

REPLY BRIEF OF APPELLANT

In The Court of Appeals

APPEAL FROM OCONEE COUNTY

Court of Common Pleas

Steven C. Kirven, Master-in-Equity

Case No. 2011-37-1056

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

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SC Court of Appeals

APPELLANTS' REPLY TO RESPONDENTS' RETURN TO

APPELLANTS' PETITION FOR REHEARING

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

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TABLE OF AUTHORITIES

Cases

The Table of Authorities from the Dalens' Final and Reply Briefs are incorporated herein by reference to those documents. Additional cases have been added.

Bank of America, N.A. vs. Grisel Reyes-Toledo, Case No. SCWC –15 – 0000005
(28 Feb. 2017)

In the Supreme Court of the State of Hawaii, this case raises issues of standing and appellate jurisdiction that pertain to foreclosure proceedings.

Brady v. U.S, 397 U.S. 742, 748 (1970) Pertains to Waiver of Constitutional Rights
Carnley v. Cochran, 369 U.S. 506, 516 (1962) Pertains to Waiver of Constitutional
Rights

Everhome Mortgage Co. v. Rowland, No. 07AP-615, 2088 WL 747698, at *3 (Ohio
Ct. App. 2008)

Relates to the genuine issue of material fact as to how and when the bank became holder of the note and mortgage.

Farm Bureau Ins. Co. of Ark. v. Running M. Farms, Inc. 237 S.W.3d 32, 36 (Ark.
2006).

“Without standing, a party is not properly before the court....”

First Union Nat'l Bank v. Hufford, 767 N.E. 2d 1206, 1210 (Ohio Ct. App. 2001)

Bank did not produce “sufficient evidence ... its right to the note or mortgage.”

Haines v. Kerner, 404 U.S. 519 (1972)

Courts should look to substance rather than form.

Joytime Distributors & Amusement Co., Inc. v. State, 338 S.C. 634, 639, 528 S.E. 2d 647, 649 (10/14/1999).

“It is fundamental in American jurisprudence that in order to bring a lawsuit against an opposing party, one must have standing to do so. Without standing, a party is not properly before the court to advance a cause of action.”

US Bank National Association vs. Ibanez (SJC – 10694), Massachusetts Supreme Court

Relates to the determination of real party of interest through perfection of chain of title.

Wash. Mut. Bank v. Green, 806 N.E.2d 604 (Ohio Ct. App. 2004)

Holding that Plaintiff had not sufficiently demonstrated that it was the holder of the note and mortgage and thus summary judgment was inappropriate.

Statutes

Uniform Commercial Code – Negotiable Instruments:

SC Codes, Ann. Title 36, Sec. 36 - 3

Other Authorities

16 Am. Jur. 2nd § 260

Protection of Constitutional Rights is a core function of the judiciary.

55 Am. Jur. 2nd Mortgages § 575 (Nov. 2016 Update)

Entitlement to foreclose.

U. S. Constitution, 5th Amendment: Due Process of Law

U. S. Constitution, 7th Amendment: Right to Trial by Jury

Other cases in our Final and Reply Briefs are incorporated herein by reference to those documents.

Introduction

This case is being appealed because the trial court presumed that the bank had subject matter jurisdiction. The trial court presumed that the banks' chain of title was proper. The Dalens from the beginning challenged the court's subject matter jurisdiction based on the fraud that the banks presented to the court as their chain of title.

To-date no proof has been entered on The Record that Bank of America, N.A. acquired the note prior to filing for foreclosure as is required by law. Without a date on the back of the note showing when the note was acquired, there is no way to determine this. The law of this case is that the plaintiffs failed to prove on The Record subject matter jurisdiction, and therefore the court had no jurisdiction to proceed with the case. Proceeding without subject matter jurisdiction violates John and Julie Dalens' rights to due process. *[See: Bank of America, N.A. vs. Grisel Reyes-Toledo, Case No. SCWC-15-0000005 (28 Feb. 2017)* In the Supreme Court of the State of Hawaii, this case raises issues of standing and appellate jurisdiction that pertain to foreclosure proceedings. *Everhome Mortgage Co. v. Rowland, No. 07AP-615, 2088 WL 747698, at *3 (Ohio Ct. App. 2008)* Relates to the genuine issue of material fact as to how and when the bank became holder of the note and mortgage. *Farm Bureau Ins. Co. of Ark. v. Running M. Farms, Inc. 237 S.W.3d 32, 36 (Ark. 2006)*. "Without standing, a party is not properly before the court...."

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Plaintiff had not sufficiently demonstrated that it was the holder of the note and mortgage and thus summary judgment was inappropriate.

Argument

#1 Standing / Subject Matter Jurisdiction

The Dalens have repeatedly, from the beginning with our Motion to Dismiss Plaintiff's Complaint, argued that the bank did not prove subject matter jurisdiction on The Record as is required by law. In the banks' return to our petition, both banks are arguing technicalities as they did not have the facts on their side.

If the banks had proved subject matter jurisdiction on The Record, they would be able to point to that proof to show the court that they in fact have standing to be before the court. Again, the trial court *presumed* that the banks had jurisdiction and standing based on a fraudulent assignment that was manufactured to facilitate this action. The Dalens have submitted documents and other evidence that clearly show that the chain of title as presented by the banks is not true, and in fact was manufactured to facilitate the unlawful foreclosure of the Dalens' home. (*See: The Record on Appeal, p. 449, Exhibit C: Assignment of Mortgage, p. 450; Exhibit D.: Plaintiff's Complaint; p. 455, Exhibit E: Notary Bonding Company with Signature of Notary, Jenny M. Kogak; p. 487, Exhibit A: Transcript of the Testimony of Zachary Chromiak; p. 491, Exhibit B: Plaintiff's Responses to Defendant's Discovery; p. 528, Exhibit E: Pooling and Servicing Agreement; p. 535, Exhibit F: Korn Law Firm Letter to Judge Macaulay acknowledging the trust; p. 537, Exhibit H: Copy of the Note dated December 20, 2007, p. 540, Exhibit I: Copy of the Assignment of Mortgage with Notary Signature and the Notary Public's Oath and Certificate of Filing; p. 543, Exhibit J: The Resume of Jenny Kogak; p. 545, Exhibit K: The Complaint Filed by All Fifty States' Attorney Generals.*)

All of these documents are evidence of the fraud perpetrated on the Dalens and the Trial Court and now this Court of Appeals. As we have noted in our petition for rehearing, there are laws surrounding the handling of notes, the securitization of notes and trusts; these laws are designed to protect homeowners from fraud.

See: *Uniform Commercial Code – Negotiable Instruments: SC Codes, Ann. Title 36, Sec. 36 – 3) and 55 Am. Jur. 2nd Mortgages § 575 (Nov. 2016 Update)* This relates to the entitlement to foreclose.

We have asked the court to review several Law Review articles pertaining to this issue. One is included in the Record on Appeal, p. 456, Exhibit F: *Standing in the Wake of the Foreclosure Crisis*. We also cited an article in our petition by David A. Dana entitled *Why Mortgage Formalities Matter* arguing that adherence to mortgage formalities regarding mortgage foreclosure is valuable for ... potential deterrence to future undesirable underwriting and securitization practices. The article reviews how some courts have in effect written procedural requirements out of the law. It also argues for equal respect to the legal rights of homeowners.

We cited a Hawaii Supreme Court case [*Bank of America, N.A. vs. Grisel Reyes-Toledo, Case No. SCWC-15-0000005 (28 Feb. 2017)*]. This case closely parallels our case in that it concerns the same banks with the same issues of standing and chain of title that the Dalens have repeatedly raised in the South Carolina courts. In this case, the banks do not have facts to stand on so they relied on their manufactured chain of title to fool the court into presuming that they had standing to file this action. The Hawaii Court did not let them get away with this.

We have repeatedly challenged Subject Matter Jurisdiction and have demanded that proof be provided on The Record. To-date no such proof has been offered. Subject matter jurisdiction can be challenged anytime, even on appeal, and once challenged must be proven on The Record before the court can proceed. The Trial Court, in proceeding without Subject Matter Jurisdiction, with no proof on The Record, has violated the Dalens' rights to due process of law. Due process of law as is contemplated by the U. S. Constitution is not just any process, but process according to the Common Law. See the U. S. Constitution, 5th Amendment for Due Process of Law.

#2 Right to Trial by Jury

The Dalens have a right to have this case heard by a jury of our peers. There's no provision in the U.S. Constitution for the abrogation of that right. (*See: Miranda v. Arizona, 384 U.S. 436.*) Where rights are guaranteed by the U.S. Constitution there can be no rulemaking that would abrogate them. It is the Court's duty to protect the rights of the citizens; in fact, it is their primary function. The Court failed to protect the Dalens' rights in this case. (*See: 16 Am. Jur. 2nd § 260 "Protection of Constitutional Rights is a core function of the judiciary."*)

The Dalens are not attorneys. The Court had a duty to inform us that we could appeal the Court's ruling on this issue. Justice and the protection of rights should *not* be afforded only to those who can afford to pay for it. The denial of a right to a

trial by jury is a violation of the Dalens' rights to due process and any actions taken after that are null and void; even failing to appeal that ruling does not allow the Court to abrogate that right. [See: *Brady v. U.S.*, 397 U.S. 742, 748 (1970) "*Waivers of Constitutional Rights, not only must they be voluntary, they must be knowingly intelligent acts done with sufficient awareness.*"]

See: *Carnley v. Cochran*, 369 U.S. 506, 516 (1962)

"Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which shows that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not a waiver."

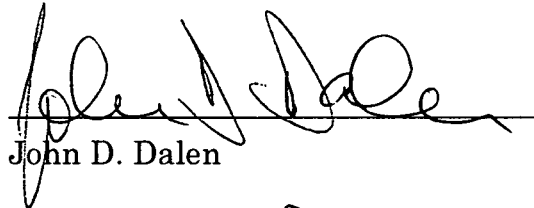
See the U. S. Constitution, 7th Amendment regarding the Right to Trial by Jury.

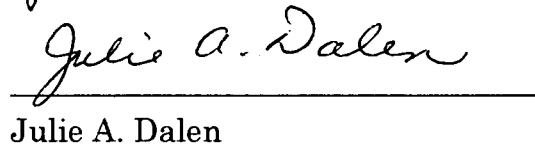
CONCLUSION

WHEREFORE the Dalens again move this Court 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 29, 2019


John D. Dalen


Julie A. Dalen

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

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July 29, 2019

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Post Office Box 11629 (29211)
Columbia, SC 29201

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Re: **Case No. 2017 - 000886**

Federal National Mortgage Assoc. and Bank of America, N.A., Respondents
v. John D. Dalen and Julie A. Dalen et al

Dear Ms. Kitchings:

Enclosed for filing are the original and seven copies of the Appellants' Reply to Respondents' Return to Appellants' Petition for Rehearing in the above case. Also enclosed are the Proof of Service and a check for \$50 for a filing fee. Please file the original and return one copy to us in the postage prepaid return envelope. Thank you.

Sincerely,



John and Julie Dalen

Cc: Brian A. Calub, Esq.
Sara C. Hutchins, Esq.

Enc. (7) Copies of the Dalens' Reply Brief
(1) Self-addressed, stamped envelope
(1) Proof of Service
(1) Check

/jd

THE STATE OF SOUTH CAROLINA

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Court of Common Pleas

Steven C. Kirven, Master-in-Equity

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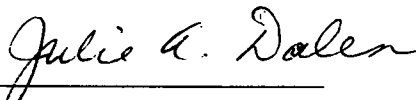
We certify that we have served Appellants John and Julie Dalen's Reply Brief to Respondents' Return to Appellants' Petition for Rehearing by depositing copies of it in the United States Mail, postage pre-paid on July 29, 2019, sent to the attorneys of record to the addresses shown on page two of this document which lists other parties and counsel of record.

July 29, 2019

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



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Hon. Jenny Abbott Kitchings
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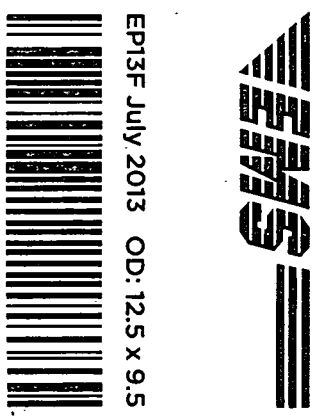
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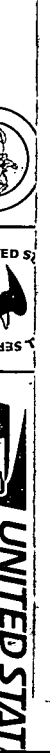
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