

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

Federal National Mortgage Association (“Fannie Mae”), a corporation organized and existing under the laws of the United States of America, and its assignee Nationstar Mortgage LLC d/b/a Mr. Cooper (“Mr. Cooper”)

PLAINTIFF,

vs.

D. Randolph Whitt; and Pearce W. Fleming,

DEFENDANTS.

IN THE COURT OF COMMON PLEAS

C/A NO: 2014-CP-32-2795

ORDER GRANTING PLAINTIFF’S MOTION FOR LEAVE TO AMEND REPLY TO DEFENDANT’S COUNTERCLAIMS

(NON-JURY MORTGAGE FORECLOSURE)

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Feb 17 2023

SC Court of Appeals

THIS MATTER came before the Court upon Motion of Plaintiff filed June 24, 2022 for leave to amend its reply to Defendant Whitt’s Counterclaims. The Plaintiff’s Motion states that “[i]n light of Defendant’s Whitt’s counterclaims, particularly the claim for statutory damages, *and the Order dated May 5, 2022 joining Nationstar Mortgage LLC d/b/a Mr. Cooper [emphasis added]*, it has become apparent that there are other federal law defenses which Plaintiffs wish to assert to Defendant’s claims”, citing the “Merrill Doctrine” and the Housing and Economic Recovery Act anti-penalty bar. The Motion to Amend the Reply to Counterclaims was heard by this Court on August 26, 2022. In the Plaintiff’s Motion and at the hearing on August 26, 2022, it remained unclear to this Court what the relationship was between the Court’s Order dated May 5, 2022, and the Plaintiff’s desire to add defenses to its Counterclaim. This confusion was a concern, especially because of the representations of the Plaintiff in its prior Motion for an Order to Amend the Caption and Pleadings which was the basis of the May 5, 2022 order.

This Court’s Order dated May 5, 2022 is an Order that relied upon the Plaintiff’s representations to the court that the assignment of the Plaintiff’s Mortgage and substitution of party plaintiffs that the Plaintiff sought at that time did not change or create any new claims or defenses, and would not prejudice the Defendant Whitt in any way. The May 5th Order only granted the Plaintiff’s motion in part, directing that the Plaintiff proceed as Fannie Mae and its assignee Mr. Cooper, instead of only as Mr. Cooper as requested in the Plaintiff’s Motion at that time. Based on representations by the Plaintiff, the May 5th Order specifically found that “Fannie Mae’s assignment to Mr. Cooper does not create any new claims or any new defenses in this litigation, and thus there is no prejudice to the Defendant from the addition of Mr. Cooper as Plaintiff...”

At the Hearing on August 26, 2022, this Court set out a schedule of time for the parties to make additional filings on the issues in the Motion and particularly how the newly raised defenses were related

to the decision of the Court in the May 5th Order. Plaintiff filed a Memorandum in support of their Motion for Leave to Amend. Defendant's filed a "Return to Second Motion to Amend". The Plaintiff's Memorandum continued with the phrase "in light of" in reference to the May 5, 2022 order, without clarification of the relationship between the order and the defenses being sought to be added to the Plaintiff's reply. The Plaintiff's Memorandum did, however, contain an attached proposed "Plaintiffs' Amended Reply to Defendant's Amended Answer and Counterclaims", which proposed adding paragraphs 20-21 to the prior pleading. The additional defenses to the Defendant's Counterclaims, are asserted to only be on behalf of, and applicable to, the Plaintiff Fannie Mae, and not to the newly added assignee Plaintiff Mr. Cooper. Plaintiff's Memorandum further asserts that one of the reasons that Fannie Mae did not move to amend to add those two defenses sooner was because it thought that it was no longer going to be a party to the case because of its assignment of the mortgage to Mr. Cooper, and it was only after the May 5, 2022 order keeping them in the case and simply adding Mr. Cooper as a Plaintiff as Fannie Mae's assignee, did the Plaintiff undertake a thorough review of the record to determine that Fannie Mae wanted to raise these two defenses. Hence, the Court's Order permitting the addition of the assignee Mr. Cooper as Plaintiff in this case did not create the applicability of any additional defenses for the Plaintiff to raise in reply to the Defendant's Counterclaims, and this Court finds no grounds for waiver, laches or judicial estoppel to prevent the Plaintiff's requested relief.

Therefore, pursuant to Rule 15(a) SCRPC, the Plaintiff is hereby leave of this Court to file its Amended Reply to Defendant's Amended Answer and Counterclaims.

Defendant Whitt requests in his Return that the Plaintiff should be required to make a more definite statement to reference the sections of the US Code relevant to its HERA defense (paragraph 21 of the proposed Amended Reply to Counterclaim). This argument is not properly before the Court, and the Defendant is welcome to make such a Motion after the Plaintiff files its Amended Reply to Defendant's Counterclaims. However, for purposes of judicial economy, if the Plaintiff would go ahead and simply add the specific relevant code sections to paragraph # 21 of the Amended Reply, then such issue may be mute and aide in moving this case toward a final hearing without another round of motions.

Defendant Whitt also asserts in his Memorandum that he should be granted a "reciprocal right to amend" his Answer and Counterclaims if the Plaintiff is allowed to amend the Reply to Counterclaims. This argument is not properly before this Court. However, if the Defendant Whitt makes the appropriate Motion with an attached proposed Amended Answer and Counterclaim, this Court will address such Motion if it is not consented to by the Plaintiff.

IT IS SO ORDERED.

Lisa Lee Smith, Special Referee, Lexington County

Chapin, South Carolina

Nov. 29, 2022