

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM LEXINGTON COUNTY  
Court of Common Pleas

Lisa Lee Smith, Special Referee

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

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**RECEIVED**  
JUN 15 2018  
SC Court of Appeals

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.

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INITIAL REPLY BRIEF OF APPELLANT

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June 15, 2018

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## STANDARD OF REVIEW

Respondent cites *Edwards v. Timmons*, 297 S.C. 314, 377 S.E. 2D 97(1988) for the proposition that findings of a master that are concurred with by the circuit court are entitled to deference on appeal. The practice of the master sending a report to the circuit court for review has abrogated under the current rules and this authority has no relevance to this case.

## ARGUMENT 1

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

Respondent's second and third arguments in their brief fail to meaningfully engage Appellant's argument regarding the South Carolina authorities the establish what is and what is not a final order. Respondent cites *Lester v. Dawson*, 327 S.C. 263, 491 S.E. 2D 240 (1997), a case in which there is no indication that the order denying the request for a jury trial contained language similar to the order of reference in this case regarding further review by a master and possible return of the case to the jury docket, or that the issue of finality was addressed by any of the parties or considered by the court.

Respondent also cites *Crewe v. Blackmon*, 289 S.C. 229, 345 S.E. 2d 754 (S.C. App. 1986) a case in which the order of reference does contain similar language regarding review by the master, but the decision does not turn on this language, or the question of finality, but on the simple conclusion that the counterclaim in that case was not compulsory. Additionally, *Crewe* was decided before *Johnson v. S.C. National Bank*, 292 S.C. 51, 354 S.E. 2D 895 (1987) which established the current framework for analyzing which counterclaims are compulsory in the context of a mortgage foreclosure.

## The Order Of Reference

As noted in Appellant's brief, his 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. Respondent has not contested the existence of this language in the June 11 Order, nor provided any alternate construction of this language.

### 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

Respondent's assertion that it was granted summary judgment on “liability and damages”, in addition to importing the language of a tort suit to this mortgage foreclosure, is also simply inaccurate. The only things in the realm of “liability and damages” established on summary judgment were the amount of the principal balance and the date on which interest began to accrue. Respondent's total debt has never been established, nor has the net amount due after consideration of the counterclaims and affirmative defense of unclean hands.

Respondent's assertion the the enforceability of the mortgage has already been established cannot withstand scrutiny. A mortgage is enforced by the court granting a judgment of foreclosure and ordering a sale. In all foreclosure cases S.C. Code § 29-3-630 requires a plaintiff to establish the precise and final dollar amount of the debt owed before a judgment of foreclosure and sale can be

rendered. No total debt has been established in this case and the enforceability of the mortgage remains to be determined. It is axiomatic that no mortgage can exist without a debt. In the event the recovery on the counterclaims exceeds any amount found to be due on the mortgage as determined in light of further proof and consideration of Respondent's unclean hands, then there will be no foreclosure. 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 including a counterclaim for breach of contract and the defense of unclean hands. The Court noted Gray's counterclaims were compulsory, not that they were bound any agreement by the parties that the counterclaims were compulsory. The court further noted that the counterclaims involved questions of fact that would also arise in the foreclosure case particularly because of the defense of unclean hands.

A finding by a jury that Respondent had breached its duty of good faith and fair dealing would make it extremely difficult for the master to avoid concluding that Respondents also have unclean hands, which would open up a variety of equitable remedies in the subsequent foreclosure action which could condition or preclude Respondent's foreclosure. A finding that Respondent had knowingly violated South Carolina Supreme Court Order 2011-05-02-01 by submitted evidence marked with an active loss mitigation flag, and by also submitting a false representation that Appellant had defaulted on a trial payment plan could also have ramifications for the enforceability of the mortgage.

#### The *Ocampo* Case

Since Respondent was thwarted in the summary judgment phase from asserting that Appellant wasn't a borrower by evidence from Respondent's own materials that established that borrowers and note signers were not coextensive terms, they have now sought solace in the RESPA definition of the term borrower. Respondent cites *Ocampo v. Carrington Mortgage Services*, 288 F. Supp. 3D 1327 (S.D. Fla. 2017), however, Respondent forgot to mention that Ocampo had conveyed away his entire ownership interest in the underlying real estate which led to the conclusion that he was not "otherwise obligated "

under the mortgage. The instant case where Appellant is the sole owner of the real estate which respondent seeks to foreclose on is obviously completely different than *Ocampo*, and Appellant's CFPB claim does not fail because of this, or any other definition of borrower.

### **The RoTec Case**

Respondent also relies on *RoTec Services, Inc. v. Encompass Services, Inc.*, 359 S.C. 467, 597S.E. 2d 881 (Ct. App. 2004). However, the Respondent finds more in the RoTec decision than is there. In *RoTec*, two causes of action were asserted, a cause of action for breach of contract, and an additional cause of action for breach of the duty of good faith and fair dealing. While RoTec found that there is no special cause of action for breach of the duty of good faith and fair dealing, it does not make the breach of the duty no longer actionable. Rather, it makes clear that violation of the implied term requiring good faith and fair dealing is no different than breach of any of the express terms of the contract. The rule established by *RoTec* is simply that a claimant may not advance both a cause of action for breach of contract and a second cause of action for breach of the duty of good faith and fair dealing. *RoTec* does not require a breach of any of the express terms of the contract. In this case Appellant has plead a single cause of action for breach of contract, exact as *RoTec* mandates.

### **The Question of Consent**

Respondent's new argument, which was not raised in the trial court, is that there was a waiver of a jury trial by consent. The consent is to be inferred from Appellant's "appearing and litigating the merits of the Counterclaims for well over two years following the reference".

What has actually been going on for these two years is Appellant seeking, and being granted, an order vacating summary judgment in favor of Respondent(copy attached) and then a series of other hearings in which Respondent has failed, in spectacular fashion, to provide sufficient evidence of its total debt or to obtain full summary judgment on any of the Counterclaims.

It is entirely reasonable to construe Judge Keesley's June 11, 2015 Order as providing for the Referee to explore the facts and dispose of the Counterclaims summarily, if possible, but to return the case to a jury if any of the Counterclaims survived. The conduct which survived as a basis for the Counterclaims dates from after October 15, 2015. ( See Page 7, Item Number 13, Special Referee Order dated April 7, 2017 ) This means the conduct was also after Judge Keesley's June 11, 2015 Order.

Such conduct includes submitting numerous documents to the Special Referee that were marked "ACTIVE LOSS MITIGATION" in clear violation of the South Carolina Foreclosure Intervention Program. Further examples of Respondent's bad faith and two year efforts to obtain summary judgment are outlined in the attached affidavits.

The fact that the summary judgment process has taken so long is a direct result of Respondent's failures. Respondent should not be rewarded for ineptitude by a finding that this length of time has ripened into a waiver by consent. The authorities cited by Respondent are distinguishable from the instant case which has never progressed beyond consideration of summary disposition of the case and because of the particular language of the order of reference in this matter

The only thing that Appellant acquiesced in was the special referee developing the facts, and making a summary disposition of issues that were appropriate for such treatment and returning the case to the jury roster of any counterclaims survived, exactly as required by the June 11 Order.

#### A Valid Claim that Requires a Jury Trial

Despite several efforts, over a period of months, Respondent was unable to secure summary judgment in this matter. It is now clear that Appellant'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

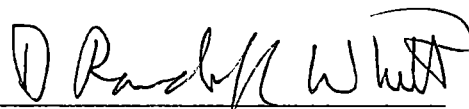
counterclaims would result in a full trial of these claims in order to determine that they should be tried by a jury.

As to issue of whether the counterclaims are triable by a jury, as outlined above, 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 Respondent's failures to meet its obligations in servicing the mortgage that is the subject of the foreclosure, and Respondent'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.

#### 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,



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PROOF OF SERVICE

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I certify that I have served the Appellant's Initial Reply Brief on Respondents listed above by depositing a copy of it in the United States Mail, postage prepaid, on June 15, 2018, addressed to their attorney of record, Magalie A. Creech, Esq., PO Box 41489, Charleston, SC 29423. A copy was also mailed on June 15, 2018 to Pearce W. Fleming at 3723 Linwood Rd., Columbia, SC 29205-2545.



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