

90294

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM OCONEE COUNTY
Court of Common Pleas
Steven C. Kirven, Master-in-Equity
Case No. 2011 - CP - 36 - 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 the 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

RECEIVED
JUL 16 2019
SC Court of Appeals

Petition for Rehearing and Memorandum in Support of Rehearing

Appellants John and Julie Dalen (collectively, the Dalens) respectfully petition this Court to rehear the issues presented in this case because we believe the Court has overlooked or misapprehended crucial issues raised by the Dalens in this case. We address these issues in the attached Memorandum in Support of this Petition.

Memorandum in Support of Petition for Rehearing

The Appellants believe that the SC Court of Appeals failed to look at critical issues dealing with Issues (1) Subject Matter Jurisdiction, (2) Chain of Title/Fraudulent Assignment, Fraud upon the Court and (3) Denial of Due Process.

Regarding Issue (1) as to the Trial Court's Lack of Subject Matter Jurisdiction

According to South Carolina law, in order for a bank to foreclose, the bank must prove that it had the note prior to filing the foreclosure action. Otherwise there is no Subject Matter Jurisdiction and the Court cannot even entertain the matter. The Dalens' concern with these issues includes the fact that there is no date on the note showing when the bank acquired the note.

Along with this issue is the fact – admitted to by the bank during the discovery process – that the note had been securitized, and was thus converted to a stock which forever changes the nature of the note. It is no longer a note, but a stock, and must be governed by the rules pertaining to securities. It is unlawful to attempt to take a stock and convert it back to a note. The Dalens discussed this in the Initial and Final Briefs; it was also discussed in the Hawaii Supreme Court case. (*See: Bank of America v. Grisel Reyes-Toledo, Sup. Ct. of Hawaii, SCWC-15-0000005, dated Feb. 28, 2017.*) (R. pp. 1079 – 1106) This Hawaii case was referenced in the Dalens' briefs because it closely parallels the Dalen case. The South Carolina Court of Appeals did not address these above-mentioned issues. It is not the court's job to make excuses for the bank or to relieve them of their responsibility to comply with all of the laws regarding mortgages and securities.

Regarding the Dalens' Issue (2) "fraud upon the [master] due to [a] fraudulent [a]ssignment of [the m]ortgage."

There are rules regarding trusts and procedures which must be followed. South Carolina law and New York Trust Law -- which governs the purported Trust in which this note was allegedly placed and the Trust of which FNMA is the Trustee -- require an unbroken chain of title from the originator of the note to the trust and also to the bank bringing the foreclosure. The mortgage assignment cannot possibly be legitimate as the bank has presented it to the Court as outlined in our final brief and as described below. Furthermore, securitization of the note bifurcates the note from the mortgage, thus rendering both unenforceable. The bank has admitted that the note was securitized and put into a trust, but there is no proof that the note was actually put into the trust, although the bank's attorneys did claim that the note was removed from the trust. (*See: R. p. 535, Exhibit F.*)

The bank has not presented any evidence of a transfer of the note or mortgage to the trust. This is evidence of a broken chain of title -- a fraud upon the Court in that the bank, in order to foreclose presents a chain of title which is in contradiction to the evidence. Furthermore, the bank submitted an Assignment of a Mortgage with a robo-signed notary signature, improper under California law; robo-signing voids the signature under California law. (*See: R. p. 537 Exhibit H, R. p. 540 Exhibit I, and R. p. 543 Exhibit J.*) Robo-signing of mortgage assignments was one of the causes of action that all fifty states' Attorneys General brought against the banks, including Bank of America, N.A. (*See: R. p. 545, Exhibit K.*) In our reply brief, pp. 11-13, and our Final Brief on pp. 13-24 we argued issues 1, 2, and 3. None of these issues were addressed by the S.C. Court of Appeals. The Hawaii Court (*See: Bank of America v. Grisel Reyes-Toledo,*

Sup. Ct. of Hawaii, SCWC-15-0000005, dated Feb. 28, 2017.) (R. pp. 1079 – 1106) discusses these issues on pp. 1087 – 1099.

The Dalens have presented evidence that there were numerous transfers of the note, none of which are reflected on the back of the note. The only transfer that is recorded on the back of the note is not dated. The only assignment of the note to FNMA occurred when Bank of America substituted plaintiffs prior to the foreclosure trial. But supposedly FNMA was the owner of the note and Bank of America merely the “servicer” at the time the foreclosure complaint was filed. As the evidence shows, in fact the real owners of the note were most likely the investors in the securities which were sold by FNMA (securitization), almost immediately and maybe even before the Dalens signed the note. As mentioned in the Dalens’ final brief, John and Julie Dalen were unable to determine at any given time who actually owned the note. We refer to this as the bank “playing a shell game with the note.” In Bank of America’s initial Brief, paraphrasing what their attorney stated: “it doesn’t matter if it’s fraud – it doesn’t matter, we have the note.” In the Dalens’ reply brief, we asserted that fraud does in fact matter. We have shown in our final brief that the chain of title is most certainly not as the bank has presented it, and is in fact a broken chain of title. Once again, it’s not the Court’s job to make excuses for, or to overlook the bank’s failure to follow proper procedures and laws. (*See: R. p. 456, entitled Standing in the Wake of the Foreclosure Crisis: Why Procedural Requirements are Necessary to Prevent Further Loss to Homeowners by Timothy A. Fruehle, Iowa Law Review.*)

Relevant to the above law review, see also Why Mortgage Formalities Matter by David A. Dana, Loyola Consumer Law Review, Vol. 24, p. 101 (2012) and available at SSRN:

<https://ssrn.com/abstract=2082374>: This Article argues that adherence to mortgage formalities regarding foreclosure is valuable for expressive reasons and also as a potential deterrent to future undesirable underwriting and securitization practices. The Article reviews how some courts have in effect written procedural requirements for foreclosure out of the law, and asks why these courts have done so and whether lenders' behavior might have been improved during this housing crisis had the state courts uniformly afforded equal respect to the legal rights of homeowners and those of lenders.

Regarding Issue (3) "the proceedings violate[d] due process of law"

We believe the Court is in error on this issue for the following reasons: The Dalens were denied a jury trial due to Statutory Rules/Regulations that are repugnant to the United States Constitution. The Seventh Amendment to the U.S. Constitution requires that in all cases where the amount in controversy exceeds \$20, the right of trial by jury shall be preserved. From the beginning in the Answer to the bank's complaint, the Dalens demanded the right to a trial by jury. This Right to a Jury Trial is a fundamental Constitutional Right that cannot be overruled by Statute or other means.

No state, no judge can overrule the Constitution of the United States. This is an unalienable right that cannot be taken away. The Court's action denying the Dalens a jury trial is in fact a violation of due process under color of law. Due process, as contemplated by the U.S. Constitution, is process according to the Common Law. Numerous Supreme Court cases were provided by the Dalens in our Final and Reply Briefs.

Bank of America did not prove its standing to foreclose, thus depriving the Court of Subject Matter Jurisdiction. Also, from the beginning, the Dalens challenged the Court's subject matter jurisdiction. Absent the bank's proof of its right to enforce the note, at the point that the Dalens challenged the Court's jurisdiction, the Court had no jurisdiction to proceed. Anything that happened after that is null and void. In all cases where Subject Matter Jurisdiction is challenged, it is the person bringing the complaint, i.e. the bank which is required to prove it on the record, not the court. Absent such proof, there is no jurisdiction. Again, we have provided numerous Supreme Court cases in our Final and Reply Briefs, as well as in all of our court filings over the past nine years that support this contention.

Proceeding without Subject Matter Jurisdiction proved on the record is a denial of due process. Denial of the Constitutionally-protected right to a jury trial is a denial of due process. These issues were repeatedly raised at hearings prior to the trial and repeatedly asserted at the trial, and repeatedly denied or not ruled upon by the court and therefore are preserved for appeal.

Summary


This case raises issues that have not been resolved or even given fair consideration. Among them are the securitization and undated transfers of the note, and purported transfers that are not documented on the note. This case was at the trial court level for more than eight (8) years, and is reflected in the Record on Appeal that the Dalens filed with this Court. There are over 1,100 pages of evidence and documentation that we feel the Court should have been able to use in providing us a more reasoned response than the under two-page response that we received as the Court's opinion.

We hoped that the South Carolina Court of Appeals would have addressed the issues that we raised in a similar way as did the Hawaii Supreme Court in a similar case involving similar issues. The volume of material presented in the Record on Appeal deserves, no – in fact demands that the Court give more consideration to the evidence presented. The Dalens also cited in our Reply and Final Briefs to this court numerous cases relating to standing and subject matter jurisdiction that were inadequately addressed by this court. We believe that the South Carolina Court of Appeals should re-examine the issues presented and tell the Dalens why the findings of the Hawaii court are not relevant to this case, in this state. (*See: Bank of America v. Grisel Reyes-Toledo, Sup. Ct. of Hawaii, SCWC-15-0000005, dated Feb. 28, 2017.*) (R. pp. 1079 – 1106).

WHEREFORE the Dalens again move this Court to rule that (1) the Trial Court did not have Subject Matter Jurisdiction due to the fact that the bank in question did not and could not prove that it had the note prior to filing for foreclosure and thus lacked standing. Furthermore, the evidence shows that (2) the Assignment of Mortgage / Chain of Title as presented by the bank is in fact fraudulent and there exists a broken Chain of Title with regard to the note and mortgage in question in this case. Also, we ask the Court to rule that there was in fact a denial of due process in denying the Dalens a trial by jury, in accordance with the United States Constitution's 7th Amendment guarantee of Trial by Jury. As well, a denial of due process because, when challenged by the Dalens, the Court proceeded without proof on the Record, of Subject Matter Jurisdiction; in fact the Court did not have Subject Matter Jurisdiction.

July 15, 2019

John D. Dalen and Julie A. Dalen
Appearing Pro Per / Appellant(s)



John D. Dalen



Julie A. Dalen

109 Wood Valley Drive
Westminster, SC 29693
Ph. 864.647.4705

Other parties and counsel of record:

Attorney for Respondent Bank of America, N.A.

Brian A. Calub, Esq.
McGuire Woods LLP
Fifth Third Center
201 North Tryon St., Ste. 3000
Charlotte, NC 28202
Ph. 704.343.2000

Attorneys for Respondent FNMA

B. Lindsay Crawford, III
Theodore von Keller
Sara C. Hutchins
B. Lindsay Crawford, IV
Crawford & von Keller, LLC
PO Box 4216
Columbia, SC 29240

**LETTER TO THE APPELLATE COURT CLERK
FILING APPELLANTS' PETITION FOR REHEARING AND
MEMORANDUM IN SUPPORT OF**

July 15, 2019

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

RECEIVED
JUL 16 2019
SC Court of Appeals

Re: Federal National Mortgage Assoc. and Bank of America, N.A., Respondents v.
John D. Dalen, Appellant Case No. 2017-000886

Dear Ms. Kitchings:

Enclosed for filing is the original and seven copies of the Appellants' Petition for Rehearing and Memorandum in Support of in the above case. Also enclosed are the following:

- 1) Proof of service of Appellants' Petition for Rehearing and Memorandum in Support of on the respondent(s).
- 2) Included is a filing fee of \$50.00 as a check payable to SC Court of Appeals.

Please file the original and return one copy to me in the postage prepaid return envelope. Thank you.

Sincerely,



John D. Dalen
109 Wood Valley Drive
Westminster, SC 29693
Appearing Pro Per

Cc:

Attorneys for Respondent
Bank of America, N.A., successor by
merger to BAC Home Loans Servicing, L.P.
f/k/a Countrywide Home Loans Servicing, L.P.
Brian A. Calub, Esq.
McGuire Woods LLP
Fifth Third Center
201 North Tryon St., Ste. 3000
Charlotte, NC 28202
Ph. 704.343.2000

Attorneys for Respondent
Federal National Mortgage Assoc.
B. Lindsay Crawford, III
Theodore von Keller
Sara C. Hutchins
B. Lindsay Crawford, IV
Crawford & von Keller, LLC
PO Box 4216
Columbia, SC 29240

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM OCONEE COUNTY

Court of Common Pleas

Steven C. Kirven, Master-in-Equity

Case No. 2011 - CP - 36 - 1056

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 the 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


RECEIVED
JUL 16 2019
SC Court of Appeals

Certificate of Service

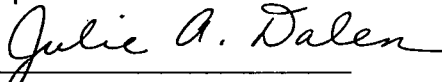
We certify that we have served Appellants John and Julie Dalen's **Petition for Rehearing and Memorandum in Support of** by depositing copies of it in the United States mail, postage pre-paid on July 15, 2019, sent to the attorneys of record to the addresses shown on page two of this document which lists other parties and counsel of record.

July 15, 2019

John D. Dalen and Julie A. Dalen
Appearing Pro Per / Appellant(s)



John D. Dalen



Julie A. Dalen

109 Wood Valley Drive
Westminster, SC 29693
Ph. 864.647.4705

Other parties and counsel of record:

Attorney for Respondent Bank of America, N.A.

Brian A. Calub, Esq.
McGuire Woods LLP
Fifth Third Center
201 North Tryon St., Ste. 3000
Charlotte, NC 28202
Ph. 704.343.2000

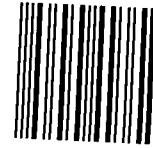
Attorneys for Respondent FNMA

B. Lindsay Crawford, III
Theodore von Keller
Sara C. Hutchins
B. Lindsay Crawford, IV
Crawford & von Keller, LLC
PO Box 4216
Columbia, SC 29240

PRESS FIRMLY TO SEAL



1007



29211

U.S. POSTAGE PAID
PME 1-Day
WESTMINSTER, SC
29693
JUL 15, 19
AMOUNT

\$25.50

R2305K142448-16



**PRIORITY
MAIL
EXPRESS®**



EE 369 11 19 19 52 US

CUSTOMER USE ONLY

FROM: (PLEASE PRINT)

PHONE 846474705

J. Dalen
109 Wood Valley Drive
Westminster, SC
29693

DELIVERY OPTIONS (Customer Use Only)

SIGNATURE REQUIRED (Note: The mailer must check the "Signature Required" box if the mailer: 1) Requires the addressee's signature; OR 2) Purchases additional insurance; OR 3) Purchases COD service; OR 4) Purchases Return Receipt service. If the box is not checked, the Postal Service will leave the item in the addressee's mail receptacle or other secure location without attempting to obtain the addressee's signature on delivery.)

Delivery Options

- No Saturday Delivery (delivered next business day)
- Sunday/Holiday Delivery Required (additional fee, where available*)
- 10:30 AM Delivery Required (additional fee, where available*)

*Refer to USPS.com® or local Post Office™ for availability.

TO: (PLEASE PRINT)

PHONE 8037341890

The Honorable
Jenny Abbott Kitchings
Clerk, So. Carolina Ct. of Appeals
P.O. Box ~~29211~~ 11629

ZIP + 4® (U.S. ADDRESSES ONLY)

29211

- For pickup or USPS Tracking™, visit USPS.com or call 800-222-1811.
- \$100.00 Insurance Included.

PAYMENT BY ACCOUNT (if applicable)

USPS® Corporate Acct. No. SC Federal Agency Acct. No. or Postal Service Acct. No.

ORIGIN (POSTAL SERVICE USE ONLY)

1-Day 2-Day Military DPO

PO ZIP Code 29693 Scheduled Delivery Date (MM/DD/YY) 07/16/19 Postage \$ 25.50

Date Accepted (MM/DD/YY) 07/15/19 Scheduled Delivery Time 10:30 AM 3:00 PM 12 NOON Insurance Fee \$ COD Fee \$

Time Accepted 10:43 AM PM 10:30 AM Delivery Fee \$ Return Receipt Fee \$ Live Animal Transportation Fee \$

Special Handling/Fragile \$ Sunday/Holiday Premium Fee \$ Total Postage & Fees \$

Weight Flat Rate Regular lbs. ozs. 5B Acceptance Employee Initials \$ 25.50

DELIVERY (POSTAL SERVICE USE ONLY)

Delivery Attempt (MM/DD/YY) Time 7/16 636 AM PM Employee Signature [Signature]

Delivery Attempt (MM/DD/YY) Time 7/16 1009 AM PM Employee Signature [Signature]

LABEL 11-B, JULY 2018

PSN 7690-02-000-9998

PEEL FROM THIS CORNER

VISIT US AT USPS.COM
ORDER FREE SUPPLIES ONLINE



UNITED STATES
POSTAL SERVICE

