BRIEF OF APPELLANT

In The Court of Appeals

APPEAL FROM OCONEE COUNTY

Court of Common Pleas

Steven C. Kirven, Master-in-Equity

Case No. 2017-000886

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SC Court of Appeals

Federal National Mortgage Association, Respondent,

v.

John D. Dalen, Julie A. Dalen
And Wawtockace Hills Property Owners Association, Defendants
Of whom John D. Dalen and Julie A. Dalen are the Appellants

v.

Bank of America, N.A., Successor by merger to
BAC Home Loans Servicing, L.P. f/k/a
Countrywide Home Loans Servicing, L.P., Respondent

INITIAL BRIEF OF APPELLANT

Appeal from final judgment of foreclosure from Oconee County Court of Common Pleas, Steven C. Kirven, Master-in-Equity

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John D. Dalen and Julie A. Dalen
109 Wood Valley Drive
Westminster, SC 29693
Phone: 864 647 4705
Appearing Pro Per / Appellant(s)

Attorneys:

Brian A. Caleb, Esq.
McGuire Woods LLP
Fifth Third Center
201 North Tryon St., Ste. 3000
Charlotte, NC 28202
Ph. 704 343 2000
For Respondent Bank of America, N.A.

Charles S. Gwynne, Jr., Esq.
Rogers, Townsend & Thomas, PC
P.O. Box 100200
Columbia, SC 29202

Ph. 803 744 1933
For Respondent FNMA

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Bank of America, N.A. v. Draper, 746 SE 2nd 478, 405 SC 214, Court of Appeals 2013

Servicer entitled to foreclose...Court presumes Assignment of Mortgage was proper.

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Bank of America, N.A. vs. Grisel Reyes-Toledo, Case No. SCWC –15 – 0000005 (28 Feb. 2017)

In the Supreme Court of the State of Hawaii, this case raises issues of standing and appellate jurisdiction that pertain to foreclosure proceedings.

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Bank of America, N.A. v. Scott A. Greenleaf et al., 2014 ME 89, July 3, 2014, 124 A. 3d 1122 (2015) 2015 ME 127

Court dismissed bank's complaint due to lack of standing and therefore Subject Matter Jurisdiction.

This case appears on page 16

Builderama v. Morton, 307 S.C. 440, 415 S.E.2d 796 (S.C. 03/16/1992)

Trial judge erred by denying a jury trial.

This case appears on page 10

Carpenter v. Longan, 83 US 16 Wall, 271, 274 (1872)

A negotiation or sale of the note carries the mortgage with it, while an assignment of the latter (mortgage) alone is a nullity.

This case appears on pages 14 and 15

David and Crystal Holm v. Wells Fargo Home Mortgage, Inc. and Federal Home Loan Mortgage Corporation (Freddie Mac), Case No. SC95755, (Feb. 28, 2017), Sup. Ct. of Missouri, En Banc.

Wrongful foreclosure -- and denial of jury trial (claimed by the banks).

This case appears on page 10 and page 16

Hungate v. Rosen, SCAP – 13 – 0005234 (Haw. Feb. 27, 2017) Supreme Court of Hawaii

Court erred in dismissing Hungate's claims.

This case appears on page 10

Hurtado v. California, 110 U.S. 516, 3 Sup. Ct. 111, 292, 28 L Ed 232 (1884)

Due process is process according the principles of the Common Law.

This case appears on page 10

Independent Oil and Chemical Workers of Quincy, Inc. v. Proctor & Gamble Mfg. Co., 864 F. 2d 927, 929 (1st Cir. 1988)

Abuse occurs when a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and no improper factors are assessed, but the court makes a serious mistake in weighing them.

This case appears on page 3 and page 10

McNutt v. General Motors Acceptance Corp. of Indiana, Inc., 298 U.S. 178, 80 L. Ed. 1135, 56 W. Ct. 780 (1936)

Jurisdiction may never be presumed.

This appears on page 3 and page 10

Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (Supreme Ct. 1966)

Referring to rights guaranteed by the Constitution of the United States, there can be no

rule making that would abrogate it.

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Rubenstein v. Collins, 20 F. 3d 160, 1994

Footnote 53: "Knowingly failing to disclose material information necessary to prevent a statement from being misleading is actionable as fraud...." *See e.g., Southeastern Financial Corp. v. United Merchants & Manufacturers, Inc.* 701 F. 2d 565, 566 – 67 (5th Cir. 1983) (noting same)

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This statute appears on page 8 and page 15

Uniform Commercial Code – Securities:

SC Code of Laws, Title 36, Sec. 36 - 8 – 102, 106, 201

This statute appears on page 8 and page 15

18 U.S.C. § 513, 1962

Mortgage is a lien on a promissory note, not on property. Reattaching the note to the mortgage after securitization is evidence rising to a level of fraud.

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Statement of Issues on Appeal

1. Was it error for the Master to proceed with trial due to plaintiff's lack of standing and therefore a lack of subject matter jurisdiction?
2. Was there fraud upon the Court due to fraudulent Assignment of Mortgage?
3. Did the proceedings violate due process of law?

   Defendants were denied jury trial and court proceeded without a competent fact witness, and without subject matter jurisdiction..

Statement of the Case

To give a brief overview followed by the history of these proceedings, we begin with an explanation: This is an appeal from a Master's order, dated March 6, 2017 granting foreclosure and sale to FNMA. From the beginning, starting with the defendants' motion to dismiss, the defendant challenged the banks' assignment of mortgage and therefore the court's subject matter jurisdiction.

This action for foreclosure commenced on a complaint filed by Bank of America, N.A. on October 31, 2011. Then, on November 22, 2011, defendants filed a Motion to Dismiss which was denied and defendants filed a Motion to Reconsider on February 14, 2012, which was also denied. Defendant then filed his Answer, Affirmative Defenses, Counterclaim and Demand for Jury Trial on February 21, 2012. In this Answer, defendants again challenged subject matter jurisdiction, filed numerous counterclaims, and demanded a trial by jury.

Defendants filed a Motion to Deny Plaintiff's Motion for Summary Judgment, on January 15, 2014. Plaintiff's motion was denied on July 9, 2014. The case was referred to the Master, and upon motion by Plaintiffs, a renewed Motion for Summary Judgment was granted on July 28, 2016, thereby denying Defendants their right to a jury trial, and a substitution of parties was entered, granting FNMA foreclosing status.

In an attempt to reassert our rights under the Common Law, as guaranteed to us by the U.S. Constitution, Defendants filed a Declaration of Claims for Fraud upon the Court, Lack of Subject Matter Jurisdiction, Fraud and Misrepresentation and Denial of Due Process of Law. This was filed on February 27, 2017.

A trial was held on March 2, 2017, followed by a judgment of foreclosure and sale on March 6, 2017, granted to plaintiff, FNMA. The amount involved was $206,295.91. Then on

March 15, 2017, defendants filed a motion for a new trial / amended judgment which was followed by the order of March 17, 2017 denying the defendants' motion. Defendants appealed the judgment of foreclosure and sale and filed a notice of appeal on May 12, 2017.

Statement of Facts

We have divided this Statement of Facts into three somewhat overlapping parts: Lack of Standing / Subject Matter Jurisdiction, Fraudulent Assignment, and Denial of Due Process.

Lack of Standing / Subject Matter Jurisdiction

Jurisdiction requires:

1. A competent witness. No complaining witness has been produced.
2. Pleadings sufficient to invoke jurisdiction; that is, there must be an injured party. No injured party has been produced. Pleadings sufficient to empower the court to act means that one of the parties must give the court its power to act by way of written and oral argument (the parties, not their attorneys, must do this.)
3. Actual facts, not mere allegations are required for subject matter jurisdiction. Statements of attorneys in their briefs and oral pleadings are not facts, but mere allegations.
4. Attorneys cannot testify. These proceedings before the master are a procedural and substantive nullity; no jurisdiction exists. Jurisdiction must be proven by the party claiming jurisdiction.
5. Proceeding without jurisdiction violates defendant's right to due process of law.

When fraud is brought upon the court, the court loses subject matter jurisdiction and the case should be dismissed. In this case, in its complaint, the bank misrepresented itself as the

owner of the note and filed with the County Recorder an Assignment of Mortgage that was fraudulent on its face -- to be discussed below, under the heading "Fraudulent Assignment".

In all of the motions and/or hearings where defendants have claimed the court lacked subject matter jurisdiction, the court refused to acknowledge the possibility of fraud and instead presumed that the statements by the bank attorneys were true. The court bases its jurisdiction on the mere fact that it is allowed to hear foreclosure cases -- not on the facts, other than those presumed to be true, not proven facts. Once jurisdiction is challenged, the party asserting jurisdiction must prove it on the record, as evidenced in the following cited cases:

McNutt v. General Motors Acceptance Corp. of Indiana, Inc., 298 U.S. 178, 80 L. Ed. 1135, 56 W. Ct. 780 (1936)

Jurisdiction may never be presumed.

Independent Oil and Chemical Workers of Quincy, Inc. v. Proctor & Gamble Mfg. Co., 864 F. 2d 927, 929 (1st Cir. 1988)

Abuse occurs when a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and no improper factors are assessed, but the court makes a serious mistake in weighing them.

In their judicial foreclosure action, Bank of America and FNMA cannot be the real party in interest and they have no standing to foreclose because, under U.S. Securities and Exchange Commission Rules, and Title 26 REMIC Rules, the loan is an unsecured debt, owned without recourse by another entity, namely, the owners of the Certificates created by the Trust Agreement dated June 1, 2007, amended and restated with the 2007 Single-Family Master Trust Agreement of January 1, 2009. See defendants' Exhibit "E", Pooling and Servicing Agreement, page one, paragraph one, and The Certificates; page 2, items "A" through "G" and on page 4,

paragraph 2, Certificate, and page 5, Article II continued through page 7. See also Exhibit "F" which is the Korn Law Firm letter to Judge Macaulay acknowledging the note was in a trust.

See also 18 U.S.C. § 513, 1962

Mortgage is a lien on a promissory note, not on property. Reattaching the note to the mortgage after securitization is evidence rising to a level of fraud.

Fraudulent Assignment

Appellant has challenged Bank of America's standing to foreclose from the beginning of this action, first with a motion to dismiss *(See Item "b" of Designation of Matter)* and followed by a Motion to Reconsider *(See Item "c" of Designation of Matter)* and then an answer and counterclaims *(Item "d" of Designation of Matter)* in which appellant has repeatedly raised the issue of securitization and chain of title issues which are the crux of the challenge to this foreclosure action.

Appellant believes and the facts of the case show that Bank of America N.A. has brought fraud upon the court in the improper first Assignment of Mortgage to Bank of America (May 9, 2011), and thus any further assignments are invalid. Because of the fraudulent assignment, the court lost subject matter jurisdiction and the case should have been dismissed.

Throughout these proceedings, the bank never presented a competent fact witness that the defendants could cross-examine. Instead they presented affidavits that were challenged by the defendants as hearsay; the affiant had no personal knowledge of the facts attested to. The only witness ever to appear in court on behalf of the bank was presented at the trial. The defendant cross-examined this witness, William Rankin, and demonstrated that Mr. Rankin had no factual knowledge that the note had or had not been securitized, nor did he show an ability to answer questions generally related to the practice of securitization. In fact, he appeared unable to

understand the questions. *See Trial Transcript, dated April 25, 2017, beginning on page 22, line 18 and continuing through page 33.*

Bank of America and FNMA each had previously produced a witness during the discovery process. On paper they answered defendants' interrogatories, admissions, and production requests. In their statements, they first denied the note had been securitized, *(See Request for Admissions, Exhibit "B" page 5, request #2 and response #2)* and then in a later interrogatory, *(See Exhibit "B", Plaintiff's Answers to Defendants' ... Second Set of Interrogatories, page 27, Interrogatory 4 and Answer 4)* admitted that the note had been securitized and purchased from Countrywide Bank FSB as servicer and seller on January 1, 2008. According to the testimony of a witness, Zachary Chromiak, provided by Bank of America, N.A. for a deposition held on September 12, 2014, *(See Exhibit "A", Transcript of the Testimony of Zachary Chromiak, pages 1 through 4)* he stated that FNMA had become the owner of the note "since January of 2008" -- less than one month after the purchasers -- the Dalens -- signed the note with Quicken Loans. Earlier in that same deposition, page 3, the witness acknowledges that as of December 6, 2011, FNMA was still the owner of the note. However, on page 4 of the testimony, questions are raised as to the date on the Assignment of Mortgage which is May 9, 2011; the Assignment purports to transfer "all beneficial interests under that certain Mortgage with the Note." As just previously pointed out, this witness acknowledges that FNMA bought the note in January of 2008, and has been the owner since then and as of December 6, 2011. How could the Assignment of Mortgage, dated May 9, 2011, from Quicken Loans to Countrywide Home Loans, be valid or true when Countrywide had sold the note to FNMA in January of 2008?

Again, in our Exhibit "B", in plaintiff's responses to defendant's Interrogatories, Requests for Admissions and Production of Documents, there are numerous examples of the

banks' attorneys or witnesses responding to our requests in contradiction to the Assignment of Mortgage and Bank of America's purported chain of title. On page ten of Exhibit "B", plaintiff's response to our 3rd Set of Requests to Admit, in answer to question one, plaintiff admits that it did not become the holder of the mortgage or note on May 9, 2011, but claims it was the holder of the note and thereby holder of the mortgage prior to that date. On page 12 of Exhibit "B", plaintiff's answers to our 3rd Set of Interrogatories, Bank of America was asked to state the date that they became holder of the mortgage. The answer given was Countrywide Bank became the holder of the note, and thereby holder of the mortgage on January 15, 2008, and goes on to state that on April 27, 2009, Countrywide Bank was acquired by plaintiff. How can this be true if as stated above, Zachary Chromiak, the bank's own witness, claims that Countrywide "sold" the note and mortgage to FNMA "in January of 2008"? How could Bank of America acquire any interest in the note and mortgage through their acquisition of Countrywide Bank in April of 2009? This and similar inconsistencies are repeated throughout our Exhibit "B" and discovery requests.

In the bank's first attempt at summary judgment, appellant filed a motion and a memorandum in opposition to the bank's motion for summary judgment which raised securitization and chain of title issues as well as ownership of the note and mortgage and the right to enforce. Judge Alexander Macaulay denied the bank's motion for summary judgment on our counter-claims stating: "After a careful consideration of the entire record, to include the arguments and filings of the parties, Plaintiff's Motion for Summary Judgment is DENIED." *(See: Order Denying Plaintiff's Motion for Summary Judgment, July 9, 2014, page 1, item "h".)*

In Master's order granting bank's renewed motion for summary judgment, and his subsequent order denying defendants' motion to reconsider, it is stated that "new issues and evidence" were being raised, and that defendant was improperly raising issues of securitization

and chain of title issues that should have been raised at the summary judgment hearing. (*See: Order Denying Motion to Reconsider, October 13, 2016, page 3, item "m".)*

Appellants contend that bank merely rehashed previous arguments, presented no new issues or evidence, and that appellants did in fact raise the chain of title and securitization issues at the renewed motion for summary judgment hearing, both through the counterclaims themselves, as well as by the attorney who was representing defendant at that time in his brief to the court. Our attorney brought up Judge Macaulay's denial of the bank's first motion for summary judgment, as the first reason that master should deny motion for renewed summary judgment. (*See: Motion's Hearing Transcript before Master-in-Equity Ellis B. Drew, August 9, 2016, page 23 through 25.)* Appellant raising these issues in his motion to reconsider was both proper and timely; these issues have been repeatedly raised throughout this case.

After the motion hearing before Judge Drew on August 9, 2016, while still trying to determine the validity of the notary signature, as discussed at that hearing, we came upon additional evidence regarding that signature. This is noted as Exhibits 9, "I" and 10, "J". Exhibit 9 is a copy of the Assignment of Mortgage with the notary signature highlighted and page 2 is the notary public's oath and certificate of filing showing that the signature used on her application must be used on all notarized documents. Instead, she did not sign in the required manner. Exhibit "J", the resume of Jenny Kogak, explains why she may have signed the document in this manner. The resume contains her statement that she performed notary services in Simi Valley for their "final docs" department, performing up to 350 notarizations per day between February, 2011 and August, 2011.

Exhibit "K" is the complaint filed by all 50 States Attorneys General and the United States of America against numerous banking institutions, including Bank of America, N.A., BAC Home Loans Servicing, and Countrywide Home Loans, Inc. This lawsuit was ultimately

settled, the banks paying a staggering 25 billion dollars. In the complaint, the banks were accused of violations of consumer protection laws and unlawful foreclosure activities, including manufacturing fraudulent documents and assignments. The bank's assignment of mortgage in our case shows a notary signature that is a perfect example of robo-signing, one of the complaints brought up in that lawsuit.

Exhibits "I", "J", and "K" were submitted for the first time with our Declaration of Claims, dated February 27, 2017, which is Item "p" in the Designation of Matter, to be included in our Record on Appeal. All of the other exhibits listed in the Designation of Matter were submitted at hearings.

South Carolina law under the UCC (SC Code of Laws Title 36 Sec. 36-3-104 (notes) and Sec. 36-8-102 (securities) requires an unbroken chain of title from the originator to the foreclosing party in order to enforce. *(See hearing transcript from May 28, 2013, of Judge Macaulay - Denial of Order of Reference and Order to Produce Pooling and Service Agreement.)* The banks, both Bank of America and FNMA have conspired to bring fraud upon the court by manufacturing a fraudulent chain of title in order to foreclose on our property. All of these arguments and facts have been repeatedly presented by the appellant to the trial court and to the master, making summary judgment for the plaintiff improper at the very least, and actionable by the appellant and grounds for dismissal of the complaint for bringing fraud upon the court. This fraud has harmed the appellants, as has the trial court and the master's inability to acknowledge the fraud and take appropriate action. Further, the trial court's ruling denying defendants' right to trial by jury and granting of summary judgment to Bank of America was improper as questions of material fact do exist. Due process of law was violated. The endorsement on the note is undated making this an issue for the jury to decide as to whether the

Bank had possession of the note at the time the complaint was filed. *See Rubenstein v. Collins, 20 F. 3d 160, 1994:*

> Footnote 53: "Knowingly failing to disclose material information necessary to prevent a statement from being misleading is actionable as fraud…." *See e.g., Southeastern Financial Corp. v. United Merchants & Manufacturers, Inc. 701 F. 2d 565, 566 – 67 (5th Cir. 1983) (noting same)*

Denial of Due Process

In referring the case to the Master and denying the defendant his right to trial by jury, and proceeding without subject matter jurisdiction, defendant's right to due process of law was violated.

In item "r" of the Designation of Matter, the Transcript of Trial before Judge Kirven on March 2, 2017 (dated April 25, 2017), starting on page four, line #25 through page nine, defendant repeatedly objected to the proceedings on grounds of a lack of subject matter jurisdiction and denial of due process of law. In those same pages, defendant also brought up a motion to dismiss for lack of subject matter jurisdiction and violation of due process. *(See same Trial Transcript page 6, starting at line 4 and continuing through line 12.)* The issue of subject matter jurisdiction and denial of due process was brought up repeatedly throughout these proceedings, as far back as our initial motion to dismiss. *(Item "b" in the Designation of Matter to be included in the record on appeal.)* None of the judges or masters has adequately addressed this challenge on the record as is required in a challenge of jurisdiction. Often it was ignored, and sometimes it was addressed but the court still failed to address the issue of fraud, presuming that the documents in question were proper. All of this led to the defendants filing a declaration of claims *(See item "p" in the Designation of Matter)* under the common law, against the master,

Judge Kirven, the banks and their attorneys and others, prior to the trial. The Master continued with the trial even though he was the subject of a suit-at-law, regarding this case. The following cases are relevant:

Builderama v. Morton, 307 S.C. 440, 415 S.E.2d 796 (S.C. 03/16/1992)

Trial judge erred by denying a jury trial.

David and Crystal Holm v. Wells Fargo Home Mortgage, Inc. and Federal Home Loan Mortgage Corporation (Freddie Mac), Case No. SC95755, (Feb. 28, 2017), Supreme Court of Missouri, En Banc.

Wrongful foreclosure -- and denial of jury trial (claimed by the banks).

Hungate v. Rosen, SCAP – 13 – 0005234 (Haw. Feb. 27, 2017) Supreme Court of Hawaii

Court erred in dismissing Hungate's claims.

Hurtado v. California, 110 U.S. 516, 3 Sup. Ct. 111, 292, 28 L Ed 232 (1884)

Due process is process according the principles of the Common Law.

Independent Oil and Chemical Workers of Quincy, Inc. v. Proctor & Gamble Mfg. Co., 864 F. 2d 927, 929 (1st Cir. 1988)

Abuse occurs when a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and no improper factors are assessed, but the court makes a serious mistake in weighing them.

McNutt v. General Motors Acceptance Corp. of Indiana, Inc., 298 U.S. 178, 80 L. Ed. 1135, 56 W. Ct. 780 (1936)

Jurisdiction may never be presumed.

Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (Supreme Ct. 1966)

Referring to rights guaranteed by the Constitution of the United States, there can be no rule making that would abrogate it.

United States Constitution, Amendment 7 -- guarantee of right to a jury trial

United States Constitution, Amendment 5 -- right to due process of law

Argument

That fraud has clearly been brought upon the court, and the trial court has failed to protect the appellant, having instead brought harm to the appellant is indisputable. The facts show that Bank of America is clearly not a party entitled to enforce. Bank of America, N.A., conspiring with FNMA and their attorneys, fraudulently manufactured and/or submitted an improper chain of title to mislead and defraud the court and the appellant. Without standing, the bank is not properly before the court. Without proof of chain of transfers, the bank has no standing to foreclose. Issues of material fact exist that should have been brought before a jury to be decided.

The trial court has been proceeding without subject matter jurisdiction from the filing of the complaint, due to the fraudulent assignment of the note and mortgage. The defendant has from the beginning, in his motion to dismiss and subsequent filings, repeatedly challenged the bank's assignment of the note and mortgage. Through discovery, defendant has accumulated evidence that clearly shows the assignment of defendant's note and mortgage was improper, and in fact was manufactured by the banks to facilitate an unlawful foreclosure. The trial court failed to protect defendant's rights to due process of law by denying the defendant a trial by jury, as required by the Constitution of the United States of America and also by proceeding with the trial and granting of foreclosure to FNMA without subject matter jurisdiction due to the fraud upon the defendant and the court brought by Bank of America and FNMA and their attorneys.

In the master's order denying motion to dismiss for lack of subject matter jurisdiction, the master failed to address the issues that were raised in the motion. A complaint for foreclosure is not properly filed where the party seeking to foreclose is trying to enforce an improper and fraudulent assignment of mortgage.

Prior to the trial, we filed a second motion to dismiss for lack of subject matter jurisdiction which the trial court dismissed as untimely. This was an error because jurisdiction can be challenged at any time and must, when challenged, be proven on the record before the court can proceed.

Also prior to the trial, in an attempt to regain our rights under the common law secured to us by the Constitution, we filed a declaration and counterclaim against the banks, their attorneys and the masters (Judges Kirven and Drew) improperly dismissed as "frivolous" at the trial held on March 2nd 2017. In that filing, John Dalen presented the evidence that has accumulated in the court's record showing the fraud that was perpetrated upon the court and the defendant(s).

At the trial, all of the evidence submitted by the bank's attorney is evidence of that fraud. The bank Note and the Assignment of Mortgage -- *listed as our letter "s" in our Designation of Matter, page 9, one of our Exhibits were listed by the bank as Exhibits (1) and (3).* The Note is signed without recourse from Quicken Loans to Countrywide Bank FSB. It is undated. This is a question of material fact as to when Bank of America came into possession of the Note. Bank of America has presented no evidence that it was in possession or the owner of the Note at the time of the filing of this foreclosure. There is a case from the Supreme Court of the State of Hawaii that raises issues of standing and appellate jurisdiction that pertain to foreclosure proceedings. *(See Bank of America, N.A. vs. Grisel Reyes-Toledo, Case No. SCWC –15 – 0000005, 28 Feb. 2017.)* This case closely parallels our case, and was decided just days before our March 2, 2017 trial.

The facts show that FNMA was in actual possession of the Note at the time of the filing of this foreclosure, and was in fact the owner of the Note and that the Note had been securitized. Beneficial interests in the Note had then been sold to holders of the certificates created by the Trust. *See: 1) Exhibit A, Transcript of Testimony of Zachary Chromiak, pages 3 and 4, as well as 5) Exhibit E, Pooling and Servicing Agreement (Trust).*

The evidence in our case clearly shows that Bank of America has brought fraud before the court. The assignments of mortgage that have been filed by Bank of America as proof of its chain of title and rights to enforce the note in question cannot be true, as the evidence in the bank's own admissions and documents obtained through discovery clearly show. The bank has admitted that the note was securitized. They have also admitted and provided documents that show the note was sold into a trust, the trustee being FNMA. However, there is no endorsement of the note to FNMA or the trust on the note. There is also no assignment of the mortgage to FNMA or the trust at the time that the facts show that FNMA became the owner of the note in January of 2008.

The bank claims in its complaint that it is both the holder of the note, and the servicer of the note. The bank has referred to FNMA as the investor, while FNMA has claimed to be the owner of the note. No mention of FNMA or any trust is found in the complaint. No assignment of the mortgage or sale of the note from Quicken Loans to FNMA or to the trust has been offered as evidence, yet the evidence clearly shows that FNMA was claiming to be the owner of the note years prior (in 2008) and prior to the assignment to Countrywide or Bank of America (2011). Where is the sale or assignment of the note and mortgage to FNMA and/or the trust? The bank has successfully substituted parties in this case, naming FNMA and entering an assignment of mortgage to FNMA to enable FNMA to proceed with this foreclosure. (*See Bank's Exhibits (1) and (3) item "s".)*

Why is an assignment of the note and mortgage from Bank of America to FNMA necessary when Bank of America is claiming to be the servicer *(See Bank of America, N.A. v. Draper, 746 SE 2nd 478, 405 SC 214, Court of Appeals 2013 Servicer entitled to foreclose…Court presumes Assignment of Mortgage was proper)* and acting as agent for FNMA which is already the owner? It appears the banks are playing a shell game with the note and mortgage to confuse the defendants and the court, in order to cover up the fact that the mortgage and the note were sold into the trust, securitized and resold to the beneficiaries of the trust, but never properly transferred to the trust.

It should be noted that the Draper case is repeatedly referred to by the bank's attorneys as their authority to foreclose. What they fail to admit is that the court in this case states that they were "presuming" that the assignment of mortgage was proper due to the fact that the defendants did not challenge the assignment. In our case, defendants have repeatedly challenged the bank's assignment and in spite of the evidence, the trial court has been proceeding on the "presumption that the assignment was proper". *(See Trial Transcript, item "k" before Judge Ellis B. Drew, August 19, 2016).*

It is equally clear that Quicken Loans sold the note to FNMA for securitization in 2007 or 2008. (*See item 1, Exhibit A, Transcript of Zachary Chromiak, September 12, 2012, item 2, Exhibit B, Plaintiff's Responses to Defendant's Interrogatories, Requests for Admissions and Production of Documents and item 5, Exhibit E, Pooling and Servicing Agreement.)*

It is also clear that the bank's assignment of mortgage from Quicken Loans, via MERS, to Countrywide and by merger to Bank of America cannot have happened, because Quicken Loans no longer had possession of the note or mortgage, having sold at least the note to FNMA. If in fact FNMA did not also receive an assignment of the mortgage at the time it purchased the note, then according to Carpenter v. Longan, the note and the mortgage have been bifurcated and

are a nullity – unenforceable. *See Carpenter v. Longan, 83 US 16 Wall, 271, 274 (1872.)* A negotiation or sale of the note carries the mortgage with it, while an assignment of the latter (mortgage) alone is a nullity.

South Carolina law under the UCC (SC Code of Laws Title 36 Sec. 36-3-104 (notes) and Sec. 36-8-102 (securities) requires an unbroken chain of title from the originator to the foreclosing party in order to enforce. *(See hearing transcript, item "e", Judge Macaulay, Denial of Order of Reference and Order to Produce Pooling and Service Agreement.)* The banks, both Bank of America and FNMA have conspired to bring fraud upon the court by manufacturing a fraudulent chain of title in order to foreclose on our property. All of these arguments and facts have been repeatedly presented by the appellant to the trial court and to the master, making summary judgment for the plaintiff improper at the very least, and actionable by the appellant and grounds for dismissal of the complaint for bringing fraud upon the court. This fraud has harmed the appellant, as has the trial court and the master's inability to acknowledge the fraud and take appropriate action. Further, the trial court's ruling denying defendants' right to trial by jury and granting of summary judgment to Bank of America was improper as questions of material fact do exist. Due process of law was violated.

The endorsement on the note is undated making this an issue for the jury to decide as to whether the Bank had possession of the Note at the time the complaint was filed. The facts in this case leave in doubt exactly which bank was the holder of the Note at the time the complaint was filed. FNMA claims to be the holder of the Note and also claims to have securitized it. Bank of America claims to be the holder of the Note and also claims to be servicing it for FNMA. There can only be one holder of the Note at any given time. This is certainly an issue of material fact that should have been presented before a jury. Bank of America was repeatedly asked to produce the original Note and failed to do so until July of 2013 by court order. In explaining the

delay in producing the Note, Bank of America claimed they were trying to locate it. All of this aside, the evidence also shows that the Note in question was in fact securitized, forever changing the nature of the Note. Once securitized, it is forever a security and severed from the Mortgage; it can never be converted back to a Note and reattached to the Mortgage.

This case reflects appellants' firm conviction that the complaint is a fraud on the court... an unlawful foreclosure wherein the trial court has acted on presumption not supported by fact. Appellants believe that the court erred due to lack of subject matter jurisdiction and therefore violated appellants' rights to due process of law.

Appellant has challenged Bank of America's standing to foreclose from the beginning of this action, first with a motion to dismiss and followed by an answer and counterclaims in which appellant has repeatedly raised the issues of securitization, chain of title and improper and fraudulent Assignment of Mortgage -- issues which are the crux of the challenge to this foreclosure action and, as well, issues that deny the court subject matter jurisdiction.

The following cases parallel our case and discuss many of the same issues we have raised:

Bank of America, N.A. vs. Grisel Reyes-Toledo, Case No. SCWC –15 – 0000005 (28 Feb. 2017)

In the Supreme Court of the State of Hawaii, this case raises issues of standing and appellate jurisdiction that pertain to foreclosure proceedings.

Bank of America, N.A. v. Scott A. Greenleaf et al., 2014 ME 89, July 3, 2014, 124 A. 3d 1122 (2015) 2015 ME 127

Court dismissed bank's complaint due to lack of standing and therefore Subject Matter Jurisdiction.

David and Crystal Holm v. Wells Fargo Home Mortgage, Inc. and Federal Home Loan Mortgage Corporation (Freddie Mac), Case No. SC95755, (Feb. 28, 2017), Supreme Court of Missouri, En Banc.

Wrongful foreclosure – bank's claim of denial of jury trial.

The following is a discussion of the Bank of America v. Grisel Reyes-Toledo case cited above that so closely parallels our own case *(copy included and listed in the Designation of Matter)* that in reading the background starting on page 2 through page 6, one would only need to change the names of the defendants to make this a mirror of the Dalen case. A copy of this case was provided to the trial court prior to the March 2, 2017 trial.

On page 4 the homeowner asserted - as did the Dalens - additional defenses that apply if the "note and mortgage were transferred into a trust and securitized." On page six of the Bank of America v. Grisel Reyes-Toledo case, in opposition to the bank's motion for summary judgment, the homeowner asserted that material questions of fact remain as to the validity of the assignment and whether Bank of America was the lawful holder of the note.

In this Hawaii case on page 11, the court references 55 Am. Jur. 2d Mortgages § 575 (November 2016 Update) which "requires the plaintiff to prove the existence and terms of the agreement, a default by the mortgagor under the terms of the agreement, and giving of the cancellation notice.... The foreclosing plaintiff must also prove its entitlement to enforce the note and mortgage." On page 13, the court goes on to discuss the requirement that the plaintiff seeking to foreclose have a substantial interest, which would amount to an injury in fact in the mortgagee's failure to satisfy its obligation to pay the debt to the note holder."

The court goes on to discuss the issue of standing and the requirement of the foreclosing party to prove its entitlement to enforce the note, as well as how standing relates to the court's jurisdiction, citing Sierra Club v. Haw. Tourism Auth. and "(noting that 'standing must be

established at the beginning of the case')." This discussion by the court continues on pages 14 through 16, and on page 16, at the bottom of the page the court begins to discuss the problems associated with modern securitization practices: "It appears that '[u]nder these circumstances, not even the plaintiffs may be sure if they actually own the notes they seek to enforce.' Id. at 1052. Basic requirements of Hawaii's Uniform Commercial Code and our law on standing should not be modified, especially in light of the widespread problems created by the securitization of mortgages…." This court should also make note of the footnotes on page 17 of this Hawaii case which discuss securitization, citing several Law Review Articles, some of which the Dalens had submitted previously in court under the Rules of Evidence as expert testimony. Due to the voluminous nature of these reports, we did not include them in our Designation of Matter; however, they are cited on page 17 of this case and are both relevant and useful in helping judges and lay people to understand the nature of securitization. We have been before judges who did not grasp what we were talking about with regard to this topic, as also evidenced in the trial transcript where John Dalen cross-examined FNMA's witness, Mr. Rankin. *(See Trial Transcript, April 25, 2017)* Mr. Rankin had no idea what Mr. Dalen was referring to when repeatedly asked about securitization of the Note.

On pages 19 - 20 of this Hawaii case, the court states, that "[a]lthough Bank of America produced evidence that it produced the blank, endorsed note at the time it sought summary judgment, a material question of fact exists as to whether Bank of America possessed the note, or was otherwise a holder, at the time it brought the foreclosure action." On page 21, the court discusses the fact that because of the undated, blank indorsement of the note, there is a genuine issue of material fact as to whether the bank held the note at the time it filed the complaint, and that the circuit court erred in granting summary judgment to Bank of America. This issue of the undated, blank assignment of the note was brought up at both summary judgment hearings that were held in the Dalen case.

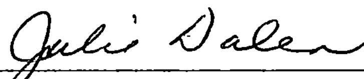
Conclusion

The defendants have suffered irreparable harm as a result of the banks and the trial court's actions. Our property has been sold by FNMA. The foreclosure was unlawful and a denial of our right to due process of law.

For all of the above reasons, the Court should vacate the judgment of foreclosure of the Master-in-Equity and remand the case back to the trial court for trial on defendants' counterclaims which had been erroneously dismissed in the granting of summary judgment to Bank of America as well as hearings to assess the damages owed to homeowners John and Julie Dalen due to the fraud brought upon the court.

Dated: May 15, 2017

John D. Dalen, Appearing Pro Per
109 Wood Valley Drive
Westminster, SC 29693
Ph. 864 647 4705



Julie A. Dalen, Appearing Pro Per
109 Wood Valley Drive
Westminster, SC 29693
Ph. 864 647 4705

PROOF OF SERVICE

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

Steven C. Kirven, Master-in-Equity

Case No. 2017-000886

Federal National Mortgage Association, Respondent,

v.

John D. Dalen, Julie A. Dalen
And Wawtockace Hills Property Owners Association, Defendants
Of whom John D. Dalen and Julie A. Dalen are the Appellants

v.

Bank of America, N.A., Successor by merger to
BAC Home Loans Servicing, L.P. f/k/a
Countrywide Home Loans Servicing, L.P., Respondent

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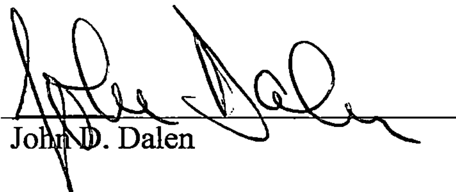
MAY 19 2017
SC Court of Appeals

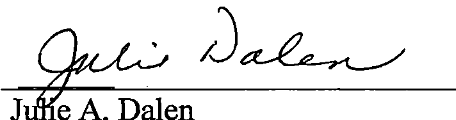
PROOF OF SERVICE OF INITIAL BRIEF OF APPELLANTS

I certify that I have served the Initial Brief of Appellants on Federal National Mortgage Association and Bank of America, N.A. by depositing a copy of it in the United States Mail, postage prepaid, on May 16, 2017, addressed to the attorneys of record: Charles S. Gwynne, Jr., Esq., Rogers Townsend & Thomas, PC, P.O. Box 100200, Columbia, SC 29202 and Brian A. Caleb, Esq., McGuire Woods LLP, Fifth Third Center, 201 North Tryon Street, Suite 3000, Charlotte, NC 28202.

May 15, 2017



John D. Dalen



Julie A. Dalen

John and Julie Dalen
109 Wood Valley Drive
Westminster, SC 29693
Ph. 864 647 4705
Appearing Pro Per

LETTER TO THE APPELLATE COURT CLERK
FILING INITIAL BRIEF

May 16, 2017

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

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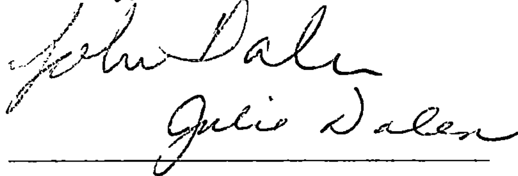
MAY 19 2017
SC Court of Appeals

Re: Federal National Mortgage Assoc. and Bank of America, N.A., Respondents v. John D. Dalen and Julie A. Dalen, Appellants, Case No. 2017-000886

Dear Ms. Kitchings:

Enclosed for filing is our Initial Brief and Designated Matter to be Included in the Record on Appeal in the above case. Please file the original and return the copies to us in the return envelope provided.

Sincerely,



John and Julie Dalen
109 Wood Valley Drive
Westminster, SC 29693
Ph. 864 647 4705
Appearing Pro Per

Cc: Attorneys for Respondent(s):

Brian A. Caleb, Esq.
McGuire Woods LLP
Fifth Third Center
201 North Tryon Street, Suite 3000
Charlotte, NC 28202-2146
Ph. 704 343 2000

Charles S. Gwynne, Jr., Esq.
Rogers Townsend & Thomas, PC
Post Office Box 100200
Columbia, SC 29202-3200
Ph. 803 744 1933

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FROM: J. Dalen

TO: Clerk of Court
The Hon. Jenny Abbott Kitchings

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