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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
Bentley D. Price, Circuit Court Judge

Appellate Case No. 2020-001204
Case No. 2018-CP-10-02762

Wilmington Trust National Association as Successor Trustee to Citibank N.A. as Trustee of Structured Asset Mortgage Investments II Inc., Bear Stearns ALT-A Trust II Mortgage Pass-Through Certificates Series 2007-1, ... Plaintiff,

v.

Temisan Etikerentse a/k/a Temisan L. Etikerentse, Ijeoma Etikerentse a/k/a Ijeoma Etkis, Suntrust Mortgage Inc., Capital Bank Corporation, Bank of America NA, Keybank National Association, and Olde Park Homeowners' Association Inc., ... Defendants.

AND

Temisan Etikerentse a/k/a Temisan L. Etikerentse, Ijeoma Etikerentse a/k/a Ijeoma Etiks ..... Appellants,

v.

Specialized Loan Servicing LLC a/k/a SLS, ... Respondent.

RETURN TO PETITION FOR REHEARING

This Court correctly affirmed the lower court's order granting summary judgment in favor of Respondent Specialized Loan Servicing LLC ("SLS") on Appellants' third-party claims. Appellants' untimely[1] petition for rehearing does not identify any issues that the Court overlooked or misapprehended and, therefore, should be denied.

[1] The Court issued its Opinion on October 25, 2023, and the clerk's office emailed it to parties that same day. Pursuant to Rule 221(a), Appellants petition for rehearing was due on November 9, 2023. However,

I. The Court properly affirmed the lower court.

This is an appeal from the lower court's grant of summary judgment in favor of SLS on third party claims asserted by Appellants against SLS complaining of issues associated with SLS's servicing of their loan.[2] Appellants' third-party claims sought monetary damages from SLS for alleged regulatory and statutory violations. The foreclosure claim brought by the Plaintiff mortgage holder (Wilmington Trust) against Appellants associated with their 2008 default on their obligations under their mortgage, as well as Appellants' counterclaims and affirmative defenses, remain pending before the lower court and awaiting adjudication. The lower court properly determined that Appellants' claims against SLS were not proper "third party" claims and, in any event, Appellants failed to present even a scintilla of evidence which would demonstrate a genuine issue of material fact for trial. This Court correctly affirmed.

Appellants' Petition for Rehearing should be denied. Much of the Petition rehashes the same difficult to follow, legally incorrect arguments that the Court has already considered and rejected. The remainder of the grounds are based on materials that were properly stricken from the record on appeal because they were never presented to the lower court.[3] Because Appellants fail to identify any issues that the Court overlooked or misapprehended as required by Rule 221(a), the Petition should be denied.

Appellants did not serve and file their Petition for Rehearing until November 10, 2023 and have not moved this court for leave to submit the Petition out of time.

[2] Mortgage servicing is "[t]he administration of a mortgage loan, including the collection of payments, release of liens, and payment of property insurance and taxes." *Bank of Am., N.A. v. Draper*, 405 S.C. 214, 221, 746 S.E.2d 478, 481 (Ct. App. 2013) (quoting Black's Law Dictionary 1105 (9th ed. 2009)).

[3] The Court's Order struck the following: (1) 2009 Foreclosure Complaint; (2) Chapter 7 Bankruptcy Petition; (3) Bankruptcy ECF No. 24-1; (4) Bankruptcy ECF No. 24-2; (5) Copy of Bankruptcy ECF Records (List); (6) Bankruptcy ECF No. 36; (7) Bankruptcy ECF No. 37; and (8) LPS 7907-7954. It is undisputed that these materials were never submitted to the lower court.

A. Appellants did not present any evidence in support of their claims to the lower court.

In support of its motion for summary judgment, SLS submitted affidavit and deposition testimony as well as supporting exhibits. Appellants did not submit even a scintilla of any ***evidence*** from this case to the lower court to support their claims that SLS improperly serviced their loan. Instead, Appellants' arguments to the lower court and this Court focused on attacking the sufficiency of SLS's evidence (without producing any opposing evidence) and legally incorrect procedural arguments.

It is axiomatic that if a party "files no counter-affidavits, and makes no factual showing in opposition to a motion for summary judgment, the [lower] court is ***required*** under Rule 56, to grant summary judgment" if the facts presented by the defendant support that it is entitled to judgment as a matter of law. *Higgins v. Med. Univ. of S.C.*, 326 S.C. 592, 598-99, 486 S.E.2d 269, 272 (Ct. App. 1997) (emphasis added) (quoting *Humana Hospital-Bayside v. Lightle*, 305 S.C. 214, 216, 407 S.E.2d 637, 638 (1991)). "When a non-movant fails to cite materials in the record to support her assertion that an issue of fact is genuinely disputed, the court is under no obligation to 'scour the record in search of evidence to defeat a motion for summary judgment.'" *Hickerson v. Yamaha Motor Corp.*, No. 8:13-CV-02311-JMC, 2016 WL 7324684, at *12 (D.S.C. Dec. 16, 2016) (quoting *Ritchie v. Glidden Co.*, 242 F.3d 713, 723 (7th Cir. 2001)). Moreover, "[a]rguments made by counsel are not evidence." *S.C. Dep't of Transp. v. Thompson*, 357 S.C. 101, 105, 590 S.E.2d 511, 513 (Ct. App. 2003).

SLS detailed the deficiencies with each of Appellants' cause of action in its merits brief and reasserts those arguments in full herein. The lower court properly granted summary judgment because the evidentiary record conclusively established that there were no genuine issues of material fact for trial. Appellants' Petition continues to attack the sufficiency of SLS's

evidence while glossing over the fact that they never submitted any *contra* affidavits, deposition testimony, or other supporting evidence. At the end of the day, Appellants bore the burden of proving their claims and the Court correctly affirmed the lower court's finding that they failed to show any genuine issues of material fact.

B. Appellants' claims were improperly pled as "third party" claims.

The lower court also correctly determined that Appellants' claims were not proper "third-party" claims against SLS, and this Court appropriately affirmed on this alternative basis. As the Court noted, either the lack of evidence **or** the improper nature of the claims would have independently been sufficient to affirm the lower court.

Pursuant to Rule 14(a), "a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action ***who is or may be liable to him for all or part of the plaintiff's claim against him***." Rule 14(a), SCRCP (emphasis added). Thus, "[u]nder Rule 14, the third-party plaintiff must have a substantive claim against the third-party defendant founded upon ***derivative*** liability," meaning the "outcome of the princi[pal] claim must impact the third-party defendant's liability." *First Gen. Servs. of Charleston, Inc. v. Miller*, 314 S.C. 439, 442, 445 S.E.2d 446, 447 (1994) (emphasis added). In other words, the key question is would the claim of the third-party plaintiff "impose liability upon [the third-party defendant] for all or part of [the plaintiff's] claim." *Id.*

In interpreting the analogous federal rule, the District of South Carolina has explained that a "third party" claim is "viable only where a proposed third party plaintiff says, in effect, 'If I am liable to plaintiff, then my liability is only technical or secondary or partial, and the third party defendant is derivatively liable and must reimburse me for all or part . . . of anything I must pay plaintiff.'" *Michelin N. Am., Inc. v. Klinger Ents., Inc.*, No. CV 6:18-518-HMH, 2018 WL

9988509, at *3 (D.S.C. Aug. 13, 2018) (quoting *Watergate Landmark Condo. Unit Owners' Ass'n. v. Wiss, Janey, Elstner Assocs., Inc.*, 117 F.R.D. 576, 578 (E.D. Va. 1987)). Derivative liability "usually arises in cases involving indemnification, joint tortfeasors, or contribution" and typically such claims "involve one joint tortfeasor impleading another, an indemnitee impleading an indemnitor, or a secondarily liable party impleading one who is primarily liable." *Id.* (quoting *AIG Eur. Ltd. v. Gen. Sys., Inc.*, No. RDB-13-0216, 2013 WL 6654382, at *2 (D. Md. Dec. 16, 2013)).

SLS has never been a proper "third-party" defendant under Rule 14(a), and Appellants' Petition continues to misunderstand this argument. The genesis of this case was the foreclosure claim filed by the mortgage holder/Trust against Appellants for their 2008 default on their obligations under their mortgage. SLS cannot possibly be secondarily liable, in whole or in part, for the ***foreclosure*** claim. Appellants claims do not contend as much; instead, their claims seek monetary damages against SLS for alleged violations of various statutes and regulations in the servicing of their loan.

The District of South Carolina addressed this exact issue in *Deutsche Bank National Trust Co. v. Stevenson*, No. 2:12-1854-CWH, 2013 WL 12241630, at *3 (D.S.C. Jan. 30, 2013) under the nearly identical federal Rule 14(a). In *Stevenson*, the defendant asserted third-party claims against its loan servicer for violation of the UTPA and breach of the duty of good faith premised on the servicer's failure to meaningfully engage in loss mitigation. *See id.* The District Court agreed with the servicer that "[t]he outcome of [plaintiff's] foreclosure claim would not impact the liability of [the servicer]." *Id.* Thus, the third-party complaint was not valid as it "seeks no indemnification, and there is no relationship to the plaintiff's claim against the third-party plaintiff." *Id.* The same is true here.

As SLS has maintained, Appellants' claims were not asserted through the correct procedural vehicle. Appellants should have either joined SLS as a counterclaim defendant under Rule 13(h) ***or*** brought a separate suit against SLS. *See U.S. Bank Nat'l Ass'n v. Kahn Prop. Owner, LLC*, 64 Misc. 3d 1236(A), 118 N.Y.S.3d 369 (N.Y. Sup. Ct. 2019). Appellants were masters of their pleading, however, and willfully chose to improperly state their claims without ever seeking to correct that error.

Therefore, for all these reasons, this Court properly affirmed the lower court's grant of summary judgment on this basis.

II. The arguments raised in Appellants' Petition for Rehearing are without merit.

Faced with the clear deficiencies with their claims, Appellants resorted to contending that the lower court lacked the power to rule on SLS's motion. The Court correctly found that these arguments were without merit.

A. Appellants' petition asserts vague, illogical arguments that are unsupported by any applicable law.

Appellants' Petition begins by discussing preemption, contending that unspecified federal matters preempted South Carolina's "regulatory or adjudicatory powers" over the claims they chose to assert in the circuit courts of this State. (Pet. at 2.) Preemption was not discussed in any detail in Appellants' merits brief. Moreover, Appellants did not argue preemption to the lower court aside from a passing reference in their motion to reconsider contending that the Home Ownership Lending Act preempts South Carolina law defining "default." (Mot. to Reconsider at 5; R. 358.) Preemption is a distinct doctrine from subject matter jurisdiction and must be raised to and ruled upon to be preserved. *See Herron v. Century BMW*, 395 S.C. 461, 470, 719 S.E.2d 640, 645 (2011) (holding that the issue preservation principles applied to Appellant's preemption argument and finding the issue unpreserved). And, of course, "[a] party

cannot use a motion to reconsider, alter or amend a judgment to present an issue that could have been raised prior to the judgment but was not." *Dixon v. Dixon*, 362 S.C. 388, 608 S.E.2d 849 (2005).

Any "preemption" argument was not preserved to the extent Appellants are contending that the lower court erred by failing to find preemption. Regardless, it is unclear why Appellants are attempting to make such an argument considering preemption, if anything, would be a ***defense*** raised in response to causes of action brought against a party. Appellants appear to be asserting that the very claims they decided to assert in this forum cannot, in fact, be heard by that forum, which is nonsensical.

B. The lower court properly granted SLS's motion to strike.

Appellants' Petition next takes issue with this Court's grant of SLS's motion to strike certain matters from the Record on Appeal. Appellants contend that SLS asked the Court to "exclude evidence" through its motion, but this is a fundamental mischaracterization of SLS's motion. The basis of the motion was Appellants' attempt ***to include materials in the record on appeal that were never presented to the lower court***. This Court is not the stage to produce new materials to support new arguments that the lower court never had the opportunity to consider in ruling on the issues before it.[4] Vague assertions of "preemption" or "subject matter jurisdiction" do not allow a party to hand-wave away the requirements for developing the record at the circuit court level.

Moreover, contrary to what Appellants seem to imply, the Court did not preclude Appellants from making any arguments in its Order granting SLS's motion to strike and

[4] Appellants are correct that subject matter jurisdiction may be raised at any time. However, this does not permit a party to shoe-horn improper materials into the Record on Appeal. Rule 210(c)'s directive is clear, providing that the Record "shall not . . . include matter which was not presented to the lower court or tribunal." Rule 210(c), SCACR.

expressly stated that it was not making any rulings regarding issue preservation. The Court's order merely struck materials from Appellants' designation of matter that were never presented to the lower court and prevented reference to those stricken materials in accordance with the well-established rules. Much of Appellants' petition is an effort to raise improper arguments based on these excluded materials and are not a proper basis for establishing any issues that the Court may have "overlooked or misapprehended" under Rule 221(a). Thus, they should be rejected.

C. Appellants' arguments about Temisan Etikerentse's bankruptcy proceedings are improper and without merit.

Appellants' Petition for Rehearing then raises several points relying on the materials excluded from the Record on Appeal from Temisan Etikerentse's bankruptcy. These arguments should be disregarded on this basis alone. However, they should also be rejected because they lack merit.

Appellants appear to contend that the bankruptcy court is the only court that has jurisdiction to adjudicate the issues raised by the claims that ***they chose*** to bring in circuit court. They assert that they have raised a question as to whether the circuit court "has appellate jurisdiction" over "a final unappealed order of the bankruptcy court." (Pet. at 2.) SLS remains unable to decipher precisely what Appellants are trying to argue about Temisan Etikerentse's bankruptcy or how this supposedly impacted the lower court's power to hear their claims but will briefly address this issue out of an abundance of caution.

Appellant Temisan Etikerentse filed a voluntary bankruptcy petition pursuant to Chapter 7 of the Bankruptcy Code on August 7, 2014. The Bankruptcy Court entered its Order discharging Etikerentse on November 12, 2014. The mortgage held by Wilmington Trust was not discharged through the bankruptcy, which Appellants' counsel acknowledged at the hearing

below. The lower court specifically asked counsel if the bankruptcy discharged any of the mortgage. Counsel conceded that their position was that the bankruptcy "**discharged everything but the mortgage**" and that the mortgagor could "go after the mortgage." (Tr. of 7/13/2020 Hrg. 22:5-17; R. 394 (emphasis added).)

As noted, this case began as a foreclosure case brought by the mortgage holder. Appellants then asserted their third-party claims contending SLS engaged in improper servicing practices and sought monetary damages. SLS did not ask the lower court to review or contradict the bankruptcy court's rulings in seeking summary judgment.[5] Etikerentse's bankruptcy simply has nothing to do with this appeal.

D. South Carolina courts continue to have jurisdiction over this case.

Appellants next appear to reassert their argument that a consent order between SLS and the Consumer Financial Protection Bureau ("CFPB") deprived the state courts of jurisdiction. The lower court and this Court properly rejected this argument.

Appellants are not parties to the Consent Order and, as SLS detailed in its merits brief, lack the ability to seek enforcement of its terms. Nevertheless, Appellants contend that the CFPB order and enabling statute stripped South Carolina courts of subject matter jurisdiction. Subject matter jurisdiction concerns the "court's constitutional or statutory power to adjudicate a case." *Johnson v. S.C. Dep't of Prob., Parole, & Pardon Servs.*, 372 S.C. 279, 284, 641 S.E.2d 895, 897 (2007). In other words, it involves the court's "power to hear and determine cases of the general class to which the proceedings in question belong.'" *Id.* (quoting *State v. Gentry*, 363

[5] The only reference SLS made to Temisan Etikerentse's bankruptcy was to note as an additional, alternative ground that to the extent Etikerentse sought to assert causes of action that accrued prior to his bankruptcy, they were barred because they were not disclosed on the asset schedules and expressly abandoned by the Bankruptcy Trustee. (*See id.* at 14-15; R. 230-31.) However, this did not form a basis of the lower court's summary judgment order and SLS did not raise it as an additional sustaining ground on appeal.

S.C. 93, 100, 610 S.E.2d 494, 498 (2005)). Appellants only complained of the court's "jurisdiction" to proceed on the eve of the summary judgment hearing after they failed to come forward with any specific evidence supporting that SLS acted improperly. Again, this is a bizarre scenario where a claimant appears to be contending that the claims they asserted are improper in the forum where they chose to litigate.

Regardless, however, as noted above, the Consent Order did not deprive the lower court of jurisdiction. The CFPB issued the subject Consent Order under 12 U.S.C. § 5563(d)(2). *See* Consent Order, *In re: Specialized Loan Servicing, LLC*, No. 2020-BCFP-0002, 2020 WL 8182145 (May 11, 2020). 12 U.S.C. § 5563 details the enforcement powers of the CFPB and its hearing and adjudication process. *See id.* The subsection cited by Appellants, (d)(2), details special rules for the enforcement of CFPB orders ***by the CFPB*** and notes that except as otherwise provided "no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any notice or order or to review, modify, suspend, terminate, or set aside any such notice or order" issued pursuant to this statute. *Id.*

The lower court correctly found that this statute had no impact on its ability to hear and rule on SLS's motion or the merits of Appellants' claims. As the lower court explained, § 5563(d)(2) is in the CFPB's enabling legislation and concerns the CFPB's own enforcement powers. *See generally* 12 U.S.C. § 5563. Subsection (d) simply gives the ***CFPB*** the power to seek enforcement of its orders through the court system but provides that otherwise no court has jurisdiction to affect the issuance or enforcement of the Consent Order or alter its terms. *See id.* Thus, the lower court properly rejected Appellants' argument that § 5563(d)(2) deprived it of subject matter jurisdiction and this Court correctly concluded the same.

E. The CFPB Consent Order was not evidence.

Finally, Appellants revisit the CFPB Consent Order, contending that it constitutes evidence in support of their claims. However, although Appellants assert that SLS "admitted" certain violations of the law in the Consent Order, they conveniently omit that the Consent Order expressly states the exact opposite, providing that SLS has consented to its issuance "***without admitting or denying any of the findings of fact or conclusions of law***." *See* Consent Order, 2020 WL 8182145.

Furthermore, the lower court correctly found that there is nothing in the Consent Order tying its contents to the facts of ***this*** case. The unrebutted evidence here showed that SLS complied with its obligations in servicing Appellants' loan.

In any event, courts have rejected similar attempts by plaintiffs to rely on analogous orders as evidence. For example, in *Loughlin v. Amerisave Mortg. Corp.*, the court explained that it could not take judicial notice of a consent order between the CFPB and defendants since the defendants had expressly refused to admit its findings of fact and conclusions of law. No. 1:14-CV-3497-LMM-LTW, 2019 WL 8375920, at *17 (N.D. Ga. Nov. 12, 2019), *report and recommendation adopted*, No. 1:14-CV-3497-LMM-LTW, 2020 WL 1809362 (N.D. Ga. Feb. 3, 2020). Moreover, as the *Laughlin* court reasoned, under Rule 408 the consent order was not admissible to prove the underlying facts on which the compromise between the CFPB and defendants was made. *See id.* The same applies for the Consent Order at issue here.[6]

Phillips v. Ocwen Loan Servicing, LLC, 92 F. Supp. 3d 1255 (N.D. Ga. 2015) held similarly. The *Phillips* court found that a consent judgment from a separate administrative

[6] As the Fourth Circuit has explained, it would violate Rule 408 (which prohibits the admissibility of evidence of compromise offers and negotiations to prove or disprove the validity of a disputed claim) to admit a consent order for purposes of proving the truth of the matters on which compromise had been reached. *Johnson v. Hugo's Skateway*, 974 F.2d 1408, 1413 (4th Cir. 1992).

matter was not evidence supporting the plaintiff's claim. *See id.* at 1293 (explaining that the defendant having "entered into a settlement agreement in another case in which it was also accused of committing alleged errors in the servicing of mortgage loans is not evidence that it committed errors with respect to the Plaintiff's Loan in this case"); *see also, e.g.*, *Faiella v. Fed. Nat'l Mortg. Ass'n*, No. 16-CV-088-JD, 2017 WL 6375600, at *7 (D.N.H. Dec. 13, 2017), *aff'd*, 928 F.3d 141 (1st Cir. 2019) (finding that a consent decree between the defendant and the CFPB should not be credited as any evidence of wrongdoing on the part of the defendant who neither admitted nor denied the allegations therein); *Castellanos v. Portfolio Recovery Assocs., LLC*, No. 1:17-CV-20593-UU, 2017 WL 7796303, at *3 (S.D. Fla. Oct. 31, 2017) (granting a motion in limine prohibiting plaintiff from introducing any evidence regarding a consent order between the defendant and the CFPB entered in a separate matter).

Therefore, the lower court correctly found that the Consent Order was not admissible evidence supporting any wrongful act committed by SLS.[7] Regardless, even if the Consent Order could be considered evidence of generalized wrongful acts committed by SLS, Appellants still did not submit any evidence of any impropriety by SLS ***in this case***—nor could they since the unrebutted evidence supported that SLS complied with all regulatory obligations. Again, the lower court properly granted summary judgment and this Court did not overlook or misapprehend any argument in affirming that order.

[7] Appellants' repeat their contention that the Consent Order caused a "shifting of the burden" requiring ***SLS*** to determine the damages it caused to ***Appellants***. As SLS noted, this was not raised to the lower court and is unpreserved. Moreover, it would lead to an absurd result if this was correct. Appellants are, in essence, saying that it is incumbent on SLS to provide evidence supporting their claims despite being unable to produce any themselves. The Supreme Court case Appellants cite does not support their position. *See generally Bd. of Governors of Fed. Reserve Sys. v. MCorp Fin., Inc.*, 502 U.S. 32, 38 (1991).

CONCLUSION

The Court's Opinion was well reasoned and correct. Appellants' petition for rehearing does not identify any issues that the court misapprehended or overlooked and should be denied.

Respectfully submitted,

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PROOF OF SERVICE

I, the undersigned Administrative Assistant, of the law offices of Nelson Mullins Riley & Scarborough, LLP, do hereby certify I have served all counsel in this action with a copy of the pleading(s) hereinbelow in accordance with the Supreme Court Order 2022-05-06-04, by emailing a copy to each attorney listed below using their primary email address listed in the Attorney Information System.

Documents Served: **Return to Petition for Rehearing**

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December 8, 2023

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Subject: Temisan Etikerentse v. Specialized Loan Servicing, LLC - Appellate Case No. 2020-001204
Attachments: 2023.12.08 Return to Petition for Rehearing (Etikerentse).pdf; 2023.12.08 Proof of Service (Etikerentse).pdf

Good afternoon,

Attached for service upon you in the above matter is the Return to Petition for Rehearing and Proof of Service.

Thank you,

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