

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM Horry COUNTY
Court of Common Pleas

Larry B. Hyman, Jr., Circuit Court Judge

Case No. 2013-CP-26-7677
Appellate Case No. 2015-000675

Synovus Bank, successor in interest to
The National Bank of South Carolina, Respondent,
v.

Paul D. Gunter and Brenda Gunter, Appellants.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- I. Did the trial court err in concluding that a cause of action for breach of the implied covenant of good faith must also allege a breach of one of the express terms of the contract?
- II. Did the trial court err in concluding that the Appellants election not to plead a setoff against the amounts claimed by the Respondent barred them from obtaining an independent affirmative judgment against Respondent?
- III. Did the trial court err in concluding that a general plea for damages was insufficient, especially in light of the Respondent's failure to file a motion for a more definite statement pursuant to SCRPC Rule 12(e)?

STATEMENT OF THE CASE

This matter was commenced by the Respondent's Complaint of November 18, 2014. In this action Respondent seeks foreclosure of a pair of mortgages on property owned by Appellants. Appellants served a motion to dismiss which was resolved by Respondent agreeing to amend its complaint. In response to the Amended Complaint, Appellants served an Answer and Counterclaims dated May 1, 2014. The Counterclaims included a cause of action for breach of the implied covenant of good faith. Respondents moved to dismiss the Counterclaims on May 30, 2014. A hearing was held on the motion to dismiss on September 5, 2014. The Order granting Respondent's motion to dismiss was filed on October 15, 2014. Appellants served a Rule 59(e) motion on November 10, 2014. A hearing was held on the Rule 59(e) motion on February 9, 2015. A form order denying the Rule 59(e) motion was dated February 9, 2015. Appellants received written notice of the entry of the order denying the Rule 59(e) motion on February 19, 2015. The Notice of appeal was served on March 23, 2015. This Appeal follows.

STATEMENT OF FACTS

This action involves a pair of mortgages held by Respondent and which encumber property owned by Appellants. (Amended Complaint dated March 26, 2014, paragraphs 10, 11, 13, 14, 33, 34, 36, 37: R. ___)

In this Appeal of a ruling under SCRCR Rule 12(b)(6), the following allegations from the counterclaim are deemed to be true:

- 1) In an effort to liquidate their debt to their plaintiff, Defendants engaged the services of a real estate agent to attempt to consummate a short sale of the properties.
- 2) As part of this effort, Defendants' agent contacted the Plaintiff to ascertain an acceptable listing price for the units.
- 3) As a result of appraisals obtained by the Plaintiff, listing prices for each unit were set in accordance with the wishes of the Plaintiff.
- 4) However, when a buyer materialized for one of the units, at the price previously validated by the Plaintiff, it presented documents to Defendants not for a short sale but for Defendants to remain liable for the full amount of the debt.
- 5) Upon refusal of Defendants to enter into this new and untenable deal, Plaintiff held out the hope to Plaintiff that it might honor the originally contemplated short sale. As a condition of considering the originally contemplated short sale the Plaintiff demanded voluminous documents from

Defendants, including corporate documents of entities that are not parties to this action.

- 6) Plaintiff did not definitively respond to the short sale proposal before the prospective buyer abandoned efforts to obtain the property.
- 7) However, Plaintiff has still indicated that it might consider a short sale if new buyers can be located. (Answer and Counterclaim served May 1, 2014.

R. __)

STANDARD OF REVIEW

Respondent sought dismissal of the counterclaims pursuant to Rule 12(b)(6) for failure to state facts sufficient to constitute a cause of action. In ruling on such a motion, the inquiry does not proceed beyond the four corners of the counterclaim. *Baird v. Charleston County*, 333 S.C. 519, 527, 511 S.E.2d 69, 73 (1999) Moreover, the factual allegations of the counterclaim must be deemed to be true for purposes of this motion. The Motion should be denied if the facts stated provide a basis for relief under any theory of the case. *Gentry v. Yonce*, 337 S.C. 1, 5, 522 S.E.2d 137, 139 (1999). Finally, the motion should not be granted solely because of doubts that the claimant will prevail at trial. *Gentry*. 337 S.C. at 5, 522 S.E.2d at 139.

ARGUMENTS

I. The trial court erred in concluding that a cause of action for breach of the implied covenant of good faith must also allege a breach of one of the express terms of the contract.

In the Motion to Dismiss Respondent relied primarily on *RoTec Services, Inc. v. Encompass Services, Inc.*, 359 S.C. 467, 597S.E. 2d 881 (Ct. App. 2004). However, the trial court found more in the RoTec decision than is there. While RoTec found that there is no special cause of action for breach of the duty of good faith and fair dealing, it does not make the breach of the duty no longer actionable. Rather, it makes clear that violation of the implied term requiring good faith and fair dealing is no different than breach of any of the express terms of the contract. The series of cases cited by the trial court all involve situations where the claimants attempted to advance both a cause of action for breach of contract and a second cause of action for breach of the duty of good faith and fair dealing. Therefore these cases are not dispositive in this matter, in which the Appellants have brought a single cause of action for breach of contract.

The order appealed from contains the following language: “Yet, Defendants’ Answer fails to assert a claim for breach of contract, and fails to identify any specific provisions of the mortgage that the Plaintiff allegedly breached” (emphasis added, Order filed 10/15/2014 R. ___). The trial court’s finding that it is necessary to have violated one of the express terms of the contract in order to make a violation of the implied duty of good faith and fair dealing actionable, cannot be sustained.

The Appellants have alleged the existence of a contractual provision, the implied duty of good fair and fair dealing. They have alleged conduct which a reasonable jury could conclude violated that duty, i.e. giving the Appellants a price for a short sale and then retreating from that price when a buyer appeared. Finally, they have alleged that they suffered damages. See *Pilkington v. McBain*, 274 S.C. 312, 262 S.E. 2d 916(1980). At this stage in the proceeding, that is enough.

II. The trial court erred in concluding that the Appellants election not to plead a setoff against the amounts claimed by the Respondent barred them from obtaining an independent affirmative judgment against Respondent

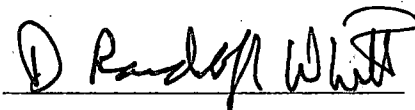
A setoff is an elective remedy which may be asserted by a party who wishes to "net out" the competing liabilities of litigation parties. None of the cases cited by Respondent and relied upon by the trial court establish any more than that a party who wishes to avail themselves of a setoff must plead accordingly. However, Appellants do not now, and have not at any point wished to set off their claim against Respondent. Appellants claim, being tried by a jury must be heard first. Appellants wish to have a judgment against Respondent at the conclusion of their jury trial. They do not wish to wait for the conclusion of the equitable proceedings that will be necessary for adjudication of Respondents foreclosure claims, any foreclosure sale that might be ordered and any appraisal proceeding that might occur post-sale to finally determine the amount, if any, of the judgment to which Respondent may be entitled. To the extent Respondent desires to seek to force a setoff, that is a matter for the respondent's Reply upon remand.

III. The trial court erred in concluding that a general plea for damages was insufficient, especially in light of the Respondent's failure to file a motion for a more definite statement pursuant to SCRCF Rule 12(e).

The trial court's order erroneously concludes that a plea for general damages provides a basis for granting Respondent's SCRCF Rule 12(b)(6) Motion. This conclusion cannot be upheld, especially in the absence of a motion for a more definite statement. Pilkington v. McBain, 274 S.C. 312, 314, 262 S.E.2d 916, 917 (1980). The Counterclaim alleges that the Appellants lost a sale that would have liquidated their debt to Respondent, as a consequence of Respondents reneging on their earlier approval of the sales price. (Answer and Counterclaim R. ____). This provides an ample basis for concluding that the Appellants will be able to establish a precise damage amount at trial, and have met the burden imposed on them by SCRCF Rule 12(b)(6).

Conclusion

For the reasons stated above, the order dismissing Appellants' Counterclaim for breach of the implied covenant of good faith should be reversed and the case should be remanded to the jury trial roster for Horry County



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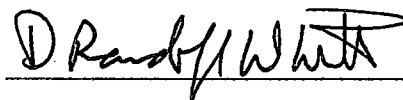
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PROOF OF SERVICE

I certify that I have served the Appellants' Initial Brief and Designation of Matter on Synovus Bank by depositing a copy of each of them in the United States Mail, postage prepaid, on July 22, 2015, addressed to its attorney of record, Tara E. Nauful, Adams and Reese LLP, 1501 Main Street, 5th Floor, Columbia, SC 29201.



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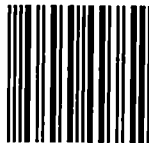
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