

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LANCASTER COUNTY
In The Circuit Court

Brian Gibbons, Circuit Court Judge
William C. Tindal, Special Referee

Appellate Case No. 2018-001823

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SC Court of Appeals

First Citizens Bank & Trust Company,

Respondent,

v.

Linda P. Faulkner a/k/a Linda Faulkner,
Founders Federal Credit Union, and
CACH, LLC,
of whom Linda P. Faulkner is the

Appellant.

INITIAL REPLY BRIEF OF APPELLANT

John Martin Foster
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Rule 13(a), S.C.R.C.P
.....

OTHER AUTHORITIES:

28 AM.JUR.2D *Estoppel and Waiver* § 27 (09/2002)
Pomeroy EQUITY JURISPRUDENCE 4th Ed.

STATEMENT OF THE CASE

This foreclosure action was filed by the Respondent FIRST CITIZENS BANK & TRUST COMPANY on August 9, 2017. On January 2, 2018, the Appellant LINDA FAULKNER filed her Answer and Counterclaim advancing counterclaims and defenses for express and implied waiver by reason of accepting payments, Truth in Lending violations, violations of the Fair Debt Collections Act, and breach of good faith. She requested a jury trial.

A Motion to Strike Jury Demand and an Order granting that Motion were both filed January 31, 2018. No previous communication was received and no hearing was noticed for the Motion. The Certificate of Service for this Motion is dated January 29, 2018 and filed January 31, 2018.

A Motion to refer the case to a Special Referee and an Order granting that Motion were both filed February 2, 2018. No previous communication was received and no hearing was noticed for the Motion. The Certificate of Service for this Motion is dated January 29, 2018 and filed February 2, 2018.

Both Motion above were granted, and served on Appellant with a Certificate of Service dated February 7, 2018 and filed February 9, 2018.

On February 20, 2018, FAULKNER served her Motion under Rule 59, S.C.R.C.P. to set aside the Order striking the jury request and referring the case to a Special Referee. After hearing, the Circuit Court issued its Order filed October 2, 2018 denying Rule 59 relief. This appeal followed.

ARGUMENT

I. COMPULSORY COUNTERCLAIMS TO EQUITABLE ACTIONS ARE INDISTINGUISHABLE TO MATTERS ASSERTED AS AFFIRMATIVE DEFENSES.

The Respondent argues that the holding of *Wachovia Bank National Association v. Blackburn*, 407 S.C. 321, 755 S.E.2d 437 (2014) and other cases on compulsory counterclaims has no application to the causes asserted by the Appellant and designated as Defenses.

To repeat, *Wachovia Bank* and accompanying authority affirms the right to a jury trial where a compulsory legal counterclaim is asserted by a defendant to an equitable complaint. *Id.*, 407 S.C. at 329-30, 755 S.E.2d at 441.

Compulsory counterclaims are defined in Rule 13(a), S.C.R.C.P., which states in relevant part:

(a) Compulsory Counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.

The Appellant first notes that the distinction drawn by the Respondent – between a legal counterclaim and a legal defense – would deny anyone asserting a defense or affirmative defense the right to a jury trial. This distinction cannot be supported by South Carolina precedent.

In *Keels v. Pierce*, 315 S.C. 339, 433 S.E.2d 902 (Ct.App. 1993), this Court dealt with an Appellant asserting permissive counterclaims. The Court held that permissive counterclaims could be severed and tried separately. The Court went on to state:

The right of trial by jury is highly favored, and waivers of the right are always strictly construed and not lightly inferred or extended by implication. *IN RE Gilliland*, 248 N.C. 517, 103 S.E.2d 807 (1958). In absence of an express agreement or consent, a waiver of the right to a jury trial will not be presumed. *Id.*

[*Id.*, 315 S.C. ____, 433 S.E.2d 904.]

Earlier, in *Rush v. Thompson*, 203 S.C. 106, 26 S.E.2d 411 (1943), in discussing severance of equitable and legal issues, our Supreme Court stated:

If the matters set up in the equity complaint had been pleaded defensively to the law complaint, we would of course have had but one action, and although involving both legal and equitable issues, [the Defendant] Rush could not have thus been deprived of his right to a jury trial on the legal issues.

[*Id.*, 203 S.C. ____, 26 S.E. 413; underlining added; words in brackets added for clarity.]

The Appellant notes that the language used above, as well as that in Rule 13(i), S.C.R.C.P. on severance of trials, references the “claims” advanced, and is not limited to counterclaims.

In *Wachovia Bank National Association v. Blackburn* itself, *supra*, the Supreme Court set out procedure for the handling of mortgage litigation involving legal and equitable issues, in the context of a waiver, stating:

If such a waiver does not exist, the proper procedure for handling the counterclaims is as follows:

(a) The trial judge may, pursuant to Rule 42(b), order separate trials of the legal and equitable claims, or may order the claims tried in a single proceeding.

(b) If separate trials are ordered, the judge must determine which issues are to be tried first. If there are factual issues common to both claims, absent the most imperative circumstances, the at law claim must be tried first. If there are no common factual issues, it is within the trial judge's discretion which claim will be tried first.

(c) If the claims are to be tried in a single proceeding and there are factual issues common to both claims, the jury shall first determine the legal issues. The court may then determine the equitable claims, but the jury's determination of common factual issues shall be binding upon the court.

[*Wachovia Bank National Association v. Blackburn*, 407 S.C. ___, 755 S.E.2d 442.; underlining added.]

A logical reading of South Carolina precedent, as well as Rule 13, S.C.R.C.P., clearly shows that our Courts have made no distinction between legal counterclaims and defenses with regard to the right to a jury trial.

III. THE APPELLANT HAS EFFECTIVELY AND TIMELY INVOKED THE DOCTRINE OF EQUITABLE ESTOPPEL.

The Appellant's Second and Third Defense are denominated "Express Waiver" and "Implied Waiver" in their headings. RECORD ON APPEAL, p. ___. In her Rule 50 Memorandum, she used the term "equitable estoppel". RECORD ON APPEAL, p. ___. The Respondent objects to this language as referencing an issue "neither raised or passed upon" by the Circuit Court.

Equitable estoppel was discussed, and acknowledged, by the Supreme Court in *Smith v. Williams*, 141 S.C. 265, 139 S.E. 625 (S.C., 1927), as follows:

In the footnote to the quoted section of Pomeroy [EQUITY JURISPRUDENCE 4th Ed.] (volume 2, pp. 1636-1639) the author makes particular reference to the admirable and accurate presentation of the equitable conception of estoppel from conduct (as a rule of property, contract, or remedy, rather than a mere rule of evidence), as given in the famous opinion of Chief Justice Perley in *Horn v. Cole*, 51 N.H. 287, 289 (12 Am.Rep. 111), where it is said:

"Equitable estoppels are admitted on the * * * ground of promoting the equity and justice of the individual case *by preventing a party from asserting his rights under a general technical rule of law*, when he has so conducted himself that it would be contrary to equity and good conscience for him to allege and prove the truth. * * * As in other cases of fraud and dishonesty, the circumstances out of which the question may arise are of infinite variety; * * * and in equity, the doctrine has been liberally applied *to suppress fraud and enforce honesty and fair dealing*, without any attempt to confine the doctrine within the limits of a strict definition."
(*Italics ours.*)

[*Id.*, 141 S.C. ___, 139 S.E. 630; matter in brackets added for clarity.]

The commentators of AMERICAN JURISPRUDENCE 2D state the relation of equitable estoppel to estoppel as follows:

The terms "estoppel in pais" and "equitable estoppel" are now generally used interchangeably as applicable to all estoppels other than those by record, deed, or bond. Equitable estoppels operate in their own field as effectively as technical estoppels do in theirs. Since, however, the principle which underlies equitable estoppel in its proper sense runs throughout all the transactions and contracts of civilized life; such estoppels cannot be subjected to fixed and settled rules of universal application, like legal estoppels, or hampered by the narrow confines of a technical formula. In other words, each case of estoppel must in the nature of things stand on its own bottom—that is, the facts and circumstances of the particular case. It is thus a flexible doctrine.

[28 AM.JUR.2D *Estoppel and Waiver* § 27 (09/2002); footnotes omitted but citing, e.g., *Tarlton v. Stidham*, 122 N.C. App. 77, 469 S.E.2d 38 (1996), *rev. denied*, 343 N.C. 311, 471 S.E.2d 81 (1996).]

In the leading case of *Harvey v. Philadelphia Life Ins. Co. Of Philadelphia*, 131 S.C. 405, 127 S.E. 836 (1925), the Supreme Court stated:

Although "waiver" and "estoppel" are often loosely used interchangeably in the law of insurance, they are not convertible terms. 27 R.C.L. 905, § 2. A waiver is an intentional relinquishment of a known right, while the essential elements of estoppel are the ignorance of the party who invokes the estoppel, representations, or conduct of the party estopped which mislead, and an innocent and deleterious change of position in reliance on such representations or conduct.

[*Id.*, 131 S.C. ___, 127 S.E. 838.]

The Answer of the Appellant clearly alleges as follows:

11. The Defendant FAULKNER relied on the said waiver, acknowledgment and acquiescence of Plaintiff in ordering her affairs, which ordering will be to their detriment if the causes of action set out in the Complaint and relating to collection and foreclosure are now prosecuted.

[RECORD ON APPEAL, p. ___.]

The Appellant has adequately plead estoppel, under whatever name. The the was raised to the Circuit Court by its use in the Memorandum of the Appellant. RECORD ON APPEAL, p. ___. The use of the term was not waived in argument at the Rule 59 hearing. RECORD ON APPEAL, p. ___.`

The claim that the term was not "passed on" by the Circuit Court is disingenuous: the argument before the Circuit Court was on Appellant's Rule 59 Motion. That Motion was filed – as is effectively admitted by the Respondent – owing to it failure to give proper notice of its earlier Motions.

Procedure does not allow filing a Rule 59 Motion in response to a ruling on a Rule 59 Motion: if the Court failed to address the term "equitable estoppel", the only solution is this appeal. The Respondent cannot assert a grounds of a lack of ruling caused by its own failure to follow procedure.

CONCLUSION

FAULKNER timely advanced compulsory defenses and counterclaims to the Respondent Bank's equitable claim for foreclosure, including grounds for equitable estoppel and following the list of possibilities set out in *Wachovia Bank National Association v. Blackburn, supra*. She is entitled to a jury trial of the legal defenses raised by her.

Respectfully submitted,



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Attorney for Appellant

October 9, 2019

Rock Hill, South Carolina

CERTIFICATE OF COUNSEL

The undersigned certifies that this final Reply Brief of Appellants complies with Rule 211(b), S.C.A.C.R.

October 9, 2019

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CERTIFICATE OF SERVICE

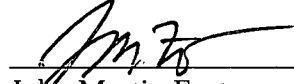
I certify that, on the date below, I have served the Initial Reply Brief of Appellant on the following counsel of record:

J. Kershaw Spong
Mary McDonald Campolong
Sowell Gray Robinson Stepp & Lafitte, LLC
Post Office Box 11449
Columbia. SC 29211
Attorneys for Respondent

by depositing the same with the United States mail, with sufficient first class postage attached, properly addressed to the clerk of the Court, and with a copy also directed to the respective last known address(es) of those attorney(s) and/or persons set out below; or

by hand delivering copies of the same to the following persons, or by leaving the same at that person's office with that person's clerk or some other person in charge thereof, or by leaving it in a conspicuous place therein; of if the office was closed or the person to be served has no office, by leaving a copy at that person's dwelling place or usual place of abode with some person of suitable age and discretion then residing therein. all pursuant to Rule 262, S.C.A.C.R.

October 9, 2019



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October 9, 2019

The Honorable Jenny Abbott Kitchings
Clerk of the South Carolina Court of Appeals
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SC Court of Appeals

Re: First Citizens Bank & Trust Company, Inc.
v. Linda P. Faulkner; *et al.*
Case No.: 2017-CP-29-00872
Appellate Case No. 2018-001823

Dear Ms. Kitchings:

In accordance with Rule 208, S.C.A.C.R., enclosed herewith please find the original and one (1) copy of the Appellant's Reply Brief, together with Certificate of Service for the same in the above referenced case.

By copy of this letter, I am serving the attorney for the Respondent with copies of the said Initial Reply Brief, as evidenced by the Certificate of Service.

Please return the extra conformed copy to my office in the enclosed self-addressed, stamped envelope. As always, thank you, and your staff, for your assistance in these matters.

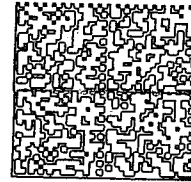
Sincerely yours,


John Martin Foster

jmf/
enclosures

cc: Client File

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