

THE STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM OCONEE COUNTY

Court of Common Pleas

Steven C. Kirven, Master-in-Equity

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 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.

APPENDIX

VOL. 4 of 4

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

Attorneys:

Brian A. Calub, Esq.  
McGuire Woods  
Fifth Third Center  
201 North Tryon St., Ste. 3000  
Charlotte, NC 28202  
Phone #: 704.343.2000  
For Respondent Bank of America, N.A.

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 49240  
Phone #: (803) 790-2626  
For Respondent FNMA

## **INDEX**

|                               |     |
|-------------------------------|-----|
| Record on Appeal Vol. 1 ..... | 1   |
| Record on Appeal Vol. 2 ..... | 414 |
| Record on Appeal Vol. 3 ..... | 792 |

### **Volume 4 -- Begins on Page 1108**

#### **Briefs of Appellants**

|                                                                                     |      |
|-------------------------------------------------------------------------------------|------|
| Final Brief of Appellants .....                                                     | 1108 |
| Reply Brief of Appellants .....                                                     | 1139 |
| Appellants' Petition for Rehearing .....                                            | 1158 |
| Appellants Reply to Respondents' Return to Appellants' Petition for Rehearing ..... | 1166 |

#### **Briefs of Respondents**

|                                                                                       |      |
|---------------------------------------------------------------------------------------|------|
| Final Brief of Respondents Bank of America, N.A. ....                                 | 1178 |
| Final Brief of Respondents FNMA .....                                                 | 1199 |
| Respondents' Return to Appellants' Petition for Rehearing, Bank of America, N.A. .... | 1224 |
| Respondents' Return to Appellants' Petition for Rehearing, FNMA .....                 | 1239 |

#### **Appeals Court Decisions, Orders**

|                                                   |      |
|---------------------------------------------------|------|
| Opinion Affirmed .....                            | 1250 |
| Order Denying Petition for Rehearing, 2 pgs. .... | 1255 |

#### **Supplemental Citation**

Bank of America, N.A. vs. Grisel Reyes-Toledo, SCWC – 15 – 0000005

|                                                                 |      |
|-----------------------------------------------------------------|------|
| Filed October 19, 2018, Court of Appeals, Rule 208 Sec. 7 ..... | 1257 |
|-----------------------------------------------------------------|------|

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. 2011-37-1056

Appellate Case No. 2017-000886

RECEIVED

NOV 30 2017

SC Court of Appeals

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.

FINAL BRIEF

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

Attorneys: Brian A. Calub, Esq.  
McGuire Woods LLP  
Fifth Third Center  
201 North Tryon St., Ste. 3000  
Charlotte, NC 28202  
Phone #: 704.343.2000  
For Respondent Bank of America, N.A.

Charles S. Gwynne, Jr., Esq.  
Rogers, Townsend & Thomas, PC  
P.O. Box 100200  
Columbia, SC 29202  
Phone #: 803.744.1933

For Respondent FNMA

## TABLE OF CONTENTS

|                                     |    |
|-------------------------------------|----|
| Table of Authorities, Cases .....   | ii |
| Statutes .....                      | iv |
| Other Authorities.....              | v  |
| Statement of Issues on Appeal ..... | v  |
| Statement of the Case.....          | 1  |
| Statement of Facts.....             | 2  |
| Subject Matter Jurisdiction .....   | 2  |
| Fraudulent Assignment.....          | 5  |
| Denial of Due Process.....          | 11 |
| Argument .....                      | 13 |
| Conclusion .....                    | 23 |

## TABLE OF AUTHORITIES

### Cases

Bank of America, N.A. v. Draper, 746 SE 2<sup>nd</sup> 478, 405 SC 214, Court of Appeals 2013

Servicer entitled to foreclose...Court presumes Assignment of Mortgage was proper.

This case appears on page 17

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.

This case appears on pages 15, 20 - 23

Bank of America, N.A. v. Scott A. Greenleaf et al., 2014 ME 89, July 3, 2014, 124 A. 3d 1122

(2015) 2015 ME 127

Court dismissed bank's complaint due to lack of standing and therefore Subject Matter Jurisdiction.

This case appears on page 20

Builderama v. Morton, 307 S.C. 440, 415 S.E.2d 796 (S.C. 03/16/1992)

Trial judge erred by denying a jury trial.

This case appears on page 12

Carpenter v. Longan, 83 US 16 Wall, 271, 274 (1872)

A negotiation or sale of the note carries the mortgage with it, while an assignment of the latter (mortgage) alone is a nullity.

This case appears on page 18

David and Crystal Holm v. Wells Fargo Home Mortgage, Inc. and Federal Home Loan Mortgage Corporation (Freddie Mac), Case No. SC95755, (Feb. 28, 2017), Sup. Ct. of Missouri, En Banc.

Wrongful foreclosure -- and denial of jury trial (claimed by the banks).

This case appears on page 12 and page 21

Hungate v. Rosen, SCAP – 13 – 0005234 (Haw. Feb. 27, 2017) Supreme Court of Hawaii

Court erred in dismissing Hungate's claims.

This case appears on page 12

Hurtado v. California, 110 U.S. 516, 3 Sup. Ct. 111, 292, 28 L Ed 232 (1884)

Due process is process according the principles of the Common Law.

This case appears on page 12

Independent Oil and Chemical Workers of Quincy, Inc. v. Proctor & Gamble Mfg. Co., 864 F.

2d 927, 929 (1<sup>st</sup> Cir. 1988)

Abuse occurs when a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and no improper factors are assessed, but the court makes a serious mistake in weighing them.

This case appears on page 4 and page 12

McNutt v. General Motors Acceptance Corp. of Indiana, Inc., 298 U.S. 178, 80 L. Ed. 1135, 56

W. Ct. 780 (1936)

Jurisdiction may never be presumed.

This appears on page 3 and page 13

Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (Supreme Ct. 1966)

Referring to rights guaranteed by the Constitution of the United States, there can be no

rule making that would abrogate it.

This appears on page 13

Rubenstein v. Collins, 20 F. 3d 160, 1994

Footnote 53: "Knowingly failing to disclose material information necessary to prevent a statement from being misleading is actionable as fraud...." See e.g., *Southeastern*

*Financial Corp. v. United Merchants & Manufacturers, Inc.* 701 F. 2d 565, 566 – 67 (5th

Cir. 1983) (noting same)

This appears on page 11

### Statutes

Uniform Commercial Code – Negotiable Instruments:

SC Code of Laws, Title 36, Sec. 36 - 3 – 104, 203, 301

This statute appears on page 10 and page 18

Uniform Commercial Code – Securities:

SC Code of Laws, Title 36, Sec. 36 - 8 – 102, 106, 201

This statute appears on page 10 and page 18

18 U.S.C. § 513, 1962

Mortgage is a lien on a promissory note, not on property. Reattaching the note to the mortgage after securitization is evidence rising to a level of fraud.

Appears on page 4

26 U.S.C. § 860D

REMIC's Real Estate Mortgage Investment Conduit

Appears on page 4

## **Other Authorities**

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

Entitlement to foreclose

Appears on page 21

U. S. Constitution, 5<sup>th</sup> Amendment: Due Process of Law

Appears on page 13, 14, 20, 23

U.S. Constitution, 7<sup>th</sup> Amendment: Right to Trial by Jury

Appears on page 13, 19

## **Statement of Issues on Appeal**

1. Was it error for the Master to proceed with trial due to plaintiff's lack of standing and therefore a lack of subject matter jurisdiction?
2. Was there fraud upon the Court due to fraudulent Assignment of Mortgage?
3. Did the proceedings violate due process of law?

Defendants were denied jury trial and court proceeded without a competent fact witness, and without subject matter jurisdiction.

## Statement of the Case

To give a brief overview followed by the history of these proceedings, we begin with an explanation: This is an appeal from a Master's order dated March 6, 2017, granting foreclosure and sale to FNMA. (R. pp. 55-70) From the beginning, starting with the defendants' motion to dismiss (R. pp. 77-80), the defendant challenged the banks' assignment of mortgage and therefore the court's subject matter jurisdiction.

This action for foreclosure commenced on a complaint filed by Bank of America, N.A. on October 31, 2011. (R. pp. 71-76) Then, on November 22, 2011, defendants filed a Motion to Dismiss (R. pp. 77-80) which was denied (R. p. 1) and defendants filed a Motion to Reconsider on February 14, 2012, (R. pp. 81-86) which was also denied. (R. p.4) Defendant then filed his Answer, Affirmative Defenses, Counterclaim and Demand for Jury Trial on February 21, 2012. (R. pp. 87-109) In this Answer, defendants again challenged subject matter jurisdiction, filed numerous counterclaims, and demanded a trial by jury.

Defendants filed a Motion to Deny Plaintiff's Motion for Summary Judgment on January 15, 2014. (R. pp. 129-142) Plaintiff's motion was denied on July 9, 2014. (R. pp. 6-8) The case was referred to the Master, and upon motion by Plaintiffs, a renewed Motion for Summary Judgment was granted on July 28, 2016, (R. pp. 29-43) thereby denying Defendants their right to a jury trial, and a substitution of parties was entered, granting FNMA foreclosing status. (R. pp. 19-22)

In an attempt to reassert our rights under the Common Law, as guaranteed to us by the U.S. Constitution, Defendants filed a Declaration of Claims for Fraud

upon the Court, Lack of Subject Matter Jurisdiction, Fraud and Misrepresentation and Denial of Due Process of Law. This was filed on February 27, 2017. (R. pp. 261-282)

A trial was held on March 2, 2017, followed by a judgment of foreclosure and sale on March 6, 2017, granted to plaintiff, FNMA. (R. pp. 55-70) The amount involved was \$206,295.91. Then on March 15, 2017, defendants filed a motion for a new trial / amended judgment (R. pp. 283-303) which was followed by the order of March 17, 2017 denying the defendants' motion. (R. pp. 53-54) Defendants appealed the judgment of foreclosure and sale and filed a notice of appeal on May 12, 2017.

### Statement of Facts

We have divided this Statement of Facts into three somewhat overlapping parts: Lack of Standing / Subject Matter Jurisdiction, Fraudulent Assignment, and Denial of Due Process.

#### Lack of Standing / Subject Matter Jurisdiction

##### Jurisdiction requires:

1. A competent witness. No complaining witness has been produced.
2. Pleadings sufficient to invoke jurisdiction; that is, there must be an injured party. No injured party has been produced. Pleadings sufficient to empower the court to act means that one of the parties must give the court its power to act by way of written and oral argument (the parties, not their attorneys, must do this.)

3. Actual facts, not mere allegations are required for subject matter jurisdiction. Statements of attorneys in their briefs and oral pleadings are not facts, but mere allegations.
4. Attorneys cannot testify. These proceedings before the master are a procedural and substantive nullity; no jurisdiction exists. Jurisdiction must be proven by the party claiming jurisdiction.
5. Proceeding without jurisdiction violates defendant's right to due process of law.

When fraud is brought upon the court, the court loses subject matter jurisdiction and the case should be dismissed. In this case, in its complaint, the bank misrepresented itself as the owner of the note and filed with the County Recorder an Assignment of Mortgage that was fraudulent on its face -- to be discussed below, under the heading "Fraudulent Assignment".

In all of the motions and/or hearings where defendants have claimed the court lacked subject matter jurisdiction, the court refused to acknowledge the possibility of fraud and instead presumed that the statements by the bank attorneys were true. The court bases its jurisdiction on the mere fact that it is allowed to hear foreclosure cases -- not on the facts, other than those presumed to be true, not proven facts. Once jurisdiction is challenged, the party asserting jurisdiction must prove it on the record, as evidenced in the following cited cases:

*McNutt v. General Motors Acceptance Corp. of Indiana, Inc.*, 298 U.S. 178,  
80 L. Ed. 1135, 56 W. Ct. 780 (1936)

*Jurisdiction may never be presumed.*

*Independent Oil and Chemical Workers of Quincy, Inc. v. Proctor & Gamble Mfg. Co., 864 F. 2d 927, 929 (1<sup>st</sup> Cir. 1988)*

*Abuse occurs when a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and no improper factors are assessed, but the court makes a serious mistake in weighing them.*

In their judicial foreclosure action, Bank of America and FNMA cannot be the real party in interest and they have no standing to foreclose because, under U.S. Securities and Exchange Commission Rules, and Title 26 REMIC Rules, the loan is an unsecured debt, owned without recourse by another entity, namely, the owners of the Certificates created by the Trust Agreement dated June 1, 2007, amended and restated with the 2007 Single-Family Master Trust Agreement of January 1, 2009. See defendants' Exhibit "E", Pooling and Servicing Agreement, (R. p. 528) page one of the Exhibit, paragraph one, and The Certificates (R. p. 529) page 2 of the Exhibit items "A" through "G", and (R. p. 531) on page 4, paragraph 2, *Certificate*, and page 5, (R. pp. 532-534) Article II continued through page 7. See also Exhibit "F" (R. p. 535) which is the Korn Law Firm letter to Judge Macaulay acknowledging the note was in a trust.

*See also 18 U.S.C. § 513, 1962*

*Mortgage is a lien on a promissory note, not on property. Reattaching the note to the mortgage after securitization is evidence rising to a level of fraud.*

## Fraudulent Assignment

Appellant has challenged Bank of America's standing to foreclose from the beginning of this action, first with a motion to dismiss (*See Item "b" of Designation of Matter*) (R. pp. 77-80) and followed by a Motion to Reconsider (*See Item "c" of Designation of Matter*) (R. pp. 81-86) and then an answer and counterclaims (*Item "d" of Designation of Matter*) (R. pp. 87-109) in which appellant has repeatedly raised the issue of securitization and chain of title issues which are the crux of the challenge to this foreclosure action.

Appellant believes and the facts of the case show that Bank of America N.A. has brought fraud upon the court in the improper first Assignment of Mortgage to Bank of America (May 9, 2011) (R. p. 449; R. p. 536; and R. p. 540), and thus any further assignments are invalid. Because of the fraudulent assignment, the court lost subject matter jurisdiction and the case should have been dismissed.

Throughout these proceedings, the bank never presented a competent fact witness that the defendants could cross-examine. Instead they presented affidavits that were challenged by the defendants as hearsay; the affiant had no personal knowledge of the facts attested to. (R. p. 585; R. p. 708; and R. p. 1076) The only witness ever to appear in court on behalf of the bank was presented at the trial. The defendant cross-examined this witness, William Rankin, and demonstrated that Mr. Rankin had no factual knowledge that the note had or had not been securitized, nor did he show an ability to answer questions generally related to the practice of securitization. In fact, he appeared unable to understand the questions. *See Trial*

*Transcript, March 2, 2017, (R. p. 378) beginning on page 22 (R. pp. 399-410, line 1) and continuing through page 33. (R. p. 410, line 17)*

Bank of America and FNMA each had previously produced a witness during the discovery process. On paper they answered defendants' interrogatories, admissions, and production requests. In their statements, they first denied the note had been securitized, (*See Request for Admissions, Exhibit "B" page 5, request #2 and response #2*) (R. p. 495) and then in a later interrogatory, (*See Exhibit "B", Plaintiff's Answers to Defendants' ... Second Set of Interrogatories, page 27, Interrogatory 4 and Answer 4*) (R. p. 517) admitted that the note had been securitized and purchased from Countrywide Bank FSB as servicer and seller on January 1, 2008. According to the testimony of a witness provided by Bank of America, N.A. for a deposition held on September 12, 2014, (*See Exhibit "A", Transcript of the Testimony of Zachary Chromiak, pages 1 through 4 on Transcript page 13, lines 1-16*) (R. p. 490) Zachary Chromiak stated that FNMA had become the owner of the note "since January of 2008" – less than one month after the purchasers – the Dalens – signed the note with Quicken Loans. Earlier in that same deposition on page 3 (*Transcript page 12, lines 7-18*) (R. p. 489) the witness acknowledges that as of December 6, 2011, FNMA was still the owner of the note. However, on page 4 of the testimony, (*Transcript pages 15-16, lines 1-25*) (R. p. 490) questions are raised as to the date on the Assignment of Mortgage which is May 9, 2011; the Assignment purports to transfer "all beneficial interests under that certain Mortgage with the Note." (R. p. 449; R. p. 536; R. p. 540; and R. p. 579)

As just previously pointed out, this witness acknowledges that FNMA bought the note in January of 2008, and has been the owner since then and as of December 6, 2011. How could the Assignment of Mortgage, dated May 9, 2011, from Quicken Loans to Countrywide Home Loans, be valid or true when Countrywide had sold the note to FNMA in January of 2008?

Again, in our Exhibit "B" (R. pp. 491-507) in plaintiff's responses to defendant's Interrogatories, Requests for Admissions and Production of Documents, there are numerous examples of the banks' attorneys or witnesses responding to our requests in contradiction to the Assignment of Mortgage and Bank of America's purported chain of title. On page ten of Exhibit "B" (R. p. 500) plaintiff's response to our 3<sup>rd</sup> Set of Requests to Admit, in answer to question one, plaintiff admits that it did not become the holder of the mortgage or note on May 9, 2011, but claims it was the holder of the note and thereby holder of the mortgage prior to that date. On page 12 of Exhibit "B" (R. pp. 502-503) plaintiff's answers to our 3<sup>rd</sup> Set of Interrogatories, Bank of America was asked to state the date that they became holder of the mortgage. The answer given was Countrywide Bank became the holder of the note, and thereby holder of the mortgage on January 15, 2008, and goes on to state (Interrogatory 4) that on April 27, 2009, Countrywide Bank was acquired by plaintiff. How can this be true if as stated above, Zachary Chromiak, the bank's own witness, claims that Countrywide "sold" the note and mortgage to FNMA "in January of 2008"? How could Bank of America acquire any interest in the note and mortgage through their acquisition of Countrywide Bank in April of

2009? This and similar inconsistencies are repeated throughout our Exhibit "B" and discovery requests.

In the bank's first attempt at summary judgment (R. pp. 117-128), appellant filed a motion and a memorandum in opposition to the bank's motion for summary judgment (R. pp. 129-142) which raised securitization and chain of title issues as well as ownership of the note and mortgage and the right to enforce. Judge Alexander Macaulay denied the bank's motion for summary judgment on our counterclaims stating: "After a careful consideration of the entire record, to include the arguments and filings of the parties, Plaintiff's Motion for Summary Judgment is DENIED." (*See: Order Denying Plaintiff's Motion for Summary Judgment, July 9, 2014, page 1, Designation of Matter, item "h".*) (R. pp. 6-8)

In Master's order granting bank's renewed motion for summary judgment (R. pp. 29-41), and his subsequent order denying defendants' motion to reconsider (R. pp. 44-47), it is stated that "new issues and evidence" were being raised, and that defendant was improperly raising issues of securitization and chain of title issues that should have been raised at the summary judgment hearing. (*See: Order Denying Motion to Reconsider, October 13, 2016, Designation of Matter, page 3, item "m".*) (R. p. 46)

Appellants contend that bank merely rehashed previous arguments, presented no new issues or evidence, and that appellants did in fact raise the chain of title and securitization issues (R. pp. 330-355) (*Transcript of March 23, 2016, page 21, lines 1-11, pages 23-25*) (R. p. 348; and R. p. 350-352) at the renewed motion for summary judgment hearing, both through the counterclaims themselves,

as well as by the attorney who was representing defendant at that time in his brief to the court. Our attorney brought up Judge Macaulay's denial of the bank's first motion for summary judgment, (R. p. 6) as the first reason that master should deny motion for renewed summary judgment. (*See: Motion's Hearing Transcript before Master-in-Equity Ellis B. Drew, March 23, 2016, pages 21 through 25.*) (R. pp. 328-356) Appellant raising these issues in his motion to reconsider was both proper and timely; these issues have been repeatedly raised throughout this case.

After the motion hearing before Judge Drew on March 23, 2016, while still trying to determine the validity of the notary signature, as discussed at that hearing, we came upon additional evidence regarding that signature. This is noted as Exhibits 9, "I" (R. pp. 540-542) and 10, "J" (R. pp. 543-544). Exhibit 9 (R. P 540) is a copy of the Assignment of Mortgage with the notary signature highlighted and page 2 (R. pp. 541-542) is the notary public's oath and certificate of filing showing that the signature used on her application must be used on all notarized documents. Instead, she did not sign in the required manner. Exhibit "J" (R. pp. 543-544), the resume of Jenny Kogak, explains why she may have signed the document in this manner. The resume contains her statement that she performed notary services in Simi Valley for their "final docs" department, performing up to 350 notarizations per day between February, 2011 and August, 2011.

Exhibit "K" (R. pp. 545-559) is the complaint filed by all 50 States Attorneys General and the United States of America against numerous banking institutions, including Bank of America, N.A., BAC Home Loans Servicing, and Countrywide Home Loans, Inc. This lawsuit was ultimately settled, the banks paying a

staggering 25 billion dollars. In the complaint, the banks were accused of violations of consumer protection laws and unlawful foreclosure activities, including manufacturing fraudulent documents and assignments. The bank's assignment of mortgage (R. p. 536) in our case shows a notary signature that is a perfect example of robo-signing, one of the complaints brought up in that lawsuit.

Exhibits "I", "J", and "K" were submitted for the first time with our Declaration of Claims, dated February 27, 2017, which is Item "p" in the Designation of Matter, to be included in our Record on Appeal. (R. pp. 261-282) All of the other exhibits listed in the Designation of Matter were submitted at hearings.

South Carolina law under the UCC (SC Code of Laws Title 36 Sec. 36-3-104 (notes) and Sec. 36-8-102 (securities) requires an unbroken chain of title from the originator to the foreclosing party in order to enforce. *(See hearing transcript from May 28, 2013, of Judge Macaulay - Denial of Order of Reference and Order to Produce Pooling and Service Agreement, page 29 lines 12-18.)* (R. p. 323) The banks, both Bank of America and FNMA have conspired to bring fraud upon the court by manufacturing a fraudulent chain of title in order to foreclose on our property. All of these arguments and facts have been repeatedly presented by the appellant to the trial court and to the master, making summary judgment for the plaintiff improper at the very least, and actionable by the appellant and grounds for dismissal of the complaint for bringing fraud upon the court. This fraud has harmed the appellants, as has the trial court and the master's inability to acknowledge the fraud and take appropriate action. Further, the trial court's ruling denying defendants' right to trial by jury and granting of summary judgment to Bank of

America was improper as questions of material fact do exist. Due process of law was violated. The endorsement on the note is undated making this an issue for the jury to decide as to whether the Bank had possession of the note at the time the complaint was filed. *See Rubenstein v. Collins, 20 F. 3d 160, 1994:*

Footnote 53: "Knowingly failing to disclose material information necessary to prevent a statement from being misleading is actionable as fraud...." *See e.g., Southeastern Financial Corp. v. United Merchants & Manufacturers, Inc. 701 F. 2d 565, 566 - 67 (5th Cir. 1983) (noting same)*

### Denial of Due Process

In referring the case to the Master and denying the defendant his right to trial by jury, and proceeding without subject matter jurisdiction, defendant's right to due process of law was violated.

In item "r" of the Designation of Matter, the Transcript of Trial before Judge Kirven on March 2, 2017 (R. pp. 378-413) starting on page four, line #25 through page nine, (R. pp. 381-386) defendant repeatedly objected to the proceedings on grounds of a lack of subject matter jurisdiction and denial of due process of law. In those same pages, defendant also brought up a motion to dismiss for lack of subject matter jurisdiction and violation of due process. (*See same Trial Transcript page 6, starting at line 4 and continuing through line 12.*) (R. p. 383) The issue of subject matter jurisdiction and denial of due process was brought up repeatedly throughout these proceedings, as far back as our initial motion to dismiss. (*Item "b" in the Designation of Matter to be included in the Record on Appeal.*) (R. pp. 77-80)

None of the judges or masters has adequately addressed this challenge on the record as is required in a challenge of jurisdiction. Often it was ignored, and sometimes it was addressed but the court still failed to address the issue of fraud, presuming that the documents in question were proper. All of this led to the defendants filing a declaration of claims (*See item "p" in the Designation of Matter*) (R. pp. 261-282) under the common law, against the master, Judge Kirven, the banks and their attorneys and others, prior to the trial. The Master continued with the trial even though he was the subject of a suit-at-law, regarding this case. The following cases are relevant:

*Builderama v. Morton*, 307 S.C. 440, 415 S.E.2d 796 (S.C. 03/16/1992)

Trial judge erred by denying a jury trial.

*David and Crystal Holm v. Wells Fargo Home Mortgage, Inc. and Federal Home Loan Mortgage Corporation (Freddie Mac)*, Case No. SC95755, (Feb. 28, 2017), Supreme Court of Missouri, En Banc.

Wrongful foreclosure -- and denial of jury trial (claimed by the banks).

*Hungate v. Rosen*, SCAP – 13 – 0005234 (Haw. Feb. 27, 2017) Supreme Court of Hawaii

Court erred in dismissing Hungate's claims.

*Hurtado v. California*, 110 U.S. 516, 3 Sup. Ct. 111, 292, 28 L Ed 232 (1884)

Due process is process according the principles of the Common Law.

*Independent Oil and Chemical Workers of Quincy, Inc. v. Proctor & Gamble Mfg. Co.*, 864 F. 2d 927, 929 (1<sup>st</sup> Cir. 1988)

Abuse occurs when a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and no improper factors are assessed, but the court makes a serious mistake in weighing them.

McNutt v. General Motors Acceptance Corp. of Indiana, Inc., 298 U.S. 178, 80 L. Ed. 1135, 56 W. Ct. 780 (1936)

Jurisdiction may never be presumed.

Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (Supreme Ct. 1966)

Referring to rights guaranteed by the Constitution of the United States, there can be no rule making that would abrogate it.

United States Constitution, Amendment 7 -- guarantee of right to a jury trial

United States Constitution, Amendment 5 -- right to due process of law

### Argument

That fraud has clearly been brought upon the court, and the trial court has failed to protect the appellant, having instead brought harm to the appellant is indisputable. The facts show that Bank of America is clearly not a party entitled to enforce. Bank of America, N.A., conspiring with FNMA and their attorneys, fraudulently manufactured and/or submitted an improper chain of title to mislead and defraud the court and the appellant. Without standing, the bank is not properly before the court. Without proof of chain of transfers, the bank has no standing to

foreclose. Issues of material fact exist that should have been brought before a jury to be decided.

The trial court has been proceeding without subject matter jurisdiction from the filing of the complaint (R. pp. 71-76), due to the fraudulent assignment of the note and mortgage. The defendant has from the beginning, in his motion to dismiss and subsequent filings repeatedly challenged the bank's assignment of the note and mortgage. Through discovery, defendant has accumulated evidence that clearly shows the assignment of defendant's note and mortgage was improper, and in fact was manufactured by the banks to facilitate an unlawful foreclosure. The trial court failed to protect defendant's rights to due process of law by denying the defendant a trial by jury, as required by the Constitution of the United States of America and also by proceeding with the trial and granting of foreclosure to FNMA without subject matter jurisdiction due to the fraud upon the defendant and the court brought by Bank of America and FNMA and their attorneys.

In the master's order denying motion to dismiss for lack of subject matter jurisdiction, the master failed to address the issues that were raised in the motion. (R. pp. 48-50) A complaint for foreclosure is not properly filed where the party seeking to foreclose is trying to enforce an improper and fraudulent assignment of mortgage.

Prior to the trial, we filed a second motion to dismiss for lack of subject matter jurisdiction which the trial court dismissed as untimely. (R. pp. 247-260) This was an error because jurisdiction can be challenged at any time and must, when challenged, be proven on the record before the court can proceed.

Also prior to the trial, in an attempt to regain our rights under the common law secured to us by the Constitution, we filed a declaration and counterclaim (R. pp. 261-282) against the banks, which their attorneys and the masters (Judges Kirven and Drew) improperly dismissed as "frivolous" at the trial held on March 2, 2017. In that filing, John Dalen presented the evidence that has accumulated in the court's record showing the fraud that was perpetrated upon the court and the defendant(s).

At the trial, all of the evidence submitted by the bank's attorney is evidence of that fraud. The bank Note and the Assignment of Mortgage -- *listed as our letter "s" in our Designation of Matter, page 9, one of our Exhibits listed by the bank as Exhibits (1) and (3).* (R. pp. 916-935) The Note is signed without recourse from Quicken Loans to Countrywide Bank FSB. It is undated. This is a question of material fact as to when Bank of America came into possession of the Note. Bank of America has presented no evidence that it was in possession or the owner of the Note at the time of the filing of this foreclosure. There is a case from the Supreme Court of the State of Hawaii that raises issues of standing and appellate jurisdiction that pertain to foreclosure proceedings. (*See Bank of America, N.A. vs. Grisel Reyes-Toledo, Case No. SCWC-15-0000005, 28 Feb. 2017.*) (R. pp. 1079 - 1106). This case closely parallels our case, and was decided just days before our March 2, 2017 trial.

The facts show that FNMA was in actual possession of the Note at the time of the filing of this foreclosure, and was in fact the owner of the Note and that the Note had been securitized. Beneficial interests in the Note had then been sold to

holders of the certificates created by the Trust. *See: 1) Exhibit A, Transcript of Testimony of Zachary Chromiak, pages 3 and 4, (R. pp. 487- 490) as well as 5) Exhibit E, Pooling and Servicing Agreement (Trust) (R. pp. 528 - 534).*

The evidence in our case clearly shows that Bank of America has brought fraud before the court. The assignments of mortgage that have been filed by Bank of America as proof of its chain of title and rights to enforce the note in question cannot be true, as the evidence in the bank's own admissions and documents obtained through discovery clearly show. The bank has admitted that the note was securitized. They have also admitted and provided documents that show the note was sold into a trust, the trustee being FNMA. However, there is no endorsement of the note to FNMA or the trust on the note. There is also no assignment of the mortgage to FNMA or the trust at the time that the facts show that FNMA became the owner of the note in January of 2008.

The bank claims in its complaint that it is both the holder of the note, and the servicer of the note. The bank has referred to FNMA as the investor, while FNMA has claimed to be the owner of the note. No mention of FNMA or any trust is found in the complaint. No assignment of the mortgage or sale of the note from Quicken Loans to FNMA or to the trust has been offered as evidence, yet the evidence clearly shows that FNMA was claiming to be the owner of the note years prior (in 2008) and prior to the assignment to Countrywide or Bank of America (2011). Where is the sale or assignment of the note and mortgage to FNMA and/or the trust? The bank has successfully substituted parties in this case, (R. pp. 19-22) naming FNMA

and entering an assignment of mortgage to FNMA (R. p. 686) to enable FNMA to proceed with this foreclosure. (*See Bank's Exhibits (3) Designation of Matter item "s".*) (R. p. 936)

Why is an assignment of the note and mortgage from Bank of America to FNMA necessary when Bank of America is claiming to be the servicer (*See Bank of America, N.A. v. Draper, 746 SE 2nd 478, 405 SC 214, Court of Appeals 2013 Servicer entitled to foreclose... Court presumes Assignment of Mortgage was proper*) and acting as agent for FNMA which is already the owner? It appears the banks are playing a shell game with the note and mortgage to confuse the defendants and the court, in order to cover up the fact that the mortgage and the note were sold into the trust, securitized and resold to the beneficiaries of the trust, but never properly transferred to the trust.

It should be noted that the Draper case is repeatedly referred to by the bank's attorneys as their authority to foreclose. What they fail to admit is that the court in this case states that they were "presuming" that the assignment of mortgage was proper due to the fact that the defendants did not challenge the assignment. In our case, defendants have repeatedly challenged the bank's assignment and in spite of the evidence, the trial court has been proceeding on the "presumption that the assignment was proper". (*See Trial Transcript, item "k" before Judge Ellis B. Drew, March 23, 2016*). (R. p. 334, lines 10-25; R. p. 335, lines 1-25)

It is equally clear that Quicken Loans sold the note to FNMA for securitization in 2007 or 2008. (*See Designation of Matter item 1, Exhibit A,*

*Transcript of Zachary Chromiak, September 12, 2012 (R. p. 490) page 13, lines 1-25;*  
*Designation of Matter item 2, Exhibit B, Plaintiff's Responses to Defendant's*  
*Interrogatories, Requests for Admissions and Production of Documents (R. p. 503)*  
*answer #6, (R. p. 504) answer #8, #9, (R. p. 514) answer #11, (R. p. 516) answer #1,*  
*(R. p. 517) answer #3, #4 (admitting securitization of loan on Jan. 1, 2008) and*  
*Designation of Matter item 5, Exhibit E, Pooling and Servicing Agreement.)*  
*(R. pp. 528-534)*

It is also clear that the bank's assignment of mortgage from Quicken Loans, via MERS, to Countrywide and by merger to Bank of America cannot have happened, because Quicken Loans no longer had possession of the note or mortgage, having sold at least the note to FNMA. If in fact FNMA did not also receive an assignment of the mortgage at the time it purchased the note, then according to *Carpenter v. Longan*, the note and the mortgage have been bifurcated and are a nullity – unenforceable. *See Carpenter v. Longan, 83 US 16 Wall, 271, 274 (1872.)* A negotiation or sale of the note carries the mortgage with it, while an assignment of the latter (mortgage) alone is a nullity.

South Carolina law under the UCC (SC Code of Laws Title 36 Sec. 36-3-104 (notes) and Sec. 36-8-102 (securities) requires an unbroken chain of title from the originator to the foreclosing party in order to enforce. *(See hearing transcript, Designation of Matter item "e", Judge Macaulay, Denial of Order of Reference and Order to Produce Pooling and Service Agreement.)* (R. p. 323, lines 12-18) The banks, both Bank of America and FNMA have conspired to bring fraud upon the court by manufacturing a fraudulent chain of title in order to foreclose on our

property. All of these arguments and facts have been repeatedly presented by the appellant(s) to the trial court and to the master, making summary judgment for the plaintiff improper at the very least, and actionable by the appellant and grounds for dismissal of the complaint for bringing fraud upon the court. This fraud has harmed the appellant(s), as has the trial court and the master's inability to acknowledge the fraud and take appropriate action. Further, the trial court's ruling denying defendants' right to trial by jury and granting of summary judgment to Bank of America was improper as questions of material fact do exist. Due process of law was violated.

The endorsement on the note is undated (R. pp. 537, 560, 664, 916) making this an issue for the jury to decide as to whether the Bank had possession of the Note at the time the complaint was filed. The facts in this case leave in doubt exactly which bank was the holder of the Note at the time the complaint was filed. FNMA claims to be the holder of the Note and also claims to have securitized it. Bank of America claims to be the holder of the Note and also claims to be servicing it for FNMA. There can only be one holder of the Note at any given time. This is certainly an issue of material fact that should have been presented before a jury. Bank of America was repeatedly asked to produce the original Note and failed to do so until July of 2013 by court order. In explaining the delay in producing the Note, Bank of America claimed they were trying to locate it. All of this aside, the evidence also shows that the Note in question was in fact securitized, forever changing the nature of the Note. Once securitized, it is forever a security and severed from the Mortgage; it can never be converted back to a Note and reattached to the Mortgage.

This case reflects appellants' firm conviction that the complaint is a fraud on the court... an unlawful foreclosure wherein the trial court has acted on presumption not supported by fact. Appellants believe that the court erred due to lack of subject matter jurisdiction and therefore violated appellants' rights to due process of law.

Appellants have challenged Bank of America's standing to foreclose from the beginning of this action, first with a motion to dismiss (R. pp. 77- 80) and followed by an answer and counterclaims (R. pp. 87-109) in which appellant has repeatedly raised the issues of securitization, chain of title and improper and fraudulent Assignment of Mortgage – issues which are the crux of the challenge to this foreclosure action and, as well, issues that deny the court subject matter jurisdiction.

The following cases parallel our case and discuss many of the same issues we have raised:

Bank of America, N.A. vs. Grisel Reyes-Toledo, Case No. SCWC-15-0000005  
(28 Feb. 2017) (R. pp. 1,079-1,106).

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

Bank of America, N.A. v. Scott A. Greenleaf et al., 2014 ME 89, July 3, 2014,  
124 A. 3d 1122 (2015) 2015 ME 127

Court dismissed bank's complaint due to lack of standing and therefore  
Subject Matter Jurisdiction.

David and Crystal Holm v. Wells Fargo Home Mortgage, Inc. and Federal Home Loan Mortgage Corporation (Freddie Mac), Case No. SC95755, (Feb. 28, 2017), Supreme Court of Missouri, En Banc.

Wrongful foreclosure – bank's claim of denial of jury trial.

The following is a discussion of the Bank of America v. Grisel Reyes-Toledo case cited above that so closely parallels our own case (*copy included and listed in the Designation of Matter*) (R. pp. 1079 – 1106) that in reading the background starting on page 2 through page 6, one would only need to change the names of the defendants to make this a mirror of the Dalen case. A copy of this case was provided to the trial court prior to the March 2, 2017 trial.

On page 4 (R. p. 1082), the homeowner asserted – as did the Dalens – additional defenses that apply if the “note and mortgage were transferred into a trust and securitized.” On page six (R. p. 1084) of the Bank of America v. Grisel Reyes-Toledo case, in opposition to the bank's motion for summary judgment, the homeowner asserted that material questions of fact remain as to the validity of the assignment and whether Bank of America was the lawful holder of the note.

In this Hawaii case on page 11, (R. p. 1089) the court references 55 Am. Jur. 2d Mortgages § 575 (November 2016 Update) which “requires the plaintiff to prove the existence and terms of the agreement, a default by the mortgagor under the terms of the agreement, and giving of the cancellation notice.... The foreclosing plaintiff must also prove its entitlement to enforce the note and mortgage.” On page 13, (R. p. 1091) the court goes on to discuss the requirement that the plaintiff seeking to foreclose have a substantial interest, which would amount to an injury in

fact in the mortgagee's failure to satisfy its obligation to pay the debt to the note holder.

The court goes on to discuss the issue of standing and the requirement of the foreclosing party to prove its entitlement to enforce the note, as well as how standing relates to the court's jurisdiction, citing *Sierra Club v. Haw. Tourism Auth.* and "(noting that 'standing must be established at the beginning of the case')." This discussion by the court continues on pages 14 through 16 (R. pp. 1092-1094) and on page 16, at the bottom of the page the court begins to discuss the problems associated with modern securitization practices: "It appears that '[u]nder these circumstances, not even the plaintiffs may be sure if they actually own the notes they seek to enforce.' Id. at 1052. Basic requirements of Hawaii's Uniform Commercial Code and our law on standing should not be modified, especially in light of the widespread problems created by the securitization of mortgages...." This court should also make note of the footnotes on page 17 (R. p. 1095) of this Hawaii case which discuss securitization, citing several Law Review Articles, some of which the Dalens had submitted previously in court under the Rules of Evidence as expert testimony. Due to the voluminous nature of these reports, we did not include them in our Designation of Matter; however, they are cited on page 17 of this case and are both relevant and useful in helping judges and lay people to understand the nature of securitization. The Dalens have been before judges who did not grasp what we were talking about with regard to this topic, as also evidenced in the trial transcript where John Dalen cross-examined FNMA's witness, Mr. Rankin. (*See Trial Transcript, March 2, 2017.*) (R. p. 399-410)

Mr. Rankin had no idea what Mr. Dalen was referring to when repeatedly asked about securitization of the Note.

On pages 19 - 20 (R. pp. 1097 - 1098) of this Hawaii case, the court states that "[a]lthough Bank of America produced evidence that it produced the blank, endorsed note at the time it sought summary judgment, a material question of fact exists as to whether Bank of America possessed the note, or was otherwise a holder, at the time it brought the foreclosure action." On page 21, (R. p. 1099) the court discusses the fact that because of the undated, blank "indorsement" of the note, there is a genuine issue of material fact as to whether the bank held the note at the time it filed the complaint, and that the circuit court erred in granting summary judgment to Bank of America. This issue of the undated, blank assignment of the note was brought up at both summary judgment hearings that were held in the Dalen case.

### Conclusion

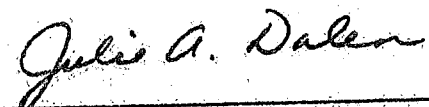
The defendants have suffered irreparable harm as a result of the banks and the trial court's actions. Our property has been sold by FNMA. The foreclosure was unlawful and a denial of our right to due process of law.

For all of the above reasons, the Court should vacate the judgment of foreclosure of the Master-in-Equity and remand the case back to the trial court for trial on defendants' counterclaims which had been erroneously dismissed in the granting of summary judgment to Bank of America as well as hearings to assess the damages owed to homeowners John and Julie Dalen due to the fraud brought upon the court.

*(Signature page to follow.)*

Dated: October 24, 2017

  
\_\_\_\_\_  
John D. Dalen, Appearing Pro Per  
109 Wood Valley Drive  
Westminster, SC 29693  
Ph. 864.647.4705

  
\_\_\_\_\_  
Julie A. Dalen, Appearing Pro Per  
109 Wood Valley Drive  
Westminster, SC 29693  
Ph. 864.647.4705

—

—

**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. 2011-37-1056**

**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**

---

**REPLY BRIEF OF APPELLANTS**

---

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

**Attorneys: Brian A. Calub, Esq.  
McGuire Woods LLP  
Fifth Third Center  
201 North Tryon St., Ste. 3000  
Charlotte, NC 28202  
Phone #: 704.343.2000  
For Respondent Bank of America, N.A.**

**Charles S. Gwynne, Jr., Esq.  
Rogers, Townsend & Thomas, PC  
P.O. Box 100200  
Columbia, SC 29202  
Phone #: 803.744.1933  
For Respondent FNMA**

## TABLE OF CONTENTS

|                                     |     |
|-------------------------------------|-----|
| Table of Authorities .....          | ii  |
| Statutes .....                      | iii |
| Statement of Issues on Appeal ..... | iv  |
| Statement of Facts of the Case..... | 1   |
| Argument.....                       | 11  |
| Conclusion .....                    | 12  |

## TABLE OF AUTHORITIES

### Cases

Bank of America, N.A. v. Draper, 405 SC 220-22, 746 S.E. 2d 478, 481, 482 (Ct. App.

2013) Servicer entitled to foreclose...Court presumes Assignment of

Mortgage was proper. This case appears on page 1.

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. This case appears on pages 2 and 12.

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, cited on page 4 (b).

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...."

Cited on page 4 (c).

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"

on page 4 (b).

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

Courts should look to substance rather than form, as cited on page 3.

Hoss v. Fabacher 578 S.W.2d 454 (1979) Tex 1<sup>st</sup> D Ct App

Discusses the UCC as it relates to incomplete negotiable instruments on pages 9 – 11.

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.” See page 4 (c).

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, cited on page 3 (1).

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. Cited on page 4, (1) (c).

### Statutes

Uniform Commercial Code – Negotiable Instruments:

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

This statute appears on page 3, (1).

SC Codes Ann. § 36-3-301

Person entitled to enforce the instrument includes the holder of the instrument -- page 4. The "holder" of the instrument is defined, cited on page 5.

S.C. Codes Ann. § 36 - 3

Uniform Commercial Code is described; see pages 5 through 11.

15 USC § 1629 (g)

Debt validation, noted on page 8.

### **Statement of Issues on Appeal**

1. Was it error for the Master to proceed with trial due to plaintiff's lack of standing and therefore a lack of subject matter jurisdiction?
2. Was there fraud upon the Court due to fraudulent Assignment of Mortgage?
3. Did the proceedings violate due process of law?

Defendants were denied jury trial and court proceeded without a competent fact witness, and without subject matter jurisdiction.

## STATEMENT OF FACTS OF THE CASE

The Appellants stand by their Statement of Issues on Appeal in their Initial Brief, and contend that these issues are preserved for appeal. The Respondents contend the only issues on appeal apply to BANA's Renewed Motion for Summary Judgment. Throughout this case in the trial court, and now in the Appellate Court, BANA has repeatedly argued that even if it was fraud, "it doesn't matter." BANA believes that, even if the assignments are improper and securitization occurred, those facts are irrelevant because BANA held the note and South Carolina courts have ruled that the homeowners have no rights to challenge assignments. BANA repeatedly quotes the Draper case. *See Bank of America, N.A. v. Draper, 405 S.C. at 220-22, 746 S.E. 2d at 481-82 (Ct. App. 2013).*

BANA conveniently leaves out the fact that the Draper court stated that they were issuing their ruling presuming that the assignments were proper, as the defendants did not challenge the assignment in that case, leaving one to conclude that if the assignments had been challenged, the Draper case might have been decided differently. Also, the court implied that the defendants in that case could have challenged the assignments. It would seem that it would be ludicrous for any court to decide that improper assignments cannot be challenged. This would equally apply as well to the securitization of a note, which is extremely relevant because it forever changes the note into a security which cannot be converted back into a note.

Throughout the trial court's proceedings regarding this foreclosure action, the Appellants have been treated as though they were not competent to handle their own defense, repeatedly admonished that they should hire an attorney. Most of our arguments were discounted and/or ignored, particularly when the issue of securitization was raised. The Appellants do not believe that any of the judges involved in this case really understood securitization.

Initially, when we tried to find an attorney who understood securitization, we could find no one to take the case. Two and a half years later, we were confronted with a judge who told us that he would "grant summary judgment to the bank" if we did not hire an attorney to file a motion to deny summary judgment. We were backed into a corner, and looked again in order to comply and found William H. Sloan, Esq., who filed our Motion to Deny Summary Judgment, which was in fact denied on July 9, 2014 by Judge Alexander Macaulay. (*See: Order Denying Plaintiff's Motion for Summary Judgment.*) (R. pp. 6-8) After nearly two years with this attorney, not making any significant progress, we decided to return to handling the case ourselves, pro per.

Just days before the trial in this case, the Supreme Court of the State of Hawaii published an opinion of interest here. (*Bank of America v. Grisel Reyes-Toledo, Sup. Ct. of Hawaii, SCWC-15-0000005, dated February 28, 2017*) (R. pp. 1079 – 1106) This Hawaii case closely parallels our case, and raises many – if not all – of the issues that we have repeatedly raised throughout these proceedings.

The Supreme Court has ruled that defendants representing themselves without an attorney cannot be held to the same standards as attorneys, and the courts in these cases should look to the substance rather than the form. *See Haines v. Kerner 404 U.S. 519 (1972)*. The Appellants are a carpenter and a homemaker, stay-at-home mom/secretary. We have had to learn legal procedure along the way, and admittedly have made mistakes. These mistakes, however, should not preclude the Appellants from receiving justice. The facts of this case are clear:

1) A Massachusetts Supreme Court ruling cited as US Bank National Association vs. Ibanez (SJC – 10694), wherein it was ruled unanimously that for a bank to foreclose, it must demonstrate that it is the real party of interest through perfection of chain of title for both the Deed of Trust/mortgage and the Promissory Note. BANA'S Motion for Summary Judgment was denied on July 9, 2014 (R. pp. 6-8) because the judge found that there were issues of material fact. Judge Macaulay has also stated that South Carolina law required Plaintiff to prove it was the real party in interest through perfection of the chain of title from the originator to the party claiming the right to foreclose. (R. p. 323, lines 12-18) See S.C. Codes Ann. § 36 -3 (Title 36, Chapter 3, Commercial Code Negotiable Instruments). Evidence obtained through discovery admissions include:

a) That the loan was securitized (R. p. 517, answer #4), the loan was sold to a trust (R. pp. 528-534), and later removed from the trust. (R. p. 535) Plaintiff's version of the chain of title does not include these transactions. (R. pp. 536-539) Plaintiff has brought fraud upon the court with its purported chain of title, and the facts show this chain of title to be false. This is a genuine issue of material fact and summary judgment was inappropriate.

- b) In *Everhome Mortgage Co. v. Rowland*, No. 07AP-615, 2088 WL 747698, at \*3 (Ohio Ct. App. 2008) (holding that Plaintiff was not entitled to summary judgment because a genuine material issue of fact remained as to “how or when it became the holder of the note and mortgage”); *First Union Nat’l Bank v. Hufford*, 767 N.E.2d 1206, 1210 (Ohio Ct. App. 2001) (finding that the Plaintiff First Union National Bank did not produce “sufficient evidence explaining or demonstrating its right to the note or mortgage” other than “inferences and bald assertions”). This is a genuine issue of material fact and summary judgment was inappropriate.
- c) Standing to sue is a fundamental requirement in instituting an action. *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.” *Farm Bureau Ins. Co. of Ark. v. Running M. Farms, Inc.* 237 S.W.3d 32, 36 (Ark. 2006). “Without evidence demonstrating the circumstances under which it received an interest in the note and mortgage, Everhome cannot establish itself as the holder.” *Everhome Mortgage Co. v. Rowland*, No. 07AP-615, 2008 WL 747698, at \*3 (Ohio Ct. App. 2008. See also *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). BANA cannot or has not provided a true chain of title showing it is the PETE (Party Entitled To Enforce), but instead has “manufactured” a chain of title for the purpose of illegally foreclosing on our property.
- 2) The chain of title presented by BANA is fraud upon the court, the assignment(s) are not proper. BANA was not the holder of the note, or mortgage, at the time it filed the complaint, and the trial court lacked subject

matter jurisdiction to continue this foreclosure. This is a genuine issue of material fact and summary judgment was inappropriate.

- 3) BANA'S Assignment of Mortgage has a robo-signed notary signature. (R. p. 540) Handwriting analysis was conducted on the notary signature and was inconclusive. However, the document was notarized in California, and California law requires the notary to sign ALL documents with the same signature as was used on the application to become a notary. This requirement is in place to ensure that notary signatures can be authenticated. The signature on the assignment to BANA voids the assignment under California law, as the signature does not comply with the law. It is therefore invalid in any court proceeding. This assignment of mortgage is not proper. This is a genuine issue of material fact and summary judgment was inappropriate.

In addition to the fact that the indorsement on the note is undated, (R. p. 539) and therefore BANA is unable to prove when they became the owner and holder of the note, BANA contends in their reply brief that SC Codes Ann. § 36-3-301, the person entitled to enforce the 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 the bearer or an identified person that is the person in possession.'... " A close inspection of the note in question shows that the note is endorsed in blank, not payable to a named payee nor is it payable to the bearer of. Therefore, a more detailed look at S.C. Codes Ann. § 36, aka the Uniform Commercial Code is in order here, as follows:

- 4) Whenever a claim is brought before a court where an indorsement of a negotiable instrument (Note) is challenged, the bank's attorney will always

claim that the absence or omission of a named payee is a negotiable instrument "indorsed in blank". He will also claim that the note indorsed in blank is lawful pursuant to SC Codes Ann. § 36 - 3 - 205(b) and thus becomes a "bearer instrument". The first thing we should look at in order to understand this argument is the definition of "indorsement". We find this term defined in SC Codes Ann. § 36- 3 - 204(a) wherein the term indorsement is defined as follows:

**"Indorsement" means a signature, other than that of a signer as maker, drawer, or acceptor, that alone or accompanied by other words is made on an instrument for the purpose of (i) negotiating the instrument, (ii) restricting payment of the instrument, or (iii) incurring indorser's liability on the instrument, but regardless of the intent of the signer, a signature and its accompanying words is an indorsement unless the accompanying words, terms of the instrument, place of the signature, or other circumstances unambiguously indicate that the signature was made for a purpose other than indorsement. For the purpose of determining whether a signature is made on an instrument, a paper affixed to the instrument is a part of the instrument."** [Emphasis added]

- 5) Now we need to know how the law defines, "blank indorsement" and "special indorsement" "indorsed in blank". For these definitions we go to SC Codes Ann. § 36- 3 - 205 (a), (b), and (c) with emphasis on the key points:

(a) If an indorsement is made by the holder of an instrument, whether payable to an identified person or payable to bearer, and the indorsement identifies a person to whom it makes the instrument payable, it is a "special indorsement." When specially indorsed, an instrument becomes payable to the identified person and may be negotiated only by the indorsement of that person. The principles stated in Section 36 - 3 - 110 apply to special indorsements.

(b) If an indorsement is made by the holder of an instrument and it is not a special indorsement, it is a "blank indorsement." When indorsed in blank, an instrument becomes payable to bearer and may be negotiated by transfer of possession alone until specially indorsed.

(c) The holder may convert a blank indorsement that consists only of a signature into a special indorsement by writing, above the signature of the indorser, words identifying the person to whom the instrument is made payable.

Now that we have defined these critical terms, let's look at how someone acquires the right to enforce the instrument. For this information we go to SC Codes Ann. § 36-3-203 wherein the law provides the following:

*(a) An instrument is transferred when it is delivered by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument.*

*(b) Transfer of an instrument, whether or not the transfer is a negotiation, vests in the transferee any right of the transferor to enforce the instrument, including any right as a holder in due course, but the transferee cannot acquire rights of a holder in due course by a transfer, directly or indirectly, from a holder in due course if the transferee engaged in fraud or illegality affecting the instrument.*

*(c) Unless otherwise agreed, if an instrument is transferred for value and the transferee does not become a holder because of lack of indorsement by the transferor, the transferee has a specifically enforceable right to the unqualified indorsement of the transferor, but negotiation of the instrument does not occur until the indorsement is made.*

*(d) If a transferor purports to transfer less than the entire instrument, negotiation of the instrument does not occur. The transferee obtains no rights under this Article and has only the rights of a partial assignee.*

Let's look closer at what we have here in the law, and compare what the law says to what we generally see on a copy of a note as it exists today.

- We see in 36 - 3- 204(a) that an indorsement is a signature.
- We see in 36 - 3- 205(b) that a note indorsed in blank is payable to the bearer of the instrument.
- We see in 36 - 3- 205(c) that the holder may convert the blank indorsement into a special indorsement by writing his name in the payee line.

Now this is what we usually see on the copy of the note that a bank will send you if you ask for a copy of the note from the servicer in a debt validation request pursuant to 15 USC §1629(g). Look on the last page of the note (R. p. 539) and you will usually see –

PAY TO THE ORDER OF

\_\_\_\_\_  
WITHOUT RECOURSE

Somebody's Signature

What's missing? This says pay to the "ORDER" of, but it does not say to whom. It is not a "special indorsement" because it does not have a named payee, nor does it say "Bearer". Though an incomplete indorsement may be construed as to show an alleged intent to negotiate, or transfer a negotiable instrument, intent alone does not supersede statutory requirements of a true negotiation.

This can only mean one thing, that this is an incomplete and insufficient indorsement. Whoever signed it acquired no rights under the instrument and they are not the proper party to enforce the note. Whoever received the document only has a partial right as a partial assignee. A foreclosing party must have full rights in order to foreclose.

The note in question (R. p. 539), stating: "Pay to the order of \_\_\_\_\_" is not a bearer instrument....

Let's get an understanding of the basics before we move on to the details. If an instrument states "Pay to the Order of" it is "order paper" or an "order instrument", as where if an instrument states "Pay to Bearer" or "Pay to the order of Bearer" it is "bearer paper" or a "bearer instrument."

An order instrument must have a specifically named "payee" identified on the payee line, as where a bearer instrument is payable to whomever has possession of the instrument. A good example of an order instrument would be a check because on its face the check states "Pay to the order of" and then whoever draws the check would write in the name of the person or entity entitled to receive payment by the presentment of this instrument.

A good example of a bearer instrument is a 10 dollar bill, because it is a negotiable instrument, but whoever has the 10 dollar bill in his possession can present the instrument for payment.

Now for the details, in *Hoss v. Fabacher* 578 S.W.2d 454 (1979) Tex 1<sup>st</sup> D Ct App (hereafter Hoss) the vital differences were defined in very fine detail.

Note: The Texas Business and Commerce Code (BCC) reflects the Federal Uniform Commercial Code very closely. For example here the Fed section will be 3-203, the Texas statutory equivalent will be section 3.203. We have cited equivalent South Carolina sections of the UCC below after the Texas citing referred to in the Hoss case.

In Hoss it states, "Under the Texas Business and Commerce Code, 'instrument' means a negotiable instrument." § 3.102(a) (5) (1967). [*SC Codes Ann. Sec. 36 - 3-104(b)*]

To be a negotiable instrument, the writing must:

(1) be signed by the maker or drawer,

(2) contain an unconditional promise or order to pay a sum certain in money and no other promise, order, obligation or power given by the maker or drawer except as authorized by the Code,

(3) be payable on demand or at a definite time, and

(4) be payable to order or to bearer. § 3.104(a)(1967). [*SC Codes Ann. § 36-3-104(a)(1)*]

An instrument is payable to bearer when by its terms it is payable to

(1) bearer or to the order of bearer; or

(2) a specified person or bearer; or

(3) "cash" or the order of "cash", or any other indication which does not purport to designate a specific payee.

The official comment to this section clearly states 2. Paragraph (c) is reworded to remove any possible implication that "Pay to the order of \_\_\_\_\_" makes the instrument payable to bearer. It is an incomplete order instrument and falls under Section 3-115. (*SC Codes Ann. Sec. 36-3-1115*)

Hoss goes further to state, "Section 3.115(a) [*SC Codes Ann. Sec. 36-3-1115(a)*] of the Code, titled "Incomplete Instruments," provides that when a paper whose contents at the time of signing show that it is intended to become an instrument is signed while incomplete in any necessary respect, it is unenforceable until completed. Comment 2 following that section defines "necessary" as "necessary to complete instrument. It will always include the promise or order, the designation of the payee, and the amount payable." In our case, the note in question (R. p. 539), states: "Pay to the order of \_\_\_\_\_" and it is not a bearer instrument.

There have been many attorneys that argue that an "incomplete order instrument" is a negotiable instrument that is, "indorsed in blank" and is

therefore a "bearer instrument". Under Hoss, this argument falls on its face. Hoss outlines that an "incomplete order instrument" is in fact NOT a bearer instrument and that the attorney is trying to pull the "proverbial wool over the eyes" of the court. Counsel's statement may not reach fraud upon the court but it is certainly not a winning argument in light of Hoss.

## ARGUMENT

The trial court lost subject matter jurisdiction at the time of the filing of the complaint as the negotiation of the note is incomplete and undated, making it impossible to ascertain if BANA acquired rights to the note prior to the filing of the foreclosure. Furthermore, BANA's attorneys argue that securitization of the note has no bearing on this case. Appellants contend that it most certainly does, as securitization forever changes the note. It changes the note into a security and separates the security from the mortgage. It can never be converted back into a note, and reattached to the mortgage. The evidence in this case clearly shows that securitization happened almost immediately after John Dalen signed the note. The evidence also clearly shows that the banks, BANA and FNMA orchestrated an unlawful foreclosure, creating documents to facilitate their purpose(s), causing irreparable harm to the Dalens. The process of securitization allowed the banks to enrich themselves many times over by selling individual notes multiple times. A federal commission was set up to study the 2008 economic collapse and laid the blame squarely on the bank's reckless activities -- writing and securitizing mortgages -- which ultimately led to all 50 States Attorneys General suing the

banks for wrongful foreclosures, including manufacturing documents to facilitate these foreclosures.

For all of the above-cited reasons, summary judgment for BANA was improper and the Appellants were denied due process by the trial court for proceeding with trial without subject matter jurisdiction and denial of trial by jury. The entire trial court proceeding(s) constitute unlawful foreclosure. Subject matter jurisdiction must be proved on the record by the party asserting it. BANA never proved jurisdiction and therefore the trial and all the proceedings were unlawful. The court must look to the entire case to see if subject matter jurisdiction was lost. (*See: Bank of America v. Grisel Reyes-Toledo, Sup. Ct. of Hawaii, SCWC-15-0000005, dated February 28, 2017.*) (R. pp. 1079 – 1106)

### Conclusion

The trial court engaged in an unlawful foreclosure action and the court lacked subject matter jurisdiction. Proceeding without such jurisdiction violated our right to due process. The Appellants issues, preserved for appeal, deserve contemplative study by this Appellate Court. In doing so, it is hoped that the court will remember that the primary function of any court is the protection of the citizen's Constitutional rights -- to be forever watchful for encroachments thereon. Consider the immortal and prophetic words of Thomas Jefferson:

*"I believe that banking institutions are more dangerous to our liberties than standing armies. If the American people ever allow private banks to control the*

*issue of their currency, first by inflation, then by deflation, the banks and corporations that will grow up around [the banks] will deprive the people of all property until their children wake up homeless on the continent their fathers conquered."*

WHEREFORE, the court should vacate the judgment of foreclosure of the Master in Equity, dismiss Plaintiff's complaint with prejudice, and remand the case back to the trial court for trial on defendants' counterclaims, which had been erroneously dismissed in the granting of summary judgment to Bank of America, N.A. as well as for hearings to assess the damages owed to homeowners John and Julie Dalen due to fraud brought upon the court by BANA and FNMA.

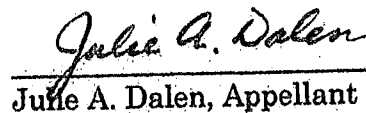
Submitted by John D. Dalen and Julie A. Dalen

DATED this 24<sup>th</sup> day of October, 2017



John D. Dalen, Appellant

109 Wood Valley Drive  
Westminster, SC 29693  
864.647.4705



Julie A. Dalen, Appellant

—

1

—

**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 - 36 - 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

**RECEIVED**

JUL 16 2019

SC Court of Appeals

**Petition for Rehearing and Memorandum in Support of Rehearing**

Appellants John and Julie Dalen (collectively, the Dalens) respectfully petition this Court to rehear the issues presented in this case because we believe the Court has overlooked or misapprehended crucial issues raised by the Dalens in this case. We address these issues in the attached Memorandum in Support of this Petition.

## **Memorandum in Support of Petition for Rehearing**

The Appellants believe that the SC Court of Appeals failed to look at critical issues dealing with Issues (1) Subject Matter Jurisdiction, (2) Chain of Title/Fraudulent Assignment, Fraud upon the Court and (3) Denial of Due Process.

### **Regarding Issue (1) as to the Trial Court's Lack of Subject Matter Jurisdiction**

According to South Carolina law, in order for a bank to foreclose, the bank must prove that it had the note prior to filing the foreclosure action. Otherwise there is no Subject Matter Jurisdiction and the Court cannot even entertain the matter. The Dalens' concern with these issues includes the fact that there is no date on the note showing when the bank acquired the note.

Along with this issue is the fact – admitted to by the bank during the discovery process – that the note had been securitized, and was thus converted to a stock which forever changes the nature of the note. It is no longer a note, but a stock, and must be governed by the rules pertaining to securities. It is unlawful to attempt to take a stock and convert it back to a note. The Dalens discussed this in the Initial and Final Briefs; it was also discussed in the Hawaii Supreme Court case. (See: *Bank of America v. Grisel Reyes-Toledo, Sup. Ct. of Hawaii, SCWC-15-0000005, dated Feb. 28, 2017.*) (R. pp. 1079 – 1106) This Hawaii case was referenced in the Dalens' briefs because it closely parallels the Dalen case. The South Carolina Court of Appeals did not address these above-mentioned issues. It is not the court's job to make excuses for the bank or to relieve them of their responsibility to comply with all of the laws regarding mortgages and securities.

Regarding the Dalens' Issue (2) "fraud upon the [master] due to [a] fraudulent [a]ssignment of [the m]ortgage."

There are rules regarding trusts and procedures which must be followed. South Carolina law and New York Trust Law -- which governs the purported Trust in which this note was allegedly placed and the Trust of which FNMA is the Trustee -- require an unbroken chain of title from the originator of the note to the trust and also to the bank bringing the foreclosure. The mortgage assignment cannot possibly be legitimate as the bank has presented it to the Court as outlined in our final brief and as described below. Furthermore, securitization of the note bifurcates the note from the mortgage, thus rendering both unenforceable. The bank has admitted that the note was securitized and put into a trust, but there is no proof that the note was actually put into the trust, although the bank's attorneys did claim that the note was removed from the trust. (*See: R. p. 535, Exhibit F.*)

The bank has not presented any evidence of a transfer of the note or mortgage to the trust. This is evidence of a broken chain of title -- a fraud upon the Court in that the bank, in order to foreclose presents a chain of title which is in contradiction to the evidence. Furthermore, the bank submitted an Assignment of a Mortgage with a robo-signed notary signature, improper under California law; robo-signing voids the signature under California law. (*See: R. p. 537 Exhibit H, R. p. 540 Exhibit I, and R. p. 543 Exhibit J.*) Robo-signing of mortgage assignments was one of the causes of action that all fifty states' Attorneys General brought against the banks, including Bank of America, N.A. (*See: R. p. 545, Exhibit K.*) In our reply brief, pp. 11-13, and our Final Brief on pp. 13-24 we argued issues 1, 2, and 3. None of these issues were addressed by the S.C. Court of Appeals. The Hawaii Court (*See: Bank of America v. Grisel Reyes-Toledo,*

*Sup. Ct. of Hawaii, SCWC-15-0000005, dated Feb. 28, 2017.)* (R. pp. 1079 – 1106) discusses these issues on pp. 1087 – 1099.

The Dalens have presented evidence that there were numerous transfers of the note, none of which are reflected on the back of the note. The only transfer that is recorded on the back of the note is not dated. The only assignment of the note to FNMA occurred when Bank of America substituted plaintiffs prior to the foreclosure trial. But supposedly FNMA was the owner of the note and Bank of America merely the “servicer” at the time the foreclosure complaint was filed. As the evidence shows, in fact the real owners of the note were most likely the investors in the securities which were sold by FNMA (securitization), almost immediately and maybe even before the Dalens signed the note. As mentioned in the Dalens’ final brief, John and Julie Dalen were unable to determine at any given time who actually owned the note. We refer to this as the bank “playing a shell game with the note.” In Bank of America’s initial Brief, paraphrasing what their attorney stated: “it doesn’t matter if it’s fraud – it doesn’t matter, we have the note.” In the Dalens’ reply brief, we asserted that fraud does in fact matter. We have shown in our final brief that the chain of title is most certainly not as the bank has presented it, and is in fact a broken chain of title. Once again, it’s not the Court’s job to make excuses for, or to overlook the bank’s failure to follow proper procedures and laws. (See: R. p. 456, entitled Standing in the Wake of the Foreclosure Crisis: Why Procedural Requirements are Necessary to Prevent Further Loss to Homeowners by Timothy A. Fruehle, Iowa Law Review.)

Relevant to the above law review, see also Why Mortgage Formalities Matter by David A. Dana, Loyola Consumer Law Review, Vol. 24, p. 101 (2012) and available at SSRN:

<https://ssrn.com/abstract=2082374>: This Article argues that adherence to mortgage formalities regarding foreclosure is valuable for expressive reasons and also as a potential deterrent to future undesirable underwriting and securitization practices. The Article reviews how some courts have in effect written procedural requirements for foreclosure out of the law, and asks why these courts have done so and whether lenders' behavior might have been improved during this housing crisis had the state courts uniformly afforded equal respect to the legal rights of homeowners and those of lenders.

Regarding Issue (3) "the proceedings violate[d] due process of law"

We believe the Court is in error on this issue for the following reasons: The Dalens were denied a jury trial due to Statutory Rules/Regulations that are repugnant to the United States Constitution. The Seventh Amendment to the U.S. Constitution requires that in all cases where the amount in controversy exceeds \$20, the right of trial by jury shall be preserved. From the beginning in the Answer to the bank's complaint, the Dalens demanded the right to a trial by jury. This Right to a Jury Trial is a fundamental Constitutional Right that cannot be overruled by Statute or other means.

No state, no judge can overrule the Constitution of the United States. This is an unalienable right that cannot be taken away. The Court's action denying the Dalens a jury trial is in fact a violation of due process under color of law. Due process, as contemplated by the U.S. Constitution, is process according to the Common Law. Numerous Supreme Court cases were provided by the Dalens in our Final and Reply Briefs.

Bank of America did not prove its standing to foreclose, thus depriving the Court of Subject Matter Jurisdiction. Also, from the beginning, the Dalens challenged the Court's subject matter jurisdiction. Absent the bank's proof of its right to enforce the note, at the point that the Dalens challenged the Court's jurisdiction, the Court had no jurisdiction to proceed. Anything that happened after that is null and void. In all cases where Subject Matter Jurisdiction is challenged, it is the person bringing the complaint, i.e. the bank which is required to prove it on the record, not the court. Absent such proof, there is no jurisdiction. Again, we have provided numerous Supreme Court cases in our Final and Reply Briefs, as well as in all of our court filings over the past nine years that support this contention.

Proceeding without Subject Matter Jurisdiction proved on the record is a denial of due process. Denial of the Constitutionally-protected right to a jury trial is a denial of due process. These issues were repeatedly raised at hearings prior to the trial and repeatedly asserted at the trial, and repeatedly denied or not ruled upon by the court and therefore are preserved for appeal.

### Summary

This case raises issues that have not been resolved or even given fair consideration. Among them are the securitization and undated transfers of the note, and purported transfers that are not documented on the note. This case was at the trial court level for more than eight (8) years, and is reflected in the Record on Appeal that the Dalens filed with this Court. There are over 1,100 pages of evidence and documentation that we feel the Court should have been able to use in providing us a more reasoned response than the under two-page response that we received as the Court's opinion.

We hoped that the South Carolina Court of Appeals would have addressed the issues that we raised in a similar way as did the Hawaii Supreme Court in a similar case involving similar issues. The volume of material presented in the Record on Appeal deserves, no – in fact demands that the Court give more consideration to the evidence presented. The Dalens also cited in our Reply and Final Briefs to this court numerous cases relating to standing and subject matter jurisdiction that were inadequately addressed by this court. We believe that the South Carolina Court of Appeals should re-examine the issues presented and tell the Dalens why the findings of the Hawaii court are not relevant to this case, in this state. (See: *Bank of America v. Grisel Reyes-Toledo, Sup. Ct. of Hawaii, SCWC-15-0000005, dated Feb. 28, 2017.*) (R. pp. 1079 – 1106).

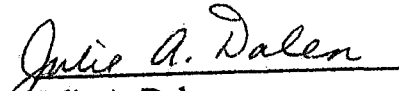
WHEREFORE the Dalens again move this Court to rule that (1) the Trial Court did not have Subject Matter Jurisdiction due to the fact that the bank in question did not and could not prove that it had the note prior to filing for foreclosure and thus lacked standing. Furthermore, the evidence shows that (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 7<sup>th</sup> 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 15, 2019

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

  
John D. Dalen

109 Wood Valley Drive  
Westminster, SC 29693  
Ph. 864.647.4705

  
Julie A. Dalen

Other parties and counsel of record:

Attorney for Respondent Bank of America, N.A.

Brian A. Calub, Esq.  
McGuire Woods LLP  
Fifth Third Center  
201 North Tryon St., Ste. 3000  
Charlotte, NC 28202  
Ph. 704.343.2000

Attorneys for Respondent FNMA

B. Lindsay Crawford, III  
Theodore von Keller  
Sara C. Hutchins  
B. Lindsay Crawford, IV  
Crawford & von Keller, LLC  
PO Box 4216  
Columbia, SC 29240

**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**

**RECEIVED**  
JUL 30 2019  
SC Court of Appeals

---

**APPELLANTS' REPLY TO RESPONDENTS' RETURN TO**

**APPELLANTS' PETITION FOR REHEARING**

---

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

1166

## TABLE OF CONTENTS

|                            |     |
|----------------------------|-----|
| Table of Authorities ..... | iii |
| Introduction.....          | 1   |
| Argument #1.....           | 1   |
| Argument #2.....           | 4   |
| Conclusion .....           | 5   |

## **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. 2<sup>nd</sup> § 260

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

55 Am. Jur. 2<sup>nd</sup> Mortgages § 575 (Nov. 2016 Update)

Entitlement to foreclose.

U. S. Constitution, 5<sup>th</sup> Amendment: Due Process of Law

U. S. Constitution, 7<sup>th</sup> 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..."

*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."

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)  
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 Plaintiffs 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. 2<sup>nd</sup> 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, 5<sup>th</sup> 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. 2<sup>nd</sup> § 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."*

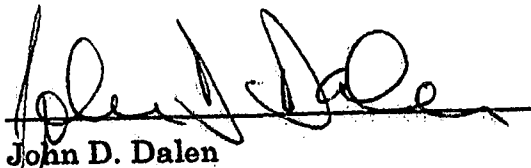
See the U. S. Constitution, 7<sup>th</sup> Amendment regarding the Right to Trial by Jury.

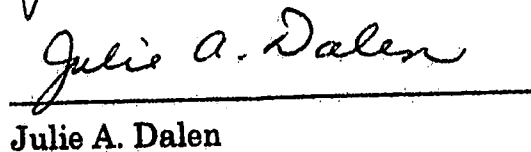
## CONCLUSION

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 7<sup>th</sup> 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)

109 Wood Valley Drive  
Westminster, SC 29693  
Phone 864.647.4705

Other parties and counsel of record:

Attorneys:

Brian A. Calub, Esq.  
McGuire Woods  
Fifth Third Center  
201 North Tryon St., Ste. 3000  
Charlotte, NC 28202  
Phone #: 704.343.2000  
For Respondent Bank of America, N.A.

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 49240  
Phone #: (803) 790-2626  
For Respondent FNMA

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM OCONEE COUNTY  
Court of Common Pleas

Honorable Steven C. Kirven, Master-In-Equity

Case No. 2011-CP-37-1056

Appellate Case No. 2017-000886

RECEIVED

NOV 02 2017

SC Court of Appeals

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

**FINAL BRIEF OF RESPONDENT BANK OF AMERICA, N.A.**

Brian A. Calub (SCSB #72009)  
MCGUIREWOODS, LLP  
201 North Tryon Street, Suite 3000  
Charlotte, North Carolina 28202  
Telephone: (704) 343.2009  
Facsimile: (704) 373-8842  
[BCalub@mcguirewoods.com](mailto:BCalub@mcguirewoods.com)  
*Attorney for Respondent Bank of America, N.A.,  
successor by merger to BAC Home Loans Servicing,  
L.P. f/k/a Countrywide Home Loans Servicing, L.P*

## TABLE OF CONTENTS

|                                                                                                                                                                                                             | Page |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------|
| STATEMENT OF ISSUES ON APPEAL .....                                                                                                                                                                         | 1    |
| STATEMENT OF FACTS .....                                                                                                                                                                                    | 1    |
| STANDARD OF REVIEW .....                                                                                                                                                                                    | 6    |
| ARGUMENT .....                                                                                                                                                                                              | 7    |
| I.    The Trial Court was Not Precluded from Hearing BANA's Renewed Motion for<br>Summary Judgment .....                                                                                                    | 7    |
| II.   The Trial Court Did Not Err in Granting BANA's Renewed Motion for Summary<br>Judgment .....                                                                                                           | 8    |
| A.   As Appellant has Failed to Raise Any Argument, in His Brief, as to How<br>the Trial Court Erred in Granting BANA's Renewed Motion for Summary<br>Judgment, He Has Abandoned the Issue on Appeal .....  | 8    |
| B.   To the Extent Appellant's Arguments Are Preserved for Review, They<br>Are Without Merit .....                                                                                                          | 9    |
| 1.   South Carolina law is clear that the servicer of a mortgage loan, as<br>the note holder, has authority to prosecute a foreclosure action .....                                                         | 9    |
| 2.   as the holder of the note, BANA was not required to establish its<br>standing to prosecute the Foreclosure Action as the <i>owner</i> of the<br>Note or through an assignment of the Mortgage .....    | 12   |
| 3.   Appellant's contention that securitization of the Note and<br>Mortgage rendered the debt unsecured is contrary to well-<br>established South Carolina law and law from throughout the<br>country ..... | 13   |
| 4.   Appellant does not have standing to Challenge the Validity of the<br>Assignment of Mortgage .....                                                                                                      | 14   |
| CONCLUSION .....                                                                                                                                                                                            | 15   |

# TABLE OF AUTHORITIES

| Cases                                                                                                          | Page(s)           |
|----------------------------------------------------------------------------------------------------------------|-------------------|
| <i>Ballenger v. Bowen</i> ,<br>313 S.C. 476, 443 S.E.2d 379 (1994) .....                                       | 7                 |
| <i>Bank of Am., N.A. v. Draper</i> ,<br>405 S.C. 214, 746 S.E.2d 478 (Ct. App. 2013).....                      | 7, 10, 11, 12, 13 |
| <i>Bankers Trust (Delaware) v. 236 Beltway Inv.</i> ,<br>865 F. Supp. 1186 (E.D.Va.1994) .....                 | 10                |
| <i>Bankers Trust of S.C. v. Bruce</i> ,<br>283 S.C. 408, 323 S.E.2d 523 (Ct. App. 1984).....                   | 7                 |
| <i>Crosswell Enterprises, Inc. v. Arnold</i> ,<br>309 S.C. 276, 422 S.E.2d 157 (Ct. App. 1992).....            | 7                 |
| <i>Dorrell v. S.C. Dep't of Transp.</i> ,<br>361 S.C. 312, 605 S.E.2d 12 (2004) .....                          | 7                 |
| <i>Englert, Inc. v. Netherlands Ins. Co.</i> ,<br>315 S.C. 300, 433 S.E.2d 871 (Ct. App. 1993).....            | 8                 |
| <i>Fields v. Melrose Ltd. P'ship</i> ,<br>312 S.C. 102, 439 S.E.2d 283.(Ct. App. 1993).....                    | 8, 9, 13          |
| <i>Glasscock, Inc. v. U.S. Fid. &amp; Guar. Co.</i> ,<br>348 S.C. 76, 557 S.E.2d 689 (Ct. App. 2001).....      | 9                 |
| <i>Hill v. S.C. Dep't of Health &amp; Envtl. Control</i> ,<br>389 S.C. 1, 698 S.E.2d 612 (2010) .....          | 9                 |
| <i>Jackson v. Bermuda Sands, Inc.</i> ,<br>383 S.C. 11, 677 S.E.2d 612 (Ct. App. 2009).....                    | 6                 |
| <i>Jinks v. Richland Cty.</i> ,<br>355 S.C. 341, 585 S.E.2d 281 (2003) .....                                   | 8, 13             |
| <i>Jones v. SC Dep't of Health &amp; Envtl. Control</i> ,<br>384 S.C. 295, 682 S.E.2d 282 (Ct. App. 2009)..... | 8                 |
| <i>In re Kain</i> ,<br>No. 08-08404-HB, 2012 WL 1098465 (Bankr. D.S.C. Mar. 30, 2012) .....                    | 14                |

|                                                                                                          |        |
|----------------------------------------------------------------------------------------------------------|--------|
| <i>Kriegel v. MERS</i> ,<br>No. PC-2010-7099, 2011 WL 4947398 (R.I. Super. Ct. Oct. 13, 2011) .....      | 14     |
| <i>In re Marks</i> ,<br>548 B.R. 703 (Bankr. D.S.C. 2016) .....                                          | 10, 11 |
| <i>In re MERS Litigation</i> ,<br>No. 09-2119-JAT, 2011 WL 4550189 (D. Ariz. Oct. 3, 2011) .....         | 14     |
| <i>R.J. Griffin &amp; Co. v. Beach Club II Homeowners Ass'n.</i> ,<br>384 F.3d 157 (4th Cir. 2004) ..... | 14, 15 |
| <i>Reese v. U.S. Bank, N.A.</i> ,<br>No. 3:11-2990-CMC-SVH, 2012 WL 1952819 (D.S.C. Apr. 30, 2012) ..... | 14     |
| <i>Sides v. Greenville Hosp. Sys.</i> ,<br>362 S.C. 250, 607 S.E.2d 362 (Ct. App. 2004) .....            | 6      |
| <i>Sloan v. Friends of the Hunley, Inc.</i> ,<br>369 S.C. 20, 630 S.E.2d 474 (2006) .....                | 9      |
| <i>In re Woodberry</i> ,<br>383 B.R. 373 (Bankr. D.S.C. 2008) .....                                      | 12     |
| <b>Statutes</b>                                                                                          |        |
| S.C. Code Ann. § 36-1-201(21) .....                                                                      | 10     |
| S.C. Code Ann. § 36-3-301 .....                                                                          | 10, 12 |
| <b>Other Authorities</b>                                                                                 |        |
| Rule 56(c) .....                                                                                         | 6      |

### STATEMENT OF ISSUES ON APPEAL

- I. Whether Appellant preserved any issues for appellate review concerning the Trial Court's grant of summary judgment to Bank of America, N.A., successor by merger to BAC Home Loans Servicing, L.P. f/k/a Countrywide Home Loans Servicing, L.P. ("BANA")
- II. Whether the Trial Court erred in considering and granting BANA's Renewed Motion for Summary Judgment.

### STATEMENT OF FACTS

BANA commenced the underlying equitable action for foreclosure on October 31, 2011 ("Foreclosure Action"), alleging that Defendant John D. Dalen defaulted on a promissory note ("Note") he executed and delivered to Quicken Loans Inc. ("Quicken Loans"), on December 20, 2007, in the amount of \$118,750.00, plus interest. [R. pp. 71-76.] To secure the Note, John and Julie A. Dalen (collectively, "the Dalens" or "Appellant") executed a mortgage ("Mortgage") to Mortgage Electronic Registration Systems, Inc. ("MERS"), acting solely as nominee for Quicken Loans, its successors and assigns, covering real property located at 109 Wood Valley Dr., Westminster, South Carolina 29693 (the "Property"). [R. pp. 919-34.] The Mortgage was recorded on December 21, 2007 in the Oconee County real property records. [R. pp. 919-34.]

By an assignment of Mortgage dated May 9, 2011, and recorded May 16, 2011, in the Oconee County real property records, MERS assigned the Mortgage to BAC Home Loans Servicing, LP f/k/a Countrywide Home Loans Servicing LP (the "2011 Assignment"). [R. p. 935.] BANA is the successor to BAC Home Loans Servicing, LP pursuant to a corporate merger. [R. p. 73 ¶ 9.] BANA and its predecessors-in-interest held the Mortgage until it was assigned from BANA to Federal National Mortgage Association ("Fannie Mae") on or about April 13, 2015 ("2015 Assignment"). [R. p. 936.]

In response to BANA's Complaint, the Dalens filed a Motion to Dismiss on November 22, 2011, alleging that BANA lacked standing to foreclose and was not the real party in interest to enforce the Note and/or Mortgage, which was denied on March 7, 2012 ("Order Denying Motion to Dismiss"). [R. pp. 1-3, 77-80.] On February 21, 2012, the Dalens filed their Answer, Affirmative Defenses, Counterclaims, and Demand for Jury Trial ("Answer"). [R. pp. 87-104.]

On April 13, 2012, BANA filed an Affidavit certifying that it held both the Note and Mortgage. [R. pp. 1076-77.] The Dalens subsequently moved for reconsideration of the Order Denying Motion to Dismiss. This motion was denied on June 20, 2012. [R. pp. 4-5, 81-86.]

After a period of discovery, BANA filed a Motion for Summary Judgment ("Motion for Summary Judgment") regarding the Counterclaims, on December 4, 2013. BANA's Motion for Summary Judgment was denied on July 9, 2014. [R. pp. 6-8, 117-28.]

On November 17, 2014, BANA filed a Motion to Strike Jury Trial Demand and Refer to the Master-in-Equity ("Motion for Order of Reference"), and, on the same day, the Dalens filed a Motion for Summary Judgment arguing that the 2011 Assignment to BANA was void and BANA therefore lacked standing to foreclose. [R. pp. 185-86, 187-88.] Following a hearing on both motions, the Trial Court rendered its rulings in a Form 4 order, entered on January 28, 2015, denying the Dalen's Motion for Summary Judgment and granting BANA's Motion for Order of Reference; a formal order was entered on February 25, 2015 ("Order of Mandatory Reference"). [R. pp. 9-10, 11-14.] In the Order, the Trial Court denied the Dalen's Motion for Summary Judgment concluding, *inter alia*, that because BANA was the undisputed servicer of the loan when the Complaint was filed, BANA was a real party in interest with standing to foreclose. [Id.] The Dalens did not appeal the Order of Mandatory Reference.

On March 17, 2015, the Dalens filed a Motion to Compel Discovery and a Motion to Compel Mediation. [R. pp. 189–91.] And, on June 1, 2015, BANA filed a Motion to Substitute Plaintiff seeking to substitute Federal National Mortgage Association (“FNMA”) as the plaintiff in the Foreclosure Action based upon an assignment of the Mortgage executed by BANA on April 13, 2015, in favor of FNMA (“Assignment of Mortgage”). [R. p. 191.] These motions were heard on August 26, 2016. In an order entered on September 23, 2015, the Trial Court granted BANA’s Motion to Substitute Plaintiff, noting that BANA would remain a counterclaim defendant (“Order Substituting Plaintiff”), and denied the Dalens’ Motion to Compel Discovery and Motion to Compel Mediation. [R. pp. 19–22.]

On February 16, 2016, BANA filed a motion to amend the Trial Court’s December 9, 2014 scheduling order, in part, so that BANA could file a renewed motion for summary judgment. [R. pp. 192–194.] The Dalens’ consented to BANA’s motion, and the Trial Court entered a Consent Order Amending Scheduling Order on March 2, 2016. [R. pp. 796–98.]

On March 9, 2016, BANA filed a Renewed Motion for Summary Judgment as to the Counterclaims asserted in the Dalens’ Answer (“Renewed Motion for Summary Judgment”) [R. pp. 195–224], and the Dalens filed a Motion to Dismiss for lack of subject matter jurisdiction, on May 5, 2016, alleging BANA did not have standing to commence the Foreclosure Action (“Motion to Dismiss”). [R. pp. 225–32.] The Foreclosure Action was struck from the active docket due to Appellant’s bankruptcy filing on May 10, 2016. [R. pp. 23–25.] The Action was restored to the active docket on July 28, 2016, after Appellant’s bankruptcy case was dismissed. [R. pp. 26–28.] That same day, the Trial Court entered an order granting BANA’s Renewed Motion for Summary Judgment and dismissing the Dalens’ Counterclaims. (“Summary Judgment”). [R. pp. 29–41.]

The Dalens' filed a Motion for Reconsideration of the Summary Judgment, on August 8, 2016. [R. pp. 233-46.] Following a hearing on September 8, 2016, the Dalens' Motion for Reconsideration and Motion to Dismiss were denied in separate orders on October 13, 2016. In the order denying the Motion for Reconsideration of the Summary Judgment, the trial court noted that the motion improperly attempted to supplement the record developed during the summary judgment hearing by including materials that were not presented at the hearing. [R. pp. 44-50.] Appellant filed a notice of appeal from the order denying the Motion to Dismiss, and this Court dismissed the appeal as interlocutory on November 18, 2016. [R. pp. 51-52.]

The Foreclosure Action came on for trial on March 2, 2017, before the Honorable Steven C. Kirven, Master-in-Equity ("Trial"). [R. p. 378.] At Trial, FNMA presented the testimony of William Rankin ("Rankin"), a litigating officer with Seterus, Inc. ("Seterus"), the servicer of the Loan. [R. pp. 387:1-388:5.] Rankin testified that he had personal knowledge of the business records maintained by Seterus in connection with the Loan. [R. pp. 388:1-16.] Rankin identified the Note, executed by Appellant, and the Mortgage, executed jointly by the Dalens, and he testified that the Mortgage constituted a first mortgage lien on the Dalen's property. [R. pp. 388:17-390:12.] Rankin testified that Seterus was in possession of the Note through FNMA's counsel and that the Note was endorsed in blank and present in the courtroom during Trial. [R. p. 389:14-21.] The Note and Mortgage were admitted into evidence over Appellant's non-specific objection "to the whole proceeding" and his contention that there was "no competent fact witness" for him to cross-examine; Appellant provided no specific basis related to the admissibility of the exhibits. [R. pp. 390:13-391:7.]

Rankin identified the 2011 Assignment and the 2015 Assignment. [R. p. 391:12-21.] Appellant objected to the admission of both assignments into evidence by merely stating, "I

object.” [R. pp. 391:25–392:1.] The objection was overruled, and both assignments were admitted into evidence. [R. p. 392:1–6.]

Rankin next identified Seterus’s records of Appellant’s payments made on the Loan, which included the records of payments on the Loan from BANA, the prior servicer, and testified that the records reflected Appellant had defaulted on the Loan in December 2010 (“Payment History”). [R. pp. 392:8–394:2.] When FNMA offered the Payment History into evidence, Appellant’s only objection was that the Trial Court did not have subject matter jurisdiction over the Foreclosure Action. [R. p. 394:8–17] Appellant’s objection was overruled, and the Payment History was admitted into evidence. [*Id.*] Rankin also testified that BANA, as the servicer of the Loan at the time of Appellant’s default, sent an acceleration letter to Appellant on December 17, 2010 (“Acceleration Letter”). [R. pp. 394:21–395:4.] When FNMA offered the Acceleration Letter into evidence, the Trial Court overruled Appellant’s objection that the Trial was “an unlawful foreclosure,” and the letter was admitted into evidence. [R. p. 395:5–16.]

Rankin then provided a breakdown of the total amount that was due to FNMA, by Appellant, under the Loan (“Summary of Amount Due”) [R. pp. 395:20–396:9], as well as the related costs and attorney’s fees that FNMA sought to collect from Appellant (“Affidavit of Costs and Fees”) [R. pp. 397:10–398:12]. Both the Summary of Amount Due and Affidavit of Costs and Fees were admitted into evidence over Appellant’s objection that the Trial was “an unlawful foreclosure, and violation of [his] constitutional rights.” [R. pp. 397:19–398:13.] At the close of FNMA’s case, Appellant did not call any witness, and he provided no testimony or evidence; Appellant merely objected to the Trial as violation of his constitutional rights and “fraud upon the court.” [R. pp. 411:13–412:12.]

On March 6, 2017, the Trial Court entered a Final Judgment of Foreclosure in favor of FNMA ("Final Judgment"). [R. pp. 55–70.] On March 14, 2017, Appellant filed an Objection and Motion for New Trial and/or Amendment of Judgment on Grounds of Fraud and Denial of Due Process of Law ("Motion for New Trial"), in which Appellant alleged, inter alia: that the Trial Court's "decision" invaded "the province of the jury"; that the Trial Court had no subject matter jurisdiction to due fraudulent documents; that neither FNMA nor BANA had possession of the promissory note; and that FNMA and BANA failed to support their "claims" with business records that survived the business record hearsay exception. [R. pp. 283–97.]

The Trial Court denied the Motion for New Trial in an order entered on March 17, 2017 ("Order Denying Motion for New Trial"). [R. pp. 53–54.] Appellant filed a notice of appeal from the Final Judgment and the Order Denying Motion for New Trial on March 31, 2017 ("Notice of Appeal").<sup>1</sup>

### STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, this court applies the same standard that governs the trial court under Rule 56(c), SCRCP; summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. . . . In determining whether a genuine issue of fact exists, the evidence and all reasonable inferences drawn from it must be viewed in the light most favorable to the nonmoving party. . . . "Once the moving party carries its initial burden, the opposing party must come forward with specific facts that show there is a genuine issue of fact remaining for trial." *Sides v. Greenville Hosp. Sys.*, 362 S.C. 250, 255, 607 S.E.2d 362, 364 (Ct. App. 2004). "[A]ssertions as to liability must be more than mere bald allegations made by the non-moving party in order to create a genuine issue of material fact." *Jackson v. Bermuda Sands, Inc.*, 383 S.C. 11, 17, 677 S.E.2d 612, 616 (Ct. App. 2009).

---

<sup>1</sup> Appellant filed an amended notice of appeal on April 21, 2017, in which he appears to have merely crossed through the Trial Court case number and added the case number of this appeal. [R. p. 1078.]

*Bank of Am., N.A. v. Draper*, 405 S.C. 214, 219, 746 S.E.2d 478, 480 (Ct. App. 2013).

### ARGUMENT

#### **I. The Trial Court was Not Precluded from Hearing BANA's Renewed Motion for Summary Judgment.**

As an initial matter, BANA notes that the Trial Court's denial of its first motion for summary judgment did not preclude BANA from filing its Renewed Motion for Summary Judgment. A trial court has the discretionary authority to review a party's renewed motion for summary judgment based upon matter not previously addressed by the court. *See Dorrell v. S.C. Dep't of Transp.*, 361 S.C. 312, 325, 605 S.E.2d 12, 18 (2004) (holding that denial of previous motion for summary judgment did not preclude party from "renewing its motion once new evidence came to light" (citing *Ballenger v. Bowen*, 313 S.C. 476, 477, 443 S.E.2d 379, 380 (1994) ("A denial of a motion for summary judgment decides nothing about the merits of the case, but simply decides the case should proceed to trial."); *Crosswell Enterprises, Inc. v. Arnold*, 309 S.C. 276, 279, 422 S.E.2d 157, 159 (Ct. App. 1992) (where a first motion for summary judgment is denied, the trial court may permit a second motion for summary judgment based on matters not involved in the first). As BANA filed its Renewed Motion for Summary Judgment based on new matters and evidence, including the 2015 Assignment and the Trial Court's substitution of FNMA as Plaintiff. Moreover, the Dalens *consented* to BANA's Motion to Amended Scheduling Order, which was premised on BANA's desire to file a renewed motion for summary judgment. [R. pp. 195-224; 796-98.] As such, Appellant is precluded from arguing the Trial Court erred in permitting BANA to file its Renewed Motion for Summary Judgment. *See Bankers Trust of S.C. v. Bruce*, 283 S.C. 408, 417, 323 S.E.2d 523, 529 (Ct. App.

1984) (a party will not be heard to complain on appeal regarding an issue to which he consented below).

**II. The Trial Court Did Not Err in Granting BANA's Renewed Motion for Summary Judgment.**

**A. As Appellant Has Failed to Raise Any Argument, in His Brief, as to How the Trial Court Erred in Granting BANA's Renewed Motion for Summary Judgment, He Has Abandoned the Issue on Appeal.**

Appellant has abandoned the issue of whether the Trial Court erred in Granting BANA's Renewed Motion for Summary Judgment as he has failed to provide *any* argument in his Brief as to *how* the Trial Court erred in granting the Motion. Beyond the conclusory assertions in his Brief "that [BANA] rehashed previous arguments, presented no new issues or evidence," and that the Dalens' "brought up Judge Macaulay's denial of [BANA's] first motion for summary judgment" as the reason the Renewed Motion for Summary Judgment should be denied, Appellant provides no argument as to *how* the Trial Court erred in granting BANA's Motion. (Appellant's In. Br. p. 7.) Appellant has also failed to cite to *any* legal authority to demonstrate how the granting of BANA's Motion was error. (*Id.*) As such, Appellant has failed to preserve the issue for review. See *Jinks v. Richland Cty.*, 355 S.C. 341, 344 n.3, 585 S.E.2d 281, 283 n.3 (2003) (concluding that an issue raised in appellant's brief was abandoned when appellant provided no argument on the issue); *Fields v. Melrose Ltd. P'ship*, 312 S.C. 102, 106 n.3, 439 S.E.2d 283, 285 n.3 (Ct. App. 1993) ("[A]n issue is deemed abandoned on appeal and, therefore, not presented for review, if it is argued in a short, conclusory statement without supporting authority."); *Jones v. SC Dep't of Health & Env'tl. Control*, 384 S.C. 295, 317, 682 S.E.2d 282, 294 (Ct. App. 2009) (argument abandoned where appellant failed to explain *how* the trial court erred); *Englert, Inc. v. Netherlands Ins. Co.*, 315 S.C. 300, 304 n.2, 433 S.E.2d 871, 873 n.2 (Ct. App. 1993) (concluding that appellant's one-sentence argument was too conclusory to preserve

an issue for appellate review).<sup>2</sup> Accordingly, the Trial Court's Summary Judgment should be affirmed.

**B. To the Extent Appellant's Arguments are Preserved for Review, They Are Without Merit.**

Although all of Appellant's Counterclaims and affirmative defenses were addressed—and dismissed—by the Trial Court's Summary Judgment, the only issue that Appellant addresses in his Brief as a basis for reversing the Trial Court's Summary Judgment is his contention that BANA lacked standing to prosecute the Foreclosure Action. To the extent BANA can decipher Appellant's arguments, Appellant asserts that the “crux” of his challenge to the Foreclosure Action is that BANA lacked standing due to (1) BANA's securitization of the Note, (2) BANA's failure to produce an “unbroken chain of title” for the Note, and (3) for BANA's production of (allegedly) fraudulent assignments of the Mortgage. (Appellant's In. Br. pp. 11–16.) Assuming, *arguendo*, that Appellant's conclusory assertions have preserved the issue for review, Appellant's arguments are baseless as they are contrary to the evidence presented and well-established caselaw:

1. South Carolina law is clear that the servicer of a mortgage loan, as the note holder, has authority to prosecute a foreclosure 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 the Hunley, Inc.*, 369 S.C. 20, 28, 630 S.E.2d 474, 479 (2006)).

---

<sup>2</sup> Furthermore, as Appellant failed to make any argument in his Brief as to *how* the Trial Court erred in granting BANA's Renewed Motion for Summary Judgment, he is precluded from more fully addressing the issue in a *reply brief*. See *Fields*, 312 S.C. at 106 n.3, 439 S.E.2d at 285 n.3 (“[A]n appellant may not use the reply brief to argue issues not argued in his brief in chief[.]”); *Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 692 (Ct. App. 2001) (holding that even if an argument is raised in an initial brief, if the argument is conclusory and

South Carolina law 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, 222–23, 746 S.E.2d 478, 482 (Ct. App. 2013) (citing *Bankers Trust (Delaware) v. 236 Beltway Inv.*, 865 F. Supp. 1186, 1191 (E.D.Va.1994) (concluding that both lender and servicer have standing to foreclose even if servicer is not the holder of the mortgage)); *In re Marks*, 548 B.R. 703, 712 (Bankr. D.S.C. 2016) (citing *Draper* to hold that plaintiff was entitled to enforce mortgage as either the holder of the promissory note or the servicer of the mortgage loan). In addition, pursuant to S.C. Code Ann. § 36-3-301, 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).

In this case, the evidence produced at the March 23, 2016 hearing on BANA’s Renewed Motion for Summary Judgment unequivocally proved that BANA was both the holder of the Note and the servicer of the Loan. In support of the Renewed Motion for Summary Judgment, the Trial Court admitted into evidence the transcript of the deposition of Zachary Chromiak, a BANA Assistance Vice President, who testified that BANA’s predecessor, Countrywide, came into possession of the Note on January 14, 2008, and that BANA, and its predecessor Countrywide, have serviced the Loan since January 14, 2008. [R. pp. 897 3:5–16, 898 5:13–6:12, 900 14:3–17.] BANA provided a history of the Dalen’s payments on the Loan to BANA, from the time of the Loan’s inception through the Dalen’s default (“Payment History”). [R. pp. 765–84.]

---

unsupported by authority, the argument is not preserved for review and the appellant is precluded from more fully addressing the issue in a reply brief).

BANA also introduced into evidence several acknowledgments by Appellant recognizing BANA as the servicer of the Loan, including: Appellant's deposition testimony, in which Appellant conceded that Countrywide was BANA's predecessor-in-interest, and that the Dalens made payments to BANA as the servicer of their Loan at the time of the Dalens' default [R. pp. 828:25-829:1-4]; the Dalens' response to BANA's request for admission, by which the Dalens acknowledged that the Payment History was an accurate reflection of their payments on the Loan [R. pp. 693-94]; the Dalens' Memorandum of Law stating that BANA is a servicer [R. pp. 799-805]; and BANA's response to the Dalens' Request for Admissions, stating that BANA is the servicer of the Loan. [R. pp. 893-95].

Thus, BANA produced sufficient summary judgment evidence to establish its standing to foreclose the Mortgage as the servicer of the Loan, *see Draper*, 405 S.C. at 223, 746 S.E.2d at 482 (master-in-equity did not err in finding plaintiff had standing to foreclose on mortgage where defendant acknowledged that plaintiff was servicer of his loan), and as the holder of the Note, *see id.* at 223-24, 746 S.E.2d at 483 (summary judgment evidence was sufficient to establish bank as holder of note where note executed in favor of plaintiff's predecessor-in-interest, plaintiff produced copy of note endorsed-in-blank by plaintiff's predecessor-in-interest, as well as a ledger of payments on the loan beginning one month after borrower executed the note, and defendant did not contest that plaintiff had merged with predecessor-in-interest). *See also Marks*, 548 B.R. at 712. Since BANA unequivocally demonstrated its standing to prosecute the Foreclosure Action, Appellant's argument on appeal to the contrary clearly fails. Therefore, the Summary Judgment should be affirmed.

2. As the holder of the Note, BANA was not required to establish its standing to prosecute the Foreclosure Action as the owner of the Note or through an assignment of the Mortgage.

Appellant also contends that BANA did not have standing to prosecute the Foreclosure Action because it failed to produce an “unbroken chain of title” to the Note and Mortgage. [Appellant’s In. Br. pp. 6, 8, 11, 13.] In support of this argument, Appellant contends that BANA could not have obtained an interest in, and a right to enforce, the Note and Mortgage through its acquisition of Countrywide because FNMA became the “owner” of the Note before Countrywide merged with BANA. [*Id.*] Appellant further contends that BANA lacked standing as the assignment of the Mortgage from Quicken Loans to Countrywide, BANA’s predecessor-in-interest, could not have occurred as the Note had been sold to FNMA prior to the execution of the 2011 Assignment.

As discussed above, however, the holder in possession of a mortgage-backed promissory note may enforce the note and mortgage without a further showing that it is the beneficial owner of the note. See *Draper*, 405 S.C. at 220–22, 746 S.E.2d at 481–82 (finding that a loan servicer was a real party in interest with standing to enforce the note and mortgage); S.C. Code Ann. § 36-3-301 (“A person may be a person entitled to enforce the instrument *even though the person is not the owner of the instrument . . .*” (emphasis added)). Similarly, an assignment of a mortgage is not required to establish standing to enforce the note and the mortgage securing the note. See *Draper*, 405 S.C. at 220–22, 746 S.E.2d at 481–82 (noting that a mortgage follows the note it secures and a servicer of a mortgage has standing to foreclose even if it is not the holder of the mortgage); *In re Woodberry*, 383 B.R. 373, 377 (Bankr. D.S.C. 2008) (“No written assignment of the mortgage is required under state law.”). Thus, Appellant’s contention that the assignments of the Mortgage were fraudulent is irrelevant to BANA’s standing to foreclose.

BANA established that it was the holder of the Note and was, therefore, not required to prove it owned the Note or to produce an assignment of the Mortgage to establish its standing to prosecute the Foreclosure Action. *See Draper*, 405 S.C. at 220–22, 746 S.E.2d at 481–82.

On appeal, Appellant has failed to make any argument as to how the Trial Court erred. In his Brief, Appellant merely makes repeated assertions that the assignment were fraudulent and makes a reference to a “declaration and counterclaim” as containing the evidence of the alleged fraud, which Appellant filed with the Trial Court on March 27, 2017. [Appellant’s In. Br. p. 12.] As the “declaration and counterclaim” was filed *after* the entry of the Summary Judgment and his Motion for Reconsideration, it cannot support Appellant’s argument for reversal of Summary Judgment. As Appellant failed to make any argument on appeal regarding the alleged fraudulent assignments of the Mortgage, he has failed to preserve the issue for review. *See Jinks*, 355 S.C. at 344 n.3, 585 S.E.2d at 283 n.3; *Fields*, 312 S.C. at 106 n.3, 439 S.E.2d at 285 n.3.

3. Appellant’s contention that securitization of the Note and Mortgage rendered the debt unsecured is contrary to well-established South Carolina law and law from throughout the country.

To the extent Appellant contends that the securitization of the Loan converted the Loan to an “unsecured debt” [Appellant’s In. Br. pp. 3, 14], his argument is contrary to South Carolina caselaw. As discussed above, the holder in possession of a mortgage-backed promissory note may enforce the note and mortgage without a further showing that it is the beneficial owner of the note. *See Draper*, 405 S.C. at 220–22, 746 S.E.2d at 481–82 (finding that a loan servicer was a real party in interest with standing to enforce the note and mortgage). Accordingly, securitization of the Loan cannot affect a holder’s right to enforce the note and mortgage. Appellant’s argument to the contrary is without merit and provides no basis for reversing the Summary Judgment.

4. Appellant does not have Standing to Challenge the Validity of the Assignment of Mortgage.

South Carolina law is clear that Appellant lacks standing to challenge an assignment of a mortgage to which he is not a party. "Generally, a third person not in privity of contract with the contracting parties has no right to enforce a contract." *R.J. Griffin & Co. v. Beach Club II Homeowners Ass'n.*, 384 F.3d 157, 164 (4th Cir. 2004) (internal quotation marks and citations omitted) (applying South Carolina law). A mortgagor is only a party to the mortgage, and because an assignment or mortgage is a separate contract to which the mortgagor is not a party, a mortgagor cannot question its validity. See *Reese v. U.S. Bank, N.A.*, No. 3:11-2990-CMC-SVH, 2012 WL 1952819, at \*3 (D.S.C. Apr. 30, 2012) ("Plaintiff lacks standing to contest the Assignment of the Mortgage. Plaintiff is only a party to the Mortgage and, because the Assignment is a separate contract to which Plaintiff is not a party, she cannot question its validity." (citing *R.J. Griffin & Co.*, 384 F.3d at 164)); *In re Kain*, No. 08-08404-HB, 2012 WL 1098465, at \*8 (Bankr. D.S.C. Mar. 30, 2012) ("Whatever the context, it appears that a judicial consensus has developed holding that a borrower lacks standing to (1) challenge the validity of a mortgage securitization or (2) request a judicial determination that a loan assignment is invalid due to noncompliance with a pooling and servicing agreement, when the borrower is neither a party to nor a third party beneficiary of the securitization agreement, i.e., the PSA." (emphasis in original)); see also *In re MERS Litigation*, No. 09-2119-JAT, 2011 WL 4550189, at \*5 (D. Ariz. Oct. 3, 2011) ("Plaintiffs, as third-party borrowers, are uninvolved and unaffected by the alleged Assignments, and do not possess standing to assert a claim based on such."); *Kriegel v. MERS*, No. PC-2010-7099, 2011 WL 4947398, at \*5 (R.I. Super. Ct. Oct. 13, 2011) ("The assignment from MERS to FNMA did not cause injury in fact to the Plaintiff, as the assignment did not change his obligation to timely pay the Mortgage Note or suffer the consequences of

foreclosure.”). Accordingly, because Appellant was not a party to either the 2011 Assignment or the 2015 Assignment, he cannot question their validity. *See R.J. Griffin & Co.*, 384 F. 3d at 164.

### CONCLUSION

For the foregoing reasons, this Court should affirm the Summary Judgment.

This the 1<sup>st</sup> day of November, 2017.

Respectfully submitted,

**MCGUIREWOODS LLP**



Brian A. Calub (SCSB #72009)

MCGUIREWOODS, LLP

201 North Tryon Street, Suite 3000

Charlotte, North Carolina 28202

Telephone: (704) 343.2009

Facsimile: (704) 373-8842

BCalub@mcguirewoods.com

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

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM OCONEE COUNTY  
Court of Common Pleas

Honorable Steven C. Kirven, Master-In-Equity

RECEIVED

NOV 02 2017

SC Court of Appeals

Case No. 2011-CP-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.....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

CERTIFICATE OF COMPLIANCE FOR FINAL BRIEF

Brian A. Calub (SCSB #72009)

MCGUIREWOODS, LLP

201 North Tryon Street, Suite 3000

Charlotte, North Carolina 28202

Telephone: (704) 343.2009

Facsimile: (704) 373-8842

[BCalub@mcguirewoods.com](mailto:BCalub@mcguirewoods.com)

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

1197

The undersigned certifies that Respondent Bank of America, N.A.'s Final Brief complies with Rule 211(b), SCACR.

Brian A. Calub  
Brian A. Calub

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM OCONEE COUNTY  
Court of Common Pleas

Steven C. Kirven, Master-In-Equity

Appellate Case No.: 2017-000886

**RECEIVED**

NOV 02 2017

SC Court of Appeals

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.

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.

**FINAL BRIEF OF RESPONDENT FEDERAL NATIONAL MORTGAGE  
ASSOCIATION**

Charles S. Gwynne Jr. (SC Bar # 73844)  
Rogers Townsend & Thomas, PC  
Post Office Box 100200 (29202)  
1221 Main Street 14<sup>th</sup> Floor  
Columbia, South Carolina 29201  
(803)771-7900  
charlie.gwynne@rtt-law.com  
Attorney for the Respondent Federal  
National Mortgage Association  
Rogers Townsend & Thomas, PC and its staff are debt collectors

November 2, 2017

## TABLE OF CONTENTS

|                                                                                                                                                                                                                                                                      |    |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----|
| Table of Authorities .....                                                                                                                                                                                                                                           | 3  |
| Statement of Issues on Appeal .....                                                                                                                                                                                                                                  | 6  |
| Statement of the Case .....                                                                                                                                                                                                                                          | 7  |
| Statement of Facts .....                                                                                                                                                                                                                                             | 10 |
| Standard of Review .....                                                                                                                                                                                                                                             | 14 |
| Arguments .....                                                                                                                                                                                                                                                      | 15 |
| I.    APPELLANTS HAVE ABANDONED THEIR ISSUES RAISED ON<br>APPEAL BY MAKING ONLY CONCLUSORY ARGUMENTS<br>WITHOUT ANY VALID SUPPORTING<br>AUTHORITY .....                                                                                                              | 15 |
| II.   THE TRIAL COURT PROPERLY HELD THAT RESPONDENT<br>FEDERAL NATIONAL MORTGAGE ASSOCIATION HAD<br>STANDING TO BRING THE ACTION .....                                                                                                                               | 16 |
| III.  THE TRIAL COURT DID NOT ERR IN FINDING THAT THE<br>COURT HAD SUBJECT MATTER JURISDICTION OVER THE<br>CASE .....                                                                                                                                                | 18 |
| IV.   THE TRIAL COURT DID NOT ERR IN DISMISSING<br>APPELLANTS' ARGUMENTS THAT SECURITIZATION OF<br>THE NOTE AND MORTGAGE RENDERED THE DEBT<br>UNSECURED OR THAT THE ASSIGNMENT OF MORTGAGE<br>PREVENTED THE RESPONDENT FROM PROCEEDING WITH<br>THE FORECLOSURE ..... | 19 |
| V.    THE TRIAL COURT DID NOT ERR IN FINDING THAT<br>RESPONDENT FEDERAL NATIONAL MORTGAGE<br>ASSOCIATION PRESENTED A COMPETENT FACT WITNESS<br>AT THE FINAL FORECLOSURE TRIAL .....                                                                                  | 21 |
| VI.   THE TRIAL COURT DID NOT ERR IN PROCEEDING WITH A<br>NON JURY TRIAL .....                                                                                                                                                                                       | 22 |
| VII.  APPELLANTS FAILED TO REFUTE THE MASTER'S LEGAL<br>CONCLUSIONS WITH CITATION TO<br>AUTHORITIES .....                                                                                                                                                            | 23 |
| Conclusion .....                                                                                                                                                                                                                                                     | 24 |

## TABLE OF AUTHORITIES

### CASES

|                                                                                                          |        |
|----------------------------------------------------------------------------------------------------------|--------|
| <u>BAC Home Loan Servicing, L.P. v. Kinder</u><br>398 S.C. 619, 623-24, 731 S.E.2d 547, 549 (2012) ..... | 20     |
| <u>Balcon Inc. v. Sadler</u><br>244 S.E.2d 164 (N.C. App. 1978) .....                                    | 18     |
| <u>Ballou v. Young</u><br>42 S.C. 170, 20 S.E. 84 (1894) .....                                           | 20     |
| <u>Bank of Am., N.A. v. Draper</u><br>405 S.C. 214, 746 S.E.2d 478 (Ct. App. 2013) .....                 | 17, 19 |
| <u>Bank of Babylon v. Quirk</u><br>472 A.2d 21 (Conn. 1984) .....                                        | 18     |
| <u>Dove v. Gold Kist</u><br>314 S.C. 235, 442 S.E.2d 598 (1994) .....                                    | 18     |
| <u>Ellie Inc. v. Miccichi</u><br>358 S.C. 78, 594 S.E.2d 485 (Ct. App. 2004) .....                       | 15     |
| <u>Hahn v. Smith</u><br>157 S.C. 157, 154 S.E. 112 (1930) .....                                          | 20     |
| <u>Hayne Fed. Credit Union v. Bailey</u><br>327 S.C. 242, 489 S.E.2d 472 (1997) .....                    | 14, 23 |
| <u>Hill v. S.C. Dep't of Health &amp; Envtl. Control</u><br>389 S.C. 1, 698 S.E.2d 612 (2010) .....      | 17     |
| <u>In re McCracken</u><br>346 S.C. 87, 551 S.E.2d 235 (2001) .....                                       | 15     |
| <u>In re Woodberry</u><br>383 B.R. 373, 376 (Bankr. D.S.C. 2008) .....                                   | 20     |
| <u>l'On v. Town of Mt. Pleasant</u><br>338 S.C. 406, 526 S.E.2d 716 (2000) .....                         | 14     |
| <u>Lester v. Dawson</u><br>327 S.C. 263, 491 S.E.2d 240 (1997) .....                                     | 22     |

|                                                                                                                   |    |
|-------------------------------------------------------------------------------------------------------------------|----|
| <u>Lowcountry Open Land Trust v. Charleston S. Univ.</u><br>376 S.C. 399, 656 S.E.2d 775 (Ct. App. 2008).....     | 14 |
| <u>Midfirst Bank, SSB v. C.W. Haynes &amp; Co., Inc.</u><br>893 F. Supp. 1304, 1318 (D.S.C. 1994).....            | 20 |
| <u>Mortgage Elec. Sys., Inc. v. White</u><br>384 S.C. 606, 682 S.E.2d 498, 502 n. 2 (Ct. App. 2009).....          | 14 |
| <u>Pinckney v. Warren</u><br>344 S.C. 382, 544 S.E.2d 620 (2001) .....                                            | 14 |
| <u>Potter v. Spartanburg Sch. Dist. 7</u><br>395 S.C. 17, 716 S.E.2d 123 (Ct. App. 2011).....                     | 15 |
| <u>R.J. Griffin &amp; Co. v. Beach Club II Homeowners Ass'n</u><br>384 F.3d 157 (4 <sup>th</sup> Cir. 2004) ..... | 19 |
| <u>South Carolina Nat'l Bank v. Halter</u><br>293 S.C. 121, 128, 359 S.E.2d 74, 77 (Ct.App.1987).....             | 20 |
| <u>Sloan v. Friends of the Hunley, Inc.</u><br>369 S.C. 20, 630 S.E.2d 474 (2006) .....                           | 17 |
| <u>Skinner v. Westinghouse Elec. Corp.</u><br>380 S.C. 91, 668 S.E.2d 795 (1995) .....                            | 18 |
| <u>Twelfth RMA Partners, L.P. v. National Safe Corp.</u><br>335 S.C. 635, 518 S.E.2d 44 (Ct. App. 1999).....      | 21 |
| <u>Wachovia Bank, Nat. Ass'n. v. Blackburn</u><br>407 S.C. 321, 755 S.E.2d 437 (2014).....                        | 23 |

#### OTHER AUTHORITIES

|                                                           |    |
|-----------------------------------------------------------|----|
| South Carolina Appellate Court Rules<br>Rule 220(c) ..... | 14 |
| Rule 208(b)(1)(D) .....                                   | 15 |
| South Carolina Constitution<br>Art. V, § 11 .....         | 18 |
| South Carolina Statutes<br>S.C. Code Ann. § 14-11-15..... | 18 |

|                                     |        |
|-------------------------------------|--------|
| S.C. Code Ann. § 14-11-85.....      | 19     |
| S.C. Code Ann. § 19-5-510.....      | 21, 22 |
| S.C. Code Ann. § 30-7-30.....       | 20     |
| S.C. Code Ann. § 30-7-40.....       | 20     |
| S.C. Code Ann. § 36-1-201(21) ..... | 17     |
| S.C. Code Ann. § 36-3-301.....      | 17     |
| South Carolina Rules of Evidence    |        |
| Rule 803(6) .....                   | 21, 22 |
| Secondary Sources                   |        |
| 21 C.J.S. Courts § 23 .....         | 18     |

**STATEMENT OF ISSUES ON APPEAL**

- I. HAVE APPELLANTS ABANDONED THEIR ISSUES RAISED ON APPEAL BY MAKING ONLY CONCLUSORY ARGUMENTS WITHOUT ANY LEGITIMATE SUPPORTING AUTHORITY?
- I. DID THE TRIAL COURT ERR IN FINDING THAT RESPONDENT FEDERAL NATIONAL MORTGAGE ASSOCIATION HAD STANDING TO BRING THIS ACTION?
- II. DID THE TRIAL COURT ERR IN FINDING THAT THE COURT HAD SUBJECT MATTER JURISDICTION OVER THE CASE?
- III. DID THE TRIAL COURT ERR IN DISMISSING APPELLANTS' ARGUMENTS THAT SECURITIZATION OF THE NOTE AND MORTGAGE AND ASSIGNMENT OF THE MORTGAGE RENDERED THE DEBT UNSECURED?
- IV. DID THE TRIAL COURT ERR IN FINDING THAT RESPONDENT FEDERAL NATIONAL MORTGAGE ASSOCIATION PRESENTED A COMPETENT FACT WITNESS AT THE FINAL FORECLOSURE TRIAL?
- V. DID THE TRIAL COURT ERR IN PROCEEDING WITH A NON JURY TRIAL?
- VI. DID APPELLANTS FAIL TO REFUTE THE MASTER'S LEGAL CONCLUSIONS WITH CITATION TO AUTHORITIES?

### STATEMENT OF THE CASE

This lawsuit 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. ("BANA"), filed its Lis Pendens, Summons, and Complaint on October 31, 2011. (R. pp. 71-76). On February 21, 2012, Appellants John D. Dalen and Julie A. Dalen ("Appellants") filed an Answer, Affirmative Defenses, Counterclaim, and Demand for Jury Trial. (R. pp. 87-104). On March 26, 2012, BANA filed a Reply to Appellants' 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, Appellants filed a Motion for Summary Judgment on Plaintiff's Complaint for Foreclosure. (R. pp. 185-186)<sup>1</sup>. 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 Order denying Appellants' 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 Appellants' 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).<sup>2</sup>

On June 1, 2015, BANA filed a Motion to Substitute the Plaintiff to Federal

---

<sup>1</sup> During the lawsuit, Appellants retained attorney William H. Sloan, Jr., Esquire to represent them. However, on August 11, 2016, an Order Relieving William H. Sloan as Counsel for Appellants was filed.

<sup>2</sup> The Court filed a duplicate Order on May 15, 2015.

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 Appellants' Counterclaims. (R. pp. 195-197). On March 21, 2016, BANA filed a Memorandum of Law in Support of its Renewed Summary Judgment Motion. (R. pp. 198-224).

On May 5, 2016, Appellants filed a Notice of Demand and Motion to Dismiss for Lack of Subject Matter Jurisdiction. (R. pp. 225-232). On July 28, 2016, the Court Issued an Order granting BANA's Renewed Motion for Summary Judgment as to Appellants' Counterclaims. (R. pp. 29-41). On August 8, 2016, Appellants filed a Motion for Reconsideration of the Court's July 28, 2016 Order. (R. pp. 233-246). On October 13, 2016, the Court issued an Order denying Appellants' Motion to Dismiss (R. pp. 48-50). On October 13, 2016, the Court issued an Order denying Appellants' Motion for Reconsideration of Order granting BANA's renewed Motion for Summary Judgment as to Appellants' 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. (R. pp. 55-70).

On March 15, 2017, Appellants filed an Objection and Notice of Motion, and Motion for a New Trial and/or Amendment 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 Appellants' Motion for a New Trial and/or Amendment of Judgment on Grounds of Fraud and Denial of Due Process of Law. (R. pp. 53-54).

On March 31, 2017, the Appellants filed their Initial Brief and Designation of Matter to be Included in the Record on Appeal appealing the Court's Judgment of Foreclosure and Sale filed March 6, 2017 and Order denying Motion for a New Trial filed March 17, 2016.

### STATEMENT OF THE FACTS

This appeal involves the outcome of a non-jury final foreclosure trial held on March 2, 2017 in which Respondent Federal National Mortgage Association was granted a Judgment of Foreclosure and Sale by order of the Honorable Steven C. Kirven, Master-in-Equity for Oconee County. (R. pp. 55-70).

On or about December 20, 2007, Appellant John D. Dalen executed a Fixed Rate Note ("Note") in the amount of \$118,750.00 in favor of Quicken Loans, Inc. ("Quicken Loans") (R. pp. 916-918). That same day, Appellants also executed a Mortgage ("Mortgage") on the property located at 109 Wood Valley Drive Westminster, SC 29693 ("Property"), which secured the Note and was delivered to Mortgage Electronic Registration Systems, Inc. as nominee for Quicken Loans, Inc., its successors and assigns. (R. pp. 919-934). The Mortgage was recorded in the Office of the Register of Deeds for Oconee County on December 21, 2007 in Book 2551 at Page 206. (R. pp. 919-934). This Mortgage was assigned to BAC Home Loans Servicing, L.P. f/k/a Countrywide Home Loans Servicing, L.P. by assignment dated May 9, 2011 and recorded on May 16, 2011 in Book 2975 at Page 40. (R. pp. 935-936). Subsequently, this Mortgage was assigned to Federal National Mortgage Association, by assignment dated April 13, 2015 and recorded on April 22, 2015 in Book 3382 at Page 237. (R. pp. 935-936). Appellant John D. Dalen failed to make the required payments under the terms of the Note; the Note remained in default after December 1, 2010. (R. p. 393, line 25-p. 394, line 3). As of March 2, 2017, Appellant John D. Dalen owed \$114,875.72 in principal, \$49,130.92 in interest, and \$42,289.27 in other associated fees and costs related to the Mortgage. (R. p. 58-62).

At the trial on March 2, 2017, Respondent presented the testimony of William Rankin ("Rankin"), a Litigation Officer with Seterus, the Respondent's loan servicer. (R. p. 387, line 8-p. 388, line 5). Rankin testified that he had personal knowledge of the records kept and maintained in connection with Appellants' loan as part of his job duties. (R. p. 387, line 22-p. 388, line 16). Rankin also testified as to the fact that the Note was endorsed in blank and that Seterus was in physical possession of the original Note through its attorney, which was present in the courtroom during the trial. (R. p. 389, lines 14-18). The Note and the Mortgage were admitted into evidence over the objection of Appellants. (R. p. 390, line 13-p. 391, line 8, pp. 16-934). Rankin further testified that the Mortgage had been assigned from the original lender to Respondent by way of two Assignments of Mortgage and a copy of the two Assignments of Mortgage were admitted into evidence over the objection of Appellants. (R. p. 391, line 12-p. 392, line 7, pp. 935-936).

Rankin testified that Appellant John D. Dalen eventually failed to make his loan payments and that the loan went into default under the terms of the loan documents. (R. p. 392, lines 8-11). Rankin testified that the loan was due and owing for the December 2010 payment. (R. p. 393, line 25-p. 394, line 3). A copy of the loan payment history was then admitted into evidence over the objection of the Appellants. (R. p. 394, lines 4-20). Rankin then provided a breakdown for the Court as to what the total amount due was on the loan. (R. p. 395, line 20-p. 398, line 13, pp. 1005-1075).

At the trial, Appellant John D. Dalen made four main arguments. First, he objected to the entire proceeding based on the argument that a) the court lacked subject

matter jurisdiction, b) it was an unlawful foreclosure, and c) he was entitled to a jury trial. (R. p. 381, line 25-p. 386, line 7, p. 395, lines 8-10). Second, Appellant John D. Dalen also objected to the proceedings by arguing that Rankin was not a competent fact witness because he was employed by Seterus and not the Respondent. (R. p. 390, lines 18-25). Third, he argued that securitizing the Note resulted in Respondent being paid in full and it is therefore not possible for the Appellants to be in default under the terms of the Note. (R. p. 404, line 21-p. 405, line 7). Finally, Appellant John D. Dalen argued that there has not been a proper "chain of title" based on evidence of fraud due to the date of the Assignment of Mortgage in the case to BANA. (R. p. 405, line 14-p. 107, line 17).

Following the trial, on March 6, 2017, the Master-in-Equity entered a final Judgment of Foreclosure and Sale in favor of Respondent, finding inter alia, that Respondent has standing to persecute this action, that the witness's testimony supported a finding that Appellant John D. Dalen defaulted under the terms of the Note and Respondent was entitled to foreclose its Mortgage lien on the property, and that Appellants' default on the loan resulted in a total damages amount of \$206,295.91. (R. p. 56-62).

Appellants' initial brief on appeal rambles, is incoherent, and presents little or no substantive legal support for their arguments. At best, Appellants appear to challenge 1) the standing of the Respondent; 2) the trial court's subject matter jurisdiction; 3) the validity of the Assignment of Mortgages; 4) the Appellants' "denial" of a jury trial; and 5) Respondent's failure to provide a competent witness for trial.

The Master-in-Equity's final Judgment of Foreclosure and Sale and Order denying Appellants' Motion to Reconsider Judgment should be affirmed on several grounds. First, South Carolina law is clear that the servicer of a mortgage loan, as well as the Note holder, has authority to prosecute a foreclosure action, and actual "ownership" of the Note and Mortgage is not required. Second, the trial court had proper subject matter jurisdiction to hear the case and the Appellants were not entitled to a jury trial involving an equitable foreclosure cause of action. Third, Appellants' contention that securitization of the Note and Mortgage or the Assignments of Mortgage rendered the debt invalid and/or unsecured are contrary to well-established South Carolina law. Finally, Respondent's witness at trial was competent to testify and his testimony supported the findings in the Master's Orders.

### STANDARD OF REVIEW

The Court may affirm for any ground appearing in the record. Rule 220(c), SCACR; *see also* Mortgage Elec. Sys., Inc. v. White, 384 S.C. 606, 614, 682 S.E.2d 498, 502 n. 2 (Ct. App. 2009)(citing I'On v. Town of Mt. Pleasant, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000)).

"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). "In an appeal from an action in equity, tried by a judge alone, the Court may find facts in accordance with its own view of the preponderance of the evidence." Lowcountry Open Land Trust v. Charleston S. Univ., 376 S.C. 399, 407, 656 S.E.2d 775, 779 (Ct. App. 2008). "However, this broad scope of review does not require an appellate court to disregard the findings below or ignore the fact that the trial judge is in the better position to assess the credibility of the witnesses." Pinckney v. Warren, 344 S.C. 382, 387, 544 S.E.2d 620, 623 (2001).

"Moreover, the appellant is not relieved of his burden of convincing the appellate court the trial judge committed error in his findings." Id. at 38788, 544 S.E.2d at 623.

## ARGUMENTS

### **I. APPELLANTS HAVE ABANDONED THEIR ISSUES RAISED ON APPEAL BY MAKING ONLY CONCLUSORY ARGUMENTS WITHOUT ANY VALID SUPPORTING AUTHORITY**

Appellants have raised issues in this appeal by making only conclusory arguments without providing any valid statutory or common law in support of their allegations. As a result, Appellants have abandoned these arguments and they should not be considered by this Court.

In essence, abandonment is akin to issue preservation. "A bald assertion, without supporting argument, does not preserve an issue for appeal." In re McCracken, 346 S.C. 87, 92, 551 S.E.2d 235, 238 (2001). "An issue is deemed abandoned if the argument in the brief is not supported by authority or is only conclusory." Potter v. Spartanburg Sch. Dist. 7, 395 S.C. 17, 24, 716 S.E.2d 123, 127 (Ct. App. 2011).

Additionally, the South Carolina Appellate Court Rules provide that "[t]he brief shall be divided into as many parts as there are issues to be argued. At the head of each part, the particular issue to be addressed shall be set forth in distinctive type, followed by discussion and citations of authority." Rule 208(b)(1)(D), SCACR. "Numerous cases have held that where an issue is not argued within the body of the brief but is only a short conclusory statement, it is abandoned on appeal." Ellie, Inc. v. Miccichi, 358 S.C. 78, 99, 594 S.E.2d 485, 496 (Ct. App. 2004).

Here, Appellants list three issues for the Court's consideration in their Initial Brief and appear to make their arguments in both the "Statement of Facts" and "Argument" sections. (Initial Brief of Appellant pages v. and 2-18). While Appellants' Initial Brief does cite case law, Appellants make little or no attempt to connect their

arguments with the substance of the allegedly supportive case law. Appellants simply make conclusory statements throughout their Initial Brief and then imply, without any legal analysis, that various cases, many from jurisdictions outside South Carolina, support their position. The burden is on the Appellants to argue their position using the case law and statutory authority and not shift the burden to the Court to speculate as to how the legal authority was meant to be used to support the Appellants' arguments. Based on this, the Appellants have abandoned their issues on appeal.

## **II. THE TRIAL COURT PROPERLY HELD THAT RESPONDENT FEDERAL NATIONAL MORTGAGE ASSOCIATION HAD STANDING TO BRING THE ACTION**

Appellants' argument that Respondent lacks standing to prosecute the foreclosure action appears to relate to Appellants' mistaken belief that Respondent was required to show a proper "chain of title" from the original lender to the Respondent. (Initial Brief of Appellant pp. 2-9). This argument by the Appellants demonstrates a clear misunderstanding and misinterpretation of South Carolina law.

Appellants' arguments, to the best Respondent can decipher them, ultimately assert that (1) Respondent lacked standing to prosecute the foreclosure action because Respondent cannot prove a "chain of title" of the Note; (2) Respondent was not the "owner" of the Note because of a fraudulent Assignment of Mortgage; and (3) the mortgage loan is invalid and/or unsecured in light of an alleged securitization of the Note and Mortgage. (See generally Initial Brief of Appellant). Appellants' arguments, however, are baseless and contrary to both the evidence presented in this case and South Carolina law. Accordingly, the Trial Court properly entered final Judgment of

Foreclosure and Sale in favor of Respondent and properly denied Appellants' Motion to Reconsider Judgment.

"Generally, a party must be a real party in interest to the litigation to have standing." Hill v. S.C. Dep't of Health & Env'tl. Control, 389 S.C. 1, 22, 698 S.E.2d 612, 623 (2010) (quoting Sloan v. Friends of the Hunley, Inc., 369 S.C. 20, 28, 630 S.E.2d 474, 479 (2006)). South Carolina law 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). In addition, pursuant to S.C. Code Ann. § 36-3-301, 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 evidence produced at trial proved that Respondent had standing to bring this action. Rankin, the witness from Respondent's loan servicer, testified at trial that Seterus was servicing the Appellants' loan and he was aware of this based on his job duties. (R. p. 387, line 8-p. 388, line 16). The witness also testified that the Note was endorsed in blank, Seterus was in physical possession of the original Note through its attorney, and the Note was present in the courtroom during the trial. (R. p. 389, lines 14-18). Respondent's possession of the original Note endorsed in blank undoubtedly demonstrated its standing to prosecute the foreclosure action in this case; thus proving how Appellants' argument on appeal clearly fails. Therefore, the Master-in-Equity's

Judgment of Foreclosure and Sale and Order denying Appellants' Motion to Reconsider should be affirmed.

### III. THE TRIAL COURT DID NOT ERR IN FINDING THAT THE COURT HAD SUBJECT MATTER JURISDICTION OVER THE CASE

Appellants appear to argue that due to an alleged "fraudulent" Assignment of Mortgage, that fact alone divested the Court of subject matter jurisdiction to hear the case. Appellants provide no legal basis to support this position.

"Subject matter jurisdiction is 'the power to hear and determine cases of the general class to which the proceedings in question belong.'" Skinner v. Westinghouse Elec. Corp., 380 S.C. 91, 93, 668 S.E.2d 795, 796 (2008); Dove v. Gold Kist, 314 S.C. 235, 237-238, 442 S.E.2d 598, 600 (1994) (quoting Bank of Babylon v. Quirk, 472 A.2d 21, 22 (Conn. 1984); accord Balcon, Inc. v. Sadler, 244 S.E.2d 164 (N.C.App.1978) (citing 21 C.J.S. Courts § 23, pp. 36-37). "The Circuit Court shall be a general trial court with original jurisdiction in civil and criminal cases, except those cases in which exclusive jurisdiction shall be given to inferior courts, and shall have such appellate jurisdiction as provided by law." S.C. Const. Ann. Art. V, § 11. "The equity court is considered a division of the circuit court, and the master-in-equity, as judge of the equity court, is entitled to all the benefits and subject to all the requirements of the South Carolina Bar and the rules of the Supreme Court in the same respect as circuit court and family court judges." S.C. Code Ann. § 14-11-15. "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 an 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.

This action was properly referred to the Oconee Master-in-Equity. Pursuant to case law, statute, and The Constitution of the State of South Carolina, the Master-in-Equity clearly had subject matter jurisdiction to hear the case and issue a final judgment on all causes of action.

**IV. THE TRIAL COURT DID NOT ERR IN DISMISSING APPELLANTS' ARGUMENTS THAT SECURITIZATION OF THE NOTE AND MORTGAGE RENDERED THE DEBT UNSECURED OR THAT THE ASSIGNMENT OF MORTGAGE PREVENTED THE RESPONDENT FROM PROCEEDING WITH THE FORECLOSURE.**

Appellants' assertion that securitization of the loan wipes out the secured mortgage obligation is unsupportable under South Carolina law. As discussed *supra* in Section II, the holder in possession of a mortgage-backed promissory note may enforce the note and mortgage without a further showing that it is the beneficial owner of the note. See Draper, 405 S.C. at 220-22, 746 S.E.2d at 481-82 (finding that a loan servicer was a real party in interest with standing to enforce the note and mortgage). Accordingly, securitization of the loan cannot affect a holder's right to enforce the note and mortgage.

Furthermore, South Carolina law is clear that Appellants lack standing to challenge an assignment to which they are not a party. "Generally, a third person not in privity of contract with the contracting parties has no right to enforce a contract." R.J. Griffin & Co. v. Beach Club II Homeowners Ass'n., 384 F.3d 157, 164 (4th Cir. 2004) (internal quotation marks and citations omitted) (applying South Carolina law). A mortgagor is only a party to the mortgage, and because an assignment or mortgage is a

separate contract to which the mortgagor is not a party, a mortgagor cannot question its validity.

Assignments of mortgage are not transfer documents, convey no right or interest in the note or loan, and are a nullity as to the issue of standing. The recording of an assignment of mortgage gives notice to third parties regarding the new holder of the debt, but it does not transfer the debt itself. See S.C. Code Ann. § 30-7-30 and § 30-7-40. Further, an assignment does not even have to be recorded, and failure to record an assignment of mortgage does not affect the rights of an assignee. BAC Home Loan Servicing, L.P. v. Kinder, 398 S.C. 619, 623-24, 731 S.E.2d 547, 549 (2012), reh'g denied (Sept. 6, 2012). South Carolina law "does not require both possession of the note and a written assignment of the mortgage to prove ownership..." In re Woodberry, 383 B.R. 373, 376 (Bankr. D.S.C. 2008) "South Carolina recognizes the 'familiar and uncontroverted proposition' that 'the assignment of a note secured by a mortgage carries with it an assignment of the mortgage.'" Midfirst Bank, SSB v. C.W. Haynes & Co., Inc., 893 F. Supp. 1304, 1318 (D.S.C. 1994)(citing Hahn v. Smith, 157 S.C. 157, 154 S.E. 112 (1930); Ballou v. Young, 42 S.C. 170, 20 S.E. 84 (1894)). "The assignment of a mortgage as distinct from the debt it secures is nugatory and confers no rights upon the transferee. . . ." South Carolina Nat'l Bank v. Halter, 293 S.C. 121, 128, 359 S.E.2d 74, 77 (Ct.App.1987) (citing Hahn, 157 S.C. 157, 154 S.E. 112). Therefore, enforcement of a note in South Carolina does not require the plaintiff to have a written assignment of the mortgage. Woodberry, 383 B.R. at 377.

**V. THE TRIAL COURT DID NOT ERR IN FINDING THAT  
RESPONDENT FEDERAL NATIONAL MORTGAGE  
ASSOCIATION PRESENTED A COMPETENT FACT WITNESS  
AT THE FINAL FORECLOSURE TRIAL**

Appellants' argument that Respondent's witness at trial was not competent to testify at trial is that 1) he did not work for Respondent and 2) he did not understand what Appellant John D. Dalen was referring to when Mr. Dalen questioned him about securitization of mortgage loans. (Appellants' Initial Brief pages 4-9 and R. p. 390, lines 18 to 25). As an employee of the Respondent's loan servicer, Rankin properly testified to the business records for the Appellants' loan, provided sufficient evidence to establish the Appellants' default under the terms of the loan documents, and testified to the amount due under the loan documents.

"The business records exception is found in both the South Carolina Code at § 19-5-510 (1985) and Rule 803(6) of the South Carolina Rules of Evidence. Both exceptions require that the evidence be given by a 'custodian or other qualified witness.'" Twelfth RMA Partners, L.P. v. National Safe Corp., 335 S.C. 635, 642, 518 S.E.2d 44, 48 (Ct.App.1999)

"A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, or diagnoses, made at or near the time by, or from information transmitted by a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness" is not excluded from evidence by the hearsay rule. Rule 803(6), SCRE. Further, "[a] record of an act,

condition or event shall, insofar as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission." S.C. Code Ann. § 19-5-510 ("Uniform Business Records as Evidence Act").

In this case, Rankin's testimony laid the foundation for all the exhibits introduced at trial by the Plaintiff. Rankin's testimony established that he worked for the Respondent's loan servicer, he had personal knowledge of the records kept and maintained in connection with Appellants' loan, the Note was endorsed in blank, the loan was in default, and he testified to the current amount due under the loan records. (R. p. 387, line 8-p. 394, lines 20, pp. 916-1075). This testimony established Rankin as a competent witness who met Rule 803(6)'s authentication requirement and the Uniform Business Records as Evidence Act's requirements as a records custodian. Appellants' challenge of Rankin as a competent witness lacks merit. Therefore, the Master-in-Equity's Judgment of Foreclosure and Sale and Order denying Appellants' Motion to Reconsider should be affirmed.

## **VI. THE TRIAL COURT DID NOT ERR IN PROCEEDING WITH A NON JURY TRIAL**

Appellants argue that the trial court improperly denied their right to a jury trial. "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). "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). Because a foreclosure action is one sounding in equity, a party is not entitled, as a matter of right, to a jury trial. Wachovia Bank, Nat. Ass'n v. Blackburn, 407 S.C. 321, 328, 755 S.E.2d 437, 441 (2014). The trial court did not err in proceeding with this equitable foreclosure action with a non-jury trial.

#### **VII. APPELLANT FAILED TO REFUTE THE MASTER'S LEGAL CONCLUSIONS WITH CITATION TO AUTHORITIES**

Again, if this Court were to find that Appellants have preserved issues for appellate review, Appellants have failed to refute or counter any of the Master's legal conclusions in the Orders with citation to authorities. As further grounds for affirmance, Respondent hereby incorporates by reference all of the Master's legal conclusions and legal authorities set forth in the Final Orders.

**CONCLUSION**

Based on the foregoing and any additional sustaining grounds appearing in the record, Respondent respectfully requests that the Court affirm the Master in Equity's Orders entered on March 6, 2017 and March 17, 2017.

Respectfully submitted,



---

Charles S. Gwynne Jr. (SC Bar # 73844)  
Rogers Townsend & Thomas, PC  
Post Office Box 100200 (29202)  
1221 Main Street 14<sup>th</sup> Floor  
Columbia, South Carolina 29201  
(803)771-7900  
charlie.gwynne@rtt-law.com  
Attorney for the Respondent  
Rogers Townsend & Thomas, PC and its staff are debt collectors

November 2, 2017

## CERTIFICATE OF COUNSEL

The undersigned counsel for Respondent Federal National Mortgage Association certifies that the foregoing Final Brief of Respondent Federal National Mortgage Association complies with Rule 211(b), SCACR.



Charles S. Gwynne Jr. (SC Bar # 73844)  
Rogers Townsend & Thomas, PC  
Post Office Box 100200 (29202)  
1221 Main Street 14<sup>th</sup> Floor  
Columbia, South Carolina 29201  
(803)771-7900  
charlie.gwynne@rtt-law.com  
Attorney for the Respondent  
Rogers Townsend & Thomas, PC and its staff are debt collectors

November 2, 2017

**RECEIVED**  
NOV 02 2017  
SC Court of Appeals

McGuireWoods LLP  
Fifth Third Center  
201 North Tryon Street  
Suite 3000  
Charlotte, NC 28202  
Tel 704.343.2000  
Fax 704.343.2300  
www.mcguirewoods.com

Brian A. Calub  
Direct: 704.343.2009

McGUIREWOODS

bcalub@mcguirewoods.com  
Fax: 704.373.8842

July 24, 2019

**VIA FEDERAL EXPRESS**

**TRACKING NUMBER: 788659587940**

Clerk of Court  
SC Court of Appeals  
Post Office Box 11629  
Columbia, SC 29211

**RE:** Federal National Mortgage Assoc. and Bank of America, N.A., Respondents v.  
John D. Dalen  
Appellant Case No.: 2017-000886

Dear Sir or Madam

Enclosed for filing please find one (1) original and six (6) copies of Respondent Bank of America, N.A.'s Return to Appellant's Petition for Hearing. Once file-stamped, please return a copy in the enclosed self-addressed, stamped envelope provided for your convenience.

Thank you for your assistance to this matter, and should you have any questions, please do not hesitate to contact me.

Very truly yours,

McGuireWoods LLP



Brian A. Calub

Enclosures

cc: John D. Dalen  
Julie A. Dalen  
B. Lindsay Crawford, III  
Theodore Von Kellar

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM OCONEE COUNTY  
Court of Common Pleas

Honorable Steven C. Kirven, Master-In-Equity

Case No. 2011-CP-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.....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 BANK OF AMERICA, N.A.'S  
RETURN TO APPELLANT'S PETITION FOR REHEARING

Brian A. Calub (SCSB #72009)  
MCGUIREWOODS, LLP  
201 North Tryon Street, Suite 3000  
Charlotte, North Carolina 28202  
Telephone: (704) 343-2009  
[BCalub@mcguirewoods.com](mailto:BCalub@mcguirewoods.com)  
*Attorney for Respondent Bank of America, N.A.,  
successor by merger to BAC Home Loans Servicing,  
L.P. f/k/a Countrywide Home Loans Servicing, L.P*

## TABLE OF CONTENTS

|                                                                                                                                                                                                                                                                                      | Page |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------|
| INTRODUCTION .....                                                                                                                                                                                                                                                                   | 1    |
| ARGUMENT .....                                                                                                                                                                                                                                                                       | 1    |
| I.    BECAUSE APPELLANTS' NEVER ARTICULATED ANY GROUNDS<br>TO APPEAL THE TRIAL COURT'S GRANT OF SUMMARY<br>JUDGMENT TO BANA FOR APPELLANTS' COUNTERCLAIMS,<br>APPELLANTS ARE NOT ENTITLED TO ANY REHEARING ON<br>SUCH ISSUES THAT WERE NEVER PROPERLY RAISED IN THEIR<br>BRIEF ..... | 1    |
| II.   THE TRIAL COURT PROPERLY REFERRED SUBJECT MATTER<br>JURISDICTION OVER THE FORECLOSURE ACTION TO THE<br>MASTER-IN-EQUITY FOR FINAL ADJUDICATION .....                                                                                                                           | 2    |
| III.  FANNIE MAE HAD STANDING TO PROSECUTE THE<br>FORECLOSURE ACTION UNDER SOUTH CAROLINA LAW AS<br>THE HOLDER OF THE NOTE FOR APPELLANTS' LOAN.....                                                                                                                                 | 4    |
| IV.   THE APPELLANTS ARE PRECLUDED FROM RAISING MODE OF<br>TRIAL ISSUES ON APPEAL BECAUSE THEY WAIVED THE RIGHT<br>TO DO SO BY FAILING TO APPEAL TIMELY THE TRIAL COURT'S<br>ORDER OF MANDATORY REFERENCE .....                                                                      | 5    |
| V.    APPELLANTS ALSO WAIVED APPEAL OF MODE OF TRIAL<br>ISSUES BY LITIGATING THE MERITS OF VARIOUS MOTIONS<br>BEFORE THE MASTER-IN-EQUITY .....                                                                                                                                      | 7    |
| CONCLUSION.....                                                                                                                                                                                                                                                                      | 8    |

# TABLE OF AUTHORITIES

Page(s)

## Cases

|                                                                                                                                       |      |
|---------------------------------------------------------------------------------------------------------------------------------------|------|
| <i>Bank of America, N.A. v. Draper</i> ,<br>405 S.C. 214, 746 S.E.2d 478 (Ct. App. 2013).....                                         | 4    |
| <i>Creed v. Stokes</i> ,<br>285 S.C. 542, 331 S.E.2d 351 (1985) .....                                                                 | 6    |
| <i>Englert, Inc. v. Netherlands Ins. Co.</i> ,<br>315 S.C. 300, 433 S.E.2d 871 (Ct. App. 1993).....                                   | 2    |
| <i>Fields v. Melrose Ltd. P'ship</i> ,<br>312 S.C. 102, 439 S.E.2d 283 (Ct. App. 1993).....                                           | 2    |
| <i>First Union Nat'l Bank of S.C. v. Soden</i> ,<br>333 S.C. 554, 511 S.E.2d 372 (Ct. App. 1998).....                                 | 6    |
| <i>Foggie v. CSX Transp., Inc.</i> ,<br>315 S.C. 17, 431 S.E.2d 587 (1993) .....                                                      | 5    |
| <i>Glasscock, Inc. v. U.S. Fid. &amp; Guar. Co.</i> ,<br>348 S.C. 76, 557 S.E.2d 689 (Ct. App. 2001).....                             | 2    |
| <i>Jinks v. Richland Cty.</i> ,<br>355 S.C. 341, 585 S.E.2d 281 (2003) .....                                                          | 2    |
| <i>Jones v. SC Dep't of Health &amp; Envtl. Control</i> ,<br>384 S.C. 295, 682 S.E.2d 282 (Ct. App. 2009).....                        | 2    |
| <i>Karl Sitte Plumbing Co., Inc. v. Darby Development Co. of Columbia, Inc.</i> ,<br>295 S.C. 70, 367 S.E.2d 162 (Ct. App. 1988)..... | 7, 8 |
| <i>Rawlinson Rd. Homeowners Ass'n, Inc. v. Jackson</i> ,<br>395 S.C. 25, 716 S.E.2d 337 (Ct. App. 2011).....                          | 8    |
| <i>South Carolina Community Bank v. Salon Proz, LLC</i> ,<br>420 S.C. 89, 800 S.E.3d 488 (Ct. App. 2017).....                         | 6    |
| <i>Wachovia Bank of South Carolina, N.A. v. Player</i> ,<br>341 S.C. 424, 535 S.E.2d 128 (2000) .....                                 | 3    |
| <i>Watson v. Watson</i> ,<br>319 S.C. 92, 460 S.E.2d 394 (1995) .....                                                                 | 3    |

**Statutes**

|                                       |   |
|---------------------------------------|---|
| S.C. Code Ann. § 14-11-15 (2006)..... | 3 |
| S.C. R. Civ. P. 53 .....              | 3 |

## INTRODUCTION

Pursuant to the Court's order of July 16, 2019, Appellee Bank of America, N.A. ("BANA") hereby objects to the Petition for Rehearing filed by Appellants John D. Dalen and Julie A. Dalen (collectively, "the Dalens" or "Appellants"). The Petition for Rehearing is nothing more than an attempt to argue their unsuccessful appellate arguments a second time. Nothing raised in Petition shows that the Court overlooked or misapprehended the record for the Foreclosure Action or application of South Carolina law to the issues on appeal. Accordingly, for the following reasons, the Petition should be denied because the Court properly affirmed the Trial Court foreclosure judgment in favor of Federal National Mortgage Association ("FNMA" or "Fannie Mae"):

## ARGUMENT

- I. **BECAUSE APPELLANTS' NEVER ARTICULATED ANY GROUNDS TO APPEAL THE TRIAL COURT'S GRANT OF SUMMARY JUDGMENT TO BANA FOR APPELLANTS' COUNTERCLAIMS, APPELLANTS ARE NOT ENTITLED TO ANY REHEARING ON SUCH ISSUES THAT WERE NEVER PROPERLY RAISED IN THEIR BRIEF.**

As stated previously in BANA's Final Respondent's Brief, Appellants have abandoned the issue of whether the Trial Court erred in Granting BANA's Renewed Motion for Summary Judgment ("Motion") as they have failed to provide *any* argument in their Brief as to *how* the Trial Court erred in granting the Motion. Beyond the conclusory assertions in their Final Appellant's Brief "that [BANA] rehashed previous arguments, presented no new issues or evidence," and that the Dalens' "brought up Judge Macaulay's denial of [BANA's] first motion for summary judgment" as the reason the Renewed Motion for Summary Judgment should have been denied, Appellants provide no argument as to *how* the Trial Court erred in granting BANA's Motion. (Appellant's In. Br. p. 7.) Appellants have also failed to cite to *any* legal authority to demonstrate how the granting of BANA's Motion was error. (*Id.*) As such, Appellant has failed to preserve the issue for review. *See Jinks v. Richland Cty.*, 355 S.C. 341, 344 n.3, 585 S.E.2d 281, 283 n.3

(2003) (concluding that an issue raised in appellant's brief was abandoned when appellant provided no argument on the issue); *Fields v. Melrose Ltd. P'ship*, 312 S.C. 102, 106 n.3, 439 S.E.2d 283, 285 n.3 (Ct. App. 1993) ("[A]n issue is deemed abandoned on appeal and, therefore, not presented for review, if it is argued in a short, conclusory statement without supporting authority."); *Jones v. SC Dep't of Health & Envtl. Control*, 384 S.C. 295, 317, 682 S.E.2d 282, 294 (Ct. App. 2009) (argument abandoned where appellant failed to explain *how* the trial court erred); *Englert, Inc. v. Netherlands Ins. Co.*, 315 S.C. 300, 304 n.2, 433 S.E.2d 871, 873 n.2 (Ct. App. 1993) (concluding that appellant's one-sentence argument was too conclusory to preserve an issue for appellate review).<sup>1</sup> Accordingly, Appellants' Petition for Rehearing should be denied to the extent it is attempting to raise waived arguments concerning the Trial Court's grant of summary judgment in favor of BANA.

## **II. THE TRIAL COURT PROPERLY REFERRED SUBJECT MATTER JURISDICTION OVER THE FORECLOSURE ACTION TO THE MASTER-IN-EQUITY FOR FINAL ADJUDICATION.**

This Court properly concluded that the Master-In-Equity had subject matter jurisdiction over the Foreclosure Action pursuant to an order of reference that Appellants never timely appealed.

Under South Carolina law, "[s]ubject matter jurisdiction refers to the court's power to hear and determine cases of the general class to which the proceedings in question belong." *Watson v.*

---

<sup>1</sup> Because Appellants failed to make any argument in their Brief as to *how* the Trial Court erred in granting BANA's Renewed Motion for Summary Judgment, they improperly articulate such an argument in their *Reply Brief*. The Court should not consider these improperly raised arguments. See *Fields v. Melrose Ltd. P'ship*, 312 S.C. 102, 106 n.3, 439 S.E.2d 283, 285 n.3 (Ct. App. 1993) ("[A]n appellant may not use the reply brief to argue issues not argued in his brief in chief[.]"); *Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 692 (Ct. App. 2001) (holding that even if an argument is raised in an initial brief, if the argument is conclusory and unsupported by authority, the argument is not preserved for review and the appellant is precluded from more fully addressing the issue in a reply brief).

*Watson*, 319 S.C. 92, 93, 460 S.E.2d 394, 395 (1995) (internal quotations omitted). The Master-in-Equity is considered a division of the circuit court and obtains jurisdiction through an order of reference from the circuit court. *See* S.C.Code Ann. § 14-11-15 (2006); S.C. R. Civ. P. 53. A master would then have subject matter jurisdiction over a properly referred foreclosure action. *See, e.g., Wachovia Bank of South Carolina, N.A. v. Player*, 341 S.C. 424, 427, 535 S.E.2d 128, 129 (2000) (holding that master in equity had subject matter jurisdiction to address post-judgment motions pursuant to order of reference).

On November 17, 2014, BANA filed a Motion to Strike Jury Trial Demand and Refer to the Master-in-Equity (“Motion for Order of Reference”), and, on the same day, the Dalens filed a Motion for Summary Judgment arguing that the 2011 Assignment to BANA was void and BANA therefore lacked standing to foreclose. [R. pp. 185–86, 187–88.] Following a hearing on both motions, the Trial Court rendered its rulings in a Form 4 order, entered on January 28, 2015, denying the Dalen’s Motion for Summary Judgment and granting BANA’s Motion for Order of Reference; a formal order was entered on February 25, 2015 (“Order of Mandatory Reference”). [R. pp. 9–10, 11–14.] In the Order, the Trial Court denied the Dalen’s Motion for Summary Judgment concluding, *inter alia*, that because BANA was the undisputed servicer of the loan when the Complaint was filed, BANA was a real party in interest with standing to foreclose. [*Id.*] The Dalens did not appeal the Order of Mandatory Reference, which was entered by a Circuit Court Judge and authorized the Master-In-Equity “to take testimony and to direct entry of final judgment in this action under Rule 53(b), SCRCP.” [*Id.* at 13-14.]

Because the Trial Court properly entered the Order of Mandatory Reference after conducting a merits hearing for BANA’s Motion for Order or Reference [*Id.* at 11], this Court

property concluded that the Master-In-Equity had subject matter jurisdiction to adjudicate all claims and issues arising the Foreclosure Action.

**III. FANNIE MAE HAD STANDING TO PROSECUTE THE FORECLOSURE ACTION UNDER SOUTH CAROLINA LAW AS THE HOLDER OF THE NOTE FOR APPELLANTS' LOAN.**

This Court properly concluded that the transfer of the Appellants' Loan to Fannie Mae was not fraudulent and that Fannie Mae had standing to prosecute the Foreclosure Action.

South Carolina law recognizes that standing refers to a party's right to make a legal claim or seek judicial enforcement of a duty or right. *Bank of America, N.A. v. Draper*, 405 S.C. 214, 746 S.E.2d 478 (Ct. App. 2013). Mortgage loan servicers, such as BANA, have standing to foreclose a mortgage loan because of their pecuniary interests in collecting payments made under a mortgage loan or the servicer's contractual duty to collect payments and foreclose mortgages in the event of default. *Id.* at 222, 405 S.E.2d at 482 (quoting *In re Woodberry*, 383 B.R. 373, 379 (Bankr. D.S.C. 2008) and *In re Neals*, 459 B.R. 612, 617 (D.S.C. 2011)). Further, the holder of a mortgage note, such as Fannie Mae, can have standing to foreclose upon proof that it is in physical possession of a properly indorsed note. *See id.* at 223-24, 405 S.E.2d at 482-83 (citing S.C. Code Ann. §§ 36-1-201(20) & 36-3-602(a)).

The record for the Foreclosure Action reflects that in the Order of Mandatory Reference, the Trial Court properly concluded that BANA had standing to file the Foreclosure Action as the servicer of the Appellants' Loan. [R. pp. 12.] Next, in the Trial Court's Order Substituting Plaintiff, the Trial Court concluded that Appellants' Loan was transferred to Fannie Mae after conducting a hearing for BANA's Motion to Substitute Plaintiff and considering the record developed at the hearing. [R. pp. 19.] At the trial for the Foreclosure Action, Fannie Mae presented the testimony of William Rankin ("Rankin"), a litigating officer with Seterus, Inc.

("Seterus"), the servicer of the Loan. [R. pp. 387:1–388:5.] Rankin testified that he had personal knowledge of the business records maintained by Seterus in connection with the Loan. [R. pp. 388:1–16.] Rankin identified the Note, executed by Appellant John D. Dalen, and the Mortgage, executed jointly by the Dalens, and he testified that the Mortgage constituted a first mortgage lien on the Dalen's property. [R. pp. 388:17–390:12.] Rankin testified that Seterus was in possession of the Note through FNMA's counsel and that the Note was endorsed in blank and present in the courtroom during Trial. [R. p. 389:14–21.]

Here, the record shows that the evidence that Fannie Mae presented at trial, proved that Fannie Mae had standing to foreclose the Loan because Fannie Mae was in possession of the Note that was signed by Appellant John D. Dalen and was also indorsed in blank. Accordingly, upon proof of possession of the Note with a blank indorsement, the Trial Court properly recognized that Fannie Mae—as the holder of the Note—had standing to prosecute the Foreclosure Action.

**IV. THE APPELLANTS ARE PRECLUDED FROM RAISING MODE OF TRIAL ISSUES ON APPEAL BECAUSE THEY WAIVED THE RIGHT TO DO SO BY FAILING TO APPEAL TIMELY THE TRIAL COURT'S ORDER OF MANDATORY REFERENCE.**

This Court properly concluded that Appellants failed to preserve any mode of trial issues for this appeal.

Following the entry of the Order of Mandatory Reference on February 15, 2015, Appellants did not appeal from the order. 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); *see also First Union Nat'l*

*Bank of S.C. v. Soden*, 333 S.C. 554, 565, 511 S.E.2d 372, 377–78 (Ct. App. 1998) (holding that the appellant’s failure to appeal the denial of a motion for a jury trial precluded the Court of Appeals from addressing the issue).<sup>2</sup>

While Appellants contend that the Order of Mandatory Reference denied their right to a trial by jury, they did not appeal from the order. That failure to appeal is fatal to Appellants’ appeal now. Even assuming *arguendo* that they had any right to a jury trial for the Foreclosure Action, Appellants’ failure to appeal from the Order of Mandatory Reference established the order as the law of the case and precludes their present challenge the non-jury mode of trial completed by the Master-In-Equity.

The South Carolina Supreme Court has left no doubt of this result. In *Creed v. Stokes*, 285 S.C. 542, 331 S.E.2d 351 (1985), that court recognized that the appellant was correct that he had a right to a jury trial instead of having the case decided by a master. But the appellant “failed to appeal” the order of reference. *Id.* at 542–43, 331 S.E.2d at 352. That order, the supreme court explained, “should have been appealed immediately because it affected the mode of trial, a substantial right.” *Id.* at 543, 331 S.E.2d at 352. Because the appellant did not appeal, that order “became the law of the case.” *Id.*; see also *Soden*, 333 S.C. at 566, 511 S.E.2d at 378 (“Failure to challenge the ruling is an abandonment of the issue and precludes consideration on appeal. The unchallenged ruling, *right or wrong*, is the law of the case and requires affirmance.” (emphasis added)). Here, the result is the same. Regardless of whether Appellants had a right to a jury trial,

---

<sup>2</sup> The Court’s ruling in *South Carolina Community Bank v. Salon Proz, LLC*, 420 S.C. 89, 800 S.E.3d 488 (Ct. App. 2017) is inapposite. Unlike *Salon Proz*, a Circuit Court Judge entered the Order of Mandatory Reference after conducting a merits hearing for BANA’s Motion for Order of Reference [R. pp. 9–10, 11–14] rather than a clerk of court without any merits hearing.

when they failed to appeal the Order of Mandatory Reference, that order became the law of the case. Accordingly, Appellants did not preserve mode of trial issues for this appeal.

**V. APPELLANTS ALSO WAIVED APPEAL OF MODE OF TRIAL ISSUES BY LITIGATING THE MERITS OF VARIOUS MOTIONS BEFORE THE MASTER-IN-EQUITY.**

In addition to this appeal being barred by the law of the case doctrine, Appellants also waived any objection to the Order of Mandatory Reference they may have had by their participation in proceedings before the Master-in-Equity. Participating in these proceedings is acquiescence to the Master-in-Equity's authority to decide the merits of the case, so Appellants cannot now challenge the Master's appointment on appeal.

As this Court has established, 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."

That rule controls the outcome of this case. Here, following the entry of the order of Mandatory Reference, Appellants not only failed to appeal from the order, but they also actively participated in proceedings before the Master-in-Equity *without* objecting to the appointment of the Master-In-Equity to adjudicate the Foreclosure Action. In fact, Appellants did more than simply participate: they proactively sought an adjudication of the merits of the case from the Master-in-Equity by filing a Motion to Compel Discovery and Motion to Compel Mediation [R.

pp. 189–90], a Motion for Reconsideration of the Master-In-Equity’s summary judgment award to BANA [R. pp. 233-46], two Motions to Dismiss for Lack of Subject Matter Jurisdiction [R. pp. 225-32, 247-60], and a Motion for New Trial [R. pp. 283-97]. Critically, the Appellants never made a targeted objection to the Master-In-Equity’s appointment and authority under the Order of Mandatory Reference.

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—and indeed, affirming his authority to do so, *see Rawlinson Rd. Homeowners Ass’n, Inc. v. Jackson*, 395 S.C. 25, 36, 716 S.E.2d 337, 343 (Ct. App. 2011) (noting that a motion for summary judgment before a Master-in-Equity seeks an adjudication on the merits of the claims)—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.

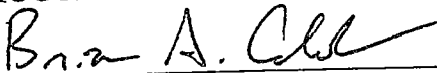
### CONCLUSION

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

This the 24th day of July, 2019.

Respectfully submitted,

**MCGUIREWOODS LLP**



Brian A. Calub (SCSB #72009)  
MCGUIREWOODS, LLP  
201 North Tryon Street, Suite 3000  
Charlotte, North Carolina 28202  
Telephone: (704) 343.2009  
Facsimile: (704) 373-8842  
BCalub@mcguirewoods.com

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

**CERTIFICATE OF SERVICE**

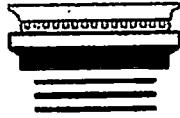
The undersigned attorney for the Respondent Bank of America, N.A., successor by merger to BAC Home Loans Servicing, L.P. f/k/a Countrywide Home Loans Servicing, L.P. certifies that its *Return to Appellant's Petition for Rehearing* was served on the parties to this action by depositing a copy thereof in the United States Mail, first class, postage prepaid, on July 24, 2019, to the following:

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

B. Lindsay Crawford, III  
Theodore Von Keller  
Crawford & von Keller, LLC  
1640 St. Julian Place  
Post Office Box 4216 (29240)  
Columbia, SC 29204  
*Attorneys for Federal National Mortgage Association*

  
Brian A. Calub (SCSB #72009)

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



**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

**RECEIVED**

**JUL 26 2019**

**SC Court of Appeals**

**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 (!) clocked copy in the enclosed envelope.

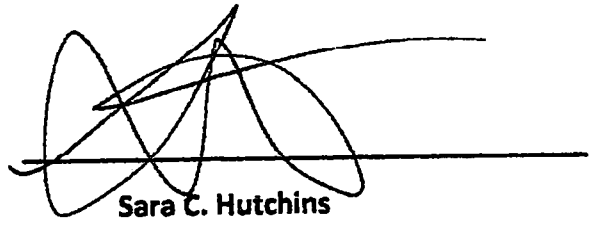
Should you require anything further please do not hesitate to contact me.

Sincerely,

Sara C. Hutchins

Enclosure(s)

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



Sara C. Hutchins

Columbia, South Carolina

July 26, 2019

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

Appellate Case No. 2017-000886

RECEIVED

JUL 26 2019

SC Court of Appeals

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 Rehearing 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

1241

**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**

**Appellate Case No. 2017-000886**

**RECEIVED**

**JUL 26 2019**

**SC Court of Appeals**

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**

**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**

1242

## TABLE OF CONTENTS

|                                                                                                                          |   |
|--------------------------------------------------------------------------------------------------------------------------|---|
| INTRODUCTION .....                                                                                                       | 1 |
| ARGUMENT .....                                                                                                           | 1 |
| I.    THE COURT DID NOT MISPPREHEND OR OVERLOOK SOUTH CAROLINA<br>LAW REGARDING SUBJECT MATTER JURISDICTION.....         | 1 |
| II.   THE COURT DID NOT MISPPREHEND OR OVERLOOK SOUTH CAROLINA<br>LAW REGARDING STANDING.....                            | 2 |
| III.  THE COURT DID NOT MISPPREHEND OR OVERLOOK SOUTH CAROLINA<br>LAW REGARDING DUE PROCESS - RIGHT TO A JURY TRIAL..... | 3 |
| CONCLUSION .....                                                                                                         | 5 |

## TABLE OF AUTHORITIES

### **Cases**

*Bank of America, N.A. v. Draper*, 407 S.C. 214, 746 S.E.2d 478 (Ct. App. 2013)

*Bardoon Props., NV v. Eidolon Corp.*, 326 S.C. 166, 485 S.E.2d 371 (1997).

*Foggie v. CSX Transp., Inc.* 315 S.C. 17, 431 S.E.2d 587 (1993)

*Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 489 S.E.2d 472 (1997)

*Hill v. S.C. Dep't of Health & Envtl. Control*, 389 S.C. 1, 698 S.E.2d 612 (2010)

*Karl Sitte Plumbing Co., Inc. v. Darby Development Co. of Columbia, Inc.*, 295 S.C. 70, 367 S.E.2d 162 (Ct. App. 1988)

*Kennedy v. S.C. Ret. Sys.*, 349 S.C. 531, 564 S.E.2d 322 (2001)

*Lester v. Dawson*, 327 S.C. 263, 491 S.E.2d 240 (1997)

*State v. Gentry*, 363, S.C. 93, 610 S.E.2d 494 (2005)

### **Statutes**

S.C. Code Ann. §14-11-15 (2006)

S.C. R. Civ. P. 53

## **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), SCRCF 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 properly 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: \_\_\_\_\_

**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**

**July 26, 2019**



## The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS  
CLERK

V. CLAIRE ALLEN  
DEPUTY CLERK

POST OFFICE BOX 11629  
COLUMBIA, SOUTH CAROLINA 29211  
1220 SENATE STREET  
COLUMBIA, SOUTH CAROLINA 29201  
TELEPHONE: (803) 734-1890  
FAX: (803) 734-1839  
[www.sccourts.org](http://www.sccourts.org)

July 3, 2019

John D. Dalen  
109 Wood Valley Drive  
Westminster SC 29693

Julie A. Dalen  
109 Wood Valley Drive  
Westminster SC 29693

Mr. Brian A. Calub, Esquire  
201 North Tryon St.  
Suite 3000  
Charlotte NC 28202-2146

Ms. Sara Christine Hutchins, Esquire  
PO Box 4216  
Columbia SC 29240

Mr. Theodore von Keller, Esquire  
PO Box 4216  
Columbia SC 29240

Mr. Baxter Lindsay Crawford, IV, Esquire  
PO Box 4216  
Columbia SC 29240

Mr. B. Lindsay Crawford, III, Esquire  
PO Box 4216

1250

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE  
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING  
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA  
In The Court of Appeals**

Federal National Mortgage Association, Respondent,

v.

John D. Dalen, Julie A. Dalen and Wawtrockace 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.

Appellate Case No. 2017-000886

---

Appeal From Oconee County  
Steven C. Kirven, Master-in-Equity

---

Unpublished Opinion No. 2019-UP-238  
Submitted April 1, 2019 – Filed July 3, 2019

---

## AFFIRMED

---

John D. Dalen and Julie A. Dalen, both of Westminster,  
pro se.

Theodore von Keller, B. Lindsay Crawford, III, Sara  
Christine Hutchins, and Baxter Lindsay Crawford, IV, all  
of Crawford & von Keller, LLC, of Columbia, for  
Respondent Federal National Mortgage Association.

Brian A. Calub, of McGuireWoods LLP, of Charlotte,  
North Carolina, for Respondent Bank of America, N.A.,  
successor by merger to BAC Home Loans Servicing, L.P.  
f/k/a Countrywide Home Loans Servicing, L.P.

---

**PER CURIAM:** John D. Dalen and Julie A. Dalen (collectively, the Dalens) appeal the master-in-equity's order and judgment of foreclosure and sale. On appeal they argued (1) it was "error for the [m]aster to proceed with [the hearing] due to [Federal National Mortgage Association's] lack of standing and therefore a lack of subject matter jurisdiction," (2) "fraud upon the [master] due to [a] fraudulent [a]ssignment of [the m]ortgage," and (3) "the proceedings violate[d] due process of law." We affirm.

As to issues one and two, we find the master had subject matter jurisdiction over the foreclosure action, the chain of title was not fraudulent, and Federal National Mortgage Association had standing to pursue the foreclosure. *See U.S. Bank Tr. Nat'l. Ass'n v. Bell*, 385 S.C. 364, 373, 684 S.E.2d 199, 204 (Ct. App. 2009) ("In an appeal from an action in equity, tried by a judge alone, we may find facts in accordance with our own view of the preponderance of the evidence. 'However, this broad scope of review does not require an appellate court to disregard the findings below or ignore the fact that the trial judge is in the better position to assess the credibility of the witnesses.'" (footnote omitted) (citation omitted) (quoting *Pinckney v. Warren*, 344 S.C. 382, 387, 544 S.E.2d 620, 623 (2001))); *Johnson v. S.C. Dep't of Prob., Parole, & Pardon Servs.*, 372 S.C. 279, 284, 641 S.E.2d 895, 897 (2007) ("Stated somewhat differently, 'subject matter jurisdiction is the power of a court to hear and determine cases of the general class to which the

proceedings in question belong." (quoting *State v. Gentry*, 363 S.C. 93, 100, 610 S.E.2d 494, 498 (2005)); Rule 53(b), SCRCF ("In . . . an action for foreclosure, some or all of the causes of action in a case may be referred to a master . . ."); *Bank of Am., N.A. v. Draper*, 405 S.C. 214, 219, 746 S.E.2d 478, 480 (Ct. App. 2013) ("Standing refers to a party's right to make a legal claim or seek judicial enforcement of a duty or right." (omissions by court) (quoting *Powell ex rel. Kelley v. Bank of Am.*, 379 S.C. 437, 444, 665 S.E.2d 237, 241 (Ct. App. 2008))); S.C. Code Ann. § 36-1-201(b)(21)(a) (Supp. 2018) (stating a holder is "the person in possession of a negotiable instrument that is payable . . . to . . . an identified person that is the person in possession"); S.C. Code Ann. § 36-3-301 (Supp. 2018) (noting the holder of an instrument is entitled to enforce the instrument); *Bell*, 385 S.C. at 374, 684 S.E.2d at 204 ("A mortgage and a note are separate securities for the same debt, and a mortgagee who has a note and a mortgage to secure a debt has the option to either bring an action on the note or to pursue a foreclosure action."); *Draper*, 405 S.C. at 223, 746 S.E.2d at 482 (noting "[s]everal bankruptcy courts and federal district courts, including those in South Carolina, have recognized the servicer of a loan to be a real party in interest and able to initiate a foreclosure," and "agree[ing] with this view").

As to issue three, to the extent the Dalens argue their due process rights were violated because they were denied the right to a jury trial, we find this issue was waived by the Dalens' failure to appeal the February 25, 2015 order. *See Creed v. Stokes*, 285 S.C. 542, 542-43, 331 S.E.2d 351, 352 (1985) (holding the appellant's failure to timely appeal an order referring the case to a master precluded the appellant from later complaining that he had been entitled to a trial by jury). Further, to the extent the Dalens argue their due process rights were violated because the master proceeded with the foreclosure hearing, we find this issue was not preserved for appellate review. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the [master] to be preserved for appellate review.").

**AFFIRMED.<sup>1</sup>**

**LOCKEMY, C.J., and SHORT and MCDONALD, JJ., concur.**

---

<sup>1</sup> We decide this case without oral argument pursuant to Rule 215, SCACR.

Columbia SC 29240

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

Dear Counsel and Julie and John Dalen:

Enclosed is the decision of the Court. The remittitur will be sent as provided by Rule 221(b) of the South Carolina Appellate Court Rules.

Very truly yours,

*V. Claire Allen, Deputy*

CLERK

cc: The Honorable Steven C. Kirven

# The South Carolina Court of Appeals

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.

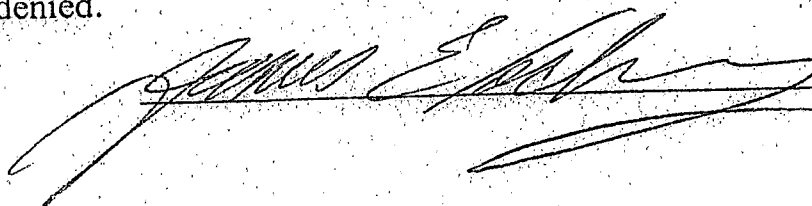
Appellate Case No. 2017-000886

---

## ORDER

---

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

 C.J.

Paul E. Short, Jr.

J.

Stephanie L. McDonald

J.

Columbia, South Carolina

**FILED**

cc:

John D. Dalen

Julie A. Dalen

Brian A. Calub, Esquire

Sara Christine Hutchins, Esquire

Theodore von Keller, Esquire

Baxter Lindsay Crawford, IV, Esquire

B. Lindsay Crawford, III, Esquire

The Honorable Steven C Kirven

August 22, 2019

*John and Julie Dalen*

---

109 Wood Valley Drive  
Westminster, SC 29693

October 16, 2018

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

RECEIVED

OCT 19 2018

SC COURT OF APPEALS

**Supplemental Citation**

**Re: 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

Dear Ms. Kitchings:

Pursuant to Rule 208, Section 7, *Supplemental Citations*, the Dalens would like to advise the Clerk of the Appellate Court by this letter, with copies sent to counsel of record, that a pertinent and significant authority has come to our attention. This case that we are now citing is a continuation of a case that we cited in our Initial Brief and included as well with the Record on Appeal. We believe the court should review this new ruling as this case mirrors or parallels our Appeal in many ways.

The case we are citing is:

Bank of America, N.A. vs. Grisel Reyes-Toledo, SCWC-15-0000005, October 9, 2018.

This Supreme Court of Hawai'i case returned to the Hawai'i Supreme Court after it was remanded to the Intermediate Court of Appeals by their February 28, 2017 opinion, *Bank of America, N.A. v. Reyes-Toledo*, 139 Hawai'i 361, 390 P. 3d 1248 (2017) (*Reyes-Toledo I*). Appellant appealed to the Hawai'i Supreme Court, and the Hawai'i Supreme Court again sided with the Appellant.

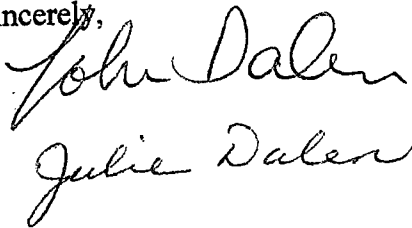
1257

Dalen  
October 16, 2018  
Page 2 of 2

We cited this original case on pages 15 and 20, and a discussion of the case runs from page 21 through 23 of our Initial Brief. We also included the entire Reyes-Toledo I case in our Record on Appeal on R. pp. 1079-1106. Also, we are including a copy of this newly-cited case with this letter to the Clerk of the Court as well as providing a copy to the Attorneys of Record.

The Dalens are sending, via U.S.P.S., prepaid on October 17, 2018, eleven copies of this letter, including one original for the Clerk of Court, one copy to be stamped and returned to the Dalens in the self-addressed, stamped envelope provided, and nine additional copies so that all packets of the Dalens' Initial Brief will reference this supplemental citation. By copy of this letter, we are serving a copy of this Supplemental Citation letter to all parties of this appeal. Thank you for your attention to these matters.

Sincerely,

The block contains two handwritten signatures in cursive. The first signature is "John Dalen" and the second signature is "Julie Dalen".

John and Julie Dalen

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

Enc. (1) Copy of the case cited  
(1) Original of this letter  
(10) Copies of the letter  
(1) Self-addressed, stamped envelope

/jd

RECEIVED  
SUPREME COURT  
HAWAII  
12-007-0005  
OCT 11 2018

IN THE SUPREME COURT OF THE STATE OF HAWAII

---oOo---

---

BANK OF AMERICA, N.A., SUCCESSOR BY MERGER TO BAC HOME LOANS  
SERVICING, LP FKA COUNTRYWIDE HOME LOANS SERVICING LP,  
Respondent/Plaintiff-Appellee,

vs.

GRISEL REYES-TOLEDO, Petitioner/Defendant-Appellant,  
and

WAI KALOI AT MAKAKILO COMMUNITY ASSOCIATION;  
MAKAKILO COMMUNITY ASSOCIATION; and  
PALEHUA COMMUNITY ASSOCIATION,  
Respondents/Defendants-Appellees.

---

SCWC-15-0000005

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS  
(CAAP-15-0000005; CIVIL NO. 12-1-0668)

OCTOBER 9, 2018

NAKAYAMA, ACTING C.J., MCKENNA, POLLACK, AND WILSON, JJ.,  
AND CIRCUIT COURT JUDGE GARIBALDI,  
IN PLACE OF RECKTENWALD, C.J., RECUSED

OPINION OF THE COURT BY MCKENNA, J.

### I. Introduction

This case returns to us after it was remanded to the  
Intermediate Court of Appeals ("ICA") by our February 28, 2017  
opinion Bank of America, N.A. v. Reyes-Toledo, 139 Hawai'i 361,

390 P.3d 1248 (2017) ("Reyes-Toledo I"). In Reyes-Toledo I, we vacated a foreclosure decree based on issues of fact regarding whether Bank of America, N.A., a National Association, as successor by merger to BAC Home Loans Servicing, LP FKA Countrywide Home Loans Servicing LP ("Bank of America") held the note at the time the foreclosure lawsuit was filed. See 139 Hawai'i at 373, 390 P.3d at 1260.

Relevant to this certiorari proceeding, Reyes-Toledo I remanded the case to the ICA for a determination of whether the Circuit Court of the First Circuit ("circuit court")<sup>1</sup> erred by dismissing Grisel Reyes-Toledo's ("Homeowner['s]") four-count counterclaim before granting summary judgment for foreclosure in favor of Bank of America. See 139 Hawai'i at 373, 390 P.3d at 1260. On remand, the ICA ruled the circuit court properly dismissed the wrongful foreclosure, declaratory relief, and quiet title counts in Homeowner's counterclaim, but that it erred in dismissing the unfair and deceptive trade practices count. See Bank of America, N.A., Successor v. Reyes-Toledo, No. CAAP-15-0000005 (App. July 21, 2017) (SDO).

In sum, the ICA concluded the three counts were appropriately dismissed pursuant to Hawai'i Rules of Civil Procedure ("HRCP") Rule 12(b)(6) because: (1) as Homeowner did

---

<sup>1</sup> The Honorable Bert I. Ayabe presided.

not provide any authority to support "the proposition that a wrongful foreclosure claim can be raised prior to foreclosure or the sale of the property in judicial foreclosure," no set of facts would entitle Homeowner to relief, Reyes-Toledo, SDO at 6; (2) the face of the Mortgage listed MERS as "mortgagee" and "nominee," and as such, Homeowner's arguments in support of her allegations that "MERS was nothing more than a strawman and a conduit for fraud being practiced upon the Defendant and others" lacked merit, Reyes-Toledo, SDO at 7; and (3) Homeowner's quiet title count does not allege that she paid, or was able to pay, the outstanding debt on the Property "so as to demonstrate the superiority of her claim," Reyes-Toledo, SDO at 9. In so concluding, the ICA applied the "plausibility" pleading standard set forth in Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007), which it had previously adopted in Pavsek v. Sandvold, 127 Hawai'i 390, 279 P.3d 55 (App. 2012). See Reyes-Toledo, SDO at 2-4; see also Ashcroft v. Iqbal, 556 U.S. 662, 677-80 (2009) (clarifying Twombly).

Homeowner timely filed an application for writ of certiorari ("Application"), asserting the ICA erred in upholding the dismissal of the other three counts as it applied the wrong

pleading standard.<sup>2</sup> According to Homeowner, these three counts should have survived dismissal because when a party moves to dismiss a complaint pursuant to Hawai'i Rules of Civil Procedure ("HRCP") Rule 12(b)(6), the party admits the well-pleaded allegations of fact.

This appeal raises two issues: (1) the standard a pleading<sup>3</sup> must meet to overcome a HRCP Rule 12(b)(6) motion to dismiss; and (2) whether a claim for wrongful foreclosure exists under Hawai'i law.

As to the first issue, this court has never adopted the Twombly/Iqbal "plausibility" pleading standard, and we now expressly reject it. We reaffirm that in Hawai'i state courts, the traditional "notice" pleading standard governs. This provides citizen access to the courts and to justice.

As to the second issue, we hold that a party may bring a claim for wrongful foreclosure before the foreclosure actually occurs.

We therefore vacate the ICA's judgment on appeal affirming the circuit court's dismissal of three counts of Homeowner's

---

<sup>2</sup> Bank of America did not apply for certiorari with respect to the ICA's reinstatement of the unfair and deceptive trade acts and practices count, so that issue is not before us.

<sup>3</sup> Pursuant to HRCP Rule 8(a), a "pleading" "sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim[.]"

counterclaim, and remand the case to the circuit court for further proceedings consistent with this opinion as well as our opinion in Reyes-Toledo I.

## II. Background

Only the factual and procedural backgrounds relevant to the issues on certiorari are discussed below.<sup>4</sup>

### A. Homeowner's Answer and Counterclaim

In response to Bank of America's complaint seeking foreclosure ("Complaint") of Homeowner's property ("Property"), Homeowner filed her Answer and Counterclaim on September 28, 2012, denying all of the allegations in the Complaint, except those pertaining to her personal background, her September 24, 2007 execution of a promissory note made payable to Countrywide Bank, FSB ("Note"), and the recordation of a mortgage on the Property that secured the Note ("Mortgage"). She also asserted the following defenses in her Answer: (1) failure to state a claim upon which relief can be granted, (2) assumption of risk and contributory negligence, (3) fraud, based on Homeowner's reasonable belief that Bank of America was not the real party-in-interest and owner of the Note and Mortgage through any claimed assignment by Mortgage Electronic Registration Systems, Inc. ("MERS"), and (4) illegality, insofar as Bank of America

---

<sup>4</sup> See Reyes-Toledo I for further details not relevant to the issues on certiorari.

was not the owner and holder of the Note and Mortgage and therefore not entitled to foreclose on the Mortgage. She also contended that there was no valid interim assignment of the Mortgage to Bank of America and no valid negotiation for value of the Note to Bank of America. She further asserted MERS could not be a lawful beneficiary of the Mortgage if it lacked possession of the Note.

Homeowner also asserted the following defenses in the event the Note and Mortgage had been transferred into a trust and securitized: (1) the claimed assignment of the Note and Mortgage into the trust may have violated the ninety-day closing date; (2) the claimed Mortgage assignment to Bank of America in October 2011 would be void as a violation of the express terms of the trust; (3) the purported assignment by which Bank of America claimed ownership of the Note and Mortgage may violate the trust provisions for the closing-date rule; (4) the purported transfers or assignments of the Mortgage after the closing date of the trust would be void in violation of the express terms of the trust and 26 U.S.C. § 860 et seq.; (5) the purported transfers may violate New York trust law and would therefore be void; (6) the Note may never have been transferred into the trust; (7) MERS was not a lender, banker, or servicer and therefore any transfers by MERS were void; (8) the purported transfers into and out of the trust violated the Internal

Revenue Code, 26 U.S.C. § 860; (9) the claimed assignments into and out of the trust may have violated the Pooling and Service Agreement ("PSA"), together with the Underwriting Agreement for the trust; (10) if there were transfers into a trust under the PSA, the transfers were not performed according to the terms of the trust and were therefore void; (11) the Note and Mortgage may never have been deposited or transferred into the trust; and (12) if the transfers were made into and out of a securitized trust, the signatures may have been by unauthorized persons and therefore void as forgeries, which would render the purported transfers fraudulent and void.

Homeowner asserted four counts in the counterclaim filed along with her Answer: (1) wrongful foreclosure; (2) declaratory relief; (3) quiet title; and (4) unfair and deceptive trade acts and practices (sometimes "UDAP") under HRS § 480-1 et seq.

In the first count of her counterclaim, alleging wrongful foreclosure, Homeowner incorporated by reference the defenses in her Answer, and alleged that Bank of America's conduct in commencing the foreclosure action was willful, malicious, and without just cause.

In the second count of her counterclaim, seeking declaratory relief, Homeowner incorporated by reference the allegations in the wrongful foreclosure count. She asserted she was entitled to declaratory relief pursuant to HRS § 632-1 that

(1) Bank of America was not the owner of the Mortgage and Note; (2) Bank of America was not entitled to foreclose on the Mortgage and Note; and (3) MERS was not the mortgagee on the Mortgage but rather was a "sham and fraud" that "acted only as a strawman." She also requested that the court determine the identity of the mortgagee and award her costs and attorney's fees pursuant to HRS § 607-14.

In the third count of her counterclaim, requesting the quieting of her title, Homeowner again incorporated by reference the allegations in the wrongful foreclosure count. She asserted she was entitled to have her legal title to the Property quieted against Bank of America's claims pursuant to HRS § 669-1 et seq., and that she was entitled to recover her costs and attorney's fees pursuant to HRS § 607-14.

Finally, in the fourth count of her counterclaim, alleging unfair and deceptive trade acts and practices, Homeowner again incorporated by reference the allegations in the wrongful foreclosure count. She alleged she was a consumer with respect to the Mortgage and Note, and she asserted the acts and conduct of Bank of America, its agents and predecessors, and MERS constituted an unfair and deceptive trade practice by "either or both mortgage lenders, mortgage servicers, mortgage holders, claimants, debt collectors, and/or finance companies." Homeowner claimed she paid about \$55,593 to Bank of America

based on erroneous information and billings, and on the assumption that Bank of America was the rightful owner of the Mortgage. She maintained Bank of America and MERS were therefore subject to liability under HRS §§ 480-2 and 480-13 for injuries and damages of not less than \$1,000, or for treble damages, plus attorney's fees and costs. Additionally, Homeowner asserted she was entitled to injunctive relief to enjoin the unlawful practices of Bank of America, its agents and predecessors, and MERS.

**B. Motion to Dismiss Counterclaim**

On October 22, 2012, Bank of America filed a Motion to Dismiss Defendant Grisel Reyes-Toledo's Counterclaim ("Motion to Dismiss Counterclaim"). As to the wrongful foreclosure count, Bank of America asserted Homeowner did not describe any foreclosure that had actually occurred or what was wrongful about the alleged foreclosure, and that therefore the count should be dismissed. As to the declaratory judgment count, Bank of America alleged the involvement of MERS in loan transactions has been repeatedly approved by this court and that there was no allegation that MERS exceeded its traditionally approved role in Homeowner's case.

As to the quiet title count, Bank of America alleged that Homeowner failed to state a claim because she did not assert she had fully paid off the underlying obligation or is able to

tender the full amount before seeking relief. Finally, Bank of America asserted that although the unfair and deceptive trade acts and practices count incorporated by reference the allegations in the wrongful foreclosure count, Homeowner did not describe the alleged unfair or deceptive acts or practices in any detail.

In her Memorandum in Opposition to Bank of America's Motion to Dismiss Counterclaim, Homeowner argued that all counts of her counterclaim, including the wrongful foreclosure count, were sufficient to survive a HRCF Rule 12(b)(6) motion to dismiss. She argued if she were to prove the facts alleged in her counterclaim, which incorporated the allegations in her Answer, she would be entitled to relief against Bank of America. Homeowner also asserted that Bain v. Metro Mortgage Group, Inc., 285 P.3d 34 (Wash. 2012) supports her claim that MERS is merely a registration system and not a holder of the Note. Additionally, Homeowner maintained sufficient facts were pled for both the declaratory judgment and quiet title counts pursuant to Amina v. Bank of New York Mellon, Civil No. 11-00714 JMS/BMK, 2012 WL 3283513 (D. Haw. 2012), in which the court held that a borrower need not tender payment or allege that a note

and mortgage were satisfied to quiet title against a party who is not a mortgagee.<sup>5</sup>

In its Reply Memorandum, Bank of America asserted that if Homeowner believed Bank of America lacked authority to foreclose, then her arguments were defenses, not affirmative claims for relief. Bank of America also asserted that a claim for wrongful foreclosure cannot arise before a foreclosure occurs. Bank of America alleged that to the extent Homeowner's other counts relied upon allegations set forth in the wrongful foreclosure count, they should also be dismissed.

On February 12, 2013, the circuit court entered an order granting Bank of America's Motion to Dismiss Counterclaim ("Order Dismissing Counterclaim"). Homeowner filed a motion for reconsideration contending she had sufficiently pled her "compulsory" counterclaim as Bank of America was not the mortgagee, had no right to bring a foreclosure action, and was liable to her for over \$160,000 based on her UDAP counterclaim. In the alternative, she moved for entry of final judgment and a HRCP Rule 54(b) certification allowing immediate appeal of the order Dismissing Counterclaim. She also requested a stay pending appeal pursuant to HRCP Rule 62(d) and (h).

After Bank of America filed its opposition,

---

<sup>5</sup> The UDAP count was reinstated by the ICA and is not before us on certiorari.

on December 31, 2013, the circuit court denied Homeowner's Motion for Reconsideration and Rule 54(b) Certification ("Order Denying Defendant Grisel Reyes-Toledo's Motion for (1) Reconsideration of the February 12, 2013 Order Dismissing Counterclaim; (2) HRCP Rule 54(b) Certification; and (3) HRCP Rule 62(d) and (h) Stay Pending Appeal Filed on February 22, 2013") ("Order Denying Motion for Reconsideration").<sup>6</sup>

**C. ICA's Decision on Remand**

Addressing the propriety of the dismissal of Homeowner's counterclaim for the first time on remand from Reyes-Toledo I, the ICA affirmed in part and vacated in part the circuit court's Order Dismissing Counterclaim, entering its summary disposition order ("SDO") on July 21, 2017. See Reyes-Toledo, SDO at 12. The ICA applied the following standard to evaluate Bank of America's HRCP Rule 12(b)(6) motion to dismiss:

---

<sup>6</sup> The circuit court subsequently granted Bank of America's motion for summary judgment through its December 9, 2014 "Findings of Fact, Conclusions of Law, Order Granting Plaintiff's Motion for Summary Judgment Against All Parties and Interlocutory Decree of Foreclosure Filed April 4, 2014" ("Foreclosure Decree"), and entered a separate foreclosure judgment. In the first appeal, Homeowner appealed this judgment. In a summary disposition order, the ICA affirmed. As noted, on certiorari in Reyes-Toledo I, we held: (1) genuine issues of material fact existed as to whether Bank of America was entitled to enforce the Note at the time it commenced the foreclosure proceedings, precluding summary judgment as to Bank of America's standing to institute the proceedings; (2) the assignment of the Mortgage was insufficient to establish Bank of America's standing to institute foreclosure proceedings; and (3) the foreclosure judgment was a final appealable judgment, and thus the ICA had appellate jurisdiction over the Order Dismissing Counterclaim. We vacated the ICA's April 13, 2016 Judgment on Appeal and the Foreclosure Decree to the extent it granted summary judgment in favor of Bank of America. We also remanded the case to the ICA to determine whether the circuit court erred in dismissing Homeowner's counterclaim.

A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his or her claim that would entitle him or her to relief. We must therefore view a plaintiff's complaint in a light most favorable to him or her in order to determine whether the allegations contained therein could warrant relief under any alternative theory. For this reason, in reviewing a circuit court's order dismissing a complaint our consideration is strictly limited to the allegations of the complaint, and we must deem those allegations to be true.

Reyes-Toledo, SDO at 3 (quoting In Re Estate of Rogers, 103 Hawai'i 275, 280-81, 81 P.3d 1190, 1195-96 (2003)). The ICA went on, however, to quote an excerpt from Twombly, 550 U.S. at 555, which the ICA previously quoted in Pavsek, 127 Hawai'i 390, 279 P.3d 55 (App. 2012):

While a complaint attacked by [a HRC] Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the "grounds" of his "entitlement to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all of the complaint's allegations are true (even if doubtful in fact).

Reyes-Toledo, SDO at 4 (quoting Pavsek, 127 Hawai'i at 403, 279 P.3d at 68).

Based on these standards, the ICA concluded the circuit court did not err in dismissing three of the four counts of Homeowner's counterclaim.

First, with respect to the wrongful foreclosure count, the ICA noted that although Homeowner alleged Bank of America's conduct in commencing the foreclosure was "willful, malicious, and without just cause," she failed to identify any other

specific acts that would make the foreclosure wrongful. Reyes-Toledo, SDO at 4. Further, the ICA opined that Homeowner failed to provide any authority to support her proposition that a wrongful foreclosure claim can be asserted before the foreclosure or sale of the property in a judicial foreclosure. See Reyes-Toledo, SDO at 6. According to the ICA's analysis, only non-judicial wrongful foreclosure has been recognized in Hawai'i, and other jurisdictions have held a wrongful foreclosure claim does not arise until after the foreclosure occurs. See Reyes-Toledo, SDO at 4-5 (citing Santiago v. Tanaka, 137 Hawai'i 137, 366 P.3d 612 (2016); Cervantes v. Countrywide Home Loans, Inc., 656 F.3d 1034 (9th Cir. 2011)). As this case involved a pending judicial foreclosure and Homeowner asserted her wrongful foreclosure claim before any foreclosure or sale occurred, the ICA concluded Homeowner could not prove a set of facts that would entitle her to relief on the wrongful foreclosure count. See Reyes-Toledo, SDO at 6.

Second, the ICA also concluded the circuit court did not err in dismissing the declaratory judgment count. See Reyes-Toledo, SDO at 7-8. The ICA disagreed with Homeowner's argument that pursuant to Bain, 285 P.3d 34, she was entitled to declaratory relief under HRS § 632-1, ruling that Bain was distinguishable as explained in its prior decision in Bank of America, N.A. v. Hermano, No. CAAP 13-0006069, at 6-7 (App. June

22, 2016) (SDO), cert. denied, No. SCWC-13-0006069 (Sept. 22, 2016):

Bain was decided in the context of a non-judicial deed-of-trust foreclosure, whereas the instant case is a judicial foreclosure of a mortgage. Thus, the procedures and law in Bain appear to be inapplicable here. The Bain decision was limited to whether MERS is a "beneficiary" under the language of Washington's Deed of Trust Act, thus the analysis is different. In addition, Bain is a Washington State case; upon review, we are not inclined to depart from the Hawai'i cases that have consistently recognized the validity of assignments of mortgages by MERS where lenders granted to MERS, as nominee for lenders and lenders' successors and assigns, the right to exercise all of those interests granted by a borrower, including the right to foreclose and sell a property and to take any action required of a lender.

Reyes-Toledo, SDO at 7 (quoting Hermano, SDO at 6-7) (citations omitted). Here, MERS was listed in the Mortgage as "mortgagee" and "nominee," and the Mortgage's terms granted MERS the right to "exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument." Id. Thus, the ICA concluded Homeowner's argument was without merit and the circuit court did not err in dismissing this count. See Reyes-Toledo, SDO at 7-8.

Third, the ICA concluded the circuit court did not err in dismissing Homeowner's quiet title count. See Reyes-Toledo, SDO at 9. The ICA reasoned that as with the counterclaimant in Hermano, Homeowner's reliance on Amina, Civil No. 11-00714 JMS/BMK, 2012 WL 3283513, to support her argument that a

"borrower does not need to tender payment to allege that the promissory note and the mortgage were paid where the borrower brings a quiet title action against a party, who, according to the complaint, is not a mortgagee," was misplaced. Id. To the ICA, Amina provided a significant clarification:

To be clear . . . this is not a case where Plaintiffs assert that Defendant's mortgagee status is invalid (for example, because the mortgage loan was securitized or because Defendant does not hold the note). On their own, such allegations would be insufficient to assert a quiet title claim—they admit that a defendant is a mortgagee and attack the weakness of the mortgagee's claim to the property without establishing the strength and superiority of the borrower's claim (by asserting an ability to tender).

Id. (quoting Amina, 2012 WL 3283513, at \*5).

The ICA concluded each of Homeowner's arguments — that Bank of America's mortgagee status was invalid, the mortgage loan was securitized, and Bank of America did not possess the Note — were "specifically distinguished" in Amina. See id. The ICA concluded the quiet title count therefore failed because Homeowner did not "demonstrate the superiority of her claim" as she did not allege she paid, or was able to pay, the outstanding debt on the Property. Id.

As to Homeowner's UDAP claim raised in the fourth and final count of her counterclaim, however, the ICA concluded that because of this court's decisions in Santiago, 137 Hawai'i 137, 366 P.3d 612, Hungate v. Law Office of David B. Rosen, 139 Hawai'i 394, 391 P.3d 1 (2017), and Reyes-Toledo I, the circuit

court erred in dismissing the UDAP counterclaim. See Reyes-Toledo, SDO at 10-11.

Finally, the ICA also concluded Homeowner was not entitled to any further relief based on her request for reconsideration of the circuit court's dismissal of her counterclaim. See Reyes-Toledo, SDO at 11-12. The ICA reasoned she failed to present any new evidence or arguments in conjunction with her motion for reconsideration that could not have been presented during the earlier adjudicated motion to dismiss. See id.

The ICA thus affirmed in part and vacated in part the circuit court's Order Dismissing Counterclaim, and remanded to the circuit court for further proceedings. See Reyes-Toledo, SDO at 12. The ICA entered its Judgment on Appeal on October 5, 2017.

**D. Application for Writ of Certiorari**

Homeowner timely applied for a writ of certiorari ("Application") from the October 5, 2017 Judgment entered by the ICA pursuant to its July 21, 2017 SDO, essentially arguing the three remaining counts of her counterclaim should not have been dismissed pursuant to HRCF Rule 12(b)(6). Bank of America filed a response on November 2, 2017.

**III. Standard of Review**

A circuit court's ruling on a motion to dismiss is reviewed de novo. See Hungate, 139 Hawai'i at 401, 391 P.3d at 8 (quoting

Kamaka v. Goodsill Anderson Quinn & Stifel, 117 Hawai'i 92, 104, 176 P.3d 91, 103 (2008), as amended (Jan. 25, 2008 & Feb. 14, 2008)). Moreover, "[w]hen interpreting rules promulgated by the court, principles of statutory construction apply. Interpretation of a statute is a question of law which we review de novo." Ranger Ins. Co. v. Hinshaw, 103 Hawai'i 26, 30, 79 P.3d 119, 123 (2003) (quoting Molinar v. Schweizer, 95 Hawai'i 331, 334-35, 22 P.3d 978, 981-82 (2001) (citations and quotation marks omitted)). Therefore, we also interpret the HRCF de novo. See Sierra Club v. Dep't of Transp. of State of Hawai'i, 120 Hawai'i 181, 197, 202 P.3d 1226, 1242 (2009) (citing Molinar, 95 Hawai'i at 335, 22 P.3d at 982).

It is further well established that:

a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his or her claim that would entitle him or her to relief. The appellate court must therefore view a plaintiff's complaint in a light most favorable to him or her in order to determine whether the allegations contained therein could warrant relief under any alternative theory. For this reason, in reviewing a circuit court's order dismissing a complaint . . . the appellate court's consideration is strictly limited to the allegations of the complaint, and the appellate court must deem those allegations to be true.

Kealoha v. Machado, 131 Hawai'i 62, 74, 315 P.3d 213, 225 (2013) (citations and brackets omitted).

#### IV. Discussion

We accepted certiorari to address two issues: (1) the clarification of the proper standard for a HRCF Rule 12(b)(6)

motion to dismiss, and (2) whether a wrongful foreclosure claim exists in Hawai'i. We discuss them in turn.

A. HRCP Rule 12(b)(6) Standard

The first issue requires us to review the "plausibility" pleading standard the ICA applied in affirming the dismissal of three counts of Homeowner's counterclaim pursuant to HRCP Rule 12(b)(6), which mirrors Federal Rules of Civil Procedure ("FRCP") Rule 12(b)(6). See Reyes-Toledo, SDO at 4. The ICA adopted this standard in Pavsek v. Sandvold, 127 Hawai'i 390, 279 P.3d 55 (App. 2012), citing to the United States Supreme Court's adoption of the standard in Twombly, 550 U.S. 544, and Iqbal, 556 U.S. 662:

While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the "grounds" of his "entitlement to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all of the complaint's allegations are true (even if doubtful in fact).

Pavsek, 127 Hawai'i at 403, 279 P.3d at 68 (quoting Twombly, 550 U.S. at 555).

Prior to Twombly and Iqbal, the "notice pleading" standard was applied in federal courts to determine whether a pleading can be dismissed for "failure to state a claim upon which relief can be granted" under FRCP Rule 12(b)(6). It is also the standard this court has expressly adopted.

Although the "plausibility" pleading standard has not been adopted by this court,<sup>7</sup> the ICA has nevertheless relied on it in evaluating HRCP Rule 12(b)(6) motions to dismiss filed in unpublished cases subsequent to Pavsek. See, e.g., Bank of New York Mellon v. Mazerik, No. CAAP-14-0001100, at 5 (App. Nov. 16, 2016) (SDO), cert. denied, No. SCWC-14-0001100 (Feb 24, 2017); Abordo v. Dep't of Pub. Safety, No. CAAP-13-0005534, at 4 (SDO) (App. Feb 26, 2016); Klausmeyer-Among v. Honolulu City Council, No. CAAP-13-00001184, at 3 (App. Nov. 29, 2013) (mem.), cert. denied, No. SCWC-13-0000184 (Apr. 9, 2014); Hermano, SDO at 3. Thus, to answer whether the ICA erred in affirming the circuit court's dismissal of three counts of Homeowner's counterclaim pursuant to HRCP Rule 12(b)(6), we must determine whether our traditional "notice pleading" standard or the "plausibility" standard cited in Pavsek governs. The answer turns on the proper interpretation of HRCP Rule 8(a).

We begin with the plain language of HRCP Rule 8(a). HRCP Rule 8(a) states, in relevant part, that "a pleading which sets forth a claim for relief, whether an original claim,

---

<sup>7</sup> We cited to Pavsek in Hungate v. Rosen, 139 Hawai'i 394, 401, 391 P.3d 1, 8 (2017), and Kealoha v. Machado, 131 Hawai'i 62, 74, 315 P.3d 213, 225 (2013), not with respect to the "plausibility" pleading standard, but with respect to the proposition that "in weighing the allegations of [a pleading] as against a motion to dismiss, the court is not required to accept conclusory allegations on the legal effect of the events alleged." Pavsek cited to Marsland v. Pang, 5 Haw. App. 463, 474, 701 P.2d 175, 186 (1985), for that proposition, which, in turn, cited to 5 Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure: Civil § 1357 (1969). This legal proposition is not at issue in this case.

counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief the pleader seeks." Since being promulgated and adopted in 1953,<sup>8</sup> we have amended HRCP Rule 8(a) only once, which was to change gendered terms. See Order Amending the Hawai'i Rules of Civil Procedure (Dec. 7, 1999) (eff. Jan. 1, 2000). Noticeably absent from Rule 8(a) is any mention of requiring "plausibility" of factual allegations, or that such allegations be "enough," or some variation of those terms.

We first interpreted HRCP Rule 8(a) in Hall v. Kim, 53 Haw. 215, 491 P.2d 541 (1971), where we explained the principles underlying the rule and motions to dismiss:

H.R.C.P., Rule 8(a)(1) provides that a pleading for claim of relief shall contain 'a short and plain statement of the claim showing that the pleader is entitled to relief.' It is also to be noted that Rule 8(f) reads: 'All pleadings shall be so construed as to do substantial justice.'

. . . .

We believe that the mandate of H.R.C.P. Rule 8(f) that 'all pleadings shall be so construed as to do substantial justice' epitomizes the general principle underlying all rules of H.R.C.P. governing pleadings, and by the adoption of H.R.C.P. we have rejected 'the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome' and in turn accepted 'the principle that the purpose of pleading is to facilitate a proper decision on the merits.'

Accordingly, under Rule 8(a)(1) 'a complaint is sufficient if it sets forth 'a short and plain statement of

---

<sup>8</sup> See Hawai'i Rules of Civil Procedure (adopted & promulgated by the Supreme Court of the Territory of Hawai'i, Dec. 7, 1953) (eff. June 14, 1954).

the claim showing that the pleader is entitled to relief.' . . . The rule is satisfied if the statement gives the defendant fair notice of the claim and the ground upon which it rests. . . . It is not necessary to plead under what particular law the recovery is sought.' . . .

. . . .

'In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' . . . Though it may be improbable for the plaintiffs to prove their claims, they are entitled to an opportunity to make that attempt. It is not for a court to circumvent a determination of an action upon the merits of the case by accepting an assertion that the claim asserted in the complaint is groundless.

Hall, 53 Haw. at 219-22, 491 P.2d at 544-46 (citations omitted). In other words, "[HRCP] Rule 8(a)(1) does not require the pleading of facts; it requires a complaint to set forth 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" Hall, 53 Haw. at 220, 491 P.2d at 545 (citations omitted)). Thus, we held whether a pleading states evidence, facts, or conclusions of law was not dispositive. See id.

We held to these principles in subsequent cases. See, e.g., Au v. Au, 63 Haw. 210, 221, 626 P.2d 173, 181 (per curiam), recon. denied, 63 Haw. 263, 626 P.2d 173 (1981) ("Thus, Rule 8(a) H.R.C.P., requires a complaint to set forth a 'short and plain statement of the claim. . . .' This requirement under our pleading system provides defendant with fair notice of what the plaintiff's claim is and the grounds upon which the claim

rests." (citing Conley v. Gibson, 355 U.S. 41, 47 (1957); Hall, 53 Haw. 215, 491 P.2d 541)). It is well established that Hawai'i is a notice-pleading jurisdiction. See, e.g., In re Genesys Data Techs., Inc., 95 Hawai'i 33, 41, 18 P.3d 895, 903 (2001) ("Hawaii's rules of notice pleading require that a complaint set forth a short and plain statement of the claim that provides defendant with fair notice of what the plaintiff's claim is and the grounds upon which the claim rests." (citations omitted)). Under Hawaii's notice pleading approach, it is "[not] necessary to plead legal theories with . . . precision." Leslie v. Estate of Tavares, 93 Hawai'i 1, 4, 994 P.2d 1047, 1050 (2000); see also Perry v. Planning Comm'n, 62 Haw. 666, 685, 619 P.2d 95, 108 (1980) ("Modern judicial pleading has been characterized as 'simplified notice pleading.' Its function is to give opposing parties 'fair notice of what the . . . claim is and the grounds upon which it rests.'" (citing Gibson, 355 U.S. at 47))).

Next, we examine the purpose and history of HRCF Rule 8(a). The purpose of HRCF Rule 8(a)(1) is to "give[] the defendant fair notice of the claim and the ground upon which it rests." Hall, 53 Haw. at 221, 491 P.2d at 545 (citation omitted). Further, we have stated that "[w]e believe that the mandate of H.R.C.P. Rule 8(f) that 'all pleadings shall be so construed as to do substantial justice' epitomizes the general principle underlying all rules of H.R.C.P. governing pleadings, and by the

adoption of H.R.C.P. we have rejected 'the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome' and in turn accepted 'the principle that the purpose of pleading is to facilitate a proper decision on the merits.'" Id. (quoting Gibson, 355 U.S. at 48).

Finally, we turn to the context of HRCP Rule 8(a). See Moana v. Wong, 141 Hawai'i 100, 109, 405 P.3d 536, 545 (2017) ("It is well established that the interpretation of rules promulgated by the supreme court involves principles of statutory construction." (quoting State v. Bohannon, 102 Hawai'i 228, 240, 74 P.3d 980, 992 (2003)); Cty. of Kaua'i v. Hanalei River Holdings Ltd., 139 Hawai'i 511, 519, 394 P.3d 741, 749 (2017) ("When construing a statute, our foremost obligation is to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. And we must read statutory language in the context of the entire statute and construe it in a manner consistent with its purpose." (citation omitted)). As previously discussed, HRCP Rule 8(a) is devoid of any mention of facts, specificity, or plausibility. Moreover, when the HRCP require a pleading to have specificity, they expressly state so. For example, HRCP Rule 9, titled "Pleading Special Matters," offers examples of when specificity is required; HRCP Rule 9(b), titled "Fraud, mistake, condition of the mind," requires that

"[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally." Similarly, HRCF Rule 9(c)<sup>9</sup> and HRCF Rule 9(g)<sup>10</sup> require specificity. In contrast, HRCF Rule 8(a), as well as HRCF Rule 13 (governing counterclaims and cross-claims), are devoid of any mention of specificity or particularity.

In addition, the HRCF also provides a mechanism for dealing with any lack of clarity resulting from our preference for notice pleading under HRCF Rule 8. HRCF Rule 12(e), titled "Motion for more definite statement," states that "[a] party may move for a more definite statement" if a pleading is "so vague and ambiguous that a party cannot reasonably be required to frame a responsive pleading." The motion under HRCF Rule 12(e) "shall point out the defects complained of and the details desired." HRCF Rule 12(e). Thus, under HRCF Rule 12(e), a court may order that any "vague or ambiguous" pleadings be cured; should a party fail to comply, the court may also strike

---

<sup>9</sup> HRCF Rule 9(c), titled "Conditions precedent," reads: "In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity."

<sup>10</sup> HRCF Rule 9(g), titled "Special Damage," reads: "When items of special damage are claimed, they shall be specifically stated."

the pleading to which the motion was directed or issue other orders as deemed just.

Lastly, the HRCPP are to "be construed and administered to secure the just, speedy, and inexpensive determination of every action." HRCPP Rule 1. The framework for our rules of civil procedure support notice pleading, as our rules contain a variety of methods to determine the merits of a case. See Hall, 53 Haw. at 218, 491 P.2d at 544 ("Such simplified 'notice pleading' is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues." (quoting Gibson, 355 U.S. at 47-48) (construing the federal rule that is analogous to HRCPP Rule 8(a))). For example, HRCPP Rule 26 gives the trial court wide discretion in managing discovery to "secure the just, speedy, and inexpensive determination of every action," HRCPP Rule 1, as HRCPP Rule 26(b)(2) "secure[s] the just, speedy, and inexpensive determination of every action" by limiting the frequency or extent of the discovery methods used.<sup>11</sup>

<sup>11</sup>

Limitations. By order, the court may alter the limits in these rules on the number of depositions and interrogatories or the length of depositions under Rule 30. By order, the court may also limit the number of requests under Rule 36. The frequency or extent of use of the discovery methods otherwise permitted under these rules (continued. . .)

Notably, our case law cites heavily to Conley v. Gibson, 355 U.S. 41, 47 (1957). For many years the Supreme Court of the United States similarly interpreted FRCP Rule 8(a)(2), the federal counterpart to HRCF Rule 8, as requiring a complaint to provide notice of the plaintiff's claim and the grounds upon which it rests. But in 2007 with the issuance of Twombly, the Court expanded the requirements imposed on a complaint by FRCP Rule 8(a)(2). As the ICA in Pavsek cited to Twombly for its standard, it is important that we discuss Gibson, 355 U.S. 41, and its progeny.

In Gibson, the Court addressed what became known as the "no set of facts" standard. See 355 U.S. at 44. The Supreme Court held, among other things, the petitioners' complaint containing general allegations survived a motion to dismiss because the FRCP did not require claimants to set out detailed facts for the basis of their claim. See 355 U.S. at 47. The Court stated it

---

(. . .continued)

shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. The court may act upon its own initiative after reasonable notice or pursuant to a motion under Rule 26(c).

HRCF Rule 26(b)(2).

followed the accepted rule that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." 355 U.S. at 45-46 (footnote omitted). Further, the Court reasoned the FRCP only required a "'short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." 355 U.S. at 47 (footnote omitted). Following the "simple guide" of FRCP Rule 8(f) that "all pleadings shall be so construed as to do substantial justice," the Court concluded the FRCP rejected the approach that "pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." 355 U.S. at 48 (citation omitted).

The Court abrogated Gibson in Twombly, however, holding that a "plausibility" standard governed pleadings of a complaint alleging an antitrust conspiracy. Twombly, 550 U.S. at 555-57. In this context, the Court stated the pleading must contain "enough facts to state a claim to relief that is plausible on its face." 550 U.S. at 570. Further, the Court stated it is not sufficient for the pleading to contain mere "labels and conclusions [or] a formulaic recitation of the elements of a cause of action." 550 U.S. at 555. To survive a motion for

dismissal, the "[f]actual allegations must be enough to raise a right to relief above the speculative level." Id.

Justice Stevens, joined by Justice Ginsburg, dissented in Twombly. See 550 U.S. at 570-97. Pointing out that the plausibility standard was an evidentiary standard, Justice Stevens stated that the plausibility standard contradicted what the FRCP intended to codify. See 550 U.S. at 580. He explained: "Under the relaxed pleadings standards of the Federal Rules, the idea was not to keep litigants out of court but rather to keep them in. The merits of a claim would be sorted out during a flexible pretrial process and, as appropriate, through the crucible of trial." 550 U.S. at 575. Justice Stevens noted that twenty-six States and the District of Columbia utilized the Gibson Court's language of "whether it appears 'beyond doubt' that 'no set of facts' in support of the claim would entitle the plaintiff to relief." 550 U.S. at 578 (footnote omitted).

Two years after Twombly, the Supreme Court clarified the plausibility standard in Ashcroft v. Iqbal, 556 U.S. 662 (2009). The Court held that the Twombly plausibility standard was not limited to complaints in the antitrust conspiracy context, but instead, was applicable to "all civil actions and proceedings in the United States district courts." Iqbal, 556 U.S. at 678-80, 684 (quoting FRCP Rule 1). The Court explained the two

principles in Twombly underlying the plausibility standard: first, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions," and second, "only a complaint that states a plausible claim for relief survives a motion to dismiss." Iqbal, 556 U.S. at 678-79 (citing Twombly, 550 U.S. at 555-56). The Court explained that "[d]etermining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Id. (citation omitted). Further, the Court stated that if "the well-pleaded facts do not permit a court to infer more than the mere possibility of misconduct, the complaint has alleged — but it has not 'shown' — 'that the pleader is entitled to relief.'" Id. (quoting FRCP Rule 8(a)(2)) (brackets omitted).

Although "[t]he advent of plausibility pleading in Twombly and Iqbal was motivated in significant part by a desire . . . to deter allegedly abusive practices . . . and to contain costs," when compared to the "notice pleading" standard, the "plausibility" pleading standard is restrictive as it results in decreased access to the courts for citizens. Arthur R. Miller, From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure, 60 Duke L.J. 1, 21 & n.67 (2010) ("[T]he perception among many practicing attorneys and

commentators is that the grant rate [for motions to dismiss] has increased, particularly in civil rights cases, employment discrimination, private enforcement matters, class actions, and proceedings brought pro se. Some initial empirical evidence supports these impressions.").

Indeed, when the FRCP was promulgated in 1938, "[t]he rulemakers believed in citizen access to the courts and in the resolution of disputes on their merits," and therefore had "established a relatively plainly worded, non-technical procedural system." Arthur R. Miller, Are the Federal Courthouse Doors Closing? What's Happened to the Federal Rules of Civil Procedure?, 43 Tex. Tech. L. Rev. 587, 587-88 (2011) (footnotes omitted); see also Twombly, 550 U.S. at 573 (Stevens, J., dissenting) ("Rule 8(a)(2) of the Federal Rules requires that a complaint contain 'a short and plain statement of the claim showing that the pleader is entitled to relief.' The Rule did not come about by happenstance, and its language is not inadvertent. [In contrast to hypertechnical English pleading rules, the Rule intended to set forth] a pleading standard that was easy for the common litigant to understand and sufficed to put the defendant on notice as to the nature of the claim against him and the relief sought." (emphasis added)). Just like Hawaii's "notice pleading" standard, "[t]he [Federal] Rules had a notice pleading regime that abjured factual detail and

verboseness." See Miller, 43 Tex. Tech. L. Rev. at 588 (citing Gibson, 355 U.S. 41).

The "plausibility" pleading standard, i.e., "fact pleading by another name," however, has effectively "tak[en] federal civil practice back toward code and common law procedure and their heavy emphasis on detailed pleadings and frequent resolution by a demurrer to the complaint or code motion to dismiss." Miller, 60 Duke L.J. at 21. Indeed, Twombly suggests "parity between the level of scrutiny applied to claims at the Rule 12(b)(6) and Rule 56 stages — with the only distinction being that between alleged facts and evidenced facts . . . ."

A. Benjamin Spencer, Plausibility Pleading, 49 B.C. L. Rev. 431, 487 (2008); see also Twombly, 550 U.S. at 586 (Stevens, J., dissenting) ("Everything today's majority says would therefore make perfect sense if it were ruling on a Rule 56 motion for summary judgment and the evidence included nothing more than the Court has described. But it should go without saying . . . that a heightened production burden at the summary judgment stage does not translate into a heightened pleading burden at the complaint stage."). This "approach [is] wholly out of line with the original liberal vision of the rules and would ultimately saddle plaintiffs in disfavored actions like antitrust and civil rights claims with burdens they will have difficulty meeting." Spencer, 49 B.C. L. Rev. at 488 (footnotes omitted).

Furthermore, "[s]ince Iqbal, what constitutes ample facts, and whether those facts appear plausible, are matters left to the presiding judge's discretion – whereas one judge may subjectively regard a claim as fanciful or implausible, another may permit a similar claim to proceed." Ramzi Kassem, Implausible Realities: Iqbal's Entrenchment of Majority Group Skepticism Towards Discrimination Claims, 114 Penn St. L. Rev. 1443, 1465 (2010).

For all of these reasons, the ICA's adoption of the Pavsek "plausibility" standard is contrary to our well-established historical tradition of liberal notice pleading and undermines citizen access to the courts and to justice. Instead of deeming the factual allegations as true as we have consistently held to govern HRCP Rule 12(b)(6) motions to dismiss, the standard in Pavsek results in factual weighing by the trial court, resulting in inconsistent application.

For approximately seventy years, we have upheld our liberal notice pleading standard. See, e.g., Kawakami v. Kahala Hotel Investors, LLC, 142 Hawai'i 507, 518, 421 P.3d 1277, 1288 (2018) ("Under our rules, a complaint is good if it contains a short and plain statement of the claim showing that the pleader is entitled to relief." (quoting Yap v. Wah Yen Ki Tuk Tsen Nin Hue of Honolulu, 43 Haw. 37, 39 (Haw. Terr. 1958)); Laeroc Waikiki Parkside, LLC v. K.S.K. (Oahu) Ltd., 115 Hawai'i 201, 166 P.3d

961 (2007) (citing In re Genesys Data Techs., Inc., 95 Hawai'i at 41, 18 P.3d at 903; Au, 63 Haw. at 220-21, 626 P.2d at 181)); Hall, 53 Haw. at 221, 491 P.2d at 545; Midkiff v. Castle & Cooke, Inc., 45 Haw. 409, 413-16, 368 P.2d 887, 890-92 (1962). Courts should "not depart from the doctrine of stare decisis without some compelling justification." State v. Garcia, 96 Hawai'i 200, 206, 29 P.3d 919, 925 (2001) (quoting Hilton v. South Carolina Pub. Ry. Comm'n, 502 U.S. 197, 202 (1991)) (emphasis in original). Not once have we questioned, or found ambiguous, our standards for HRCF Rule 8(a) and a motion to dismiss. If a complaint meets the requirements of HRCF Rule 8(a), dismissal pursuant to HRCF Rule 12(b)(6) is appropriate where "the allegations of the complaint itself clearly demonstrate that plaintiff does not have a claim," Touchette v. Ganai, 82 Hawai'i 293, 303, 922 P.2d 347, 357 (1996), and in weighing the allegations of the complaint as against a motion to dismiss, the court "will not accept conclusory allegations concerning the legal effect of the events the plaintiff has [alleged]." 5B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1357, at pp. 548-53 (3d ed. 2004).

Although Twombly and Iqbal are persuasive in interpreting and applying HRCF Rule 8, we are not bound by the Supreme Court's interpretation of an analogous federal rule. See, e.g., Kawamata Farms, Inc. v. United Agri Products, 86 Hawai'i 214,

251-52, 948 P.2d 1055, 1092-93 (1997) ("[N]otwithstanding their persuasiveness, interpretations of the FRCP by federal courts are by no means conclusive with respect to our interpretation of any rule within the HRCF."); Roxas v. Marcos, 89 Hawai'i 91, 119, 969 P.2d 1209, 1237 (1998) (noting that although HRCF Rule 25 was "nearly identical to its federal counterpart," the rules "are not coextensive, and the federal court's interpretation of the federal rule is not binding on Hawaii's interpretation of its own rule"). See also Hawai'i Const. art. VI, § 7 ("The supreme court shall have power to promulgate rules and regulations in all civil and criminal cases for all courts relating to process, practice, procedure and appeals, which shall have the force and effect of law."). We find no reason to depart from our established precedent in evaluating an HRCF Rule 12(b)(6) motion to dismiss. Accordingly, we reject the ICA's standard in Pavsek and clarify that our well-established notice pleading standard governs in Hawai'i.

Having reaffirmed our traditional notice pleading standard, we now turn to the issue of whether the ICA erred in affirming the circuit court's dismissal of three counts of Homeowner's counterclaim.

**B. Wrongful Foreclosure Claim**

In the following analysis, we first address whether the ICA erred in concluding there must first be a foreclosure before a

wrongful foreclosure claim can be brought. We then apply the traditional notice pleading standard to determine whether the circuit court erred in dismissing Homeowner's wrongful foreclosure claim.

Although we have not previously squarely addressed whether a wrongful foreclosure counterclaim may be brought in a judicial foreclosure case when no foreclosure or sale of the property has yet occurred, upon careful review, we hold that such a wrongful foreclosure claim exists in Hawai'i. We base our conclusion on our past consideration of potential circumstances in which a wrongful foreclosure claim may exist in non-judicial foreclosures. See Hungate, 139 Hawai'i at 407, 391 P.2d at 14 (holding there was no need to create a cause of action against a foreclosing mortgagee's attorney under former HRS § 667-5 concerning non-judicial foreclosures as "the mortgagor can protect its interest through filing a claim against the mortgagee for wrongful foreclosure"); Santiago, 137 Hawai'i at 157-58, 366 P.3d at 632-33 (holding the mortgagee's non-judicial foreclosure of the mortgagors' property after the mortgagors cured their default was wrongful); Mount v. Apao, 139 Hawai'i 167, 180, 384 P.3d 1268, 1281 (2016) (concluding the mortgagee's non-judicial foreclosure violated former HRS § 667-5(c)(1) and was, therefore, wrongful). We see no reason why a different standard should exist for judicial foreclosures.

In Reyes-Toledo I, we recognized and discussed the problems associated with modern mortgage securitization practices. See Reyes-Toledo I, 139 Hawai'i at 369 & n.14, 390 P.3d at 1256 & n.14. We noted that "[t]he requirement that a foreclosing plaintiff prove its entitlement to enforce the note at the commencement of the proceedings 'provides strong and necessary incentives to help ensure that a note holder will not proceed with a foreclosure action before confirming that it has a right to do so.'" Id. (citations omitted). "Basic requirements of Hawaii's Uniform Commercial Code and our law on standing should not be modified, especially in light of the widespread problems created by the securitization of mortgages, because a requirement that seems to be merely technical in nature may serve an essential purpose." Id. "[T]he possession requirement, which applies unless a specific statutory exception exists, protects the maker of an instrument from multiple enforcements of the same instrument." Id. (citing Hanalei, BRC Inc. v. Porter, 7 Haw. App. 304, 308, 760 P.2d 676, 679 (1988)). Accordingly, a foreclosing plaintiff must prove "the existence of an agreement, the terms of the agreement, a default by the mortgagor under the terms of the agreement, and giving of the cancellation notice," as well as prove entitlement to enforce the defaulted upon note. Reyes-Toledo I, 139 Hawai'i at 367-68, 390 P.3d at 1254-55.

It follows that if a foreclosing plaintiff does not prove the aforementioned elements and commences a foreclosure action, the mortgagor should be able to challenge the lawsuit without having to await a foreclosure decree. Indeed, other jurisdictions have held that a party may not foreclose without having the legal power to do so.<sup>12</sup> See, e.g., Barrionuevo v. Chase Bank, N.A., 885 F. Supp. 2d 964, 974 (N.D. Cal. 2012) (holding the mortgagors stated a claim of wrongful foreclosure against the bank, trustee under a deed of trust, and others by alleging the defendants were not current beneficiaries under the deed of trust); 100 Lakeside Trail Trust v. Bank of America, N.A., 804 S.E.2d 719, 725 (Ga. App. 2017) (noting that under Georgia law, "an attempted wrongful foreclosure claim exists when, in the course of a foreclosure action that was not completed, a defendant makes a knowing and intentional publication of untrue and derogatory information concerning the debtor's financial condition, and damages were sustained as a direct result of the publication" (citation and brackets omitted)); Fields v. Millsap & Singer, P.C., 295 S.W.3d 567, 571

---

<sup>12</sup> Generally, if a foreclosure is conducted negligently or in bad faith to the detriment of the mortgagor, the mortgagor may assert a claim of wrongful foreclosure by establishing the following elements: (1) a legal duty owed to the mortgagor by the foreclosing party; (2) a breach of that duty; (3) a causal connection between the breach of that duty and the injury sustained; and (4) damages. See James Buchwalter et al., 59 C.J.S. Mortgages § 650 (2009). However, an action for damages against the mortgagee "lies . . . only when the mortgagee had no right to foreclose at the time foreclosure proceedings were commenced." Id. (footnote omitted).

(Mo. Ct. App. 2009) (stating "[a] tort action for damages for wrongful foreclosure lies against a mortgagee only when the mortgagee had no right to foreclose at the time foreclosure proceedings were commenced," but "[i]f the right to foreclose existed, no tort cause of action for wrongful foreclosure can be maintained" (citation omitted)); Gregorakos v. Wells Fargo Nat'l Ass'n, 647 S.E.2d 289, 292 (Ga. App. 2007) (stating that in Georgia, "a plaintiff asserting a claim of wrongful foreclosure must establish a legal duty owed to it by the foreclosing party, a breach of that duty, a causal connection between the breach of that duty and the injury it sustained, and damages" (citation and brackets omitted)); McKnight Family, L.L.P. v. Adept Mgmt., 310 P.3d 555, 559 (Nev. 2013) (stating a wrongful foreclosure claim challenges the authority behind the foreclosure, not the foreclosure act itself). Thus, we hold that a mortgagor may bring a wrongful foreclosure claim before a foreclosure decree is entered.

Therefore, to assert a wrongful foreclosure claim, the foreclosing plaintiff must have failed to establish its standing as required by Reyes-Toledo I and the mortgagor must have suffered an "injury in fact" and damages as a result. As explained above, a mortgagor need not wait for a foreclosure decree to assert a wrongful foreclosure claim. If a party with no authority or standing files a foreclosure action, no

foreclosure decree would result, yet the mortgagor would have spent time and incurred expenses to defend against such a lawsuit. Allowing a mortgagor to bring a wrongful foreclosure counterclaim without awaiting an actual foreclosure benefits judicial economy and efficiency, as a foreclosure defendant should not have to institute a separate legal action after the pending foreclosure case is decided. Accordingly, a mortgagor should be able to assert a counterclaim for wrongful foreclosure based on the underlying facts of the pending foreclosure case. However, we emphasize this does not mean a mortgagor must assert the wrongful foreclosure claim as a compulsory counterclaim.

Here, it remains an issue of fact whether Bank of America attempted to foreclose on Homeowner's Property without standing to do so. See Reyes-Toledo I, 139 Hawai'i at 371, 390 P.3d at 1258 ("A foreclosing plaintiff's burden to prove 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.'" (citation omitted)). As a result of defending against Bank of America's lawsuit, Homeowner alleged she incurred costs and expenses. Thus, the ICA erred when it concluded Homeowner did not yet have a claim for wrongful foreclosure against Bank of America.

We next address whether Homeowner's wrongful foreclosure count was properly dismissed by the circuit court, which the ICA

affirmed applying the incorrect "plausibility" pleading standard. By incorporating the defenses in her Answer into her wrongful foreclosure count, Homeowner asserted Bank of America was not the real party-in-interest, owner, holder, or holder in due course of the Note and Mortgage. She also asserted there was "no valid negotiation for value of [her] promissory note to [Bank of America]." She argued that, therefore, "[Bank of America]'s conduct in commencing this case was willful, malicious, without just cause," and she was entitled to "general, special, and punitive damages in an amount to vest this Court with jurisdiction."

Taking Homeowner's allegations as true, as we must in evaluating a Rule 12(b)(6) motion to dismiss, the wrongful foreclosure count within her counterclaim satisfies HRCP Rule 8(a) and our traditional notice pleading standard. There is an issue of fact regarding whether Bank of America had standing prior to commencing the lawsuit, and Homeowner has provided notice through her allegations that, if not, Homeowner has been injured, establishing a claim for damages. Thus, Homeowner's wrongful foreclosure count should not have been dismissed.

**C. Declaratory Judgment Claim**

Homeowner's declaratory judgment count, which incorporated by reference the allegations set forth in her wrongful foreclosure count, asserted she was entitled to declaratory

relief under HRS § 632-1. On remand, it appears the ICA based its analysis on the Pavsek standard, and seemed to assume as true the assertions with respect to the parties and assignment documents contained in Bank of America's Complaint, as opposed to the Counterclaim filed by Homeowner. Additionally, the ICA focused solely on issues regarding MERS raised in Bain, and disregarded Homeowner's remaining assertions in her declaratory judgment count of her counterclaim.

As Homeowner argues, the declaratory judgment count also asserted: (1) Bank of America was not the owner and holder of the Mortgage and Note; (2) Bank of America was not entitled to foreclose on the Mortgage and Note; (3) MERS was not the mortgagee on the Mortgage but rather was a "sham and fraud" and MERS "acted only as a strawman"; (4) the court should decide who is the mortgagee on the Mortgage and the Note; and (5) Homeowner can recover costs and attorney's fees pursuant to HRS § 607-14. Applying HRCF Rule 8(a)'s notice pleading standard, Homeowner's declaratory judgment count provided sufficient notice of her claim and should not have been dismissed pursuant to HRCF Rule 12(b)(6). Taking the allegations asserted by Homeowner as true, it does not appear beyond doubt that Homeowner could not prove a set of facts entitling her to relief. Thus, the ICA erred in affirming the circuit court's dismissal of the declaratory judgment count within Homeowner's counterclaim.

D. Quiet Title Claim

Homeowner also incorporated by reference the allegations in her wrongful foreclosure count into her quiet title count. Stating she was the owner of the Property, she sought to quiet title to the Property against Bank of America's adverse claim, asserting Bank of America was not the mortgagee. Accepting Homeowner's allegations as true, she has satisfied HRCF Rule 8(a)'s pleading requirements by asserting that she has a substantial interest in the Property, and that her interest in the Property is greater than Bank of America's. See Ka'upulehu Land LLC v. Heirs & Assigns of Pahukula, 136 Hawai'i 123, 137, 358 P.3d 692, 706 (2015) ("While it is not necessary for the plaintiff to have perfect title to establish a prima facie case, he must at least prove that he has a substantial interest in the property and that his title is superior to that of the defendants." (quoting Maui Land & Pineapple Co., 76 Hawai'i at 408, 879 P.2d at 513)). If Bank of America is indeed not the mortgagee, Homeowner's quiet title count states a claim upon which relief can be granted. Thus, we conclude the ICA erred in affirming the circuit court's dismissal of the quiet title count within her counterclaim.

V. Conclusion

For the foregoing reasons, the ICA erred in affirming the circuit court's dismissal of the remaining three counts of

Homeowner's counterclaim because the assertions satisfied our traditional notice pleading standard. Accordingly, we vacate the ICA's Judgment on Remand. We also vacate the circuit court's Order Dismissing Counterclaim and Order Denying Motion for Reconsideration to the extent it denied reconsideration of the Order Dismissing Counterclaim,<sup>13</sup> and we remand to the circuit court for further proceedings consistent with this opinion.

R. Steven Geshell  
for petitioner

Jade Lynne Ching,  
Nakashima Ching LLC  
for respondent

/s/ Paula A. Nakayama

/s/ Sabrina S. McKenna

/s/ Richard W. Pollack

/s/ Michael D. Wilson

/s/ Colette Y. Garibaldi



<sup>13</sup> In light of Reyes-Toledo I setting aside the grant of summary judgment of foreclosure in favor of Bank of America, our holding to reinstate the remaining three counts of Homeowner's counterclaim, and the ICA's decision to reinstate the UDAP count, which was not challenged by Bank of America, we need not address the remaining issue in Homeowner's Application regarding the circuit court's refusal "to allow [Homeowner] to use her home as the supersedeas bond."