

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Gary Washington, Michelle)
Washington, Carolina Procurement)
Institute, Inc., Carolina Encouragement)
Center, Gervais Professional Suites,)
LLC, Wellsfargo Bank, FRU,)
Haynsworth Sinkler Boyd, P.A.,)
Edgefield Holdings, LLC (Assignee),)
Liberty Solutions, US Department of)
Treasury, Fannie MAE and Freddie)
MAC, First Palmetto Savings Bank,)
F.S.B., Branch Banking and Trust)
Company of South Carolina, Palmetto)
Health Alliance, State of South)
Carolina Department of Revenue,)
Seturas Mortgage Company)

Civil Action No. 2018-CP-40-06469

**ORDER GRANTING DEFENDANT'S
MOTION TO DISMISS IN LIEU OF
ANSWER**

Plaintiffs,

v.

South Carolina Community Bank a.k.a.)
SC Community Bank a.k.a. SCCB,)
OPTUS Bank)

Defendant.

RECEIVED

AUG 27 2019

SC Court of Appeals

This matter came before the Court by way of a Motion to Dismiss in Lieu of Answer filed by Defendant South Carolina Community Bank, a/k/a SC Community Bank, a/k/a SCCB, OPTUS Bank ("SCCB") pursuant to Rule 12(b)(1) and 12(b)(6) of the South Carolina Rules of Civil Procedure. Plaintiffs Gary Washington, Michele Washington, and Carolina Procurement Institute, Inc. (collectively, "Plaintiffs")¹ bring claims of "extrinsic

¹ On December 11, 2018, Plaintiffs Gary Washington and Michelle Washington filed a Summons and Complaint with the Clerk of Court for Richland County, South Carolina. The Washingtons named themselves as Plaintiffs, as well as Carolina Procurement Institute, Inc., Carolina Encouragement Center, and Gervais Professional Suites, LLC. South Carolina Community Bank was the only named Defendant in this original pleading.

fraud”, “fraud upon the Court”, and violations of Title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989. In support of its Motion to Dismiss, SCCB relies upon the doctrines of res judicata, collateral estoppel, and laches. SCCB also argues that Plaintiffs’ Amended Complaint does not state sufficient facts to constitute causes of action for “Fraud Upon the Court” and “Extrinsic Fraud”.

For the reasons stated, SCCB’s Motion to Dismiss is GRANTED.

PROCEDURAL HISTORY²

SCCB initiated a foreclosure action against Plaintiffs Gary Washington, Michele Washington, and Carolina Procurement Institute, Inc.³ on December 17, 2008 in the Richland County Court of Common Pleas, seeking to foreclose on a mortgage given by Plaintiffs on certain real properties located at 1811 and 1815 Gervais Street, Columbia, South Carolina in Richland County. On July 31, 2009, the case was referred to Joseph M. Strickland, the Master-In-Equity for Richland County. Plaintiffs failed to respond to the

On December 18, 2018, the Washingtons filed an Amended Complaint and added the following Plaintiffs: Wellsfargo [sic] Bank, FRU, Haynsworth Sinkler Boyd, P.A., Edgefield Holdings, LLC (Assignee), Liberty Solutions, US Department of Treasury, Fannie MAE and Freddie MAC, First Palmetto Savings Bank, F.S.B., Branch Banking and Trust Company of South Carolina, Palmetto Health Alliance, State of South Carolina Department of Revenue, Seturas Mortgage Company. The Washingtons also modified the only named Defendant to include “South Carolina Community Bank a.k.a. SC Community Bank a.k.a. SCCB, OPTUS Bank.

No new claims or causes of action were added in the Washingtons’ Amended Complaint. As will be discussed more fully in this Memorandum, besides Carolina Procurement Institute, Inc., Plaintiffs cannot represent any of the entities they have named as Plaintiffs.

² The Court’s ruling is specifically limited to the allegations set forth in the Washingtons’ Amended Complaint, as is required. See Rule 12(b)(6), SCRCP; see also Jarrell v. Petoseed Co., Inc., 331 S.C. 207, 209, 500 S.E.2d 793, 794, (Ct.App.1998). However, in the interest of justice and for the convenience of all parties, the Court herein summarizes the entire procedural history giving rise to the subject civil action. Pursuant to Rule 201 of the South Carolina Rules of Evidence, the Court takes judicial notice of the filings, pleadings, briefs, and orders referenced herein.

³ Carolina Procurement Institute, Inc. (“Carolina Procurement”) was dismissed pursuant to a Stipulation of Dismissal filed on September 30, 2015. See Exhibit 3. Furthermore, Carolina Procurement did not join in the Motion to Set Aside the Foreclosure Sale filed on January 27, 2016 or the Motion to Reconsider filed on April 14, 2016. See Exhibits 4 and 5.

foreclosure action, and, thereafter, on July 31, 2009, SCCB filed an Affidavit of Default. Following Plaintiffs' default, the Master-In-Equity issued its Report and Judgment of Foreclosure on October 8, 2009. The Judgment noted that Plaintiffs were in default for failure to respond to the suit. The Master-In-Equity ordered that SCCB was entitled to foreclose on the mortgaged properties and further ordered the properties to be sold, after due advertisement, at a public auction at the Richland County Judicial Center on a convenient sales day thereafter.

The foreclosure action was stayed on multiple occasions by various bankruptcy filings by Plaintiffs⁴. Supplemental Orders to the Master-In-Equity's Judgment of Foreclosure were issued by the Court for the limited purpose of updating and adjusting the judgment debt figures. Plaintiffs neither moved to set aside or reopen the Judgment of Foreclosure and the supplemental orders nor appealed such orders.

The judicial sale of the mortgaged properties at issue was scheduled for November 2, 2015 at 12:00 p.m. at the Richland County Judicial Center before the Master-In-Equity. The Notice of Sale was advertised in The Columbia Star, a weekly newspaper of general

⁴ On November 2, 2009, Plaintiffs filed for Chapter 11 bankruptcy in the United States Bankruptcy Court. C/A No. 09-08248-DD. Plaintiffs were represented J. Steven Huggins, Esq. On September 24, 2010, Plaintiff's bankruptcy action was dismissed due to Plaintiffs' failure to comply with filing and reporting requirements and failure to file an acceptable disclosure statement and plan within the first 180 days.

On February 3, 2011, Plaintiffs again filed for Chapter 11 bankruptcy in the United States Bankruptcy Court. C/A No. 11-00625-DD. The final decree was filed on May 31, 2013. During the course of this bankruptcy proceeding, Plaintiffs were represented by Reed B. Smith, Esq.

October 3, 2014, Plaintiffs filed for bankruptcy a third time. C/A No. 14-05589-DD. Plaintiffs were first represented by Jonathan L. Davis, Esq., and then later by Robert H. Cooper, Esq. An Order Terminating the Case was entered on January 4, 2016 based on Plaintiffs' failure to comply with the previous Order requiring Plaintiffs to confirm a plan by December 31, 2015.

May 30, 2016, Plaintiffs filed for bankruptcy a fourth time. SCCB not involved in this bankruptcy proceeding because the final sale of the subject properties had already occurred. During this action, Plaintiffs were represented by Eddy Lane, Esq., and then later by Benjamin R. Matthews, Esq.

circulation published in the City of Columbia, for three consecutive weeks preceding the sales day (October 16, 23, and 30, 2015). In addition, on October 1, 2015, counsel for SCCB mailed the Notice of Sale to Plaintiffs at their 1815 Gervais Street, Columbia, South Carolina address which was the address of one of the properties subject to the foreclosure sale. The letter was also mailed to Robert H. Cooper, an attorney representing Plaintiffs in the 2014 bankruptcy proceeding at the time, as well as to the Master-In-Equity.

The mortgaged properties were sold on November 2, 2015 to SCCB which entered the highest bid in the amount of \$370,000.00. The Master-In-Equity's Deed conveying the properties at issue to SCCB was recorded on December 18, 2015. An order of deficiency judgment was also filed by the Master-In-Equity on December 18, 2015 ordering that SCCB was entitled to a deficiency judgment in the amount of \$187,365.21 through December 3, 2015.

On January 27, 2016, Plaintiffs moved to set aside the foreclosure sale. In this motion, the Washingtons argued that the sale was accompanied by other circumstances warranting the interference of the court, in particular, allegations that the Washingtons' bankruptcy counsel was deficient in the bankruptcy proceedings with respect to valuation of the properties resulting in the lifting of the automatic stay by the bankruptcy court so that SCCB could proceed with the foreclosure. The Washingtons further argued that the Judgment of Foreclosure and the Third Supplemental Order, neither of which had ever been challenged or appealed, failed to meet the requirements of Rule 71 of the South Carolina Rules of Civil Procedure. Finally, the Washingtons contended that Gary Washington did not receive notice of the sale date.

On February 1, 2016, SCCB filed a Petition for Writ of Assistance to remove Plaintiffs and their tenants from the properties after Plaintiffs and their tenants refused to vacate the properties following the sale.

A hearing was held before the Master-In-Equity on February 19, 2016. Following the hearing, the Master-In-Equity issued an order on March 23, 2016 finding (1) the Washingtons were in default; (2) the sales price of \$370,000.00 was not so gross as to shock the conscience to warrant setting aside the judicial sale previously consummated; (3) no other circumstances existed warranting the interference of the court into the judicial sale; (4) the Washingtons' argument as to deficient bankruptcy counsel was appropriately addressed by the United States Bankruptcy Court for the District of South Carolina and was not grounds for setting aside the judicial sale; (5) the notice of the November 2, 2015 sale date of the properties was appropriately published and noticed to the Washingtons; and (6) the Master-In-Equity's Judgment of Foreclosure, filed October 8, 2009, as supplemented by the Third Supplemental Order, filed July 17, 2015, complied with the requirements of Rule 71, SCRCP. The Master-In-Equity therefore denied the Washingtons' motion to set aside the foreclosure sale. On March 28, 2016, the Master-In-Equity also granted SCCB's Petition for a Writ of Assistance to remove Plaintiffs and their tenants from the properties.

On April 14, 2016, the Washingtons filed a motion requesting reconsideration of the Order Denying the Motion to Set Aside the Foreclosure Sale and Order for Writ of Assistance. The motion reargued that the judicial sale should be set aside because of the circumstances attendant to the bankruptcy proceeding, the alleged failure of the Judgment of Foreclosure and Third Supplemental Order to comply with Rule 71(6),

SCRCP, and the alleged failure of Gary Washington to receive notice of the foreclosure sale date.

A hearing was held on the motion for reconsideration on April 28, 2016 before the Master-In-Equity. The Master-In-Equity thereafter issued an order denying the motion for reconsideration on June 1, 2016 and additionally ordered that the Sheriff of Richland County be authorized to remove Plaintiffs and their tenants from the properties any time after 5:00 p.m. on June 6, 2016 and that any rent by tenants should be paid and delivered to SCCB.

Plaintiffs filed their Notice of Appeal with the Court of Appeals on July 12, 2016, inaccurately asserting that the appeal deadline was stayed due to an automatic bankruptcy stay which expired on June 30, 2016. Plaintiffs appealed only the June 1, 2016 order of the Master-In-Equity denying the motion for reconsideration. In their appeal to the Court of Appeals, Plaintiffs argued: (1) the Master-in-Equity's order denying the motion for reconsideration failed to comply with Rule 52(a), SCRCP; (2) the Notice of Sale did not comply with the requirements of Rule 71, SCRCP; and (3) Plaintiff Gary Washington allegedly did not receive notice of the sale.

On May 2, 2018, the Court of Appeals affirmed the Master-in-Equity's order denying Plaintiffs' motion to set aside the foreclosure sale and the order denying Plaintiffs' motion for reconsideration, holding (1) findings of fact and conclusions of law are not required under Rule 52(a) for decisions on motions; (2) Petitioners' argument regarding the Notice of Sale not complying with Rule 71 was not preserved for appellate review; and (3) parties to a suit for foreclosure are not required to be given personal notice of a judicial sale.

On or about May 17, 2018, Petitioners filed a Petition for Rehearing with the Court of Appeals. They did not challenge any of the holdings in the Court of Appeals' Opinion, but rather argued that the judgment below was not valid because Carolina Procurement was in bankruptcy and subject to the automatic stay provided under 11 U.S.C. § 362 from September 2015 and the subsequent months when the foreclosure proceedings occurred.

The Court of Appeals denied the Petition for Rehearing on August 16, 2018. On September 17, 2008, Plaintiffs filed a Petition for Writ of Certiorari with the South Carolina Supreme Court. In a November 28, 2018 Order, the Supreme Court denied the Plaintiffs' Petition.

The instant case was filed thereafter on December 11, 2018.

STANDARD OF REVIEW

A motion to dismiss must be based solely upon the allegations set forth in the Amended Complaint. Rule 12(b)(6), SCRCP; Jarrell v. Petoseed Co., Inc., 331 S.C. 207, 209, 500 S.E.2d 793, 794, (Ct. App. 1998). The Court should view the evidence in the light most favorable of the Plaintiff, and, if facts alleged in the Amended Complaint and inferences reasonably deduced therefrom do not entitle Plaintiff to relief, then the motion to dismiss must be granted. Jarrell, 331 S.C. at 209, 500 S.E.2d at 794. See also Douglass ex rel. Louthian v. Boyce, 336 S.C. 318, 519 S.E.2d 802 (Ct. App. 1999), *aff'd*, 344 S.C. 5, 542 S.E.2d 715 (2001) (holding the trial court properly dismissed action under 12(b)(6), SCRCP); Stiles v. Onorato, 318 S.C. 297, 457 S.E.2d 601 (1995) (affirming trial court's dismissal of action under 12(b)(6), SCRCP).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Res Judicata

Under the doctrine of res judicata, “a final judgment on the merits bars further claims by parties or their privies” of similar claims based on the same transaction or occurrence.” Andrews v. Daw, 201 F.3d 521 (4th Cir. 2000) quoting Montana v. United States, 440 U.S. 147, 153 (1979); see also Estridge v. Joslyn Clark Controls, Inc., 482 S.E.2d 577, 581 (S.C. App 1997).

In order to establish res judicata, three (3) elements must be shown: (1) the identities of the parties are the same as the prior litigation; (2) the subject matter is the same as prior litigation; and (3) there was adjudication of the issue in the former proceedings. See Plum Creek Development Co., Inc. v. City of Conway, 334 S.C. 30, (1999); Renaissance Enterprises, Inc. v. Ocean Resorts, Inc., 330 S.C. 13 (1998); Johnson v. Greenwood Mills, Inc., 317 S.C. 248 (1994).

The Court finds that all three (3) of the elements of res judicata are satisfied here. The parties in this action are the same as those involved in the previously detailed foreclosure proceedings. This action involves the same subject matter that was litigated in the prior suit. Plaintiffs now allege that SCCB perpetrated a fraud upon the Court and extrinsic fraud in order to reach a meritorious result in its foreclosure action. By their very nature, the claims which Plaintiffs raise are the same the subject matter as the original foreclosure action, and all issues arise from the same set of facts. Plaintiffs appealed the previous foreclosure action to the South Carolina Supreme Court, which denied their petition for a writ of certiorari. The Supreme Court’s denial of Plaintiffs’ petition for a writ of certiorari clearly indicates the satisfaction of the third element of res judicata.

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Accordingly, Plaintiffs' claims are barred by the doctrine of res judicata, and SCCB is entitled to dismissal of Plaintiffs' claims.

B. "Fraud Upon the Court"

Even assuming *arguendo* that Plaintiffs' claims were not barred by the doctrine of res judicata, Plaintiffs have failed to plead sufficient facts to constitute causes of action for "Fraud Upon the Court" or "Extrinsic Fraud."

In order to establish a claim of "fraud upon the court," the plaintiff must show that one has acted with intent to deceive or defraud the court. Chewing v. Ford Motor Co., 354 S.C. 72, 78–79, 579 S.E.2d 605, 608–09 (2003) (citing United States v. Buck, 281 F.3d 1336, 1342 (10th Cir. 2002)). A proper balance between the interests of finality on the one hand and allowing relief due to inequitable conduct on the other makes it essential that there be a showing of conscious wrongdoing before relief from a final judgment is appropriate. Id. Conscious wrongdoing in this context can properly be characterized as a deliberate scheme to defraud. When there is no intent to deceive, the fact that misrepresentations were made to a court is not, in and of itself, sufficient basis for setting aside a judgment for 'fraud on the court.' Id.

In Chewing, the Supreme Court noted that, generally, only the most egregious misconduct, such as bribery of a judge or members of a jury or the fabrication of evidence by a party in which an attorney is implicated will constitute fraud on the court. Id. Less egregious misconduct, such as nondisclosure to the court of facts allegedly pertinent to the matter before it, will not ordinarily rise to the level of fraud on the court. Id.

The only factual allegations which Plaintiffs make in support of this cause of action are as follows: "South Carolina Community Bank knowingly and willingly deceived the

Court that equity did not exist in the property and testifying that it was not being adequately protected. The Court accepted the fraudulent claim and removed property for the Automatic Stay in which the plaintiffs were entitled.” (See Plaintiffs’ Compl., p. 1.) Even taking this statement as true, as the Court must in considering SCCB’s Motion to Dismiss, it does not rise to the level of conduct specifically enumerated in Chewning. Plaintiffs do not allege that attorneys for SCCB participated in conduct tantamount or equivalent to fabricating evidence or paying bribes to judicial officers in order to successfully foreclose upon the at-issue property.

In reviewing the procedural history of this controversy, it is clear that SCCB merely relied upon a valuation of the subject property provided by the Plaintiffs. Clearly, this conduct does not rise to the level of perpetuating a fraud upon the Court.

C. “Extrinsic Fraud”

Likewise, even if Plaintiffs’ claims were not barred by the doctrine of res judicata, Plaintiffs do not plead sufficient facts to constitute causes of action for “Extrinsic Fraud.”

Extrinsic fraud is “fraud that induces a person not to present a case or deprives a person of the opportunity to be heard. Relief is granted for extrinsic fraud on the theory that because the fraud prevented a party from fully exhibiting and trying his case, there has never been a real contest before the court on the subject matter of the action.” Hilton Head Ctr. of South Carolina v. Public Serv. Comm'n, 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987).

Here, the Court finds that the litigation between Plaintiffs and SCCB began in 2008. Since then, Plaintiffs have had every opportunity to present any defense, allegation, and/or claim. Accordingly, the Court finds that Plaintiffs have had a full and fair

opportunity to present their case. The Court further notes that Plaintiffs have not plead any facts to support the allegation that SCCB induced Plaintiffs in any way not to present any aspect of their case. To the contrary, it is evident from the procedural history of this long-pending matter that Plaintiffs have had every opportunity to present each and every aspect of their case.

D. Violations of Title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989

Because it has already found that Plaintiffs' claims are barred by res judicata, the Court does not reach Plaintiffs' claims for alleged violations of Title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989.

CONCLUSION

For the reasons stated herein, Plaintiffs' Amended Complaint is dismissed with prejudice and the Lis Pendens filed December 11, 2018 with Richland County Lis Pendens number 2018LP4001745 is hereby cancelled of record such that the Richland County Clerk of Court is directed to update the status of the said Lis Pendens to "Cancelled". Plaintiffs' claims are barred by res judicata. Even if they were not barred, Plaintiffs have had every opportunity to fully, adequately, completely, and satisfactorily present their claims to each tribunal in front of which they have appeared.

IT IS THEREFORE ORDERED that Plaintiffs' Amended Complaint is DISMISSED
WITH PREJUDICE.

AND IT IS SO ORDERED.

Judge Jocelyn Newman
Circuit Court Judge for the Fifth Judicial Circuit

Columbia, South Carolina

_____, 2019

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Richland Common Pleas

Case Caption: Gary Washington , plaintiff, et al vs South Carolina Community Bank , defendant, et al
Case Number: 2018CP4006469
Type: Order/Dismissal and Cancellation of Lis Pendens

So Ordered

Jocelyn Newman

Certificate of Electronic Notification

Recipients

Charles Webb - Notification transmitted on 08-01-2019 03:40:01 PM.

William Yarborough - Notification transmitted on 08-01-2019 03:40:01 PM.

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Court: CIRCUIT COURT

Common Pleas

Richland

Case Caption: Gary Washington , plaintiff, et al vs South Carolina Community Bank , defendant, et al

Document(s) Submitted: Order Granting Defendants Motion to Dismiss in Lieu of Answer Order Granting Defendants Motion to Dismiss in Lieu of Answer

Filed by or on behalf of: Jocelyn Newman

This notice was automatically generated by the Court's auto-notification system.

The following people were served electronically:

Charles Joseph Webb for South Carolina Community Bank

William G. Yarborough, III for Gary Washington

The following people have not been served electronically by the Court. Therefore, they must be served by traditional means:

First Palmetto Savings Bank Fsb

Freddie Mac

Fannie Mae

Us Department Of Treasury

Liberty Solutions

Edgefield Holdings Llc for Michele Washington

Haynesworth Sinkler Boyd Pa

Fru

Wellsfargo Bank
Gervais Professional Suites Llc
Carolina Encouragement Center
Carolina Procurement Institute Inc
Michele Washington for Michele Washington
Gary Washington for Gary Washington
Michele Washington for Edgefield Holdings Llc,
Michele Washington
Optus Bank
Seturas Mortgage Company
State Of South Carolina Department Of Revenue
Gary Washington for Gary Washington
Palmetto Health Alliance
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Carolina