THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master in Equity for Charleston County

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Appellate Case No. 2015-001182

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,

Respondent,

v.

Martin H. Seppala, 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 Farms Community Foundation, Inc.

Of Whom Thomas F. True 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.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

On April 26, 2005, Martin H. Seppala executed a promissory note in favor of Countrywide Home Loans, Inc. in the amount of $667,500.00 with interest at an adjustable rate. (R. pp. 1-5). Simultaneously with the execution of the note and to secure payment thereon, Martin H. Seppala and John True executed and delivered a mortgage in favor of Mortgage Registration Systems, Inc. ("MERS") as nominee for Countrywide Home Loans, Inc. (R. pp. 6-28). The mortgage was recorded May 3, 2005, and constituted a purchase money mortgage with the proceeds of the loan being used to purchase the subject property. (R. p. 120, line 20). Pursuant to a loan modification agreement dated February 25, 2009, the parties to the note modified its original terms which, *inter alia*, increased the unpaid principal balance to $721,430.99. (R. pp. 38-39; R. p. 120, line 21). By assignment dated September 7, 2011 and recorded September 19, 2011, MERS as nominee for Countrywide Home Loans, Inc. assigned the mortgage to 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 ("Respondent"). (R. p. 120, line 22). In the interim, the subject property was transferred by virtue of the following conveyances: Martin H. Seppala and John True to Cloice D. Janson by deed dated June 8, 2006 and recorded August 11, 2006; Cloice D. Janson to Thomas F. True as Trustee of the Jate IV Trust utd 7-7-2000 ("Appellant Jate Trust") by deed dated March 18, 2008 and recorded April 8, 2008. (R. pp. 29-37). Neither conveyance was authorized in writing by Bank of America, N.A. ("BANA"), as successor by merger with Countrywide Home Loans, Inc.[1]

Martin H. Seppala defaulted on his payment obligations as of October 1, 2009 and after providing Martin H. Seppala notice of his default, BANA accelerated the monthly mortgage

[1] On July 1, 2008, Bank of America Corporation completed its purchase of Countrywide Financial Corporation.

payments and demanded the balance of the loan payable in full August 4, 2010. (R. pp. 40-343). Respondent then commenced a foreclosure action by the filing of a Lis Pendens, Summons, and Complaint November 14, 2011. (R. pp. 44-53). David A. Collins and William J. Thrower ("Appellants") were named defendants to the foreclosure by virtue of a mortgage given to them by Appellant Jate Trust in the amount of $100,000.00, dated August 17, 2011 and recorded August 22, 2011. (R. p. 51, line 14(a)). The United States of America and South Carolina Department of Revenue were named as defendants due to their respective tax liens against the property. (R. pp. 51-52, lines 14(b)-(c)). Snee Farms Community Foundation, Inc. was named a defendant by virtue of any unpaid assessments or liens against the property, and 4th National Harbor Realty Trust was named a defendant by virtue of a residential lease contract for the property from Appellant Jate Trust recorded July 6, 2010. (R. p. 52, lines 14(d)-(e)).

After serving all parties, Respondent filed a Certification of Exemption from S.C. Supreme Court Administrative Order 2011-05-02-01 November 14, 2011 on the grounds that the property was not owner occupied. (R. p. 54). David A. Collins, *pro se* and as counsel for Appellants Jate Trust and William Thrower, filed an Answer January 4, 2012. (R. pp. 55-59). Appellants' Answer raised failure to join a necessary party and the statute of limitations and/or laches as affirmative defenses. (R. p. 57, lines 13-16). Appellants also alleged they were not provided reasonable notice of default and an opportunity to cure. (R. p. 58, lines 17-18). Respondent filed an Affidavit of Default as to Martin H. Seppala, Snee Farms Lakes Home Owners Association, Inc. and 4th National Harbor Realty Trust[2], and an Order of Reference to Mikell R. Scarborough as Charleston County Master in Equity for Charleston County was entered March 22, 2012. (R. pp. 60-61). Thereafter, the case was stricken from the active

[2] The Affidavit of Default also placed Appellants in default; however, Appellants' late answer was permitted by the Court.

docket from May 25, 2012 to October 8, 2012 due to outstanding discovery and settlement discussions. (R. pp. 62-63).

On November 6, 2012, a Motion to Intervene was filed by a tenant leasing the subject property from Appellant Jate Trust, pursuant to a lease and purchase agreement recorded November 15, 2011. (R. pp. 64-65). The Master subsequently denied the Motion to Intervene June 4, 2014, on the grounds that the tenant's interest was recorded subsequent to the filing of Respondent's Lis Pendens and thus he was not a necessary party to the foreclosure. (R. p. 70). On June 2, 2014, the parties filed a Consent Scheduling Order with the Court which provided for the close of all discovery by August 15, 2014. (R. pp. 68-69).

Respondent moved for Summary Judgment and filed a supporting Affidavit November 7, 2014. (R. p. 71; pp. 72-90). Appellants filed an Opposition thereto December 1, 2014 and corresponding Affidavit of John True. (R. p. 91-92; pp. 72-90). Appellants' Opposition also included a Motion to Dismiss, based on alleged discovery violations and challenging Respondent's standing to foreclose. (R. pp. 96-97). The Affidavit of John True admitted his execution of the mortgage and the subsequent conveyances of the property. (R. p. 94, lines 7-8). The Affidavit also attested to various purported agreements between Thomas F. True, III and Martin Seppala regarding the subject property, and stated that John True did not receive a notice of default. (R. pp. 93-94, lines 5-7; R. p. 95, line 16). Respondent filed an Affidavit of Verified Statement of Account January 22, 2015. (R. pp. 100-101).

Respondent provided all parties with notice of the Summary Judgment hearing, which was held March 12, 2015. (R. pp. 98-99). Counsel for Respondent and Appellants were in attendance at the hearing. (R. pp-103-104). Appellants argued that discovery on Respondent's standing to foreclose was not complete. (R. pp. 105-107, lines 5-20). Counsel for Respondent

presented the original note executed by Martin H. Seppala to the Court and parties. (R. p. 109, lines 20-25). The Master granted Respondent's Motion for Summary Judgment, and a corresponding judgment was entered March 24, 2015. (R. p. 102). Appellants filed a Motion for Reconsideration which was denied by the Court April 27, 2015. (R. pp. 142-258; R. p. 290). Respondents then moved for the establishment of a bond to stay the foreclosure sale. (R. pp. 292-292). After conducting a hearing on the Motion for Supersedeas Bond and considering the tax assessed value of the property at $853,000.00, *inter alia*, the Master ordered Appellants to present the names of two sureties reflecting a written undertaking in the amount of $125,000.00 or, alternatively, a $20,000.00 cash bond to the Clerk of Court by 11:00 am the day of the sale. (R. pp. 293-294).

Appellants filed the instant appeal of the Judgment and Order of Foreclosure and Sale June 1, 2015. (R. pp. 295-298). Appellant Jate Trust then filed for relief under Chapter 11 of the US. Bankruptcy Code July 22, 2015. (R. p. 299). The bankruptcy case was dismissed by Order entered December 20, 2016, on the grounds that it was subjectively filed in bad faith. (R. pp. 300-306). The case was remanded to the Master and the foreclosure sale was advertised for February 7, 2017. (R. p. 307). The day before the sale, Appellants filed a Motion for Entry of TRO seeking to stay the sale. (R. pp. 308-311). No appeal bond was posted and Appellants' Motion was denied at a hearing immediately prior to the sale. (R. p. 312). The property was sold to Respondent as the successful bidder at sale, and a Master's Deed was recorded February 22, 2017. (R. p. 313; R. pp. 313-315).

ARGUMENT

I. THE MASTER IN EQUITY CORRECTLY GRANTED RESPONDENT'S MOTION FOR SUMMARY JUDGMENT BECAUSE THERE IS NO ISSUE OF MATERIAL FACT IN DISPUTE THAT RESPONDENT IS ENTITLED TO FORECLOSE.

Appellants contend that issues of fact as to Respondent's standing to foreclose the subject mortgage precluded a grant of summary judgment. Specifically, Appellants argue that their Opposition to Respondent's Motion for Summary Judgment and the Affidavit of John True created material, triable issues of fact warranting additional discovery. As set forth below and in Sections I(A) and I(B), both arguments are without merit because Respondent presented sufficient evidence to establish the existence of the debt and mortgagor Martin H. Seppala's default on that debt under the terms of the note and mortgage. Appellants did not and could not offer any evidence to dispute the foregoing, nor did Appellants set forth any valid defense to the foreclosure. Furthermore, Appellants failed to show any triable issue of fact regarding Respondent's standing to foreclose. Accordingly, the Master correctly granted Respondent's Motion for Summary Judgment.

"Generally, a party must be a real party in interest to the litigation to have standing." *Sloan v. Friends of Hunley, Inc.*, 369 S.C. 20, 28, 630 S.E.2d 474, 479 (2006). "In South Carolina, it is well established that an assignee stands in the shoes of its assignor." *Twelfth RMA Partners, L.P. v. Nat'l Safe Corp.*, 335 S.C. 635, 639, 518 S.E.2d 44, 46 (Ct. App. 1999); *see also* S.C. Code Ann. § 36-3-203(b) (Supp. 2012) (providing a transfer of an instrument vests in the transferee any rights the transferor had). "[T]he 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." *Bank of America, N.A. v. Draper*, 405 S.C. 214, 220, 746 S.E.2d 478, 481 (Ct. App. 2013) (holding a loan servicer is a real party in interest and

thus has standing to foreclose); *see also Ballou v. Young*, 42 S.C. 170,176, 20 S.E. 84, 85 (1894) ("The transfer of a note carries with it a mortgage given to secure payment of such note.")

"A mortgage and a note are separate securities for the same debt, and a mortgagee who has a note and a mortgage to secure a debt has the option to either bring an action on the note or to pursue a foreclosure action." *U.S. Bank Trust Nat'l Ass'n v. Bell*, 385 S.C. 364, 374, 684 S.E.2d 199, 204 (Ct. App. 2009); *see also Lever v. Lighting Galleries, Inc.*, 374 S.C. 30, 33, 647 S.E.2d 214, 216 (2007) ("A mortgagee who has a promissory note and a mortgage to secure a debt has the option to either bring an action on the note or to pursue a foreclosure action"). This principle has long been settled by the South Carolina Supreme Court, which stated,

> The note is the principal and the mortgage is the incident that follows the note in its delivery from one person to another. When a negotiable note payable to order is indorsed generally to the payee the note and its incident pass in the commercial world by delivery.

Union Nat'l Bank of Columbia v. Cook, 110 S.C. 99, 96 S.E. 484, 486 (1918).

"[T]he party seeking foreclosure has the burden of establishing the existence of the debt and the mortgagor's default on that debt." *Bell*, 385 S.C. at 374-75, 684 S.E.2d at 205. "Once the debt and default have been established, the mortgagor has the burden of establishing a defense to foreclosure such as lack of consideration, payment, or accord and satisfaction." *Id.*

At the summary judgment hearing, Respondent's counsel presented the original note, indorsed in blank, to the Master and parties. (R. p. 109, lines 20-25). The assignment of mortgage transferring the original mortgagor's interest in the mortgage to Respondent was recorded before the commencement of this action. (R. p. 49-50, line 6(a)). As the holder of the original note indorsed in blank and assignee of the mortgage, Respondent was the real party in interest and had standing to foreclose. Nothing in Appellants' Opposition to Summary Judgment and the Affidavit of John True created any issue of fact as to the foregoing. Therefore, there was

no factual issue in dispute that Respondent possessed standing to foreclose as both holder of the note and assignee of the mortgage at the time the action was filed. The Master correctly determined that Respondent was the real party in interest and thus had standing to foreclose.

In support of its Motion, Respondent offered an Affidavit of Verified Statement of Account attesting to the unpaid amounts due and owing under the note and mortgage. Respondent also offered an Affidavit in Support of Summary Judgment, attesting that the sole obligor on the note, Martin H. Seppala, failed to make the required mortgage payments under the note and mortgage as of October 1, 2009. (R. pp. 100-101). Furthermore, all allegations as to Martin H. Seppala were deemed admitted based on his failure to answer Respondent's Complaint. Based on these relevant facts, which Appellants' Opposition and Affidavit did not contradict, the Master correctly concluded that no issue of material fact existed as to the existence of the debt and Martin H. Seppala's default on that debt. Respondent thus met its burden to establish the necessary elements of the foreclosure action.

As such, the burden then shifted to Appellants to present a defense to the foreclosure. *See Bell*, 385 S.C. at 374-75, 684 S.E.2d at 205. However, the only defenses asserted in Appellants' Answer were failure to join a necessary party, failure to provide reasonable notice of default, and the statute of limitations and/or laches. In its foreclosure decree, the trial court rejected all three defenses. (R. p. 119, lines 14-17). First, the lower court found that Respondent had named all parties with an interest in the subject property at the time of the filing of its Lis Pendens and, on these same grounds, denied a tenant's Motion to Intervene whose agreement to lease the property was recorded after the filing of the Lis Pendens. Second, the lower court found that notice of default was given pursuant to the terms of the note and mortgage. Appellants, who do not enjoy privity of contract with Respondent, were not entitled

to notice of Martin H. Seppala's default. Third, the lower court determined that the maturity date of the mortgage was May 1, 2035 and that under S.C. Code § 29-1-10, the twenty-year statute of limitations to enforce the mortgage had not expired.

For all these reasons, the Master correctly rejected Appellants' defenses to the foreclosure and determined summary judgment was proper. Accordingly, this Court should affirm the Master's ruling granting Respondent's Motion for Summary Judgment.

A. Summary Judgment was not granted prematurely because Appellants had the opportunity to conduct appropriate discovery.

Appellants' first argument on appeal is that summary judgment was granted prematurely because Appellants were not afforded a full and fair opportunity to complete discovery. Appellants argued at the final hearing that additional discovery, specifically a deposition, was needed to factually develop how Respondent acquired its interest in the loan instruments and what relationship it has with Bayview Loan Servicing, LLC, as Respondent's loan servicer. (R. p. 112, lines 9-25). Because no issue of fact existed regarding Respondent's standing as both the holder of the original note and assignee of record, additional discovery on this issue was not warranted. Furthermore, Appellants had a full and fair opportunity to conduct discovery. For these reasons the Master's grant of Summary Judgment was not premature.

"Since it is a drastic remedy, summary judgment should be cautiously invoked so that no person will be improperly deprived of a trial of the *disputed* factual issues." *Baughman v. America Tel. and Tel. Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991) (emphasis added). "A court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony; however, summary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner." *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006).

"Summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery. Nonetheless, the nonmoving party must demonstrate the likelihood that further discovery will uncover additional relevant evidence and that the party is not merely engaged in a fishing expedition." *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003) (quoting *Baughman*, 306 S.C. at 112, 410 S.E.2d at 544) (internal quotation marks omitted).

Appellants filed an Answer in this matter January 4, 2012 and pursuant to the parties' Consent Scheduling Order, had until August 15, 2014 to complete discovery. (R. pp. 55-59; R. pp. 68-68). The parties did, in fact, engage in extensive written discovery during this period. However, Appellants have not advanced any reasons, let alone sufficient ones, why the time under the Scheduling Order was insufficient to complete discovery, and, more importantly, why further discovery would uncover additional relevant evidence and create a genuine issue of material fact as to standing. Given Respondent's irrefutable status as the holder in possession of the original note indorsed in blank and as assignee of the mortgage, discovery on this issue is entirely unnecessary and inappropriate. It is precisely this type of "fishing expedition" that our discovery rules and case law proscribe.

Appellants have failed to demonstrate that further discovery on the issue of standing would uncover additional relevant evidence or create an issue of material fact. Appellants also had approximately two and a half years to complete discovery, and thus were not denied a full and fair opportunity to factually develop any of their claims or defenses. Therefore, the Master did not prematurely grant summary judgment and this Court should affirm the Master's ruling.

B. The Master in Equity correctly concluded that Appellants' Opposition to Summary Judgment failed to create a triable issue of fact.

Appellants contend that the lower court failed to properly consider their Opposition to

Summary Judgment and the Affidavit of John True in its ruling in favor of Respondent. Appellants claim that their Opposition and Affidavit created factual issues precluding summary judgment. However, the Master properly determined that Appellants' Opposition to Summary Judgment and the Affidavit of John True failed to create any *material* issues of fact. Respondent had satisfied its legal and evidentiary burden to establish the foreclosure, and Appellants failed to present any sustainable defense thereto. Thus, the Master's grant of summary judgment was proper.

"In determining whether summary judgment is appropriate, a court must not try issues of fact, but must discern whether genuine issues of fact exist to be tried." *Rothrick v. Copeland*, 305 S.C. 402, 405, 409 S.E.2d 366, 367 (1991). "Summary judgment is appropriate in those cases in which plain, palpable and undisputable facts exist on which reasonable minds cannot differ." *Main v. Corley*, 281 S.C. 525, 526, 316 S.E.2d 406, 407 (1984) (holding testimony of seller's husband that seller's signature on contract to buy land was not hers failed to create a genuine issue of fact and thus the grant of summary judgment was proper). "The judge is not required to single out some one morsel of evidence and attach to it great significance when patently the evidence is introduced solely in a vain attempt to create an issue of fact that is not genuine." *Id.* at 527, 316 S.E.2d at 407. "It is not sufficient that one create an inference which is not reasonable or an issue of fact that is not genuine." *Durkin v. Hansen*, 313 S.C. 343, 346, 437 S.E.2d 550, 552 (Ct. App. 1993).

Here, Appellants' Opposition and the Affidavit of John True, who is notably not a party to the action, allege the existence of separate agreements regarding the property between the obligor and mortgagor, Martin H. Seppala, and Thomas F. True. (R. p 93, lines 4-5). Appellants' Opposition also refers to a class action settlement involving the sale of Countrywide

loans to CWALT, Inc. (R. p. 91). Yet, what is dispositive in this matter, is that Appellants admit in their pleadings that Martin H. Seppala executed the note, Martin H. Seppala and John True executed the mortgage, and that the property was conveyed subject to the Respondent's purchase money mortgage. (R. p. 55, line 3; R. p. 56, line 8). *See Elrod v. All*, 243 S.C. 425, 134 S.E.2d 410 (1964) (holding parties are generally bound by their pleadings and are precluded from advancing arguments or submitting evidence contrary to those assertions).

> [T]he general rule [is] that the parties to an action are judicially concluded and bound by such unless withdrawn, altered or stricken by amendment or otherwise. The allegations, statements or admissions contained in a pleading are conclusive as against the pleader. It follows that a party cannot subsequently take a position contradictory of, or inconsistent with, his pleadings and the facts which are admitted by the pleadings are to be taken as true against the pleader for the purpose of the action. Evidence contradicting such pleadings is inadmissible."

Elrod, 243 S.C. at 436, 134 S.E.2d at 416.

While Appellants' Opposition may attempt to create issues of fact, they are not genuine issues of material fact which have any bearing on Respondent's right to foreclose the mortgage, as the holder of the note and mortgage assignee. Furthermore, none of Appellants' purported factual issues can contradict or otherwise dispute the existence of the debt or Martin H. Seppala's default on that debt. Appellants' interest in the property was admittedly junior and subordinate to Respondent's mortgage. (R. p. 56, line 8). Moreover, the conveyances of the property were made without the prior written consent of the mortgagee, and thus constitute an event of default under the mortgage. (R. p. 13, line 18).

The only relevant, material, and genuine factual issues were established by Respondent, and nothing in Appellants' Opposition and Affidavit alters that. Therefore, the Master's ruling should be affirmed.

II. ALL REMAINING ISSUES RAISED BY APPELLANTS ARE NOT PRESERVED FOR APPELLATE REVIEW AND SHOULD BE DENIED.

As an initial matter, an issue must be raised and ruled upon in order to preserve it on appeal. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). An objection, which is sufficiently specific as to inform the court of the point urged by the objector, will preserve an issue for appellate review. *See Busillo v. City of N. Charleston*, 404 S.C. 604, 607, 745 S.E.2d 142, 144 (Ct. App. 2013); *see also State v. Johnson*, 363 S.C. 53, 58, 609 S.E.2d 520, 523 (2005) ("To preserve an issue for review there must be a contemporaneous objection that is ruled upon by the trial court."); *Busillo*, 404 S.C. 604, 745 S.E.2d 142 (holding that appellant's arguments were not adequately presented to the trial court or not presented at all and thus were not preserved for appellate review); *Armstrong v. Collins*, 366 S.C. 204, 225, 621 S.E.2d 368, 378 (Ct. App. 2005) (holding that an issue was not preserved for review on appeal where the argument was not presented to the trial court and the court was not given an opportunity to rule on it). "If a party fails to properly object, the party is procedurally barred from raising the issue on appeal." *Johnson*, 363 S.C. at 58-59, 609 S.E.2d at 523 (citing *State v. Pauling*, 322 S.C. 95, 99, 470 S.E.2d 106, 109 (1996)).

The remaining arguments styled as Issues III, IV, V, and VI in Appellants' Initial Brief were not specifically raised by Appellants and ruled upon by the lower court, and therefore are not preserved for appellate review. Appellants did not make <u>any</u> objections at the summary judgment hearing held March 12, 2015, nor did Appellants object to Respondent's written testimony as to the debt amounts. (R. pp. 103-116). Instead, Appellants merely argued at the final hearing that summary judgment was inappropriate because additional discovery on the issue of Respondent's standing to foreclose was necessary.

While Appellants did file a Motion for Reconsideration of the Order Granting

Respondent's Motion for Summary Judgment, it only raised three arguments. (R. p. 142-143). First, that the lower court wrongfully denied Appellants the opportunity to depose Respondent as to its standing to foreclose. Second, that Appellants' Opposition to Summary Judgment and the Affidavit of John True created issues of fact which were not considered by the lower court. And third, that Appellants were denied due process because they were deprived of the opportunity to depose Respondent. These three issues are addressed in sections I(A) and I(B) above. All remaining issues raised by Appellants are not preserved for review, and thus Appellants are procedurally barred from raising these issues.

Even if this Court finds that Appellants' arguments were preserved, the Court should nevertheless reject these arguments for the reasons set forth below:

A. The original note is competent evidence as to standing.

Appellants claim Respondent's possession of the original note indorsed in blank is not competent evidence of its standing. The first time Appellants raised this issue was in their Initial Brief, and thus it is not preserved for review. Nevertheless, this argument is plainly undercut by the black letter law of this State. Appellants have not and cannot cite to any authority to the contrary.

A promissory note is a "negotiable instrument" within the meaning of South Carolina's version of the Uniform Commercial Code. See S.C. Code § 36-3-104. Negotiable instruments may be negotiated by indorsement. See S.C. Code § 36-3-204. An indorsement may be a special indorsement or a blank indorsement. A blank indorsement is an indorsement which does not identify the person to whom the instrument is being indorsed. See S.C. Code § 36-3-205. A person who is the holder of a negotiable instrument is entitled to enforce it. See S.C. Code § 36-3-301. A holder is a person in possession of instrument drawn, issued, transferred, or indorsed to

him. See S.C. Code Ann. § 36-1-201(20). Furthermore, Section 36-3-301 of the South Carolina Code states:

> Person entitled to enforce an instrument means (i) the holder of the instrument, (ii) a nonholder in possession of the instrument who has the rights of a holder, or (iii) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to Section 36-3-309 or 36-3-418(d). A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument.

S.C. Code 36-3-301.

Respondent was in possession of the original promissory note in this case, which is indorsed in blank. Respondent was therefore entitled under the law of this State to enforce the note.

Furthermore, the mortgage is secondary to the note in a foreclosure proceeding in South Carolina. Our Supreme Court has stated: "The assignment and delivery of the note carries with it the mortgage securing the same. The note is the principal and the mortgage is the incident and follows the note in its delivery from one person to another." *Cook*, 96 S.E. at 486. The second edition of American Jurisprudence has expanded on this, stating that "[a] mortgage securing the repayment of a promissory note follows the note, and thus, only the rightful owner of the note has the right to enforce the mortgage." 55 Am.Jur.2d Mortgages § 584. Consequently, in South Carolina a holder of an indorsed note has the right and standing to bring an action to enforce the mortgage securing the note. As the holder of the note in this case, Respondent had standing to sue for foreclosure. Moreover, the note and mortgage are self-authenticating as commercial paper under Rule 902(9), SCRE and S.C. Code 36-3-308(a) (Supp. 2014):

> The "general commercial law" of South Carolina includes our Uniform Commercial Code, see S.C. Code Ann. § 36-1-101(a) (Supp. 2014), which provides, "In an action with respect to an instrument, the authenticity of ... each signature on the instrument is admitted unless specifically denied in the pleadings," S.C. Code Ann. § 36-3-308(a) (Supp. 2014).

Deep Keel, LLC v. Atlantic Private Equity Group, LLC, 413 S.C. 58, 67, 773 S.E.2d 607, 612 (Ct. App. 2015).

Therefore, the Court should disregard this argument because it is not preserved for review and is without merit.

B. Affidavits executed by Respondent's loan servicer are valid and proper under Rule 56, SCRCP.

Appellants argue that the Affidavits executed by Respondent's servicer constitute hearsay and were not made on personal knowledge. The first time Appellants raised this issue was in their Initial Brief, and thus it is not preserved for review.

"In order to preserve for review an alleged error in admitting evidence, objection should be sufficiently specific to bring into focus the precise nature of the alleged error so it can be reasonably understood by the trial judge." *State v. New*, 338 S.C. 313, 318, 526 S.E.2d 237, 239 (Ct. App. 1999) (citing *State v. Holliday*, 333 S.C. 332, 338, 509 S.E.2d 280, 283 (Ct. App. 1998)); *see also Burke v. AnMed Health*, 393 S.C. 48, 55, 710 S.E.2d 84, 87 (Ct. App. 2011) (finding a contemporaneous objection is typically required to preserve issues for appellate review).

Here, the Affidavit of Verified Statement of Account constituted sworn testimony and was offered as evidence of the debt owed by Martin H. Seppala at the final hearing. (R. pp. 100-101). Having failed to answer the Complaint, all allegations as to Martin H. Seppala's execution of the note and mortgage were deemed admitted, and thus liability was established. Appellants failed to make any objection to the proffer of either the Affidavit of Verified Statement of Account or Affidavit in Support of Summary Judgment, and they were duly admitted into evidence. (R. pp. 103-116). Therefore, because Appellants failed to contemporaneously object to Respondent's proffer of the Affidavit in Support of Summary Judgment and the Affidavit of

Verified Statement of Account on hearsay grounds, this issue is not preserved for review. Nevertheless, both Affidavits were admissible under Rule 56, SCRCP.

"The rule governing summary judgment provides that '[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.'" *Dawkins*, 354 S.C. at 64, 580 S.E.2d at 436 (quoting Rule 56(e), SCRCP). South Carolina recognizes a servicer's standing to foreclose, even if it is not the owner or holder of the note. *See Draper*, 405 S.C. at 223, 746 S.E.2d at 482.

> A servicer is defined 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.

Id. at 221, 746 S.E.2d at 481, citing *Bryant v. Wells Fargo Bank, Nat'l Ass'n*, 861 F.Supp.2d 646, 658 (E.D.N.C. 2012) (citation and internal quotation marks omitted). As the authorized servicer and records custodian for Respondent, the affidavits executed by Bayview Loan Servicing were admissible under Rule 56, SCRCP. *See also Bayview Loan Servicing, LLC v. Cornejo*, 39 N.E.3d 68 (Ill. App. Ct. 3d Dist. 2015) (affidavit of loan servicer's employee filed in support of servicer's motion for summary judgment was admissible in foreclosure action against mortgagors, despite claim that, since employee reviewed business records based on data compilations done by others, affidavit did not comply with requirements for affidavits filed in support of motions for summary judgment; affidavit met requirements for business record affidavit, as employee attested that she was familiar with business process and that records were made in regular course of business).

Therefore, because Appellant failed to contemporaneously object to Respondent's proffer of the Affidavit in Support of Summary Judgment and Affidavit of Verified Statement of Account on hearsay grounds, this issue is not preserved for review.

C. Respondent's Notice of Default was proper.

Appellants contend that the Master erred in finding Respondent's notice of default was sufficient when Respondent knew or should have known the borrower conveyed the property and had a new address. This is the first time Appellants have raised this issue, and thus it is not preserved for appeal. Nevertheless, Respondent provided notice of default pursuant to the terms of the loan instruments. (R. pp. 40-43; R. p. 119, line 16). Appellants were not parties to the note and mortgage, and thus were not entitled to notice of default. Moreover, Appellants lack standing to challenge the notice of default as non-parties to the loan agreement.

"'Privity' denotes [a] mutual or successive relationship to the same rights of property." *Thompson v. Hudgens*, 161 S.C. 450, 462, 159 S.E. 807, 812 (1931) (citation omitted); *see also Black's Law Dictionary* 1394 (10th ed. 2014) (defining "privity" as "[t]he connection or relationship between two parties, each having a legally recognized interest in the same subject matter (such as a transaction, proceeding, or piece of property); mutuality of interests"). South Carolina courts have equated privity with standing. *See Maners v. Lexington Cnty. Sav. & Loan Ass'n*, 275 S.C. 31, 33-34, 267 S.E.2d 422, 423 (1980) (affirming the trial judge's determination that "appellant had no standing to allege [her claim] because she was not in privity with respondent").

Accordingly, Appellants lack standing to challenge notice of default under the terms of a loan agreement to which they are not a party, and share no privity of contract with any parties thereto. Further, this issue is not preserved for review and should be rejected by this Court.

D. The "CWALT Cases" are irrelevant and immaterial to Respondent's burden of proof to establish the foreclosure.

Appellants' final argument on appeal is that the lower court should have taken judicial notice of the "CWALT Cases," and that if it had, they created a triable issue of fact. This issue was not raised to the trial court and therefore is not preserved for review. Nevertheless, even if the lower court had taken judicial notice of these cases, they are irrelevant to any claim or defense in the action and thus fail to create a triable issue of material fact.

As set forth previously herein, Respondent satisfied its legal and evidentiary burden to establish the foreclosure. The purported evidence Appellants presented by way of their Opposition and Affidavit, as well as judicial notice of a separate class action which has no bearing on the underlying debt or the parties' obligations under the note and mortgage, fail to create a genuine issue of material fact. Therefore, the Master's grant of summary judgment was proper.

CONCLUSION

For all the reasons set forth herein, this Court should affirm the Master in Equity's grant of Summary Judgment on Respondent's claim for foreclosure. Appellants have failed to preserve issues III, IV, V, and IV and, therefore, they should be denied by this Court.

(SIGNATURE PAGE FOLLOWS)

The Bank of New York Mellon v. Martin H. Seppala, et al.
Appeal from Charleston County Court of Common Pleas
Appellate Case No. 2015-001182

Respectfully submitted,

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June 19, 2017

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master in Equity for Charleston County

---

Appellate Case No. 2015-001182

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,

Respondent,

v.

Martin H. Seppala, 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 Farms Community Foundation, Inc.

Of Whom Thomas F. True 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.

CERTIFICATE OF COUNSEL

I certify that *Respondent's Final Brief* complies with Rule 211(b), SCACR.

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Of Whom Thomas F. True 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

I certify that I have served the *Respondent's Final Brief* and *Certificate of Counsel* by depositing a copy of same in the United States Mail, postage prepaid, on June 19, 2017, addressed to Appellants' counsel of record, Peter H. Rosenthal, Esquire, 647 Pleasant Street, Weymouth, MA 02189.

(SIGNATURE PAGE FOLLOWS)

Bank of New York Mellon, as Trustee, et al. v. Seppala
Appeal from Charleston County Court of Common Pleas
Appellate Case No. 2015-001182

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June 19, 2017

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REPLY TO:
CHARLESTON LITIGATION

June 19, 2017

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

RE: Bank of New York Mellon, as Trustee, et al. v. Seppala
Appellate Case No.: 2015-001182
Our File No.: 53960.48575

Dear Ms. Kitchings:

Enclosed for filing is the *Respondent's Final Brief, Certificate of Counsel,* and related *Proof of Service* in the above-referenced case.

Should you have any questions concerning this matter, please do not hesitate to contact our office at your earliest convenience.

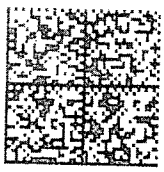
With kind personal regards, we are

Yours very truly,

FINKEL LAW FIRM

Magalie A. Creech

CC: Peter H. Rosenthal, Esquire



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