THE STATE OF SOUTH CAROLINA
In The Court of Appeals

70201

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Maite Murphy, Circuit Court Judge

Case No. 2012-CP-18-0539

Appellate Case No. 2012-213208

South Carolina Federal Credit Union and Bank of America,.. Respondents,

v.

Roger L. Whaley, ... Appellant.

BANK OF AMERICA'S MOTION TO DISMISS APPEAL AND OPPOSITION TO APPELLANT'S "LETTER TO CLERK A/K/A MOTION FOR JUDGMENT AGAINST RESPONDENT BANK OF AMERICA/OR/REQUEST TO REMAIN THAT SAID RESPONDENT MATTER BACK TO LOWER TRIAL COURT WITH INSTRUCTION, TO ENTER DIRECT JUDGMENT IN FAVOR OF PLAINTIFF/APPELLANT ROGER WHALEY" DATED SEPTEMBER 30, 2013, AND, ALTERNATIVELY, MOTION TO STRIKE PARTS OF APPELLANT'S DESIGNATION OF MATTER

Pursuant to Rule 240, SCACR, Respondent Bank of America ("BOA") hereby requests that the Court dismiss the instant appeal with prejudice. The grounds for this Motion are that the Appellant's Initial Brief, to the extent it can be understood, appears to be based solely on the fact that the trial court judge asked the Respondents' counsel to draft the proposed orders being appealed from, which is not an appropriate or sufficient grounds to review or overturn these orders. Alternatively, if this appeal is not dismissed, BOA moves to strike those matters improperly designated by Appellant in his Designation of Matter which are not in the record below.

Procedural Background

On February 16, 2012, Appellant commenced the underlying action by filing a complaint against Respondents. Although it is difficult to comprehend the allegations in the Complaint, it appears that it contains general allegations of civil conspiracy, fraud, theft of money, and breach of contract with respect to cashier's checks issued by Respondent South Carolina Federal Credit Union ("SCFCU") to an entity known as Capital Consortium Group and deposited into accounts at BOA. *See generally* Compl. and Exs.

On March 7, 2012, SCFCU filed a Motion to Dismiss, and on March 22, 2012, BOA filed its Motion to Dismiss or, in the Alternative, Motion for More Definite Statement. A hearing on these Motions was held May 8, 2012. On June 27, 2012, the trial court entered its Order granting the Motions to Dismiss and dismissing the Complaint with prejudice. The Order dismissing the Complaint finds that the Complaint was unintelligible and failed to meet the minimum pleading requirements of Rule 8(a), SCRCP. The trial court further found, among other things, that the Complaint should be dismissed with prejudice because (1) the Appellant lacked standing to sue as the purchaser of a cashier's check pursuant to *Steele v. Victory Sav. Bank*, 295 S.C. 290, 293, 368 S.E.2d 91, 92 (1988) and (2) Appellant's claims, if any, should be brought in the ongoing receivership action in federal district court related to the Capital Consortium Group/Three Hebrew Boys.

Appellant filed a Motion to Reconsider on June 28, 2012, and a hearing was held on this Motion on August 29, 2012. On September 17, 2012, the trial court entered its Order denying Appellant's Motion to Reconsider, finding that Appellant had not articulated any new arguments or identified any errors of law or fact to support reconsideration of the Order dismissing his Complaint. Furthermore, the trial court noted that although Appellant's primary objection appeared to be that the trial court provided the grounds for its ruling in an email to counsel for BOA with a copy to Appellant and SCFCU and requested that counsel for BOA draft the proposed order, the trial court reviewed the proposed order carefully to ensure it accurately stated the court's ruling before signing.

On October 5, 2012, Appellant filed his Notice of Appeal of both the trial court's June 27, 2012, Order dismissing his Complaint with prejudice and the September 17, 2012, Order denying his Motion to reconsider the June 27th Order. Appellant's Initial Brief was submitted August 10, 2013, and by Order of September 27, 2013, this Court granted an extension for Respondents to respond to the Initial Brief until November 4, 2013.[1]

Analysis

I. This Appeal Should Be Dismissed.

First, like Appellant's Complaint, Appellant's Initial Brief is unintelligible and fails to comply with the requirements of Rule 208(b)(1), SCACR, regarding the content and structure of an initial appellant's brief and should be dismissed for this reason.

Furthermore, to the extent the Initial Brief can be understood, Appellant's primary objection seems to be the same as that advanced before the trial court on Appellant's Motion for Reconsideration: that the trial court provided the grounds for its ruling in an email to counsel for BOA with a copy to Appellant and SCFCU and requested that counsel for BOA draft the proposed order. Appellant seems to be arguing that the trial court's Order did not

[1] Appellant's "Letter to Clerk a/k/a Motion for Judgment against Respondent Bank of America . . . " dated September 30, 2013, is based on his erroneous assertion that this Court's extension of time for Respondents to respond to his Initial Brief did not also apply to BOA. The Court's order is not limited as Appellant suggests.

comply with the trial court's emailed instructions regarding the Order. Appellant ignores the fact that in its Order on his Motion for Reconsideration, the trial court confirmed it reviewed the proposed Order dismissing his Complaint carefully to ensure it accurately stated the court's ruling before it was signed. In any event, Appellant fails to set forth any arguments or identify any errors of law or fact to support his appeal of the Orders at issue. This appeal should therefore be dismissed.

II. Alternatively, Those Matters Designated by Appellant in His Designation of Matter Which Are Not in the Record Below Should Be Stricken.

Appellant's Designation of Matter shall not "include matter which was not presented to the lower court or tribunal." Rule 210(c), SCACR. The following items were listed by Appellant in his Designation of Matter but were not presented to the lower court or tribunal, and should, therefore, be stricken:

A) Item Two*;

*Although the text of this UCC Section was included as an Exhibit to Appellant's Complaint, the page referencing UCC Section 3-312 entitled "National Check Fraud Center, Other Check Problems: Lost, Stolen, or Destroyed Cashier Checks, Teller and Certified Checks" attached as an Exhibit to his Initial Brief (all of which exhibits seem to correspond with those items listed in his Designation of Matter) was not presented to the lower court and should therefore be stricken.

B) Item Five; and

C) Items Seven through Fourteen.

Conclusion

For the foregoing reasons, Respondent Bank of America respectfully requests that the Court dismiss this appeal with prejudice, or in the alternative, strike those matters designated by Appellant in his Designation of Matter which are not in the record below as listed in Section II above.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: Tara C. Sullivan

Jody A. Bedenbaugh, SC Bar No. 71176
E-Mail Address: jody.bedenbaugh@nelsonmullins.com
Erik T. Norton, SC Bar No. 73860
E-Mail: erik.norton@nelsonmullins.com
Tara C. Sullivan, SC Bar No. 79806
E-Mail: tara.sullivan@nelsonmullins.com
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

Attorneys for Respondent Bank of America

Columbia, South Carolina

10/24, 2013.

CERTIFICATE OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Bank of America, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings:

Motion to Dismiss

Counsel Served:

Roger L. Whaley
8673 Laurel Grove Lane
North Charleston, South Carolina 29420
Pro Se Plaintiff

Andrew H. Butler, Esq.
Richardson Plowden & Robinson, P.A.
1900 Barnwell Street
Columbia, SC 29201

Maria Weiland
Administrative Assistant

October 24, 2013

Nelson Mullins

Nelson Mullins Riley & Scarborough LLP
Attorneys and Counselors at Law
1320 Main Street / 17th Floor / Columbia, SC 29201
Tel: 803.799.2000 Fax: 803.255.9079
www.nelsonmullins.com

Tara C. Sullivan
Tel: 803.255.9591
Fax: 803.255.9079
tara.sullivan@nelsonmullins.com

October 24, 2013

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

RE: Roger L. Whaley v. South Carolina Federal Credit Union and Bank of America
Case No. 2012-CP-18-539
Appellate Case No. 2012-213208
Our File No. 05100/02149

Dear Ms. Kitchings:

Enclosed for filing, please find an original and seven copies of Bank of America's Motion to Dismiss, Certificate of Service and filing fee of $25.00 in the above-referenced matter. Please return one file-stamped copy in the enclosed self-addressed stamped envelope.

By copy of this letter, we are hereby serving all counsel with a copy of these documents.

Very truly yours,

Tara C. Sullivan

Tara C. Sullivan

TCS:mw
Enclosures

cc: Roger L. Whaley, Plaintiff pro se
Drew Hamilton Butler, Esquire (Counsel for South Carolina Federal Credit Union)