THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM COLLETON COUNTY
Court of Common Pleas 2012-CP-15-00262
The Honorable Maité Murphy, Circuit Court Judge

APPELLATE CASE NO. 2013-002555

MELISSA JEAN MARKS, ...Appellant,

Old South Mortgage Corporation, John Does v. 1-100, Nationstar Mortgage, LLC, Defendants, Of whom Nationstar Mortgage, LLC, is .....Respondent.

FINAL BRIEF OF RESPONDENT NATIONSTAR MORTGAGE, LLC

Robert A. Muckenfuss (SC Bar # 13903)
MCGUIREWOODS LLP
201 North Tryon Street, Suite 3000
Charlotte, North Carolina 28202
Telephone: (704) 343-2000
Facsimile: (704) 343-2300
rmuckenfuss@mcguirewoods.com

Elizabeth M.Z. Timmermans (SC Bar # 100288)
MCGUIREWOODS, LLP
434 Fayetteville Street, Suite 2600
Raleigh, North Carolina 27608
Telephone: (919) 755-6576
Facsimile: (919) 755-6699
eztimmermans@mcguirewoods.com

ATTORNEYS FOR RESPONDENT NATIONSTAR MORTGAGE, LLC

TABLE OF CONTENTS

TABLE OF CASES

Page

Cases

Statutes

STATEMENT OF ISSUES ON APPEAL

I. DID THE TRIAL COURT PROPERLY GRANT NATIONSTAR'S MOTION FOR SUMMARY JUDGMENT WHERE PLAINTIFF'S CLAIMS ARE SUBJECT TO A FINAL JUDGMENT BY THE BANKRUPTCY COURT?

II. DID THE TRIAL COURT PROPERLY DENY PLAINTIFF'S MOTION TO DISMISS NATIONSTAR AS AN INTERVENING PARTY WHERE NATIONSTAR IS THE CURRENT SERVICER OF PLAINTIFF'S MORTGAGE AND HER LAWSUIT SEEKS INVALIDATION OF THAT MORTGAGE?

STATEMENT OF THE CASE

On or about October 5, 2007, Plaintiff Melissa Jean Marks ("Plaintiff") entered into a Promissory Note with Old South Mortgage Corporation ("Old South") in the amount of $76,000.00 (the "Note"). (R. pp. 106–08) On that same date, Plaintiff executed a Mortgage, granting Old South a security interest in her home (the "Property"). (R. pp. 94–105) At the October 5 closing, Plaintiff received and signed a Notice of Transfer of Loan Servicing Rights, informing her that Old South would assign the Mortgage to Flagstar Bank, FSB ("Flagstar") on November 1, 2007. (R. pp. 142–43) She also admits receiving a "First Payment Letter" informing her that Flagstar would service the Mortgage. (R. p. 41 ¶ 21; R. p. 187) At the closing, the Note was endorsed to Flagstar, (R. p. 108), and Flagstar provided the funds used to purchase the Property, (R. p. 55 ¶ 84; R. p. 91) On or about October 1, 2009, Fannie Mae, the owner of the loan, transferred the right to service the Mortgage to Nationstar Mortgage, LLC ("Nationstar"). (R. p. 1311; R. pp. 42–43 ¶ 28; R. p. 202) Nationstar is the current holder of the Note and servicer of the Mortgage. (R. pp. 1310–11; R. p. 12)

On or about April 20, 2011, Plaintiff filed a Chapter 13 bankruptcy petition in the United States Bankruptcy Court for the District of South Carolina (the "Bankruptcy Proceeding"). (R. p. 44 ¶ 34); *In re Marks*, No. 11-02169-jw, Doc. 1, Vol. Pet. & Sch. (Bankr. D.S.C. Apr. 20, 2011). This petition and its associated schedules named Nationstar as a secured creditor and the servicer of the Mortgage. *In re Marks*, No. 11-02169-jw, Doc. 1. On June 21, 2011, the Bankruptcy Court issued an order confirming the Chapter 13 Bankruptcy Plan. *Id.*, Doc. 12, Order Conf. Plan (Jun. 21, 2011). The confirmed Chapter 13 Plain requires Plaintiff to continue to make mortgage payments to Nationstar. *Id.*, Doc. 9, Notice of Plan Modification, p. 3 (Jun. 8, 2011). Plaintiff is

current on her post-Petition mortgage payments, and Nationstar has not attempted to foreclose on the Property. (R. p. 22)

Without prior notice to the Bankruptcy Court or Nationstar, on April 6, 2012, Plaintiff filed a Complaint in the Colleton County Court of Common Pleas alleging fraudulent misrepresentation, unconscionability of the Mortgage, and seeking to invalidate the Note and Mortgage (the "State-Court Action" or the "State-Law Claims"). (R. pp. 35–78) While Plaintiff includes numerous allegations against Nationstar, and contends that "Nationstar does not have and never had lawful ownership of or a substantial equitable interest in the original mortgage," (*see, e.g.,* R. p. 56 ¶ 91; R. pp. 46–48 ¶¶ 48, 54), the Complaint does not name Nationstar as a defendant. Instead, it names only Old South, John Does 1–100 and Fictitious Corporations 1–100.[1] In effect, Plaintiff sought to obtain a judgment declaring the Mortgage invalid by naming as the only real defendant a dissolved corporation that had no involvement with the Mortgage after October 2007. (R. p. 40 ¶ 16; R. p. 185; R. p. 421 ¶ 7)

After learning of the State-Court Action, Nationstar moved the Bankruptcy Court to lift the automatic bankruptcy stay to allow it to intervene. The Bankruptcy Court issued an Order Modifying Stay, which concluded that "Movant would be prejudiced if Debtor were granted the relief she is seeking in the State Court Action unless Movant is allowed to intervene and asserts its rights to the mortgage and underlying obligations in such action." *In re Marks*, No. 11-02169-jw, Doc. 24, Order Modifying Stay, at 2 (May 25, 2012).

[1] On April 16, 2013, Plaintiff voluntarily dismissed the Doe defendants and the fictitious corporations. (R. pp. 773–74)

On June 4, 2012, Nationstar moved to intervene in the State-Court Action. (R. pp. 475–78) The Trial Court granted this motion on or about August 2, 2012, holding that: "Nationstar [has] an unconditional right to intervene because the Plaintiff seeks a declaratory judgment that could affect Nationstar's claim under the Note and Mortgage, . . . [and] Nationstar claims an interest in the action that is not being protected by any other named party." (R. p. 5) On March 25, 2013, Nationstar filed a Motion for Judgment on the Pleadings or, in the alternative, a Motion for Summary Judgment. (R. pp. 776–82) On June 26, 2013, Plaintiff filed a Motion to Dismiss Defendant as Intervening Party, contending that Nationstar was not a proper party to the State-Court Action. (R. pp. 883–908)

On October 9, 2013, the Trial Court granted Nationstar's Motion for Summary Judgment on the grounds that res judicata and judicial estoppel bar Plaintiff's claims, that she cannot show any damages to support her fraud claims, and that the Note and Mortgage are enforceable as a matter of law. (R. pp. 21–28) The Court denied Plaintiff's Motion to Dismiss Defendant as Intervening Party, holding that Nationstar is a necessary party to the State-Court Action. (R. pp. 29–32) Plaintiff filed a Motion to Reconsider both of these rulings, which the Trial Court denied on November 6, 2013. (R. pp. 1117–37; R. pp. 33–34) On, November 21, 2013, Plaintiff filed a Notice of Appeal from the Orders Granting Summary Judgment, Denying the Motion to Dismiss Defendant as Intervening Party, and Denying the Motion to Reconsider. (R. pp. 1201–06)

While Plaintiff refers to numerous motions in her Brief, (Pl.'s Final Br. at 3–5), the only Orders that are the subject of this appeal are those listed in the Notice of Appeal: the Order Granting Defendant's Motion for Summary Judgment, the Order Denying Plaintiff's Motion to Dismiss Defendant as Intervening Party, and the Order Denying

Reconsideration of both motions. *See Pickens v. Dwight*, 4 S.C. 360, 366 (1873) (noting that appellate court's judgment "will be restricted to the points made in the notice of appeal").

STANDARDS OF REVIEW

Plaintiff appeals both the Trial Court's grant of Nationstar's Motion for Summary Judgment and its denial of Plaintiff's Motion to Dismiss Nationstar as an Intervening Party. In reviewing these Orders, this Court should apply two different standards of review.

I. MOTION FOR SUMMARY JUDGMENT

A court should grant summary judgment where it finds that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP; *see also Turner v. Milliman*, 392 S.C. 116, 121–22, 708 S.E.2d 766, 769 (2011) (setting forth standard). While the Court must view the evidence in the light most favorable to the non-moving party, *Fleming v. Rose*, 350 S.C. 488, 493–94, 567 S.E.2d 857, 860 (2002), the party opposing summary judgment "may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial," Rule 56(e), SCRCP. If the plaintiff has not shown a genuine issue of material fact, "summary judgment, if appropriate, shall be entered against him." *Id.*

The South Carolina appellate courts review orders granting summary judgment *de novo*. *See Turner*, 392 S.C. at 121–22; 708 S.E.2d at 769 (appellate courts apply same standard as the trial court). Nevertheless, the Court may affirm an order granting summary judgment "upon any ground(s) appearing in the Record on Appeal." Rule

220(c), SCACR; *Williams v. Riedman*, 339 S.C. 251, 282, 529 S.E.2d 28, 44 (Ct. App. 2000).

II. MOTION TO DISMISS DEFENDANT AS AN INTERVENING PARTY

"The decision to grant or deny a motion to join an action pursuant to Rule 19, SCRCP, or intervene in an action pursuant to Rule 24, SCRCP, lies within the sound discretion of the trial court." *Gov't Emp.'s Ins. Co. v. Goethe*, 373 S.C. 132, 135, 644 S.E.2d 699, 701 (2007) (citing *Berkeley Elec. Coop., Inc. v. Town of Mt. Pleasant*, 302 S.C. 186, 189, 394 S.E.2d 712, 714 (1990); *Hunnicutt v. Rickenbacker*, 268 S.C. 511, 517, 234 S.E.2d 887, 890 (1977)). Under this standard, the reviewing court must not overturn the decision of the trial court "unless a manifest abuse of discretion is found resulting in an error of law. Moreover, the error of law must be so opposed to the trial judge's sound discretion as to amount to a deprivation of the legal rights of the party." *Jeter v. S.C. Dept. of Transp.*, 369 S.C. 433, 438, 633 S.E.2d 143, 145 (2006).

ARGUMENT

This Court should uphold the Trial Court's Orders granting Nationstar's Motion for Summary Judgment and denying Plaintiff's Motion to Dismiss Nationstar as an Intervening Party because Nationstar has a valid interest in the subject matter of the lawsuit, and Plaintiff's claims fail as a matter of law.[2] Plaintiff's claims fail for the following reasons: (1) judicial estoppel and res judicata bar Plaintiff's claims; (2) Plaintiff suffered no damages from any alleged fraud, and the statute of limitations bars her fraud claim; and (3) the Note and Mortgage are valid and, as the loan servicer,

[2] While Plaintiff included the Trial Court's Order Denying her Motion for Reconsideration in her Notice of Appeal, she does not raise any argument as to it in her Brief. (*See generally*, Plaintiff's Final Br.) To the extent this Court concludes that Plaintiff did not waive any error in the Order Denying Reconsideration by failing to present any arguments on this point, this Court should affirm the Trial Court's Order for the reasons presented herein in support of the other two orders listed in the Notice of Appeal.

Nationstar may enforce them. Finally, because this lawsuit affects Nationstar's interest under the Note and Mortgage, and because no other party to the action would protect this interest, the Trial Court properly denied Plaintiff's Motion to Dismiss Nationstar as an Intervening Party.

I. THE TRIAL COURT PROPERLY GRANTED NATIONSTAR'S MOTION FOR SUMMARY JUDGMENT.

A. Res judicata bars Plaintiff's claims.

As properly determined by the Trial Court, the doctrine of res judicata bars all of Plaintiff's claims in this State-Court Action. The doctrine of res judicata, or claim preclusion, prohibits "relitigating claims that were or could have been raised in [a prior] action." *Venture Eng'g v. Tishman Constr. Corp.*, 360 S.C. 156, 162, 600 S.E.2d 547, 550 (Ct. App. 2004). Res judicata applies where (1) the parties are identical or in privity with each other; (2) the claim in the second action arises from the same subject matter as the prior action; and (3) there was a final judgment on the merits in the prior action. *Id.* Section 1327 of the Bankruptcy Code sets forth "[t]he res judicata effect of a confirmed Chapter 13 plan on the debtor and creditors." *Nix v. Household Fin. Corp. (In re Nix)*, No. 10-01103-HB, Adv. No. 11-80062-HB, slip op., 2012 WL 27667, at *5 (Bankr. D.S.C. Jan. 5, 2012). Specifically, 11 U.S.C. § 1327(a) (2014) states that "[t]he provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan." *Id.* Consequently, if a party fails to raise a claim she could have raised prior to confirmation of the plan, she may not do so following confirmation of the plan. *In re Nix*, 2012 WL 27667, at *5 (citation omitted); *Varat Enters., Inc. v. Nelson, Mullins, Riley & Scarborough (In re Varat Enters)*, 81 F.3d

1310, 1315 (4th Cir. 1996) ("A bankruptcy court's order of confirmation is treated as a final judgment with res judicata effect."); *Snow v. Countrywide Home Loans, Inc.*, 270 B.R. 38, 41 (D. Md. 2001) ("It is well accepted that once a plan is confirmed, all questions which could have been raised pertaining to such plan are res judicata." (quotation omitted)).

Here, all three elements of the res judicata doctrine are met. Plaintiff is a party to both the Bankruptcy Proceeding and the State-Court Action, and the claims in both matters arise from the same cause of action in that both concern the validity, enforceability, and amount of Plaintiff's Mortgage. In addition, the Bankruptcy Court confirmed Plaintiff's Chapter 13 plan on June 21, 2011, nearly one year before Plaintiff filed the State-Court Action, finding that Nationstar is the secured creditor entitled to receive payment on the Mortgage. *In re Marks*, No. 11-02169-jw, Doc. 12, Order Conf. Plan (Jun. 21, 2011). Under 11 U.S.C. § 1327(a), the confirmed plan is a final adjudication as to any and all claims Plaintiff could have raised against Nationstar prior to confirmation of the plan. *See In re Nix*, 2012 WL 27667, at *5; *In re Marks*, No. 11-02169-jw, Doc. 12.

Plaintiff's Complaint essentially asks the State Court for cancellation of a debt already adjudicated by the Bankruptcy Court, and she claims she was unaware of her causes of action available to challenge the validity of the Note and Mortgage at the time she filed for bankruptcy protection, (*see* Pl.'s Final Br., at 31). Plaintiff's State-Law Claims, however, relate to alleged infirmities during the Mortgage origination in 2007, the servicing transfer to Nationstar in 2009, and servicing activities by Nationstar in

2009, all known to her well before filing the Bankruptcy Proceeding.[3] Nonetheless, Plaintiff did not disclose any claims relating to the Mortgage in her Chapter 13 schedules. Even assuming that Plaintiff was not aware of her allegations against Nationstar at the time of the Order confirming the Chapter 13 Bankruptcy Plan, the proper avenue for any claim would be an adversary proceeding in the Bankruptcy Court pursuant to the procedures set forth in the Federal Rules of Bankruptcy Procedure. *See, e.g.*, 11 U.S.C. § 1329 (2014) (noting procedures for modification of confirmed bankruptcy plan); 11 U.S.C. § 1330 (2014) (allowing revocation of order of confirmation if procured by fraud); FED. R. BANKR. P. 3007(b), 7001, *et seq*. In essence, Plaintiff is using this Court in an attempt to seek remedies against Nationstar that are reserved for the federal bankruptcy court as a direct result of her seeking bankruptcy relief.

The Trial Court correctly held that the doctrine of res judicata bars all of Plaintiff's claims in this State-Court Action. This Court should affirm the Trial Court's grant of summary judgment.

B. Judicial estoppel bars Plaintiff's claims.

"Judicial estoppel is an equitable concept that prevents a litigant from asserting a position inconsistent with, or in conflict with, one the litigant has previously asserted in the same or related proceeding." *Cothran v. Brown*, 357 S.C. 210, 215, 592 S.E.2d 629, 631 (2004). Judicial estoppel applies where there are: (1) two inconsistent positions taken by the same party; (2) the positions are taken in the same or related proceedings; (3) the party taking the position succeeded in maintaining that position, and obtained a benefit by it; (4) the inconsistency is part of an intentional effort to mislead the court; and

[3] The only post-petition allegations against Nationstar relate to the alleged denial of access to Nationstar's online banking website after the filing of Plaintiff's bankruptcy petition. (R. pp. 43–51 ¶¶ 32–66.) These allegations are entirely irrelevant to the causes of actions that Plaintiff alleges relating to fraud at the origination of her Mortgage and the validity and enforceability of her Mortgage.

(5) the two positions are totally inconsistent. *Auto-Owners Ins. Co. v. Rhodes*, 405 S.C. 584, 598, 748 S.E.2d 781, 788 (2013).

In the bankruptcy context, judicial estoppel specifically prevents a debtor who fails to disclose a claim in the bankruptcy proceeding from later taking advantage of that claim in a separate action against a creditor. *Abraham v. Bank of Am., N.A. (In re Abraham)*, No. 10-05354-jw, Adv. No. 10-80118-jw, slip op., 2010 WL 5437253, at *3 (Bankr. D.S.C. Sep. 20, 2010) (applying judicial estoppel to prevent state-law claims where debtor did not identify causes of action against creditor on its Chapter 13 schedules); *In re Nix*, 2012 WL 27667, at *5 (holding that a failure to raise an available claim prior to confirmation of the bankruptcy plan precludes raising the claim after the plan's confirmation.).

Indeed "a debtor's failure to satisfy her statutory disclosure duty is inadvertent 'only when, in general, the debtor *either lacks knowledge of the undisclosed claims or has no motive for their concealment.*'" *Wright v. Guess*, No. 3:08-4130-JFA, 2010 U.S. Dist. LEXIS 5532, at *6 (D.S.C. Jan. 25, 2010) (unpublished) (quoting *In re Coastal Plains*, 179 F.3d 197, 210 (5th Cir. 1999)) (emphasis added). The second prong of this disjunctive test, motive to conceal, may be inferred where a "plaintiff's disclosure of her lawsuit in her bankruptcy petition could have increased the amount of her assets, resulting in a less-favorable Chapter 13 plan." *Id.*; *In re Family Dollar FLSA Litigation*, Nos. 3:08-cv-110, 3:07-cv-501, 2011 U.S. Dist. LEXIS 119281, at *18 (W.D.N.C. Oct. 14, 2011) (unpublished). Moreover,

> [t]he debtor need not know all of the facts or even the legal basis for the cause of action; rather, if the debtor has enough information prior to confirmation to suggest that it may have a possible cause of action, then it is a "known" cause of action that must be disclosed.

In re Family Dollar, 2011 U.S. Dist. LEXIS 119281, at *19 (quoting *Gaskins v. Thousand Trails, LP*, 521 F. Supp. 2d 693, 696 (S.D. Ohio 2007)) (internal quotation omitted). Failure to disclose the claim in the bankruptcy proceeding precludes the debtor from later capitalizing on it. *In re Nix*, 2012 WL 27667, at *5; *see* 11 U.S.C. § 541(a)(1) (2014).

Again, the Bankruptcy Court confirmed Plaintiff's Chapter 13 plan on June 21, 2011, nearly one year before Plaintiff filed the State-Court Action, finding that Nationstar is the secured creditor entitled to receive payment on the Mortgage. Rather than challenging the validity of the Mortgage in her pending Bankruptcy Proceeding, Plaintiff sought to sidestep the federal requirements governing her claims and file a separate State-Court Action asking this Court to provide relief relating to the Mortgage and to exclude Nationstar from being able to defend against her allegations. Furthermore, Plaintiff's material allegations relate to origination and servicing claims occurring between 2007 and 2009, (*see, e.g.*, R. pp. 39–43 ¶¶ 12, 19, 28–29), providing her with "enough information prior to confirmation to suggest that [she] may have a possible cause of action," *In re Family Dollar*, 2011 U.S. Dist. LEXIS 119281, at *19. As a result, Plaintiff's cause of action was a "known" cause of action that must be disclosed to the Bankruptcy Court. Finally, by bringing State-Law Claims in which she seeks to avoid the Mortgage, and thus increase the value of her assets, Plaintiff artificially reduced the value of her assets in the Bankruptcy Proceeding, impairing her creditors' ability to recover and establishing a clear motive for concealment of her claims. *See* 11 U.S.C. § 541(a)(1) (The bankruptcy estate is "comprised of . . . [a]ll legal or equitable interests of the debtor.").

Because Plaintiff failed to disclose the allegations underlying her State-Law Claims in her Bankruptcy Proceeding and the Bankruptcy Court already held the Mortgage to be valid and enforceable, judicial estoppel bars Plaintiff from asking this Court to invalidate the Mortgage. Therefore, the Court should affirm the Trial Court's grant of summary judgment.

C. *The Trial Court properly granted summary judgment on Plaintiff's fraud claim because she cannot establish damages, and the statute of limitations bars her claim.*

Under South Carolina law, a plaintiff must show by clear, cogent, and convincing evidence, all of the following to recover for fraud: (1) a representation; (2) its falsity; (3) its materiality; (4) knowledge or reckless disregard of its falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely on its truth; and (9) the hearer's proximate injury. *First State Savings & Loan v. Phelps*, 299 S.C. 441, 446–47, 385 S.E.2d 821, 824 (1989). A fraud claim cannot succeed unless it alleges the elements of fraud with particularity. *See* Rule 9(b), SCRCP. Moreover, "[f]ailure to prove any element of fraud is fatal to the action." *Sorin Equip. Co. v. The Firm, Inc.*, 323 S.C. 359, 366, 474 S.E.2d 819, 823 (Ct. App. 1996) (citations omitted).

As the Trial Court properly determined, Plaintiff has failed to establish any alleged damages from fraud relating to the origination of the Mortgage. While Plaintiff's fraud allegations remain unclear, Plaintiff appears to allege that the Mortgage is fraudulent because it identifies Old South as the lender, but that Old South subsequently transferred the Mortgage ownership and servicing rights of the Mortgage. Without conceding that Plaintiff's Complaint pleads a cause of action for any of the elements of fraud, Plaintiff cannot show any injury as a result of any alleged fraud because, as the

Trial Court held, she received all that she bargained for under the terms of the Note and Mortgage. Plaintiff received the loan proceeds after the October 5, 2007 closing, which she used to purchase the Property. She does not allege that she paid Nationstar (or any another party) any amounts other than those due under the Note. It is inconsequential that Flagstar, and not Old South, funded the loan because Plaintiff does not dispute that she actually received the money. Moreover, Plaintiff knew that Flagstar, and not Old South, would service the loan. (R. p. 41 ¶ 21; R. p. 187) Additionally, Plaintiff is current on her mortgage payments, and Nationstar has not attempted to foreclose on the Mortgage. Thus, she cannot show any harm to her from any alleged fraud.

In addition, the statute of limitations prevents Plaintiff from recovering on her fraud claim. The statute of limitations for fraud is three years. S.C. CODE ANN. §§ 15-3-530(5); 15-3-535 (2014). On or about October 5, 2007, Plaintiff executed the loan closing documents, including the Notice of Transfer of Loan Servicing Rights, informing her that Old South would assign the Mortgage to Flagstar. (R. pp. 94–108; R. pp. 142–43) She also admits receiving a "First Payment Letter" on or about October 5, 2007 informing her that Flagstar would service the Mortgage. (R. p. 41 ¶ 21; R. p. 187) Thus, it is undisputed that Plaintiff discovered the alleged origination issues that form the basis for her fraud claim in 2007. The statute of limitations on this claim elapsed long before she filed her Complaint in April 2012.

Because Plaintiff's fraud claim fails as a matter of law, the Court should uphold the Trial Court's grant of summary judgment and dismiss Plaintiff's fraud claim.

D. The Trial Court correctly concluded that the Note and Mortgage are valid and that Nationstar may enforce them.

Plaintiff contends that "there are no lawful owners" of the Note and that Nationstar cannot enforce the Note because it does not own the Note. (Pl.'s Final Br., at 2.) However, a party may enforce a negotiable instrument even if it "is not the owner of the instrument." S.C. CODE ANN. § 36-3-301 (2014) (codified from Article 3 of the Uniform Commercial Code); *see Midfirst Bank, SSB v. C.W. Haynes & Co.*, 893 F. Supp. 1304, 1312 (D.S.C. 1994) (holding that Uniform Commercial Code Article 3 applies to assignments of mortgage notes). Rather, any of the following persons may enforce a promissory note: (1) the holder of the note; (2) a non-holder in possession of the instrument who has rights of a holder; or (3) a party who once had possession of a now lost instrument. S.C. CODE ANN. § 36-3-301. A mortgage servicer is "a real party in interest" with the power to enforce a mortgage. *Bank of Am., N.A. v. Draper*, 405 S.C. 214, 222–23, 746 S.E.2d 478, 482 (2013).

An assignee of a mortgage "stands in the shoes of the assignor," and has the same right to enforce the mortgage as the assignor. *BAC Home Loan Servicing, LP v. Kinder*, 398 S.C. 619, 624, 731 S.E.2d 547, 549 (2012) (citing *Moore v. Weinberg*, 373 S.C. 209, 220, 644 S.E.2d 740, 745 (Ct. App. 2007)). "[T]he assignment of a mortgage does not need to be recorded, and failure to do so has no effect on the rights of the assignee." *Id.* at 623, 731 S.E.2d at 549; *Singleton v. Singleton*, 60 S.C. 216, 235, 38 S.E. 462, 469 (1901) ("Notice to a mortgagor of the assignment of a mortgage is not necessary to its validity." (quotation omitted)). Instead, a mortgage simply follows the note. *Union Nat'l Bank of Columbia v. Cook*, 110 S.C. 99, 96 S.E. 484, 486 (1918).

Plaintiff appears to contend that because the assignment of the Note was not recorded, the Note and Mortgage are invalid. (Pl.'s Final Br. at 2; 17–21.) However, Plaintiff does not cite any case showing this to be the rule in South Carolina.[4] (*See generally* Pl.'s Final Br.) Indeed, Plaintiff admits that "it's true that in South Carolina, you do not have to record assignments." (Pl.'s Final Br., at 19 (quoting her statements to the Trial Court)) Here, Nationstar is the servicer of the Mortgage, and has possession of the original Note, endorsed in blank by Flagstar. (R. pp. 1310–11; Pl.'s Final Br. at 3.) Thus, the Trial Court correctly held that the Note and Mortgage are valid and that Nationstar has the power to enforce them.

II. THE TRIAL COURT DID NOT ERR IN HOLDING THAT NATIONSTAR IS A NECESSARY PARTY TO PLAINTIFF'S LAWSUIT BECAUSE PLAINTIFF SEEKS TO INVALIDATE A MORTGAGE OF WHICH NATIONSTAR IS THE CURRENT SERVICER.

The Court should uphold the Trial Court's Order Denying Plaintiff's Motion to Dismiss Defendant as Intervening Party because the Trial Court correctly held that Nationstar is a necessary party to the State-Court Action.[5] The Rules of Civil Procedure

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[4] Plaintiff depends on *Deutsche Bank Nat'l Trust Co. v. Heinrich*, No. 2011-CP-10-1060 (Ct. of Common Pleas, Charleston Cnty. Jul. 31, 2013) and *Nationstar Mortg., LLC v. Van Cott*, 2012-Ohio-5807 (Ohio Ct. App. 2012) to support her argument that an assignment of a mortgage must be recorded. (*See* Pl.'s Final Br. at 17–18.) However, both of these opinions lack precedential value in this Court, and neither analyzes South Carolina law as to Nationstar's right to enforce the Note and Mortgage. As an initial matter, unlike in *Heinrich* and *Van Cott*, Nationstar is not attempting to foreclose on the Property, but merely seeks to defend its interest in the Note and Mortgage in litigation brought by Plaintiff. Moreover, under South Carolina law, "the assignment of a mortgage does not need to be recorded," *Kinder*, 398 S.C. at 623, 731 S.E.2d at 549, and a mortgage servicer is "a real party in interest" with the power to enforce a mortgage. *Draper*, 405 S.C. at 222–23, 746 S.E.2d at 482. Thus, contrary to Plaintiff's assertions, as the holder of the Note and servicer of the Mortgage, (R. pp. 1310–11; R. p. 12), Nationstar is entitled to enforce them.

[5] The issue of whether Nationstar had the right to intervene was the subject of at least two prior motions before the Trial Court, all of which the Court decided in favor of Nationstar. (*See* R. pp. 4–7; R. pp. 9–13) Nonetheless, Plaintiff continues to protest Nationstar's involvement in the State-Court Action. Rule 43(l) of the South Carolina Rules of Civil Procedure states that "[i]f any motion be made to any judge and be denied, in whole or in part . . . no subsequent motion upon the same state of facts shall be made to any other judge in that action." Thus, the prior determination of Nationstar's right to intervene was, by itself, a sufficient ground for the Trial Court to deny Plaintiff's Motion to Dismiss Nationstar as an Intervening Party.

"permit liberal intervention particularly where as here, judicial economy will be promoted by the declaration of the rights of all parties who may be affected." *Berkeley*, 302 S.C. at 189, 394 S.E.2d at 714.

A. Nationstar properly intervened as of right.

Rule 24(a) of the South Carolina Rules of Civil Procedure governs intervention as of right. The rule states that:

> Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; *or* (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest.

Rule 24(a), SCRCP (emphasis added). "Intervention of right under this Rule is a counterpart to Rule 19(a) on joinder of persons needed for a just adjudication;" *id.* note; which requires that "'whenever possible persons materially interested in the action should be joined so that they may be heard and a complete determination had,'" *Goethe*, 373 S.C. at 136, 644 S.E.2d at 701 (quoting Rule 19(a), SCRCP note). While a party may intervene as of right if it meets either prong of Rule 24(a), here, Nationstar meets both tests.

First, Section 15-53-80 of the South Carolina Code provides that "[w]hen declaratory relief is sought all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding." S.C. CODE ANN. § 15-53-80. Plaintiff seeks a declaratory judgment that the Note and Mortgage are invalid or unenforceable. (R. pp. 76–77 ¶¶ 1–4; Pl.'s Final Br. at 2.) Nationstar is the current servicer of the Mortgage and holder of the Note. (R. pp. 1310–11; R. p. 12) Moreover, Nationstar is a

named creditor in Plaintiff's confirmed Chapter 13 Bankruptcy Plan; the Bankruptcy Court confirmed that Nationstar is the secured creditor entitled to receive payment on the Mortgage; and Plaintiff currently makes her mortgage payments to Nationstar. Thus, any adjudication of Plaintiff's claims relating to the validity of the Mortgage undoubtedly affects Nationstar's rights either as a holder or servicer, or by altering the assets disclosed in the Bankruptcy Proceeding. Section 15-53-80 of the South Carolina Code secures Nationstar the right to intervene pursuant to Rule 24(a)(1) of the South Carolina Rules of Civil Procedure.

Furthermore, even in the absence of a statute on point, Nationstar "claims an interest relating to the property or transaction which is the subject of the action and . . . is so situated that the disposition of the action may as a practical matter impair or impede [its] ability to protect that interest." Rule 24(a)(2), SCRCP. A party seeking to intervene under Rule 24(a)(2) must show the following: (1) timely application; (2) an interest relating to the property or transaction that is the subject of the action; (3) disposition of the action without intervention may impair its ability to protect this interest; and (4) its interest is inadequately protected by the other parties. *Reichlyn v. Columbia Organic Chem. Co.*, 310 S.C. 495, 498, 427 S.E.2d 661, 663 (1993); *Berkeley*, 302 S.C. at 189, 394 S.E.2d at 714.

Again, the subject of the State-Court Action is the validity of the Note and Mortgage, and Nationstar is the holder of the Note and the current servicer of the Mortgage. (R. pp. 1310–11; R. p. 12) Thus, Nationstar claims an interest in the subject of the State-Court Action. In addition, Nationstar's Motion to Intervene was timely, as it moved to intervene only ten days following the Bankruptcy Court's order lifting the automatic stay. *In re Marks*, No. 11-02169-jw, Doc. 24, Order Modifying Stay at 2 (May

25, 2012); (R. pp. 475–78) Because Plaintiff seeks a judgment declaring the Mortgage invalid, disposition of the action without Nationstar's intervention would impair its ability to protect its interest in the Mortgage. *See Berkeley,* 302 S.C. at 190–91, 394 S.E.2d at 715 (allowing intervention whenever disposition of a case *may* impair a party's interest).

Finally, Prior to Nationstar's intervention, the only defendants in the State-Court Action were Old South Mortgage and the subsequently dismissed Doe defendants, none of whom could adequately protect Nationstar's interests. *See id.* at 191, 394 S.E.2d at 715 (noting that a court should consider whether an existing party will undoubtedly make all of the intervenor's arguments, is capable and willing to make such arguments, and whether the intervenor offers different knowledge, experience, or perspective on the proceedings). Old South is a dissolved corporation, (R. p. 40 ¶ 16; R. p. 185; R. p. 421 ¶ 7), held the Note only for a few weeks following Closing, (R. pp. 142–43), and thus does not share any interest in protecting Nationstar's rights. Without Nationstar's involvement in the suit, its rights would go unprotected.

Indeed, without Nationstar's intervention in the State-Court Action, no party would oppose Plaintiff's interest in invalidating the Mortgage. Thus, intervention by Nationstar, the holder of the Note and the servicer of the Mortgage, is required for a complete determination of the State-Court Action, and the Trial Court did not err in ruling that Nationstar had the right to intervene.

B. The rules governing permissive intervention also allow Nationstar's intervention.

Even if the Court concludes that Nationstar did not have the right to intervene under Rule 24(a), the Court should nonetheless affirm the Trial Court's Order allowing

intervention under Rule 24(b). *See* Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal."). Rule 24(b) governs permissive intervention and holds that "anyone may be permitted to intervene in an action . . . when an applicant's claim or defense and the main action have a question of law or fact in common." Rule 24(b)(2), SCRCP.

Here, there are numerous questions of law and fact in common between Plaintiff's claims and Nationstar's defenses. The heart of Plaintiff's State-Law Claims is that the Note and Mortgage are unenforceable. (R. pp. 76–77 ¶¶ 1–4; Pl.'s Final Br. at 2.) Nationstar, as the holder of the Note and the servicer of the Mortgage, opposes this claim, and relies upon the validity of the Note and Mortgage in conducting its business. Thus, the Trial Court properly held that Nationstar should be permitted to intervene.

Because the Trial Court correctly concluded on multiple occasions that Nationstar is a necessary party to the State-Court Action, this Court should uphold the Trial Court's denial of Plaintiff's Motion to Dismiss Nationstar as an Intervening Party.

CONCLUSION

For the reasons discussed above, this Court should affirm both judgments of the Trial Court in their entirety.

This the 8 day of April, 2014.

Respectfully submitted,

MCGUIREWOODS LLP

Robert A. Muckenfuss (SC Bar # 13903)
MCGUIREWOODS LLP
201 North Tryon Street, Suite 3000
Charlotte, North Carolina 28202
Telephone: (704) 343-2000
Facsimile: (704) 343-2300
rmuckenfuss@mcguirewoods.com

Elizabeth M.Z. Timmermans (SC Bar # 100288)
MCGUIREWOODS, LLP
434 Fayetteville Street, Suite 2600
Raleigh, North Carolina 27608
Telephone: (919) 755-6576
Facsimile: (919) 755-6699
eztimmermans@mcguirewoods.com
ATTORNEYS FOR RESPONDENT NATIONSTAR MORTGAGE, LLC

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM COLLETON COUNTY
Court of Common Pleas 2012-CP-15-00262
The Honorable Maité Murphy, Circuit Court Judge

APPELLATE CASE NO. 2013-002555

MELISSA JEAN MARKS, ...Appellant,

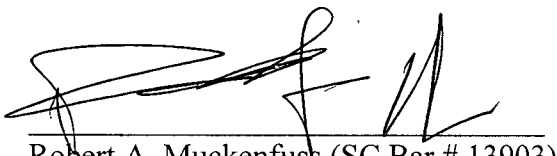
v.

NATIONSTAR MORTGAGE, LLC,.....Respondent.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this **FINAL BRIEF OF RESPONDENT NATIONSTAR MORTGAGE, LLC** complies with Rule 211(b), SCACR.

April 8 2014



Robert A. Muckenfuss (SC Bar # 13903)
MCGUIREWOODS LLP
201 North Tryon Street, Suite 3000
Charlotte, North Carolina 28202
Telephone: (704) 343-2000
Facsimile: (704) 343-2300
rmuckenfuss@mcguirewoods.com

Elizabeth M.Z. Timmermans (SC Bar # 100288)
MCGUIREWOODS, LLP
434 Fayetteville Street, Suite 2600
Raleigh, North Carolina 27608
Telephone: (919) 755-6576
Facsimile: (919) 755-6699
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PROOF OF SERVICE

I, the undersigned Attorney of the Law offices of McGuireWoods LLP, attorneys for Respondent, do hereby certify that I have served all counsel/parties 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: Final Brief of Respondent Nationstar Mortgage, LLC

Counsel Served: Melissa J. Marks, Pro Se
209 Presidential Court
Round O, SC 29474
Pro Se Appellant

John F. Knobeloch
King & Knobeloch, PC
808 Johnnie Dodds Blvd.
Mt. Pleasant, SC 29464
Attorney for Old South Mortgage Corporation

April 8, 2014.

Robert A. Muckenfuss (SC Bar # 13903)
MCGUIREWOODS LLP
201 North Tryon Street, Suite 3000
Charlotte, North Carolina 28202
Telephone: (704) 343-2000
Facsimile: (704) 343-2300
rmuckenfuss@mcguirewoods.com

Elizabeth M.Z. Timmermans (SC Bar # 100288)
MCGUIREWOODS, LLP
434 Fayetteville Street, Suite 2600
Raleigh, North Carolina 27608
Telephone: (919) 755-6576
Facsimile: (919) 755-6699
eztimmermans@mcguirewoods.com
ATTORNEYS FOR RESPONDENT NATIONSTAR MORTGAGE, LLC