THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Hon. D. Garrison Hill, Circuit Court Judge
Case No. 2012-CP-23-2080

South Carolina Court of Appeals Appellate Case No. 2012-212893

Edward J. Rivera and Michele L. Rivera APPELLANTS,

v.

BAC Home Loans Servicing, L.P. RESPONDENT.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

BAC Home Loans Servicing initiated foreclosure proceedings against the Plaintiff concerning the subject property on August 20, 2009 (Civil Action Number 2009-CP-23-7123). R. pp. 25-32. As shown by the Affidavits of Service filed in that action, the Appellants were served on August 20, 2009. R. pp. 109-110. No Answer or other responsive pleadings were filed by the Appellants, as shown by the Affidavit of Default filed on April 5, 2010. R. p. 111. The case was referred to the Honorable Charles B. Simmons, Jr. as Master in Equity for Greenville County and a final foreclosure hearing was held on September 3, 2010. Although having been duly notified of the hearing, as shown by the Notice of Hearing filed August 23, 2010, the Appellants did not attend. R. pp. 112-113. At the hearing, Judge Simmons found that the Respondent had standing to bring the action, the court had subject matter jurisdiction, and he entered judgment in favor of the Respondent. R. pp. 1-20. The Master in Equity's Report and Judgment of Foreclosure and Sale was filed on September 7, 2010, and a judicial sale of the property was held on October 4, 2010. The Respondent (plaintiff in the foreclosure action) was the successful bidder at the foreclosure sale. R. pp. 114-116. The Court's records do not reflect any SCRCP Rule 59 or 60(b) motions filed regarding the Master in Equity's Report and Judgment of Foreclosure and Sale, nor any appeal from the Master in Equity's ruling.

The quiet title action resulting in this appeal was filed by the Appellants on March 23, 2012, approximately one and a half years after completion of the foreclosure action. R. pp. 33-40. The action alleged that the Respondent was not the real party in interest pursuant to Rule 17(a) of the South Carolina Rules of Civil Procedure and cited this as

grounds that the prior foreclosure should be overturned. R. p. 38, lines 16-17. Alternatively, the Appellant sought relief under Rule 60(b) alleging fraud on the court. R. p. 38, line 21-p. 39, line 15. Thereafter, on or about April 11, 2012, Respondents filed a Motion to Dismiss Appellants' Complaint. On May 3, 2012, Appellants filed a Motion for Judgment on the Pleadings. Both motions were heard on May 29, 2012. At the hearing, Respondents filed a Memorandum in Support of its Motion to Dismiss and in Opposition to Appellants' Motion for Judgment on the Pleadings. R. pp. 85-87. With leave of the Court, Appellants later filed a Memorandum in Support of its Motion for Judgment on the Pleadings. R. pp. 101-108. Subsequently, on August 8, 2012, the Honorable D. Garrison Hill entered an Order granting Respondent's Motion to Dismiss and Denying the Plaintiff's Motion for Judgment on the Pleadings. R. p.21-24.

Appellants filed a Notice of Appeal with the Court of Appeals on September 6, 2012, and filed their Initial Brief January 15, 2013. Respondent is now filing their Initial Brief with the Court of Appeals.

ARGUMENTS

I. THE APPELLANTS ARE INCORRECT IN ASSERTING THAT UNDER SOUTH CAROLINA LAW STANDING TO SUE IS A SUBJECT MATTER JURISDICTIONAL ISSUE THAT DETERMINES A COURT'S ABILITY TO HEAR A CASE IN CONTROVERSY AND ACCORDINGLY APPELLANTS ARE TIME BARRED FROM SEEKING RELIEF UNDER RULE 17(a).

Standing is "a party's right to make a legal claim or seek judicial enforcement of a duty or right." *Blacks Law Dictionary* 671 (3rd pocket ed. 1996). Subject matter jurisdiction on the other hand is "jurisdiction over the nature of the case and the type of relief sought; the extent to which a court can rule on the conduct of persons or the status of things." *Blacks Law Dictionary* 396 (3rd pocket ed. 1996). "A plaintiff must have

standing to institute an action." *Mulherin-Howell v. Cobb,* 326 S.C. 588, 597 608 S.E.2d 587, 592 (Ct. App. 2005). To have standing, one must be the real party in interest and therefore have a stake in the action. *Id.* The issue of whether a party has standing does not involve subject matter jurisdiction. *Bardoon Properties, NV v. Eidolon Corporation*, 326 S.C. 166, 170-71 485 S.E. 2d 371, 373-74, (1997).

In *Bardoon Properties*, Bardoon leased office space to Eidolon Corporation in January of 1992. *Id.* at 168, 372. Bardoon went into foreclosure and in June of 1992, Provident purchased the property at foreclosure sale. *Id.* In March, 1993, Eidolon vacated the premises and subsequently Bardoon brought suit against Eidolon for breach of lease in August of 1993. *Id.* Eidolon failed to answer in a timely fashion and was held in default. *Bardoon Properties*, 326 S.C. at 168, 485 S.E. 2d at 372. Subsequently, Eidolon filed a motion to set aside default, which was denied and damages were awarded to Bardoon. *Id.*. Eidolon filed a motion to reconsider, which was also denied. *Id.*

"On appeal, the Court of Appeals held Eidolon had waived any challenge to Bardoon's status as real party in interest by failing to object prior to entry of default. Eidolon sought rehearing, claiming the issue was one of subject matter jurisdiction such that it could be raised at any time" and The South Carolina Supreme Court granted certiorari. *Id.*

> The right of a plaintiff to maintain a suit, while frequently treated as going to the question of jurisdiction, goes, in reality to the right of the plaintiff to relief rather than to the jurisdiction of the court to afford it. 21 C.J.S. Courts § 16 (1990). A challenge to a party's status as real party in interest must be made promptly or the court may conclude the point has been waived. 6A Charles Alan Wright, Arthur R. Miller and Mary Kay Kane, *Federal Practice and Procedure,* § 1554, pp. 406–407 (1990) (hereinafter, Wright, Miller and Kane). *See also Gogolin & Stelter v. Karn's Auto Imports, Inc.* 886 F.2d 100, 102 (5th Cir.1989), *cert. denied* 494 U.S. 1031, 110 S.Ct. 1480, 108 L.Ed.2d 617(defendant waived defense that plaintiff was not real party in interest by

> failing to timely raise issue); *Hefley v. Jones,* 687 F.2d 1383, 1388 (10th Cir.1982) (real party in interest defense is for defendant's benefit and is waived if not timely raised); *Fox v. McGrath,* 152 F.2d 616, 618–619 (2nd Cir.1945), *cert. denied,* 327 U.S. 806, 66 S.Ct. 966, 90 L.Ed. 1030 (since real party in interest rule is for defendants' protection, it is not jurisdictional and is freely waivable); *Bielski v. Zorn,* 627 N.E.2d 880 (Ind.1994) (if action is brought by other than real party in interest, remedy is not dismissal for lack of subject matter jurisdiction). *Bardoon Properties*, 326 S.C. at 169-70, 485 S.E. 2d at 373.

Accordingly, the Supreme Court held that standing does not involve subject matter jurisdiction and the Court of Appeals correctly held that Eldon's assertion of lack of standing, having not been timely raised prior to the entry of default, was waived. *Id.* at 373-74, 171-72.

In emphasizing the difference between standing and subject matter jurisdiction, the Supreme Court in *Bardoon Properties* cites the Indiana case of *Bielski v. Zorn*. *Bardoon Properties*, 326 S.C. at 170, 485 S.E. 2d at 373. In *Bielski*, the court held standing is not a question of subject matter jurisdiction. *Bielski v. Zorn*, 627 N.E.2d 880, 888 (Ind. Tax Ct.1994). The court goes on to make clear that standing is a judicial creation used to determine whether the complaining party is the correct person to invoke the court's power. *Id.*

Despite the wealth of authority holding that standing is not a part of subject matter jurisdiction, the Appellant attempts to use *Lennon v. South Carolina Coastal Council* to reach a different conclusion. The Appellant states "[w]hether or not a party has standing to bring an action before a South Carolina court is a subject matter jurisdictional issue that goes to the court's ability to hear a case or controversy" and cites *Lennon* for this proposition. *Appellants Initial Brief* p. 4. The Respondent must respectfully disagree with this interpretation as such a statement or idea is not to be found anywhere within the case.

In *Lennon*, two business partners bought lots on Folly Beach in 1985. *Id.* at 415, 906. Several years later, in 1993, they applied for permits to build on their lots. *Id.* The council ultimately issued the permits and Lennon, joined by the neighboring property owner of the disputed lots, filed a summons and complaint requesting judicial review of the counsel's decision; thereafter, the circuit court affirmed the decision and Lennon appealed. *Id.* Lennon alleged he was a pro-se litigant acting on behalf of several neighbors of the adjoining lots. *Lennon* 330 S.C. at 415, 498 S.E.2d at 906. Lennon owned no adjoining property and suffered no individual injury, and on these grounds it was determined he had no standing. *Lennon* 330 S.C. at 416, 498 S.E.2d at 907.

The Court draws a clear distinction between *Lennon* and *Bardoon Properties* by stressing the difference on how standing can be used when a case involves the realm of public law when governmental action is attacked on the grounds that it violates private rights. *Id.* at 415, 906. Several other elements of the standing doctrine are clearly unrelated to the proposition set forth in Rule 17(a). *Lennon* 330 S.C. at 417, 498 S.E.2d at 907.

Lennon involves a decision made by The South Carolina Coastal Counsel, which affects the rights of private individuals as to the use of their property. *Bardoon Properties* deals with the issue of standing and real party in interest as it relates to real property and foreclosure, which are the exact same issues in the case at bar. The South Carolina Supreme Court has gone through great lengths to distinguish standing from subject matter jurisdiction, thus making it clear that the two principals are mutually exclusive. Therefore, the Appellant cannot maintain an action based upon Rule 17(a) of the South Carolina Rules of Civil Procedure, a rule titled "real party in interest." 17(a), SCRP.

Furthermore, the rule clearly states that even in the event that an action was not brought by the real party in interest "[n]o action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time as been allowed, after objection, for ratification of the commencement of the action..." 17(a), SCRP. Based upon the exact wording of the rule it is abundantly clear that a 17(a) objection can only be brought within the course of the action, not over a year later in a separate action, which is the situation with the case at bar.

II. THE CIRCUIT COURT JUDGE WAS CORRECT IN HIS DENIAL OF THE APPELLANTS' MOTION FOR JUDGMENT ON THE PLEADINGS, AS THE APPELLANTS FAILED TO MEET THE APPROPRIATE STANDARD AND THE RESPONDENT PRESENTED EVIDENCE OF ITS STANDING.

A. An Assignment of Mortgage is not indicative of the date of transfer of ownership or even necessary to establish ownership.

The granting of a Motion for Judgment on the Pleadings is a drastic measure and should be granted only where the pleadings are so defective that, even when taking the facts alleged as admitted, no cause of action or defense could be sustained. *Lydia v. Horton*, 343 S.C. 376, 540 S.E. 2d 102 (Ct. App. 2000). The Appellants' basis for asserting that the Respondent lacks standing is based on the date of the assignment of mortgage. An assignment of mortgage of public record serves to put the world at large on notice of the transfer and is not indicative of the date of the transfer of a negotiable instrument. R. p. 22, lines 15-23. An assignment of a note and mortgage serves as evidence of a prior transfer and evidence of the party's standing to enforce the note and mortgage. R. p. 22, lines 23-24. There is no law requiring that an assignment of mortgage be recorded. *Williams & co. v. Paysinger*, 15 S.C. 171, 174 (1881).

In *Talbert v. Talbert*, Farmer Bank denied the assignment of a note and mortgage to Ms. Talbert and contested her right to foreclosure. *Talbert v. Talbert*, 97. S.C. 136, 81 S.E. 644, 647 (1914). Ms. Talbert alleges that she paid valuable consideration for the mortgage and states that an assignment was executed, that the assignment of mortgage was not recorded, and that neither an original nor a copy could be found. *Id.* The court stated "[t]he complaint avers 'that the plaintiff is now the legal owner and holder of said mortgage.' The note is payable to bearer, and plaintiff stated he was the owner of the note, that inasmuch as he had possession of the note, which itself is prima facie evidence of ownership ... and was all that was necessary to sustain the action." *Id.* at 136, 647.

In the present case, in further evidence of the Respondent's standing to bring the action and as grounds to deny the Appellants' Motion for Judgment on the Pleadings, counsel for the respondent submitted to the Court a copy of the original Note, Mortgage and Assignment of Mortgage. R. pp. 85-87. Counsel had the original documents in his possession on behalf of his client. R. pp. 85-87. Said note is endorsed in blank and is in the possession of the Respondent. R. p. 75, lines 7-15. Similar to *Talbert v. Talbert*, the Respondent was in possession of the original note and mortgage, ownership was alleged in their complaint and the Master in Equity similarly found it was entitled to foreclose.

"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 Ann. § 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 his order or to bearer or in blank.'" *Kain v. Bank of N.Y. Mellon* (*In re Kain*), Ch. 13 Case No. 08-08404-HB, Adv. No. 10-80047-HB, Adv. No. 10-80047-HB, slip op. at 7 (D. SC. Mar.

30, 2012). When an instrument is indorsed in blank, it becomes payable to the bearer and may be negotiated by delivery alone. *Id.* (*citing* S.C. Code Ann. § 36-3-204(b) (2003)). "Possession of a bearer instrument is prima facie evidence of ownership." Id. (*citing* In re Woodberry, 383 B.R. 373, 377 (Bankr.D.S.C.2008). Further, the possession that is required by Former Article 3, to constitute a person as a holder, may be the constructive possession achieved by delivering the instrument to one on his behalf. *In re Kain* at 7. Therefore, a person is the holder of an instrument when it is in the possession of his agent. *Id.* "If the underlying note is payable to bearer, then a separate assignment is not required; the possession of the note and mortgage is prima facie evidence of an assignment." 5 S.C. Jur. Assignments § 37 (2012). The endorsement of a negotiable note secured by a mortgage and the delivery of the mortgage to the endorsee, without a written assignment, were held to constitute an assignment of mortgage. *Wright v Eaves*, 10 Rich.Eq. 582, 585, 31 S.C.Eq.582, 585 (1858).

Therefore, the Circuit Court Judge was correct in finding that the date of the assignment of mortgage was immaterial, that the Appellant did not meet the high standard to obtain a judgment on the pleadings, and in deciding that a determination of whether standing is tantamount to subject matter jurisdiction was unnecessary.

III. THE CIRCUIT COURT WAS CORRECT IN RULING THE APPELLANTS ACTION IS BARRED BY THE PRINCIPALS OF RES JUDICATA AND PROPERLY GRANTED THE RESPONDENT'S 12(B) MOTION TO DISMISS.

The doctrine of res judicata bars a litigant from bringing an action with any issues that were adjudicated in a prior suit and any issues which might have been raised in a former suit. *Plum Creek Development Co., Inc v. City of Conway*, 334 S.C. 30, 512 S.E. 2d 106 (1999). The doctrine of res judicata is comprised of three elements: 1) the parties

must be identical, 2) the subject matter must be identical, and 3) the subject issue must have been litigated in the former suit. *Id.* at 34, 109 "Res judicata is the branch of the law that defines the effect a valid judgment may have on subsequent litigation between the same parties and their privies. Res judicata ends litigation, promotes judicial economy and avoids the harassment of relitigation of the same issues." *Id.* at 34,108 (citing J. Flanagan, *South Carolina Civil Procedure* p. 642 (1996)).

The Respondent's prior foreclosure action involved the same parties as the instant action and involved the same subject matter as the instant action (i.e., the bank's standing to bring a foreclosure action as to the subject property), and that issue was ruled on in the previous action. R. p. 27-32 and pp. 1-8. Furthermore, the fact that the Respondent clearly meets all three elements of the doctrine of res judicata is not denied by the Appellants. *Initial Brief of Appellant.* Instead the Appellant attempts to incorrectly assert that res judicata should not apply to the instant action as it would contravene other important public policy. Appellants cite *Johns v Johns* for the proposition that although res judicata is based on sound public policy, it is not to be applied rigidly so as to defeat the ends of justice. *Johns*, 309 S.C. 199, 203, 420 S.E. 2d. 856, 859 (Ct. App. 1992). While true that res judicata should not be applied so rigidly as to contravene public policy, such would not be the case in the instant action. Both cases citied by the Appellants to support their proposition are family court cases. In *Johns* the court declines to apply res judicata and determines that a couple was not married under common law despite a previous court order, which ruled that a common law marriage existed. *Johns, 309 S.C. at 203,420 S.E.2d at859.* The court was willing to reach this conclusion because one party was already legally married during the period of cohabitation. *Id.* at

201, 857. Had the court ruled otherwise, it would have contravened the public policy against bigamous marriages.

Next the Appellants cite *Jennings v Dargan,* in which the court held a settlement regarding paternity and child support void. 308 S.C. 317, 318, 417 S.E. 2d 646 (Ct. App. 1992). "The court concluded that res judicata did not apply because the order entered in the earlier case was not a valid final order since the court at that time did not comply with the applicable statute and made no finding that the settlement was 'a fair one, in the best interest of the minor, and it was not approved by [the court].'" *Id.* The Court of Appeals confirmed this decision and stated "where two policies conflict ...the more overriding concern is the protection of the interest of minors." *Id.* at 321, 648. These two cases set forth two extremely important public polices recognized nationwide, the illegality of bigamous marriages and the importance of protecting minors. However, the Appellants fail to set forth any public policy relevant to the present action.

Instead, the Appellants talk generally about the wide spread foreclosure "epidemic" and robo-signing. *Appellants Initial Brief* p. 10. However, there have never been any allegations that there was anything improper relating to the execution of the mortgage or foreclosure at issue other than the claim that the Respondent lacked standing. Furthermore, the Appellants were given a full and fair opportunity to raise any such allegations in the previous action. The Appellants were served with the foreclosure action, and a notice of hearing was sent to the Appellants on 8/20/2010. Yet the Appellants declined to file a notice of appearance, an answer or attend the hearing. They further failed to file any motions to have the foreclosure judgment reconsidered and to date have still never alleged any behavior on the part of the Respondent that contravenes

any public policy. No additional evidence or information is referred to in the quiet title action that was not readily available at the time the foreclosure action was filed.

This case is the epitome of the exact scenario that the doctrine of res judicata seeks to avoid. The present action is so intertwined with the former foreclosure that it is impossible to separate the two. The Appellants entire action is a recitation of the facts and issues determined in the prior action in which new or additional facts, evidence, or issues are brought before the court. Therefore the Circuit Court Judge correctly determined res judicata barred the Appellants quiet title action and granted the Respondent's 12(b) Motion to Dismiss and decided that a determination of whether standing is tantamount to subject matter jurisdiction was unnecessary.

IV. EVEN IF THE RESPONDENT HAD LACKED STANDING IN THE FORECLSOURE ACTION, THE APPELLANTS FAILED TO SEEK THE PROPER RESOLUTION.

A. The Appellants incorrectly claimed that the Respondent is not the real party in interest as set forth in Rule 17(a) and furthermore asked for the incorrect relief had there in fact been an issue under 17(a).

As previously discussed above, if a party lacks standing brings an action, the remedy is not dismissal for lack of subject matter jurisdiction. Rule 17(a), SCRP. "No action 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 ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest." Rule 17(a), SCRP. In accordance with Rule 17(a), the proper course of action for the Appellants would have been to plead their concerns in the foreclosure action. The Master in Equity ruled on the

issue of standing in the foreclosure action, and the Appellants made no assertions to the contrary or filed any motions in objection of this conclusion within the time allowable after final judgment. R. p. 2, lines 13-18.

Even taking the Appellants incorrect premise that the Respondent lacked standing when it brought the foreclosure action to be true, their argument still fails. Rule 17(a) allows for ratification of the real party in interest and such ratification shall have the same affect as though the action was commenced by the real party in interest. Rule 17(a), SCRP. The Respondent, by having an assignment executed and recorded with the county shortly after commencement of the action, therefore effectively ratified their standing as real party in interest as allowed by the Rule, thus making any future objections pursuant to Rule 17 irrelevant. The Appellants only qualm with the assignment is that it was executed and recorded after the action commenced. R. p. 38, lines 1-3. They raise no other issues or arguments that go to the question of standing and real party in interest and raise no actual questions of subject matter jurisdiction. See generally R. pp. 33-69 *and Initial Brief of Appellant.*

B. The Appellants incorrectly assert that they are entitled to relief under Rule 60(b) for fraud on the court. Furthermore, even if there was a claim to be made under Rule 60(b)(3), it was not timely made by the Appellants.

In their complaint, the Appellants assert a cause of action for fraud on the court, claiming that the Respondent had fraudulently obtained judgment by misrepresenting that it was the actual owner and holder of the note and mortgage. R. pp. 38-39. As explained in the above arguments, these assertions are incorrect as the Respondent clearly was the owner and holder of the note and mortgage at the time that the action was filed and at the time of entry of judgment. Even if that had not been the case, Rule 60 states that claim of

fraud "shall be made within a reasonable time, and ... not more than one year after the judgment, order, or proceeding was entered or taken." Rule 60, SCRP.

In the prior foreclosure action, the Appellants were held in default, a default hearing was held before Judge Simmons, and a final order and judgment were entered. R. pp. 1-20. At the hearing, the Judge made a ruling as to subject matter jurisdiction and no objections were made or motions filed. The Appellant has no grounds based upon any rule or case law on which they can base bringing any action to void or set aside the Master In Equity's Report and Judgment of Foreclosure and Sale entered on September 3, 2010 and filed on September 7, 2010.

CONCLUSION

Wherefore, based on the forgoing, the Respondent respectfully submits that this Court should affirm the decision of the Circuit Court to dismiss the Appellants' action to quiet title.

April 3, 2013

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CERTIFICATE OF COUNSEL

The undersigned counsel for the Respondent does hereby certify that the Final Brief of the Respondent complies with Rule 211(b) SCACR.

April 3, 2013

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CERTIFICATE OF SERVICE

The undersigned counsel for the Respondent does hereby certify that she has served the Appellants counsel with a copy of the **Brief of Respondent** and **Certificate of Service** by mailing a copy of the same on the date below via UPS Next Day Air to the following address:

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