

RECEIVED
OCT 12 2018
SC Court of Appeals

ELECTRONICALLY FILED - 2018 Oct 02 8:55 AM - LANCASTER - COMMON PLEAS - CASE#2017CP2900872

| | | |
|---|---|------------------------------|
| STATE OF SOUTH CAROLINA |) | |
| |) | IN THE COURT OF COMMON PLEAS |
| COUNTY OF LANCASTER |) | |
| First-Citizens Bank & Trust Company, |) | CASE NO. 2017-CP-29-00872 |
| |) | |
| Plaintiff, |) | |
| |) | ORDER DENYING DEFENDANT'S |
| v. |) | RULE 59 MOTION TO ALTER OR |
| |) | AMEND |
| Linda P. Faulkner a/k/a Linda Faulkner, |) | |
| Founders Federal Credit Union, and |) | |
| CACH, LLC, |) | |
| |) | |
| Defendants., |) | |

Pursuant to Rule 59 of the South Carolina Rules of Civil Procedure, the Defendant Linda P. Faulkner ("Defendant Faulkner") moved to alter or amend this Court's Order dated January 31, 2018, striking Defendant Faulkner's jury demand and the Clerk of Court's Order dated February 2, 2018, referring this foreclosure action to William C. Tindal as Special Referee. Defendant Faulkner argued altering the Order is appropriate because she (1) is entitled to a jury trial as to certain defenses and (2) it was improper to refer this case to a Master in Equity or Special Referee. This Court disagrees and finds it is not necessary for this Court to Alter or Amend the two Orders.

BACKGROUND

Plaintiff, First-Citizens Bank & Trust Company ("FCB"), filed a Summons and Complaint on August 9, 2017, seeking for foreclose on two mortgages given by Defendant Faulkner to First Citizens Bank and Trust Company, Inc., to which FCB is a successor in interest. The first mortgage was executed in 2005, and the second mortgage was executed in 2010.

Defendant Faulkner filed an “Answer and Counterclaim Jury Trial Demanded” on December 29, 2017, which Plaintiff received on January 3, 2018.¹ As defenses to the Complaint, Defendant Faulkner alleged FCB expressly waived any claim of default under “said mortgage;”² FCB’s actions created an implied waiver of any claim of default under “said mortgage;” FCB violated the Truth in Lending Act, 15 U.S.C. § 1601 *et al.*, and Federal Reserve Board Regulation Z, 12 C.F.R. § 226, and FCB is liable to Defendant Faulkner for damages from this violation; third parties hired by FCB violated the Unfair Debt Collection Act, 15 U.S.C. § 1692 *et al.*; and FCB breached a duty of good faith to Defendant Faulkner.

FCB filed a Reply to Counterclaim, denying every defense not expressly admitted, arguing the statute of limitations precluded Defendant Faulkner from asserting a counter-claim under the Truth in Lending Act; asserting FCB did not meet the definition of debt collector in the Unfair Debt Collections Act and had no knowledge of the actions of third parties; denying any breach of a covenant of good faith and fair dealing; and claiming Defendant Faulkner failed to state facts to support any cause of action and asking the Court to dismiss Defendant Faulkner’s claims pursuant to Rule 12(b)(6).

On January 29, 2018, FCB moved for the case to be referred to a Special Referee and on January 31, 2018, FCB moved to strike Defendant Faulkner’s jury demand. The Court granted both motions. On February 20, 2018, Defendant Faulkner moved to alter or amend both orders, and on September 24, 2018, Defendant Faulkner filed a Memorandum on her motion. On September 25, 2018, this Court held a hearing on the motions. In attendance for FCB was its

¹ As to the other defendants, Founders Federal Credit Union filed an Answer on August 22, 2017, admitting it is the holder of an unpaid judgment and asking the Court for notice of proceedings going forward. CACH, LLC filed no Answer in the case and on January 29, 2018, J. Kershaw Spong, attorney for FCB, filed an Affidavit of Default with respect to CACH, LLC.

² It is unclear from the document which mortgage Defendant Faulkner is referring to.

attorney, J. Kershaw Spong, and for Defendant Faulkner was her attorney, John Martin Foster. After carefully considering the briefs and the arguments of both attorneys, I deny Defendant Faulkner's motion.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court denies the motion by Defendant Faulkner, affirms the orders striking Defendant Faulkner's demand for a jury trial, and finds referring the matter to the Special Referee was proper. The order striking Defendant Faulkner's demand for a jury trial was proper because the matter is a foreclosure case where there are no counter-claims. The order referring the matter to the Special Referee is proper because the Court complied with Rules 53 and 70 of the South Carolina Rules of Civil Procedure.

1. Order Striking Demand for Jury Trial

A foreclosure action is in equity, so the parties are not entitled to a jury trial. *Wachovia Bank National Association v. Blackburn*, 407 S.C. 321, 328, 755 S.E.2d 437, 441 (2014).

However, counterclaims may be entitled to a jury trial. As the court explained in *Blackburn*:

- (1) If both the complaint and counterclaim are in equity, the entire matter is triable by the court.
- (2) If both are at law, the issues are triable by a jury.
- (3) If the complaint is equitable and the counterclaim is legal and permissive, the defendant waives his right to a jury trial.
- (4) If the complaint is equitable and the counterclaim is legal and compulsory, the plaintiff or the defendant has a right to a jury trial on the counterclaim unless a valid jury trial waiver exists that encompasses the counterclaim

407 S.C. at 329-30, 755 S.E.2d at 441-42.

Defendant Faulkner claims, with the exception of the Unfair Trade Practices Act defense, that all of her raised defenses were in fact counter-claims. A defense is "a defense to each cause of action asserted." Rule 8, SCRCF. A counter-claim shows "the pleader is entitled to relief"

and includes a “prayer or demand for judgment for the relief.” Rule 8, SCRCP. Waiver, implied waiver, and breach of duty of good faith are clearly defenses and not counter-claims. Each of these defenses allege why Defendant Faulkner believes FCB cannot recover against her, not an argument as to why Defendant Faulkner is entitled to relief. See *First South Bank v. Rosenberg*, 418 S.C. 170, 183-84, 790 S.E.2d 919, 926-27 (Ct. App. 2016) (comparing defenses to counter-claims and determining negligence and breach of contract were both counter-claims). In her prayer for relief for all three defenses, Defendant Faulkner only asks the Court to dismiss the claims of FCB against Defendant Faulkner.

Additionally, Defendant Faulkner’s Truth in Lending Act allegations must be classified as a defense and not a counter-claim. Under the Truth in Lending Act, a claim for violation of the Act may only be brought “within one year from the date of the occurrence of the violation.” 15 U.S.C. § 1640(e). Defendant Faulkner claims FCB’s violation of the Truth in Lending Act occurred in March 2008, ten years ago. (Def’s Ans. & Counter-Claim ¶ 21). So, Defendant Faulkner cannot assert a counter-claim for a violation of the Truth in Lending Act. However, in a foreclosure action, “a consumer may assert a violation by a creditor” of certain parts of the Act, “as a matter of defense by recoupment or setoff without regard for the time limit on a private action for damages under subsection (e).” 15 U.S.C. § 1640(k)(1). The statute allowing Defendant Faulkner to assert a violation of the Truth in Lending Act defines the assertion as a defense, not a counter-claim. Further, in *Tuloka Affiliates, Inc. v. Moore*, 275 S.C. 199, 202, 268 S.E.2d 293, 295 (1980), the Supreme Court of South Carolina found—prior to the enactment of section 1640(k)(1)—a “defense and counter-claim” under the Act in response to a foreclosure action after the one-year statute of limitations had expired was an equitable defense, not a

counter-claim. Thus, it is clear Defendant Faulkner's Truth in Lending Act allegations are a defense, equitable in nature, and therefore, no jury trial is appropriate.

2. Order Referring the Case to the Special Referee

The order referring the case to the Special Referee was appropriate because "[a]ctions to foreclose liens . . . shall ordinarily be referred to a master pursuant to Rule 53" of the South Carolina Rules of Civil Procedure. Rule 70(a), SCRPC. Rule 53(b) provides: "In an action where the parties consent, in a default case, or an action for foreclosure, some or all of the causes of action in a case may be referred to a master or special referee by order of a circuit court judge or the clerk of court." Here, after striking the jury demand made by Defendant Faulkner, this Court referred a foreclosure action to a special referee. This is consistent with its powers under the Rules of Civil Procedure and appropriate.

Further, Defendant Faulkner argues the Order was not proper because she is entitled to a jury trial. However, as discussed above, this is not the case. None of Defendant Faulkner's defenses or counter-claims entitle her to a jury trial.

NOW, THEREFORE:

For the reasons discussed above, this Court denies Defendant Faulkner's Rule 59 motion, affirms the Order Striking Demand for Jury Trial, and affirms the Order Referring the Case to a Special Referee.

AND IT IS SO ORDERED.

SIGNATURE PAGE TO FOLLOW



Lancaster Common Pleas

Case Caption: First-Citizens Bank & Trust Company VS Linda P Faulkner ,
defendant, et al
Case Number: 2017CP2900872
Type: Order/Amend

So Ordered

s/Brian M. Gibbons #2168 Circuit Judge

Electronically signed on 2018-10-01 23:32:44 page 6 of 6