The South Carolina Court of Appeals

Bonnie N. Charlton, Robert L. Charlton, and Bayside Property, Inc., Plaintiffs

v.

South Bay Properties, LLS, Stantec Consulting Services, Inc., f/k/a Trico Engineering Consultants, Ind., Milone & MacBroom, Inc., John Steven Goodwin, Louise C. Goodwin, Thomas I. Puckett, Brenda C. Puckett, Robert Nahama, Jeanne E. Nahama, Thomas Holland, Sharon Louise Holland, Joyce K. Sobel, Robert W. Waruszewski, Richard N. Taylor, Robert K. Spillers, (a/ka Robert Spillers), Deborah T. Spillers (a/k/a Deborah Spillers), Patrick A. DiAngelo, Deborah A. DiAngelo, Gary E. Owens, Joyce M. Owens, Fount L. Shults, Lynda M. Shults, Dennis Ridgeway, Teresa Lynn Ridgeway and Georgetown County Forfeited Land Commission, Defendants,

Of Whom

John Steve Goodwin, Louise C. Goodwin, Gary E. Owens, and Joyce M. Owens, Appellants,

v.

Bonnie N. Charlton, Ronald L. Charlton, and Bayside Property, LLC, South Bay Properties, LLC, Stantec Consulting Services, Inc., f/k/a Trico Engineering Consultants, Inc., Milone & MacBroom, Inc., Patrick A. DiAngelo, Deborah A. DiAngelo, and Georgetown County Forfeited land Commission, Respondents.

Appellate Case No. 2013-000712

The Honorable Benjamin H. Culbertson
Georgetown County
Trial Court Case No. 2012-CP-22-00934

APPELLANTS' REPLY BRIEF

RECEIVED
DEC 0 6 2013
SC Court of Appeals

TABLE OF CONTENTS

Table of Authorities....................ii

Statutes and Rules....................ii

Statement of Issues on Appeal....................iii

Brief Statement in Reply....................1

Reply Arguments

I. This Appeal Is Not Moot....................1

II. The Two (2) Issue Rule Is Not Applicable....................3

III. Appellants' Deadline for Requesting a Jury Trial Had Not Expired, and Appellants Had Not Waived Their Right To A Jury Trial....................5

Conclusion....................7

TABLE OF AUTHORITIES

Alston v. Limehouse, 61 S.C. 1, 4, 39 S.E. 182m183 (1901) 3

Fulmer v. Cain, 380 S.C. 466, 470, 670 S.E.2d 652, 654 (2008) 3

King v. Shorter, 291 S.C. 501, 354 S.E.2d 402 (S.C. App. 1987) 1

Lester v. Dawson, 327 S.C. 263, 267, 491 S.E.2d 240, 242 (1997) 2

McMasters v. Charpia, 101111 S.C.C.A., 2011-UP-445 (Unpublished Opinion, October 11, 2011) 2

N.C. Fed. Sav. & Loan Ass'n v. Twin States Dev. Corp., 289 S.C. 480, 481, 347 S.E.2d 97, 97 (msb) 4

Shirley's Iron Works, Inc. v. City of Union, 743 S.E.2d 778, 785 (2013) 3

TD Bank, NA v. Farm Hill Associates, LLC, 2013-UP-118 (Unpublished Opinion) 3, 4

Truluck v. Snyder, 362 S.C. 108, 606 S.E.2d 792, 795 (Ct. App. 2004) 2

Wilder Corp. v. Wilke, 324 S.C. 570, 576, 479 S.E.2d 510, 513 Ct. App. 1996) 2

STATUTES AND RULES

1. Rule 5(d), SCRCP 2
2. Rule 15, SCRCP 5
3. Rule 38, SCRCP 2,6,7
4. Rule 38(b), SCRCP 1,2,7
5. Rule 38(d), SCRCP 1

STATEMENT OF ISSUES ON APPEAL

Issues Asserted by Respondents:

i. Appellants' Appeal is Moot;

ii. The Two Issue Rule Requires That The Order of Reference Be Affirmed;

iii. Appellants' Deadline for Requesting a Jury Trial Had Expired And Appellants Waived Their Right To A Jury Trial.

BRIEF STATEMENT IN REPLY

The crux of this Appeal is found in the following language of the February 22, 2013 Form 4 Order issued by Judge Culbertson:

> *Even though the Defendants have a pending Motion to Amend Answer so that they can assert counterclaims, the deadline for requesting a jury trial has expired, and, therefore, the Defendants have waived their right to a jury trial. See Rules 38(b) and 38(d), SCRCP. See also, King v. Shorter, 291 S.C. 501, 354 S.E.2d 402 (S.C. App. 1987").*

This Order was issued by Judge Culbertson for the purpose of denying Appellants' Motion to Reconsider his prior Order dated January 28, 2013, granting Respondents' Motion to Refer their foreclosure action to the Master in Equity. The above cited portion of the February 22, 2013 Order was, therefore, unnecessary and irrelevant to the issue before Judge Culbertson. Had this language not been included in the February 22, 2013 Order, Appellants would agree with the first argument of Appellants' Initial Brief (*"1. This Appeal Is Moot."*)

REPLY ARGUMENTS

I. THIS APPEAL IS NOT MOOT.

Appellants agree that their Motion to Amend their Answers in Respondents' foreclosure action (2012-CP-22-934), and their Motion to Reinstate/Restore their original action (2009-CP-22-1045), and to consolidate the two actions, were not before the Circuit Court, and were specifically not ruled upon by the Circuit Court.

However, the above cited extraneous language in the February 22, 2013 Order, does not limit itself to finding that Appellants had failed to request a jury trial upon filing

their original Answers to the Respondents' mortgage foreclosure action. The Order finds that *"the deadline for requesting a jury trial has expired, and, therefore, the Defendants **have waived** their right to a jury trial."* (emphasis added.) As argued in Appellants' Initial Brief, their original Answers, consisting of mere general denials, did not give rise to a right to trial by jury (Appellants' Initial Brief, p. 10-15). See also, Lester v. Dawson, 327 S.C. 263, 267, 491 S.E.2d 240, 242 (1997) (*"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.";* Wilder Corp. v. Wilke, 324 S.C. 570, 576, 479 S.E.2d 510, 513 (Ct. App. 1996) (*actions for foreclosure are in equity).* (Cited with approval in: McMasters v. Charpia, 101111 S.C.C.A., 2011-UP-445 (Unpublished Opinion), October 11, 2011.)

In Truluck v. Snyder, 362 S.C. 108, 606 S.E.2d 792, 795 (Ct. App. 2004), this Court expressly ruled:

> *The procedure for demanding a jury trial appears in Rule 38, SCRCP, which is included in part VI, entitled "Trials." Under Rule 38, the only circumstance constituting a waiver of this right is a party's failure to "serve a demand as required by this Rule and file it as required by Rule 5(d)."*
>
> Rule 38(b) allows such a demand to be *"endorsed upon a pleading of the party." The Rule also allows a jury trial demand to be included in a separate document served up to ten (10) days after the last pleading pertinent to the issue on which a jury trial is warranted."* (citing Rule 38, SCRCP.)

Thus, as previously argued in Appellants' Brief, the time for Appellants to request a jury trial had not expired, and Appellants did not waive this right by failing to request a

jury trial at the time they filed general denials to the foreclosure complaint. Appellants' Motion to Amend their Answers has yet to be heard.

II. <u>THE TWO (2) ISSUE RULE IS NOT APPLICABLE.</u>

Once again, Appellants would agree that, based upon the status of the pleadings on the day the Motion for Order of Reference was heard, and the fact that the Court did not consider or rule upon Appellants' Motions to Amend and to Reinstate/Consolidate, the Respondents' foreclosure was a "*proper matter to refer to the...Master in Equity for Georgetown County.*" The Order of Reference filed on January 28, 2013, coupled with the February 22, 2013 Order, however, deprives Appellants of a mode of trial to which they are entitled on several of their compulsory counterclaims. See, <u>TD Bank, NA v. Farm Hill Associates, LLC,</u> 2013-UP-118 (Unpublished Opinion), ("*We recognize that an order of reference that denies a party the right to a jury trial is directly appealable.*" <u>Alston v. Limehouse,</u> 61 S.C. 1, 4, 39 SE 192, 193 (1901). See <u>Fulmer v. Cain</u>, 280 S.C. 466, 470, 670 S.E.2d 652, 654 (2008) (holding "*the mode of trial exception to the general rule that only final orders are appealable is confined to orders which abridge a party's constitutional right to trial by jury.*")) (<u>TD Bank, NA,</u> supra.)

Because of the findings in the February 22, 2013, order cited above, this order may constitute a pre-emptive advisory opinion, denying Appellants' right to a trial by jury before their motion to amend has been heard, and regardless of the outcome of such motion hearing. This ruling, issued subsequent to the order of reference, could become the law of the case if not appealed. <u>Shirley's Iron Works, Inc. v. City of Union,</u> 743 S.E.2d 778, 785 (2013) (*"An unappealed ruling is the law of the case and requires*

affirmance.") (citation omitted.) *An order of reference in an action to foreclose a mortgage is not subject to an immediate appeal.* N.C. Fed. Sav. & Loan Ass'n v. Twin States Dev. Corp., 289 S.C. 480, 481, 347 S.E.2d 97, 97 (msb). (Cited with approval in TD Bank, NA, supra.)

The trial court's findings with regard to Appellants' supposed waiver of their right to a jury trial in the February 22, 2013 order was not a "ground" to support the court's decision. The court correctly held that the Appellants' Motions to Amend, and to Restore/Reinstate and Consolidate, were not properly before it at the hearing on January 22, 2013. Similar to the Circuit Court Order in TD Bank, NA, supra, the trial court correctly ruled that the Master in Equity could hear Appellants' Motion, and "*...If he grants the Motions and there are factual issues that are to be heard by a jury, then he can send those back and to the Circuit Court and we'll set them up for trial. But since the Motion to Restore and the Motion to Amend were just filed this morning, I am going to go ahead in the present structure since there has been no request for a jury trial, and since it is a foreclosure action, allow it to go to the Master in Equity."* (Tr. p. 11, ll. 16-23.) The contested language in the February 22nd Order went beyond such findings, however, to preemptively find that Appellants had waived their right to a jury trial on their legal counterclaims even if the motion to amend is granted. If Appellants' motion to amend is granted, they will not only be entitled to a jury trial upon those legal counterclaims, they will also be entitled to have their jury trial conducted first, before Respondents' foreclosure action. (Appellants' Initial Brief p. 14-15). Appellants contend

that the February 22, 2013 Order is a separate ruling, not additional grounds to support the January 28, 2013 Order of Reference.

III. APPELLANTS' DEADLINE FOR REQUESTING A JURY TRIAL HAD NOT EXPIRED, AND APPELLANTS HAD NOT WAIVED THEIR RIGHT TO A JURY TRIAL.

This issue was fully briefed in Appellants' Initial Brief. Appellants take exception, however, to Respondents' arguments as follows:

A. Incorrect Characterization of Appellants' Brief.

Respondent avers that Appellants' brief "*...argues that the Goodwins and Owens anticipate that their Motion to Amend their Answers and their Motion in Civil Action Number 2009-CP-22-1045 to reinstate/restore that action to the trial roster, and to consolidate that action with the present action will be successful, therefore it was error for the Circuit Court not to grant the requested relief before the Motions were heard.*" (citing: Appellants' Brief p. 6.) Appellants' Brief averred as follows:

> *"Anticipating that their Motion to Amend would be granted, having been timely filed under Rule 15, SCRCP, with the liberal application mandated by the Rule itself, Appellants nonetheless sought to avoid the possibility that the foreclosure action would be allowed to proceed before the Master in Equity, while their Motion to Restore and Consolidate their original action with the Charlton/Bayside Foreclosure awaited hearing in Circuit Court."* (Footnote 1: *All Defendants other than Appellants either consented to the reference or were in default as of the date Respondents' Motion was heard* (R. Exhibit 11.) *Except for Appellants' pending motions, there was no opposition to the Respondents' foreclosure."*)

Given the status of the Respondents' foreclosure action, and the language of Rule 15 itself, Appellants anticipated that their Motion to Amend would be granted in almost a

perfunctory matter. They did not expect the ruling upon their Motion to Restore/Reconsolidate to be perfunctory, but they did expect it to be granted. The fact that it has been denied, and its denial has also been appealed to this Court, in no way undermines the validity of Appellants' argument on these issues.

B. Improper Characterization of Appellants' Argument Below.

Appellants did not argue below, and do not assert on Appeal, that "*...merely filing a Motion to Amend an Answer prevents the issuance of an Order of Reference or entitles a party to a jury trial.*" (Respondents' Brief, p. 9.) Appellants were merely attempting to avoid the potential of inconsistent outcomes, and prevent the Respondents' otherwise unopposed foreclosure from proceeding quickly to a final hearing, while Appellants' motion to restore/reinstate and consolidate their previous action with the foreclosure action awaited hearing. Appellants fully, and reasonably, expected their motion to restore/reinstate, and to consolidate, to be granted.[1] If Respondents were allowed to proceed with foreclosure upon the subject property prior to the adjudication of Appellants' claims, Appellants would be substantially and irreparably prejudiced and damaged by the loss of the real property against which they have asserted a superior lien right.

Except as noted herein, Appellants have fully briefed the facts and law relevant to their position that their deadline for requesting a jury trial had not expired, and that they had not waived their right a jury trial by virtue of Rule 38, SCRCP. If the Plaintiffs'

[1] As will be addressed in the separate appeals of the order denying Appellants' motion to restore/reinstate and consolidate, fourteen (14) other cases were restored/reinstated by the trial court, prior to its denial of Appellants' motion. Further, if the order denying the motion to restore/reinstate is not reversed, Appellants' motion to amend, under the present appeal, will be moot due to the resulting expiration of the applicable statute of limitations.

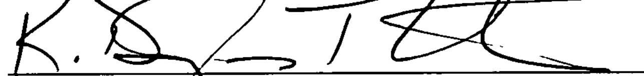
amended motion to amend is granted, their request for a jury trial has now been asserted on the face of the proposed Amended Complaint, and will be timely under Rule 38, SCRCP.

CONCLUSION

For the foregoing reasons, Appellants respectfully submit that their Appeal is not moot, and that the two issue rule is inapposite, due to the contested findings and conclusions in the February 22, 2013 Order. Appellants further submit that their deadline for requesting a jury trial had not expired, and that they did not waive their right to a jury trial by failing to demand same at the time they filed their initial Answers. Appellants will not be entitled to demand a jury trial until their motion to amend is granted, at which time they may either request same on the face of their amended pleadings, or submit and file a written request for jury trial within ten (10) days after filing and service of their amended pleadings. Rule 38(b), SCRCP.

Respectfully submitted:

THORNTON LAW FIRM, LLC



K. Douglas Thornton
1025 Third Avenue
Conway, South Carolina 29526
Telephone: (843) 488-5858
kdouglasthornton@gmail.com

LAW OFFICES OF JOHN M. LEITER, PA
John M. Leiter
1203 48th Avenue, North, Suite 109
Myrtle Beach, South Carolina 29577
Telephone: (843) 449-1451
jleiter@48th.com
ATTORNEYS FOR APPELLANTS

Conway, S.C.
December 4, 2013