

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM SUMTER COUNTY

COURT OF COMMON PLEAS

Hon. Michael G. Nettles, Circuit Court Judge

RECEIVED

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SC Court of Appeals

Appellate Case No: 2016-001526

The Bank of New York Mellon f/k/a The Bank of New York, as Trustee for
the benefit of Certificateholders of Popular ABS, Inc. Mortgage Pass-
Through Certificates Series 2006-E, Respondents,

v.

Charles Taylor, Burgess Brøgdon Bldg. Supply, Palmetto Health Alliance,
Defendants,

Of Whom Charles Taylor is the Appellant.

FINAL BRIEF OF APPELLANT

CHARLES TAYLOR, APPELLANT
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STATEMENT OF ISSUES ON APPEAL

- I. DID THE LOWER COURT ERR TO DENY APPELLANT'S RULE 59(e) MOTION TO AMEND HIS ANSWER AND COUNTERCLAIM TO THE RESPONDENTS' FORECLOSURE SUIT? P. 3-3

- II. DID THE LOWER COURT ERR TO DENY APPELLANT'S RULE 59(e) MOTION RE: GRANTING RESPONDENTS' MOTION TO DISMISS & STRIKE APLNT'S COUNTERCLAIM TO RESPONDENTS' FORECLOSURE SUIT? P. 4-5

- III. DID THE LOWER COURT ERR TO DENY APPELLANT'S RULE 59(e) MOTION TO DISMISS RESPONDENTS' FORECLOSURE SUIT? P. 5-6

INTRODUCTION / STATEMENT OF THE CASE / STATEMENT OF FACTS / COMBINED

1. That in brief-this is a foreclosure case file by the Bank of New York et al. ("Hereinafter Resp'd's.") on 1-28-11 & receive by Charles Taylor ("hereinafter Apln't Taylor") on 2-2-11 & answered & counter claimed 3-1-11, (*jury trial demanded*), which was once amended 7-28-11 as a matter of course; which case was later stayed 8-27-12 pursuant to SC Supreme Court's Administrative Modification Workout Order No: 2011--05-02--01; which stay was lifted only 3-31-16 to proceed from original stay 8-27-12 (*almost 4yrs. in between*), &;
2. That these relevant (to this appeal) motions were filed on the following dates:
 - a. 3-31-11 Respds' motion to dismiss & 8-1-11 motion to strike Aplnt's counterclaim, &;
 - b. 2-28-12 Appellant Taylor's motion to dismiss the Respondents' foreclosure suit, and;
 - c. 1-22-16 Appellant Taylor's motion to amend his answer & counter claim; (*re: the stay's length-para.1 line 6 above-& a relevant lot happen & change in that time--obviously--on p. 3*) &;
3. That these motions were heard, before the Honorable Judge Nettles, on 5-16-16, &;
4. That Respds.' motions were granted & Aplnt's. denied in the Judge's 6-8-18 order, &;
5. That Apln't. can't really defend Respds' suit if he can't amend--see-all of #2c above, &;
6. Thus Apln't Taylor file 6-13-16 a reconsider Rule 59(e) Motion to Amend etc. & it too was denied in the Judge's 7-7-16 order-judgment; from which this appeal comes; now [*pursuant to South Carolina's section 14-3-330 sub-section numbers (1) and (2)*]; on grounds-the lower court erred (*fatally for Aplnt*) to grant Respds' motions & deny his; see: Appellant's arguments in argument sections beginning on p. 3 next below.

ARGUMENTS

(Standard of Review: Abuse of Discretion)

Argument: #1: THE LOWER COURT ERR TO DENY APPELLANT'S RULE 59(e) MOTION TO AMEND HIS ANSWER AND COUNTERCLAIM TO RESPONDENTS' FORECLOSURE SUIT; p. 3-3

(1-a). Because a motion to amend should be freely given where justice requires & no prejudice would occur--*Rule 15* & *see: Forman v. Davis, 371 U.S. 178, 182 (1962)*; & in this case;

(1-b). Justice required it; Because Apln't needed / must / amend pleadings to prevent an injustice; in that Respd's /their loan servicer--*agents*--had been later caught by Federal Authorities, forcing some of their customers & (*Apln't was one of them*) into illegal default et al. etc., by their withholding & returning payments to them to later have "cause" (bogus) to file foreclosure suit against their mortgagors that had sizeable equity in their homes over & above the mortgage balance so that they could steal it in foreclosure fees etc., (*Apln't had over \$100,000.00 house equity above the \$39ish mortgage balance*), & thus was 1 of their victims (*payments held & return:* R. pp. 91-92) & Aplnt's recompense 5-3-13 from their being caught (R. p. 70); which required Aplnt. Taylor to must--after stay lifted 3-31-16--amend his said 4 years old (*earlier*) answer & counterclaim for said reason-s herein & for the important others detailed in (*Aplnt's. 1-22-16 motion to amend w/ supporting memorandum attach thereto--a copy of the proposed amended complaint:* R. pp. 71 – 83); Aplnt argues, &;

(1-c). No prejudice would occur; Because discovery just begin (5-19-16: R. p. 93) & continued after lifting stay (3-31-16: R. p. 14); & more importantly no prejudice to Respd's for all other reasons in Aplnt's (*mot. to amend:* R. pp. 71-83 & / or *59-e motion:* R. pp. 86 - 93 *esp. para. 12-13:* R. p. 90); Aplnt argues.

Argument: #2: THE LOWER COURT ERR TO DENY APPELLANT'S RULE 59(e) MOTION RE: GRANTING RESPONDENTS' MOTIONS TO DISMISS AND STRIKE APPELLANT'S COUNTERCLAIM TO RESPONDENTS' FORECLOSURE SUIT; p. 4-5

(Standard of Review: Abuse of Discretion)

(2-a). Because Resps' 12b-6 motion (R. p. 45) shouldn't be granted where facts are sufficiently stated to constitute a cause of action, &, if the facts & inferences drawn from the facts alleged in the pleadings (counterclaim, R. pp. 20--28 & / or the proposed counterclaim R. pp. 73 – 83), viewed in the light most favorable to the non-moving party, would entitle the non-moving party (Appellant Taylor) to any relief on any theory in his counterclaims, then the grant of a motion to dismiss for failure to state a claim is improper. *see Brazell v. Windsor, 384 S.C. 512, 515, 682 S.E.2d 824, 826 (2009)*; In the instant case, Aplnt Taylor's counterclaim, stated valid claims for relief as it did state such facts in counterclaim (R. pp. 20-28) &/or proposed counterclaim (R. pp. 73-83) & therefore, it was prejudicial & reversible court err / abuse of discretion, to dismiss the counterclaims (which effectively was / is too--Appellant's defenses (affirmative) to Resps' foreclosure suit: R. pp. 73 – 83 and R. pp. 86 - 93), all Appellant Taylor argues, and;

(2-b). Even if a defect as said in (6-8-16 order: R. p. 3 #1) Apln't still should've been allowed to amend his counterclaims, as oppose to dismissal, for reasons argued in Argument #1-1c above p.3, w/ amending the most appropriate & preferred remedy-(*the rules of civil procedure "encourages an opportunity to amend before dismissal see 2 James Wm. Moore, et al., Federal Practice 12.34[5] (3d ed. 2000)*); thus it was prejudicial & reversible court err-abuse of discretion to grant Respd's. motion to dismiss the counterclaims, Apln't. Taylor argues; &;

(2-c). Because Respds'. Rule 12(f) motion to strike, (*said counterclaim as amended 7-28-11 once as a matter of course*) alleged it was untimely amended back on 7-28-11 as the motion's reason for (*their Mot. to Strike: R. p. 50 L. 6*); but even if it otherwise might not be err to grant such motion, here it was because the case was stayed from 8-27-12 (R. p. 9) to 3-31-16 (R. p. 14) 4 years (& *Respds' fault see 2-d below*) & because of such expiration of time & all that happened (*as stated*) between the almost 4 years' time period, the counterclaims, even if with a defect as (*untimely amending 7/28/11*), here again too, Apln't. should've been allowed to amend it, (*Re: the stay*), as opposed to--*fatally for Aplnt--*striking it, as he argued for leave to do in Argument #1-1c on p.3, w/ amending the most appropriate & preferred remedy as stated, & thus it was prejudicial & reversible court err / abuse of discretion to grant Respd's. motion to strike the counterclaim; all Apln't. Taylor argues; &;

(2-d). **It should be highlighted here:** That the long length of said stay (8-27-12 to 3-31-16) before the Respd's. move to lift it (*as the ball was in their court to do so at any time*) was their fault because they feared the Aplnt's. counterclaims re what they had done & been caught at by the Federal Authorities as stated (R. p. 87) so did not move----more reason(s) supporting why their motion(s) should have been denied, Apln't. Taylor argues; &;

(2-e). *See Also, Johnsrud v. Carter, 620 F.2d 29, 32-33 (3d Cir. 1980) & Forman v. Davis, 371 U.S. Supreme Court 178, 182 (1962); in pertinent part that; to dismiss Plaintiff's claim without first permitting an opportunity to amend, would constitute forfeiture resulting simply from non--compliance with the Rules of Civil Procedure.*

Argument: #3 THE LOWER COURT ERR TO DENY APPELLANT'S RULE 59(e)
MOTION TO DISMISS RESPONDENTS' FORECLOSURE SUIT

(Standard of Review: Abuse of Discretion / De Novo?)

(3-a). Because the motion should've been granted as a matter of law-based on the motion's

Supporting memo's / briefs / arguments / etc., all attach (R. pp. 53-58 & 64-70 & 84-96) which the court considered (7-7-16 order p.2: R. p. 8 para. 2); & (6-8-16 order p.1: R. p. 3 top para L.8-10) & (R. p. 5 para. 5 bot'm.); & that this converted the 12 b-6 to a rule 56 summary judgment motion--which Apln't. should have been granted based on the above as just stated, Apln't. Taylor argues---see---*McDonnell v. The Consolidated School District Of Aiken*, 315 S. C. 487, 489, 445 S. E.2d 639, 639n.2 (1994); and *Gilbert v. Miller*, 356 S. C. 25, 586 S.E.2d 861 (Ct. App. 2003); in pertinent part that—if—material outside the pleadings is considered by the lower court—the motion becomes one for summary judgment; & see *Woodson v. DLI Properties, LLC.*, 753 S.E.2d 428-S. C. Supr. Ct. (2014); in pertinent part that; trial courts must base their summary judgment orders on rule 56 SCRPC evidence presented (which in this instance was) (R. pp. 53-58 & 64-70 & 84-96).

CONCLUSION

That based on all the foregoing, Respds' motion to dismiss & strike Aplnt's counterclaim being granted was lower court's prejudicial & reversible err, Aplnt argues; for reversal; &;

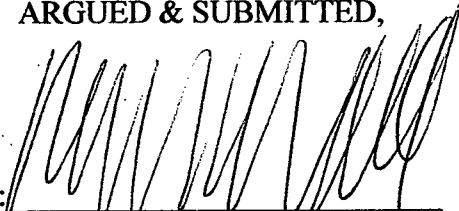
That Aplnt's motion for leave to amend his answer & counterclaim should've been granted but for the lower court's prejudicial & reversible err, Aplnt Taylor argues; for reversal; &;

That Aplnt's motion to dismiss Respds' foreclosure suit should have been granted but for the lower court's prejudicial & reversible err, Apln't Taylor argues; for reversal; &;

That Appellant's counterclaim, effectively is too, Aplnt's defense-s (affirmative also) to Respondents' foreclosure suit, against which Aplnt can't really / properly / effectively defend because the Judge's 6-8-16 order, leaves only Appellant's 4 years old 3-1-11 initial answer as his only operative pleading for the remainder of this case (6-8-16 Order p. 4: R. p. 6); notwithstanding all else--herein; which ruling--thus--too, is prejudicial & reversible court err-Apln't argues; for reversal; [which order too, necessitated this appeal; (now, pursuant to S. C. sec. 14-3-330 sub-sections (1). affecting both: merits & (2). rights);

IF the last line is raise by Respd's as to this Appeal being file now--rather than later].

MOST RESPECTFULLY
ARGUED & SUBMITTED,

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Sumter, South Carolina

January 2, 2017

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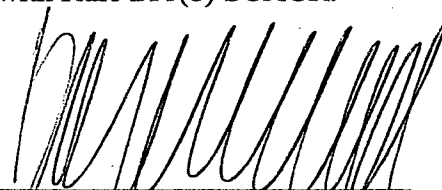
Of Whom Charles Taylor is the Appellant.

CERTIFICATE OF APPELLANT

Appellant certifies that his Final Brief complies with Rule 211(b) SCACR.

January 2, 2017

BY:


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