

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas

Mikell R. Scarborough, Master-in-Equity

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APR 04 2017

SC Court of Appeals

Case No. 2017-0000613

Nationstar Mortgage LLC.....Respondent,

v.

Robert Hammond.....Appellant.

REQUESTED MEMORANDUM OF RESPONDENT

William P. Stork, S.C. Bar No. 100242
Scott & Corley, P.A.
2712 Middleburg Dr., Suite 200
Columbia, SC 29204
803-252-3340
Attorneys for Respondent

STATEMENT OF THE CURRENT ISSUE

I. WHETHER THE DEFENDANT/APPELLANT'S APPEAL OF THE LOWER COURT'S ORDER SUBSTITUTING PLAINTIFF IS TIMELY AND PROPER.

INTRODUCTION AND FACTS

By assignment dated August 17, 2016, Nationstar Mortgage LLC, prior Plaintiff in the underlying foreclosure action, transferred the subject mortgage to U.S. Bank Trust N.A., as Trustee for LSF9 Master Participation Trust by Assignment of Mortgage dated August 17, 2016 and recorded with the Charleston County Register of Deeds October 28, 2016 in Book 0593 at Page 116. Due to the transfer of the mortgage that is the subject of the underlying civil action, Plaintiff's counsel submitted a proposed Order Substituting Plaintiff pursuant to Rule 17(a), SCRCP, to the Court for review. A copy of this proposed Order Substituting Plaintiff was mailed to counsel for Appellant as well. The proposed Order Substituting Plaintiff was executed by the lower Court and filed of record with the Charleston County Clerk of Court on December 1, 2016. In response to the Order Substituting Plaintiff which was entered by the lower Court, Appellant filed a "Motion to Reconsider Order Granting Substitution of Plaintiff and for Sanctions." Appellant's motion was first heard on January 23, 2017. By Order executed January 24, 2017 and filed with the Charleston County Clerk of Court on January 26, 2017, the lower Court denied Appellant's Motion to Reconsider. The underlying foreclosure, including third-party claims against the original servicer Ocwen Loan Servicing, is still pending before the lower Court. To date, no final judgment has been rendered by the lower Court.

LEGAL STANDARD

"The right of appeal arises from and is controlled by statutory law." *Ex parte Capital U-Drive-It, Inc.*, 369 S.C. 1, 6, 630 S.E.2d 464, 467 (2006). Usually, an appeal may only be sought after a party has procured a final judgment; an order that does not end a case or prevent a final

judgment from which a party could appeal is not generally considered immediately appealable. *Watson v. Underwood*, 407 S.C. 443, 458-59, 756 S.E.2d 155, 163 (Ct. App. 2014); S.C. Code Ann. §14-3-330(1) (1977); Rule 72, SCRCP; Rule 201(a), SCACP. Whether a party can immediately appeal an order before final judgment depends upon whether the order falls into one of the categories that allows for immediate appeal as set forth in §14-3-330. S.C. Code Ann. §14-3-330 (1976 & Supp. 2003). For an order to be appealable prior to final judgment, the order must involve the merits of the case, affect a substantial right, or involve the granting, continuing, modifying, or refusing of an injunction or the appointment of a receiver. *Id.*

ARGUMENT

I. THE ORDER SUBSTITUTING PLAINTIFF IS NOT IMMEDIATELY APPEALABLE.

a. The Order Substituting Plaintiff does not involve the merits of the case.

“An order ‘involves the merits,’ as that term is used in [s]ection 14-3-330(1)[,] and is immediately appealable when it finally determines some substantial matter forming the whole or part of some cause of action or defense.” *Watson v. Underwood*, 407 S.C. 443, 458, 756 S.E.2d 155, 163 (Ct. App. 2014) citing *Ex parte Capital U-Drive-It, Inc.*, 369 S.C. 7, 630 S.E.2d at 467. The phrase “involve the merits” is narrowly construed and orders that require some further act by the trial court prior to determining the parties’ rights are typically found to be interlocutory orders and are not immediately appealable.

The Order Substituting Plaintiff in the present matter does not involve the merits of the case because the Order merely determines that the underlying action will continue in the name of a substituted party. The Order does not affect Appellant’s raised defenses before the lower Court, nor does it affect Appellant’s third-party complaint against the prior mortgage servicer,

Ocwen Loan Servicing. The underlying foreclosure action, along with the third-party complaint, is still pending before the lower Court. The Order does not determine the outcome of the case or the rights of the parties. Based on the foregoing, the Order does not involve the merits of the case and is not immediately appealable pursuant to S.C. Code Ann. §14-3-330(1).

b. The Order Substituting Plaintiff does not affect a substantial right.

An order affects a substantial right and is immediately appealable when the order “(a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial, or (c) strikes out an answer or any part thereof or any pleading in any action.” S.C. Code Ann. §14-3-330(2).

In the present case, the Order Substituting Plaintiff does not affect a substantial right of Appellant. In fact, pursuant to Rule 17(a), SCRPC, the underlying action must be brought by the real party in interest; therefore, the Order was completely proper since the real party in interest changed during the pendency of the action. Further, Rule 17(a), SCRPC states, “No actions shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed, after objection, for ... substitution of, the real party in interest.” Rule 17(a), SCRPC. Additionally, Rule 25(e), SCRPC, states that substitution of parties due to a transfer of interest “may be made by the trial court either before or after judgment or pending appeal, by the appellate court.” (underline emphasis added)

That is exactly what happened in this matter: a proposed order was mailed to the lower Court and opposing counsel; the lower Court granted the Order; Appellant objected; and the lower Court ruled against Appellant and sustained the Order Substituting Plaintiff. The Order Substituting Plaintiff does not grant or refuse a new trial, nor does it strike out an answer or any

part of that answer or pleadings in the action. The Order Substituting Plaintiff, therefore, does not affect a substantial right and is not immediately appealable.

c. The Order Substituting Plaintiff in not a final order and does not involve injunctions or the appointment of a receiver.

The Order Substituting Plaintiff in the underlying foreclosure case merely substitutes the new real party in interest in the place of the previous real party in interest. No findings of fact have been made, no defenses have been weighed, and the third-party claim is still outstanding. The Order Substituting Plaintiff is in no way a final judgment. Further, the present case does not involve injunctions or the appointment of a receiver. Since the Order Substituting Plaintiff is not a final order, nor does it involve injunctions or the appointment of a receiver, the Order Substituting Plaintiff does not fall within SC Code Ann. §14-3-330(2) or §14-3-330(3) and is not immediately appealable.

CONCLUSION

For the reasons stated above, the Order Substituting Plaintiff is not an immediately appealable issue, making the Notice of Appeal inappropriate at this time.

Respectfully submitted,



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3131, 2017
Columbia, South Carolina

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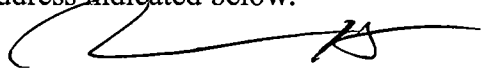
v.

Robert Hammond.....Appellant.

PROOF OF SERVICE

I certify that I have served the Requested Memorandum of Respondent on Robert Hammond by depositing a copy of it in the United States mail, postage prepaid, on March 31, 2017, addressed to his attorney of record, John R. Cantrell, at his address indicated below.

Dated: 3/31



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March 31 2017

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

RE: U.S. Bank Trust, N.A. as Trust v. Robert E. Hammond, Appellant
Appellate Case No.: 2017-000613

Dear Ms. Kitchings,

Enclosed please find one original and copy of the Requested Memorandum of Respondent and Proof of Service in the above referenced matter. Upon filing, kindly return a clocked copy of same to our office in the self-addressed, postpaid envelope provided.

Should you have any questions, please do not hesitate to contact me.

Very truly yours,

Scott and Corley, P.A.

Caroline Laster
Litigation Paralegal

Enclosed:
Re: John R. Cantrell, Jr.

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SC Court of Appeals



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