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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 Accredit 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 the 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

Of Whom Curtis Rogers, Julie Rogers and Ashley Johnson Beshara Trustee of the Revocable Trust Agreement for 2235 Shoreline Drive originally dated 3rd day of March 2020 are …….....Appellants,

v.

Nationstar Mortgage LLC, …….Respondent.

APPELLANTS CURTIS ROGERS AND JULIE ROGERS' REPLY TO RESPONDENT NATIONSTAR MORTGAGE LLC'S INITIAL BRIEF

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INTRODUCTION

This appeal involves four foreclosure actions brought to attempt to correct problems. The voluntary dismissals and re-filings of actions does not and should not cure problems and there should not be unlimited "bites at the apple" to do so.

SUPPLEMENTAL RELEVANT FACTS

Nationstar was made a party to the second foreclosure action pursuant to an Order Substituting the Plaintiff and Amending the Caption filed on June 14, 2013. (Order Substituting). The Order provides "it appearing the Note and Mortgage in this case have been assigned to Nationstar Mortgage LLC, therefore, and on motion of the plaintiff's attorney…" (Order Substitution). The Rogers filed a Notice of Motion and Motion Vacate the Order Substituting Plaintiff and Amending the Caption on June 29, 2013. (Motion to Vacate) The Rogers objected to the Order Substituting and sought its vacatur on the following grounds:

1. Plaintiff did not file a motion as required by Rule 25, SCRCP, for an order substituting a party and Amending the Caption, rather Plaintiff simply submitted a proposed order to the Court.
2. Rule 25, SCRCP requires: "The motion for substitution may be made by any party... together with the notice of hearing shall be on the parties as provide in Rule 5 ... "
3. Rule 5, SCRCP requires: "written motions, other than ones which may be heard ex parte... shall be served upon each of the parties of record."
4. Defendants alleged as to Aurora Loan Services, LLC, in their Amended Answer and Counterclaim "that the Complaint fails to name a necessary and real party in interest and Plaintiff is not the real party or owner of the subject note and mortgage and/or lacks standing and therefore the Complaint should be dismissed." Because Defendants have called into question whether Aurora Loan Services, LLC, is a real party in interest or has standing to pursue this action, then it naturally follows that Defendant disputes Aurora Loan Services, LLC's ability to transfer any interest in the subject note and mortgage to Nationstar Mortgage, LLC.
5. After examination of the of the public records of the Charleston RMC Office, Defendant would allege, upon information and belief, that no assignment of the subject

> mortgage from Aurora Loan Services, LLC, to Nationstar Mortgage, LLC has been recorded in this matter.

(Motion to Vacate)

Nationstar responding to the third-party complaint filed by Beshara in the fourth foreclosure action declared in its responsive pleading referring to itself as the Plaintiff that it "admits only that it filed this foreclosure action against Defendant on August 27, 2019." (Nationstar Reply to Beshara's Counterclaims, ¶72) Nationstar and Deutsche asserted in their Replies to Appellants' Counterclaims that "Nationstar is the principle contact for Plaintiff's counsel in this matter." (Plaintiff's Reply to Interveners' Counterclaims ¶77, and Plaintiff's Reply to Defendant Beshara's Counterclaims ¶74)

The Complaint in each of the first three foreclosure actions is identical and accelerated the debt by declaring the entire balance of said indebtedness due and payable. (2009 Complaint ¶ 16). The fourth foreclosure action again accelerated the debt stating it "elects to, and does declare the entire balance due and payable…" (2019 Complaint ¶14) The Complaint filed in the 2009 and refiled in the 2011 and 2015 Actions states the note and mortgage are in default since May 1, 2009. (2009 Complaint). The 2019 Complaint filed in excess of ten (10) years after the alleged default in the 2009 Complaint, states in paragraph 14 "payments on the note secured by the mortgage are due as of September 1, 2009." (2019 Complaint) Contrary to the allegations in the 2019 Complaint but consistent with the allegations of the 2009 Complaint, the Blunt Affidavit dated October 15, 2022 and submitted by Respondents in support of their motions for summary judgment states at paragraph 10 "the note and mortgage and were in default since May 1, 2009." (Blunt Aff. ¶10)

ARGUMENT

I. RULE 40(j), SCRCP DOES NOT PERMIT MORE THAN ONE DISMISSAL

a. Respondents have waived arguments raised by Appellants.

Nationstar, who adopts the arguments of Deutsche pursuant to Rule 208(b)(6), SCACR, waives certain issues by doing so. *See Amick v. Hagler*, 286 S.C. 481, 486, 334 S.E.2d 525, 528 (Ct. App. 1985) (finding the appellant waived an argument because she "did not take exception to [a certain] aspect of the order [on appeal] or mention it in her brief"); and, *see Ellie, Inc. v. Miccichi*, 358 S.C. 78, 99, 594 S.E.2d 485, 496 (Ct. App. 2004) ("Numerous cases have held that where an issue is not argued within the body of the brief but is only a short conclusory statement, it is abandoned on appeal.").

The Rogers argue the trial committed error through its construction of Rule 40(j), SCRCP by failing to consider the words "one time" used within the text of Rule. (Rogers Initial Brief, pp. 25-27) Beshara makes the same or similar argument by asserting that the language of Rule 40(j), SCRCP, permits only one voluntary dismissal. (Beshara Initial Brief, pp. 34-35). Respondents, Deutsche and Nationstar did not address these arguments. The construction of the language of the Rule is not addressed by Respondents. Respondents do not mention the law of construction of statutes and rules. The failure to address the law relating to the construction of the Rules, is a waiver of the arguments presented by Appellants. Likewise, Respondents failure to address the concept of collateral estoppel precluding repetitive filing is a waiver of the argument addressed by Beshara. (Beshara Initial Brief, pp. 32-33). 2-33)

b. There is not an unlimited right to dismiss and re-file actions.

Respondent, Deutsche is not unfamiliar with having cases dismissed because of multiple dismissals. In the case of *Deutsche Bank Trust Company Americans, as Trustee for the Trust Know as Residential Accredit Loans Inc., Mortgage Asset-Backed Pass-Through Certificates, Series 2006-QS15, vs. Eyal M. Sigler,* 169 N.E. 3d 759, 446 Ill. Dec. 96 (Il. App (1st) 2020), the lower court on

motion of the consumer homeowner, Sigler, dismissed a foreclosure action filed by Deutsche as a Trustee, due to Deutsche violating section 13-217 of the Illinois Code of Civil Procedure (Code), also know as the single re-filing rule.

Like here, in *Sigler* four foreclosure actions were filed relating to the same note and mortgage. Deutsche in June 2008, filed a foreclosure action ("2008 Action") against the Siglers under a promissory note and mortgage it claimed had an outstanding principal balance of $681,000.00. Sigler challenged the 2008 Action and demand Deutsche dismiss the action on the ground the named plaintiff identified did not exist. Deutsche in response to the demand filed a Motion to Correct Misnomer to which Sigler opposed. Sigler argued the relief sought by Deutsche should be denied "as a sanction for Deutsche Bank's 'fraud on the court' by, inter alia, filing various 'false affidavits' that identified incorrect trust." *Id*. at 763. Deutsche's motion was denied on October 20, 2011 and on that same day Deutsche made an oral motion to voluntarily dismiss the 2008 Action which the circuit court granted. On the next day, October 21, 2011, Deutsche filed a second foreclosure action against Siglers claiming the same outstanding principal balance under the note and mortgage. ("2011 Action") Less than two months later, on December 1, 2011, Deutsche voluntarily dismissed the second action, the 2011 Action. Several months thereafter, Deutsche filed the third foreclosure action on February 8, 2012 ("2012 Action") which again asserted the same outstanding principal balance of $681,000.00. The Siglers then moved to dismiss the third foreclosure action arguing the 2012 Action should be "dismissed for violating section 13-217 of the Illinois Civil Procedure Code, also known as the 'single-refiling rule' which prohibits actions that have been voluntarily dismissed from being refiled more than once." *Id.* at 763. The motion was denied however, on March 2, 2016, Deutsche again voluntarily dismissed the action.

On March 9, 2016, Deutsche filed its fourth foreclosure action against the Siglers ("2016 Action") alleging "[t]he current unpaid principal balance is $681,000, plus accrued interest, court costs, title cost and plaintiff's attorney fees" and that "[t]he subject loan is paid through February 1, 2008." *Id*. at 764. The Siglers again "filed a motion pursuant to section 2-619(a)(9) of the Code to dismiss Sigler IV [2016 Action], arguing that Sigler IV [2016 Action] violated the single-refiling rule because it arose out of the same operative facts as the prior foreclosure actions that Deutsche Bank had voluntarily dismissed." *Id.* at 764. The Circuit Court denied the motion without prejudice. The Siglers ultimately filed a motion to reconsider and both parties filed motions for summary judgment. The Siglers requested that the circuit court consider two cases that had been recently decided; *First Midwest Bank v. Cobo*, 429 Ill. Dec. 416, 124 N.E.3d 926 (2018) and *Webster Bank, N.A. v. Pierce & Associates, P.C.* , No. 16 C 2522, 2019 WL 1227835 (N.D. Ill. Mar. 14, 2019). The circuit court granted the Siglers' motion to reconsider and dismissed Deutsche's fourth foreclosure complaint and stated:

> "I am ruling that Siglers 2, 3, and 4 all arise out of the same operative set of facts based on the *Webster* opinion, interpreting *Cobo* . And I am granting the [Siglers'] motion to reconsider my denial of the 2-619(a)(9) motion.
>
> I'm granting that motion. I'm filing [*sic*] that—finding that Sigler 4 is a second refiling of Sigler II.
>
> And I am dismissing [Deutsche Bank's] complaint with prejudice."

Id. at 765.

Deutsche appealed the dismissal. The lower court's decision was affirmed. The Illinois First District Appellate Court concluded because the lender had invoked the acceleration clause the contract became indivisible and the three final complaints arose from the same set of facts, rendering the fourth action a violated the single-refiling rule. *Id*. at 771. The Court found no basis to allow

Deutsche to circumvent the single-filing rule which would treat Deutsche differently from other litigates making claims safe from issue preclusion and barred by prior adjudication. *Id.* at 772.

Like Illinois, South Carolina and Ohio[1], the Indiana's Rules of Civil Procedure and common law preclude repetitive filing of actions. In the case of *Mannion v. Wilmington Savings Fund Society FSB*, 133 N.E. 3d 240 (2019), the lender initiated a foreclosure action against the borrower in February 2009. The trial court dismissed the action pursuant to Rule 41(E), IRCP, due to the lenders failure to prosecute. A second foreclosure action was filed 2012 and dismissed in 2017 at the plaintiff's request. A third action was filed in April 2018 and cross motions for summary judgment were filed. The lower court granted summary judgment in favor of the lender, plaintiff. The Indiana Court of Appeals reversed the trial court's summary judgment for the lender concluding the order of dismissal of the first foreclosure action was not limited and did not otherwise indicate it was without prejudice; therefore, the order was deemed an adjudication on the merits. Addressing the lenders public policy argument that the borrower should not receive the property unencumbered, the Court noted "the creditor created the situation as a direct result of its failure to prosecute, and the homeowner obtained a judgment on the merits, the judgment should have its full res judicata effect in accordance with res judicata principles." *Id*. at 244.

Here as in *Sigler* four foreclosure actions involving the same accelerated debt have been filed. Although the rules of civil procedure are different between South Carolina. Illinois and Indiana, their purpose by the language employed are similar: to limit re-filings and dismissals. It defies the specific language of Rule 40(j), SCRCP to suggest multiple re-filings by way of motion

[1] *See U.S. Bank, N.A. vs. Gullotta,* 120 Ohio St. 3d 399, 2008-Ohio-6268, 899 N.E. 2d 937 (2008) (the two-dismissal found in Ohio Civ. R. 41(A) applies and res judicata barred the third foreclosure complaint).

are implied. Deutsche nor Nationstar have not been able correct the underlying problems the Appellants have drawn to the attention of Respondents by the repetitive re-filings. Instead, Respondents by their intentional acts have worked their way into barring any claims in a fourth lawsuit by failing to prosecute three prior lawsuits and voluntarily dismissing each of them.

II. THE COURT ERRED IN FINDING ROGERS' THIRD-PARTY CLAIMS AS TO NATIONSTAR WERE BARRED BY THE STATUTE OF LIMITATIONS.

Pursuant to Rule 208(b)(6) of the South Carolina Appellate Court Rules, in response to the arguments presented by Nationstar, the Rogers adopt all arguments presented in their Initial Brief, and Reply Brief to Respondent Deutsche. The Rogers also adopt all arguments presented by Beshara in her Initial Brief and Reply Brief to Respondent Deutsche.

Notwithstanding, and in further support the Rogers draw to the Court's attention the fact that Nationstar like Deutsche concedes the causes for malicious prosecution and abuse of process "would not be time barred…" (Nationstar Reply Br. p. 6) Thus, the trial court's determination should be reversed and causes returned for further consideration.

REMAINING ARGUMENTS

As to all remaining arguments addressed by Nationstar, pursuant to Rule 208(b)(6) of the South Carolina Appellate Court Rules, the Rogers adopt all arguments presented in their Initial Brief, and Reply Brief to Respondent Deutsche. The Rogers also adopt all arguments presented by Beshara in her Initial Brief and Reply Brief to Respondent Deutsche.

CONCLUSION

Therefore, for the forgoing reasons, Appellants Curtis and Julie Rogers, respectfully ask this Court to reverse the lower court's finding and that summary judgment be granted in their favor due to Respondents dismissal of the three prior matters.

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

AND
Ashley Johnson Beshera 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.

PROOF OF SERVICE

I HEREBY CERTIFY that I have served the APPELLANTS, CURTIS ROGERS AND JULIE ROGERS' REPLY BRIEF on Respondents and all parties of interest via electronic mail, on December 12, 2024 as follows:

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