THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master In Equity

Appellate Case No. 2016-001054

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SC Court of Appeals

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.

Final Reply Brief of Appellant

Michael J. Anzelmo
Phillips McWilliams
NELSON MULLINS RILEY & SCARBOROUGH LLP
1320 Main Street / 17th Floor
Columbia, South Carolina 29201
803.799.2000

Erica G. Lybrand
Rogers Townsend & Thomas, PC
1221 Main Street/ 14th Floor
Columbia, South Carolina 29201

Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Rules

Statutes

Reply Argument

I. Respondent mispresents the order granting Appellant's motion to reconsider in an attempt to support a fraud defense that fails as a matter of law.

In her reply brief, Goldberg devotes eight pages of the initial argument section recounting the procedural history of the hearing and summarizing the master's orders rather than addressing the arguments advanced in Appellant's brief in chief. {Resp. Br. p. 8-16, 17}. After that recitation, Goldberg glosses over or ignores the issues before this Court. The first issue advanced to the Court was that the master erred in barring the foreclosure action based on the fraud the court imputed to Appellant because the master removed the two grounds on which the court based the imputation to Appellant. {App. Br. p. 9-10}. Goldberg now claims that although "the Master withdrew imputed notice based on agency as an additional sustaining ground" the master "did not disturb his ruling Countrywide had constructive notice of the fraud." {Resp. Br. 16-17}. This argument is incorrect and misrepresents the effect of the master's ruling on the motion to reconsider. A brief review of the master's orders illustrates the lack of merit in Goldberg's appellate argument.

Goldberg argued to the master that Appellant could not foreclose on two grounds: (1) Appellants had constructive notice of the Ryba's fraudulent scheme related to the 2007 loan to which the Goldberg fell victim, and (2) Appellants had constructive notice because the Rybas were the agents of Countrywide (the loan originator), and, therefore, Appellant could not foreclose the 2007 loan. The master initially agreed and found such in the original order. {Order, R. 41}. The master precluded the foreclosure on two grounds and two grounds only. First, Appellant could not foreclose on the property because the Rybas were agents of Countrywide, the loan originator. Second, Appellant could not foreclose because Appellant

had constructive notice of the fraud based on the Rybas' illegal recasting scheme related to the 2007 loan that defrauded Goldberg. {Id.}.

However, upon motion of Appellants, 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. The order granting the motion to alter or amend unequivocally found that:

> [Appellant's] motion to alter, amend, or reconsider the Order on the ground [Goldberg] did not plead agency is granted . . . and is deleted.

{Order granting Motion to Alter or Amend p. 3-5, R. 3-4}. The master also removed the finding that Appellant had constructive notice of any fraudulent recasting scheme perpetrated by the Rybas on Goldberg, again unambiguously finding that: "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." {Order granting Motion to Alter or Amend p. 10, R. 10}.[1]

While the order granting Appellant's motion for 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 fraudulently causing Goldberg to transfer the deed to the Rybas in 2005. That language did not make any finding of constructive notice to Appellant. That is because Respondent presented no evidence, and the master found none, that Appellant had any knowledge or notice

[1] 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").

of that fraudulent scheme employed by Goldberg. The master made no findings to support fraud against Appellant other than those related to the fraudulent recasting scheme in 2007 that were all deleted by the master on reconsideration.

Thus, Goldberg's argument to this Court lacks merit and should be rejected by this Court. The record supports only one conclusion—the fraud committed by the Rybas cannot be imputed to Appellant on any basis and, as a result, the master erred in barring foreclosure on that ground. This Court should reverse and remand with instructions to enter a foreclosure judgment for Appellant.

Moreover, Goldberg fails to even address the fact that even if the master had not removed the only grounds to support an imputed fraud finding against Appellant, the fraud claim still failed as a matter of law as to Appellant. The claim failed as to Appellant because Goldberg failed to plead fraud against Appellant. Rather, Goldberg made only a general allegation regarding **the conduct of the Rybas** back in 2005, claiming "[t]he deed from Mrs. Goldberg to the Rybas conveying title to 34 Tarleton Drive, being void, the Rybas could not execute a valid mortgage." {Answer and Counterclaim dated July 31, 2013 p. 7, R. 93}. Goldberg did not plead all nine elements[2] of fraud against the Rybas. Critically, Goldberg failed even to mention, much less plead facts in support of all nine fraud elements, against Appellant. {Answer and Counterclaim dated July 31, 2013 p. 7, R. 93}. Thus, no fraud claim was pleaded against Appellant, or, at a minimum, the alleged fraud claim failed as a

[2] 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).

matter of law. Ardis v. Cox, 314 S.C. 512, 515, 431 S.E.2d 267, 269 (Ct. App. 1993) (holding that when the complaint omits allegations on any element of fraud, the complaint fails as a matter of law); Rule 9, SCRCP, ("In 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 be averred generally.").

This wholesale failure of Goldberg 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.[3]

II. Respondent likewise fails to refute or even address the fact that the removal of the grounds supporting the fraud findings against Appellant from the master's order rendered the holder in due course argument irrelevant.

A party can only utilize the defense of fraud in the inducement as a defense against a party claiming to be a holder of a negotiable instrument. Section 36-3-305(a)(1)(iii) of the South Carolina provides that rule, stating that:

> [T]he 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 constitute an offensive claim against the holder of the instrument. Id. By removing the grounds to support the fraud ruling, the master 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 of Appellant's undisputed status as holder of the 2007 loan.

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[3] In fact, even if properly pleaded against Appellant, Goldberg did not introduce any evidence that Appellant committed fraud. Rather, Goldberg only presented evidence of fraudulent conduct by the Rybas and attempted to impute that fraud on grounds later removed by the master from the order.

Because fraud imputed to Appellant had been removed, Goldberg possessed no further defense to the master's ruling that Appellant in fact held the note and mortgage finding. {Order dated June 22, 2015 p. 6 ([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), R. 23}. 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. 11}. 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 and remand with instructions to enter a foreclosure judgment for Appellant.

III. This Court should reverse because the master's requirement that Appellant be a holder in due course is irrelevant because a loan servicer can foreclose even without holding the note at issue.

Even if the holder issue remained relevant to this action vis-à-vis Goldberg's fraud claim, the master still erred in requiring Appellant to establish holder in due course status. This is because SLS, as loan servicer, possessed the standing to foreclosure on behalf of Appellant even if Appellant did not hold the note.[4] Respondent failed to even address that fact in brief to this Court.

The record established that SLS serviced the loan on behalf of Appellant and, as such, had standing to foreclose even if it did not hold the note. {Pooling and Servicing Agreement,

[4] 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. 23}. 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. 11}.

R. 158}. This Court has previously held that 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, 222, 746 S.E.2d 478, 482 (Ct. App. 2013) (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**") (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)); 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).

Thus, Goldberg's convoluted analysis as to whether Appellant qualified as a holder in due course was irrelevant as to SLS's ability on behalf of Appellant to foreclose the 2007 loan executed by the Rybas. As a result, the master erred in barring Appellant from foreclosing[5] based on a holder basis. This Court should reverse and remand with instructions to enter a foreclosure judgment for Appellant.[6]

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[5] The Rybas were admittedly in default on the 2007 loan.

[6] Goldberg claims that Appellant failed to preserve the argument that Goldberg's admitted lack of interest in the 2007 note and mortgage showed that she lacked standing to even challenge whether Appellant qualified as a holder in due course based on assignments of the 2007 note and mortgage was misplaced. {Resp. Br. p. 18-20}. This is incorrect. The master admitted evidence related to the fact that Goldberg was not a party to the 2007 note and mortgage, {Pl. Ex. 4, R. 345; Pl. Ex. 5, R. 350}, and that 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. 249, 252}. Thus, the issue of Goldberg's standing under the 2007 note and mortgage was raised to the master. The master ruled on the issue by allowing Goldberg to

Conclusion

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

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: _____

Michael J. Anzelmo
Phillips L. McWilliams
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, South Carolina 29201
(803) 799-2000

and

Erica G. Lybrand
Rogers Townsend & Thomas, PC
1221 Main Street/ 14th Floor
Columbia, South Carolina 29201

Attorneys for Appellant

Columbia, South Carolina

March 31, 2017

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avoid the foreclosure. It is important to note that even if this argument were not preserved, it does not allow the Court to affirm the master. Rather, the numerous other issues that would be properly before this Court warrant reversal of the master's erroneous ruling.

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Reply Brief complies with Rule 211(b), SCACR.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: _____

Michael J. Anzelmo
Phillips L. McWilliams
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, South Carolina 29201
(803) 799-2000

and

Erica G. Lybrand
Rogers Townsend & Thomas, PC
1221 Main Street/ 14th Floor
Columbia, South Carolina 29201

Attorneys for Appellant

Columbia, South Carolina

March 31, 2017