THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge



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Case No. 2012-CP-08-2618
Case No. 2012-CP-08-3478

Appellate Case No. 2016-002192

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Bank of North Carolina, Respondent,

v.

Anthony Whitfield and Cindy Whitfield,

Defendants,

Of whom Anthony Whitfield is the Appellant
and Cindy Whitfield is a Respondent.

Anthony Whitfield,

Appellant,

v.

David Swanson, Respondent.

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# BRIEF OF RESPONDENT DAVID SWANSON

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## STATEMENT OF ISSUES ON APPEAL

1. Whether the trial court properly dismissed Appellant's claims pursuant to Rule 12(b)(8) where Appellant had already asserted those same claims against the same party in another pending action.

## STATEMENT OF THE CASE

In this appeal from two Berkeley County foreclosure actions, Appellant Anthony M. Whitfield appeals the trial court's dismissal of his claims against Respondent David Swanson for civil conspiracy and abuse of process. A statement of this case necessarily involves some of the procedural history of six foreclosure actions that Harbor National Bank (now Bank of North Carolina) filed against Whitfield: Charleston County Case No.: 2012-CP-10-5887; Dorchester County Case Nos.: 2014-CP-18-0358, 2014-CP-18-1792, and 2014-CP-18-1793; and Berkeley County Case Nos.: 2012-CP-08-2618 and 2012-CP-08-3478. Whitfield answered the foreclosure complaints and asserted various counterclaims against the Bank alleging, *inter-alia*, that the Bank breached its agreement to renew the subject loans. (R. pp. 116-137.) Whitfield subsequently amended his pleadings to assert claims against Swanson for civil conspiracy and abuse of process in each of the six foreclosure actions. (R. pp. 72-93, 94-115.)

David Swanson is an attorney at Haynsworth Sinkler Boyd, P.A. Whitfield's claims against him are based on deposition testimony that Swanson gave in the Charleston County foreclosure action concerning advice he gave the Bank about a title issue that had arisen with respect to the property that is the subject of the Charleston County foreclosure action. (R. pp. 85-89, 107-111.) Whitfield alleges that the advice was never actually given, and that Swanson provided the testimony as part of a conspiracy with Harbor National Bank to manufacture an "advice of counsel" defense to Whitfield's counterclaims. (Id.)

Whitfield brought the civil conspiracy and abuse of process claims against Swanson in the Charleston County foreclosure action on January 8, 2016. (R. pp. 265-288.) On March 8, 2016, Whitfield filed amended pleadings in the Berkeley and Dorchester County foreclosure actions asserting these same claims against Swanson. (R. pp. 72-93, 94-115.) The seventeen paragraphs

of allegations against Swanson in the Charleston County foreclosure action (R. pp. 280-283.) were repeated verbatim in Whitfield's five subsequent pleadings filed in the Berkeley and Dorchester County foreclosure actions. (R. pp. 85-89, 107-111, 171-175, 193-197, 215-218.)

In the Berkeley and Dorchester County foreclosure actions, but not the Charleston County foreclosure action, Swanson filed motions to dismiss pursuant to Rule 12(b)(8), SCRCP on the ground that another action was pending between the same parties for the same claims. (R. pp. 316-322, 323-329.) The trial courts in Berkeley and Dorchester counties ultimately granted Swanson's motions. (R. pp. 1-6, 7-12, 347-358.) In this appeal, Whitfield appeals the dismissal of his claims against Swanson in the Berkeley County foreclosure actions. (R. p. 380.) In a related appeal, Appellate Case No.: 2016-002193, Whitfield appeals the dismissal of his claims against Swanson in the Dorchester County foreclosure actions.

The Berkeley County foreclosure actions were commenced as follows: Case No.: 2012-CP-08-2618 was filed on September 7, 2012. (R. pp. 18-50.) Case No.: 2012-CP-08-3478 (R. pp. 51-71.) was filed on December 7, 2012. Whitfield asserted the civil conspiracy and abuse of process claims against Swanson in each of the Berkeley County foreclosure actions on March 8, 2016 in the following operative pleadings: Whitfield's Fifth Amended Answer and Counterclaims filed in Case No.: 2012-CP-08-2618, (R. pp. 72-93.) and Whitfield's Fourth Amended Answer and Counterclaims filed in Case No.: 2012-CP-08-3478. (R. pp. 94-115.)

Swanson's motions to dismiss were filed on April 7, 2016 in Case No.: 2012-CP-08-2618 (R. pp. 316-322.) and April 11, 2016 in Case No.: 2012-CP-08-3478.[1] (R. pp. 323-330.) The motions were heard by the Honorable R. Markley Dennis on June 28, 2016. Judge Dennis entered form orders denying the motions on June 30, 2016. (R. pp. 13-14.) On July 11, 2016, Swanson

[1] Both motions were served on April 4, 2016.

served motions to reconsider the form orders denying his motions to dismiss.[2] (R. pp. 341-361.) The motions to reconsider were heard on September 20, 2016. On September 29, 2016, Judge Dennis entered orders granting Swanson's motions to reconsider. (R. pp. 1-12.) The trial court found that based upon a review of the relevant pleadings, Whitfield's claims against Swanson in the Berkeley County foreclosure actions were substantially the same, if not identical, to Whitfield's claims against Swanson in the Charleston County foreclosure action, and that dismissal was warranted pursuant to Rule 12(b)(8), SCRCP. (Id.)

On October 21, 2016, Whitfield served notices of appeal of the trial court's September 29, 2016 orders from both of the Berkeley County foreclosure actions. (R. pp. 380-401.)

[2] Notwithstanding that the timeliness of Respondent's motions to reconsider was not raised in the proceedings below, Respondent Swanson received notice of the form orders denying his motions to dismiss on June 30, 2016 and served his motions to reconsider on Monday, July 11, 2016.

## INTRODUCTION

The six related foreclosure actions that Harbor National Bank filed against Anthony M. Whitfield arose out of a series of loans that the Bank extended to Whitfield in 2007 and 2008. (R. pp. 18-50.) The loans were secured by nine properties owned by Whitfield located in Charleston, Dorchester and Berkeley counties. (R. pp. 72-116, 223-253.) As the 5-year balloon notes began maturing in 2012, Whitfield and the Bank negotiated renewal terms, and a closing was scheduled to take place in June 2012. (R. pp. 76-78.)

One of the loans that was scheduled to close in June 2012 was secured by real property located in Charleston County that is referred to throughout the pleadings as the "Black Rush Property." (R. pp. 77-89.) In 2007, when Whitfield gave the Bank a first mortgage on the Black Rush Property, he owned it in fee simple. The updated title search that was conducted in connection with the June 2012 closing revealed that Whitfield had subsequently deeded a one-half interest in the Black Rush Property to his ex-wife, Cindy Whitfield. (R. p. 228.)

Scott Warren was the Bank's primary point of contact for the Whitfield loans. (R. p. 77.) The closing attorney brought this issue to his attention and initially indicated that Cindy Whitfield would need to sign the mortgage on the Black Rush Property. Two days prior to the scheduled closing, the closing attorney asked Warren if the Bank was okay with keeping the existing lender's title insurance policy in place rather than issuing a new policy. (Id.) Warren called David Swanson to discuss what should be done from the Bank's perspective. (R. pp. 85-87.) Swanson recommended that the Bank obtain a title endorsement to bring the lender's policy up to date, or have Cindy Whitfield sign the mortgage on the Black Rush Property. (Id.) Warren then wrote back to the closing attorney "I called bank counsel to get some advice on how to handle it . . . We need a title endorsement on Black Rush. . . ."

The closing attorney was unable to get the title endorsement or Cindy Whitfield's signature on the mortgage, and the closing fell apart. (R. pp. 77-78.) At that point, several of Whitfield's loans had already matured, and several more were set to mature by the end of the year. The Bank commenced the first of its six foreclosure proceedings against Whitfield on September 7, 2012. (R. pp. 223-253.)

Most, if not all, of the discovery was conducted in the Charleston County foreclosure action involving the Black Rush Property. Scott Warren and David Swanson were deposed, and both testified extensively about their conversation prior to the failed closing in June 2012 in which Swanson recommended that the Bank obtain a title endorsement or have Cindy Whitfield sign the mortgage. (R. pp. 282-283.) Scott Warren's contemporaneous email documenting the call was attached as an exhibit to his deposition cited in Whitfield's pleadings.

Despite all of this, Whitfield alleges the conversation never happened.[3] (R. pp. 85-89.) Whitfield amended his pleadings to assert claims against David Swanson alleging that he conspired with the Bank to manufacture a defense to Whitfield's counterclaims by providing deposition testimony that corroborates Scott Warren's testimony, all for an "advice of counsel" defense that the Bank has not asserted as an affirmative defense, and that does not appear to have any basis in existing law for application to a borrower's counterclaims against a lender in a foreclosure action. (Id., R. pp. 138-157.)

The merits of Whitfield's civil conspiracy and abuse of process claims against David Swanson are for another day. For now, the question for this Court is whether Swanson should be

[3] To be clear, Whitfield does not dispute that the Bank did in fact request a title endorsement prior to the June 2012 closing, only that Scott Warren called David Swanson prior to the June 2012 closing and received the very recommendation that was documented in Warren's contemporaneous email to the closing attorney.

required to defend these same claims in six different lawsuits and face potentially different, inconsistent outcomes in each, or worse, multiple exposure for the same alleged conduct, or whether the trial court correctly determined that Rule 12(b)(8) limits Whitfield to pursuing his claims against Swanson to a single lawsuit.

## STANDARD OF REVIEW

On review of the dismissal of a claim pursuant to Rule 12(b)(8), an appellate court applies the same standard of review as the trial court. As the trial court is charged with determining each of the components of the rule as a matter of law, a de novo standard of review applies. Capital City Ins. Co. v. B.P. Staff, Inc., 382 S.C. 92, 99, 674 S.E.2d 524, 528 (Ct. App. 2009)(*citing* Miami Sand & Gravel, LLC v. Nance, 849 N.E.2d 671, 676 (Ind. Ct. App. 2006)). "In other words, [the appellate court] may determine whether there is another action involving the same parties, claims (or subject matter), and remedies as a matter of law." Id.

## ARGUMENT

### I. The claims that Whitfield asserted against Swanson in the Berkeley County foreclosure actions were the same claims that he asserted against Swanson in the pending Charleston County foreclosure action, and they were properly dismissed by the trial court pursuant to Rule 12(b)(8), SCRCP.

Rule 12(b)(8) of the South Carolina Rules of Civil Procedure provides that a defendant may seek dismissal of an action when "another action is pending between the same parties for the same claim." In considering a motion to dismiss under Rule 12(b)(8), courts must consider both the identity of the parties and the identity of the claims. Cricket Cove Ventures, LLC v. Gilland, 390 S.C. 312, 321-22, 701 S.E.2d 39, 44-45 (Ct. App. 2010). In order to warrant dismissal of an action pursuant to Rule 12(b)(8), the claims subject to dismissal "must be precisely or substantially the same in both proceedings." Capital City Ins. Co. v. B.P. Staff, Inc., 382 S.C. 92, 105, 674 S.E.2d 524, 532 (Ct. App. 2009); *see also* Freemantle v. Preston, 398 S.C. 186, 728 S.E.2d 40, 45 (2012).

In identifying the overarching policy concerns behind Rule 12(b)(8), the Supreme Court of South Carolina has explained that the underlying principal of Rule 12(b)(8) is very simply that "duplicative litigation should be avoided." State ex rel. Wilson v. Condon, 410 S.C. 331, 333, 764 S.E.2d 247, 248 (2014). In other words, a party should not be forced to litigate the same factual allegations applied to the same causes of action in multiple pending lawsuits.

This principal, however, is rooted in far more than simply avoiding the redundancy of litigating the same issues more than once. Most importantly, Rule 12(b)(8) serves to prevent the possibility of inconsistent verdicts from different juries, multiple exposure to the defending party, or double recovery for the party asserting the claim. Dismissal of duplicative lawsuits also avoids excessive costs and prejudice to parties, and avoids the inefficiency and unnecessary expense that would burden the courts and the public in empaneling multiple different juries and conducting multiple trials to litigate the same claims that have already been asserted against the same party in another pending action.

**A. The parties and claims are identical.**

Whitfield's claims against David Swanson in each of the six lawsuits are not merely "substantially the same," the seventeen paragraphs of allegations made against David Swanson in the six lawsuits are literally identical. *Compare* Def.'s Fifth Amended Answer and Counterclaims filed in Charleston County Case No.: 2012-CP-10-5887, ¶¶65-82, with Def.'s Fifth Amended Answer and Counterclaims filed in Berkeley County Case No. 2012-CP-08-2618, ¶¶ 55-72, Def.'s Fourth Amended Answer and Counterclaims filed in Berkeley County Case No. 2012-CP-08-3478, ¶¶ 55-72, Def.'s Amended Answer and Counterclaims filed in Dorchester County Case No: 2014-CP-18-0358, ¶¶ 55-72, Def.'s Fourth Amended Answer and Counterclaims filed in Dorchester County Case No.: 2014-CP-18-1792, ¶¶ 55-72, and Def.'s Fifth Amended Answer and Counterclaims filed in

Dorchester County Case No. 2014-CP-18-1793, ¶¶ 55-72. (R. pp. 279-283, 85-89, 107-111, 171-175, 193-197, 215-218.)

The allegations and claims that are repeated in the six lawsuits allege that Swanson is liable for civil conspiracy and abuse of process based on the deposition testimony he gave in the Charleston County foreclosure action in which Swanson confirmed that he spoke with Scott Warren and recommended that the Bank obtain a title endorsement to bring the lender's policy up to date, or have Cindy Whitfield sign the mortgage on the Black Rush Property. (Id.) Whitfield alleges that the conversation never happened, and that Swanson provided false testimony to manufacture an after-the-fact defense to Whitfield's counterclaims against the Bank. (Id.)

In the abuse of process claim against Swanson, Whitfield specifically alleges in each of the six lawsuits that "[b]ecause the telephone records show the call never occurred, the sworn testimony that the call was made, when in fact evidence show that it was not made at the time, was given with the ulterior purpose of fabricating a legal defense for the bank's failure to renew its contractual obligations to renew Mr. Whitfield's loans." See *e.g.*, Def.'s Fifth Amended Answer and Counterclaims filed in Berkeley County Case No. 2012-CP-08-2618, ¶ 59 (emphasis removed). (R. pp. 85-87.)

In the civil conspiracy claim against Swanson, Whitfield specifically alleges in each of the six lawsuits that "[t]he sworn testimony that the call was placed before closing, when in fact it was not, was a willful or overt act, done with the intent and collateral objective of furnishing a legal defense (advice of counsel) for the bank and injuring Mr. Whitfield." See *e.g.*, Def.'s Fifth Amended Answer and Counterclaims filed in Berkeley County Case No. 2012-CP-08-2618, ¶ 69. (R. pp. 87-89.) The allegations of damages that Whitfield attributes the abuse of process and civil conspiracy claims are

likewise identical in each of the six lawsuits. See *e.g.*, Def.'s Fifth Amended Answer and Counterclaims filed in Berkeley County Case No. 2012-CP-08-2618, ¶¶ 62, 72. (R. pp. 85-89.)

In filing these civil conspiracy and abuse of process claims against David Swanson in each of the six foreclosure actions, Whitfield sought to hold Swanson liable for the exact same alleged conduct, on the exact same causes of action, in six different pending lawsuits. This is precisely why Rule 12(b)(8) exists. The trial court's decision was correct and should be affirmed.

## II. Whitfield's claims against Swanson are not for "wrongful foreclosure."

Whitfield's emphasis on the fact that the Bank is foreclosing on different properties in each lawsuit misses the point. Whitfield argues that dismissal was improper because "the damages of each case arise out of the wrongful foreclosure of that specific property." Brief of App. p. 17. However, his abuse of process and civil conspiracy claims do not seek to hold David Swanson liable for wrongful foreclosure; they seek to hold Swanson liable for alleged false deposition testimony that he provided long after the Bank first commenced the foreclosure actions.[4] This point was expressly recognized by the trial Court in granting Swanson's motion to reconsider. (Sept. 20, 2016 Hearing Transcript, p. 3 ln. 20-25). (R. pp. 305-315.)

Whitfield's claims against Swanson relate solely to the occurrence or non-occurrence of a single conversation that was the subject of deposition testimony that Swanson gave almost two years after the loans were not renewed by the Bank and twenty months after the Bank commenced

[4] In direct contradiction to Whitfield's entire theory of liability against Swanson, Whitfield argues elsewhere in his Brief of Appellant that the claims against Swanson "involve advice the bank *has relied upon* for the foreclosure of nine (9) different income-producing properties in six different suits. . . ." Brief of App. p. 13 (emphasis added). He cannot have it both ways, but even if he could, Whitfield's damages argument is a red herring. Just as a car accident plaintiff who received treatment from different providers in different counties cannot sue the same defendant multiple times for the same tort, Whitfield cannot sue Swanson six times on the same claims for the same alleged conduct by claiming property-specific damages piecemeal. (R. p. 309.)

the foreclosure actions against Whitfield. Regardless of whether Whitfield's counterclaims *against the Bank* are unique to each specific property foreclosed upon, Whitfield's claims *against David Swanson* are not. They are the same claims against the same party involving the same subject matter, repeated six times.

Whitfield argues for the first time on appeal that S.C. Code §15-7-10 and Rule 13(a), SCRCP required that Whitfield assert these civil conspiracy and abuse of process claims against Swanson in each of the six foreclosure actions. These arguments were not raised or ruled upon at any point in the proceedings below. They are not preserved for appellate review. Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the [circuit court] to be preserved for appellate review."); Noisette v. Ismail, 304 S.C. 56, 58, 403 S.E.2d 122, 124 (1991)(finding an issue was not preserved when the circuit court did not rule on the issue and the appellant did not file a motion to reconsider); Dodge v. Dodge, 332 S.C. 401, 418, 505 S.E.2d 344, 352-53 (Ct. App. 1998)(finding appellant's argument was not presented for appeal when he "failed to specifically raise the issue in his Rule 59(e), SCRCP, motion for reconsideration").[5]

If these arguments had been preserved, there is simply no support whatsoever in S.C. Code §15-7-10 or Rule 13(a), SCRCP for the proposition that Whitfield was required to bring the abuse of process and civil conspiracy claims against Swanson in any of the foreclosure actions, much less all six.

[5] To the extent Whitfield implicitly argues in his Brief of Appellant that he should have been allowed to amend his pleadings a fifth and sixth time in the respective Berkeley County foreclosure actions, this issue likewise was not raised or ruled upon at any point in the proceedings below. Nor did Whitfield move to amend his pleadings or submit any proposed amended pleadings to demonstrate how the defects could be cured. Issue preservation aside, it would have been futile for the trial court to allow further amendment as it would not have cured the fact that another action was pending between the same parties for the same claims arising out of the same alleged conduct.

Section 15-7-10 is a venue statute. It provides that venue in an action for the foreclosure of a mortgage of real property lies in the county in which the property is situated. The claims against Swanson for civil conspiracy and abuse of process are not mortgage foreclosure claims. Section 15-7-10 does not bestow upon anyone the right to bring multiple duplicative claims against the same party for the same alleged conduct when another action is already pending between the same parties for the same claims.

Rule 13(a), SCRCP compels a party to bring a counterclaim "against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim. . . ." In the context of a foreclosure action, a counterclaim is considered compulsory if it affects the enforceability of the note and mortgage. N.C. Fed. Sav. & Loan Ass'n v. DAV Corp., 298 S.C. 514, 518, 381 S.E.2d 903, 905 (1989); Advance Int'l, Inc. v. N.C. Nat'l Bank of S.C., 316 S.C. 266, 269-70, 449 S.E.2d 580, 582 (Ct. App. 1994)(holding that in a foreclosure action, the compulsory counterclaim "logical relationship" test is performed by determining whether the counterclaim would affect the lender's right to enforce the note and foreclose the mortgage), *aff'd in part, vacated in part*, 320 S.C. 532, 466 S.E.2d 367 (1996).

Whitfield's claims against Swanson and the alleged conduct upon which they are based cannot affect the enforceability of any of the notes and mortgages that are the subject of the Bank's foreclosure actions. The claims against Swanson relate exclusively to acts done after the subject loans were closed, after the Bank did not renew the subject loans, and after the Bank commenced its foreclosure actions. (R. pp. 85-89.) Swanson's deposition testimony in 2014 has absolutely no bearing on whether the Bank's 2007 and 2008 notes and mortgages are enforceable. Whatever claims Whitfield may have against Swanson arising out of that testimony, they are not compulsory counterclaims in any of the Bank's foreclosure actions.

Moreover, Swanson was a third-party to the foreclosure actions, and it is well established that a defendant's claims against a third party are permissive. DAV Corp., 298 S.C. at 519, 381 S.E.2d at 907; *see also* Rule 20, SCRCP ("[P]ersons *may* be joined in one action as defendants . . . .")(emphasis added); Rule 14, SCRCP (a "defendant *may* bring in a third party")(emphasis added). Even if such claims for abuse of process and civil conspiracy against a third-party could somehow be viewed as compulsory, Rule 13(a) would not require Whitfield to assert those claims against Swanson in each of the six foreclosure actions. *See* id. ("[T]he pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action. . . .").

Regardless of whether Whitfield could or was required to assert counterclaims *against the Bank* in each of the foreclosure actions, he was not required to assert any claims *against David Swanson* in any of the foreclosure actions, and as the trial court correctly ruled, our Rules of Civil Procedure do not permit him to sue David Swanson six times in six different pending lawsuits for the exact same alleged conduct.

Whitfield also argues for the first time in this appeal that dismissal under Rule 12(b)(8) deprives him of a constitutional right to assert claims against Swanson. Notwithstanding that this argument has not been preserved for review, *see* Noisette, 304 S.C. at 58, 403 S.E.2d at 124 (1991), the *sin qua non* of a dismissal pursuant to Rule 12(b)(8) is that another action is already pending between the same parties for the same claim. The trial court's decision does not deprive Whitfield of his right to seek redress from Swanson. Rather, it simply limits Whitfield to pursuing his claims in a single lawsuit. Nothing in our Constitution affords an individual the right to sue the same person six times in six different pending lawsuits for the exact same alleged conduct.

Finally, Whitfield contends that dismissal of his claims against Swanson will somehow operate to prevent him from contesting what he characterizes as the Bank's "advice of counsel" defense. Swanson clearly does not need to be a party to these or any of the foreclosure actions for Whitfield to challenge this defense as he would any other. The trial court's orders do not in any way preclude Whitfield from asserting that the conversation never happened, that the advice was never given, and that the defense was manufactured after-the-fact. Indeed, the trial court specifically noted at the hearing on Swanson's motions to reconsider that the dismissal of Whitfield's claims against Swanson would not impact Whitfield's ability to challenge the Bank's defense. (Sept. 20, 2016 Hearing Transcript, p. 7 ln. 14-18, p. 8 ln. 10-25). (R. pp. 305-315.)

## CONCLUSION

The claims that Whitfield asserted against David Swanson in the Berkeley County foreclosure actions were the same claims that he asserted against David Swanson in the pending Charleston County foreclosure action. They were properly dismissed by the trial court pursuant to Rule 12(b)(8), SCRCP, and the trial court's decision should be affirmed.

Respectfully submitted,

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March 20, 2018

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**CERTIFICATE OF COUNSEL**

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I certify that the *Final Brief of Respondent David Swanson* complies with Rule 211(b), SCACR.

[SIGNATURE PAGE FOLLOWS]

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