THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Master-in-Equity

The Honorable Charles B. Simmons, Jr.

Case No. 2011-CP-23-5912

Court of Appeals Tracking No. 2012-213310

Bank of America, N.A., successor by merger to BAC Home Loans Servicing, LP FKA Countrywide Home Loans Servicing, LP, ...Appellant,

v.

Charles M. Thompson, Mortgage Electronic Registration Systems, Inc., as nominee for E-Loan, Inc., Mortgage Electronic Registration Systems, Inc. as nominee for MidCountry Bank, Bridges Crossing Property Owners' Association, Inc., and SC Telco Federal Credit Union, ...Defendants

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Case No. 2011-CP-23-3368

U.S. Bank, National Association, ...Respondent,

v.

Charles M. Thompson, E-Loan, Inc. and SC Telco Federal Credit Union, of whom Bank of America, N.A. as successor in interest to E-Loan, Inc. is. .....Apellant.

Final Brief of Appellant Bank of America, N.A., successor By merger to BAC Home Loans Servicing, LP FKA Countrywide Home Loans Servicing, LP

Michael J. Anzelmo
NELSON MULLINS RILEY & SCARBOROUGH, L.L.P.
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
803.799.2000

Attorneys for Bank of America, N.A., successor by merger to BAC Home Loans Servicing, LP FKA Countrywide Home Loans Serving, LP

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Attorneys for Bank of America, N.A., successor by merger to BAC Home Loans Servicing, LP FKA Countrywide Home Loans Serving, LP

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STATEMENT OF THE CASE

On May 31, 2011, the respondent, U.S. Bank, National Association (U.S. Bank), initiated the foreclosure of its mortgage encumbering two properties located at 2 Country Mist Drive, Greer, SC (Greer Property) and at 104 Nobska Light Court, Simpsonville, SC (Simpsonville Property). (USBank.Comp. ¶ 7; R. 42). The Greenville County Court of Common Pleas docketed U.S. Bank's complaint as civil action number 2011-CP-23-3668 (3668). (USBank.Comp.; R. 38). The complaint named as a defendant the original holder of the note, E-Loan, Inc., mistakenly identifying it as the holder of a mortgage on the Simpsonville Property. U.S. Bank failed to name the actual mortgagee and Bank of America, N.A.'s (BANA) predecessor in interest, Mortgage Electronic Registration

Systems, Inc., as nominee for E-Loan. (Id. at ¶ 18). In an attempt to serve E-Loan, U.S. Bank delivered the summons and complaint to Banco Popular North America (Banco), E-Loan's parent company. (Aff.Svc. 3668). Neither MERS, a non-party, nor E-Loan appeared in this case. (Ord.Def.3668; R. 10-16).

On U.S. Bank's motion, the court referred the case to the Honorable Charles B. Simmons, Jr., master-in-equity for Greenville County. (Ord.Ref.3668; R. 2). On March 26, 2012, the master-in-equity issued an order and judgment of foreclosure and sale, (F/CJdg.3668; R. 10-16), and an order finding that MERS's mortgage no longer constituted a lien on the Simpsonville Property and releasing it of record (Release Order). (Rel.Ord.3668; R. 17).

Nearly seven months earlier, on September 2, 2011, BANA, mortgage assignee of MERS and the note transferee of E-Loan, commenced an action to foreclose its mortgage on the Simpsonville Property. (BANA.Comp.; R. 25). The complaint was filed under civil action number 2011-CP-23-5912 (5912). (Id.). Contemporaneously with filing the complaint, BANA recorded the notice of pendency of action. (BANA'sLP; R. 24).

On BANA's motion, the court referred the case to the Honorable Charles B. Simmons, Jr., the master-in-equity for Greenville County. (Ord.Ref.5912; R. 1). On April 20, 2012, the master-in-equity issued an Order and Judgment of Foreclosure and Sale (Foreclosure Judgment) and scheduled the sale of the Simpsonville Property for June 4, 2012. (F/CJdg.5912; R. 3-9). Shortly before the sale, the respondent, Oriole Properties, LLC (Oriole) moved, simultaneously, to intervene in BANA's action, to dismiss the action pursuant to Rule 56, SCRCP, and to set aside the Foreclosure Judgment under Rules 60 and 59(e), SCRCP. (O'sMot.Int.); (O'sMot.D/SetA); (Tr. p. 4, lines 14-6); R.

215; 217). Oriole grounded its motion on the fact that it was the assignee of the winning bid at the sale concluding U.S. Bank's action and a bona fide purchaser of the Simpsonville Property. (O'sMemo1; R. 237). The sale of both the Greer and Simpsonville properties took place on May 7, 2012. (Id.).

Following Oriole's motion, BANA moved pursuant to Rule 60(b)(3) and (4), SCRCP, for relief from the Release Order issued in case 3668. (BANA'sMot; R. 182).

The master-in-equity heard BANA's and Oriole's motions together[1], on June 27, 2012, (Tr. pp. 3-26), and by order dated July 16, 2012, granted Oriole's motions, whereby dismissing case 5912 and setting aside Foreclosure Judgment, and denied BANA's Rule 60(b) motion in case 3668. (Mot.Ord.; R. 18).

BANA now appeals.

STATEMENT OF THE FACTS

With the help of a loan from E-Loan, Charles M. Thompson (Thompson) purchased a house at 102 Nobska Light Court in Simpsonville, South Carolina (Simpsonville Property). (BANA.Comp.; R. 25). Thompson executed a $113,520 promissory note payable to E-Loan and secured its repayment by delivering to Mortgage Electronic Registration Systems, Inc. (MERS), as nominee for E-Loan, a mortgage on that property. (Id.). MERS recorded the mortgage on October 12, 2006, in Book 4658 at Page 623 of the Greenville County Register of Deeds. (Id.).

On February 29, 2008, Thompson delivered to U.S. Bank a purchase-money mortgage encumbering a piece of real estate at 2 Country Mist Drive in Greer, South Carolina (Greer Property). (USBank.Comp.; R. 42). The mortgage's legal description

[1] Master-in-Equity did not issue an order under Rule 42(a), SCRCP,; however, both cases were treated as de factor consolidated and neither party objected to the joint hearing and disposition of the motions.

also included the description of the Simpsonville Property. (Id.).

In early 2011, following the default on both loans, Thompson filed for bankruptcy protection. (BANA's.Memo; R. 184). In the Schedules A and D attached to the Chapter 7 petition, Thompson listed BANA, MERS's successor in interest and an E-Loan's immediate successor in holding the note, as the first priority mortgagee of the Simpsonville Property. (Id.).

On May 31, 2011, U.S. Bank filed its foreclosure complaint alleging that E-Loan's mortgage no longer constituted a lien on the property. (USBank.Comp. ¶ 18; R. 44). The complaint did not articulate any facts giving rise to such a conclusion. (Id.). The complaint did not name E-Loan's nominee, MERS—the mortgagee of record—as a party defendant. (USBank.Comp.; R. 42).

On June 8, 2011, in an apparent attempt to perfect service on E-Loan, U.S. Bank delivered the summons and complaint to an employee of the loan servicing department of Banco Popular located in Rosemont, Illinois. (Aff.Svc. 3668). Banco Popular North America (Banco), a New York state chartered bank, is the parent corporation for E-Loan. (BANA's.Memo; R. 184). At the time, E-Loan's authority to conduct business in South Carolina had been withdrawn and it no longer maintained an agent for service in this state, (Ex.2, USBank'sMemo; R. 214), however, the South Carolina Secretary of State's website listed the address of 120 Broadway, New York, NY 10271, as the address for service. (Ex.C.BANA'sMemo; R. 193). The same address had been listed as the address for the entity and its president, Brian Doran, on California's and Illinois's secretaries of state's websites. (Ex.D&E.BANA'sMemo; R. 194; 195).

U.S. Bank proceeded with service on Banco because its counsel was under

mistaken impression that E-Loan no longer existed as a separate entity. (See Tr. pp. 18-20; R. 99-101). This misimpression was predicated upon the following facts: the process server did not find E-Loan at the address listed on the mortgage, (Tr. p. 19; R. 100), E-Loan was listed as dissolved by the South Carolina Secretary of State, (id.), and the counsel's staff misinterpreted the disclaimer: "THIS IS NOT A STATEMENT OF GOOD STANDING," (id.), which routinely appears at the top of a webpage displaying entity details on record with the Delaware Secretary of State.

On June 15, 2011, seven days after handing the summons and complaint to a Banco employee, an assignment was recorded, which assigned the mortgage on the Simpsonville Property from MERS to BAC Home Loans Servicing LP (BAC). (Ex.A.BANA'sMemo; R. 191). Neither E-Loan nor BAC, which later merged into BANA, appeared in U.S. Bank's action. (Tr. p. 20, lines 12-8; R. 101).

At the foreclosure hearing on March 26, 2012, the attorney for U.S. Bank requested the release of BANA's mortgage on the Simpsonville Property and submitted a proposed order to the master-in-equity. (3668Tr. p. 2, lines 21-5; R. 113). The attorney cited as the basis for the order E-Loan's failure to answer and defend against the allegation that the mortgage actually held by MERS at the commencement of the action, no longer constituted a lien. (3886Tr. p. 3, lines 3-11; R. 114). Meanwhile, BANA's foreclosure action on the Simpsonville Property had been referred to the master-in-equity, with the hearing scheduled to take place on April 19, 2012. (5912Tr. p. 1; R. 109).

On May 7, 2012, the master-in-equity auctioned off the Simpsonville Property pursuant to the Master's Order and Judgment of Foreclosure and Sale, issued in case 3668. (Custer.Aff; R. 206-210). After reviewing the orders issued in this action and

obtaining the attorney's title report, the respondent, Oriole Properties, LLC (Oriole), acting through its member, Clayton M. Custer (Custer), purchased the winning bid. (Id.). On May 16, 2012, Oriole complied with the bid by delivering to the office of the master-in-equity a check for the remaining balance of the bid. (Id.). On May 22, 2012, the master-in-equity executed the deed vesting title to the Simpsonville Property into Oriole. (Master's Deed).

In the meantime, pursuant to the Master's Order and Judgment of Foreclosure and Sale in BANA's action, 5912, the court listed the Simpsonville Property for the June 2012 judicial sale. (F/CJdg.5912; R. 3). Having realized that the property it had just purchased was being advertised for sale, Oriole contacted the attorneys for BANA, and then retained counsel to represent its interests. (Custer.Aff; R. 206-210).

ARGUMENT

In this appeal, BANA seeks reversal of the order denying its motion for relief from the Release Order. At first, in light of Section 15-39-870 of the South Carolina Code of Laws[2], the reversal might seem an illusory remedy. S.C. Code Ann. § 15-39-870 (2005). Here, however, this remedy is not illusory. Reversal is necessary to eliminate the defenses of issue and claim preclusion, which otherwise would likely be asserted in BANA's anticipated declaratory judgment action against U.S. Bank. In that action, BANA would seek disgorgement of sale proceeds allocable to BANA's mortgage—a mortgage that was held not to constitute a lien on the property at the time of the sale.

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[2] The statute provides that

> [u]pon the execution and delivery by the proper officer of the court of a deed for any property sold at a judicial sale under a decree of a court of competent jurisdiction the proceedings under which such sale is made shall be deemed res judicata as to any and all bona fide purchasers for value without notice, notwithstanding such sale may not subsequently be confirmed by the court.

S.C. Code Ann. § 15-39-870 (2006).

Standard of Review

Generally, in actions in equity, the appellate court's view of the preponderance of the evidence constitutes the applicable standard of review. Williams v. Wilson, 349 S.C. 336, 339-40, 563 S.E.2d 320, 322 (2002). However, the decision to grant or deny relief from judgment under Rule 60(b)[3] of the South Carolina Rules of Civil Procedure lies within the sound discretion of the judge. Rule 60, SCRCP; Coleman v. Dunlap, 306 S.C. 491, 494, 413 S.E.2d 15, 17 (1992). Accordingly, the reviewing court is limited to determining whether there was an abuse of discretion. Raby Const., L.L.P. v. Orr, 358 S.C. 10, 594 S.E.2d 478 (2004). "[A]n abuse of discretion arises where the judge issuing the order was controlled by an error of law or where the order is based on factual conclusions that are without evidentiary support." BB & T v. Taylor, 369 S.C. 548, 551, 633 S.E.2d 501, 503 (2006) (citing Tri–County Ice & Fuel Co. v. Palmetto Ice Co., 303 S.C. 237, 242, 399 S.E.2d 779, 782 (1990)).

South Carolina appellate courts have not articulated a separate standard for reviewing rulings under subsection four of Rule 60(b), SCRCP. Federal courts, however, review the decisions under the federal counterpart of Rule 60(b)(4), SCRCP, de novo. See Cent. Vt. Pub. Serv. Corp. v. Herbert, 341 F.3d 186, 189 (2d Cir. 2003) (surveying decisions of other circuits regarding standard of review applicable to 60(b)(4) rulings).

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[3] Rule 60(b) provides that

> [o]n motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
> (1) mistake, inadvertence, surprise, or excusable neglect;
> (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b));
> (3) fraud, misrepresentation, or other misconduct of an adverse party;
> (4) the judgment is void;
> (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that Rule 60(b), SCRCP.

According to the Sixth Circuit, "a deferential standard of review is not appropriate because if the underlying judgment is void, it is a *per se* abuse of discretion for a district court to deny a movant's motion to vacate the judgment under Rule 60(b)(4)." Jalapeno Prop. Mgmt., LLC v. Dukas, 265 F.3d 506, 515 (6th Cir. 2001). The Fourth Circuit reviews "de novo a district court's denial of a motion under Fed. R. Civ. P. 60(b)(4)." Wendt v. Leonard, 431 F.3d 410, 412 (4th Cir. 2005).

I. BANA'S MORTGAGE REMAINED A VALID LIEN ON THE PROPERTY BECAUSE THE ORDER, HOLDING THAT IT NO LONGER CONSTITUTED A LIEN AND RELEASING IT OF RECORD, WAS ISSUED IN AN ACTION TO WHICH THE MORTGAGEE, BANA'S PREDECESSOR-IN-INTEREST, HAD NOT BEEN A PARTY.

BANA moved for relief under Rule 60(b)(4), SCRCP, on the grounds that the order finding that its mortgage no longer constituted a lien on the property and releasing it of record was void, or otherwise ineffective as to BANA, because its predecessor-in-interest, MERS—the entity holding the legal interest in the property under the mortgage, was not made party to U.S. Bank's foreclosure action.

A. MERS was a necessary party to U.S. Bank's foreclosure action.

It is a settled principle of South Carolina law that a senior mortgagee is not a necessary party to a foreclosure action. 27 S.C. Jur. Mortgages § 108 (1996) (citing Watson v. Fowler, 165 S. C. 288, 163 S. E. 640 (1932); Evans v. McLucas, 12 S. C. 56 (1879)). This is because the land may be sold in the junior mortgagee's foreclosure action subject to the lien of the senior mortgagee. Id. However, if the junior mortgagee seeks to have the rights of the senior mortgagee discharged or in any way affected by the foreclosure and sale of the property, it must make the senior mortgagee a party to its action. Id. In such a case, the failure to name or join the senior mortgagee renders the

foreclosure decree incapable of affecting the senior mortgagee's interest in the property. See Id. (citing Zeigler v. Maner, 53 S. C. 115, 30 S. E. 829 (1898)).

In Union National Bank of Columbia v. Cook, 110 S.C. 99, 96 S.E. 484 (1918), the South Carolina Supreme Court stated that prior or junior mortgagees "are not necessary parties, in the sense that their presence is indispensable to the rendition of a decree of sale, *but they are necessary [party] defendants to the recovery of a judgment which shall give the purchaser a title free from their liens and [encumbrances].*" Id., 96 S.E. at 488 (emphasis added).

In the instant case, U.S. Bank sought release of BANA's mortgage so the successful bidder at the foreclosure sale could acquire unencumbered title to the Simpsonville Property. The foreclosure complaint mistakenly identified E-Loan, the holder of Thompson's note, as the mortgagee, and further stated that the mortgage no longer constituted a lien on the property. However, MERS, and not E-Loan, was the entity holding the mortgage on the Simpsonville Property at the time U.S. Bank commenced its action. (BANA'sMtg; R. 130). MERS held the legal interest in the Simpsonville Property, and therefore was a necessary party to the action—an action in which U.S. Bank sought adjudication of the viability of MERS's mortgage.

B. Failure to name MERS or join BANA resulted in a jurisdictional defect rendering the Release Order void.

In Union Nat. Bank of Columbia, the South Carolina Supreme Court stated that findings of a foreclosure decree, "so far as they purport to change the priority of liens of the parties or the status of the rights of the [mortgagee, not made party to the action], are null and void[]." Id. Accordingly, a Release Order based on such findings should be void as well.

U.S. Bank was not entitled to the adjudication of whether the senior mortgage constituted a lien on the property without naming the entity holding it, MERS, as a defendant in its action. Failure to name MERS or join BANA should be fatal to the master-in-equity's order. See Betty G. Weldon Revocable Trust ex rel. Vivion v. Weldon ex rel. Weldon, 231 S.W.3d 158, 171 (Mo. Ct. App. 2007) ("The presence of an indispensable party is a jurisdictional requirement. . . . The failure to join an indispensable party to the trial court proceeding is fatal to that court's judgment.").

C. The master-in-equity abused his discretion because his denial of BANA'S motion was controlled by an error of law.

It is a basic principle of law that "no one is bound by a proceeding to which he was not a party." Union Nat., 110 S.C. 99, 96 S.E. at 488. If lien holders are "not joined as defendants, their rights are unaffected, their liens remain undisturbed and continue upon the land while in the hands of the purchaser[.]" Id. Furthermore, a judgment affecting rights of such lien holders is void because the court acted without jurisdiction. See 49 C.J.S. Judgments § 33 (2009) ("A valid judgment cannot be rendered where there is a want of necessary or indispensable parties, and an adjudication made without joining such a party to the litigation is null and void.").

Accordingly, the master-in-equity's denial of BANA's motion under Rule 60(b)(4) for relief from the Release Order was controlled by an error of law and therefore amounted to an abuse of discretion. See BB & T, 369 S.C. at 551, 633 S.E.2d at 503; see also Jalapeno, 265 F.3d at 515 (6th Cir. 2001).

II. THE MASTER-IN-EQUITY ERRED IN DENYING BANA'S MOTION UNDER RULE 60(b)(4), SCRCP, BECAUSE U.S. BANK NEITHER PRESENTED EVIDENCE NOR ARGUED THAT E-LOAN AND BANCO POPULAR, DESPITE FORMAL CORPORATE SEPARATENESS, CONSTITUTED ESSENTIALLY ONE ENTITY, WHICH WOULD ALLOW

FOR SERVICE OF PROCESS ON ONE TO BE EFFECTIVE AS TO THE OTHER, THUS ENABLING THE LOWER COURT TO ACQUIRE PERSONAL JURISDICTION OVER E-LOAN.

In its action, U.S. Bank failed to name MERS, the indispensable party by virtue of holding the mortgage on the Simpsonville Property, but named instead E-Loan, the original holder of the note. Even if we assume that it was E-Loan who had the legal interest in the Simpsonville Property, the Release Order is still void.

Rule 4(d)(3) of the South Carolina Rules of Civil Procedure provides that service of process upon a corporation can be perfected by "deliver[y of] a copy of the summons and complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process . . . ." Rule 4(d)(3), SCRCP. Service of process pursuant to Rule 4(d)(3), SCRCP, is necessary to *"confer personal jurisdiction* on the court and [to] assure[] the defendant of reasonable notice of the action." Roche v. Young Bros., Inc., of Florence, 318 S.C. 207, 209, 456 S.E.2d 897, 899 (1995) (emphasis added). If service is not perfected, then a court does not acquire personal jurisdiction, and the subsequent order is void. See BB & T, 369 S.C. at 551, 633 S.E.2d at 504.

In its motion for relief under Rule 60(b)(4), SCRCP, BANA maintained that absent special circumstances, which were not present here, delivery of the summons and complaint to Banco, the parent corporation, did not effect service on E-Loan, the subsidiary. (BANA'sMotion; R. 182-184). Accordingly, the court acted without personal jurisdiction, rendering the order void. (Id.).

A. A party seeking to sustain service of process on the subsidiary through its corporate parent must prove that the subsidiary is nothing more than an adjunct, instrumentality, or alter ego of the parent corporation.

South Carolina courts have not established guidelines of inquiry as to effectiveness of service of process on a subsidiary through its corporate parent, or vice versa. The leading secondary sources hold that service should not be sustained unless "the facts indicate that one corporation so controls the affairs of another corporation that the two entities are essentially one [.]" 19 C.J.S. Corporations § 814 (2007). According to the authors of American Jurisprudence, Second Edition,

> service on a parent [corporation]. . . is not service on the defendant even though one corporation holds an equity interest in the other, one is wholly owned by the other, both corporations have a common parent, the two corporations have identical officers and directors . . . . The mere existence of a parent-subsidiary relationship, without a more definite showing of the parent's control of the subsidiary, will not suffice to permit service of process on the subsidiary through the parent corporation.

62B Am. Jur. 2d Process § 255 (2005).

In Rollins v. Proctor & Schwartz, 478 F. Supp. 1137, 1146 (D.S.C. 1979) rev'd sub nom. Proctor & Schwartz, Inc. v. Rollins, 634 F.2d 738 (4th Cir. 1980), the United States District Court for the District of South Carolina held that

> as long as the two corporations maintain formal corporate separateness "in all respects," the de facto control of one by the other does not justify piercing the corporate veil [for jurisdictional purposes]. . . . [O]bservation of all corporate formalities prevents subjecting the parent to jurisdiction via the activities of the subsidiary (or vice versa).

Id. The same court in an earlier decision observed that the "mere relationship of parent and subsidiary would be insufficient to sustain service on the subsidiary in an action against the parent." T.S. Ragsdale Co. v. Gen. Drivers & Helpers Local No. 509 & Int'l Broth. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am., No. 71-1017, 1972 WL 747 (D.S.C. Jan. 6, 1972) (citing 2 Moore's Federal Practice (2d ed.), P 4.25 [6]; u, 267 U. S. 333 (1925)).

In Potts v. Dynacorp International, LLC, 2007 WL 899040, the United States District Court for the Middle District of Alabama found that "a parent corporation is a distinct entity from its subsidiary . . . unless it is a mere adjunct, instrumentality, or alter ego of the parent corporation." Accordingly, the issue of whether service is sufficient to confer jurisdiction turns on the finding of a degree of interrelation between the parent and subsidiary, which precludes the court from recognizing their separate legal existence. See id.

Under these authorities, the plaintiff is clearly burdened with producing the evidence and persuading the court that legal separateness of the entities should be ignored. The opinion of the United States District Court for the Eastern District of Virginia in Consolidated Engineering Co. v. S. Steel Co., 88 F.R.D. 233 (E.D. Va. 1980), illustrates the operation of this rule.

In that case, the plaintiff, Consolidated Engineering Co. (Consolidated), attempted to serve the defendant Southern Steel Company (Southern Steel), by delivering summons to the registered agent of its wholly owned subsidiary, Southern Prison Company (Southern Prison). Having analyzed the United States Supreme Court's decision in Cannon Mfg. Co. v. Cudahy Packing Co., 267 U.S. 333 (1925), the court found that the issue of "whether the subsidiary and the parent keep their corporate operations distinct and separate[,]" was dispositive. The court then examined the evidence accordingly.

In its argument that Southern Prison was an alter ego of Southern Steel, Consolidated relied on a witness testimony in a related case – Consolidated v. Southern Prison – showing that "Southern Prison Company is a corporation that has common ownership, or common directors and ownership by Southern Steel." Consolidated

Engineering, 88 F.R.D. at 241. It also invoked the fact that in that case the Southern Prison's attorney and defense witnesses made no distinction between the two companies. Id. Consolidated further argued that Southern Steel transacted business in the forum state under the name "Southern Prison Company" only because the name "Southern Steel Company" was not available. Id. Finally, it submitted a letter from a director of Southern Steel to Consolidated regarding a project for which Consolidated contracted with Southern Prison. Id. at 241-42. Despite those submissions, the court held that "Consolidated [had] not *carried its burden of proving* that service of process on Southern Prison is the equivalent in law to service of process on Southern Steel." Id. at 242 (emphasis added).

On the other hand, in Duplan Corp. v. Deering Milliken, Inc., 334 F. Supp. 703 (D.S.C. 1971), the United States District Court for the District of South Carolina found that it had acquired jurisdiction over the defendant through service on its wholly owned subsidiary. However, the court so concluded only after examining ample evidence of domination and control of the subsidiary – ARCT, Inc., by the parent corporation – ARCT France. See id. at 711-12. The record before the court contained, inter alia: a letter from the parent's president speaking for ARCT France, that, following the set up of the subsidiary in North Carolina, "'we are ourselves established at Greensboro'"; a letter from ARCT, Inc. containing printed letterhead showing the president of ARCT France as the president of ARCT, Inc.; a brochure carrying "insignia or logo of both, with ARCT France clearly dominant"; and "other publications of ARCT France, where ARCT, Inc. is referred to as its 'direct subsidiary' and its 'North American Headquarters.'" Id.

B. U.S. Bank did not meet its burden of proof because it neither presented evidence, nor advanced an argument, that E-loan and Banco were

"essentially one entity."

In the case at bar, the record is devoid of any evidence that would allow for holding that E-Loan and Banco were essentially one entity and, consequently, that the lower court acquired jurisdiction over E-Loan through service on Banco. In the memorandum supporting its motion under Rule 60(b), BANA maintained, citing Popular, Inc.'s[4] 2011 annual report, that E-Loan and Banco were separate entities, organized under the laws of different states and involved in different, though related, lines of business. (BANA'sMemo; R. 184-197).

U.S. Bank did not carry its burden of producing evidence and then persuading the master-in-equity that E-Loan was an alter ego of Banco. At the motion hearing, U.S. Bank merely asserted the existence of parent-subsidiary relationship between the two companies, and that it proceeded with service on Banco because, according to its research, E-Loan had been dissolved in South Carolina. (See Tr. pp. 18-20; USBankMemo; R. 99-101).

At the hearing and in its memorandum in opposition, U.S. Bank cited Rollins v. Proctor & Schwartz, 478 F. Supp. 1137 (D.S.C. 1979), in support of an argument that the service on Banco Popular was effective as to E-Loan. However, in Rollins, "the most fundamental of all corporate formalities [had] been disregarded." Id. at 1146. The subsidiary company had no functioning board of directors, id., and the corporate policy of the subsidiary was set by an officer of the parent corporation, answerable to the parent's board. Id. at 1146-47. Having established those facts the court found the subsidiary to be

[4] Popular, Inc. is the parent company of Banco Popular North America and, indirectly, of E-Loan, Inc. Popular, Inc. 2011 Annual Report, http://www.snl.com/Cache/1500040081.PDF?D=&O=PDF&IDD=100165&Y=&T=&FID=1500040081 (last visited Oct. 29, 2012).

"not an independent operating entity, but a de facto division of [its corporate parent]." Id. at 1147.

Unlike the companies in Rollins, Banco Popular and E-Loan maintained formal corporate separateness. (BANA'sMemo; R. 184-197). Though the South Carolina Secretary of State's website lists E-Loan as dissolved, a simple internet search reveals an active company – a company distinct from Banco Popular. (See id.). The websites of the secretaries of state[5] of Illinois and California, for example, show the company as active, listing the address of 120 Broadway, New York, NY 10271, as the headquarters of E-Loan. (Ex.D&E.BANA'sMemo; R. 194-95). The same address appears as the address for service of process on E-Loan's application for surrender of authority to do business in South Carolina. (Ex.2, USBank'sMemo; R. 214).

C. The master-in-equity abused his discretion because the order was based on factual conclusions that lacked evidentiary support.

U.S. Bank attempted service through the parent corporation, because it was under mistaken impression that the subsidiary no longer existed. Misapprehension of reality on the part of U.S. Bank, however, cannot serve as the foundation of the court's personal jurisdiction over E-Loan. U.S. Bank failed to provide any evidence, or cite any facts, that could indicate to the court that E-Loan was "a mere adjunct, instrumentality, or alter ego" of Banco Popular.

The master-in-equity had nothing from which to find or infer that service was perfected, and that it had power over E-Loan—a factual conclusion prerequisite to denying BANA's motion without abusing discretion. See BB&T, 369 S.C. at 551, 633 S.E.2d at 503. The fact that BANA might have had notice of the proceedings and failed

[5] Delaware Secretary of State's website lists E-Loans, Inc. as an active, domestic corporation.

to intervene in the action has no bearing on the fact that at the time of issuing the order the master-in-equity acted without jurisdiction.

Because the ruling on BANA's motion lacked reasonable factual support and resulted in prejudice to BANA's rights, the master-in-equity's denial of BANA's motion was a reversible error. See Bridges v. Wyandotte Worsted Co., 239 S.C. 37, 40, 121 S.E.2d 300, 302 (1961).

III. ORIOLE LACKED STATUS OF A BONA FIDE PURCHASER WITHOUT NOTICE UNDER S.C. CODE § 15-39-870 BECAUSE, BY VIRTUE OF THE LIS PENDENS, IT HAD CONSTRUCTIVE NOTICE OF BANA'S ADVERSE CLAIM, AND BECAUSE IT FAILED TO INQUIRE AS TO THE PERSONAL JURISDICTION OF THE MASTER-IN-EQUITY AT THE TIME OF THE SALE.

Under South Carolina law, proceedings culminating in a judicial sale under a decree of a court of competent jurisdiction are deemed res judicata as to bona fide purchasers for value without notice. S.C. Code Ann. § 15-39-870 (2005). In moving for dismissal of BANA's action and vacation of the Foreclosure Judgment, Oriole maintained that it was entitled to the protection afforded by the statute because, at the time of the sale, it had not been aware of BANA's adverse claim to the Simpsonville Property.

A. Oriole did not have status of a bona fide purchaser because, by operation of the law, it was charged with the knowledge of BANA's interest in the Simpsonville Property.

Section 15-11-20 of the South Carolina Code of Laws provides that from the time of filing of an action affecting real property, any subsequent purchaser of the property is deemed to have had notice of any interests asserted, as if it were a party to the action. See S.C. Code Ann. § 15-11-20 (2005) (a filed notice of "pendency of the action shall be constructive notice to a purchaser . . . of the property affected thereby[.]"). According to

this Court in MI Co. v. McLean, 325 S.C. 616, 626, 482 S.E.2d 597, 603 (Ct. App. 1997), "when a notice of pendency is filed . . . , a purchaser is charged with constructive notice of litigation . . . [and the fact] [t]hat the purchaser lacks actual knowledge of the filing is irrelevant[.]" Id. Consequently, equities in favor of a purchaser lack any significance. Id.

Constructive notice by virtue of a *lis pendens*[6] ought to deprive a party of bona fide purchaser status. A number of decisions of the appellate courts of other states illustrate this point. Recently, Murphy v. Fishman, 52 A.3d 130 (Md. Ct. Spec. App. 2012), the Court of Special Appeals of Maryland concluded that there was "no reason to distinguish between actual notice and constructive notice for purposes of determining a party's status as a bona fide purchaser." Id. at 145. The court held that the "*lis pendens* provided constructive notice . . . of the existing interest in the [p]roperty, thereby precluding [a party] from protection as a bona fide purchaser." Id. at 147.

Likewise, in Rolan v. Glass, 699 S.E.2d 428 (Ga. Ct. App. 2010), cert. denied (Jan. 24, 2011), the Court of Appeals of Georgia determined that "to qualify as a bona fide purchaser for value without notice, a party must have neither actual nor constructive notice of the matter at issue." Id. at 218, 699 S.E.2d at 430. Having found that previously filed *lis pendens* was within the chain of title and thus constituted constructive notice to any subsequent buyer, id. at 219, 699 S.E.2d at 431, the court held that the plaintiff was not a bona fide purchaser without notice. Id. at 220, 699 S.E.2d at 431.

The decision of the California Court of Appeal in Dyer v. Martinez, 54 Cal. Rptr. 3d 907 (Cal. Ct. App. 2007), underscores significance of a lis pendens as a source of constructive notice and its consequence for bona fide purchaser status. Id. at 909. In

[6] Hereinafter, itaclicized "lis pendens" is used to signify the document of notice of pendency of action.

Dyer, the *lis pendens*, though filed, had yet to be indexed at the time of the conveyance. Id. at 908. The court found the purchaser to be bona fide because at that time the *lis pendens* had not been capable of imparting constructive notice. Id. Conversely, had the *lis pendens* been indexed and thus capable of being found by a diligent abstractor, the purchaser would have not attained the status of a bona fide purchaser. Id. at 912.

The United States District Court for the District of South Carolina in United States v. Taylor, 292 F. Supp. 2d 791 (D.S.C. 2003), declined to recognize the intervenors in a federal tax lien foreclosure action as bona fide purchasers. Id. at 793-94. At the time of the transaction, the notice of lis pendens had been of record with the Greenville County Register of Deeds for over two years. Id. at 794. Having applied S.C. Code Ann. § 15-11-20 (2005), the court held that the intervenors had constructive notice of the litigation. Id.

In the instant case, BANA's *lis pendens* had been filed nearly nine months before Oriole's purchase of the bid. Id. Oriole cannot claim to have been a bona fide purchaser without notice because, under S.C. Code Ann. § 15-11-20 (2005), it had constructive notice of BANA's claim. The fact that Oriole's real estate attorney failed to discover BANA's *lis pendens* is irrelevant, and perceived equities in Oriole's favor are, in the words of this Court, of no moment. See MI Co., 325 S.C. at 626, 482 S.E.2d at 603.

B. The master-in-equity's reliance on *Robinson v. Estate of Harris* is misplaced because it is distinguishable from the case at bar.

The master-in-equity ruled that under § 15-39-870 and this Court's holding in Robinson v. Estate of Harris, 378 S.C. 140, 662 S.E.2d 420 (Ct. App. 2008) aff'd, 390 S.C. 272, 701 S.E.2d 740 (2010), Oriole "was a bona fide purchaser for value in good faith." (Master's Order p. 5). However, closer examination of Robinson reveals that it

does not support Oriole's argument for a finding that it had status of a bona fide purchaser without notice.

Robinson involved a quiet title action brought by Kathleen and Bobbie Brown (the Browns), the former owners of a half acre parcel of land, which they lost in a foreclosure action five years earlier. Robinson, 378 S.C. at 143, 662 S.E.2d at 421. In their amended complaint, the Browns "requested the []foreclosure be set aside because of ineffective service of process[.]" Id. The affidavits of service filed in that action indicated that the summons and complaint were left at their place of abode with one Keith Brown, the son of Kathleen and the brother of Bobbie. Id. at 143, 662 S.E.2d at 421-22. The defendant Robert Duggan, who bought the parcel from the purchaser at the foreclosure sale, "asserted as affirmative defenses section 15-39-870, his status as a bona fide purchaser for value without notice, and the doctrines of res judicata and collateral estoppel." Id.

In response to the motion for summary judgment filed by other defendants, in which Duggan joined, the Browns submitted the affidavit of Keith Brown. In his affidavit, Keith challenged sworn statements of the process server that he was the person served on behalf of the Browns in the foreclosure action. Id. He further stated that the Browns were incompetent at that time. The Browns also submitted affidavits from two other relatives who supported that assertion. Id. The trial court granted summary judgment, and this Court affirmed, holding that Duggan was a bona fide purchaser without notice under § 15-39-870. Id.

The key distinction between the facts of Robinson and the instant case is that in Robinson, the affidavits, which could have alerted the purchaser to the fact that the

mortgagors were incompetent and the service defective, were not matters of record at the time of the foreclosure sale. Id. at 146, 662 S.E.2d at 423. BANA's *lis pendens*, on the contrary, had been of record for over eight months. (BANA's.LP). Furthermore, even if the affidavits were matters of record, their filing, unlike the filing of the *lis pendens*, would not, in and of itself, impart constructive notice to the purchasers.

In Robinson, this Court found "no evidence that either Duggan or his predecessors-in-title had notice, *constructive* or otherwise[.]" Id. at 147, 662 S.E.2d at 423 (emphasis added). Here, however, Oriole had notice because of operation of the statute which prescribes that a filed "notice of pendency of action *shall be constructive notice* to a purchaser . . . of the property affected thereby[.]" S.C. Code Ann. § 15-11-20 (2005) (emphasis added); see MI Co., 325 S.C. at 626, 482 S.E.2d at 603.

Moreover, were we to assume that the *lis pendens* did not provide notice, Oriole still would not be able to claim status of a bona fide purchaser under § 15-39-870. According to Robinson, "'a purchaser in good faith at a judicial sale is not affected by irregularities in the proceedings or even error in the judgment under which the sale is made; [however, the purchaser] is required at his peril . . . to make inquiry as to the jurisdiction of the court which ordered the sale, and whether all proper parties were before the court when the order was made." Robinson, 378 S.C. at 145, 662 S.E.2d at 422 (quoting Cumbie v. Newberry, 251 S.C. 33, 159 S.E.2d 915 (1968)). This statement clearly implies that a purchaser will be affected by irregularities in the proceedings should it fail to inquire as to personal jurisdiction of the court ordering the sale.

Thus, to claim protection of § 15-39-870, the purchaser cannot just rely on the finding contained in the order that "[s]ervice was made upon the Defendants . . . as is shown by

proofs of service filed herein . . . [,]" (3668F/C.Jdg), but must carefully examine the whole record. The "facts appearing in the record itself [may] fully rebut any presumptions arising from the existence of the judgment." Tederall v. Bouknight, 25 S.C. 275, 282 (1886) (the court held that the judicial sale in a partition action was ineffective as to the infant party because the purchaser could have inferred from the record that, despite appointment of a guardian ad litem, the infant was not properly before the court – there was no summons issued and no personal service perfected).

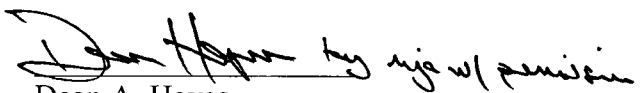
In the case at bar, the purchaser failed to examine the record and ensure that the master-in-equity had personal jurisdiction over each party. According to the affidavit of Clayton Custer, a member of Oriole, only the Order and Judgment of Foreclosure and Sale was subject to his scrutiny. Had he reviewed the affidavits of service, he would have realized that E-Loan was not served. The affidavit, purporting to constitute a proof of service on E-Loan, states that the summons and complaint were delivered to an employee of Banco Popular. Unlike natural persons, however, corporations do not share places of abode, where, in conformity with the procedural rules, the summons destined for one could be left in care of the other. Cf. Rule 4(b)(1), SCRCP. The fact that the affidavit listed: "c/o parent company Banco Popular" as the place of service, should have alerted Oriole that the master-in-equity might have lacked jurisdiction over E-Loan. And last but not least, Oriole failed to ascertain whether the actual mortgagee—MERS or its successor in interest—was "before the court when the order was made." Robinson, 378 S.C. at 145, 662 S.E.2d at 422; Turner v. Washington Realty Co., 128 S.C. 271, 122 S.E. 768, 769-70 (1924) ("a purchaser at a judicial sale, is bound to inquire whether all necessary parties were befor [sic] the court when the order of sale was made").

Custer, who acted on behalf of Oriole, is not an average buyer. He is an attorney and a sophisticated real estate investor. (Custer.Aff;Ex.C,O'sMotDis/SetAside). The affidavit of service, coupled with the complaint, which alleged that E-Loan's mortgage no longer constituted a lien while failing to articulate any reasons for such a conclusion, should have prompted further inquiry. See Spence v. Spence, 368 S.C. 106, 120, 628 S.E.2d 869, 876 (2006) (holding that "constructive . . . notice may arise when a party . . . should have become aware of certain facts which if investigated, would reveal claim of another[;]" and that a "party is not entitled to protection as a bona fide purchaser . . . unless [it] looks to every part of the title . . . , neglecting no source of information"). Because Oriole neglected to fully examine the record and inquire as to the master-in-equity's personal jurisdiction, it cannot claim protection as a bona fide purchaser without notice.

CONCLUSION

For the reasons stated above, this Court should reverse the master-in-equity's order denying BANA's motion for relief from Release Order, dismissing the complaint and vacating the order of foreclosure and sale in BANA's action.

Respectfully submitted,



Dean A. Hayes
Chris S. Truluck
Korn Law Firm, P.A.
P.O. Box 12369
Columbia, SC 29211-2369
Attorney for Appellant

September 17, 2013

~#4841-4902-6837 v.2~

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Master-in-Equity

The Honorable Charles B. Simmons, Jr.

Case No. 2011-CP-23-5912

Court of Appeals Tracking No. 2012-213310

Bank of America, N.A., successor by merger to BAC Home Loans Servicing, LP FKA Countrywide Home Loans Servicing, LP,..... Appellant,

v.

Charles M. Thompson, Mortgage Electronic Registration Systems, Inc., as nominee for E-Loan, Inc., Mortgage Electronic Registration Systems, Inc. as nominee for MidCountry Bank, Bridges Crossing Property Owners' Association, Inc., and SC Telco Federal Credit Union, and Oriole Properties, Inc., of whom Oriole Properties is, ... Respondent.

Case No. 2011-CP-23-3368

U.S. Bank, National Association,..... Respondent,

v.

Charles M. Thompson, E-Loan, Inc. and SC Telco Federal Credit Union,
of whom Bank of America, N.A. as successor in interest to E-Loan, Inc. is, ... Appellant.

CERTIFICATE OF COUNSEL

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

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: _____

Michael J. Anzelmo
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, South Carolina 29201

Attorneys for Bank of America, N.A., successor by merger to BAC Home Loans Servicing, LP FKA Countrywide Home Loans Servicing, LP

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Charles B. Simmons, Circuit Court Judge

Appellate Case No. 2012-213310
Trial Court Case No. 2011-CP-23-05912, 2011-CP-23-03668

Bank of America, N.A. successor by merger to BAC Home Loans Servicing, LP FKA Countrywide Home Loans Servicing, LP, ... Appellant.

v.

Charles M. Thompson, Mortgage Electronic Registration Systems, Inc., as nominee for E-Loan, Inc., Mortgage Electronic Registration Systems, Inc., as nominee for MidCountry Bank, Bridges Crossing Property Owners' Association, Inc., and SC Telco Federal Credit Union, and Oriole Properties, Inc.,, Defendants,

Of Whom Oriole Properties, LLC is the Respondent.

U.S. Bank, National Association ..... Respondent,

v.

Charles M. Thompson, E-Loan, Inc., and SC Telco Federal Credit Union,..... Defendants.

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Bank of America, N.A., do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings: Bank of America's Final Brief

Counsel Served:

Paul E. Hammack
Andrew F. Carson
Clawson and Staubes, LLC
223 W. Stone Avenue, Suite 100
Greenville, SC 29609

Jennifer Lee
Administrative Assistant

September 17, 2013