

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

The Hon. J. Mark Hayes, Circuit Court Judge

Appellate Case No.: 2015-00650

75097
RECEIVED

APR 16 2015

SC Court of Appeals

Provident Community Bank,

Respondent,

v.

Delbert R. Tangeman, T&T Investments
of Spartanburg, LLC, Barry D. Mallek,
Alice R. Mallek, Bureaus Investment
Group #8, LLC and Donald C. Coggins, Jr.,

Of whom, Delbert R. Tangeman is

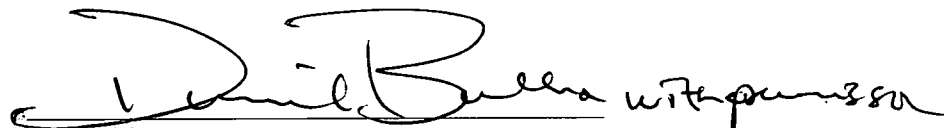
Appellant.

MOTION TO DISMISS APPEAL

Respondent hereby moves to dismiss the Appeal filed by the Appellant. This Motion is made on the grounds that the Order from which the Appeal is taken is interlocutory and not immediately appealable, and is not timely.

Respectfully submitted,

April 14, 2015



W. Keith Martens
HAMILTON MARTENS BALLOU
& CARROLL, LLC
P.O. Box 10940
Rock Hill, SC 29730
(803) 329-7672

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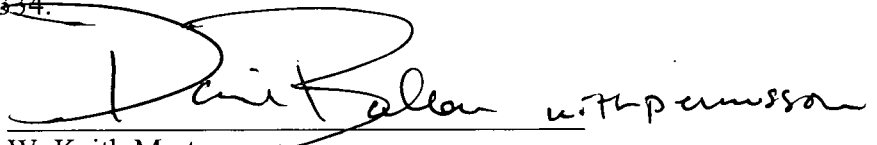
Of whom, Delbert R. Tangeman is

Appellant.

PROOF OF SERVICE

The undersigned certifies that she has served this Motion to Dismiss Appeal and Memorandum in Support of Motion to Dismiss Appeal on the Appellant by depositing a copy of it in the United States Mail, postage prepaid, on April 14, 2015, addressed to the Appellant at 104 Riverside Lane, Duncan, SC 29334.

April 14, 2015

 with permission

W. Keith Martens
HAMILTON MARTENS BALLOU
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Of whom, Delbert R. Tangeman is

Appellant.

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS APPEAL

This appeal arises from the Order of the Honorable J. Mark Hayes filed on September 24, 2013 referring this foreclosure matter to the Spartanburg Master in Equity ("Order"). The trial court judge denied the Appellant's Motion to Reconsider the Order on October 3, 2014. A true and correct copy of the Order is attached hereto as Exhibit "A," and a true and correct copy of the Order denying the Motion to Reconsider is attached as Exhibit "B."

An order of reference in an action to foreclose a mortgage is normally not subject to an immediate appeal. N.C. Fed. Sav. & Loan Ass'n v. Twin States Dev. Corp., 289 S.C. 480, 481, 347 S.E.2d 97, 97 (1986); S.C. Code Section 14-3-330 (1997 & Supp. 2012); State v. Wilson, 387 S.C. 597, 600, 693 S.E.2d 923, 924 (2010); Mid-State Distributions, Inc. v. Century Imps., Inc.,

310 S.C. 330, 426 S.E.2d 777 (1993). Although denominated as counterclaims, Appellant's answer merely contains affirmative defenses not subject to the right to trial by jury. The Order is silent as to Appellant's right to a jury trial as to any true counterclaims, and is therefore interlocutory in nature and not immediately appealable.


Even if the Order is determined to affect a substantial right to jury trial, the Order was entered on September 24, 2013. Appellant filed a Motion to Reconsider the Order of Reference on September 27, 2013, and the trial court judge deferred consideration of that Motion while the parties engaged in settlement discussions. Upon receiving notice that the parties were unable to resolve their dispute, the trial judge entered an Order denying the Appellant's Motion to Reconsider approximately 1 year later on October 3, 2014. Respondent received written notice of that Order on October 20, 2014. The record is silent as to when Appellant received written notice of the October 24, 2014 Order, and Appellant has failed to specify the date on which such notice was received.

Notice of Appeal was served upon counsel for the Respondent on January 30, 2015. Even if the Appellant can establish that the Notice was time served upon the Respondent pursuant to Rule 203(b), Rule 203(d)((1)(B) requires that Notice of Appeal be filed with the Court of Appeals within 10 days of service. Rule 203(d)(2)(B) specifies that "[i]f the notice of appeal is not timely filed ...the appeal shall be dismissed." Appellant's Notice was not filed with the Court of Appeals until March 25, 2015, some 54 days after service. Accordingly, the Notice of Appeal is not timely, was not timely filed, and should be dismissed.

CONCLUSION

The Order referring this case to the Master in Equity is interlocutory and not immediately appealable. Even if the Order is immediately appealable, Appellant's appeal is not timely by virtue of his failure to comply with the Rules of Appellate Procedure, and should be dismissed.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "W. Keith Martens", written over a horizontal line.

W. Keith Martens
HAMILTON MARTENS BALLOU
& CARROLL, LLC

P.O. Box 10940
Rock Hill, SC 29730
(803) 329-7672

April 14, 2015

4834-8273-3347, v. 1

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

Provident Community Bank,)
)
Plaintiff,)

C/A No. 2012-CP-42-00665

v.)

ORDER OF REFERENCE

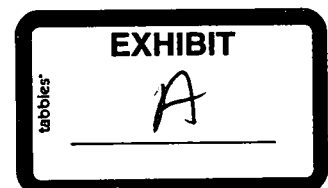
Delbert R. Tangeman, T&T)
Investments of Spartanburg, LLC,)
Barry D. Mallek, Alice R. Mallek,)
Bureaus Investment Group # 8,)
LLC and Donald C. Coggins, Jr.,)
_____)

This matter came before the court on September 11, 2013 upon Plaintiff's Motion for Order of Reference. All defendants were served with notice of this hearing on Plaintiff's motion, though only Pro-Se Defendant Delbert R. Tangeman ("Tangeman") appeared to oppose Plaintiff's motion.

This is an action for foreclosure of Plaintiff's mortgages, which secure two notes given by Plaintiff's borrower, Tangeman. All defendants answered plaintiff's complaint. In addition, Tangeman raised four affirmative claims, denominated as "counterclaims," and demanded trial "before a jury of his [peers]."

The issue now before this court is whether Tangeman is entitled to a jury trial as a matter of right. If so, Plaintiff's motion for order of reference must be denied. See Rule 53 S.C. R. Civ. P. ("Any party [to a referred action] may request a jury on all issues triable of right by a jury, and upon the filing of a jury demand, the matter shall be returned to the circuit court."). Plaintiff is entitled to have this case referred to the Spartanburg County Master in Equity. Id.

Ordinarily, "because a foreclosure action is an action in equity, a party has no right to a jury trial of the issues raised" in the action. Gardner v. Travis, 316 S.C. 315, 318, 450 S.E.2d 54,

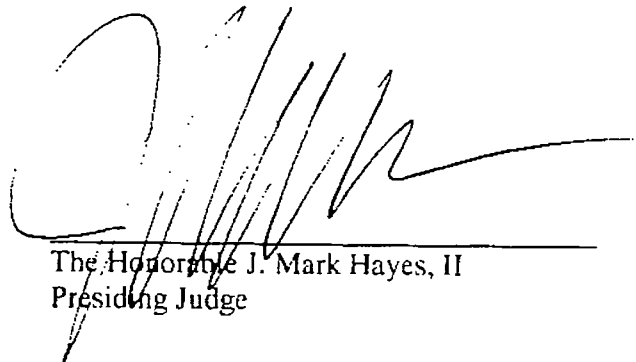


56 (Ct. App. 1994). Only "where a defendant . . . asserts a compulsory counterclaim that alleges actions at law [do] both the plaintiff and the defendant have a right to have a jury trial on the issues raised by the compulsory legal counterclaim." Id.

While Tangeman has asserted claims denominated as "counterclaims," Tangeman's claims are, in fact, affirmative defenses to Plaintiff's foreclosure action. Tangeman's first three "counterclaims" merely allege that Tangeman is not in default of Plaintiff's notes and mortgages, or that Tangeman's default has been cured. Tangeman's final "counterclaim" alleges that Defendants Mallek and Coggins have no valid interest in the real property that is the subject of this action. None of Tangeman's alleged "counterclaims" is a compulsory counterclaim alleging an action at law. Therefore, Tangeman has no right to a jury trial on any of the issues raised in this action. Plaintiff is entitled to have this matter referred to the Master in Equity.

IT IS HEREBY ORDERED that the above-entitled action be, and hereby is, referred to Gordon G. Cooper, Master in Equity for Spartanburg County, to: make findings of fact and conclusions of law; dispose of any and all issues; and enter a final judgment in the case. Any appeal from the decision of the Master shall be directly to the South Carolina Court of Appeals.

IT IS SO ORDERED.



The Honorable J. Mark Hayes, II
Presiding Judge

9/12/17

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2013 SEP 24 AM 8:45
T. HURF & DAUGHTLEY

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

Provident Community Bank,)
)
Plaintiff,)

C/A No. 2012-CP-42-00665

-v-

ORDER

Delbert R. Tangeman, T&T)
Investments of Spartanburg, LLC,)
Barry D. Mallek, Alice R. Mallek,)
Bureaus Investment Group # 8,)
LLC and Donald C. Coggins, Jr.,)

FILED
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M. HOPE BLACKLEY

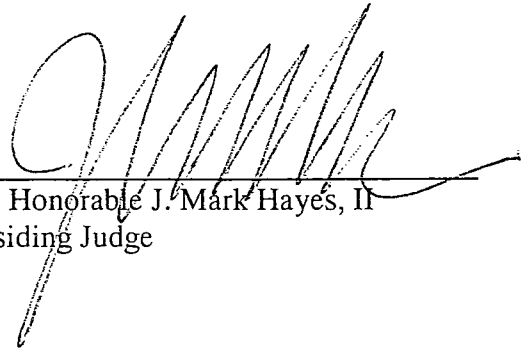
On September 24, 2013, I entered an order referring this foreclosure action to the Spartanburg County Master in Equity for further proceedings. Defendant Delbert Tangeman timely filed a motion for reconsideration of that order. I deferred ruling on Defendant's motion for reconsideration while the parties attempted to negotiate a resolution of their dispute. I have now been informed that the parties were unable to resolve their dispute. Thus, it is appropriate for me to rule on Defendant Tangeman's motion for reconsideration.

Based upon the review of my prior order of reference and the other materials in the case record, I find and conclude that Defendant's motion for reconsideration should be denied. Defendant has not asserted any new evidence for the court to consider, nor has Defendant brought to the court's attention any argument or issue that I supposedly overlooked or misapprehended in my original order. The matters asserted in Defendant's motion for reconsideration appear to raise defenses to foreclosure, rather than counterclaims entitling Defendant to a jury trial.

EXHIBIT
B

IT IS ORDERED that Defendant's motion for reconsideration be, and is hereby, denied.

10/3, 2014.



The Honorable J. Mark Hayes, II
Presiding Judge

4823-5681-1806, v. 1

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CLERK OF COURT
SPARTANBURG COUNTY
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M. HOPE BLACKLEY

HAMILTON
MARTENS
BALLOU &
CARROLL
ATTORNEYS AT LAW

L. Melia Sweatt
Paralegal
803-329-7702
melia.sweatt@hamiltonmartens.com

April 13, 2015

The Honorable Jenny Abbott Kitchings
Clerk of Court
SC Court of Appeals
PO Box 11629
Columbia, SC 29211

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APR 16 2015

RE: Provident Community Delbert Tangeman
C. A. No.: 2012-CP-42-00665
Appellate Case No.: 2015-000262

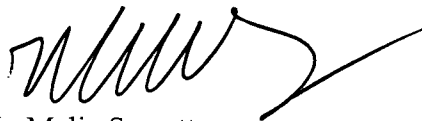
SC Court of Appeals

Dear Ms. Kitchings:

Enclosed for filing, please the original and seven (7) copies of Respondent's Motion to Dismiss Appeal and Memorandum in Support of Motion to Dismiss. Please also file the originals and return the clocked copies to me. I have enclosed the filing fee of \$25.00. Please return clocked-in copies of each of the above-documents in the envelope provided.

Thank you for your cooperation in this matter.

Sincerely,



L. Melia Sweatt
Paralegal

/lms
Enclosures

Hamilton Martens Ballou & Carroll, LLC

130 East Main Street (29730) • Post Office Box 10940 (29731) • Rock Hill, South Carolina
Phone: 803.329.7672 • Facsimile: 803.329.7678 • www.hamiltonmartens.com

cc: Delbert Tangeman
104 Riverside Lane
Duncan, SC 29334