

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Lisa Lee Smith, Special Referee

Appellate Case No. 2017-002608
Case No. 2014-CP-32-02795

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

D. Randolph Whitt and Pearce W. Fleming, Defendants.

Of whom D. Randolph Whitt is the Appellant.

INITIAL BRIEF OF APPELLANT

January 19, 2018

D. Randolph Whitt
Fleming & Whitt, P.A.
S.C. Bar No. 13068
344 Blossom View Ct.
West Columbia, SC 29170
(803) 422-2176 Tel
dwhitt2001@aol.com
Attorney for Appellant

Other counsel of Record:

Magalie A. Creech, Esq.
PO Box 41489
Charleston, SC 29423

Pearce W. Fleming
3723 Linwood Rd.
Columbia, SC 29205-2545

Attorney for Respondent

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TABLE OF CONTENTS

Table of Authorities ii

Statement of Issues on Appeal 1

Statement of the Case 1

Facts Adjudicated on Summary Judgment 2

Appellant's Assertions of Bad Faith by Respondent2

Arguments

 1. THE SPECIAL REFEREE ERRED IN FINDING THAT JUDGE KEESLEY'S
 ORDER OF JUNE 11, 2015 WAS A FINAL APPEALABLE ORDER.....3

 2. THE SPECIAL REFEREE ERRED IN FINDING THAT NO RIGHT TO A JURY
 TRIAL EXISTS.....5

Conclusion7

TABLE OF AUTHORITIES

CASES

Ashenfelder v. City of Georgetown, 389 S.C. 568, 698 SE 2d 856 (S.C. App.2010).....4
Johnson v. S.C. National Bank, 292 S.C. 51, 354 S.E. 2D 895 (1987)6
Lewis v. State 368 S.C. 630, 630 SE 2d 464 (2006).....4
Plantation Federal Bank v. Gray, 401 S.C. 507 (S.C. App. 2013).....6
Smith v. Ocean Lakes Family Campground, 315 S.C. 379, 433 S.E.2d 909,(S.C. App.1993)...4

STATUTES

SC Code § 14-3-330(1).....5

OTHER AUTHORITIES

South Carolina Supreme Court Order 2011-05-02-012

STATEMENT OF ISSUES ON APPEAL

1. DID THE SPECIAL REFEREE ERR IN FINDING THAT JUDGE KEESLEY'S ORDER OF JUNE 11, 2015 WAS A FINAL APPEALABLE ORDER?
2. DID THE SPECIAL REFEREE ERR IN FINDING THAT NO RIGHT TO A JURY TRIAL EXISTS?

STATEMENT OF THE CASE

This mortgage foreclosure action was commenced by the Respondent's filing of a Lis Pendens, Summons and Complaint on August 1, 2014.(R. p. __) Appellant served and Amended Answer and Counterclaims alleging respondent had breached the implied duty of good faith under the mortgage contract and that Respondent had engaged in impermissible dual tracking. (R. p. __) Respondent served a Reply to the Counterclaims.(R. p. __).

An order of reference was entered(R. p. __) A judgment of foreclosure was granted by the Special Referee (R. p. __).Appellant filed a motion to vacate this judgment(R. p. __) which was granted. Respondent filed a motion for summary judgment(R. p. __) which had an affidavit attached(R. p. __).

Respondent filed an additional affidavit (R. p. __) at the time of the motion hearing, and another affidavit (R. p. __) pursuant to an order allowing further materials to be submitted (R. p. __)..

Appellant filed counter affidavits as the summary judgment process unfolded(R. p. __).

The motion for summary judgment was granted in part and denied in part (R. p. __)

Appellant filed a motion to transfer the case to the jury roster for trial of the counterclaims (R. p. __). Respondent filed a return to the motion to transfer(R. p. __).Appellant filed a response to the return(R. p. __).

The Special Referee denied the motion to transfer (R. p. __). A notice of appeal was filed and served (R. p. __) .

FACTS ADJUDICATED ON SUMMARY JUDGMENT

The existence, execution and validity of the note and mortgage were established (R. p. __) As were the various assignments of the mortgage and correction of an error in the property description (R. p. __) The current ownership of the property was also established (R. p. __).

The principal balance and the interest rate were also established (R. p. __) as was the fact that not all monthly installments were not paid when due (R. p. __) .

The Special Referee also held that Appellant's Counterclaims were limited to conduct which occurred after October 15, 2015 (R. p. __).

Appellant's Assertions of Bad Faith by Respondent

Appellant has has asserted two counterclaims, one involving breach of the implied duty of good faith that is a part of every contract under South Carolina Law, including the mortgage contract that is the basis of Respondent's action, and a counterclaim asserting that Respondent improperly continued with the foreclosure action while loss mitigation efforts were still in progress in violation of both South Carolina Law and the regulations established by the CFPB. This practice is often described as “dual tracking”and has been disapproved of by both the South Carolina Supreme Court through Order 2011-05-02-01 as well as the CFPB through its regulations. Respondents conduct is actionable under either of these claims.

Despite being put on notice of its deficient performance in the order vacating its original judgment of foreclosure (R. p. __), Respondent's performance was even worse as the case progressed further.

The initial deficiencies included irregularities and Respondent doing less than it could have to

provide notice of the hearing that resulted in the vacated judgment, submission of exhibits that were marked "ACTIVE LOSS MITIGATION" and provision of financial information that was incomplete, incoherent and internally inconsistent. (See Motion to vacate and supporting affidavit R. p. __).

Rather than making an effort to do better, Respondents next effort veered into ridiculousness with the assertion that detailed debt information was a secret that could not be disclosed to Appellant because he was not Respondent's "customer"(see August 16 affidavit, especially item 19 (R. p. __)). Respondent took this position despite having submitted voluminous, though hopelessly muddled , information of this sort at the first hearing.

Respondent's subsequent affidavits (R. p. __) did nothing to bring clarity of coherence to the evidence provided by Respondent. In fact some of the initial errors were reintroduced, while others were exacerbated (see Appellant's affidavits and pleadings (R. p. __)).

Respondent has apparently become so accustomed to obtaining foreclosure judgments by overawing *pro se* defendants with masses of gibberish that it has lost the ability to respond with clarity and coherence when challenged. Alternatively, maybe Respondent simply has disdain for its obligation to openly and honestly establish its entitlement to the relief it seeks. In either case Respondents conduct is the epitome of bad faith with a flourish of dual tracking as a bonus.

ARGUMENT 1

THE SPECIAL REFEREE ERRED IN FINDING THAT JUDGE KEESLEY'S ORDER OF JUNE 11, 2015 WAS A FINAL APPEALABLE ORDER

The Order Of Reference

This case was referred to the Special Referee by Order filed June 11, 2015. The Order contained the following language: "Should 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."

(see Order p. 1) It is axiomatic that the order should be construed in a way that avoids rendering these words meaningless.

The Order further provided that the Court “did not hear the motion for an order striking Defendant's jury demand.” (see Order p.1) This language also supports the conclusion that the order referring the case was not a final determination of the jury trial question.

Pursuant to Rule 53, SCRPC, a master or special referee has no power or authority except that which is provided in the order of reference. *Smith v. Ocean Lakes Family Campground*, 315 S.C. 379, 381, 433 S.E.2d 909, 910 (S.C. App.1993). In this case, the Special Referee had a clear mandate to make an assessment of the jury trial issue after the facts had been developed as the litigation progressed.

A Final Order?

An analysis of various preclusive doctrines is relevant in this matter. Regardless of which of these doctrines is considered, they all fail at the same point. The Order of Reference in this case is not a final order under South Carolina Law.

A final order is one which requires no additional action before the rights of the parties are fixed. See e.g., *Lewis v. State* 368 S.C. 630, 630 SE 2d 464 (2006) (“a conditional order of dismissal is not the final judgment in a post-conviction relief case since there is another act to be done before the rights of the parties are finally determined”) Likewise, the Order of Reference in this case is conditional and not a final order, based on the language cited in this motion.

An order is also not final if it is subject to revision. See e.g. *Ashenfelder v. City of Georgetown*, 389 S.C. 568, 698 SE 2d 856 (SC App. 2010). The quoted language in the Order of Reference can only be read to mandate the revision of the order based on the Special Referee's determination.

The language of the order means there is both a further act to be done (the Special Referee making a determination) and the June 11, 2015 Order was subject to revision based on the result of

that determination.

SC Code § 14-3-330(1)

Rather than subsection 330(2), which was cited by Respondent, the applicable statutory provision is subsection 330(1) for this intermediate order. This subsection provides in part “*provided, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from*”.

The final order on the mode of trial was the Special Referee's Order that is the subject of this appeal. None of the preclusive doctrines extant under South Carolina Law should have constrained the Special Referee's consideration of this motion.

ARGUMENT 2

THE SPECIAL REFEREE ERRED IN FINDING THAT
NO RIGHT TO A JURY TRIAL EXISTS

A Valid Claim that Requires a Jury Trial

Despite several efforts, over a period of months, Plaintiff has been unable to secure summary judgment in this matter. It is now clear that defendant's counterclaims will not be disposed of short of trial in one forum or the other. Therefore a valid claim exists for purposes of the order of reference's provision regarding a jury trial. Requiring the Special referee to determine the ultimate and final validity of the counterclaims would result in a full trial of these claims in order to determine that they should be tried by a jury.

As to issue of whether the counterclaims are triable by a jury, there is no question that these are compulsory legal counterclaims. An action for breach of the mortgage contract that is the subject of the foreclosure, and claims related to Plaintiff's failures to meet its obligations in servicing the mortgage that is the subject of the foreclosure, and Plaintiff's failure to provide accurate information to the court

in hearings related to the foreclosure as to the amount of its debt and status of the account are prototypical examples of claims which are so closely related to the foreclosure that they are compulsory legal counterclaims.

The Gray Case

In *Plantation Federal Bank v. Gray*, 401 S.C. 507 (S.C. App. 2013) the Court of Appeals considered issues similar to the present case and found that the master in equity proceeding with a foreclosure sale of a vacant lot was erroneous. The Court of Appeals noted that the allegations of Gray's counterclaims, which included a breach of contract claim, "involve questions of fact that will most certainly arise in the foreclosure action, especially when considered in light of Gray's defenses to the foreclosure action, including unclean hands.(emphasis added).

In response to the Bank's argument regarding the decline in value of the lot and the necessity of the Bank paying property taxes in the interim, the Court of Appeals noted: "These circumstances would possibly, if not likely, occur in every foreclosure action currently pending. Further, neither of these concerns represent the kind of "irreparable harm" contemplated by the Supreme Court that would justify infringing on Gray's constitutional right to a trial by jury.

The Special Referee dismissed the *Gray* case because "the compulsory nature of the mortgagee's counterclaims in *Gray* was not disputed". This assertion, which is not clear from a reading of the opinion, would still mean that each of the opposing attorney's had concluded that claims which were analogous to the counterclaims in this action were compulsory, and the appellate court adopted this conclusion without a caveat as to any doubts about its correctness.

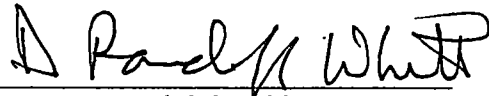
In *Gray*, the attorneys and the court all recognized that application of the principles of *Johnson v. S.C. National Bank*, 292 S.C. 51, 354 S.E. 2D 895 (1987) to a counterclaim for breach of the mortgage contract was compulsory and required a trial by jury. It was error for the Special Referee to

reach the opposite conclusion.

CONCLUSION

For the foregoing reasons, the Order of the Special Referee should be reversed and the case remanded to Lexington County, with instructions to transfer the case to the jury roster for trial of the Counterclaims first and then return the case to the Special Referee to hear the merits of the foreclosure case.

Respectfully submitted,



D. Randolph Whitt
Fleming & Whitt, P.A.
S.C. Bar No. 13068
344 Blossom View Ct.
West Columbia, SC 29170
(803) 422-2176 Tel
dwhitt2001@aol.com
Attorney for Appellant

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PROOF OF SERVICE

I certify that I have served the Appellant's Initial Brief and the Designation of Matter to be Included in the record on Appeal on Respondents listed above by depositing a copy of it in the United States Mail, postage prepaid, on January 19, 2016, addressed to their attorney of record, Magalie A. Creech, Esq.'PO Box 41489, Charleston, SC 29423. A copy was also mailed on January 19, 2016 to Pearce W. Fleming at 3723 Linwood Rd., Columbia, SC 29205-2545.



D. Randolph Whitt
Fleming & Whitt, P.A.
S.C. Bar No. 13068
344 Blossom View Ct.
West Columbia, SC 29170
(803) 422-2176 Tel
dwhitt2001@aol.com
Attorney for Appellant

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