THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Mikell R. Scarborough, Master-In-Equity

Appellate Case No. 2016-001054

HSBC Bank USA, National Association, as Trustee for the Holders of the Deutsche ALT-A Securities, Inc. Mortgage Loan Trust, Mortgage Pass-Through Certificates Series 2007-OA4, assignee of Bank of America N.A., successor by merger to BAC Home Loans Servicing L.P., f/k/a Countrywide Home Loans Servicing, Inc., ... Appellant,

v.

Clifford L. Ryba; Beverly Ryba; Regions Bank; First Federal Savings and Loan Association of Charleston; Citibank (South Dakota) N.A., and Carol Garfield Goldberg ..... Defendants,

Of whom Carol Garfield Goldberg is the ..... Respondent.

FINAL BRIEF OF THE RESPONDENT

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F. Patrick Hubbard and Robert L. Felix, The South Carolina Law of Torts, 2nd Ed., SC Bar/CLE, p. 635 (1997) 15

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STATEMENT OF THE ISSUES ON APPEAL

Appellate Courts Rules require a concise and direct statement as to each issue on appeal.[1] The Initial Brief of the Appellant does not include a statement of the issues on appeal. "Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal."[2] If the Court discerns an extraordinary circumstance, the Respondent responds to the arguments made in the Appellants' brief as follows:

I. A mortgage foreclosure is an action in equity. The Appellant failed to prove entitlement to holder in due course status and stands in the shoes of Countrywide which facilitated, turned a blind eye to, and profited from the scheme to defraud the Respondent of her property. This Court should affirm the Master's denial of foreclosure.

II. All issues and arguments must first be presented to the lower court. Issues and arguments not raised and ruled on by the lower court are not preserved for appellate review.

A. For the first time on appeal the Appellant argues the Respondent lacked standing under the Uniform Commercial Code to raise fraud as a defense to the foreclosure. This Court should decline to consider the issue because it was not raised and ruled on by the Master-In-Equity.

B. For the first time on appeal the Appellant argues a loan servicer automatically has holder in due course status and can foreclose a mortgage free from all claims and defenses. This Court should decline to consider the issue because it was not raised and ruled on by the Master-In-Equity.

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[1] Rule 208(b)(1)(B), SCACR.

[2] *Id.*

SUMMARY OF THE ARGUMENT

A mortgage foreclosure is an action in equity. Courts of equity protect those of whom undue advantage has been taken, abhor a wrong without a remedy, and will look beneath the rigid rules of law to do substantial justice. The Respondent was an inexperienced, single mother struggling to save her home. She turned to a licensed mortgage broker for help. Instead of helping her, he helped himself to the $150,000.00 equity in her home. The Master did not foolishly fashion a remedy to assist or punish either party, he ruled the Appellant failed to prove they paid value for the note and mortgage without notice and, therefore, stood in the shoes of Countrywide which had constructive notice of the fraud perpetrated to obtain title to the mortgaged property. The Master gave the parties every opportunity to raise issues and present evidence. The Appellant now seeks to raise new issues that were neither raised nor ruled on by the Master. This Court should decline to consider the new issues not preserved for appellate review. This Court should affirm the Order denying foreclosure because the Master did substantial justice based on the issues raised and the evidence presented, or not presented, by the parties.

STATEMENT OF THE CASE

Appellant's two paragraph Statement of the Case does not include all proceedings necessary to an understanding of the appeal.

On August 29, 2008, the Respondent filed a complaint alleging fraud against Clifford and Beverly Ryba and First Rate Mortgage, L.L.C. R., pp. 50 – 60. At the same time she filed a *lis pendens* giving statutory notice of her claim. R., p. 47.

Three years later, on October 27, 2011, Bank of America, N.A., successor by merger to BAC Home Loans Servicing, LP, f/k/a Countrywide Home Loans Servicing, L.P., alleged the mortgage was assigned to them on September 15, 2011 and filed this foreclosure action. R., pp. 63 – 68. Respondent moved to intervene in the foreclosure. R., p. 458. The motion to intervene was granted. R., p. 44.

On May 12, 2014 Bank of America filed a motion for partial summary judgment. R., pp. 460 – 466. At the same time HSBC Bank USA, National Association, as Trustee for the Holders of the Deutsche ALT-A Securities, Inc. Mortgage Loan Trust, Mortgage Pass-Through Certificates Series 2007-OA4, assignee of Bank of America N.A., successor by merger to BAC Home Loans Servicing L.P., f/k/a Countrywide Home Loans Servicing, Inc., alleged the mortgage was assigned to them by Bank of America on May 21, 2012 and moved to be substituted as the plaintiff. R., pp. 501 – 502. The motion to substitute was granted.

In their motion for partial summary judgment Bank of America and the Appellant argued they paid value for the note and mortgage without notice and, therefore, were holders in due course not subject to the Respondent's claim or defense of fraud. R., p. 463 – 465. The Respondent responded and argued the Appellant was not entitled to holder in due course status. R., pp. 505 – 514. After the hearing, the Appellant filed a supplemental memorandum arguing they were entitled to the protection of the shelter rule. The Master ruled material questions of fact remained and denied partial summary judgement. R., pp. 3 – 4.

The foreclosure was heard before the Master on March 24, 2015. At the conclusion of the Appellant's case, the Respondent moved for a directed verdict on the ground the Appellant failed to prove it had given value for the note and mortgage. R., pp. 226 – 229.

The Master issued his Order denying foreclosure. R., pp. 18 - 41.

Appellant filed for motion to alter, amend, or reconsider or for a new trial. R., pp. 516 – 529. Appellant's motion was granted in part and denied in part. R., pp. 1 – 17.

The Appellant timely filed Notice of Appeal. R., p. 564.

FACTS

The Respondent was an inexperienced, single mother desperately trying to save her home. She inherited her home located at 34 Tarleton Drive, Charleston, South Carolina from her grandfather. She had mortgaged the property because she was adopting a child and her husband wanted to open a restaurant.[3] Subsequently, her husband was incarcerated, his restaurant closed, and the Respondent was left with insufficient income to pay the mortgage. She obtained a short term loan to keep up the payments but needed to secure long term refinancing. She mentioned her situation to Clifford Ryba, a licensed mortgage broker with First Rate Mortgage, LLC., who said he would help save her home.

[3] The statement of the facts is taken from the unappealed factual findings in the Master's Order denying foreclosure.

The Respondent met with Ryba at First Rate Mortgage, LLC. She answered questions as he filled out what she presumed was a mortgage loan application. Ryba later told her she could not qualify for a mortgage loan even with a co-signor. Ryba proposed the Respondent deed her home to him so he could obtain a mortgage in his name, lease the home back to her for an amount equal to the new mortgage payments, and she would have the right to repurchase the home by reimbursing him for his costs. Respondent testified she was an inexperienced borrower and relied upon Ryba because he was a licensed mortgage broker who worked for a mortgage brokerage firm. She did not know the proposed scheme had all the earmarks of recasting prohibited under the laws regulating mortgage brokers.

Ryba took care of everything assuring the Respondent would not be represented by a real estate agent or attorney in the lease or buy and sell agreements. Ryba prepared a Residential Lease Agreement on August 12, 2005 leasing the property he didn't own yet back to Respondent for a monthly rent of $850.00. R., pp. 382 – 388. Giving false assurance to the Respondent paragraph 14 of the lease agreement drafted by Ryba said "[t]enant is owner." The Respondent understood her rent would be equal to and used the pay for the mortgage Ryba would obtain in his name. Ryba prepared an Agreement to Buy and Sell the property for $205,000.00 on August 16, 2005. The Respondent understood that was the amount needed to satisfy her existing mortgage and pay closing costs for the new mortgage. R., p. 239. The balance owing on her existing mortgage, including interest and fees, was $199,689.75. R., pp. 389 – 390. The Respondent signed a deed conveying her property to Ryba and

his wife on August 31, 2005. R., pp. 468 – 469. The appraisal showed her home was worth $350,000.00. She did not receive any payment from the closing for her $150,000.00 equity in her home. The closing attorney testified he would not have closed the loan if he had known of Ryba's fraudulent representations.

On the day of closing, Ryba and his wife obtained a mortgage loan from Countrywide in the principal amount of $163,500.00. R., pp. 391 – 401. The mortgage application was handled by Ryba and his employer, First Rate Mortgage, LLC. The proceeds of the loan, together with a second mortgage of unknown origin in the amount of $20,857.00 and cash from borrower in the amount of $21,199.11, were used satisfy the Respondent's outstanding mortgage as shown by the HUD Settlement Statement. R., pp. 417 - 418. Whatever personal funds Ryba may have contributed were more than reimbursed when on October 11, 2005 Ryba and his wife obtained a second mortgage on the property from Regions Bank in the amount of $100,000.00. Respondent had no knowledge of this mortgage. Seven months later, on May 9, 2006, Ryba and his wife refinanced the Regions Bank second mortgage increasing it to $115,000.00. Respondent had no knowledge of this refinancing.

Ryba and his wife refinanced the Countrywide mortgage on May 2, 2007 increasing it to $172,000.00. R., pp. 473 – 487. Prior to this refinance, Regions Bank agreed to subordinate its second mortgage. R., pp. 372 – 373. Respondent had no knowledge of this refinancing. This was the "no doc," negative amortization subprime mortgage loan sought to be foreclosed in this case.

The mortgage application was again handled by Ryba and his employer, First Rate Mortgage, LLC. R., pp. 413 - 416. Michael Ward who was called by the Appellant to verify the loan documents, testified Countrywide relied upon First Rate Mortgage, LLC, to gather and submit complete and accurate information but also testified the loan was a "no doc" loan, meaning Countrywide did not require the information on the loan application be verified or documented. The application was not signed until the day of the closing. The loan application disclosed Ryba was an employee of First Rate Mortgage, LLC. The year Ryba acquired the property was left blank. The loan application disclosed Ryba did not live on the property. Although the property was described as an investment, the application and appraisal showed the property was rented for a net monthly loss at substantially less than fair market value. The closing attorney testified the $171,445.01 net proceeds of the mortgage, after payment of the broker fee, title insurance, and closing costs, were all paid to Countywide. R., p. 419. The appraisal showed the property was worth $375,000.00. R., pp. 422 – 443.

The Respondent testified Ryba demanded she increase her rent payments from $850.00 to $1,600.00 a month and, when she refused, he tried to have her evicted from the property. She retained counsel to stop the eviction proceedings. The Respondent paid the taxes on the property when Ryba failed to and a delinquent tax notice was posted on her front door. Ryba hired a real estate agent to sell the home who put a "lock box" on her front door and for sale signs in the yard which she removed. The Respondent filed a Complaint, Case No. 08-CP-10-4970, against the

Rybas and First Rate Mortgage, LLC, alleging various causes of action, including fraud and recasting. R., pp. 50 – 60. At the same time, Respondent filed a *lis pendens* giving statutory notice of the alleged fraud and her claim to the property. R., p. 47.

Ryba filed for bankruptcy. The Respondent intervened in the bankruptcy and Ryba and his wife transferred ownership of the property back to her by quick claim deed on October 26, 2012.

ARGUMENT

In an appeal from an action in equity, the appellant court may find facts in accordance with its own view of the evidence.[4] This broad scope of review, however, does not require an appellate court to disregard the findings below or to ignore the fact the trial judge was in a better position to assess credibility.[5] Nor does it relieve the Appellant of convincing the appellate court the trial judge committed error in his findings.[6]

I. A mortgage foreclosure is an equitable action. The Appellant failed to prove entitlement to holder in due course status and, therefore, stood in the shoes of Countrywide which facilitated, turned a blind eye to, and profited from the scheme to defraud the Respondent of her property. This Court should affirm the Master's denial of foreclosure.

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[4] Lowcountry Open Land Trust v. Charleston S. Univ., 376 S.C. 399, 407, 656 S.E.2d 775, 779 (Ct.App.2008).

[5] Pinckney v. Warren, 344 S.C. 382, 387, 544 S.E.2d 620, 623 (2001).

[6] *Id.* at 387–88, 544 S.E.2d at 623.

A mortgage foreclosure is an action in equity.[7] Courts of equity protect those of whom undue advantage has been taken,[8] abhor a wrong without a remedy,[9] and will look beneath the rigid rules of law to seek substantial justice.[10] The decision to grant equitable relief is in the discretion of the trial judge.[11] The Master did not foolishly fashion a remedy to assist or punish either party, he ruled the Appellant failed to prove they paid value for the note and mortgage without notice and, therefore, stood in the shoes of Countrywide which had constructive notice of the fraud perpetrated to obtain title to the mortgaged property. The Master ruled on the issues raised and the evidence presented, or not presented, by the parties.

The issues were framed by the parties. Both the Bank of America and the Appellant argued in their motion for partial summary judgement they paid value without notice giving them holders in due course status not subject to the Respondent's claim or defense of fraud. They argued:

> In South Carolina, a purchaser may assert a plea in equity of a bona fide purchaser for value, without notice of defect in his title, by showing (1) he has actually paid in full the purchase money (giving security for the payment is not sufficient, not is past indebtedness a sufficient consideration); (2) he purchased and acquired the legal title, or the best right to it; and (3) he purchased bona fide; *i.e.*, in good faith and with integrity of dealing, without notice of a lien or defect.

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[7] Hayne Fed. Credit Union v. Bailey, 327 S.C. 242, 248, 489 S.E.2d 472, 475 (1997).
[8] Smothers v. U.S. Fidelity and Guar. Co., 322 S.C. 207, 470 S.E.2d 858 (S.C. App. 1996).
[9] State ex rel. Daniel v. Strong, 185 S.C. 27, 192 S.E.671 (1937).
[10] *Id.*
[11] First Union Nat. Bank of S.C. v. Soden, 333 S.C. 554511 S.E.2d 372 (S.C. App. 1998).

R., pp. 501 – 504. The Respondent filed a memorandum in opposition and argued neither Bank of America nor the Appellant were holders in due course. R., pp. 505 – 515. After the hearing, Appellant switched gears and filed a supplemental memorandum arguing they were entitled to the protection of the shelter rule because their predecessor in title, Countrywide, paid value without notice when it funded the mortgage loan. The Master ruled material questions of fact remained and denied summary judgement.[12] One matter that troubled the Master was the refinancing of the property four times over two years. The Master requested the Appellant produce evidence regarding lending standards for multiple refinancing of property over a short period of time at the trial. R., p. 36.

The trial was heard before the Master beginning on March 24, 2015. The Master ruled the Appellant was the holder of the note and mortgage because it produced the original documents. The Master ruled the mortgage was filed in accordance with § 30-7-10, S.C. Code Anno., 1976, and, therefore, valid as to subsequent purchasers for value without notice. This ruling was the consistent with issues raised by and the South Carolina case law cited by both parties.[13] The Master turned to the issues thus presented.

The foreclosure was originally brought by Bank of America which alleged the mortgage was assigned to them on September 15, 2011. R., p. 374. The complaint

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[12] Handcock v. Mid-South Management Co., Inc., 673 S.C. 801, 381 S.E.2d 326 (2009).

[13] Spence v. Spence, 368 S.C. 106, 628 S.E.2d 869 (2006); S.C.Tax Commn. v. Belk, 266 S.C. 539, 543, 225 S.E. 2d 177, 179 (1976); Smith v. Faust, 107 S.C. 37, 92 S.E. 24 (S.C. 1917).

was amended to substitute the Appellant which alleged the mortgage was assigned to them by Bank of America on May 21, 2012. The Master commented about the time and effort spent by the Court and the parties arguing the motion for partial summary judgement based on these assignments. R., pp. 20 – 21. At trial, however, Michael Ward, who was called to verify the documents, switched gears again and testified the mortgage was actually assigned to the Appellant as part of a securitization agreement on June 1, 2007. The Master expressed his frustration:

> If the trial testimony is to be believed, then the two prior assignments recorded in the RMC Office, referenced in pleadings, and relied upon in arguments before this Court were either the product of incompetence, the result of a total lack of accurate record keeping, or a complete sham. This Court is charged with the difficult task and responsibility of deciding cases affecting the lives of citizens whose homes are being foreclosed. Of necessity, the Court must rely on the accuracy of the documents submitted. The Court emphasizes a mortgage foreclosure is an action in equity and a party seeking to foreclose a mortgage must come before the Court with clean hands. Hayne Fed. Credit Union v. Bailey, 327 S.C. 242, 489 S.E.2d 472 (1997); Wachovia Bank, N.A. v. Coffey, 389 S.C. 68, 698 S.E.2d 244 (2010). The inconsistent testimony causes the Court to have great concern about the accuracy and reliability of the documents the [Appellant] relies upon.

R., p. 22.

Not sure which theory of case to believe, the Master ruled on the assignments and the securitization agreement separately. The Master ruled the assignments were made after the Respondent had filed her *lis pendens* giving statutory notice of her

claim[14] and after the note and mortgage were in default.[15] The Master further ruled Bank of America purchased Countrywide in a bulk sale not in the ordinary course of business.[16] The problem with ruling on the securitization agreement was Michael Ward did not bring a copy to be introduced into evidence.

At the close of the [Appellant's case][17], Respondent moved for a directed verdict on the grounds the Appellant had failed to prove it had paid value for the note and mortgage. R., pp. 226 – 229. In response to the motion, the Appellant represented the missing securitization agreement recited consideration and moved to reopen the case to allow introduction of the agreement. The Master did not rule on the motion but instructed the Appellant to provide a copy of the agreement to the Respondent. The Master offered to allow the Appellant to file a brief and to request a further hearing before ruling on the motion. No brief was filed and no hearing was requested. In his Order denying foreclosure the Master ruled, "As to the claim the [Appellant] became the holder of the note on June 1, 2007 pursuant to an agreement that was not introduced into evidence, the Court is unconvinced. The [Appellant] did not introduce a copy of the agreement, and, other than representations of counsel, the Court has no way of knowing who the agreement was between, what the terms of the agreement were, or whether it included the subject not and mortgage." [18] R., p. 24.

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[14] § 30-7-10, S.C. Code Anno., 1976.
[15] § 36-3-302(1)(c), S.C. Code Anno., 1976.
[16] § 36-3-302(3)(c), S.C. Code Anno., 1976.
[17] Respondent's Initial Brief incorrectly stated the motion for directed verdict was made at the close of the evidence rather that at the close of the Appellant's case.
[18] A copy of the securitization agreement was produced to Respondent's counsel and later to the Court when the Appellant filed it's motion to alter, amend, or reconsider or for a new trial. In his Order granting in part and denying in part the Appellant's

The Master found the Appellant failed to prove it was a bona fide purchaser of the note and mortgage for value.

Finding the Appellant failed to prove it was a bona fide purchaser for value did not end the inquiry. Under the issues raised by the parties the Appellant further argued its predecessor in interest, Countrywide, was a holder in due course entitling the Appellant to the protection of the shelter rule.[19] The holder in due course and shelter rules facilitate financial transactions by shielding holders of negotiable instruments from claims and defenses when they pay value without notice or purchase the instrument from someone who did. Fraud, undue influence, or duress perpetrated by a third person without the instigation, procurement, knowledge or consent of the mortgagee will generally not affect the mortgage.[20] Conversely, knowledge of a fraud by the mortgagee can affect a mortgage. This was implicit in

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motion, the Master ruled, "The Court has reviewed the PSA agreement and finds it was an agreement between ACE Securities Corp., as the depositor, Wells Fargo Bank, N.A., as the master servicer and securities administrator, Clayton Fixed Income Services, Inc., as the credit risk manager, and the Plaintiff, HSBC Bank USA, National Association, as the Trustee. Countrywide was not a party to the PSA agreement. Nowhere does the PSA agreement say what, if anything, or when Countrywide was paid for the subject note and mortgage. The Schedule of Loans included with the PSA agreement does include the subject note and mortgage but it does not say what, if anything, Countrywide was paid for the subject note and mortgage. Whatever mutual promises and covenants or other "good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged" that may have been exchanged between the parties to the PSA agreement, that consideration would not have flowed to Countrywide who was not a party to the agreement."

[19] Manship v. Newsome, 188 S.C. 6, 198 S.E.428 (1938); Smith v. Faust, 107 S.C. 37, 92 S.E.2d 24 (1917); Liberty Loan Corp. of Darlington v. Mumford, 283 S.C. 134, 322 S.E.2d 17 (S.C. App. 1984).

[20] Wicklein v. Kidd et al, 149 Md 412, 131 A 780 (1926); Green & Densmore v. Scrange, 19 Iowa 461 (1865); Moore v. Fuller et al, 6 Or 272 (1877).

the South Carolina case of Ex parte Mercer[21] in which it was alleged a property owner mortgaged property he previously verbally agreed to sell. The issue was whether the purchaser, who had paid the purchase price and built a home on the property, could intervene in the foreclosure action on the ground the mortgagee had actual notice of the purchaser's rights.[22] The Court ruled the trial judge did not abuse his discretion in denying intervention because the evidence failed to prove the mortgagee knew of the prior sale or the purchaser's claim to the property. The rule is consistent with the statutory rule a holder not in due course takes subject to all valid claims on the part of any person.[23]

The Master ruled Countrywide's funding of the mortgage constituted the payment of value but, in order to be a holder in due course, Countrywide had to prove it paid value without notice. The Master ruled the mortgage was entered into before the Respondent filed her *list pendens* eliminating statutory notice. The Master turned his attention to the mortgage transaction itself to see whether there was evidence Countrywide knew or should have known about the fraud perpetrated by Ryba to obtain title to the Respondent's property.

The Master ruled Countrywide had actual notice Ryba was an employee of the loan broker, the "no doc" loan applied for was a negative amortization subprime loan, the date Ryba acquired the property had been left blank on the loan application, and the property described as an investment was rented at a significant net monthly loss

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[21] Ex parte Mercer, 125 S.C. 33 (S.C. 1924)
[22] *Id.* at 34.
[23] § 36-3-306, S C. Code Anno., 1976.

below fair market value. Countrywide also had notice the property had been financed and refinanced four times over two years. The Master had specifically requested information from the Appellant regarding lending standards for multiple refinancing over a short period of time but none was provided at trial. The Master ruled, while none of these facts actually known to Countrywide may have been enough considered individually, taken together they were sufficient to have put Countrywide on further inquiry. R., p. 36.

The Master then ruled if an inquiry had been diligently conducted, Countrywide would have discovered the underlying fraudulent scheme.[24] R., pp. 19 – 20. The Master ruled Countrywide had constructive notice of the fraud and was, therefore, not a holder in due course. The Appellant, willing to take the risk associated with Countrywide's subprime loans, stood in Countrywide's shoes which had facilitated, turned a blind to, and profited from the scheme to defraud the Respondent of her property.

The Appellant argues the Master's withdrawal of his ruling on agency absolves Countrywide of any notice of the fraud. After finding Countywide had constructive notice of the fraud, the Master ruled, as an alternative sustaining ground, notice was also imputed to Countrywide because Ryba was its agent under South Carolina case law.[25] The Appellant filed a motion to alter, amend, or reconsider on the ground

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[24] City of Greenville v. Washington Am. League Baseball Club, 205 S.C. 495, 32 S.E.2d 777 (1945); O'Leary-Payne v. R.R. Hilton Head, II, Inc., 371 S.C. 340, 638 S.E.2d 96 (S.C. App. 2006).

[25] *See*: F. Patrick Hubbard and Robert L. Felix, The South Carolina Law of Torts, 2nd Ed., SC Bar/CLE, p. 635 (1997); Restatement (Second) of Agency, § 1; Peoples

notice is not imputed to the principal from an agent committing fraud for his own benefit.[26] R., pp. 523 – 525. After considering the case law cited by the Appellant, the Master withdrew imputed notice based on agency as an additional sustaining ground. The Master did not disturb his ruling Countrywide had constructive notice of the fraud.

The Master ruled based on the issues raised and the evidence presented, or not presented by the parties. The Master's Order denying foreclosure concludes by saying:

> The Court wishes to emphasize this is a very fact specific case. It involved a licensed mortgage broker and his company engaging in a fraudulent and illegal scheme called recasting from which they profited. It involves Countrywide, now a defunct mortgage company, the [Respondent] aptly described as a poster child for the mortgage loan abuses that led to the largest financial crisis of our generation. And, it involves a financial institution willing to take the risk of Countrywide's suspect mortgages. Denying foreclosure under the facts of this case does not endanger the legal underpinnings of our financial system. It is well founded under existing South Carolina law and is consistent with the public policy that holds those who facilitate or turn a blind eye to or are willing to assume the risk should be held responsible rather than the victims of fraud and illegal activity. The Court is mindful of the [Appellant's] argument the [Respondent] would receive a windfall if foreclosure is denied. The [Respondent's] property, however, remains subject to the Regions Bank mortgage in the principal amount of $115,000.00 that has also been unpaid since May of 2011 and subject to foreclosure by them. With accumulated interest, late fees,

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Fed. Sav. & Loan Ass'n v. Myrtle Beach Gold & Yatch Club, 310 S.C. 132, 1465 – 146; 425 S.E.2d 764, 773 (S.C. App. 1992).

[26] Charleston Library Society v. Citizens & Southern Nat'l Bank, 201 S.C. 447, 23 S.E.2d 362 (1942); Mauldin Furniture Galleries, Inc. v. Branch Banking & Trust Co., 2012 U.S. Dist. LEXIS 121140, 2012 WL 3680426 (D.C.S.C. Aug. 27, 2012) *citing* Crystal Ice Co. v. First Colonial, 273 S.C. 306, 257 S.E.2d 496 (1979).

> and probable attorney fees, any windfall to the Respondent is likely to be minimal. The facts and circumstances regarding the Regions Bank may be entirely different from this case and nothing contained in this Order should be interpreted as binding in any foreclosure action they may bring.

R., pp. 39 - 41. Further balancing the scales of justice it is noted the Appellant is left with its action in law on the note against the perpetrators of the fraud and whatever recourse they may have under the title insurance purchased as part of the mortgage closing or credit swaps purchaed as part of the securitization agreement. The Master's denial of foreclosure should be affirmed because the Master did substantial justice.

II. All issues and arguments must first be presented to the lower court. Issues and arguments not raised and ruled on by the lower court are not preserved for appellate review.

"[A] great number of reported cases in South Carolina for at least four generations, and more recently the appellate court rules and rules of civil procedure, have emphasized the importance and absolute necessity of ensuring that all issues and arguments are presented to the lower court for its consideration. Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court.[27] In order for an issue to be properly preserved for appeal, it must have been both raised to and ruled upon by the trial court.[28]

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[27] *E.g.,* Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."); Long v. Dunlap, 87 S.C. 8, 68 S.E. 801 (1910) (Supreme Court will not consider any point which was not presented and considered below unless it involves jurisdiction of the court); Gaffney v. Peeler, 21 S.C. 55 (1884); Rule 210(c), SCACR (record on appeal shall not include matter which was not presented to lower court).

[28] Elam v. S.C. Dep't of Transp., 361 S.C. 9, 23–24, 602 S.E.2d 772, 779–780 (2004).

The Appellant did not raise the issue the Respondent lacked standing under the Uniform Commercial Code to raise her claim or defense of fraud or that a loan servicer automatically has holder in due course status and can foreclose a mortgage free from all claims and defenses in its motion for partial summary judgment, at trial, or its post-trial motion. The Master never ruled on either of these issues in his Order denying foreclosure or his Order denying in part and granting in part Appellant's post-trial motions. The Appellant improperly seeks to raise new issues for the first time on appeal.

A. For the first time on appeal the Appellant argues the Respondent lacked standing under the Uniform Commercial Code to raise fraud as a defense to the foreclosure. This Court should decline to consider the issue because it was not raised and ruled on by the Master-In-Equity.

Appellant's argument II asserts "[t]he removal of fraud from the master's order renders the holder in due course argument irrelevant" but the argument made is the Respondent lacked standing to raise her claim or defense of fraud under § 36-3-305(a)(1)(iii), S.C. Code Anno., as amended July 1, 2009. Not only was this provision of the Uniform Commercial Code not raised below, it would not have been applicable because the Editor's Note explains the 2008 amendments to Part 3 of the code do not apply to transactions before the effective date of the act, July 1, 2008.[29] The mortgage sought to be foreclosed in this action was entered into on May 7, 2007. The Code provision in effect at the time of this mortgage provided a holder not in due course took the instruction subject to all valid claims on the part of any person.[30] The issue

[29] *See:* Editor's Notes, §§ 4.A and 4.B at the beginning of Part 3, § 36-3-301, et seq., S.C. Code Anno., 2015 Supp.

[30] § 36-3-306, S.C. Code Anno., 1976.

the Respondent lacked standing to assert her claim or defense of fraud under the Uniform Commercial Code was not raised before or ruled upon by the Master. This Court should decline to consider the issue because it was not preserved for appellate review.

B. For the first time on appeal the Appellant argues a loan servicer automatically has holder in due course status and can foreclose a mortgage free from all claims and defenses. This Court should decline to consider the issue because it was not raised and ruled on by the Master-In-Equity.

Appellant's argument III asserts "[t]he requirement that Appellant be a holder in due course is irrelevant to whether a loan servicer can foreclose" but the argument made is, since South Carolina case law recognizes a loan servicers have standing to foreclose a mortgage,[31] a loan servicer automatically has holder in due course status and can foreclose free of all claims and defenses. Neither the South Carolina Court of Appeals in *Draper* nor the bankruptcy courts in the cases cited by the Appellant ever ruled loan servicers automatically have holder in due course status entitling them to foreclose free of all claims and defenses. This issue was never raised before or ruled upon by the Master. This Court should decline to consider the issue because it was not preserved for appellate review.

CONCLUSION

The Master did not foolishly try to assist or punish either party. He tried to do substantial justice based on the issues raised and the evidence submitted by the parties. His ruling will not cause the collapse of the financial markets. Lenders like

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[31] Bank of Am., N.A. v. Draper, 405 S.C. 214, 746 S.E.2d 478 (S.C. App. 2013.,

Countrywide who profited selling subprime mortgage loans already did that. This case is about a desperate mother who fell victim to a corrupt mortgage broker willing to take advantage of Countrywide's subprime, "no doc" mortgage loan mill to blatantly steal the equity in the Respondent's home. The Master applied the South Carolina law cited by the parties. When the Appellant argued they were holders in due course, the Master ruled the assignments relied upon were made after the Respondent filed her *lis pendens*, after the note and mortgage were in default, and Bank of Amercia bought Countrywide in a bulk fire sale. When the Appellant introduced surprise evidence about a securitization agreement at trial, the Master ruled they cast doubt on the accuracy and reliability of their own records. When the Appellant argued it was entitled to the protection of the shelter rule, the Master ruled Countrywide was not a holder in due course because it has constructive notice of the fraud. When the Appellant forgot to bring a copy of the securitization agreement to introduce into evidence, the Master bent over backwards giving them a chance to submit a brief or request a hearing to reopen the case to introduce the agreement but the Appellant did neither. When a copy of the agreement was attached as an exhibit to the Appellant's post-trial motion, the Master ruled it failed to show what or when value had been or would be paid to Countrywide which was not a party to the agreement. Left with changing theories of the case, unreliable documents, and missing evidence, the Master ruled the Appellant stood in the shoes of Countrywide which facilitated, turned a blind to, and profited from the fraud the Master ruled they had constructive notice of. Simply put, the Appellant failed to prove anybody in its

chain of title paid value for the mortgage sought to be foreclosed without notice of the Respondent's claim to the property. Now on appeal the Appellant seeks to raise two additional new issues that were neither raised to nor ruled upon by the Master. The Master did substantial justice based on the issues raised and the evidence presented by the parties. The Appellant is left with its action at law on the note against the perpetrators of the fraud and recourse to whatever title insurance and default swaps they obtained as part of the mortgage closing or securitization agreement. This Court should affirm the Master's Order denying foreclosure.

Respectfully submitted,

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Charleston, South Carolina

24 day of March, 2017.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Mikell R. Scarborough, Master-In-Equity

Appellate Case No. 2016-001054

HSBC Bank USA, National Association, as Trustee for The Holders of the Deutsche ALT-A Securities, Inc. Mortgage Loan Trust, Mortgage Pass-Through Certificates Series 2007-0A4, assignee of Bank of America N.A., successor by merger to BAC Home Loans Servicing L.P., f/k/a Countrywide Home Loans Servicing, Inc., ... Appellant,

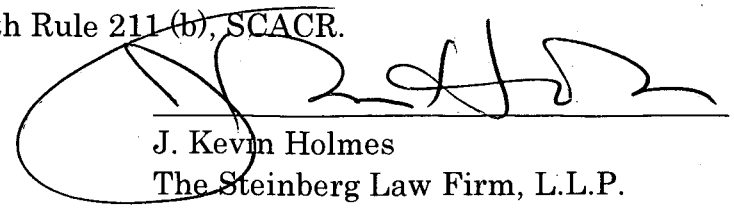
v.

Clifford L. Ryba; Beverly Ryba; Regions Bank; First Federal Savings and Loan Association of Charleston; Citibank (South Dakota) N.A., and Carol Garfield Goldberg ..... Defendants,

Of whom Carol Garfield Goldberg is the ..... Respondent.

CERTIFICATE OF COUNSEL

The undersigned attorney for the Respondent, certify that the Final Brief of the Respondent complies with Rule 211 (b), SCACR.



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28th day of March, 2017.