ORIGINAL

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case No. 2014-000377

DRV FONTAINE, LLC, ... Respondent,

v.

FONTAINE BUSINESS PARK, LLC, FONTAINE BUSINESS PARK 2, LLC, FONTAINE BUSINESS PARK 3, LLC, FONTAINE BUSINESS PARK 4, LLC, FONTAINE BUSINESS PARK 5, LLC, FONTAINE BUSINESS PARK 6, LLC, FONTAINE BUSINESS PARK 7, LLC, FONTAINE BUSINESS PARK 8, LLC, FONTAINE BUSINESS PARK 9, LLC, FONTAINE BUSINESS PARK 10, LLC, FONTAINE BUSINESS PARK 11, LLC, FONTAINE BUSINESS PARK 12, LLC, FONTAINE BUSINESS PARK 13, LLC, FONTAINE BUSINESS PARK 14, LLC, FONTAINE BUSINESS PARK 15, LLC, FONTAINE BUSINESS PARK 16, LLC, FONTAINE BUSINESS PARK 17, LLC, FONTAINE BUSINESS PARK 18, LLC, FONTAINE BUSINESS PARK 19, LLC, FONTAINE BUSINESS PARK 20, LLC, FONTAINE BUSINESS PARK 21, LLC, FONTAINE BUSINESS PARK 22, LLC, FONTAINE BUSINESS PARK 23, LLC, FONTAINE BUSINESS PARK 24, LLC, FONTAINE BUSINESS PARK 25, LLC, FONTAINE BUSINESS PARK 26, LLC, FONTAINE BUSINESS PARK 27, LLC, FONTAINE BUSINESS PARK 28, LLC, FONTAINE BUSINESS PARK 29, LLC, FONTAINE BUSINESS PARK 30, LLC, and FONTAINE BUSINESS PARK 31, LLC, ... Appellants.

FINAL REPLY BRIEF OF APPELLANTS

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II. An order from one circuit judge is the law of the case and cannot be reversed by another circuit judge. Here, before Judge Cooper granted the Investor's oral Motion for Order of Reference, Judge Lee ordered that the Motion would not be heard until the legal issues in the case were adjudicated. Accordingly, Judge Cooper's subsequent Order of Reference is invalid and must be reversed.

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STATEMENT OF THE ISSUES ON APPEAL

I.

A defendant in a foreclosure action is entitled to a jury trial on legal counterclaims in the absence of a valid waiver. Here, the contractual jury waivers do not apply to the Owners' non-contractual counterclaims, including those for breach of fiduciary duty, economic duress, tortious interference with contractual and business relations, and unfair trade practices, because those claims arose in connection with duties imposed by law, not the Loan Documents. Accordingly, the trial court erred in granting the Investor's Motion to Strike the Owners' jury trial demand.

II.

An order from one circuit judge is the law of the case and cannot be reversed by another circuit judge. Here, before Judge Cooper granted the Investor's oral Motion for Order of Reference, Judge Lee ordered that the Motion would not be heard until the legal issues in the case were adjudicated. Accordingly, Judge Cooper's subsequent Order of Reference is invalid and must be reversed.

The Owners incorporate, by reference, their Final Brief, including all defined terms set forth therein. For a Reply to the Final Brief of Respondent filed by the Investor, the Owners would show this Honorable Court as follows:

ARGUMENT

I. THE OWNERS ARE ENTITLED TO A JURY TRIAL ON THEIR LEGAL COUNTERCLAIMS BECAUSE THEY ARISE IN CONNECTION WITH DUTIES IMPOSED BY LAW.

A. The Owners' counterclaims arise in connection with obligations imposed by law, not any obligation imposed by the Loan Documents, or any other contract between them and the Investor.

In their Initial Brief, the Owners argued that their counterclaims for breach of fiduciary duty, economic duress, tortious interference with contract and business relations, and for breach of the Unfair Trade Practices Act do not exist "with regard to the Loan Agreement," the "Mortgage," or "any other Loan Document." (Appellants' Br. 19) They also asserted that they are not actions "arising in connection therewith." (*Id.*) In its Initial Brief, the Investor focuses on the phrase "arising in connection therewith" and declares that all of the Owners' counterclaims arise from a contract between them and the Investor. (Appellee's Br. 13 *et seq.*). As demonstrated in the Owners' Initial Brief, and as will be further set forth below, such a declaration is contrary to applicable South Carolina law.

The Owners' counterclaims arise from duties imposed by law, not by any related contract. "An affirmative legal duty may be created by statute, a contractual relationship, status, property interest, or some other special circumstance." *Madison v. Babcock Ctr., Inc.*, 371 S.C. 123, 136, 638 S.E.2d 650, 656–57 (2006). The Owners' tort claims arise from the Investor tortfeasor's legal relationship to them. *S. Carolina State Ports Auth. v. Booz-Allen & Hamilton, Inc.*, 289 S.C. 373, 376, 346 S.E.2d 324, 325 (1986). These duties arise independent from any contractual relationship between the parties herein. *See Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 320 S.C.

49, 55, 463 S.E.2d 85, 89 (1995) (noting that tort claims arise from a duty that is separate and distinct from the contract between the parties).

For example, the Owners' claim for breach of fiduciary duty arises as a matter of law from the special circumstances created by the parties' business relationship: One standing in a fiduciary relationship to another is subject to liability to the other for harm resulting from a breach of duty imposed by that relationship. *Moore v. Moore*, 360 S.C. 241, 253, 599 S.E.2d 467, 473 (Ct. App. 2004). The tort of economic duress allows for damages to an aggrieved party in order "to prevent a stronger party from presenting an unreasonable choice of alternatives to a weaker party in a bargain situation." *Troutman v. Facetglas, Inc.*, 281 S.C. 598, 316 S.E.2d 424 (Ct. App. 1984). Likewise, the Owners' claims for tortious interference with a contractual and business relations arise from the Investor's duty to not interfere unjustly with the Owners' existing contractual and business relationships with other parties. *Kinard v. Crosby*, 315 S.C. 237, 240, 433 S.E.2d 835, 837 (1993). Finally, the Owners' Unfair Trade Practices claim also arises as a matter of law. That claim arises in connection with the Investor's breach of its statutory duty to refrain from acts that are offensive to public policy, immoral, unethical, or oppressive. *See Bessinger v. BI-LO, Inc.*, 366 S.C. 426, 432, 622 S.E.2d 564, 567 (Ct.App. 2005).

If a cause of action is equitable and an asserted counterclaim is legal and compulsory, the counterclaimant is entitled to a jury trial. *Wachovia v. Blackburn*, 407 S.C. 321, 755 S.E.2d437 (2014). Here, the Owners' counterclaims are both legal and compulsory.[1] They are, therefore, entitled to a jury trial on those counterclaims.

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1 A counterclaim is compulsory if it arises out of the same transaction or occurrence as the opposing party's claim and does not require the presence of a third party. SCRCP 13(a); *N. Carolina Fed. Sav. & Loan Ass'n v. DAV Corp.*, 298 S.C. 514, 517, 381 S.E.2d 903, 905 (1989). Here, the interactions between the Owners and the Investor included both legal and contractual obligations, but the related facts are largely the same. Moreover, *res judicata* and/or issue preclusion would potentially bar a subsequent suit on the legal counterclaims if they were not plead herein.

B. The Investor's repetitive argument that all disputes between the parties have their genesis in the contractual relationship created by the Loan Documents ignores the independent legal duties it owed to the Owners.

Beginning on Page 7, and throughout the remainder of its Initial Brief, the Investor contends that the "cornerstone" or "linchpin" of the Owner's legal counterclaims are no more than "axiomatic" extensions of their breach of contract claims (Appellee's Br. 7 *et seq.*). This argument ignores the independent legal duties owed by the Investor to the Owners (as articulated above), and over-extends the language of the contractual jury trial waivers at issue.

When the Investor addresses the language of the jury waivers in its Initial Brief, it stretches the phrase "arises in connection therewith [the Loan Documents]" to extend the contractual jury trial waivers to every potential interaction and relationship between the parties. The Investor advances this construction without reference to any legal authority or principle for the interpretation of contracts as if the Investor's *ipse dixit* is sufficient to carry the day. It is not. Simply stated, and as set forth above, the Owners' tort counterclaims do not "arise in connection" with the Loan Documents because the *sine qua non* of a tort claim is a duty independently imposed by law--not a private contract.

Next, the Investor takes the Owners' argument that they are entitled to a jury trial on their unwaived legal counterclaims, and restates it in a tautological fashion (Appellee's Br. 12)--apparently with the belief that doing so is dispositive of the issue. It is not. Regardless of the semantic presentation, the issue is the same: Do the contractual jury trial waivers apply to the Owners' compulsory legal counterclaims? Respectfully, and as set forth in their Initial Brief (and otherwise herein), the Owners assert that they do not. The Investor's misguided assertion of misquotation, and determination to ignore the related independent breaches of duty through its repetitive breach of contract incantations, does not change that fact.

The Investor then turns to the Owners' equitable estoppel argument, claiming that it is not preserved for appeal, and that it is otherwise without merit. Once again, the Investor has avoided

addressing the issue before the Court. The Investor claims that the Owners' did not argue that the Investor engaged in misconduct in obtaining the jury trial waiver. This goes without saying. The crux of the Owners' position is that the Investor was not involved in the origination of the Loan Documents, did not have any experience as a lender under such loan transactions, and then proceeded to simply ignore the obligations imposed by the Loan Documents, statutes, common law legal duties, and the special relationship between the parties in its zeal to eventually gain title to the real property collateral in a textbook "loan-to-own" plan. The Owners have no reason to argue that the Investor--who arrived after the fact--engaged in misconduct during a transaction to which it was not a party. The Investor's argument in this regard is a *non sequitur.* Likewise, the Investor's argument about the Owners' decision not to challenge the trial court's ruling that the jury trial waiver is "conspicuous and unambiguous" or that its assent was "knowing and voluntary" is also a *non sequitur.* The Owners do not contest the existence of the jury waivers. They are plain to see. Nor do the Owners contest that those rulings are law of the case. Instead, the Owners' contest the applicability of the waivers to their counterclaims. That is where the trial court erred.

Next, the Investor resorts to a bizarre misstatement of the Owners' equitable estoppel argument and dismisses it as "nonsensical." The Investor misunderstands the equitable estoppel argument made by the Owners in their Initial Brief. In their Initial Brief, the Owners argued that the Investor should be equitably estopped from enforcing the jury waivers because the Investor engaged in "conduct that is arbitrary, capricious, outrageous, and unconscionable." Moreover, the Owners identified twenty-three (23) points of outrageous conduct in support of that argument, to which the Investor offers no response. The Investor's approach is understandable, given the utter indefensibility of its conduct during its relationship with the Owners.

Finally, the trial court's citation to *Collier v. Green*, 244 S.C. 367, 137 S.E.2d 277 (S.C. 1964), is not the law of the case herein. In asserting to the contrary, the Investor advances a law of the case

argument that is unprecedented in South Carolina jurisprudence. Under the law of the case doctrine, a party is precluded from re-litigating, *after an appeal*, matters that were either not raised on appeal, but should have been, or raised on appeal, but expressly rejected by the appellate court. *Sloan Const. Co. v. Southco Grassing, Inc.*, 395 S.C. 164, 169-70, 717 S.E.2d 603, 606 (2011). A straightforward application of this doctrine reveals that the Owners' have challenged the trial court's ruling on the applicability of the jury trial waiver provisions in the Loan Documents. After this appeal, the Owners will have no reason to re-litigate the applicability of the jury trial waivers under *Collier*. Moreover, the law of the case doctrine has never been construed to require an explicit discussion of each of the trial court's discrete citations to authority. Adopting such a rule would needlessly inject chaos into the civil justice system by forcing litigants and appellate courts to engage in petty preciosity in every matter. Lastly, the Owners see no need to discuss *Collier* because, as a plain reading of both parties' Initial Briefs demonstrates, this case should be decided under the Supreme Court's decision in *Blackburn*.[2]

II. THE ORDER OF REFERENCE IS INVALID UNDER THE LAW OF THE CASE DOCTRINE BECAUSE JUDGE LEE HAD ALREADY DECIDED THAT THE MOTION FOR ORDER OF REFERENCE WOULD NOT BE HEARD UNTIL ALL LEGAL ISSUES HAD BEEN RESOLVED.

Here, the Investor's Motion for Order of Reference was heard by Judge Alison Lee on February 1, 2013, and taken under advisement. (R. 733, *Notice of Motion Scheduling,* MORDRE, Jan. 4, 2013; R. 782-783, *Motion Trans.*, pp. 22-23). In the Order Appointing Receiver, Judge Lee ruled that: "The Court declined to hear Plaintiff's Motion for Order of Reference *pending the resolution of the legal claims asserted in this matter*" (R. 2, *Order Appt. Rec.*, p. 2; Italics added). That aspect of Judge Lee's decision has not been challenged by any party. Nevertheless, during the hearing on the Investor's

2 Notwithstanding the Investor's representation to the contrary, in their Initial Brief, the Owners not only acknowledged that *Blackburn* was reversed after they filed the instant appeal, but they have specifically set forth why that opinion is distinguishable from the situation here. Rather than repeat the related arguments herein, the Owners direct the Court to that particular section of their Initial Brief.

Motion to Strike Jury Demand, the Investor mentioned the Order of Reference issue (R. 604, *Notice of Motion Scheduling,* MSTRIK, Dec. 18, 2013; R. 734, MSTRIK *Trans.*, Jan. 13, 2014).

Before those extemporaneous remarks by Investor's counsel, the Owners received no notice that any Motion for Order of Reference would be considered or ruled upon by Judge Cooper. It should go without saying that procedural due process requires "adequate notice of the proceeding." S.C. Const. art. 1, § 22; *Stono River Envtl. Protection Ass'n v. S.C. Dep't of Health and Envtl. Control*, 305 S.C. 90, 94, 406 S.E.2d 340, 342 (1991); *Kurschner v. City of Camden Planning Comm'n*, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008). The requirement of notice takes on even more significance when one party extemporaneously seeks review of a prior ruling through passing comments related to a question that has already been considered and determined by a different judge.

The Investor seeks to avoid a ruling on this issue in misplaced reliance on the argument that the issue is not preserved for appeal. Given, however, that Judge Cooper did not have the authority to hear the related Motion, the issue is one of subject matter jurisdiction, which can never be waived. *Atlanta Skin and Cancer v. Hallmark Gen'l Partners*, 320 S.C. 113, 463 S.E.2d 600 (1995) (subject matter jurisdiction may not be waived or conferred by consent). Moreover, if this Court does not review the issue, the parties will be remanded to the trial court, where they will be stuck in the unenviable position of having to litigate this matter under competing orders from judges of equal authority.

In any event, the Investor's interpretation of Judge Lee's order is incorrect. The only reasonable interpretation of Judge Lee's order is that the legal counterclaims must be decided before the Motion for Order of Reference. This decision is in keeping with the Supreme Court's decision in *Blackburn.* Moreover, the Investor's attempt to minimize the importance of the hearing on the Motion for Order of Reference is disingenuous. During that hearing, the Investor vigorously sought both an Order of Reference and the Appointment of a Receiver. Judge Lee denied the former, and granted the latter. Accordingly, Judge Cooper was precluded from revisiting the issue. The jury trial

issue was not before Judge Lee, and Judge Cooper's subsequent ruling does not affect the validity of her decision to mandate that, in accordance with *Blackburn*, the legal counterclaims be heard before the Motion for Order of Reference.

CONCLUSION

Premises considered, the Order Granting the Motion to Strike and the Order Granting the Motion for Order of Reference should be reversed, and this matter should be remanded for a jury trial. Additionally, and in accordance with the law of the case, this matter should be remanded for a resolution of all legal issues before the Motion for Order of Reference is heard.

Date: January 30, 2015.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned certify that this Final Reply Brief complies with Rule 211(b), SCACR.

This 30th day of January 2015.

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PROOF OF SERVICE

We certify that a copy of the Final Reply Brief of Appellants was served on the Appellee's counsel by U.S. Mail, postage prepaid, addressed to Paul D. Hamill and Robert L. Widener, P.O. Box 11390, Columbia, S.C. 29211.

This 30th day of January 2015.

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