THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Roger M. Young, Sr., Circuit Court Judge
Mikell R. Scarborough, Master in Equity, Charleston County

Case No. 2017-000613

U.S. Bank Trust, N.A., as Trustee for LSF9 Master Participation Trust.....Respondent,

v.

Robert Hammond.....Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE ISSUES ON APPEAL

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STATEMENT OF THE CASE

This is an appeal from a circuit court order in a foreclosure case substituting the Respondent as Plaintiff. This is also an appeal from a subsequent circuit court order denying Appellants motion to reconsider that prior order.

The underlying action is one to foreclose real property located in Charleston County, South Carolina. The action was initiated by the filing of a Lis Pendens, Summons and Complaint on October 13, 2011. (R. pp. 17-23). Appellant filed an answer on December 14, 2011. (R. pp.24-30). On March 31, 2016, Appellant moved before the Court for an Order allowing Appellant to amend his answer. (R. pp. 31-40). A hearing was held, and on June 27, 2016 an Order was entered by the Charleston County Master in Equity allowing Appellant to amend his answer to add a third-party complaint against Ocwen Loan Servicing, but denying Appellant's motion to add counterclaims against the prior Plaintiff, Nationstar Mortgage LLC (hereinafter "Nationstar"). (R. pp 9-10). On January 23, 2017, almost eight months after the motion was granted, Appellant filed his answer which, pursuant to the Judge's Order, contained no affirmative claims against the Plaintiff/Respondent. (R. pp. 42-49).

By virtue of an Assignment of Mortgage executed August 7, 2016 and filed with the Charleston County Clerk of Court on October 28, 2016, Nationstar assigned and transferred their interest in the subject promissory note and mortgage to current Plaintiff/Respondent, U.S. Bank, N.A., as Trustee for LSF9 Master Participation Trust (hereinafter "Respondent"). Pursuant to the requirements of Rules 25(c) and 17(a), SCRCP, Nationstar submitted to the Court a Motion and Order Substituting Plaintiff. (R. pp. 2-6). A copy of this Motion and Order was placed in the mail with proper postage attached and sent to counsel for Appellant on November 22, 2016. Along with the Motion and Order Substituting Plaintiff, Nationstar included as an Exhibit a copy of a filed Assignment of Mortgage evidencing the transfer and negotiation of the subject promissory note and mortgage to Respondent. (R. p. 5). On December 1, 2016, after having reviewed the Motion and proposed Order along with the assignment, Judge Roger M. Young, Sr. executed and filed the Substitution Order. (R. p. 3). As a result of this order, Respondent became the current plaintiff in this case, and the case caption was changed accordingly.

On December 19, 2016, eighteen days after the execution and filing of the Motion and Order Substituting Plaintiff, Appellant served the Motion to Reconsider Order Substituting Plaintiff and For Sanctions ("Reconsideration Motion") on Respondent, which was filed with the Court on December 22, 2016. (R. pp. 11-16). The Reconsideration Motion was heard by Judge Mikell R. Scarborough on January 23, 2017, after which he entered a Form 4 order ("Reconsideration Order") on January 26, 2017 denying the Reconsideration

Motion. (R. pp. 7-8). The Court's ruling in the Reconsideration Order was based on the courts finding that the Reconsideration Motion was not properly filed according to Rule 59(e), SCRCP and that the Appellant did not show any prejudice as a result of the Substitution Order. (R. p. 7).

On March 4, 2017, Appellant served a Notice of Appeal with this court appealing both of the circuit court orders indicated above. (R. pp. 76-78).

STANDARD OF REVIEW

"A trial court has the sound discretion to substitute parties when some act has affected the capacity of a named party to be sued, and its decision will not be reversed on appeal absent a showing of an abuse of discretion." *Bryant v. Waste Mgmt., Inc.*, 342 S.C. 159, 166, 536 S.E.2d 380, 384 (Ct. App. 2000).

ARGUMENTS

I. THE MOTION AND ORDER SUBSTITUTING PLAINTIFF IS INTERLOCUTORY IN NATURE AND NOT IMMEDIATELY APPEALABLE

"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). In South Carolina, "it is well settled that an interlocutory order is not immediately appealable unless it involves the merits of the case or affects a substantial right." *Brown v. County of Berkeley*, 366 S.C. 354, 361, 622 S.E.2d 533, 537 (2005).

Again, 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. S.C. Code Ann. § 14-3-330 (1976 & Supp. 2003).[1] While §14-3-330 applies to "law cases" this court has recognized that it is applicable to equity cases, foreclosure in particular. *Kriti Ripley, LLC v. Emerald Invs.*, LLC, 404 S.C. 367, 381, 746 S.E.2d 26, 33 (2013); *See also Ex. Parte Wilson*, 367 S.C. 7, 12 n. 2, 625 S.E.2d 205, 207 n. 2 (2005). "If there is some further act which must be done by the court prior to a determination of rights of the parties, then the order is interlocutory. *Mid-State Distrubs. v. Century Imps.*, 310 S.C. 330, 335, 426 S.E.2d 777, 781 (1993).

a. THE ORDER SUBSTITUTING THE PLAINTIFF DOES NOT INVOLVE THE MERITS OF THE CASE

"An order 'involves the merits,' as that term is used in S.C. Code Ann. §14-3-330(1), and is immediately appealable when it finally determine 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); *Ex parte Capital U-Drive-It, Inc.*, 369 S.C. 7, 630 S.E.2d 464 (2006). The phrase "involve the merits" is narrowly construed, and court orders which require some further act by the lower Court prior to determine the parties' rights are typically found to be

[1] *See Edwards v. SunCom*, 369 S.C. 91, 631 S.E.2d 529 (2006) (setting the threshold for §14-3-330 very high; whereby an order must affect a substantial right **and** prevent a judgment from which an appeal may later be taken in order to be immediately appealed).

interlocutory orders and not immediately appealable. *Watson v. Underwood* at 458, S.E.2d at 163.

While the Order Substituting Plaintiff changed the party who is prosecuting the foreclosure action, no final determination of rights has been established. The underlying foreclosure matter is still pending, a dispositive hearing must be held, and Respondent must prove to the Court that they are the real party in interest and have standing to foreclose. As was discussed previously, at the time of substitution there were no pending affirmative claims against the former plaintiff Nationstar (R. pp. 42-49). Since there were no affirmative claims pending, the act of substituting the Plaintiff does not have any effect as to the merits of the case. Additionally, since standing to prosecute the foreclosure must still be determined by the Master-in-Equity at a final hearing, the rights of the parties have not been determined by the lower court and the Order is interlocutory and not immediately appealable.

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 it is clear that in accordance with the aforementioned statue no substantial right was affected. In fact, pursuant to Rule 17(a) SCRP, "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), SCRCP. Additionally, Rule 25(e), SCRCP, 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" (emphasis added). Furthermore, pursuant to Rule 17(a), SCRCP, the Order Substituting Plaintiff was completely proper and necessary since the real part in interest changed during the pendency of the action.

As has been discussed, there were no pending affirmative claims against Nationstar (R. pp. 24-49), therefore the substitution of Plaintiff did not affect any substantial right of the Parties. Respondent and Appellant must still attend a final hearing on the underlying foreclosure matter, and, at that hearing, a final determination will be made by the lower Court as to whether the current named Plaintiff has standing to prosecute the foreclosure action. The substitution did not discontinue any claims against Nationstar, and the foreclosure action is still proceeding towards a final hearing. While the Plaintiff may have changed, there was no final judgment or determination was made by the lower Court.

c. ORDER SUBSTITUTING PLAINTIFF IS NOT A FINAL ORDER AND DOES NOT INVOLVE INJUNCTIONS OR THE APPOINTMENT OF A RECEIVER.

As set forth above, § 14-3-330 clearly states that 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. S.C. Code Ann. § 14-3-330. The present case does not involve injunctions or the appointment of a receiver thus making it outside the scope of § 14-3-330. 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.

II. THE ENTRY OF THE ORDER SUBSTITUTING PLAINTIFF DID NOT VIOLATE THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

The Fourteenth Amendment to the United States Constitution ensures that citizens shall not be deprived of "life, liberty, or property, without due process of law." U.S. Const. amend. 14, §1. "The requirements of procedural due process apply only to the deprivation of interests encompassed by the protection of liberty and property of the Fourteenth Amendment." *Howard v. S.C. Dep't of Corr.*, 399 S.C. 618, 635, 733 S.E.2d 211, 220 (2012).

As has been discussed at length, the Order being appealed is not a final order. The cases cited by Appellant in support of his assertion that his Fourteenth Amendment due process rights were violated all involve the deprivation of life, liberty, or property. In the present matter, there has been no such deprivation. The Order under appeal merely substituted the real party in interest. To assert that the substitution of the real party in interest deprived the Appellant of life, liberty, or property is hyperbolic and inaccurate.

Even assuming, *arguendo*, that the Order deprived the Appellant of some form of life, liberty, or property, the Appellant was afforded a hearing to argue the merits of the motion. On January 23, 2017, Appellant's Reconsideration Motion was heard by the Master-in-Equity who fully considered the Court's granting of the Order, and denied Appellant's request to have it stricken (R. pp. 7-8). While Appellant does not agree with the Court's ruling, he was allowed to challenge the Order.

III. MOTIONS MAY BE GRANTED OR DENIED WITHOUT A HEARING

Courts in South Carolina have recognized that it is not improper to rule on motions without a hearing. See *Winnsboro v. Wiedeman-Singleton, Inc.*, 303 S.C. 52, 398 S.E.2d 500 (Ct. App. 1990); *Vinson v. Hartley*, 324 S.C. 389, 477 S.E.2d 715 (Ct. App. 1996); *Arthur v. Sexton Dental Clinic,* 386 S.C. 326, 628 S.E.2d 894 (Ct. App. 2006).

One of the options on the "Motion and Order Information Form and Cover Sheet" used in civil practice in South Carolina is "FORM MOTION, NO

HEARING REQUESTED." To assert, as Appellant does, that every motion made in the state of South Carolina requires a formal hearing is counterintuitive to the language included on this document used state-wide. When a motion is ministerial and administrative in nature, it would be completely contrary to the policy of judicial economy to request a hearing. In the present matter, the Motion and Order Substituting Plaintiff was completely administrative in nature. As was evidenced by the filed Assignment of Mortgage (R. p. 5), the real party in interest changed and, therefore, a substitution of plaintiff was proper. No claims were pending against the prior plaintiff (R. pp. 42-49), so there was no prejudice to the Appellant with the Court's granting of the motion. The Respondent must still attend a final hearing where Respondent proves to the Court that they have standing to prosecute the foreclosure action. The Motion and Order Substituting Plaintiff merely ensured that the proper parties were reflected on the pleadings. If, after reviewing the submitted Motion and Order Substituting Plaintiff along with the presented exhibits, the Court determines that a hearing is necessary then one may be scheduled. To clog up the Court system with administrative and ministerial motions would ensure a massive slow-down in the judicial process and would have an extremely detrimental effect on public policy.

IV. APPELLANT'S RELIANCE ON *NEELTECH ENTERP. INC. V. LONG* AND *WATTS V. COPELAND* IS INPROPER AND 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 (R. pp. 42-49); 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.

V. THE LOWER COURT PROPERLY RULED ON APPELLANT'S RULE 59(E) MOTION

Even assuming, *arguendo*, that the Rule 59(e), SCRCP, motion was timely filed, an additional ground as delineated by the lower Court for its denial is the lack of prejudice to the Appellant. The lower Court, in determining that there was no prejudice, stated, "I don't see the counterclaim against Nationstar. I haven't heard a Complaint against Nationstar other than you want to see the life of the loan. So unless or until there's some sort of problem there, I don't see any reason to keep Nationstar in the case from that standpoint." (R. p. 62, lines 20-25). Further evidencing the lack of prejudice to the Appellant and emphasizing the administrative function of the Motion and Order Substituting Plaintiff, the lower Court continued, "So in other words, Ocwen – the original Plaintiff has now been third-partied into the case. They were already in the case because the counterclaim had already been asserted against them. So it's just a matter of

recording the priorities. So I'm going to allow the order to substitute the Plaintiff to remain." (R. p. 68, lines 6-13).

When considering whether to allow the Motion and Order Substituting Plaintiff to stand, the lower Court fully considered all issues of prejudice to the Appellant. At the time of substitution, there was no affirmative claim pending against Nationstar. No final judgment was entered and no claim was ended by the substitution of Plaintiff, as the lower Court stated, "it's just a matter of recording the priorities." When reviewing the Motion and Order Substituting Plaintiff, and taking full consideration of the rights of the Parties involved, the lower Court properly held that no prejudice was suffered by the Appellant when the Plaintiff was substituted and that the act was necessary because the former Plaintiff no longer had standing to prosecute the action. In an effort to explain the transfer of ownership and how it affects the rights of the parties, the lower Court stated, "[A]ll of a sudden by operation of law the current Plaintiff is no longer the – they don't have standing." (R. p. 64, lines 18-20). Not only was there no prejudice suffered by the Appellant, the substitution was proper to satisfy the basic requirement of standing.

CONCLUSION

The Motion and Order Substituting Plaintiff is an interlocutory order and not ripe for appeal. The Order does not 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. The issue of the Respondent's

standing to prosecute the underlying action must still be formally adjudicated by the lower Court. No final order regarding Respondent's standing has been issued. There were no claims against former Plaintiff Nationstar pending at the time of substitution, so the substitution did not have the effect of a final judgment or order. Because of its interlocutory nature, the Motion and Order Substituting Plaintiff is not ripe for appeal.

Assuming, *arguendo*, that this matter is ripe for appeal, the Motion and Order Substituting Plaintiff was properly entered by the lower Court. When the real party in interest changes, it is proper under the South Carolina Rules of Civil Procedure to substitute the new real party in interest. This substitution ensures that the proper parties are represented in the pending matter. At the time of substitution, there were no claims pending against former Plaintiff Nationstar so the act of substituting the Plaintiff had absolutely no effect on the rights of the Appellant. Additionally, the issue of the Respondent's standing to prosecute the foreclosure action must still be adjudicated by the lower Court. Therefore, because the substitution of the Plaintiff was proper to reflect the real party in interest, because there were no claims pending against the former Plaintiff at the time of substitution, and because the Respondent must still prove to the lower Court that they are the proper real party in interest, the Motion and Order Substituting Plaintiff was properly granted.

Additionally, the lower Court properly reviewed and denied Appellant's Rule 59(e) Motion. As was shown in the transcript of the hearing, the lower Court fully considered any prejudice which could be suffered by the Appellant.

The lower Court found that there was no prejudice to the Appellant since the Appellant had no claims pending against former Plaintiff Nationstar at the time of the substitution. Continuing, the lower Court emphasized the administrative nature of Motions and Orders to Substitute Plaintiff and stated that they were necessary to ensure that the proper party was named. Since the lower Court properly considered the Rule 59(e) Motion, and since there is no prejudice suffered by the Appellant, the denial of the Rule 59(e) motion was proper.

Respectfully submitted,

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4/9, 2018
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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

U.S. Bank Trust, N.A., as Trustee for LSF9 Master Participation Trust.....Respondent,

v.

Robert Hammond.....Appellant.

SCACR RULE 211(b) CERTIFICATE OF COMPLIANCE

The undersigned counsel for Respondent hereby certifies that Respondent's Final Brief complies with SCACR Rule 211(b).

Dated: 4/9/18

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