

STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM OCONEE COUNTY

Court of Common Pleas

Steven C. Kirven, Master-in-Equity

Case No. 2011-37-1056

Appellate Case No. 2017-000886

RECEIVED

SEP 16 2019

S.C. SUPREME COURT

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

PETITION FOR WRIT OF CERTIORARI

Appellants John and Julie Dalen hereby petition the Supreme Court of the State of
South Carolina for a Writ of Certiorari per Rule 242 SCACR.

John D. Dalen and Julie A. Dalen
109 Wood Valley Drive
Westminster, SC 29693
Phone #: 864.647.4705
Appearing Pro Per / Appellant(s)

PETITION FOR WRIT OF CERTIORARI

The Dalens believe that the Supreme Court should review the Appellate Court ruling based on:

- #1) Novel questions of law are involved due to the securitization of the note and the complexities associated with it as well as standing and subject matter jurisdiction, and genuine issues of material fact that are unresolved.
- #4) Substantial constitutional issues are involved regarding right to trial by jury.
- #5) A federal question is included, i.e. Constitutional guarantee of trial by jury and the decision of the Appellate Court conflicts with decisions of the United States Supreme Court.

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CERTIFICATION BY PETITIONERS

Appellants John and Julie Dalen hereby certify that a petition for rehearing was made and finally ruled on by the South Carolina Court of Appeals on August 22, 2019. A copy of that petition and the Appeals Court order is included in the Appendix of the Record on Appeal.

Dated: Sept. 16, 2019


John D. Dalen


Julie A. Dalen

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Questions Presented for Review

1. Was it error for the Trial Court and the Master to proceed with trial due to plaintiff's lack of standing and therefore a lack of subject matter jurisdiction?
2. Did the proceedings violate due process of law due to a denial of trial by jury and a lack of subject matter jurisdiction?
3. Was there fraud upon the Court due to the bank's fraudulent chain of title and assignment of mortgage?

Statement of the Case

The Dalens, the Appellants in this case, repeatedly from the filing of the bank's complaint, have challenged the bank's standing, raised chain of title, and securitization issues that to this date remain genuine issues of material fact that have not been addressed or resolved. The Trial Court, the Master, and recently the Court of Appeals have all acted upon presumptions that the bank has standing and that the assignments as well as chain of title are proper in contradiction to the evidence that the Dalens presented.

Just days before the trial, in the trial court before Master-in-Equity Steven C. Kirven, a case was handed down from the Hawaii Supreme Court which parallels the Dalen case in almost every respect. Prior to the decision of this Hawaii case, the Dalens' arguments were summarily dismissed, not ruled on, and/or ignored. With this Hawaii decision the Dalens were able to reference a State Supreme Court

ruling that addressed many of the issues that we had raised from the beginning. We had hoped that the Appellate Court would hand down a ruling that would explain the court's reasoning in their decision as did the Hawaii court. Instead we received a brief, two-paragraph statement that fails to address any of the issues that we raised.

The Dalens filed an answer in this case after our November 2, 2011, Motion to Dismiss was denied (R. pp. 77 – 80). This motion was followed by a Motion to Reconsider (R. pp. 81 – 86). The Motion to Dismiss was based on a lack of standing of the bank and therefore lack of subject matter jurisdiction of the court. Neither lack of standing nor subject matter jurisdiction was ever proved on the record at this time or anytime thereafter. In these motions, the Dalens challenged the chain of title, assignments, and the improperly indorsed note. Throughout the course of this case, including at the trial we challenged and objected to the proceedings based on a lack of standing and subject matter jurisdiction of the court (See transcript: R. pp. 378 – 413).

Trial by jury is a fundamental right that cannot be denied on procedural grounds. In the answer that the Dalens filed on February 21, 2012, we demanded a trial by jury on all issues triable by jury (R. pp. 87 – 1009). The Dalens were forced to retain an attorney upon Bank of America's filing of its first motion for summary judgment on December 4, 2013, after the judge in that hearing – Judge Alexander Macauley – told the Dalens that he would grant the bank's motion unless we hired an attorney (R. pp. 117 – 128). Believing the judge, we hired an attorney.

Subsequently Bank of America was successful in getting the case referred to the master at which time the bank also prevailed on a motion to strike demand for jury trial. The Dalens, not being attorneys and trusting our attorney, were not aware nor were we informed that this was an immediately appealable decision. It is our contention that a fundamental Constitutional Right cannot be lost in this way. Waivers of Constitutional Rights must be by informed and knowledgeable consent. Otherwise they are not waived. This constitutes a denial of due process. The Dalens subsequently fired their attorney and once again proceeded pro per.

Dimmock v. Scalded, 293 US 474 (1935) "Courts must indulge every reasonable presumption against waiver of fundamental constitutional rights, and ...not presume acquiescence in the loss of fundamental rights."

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."

The Dalens have shown throughout this case that the chain of title presented by Bank of America, N.A. is not the true chain of title and that the assignments were manufactured to facilitate an unlawful foreclosure. We have presented evidence to this effect to both the trial and appellate courts to no avail. Again, the courts have been acting on presumptions and not facts, or deciding that the facts are irrelevant because the bank has possession of the note. However, possession alone does not prove that Bank of America has the right to enforce and foreclose on the Dalens' property. The Dalens provided numerous Law Review articles (R. pp. 426 – 436 and R. pp. 444 – 448) during the course of these proceedings to assist the

court in understanding the complexities of the securitization process and how it affects the notes and the rights of the Homeowners. Please see *Standing in the Wake of the Foreclosure Crisis* published by the Iowa Law Review (R. pp. 456 – 481).

Arguments in Support of Petition

1. Was it error for the Trial Court and the Master to proceed with trial due to plaintiff's lack of standing and therefore a lack of subject matter jurisdiction?

In order for a court to have subject matter jurisdiction, the plaintiff filing the complaint must have standing to bring the issue before the court. Without standing there is no subject matter jurisdiction. In the Hawaii case, *Bank of America, N.A. vs. Grisel Reyes-Toledo*, Case No. SCWC – 15 – 0000005 (28 Feb. 2017), (R. pp. 1079 – 1106) the court concluded that the lack of a date on the note (when it was transferred) was a material question of fact as to when the bank became holder of the note and thus entitled to enforce. See R. pp. 1091 – 1100. On R. p. 1095 the court discusses complications posed by securitization. See also the footnotes on R. p. 1095.

The Hawaii court ruled that summary judgment was inappropriate. Referring to the endorsement on the note, the court said "...there is a genuine issue as to whether Bank of America was entitled to foreclose when it commenced the proceeding. Thus, viewing the facts and inferences most favorable to the

Homeowner, there is a genuine issue of material fact as to whether Bank of America held the Note at the time it filed the complaint. Accordingly, Bank of America failed to meet its burden of demonstrating that it was entitled to judgment as a matter of law.” (R. p. 1099)

In our case as in the Hawaii case, “...there is no evidence in the record, either through the Note itself, ... or other documents attached to the motion for summary judgment, showing that the blank endorsement on the Note occurred prior to the initiation of the suit.” (R. p.1099) “A foreclosing plaintiff’s burden to entitlement to enforce the note overlaps with the requirements of standing in foreclosure actions as ‘[s]tanding is concerned with whether the parties have the right to bring suit.’ Mottl v. Miyahira, 95 Hawai’i 381, 388, 23 P.3d 716, 723 (2001). The Hawaii court vacated Bank of America’s judgment and the case was remanded to the Appeals Court to determine if the Circuit Court erred in dismissing the homeowner’s counterclaims. (R. p. 1106)

The Hawaii court also discusses the issue of securitization of mortgages (See R. pp. 1094 – 1095). “...the general requirement that a holder be in possession of the instrument is meant ‘to protect the maker or drawer from multiple liability on the same instrument.’ The Supreme Court of New Mexico recently observed that ‘[t]his procedural safeguard is vital because the securitization of mortgages has given rise to a pervasive failure among mortgage holders to comply with the technical requirements underlying the transfer of promissory notes and, more generally the recording of interests in property.” (R. p. 1094)

The Dalens have repeatedly raised the issues of lack of standing and subject matter jurisdiction as well as securitization of the note and the fraudulent assignment of the mortgage. Please see Dalen's ...Motion for Reconsideration of Order Granting Plaintiff's/Counterclaim Defendant's Motion for Summary Judgment (R. pp. 233 – 246) and ...Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction and for Denial of Due Process of Law (R. pp. 247 – 260). See also Exhibits A through G, R. pp. 420 – 482, and Exhibits A through K, R. pp. 487 – 545. These exhibits show that Bank of America and their attorneys have manufactured a chain of title to facilitate an unlawful foreclosure. They also show that Bank of America's chain of title as presented to the court is in fact fraudulent. (See also the third argument, plaintiff's answers under number three.)

2. Did the proceedings violate due process of law due to a denial of trial by jury and lack of subject matter jurisdiction?

Our attorney allowed the court to strike our demand for jury trial without argument. See the Dalens' Answer, Counterclaims, and Demand for Jury Trial (R. p. 87). Neither our attorney nor the judge had informed us that the ruling to strike the jury trial was an immediately appealable ruling. The appellate court cited the fact that we failed to appeal in a timely manner as their reason for ruling against our claim of denial of due process. After firing that attorney, the Dalens filed a motion to dismiss for lack of subject matter jurisdiction and denial of due process, demanding our rights under the Common Law, including the right to trial

by jury. In that motion we informed the trial court that we did not consent to any further proceedings. See R. pp. 247 – 260.

The right to a trial by jury is a fundamental right secured by the United States Constitution in the Bill of Rights, Seventh Amendment. It cannot be taken away on procedural grounds. Denial of this right is a denial of due process of law. Due process of law refers to the Common Law and is also secured by the United States Constitution in the Bill of Rights, Fourth Amendment. Furthermore it is the court's duty and also its sole function to protect the Constitutional Rights of its citizens. The following United States Supreme Court decisions affirm all of the above just-mentioned assertions:

- 1) *Marbury v. Madison*, 5 US 137, 174, 176 (1803) "All laws which are repugnant to the Constitution are null and void." "The Constitution is superior to any act of the legislature; the Constitution and not such ordinary act, must govern the case to which they both apply."
- 2) *Miranda v. Arizona*, U.S. Supreme Ct, 380 US 436 (1966) "Where rights secured by the Constitution are involved, there can be no rulemaking or legislation which would abrogate them."
- 3) *Boyd v. U.S.*, 116 US 616, 635 (1885) "It is the duty of the courts to be watchful for the Constitutional Rights of the citizen, against any stealthy encroachments thereon."

- 4) *Dimmock v. Scalded*, 293 US 474 (1935) “Courts must indulge every reasonable presumption against waiver of fundamental constitutional rights, and ...not presume acquiescence in the loss of fundamental rights.”
- 5) *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.”

There are clearly genuine issues of material fact that the Dalens have repeatedly raised and that have not been addressed by the court. The Dalens have a fundamental right to have these issues heard and decided by a jury of our peers.

3. **Was there fraud upon the Court due to the bank’s fraudulent chain of title and assignment of mortgage?**

Consistently and often the Dalens have brought to the court’s attention discrepancies in Bank of America’s version of its chain of title. The bank virtually ignores the fact that the note was securitized. See:

- (1) Deposition of Zachary Chromiak, owner of the note · FNMA, R. p. 490;
- (2) Plaintiff’s response to Dalens’ Request for Admissions wherein Bank denies loan was securitized. (R. p. 495)
- (3) Dalens’ Second Set of Interrogatories answer #4 wherein plaintiff admits FNMA securitized the loan on January 1, 2008. (R. p. 517)

(4) Plaintiff's Answers to Dalens' Third Set of Interrogatories wherein plaintiff claimed that Quicken Loans assigned the mortgage on May 9, 2011, after having sold the note to FNMA in January of 2008, thus bifurcating the note and the mortgage. (R. p. 503) *If the mortgage follows the note then Quicken had no mortgage to assign on May 9, 2011.* (R. p. 536; R. pp. 540 – 544)

"The note and the mortgage are inseparable; the former as essential, the latter as an incident."

"An assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity."

See *Carpenter v. Longan*, 83 U.S. 16 Wall, 271 274 (1872).

(5) Plaintiff's Responses to Dalens' Second Set of Requests to Admit, #9

Plaintiff denies subject note is part of a trust. (R. p. 514)

(6) In a letter to Judge Alexander Macauley, Chris S. Truluck, Esq. agreed to provide the pooling and servicing agreement (a trust) associated with the subject note; Bank of America's attorneys admit that the loan was "reclassified out of the trust." (R. p. 535)

(7) Discrepancies in the assignment of mortgage dated May 16, 2011, in particular the signature of the notary is unintelligible. (R. p. 540)


(8) Notary Public's Oath and Certificate of Filing, wherein we find the signature of notary and the stipulation that the signature of the notary must be used in signing all notarized documents and must match the signature on notary public application. (R. p. 541)

- (9) Notary Jennie Kojak's online resume wherein she lists her work for Bank of America during the time that the assignment of mortgage was notarized in Simi Valley, California, "performing up to 350 notarizations per day." (R. p. 543) (*aka Robo-signing*)
- (10) Complaint by all 50 States Attorneys General which outlines the numerous wrongful acts of the banking industry including:
3. Wrongful Conduct Related to Foreclosures, particularly items:
- a. failing to properly identify the foreclosing party; and
- c. preparing, executing, notarizing or presenting false and misleading documents, filing false and misleading documents with courts and government agencies, or otherwise using false or misleading documents as part of the foreclosure process.
- (R. p. 556)
- (11) The Note which has no date on the endorsement and therefore no proof of when the bank acquired the note. Also the note does not show any endorsement to FNMA or any other entity. (R. pp. 560 – 562)
- (12) The Plaintiff's Complaint – See items #8 and #9 which cannot be true if in fact the note was sold by Quicken Loans to FNMA in January of 2008 and incorporated into an MBS Trust (Mortgage-Backed Securities Trust). See (9) above, which is related to wrongful conduct related to foreclosures. (R. p. 582)
- (13) Defendants' Answer, Affirmative Defenses, Counterclaim, and Demand for Jury Trial – See Dalens' Counterclaims. (R. pp. 594 – 605)


WHEREFORE petitioners request the Supreme Court of the State of South Carolina to grant this review, and issue a Writ of Certiorari to review the final decision of the Court of Appeals in this case.

September 16, 2019

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


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Loans Servicing, L.P., Respondent.**


PROOF OF SERVICE

We certify that on September 16, 2019, the original and six copies of the Dalens' Petition for Writ of Certiorari were hand delivered to the South Carolina Supreme Court Clerk of Court address for Daniel E. Shearouse at 1231 Gervais Street, Columbia, SC 29201, and one additional copy was hand delivered to the SC Court of Appeals Clerk of Court address for Jenny Abbott Kitchings at 1220 Senate Street, Columbia, SC 29201, and that we have served Appellants John and Julie Dalen's Petition for Writ of Certiorari on Respondents Bank of America, N.A. and

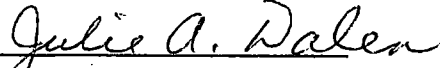
FNMA, also by depositing copies in the United States mail, postage paid, on
September 16, 2019, sent to the attorneys of record to the addresses shown below.

September 16, 2019

John D. Dalen and Julie A. Dalen
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