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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FINAL REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES

OTHER

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), SCRCP AS A RESULT OF RESPONDENT'S VACATED RULE 40(J) ORDER?

STATEMENT OF THE CASE

Respondent is correct that the Joint Stipulation of Facts was filed with the court at the November 15, 2017 hearing, and not January 9, 2018 as may have initially appeared from Appellant's Statement of the Case, although it was offered into evidence without objection as Appellant's Exhibit 1 at the January 9, 2018 hearing.

STANDARD OF REVIEW

Respondent agrees with Appellant that the standard of review regarding the lower court's decision not to impose sanctions is an abuse of discretion standard. However, Respondent does not address Appellant's contention that the standard of review regarding the lower court's findings of fact is *de novo*, so Respondent should be deemed to have consented to Appellant's statement of that standard.. Rule 208(b)(2), SCACR.

ARGUMENTS

Appellant will respond to Respondent's arguments in Respondent's Brief below based on the Statement of Issues as stated by Appellant. Respondent's Statement of the Issues is similar but combines two of Appellant's issues regarding the law in its first issue, and addresses Appellant's issue regarding the factual findings last instead of first as was done by Appellant.

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

Respondent's arguments on this issue claim that Appellant is dissatisfied with the Master's findings of fact merely because they were not stated as Appellant had requested, but this is incorrect. Actually, the Master's failure to find all relevant facts even ignored the relevant facts that were stipulated to by both parties in their Joint Stipulation of Facts filed with the court

at the first hearing on November 15, 2017, so it wasn't merely Appellant's version of the facts that was ignored by the lower court, but Respondent's agreement with those facts also.

Respondent claims that the Master was not required to make findings of fact in his decision, since it was in regards to a sanctions motion, and Rule 52(a), SCRCP does not require such findings regarding motions. However, that limitation is subject to an exception as provided in Rule 41(b), SCRCP. An examination of Rule 41(b), SCRCP reveals that it applies to motions to dismiss a plaintiff's case when the plaintiff is alleged to have failed to "comply with these rules or any order of the court,..." both of which the Appellant has alleged in his Motion to Dismiss Case and For Sanctions upon which the court was ruling. Appellant therefore believes that the Master should have been required to make all relevant findings of fact, and that his failure to do so led to an incorrect decision regarding the legal issues presented. In any event, as stated in the authorities cited in Appellant's Standard of Review section in his prior Brief, Appellant believes that the appellate court has *de novo* review of the Master's factual findings, and that the appellate court can correct or add any findings of fact that are appropriate based on the record, which Appellant is asking the appellate court to do.

Respondent's alleges that Mr. Ivey has suffered no prejudice from Fannie Mae's actions, since Mr. Ivey eventually received a permanent loan modification, and Fannie Mae further alleges that all of Mr. Ivey's alleged damages are self-inflicted. However, Fannie Mae is ignoring the fact that Fannie Mae didn't even sign the initial TPP Agreement or offer the permanent loan modification, let alone dismiss the pending foreclosure, until after Mr. Ivey had to file his Motion to Dismiss and For Sanctions. How Fannie Mae can argue in good faith that Mr. Ivey's unnecessary legal fees to object to (and eventually get vacated) Fannie Mae's improper

Rule 40(j) Motion that was filed without his consent (although such motions require the consent of all parties) were his own fault is beyond Appellant's ability to understand. Respondent has consistently maintained that it was proper for it to have filed the Rule 40(j) consent order without Mr. Ivey's consent, so it is unreasonable to assume that they would have corrected it on their own without the Motion that Mr. Ivey had to file to get it corrected. Indeed, had they wished to correct the improper filing, the record is clear that Fannie Mae's counsel was notified by Mr. Ivey's counsel via email on November 1, 2017 that the filing of the Rule 40(j) Motion was filed without Mr. Ivey's consent (R. p. 194), yet they insisted in their email response that the Motion was proper (R. p. 193) and did nothing to correct the improper filing until after the Master ordered the Rule 40(j) Order vacated at the hearing on November 15, 2017. However, the Master not only denied Mr. Ivey reimbursement for the reasonable attorney fees and costs that he had to incur to correct Fannie Mae's improper actions and inactions, but also denied Mr. Ivey's request that Fannie Mae be prevented from charging Respondent's legal fees and costs for its improper actions to Mr. Ivey's loan account, thereby adding insult to injury. Appellant therefore respectfully requests that the court correct any of the Master's findings of fact that were erroneous, and find such additional facts as may appear from the record to be relevant to this case, as have previously been requested by Appellant (R. p. 271-276).

Respondent alleges that the type of delay considered to be bad faith by Rule 11, SCRCP is the filing of a frivolous motion to prevent an action from going forward, but that it would apparently be acceptable to file such a motion to prevent a case from being dismissed (Resp. Brief p. 19), but cites no authority for that proposition. Respondent also claims that the Rule 40(j) Motion was not filed to delay the foreclosure, but that it was filed to give the parties more

time to obtain a permanent loan modification which would end the case *(Ibid.),* which is essentially an admission that the frivolous motion was filed to delay the dismissal of the foreclosure. Had Fannie Mae not filed the Rule 40(j) Motion without Appellant's consent, the case would have been dismissed without prejudice by the Master (and thereby ended) much more quickly than actually occurred. Appellant sees no difference between filing a frivolous motion to prevent a case from moving forward or in filing a frivolous motion to prevent a case from being dismissed. The case law interpreting Rule 11, SCRCP simply says that it is bad faith to file a motion that causes unnecessary delay, even if there are good grounds to support the motion. *Runyon v. Wright*, 322 S.C. 15, 19, 471 S.E.2d 160, 162 (1996).

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 addition to the arguments made in Appellant's prior Brief, which incorporated by reference the arguments made during trial as noted in the Transcript and in his Proposed Order, and which Appellant incorporates by reference again in this reply brief, Appellant hereby replies to Respondent's arguments in its Brief regarding the alleged violation of the 2011 Admin Order.

Respondent responds to Appellant's arguments in Appellant's prior Brief by claiming that Respondent was acting in good faith, and that Respondent actually complied with the 2011 Admin Order. In that regard, Appellant would first like to direct the court's attention to the first portion of Respondent's Brief where Respondent cites the relevant sanctions portion of the 2011 Admin Order, particularly the section which the Respondent has underlined (Resp. Brief, p. 5). It is clear from reading the sanctions language underlined there that the Appellant only has to

prove either that Fannie Mae has "failed to comply with the terms of [the 2011 Admin Order]" or "has not attempted to reach an agreement for foreclosure intervention in good faith." It is not necessary that the Appellant prove that Fannie Mae has acted in bad faith if Appellant can prove simply that Fannie Mae has failed to comply with the 2011 Admin Order, which essentially means that Respondent's briefing on Fannie Mae's good faith is irrelevant in the event that the 2011 Admin Order applies to Appellant and Fannie Mae has failed to follow it. Respondent's overemphasis on the good faith portion of this order is misplaced since the order requires both good faith and full compliance with the order.

In this Good Faith section of its Brief, Respondent makes many factual allegations, without citation to the record. To the extent that any of these factual allegations or evidence do not appear in the record, but have been added by Respondent in its Brief, Appellant requests that the appellate court ignore such statements that are being raised for the first time on appeal. Additionally, to the extent that Respondent alleges that Appellant was not acting in good faith during the loan modification process, Appellant objects that such arguments are not relevant, since there is no motion for sanctions against the Appellant pending before any court.

In addition to arguing that Respondent acted in good faith during the foreclosure case, Respondent also argues that it complied with the 2011 Admin Order. Essentially, Fannie Mae claims that it complied with the 2011 Admin Order after Mr. Ivey filed his Motion, but this is insufficient. In order to avoid a finding of contempt, an alleged contemnor has to comply before a contempt action is filed, not after. Otherwise, no order would have any real effect until after someone harmed by a violation of that order brings that violation to the court's attention, and then there would be no remedy for the damages incurred by the victim of that contempt if the

alleged contemnor were to comply after the victim has filed his action, and thereby escape liability for his contempt.

Respondent argues that there was no prejudice to Mr. Ivey due to Fannie Mae's failure to sign the TPP Agreement until after Mr. Ivey filed his sanctions motion. However, even the Master realized that this argument was incorrect, since one of the reasons he continued the first sanctions motion hearing was to give Fannie Mae time to sign the TPP Agreement (R. p. 74, line 17 – p. 75, line 16) since Mr. Ivey had argued that if Fannie Mae chose to transfer this loan to a different owner or servicer, that without the signed TPP Agreement Mr. Ivey would have no recourse to prove that he was entitled to a loan modification. Further, Mr. Ivey argued that the 2011 Admin Order required that this document be signed, so even aside from questions about prejudice to Mr. Ivey, compliance with the Order (which undoubtedly was only entered by our state Supreme Court after much consideration) required that it be signed by Respondent. (R. p. 72, lines 5-14). Respondent cites cases for the proposition that Mr. Ivey was not prejudiced by its alleged violation of the 2011 Admin Order, since Mr. Ivey eventually received a permanent loan modification, so its failure to sign the TPP Agreement before the sanctions motion was filed didn't matter. However, *Cox v. Cox*, 290 S.C. 245, 349 S.E.2d 92 (Ct. App. 1986) does not stand for this proposition. Indeed, in that family court case, no sanctions motion for contempt of court was at issue. Further, the Master's order that Fannie Mae sign the TPP Agreement before the second hearing on the Motion is evidence that there was prejudice to Mr. Ivey if the TPP Agreement remained unsigned, and that having it signed by Respondent did matter. Respondent also cites *McCall v. Finley*, 294 S.C. 1, 362 S.E.2d 26 (Ct. App. 1987) for this same proposition. However, that case also was not dealing with a contempt of court issue, but was instead

addressing a court's failure to grant a requested continuance, even though the court had provided the party with an additional ten days to submit any evidence in opposition to what was presented to him the day before the hearing that he wanted continued. Respondent believes that Fannie Mae's reliance upon its lack of prejudice argument reveals a misunderstanding of the law of contempt. Contempt of court does not require prejudice to be actionable. The elements of contempt of court in our state are set forth in *Eaddy v. Oliver*, 345 S.C. 39, 42 545 S.E.2d 830 (S.C. App. 2001). Lack of prejudice to any party is not an element of contempt of court, so that factor is irrelevant.

Respondent also claims that Fannie Mae complied with the 2011 Admin Order since the TPP Agreement does not qualify as an "Agreement" under that Order. However, Appellant contends that the language of the 2011 Admin Order that requires a foreclosure plaintiff to dismiss a foreclosure case without prejudice applies to "any loan modification or other loss mitigation plan," which language is broad enough to include the TPP Agreement in question. Indeed, the fact that the 2011 Admin Order requires the case to be dismissed within 90 days after any Agreement is reached fits squarely within the normal time period for a TPP Agreement to be completed, which is further evidence that the Order should apply to the TPP Agreement in this case as well. Respondent cites no authority for limiting the very broad plain language of the 2011 Admin Order to only require dismissal of the foreclosure case after a permanent loan modification is signed. Respondent also claims that even if the TPP Agreement were to qualify as an Agreement under the 2011 Admin Order, that Fannie Mae would have complied with the Order since they were prepared to dismiss the case by December 1, 2017, but this argument is without merit since the 90 day period should run from the start date of the Agreement, not the

completion date, and Fannie Mae does not argue that it was prepared to dismiss the case by September 1, 2017, which was the completion date of the TPP Agreement. Indeed, Fannie Mae's filing of the improper Rule 40(j) Motion after that time prevented the *sua sponte* dismissal of the case by the Master on October 31, 2017, so Respondent clearly was not agreeable to dismissing the case prior to the filing of the sanctions motion, which is one reason why they should be found to be in contempt of the 2011 Admin Order.

Respondent further contends that the 2011 Admin Order does not protect Mr. Ivey, since Fannie Mae claims that he is not a "Mortgagor" as defined under the 2011 Admin Order. Appellant has already fully responded to this argument in his prior Brief, which incorporates his arguments during the hearing on his Motion (R. p. 108 – p. 110, line 6) and his Proposed Order (R. p. 279-280). Essentially, Mr. Ivey relies upon the definition of Mortgagor in the 2011 Admin Order itself, which includes an owner of the property, and Fannie Mae has admitted from the start that Mr. Ivey qualifies as an owner of the property (R. p. 36, par. 19, R. p. 42, R. p. 249, par. 4), although they claim that the fact that he was not an original signer of the Note or Mortgage means that he does not qualify as an Owner or Mortgagor under the 2011 Admin Order. If the court were to adopt Fannie Mae's limitations on the definition of a Mortgagor under the 2011 Admin Order, it will mean that widows and orphans who received their interest in the property by inheritance will not be protected under the 2011 Admin Order, even though they are protected under Fannie Mae's own guidelines as successors in interest and are treated just as if they had signed the original loan documents anyway by Fannie Mae. (R. p. 201-207 and Resp. Brief p.12, FN 2). This will create an anomaly where the substantive protections afforded to people like Mr. Ivey by Fannie Mae's guidelines are not fully implemented by the 2011 Admin

Order, which is supposed to be a procedural order only, and should not be construed to limit a South Carolina homeowner's substantive loan modification rights as provided by the mortgage lenders themselves.

Oddly, in footnote 3 on page 14 of Respondent's Brief, Respondent suggests that Appellant's arguments challenging the Master's rulings on the sanctions issue for violation of the 2011 Admin Order might not have been properly preserved on appeal since Respondent claims that Mr. Ivey did not raise this issue in his Statement of Issues in his appeal and did not directly argue this issue in his Brief. Appellant does not understand this claim, since the second issue as stated in Appellant's Statement of Issues addresses Respondent's alleged violation of the 2011 Admin Order, and his Brief at Roman numeral II incorporates by reference his arguments on this issue as were made both in the Transcript of the lower court hearing and in his Proposed Order. Appellant therefore believes that he has raised and addressed this issue in his Brief, and has also replied to Respondent's arguments on this issue in its Brief in this Reply Brief as well.

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

Appellant herein incorporates by reference his arguments in his Proposed Order (R. pp. 277-278, 280-283, 294-296) and as noted in the Transcript (R. p. 94-105, 171-174) 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), SCRCP. Appellant also incorporates by reference his arguments above in section I of this Reply Brief that relate to the alleged Rule 11 violation.

Throughout the hearings and arguments in this case, Respondent has persisted in two unfounded beliefs about the application of the procedural rules that apply in this case. Respondent's first misunderstanding is that both parties were required to comply with Rule 11(a)'s duty of consultation requirement before filing any motions in this case. (Resp. Brief, pp. 14-16 and FN 4). However, that contention ignores the fact that this is a foreclosure case, and Rule 11(a), SCRCP specifically provides that "[t]here is no duty of consultation...in real estate foreclosure cases...". (par. 2, 2nd sentence). Even though Appellant cited the exception language of this Rule showing that there was no duty to consult in this case during oral argument on the Rule 11 portion of the sanctions motion (R. p. 182, line 13 – p. 183, line 17), Respondent continues to insist that such a duty exists, and that they were required to comply with it. However, Respondent's arguments on this issue can no longer be considered to have been made in good faith, given the plain language of Rule 11(a), SCRCP, and the fact that their misunderstanding of this Rule has previously been brought to their attention, yet their improper argument persists. That is not, however, their most troubling misunderstanding of the Rules. More importantly under the facts of this case is Fannie Mae's persistent misunderstanding of Rule 40(j), SCRCP, which was the catalyst that precipitated the current sanctions motion. It is obvious, based on Fannie Mae's filings in this case, that they believe that it is proper to file a Rule 40(j) motion without the consent of the other parties in the case as long as they ask for consent before they file their motion, and regardless of whether or not they have obtained that consent. (Resp. Brief, p. 16) (R. p. 250, par. 11-13) (R. p. 268, middle par.). Although the Master rejected Fannie Mae's improper assertion that a Rule 40(j) Motion was proper without the consent of all of the parties in the case (R. p. 28, par. 1), somehow he was still able to find that

Respondent's intentional filing of the improper Rule 40(j) Motion without consent was not sanctionable. This is a non sequitur, as was his erroneous factual finding in that same paragraph that the Rule 40(j) Motion "expressly provided that the parties did not reach an agreement as to the Motion to Strike...," since no such express provision exists, only a vague statement that a hearing would be necessary (R. p. 16), without stating why, and which vague statement was in conflict with the motion cover sheet which stated that the Rule 40(j) Motion was a consent order and that a hearing would not be required (R. p. 15). Essentially, even if the appellate court accepts Respondent's contention that the three references in the Rule 40(j) Motion to having obtained the proper consent to file the Motion were all mere scrivener's errors, the fact that Respondent knew when it intentionally filed the Motion that it lacked the consent of all of the parties makes the Motion frivolous under Rule 11, SCRCP, since there were not good grounds under Rule 40(j) to support it. Therefore, the appellate court should find that Rule 11, SCRCP was violated in this case by Respondent, and that this violation was willful due to Respondent's willful filing of the Rule 40(j) Motion while all the time knowing that consent to file it had not been obtained, and that (as the Master correctly found) such consent is required by that rule (R. p. 28, par. 1) .

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 (R. p. 276-271). 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), SCRCP 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 January 21, 2019.

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CERTIFICATE OF COUNSEL

The undersigned certified that this Final Reply Brief complies with Rule 211(b), SCACR.

January 21, 2019.

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