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SC Court of Appeals

STATE OF SOUTH CAROLINA

COUNTY OF LANCASTER

Founders Federal Credit Union,

Plaintiff,

vs.

Richard O. Gardner, III,

Defendant.

IN THE CIRCUIT COURT

Case No. 2022-CP-29-01298

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

This matter comes before me upon the Notice and Motion to Alter or Amend Judgment ("Second Motion to Alter or Amend") filed by Defendant Richard O. Gardner, III ("Defendant Gardner") 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 Gardner. I have reviewed and considered the motion and brief of Defendant Gardner. 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 October 13, 2022, Founders commenced this judgment-lien foreclosure action against Defendant Gardner, filing its Summons and Complaint and Lis Pendens. Defendant Gardner filed his Motion to Dismiss Complaint on December 6, 2022, which the Court denied by Order/Form 4 entered on April 27, 2023.² Founders filed its Motion for Order of Reference on March 17, 2023, which the Court granted by Order/Form 4 entered on April 27, 2023.³

On May 8, 2023, Defendant Gardner filed his Notice and Motion to Alter or Amend

¹ In support of the Second Motion to Alter or Amend, Defendant Gardner filed his Brief on Motion to Alter or Amend Judgment on June 12, 2023 ("Memorandum").

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

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

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Judgment Pursuant to SCRCP 59(a) and (e) (“First Motion to Alter or Amend”), seeking an order altering or amending the Circuit Judge’s Order Denying Defendant Gardner’s Motion to Dismiss. After conducting a hearing, Judge Gibbons entered an Order denying Defendant Gardner’s First Motion to Alter or Amend on May 30, 2023.

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

On May 27, 2023, Defendant Gardner filed his 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 Gardner was in default.

In conjunction with the denial of Defendant Gardner’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 Susan Gardner, on behalf of her husband Defendant Gardner, and J. Martin Foster, attorney for Defendant Gardner. 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 Gardner filed his 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 Gardner 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 Gardner’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 Gardner conceded that items 1 and 2 were addressed in the Foreclosure Order. With respect to item 3, Defendant Gardner 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 Gardner focused mainly on this argument.

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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 answer deadline under SCRCP 12(a).

In his Second Motion to Alter or Amend and accompanying Memorandum, Defendant Gardner argues that his First Motion to Alter or Amend tolled his deadline to file an answer in this case and that he “has defended as provided by these rules.” Defendant Gardner is unable to cite 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 Gardner received initial notice of the Court’s denial of his Motion to Dismiss Complaint via the Order/Form 4 entered and then again when a formal Order was entered on May 3, 2023. Defendant Gardner did not file a responsive pleading (*i.e.*, an answer) within 15 days of either April 27, 2023 or May 3, 2023.

Defendant Gardner’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 Gardner. *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 proper at the conclusion of the case.

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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, SCRCF, 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 severely prejudiced if leave were given to file a late answer.

Defendant Gardner further argued that even if the Court ruled that the First Motion to Alter or Amend failed to toll the answer deadline under SCRCF 12(a), leave should be freely given to Defendant Gardner to file an answer. *See* Motion to Enlarge Time. To support this position, Defendant Gardner argued that there would be no prejudice to Plaintiff with an enlargement of time to file an answer. However, I disagree with Defendant Gardner'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 should not be granted.

Finally, I note that Defendant Gardner was represented at the foreclosure hearing by his counsel and his wife. 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 HEREBY ORDERED that Defendant Gardner'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