

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. 2017-0000613

RECEIVED

JUL 25 2017

SC Court of Appeals

Nationstar Mortgage LLC.....Respondent,

v.

Robert Hammond.....Appellant.

RESPONDENT'S RETURN TO APPELLANT'S PETITION FOR REHEARING

William P. Stork, S.C. Bar No. 100242
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803-252-3340
Attorneys for Respondent

INTRODUCTION

By Order of the South Carolina Court of Appeals filed May 11, 2017, Appellant's challenge of the lower Court's Order Substituting Plaintiff was dismissed as being interlocutory and not immediately appealable. On May 26, 2017, Appellant filed a Petition for Rehearing on Appealability Issue. On July 19, 2017, the South Carolina Court of Appeals requested a Return to the Appellant's Petition for Rehearing from the Respondent.

LEGAL STANDARD

"The right of appeal arises from and is controlled by statutory law." *Ex parte Capital U-Drive-It, Inc.*, 369 S.C. 1, 6, 630 S.E.2d 464, 467 (2006). Usually, an appeal may only be sought after a party has procured a final judgment; an order that does not end a case or prevent a final judgment from which a party could appeal is not generally considered immediately appealable. *Watson v. Underwood*, 407 S.C. 443, 458-59, 756 S.E.2d 155, 163 (Ct. App. 2014); S.C. Code Ann. §14-3-330(1) (1977); Rule 72, SCRCF; Rule 201(a), SCACP. Whether a party can immediately appeal an order before final judgment depends upon whether the order falls into one of the categories that allows for immediate appeal as set forth in §14-3-330. S.C. Code Ann. §14-3-330 (1976 & Supp. 2003). For an order to be appealable prior to final judgment, the order must involve the merits of the case, affect a substantial right, or involve the granting, continuing, modifying, or refusing of an injunction or the appointment of a receiver. *Id.*

ARGUMENT

I. THE ORDER SUBSTITUTING PLAINTIFF IS NOT IMMEDIATELY APPEALABLE.

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

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

The Order Substituting Plaintiff in the present matter does not involve the merits of the case because the Order merely determines that the underlying action will continue in the name of a substituted party. The Order Substituting Plaintiff does not affect Appellant’s raised defenses before the lower Court, nor does it affect Appellant’s third-party complaint against the prior mortgage servicer, Ocwen Loan Servicing. The underlying foreclosure action, along with the third-party complaint, is still pending before the lower Court. The Order Substituting Plaintiff does not determine the outcome of the case or the rights of the parties.

Based on the foregoing, the Order Substituting Plaintiff does not involve the merits of the case and is not immediately appealable pursuant to S.C. Code Ann. §14-3-330(1).

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

An order affects a substantial right and is immediately appealable when the order “(a) in effect determines the action and prevents a judgment from which an appeal might be taken or

discontinues the action, (b) grants or refuses a new trial, or (c) strikes out an answer or any part thereof or any pleading in any action.” S.C. Code Ann. §14-3-330(2).

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

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

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

The Order Substituting Plaintiff in the underlying foreclosure case merely substitutes the new real party in interest in the place of the previous real party in interest. No findings of fact have been made, no defenses have been weighed, and the third-party claim is still outstanding. The Order Substituting Plaintiff is in no way a final judgment. Further, the present case does not

involve injunctions or the appointment of a receiver. Since the Order Substituting Plaintiff is not a final order, nor does it involve injunctions or the appointment of a receiver, the Order Substituting Plaintiff does not fall within SC Code Ann. §14-3-330(2) or §14-3-330(3) and is not immediately appealable.

d. Appellant's reliance on *Neeltec Enterp. Inc v. Long* and *Watts v. Copeland* is misplaced.

In its holding in *Neeltec Enters. V. Long*, 397 S.C. 563, 725 S.E.2d 926, the South Carolina Supreme Court held that the substitution of a Defendant affected a substantial right of the Plaintiff because it “effectively discontinues petitioner’s suit against [Defendant].” *Neeltec* at 566, S.E.2d at 238. These facts are completely contrary to the matter being appealed. Appellant has no claims whatsoever pending against the prior Plaintiff; therefore, no suit is being discontinued. The third-party complaint which Appellant brought is still pending and is unaffected by the Order Substituting Plaintiff, and all defenses brought by Appellant in the underlying foreclosure action are still before the lower Court. The holding of *Neeltec* was posited upon the discontinuation of an action as a result of the substitution of parties. No such discontinuation is present in this matter.

Likewise, Appellant’s reliance on the Supreme Court’s holding in *Watts v. Copeland*, 170 S.C. 449, 170 S.E. 780 (1933) is in error. That matter concerned the assignment of a final judgment which was then the subject of a collection suit by the assignee. The Court held that the assignment of the debt was *res judicata* because the issue of standing was not raised in the answer filed by the Defendant. *Watts* at 456-57, S.E. at 783. Unlike the facts in *Watts*, Appellant raised the issue of standing in his responsive pleading to the lower Court. Any party seeking to foreclose a debt must establish the ownership of the debt, and that issue of standing is still before

the lower Court. See *U.S. Bank Trust Nat. Ass'n v. Bell*, 385 S.C. 364, 374-75, 684 S.E.2d 199, 205 (Ct. App. 2009).

The common factor with the Court's holding in both *Neeltec* and *Watts* is finality which affects a substantial right. As was previously discussed, the Order Substituting Plaintiff under review does not affect a substantial right of Appellant in any way. Because the Order Substituting Plaintiff under review does not affect a substantial right of Appellant, the issue of standing is still before the lower Court for determination, and the third-party complaint is still proceeding, the Order Substituting Plaintiff is not an immediately appealable issue.

e. Appellant's assertion that the Order Substituting Plaintiff deprived Appellant of procedural due process fails as a matter of law.

Procedural due process requires that government officials follow fair procedures before depriving a person of life, liberty, or property. Appellant asserts that his right to procedural due process was violated by the submission of a proposed order substituting the plaintiff in a foreclosure matter where there was a valid assignment of record. Nowhere in Appellant's argument is it stated how this matter will prejudice Appellant, and Appellant admits throughout his petition for a rehearing that this matter is still pending before the lower Court. The issue of "real party in interest" is one which still must be proven by the Plaintiff in a final hearing before the lower Court. Appellant's ability to question the standing of the substituted Plaintiff has yet to occur in the foreclosure action. Throughout the discovery process and in the final hearing, Appellant will have an opportunity to challenge the standing of the substituted Plaintiff to foreclose its mortgage.

f. Since the Order Substituting Plaintiff is not ripe for appeal, any issues regarding the lower Court's Order concerning the Appellant's Motion to Reconsider are moot.

The purpose of a Motion to Reconsider is to preserve issues for appeal; however, since the issue of standing to foreclose has yet to be ruled upon by the lower Court, the issue is not ripe for appeal. In denying Appellant's Motion to Reconsider, the lower Court specifically states that no prejudice to the Appellant was shown in challenging the substitution. As has been discussed at length in this Return, the substitution of the Plaintiff was not final as to any of the issues pending in the underlying foreclosure action, including the issue of standing.

Appellant has not alleged any prejudice resulting from the lower Court's granting of the Order Substituting Plaintiff, nor has any prejudice been shown by the denial of the Motion to Reconsider. Appellant's Answer in the foreclosure action challenges standing to pursue foreclosure; that issue will be determined at the final hearing on the merits. The third-party complaint which Appellant brought against Ocwen Loan Servicing LLC is completely unaffected by the appealed Order and is still pending and proceeding with the lower Court.

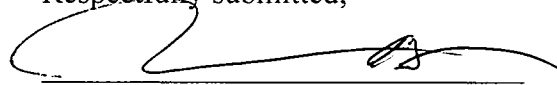
Since the lower Court denied Appellant's Motion to Reconsider based on Appellant's inability to show how he is prejudiced in any way by the Order Substituting Plaintiff and since the issue of standing is still pending before the lower Court, the denial of the Motion to Reconsider is ministerial in nature and is not appealable at this time.

CONCLUSION

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

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Respectfully submitted,



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7/24, 2017
Columbia, South Carolina

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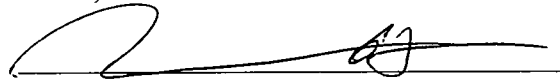
Robert Hammond.....Appellant.

PROOF OF SERVICE

I certify that I have served the Requested Return to Appellant's Petition for Rehearing on Robert Hammond by depositing a copy of it in the United States mail, postage prepaid, on July 24, 2017, addressed to his attorney of record, John R. Cantrell, at his address indicated below.

Dated: _____

7/24



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July 24, 2017

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
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Columbia, SC 29211

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JUL 25 2017

SC Court of Appeals

RE: Nationstar Mortgage LLC v. Robert E. Hammond, Appellant
Appellate Case No.: 2017-000613

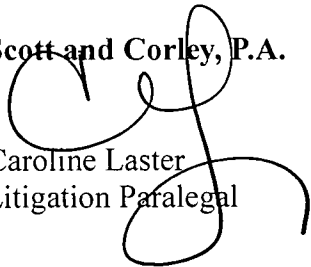
Dear Ms. Kitchings,

Enclosed please find one original and copy of the Respondent's Return to Appellant's Petition for Rehearing and Proof of Service in the above referenced matter. Upon filing, kindly return a clocked copy of same to our office in the self-addressed, postpaid envelope provided.

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

Very truly yours,

Scott and Corley, P.A.


Caroline Laster
Litigation Paralegal

Enclosed:
Re: John R. Cantrell, Jr.

THIS IS A COMMUNICATION FROM A DEBT COLLECTOR ATTEMPTING TO COLLECT A DEBT AND ANY INFORMATION OBTAINED WILL BE USED FOR THAT PURPOSE, EXCEPT AS STATED BELOW IN THE INSTANCE OF BANKRUPTCY PROTECTION.

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