RECEIVED
Mar 14 2023
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Honorable Clifton B. Newman, Circuit Court Judge

Case No.: 2021CP1003055

Appellate Case No.: 2022-001051

Wilmington Savings Fund Society, FSB, solely as trustee for Invictus Residential Pooler Trust 2A, and not in its individual capacity .....Respondent,

v.

Alice Swope Thompson .....Appellant.

RESPONDENT'S FINAL BRIEF

RILEY POPE & LANEY, LLC

s/Peter M. Balthazor
Peter M. Balthazor SC Bar # 68244
Stephanie M. Huggins SC Bar # 101757
2838 Devine Street (29205)
P.O. Box 11412
Columbia, SC 29211
Telephone: (803)799-9993
Facsimile: (803) 239-1414
peteb@rplfirm.com
shuggins@rplfirm.com
Attorneys for Respondent

Columbia, South Carolina

March 14, 2023

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES

STATEMENT OF ISSUES ON APPEAL

I. WHETHER THE TRIAL COURT CORRECTLY GRANTED RESPONDENT'S MOTION TO STRIKE APPELLANT'S JURY DEMAND?

STATEMENT OF THE CASE

This case is an action for the foreclosure of a mortgage of real property located in Charleston County. Respondent filed its Complaint on July 6, 2021. (R. pp. 9-47). Appellant executed a note on January 25, 2019, secured by a mortgage. (R. pp. 14-46). Appellant defaulted on the note and mortgage as of April 1, 2020. (R. p. 11). Respondent seeks a judgment of foreclosure for the amount due upon the note and mortgage. (R. p. 11 - p. 12)

Appellant filed an Answer and asserted a counterclaim for trespass on September 13, 2021. (R. pp. 48-52). Appellant alleges Respondent intentionally entered the property and proximately caused damages to Appellant by changing the locks and turning off utilities. (R. p. 50). Appellant alleges these actions interfered with her ability to lease the premises to generate income to make the mortgage payments. (R. p. 50).

Appellant demanded a jury trial. (R. p. 48). Respondent filed a Motion to Strike Jury Demand, and the circuit court held a hearing on January 27, 2022. (R. pp. 72-75). The circuit court entered an order granting the motion on February 2, 2022. (R. pp. 1-4) Appellant filed a motion to reconsider on February 14, 2022. (R. pp. 76-79). The circuit court denied this motion by order filed on June 22, 2022. (R. pp. 5-6). Appellant timely filed a Notice of Appeal on July 25, 2022.

STANDARD OF REVIEW

"A mortgage foreclosure is an action in equity." *Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 248, 489 S.E.2d 472, 475 (1997). "Whether a party is entitled to a jury trial is a question of law." *Verenes v. Alvanos*, 387 S.C. 11, 15, 690 S.E.2d 771, 772 (2010). Appellate courts may

decide questions of law with no particular deference to the circuit court's findings. *Id.* 387 S.C. at 15, 690 S.E.2d at 772–73.

ARGUMENT

I. THE CIRCUIT COURT CORRECTLY DENIED APPELLANT'S DEMAND FOR JURY TRIAL PURSUANT TO RULE 38, SCRCP, BECAUSE APPELLANT DID NOT ALLEGE A COMPULSORY COUNTERCLAIM.

Appellant is not entitled to a jury trial because the alleged counterclaim, while legal, is permissive and not compulsory. Only legal, compulsory counterclaims are entitled to a jury trial. *Johnson v. South Carolina Nat'l Bank*, 292 S.C. 51, 354 S.E.2d 895 (1987). Mortgage foreclosure actions are equitable in nature. *Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 248, 489 S.E.2d. 472, 475 (1997) ("A mortgage foreclosure is an action in equity.") "In equity actions the parties are not entitled, as a matter of right, to a trial by jury." *Williford v. Downs*, 265 S.C. 319, 321, 218 S.E.2d 242, 243 (1975). "If the complaint is equitable and the counterclaim is legal and permissive, the defendant waives his right to a jury trial." *Wachovia Bank, N.A. v. Blackburn*, 407 S.C. 321, 330, 755 S.E.2d 437, 441 (2014).

A counterclaim is compulsory only if it arises out of the same transaction or occurrence as the opposing party's claim. Rule 13(a), SCRCP. South Carolina has adopted the "logical relationship" test to determine whether claims arise out of the same transaction or occurrence as the opposing party's claim. *North Carolina Fed. Sav. & Loan Ass'n. v. DAV Corp.*, 298 S.C. 514, 519, 381 S.E.2d 903, 906 (1989). Under the logical relationship test, when the alleged occurrence affects the enforceability of the note, then the claims arise from the same transaction or occurrence and are compulsory. The converse is true; where the claims do not affect the enforceability of the note, they do not arise from the same transaction or occurrence. *Id.*

The complaint that forms the basis of this appeal is for mortgage foreclosure. Appellant asserts in the Initial Brief that the basis of the counterclaim is a breach of contract by the parties. Appellant did not allege a breach of contract in the pleadings. The words "breach of contract" do not appear anywhere in Appellant's pleadings and Appellant has not amended the pleadings to include a breach of contract claim. Generally, claims or defenses not presented in the pleadings will not be considered on appeal. *McNeely v. S.C. Farm Bureau Mut. Ins. Co.,* 259 S.C. 39, 190 S.E.2d 499 (1972). Appellant's counterclaim is for trespass only and asserts that Respondent intentionally entered the real property that is the subject of the foreclosure action. (R. p. 50 - p. 51). This is not a breach of contract counterclaim. If the allegations of trespass are true, which are denied, it might be an unlawful entry onto the property. However, Appellant's characterization of her counterclaim as breach of contract is incorrect. The only counterclaim alleged in the pleadings is for trespass. (R. p. 50).

Appellant asserts that her trespass counterclaim is legal. Respondent agrees. However, the counterclaim is not compulsory. Appellant relies on *DAV Corp., supra* in support of her argument. In that case, a lender initiated a foreclosure action against Parsol Inn Joint Venture—a joint venture comprised of DAV Corporation and two other companies. *Id.* at 298 SC 516, 381 S.E.2d 904. DAV alleged six counterclaims. Five of the counterclaims alleged that the lender's right to bring the foreclosure action was modified by an oral agreement to provide additional financing. *Id.* 298 S.C. 518, 381 S.E.2d at 905. The sixth counterclaim alleged a breach of two additional oral agreements that occurred eleven months after the execution of the promissory note. The Court held all counterclaims but the sixth were compulsory. *Id.* The Court found that the later oral agreements did not affect the enforceability of the note and, therefore, the sixth counterclaim was not compulsory. *Id.* at 298 S.C. 518, 381 S.E.2d at 905. The Court reasoned a logical relationship

existed which made the other five counterclaims compulsory, because if the terms of the oral agreements were enforced, then DAV would not have defaulted on the note. *Id.* In other words, the enforcement of the oral agreements would affect the enforceability of the note. *See Blackburn*, 407 S.C. at 330 n. 7, 755 S.E.2d at 442 n. 7 ("If the defendant's prevailing on his counterclaim would affect the bank's right to enforce the note and foreclose the mortgage, there is a logical relationship between the counterclaim and the underlying suit, and the counterclaim is therefore compulsory.")

Additionally, in *South Carolina Cmty Bank v. Salon Proz, LLC*, the Court found a claim was compulsory in a foreclosure action when, if the allegations were true, it could affect the mortgage's enforceability. 420 S.C. 89, 97-98, 800 S.E.2d 488, 492 (Ct. App. 2017). Salon Proz alleged a violation of the Unfair Trade Practices Act (UPTA) in which the bank "engaged in a pattern of reneging upon promises to modify or otherwise restructure loans, including but [not limited] to the loan subject of this case." *Id.* These allegations stated a compulsory counterclaim because, if true, they would affect the enforceability of the loan.

In the present action, similar to *DAV*, the transaction or occurrence at issue is the execution and enforceability of the note and mortgage. The execution of the note and mortgage on January 5, 2019 created a contract that established the rights and obligations of both Appellant and Respondent. Appellant promised to pay when due the principal and interest on the debt as evidenced by the note. (R. p. 14). Appellant defaulted on the obligation to pay and Respondent properly initiated a foreclosure action. (R. pp. 9-12). Unlike *Salon Proz*, Appellant does not allege any act by or on behalf of the Respondent which affects the enforceability of the note and mortgage. (R. p. 61 - p. 62).

Respondent's actions as alleged were to enter into a vacant property to secure it and

winterize it. (R. p. 50). While this may have affected Appellant's ability to rent the property as she wished, it does not affect the execution or enforceability of the note and mortgage. (R. p. 67). Whether a trespass occurred and whether she might be entitled to some damages for trespass is not relevant to the analysis of the whether the counterclaim is permissive or compulsory as it in no way modifies or nullifies the terms of note and mortgage. (R. p. 67 - p. 68). Appellant is trying to argue that any act which might affect her ability to repay the note and mortgage affects the enforceability of the loan. This characterization of the allegations of her counterclaim is incorrect. Here, the transaction or occurrence is the execution of the mortgage. (R. p. 60). The trespass counterclaim "does not arise out of that transaction or occurrence because it bears no logical relationship to either the execution or enforceability of the [loan documents]." *Carolina First Bank, v. BADD, LLC*, 414 S.C. 289, 296, 778 S.E.2d 106, 109 (2015). Therefore, Appellant's counterclaim is permissive, and Appellant waived her right to a jury trial.

CONCLUSION

For the reasons stated above, this Court should affirm the judgment of the circuit court.

RILEY POPE & LANEY, LLC

Peter M. Balthazor SC Bar # 68244
Stephanie M. Huggins SC Bar # 101757
2838 Devine Street (29205)
Post Office Box 11412
Columbia, South Carolina 29211
Telephone: (803)799-9993
Facsimile: (803) 239-1414
peteb@rplfirm.com
shuggins@rplfirm.com
Attorneys for Respondent

Columbia, South Carolina
March 14, 2023

RECEIVED
Mar 14 2023
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Honorable Clifton B. Newman, Circuit Court Judge

Case No.: 2021CP1003055

Appellate Case No.: 2022-001051

Wilmington Savings Fund Society, FSB, solely as trustee for Invictus Residential Pooler Trust 2A, and not in its individual capacity .....Respondent,

v.

Alice Swope Thompson .....Appellant.

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

RILEY POPE & LANEY, LLC

Peter M. Balthazor SC Bar # 68244
Stephanie M. Huggins SC Bar # 101757
2838 Devine Street (29205)
Post Office Box 11412
Columbia, South Carolina 29211
Telephone: (803)799-9993
Facsimile: (803) 239-1414
peteb@rplfirm.com
shuggins@rplfirm.com
Attorneys for Respondent

Columbia, South Carolina
March 14, 2023