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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Roger M. Young, Sr., Presiding Judge

Appellate Case No. 2024-001098

Taylor Brunson,Respondent,

v.

Zack L. Evans, deceased, and any children and heirs at law, distributees and devisees, and if any be deceased then any persons entitled to claim under or through them; also all other persons unknown claiming any right, title, interest, or lien herein, any unknown adults being a class designated as John Doe; and any other unknown minors or persons under disability or in the military service being a class designated as Richard Roe, Tina L. Evans individually and as Personal Representative of the Estate of Zack L. Evans, Kara Pitchford, and Autumn Skye Properties, LLC, Defendants,

of whom Tina L. Evans individually and as Personal Representative of the Estate of Zack L. Evans, and Kara Pitchford are the Appellants.

APPELLANTS' INITIAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

- I. The South Carolina Consumer Protection Code states that a defendant in a collection action may assert a violation of the Attorney Preference Statute defensively for recoupment or set-off. Is a violation of this Statute enforceable against an assignee who assumed all rights and obligations of the original note and mortgage?

- II. The South Carolina Consumer Protection Code states that a defendant in a collection action may assert a violation of the High-Cost and Consumer Home Loans Act defensively or recoupment or set-off. Is a violation of this statute enforceable against an assignee who assumed all rights and obligations of the original note and mortgage?

STATEMENT OF THE CASE

Zack Evans owned a home at 141 Browning Court, Lexington, South Carolina. He had a long history of alcoholism, drug abuse, and psychiatric hospitalizations. Mr. Evans ultimately electrocuted himself by climbing up a utility pole. He died on May 24, 2023.

At the time of his death, Mr. Evans was being sued to enforce a contract with Autumn Skye, LLC. (2023-CP-32-0179). This alleged contract purports to obligate Mr. Evans to sell his home with an appraised value of \$250,000 to Autumn Skye for \$60,000. (Tr. P. 8: 22-25; R. p. ____). Taylor Brunson is the sole owner of Autumn Skye, LLC. After Mr. Evans' death, Autumn Skye, LLC amended its complaint to add Zack Evans' widow Tina Evans and his daughter Kara Pitchford as defendants to force the sale of the home to Autumn Skye pursuant to the contract Autumn Skye alleges Zack Evans signed before his death.

During discovery, the parties learned that a mortgage was recorded against the home for \$17,220.00 in favor of Wesley Martin. The mortgage is recorded at Book 20842, Page 4928 at the Lexington County Register of Deeds. Taylor Brunson purported to purchase the mortgage from Wesley Martin. Taylor Brunson recorded an assignment of the mortgage on December 15, 2023, at Book 21086, Pages 2309-2310 at the Lexington County Register of Deeds. The assignment

purports to assign the mortgage, “together with the note(s) and obligations therein described and the money due and to become due there with interest, and all rights accrued or to accrue under such mortgage.” (Assignment, page 2; R. p. _____).

After recording the assignment, Mr. Brunson brought this lawsuit to foreclose on the mortgage and acquire the property from Mr. Evans’ estate by way of foreclosure. Mr. Brunson personally sued Zack Evans’ estate, his widow Tina Evans and his daughter Kara Pitchford.

Ms. Evans and Ms. Pitchford answered denying Mr. Brunson’s claims. Ms. Evans and Ms. Pitchford asserted counterclaims and affirmative defenses based on the Attorney Preference Statute, Code Section 37-10-105 and the High-Cost and Consumer Home Loans Act, Code Section 37-23-10.

Mr. Brunson moved to dismiss these claims. He argued that the Attorney Preference Statute does not apply to him because he is the assignee of the note and mortgage and not the originating lender. He also argued that the High-Cost and Consumer Home Loans Act does not apply because he is an assignee and not the original lender. Judge Roger Young agreed, and on June 10, 2024, he issued an order dismissing these claims and defenses. On June 28, 2024, Ms. Evans and Ms. Pitchford filed a notice of appeal.

STANDARD OF REVIEW

“In reviewing the dismissal of a claim for failure to state facts sufficient to constitute a cause of action under Rule 12(b)(6), SCRCF, the appellate court applies the same standard of review as the trial court.” *Sloan Constr. Co. v. Southco Grassing, Inc.*, 377 S.C. 108, 112, 659 S.E.2d 158, 161 (2008). “The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief.” *Plyler v. Burns*, 373 S.C. 637, 645, 647 S.E.2d 188, 192 (2007). “If the facts and inferences would entitle the plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a claim

is improper.” *Hager v. McCabe, Trotter & Beverly, P.C.*, 435 S.C. 740, 746, 869 S.E.2d 886, 889 (Ct. App. 2022) (quoting *Rydde v. Morris*, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009)). “Rule 12(b)(6) permits the trial court to address the sufficiency of a pleading stating a claim; it is not a vehicle for addressing the underlying merits of the claim.” *Skydive Myrtle Beach, Inc. v. Horry Cnty.*, 426 S.C. 175, 180, 826 S.E.2d 585, 587 (2019). “[T]he complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action.” *Plyler*, at 645, 647 S.E.2d at 192.

DISCUSSION

I. THE TRIAL COURT INCORRECTLY DISMISSED THE ATTORNEY PREFERENCE DEFENSE AND COUNTERCLAIM BECAUSE THE ATTORNEY PREFERENCE STATUTE APPLIES TO AN ASSIGNEE.

The trial court erred in holding that Brunson could not be held liable under the Attorney Preference Statute because Brunson is an assignee of the original note. The Attorney Preference Statute requires the creditor to “ascertain prior to closing the preference of the borrower as to the legal counsel that is employed to represent the debtor.” S.C. Code Ann. § 37-10-102. S.C. Code Section 37-10-105 permits a debtor to assert a violation of the statute in a debt collection action “as a matter of defense by recoupment or set-off in such action.”

Judge Young dismissed the attorney preference claims because the “Plaintiff is an assignee of the original lender.” (Order p. 4, R. p. ____). Because Ms. Evans and Ms. Pitchford are entitled to assert the Attorney Preference Statute as a “defense by recoupment or set-off,” Judge Young improperly dismissed this claim.

The Attorney Preference Statute applies to a “creditor,” and a creditor includes “the person who grants credit ... or ... an assignee of a creditor’s right to payment.” S.C. Code § 37-1-301(13). Thus, as an assignee, Mr. Brunson is subject to Ms. Evans’ and Ms. Pitchford’s attorney preference

claims “as a matter of defense by recoupment or set-off” as allowed by the statute. S.C. Code Ann. § 37-10-105.

In *Rosemond v. Campbell*, 288 S.C. 516, 343 S.E.2d 641 (Ct. App. 1986), this Court addressed an assignee of a mortgage that claimed it was not subject to defenses under the Consumer Protection Code. The Rosemonds signed a note and mortgage with Campbell to secure repairs for their home. Campbell assigned the note and mortgage to Pickensville Investment Company. When Campbell did not properly complete the work, the Rosemonds sued him and Pickensville Investment. The trial judge dismissed Pickensville Investment from the action as merely an assignee, and the jury returned a verdict against Campbell. The Court of Appeals reversed the dismissal of Pickensville Investment. It held that the Rosemonds could assert Consumer Protection Code violations as a defense and as a counterclaim based upon the legislative history of the code section at issue. The court recited the law on assignment and defenses as follows:

At common law, an assignee's rights can be no greater than those of his assignor. *Dixie Wood Preserving Co. v. Albert Gersten Associates*, 244 S.C. 57, 135 S.E.2d 368 (1964). Consequently, the assignee of a debt takes the obligation subject to all claims and defenses the obligor may have against the assignor. *Id.* However, absent an agreement to the contrary, the common law assignee takes only the benefits, not the burdens of the assigned obligation. *Koppers Company v. Kaiser Aluminum and Chemical Corp.* 9 N.C. App. 118, 175 S.E.2d 761 (1970). Thus, as against the assignee, the obligor can only assert a claim defensively when the assignee seeks to enforce the obligation; he has no common law right to sue the assignee affirmatively on a claim against the assignor arising from the underlying obligation. *Langel v. Betz*, 250 N.Y. 159, 164 N.E. 890 (1928); *Pargman v. Maguth*, 2 N.J. Super. 33, 64 A.2d 456 (1949).

Rosemond v. Campbell, 288 S.C. 516, 523, 343 S.E.2d 641, 645 (Ct. App. 1986) (Bell, J.).

The Court of Appeals ruled that the Rosemonds could assert their consumer protection code claims “offensively against the assignee,” but recoupment is limited to the “amount due on the obligation at the time the assignee” receives notice of the claim. *Id.* at 525, 343 S.E.2d at 646.

Likewise the Attorney Preference Statute allows a debtor to assert a claim against a creditor as “a matter of defense by recoupment or set-off.” S.C. Code Ann. § 37-10-105. As an assignee, Brunson is a creditor under the Consumer Protection Code. *See*, S.C. Code Ann. § 37-1-301(13). And, as a result, he is subject to the same claims that could be asserted against the original creditor. Though Brunson does not take on “any obligation of his assignor,” he is still subject to claims and defenses to the note he has been assigned. *Id.*

II. IN ADDITION TO THE CONSUMER PROTECTION CODE PROVISIONS, THE ASSIGNMENT TO BRUNSON ALSO ASSIGNS CLAIMS AGAINST THE NOTE. THUS, THE TRIAL COURT IMPROPERLY DISMISSED THE CLAIMS BASED ON BRUNSON’S ASSIGNEE STATUS.

Brunson was assigned the mortgage “together with the note(s) and obligations therein described and the money due and to become due thereon with interest, and all rights accrued or to accrue under such Mortgage.” (Assignment Recorded in Lexington County Deed Book: 21086, Page: 2310; R. p. ____). Brunson agreed to an assignment of the Mortgage subject to the benefits and burdens of the original note “without recourse” against the original obligor. *Id.*

The assignment assigns the mortgage, note and “obligations therein described and the money due and to become due thereon with interest, and all rights accrued or to accrue under such Mortgage.” (*Id.* p 2, R. p. _____). Therefore, Brunson took not only the right to payment under the note and mortgage, he also took all rights accrued or to accrue under the mortgage and “all obligations therein described.” As a result, the assignment assigns not only the right to payment, but also the rights of recoupment and off-set which “accrue under such mortgage.”

III. THE TRIAL COURT INCORRECTLY DISMISSED THE HIGH-COST AND CONSUMER HOME LOANS ACT DEFENSE AND COUNTERCLAIM BECAUSE THIS ACT APPLIES TO AN ASSIGNEE.

Like the Attorney Preference Statute that proceeds it in the Consumer Protection Code, the High-Cost and Consumer Home Loans Act allows a debtor to assert its provisions “as a matter of defense by recoupment or set-off.” S. C. Code Ann. 37-23-50. Judge Young improperly dismissed the defendants’ defenses and counterclaim under this act on the basis that the plaintiff is the assignee of the note and mortgage and not the original lender. Because the Act allows the borrower to assert this claim by way of “recoupment or set-off” and because Mr. Brunson assumed the obligation of the original lender, Judge Young erred. And, this court should reinstate the defendants’ counterclaims and defenses for violation of the High-Cost and Consumer Home Loans Act.

CONCLUSION

Judge Young improperly dismissed the defendants’ claims for violation of the Attorney Preference Statute and the High-Cost and Consumer Home Loans Statute. These statutes both allow a defendant borrower to assert them by way of “recoupment or set-off.” And, the assignment Mr. Brunson received transferred all obligations of the original lender to him.

As a result, this Court should reverse Judge Young and reinstate the defendants’ defenses and counterclaims based upon the Attorney Preference Statute and the High-Cost and Consumer Home Loans Statute.

Respectfully submitted,

[Signature block to follow]

November 14, 2024

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