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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Honorable Clifton Newman, Circuit Court Judge

Appellate Case No. 2022-001051

Wilmington Savings Fund Society.....Plaintiff

V.

Alice Swope Thompson.....Defendant

APPELLANT'S FINAL BRIEF

Respectfully submitted,

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March 24, 2023

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STATEMENT OF THE ISSUES ON APPEAL

DID THE TRIAL COURT ERR IN STRIKING DEFENDANT'S DEMAND FOR A JURY TRIAL PURSUANT TO SCRPC RULE 38?

- A. DID DEFENDANT PLEAD A LEGAL COUNTERCLAIM TO THE PLAINTIFF'S EQUITABLE FORECLOSURE ACTION?

- B. DID DEFENDANT'S COUNTERCLAIM IN ITS THIRD AFFIRMATIVE DEFENSE SET FORTH A COMPULSORY COUNTERCLAIM?

STATEMENT OF THE CASE

The Defendant entered into a refinance Note and Mortgage on or about January 25, 2019 in favor of Family First Funding, LLC, encumbering certain non-owner occupied residential real property located at 29 Riverdale Drive, County of Charleston, South Carolina in the principal sum of Two Hundred Sixty Thousand and 00/100s (\$260,000.00) Dollars (ROA pp. 9-10 and pp. 14-46). The Mortgage has a 1-4 Family Rider (Assignment of Rents), which provides in pertinent part that:

H. ASSIGNMENT OF RENTS; APPOINTMENT OF A RECEIVER; LENDER IN POSSESSION. Borrower absolutely and unconditionally assigns and transfers to Lender all the rents and revenues (“Rents”) of the Property, regardless of to whom the Rents of the Property are payable. Borrower authorizes Lender or Lender’s agents to collect the Rents, and agrees that each tenant of the property shall pay the Rents to Lender or Lender’s agents. However, Borrower shall receive the Rents until (1) Lender has given Borrower notice of default...and (2) Lender has given notice to the tenant(s) that the Rents are to be paid to the Lender or Lender’s agents (ROA pp. 31-32).

The Borrower/Defendant allegedly went into default with the April 1, 2020 mortgage payment (ROA p. 11).

The Defendant in her Answer and Counterclaim had previously requested “loss mitigation from the servicer for Plaintiff for her loan”(ROA pp. 49-50). She further alleged that the property had substantial equity (ROA p. 49). The Defendant further alleged that she had employed Roosevelt Law Group to negotiate loss mitigation for each of six (6) Notes, and that this servicer refused to speak with her counsel (ROA p. 49). She further alleged that the Plaintiff knew her income was derived from rental income, which had been substantially curtailed by Covid-19 federal regulations preventing her from evicting non-paying tenants (ROA p. 49). She further alleged that Plaintiff’s agent(s) have repeatedly entered the leasehold and “winterized: it by turning off the utilities (ROA pp. 49-50). She advised the servicer that the unit was being

rented on a month to month basis, and later that she subsequently advised the servicer the unit was being prepared to be utilized as an AirBNB (ROA p. 50) . She alleged that the trespass was repeated on 2 more occasions (ROA p. 50). This was all alleged to have occurred prior to the institution of foreclosure proceedings (ROA p. 50). She further alleged in her Third Affirmative Defense by Way of Counterclaim:

13. That the responses contained paragraphs 1 through the preceding paragraph are repeated.... (ROA p. 50).
14. ...[T]he Plaintiff's agent intentionally entered the improvement to the real property which forms the gravamen of the issues herein presented. (ROA p. 50).
15. ...Plaintiff's agent directly and proximately caused damage to the improvements to the real property by:
 - A. Changing the locks;
 - B. Publicly posting no trespassing signs without authorization;
 - C. Turning off the breakers in the breaker box without authority;
 - D. Turning off the water supply to the improvements to the real property;
 - E. "Winterizing" the plumbing system of the improvement to the real property;
 - F. Doing all of the foregoing with no prior notice to the Defendant, while granting foreberance due to Covid restrictions, and months before actually filing this foreclosure action;

G. Interfering with the Dedendant's ability to let the premises to generate income to make the payments to Plaintiff's claims are due.

(ROA p. 50).

16. That upon information and belief the Defendant has been actually damaged in an appropriate amount to be determined by the trier of fact herein... (ROA p. 51).

The face page of Defendant's Answer and Counterclaim in the caption provided (JURY TRIAL DEMANDED). (ROA p. 48).

STANDARD OF REVIEW

The instant issue before the Trial Court was Plaintiff's Motion to Strike Defendant's Jury Trial Demand pursuant to SCRCF Rule 12(f). As Plaintiff's Motion was filed two weeks after the Answer and Counterclaim and prior to any discovery, the record before the Trial Court was limited to the allegations contained in the pleadings. Under the "well pleaded complaint" rule, the Court's inquiry of Defendant's jury trial demand should have been limited to the pleadings, themselves. Defendant would urge that this Honorable Court's standard of review is *de novo*.

ARGUMENT

DID THE TRIAL COURT ERR IN STRIKING DEFENDANT'S DEMAND FOR A JURY TRIAL PURSUANT TO SCRCF RULE 38?

A. DID DEFENDANT PLEAD A LEGAL COUNTERCLAIM TO THE PLAINTIFF'S EQUITABLE FORECLOSURE ACTION?

The Defendant's Answer and Counterclaim provided a Jury Trial Demand in the caption. In its "Second Affirmative Defense - Unclean Hands" set forth in paragraph 11:

- A. The Defendant has requested loss mitigation from the servicer...for her loan;
- B. Since early in 2001, the Defendant employed Roosevelt Law Group to negotiate loss mitigation for each of...six (6) notes;
- C. That upon information and belief the Plaintiff has refused to discuss the issues with this or any other of the outstanding Notes with Roosevelt Law Group or Defendant's counsel;
- D. That through prior financial disclosures to the Plaintiff and its predecessor, the Plaintiff is aware that the Defendants' income is largely derived from residential rental income, which has been substantially curtailed by Covid-19 federal regulations preventing her from evicting non-paying tenants; and/or
- E. That the Plaintiff is aware that the subject real property has substantial equity, obviating the need for Plaintiff's claim for a personal deficiency judgment.
- F. That the Plaintiff's agent(s) have repeatedly entered the leasehold and "winterized" it by turning off the utilities.
- G. That after the first time such was done, Defendant contacted Plaintiff's servicer to advice that the unit was being rented on a month to month basis.

- H. Later, Defendant informed the Plaintiff's servicer that the unit was being prepared to be utilized as an AirBNB
- I. The trespass into the unit was repeated upon information and belief two (2) more times.... (ROA pp. 49-50).
- 13. That the responses contained paragraphs 1 through the preceding paragraph are repeated.... (ROA p. 50).
- 14. ...[T]he Plaintiff's agent intentionally entered the improvement to the real property which forms the gravamen of the issues herein presented. (ROA p. 50).
- 15. ...Plaintiff's agent directly and proximately caused damage to the improvements to the real property by:
 - A. Changing the locks;
 - B. Publicly posting no trespassing signs without authorization;
 - C. Turning off the breakers in the breaker box without authority;
 - D. Turning off the water supply to the improvements to the real property;
 - E. "Winterizing" the plumbing system of the improvement to the real property;
 - F. Doing all of the foregoing with no prior notice to the Defendant, while granting forbearance due to Covid restrictions, and months before actually filing this foreclosure action;

G. Interfering with the Dedendant's ability to let the premises to generate income to make the payments to Plaintiff's claims are due. (ROA p. 50).

16. That upon information and belief the Defendant has been actually damaged in an appropriate amount to be determined by the trier of fact herein.... (ROA p. 51).

Clearly, the Defendant has alleged a legal counterclaim.

B. DID DEFENDANT'S COUNTERCLAIM IN ITS THIRD AFFIRMATIVE DEFENSE SET FORTH A COMPULSORY COUNTERCLAIM?

This matter concerns Defendant's fundamental right to a jury trial enshrined in SCRCP Rule 38(a), (b) and (c) with which the Defendant has complied. Further, the Court's denial of Defendant's jury trial right has a fundamental effect on the trial procedure to which this case or controversy is subject. (ROA pp. 65-66).

The Plaintiff's complaint is at its heart a breach of contract action, and the Plaintiff is seeking the equitable remedy of foreclosure for that breach. The Defendant's answer and counterclaim asserts a prior breach of the contract by the Plaintiff, specifically in paragraphs 8 through 11, which are incorporated by reference in paragraph 13, and further set forth in paragraphs 14 through 16. At issue is the invasion of the subject property by an agent of the Plaintiff as set forth specifically in paragraph 15:

- A. Changing the locks;
- B. Publicly posting no trespassing signs without authorization;
- C. Turning off the breakers in the breaker box without authority, creating the potential for mold growth;
- D. Turning off the water supply to the improvements of the real property;
- E. “Winterizing” the plumbing system of the improvement to the real property;
- F. Doing all of the foregoing with no prior notice to the Defendant, while granting forbearance due to Covid restrictions, and months before actually filing this foreclosure filing; [and]
- G. Interfering with the Defendant’s ability to let the premises to generate income to make the payments Plaintiff’s claims are due....

As the trial court Motion was based upon the pleadings and not a Motion for Summary Judgment, the party seeking a jury trial should need only to assert allegations necessary to support its right to a jury trial. Here the Defendant has clearly pleaded averments setting forth a breach of the contract by the Plaintiff during the forbearance granted because of Covid. Noteworthy is the simultaneous federal prohibition of foreclosure and eviction during much of the period commencing with the alleged breach by the Defendant. Despite these federal prohibitions, the Plaintiff’s agent undertook these overly aggressive invasions of the real property. These are issues for a trier of fact herein. They’re compulsory as they clearly relate to the actual default averred by the Plaintiff.

The seminal case on issues of this type is *N.C. Fed. Sav. and Loan Assn. v. DAV Corp.*, 381 S.E.2d 903, 298 S.C. 514 (S.C. 1989). “A party does not waive its right to a jury trial on a counterclaim asserted in an equity action if the counterclaim is legal and compulsory in nature”. *N.C. Fed. Sav. and Loan Assn.* at 904. (ROA pp. 65-66). That Court set forth an initial inquiry of whether the Defendant’s counterclaim was indeed legal, and not equitable in nature. “Next, it must be determined that the counterclaims are compulsory.... SCRCF Rule 13(a), which is a four factor test:

- 1) Are the issues of fact and law largely the same?
- 2) Would res judicata bar a subsequent suit on the counterclaims?
- 3) Does substantially the same evidence apply?
- 4) Is there any logical relationship between the claim and the counterclaim?

South Carolina has adopted the fourth test. (*See Wachovia Bank, N.A. v. Blackburn*, 407 S.C. 321, 755 S.E.2d 437 (S.C. 2014) and *Carolina First Bank v. Badd, LLC*, 381 S.E.2d 903, 298 S.C. 514 (S.C. 2015). (ROA pp. 61-65 and pp. 77-79).

Here, there is a logical relationship between the parties’ respective alleged breaches of the same contract prior to the institution of the lawsuit by Plaintiff. (ROA pp. 50, 77-79). Defendant alleges that Plaintiff created and exacerbated its own damages by sending its agent to invade the property, commit trespass to chattel in furtherance of his perceived duties to his master or was acting outside the scope of his instructions. (ROA pp. 50, 63-66 and 77-79). These are all issues fundamentally intertwined with the Defendant’s nonpayment of the Note, which is the Defendant’s alleged breach. (ROA pp. 50, 63-66 and 77-79).

Again, these are inferences reasonably drawn from the pleadings to which the Trial Court is confined in addressing the Defendant's jury trial right. The Defendant need not prove his case to be entitled to a jury trial. To hold otherwise subverts the fundamental right to jury trial and the "well pleaded complaint" rule. While it may be inconvenient or even inefficient to afford the Defendant her jury trial right, she is nonetheless entitled to it if her legal counterclaim is compulsory. Here, the averments set forth in the answer and counterclaim are a compulsory legal counterclaim. Further, they do affect the enforceability of the Note. *North Carolina Federal Sav. And Loan Ass'n* at 906.

CONCLUSION

This Honorable Court is compelled to find that Defendant's Answer and Counterclaim is legal and compulsory. Her right to a jury trial is protected by SCRCP Rule 38.

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CERTIFICATION OF APPELLANT'S COUNSEL

I, William K. Swope, Esquire, do hereby certify that I am filing the Appellant's Final Brief in compliance with the S.C. Appellate Court rules, and have made no substantial changes to Appellant's Initial Brief, save the insertion of references to the Record on Appeal and correction of typographical errors in the Initial Brief.

Respectfully submitted,

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