
IN THE
Supreme Court of Virginia

—
RECORD NO. 101956
—

MARIA R. JIMENEZ,

Plaintiff-Appellant,

V.

CITIBANK, N.A., AS TRUSTEE, et al.,

Defendants-Appellees.

—
AMICI CURIAE BRIEF IN SUPPORT OF APPEAL
—

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Record No. 101956

**MARIA R. JIMENEZ,
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v.

**CITIBANK, N.A., AS TRUSTEE,
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Defendant-Appellees**

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) **From Fairfax County**
) **Circuit Court**
) **Case No. CL2011-04193**
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AMICI CURIAE BRIEF IN SUPPORT OF APPEAL

Pursuant to Rule 5:30 of the Rules of the Virginia Supreme Court, and with the approval of this Court, the Virginia Poverty Law Center (VPLC), the National Association of Consumer Advocates (NACA), the National Consumer Law Center (NCLC), Housing Opportunities Made Equal (H.O.M.E.), and the Virginia Interfaith Center for Public Policy (Interfaith Center) support the Appeal filed by Maria R. Jimenez. *Amici* request that the Supreme Court of Virginia reverse the final Order of the Circuit Court of the County of Fairfax that dismissed Ms. Jimenez’s complaint, and instead find that the complaint states two different claims for relief.

ASSIGNMENT OF ERROR

Amici support the first assignment of error proposed by Ms. Jimenez: that the Circuit Court erred when sustaining Defendant's Demurrers to Counts I and III of Plaintiff's Complaint. *Amici* believes that this assignment of error is better treated as two different assignments of error so that each count can be addressed separately.

Amici do not support the second assignment of error regarding the Circuit Court "relying upon the purported allonge" because the Court's Order of July 16, 2010, does not state that the Circuit Court relied on this document.

QUESTIONS PRESENTED

Amici support part of the first question presented by Ms. Jimenez, and consistent with two different causes of actions being considered, restate it as follows:

A (1). By alleging that Ms. Jimenez owes no money to Citibank, that Citibank is not the owner or holder of the note, and that Citibank has no authority under the Deed of Trust that secures the note, does the complaint state a claim for declaratory relief that Cititbank may not foreclose on the note?

A (2). By alleging that Citibank is not the owner or holder of the note and that it has no authority under the Deed of Trust, does the complaint state a quiet title claim that a Deed of Substitute Trustee executed by an agent of Citibank's agent should be stricken from the title records?

Regarding the second question presented by Ms. Jimenez, *Amici* believe that although the second assignment of error is not proper, the question about the purported allonge is embedded in part of the analysis in answering the questions above, and to that extent, restates this question as follows:

B. Does the allegation of the existence of a purported allonge to the note that is signed by the original lender in blank defeat the allegations that Citibank is not the owner or holder of the note and that Citibank has no authority under the deed of trust?

**STATEMENT OF THE NATURE OF THE CASE AND MATERIAL
PROCEEDINGS**

On March 23, 2010, Ms. Jimenez filed a complaint against Citibank, N.A. as Trustee for the Certificateholders of Structured Asset Mortgage Investments II Trust 2007-AR3, Mortgage Pass-Through Certificates,

Series 2007-AR3, (Citibank) and Equity Trustees, LLC (Equity). (App. 1-9). The complaint had three claims, declaratory judgment, breach of fiduciary duty, and quiet title. Ms. Jimenez sought a temporary injunction which the Circuit Court denied. Both Citibank and Equity filed a demurrer and a motion craving oyer over documents referenced in the complaint. The Court held a hearing on July 16, 2010, where it granted the demurrers as to all claims without ruling on the motions craving oyer. No evidence was received by the Court at that hearing. (App. at 240, Statement of Facts, pg. 2).

Ms. Jimenez filed a Petition for Appeal regarding the first claim for declaratory relief and the third claim to quiet title. Both Citibank and Equity filed oppositions to her petition. The petition was granted by this Court on February 25, 2011.

STATEMENT OF FACTS

Amici cannot adopt the statement of facts from any of the briefs filed as part of the Petition for Appeal. Each of them asserts facts not found in the complaint. The parties agree that the Circuit Court did not grant the motion craving oyer, and yet each argues facts from documents that are not attached to the complaint and thus not part of the record on which this

Court is to decide the matter. *Amici* will limit its Statement of Facts to the allegations in the complaint.

Ms. Jimenez owns property located at 5717 Old Clifton Road, in Clifton, Virginia. (App. at 3, Para. 6). That property is subject to a lien in favor of Southstar Funding, LLC., (Southstar) pursuant to a deed of trust filed in the land records. (App. at 3, Para. 11). The deed of trust secures a loan by Southstar to Plaintiff. (App. at 3, Para. 8). After the loan was made, Ms. Jimenez started paying Southstar. (App. at 3, Para. 10).

In December 2008, Defendant Equity sent demands to Ms. Jimenez that stated the debt on the loan was in default, that the loan had been accelerated, and that the lender had requested foreclosure. (App. at 3, Para. 12). With a letter dated March 10, 2010, Equity sent Ms. Jimenez a “Deed of Substitute Trustee” dated January 26, 2010, which was executed by “EMC Mortgage Corporation, as Servicing Agent” on behalf of Defendant Citibank. (App. at 3-4, Para. 13-14). The Deed of Substitute Trustee also stated it was executed “by the authorized agent of EMC Mortgage Corporation” and the signature shows Greg Allen next to a stamp “Vice President.” (App. at 4, Para. 16). The document does not make clear whether Greg Allen is a Vice President of EMC Mortgage or an authorized agent of EMC Mortgage. (Id.).

The Deed of Substitute Trustee states that Citibank is the party of the first part, and that the “the party of the first part is the owner and holder of the note secured by the Deed of Trust.” (App. at 4, Para. 17-18). The assertion that Citibank is the owner and holder of the note is “a fraudulent assertion.” (App. at 4, Para. 18).

At her request, Equity provided Ms. Jimenez a copy of the note and that copy contained no endorsements. (App. at 4, Para. 19). Equity also provided a purported “Allonge” to the Note signed by an Assistant Vice-President of Southstar. (Id.). The purported “Allonge” to the Note contains a blank endorsement. (Id.).

Ms. Jimenez requested the following evidence from Equity: that Citibank had authority to act as the lender; that EMC had authority to sign on behalf of Citibank; and that Greg Allen had authority to sign on behalf of EMC. (App. at 5, Para. 21). No evidence exists that Citibank had authority to act as the lender. (App. at 6, Para. 28). Plaintiff has been provided no evidence that Citibank has possession of the original note. (App. at 7, Para. 33).

Plaintiff owes no money to Citibank and Citibank is not a holder of the note. (App. at 6, Para. 32-33). If Citibank does have possession of the original note, then it is a nonholder in possession without the rights of a

holder. (App. at 6, Para. 33). Citibank is not the person to whom the loan is owed, and it has no authority to enforce the Deed of Trust. (App. at 6, Para. 35).

Because Equity scheduled a foreclosure on Ms. Jimenez's home, Ms. Jimenez filed the complaint to stop that foreclosure. (App. at 3-4, Para. 13 and 24).

SUMMARY OF ARGUMENT

Amici are organizations committed to helping consumers and *amici* have developed special expertise in credit matters. They are actively engaged in solving the foreclosure crisis that has swept through our economy. They are each very experienced with the issues surrounding foreclosure and want to ensure that this important appeal provides the proper guidance to trial courts in Virginia.

On demurrer, all facts properly alleged in the complaint are assumed true, as are any facts which are "reasonably and fairly implied and inferred from those allegations." Kaltman v. All American Pest Control, Virginia Supreme Court, decided March 4, 2011, Record No. 092541. Because this matter was decided on demurrer and the motion craving over was not granted, the factual record which must be assumed true are the facts alleged in Ms. Jimenez's complaint.

The facts in the complaint assert that Ms. Jimenez owes no money to Citibank, that Citibank is not the owner or the holder the loan, that Citibank has no authority to enforce the deed of trust, that Citibank does not possess the note, and that Citibank is seeking to enforce the note by foreclosing. Under Va. Code § 8.01-184, these facts properly allege an actual controversy. Therefore, the complaint properly pleads a claim for declaratory relief. Allowing this claim to go forward is necessary because this claim is how homeowners can seek relief when they have a dispute about an impending foreclosure.

The complaint also alleges that a “Deed of Substitute Trustee” has been prepared that appoints Equity as the trustee to pursue foreclosure. The same facts alleged about Citibank’s lack of ownership of the note also apply to this claim. Assuming these facts to be true, Citibank had no authority to appoint any substitute trustee, and that deed is properly stricken from the land records. Therefore the action to quiet title was also appropriately alleged.

Finally, although the complaint includes allegations about a purported allonge to the note, no evidence is provided that this document was affixed to the note. Consequently, the allegations in the complaint do not show that the note has been converted to bearer paper. Therefore, even

assuming that Citibank did possess the original note, the inadequate factual record does not allow the Court to find that Citibank is the holder of bearer paper. Once a complete factual record is established, the legal rights and responsibilities can be easily determined.

ARGUMENT

I.

AS ORGANIZATIONS COMMITTED TO HELPING CONSUMERS, AMICI HAVE DEVELOPED SPECIAL EXPERTISE IN CREDIT MATTERS AND ARE ACTIVELY ENGAGED IN SOLVING THE FORECLOSURE CRISIS.

Amicus NACA is a non-profit association of attorneys and consumer advocates committed to representing consumers' interests. Its members are private and public sector attorneys, legal services attorneys, law professors and law students whose primary focus is the protection and representation of consumers. NACA members provide counsel for consumers against banks, finance companies, car dealers and others who profit from taking unfair advantage of consumers. NACA is committed to rebuilding an effective marketplace that is based on our nation's fundamental sense of fairness, equity and honesty. On both the federal and state level, NACA takes an active role in advocating consumer interests before the courts, legislatures, and administrative agencies. It has filed amicus briefs in the leading consumer protection cases before the

United States Supreme Court and other state and federal appellate courts across the country. It has also presented oral argument as amicus counsel in consumer cases in the United States Court of Appeal for the Fourth Circuit, and the Supreme Court of Ohio.

Amicus VPLC provides leadership, support, training, public education, and advocacy to address the civil legal needs of Virginia's low-income population. Its legal staff specializes in the diverse areas of law that affect low-income Virginians. Through training and communications, VPLC educates others about the legal rights of the poor and identifies systemic problems and issues. VPLC works collaboratively with Virginia's legal aid community, other organizations, and stakeholders to represent the interests of low-income Virginians in the courts, executive agencies, and legislative bodies. VPLC has been extensively involved in the numerous legislative initiatives concerning financial matters that have come before the Virginia General Assembly over the past 10 years, and has been focusing on the foreclosure crisis. It is recognized by the legislators, the media and the public as an expert on lending issues in Virginia and its Executive Director is a member of the Governor's Foreclosure Task Force.

Amicus the NCLC is a national research and advocacy organization focusing on the legal needs of low-income, financially distressed, and

elderly consumers. With offices in Boston and Washington, D.C., NCLC is a nationally-recognized expert on consumer credit issues, including mortgage related subjects, and has drawn on this expertise to provide information, legal research, policy analyses, and market insight to Congress and state legislatures, administrative agencies, and courts for 40 years. A major focus of NCLC's work has been to increase public awareness of, and to promote protections against, unfair and deceptive practices perpetrated against low-income and elderly consumers. NCLC's twenty-five attorneys write and edit an eighteen-volume Consumer Credit and Sales Legal Practice Series, including, *inter alia*, *Foreclosures* (3rd ed. 2010), that is used by consumer law practitioners throughout the United States. It has also published *Foreclosure Prevention Counseling* (2nd ed. 2009). NCLC frequently is asked to appear as *amicus curiae* in consumer law cases before courts around the country and does so in appropriate circumstances.

Amicus Housing Opportunities Made Equal (H.O.M.E.) was established in 1971 as an advocacy and education public interest group with the objective of eliminating the barriers which diminish social and economic opportunity in Virginia and beyond. H.O.M.E.'s mission is to ensure equal access to housing for all people, and it has been aggressively

pursuing that mission through a combination of direct services and powerful advocacy. In 2006, H.O.M.E. formally established the Center for Housing Leadership (CHL) as part of an effort to address the systemic issues that perpetuate social injustices, including inadequate consumer protections in housing issues. CHL is built around developing and advocating for innovative and effective policy solutions that promote the principles of fair lending and consumer protection.

Amicus Interfaith Center is the only statewide, nonpartisan, interfaith partnership focused on social and economic justice in Virginia. Its approach is to create a collaborative system of advocacy that includes fiscal and legislative analysis, issue education, grass-roots organizing, and public awareness. The Interfaith Center is a 501(c)3 charitable organization, funded by local, regional and national foundations, denominations, congregations and individuals. Since 2007, a substantial portion of its resources has been devoted to ensuring that low and moderate income consumers have access to affordable credit options. The most notable efforts in this area include a statewide public education campaign highlighting predatory lending practices. In addition to running a larger public education campaign, the Interfaith Center facilitates financial

literacy training events to provide low and moderate income families with the tools they need to effectively manage their finances.

In several Virginia foreclosures cases in the United States Court of Appeals for the Fourth Circuit, *amici* have filed similar requests for permission to file an amicus brief. In Nicholas Bernardo v. National City Real Estate Serv., No. 10-1803 (4th Cir. 2010- decision pending), this request was granted and *amici* successfully sought to have case heard by the same panel as another case, while six other similar cases were then stayed. These cases all involved the same law firm representing the homeowners and each required application of Virginia Code § 55-59(9) to determine whether an appointment of a substitute trustee was proper. In one of the cases that was stayed, Schafer v. Citibank, N.A., No. 10-2043, (4th Cir. 2010- decision pending) *amici* asked the Fourth Circuit to certify a question about the proper application of Virginia Code § 55-59(9) to the Virginia Supreme Court; ruling on that request has been deferred by the Fourth Circuit.

Amici are concerned about cases like Ms. Jimenez's because of the problems with defective legal proceedings that have arisen as part of the foreclosure crisis in this country. The problems that have been discovered are some financial entities using false affidavits, falsified notarizations,

incorrect assertions of title, and other legally defective documents in the foreclosure process. Those problems are currently under investigation in all fifty states and receives almost daily coverage in newspapers. For instance, during the middle of October in 2010, the following is just a selection of some of the news stories: “Out of Maine, a Foreclosure Freeze,” by David Streitfield, *New York Times*, October 14, 2010, available at <http://www.nytimes.com/2010/10/15/business/15maine.html> “Witness: Signatures Were Faked at Foreclosure Firm,” by Mike Schneider and Tamara Lush, *Associated Press*, October 18, 2010, available at http://hosted.ap.org/dynamic/stories/U/US_FORECLOSURES_LAW_FIRM?SITE=INEVA&SECTION=HOME&TEMPLATE=DEFAULT; “Bank of America, JP Morgan Get Texas Subpoenas on Foreclosures,” by Margaret Cronin Fisk, *BusinessWeek*, October 26, 2010, available at <http://www.businessweek.com/news/2010-10-26/bank-of-america-jpmorgan-get-texas-subpoenas-on-foreclosures.html>; “Cuccinelli to Join Foreclosure Probe,” by Carol Hazard, *Richmond Times-Dispatch*, October 14, 2010, available at <http://www2.timesdispatch.com/business/2010/oct/14/b-mort14-ar-561875/>.

II.

TO ENSURE THAT BORROWERS ARE GIVEN THE OPPORTUNITY TO BRING DISPUTES INTO THE JUDICIAL SYSTEM, THE TRIAL COURT SHOULD BE REVERSED AND MS. JIMENEZ ALLOWED TO PROVE HER CLAIMS AGAINST CITIBANK AND EQUITY.

Amici urge the Court to hold that the trial court erroneously dismissed the Complaint in response to Citibank's and Equity's demurrers. As recently reiterated by this Court, a demurrer determines "whether a complaint states a cause of action upon which relief may be granted and "it admits the truth of all properly pleaded facts to which it is addressed, as well as any facts that may be reasonably and fairly implied and inferred from those allegations." Kaltman v. All American Pest Control, decided March 4, 2011, Record No. 092541, *citing* Tronfeld v. Nationwide Mutual Ins. Co., 272 Va. 709, 712-13, 636 S.E.2d 447, 449 (2006) and Dodge v. Randolph-Macon Woman's College, 276 Va. 1, 5, 661 S.E.2d 801, 803 (2008). As explained below, because the facts in the complaint properly state claims for declaratory judgment and quiet title, the Circuit Court's order should be reversed.

A. The complaint properly alleges an action for declaratory judgment because it alleges that Ms. Jimenez owes no money to Citibank and Citibank is seeking to foreclose on her home.

Accepting the allegations in the complaint as true, the complaint adequately alleges that Citibank is not the owner, holder, or possessor of

the note secured by a deed of trust on Ms. Jimenez's home. According to the complaint, Ms. Jimenez owes no debt to Citibank and Citibank is not the owner or the holder the loan. The claim by Citibank that it is the owner and holder is a fraudulent assertion. Citibank has no authority to enforce the deed of trust, and that no evidence exists that Citibank has such authority. Ms. Jimenez has been given no evidence that Citibank has possession of the original note. Citibank is seeking to enforce the note by foreclosing through Equity. A Greg Allen, who may be an agent of Citibank's agent, executed a Deed of Substitute Trustee to appoint Equity to pursue a foreclosure.

The first count for declaratory relief is brought pursuant to Va. Code § 8.01-184. This statute states as follows:

In cases of actual controversy, circuit courts within the scope of their respective jurisdictions shall have power to make binding adjudications of right, whether or not consequential relief is, or at the time could be, claimed and no action or proceeding shall be open to objection on the ground that a judgment order or decree merely declaratory of right is prayed for. Controversies involving the interpretation of deeds, wills, and other instruments of writing, statutes, municipal ordinances and other governmental regulations, may be so determined, and this enumeration does not exclude other instances of actual antagonistic assertion and denial of right.

The General Assembly has stated the purpose of this section and how it is to be implemented.

This article is declared to be remedial. Its purpose is to afford relief from the uncertainty and insecurity attendant upon controversies over legal rights, without requiring one of the parties interested so to invade the rights asserted by the other as to entitle him to maintain an ordinary action therefor. It is to be liberally interpreted and administered with a view to making the courts more serviceable to the people.

Va. Code § 8.01-191.

This Court has repeatedly acknowledged how this section is to be applied.

Code § 8.01-184 is to be liberally interpreted and administered "with a view to making the courts more serviceable to the people." Fairfax County v. Southland Corp., 224 Va. 514, 521, 297 S.E.2d 718, 721 (1982).

Virginia's declaratory judgment statutes provide a mechanism for resolving uncertainty in controversies regarding legal rights, without requiring one party to invade the asserted rights of another in order to permit an ordinary civil action for damages. Miller v. Highland County, 274 Va. 355, 370, 650 S.E.2d 532, 539 (2007); Umstatt v. Centex Homes, 274 Va. 541, 548, 650 S.E.2d 527, 531 (2007); Cupp v. Board of Supervisors, 227 Va. 580, 592, 318 S.E.2d 407, 413 (1984); Liberty Mutual Ins. Co. v. Bishop, 211 Va. 414, 418, 177 S.E.2d 519, 522 (1970). A declaratory judgment action, which is preventive relief, may only be obtained when an actual controversy exists. Miller, 274 Va. at 369-70, 650 S.E.2d at 538; Chaffinch v. C & P Tel. Co., 227 Va. 68, 72, 313 S.E.2d 376, 378 (1984); Bishop, 211 Va. at 419, 177 S.E.2d at 522-23; Williams v. Southern Bank of Norfolk, 203 Va. 657, 662, 125 S.E.2d 803, 807 (1962). Courts may only issue declaratory judgments in cases of "actual controversy when there is antagonistic assertion and denial of right." Board of Sup. Loudoun Cty. v. Town of Purcellville, 276 Va. 419, 434, 666 S.E.2d 512, 519 (2008) (quoting Treacy v. Smithfield Foods, 256 Va. 97, 103, 500 S.E.2d 503, 506 (1998)); Miller, 274 Va. at 369-70, 650 S.E.2d at 538-39; Hoffman Family, L.L.C. v. Mill

Two Associates, 259 Va. 685, 692, 529 S.E.2d 318, 323 (2000); Blue Cross & Blue Shield v. St. Mary's Hospital, 245 Va. 24, 35, 426 S.E.2d 117, 123 (1993); Erie Insurance Group v. Hughes, 240 Va. 165, 170, 393 S.E.2d 210, 212 (1990).

We have stated the following principles that are equally pertinent here:

"A plaintiff has standing to institute a declaratory judgment proceeding if it has a 'justiciable interest' in the subject matter of the proceeding, either in its own right or in a representative capacity. Henrico County v. F. & W., Inc., 222 Va. 218, 223, 278 S.E.2d 859, 862 (1981); Lynchburg Traffic Bureau v. Norfolk and Western Railway, 207 Va. 107, 108, 147 S.E.2d 744, 745 (1966). In order to have a 'justiciable interest' in a proceeding, the plaintiff must demonstrate an actual controversy between the plaintiff and the defendant, such that his rights will be affected by the outcome of the case."

W.S. Carnes, Inc. v. Chesterfield County, 252 Va. 377, 383, 478 S.E.2d 295, 299 (1996).

Bell v. Saunders, 278 Va. 49, 677 S.E.2d 39, 40-41 (2009).

A declaratory judgment action is proper where one party claims the power to take an action and that action threatens another party's rights.

"Declaratory judgments are creatures of statutes enacted to increase the usefulness of the courts, and to remove doubt and uncertainty as to the final result of actual controversies when certain conditions arise." Williams v. Southern Bank of Norfolk, 203 Va. 657, 661-62, 125 S.E.2d 803, 806.

Where a Board of Supervisors claimed the right to impose restrictions and conditions on allowing a development, the threat of harming the landowner's interests was an actual controversy. Cupp v. Board of Supervisors of Fairfax County, 227 Va. 580, 593, 318 S.E.2d 407, 414

(1984). Similarly, one property owner's threat to develop land that another thought would violate restrictive covenants was an actual controversy. River Heights Assoc. Partnership v. Batten, 267 Va. 262, 591 S.E.2d 683, 687 (2004)(finding an actual controversy existed because "Wood's assertion here that he had the power to develop the lots in question for commercial use and that he would exercise that power threatened Batten.").

An actual controversy exists between the parties because Citibank has threatened to foreclose on Ms. Jimenez's residence. Ms. Jimenez has alleged that Citibank is not the owner or holder of the note that is secured by her home, and has asked the Court to determine this controversy. Just like the plaintiffs in Cupp and in River Heights Assoc. Partnership, Ms. Jimenez should be allowed to have the dispute about this threatened conduct resolved by declaratory judgment. Because an actual controversy exists between the parties, the complaint adequately alleged a controversy to be decided under Va. Code § 8.01-184.

A declaratory judgment regarding Citibank's status as owner or holder of the loan prior to foreclosure is the type of "construction of definite stated rights, status, or other relations, commonly expressed in written instruments" that is appropriate for declaratory judgment. See USAA Cas.

Ins. Co. v. Randolph, 255 Va. 342, 346, 497 S.E.2d 744, 746 (1998)(finding that an action to determine the issue of whether an injury occurred in the course of scope of employment did not meet this test). Any fact issues that are part of the determination of Citibank's true status regarding the loan are of the type that are ordinarily resolved by reference to written documents and do not remove this claim from the purview of Va. Code § 8.01-184. Even if the issues of fact are triable by jury, Va. Code § 8.01-188 provides the process by which those issues can be submitted to a jury.

Amici are very concerned that the Circuit Court terminated this lawsuit without requiring an answer from Citibank and without the benefit of a complete factual record behind Citibank's claim. In the last legislative session, many of the *amici* were involved in several hearings held by the General Assembly regarding Virginia's foreclosure process. In those hearings, the legislators repeatedly stated their belief that any homeowner could challenge an intended foreclosure under existing law by filing in Circuit Court prior to the foreclosure. The debate on this issue was mostly whether the fourteen day notice period was sufficient time for this to occur. Ms. Jimenez did exactly what those legislators said any homeowner could do, and she filed to challenge the foreclosure before it occurred. *Amici* believe that a homeowner's ability to seek judicial redress prior to

foreclosure is a fundamental right of Virginia's nonjudicial foreclosure system. The United States Supreme Court has stated "[t]he right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government." Chambers v. Baltimore & Ohio Railroad Co., 207 U.S. 142, 148 (1907).

The federal authorities trying to resolve the foreclosure problem on a national basis would also be surprised to learn that a homeowner in Virginia was not allowed to challenge a foreclosure sale. On November 18, 2010, Elizabeth Duke of the Board of Governors of the Federal Reserve System testified to a congressional subcommittee that "[i]n nonjudicial foreclosure states, to challenge the foreclosure, the homeowner must take the initiative to file suit in state court to enjoin the foreclosure of file for bankruptcy." Pg. 7 of Statement by Elizabeth A. Duke to the Subcommittee on Housing and Community Opportunity of the Committee on Financial Services, United States House of Representatives, November 18, 2010, <http://financialservices.house.gov/Media/file/hearings/111/Duke111810.pdf>

Finally the facts outside of the complaint that are referred to by the parties show the necessity for a full factual record to be developed about this controversy. In its Opposition Brief to the Petition for Appeal, Citibank

avers that it has possession of the original note and has shown it to Plaintiff's counsel; this allegation about an important fact is outside the record of this case. Also, the Adjustable Rate Note (App. at 45), which is repeatedly referenced by all parties but not part of the evidence in the trial court, shows that the term "Note Holder" is reserved for "anyone who takes this Note by transfer and who is entitled to receive payments under this Note." Because the parties appear to stipulate that the note is a negotiable instrument, pursuant to Va. Code § 8.3A-203 the term "transfer" means "delivered by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument." Therefore, whether Citibank is the note holder may ultimately turn on whether the note was delivered to it for the purpose of giving Citibank the right to enforce it. For this Court to take up the underlying legal issues, this Court must first have this full factual record on these important issues.

For these reasons, the demurrer by Citibank to the declaratory relief claim should not have been granted and this claim remanded.

B. The complaint properly alleges a quiet title action because it alleges that a Deed of Substitute Trustee has been recorded regarding Ms. Jimenez's property and that this deed is invalid.

The complaint asserts that Citibank has no rights under the note or the deed of trust that secures it. A Deed of Substitute Trustee was signed

purportedly on Citibank's behalf that appointed Equity as substitute trustee. It cannot be determined whether that deed was signed by a Greg Allen acting as Vice President of EMC Mortgage, an alleged servicer for Citibank, or signed by him acting as an authorized agent for EMC Mortgage. Although the date of the recording of this deed or the deed book and page is not alleged, from the request that it be stricken from the land records, it can fairly be inferred that the complaint is alleging it was recorded. The Deed of Substitute Trustee divests the deed of trust from the original trustee to Equity and this transfer was done for the purpose of foreclosure. Consequently, although this deed does not change the fact that Ms. Jimenez's property is subject to a lien, it does greatly affect her rights because it places the deed of trust in a foreclosure trustee who seeks to transfer the property away from her.

As Equity knows, a quiet title action is essentially a declaratory judgment action about competing interests in land. See Beeren & Barry Investments, LLC v. AHC, 277 Va. 32, 671 S.E.2d 147,149 (2009) ("B & B filed a declaratory judgment action in the circuit court against AHC and Equity Trustees seeking to quiet title to the property. Equity Trustees filed a cross-bill against AHC for declaratory judgment seeking the same relief."). In that action, this same defendant, Equity, sought a declaratory judgment

seeking to quiet title regarding the effect of terms in a deed of trust. Id. In that appeal, this Court granted that relief to B&B. Id., 671 S.E.2d at 151. “The ground upon which jurisdiction of courts of equity to quiet possession and remove clouds from a title rests is that it is inequitable that a party in possession with a good title should be embarrassed by having a hostile claim outstanding against his property, which, although not actively asserted, and not of any validity, is nevertheless calculated to affect the marketability of the title.” Neff v. Ryman, 100 Va. 521, 42 S.E. 314, 315 (1902).

On page four of its Revised Memorandum in Support of Demurrer, (App. at 173), Equity recognized that the Deed of Substitute Trustee could be void; it wrote “if an unauthorized party tried to appoint a trustee, that appointment would be void. *See e.g. Washington A & G.R. Co. v. Alexandria & W.R. Co.*, 19 Gratt. 592, 1870 WL 33568 at *5 (1870).” Thus, Equity, Ms. Jimenez, and *amici* all agree on this core legal principle. When a substitute trustee of a trust is not validly appointed, a court properly strips the substitute trustee of its powers. See Little v. Ward, 250 Va. 3, 10, 458 S.E.2d 586, 590 (1995) (regarding an irrevocable trust but equally applicable to a deed of trust).

When a substitute trustee is properly appointed, the substitute trustee receives the deed interest given to the original trustee and is then able to transfer that deed interest to a buyer at a foreclosure sale. *See Virginia Lawyers Practice Handbook, “Real Estate Transactions in Virginia” Vol I, 2nd ed., § 5.806, Foreclosure Sales, Kessler and Richmond, Virginia CLE Publications.* Therefore, when the substitute trustee process is used, the integrity of the land transfers that flow from that foreclosure sale is dependent on the substitute trustee being properly appointed.

Under Virginia’s real property statutes, the party secured by a deed of trust always has the power to appoint a substitute trustee even if the deed of trust does not specifically grant it.

Every deed of trust to secure debts or indemnify sureties is in the nature of a contract and shall be construed according to its terms to the extent not in conflict with the requirements of law. .

. .

9. The party secured by the deed of trust, or the holders of greater than fifty percent of the monetary obligations secured thereby, shall have the right and power to appoint a substitute trustee or trustees for any reason and, regardless of whether such right and power is expressly granted in such deed of trust, by executing and acknowledging an instrument designating and appointing a substitute. . . .

Va. Code § 55-59.

The core claim is that Citibank did not have the power to appoint Equity as a substitute trustee. Accepting the allegations of the complaint

as true, it can fairly be inferred that Citibank is not the party secured by the deed of trust nor a holder of greater than fifty percent of the monetary obligation secured by the deed of trust. Consequently, the complaint properly alleges a claim that the Deed of Substitute Trustee is void and should be stricken from the land records. A declaratory judgment action to quiet title is the proper means to achieve this relief.

As with the declaratory judgment action directly regarding Citibank, determination of the validity of the Deed of Substitute Trustee will require a full factual record regarding Citibank's claim to the note. In addition to the issues identified in Section II. A above, other factual issues about the authority of Greg Allen to sign this deed for Citibank need to be presented.

As alleged, this Deed of Substitute Trustee was purportedly signed by EMC, an agent of Citibank, or by an agent for EMC. Although not part of the evidence, the parties seem to agree that the document found at 148-149 of the Appendix is the deed. Even if Citibank is found to have the right to choose a substitute trustee, whether that power had been transferred to the agent who signed this deed will need to be shown. The Virginia Practice Series, Real Estate Closings, 2009-2010, § 3:11 states as follows: "Where a deed in the seller's chain of titled was signed for the grantor or grantee by his attorney, a properly executed power of attorney should have

been recorded along with the deed. If it was not, the effect is the same as if the deed itself was not signed.” Although such proof should be as simple as providing the necessary powers of attorney documents, that proof is not yet before this Court and whether that proof exists is currently unknown.

If Equity were put to its proof about the authority of Greg Allen to sign for Citibank, *amici* believe that this proof will be consistent with the deposition of Gregory N. Allen, taken January 13, 2010, in Minneapolis, Minnesota, as part of the lawsuit Krista Bain v. Metropolitan Mortgage Group, Case No. 09-CV-00149-JCC, pending in the United States District Court for the Western District of Washington. This deposition is available at <http://stopforeclosurefraud.com/2010/12/18/full-deposition-transcript-of-lps-greg-allen-mers-is-alive/> and identifies a Greg Allen as Vice President of customer support of an entity called LPS. On page 12 and 13 of that deposition, he testified that in his role as Vice President at LPS he executes appointment of successor trustees for a wide variety of financial institutions. LPS is Lender Processing Services, Inc., and the home page of its website states in part that its “high-performance technology, data and services empower lenders and servicers by providing them with the solutions they need to achieve their business goals and succeed in today’s competitive marketplace.” <http://www.lpsvcs.com/Pages/default.aspx>.

Given this similarity in the name, Greg Allen, and the function he or someone signing for him performed for EMC, Ms. Jimenez's request to Equity for evidence of Mr. Allen's authority to sign for EMC on Citibank's behalf (App. at 5, Para. 21), was well founded.

If indeed the Greg Allen who signed the deed is with LPS, then even more reason exists to investigate the validity of the Deed of Substitute Trustee. A 60 Minutes expose on CBS on April 3, 2011, shows that LPS was employing untrained and low-wage workers to forge names to foreclosure documents as if they were vice presidents of banks.

<http://www.youtube.com/watch?v=00b9Awyf5bQ&feature>. On November 18, 2010, the Acting Comptroller of the Currency testified to a congressional subcommittee that the OCC was "participating in an examination being led by the FRB of Lender Processing Services, Inc., which provides third-party foreclosure services to banks." Pg. 16 of Testimony of John Walsh before the Subcommittee on Housing and Community Opportunity of the Committee on Financial Services, U.S. House of Representatives, <http://financialservices.house.gov/Media/file/hearings/111/Walsh111810.pdf>. He also testified about the developing situation of improper foreclosure documentation. "As the situation has evolved, concerns have broadened to include the accuracy of

all information underlying the foreclosure process, and the physical possession and control over documents necessary to foreclose on a home.” Id. at 3.

For these reasons, the demurrer by Equity to the quiet title action should not have been granted. This claim should be remanded to the trial court for further proceedings to determine the validity of the Deed of Substitute Trustee.

C. Because of the absence of evidence that the “allonge” was affixed to the note, the allegations about the existence of a purported allonge assigned in blank provide no basis to dismiss either claim.

The allegations about the purported allonge to the note do not defeat any of the claims because no evidence has been presented that it was affixed to the note. Although not in evidence, the parties seem to agree that the document at page 51 of the Appendix is a copy of the purported allonge. Under Va. Code § 8.3A-204(a), this separate document qualifies as part of the note only if it is “a paper affixed to” the note. Consequently, even though the parties seem to agree that the note is a negotiable instrument and even if Citibank is in possession of it, its role could be as assignee rather than holder. See Becker v. National Bank and Trust Co., 222 Va. 716, 721, 284 S.E.2d 793, 795-96 (1981)(finding that “because United took the notes by mere assignment and not through the

endorsement of Polled, United was not a holder.) Without evidence that the document was affixed to the note Citibank cannot claim to be the holder of bearer paper even it has possession of the note and the purported allonge. As an assignee rather than a holder, it will still need to prove that it was assigned the note. Presumably if this occurred, Citibank would have some document referencing that assignment that could easily be introduced into evidence.

Both Citibank and Equity filed demurrers and motions to crave oyer rather than filing an Answer and putting into evidence the documentation to support their assertions that Citibank owns the note and that the Deed of Substitute Trustee is proper. If Citibank's and Equity's assertions are true, it should be relatively easy for Citibank and Equity to provide the documentation. If this documentation does not exist or is improper, then Ms. Jimenez is entitled to an order that protects her from an improper nonjudicial foreclosure. The only way to determine whether proper documentation exists is for this Court to reverse the trial court and remand Ms. Jimenez's claim for further proceedings.

Especially because of the documented problems with foreclosure practices, homeowners in Virginia are entitled to bring their claims to the court system when questions about the propriety of a foreclosure are

raised. Those problems are not erased simply because a separate piece of paper exists that may have converted a home loan into bearer paper. A trial court still must decide the basic issues of whether the instrument is a negotiable instrument, whether the separate paper is affixed to the instrument, and who is lawfully entitled to possess the instrument.

CONCLUSION AND RELIEF SOUGHT

Amici respectfully requests that the Circuit Court ruling be reversed and this matter remanded for further proceedings. A complete factual record is necessary to determine the actual controversy between the parties, and Ms. Jimenez adequately alleged facts showing she is entitled to relief. If the Circuit Court's ruling is not set aside, this Court would be shutting the courthouse doors to homeowners who have legitimate disputes about pending foreclosures on their homes.

DATED: April 6TH, 2011.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Thomas D. Doman".

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CERTIFICATE OF SERVICE

I, Thomas D. Domonoske, do hereby certify that on this 6th day of April, 2011, service of this brief has been done in compliance with Rule 5:26(d). I filed in the Office of the Clerk of the Supreme Court of Virginia fifteen copies of this Amici Brief and sent an electronic copy to the clerk, and on the same day mailed three copies of the foregoing Amici Brief by United States mail, postage pre-paid, to the following counsel of record:

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A handwritten signature in black ink, appearing to read "Thomas D. Doman", is written over a horizontal line.