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-37-1056

RECEIVED
JUL 26 2019
SC Court of Appeals

Appellate Case No. 2017-000886

Federal National Mortgage Association.....RESPONDENT

v.

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

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

And

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

v.

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

RESPONDENT'S RETURN TO APPELLANT'S PETITION FOR REHEARING

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INTRODUCTION

Respondent Federal National Mortgage Association (herein after referred to as "Respondent FNMA") hereby responds to and opposes Appellant's Petition for Rehearing. Respondent FNMA asserts that the Court of Appeals correctly applied the law and correctly affirmed the decision of the master-in-equity's order and judgment of foreclosure and sale; that the Court did not overlook or misapprehend any point of law or fact; and that Appellant is not entitled to a rehearing for the reasons set forth herein.

ARGUMENT

I. THE COURT DID NOT MISPPREHEND OR OVERLOOK SOUTH CAROLINA LAW REGARDING SUBJECT MATTER JURISDICTION

"Subject matter jurisdiction is 'the power to hear and determine cases of the general class to which the proceedings in question belong.'" *State v. Gentry*, 363 S.C. 93,100, 610 S.E.2d 494, 498 (2005). Rule 53(b), SCRCP provides that in an "action for foreclosure, some or all of the causes of action in a case may be referred to a master...". "When some or all of the causes of action in a case are referred to a master-in-equity or special referee, the master or referee shall enter final judgment as to those causes of action, and on appeal from an order or judgment of the master or referee must be to the Supreme Court of the Court of Appeals as provided by the South Carolina Appellate Court Rules." S.C. Code Ann. §14-11-85.

In continuing to argue that the master-in-equity lacked subject matter jurisdiction to hear the underlying foreclosure action, the Appellants fail to understand that subject matter jurisdiction refers to a court's power to hear and determine cases of a general class to which proceedings in question belong, "whether or not party is "real party in interest" simply does not involve court's power to hear case or subject matter jurisdiction." *Bardoon Props., NV v. Eidolon Corp*, 326 S.C. 166, 485 S.E.2d 371 (1997). "The right of a plaintiff to maintain suit, while frequently treated as going to the question of jurisdiction, goes, in reality, to the right of the plaintiff to relief rather than the jurisdiction of the court to afford it." ID

In the present case, by Order of Reference entered February 25, 2015, by a Circuit Court judge the matter was referred to the master-in-equity "to take testimony and to direct entry of final judgment in this action under Rule 53(b), SCRCP." [R.pp. 11] The Appellants did not appeal the Order of Reference.

The Court of Appeals, applying numerous consistent definitions and rulings on subject matter jurisdiction, correctly concluded that the master-in-equity had subject matter jurisdiction over the underlying foreclosure action.

II. THE COURT DID NOT MISPPREHEND OR OVERLOOK SOUTH CAROLINA LAW REGARDING STANDING

"Generally, a party must be a real party in interest to the litigation to have standing" *Hill v. S.C. Dep't of Health & Envtl. Control*, 389 S.C. 1,22, 698 S.E.2d. 612, 623(2010) (quoting *Sloan v. Friends of Hunley, Inc.*, 369 S.C. 20, 28, 630 S.E.2d 474, 479 (2006)). South Carolina is clear that a loan servicer is a real party in interest to a foreclosure action and has the ability to prosecute a foreclosure action. See *Bank of Am., N.A. Draper*, 405 S.C. 214, 222-223, 746 S.E.2d 478, 482 (Ct. App. 2013). Additionally, pursuant to the S.C. Code Ann. §36-3-304, the person entitled to enforce an instrument includes the "holder of the instrument." *Id.* A "holder" of the instrument is defined to include "the person in possession of a negotiable instrument that is payable either to bearer or an identified person that is the person in possession." S.C. Code Ann. §36-1-201(21).

The Trial Court property concluded that Bank of America, N.A. had standing to file the foreclosure action as the servicer of the Appellants' loan [R. pp. 12.] Furthermore, in the Trial Court's Order Substituting Plaintiff, the Trial Court concluded that Appellants' Loan was transferred to Respondent FNMA. [R. pp. 19.] Lastly, at trial, William Rankin, litigating officer with Seterus, Inc., the servicer of the subject mortgage loan testified that Seterus was in possession of the original Note through FNMA's counsel and that the Note was endorsed in blank and present in the courtroom during trial. Respondent FNMA's physical possession of the

original Note clearly demonstrated its standing to prosecute the foreclosure action in this case.

In light of the above, the Court of Appeals properly affirmed the ruling of the Trial Court concluding that there was no fraud committed upon the master-in-equity; no fraudulent chain of title, and that the Respondent FNMA had standing to prosecute the foreclosure action.

III. THE COURT DID NOT MISPPREHEND OR OVERLOOK SOUTH CAROLINA LAW REGARDING DUE PROCESS – RIGHT TO A JURY TRIAL

A. No right to jury trial in equitable actions

"Generally, the relevant question in determining the right to trial by jury is whether an action is legal or equitable; there is no right to trial by jury for equitable actions." *Lester v. Dawson*, 327 S.C. 263, 267, 491 S.E.2d 240, 242 (1997). It is well established that a mortgage foreclosure is an action in equity. *Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 248, 489 S.E.2d 472, 475 (1997).

The present matter is a mortgage foreclosure action, sounding in equity and Appellants were not entitled to a jury trial.

B. Right to Jury Trial - Waived

This Court properly concluded pursuant to the laws of the State of South Carolina that the Appellants' failure to appeal the Order of Reference of February 15, 2015, resulted in a waiver of the right to demand a jury trial. As the South Carolina Supreme Court has explained, "[i]ssues regarding mode of trial must be raised in the trial court at the first opportunity, and the order of the trial judge is immediately appealable. The failure to timely appeal the interlocutory order of the trial court effects a waiver of appeal rights." *Foggie v. CSX Transp., Inc.*, 315 S.C. 17, 23, 431 S.E.2d 587, 590 (1993) (internal citations omitted) (dismissing the appellant's argument regarding mode of trial because the issue was not preserved for appellate review). Furthermore, in *Creed v. Stokes*, the South Carolina Supreme Court held that the appellant's failure to timely appeal the order of reference precluded the appellant from later arguing that he was entitled to a trial by jury. 285 S.C. 542, 542-43, 331 S.E.2d at 352.

C. Right to Jury Trial – Issue not preserved for appeal

Additionally, the Appellants waived any objection to the Order of Mandatory Reference they may have had by their participation in proceedings before the Master-in-Equity. Full participation in these proceedings, including, active participation in the adjudication of the merits of the case and by filing a Motion to Compel Discovery, a Motion to Compel Mediation [R. pp. 189-90], a Motion for Reconsideration of the Master-In-Equity's summary judgment [R. pp. 233-46], and two Motion for New Trial [R. pp. 283-97], and the failure to object to the Master-In-Equity's appointment prohibits the Appellants from now challenging the Master's appointment on appeal.

It is well established that when a party participates in proceedings before the Master-in-Equity without objection to his appointment, that party waives its right to contest the order of reference on appeal. In *Karl Sitte Plumbing Co., Inc. v. Darby Development Co. of Columbia, Inc.*, 295 S.C. 70, 72, 367 S.E.2d 162, 164 (Ct. App. 1988), this Court held that although the trial court erred in entering an order of reference, when the appellant "participated in the reference proceedings without objecting or excepting to the order of reference or to the master's appointment, authority, or jurisdiction," the appellant "waived any objection it might have had to the action being referred."

Because Appellants filed various motions that were adjudicated by the Master-In-Equity and participated in hearings for these filings before the Master-in-Equity without objecting to his appointment or his authority to rule on the merits of the case the Appellants have waived their objection and ability to appeal the Order of Mandatory Reference, *see Karl Sitte Plumbing*, 295 S.C. at 73, 367 S.E.2d at 164. Accordingly, any objection that Appellants have to the Foreclosure Action being referred to the Master-in-Equity must fail.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for Rehearing.

This the 26th day of July, 2019.

Respectfully submitted,

CRAWFORD & VON KELLER, LLC

BY: _____

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July 26, 2019

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PROOF OF SERVICE

I, Sara C. Hutchins, an employee of Crawford & von Keller, LLC, do hereby certify that on this date, served a copy of **Respondent Federal National Mortgage Association's Return to Appellant's Petition for Rehearing** on counsel/parties listed below, by U. S. Mail on the said date, addressed as follows:

John D. Dalen and Julie A. Dalen
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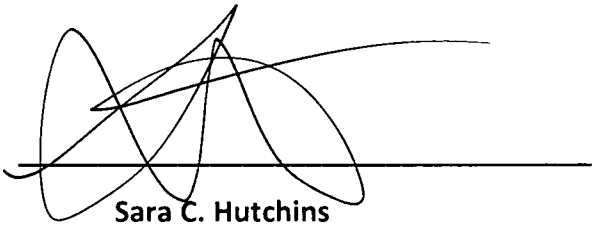

Sara C. Hutchins

Columbia, South Carolina

July 26, 2019

CRAWFORD & VON KELLER, LLC

July 26, 2019

VIA HAND DELIVERY
Jenny Abbott Kitchings, Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

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RE: Federal National Mortgage v. John D. Dalen
Appellate Case No.: 2017-000886

Dear Ms. Kitchings:

Enclosed please find the original and seven (7) of Respondent Federal Nation Mortgage Association's Return to Appellants' Petition for Rehearing and Proof of Service of the same. Kindly file and original and six (6) copies in accordance with the rules and return one (1) clocked copy in the enclosed envelope.

Should you require anything further please do not hesitate to contact me.

Sincerely,

Sara C. Hutchins

Enclosure(s)

cc: John D. Dalen (w/enclosures)
Julie A. Dalen (w/enclosures)
Brian A. Calub (w/enclosures)