STATE OF SOUTH CAROLINA

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable James R. Barber, Circuit Court Judge

Appellate Case No. 2015-002537

Bank of America, N.A., ... Plaintiff,

v.

Theda B. Vaughan a/k/a Theda L. Vaughan; James R. Vaughan; LBB & HHV II, LLC; Hometrust Bank, N.A.; Quality Business Solutions, Inc.; Creative Builders, Incorporated; Matthew J. Bynum; Ann Bynum; Mayfield Dairy Farms, LLC: TD Bank, N.A., as successor by merger with Carolina First Bank; Butler Improvements, LLC; Discover Bank; Suiza Dairy Group, LLC; FIA Card Services, N.A.; Wells Fargo Bank, N.A., as successor by merger to Wachovia Bank, National Association; L. Stewart Spinks; Dillanos Coffee Roasters, Inc.; Branch Banking and Trust Company; Spaulding Farm Homeowners Association, Inc.; TCP Leasing, Inc.; First South Bank; Brookfield South Associates, LLC; Green Tree Servicing, LLC formerly known as Green Tree Financial Servicing Corporation, a Limited Liability Company under the laws of the State of Delaware; Bank of Travelers Rest; Comprehensive Legal Solutions, Inc.; The South Carolina Department of Revenue, ...Defendants.

of which

Bank of America, N.A., ...Respondent,

v.

LBB & HHV II, LLC,.....Appellant.

INITIAL BRIEF OF APPELLANT

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Was the Circuit Judge correct in dismissing Appellant's trespass claim pursuant to Rule 12(b)(6), SCRCP?

STATEMENT OF THE CASE

Respondent ("Bank") filed an action to foreclosure its note on the 305 Buckland Way property in 2015. R.___. Appellant filed a timely answer to the complaint and alleged various counterclaims. R.___. Bank filed a pro forma three (3) line motion pursuant to Rule 12(b)(6), SCRCP, to dismiss Appellant's counterclaims. R.___.

On October 23, 2015, a hearing was convened before the Honorable James R Barber, III. on Bank's motion. R.___. After hearing brief arguments, the Circuit Judge took the matter under advisement. R.___. Post-hearing memoranda and proposed orders were submitted to the lower Court. On November 2, 2015, the Circuit Judge granted Bank's motion and dismissed Appellant's counterclaims. R.___. This appeal follows.

STATEMENT OF FACTS

The Vaughans abandoned the property in 2009 that was encumbered by the Bank's mortgage and Spaulding Farm Homeowners' ("HOA") lien for the unpaid assessments. R.___. Ultimately, the HOA foreclosed its lien and Appellant purchased the property at the foreclosure sale in October 2014. R.___. Prior to Appellant's purchase of the property at the foreclosure sale, the property suffered from numerous defects including a structure on the property that was condemned by the county. R.___. Appellant expended substantial resources to restore the previously abandoned property to habitable condition. R.___. Post-repairs, the Appellant's tenants have occupied the rehabilitated property.

It was not until the Bank realized the property was again viable and had increased in value that it, as senior lien holder, sought to foreclose its note on the property. R.___. The Bank's agents have repeatedly entered upon the property of Appellant without authorization and have caused damage to the property. R.___. The trespass was utilized as an intimidation tactic by the Bank, in order to threaten the Appellant's tenants living in the house. R.___.

STANDARD OF REVIEW

Rule 12(b)(6) of the South Carolina Rules of Civil Procedure provides:

> Every defense, in law or fact, to a cause of action in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion . . . (6) failure to state facts sufficient to constitute a cause of action . . .

"In considering such a motion, the trial court must base its ruling solely on allegations set forth in the complaint." Spence vs. Spence, 368 S.C. 106, 116, 628 S.E.2d 869, 874 (2006). "If the facts and inferences drawn from the facts alleged in the complaint, viewed in the light most favorable to the plaintiff [or counterclaimant], would entitle the plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper." Brazell v. Windsor. 384 S.C. 512, 515, 682 S.E.2d 824, 826 (2009).

"In deciding whether the trial court properly granted the motion to dismiss, the appellate court must consider whether the complaint, viewed in the light most favorable to the plaintiff, states any valid claim for relief." Gentry v. Yonce, 337 S.C. 1, 5, 522 S.E.2d 137, 139 (1999). On appeal from the grant of a Rule 12(b)(6) motion, the Court is concerned only with whether the allegations of the complaint, which must be accepted as true, state a cause of action. Chestnut v. AVX Corp., 413 S.C. 224, 227, 776 S.E.2d 82, 84 (2015). "The complaint should not be dismissed merely because the court doubts the plaintiff [or counterclaimant] will prevail in the action." Doe v. Marion. 373 S.C. 390, 395, 645 S.E.2d 245, 247-48 (2007).

ARGUMENT

I.

Reversal is necessary where the Circuit Judge committed certain error in granting the Bank's Rule 12(b)(6), SCRCP motion to dismiss Appellant's claim of betterments.

Appellant contends the Circuit Judge erred as a matter of law in granting Bank's motion where the legislature clearly conferred a statutory right to assert and immediately litigate a claim for betterments. The Circuit Judge's error is further exacerbated by its reliance on ancient dicta that contravenes the dispositive statute. The effect of the Circuit Judge's error clearly prejudices Appellant's ability to litigate this matter.

A.

As clearly set forth in its Answer and Counterclaims, Appellant asserted its claims of betterments:

> 16. [By incorporation] [Bank] with intent to abandon and forsake the property described in the [Bank]'s complaint, relinquished all property rights to said property and is barred from asserting a claim for recovery sought herein.
>
> 17. [Appellant] repeats and realleges the allegations set for in the preceding paragraphs as if set forth herein verbatim.
>
> 18. Spaulding Farm Homeowners' Association, Inc. conveyed the property located at 305 Buckland Way and bearing TMS #0531.07-01-097.00 to [Respondent] by deed dated October 21, 2014 and recorded December 5, 2014 in Book 2456 at Page 1073.
>
> 19. [Appellant] made significant improvements to the property located at 305 Buckland Way and bearing TMS # 0531.07-01-097.00
>
> 20. Said improvements increased the value of the property located at 305 Buckland Way and bearing TMS # 0531.07-01-097.00.
>
> 21. [Bank] is entitled to a judgment equal to the value of said improvements.

R. ___. At the motion hearing, Bank argued Appellant's claim for betterments should be dismissed pursuant to Rule 12(b)(6), SCRCP based upon two points of contention: (1) Appellant took title to knowing Bank had a superior lien interest in the property; (2) a claim for betterments is procedurally barred until a judgment has been entered that disposes of Appellant's interest in the property. R. ___.

In granting Bank's motion to dismiss, the Circuit Judge found "[Appellant]'s claim for Betterments as it is not ripe for determination. A claim of betterments cannot be made in a foreclosure action and may only be made after a final judgment in an action for recovery of lands and tenements. Leslie v. Bowie, 27 S.C. 193, 197 (1887)." R. ___.

B.

First, Appellant contends the Circuit Judge erred as a matter of law in granting Bank's motion where the legislature clearly conferred upon Appellant the right to immediately litigate and assert a betterments claim in its responsive pleadings. "The issue of interpretation of a statute is a question of law for the court." University of S. Cal. v. Moran, 365 S.C. 270, 275, 617 S.E.2d 135, 137 (Ct. App. 2005). "The cardinal rule of statutory interpretation is to determine the intent of the legislature." Bass v. Isochem, 365 S.C. 454, 459, 617 S.E.2d 369, 377 (Ct. App. 2005). "When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning." Miller v. Aiken, 364 S.C. 303, 307, 613 S.E.2d 364, 366 (2005).

In S.C. Code Ann. § 27-27-10, the legislature conferred a cause of action for betterments. The statute reads as follows:

> [S]upposing at the time of such purchase or acquisition such title to be good in fee or such lease to convey and secure the title and interest therein expressed, such defendant shall be entitled to recover of the plaintiff in such action the full value

> of all improvements made upon such land by such defendant or those under whom he claims, in the manner provided in this chapter.

Id. As such, the statutory framework supports Appellant's claim for betterment. Bank's argument to the contrary is without merit where S.C. Code Ann. § 27-27-70 states:

> In any action for the recovery of lands and tenements, whether such action be denominated legal or equitable, the defendant who may have made improvements or betterments on such land, believing at the time he made such improvements or betterments that his title thereto was good in fee, may set up in his answer a claim against the plaintiff for so much money as the land has been increased in value in consequence of the improvements so made and the defendant may also set up a claim against the plaintiff for so much money as the land has been increased in value in consequence of improvements or betterments made by any person under or through whom he claims, if it be shown that the defendant actually believed he was taking a good title in fee simple thereto at the time of the alleged taking thereof.

Id. (emphasis added). "The [appellant] is allowed to set up in his answer a claim for so much money as the land has been increased in value in consequence of the improvements." Howard v. Kirton, 144 S.C. 89, 142 S.E. 39, 42 (1928). Therefore, the legislature expressly granted Appellant the right to assert a claim for betterment in its responsive pleadings that is immediately ripe for litigation. See Isochem, 365 S.C. at 459, 617 S.E.2d at 377.

Second, the Circuit Judge's reversible error in ignoring S.C. Code Ann. § 27-27-70 is further exacerbated by the lower court's faulty reliance on the ancient dicta in Leslie v. Bowie, 27 S.C. 193, 3 S.E. 199 (1887). R. ___. While the Bowie Court noted "that a claim of improvements cannot be made in an action for foreclosure of a mortgage," the South Carolina supreme court in more recent cases has rejected that proposition. The holding of National Surety Co. v. Carsten, 159 S.C. 222, 156, S.E. 336 (1930) is instructive to the present case. Although unavailing on the merits, the Court in Carsten recognized that defendant's statutory right to assert and immediately litigate a claim of betterments in his answer to the complaint. Id. at ___, 156 S.E.2d at 342-45; see also Griddle v. Taylor, 182 S.C. S.C. 349, 189 S.E. 461 (1937)

(affirming that defendant's statutory right assert a betterments counterclaim in his answer in a partition action from an equitable mortgage); Butler v. Lindsey, 293 S.C. 566, 474, 361 S.C. 621, 625 (1987) ("Section 27-27-70 permits a defendant to request by counterclaim the value of improvements made to the land"). Regardless, because S.C. Code Ann. § 27-27-70 allows an entity to assert a counterclaim for betterments in an "equitable action" such as a mortgage foreclosure, the proposition for which the Circuit Judge relies upon Bowie constitutes reversible error.

Third, the Circuit Judge's ruling greatly harms Appellant's ability to efficiently litigate the present case. Affirmance of the Circuit Judge will place an undue burden on Appellant, and those similarly situated, to relitigate and prove its counterclaim for betterments in an entirely separate proceeding after losing a quiet title or foreclosure action. Simply, the procedural bar would chill Appellant, and those similarly situated, from engaging in litigation against powerful interests such as Bank of America. Furthermore, having an entirely separate hearing to resolve Appellant's counterclaim for betterments would unduly tax the judiciary and prolong the disposition of a case such as the present one.

Accordingly, this Court should reverse the Circuit Judge's grant of dismissal where Appellant sufficiently pled a cognizable claim for betterment. See Rule 8(f), SCRCP ("All pleadings shall be so construed as to do substantial justice to all parties").

II.

Reversal is necessary where the Circuit Judge committed certain error in granting the Bank's Rule 12(b)(6), SCRCP motion to dismiss Appellant's claim of trespass.

Appellant contends the Circuit Judge erred as a matter of law in granting Bank's motion where Bank's unauthorized entrance onto Appellant's property constituted trespass. Bank had neither the implied nor the expressed 'right of entry' onto Appellant's property.

A.

As clearly set forth in its Answer and Counterclaims, Appellant asserted its claim of trespass as follows:

> 22. [Appellant] repeats and realleges the allegations set forth in the preceding paragraphs as if set forth herein.
>
> 23. [Bank]'s agents have repeatedly entered upon the property of [Appellant] without authorization and caused damage to said property.
>
> 24. [Appellant] notified [Bank] that the aforementioned entry was unauthorized through a letter dated December 11, 2014.
>
> 25. [Bank]'s agents entered upon the property of [Appellant] without authorization after given notice.
>
> 26. [Appellant] is entitled to a judgment equal to the cost of all damages that resulted from the trespass of [Bank]'s agents.

R.___. At the motion hearing, Bank argued Appellant's trespass claim should be dismissed pursuant to Rule 12(b)(6), SCRCP based upon one point of contention – that Bank did not commit an authorized entry upon the property. R. ___. In granting Bank's motion to dismiss, the Circuit Judge ruled that "because the mortgage in question was in default, [Bank] was authorized to enter upon the property and [Appellant]'s claim for trespass fails as a matter of law. R. ___.

B.

First, Appellant contends the Circuit Judge erred as a matter of law in granting Bank's motion where it had no implied right of entry on the property as mortgagee. R.___.

"[T]he person in peaceable possession has the right to exclude all others from the enclosure. The unwarrantable entry on land in the peaceable possession of another is a trespass, without regard to the degree of force used, the means by which the enclosure is broken, or the extent of the damage inflicted." Snow v. City of Columbia, 305 S.C. 544, 552, 409 S.E.2d 797, 802 (Ct. App. 1991) (internal citations omitted). "The mere entry entitles the party in possession at least to nominal damages. To constitute an actionable trespass, however, there must be an affirmative act, the invasion of the land must be intentional, and the harm caused must be the direct result of that invasion." Id. at 553, 409 S.E.2d at 802 (internal citations omitted).

Because Appellant held title to and occupied the property at the time of the disputed entry in 2014, as a matter of law Bank's status as a senior lien holder did not provide it a per se right of entry. The Circuit Judge's reasoning that a mortgagee has an implied or potential expressed right of entry upon the condition of a mortgagor is erroneous. R.___. In Glover v. United States, 164 U.S. 294 (1896), the United States Supreme Court eloquently summarized South Carolina's rich history as a lien theory state. The Court noted,

> [a]s late as 1890 the supreme court of South Carolina construed this statute in Hardin v. Hardin, 34 S. C. 77, 80, 12 S. E. 936, and it was there held that it was well settled, by many decisions, that in South Carolina a mortgage of real estate is not a conveyance of any estate whatever, but is simply a contract whereby the mortgagee obtains a lien on the property mortgaged as a security for the payment of the debt, and that the mortgagor still remains, even after the condition is broken, the owner of the land.

Id. at 296. The Court continued "[c]onstruing the words 'legal owner' in a strictly literal and purely technical sense, it is clear that, under the law of South Carolina, a mortgage creditor is not such a legal owner" in holding that no mortgagee shall be entitled to maintain any possessory

action prior to the foreclosure of its lien. Id. The South Carolina supreme court, in fact, confines the Bank to one of two options: either bring an action on the note or pursue a foreclosure action. See Lever v. Lighting Galleries, Inc., 374 S.C. 30, 33, 647 S.E.2d 214, 216 (2007). The notion that a mortgagee possess a per se implied right of entry onto encumbered property is fundamentally inapposite to this state's adherence to the lien theory doctrine.

Second, any expressed provision that provides Bank a right of entry upon default in the note does not bind Appellant because there is no privity between Bank and Appellant. The note constitutes a contract between Bank and the Vaughans. R.___. Any expressed provision that contemplates default by the Vaughans was rendered moot at the point the HOA, as a junior lien holder, completed its foreclosure of the property. See Maners v. Lexington Cty. Sav. & Loan Ass'n, 275 S.C. 31, 34, 267 S.E.2d 422, 423 (1980) (holding that where a grantee of mortgaged property assumes payment of the mortgage debt, he is not in privity). Simply, Appellant has grounds to assert a trespass claim where Bank intentionally committed multiple unlawful entries on the property not only prior to the disposition of its foreclosure action, but even before filing its foreclosure suit. R.___.

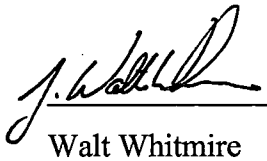
Third and last, even assuming arguendo that Bank had a right of entry for inspection during Appellant's ownership of the property, there is still a very viable factual dispute as to whether Bank exceeded its limited authority to inspect by committing harassment. R.___. Thus a finder of fact would still have to determine if Bank ultimately committed an unauthorized entry and trespass through its brutish conduct.

Accordingly, this Court should reverse the Circuit Judge's grant of dismissal where Appellant sufficiently pled a cognizable claim for trespass. See Rule 8(f), SCRCP ("All pleadings shall be so construed as to do substantial justice to all parties").

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment of lower court be reversed.

Respectfully submitted,



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