

STATE OF SOUTH CAROLINA
APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable James R. Barber, Circuit Court Judge

Appellate Case No. 2015-002537

Bank of America, N.A.,Respondent,

v.

Theda B. Vaughan a/k/a Theda L. Vaughan; James R. Vaughan; LBB & HHV II, LLC; Hometruster Bank, N.A.; Quality Business Solutions, Inc.; Creative Builders, Incorporated; Matthew J. Bynum; Ann Bynum; Mayfield Dairy Farms, LLC; TD Bank, N.A., as successor by merger with Carolina First Bank; Butler Improvements, LLC; Discover Bank; Suiza Dairy Group, LLC; FIA Card Services, N.A.; Wells Fargo Bank, N.A., as successor by merger to Wachovia Bank, National Association; L. Stewart Spinks; Dillanos Coffee Roasters, Inc.; Branch Banking and Trust Company; Spaulding Farm Homeowners Association, Inc.; TCP Leasing, Inc.; First South Bank; Brookfield South Associates, LLC; Green Tree Servicing, LLC formerly known as Green Tree Financial Servicing Corporation, a Limited Liability Company under the laws of the State of Delaware; Bank of Travelers Rest; Comprehensive Legal Solutions, Inc.; The South Carolina Department of Revenue,Defendants.

of which

LBB & HHV II, LLC,Appellant.

APPELLANT'S PETITION FOR REHEARING

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SC Court of Appeals

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STATEMENT OF ISSUES

- 1. Did the Court of Appeals Err In Affirming The Circuit Court's Grant Of Dismissal Under Rule 12(b)(6) Of The South Carolina Rules Of Civil Procedure Where A Statutory Right To Assert And Immediately Litigate A Claim For Betterments Exists In Any Action For The Recovery Of Land?**

STATEMENT OF THE CASE

Respondent (“Bank”) filed an action to foreclosure its note on the 305 Buckland Way property in 2015. R. 1-19. Appellant filed a timely answer to the complaint and alleged various counterclaims. R. 20-45. Bank filed a pro forma three (3) line motion pursuant to Rule 12(b)(6), SCRCF, to dismiss Appellant’s counterclaims. R. 49-51.

On October 14, 2015, a hearing was convened before the Honorable James R Barber, III. on Bank’s motion. R 52-71. After hearing brief arguments, the Circuit Judge took the matter under advisement. R. 52-71. Post-hearing memoranda and proposed orders were submitted to the lower Court. On November 2, 2015, the Circuit Judge granted Bank’s motion and dismissed Appellant’s counterclaims. R 87-90. Following an appeal, the Court of Appeals submitted its decision on June 1, 2017 and the decision was filed on July 5, 2017. In its decision, the Court of Appeals affirmed the circuit court’s ruling as to dismissal under Rule 12(b)(6), SCRCF, of Appellant’s counterclaims, notably the cause of action for betterments. This Motion for Rehearing follows pursuant to Rule 221 and Rule 240 of the South Carolina Appellate Court Rules.

STATEMENT OF FACTS

The Vaughans abandoned the property in 2009 that was encumbered by the Bank's mortgage and Spaulding Farm Homeowners' ("HOA") lien for the unpaid assessments. R. 37. Ultimately, the HOA foreclosed its lien and Appellant purchased the property at the foreclosure sale in October 2014. R. 38. Prior to Appellant's purchase of the property at the foreclosure sale, the property suffered from numerous defects including a structure on the property that was condemned by the county. R. 37-38. Appellant expended substantial resources to restore the previously abandoned property to habitable condition. R. 39. Post-repairs, the Appellant's tenants have occupied the rehabilitated property.

STANDARD OF REVIEW

Under Rule 12(b)(6) of the South Carolina Rules of Civil Procedure, a party may move to dismiss a claim based on a failure to state facts sufficient to constitute a cause of action. *Spence v. Spence*, 368 S.C. 106, 116, 628 S.E.2d 869, 874 (2006). The trial court must dispose of a motion for failure to state a cause of action based solely upon allegations set forth on the face of the Complaint. *Brown v. Leverette*, 291 S.C. 364, 366, 353 S.E.2d 697, 698 (1987). The motion cannot be sustained if facts alleged in the complaint and inferences reasonably deducible therefrom would entitle plaintiff to any relief on any theory of the case. *Brown*, at 366, 353 S.E.2d at 698; *Blandon v. Coleman*, 285 S.C. 472, 330 S.E.2d 298 (1985).

“In deciding whether the trial court properly granted the motion to dismiss, the appellate court must consider whether the complaint, viewed in the light most favorable to the plaintiff, states any valid claim for relief.” *Gentry v. Yonce*, 337 S.C. 1, 5, 522 S.E.2d 137, 139 (1999). On appeal from the grant of a Rule 12(b)(6) motion, the Court is concerned only with whether the allegations of the complaint, which must be accepted as true, states a cause of action. *Chestnut v. AVX Corp.*, 413 S.C. 224, 227, 776 S.E.2d 82, 84 (2015). “The complaint should not be dismissed merely because the court doubts the plaintiff [or counterclaimant] will prevail in the action.” *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247-48 (2007).

ARGUMENT

I. Appellant Seeks Rehearing Because The Court Of Appeals Erred In Affirming The Circuit Court’s Grant Of Dismissal Under Rule 12(b)(6) Of The South Carolina Rules Of Civil Procedure Where A Statutory Right To Assert And Immediately Litigate A Claim For Betterments Exists.

Under Section 27-27-10 of the South Carolina Code Annotated, the legislature conferred a claim for betterment. Section 27-27-10 reads as follows:

After final judgment in favor of the plaintiff in an action to recover lands and tenements, if the defendant has purchased or acquired the lands and tenements recovered in such action or taken a lease thereof or those under whom he holds have purchased or acquired title to such lands and tenements or taken a lease thereof, supposing at the time of such purchase or acquisition such title to be good in fee or such lease to convey and secure the title and interest therein expressed, such defendant *shall* be entitled to recover of the plaintiff in such action the full value of all improvements made upon such land by such defendant or those under whom he claims, in the manner provided in this chapter.

S.C. Code Ann. § 27-27-10. In order for the defendant to be entitled to recovery, the improvements or betterments must be made by a defendant who believed, at the time he makes such improvements or betterments, that his title is in good fee. *Tumbleston v. Rumph*, 43 S.C. 275, 21 S.E. 84, 86 (1895). “[T]he statute expressly declares that [defendant] is entitled to recover the value of all improvements made upon the land by the party from whom it has been recovered.” *Templeton v. Lowry*, 22 S.C. 389, 392 (1885).

A. Appellant’s Counterclaim For Betterments Is Supported By The Current Statutory Framework Where S.C. Code Ann. § 27-27-70 Allowing Alternative Procedure By Alleging Value Of Improvement In An Answer.

Under Section 27-27-70, “[i]n any action for the recovery of lands and tenements, whether such action be denominated legal or equitable, the defendant who may have made improvements or betterments on such land, believing at the time he made such improvements or betterments that his title thereto was in good fee, may set up in his answer a claim against the plaintiff for so much money as the land has been increased in

value in consequence of the improvements so made and the defendant may also set up a claim against the plaintiff for so much money as the land has been increased in value in consequence of improvements or betterments made by any person under or through whom he claims, if it be shown that the defendant actually believed he was taking a good title in fee simple thereto at the time of the alleged taking thereof.” S.C. Code Ann. § 27-27-70 (2007). “The right to recover for betterments being statutory, the remedy or method prescribed by statute for its enforcement must be followed.” *Howard v. Kirkton*, 144 S.C. 89, 94, 142 S.E. 39, 41 (1928).

In *Salinas v. C. Aultman & Co.*, 45 S.C. 283, 22 S.E. 889, the South Carolina Supreme Court stated that Section 27-27-70 is meant to supplement 27-27-10 and provide a remedy for a different state of facts. Moreover, the Supreme Court stated 27-27-70 “was intended to afford relief in such cases as were not covered in [27-27-10], by providing that the defendant who may have made improvements or betterments on the lands sought to be recovered from him, believing, at the time he made such improvements or betterments, that his title was good in fee, should be allowed to set up in his answer a claim against the plaintiff for so much money as the land was increased in value in consequence of the improvements so made.” *See Salinas*, at 283, 22 S.E. at 891; (*citing Tumbleston v. Rumph*, 43 S.C. 275, 21 S.E. 84 (1895)).

By taking possession of the Property, after purchasing said Property at a foreclosure sale, Appellant believed in good faith that he held title in good fee and made improvements thereon in reliance on this belief. Only after such improvements upon the property did Petitioner seek to foreclose its lien, at which time in its Complaint Petitioner stated: “(3) [o]rder the reimbursement of all costs for inspecting and securing the

property incurred by the Plaintiff as a result of the delinquency; (4) [a]ppoint a Receiver to collect the rents, issues, profits or designated sums from the mortgagor(s), and/or the grantees of the mortgagor, and/or tenants occupying or exercising control over the mortgaged premises; (5) [u]nder the direction of this Court, sell the mortgaged premises, bar any equity of redemption....” (R. 16, ¶¶ 3-5). According to this State’s Supreme Court, this statute permits one “to recover for improvements made by him only where an action at law has been brought by the owner to recover possession.” *See Citizens and Southern National Bank, Atl., Ga. v. Modern Homes Construction Co.*, 248 S.C. 130, 134, 149 S.E.2d 326, 328 (1966). In the present case no final judgment has been rendered but the owner, Petitioner, has initiated legal action to take possession of the property and ultimately sell the property. By initiating the foreclosure action, Petitioner brought “an action at law... to recover possession.” *See Id.*

Appellant’s answer to the Complaint specifically referred to Petitioner’s foreclosure action, Appellant’s good faith belief he held good title in fee to the Property and the improvements made, which is all that is required under S.C. Code Ann. § 27-27-70. This Section, as opposed to 27-27-10, does not require the defendant to wait until a final judgment has been rendered; rather, Section 27-27-70 expressly states “[i]n any action for the recovery of lands and tenements....”

Therefore, the plain and unambiguous language specifically allows for a defendant to assert a betterment claim in its answer to a complaint purporting to foreclose a lien and take possession of the property and the meaning of Section 27-27-70 must be honored. *See Strother v. Lexington Cty. Recreation Comm’n*, 332 S.C. 54, 62, 504 S.E.2d 117, 121-22 (1998) (“If a statute’s language is plain and unambiguous and conveys a clear

and definite meaning, there is no occasion for employing rules of statutory interpretation and the Court has no right to look for or impose another meaning.”). Section 27-27-70’s purpose is to supplement 27-27-10 so as to allow recovery to those who would be barred under 27-27-10 an avenue for legal recovery for their improvements. *See Salinas*, 45 S.C. 283, 22 S.E. 889. Furthermore, the South Carolina Supreme Court held in *Reaves v. Stone*, 231 S.C. 628, 99 S.E.2d 729 (1957) that a “[c]laim for betterments in answer must contain allegation of belief of good title, and in order to recover, this must be proved.”

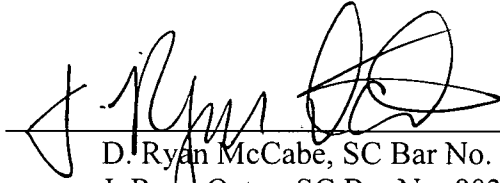
As such, Appellant’s claim for betterments was erroneously dismissed under Rule 12(b)(6) where S.C. Code Ann. § 27-27-70 specifically states that a defendant may assert such a claim in an answer to a complaint in “any action for the recovery of lands and tenements.” Appellant asserted a claim for betterments alleging that the Petitioner’s foreclosure action to recover the Property and tenements, along with his good faith belief he held title in good fee, sufficiently states a cause of action per Section 27-27-70, as such Appellant’s claim should not have been dismissed under Rule 12(b)(6) where the facts and allegations properly address a cause of action for betterments.

CONCLUSION

Based on the reasons stated herein, Appellant requests this Honorable Court to grant this Petition for Rehearing.

SIGNATURE PAGE ATTACHED

Respectfully submitted,



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July 20, 2017

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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The Honorable James R. Barber, Circuit Court Judge

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PROOF OF SERVICE OF PETITION FOR REHEARING

I, J. Ryan Oates, of McCabe, Trotter & Beverly, P.C., attorney for LBB & HHV II, LLC, do hereby certify that a copy of the foregoing documents have been served upon the below named individual and/or counsel on the 20th day of July, 2017, via US First Class Mail, addressed as follows:

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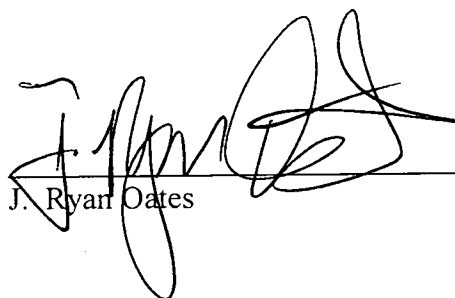
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