

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

170487

APPEAL FROM BERKELY COUNTY
Court of Common Pleas

Kristi Lea Harrington, Circuit Court Judge
Robert E. Watson, Master-in-Equity

RECEIVED

NOV 25 2013

Case No. 2011-CP-08-03412

SC Court of Appeals

First Citizens Bank and Trust Company, Inc.,
successor-in-interest to the Federal Deposit Insurance
Corporation, receiver of Georgian Bank, Respondent,

Goose Creek II, LLC, James C. Wallace a/k/a James C.
Wallace, Sr., John S. Paulson a/k/a John Paulson, Jiri Jilich
a/k/a Jiri Jilich, Jr., James K. Price, Eastwood Homes, Inc.,
Charles Huff, as the Personal Representative of the Estate
of Richard P. Huff, Jr., Seamon, Whiteside & Associates, Inc.,
Monarch Plantation Homeowners' Association, Inc., Defendants,

Of whom Eastwood Homes, Inc., is, Appellant.

MOTION TO DISMISS APPEAL

Now comes the Respondent, First Citizens Bank and Trust Company, Inc., successor in interest to the Federal Deposit Insurance Corporation, receiver of Georgian Bank, (hereinafter, "FCB"), by and through counsel and pursuant to Rules 201(a), 203(d)(3), and 240 of the South Carolina Appellate Court Rules, and hereby moves this Court to dismiss the appeal of Appellant Eastwood Homes, Inc. ("Eastwood"). In support of this Motion, FCB presents the following.

STATEMENT OF THE CASE

This case arises out of a loan made by Georgian Bank to Defendant Goose Creek II, LLC (“Goose Creek”) to develop a tract of land in Berkeley County, South Carolina (the “Loan”). On or about September 25, 2009, Georgian Bank was closed and placed into receivership, with the Federal Deposit Insurance Corporation (hereinafter, the “FDIC”) as receiver. FCB purchased and assumed certain assets of Georgian Bank from the FDIC, including the Loan.

On December 8, 2011, FCB filed suit against Goose Creek and several guarantors on the Loan to collect the amounts due and owing under the Loan and the Defendants’ personal guaranties and to foreclose on certain real property (the “Property”) securing the Loan by way of a mortgage recorded on January 9, 2008 (the “FCB Mortgage”). Eastwood was made a party-Defendant to the action because of a second mortgage on the Property in its favor that was recorded on or about February 3, 2009 (over a year after the FCB Mortgage was recorded) (the “Eastwood Mortgage”).¹ On February 15, 2012, Eastwood filed an Answer and Counterclaims in the foreclosure action (the “Foreclosure Action”), asserting claims for equitable estoppel, waiver, and an equitable lien (the “Original Counterclaims”).

On April 16, 2012, FCB filed a Motion to Dismiss Eastwood’s Original Counterclaims. Subsequently, Eastwood filed a Motion to Amend Pleading, seeking leave to file an Amended Answer and Counterclaim (the “First Amended Counterclaims”). Eastwood’s First Amended Counterclaims attempted to re-assert the same counterclaims

¹ Eastwood alleged that they entered into a contract with a predecessor-in-interest to Goose Creek, wherein Eastwood agreed to purchase lots in a subdivision to be developed on the Property. Eastwood further alleged that, pursuant to the contract, they paid a cash deposit and recorded the Eastwood Mortgage in the amount of the cash deposit. Ultimately, Eastwood claimed that the Eastwood Mortgage had priority over the FCB Mortgage.

contained in the Original Counterclaims (equitable estoppel, waiver, and equitable lien) along with two additional counterclaims for a declaratory judgment and to have FCB's mortgage deemed void.

On October 3, 2012, Judge Harrington held a hearing on FCB's Motion to Dismiss Eastwood's Original Counterclaims. At the hearing, Eastwood argued, in part, that the court should not dismiss its Original Counterclaims because its First Amended Counterclaims, if allowed, would cure the defects in the Original Counterclaims.²

On November 9, 2012, Judge Harrington issued an order granting FCB's Motion to Dismiss (the "Order," which was attached to Eastwood's Notice of Appeal as Exhibit A). In the Order, Judge Harrington took judicial notice of Eastwood's Motion to Amend its Answer and Counterclaims and the related First Amended Counterclaims due to Eastwood's reliance on those filings at oral argument, but found that the First Amended Counterclaims "d[o] not alter this Court's ruling." *See* Order at p. 6 & n.2. Judge Harrington further noted that, "[b]ecause this Court rules herein that the Counterclaims are dismissed, [Eastwood]'s Motion to Amend is rendered moot." *See id.* at p. 6, n.2.

Eastwood did not file any motion under Rule 59(e) or under Rule 60, SCRPC, to challenge the Order, nor did it appeal the Order within the prescribed period.

On January 15, 2013, Eastwood filed a second Motion to Amend Pleading, which proposed another Amended Answer and Counterclaim (the "Second Amended

² FCB's Motion to Dismiss was based, in part, upon the application of the South Carolina Lender Statute of Frauds (S.C.Code Ann. § 37-10-107), the South Carolina Statute of Frauds (S.C.Code Ann. § 32-3-10), the FDIC's "Special Powers" under 12 U.S.C. § 1823(e), and the *D'Oench Duhme* doctrine, due to Eastwood's failure to allege a sufficient writing to support its counterclaims. Eastwood's Motion to Amend Pleading and First Amended Counterclaims sought to cure this pleading defect by alleging the existence of a writing, which it attached to the proposed First Amended Counterclaims. Judge Harrington found that writing to be insufficient under 12 U.S.C. § 1823(e). *See* Order at pp. 6-7.

Counterclaims”). The Second Amended Counterclaims included four of the five counterclaims contained in its First Amended Counterclaims (equitable estoppel, waiver, voiding of FCB’s mortgage, and declaratory judgment). Importantly, the Second Amended Counterclaims did not include any claims that were not included in the First Amended Counterclaims that were addressed and barred by Judge Harrington’s Order. On January 30, 2013, FCB filed a Memorandum in Opposition to Eastwood’s Motion to Amend Pleading.

On February 27, 2013, the parties filed a Consent Order, wherein they agreed to refer all claims and defenses in the Foreclosure Action, other than the guarantor liability claims and defenses, to the Honorable Robert E. Watson, as the master in equity for Berkeley County, in order to direct entry of final judgment of all such referred claims and defenses. On September 25, 2013, Judge Watson held a hearing to render a final judgment on all claims referred to him. During the hearing, the parties addressed Eastwood’s second Motion to Amend Pleading. Further, the second Motion to Amend Pleading was also addressed in the Master’s Decree (the “Master’s Decree,” which was attached to Eastwood’s Notice of Appeal). The Master’s Decree provided:

[Judge Harrington’s] Order bars Eastwood’s argument that its mortgage on the Property is superior in priority to the [FCB] Mortgage. Eastwood’s counterclaims and related affirmative defenses that advance its arguments on this issue were dismissed by an Order filed by Judge Harrington on November 9, 2012. That Order is the law of this case. *See Long v. Sealed Air Corp.*, 391 S.C. 483, 488, 706 S.E.2d 34, 37 (Ct. App. 2011). This Court is unwilling to abrogate Judge Harrington’s Order, especially considering that Eastwood did not move Judge Harrington to reconsider the Order, nor did it appeal the Order. The counterclaims and affirmative defenses in its current iteration of its Answer and Counterclaim directly mirror those dismissed or rendered moot by the Order. As such, Eastwood’s pending Motion to Amend Pleading is denied.

See Master's Decree at p. 15, n.10.

As to the Foreclosure Action, Judge Watson found that Goose Creek had breached its note and the FCB Mortgage, and that the FCB Mortgage constituted a first priority mortgage lien on the Property. On October 4, 2013, Judge Watson ordered foreclosure of the Property and issued a Notice of Sale.

Eastwood has now filed a Notice of Appeal in this matter. In their Notice of Appeal, Eastwood appeals Judge Harrington's Order, the Master's Decree, and the Notice of Sale.

Arguments

I. Because Eastwood failed to immediately appeal Judge Harrington's Order dismissing the counterclaims, its belated attempt to appeal from the Order is untimely.

"[F]or reasons of public policy, some rulings . . . must be immediately appealed, or the right to review will be lost." *Link v. Sch. Dist. of Pickens Cty.*, 302 S.C. 1, 6 n.5, 393 S.E.2d 176, 178 n.5 (1990).

S.C.Code Ann. § 14-3-330(2) requires an immediate appeal of:

(2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) *strikes out an answer or any part thereof or any pleading in any action*[.]

S.C.Code Ann. § 14-3-330(2) (emphasis added).

Indeed, "[a]n order granting a Rule 12(b) motion as to one of multiple claims is directly appealable under § 14-3-330(2) because it affects a substantial right and strikes out part of a pleading." *Lebovitz v. Mudd*, 289 S.C. 476, 479, 347 S.E.2d 94, 95 (1986).

Our Supreme Court “has held that an interlocutory order that falls within the purview of § 14–3–330(2)(a) must be immediately appealed if it is to be considered at all, and that there is no review available after final judgment.” *Neeltec Enters., Inc. v. Long*, 397 S.C. 563, 567, 725 S.E.2d 926, 928 (2012). Further, “[a]n interlocutory order which affects a substantial right, and either in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues an action, is immediately appealable under § 14–3–330(2)(a).” *See id.* at 566, 725 S.E.2d at 928.

When Judge Harrington dismissed Eastwood’s counterclaims, Eastwood did not immediately appeal the Order nor did it file a Rule 59(e) or Rule 60 motion to challenge the Order. If Eastwood wanted to appeal Judge Harrington’s Order dismissing the counterclaims, it was required to do so immediately after the Order was issued.

Judge Harrington’s Order was immediately appealable because it struck and dismissed Eastwood’s counterclaims and because it affected a substantial right of Eastwood. *See* S.C.Code Ann. § 14–3–330(2)(c); *Link*, 302 S.C. at 5, 393 S.E.2d at 178 (providing that an order granting a 12(b)(6) motion is immediately appealable even when the ruling only affects some but not all of the party’s causes of action); *Lebovitz*, 289 S.C. at 479, 347 S.E.2d at 96. Eastwood’s failure to immediately appeal Judge Harrington’s Order compels a dismissal of its appeal pursuant to Rule 203(d)(3), SCACR.

II. Eastwood’s appeal of the Notice of Sale should be dismissed as it is neither an order nor a judgment that may be appealed.

Rule 201(a), SCACR, provides that a party may appeal from any final judgment, appealable order or decision. The Notice of Sale is neither a final judgment nor an order. A Notice of Sale is merely statutorily-mandated notice related to the sale of a mortgaged

property upon foreclosure. The Notice of Sale did not determine any of the rights of the parties in this action or direct any type of action. Rather, it simply operated to provide notice to the general public that the sale was occurring. Accordingly, this Court should dismiss Eastwood's appeal of the Notice of Sale because it is neither a final judgment nor an order.

CONCLUSION

Based on the foregoing arguments, Respondent respectfully requests the Court dismiss Appellant's Notice of Appeal.

Respectfully submitted,

November 21, 2013



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Charles Huff, as the Personal Representative of the Estate
of Richard P. Huff, Jr., Seamon, Whiteside & Associates, Inc.,
Monarch Plantation Homeowners' Association, Inc., Defendants,

Of whom Eastwood Homes, Inc., is, Appellant.

PROOF OF SERVICE

I CERTIFY THAT I HAVE SERVED the Respondent's Motion to Dismiss Appeal on
Appellant Eastwood Homes, Inc., by depositing a copy in the United States Mail, postage
prepaid, on November 21, 2013, addressed to their attorneys of record:

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Respectfully submitted,

November 21, 2013

A handwritten signature in cursive script that reads "Lesley A. Firestone". The signature is written in black ink and is positioned above the typed contact information.

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**RE: First Citizens Bank and Trust Company, Inc. vs. Goose Creek II, LLC, et al.
Berkeley County Court File No. 2011-CP-08-3412**


Dear Madam Clerk:

Enclosed please find an original and seven copies of the **Respondent's Motion to Dismiss Appeal and Proof of Service** in the above-referenced matter. Please file the originals and return a filed stamped copy to our office in the enclosed self-addressed stamped envelope. By copy of this letter, I am serving all counsel of record with a copy of the same.

Thank you for your assistance in this matter and please call me with any questions.

Yours very truly,

MOORE & VAN ALLEN, PLLC


Lesley A. Firestone

LAF/ws

Enclosures

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