The Supreme Court of South Carolina

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December 10, 2015

The Honorable Melanie Huggins-Ward
PO Box 677
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REMITTITUR

Re: Carolina First v. Badd, LLC
Lower Court Case No. 2010CP2608505
Appellate Case No. 2013-000107

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court along with the earlier decision of the South Carolina Court of Appeals is enclosed.

Very truly yours,

CLERK

cc: Richard R. Gleissner, Esquire
C. Mitchell Brown, Esquire
Thomas Wm. McGee, III, Esquire
Allen Mattison Bogan, Esquire

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Carolina First Bank, n/k/a TD Bank, NA, Petitioner,

v.

BADD, L.L.C., William McKown, and Charles A. Christenson, Defendants,

of whom BADD, L.L.C. and William McKown are Respondents.

BADD, L.L.C. and William McKown, Third-Party Plaintiffs,

v.

William Rempher, Third-Party Defendant.

Appellate Case No. 2013-000107

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Horry County
Steven H. John, Circuit Court Judge

Opinion No. 27486
Heard December 10, 2014 – Filed January 28, 2015

REVERSED

Thomas Wm. McGee, III, C. Mitchell Brown, Allen Mattison Bogan, all of Nelson Mullins Riley & Scarborough, L.L.P., of Columbia, for Petitioner.

Richard R. Gleissner, of Gleissner Law Firm, L.L.C., of Columbia, for Respondents.

JUSTICE PLEICONES: In this mortgage foreclosure action, the Court granted Carolina First Bank's ("the Bank") petition for a writ of certiorari to review the Court of Appeals' decision in *Carolina First Bank v. BADD, L.L.C.*, 400 S.C. 343, 733 S.E.2d 619 (Ct. App. 2012), which held William McKown[1] is entitled to a jury trial. We disagree and therefore reverse the decision of the Court of Appeals.

Procedural History

BADD, L.L.C. ("BADD"), purchased three warehouse units in Myrtle Beach. To finance the transaction, BADD executed two promissory notes. A personal guaranty was also executed by McKown, who was a member of BADD. After BADD defaulted, the Bank brought this foreclosure action and included McKown as a party pursuant to S.C. Code Ann. § 29-3-660 (2007) based on his status as a guarantor.

In McKown's amended answer and counterclaim, he demanded a jury trial because the Bank sought a money judgment for the breach of a guaranty arrangement. McKown further sought an accounting and a determination that the guaranty agreement was unconscionable. McKown then asserted two counterclaims—(1) civil conspiracy and (2) breach of contract—both based on an alleged conspiracy between the Bank and William Rempher. Finally, McKown asserted third-party claims against Rempher.[2]

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[1] While BADD also joined McKown in his demand for a jury trial, the Court of Appeals' decision turns on McKown's right to a jury trial. Therefore, we address the merits of that decision with respect to McKown.

[2] There is no question these third-party claims are permissive and do not entitle McKown to a jury trial. *See N.C. Fed. Sav. & Loan Ass'n v. DAV Corp.*, 298 S.C. 514, 519, 381 S.E.2d 903, 906 (1989) (holding third-party claims are permissive

The Bank moved for an order of reference. The circuit granted the motion, referring the matter in its entirety to the master-in-equity.

The Court of Appeals reversed, holding McKown was entitled to a jury trial because the Bank's claim on the guaranty agreement was a separate and distinct legal claim.[3] *Carolina First Bank*, 400 S.C. at 347, 733 S.E.2d at 620.

We granted the Bank's petition for a writ of certiorari to review the Court of Appeals' decision.

Issue Presented

Did the Court of Appeals err in finding McKown was entitled to a jury trial?

Standard of Review

Whether a party is entitled to a jury trial is a question of law, which this Court reviews de novo, owing no deference to the Court of Appeals' decision. *See Wachovia Bank, Nat. Ass'n v. Blackburn*, 407 S.C. 321, 328, 755 S.E.2d 437, 441 (2014).

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and a party waives his right to a jury trial by asserting them in a foreclosure action).

[3] The Court of Appeals also found McKown was entitled to a jury trial based on his counterclaims, but that finding relied on the threshold holding that the Bank's action on the guaranty agreement was separate and distinct from the foreclosure action. *See Carolina First Bank*, 400 S.C. at 347, 733 S.E.2d at 621.

Law/Analysis

The Court of Appeals held that when a lender exercises its statutory right to join a guarantor as a party to a foreclosure action in order to seek a deficiency judgment, the guarantor has a right to a jury trial. The Bank contends this was error. We agree.

I. Guarantor's Right To A Jury Trial When A Bank Seeks A Deficiency Judgment Pursuant to § 29-3-660.

The South Carolina Constitution provides that the right to a jury trial shall be preserved inviolate. S.C. Const. art. I, § 14. Whether a party is entitled to a trial by jury depends on whether the right to a jury was secured at the time of the adoption of our state constitution. *Mims Amusement Co. v. S.C. Law Enforcement Div.*, 366 S.C. 141, 150, 621 S.E.2d 344, 348 (2005) ("The right to a trial by jury is guaranteed in every case in which the right to a jury was secured at the time of the adoption of the Constitution in 1868."). "Generally, the relevant question in determining the right to a trial by jury is whether the action is legal or equitable." *Lester v. Dawson*, 327 S.C. 263, 267, 491 S.E.2d 240, 242 (1997). Because a foreclosure action is one sounding in equity, a party is not entitled, as a matter of right, to a jury trial. *Wachovia Bank, Nat. Ass'n v. Blackburn*, 407 S.C. 321, 328, 755 S.E.2d 437, 441 (2014).

McKown was joined as a party to the foreclosure action pursuant to S.C. Code Ann. § 29-3-660 (2007). Section 29-3-660 provides:

> In actions to foreclose mortgages . . . if the mortgage debt be secured by the covenant or obligation of any person other than the mortgagor the plaintiff may make such person a party to the action and *the court may adjudge* payment of the residue of such debt remaining unsatisfied after a sale of the mortgaged premises against such other person and may enforce such judgment as in other cases.

(Emphasis supplied). This statute is derived, in part, from the Act of 1791, which vests exclusive jurisdiction in courts of equity for foreclosure actions. *See, e.g.*, *Williams v. Beard*, 1. S.C. 309, 324 (1870) (discussing the Act of 1791 and the role it played in vesting courts of equity with jurisdiction to decide mortgage-related disputes). The power to render a deficiency judgment is included within the jurisdiction of courts of equity. *See Perpetual Bldg. & Loan Ass'n of Anderson v. Braun*, 270 S.C. 338, 342, 242 S.E.2d 407, 409 (1978) (recognizing that a

deficiency judgment is incidental to the relief sought in a foreclosure action and that the Act of 1791 integrated the two for purposes of characterizing the action as equitable); *see also* 27 S.C. Jur. *Mortgages* § 103 (1996) ("Mortgage foreclosures are partly in rem . . . and partly in personam . . . ; however, the strict distinction between such designations was abandoned by the Act of 1791. . . . The court's in personam jurisdiction to enter a deficiency judgment does not alter the equitable character of the [foreclosure] action.").

Here, it is clear the Bank included McKown as a party to its foreclosure action only for the purpose of collecting a deficiency should one be adjudged. The Bank's action does not alter the equitable character of the action. *See Perpetual Bldg. & Loan Ass'n of Anderson*, 270 S.C. at 342, 242 S.E.2d at 409. Likewise, § 29-3-660 states, in part, that it is for the court to adjudge a deficiency. This statute, with its origins pre-dating the enactment of our Constitution, illustrates that a party does not have a right to a jury trial when he is included in the action solely for the purpose of obtaining a deficiency judgment. *See also* 27 S.C. Jur. *Mortgages* § 103 (stating mortgage foreclosure proceedings are regulated by statutes, and those statutes should be substantially followed). We therefore hold McKown is not entitled to a jury trial solely based on the Bank's inclusion of him as a party pursuant to § 29-3-660.

Accordingly, we reverse the Court of Appeals' holding that McKown was entitled to a jury trial solely based on the Bank's inclusion of McKown as a party to obtain a possible deficiency judgment. That holding conflicts with § 29-3-660, which confers upon *the court* the power to adjudge a deficiency.

Having determined McKown is not entitled to a jury trial for the reason relied on by the Court of Appeals, we address whether McKown is entitled to a jury trial based on his counterclaims. We do so in the interest of judicial economy as this issue was not addressed squarely by the Court of Appeals.

II. McKown's Right To A Jury Trial Based On His Civil Conspiracy And Breach of Contract Counterclaims.

The Bank argues the Court of Appeals erred because McKown's counterclaims, while legal, are permissive and thus, McKown waived his right to a jury trial by asserting them in this equitable suit. We agree.

McKown is entitled to a jury trial on his counterclaims in an equitable action only if the counterclaims are legal and compulsory. *See* Rule 13(a), SCRCP. A

counterclaim is compulsory if it arises out of the same transaction or occurrence as the party's claim. *Id.* In a foreclosure action, a counterclaim arises out of the same transaction or occurrence and is thus compulsory, when there is a "logical relationship" between the counterclaim and the enforceability of the guaranty agreement. *Cf. N.C. Fed. Sav. & Loan Ass'n*, 298 S.C. at 518–19, 381 S.E.2d at 905–06 (finding a foreclosure defendant was entitled a jury trial because his counterclaims that the bank breached subsequent oral contracts to arrange additional financing were compulsory because they bore a logical relationship to the enforceability of the note).

Given this framework, we determine whether McKown's legal counterclaims are compulsory.

a. Civil Conspiracy

McKown's civil conspiracy counterclaim is based on an alleged conspiracy between the Bank and Rempher. McKown contended that two years after the execution of the notes and guarantees, Rempher was substituted in Christensen's place as a member of BADD and began collecting rents from the income-producing warehouse units. Allegedly, Rempher had an ownership interest in other warehouse units not purchased by BADD and as a result, conspired with the Bank to induce BADD's default by directing potential tenants away from renting the properties. McKown further claimed Rempher intentionally failed to make payments on the note even though sufficient funds were available because Rempher wanted to purchase the three warehouse units at a below market value, foreclosure sale.

Here, the execution of the guaranty agreements was the "transaction or occurrence" that gave rise to McKown's inclusion in the Bank's foreclosure complaint. McKown's civil conspiracy counterclaim does not arise out of that transaction or occurrence because it bears no logical relationship to either the execution or enforceability of the guaranty agreements. *Cf. N.C. Fed. Sav. & Loan Ass'n*, 298 S.C. at 518–19, 381 S.E.2d at 905–06; *Advance Int'l, Inc. v. N.C. Nat'l Bank of S.C.*, 316 S.C. 266, 270–71, 449 S.E.2d 580, 582–83 (Ct. App. 1994), *aff'd in part, vacated on other grounds*, 320 S.C. 532, 486 S.E.2d 367 (1996) (finding claims of fraud, negligence, and unfair trade practices in a foreclosure action were not compulsory because those claims did not affect the enforceability of the note). In other words, the civil conspiracy claim presumes the enforceability of the guaranty agreements because the allegations, if true, would not render the guarantees unenforceable. We therefore hold McKown waived his right to a jury trial by

asserting the civil conspiracy counterclaim in a foreclosure action because the claim is permissive as it does not arise out of the same transaction or occurrence as the execution of the guaranty agreements. *See Johnson v. S.C. Nat'l Bank*, 292 S.C. 51, 55, 354 S.E.2d 895, 897 (1987) (stating a defendant waives his right to a jury trial by asserting a permissive counterclaim in an equitable action).

b. Breach of Contract

The breach of contract claim is based on an allegation that Rempher agreed to obtain financing for the three units BADD mortgaged. The only allegation specific to the Bank is that the Bank breached its covenant of good faith and fair dealing implied in the note, mortgage, and guaranty agreements based on the Bank's purported conspiracy with Rempher. Again, the "transaction or occurrence" for the purpose of determining the compulsory character of McKown's counterclaim is the execution of the guaranty agreements. McKown's "breach of covenant of good faith and fair dealing" claim depends on a purported conspiracy that took place, if at all, two years after the guarantees had been executed. This claim does not arise out of the underlying transaction or occurrence because it does not affect the execution or enforceability of the guaranty agreements. We therefore hold McKown waived his right to a jury trial by asserting a permissive counterclaim in the foreclosure action. *Cf. Advance Int'l, Inc.*, 316 S.C. at 270–71, 449 S.E.2d at 582–83.

Conclusion

We reverse the Court of Appeals as McKown is not entitled to a jury trial solely because the Bank exercised its statutory right to join him as a party in the event of a deficiency judgment. We further hold McKown is not entitled to a jury trial based on his counterclaims, which, while legal, are permissive. McKown waived his right to a jury trial by asserting permissive counterclaims in an equitable action. Accordingly, the effect of our decision affirms the circuit court's decision, which referred this matter in its entirety to the master-in-equity.

The Court of Appeals decision is therefore

REVERSED.

TOAL, C.J., BEATTY, KITTREDGE and HEARN, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Carolina First Bank, n/k/a TD Bank, NA, Respondent,

v.

BADD, LLC, William McKown, and Charles A. Christenson, Defendants,

Of whom BADD, LLC and William McKown are Appellants.

BADD, LLC and William McKown, Third-Party Plaintiffs,

v.

William Rempher, Third-Party Defendant.

Appellate Case No. 2011-187747

Appeal From Horry County
Steven H. John, Circuit Court Judge

Published Opinion No. 5041
Heard September 13, 2012 – Filed October 24, 2012

REVERSED AND REMANDED

Richard R. Gleissner, of Gleissner Law Firm, LLC, of Columbia, for Appellants.

William Wayne DesChamps, III, of DesChamps Law Firm, of Myrtle Beach, for Respondent.

WILLIAMS, J.: BADD, LLC (BADD) and William McKown appeal the circuit court's order referring the instant case to the master-in-equity (master), arguing the circuit court erred in (1) referring Carolina First Bank's (Carolina First) claim against McKown as guarantor to the master based on its finding that the main purpose of the action was equitable in nature; and (2) referring BADD and McKown's counterclaims to the master based on its finding that those claims were permissive counterclaims asserted in an equitable action and, thus, that BADD and McKown waived their right to a jury trial on those claims. We reverse.

I. FACTS

On March 14, 2008, Charles Christenson and McKown, as members of and on behalf of BADD, executed a promissory note and mortgage to obtain financing for the acquisition of income-producing real estate. McKown also executed a guaranty at the same time, personally guaranteeing performance and payment of the promissory note. On April 1, 2008, Christenson and McKown, again on behalf of BADD, executed another promissory note and mortgage to obtain additional financing for income-producing real estate (collectively Notes and Mortgages). McKown executed a second guaranty on the same day (collectively Guaranties). In 2009, Christenson began experiencing financial problems and sought McKown's consent to allow William Rempher to buy his interest in BADD and assume responsibility for the operations of BADD. McKown agreed to the arrangement, and Rempher became a member of BADD.

On September 9, 2010, Carolina First filed an action against BADD seeking judgment for the full amount owed on the Notes and Mortgages and foreclosure and sale of the properties secured by the Mortgages. In addition, Carolina First sought a judgment against McKown, as guarantor of the Notes and Mortgages, for payment of the residue of the mortgage indebtedness, if any, remaining unsatisfied after the judicial sale of the properties. In response, McKown demanded a jury trial on Carolina First's claim against him based on the Guaranties and, along with BADD, filed several counterclaims against Carolina First, including civil conspiracy, breach of contract, and a claim seeking a determination that the Guarantees were unconscionable and, thus, unenforceable. In addition, McKown impleaded Rempher as a third-party defendant by alleging causes of action against him for civil conspiracy, breach of contract, intentional interference with

contractual relations and prospective business relations, and breach of fiduciary duty. Carolina First filed a motion to refer the entire case to a master-in-equity, and the circuit court granted the motion, finding that the action brought by Carolina First was an equitable action to foreclose two mortgages and that BADD and McKown waived their right to a jury trial on their counterclaims because the claims were permissive. This appeal followed.

II. STANDARD OF REVIEW

"Whether a party is entitled to a jury trial is a question of law." *Verenes v. Alvanos*, 387 S.C. 11, 15, 690 S.E.2d 771, 772 (2010). "An appellate court may decide questions of law with no particular deference to the [circuit] court." *Id.* at 15, 690 S.E.2d at 772-73.

III. LAW/ANALYSIS

McKown argues that Carolina First's claim against him for any indebtedness resulting after the sale of the subject properties is a breach of contract claim arising from the Guaranties and is legal in nature. Accordingly, McKown asserts the circuit court erred in referring this claim to the master. In addition, McKown and BADD argue the circuit court erred in referring their legal counterclaims for civil conspiracy and breach of contract to the master. We agree.

"Generally, 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). "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) (internal quotation marks omitted). However, "[i]t is well settled that a guarantor's liability is an independent contractual obligation." *TranSouth Fin. Corp. v. Cochran*, 324 S.C. 290, 295, 478 S.E.2d 63, 65 (Ct. App. 1996). Accordingly, a claim to recover on a guaranty agreement is one at law, even if the plaintiff seeks a deficiency judgment resulting from the foreclosure of real property. *See S. Bank & Trust Co. v. Harley*, 295 S.C. 423, 424, 368 S.E.2d 908, 909 (1988) (noting that a plaintiff's case seeking a deficiency judgment on a guaranty agreement after the foreclosure of real properties "was a law case"); *see also Johnson v. S.C. Nat'l Bank*, 292 S.C. 51, 53, 354 S.E.2d 895, 896 (1987) (classifying a party's counterclaim for damages under a guaranty agreement as a "legal counterclaim"). "When a complaint raises both legal and equitable issues and rights, the legal issues are determined by a jury

while equitable issues are for the judge." *JASDIP Props. SC, LLC v. Estate of Richardson*, 395 S.C. 633, 639, 720 S.E.2d 485, 488 (Ct. App. 2011).

In its order referring this case to the master, the circuit court found that the main purpose of the instant action was to foreclose on the properties securing the Notes and that it was therefore appropriate to refer the claims on the Guaranties to the master as well as the foreclosure claim. This reasoning traces its roots to the case of *Alford v. Martin*, in which our supreme court explained that "[t]he character of an action is determined by the complaint in its main purpose and broad outlines and not merely by allegations that are merely incidental." 176 S.C. 207, 212, 180 S.E.13, 15 (1935). However, our supreme court more recently expressed its concern in *Floyd v. Floyd* "that, as courts have sought to ascertain the 'main purpose' of lawsuits, the pendulum appears to have swung with steadied progress toward decisions tending to place within the sole purview of the equity judge issues properly triable only by jury." 306 S.C. 376, 380, 412 S.E.2d 397, 399 (1991). Consequently, "[w]ith a view toward harmonizing the case law on this issue," the supreme court clarified "that in instances where legal and equitable issues or rights are asserted in the same complaint, the legal issues are for determination by a jury and the equitable issues are to be decided by the court." *Id.*

Based on the supreme court's holding in *Floyd*, we hold the circuit court erred in referring Carolina First's claim against McKown arising from the Guaranties to the master. This claim was separate and distinct from the foreclosure action and was legal in nature. Accordingly, McKown was entitled to a jury trial on this claim, and we reverse the circuit court's order referring this claim to the master. Further, the filing of a legal counterclaim in response to an equitable complaint amounts to a waiver of the right to a trial by jury only when the counterclaim is permissive. *See Johnson*, 292 S.C. at 55-56, 354 S.E.2d at 897. Because we find Carolina First's complaint against BADD and McKown contained both a legal and an equitable claim, we find BADD and McKown did not waive their right to a jury trial by filing legal counterclaims against Carolina First. Accordingly, we also reverse the circuit court's order to the extent it referred BADD and McKown's counterclaims for breach of contract and civil conspiracy to the master and remand for proceedings consistent with this opinion.

REVERSED AND REMANDED.

FEW, C.J., and PIEPER, J., concur.