THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Mikell R. Scarborough
Master-In-Equity

Case No. 2011-CP-10-8421
Court of Appeals Docket 2015-001182

The Bank of New York Mellon f/k/a Bank of The New York as Trustee for the Certificateholders of CWALT, Inc., Alternative Loan Trust 2005-17, Mortgage Pass-Through Certificates, Series 2005-17 Respondents,

v.

Martin H. Seppala and Thomas F. True III, as Trustee of the Jate IV Trust, utd 7-7-2000, The Jate IV Trust utd 7-7-2000, David A. Collins, William J. Thrower, The United States of America, The South Carolina Department of Revenue,4th National Harbor Realty Trust, Snee Farm Lakes Homeowner's Association, Inc.

Of Whom Thomas F. True III as Trustee of the Jate IV Trust utd 7-7-2000. The Jate IV Trust utd 7-7-2000, David A. Collins and William J Thrower are Appellants,

---

BRIEF OF APPELLANTS

Peter H. Rosenthal (SC Bar 75645)
647 Pleasant St.
Weymouth, MA. 02189
Tel. (617)571-9177
Fax (781)335-2153
phr100@comcast.net
Attorney For Appellants
Thomas F. True III as Trustee
of the Jate IV Trust and the
Jate IV Trust

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

STATEMENT OF THE ISSUES ON APPEAL

1. DID THE MASTER IN EQUITY ERR IN HOLDING SUMMARY JUDGMENT HEARING PREMATURELY THEREBY DENYING APPELLANTS FULL AND FAIR DISCOVERY?

2. DID THE MASTER IN EQUITY ERR IN NOT CONSIDERING OR EVEN ACKNOWLEDGING APPELLANTS' TIMELY FILED OPPOSITION AND AFFIDAVIT TO THE MOTION FOR SUMMARY JUDGMENT?

3. DID THE MASTER IN EQUITY ERR IN FINDING THE RESPONDENT PRESENTED COMPETENT EVIDENCE UNDER RULE 56 TO SUPPORT A GRANT OF SUMMARY JUDGMENT AND IN ISSUING AN ORDER AND JUDGMENT OF FORECLOSURE AND SALE WITHOUT REQUIRING SUCH COMPETENT EVIDENCE?

4. DID THE MASTER IN EQUITY ERR IN CONSIDERING THE AFFIDAVITS OF RESPONDENT THOSE OF SERVICERS AND THEREFORE QUALIFY FOR THE BUSINESS RECORDS EXCEPTION TO THE HEARSAY RULE?

5. DID THE MASTER IN EQUITY ERR IN FINDING THE DEFAULT NOTICE UNDER THE MORTGAGE TERMS SUFFICIENT BECAUSE THE RESPONDENT KNEW OR SHOULD HAVE KNOWN THE BORROWER HAD CONVEYED THE PROPERTY AND HAD A NEW ADDRESS?

STATEMENT OF THE CASE

On November 14, 2011, the Respondent, The Bank of New York Mellon f/k/a The Bank of New York as Trustee for the Certificateholders of CWALT, Inc., Alternative Loan Trust 2005-17, Mortgage Pass Through Certificates, Series 2005-17 (hereinafter referred to as "Mellon" or "Respondent"), filed a foreclosure action (R48-

R53). The mortgagor and obligor and co-owner of the subject property when the mortgage was executed on April 26, 2005 was Martin H. Seppala who was defaulted on the said foreclosure complaint. (See subject mortgage and note R1-R28). Appellant, The Jate IV Trust utd 7-7-2000 was the record owner of the property subject to the subject mortgage throughout the course of the instant foreclosure action.

Appellants Thomas F. True III, as Trustee of The Jate IV Trust utd 7-7-2000 and The Jate IV Trust utd 7-7-2000 (hereinafter referred to as Jate IV or Jate IV Trust) along with David A. Collins and William J. Thrower late filed an Answer to the foreclosure complaint on January 4, 2012 that was accepted pursuant to a motion to answer late. (See Answer R55-R59).

Neither David A. Collins nor William J. Thrower joins in this brief nor are they represented by the counsel filing this appeal for Jate IV Trust.

After a series of court events, including motions and scheduling orders further discussed, below, the master in equity, pursuant to Mellon's motion for summary judgment at a hearing held on March 12, 2015 (See Transcript R103-R116), granted Mellon's summary judgment motion and entered an Order and Judgment of Foreclosure and Sale on March 24, 2015 (See R117-R141).

Jate IV Trust, by counsel, timely filed on December 1, 2014 a motion to dismiss the foreclosure action for failure to provide discovery (R96-R97), an opposition to the motion for summary judgment (R91-R92), and an affidavit in support of the appellants' opposition to summary judgment (R93-R95).

Appellants timely filed a Motion for Reconsideration (R142-R258) that was received and filed by the court on April 7, 2015. Said motion was subsequently heard by the master in equity on April 28, 2015 (see Transcript R259-R289) and denied.

Appellants served a Notice of Appeal on Respondent on May 1, 2015. (R295-R298).

FACTS

The following facts are uncontested regarding the relevant history of the mortgaged premises and its ownership.

1, The address of the subject premises is 1180 Chersonese Round, Mount Pleasant, Charleston County, South Carolina.

2, Named Defendant Martin H. Seppala made, executed and delivered a Note dated April 26, 2005, promising thereby to pay to the order of Countrywide Home Loans, Inc. the sum of $667,500.00 with interest at an adjustable rate pursuant to the terms of the Note (R1-R5).

3, Martin H. Seppala and John True made, executed and delivered to Mortgage Electronic Registration Systems, Inc. (MERS), as nominee for Countrywide Home Loans, Inc., a corporation organized and existing under the laws of New York, a Mortgage, in writing, dated April 26, 2005, covering the real property described in paragraph 1, above. This is the same property described in the Respondent's complaint. The Mortgage was filed and recorded in the Office of the Register of Deeds for Charleston County in Book K535 at Page 473 (R6-R28).

4. Martin H. Seppala and John True conveyed the subject property to Cloice D. Jansen by Deed dated June 8, 2006 and recorded in the Office of the Register of Deeds for Charleston County on August 11, 2006 in Book J594 at Page 568 (R32-R34).

5. Cloice D. Jansen conveyed the subject property to Thomas F. True III, as Trustee of The Jate IV Trust utd 7-7-2000 by Deed dated March 18, 2008 and recorded in the Office of the Register of Deeds for Charleston County on April 8, 2008 in Book C656 at Page 699 (R35-R37).

6. The titleholder of record in and to the subject property as of the filing of the Foreclosure Complaint on November 14, 2011 was Thomas F. True III as Trustee of The Jate IV Trust utd 7-7-2000.

STANDARD OF REVIEW

When reviewing an order that grants a party summary judgment, the appellate court employs the same standard as applied in the trial court under SCRCP 56. *Wachovia Bank, N.A. v. Coffey,* 404 S.C. 421, 425, 746 S.E. 2nd 35, 37 (2013) (citations omitted).

Summary judgment is ripe only if there is no genuine issue as to any material fact. Rule 56(c), SCRP. "In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party." *Quail Hill, LLC v. City of Richland*, 387 S.C. 223, 235, 692 S.E. 2nd 499, 505, (2010) (citations omitted).

ARGUMENT

I. BECAUSE MASTER HELD SUMMARY JUDGMENT HEARING PREMATURELY, APPELLANTS WERE DENIED FULL AND FAIR DISCOVERY

A. Discovery Not Complete

The Appellants argue that the master held the summary judgment hearing before giving the Defendant/Appellant full and fair opportunity for discovery.

The Supreme Court of South Carolina in *Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 112, 410 S.E. 2nd 537 (1991) held that summary judgment is "a drastic remedy and must not be granted until the opposing party has had a full and fair opportunity to complete discovery". In the instant appeal, Jate IV tried on at least five occasions to bring the respondent or their servicer to a deposition. The date last scheduled for a deposition (but not held) was March 9, 2015, just three days before the master granted respondent's summary judgment motion. See the Transcripts of 3/12/15 (R103-R116) and 4/28/15 (R259-R289) and the exhibits attached to the Appellant/Defendants' Motion for Reconsideration that include the deposition notices (5 notices R145-R159) and a motion to compel (R268 referred to by judge at p.10, line 9-10).

Viewed in the light most favorable to Jate IV, it can be inferred from the March 12, 2015 hearing that counsel for Jate IV expected only a status hearing and not a summary judgment hearing. This hearing was a surprise to counsel for Jate IV as shown by the introductory remarks (Transcript page 3 lines 3 to 6; R105) between the master and counsel:

THE COURT: Do we have discovery motions? The only thing I have listed is a summary judgment.

MR. COLLINS: Judge, we don't have discovery motions. We've avoided that.

Reading on in the transcript pages 3 through 6 (R105-R108), it is clear that Collins, counsel for Jate IV is expressing his relief that defendant/appellant will finally get a representative from the plaintiff/respondent Mellon to depose. Collins says at page 3 lines 18 to 20: "... I'm not ready to argue the summary judgment motion until I can get this deposition taken care of." (R105).

Although Collins presents somewhat confusing reasoning at times in his argument on what Jate IV seeks from the deposition of a representative of Mellon or its servicer, in the light most favorable to the appellant, counsel seeks to determine who held the note throughout the course of the mortgage and especially at the time the foreclosure was filed. At page 6 of the hearing March 12, 2015 transcript, Jate IV's counsel states at lines 9 to 13(R108):

> "Simply because they got a new servicer that's responsible for collecting the money, that should not absolve them of having to put a witness at my conference table and let me question them under oath concerning how they got the debt."

Pursuant to *Bank of America N.A. v. Todd Draper,* 405 S.C. 214, 746 S.E. 2nd 478, (2013) the party seeking to foreclose on a mortgage must show that it is either: a) the mortgagee; or b) was properly assigned the mortgage at issue. The party must be the holder of the note at the time the foreclosure action is filed. *Id.* Pg. 220. Having the mortgage instrument properly assigned is not enough to prove that the respondent held

the note when the foreclosure proceedings were filed. See *Draper* at page 220 quoting *Hahn v. Smith*, 157 S.C. 157, 167, 154 S.E. 112, 115 (1930): "the assignment of a note secured by a mortgage carries with it an assignment of the mortgage, but ... the assignment of the mortgage alone does not carry with it an assignment of the note."

The master in equity issued on June 2, 2014 a scheduling order, one in a series of scheduling orders that attempted to get defendant/appellant the discovery it sought including interrogatories, requests for production and deposition. (Scheduling Order of 6/2/14, R68-R69). The scheduling orders included specific language stating that once the written discovery is completed, depositions if any are to be noticed. Further, should the discovery "uncover any potential claims on the part of either party, motions to amend pleadings shall be filed no later than November 1, 2014 so long as discovery order has been complied with the discovery schedule." In the said scheduling order, the court set December 4, 2014 as a court date for "dispositive motions".

The above order, viewed in the light most favorable to the appellants, gives reason for Jate IV to expect that if Mellon did not comply, the court would use the December 4, 2014 court date to deal with the non-compliance and extend the order to accommodate the noticed deposition.

Further, in Appellants' Answer, its first Affirmative Defense (Answer paragraph 12, R57) states that "they intend to rely on such other affirmative defenses as may become available or apparent during the course of discovery and thus reserves the right to amend their Answer to assert any such defense." Because Jate IV was deprived of deposing a representative of Mellon who had knowledge of the history of

the loan transaction from 2005 until the foreclosure, Jate IV was deprived from mounting affirmative defenses that would only become known after such deposition.

From the clear statements made by Collins at the March 12, 2015 hearing (R103-R116), Mellon had not complied with the scheduling order of June 2, 2014 and Collins and counsel for Mellon had discussed a deposition schedule about which Collins tried to inform the master at the start of the hearing of March 12, 2015. Nevertheless, the master chose to allow Mellon to use the hearing "to be dispositive" by hearing Mellon on its summary judgment motion.

B. Likelihood That Discovery Sought Would Lead To Evidence

As it is clear that discovery was not complete on March 12, 2015, the next question is was there a likelihood that the further discovery sought (here a deposition of Mellon) would uncover evidence that will likely lead to additional evidence relevant to the defendants defense and as stated in the scheduling order (scheduling order of 6/2/14, R68-R69) to other potential claims to be addressed by motions to amend the pleadings. See *Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 112, 410 S.E. 2nd 537 (1991) wherein at page 112 the court states that as long as the further discovery sought is not a "fishing expedition" but is likely to lead to additional relevant evidence, the court should allow the discovery to proceed before holding a hearing on summary judgment.

Appellant avers that the discovery sought and eventually denied by the master would, in the light most favorable to the appellant, lead to such evidence that would support the Jate IV's defenses and likely lead to motions to amend the pleadings. Such

additional evidence is clearly proffered by the pleadings and affidavit filed by Jate IV on December 1, 2014 in anticipation of a hearing on Mellon's motion for summary judgment. (See the defendants Motion to Dismiss R96-R97, Opposition to Motion for Summary Judgment R91-R92, and Affidavit of John True, R93-R95, all filed 12/1/14).

II. THE MASTER IN EQUITY DID NOT CONSIDER OR EVEN ACKNOWLEDGE APPELLANTS' TIMELY FILED OPPOSITION TO THE MOTION FOR SUMMARY JUDGMENT

It can be inferred that Jate IV's flurry of filings on December 1, 2014 were spurred by Mellon bringing on new counsel and filing their summary judgment affidavit from Bayview Loan Servicing LLC employee Dara Foye (R72-R90). On November 7, 2014, counsel filed her summary judgment motion and affidavit and marked it for a hearing date of December 4, 2014, the date the master had set for dispositive motions if the discovery had been completed. (See 11/7/14 motion for summary judgment R71, affidavit R72-R90 and marking date, R98-R99).

The filings by Jate IV on December 1, 2014 demonstrate several areas of inquiry that in light most favorable to the appellant could lead to material and relevant discoverable evidence from a deposition of a representative of Mellon with knowledge of the history of this matter. These filings and documents include the following issues not considered by the master in equity in his allowance of the summary judgment:

A. From Jate IV's Motion to Dismiss (See Motion R96-R97)

1. Said motion states in its fourth paragraph that "The facts of the loan history were needed by the defendant to reasonably defend this action and to pursue its counterclaims."
2. Said motion in its sixth paragraph states the court was advised in June of 2014 that Jate IV could not prepare for the December 4, 2014 status conference "without knowledge of the loan history."
3. Said motion in its eighth paragraph states that without a deposition of Mellon's representative that Jate IV is "unable to prepare and present an array of legal defenses to the foreclosure action including fraud, misrepresentation, material interference with collateral of the Defendants, conspiracy and lack of possession of the original note and/or lack of evidence of proper assignment of the mortgage to the Plaintiff."
4. Said motion in its tenth paragraph states that "the mortgagee alleges the loan was modified in 2009 with the Borrower and at the time the said Borrower had not been the record owner of the secured property since 2006 and the mortgagee still was dealing with the non owner Borrower knowing he was in default since 2005."

B. From Jate IV's Opposition To Plaintiff Motion For Summary Judgment (See Opposition R91-R92)

1. Said Opposition in its third paragraph alerts the court to the affidavit of Mellon by Dara Foye purporting to support the motion for summary judgment stating that "affiant Foye has no personal knowledge of her allegations."
2. Said Opposition in its sixth paragraph points to the "factual issue of whether the Plaintiff is the correct party as the Plaintiff is the Bank as Trustee for the Certificate Holders of CWALT 2005-17. Legally these Certificate Holders are not the owners or assignees of the mortgage but only entitled to the income from these instruments."
3. Said Opposition in its seventh paragraph states "This court must determine who is the holder of the mortgage and note..."
4. Said Opposition in its eighth paragraph asserts there is a chain of custody issue.
5. Said Opposition in its ninth paragraph states "Foye gives no information as to the history of the note and mortgage..."
6. Said Opposition in paragraphs ten through twelve, raise the issue of the February 2009 modification agreement and its invalidity because it was unsigned by the Lender as required in the language of the said agreement. (Modification Agreement R38-R39).

C. From Affidavit of John True (See Affidavit R93-R95)

1. John True asserts he has personal knowledge of several facts sworn to in his affidavit.
2. John True was a co-borrower on the mortgage in issue.

3. John True recites in his affidavit several facts that allege the Lender did not make an arms-length transaction when it made the loan to Seppala in 2005 and by the Lender's actions put the Jate IV Trust at risk and details several possible counterclaims Jate IV may have based on the results of further discovery leading to motions to amend the Answer of Jate IV.
4. In paragraph 9 of his affidavit True alleges that no notice of default was sent or received by anyone at the mortgaged property.
5. John True in his affidavit paragraphs 10 to 15 sets out how the actions of the Lender, by not defaulting the Borrower in the normal course of its mortgage business jeopardized Jate IV's collateral security from Seppala (other security Jate IV had to protect its interest in the subject property) and were denied the opportunity to use to pay off any loan default on the subject property.

In further support of its argument that the summary judgment hearing was premature and Jate IV should have been afforded full and fair discovery is SCRCP Rule 56(f) that states:

> Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such order as is just.

Although Jate IV did not file an affidavit invoking this Rule 56(f) provision, as stated by the South Carolina Supreme Court in *Baughman v. American Tel. and Tel.*

Co., 306 S.C. 101, 112, 410 S.E. 2nd 537 (1991) at Note 4: "... other courts have not mandated strict compliance with the technical requirements of Rule 56(f) where, as here, the need for further discovery is otherwise made known to the trial court. *First Chicago Int'l, supra; Snook v. Trust Co. of Ga. Bank of Savannah*, 859 F. (2d) 865 (11th Cir.1988)."

Jate IV is entitled to full and fair discovery and the master in equity was in error in not allowing same to take place.

III. THE MASTER IN EQUITY ERRED IN FINDING THE RESPONDENT PRESENTED COMPETENT EVIDENCE UNDER RULE 56 TO SUPPORT A GRANT OF SUMMARY JUDGMENT AND IN ISSUING AN ORDER AND JUDGMENT OF FORECLOSURE AND SALE WITHOUT REQUIRING SUCH COMPETENT EVIDENCE

A. Master in Equity's Order

Appellant avers that there was not competent evidence presented by Mellon to support the master's grant of summary judgment at the March 12, 2015 hearing. The master in equity's finding that Mellon was the note holder at the time the foreclosure action was filed on November 14, 2011 is totally unsupported by any competent evidence.

On March 24, 2015, the master in equity filed his "Order and Judgment of Foreclosure and Sale (Deficiency Waived)" (R117-R141) which recited his Findings of Fact and Conclusions of Law. Jate IV takes exception to the facts found in paragraphs 21, 22 and 26. With the facts from these paragraphs excluded, the summary judgment and damage amount finding must fail.

1. Paragraph 21: The Modification (R38-R39)

The finding in paragraph 21 states: "by virtue of a loan modification agreement dated February 25, 2009 (R38-R39), the parties modified the terms of the original loan which, *inter alia*, increased the unpaid principal balance to $721,430.99.

At page 11, beginning at line 16 of the March 12, 2015 summary judgment transcript (R113), the following exchange takes place:

> MS. ARCURE: There also is a subsequent modification, Your Honor, and I do have that original as well.
>
> THE COURT: You do have that? Signed by Mr. Seppala?
>
> MS ARCURE: Yes, Your Honor.
>
> THE COURT: I'll take your word on that one. This is clearly -- they have standing to pursue it. I'm going to grant the motion for Summary Judgment

When the alleged Modification document, dated February 25, 2009, and signed by Seppala on March 3, 2009, Seppala had not been the record owner of the property that was the subject of the mortgage since June of 2006. (See Deed out to Janson, R32-R34). There was no submission of the alleged modification agreement to the master at the hearing or any evidentiary foundation for any submission of the alleged modification. The loan was likely in arrears at the time of the modification and in the light most favorable to Jate IV, the modification was offered to bring the loan current. These facts would be discoverable with a deposition and further discovery based on the deposition testimony.

There is no mention in the Affidavit of Dara Foye of this modification nor was it included in the exhibits attached to her affidavit. (R72-R90)

The alleged modification document is between "Countrywide" as Lender and Seppala as Borrower. It clearly contemplates a bilateral contract to be signed by both parties and on the last page states: "as evidenced by their signatures below, the Borrower and the Lender agree to the foregoing". The alleged document is only signed by Seppala and notarized in Florida. The Lender did not sign the agreement.

Therefore, in the light most favorable to Jate IV, there is arguably no modification to the note. This would reduce the amount found due and owing. Further, it provides strong evidence that as of February of 2009, Mellon and/or Countrywide and/or Bank of America knew of Seppala's whereabouts and could have served the acceleration, default and other required notices on him. Instead the default letter and acceleration notice were mailed to the mortgage property address long after Seppala had deeded the property in 2006. (See Acceleration (R40-R42) and Default (R43) notices). This questionable business dealing by the bank lends credence to Jate IV's possible counterclaims and affirmative defenses which have been prevented by the summary judgment. Full discovery would likely have led to the evidence Jate IV required for its defense and counterclaims.

2. Paragraph 22: Assignment of the Note

The master is alone in stating the note at issue was in the possession of Mellon at a date near the filing of the foreclosure complaint. In paragraph 22 of the Order and Judgment the master stated the note was assigned to Mellon by MERS when MERS

assigned the mortgage. It does not appear in the transcript of the hearing of March 12, 2015. It does not appear in the foreclosure complaint. It does not appear in the affidavit of Foye that supports the motion for summary judgment.

The said paragraph 22 states the assignment by MERS of the mortgage on September 7, 2011 also assigned the note. Stating MERS, "...as nominee for Countrywide Home Loans assigned the subject Note and Mortgage..." to Mellon. This unsupported conclusion is not enough to pass muster under Rule 56 SCRCP.

Jate IV argues there is no competent evidence to support the master's finding that MERS ever possessed the note. It is purely speculation without factual support on the part of the master. MERS obviously assigned the mortgage per the Assignment of September 9, 2011. However, where is the evidence that the Note was assigned?

An assignee takes only what an assignor has to assign. Assignee stands in the shoes of the assignor. See *Bank of America N.A. v. Todd Draper,* 405 S.C. 214, 220 746 S.E. 2nd 478, (2013). As argued above, "the assignment of a note secured by a mortgage carries with it an assignment of the mortgage, but ... the assignment of the mortgage alone does not carry with it an assignment of the note." See *Draper* at page 220 quoting *Hahn v. Smith*, 157 S.C. 157, 167, 154 S.E. 112, 115 (1930).

There was no evidence presented by Mellon that MERS, solely a nominee here with minimal power and without any role except to hold the mortgage, ever held the Note. The evidence presented as of the date of the grant of summary judgment, concerning the known note holders and servicers are as follows:

a. Mellon's counsel at the March 12, 2015 summary judgment hearing stated at page 7 of the transcript lines 7 and 8 that Bayview Loan Servicing LLC gave counsel the original instruments.(Transcript R109)

b. Bayview could not have become the servicer at until well after September 27, 2013 because on that date, Bank of America N.A. was the servicer for Mellon and was substituted as plaintiff in this case by the master. (See Substitution Order R66-R67).

c. On August 10, 2010 BAC Home Loan Servicing LP was the servicer. In the acceleration notice dated August 10, 2010, BAC stated they were the servicer (See Acceleration Notice R40-R42). The notice further stated BAC Home Loan Servicers LP serviced the loan "on behalf of the holder of the promissory note". This makes it unlikely that MERS was the holder or possessor of the note as it is extremely likely that MERS as nominee of the Lender was used to hold the mortgage only and assign the mortgage on the instruction of the lender or its assigns.

d. On February 25, 2009, when the alleged Modification agreement was drawn, the "Lender" was named as "Countrywide". "Countrywide" was a party according to the first paragraph in the modification document. So obviously at that date, "Countrywide" (no further designation of who this is) was the "Lender" on that date. No mention of MERS. (Modification R38-R39).

e. The original Lender on the Note of April 26, 2005 was Countrywide Home Loans Inc. (Note R1-R5).

f. According to the Jate IV Opposition document filed on December 1, 2014 (Opposition R91-R92) there was a lawsuit filed California and settled which alleged the CWALT 2005-17 mortgages were deposited with Certificate Holders of CWALT 2005-17 on May 31, 2005. These are arguably the Certificateholders in the caption of Mellon's complaint.

It should be noted that on the face of the MERS mortgage assignment document it states that Bank of America, not Mellon, requested the document be recorded. Further it stated the recorded document be mailed to "Core Logic" (R135).

There is no credible evidence presented by Mellon that MERS ever had the note to assign. The first holder was the original lender, Countrywide Home Loans, Inc.

There is a major material question of fact presented here as to who was the holder when Mellon filed the foreclose action. Certainly, viewing this in the light most favorable to the Appellants, there are many note holders and servicers involved with this note and MERS was merely a nominee with minimal power. There is little doubt that the master erred by stating in paragraph 22 that MERS assigned the Note to Mellon where there is no competent evidence to support this statement. Granting summary judgment without allowing Jate IV to depose a knowledgeable Mellon representative before holding the summary judgment hearing was error.

3. Paragraph 26: The Amount Due

On January 22, 2015, Mellon filed with the court an Affidavit of Verified Statement of Account (See Affidavit R100-R101). This affidavit was executed by a Randall Jackson identifying himself as "Document Coordinator" in this action. Mr. Jackson signs the affidavit as representative of Bayview Loan Servicing LLC. Mr. Jackson asserts he is "authorized to execute" the affidavit. He then goes on to list the alleged principal balance, interest, escrow and recoverable balance he alleges "are secured by the mortgage being foreclosed".

This affidavit of Randall Jackson forms the evidentiary basis for the master's determination of the amount due on the note.

There are numerous reasons for the court to reject this accounting. First, the principal is based on the alleged Modification agreement of February 25, 2009, set out above, that the Appellant has challenged as flawed and should be disregarded.

Further, the affidavit itself violates Rule 56(e) SCRCP regarding personal knowledge. The Rule states that affidavits "shall be made on personal knowledge, shall set forth facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."

The Jackson affidavit does not state it is made on personal knowledge and would not be admissible as an exception to the hearsay rule on business records. Bayview is not a servicer within the meaning of the term for loan servicing. See the appellant's argument on business records exception, in C, below.

B. Lender's Requirement to Notify Borrower of Servicer Change

In paragraph 20 of the Mortgage (R14, Mortgage paragraph 20), concerning the change of holder of the note in pertinent part it states:

> "The Note... can be sold one or more times without prior notice to Borrower... There also might be one or more changes of the Loan Servicer... If there is a change of the Loan Servicer, Borrower will be given written notice of the change... If the Note is sold and thereafter the Loan is serviced by a Loan Servicer other than the purchaser of the Note, the mortgage loan servicing obligations to Borrower will remain with the Loan Servicer..."

This paragraph 20 from the Mortgage document indicates that there is a strong likelihood that further discovery by the Appellant would have uncovered the trail of the Note from origin to date of the foreclosure action. Jate IV is entitled to evidence from the Lender of the note's history and it is clear from paragraph 20 of the Mortgage that there is a record held by the Lender or its servicers as to who had the Note during the relevant period of time addressed in this matter.

C. Lack of Evidence Presented At Hearing That Mellon Was Note Holder When Foreclosure Filed

No competent evidence was presented by Mellon at the March 12, 2015 hearing on a core issue to be proven: holding or possessing note at foreclosure filing. The affidavit from Dara Foye did not help to support a grant of summary judgment because it did not present evidence that Mellon was the holder of the note when the

foreclosure complaint was filed on November 14, 2011. Mellon proved only that it was the possessor and holder of the note on the hearing date but not before.

Two exchanges from the summary judgment hearing highlight the master in equity's belief that because Mellon held the note in March of 2015, it supported sufficient evidence that Mellon had the right to foreclose. The exchanges are:

1. At page 7 of the Transcript of March 12, 2015, beginning at line 20 (R109):

   THE COURT: Have you got the original note and mortgage there?

   MS. ARCURE: I do. I have them here.

   THE COURT: Have you shown them to Mr. Collins?

   MS. ARCURE: Yes.

   THE COURT: Mr. Collins, I generally consider that to be the trump card only because the real issue is standing.

2. At pages 10-12, Transcript of March 12, 2015 (R112-R114), beginning at line 15:

   THE COURT: Let me see the documents. I'm going to decide if they are holders right now.

   MR. COLLINS: Well, Judge, you don't know the history of the note. How in the world without the testimony from Countrywide on up to Mellon were we to determine whether or not they're purchasers in due course? You told me...

   MS. ARCURE: Whether or not they're holders in due course or holders, that still gives them standing.

   MR. COLLINS: You told me a year ago, Judge, that I had the right to depose.

   THE COURT: Well, you know it's been a year.

MR. COLLINS: Yes, sir. And I've been trying and trying and trying. I don't know how many times I've been here in front of you trying to get them to present a witness.

THE COURT: Well, I'm looking at an adjustable rate note dated April 26, 2005 with an original signature from Martin H. Seppala on it, pay to the order of blank without recourse from Countrywide Home Loans, which this Court is well familiar with doesn't exist anymore. It was bought by ...

MR. COLLINS: Somebody.

THE COURT: Bank of America. And payments were June 1, 2005. I think the affidavit I saw showed no payments since 2009.

MS. ARCURE: There also is a subsequent modification, Your Honor, and I do have the original as well.

THE COURT: You do have that? Signed by Mr. Seppala?

MS ARCURE: Yes, Your Honor.

THE COURT: I'll take your word on that one. This is clearly – they have standing to pursue it. I'm going to grant Summary Judgment.

MR. COLLINS: Okay.

THE COURT: Establish the debt pursuant to the affidavit on file filed January 22, 2015. I'm going to put this one to bed. Mr. Collins, you're welcome to appeal it.

A further relevant entry from the hearing in regard to the importance to the master of possession of the note on the March 12, 2015 hearing date rather than on the filing date of the foreclosure complaint in November of 2011, the master states at page 13 of the Transcript (R115), beginning at line 1:

THE COURT: If they didn't have the original note in here I probably wouldn't grant the motion but they do. ..

South Carolina takes the position as do most states that the crucial time for standing to foreclose is being the holder or possessor of the note is on the date of filing the foreclosure complaint, here that date is November 14, 2011. In *Bank of America N.A. v. Todd Draper,* 405 S.C. 214, 746 S.E. 2nd 478, (2013), at page 224, the court recites that the bank on summary judgment "asserted when it filed the foreclosure action that it was the holder of the note and mortgage". That "Because the evidence indicates the Bank did hold the note, the master did not err in granting summary judgment on this issue." *Id.* 224.

There are several problems with the master in equity granting summary judgment and finding of damages. Basing his findings on the affidavits presented to the court before the hearing is one of those problems. The appellant avers that the standard for affidavits made on personal knowledge and not being hearsay as set out in Rule 56 SCRCP were not met and presents its argument on this issue below.

IV. THE AFFIDAVITS OF RESPONDENTS FROM BAYVIEW ARE NOT SERVICERS THUS THEIR RECORDS ARE NOT BUSINESS RECORDS ELIGIBLE FOR THE HEARSAY EXCEPTION AS AFFIANTS ARE NOT QUALIFIED WITNESSES

Jate IV argues that the master in equity should not have treated the Bayview affiants as representatives of Mellon as a "servicer". The servicer of a note holder is defined by the court in *Draper,* 405 S.C. 214, 221-223, 746 S.E. 2nd 478, (2013). *Draper*, at page 221, quoting from *Black's Law Dictionary* 1105 (9th ed. 2009) that "servicing is the administration of a mortgage loan." It clearly refers to a current working loan, not one placed in default and in foreclosure court proceedings for three

years. The servicer of the instant loan according to Mellon was Bank of America N. A. This is affirmed by the Substitution Order of September 27, 2013. (R66-R67).

In *Bryant v. Wells Fargo Bank*, 861 F. Supp. 2d, 646, 658 (E.D.N.C. 2012) quoted in *Draper* Id. defines servicer 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). Servicing is defined as receiving any scheduled periodic payments from a borrower pursuant to the terms of any loan, including amounts for escrow accounts described in section 2609 of this title, and making the payments of principal and interest and such other payments with respect to the amounts received from the borrower as may be required pursuant to the terms of the loan."

As shown in *Draper,* the importance of defining servicer is in regard to the issue of standing and in the instant case, whether the affidavits submitted in support of Mellon are any more than inadmissible hearsay. Therefore, their contents cannot be used as competent proof under Rule 56(e), SCRCP.

Further, testimony from an affiant should only be admitted as competent if that affiant is a qualified witness. An affiant should not be granted more standing than a live witness before the court. Here, Dara Foye, the employee of Bayview, executed an affidavit that was admitted by the master to support several of Mellon's claims. Those claims included statements concerning the holder of the note and various other fact issues such as the mortgage assignment from MERS.

Analyzing Foye's affidavit (R72-R90), in paragraph 2, she identifies herself as a Bayview employee. In paragraph 4, she states in pertinent part:

> "I am familiar with the loan transaction at issue in this matter, and

> make my declaration based on my review and understanding of records that Bayview Loans Servicing LLC, servicer for the above named Plaintiff, maintains in the ordinary course of business... It is Bayview Loan Servicer LLC's regular practice to make these records at or near the time of occurrence of the events reflected in the records."

In *Deep Keel LLC v. Atlantic Private Equity Group, LLC,*413 S,C, 58, 773 S.E. 2d 607 (2015) the court dealt with hearsay issues in a foreclosure case. The court was making a determination as to whether a witness was a "qualified witness" under Rule 803(6) SCRE. The court referred to its decision in *Twelfth RMA Partners, L.P. v. National Safe Corp.*, 335 S.C. 635, 518 S.E. 2d 44 (1999) wherein there was an exception to personal participation. The court held a witness may be qualified to testify about a business record, despite the fact he or she did not personally participate in the record creation but knowledge is still a requirement and that knowledge needs to have been conveyed to the witness by someone with knowledge at the time the records were created. 335 S.C. at 642, 518 S.E. 2d at 48.

In the instant case, Foye does not have personal knowledge and therefore cannot convey in an affidavit information from records created by someone else with knowledge of the business records of this loan. Foye states she is referring to records allegedly kept by Bayview and made by them at or near the time of their occurrence. This is a contradiction on its face. Here, the Seppala loan records were kept by someone else at least up until September 9, 2013 when Bank of America N. A. who was then servicer of Mellon was named as Plaintiff in this matter. (See Order of

Substitution R66-R67) Therefore, there is no way Foye can be a competent witness here.

Even if Foye's affidavit contained evidence damaging to the Appellants, it would be inadmissible. Jate IV argues that Foye's affidavit should not be considered as competent evidence as it contains no statements regarding the central issue relied on by the master, i.e. the holder of the note at the time of the foreclosure filing on November 14, 2011.

Regarding the affidavit of Randall Jackson, his situation is even further removed from Foye and it should be excluded. Jackson states in his January 19, 2015 affidavit in pertinent part: "I am authorized to execute this Affidavit of Verified Statement of Account." (R100-R101). Jackson is identified above his signature line as Mellon "by its servicer Bayview Loan Servicing LLC.

In Jackson's affidavit, there are fewer qualifications as a witness than for Foye. Jackson makes no allegation that the conclusions he makes are from records conveyed to Bayview from a person with knowledge at or around the time they are created. His affidavit has no credibility, is hearsay and does not come under any exceptions to the hearsay rules and should be disregarded by the court.

V. THE MASTER ERRED IN FINDING IN PARAGRAPH 16 OF HIS ORDER THAT THE DEFAULT NOTICE UNDER THE MORTGAGE TERMS WAS SUFFICIENT WHEN RESPONDENT KNEW OR SHOULD HAVE KNOWN THE BORROWER HAD CONVEYED THE PROPERTY AND HAD A NEW ADDRESS

The master in equity in his Order and Judgment at paragraph 16 (R125) found that the notice of default on the note was sent to the subject property. That therefore it complied with the terms of the mortgage.

This finding can be challenged by the Appellants if as was likely the Respondent knew or should have known that Seppala, the Borrower, had conveyed the property in June 6, 2006. Respondent also knew or should have known that the alleged modification of February 25, 2009 (R38-R39) signed by Seppala was notarized in Florida and if the inference is drawn in the light most favorable to the Appellants, the default was sent to the wrong address. In the Mortgage instrument, paragraph 15 (R13), regarding Notices, it states in pertinent part, that the notice address shall be the property address unless "Borrower has designated a substitute notice address by notice to the Lender."

The master denied the Appellants request for further discovery. What would have been simple records request that would have determined if a substitute address was given to Countrywide was denied to the Appellants. It must be noted here that Countrywide was involved with the February 2009 modification instrument done in Florida while Bank of America N.A. was the servicer that sent the default notice. In the light most favorable to Jate IV, the servicer sent the default notice to the wrong address and the appellant was entitled to discover if this is in fact true.

VI. JUDICIAL NOTICE OF CWALT CASES

Jate IV requests that this court find the master in equity erred by not taking Judicial Notice under Rule 201(b) SCRE of the hundreds of cases that have been

brought to court in what is commonly referred to as the securitization scandals cases involving Countrywide Home Loans, Inc.

Jate IV in its filings on December 1, 2014 informed the court of one of the cases, *Maine State Retirement System, et al.* (Jate IV Opposition to Summary Judgment with exhibits R91-R92). Attorney Collins, at the Reconsideration Hearing, brought to the master's attention more of these cases and included in his exhibits a lengthy settlement agreement involving CWALT loans (R263-266, R274, R277, R278, R281)

At pages 19 and 20 (R277-R278) of the transcript of the Reconsideration hearing the master clearly knew of the CWALT cases and in fact knew the CWALT 2005-17 mortgages (of which the instant mortgage is one) were included. The master recognized this and stated at lines 13 and 14 of page 19 of the transcript that he sees the instant loan listed there. The master however determines these are third party beneficiary issues not relevant to Jate IV.

The master disregarded the CWALT litigations where there was clearly an issue with the CWALT mortgages and the Appellants were denied the right to full and fair discovery. His finding that the case was ripe for summary judgment is clearly premature in light of the CWALT litigations of which judicial notice can be invoked as a fact finding to be considered in allowing Appellants to seek further discovery.

CONCLUSION

The court below erred in granting summary judgment and in holding a summary judgment motion hearing before the Appellants could complete full and fair discovery.

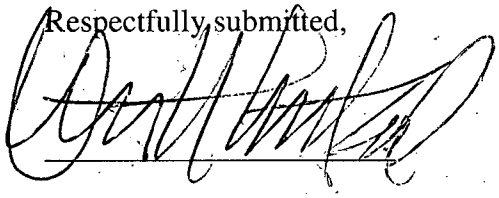
The court below did not have competent evidence to enter summary judgment based on the flawed affidavits submitted by the Respondent in support of its motion.

This court should reverse the grant of summary judgment are remand the case back to the master in equity to allow the Appellants sufficient time to complete its discovery, and amend its Answer if appropriate to bring such affirmative defenses and counterclaims to which it is entitled.

There are material questions of fact concerning what entity was the holder of the note on the filing date of the foreclosure complaint which clearly cannot be determined on one flawed affidavit and Respondent's possession of the note on the date of the summary judgment hearing.

Based on the checkered history of the CWALT mortgages and the loan at issue in this case, the master erred in "putting this case to bed" as the master did without seeing that this case was not a run of the mill "OK note and mortgage in your hands, I'm done". Appellant are entitled to their full and fair discovery and a trial on the merits of their strong claims for wrongdoing by the respondent or its predecessors.

Respectfully submitted,



Weymouth, Massachusetts

June 6, 2017

Peter H. Rosenthal
647 Pleasant St.
Weymouth, MA 02189
617-571-9177 Tel.
781-335-2153 Fax
phr100@comcast.net

Attorney for Appellants

Note: Appellants Collins and Thrower are not represented in this brief

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Mikell R. Scarborough
Master-In-Equity

Case No. 2011-CP-10-8421
Court of Appeals Docket 2015-001182

The Bank of New York Mellon f/k/a Bank of The New York as Trustee for the Certificateholders of CWALT, Inc., Alternative Loan Trust 2005-17, Mortgage Pass-Through Certificates, Series 2005-17 Respondents,

v.

Martin H. Seppala and Thomas F. True III, as Trustee of the Jate IV Trust, utd 7-7-2000, The Jate IV Trust utd 7-7-2000, David A. Collins, William J. Thrower, The United States of America, The South Carolina Department of Revenue,4th National Harbor Realty Trust, Snee Farm Lakes Homeowner's Association, Inc.

Of Whom Thomas F. True III as Trustee of the Jate IV Trust utd 7-7-2000. The Jate IV Trust utd 7-7-2000, David A. Collins and William J Thrower are Appellants,

---

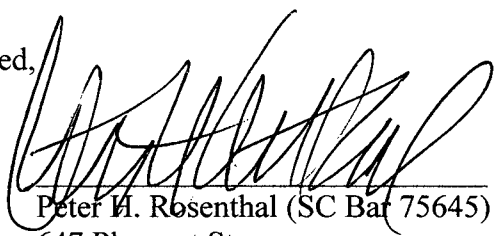
CERTIFICATION OF COMPLIANCE WITH RULE 211(b) SCACR

I, Peter H. Rosenthal, hereby certify that, pursuant to Rule 211 SCACR, that the Final Briefs comply with Rule 211(b) SCACR.

Magalie A Creech (SC Bar 78855)
FINKEL LAW FIRM LLC
Post Office Box 41489
Charleston, South Carolina 29423
Telephone: (843) 577-5460
Attorney for Respondent

June 12, 2017

Signed,



Peter H. Rosenthal (SC Bar 75645)
647 Pleasant St.
Weymouth, MA. 02189
Tel. (617)571-9177
Fax (781)335-2153
phr100@comcast.net
Attorney For Appellants
Thomas F. True III as Trustee
of the Jate IV Trust and the
Jate IV Trust

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Mikell R. Scarborough
Master-In-Equity

Case No. 2011-CP-10-8421
Court of Appeals Docket 2015-001182

The Bank of New York Mellon f/k/a Bank of The New York as Trustee for the Certificateholders of CWALT, Inc., Alternative Loan Trust 2005-17, Mortgage Pass-Through Certificates, Series 2005-17

Respondents,

v.

Martin H. Seppala and Thomas F. True III, as Trustee of the Jate IV Trust, utd 7-7-2000, The Jate IV Trust utd 7-7-2000, David A. Collins, William J. Thrower, The United States of America, The South Carolina Department of Revenue, 4th National Harbor Realty Trust, Snee Farm Lakes Homeowner's Association, Inc.

Of Whom Thomas F. True III as Trustee of the Jate IV Trust utd 7-7-2000. The Jate IV Trust utd 7-7-2000, David A. Collins and William J Thrower are

Appellants,

PROOF OF SERVICE OF FINAL BRIEFS AND CERTIFICATION PURSUANT TO RULE 211 SCACR

I, Peter H. Rosenthal, hereby certify that I have, on the date indicated below, served counsel named below with a copy of the Final Brief and Final Reply Brief and the Certification of Compliance as required under Rule 211 SCACR by mailing via United States Mail, first class, postage prepaid and return address clearly indicated on the envelope to:

June 12, 2017

Weymouth, Massachusetts

Signed,

Peter H. Rosenthal (SC Bar 75645)
647 Pleasant St.
Weymouth, MA. 02189
Tel. (617)571-9177
Fax (781)335-2153
phr100@comcast.net
Attorney For Appellants
Thomas F. True III as Trustee
of the Jate IV Trust and the
Jate IV Trust

PETER H. ROSENTHAL
ATTORNEY AT LAW
647 Pleasant Street
Weymouth, MA. 02189

ALSO ADMITTED IN SOUTH CAROLINA

Phone: (617) 571-9177
Fax: (781) 335-2153

June 12, 2017

Hon. Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
PO Box 11629
Columbia, SC 29211

Re: Bank of New York Mellon, The as Trustee, et al vs. Martin H. Seppala, et al
Appeals Court Docket No. 2015- 001182;

Dear Madam Clerk,

Pursuant to Rule 211(a) SCACR, enclosed please find the following:

- Signed unbound original of Brief of Appellant;
- Signed unbound original of Reply Brief of Appellant;
- Unbound copy of Record on Appeal;
- Certification of Compliance with Rule 211(b);
- Proof of Service of Briefs and Certification;

As requested in the May 8, 2017 letter from the Clerk, bound copies of final briefs and record on appeal have been sent (FedEx) to 1220 Senate Street, Columbia S.C. 29201.

Please docket and file the above listed documents.

Very truly yours,

Peter H. Rosenthal
Attorney for Appellants
PHR:smm
Attachments
Copy to Magalie Creech, Esq.

FILED

JUN 14 2017

SC Court of Appeals

UNITED STATES POSTAL SERVICE. Retai

P

US POSTAGE PAID

$11.65

Origin: 02205
Destination: 29211
2 Lb 9.00 Oz
Jun 11, 17
2400790109-34

1004

PRIORITY MAIL ®2-Day

Expected Delivery Day: 06/14/2017

B012

USPS TRACKING NUMBER

9505 5145 7859 7162 2110 98

Peter H. Rosenthal, Attorney
647 Pleasant St.
Weymouth, MA 02189

Hon. Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
PO Box 11629
Columbia, SC 29211

IORITY
AIL