

THE SOUTH CAROLINA COURT OF APPEALS

New York Community Bank, Respondent,

v.

Scott L. Butler; Jacqueline Butler; Mortgage Electronic
Registration Systems, Inc, as nominee for Northstar
Mortgage Group, LLC; and LVNV Funding, LLC,
Defendants,

Of Whom Scott L. Butler and Jacqueline Butler are the
Appellants.

Appellate Case No. 2016-000744

The Honorable William C. Tindal, Special Referee
Lancaster County
Trial Court Case No. 2012CP2900892

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SC Court of Appeals

APPELLANTS' INITIAL BRIEF

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STATEMENT OF THE ISSUES ON APPEAL

Whether the lower court erred in granting Respondent's Motion for Summary Judgment and entering the Order and Judgment of Foreclosure and Sale.

STATEMENT OF THE CASE

The instant appeal is of the Special Referee's (the trial court's) grant of Respondent's Motion for Summary Judgment and entry of the Order and Judgment of Foreclosure and Sale. The subject Order was entered on March 2, 2016. Appellants filed their Notice of Appeal of that Order on April 6, 2016.

Respondent filed an action for judicial foreclosure on or about July 5, 2012 which sought to foreclose on Appellants' primary residence, a portion of which is situated in the State of North Carolina. Appellants filed a *pro se* Answer and served discovery requests. Respondent filed a Motion for Summary Judgment (hereafter "MSJ") on or about November 19, 2014. Appellants filed an Opposition to the MSJ, and a Motion to Amend their Answer. A hearing was held on the MSJ before the trial court on February 12, 2015, at which time the trial court requested supplemental briefing. Appellants filed their Supplemental Memorandum in Opposition to the MSJ and SCRCP 56(f) Motion for Additional Discovery and to continue the hearing on the MSJ on December 1, 2015. The trial court denied Appellants' Motion and entered an Order and Judgment of Foreclosure and Sale on March 2, 2016. Appellants filed a Notice of Appeal of this Order on April 6, 2016.

Appellants requested that this Court permit them leave to file a SCRCP 60(b) Motion, which request was granted by this Court's Order of July 25, 2016 which partially remanded the matter to the circuit (trial) court for the limited purpose of allowing the trial court to hear the Rule 60(b) Motion. The subject Order also stated that the stay otherwise remained in place.

Appellants filed their SCRCP 60(b) Motion to Vacate the Final Judgment and an Amended Motion to Set Aside and Vacate Judgment of Foreclosure and Sale on or about September 26, 2016. The trial court held a hearing on the Motion to Vacate on October 26, 2016. Appellants filed their Post-Hearing Brief on or about December 14, 2016. The trial court entered its Order denying Appellants' Motion to Vacate on March 6, 2017. That Order was appealed by Notice of Appeal filed May 3, 2017. The two appeals were consolidated.

An Amended Final Judgment was subsequently entered which eliminated any reference to the subject Judgment foreclosing on that portion of Appellants' residential real property which is situated in North Carolina, thus mooted that portion of this consolidated appeal. The instant Initial Brief is filed following the grant of two extensions of time to do so.

ARGUMENT

I. Standard of Review

When reviewing a grant of summary judgment, this court applies the same standard as the trial court, which is that summary judgment is proper when there exists no issue of material fact and the moving party is entitled to judgment as a matter of law per SCRCP 56(c). In making this determination, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the non-moving party. *Law v. S.C. Dept. of Corrs.*, 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006).

Summary judgment is a drastic remedy, and in cases applying the preponderance of the evidence burden of proof, the non-moving party need only present a scintilla of evidence creating a genuine issue of material fact. *Zurich Am. Ins. Co. v. Tolbert*, 387 S.C. 280, 283, 692 S.E.2d 523, 524 (2010); *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

This same standard applies to appeals of summary judgment in foreclosure proceedings. See, e.g., *Wachovia Bank, N.A. v. Coffey*, 404 S.C. 421, 746 S.E.2d 35, 37 (S.C. 2013).

II. The Trial Court Erred in Granting Respondent's Motion for Summary Judgment

There is no dispute that the matter is one in which the preponderance of evidence burden of proof applied. Thus, Appellants were only required to present a scintilla of evidence which created a genuine issue of material fact to defeat Respondent's MSJ. Appellants more than satisfied this burden, demonstrating that the trial court erred in granting Respondent's MSJ.

A. Genuine Issues of Material Fact As to Respondent's Standing

Respondent traveled on a theory of alleged "Allonges" which it characterized as "endorsements", as there was no endorsement on the Note itself. The two purported "Allonges" were not produced until June 16, 2014, which is just shy of two (2) years after the foreclosure Complaint was filed. The alleged "Allonges" were also apparently not even in possession of Respondent as of late May, 2014, as they were not produced with Respondent's response to Appellants' initial discovery requests. There is also no allegation in the Complaint that the alleged Allonges existed at the time that the Complaint was filed. In view thereof, there were genuine issues of material fact as to Respondent's standing as of the time that Respondent filed the foreclosure action.

In South Carolina, standing is a fundamental requirement for instituting an action, and a party must be a real party in interest to the litigation to have standing. *Bank of America, N.A. v. Draper*, 405 S.C. 214, 219, 746 S.E.2d 478, 480-481 (S.C. App. 2013), citing, *inter alia*, *Brock v. Bennett*, 313 S.C. 513, 519, 443 S.E.2d 409, 412 (S.C. App. 1994) and *Hill v. S.C. Dep't of Health & Envtl. Control*, 389 S.C. 1, 22, 698 S.E.2d 612, 623 (2010). Thus, a party filing a foreclosure complaint must have standing at the time that the Complaint is filed. Respondent's production of

the alleged “Allonges” (one of which does not even relate to the loan the subject of this action) two years after the Complaint was filed demonstrate the presence of genuine issues of material fact as to what interest, if any, Respondent had when the Complaint was filed in 2012, thus precluding summary judgment.

It is established law in South Carolina that no person is permitted to acquire a right of action from their own unlawful act, and that one who participates in an unlawful act cannot recover damages for the consequences of that act; further, these rules apply at both law and in equity and whether the cause of action is in contract or tort. *Wachovia Bank, NA v. Coffey*, 389 S.C. 68, 698 S.E.2d 244, 248 (S.C. App. 2010) (affirming summary judgment in favor of homeowner on foreclosure filed by Wachovia), citing *Jackson v. Bi-Lo Stores, Inc.*, 313 S.C. 272, 276-77, 437 S.E.2d 168, 170-71. The more than questionable late production of the claimed “Allonges”, which were the principal documents upon which Respondent claimed to have standing to institute the foreclosure action, presented genuine issues of material fact, and warranted both written and deposition discovery as to, among other matters, (a) when the alleged “Allonges” were prepared; (b) by whom they were prepared; (c) at whose direction they were prepared; (d) for what purpose they were prepared; and (d) the person(s) authorizing the preparation thereof. Even though there is no dispute as to the production of the Allonges, there are disputes as to the conclusions or inferences to be drawn therefrom which alone precluded summary judgment. *Schmidt v. Courtney*, 357 S.C. 310, 319, 592 S.E. 2d 326 (S.C. App. 2003).

SC Code sec. 36-3-203(b), which governs the transfer of instruments and rights acquired by transfer, provides in pertinent part that transfer of an instrument, whether or not the transfer is a negotiation, vests in the transferee any right of the transferor to enforce the instrument. SC Code sec. 36-3-203(d) expressly provides that if the transferor purports to transfer less than the entire

instrument, negotiation of the instrument does not occur and the transferee obtains no rights under the statute and has only the rights of a partial assignee. In South Carolina, the assignment of a mortgage alone does not carry with it an assignment of the Note. *Hahn v. Smith*, 157 S.C. 157, 164, 154 S.E. 112, 115 (1930), cited in *Bank of America, et al. v. Draper*, No. 2012-208806, Opinion No. 5140 (SC Ct.App. 2012 and citing SC Code sec. 36-3-203(b)).

The Statute and the decisional law thus clearly provide that the transfer of an instrument vests in the transferee any rights the transferor had, and that an assignment of a mortgage alone does not carry with it an assignment of the Note. There were thus genuine issues of material fact as to what interest, if any, was transferred from the original lender to Respondent given the genuine issues of material fact as to the claimed “Allonges”.

There is no dispute that the original lender went out of business. There is no law which permits an assignment or transfer of a loan by a third-party downline “assignee”, which went out of business and into Receivership, to anyone, especially where, as here, there the word “VOID” is marked across a claimed endorsement which purports to transfer an interest to the out-of-business entity. Where there is no law from the appellate courts of South Carolina on a particular issue, the Courts of this state look to their own general principles of law as well as the law of other jurisdictions for instruction. *State v. Williams*, 624 S.E.2d 443, 446, 367 S.C. 192 (SC 2006); *Simmons v. Tuomey Regional Medical Center*, 341 SC 32, 44, 533 S.E.2d 312 (S.C. 2000); *Heilker v. Zoning Bd. of Appeals*, 346 S.C. 401, 407, 552 S.E.2d 42 (S.C. App. 2001); *Hardin Construction Group, Inc. v. Carlisle Construction Company*, 388 S.E.2d 794, 300 S.C. 456 (S.C. 1989).

The general principles of law in South Carolina which are set forth in both statutory and decisional law as to what interests, if any, result from an assignment are cited above. The closest case as to the alleged effect of an assignment of an interest in a mortgage by an out-of-business

lender is explained in *Drouin v. American Home Mortgage Servicing, Inc.*, No. 11-cv-596-JL (D. New Hampshire, May 18, 2012). A copy of the *Drouin* decision was filed below.

In *Drouin*, American Home Mortgage and Wells Fargo claimed to possess an assignment of the homeowners' mortgage from Sand Canyon Corporation, the successor-in-interest to the original lender (Option One). The homeowners claimed that Sand Canyon could not have assigned the mortgage to Wells Fargo because the assignor (Sand Canyon) ceased holding any mortgages years before the assignment. There was evidence presented that Sand Canyon ceased business operations in 2008, yet purportedly assigned the homeowners' mortgage to Wells Fargo on March 24, 2011, with Wells Fargo thereafter instituting foreclosure.

The New Hampshire Federal Court relied on New Hampshire case law which provides that a debtor may raise defenses to an assignment and the lack of a plaintiff's title or right to sue, and Section 336 of the Restatement (Second) of Contracts (1981) which provides that by an assignment the assignee acquires a right against the obligor only to the extent that the obligor is under a duty to the assignor; and if the right of the assignor would be voidable by the obligor *or unenforceable against him if no assignment had been made*, the right of the assignee is subject to the infirmity. (emphasis supplied)

Applying the general principles of law and the Restatement of Contracts, the *Drouin* Court found that the homeowners had standing to pursue their claim that since the assigning party did not hold their mortgage, it could not have been assigned to Wells Fargo. The Court cited from the opinion in *Newitt v. Wells Fargo Bank, N.A.*, No. 213-2011-CV-00173 (N.H. Super. July 14, 2011), which held that “[t]he assignment from Sand Canyon to Wells Fargo of an interest which Sand Canyon did not possess” was no more effective to assign the mortgage “than the lack of any assignment at all”.

South Carolina courts regularly rely upon the principles of the Restatement (Second) of Contracts. *See, e.g., Electro Lab of Aiken v. Sharp Const.*, 357 S.C. 363, 369, 593 S.E.2d 170 (S.C.App. 2004); *Holler v. Holler*, 364 S.C. 256, 612 S.E.2d 469, 475 (SC, 2005); *Collins Entertainment Corporation v. Coats and Coats Rental Amusement*, 629 S.E.2d 635, 637 368 S.C. 410 (S.C. 2006). Applying South Carolina general law, the New Hampshire Federal decision, and the principles of the Restatement (Second) of Contracts to the undisputed facts of this case, Respondent had no interest to enforce, and at a minimum, there were genuine issues of material fact as to what alleged interest in the Note, if any, was ever transferred to Respondent and when this allegedly took place. There is no date or other authenticating information as to any of the stamps on the alleged “Allonges” which would show any date when Respondent allegedly acquired any interest in the loan; there is no evidence of any authority of the defunct AmTrust Bank to transfer anything to the Federal Home Loan Bank of Cincinnati; and, as set forth below, there is no evidence that “Christine Ackley” was permitted to act as an agent for both the FDIC and the Plaintiff.

The trial court thus erred in finding that Respondent proved (a) the existence of a debt *owed to the Plaintiff or the Plaintiff's principal* or a right to collect payments. *U.S. Bank National Association v. Bell*, 385 S.C. 364, 374, 684 S.E.2d 199, 204 (SC App. 2009); *In Re Neals*, 459 B.R. 612, 617 (Bankr. D.S.C. 2011). The genuine issues of material fact surrounding the alleged “Allonges” which involve at least one defunct transferring party warranted denial of Respondent’s MSJ and further warranted discovery into the issues related to the “Allonges” especially in view of South Carolina law that summary judgment is a drastic remedy which must not be granted until the opposing party has had a full and fair opportunity to complete discovery. *See e.g. Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E. 2d 433, 439 (2003); *Doe v. Batson*, 345 S.C. 316, 322, 548 S.E.

2d 854, 857 (2001); *Baird v. Charleston County*, 333 S.C. 519, 529, 511 S.E. 2d 69, 74 (1999).

The trial court thus erred in granting Respondent's MSJ, warranting reversal of the Order and Judgment appealed from.

B. Genuine Issues of Material Fact as to Agency (Christine Ackley)

Respondent took the position that Christine Ackley, who executed both of the purported "Allonges", was authorized to act as an agent for two separate and distinct entities (one of which is an agency of the Federal Government) for the purpose of signing stamps on pieces of paper which Respondent claimed to be "endorsements" on "Allonges". Respondent thus raised the issue of agency, which required Respondent to present evidence to establish either apparent or actual agency, and whether there is an agency relationship itself.

In South Carolina, agency is either apparent or actual. The elements which must be proven to establish apparent agency are (1) that the purported principal consciously or impliedly represented another to be his agent; (2) that there was a reliance upon the representation; and (3) that there was a change of position to the relying party's detriment. The conduct must be initiated by the principal. *Graves v. Serbin Farms, Inc.*, 306 S.C. 60, 409 S.E.2d 769, 771 (1991), and the principal must make a conscious or implied representation to another to be his agent. *Graves, supra*, cited in *Froneberger v. Smith*, 406 S.C. 37, 748 S.E.2d 625, 630 (SC App. 2013)(finding that first element of agency not satisfied).

Here, someone named Christine Ackley purported to act as agent of both the FDIC and as the "authorized agent" of Respondent, yet Respondent submitted no Affidavit of Christine Ackley or anyone else to provide the necessary evidence to establish any authorization for Christine Ackley to act as an agent for either the FDIC, or for Respondent, or explain the dual roles which Christine Ackley claims to have played and the dates on which she purported to act.

Actual agency is a fiduciary relationship that arises when a principal manifests assent to another person that the agent shall act on the principal's behalf and subject to the principal's control. *Froneberger, supra* at 631. Questions of agency should not ordinarily be resolved on summary judgment where there are any facts giving rise to an inference of an agency relationship (*Froneberger* at 631). Here, the facts are that someone named Christine Ackley purports to act simultaneously for two different entities, one of which is an agency of the Federal Government and the other being a private New York banking entity. The presence of these facts, which demonstrated genuine issues of material fact on the issue of agency, alone precluded summary judgment, and militated heavily in favor of a deposition of Christine Ackley being taken as well.

The test to determine the presence of agency is whether or not the principal has the right to control the conduct of his alleged agent, and whether there exists the right and authority to control and direct the particular work or undertaking as to the manner or means of its accomplishment. *Watkins v. Mobil Oil Corporation*, 291 S.C. 52, 352 S.E.2d 284, 286 (SC App. 1986), citing *Fernander v. Thigpen*, 278 S.C. 140, 144, 293 S.E.2d 424, 426 (1982) and *Young v. Warr*, 252 S.C. 179, 189, 165 S.E.2d 797, 802 (1969).

There is no evidence of how Christine Ackley's dual authority originated or how it was approved or by who; no evidence of whether both the FDIC and Respondent consented to Christine Ackley's dual role as agent of both entities; and no evidence as to whether there was any right or authority of either the FDIC or Respondent to control and direct Christine Ackley's signing as agent of both entities for the purpose of either transferring any interest in the Note and/or furthering a foreclosure. The trial court thus erred in granting the Order and Final (summary) Judgment of Foreclosure, which must be reversed.

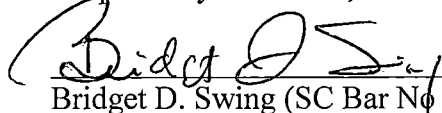
The questions as to the alleged dual agency of Christine Ackley warranted not only the taking of her deposition, but also written discovery of any documents which purports to grant such agency; documents defining the scope and limitations of her agency; and documents demonstrating a waiver of any conflict of interest regarding her dual agency. Respondent's MSJ should thus have been denied on this series of issues alone, which issues warrant inquiry into the facts surrounding the alleged dual agency claimed by Christine Ackley. *Pee Dee Stores, Inc. v. Doyle*, 381 S.C. 234, 240, 672 S.E.2d 799, 802 (S.C. App. 2009). The trial court thus erred and abused its discretion in failing to grant Appellants' SCRCP 56(f) Motion.

CONCLUSION

Respondent failed to satisfy its burden on summary judgment. Appellants raised numerous genuine issues of material fact as to Respondent's standing to institute the foreclosure action, and Respondent itself raised genuine issues of material fact as to the issues of agency surrounding Christine Ackley's acting in multiple capacities. The trial court thus erred in granting Respondent's MSJ and entering the Order and Judgment of Foreclosure, which must be reversed.

June 12, 2017

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LANCASTER COUNTY
Court of Common Pleas

William C. Tindal, Special Referee

Case No.: 12-CP-29-0892

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Appellants,

New York Community Bank,

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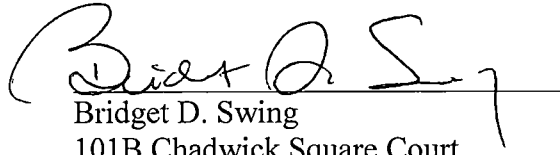
Certificate of Service

The undersigned attorney of record for Appellants Scott L. Butler and Jacqueline Butler hereby certifies that the foregoing Initial Brief of Appellants and Appellants Designation of Record on Appeal was served upon the following addressees via regular US mail:

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This the 12th day of June, 2017

A handwritten signature in black ink, appearing to read "Bridget D. Swing", is written over a horizontal line.

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