THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell Scarborough
Master-in-Equity

Appellate Case No. 2019-000575
Charleston County Case No. 2010-CP-10-7838

Ditech Financial, LLC ..... Respondent,

v.

Kevin G. Snyder, individually and
As Personal Representative of the
Estate of Mary Snyder ..... Appellant.

[redacted] REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

I. Snyder has set forth a cause of action for Civil Compensatory Contempt and has likewise set forth a scintilla of evidence supporting it.

In re Mortgage Foreclosure Actions specifically provides for relief for violation of that order:

> The Court having jurisdiction over the foreclosure action shall hear and determine any dispute concerning any party's compliance with this order, including without limitation, the failure of any party to act in good faith in complying with the terms of this order. In the event the Court determines that any party to the foreclosure action, or their acting agent, has failed to comply with the terms of this order, or has not attempted to reach an agreement for foreclosure intervention in good faith, the Court may, in its discretion, impose such sanctions as it determines to be reasonable and just under the circumstances, including without limitation, the assessment of reasonable attorneys' fees and costs against the culpable party.

396 S.C. 209, 213, 720 S.E.2d 908, 910 (2011). Civil contempt is defined as: "The failure to obey a court order that was issued for another party's benefit." Black's Law Dictionary 336 (8th ed. 2004). South Carolina recognizes a cause of action for Civil Compensatory Contempt. Jarrell v. Petoseed Co., Inc., 331 S.C. 207, 500 S.E.2d 793 (Ct. App. 1998). The fact that, as Ditech points out in its brief, Jarrell involves the sale of contaminated watermelon seeds is completely irrelevant to the fact that a cause of action exists.[1]

Ditech does not dispute that the acts Snyder complains of (see Snyder Principal Brief Argument I) occurred. Ditech argues that these errors "individually and collectively" do not amount to bad faith. While Ditech does attempt to minimize its acts on an individual

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[1] Even if, contrary to Jarrell, Civil Compensatory Contempt is found to not be a valid cause of action, Snyder's motion for summary judgment requested alternatively that it be treated as a motion for sanctions under In re Mortgage Foreclosure Actions. (R. p. 412).

basis, Ditech's acts speak for themselves.[2] Further, while Ditech's predecessor's false affidavit was eventually stricken (after almost six years), false swearing is nonetheless an abuse of the judicial process that may constitute contempt of court. See State v. Stanley, 365 S.C. 24, 615 S.E.2d 455 (2005). Finally, Ditech's never fully addresses how the collective effect of all its bad acts do not constitute a violation of the 2011 Administrative Order. On the contrary, the "death by a thousand cuts" Kevin Snyder and his late wife have been subjected to the past 9-10 years speaks to a fundamental failure of the intervention process. Cf. State v. Freeman, 319 S.C. 110, 459 S.E.2d 867 (Ct. App. 1995) (cumulative error doctrine); Tennant v. Marion Health Care Foundation, 459 S.E.2d 374, n.28 (W.Va. 1995) (same); U.S. v. Basham, 561 F.3d 302, 330 (4th Cir. 2009) (same). As a result of this fundamental failure, interest and other fees due and owing in this loan exceed the principal balance. The correct method by which this wrong can be remedied is the 2011 Administrative Order, and Snyder's requested relief must be granted.

II. The March 12, 2014 order amending the caption was an abuse of discretion because Ditech's predecessor did not have standing to pursue this action.

Ditech contends that the Master-in-Equity's March 12, 2014 order amending the caption was supported by unspecified "record evidence". Ditech is correct that it possessed at trial the original Note endorsed in blank. The record only establishes that this Note was in the possession of Ditech at trial; Ditech's witness was unable to testify as to its possessor (*i.e.* its chain of title) prior to trial, which includes February 19, 2014, when the motion to amend the caption was made. (R. pp. 642-44). While lack of evidence may not be relevant to the owner of the Note (which was endorsed in blank) it is relevant to the owner of the

[2] Ditech emphasizes the low number of acts of alleged misconduct, but Snyder was denied his discovery to further develop this cause of action. (See Argument III).

mortgage. While it is the law that the assignment of the Note includes an assignment of the mortgage, there is no evidence in the record of any of the assignments of the Note preceding the April 1, 2019 trial of this matter. The record does establish that the current owner of the mortgage is Countrywide Home Loans, LP. (Snyder Brief Arg. III). Ditech never established that any entity that assigned the note was also an owner of the mortgage, and therefore it lacks standing to pursue this action.

III. The Master-in-Equity abused his discretion by refusing to compel the production of documents plainly relevant under South Carolina law that Ditech did not properly object to.

Snyder's motion to compel was denied by a Form 4 order and a single line in the subsequent order granting partial summary judgment. (R. pp. 17, 19-22). Neither of these orders provide an explanation for the denial. Ditech attempts to cast Snyder's requests as overbroad by claiming that they request documents from Federal Trade Comm'n v. Green Tree Servicing, LLC litigation in the District of Minnesota. This is not correct. The relevant order in this case requires that Green Tree (now Ditech) preserve and maintain certain records relating to all of the loans it serviced, which would include Snyder's loan. Federal Trade Comm'n v. Green Tree Servicing, LLC, 0:15-cv-02064-SRN-JSM (D. Minn. Order dated April 23, 2015). Snyder's discovery requests referenced this order to provide a clear and unambiguous request for documents Snyder knows that Green Tree, now Ditech, must possess. All of Snyder's requests are limited to information related to the loan at issue in this action and to people related to the alleged bad faith conduct. To the extent that Ditech contends that certain requests require the production of home addresses, phone numbers, &c. of Ditech employees, this is information that could easily be redacted. While Snyder would consent to such redactions, Ditech never attempted to negotiate a limited response

("...Ditech is standing on its objections which I understand will likely lead to a motion to compel."). (R. p. 189).

Ditech dismisses Snyder's citation of In re Oxbow Carbon, LLC Unitholder Litig., No. CV 12447-VCL, 2017 WL 959396 (Del. Ch. Order dated March 13, 2017); Curtis v. Time Warner Entertainment-Advance-Newhouse P'ship, No. 3:12-cv-2370-JFA, 2013 WL 2099496 (D.S.C. May 14, 2013); Crescom v. Terry, No. 2:12-cv-63-PMD, 2017 WL 2880866 (D.S.C. Order dated July 6, 2017) as not "South Carolina authority". Ditech is correct that these are not South Carolina decisions, but they are very persuasive opinions applying substantially the same discovery rules. In re Oxbow, which cites numerous nationwide authorities, is significant enough that Judge Roger Young of the Ninth Judicial Circuit attached the entire opinion to a recent memorandum to the bar:

- **Discovery Abuse.** In my 22 years as a judge I have grown to truly loathe discovery motion hearings. Both sides are guilty, as are large and small firms. Computers have made it simple to cut and past stock objections. The result is a non-jury docket cluttered with motions to compel, a large number of which are settled last-minute. However, a number of them do not, and judges have to sift through some of the most tedious objections you can imagine. It's the only time I ever seriously consider retirement. However, I have discovered I am not alone! The trend is that courts around the country increasingly require litigants provide more than stock objections to discovery requests.

- I draw the reader's attention to an attached unpublished Delaware Chancery Court order [In re Oxbow] of which I have become very fond. The Delaware court bares its judicial teeth at the loathsome practice of responding to discovery requests with boilerplate, generalized objections. The court calls these "inadequate and tantamount to not making an objection at all." The court also harshly criticizes the pervasive practice of asserting privilege without any factual support or privilege log. I read it and am reminded of the scene in the movie "Patton" where Patton overlooks the battlefield action and says, "God help me I do love it so." Please ready the attached case before your next appearance in motions week.

Judge Roger Young, Memorandum to Members of the Charleston County Bar (July 2, 2018); see also Judge Mikell Scarborough, Notice Regarding all Motions to Compel (Sept. 19, 2018). Curtis and Crescom are opinions of Judge Joseph Anderson and Judge Patrick Duffy of South Carolina's District Court. Both of these seasoned and well-regarded judges apply the same principles of discovery to the federal rules, which are substantially similar to South Carolina's. The consistent position of all of these cases, and ever-growing body of case law like them, is that boilerplate, generalized objections like those employed by Ditech in this case are a form of discovery abuse that must be dealt with harshly.[3]

IV. The Attorney Preference Statute applies to persons whose ownership interest will be encumbered by the debt.

The relevant language of the Attorney Preference Statute, quoted in part by Ditech in its brief, is:

> The creditor must ascertain prior to closing the preference of the **borrower** as to the legal counsel that is employed to represent the **debtor** in all matters of the transaction relating to the closing of the transaction and except in the case of a loan on property that is subject to the South Carolina Horizontal Property Act (Section 27-31-10, et seq.) the insurance agent to furnish required hazard and flood property insurance in connection with the mortgage and comply with such preference.

S.C. Code § 37-10-102(a). The words "borrower" and "debtor" are used in the same statute; if the legislature intended for "borrower" to be equivalent to "debtor", it would have used the word "debtor". Accordingly, "borrower" must have a different meaning under this statute. It is reasonable to include non-debtor signatories to the mortgage in the definition

[3] A reversal of this discovery order will necessarily require re-litigation of the motions for summary judgment and the final hearing, with all the attendant costs to Snyder. Therefore, Snyder would ask this Court to consider the sanctions detailed in Argument I.B of Snyder's Principal Brief in response to Ditech's conduct. The sanctions detailed in that argument are the harshest sanctions possible under Rule 37, SCRCP, that comply with the Southern Bankruptcy District of New York's automatic stay.

of "borrower", as that person's ownership interest will be encumbered by the debtor's transaction, as has occurred in this case. Accordingly, it is appropriate to consider the late Mary Snyder a "borrower" under the Attorney Preference Statute by virtue of her ownership of the property and being party to the mortgage that encumbers it.

V. The Master-in-Equity lost jurisdiction over this matter upon the service of the original Notice of Appeal on March 29, 2019.

Ditech's argument on appealability takes a different tack than its argument in its May 16, 2019, Memorandum on Appealability, which stated: "Respondent does not dispute the immediate appealability of the portion of the Court's March 27, 2019 Order granting Ditech partial summary judgment and striking Appellant's defense..." (R. pp. 541-43, 549). If the striking of the Attorney Preference Statute defense was immediately appealable, then the foreclosure action is stayed pending its appeal. The Attorney Preference Statute has a direct effect on the foreclosure action, as should the Estate of Mary Snyder prevail, it would be entitled to a setoff. See Deutsche Bank Nat. Trust Co. v. Booms, Op. No. 2015-UP-097 (S.C. Ct. App. Feb. 25, 2015) (citing S.C. Code § 37-10-105(A)). Further, the immediate appeal of the striking of the Attorney Preference Statute also allows for the consideration of any prior interlocutory orders. See Cox v. Woodmen of the World Ins. Co., 347 S.C. 460, 469, 556 S.E.2d 397, 402 (Ct. App. 2001) ("...an order that is not directly appealable will be considered if there is an appealable issue before the court."). Thus, the Master-in-Equity's March 12, 2014 order amending the caption and March 18, 2019 order denying Snyder's motion to compel were also before the Court of Appeals. As both of these orders have an effect on the foreclosure action as a whole, the Master-in-Equity was divested of jurisdiction upon the service of the first Notice of Appeal on March 29, 2019.

The Master-in-Equity's March 27, 2019, order granting summary judgment does not fall within any of the recognized exceptions in Rule 241(b), SCACR. Therefore, the March 27, 2019, order falls under the "general rule" of Rule 241(a), where "the service of a notice of appeal in a civil matter acts to automatically stay matters decided in the order, judgment, decree or decision on appeal". Ditech should have then sought relief from the automatic stay under Rule 241(c), SCRCP. None of this occurred, and the trial of this matter went forward, over Snyder's objection, on April 1, 2019.

CONCLUSION

For the argument set forth above and in his Principal Brief, Kevin Snyder asks this Court to reverse the decisions of the Charleston County Master-in-Equity, award him the relief requested under the Admin Order, and award him all such other and further relief as this Court deems just and proper.

Dated: 10/11/19

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