

ORIGINAL

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 areAppellants.

FINAL REPLY BRIEF OF APPELLANTS

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I. THE RESPONDENT, AS SERVICER AND NON-HOLDER AND NON-OWNER OF THE NOTE, LACKS STANDING TO MAINTAIN THE FORECLOSURE ACTION IN ITS NAME.

Respondent correctly cites that neither this Court nor the South Carolina Supreme Court has precisely addressed the issue of whether a mortgage loan servicer who is not the owner or holder of the note has the right to maintain a foreclosure action which derives from the note that it does not own or hold. Appellants concede that Respondent is the servicer of the subject mortgage and Respondent appears to concede in its Brief (p.4) that is not the owner of the note but rather that Freddie Mac is the owner.

Respondent argues that the Supreme Court has implicitly acknowledged servicers' role in foreclosures by defining "servicer" in the Administrative Order In Re Mortgage Foreclosure Actions, 396 S.C. 209, 720 S.E. 2d 908 (2011). (Brief of Respondent p.5) The Order does not define servicer or outline any rights of the servicer in foreclosures, rather it expands the definition of Mortgagee to include parties "acting on behalf of the owner and holder of the note and mortgage" for the purposes of the Administrative Order and actually distinguishes servicers from owners and/or holders of the note.

The only South Carolina Court to make reference to a requirement of note ownership in order to foreclose was this Court in U.S. Bank Trust National Association v. Bell, 385 S.C. 364, 684 S.E. 2d 199 (Ct. App. 2009) when observing that "[G]enerally, the party seeking foreclosure has the burden of establishing the existence of the debt and the mortgagor's default on that debt" (385 S.C. at 374). In support of that proposition, the Court in footnote "9" cites cases from Connecticut and New York which suggest that ownership of the instruments controls the ability to maintain an action for foreclosure:

See, e.g., Franklin Credit Mgmt. Corp. v. Nicholas, 73 Conn.App. 830, 812 A.2d 51, 57–58 (2002) ("In a mortgage foreclosure action, to make out its prima facie case, the foreclosing party had to prove by a preponderance of the evidence that it was the owner of the note and mortgage and that the [defendant] had defaulted on the note.") (internal quotations omitted) (internal citations omitted); Campaign v. Barba, 23 A.D.3d 327, 805 N.Y.S.2d 86, 86 (N.Y.App.Div.2005) ("To establish a prima facie case in an action to foreclose a mortgage, the plaintiff must establish the existence of the mortgage and mortgage note, ownership of the mortgage, and the defendant's default in payment.") ... (S.C. 385 at 380).

Respondent cites several out of state cases, including cases in Bankruptcy Court which are relying on the law of states other than South Carolina. Citation of the holding in In re Tainan, 48 B.R. 250 (Bankr. E.D. Pa. 1985) that a servicer's standing to seek relief from the stay is in accord with Rule 17(a) of the Federal Rules of Civil Procedure is unpersuasive because in the case at bar there was no evidence offered as to what rights, duties, or responsibilities Respondent had in its service/debt owner relationship with Freddie Mac other than to collect monthly checks from the mortgagor. The citation of CWCapital v. Chi. Props., LLC, 610 F.3d 497 (7th Cir. 2010) is likewise unpersuasive in the face of a complete lack of evidence of any servicer agreement in the record.

Respondent's reliance on the two South Carolina Bankruptcy Court cases which it cites, In Re Woodberry, 383 B.R. 373 (Bankr. D.S.C. 2008) and In Re Neals, 459 B.R. 612 (Bankr. D.S.C. 2011) is also misplaced. In each of those cases, the issue involved standing to request relief from a stay, not specifically to prosecute the foreclosure of a mortgage, which presumably would be done in state court pursuant to state law upon the lift of the stay. Moreover, Woodberry and Neals are easily distinguishable from the facts in the case at bar because in each of those cases (Woodberry at 383 B.R. 376 and Neals at 459 B.R. 614) the servicer produced the original note and thus by definition under S.C Code Ann. 36-3-301 (1976) it became at least a non-holder in possession of the note and had the right to collect on the note.

II. FAILURE TO PRODUCE THE ORIGINAL NOTE IS A GENUINE ISSUE OF MATERIAL FACT; A PHOTOCOPY UNDER THE RULES OF EVIDENCE DOES NOT SUFFICE

Respondent admits that it failed to introduce the original note or mortgage into the record and instead offered copies. By simply having a copy of the original note, Respondent argues, its possession of the original cannot be questioned. However, Appellants requested an inspection of the original nearly a year before the summary judgment hearing (R.p. 86) and the response was that Respondent would make

the original available but it never did (R.p. 87). When the original was not even produced into evidence at the hearing, there arose a genuine question as to the authenticity or even existence of the original and accordingly of whom may be in possession or ownership of it as contemplated by South Carolina Rules of Evidence Rule 1003. Rule 1002 states that an original document is required to prove the contents thereof unless otherwise provided for by the Rules of Evidence or statute. There was no evidence that the duplicate accurately reflected the note at the time of its entry into evidence but only as of the time that the duplicate was rendered, which was not reflected on the duplicate and which leaves open the possibilities of any number of subsequent endorsements and transfers of ownership. Moreover, the Appellants' discovery responses did not admit to the authenticity of the duplicate (R.p. 59) and there was no evidence of authenticity of the duplicate offered below other than the bare submission to the Court by counsel.

Even if a duplicate satisfied Rule 1003, the law in South Carolina requires presentation of the original note upon demand for collection or in the alternative, the *owner* of the note must proceed under S.C. Code § 36-3-804 (2003) which 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. As argued in the Brief of Appellant, the Official Comment to that Section observes that such an owner is not a holder because he is not in "possession of the paper". 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 proving ownership and right to recover. Respondent argues that the note stayed with "one entity, while only the entity's name and ownership changed" but if so, where is it, or at least why was the procedure proscribed by S.C. Code § 36-3-804 (2003) not complied with? Ownership has been transferred somehow to Freddie Mac, but without the original note true ownership cannot be verified by the Appellant only guessed at based on information provided by Respondents which amounts to a failure of proof. There is no evidence in the

record nor does Respondent offer any explanation in its Brief as to why without the original note it did not comply with S.C. Code § 36-3-804 (2003).

Lastly, Affidavits of Draper and Henrikson do create a question of fact as to ownership of the note, although that fact seems to have been admitted by Respondent in its Brief. The standing issue is a derivative of the note ownership issue in that it is a legal issue based upon facts which have either been admitted to by Respondent or not yet properly developed. While it is true that an issue does not defeat summary judgment simply because it is a novel issue, Appellants contend that the facts are not developed enough and the record was not developed enough for summary judgment to have been properly granted in this case.

III. CONCLUSION

For the reasons stated above, the Court should reverse the lower Court's grant of summary judgment.



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CERTIFICATE OF COUNSEL

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

September 27, 2012



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