

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
L. CASEY MANNING, CIRCUIT COURT JUDGE

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SC Court of Appeals

Case No. 2017-CP-40-05336
Appellate Case No. 2017-001130

Tom Efland Appellant,

v.

Randy L. Mills and Richland County Respondents.

FINAL BRIEF OF RESPONDENT

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ISSUES ON APPEAL

- I. THE TRIAL JUDGE'S RULING ON JUDGMENT ON THE PLEADINGS WAS CORRECT. (APPELLANT'S ISSUE A AND B).
- II. JUDGE BENJAMIN'S RULING WAS FINAL.

STATEMENT OF THE CASE

Appellant Tom Efland (hereafter "Efland") lives near Respondent Randy Mills (hereafter "Mills"). This is the third lawsuit between these parties. The first lawsuit, *Randy Mills v. Thomas D. Efland Jr.*, Case No. 2005-CP-40-04535, was filed in 2005, and Efland filed counterclaims; the case was dismissed without prejudice, no decisions having been made. (R. pp. 16-23).

The second action between these parties, *Mills v. Efland*, Case No. 2008-CP-40-00876, was filed on or about February 5, 2008. Again, Efland filed counterclaims against Mills and Mills filed a reply. (R. pp. 24-35). The parties agreed to submit the entire action to binding arbitration and a decision was issued by the arbitrator, Walt Todd. The decision of the arbitrator dated June 23, 2015, found in favor of Mills, awarding Mills judgment against Efland in the amount of \$60,000. (R. pp. 155-156).

Efland filed a Motion to Remand with the circuit court on July 20, 2015, alleging, *inter alia*, that "[t]he Arbitrator simply failed to deal with any of the issues raised in the Counterclaims of the Defendant. Before this Award becomes final, those issues should be resolved." (R. pp. 158-159). On or about December 16, 2015, Circuit Court Judge DeAndre Benjamin denied Efland's Motion to Remand, concluding and finding that Efland had failed to seek relief in a timely manner and was barred from proceeding to further litigate his counterclaims. (R. pp.160-161).

No appeal was taken by either party. Mills undertook collection proceedings, which resulted in a Notice of Sheriff's Sale to sell Efland's property to satisfy Mills' judgment against Efland. (R. pp. 162-164). Just before his property was sold, Efland paid Mills' judgment in full and it was marked satisfied. (R. pp.165-167).

On or about September 1, 2016, Efland filed this lawsuit against Mills, failing to disclose the prior litigation, the prior judgment, or the satisfaction of judgment. (R. pp.179-184). Mills filed an answer and counterclaim, attaching and incorporating the relevant pleadings from the prior two lawsuits between the parties, to establish that the issues asserted in this lawsuit had already been decided. (R. pp.8-168).

Mills filed a motion for judgment on the pleadings. (R. pp. 198-202). No response was filed, nor was any evidence provided by Efland to oppose the motion for judgment on the pleadings. At the hearing on the motion, Efland's counsel said that the arbitrator in the 2008 case had failed to rule on Efland's claims against Mills and had only ruled on Mills' claims against Efland. (R. p. 222, line 12 – p. 223, line 1). Efland's counsel admitted that he had filed the current 2016 lawsuit "to find some way of bringing the issues back up or somebody gets burned." (R. p. 223, lines 5-11). Efland's counsel asserted that the issues he was attempting to litigate in this third lawsuit "were never decided [in the 2008 action], although they were brought out." (*Id.* lines 21-21). He continued "w[e] made a mistake of consenting to arbitration to try our case and when the arbitrator didn't decide the issues that it was insisted he decided." (R. p. 224, lines 13-15).

Circuit Court Judge Casey Manning granted Mills' motion for judgment on the pleadings by order filed April 14, 2017.¹ (R. pp. 4-7). No motion for reconsideration was filed, so no issues are preserved on appeal.

¹ In the current action, Efland also sued Richland County, but made no allegations against Richland County in the complaint. Richland County filed a motion to dismiss, which was granted. No motion for reconsideration was filed as to Richland County, either. The Notice of Appeal named Richland County as a respondent in this appeal, but the initial brief does not raise any argument as to Richland County, so it appears the appeal is only against Mills.

STATEMENT OF FACTS

Mills purchased his river-front home in Richland County in 1999. (Richland County, Book 276, Page 1603) Efland is a neighbor. (R. p. 180, ¶ 6). Mills and Efland used to get along, but they don't anymore; hence the 2005 and 2008 lawsuits and the instant lawsuit. (R. pp. 10-11 ¶¶ 21-25; R. pp. 16-35).

The first lawsuit, *Randy Mills v. Thomas D. Efland Jr.*, Case No. 2005-CP-40-04535, was filed in 2005. In his *pro se* answer and amended answer in that 2005 action, Efland asserted, *inter alia.*, Efland asserted that: (R. pp. 16-22),

- (a) Mills had leased property from Efland beginning in October 2001 known as “the bottom land on the eastern side of the old creek bed” for five years for the purpose of keeping Mills’ horses... (Paragraph 3).
- (b) Mills “proceeded to fence in and seed bottom land that had remained under cultivation for in excess of 50 years...” *Id.*
- (c) Mills “installed an illegal septic system over the objections of [Efland.]” *Id.*
- (d) “Despite being told that the bottom land flooded...” *Id.*
- (e) “Upon flooding of the bottom land...” *Id.*
- (f) “[B]uilt or caused to be built a culvert that would not meet the flood load for a ground path he intended to be a road all in a location [Plaintiff] had requested not be used...” *Id.*

- (g) Mills “opened up a road into [Mills’] property unauthorized over and across the lands of [Efland] all without permission or easement.” *Id.*
- (h) After Thanksgiving 2003, Mills committed “acts of vandalism including but not limited to causing a drastic increase of water flow onto the [Efland’s] property polluted with horse manure and destroying a well.” *Id.*
- (i) Mills “has created a Nuisance to [Efland] by drastically altering water flow onto [Efland’s] land causing damage that has and will in the future cost great sums to rectify and has lowered the value of his property.” Paragraph 24.
- (j) Mills “placed horse manure on his property in such a manner as to cause water flow onto [Efland’s] property to be polluted.” Paragraph 25.
- (k) Mills “without permission or easement, trespassed and continues to do so onto the property of [Efland] adjoining the road to the leased property by cutting trees and opening another driveway to his property when he has a usable specific easement in another location.” Paragraph 28.²

On or about October 17, 2006, the 2005 action was “dismissed without prejudice.” (R. p. 23).

The second action between these parties, *Mills v. Efland*, Case No. 2008-CP-40-00876, was filed on or about February 5, 2008. Efland answered and asserted many of the same counterclaims, some verbatim, which were set forth in his Answer in the 2005 complaint. (R. pp.

² The original Answer and Counterclaim further claimed that Mills had “intentionally inflicted great emotional distress upon [Efland] by his actions...” See Paragraph 31 of the original Answer.

24-31). Binding arbitration decided all issues, and judgment was entered in favor of Mills. (R. pp.155-156). Specifically, the arbitrator found that Efland's claim against Mills (as set forth in paragraphs (a) through (f) above "has not been proven by a preponderance of the evidence." (R. p. 156, first full paragraph). The case was over. Mills collected the judgment that was awarded to him, and satisfaction of judgment was filed.

Efland filed this action to relitigate his counterclaims from the second action (which he lost), and he wants to try again. Efland's counsel freely admitted at the hearing on Mills' motion for judgment on the pleadings that the complaint in this action was filed to simply try again to litigate the same counterclaims that Efland had raised in the second action. Counsel admitted the instant lawsuit was filed after Efland's counsel communicated *ex parte* with the arbitrator about changing his decision.

So I said [to the arbitrator], well, how about re-open the arbitration and rule on the rest of it? Well, [the arbitrator said] I don't think I got jurisdiction to do that. If you [counsel for Efland] can get someone to tell me I can reopen it and rule on the other side of the case which I did not rule on – so I figured the best way to re-open the case was to speak with Ms. Ballard, and she said, no... So I went back to my office and the only thing I knew to do was to basically bring back before the Court that issue that was never decided.

(R. p. 222, lines 17 – p. 223, line 4).

The trial judge granted Mills' motion for judgment on the pleadings, determining that issue preclusion prevented the re-litigation of the issues from the 2008 litigation. (R. pp 4-7). In his initial appellant's brief, Efland again admits this is just another lawsuit to try to resolve what he already litigated in the 2008 action. "Appellant commenced the present lawsuit. . . in order to have the issues which should have been decided by the arbitrator finally decided by the Court." (Appellant's Initial Brief, p. 6).

ARGUMENT

Issue One

THE TRIAL COURT'S RULING ON ISSUE PRECLUSION IS CORRECT (APPELLANT'S ISSUES A AND B)

These issues are not preserved for appeal. Efland did not file any opposition to Mills' motion for judgment on the pleadings, nor was a Motion for Reconsideration ever filed pursuant to Rule 59(e), SCRCF. As a result, he has preserved no issues for consideration by this Court on appeal, having failed to raise any before the trial court, and then doubling down on that failure by not seeking reconsideration on any issue on which the Court based its decision.

"It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised and ruled upon by the [circuit court] to be preserved for review." *Wilder Corporation v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998); "Matters not argued to or ruled on by the [circuit court] are not preserved for review." *Doe v. S.B.M.*, 327 S.C. 352, 356-57, 488 S.E.2d 878, 881 (Ct. App. 1997). "A party must file [a Rule 59(e), SCRCF] motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review." *Elam v. S.C. Department of Transportation*, 361 S.C. 9, 24, 602 S.E.2d 7762, 780 (2004); An issue not addressed in the trial court's final order is not preserved when the appellant does not file a motion under Rule 59(e) seeking a ruling on the issue. *Hancock v. Wal-Mart Stores Inc.*, 355 S.C. 168, 171, 584 S.E.2d 398, 399 (Ct. App. 2003).

Even if the issues raised by Efland in this appeal were presented, they are without merit. In filing his answer (and counterclaims), Mills specifically attached and incorporated into the pleading all the relevant documents from the prior litigation. (R. pp. 16-167). There was a reason

to do that, so the legal issue could be presented and decided on a motion for judgment on the pleadings, as opposed to summary judgment.

A motion for judgment on the pleadings should be considered on the basis of the allegations of the complaint, which, for purposes of the motion, are presumed to be true. *Home Builders Association of South Carolina v. School District No. 2 of Dorchester County*, 405 S.C. 458, 748 S.E.2d 230 (2013). Normally when documents beyond the complaint are introduced, the matter would be construed as one for summary judgment. *Preferred Research Inc. v. Reeve*, 292 S.C. 545, 357 S.E.2d 489 (Ct. App. 1987). However, because Mills incorporated the documents into his answer and counterclaim and made them a part of the pleading itself pursuant to Rule 10(c), SCRCF, the motion can be considered with the Court reviewing both the complaint and the answer; with exhibits in deciding the legal issues presented. *See Gregory v. Gregory*, 292 S.C. 587, 358 S.E.2d 147 (Ct. App. 1987).

“Under the doctrine of collateral estoppel, also known as issue preclusion, when an issue has been actually litigated and determined by a valid and final judgment, the determination is conclusive in a subsequent action whether on the same or a different claim.” *Zurcher v. Zurcher*, 379 S.C. 132, 135, 666 S.E.2d 224, 226 (2008); *Kunst v. Loree*, 404 S.C. 649, 740 S.E.2d 360 (Ct. App. 2013). The arbitrator specifically ruled that Efland had not sustained his burden of proof in his claims against Mills. (R. pp. 155-156).

In granting the motion, Judge Manning stated that the arbitrator’s order did not specifically rule on Efland’s counterclaims. (R. p. 5, last full paragraph). That is incorrect. As stated above, the arbitrator specifically found that Efland had failed to carry his burden of proof with respect to his (Efland’s) counterclaims against Mills. Judge Manning also concluded, correctly, that the

“arbitrator necessarily decided [Efland’s counterclaims]” adversely to Efland.” (R. p. 7). While Judge Manning’s order makes both statements, it is without doubt that the arbitrator’s award considered Efland’s claims against Mills to be unproven. (R. pp. 155-156).

Even if the issue had not actually been litigated in the 2008 action, it could have been. “Claim preclusion... bars [parties] from pursuing successive suits where the claim was litigated or could have been litigated.” *Crestwood Golf Club Inc. v. Potter*, 328 S.C. 201, 493 S.E.2d 826 (Ct. App. 1997), citations omitted (emphasis added).

It is without doubt that the disputes between Mills and Efland relate to property issues involving their respective real estate. Therefore, Efland was required to raise his counterclaims in the 2008 action filed by Efland (and he did so). “[I]f a counterclaim is compulsory, but not raised in the first action, a defendant is precluded from asserting the claim in a subsequent action.” *Crestwood Golf Club, Inc. supra*, 329 S.C. at 217. So, even if Efland forgot to raise his counterclaims in the 2008 action (but he did, in fact, raise them), he was required to have raised them in the 2008 action, and he cannot bring this third action to litigate issues which were compulsory counterclaims in the 2008 action.

Efland’s claims against Mills were compulsory counterclaims. Rule 13, SCRPC. “A pleading shall state as a [compulsory] counterclaim any claim which at the time of serving of the pleading . . . if it arises out of the transaction or occurrence that is the subject matter of the opposing party’s claim...” *Beach Company v. Twillman Ltd.*, 351 S.C. 56, 566 S.E.2d 863 (Ct. App. 2002).

Efland and Mills' claims against one another arose out of the same series of transactions which were the subject matter of the complaint made by the other. Efland did, in fact, raise his counterclaims. They were, in fact, decided. The trial court's ruling was correct.

Issue Two

JUDGE BENJAMIN'S RULING WAS FINAL

Efland asserts that the trial judge's reference to Judge Benjamin's order as "the law of the case" is somehow incorrect and warrants reversal. He is incorrect.

After the arbitrator ruled on the issues on June 23, 2015 Efland made a "motion to remand" the matter to the arbitrator alleging "[t]he Arbitrator simply failed to deal with any of the issues raised in the Counterclaims of the [Efland]. Before this Award becomes final those issues should be resolved." (R. pp. 158-159).

By order dated December 16, 2015, Circuit Court Judge DeAndre Benjamin denied Efland's Motion to Remand the case to the arbitrator concluding and finding that Efland had failed to seek relief in a timely manner and was procedurally barred from further litigating his counterclaims. (R. pp. 160-161). Judge Benjamin said "[e]ven if [Efland] had legitimate claims, [Efland] has been untimely. There is no jurisdiction for the Court to grant the relief" sought by Efland. *Id.*

Efland did not appeal Judge Benjamin's decision. It became the law of the case. *D.R. Horton Inc. v. Wescott Land Company LLC*, 411 S.C. 319, 764 S.E.2d 701 (2014). "An unappealed ruling is the law of the case and requires affirmance." *Id.* at 320.

CONCLUSION

There are no issues preserved for appeal. Efland did not file any opposition to the motion for judgment on the pleadings, and after the court's ruling, he did not seek reconsideration pursuant to Rule 59(e), SCRPC. Judgment should be affirmed on this procedural ground alone.

Further, the issues raised by Efland on appeal lack merit and the trial judge's decision should be affirmed.

Mills renews his assertion that this appeal has been filed by Efland for purposes of delay, intended to further harass and burden Mills, whose counterclaims against Efland remain stalled by Efland's contention that this appeal prevents the trial court proceedings from continuing. Through his counsel, Efland has refused to respond to discovery requests or attend mediation with respect to those matters that survived summary judgment, and which should continue unabated notwithstanding this appeal.



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CERTIFICATE OF COUNSEL

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

Respectfully submitted,



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