STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM OCONEE COUNTY
Court of Common Pleas
Hon. Steven C. Kirven, Master-in-Equity

RECEIVED
OCT 23 2019
S.C. SUPREME COURT

Supreme Court Case No. 2019-001561
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

APPELLANTS' REPLY BRIEF TO RESPONDENT BANK OF AMERICA, N.A.'S RETURN AND RESPONDENT FNMA'S RETURN TO APPELLANTS' PETITION FOR A WRIT OF CERTIORARI

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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.

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?

INTRODUCTION

The Appellants believe that not only is the fraud upon the court a novel question of law due to the complexities of the securitization and other issues, including the plaintiff's lack of standing and therefore the court's lack of subject matter jurisdiction, but importantly as well are the constitutional questions regarding the right of the defendants to a jury trial.

FNMA claims there is no right to jury trial, and then claims the right to a jury trial was waived by failure to appeal. BANA cites *Creed v. Stokes* 285 SC 342 affirming appellant was correct that he (they) had a right to a jury trial instead of having the case heard by a master. The court called it a substantial right. Both FNMA and BANA argue that appellants made procedural errors, which denies them the right to appeal. The Dalens counter that we are not attorneys and have made our best effort to comply with rules and procedures to the best of our knowledge and abilities.

Even accounting for our mistakes, the Dalens are properly before this court. The *real* "law of this case" is the issue of standing and whether either bank had standing when filing the complaint; the Dalens have – from the beginning – challenged the banks' standing with our Motion to Dismiss (R. pp. 77 – 80). The banks have not proved on the record that they have standing. Therefore, if the banks did not have standing at the beginning of this case, then there was no justiciable issue for the court to hear, i.e. no subject matter jurisdiction. The United

States Supreme Court ruled that: "Because subject-matter jurisdiction goes to the power of the court to adjudicate the merits of a case, it can never be waived and may be challenged at any time." *(United States v. Cotton* (2002), 535 U.S. 625, 630, 122 S. Ct. 1781, 152 L.Ed.2d 860) See also: "If a party does not have standing to bring a claim, a court has no subject matter jurisdiction to hear the claim." *(Estate of Apple v. Commercial Courier Express, Inc.*, 168 N.C. App. 175, 177, 607 S.E. 2d 14, N.C. Ct. App. 2005)

STATEMENT OF THE CASE

The facts of this case were laid out in all of our previous briefs, including the most recent Petition for Writ of Certiorari and are incorporated herein by reference to same. As stated above, the "Law of the Case" is simple. Did the plaintiff have standing at the time the complaint was filed? The Dalens have repeatedly challenged the Standing of BANA and FNMA from the beginning, starting with our Motion to Dismiss through eight years of Trial Court proceedings and Motions, and the Trial through the Appeals Court process and now in this court. We believe that the courts to date have not addressed the issue of the banks' standing but instead have relied on presumptions that the banks had standing where no proof exists in the Record.

ARGUMENT

Question #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?

Without standing there is no case to adjudicate; the law of this case has always been Standing. The banks' attorneys are quick to point out the Dalens' failures to follow court rules and procedures, whereas a fair application of the law should require the banks to follow proper procedures as well. In two recent cases which are in the Supreme Court of the State of Hawaii (R. pp. 1,079 – 1,107, *Bank of America v. Grisel Reyes-Toledo,* Sup. Ct. of Hawaii, SCWC-15-0000005, dated Feb. 28, 2017) and in the Appellate Court of the State of Florida (*Certo v. Bank of N.Y. Mellon,* Court of Appeal of Florida, First District, April 3, 2019, Decided, No. 1D17-4421, *Reporter,* 2019 Fla. App. LEXIS 5128), there is substantial discussion of the issue of standing that is extremely relevant to the Dalens' appeal. The Hawaii case has been discussed in greater detail in our Initial Brief as well as subsequent briefs we filed with the courts previously, and so in this brief we will focus on the Certo case most recently decided this year.

The just-mentioned Certo case was recently brought to our attention and we believe the issues discussed in that case and the conclusions reached by that court (backed up by numerous Florida court decisions as cited in that case) are the same issues that we have raised from the beginning of our case. The Certo court ruled that:

"...Bank of New York Mellon failed to prove its standing, we must reverse."

The heart of the matter, quoting again from the case, "...it is insufficient for the plaintiff to rely on its acquisition of the other entity."

Also, "...(despite testimony of merger, witness gave no testimony as to what assets exactly were acquired)"

"...testimony one entity 'took over' another is not sufficient"

"Similarly, listing party status as "successor by merger" or claiming a title is not sufficient; a plaintiff must support its claim by evidence."

"...words 'successor by merger' were insufficient to 'establish the merger, let alone that the [plaintiff] acquired all of [the successor's] assets' "

"Mellon relies on the Note, three assignments of mortgage, two change in servicer letters, a power of attorney, a Pooling & Servicing Agreement, and payment history. None of these proves standing."

"...the change in servicer letters reflect only that a new servicing company was servicing the Note. The letters say nothing about the underlying debt and Note being sold to a new bank."

Both the Hawaii and the Florida courts affirm the Dalens' contention that the banks must have standing to file their complaints. Because the banks did not prove standing at the time the complaint was filed, nor since in our case, the court was denied subject matter jurisdiction and the case should have been dismissed upon on the Dalens' original Motion to Dismiss and subsequent motions. Everything that has happened after the trial court's failure to dismiss this case for lack of proof of

standing is irrelevant as without standing there is no case to adjudicate; the "law of this case" has always been Standing (i.e. the banks' lack of standing).

From our own South Carolina Court of Appeals, in a 2008 case: "Standing to sue is critical to the proper functioning of the judicial system. It is a threshold issue. If standing is blocked, the pathway to the courthouse is blocked. If a plaintiff lacks standing to sue, the plaintiff may not proceed in the action." (*Powell v. Bank of America,* 665 S.E.2d 237, 379 S.C. 437, South Carolina Court of Appeals 2008)

And also: "Standing to sue is a fundamental requirement in instituting an action." (*Bodman v. State of S.C.,* Op. No. 27248, S.C. Sup. Ct. filed May 8, 2013, Shearouse Adv. Sh. No. 21 at 27, 31, *Joytime Distribs. & Amusement Co. v. State, 338 S.C. 634, 639, 528 S.E.2d 647, 649 (1999)*

Please see also *Standing in the Wake of the Foreclosure Crisis* (R. p. 456, Exh. F). And also see a Law Review article by David A. Dana entitled *Why Mortgage Formalities Matter*, arguing that adherence to mortgage formalities regarding mortgage foreclosure is valuable for ... potential deterrents to future undesirable underwriting and securitization practices. This 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.

Answer to Question # 2:

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

The case of *Builderama v. Morton,* 307 S.C. 440, 415 S.E.2d 796, 1992, involves a collection action that was referred to the Master where the defendant had demanded a jury trial. The court ruled that the trial judge erred in denying a jury trial.

A "substantial right" should not be lost by a failure of the appellant(s) to follow procedure. For the Dalens to lose a substantial right due to procedural error is antithetical to the American concept of justice. In *Miranda v. Arizona,* 384 U.S. 436 (1966) the Supreme Court, referring to the rights guaranteed by the Constitution of the United States, stated that there shall be no rule making that would abrogate it.

It is the court's duty to protect the right of the citizens. From *Byars v. U.S.,* 273 U.S. 28, 32, (1927), "It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon."

And in *American Jurisprudence,* 2d, § 260, protection of Constitutional Rights is a core function of the judiciary.

The U. S. Constitution guarantees under the Seventh Amendment a Right to a Trial Jury and under the Fifth Amendment guarantees a Right to Due Process of Law.

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."

To hold the Dalens to the same standards as trained, licensed lawyers is a miscarriage of justice. The trial court should have notified the Dalens of their right to an immediate appeal of the Order of Reference and loss of the right to a jury trial. The failure of the court to do so was a violation of the Dalens' right to due process of law.

That the Dalens made mistakes in pursuing their claim is without question, but to lose a substantial right, a fundamental right due to a procedural error by a non-lawyer is antithetical to any concept of justice. In addition to the legal questions presented, there is a moral question here. The Dalens are not lawyers. John is a carpenter and Julie is a wife. If John asked the banks' attorneys to build a house, them having no prior experience, it would be expected that they would make mistakes, even "fatal" errors that would undermine the structural integrity of the structure. Expecting the banks' lawyers to be competent in building a house – even watching as they make mistakes without notifying them of their error, or giving proper instructions, and then punishing them for their error – is not justice. As stated above, the trial court should have notified the Dalens of their right to an immediate appeal of the Order of Reference, and the resulting loss of the right to a jury trial for failure to appeal immediately.

Regardless, the Dalens believe that the denial of the defendants' right to a jury trial is a constitutional violation at the point in time that it occurred, whether or not the decision was appealed immediately. Violations of protected constitutional rights nullify the proceedings at the point of the violation. Furthermore, the trial court in proceeding with this case where standing had been challenged from the beginning and the plaintiff had not provided any proof of standing amounts to the appellants being denied due process of law.

Answer to Question #3:

Was there fraud upon the Court due to the banks' fraudulent chain of title and assignment of mortgage?

The banks' chain of title as presented to the court is evidence of fraud. The court's failure to recognize or address the fraud perpetrated on the court, and the Dalens, undermines the integrity of our judicial system. And banks, including Bank of America, have a history of not following proper procedures and manufacturing documents to facilitate foreclosure actions as evidenced by the lawsuit which was filed against them by all 50 States Attorneys General (R. pp. 545 – 559 Exhibit K).

Bank of America presented a simple "we have the note" case for foreclosure, ignoring the facts: the note was separated from the mortgage by the securitization process, thus rendering the note void and unenforceable. See *Carpenter v. Longan,* 83 U.S. 16 Wall 271, 274 (1872): "The note and the mortgage are inseparable, the

former is 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."

The banks' Assignment of Mortgage dated May 9, 2011, is evidence of the fraud and also shows the bifurcation of the note and the mortgage. In January of 2008, the note was being held by FNMA in the trust as shown further on in this brief. If the note was actually placed in the trust, the mortgage would have had to also be placed in the trust; if BANA could obtain the mortgage by acquiring Countrywide Home Loans while the note was already in a trust, then the note and the mortgage have been separated. If Quickens Loans sold the note to FNMA as shown in the deposition of Zachary Chromiak (R. pp. 487 – 490) then there is no way that BANA or Countrywide could have been assigned the mortgage as the banks have claimed unless the note and the mortgage were separated, which makes the mortgage a nullity according to the Supreme Court of the United States in the Longan decision.

The Dalens have shown by the evidence that the chain of title presented by the banks cannot be true. The evidence shows that the originator of the note was Quicken Loans, Inc. and then that the note was sold two times to make the sales' bankruptcy remote, which is a requirement before the note can be placed in a trust. It was sold to FNMA and supposedly, according to the banks' attorneys, placed into a trust in January, 2008. None of this is reflected in the banks' purported chain of title. BANA claims that it acquired the note through a merger with bankrupt Countrywide Home Loans. However, at the time BANA acquired Countrywide

Home Loans, the note was supposedly already in the trust, having been purchased by FNMA. Countrywide was only a servicer, and did not have a note which could have been acquired by BANA. All of this proves the chain of title as the banks have presented it a fraud on the court, using manufactured documents that do not reflect the *true* chain of title.

Some examples of BANA's history of not following proper procedures and manufacturing documents in our case:

Defendant's Request for Admissions (R. p. 495) wherein plaintiff denies the loan was securitized.

Plaintiff's Answers to Defendants' Second Set of Requests for Admissions wherein Plaintiff denies that the loan was part of a trust (R. p. 514).

The banks' attorneys acknowledged the note was securitized and placed in a Trust. (Plaintiff's Answers to Defendants' Interrogatories, R. p. 517)

The Korn letter to Judge Macaulay acknowledges the trust (R. p. 545).

The trust documents, also known as the Pooling & Servicing Agreement (R. p. 528 – 534).

Notary Bonding Company document showing signature of notary Jennie M. Kogak (R. p. 542)

Copy of the Assignment of Mortgage with Notary Signature and the Notary Public's Oath and Certificate of Filing (R. pp. 540 – 541) These documents show the robo-signing of the assignment of mortgage as noted in the resume below, as well as the notary's requirement to notarize documents with the same signature used on the notary application.

Resume of Notary Jennie M. Kogak (R. pp. 543 – 544)

Notary Kogak lists her work with BANA during the time the Assignment of Mortgage in the Dalen case was signed, February, 2011 through August, 2011. The assignment of mortgage is May 9, 2011. Also on her resume Jennie Kogak states she had been "performing more than 350 notarizations per day."

There is no proof on the record that the subject note was ever placed into the trust. Proper procedures must be followed when notes are securitized. We have explained this fully in our Initial Brief as well as in many of the filings with the trial court.

Waiving the note in front of the court was all that the banks' attorney believed was necessary to facilitate their foreclosure. The fact that the note which was finally produced by the bank didn't have a date of the assignment...this would seem to be a "fatal" omission even to a first year student of contract law. How could anyone determine when BANA acquired the note? Had the banks been honest with the court they would have proved that the note was actually placed in the trust, how it was removed from the trust and how BANA came into possession of the note in

order to foreclose on our property, in order to establish a proper chain of title. There are tax laws (IRS) that govern REMICS and trust laws that govern trusts, and procedures that must be followed to comply with those laws.

These fraudulent practices are addressed by the lawsuit filed by all 50 States Attorneys General (R. pp. 545 – 559 Exhibit K). The banks, including Bank of America, are continuing that practice in this case. In most cases they get away with it so they continue to do it. This is the shell game that the banks are playing to confuse the Dalens and the courts. Again, the failure of the court to recognize this fraud undermines the integrity of the judicial system.

CONCLUSION

It is clear from the evidence presented that neither BANA nor FNMA had standing to foreclose when the complaint was filed, nor has either bank presented any evidence during the course of these proceedings (spanning approximately eight years) to prove standing to foreclose. On the contrary, it is also clear that the banks have in fact perpetrated fraud upon the court and the appellants, the Dalens, with their manufactured chain of title and assignments that clearly contradict the evidence presented by the Dalens.

We believe that the fraud upon the court is a novel question of law due to the complexities of the securitization of the note in question and its effect on the

standing of the plaintiff. As well, this case presents a substantial Constitutional issue and federal question in the denial of due process and the right to trial by jury.

In a previous brief to the appellate court, BANA's attorney argued that even if it was fraud, BANA has the note. BANA's attorney now argues in his return that right or wrong, BANA got the court to rule in the bank's favor, so the Dalens lose! Right is right and wrong is wrong and fraud needs to be punished.

A few courts are holding the banks accountable to the requirements of the law. We ask the SC Supreme Court to review this case and to apply the rule of law and legal procedures to BANA and FNMA. Accordingly we have filed this Writ of Certiorari for your review.

WHEREFORE petitioners request the Supreme Court of the State of South Carolina to grant this review.

October 21, 2019

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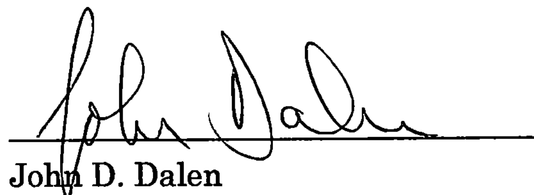
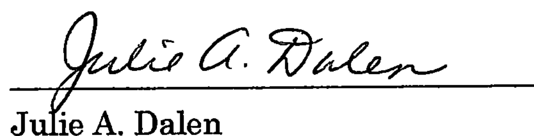


John D. Dalen



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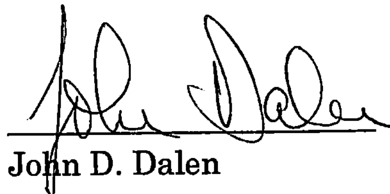
CERTIFICATE OF SERVICE

We certify that on October 21, 2019, the Dalens served on Respondents FNMA and BANA, the parties to this action, via U.S.P.S., First Class, postage prepaid, copies of the Dalens' *Reply Brief to Respondent Bank of America, N.A.'s Return and Respondent FNMA's Return to Appellants' Petition for a Writ of Certiorari* at the addresses below.

October 21, 2019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