

STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTON

Deutsche Bank National Trust Company, as  
Trustee of the IndyMac INDX Mortgage Trust  
2007-FLX3, Mortgage Pass-Through  
Certificates, Series 2007-FLX3 under the  
Pooling and Servicing Agreement dated April 1,  
2007

Plaintiff,

vs.

Scott J. Heinrich; Dinah K. Heinrich; OneWest  
Bank, FSB; County of Charleston,

Defendants.

(514773-00572 JJH)

IN THE COURT OF COMMON PLEAS  
OF THE NINTH JUDICIAL CIRCUIT

DOCKET NO.: 2011-CP-10-1060

FILED  
2013 JUL 31 AM 9:17  
JULIE J. ARMSTRONG  
CLERK OF COURT  
BY

  
ORDER ~~DEFENDING~~ DEFENDANTS SCOTT  
J. HEINRICH AND DINAH K.  
HEINRICH'S MOTION TO DISMISS

  
This case came before me on May 13, 2013 on Defendants' pre-Answer Motion to Dismiss this case pursuant to Rules 12(b)(6) and 12(b)(7), SCRCP. Defendants, Scott J. Heinrich and Dinah K. Heinrich ("Defendants"), were represented by William H. Sloan of the Sloan Law Firm, PA in Summerville, and Plaintiff was represented by John J. Hearn of Rogers Townsend & Thomas, PC in Columbia.

**I. Rule 12(b)(6), SCRCP**

Defendants claim that the Complaint should be dismissed pursuant to Rule 12(b)(6), SCRCP, because Plaintiff "lacks the necessary standing to file this action prior to acquiring and recording an Assignment of Mortgage" and fails to mention how they are the owner of the Note and Mortgage in this case under our fact-based pleading scheme. Plaintiff admits that the assignment of mortgage into Plaintiff was recorded February 23, 2011, about two weeks after this action was filed. Plaintiff claims to have no obligation to record the assignment into itself prior to filing this action.

Plaintiff has possession of the original Note, which is indorsed in blank at the time of the hearing before me on May 13, 2013. Plaintiff claims that the note is a negotiable instrument under the South Carolina Uniform Commercial Code, S.C. Code §36-3 et seq. which would entitle them certainly to sue on the note in this action. However, Plaintiff is seeking to foreclose on the mortgage that is attached to the real property as opposed to simply suing on the promissory note.

The idea that the Mortgage follows the Note is one which has been repeatedly confirmed by our courts: "South Carolina recognizes the 'familiar and uncontroverted proposition' that 'the assignment of a note secured by a mortgage carries with it an assignment of mortgage. However, *Carpenter v. Longan*, 83 U.S. 271, 16 Wall. 271, 21 L.Ed. 313 (1872), quoted by Plaintiff's counsel in this oral argument and brief, clearly supports the notion that the Plaintiff must clearly **own the Note and the Mortgage** to foreclose on the property. Plaintiff failed to show that it owned <sup>gcn</sup> the Mortgage at the time the Complaint was filed. <sup>IN gcn</sup> **in its Complaint**, Plaintiff merely contends in §3 of its Complaint that it is a holder and has the right to enforce. Further, the mortgage of this case shows Mortgage Electronic Registration Systems, Inc. (MERS) to be the mortgagee. This was confirmed by Plaintiff's counsel in oral argument. MERS is never mentioned on the Note, <sup>gcn</sup> and therefore, ~~the Note and Mortgage of this case have been separated permanently.~~ <sup>gcn</sup> permanently.

Our state court of appeals made a recent decision in *BAC Home Loan Servicing, L.P. v. Kinder*, 398 S.C. 619, 731 S.E.2d 547 (Ct. App. 2012.) "[T]he assignment of a mortgage does not need to be recorded, and failure to do so has no effect on the rights of the assignee." *Id.* at 623. However, I distinguish the facts of *Kinder* from this case as the Assignment of Mortgage in

Kinder was after the foreclosure was already complete and the issue at dispute in that case was the surplus funds going to the Assignee. *Filing is not the issue but ownership of the note. JCM*

It is clear that to have standing in this foreclosure case, Plaintiff must not only be the holder *& owner JCM* of the original Note, but also the Mortgage as well. Plaintiff's Complaint in this case fails to meet this criteria. Plaintiff lacks the standing to initiate and prosecute the foreclosure, and dismissal pursuant to Rule 17(a) and Rule 12(b) (6) SCRPC is appropriate.

## II. Failure to Join Necessary Parties under Rule 12(b)(7), SCRPC

Rule 12(b)(7) provides that one defense to an action is the failure to join a party under Rule 19 of the South Carolina Rules of Civil Procedure. Rule 19 provides that:

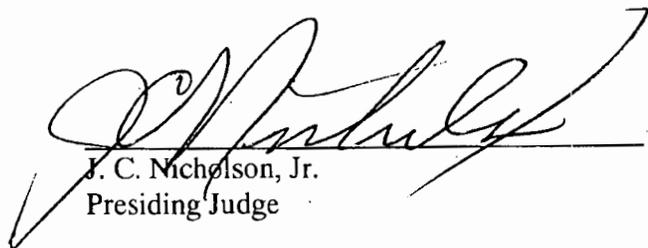
*JCM*  
A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be afforded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party.

Defendants claim that Mortgage Electronic Registration Systems, Inc. ("MERS") and IndyMac Bank, FSB ("IndyMac") are necessary parties to this action, and that the court must join them as parties to protect the Defendants from "double or triple liability" on the Note and Mortgage at issue. Again, Defendants misapprehend the applicable law by advancing this argument. Under South Carolina law, Defendants would not be subject to duplicative payment obligations because Plaintiff's foreclosure judgment will discharge Defendants' liability to other claimants. See S.C. Code Ann §36-3-603(1) (2003) (explaining the circumstances under which cancellation or satisfaction filed by the holder of a negotiable instrument will discharge liability for other claims on same instrument.)

There is no reason that the absence of MERS or IndyMac would prevent this court from issuing a foreclosure judgment establishing Plaintiff's sole authority to enforce the Note and Mortgage at issue here. Further, even if it is determined that these were necessary parties. Rule 12(b)(7) does not call for dismissal of the action, and instead only requires that the parties be joined. On a Rule 12(b)(7) motion, "the proper course for the trial court is to determine the necessity of adding a new party under Rule 19 to insure a full adjudication of the controversy." *Bancohio National Bank v. Neville*, 310 S.C. 323, 328, 426 S.E.2d 773, 776 (1993). As such, Defendants' motion to dismiss pursuant to Rule 12(b)(7) is denied. However, In find this issue moot as I have dismissed this case pursuant to Defendants' Heinrich's Motion to Dismiss under Rule 12(b)(6), SCRPC.

And it is so ordered that this case be dismissed without prejudice.

IT IS SO ORDERED!

  
J. C. Nicholson, Jr.  
Presiding Judge

July  
~~May~~ 30, 2013