

STATE OF SOUTH CAROLINA  
COUNTY OF BERKELEY  
Federal National Mortgage Association  
("Fannie Mae")

Plaintiff,

vs.

Richard C. Ivey a/k/a Richard Curtis  
Ivey; Crowfield Plantation Community  
Services Association, Inc.; Unifund CCR  
Partners Assignee of Palisades, a General  
Partnership; and CIT Bank, National  
Association,

Defendants.

151083.00327

IN THE COURT OF COMMON PLEAS

CASE No. 2016-CP-08-00591

ORDER DENYING DEFENDANT'S  
MOTION FOR SANCTIONS

AND

DISMISSING CASE WITHOUT PREJUDICE

RECEIVED

MAR 28 2018

SC Court of Appeals

2018 FEB 22 AM 9:15

FILED  
C.A.

This matter comes before the Court pursuant to the Motion to Dismiss Case and for Sanctions ("Motion") filed by Defendant Richard C. Ivey a/k/a Richard Curtis Ivey ("Defendant") against Federal National Mortgage Association ("Plaintiff"). A hearing was held before this Court on January 9, 2018. Present and participating at the hearing were William P. Stork, attorney for Plaintiff, and John R. Cantrell, Jr., attorney for Defendant. Based upon a review of the file, evidence presented and admitted in the record, arguments of counsel, and applicable South Carolina statutory and case law, I hereby find that the relief sought in Defendant's Motion for sanctions against Plaintiff and/or Plaintiff's counsel is hereby DENIED. I further find that the portion of Defendant's Motion seeking dismissal of the case, is hereby granted without prejudice based upon consent of the parties.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

- I. I hereby find and conclude as a matter of law that the South Carolina Supreme Court's 2011 Administrative Order does not apply to the Defendant nor the subject property in this matter.

In Defendant's Motion, he alleges that Plaintiff is in contempt of the South Carolina Supreme court's May 2, 2011 Administrative Order ("Administrative Order"), and, thus, Defendant is entitled to sanctions against the Plaintiff and/or Plaintiff's counsel. This argument is without merit, however, because Defendant nor the subject property is entitled to the protection afforded by the Administrative Order.

The Administrative Order expressly and solely applies to the "Mortgagor," which is defined in the Administrative Order as, "every owner, mortgagor, and debtor under the note and mortgage at issue." [emphasis added]. In this case, Defendant was not a party to the original, underlying "note and mortgage at issue." Rather, Marion K. Ivey and Frank R. Ivey (the Defendant's deceased parents) (collectively, "Mortgagors") were the only "owners, mortgagors, and debtors" who executed and delivered the note and mortgage to Plaintiff's predecessor in interest. Defendant did not acquire his inherited interest in the subject property until well after his parents, the Mortgagors, closed on the underlying note and mortgage transaction. Accordingly, a plain reading of the Administrative Order dictates that this Court find that Defendant was not in privity of contract with Plaintiff nor its predecessor with regard to the note and mortgage at issue, and, therefore, any protections afforded by the Administrative Order do not apply to Defendant.

To further bolster this Court's finding and conclusion that the Administrative Order does not apply to Defendant in this case, this Court specifically takes judicial notice, pursuant to Rule 201 of the South Carolina Rules of Evidence, of the South Carolina Court Administration's formal letter dated June 7, 2011 ("Admin Explanation Letter"), which interprets and explains the intent, scope, and application of the Administrative Order.

Pursuant to the Admin Explanation Letter:

In paragraph A(1), concerning who is entitled to participate in foreclosure intervention, the definition of "Mortgagor," read in context includes only parties involved in the mortgage transaction in question" [emphasis added].

Admin Explanation Letter, Page 2.

In this case, Defendant is not a "party involved in the mortgage transaction in question," as the mortgage transaction was between and among the Mortgagors and Plaintiff's predecessor in interest, only. As stated above, Defendant merely obtained an inherited interest in the mortgaged property, subject to Plaintiff's first priority mortgage lien, *after* the note and mortgage transaction/closing was completed between the Borrowers and Plaintiff's predecessor.

I hereby find and conclude that, because the Defendant is not entitled to the protections afforded by the Administrative Order, neither Plaintiff nor Plaintiff's counsel can be sanctioned for any alleged violation of said Administrative Order. Neither Plaintiff nor Plaintiff's counsel is, nor ever was, required to comply with any of the terms of the Administrative Order with respect to Defendant in this case; therefore, it is axiomatic that Plaintiff or Plaintiff's counsel can not be sanctioned for failing to do that which is not required by law.

Based on the foregoing, I hereby find and conclude that Defendant's Motion for sanctions based upon an alleged violation of the Administrative Order fails as a matter of law and is denied.

II. In the alternative, even in the event that this Court were to assume that the Administrative Order applies to Defendant, I hereby find and conclude as a matter of law that Plaintiff fully complied with the terms of the Administrative Order.

Subsequent to the filing of this action, Plaintiff actually, and in good faith, participated in loss mitigation efforts with the Defendant which resulted in the Defendant entering into a trial modification with Plaintiff on or about July 2017 ("Trial Mod"). The Administrative Order does not impose any specific requirements on the Mortgagee when the parties have merely entered into a temporary or trial work-out solution. Instead, the Administrative Order only sets forth certain required procedures in the event that the parties agree to a formal and final loan modification or loss mitigation plan as follows:

In the event that the Mortgagor and Mortgagee agree on any loan modification or other loss mitigation plan ("Agreement"), such Agreement shall be reduced to writing, executed by the Mortgagor and Mortgagee, and served on all parties in the case. Any pending case shall be stayed, and no hearing or foreclosure sale held for 90 days following the entry of any Agreement, unless the Mortgagor shall not comply with the terms of the Agreement. [emphasis added].

...  
If the Mortgagor shall be in compliance with the terms of the Agreement after 90 days, the Mortgagee's attorney shall promptly file a notice of dismissal of the action without prejudice, and the case will be dismissed. (emphasis added).

In this case, the Parties did not agree to any final "loan modification or loss mitigation plan" as contemplated by the Administrative Order. Rather, Plaintiff allowed Defendant to participate in a tentative work-out solution in the form of the Trial Mod. The Trial Mod entered into by Defendant and Plaintiff in this case was merely temporary, with the express provision that if Defendant were to default under the Trial Mod, Defendant would be denied a permanent loan modification. I, therefore, find and conclude that the Trial Mod does not constitute an "Agreement" as defined in the

Administrative Order, and, thus, Plaintiff did not violate any provision of the Administrative Order with respect to the Trial Mod.

**III. Plaintiff and its counsel complied with Rule 11, SCRPC, at all times throughout the case, and, therefore, any alleged violation thereof cannot support a basis for sanctions against Plaintiff and/or Plaintiff's counsel.**

Under Rule 11(a), SCRPC, a party and/or the party's attorney may be sanctioned for filing a frivolous pleading, motion, or other paper, or for making frivolous arguments. The party and/or attorney may also be sanctioned for filing a pleading, motion, or other paper in bad faith whether or not there is good ground to support it. *Ex parte Gregory*, 378 S.C. 430, 663 S.E.2d 46 (2008). "Rule 11 requires '[a]ll motions filed shall contain an affirmation that the movant's counsel prior to filing the motion has communicated, orally or in writing, with opposing counsel and has attempted in good faith to resolve the matter ... unless the movant's counsel certifies that consultation would serve no useful purpose, or could not be timely held.' The penalty for noncompliance is to strike the motion unless the attorney promptly amends the document to comply with the rule." *Jackson v. Speed*, 326 S.C. 289, 310, 486 S.E.2d 750, 761 (1997). The determination whether to impose sanctions is at the discretion of the Judge and "sounds in equity rather than at law." *Holmes v. Haynsworth, Sinkler & Boyd, P.A.*, 408 S.C. 620, 641, 760 S.E.2d 399, 410 (2014), *reh'g denied* (Aug. 5, 2014).

Counsel for Plaintiff filed its Motion to Strike pursuant to Rule 40(j) on or about October 31, 2017 ("Motion to Strike"), seeking a hearing and Order Striking the case from the active docket to allow the parties sufficient time to resolve the matter. In accordance with the requirements of Rule 11, SCRPC, *prior to filing its Motion to Strike*, counsel for Plaintiff discussed Plaintiff's desire to strike the case with leave to restore with counsel for Defendant and respectfully requested Defendant's consent to Plaintiff's Motion to Strike. Plaintiff concedes that counsel for Defendant advised Plaintiff that Defendant

would not consent to the Motion to Strike. The Motion erroneously asserts that Defendant consented to the entry of the motion pursuant to Rule 40(j).

Counsel for Defendant asserts that Plaintiff "willfully" filed the Motion to Strike under Rule 40(j) without Defendant's consent, and as such, Plaintiff violated Rule 11, SCRPC. Defendant's assertion is correct that the Motion was factually incorrect regarding consent. Further, the citation to Rule 40(j) is incorrect as a dismissal under that Rule requires consent of which there was none. However, the Motion to Strike expressly provided that the parties did not reach an agreement as to the Motion to Strike, and that a hearing was necessary. The filed Motion to Strike clearly stated that a hearing on the matter would be required which would here allowed Defendant a full and fair opportunity to dispute and/or argue against the Motion to Strike. Unfortunately, the Court erroneously executed the proposed Order. However, such Order was rescinded and the parties were allowed an opportunity to be heard as to the Motion to Strike.

It is well settled that "The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." Rule 61, SCRPC. Any defect in Plaintiff's Motion to Strike was a harmless error which did not affect the substantial rights of the parties. Defendant completed his loan modification review, was approved, and is now current. Whether the case was stricken from the docket, or whether it was dismissed, is now irrelevant since the loan is current and Plaintiff consents to the matter being dismissed.

Lastly, Defendant claims that Plaintiff filed the Motion to Strike merely for the purposes of delay and that such alleged improper motive is improper under Rule 11, SCRPC. Defendant has provided no evidence whatsoever that supports this contention. Defendant failed to show any prejudice to him resulting from the Motion to Strike, and Plaintiff established good grounds to file such Motion to Strike.

For the foregoing reasons, Defendant's claim that Plaintiff's counsel and/or Plaintiff violated Rule 11 SCRPC is insufficient to support an award of sanctions against Plaintiff as a matter of law.

**IV. Dismissal**

The parties agree that the Trial Loan Modification was successful and subsequently a permanent Loan Modification was entered into and executed by the parties. Therefore both parties agree and consent this action should be dismissed with out prejudice.

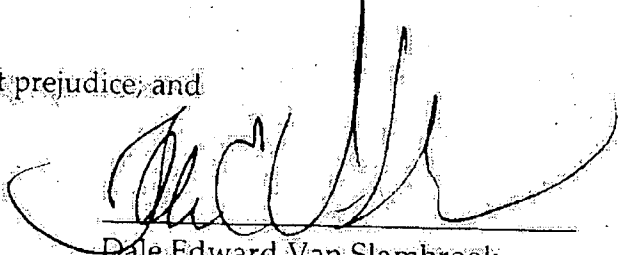
**ORDER**

Based on the foregoing, it is hereby ORDERED, ADJUDGED, AND DECREED that:

1. The South Carolina Supreme Court's 2011 Administrative Order does not apply to the Defendant nor the subject property in this matter.
2. Defendant's Motion for Sanctions against Plaintiff and/or Plaintiff's counsel based upon an alleged violation of the Administrative Order is denied;
3. Defendant's Motion for Sanctions against Plaintiff and/or Plaintiff's counsel based upon an alleged violation of Rule 11 of the South Carolina Rules of Civil Procedure is denied;
4. The case is dismissed without prejudice; and

IT IS SO ORDERED.

2/15 2018

  
Dale Edward Van Slambrook  
Berkeley County Master in Equity

7 