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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**

THE HONORABLE KRISTI F. CURTIS, CIRCUIT COURT JUDGE

APPELLATE CASE NO.: 2023-001844

CASE NO. 2019-CP-10-4503

Deutsche Bank Trust Company Americas, as Trustee for Residential Accredited Loans, Inc., Pass-Through Certificates 2007-QH2..... Respondent,

v.

Ashley Johnson Beshara as Trustee of the Revocable Trust Agreement for 2235 Shoreline Drive originally dated 3rd day of March 2010; Shoreline Farms Community Association, Inc.; Wells Fargo Bank, N.A.; Cadle Rock Joint Venture, L.P. an Ohio Limited Partnership, Curtis Rogers and Julie Rogers, Defendants,

Of whom Curtis Rogers, Julie Rogers and Ashley Johnson Beshara as Trustee of the Revocable Trust Agreement for 2235 Shoreline Drive originally dated 3rd day of March 2010 areAppellants,

AND

Ashley Johnson Beshara as Trustee of the Revocable Trust Agreement for 2235 Shoreline Drive originally dated 3rd day of March 2010, Third-Party Plaintiff,

v.

Nationstar Mortgage LLC, Third-Party Defendant..... Respondent.

**RESPONDENT NATIONSTAR MORTGAGE LLC' REPLY TO APPELLANTS
CURTIS AND JULIE ROGERS'
AND ASHLEY BESHARA'S INITIAL BRIEFS**

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Date: November 18, 2024

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STATEMENT OF THE CASE

Curtis and Julie Rogers, who were allowed to intervene in this action as defendants, filed a Motion for Summary Judgment and a Motion to Compel and for Sanctions. Respondent Nationstar Mortgage LLC (“Nationstar”), together with Respondent Deutsche Bank Trust Company Americas, as Trustee for Residential Accredit Loans, Inc., Pass-Through Certificates 2007-QH2 (“DBTCA”) also filed Motions for Summary Judgment as to all claims asserted against them by the Intervenors Curtis and Julie Rogers and together with Appellant Ashley Beshara. Pursuant to an Order entered by the trial court on July 10, 2023, the Intervenors Curtis and Julie Rogers’ Motion for Summary Judgment was denied, Respondents’ Motions for Summary Judgment as to Appellants’ Third-Party/Crossclaims were granted. Additionally, the Intervenors Curtis and Julie Rogers’ Motion to Compel and for Sanctions was granted in part and denied in part. On July 20, 2023, Appellants filed Motions requesting reconsideration of the trial court’s July 10, 2023 Order. On November 1, 2023, the trial court issued an order denying Appellants’ motions to reconsider. Appellant Beshara and the Intervenors Curtis and Julie Rogers have appealed.

However, Nationstar was not initially identified as a respondent in those appeals. On February 23, 2024, the Intervenors Curtis Rogers and Julie Rogers filed their initial brief. On March 25, 2024, Appellant Ashley Beshara filed her Initial Briefs. On April 24, 2024, Respondent DBTCA filed its Initial Brief. On August 29, 2024, this Court granted Appellants’ request to have Nationstar designated as a respondent in this appeal and Nationstar now responds.

STATEMENT OF FACTS

Loan Origination

This case is an attempt to foreclose a first-priority mortgage encumbering real property at 2235 Shoreline Drive, Johns Island, South Carolina 29455 (“Property”). The first-priority

mortgage being foreclosed in this current action was originated when Curt Rogers executed and delivered a promissory note (“Note”) in the amount of \$1,500,000.00 in favor of Homecomings Financial, LLC—f/k/a Homecomings Financial Network, Inc.—(“Lender”) on January 12, 2007. (Compl. ¶ 6.) To secure payment on the note, the Borrower-Defendants signed a mortgage (“Mortgage” and together with the Note, the “Loan”) that encumbers the Property. (*Id.* ¶ 7.) The Mortgage was recorded with the Charleston County Register of Deeds Office (“ROD Office”) in Book B613 at Page 844 on January 24, 2007. (*Id.* ¶ 8.)

Rogers’ Default and Transfer of the Mortgage Loan and Property

During the repayment term for the Mortgage Loan, the Rogers defaulted on the repayment obligations under the Loan by failing to remit timely payments coming due on May 1, 2009, and thereafter. (Resp.’s MSJ, Blunt Aff., ¶ 10.)

On September 8, 2009, Mortgage Electronic Registration Systems, Inc. as nominee for Lender, assigned the Mortgage to Aurora Loan Servicing LLC (“Aurora”) pursuant to an assignment of mortgage that was recorded with the ROD Office in Book 0081 at Page 058 on September 15, 2009. (Blunt Aff., ¶ 8.)

To collect amounts due under the Mortgage Loan, Aurora filed a foreclosure action (“Foreclosure Action”) against the Rogers with the Court of Common Pleas for Charleston, South Carolina under civil action no. 2009-CP-10-05840 on September 15, 2009 (“Action 1”). Ultimately, Action 1 was removed from the court’s active trial roster for loss mitigation with leave for Aurora or the Rogers to restore pursuant to a Rule 40(j) Order entered on March 9, 2010. (Resp.’s MSJ, Exhibit D, Order March 9, 2010.)

The Foreclosure Action was reinstated to the court’s active trial roster under case no. 2011-CP-10-01805 pursuant to an order entered on March 10, 2011 (“Action 2”). (Resp.’s MSJ, Exhibit

E, Order March 10, 2011). The Rogers secured a court order to amend their answer and on February 2, 2012, they served their amended answer and counterclaims to allege counterclaims against Aurora for the following:

- breach of contract and good faith and fair dealing for an alleged breach of a purported work-out agreement,
- declaratory judgment to address alleged unconscionable loan terms,
- unjust enrichment,
- negligent misrepresentation regarding loss mitigation negotiations and purported workout agreements,
- demand for accounting,
- promissory estoppel,
- violations of the South Carolina Unfair Trade Practices Act, and
- violation of the Truth in Lending Act.

(Resp.'s MSJ, Exhibit F, Amended Answer). Aurora served a timely reply to the counterclaims, and the court entered an order substituting Nationstar for Aurora as the plaintiff in the Foreclosure Action on June 14, 2013. (Resp.'s MSJ, Exhibit G, Order June 14, 2013.) Subsequently, for the second time, the action was removed from the court's active trial roster pursuant to a consent Rule 40(j) order entered by the trial court on June 24, 2014. (Resp.'s MSJ, Exhibit H, Order June 24, 2014.)

Pursuant to a reinstatement order entered on April 7, 2015, the trial court returned the Foreclosure Action to active trial roster under case no. 2015-CP-10-01971 ("Action 3"). By consent of the Rogers and Nationstar, Action 3 was also stricken from the docket pursuant to a Rule 40(j) order entered on May 16, 2016. (Resp.'s MSJ, Exhibit I, Order May 16, 2016.)

Respondent Files Foreclosure Action

Neither the Rogers nor Nationstar restored Action 3 to the trial court's active trial roster. Thus, because the Mortgage Loan was transferred to Respondent and Respondent became the holder of the Mortgage Loan, Respondent filed this foreclosure action against Beshara, as trustee for a revocable trust established by the Rogers ("Action 4."). (Compl. *passim*.) In its foreclosure

complaint, Respondent pled that it “does not demand a deficiency judgment in the event the sale of the real estate herein does not yield a sum sufficient to satisfy all indebtedness due unto” Respondent, “including costs and Attorney’s fees.” (Compl. ¶ 16.)

In response to the foreclosure complaint, Beshara filed a motion to dismiss arguing that the prior entry of three 40(j) Orders in the prior Actions precluded Respondent’s current action under Rule 41 and the doctrine of collateral estoppel. (Beshara’s Mot. to Dismiss. & Beshara’s Reply to Mot. To Dismiss.) Beshara further argued that Respondent’s action should also be dismissed because the Rogers were not joined as necessary parties to the action in Deutsche Bank’s foreclosure complaint. (*Id.*) The trial court considered these arguments and denied Beshara’s motion to dismiss by a Form 4 Order entered on June 23, 2020. (Order of June 23, 2020.)

Counterclaims

After the Rogers were allowed to intervene, Beshara and the Rogers filed and served answers that included counterclaims against Respondent and cross-claims and third-party claims against Nationstar. (Beshara’s Ans. *passim* & Borrower-Defendants’ Ans. *passim*.) Beshara and the Rogers allege the following six claims against Respondent:

- Demand for Accounting;
- Negligent Misrepresentation;
- Abuse of Process;
- Malicious Prosecution;
- Violation of the South Carolina Unfair Trade Practices Act (“SCUTPA”); and
- Declaratory Judgment.

(Appellants’ Answers and Counterclaims.)

The demand for accounting claim, SCUTPA claim, negligent misrepresentation claim, and declaratory judgment claim alleged in this action mirror the counterclaims the Rogers raised in the amended answer that they served in Action 2 on February 2, 2012.¹

STANDARD OF REVIEW

“When reviewing the grant of a summary judgment motion, appellate courts apply the same standard that governs the trial court under Rule 56(c), which provides that summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” *USAA Prop. & Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 653, 661 S.E.2d 791, 796 (2008). “This court reviews questions of law de novo.” *Proctor v. Steedley*, 398 S.C. 561, 573, 730 S.E.2d 357, 363 (Ct. App. 2012). “The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion.” *State v. Hatcher*, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011)(internal quotations and cites omitted). A trial judge's rulings on discovery matters will not be disturbed by an appellate court absent a clear abuse of discretion. *Hollman v. Woolfson*, 384 S.C. 571, 577, 683 S.E.2d 495, 498 (2009).

SUMMARY OF THE ARGUMENT

Pursuant to Rule 208(b)(6) of the South Carolina Appellate Court Rules, Respondent Nationstar adopts the Summary of the Argument presented in the Initial Brief of Respondent DBTCA.

ARGUMENT

I. The Trial Court Correctly Held that Striking or Dismissing an Action Pursuant to Rule 40(j) of the South Carolina Rules of Civil Procedure Is Not

¹ Rogers' Ans. & Countercl. filed in Foreclosure Action (2011-CP-10-01805) on February 2, 2012.

Subject to a ‘Two-Dismissal’ Rule and Second or Successive Strikes or Dismissals Are Not Decisions on the Merits.

Pursuant to Rule 208(b)(6) of the South Carolina Appellate Court Rules, Respondent Nationstar adopts the Argument I presented in the Initial Brief of Respondent DBTCA.

II. The Trial Court Correctly Found that Appellants’ Claims Are Time-Barred.

Pursuant to Rule 208(b)(6) of the South Carolina Appellate Court Rules, Respondent Nationstar adopts Argument II as presented in the Initial Brief of Respondent DBTCA.

Additionally, to the extent Appellants contend the filing of the instant case serves as the basis for their malicious prosecution and abuse of process actions, as discussed in Footnote 2 of DBTCA’s Initial Brief, Respondent Nationstar did not file the instant case. Consequently, in that case, those actions would not be time-barred but would fail for the myriad other reasons referenced by the trial court.

III. The Trial Court Correctly Found that Appellants Could not Show a Genuine Issue of Material Fact as to Any of Their Claims.

Pursuant to Rule 208(b)(6) of the South Carolina Appellate Court Rules, Respondent Nationstar adopts Arguments III(a)-(f) as presented in the Initial Brief of Respondent DBTCA.

IV. Appellants Have Not Shown Reversible Error with Respect to Respondent’s Evidence.

Pursuant to Rule 208(b)(6) of the South Carolina Appellate Court Rules, Respondent Nationstar adopts Argument IV as presented in the Initial Brief of Respondent DBTCA.

V. Trial Court Did Not Err in Concluding Respondent Met Its Initial Burden For Summary Judgment.

Pursuant to Rule 208(b)(6) of the South Carolina Appellate Court Rules, Respondent Nationstar adopts Argument V as presented in the Initial Brief of Respondent DBTCA.

VI. Appellants Can Not Show Reversible Error From Their Generalized Arguments Sounding in “Equity,” a Lack of “Vigilance or “Totality of the Circumstances.”

Pursuant to Rule 208(b)(6) of the South Carolina Appellate Court Rules, Respondent Nationstar adopts Argument VI as presented in the Initial Brief of Respondent DBTCA. However, to the extent Appellants’ arguments referenced in this section are directed at Nationstar, those arguments are improper as Nationstar is not prosecuting the foreclosure in this matter; Respondent DBTCA is the foreclosing plaintiff.

VII. Appellants Have Not Shown Reversible Error from the Trial Court’s Discovery Ruling.

Pursuant to Rule 208(b)(6) of the South Carolina Appellate Court Rules, Respondent Nationstar adopts Argument VII as presented in the Initial Brief of Respondent DBTCA.

CONCLUSION

For the reasons and authorities stated above, this Court should affirm the Trial Court’s Orders

This the 18th day of November 2024.

/s/ Jasmine K. Gardner

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Joint Venture, L.P. an Ohio Limited Partnership, Curtis Rogers and Julie
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AND

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2235 Shoreline Drive originally dated 3rd day of March 2010, Third-Party
Plaintiff,

v.

Nationstar Mortgage LLC, Third-Party Defendant..... Respondent.

PROOF OF SERVICE

I certify that I have served a copy of the *Respondent Nationstar Mortgage LLC's Reply to Appellants Curtis and Julie Rogers' and Ashley Beshara's Initial Briefs* upon all counsel of record in this action via electronic mail, on November 18, 2024 as follows:

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SC Court of Appeals

VIA US MAIL AND EMAIL

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Re: Deutsche Bank Trust Company Americas v. Ashley Johnson Beshara et. al.
Civil Action No. 2019-CP-10-4503, Appellate Case No. 2023-001844

Dear Mrs. Kitchings:

Please find attached the following with regard to the above case.

1. Respondent NSM's Reply to Appellant's Initial Briefs
2. Proof of Service of the Reply Brief;
3. Respondent NSM's Designation of Matter.

By copy of this letter all counsel of record is being served with the same. Should you have any questions or need any further information, please do not hesitate to contact my office.

Sincerely,

McGuireWoods LLP

Jasmine K. Gardner

Jasmine K. Gardner
Attorney

Enclosures: All Parties of Record