result, Appellant could not foreclose on the property because the Rybas were agents of Countrywide, the loan originator and because Appellant had constructive notice of the fraud due to the Rybas' illegal recasting scheme

[4] The master did not issue an amended order in response to the initial order. Rather, the order merely addressed the arguments in the motion and removed or left intact each argument. However, the following sections of the initial order were deleted by the order dated April 20, 2016: (1) the final sentence of the paragraph ending at the top of page 10; (2) the final paragraph on page 16 that continues onto page 17; (3) the first sentence of the first paragraph that begins on page 19 (possibly the entire paragraph is intended to be deleted); (4) the second to last sentence in the paragraph ending at the top of page 20; (5) the sentence right before the sentence that introduces the block paragraph at the bottom of page 20; and (5) the second sentence of the paragraph that begins at the bottom of page 22.

related to the 2007 loan. Second, the master further found that Appellant lacked standing to pursue the foreclosure because it did not qualify as a holder in due course of the note. Both rulings constituted error as a matter of law as set forth herein. This Court should reverse and remand this matter with instructions for the master to enter a foreclosure judgment against the Rybas.

I. This Court should reverse because the master erred in allowing Goldberg to maintain a defense to the foreclosure based on a claim of fraud.

The master found that Appellant could not foreclose because the Rybas' fraud induced Goldberg to transfer the deed in 2005. The master based this ruling on two grounds. First, the master found Appellants had constructive notice of the fraud because of the Rybas' illegal recasting scheme related to the 2007 loan. Second, the master found the Rybas were the agents of the loan originator, and, as a result, Appellant could not foreclose. The master erred in both regards. Neither ground can be used as a defense to the foreclosure by Goldberg for several reasons.

First, the grounds cited in the initial order were removed by the master, and, in so doing, no grounds remained to support a finding of fraud against Appellant. Appellant moved for reconsideration of both the master's fraud grounds, arguing the evidence at trial did not support either finding. In response to that motion, the master removed both grounds from the original order.

The master deleted the finding that Appellant and the Rybas had an agency relationship that would hold Appellant vicariously liable for the Rybas' fraudulent conduct. {Order granting Motion to Alter or Amend p. 3-5 ("[Appellant's] motion to alter, amend, or reconsider the Order on the ground [Goldberg] did not plead agency is granted . . . and is

deleted"), R. ___}. The master also removed the ground finding that Appellant had constructive notice of any illegal recasting scheme perpetrated by the Rybas. {Order granting Motion to Alter or Amend p. 10 ("The Court grants the [Appellant's] motion to alter, amend, or reconsider its Order to delete the references to the scheme being perpetrated as illegal recasting"), R. ___}.[5]

When read in combination, the initial order and order on the motion to reconsider contain no findings to support a finding of fraud against Appellant independent from those deleted by the master. That is because a third-party cannot be held liable for the fraudulent conduct of another in the absence of an agency relationship. See, e.g., State ex rel. McLeod v. C & L Corp., 280 S.C. 519, 528, 313 S.E.2d 334, 339–40 (Ct. App. 1984) (restating the well-settled rule that "a principal is liable to third persons for the frauds, deceits, concealments, misrepresentations, negligences and other malfeasances and omissions of duty of his agent acting within the scope of his agency . . . ."), abrogated on other grounds by Murphy v. Owens-Corning Fiberglas Corp., 346 S.C. 37, 550 S.E.2d 589 (Ct. App. 2001), (citing Reynolds v. Witte, 13 S.C. 5 (1879); Williams v. Commercial Casualty Insurance Co., 159 S.C. 301, 156 S.E. 871 (1931). Thus, fraud was no longer an issue in the litigation and

[5] While the order on reconsideration did state "the Court's finding the conduct constituted fraud stands and is sufficient to sustain the Court's Order[,]" the findings referenced in that sentence related solely to the conduct of the Rybas in obtaining the deed in 2005. The master made no findings to support fraud against Appellant other than those deleted by the master. Thus, Goldberg failed to carry her burden of proof on this claim. Ardis v. Cox, 314 S.C. 512, 515, 431 S.E.2d 267, 269 (Ct. App. 1993) (holding that under South Carolina law, "[f]raud is not presumed, but must be shown by clear, cogent, and convincing evidence").

cannot be used as a defense to the foreclosure by Goldberg or to defeat a claim of holder in due course.[6]

Even if the master had not removed the only grounds to support a fraud finding against Appellants, the claim still failed as a matter of law as to Appellants. Goldberg failed to plead fraud against Appellant. Rather, Goldberg made only a general allegation regarding the conduct of the Rybas back in 2005. {Answer and Counterclaim dated July 31, 2013 p. 7 ("The deed from Mrs. Goldberg to the Rybas conveying title to 34 Tarleton Drive, being void, the Rybas could not execute a valid mortgage."), R. ___}. In fact, there is no evidence in the record that Appellant committed fraud. Goldberg only presented evidence of fraudulent conduct by the Rybas.

Under South Carolina law, to state a claim for fraud, a plaintiff must allege:

> (1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury.

Moseley v. All Things Possible, Inc., 388 S.C. 31, 36, 694 S.E.2d 43, 45 (Ct. App. 2010) (citation omitted). When the complaint omits allegations **on any** element of fraud, the complaint fails as a matter of law. Ardis v. Cox, 314 S.C. 512, 515, 431 S.E.2d 267, 269 (Ct. App. 1993) (emphasis added). Furthermore, Rule 9, SCRCP, mandates that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake **shall be stated with particularity**. Malice, intent, knowledge, and other condition of mind of a person may

[6] Goldberg failed to appeal the master's removal of the fraud findings against Appellant. Thus, those rulings are law of the case. See, e.g., Atl. Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) (reaffirming that "an unappealed ruling, right or wrong, is the law of the case").

be averred generally." Rule 9, SCRCP (emphasis added); see also Ardis, 314 S.C. at 515, 431 S.E.2d at 269. Thus, a complaint failing to specifically allege all elements of fraud fails as a matter of law. Ardis, 314 S.C. at 515, 431 S.E.2d at 269.

Goldberg's failure to plead fraud against Appellant precluded the master from granting relief on that basis. Thus, the master erred in ruling on an improperly presented claim. This Court should reverse.

II. The removal of fraud from the master's order renders the holder in due course argument irrelevant.

Goldberg claimed the fraud perpetrated by Ryba constituted a defense to Appellant claiming the protections afforded to a holder in due course. Fraud[7] can, however, only be used as a defense to claims asserted by a party claiming to be a holder of a negotiable instrument. See S.C. Code Ann. § 36-3-305(a)(1)(iii) (recognizing that "the right to enforce the obligation of a party to pay an instrument is subject to the following . . . (1) a defense of the obligor [borrower] based on . . . (iii) fraud that induced the obligor to sign the instrument . . . ."). Fraud does not constituted an offensive claim against the holder of the instrument. Id.

The master's removal of the fraud ruling from the order established that fraud was no longer an issue in the litigation and could not be used as a defense to the foreclosure by Goldberg or to defeat a claim Appellant as holder of the 2007 loan. That is because the master ruled Appellant in fact held the note and mortgage, finding:

> [Appellant] argued that the blank endorsement made the note a bearer instrument and produced the original note. The Court was satisfied this proved [Appellant] is holder of the note.

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[7] A party can only utilize the defense of fraud in the inducement as a defense against a holder. S.C. Code Ann. 36-3-305(a)(1)(iii).

{Order dated June 22, 2015 p. 6, R. ___}. The master reaffirmed this finding, noting "[Appellant] was the holder of the note and mortgage in question based on its actual possession of the original documents." {Order on Motion to Alter or Amend p. 11, R. ___}. Thus, because Goldberg no longer had any fraud defense, Appellant's status as holder of the 2007 note and mortgage provided the requisite standing to foreclose on the loan. This Court should reverse.

III. This Court should reverse because the master's requirement that Appellant be a holder in due course is irrelevant to whether a loan servicer can foreclose.

Even if the holder issue remained relevant to this action, the master still erred in requiring Appellant to establish holder in due course status. The master conditioned Appellant's ability to foreclose on whether Appellant qualified as a holder in due course of the 2007 note and mortgage. That constituted error because holder in due course is irrelevant to the issue of whether a loan servicer can initiate a foreclosure action. Assuming arguendo, that Appellant did not hold[8] the 2007 note and mortgage, such still would not preclude Appellant, through SLS as servicer for Appellant, from pursuing the foreclosure in this action. South Carolina law allows a servicer of a loan to foreclose. Moreover, a servicer need not be a holder in due course to foreclose on a delinquent obligation. This Court should reverse and remand this matter to proceed with the foreclosure.

In South Carolina, a servicer qualifies as a real party in interest and, therefore, is able to maintain a foreclosure action. Bank of Am., N.A. v. Draper, 405 S.C. 214, 223, 746

[8] Again, Appellant did in fact hold the original 2007 note and mortgage. The master found that Appellant "argued that the blank endorsement made the note a bearer instrument and produced the original note. The Court was satisfied this proved [Appellant] is holder of the note." {Order dated June 22, 2015 p. 6, R. ___}. The master reaffirmed this finding, noting "[Appellant] was the holder of the note and mortgage in question based on its actual possession of the original documents." {Order on Motion to Alter or Amend p. 11, R. ___}.

S.E.2d 478, 482 (Ct. App. 2013); see also In re Neals, 459 B.R. 612, 617 (Bankr. D.S.C. 2011) (holding loan servicer has standing to seek relief on a note and mortgage); In re Woodberry, 383 B.R. 373, 379 (Bankr. D.S.C. 2008) (finding that a loan servicer, with a contractual duty to collect payments and foreclose mortgages in the event of default, has standing to pursue relief related to the note and mortgage). In Draper, this Court settled the question as to whether a party must be holder of the note and mortgage in order to maintain a foreclosure action against a delinquent borrower or whether status as a loan servicer sufficiently vests the party with the requisite standing. 405 S.C. at 222-23, 746 S.E.2d at 481-82.

This Court held that loan servicers have a contractual pecuniary interest in collecting payments under the note and mortgage. Id. This Court held that such an interest as servicer, and that interest alone, is sufficient to vest the servicer with standing to initiate a foreclosure action. Id. In so holding, this Court recognized the distinction that loan servicer and holder of the note and mortgage are not synonymous and need not be one in the same. The Court noted defined mortgage servicing as "[t]he administration of a mortgage loan, including the collection of payments, release of liens, and payment of property insurance and taxes." Id. at 221, 746 S.E.2d at 481.

The Court confirmed the fact that a distinction can exist between a party acting as a servicer or a party holding the loan, recognizing that "a servicer is defined as the person responsible for servicing of a loan (including the person who makes or holds a loan if such person also services the loan)." Id. After acknowledging that a servicer can act even without holding the note and mortgage, this Court held that loan servicers "**have standing to foreclose even if the servicer is not the holder of the mortgage.**" Id. at 222, 746 S.E.2d at 482

(emphasis added) (citing Bankers Trust (Delaware) v. 236 Beltway Inv., 865 F.Supp. 1186, 1191 (E.D. Va. 1994) (concluding that both lender and servicer have standing to foreclose even if servicer is not the holder of the mortgage)). Therefore, this Court correctly confirmed what other courts in South Carolina already confirmed—it is possible to be the servicer of a loan without being the holder of the note and mortgage. See Harris v. Option One Mortgage Corp., 261 F.R.D. 98, 103-04 (D.S.C. 2009) (recognizing that a servicer of a loan does not have to be the holder of the note and mortgage).

Based on the above, Appellant had standing to maintain the action through its servicer SLS. The evidence in the record established that SLS serviced the loan on behalf of Appellant. {Pooling and Servicing Agreement, R. ___}. SLS's undisputed status as servicer of the 2007 note and mortgage settled the issue of standing to foreclose. Thus, the convoluted analysis as to whether Appellant qualified as a holder in due course was irrelevant as to SLS's ability to foreclose the 2007 loan executed by the Rybas on behalf of Appellant. As a result, the master erred in barring Appellant from foreclosing on the admittedly in default 2007 loan.

Likewise, the master's analysis as to whether Appellant qualified as a holder in due course based on assignments of the 2007 note and mortgage was misplaced. Status as holder was again a red herring because SLS maintained the action for servicer Appellant. Even if such were insufficient to grant standing to Appellant, Goldberg lacked the standing necessary to challenge the assignment of the 2007 note and mortgage to Appellant. A property owner who is not a party to a note and mortgage does not have standing to question the validity of the note and mortgage. See Reese v. U.S. Bank Nat. Ass'n, No. CA 3:11-2990-CMC-SVH, 2012 WL 1952819, at *3 (D.S.C. Apr. 30, 2012), report and recommendation adopted, No. 3:11-CV-2990-CMC-SVH, 2012 WL 1952295 (D.S.C. May 30, 2012) ("Plaintiff lacks standing to

contest the Assignment of the Mortgage. Plaintiff is only a party to the Mortgage and, because the Assignment is a separate contract to which Plaintiff is not a party, she cannot question its validity."); Doherty v. PNC Mortgage, No. CA 0:14-4013-TLW, 2015 WL 5012781, at *3 (D.S.C. July 16, 2015), report and recommendation adopted pertinent in part, No. CIV.A. 0:14-4013-TLW, 2015 WL 5012823 (D.S.C. Aug. 21, 2015) ("Plaintiff was neither a party to the Note and Mortgage executed by Swiss nor to the subsequent Assignment from MERS to Defendant. Based on this court's and the Fourth Circuit's interpretation of South Carolina law, . . . the court find[s] Plaintiff lacks standing to challenge Defendant's status as the holder of the Note and Mortgage.").

Here, Goldberg does not have standing to challenge the validity or assignments of the 2007 note and mortgage even after the Rybas conveyed the property back to Goldberg in the 2012 settlement. The Rybas executed the 2007 note and mortgage solely in their name. Goldberg was not a party to either. {Pl. Ex. 4, R. ___; Pl. Ex. 5, R. ___}. The deed from the Rybas to Goldberg conveying title to Goldberg was not entered into evidence. Moreover, Goldberg testified that she does not owe any money on the 2007 note and mortgage to Appellant. {Trans. dated 3/24/15 p. 155:10-12, 158:1-3, R. ___}. Because Goldberg was not a party to the 2007 note and mortgage, she lacked the standing to assert Appellant was not a holder in due course of the 2007 note and mortgage.

Lastly, the master deleted the portions of the order that support the finding of fraud as to Appellants. Goldberg maintained her unpled claim of fraud as a defense to Appellant's ability to foreclose. Goldberg did not and cannot maintain a claim of fraud as affirmative relief. See, e.g., In re First Indep. Capital Corp., 181 F. App'x 524, 527 (6th Cir. 2006) (holding that certain claims "serve only to invalidate a potential *defense*" of holder in due

course but do not create an affirmative cause of action) (alteration in original); Pope v. Wells Fargo Bank, N.A., No. CIV. 11-2496 SRN/FLN, 2012 WL 1886493, at *1 n.1 (D. Minn. May 23, 2012) (holding that a claim that the defendants were "not holders of the original notes" or "are not holders in due course of the original notes" are not causes of action but merely defenses). Thus, once the master deleted the fraud findings as to Appellant, Goldberg's claim that Appellant could not qualify as a holder in due course became irrelevant to the action. This Court should reverse.

Conclusion

Based on the foregoing, this Court should reverse the trial court and remand the matter to proceed with the foreclosure.

{Signature Page Follows}

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February 13, 2017

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master In Equity

Appellate Case No. 2016-001054

HSBC Bank USA, National Association, as Trustee for the Holders of the Deutsche ALT-A Securities, Inc. Mortgage Loan Trust, Mortgage Pass-Through Certificates Series 2007-OA4, 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., ... Appellant,

v.

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

Of whom Carol Garfield Goldberg is the, ... Respondent.

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for HSBC Bank USA, National Association, as Trustee for the Holders of the Deutsche ALT-A Securities, Inc. Mortgage Loan Trust, Mortgage Pass-Through Certificates Series 2007-OA4, 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.,

do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified to the following address(es):

Pleadings: **AMENDED INITIAL BRIEF OF APPELLANT**

Counsel Served:

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Eileen Hindman
Sr. Administrative Assistant

February 13, 2017

(5)

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February 13, 2017

Hand Delivered
The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

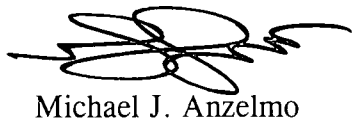
RE: HSBC Bank USA, National Association v. Clifford L. Ryba, et. al
South Carolina Court of Appeals, Charleston County
Appellate Case No. 2016-001054
Our File No. 42753.01607

Dear Ms. Kitchings:

Per the Appellant's contemporaneously filed Motion to allow Amended Initial Brief of Appellant, enclosed for filing in the above-reference matter please find the original and one copy of Appellant's Amended Initial Brief of Appellant. Please return a clocked-in copy to us via our courier.

By copy of this letter, we are serving all counsel with these documents.

Very truly yours,



Michael J. Anzelmo

MJA:eh
Enclosures
cc: Erica G. Lybrand, Esquire
J. Kevin Holmes, Esquire

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Via Hand Delivery
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42753/01607