

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Dale E. Van Slambrook, Master In Equity, Berkeley County

Case No. 2018-000539

Federal National Mortgage
Association ("Fannie Mae")

Respondent,

v.

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

Appellant.

Of whom Richard C. Ivey a/ka/
Richard Curtis Ivey is the Appellant

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INITIAL BRIEF OF APPELLANT

John R. Cantrell, Jr., Esq.
Cantrell Legal, PC
Post Office Box 1276
Goose Creek, SC 29445-1276
(843) 797-2454
Attorney for Appellant

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Rule 40(j), SCRCP.....5,6,8,9,10,11

STATEMENT OF ISSUES ON APPEAL

1. DID THE MASTER IN EQUITY ERR BY FAILING TO PROPERLY FIND ALL RELEVANT FACTS IN THE ORDER BEING APPEALED?
2. DID THE MASTER IN EQUITY ERR BY DENYING APPELLANT'S MOTION FOR SANCTIONS REGARDING RESPONDENT'S ALLEGED VIOLATION OF THE SUPREME COURT'S 2011 ADMINISTRATIVE ORDER?
3. DID THE MASTER IN EQUITY ERR BY DENYING APPELLANT'S MOTION FOR SANCTIONS REGARDING RESPONDENT'S ALLEGED VIOLATION OF RULE 11(A), SCRCF AS A RESULT OF RESPONDENT'S VACATED RULE 40(J) ORDER?

STATEMENT OF THE CASE

This is an appeal from a circuit court order in a foreclosure case denying Appellant's Motion for Sanctions ("Sanctions Motion") regarding Respondent's alleged violations of Rule 11(a), SCRCF and the 2011 Supreme Court Administrative Order ("2011 Admin Order").

This foreclosure case was commenced by Fannie Mae ("Respondent") against Richard C. Ivey ("Appellant" or "Mr. Ivey") by Summons and Complaint filed in Berkeley County on March 9, 2016. The original Note and Mortgage were signed by Mr. Ivey's parents, not by him, and he acquired his ownership of the property by inheritance. Mr. Ivey filed a Request for Foreclosure Intervention on October 27, 2016. As a result of the foreclosure intervention request, the Fannie Mae's loan servicer sent Mr. Ivey a streamlined Trial Payment Plan ("TPP") by mail, which Mr. Ivey accepted on June 26, 2017 by signing and returning the TPP Agreement. Mr. Ivey subsequently made all three TPP payments in a timely manner, with the first payment due on July 1, 2017, and the last payment made on September 1, 2017, and receipt of all required TPP payments was confirmed by Fannie Mae's counsel on September 18, 2017. However, Fannie Mae did not dismiss the foreclosure at that time, so Mr. Ivey's counsel sent a series of emails to Fannie Mae's counsel in an attempt to get the foreclosure case dismissed, and to get Fannie Mae to sign and return the TPP Agreement. Around the same time, the Master in Equity's office informed Fannie Mae's counsel that the foreclosure case would be dismissed for lack of prosecution unless the case were to move forward by October 31, 2017. Therefore, Fannie Mae's counsel requested that Mr. Ivey consent to a Rule 40(j) motion, but he refused to do so, and instead insisted that the case be dismissed due to his successful completion of the TPP Agreement. Although Fannie Mae knew that Mr. Ivey had not consented to the Rule 40(j)

motion, Fannie Mae filed it anyway on October 31, 2017, and alleged in the Rule 40(j) motion that Mr. Ivey had consented to it. In reliance upon the alleged consent of the parties in the motion, the court issued the Rule 40(j) Order on October 31, 2017. After consulting with Fannie Mae's counsel about the filing of the Rule 40(j) motion without Mr. Ivey's consent, and Fannie Mae's failure to sign the TPP Agreement and send a copy to Mr. Ivey, his counsel filed the Sanctions Motion on November 7, 2017.

On November 15, 2017, the first hearing on the Sanctions Motion was held. At that time, the court agreed to vacate the Rule 40(j) Order, and found that Mr. Ivey had not consented to the entry of that order. The court also required Fannie Mae to sign the TPP Agreement and send a copy to Mr. Ivey. The court then continued the hearing on the Sanctions Motion until January 9, 2018. Prior to the second hearing, Fannie Mae signed the TPP Agreement, sent it to Mr. Ivey, and the parties entered into a permanent loan modification agreement. At the January 9, 2018 hearing, the parties consented to the entry of a Joint Stipulation of Facts. In addition, Mr. Ivey submitted four exhibits, all of which were eventually admitted into evidence, and the court took judicial notice, over Mr. Ivey's objection, of one document. After the hearing, the court requested that both parties submit proposed orders, and the court deferred hearing any evidence on Mr. Ivey's alleged damages until after any finding as to liability by Fannie Mae for those alleged damages might be entered. After considering both proposed orders, the court adopted Fannie Mae's Order Denying Defendant's Motion for Sanctions and Dismissing Case Without Prejudice ("Order Denying Sanctions") with only minor modifications, which order was filed February 22, 2018. Appellant served a timely appeal of that order on March 26, 2018, which was filed with this court on March 28, 2018.

STANDARD OF REVIEW

The decision whether or not to impose sanctions is one in equity, so the appellate court should review the lower court's factual findings *de novo*, and the lower court's decision whether or not to impose sanctions is reviewed under an abuse of discretion standard. *Pee Dee Health Care v. Estate of Hugh S. Thompson*, Op. No. 27839 (S.C. Sup. Ct. filed Aug. 29, 2018) (Shearouse Adv. Sh. No. 35 at 98) (*see FN 11*). An abuse of discretion may be found if the conclusions reached by the lower court are without reasonable factual support. *Runyon v. Wright*, 322 S.C. 15, 19, 471 S.E.2d 160, 162 (1996). An order refusing to hold a party in contempt of a court order should be reversed when the holding is based on a finding that is without evidentiary support or when there is an abuse of discretion. *Eaddy v. Oliver*, 345 S.C. 39, 42, 545 S.E.2d 830 (S.C. App. 2001).

ARGUMENTS

I. THE MASTER IN EQUITY FAILED TO MAKE ACCURATE FINDINGS REGARDING ALL RELEVANT FACTS

Although the parties file a Joint Stipulation of Facts in an attempt to narrow the matters in dispute, the Master in Equity failed to state those agreed facts in his Order Denying Sanctions. In addition, Mr. Ivey prepared a proposed order, at the court's request, in which he notes both the stipulated facts, and additional alleged facts, supported by citations to the record in the lower court. In an effort to promote judicial economy, and to avoid restating those proposed factual findings here, Appellant hereby incorporates by reference both the Joint Stipulation of Facts and Appellant's proposed order granting the Sanctions Motion. Appellant believes that the lower court's failure to properly find the relevant facts has prejudiced Appellant, since reference to the

facts as alleged by Appellant will show that the court's conclusions are without proper factual support. Appellant therefore requests that the appellate court adopt the findings of fact as proposed by Appellant in his proposed order granting the Sanctions Motion.

In addition to the Master's failure to find all relevant facts, some of the lower court's findings of fact are contrary to the actual record in this case and in error. On page 6 of the Order Denying Sanctions, in the first full paragraph, the lower court finds that "the Motion to Strike expressly provided that the parties did not reach an agreement as to the Motion to Strike..." which is false. Reference to the body of the one page Rule 40(j) Motion (aka Fannie Mae's Motion to Strike), will not show any express provision about lack of consent. On the contrary, Fannie Mae twice alleged that there was consent, as reference to the Rule 40(j) Motion will show, and which is the basis for the court's finding at the top of page 6 of the Order Denying Sanctions that the Rule 40(j) Motion "erroneously asserts that [Mr. Ivey] consented to the entry of the motion." In addition, the court failed to find, as requested by Mr. Ivey in his proposed order, that the cover sheet attached to the Rule 40(j) Motion did not have the box checked requesting a hearing, but instead checked the box stating that it was a consent order, which is contrary to the court's finding on page 6 that "the Motion to Strike clearly stated that a hearing on the matter would be required." It appears that the court's conclusions that Rule 11(a), SCRCPC was not violated by Fannie Mae are based on an inaccurate statement of the facts regarding the Rule 40(j) Motion. The court also found that any error regarding the granting of the improper Rule 40(j) Order was harmless, since the parties eventually reached a loan modification agreement, but this finding ignores the actual damages that Mr. Ivey had to incur, including unnecessary attorney fees, as a result of the improper Rule 40(j) motion, and not only his own

attorney fees, but potentially creditor attorney fees as well that Fannie Mae could very well attempt to charge to Mr. Ivey's loan account, as Mr. Ivey noted in his proposed order and requested that they be disallowed. Mr. Ivey alleges that it is inequitable for him to have to pay to correct Fannie Mae's misrepresentation of facts, as has been allowed by the Order Denying Sanctions.

The lower court also finds, at the bottom of page 6 of the Order Denying Sanctions, that Mr. Ivey has provided no evidence that the Rule 40(j) Motion was filed for purposes of delay, and that Mr. Ivey has failed to show any prejudice to him from the filing of the motion. However, this finding ignores the circumstantial evidence, as established by Appellant's Ex. 2 (Tran. Ex. 2), of the emails between counsel for the parties, and the Joint Stipulation of Facts (at par. 8-9) showing the timing of the filing of the improper Rule 40(j) Motion, which just so happened to occur on the very last day that it could be filed to prevent the court from dismissing the case due to lack of prosecution. Indeed, the court's Order Denying Sanctions itself also finds that the Rule 40(j) Motion was filed "to allow the parties sufficient time to resolve the matter" (Order Denying Sanctions, p. 5), which is Fannie Mae's language from its proposed order, and amounts to nothing more than an admission that it was filed without consent of opposing parties in order to prevent the case from being dismissed for lack of prosecution. As indicated above, plenty of prejudice was alleged by Mr. Ivey in regards to damages that the court indicated could be raised at a later date if Mr. Ivey were to prevail on the Sanctions Motion (Tran. pp. 50-52).

The lower court also found that the parties had agreed to dismissal without prejudice, while Mr. Ivey actually argued that the court could either dismiss the case without prejudice under the administrative order or with prejudice as a sanction, so that finding was inaccurate.

II. THE MASTER IN EQUITY ABUSED HIS DISCRETION BY DENYING APPELLANT'S MOTION FOR SANCTIONS REGARDING THE ALLEGED VIOLATION OF THE 2011 ADMIN ORDER.

In an effort to promote judicial economy, Appellant herein incorporates by reference his arguments on this point as made in the Transcript and in his proposed order granting the sanctions motion (Proposed Order) wherein he argued that the 2011 Supreme Court Admin order was violated both due to the fact that Fannie Mae failed to sign and return the TPP Agreement to Mr. Ivey prior to the filing of the Sanctions Motion, and that the 2011 Admin Order was violated due to Fannie Mae's failure to dismiss the foreclosure case without prejudice after Mr. Ivey completed his obligations under the TPP Agreement by making the final payment on September 1, 2017.

III. THE MASTER IN EQUITY ABUSED HIS DISCRETION BY DENYING APPELLANT'S MOTION FOR SANCTIONS REGARDING THE ALLEGED VIOLATION OF RULE 11(A), SCRPC.

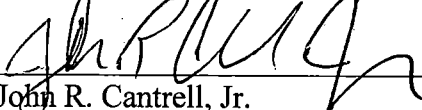
Appellant herein incorporates by reference his arguments in his Proposed Order and as noted in the Transcript where he argued that Fannie Mae's improper Rule 40(j) Motion, which resulted in an Order that was later vacated by the court due to lack of consent to its entry, was made in violation of Rule 11(a), SCRPC.

CONCLUSION

The lower court's Order Denying Sanctions improperly fails to find facts that the parties have either stipulated to or else clearly appear in the record. This court should therefore find the facts as requested by Appellant in his Proposed Order granting the Sanctions Motion. Once

those facts are referenced, it becomes clear that many of the lower court's factual findings are either incomplete or inaccurate, thereby resulting in legal conclusions which are not supported by the actual facts in this case. In addition, this court should find that the lower court abused its discretion in finding the Fannie Mae was not in contempt of the 2011 Admin Order, and that the lower court abused its discretion in finding that Fannie Mae did not violate Rule 11(a), SCRPC through its actions regarding the filing of the improper Rule 40(j) Motion, which was filed without the necessary consent that is required for a motion of that type. In addition to reversing these improper legal findings by the lower court, this court should remand the case back to the lower court to establish Appellant's damages that were proximately caused by Respondent's violations of these legal authorities.

Dated this September 7, 2018

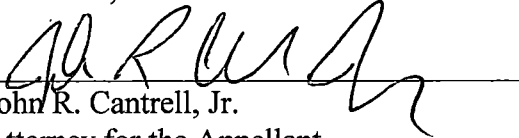


John R. Cantrell, Jr.
Attorney for the Appellant
Cantrell Legal, PC
PO Box 1276
Goose Creek, SC 29445-1276
(843) 797-2454 (office)

Certificate of Service

I hereby certify that the Initial Brief of Appellant and designation of matter in the above-referenced matter, has been served by mailing the same to the Respondent through its legal counsel at the address indicated below via first class mail, with the proper postage affixed, on this September 7, 2018 at the following address:

Scott & Corley, P.A.
PO Box 2065
Columbia, SC 29202



John R. Cantrell, Jr.
Attorney for the Appellant

CANTRELL LEGAL, PC
PO BOX 1276
GOOSE CREEK SC 29445-1276
843-797-2454 (voice) 309-213-0922 (fax)
Email: lawyer@comcast.net

September 7, 2018

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
PO Box 11629
Columbia, South Carolina 29211

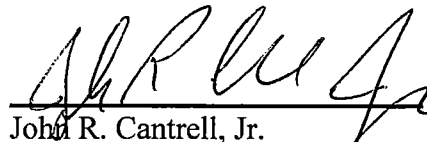
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RE: Fannie Mae v. Richard C. Ivey
Appellate Case No. 2018-000539

Dear Miss Kitchings:

Enclosed for filing in the above case are the following original documents:

- (1) Original Appellant's Designation of Matter to be Included in the Record on Appeal
- (2) Original Initial Brief of Appellant
- (3) Original proof of service of the above on the Respondent.



John R. Cantrell, Jr.
Cantrell Legal, PC
PO Box 1276
Goose Creek, South Carolina 29445-1276
(843) 797-2454
Attorney for Appellant

cc: Louise M. Johnson, Esq.

Cantrell Legal PC
PO Box 1276
Goose Creek, SC 29445-1276

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