

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master In Equity

Appellate Case No. 2016-001054

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SC Court of Appeals

HSBC Bank USA, National Association, as Trustee for
the Holders of the Deutsche ALT-A Securities, Inc.
Mortgage Loan Trust, Mortgage Pass-Through
Certificates Series 2007-OA4, assignee of Bank of
America N.A., successor by merger to BAC Home Loans
Servicing L.P., f/k/a Countrywide Home Loans
Servicing, Inc.,

Appellant,

v.

Clifford L. Ryba; Beverly Ryba;
Regions Bank; First Federal Savings
and Loan Association of Charleston; Citibank (South
Dakota) N.A., and Carol Garfield Goldberg,

Defendants,

Of whom Carol Garfield Goldberg is the,

Respondent.

Petition for Rehearing

Pursuant to Rules 221(a) and 240 of the South Carolina Appellate Court Rules, Appellant HSBC Bank USA, National Association, as Trustee (“HSBC”), requests rehearing of the Court’s opinion issued April 10, 2019, affirming the master in equity’s ruling in favor of Respondent Carol Garfield Goldberg. *See HSBC Bank USA, Nat’l Ass’n v. Ryba*, Op. No. 2019-UP-132 (S.C. Ct. App. filed Apr. 10, 2019). This Court overlooked or misapprehended several points, and it should grant rehearing and reverse the master in equity’s ruling.

Argument

The master and this Court have misapprehended the issues in this case. Contrary to the master's findings, this case does not turn on whether HSBC is a holder in due course or whether HSBC paid consideration for the 2007 note and mortgage. Rather, the Court must address two main issues: (1) whether the Court lacks subject matter jurisdiction over Goldberg's defenses because she lacks standing to challenge the 2007 loan or to assert fraud as a defense to foreclosure, and (2) whether the original lender, Countrywide, was on constructive or inquiry notice¹ of the fraud allegedly committed by Clifford Ryba.

Neither the master nor this Court complied with the duty to evaluate subject matter jurisdiction. Therefore, the Court must grant rehearing and consider the merits of HSBC's standing arguments to determine whether the master had subject matter jurisdiction over Goldberg's defenses. Further, this Court erred in failing to address the merits of the master's fraud findings. The findings are properly before this Court, and the Court should therefore grant rehearing, consider the merits, and reverse the master's findings as unsupported by the evidence.

Finally, the master's orders stand on a fundamental misunderstanding of evidence related to the loan at issue and the operation of the mortgage industry. A proper consideration of the evidence in this case compels a finding that HSBC is itself a holder in due course and is therefore entitled to foreclose. This Court must grant rehearing. On rehearing, the Court should consider the merits of HSBC's arguments, reverse the master's ruling, and remand for further foreclosure proceedings.

¹ Inquiry notice and constructive notice are different names for the same doctrine. *See Strother v. Lexington Cty. Recreation Comm'n*, 332 S.C. 54, 64 n.6; 504 S.E.2d 117, 122 n.6 (1998).

I. Goldberg lacked standing to challenge the validity of the 2007 mortgage or to assert a fraud defense.

The Court overlooked and misapprehended HSBC's standing arguments. In its opinion, the Court gave only a cursory review to HSBC's standing arguments and found the standing issue unpreserved. Op. No. 2019-UP-132 at 9. This finding was erroneous, and this Court should grant rehearing and reverse the master's decision on the ground that Goldberg lacked standing to challenge the validity of the 2007 mortgage or to assert fraud as a defense to foreclosure.

Standing is part of the justiciable controversy requirement for subject matter jurisdiction. *See Lennon v. S.C. Coastal Council*, 330 S.C. 414, 417–18, 498 S.E.2d 906, 907–08 (Ct. App. 1998) (“No justiciable controversy is presented unless the plaintiff has standing to maintain the action.” (quoting *Brock v. Bennett*, 313 S.C. 513, 519, 443 S.E.2d 409, 413 (Ct. App. 1994))); *see also Bardoan Props., NV v. Eidolon Corp.*, 326 S.C. 166, 168–69, 485 S.E.2d 371, 372–73 (1997) (“Subject matter jurisdiction refers to the court’s power to hear and determine cases of the general class to which the proceedings in question belong.”). If a party asserting a claim or defense lacks standing to do so, the courts lack subject matter jurisdiction to decide the claim or defense. *Lennon*, 330 S.C. at 417–18, 498 S.E.2d at 907–08.

Subject matter jurisdiction can never be waived, and a party may therefore raise the lack of subject matter jurisdiction at any time, including for the first time on appeal. *Id.*; *see also Bardoan Props.*, 326 S.C. at 168–69, 485 S.E.2d at 372–73 (providing it “is well-settled that issues relating to subject matter jurisdiction maybe [sic] raised at any time”). Moreover, every court—including this Court—has a duty to consider subject matter jurisdiction *sua sponte* and dismiss a claim or defense if the court lacks subject matter jurisdiction. *See Lennon*, 330 S.C. at 415, 498 S.E.2d at 906; *see also Vulcan Materials Co. v. Greenville Cty. Bd. of Zoning Appeals*, 342 S.C. 480, 489 n.7, 536 S.E.2d 892, 896 n.7 (Ct. App. 2000) (providing a jurisdictional requirement

“may be raised at anytime by either party or sua sponte by this Court”). This Court cannot reject a standing argument on preservation grounds; in doing so, it ignores the requirement that the courts may decide only a “case or controversy.” *Lennon*, 330 S.C. at 417–18, 498 S.E.2d at 907–08. Accordingly, this Court must consider the merits of HSBC’s standing arguments to determine whether the master—and, by extension, this Court—had subject matter jurisdiction over Goldberg’s claims and defenses.

This Court should find Goldberg lacked standing to challenge the validity of the 2007 mortgage or to assert fraud as a defense to foreclosure, and it should therefore reverse the master’s ruling and order the foreclosure to proceed. Goldberg was not a party to—and had no interest in—the 2007 note and mortgage, which is the only note and mortgage at issue in this appeal. (R. 345–70). She did not own the property at the time Ryba and Countrywide entered into the 2007 note and mortgage, *see* (R. 337–37), and she admitted that she does not owe any money on the 2007 note and mortgage, (R. 249).

In fact, beginning in 2005, Goldberg had no interest in the property whatsoever until she acquired it via a quitclaim deed in October 2012 as part of a settlement with Ryba despite knowing Ryba had mortgaged the property.² A quitclaim deed does not guarantee the quality of title; it conveys only whatever interest the grantor has in the property. *Milton P. Demetre Family Ltd. P’ship v. Beckmann*, 413 S.C. 38, 55, 773 S.E.2d 596, 605 (Ct. App. 2014) (“[A] quitclaim deed does not convey the fee, but only the right, title[,] and interest of the grantor.”). A quitclaim deed contains no warranties or other promises and creates no title covenants. 17 S.C. Jur. *Covenants* § 33. A person who receives property via a quitclaim deed takes it subject to whatever claims or

² The quitclaim deed is recorded at Book 287, Page 81 in the Charleston County RMC Office. The settlement agreement is attached to the recorded deed.

liens exist against the grantor. The grantee is automatically on inquiry notice, particularly if there are other suspicious circumstances—as there are in this case, where the grantee *knew* the grantor acquired the property by fraud and mortgaged the property. *See Martin v. Ragsdale*, 71 S.C. 67, 50 S.E. 671, 674 (1905) (“Some of the cases go so far as to hold that one who purchases from another holding under a quitclaim deed cannot, by reason of that fact, claim to be a purchaser without notice . . .”).

Goldberg cannot manufacture standing by acquiring property via a quitclaim deed that she knows is subject to a mortgage to which she is not a party. Goldberg and Ryba executed the quitclaim deed after the foreclosure action was already pending and acknowledged the foreclosure action in the settlement agreement. Goldberg cannot claim standing to challenge the foreclosure when she expressly accepted the property subject to an active foreclosure action involving a mortgage to which she was not a party. Consequently, Goldberg lacks standing to challenge the 2007 mortgage. *Doherty v. PNC Mortg.*, No. CA 0:14-4013-TLW, 2015 WL 5012781, at *2 (D.S.C. July 16, 2015), *report and recommendation adopted in part*, No. CIV.A. 0:14-4013-TLW, 2015 WL 5012823 (D.S.C. Aug. 21, 2015), *aff’d sub nom. Doherty v. PNC Mortg., a Div. of PNC Bank, NA*, 696 F. App’x 102 (4th Cir. 2017) (finding a plaintiff—who acquired title to property via a quitclaim deed—lacked standing to challenge the validity of a note and mortgage encumbering the property or the defendant’s status as holder of the note and mortgage because she was not a party to the note and mortgage or to an assignment of the note and mortgage).

Similarly, a borrower does not have standing to challenge a lender’s *assignment* of a mortgage. *See Reese v. United States Bank Nat’l Ass’n*, No. 3:11-2990-CMC-SVH, 2012 U.S. Dist. LEXIS 75652, at *8–9 (D.S.C. Apr. 30, 2012) (“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.”); *see also Windsor Green Owners Ass’n, Inc. v. Allied Signal, Inc.*, 362 S.C. 12, 17, 605 S.E.2d 750, 752 (Ct. App. 2004) (“Generally, one not in privity of contract with another cannot maintain an action against him in breach of contract.”). Goldberg therefore cannot challenge the timeliness of the assignments or whether the assignments occurred in exchange for valuable consideration.

Finally, Goldberg also must prove her standing to assert fraud as a defense to foreclosure. *See HSBC Mortg. Servs., Inc. v. Dennis*, No. 2012-209386, 2014 WL 2949773, at *1 (S.C. Ct. App. June 25, 2014) (affirming a master’s finding that the appellants lacked standing to assert defenses to foreclosure); *MidFirst Bank v. Brooks*, No. 2008-UP-196, 2008 WL 9841165, at *3 (S.C. Ct. App. Mar. 20, 2008) (same). She failed to do so and, therefore, has no defense to foreclosure.

This Court must grant rehearing to determine whether the courts have subject matter jurisdiction over Goldberg’s defenses. On rehearing, the Court should reverse the master’s ruling because Goldberg lacks standing to challenge the 2007 note and mortgage or to assert fraud as a defense to foreclosure.

II. The Court erred in affirming the master’s finding that the foreclosure is barred based on fraud.

The Court overlooked or misapprehended HSBC’s arguments related to the master’s findings of fraud. The Court did not address the merits of the master’s fraud ruling; it disposed of the issue solely on law of the case and issue preservation grounds. Op. No. 2019-UP-132 at 3–4. The Court’s ruling was erroneous.

A. The merits of the master’s fraud findings are properly before this Court.

The Court erred in holding that the master’s fraud findings are the law of the case. HSBC expressly appealed the master’s finding that Ryba’s fraud bars this foreclosure. In its statement of

issues on appeal, HSBC asserted that the master erred in relying on the fraud allegations as a defense to foreclosure: “This Court should reverse because the master erred in allowing Goldberg to maintain a defense to the foreclosure based on a claim of fraud.” (App. Br. 1). HSBC further argued “Goldberg failed to carry her burden of proof on [her fraud] claim.” (App. Br. 10 n.5); *see also* (Reply Br. 2–3) (clarifying HSBC’s argument that Ryba’s fraud cannot be imputed to HSBC and that the record does not support a finding that HSBC had knowledge or was on notice of the fraud). Thus, the fraud findings fall squarely within HSBC’s statement of issues and the arguments in its brief, and they are not the law of the case. *See Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012); Rule 208(b)(1)(B), SCACR. An appellant is not required to state every legal doctrine or issue in its exact words if the issue “is *reasonably clear* from [its] arguments.” *Herron v. Century BMW*, 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2011). When in doubt, this Court should find an issue preserved. *State v. Jenkins*, 408 S.C. 560, 568 n.7, 759 S.E.2d 759, 763 n.7 (Ct. App. 2014) (recognizing “it may be good practice for [the appellate court] to reach the merits of an issue when error preservation is doubtful” and “where the question of preservation is subject to multiple interpretations, any doubt should be resolved in favor of preservation” (quoting *Atl. Coast Builders & Contractors*, 398 S.C. at 330, 730 S.E.2d at 285; and *id.* at 333, 730 S.E.2d at 287 (Toal, C.J., concurring))). This Court’s failure to address the master’s fraud findings, standing alone, entitles HSBC to a rehearing.

B. Countrywide was not on inquiry notice of Ryba’s alleged fraud.

Even if the master was correct in finding HSBC stands in Countrywide’s shoes, the master’s judgment can stand only if Countrywide was on inquiry notice of Ryba’s fraud. *See Spence v. Spence*, 368 S.C. 106, 117, 628 S.E.2d 869, 874–75 (2006). This Court overlooked or misapprehended HSBC’s arguments and did not analyze whether Countrywide was on inquiry

notice. *See* Op. No. 2019-UP-132 at 3–4. Instead, the Court merely recited the master’s findings without affirming or rejecting those findings. *Id.* The Court should grant rehearing and address whether Countrywide was on inquiry notice. *See U.S. Bank Tr. Nat. Ass’n v. Bell*, 385 S.C. 364, 373, 684 S.E.2d 199, 204 (Ct. App. 2009) (“‘A mortgage foreclosure is an action in equity.’ In an appeal from an action in equity, tried by a judge alone, we may find facts in accordance with our own view of the preponderance of the evidence.” (quoting *Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 248, 489 S.E.2d 472, 475 (1997))).

The master’s order addressing HSBC’s motion to alter or amend, when read together with the original order, establishes the following conclusions: (1) HSBC is the holder of the note and mortgage and has a right to foreclose, (2) the only fraud in this case was perpetrated by Ryba, and (3) Ryba was not an agent of Countrywide. (R. 1–41). The master found HSBC was the holder of the note and mortgage and—standing in the shoes of the original lender, Countrywide—was on inquiry notice of Ryba’s fraud. (R. 13–14). The evidence does not support the master’s finding that Countrywide was on inquiry notice of the alleged fraud committed by Mr. Ryba. To the contrary, the only evidence is that Countrywide was *not* on notice, and HSBC maintains its right to foreclose.

The master relied on five purported “red flags” that he found should have alerted Countrywide to the possibility of fraud: (1) Ryba was an employee of the mortgage brokerage company that brokered the loan; (2) the loan was a stated income, “no doc” loan; (3) Ryba refinanced the loan four times in the two years after origination; (4) Ryba claimed the property was rental property but rented it for less than fair market value; and (5) the date Ryba acquired the property was left blank on his application for the 2007 loan. (R. 13). These purported “red flags” are insufficient to place Countrywide on inquiry notice.

First, the fact that Ryba was an employee of the mortgage brokerage company does not place a lender on any type of notice. As Michael Ward—a vice president for the loan servicer—testified at trial, it is not unusual for an individual who happens to be a mortgage broker to acquire real property and obtain a mortgage loan. (R. 201). It also is not unusual for a mortgage broker to have his employer—rather than a competitor—broker his loan. (*Id.*). Ryba did not broker his own loan, and the manner in which the loan was brokered would not raise any red flags to a lender. (*Id.*).

Second, a stated income, “no doc” loan does not automatically raise a red flag to a lender. (R. 202) (Ward: “If he had exceptional credit and chose to do a stated income or no doc or no ratio loan and he met the lender requirements -- I don’t think there would be any red flags.”). Ryba refinanced a loan he obtained from the same lender, and the original loan had required him to prove ownership of the property and that he had sufficient income. As Ward testified, nothing about this situation would raise any red flags to a lender or cause the lender to seek additional information. (R. 201–02, 220–21).

Third, it is not unusual for a borrower to refinance every year when interest rates are dropping, as they were at the time of the 2007 loan. (R. 150–51) (testimony of second closing attorney, David Chard). Ryba’s refinancing of the loan to obtain a lower interest rate, therefore, would not raise any red flags to a lender. (R. 150); *see also* (R. 413) (showing Ryba stated on the 2007 loan application that the purpose of refinancing was to obtain a “term and rate reduction”).

Fourth, it is not unusual for an individual to rent a property at less than fair market value, and there is no reason for a lender to question the borrower’s rental income. (R. 203) (Ward: “[I]t’s not unusual to see negative or net rental amounts in the negative.”); (R. 219–20). In fact, a

conservative lending approach dictates that lenders deduct 25% from any rental income reported by a potential borrower, which can result in a negative net rental income. (R. 202–03).

Finally, the 2007 loan was a refinance with the same lender. (R. 345, 413–16). Therefore, Ryba’s failure to write the date he acquired the property on the refinance loan application is inconsequential and would not raise any red flags.

The record demonstrates that these purported “red flags” are neither individually nor collectively sufficient to place Countrywide on inquiry notice, and this Court should grant rehearing and reverse the master’s findings.

III. HSBC is entitled to foreclose based on Countrywide’s status as a holder in due course and its own status as a holder in due course.

As HSBC explained at oral argument, this case does not turn on whether HSBC is a holder in due course. However, even if the Court engages in a holder in due course analysis, HSBC remains entitled to foreclose.

A. Countrywide was a holder in due course, and HSBC is therefore protected by the shelter rule.

The master found Countrywide paid value for the loan but ruled Countrywide was not a holder in due course solely on the ground that it was on inquiry notice of Ryba’s alleged fraud. (R. 34). Because Countrywide was *not* on inquiry notice of Ryba’s alleged fraud,³ it was a holder in due course. *See Spence*, 368 S.C. at 117, 628 S.E.2d at 874–75. HSBC, as a subsequent purchaser, is therefore protected by the shelter rule and is entitled to foreclose even if it stands in Countrywide’s shoes.

³ *See* Part II, *supra* pp. 6–10.

B. HSBC is itself a holder in due course.

The master's order is based on a fundamental misunderstanding of the 2007 loan and the operation of the mortgage industry. The master relied solely on two assignments executed in 2011 and 2012 as evidence showing when HSBC acquired the note and mortgage and, in doing so, rejected evidence that HSBC has been the trustee of a trust holding securitized loans—including the 2007 loan at issue in this case—since June 2007.

Countrywide originated the loan on May 2, 2007. (R. 161–62). The mortgage named Mortgage Electronic Registration Systems, Inc. (“MERS”) as nominee for the lender. (R. 350). The loan was securitized into a trust less than a month later pursuant to a Pooling and Service Agreement (“PSA”) executed on June 1, 2007,⁴ while Countrywide remained the loan servicer. (R. 164–65). The PSA states on its face that the parties entered into the agreement and the trustee—HSBC, the plaintiff in this case—accepted the trust created by the agreement “for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged.”⁵ (Pooling & Servicing Agr. at 1, Ex. 4 to HSBC’s Motion to Alter or Amend).

MERS assigned the note and mortgage to a new loan servicer, Bank of America, on September 15, 2011, because the loan was in default. *See* (R. 164, 374). After a transfer of servicing rights to Specialized Loan Servicing, LLC, Bank of America assigned the note and mortgage to the trust—which already owned the loan pursuant to the PSA. (R. 158–59, 166).

⁴ The PSA is a matter of public record available on the Securities Exchange Commission’s website and on the Charleston County public index as Exhibit 4 to HSBC’s Rule 59(e) motion filed July 6, 2015. Although the PSA itself is not in the Record on Appeal, this Court may take judicial notice of its existence and terms. *See Wise v. Wise*, 394 S.C. 591, 601, 716 S.E.2d 117, 122 (Ct. App. 2011); *Freeman v. McBee*, 280 S.C. 490, 494, 313 S.E.2d 325, 327 (Ct. App. 1984).

⁵ Similar to the note and mortgage, Goldberg was not a party to the PSA and lacks standing to challenge its validity or enforceability. *See Windsor Green Owners Ass’n*, 362 S.C. at 17, 605 S.E.2d at 752.

None of the assignments caused any transfer of ownership of the note or mortgage. (R. 165); *see also* (R. 167) (Ward: “Assignments of Mortgage are typically a housekeeping matter, keeping the general public on notice of a prior transaction or sale, I guess, of the fact. So no, there was no sale [at the time of the 2011 assignment].”). Contrary to the master’s finding, which this Court appeared to approve, the 2011 assignment and subsequent 2012 recording were not subject to Goldberg’s claims against Ryba because the final transfer of ownership occurred as part of the securitization under the PSA in 2007.

The master’s ruling demonstrates a misunderstanding of MERS and the 2007 loan. The master summarily rejected any reliance on the PSA in his original order on the sole ground that the PSA—as explained through Ward’s testimony—was inconsistent with the subsequent assignments. (R. 22). In keeping with common mortgage industry practice, MERS never owned the note or mortgage. Rather, MERS simply held the mortgage as nominee for the lender. (R. 350). At trial, Michael Ward clearly explained how MERS works:

So this was assigned into the MERS system at origination. You are not allowed to initiate any type of default proceedings or loans or anything to that effect in the name of MERS. So it goes into MERS at origination and stays there until there’s an event that requires an assignment taken out of that system, so in this case default.

(R. 197). The South Carolina Supreme Court has also recently explained how MERS works in a case involving a failed challenge to this practice:

MERS is a subsidiary of MERSCORP and is a member-based organization made up of lenders and investors, including mortgage banks, title companies, and title insurance companies. When MERS member-lenders issue a mortgage and promissory note, MERS is listed as the mortgagee, specifically as “nominee” in place of the lender. The mortgage is then recorded in the county where the real property is located, and internally, the loan is registered in the MERS system. Accordingly, MERS becomes the grantee in the public index, despite the fact that MERS holds no security interest in the promissory note. This allows the lender to retain priority with

MERS as the nominee without having to record each time there is an assignment of the mortgage when the promissory note is transferred. MERS essentially provides a convenient framework through which members can transfer notes amongst themselves without having to record each exchange.

Kubic v. MERSCORP Holdings, Inc., 416 S.C. 161, 166, 785 S.E.2d 595, 597–98 (2016). Despite Ward’s explanation, the master rejected any reliance on the 2007 securitization of the loan and, instead, relied on the 2011 and 2012 assignments as evidence that ownership of the note and mortgage transferred from MERS to Bank of America (the servicer at the time the loan went into default), then from Bank of America to HSBC (the owner of the note and mortgage pursuant to the PSA). (R. 22). In his subsequent order addressing HSBC’s Rule 59(e) motion, the master reviewed the PSA and found that it included the 2007 loan at issue in this case. (R. 7–8) (“The Schedule of Loans included with the PSA agreement *does include* the subject note and mortgage” (emphasis added)). The master also recognized the statement in the PSA that the parties to the agreement exchanged consideration. (R. 8); *see also* 116 A.L.R. 545 (“The words ‘value received’ in a written instrument, other than a negotiable or sealed instrument, have generally been held to create a presumption, or make a prima facie case, of a sufficient consideration to support the instrument.”). Nonetheless, he disregarded the PSA on the ground that it did not expressly state “what or when anything of value was paid to Countrywide for the subject note and mortgage.” (R. 8).

This fundamental misunderstanding infected the master’s entire analysis of this case and caused him to incorrectly apply the holder in due course doctrine. The 2007 note and mortgage have been owned by HSBC, as trustee, since June 1, 2007. The assignments reflect only a transfer from MERS to the entity charged with prosecuting a foreclosure action. Accordingly, any event

occurring after June 1, 2007—such as the filing of a lawsuit or lis pendens—is of no moment in analyzing whether HSBC is a holder in due course.

C. Goldberg, the master, and this Court misapprehend the effect of a lis pendens.

The master and this Court compounded the error by relying on the lis pendens Goldberg filed with her claims against Ryba in 2008. Goldberg, the master, and this Court misapprehend the effect of a lis pendens. No law supports the master’s holding—which this Court appears to approve—that a lis pendens placed an assignee of the note and mortgage on “statutory notice” that Goldberg claimed the mortgage was procured by fraud. (R. 24–25); Op. No. 2019-UP-132 at 4. The lis pendens mechanism is not designed to aid either side in a dispute between private parties. *Pond Place Partners, Inc. v. Poole*, 351 S.C. 1, 17, 567 S.E.2d 881, 889 (Ct. App. 2002) (quoting 51 Am. Jur. 2d *Lis Pendens* § 2). Rather, it is designed primarily to protect unidentified third parties by alerting prospective purchasers of property as to what is already on public record—i.e., a lawsuit involving the property. *Id.* “Thus, it notifies potential purchasers that there is pending litigation that may affect their title to real property and that the purchaser will take subject to the judgment, without any substantive rights.” *Id.* Any third party attempting to acquire an interest in the property during the pendency of the action does so at his own peril, as any interest obtained is subject to an order of the court issued in the litigation involving the property. 14 S.C. Jur. *Lis Pendens*, § 4. “The real estate involved in the action is under the control and direction of the court during the pendency of the action, and the filing of the lis pendens constitutes notice of that fact to all other persons.” *Id.*

Goldberg’s 2008 lis pendens is irrelevant to this case. The litigation between Goldberg and Ryba did not end with a judgment affecting the property. Instead, Goldberg settled her claims and accepted a quitclaim deed for the property. Therefore, the litigation to which the lis pendens

attached did not affect the property. Moreover, Goldberg cannot escape all liens attached to the property—and nullify any future assignments of existing liens—by merely filing a lawsuit and lis pendens and settling that lawsuit.

IV. The Court overlooked or misapprehended HSBC’s remaining arguments.

The Court overlooked or misapprehended HSBC’s equitable subrogation argument. HSBC raised equitable subrogation as a defense in its answer to Goldberg’s counterclaims and at trial. *See* (Reply to Counterclaims ¶ 28;⁶ R. 110). Goldberg took the property subject to her notice of the lien on the property. (R. 53). Moreover, she admitted she owed at least \$199,000 on her own mortgage loan and that Ryba used the proceeds from the 2005 loan to pay off her existing loan. (R. 239, 252). Thus, Goldberg received a benefit from—and participated in—Ryba’s alleged fraud. The result of the master’s and this Court’s ruling is that Goldberg receives a windfall from her own fraud because she owns the property *and* is free of her pre-2005 mortgage. Thus, at the very least, the 2005 loan was equitably subrogated to Goldberg’s preexisting loan. *See Matrix Fin. Servs. Corp. v. Frazer*, 394 S.C. 134, 137, 714 S.E.2d 532, 533 (2011) (citing *Dedes v. Strickland*, 307 S.C. 155, 158, 414 S.E.2d 134, 136 (1992)). Even if the 2007 loan is nullified, the 2005 loan must be reinstated and the case must be remanded to the master for further foreclosure proceedings related to the 2005 loan.

Finally, the Court overlooked or misapprehended all remaining arguments HSBC raised in its briefs and at oral argument. *See Herron*, 395 S.C. at 466, 719 S.E.2d at 643 (providing the purpose of a petition for rehearing is to raise specific points overlooked or misapprehended by the court, not “to have the case tried in the appellate court a second time”).

⁶ Although the reply to counterclaims is not in the Record on Appeal, it is a public record and this court may take judicial notice of its contents. *See Wise*, 394 S.C. at 601, 716 S.E.2d at 122; *Freeman*, 280 S.C. at 494, 313 S.E.2d at 327.

CONCLUSION

HSBC requests that the Court grant rehearing, reverse the master's ruling, and remand for further foreclosure proceedings.

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Columbia, South Carolina

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Of whom Carol Garfield Goldberg is the,

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PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for HSBC Bank USA, National Association, as Trustee for the Holders of the Deutsche ALT-A Securities, Inc. Mortgage Loan Trust, Mortgage Pass-Through Certificates Series 2007-OA4, assignee of Bank of America N.A., successor by merger to BAC Home Loans Servicing L.P., f/k/a Countrywide Home Loans Servicing, Inc., do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified to the following address(es):

Pleadings: Appellant's Petition for Rehearing

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May 13, 2019



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May 13, 2019

Hand Delivered

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RECEIVED
MAY 13 2019
SC Court of Appeals

RE: HSBC Bank USA, National Association v. Clifford L. Ryba, et al.
Appellate Case No. 2016-001054
Our File No. 42753.01607

Dear Ms. Kitchings:

Enclosed please find the original and seven copies of Appellant's Petition for Rehearing in the above-referenced matter. We would ask that you file the original and return a clocked-in copy to us via our courier.

A check in the amount of \$50.00 is enclosed as the required filing fee. Thank you for your consideration of this request.

Very truly yours,

A handwritten signature in cursive script, appearing to read 'Nick Charles'.

Nicholas A. Charles

NAC:jlt

Enclosure

cc: Erica G. Lybrand, Esquire
J. Kevin Holmes, Esquire
A. Mattison Bogan, Esquire