

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

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SC Court of Appeals

Case No. 2013-CP-21-02795
Court of Appeals No. 2015-001873

Nationstar Mortgage LLC..... Respondent.

v.

Barbara A. Gibbs, Melvin E. Gibbs, and
Westbrook Phase IV Homeowners Association, Defendants,
Of whom Melvin E. Gibbs is the.....Appellant.

**RESPONDENT NATIONSTAR MORTGAGE LLC'S
MEMORANDUM OF LAW IN RESPONSE TO
THE COURT'S ORDER DATED OCTOBER 20, 2015**

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Attorney for Respondent

Date: November 12, 2015

Pursuant to the Court's October 20, 2015, order, Respondent Nationstar Mortgage LLC ("Nationstar") submits this memorandum to address the appealability of the trial court order granting Nationstar's motion to appoint a special referee and to report on the status of underlying foreclosure action giving rise to this appeal.

STATEMENT OF THE CASE

This case concerns an equitable foreclosure action that Nationstar filed against Melvin E. Gibbs; his spouse, Barbara Gibbs;¹ and the Westbrook Phase IV Homeowners Association on October 23, 2013. (Ex. 1, Compl.) Nationstar filed the foreclosure action with the court of common pleas for Florence County, South Carolina. Mr. Gibbs was personally served with Nationstar's foreclosure complaint on November 8, 2013, and he filed an answer on March 20, 2014.

In this appeal and a previously dismissed appeal (Case No. 2014-000596), Mr. Gibbs seeks appellate review of orders of reference entered in the foreclosure action. The trial court entered the first order of reference on March 11, 2014, to refer Nationstar's foreclosure to Special Referee Benjamin D. Moore. Mr. Gibbs appealed the entry of that order ten days later, and this Court dismissed the appeal pursuant to an order entered that same day. In its order, the Court concluded that the first order of reference entered in the foreclosure action did not raise any appealable issues. After entry of the Order, the special referee recused himself from the foreclosure because Mr. Gibbs had amended a complaint that he had filed in a *pro se* action in the United States District Court for the District of Colorado to add the special referee as a defendant.

¹ Barbara Gibbs is the only defendant obligated to repay the note and mortgage subject to Nationstar's foreclosure action. Melvin E. Gibbs is only named as defendant in the foreclosure because he holds title to real property encumbered by Nationstar's first-priority mortgage.

Because the special referee recused himself, Nationstar filed a motion for appointment of another special referee. After a hearing on that motion, the trial court granted the motion by entering an order referring the foreclosure case to the master in equity for Horry County. On August 24, 2015, the trial court clarified its order by entering a Form 4 judgment that expressly granted Nationstar's motion for appointment and transferred the case to the master in equity for final adjudication.

On September 5, 2015, Mr. Gibbs initiated the current appeal, claiming that he is appealing the trial court's denial of his motion to dismiss Nationstar's foreclosure action.

ARGUMENT

In a memorandum of law filed on October 26, 2015, Mr. Gibbs appears to identify the following two issues for appellate review: (1) the denial of his motion to dismiss Nationstar's foreclosure action and (2) the reference of this case to the master in equity for final adjudication. (App. Mem.) Neither of these issues raises any viable grounds for appeal.

I. The denial of a motion to dismiss does not give rise to the right to an interlocutory appeal to this Court.

Under South Carolina law, the denial of a motion to dismiss for failure to state a claim is not immediately appealable under S.C. Code Ann. § 14-3-330. *See Moyd v. Johnson*, 289 S.C. 482, 482, 347 S.E.2d 97, 98 (1986) ("We hold that the denial of a Rule 12(b)(6) motion is not directly appealable under S.C. Code Ann. § 14-3-330 (1976)."); *see also McLendon v. S.C. Dep't of Highways and Pub. Transp.*, 313 S.C. 525, 526, 443 S.E.2d 539, 540 (1994). In *McLendon*, the appellant attempted to appeal an order denying his motion to dismiss, which he based upon the passing of the statute of limitations. The South Carolina Supreme Court recognized that such a motion to dismiss

was simply an attempt to argue that the respondent failed to state a cause of action. *Id.* Like the motion to dismiss at issue in *McLendon*, the motion to dismiss that Mr. Gibbs has filed in the foreclosure action simply attempted to dismiss Nationstar's complaint for failure to state a claim. (Ex. 2, Mot. to Dismiss.²) Accordingly, the trial court's denial of the motion to dismiss the foreclosure complaint cannot be the subject of any immediate appeal to this Court.

II. The procedural posture of the foreclosure precludes Appellant from raising any appealable issue regarding mode of trial.

As a general rule, "orders affecting the right to jury trial are immediately appealable and must be raised in court at the first opportunity." *Mortg. Elec. Sys., Inc. v. White*, 384 S.C. 606, 612, 682 S.E.2d 498, 501 (Ct. App. 2009). Nationstar's foreclosure action, however, is an action in equity. *Wachovia Bank, N.A. v. Blackburn*, 407 S.C. 321, 328, 755 S.E.2d 437, 441 (2014). "In equity the parties are not entitled, as a matter of right, to a trial by jury." *Id.* (quoting *Williford v. Downs*, 265 S.C. 319, 321, 218 S.E.2d 242, 234 (1975)). Accordingly, because Nationstar's foreclosure action is an action in equity, Mr. Gibbs is not entitled, as a matter of right, to a trial by jury.

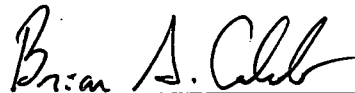
Moreover, nothing in Mr. Gibbs's answer changes the purely equitable character of Nationstar's foreclosure. (Compl. *passim*; Ans. *passim*.) In his answer, Mr. Gibbs alleges ten affirmative defenses to Nationstar's foreclosure cause of action. (*Id.*) None of the ten affirmative defenses alleges any counterclaim against Nationstar, and nothing in the answer alleges a demand for a remedy against Nationstar. (*Id.*) Accordingly, because Nationstar's foreclosure is an action in equity and because Mr. Gibbs has failed to plead

² Nationstar is not providing the exhibits attached to Mr. Gibbs's Motion to Dismiss filed with the trial court because he included unredacted bank statements and correspondence that disclose various account numbers and personal identifying information. If the Court wishes, Nationstar can supplement the record with redacted exhibits.

any legal claims against Nationstar in his answer, the procedural posture of Nationstar's equitable foreclosure action precludes the appeal of any mode of trial rights. *See, e.g., N.C. Fed. Sav. & Loan Ass'n v. Twin States Dev. Corp.*, 289 S.C. 480, 481, 347 S.E.2d 97, 97 (1987) (granting respondent's motion to dismiss an appeal of an order of reference entered in a foreclosure action).

CONCLUSION

For the foregoing reasons, Appellant's motion to reinstate this appeal should be denied, and this appeal should remain dismissed.



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Attorney for Respondent

CERTIFICATE OF SERVICE

The undersigned certifies that *Respondent Nationstar Mortgage LLC's Memorandum of Law In Response to the Court's Order Dated October 20, 2014*, was served on Appellant by depositing a copy thereof in the United States Mail, first class, postage prepaid, addressed to:

Melvin E. Gibbs
4257 Monterey Drive
Florence, SC 29501

This the 12th day of November, 2015.



Brian A. Calub

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November 12, 2015

VIA FEDERAL EXPRESS
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Jenny Abbott Kitchings
Court of Appeals Clerk of Court
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Re: ***Nationstar Mortgage LLC v. Barbara A. Gibbs, Melvin E. Gibbs, et al.***
Court of Appeals No. 2015-001873
Court of Common Pleas No. 2013-CP-21-02795

Dear Ms. Kitchings:


Enclosed please find an original and (7) copies of Respondent Nationstar Mortgage LLC's Memorandum of Law in Response to the Court's Order dated October 20, 2015, with Exhibits 1 – 2, regarding the above-captioned matter.

Upon receipt, kindly file the original and return a conformed copy to my attention in the postage-paid envelope provided for your convenience.

Please feel free to contact me should you have any questions. Thank you for your assistance.

Sincerely,

MCGUIREWOODS LLP


Muriel Powell
Paralegal

/MP
Enclosures
c: Melvin E. Gibbs (w/encl.)