THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas
Thomas A. Russo, Circuit Court Judge

Appellate Case No. 2014-001766

Wells Fargo Bank, N.A. . . . . Respondent,

v.

Gisela B. Moore, Thomas J. Moore a/k/a Tom J. Moore, and John Moore . . . .Appellants.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

This appeal arises out of a mortgage foreclosure action filed by Wells Fargo Bank, N.A. ("Wells Fargo") on September 12, 2011. In response to the foreclosure complaint, Appellants filed an Answer and Counterclaim. Wells Fargo filed a Reply to the Answer and Counterclaim. Thereafter, the parties exchanged written discovery. Wells Fargo then filed a Motion for Summary Judgment and a Motion for Order of Reference.

Both motions were argued before the Honorable Thomas A. Russo. On October 4, 2013, Judge Russo entered an Order Granting Partial Summary Judgment and Referring Case to Master in Equity. More specifically, the Order granted Wells Fargo's motion with respect to the legal counterclaims asserted by Appellants, but denied the motion as to Wells Fargo's foreclosure claim and Appellants' equitable counterclaim for an accounting.

On November 20, 2013, Appellants filed a Motion to Reconsider. On June 30, 2014, Judge Russo entered an Order denying the Motion to Reconsider. On August 4, 2014, Appellants timely served a Notice of Appeal.

STATEMENT OF FACTS

On July 17, 2008, Gisela B. Moore and Thomas J. Moore entered into a mortgage loan transaction with American Mortgage Network, Inc. The loan was evidenced by a promissory note in the original amount of $90,000, which was secured by a mortgage on a house located in Lexington County. (R. 34-54). Appellants' purpose in obtaining the loan was to keep the house in the family, in light of Appellant Gisela Moore's advancing age and deteriorating health. (R. 102, ¶ 3). Subsequent to the closing of the transaction, the promissory note was endorsed in blank by American Mortgage Network, Inc. and transferred to Wells Fargo. (R. 38).

Although the loan was made to Gisela B. Moore and Thomas J. Moore, Appellants' plan was for John Moore to live in the house and make the mortgage payments (R. 102, ¶¶ 2, 3). However, because John did not own the house, property taxes were assessed by Lexington County at the higher, non-owner occupied rate in 2009. Appellants contend that the original lender, American Mortgage Network, Inc., is to blame for this situation. (R. 102, ¶¶ 4, 5).

Because the property taxes were higher than expected, John got behind on the mortgage payments. (R. 103, ¶ 6). Although he could not afford to make the full monthly payment, John sent in partial payments to Wells Fargo, which payments were accepted. (R. 114, ¶¶ 5, 6). However, John thereafter sustained an injury which resulted in lost income, and he was no longer able to make partial payments. He continued to make

payments when he could, and those payments were accepted by Wells Fargo. (R. 114, ¶ 6).

On August 23, 2011, John made a payment in the amount of $2,148.69, which he believed was sufficient to cure the arrearage on the loan. However, the payment was not enough to cure the past due amount. (R. 114-115, ¶¶ 7 and 8). This foreclosure action was then filed on September 12, 2011.

STANDARD OF REVIEW

"The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder." *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). Summary judgment is proper when there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002), *citing* Rule 56(c), SCRCP. For the purpose of its motion for summary judgment, Wells Fargo did not dispute the facts alleged by Appellants Thomas J. Moore and John Moore in their affidavits. Therefore, there were no disputed issues of fact - only questions of law on which summary judgment is appropriate.

ARGUMENTS

I. THE LOWER COURT PROPERLY DISMISSED APPELLANTS' COUNTERCLAIM FOR BREACH OF CONTRACT WHERE THE FACTS ALLEGED WOULD ONLY ENTITLE THEM TO A RIGHT OF OFFSET OR A DEFENSE TO THE FORECLOSURE ACTION.

In their Answer and Counterclaim, Appellants allege as their Ninth Defense and Counterclaim a cause of action for breach of contract. In support of the counterclaim, they allege that Wells Fargo did not have the right to declare Appellants to be in default and accelerate the balance due on the loan because Wells Fargo had "engaged in a course

of repeatedly accepting payments less than the amount now claimed to have been due." (R. 21, ¶53-56). The lower court ruled that, even if true, these allegations did not give rise to a legal counterclaim. Instead, they would simply be a defense to the foreclosure action. (R. 3-4). Appellants contend that the lower court erred in this ruling by characterizing their counterclaim for breach of contract as a defense rather than a counterclaim.

It is well-established that in an action to collect a debt, payment is a defense, not a counterclaim. *See Twitty v. Harrison,* 230 S.C. 174, 94 S.E.2d 879 (1956); *Bank of America, N.A. v. Draper,* 405 S.C. 214, 746 S.E.2d 478 (Ct. App. 2013); Rule 8(c), SCRCP. Appellants' desire to assert payment as a counterclaim, rather than a defense, is simply an attempt to keep this case on the jury docket. If all of their legal counterclaims are dismissed (or treated merely as defenses), then this case should be referred to the Master in Equity. *C&S Real Estate Services, Inc. v. Massengale*, 290 S.C. 299, 350 S.E.2d 191 (1986).

Appellants cite a number of cases describing the distinction between a counterclaim and a right of setoff. However, most of those cases are not applicable to the issue before the Court in this case. Specifically, in none of these cases was the appellate court evaluating the difference between a counterclaim and a right of setoff as it relates to the mode of trial. For example, in *Carolina Mechanical Contractors, Inc. v. Yeargin Construction Co., Inc.,* 261 S.C. 1, 198 S.E.2d 224 (1973), the underlying facts, as indicated by the language quoted in Appellants' brief involved "a situation where a plaintiff supposedly owes a defendant monies..." 261 S.C. at 12, 198 S.E.2d at 230. However, that is clearly not the situation here, where it is the plaintiff, Wells Fargo, that

is owed money. It is undisputed that a mortgage loan was made to Appellants and that there is a balance still owed on that loan.

The one case cited by Appellants on this issue that is relevant is *Wachovia Bank, N.A. v. Beane*, 397 S.C. 612, 725 S.E.2d 715 (Ct. App. 2012). In that case, the lender filed an action to collect on promissory note that was in default. During the course of the litigation, the borrowers sought to amend their answer to assert a counterclaim for negligent mismanagement of a securities account that was pledged as collateral for the loan. In reviewing the motion, the lower court noted that there was no dispute that there was a debt owed by the borrowers to the lender. However, the lower court found that there was a dispute as to the amount owed. Therefore, rather than allowing the borrowers to raise the negligent mismanagement issue as a counterclaim, the lower court allowed them to amend their answer "to the extent that the [borrower] seeks to establish the right to setoff of the amount owed under the Note." 397 S.C. at 615, 725 S.E.2d at 716. On appeal, the Court of Appeals held that the lower court acted properly in limiting the proposed amendment. 725 S.E.2d at 719.

The situation presented in this case is similar to that presented in *Wachovia Bank v. Beane*. Appellants do not dispute that they obtained a loan and that the loan has not been paid in full. Indeed, in their Memorandum in Support of Motion to Reconsider, they acknowledge that the alleged misapplication or non-application would result "in a larger debt." (R. 57). There is no suggestion that Wells Fargo owes Appellants any money. At most, they are entitled to a credit against the mortgage loan balance. As such, any claim that relates to whether the loan is in default or to the balance due on the loan should be

treated as a defense or right of setoff, not as a legal counterclaim on which the borrowers are entitled to a jury trial.

Appellants also contend that the lower court erred in characterizing the breach of contract claim as a defense because Wells Fargo has not established ownership of the loan that is the subject of this action. However, this issue is not before the Court because it was not addressed in the Order of the lower court, nor was it raised in Appellants' motion to reconsider. Regardless, this argument ignores the record in this case and is without merit.

With regard to the promissory note, a copy of the note is attached to the Affidavit of Amanda Weatherly, which was filed by Wells Fargo in support of its motion for summary judgment. The original payee on the note was American Mortgage Network, Inc. On the last page of the note, it is endorsed in blank by American Mortgage Network, Inc. Additionally, the affidavits filed by Appellants in opposition to Wells Fargo's motion for summary judgment acknowledge that the Appellants had been making their payments to Wells Fargo and had requested a loan modification from Wells Fargo. (R. 103, ¶¶9, 10). Based on the holding in *Bank of America v. Draper*, *supra*, this is sufficient to establish Wells Fargo's status as the holder of the promissory note.

Concerning ownership of the mortgage, the law in South Carolina is that the holder of a promissory note is also the owner of the mortgage given to secure that note. *See Hahn v. Smith*, 157 S.C. 157, 154 S.E. 112 (1930); *Ballou v. Young,* 42 S.C. 170, 20 S.E. 84 (1894). "The assignment of a mortgage as distinct from the debt it secures is nugatory and confers no rights upon the transferee...." *South Carolina Nat'l Bank v.*

Halter, 293 S.C. 121, 128, 359 S.E.2d 74, 77 (Ct.App.1987) (*citing Hahn*, 157 S.C. 157, 154 S.E. 112).

If a borrower is allowed to assert any alleged defect in the handling of his mortgage loan payments as a legal counterclaim for breach of contract, then every mortgage foreclosure will end up in a jury trial. For example, if a borrower could assert that an incorrect calculation of the loan balance gives rise to a cause of action for breach of contract, then he would be entitled to a jury trial on that issue. In this case, Appellants' breach of contract claim asserts that Wells Fargo accepted partial payments and is, therefore, precluded from bringing this foreclosure action. This is clearly not a counterclaim, but simply a defense to the foreclosure action. Therefore, the lower court properly ruled that the allegations of this counterclaim, if true, establish at most a defense to the foreclosure action, but not a legal counterclaim on which Appellants are entitled to a jury trial and the recovery of damages.

II. THE LOWER COURT PROPERLY HELD THAT WELLS FARGO WAS NOT SUBJECT TO APPELLANTS' POTENTIAL CLAIMS AGAINST THE ORIGINAL LENDER.

The lower court also granted summary judgment on Appellants' claims for unfair trade practices and negligent misrepresentation. Those claims arise out of alleged misconduct by American Mortgage Network, the original lender in this mortgage loan transaction. Appellants contend that they have the right to assert those claims against Wells Fargo, as assignee of the promissory note and mortgage.

In support of their position, Appellants cite *Rosemond v. Campbell,* 288 S.C. 516, 343 S.E.2d 641 (Ct. App. 1986). However, *Rosemond v. Campbell* is both factually and

legally distinguishable from this case. From a factual standpoint, the promissory note in that case contained the following language:

> ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

288 S.C. at 520, 343 S.E.2d at 643. There is no such provision in the promissory note in this case.

Regarding the legal distinction, the debt in *Rosemond v. Campbell* was a consumer credit sale that was subject to the South Carolina Consumer Protection Code, S.C. Code Section 37-1-101, *et seq.* The Consumer Protection Code contains a specific statute that provides that an assignee of a loan that is subject to the Consumer Protection Code takes the loan "subject to all claims and defenses of the consumer against the seller." S.C. Code Section 37-2-404. However, the Consumer Protection Code is not applicable to the loan that is the subject of this action because, with limited exceptions not present in this case, it does not apply to first mortgage loans. S.C. Code Section 37-3-105(1). Thus, Section 37-2-404 is not applicable to the note and mortgage in this case.

In their analysis of *Rosemond*, Appellants quote what they contend is the "pertinent language" from the opinion which states that at "common law, an assignee's rights can be no greater than those of his assignor..." 288 S.C. at 522. However, they ignore the language in the next paragraph that is directly applicable to this issue in this case. "The common law rule that an assignee has no greater rights than his assignor is subject to an important exception in the case of a negotiable instrument. A person taking a negotiable instrument as a 'holder in due course' takes it free from all claims to it on the

part of any person and free from all 'personal' defenses of any party to the instrument with whom the holder has not dealt." 343 S.E.2d at 645. Therefore, *Rosemond v. Campbell* actually supports the lower court's ruling that Wells Fargo is not subject to the claims for unfair trade practices and negligent misrepresentation that Appellants may have against the original lender.

III. THE LOWER COURT CORRECTLY GRANTED SUMMARY JUDGMENT ON THE LEGAL COUNTERCLAIMS ASSERTED AGAINST WELLS FARGO BECAUSE THE FACTS ALLEGED IN APPELLANTS' AFFIDAVITS WERE NOT SUFFICIENT TO SUPPORT THE COUNTERCLAIMS.

Appellants assert that there are issues of fact in the record that preclude the granting of summary judgment on their counterclaims. Specifically, Appellants contend that:

-- there is a genuine issue of material fact about whether Wells Fargo followed the process required by the mortgage in order for acceleration of the debt to take place;

-- there is a genuine issue of fact about when or even whether any pre-acceleration notice was given.

Wells Fargo acknowledges that in order to obtain summary judgment on its cause of action for mortgage foreclosure, both of these issues of fact would have to be undisputed. However, the lower court did not grant summary judgment on the mortgage foreclosure cause of action. Therefore, even if these facts are in dispute, they are not relevant to the causes of action on which the lower court granted summary judgment.

The only facts in the record that involve actions taken by Wells Fargo are found in the affidavits of Thomas J. Moore and John Moore, which were filed in opposition to

Wells Fargo's Motion for Summary Judgment. As it relates to Wells Fargo, the affidavit of Thomas J. Moore asserts that:

1. Property taxes went down but Wells Fargo continued to send bills for payments at the increased escrow rate (R. 103, ¶8);
2. He paid Wells Fargo $1,675.91 to cover an escrow shortfall, but he did not see where that payment was credited to his account (R. 103, ¶9); and
3. Wells Fargo never sent him modification paperwork or a trial period plan (R. 103, ¶10).

The affidavit of John Moore states that:

1. He sent in partial payments of $675.00 for several months and Wells Fargo accepted those payments (R. 114, ¶5);
2. He made a payment of $2,148.69 on August 23, 2011, that was intended to catch up the past due payments (R. 114, ¶ 7);
3. Wells Fargo has not credited the $2,148.69 payment or refunded it to him (R. 115, ¶8).

Even if all of these statements are true, they do not support the legal counterclaims alleged by Appellants. At best, Appellants are entitled to an accounting. An accounting is an equitable remedy that involves an inquiry into payments and receipts by the parties and results in "an adjustment of the accounts of the parties and a rendering of a judgment for the balance ascertained to be due." *Historic Charleston Holdings v. Mallon*, 381 S.C. 417, 673 S.E.2d 448 (2009). Indeed, the lower court specifically found that, based on the allegations in the affidavits, Appellants were entitled to proceed on their equitable counterclaim for an accounting. (R. 3).

As to the other causes of action, the assertions contained in the affidavits are not sufficient to support claims for breach of contract and unfair trade practices. At best, they may provide a defense to the foreclosure action. *See Wachovia Bank, N.A. v. Beane*, 397 S.C. 612, 725 S.E.2d 715 (Ct. App. 2012); *Spaulding v. Wells Fargo Bank, N.A.*, 714 F.2d 769 (4th Cir. 2013) (no private right of action for failure to offer a loan modification); *Bank of America, N.A. v. Draper*, 405 S.C. 214, 746 S.E.2d 478 (Ct. App. 2013) (payment is a defense to a collection action); *South Carolina Nat. Bank v. Silks*, 295 S.C. 107, 367 S.E.2d 421 (Ct. App. 1988) (lender's alleged breach of contract does not constitute a violation of the Unfair Trade Practices Act).

All of the factual assertions made by Appellants are still relevant in this proceeding and may be asserted in their counterclaim for an accounting and as a defense to the foreclosure action. Nothing in the Order Granting Partial Summary Judgment precludes them from raising these issues. However, these factual assertions do not give rise to legal counterclaims on which Appellants are entitled to a jury trial.

IV. THE LOWER COURT ACTED PROPERLY IN REFERRING THE FORECLOSURE ACTION AND EQUITABLE COUNTERCLAIM TO THE MASTER IN EQUITY.

After dismissing Appellants' legal counterclaims, the lower court referred this matter to the Master in Equity. In support of the reference, the lower court cited *Wells Fargo Bank, N.A. v. Smith*, 398 S.C. 487, 730 S.E.2d 328 (Ct. App. 2012). Appellants correctly point out that the South Carolina Supreme Court entered an Order on June 11, 2014, directing that this opinion be depublished. However, this case was valid legal precedent when it was cited by the lower court in its Order dated October 2, 2013.

Moreover, even without that precedent, the existing case law in South Carolina supports the lower court's reference of this matter to the Master in Equity.

The relevant question in determining the right to trial by jury is whether an action is legal or equitable; 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). If a complaint is equitable and the counterclaim legal and compulsory, the defendant has the right to a jury trial on the counterclaim. *Johnson v. S.C. Nat'l Bank*, 292 S.C. 51, 354 S.E.2d 895 (1987). "A mortgage foreclosure is an action in equity." *U.S. Bank Trust Nat'l Ass'n v. Bell*, 385 S.C. 364, 373, 684 S.E.2d 199, 204 (Ct.App.2009). In this case, because Wells Fargo's foreclosure allegation is equitable in nature, Appellants would have the right to a jury trial only if they have alleged a counterclaim that is both legal and compulsory. *C&S Real Estate Services, Inc. v. Massengale*, 290 S.C. 299, 350 S.E.2d 191 (1986).

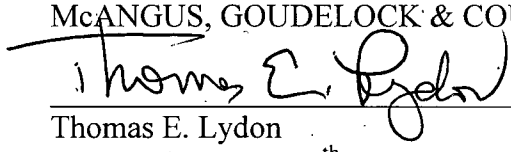
The lower court dismissed the legal counterclaims asserted by Appellants, leaving only the counterclaim for an accounting. An accounting is an equitable remedy which allows for "an adjustment of the accounts of the parties and a rendering of a judgment for the balance ascertained to be due." *Historic Charleston Holdings, LLC v. Mallon*, 381 S.C. 417, 673 S.E.2d 448 (2009). Therefore, there being no legal, compulsory counterclaims remaining in the case, the lower court correctly referred this equitable foreclosure action and the equitable counterclaim to the Master in Equity.

CONCLUSION

In concluding, the Order Granting Partial Summary Judgment and Referring Case to Master in Equity should be affirmed. Wells Fargo is not subject to claims that

Appellants may have against the original lender. Furthermore, the allegations contained in Appellants' affidavits are not sufficient to establish legal counterclaims against Wells Fargo. The lower court, therefore, acted correctly in dismissing the legal counterclaims and referring this case to the Master in Equity.

McANGUS, GOUDELOCK & COURIE, L.L.C.



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June 8, 2015

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the Final Reply Brief of Respondent complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I hereby certify that I have this 9th day of June, 2015, served the Final Brief of Respondent by mailing a copy, postage prepaid, in the United States mail, with sufficient postage affixed as follows:

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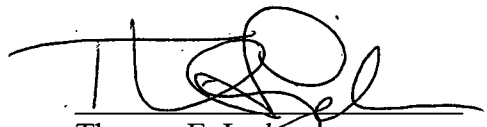

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