THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

James O. Spence, Master-in-Equity

Appellate Case No. 2019-000653

Wells Fargo Bank, N.A.,.....Respondent,

v.

Eric L. McGlaughlin; Gary L. McGlaughlin; Oneta C. McGlaughlin,.....Defendants,

Of whom Eric L. McGlaughlin is the.....Appellant.

MEMORANDUM AS TO APPEALABILITY

The Appellant, Eric L. McGlaughlin (hereinafter "McGlaughlin"), submits this memorandum as to the appealability of the orders subject of this appeal. The orders make multiple rulings. Some of those rulings are not appealable. Some of those rulings are appealable.

BACKGROUND AND PROCEDRUAL HISTORY

This is a contested mortgage foreclosure action. Respondent (hereinafter "Wells Fargo") made a motion for summary judgment in its favor in this case. McGlaughlin made a motion for dismissal of Wells Fargo's claim or for summary judgment in McGlaughlin's favor on that claim. The master-in-equity denied Wells Fargo's motion for summary judgment and partially denied McGlaughlin's motion,

declining to dismiss the action. The master-in-equity deferred ruling on McGlaughlin's motion for summary judgment. McGlaughlin does not appeal those rulings.

The master-in-equity also ruled as follows:

> Plaintiff to serve Summons and Rule To Show Cause on all possible owners of the note and mortgage, [sic]
>
> Defendant argues that the legal owner of the notes must be MERS [Mortgage Electronic Registrations Systems, Inc.]. "Per the assignment documents the Plaintiff has offered, MERS owns the note and mortgage." MERS is not a party. SCRCP 19 and 21 contemplates joining such parties. "Parties may be dropped or added by order of the court on motion of the party or of its own initiative at any stage of the action and on such terms as are just.
>
> No other party has come forward claiming ownership of the note and mortgage other than the Plaintiff. If the Defendant is legitimately concerned that the complete ownership interest has not transferred to the Plaintiff, this Court can fully resolve this issue and alleviate any concerns by issuing a Rule to Show Cause naming all prior parties and ordering them to come forward if any such interest is claimed. This would eliminate any concerns regarding potential threats of double liability. It would also address any concerns regarding entities wrongfully correcting payments, although Plaintiff would note that no such concerns have been raised.
>
> I find a Summons and RTSC joining all possible claimants to ownership of the note and mortgage is just because it will result in judicious use of court time and a judicial determination of note and mortgage ownership which will insure [sic] to the benefit of both Plaintiff and Defendant.

(Order filed Dec. 19, 2018, pp. 3-4.)

The master-in-equity denied McGlaughlin's motion to reconsider and ruled as follows:

> This foreclosure action was referred pursuant to Rule 53 SCRCP. Rule 71 SCRCP details how the court is to make

determination of the debt owed to the Plaintiff. Inherent in this examination is for the court and the parties to determine who is the proper Plaintiff or owner of the note and mortgage. The court notes, while not citing, the numerous appellate cases over the last ten (10) years addressing the issue of who is the proper Plaintiff to have standing to sue the Defendant in a foreclosure action.

The Defendant(s) want the proper Plaintiff named so the case can be adjudicated and their rights and obligations decided and determined, rather than not determining the possible Plaintiff and leaving the Defendant(s) open to a second or third law suit based upon another party claiming that they own the note and should be named Plaintiff. The Court and the Plaintiff have similar desires to use judicious judicial economy.

Here, Plaintiff alleges it has set forth clear ownership of the note and mortgage; defendant(s) disagree, arguing specific parties appear to be the record owner of the note. The court has ruled that a Summons and Rule to Show Cause is to be issued to all parties in the chain of ownership of the note and mortgage to appear before the court to either claim an ownership interest by appearing at RTSC hearing or, waiving any right to claim so, by failure to appear.

This procedure would seem to be in each parties and the court's best interest and use of judicial economy and time. If for example, this was a quiet title action and one party claimed an omitted owner was left out, certainly no one would object to joining or giving the opportunity for the omitted owner to be ruled into court with a Summons and Rule to Show Cause, so that the court could properly adjudicate all interests.

It is undisputed that the RTSC must be served with a Summons. Again, the Court calls attention to the several South Carolina appellate cases stating and re-stating this fundamental rule. Since there is to be a Summons with the RTSC, then the only other jurisdictional issue might be does the issuance of the Summons and RTSC exceed Order of Reference powers? Clearly, No., whereas, there are cases detailing bringing in an omitted lien creditor after the action, here the action is still on going.

> The purpose of the Summons and Rule to Show Cause hearing, whereby all assignees of record are joined to the action, is to give the assignees in the assignment chain the opportunity to assert any ownership interest in the subject Promissory Note and Mortgage. Not until the Summons and Rule to Show Cause hearing has been held will the Court rule on questions concerning the ownership of the note and mortgage and the Plaintiff's right to enforce them in this foreclosure action. The Court has the right to add parties to this action, which provides the basis for the issuance of the rule to show cause. Rule 19, SCRCP; see also Gillman v. City of Beaufort, 368 S.C. 24, 28, 627 S.E.2d 46, 748 (Ct. App. 2006)("Rule 19, SCRCP allows a court to join, whenever possible, persons materially interested in an action so that a complete determination can be made."). The Defendant argued that the Summons and Rule to Show Cause procedure ordered by the Court appears to abrogate or lessen the Plaintiff's burden to prove its entitlement to enforce the subject note and mortgage. The Court disagrees. The purpose of the Summons and Rule to Show Cause proceeding is to determine whether the entities to which the Rule to Show Cause is directed assert any interest in the subject note and mortgage, which bears upon questions concerning the ownership of the note and mortgage and the Plaintiff's right to enforce the same.

(Order filed March 26, 2019, pp. 2-4.)

The master-in-equity then issued a rule to show cause as contemplated by these orders. (Summons and Rule to Show Cause filed April 1, 2019.)

THERE ARE APPEALABLE RULINGS IN THE ORDERS

The orders at issue added a party to the case and enjoined that party to show cause as directed in the rule to show cause. The orders also changed the burden of proof. The orders on appeal created a situation in which MERS' failure to respond or to show cause sufficient to satisfy the master is to be used as evidence against McGlaughlin on the issue of ownership of the note and mortgage – an element of Wells

Fargo's claim on which it bears the burden of proof. The orders set up a scenario in which Wells Fargo can be determined, as against McGlaughlin, to own the note and mortgage not because it proves that it does but because a third party fails to prove that the third party does. That is appealable.

I. The orders are appealable because they make someone a party to the case.

Our Supreme Court has previously held that orders substituting parties are immediately appealable orders. Neeltec Enters., Inc. v. Long, 397 S.C. 563, 566-67, 725 S.E.2d 926 (2012); Watts v. Copeland, 170 S.C. 449, 456-57, 170 S.E. 780, 783 (1933). The Supreme Court has held that an order that refuses to add a party is immediately appealable. Rutledge v. Tunno, 63 S.C. 205, 41 S.E. 308, 309 (1902). The Supreme Court has also held that an order that makes a person a party to an action is immediately appealable. Natl. Exchange Bank v. Stelling, 32 S.C. 102, 10 S.E. 766, 768-69 (1890).

The orders in this appeal are appealable orders. They make MERS a party to this case.

II. The orders affect a substantial right. The orders alter the burden of proof and deny McGlaughlin a mode of trial to which he is entitled.

The orders in this appeal are appealable under S.C. Code Ann. § 14-3-330(2). They affect a substantial right of McGlaughlin's: the burden of proof.

Our Supreme Court has recognized that the burden of proof is a substantial right:

> The rule as to the burden of proof is important and indispensable in the administration of justice, and constitutes a substantial right of the party upon whose

> adversary the burden rests. It should therefore be jealously guarded and rigidly enforced by the courts.

Jackson v. Frier, 146 S.C. 322, 144 S.E. 66, 67 (1928) (quoting 22 C.J. 69).

Consistently with this principle, the Court has held that, even though styled as a bifurcation order, an order that changed what a plaintiff had to prove to prevail in a case affected a substantial right and was an immediately appealable order. Morrow v. Fundamental Long-Term Care Holdings, LLC, 412 S.C. 534, 773 S.E.2d 144 (2015).

As the plaintiff in this foreclosure action, Wells Fargo bears the burden of proving that it owns or is otherwise entitled to enforce the subject note and mortgage. "A mortgage and a note are separate securities for the same debt, and a mortgagee who *has a note and a mortgage* to secure a debt has the option to either bring an action on the note or to pursue a foreclosure action." U.S. Bank Natl. Trust Assn. v. Bell, 385 S.C. 364, 684 S.E.2d 199, 204 (Ct. App. 2009) (emphasis added). A plaintiff in a foreclosure action has the burden of establishing the existence of a debt owed to it, its ownership of the mortgage securing that debt, and the debtor's default of the debt obligation. See id. at 205. In accordance with the general principle that in a civil action the plaintiff bears the burden of proof, it is incumbent upon the party seeking foreclosure of a mortgage to prove all the elements of its case. See Baugh & Sons Co. v. Graham, 150 S.C. 398, 401, 148 S.E. 220 (1926) (plaintiff bears burden of proof in civil case); Paramount Fund, Inc. v. Cusaac, 282 S.C. 497, 499, 319 S.E.2d 354, 355 (Ct. App. 1984) ("[i]n an action to foreclose a mortgage on real property, the mortgagee has the burden of proving a disputed mortgage by the preponderance of the evidence").

Here, the orders at issue shift that burden away from Wells Fargo. The master-in-equity ordered that the rule to show cause proceeding "will result in . . . a judicial

determination of note and mortgage ownership." (Order filed Dec. 19, 2018, p. 4.) The master-in-equity ruled that he would then, summarily, "rule on questions concerning the ownership of the note and mortgage and the Plaintiff's right to enforce them in this foreclosure action." (Order filed March 26, 2019, p. 3.) So, instead of Wells Fargo having to prove its ownership of the note and mortgage, the orders at issue provide that this will be decided – with regard to *McGlaughlin*, not just MERS – on the basis of what showing MERS makes in response to the rule to show cause.

This burden-shifting also deprives McGlaughlin of a mode of trial to which he is entitled: one in which the burden of proof is on the plaintiff to prove each element of its claim.

Discussing whether an order establishing an opt-in procedure in a class action was immediately appealable, the Supreme Court observed that while the mode-of-trial analysis of appealability under S.C. Code Ann. § 14-3-330(2) *typically* focuses on whether a party has the right to a jury trial, whether trial will be non-jury or by jury is not the only question that falls within the scope of this inquiry. Salmonsen v. CGD, Inc., 377 S.C. 442, 661 S.E.2d 81, 87 (2008).

> "Pursuant to § 14-3-330(2), this Court has held on numerous occasions that when a trial courts order deprives a party of a mode of trial to which it is entitled to as a matter of right, such order is immediately appealable." Flagstar Corp. v. Royal Surplus Lines, 341 S.C. 68, 72, 533 S.E.2d 331, 333 (2000). "These cases not only permit, but indeed require, immediate appeal in the event of the denial of a mode of trial to which one is entitled as a matter of right." Id. This Court's traditional analysis of claims of denial of a mode of trial requires a determination of whether or not a party is erroneously denied a trial by jury in a law case, or is erroneously required to proceed before a jury in an equity case. Id. However, the mode of trial analysis indubitably includes

> the consideration of the availability of trial. The question of the denial of an actual trial is intrinsic.

Id.

Here, the effect of the master-in-equity's order is to deny McGlaughlin a trial on the issue of whether Wells Fargo owns the note and mortgage and replace it with a proceeding in which Wells Fargo will be determined to own the note and mortgage in the event the MERS does not make a sufficient showing of ownership. McGlaughlin is entitled to a trial in which the plaintiff bears fully the burden of proof, and the master-in-equity's order has taken that trial away from him.

The Supreme Court has held to fall within the purview of S.C. Code Ann. § 14-3-330(2) rulings of a sort that presented much closer questions of whether they were immediately appealable. See Neeltec, 397 S.C. at 566-67; Hagood v. Sommerville, 362 S.C. 191, 195, 607 S.E.2d 707 (2005) (order disqualifying attorney immediately appealable); City of Rock Hill v. Thompson, 349 S.C. 197, 201, 563 S.E.2d 101 (2002) ("if City ability to prosecute Thompson is significantly disadvantaged by Judge's ruling on its motion in limine, City can appeal"); State v. McKnight, 287 S.C. 167, 168, 337 S.E.2d 208, 209 (1985) ("pre-trial order granting the suppression of evidence which significantly impairs the prosecution of a criminal case is directly appealable under S.C. Code Ann. § 14-3-330(2)(a)"); Watts, 170 S.C. at 456-57; Rutledge, 41 S.E. at 309; Natl. Exchange Bank, 10 S.E. at 768-69.

If those rulings are immediately appealable, a ruling that shifts, changes, or waters down a burden of proof surely is. The orders here are and ought to be immediately appealable.

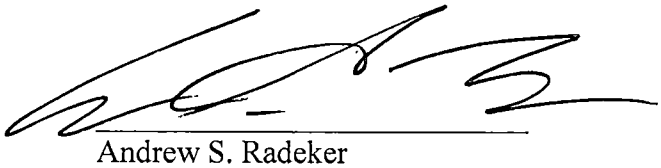
III. The orders grant an injunction.

A party may immediately appeal "[a]n interlocutory order or decree in a court of common pleas granting, continuing, modifying, or refusing an injunction." S.C. Code Ann. § 14-3-330(4). By way of a rule to show cause, the orders at issue here enjoin MERS to appear before the court to "show cause . . . why an Order should not be issued declaring that [MERS has] no interest in the Note and Mortgage that are the subject of the instant foreclosure action." (Summons and Rule to Show Cause filed April 1, 2019, p. 1.) This is immediately appealable under S.C. Code Ann. § 14-3-330(4).

CONCLUSION

For more than one reason, the orders on appeal are immediately appealable.

Respectfully submitted,



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PROOF OF SERVICE

I certify that I served the foregoing memorandum as to appealability in this case by depositing a copy of it on the date shown below in the United States Mail, postage prepaid, addressed as follows:

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