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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FRON LEXINGTON COUNTY
Court of Common Pleas

Lisa Lee Smith, Special Referee

Appellate Case No. 2026-001142
Case No. 2014-CP-32-02795

Nationstar Mortgage LLC d/b/a Mr. Cooper and Federal National Mortgage Association ("Fannie Mae"), a corporation organized and existing under the laws of the United States of America and its assignee Nationstar Mortgage LLC d/b/a Mr. Cooper,
Respondents,

v.

D. Randolph Whitt and Pearce W. Fleming,
Defendants.

Of whom D. Randolph Whitt is the
Appellant.

APPELLANT'S INITIAL BRIEF

D. Randolph Whitt
S.C. Bar no. 13068
344 Blossom View Ct.
West Columbia,SC29170
(803) 422-2176 Tel
dwhitt2001@aol.com
Attorney for Appellant

June 22, 2026

Other counsel of Record:
Jessica O'Brien Peretz
McGuireWoods LLP
201 North Tryon Street, Suite 3000
Charlotte, NC 28202-2146
Telephone: (704) 343-2000
Facsimile: (704) 343-2300 \
Attorney for Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err in finding that Appellant was not entitled to any loss mitigation review based on the assertion that Appellant if not a " borrower" under the applicable servicing regulations and granting summary judgment on the defense of unclean hands, and the counterclaim for dual tracking.

2. Did The trial court err in categorizing the Respondents many failing and misdeeds throughout this case as mere "matters of mistake or oversight"and granting summary judgment on the defense of unclean hands, and the counterclaim for breach of the duty of good faith and fair dealing.

STATEMENT OF THE CASE

This mortgage foreclosure action was commenced by the Respondent's filing of a Lis Pendens, Summons and Complaint on August 1, 2014.(R. p.__) Appellant served and Amended Answer and Counterclaims alleging respondent had breached the implied duty of good faith under the mortgage contract and that Respondent had engaged in impermissible dual tracking. (R. p.__) Respondent served a Reply to the Counterclaims.(R. p.__).

An order of reference was entered(R. p.__) A judgment of foreclosure was granted by the Special Referee (R. p.__).Appellant filed a motion to vacate this judgment(R. p.__) which was granted. Respondent filed a motion for summary judgment(R. p.__) which had an affidavit attached(R. p.__).

Respondent filed an additional affidavit (R. p.__) at the time of the motion hearing, and another affidavit (R. p.__) pursuant to an order allowing further materials to be submitted (R. p.__)..

Appellant filed counter affidavits as the summary judgment process unfolded(R. p.__).

The motion for summary judgment was granted in part and denied in part (R. p.__)

Appellant filed a motion to transfer the case to the jury roster for trial of the counterclaims (R. p.__). Respondent filed a return to the motion to transfer(R. p.__).Appellant filed a response to the return(R. p.__).

The Special Referee denied the motion to transfer (R. p.__).

Respondent filed two motions to amend, both of which were granted (R. pp.__).

The Special Referee granted the second motion to for summary judgment The Special Referee denied the motion to transfer (R. p.__).

A timely notice of appeal was filed and served (R. p.__) .

FACTS ADJUDICATED ON FIRST SUMMARY JUDGMENT

The existence, execution and validity of the note and mortgage were established(R. p.__) As were the various assignments of the mortgage and correction of an error in the property description (R. p.__) The current ownership of the property was also established (R. p.__).

The principal balance and the interest rate were also established (R. p.__) as was the fact that not all monthly installments were not paid when due (R. p.__) .

The Special Referee also held that Appellant's Counterclaims were limited to conduct which occurred after October 15, 2015 (R. p.__).

Appellant's Assertions of Bad Faith by Respondent

Appellant has has asserted two counterclaims, one involving breach of the implied duty of good faith that is a part of every contract under South Carolina Law, including the mortgage contract that is the basis of Respondent's action, and a counterclaim asserting that Respondent improperly continued with the foreclosure action while loss mitigation efforts were still in progress in violation of both South Carolina Law and the regulations established by the CFPB. This practice is often described as “dual tracking”and has been disapproved of by both the South Carolina Supreme Court through Order 2011-05-02-01 as well as the CFPB through its regulations. Respondents conduct is actionable under either of these claims.

Despite being put on notice of its deficient performance in the order vacating its original judgment of foreclosure (R. p.__), Respondent's performance was even worse as the case progressed further.

The initial deficiencies included irregularities and Respondent doing less than it could have to provide notice of the hearing that resulted in the vacated judgment, submission of exhibits that were marked “ACTIVE LOSS MITIGATION” and provision of financial information that was incomplete, incoherent and internally inconsistent. (See Motion to vacate and supporting affidavit R. p.__).

Rather than making an effort to do better, Respondents next effort veered into ridiculousness with the assertion that detailed debt information was a secret that could not be disclosed to Appellant because he was not Respondent's “customer”(see August 16 affidavit, especially item 19 (R. p.__). Respondent took this position despite having submitted voluminous, though hopelessly muddled , information of this sort at the first hearing.

Respondent's subsequent affidavits (R. p.__) did nothing to bring clarity of coherence to the evidence provided by Respondent. In fact some of the initial errors were reintroduced, while others were exacerbated (see Appellant's affidavits and pleadings (R. p.__).

Respondent has apparently become so accustomed to obtaining foreclosure judgments by overawing *pro se* defendants with masses of gibberish that it has lost the ability to respond with clarity and coherence when challenged. Alternatively, maybe Respondent simply has disdain for its obligation to openly and honestly establish its entitlement to the relief it seeks. In either case Respondents conduct is the epitome of bad faith with a flourish of dual tracking as a bonus.

ARGUMENT 1

> The special referee erred in finding that Appellant was not entitled to any loss mitigation review based on the assertion that Appellant if not a “ borrower” under the applicable servicing regulations and granting summary judgment on the defense of unclean hands, and the counterclaim for dual tracking.

In this case Appellant's status as a borrower is established both by the page of the servicing requirements attached to Appellant's affidavit(R. p.__), and the signature page of the mortgage that is the basis of this action (R. p.__), which identifies Appellant as “borrower. A right to be reviewed for a loss mitigation solution flows from this status and is mandates under our Supreme Court's Administrative order as well as the regulations applicable to Respondents. Respondents failure to honor this obligation is an ongoing default, especially as it has moved ahead with the foreclosure action. Failure to complete loss mitigation efforts before moving forward with a foreclosure is the definition of “dual tracking”.

ARGUMENT 2

The special referee erred in categorizing the Respondents many failing and misdeeds throughout this case as mere “matters of mistake or oversight”and granting summary judgment on the defense of unclean hands, and the counterclaim for breach of the duty of good faith and fair dealing.

In the foundation case in this area, *Commercial Credit Corp. v. Nelson Motors, Inc.*, 247 S.C. 360, 147 S.E.2d 481(1966) the central issue was whether our Supreme Court would recognize the possibility of an implied duty to pursue collection of a group of accounts. The Court concluded :

> “Without going into further detail, we are satisfied that under the terms of the contract in the light of surrounding circumstances, including the relationship of the parties and their past dealings, it is, to say the least, fairly arguable that Commercial was **impliedly obligated to pursue the collection of the accounts with reasonable and customary diligence**. Hence, we would not be justified in concluding that the

> defense and counterclaim are manifestly false and not pleaded in good faith. Since **no provision of the written contract touches on this important subject**, which is necessarily involved in the contractual relations of the parties, evidence as to prior dealings between them would involve no contradiction of the writing and would not violate the parol evidence rule. Chatfield-Woods Co. v. Harley, 124 S.C. 280, 117 S.E. 539; Soulios v. Mills Novelty Co., 198 S.C. 355, 17 S.E. (2d) 869." (Emphasis Added)

Therefore, from the beginning our Supreme Court countenanced an action based solely on a breach of the implied duty of good faith. As noted in the conclusion of the Court's Opinion, no express term of the contract was implicated. However, a violation of the implied duty of good faith, without more was held to be sufficient to create an actionable claim, obviously if proven in further proceedings. Nowhere is there a suggestion that some second breach of an express term is also required.

Later in *Tharpe v. G.E. Moore Co*. 254 S.C. 196, 174 S.E.2d 397 (S.C. 1970), a worker's compensation case, the Court based its conclusion on the implied duty of good faith int the context of an independent contractor relationship took the form of a duty to "perform it in a workmanlike manner" (Id. At 201). Central to the analysis was the conclusion that a breach of this implied duty to "perform in a workmanlike manner" would, without more, be enough to constitute a breach of contract. Nowhere is there a suggestion that some second breach of an express term is also required.

Taken together, the South Carolina Opinions establish that the duty of good faith and fair dealing is no less, and no more than any other contractual term. The early cases discussed above establish that the duty of good faith and fair dealing is no different from any express term. Breach of a single contract term, whether express or implied is sufficient to support a breach of contract claim.

The import of *RoTec Svcs., Inc. v. Encompass Svcs. Inc.,* 359 S.C. 467, 597 S.E.2d 881(S.C. App. 2004) is that the duty of good faith and fair dealing is no more than any other contract term.There is no "special" cause of action for breach of this implied term. It is simply a breach of contract, just like its express term counterparts. Whether a single term of a contract is breached, or several, it still only gives rise to a cause of action for breach of contract. Whether that single term is express or implied does not impact the actionability of the breach.

In the instant case, the record is full of examples of the Respondents falling short ot the good faith standard, for example, failing to provide accurate information regarding the mortgage debt (R.p p.__), failing to honor a commitment to collaborate with Appellant on scheduling (R. p.__), failing to honor a commitment that the first motion to amend would not result in any new claims or defenses (R. p.__) and taking positions violating the most basic standards of due process such as asserting that an affidavit of debt (R. p.__) or a deposition transcript (R. p.__) could be presented to the special referee but withheld from Appellant.

Especially when viewed in context of the cumulative record of failure present in in this case, the special referee erred in categorizing the Respondents conduct as mere "matters of mistake or oversight" is erroneous, and mandates reversal of the resulting grant of summary judgment.

The Gray Case

In *Plantation Federal Bank v. Gray*, 401 S.C. 507 (S.C. App. 2013) the Court of Appeals considered issues similar to the present case and found that the master in equity proceeding with a foreclosure sale of a vacant lot was erroneous. The Court of Appeals noted that the allegations of Gray's counterclaims, which included a breach of contract claim, "involve questions of fact that will most certainly arise in the foreclosure action, especially when considered in light of Gray's defenses to the foreclosure action, including <u>unclean hands</u>.(emphasis added).

CONCLUSION

For the foregoing reasons, the Order of the Special Referee should be reversed and the case remanded to Lexington County, with instructions to hear Appellant's Counterclaims and the defense of unclean hands on the merits

Respectfully submitted,

s/D.Randolph Whitt

D. Randolph Whitt
S.C. Bar No. 13068
344 Blossom View Ct.
West Columbia, SC 29170
(803) 422-2176 Tel
dwhitt2001@aol.com
Attorney for Appellant

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