

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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AUG 18 2015

SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
R. Markley Dennis
Circuit Court Judge

Case No. 2014-CP-10-4946

Wells Fargo Bank, N.A., as Successor by Merger
to Wachovia Bank, National Association as
Successor by Merger to First Union National
Bank,..... Plaintiff/Respondent,

v.

Penny Creek Associates, L.L.C. a/k/a Penny
Creek Associates, LLC; The Grove at Fenwick
Plantation, LLC; Charlotte Zurlo and Eugene J. Zurlo,
as Co-Trustees of The Nicklaus Lane Realty
Trust No.1 under Declaration of Trust dated
May 22, 1998; Fenwick Hall Plantation Property
Owners Ass'n., Inc. a/k/a Fenwick Hall Plantation
Property Owners' Association, Inc.; Preserve at
Fenwick Hall Property Owners' Association, Inc.;
and The Grove at Fenwick Plantation
Condominium Association, Inc.,Defendants/Respondents,

Michel F. LaPlante a/k/a Michel
LaPlante a/k/a Mitch LaPlante,..... Defendant/Third-Party Plaintiff/Appellant,

v.

The Eugene J. Zurlo Living Trust,
Dated December 11, 1997 and Paul Zurlo,..... Third-Party Defendants/Respondents.

**REPLY OF RESPONDENT WELLS FARGO BANK, N.A. TO APPELLANT'S
RETURN TO RESPONDENT'S MOTION TO DISMISS**

Pursuant to Rule 240(e), SCACR, Respondent Wells Fargo Bank, N.A. (“Wells Fargo”) respectfully submits this Reply to Appellant Michel F. LaPlante’s (“Appellant”) Return to Respondent’s Motion to Dismiss this appeal as interlocutory and premature. Wells Fargo’s Motion to Dismiss thoroughly addresses Appellant’s arguments, and Wells Fargo reiterates all of the arguments contained in its Motion to Dismiss, but offers this Court a brief reply to address several issues in Appellant’s Return.

DISCUSSION

Appellant mistakes the lack of a jury available in a proceeding before a master-in-equity as a denial of the right to a jury trial immediately upon reference to a master-in-equity. A master-in-equity has the authority to determine whether a jury trial is required, and, if so, to return the case to the circuit court. *See* Rule 53(c), SCRCP (“Once referred, the master or special referee shall exercise all power and authority which a circuit judge sitting without a jury would have in a similar matter.”). In fact, the circuit court in this case specifically requested the master-in-equity to decide Wells Fargo’s motion to strike Appellant’s request for a jury trial. Appellant erroneously argues that the order of reference strikes his jury demand. Until the master-in-equity has an opportunity to rule on Wells Fargo’s motion to strike, the issue of whether Appellant will receive a jury trial on its claims is undecided.¹ Thus, the order of reference did not affect a substantial right of Appellant and it is not immediately appealable.

Further, Appellant conflates a counterclaim with other types of claims, erroneously arguing that because his cross-claims and third party claims meet the test for a compulsory counterclaim (an argument that Wells Fargo does not concede), then his

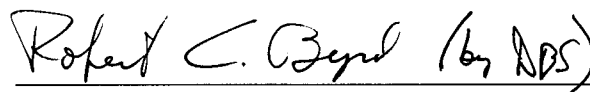
¹¹ As an alternative to striking the Appellant’s jury demand, the master-in-equity could also sever the cross-claims and third-party claims from the plaintiff’s claims. Appellant has never requested such relief from the court.

cross-claims and third party claims must also be compulsory. As this Court is fully aware, cross-claims and third party claims are different from counterclaims, which is why the Rules of Civil Procedure and South Carolina jurisprudence distinguish among them. The Rules of Civil Procedure do not provide for compulsory cross-claims and third-party claims. Compare Rule 13(a), SCRPC (“A pleading ***shall state as a counterclaim*** any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party’s claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.”) with Rule 13(g), SCRPC, (“A pleading ***may state as a cross-claim*** any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action.”) and Rule 14(a), SCRPC (“At any time after commencement of the action ***a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party*** to the action who is or may be liable to him for all or part of the plaintiff’s claim against him..”) (emphasis added).

Finally, a lack of a complete record is not a sufficient reason to hold this motion in abeyance. Whether the order of reference is immediately appealable is a pure question of law. The Court’s resolution of Wells Fargo’s Motion to Dismiss the appeal will not be aided by a full briefing on questions that are irrelevant to its determination of the Motion.

CONCLUSION

Appellant presents to this Court an unpreserved, premature issue on an order that is not immediately appealable. For these reasons, Respondent Wells Fargo respectfully requests this Court dismiss Appellant's appeal.



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August 18, 2015

Charleston, South Carolina

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Michel F. LaPlante a/k/a Michel
LaPlante a/k/a Mitch LaPlante, Defendant/Third-Party Plaintiff/Appellant,

v.

The Eugene J. Zurlo Living Trust,
Dated December 11, 1997 and Paul Zurlo, Third-Party Defendants/Respondents.

PROOF OF SERVICE

The undersigned hereby certifies that on August 18, 2015 s/he has caused a copy of the **REPLY OF RESPONDENT WELLS FARGO BANK, N.A. TO APPELLANT'S RETURN TO RESPONDENT'S MOTION TO DISMISS** to be served upon all counsel of record by hand delivering a copy of the same addressed as follows:

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Charleston, SC
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August 18, 2015

VIA HAND DELIVERY

Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

RECEIVED
AUG 18 2015
SC Court of Appeals

Re: *Wells Fargo Bank, N.A., et al. v. Penny Creek, et al.*
Appellate Case No. 2015-001461

Dear Ms. Kitchings:

Enclosed please find an original and six copies of the Reply of Respondent Wells Fargo Bank, N.A. to Appellant's Return to Respondent's Motion to Dismiss in the above-referenced matter. As copied on this letter, and as evidenced by the Proof of Service, we are providing copies of the same to all counsel of record.

If you should have any questions, please do not hesitate to contact me. Thank you for your assistance in this matter.

With kindest regards, I am

Sincerely,

Robert C. Byrd

RCB:ccq
Enclosures

cc (w/enc.): Jason Scott Luck, Esquire
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Thomas B. Pritchard, Esquire
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