

THE 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-CP-37-1056

Appellate Case No. 2019-001561

RECEIVED

OCT 15 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 .....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 WRIT OF  
CERTIORARI

B. LINDSAY CRAWFORD, III (6510)  
THEODORE VON KELLER (5718)  
SARA C. HUTCHINS (72879)  
B. LINDSAY CRAWFORD, IV (101707)  
CRAWFORD & VON KELLER, LLC  
POST OFFICE BOX 4216  
COLUMBIA, SOUTH CAROLINA 29240  
(803) 790-2626  
ATTORNEYS FOR RESPONDENT FEDERAL NATIONAL  
MORTGAGE ASSOCIATION

## **STATEMENT OF QUESTIONS PRESENTED**

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?

## **INTRODUCTION**

Respondent Federal National Mortgage Association (herein after referred to as "Respondent FNMA") hereby responds to and opposes Petitioner's Petition for Certiorari. 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 there are no novel questions of law, no federal questions, no substantial constitutional issues in dispute, the decision of the Court of Appeals is not in conflict with a prior decision of the Supreme Court and there was no dissent in the decision of the Court of Appeals. Accordingly, the Court should deny review.

## **COUNTER STATEMENT OF THE CASE**

This matter arises out of the foreclosure of a residential real estate mortgage. Bank of America, N.A., successor by merger to BAC Home Loans Servicing, L.P. f/k/a Countrywide Home Loans Servicing, L.P. (hereinafter referred to as "BANA"), filed its Lis Pendens, Summons and Complaint on October 31, 2011. (R. pp. 71-76) On February 21, 2012, Petitioners John D. Dalen and Julie A. Dalen filed an Answer, Affirmative Defenses, Counterclaim, and Demand for Jury Trial. (R. pp. 87-104) On March 26, 2012, BANA filed a Reply to Petitioners' Answer. (R. pp. 110-116)

On December 4, 2013, BANA filed a Motion for Summary Judgment. (R. pp. 117-128)

On July 9, 2014, the Court issued an Order denying BANA's Motion for Summary Judgment. (R. pp. 6-8)

On November 17, 2014, Petitioner filed a Motion for Summary Judgment on Plaintiff's Complaint for foreclosure. (R. pp. 185-186)) On November 17, 2017, BANA filed a Motion to Strike Jury Trial Demand and Refer to the Master in Equity. (R. pp. 187-188) On January 28, 2015, the Court issued a Form 4 denying Petitioner's Motion for Summary Judgment and granting BANA's Motion to Strike Jury Trial Demand and Refer to the Master in Equity. (R. pp. 9-10) On February 25, 2015, the Court issued a formal order denying Petitioner's Motion for Summary Judgment and granting BANA's Motion to Strike Jury Trial Demand and Refer to the Master in Equity. (R. pp. 11-18)

On June 1, 2015, BANA filed a Motion to Substitute the Plaintiff to Federal National Mortgage Association. (R. pp. 191) On September 23, 2015, the Court issued an order granting BANA's Motion to Substitute the Plaintiff and making BANA a Counterclaim Defendant. (R. pp. 19-22)

On March 9, 2016, BANA filed a renewed Motion for Summary Judgment as to Petitioner's Counterclaims. (R. pp. 195-197) On March 21, 2016, BANA filed a Memorandum of Law in Support of its renewed Motion for Summary Judgment Motion. (R. pp. 198-224)

On May 5, 2016, Petitioners filed a Notice of Demand and Motion to Dismiss for Lack of Subject Matter Jurisdiction, which was subsequently denied. (R. pp. 225-232) On July 28, 2016, the Court Issued an Order granting BANA's renewed Motion for Summary Judgment as to Petitioners' Counterclaims. (R. pp. 29-41) On August 8, 2016, Petitioners filed a Motion for Reconsideration of the Court's July 28, 2016 (R. pp. 233-246) On October 13, 2016, the Court issued an Order denying Petitioners' Motion for Reconsideration of Order granting BANA's renewed Motion for Summary Judgment as the Petitioners' Counterclaims. (R. pp. 44-47)

On March 2, 2017, a final foreclosure hearing was held before the Honorable Steven C.

Kirven, Master in Equity for Oconee County under the terms of which foreclosure and sale were granted. (R. pp. 55-70)

On March 15, 2017, Petitioner filed an Objection and Notice of Motion and Motion for New Trial and/or Amended of Judgment on Grounds of Fraud and Denial of Due Process of Law. (R. pp. 283-297) On March 17, 2017, the Court issued an Order denying Petitioners' Motion for New Trial and/or Amendment of Judgment on Grounds of Fraud and Denial of Due Process of Law. (R. pp. 53-54)

Petitioner filed a Notice of Appeal on April 11, 2017 as to the Judgment of Foreclosure and Sale filed March 6, 2017 and Order denying Motion for New Trial filed March 17, 2017. After briefing was complete, the South Carolina Court of Appeals entered an Order affirming the ruling of the Honorable Steven C. Kirven in the March 6, 2017 Order of Judgment of Foreclosure and Sale and the March 17, 2017 Order denying Motion for New Trial. Petitioner timely filed a Petition for Rehearing, however, on August 22, 2019, the Court of Appeals denied the Petition for Rehearing. Petitioner filed the instant Petition for Certiorari with this Court on September 16, 2019, claiming that the following questions were presented for review:

4. 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?
5. Did the proceedings violate due process of law due to a denial of trial by jury and a lack of subject matter jurisdiction?
6. Was there fraud upon the Court due to the bank's fraudulent chain of title and assignment of mortgage?

### ARGUMENT

#### **I. THE COURT CORRECTLY HELD THAT THE TRIAL COURT HAD 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), SCRPC 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 or 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 Petitioners 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 a “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, 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), SCRPC.” [R.pp. 11] The Petitioner 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. 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 there are no novel questions of law, no federal questions, no substantial constitutional issues in dispute, the decision of the Court of Appeals is not in conflict with a prior decision of the Supreme Court and there was no dissent in the decision of the Court of Appeals. Accordingly, the Court should deny review.

## II. THE COURT CORRECTLY HELD THAT THE RESPONDENT HAD STANDING PURSUE THE SUBJECT ACTION

“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. v. Draper*, 405 S.C. 214, 222-223, 746 S.E.2d 478, 482 (Ct. App. 2013). Additionally, pursuant to 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 properly concluded that Bank of America, N.A. had standing to file the foreclosure action as the servicer of the Petitioners’ loan [R. pp. 12.] Furthermore, in the Trial Court’s Order Substituting Plaintiff, the Trial Court concluded that Petitioners’ loan was transferred to Respondent FNMA. [R. pp. 19.] Lastly, at trial, William Rankin, litigation 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. Contrary to Petitioners’ repeated claims there was no evidence of fraud presented.

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.

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

there are no novel questions of law, no federal questions, no substantial constitutional issues in dispute, the decision of the Court of Appeals is not in conflict with a prior decision of the Supreme Court and there was no dissent in the decision of the Court of Appeals. Accordingly, the Court should deny review.

### **III. PETITIONER HAS NO BASIS FOR APPEALING THE MODE OF 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 Petitioners were not entitled to a jury trial.

#### **B. Right to Jury Trial - Waived**

This Court of Appeals properly concluded pursuant to the laws of the State of South Carolina that the Petitioners’ failure to appeal the Order of Reference of February 15, 2015, resulted in a waiver of the right to demand a jury trial. As this Court as previously 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*, 285 S.C. 542, 542-43, 221 S.E.2d at 352 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.

### **Right to Jury Trial – Issue not preserved for appeal**

Additionally, the Petitioners 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 Petitioners 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), the Court of Appeals 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 Petitioners 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 Petitioners 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. 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 there are no novel questions of law, no federal questions, no substantial constitutional issues in dispute, the decision of the Court of Appeals is not in conflict with a prior decision of the Supreme Court and there was no dissent in the decision of the Court

of Appeals. Accordingly, the Court should deny review.

**CONCLUSION**

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

Respectfully submitted,

**CRAWFORD & VON KELLER, LLC**

BY: \_\_\_\_\_

**B. Lindsay Crawford, III**

**Theodore von Keller**

**Sara C. Hutchins**

**B. Lindsay Crawford, IV**

**Post Office Box 4216**

**Columbia, South Carolina 29240**

**Telephone: (803) 790-2626**

**Attorney for Respondent Federal Nation**

**Mortgage Association**

October <sup>15</sup>/~~14~~, 2019

THE 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-CP-37-1056

Appellate Case No. 2017-000886

RECEIVED

OCT 15 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 .....APPELLANTS

And

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

v.

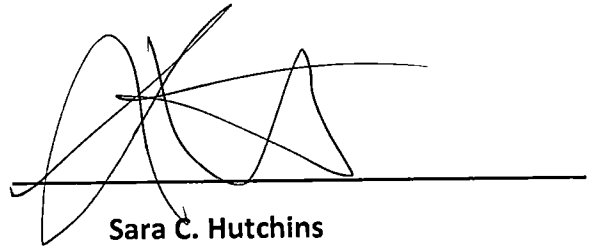
Bank of America, N.A., successor by merger to BAC Home Loans Servicing, L.P. f/k/a  
Countrywide Home Loans Servicing, L.P.....RESPONDENT

**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 Writ of Certiorari** on counsel/parties listed below, by U. S. Mail on the said date, addressed as follows:

**John D. Dalen and Julie A. Dalen**  
109 Wood Valley Drive  
Westminster, SC 29693  
Pro Se Appellant

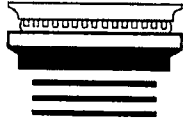
**Brian A. Calub, Esquire**  
McGuire Woods LLP  
Fifth Third Center  
201 North Tryon St., Ste. 3000  
Charlotte, SC 28202  
For Respondent Bank of America, NA



Sara C. Hutchins

Columbia, South Carolina

October 15, 2019



**CRAWFORD & VON KELLER, LLC**

October 15, 2019

**VIA HAND DELIVERY**

Daniel E. Shearouse, Clerk of Court  
South Carolina Supreme Court  
1231 Gervais Street  
Columbia, SC 29201

**RECEIVED**

**OCT 15 2019**

**S.C. SUPREME COURT**

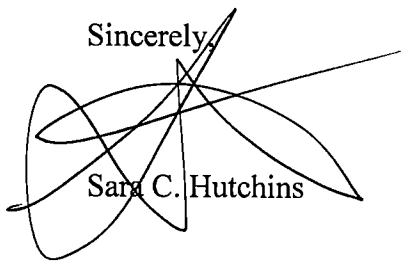
**RE: Federal National Mortgage v. John D. Dalen  
Appellate Case No.: 2019-001561**

Dear Mr. Shearouse:

Enclosed please find the original and seven (7) of Respondent Federal Nation Mortgage Association's Return to Appellants' Petition for Rehearing and Certiorari 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)