

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
The Honorable DeAndrea Gist Benjamin, District Court Judge

DEC 02 2020
SC Court of Appeals

Case No. 2014-CP-40-02063

Appellate Case No. 2020-000069

U.S. Bank, National Association, as trustee for the Holders of The Banc of America Funding Corporation, 2008-FT1 Trust, Mortgage Pass-Through Certificates, Series 2008-FT1, ...Respondent,

v.

Rhonda Lewis Meisner a/k/a Rhonda L. Meisner; Bank of America, N.A.; and SCBT, ...Defendants,

Of whom Rhonda Lewis Meisner is the Appellant.

RESPONDENT'S FINAL BRIEF

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Date: December 1, 2020

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STATEMENT OF ISSUES ON APPEAL

- I. WHETHER THE TRIAL COURT CORRECTLY GRANTED U.S. BANK'S MOTION FOR SUMMARY JUDGMENT WHERE U.S. BANK DEMONSTRATED THAT IT POSSESSED THE NOTE INDORSED IN BLANK
- II. WHETHER THE TRIAL COURT CORRECTLY GRANTED U.S. BANK'S REQUEST FOR ATTORNEYS' FEES IN ITS MOTION FOR SUMMARY JUDGMENT

STATEMENT OF THE CASE

A. U.S. Bank Filed For Foreclosure As A Result Of Appellant's Default On Her Loan.

U.S. Bank, National Association, as trustee for the Holders of The Banc of America Funding Corporation, 2008-FT1 Trust, Mortgage Pass-Through Certificates, Series 2008-FT1 ("U.S. Bank"), commenced the underlying equitable action for foreclosure on March 31, 2014 ("Foreclosure Action"), alleging that Rhonda Meisner ("Meisner") defaulted on her promissory note executed on August 13, 2003 ("Note"). Pursuant to the terms of the Note, Meisner promised to pay Bank of America, N.A. ("BANA") the sum of \$61,516.00, plus interest. The Note was secured by a mortgage ("Mortgage") (collectively, the "Loan"), which Meisner executed the same day that she signed the Note, on the real property located at 406 Koon Store Road, Columbia, South Carolina ("the Property").

In the Complaint, U.S. Bank alleged that it was the holder of the Note and the Mortgage and named two additional defendants that it alleged may claim an interest in the Property, South Carolina Bank and Trust, N.A. ("SCBT") and BANA. (R. pp. 41.) U.S. Bank alleged that BANA may claim an interest in the Property stemming from a mortgage executed in 2005. (R. pp. 43.) As for SCBT, U.S. Bank alleged that it might claim an interest in the Property stemming from a 2007 mortgage, executed by Meisner in favor of SCBT, and a deficiency judgment entered against Meisner in Richland County in 2012. (R. pp. 43.)

In response, Meisner filed an Answer on May 23, 2014 asserting affirmative defenses as well as counterclaims for: (1) breach of contract, alleging that the “Plaintiffs” failed to resolve an escrow dispute before transferring the servicing of the loan; and (2) a declaratory judgment seeking a determination the parties’ right under the Note and Mortgage as well as appraisal rights for the Property (“Original Answer”). (R. pp. 49.)

B. Meisner Files A Motion To Dismiss, Which The Trial Court Denies.

On May 6, 2014, Meisner filed a motion to dismiss the Foreclosure Action pursuant to “S.C. Code Ann. Rule 12(b)(8)(9) [sic]” (“Motion to Dismiss”), and, on June 4, 2014, she filed a memorandum of law in support of the Motion (“Memorandum”). (R. pp. 461.) As stated in her Motion to Dismiss and supporting Memorandum, Meisner alleged that the Foreclosure Action should be dismissed because U.S. Bank failed to timely respond to a complaint filed by SCBT in a separate foreclosure action against Meisner, in November 2013, in which SCBT sought to foreclose a junior mortgage on the Property (Case No. 2013-CP-40-7144) (“SCBT Foreclosure”). (R. pp. 462.)

Meisner’s Motion to Dismiss came on for a hearing on June 10, 2014. At the hearing, U.S. Bank argued that SCBT’s foreclosure of its junior lien had no effect on the validity of U.S. Bank’s senior lien at issue in this action. (June 10, 2014 T. pp. 7:9–8:13.) Consequently, U.S. Bank argued that its failure to timely respond to the complaint in the SCBT Foreclosure could not serve as a basis for the dismissal of the Foreclosure Action under Rule 12(b)(8), SCRPC. (*Id.*)

During the hearing, Meisner attempted to challenge U.S. Bank’s standing to maintain the Foreclosure Action based on her allegation that the Assignment of Mortgage was defective. (June 10, 2014 T. pp. 8:21–9:11.) The Trial Court, however, informed Meisner that it could not hear her argument regarding the Assignment of Mortgage as Meisner had not filed a motion on the issue with the Court. (June 10, 2014 T. pp. 9:3–12.) Although Meisner stated that she had filed a motion

challenging U.S. Bank's standing (June 10, 2014 T. p. 9:7–8), the Record shows no such motion was filed—and, in her subsequent Rule 59(e) motion (discussed below), Meisner conceded that she made an *oral* motion challenging U.S. Bank's standing at the June 10th hearing.

C. The First Order of Reference is Entered but Subsequently Vacated.

While Meisner's Motion to Dismiss was still pending, U.S. Bank filed a Motion to Strike Jury Trial Demand and for Mandatory Order of Reference, on June 23, 2014, arguing that Meisner's counterclaims were not legal counterclaims as they did not affect U.S. Bank's right to enforce the Note and Mortgage. U.S. Bank therefore sought an order referring the entire matter to the Master-in-Equity. (R. pp. 445.)

On June 27, 2014, the Court entered an order denying Meisner's Motion to Dismiss ("Order Denying Motion to Dismiss"). In the Order, the Trial Court noted that, although Meisner cited Rules 12(b)(8) and (9), SCRCP, as grounds for her Motion to Dismiss, Rule 12(b)(9) did not exist; therefore, the Court only addressed Meisner's Motion pursuant Rule 12(b)(8). (R. pp. 23.) The Court denied the Motion to Dismiss because it concluded Meisner's default under the Note and Mortgage was "entirely unrelated to her performance under the terms of [her] loan agreement with SCBT[.]"

In a motion filed on June 30, 2014, pursuant to Rules 59(e) and 60, SCRCP, Meisner asked the Trial Court to amend the Order Denying Motion to Dismiss, and for relief from the Order ("Motion for Reconsideration"). (R. pp. 452.) Meisner asked the Court to reconsider its ruling under Rule 12(b)(8) and noted that the Court had not ruled on her oral motion at the June 10, 2014 hearing challenging the assignment of the Mortgage to U.S. Bank. (R. pp. 452.) The Trial Court denied Meisner's Motion for Reconsideration, in a Form 4 order on September 5, 2014, stating that it did not receive a copy of the motion as required by Rule 59(g), SCRCP ("Order Denying Motion for Reconsideration"). (R. pp. 26.) Meisner appealed the Order Denying Motion to

Dismiss and the Order Denying Motion for Reconsideration. This Court dismissed the appeal as interlocutory in an order entered November 19, 2014. (R. p. 8.)

On July 24, 2014, the Clerk of Court entered an order striking Meisner's demand for a jury trial and referring the matter to the Master-in-Equity ("First Order of Reference"). (R. pp. 19.) The Master-in-Equity, Judge Strickland, vacated the First Order of Reference, on January 15, 2015, concluding that the Order was inadvertently signed by the Clerk of Court but should have been signed by a Circuit Court Judge. (R. p. 18; Dec. 16, 2015 T. pp. 13:17–14:5.)

D. Meisner Files an Amended Answer and Counterclaims and U.S. Bank Obtains an Order of Mandatory Reference.

On August 10, 2015, Meisner filed an amended answer and counterclaims ("Amended Answer")¹ asserting various affirmative defenses and counterclaims for: (1) declaratory judgment to determine the real party in interest; (2) breach of contract against Bank of America; (3) breach of contract accompanied by a fraudulent act against Bank of America; (4) abuse of process against U.S. Bank; (5) failure to file a satisfaction of mortgage against Bank of America; (6) slander of title against Bank of America; and (7) slander of title, based in equity, against SCBT. (R. pp. 61.)

After filing its Reply to Meisner's Amended Answer (R. pp. 85), U.S. Bank again sought an order of reference when it filed a Motion to Strike Jury Trial Demand and for Mandatory Order of Reference on October 28, 2015 ("Motion for Order of Reference"). U.S. Bank's Motion for Order of Reference was heard on December 16, 2015. (Dec. 16, 2015 T. p. 1.)

On April 13, 2016, the Trial Court entered an order striking Meisner's demand for a jury trial and referred the matter to a Master-in-Equity ("Second Order of Reference"). (R. pp. 14.) In the Second Order of Reference, the Trial Court concluded that Meisner's counterclaims and cross-

¹ For clarification, U.S. Bank notes that Meisner titled her Amended Answer as her "First Amended Complaint." (R. p. 61.)

claims, if proven true, would not have any impact on the enforceability of the Note and Mortgage, and were, therefore, permissive. (R. pp. 15.) Because Meisner raised the permissive counterclaims and cross-claims in the equitable foreclosure proceedings, the Trial Court concluded that Meisner had waived her right to a jury trial and referred the matter to the Master-in-Equity. (R. pp. 16.)

Meisner filed a Motion to Alter and Amend Ruling Pursuant to SCRPC Rule 59-e [sic] (“Motion to Amend”) on April 20, 2016. (R. pp. 400.) However, no order ruling on Meisner’s Motion to Amend appears in the Record.

Meisner filed a Notice of Appeal from the Second Order of Reference on May 12, 2016. (R. pp. 398.) After the briefing in this first appeal, on February 13, 2019, this Court entered an Order dismissing the appeal. (R. pp. 5.) Meisner sought a rehearing, which this Court denied on March 21, 2019. (R. pp. 4.) Meisner then filed a Petition for Writ of Certiorari with the South Carolina Supreme Court, which the South Carolina Supreme Court denied on June 28, 2019. (R. 1.)

E. U.S. Bank Files its Motion for Summary Judgment and, After a Hearing on October 29, 2019, the Trial Court Grants the Motion for Summary Judgment.

On April 15, 2019, U.S. Bank filed its Motion for Summary Judgment (“MSJ”) and contemporaneously filed its Affidavit in Support of the MSJ (the “Affidavit”). (R. pp. 340). In the Affidavit, Theresa Robinson, an employee of Nationstar Mortgage, LLC d/b/a Mr. Cooper, the servicer of this loan, stated that Meisner had defaulted on the loan, which had been assigned to U.S. Bank, and that she had failed to cure the default. (R. pp. 342). In addition, a copy of the Note was attached to the Affidavit, which bears a blank indorsement from the original lender, BANA. (R. pp. 344). An assignment of the mortgage from BANA to U.S. Bank was also attached to the Affidavit, which was recorded on May 2, 2014. (R. pp. 342). Moreover, sworn discovery response

from BANA, the only other party who could have had an interest in this loan, stated that BANA transferred possession of the Note to U.S. Bank on June 29, 2013.

On June 1, 2019, Meisner filed a response to the MSJ stating that the Court did not have jurisdiction because an appeal was currently pending and that it was not clear if U.S. Bank had standing to foreclose. (R. pp. 404). The Trial Court held a hearing on the MSJ on October 29, 2019. (October 29, 2019, T. pp. 1). At the hearing, the Trial Court repeatedly asked Meisner to state any factual issues that would require a trial in this matter. (*See, e.g.*, October 29, 2019, T. 24:4-6). Meisner responded that she did not think that U.S. Bank had been properly assigned the Note and Mortgage and also stated that BANA may have an interest in the loan and may owe her money because it failed to draft payments from her bank account or file a satisfaction of the mortgage. (October 29, 2019, T. 24:7-15; 25:4-23). However, BANA had originally given Meisner two loans, the subject loan in 2003, which U.S. Bank currently holds, and a subsequent loan in 2005. (October 29, 2019, T. 39:10-14). Meisner appeared to claim that the 2005 loan should have been satisfied, which is irrelevant to this action, and could never offer any evidence that BANA still had any interest in the 2003 loan, which BANA had disclaimed as explained above. (October 29, 2019, T. 22:4-10). Given Meisner's failure to offer any evidence to rebut U.S. Bank's MSJ, the Trial Court entered an Order on November 7, 2019 granting the MSJ ("MSJ Order"). (R. pp. 27). Meisner moved to alter or amend the judgment but the Trial Court denied that Motion on December 2, 2019 ("December 2 Order"). (R. pp. 9). Meisner filed the instant appeal of both the MSJ Order and December 2 Order.

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).

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 HAD JURISDICTION TO RULE ON SUMMARY JUDGMENT.

As an initial matter, Meisner attempts to argue that, because her first appeal was still pending when U.S. Bank filed its MSJ on April 15, 2019, the Trial Court had no jurisdiction to consider the MSJ. (App. Br. at 5-6, 10-11). Meisner offers no authority to support the proposition that a trial court may not hear a motion filed during the pendency of an appeal after the case is remanded to the trial court. Rather, it is well-established under South Carolina law that a trial court is vested with jurisdiction to hear all matters after remittur from the appellate courts and to take action on all matters consistent with the appellate court’s ruling. *Martin v. Paradise Cove Marina, Inc.*, 348 S.C. 379, 385, 559 S.E.2d 348, 351-52 (2001).

In this case, this Court dismissed Meisner’s appeal on February 13, 2019 and denied her Motion for Rehearing on March 21, 2019. (R. pp. 4-5). Meisner did have a Petition for Writ of Certiorari pending on April 15, 2019, when the MSJ was filed, but the South Carolina Supreme Court denied that petition on June 28, 2019. (R. pp. 1). That Court issued a remittur to the Trial Court, which had authority to hear any matters and take any action to move the case to conclusion after that remittur. *Martin*, 348 S.C. at 385, 559 S.E.2d at 351-52. Therefore, Meisner’s argument

that the Trial Court did not have jurisdiction to consider the MSJ is completely meritless and the Trial Court's MSJ Order should be affirmed.

II. U.S. BANK PROVED ITS STANDING TO FORECLOSE ON THE SUBJECT PROPERTY.

Although Meisner's Inial Brief is repetitive and, at times, incoherent, Mesiner's main argument is that there is a question of fact as to whether U.S. Bank or BANA had standing to bring this foreclosure because the assignment of the mortgage was executed on April 2, 2014, after the foreclosure was filed and BANA had allegedly claimed an interest in the Note, creating an issue of fact as to which entity actually holds the Note and has the right to foreclose. (App. Br. at 6-10, 11-13). However, these assertions are meritless given that U.S. Bank produced the Note, indorsed in blank by BANA, and BANA explicitly stated that it transferred the Note to U.S. Bank on June 29, 2013. For these reasons, U.S. Bank proved that it is the holder of the Note with standing to foreclose.

1. South Carolina law is clear that the holder of the Note 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)). 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 with the April 15, 2019 MSJ, along with discovery in this case, unequivocally proved that U.S. Bank was both the holder of the Note with the right to foreclose. In support of the MSJ, U.S. Bank submitted the Affidavit of Theresa Robinson, employee for the servicer Nationstar, who attested that U.S. Bank was the lienholder and that Meisner was in default. (R. pp. 342). Moreover, BANA, as the originator of the Note, explicitly disclaimed an interest in the Note in its sworn responses to Meisner’s discovery requests, when it stated that it transferred the Note to U.S. Bank on June 29, 2013, before this case was filed. U.S. Bank produced the Note indorsed in blank by BANA as an attachment to the Affidavit in support of the MSJ. (R. pp. 344). The fact that BANA may have claimed to be the holder of the Note prior to June 29, 2013 is not sufficient to raise an issue of fact given that BANA disclaimed any such interest in this matter. As BANA was the only other party that could claim an interest in this loan and it has disclaimed that interest, U.S. Bank has standing to foreclose as holder of the Note indorsed in blank.

For the foregoing reasons, U.S. Bank produced sufficient summary judgment evidence to establish its standing to foreclose the Mortgage as the holder of the Note, *see Draper*, 405 S.C. 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). Since U.S. Bank unequivocally demonstrated its standing to prosecute the Foreclosure Action, Meisner's argument on appeal to the contrary clearly fails. Therefore, the Summary Judgment should be affirmed.

2. As the holder of the Note, U.S. Bank 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

Meisner contends that the late assignment of the mortgage prohibits U.S. Bank from establishing standing in this case and that U.S. Bank was not the owner of the Note; thus, it allegedly had no standing to foreclose. (App. Br. 6-10). However, the assignment of the mortgage and the "owner" of the Note are irrelevant to whether U.S. Bank has standing to foreclose. Rather, given that it possesses the Note indorsed in blank, U.S. Bank clearly has standing to foreclose.

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); 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, Meisner's arguments regarding the assignment and the owner of the Note are without merit. U.S. Bank 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.

III. ALL CLAIMS WERE ADJUDICATED BY THE TRIAL COURT AND THE CROSS-CLAIMS AGAINST BANA DO AFFECT U.S. BANK'S ABILITY TO FORECLOSE.

Meisner argues that BANA was not present at the foreclosure hearing and, therefore, the cross-claims against it were not adjudicated; thus, Meisner claims, without support, that the Trial Court should not have entered summary judgment in favor of U.S. Bank. (App. Br. at 13-15). However, the Trial Court explicitly held that BANA had joined in the MSJ filed by U.S. Bank and, given the commonality of the facts between the cross-claims and the foreclosure claims, summary judgment was appropriate for BANA. (R. pp. 31). Moreover, regardless of whether the cross-claims were properly adjudicated, Meisner has failed to explain how U.S. Bank is not entitled to summary judgment when it produced evidence showing that she was in default and that it held the Note indorsed in blank. Accordingly, even if the cross-claims were not sufficiently adjudicated, that would not prevent summary judgment in favor of U.S. Bank.

IV. MEISNER HAS WAIVED THE ADDITIONAL ISSUES WHICH SHE DID NOT RAISE IN HER INTIAL BRIEF.

On appeal, although Meisner vaguely references the fact that she filed counterclaims against U.S. Bank for declaratory judgment and abuse of process, and that she filed a Motion to Alter or Amend, she fails to make any argument as to why the Trial Court's decisions to grant summary judgment on the counterclaims and deny the Motion to Alter or Amend were in made in error. (*See generally* App. Br.). As Appellant failed to make any argument on appeal regarding these issues, she has failed to preserve the issue for review. *See Jinks v. Richland Cnt'y*, 585 S.E.2d 281, 283 n.3 (S.C. 2003); *Fields v. Melrose Ltd. Partnership*, 439 S.E.2d 283, 285 n.3 (S.C. Ct. App. 1993). Accordingly, the MSJ Order and the December 2 Order should be affirmed.

CONCLUSION

For the reasons and authorities stated above, this Court should affirm the Trial Court's MSJ Order and December 2 Order and for such other relief as this Court deems necessary and appropriate.

This the 1st day of December, 2020.

Respectfully submitted,

MCGUIREWOODS LLP

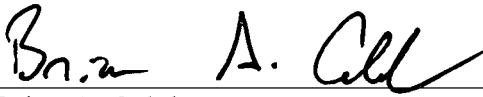
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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with Rule 208(b), SCACR.



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