STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GEOGRETOWN COUNTY
Court of Common Pleas

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SC Court of Appeals

Benjamin H. Culbertson, Circuit Court Judge

Case No. 2012-CP-22-934

Bonnie N. Charlton, Ronald L. Charlton, and Bayside Property, Inc. . . . . *Plaintiffs*

v.

South Bay Properties, LLC, Stantec Consulting Services, Inc., f/k/a Trico Engineering Consultants, Inc., Milone & MacBroom, Inc., John Steven Goodwin, Louise C. Goodwin, Thomas I. Puckett, Brenda C. Puckett, Robert Nahama, Jeanne E. Nahama, Thomas Holland Sharon Louise Holland, Joyce K. Sobel, Robert W. Waruszewski, Richard N. Taylor, Robert K. Spillers (a/k/a Robert Spillers), Deborah T. Spillers (a/k/a Deborah Spillers), Patrick A. DiAngelo, Deborah A. DiAngelo, Gary E. Owens, Joyce M. Owens, Fount L. Shults, Lynda M. Shults, Dennis Ridgeway, Teresa Lynn Ridgeway and Georgetown County Forfeited Land Commission . . . . . . *Defendants*

of Whom

John Steven Goodwin, Louise C. Goodwin, Gary E. Owens, and Joyce M. Owens are . . . . *Appellants*

and

Bonnie N. Charlton, Ronald L. Charlton, and Bayside Property, Inc., South Bay Properties, LLC, Stantec Consulting Services, Inc., f/k/a Trico Engineering Consultants, Inc., Milone & MacBroom, Inc., Patrick A. DiAngelo, Deborah A. DiAngelo, and Georgetown County Forfeited Land Commission, are the . . . . *Respondents*

BRIEF OF APPELLANTS

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STATUTES AND RULES

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STATEMENT OF ISSUES ON APPEAL

I. WHETHER THE TRIAL COURT ERRED IN FINDING AND CONCLUDING THAT THE DEADLINE FOR REQUESTING A JURY TRIAL HAD EXPIRED; and

II. WHETHER THE TRIAL COURT ERRED IN FINDING AND CONCLUDING THAT APPELLANTS HAD WAIVED THEIR RIGHT TO A JURY TRIAL.

STATEMENT OF CASE

This action arises from a failed real estate subdivision in the City of Georgetown, South Carolina, known as "Harbor Club on Winyah Bay." As more fully alleged in Appellants' Complaint (R., pp. 2-53) and in their proposed Amended Answer (R., pp. 121-172), dubious marketing practices and representations were employed by the developers and their realtor in soliciting purchase contracts for the subdivision lots. A substantial majority of each lot's appraised value was based upon the projected completion of all infrastructure and amenities in the subdivision. The infrastructure and amenities were to have been completed in approximately August of 2008. Absent the infrastructure, the City of Georgetown allowed closings conditioned upon issuance of a subdivision performance bond, which was issued by Hartford Casualty Insurance Company in the principal penal sum of $7,882,359.00. To this day, no infrastructure or amenities have been built or installed.

The Respondents, Bonnie N. Charlton, Ronald L. Charlton, Bayside Property, Inc., and Third Party Defendant James R. Charlton (collectively referred to herein as "the Charltons") conveyed the subdivision land to the putative developer, South Bay Properties, LLC, for the sum of $20,850,000.00. This contract closed on September 17, 2007, the same date South Bay conveyed 29 lots to various purchasers, resulting in total gross lot sale proceeds of $7,926,550.00. The Charltons took back a promissory note and mortgage in the sum of $14,580,662.82. It thus appears that the Charltons received approximately 79% of the gross lot closing proceeds, which they presumably

used to satisfy personal debt of approximately $7,000,000.00. This debt had previously been secured by the subdivision tract.

Appellants contend that, prior to this closing date, the Charltons had been notified by South Bay that its development loan had been withdrawn, and that there were therefore no funds available for constructing the infrastructure or amenities. Appellants further contend that, despite this knowledge, the Charltons were allowed to make the decision, and elected to proceed with the closings of the first 29 lots (R., p. 99). Between September 29, 2007 and January 4, 2008, South Bay sold 25 more lots in the subdivision to ultimate lot purchasers, generating additional gross lot sales proceeds of $6,811,050.00. Presumably, the Charltons received approximately 79% of these net closing proceeds as well. In summary, the Appellants contend and have alleged that the Charltons and Bayside were joint venturers in the subdivision with the developer(s).

Appellants' efforts to conduct discovery in the case below were stayed when South Bay filed a petition for relief under Chapter 11 of the Bankruptcy Code on June 18, 2010. Thereafter, by form Order dated July 22, 2011, the Circuit Court struck Appellants' action, with the notation "Case Stricken Due to Bankruptcy." (R., p. 54). A nearly identical form Order was filed in fourteen (14) other similar pending cases in which South Bay was a party Defendant. By Order executed on August 12, 2011, the Honorable Stephani W. Humrickhouse, United States Bankruptcy Judge, dismissed the Bankruptcy Petition of South Bay Properties, LLC (R., p. 55).

On August 31, 2012, Respondents Bonnie N. Charlton, Ronald L. Charlton and Bayside Properties, Inc. filed their Summons and Complaint for Foreclosure

of their above referenced Mortgage (the "Charlton/Bayside Foreclosure"). Appellants were named as Parties-Defendant to the foreclosure action, because of their Lis Pendens and Complaint filed on July 9, 2009, in Civil Action Number 2009-CP-22-1045 (R., pp. 59-75).

Appellants Owens and Goodwin initially filed *pro se* Answers, in the form of general denials, to the Charlton/Bayside foreclosure action on November 5 and 19, 2012, respectively (R., pp. 76-81). On November 19, 2012, Respondents Bonnie M. Charlton, Ronald L. Charlton and Bayside Properties, Inc. filed a Motion for Order of Reference (R., pp. 82-87), seeking to refer their foreclosure action to the Master in Equity for Georgetown County. Thereafter, Appellants retained the services of their former trial attorneys, and on January 22, 2013, Appellants filed a Motion for Leave to Amend their Answers (R., pp. 116-172), and a Motion to Reinstate/Restore Complaint and Lis Pendens, and to Consolidate Appellants' original action with the Charlton/Bayside foreclosure action for trial (R., pp. 102-115). The Charlton/Bayside Motion for Order of Reference was heard and granted by the Trial Court on January 22, 2013 (R., p. 173). Because Appellants' Motions had been filed and served on the same date as the hearing of the Charlton/Bayside Motion for Order of Reference, the Court did not consider either of Appellants' Motions in reaching its decision to refer the foreclosure action (R., p. 101). Appellants filed a Motion for Reconsideration of the Order of Reference, pursuant to Rule 59(e), SCRCP, on or about February 6, 2013 (R., pp. 181-187). Appellants' Motion for Reconsideration was denied by the Court, without oral argument, by Form Order dated February 22, 2013 (R., p. 188-189). This Order states, in its entirety:

> *The Motion to Reconsider by the Defendants John Steven Goodwin, Louise C. Goodwin, Gary E. Owens and Joyce M. Owens is DENIED. Even though the defendants have a pending Motion to Amend Answer so that they can assert counterclaims, the deadline for requesting a jury trial has expired, and, therefore, the Defendants have waived their right to a jury trial. See Rules 38(b) and 38(d), SCRCP. See also, King v. Shorter, 291 S.C. 501, 354 S.E.2d 402 (S.C. App. 1987).*

The issue of the Appellants' entitlement to a jury trial was not raised in the Respondents' Motion to Refer.[1] As will be shown below, the Court actually stated that the issue of the Appellants' right to a jury trial could be decided at a later hearing.

Appellants filed a Motion for Reconsideration of the February 22, 2013 Order on March 7, 2013 (R., pp. 188-189). This Motion was summarily denied by the Court, without oral argument, by Order dated March 26, 2013 (R., pp. 198-199).

Appellants' Motion for Leave to Amend their Answer was scheduled to be heard by the Master in Equity on February 25, 2013. However, the Master in Equity concluded that a conflict of interest precluded him from hearing the Motion to Amend, and an Order Returning Action to Circuit Court was filed on March 22, 2013 (R., pp. 193-197). Appellants' Motion to Amend, therefore, has yet to be heard and decided.

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[1] Rule 7(b)(1), SCRCP requires that the motion "... unless made during a hearing ... shall state with particularity the grounds therefor, and shall set forth the relief or order sought." The Plaintiff did not request an Order on the issue of the Appellants' right to a jury trial, either in their written motion or at the hearing.

STANDARD OF REVIEW

Whether a party is entitled to a jury trial is a question of law. Carolina First Bank v. Badd. LLC, citing: Verenes v. Alvanos. 387 S.C. 11, 15, 690 S.E.2d 771, 772 (2010). *An appellate court may decide questions of law with no deference to the [circuit] court.* (Id. at 15, 696 S.E.2d at 772-773).

ARGUMENT

I. THE TRIAL COURT ERRED IN FINDING AND CONCLUDING THAT THE DEADLINE FOR REQUESTING A JURY TRIAL HAD EXPIRED.

As noted above, Appellants' Motion to Amend, and Motion to Restore/Reinstate the original action, and consolidate it with the Charlton/Bayside foreclosure, was filed on the same date that Respondents Charlton/Bayside's Motion for an Order of Reference was heard by the Court, January 22, 2013. During this Motion hearing, Appellants disclosed the nature of their counterclaims, cross-claims and Third-Party Complaint, as set forth in their proposed Amended Answer, and argued that they would be entitled to a jury trial on such claims. Respondents argued, briefly, that Appellants had waived their right to a Jury Trial by not demanding it within ten (10) days from the date on which they filed their respective Answers (R., p. 100). The Court went on to state: *"So, in the present posture I'm going to go ahead and allow the referral. The Master-in-Equity can hear those motions. Certainly if he grants the motions* [the Motion to Amend] *and there are factual issues that are to be heard by a jury, then he can send those back to the Circuit Court and we'll set them up for trial..."* (R., p. 101). The Court, at the end of the hearing, appropriately did not rule on the issue of the Appellants' right

to a jury trial in order to allow the Master-in-Equity to rule on the pending motion to amend.

The Court found that: *"Since the time required by Rule 6(d), SCRCP, had not run, these Motions were not considered by the undersigned. The Goodwins' and Owens' Motion to Amend may be considered by the Master in Equity. Based upon the present pleadings in this action, it appears that this is a proper matter to refer to the Honorable Joe M. Crosby, as Master in Equity for Georgetown County"* (R., p. 176). The Court then ruled that: *"Nothing herein should be construed as a ruling on the Defendants Goodwin and Owens' recently filed Motions referred to above. These Motions are to be heard and ruled upon by the appropriate Court."* (R., p. 177).

Anticipating that their Motion to Amend would be granted, having been timely filed under Rule 15, SCRCP, with the liberal application mandated by the Rule itself, Appellants nonetheless sought to avoid the possibility that the foreclosure action would be allowed to proceed before the Master in Equity, while their Motion to restore and consolidate their original action with the Charlton/Bayside foreclosure awaited hearing in Circuit Court.[2] The causes of action asserted by Appellants in the original action, and the Defendants against whom they had been asserted, were identical to those set forth in their proposed Amended Answer, Counterclaims, Cross-Claims and Third Party Complaint in the Charlton/Bayside foreclosure. For this reason, Appellants filed a Motion for Reconsideration of the Order of Reference, again raising the legal claims and causes of action set forth in their counterclaims, cross-claims and third-

[2] All Defendants other than Appellants either consented to the reference or were in default as of the date Motion to Refer was heard (R., pp. 90-93). Except for Appellants' pending Motions, there was no opposition to the Respondents' foreclosure.

party complaint. Appellants' Motion asserted that such counterclaims, cross-claims and third-party causes of action were compulsory, because there was a logical relationship between the Respondents' claim to the right to foreclose and the Appellants' legal claims challenging such right to foreclose, as well as challenging the lien priority of Respondents' mortgage. Appellants' Motion further asserted that an equitable action with compulsory counterclaims asserting legal issues could not be referred to the Master in Equity for a jury trial on the legal issues.

The Court declined to grant Appellants a hearing on the issues raised in their Motion to Reconsider, despite having declined to consider such issues raised by Appellants' Motion to Amend at the January 22, 2013, hearing on Respondents' Motion for an Order of Reference. Nonetheless, the Form Order issued by the Court on February 22, 2013 expressly ruled upon Appellants' right to a jury trial, finding that *"... the deadline for requesting a jury trial has expired, and therefore, the Defendants have waived their right to a jury trial."* [Citing: Rule 38(b) and (d), SCRCP; and King v. Shorter, 291 S.C. 501, 364 S.E.2d 402 (S.C. App. 1987).]

Rule 38(b) SCRCP

Rule 38(b) provides that: *"Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other party a demand therefore in writing at any time after the commencement of the action and* ***not later than ten (10) days after the service of the last pleading directed to such issue.*** *Such demand* ***may*** *be endorsed upon a pleading of the party."* (Emphasis added.) Appellants' original answers, filed pro se, were general denials. Those Answers asserted no affirmative claims for relief, legal or otherwise. Since mortgage

foreclosure actions are apodictically equitable in nature[3], Appellants had no right to demand a jury trial when these pleadings were served. Thus, the filing of the original Answers by Appellants did not trigger the ten (10) day window provided by Rule 38(b) for demanding a jury trial.

Appellants' proposed Amended Answer, Counterclaims, Cross-Claims, and Third-Party Complaint, inadvertently failed to demand a jury trial on its face.[4] The plain meaning of the language contained in Rule 38(b) indicates that this inadvertent failure to demand a jury trial on the proposed amended pleadings attached to Appellants' original Motion to Amend was not fatal or dispositive of their right to demand a jury trial.

Appellants were entitled to file and serve a demand for jury trial in writing within ten (10) days after the service of the amended pleadings. It is not mandatory that the demand for a jury trial be endorsed upon the pleadings.[5]

Appellants also note that they simultaneously filed and served a motion to restore/reinstate, and to consolidate their original action with the Charlton/Bayside foreclosure action, for trial. The original action was on the jury trial docket. If granted, this would have obviated the need for amendment of Appellants' original answers, and would have required transfer of the foreclosure action to the jury trial docket.

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[3] Carolina First Bank v. Badd, LLC. 400 S.C. 343, 733 S.E.2d 619 (Ct. App. 2012); US Bank Trust National Assoc. v. Bell. 385 S.C. 364, 373, 684 S.E.2d 199, 204 (Ct. App. 2009) *("A Mortgage foreclosure is an action in equity.");* Continental Mortgage Investors v. Quail Run Assocs., 280 S.C. 409, 312 S.E.2d 272 (Ct. App. 1984) ("A foreclosure action is an action in equity.).

[4] Appellants have now filed and served an Amended Motion to Amend, the proposed amended pleadings attached to which specifically demand a jury trial.

[5] Rule 5(a)(7) and Rule 5(d).

Since more than thirty (30) days had passed after Appellants' Answers were served, Rule 15 establishes that Appellants were only entitled to amend their pleadings by leave of Court, or by written consent of the adverse party. Appellants' proposed amended pleadings were attached as an exhibit to their Motion to Amend. Only the Motion was served, not the amended pleadings. The amended pleadings could not be served unless and until the amendment was granted by the Court. At that point it would be necessary to serve all adverse parties named in the amended answer, not just the Respondents. Appellants' Motion to Amend has yet to be heard or decided as noted above. Since the amendment has not been granted, Appellants' Amended Answer, Counterclaims, Cross-Claims and Third-Party Complaint have not yet been served, as contemplated and required by Rules 15 and 5, SCRCP. Therefore, the ten (10) day window **after** the service of the last pleading directed to such issue provided by Rule 38(b) (emphasis added) had not expired as of the date of the trial court's ruling.

II. THE TRIAL COURT ERRED IN FINDING AND CONCLUDING THAT THE APPELLANTS HAD WAIVED THEIR RIGHT TO A JURY TRIAL.

The Trial Court cited Rule 38(d), SCRCP, and King v. Shorter, *supra,* in support of its finding that the Appellants had waived their right to a jury trial. Rule 38(d) provides, in pertinent part, that: *"The failure of a party to serve a demand as required by this Rule and to file it as required by Rule 5(d), constitutes a waiver by him of trial by jury.* As previously discussed, Rule 38(b) provides a party with a right to demand a jury trial, by serving a written demand for jury trial upon opposing parties *not later than ten (10) days after service of the last pleading*

directed to such issue. Appellants' original Answers, unlike their proposed Amended Answer, raised no affirmative claims for legal or equitable relief, and raised no new factual issues. Appellants therefore had no right to demand a jury trial unless and until their amended pleadings were approved or allowed by the Court pursuant to Rule 15, SCRCP, at which time Appellants would have been entitled to serve and file their written demand for a jury trial in accordance with Rule 38(b), and Rule 5(d). Appellants' failure to demand a jury trial upon service of their original answers, therefore, did not constitute a waiver of their right to trial by jury.

In King, *supra,* the Defendant Shorter failed to demand a jury trial until he filed a second Motion for Amendment of his Answer, after the case had been set for trial on the non-jury calendar. The Court of Appeals affirmed the trial court's granting of Shorter's Motion to Amend, and its simultaneous denial of his Motion to transfer the case to the jury calendar. In doing so, the Court noted that this particular question had not been brought before the South Carolina appellate courts since the effective date of the SCRCP. Noting that South Carolina's Rule 38 is substantially the same as Rule 38 of the Federal Rules of Civil Procedure, the Court relied upon federal cases for guidance. The Court found that:

> *"Under the federal cases, a litigant's entitlement to a jury trial on the issues presented by an amended pleading, when no prior demand for a jury trial has been made, turns on whether the amended pleadings create new issues of fact In the case of Trixler Brokerage Co. v. Ralston Purina Company, 505 F.2d 1045 (9th Cir. 1974), the Court held that where the Plaintiff failed to move for a jury trial on his first five claims, but did make a timely demand for a jury trial on an amended complaint which added sixth and seventh claims, a motion for jury trial was determined to be properly denied because the new*

> *claims failed to create new issues of fact. See also* New Hampshire Fire Ins. Co. v. Perkins. *28 F.R.D. 588 (D.Del. 1961);* Williams v. Farmers and Merchants Ins. Co., *457 F.2d 37, 18A.L.R.Fed. 748 (6F Cir. 1972).*

The Court found that all three of Shorter's pleadings involved essentially the same facts, and therefore affirmed the trial court's denial of his Motion to transfer the case to the jury trial calendar. The proposed amended answer in the case *subjudice,* unlike Defendant Shorter's, is Appellants' first proposed amendment, and raises a plethora of new facts and affirmative claims for legal relief, which create numerous new issues of fact not found in the original Complaint or Answers. The trial court specifically declined to address these issues at the only oral argument heard by it on Respondents' Motion for Order of Reference. Had Appellants been given the opportunity for oral argument upon their Motion for Reconsideration, these facts and legal authority would have been presented by Appellants for the Court's consideration.

Appellants' Counterclaims, Cross-Claims, and Third-Party Complaint were compulsory in nature. This issue was raised in Appellants' Motions for Reconsideration, but was not addressed by the trial court in its Order denying those Motions. *When a Defendant in an equitable action asserts a compulsory counterclaim that alleges actions at law, both the Plaintiff and Defendant have a right to have a jury trial on the issues raised by the compulsory legal counterclaim.* Plantation Federal Bank v. Gray, 401 S.C. 507, 737 S.E.2d 515, 517 (Ct. App. 2013). Citing: Johnson v. S.C. National Bank, 292 S.C. 51, 54, 354 S.E.2d 895, 896 (1987). *If there are factual issues, common to both the legal and equitable claims, the legal claims "absent the most imperative circumstances," must be*

tried, that is, disposed of, first (Id. 56, 354 S.E.2d 897) (internal quotation marks omitted). *In such cases, the United States Supreme Court has cautioned that the discretion to try an equitable claim first "is very narrowly limited and must, whenever possible, be exercised to preserve jury trial."* Beacon Theaters, Inc. v. Westover, 359 U.S. 500, 510, 79 S. Ct. 948, 3 L. Ed.2d 988 (1959). In the present case, therefore, Appellants are entitled to a jury trial on the legal and factual issues raised in their compulsory legal counterclaims, cross-claims and third-party complaint, and to have these claims tried first.

CONCLUSION

For the foregoing reasons, Appellants respectfully submit the Trial Court erred in finding and concluding that the deadline for requesting a jury trial had expired, and that Appellants had waived their right to a jury trial. Appellants request that the matter be remanded to the Circuit Court, and that their Motion for Leave to Amend be heard by the Court, together with Appellants' Motion to Restore/Reinstate and Consolidate their original action for trial with the Charlton/Bayside foreclosure.[6] Upon remand, Appellants further request appropriate instructions regarding the application of Rule 38, SCRCP, and the law of King v. Shorter, *supra,* to the facts of this case.

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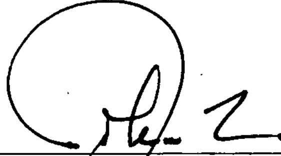
[6] The Trial Court's denial of Appellants' Motion to Restore/Reinstate and Consolidate is currently on appeal before this Court, and may be consolidated with the present appeal. An adverse determination of the Statute of Limitations issued raise in the companion appeal would render Appellants' Motion to Amend moot.

Respectfully submitted,



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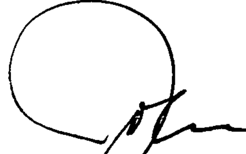
.... Respondents

CERTIFICATE OF COUNSEL

The undersigned certifies that this **BRIEF OF APPELLANTS** complies with Rule 211(b).



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.... Respondents

PROOF OF SERVICE

I certify that I have served a copy of the Appellants' **FINAL BRIEF** by depositing a copy of it in the U.S. Mail on February 21, 2014, addressed to the attorneys of record:

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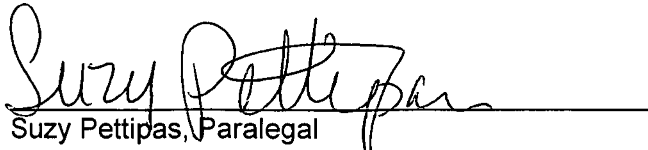

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