

STATE OF SOUTH CAROLINA
COUNTY OF LANCASTER

Founders Federal Credit Union,
Plaintiff,

vs.

Kimberly Boone a/k/a Kimberley Boone a/k/a
Kimberley D. Boone f/k/a Kimberly Dawley
f/k/a Kimberley Dawley, Brian Lemon, Crystal
Lemon, Bank of America, N.A., Discover
Bank and Mortgage Electronic Registration,
Inc.,

Defendants.

IN THE CIRCUIT COURT

Case No. 2023-CP-29-00113

**ORDER DENYING DEFENDANT
BOONE'S MOTION TO ALTER OR
AMEND JUDGMENT**

RECEIVED
Jun 20 2023
SC Court of Appeals

This matter comes before me upon the Notice and Motion to Alter or Amend Judgment (“Second Motion to Alter or Amend”) filed by Defendant Kimberly Boone (“Defendant Boone”) on June 6, 2023, seeking an order altering or amending the Special Referee’s Order and Judgment of Foreclosure and Sale (“Foreclosure Order”), which was entered on June 5, 2023.¹

Pursuant to the Order of Reference entered in the above-entitled case, a virtual hearing on the Second Motion to Alter or Amend was held before me, as Special Referee, on June 13, 2023. In attendance at the virtual hearing were Suzanne Taylor Graham Grigg, attorney for Founders Federal Credit Union (“Plaintiff” or “Founders”), and J. Martin Foster, attorney for Defendant Boone. Based on the arguments of counsel, and the briefs and pleadings filed herein, I make the following findings and conclusions.

RELEVANT FACTUAL AND PRODEDURAL BACKGROUND

On January 26, 2023, Founders commenced this judgment-lien foreclosure action against Defendant Boone, filing its Summons and Complaint and Lis Pendens. Defendant Boone filed her Motion to Dismiss Complaint pursuant to Rule 12(b), SCRCF, on February 27, 2023, which Circuit Judge Gibbons denied by Order/Form 4 entered on April 27, 2023.²

Founders filed its Motion for Order of Reference on March 20, 2023, which the Court

¹ In support of the Second Motion to Alter or Amend, Defendant Boone filed her Brief on Motion to Alter or Amend Judgment on June 12, 2023 (“Memorandum”).

² A formal Order denying Defendant Boone’s Motion to Dismiss was entered by the Court on May 3, 2023.

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granted by Order/Form 4 entered on April 27, 2023.³ On May 8, 2023, Defendant Boone filed her Notice and Motion to Alter or Amend the Judgment Pursuant to SCRCP 59(a) and (e), SCRCP (“First Motion to Alter or Amend”), seeking an order altering or amending the Court’s Order Denying Defendant Boone’s Motion to Dismiss. After conducting a hearing, Judge Gibbons entered an Order denying Defendant Boone’s First Motion to Alter or Amend on May 30, 2023.

Based on Defendant Boone’s failure to file an answer to the Complaint within 15 days of the Court denying her Motion to Dismiss (Rule 12), Founders filed its Affidavit of Default as to Defendant Boone on May 26, 2023, and Memorandum in Support of Default on May 30, 2023.

On May 27, 2023, Defendant Boone filed her Motion to Enlarge Time, seeking an extension of the answer deadline. In accordance with the Order of Reference, I presided over the Default and Motion to Enlarge Time hearing on May 30, 2023. At the hearing, I denied the Motion to Enlarge Time, and ruled that Defendant Boone was in default.

In conjunction with the denial of Defendant Boone’s Motion to Enlarge Time, I presided over the hearing on the underlying judgment lien foreclosure action on May 30, 2023. Present at the hearing were Defendant Boone and J. Martin Foster, her attorney. Plaintiff was represented by Suzanne Taylor Graham Grigg, and Jeanne Barton testified on behalf of Plaintiff. After testimony and argument, I granted the foreclosure to Plaintiff, and ordered that the property be sold. The Foreclosure Order was entered on June 5, 2023.

On June 6, 2023, Defendant Boone filed her Second Motion to Alter or Amend, seeking an order altering or amending the Foreclosure Order, and asking the Court to reconsider the denial of the Motion to Enlarge Time. Additionally, the Second Motion to Alter or Amend included a number of other complaints. Defendant Boone argued that the Foreclosure Order was deficient in the following particulars: (1) the Foreclosure Order failed to accurately recite the procedural history in this case, (2) the Foreclosure Order failed to address Defendant Boone’s homestead exemption; (3) the Foreclosure Order awarded attorneys’ fees and costs without any support; and (4) the Foreclosure Order failed to address the Motion to Enlarge Time.

At the hearing, Defendant Boone conceded that items 1 and 2 were addressed in the Foreclosure Order. With respect to item 3, Defendant Boone did not argue this position at the hearing. I note that Plaintiff filed an Affidavit of Attorneys’ Fees and Costs on June 2, 2023, which supports the amount awarded in the Foreclosure Order. With respect to item 4, Defendant Boone focused mainly on this argument.

³ A formal Order granting Founders’ Motion for Order of Reference was entered by the Court on May 3, 2023.



CONCLUSIONS OF LAW

After consideration and review of the pleadings, argument of the parties, and applicable law, I make the following conclusions of law.

1. SCRCP 59(e) does not toll the time to answer under SCRCP 12(a).

In her Second Motion to Alter or Amend and accompanying Memorandum, Defendant Boone argues that her First Motion to Alter or Amend tolled her deadline to file an answer in this case, and that she “has defended as provided by these rules.” Defendant Boone is unable to cite to any case, rule, or other legal authority to support this proposition, and the Court is not aware of any such authority or right of tolling under these circumstances.

In answering a complaint, “[a] party shall state in short and plain terms the facts constituting his defenses to each cause of action asserted and shall admit or deny the averments upon which the adverse party relies.” SCRCP 8(b). A defendant shall serve his or her answer within 30 days after service of the complaint. SCRCP 12(a). However, “[t]he service of a motion permitted under this rule alters these periods of time as follows . . . if the Court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 15 days after notice of the Court’s action.” *Id.*

On April 27, 2023, Defendant Boone received initial notice of the Court’s denial of her Motion to Dismiss Complaint via the Order/Form 4, and then again when a formal Order was entered on May 3, 2023. Defendant Boone did not file a responsive pleading (*i.e.*, an answer) within 15 days of either April 27, 2023, or May 3, 2023.

Defendant Boone’s First Motion to Alter or Amend did not constitute an answer to Plaintiff’s Complaint as required under the South Carolina Rules of Civil Procedure. *See Stark Truss Co. v. Superior Const. Corp.*, 360 S.C. 503, 508-09, 602 S.E.2d 99, 102 (Ct. App. 2004) (“If a party has failed to ‘plead or otherwise defend as provided by the South Carolina Rules of Civil Procedure and that fact is made to appear by affidavit or otherwise,’ the clerk of court will enter default.”) (citations omitted). Accordingly, default was properly entered against Defendant Boone. *See id.* (“A plain reading of Rule 55(a) allows entry of default when a pleading or defense *is asserted in a manner noncompliant* with the Rules of Civil Procedure. To hold otherwise would render the requirements in Rule 12(a), SCRCP, meaningless.”) (Emphasis added).

I further note that an order denying a Rule 12(b) motion is not immediately appealable. An appeal of such an order is preserved, and is properly prosecuted at the conclusion of the case.

The Defendant’s reliance on Rule 59(e) to toll the time to file a responsive pleading after denial of a motion to dismiss pursuant to Rule 12, SCRCP, is misplaced. From consideration of

the title and plain language, and the context, of Rule 59, I conclude that the relief and the tolling of time for a responsive pleading provided by Rule 59 pertains to relief from a final judgment. Such relief is not available or appropriate in regard to a *denial* of a motion to dismiss pursuant to Rule 12. The *denial* of a Rule 12 motion is not a final judgment or disposition of the case, and appeal is preserved.

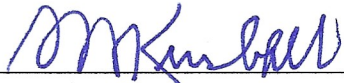
2. Plaintiff would be prejudiced if leave were given to file a late answer.

Defendant Boone further argued that even if the Court ruled that the First Motion to Alter or Amend failed to toll the answer deadline under SCRCP 12(a), leave should be freely given to Defendant Boone to file an answer. (*See* Motion to Enlarge Time.) To support this position, Defendant Boone argued that there would be no prejudice to Plaintiff with an enlargement of time to file an answer. However, I disagree with Defendant Boone’s argument, as the ten-year statute of limitations with respect to judgment execution would expire prior to entry of an order granting foreclosure of the judgment. Therefore, I find that an enlargement of time would prejudice Plaintiff in this case, and that leave to answer should not be granted.

Finally, I note that Defendant Boone attended the foreclosure hearing, and was represented by her counsel at the hearing. Counsel for Defendant Boone was allowed to examine Plaintiff’s witness, and argued fully Defendant’s position. The underlying judgment being foreclosed has not been challenged, and Defendant Boone has not argued any inequity that would result from its enforcement, except the foreclosure sale of the subject property. Further, her statutory homestead exemption has been recognized by Plaintiff.

THEREFORE, IT IS ORDERED that Defendant Boone’s Second Motion to Alter or Amend be denied.

AND IT IS SO ORDERED.



S. Jackson Kimball
Special Referee for Lancaster County

June 16, 2023

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