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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Greenville County
Charles B. Simmons, Jr., Master in Equity

Docket No.: 2010-CP-23-10468

Bank of America, N.A. ..... Respondent,

v.

Todd Draper, Mortgage Electronic Registration Systems, Inc., acting, Shawn Kephart, Matthew H. Henrikson, The United States of America, by and Through its Agency, South Carolina Department of Revenue, Branch Banking and Trust Company, and Linkside III Homeowners Association, Inc.,

Of Whom Todd Draper and Matthew H. Henrikson are .....Appellants.

FINAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

1. SHOULD THE TRIAL COURT HAVE GRANTED THE PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ?

STATEMENT OF THE CASE

This is a mortgage foreclosure action arising out a Note and Mortgage executed in August 2005, by Todd Draper for residential property in Greenville County, South Carolina. The lower court, Greenville County Master in Equity granted Respondent's motion for summary judgment. The Appellant Draper admits that he is in default on the Note, but denies that Respondent has the right to prosecute the foreclosure action and asserts that Respondent failed to present any evidence which would entitle it to summary judgment.

FACTS

On August 25, 2005, Todd Draper (Draper) executed a Note to America's Wholesale Lender in the amount of $245,000.00 which was secured by a Mortgage given on the same date by Draper to Mortgage Electronic Registrations Systems, Inc. (MERS). The Mortgage was recorded in the Greenville County Register of Deeds office at Book 4424 at Page 1799 on August 30, 2005. BAC Home Loans Servicing, L.P., f/k/a Countrywide Home Loans Servicing, L.P. (BAC) filed suit on December 30, 2010 against Appellants and others with an alleged interest in the property seeking a deficiency judgment. Appellant Draper filed an Answer on March 7, 2011. On April 8, 2011 the case was referred to the Master in Equity for Greenville County. Thereafter the Master signed an Order changing the Plaintiff from BAC to Bank of America, N.A.

(Respondent). After some written discovery between the parties respondent filed a motion for summary judgment (R.p. 108) based on an affidavit of Lisa M. Byers, an employee of Bank of America, N.A. (R.p. 110). In documents produced in discovery Respondent disclosed that it was the Respondent was only a servicer of the loan which was owned by another entity, Freddie Mac. The Appellants filed and served a motion for Summary Judgment (R.p. 123) and affidavits in opposition to the Respondent's motion on October 19, 2011 (R.p. 116 and R.p. 121). The motions were heard by the Master on October 24, 2011 and the Master granted the Respondent's motion and Denied Appellants' motion in an Order dated January 24, 2012. The Appellants filed their Notice of Intent to Appeal on February 28, 2012.

STANDARD OF REVIEW

Summary Judgment

Summary judgment is appropriate only where there is no genuine issue of material fact and it is clear the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP. In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. Koester v. Carolina Rental Ctr., 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994). In cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment. Summary judgment should be denied where the non-moving party submits a mere scintilla of evidence. Hancock v. Mid-South Mgmt. Co., Inc., 381 S.C. 326, 673 S.E.2d 801 (2009).

Mortgage Forclosures

A mortgage foreclosure is an action in equity. The appellate scope of review of a case heard by a master who enters a final judgment is to determine facts in accordance with the appellate court's view of the preponderance of the evidence. E. Sav. Bank, FSB v. Sanders, 373 S.C. 349, 354, 644 S.E.2d 802, 805 (2007) (quoting Hayne Fed. Credit Union v. Bailey, 327 S.C. 242, 248, 489 S.E.2d 472, 475 (1997)).

Arguments

I. THE TRIAL COURT ERRED IN GRANTING THE RESPONDENT'S MOTION FOR SUMMARY JUDGMENT BECAUSE RESPONDENT LACKS STANDING TO SUE, FAILED TO OFFER ANY EVIDENCE THAT IT WAS THE OWNER OR HOLDER OF THE SUBJECT MORTGAGE NOTE, AND ITS AFFIDAVIT FOR DAMAGES WAS CONTRACDICTED BY OPPOSING AFFIDAVITS THEREBY CREATING A QUESTION OF FACT.

A. Lack of Standing to Sue

The Appellants contend that the lower court erred in granting Respondents' motion for summary judgment because the Respondent failed to offer any evidence that it was the owner of the subject Note or Mortgage and accordingly it lacked standing to bring the foreclosure action. and because the affidavit upon which the Respondent's motion was based was controverted by affidavits in opposition to the motion. (R.p. 116 and R.p. 121). Respondent is not the real party in interest and as such lacks standing to

maintain the foreclosure action. Standing to sue is a fundamental requirement in instituting an action. Joytime Distribs. & Amusement Co. v. State, 338 S.C. 634, 639, 528 S.E.2d 647, 649 (1999). No justiciable controversy is presented unless the plaintiff has standing to maintain the action. Flast v. Cohen, 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968). To have standing, a party must have an interest in the subject matter of the action. Furman University v. Livingston, 244 S.C. 200, 136 S.E.2d 254 (1964). In South Carolina, a party must also be the "real party in interest." S.C.Code of Laws Section 15-5-70 (1976); Richbourg's Shoppers Fair, Inc. v. Stone, 249 S.C. 278, 153 S.E.2d 895 (1967); 59 Am.Jur.2d Parties Section 38 at 394 (1971); see S.C.R.CIV.P. 17(a) and 86. "A real party in interest ... ordinarily is one who has a real, actual, material, or substantial interest in the subject matter of the action, as distinguished from one who has only a nominal, formal, or technical interest in, or connection with, the action." 67A C.J.S. Parties Section 18 at 673-74 (1978); 59 Am.Jur.2d Parties Section 40 at 397 (1971). Dockside Ass'n, Inc. v. Detyens, et al. 285 S.C. 585, 330 S.E. 2d 537 (Ct.App. 1985).

By its own admission, Respondent is not the owner of the loan, debt, or Note. In a letter to Appellant Draper dated March 22, 2010, respondent advises that "[T]he owner of the note is Freddie Mac..... Bank of America services the loan on behalf of the owner." (R.p. 119). As servicer, Respondent merely receives payments from a mortgagor on a loan owned by another entity, it's interest is not real, actual, material, or substantial but rather is only nominal, formal, or technical. Respondent did not offer any evidence of its connection with the subject debt other than to state that it did not own the loan but that it

"serviced" the loan for the actual owner. Its role as servicer or any other connection with the loan or owner of the loan was not developed in the record.

B. Original Note and Mortgage

Even if Respondent has standing to bring the suit, it failed to offer any evidence that it was the holder or owner of the Note and failed to present the original Note at the hearing. Through discovery, Appellants requested that the Respondent produce for inspection the original Note and Mortgage. The originals were never produced (R.p. 87) and were not offered at the hearing or put in the record. Respondent has never asserted that it is in possession of the original Note or Mortgage nor has it ever asserted that the original documents have been lost, destroyed or stolen.

The Note is a negotiable instrument subject to the UCC. At the time of the closing and issuance of the Note and Mortgage, the former version of the UCC, S.C. Code § 36–1–101 (2003) et seq. ("Former Article 3"), was the applicable law and should be applied to this case. Former Article 3 governs commercial paper, see S.C. Code § 36–3–101 (2003), which includes a note secured by a mortgage on real property. Swindler v. Swindler, 355 S.C. 245, 251, 584 S.E.2d 438, 441 (Ct.App.2003) ("Thus, even when executed simultaneously with a mortgage, a note remains subject to the provisions of Article 3." (citing Northwestern Bank v. Neal, 271 S.C. 544, 546–47, 248 S.E.2d 5)). Under Former Article 3, "The holder of an instrument whether or not he is the owner may transfer or negotiate it and ... discharge it or enforce payment in his own name." S.C. Code § 36–3–301 (2003). A holder of a negotiable instrument is defined as "a person

who is in possession of ... an instrument ... drawn, issued, or indorsed to him or to his order or to bearer or in blank." S.C. Code § 36–1–201(20) (1976).

S.C. Code § 36-3-804 (2003) provides that *the owner* of an instrument which is lost destroyed or stolen may maintain an action "in his own name" with proof of ownership and facts which prevent the production of the instrument and its terms. The Official Comment to that Section observes that such an owner is not a holder because he is not in "possession of the paper". Logically, as the General Assembly clearly intended, in order to be a holder of a Note, one must be in possession of the *original* paper. In the absence of the production of the original note by a holder, then the owner of the Note must proceed as required by 36-3-804 (2003) by affirmatively ownership and right to recover.

Respondent offered no evidence that it was either the owner of the Note, the holder of the Note, in possession the Note, or that the Note had been lost, destroyed or damaged. The affidavit of Respondent employee Lisa M. Byers (R.p. 110) makes no claim that Respondent owns the Note, holds the Note, is in possession of the Note or is otherwise connected to the Note in any way except that Respondent maintains records from which the affiant can determine what is owed at a particular point in time on the subject loan. The record is devoid of any evidence that Respondent is the owner or holder of the Note and granting summary judgment was in error.

C. Opposing Affidavits

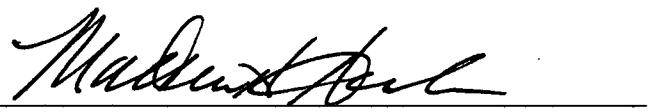
Appellants submitted affidavits in opposition to Respondent's motion for summary judgment and the Byers affidavit in particular. Admittedly, the inaccuracies

identified in the Byers affidavit are not related to the Note but rather are related to charges for expenses claimed to have been incurred by Respondent. Respondent claims numerous expenses for "occupied inspection" and "lawn cuts". (R.p. 113) The affidavits specifically refute that those events occurred thereby creating a question of fact as to the accuracy of the Byers affidavit, which was the sole factual basis upon which the amount claimed by respondent was made. The existence of factual inaccuracies, however minor, related to expenses claimed by Respondent cast doubt on the entirety of the affidavit, which was clearly sworn to by someone with no personal knowledge of the actual facts alleged.

With no live witnesses to be cross examined, and sole reliance on the factual assertions in an affidavit to prove its damages case, Respondent should be held to a strict requirement of accuracy and *any* questions of fact as were created by the opposing affidavits should defeat summary judgment as a scintilla of evidence as to the inaccuracy of the affidavit and thus Respondent's prima facie case.

CONCLUSION

For the reasons set forth above, this Court should reverse the lower court's grant of summary judgment.



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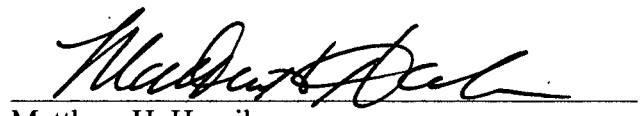
CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

September 27, 2012



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