

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Letitia Verdin, Circuit Court Judge

Case No. 2013-CP-23-5575
SC Ct. App. filed March 13, 2015

HHH Ltd. of Greenville, by
and through its Receiver,
Randy A. Skinner

Respondent,

v.

Randall S. Hiller, Robert E.
Hiller and Randall S. Hiller,
P.A.,

Appellant.

PETITION FOR WRIT OF CERTIORARI

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SC Court of Appeals

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CERTIFICATE OF COUNSEL

Pursuant to Rule 226(d)(1), SCACR, Counsel for Petitioner certifies that a Petition for Rehearing was made to the Court of Appeals on July 11, 2016 and denied by the Court of Appeals on August 18, 2016.

INTRODUCTION

This case concerns whether a party has a substantial right to a trial in the circuit court when a motion is made for reference which is opposed, contains a legal claim and counterclaims demanding a jury trial, is immediately appealable.

As well as whether the counterclaims raised by the Appellant constitute compulsory counterclaims requiring a jury trial.

The Court of Appeals summarily dismissed the appeal pursuant to Rule 220(b), SCACR, citing, substantially, cases involving whether the counterclaims were legal and compulsory and logically related without regard for the propriety of whether the entire proceeding was one that could be summarily referred without consent of all the parties pursuant to Rule 53, SCRCP and Rule 38, SCRCP.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in refusing to address whether the Court had authority under Rule 53, SCRCP, to refer the case to the Master in Equity without the consent of the Appellants and this was a substantiated right affecting mode of trial that was immediately appealable.
2. Did the Court of Appeals err in finding that the counterclaims of the Appellant were not compulsory and/or logically related to the claims of Plaintiff rendering the order immediately appealable.
3. Did the Court of Appeals err in not considering the Defendants entitlement under the Constitution of South Carolina and Rule 38, SCRCP, to a jury trial on all issues

so demanded and this was a substantiated right affecting mode of trial that was immediately appealable.

4. Did the Court of Appeals err in failing to address the issue of whether Article I, Section III; Section XVI; Article V, Section XI, Section XIII and Section XVI of the South Carolina Constitution afford litigants a substantial right to have a case heard by a duly elected circuit court judge subject to the requirement set forth therein and this was a substantiated right affecting mode of trial that was immediately appealable.

STATEMENT OF THE CASE

This action was commenced by the filing of a Summons and Complaint on October 16, 2013 wherein the Plaintiff alleged that it had participated in the transfer of real property in violation of Section 27-23-10 of the South Carolina Code of Laws and a prior Court Order. Appellant timely moved to dismiss pursuant to Rules 12(b)(6) and 12(b)(7) which Motion was denied (App. Pg.150). Appellant thereafter timely answered and set forth seven affirmative defenses and two counterclaims both of which were law claims, expressly electing a jury trial on those claims (App. Pg.78-86).

A hearing before the Honorable Letitia H. Verdin was held on that Motion and Appellant's Motion for Summary Judgment on December 18, 2014. On December 19, 2014 Judge Verdin issued a Form Order granting Plaintiff's Motion for Reference to the Master in Equity. Appellant thereafter filed a timely Motion to Reconsider on January 6, 2015 pursuant to Rules 59 and 60 of the South Carolina Rules of Civil Procedure which were denied by Form Order of Judge Verdin dated January 8, 2015 and received by Appellant on January 12, 2015. Subsequently a corrective Order amending the January 8, 2015 Order dated February 25, 2015 was issued and received by Appellant on February 27, 2015.

The Court of Appeals mistakenly dismissed the appeal apparently on the grounds that the counterclaims raised were not legal and compulsory, bore a logical relationship to the complaint and neglected to rule on the issue of whether a litigant has a constitutional right to have his or its claim heard by a duly elected circuit court judge, whether it is equitable or legal, by Order filed June 29, 2016.

Respondent timely filed a Petition for Rehearing which was denied by the Court of Appeals
by Order filed August 18, 2016.

ARGUMENTS

1. **Did the Court of Appeals err in refusing to address whether the Court had authority under Rule 53, SCRCP, to refer the case to the Master in Equity without the consent of the Appellants and this was a substantiated right affecting the mode of trial that was immediately appealable.**

Plaintiff filed the subject action on October 16, 2013, stating three causes of action (App. Pg. 39). The third cause of action alleged that the properties which are the subject of the action were transferred in violation of Judge Edward W. Miller's March 15, 2007 Order and prayed that the deeds be cancelled of record set aside and rendered null and void (App. Pg. 48 & 49). Subsequent to a failed Motion to Dismiss by Appellants they filed their answer and counterclaim, containing a demand for jury trial, on May 19, 2014 (App. Pg. 78). Five months after the pleadings were closed on November 3, 2014 Plaintiff filed its Motion for Reference to the Master in Equity and on November 17, 2014 the Defendants filed their Motion for Summary Judgment (App. Pg. 102).

On October 31, 2014 Plaintiff filed a Motion for Reference to Master in Equity upon the following grounds:

1. This is an equitable matter;
2. As evidenced by the Master's previous Order, the Master is knowledgeable of the facts and circumstances of this matter;
3. This matter centers on real property issues for which the Master is best suited to adjudicate; and
4. Judicial economy will be best served if the Master presides over this matter. (App. Pg. 88-89)

The Court, without comment, granted the Motion. (App. Pg.115)

The South Carolina Supreme Court has interpreted S.C.R.C.P. Rule 53(b) to authorize the Circuit Court to refer an action to a Master in Equity under four specific circumstances. (1) By consent of the parties, (2) If there is a default, (3) In actions with complicated issues to be tried before a jury, and (4) In all other actions upon application of any party or upon the Court's Motion. First Palmetto Bank and Trust Co. v. Boyles, 302 S.C. 136, 394 S.C.2nd 313 (S.Ct. 1990)

The Defendant did not consent and there is no default nor was there any contention by the Plaintiff that there were complicated issues to be tried before a jury. Thus, the only basis for referral would be pursuant to reason number four, which only applies unless a request for a jury trial pursuant to Rule 38 is not made or has not been made. Rule 53(b), SCRCF, specifically mandates that a reference under the latter **shall be** returned to the Circuit Court if a jury demand is made.

None of the Plaintiff's stated grounds, even were they accurate, could meet those conditions.

"*This is an equitable matter*" is half true. The Plaintiff states two claims, a claim that it (the Plaintiff) violated Section 27-3-10 of the South Carolina Code of Laws which is indeed equitable and a claim that it violated an existing prior court order which is an action at law. (App. Pg. 45-46) Strangely, the second cause of action relies upon a court order which contains a provision retaining jurisdiction to the Honorable Edward Miller, a fact which the Plaintiffs conveniently ignored.

Both the Circuit Court and the Court of Appeals overlooked the fact that the third cause of action sought an interpretation and construction of an order by a Judge, or in this case a Master, of a previous Circuit Judge's Order. The allegations and the relief requested in the third cause of action of the Plaintiff is an action to construe an order (App. Pg. 48) As such, it is an action at law.

McGill v. Moore, 381 S.C. 179, 672 S.C. 2nd 571 (2009). Since the Plaintiff plead a claim as an action at law the referral of all of the claims to the Master in Equity without the consent of the Appellants was error and renders the Court of Appeals analysis of whether the counterclaims were compulsory or permissive, moot.

"As evidenced by the Master's previous Order, the Master is knowledgeable of the facts and circumstances of this matter" is simply not true. The prior Order is nothing more than a supplemental proceeding brought under Section 15-39-310, et. seq., appointing a Receiver and, most importantly, was a matter to which these Appellants were not a party. (App. Pg.164)

"This matter centers on real property issues for which the Master is best suited to adjudicate;" is akin to saying that a breach of contract action for the sale of real property centers on real estate. Nothing about this action involves title to property nor, for that matter, is the Master particularly suited for hearing even a case such as the latter. The case, from the Plaintiff's perspective, is about determining whether or not a valuable consideration was given and interpreting and applying a prior order, nothing more.

"Judicial economy will be best served if the Master presides over this matter" is nothing more than a bald statement unsupported by any fact or argument. It is unsupported because it is inaccurate. In truth judicial economy would best be served by allowing the jury issues and the non-jury issues to be heard by the same trial judge during the same trial as is common practice in the courts of this state.

In the instant case the Defendant has set forth compulsory counterclaims alleging fraud and breach of contract directly related to and arising from the very same facts as Plaintiff's claims, both of which are actions at law, and for which a jury trial was duly demanded. Notwithstanding that the referral itself of all claims and causes of actions of both parties to the Master in Equity

without the consent of all parties was improper, the Court of Appeals incorrectly determined that if the referral was authorized that the Appellants counterclaims were not compulsory.

Accordingly, the Defendant is entitled under the Constitution of the State of South Carolina and Rule 38 of the South Carolina Rules of Civil Procedure to a jury trial on all issues so demanded and the Court of Appeals dismissal has deprived the Defendant improperly of that right.

2. **Did the Court of Appeals err in finding that the counterclaims of the Appellant were not compulsory and/or logically related to the claims of Plaintiff rendering the order immediately appealable.**

The Court of Appeals misapprehended the actual parties in interest in the subject action.

The Court of Appeals has applied the law of compulsory counterclaims to the within action as if the **judgment creditor** were the Plaintiff. That was how it should have been. As Appellants argued at their initial Rule 12(b)(6), S.C.R.C.P., motion to dismiss, it was improper to bring the action in the name of the transferor of the property under a Section 27-23-10, *South Carolina Code of Laws*, cause of action (App. Pg. 147). Appellants argued, unsuccessfully, that the judgment creditor was required to bring the action under the aforesaid section and the Plaintiff of the within action was required to be a co-defendant (App. Pg. 150). Had the trial court ruled in Appellants' favor then there could not have possibly existed a compulsory counterclaim as the judgment creditor would be the Plaintiff and the current Plaintiff would be a cross-defendant thereby eliminating any compulsory claim.

In this case however the Plaintiff/Respondent is the grantor of the deeds which it, now, seeks to set aside as fraudulent transactions although it directly participated in the transaction. No matter the theory under which the Plaintiff/Respondent seeks to void the transactions with the Appellants, whether it be rescission, fraud or the chosen method in this action, the result is that the underlying transaction is the transaction at issue.

As the Court of Appeals correctly pointed out "a counterclaim is compulsory only if it arises out of the same transaction or occurrence as the opposing parties claim" First Citizens Bank & Trust Co. of SCV Hucks, 305 S.C. 296, 298, 408 S.C. 2nd 222, 223 (1991). In this case the opposing party IS the PARTY that the Appellants transacted business with and thus all of the facts of the counterclaim are identical and logically related to the facts of Plaintiff's claim.

The complaint states two claims against two separate Appellants seeking to set aside the conveyance of two separate parcels of real estate.

In the first instance, the Plaintiff executed a purchase money note and mortgage to a third party secured by real estate in Greenville County. The Appellant, Randall S. Hiller, subsequently purchased the note and mortgage and an assignment was duly recorded at least 8 years prior to the entry of a judgment against the Plaintiff. The Plaintiff/Respondent was in default and issued a deed in lieu of foreclosure to satisfy the debt. The Plaintiff now seeks to set aside that deed as fraudulent. The judgment creditor is not a party and has not sought to set aside that deed. This counterclaim by the Appellant unquestionably arises out of the same transaction or occurrence that is the subject of the action and is thus compulsory under case law and Rule 13, SCRPC. Clearly there is a logical relationship between the enforceability of the purchased note and mortgage, the deed given in lieu of foreclosure and the Plaintiff's now claim that it executed the deed in lieu of foreclosure with the intent to defraud a creditor. If, indeed, the Plaintiff deeded the property in violation of Section 27-23-10, et. seq., then Appellant will have no remedy for its financial loss unless it counterclaims in this action.

The second piece of property, also conveyed by the Plaintiff/Respondent as Grantor, was conveyed pursuant to a written contingent contract between Plaintiff and the Appellant, Randall S. Hiller, P.A. to file an action to set aside a tax sale under which the subject property had already

been deeded to the successful purchasers at a tax sale. The Appellant did in fact file an action and after a non-jury trial obtained a successful result wherein the tax sale deeds were voided and title to the property reverted to the Plaintiff. In accordance with the written fee contract, the Plaintiff then executed a deed to a one-half interest in the property to the Appellant which the Plaintiff now seeks to set aside as having improperly executed. The contract was performed by Plaintiff and Defendant in accordance with its terms but the Plaintiff now seeks to set the entire agreement aside as a fraudulent conveyance. If it indeed did fraudulently execute the deed then Appellant would have no remedy as its counterclaims against the Plaintiff obviously and completely arose out of the same transaction or occurrence that is the subject of the action.

Because the Plaintiff/Respondent is a direct participant in each transaction which is the subject of this litigation and the Appellant's counterclaims are based on the exact same transactions they are both compulsory and rationally related and the Court of Appeals dismissal should be reversed. North Carolina Federal Savings and Loan Association v. DAV Corp., 298, S.C. 514, 381 S.E. 2nd 903 (1989)

The Court of Appeals failed to follow Supreme Court precedent in Creed v. C.W. Stokes, 285 S.C. 542, 331 S.C. 2nd 351 (1985) declaring that a reference of a jury issue must be appealed immediately because it effected the mode of trial, a substantial right.

3. **Did the Court of Appeals err in not considering the Defendants entitlement under the Constitution of South Carolina and Rule 38, SCRPC, to a jury trial on all issues so demanded and this was a substantiated right of affecting mode of trial that was immediately appealable.**
4. **Did the Court of Appeals err in failing to address the issue of whether Article I, Section III; Section XVI; Article V, Section XI, Section XIII and Section XVI of the South Carolina Constitution afford litigants a substantial right to have a case heard by a duly elected circuit court judge subject to the requirement set forth therein and this was a substantiated right affecting the mode of trial that was immediately appealable.**

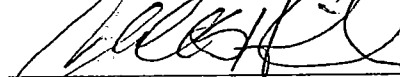
While the dismissal must be reversed for depriving the Appellants of their right to a jury trial and being outside the scope of an Order of Reference pursuant to S.C.R.C.P Rule 53, State constitutional issues also arise under the "catch all" aspects of Rule 53.

Article I, Section III of the South Carolina Constitution grants to its citizens due process of law. Section IX insures its citizens that "all Courts shall be public, and every person shall have speedy remedy therein for wrongs sustained." Article V of the Constitution, Section XI, establishes jurisdiction of the Circuit Court as being a general trial court with original jurisdiction in civil and criminal cases. Section XIII divides the states into judicial circuits and Section XIV provides for the rotation of judges within those circuits. Pursuant to the Constitution the General Assembly enacted Section 14-1-70 of the South Carolina Code of Laws designating the courts of the state. Nowhere to be found within that designation is the Master in Equity. To the contrary the Master in Equity is separately described and his duties are set forth in Section 14-11-80, South Carolina Code of Laws.

Accordingly, absent consent, default or foreclosure a citizen of the State of South Carolina has a constitutional right to have his or her remedy litigated in the Circuit Court and by a Circuit Judge which is specifically provided with the power to hear and determine equitable and non-jury matters.

RESPECTFULLY SUBMITTED,

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September 15, 2016

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Letitia Verdin, Circuit Court Judge

Case No. 2013-CP-23-5575

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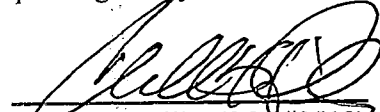
Randall S. Hiller, Robert E.
Hiller and Randall S. Hiller P.A.,

Appellant.

PROOF OF SERVICE

I certify that I have served Appellant's Petition Writ of Certiorari on the SC Court of Appeals, John T. Crawford, Esq. and Randy A. Skinner, Esq. by depositing a copy of it in the UPS Overnight, on September 15, 2016

September 15, 2016


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September 15, 2016

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SC Court of Appeals

Re: HHH Ltd. of Greenville v. Randall S. Hiller, et al
Petition for Writ of Certiorari

Dear Your Honor:

Please find enclosed one original and seven copies of our Petition for Writ of Certiorari, one bound and one unbound Appendix and Proof of Service regarding the above. Please file the original and six copies and return a stamped copy to me in the envelope provided.

By copy of this letter I am providing SC Court of Appeals and opposing counsels with same.

Yours very truly,



Alison H. Kelley
Paralegal to Randall S. Hiller

/ak

Enclosures.

Cc: SC Court of Appeals
Randy A. Skinner, Esq.
John T. Crawford, Esq.

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SC Court of Appeals

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