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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

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

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APR 05 2013

SC Court of Appeals

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

Edward J. Rivera and Michele L. Rivera,

Appellants

vs.

BAC Home Loans Servicing, L.P.

Respondent

FINAL BRIEF OF APPELLANTS

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PO Box 8246
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STATEMENT OF ISSUES ON APPEAL

1. DID THE CIRCUIT COURT JUDGE ERR IN RULING THAT WHETHER OR NOT STANDING TO SUE IS TANTAMOUNT TO SUBJECT MATTER JURISDICTION NEED NOT BE CONSIDERED WHEN RULING ON APPELLANT'S MOTION FOR JUDGMENT ON THE PLEADINGS AND RESPONDENTS MOTION TO DISMISS?
2. DID THE CIRCUIT COURT JUDGE ERR IN RULING THAT APPELLANTS LACK OF STANDING ARGUMENT FAILED?
3. DID THE CIRCUIT COURT JUDGE ERR IN RULING THAT APPELLANTS' ACTION WAS BARRED BY THE DOCTRINE OF RES JUDICATA AND GRANTING RESPONDENT'S RULE 12(b)(6) MOTION TO DISMISS?

STATEMENT OF THE CASE

On November 10, 2004, Appellants made, executed and delivered to Countrywide Home Loans, Inc. a certain Note (the "Note") in the amount of \$116,519.00. *Note (R. pp.42-43)*. On that same date, to wit November 10, 2004, Appellants made, executed and delivered to Mortgage Electronic Registration Systems, Inc., as nominee for Countrywide Home Loans, Inc., its successors and assigns, a certain Mortgage (the "Mortgage") encumbering real property known as 110 Confederate Circle Taylors, South Carolina 29687 ("real property"). *Mortgage (R. pp.45-51)*. Subsequently, Respondent filed a Complaint for foreclosure on August 20, 2009. *Foreclosure Complaint (R. pp.27-32)*. The Foreclosure Complaint alleged subject matter jurisdiction in paragraph 6 of the Foreclosure Complaint by alleging "[o]n December 7, 2004, said Mortgage was recorded in the Greenville County Registry in Mortgage Book 4281 at page 962. Thereafter the Mortgage was assigned to the Plaintiff herein." *Foreclosure Complaint, para 6 (R. p.28)*.

A Judgment of Foreclosure and Sale (the "Foreclosure Judgment"), was signed by Master-in-Equity Charles B. Simmons, Jr. on September 3, 2010, and filed on September 7, 2010. *Judgment of Foreclosure (R. pp.1-20)*. The Foreclosure Judgment states that "[b]y Assignment of Mortgage dated August 27, 2009, and recorded in the office of the Register of Deeds/RMC Office for Greenville County in Book 5054 at page 1908 on September 1, 2009, Mortgage Electronic Registration Systems, Inc., as nominee for Countrywide Home Loans, Inc. assigned the subject note and mortgage to BAC Home Loans Servicing, L.P. f/k/a Countrywide Home Loans Servicing, L.P. By virtue of said assignment, the Plaintiff in this action is the owner and holder of the note and

mortgage.” Judgment of Foreclosure (emphasis added) (R. p. 2) . A judicial sale of the property was held on October 4, 2010 with Respondents being the successful bidder at the foreclosure sale. Appellants remain living in the home as their primary and only residence.

Subsequently, the instant action was filed by Appellants on March 23, 2012 seeking a quiet title action to restore title to the real property to Appellants. Appellants Quiet Title Action contains two causes of action and seeks restoration of title to Appellants based on Respondents lack of standing to bring the underlying prior foreclosure action. *Complaint (R. pp.33-69)*. Thereafter, on or about April 11, 2012, Respondents filed a Motion to Dismiss Appellants Complaint. *Motion to Dismiss Complaint (R. pp. 83-84)*. On May 3, 2012, Appellants filed a Motion for Judgment on the Pleadings. *Motion for Judgment on the Pleadings (R. pp.88-100)*. A hearing was held to hear both motions by the Circuit Court Judge on May 29, 2012. At said hearing, Respondents filed a Memorandum in Support of its Motion to Dismiss and in Opposition to Appellants Motion for Judgment on the Pleadings. *Memorandum in Support of Motion to Dismiss and in Opposition to Appellants Motion for Judgment on the Pleadings (R. pp.85-87)*. With leave of the Court, Appellants filed its Memorandum in Support of its Motion for Judgment on the Pleadings. *Memorandum in Support of Plaintiff’s Motion for Judgment on the Pleadings (R. pp.101-108)*. Subsequently, on August 8, 2012, the Circuit Court Judge, Honorable D. Garrison Hill, entered and filed an Order granting Respondents Motion to Dismiss and Denying the Plaintiff’s Motion for Judgment on the Pleadings. *August 8, 2012 Order (R. pp.21-24)*.

Appellants filed a Notice of Appeal with the Court of Appeals on September 6, 2012 in response to the Circuit Court Judge's Order. *September 6 Notice of Appeal (R. pp.117)*. Appellants are now filing their Initial Brief dated January 15, 2013, with the Court of Appeals.

ARGUMENTS

I. 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 IS AN ISSUE THAT CAN NEVER BE WAIVED

At issue in this matter is whether Appellant's Motion for Judgment on the Pleadings should be granted and title to the real property at issue in this matter be returned to Plaintiff. In order to decide this issue, it is the Appellants contention that the lower court must determine whether the original judgment of foreclosure on the real property at issue is void and a nullity based on the fact that Respondent lacked the authority, standing, and thus subject matter jurisdiction to bring the original foreclosure action. Appellants' argue that when viewed in the light most favorable to the Respondent, the pleadings clearly establish that Respondent did not have standing to bring the original foreclosure complaint and thus lacked subject matter jurisdiction to enforce the underlying note and mortgage. As such, the foreclosure judgment is void and title to the real property should be returned to Appellants as sought in Appellants Complaint.

Issues of standing and lack of subject matter jurisdiction cannot be waived, even by consent, and can be taken notice of by the court on its own motion *Fielden v. Fielden*, 274 S.C. 219, 269 S.E.2d 43 (1980). *Harden v. S.C. Highway Dept.*, 266 S.C. 119, 124, 221 S.E. 2d 851, 853 (1976). *State v. Gorje*, 256 S.C. 539, 183 S.E.2d 334 (1971),

Hunter v. Boyd, 203 S.C. 518, 28 S.E.2d 412 (1943). Subject matter jurisdiction has been interpreted by South Carolina Courts to mean “a court’s constitutional or statutory power to adjudicate a case” *Johnson v. S.C. Dep’t of Prob., Parole, and Pardon Servs.*, 372 SC 279, 284, 641 S.E. 2d 895, 897 (2007). Whether or not a party has standing to bring an action before a South Carolina court is a subject matter jurisdictional issue that goes to a court’s ability to hear a case or controversy. *Lennon v. South Carolina Coastal Council*, 330 S.C. 414, 498 SE 2d 906 (Ct.App. 1998). “No justiciable controversy is presented unless the plaintiff has standing to maintain the action.” *Brock v. Bennett*, 313 S.C. 513, 519, 443 S.E. 2d 409, 413 (Ct.App. 1994). “A plaintiff must allege an actual controversy in which he has a personal stake.” *Energy Research Found. V. Waddell*, 295 S.C. 100, 102, 367 S.E.2d 419, 420 (1988). *If a court acts without subject matter jurisdiction, its judgments are void and from its inception the judgment is a complete nullity and without legal effect.* *Thomas & Howard Company, Inc. v. T.W. Graham and Co.*, 318 S.C. 286, 281, 457 S.E.2d 340, 343 (1995)(emphasis added); *South Carolina Dept. of Motor Vehicles v. Holzclaw*, 675 S.E. 2d 756 (S.C.Ct. App. 2009); *Fryer v. South Carolina Law Enforcement Div.*, 631 S.E. 2d 918 (S.C. Ct. App. 2006). The law is well settled that when a court has no authority to act, its acts are void. *Russell v. Bea Staple Mfg. Co.*, 266 N.C. 531, 146 S.E.2d 459 (1966); *Davis v. Page*, 125 S.E.2d 60 (Ga.1962); *Cruikshank v. Duffield*, 138 W.Va. 726, 77 S.E.2d 600 (1953).

In the case at bar, the Circuit Court Judge ruled that “a determination as to whether or not standing to sue is tantamount to subject matter jurisdiction is not necessary in considering the motion before me.” *Order (R. p.22)*. Appellants, however, would respectfully disagree with the Circuit Judge’s holding. In support of their position,

Appellants contend that since standing is a component of subject matter jurisdiction, and since an Order executed without subject matter jurisdiction is void and a nullity, a determination as to whether the Respondent's lacked standing to obtain the original Foreclosure Order is crucial in the lower court's analysis of the two motions at issue in this matter.

II. BECAUSE APPELLANTS' ALLEGATIONS THAT RESPONDENT'S LACKED STANDING TO BRING THE ORIGINAL FORECLOSURE COMPLAINT WERE NOT BASED ON THE DATE THE MORTGAGE ASSIGNMENT WAS FILED, THE CIRCUIT COURT JUDGE'S ORDER MUST BE OVERTURNED.

In his Order, the Circuit Court Judge states:

[P]laintiffs allege that the Defendant did not have standing to bring the foreclosure action because the filing of an Assignment of Note and Mortgage into BAC Home loans Servicing, L.P. f/k/a Countrywide Home Loans Servicing, L.P. occurred after the filing of the foreclosure action and, as such, the Defendant did not own the Note and Mortgage until after it filed its foreclosure action. *Order (R. p.22)*

Appellants respectfully disagree with this finding. Appellant's Motion for Judgment on the Pleadings and the oral arguments presented by Appellants at the May 29, 2012 hearing clearly show that this was not the Appellants argument. Rather, the Appellant argued that Respondent lacked standing and thus lacked subject matter jurisdiction to bring the underlying foreclosure action because: 1) the authority to enforce a promissory note via foreclosure of the mortgage associated with said promissory note is found in Article 3 of the South Carolina Uniform Commercial Code, and Respondents failed to allege in its foreclosure complaint and the Foreclosure Judgment does not find that Respondent held the authority to foreclose; and 2) Respondents contention that it had standing to proceed was based on a mortgage assignment that was not even executed until after the original foreclosure complaint was filed.

In support of the above, Appellants would point this honorable court to the May 29th Transcript in which undersigned counsel argued that the underlying foreclosure complaint:

Alleges that it [Respondent] was the holder of the mortgage and note by virtue of the mortgage assignment. It did not allege that it was the holder of the note by virtue of holding the note. In order to negotiate a note in South Carolina, you have to follow the rules of the UCC as set forth in South Carolina. And an assignment of the note by virtue of its mortgage assignment and note does not create a holder status. They did not allege that in the complaint, nor did they prove it. Their entire argument was based on the mortgage assignment, which was not signed and recorded until after the complaint. And until that mortgage assignment is executed or until they are able to establish that they were the actual holder of the note, they had no subject matter jurisdiction. *May 29, 2012 Transcript* (emphasis added) (*R. p. 76, lines 10-19; 25; p. 77, line 1-6*).

Further, Appellants Motion for Judgment on the Pleadings does not argue lack of standing due to the date the Assignment was recorded, rather the motion argues that "the Assignment of Note and Mortgage, through which Defendant claimed to have an interest in the foreclosure action, was not executed until August 27, 2009, and was not filed with the Greenville County Registry of until September 2, 2009. *Motion for Judgment on the Pleadings* (*R. p. 89*).

The Appellant agrees with the Circuit Court Judge's Order that the filing of an assignment of mortgage of public record serves only to put the world at large on record of said assignment and does not have any bearing on the date of transfer of a negotiable instrument. *Order* (*R. p. 22*). This, however, was not the Appellants argument and the Appellant respectfully urges this court to vacate the Order or remand this issue for further consideration of the arguments put forth by Appellants.

III. BECAUSE SUBJECT MATTER JURISDICTION IS AN ISSUE THAT CAN NEVER BE WAIVED AND BECAUSE THE PUBLIC POLICY BEHIND FINDING THE ORIGINAL FORECLOSURE ORDER A NULLITY BASED ON

LACK OF SUBJECT MATTER JURISDICTION OUTWEIGHS THE POLICIES BEHIND THE DOCTRINE OF RES JUDICATA, THE DOCTRINE OF RES JUDICATA IS INAPPLICABLE TO THE CASE AT BAR AND THE CIRCUIT COURT ERRED IN GRANTING RESPONDENTS SCRPC RULE 12(b) (6) MOTION TO DISMISS.

The Circuit Court's August 8, 2012 Order grants Defendant's Rule 12(b) (6) Motion based on its finding that Plaintiff's action is barred by the doctrine of res judicata. For the reasons set forth above and as more fully outlined herein below, Appellants disagree with said finding and respectfully request that the granting of Respondents 12(b)(6) Motion be reversed.

Under Rule 12(b) (6), SCRPC, a defendant may bring a motion to dismiss based upon a plaintiff's failure to state a claim constituting a cause of action. *Bergstrom v. Palmetto Health Alliance*, 352 S.C. 221, 573 S.E. 2d 805 (Ct. App. 2002). A trial judge may dismiss the claim if the defendant demonstrates the plaintiff has failed "to state facts sufficient to constitute a cause of action" in the pleadings filed with the court. *Williams v. Condon*, 347 S.C. 227, 232-233, 553 S.E.2d 496, 499 (Ct. App. 2001) (quoting *Rule 12(b) (6) SCRPC*). When considering a motion to dismiss for failure to state a claim, the trial court must base its ruling solely upon the allegations made on the fact of the complaint. *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999); *Stiles v. Onorato*, 318 S.C. 297, 457 S.E. 2d 601 (1995). If the facts and inferences drawn from the facts alleged on the complaint would entitle the plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper. *Brown v. Leverette*, 291 S.C. 364, 353 S.E.2d 697 (1987); *McCormick v. England*, 328 S.C. 627, 494 S.E.2d 431 (Ct.App.1997). The facts and inferences alleged on the complaint are viewed in the light most favorable to the plaintiff. *Brown v. Leverette*, 291 S.C. 364, 353

S.E.2d 697 (1987); McCormick v. England, 328 S.C. 627, 494 S.E.2d 431 (Ct.App.1997).

In determining whether the trial court properly granted the motion to dismiss, the appellate court must consider whether the complaint, viewed in the light most favorable to the plaintiff, states any valid claim for relief. *Bergstrom*, 352 S.C. at 233, 573 S.E.2d at 811.

In the instant case, the circuit court improperly used the doctrine of res judicata when granting Respondent's Motion to Dismiss. Removing any barriers to Appellants' claims under the theory of res judicata, and when viewing Appellant's claims in a light most favorable to Appellant, Respondent's Motion to Dismiss should not have been granted by the circuit court.

Res Judicata bars subsequent actions by the same parties when the claims arise out of the same transactions or occurrence that was the subject of a prior action between those parties." *Judy v. Judy*, 393 S.C. 160, 172, 712 S.E.2d 408, 414 (2011). To establish res judicata, a defendant must prove three elements: (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit. *Sealy v. Dodge*, 289 S.C. 543, 347 S.E.2d 504 (1986); Rogers v. Kunja Knitting Mills USA, 336 S.C. 533, 537, 520 S.E.2d 815, 817 (1994); Owenby v. Owens Corning Fiberglas, 313 S.C. 181, 437 S.E.2d 130 (Ct.App.1993). "Our courts, however, have found that the doctrine of *res judicata* is not an "ironclad" bar to a later lawsuit." *Garris v. Governing Bd. Of the South Carolina Reinsurance Facility*, 333 S.C. 432, 449, 511 S.E. 2d 48, 57 (1998). Further, even when the defendant meets all of the required elements, res judicata will not be applied "where it will contravene other important public policies; the courts must weigh the competing public policies. *Johns v. Johns*, 309 S.C. 199, 203, 420 S.E.2d

856, 859 (Ct.App.1992). "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." James F. Flanagan, *South Carolina Civil Procedure* 642 (2d ed.1996) (emphasis added).

In *Johns*, an alleged common-law wife appealed a family court order which ruled that no common-law marriage existed. The parties in *Johns* began residing together while the respondent was still married to a third party. The respondent obtained a divorce from the third party in 1988 and in 1989 the parties in the alleged common-law marriage signed a consent order in which the court found they were married at common law and ordered that they were "legally separated". *Johns*, 309 S.C. 199, 201. The appellate court was asked to determine whether a common law marriage ever existed between the parties. In finding that a common law marriage never existed, the court ruled that res judicata shall not be applied to the earlier consent order which found that a common law marriage existed.

Although *res judicata* is based on sound public policy, it is not to be applied rigidly so as to defeat the ends of justice. *Beverly Beach Properties, Inc. v. Nelson*, 68 So.2d 604 (Fla.1953); 46 Am.Jur.2d *Judgments* § 402 (1969). Thus, application of *res judicata* will not be applied where it will contravene other important public policies; the courts must weigh the competing public policies. *Id.* The public policy underlying *res judicata* may have to yield to other public policies, even in consent orders. 47 Am.Jur.2d *Judgments* § 1090 (1969). Here, the public policy expressed in S.C.Code Ann. § 20-1-80 (1985) overrides the public policy of *res judicata*. Although the parties' consent order is not void, the marriage it affirms is void. In balancing the relevant public policies (i.e. the public policy of finality of judgments versus the public policy of not recognizing bigamous marriages) the consent order should not be given *res judicata* effect. Accordingly, we affirm the ruling of the court that *res judicata* does not bar this action. *Cf. Jennings v. Dargan*, 417 S.E.2d 646 (S.C. Ct.App.1992) (where two policies conflict, the court will give deference to the overriding policy). *Id.* at 203. *Johns*, 309 S.C. 199, 203, 420 S.E.2d 856, 859.

Similarly, in *Jennings v. Dargan*, 308 S.C. 317, 417 S.E.2d 646 (S.C. Ct. App. 1992), the Court held that an order approving a settlement regarding paternity and child support was void and thus did not have a preclusive effect against the child in her action for support because the record did not indicate the family court had complied with statutes requiring a finding that the settlement was in the best interest of the minor and requiring review and approval of the settlement. *Id.* 308 S.C. 317, 320-21. The court in *Jennings* acknowledged the policy respecting finality of judgments but stated that the policy expressed in the cited statutes (protecting minors) was the overriding concern. *Id.*

Similar to the *Johns* and *Jennings* cases, res judicata should not be applied to the case as bar as there are other important public policy concerns that outweigh the public policy of res judicata. As this court is aware, South Carolina as well as the nation at large has been through a well-publicized foreclosure crisis in which many of America's largest lenders and loan servicers (including the Respondent) were allegedly involved in a widespread epidemic of improper foreclosures in which foreclosures were often times pushed through the courts without the proper evidence needed to establish a lender's right to foreclosure or with fraudulently executed documents or affidavits signed by individuals who have since admitted that they executed the affidavits without reviewing the validity or the accuracy of the sworn affidavits, so called "robo-signers". As a result of these alleged improper practices, the federal government along with forty-eight states, including South Carolina, reached a settlement agreement to address mortgage servicing and foreclosure abuses. An informational website developed by the state Attorney General offices on the executive committee that negotiated the settlement can be found at <http://www.nationalmortgagesettlement.com>. Respondent is part of this joint settlement

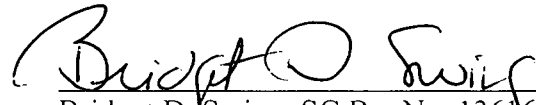
agreement reached with the Federal Government and 48 states, including the state of South Carolina. Appellants are unable to state at this time whether their particular foreclosure falls within the purview of this agreement; however, the fact that the original foreclosure occurred at a time covered by the settlement agreement indicates that Appellants Complaint for Quiet Title should not be summarily dismissed as requested by Respondent in its Motion to Dismiss. In the instant matter, Respondent sought to foreclosure the Appellants property by alleging that it had that right by virtue of an assignment of mortgage that the Respondent knew or should have known did not exist at the time the foreclosure complaint was filed. In addition, the Foreclosure Judgment erroneously states that Respondent in the action was the owner and holder of the note by virtue of an Assignment that did not occur until *after* the underlying complaint was filed. The important public policy of protecting homeowners from wrongful foreclosure should override the public policies behind the theory of res judicata.

As set forth above, a Motion to Dismiss should not be granted if the facts and inferences drawn from the facts alleged on the complaint would entitle the plaintiff to relief on *any* theory. In this case, Appellants' complaint for Quiet Title asks that title to their home be rightfully restored to their names because the Master-in-Equity was without subject matter jurisdiction to adjudicate the matter and thus the Foreclosure Judgment is void. Respondent has failed to meet the elements necessary to prevail in a SCRCP 12(b)(6) motion to dismiss.

CONCLUSION

For the reasons stated herein, this Court should reverse the decision of the Master-in-Equity and remand the matter to allow Appellants to file an Answer or other response to Respondent's Complaint.

Respectfully submitted,


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April 2, 2013
Greenville, SC

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vs.

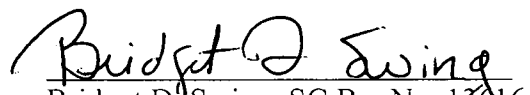
BAC Home Loans Servicing, L.P.

Respondent

CERTIFICATE OF COUNSEL

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

This 4th day of April, 2013


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Respondent

PROOF OF SERVICE

I, the undersigned attorney of record for Appellants, do hereby certify that I have served all counsel in this action with a copy of Appellants Final Brief and Certificate of Counsel in the above referenced matter by mailing a copy of same via regular US Mail, postage prepaid to the following addresses:

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Bridget D. Swing
Bridget D. Swing

This 4th day of April, 2013

Greenville, SC