

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

Federal National Mortgage Association ("Fannie Mae"), a corporation organized and existing under the laws of the United States of America,

PLAINTIFF,

v.

D. Randolph Whitt; and Pearce W. Fleming.

DEFENDANTS.

IN THE COURT OF COMMON PLEAS

CASE NO.: 2014-CP-32-02795

ORDER DENYING DEFENDANT'S  
MOTION TO TRANSFER  
TO THE JURY ROSTER

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SC Court of Appeals

THIS MATTER came before the Court upon Motion by D. Randolph Whitt ("Defendant") seeking an Order transferring this action to the jury roster on Defendant's counterclaims. A motion hearing was held on September 22, 2017, with participation by the Defendants D. Randolph Whitt and Pearce W. Fleming, each members of the South Carolina Bar representing themselves *pro se*; and Magalie A. Creech, attorney for the Plaintiff Federal National Mortgage Association. After consideration of the memoranda submitted by the parties, the oral arguments at the hearing, and the proposed orders of the parties, Defendant's Motion is denied based upon the following findings of fact and conclusions of law:

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. Plaintiff commenced the instant residential mortgage foreclosure action upon the filing of its Lis Pendens, Summons and Complaint on August 1, 2014.
2. Defendant served an Amended Answer on March 27, 2015, which contained a jury trial demand and asserted counterclaims for violation of the implied covenant of good faith and fair dealing and violation of the CFPB Dual Tracking Regulations. The alleged conduct giving rise to the Defendant's counterclaims is alleged to have occurred after the Defendant's default under the terms of the note and mortgage. Plaintiff filed a timely Reply denying the counterclaims on April 6, 2015.

3. On March 25, 2015, Plaintiff filed a Motion to Strike Defendant's Jury Demand and for a Mandatory Order of Reference.

4. By Order of the Honorable William P. Keesley captioned "Mandatory Order of Reference to Special Referee and Striking the Demand for a Jury Trial on the Counterclaim" ("Order of Reference") entered June 11, 2015, this action was referred in its entirety to Lisa Lee Smith as Special Referee. The Order of Reference specified that as an action for foreclosure, the case is subject to a "mandatory order of reference". Furthermore, because the Defendant failed to appear and oppose the Plaintiff's motion to strike the demand for a jury trial, Judge Keesley ordered that "the demand for jury trial is stricken and the court directs that the issues be tried without a jury."

5. The Order addressed each of the counterclaims in the Answer, found no basis for a jury trial, and also found that that by asserting permissive legal counterclaims in response to Plaintiff's equitable foreclosure action, Defendant had waived any right he may have had to a jury trial. The parties received the filed Order of Reference and neither moved for reconsideration of the Order, nor did either party appeal the Order.

6. The Order of Reference further indicated that "[s]hould the Special Referee determine that there is a valid claim that requires a jury trial, she may notify the circuit court, as provided in the South Carolina Rules of Civil Procedure". This sentence granted to the Special Referee the power during the handling of the case to consider the issue if the Special Referee is made aware of "a valid claim that requires a jury trial".

7. At the hearing on Defendant's present Motion to Transfer to the Jury Trial Roster, considerable focus by the parties was on the issue of whether Judge Keesley's Order was a final order or a conditional order. If conditional, the order would not be a final order for purposes of appeal. This argument focused on whether Judge Keesley's Order was appealable, and whether the fact that the Defendant did not appeal

Judge Keesley's order striking the demand for a jury trial, resulted in the Defendant's present claim being barred by the doctrine of *res judicata* and Judge Keesley's order stands as the law of the case.

8. An order denying a request for a jury trial involves the mode of trial, affects substantial rights under section 14-3-330(2) of the South Carolina Code, and is immediately appealable. *See Bateman v. Rouse*, 358 S.C. 667, 674, 596 S.E.2d 386, 3991 (Ct. App. 2004). "The failure to immediately appeal an order affecting the mode of trial constitutes a waiver of the right to appeal these issues." *Id.*; *see, e.g., Edwards v. Timmons*, 297 S.C. 314, 316, 377 S.E.2d 97, 97 (1988) (holding that the trial court's un-appealed order of reference to a master-in-equity became the law of the case); *Creed v. Stokes*, 285 S.C. 542, 542-43, 331 S.E.2d 351, 351-52 (1985) (finding the appellant waived his objection to the order of reference by not immediately appealing the order).

9. Judge Keesley's order striking the Defendant's demand for a jury trial was a final appealable order. Judge Keesley's order contained no language that made it conditional on any further action or review by the Special Referee or contingent upon further action of the Circuit Court or Special Referee. Therefore, by the express terms of the Order of Reference, the Plaintiff's initial claim for a jury trial was stricken by Judge Keesley and as such is the law of the case as to the counterclaims plead.

10. However, Defendant has moved anew for the case to be transferred to the jury trial roster, and Judge Keesley's order clearly granted the Special Referee the power to consider such a motion if raised during the pendency of the case.

11. With one exception, the Defendant's counterclaims are the same now as they were in the pleadings considered by Judge Keesley in his June 11, 2015 order. That exception is that Defendant's counterclaims have evolved over the course of the litigation to include complaints about the actions of the Plaintiff during the litigation in submitting alleged inconsistent and confusing Affidavits regarding the debt calculation at prior hearings where the Plaintiff sought Summary Judgement before the Special Referee.

12. By Order dated April 7, 2017 and filed April 10, 2017, the Special Referee partially granted, and partially denied, the Plaintiff's Motion for Summary Judgment, setting forth in detail the matters where there are no issues of material fact, such that summary judgment was appropriate ("Order for Partial Summary Judgment").

13. Among other findings, the Order for Partial Summary Judgment included findings that (a) as of the date of Requests for Admissions dated October 15, 2015, Defendant Whitt is deemed to have admitted that he had not suffered any damages, did not have valid claims against the Plaintiff, and did not have valid defenses to the foreclosure of the Mortgage; and (b) the Plaintiff is entitled to foreclose the mortgage and the amount of the principal and interest calculation on the debt is final as set forth therein.

14. One issue in which Summary Judgment was denied concerned the calculation of amounts that may be owed to the Plaintiff over and above the principal and interest calculation.

15. The finding that the Plaintiff failed to meet the steep burden for Summary Judgment as to the calculation of the debt amount over and above the stated amount of principal and interest formula, did not give rise to a new counterclaim, or any recharacterization of an original counterclaim, which would warrant a jury trial. Defendant argues essentially that the Plaintiff's failure to win on all issues at summary judgment is evidence supporting the original counterclaims, and evidence that the counterclaims are compulsory in nature. A "compulsory counterclaim" is not created just because a non-moving party successfully identifies issues of material fact not appropriate for summary judgment. Rather, it simply means the issues identified by the non-moving party are ripe for cross examination at a hearing on the merits.

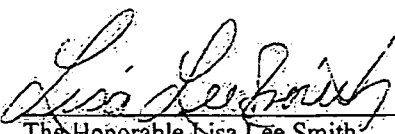
16. Defendant contends that he is entitled to a jury trial because his counterclaims are compulsory, and cites *Plantation Federal Bank v. Gray*, 401 S.C. 507, 737 S.E.2d 515 (Ct. App. 2013) in support of this argument. However, Defendant's reliance on the *Gray* case is misplaced because *Gray* did not address the question of whether a mortgagee's counterclaims were compulsory. Instead, *Gray* held that a mortgagee's

equitable foreclosure action could not be heard prior to a jury trial of the mortgagor's counterclaims at law. The compulsory nature of the mortgagee's counterclaims in *Gray* was not in dispute, and for that reason the foreclosure and legal counterclaims were bifurcated.

17. Judge Keesley's Order unequivocally determined that the Defendant was not entitled to a jury trial, the counterclaims as plead are permissive and that Defendant waived his right to a jury trial by asserting permissive counterclaims in this foreclosure. Defendant's evolution of his counterclaims before the Special Referee has not convinced the Special Referee that any of his counterclaims are "compulsory counterclaims" as that term is defined by applicable case law and rules of civil procedure.

18. Upon review of the counterclaims raised by the Defendant, the Special Referee finds that the Defendant's current articulation of the counterclaims does not alter any of the originally plead counterclaims in such a way as to identify any valid claim that requires a jury trial for any part of this case.

NOW THEREFORE, the Defendant Whitt's Motion to transfer to the Jury Trial Roster is **DENIED**. This matter shall be scheduled for a non-jury merits hearing on the remaining issues herein as soon as is practicable.

  
The Honorable Lisa Lee Smith  
Special Referee for Lexington County

Chapin, South Carolina

November 22, 2017