THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY

OFFICE OF THE MASTER IN EQUITY

Mikell Scarborough, Judge

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JUN 13 2014

SC Court of Appeals

Appellate Case No. 2013-002065

Bank of America, N.A., Respondent,

v.

Frank Cook a/k/a/ Frank W. Cook, Judith H. Cook and Ian Blake, Defendants,

Of whom Frank Cook and Judith H. Cook are the Appellants.

FINAL BRIEF OF APPELLANTS

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STATEMENT OF THE ISSUES ON APPEAL

I. THE MASTER-IN-EQUITY IMPROPERLY RETAINED JURISDICTION OF THE CASE WITHOUT CONSENT OF THE PARTIES OR A DEFAULT AS REQUIRED BY RULE 53(b) OF THE SOUTH CAROLINA RULES OF CIVIL PROCEDURE.

II. THE APPELLANTS WERE ENTITLED TO A TRIAL BY JURY AFTER DEMANDING SAME IN THEIR AMENDED ANSWER.

STATEMENT OF THE CASE

This appeal arises from a suit for foreclosure. On April 20, 2012, the Respondent, Bank of America filed a Notice of Foreclosure Intervention, Lis Pendens, and Summons and Complaint in the Charleston County Court of Common Pleas against Appellants, Frank and Judith Cook and their co-defendant Ian Blake. (R. pp. 1-6). At issue was the payment of a mortgage for 13 Poplar Street in Charleston County in the amount of $175,000.00. Defendants, Frank and Judith Cook timely answered the Summons and Complaint and filed their Answer with the Charleston County Clerk of Court on May 9, 2012. (R. pp. 9-12). On June 5, 2012, Respondents filed an Affidavit of Default as to Defendants Frank and Judith Cook and Ian Blake. (R. pp. 29-30). They also filed an Order referring the case to the Charleston County Master-in-Equity on the basis of the Defendants' default. (R. p. 14). This Order was signed by the Clerk on and filed on June 18, 2012. (R. p. 14).

On May 28, 2012, Defendants Frank and Judith Cook filed an Amended Answer of the Complaint demanding a jury trial. (R. pp. 15-21). On August 16, 2012, Defendants Frank and Judith Cook also filed a Motion to Rescind the default entry of judgment by the Plaintiffs and the motion referring this matter to the Master-in-Equity. (R. pp. 22-23). A hearing on this motion was held on September 18, 2012. At the hearing, the Court ruled that the Defendants Frank Cook and Judith Cook filed a timely Answer on May 9, 2012 and accordingly were not

in default. (R. pp. 35-37). However, the Master-in-Equity denied the Plaintiffs motion rescinding the referral to the Master-in-Equity on the basis of that default. This Order denying the Defendant's Motion to Rescind was filed on October 11, 2012. (R. pp. 40-41).

Defendants filed an appeal of this Order on November 1, 2012. (R. p. 38). However, by Order of the Court of Appeals dated February 21, 2013, the Court of Appeals ruled that the Order was not immediately appealable, and the issue of referral to the Master would not be appealable until the conclusion of the case. (R. p. 97). The case was then remitted back to the trial court by order filed February 21, 2013. (R. p. 97).

Shortly after Plaintiff/Appellants filed their original appeal on November 1, 2012, Respondents filed a Motion for Summary Judgment on November 14, 2012. (R. pp. 45-50). This motion was heard by the Master on July 22, 2013, and granted by Order filed August 2, 2013. (R. p. 117-119).

STATEMENT OF FACTS

Appellant Frank and Judith Cook entered into a mortgage with Respondent Bank of America on May 15, 2008. The Respondent filed this foreclosure action on April 20, 2012 after alleging the Appellants failed to make payments as due. (R. pp. 1-6). The Appellants filed a timely Answer to the Complaint with the Charleston County Clerk of Court on May 9, 2012. (R. pp. 9-12). The Respondent did not receive a copy of the filed Answer and moved to put Appellants into default without checking with the Clerk of Court to see if an Answer had been timely filed. On Respondent's entry of default and motion, the Clerk referred the matter to the Master-in-Equity for a final hearing by Order dated June 18, 2012. (R. p. 14).

Wishing to preserve their right to a jury trial, the Appellants filed an Amended Answer on June 28, 2012. (R. pp. 15-21). At a hearing before the Master-in-Equity to

remove the entry of default and rescind the Order of Reference, the Master ruled that the Appellants were not in default but decided not to rescind the Order of Reference despite the Appellants' request for a jury trial and objection to the same. (R. pp. 120-132). In the interim, Respondent moved for summary judgment in the foreclosure action on November 14, 2012. (R. pp. 45-50). Appellants appealed the Master's Order Denying Motion to Rescind, but this appeal was rejected as premature since no final order had been rendered in the case. (R. p. 97).

At a hearing dated June 22, 2013, the Master-in-Equity ruled in favor of the Respondent on its motion for summary judgment. (R. pp. 117-119). Upon receiving mailed notice of the Master's Order on August 9, 2013, this appeal followed.

STANDARD OF REVIEW

The standard of review on an appeal of a Master-in-Equity's final judgment is the same on prescribed for an appeal of a judgment made in a law case tried without a jury. In such a case, the trial judges findings of fact will not be disturbed on appeal unless found to be without evidence reasonably supporting them. Townes Associates, Ltd. vs. City of Greenville, 266 S.C. 81, 221 S.E.2nd 773 (1976).

LEGAL ARGUMENTS

I. THE MASTER-IN-EQUITY IMPROPERLY RETAINED JURISDICTION OF THE CASE WITHOUT CONSENT OF THE PARTIES OR A DEFAULT AS REQUIRED BY RULE 53(b) OF THE SOUTH CAROLINA RULES OF CIVIL PROCEDURE.

Rule 53(b) of the South Carolina Rules of Civil Procedure provides that references to the Master-in-Equity can be made upon order of the clerk of the court, "when the parties consent or there is a default." SCRCP, Rule 53(b). "In all other cases, a reference can be made upon motion of a party or upon the court's own order provided there is an action at the

time of the reference." SCRCP, Rule 53(b). An order to grant or deny a reference is usually not appealable unless the reference deprives a party of a right to trial by jury. Willford vs. Downs, 265 S.C. 319, 218 S.E 2nd 242 (S.C.1975), "A circuit judge's order cannot indirectly deprive a party of the right to a jury by ordering a reference. The court also cannot order the Master to try a matter at law." Build-a-Rama, Incorporated vs. Morton, 307 S.C. 440, 415 S.E.2nd 796 (SC 1992).

Rule 53(b) of the South Carolina Rules of Civil Procedure also provides:

"In an action where the parties consent or in a default case, any and all issues, whether of law or fact, may be referred to a Master by order of a judge or the clerk of court." SCRCP, Rule 53(b). The Master may enter a final judgment if the parties consent or the order of reference so provides. SCRCP, Rule 53(b). In the instant action, there was neither a default or consent between the parties to refer the case to the Master-in-Equity. The case was referred on the erroneous assumption that the defendants had not filed a timely Answer although the Answer had been received by the Clerk of Court and was a matter of public record.

Without the proper prerequisites for referring the case to the Master-in-Equity, the Master-in-Equity did not have proper jurisdiction to hear this case. By contrast, because there was no specific agreement between the parties to have the case referred to the Master-in-Equity, a reference could only be made upon the motion of a party or upon the Court's own order provided that there was an action pending at the time of reference. Smith Companies of Greenville vs. Hayes, 311 S.C. 358, 428 S.E.2nd 900 (S.C. App. 1993); Chabek vs. Nationwide Mutual Fire Insurance Company, 303 S.C. 26, 397 S.E.2nd 786 (S.C. App. 1990).

Accordingly, the referral of this matter to the Master-in-Equity denied the defendants the right to have this matter tried by jury although a proper request for a jury trial had been made. The question of whether or not this case should have been referred to the Master-in-Equity despite the filing of an Amended Answer requesting a jury trial should have been heard by the circuit court. It is axiomatic to say that a Master-in-Equity cannot make the decision of whether or not a matter should be heard by the Master-in-Equity since he is without the authority to make any binding decisions in the case absent a proper order of reference conferring that authority upon him.

The case of Karl Sitte Plumbing vs. Darby Development Company, 367, S.E.2nd 162 (S.C. App. 1988) stands for the proposition that a party desiring to question the propriety of a reference, should move for revocation of the reference and the failure to make such a motion constitutes acquiesces and consent to the reference. Id. at 164. In that case, one of the parties, East Coast, did not consent in writing to the order of reference, however, it made no motion to revoke the order of reference and it participated in the reference proceedings without objecting or accepting to the order of reference to the Masters appointment authority or jurisdiction. Id. at 164. East Coast, therefore, waived any objection it might have had to the action being referred. Id.

In the present case, the Appellants made an appropriate motion to rescind the Order of Reference on August 16, 2012. (R. pp. 22-23). By order dated October 11, 2012, the Master-in-Equity denied this motion without the authority to issue this decision. (R. pp. 35-37). In Karl Sitte, the appellate court noted "Had East Coast at the reference hearing objected to the Master's authority to enter final judgment in this case because it had not consented to the reference and to the entry of final judgment by the Master, the question

could have been resolved quickly by the Master's allowing Karl Sitte, pursuant to Rule 53(e)(1) and with notice to East Coast, to apply to the circuit court for an order authorizing the Master to enter final judgment." Id. at 165. Similarly, in this case, the question of reference without consent could have been decided by the circuit court since there was no default.

In the instant case, the Respondents raised this issue at a hearing dated September 18, 2012. Rather than following the procedure set forth in Karl Sitte and approved with favor by the Court of Appeals, the Master-in-Equity retained jurisdiction of the matter and denied Appellants motion to rescind the Order of Reference without directing the matter to the Circuit Court. This was not the proper procedure as set forth in Karl Sitte after a proper motion challenging the authority of the Master to hear the matter.

At the hearing to rescind the reference, the Master-in-Equity stated; "What I am going to do—I am not going to refer it back to the Circuit Court. I am going to keep it in the Master's Court for now. I will place it on my contested calendar and set a scheduling order, which I am happy and prepared to do now." (R. pp. 120-132, p. 129, lines 19-24).

Under Karl Sitte, a Master-in-Equity does not have discretion of deciding on whether or not to refer a matter back to Circuit Court when a matter is not in default, there is no consent to an order of reference, and a timely motion to revoke the order of reference has been made. According to the case law, the proper procedure at that point is for the Master to allow the moving party, pursuant to Rule 53(e) and with notice to the opposing side to apply to the Circuit Court for an order authorizing the Master to enter final judgment, or conversely for an order retaining the case. The Master's failure to do so in this instance deprived Appellants to their right to a jury trial filed well prior to the hearing in this case.

II. THE APPELLANTS WERE ENTITLED TO A TRIAL BY JURY AFTER DEMANDING SAME IN THEIR AMENDED ANSWER.

Rule 38 of the South Carolina Rules of Civil Procedure states: "The right of a trial by jury as declared by the Constitution or as given by a statute of South Carolina shall be preserved to the parties inviolate. Issues of fact and action for the recovery of money only or a specific real or personal property must be tried by a jury unless a jury trial be waived." Rule 38(a), SCRCP. Rule 38(b) requires that a party specifically demand a jury no later than ten days after the filing of the last pleading directed to that issue. The demand may be made in a pleading, but may also be a separate notice.

In the instant case, Defendants/Respondents demanded a jury trial in their Amended Answer which was filed with the Charleston County Clerk of Court on June 28, 2012. (R. pp. 15-21). This was within ten days of the Affidavit of Default (non-jury mortgage foreclosure) pleading which was filed with the Clerk of Court on June 18, 2012. (R. p. 14). This pleading incorrectly alleged that the Appellants failed to answer, appear, or otherwise plead in the action and directly bore on the issue of whether or not the Respondents would receive a jury trial. Additionally, the Affidavit of Default contained incorrect information in that the Respondents had filed a timely Answer within thirty days of the Summons and Complaint, and that Answer was on file as a matter of public record with the Charleston County Clerk of Court.

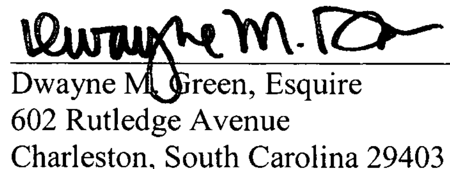
Based on the case of <u>Build-a-Rama, Incorporated vs. Morton</u>, 307, S.C. 440, 415 S.E.2nd 796, (S.C. 1992), the court's order cannot indirectly deprive a party of the right to a jury by ordering a reference. Additionally, the parties must have ten days after the last pleading to claim the right before a reference is made. <u>First Palmetto State Bank and Trust Company vs. Boyles</u>, 302, S.C. 136, 394 S.E.2nd 313 (1990). The Appellants in this matter

filed their Amended Answer within ten days of the last pleading affecting their right to a jury trial. In the Master's order denying Defendant's Motion to Rescind, the Master elected not to refer the matter back to the circuit court after the Defendant had properly made a motion objecting to the order. (R. pp. 35-37). Because there was a timely request for jury trial, and because the Order of Reference was wholly premised on a default of the parties which did not in fact occur, the Respondents were accordingly denied their right to trial by jury. Accordingly, the Master was without authority to issue a final order in this matter since he was without jurisdiction.

CONCLUSION

The Appellants in this case were properly held not to be in default since they filed an Answer to the Complaint within thirty days of being served the Summons and Complaint. Additionally, the Appellants filed an Amended Answer within ten days of the erroneous Order of Reference which affected their right to a jury trial. Based on the same and because the Appellants did not consent to a reference to the Master-in-Equity, this matter should have been determined by the circuit court upon the Appellants' timely motion to rescind (revoke) the Order of Reference. Accordingly, the Appellants pray that the final order of the Master-in-Equity be reversed as a matter of law since the Order of Reference was not proper and the Master-in-Equity did not have the authority to hear this case under Rule 53(b) of the South Carolina Rules of Civil Procedure.

Respectfully Submitted,
HAMPTON GREEN, LLC



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CERTIFICATE OF APPELLANT'S COUNSEL

The undersigned certifies that this Final Brief complies with 211(b) of the South Carolina Rules of Appellate Procedure.

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