THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

The Honorable Michael G. Nettles, Circuit Court Judge

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,..... Respondent,

v.

Charles Taylor, Burgess Brogdon Bldg. Supply, Palmetto Health Alliance,..... of Whom Charles Taylor is the Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

This appeal surrounds the dismissal of a fraud counterclaim that was filed by Appellant Charles Taylor ("Appellant") in response to a Complaint for foreclosure, the striking of two improperly filed pleadings, and the denial of a motion to amend. Because the lower court rulings were proper and Appellant has not shown an abuse of discretion, Respondent 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 ("Respondent") respectfully requests that this Court affirm the lower court's rulings so that the foreclosure proceedings can proceed.

On January 28, 2011, Respondent filed a Complaint for foreclosure of a real estate mortgage due to Appellant's default on his payment obligations. (*See* R. pp. 158–162.) The foreclosure relates to a September 23, 2006 Note in the original principal amount of $43,700.00, which is secured by a Mortgage on certain real property known as 334 Myrtle Beach Highway, Sumter, SC 29153. (R. p. 159, at ¶¶ 7–10.) Appellant defaulted on the loan, which was due for the September 1, 2010 payment and as a result, Respondent accelerated the loan balance. The default and acceleration led to the filing of the Complaint for foreclosure. (R. p. 159, at ¶ 12.) On March 1, 2011, in response to the Complaint for foreclosure, Appellant filed a pleading captioned "Answer and Counter Claim (Jury Trial Demanded)" in which he answered the specific allegations of the Complaint, admitted executing the Note, and stated that he "will allege and show fraud in his counter claim to this suit." (*See* R. pp. 20–28, at ¶¶ 7, 13.) Further, Appellant asserted two affirmative defenses: (1) the statute of frauds and (2) "injustice." (R. pp. 25–26 (identified as Second and Third Defenses to all causes of action).) On April 1, 2011, Respondent filed a Reply and Motion to Dismiss Counterclaim. (*See* R. pp. 29–37.)

After the close of the pleadings, Appellant filed two new documents titled "Counterclaim;" the first was filed on July 20, 2011, and the second on July 28, 2011. (*See* R. pp. 31–44.) On August 2, 2011, Respondent moved, pursuant to Rule 12(f), SCRCP, to strike both documents titled "Counterclaim." (*See* R. pp. 49–52.) On February 28, 2012, following completion of foreclosure intervention efforts in which Appellant failed to complete the necessary prerequisites for the loan modification offered, Appellant filed a Motion to Dismiss Foreclosure Suit. (*See* R. pp. 164–238, p. 53.) Appellant then waited another four (4) years (knowing the dispositive motions would be set for a hearing) before filing the Motion to Amend his Answer and Counterclaim on January 20, 2016. (*See* R. pp. 71–72.)

Thereafter, following an additional attempt at offering Appellant one of many loan modifications, and his failure to follow through with the necessary prerequisites to modification, the Honorable George C. James, Jr. ("Judge James") issued an Order directing that the motions be scheduled for a hearing. (*See* R. pp. 142–145, pp. 97–102, pp. 146–148).[1] On May 16, 2016, the Honorable Michael G. Nettles heard argument on (1) Respondent's Motion to Dismiss Counterclaims; (2) Respondent's Motion to Strike; (3) Appellant's Motion to Dismiss Foreclosure Claims; and (4) Appellant's Motion to Amend. By Order dated June 8, 2016, the lower court granted Respondent's motions and denied Appellant's motions in their entireties. (R. pp. 149–153.) On June 13, 2016, Appellant filed a Rule 59(e) Motion to Reconsider; the motion was denied on July 7, 2016, and this appeal followed. (*See* R. pp. 86–93, pp. 154–156.)

[1] Appellant references a "stay" in his initial brief, but the record reflects only the foreclosure intervention stay between May 2011 and December 2012, and the subsequent stay through the Order of Judge James between January and March 2016 (a three (3) month period). There were *years* of litigation time between the two short stays—stays in which Respondent acted in good faith in offering Appellant loan modifications to keep his property and during which Appellant sought to cause unnecessary delay.

ARGUMENTS

I. APPELLANT CANNOT APPEAL THE DENIAL OF HIS MOTION TO DISMISS THE FORECLOSURE CLAIMS.

Appellant's third issue on appeal states: "Did the lower court err to deny appellant's Rule 59(e) motion to dismiss respondents'[sic] foreclosure suit?" (App.'s Br. at p.1.) This issue is not proper on appeal. And, even if the issue was proper for appeal, the answer is "no," there was not any error in the denial of Appellant's motion to dismiss the foreclosure claims.

A. Denial of a Motion to Dismiss is Not Subject to Immediate Appeal.

In South Carolina, "it is well settled that an interlocutory order is not immediately appealable unless it involves the merits of the case or affects a substantial right." *Brown v. County of Berkeley*, 366 S.C. 354, 361, 622 S.E.2d 533, 537 (2005); *see also* S.C. Code Ann. § 14-3-330. The denial of a motion to dismiss does not decide the merits of the case or affect a substantial right. *See Huntley v. Young*, 319 S.C. 559, 560, 462 S.E.2d 860, 860 (1995) ("Since the order denying the Rule 12(b)(6) motion does not finally decide any issue, it is not directly appealable."). Instead, a "motion to dismiss has the effect of asserting that respondent has failed to state a cause of action," and the "denial of such a motion is not immediately appealable under S.C. Code Ann. § 14-3-330." *McLendon v. S.C. Dep't of Highways & Pub. Transp.*, 313 S.C. 525, 526, 443 S.E.2d 539, 540 (1994).

Appellant seeks to appeal the denial of a Rule 12(b)(6) motion to dismiss the foreclosure claims. Such an appeal, as outlined above, is interlocutory and improper.

B. Appellant Fails to Identify a Basis for Reversal of the Lower Court's Order.

Additionally, Appellant fails to identify any error in the denial of the motion to dismiss the foreclosure claims. Appellant's only argument on this issue is that when a lower court considers materials outside of the pleadings in deciding a Rule 12(b)(6) motion, it can be converted to a Rule 56 motion for summary judgment. (*See* App.'s Br. at pp. 5–6.) This standard is irrelevant to the lower court's denial of Appellant's motion to dismiss the foreclosure claims. Nothing in the lower court's Order suggests that materials outside of the pleadings were submitted or considered in making the determination to deny Appellant's motion. Instead, the Order states: "The Court *reviewed the Complaint, heard the arguments* of the Defendant, and determined that the Complaint states facts sufficient to constitute a cause of action for foreclosure." (R. pp. 150–151, at ¶ 3 (emphasis added).) Thus, the record establishes that the lower court was not presented with nor did it consider matters outside the pleadings in making its ruling on Appellant's motion.[2] Appellant's reliance on the conversion portion of Rule 12, SCRCP is misplaced.

Moreover, "[i]n reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCP, the appellate court applies the same standard of review as the trial court." *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007). "The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief." *Id.* at 395, 645 S.E.2d at 247–48 (citing *Gentry v. Yonce*, 337 S.C. 1, 5, 522 S.E.2d 137, 139 (1999)). In the Complaint filed on January 28, 2011, Respondent alleged the existence of the debt, the security, the default, the acceleration, and sought foreclosure judgment in its

[2] Appellant did not raise or receive a ruling the Rule 12 to Rule 56 "conversion" argument and, therefore, it is not preserved on appeal. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 497 S.E.2d 731 (1998); *Holy Loch Distribs., Inc. v. Hitchcock*, 340 S.C. 20, 531 S.E.2d 282 (2000).

favor. (*See* R. pp. 158–162.) Viewing the allegations in the "light most favorable to" Respondent, it properly pled a cause of action for foreclosure. Appellant's motion to dismiss failed to identify any legal basis to dismiss Appellant's foreclosure claims. The lower court ruling denying Appellant's motion should be affirmed.

II. THE LOWER COURT PROPERLY DISMISSED THE COUNTERCLAIM AND STRUCK THE IMPROPER PLEADINGS.

As for Appellant's second issue on appeal, he fails to identify how the lower court abused its discretion in dismissing the fraud counterclaim when all nine elements of fraud were not pled. Further, he fails to identify any error as to the striking the two late amended pleadings. Each issue is addressed below. As outlined, the lower court's rulings must be affirmed.

A. Failure to Plead All Nine Elements of Fraud is Fatal to the Claim.

The lower court properly dismissed the counterclaim in the March 1, 2011 pleading due to Appellant's failure to plead all nine elements of fraud. (*See* R. pp. 149–150, at ¶ 1.) In Appellant's only "proper" pleading, he claimed to be pursuing a claim for fraud against Respondent. (*See* R. pp. 20–28.) In South Carolina, it is well-established that a party must plead all nine elements of fraud to survive dismissal. *See, e.g., Inman v. Ken Hyatt Chrysler Plymouth, Inc.*, 294 S.C. 240, 242, 363 S.E.2d 691, 692 (1988) ("The motion to dismiss the fraud cause of action should have been granted on the ground Inman's complaint fails to allege all nine elements of fraud."). The nine elements of fraud are: "(1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury." *Ardis v. Cox*, 314 S.C. 512, 515, 431 S.E.2d 267, 269 (Ct. App. 1993). "It is well-settled that a complaint is *fatally defective* if it fails to allege all nine

elements of fraud." *Inman*, 294 S.C. at 242, 363 S.E.2d at 692 (emphasis added). Further, Rule 9(b) requires that the circumstances constituting the fraud be pled with particularity. *See* S.C. R. Civ. P. 9(b). Therefore, failure to plead fraud with particularity is also a basis for dismissal.

In this case, Appellant failed to plead *a single* element of fraud in his "counterclaim" filed on March 1, 2011—let alone all nine of the required elements with particularity. (*See* R. pp. 20–28.) Because Appellant's pleading failed to set forth all nine elements of fraud, the trial court properly granted Respondent's motion to dismiss. *Ardis*, 314 S.C. at 515, 431 S.E.2d at 269 ("Where the complaint omits allegations on any element of fraud, the trial court *should grant* the defendants' motion to dismiss the claim." (emphasis added).). Finally, despite Appellant's blanket contentions, the lower court was under no obligation to provide him with an opportunity to amend the fatal claim as a matter of right. *See id.* The dismissal of the fraud counterclaim was proper and this Court should affirm.

B. Appellant's July 20, 2011 and July 28, 2011 Pleadings Were Properly Stricken for Appellant's Failure to Comply with Rule 15, SCRCP.

After filing his Answer and Counterclaim, Appellant proceeded to file two subsequent pleadings—one on July 20, 2011, and the second on July 28, 2011. Neither was a proper amended pleading under Rule 15, SCRCP. For this reason, the lower court struck the improper pleadings in accordance with Rule 12(f), SCRCP. (*See* R. p. 150, at ¶ 2.) This Court should affirm the lower court's decision.

Rule 15(a), SCRCP provides two mechanisms by which a party can amend their pleading. The first mechanism is considered an amendment "as a matter of course." *See* S.C. R. Civ. P. 15(a). A party has the right to amend his pleading once "as a matter of course" "within 30 days after a responsive pleading is served or, if the pleading is one to which no responsive pleading is required and the action has not been placed upon the trial roster, he may so amend it

at any time within 30 days after it is served." *Id.* (emphasis added). When more than 30 days have passed, the party is left with the second mechanism for amendment—leave of court or consent of the opposing party. *See id.* The rule provides: "Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party[.]" *Id.* (emphasis added). Here, Appellant failed to amend with the 30 day period required for an amendment "as a matter of course" and failed to obtain leave of court or written consent of Respondent for his proposed amended pleadings.

More specifically, Appellant served his Answer and Counterclaim on March 1, 2011. (*See* R. pp. 20–28.) Respondent then served its Reply to the Answer and Counterclaim on March 31, 2011. (*See* R. pp. 29–30.) Under Rule 15(a), SCRCP, Appellant had 30 days from March 31, 2011 to serve any amended pleading "as a matter of course." In this case, that 30-day deadline passed on May 2, 2011 (the 30th day fell on the weekend). Necessarily then, Appellant's July 20, 2011 and July 28, 2011 pleadings were not proper amendments "as a matter of course." S.C. R. Civ. P. 15(a); *see also Stanley v. Kirkpatrick*, 357 S.C. 169, 174, 592 S.E.2d 296, 298 (2004) ("Rule 15(a), SCRCP, provides that, if more than thirty days have elapsed from the time a responsive pleading is served, a party may amend his pleading only by leave of court or by written consent of the adverse party."). Moreover, Appellant did not obtain the consent of Respondent to file and serve any amended pleading nor did he obtain leave of court to file and serve the same. (*See* R. p. 150, at ¶ 2.)

Because the record establishes that the July 20, 2011 and July 28, 2011 pleadings were outside of the 30-day period to amend "as a matter of course" and that Appellant did not obtain the consent of Respondent or leave of court to amend, the lower court was correct when it struck the pleadings pursuant to Rule 12(f), SCRCP. *See Alladin Plastics, Inc. v. Wintenna, Inc.*, 301

S.C. 90, 93, 390 S.E.2d 370, 372 (Ct. App. 1990) (noting that with a Rule 12(f) motion "a Court decides whether a party should be allowed to plead a defense or other matter, not whether there are facts supporting what has been pleaded"). In sum, Appellant has not identified any reversible error as to the striking of the two improper pleadings and this Court should affirm.

III. THE LOWER COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT'S MOTION TO AMEND.

After filing and serving his Answer and Counterclaim on March 1, 2011, filing two subsequent improper pleadings, and after proceeding with the case for another five (5) years, Appellant then asked the lower court to, essentially, restart the litigation and allow him to amend his pleading. This proposed amendment was not to change any responses to the allegations of the Complaint for foreclosure in light of new information learned during the course of the litigation but, instead, to assert, at best, permissive counterclaims that do not bear a logical relationship to the foreclosure. The lower court properly denied the motion to amend finding that: (1) justice did not require the amendment and (2) Respondent would be unduly prejudiced if it were to allow the amendment. (*See* R. p. 151, at ¶ 4.) Therefore, this Court should affirm.

While Rule 15(a), SCRCP allows amendments to be "freely given when justice so requires and does not prejudice any other party," a trial court is granted wide discretion in granting or denying motions to amend, particularly where, as here, there is a significant delay in time. *See, e.g., Wachovia Bank Nat'l Ass'n v. Beane*, 397 S.C. 612, 619, 725 S.E.2d 715, 719 (Ct. App. 2012) ("The Beanes waited almost three years before they made any motion to amend their answer. Trial courts have wide discretion to grant or deny motions to amend, particularly after such a significant delay."); *see also Foggie v. CSX Transp., Inc.*, 315 S.C. 17, 22–23, 431 S.E.2d 587, 590 (1993) ("In view of the tenuous nature of the assertion sought to be declared, the remaining admissions in CSX's answer, the facts in evidence, *and the circumstances*

surrounding the case, we do not find an abuse of discretion in denying leave to amend the answer." (emphasis added)). For that reason, the decision of the trial judge "will rarely be disturbed on appeal." *City of N. Myrtle Beach v. Lewis-Davis*, 360 S.C. 225, 232, 599 S.E.2d 462, 465 (Ct. App. 2004) (citing *Berry v. McLeod*, 328 S.C. 435, 450, 492 S.E.2d 794, 802 (Ct. App. 1997).) Specifically, "[t]he trial judge's finding will not be overturned without an abuse of discretion or unless manifest injustice has occurred." *Id.* at 232–33, 599 S.E.2d at 465. Appellant fails to identify any abuse of discretion or manifest injustice with the lower court's denial his Motion to Amend.

The lower court's Order outlines that justice did not require the amendment and, that given the length of time the case has been pending and protracted procedural history of the litigation, Respondent would be prejudiced by the late amendment. The Order reads:

> In this case, the Court finds that the proposed amendment would unduly prejudice the Plaintiff because *the counterclaims proposed* to be included by Defendant in the amended pleading *could have been asserted in 2011*. This Court finds *that given the amount of time that has passed in this case and the procedural history of the litigation*, it would be unfair and prejudicial to Plaintiff to change the causes of action and, essentially, restart the litigation at this juncture.

(R. p. 151, at ¶ 4 (emphasis added).) These rulings are proper and supported by South Carolina case law. *See, e.g., Holland v. Morbark*, 407 S.C. 227, 235, 754 S.E.2d 714, 719 (Ct. App. 2014) (affirming denial of motion to amend where party was in possession of information for a considerable amount of time before moving to amend); *Collins Entm't, Inc. v. White*, 363 S.C. 546, 562, 611 S.E.2d 262, 270 (Ct. App. 2005) ("The prejudice that Rule 15[, SCRCP] envisions is a lack of notice that the new issue is to be tried and a lack of opportunity to refute it." (citing *Tanner v. Florence Cnty. Treasurer*, 336 S.C. 552, 558-59, 521 S.E.2d 153, 156 (1999))).

It seems Appellant is contending that without an amendment, he cannot defend himself against the foreclosure. This is simply not the case. The lower court noted that, even though it was denying the proposed amendment, Appellant remains able to pursue the affirmative defenses to the foreclosure that he raised in the March 1, 2011 Answer and Counterclaim. (R. p. 151, at ¶ 4.) Thus, Appellant's purported basis for reversal is not support by the record.

Finally, Appellant's blanket contention that "[n]o prejudice would occur" is just that—a blanket, unsupported argument on appeal. *See* Rule 208(b)(1)(D), SCACR. Appellant fails to cite any precedent to support a finding that, based on the record in this case, "[n]o prejudice will occur." The argument is conclusory, unsupported, and does not support a finding of abuse of discretion or manifest injustice to reverse the lower court's denial of the motion to amend. *See, e.g., First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (finding the failure to provide arguments or cite to authority in support of argument constitutes abandonment of an issue on appeal); *see also Atl. Coast Builders & Contrs., LLC v. Lewis*, 398 S.C. 323, 327 n.1, 730 S.E.2d 282, 282 n.1 (2012) ("Although Lewis has raised this issue on appeal, we find it abandoned as the argument in her brief is purely a recitation of facts, devoid of any citation to legal authority, with the summary conclusion that Atlantic breached the lease."); *Potter v. Spartanburg Sch. Dist. 7*, 395 S.C. 17, 24, 716 S.E.2d 123, 127 (Ct. App. 2011) ("An issue is deemed abandoned if the argument in the brief is not supported by authority or is only conclusory.").

Ultimately, Appellant fails to identify any abuse of discretion or manifest injustice sufficient to require reversal of the lower court's denial of his motion to amend—a motion made almost five (5) years after his initial pleading. For all of the foregoing reasons, this Court should affirm the denial of Appellant's Motion to Amend.

CONCLUSION

The lower court properly applied the standards as to the motions before it, as well as the South Carolina Rules of Civil Procedure, when it issued its Order dismissing the fraud counterclaim, striking the two improper pleadings of Appellant, denying the motion to dismiss the foreclosure claims, and denying the motion to amend filed five (5) years after the start of the case. Appellant fails to show an abuse of discretion or manifest injustice to support reversal of these rulings. For all of these reasons, Respondent respectfully requests that this Court affirm the decisions of the lower court and allow the foreclosure case to proceed without further delay.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief complies with Rule 211(b), SCACR.

SIGNATURE PAGE IS ATTACHED

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