

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge
Civil Action No. 2013-CP-40-0712

Appellate Case No. 2016-001389

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SC Court of Appeals

Green Tree Servicing, LLC,.....Respondent,

v.

Jacqueline L. Taylor a/k/a Jacqueline Taylor Hendricks,.....Appellant.

SUPPLEMENTAL RECORD ON APPEAL

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INDEX

Bankruptcy Order of Dismissal.....01

Order Granting Summary Judgment on Defendant’s Counterclaim.....05

Order Denying Appellant’s Motion for Reconsideration.....09

Denial of Foreclosure Intervention..... 11

Lis Pendens, Summons, Complaint and Notice of Foreclosure Intervention.....12

Answer and Counterclaim.....25

Motion to Strike Amended Answer and Counterclaim.....36

Plaintiff’s Reply to Defendant’s Answer and Counterclaim.....41

Amended Answer and Counterclaim.....47

Transcript of Summary Judgment Hearing.....52

Bankruptcy Summary of Schedules.....66

Defendant’s Motion to Alter or Amend Judgment.....130

Stipulation of Dismissal of Foreclosure.....134

Respondent’s Motion for Summary Judgment.....135

Appellant’s Memorandum in Opposition to Summary Judgment.....136

Affidavit of Defendant.....150

The South Carolina Supreme Court’s Administrative Order 2009-05-22-01.....174

The South Carolina Supreme Court’s Administrative Order 2011-05-02-01.....178

Notice of Appeal.....182

SUPPLEMENTAL DOCUMENT

Proposed Order Denying Plaintiff’s Motion for Summary Judgment on
Defendant’s Counterclaim.....190

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Green Tree Servicing, LLC,

Plaintiff,

vs.

Jacqueline L. Taylor a/k/a Jacqueline Taylor
Hendricks,

Defendant.

IN THE COURT OF COMMON PLEAS

C.A. NO.: 2013-CP-40-0712

**ORDER DENYING PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT
ON DEFENDANT'S COUNTERCLAIMS**

This matter came before me on April 4, 2016, for a hearing on Plaintiff's Motion for Summary Judgment on Defendant's Counterclaims. Having considered the arguments of counsel, the pleadings, memoranda, exhibits and other submissions filed with the Court, and for the following reasons and based upon the following law, Plaintiff's Motion for Summary Judgment on Defendant's Counterclaim is DENIED. The Court finds Green Tree Servicing, LLC is not entitled to judgment in its favor as a matter of law as to Defendant's Counterclaims.

FINDINGS OF FACT

Viewing the evidence and inferences therefrom in a light most favorable to the non-movant, the Court makes the following findings of fact:

1. On March 22, 2004, Defendant executed and delivered a promissory note to Bank of America. Bank of America then assigned the mortgage to Plaintiff on June 7, 2013. Plaintiff, as the lienholder of the mortgage, could collect the owed and due balance if Defendant defaulted on the note/mortgage. Moreover, Defendant defaulted on her mortgage payments on November 1, 2009, and Bank of America proceeded to file a foreclosure action on the entire balance due. Green Tree Servicing, LLC, has been substituted for Bank of America as Plaintiff.

2. On July 3, 2014, Defendant filed a timely Answer and Counterclaim against Plaintiff in the foreclosure proceeding. During this proceeding, Plaintiff was fully aware of the counterclaims against it. Defendant consulted a bankruptcy attorney during this proceeding, who advised Defendant not to include the counterclaims against Plaintiff in the bankruptcy schedule because the attorney categorized the claims as “moot” due to the Plaintiff agreeing to give Defendant a mortgage modification.

3. On October 3, 2014, Defendant filed for a Chapter 13 bankruptcy and disclosed her scheduled assets in Summary of Schedules to the United States Bankruptcy Court for the District of South Carolina on February 3, 2015, but did not include the counterclaims because of the advice of her attorney. Since Plaintiff was a creditor, it received notice of Defendant’s bankruptcy proceeding. However, the Court dismissed the bankruptcy proceeding on March 13, 2015, without Defendant receiving a discharge.

4. On April 23, 2015, Defendant entered a “Stipulated Order for Permanent Injunction and Monetary Judgment” with the Federal Trade Commission and Consumer Financial Protection Bureau in the United States District Court for the District of Minnesota in Case 0:15-cv-02064-SRN-JSM Doc. 5 based upon the federal government’s complaint against Defendant for violations of the Federal Trade Commission-Act, the Consumer Financial Protection Act of 2010, the Fair Credit Reporting Act and the Real Estate Settlement Procedures Act and its implementing regulation, Regulation X for Defendant’s conduct in collecting on past-due debts, in-process loan modification practices, loss mitigation practices, and loan servicing practices. Defendant has alleged similar misconduct by Plaintiff in relation to the loan and mortgage at issue in the case at bar.

LEGAL STANDARD

“Summary Judgment is appropriate where it is clear that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law.” *Hamiter v. Retirement Division of South Carolina*, 326 S.C. 93, 484 S.E. 586 (1997); *see also* SCRCF Rule 56. “In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party.” *Strother v. Lexington County Recreation Comm’n.*, 332 S.C. 54, 61, 504 S.E.2d 117, 121 (1998) (quoting *Id.*). Therefore, I make the following Conclusions of Law:

CONCLUSIONS OF LAW

Judicial Estoppel Does Not Bar Defendant’s Counterclaim, Defendant can show no prejudice and Defendant is not entitled to equitable relief at this stage in the litigation.

1. South Carolina courts apply a five-prong test in determining whether Judicial Estoppel bars a party’s claim. The party asserting judicial estoppel is required to meet all of these elements:

“(1) two inconsistent positions taken by the same party or parties in privity with one another; (2) the positions must be taken in the same or related proceedings involving the same party or parties in privity with each other; (3) the party taking the position must have been successful in maintaining that position and have received some benefit; (4) the inconsistency must be part of an intentional effort to mislead the court; and (5) the two positions must be totally inconsistent.”

Sims v. Amisub of South Carolina, Inc., 408 S.C. 202, 213, 758 S.E.2d 187, 193 (Ct. App. 2014) (quoting *Cothran v. Brown*, 357 S.C. 210, 215, 592 S.E.2d 629, 631 (2004) (emphasis added)).

2. The Court holds that Defendant is not barred from continuing to assert her Counterclaims because Plaintiff has failed to establish the third and fourth prongs of the test under *Cothran v. Brown*. The Court finds that Defendant did not receive any benefit from the dismissal of the bankruptcy proceeding and Plaintiff failed to set forth any evidence showing that Defendant made an intentional effort to mislead the court. Specifically, in the dismissal of a bankruptcy

action, the debtor will not receive the benefit of a discharge she would otherwise receive in a successful Chapter 13 bankruptcy proceeding. In addition, Defendant's exhibits and affidavit provide factual support that Plaintiff's involvement in the foreclosure proceedings provided Plaintiff with actual notice of Defendant's Counterclaim and that Plaintiff received subsequent notice of Defendant's bankruptcy proceeding as a creditor, with full knowledge of the pendency of the counterclaims in the foreclosure action.

3. The Court further holds that Plaintiff's Motion does not bar Defendant's Counterclaim and Plaintiff is not entitled to a judgment as a matter of law on Defendant's Counterclaim.

4. Moreover, Defendant did not intentionally conceal her claims from the United States Bankruptcy Court for the District of South Carolina. The Court finds that Plaintiff, regardless of a disclosure, had actual notice of the still pending counterclaims in the foreclosure action. In addition, the Court holds that Plaintiff was not prejudiced by the non-disclosure, as Plaintiff's foreclosure action against Defendant was still pending at the time of the bankruptcy filing and that Plaintiff did not detrimentally rely on the Defendant's schedule of assets. *See Jones v. Lanthrip*, 765 So.2d 682 (Ala. Ct. App. 2000).

5. South Carolina law provides that "[w]hile the doctrine of judicial estoppel does not generally apply when a prior position was taken because of a good faith mistake or *genuine inadvertence* . . . in the context of bankruptcy proceeding, a debtor's failure to satisfy their statutory disclosure duty is inadvertent 'only when, in general, the debtor either lacks knowledge of the undisclosed claims or *has no motive for concealment*.'" *Thomas v. Palmetto Management Services*, No. 3:05-cv-17-CMC-BM, 2006 WL 2623917, at *3 (D.S.C. Sept. 11, 2006) (quoting *Ryan Operations, G.P. v. Santiam-Midwest Lumber Co., et al.*, 81 F.3d 355, 362-363 (3d Cir. 1996) and *In re Coastal Plains*, 179 F.3d 197, 210 (5th Cir. 1999) (emphasis added)).

Accordingly, “even if a debtor had full knowledge of a potential claim, the failure to disclose that claim in a bankruptcy petition could nonetheless be deemed inadvertent where he lacked a motive for concealment.” *Clafiore v. Werner Enterprises, Inc.*, 418 F. Supp. 795, 798 (D.Md. 2006). In the present case, Defendant followed the advice of her counsel in the bankruptcy proceeding, as counsel advised her that the counterclaims were “moot” and were thus unnecessary to list in her scheduling of assets. Therefore, the Court holds the Defendant acted inadvertently by not disclosing the claims and did not act intentionally to mislead the court in bankruptcy proceeding.

6. At this stage in the litigation, the Court is not inclined to grant judgment to Plaintiff as a matter of law based upon its judicial estoppel argument. Plaintiff seeks equity, and, therefore, must come to court with clean hands. Based upon the record before the court and in resolving all factual inferences in the light most favorable to Defendant, Plaintiff does not have clean hands and may well have committed the same conduct in the case at bar as complained of by the Federal Trade Commission and the Consumer Financial Protection Bureau in the United States District Court for the District of Minnesota. “Because judicial estoppel is an equitable concept, depending upon the facts and circumstances of each individual case, application of the doctrine is discretionary.” *Hawkins v. Bruno Yacht Sales*, 342 S.C. 368, 536 S.E.2d 698, 706 (Ct. App. 2000) (citing C.J.S. Estoppel & Waiver 139 (1996)). Therefore, I make the following Order:

ORDER

For all of these reasons, this Court finds that Plaintiff is not entitled to a judgment as a matter of law.

THEREFORE, it is hereby ORDERED, ADJUDGED and DECREED that the Motion for Summary Judgment filed by Plaintiff Green Tree Servicing, LLC, is DENIED.

AND IT IS SO ORDERED.

_____, 2016
Columbia, SC

The Honorable G. Thomas Cooper, Jr.
Circuit Judge for the Fifth Judicial Circuit

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v.

Jaqueline L. Taylor a/k/a Jaqueline Taylor Hendricks Appellants.

CERTIFICATE OF COUNSEL

The undersigned counsel for Appellants certifies that the Supplemental Record on Appeal of Appellant complies with Rule 210(g) SCAR.

Respectfully submitted,



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