

STATE OF SOUTH CAROLINA  
COUNTY OF DORCHESTER

) IN THE COURT OF COMMON PLEAS  
) IN THE FIRST JUDICIAL CIRCUIT  
) CASE NO.: 2014-CP-18-1792

Bank of North Carolina,  
  
Plaintiff,

vs.

Anthony Whitfield and Cindy Whitfield,  
  
Defendants,

Anthony Whitfield,  
  
Third Party Plaintiff,

vs.

✓ David Swanson,  
  
Third Party Defendant.

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

**RECEIVED**

OCT 24 2016

SC Court of Appeals

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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. Cricket Cove Ventures, LLC v. Gilland, 390 S.C. 312, 701 S.E.2d 39 (Ct. 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 (Ct. 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), SCRCP.

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-18-1729, ¶¶ 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), SCRCP.

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.

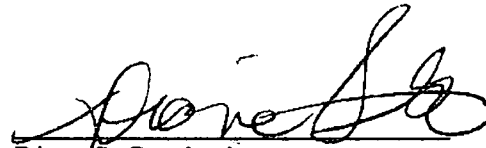
Here, the original action is a foreclosure action initiated by Bank of North Carolina against Anthony Whitfield. Regardless of whether the third-party claims are somehow related to the foreclosure action, Defendant's third-party claims for abuse of process and civil conspiracy do not seek to and cannot 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