

STATE OF SOUTH CAROLINA

COUNTY OF DORCHESTER

Wilmington Savings Fund Society, FSB, as
Trustee of Stanwich Mortgage Loan Trust C,

Plaintiff,

v.

Nelson L. Bruce; Capital Return Investments
LLC; Charleston Area CDC; SC Housing
Corp.; South Carolina Housing Trust Fund;
Reminisce Homeowners Association, Inc.,

Defendant(s).

17-004206

IN THE COURT OF COMMON PLEAS

C/A NO.: 2016-CP-18-01678

ORDER

RECEIVED

AUG 10 2020

SC Court of Appeals

This matter came before the Court for a hearing on eight motions on March 12, 2020. The Defendant Nelson L. Bruce ("Defendant") appeared, and William S. Koehler, Esq., appeared on behalf of Plaintiff. The Defendant had filed seven of the motions: Amended Motion/Pre-Trial Discovery, Motion/Dismiss, Motion/Vacate March 23, 2018 Order, Motion/Dismiss September 25, 2017 Order, Motion/Vacate September 15, 2017 Order, Motion/TRO and Motion/Stay Proceedings. Plaintiff had filed a Motion to Dismiss Defendant's Counterclaims and to refer the case to the Master in Equity.

DEFENDANT'S MOTIONS

With the exception of his Amended Motion for Pre-Trial Discovery, Defendant failed to pay the \$25.00 filing fee for any of his motions. When questioned by the Court on this issue, Defendant stated that he did not believe that he is required to pay motion filing fees. Defendant further asserted that he would want to know how the County uses the proceeds from the motion

filing fees before he would agree to pay the fees. Defendant offered no other explanation for his failure to pay the filing fees.

S.C. CODE § 8-21-320 generally requires that a \$25.00 filing fee be collected for every motion filed in the Court of Common Pleas. Defendant has not demonstrated any reason why he should be exempt from the general requirement imposed by state law.

Therefore, Defendant's Motion to Dismiss, Motion to Vacate the Court's March 23, 2018 Order, Motion to Dismiss the Court's September 25, 2017 Order, Motion to Vacate the Court's September 15, 2017 Order, Motion for Temporary Restraining Order and his Motion to Stay Proceedings are hereby dismissed without prejudice. Defendant may re-file the motions provided he pays the associated fee with each motion.

At hearing, Defendant informed the Court that he did not wish to proceed with the Amended Motion for Pre-trial Discovery at that hearing, so no action was taken on that motion. Defendant's Amended Motion for Pre-Trial Discovery is therefore continued.

PLAINTIFF'S MOTION TO DISMISS

Following the disposition of Defendant's motions, Plaintiff argued its Motion to Dismiss Plaintiff's Counterclaims.

"[A] ruling on a motion to dismiss under Rule 12(b)(6), SCRCP, must be based solely on the allegations contained in the complaint." Chewning v. Ford Motor Co., 346 S.C. 28, 32, 550 S.E.2d 584, 586 (Ct. App. 2001) citing Baird v. Charleston County, 333 S.C. 519, 527, 511 S.E.2d 69, 73 (1999). "Viewing the evidence in favor of the [non-moving party], the motion must be granted if facts alleged in the complaint and inferences reasonably deductible therefrom do not entitle the plaintiff to relief ..." Chewning v. Ford Motor Co., 346 S.C. 28, 32, 550 S.E.2d 584,

586 (Ct. App. 2001) citing Jarrell v. Petoseed Co., 331 S.C. 207, 209, 500 S.E.2d 793, 794 (Ct. App. 1998).

Additionally, the well settled rule is that *facts*, and not *legal conclusions*, must be stated in pleadings... Lowry v. Jackson, 27 S.C. 318, 323, 3 S.E. 473, 477 (1887). In reviewing the pleadings the Court is “not bound to accept as true a legal conclusion couched as a factual allegation.” Builder Mart of Am., Inc. v. First Union Corp., 349 S.C. 500, 512, 563 S.E.2d 352, 358 (Ct. App. 2002) *citing* Papasan v. Allain, 478 U.S. 265, 286, 106 S. Ct. 2932, 2944, 92 L. Ed. 2d 209 (1986).

Defendant filed his Amended Response and Countersuit on September 23, 2017. The Caption to his Amended Response appears to identify counterclaims against the Plaintiff for libel, slander, constructive fraud, violation of the Fair Debt Collection Practices Act, and a violation of TILA (presumably the Truth in Lending Act).

Defendant’s Counterclaims for Libel and Slander

The Defendant lists counterclaims for Libel and Slander in the caption of his Amended Response and Countersuit. Further, in the body of his response, Defendant states that “the state of South Carolina has laws against libel and slander, and I bring forth my claim for such...”

Under South Carolina law, “[t]he tort of defamation allows a plaintiff to recover for injury to her reputation as the result of the defendant’s communication to others of a false message about the plaintiff. Slander is a spoken defamation while libel is a written defamation or one accompanied by actions or conduct.” Holtzscheiter v. Thomson Newspapers, Inc., 332 S.C. 502 (1998). To recover on a defamation claim, a claimant must establish 1) a false and defamatory statement was made; 2) the unprivileged publication of the statement was made to a third-party;

3) the publisher of the statement was at fault and 4) the statement is actionable. Fountain v. First Reliance Bank, 398 S.C. 434 730 S.E.2d 205 (2012).

Defendant's pleadings do not allege any specific spoken defamatory statement made by the Plaintiff or any publication of statement to third parties. Therefore his claim for slander must be dismissed.

Further, Defendant's pleadings do not identify any specific libelous statements beyond what he refers to as "information on this public record." The Court is unable to determine from the pleadings what libelous statements Plaintiff could be referring to unless the Defendant is referring to the filing of the pleadings in this action. To the extent that the libelous statements to which Defendant refers are contained within the *Lis Pendens*, Summons and Complaint, or any other filed pleadings in this matter, Defendant's claim must be dismissed. The filing of those pleadings are absolutely privileged under South Carolina law and cannot be considered to be libelous:

South Carolina has long recognized that relevant pleadings, even if defamatory, are absolutely privileged. McKesson & Robbins v. Newsome, 206 S.C. 269, 33 S.E.2d 585 (1945); Texas Co. v. C.W. Brewer & Co., 180 S.C. 325, 185 S.E. 623 (1936); Rodgers v. Wise, 193 S.C. 5, 7 S.E.2d 517 (1940); Sanders v. Rollinson, 33 S.C. Law (2 Strob.) 447 (1848) (stating an action for slander based on a defamatory affidavit was a non-suit; the proper attack is under malicious prosecution); *accord* Lone v. Brown, 199 N.J.Super. 420, 489 A.2d 1192, 1195 (App.Div.1985) ("It is well established that statements, written or oral, made by judges, attorneys, witnesses, parties or jurors in the course of judicial proceedings, which have some relation thereto, are absolutely privileged from slander or defamation actions, even if the statements are made with malice."); Kropp v. Prather, 526 S.W.2d 283, 286 (Tex.Civ.App.1975) ("Any communication, oral or written, uttered *24 or published in the due course of a judicial proceeding is absolutely privileged and cannot form the basis for a cause of action in libel or slander.").

Pond Place Partners, Inc. v. Poole, 351 S.C. 1, 23-24, 567 S.E.2d 881, 893 (Ct. App. 2002)

Therefore, it is appropriate to dismiss Defendant's Counterclaims for Libel and Slander.

Constructive Fraud

Defendant includes Constructive Fraud in its caption as a counterclaim. To establish constructive fraud, all elements of actual fraud except the element of intent must be established...In order to prove actual fraud, the following elements must be shown: (1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury." Pitts v. Jackson Nat. Life Ins. Co., 352 S.C. 219, 333 (Ct.App. 1993). A complaint is fatally defective if it fails to allege all nine elements of fraud. Where the Complaint omits allegations on any element of fraud, the trial court should grant a motion to dismiss. Id.

Defendant's pleadings fail to specify what false representations the Plaintiff has made and, among other things, how the Defendant would have relied on the truth of these allegedly false representations to his detriment. Defendant has therefore failed to plead a cause of action for Constructive Fraud and this counterclaim must be dismissed.

Violation of the Fair Debt Collection Practices Act

Defendant's Amended Response appears to assert that Plaintiff has violated the Fair Debt Collection Practices Act (FDCPA), but Defendant has not pleaded sufficient facts to support that claim.

The FDCPA only applies to debt collectors. Assuming Plaintiff is collecting a debt, Plaintiff is the holder of the Note and the legal title owner of the Mortgage, so it is not collecting

the debt of another. As the U.S. Supreme Court has stated, “you have to attempt to collect debts owed *another* before you can ever qualify as a debt collector.” Henson v. Santander Consumer USA Inc., 137 S. Ct. 1718, 1724, 198 L. Ed. 2d 177 (2017) (Emphasis in original.)

Further, Plaintiff’s foreclosure action with a waiver of deficiency is not collection of a debt. It has waived deficiency and is seeking only to foreclose its security interest in the property. Enforcing a security interest in real estate is not the collection of a debt. The FDCPA is designed

Conspiracy

Defendant Response purports to assert a counterclaim for Conspiracy. “A civil conspiracy consists of three elements: (1) A combination of two or more persons, (2) for the purpose of injuring the plaintiff, (3) which causes the plaintiff special damages” Hammond v. Butler, Means, Evins & Brown, 300 S.C. 458, 463, 388 S.E.2d 796, 798 (1990). Defendant has not alleged facts to support any of the elements. In his claim he states “the opposing parties”. There are no opposing parties, only the Plaintiff. There is no combination of two or more persons, which is an essential element of the cause of action.

Defendant has not pleaded facts showing any parties have come together for the purpose of injuring Plaintiff. Additionally, Defendant has not pleaded special damages. Rule 9(g), SCRCF, requires “when items of special damage are claimed, they shall be specifically stated.” In AJG Holdings LLC v. Dunn, the Court of Appeals stated, “To prove special damages, [claimants] had to show that the acts in furtherance of the conspiracy were separate and independent from other wrongful acts alleged in the complaint. *See Todd v. S.C. Farm Bureau Mut. Ins. Co.*, 276 S.C. 284, 293, 278 S.E.2d 607, 611 (1981). Special damages must be properly pled, or the claim for civil conspiracy will be dismissed. Hackworth v. Greywood at Hammett, LLC, 385 S.C. 110,

115–16, 682 S.E.2d 871, 875 (Ct.App.2009); *see also* Rule 9(g), SCRPC (requiring special damages to be specifically stated in the pleadings). AJG Holdings LLC v. Dunn, 392 S.C. 160, 167–68, 708 S.E.2d 218, 222–23 (Ct. App. 2011), aff'd, 410 S.C. 346, 764 S.E.2d 912 (2014)

The AJG Court cited the Hackworth case, which makes it clear that dismissal is appropriate when special damages are not properly pleaded. The Defendant’s claims for conspiracy should be dismissed.

TILA

Defendant has included a counterclaim for “Violation of TILA” in the caption of his Amended Response. The reference would appear to be to the Truth in Lending Act. However, Defendant has not pleaded any specific facts related to a violation of this act. Therefore, the Defendant’s Counterclaim must be dismissed.

PLAINTIFF’S MOTION TO REFER

In relevant part Rule 53(b) provides: “In an action ... for foreclosure, some or all of the causes of action in a case may be referred to a master.” Rule 71 (a) adds: “Actions to foreclose liens or obtain partition of real property shall be tried by the court, and shall ordinarily be referred to a master pursuant to Rule 53.”

Defendant has sought a jury trial. “A mortgage foreclosure is an action in equity.” U.S. Bank Trust Nat’l Ass’n v. Bell, 385 S.C. 364, 373, 684 S.E.2d 199, 204 (Ct. App. 2009). “Generally, the relevant question in determining the right to trial by jury is whether an action is legal or equitable; there is no right to trial by jury for equitable actions.” Lester v. Dawson, 327 S.C. 263, 267, 491 S.E.2d 240, 242 (1997).

This foreclosure action is proper to be referred, and Defendant does not have a right to a jury trial.

IT IS THEREFORE ORDERED

1. Defendant's Motion to Dismiss, Motion to Vacate the Court's March 23, 2018 Order, Motion to Dismiss the Court's September 25, 2017 Order, Motion to Vacate the Court's September 15, 2017 Order, Motion for Temporary Restraining Order and his Motion to Stay Proceedings are hereby DISMISSED for failure to pay the required motion fees.
2. Defendant's Amended Motion for Pre-Trial Discovery is hereby CONTINUED.
3. Plaintiff's Motion to Dismiss Defendant's Counterclaims is GRANTED, and the Defendant's Counterclaims are DISMISSED; and
4. This matter is referred to The Honorable James E. Chellis as Master in Equity for Dorchester County.

AND IT IS SO ORDERED.

[Judge's Signature Page to Follow]



Dorchester Common Pleas

Case Caption: Wilmington Savings Fund Society FSB as Trustee of Stanwich M ,
plaintiff, et al VS Nelson L Bruce , defendant, et al
Case Number: 2016CP1801678
Type: Order/Other

This Order is Hereby GRANTED!

S/ Diane S. Goodstein (2112)