

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

The Honorable Stephanie P. McDonald, Circuit Court Judge

Case No. 2009-CP-08-3652

First National Bank of Spartanburg, Div. of First National Bank of the South,
.....Respondent,

v.

Liberty Village, LLC,
.....Appellant.

INITIAL BRIEF OF RESPONDENT

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SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

- I. WHETHER APPELLANT'S ARGUMENT THAT RULE 38(D), SCRPC, IS UNCONSTITUTIONAL IS PRESERVED?
- II. WHETHER A RULING ON A MOTION UNDER RULE 39(B), SCRPC, IS IMMEDIATELY APPEALABLE?
- III. WHETHER THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION FOR A JURY TRIAL PURSUANT TO RULE 39(B), SCRPC?

STATEMENT OF THE CASE

This case is a foreclosure action that was commenced against the Appellant Liberty Village, LLC. The Respondent, First National Bank of Spartanburg, Division of First National Bank of the South,¹ initiated this action with the filing of a Lis Pendens, Summons and Complaint on November 3, 2009. The Appellant answered, denying Respondent's claims and asserting numerous affirmative defenses and counterclaims. On May 9, 2012, Appellant filed a motion to transfer the case to the jury trial roster, and the trial court denied the motion. Subsequently, Appellant filed a motion to amend or alter the judgment regarding the jury trial denial. The trial court entered an order denying Appellant's motion to amend or alter the judgment on May 1, 2013.

FACTS

Respondent's Complaint contained a non-jury endorsement. Additionally, Respondent's amended pleadings, filed on November 24, 2009, contained the same non-jury endorsement. On January 7, 2010, Appellant filed its Answer and Counterclaims. Respondent served and filed its Reply to Counterclaims on February 9, 2010. Appellant amended its Answer and Counterclaims on January 27, 2010, and Respondent filed its Reply on March 1, 2010. Appellant did not make a request for a jury trial in its pleadings nor did it make a demand for a jury trial within ten days of the service of the last pleading.

¹ On July 16, 2010, Respondent was closed by the Office of the Comptroller of the Currency and the Federal Deposit Insurance Corporation ("FDIC") was appointed as Receiver. The loan documents at issue were assigned by FDIC as Receiver to NAFH National Bank effective July 16, 2010. NAFH and Capital Bank, Raleigh merged effective June 30, 2011, with the resulting bank title, Capital Bank, which is the holder of the loan documents. This case has been prosecuted in Respondent's name as authorized under Rule 25(c), SCRPC.

Respondent filed its motion for summary judgment on October 29, 2010. Appellant filed its motion for summary judgment on July 15, 2011. A hearing on those motions was held on August 31, 2011. The Honorable Stephanie P. McDonald took those motions under advisement.

The circuit court entered a consent scheduling order on November 14, 2011, which included, among other dates, a statement that the case was not for trial before March 1, 2012. The parties agreed to and participated in mediation on December 29, 2011; however, they were unable to reach a resolution at that time. On March 21, 2012, the case appeared on the Berkeley County non-jury trial roster. On May 9, 2012, approximately two months after receipt of notice of the case being on the non-jury trial roster, Appellant filed and served its motion to transfer the case to the jury trial roster. Thus, over two years passed between Appellant's filing of its Answer and Counterclaims and the first time Appellant requested a jury trial. A hearing on the motion to transfer was held on June 5, 2012. On June 6, 2012, the trial court entered its order denying Appellant's motion to transfer.

Appellant filed a motion to amend or alter the judgment on June 18, 2012.² A hearing on the motion to alter or amend was held on December 13, 2012. The trial court entered an order denying Appellant's motion to amend or alter the judgment on May 1, 2013. In its order, the trial court stated:

With respect to the ruling on the Motion to Transfer, the requirements of Rule 38, SCRCP and case law construing the Rule support the Court's ruling that [Appellant] waived its right to a jury trial. There is no evidence of the existence of exceptional circumstances to transfer the case to the jury roster, so the Court

² In its motion to alter or amend, Appellant asked the trial court to review three separate rulings contained in the June 6, 2012 order. Specifically, Appellant asked the trial court to review: summary judgment for Respondent on Appellant's counterclaim for unfair trade practices; a denial of Appellant's motion for summary judgment based on an unclean hands argument; and the denial of Appellant's motion to transfer the case to the jury trial roster.

decline[s] to exercise its discretion to transfer the case to the jury roster.

Appellant filed its Notice of Appeal on May 30, 2013. Appellant appeals the trial court's order denying Appellant's motion to transfer to the jury trial roster and the trial court's order denying its motion to alter or amend.

ARGUMENT

I. APPELLANT'S ARGUMENT THAT RULE 38(D), SCRPC, IS UNCONSTITUTIONAL IS NOT PRESERVED FOR APPELLATE REVIEW.

Appellant contends that Rule 38(d) of the South Carolina Rules of Civil Procedure is unconstitutional because it permits a party to unintentionally waive its right to a jury trial. See App. Br. iv, 7. Accordingly, Appellant argues that the trial court's decision to deny the motion to transfer should be reversed. This argument is not preserved for appellate review.

Appellant submitted its memorandum in support of its motion to transfer prior to and at the motion hearing. In its memorandum, Appellant argued that, under the South Carolina Constitution, it was entitled to a jury trial because both parties were asserting legal causes of action and seeking monetary damages. Ultimately, Appellant contended that the denial of a jury trial would violate its constitutional rights. At the motion hearing, Appellant re-asserted the arguments it made in its memorandum. Additionally, Appellant argued that the trial court could not find Appellant waived its right to a jury trial because it had not knowingly and intelligently done so.³ Accordingly, Appellant asserted it was entitled to a jury trial. At no point in its memorandum or at the hearing did Appellant argue that Rule 38(d), SCRPC, was

³ To support this argument, Appellant cited Broome v. Watts, 319 S.C. 337, 340, 461 S.E.2d 46, 48 (1995), which concerns the standard of review courts apply when construing a jury trial waiver provision in a contract. Appellant contended that the Broome standard—that jury trial waivers pursuant to a contract should be strictly construed—should be applied in this case. See id.

unconstitutional. Further, the trial court made no ruling on the constitutionality of Rule 38(d), SCRCF.

In its motion to alter or amend, Appellant argued for the first time that Rule 38(d), SCRCF, was unconstitutional because it abridged Appellant's fundamental right to a jury trial on its counterclaims. After hearing arguments, the trial court denied Appellant's motion to alter. In its order denying the motion, the trial court did not rule on the constitutionality of Rule 38(d), SCRCF.

In its brief, Appellant asserts that the trial court's decision denying the motion to transfer should be reversed because Rule 38(d), SCRCF, is unconstitutional. See App. Br. iv, 7. Rule 38(d), SCRCF, provides that the failure of a party to serve a demand for a jury trial within ten days of the service of the last pleading constitutes a waiver of a jury trial. Appellant asserts because Rule 38(d), SCRCF, allows a party to unintentionally waive a jury trial, it is unconstitutional. This argument is not preserved for appellate review because it was raised for the first time in Appellant's motion to alter or amend. See Johnson v. Sonoco Prods. Co., 381 S.C. 172, 177, 672 S.E.2d 567, 570 (2009) (providing an issue raised for the first time in a motion to reconsider is not preserved for review). Further, this issue was not ruled upon by the trial court. Harkins v. Greenville Cnty., 340 S.C. 606, 620, 533 S.E.2d 886, 893 (2000) (providing an issue not ruled upon by the trial court is not preserved for review). Accordingly, this Court should not address this issue on appeal because it is not preserved.

Moreover, even if Appellant's argument is preserved, it is without merit. The analogous federal rule provides: "[a] party waives a jury trial unless its demand is properly served and filed." Fed. R. Civ. P. 38(d). The United States Supreme Court established long ago that the Seventh Amendment right to a jury trial, like other constitutional rights, can be waived by failure

to preserve it as required by the rules. See United States v. Moore, 340 U.S. 616, 621 (1951). Therefore, federal courts have enforced the waiver provisions of Rule 38(d) according to its terms. Id; see also McCray v. Burrell, 516 F.2d 357, 371 (4th Cir. 1975). Accordingly, Appellant's argument is without merit.

II. A RULING ON A MOTION UNDER RULE 39(B), SCRCP, IS NOT IMMEDIATELY APPEALABLE.

Appellant contends that the trial court abused its discretion in denying Appellant a jury trial under Rule 39(b), SCRCP. See App. Br. 7-10. The trial court's ruling on Appellant's motion under Rule 39(b), SCRCP, is not immediately appealable.⁴

"An order denying a party a jury trial is not immediately appealable unless it deprives him of a mode of trial to which he is entitled as a matter of right." Rowe Furniture Corp. v. Carolina Wholesale Furniture Co., 292 S.C. 575, 576, 357 S.E.2d 725, 725 (Ct. App. 1987) (quoting C & S Real Estate Servs. v. Massengale, 290 S.C. 299, 300, 350 S.E.2d 191, 192 (1986)). Further, a ruling on a Rule 39(b) motion, where the trial court exercises its discretion in ordering a jury or non-jury trial, is interlocutory and not directly appealable. Hannah v. United Refrigeration Servs., Inc., 305 S.C. 394, 394, 409 S.E.2d 360, 361 (1991).

The failure to make a timely demand for a jury trial waives the right under Rule 38(b), SCRCP. See Rule 38(d), SCRCP. Rule 38(d), SCRCP, provides the failure of a party to serve a demand for a jury trial within ten days of the service of the last pleading constitutes a waiver of trial by jury. Once a party waives its right to a jury trial under Rule 38(d), SCRCP, it is limited to moving for a jury trial under Rule 39(b), SCRCP. Rule 39(b), SCRCP, provides:

⁴ Respondent filed a motion to dismiss this appeal on October 7, 2013. In its motion, Respondent contended that the trial court's ruling on Appellant's motion under Rule 39(b), SCRCP, was not immediately appealable.

Issues of law and issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court or may be referred to a master as provided in Rule 53; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by jury of any or all issues.

In the instant case, Appellant did not request a jury trial in its pleadings nor did it make a demand for a jury trial within ten days of the service of the last pleading. Indeed, Appellant did not request a jury trial for more than two years. Presented with these facts, the trial court properly ruled Appellant waived its right to a jury trial under Rule 38, SCRCF. See Rule 38(d), SCRCF (stating a party's failure to demand a jury trial as the rule requires constitutes a waiver of the right to a jury trial).

Accordingly, having waived its right to a jury trial, Appellant moved under Rule 39(b), SCRCF, asking the trial court to use its discretion and order a jury trial, anyway. Pursuant to Rule 39(b), SCRCF, the trial court denied Appellant's motion. In its order denying Appellant's motion, the trial court stated, "[t]here is no evidence of the existence of exceptional circumstances to transfer the case to the jury roster, so the Court decline[s] to exercise its discretion to transfer the case to the jury roster." Because the question of whether to order a jury trial in this case is a matter within the discretion of the trial court, Appellant is not entitled to a jury trial as a matter of right. Accordingly, this appeal should be dismissed as premature. See Hannah, 305 S.C. at 394, 409 S.E.2d at 361 ("A ruling on a Rule 39(b) motion is within the discretion of the [trial court] and is interlocutory and not directly appealable."); Rowe, 292 S.C. at 576, 357 S.E.2d at 725 (holding a decision denying a jury trial based on Rule 39(b), SCRCF, is discretionary and not immediately appealable).

III. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING APPELLANT A JURY TRIAL UNDER RULE 39(B), SCRCF.

Appellant contends that the trial court abused its discretion in denying Appellant a jury trial under Rule 39(b), SCRCP. See App. Br. 7-10. Appellant's argument is meritless.

Rule 39(b), SCRCP, provides: "notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by jury of any or all issues." While Rule 39, SCRCP, appears to provide a safety net for a party failing to comply with Rule 38, SCRCP, its use should not emasculate the requirement of Rule 38(b), SCRCP, that a demand for a jury trial be timely made.

In King v. Shorter, the court held that the trial court did not abuse its discretion in granting a motion to amend an answer to assert a counterclaim for unfair trade practices while denying a motion to transfer the case to the jury roster. 291 S.C. 501, 503, 354 S.E.2d 402, 403 (Ct. App. 1987). In King, the court noted three previous sets of pleadings had been filed without a request for a jury trial being made. Id. at 502, 354 S.E.2d at 403. King supports the contention that a party asking for a trial court to exercise its discretion under Rule 39(b), SCRCP, should advance some meaningful reason for doing so. Many courts construing the analogous federal rule require as much.⁵

In Satcher v. Satcher, the court held that the trial court properly exercised its discretion in denying Chip Satcher's request for a jury trial under Rule 39(b), SCRCP.⁶ 351 S.C. 477, 490, 570 S.E.2d 535, 542 (Ct. App. 2002). In Satcher, the court noted that Chip Satcher did not

⁵ See McCray v. Burrell, 516 F.2d 357, 371 (4th Cir. 1975) (affirming denial of Rule 39(b) motion in absence of "exceptional circumstances"); 8 JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 39.31 (3d ed. 2013) (providing many federal courts hold that a Rule 39(b) motion should be granted only when special circumstances are shown).

⁶ Respondent notes that the court of appeals considered Chip Satcher's appeal of the ruling on the 39(b) motion after final judgment had been entered in the case. 351 S.C. 477, 490, 570 S.E.2d 535, 542 (Ct. App. 2002). As explained above, a final judgment has not yet been entered in the instant case.

request a jury trial until after filing his second amended complaint. Id. Further, the court provided that the trial court considered the following factors in denying his 39(b) motion: the issues involved; prejudice to Chip Satcher; timeliness of the request; the docket; and the reason for the delayed jury request. Id. Satcher further supports the contention that a party asking for a trial court to exercise its discretion under Rule 39(b), SCRPC, should advance some meaningful reason for doing so.

It is within the trial court's discretion to grant or deny a Rule 39(b), SCRPC, motion. Rule 39(b), SCRPC. Regardless of whether Rule 39(b), SCRPC, requires a party to advance a meaningful reason for a trial court to exercise its discretion, appellate courts will rarely interfere with the trial court's decision to grant or deny a Rule 39(b) motion. See Patterson v. McNeill-Patterson, 312 S.C. 471, 472 n.3, 441 S.E.2d 328, 329 n.3 (Ct. App. 1994); 8 JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 39.31 (3d ed. 2013) (providing appellate courts are loathe to interfere with Rule 39(b) rulings that are committed to the discretion of the trial court that is in the best position to understand the facts of the case). Further, an abuse of discretion occurs only when the trial court's order is controlled by an error of law or when there is no evidentiary support for the trial court's factual conclusions. Fairchild v. S.C. Dep't of Transp., 398 S.C. 90, 108, 727 S.E.2d 407, 416 (2012).

The trial court properly exercised its discretion in denying Appellant's Rule 39(b), SCRPC, motion. The record establishes that Appellant has advanced no meaningful reason for the trial court to grant Appellant a jury trial. While Appellant contends that its "belief and intent to conduct a jury trial was known early on in the discovery phase[.]" Appellant did nothing to exercise its right to a jury trial. See App. Br. 9. Appellant cites to certain deposition transcripts to support its contention that it believed it had a right to a jury trial. Appellant essentially argues

that because during deposition questioning it asked witnesses a few questions aimed at striking a jury, it is entitled to a jury trial. While Appellant may have had a subjective belief that this case was going to be tried by a jury, its subjective belief is no substitute for complying with the rules regarding demanding a jury trial and is certainly not a meaningful reason for a trial court to grant a jury trial—especially when Appellant did not formally request a jury trial for over two years. See Rule 38(d), SCRCF (providing the failure of a party to serve a demand for a jury trial within ten days of the service of the last pleading constitutes a waiver of a jury trial); King, 291 S.C. at 502-03, 354 S.E.2d at 403; Satcher, 351 S.C. at 490, 570 S.E.2d at 542 (providing a party asking for a trial court to grant a jury trial under Rule 39(b), SCRCF, must advance some meaningful reason for doing so).

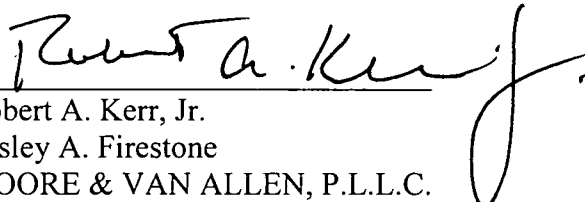
Further, the facts and circumstances militate in favor of a non-jury proceeding. A non-jury trial would result in a substantial saving in time for the trial court and the parties, and it would reduce the length and complexity of the case. Moreover, Respondent would be prejudiced by having to incur the additional fees and costs a jury trial would entail. If the case is tried non-jury there is an opportunity for counsel to brief matters and to have oral argument on novel issues. For example, this case was commenced to foreclose a mortgage after a loan matured and was not renewed or refinanced. Appellant has asserted legal counterclaims and has raised an unclean hands argument with regard to the preparation of certain loan documentation. In a non-jury trial, the trial court can address these issues together, seamlessly and without delay. In a jury trial setting, the trial court will need to take time to address motions in limine and potentially address a number of issues out of the presence of the jury. Accordingly, the trial court properly exercised its discretion in denying Appellant's motion to transfer.

CONCLUSION

For the foregoing reasons, the trial court's orders denying Appellant's motion to transfer and motion to alter or amend should be affirmed.

Respectfully submitted,

February 10, 2014



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THE STATE OF SOUTH CAROLINA
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APPEAL FROM BERKELEY COUNTY
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The Honorable Stephanie P. McDonald, Circuit Court Judge

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First National Bank of Spartanburg, Div. of First National Bank of the South,
.....Respondent,

v.

Liberty Village, LLC,
.....Appellant.

COUNTER DESIGNATION OF MATTER TO
BE INCLUDED IN THE RECORD ON APPEAL

In addition to the designations of Appellant, Respondent proposes the following
to be included in the Record on Appeal:

1. Plaintiff's Amended Reply to Counterclaim of Defendant, dated March 1, 2010
2. Berkeley County Non-jury Trial Docket Notice, dated March 21, 2012
3. Order Denying Defendant's Motion to Alter or Amend Judgment, dated May 1, 2013

Respondent certifies that this designation contains no matter which is irrelevant to
this appeal.

February 10, 2014

Respectfully submitted,



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Court of Common Pleas

The Honorable Stephanie P. McDonald, Circuit Court Judge

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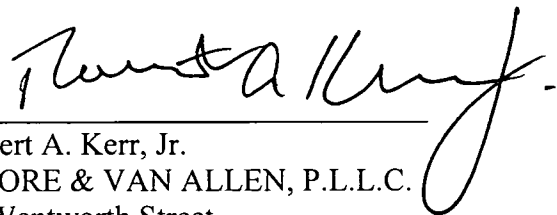
v.

Liberty Village, LLC,
.....Appellant.

PROOF OF SERVICE

The undersigned hereby certifies that on February 10, 2014, true and correct copies of the **Initial Brief of Respondent and Counter Designation of Matter to be Included in the Record on Appeal** in the above-referenced matter were served on the parties listed below, by United States mail, proper postage prepaid addressed as follows:

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**RE: First National Bank of Spartanburg, Div. of First National Bank
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Appellate Case No. 2013-001258**

Dear Ms. Kitchings:

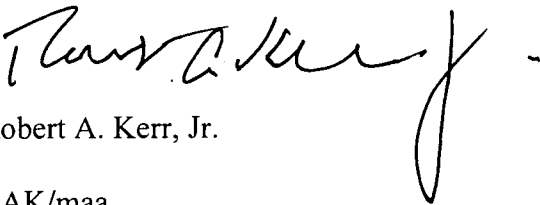
Enclosed for filing, please find an original and one (1) copy of each of the following:

- (1) Initial Brief of Respondent;
- (2) Respondent's Counter Designation of Matter to be Included in the Record on Appeal; and
- (3) Proof of Service.

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

Yours very truly,

MOORE & VAN ALLEN, PLLC



Robert A. Kerr, Jr.

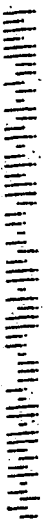
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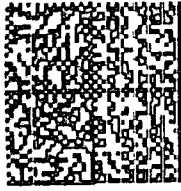
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