

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge

Case No. 2007-CP-07-03027

Carolina First Bank,..... Appellant,

v.

Charles S. McCue, Builder Services Group, Inc., d/b/a
Gale Contractor Services, Pebblethorn Landscape &
Design, LLC, Falco, Inc., Distinctive Granite &
Marble, Inc., Gustavo Angeles, individually and d/b/a
Empire Construction, and Rose Hill Plantation Property
Owners Association, Defendants,..... Defendants.

Of whom Charles S. McCue is the Respondent. Respondent.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- I. The trial court erred by finding that McCue has a right to a jury trial because his counterclaims for breach of contract, breach of contract accompanied by fraudulent act, negligence, negligent supervision, and fraud and misrepresentation sound in equity where the actual relief sought is in the nature of rescission.

- II. In the alternative, if McCue's counterclaims for breach of contract, breach of contract accompanied by fraudulent act, negligence, negligent supervision, and fraud and misrepresentation do not sound in equity, the trial court erred by finding that McCue has a right to a jury trial on these claims because these counterclaims are legal and permissive and McCue therefore waived his right to a jury trial by asserting these claims in this equitable action.

STATEMENT OF THE CASE

This case was filed by Carolina First Bank ("CFB")¹ on or about October 25, 2007, seeking to foreclose upon mortgages secured by property owned by McCue in Beaufort County, South Carolina. (Complaint, R. ____). McCue asserted affirmative defenses and counterclaims against CFB, including claims for breach of contract, breach of contract accompanied by fraudulent act, fraud and misrepresentation, negligence, negligent supervision, defamation, slander of title, intentional infliction of emotional distress, breach of fiduciary duty, conversion and violation of the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681s-2(a). (Answer to Second Amended Complaint and Counterclaim, R. ____).

In defense of the foreclosure complaint, McCue contests his liability for loan amounts disbursed for construction of the residence. McCue admitted, however, his obligation to repay loan funds disbursed to pay off a prior lender. (Motion for Partial Summary Judgment, R. ____). Consequently, CFB sought partial summary judgment relating to the amounts McCue admitted he owed by motion filed on February 25, 2009. (Motion for Partial Summary Judgment, R. ____). By Order filed May 7, 2009, the Court granted partial summary judgment in the amount of \$574,938.50 and held in abeyance its ruling as to the amount due on CFB's request for reimbursement for force-placed insurance, attorneys' fees, costs and interest. (5/7/09 Order, R. ____). Therefore, out of the approximately \$1,140,045 initially at issue, the amount remaining in dispute is \$565,061.50, plus attorney's fees, interest and other costs. (Id.)

Though McCue did not include a jury trial demand in his initial responsive

¹ CFB was purchased by TD Bank on September 30, 2010.

pleadings in this matter, at a status conference held on February 7, 2012 before Judge Carmen Mullen, current counsel for McCue clarified that McCue had intended to assert a jury trial demand in the pleadings. (See email exchange dated 5/24/2012; R. ____). CFB thereafter timely moved to strike the jury demand on March 5, 2012, even though the demand was not made in writing. (Motion to Strike Jury Demand; R. ____). However, CFB is not asserting McCue failed to make a timely jury trial demand because the Court indicated it would allow McCue to amend his pleadings to assert the jury trial demand at the February 7, 2012 status conference. Indeed, by Motion dated March 22, 2012, McCue did move to amend his pleading and for the first time in a written pleading requested a jury trial. (Notice of Motion and Motion to File Second Amended Answer and Counterclaim; R. ____).

On July 2, 2012, a hearing was held on the Motion to Strike the Jury Demand and the Motion to File Second Amended Answer and Counterclaim before Judge Mullen. (Transcript of Hearing; R. ____). By Order dated November 29, 2012, McCue's Motion to File Second Amended Answer and Counterclaim was granted, and CFB's Motion to Strike seeking to have the entire matter tried by bench trial was granted in part and denied in part. (11/29/12 Order; R. ____). Specifically, the trial court found that McCue was not entitled to a jury trial on his counterclaims for violation of the FCRA, defamation, slander of title and intentional infliction of emotional distress (collectively, "Credit Reporting Counterclaims"), and that McCue was entitled to a jury trial on his counterclaims for breach of contract, breach of contract accompanied by fraudulent act, negligence, negligent supervision and fraud and misrepresentation ("Counterclaims at Issue"). As such, the trial court denied CFB's

Motion to Strike with regard to the Counterclaims at Issue. CFB appeals the determination that McCue is entitled to a jury trial on the Counterclaims at Issue.

STATEMENT OF FACTS

CFB's foreclosure action was filed in connection with a mortgage securing a loan made to McCue in the amount of \$840,000.00 on January 31, 2006 ("Construction Loan"), and a \$300,000.00 home equity line of credit ("HELOC") entered into on November 27, 2006. (Complaint ¶¶ 10, 14; R. ____). Both loans are in default. (Id. at ¶¶ 9, 17; R. ____; see also 5/7/09 Order; R. ____). Both loans were secured by a mortgage executed in connection with a lot and construction of a residential dwelling in the Rose Hill subdivision located in Beaufort County, South Carolina. (Id.) Proceeds for the initial loan on January 31, 2006 were used to pay off a prior loan from Lowcountry Bank in the amount of \$574,938.50. (5/7/09 Order; R. ____).

McCue contracted with Defendant Empire Construction ("Empire"), which is owned by his nephew, Defendant Chad McCue, and his business partner, Brian Atkinson ("Atkinson"), to build the residence.² (Trans. p. 18, ll. 10 – p. 19, ll. 18; R. ____; see also Answer to Second Amended Complaint and Counterclaim, ¶¶ ____; R. ____). McCue alleges that Empire, Chad McCue and Atkinson collaborated with a former CFB loan officer, Blair Witkowski ("Witkowski"), in a fraudulent scheme to misuse the loan funds. (Id.)³

McCue further claims that the actions of Witkowski, Atkinson and Chad McCue

² Empire, Atkinson and Chad McCue are all in default in the present action.

³ Witkowski, Atkinson and Chad McCue all have pleaded guilty in federal court for acts constituting fraud on CFB. (Pleas of Witkowski, Atkinson and Chad McCue; R. ____).

resulted in the dwelling not being completed, and that he had to spend his own money to complete the building. (Id.) Specifically, McCue claims that he should be excused from paying any money other than that for which CFB already has obtained a judgment, and that he is also entitled to damages in the form of reimbursement of out of pocket amounts he paid to complete the dwelling. (Trans. p. 20, ll. 13-20; R. ___).

ARGUMENT

The trial court committed an error of law when it determined McCue is entitled to a jury trial on the Counterclaims at Issue. See Wells Fargo v. Smith, 398 S.C. 487, 491, 730 S.E.2d 328, 330 (Ct. App. 2012) (stating that ruling on motion to strike jury demand may be overturned based on error of law without deference to trial court). Though McCue attempts to cloak his counterclaims as legal claims, the relief sought reveals their true equitable nature and his intent to avoid the statutory foreclosure process governing such actions. As such, he is not entitled to a jury trial on these claims. Moreover, even if the court concludes the counterclaims are not equitable, they are permissive and McCue is not entitled to a jury trial on these claims because he has waived the right to a jury trial by asserting these counterclaims in an equitable proceeding.

I. McCue's Counterclaims Are Equitable.

“Generally, the relevant question in determining the right to trial by jury is whether an action is legal or equitable; there is no right to trial by jury for equitable actions.” Mortgage Electronic Systems, Inc. v. White, 384 S.C. 606, 682 S.E.2d 498 (Ct. App. 2009) (citing Lester v. Dawson, 327 S.C. 263, 267, 491 S.E.2d 240, 242 (1997)). “Orders affecting the mode of trial affect substantial rights under S.C. Code

Ann. § 14-3-330(2) (1977) and must, therefore, be appealed immediately." Lester, 327 S.C. at 266, 491 S.E.2d at 241. Because the right to proceed in the proper mode of trial is a substantial right, a court should not erroneously require a party to proceed before a jury in an equity case. Flagstar Corp. v. Royal Surplus Lines, 341 S.C. 68, 72, 533 S.E.2d 331, 333 (2000). Conversely, a jury trial right does not arise in connection with a case to be tried within the equitable jurisdiction of the court. Pelfrey v. Bank of Greer, 270 S.C. 691, 244 S.E.2d 315 (1978).

"Characterization of an 'action as equitable or legal depends on the [counterclaimant's] main purpose' in bringing the action." Smith, 398 S.C. at 494, 730 S.E.2d at 332. (quoting Ins. Fin. Servs., Inc. v. S.C. Ins. Co., 271 S.C. 289, 293, 247 S.E.2d 315, 318 (1978). "The main purpose of the action should generally be ascertained from the body of the [pleading]. However, if necessary, resort may also be had to the prayer for relief and any other facts and circumstances which throw light upon the main purpose of the action. The nature of the issues raised in the pleadings and character of relief sought under them determines the character of an action as legal or equitable." Id. (internal citations omitted); see also S.C. Nat'l Bank v. Johnson, 285 S.C. 80, 82, 328 S.E.2d 75, 76 (1985) (holding main purpose of action was to seek rescission even though permitted to maintain action for damages in the same complaint).

A foreclosure action is an equitable action. Collier v. Green, 244 S.C. 367, 370, 137 S.E.2d 277, 279 (1964). However, the South Carolina Supreme Court has held that "[t]he purpose of the foreclosure is to fully determine the entire controversy while at the same time protecting the rights of all parties, to determine the amount of

the debt in order to disburse the proceedings of the sale, and should there be a deficiency, the Court of Equity may give relief by way of a personal judgment." See General Plywood Corp. v. Richard Jones, 216 S.C. 322, 325 57 S.E.2d 636, 636 (1950). Further, "[w]here in actions of foreclosure, the defendant sets up a defense and/or a counterclaim affecting the consideration, and arising out of the transaction in which the mortgage or lien was created, the authorities hold that the issues thus raised are equitable and are to be tried by the court upon its equity side." Collier at 371, 137 S.E.2d at 280; see also Byrn v. Walker, 275 S.C. 83, 85, 267 S.E.2d 601, 602 (1980) (counterclaims in a foreclosure action that affect the validity of a mortgage lien or the amount due are equitable in nature). Thus, any counterclaims in a foreclosure action that go to the validity of the lien or question the amount due upon the debt secured by the mortgage are equitable, and a defendant has no right to a jury trial on such claims. Id.

A review of McCue's pleadings reveals the equitable nature of the relief he seeks. McCue's initial responsive pleading expressly requested rescission as relief in the Wherefore clause, did not request a jury trial and did not assert any of the Counterclaims at Issue. (See Answer and Counterclaim of Defendant McCue, R. ____.) Similarly, McCue's Amended Answer and Counterclaim also expressly sought rescission and did not request a jury trial. (See Amended Answer and Counterclaim ¶ 92, R. ____.) The Amended Answer and Counterclaim for the first time asserted a fraud claim, but did not assert any of the other Counterclaims at Issue. Tellingly, the prayer for relief in McCue's initial Answer and his Amended and Answer and Counterclaim expressly sought as the first and primary relief: "Rescission of both notes

and mortgages related to the subject property, with Plaintiff taking title to the real estate," along with other relief consistent with rescission, such as reimbursement of interest and other costs incurred by McCue pursuant to the Note and Mortgage. (See Answer, R. ____, and Amended Answer and Counterclaim, R. ____.)

More than four years after this case was filed, McCue sought to amend his responsive pleading to assert the Counterclaims at Issue and for the first time requested a jury trial. (See Notice of Motion and Motion for Charles S. McCue to File Second Amended Answer and Counterclaim.)⁴ The amended counterclaims purposefully removed any reference to the word "rescission" in a carefully crafted attempt to avoid the statutory foreclosure regime that requires a bench trial to resolve this matter. However, McCue should not be permitted to manufacture the right to a jury trial through artful pleading more than four years into the proceedings.

In fact, the South Carolina Supreme Court has previously rejected attempts by litigants to "earn" the right to a jury trial in an equitable action. In Rosenbaum v. S-M-S 32, the plaintiff purchased real property at a tax sale and filed an action to clear title pursuant to S.C. Code Ann. § 12-61-20. The defendant answered by way of general denial and asserted a counterclaim of action for trespass to try title, seeking damages for trespass and demanding a jury trial. 311 S.C. 140, 141, 427 S.E.2d 897, 897 (1993). The circuit court struck the counterclaim because the plaintiff had asserted an equitable claim seeking a remedy under a process expressly provided for purchasers at tax sales by statute. Id. at 141-142, 427 S.E.2d at 897. The Supreme Court affirmed the circuit court's decision, holding that the defendant could not "evade the intent of the

⁴ McCue filed this pleading in response to CFB's Second Amended Complaint. See Answer to Second Amended Complaint and Counterclaim.

legislature and obtain the right to a jury trial by interposing a counterclaim designed the thwart the reasonable and practical implication of Chapter 61." Id.

Similarly, CFB here brought its foreclosure action pursuant to a statutory scheme created by the legislature. Specifically, S.C. Code Ann. § 29-3-610 to -790 provides a procedure by which a mortgagor may foreclose and seek a deficiency in an equitable action decided by the court. This codified a process established by the Act of 1791, which integrated the actions of foreclosure and the action for deficiency after sale into one equitable action, without the right to a jury trial. See McConnell, et al. v. Barnes, et al., 142 S.C. 112, 140 S.E. 310 (1927).

Like the defendant in Rosenbaum, McCue improperly attempts to earn the right to a jury trial by camouflaging his request for equitable relief as legal counterclaims. A litigant may not alter the character of a equitable claim merely by calling it a legal claim. The South Carolina Supreme Court has previously articulated this long established principle of law and common sense, stating "Generally...it may be said that the essential character of the cause of action, and the remedy or relief it seeks, as shown by the allegations of the [pleading], determine whether a particular action is at law or equity, **unaffected by the conclusions of the pleader or what the pleader calls it, or the prayer for relief...**" Rogers v. Nation, 284 S.C. 330, 332 (Ct. App. 1985) (quoting Bell v. Mackey, 191 S.C. 105, 119, 3 S.E.2d 816, 822 (1939)) (emphasis added).

Therefore, Consistent with Rosenbaum, this Court should not permit McCue to evade the statutory scheme created by the Legislature for resolving foreclosure actions. In particular, McCue's request for a jury trial should be stricken. The procedural

history in this matter along with McCue's pleadings and discovery responses demonstrate that the main purpose of McCue's counterclaims is to seek rescission. "Rescission is an equitable remedy that attempts to undo a contract from the beginning as if the contract had never existed." White, 384 S.C. at 614, 682 S.E.2d at 502. "When a party elects and is granted rescission as a remedy, he is entitled to be returned to the status quo ante. Rescission entitles the party to a return of the consideration paid as well as any additional sums necessary to restore him to the position occupied prior to the making of the contract. A return to the status quo ante necessarily requires any party damaged to be compensated." Ellie, Inc. v. Miccichi, 358 S.C. 78, 95, 594 S.E.2d 485, 494 (Ct. App. 2004).

All of McCue's relief sought for the Counterclaims at Issue is in the nature of rescission, despite his intentional avoidance of the words "rescission" or "rescind" in his most recent pleading. In his Prayer for Relief, McCue "prays that this Court order [CFB] to remove or cause the removal of all mortgages and liens against the subject property and for judgment against the Plaintiff for actual damages, including attorneys' fees and costs incurred by McCue in this action,..." (See Answer to Second Amended Complaint and Counterclaim, R. ____.) This language, which first and foremost asks for the removal of all mortgages and liens against the subject property, evidences McCue's continued main purpose of seeking rescission of the loans, even though it carefully avoids using the word "rescission." To the extent McCue's pleading attempts to avoid articulating his main purpose by vaguely referencing "actual damages," his discovery responses stating the relief sought give him away:

- "rescission of the CFB mortgage loan and equity line agreements on the

grounds of fraud and is seeking that Plaintiff take title to the subject realty" (McCue's Answers to CFB's Second Interrogatories; R. ____);

- "repayment of all interest and late fees paid by [McCue] on each of the subject loans" (McCue's Answers to CFB's Second Interrogatories; R. ____);
- "any and all funds paid for by Mr. McCue towards the completion of the property located at 6 Rose Hill Drive, which currently total approximately \$124,950.00, plus interest" (McCue's Third Supplemental Answers to CFB's Second Set of Interrogatories; R. ____); and
- "recovery of all funds taken from him by Defendant Witkowski and/or improperly transferred to Empire's accounts or the accounts of others, the sum of which is \$300,000" (McCue's Third Supplemental Answers to CFB's Second Set of Interrogatories; R. ____).

As evidenced above, McCue expressly requests rescission in his discovery responses, alternately stated in his Prayer for Relief as cancellation of the mortgage and liens, and then goes on to detail the precise categories of damage he contends are available to him under a rescission theory.⁵ Specifically, repayment of interest, late fees and other costs related to the loan plainly are rescission damages designed to put McCue back in the status quo ante, as are out-of-pocket expenses allegedly incurred by McCue in order to complete the residence. As such, they are rescission damages and therefore equitable in nature.

As noted in Johnson, a case still may be required to be tried non-jury even where legal counterclaims are asserted along with equitable claims if the "main purpose" of the counterclaims is to procure rescission. 285 S.C. at 82, 328 S.E.2d at 76-77. Here, it is plain that McCue's main purpose in bringing these counterclaims is

⁵ It is unclear why McCue thinks he is entitled to recover as damages loan funds that would have to be repaid. It is undisputed that no payments were ever made by McCue on the \$300,000 HELOC loan. (Trans. p. 15, l. 16; R. ____).

to obtain rescission. Voiding the mortgage is the central request in his Prayer for Relief, and he expressly asks for rescission and related damages in his discovery responses itemizing his damages.

Therefore, the trial court committed reversible error by incorrectly ruling that McCue is entitled to a jury trial on the Counterclaims at Issue.

II. Even If McCue's Counterclaims Are Not Equitable, They Are Permissive Because They Do Not Relate to Enforceability Of The Note And Mortgage.

In order for McCue to be entitled to a jury trial on the Counterclaims at Issue in this equitable foreclosure action, the counterclaims must be legal **and** compulsory. See Smith, 398 S.C. 487, 498, 730 S.E.2d 328, 333. As noted above, because McCue's counterclaims are equitable in nature, he is not entitled to a jury trial. Therefore, no further inquiry should be necessary. However, even if McCue's counterclaims were deemed to be legal claims, they are permissive and McCue still is not entitled to a jury trial.

Under South Carolina law, "[i]f the complaint is equitable and the counterclaim legal and compulsory, the defendant has the right to a jury trial on the counterclaim." Mortgage Electronic Systems, Inc. v. White, 384 S.C. 606, 682 S.E.2d 498 (Ct. App. 2009). However, if a defendant asserts a counterclaim which is not legal and compulsory in an equitable action, he waives any right to a jury trial on that counterclaim. See N.C. Federal Savings and Loan Ass'n v. DAV Corp., 298 S.C. 514, 516, 381 S.E.2d 903, 904 (1989). Foreclosure proceedings are equitable proceedings in South Carolina. See, e.g., DAV Corp., 298 S.C. at 516, 381 S.E.2d at 904 (referring to foreclosure proceeding as equitable).

In DAV Corp. , the South Carolina Supreme Court determined that counterclaims related to a subsequent oral agreement whose breach could not have avoided a default on the note at issue were permissive. The Supreme Court reasoned that the counterclaims were permissive because they did not "affect the enforceability of the Note." Id. Therefore, legal counterclaims asserted in a foreclosure proceeding are permissive unless they are logically related to enforceability of the note and mortgage. Id.; see also Smith, 398 S.C. 487, 498, 730 S.E.2d 328, 333 (holding alleged violation of the attorney-preference statute was permissive because it did not relate to enforceability of the note and mortgage).

In this case, the Counterclaims at Issue cannot logically relate to enforceability of the notes and mortgages because they would not have avoided default and centered on activities that occurred after the Construction Loan was made. See DAV Corp., 298 S.C. at 518, 381 S.E.2d at 905. (holding counterclaims related to oral agreement after loan closing permissive did not affect enforceability of Note).

First, McCue admitted enforceability of the loan documents with regard to the amounts used to payoff Lowcountry Bank at closing and partial summary judgment already has been on this basis. (See 5/7/09 Order, R. ____.) As such, the factual allegations and relief sought necessarily relate to actions that occurred after the loan documents were executed.

Second, the specific acts alleged by McCue supporting his purported legal claims⁶ do not refer to activities during or prior to the closing, but instead refer to

⁶ Subparagraph f of Paragraph 123 refers to McCue's claim that the HELOC was obtained fraudulently, for which he plainly seeks to have the HELOC Note and

activities after closing such as CFB allegedly "failing to monitor and administer the construction loan," "failing to have a written policy governing draw requests," and "failing to comply with the requirements of its own loan documents pertaining to inspections prior to approval of draw requests." (See Second Amended Answer and Counterclaim, ¶ 123, R. ____.) Indeed, the gravamen of McCue's factual allegations is that CFB failed to properly administer construction loan funds by failing to uncover the mortgage fraud scheme by Third-Party Defendants Chad McCue, Atkinson and Witkowski. (Id. ¶ 29.) Because the draws and disbursements were not done as part of the loan closings, all of the events related to whether loan funds were disbursed properly necessarily occurred after closing and execution of the loan documents. (Id.)

Therefore, the Counterclaims at Issue are related to post-closing activities and cannot be logically related to enforcement of the notes and mortgages. Consequently, even if McCue contends his main purpose is not to seek rescission, he is not entitled to a jury trial because the Counterclaims at Issue are permissive. The trial court therefore committed reversible error by finding that McCue is entitled to a jury trial on the Counterclaims at Issue.

CONCLUSION

For the foregoing reasons, CFB respectfully requests this Court reverse the circuit court's ruling that McCue is entitled to a jury trial with regard to his counterclaims unrelated to credit reporting.

Mortgage rescinded. Therefore, this ground sounds in equity and is not material to arguments regarding legal claims.

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