

STATE OF SOUTH CAROLINA)
COUNTY OF DORCHESTER)
Bank of North Carolina,)
Plaintiff,)
vs.)
Anthony Whitfield and Cindy Whitfield,)
Defendants,)
Anthony Whitfield,)
Third Party Plaintiff,)
vs.)
✓ David Swanson,)
Third Party Defendant.)

) IN THE COURT OF COMMON PLEAS
) IN THE FIRST JUDICIAL CIRCUIT
) CASE NO.: 2014-CP-18-0358

**ORDER GRANTING MOTION TO
DISMISS THIRD-PARTY COMPLAINT**

FILED - RECORDS
2016 JUL 15 AM 9:35
DORCHESTER COUNTY
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SC Court of Appeals

This matter comes before the Court on Third-Party Defendant David Swanson's motion to dismiss the Third-Party Complaint. A hearing was held on June 1, 2016. Counsel for Plaintiff Bank of North Carolina, Defendant/Third-Party Plaintiff Anthony Whitfield, and Third-Party Defendant David Swanson were present. For the reasons set forth herein, Third-Party Defendant's motion is granted.

Introduction

This lawsuit is one of six foreclosure actions filed by Bank of North Carolina against Anthony Whitfield. Three actions are pending in Dorchester County: Case Nos. 2014-CP-18-0358, 2014-CP-18-1792, and 2014-CP-18-1793; two are pending in Berkeley County: Case Nos. 2012-CP-08-2618, and 2012-CP-08-3478; and one is pending in Charleston County: Case No. 2012-CP-10-5887. In each of the six foreclosure actions, Defendant/Third Party Plaintiff has asserted

identical third-party claims against David Swanson alleging causes of action for abuse of process and civil conspiracy.

Third-Party Defendant David Swanson is an attorney at Haynsworth Sinkler Boyd, P.A. The third-party claims against him arise out of advice he gave the bank concerning the renewal of the loan on the property that is the subject of the Charleston County foreclosure action, which is referred to in the pleadings as the "Black Rush Property." Third Party Plaintiff alleges that Mr. Swanson never actually provided the advice to the bank, and that he and the bank lied about providing the advice in order to fabricate a defense to Third Party Plaintiff's counterclaims against the bank.

Third-Party Defendant Swanson has moved to dismiss in this action pursuant to Rules 12(b)(8), 12(f) and 14(a) of the South Carolina Rules of Civil Procedure on grounds that another action is pending between the same parties for the same claim, and that the claims against him are not the proper subject of third-party claims because they do not allege derivative liability.

Findings and Conclusions

Rule 12(b)(8) of the South Carolina Rules of Civil Procedure provides that a defendant may seek dismissal of an action when "another action is pending between the same parties for the same claim." In considering a motion to dismiss under Rule 12(b)(8), courts must consider both the identity of the parties and the identity of the claims. Criquet Cove Ventures, LLC v. Gilland, 390 S.C. 312, 701 S.E.2d 39 (Cl. App. 2010). In order to warrant dismissal pursuant to Rule 12(b)(8), "the claim must be precisely or substantially the same in both proceedings. . . ." Capital City Ins. Co. v. BP Staff, Inc., 382 S.C. 92, 674 S.E.2d 524, 532 (Cl. App. 2009); *see also* Freemantle v. Preston, 398 S.C. 186, 728 S.E.2d 40, 45 (2012).

In support of this motion, Third-Party Defendant presented the Court with a copy of the pleadings in the related Charleston County action that is the subject of the Black Rush Property. The

Court finds that it is appropriate to take judicial notice of these pleadings in considering whether dismissal is warranted under Rule 12(b)(8), SCRPC.

Based on this Court's review of the pleadings in this action and the Charleston County action, the Court finds that the parties to the third-party claims are identical in both actions, and that the claims against David Swanson are substantially the same, if not identical, in both proceedings. Compare Def.'s Am, Answer and Third Party Compl., Dorchester Co. Case No. 2014-CP-18-0358, ¶¶ 55-72 with Def.'s Am. Answer and Third Party Compl., Charleston Co. Case No. 2012-CP-10-5887, ¶¶ 65-82. Accordingly, the Court finds that dismissal of the Third-Party Complaint in this action against David Swanson is warranted pursuant to Rule 12(b)(8), SCRPC.

Alternatively, Third-Party Defendant moves to dismiss the third-party claim pursuant to Rule 14(a) of the South Carolina Rules of Civil Procedure. Rule 14(a) permits a defendant to assert claims as a third-party plaintiff against a person who is not a party to the action, but only where the third party "*is or may be liable to him or all or part of the plaintiff's claim against him.*" (emphasis added). In other words, it is not whether the third-party claim is somehow related to the original action, but whether the defendant has a claim against a third party for all or part of the original claim that would shift liability for the original claim from the defendant to the third-party.

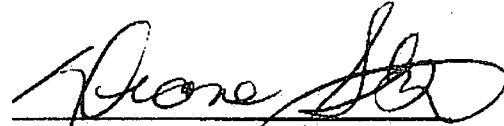
Here, the original action is a foreclosure action initiated by Bank of North Carolina against Anthony Whitfield. Regardless of whether the third-party claims are somehow related to the foreclosure action, Defendant's third-party claims for abuse of process and civil conspiracy do not seek to and cannot shift any liability he may have to the bank in the original foreclosure action to David Swanson. Accordingly, the Court finds that the claims in the Third-Party

Complaint are not premised on derivative liability, and therefore the Third-Party Complaint should be dismissed pursuant to Rule 14(a), SCRPC.

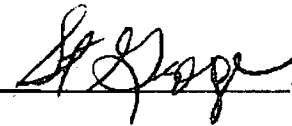
Accordingly, Third-Part Defendant's motion to dismiss is GRANTED.

IT IS SO ORDERED.

This 7 day of July, 2016



Diane S. Goodstein
Circuit Court Judge

 South Carolina

FORM 4

STATE OF SOUTH CAROLINA
 COUNTY OF DORCHESTER
 IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
 CASE NUMBER 2014CP1800358

Bank of North Carolina
 Seth Warren Whitaker

Anthony M Whitfield
 Cindy Whitfield

BNC Bancorp
 David Swanson

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: Plaintiff Defendant
 Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit);
 Rule 43(k), SCRPC (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j) SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other: _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order; (formal order to follow) Statement of Judgment by the Court

ORDER INFORMATION

This order ends does not end the case.
 Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

| Judgment in Favor of (List name(s) below) | Judgment Against (List name(s) below) | Judgment Amount Paid/Enrolled (List amount(s) below) |
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If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Diane S. Goodstein
 Circuit Court Judge

2112
 Judge Code

7/15/2016
 Date

For Clerk of Court Office Use Only

This judgment was entered on 7/15/2016, and a copy mailed first class or placed in the appropriate attorney's box on 7/15/2016, to attorneys of record or to parties (when appearing pro se) as follows:

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29413-0519

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Kropski PO Box 22528 Charleston, SC 29413

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Cheryl Graham

Court Reporter

Cheryl Graham - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
