



IN THE SUPREME COURT OF THE STATE OF DELAWARE

KENNETH BENDFELDT, and :
BETTINA ROLOFF, :
 : No. 68,2014
 :
 Defendants Below, :
 Appellants : APPEAL FROM JUDGMENT DATED
 : FEBRUARY 4, 2014 OF THE
 v. : SUPERIOR COURT OF THE STATE OF
 : DELAWARE IN AND FOR KENT
 : COUNTY
 HSBC MORTGAGE :
 CORPORATION (USA), : C.A. No. K09L-11-016 RBY
 :
 :
 Plaintiff Below, :
 Appellee. :

APPELLEE'S CORRECTED ANSWERING BRIEF

Dated: April 30, 2014

Jessica L. Case (#5932)
Ballard Spahr LLP
919 N. Market Street, 11th Floor
Wilmington, DE 19801
Telephone: (302) 252-4465
Facsimile: (302) 252-4466

-and-

Daniel JT McKenna, *Pro Hac Vice*
Ballard Spahr LLP
1735 Market St, 51st Floor
Philadelphia, PA 19108
Telephone: (215) 665-8500
Facismile: (215)864-8999
*Attorneys for Plaintiff Below,
Appellee*

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NATURE AND STAGE OF THE PROCEEDINGS

This is an appeal of an Order affirming a default judgment and denying a cross-motion to vacate that default judgment entered in an *in rem scire facias sur* mortgage foreclosure action. Appellants Kenneth Bendfeldt and Bettina Roloff (collectively “the Bendfeldts”) do not dispute the fact that they defaulted on their loan, that they were properly served with the complaint but failed to file a response and that judgment in foreclosure is proper. The only thing they dispute is whether Appellee HSBC Mortgage Corporation (USA) (“HSBC”) was the right entity to obtain that judgment. Thus, the only issue is who is entitled to judgment against the Bendfeldts.

As the Superior Court correctly held below, HSBC was the proper party to obtain judgment because it was the mortgagee at the time of judgment. Instead of directly addressing that indisputable fact, the Bendfeldts seek to avoid it by challenging the timing of the applicable assignment of mortgage, raising arguments they lack standing to raise, highlighting irrelevant post-judgment assignments and raising arguments about note ownership that have been universally rejected by Delaware courts.

The Bendfeldts’ efforts to avoid the impact of their default should be rejected and the Superior Court’s decision should be affirmed.

Nature Of The Action

HSBC commenced an *scire facias sur* mortgage foreclosure action against the Bendfeldts in the Superior Court of Delaware, Kent County on November 6, 2009, which was captioned *HSBC Mortgage Corp. v. Kenneth Bendfeldt and Bettina Roloff*, C.A. No. 09L-016 RBY. (A9). The Bendfeldts were served with the Complaint on January 25, 2010, but failed to file any response. (A7 at Dkt. 6). Two months later, on March 22, 2010, HSBC obtained a default judgment. (A6 at Dkt. 9).

On May 3, 2010, HSBC filed a *Writ of Levari Facias*, which was entered into the record and sent to the Kent County Sheriff to execute. (A6 at Dkt. 10). On June 30, 2010, one day before the scheduled Sheriff's sale, Bendfeldts' counsel entered an appearance in the Superior Court and the sale was adjourned. (A6 at Dkt. 12). Thereafter, the Superior Court stayed the Sheriff's sale and the parties engaged in discovery. (A5 at Dkt. 19). The Superior Court did not vacate the default judgment. (A5).

On April 23, 2013, HSBC filed a motion to affirm the default judgment. (A4 at Dkt. 27). The Bendfeldts responded and cross moved to vacate the judgment. (A3 at Dkt. 29). The Bendfeldts principally argued that HSBC lacked standing to obtain the judgment because: (1) it was not assigned the mortgage until five days after the Complaint was filed; (2) the assignment was allegedly not an

enforceable or valid contract between the assignor and assignee; (3) a corrective assignment was filed to remedy a clerical error after judgment was obtained; (4) the mortgage was assigned after judgment was obtained; and (5) HSBC allegedly did not own the note. (A42).

A hearing was held on both motions on December 6, 2013. (A2 at Dkt. 36). The Superior Court ordered additional briefing from the parties. (A2 at Dkt. 36). On February 4, 2014, the Superior Court entered an Order and Memorandum granting HSBC's motion to affirm and denying the Bendfeldts' cross motion to vacate. (A1 at Dkt. 43). The Superior Court held, *inter alia* that: (1) HSBC was the real party in interest to obtain foreclosure judgment; and (2) the Bendfeldts "as mortgage-debtors, do not have standing to challenge the validity of the mortgage assignment." *HSBC Mortgage Corp. v. Bendfeldt*, 2014 Del. Super. 44, at *2-3 (Del. Super. Ct. Feb. 4, 2014) (the "Opinion"); (A78-79).

The Superior Court also rejected the Bendfeldts' claim that HSBC lacked standing to bring the foreclosure because it allegedly did not own the note, thereby reaffirming the long standing holding that *scire facias sur* mortgage actions are based on the mortgage and not the note. *Bendfeldt*, 2014 Del. Super. 44, at *3; (A79).

The Bendfeldts filed their Notice of Appeal on February 11, 2014. (A1 at Dkt. 44). On March 28, 2014, the Bendfeldts filed their opening brief. This Court

issued a deficiency notice on April 1, 2014 and the Bendfeldts filed their Corrective Opening Brief on April 3, 2014. This is HSBC's answering brief.

SUMMARY OF ARGUMENT

- I. The Superior Court properly held that borrowers who are neither parties to nor intended third party beneficiaries of an assignment of mortgage lack standing to challenge the enforceability of that assignment of the mortgage. HSBC therefore denies each and every allegation in paragraph 1 of the Bendfeldts' Summary of Argument.
- II. The Superior Court properly held that HSBC had the legal right and standing to pursue and obtain judgment under Superior Court Rule of Civil Procedure 17. HSBC therefore denies each and every allegation in paragraph 2 of the Bendfeldts' Summary of Argument.
- III. The Superior Court correctly held that Rule 17 and the recognized foreclosure defenses do not create standing to raise defenses or claims that are otherwise legally barred, including challenges to the legality or enforceability of an assignment as a contract when the defendant is neither party to, nor third party beneficiary of, that assignment. HSBC therefore denies each and every allegation contained in paragraph 3 of the Bendfeldts' Summary of Argument.
- IV. The Superior Court's factual findings were properly made and supported by the record and there is nothing in the record to support the contention that the Superior Court did not consider the Bendfeldts' purported evidence.

HSBC therefore denies each and every allegation contained in paragraph 4 of the Bendfeldts' Summary of Argument.

- V. The Superior Court properly held that HSBC is the real party in interest to obtain foreclosure judgment. HSBC therefore denies each and every allegation contained in paragraph 5 of the Bendfeldts' Summary of Argument.
- VI. The Superior Court properly held that the Bendfeldts lacked standing to challenge the validity of the assignment of mortgage because they are neither parties to, nor intended third party beneficiaries of, the assignment. HSBC therefore denies each and every allegation contained in paragraph 6 of the Bendfeldts' Summary of Argument.
- VII. The Superior Court properly rejected the Bendfeldts' challenge to HSBC's standing based on ownership of the note because *scire facias sur* mortgage actions are based exclusively on the mortgage. HSBC therefore denies each and every allegation contained in paragraph 7 of the Bendfeldts' Summary of Argument.
- VIII. The Superior Court properly held that HSBC is in possession of the note. HSBC therefore denies each and every allegation contained in paragraph 8 of the Bendfeldts' Summary of Argument.

STATEMENT OF FACTS

On May 3, 2007, the Bendfeldts obtained a loan (the “Loan”) in the amount of \$283,500.00 from HSBC. (A9); (B10-13). On that same date, the Bendfeldts executed a note (the “Note”) evidencing their obligation to repay the Loan and a mortgage (the “Mortgage”) securing the Loan against real property located at 5513 Whiteleysburg Rd. Harrington, Delaware 19952 (the “Property”). (A9,13-33). The Mortgage named Mortgage Electronic Registration Systems, Inc. (“MERS”) as mortgagee, solely in its capacity as the nominee for HSBC and its successors and assigns. (A14).

On or about March 1, 2009, the Bendfeldts defaulted on the Loan by failing to make their payments when due. (A10). On November 6, 2009, eight months after the Bendfeldts’ default, HSBC initiated a *scire facias sur* mortgage foreclosure action against the Property. (A9). On November 11, 2009, the assignment of the Mortgage from MERS to HSBC was formalized via a certificate of assignment (the “Assignment”). (A34-35). The Bendfeldts were served with the Complaint on January 25, 2010, but failed to appear or file a response. (A7 at Dkt. 6).

On March 22, 2010, HSBC obtained a default judgment against the Bendfeldts. (A6 at Dkt. 9). On May 3, 2010, HSBC filed a *writ of levary facias* and a Sheriff’s Sale was scheduled for July 1, 2010. (A6 at Dkt. 9). On June 30,

2010, one day before the scheduled Sheriff's sale, Bendfeldts' counsel entered an appearance and the Sheriff's sale was adjourned. (A6 at Dkt. 12). On August 24, 2010, HSBC filed a second *writ of levare facias*. (A6 at Dkt. 15). The Sheriff's sale was rescheduled for December 20, 2010, but the Superior Court adjourned the sale. (A5 at Dkt. 23).

Thereafter, the parties engaged in discovery and, on January 7, 2011, upon the stipulation of the parties, the Superior Court stayed the Sheriff's sale. (A5 at Dkt. 23). The Superior Court did not vacate the default judgment. (A5 at Dkt. 23).

On August 23, 2012, a corrective Assignment of Mortgage (the "Corrective Assignment") was filed to remedy a clerical error in the Assignment; specifically to include the word "(USA)" after HSBC Mortgage Corporation as that word had been inadvertently left out of the Assignment. (A36-37). Later on the same day, HSBC assigned the Mortgage to HSBC Bank USA, N.A. (A38-41). Thereafter, on October 29, 2012, HSBC Bank USA, N.A. assigned the Mortgage to the Federal National Mortgage Association. (A42-44).

On April 23, 2013, HSBC moved to affirm the default judgment and proceed to Sheriff's Sale. (A4 at Dkt. 27). On June 14, 2013, the Bendfeldts filed a response and cross moved to vacate the default judgment. (A3 at Dkt. 29). The Superior Court held oral argument and ordered additional briefing from the parties. (A2 at Dkt. 36). On February 4, 2014, the Superior Court entered an Order

granting HSBC's motion to affirm and denying the Bendfeldts' cross motion to vacate. (A1 at Dkt. 43; A78-80); *Bendfeldt*, 2014 Del. Super. 44. This appeal followed.

ARGUMENT

I. THE SUPERIOR COURT PROPERLY HELD THAT HSBC HAD STANDING TO OBTAIN THE FORECLOSURE JUDGMENT

Question Presented

Whether the Superior Court properly granted HSBC's motion to affirm default judgment and properly denied the Bendfeldts' cross-motion to vacate default judgment because HSBC had standing to bring the *scire facias sur* mortgage foreclosure action to judgment since HSBC was assigned the Mortgage before default judgment was entered and was the mortgagee at the time default judgment was entered?

Suggested answer: Yes.

Scope Of Review

An appeal of a decision granting or denying a motion to vacate a default judgment is reviewed by this Court for abuse of discretion. *Battaglia v. Wilmington Sav. Fund Soc'y*, 379 A.2d 1132, 1135 (Del. 1977). "An abuse of discretion occurs when a court has . . . exceeded the bounds of reason in view of the circumstances, or . . . so ignored recognized rules of law or practices so as to produce injustice." *Senu-Oke v. Broomall Condo., Inc.*, 77 A.3d 272, at *4 (Del. 2013) (citing *Stevenson v. Swiggett*, 8 A.3d 1200, 1204 (Del. 2010)).

The Supreme Court set forth a three part test in considering whether the Superior Court abused its discretion in granting or denying a motion to vacate a

default judgment: “(i) whether the conduct resulting in the entry of the default judgment was the result of excusable neglect; (ii) whether the outcome of the action may be different if the judgment is reopened; and (iii) whether the nonmoving party will suffer substantial prejudice if the judgment is reopened.” *Schrader-VanNewkirk v. Daube*, 45 A.3d 149, at *2 (Del. 2012) (citing *Tsipouras v. Tsipouras*, 677 A.2d 493, 495 (Del. 1996)).

The Court will review questions of law *de novo* “to determine whether the trial judge committed a legal error.” *Scarpinato v. Nehring*, 864 A.2d 929, 2004 WL 2850078, at *2 (Del. 2004).

Merits Of Argument

The Bendfeldts do not dispute the fact that they defaulted on the Loan and that foreclosure judgment against them was proper. Nor do they dispute the fact that they failed to respond to the properly served Complaint and that, as a result, default judgment was proper. Instead, they challenge only whether HSBC was the right entity to obtain that judgment. The Superior Court, after analyzing the Assignment, found that HSBC had the requisite standing under Delaware law to obtain judgment and that the Bendfeldts’ remaining arguments were either barred or meritless.

The Bendfeldts do not argue that the Superior Court abused its discretion in affirming the default judgment or denying their cross-motion to vacate that

judgment. They do not contend that their default was the result of excusable neglect, that the outcome of this foreclosure may be different if the judgment is opened or that HSBC will not suffer substantial prejudice if the judgment is opened. Instead, they ignore that burden and seek to avoid judgment by raising oft-rejected arguments regarding standing in foreclosure actions. The Bendfeldts' efforts should be rejected and the Superior Court's decision should be affirmed.

A. The Bendfeldts Have Not Met Their Burden On Appeal

This Court need not address the Bendfeldts' contentions because they have not asserted any recognized basis for reversal. The Bendfeldts concede that this is an appeal of their motion to vacate under Rule 60(b) (App. Br. at 8), but the Bendfeldts failed to satisfy their burden under that Rule. Instead, they focus on the Superior Court's ruling on standing and purport to challenge that determination *de novo*. However, since the impetus of the Bendfeldts' appeal is the denial of their motion to vacate, they must satisfy that burden on appeal and cannot avoid that burden by focusing on a singular issue determined by the Superior Court.

As set forth above, the Bendfeldts have a well-defined burden to establish that their conduct resulting in the entry of the default judgment was the result of excusable neglect, that the outcome of the action may be different if the judgment is reopened, and that HSBC will not suffer substantial prejudice if the judgment is reopened. *See Schrader-VanNewkirk*, 45 A.3d at *2.

The Bendfeldts have not presented any argument or evidence in support of those elements. Nor have they presented any argument or evidence suggesting that the Superior Court exceeded the bounds of reason or ignored recognized rules of law in following the long string of similar cases. Accordingly, the Bendfeldts have not met and cannot meet their burden of establishing abuse of discretion and the Superior Court's decision should be affirmed.

B. HSBC Had Standing To Obtain Judgment

To the extent this Court considers the Bendfeldts' contentions regarding standing *de novo*, the propriety of which is denied, the Superior Court's decision should be affirmed on the merits.

The Superior Court properly held that HSBC had standing to obtain judgment in this *scire facias sur* mortgage foreclosure action. The centerpiece of the Superior Court's decision was that: (1) the Mortgage identifies HSBC as the lender for which MERS held the mortgage as nominee; (2) MERS, as the nominee for HSBC, assigned the Mortgage to HSBC prior to HSBC obtaining default judgment; and (3) HSBC was indisputably the mortgagee at the time default judgment was entered. *Bendfeldt*, 2014 Del. Super. 44, at *6; (A79-80).

The Superior Court's decision and rationale were guided by well-settled Delaware law. Superior Court Civil Rule 17 provides that every action shall be prosecuted in the name of the real party in interest. Supr. Ct. Civ. R. 17(a). A real

party in interest is defined as someone who has the right sought to be enforced by the action. *Cammile v. Sanderson*, 101 A.2d 316, 318 (Del. Super. Ct. 1953).

Scire facias sur mortgage foreclosure actions are governed by 10 *Del.C.* § 5061(a) which provides that the only parties entitled to pursue foreclosure actions are the mortgagee and the heirs, executors, administrators, successors, and assigns thereof. The statute provides, *inter alia*, that:

[U]pon breach the condition of a mortgage of real estate by nonpayment of the mortgage money or nonperformance of the condition stipulated in such mortgage at the time and in the manner therein provided **the mortgagee, the mortgagee's heirs, executors, administrators, successors or assigns may, at any time** after the last day whereon the mortgage money ought to have been paid or other conditions performed, sue out of the Superior Court of the county wherein the mortgage premises are situated a writ of *scire facias*.

See 10 *Del. C.* § 5061 (emphasis added). Thus, Delaware law specifically provides that a mortgagee or the assignee of the mortgagee's interest have standing to pursue foreclosure.

The Mortgage identifies HSBC as the lender and designates MERS as the mortgagee, solely in its capacity as nominee for HSBC and its assigns. (A14). MERS assigned the Mortgage to HSBC. The Assignment was formalized on November 11, 2009 – four months prior to HSBC obtaining judgment.¹ (A34).

¹ Bendfeldts' conclusory challenge of the MERS process (App. Br. at p. 24-25) is unavailing and has been repeatedly rejected by Delaware Courts. *See, e.g.,*

For purposes of conferring legal standing, “an assignment of mortgage is valid when it is attested to by 1 credible witness and it operates to convey all the rights and interests of the assignor.” *CitiMortgage, Inc. v. Bishop*, 2013 Del. Super. LEXIS 95, at *6, 11-12 (Del. Super. Ct. Mar. 4, 2013) (citing 25 *Del. C.* § 2109(a)). The Assignment conveys all of MERS’s rights in the Property to HSBC and was attested to and notarized by notary Brenda Petruzzo. (A34). The Bendfeldts do not challenge Ms. Petruzzo’s notarization or that the Assignment transferred all of MERS’s rights in the Property to HSBC.²

Thus, it is undisputed and indisputable that the Assignment was valid under Delaware Law for the purposes of conferring standing. *See 25 Del. C.* § 2109 (an assignment is proper if it is attested to by a credible witness and conveys all rights

BAC Home Loans Servicing, LP v. Albertson, No. 10L-11-105, 2014 WL 637659, at *3 (Del. Super. Ct. Feb. 10, 2014) (“Delaware courts will not invalidate a mortgage assignment merely because it is assigned by MERS.”); *id.* at n.9 (collecting cases); *Citimortgage, Inc. v. Stevenson*, 2013 Del. Super. LEXIS 533, at *3 (Del. Super. Ct. Nov. 22, 2013) (“The assignment from MERS was proper and enforceable.”); *Savage v. U.S. Nat’l Bank Ass’n*, 19 A.3d 302, at *5-6 (Del. 2011) (upholding plaintiff’s interest in defendant’s mortgage acquired through an assignment from MERS)); *CitiMortgage, Inc. v. Trader*, 2011 Del. Super. LEXIS 648, at *5 (Del. Super. Ct. May 13, 2011) (finding plaintiff to be the proper party in interest after an assignment of a mortgage from MERS to plaintiff).

² The Bendfeldts’ challenge to the signature of Alfonso Greene is unavailing. Mr. Greene was not the witness to the Assignment and his credibility, therefore, is not at issue. *See 25 Del. C.* § 2109(a). Regardless, that a recorder of deeds from Massachusetts is aware that borrowers have alleged Mr. Greene to be a robo-signer does not impact his credibility and does not give rise to a cognizable challenge.

and interests). HSBC, therefore, had standing on March 22, 2010 when it obtained judgment, and the Superior Court's decision should be affirmed. *See, e.g., Bishop*, 2013 Del. Super. LEXIS 95, at *4, 9-12 (finding an assignment of mortgage to create standing where it was signed and notarized); *In P & B Properties I, LLC v. Owens*, 1996 Del. Super. LEXIS 52 at *1, 4 (Del. Super. Ct. Feb. 15, 1996) (same).

C. The Bendfeldts' Challenges to The Assignment Are Unavailing and/or Improper

The Bendfeldts do not dispute the fact that the Assignment was valid for purposes of conferring standing under Delaware law and that it properly conferred standing upon HSBC. Instead, they seek to collaterally attack HSBC's standing by arguing the Assignment was untimely, the Corrective Assignment negatively impacted HSBC's standing, HSBC assigned the Mortgage after obtaining judgment and the Assignment was not a valid or enforceable contract between MERS and HSBC. The Superior Court properly rejected those contentions.

(1) The Timing of the Assignment Did Not Impact HSBC's Standing

The fact that the Assignment is dated five days after the Complaint was filed does not impact HSBC's standing. *See, e.g., Gunn v. AMBAC Assurance, EQCC*, 2012 WL 1413988, at *2 (Del. Super. Ct. March 21, 2012) ("as a matter of Delaware law, ... a plaintiff in a foreclosure can record a valid assignment after a foreclosure's filing"); *NorthPointe Holdings, LLC v. Nationwide Emerging*

Managers, LLC, 2012 WL 2005453, at *6-9 (Del. Super. Ct. May 24, 2012) (due to financial interest, plaintiff has standing even though claim not assigned until after complaint filed); *Trader*, 2011 Del. Super. LEXIS 648, at *4-5 (“The late recording of the assignment is irrelevant to Plaintiff’s standing to initiate the foreclosure proceedings”).

Regardless, even if HSBC lacked standing at the time the Complaint was filed, the same being specifically denied, it obtained standing when the Assignment was executed on November 11, 2009. *See, e.g., Smith v. Guest*, 16 A.3d 930, 928 (Del. 2011) (“A litigants standing to sue (or lack thereof) may change over time.”); *id.* (standing is remediable).

Thus, HSBC had standing on March 22, 2010 when it obtained default judgment. Accordingly, the Superior Court properly rejected the Bendfeldts’ challenge to HSBC’s standing to obtain that judgment and the Superior Court’s decision should be affirmed.

(2) The Corrective Assignment and Post-Judgment Assignments Did Not Impact HSBC’s Standing

HSBC’s standing was similarly not affected by the Corrective Assignment or the post-judgment assignments. A corrective assignment filed to remedy a clerical error does not alter or affect the prior assignment or the assignee’s standing thereunder. *See, e.g., Bishop*, 2013 Del. Super. LEXIS 95, at *6, 11-12 (a corrective assignment does not affect the legal impact of the assignment it

corrects). Here, the Corrective Assignment, by its express terms, was filed for the sole purpose of correcting a clerical error – namely the accidental omission of “(USA)” from HSBC’s name – and did not otherwise impact the previously recorded Assignment.³

THIS IS A CORRECTIVE ASSIGNMENT TO CORRECT
A PREVIOUSLY RECORDED ASSIGNMENT
RECORDED 11/19/2009 INSTRUMENT 2009-160087 BK
5212 PG 261 TO CORRECT TO ASSIGNEE FROM HSBC
MORTGAGE CORPORATION TO HSBC MORTGAGE
CORPORATION (USA)

(A37) (capitalization in original). Accordingly, the Corrective Assignment did not impact HSBC’s standing to obtain judgment on March 22, 2010. *See Bishop*, 2013 Del. Super. LEXIS 95, at *6, 11-12.

The post-judgment assignments similarly did not affect HSBC’s standing to obtain judgment because they were created after HSBC obtained default judgment.⁴ Default judgment is final judgment. *Werb v. D'Alessandro*, 606 A.2d 117, 119 (Del. 1992); *see also* 6 James W. Moore et al., *Moore's Federal Practice* ¶ 55.09 (2d ed. 1992) (“[a] default judgment is a final judgment for all purposes as between the parties ...”); *Campbell v. Robinson*, 2007 WL 1765558, at *2 (Del.

³ The Corrective Assignment was not a concession that the Assignment was invalid and the Bendfeldts’ suggestion otherwise (App. Br. at 24), is indicative of the lack of their arguments’ merit.

⁴ Since the Bendfeldts challenged HSBC’s standing to obtain default judgment, HSBC remained the proper party to address that challenge.

Super. Ct. June 19, 2007) (“Default judgment constitutes a final judgment that provides a determination of the merits of a case”); *Gebelein v. Four State Builders*, 1982 WL 17829, at *2 (Del. Ch. Oct. 8, 1982) (“The default judgment, then, is final and conclusive and has the same effect as a trial on the merits.”) (citations omitted).

Under Delaware law, a mortgage judgment holder is free to assign the mortgage. *See, e.g., St. Georges Liquors, Inc. v. International Underwrites, Inc.*, 1986 WL 4870, at *3 (Del. Ch. 1986) (“A mortgage and a judgment obtained pursuant to it may be freely assigned in the absence of some agreement that it cannot.”) (citing 6A C.J.S. Assignments § 19; § 34). Thus, since HSBC had obtained judgment, it was free to assign the Mortgage thereafter. More critically, since Plaintiffs’ challenge is whether HSBC had standing to obtain the March 22, 2010 judgment, the assignments that occurred after judgment are immaterial – they do not and cannot impact whether HSBC had standing at the time of judgment.

Accordingly, the Bendfeldts’ challenges to HSBC’s standing based on the Corrective Assignment and post-judgment assignments are meritless and the Superior Court’s decision should be affirmed.

(3) The Bendfeldts Lack Standing To Challenge The Validity And Enforceability Of The Assignment As A Contract.

The Bendfeldts' contention that the Assignment was not a valid and enforceable contract between MERS and HSBC and that, as a result, the Assignment did not confer standing upon HSBC, which is the bulk of their contention, is similarly unavailing.

In accordance with well settled principles of Delaware contract law, a mortgagor lacks standing to challenge the validity or enforceability of an assignment as a contract, when the mortgagor is neither a party to nor a third party beneficiary of that assignment. *See, e.g., Albertson*, 2014 WL 637659, at *4 (applying the Delaware contract law principle that a nonparty to a contract has no rights relating to it unless he is a third party beneficiary to a mortgagor's challenge to an assignment of mortgage); *Bishop*, 2013 Del. Super. LEXIS 95, at *12 (holding that "a mortgage-debtor lacks standing to challenge the validity of the assignment."); *Branch Banking & Trust Co. v. Eid*, 2013 Del. Super. LEXIS 264, at *11 (Del. Super. Ct. June 13, 2013) ("a debtor is not a party to a mortgage assignment, is not a third party beneficiary to the assignment and cannot show legal harm as a result of the assignment. As such, the debtor has no legally cognizable interest in an assignment and therefore is not in a position to complain

about it. Thus, it is not plaintiff who lacks standing to sue, but defendants who lack standing to contest the assignment.”)

This well-reasoned legal premise is based on long standing and unassailable Delaware contract law, which dictates that an individual has no right to challenge a contract unless he or she is a party to or third party beneficiary of that contract. *Browne v. Robb*, 583 A.2d 949, 954 (Del. 1990); *MetCap Securities, LLC v. Pearl Senior Care, Inc.*, 2007 WL 1498989, at *7 (Del. Ch. May 16, 2007).

The Assignment is a contract between MERS and HSBC. (A34-35). The Bendfeldts are not parties to the Assignment and were not third party beneficiaries of the Assignment.⁵ (A34-35); *see also Albertson*, 2014 WL 637659, at *4 (finding borrowers in identical situation were not third party beneficiaries of an assignment).

Thus, the Superior Court correctly held that:

The assignment in this action, treated like any other contract under Delaware law, does not recognize Defendants as parties to the assignment. Defendants merely benefitted from the assignment coincidentally once Defendants purchased the loan from the Plaintiff, the assignee. Therefore, Defendants, as mortgage-debtors, do not have standing to challenge the validity of the instant Mortgage assignment.

⁵ In order to be a third party beneficiary, an individual must be an intended, and not an incidental, beneficiary. *Bishop*, 2013 WL 1143670, at *5, *14-15 (citations omitted).

Bendfeldt, 2014 Del. Super. 44 at *8-9; (A80).

The Bendfeldts do not dispute the fact that they are neither parties to nor third party beneficiaries of the Assignment. (App. Br.) As such, Delaware contract law is clear that they lack standing to challenge that contract and the Superior Court was, therefore, correct in reaching the conclusion that the Bendfeldts lack standing to challenge the enforceability or validity of the Assignment as a contract.

The Bendfeldts seek to avoid that necessary result by claiming that Rule 17 and recognized *scire facias sur* mortgage foreclosure defenses grant them the right to challenge the validity of the Assignment as a contract between MERS and HSBC. (App. Br. at p.24-25). The problem with the Bendfeldts' contention is that it confuses the right to evaluate whether an assignment meets the minimums for standing under Delaware law, e.g. it is properly witnessed and transfers all rights, with *carte blanche* to challenge all aspects of an assignment, including its validity or enforceability as a contract between the assignor and the assignee. Delaware law, however, does not grant defendants such a right. Rather, as set forth above, it restricts their ability to challenge assignments as contracts.

It is no surprise, therefore, that the Bendfeldts do not cite a single case supporting their contention. Nor do they attempt to distinguish the line of cases

cited above which either directly or implicitly rejected that proposition. That is because their position is unsupportable under the law.

Rule 17 and Delaware's foreclosure laws require an assignee to establish standing by presenting an assignment proper on its face under Delaware law – namely that it was attested to by a credible witness and conveys all the rights of the assignor. *See, e.g., 25 Del. C. § 2109(a); Bishop*, 2013 Del. Super. LEXIS 95, at *6, 11-12. Although a foreclosure defendant may challenge those criteria, that does not mean the defendant can raise other challenges to the assignment unassociated with 25 *Del. C.* § 2109. Neither Rule 17, nor Section 2109, nor any other Delaware foreclosure law creates standing for the borrower to challenge the enforceability or validity of an assignment as a contract between the assignor and assignee where the defendant otherwise does not have standing to raise those issues.

The right to plead “in avoidance” similarly does not fabricate standing to challenge an assignment where such standing does not otherwise exist.

A plea in avoidance “relate[s] to the validity or illegality of the mortgage documents” and consequently must relate to the original mortgage sued upon. Such pleas may include: acts of God, assignment, conditional liability, discharge, duress, exception or proviso of statute, forfeiture, fraud, illegality of transaction, justification, nonperformance of conditions precedent, ratification, unjust enrichment, or waiver. It is not sufficient that defenses exist to other matters

arising from an underlying loan transaction of which the mortgage is a part if the attacks are not on the original mortgage transaction itself

Lasalle Nat. Bank v. Ingram, 2005 WL 1284049, at *1 (Del. Super. Ct. May 19, 2005). The Assignment is a contract that was made outside of, and three years after, the original mortgage transaction. Compare (A14) (Mortgage dated May 3, 2007), with (A34) (Assignment dated November 11, 2009). Thus, it is not part of the original mortgage transaction and may not be raised as a defense to this *scire facias sur* mortgage action.

Regardless, the right to raise available defenses does not create standing for defendants to raise claims or defenses that they otherwise lack standing to raise. Thus, even if a plea of avoidance did permit a challenge to the validity of an assignment as a contract, the same being specifically denied, the defendant must independently have standing to challenge the assignment to raise that defense. *Alberston*, 2014 WL 637659, at *4. In other words, if a defendant was a party to or third party beneficiary of an assignment, she would have standing to challenge the validity of an assignment as a contract and, if such challenge was permitted as a defense to a *scire facias sur* mortgage foreclosure, she would be allowed to raise that challenge as a plea in avoidance. *Id.* The availability of avoidance defenses, however, does not and cannot create standing for defendants to challenge assignments that they otherwise lack standing to challenge. *See id.* (although “plea

in avoidance of the original mortgage transaction may actually include a challenge to the validity of an assignment as stated above, Defendants may only have standing to challenge this assignment if Defendants are parties to the assignment contract.”) (citations omitted).

A corollary can be drawn to any number of other defenses to *scire facias sur* foreclosure actions. For example, fraud in the original transaction.⁶ A foreclosure plaintiff has to establish, *inter alia*, that the borrower executed mortgage documents securing a loan against real property, *see, e.g., Brooks v. BAC Home Loans Servicing, L.P.*, 2012 WL 3637238, at *1 (Del. Aug. 23, 2012), just like standing has to be established. However, that does not give every foreclosure defendant the ability to claim fraud as a defense. Rather, to assert such a claim, they must have, *inter alia*, justifiably relied on a misrepresentation. *See Abry Partners V, L.P. v. F&W Acquisition LLC*, 891 A.2d 1032, 1050 (Del Ch. 2006). Just like a defendant who did not justifiably rely on a misrepresentation cannot advance the defense of fraud, a defendant who was not a party to or third party beneficiary of an assignment cannot challenge the validity or enforceability of the assignment.

⁶ In certain circumstances, fraud in the original transaction can be raised as a plea in avoidance. *Lasalle Nat. Bank*, 2005 WL 1284049, at * 1.

Simply stated, the rules governing *scire facias sur* mortgage foreclosures do not create standing to challenge the enforceability of assignments as contracts where such standing otherwise does not exist. Rather, at most, those rules permit those defenses if the defendant independently has standing to raise them. Accordingly, since Delaware law prohibits an individual from challenging the validity or enforceability of a contract to which she is not a party to or third party beneficiary of and the Bendfeldts indisputably were not parties to or third party beneficiaries of the Assignment, the Superior Court properly held that the Bendfeldts lacked standing to challenge the validity and enforceability of the Assignment as a contract between MERS and HSBC.

II. THE SUPERIOR COURT PROPERLY REJECTED THE BENDFELDT'S CHALLENGE TO HSBC'S STANDING BASED ON OWNERSHIP AND POSSESSION OF THE NOTE

Question Presented

Whether the Superior Court properly rejected the Bendfeldt's contention that HSBC lacked standing to bring a *scire facias sur* mortgage foreclosure action because it allegedly did not own or possess the Note?

Suggested Answer: Yes.

Scope Of Review

An appeal of a decision granting or denying a motion to vacate a default judgment is reviewed by this Court for abuse of discretion. *Battaglia*, 379 A.2d at 1135. As set forth above, an appellant challenging a decision on this basis has the burden of establishing that the court exceeded the bounds of reason in view of the circumstances or ignored recognized rules of law or practices, *Swiggett*, 8 A.3d at 1204, and that the conduct resulting in the entry of the default judgment was the result of excusable neglect, the outcome of the action may be different if the judgment is reopened and the nonmoving party will not suffer substantial prejudice if the judgment is reopened. *Schrader-VanNewkirk*, 45 A.3d 149, at *2.

The Court will review questions of law *de novo* "to determine whether the trial judge committed a legal error." *Scarpinato*, 864 A.2d at 929, 2004 WL 2850078, at *2.

Merits Of Argument

The Bendfeldts also collaterally attack HSBC's standing by claiming that HSBC must also own the Note to pursue foreclosure, but did not and does not own the Note. The Superior Court properly rejected that argument and properly noted that, in any event, HSBC did own the Note by virtue of possession. *Bendfeldt*, 2014 Del. Super. 44, at *6; (A79-80); (B10-13). The Superior Court's decision should be affirmed.

It is well settled in Delaware that notes and mortgages are separate documents that can be separately enforced. *See, e.g., US Bank Nat'l Ass'n v. Gilbert*, 2014 Del. Super. LEXIS 20, at *8-9 (Del. Super. Ct. Jan. 15, 2014) ("A *scire facias* action is one used in connection with proceedings founded upon a matter of record, such as, in this instance, upon a mortgage, and is strictly an in rem action."); *see also JPMorgan Chase Bank v. Hopkins*, 2013 Del. Super. LEXIS 401, at *4 (Del. Super. Ct. Sept. 12, 2013) (a *scire facias sur* mortgage foreclosure action is "in essence ... a rule to show cause that requires a mortgagor to appear and establish why the mortgagee should not be allowed to foreclose") (citing *American Nat'l Ins. Co. v. G-Wilmington Assoc., L.P.*, 2002 Del. Super. LEXIS 555, at *2 (Del. Super. Ct. Oct. 18, 2002)); *see also Harmon v. Wilmington Trust Co.*, 1995 Del. LEXIS 220, at *5, 8 (Del. 1995) (explaining that a note represents a debt to a bank while a mortgage is a conveyance of an estate, by way

of pledge for the security of a debt, and that the two documents confer separate rights and obligations to the parties)

Since a note and mortgage confer separate rights and obligations, a note is considered “a separate matter and is not a part of the foreclosure action on a mortgage.” *Davis v. 913 N. Mkt. St. P'ship*, 1996 WL 769326, at *1 (Del. Super. Ct. Dec. 12, 1996) (*aff'd sub nom. 913 N. Mkt. St. P'ship, L.P. v. Davis*, 702 A.2d 927 (Del. 1997) (rejecting a defendant’s argument that the action was not properly filed as a *scire facias sur* mortgage foreclosure action because there was a note as well as a mortgage between the parties); *see also Hopkins*, 2013 Del. Super. LEXIS 401 at *4 (“[D]elaware law on *scire facias* actions is clear: only claims that arise under the **mortgage agreement** subject to foreclosure can be asserted in a *scire facias sur* mortgage action.”) (emphasis added); *Gordy*, 310 A.2d at 896 (an action on the mortgage is strictly *in rem* and *in personam* defenses based on the note may not be raised).

As a result, under long standing Delaware law,⁷ the Superior Court properly rejected the Bendfeldts’ contention that HSBC must own the Note to pursue foreclosure.

⁷ What other states may require for a plaintiff to obtain standing in a foreclosure is of no moment on this appeal.

Regardless, even if ownership of the Note was required, the same being specifically denied, the Superior Court accurately noted that HSBC has the Note in its possession, *Bendfeldt*, 2014 Del. Super. 44, at *6, (A79-80), which confers the right to enforcement. At the Superior Court's request, HSBC presented a copy of the Note to the Court, attested that the original was in possession of foreclosure counsel and offered to produce the original to the Superior Court for inspection. (B10-13); (A2 at Dkt. 37). The Note is endorsed to blank and signed by HSBC. (B13). As a result, under the UCC, possession of the Note confers ownership and/or the right of enforcement. 6 *Del. C.* §§ 1-201(b)(21), 3-104, 3-204, 3-301; *see also Branch Banking & Trust*, 2013 WL 3353846, at *1, 4 (a party physically in possession of the note payable to any bearer is the current holder and is entitled to enforcement). Thus, since HSBC is in possession of the Note, by operation of the UCC it is entitled to enforce the Note, which moots the Bendfeldts' argument.

Accordingly, the Bendfeldts' challenge based on ownership of the Note is meritless and moot and the Superior Court's decision should be affirmed.

III. THE BENDFELDTS HAVE NOT ESTABLISHED THAT THE SUPERIOR COURT FAILED TO CONSIDER ANY EVIDENCE

Question Presented

Whether the Superior Court properly considered and weighed the all of the evidence before it granted HSBC's motion to affirm and denied the Bendfeldts' motion to vacate?

Suggested Answer: Yes.

Scope of Review

An appeal of a decision granting or denying a motion to vacate a default judgment is reviewed by this Court for abuse of discretion. *Battaglia*, 379 A.2d at 1135. As set forth above, an appellant challenging a decision on this basis has the burden of establishing that the court exceeded the bounds of reason in view of the circumstances or ignored recognized rules of law or practices, *Swiggett*, 8 A.3d at 1204, and that the conduct resulting in the entry of the default judgment was the result of excusable neglect, the outcome of the action may be different if the judgment is reopened and the nonmoving party will not suffer substantial prejudice if the judgment is reopened. *Schrader-VanNewkirk*, 45 A.3d 149, at *2. The Court will review questions of law *de novo* "to determine whether the trial judge committed a legal error." *Scarpinato*, 864 A.2d at 929, 2004 WL 2850078, at *2.

Merits Of Argument

The Bendfeldts' final argument is that the Superior Court erred by not considering their evidence –namely, the Corrected Assignment, the post-judgment assignments, a purported affidavit from a Massachusetts' register of deeds and a purported securitization audit – when considering their motion to vacate.

There is nothing in the record or the Superior Court's memorandum that even suggests that the Superior Court did not consider those submissions. Thus, the Bendfeldts' real contention must be that the Superior Court should have unequivocally accepted the Bendfeldts' purported evidence as sufficient to warrant the opening of the default judgment. Despite that contention, the Bendfeldts have not argued that the Superior Court exceeded the bounds of reason or ignored recognized rules of law or practices by not unequivocally accepting those submissions. Nor have the Bendfeldts explained how those submissions satisfy their burden of establishing that the entry of the default judgment was the result of excusable neglect, the outcome of the action may be different if the judgment is reopened and the nonmoving party will not suffer substantial prejudice if the judgment is reopened. Thus, the Bendfeldts have failed to meet their burden on appeal and since this is clearly not a question of law, the Bendfeldts' challenge should be dismissed.

The Bendfeldts cannot satisfy those elements because their purported “submissions” do not impact HSBC’s standing. As explained above the Corrective Assignment and post-judgment assignments did not impact or affect HSBC’s standing to obtain judgment and since the Bendfeldts lack standing to challenge the validity or enforceability of the Assignment as a contract, the purported affidavit focused on that topic is immaterial.

The only other “submission” advanced by the Bendfeldts is their purported securitization audit, which similarly could not have impacted the default judgment. Securitization audits are generally viewed with incredulity and have been widely rejected by courts. *See, e.g., Crehan v. Countrywide Bank, FSB*, 2012 U.S. Dist. LEXIS 134361, at *4 n.2 (W.D. Mich. Sept. 20, 2012) (“it appears that this document may be a form “audit,” with the facts of Plaintiffs’ mortgage transaction inserted among pages of observations and opinions about the mortgage industry in general.”); *Hewett v. Shapiro & Ingle*, 2012 U.S. Dist. LEXIS 51651, at *4 n.4. (M.D. N.C. Apr. 12, 2012) (discussing various forms of the audit in existence and sharing its observation that “the documents make no more sense than anything else in the Debtor’s papers and confirm the empty gimmickry of these types of claims”); *Hanson v. Wells Fargo Bank N.A.*, 2011 U.S. Dist. LEXIS 57599, at *11 n.6 (W.D. Wash. May 26, 2011) (“The credibility of the Audit Report is dubious, and the Court notes that the Federal Trade Commission has issued a consumer alert

regarding forensic mortgage loan audit scams.”); *Lefont v. SunTrust Mortg., Inc.*, 2011 U.S. Dist. LEXIS 15772, at *12 n.6 (N.D. Ga. Jan. 26, 2011) (“The reports provide no information about Mr. Simpson’s qualifications to conduct a “Forensic Mortgage Audit,” and no basis for any findings contained in those ‘audits.’”).

Indeed, the Federal Trade Commission has issued a Consumer Alert on the topic, cautioning homeowners to avoid the “Forensic Mortgage Loan Audit Scam.” *See Forensic Loan Audits*, FEDERAL TRADE COMMISSION (F.T.C.) (Mar. 2010) <http://www.consumer.ftc.gov/articles/0130-forensic-loan-audits>. The Bendfeldts’ purported securitization audit is the mirror image of the mortgage audits described above and lacks any indicia of reliability or propriety.

In addition, the purported audit relates solely to ownership of the Loan and Note (A73-75), which, as set forth above, is immaterial for purposes of *scire facias sur* mortgage foreclosure actions. Accordingly, even if the Bendfeldts could establish that the Superior Court should have accepted, but failed to accept their “submissions,” the same being specifically denied, none of those submissions could have impacted the Superior Court’s decision. Thus, the Bendfeldt’s final argument fails to meet their burden and the Superior Court’s decision should be affirmed.

CONCLUSION

The Superior Court correctly held that HSBC Mortgage Corporation (USA) had standing to pursue and obtain judgment and properly rejected the legally and factually unsupported challenges to standing raised by Kenneth Bendfeldt and Bettina Roloff. Accordingly, Appellee HSBC Mortgage Corporation (USA) respectfully requests that this Court affirm the Superior Court's decision.

Dated: April 30, 2014

/s/ Jessica L. Case

Jessica L. Case (#5932)

Ballard Spahr LLP

919 N. Market Street, 11th Floor

Wilmington, DE 19801

Telephone: (302) 252-4465

Facsimile: (302) 252-4466

-and-

Daniel JT McKenna, *Pro Hac Vice*

Ballard Spahr LLP

1735 Market St, 51st Floor

Philadelphia, PA 19108

Telephone: (215)665-8500

Facismile: (215) 864-8999

Attorneys for Plaintiff Below,

Appellee