THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

Honorable Steven C. Kirven, Master-In-Equity

Case No. 2011-CP-37-1056

Appellate Case No. 2017-000886

Federal National Mortgage Association.....RESPONDENT

v.

John D. Dalen, Julie A. Dalen and Wawtockace Hills Property Owners Association.....DEFENDANTS

Of whom John D. Dalen and Julie A. Dalen are.....APPELLANTS

And

John D. Dalen and Julie A. Dalen .....APPELLANTS

v.

Bank of America, N.A., successor by merger to BAC Home Loans Servicing, L.P. f/k/a Countrywide Home Loans Servicing, L.P..... RESPONDENT

FINAL BRIEF OF RESPONDENT BANK OF AMERICA, N.A.

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Other Authorities

STATEMENT OF ISSUES ON APPEAL

I. Whether Appellant preserved any issues for appellate review concerning the Trial Court's grant of summary judgment to Bank of America, N.A., successor by merger to BAC Home Loans Servicing, L.P. f/k/a Countrywide Home Loans Servicing, L.P. ("BANA")

II. Whether the Trial Court erred in considering and granting BANA's Renewed Motion for Summary Judgment.

STATEMENT OF FACTS

BANA commenced the underlying equitable action for foreclosure on October 31, 2011 ("Foreclosure Action"), alleging that Defendant John D. Dalen defaulted on a promissory note ("Note") he executed and delivered to Quicken Loans Inc. ("Quicken Loans"), on December 20, 2007, in the amount of $118,750.00, plus interest. [R. pp. 71–76.] To secure the Note, John and Julie A. Dalen (collectively, "the Dalens" or "Appellant") executed a mortgage ("Mortgage") to Mortgage Electronic Registration Systems, Inc. ("MERS"), acting solely as nominee for Quicken Loans, its successors and assigns, covering real property located at 109 Wood Valley Dr., Westminster, South Carolina 29693 (the "Property"). [R. pp. 919–34.] The Mortgage was recorded on December 21, 2007 in the Oconee County real property records. [R. pp. 919–34.]

By an assignment of Mortgage dated May 9, 2011, and recorded May 16, 2011, in the Oconee County real property records, MERS assigned the Mortgage to BAC Home Loans Servicing, LP f/k/a Countrywide Home Loans Servicing LP (the "2011 Assignment"). [R. p. 935.] BANA is the successor to BAC Home Loans Servicing, LP pursuant to a corporate merger. [R. p. 73 ¶ 9.] BANA and its predecessors-in-interest held the Mortgage until it was assigned from BANA to Federal National Mortgage Association ("Fannie Mae") on or about April 13, 2015 ("2015 Assignment"). [R. p. 936.]

In response to BANA's Complaint, the Dalens filed a Motion to Dismiss on November 22, 2011, alleging that BANA lacked standing to foreclose and was not the real party in interest to enforce the Note and/or Mortgage, which was denied on March 7, 2012 ("Order Denying Motion to Dismiss"). [R. pp. 1–3, 77–80.] On February 21, 2012, the Dalens filed their Answer, Affirmative Defenses, Counterclaims, and Demand for Jury Trial ("Answer"). [R. pp. 87–104.]

On April 13, 2012, BANA filed an Affidavit certifying that it held both the Note and Mortgage. [R. pp. 1076–77.] The Dalens subsequently moved for reconsideration of the Order Denying Motion to Dismiss. This motion was denied on June 20, 2012. [R. pp. 4–5, 81–86.]

After a period of discovery, BANA filed a Motion for Summary Judgment ("Motion for Summary Judgment") regarding the Counterclaims, on December 4, 2013. BANA's Motion for Summary Judgment was denied on July 9, 2014. [R. pp. 6–8, 117–28.]

On November 17, 2014, BANA filed a Motion to Strike Jury Trial Demand and Refer to the Master-in-Equity ("Motion for Order of Reference"), and, on the same day, the Dalens filed a Motion for Summary Judgment arguing that the 2011 Assignment to BANA was void and BANA therefore lacked standing to foreclose. [R. pp. 185–86, 187–88.] Following a hearing on both motions, the Trial Court rendered its rulings in a Form 4 order, entered on January 28, 2015, denying the Dalen's Motion for Summary Judgment and granting BANA's Motion for Order of Reference; a formal order was entered on February 25, 2015 ("Order of Mandatory Reference"). [R. pp. 9–10, 11–14.] In the Order, the Trial Court denied the Dalen's Motion for Summary Judgment concluding, *inter alia*, that because BANA was the undisputed servicer of the loan when the Complaint was filed, BANA was a real party in interest with standing to foreclose. [*Id.*] The Dalens did not appeal the Order of Mandatory Reference.

On March 17, 2015, the Dalens filed a Motion to Compel Discovery and a Motion to Compel Mediation. [R. pp. 189–91.] And, on June 1, 2015, BANA filed a Motion to Substitute Plaintiff seeking to substitute Federal National Mortgage Association ("FNMA") as the plaintiff in the Foreclosure Action based upon an assignment of the Mortgage executed by BANA on April 13, 2015, in favor of FNMA ("Assignment of Mortgage"). [R. p. 191.] These motions were heard on August 26, 2016. In an order entered on September 23, 2015, the Trial Court granted BANA's Motion to Substitute Plaintiff, noting that BANA would remain a counterclaim defendant ("Order Substituting Plaintiff"), and denied the Dalens' Motion to Compel Discovery and Motion to Compel Mediation. [R. pp. 19–22.]

On February 16, 2016, BANA filed a motion to amend the Trial Court's December 9, 2014 scheduling order, in part, so that BANA could file a renewed motion for summary judgment. [R. pp. 192–194.] The Dalens' consented to BANA's motion, and the Trial Court entered a Consent Order Amending Scheduling Order on March 2, 2016. [R. pp. 796–98.]

On March 9, 2016, BANA filed a Renewed Motion for Summary Judgment as to the Counterclaims asserted in the Dalens' Answer ("Renewed Motion for Summary Judgment") [R. pp. 195–224], and the Dalens filed a Motion to Dismiss for lack of subject matter jurisdiction, on May 5, 2016, alleging BANA did not have standing to commence the Foreclosure Action ("Motion to Dismiss"). [R. pp. 225–32.] The Foreclosure Action was struck from the active docket due to Appellant's bankruptcy filing on May 10, 2016. [R. pp. 23–25.] The Action was restored to the active docket on July 28, 2016, after Appellant's bankruptcy case was dismissed. [R. pp. 26–28.] That same day, the Trial Court entered an order granting BANA's Renewed Motion for Summary Judgment and dismissing the Dalens' Counterclaims ("Summary Judgment"). [R. pp. 29–41.]

The Dalens' filed a Motion for Reconsideration of the Summary Judgment, on August 8, 2016. [R. pp. 233–46.] Following a hearing on September 8, 2016, the Dalens' Motion for Reconsideration and Motion to Dismiss were denied in separate orders on October 13, 2016. In the order denying the Motion for Reconsideration of the Summary Judgment, the trial court noted that the motion improperly attempted to supplement the record developed during the summary judgment hearing by including materials that were not presented at the hearing. [R. pp. 44–50.] Appellant filed a notice of appeal from the order denying the Motion to Dismiss, and this Court dismissed the appeal as interlocutory on November 18, 2016. [R. pp. 51–52.]

The Foreclosure Action came on for trial on March 2, 2017, before the Honorable Steven C. Kirven, Master-in-Equity ("Trial"). [R. p. 378.] At Trial, FNMA presented the testimony of William Rankin ("Rankin"), a litigating officer with Seterus, Inc. ("Seterus"), the servicer of the Loan. [R. pp. 387:1–388:5.] Rankin testified that he had personal knowledge of the business records maintained by Seterus in connection with the Loan. [R. pp. 388:1–16.] Rankin identified the Note, executed by Appellant, and the Mortgage, executed jointly by the Dalens, and he testified that the Mortgage constituted a first mortgage lien on the Dalen's property. [R. pp. 388:17–390:12.] Rankin testified that Seterus was in possession of the Note through FNMA's counsel and that the Note was endorsed in blank and present in the courtroom during Trial. [R. p. 389:14–21.] The Note and Mortgage were admitted into evidence over Appellant's non-specific objection "to the whole proceeding" and his contention that there was "no competent fact witness" for him to cross-examine; Appellant provided no specific basis related to the admissibility of the exhibits. [R. pp. 390:13–391:7.]

Rankin identified the 2011 Assignment and the 2015 Assignment. [R. p. 391:12–21.] Appellant objected to the admission of both assignments into evidence by merely stating, "I

object." [R. pp. 391:25–392:1.] The objection was overruled, and both assignments were admitted into evidence. [R. p. 392:1–6.]

Rankin next identified Seterus's records of Appellant's payments made on the Loan, which included the records of payments on the Loan from BANA, the prior servicer, and testified that the records reflected Appellant had defaulted on the Loan in December 2010 ("Payment History"). [R. pp. 392:8–394:2.] When FNMA offered the Payment History into evidence, Appellant's only objection was that the Trial Court did not have subject matter jurisdiction over the Foreclosure Action. [R. p. 394:8–17] Appellant's objection was overruled, and the Payment History was admitted into evidence. [*Id.*] Rankin also testified that BANA, as the servicer of the Loan at the time of Appellant's default, sent an acceleration letter to Appellant on December 17, 2010 ("Acceleration Letter"). [R. pp. 394:21–395:4.] When FNMA offered the Acceleration Letter into evidence, the Trial Court overruled Appellant's objection that the Trial was "an unlawful foreclosure," and the letter was admitted into evidence. [R. p. 395:5–16.]

Rankin then provided a breakdown of the total amount that was due to FNMA, by Appellant, under the Loan ("Summary of Amount Due") [R. pp. 395:20–396:9], as well as the related costs and attorney's fees that FNMA sought to collect from Appellant ("Affidavit of Costs and Fees") [R. pp. 397:10–398:12]. Both the Summary of Amount Due and Affidavit of Costs and Fees were admitted into evidence over Appellant's objection that the Trial was "an unlawful foreclosure, and violation of [his] constitutional rights." [R. pp. 397:19–398:13.] At the close of FNMA's case, Appellant did not call any witness, and he provided no testimony or evidence; Appellant merely objected to the Trial as violation of his constitutional rights and "fraud upon the court." [R. pp. 411:13–412:12.]

On March 6, 2017, the Trial Court entered a Final Judgment of Foreclosure in favor of FNMA ("Final Judgment"). [R. pp. 55–70.] On March 14, 2017, Appellant filed an Objection and Motion for New Trial and/or Amendment of Judgment on Grounds of Fraud and Denial of Due Process of Law ("Motion for New Trial"), in which Appellant alleged, inter alia: that the Trial Court's "decision" invaded "the province of the jury"; that the Trial Court had no subject matter jurisdiction to due fraudulent documents; that neither FNMA nor BANA had possession of the promissory note; and that FNMA and BANA failed to support their "claims" with business records that survived the business record hearsay exception. [R. pp. 283–97.]

The Trial Court denied the Motion for New Trial in an order entered on March 17, 2017 ("Order Denying Motion for New Trial."). [R. pp. 53–54.] Appellant filed a notice of appeal from the Final Judgment and the Order Denying Motion for New Trial on March 31, 2017 ("Notice of Appeal").[1]

STANDARD OF REVIEW

> When reviewing the grant of a summary judgment motion, this court applies the same standard that governs the trial court under Rule 56(c), SCRCP; summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. . . . In determining whether a genuine issue of fact exists, the evidence and all reasonable inferences drawn from it must be viewed in the light most favorable to the nonmoving party. . . . "Once the moving party carries its initial burden, the opposing party must come forward with specific facts that show there is a genuine issue of fact remaining for trial." *Sides v. Greenville Hosp. Sys.*, 362 S.C. 250, 255, 607 S.E.2d 362, 364 (Ct. App. 2004). "[A]ssertions as to liability must be more than mere bald allegations made by the non-moving party in order to create a genuine issue of material fact." *Jackson v. Bermuda Sands, Inc.*, 383 S.C. 11, 17, 677 S.E.2d 612, 616 (Ct. App. 2009).

[1] Appellant filed an amended notice of appeal on April 21, 2017, in which he appears to have merely crossed through the Trial Court case number and added the case number of this appeal. [R. p. 1078.]

Bank of Am., N.A. v. Draper, 405 S.C. 214, 219, 746 S.E.2d 478, 480 (Ct. App. 2013).

ARGUMENT

I. The Trial Court was Not Precluded from Hearing BANA's Renewed Motion for Summary Judgment.

As an initial matter, BANA notes that the Trial Court's denial of its first motion for summary judgment did not preclude BANA from filing its Renewed Motion for Summary Judgment. A trial court has the discretionary authority to review a party's renewed motion for summary judgment based upon matter not previously addressed by the court. *See Dorrell v. S.C. Dep't of Transp.*, 361 S.C. 312, 325, 605 S.E.2d 12, 18 (2004) (holding that denial of previous motion for summary judgment did not preclude party from "renewing its motion once new evidence came to light" (citing *Ballenger v. Bowen*, 313 S.C. 476, 477, 443 S.E.2d 379, 380 (1994) ("A denial of a motion for summary judgment decides nothing about the merits of the case, but simply decides the case should proceed to trial."); *Crosswell Enterprises, Inc. v. Arnold*, 309 S.C. 276, 279, 422 S.E.2d 157, 159 (Ct. App. 1992) (where a first motion for summary judgment is denied, the trial court may permit a second motion for summary judgment based on matters not involved in the first). As BANA filed its Renewed Motion for Summary Judgment based on new matters and evidence, including the 2015 Assignment and the Trial Court's substitution of FNMA as Plaintiff. Moreover, the Dalens *consented* to BANA's Motion to Amended Scheduling Order, which was premised on BANA's desire to file a renewed motion for summary judgment. [R. pp. 195–224; 796–98.] As such, Appellant is precluded from arguing the Trial Court erred in permitting BANA to file its Renewed Motion for Summary Judgment. *See Bankers Trust of S.C. v. Bruce*, 283 S.C. 408, 417, 323 S.E.2d 523, 529 (Ct. App.

1984) (a party will not be heard to complain on appeal regarding an issue to which he consented below).

II. The Trial Court Did Not Err in Granting BANA's Renewed Motion for Summary Judgment.

A. As Appellant Has Failed to Raise Any Argument, in His Brief, as to How the Trial Court Erred in Granting BANA's Renewed Motion for Summary Judgment, He Has Abandoned the Issue on Appeal.

Appellant has abandoned the issue of whether the Trial Court erred in Granting BANA's Renewed Motion for Summary Judgment as he has failed to provide *any* argument in his Brief as to *how* the Trial Court erred in granting the Motion. Beyond the conclusory assertions in his Brief "that [BANA] rehashed previous arguments, presented no new issues or evidence," and that the Dalens' "brought up Judge Macaulay's denial of [BANA's] first motion for summary judgment" as the reason the Renewed Motion for Summary Judgment should be denied, Appellant provides no argument as to *how* the Trial Court erred in granting BANA's Motion. (Appellant's In. Br. p. 7.) Appellant has also failed to cite to *any* legal authority to demonstrate how the granting of BANA's Motion was error. (*Id.*) As such, Appellant has failed to preserve the issue for review. *See Jinks v. Richland Cty.*, 355 S.C. 341, 344 n.3, 585 S.E.2d 281, 283 n.3 (2003) (concluding that an issue raised in appellant's brief was abandoned when appellant provided no argument on the issue); *Fields v. Melrose Ltd. P'ship*, 312 S.C. 102, 106 n.3, 439 S.E.2d 283, 285 n.3 (Ct. App. 1993) ("[A]n issue is deemed abandoned on appeal and, therefore, not presented for review, if it is argued in a short, conclusory statement without supporting authority."); *Jones v. SC Dep't of Health & Envtl. Control*, 384 S.C. 295, 317, 682 S.E.2d 282, 294 (Ct. App. 2009) (argument abandoned where appellant failed to explain *how* the trial court erred); *Englert, Inc. v. Netherlands Ins. Co.*, 315 S.C. 300, 304 n.2, 433 S.E.2d 871, 873 n.2 (Ct. App. 1993) (concluding that appellant's one-sentence argument was too conclusory to preserve

an issue for appellate review).[2] Accordingly, the Trial Court's Summary Judgment should be affirmed.

B. To the Extent Appellant's Arguments are Preserved for Review, They Are Without Merit.

Although all of Appellant's Counterclaims and affirmative defenses were addressed—and dismissed—by the Trial Court's Summary Judgment, the only issue that Appellant addresses in his Brief as a basis for reversing the Trial Court's Summary Judgment is his contention that BANA lacked standing to prosecute the Foreclosure Action. To the extent BANA can decipher Appellant's arguments, Appellant asserts that the "crux" of his challenge to the Foreclosure Action is that BANA lacked standing due to (1) BANA's securitization of the Note, (2) BANA's failure to produce an "unbroken chain of title" for the Note, and (3) for BANA's production of (allegedly) fraudulent assignments of the Mortgage. (Appellant's In. Br. pp. 11–16.) Assuming, *arguendo*, that Appellant's conclusory assertions have preserved the issue for review, Appellant's arguments are baseless as they are contrary to the evidence presented and well-established caselaw.

1. South Carolina law is clear that the servicer of a mortgage loan, as the note holder, has authority to prosecute a foreclosure action.

"'Generally, a party must be a real party in interest to the litigation to have standing.'" *Hill v. S.C. Dep't of Health & Envtl. Control*, 389 S.C. 1, 22, 698 S.E.2d 612, 623 (2010) (quoting *Sloan v. Friends of the Hunley, Inc.*, 369 S.C. 20, 28, 630 S.E.2d 474, 479 (2006)).

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[2] Furthermore, as Appellant failed to make any argument in his Brief as to *how* the Trial Court erred in granting BANA's Renewed Motion for Summary Judgment, he is precluded from more fully addressing the issue in a *reply brief*. *See* Fields, 312 S.C. at 106 n.3, 439 S.E.2d at 285 n.3 ("[A]n appellant may not use the reply brief to argue issues not argued in his brief in chief[.]"); *Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 692 (Ct. App. 2001) (holding that even if an argument is raised in an initial brief, if the argument is conclusory and

South Carolina law is clear that a loan servicer is a real party in interest to a foreclosure action and has the ability to prosecute a foreclosure action. *See Bank of Am., N.A. v. Draper*, 405 S.C. 214, 222–23, 746 S.E.2d 478, 482 (Ct. App. 2013) (citing *Bankers Trust (Delaware) v. 236 Beltway Inv.*, 865 F. Supp. 1186, 1191 (E.D.Va.1994) (concluding that both lender and servicer have standing to foreclose even if servicer is not the holder of the mortgage)); *In re Marks*, 548 B.R. 703, 712 (Bankr. D.S.C. 2016) (citing *Draper* to hold that plaintiff was entitled to enforce mortgage as either the holder of the promissory note or the servicer of the mortgage loan). In addition, pursuant to S.C. Code Ann. § 36-3-301, the person entitled to enforce an instrument includes "the holder of the instrument." *Id.* A "holder" of the instrument is defined to include "the person in possession of a negotiable instrument that is payable either to bearer or an identified person that is the person in possession." S.C. Code Ann. § 36-1-201(21).

In this case, the evidence produced at the March 23, 2016 hearing on BANA's Renewed Motion for Summary Judgment unequivocally proved that BANA was both the holder of the Note and the servicer of the Loan. In support of the Renewed Motion for Summary Judgment, the Trial Court admitted into evidence the transcript of the deposition of Zachary Chromiak, a BANA Assistance Vice President, who testified that BANA's predecessor, Countrywide, came into possession of the Note on January 14, 2008, and that BANA, and its predecessor Countrywide, have serviced the Loan since January 14, 2008. [R. pp. 897 3:5–16, 898 5:13–6:12, 900 14:3–17.] BANA provided a history of the Dalen's payments on the Loan to BANA, from the time of the Loan's inception through the Dalen's default ("Payment History"). [R. pp. 765–84.]

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unsupported by authority, the argument is not preserved for review and the appellant is precluded from more fully addressing the issue in a reply brief).

BANA also introduced into evidence several acknowledgments by Appellant recognizing BANA as the servicer of the Loan, including: Appellant's deposition testimony, in which Appellant conceded that Countrywide was BANA's predecessor-in-interest, and that the Dalens made payments to BANA as the servicer of their Loan at the time of the Dalens' default [R. pp. 828:25–829:1–4]; the Dalens' response to BANA's request for admission, by which the Dalens acknowledged that the Payment History was an accurate reflection of their payments on the Loan [R. pp. 693–94]; the Dalens' Memorandum of Law stating that BANA is a servicer [R. pp. 799–805]; and BANA's response to the Dalens' Request for Admissions, stating that BANA is the servicer of the Loan. [R. pp. 893–95].

Thus, BANA produced sufficient summary judgment evidence to establish its standing to foreclose the Mortgage as the servicer of the Loan, *see Draper*, 405 S.C. at 223, 746 S.E.2d at 482 (master-in-equity did not err in finding plaintiff had standing to foreclose on mortgage where defendant acknowledged that plaintiff was servicer of his loan), and as the holder of the Note, *see id.* at 223–24, 746 S.E.2d at 483 (summary judgment evidence was sufficient to establish bank as holder of note where note executed in favor of plaintiff's predecessor-in-interest, plaintiff produced copy of note endorsed-in-blank by plaintiff's predecessor-in-interest, as well as a ledger of payments on the loan beginning one month after borrower executed the note, and defendant did not contest that plaintiff had merged with predecessor-in-interest). *See also Marks*, 548 B.R. at 712. Since BANA unequivocally demonstrated its standing to prosecute the Foreclosure Action, Appellant's argument on appeal to the contrary clearly fails. Therefore, the Summary Judgment should be affirmed.

2. As the holder of the Note, BANA was not required to establish its standing to prosecute the Foreclosure Action as the *owner* of the Note or through an assignment of the Mortgage.

Appellant also contends that BANA did not have standing to prosecute the Foreclosure Action because it failed to produce an "unbroken chain of title" to the Note and Mortgage. [Appellant's In. Br. pp. 6, 8, 11, 13.] In support of this argument, Appellant contends that BANA could not have obtained an interest in, and a right to enforce, the Note and Mortgage through its acquisition of Countrywide because FNMA became the "owner" of the Note before Countrywide merged with BANA. [*Id.*] Appellant further contends that BANA lacked standing as the assignment of the Mortgage from Quicken Loans to Countrywide, BANA's predecessor-in-interest, could not have occurred as the Note had been sold to FNMA prior to the execution of the 2011 Assignment.

As discussed above, however, the holder in possession of a mortgage-backed promissory note may enforce the note and mortgage without a further showing that it is the beneficial owner of the note. *See Draper*, 405 S.C. at 220–22, 746 S.E.2d at 481–82 (finding that a loan servicer was a real party in interest with standing to enforce the note and mortgage); S.C. Code Ann. § 36-3-301 ("A person may be a person entitled to enforce the instrument *even though the person is not the owner of the instrument* . . . ." (emphasis added)). Similarly, an assignment of a mortgage is not required to establish standing to enforce the note and the mortgage securing the note. *See Draper*, 405 S.C. at 220–22, 746 S.E.2d at 481–82 (noting that a mortgage follows the note it secures and a servicer of a mortgage has standing to foreclosure even if it is not the holder of the mortgage); *In re Woodberry*, 383 B.R. 373, 377 (Bankr. D.S.C. 2008) ("No written assignment of the mortgage is required under state law."). Thus, Appellant's contention that the assignments of the Mortgage were fraudulent is irrelevant to BANA's standing to foreclose.

BANA established that it was the holder of the Note and was, therefore, not required to prove it *owned* the Note or to produce an assignment of the Mortgage to establish its standing to prosecute the Foreclosure Action. *See Draper*, 405 S.C. at 220–22, 746 S.E.2d at 481–82.

On appeal, Appellant has failed to make any argument as to how the Trial Court erred. In his Brief, Appellant merely makes repeated assertions that the assignment were fraudulent and makes a reference to a "declaration and counterclaim" as containing the evidence of the alleged fraud, which Appellant filed with the Trial Court on March 27, 2017. [Appellant's In. Br. p. 12.] As the "declaration and counterclaim" was filed *after* the entry of the Summary Judgment and his Motion for Reconsideration, it cannot support Appellant's argument for reversal of Summary Judgment. As Appellant failed to make any argument on appeal regarding the alleged fraudulent assignments of the Mortgage, he has failed to preserve the issue for review. *See Jinks*, 355 S.C. at 344 n.3, 585 S.E.2d at 283 n.3; *Fields*, 312 S.C. at 106 n.3, 439 S.E.2d at 285 n.3.

3. Appellant's contention that securitization of the Note and Mortgage rendered the debt unsecured is contrary to well-established South Carolina law and law from throughout the country.

To the extent Appellant contends that the securitization of the Loan converted the Loan to an "unsecured debt" [Appellant's In. Br. pp. 3, 14], his argument is contrary to South Carolina caselaw. As discussed above, the holder in possession of a mortgage-backed promissory note may enforce the note and mortgage without a further showing that it is the beneficial owner of the note. *See Draper*, 405 S.C. at 220–22, 746 S.E.2d at 481–82 (finding that a loan servicer was a real party in interest with standing to enforce the note and mortgage). Accordingly, securitization of the Loan cannot affect a holder's right to enforce the note and mortgage. Appellant's argument to the contrary is without merit and provides no basis for reversing the Summary Judgment.

4. Appellant does not have Standing to Challenge the Validity of the Assignment of Mortgage.

South Carolina law is clear that Appellant lacks standing to challenge an assignment of a mortgage to which he is not a party. "Generally, a third person not in privity of contract with the contracting parties has no right to enforce a contract." *R.J. Griffin & Co. v. Beach Club II Homeowners Ass'n.*, 384 F.3d 157, 164 (4th Cir. 2004) (internal quotation marks and citations omitted) (applying South Carolina law). A mortgagor is only a party to the mortgage, and because an assignment or mortgage is a separate contract to which the mortgagor is not a party, a mortgagor cannot question its validity. *See Reese v. U.S. Bank, N.A.*, No. 3:11-2990-CMC-SVH, 2012 WL 1952819, at *3 (D.S.C. Apr. 30, 2012) ("Plaintiff lacks standing to contest the Assignment of the Mortgage. Plaintiff is only a party to the Mortgage and, because the Assignment is a separate contract to which Plaintiff is not a party, she cannot question its validity." (citing *R.J. Griffin & Co.*, 384 F.3d at 164)); *In re Kain*, No. 08-08404-HB, 2012 WL 1098465, at *8 (Bankr. D.S.C. Mar. 30, 2012) ("*Whatever the context*, it appears that a judicial consensus has developed holding that a borrower lacks standing to (1) challenge the validity of a mortgage securitization or (2) request a judicial determination that a loan assignment is invalid due to noncompliance with a pooling and servicing agreement, when the borrower is neither a party to nor a third party beneficiary of the securitization agreement, *i.e.*, the PSA." (emphasis in original)); *see also In re MERS Litigation*, No. 09-2119-JAT, 2011 WL 4550189, at *5 (D. Ariz. Oct. 3, 2011) ("Plaintiffs, as third-party borrowers, are uninvolved and unaffected by the alleged Assignments, and do not possess standing to assert a claim based on such."); *Kriegel v. MERS*, No. PC-2010-7099, 2011 WL 4947398, at *5 (R.I. Super. Ct. Oct. 13, 2011) ("The assignment from MERS to FNMA did not cause injury in fact to the Plaintiff, as the assignment did not change his obligation to timely pay the Mortgage Note or suffer the consequences of

foreclosure."). Accordingly, because Appellant was not a party to either the 2011 Assignment or the 2015 Assignment, he cannot question their validity. *See R.J. Griffin & Co.*, 384 F. 3d at 164.

CONCLUSION

For the foregoing reasons, this Court should affirm the Summary Judgment.

This the 1ST day of November, 2017.

Respectfully submitted,

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The undersigned certifies that Respondent Bank of America, N.A.'s Final Brief complies with Rule 211(b), SCACR.

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