THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY

Master in Equity

James O. Spence, Master in Equity

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SC Court of Appeals

Case No. 2016-000613

SunTrust Mortgage, Inc., Respondent

v.

Cathy G. Lanier, Randy D. Lanier,
Branch Banking and Trust Company
and Job Development Loan Fund, Inc., Defendants

Of which Cathy G. Lanier and
Randy D. Lanier are the Appellants

FINAL BRIEF OF APPELLANT

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3. Did the Trial Court err in determining that the statute of limitations on 12 USC 2605 runs from the initiation of the loan rather than the violation of the statute?

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7. Did the Trial Court allow permissible injustice by not requiring proof of debt when Suntrust Mortgage used its position in this litigation to take over $270,000 from the Appellants without recourse?

STATEMENT OF THE CASE

Upon looking at what transpired in this case, it becomes apparent that the intent of the law firm bringing this case was not to successfully foreclose on a property, because they lacked proof of debt and could not prevail if substantiating the debt was required by the Court. Their intent, and what happened, was rather to have another mortgage holder pay their claim without any accounting, proof of debt, or recourse by the defendant who loses equity to the other mortgage holder. This is in fact what transpired and it does not create equitable relief for any party involved.

Neither the law firm litigating this case, the original Plaintiff (Wells Fargo), nor the Plaintiff substituted in the final order of this case (Suntrust Mortgage) supplied in discovery adequate payment records to substantiate a debt. As a response to discovery, they provided one year of payment records for a loan that was foreclosed upon at the beginning of the 14th year of payments. Furthermore, a security audit of the trust which held this mortgage showed the principle balance was satisfied in 2010 and listed the balance as zero. Consistent with the trust audit is Plaintiff's assertion the disputed payments which put this loan into foreclosure were for

escrow of property tax and insurance, not failure to make a payment on the interest and principle of the loan. (See Motion to Amend, p. 6)

Appellee Wells Fargo (hereinafter Wells Fargo) initiated this action in January 2011, but never had an interest in the mortgage. When the law firm who brought the suit realized the case was brought by a Plaintiff who never had an interest in the Mortgage, they attempted to substitute Appellee Suntrust Mortgage (hereinafter Suntrust Mortgage) as the Plaintiff over 18 months into the case. The order substituting Suntrust Mortgage for Wells Fargo was signed by Judge Knox McMahon, long after the case was referred to the Master in Equity. Both Plaintiff and Defendant agree that Judge McMahon relinquished his Jurisdiction to sign the order substituting Suntrust Mortgage when the case was referred to the Master in Equity. Suntrust Mortgage was substituted as the Plaintiff in the final Order which dismissed this case on March 19, 2015 pursuant to SCRCP 25(c). Suntrust Mortgage and Wells Fargo have never merged. Suntrust Mortgage was assigned the Mortgage by instrument dated and filed with the Lexington County Register of Deeds seven months after attempting substitution as Plaintiff in this case.

There was a dispute over discovery that appears to have never been addressed in an Order by the Lower Court. This is evidenced by a Motion to Compel filed by the Laniers in November 2012 and a follow up letter dated April 22, 2013. The April 2013 letter indicates that neither Suntrust nor Wells Fargo had completely disclosed the laundry list of items requested in discovery. Though there were many items that may not have existed, the most notable absence in discovery is a record of payments or a payment history that would allow for an accounting and substantiation of the debt owed. The totality of records regarding payment history are in Exhibit A. They range from years 2009 through 2011.

Though it appears the Lower Court never issued an Order allowing amendment of the Lanier's answer to include counterclaims, Suntrust Mortgage moved for dismissal of the case on grounds that the debt was satisfied and Summary Judgment barring all counterclaims in the Lanier's Motion to Amend. BB&T held a second mortgage on the properties and foreclosed on that second mortgage. After receiving a judgment in their foreclosure action, BB&T satisfied Suntrust Mortgage's claim against the Laniers by payment in full of the over $270,000 requested. BB&T then used this satisfaction and release as an expense against the Laniers' equity in the proceedings on the second mortgage. Because it was an expense and Suntrust Mortgage was not a party, the Laniers' did not have opportunity to question Suntrust regarding their debt calculations in the BB&T foreclosure.

The Laniers' dispute the debt owed on the property and requested payment records and any accounting that showed the alleged debt owed of over $270,000. Neither Wells Fargo nor Suntrust Mortgage produced more than one year of payment records on this 15 year mortgage that was foreclosed during its 13th year. Plaintiffs records and a mortgage trust audit indicate that this mortgage was paid off in year 2010 except for an amount owed for property tax escrow for one year. Plaintiff Cathy Lanier filed a Motion to Compel discovery to obtain payment records and the Motion was never ruled upon by the Court.

Because the Lower Court's Order relies on dates for standing to bring claims, it is important to show the timeline of this case in a concise format. The following timeline presented in Table 1 is garnered from the Court's Orders, online case history, and the Judgments in the Bankruptcy Court that are on issue in this appeal.

Table 1: Timeline	
August 1997	Cathy and Randy Lanier take out Mortgage with Heritage Federal
January 14, 2011	This foreclosure action commences
March 25, 2011	Laniers Answer foreclosure action
July 7, 2011	Referred to Master in Equity
October 7, 2011	Judgment for Foreclosure and Sale entered for BB&T on a different property that is unrelated to this case.
November 3, 2011	Randy Lanier files for Chapter 13 bankruptcy
November 7, 2011	Randy Lanier's Chapter 13 bankruptcy is dismissed
November 8, 2011	Cathy Lanier and Randy Lanier jointly file chapter 13 bankruptcy
January 3, 2012	Cathy Lanier and Randy Lanier's Chapter 13 bankruptcy is dismissed.
July 12, 2012	Motion to Amend and first introduction of counterclaims by the Laniers
August 29, 2012	Proposed order mailed to Court to Substitute Suntrust Mortgage as the Plaintiff
September 14, 2012	Motion to Amend Answer to include Counterclaims by the Laniers
November 28, 2012	Motion to Compel discovery filed by Cathy Lanier
March 16, 2013	Assignment of mortgage to Suntrust Mortgage
March 23, 2013	Assignment of mortgage to Suntrust Mortgage recorded
April 8, 2014	Order granting foreclosure to BB&T on a second mortgage of the properties securing the mortgage in this case.
March 19, 2015	Order Granting Summary Judgment. Dismissal of Suntrust's claim as satisfied by payment from second mortgage holder BB&T.
March 30, 2015	Motion to Reconsider Order Granting Summary Judgment filed by Cathy Lanier
February 17, 2016	Motion to Reconsider denied by the Lower Court
March 23, 2016	Notice of Appeal filed by Defendant Cathy Lanier

I. BECAUSE THE DEBTOR NEVER RELEASES THE PROPERTY OF THE ESTATE IN CHAPTER 13 AND BECAUSE OF LEGISLATIVE INTENT THAT THE DEBTOR KEEP CAUSES OF ACTION IN CHAPTER 13 BANKRUPTCY, THE PROHIBITION OF BRINGING CLAIMS THAT PREEXIST THE FILING OF A CHAPTER 7 LIQUIDATION BANKRUPTCY DO NOT APPLY TO DEBTORS IN CHAPTER 13 BANKRUPTCY

The Lower Court relies heavily on In re: Iredale in its determination that all claims not filed with the Bankruptcy Court remain in the Bankruptcy Estate and are not released by the Trustee. This is true of Chapter 7 Bankruptcy where the Trustee takes possession of the Estate assets pursuant to 11 USC §704(a)(1).

Defendant Lanier repeatedly informed the Court (see JA pp 168-172) that there was an important difference between her Chapter 13 Bankruptcy filings and the Chapter 7 Liquidation Bankruptcy of In re: Iredale (429 B.R. 853). Iredale filed for a Chapter 7 liquidation bankruptcy where the Trustee takes possession of the Bankruptcy Estate and liquidates the entire estate to pay the creditors of the debtor. The Iredale Court held that all causes of action not claimed in the filings but existing at the time of the filing of Chapter 7 Liquidation Bankruptcy remain with the estate and do not return to the debtor. *Id* at 855. The Trustee collects all the assets of the Estate, including claims and defenses to debt. It is the duty of the Trustee to turn the entire Estate into cash and pay creditors of the Estate pursuant to 11 U.S.C. 704. The holding of In re: Iredale makes sense for a Chapter 7 Bankruptcy since any claims existing at the time of filing for bankruptcy are a part of the Estate and no longer in the possession of the debtor, but rather the responsibility of the Trustee.

The Lanier's filed for Chapter 13 bankruptcy. Chapter 13 Bankruptcy differs significantly from Chapter 7 Bankruptcy because the debtor retains possession of the estate pursuant to 11 U.S.C. §1306(b). Furthermore, the Debtor retains ability to run the business of the Estate throughout at Chapter 13 Bankruptcy pursuant to 11 U.S.C. §1304. The code also states that a Chapter 13 debtor has all the rights of a Liquidation Trustee in 11 U.S.C. §1303. Even more revealing are the Legislative Statement and Senate Report No. 95-989 that accompany 11 USC §1303:

> **Legislative statements**
>
> Section 1303 of the House amendment specifies rights and powers that the debtor has exclusive of the trustees. The section does not imply that the debtor does not also possess other powers concurrently with the trustee. For example, although section 1323 is not specified in section 1303, certainly it is intended that the debtor has the power to sue and be sued.
>
> **Senate report no. 95–989**

> A chapter 13 debtor is vested with the identical rights and powers, and is subject to the same limitations in regard to their exercise, as those given a liquidation trustee by virtue of section 363(b), (d), (e), (f), and (h) of title 11, relating to the sale, use or lease of property.

The notes accompanying 11 U.S.C. §1303 clearly state that the debtor in a Chapter 13 Bankruptcy retains the ability to sue and be sued on behalf of his Bankruptcy Estate. Therefore the holding of In re: Iredale does not apply to the Laniers' Chapter 13 bankruptcy.

In Re: Iredale relies on the Trustee taking control of the entire Estate to justify that all claims not included in filings and released by the Trustee remain in the Estate forever. (see Iredale, 429 B.R. 853 at 855). Because the claims were not returned to the Chapter 7 debtor, the debtor has lost those claims forever. This analysis relies on the Trustee taking control of the Estate as done in Chapter 7 of the Bankruptcy Code. The Laniers did not file Chapter 7 Bankruptcy and the holding in Iredale does not apply. The Laniers always had the right to sue on behalf of the Estate and never gave up those rights to a Trustee pursuant to 11 USC §1303 and its accompanying Legislative Statement.

The Lower Court erred in dismissing counterclaims based on Iredale and the Laniers losing such counterclaims in a Liquidation Bankruptcy under Title 11, Chapter 7. The Laniers never filed for a Liquidation Bankruptcy and the Laniers never relinquished authority to bring causes of action on behalf of their estate. The Laniers instead filed for Chapter 13 bankruptcy and retained the right to bring causes of action.

II. BECAUSE SOME COUNTERCLAIMS MATERIALIZED AFTER THE BANKRUPTCY, THE TRIAL COURT FURTHER ERRED BY DISMISSING THESE CLAIMS BASED ON IREDALE.

The Laniers brought numerous counterclaims that materialized after their filing for Chapter 13 bankruptcy. These include violation of 12 USC §2605 by transferring the mortgage without notice in 2012 or 2013.

As seen in Table 1, the Laniers filed a bankruptcy under Title 13 in November 2011 and it was dismissed on January 3, 2012. Even if the Court determines that bankruptcy under Title 11, Chapter 13 bars preexisting claims, the 12 USC §2605 counterclaims arise after the initiation and dismissal

of bankruptcy. Note the proposed order for substitution of Suntrust Mortgage and assignment of Mortgage occurred after the dismissal of the Bankruptcy in Table 1.

III. BECAUSE THE STATUTE OF LIMITATIONS FOR 12 USC §2605 RUNS FROM THE TIME OF A VIOLATION AND NOT THE INITIATION OF A LOAN, THE TRIAL COURT ERRED IN DISMISSING 12 USC §2605 CAUSES OF ACTION

12 USC §2614 provides for a three year statute of limitations for failure to properly notify borrowers of a transfer of ownership of a mortgage under 12 USC §2605 and a one year statute of limitations for violations of 12 USC §2607 and 12 USC §2608. The statute of limitations runs from the time of the violation, not from the inception of the loan.

The Lower Court alleged that the inception of the loan triggered the statute of limitations. This was an error. The failure to notice assignment of the mortgage to Suntrust or Suntrust Mortgage was a violation of 12 USC 2605. The final Order granting Summary Judgment to Suntrust and dismissing this case was drafted by attorneys representing Suntrust. The dates provided in the Order provide sufficient evidence that Suntrust assigned the mortgage to Suntrust Mortgage seven months prior to the assignment recorded with the Register of Deeds. Notice was not provided of this assignment.

Attorneys for the Plaintiff brought this case under Wells Fargo, an entity that had no relation to the Lanier's mortgage. 18 months after the inception of the case, Attorneys for the Plaintiff submitted a proposed order to Judge Knox McMahon to substitute Suntrust Mortgage as the plaintiff. Seven months after attempting to substitute Suntrust Mortgage as the plaintiff, Attorneys for the Plaintiff had an Assignment of Mortgage to Suntrust Mortgage executed and filed with the Lexington County Register of Deeds. Suntrust Mortgage clearly owned the mortgage when they moved for substitution as Plaintiff in this case. Notice was not provided to the Laniers regarding this assignment of the mortgage to Suntrust Mortgage. Interestingly, Suntrust Mortgage executed an assignment and had it filed seven months after moving for substitution as the Plaintiff. Suntrust Mortgage is afforded 15 days by statute to provide notice of the assignment. Waiting seven months after alleging to the Court that Suntrust Mortgage had standing as the Plaintiff in this case is a violation of 12 USC §2605. Because of the afterthought execution and filing of an assignment, the violation either occurred on August 29, 2012 or March17, 2013. Both are within the three year statute of limitations of when the Defendant moved for a counterclaim based on violation of 12

USC §2605. The Lower Court therefore erred in its application of the statute of limitations. Claims under 12 USC §2605 should be reinstated.

IV. BECAUSE A LIS PENDENS IS NOT PRIVILEDGED WHEN THE FILING PARTY HAS NO CLAIM TOWARDS THE PROPERTY, THE LOWER COURT ERRED IN DISMISSING THE SLANDER OF TITLE COUNTERCLAIMS

While the complaint itself is privileged and subject to a safe harbor under Rule 11, the Lower Court erred in its assertion that a Lis Pendens is absolutely privileged. Wells Fargo filed the Lis Pendens claiming it had a claim against the title to these properties. Wells Fargo did not have any relationship to this mortgage. While a Lis Pendens is usually privileged, when one places a lis pendens notice on property without a `colorable claim' of right to or interest in the property, they subject themselves to a claim for slander of title. (See *Pond Place Partners, Inc. v. Poole*, 351 SC 1, 567 SE 2d 881 citing *Ex parte Boykin*, 656 So.2d 821, 826 n. 4 (Ala.Civ.App.1994)).

The Lower Court erred in dismissing the Slander of Title action on the assumption that a Lis Pendens is absolutely privileged.

V. BECAUSE THE TRIAL COURT FAILED TO LIBERALLY CONSTRUE THE PLEADINGS WITHIN THE 4 CORNERS OF THE DOCUMENT, THE TRIAL COURT ERRED IN DISMISSING THE FAIR DEBT COLLECTIONS ACT CAUSES OF ACTION UNDER 15 USC §1962(e)

The Lower Court's Order alleges insufficient pleadings of fact to state a cause of action. The Appellants pleaded as follows:

> In violation of 15 U.S.C. §1692e, 807, Plaintiff(s) engaged in the false representation of
>
> (A) the character, amount, or legal status of any debt; or
>
> (B) any services rendered or compensation which may be lawfully received by any debt collector for the collection of a debt.
>
> Plaintiff also violated section (5) by threatening to take an action that cannot legally be taken. Plaintiff(s) also violated section (14) by

> failing to divulge the true name of the organization collecting the debt, or the owner of the debt.
>
> Plaintiff(s) also failed to comply with U.S.C. 1692e, 809, by failing to provide verification and validation of the debt they claimed to be owed to them. When Defendants filed a Qualified Written Request with Plaintiff(s), they could provide only a payment and loan history dating back to 2009. Clearly, they do not possess records prior to that time, as there were not valid transfers, assignments or chain of title since the origination of the loan at Heritage Federal Savings & Loan. (JA 286-287)

It is well settled that, in considering a demurrer to a complaint, the factual allegations thereof 'are to be considered as true and, together with relevant inferences reasonably deducible therefrom, are to be liberally construed in the plaintiff's favor'. *Franks v. Anthony et al.*, 231 S.C. 191, 97 S.E.2d 891. Within the Appellant's Motion to Amend and Proposed Counterclaims, Appellant infers that Wells Fargo did not have any legal claim to this debt. Plaintiff has also alleged that the amount of debt is mischaracterized or incorrect and Plaintiff Wells Fargo does not have payment records to substantiate the existence of debt. Damages can be inferred from miscalculation of debt and are also stated throughout the document.

When construed liberally, this pleading is sufficient to state that 1) Wells Fargo made a false claim to an interest in debt and 2) neither Wells Fargo nor Suntrust have sufficient records of payment history to substantiate the existence of debt they are trying to collect.

Damages from these actions are also listed within the four corners of the Appellant's Motion to Amend. Specifically on pages 5 and 6 of the Motion to Amend the Laniers state that there is a dispute over the amount of debt.(JA 274-275) The Laniers further allege damages in the form of costs of correcting the errors with title, the cost of attorney's fees, and loss of business opportunities on page 15 of the Motion to Amend. (JA 284)

If construed liberally, all necessary elements are stated in the Motion to Amend. Furthermore, the Motion to Amend if unacceptable to the Trial Court could have been remedied by opportunity to Amend and clarify any shortcomings of the pleadings.

VI. BECAUSE THERE WAS NEVER A TRANSFER OF INTEREST FROM WELLS FARGO TO SUNTRUST MORTGAGE, SCRCP 25(c) DOES NOT APPLY.

Attorneys for Wells Fargo filed a Lis Pendens and Foreclosure Complaint for a Plaintiff that did not have payment records to substantiate the debt. Furthermore, Wells Fargo had no interest in the debt whatsoever. The Lower Court's order transfers Wells Fargo's interests in this case to Suntrust Mortgage under Rule 25(C). Wells Fargo had no interest to transfer, and thus, substitution under Rule 25(c) is not proper.

SCRCP 25(c) is commonly used when corporate mergers transfer interest in a claim from one party to another through absorption of the original corporate party. Bryant v. Waste Management, Inc. 342 SC 159, 536 SE2d 380 (SC App., 2000). Another method of transfer of interest may occur through assignment of the interest to another party. Neither Suntrust nor Wells Fargo have shown the Court evidence of merger between the banks. Likewise, the only transfer of interest was an assignment from Suntrust Bank to Suntrust Mortgage. Wells Fargo was not involved. It is improper to dismiss Wells Fargo under SCRCP 25(c) because there was no transfer of interest and Wells Fargo is a defendant should counterclaims survive.

VII. BECAUSE SUNTRUST MORTGAGE PROFITED AT THE EXPENSE OF THE LANIERS BASED ON THEIR ASSERTIONS IN THIS ACTION, EQUITY REQUIRES PROOF OF DEBT FROM SUNTRUST MORTGAGE TO AVOID INJUSTICE.

It is improper to dismiss Wells Fargo should counterclaims regarding Wells Fargo survive appeal. Similarly, equity requires Suntrust Mortgage be added as a party. Suntrust Mortgage used its position as an alleged party to this case with an interest in the mortgage on the property to leverage over $270,000 from BB&T. BB&T held a second mortgage on the properties and foreclosed on that mortgage. BB&T paid Suntrust Mortgage for satisfaction and release of the first mortgage on the property. BB&T then claimed the over $270,000 paid to Suntrust Mortgage against the equity the Lanier's held in the property.

The Laniers' evidence from both a securities expert's investigation and their own payment records indicate Suntrust Mortgage was owed nothing or very little on this mortgage. There is a material

dispute of facts regarding the payment history and amount owed on the mortgage. The failure to produce payment history prior to 2009 further indicates an inability of Suntrust Mortgage to substantiate the existence of a debt. An injustice is created by allowing Suntrust Mortgage to dismiss the case without substantiating debt. The injustice is created because Suntrust Mortgage used their participation in this litigation to receive over $270,000 indirectly from the Laniers and that money was taken from the Laniers.

This action was heard before a Court of Equity. Two of the guiding principles of Equity are illustrated in Wilke v. Philadelphia Life Ins. Co.:

> It is apparent that the plaintiffs have attempted to bring their claim within the broad principles of equity jurisdiction that "equity regards and treats that as done which in good conscience ought to be done", and that "equity looks to substance rather than to form". The latter maxim is closely associated with and evolves out of the first. The first maxim is the basis upon which an equitable right or title is founded, while the latter appertains more exactly to the equitable remedy by which such equitable right or title, once established, is given legal effect, by dispensing with pure formalities which would otherwise defeat the equity. Wilkie v. Philadelphia Life Ins. Co, 187 S.C. 382, 197 S.E. 375 (S.C., 1938)

By dismissing the case at the request of Suntrust Mortgage, the Lanier's are out over $270,000 without recourse against BB&T. Meanwhile, Suntrust Mortgage profited the same amount. The Lanier's only recourse is against Suntrust Mortgage, who must show sufficient evidence to substantiate the debt. In good conscience, the Lower Court ought to request Suntrust Mortgage show payment history and accounting of the loan to validate the over $270,000 collected from the Laniers.

The second maxim applied by Wilke v. Philadelphia Life dictates that the Court of Equity should disregard the usual formality of allowing Suntrust Mortgage to dismiss its own claim as settled

and determine how much of the over $270,000 collected by Suntrust Mortgage through wrangling of their claim in this case is owed to Suntrust Mortgage and how much belongs to the Laniers.

CONCLUSION

There are many issues with this case that raise questions about how we handle mortgage foreclosures in South Carolina. This case was dismissed because of a mistaken application of bankruptcy law related to Liquidation Bankruptcy under Title 11, Chapter 7. The Trial Court became fixated with this bankruptcy issue and failed to rule on important issues regarding discovery and failed to ensure fair discovery was conducted. (See Transcript of November 8, 2013 hearing, pp 43-46) Because the Laniers were unable to complete discovery, Summary Judgment based on any issue other than the bankruptcy issue prejudices the Laniers.

This case was filed by Wells Fargo who insisted they owned the mortgage, but later stated they had no claim. Suntrust Mortgage, who allegedly does have a claim to the mortgage was allowed to substitute itself for the original plaintiff. Due to the Trial Court failing to entertain discovery motions, many questions remain unanswered. Wells Fargo claimed to own the Mortgage. Appellant looked at the mortgage note in the offices of Appellee's counsel during the time Wells Fargo claimed ownership. Later, Suntrust Mortgage claims to own the note and moves to substitute itself for Wells Fargo. Other than an assertion of ownership, there is no tracable evidence presented substantiating the right to foreclose.

Suntrust was unable to produce payment history and proof of debt pursuant to Exhibit A. Regardless, Suntrust used its position relative to another mortgage company to strongarm equity away from the Laniers in a manner that does not allow for judicial review of the validity of the debt.

While the Trial Court was fixated on the Bankruptcy issue, it failed to entertain the differences between Liquidation Bankruptcy and Chapter 13 Bankruptcy. Furthermore, the Trial Court failed to request case law that applied the theory upon which dismissal was based to Chapter 13 Bankruptcy. As litigious as bankruptcy debtors can be, at some point in the past it would appear that these Chapter 7 prohibitions on litigation would be applied to other chapters of the Bankruptcy Code.

For the reasons stated above, and prevention of an injustice, we ask this Honorable Court to reverse the holdings of the Trial Courts Orders dated February 17, 2016 and March 19, 2015.

Respectfully Submitted

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This 12th day of September, 2016
Columbia, SC

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CERTIFICATE OF COMPLIANCE

I hereby certify that the Final Brief of the Appellant complies with Rule 211(b).

September 12, 2016
Columbia, SC

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