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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell Scarborough, Master-In-Equity

Appellate Case No. 2013-002065

Frank Cook and Judith Cook, Appellants,

v.

Bank of America, N.A., Respondent.

INITIAL BRIEF OF RESPONDENT

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TABLE OF AUTHORITIES

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QUESTIONS PRESENTED

1. Whether the Master-in-Equity properly retained jurisdiction even though all parties did not consent to the order of reference and were not in default.

2. Whether Appellants asserted compulsory, legal counterclaims that entitled them to a jury trial.

STATEMENT OF THE CASE

This is an appeal from an order of the Charleston County Master-in-Equity granting Respondent's Motion for Summary Judgment. Respondent filed a foreclosure action against Frank Cook and Judith Cook ("Appellants") on April 20, 2012, in the Charleston County Court of Common Pleas in Civil Action No. 2012-CP-10-02651 (the "Complaint"). The Complaint sought to foreclose on real property known as 13 Poplar St, Charleston, SC 29403 (the "Property").

Appellants timely filed an answer on May 9, 2012 ("Answer"), but did not serve the Answer on Respondent's counsel of record. *See* Letter to Judge Scarborough dated August 16, 2012. Respondent then filed an affidavit of default and a motion for an order of reference. The clerk of court executed an order of reference on June 18, 2012 ("Order of Reference"). Appellants filed an amended answer without leave of court on June 28, 2012 ("Amended Answer"). Appellants then filed a motion to rescind the default and the Order of Reference ("Motion to Rescind"). The Master-in-Equity held a hearing on September 18, 2012 on the Motion to Rescind and issued an order overturning the entry of default, but denying the motion to rescind the Order of Reference.

The Appellants appealed the Master's Order Denying their Motion to Rescind to the South Carolina Court of Appeals. By order dated January 29, 2013, the Court of Appeals dismissed the appeal. Respondent then filed a motion for summary judgment. A hearing was held on the motion for summary judgment and the Master-in-Equity granted the motion by order dated July 22, 2013 ("Summary Judgment Order"). This appeal then followed.

ARGUMENT

I. THE MASTER-IN-EQUITY PROPERLY RETAINED JURISDICTION BECAUSE RULES 53(B) AND 71 OF THE SOUTH CAROLINA RULES OF CIVIL PROCEDURE SPECIFICALLY DIRECT THAT ALL FORECLOSURE ACTIONS SHALL BE REFERRED TO A MASTER-IN-EQUITY.

Appellants contest the jurisdiction of the Master-in-Equity to hear the case, alleging that the Order of Reference was improper. However, pursuant to rule and well-established South Carolina precedent, the Master-in-Equity properly retained jurisdiction in this case.

Rule 53(b) of the South Carolina Rules of Civil Procedure states as follows: "In an action where the parties consent, in a default case, or an action for foreclosure, some or all of the causes of action in a case may be referred to a master or special referee by order of a circuit judge or the clerk of court." Rule 53(b), SCRCP (emphasis added).[1] The rule clearly states that there are three distinct instances in which an action may be referred to a master: (1) by consent of the parties; (2) in a default case; or (3) in a foreclosure case. Rule 53(b) clearly authorizes the referral of foreclosure cases, regardless of the consent of the parties or the case's default status. Rule 71 goes a step further, stating that all actions to foreclose liens "shall ordinarily be referred to a master pursuant to Rule 53." Rule 71, SCRCP (emphasis added).

"Pursuant to Rule 53, SCRCP, a master has no power or authority except that which is given to him by an order of reference." *Wells Fargo Bank, N.A. v. Smith*, 398 S.C. 487, 492, 730 S.E.2d 328, 331 (Ct. App. 2012). Once a matter is referred to a master, he or she "shall exercise all power and authority [that] a circuit judge sitting without a jury would have in a similar matter." Rule 53(c), SCRCP. Therefore, when a

[1] Appellants cite an older, outdated version of Rule 53 in their initial brief that omits the key reference that explicitly allows referral of actions for foreclosure.

case is referred to a master under Rule 53, that master has the power to conduct hearings in the same manner as the circuit court unless the order of reference limits the master's powers. *Smith Cos. of Greenville, Inc. v. Hayes*, 311 S.C. 358, 360, 428 S.E.2d 900, 902 (Ct. App. 1993); *Wachovia Bank of S.C, N.A. v. Player*, 341 S.C. 424, 535 S.E.2d 128 (2000) ("The proper construction of the order of reference is that it gives the master jurisdiction over the case and all matters arising from it until the master has performed all the duties assigned to him.")

In the present case, the Order of Reference authorized the Master-in-Equity to "enter final judgment" and did not limit his power in any way. *See* Order of Reference. The Master-in-Equity therefore properly determined that he should retain jurisdiction in this case because "the responsive pleading filed by [Appellants] does not raise legal questions and the underlying foreclosure is an action in equity." (Order of Reference at 2.)

Appellants' argument is unsupported by law because it is based on a previous version of Rule 53(b). All of the cases cited in Appellants' brief regarding orders of reference were decided prior to the 2002 amendment to Rule 53(b), which added foreclosure actions to the plain language of Rule 53(b). *See* pre-2002 versions of Rule 53, SCRCP. Appellants' argument should therefore be disregarded. The Order of Reference properly entered by the clerk of court gave the Master-in-Equity jurisdiction to hear this foreclosure case, by the plain language of Rule 53(b) and Rule 71. Because the Master-in-Equity had the authority to enter final judgment in this case pursuant to the Order of Reference, the Court must uphold the Summary Judgment Order.

II. APPELLANTS ARE NOT ENTITLED TO A JURY TRIAL BECAUSE THEY DO NOT RAISE ANY COMPULSORY LEGAL COUNTERCLAIMS.

Appellants next contend they are entitled to a jury trial simply because they made a demand for one in their Amended Answer. (Initial Br. of App. 7.) Even though the South Carolina Constitution provides "[t]he right of trial by jury shall be preserved inviolate," S.C. Const. art. I, § 14, there is no right to trial by jury for equitable actions. *Lester v. Dawson*, 327 S.C. 263, 267, 491 S.E.2d 240, 242 (1997). Because a foreclosure action is an action in equity, Appellants do not have an automatic right to a jury trial in this matter. *Gardner v. Travis*, 316 S.C. 315, 450 S.E.2d 54 (Ct. App. 1994). The only time a right to a jury trial arises in an equitable action is if the defendant asserts a compulsory counterclaim that alleges an action at law. *Id.*

Appellants' Answer does not contain any counterclaims and therefore provides no grounds to demand a jury trial. (*See* Ans.) Appellants' Amended Answer contains two affirmative defenses: (1) a defense asserting a combination of statute of limitations, waiver, estoppel, and laches; and (2) a defense alleging non-compliance with contractual obligations. (Am. Ans. 3-4).[2] The first defense in the Amended Answer does not contain a counterclaim, so a jury trial demand is unavailable. *Id.* at 3. Although not clearly plead, the second affirmative defense could be construed as a counterclaim for violations of the Real Estate Settlement Procedures Act ("RESPA"). *Id.* at 5. Appellants claim that Respondent "is in violation of...[RESPA]... for not notifying borrowers of the transfer of

[2] The record is unclear on whether the trial court permitted the filing of the Amended Answer; however, neither the original Answer nor the Amended Answer contain compulsory legal counterclaims so this question is irrelevant.

their loans" and request an award of actual damages, costs, attorney's fees and statutory damages of $1,000.00 (the "RESPA Claim").[3]

Appellants are only entitled to a jury trial on the RESPA Claim if this Court finds it is both (1) an action at law and (2) compulsory. *See Gardner*. First, there is no dispute that Appellant's RESPA claim is an action at law. *See Normandy Corp. v. S.C. DOT*, 386 S.C. 393, 688 S.E.2d 136 (Ct. App. 2009) (A claim is an action at law if it involves the interpretation of a statute.)

However, Appellants' RESPA Claim is clearly permissive, not compulsory. "By definition, a counterclaim is compulsory only if it arises out of the same transaction or occurrence as the opposing party's claim." *First–Citizens Bank & Trust Co. of S.C. v. Hucks*, 305 S.C. 296, 298, 408 S.E.2d 222, 223 (1991); *see also* Rule 13(a), SCRCP. The test for determining whether a counterclaim is compulsory is if there is a "logical relationship" between the claim and the counterclaim. *Mullinax v. Bates*, 317 S.C. 394, 396, 453 S.E.2d 894, 895 (1995).

In *N.C. Fed. Sav. & Loan Ass'n v. DAV Corp.*, 298 S.C. 514, 518, 381 S.E.2d 903, 905 (1989), the South Carolina Supreme Court adopted the "logical relationship" test and held DAV's counterclaim was compulsory because "there [was] a logical relationship between the enforceability of the note which [was] the subject of the foreclosure action and the validity of the purported oral agreement which, if performed, would have avoided default on the note by the joint venture." In essence, in a foreclosure action, a court determines whether there is a "logical relationship" by asking if a counterclaim asserted therein would affect the note holder's right to enforce the note and foreclose the

[3] Although Appellants do not specify under which portion of RESPA they are counterclaiming, it is presumably 12 USCS § 2605, as indicated below.

mortgage. *Advance Intern., Inc. v. N.C. Nat'l Bank of S.C.*, 316 S.C. 266, 269–70, 449 S.E.2d 580, 582 (Ct.App.1994), *aff'd in part, vacated in part*, 320 S.C. 532, 466 S.E.2d 367 (1996). So in a foreclosure action, a counterclaim is only compulsory if it affects the enforceability of the note and mortgage. *Mullinax* at 396, 453 S.E.2d at 895; *N.C. Fed. Sav. & Loan Ass'n* at 518, 381 S.E.2d at 905.

Here, there is no "logical relationship" between the enforceability of the promissory note, which is the subject of the foreclosure action, and the allegation that Respondent violated RESPA. Even if Appellants had prevailed on their RESPA Claim, it would have had no effect on Respondent's right to enforce the promissory note and foreclose the mortgage. RESPA requires loan servicers to "notify the borrower in writing of any assignment, sale, or transfer of the servicing of the loan to any other person." 12 USCS § 2605(b)(1). The notice is required to be made "not less than 15 days before the effective date of the transfer of the servicing." 12 USC § 2605(b)(2)(A). Damages for failure to comply with these provisions are limited to actual damages sustained by the borrower and, in the case of a pattern or practice of non-compliance, additional damages up to $2,000. 12 USC § 2605(f)(1)(A)-(B). In other words, damages under RESPA are strictly monetary. There is no provision of either state or federal law providing that violation of this section of RESPA has any effect on the enforceability of the note. Any damages that would have been obtained by Appellants due to the alleged violation of RESPA would have simply been a monetary set-off to Plaintiff's foreclosure judgment, not a bar to foreclosure. *See Wells Fargo v. Smith* at 499, 740 S.E.2d at 334 (stating a counterclaim raised in foreclosure actions is permissive if it only entitles the borrower to actual, monetary damages, not rescission of the note and mortgage).

If Appellants had brought the RESPA Claim in an affirmative suit against Respondent, they clearly would have been entitled to a jury trial. But, by asserting a permissive counterclaim in an equitable foreclosure action, Appellants waived their right to a jury trial. *See Wells Fargo v. Smith* at 499, 740 S.E.2d at 335, *citing N.C. Fed. Sav. & Loan Ass'n*, 294 S.C. at 30, 362 S.E.2d at 310 ("[W]here a defendant in an action begun in equity asserts a permissive counterclaim that is legal in nature, the defendant is deemed to have waived the right to a jury trial on the issues raised by the counterclaim."). Therefore, Appellants are not entitled to a jury trial and this Court should uphold the Summary Judgment Order.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests the Court to uphold the judgment of the trial court and affirm the Summary Judgment Order.

Respectfully submitted,

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