THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

The Hon. Markley Dennis, Jr., Circuit Court Judge

Appellate Case No. 2016-002192

Case No. 2012-CP-08-2618
Case No. 2012-CP-08-3478

Bank of North Carolina, Respondent,

v.

Anthony M. Whitfield and Cindy Whitfield, Defendants

Of whom Anthony Whitfield is the Appellant and Cindy Whitfield is a Respondent.

Anthony Whitfield, Appellant,

v.

David Swanson, Respondent.

APPELLANT'S INITIAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

1. Whether the trial court erred in dismissing Appellant's claims where each of the underlying actions are not identical for purposes of a Rule 12(b)(8) dismissal?

STATEMENT OF THE CASE

In 2007 and 2008, Respondent Bank of North Carolina (hereinafter "Respondent BNC" or sometimes "the bank") made nine (9) loans to the Appellant, Mr. Whitfield, for nine different residential properties. The loans were for five year terms. Beginning in 2012, those loans began coming due. In 2012, Respondent BNC initiated five (5) foreclosure lawsuits covering eight of those properties in Berkeley, Dorchester, and Charleston Counties. In March of 2014, another foreclosure lawsuit covering one of the properties was filed in Dorchester County, bringing the total of six (6) foreclosure lawsuits covering nine (9) different properties. All of the properties were single family residential rental properties, except the Charleston County property which was purchased by Appellant for his spouse at the time, Mrs. Cindy Whitfield, in order to meet his family court obligations in 2007.

In response to the foreclosure lawsuits, Appellant counterclaimed in each of the lawsuits claiming, inter-alia, that Respondent BNC made an agreement to renew all the loans for another five-year term and subsequently breached that agreement, thus causing Appellant to be damaged. Specifically, Appellant met the president of the bank on June 21, 2012 where an agreement was made to renew all nine of Mr. Whitfield's loans for another five-year term, at a reduced interest rate of 4.75%. After the meeting, the bank contacted the closing attorney and set up a closing for the following week, on June 28, 2012. Appellant attended the closing for the renewal of all nine (9) loans on June 28, 2012, and Respondent BNC refused to close any of the nine (9) loans at the closing.

Respondent BNC has denied that it made a contract to renew the loans, and has mainly defended Appellant's claims that the bank breached an agreement to renew the loans on two grounds as enumerated in its various Replies: 1) that Appellant's ex-wife Cindy Whitfield was

required to sign a mortgage to her home in Charleston County in order to renew all of the loans in Charleston, Berkeley, and Dorchester County; or 2) that a title endorsement was necessary for the property in Charleston County to renew all of the loans in Charleston, Berkeley, and Dorchester County.

As part of the Respondent BNC's "title endorsement" defense for the failure to renew the loans, Respondent BNC claims it sought the advice of a real estate transactional attorney, Respondent David Swanson (hereinafter "Respondent Swanson") who recommended that the bank should procure a title endorsement to the Charleston County property out of his hypothetical concern for an objection to the loan renewal by Cindy Whitfield (who lives in the Charleston County Property) on the grounds of an equitable subordination theory that has never been applied to a fee interest in real estate in South Carolina .

As alleged in Appellant's Counterclaims, the bank has defended its actions in each Charleston, Berkeley, and Dorchester Counties by claiming it sought Respondent Swanson's advice in their decisions not to renew loans that cover properties in each Charleston, Berkeley, and Dorchester Counties. (See, e.g., Plaintiff's Reply filed March 24, 2016, ¶¶ 13, 32, 33, 35, 38, 39 and 41).

Because of newly discovered evidence (See Counterclaims filed on March 8, 2016, ¶¶ 55-72) that supports Appellant's claim that the bank never received the advice it claims to have received and relied upon, Appellant has also sued Respondent Swanson for civil conspiracy and abuse of process.

Respondent Swanson subsequently moved to dismiss in the Berkeley and Dorchester cases primarily travelling under Rule 12(b)(8) by arguing that all of the claims being made in all six lawsuits are the same. As stated above, Appellant was sued six different times by the Respondent BNC for foreclosure of nine different individual properties in each county. Each of the properties in Berkeley

and Dorchester were separate, income producing properties. Appellant has already counterclaimed against the bank six different times that the bank made an agreement to renew the loans and he should never have been foreclosed upon. Appellant has sought and will receive a jury trial in each action. Moreover, the Respondent BNC has interposed its reliance upon the advice of Respondent Swanson in each Charleston, Berkeley, and Dorchester Counties, including this matter.

On or about April 11, 2016, Respondent Swanson filed a Motion to Dismiss in each of the two (2) cases currently pending before the Court of Common Pleas for Berkeley County, Judge Dennis presiding. (See, Respondent's Motion to Dismiss) A hearing was held before the Court on or about June 28, 2016. Subsequently, the trial Court denied each of the Respondent's motions and on or about June 30, 2016, the Court entered a Form 4 Order memorializing same. Respondent Swanson subsequently filed a Motion to Alter or Amend pursuant to Rule 59(e), SCRCP on or about July 18, 2016.[1] (See, Respondent's Motion's to Alter or Amend)

The trial court held a hearing on the Motion on or about September 20, 2016. After reviewing the briefs and considering the arguments proffered by Counsel during the hearing, the Court issued an Order Granting the Motion to Reconsider[2] and amended its June 30, 2016 Order. On or about September 29, 2016 the Court filed an Order dismissing Appellant's claims pursuant to Rule 12(b)(8), S.C.R.C.P.

This Order is now on appeal before this Court.

1 There is no indication in the record as to what date Respondent Swanson received Notice of Entry of Judgment, and accordingly Appellant is uncertain as to whether the Motion to Reconsider was timely filed within ten (10) days.
2 The caption of the Court's Order, is of course, referencing Respondent's Rule 59(e) motion by its more colloquial name "Motion to Reconsider."

SUMMARY OF LEGAL ARGUMENTS

I. The trial court erred in dismissing Appellant's claims as the each of the underlying actions are not identical for purposes of a Rule 12(b)(8) dismissal.

STANDARD OF REVIEW

The appellate court applies the same standard of review in scrutinizing the application of Rule 12(b)(8), SCRCP. *Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 99, 674 S.E.2d 524, 528 (Ct. App. 2009). While [the Court] utilize[s] the same standard of review as the circuit court in scrutinizing the application of Rule 12(b)(8), each of the components of the rule are determined as a matter of law and thus [the Court applies] a *de novo* standard of review to the grant or denial of this motion. *Id. citing Miami Sand & Gravel, LLC v. Nance*, 849 N.E.2d 671, 676 (Ind. Ct. App. 2006). The Court may determine whether there is another action involving the same parties, claims (or subject matter), and remedies available as a matter of law. *Id.*

LEGAL ARGUMENTS:

I. The trial court erred in dismissing Appellant's counterclaims to a foreclosure action in one county where each of the underlying actions are not identical for purposes of a Rule 12(b)(8) dismissal.

Before delving into the substantive issue of the improper dismissal, Appellant finds it necessary to frame their legal arguments within the context of the laws which apply to foreclosure proceedings:

The purpose of a foreclosure proceeding is to fully determine the entire controversy between the parties, to protect the rights of all parties, to determine the amount of the debt in order to disburse the proceeds of sale, and should the personal property so sold be not sufficient to pay the debt, that a deficiency judgment may be entered against the maker of the obligation. *Judson Mills v. Norris*, 166 S.C. 422, 164; 310 S.E. 919; *General Plywood Corporation v. Richard Jones, Inc.*, 216 S.C. 322, 57 S.E.2d 636. An action ... [for the foreclosure of a mortgage of real property] must be tried in the county in which the subject of the action or some part of the property is situated. S.C. Code Ann. § 15-7-10(3) (2006). A counterclaim is compulsory only if it arises out of the same transaction or occurrence as the opposing party's claim. *S.C. R. Civ. P. 13(a).*

In the present matter, Respondent BNC3 filed six (6) separate foreclosure actions against the Appellant in three (3) separate counties as required by S.C. Code Ann. § 15-7-10(3). Appellant, in response to each of the six (6) foreclosure lawsuits, has counterclaimed against Respondent BNC for a breach of their agreement to renew all the loans for another five-year term, which ultimately has resulted in a tremendous amount of damages to Appellant. Appellant brought the counterclaims in each separate foreclosure because each of the claims were compulsory in nature. *S.C. R. Civ. P. 13(a).*

Further, the claims for damages sustained by Appellant are necessary in "fully determin[ing]

3 The actions were originally brought by Harbor National Bank, which has since been purchased by Bank of North Carolina. All parties have stipulated to a substitution of Harbor National Bank for Bank of North Carolina.

the entire controversy" as to each of the properties which are the subject matter of each of the six (6) respective actions. *Judson Mills*, 166 S.C. 422, 164; 310 S.E. 919. At no point in the history of this matter has Respondent BNC ever objected to Appellant's filing of counterclaims in each of the underlying actions. Rather, it was only after Respondent Swanson was added as a co-defendant in each of the underlying cases that any party ever raised the argument that certain claim(s) should be dismissed pursuant Rule 12(b)(8). It is under this framework and procedural background of the case that Appellant now turns to the substantive issue before the Court.

In South Carolina, dismissal under Rule 12(b)(8) may be proper when there is (1) another action pending (2) between the same parties (3) for the same claim. *S.C. R. Civ. P. 12(b)(8).* The rule has historic ties to a former statute providing a defendant a similar opportunity to demur; and our supreme court traditionally interpreted that statute narrowly, stating that it only applied when there was identity of parties, causes of action and relief, and our supreme court has held such an approach is consistent with modern day practice under rules similar to Rule 12(b)(8). *Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 674 S.E.2d 524 (Ct. App. 2009); *S.C. Public Serv. Comm'n v. City of Rock Hill*, 268 S.C. 405, 408, 234 S.E.2d 228, 229 (1977). To prevail on a Motion to Dismiss pursuant to Rule 12(b)(8), the movant must show that the actions in question are between the same parties in their same capacities. 1 C.J.S. ABATEMENT AND REVIVAL § 54 (2005). Further, the claims sought to be dismissed, "must be precisely or substantially the same in both proceedings in order for the drastic remedy of dismissal to be appropriate under Rule 12(b)(8)." *Cricket Cove Ventures, LLC v. Gilland*, 390 S.C. 312, 701 S.E. 39 (Ct. App. 2010).

In *Corbett v. City of Myrtle Beach, S.C.*, the Court concluded that the trial court properly dismissed the complaint pursuant to Rule 12(b)(8) because the plaintiff's claim for negligent infliction of emotional distress against a beach service involved the same parties and was "based upon the same facts and circumstances" as the plaintiff's first two wrongful death actions. 336 S.C.

601, 610, 521 S.E.2d 276, 281 (Ct. App. 1999). In *Corbett*, the Court placed heavy emphasis on the identity of the parties, namely, that the Plaintiff's claims had been previously brought in both her individual and her representative capacity, thus barring a separate claim brought in her individual capacity. *Id.*

In *Cricket Cove Ventures, LLC v. Gilliand*, the Court, using the *Corbett* decision as a framework, focused on the identity of the claims instead of the parties in determining whether dismissal was appropriate. 390 S.C. 312, 701 S.E. 39 (Ct. App. 2010) The Court applied a narrow interpretation of the Rule to the question of whether claims were identical holding that the claims must be precisely or substantially the same in both proceedings in order for the drastic remedy of dismissal to be appropriate under Rule 12(b)(8). *Id., citing Capital City*, 382 S.C. at 105-06, 674 S.E.2d at 531-32. The *Cricket Cove* Court noted that where a case seeks relief that is different from the relief sought in the causes of action in the first case, dismissal would be improper. *Cricket Cove Ventures, LLC*, 390 S.C. 312, 701 S.E. 39 (Ct. App. 2010) The Court stated that dismissal was improper under the narrow interpretation of Rule 12(b)(8) as no claim in the action was "precisely the same" not "substantially the same" as any claim in the first proceeding.

In the present case, the claims against brought against Respondent Swanson are not "precisely or substantially the same" as they involve advice the bank has relied upon for the foreclosure of nine (9) different income-producing properties in six different suits—hence, six **different subject matters**. The claims proffered by Appellant are identical in name only, however, they each differ in that the subject matter of the litigation is adjudication of "entire controversy" of the specific properties named in each foreclosure action. In each of the six separate matters, Appellant is not simply filing suit against Respondent Swanson for civil conspiracy and abuse of process as it relates to all of the properties in each case, but rather as they relate to each separate foreclosure.

Although the trial Court originally ruled in favor of Appellant on the Motion to Dismiss, the Court subsequently decided to change their Order. This decision came, by the Court's own admission, after a review of a separate Order entered in the Dorchester County cases by the Hon. Diane S. Goodstein.[4] *See*, "*Transcript of September 20, 2016 Hearing*", *Bank of North Carolina, et al. v. Anthony M. Whitfield, et al.*, 2012-CP-08-2618; 2012-CP-08-3478, 4:4, 9:24 to 10:2.

The Court conceded that Appellant did, in fact, have a right to litigate the claim(s) it has brought against the Defendants. *Id.* at 4:11–12. Interestingly, the Court noted "the damages from a tort are wherever they occur." *Id.* at 7:2–3. The Court recognized, as Appellant has asserted in its briefs submitted in connection with the companion appeal, the Respondents tortious acts created a chain reaction of damages which has spread geographically across three different counties:

> Although the breach of the agreements resulted out of the failure of the Bank to proceed with one closing, the Respondents' actions actually affected agreements concerning nine (9) separate properties.

See, Appellant's Brief, Bank of N. Carolina v. Whitfield, et al, App. Case No. 2016-002193 at p. 16.

However, when addressing the issue of Appellant's contention that damages may be different in different places, the Court refused to rule as to whether Appellant would be able to claim those particularized damages in another county. *Transcript of Sept. 20, 2016 Hearing* at 5:1–7. Later in the hearing, the Court went on to state that:

> [The Court is unsure] how the [trial Court in Charleston] can stop [Appellant] from bringing in testimony of how it affected every [property] – because what you are trying ... is not the foreclosure. You are trying the actions taken by the Bank and the actions by Mr. Swanson in abuse of process.

Id. at 7:8–12. Interestingly enough, however, the transcript from the hearing in the Dorchester Cases made it quite clear that Judge Goodstein's position was that Appellant would not be allowed to bring in evidence of damage from other counties. Despite this, the trial Court in the Berkeley Cases ordered that the cases could only be brought in one place. Id. at 8:23–25.

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4 Appellant has appealed each of these orders separately in the companion case to this matter, *Bank of North Carolina v. Anthony M. Whitfield, et al*, App. Case No. 2016-002193.

The trial Court's Order creates an illogical paradox wherein the Court acknowledges that Appellant's damages occurred in multiple counties, and may even be different from county to county (hence from foreclosure action to foreclosure action), and yet, Appellant is only allowed to bring the claims in a single venue.

In light of the fact that the trial Court's holding in granting the Motion to Reconsider and dismissing Appellant's claims is based upon the Court's review (and concurrence with) the Order issued in Dorchester County, Appellant finds it fitting to renew their arguments raised in opposition to same in the companion appeal.

Appellant contends that damages have been alleged in each county, with respect to each property. Appellant further notes that the foreclosure of certain properties, and the ensuing receivership, have caused more damage to Appellant than others. Accordingly, each claim brought in each foreclosure action is individualized by the particular damages arising from the foreclosure of the particular property.

The Court in Dorchester County recognized that Appellant's claims ought to be able to proceed if each claim was limited to the damages flowing from each specific property in the underlying action. However, the Dorchester Court improperly granted Respondent's Motion on the concern that there was no way Appellant could argue for damages specific to each property at trial. Appellant contends that the proper mechanism for safeguarding against such a concern would be allowing Appellant the leave to amend, and issuing a ruling regarding the admissibility of evidence of the other pending suits and a limiting instruction with regard to same—not the drastic remedy of dismissal.

Appellant concedes that the counter-claims could plausibly be read as "general" in the manner in which the prayer for relief was plead, however, Appellant has plead allegations in each claim that are specific to the property. *Id.* at 12:1 to 12:8.

Moreover, the Dorchester Court's dismissal created a logical inconsistency that can be summed up in one question: ***If not here, then where?*** The Court dismisses Appellant's claim due to Appellant's currently pending claims in other counties. Simultaneously, the Court acknowledges that Appellant cannot claim damages in one county if the damages are based upon properties located outside of the county. The Court has now ruled that Appellant's claims for damages are so generalized and necessarily entwined with these other properties, that Appellant cannot bring this counterclaim in Dorchester County.

Extrapolating the Dorchester Court's logic out to the entire controversy, there would be **no county** in which Appellant could ever bring his claims, because they would necessarily invoke properties which were not the subject of the present suit. Such a conclusion violates the freedoms afforded to Appellant under the Constitution of this State. *See*, S.C. CONST., ART. I, SEC. 15 ("[E]very person shall have speedy remedy therein for wrongs sustained.") Appellant is entitled to bring these claims, to exercise his constitutionally protected right to seek remedy for a wrong committed against him. Under the current framework of our law surrounding foreclosure actions, specifically, the venue requirement imposed by S.C. Code § 15-7-10 and the compulsory counterclaim requirement of S.C. R. Civ. P. 13(a), the only two outcomes possible with respect to these counterclaims are: (1) Appellant may bring his counter claims in each of the foreclosure actions; or, (2) Appellant may bring his counter claims in none of the foreclosure actions. Only the first option comports with the constitutional protections afforded to Appellant.

Further, the Dorchester trial court's ruling impermissibly violates Appellant's constitutional right to due process and equal protection under the laws of this state. S.C. CONST., ART. I, SEC. 3 in that in each of the six cases, such a ruling allows one litigant (Respondent BNC) to raise certain affirmative defenses, while simultaneously denying the right of another (the Appellant) to make claims based upon those same set of facts. In the present case, Respondent BNC is permitted to

interpose a defense that it relied upon Respondent Swanson's advice in each of the separate cases, yet Appellant is denied the right to make claims based upon allegations that the advice was never given and was fabricated. Such a holding would be fundamentally unfair and a perversion of justice. Each of the six cases ought to be allowed to proceed as the damages of each case arise out of the wrongful foreclosure of that specific property. The generalized nature of some of the damages plead do not make the claims dismissible pursuant to 12(b)(8) as each of the counterclaims pending relate only to the wrongful foreclosure of the specific underlying properties. Accordingly, they are not identical to another proceeding in another county, and Respondent's motion ought to have been denied.

Looking again to the decision of the Berkeley Court, there is a logical disconnect between the trial Court's concessions that the damages occurred in each county, and that Appellant may have particularized damage for particular properties. The Berkeley Court agrees with the decision of the Dorchester Court, yet the very basis of the Dorchester Court's decision (prohibiting damages from other properties being presented at trial in Dorchester) is exactly the solution the Berkeley Court offered in its Order to solve the issue—that is, requiring Plaintiff to provide evidence of damages in other counties in one proceeding in Charleston County. Both the Dorchester and Berkeley trial courts fail to recognize that the individual particularized damages which have occurred from county to county are the very reason why these claims, should, and must be brought in each of the separate foreclosure actions. Further, it would be logically inconsistent to allow Appellant to maintain each and every one of his other counterclaims in each separate action, yet require this one particular set of claim(s) to be tried only in one county.

Turning once again to the general framework provided at the beginning of the argument, although the breach of the agreements resulted out of the failure of the Bank to proceed with one closing, the Respondents actions actually affected agreements concerning nine (9) separate

properties. Accordingly, Respondent BNC is required to file six (6) different actions, and Plaintiff is left with no choice but to file his counterclaims in each of the foreclosure actions due to their compulsory nature. There is no doubt that Appellant's counterclaims are "necessary to fully determine" the controversy as to each foreclosure. Any damages awarded with respect to same will be necessary to fully determine the amount still owed by either party at the conclusion of the foreclosure proceedings. Accordingly, Appellant must be allowed to bring his claims in each of the six foreclosure actions to "fully determine" the controversy for each specific property. Appellant should be allowed to continue forth with their claims, as the Appellant has suffered particularized damages at each property which is the subject matter of each case. Invoking the drastic remedy of dismissal was both contrary to the laws of this State and to the interests of justice.

CONCLUSION:

Based upon the foregoing, the Appellant contends that the trial court erred in dismissing Appellant's counterclaims to a foreclosure action in one county where each of the underlying actions are not identical for purposes of a Rule 12(b)(8) dismissal. Accordingly, the Appellant respectfully prays this Court to **REVERSE** the trial court's Order, to **REMAND** this matter to the inferior court for further proceedings.

Respectfully submitted this **10th** day of **May, 2017**

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I, the undersigned counsel of record, hereby certify that I have served the Appellant's Initial Brief and Designation of Matters to be Included in the Record on Appeal upon the Respondents Bank of North Carolina, Cindy Whitfield, and David Swanson by depositing a copy of same in the United States Mail, postage prepaid, on March 27, 2017 addressed to their attorney of record, as follows:

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Appellate Case No.: *2016-002192*
Case Nos.: *2012-CP-08-2618; 2012-CP-08-3478*

Dear Ms. Kitchings:

Enclosed you will please find two (2) copies of the Appellant's Initial Brief, along with two (2) copies of the Certificate of Service with regard to same for filing. Please return one clocked copy to my office using the self-addressed, postage-paid envelope you will also find enclosed.

Please note that I have copied all counsel of record to this correspondence pursuant the South Carolina Appellate Rules.

I thank you in advance for your time and attention to this matter, and please do not hesitate to let me know if the Court requires anything further from us in this regard.

Sincerely,

Andrew J. McCumber
Attorney for the Appellant

AJM/ssh
Enclosure(s) as stated.

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