THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
The Honorable S. Jackson Kimball, III
Master in Equity

Case No.: 2010-CP-46-04307

HSBC Mortgage Services, Inc., Respondent,

v.

James L. Dennis, Enid Dennis, and Stonewood Homeowners Association of York County, Inc., Defendants,

Of whom James L. Dennis and Enid Dennis are the Appellants.

FINAL BRIEF OF RESPONDENT

RILEY, POPE & LANEY, LLC

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STATEMENT OF THE ISSUES ON APPEAL

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STATEMENT OF THE CASE

This case involves a cause of action for the foreclosure of a mortgage involving residential real estate located in York County, South Carolina. The action commenced with the filing of an Amended Lis Pendens, Summons, and Complaint with the York County Clerk of Court on October 6, 2010. All named defendants in the action were served on October 6, 2010. On October 12, 2010, the Dennises filed an Answer to Alleged Complaint and Counterclaim, along with several other documents. Defendant Stonewood Homeowners Association did not respond to the Complaint.

The case was referred to the Honorable S. Jackson Kimball, as Master in Equity for York County, by Motion and Order of Reference filed January 14, 2011, to take testimony, make findings of fact and conclusions of law, and to enter a final judgment with any appeal being directly to the Supreme Court of South Carolina or South Carolina Court of Appeals, as appropriate. Pursuant to the 2011 South Carolina Administrative Order, a Notice of Right to Foreclosure Intervention was mailed to Appellants on August 5, 2011. Appellants responded to the Notice on August 26, 2011, requesting a payoff statement. The payoff statement was mailed to Appellants, and Plaintiff received a Certified Tender of Payment on or about September 5, 2011, purporting to pay off the loan. The check was determined to be fraudulent, having been drawn on the United States Treasury Department and signed by Enid Dennis. The account number was Enid Dennis' social security number.

A Notice of Hearing and Certificate of Mailing was mailed to the Appellants on February 21, 2012, and filed with the Court on February 22, 2012. On March 6,

2012, a bench trial was held before Judge Kimball. Present representing Respondent was Nikole H. Boland, Esquire. Also present were a woman and a man identifying themselves as Akasha el Bey and Imin el Bey, and Richards McCrae, attorney for Stonewood Homeowners Association. A Record of Hearing was presented to the Court, which included an Affidavit of Verified Statement of Account detailing the amount of the outstanding debt through March 9, 2012.

The Court issued its Report and Order of Judgment of Foreclosure and Sale Decree on March 9, 2012, and set the sale for April 2, 2012. Appellants filed a Notice of Appeal on March 7, 2012. Respondent filed an Authorization to Withdraw Property from Sale on March 20, 2012, and an Amended Notice of Sale setting the sale for May 7, 2012.

On April 30, 2012, Appellants filed a Verified Motion for an Ex Parte Temporary Restraining Order and a Permanent Injunction Under Title 18 Section 1345(1)(b, (2)(a), (3)(b), and Title 18 Section 1348(2). Judge Kimball issued his Order denying the motion on May 1, 2012, and the property was sold on May 7, 2012.

Appellants filed a Motion to Vacate Order of Judgment of Foreclosure and Sale on May 8, 2012. A hearing on this motion was held on May 17, 2012, and the Master's Order denying the motion was filed on June 11, 2012.

FACTS

This case involves the foreclosure of a mortgage involving real property located in York County. The debt was originated by Decision One Mortgage Company, LLC in the amount of $225,710.00 on or about November 30, 2006. The

debt was secured by both a Note and a Mortgage on residential real estate located at 1059 Millhouse Drive, Rock Hill, South Carolina 29730. The Mortgage was recorded with the York County Register of Deeds Office on December 4, 2006, in Book 8627 at Page 235. The Mortgage was assigned to HSBC Mortgage Services, Inc. by assignment dated October 12, 2010 and recorded in the York County Register of Deeds Office on October 25, 2010, in Book 11670 at Page 65. It was alleged that Appellants defaulted on their payments of the secured debt, which became due in March 2010.

In addition to the facts set forth above, the Complaint alleged in part as follows:

> 3. The Plaintiff is the owner and holder of the Note and Mortgage described hereafter and that are the subject of this action.
>
> 8. On or about November 30, 2006, [Appellants] made, executed and delivered unto Decision One Mortgage Company, LLC a certain Note in the principal sum of Two Hundred Twenty Five Thousand Seven Hundred Ten and 00/100 ($225,710.00) Dollars.
>
> 9. In order to secure the payment of the Note according to the terms and conditions thereof, [Appellants] made, executed and delivered unto Mortgage Electronic Registration Systems, Inc. (MERS) as nominee for Decision One Mortgage Company, LLC a certain real estate mortgage ("Mortgage") covering [the subject property at issue].
>
> 10. The mortgage was signed, witnessed and probated; thereafter the Mortgage was recorded in the public records of York County on December 4, 2006, in Book 8627 at Page 235. That thereafter, the Mortgage was assigned unto Plaintiff, which assignment is to be recorded in said ROD office.
>
> (R. pp. 10-11.)

Of these paragraphs, Appellant's Answer addresses only Paragraphs Three and Eight:

> 5. Denied; Paragraph 8 of Attorney Heidi B. Carey alleged complaint stated the Note was executed and delivered unto Decision One Mortgage Company, LLC further by Attorney Heidi B. Carey own "Exhibit A" (Which is inadmissible evidence) clearly shows the "Note" was endorse by Alfred Mapp of DECISION ONE MORTGAGE COMPANY, LLC for monetary value with tracking MIN 100077910007141428: here again Attorney Heidi B. Carey/RILEY POPE & LANEY are committing FRAUD/ACTION OF TRESPASS.

(R. p. 19.)

Along with their Answer, Appellants filed the following documents on October 12, 2010:

1) A Counterclaim, Action for Trespass and Trespass on the Case with a United States District Court caption,
2) A Removal from the Common Pleas Court State of South Carolina, and
3) A Request for Production of Document.

The Answer alleges the Complaint is frivolous and that Plaintiff's attorneys have misled the Court in numerous instances. (R. p. 18.) It claims the attorneys have committed fraud and trespass and demands production of the original wet-ink Note and Mortgage authenticated by the court under seal. (Id.) Further, the purported Answer asserts Plaintiff's attorneys have not complied with federal or state statutes because the debt was discharged in a Chapter 7 bankruptcy action and Plaintiff is unable to pursue the property. (Id.) Finally, the Answer states Plaintiff's counsel has

caused genocide against indigenous people by trying to take their land and house and they move the court to transfer the case to the federal court. (Id.)

In October 2010, the Dennises filed an action in the United States District Court concerning this matter. By Order filed August 31, 2011, the District Court granted Respondent's Motion to Dismiss and dismissed the action. In the Report and Recommendation of the Magistrate Judge, the Court explained that a foreclosure action is not removable to federal court. (Second Supp. R. pp. 8-16.) It also explained that both the Younger and Colorado River abstention doctrines called for the Court to abstain from intervening in this matter. (Id.)

On March 6, 2012, a bench trial was held before Judge Kimball, Master in Equity for York County. At the trial, counsel for Respondents and Stonewood Homeowners Association of York County, Inc. appeared. Also present were two people, a man and a woman, who were not parties to the action. (R. p. 104, lines 16-18.) When the Master in Equity asked who they were, the woman identified herself as Akasha el Bey. (Id. at line 20.) She also stated she was the occupant of the office of the executor for the Enid Dennis estate. (R. p. 5, lines 1-3.) The man identified himself as Imin el Bey and stated he was a proper person occupying the office of executor for James Dennis. (Id. at lines 7-9.) The woman also stated she was **not** a defendant and was not a corporate person. (R. p. 105, lines 23-24.) She stated several times that she was the executor for the estate. (Id. at lines 14-15; R. p. 108, lines 19-20.) She further stated the estate was not abandoned and they were there to receive a delegation of authority from all parties there acting on behalf of the estate. (R. p. 106, lines 22-24.)

At no time during the proceeding did either person identify himself or herself as one of the defendants attempting to act *pro se* as they now claim in their Initial Brief. Throughout the hearing, the el Beys claimed to represent the living estate. (R. p. 107, lines 9.) They explained their belief that estates are status and that it has nothing to do with being deceased. (Id. at lines 10-11.) The Master in Equity told the el Beys that whatever they were talking about had no standing in the litigation. (Id. at lines 13-14.) The el Beys then claimed that Plaintiff's counsel was attempting to act on behalf of the estate, and the Master told them this was incorrect. (Id. at 15-19.) The Master in Equity also explained there was no estate involved in the litigation. (R. p. 108, lines 9, 12-13.) However, Akasha el Bey stated the estate was established at birth and she had a certificate signed by a registrar that probated it. (R. p. 108, line 24 – p. 109, line 2.) The Master in Equity told them that if James Dennis was alive, then there was no estate. (R. p. 111, lines 6-10.)

The Master in Equity explained to the el Beys that many of the documents filed in the case, such as the Notice Concerning Fiduciary Relationship, had no relevance to the case, so he was striking these documents. (R. p. 112, lines 13-18.) The Master also struck the purported Answer to Summons and Complaint as it did not respond to the Complaint in any way as required by the South Carolina Rules of Civil Procedure. (R. p. 110, lines 13-17.)

After striking all of the non-responsive documents filed by the Appellants, the Master explained he was proceeding with the foreclosure sale since neither of them represented a party in the action. (Id. at lines 19-21.) The el Beys still did not identify themselves as the Dennises.

Counsel for Respondent admitted the following documents into evidence:

A. Record of Hearing;

B. The Note;

C. The Mortgage between Decision One Mortgage Company, LLC and Appellants in the amount of $225,710.00 recorded December 4, 2006, in Book 8627 at Page 235;

D. An Assignment of Mortgage from Mortgage Electronic Registration Systems, Inc. as nominee for Decision One Mortgage Company, LLC to HSBC Mortgage Services, Inc. recorded October 25, 2010, in Book 11670 at Page 65;

E. A Notice of Denial of Foreclosure Intervention and Certificate of Mailing;

F. An Attorney Certification and Certificate of Mailing;

G. An Affidavit of Verified Statement of Account signed by a HSBC Mortgage Services, Inc. Vice President and Assistant Secretary, which indicated the principal balance, interest accrued and fees due on the loan. The Affidavit established the total amount of the debt including principal, interest and advances was $245,518.40;

H. An Affidavit of Costs incurred by Respondent's counsel in the prosecution of the foreclosure action; and

I. An Affidavit of Attorney's Fees incurred by Respondent's counsel in the prosecution of the foreclosure action.

The Master issued his Order granting the foreclosure on March 9, 2012. The Order provided as follows in the Findings of Fact and Conclusions of Law:

> 7. For value received, James L. Dennis and Enid Dennis made, executed and delivered a note ("Note") dated November 30, 2006, promising thereby to pay to the order of Decision One Mortgage Company, LLC ...
>
> 10. The Plaintiff is the real party in interest pursuant to SCRCP 17(a) and is entitled to enforce the terms of the subject Note and Mortgage.
>
> 1. The Plaintiff's Mortgage should be declared a purchase money first mortgage lien and Plaintiff should have judgment of foreclosure of the mortgage and the mortgaged property should be ordered sold at public auction after due advertisement.

(R. pp. 3,6.)

The Order set the sale for April 2, 2012. Appellants filed a Notice of Appeal on March 7, 2012. Respondent filed an Authorization to Withdraw Property from Sale on March 20, 2012, and an Amended Notice of Sale setting the sale for May 7, 2012. On April 30, 2012, Appellants filed a Verified Motion for an Ex Parte Temporary Restraining Order and a Permanent Injunction Under Title 18 Section 1345(1)(b), (2)(a), (3)(b), and Title 18 Section 1348(2). Attached to the motion was a document entitled "Securitization Legal Chain of Title and Analysis Report Prepared for James L. Dennis, Enid Dennis" by Legal Forensic Auditors on April 23, 2012. Judge Kimball issued his Order denying the Motion on May 1, 2012, concluding that based on the substantial record in the case, Appellants could not demonstrate a likelihood of success on the merits at that stage of the case. The property was then sold on May 7, 2012. (R. p. 65.)

Appellants filed a Motion to Vacate Order of Judgment of Foreclosure and Sale on May 8, 2012. A hearing on this motion was held on May 17, 2012. At this hearing, Appellants argued the judgment should be vacated based on a "Legal Forensic Audit" prepared after the foreclosure hearing. The Master's Order denying the motion was filed on June 11, 2012. In this Order, the Master found the Appellants had submitted their rights to the United States Bankruptcy Court and there was no legitimate dispute over the validity of the debt. (Supp. R. p. 83.) He stated Appellants were granted a discharge of the debt and they were not permitted to also retain the property without making their mortgage payments. (Id.) By submitting their interest in the property to the Bankruptcy Court, and obtaining a discharge of the debt, they forfeited their equity in the property and lacked any standing to contest the foreclosure. (Id.) Further, the objections based on the new evidence in the "Legal Forensic Audit" were being raised for the first time at this hearing and should have been offered at the foreclosure hearing. (Id.) Finally, the Master determined the filing of the appeal divested the Court of jurisdiction over any further proceedings. (Id.) This appeal follows.

STANDARD OF REVIEW

"A mortgage foreclosure is an action in equity." U.S. Bank Trust Nat'l Ass'n v. Bell, 385 S.C. 364, 373, 684 S.E.2d 199, 204 (Ct.App. 2009). "In an appeal from an action in equity, tried by a judge alone, [the appellate court] may find facts in accordance with [its] own view of the preponderance of the evidence." Id. This de novo review does not require an appellate court to disregard the trial court' findings or to ignore the fact that the trial court is in the better position to assess the witnesses'

credibility. Pinckney v. Warren, 344 S.C. 382, 387, 544 S.E.2d 620, 623 (2001). The appellant has the burden of convincing the appellate court that the trial court committed error in its findings. Id. As such, the appellate court will affirm the trial court's findings in an equity case unless the appellant satisfies the court that the preponderance of the evidence is against those findings. Regions Bank v. Wingard Properties, Inc., 2011 WL 2535549 at *2 (Ct App. 2011).

ARGUMENT

I. THE MASTER IN EQUITY DID NOT ERR IN REFUSING TO PERMIT THE APPELLANTS TO REPRESENT THEMSELVES AT THE HEARING, PURSUANT TO AN ORDER OF REFERENCE, IN A MATTER SEEKING TO FORECLOSE A MORTGAGE.

Appellants argue the Master in Equity erred when he did not allow the purported executors of the Dennises' living estates to appear at the hearing. They assert the property was held in a trust and they were proceeding to represent the trust. (Appellants' Initial Brief, p. 4.) They further claim South Carolina law gives them an absolute right to do so. (Id.)

The Dennises cite S.C. Code Ann. §40-5-80 in support of their argument. This statute provides that a citizen may prosecute or defend his own cause. In their Brief, the Dennises, argue they were representing themselves and were statutorily entitled to act *pro se*. As detailed in the Facts section, two people appeared at the hearing and purported to represent the living estates of the Dennises. (R. p. 107, line 9.) Despite being told several times by Judge Kimball that there was no estate involved in the action and they had no standing to appear as executors of an estate, Appellants never identified themselves as the Dennises. In fact, the woman stated she was not a defendant. (R. p. 105, lines 23-24.) Despite being given numerous

opportunities to identify themselves as the Dennises at the March 6, 2012, foreclosure hearing, the Dennises continued to present themselves as the el Beys, the trustees of living estates, which the Court repeatedly explained to them did not have standing in the action. Thus, Appellants were not denied permission to appear *pro se* as they would have this Court believe. They chose not to tell the Court who they really were and not to take advantage of the opportunity to appear on their own behalf. They now want this Court to correct their mistake.

It appears from their Brief that Appellants are also trying to argue that South Carolina case law permits them to act on behalf of another party. This argument would seem rather convoluted given that we now know the el Beys and the Dennises are the same people. It is clear from their actions at the hearing that despite their claims to the contrary, they understand that, except in very limited circumstances, only an attorney can act on behalf of a party in litigation matters. The el Beys initially sat behind Plaintiff's counsel in the courtroom. The Master in Equity requested they move to the other side of the courtroom so he could see them better, and they were unwilling to do so. (R. p. 105, lines 11-13.) Akasha el Bey told the Court they were not bar attorneys and were not acting as attorneys. (Id. at lines 13-15.) She stated she was not a defendant and not a corporate person. (Id. at lines 23-25.) The Master finally had to tell her that he did not care if she sat at the defendant's table but he wanted to be able to see her and did not want her to sit behind the Plaintiff. (R. p. 106, lines 1-9.) The Master later explained to Mrs. El Bey that she could not act as an attorney for anyone in the matter unless she was a licensed practicing South Carolina

attorney. (R. p. 108, lines 13-16.) Mrs. El Bey agreed, stating she had not crossed the bar and that she was not acting as an attorney. (Id. at lines 17-19.)

The case law Appellants rely on provides that any individual may represent another individual before any tribunal if the tribunal approves of the representation and the individual is not compensated for his services. In re Unauthorized Practice of Law Rules Proposed by South Carolina Bar, 309 S.C. 304, 305, 422 S.E.2d 123, 124 (1992). This case also provides that a business may be represented by a non-lawyer officer, agent or employee in magistrate's court. Id. at 306, 124. At no time did the Dennises request permission from the Master in Equity for any other individual to appear on their behalf. While the el Beys filed documents in the case prior to the hearing, that does not mean they had permission to appear on behalf of Appellants at the hearing.

Therefore, for the reasons stated above, the Master did not err in determining the el Beys did not have standing in this matter and should not be allowed to appear at the hearing.

II. THE MASTER IN EQUITY DID NOT ERR IN PRECLUDING THE APPELLANTS FROM SHOWING THAT THE UNNOTARIZED ASSIGNMENT WAS FRAUDULENT, AND DELIVERED AFTER THE FORECLOSURE PROCEEDING WAS COMMENCED, THAT THE PROMISSORY NOTE WAS SEPARATED FROM THE MORTGAGE, AND THAT THE DEBT HAD BEEN DISCHARGED IN BANKRUPTCY, AS A DEFENSE TO THE FORECLOSURE ACTION.

Appellants argue they had viable defenses to the foreclosure action that they should have been allowed to present at the March 6, 2012, hearing. They assert the assignment from Decision One to HSBC was fraudulent, the Note was separated from

the Mortgage, and the debt was discharged in bankruptcy. (Appellants' Initial Brief, Statement of Issues on Appeal.)

The South Carolina Rules of Civil Procedure provide that a Defendant shall serve his or her answer within thirty (30) days after service of the complaint. SCRCP 12(a). Averments in a pleading to which a responsive pleading is required are admitted when they are not denied in the responsive pleading. SCRCP 8(d). As previously provided, Appellants responded to only Paragraphs 2, 3, 8 and 14 of the Complaint in their Answer. While they did deny that HSBC was the owner and holder of the Note and Mortgage, they did not deny Paragraph 10, which provided that the mortgage was assigned to the Plaintiff. They also did not raise any issue concerning separation of the Note from the Mortgage. As such, these issues were not presented to or ruled upon by the lower court and cannot be presented for the first time on appeal. SCDOT v. First Carolina Corp. of SC, 372 S.C. 295, 301, 641 S.E.2d 903, 907 (2007).

Further, it is unclear from Appellants' Brief exactly what they are arguing in regard to the assignment and the alleged separation of the Note and Mortgage in this matter. Judge Kimball found Respondent was the real party in interest and was entitled to enforce the terms of the subject Note and Mortgage. (R. p. 3, ¶10.) He also found that the Mortgage was assigned to Respondent by assignment recorded on October 25, 2010 in Book 11670 at Page 65. (Id. at ¶9.)

In support of their argument concerning separation of the Note and Mortgage, Appellants cite an 1873 United States Supreme Court case, which states that the note and mortgage are inseparable. Carpenter v. Longan, 83 U.S. 271, 274 (1873). What

they omit is the following statement: "[t]he transfer of the note carries with it the security, without any formal assignment or delivery, or even mention of the latter [the mortgage]." Id. at 275. Section 36-3-301 of the South Carolina Code of Laws provides that the "person entitled to enforce" an instrument is 1) the holder of the instrument; 2) a nonholder in possession of the instrument who has the rights of a holder; or 3) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to §36-3-309 or §36-3-418(d). A holder is defined as "a person who is in possession of ... an instrument...indorsed to him or to his order or to bearer or in blank." S.C. Code Ann. §36-1-201(20). When an instrument is endorsed in blank, it may be negotiated by transfer of possession alone until specifically endorsed. S.C. Code Ann. §36-3-205(a).

The Note in this case is indorsed in blank by Decision One. As requested by Appellants' Request for Production, Respondent produced the original Note for inspection and copying at its attorney's office. (R. p. 33.) Therefore, Respondent clearly is the holder of the instrument and is entitled to enforce it as determined by the Master in his Order.

Appellants cite a case from the Western District of Texas as being instructive on the Note issue and a case from the Supreme Judicial Court of Maine as mirroring the alleged defects in this case. However, the situation in the Texas case was that the lender did not produce any evidence that it had actual possession of the Note. Norwood v. Chase Home Finance, LLC, 1:09-CV-940 (W.D. Tx. Jan. 28, 2011). The Maine case concerned no endorsement of the Note and affidavits that contained irregularities that made them untrustworthy. HSBC Mortgage Services, Inc. v.

Murphy, 19 A. 3d 815 (ME 2011). Such is not the case here. Further, these are cases from other jurisdictions that do not require consideration by this Court.

The only issue included in Section II of Appellants' Brief that was raised to the lower court is the bankruptcy discharge. Appellants correctly state they filed a Chapter 7 bankruptcy and received a discharge from bankruptcy by Order dated August 18, 2010. (R. p. 29.) However, the Voluntary Petition filed in the bankruptcy stated the Dennises were to retain possession of the property and continue to make regular payments to HSBC. (Second Supp. R. p. 59.)

Throughout the foreclosure proceedings, Appellants have continued to dispute the outcome of their bankruptcy and claim they received a discharge and were also allowed to retain the property. They filed another case in the United States District Court asserting this issue as one of their claims against Respondent. (Second Supp. R. pp. 3-7.) Respondent filed a Motion to Dismiss asserting the federal court should abstain from hearing the matter pursuant to the Younger and Colorado River abstention doctrines because of the ongoing state foreclosure proceeding. By Report and Recommendation and Order filed August 31, 2011, the Court granted Respondent's Motion to Dismiss the federal court Complaint. (Second Supp. R. pp. 8-16.)

By Order filed June 11, 2012, the Master explained to Appellants that they were granted a discharge of the debt and they were not permitted to also retain the property without making their mortgage payments. (Supp. R. p. 83.) By submitting their interest in the property to the Bankruptcy Court, and obtaining a discharge of the

debt, they forfeited their equity in the property and lacked any standing to contest the foreclosure. (Id.)

The bankruptcy discharge has been explained to Appellants several times to no avail. These continuous attempts to halt the foreclosure process by relying on the bankruptcy discharge are not only inequitable but completely inaccurate. It has unnecessarily delayed the process and caused Respondent to incur thousands of dollars in fees and costs defending against these improper claims.

Therefore, for the foregoing reasons, the Master did not err in determining the Appellants did not have viable defenses to the foreclosure and proceeding with the hearing and sale.

CONCLUSION

Respondent respectfully requests that this court uphold the decision of the Master in Equity in this matter.

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CERTIFICATION OF COUNSEL

I certify that the Final Brief of Respondent complies with Rule 211(b) of the South Carolina Appellate Court Rules.

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