



Court of Appeals of Georgia

June 29, 2015

TO: Ms. Ramona C. Constantaras and Basil Constantaras, 5475 Mount Vernon Parkway,
N.W., Atlanta, Georgia 30327

RE: **A15A1465. Romana C. Constantaras and Basil Constantaras v. Wells Fargo Bank,
N.A., et al.**

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CASE STATUS - PENDING

- The above referenced appeal is pending in your name before this Court. The appeal was docketed in the _____ Term and a decision must be rendered by the Court by the end of the _____ Term which ends on _____.

MOTION TO EXCEED PAGE LIMIT

- The Motion to exceed the page limit in the referenced appeal was denied on June 29, 2015.**

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IN THE GEORGIA COURT OF APPEAL
STATE OF GEORGIA

ROMANA C. CONSTANTARAS
and BASIL CONSTANTARAS,

Appellants,

V

WELLS FARGO BANK, N.A., et.
al.,

APPELLEE.

APPEAL NUMBER:
A15A1465

REPLY BRIEF OF APPELLANTS

APPELLANTS, *pro se*
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Record

Appellants appealed three Orders dismissing party opponents at the trial level of this case, to-wit: Attorney Defendants in case **A15A1243**; the Banking Defendants in case **A15A1465**; and the Insurance Defendants in case **A15A1466**.

For the purposes of clarity in *this* Brief, Appellants will refer to the record in case **A15A1243** as (R1243-___), this case **A15A1465** as (R1465-___), and case **A15A1466** as (R1466-___).

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Found on the cover of the book in the reception area of the Georgia Court of Appeal entitled "The Centennial History of the Georgia Court of Appeal 1906-2006" is the following quote:

“Upon the integrity, wisdom and independence of the judiciary depend the sacred rights of free men and free women.”

—Mercer University Press
Macon, Georgia

Points to Ponder

Will the Georgia courts permit Appellees to use a closed trust to pervert the law, circumvent the S.E.C., the I.R.S., the interests of the P.S.A. investors, and defeat the rights and interests of the borrower, Appellants herein?

Will the Georgia courts can ignore, modify, alter, or vary the terms of the P.S.A. (being the controlling document of the trust) agreement binding upon the Appellees, in contravention of the express terms set out therein *and* imposed upon, registered with, and approved by the S.E.C. that were in place to protect investors, borrowers and the public at large?

Will the Georgia courts can ignore, modify, alter, or vary the terms of the P.S.A. (being the controlling document of the trust) agreement binding upon the Appellees, in contravention of the express terms set out therein *and* set forth by New York trust statutes?

Whether the Georgia Courts may look the other way while Appellees are seeking to use special purpose vehicle (S.P.V.) the 2005 closed securitization trust that was set up to specifically absorb assets up to and including the date of cut-off date (1 October 2005).

The effects of sanctioning the Appellees' asset transfer ("assignment") would have the effect of permitting U.S. Bank, N.A., as trustee, to transfer assets into a closed trust in contravention of the applicable law, merely to assist U.S. Bank, N.A. in a foreclosure proceeding and to enforce a debt that it had no interest or legitimate interest in.

For purposes of structured finance, a system designed with checks and balances to protect investors and to use this trust illegally to enforce a debt.

Basis for Remand of the Instant Action

Appellees are masquerading as claimants of a loan using an established closed 2005 trust to legitimize their illegal and sham transactions. However, the Appellees are actually hijacking and commandeering the “closed trust” for illegal purposes to conduct sham transactions and place the investors and borrowers at risk for the multiple violations of New York trust law, S.E.C. regulations and verifications, and I.R.S. favorable tax treatment. Under a securitized trust arrangement, one may never sell directly to a trustee of the trust—Never! (See First, Second and Third Enumerations of Error arguments herein and R1243, pp 14-293, Exhibit “F”). See R1243, pp 478-512 “Status Report” and particularly Exhibit “1” entitled “Flow Chart of Securitization and P.S.A.” for better understanding of the absurdity of Appellees’ position that the transaction is something other than a sham).

The P.S.A. signed by the parties is basis upon which approval by the S.E.C. and the I.R.S. is given for the establishment of the trust and the basis upon which the world rely and people invest in the trust. To do *anything* outside the terms of the P.S.A. would lead to an untenable situation as parties to the trust could swap asset and defeat the rights of investors and borrowers, as Appellees are currently

attempting to do by using the trust for purposes expressly prohibited. (*See* Second and Third Enumerations of Error below for precise language and arguments.)

By Appellees' asking the court to dismiss Appellants' claims and assertions, Appellees are effectively asking the appellate court to sanction the transfer of assets into a closed trust in contravention of the express terms and conditions of the P.S.A., the controlling document of the trust (MASTR Asset Backed Security Trust 2005-AB1, Mortgage Pass-Through Certificates, Series 2005-AB1) and against the normally accepted accounting standards, the New York trust laws, S.E.C. and I.R.S. regulations, that prohibit the transfer of assets into the closed trust after the Close Date negating the initial and final certifications of the final list of assets in the trust (due 90 days after the Closing Date of 31 October 2005) verifying the assets in the closed trust resulting in destruction of the protection put in place by the S.E.C. Such an attempted "assignment" shall always be VOID.

It is essential that this Honorable Court review carefully the Pooling and Servicing Agreement entered into by Appellees and attached to Appellants' complaint as Exhibit "F". (R1245, pp 14-293, Exhibit "F") The court will glean how exhaustively and carefully the terms of the P.S.A. have been framed. In contrast, the Appellees need the court to believe that Appellees may with the stroke

of a pen create an “assignment” after the trust closed and ignore all of the terms, conditions and protections built into the P.S.A. for the benefit of the investors, borrowers, the courts, and the public at large. A finding sanctioning this illegal behavior by the Appellees would have the severely derogative effect of overriding all of the terms of New York trust laws, S.E.C. and the I.R.S. regulations governing the P.S.A. In so doing, the Appellees would result in the defeat of the rights of the investors and this would be abhorrent to the purpose of the P.S.A. and S.E.C. protections.

The true facts presented at the trial level are strongly favoring Appellants and contrary to the interests of Appellees and the granting of the dismissal of Appellants’ complaint as amended in the trial court. (R1466, pp 591-596 bullet points)

Under the Deed to Secure Debt, borrower (Appellants herein) have not only the right but the duty to protect the title to the subject property (R1243, pp 14-293, Exhibit “C” *Security Deed*, page 3, stating, “Borrower warrants and will defend generally the title to the Property against all claims and demands, subject to any encumbrances of record.”) against Appellee fraudsters and their illegal “assignments” and other corrupt practices relating to the subject loan. The fraud concerning the failure to post Appellants’ loan payments beginning in February 2009

(R1243, pp 14-293, Exhibit “D” and Exhibit “I”) and the information revealed through the P.S.A. compelled and commanded Appellants to “defend the title” against all claims. (R1243, pp 14-293, Exhibit “G”)

First Enumeration of Error

The standard for deciding a trial level Motion to Dismiss is to review the evidence in a light most favorably to the non-moving party. In the case of *Scouten v. Amerisave Mrg. Corp.*, 283 Ga. 72 (1), 656 S.E.2d 820 (2008), the Court of Appeals iterated the following standard for review of a trial level Motion to Dismiss for failure to state a claim upon which relief may be granted:

“should not be sustained unless (1) the allegations of the complaint disclose with certainty that the claimant would not be entitled to relief under any state of provable facts asserted in support thereof; and (2) the movant establishes that the claimant could not possibly introduce evidence within the framework of the complaint sufficient to warrant a grant of the relief sought. In deciding a motion to dismiss, all pleadings are to be construed most favorably to the party who filed them, and all doubts regarding such pleadings must be resolved in the filing party’s favor.”

See Islam v Wells Fargo Bank, N.A., Ga. App. case number No. A13A2373 (2014) in which the Georgia Court of Appeal reversed the trial court’s granting of the Motion to Dismiss; *See also Stendahl v Cobb County*, 284 Ga. 525, 529 and 533; 668 S.E.2d 723 (2008) cited by Appellees in their Response Brief in which the Georgia Court of Appeal reversed the trial court’s granting of the Motion to Dismiss.

Appellees' Response Brief, page 3 states "the argument that the Superior Court did not view the facts in their favor is trivially more definite." In reality, the trial judge spent Seven (7) pages rendering facts and conclusions of law in its Order dated 11 August 2014 (R1243, pp 542-546; R1465, pp 371-377), but gave no facts and no basis for its conclusory one-paragraph judgments granting dismissals in its Orders dated 16 October 2014 (R1243, pp. 602-603), 5 November 2014 (R1466, pp 243-243), and 8 December 2014 (R1465, pp. 666-666). At the very least, this case should be remanded to the trial court and instruct the trial court to point to the specific facts upon which it bases the granting of each of its orders of dismissal. From a *bona fide* finding of fact and conclusions of law in the Order, the Court of Appeal would be able to focus in on how the trial court arrived at its conclusions.

Appellees state "securitization is immaterial² and it is the borrower that lacks standing to challenge the validity of an assignment from one creditor to another."³ See Appellees' Appeal Brief, page 6 first two lines citing *Montgomery v Bank of America, N.A.*, 321 Ga. App. 343, 346 (2013) and *You v JP Morgan Chase Bank*, 293 Ga. 67, 74 (2013). Appellees seek to deprive Appellants of the Appellants' day in court by claiming that Appellants have "no standing" to challenge the lenders' transactions and transfers in a securitization trust arrangement when the borrower is

both a necessary and indispensable party and an intended third party beneficiary of such a transaction. See Appellants' arguments *supra*. (**Second Enumeration of Error**, pages __ - __).

By the artful "sleight-of-hand", Appellees seek trickery to cause this Honorable Court to ignore the P.S.A. attached to the Complaint that is a federally required sworn to and publically filed document that controls U.S. Bank, N.A.'s actions as the trustee of the 2005 securitized mortgage transactions. The Appellees, thereby, are saying "look at Georgia law and ignore what law really governs (e.g., New York State statutory trust law)" so that the Appellees are free to violate numerous federal and income tax laws, while defrauding investors (the owners) and borrowers alike without legal accountability.

Attached to the initial Complaint, Exhibit "F", the P.S.A., was Schedule II entitled "Representations and Warranties as to the Mortgage Loans" wherein representations and warranties were made of the closing date and cutoff date signed by Appellees of the trust and given to the S.E.C., the I.R.S., and investors, to-wit:

Cannot receive into the trust loans "(iii) Not 31 days or more delinquent in payment.... (vi) (and said loans) are not subject to any right of rescission, set-off, counterclaim or defense..... (viii) Any and all requirements of any federal, state or local law including, without limitation, usury, truth-in-lending, real estate settlement procedures, consumer credit protection, ... disclosure and all applicable

predatory and abusive lending laws applicable to the Mortgage Loan have been complied with in all material respects;...”

The trial court’s dismissal of Appellants’ case is in error because Appellees’ “motion to dismiss for failure to state a claim upon which relief may be granted should not be sustained unless (1) the allegations of the complaint disclose with certainty that the claimant would not be entitled to relief under any state of provable facts asserted in support thereof, and (2) the movant establishes that the claimant could not possibly introduce evidence within the framework of the complaint sufficient to warrant a grant of the relief sought.” Mooney, *supra*. Schedule II of the Pooling and Servicing Agreement (the “trust”), Schedule II clearly established that Appellee U.S. Bank, N.A., as trustee, could not become a holder in due course based on the numerous notices served upon Appellees’ attorneys (Attorney Defendants, Aldridge Connors LLP, et. al.) with respect to Schedule II (iii), (iv) and (viii) referenced above that was attached to Plaintiffs’ Complaint as Exhibit “F”. (R1243, pp 14-293, Exhibit “F”, Schedule II). Under no viable theory presented can Appellees *ever* become holders in due course. (R1465, pp586, bullet points (a) through (i))

Interestingly, Appellees did not chose to “assign” the loan to U.S. Bank, N.A. in its own name—it assigned it to U.S. Bank, N.A. “as trustee”. And when the

Appellees chose to file the purported “assignment” dated 8 April 2011 *after* they published the notice of foreclosure in the Fulton County Daily Reports a month earlier falsely representing that U.S. Bank, N.A., as trustee, was the owner, the Assignees *knew* the terms and restrictions of the P.S.A.—the “banner” which they chose to be bound from that date forward. Appellee U.S. Bank, N.A. knew the assignment was crafted merely for foreclosure purposes and therefore could never be a holder in due course—the “assignment” was dated a month *after* the notice if publication.

It was established in the filing of the Complaint that the P.S.A. was the controlling document as determined by the “banner” on 8 April 2011 “assignment”. Therefore, the P.S.A. was attached to the Complaint as exhibit “F” (R1243, pp 14-293, Exhibit “F”). When Appellants attached the P.S.A. to the complaint, as signed off by both Appellees in 2005 in compliance with the S.E.C. and I.R.S. rules and regulations, Appellants put forth sufficient documentation to overcome Appellees’ trial-level Motion to Dismiss. The P.S.A. states unequivocally that the trustee (Appellee U.S. Bank, N.A., herein) cannot receive an asset directly—all assets must come through the elaborate series of entities set forth by the S.E.C. for securitized transactions, but also the P.S.A. as signed by the trustee, Appellee U.S. Bank, N.A.

herein. Since the trustee is prohibited from receiving an asset directly per the express terms of the contract (P.S.A.), and Appellee U.S. Bank, N.A., as trustee, was well aware of the series of legal disputes raised by Appellants in correspondence to Attorney Defendants Aldridge Connors LLP in correspondences dated November 2010 and January 2011 (R1245, pp 14-294, Exhibit "I"), Appellee U.S. Bank, N.A., as trustee could not receive into the trust loans

“(iii) Not 31 days or more delinquent in payment.... (vi) (and said loans) are not subject to any right of rescission, set-off, counterclaim or defense..... (viii) Any and all requirements of any federal, state or local law including, without limitation, usury, truth-in-lending, real estate settlement procedures, consumer credit protection, ... disclosure and all applicable predatory and abusive lending laws applicable to the Mortgage Loan have been complied with in all material respects;...” *Id.*

Second Enumeration of Error (Choice of Law—New York)

When Appellants attached the controlling Pooling and Servicing Agreement (hereinafter referred to as the “P.S.A.”) signed by each of the Appellant Banks, attached to the initial Complaint as Exhibit “F” (R1243), Appellants put into play a contract (the P.S.A.) that selected as the choice of law state as “New York” for substantive issues. (R1243, pp12-293, Exhibit “F” section 11.04).

Section 11.04 Intention of Parties.

It is the express intent of the parties hereto that the conveyance of the Trust Fund by the Depositor to the Trustee be, and be construed as, an

*absolute sale thereof to the Trustee. It is, further, not the intention of the parties that such conveyance be deemed a pledge thereof by the Depositor to the Trustee. However, in the event that, notwithstanding the intent of the parties, such assets are held to be the property of the Depositor, or if for any other reason this Agreement is held or deemed to create a security interest in such assets, then **(i) this Agreement shall be deemed to be a security agreement within the meaning of the Uniform Commercial Code of the State of New York** and (ii) the conveyance provided for in this Agreement shall be deemed to be an assignment and a grant by the Depositor to the Trustee, for the benefit of the Certificateholders and the Certificate Insurer, of a security interest in all of the assets that constitute the Trust Fund, whether now owned or hereafter acquired.*

Exhibit “F” of Appellants’ initial Complaint, pages 142-143 (emphasis added via **bold face and underlining**). (See Preliminary Statement, first full paragraph at mid-page; Article II, section 2.01(H)(2) citing “New York State [statutory] law) (R-1243, pp 14-293, Exhibit “F”).

Georgia's choice of law rules follow the doctrine of *lex loci contractus*: the law of the place where the contract is made. Under Georgia's choice of law rules, the place where the contract is made is the place where the “last act essential to the completion of the contract was done.” *Salsbury Laboratories v. Merieux Laboratories*, 735 F.Supp 1545, 1549 (M.D.Ga.1988); *General Telephone Co. of the Southeast v. Trimm*, 252 Ga. 95, 95, 311 S.E.2d 460 (1984). For insurance contracts, the act of delivery is the last act essential for completion of the insurance contract,

and thus the place of delivery is where the insurance contract is made. *Johnson v. Occidental Fire & Cas. of North Carolina*, 954 F.2d 1581, 1584 (11th Cir.1992). In this case, it is undisputed that the P.S.A. contract was delivered in New York. Therefore, applying the doctrine of *lex loci contractus*, the substantive law of New York controls this action.

In addition, in *Menendez v. Perishable Distributors, Inc.*, 254 Ga. 300, 329 S.E.2d 149 (1985), the Georgia Supreme Court stated that *lex loci contractus* mandated that as between Georgia and Florida, Florida substantive law controlled since the contract was made in Florida. *Menendez*, 254 Ga. 300, 302, 329 S.E.2d 149 (1985). However, of even more importance than the *Menendez* court's result, was that Florida had a statute on point to the issue before the Eleventh Circuit, and by certification the Georgia Supreme Court. *Menendez*, 254 Ga. at 301, 329 S.E.2d 149 ("Florida has, by statute, abolished the common law rule.... F.S.A. section 768.041."). Therefore, as in *General Telephone*, the Georgia Supreme Court's ruling in *Menendez* was consistent with Georgia's traditional interpretation of *lex loci contractus*. Nothing in the *Menendez* opinion suggests that the Georgia Supreme Court discarded Georgia's prohibition against applying a non-forum's common law. Indeed, the actual holding of the case, that Florida has a statute on point and that

under *lex loci contractus* Florida law applies, is consistent with Georgia's limitation of only applying another state's statutes and related case law.

Restatement (First) of Conflict of Laws sections 311 and 332 (1934) concludes that in contracts, claims regarding the validity (capacity, formalities, consideration and defenses) are governed by the place where the contract was made, where “the principal event necessary to make a contract occurs.” Under most choice of law analyses, the negotiated choice of law provision will be given effect *unless* (a) the parties choose the law of a state to which they have no substantial connection, or (b) the application of the chosen law would be contrary to a fundamental policy of the state which has a materially greater interest than the chosen state in the determination of the particular issue and which—under Section 188 of the Second Restatement of Conflicts of Law—would be the state with the applicable law absent an effective choice of law between the parties. Second Restatement section 187; *Nedlloyd Lines B.V. v. Superior Court*, 3 Cal. 4th 459, 466 (1992); *Frame v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 20 Cal. App. 3d 668, 672 (1st Dist. 1971) (New York law that enforces forfeiture clauses by which employee forfeits profit-sharing rights was against California public policy, so New York choice of law provision was not given effect).

In the instant action, Appellees executed the P.S.A., section 11.03 and 11.04 (R/243, pp 14-293, Exhibit “F”) with the stated command that New York Substantive Law controls the operation and interpretation of the Agreement. New York has very specific statutes that govern the P.S.A. and related documentation, so the matter is not one of New York common law, but rather New York statutory law. Under New York statutory law, borrowers have standing to challenge the illegality of trust activities and are deemed to be necessary and indispensable to the entire securitization process, to-wit: Without the borrower and his executed promissory note and deed to secure debt, there could not and would not be any reason for the securitization loan process or the trust. Therefore, the proper substantive law—New York by the express terms of the P.S.A.—shall govern this action and Plaintiffs/borrowers have standing to challenge the legitimacy of the purported “Assignment” of April 2011 in direct violation of the express terms of the P.S.A., the S.E.C. regulations, and the Internal Revenue Code favorable tax treatment of the Trust under R.E.M.I.C. See *Saldivar v. JPMorgan Case Bank, N.A.*, Case Number 11-10689, Chapter 13, Adversary Number 12-01010 (Southern District of Texas, Brownsville Division) (2013); *Wells Fargo Bank, N.A. v. Erobo*, 39 Misc. 3d 1220(A); 972 N.Y.S.2d 147 (2013) (New York Supreme Court, Kings County,

initially decided 29 April 2013); *Community State Bank v. Stonrg*, 651 F.3d 1241, *certiorari denied* 133 S.Ct. 101, 184 L.Ed.2d 22 (2011); *See also Spencer v. National City Mortg.*, 831 F.Supp.2d 1353, appeal dismissed (11th circ. 12-11620).

Georgia law, as presented by Appellees, would be a repugnant perversion of the rule of law and prevent this Honorable Court from interrupting an ongoing and now public illegal enterprise designed to deprive borrowers of their lawful interest in property and their constitutionally protected rights at law when the underlying transaction (the purported “assignment” of 8 April 2011 herein) is the purported transfer of “an asset” (it could be real estate, automobiles, or widgets) in a securitized funding trust that contractually prohibits Appellees from seeking to “legitimize” a violation and VOID transaction into the trust according to the trust document (not to forget violations of the S.E.C. and I.R.S. rules and regulations, sworn representations at the time of the Closing Date of the trust on 31 October 2005, etc.).

Appellees throughout this action have set forth to pretend all of their failures to “cross the ‘T’s and dot the ‘I’s” are mere formalities not worthy or subject to this Honorable Court’s review of the underlying facts—fraud and deceit, conversion, and R.I.C.O. behavior by Appellants, Insurance Defendants, and Attorney Defendants. These “formalities” are no less significant than if the Appellants had failed to sign

the underlying Promissory Note or Deed to Secure Debt in June 2005. Across the United States, federal and state courts are coming to the realization that a borrower's claim that the "assignments" and "transfers of lender interests" are significant and when forgeries, robo-signings, and non-ownership are asserted and demonstrated, the Plaintiffs may rightly challenge the Appellees and Appellees authority to proceed with a foreclosure and the illegitimacy of the chain of title and thus right to foreclose on the Subject Loan.

Under New York statutory trust law in a securitized loan trust, the "borrower" is deemed a "necessary and indispensable party" of which the P.S.A. would be useless, and the "borrower" is "an intended third party beneficiary" with right to challenge standing of parties in the event of a wrongful foreclosure.

As persuasive law for Georgia to consider, in *Glaski v. Bank of America, N.A.*, 218 Cal.App.4th 1079, 1083 (2013) [borrower states cause of action by allegations that foreclosing entity without authority to foreclose because borrower's promissory note was not transferred into securitized mortgage trust within lawful time], the *Glaski* court permitted a foreclosed borrower to challenge the beneficiary instituting nonjudicial foreclosure proceedings based upon the purported assignment

of the mortgagor's loan to the corpus of a securitized mortgage trust after the trust's closing date. *Glaski* held:

We conclude that a borrower may challenge the securitized trust's chain of ownership by alleging the attempts to transfer the deed of trust to the securitized trust (which was formed under [New York] law) occurred after the trust's closing date. Transfers that violate the terms of the trust instrument are void under New York trust law, and borrowers have standing to challenge void assignments of their loans even though they are not a party to, or a third party beneficiary of, the assignment agreement.

Glaski v. Bank of America, N.A., 218 Cal.App.4th 1079, 1083 (2013).

The *Glaski* court permitted the borrower to raise “questions regarding the chain of ownership, by contending that the defendants were not the lenders or beneficiaries under his deed of trust and, therefore, did not have the authority to foreclose.” Plaintiff borrowers prevailed.

In some courts around the country foreclosures have been found null and void where the lenders could not establish the chain of ownership within the securitized mortgage-back securitized pools. Some banks are facing a major problem where mounting evidence shows that the originating lender never transferred the loan in question into the securitized trust in the first place.

Some California courts permit homeowners to challenge the loss of their homes on grounds the foreclosing party did not own the homeowner's promissory note or security interest and did not represent the party who did. "[O]nly the 'true owner' or 'beneficial holder' of a Deed of Trust can bring to completion a non-judicial foreclosure under California law." *Barrionuevo v. Chase Bank, N.A.*, 885 F.Supp.2d 964, 972 (N.D.Cal. 2012). Several courts have recognized the existence of a valid cause of action for wrongful foreclosure where a party alleged not to be the true beneficiary instructs a trustee to file a Notice of Default and initiate non-judicial foreclosure." *Id.* at pp. 972-973. Cases of this post-2008 financial meltdown era are:

In *Herrera v. Deutsche Bank National Trust Co.* 196 Cal.App.4th 1366, 1378-1379 (2011): Deutsche Bank was not entitled to summary judgment on a wrongful foreclosure claim because it failed to show a chain of ownership establishing it was the true beneficiary under the deed of trust. In *Barrionuevo v. Chase Bank, N.A.*, 885 F.Supp.2d 964, 973-974 (N.D.Cal. 2012): The court permitted a wrongful foreclosure action by the borrower where a homeowner alleged that Chase lacked authority to foreclose because Washington Mutual securitized the subject loan, divesting itself of any interest prior to transferring its beneficial interest to Chase.

In direct contradiction of Appellees' position, the *Glaski* court concluded that a borrower may challenge the securitized trust's chain of ownership under New York law when a purported "assignment" occurred *after* the trust's closing date. *Glaski* held transfers that violate the terms of the trust instrument are *void* under New York trust law, and borrowers have standing to challenge void assignments of their loans even though they are not a party to, or a third party beneficiary of, the assignment agreement. *Glaski*, 218 Cal.App.4th 1079, 1083. This ruling is *the only* ruling that would restore integrity and justice to the Georgia courts' approach to handling the *scienter*-established illegal conduct designed to defraud the courts, the public, the S.E.C. and I.R.S., and the borrowers of their property.

The court may only interpret—not amend or revise contracts (the P.S.A.) to suit the banking parties. This is not about a borrower not having standing to challenge the assignment. This is about the fact that there is sufficient and cogent evidence that has been placed before the court that should have been taken note of at the trial level, and that Georgia courts on its own volition should hold Appellees accountable by addressing the veracity of the blatant misrepresentations and sham "assignment" with the clear intention to mislead the court, the public, borrowers, the S.E.C., the I.R.S., and the public at large when confronted with such clear and

unrebutted evidence presented in the Complaint, as amended. So much so that a reasonable person would view the transaction as suspect. Under federal and New York State trust law, the transaction is clearly fraudulent and void.

The P.S.A. is expressly clear and makes “nonsense” of the actions of the trustee in the “assignment” and efforts to foreclose against Appellants.

Third Enumeration of Error (Borrowers’ standing)

Appellees state “The Constantaras have the law exactly backward. It is they who have no standing to challenge U.S. Bank’s right to foreclose because they are strangers to the contracts that gave that right to U.S. Bank.” *See* Appellees’ Appeal Brief, page 8, starting at line 8.

Ever-so-slightly, Appellee U.S. Bank, N.A. seeks to deceive this Honorable Court. Notice Appellee states “U.S. Bank’s right to foreclose”. Had Appellee U.S. Bank, N.A. came in its own name under a similar fraudulent transaction, Appellants would have a much higher legal mountain to climb. However, Appellees chose the “banner” and thus the rules they must proceed—U.S. Bank, N.A., as trustee. It changes *everything*.

Under the “mold” or “banner” of Trustee was brought *after* the notice of publication for foreclosure in March 2010. Securitization and REMIC trusts are only

for securitization or raising capital and *never* used for foreclosure—against its charter, the P.S.A., and SEC / IRS rules and regulations, not to mention the certification signed by all the Appellees under oath to the SEC in 2005.

This Honorable Court should take note that in virtually *all* of the pleadings from the initial Complaint to the final order and judgment, Appellants *always* referred to Appellee U.S. Bank, N.A. as “trustee” because it is that status that forces this Honorable Court to review Appellants’ claims against Exhibit “F” of the Complaint (the P.S.A.) that removes the transaction from a normal real estate lender/lendee situation. It is now a “securitized” transaction governed by the S.E.C. rules and regulations, the I.R.S. rules and regulations, and the contents and limitations of the controlling trust. The trust agreement requires New York as the governing law, and Georgia choice of law provisions defer to New York State trust law (as outlined in the **Second Enumeration of Error**, above). See *Deconstructing the Black Magic of Securitized Trusts*, by Roy D. Oppenheim and Jacqueline K. Trask-Rohn, *Stetson Law Review*, Foreclosure Symposium, Vol. 41, No. 3, pages 745-788 (Spring 2012); *Stetson Law Review*, Foreclosure Symposium, Vol. 41, No. 3, pages 818-834 (Spring 2012); and *Mortgage Servicing*, by Adam J. Levitin and Tara Twomey, *Yale Law Review*, Vol. 28, No. 1 pages 1-90 (Winter 2011).

Further, although there is absolutely a defect in the chain of title, it is the fact that the public record (the P.S.A.) exposes the entire transaction as VOID. Appellees would have this Honorable Court ignore the blatant reality that the transaction is VOID as a matter of public record—and that this Honorable Court has no option but to sanction the VOID transaction as though it is legitimate. The court has standing to repute a deliberate fraud being perpetrated on the court—Appellants need not do one thing further.

Consider the following two admittedly wild examples (for the purpose of exposing the absurdity of Appellees' position):

Example One: A man dies and this fact is published in the newspaper and his death certificate is made part of the public Probate Court records of the county for all the world to see. Eventually, an imposter appears holding himself out to be the dead man and claiming ownership of the dead man's property. When confronted by the facts, the imposter says, "You have no standing to challenge my claims." To make the analogy more consistent with the instant case, the imposter seeks to transfer an asset to his three-month old infant. Appellees purport to bind the Court's ability to examine the absurdity of the transaction and using the Court to sanction a clearly VOID transaction? Appellants think not.

Example Two: A burglar breaks into a bank vault and steals a valuable asset. The bank robbery is highly publicized, a police report is filed and made public, and everyone is aware that the valuable asset was stolen. At a later date, the burglar seeks to sell the asset to a third party—another burglar who stole cash from another branch of the bank. The true owner of the valuable asset learns of the transaction and seeks to intervene by filing a court action. The parties go to court and the two burglars says, "The true owner has no standing to challenge the transaction between strangers to the true owner." The Appellees—approaching the characterization of

imposters and burglars claiming ownership to an asset they *never* owned—are telling this Honorable Court that the Court must stand idly by and permit the burglar to benefit from his theft at the expense of the true owner! The Appellants think not.

How does a loan servicer so another's property in a closed trust legitimately? They don't. There never was *locus standi*. Appellees never put forth any rebuttable evidence to appellants' complaint, no counterclaim, and were not holders in due course, activities of a "closed" trust, "selling" assets of the investors, misrepresenting Appellees as "the lender", etc. (R1465, pp 587 bullet points; R1465, pp 338-341)

The Appellees repeatedly contend that Appellants were in default of the securitized residential home loan. *See* Appellees Brief, page 9, the last line. However, at the trial level, Appellants set forth very specific facts under oath establishing that Appellants were not and never have been in default. (R1243, pp 14-293, Exhibit "D" and "I"). Other than an assertion by Appellees that Appellants were "in default", at no time during either the first (Cobb County Superior Court in 2011, case number 2011-EV-3982) or the second legal action (Fulton County Superior Court in 2014, case number 2014-CV-244096) has any Appellee put forth an affidavit specifically stating Appellants were in default or accounted for any of the four mortgage payments of Appellants (February, March, April, May 2009) specifically paid by Appellants but never credited to Appellants' account and the beginning of the issues that arose between and among all of the parties in this action. (R1243, pp 14-293, and specifically Exhibit "D", Appellants' letter to Appellees

dated 29 July 2009). Moreover, Appellees have never once put forth an affidavit of authority or ownership at either trial court action including as of the date of this pleading. The reason: they have already been exposed as fraudsters and non-owners by the P.S.A. (R1243, pp 14-293, Exhibit “F”), and in the admission by Appellee Wells Fargo Bank, N.A. in the tape recorded conversation between Appellee and Appellants made part of the trial record. (R1243, pp 848-857).

Appellees make a bold assertion contrary to the facts at the trial level, stating Appellants are in default “whether or not payments were misapplied”. Appellees’ Brief, page 9, the last line. Arrogant? Certainly. But insidious in that the claim seeks to ignore two absolute and irrefutable facts: First, Appellees are not and never were the creditor/lender, and second, Appellants never were in default and had *overpaid* some \$18,000.00 and could not get Appellees or the lender to correct the matter. (R1243, pp 14-293, and specifically Exhibit “D”, Appellants’ letter to Appellees dated 29 July 2009).

If Appellees were the “true” owners/ lenders, then Under Georgia law, O.C.G.A. 9-11-13, entitled “Counterclaim and cross-claim” one *must*—not *may*—bring a compulsory counterclaim when a defendant filed the initial action for Contempt in December 2014. Specifically, the statute states:

(B) Compulsory counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought an action upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Code section, or (3) the claim is not within the jurisdiction of the court.

No counterclaims were filed by Appellees against Appellants because

Fourth Enumeration Error (Declaratory Judgment)

Appellees contend that the trial court had no obligation to “declare” that Appellants were not in default of the underlying loan. *See* Appellees’ Brief, page 9. Yet, Appellees hang their legal hat on the concept that Appellants were in default and therefore had no standing to challenge the foreclosure sale set for April 2014. Interesting. Critical to Appellees’ defenses was the simple claim that Appellants were in default and therefore had “no rights” to challenge the sham perpetrated by Appellees and the other named defendants. (R1465, pp 538-540)

O.C.G.A. section 9-4-2(b), however, states the contrary:

“(b) In addition to the cases specified in subsection (a) of this Code section, the respective superior courts of this state shall have power, upon petition or

other appropriate pleading, to declare rights and other legal relations of any interested party petitioning for the declaration, whether or not further relief is or could be prayed, in any civil case in which it appears to the court that the ends of justice require that the declaration should be made; and the declaration shall have the force and effect of a final judgment or decree and be reviewable as such.”

Clearly, the requests by Appellants at the trial level authorized the trial court to make the necessary findings “that the ends of justice require that the declaration should be made”. The trial court never even mentioned “declaratory relief” in any of its orders nor ever dealt with the requests—the trial court ignored or sidestepped this issue.

Fifth Enumeration of Error (Scienter)

Appellees state “Appellants’ Brief makes no attempt to explain the relevance of scienter to any of their claims or to demonstrate how establishing any form of degree of scienter might require a different rejected.” *See* Appellees’ Brief, page 11. Appellees hinged their Motion to Dismiss Appellants’ case against Appellees on the legally required element of civil fraud “scienter” contending that a foreclosure Bank conducting a normal foreclosure sale is not personally liable regardless of the wrongdoings of the client for whom the foreclosure sale is being conducted. Generally, Plaintiffs concur with the legal proposition that a bank conducting a foreclosure sale is not personally liable for the wrongful conduct of its client.

“Scienter” is a legal term that refers to intent or knowledge of wrongdoing. *See Blacks Law Dictionary*, Fifth Edition, West Publishing, page 1207. This means that an offending party has knowledge of the “wrongness” of an act or event prior to committing it. *See Avery v. Chrysler Motors Corporation, et. al.*, 214 Ga. App. 602, 448 S.E.2d 737 (1994). The Supreme Court of the United States refers to scienter as “a mental state embracing intent to deceive, manipulate or defraud.” *Ernst and Ernst v. Hochfelder*, 425 U.S. 185, 96 S.Ct. 1375, 47 L.Ed.2d 668 (1976). Georgia law appears to subscribe to this definition.

Appellees have demonstrated *scienter* in their unconscionable disregard and repeated violations of federal and state law, furthering possible federal tax evasion by willfully breaching the rules of the R.E.M.I.C. (defined below), fabricating documents and filing the fabricated documents with this Honorable Court in violation of Georgia’s criminal statute O.C.G.A. section 16-10-20, and so forth. These Appellees *received actual notice* of their violations of law *prior* to publishing notice of foreclosure against Plaintiffs at least as 29 July 2009 (*R1243*, pp 14-293, exhibit “D”) and of 24 November 2013 (*R1243*, pp 14-293, exhibit “E”). Appellees disregarded all of their expertise knowledge of how the securitization process is designed to work legally, reviewed the Banking Defendant Wells Fargo Bank, N.A.

handbook on how to fabricate missing documents necessary to conduct a proper foreclosure (See Wells Fargo Home Mortgage Foreclosure Banking Procedural Manuel, published 9 November 2011, 150 pages, and required to be followed by all foreclosure Bank retained by Appellee Wells Fargo Bank, N.A.), proceeded with notice of publication of the foreclosure sale in *Fulton County Daily Reports* in March and April 2011, created and submitted for filing the fraudulent "Assignment" document needed in the foreclosing Banking's file to cover their tracks of fraud and deception, and knowingly and willingly filed the fraudulent document dated 8 April 2011 with the blue coversheet entitled "Recording Division: Customer Information Form" (Basil Constantaras Affidavit, Exhibit "1") in violation of O.C.G.A. section 16-10-20 (as clearly stated at the bottom of the preprinted sheet required to have been signed by Appellees, and violation of the S.P.A., Article II, section 2.02 (R1243, pp 14-293, Exhibit "F"), and proceeded vigorously toward foreclosure with Appellees' self-created and knowingly fraudulent documentation until Appellees were thwarted with risk of exposure and suspended the sale in May 2011. (See Cobb County Superior Court case number 2011-EV-3982)

There is a very important reason why Appellants insist that Appellees are not and have never been the lenders in the underlying secured residential loan

transaction. (See Annex “A”) And there is a very important reason why Appellants always refer to Appellee U.S. BANK, N.A. as “trustee”. The Appellees are not entitled to the rights of a “lender”, which is significant in how this Honorable Court *should* treat Appellees’ legal authority and rights in this action. Further, the “trustee” has only those powers granted to it by the underlying Trust—the P.S.A., Exhibit “F”, Article II, section 2.01, and Article VIII, section 8.01 (R1243, pp 14-293, Exhibit “F”). By extension, Appellees have only the authority to proceed with a foreclosure sale under the authorizing document—the S.P.A—which absolutely prohibits any “Assignment” from the trust after 31 October 2005. These two points are not light details—their actions go to the very core of the corruption of all of the Appellees and the Appellees, as well as the *scienter* of Appellees who had premeditated intentions to deprive Plaintiffs’ rights.

Sixth Enumeration of Error (Prima Facie case)

Appellees contend that “However much effort the Constantaras devoted to their arguments about securitization, and however much effort they devoted to their contention that the assignment from Wells Fargo to U.S. Bank was ineffective, their lack of standing to raise such issues in this context precluded the Superior Court from finding any viable claims” Appellees’ Appeals Brief, page 13.

See supra, First, Second and third Enumerations of Error for citations argument.

Eighth Enumeration of Error (Obstruction of Discovery)

The trial court erred in not allowing the discovery process in light of the serious allegations of fraud and clear fraud as evidenced by the P.S.A. and the tape recorded conversation between Appellants and the Wells Fargo Bank, N.A. representative on the part of all of the appellees who acted in concert to prevent and obstruct normal discovery process by dragging the automatic stay under O.C.G.A. section 9-1-12 to stifle the discovery process and defeat the ends of justice.

Ninth Enumeration of Error (Not exercising judgment judiciously)

The trial court failed to exercise reasonable review of Appellants' trial briefs before rendering several of the orders dismissing aspects of Appellants' complaint, as amended. The trial judge spent Seven (7) pages rendering facts and conclusions of law in its first dismissal Order dated 11 August 2014 (R/243, pp 542-546; R/465, pp 371-377), but gave no facts and no basis for its conclusory one-paragraph judgments granting dismissals in its Orders dated 16 October 2014 (R/243, pp. 602-603), 5 November 2014 (R/466, pp 243-243), and 8 December 2014 (R/465, pp. 666-666) when it is vitally important to decisions making final judgment of the case.

On one blatant occasion, Appellants filed a brief in response to Attorney Defendant's Motion to Dismiss on 8 August 2014 at approximately 4:00 p.m. The trial court issued the order dated 11 August 2014. (R/243, pp 542-546; and 547-553) Appellants' brief was clearly not even considered in the "rush to judgment" by the trial judge. This reflects poorly on the stature and fairness of the court and should be remanded for a proper review and finding.

Case law cited by Appellees (Brief filed 8 June 2015) Distinguished

In *In re Anderson*, 171 Ga. App. 918, 321 S.E.2d 417 (1984), cited by Appellees herein, an Appellant mother challenged the judgment of the Gwinnett Superior Court (Georgia) that denied her petition to reinstate her petition to change the name of her minor child. The court affirmed the denial of the mother's petition to reinstate her petition to change the name of her minor child. This case dealt with dismissal of a case because the Plaintiff failed to appear after a court notice was delivered to the Mother. The case has no relevance to the instant action.

In *Jurden vs HSBC*, 330 Ga. App. 179, 765 S.E.2d 440 (2014), cited by Appellees herein,, a house's owner who had moved it onto a lot owned by another failed to state a claim against a lender on the lot for wrongful foreclosure of his house. The dismissal affirmed.

That case did not allege non-compliance violation of a P.S.A. filed with the S.E.C., signed by the Defendants, and an assignment *after* the date of trust closing and choice of venue. The case simply does not apply in the instant action.

In *Kerr vs White*, 52 Ga. 362, 1874 (1874), cited by Appellees herein, Appellants in error, beneficiaries of a trust, excepted a judgment of the Richmond County Superior Court (Georgia), which denied their motion for an injunction to restrain defendants in error, an executor and a trustee, from transferring the balance of their estate in Georgia and to restrain the trustee from acting in the capacity of trustee.

The court found that if the trustee took the title under Georgia law, Tennessee law could not impose a condition. The court affirmed the lower court.

In that case, there was no “choice of law” provision selected by all of the contracting parties and there was no conclusion that Tennessee had a statutory scheme or that all of the parties had a nexus to Tennessee. The case simply does not apply to the present case.

In *Luke vs McGuire Ins.*, 133 Ga. App. 948, 212 S.E.2d 889 (1975), cited by Appellees herein, the Appellant employee sought review under Appellant employee sought review under Ga. Code 1933 section 70-207 of a jury verdict in the State

Court of DeKalb County (Georgia) in favor of appellee employer, after the court overruled appellant's motion for a new trial in his action to recover for the breach of an employment contract.

In *Luke*, the complainant was a “signatory” to the contract as amended and made no objection during the course of the employment. In this action, the “contract” was fraudulent undisclosed to Appellants, but disclosed when Appellees filed a VOID “assignment” *after* notice of publication of foreclosure. Unlike in *Luke*, complainants here objected immediately, vehemently, and without let up. The *Luke* case does not apply to the facts in the instant case.

In *Montgomery vs BOA*, 321 Ga. App. 343, 740 S.E.2d 434 (2013), cited by Appellees herein, the Appellant borrower appealed the grant of appellees', a bank, loan servicers, an electronic registration system and a law firm, motion for judgment on the pleadings with regard to his complaint alleging *inter alia* wrongful foreclosure and fraud. The grant of the motion for judgment on the pleadings was affirmed.

In *Montgomery*, complainant was admittedly in default on the underlying loan to the apparent true lender. In the instant action, Appellees *never* put forth a scintilla of evidence to refute the unrefuted fact that Appellants were not and are not in default of the loan. Further, *Montgomery* did not present the trial court with the P.S.A. at

the time of filing complainant's complaint or bring irrefutable evidence that New York substantive law was chosen by all of the parties to resolve contractual disputes. *Montgomery* does not apply to the facts of the instant case.

In *Montgomery vs City of Sylvania*, 189 Ga. App. 515, 376 S.E.2d 403, (1988), cited by Appellees herein, Appellant citizens sought review of an order from the Screven Superior Court (Georgia), which granted summary judgment in favor of appellee city in the city's action to determine the value of the condemned property easement. The court affirmed the trial court's order that granted summary judgment.

Unlike the present case, in *Montgomer vs Sylvania*, the claimant did not dispute the special master's findings of damages in favor of the City. This case is far removed from the facts of the present case and the finding of a special master unchallenged by the complainant simply does not apply.

In *Stendahl vs Cobb County*, 284 Ga. 525, 668 S.E.2d 723 (2008), cited by Appellees herein, Appellant neighbors filed an action challenging a rezoning decision. The court reversed the judgment.

The summary judgment was reversed in particular because the Court of Appeal found an inconsistency with the trial court's review of the facts and law. In the instant action, the trial court failed to submit findings of fact with all but the first

Order dismissing various parts of Appellants complaint, as amended. In essence, however, *Stendahl* stands for the principle that when in doubt, a Motion to Dismiss at the trial level cannot be sustained without a clear finding that under no circumstances could the complainant prevail at trial.

In *You vs JP Morgan*, 293 Ga. 67, 743 S.E.2d 428 (2013), cited by Appellees herein, Appellant debtors filed suit for declaratory relief, wrongful foreclosure, and wrongful eviction. Before the Supreme Court were three certified questions from United States District Court for the Northern District of Georgia.

The debtors argued that the bank was not authorized to conduct the foreclosure because, while it was the holder of the security deed, it did not also hold the note evidencing the debt. The debtors claimed that, because the basis for exercising the power of sale was the default on the note, only the party who held the note was authorized to exercise such power. The debtors based their contention in part on the fact that O.C.G.A. sections 44-14-160 through 44-14-162.4, referred to the foreclosing party as the "secured creditor," which the debtors construed to mean a party who held both the deed (thereby qualifying as "secured") and the note (thereby qualifying as a "creditor"). While that argument had superficial appeal, it was inconsistent with the language and intent of the statutes. The deed holder possessed

full authority to exercise the power of sale upon the debtors' default, regardless of its status as to the note. The Supreme Court also concluded that O.C.G.A. section 44-14-162.2, did not require the “secured creditor” be identified in the notice to the debtors, as all the statute required was the name, address, and telephone number of the entity with authority to negotiate the mortgage.

The Supreme Court answered the first question in the positive, the second question in the negative, and declined to address the third question as moot.

In the instant action, Appellants set out clearly that Appellees have violated the sworn verification at the time the P.S.A. was registered, the initial certification, and the final certifications 90 days after the 2005 trust closed in violation of the S.E.C. and I.R.S. R.E.M.I.C. trust rules and regulations.

Appellees in the instant action chose to come under the “banner” of the trust (P.S.A.) when they filed the “assignment” of 8 April 2011 naming the securitization trust as the assignee—which is a sham. In so doing, Appellees, both signatories to the trust (P.S.A.), chose and imposed upon themselves to be governed by the terms of the P.S.A., which included their selection of New York’s jurisdiction and the substantive law of New York’s trust statutory scheme which now must be adhered to under Georgia’s choice of law *stare decisis* as cited above in the argument of

Second Enumeration of Error. In addition, the Georgia court has before it a legal contract (P.S.A.) which is a legal document that shall be honored under the doctrine of comity by every state in the Union. This document specifically sets forth what the trust (and thereby the trustee) can and cannot do. With respect, Georgia courts are prohibited from rewriting, revising, amending, modifying, bolstering, ignoring, or otherwise perverting the clear and express terms of the contract among the parties thereto and the regulatory agencies, to-wit: the S.E.C., upon the sole and exclusive basis for the approval of the trust by the S.E.C. and I.R.S.

It is clear that this document (the P.S.A.) as the sole memorial of the powers of the trust and its trustee while conducting business under the “banner” of the trust. As such, this Honorable Court is strictly bound to give *full force and effect* to its express terms. In so upholding the contract (P.S.A.) it is incumbent upon this Honorable Court to protect the sanctity of this document for the benefit of the S.E.C., the I.R.S., the investors, the loan participants (borrowers/intended beneficiaries), the courts, and the public at large.

In upholding the terms of the P.S.A. as required by the choice of law jurisdiction in the contract and the express terms of the contract generally, Georgia courts should universally strike down the sham “assignment” and transaction as

VOID and to prevent perpetrating a fraud upon and coercing the Georgia courts to be unwilling participants in the sham transaction.

Respectfully submitted this 25th day of June 2015.

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IN THE GEORGIA COURT OF APPEAL
STATE OF GEORGIA

ROMANA C. CONSTANTARAS
and BASIL CONSTANTARAS,

Appellants,

V

WELLS FARGO BANK, N.A. , et.
al.,

APPELLEE.

APPEAL NUMBER:
A15A1465

CERTIFICATE OF SERVICE

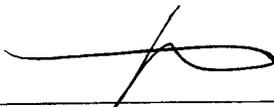
Comes now, Basil Constantaras, Appellant, and hereby certifies that he has this day served opposing the foregoing pleadings upon each of the parties listed herein by placing a true and correct copy of the foregoing pleadings into the regular United States Mail with sufficient postage affixed to each of the following:

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