

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Ninth Judicial Circuit

RECEIVED
Aug 31 2020
SC Court of Appeals

Honorable Diane S. Goodstein, Circuit Court Judge

Case No.: 2012-CP-10-05887
Appellate Case No. 2020-000162

Pinnacle Bank, as successor in interest to Bank of North Carolina, previous successor in interest to Harbor National Bank, Plaintiff,

v.

Anthony Whitfield and Cindy Whitfield, Defendants

Anthony Whitfield, Counterclaimant,

v.

David Swanson, Counterclaim Defendant

Of Whom Anthony Whitfield is the Appellant and David Swanson is the Respondent.

RESPONDENT'S REPLY IN SUPPORT OF MOTION TO DISMISS APPEAL

Respondent David Swanson, by and through the undersigned counsel, submits this reply in support of its motion to dismiss this appeal.

Argument

A. The civil conspiracy counterclaim is indisputably permissive

In his motion to dismiss this appeal, Respondent established that the civil conspiracy counterclaim is indisputably a permissive counterclaim. Indeed, the facts underlying the civil conspiracy counterclaim relate solely to an alleged conspiracy to give false deposition testimony *after commencement* of the foreclosure action for the purpose of bolstering Pinnacle Bank's defenses to Whitfield's counterclaims. This counterclaim does not and cannot affect the enforceability of the note and mortgage on which Pinnacle Bank was foreclosing, nor did it arise out of the making of the note and mortgage that Pinnacle Bank was foreclosing upon. (Resp. MTD exhibits B-D). Whitfield's counsel conceded as much at the hearing on Respondent's motion to strike the jury demand. (See, Resp. MTD Ex. D) ("we don't believe it [the civil conspiracy counterclaim] relates to the foreclosure action.").

In opposition, Whitfield does not point to any evidence that his counterclaim is compulsory. Rather, Whitfield simply argues that "a controversy exists as to whether the civil conspiracy counterclaim is compulsory or permissive. (App. Return to MTD at pg. 2). However, the only support cited by Whitfield for this argument is his own conclusory statement that "Mr. Whitfield asserts that the civil conspiracy counterclaim is legal and compulsory, entitling him to a jury trial." Mr. Whitfield's conclusory argument that *he* believes his counterclaim is compulsory does not make it so.

The allegations of Whitfield's civil conspiracy counterclaim, (Resp. MTD Ex. B¶66-69), Whitfield's counsel's concession at the hearing on Respondent's motion, (Respond. MTD Ex. D), and Whitfield's own deposition testimony, (Resp. MTD Ex. B, at Ex. F, Whitfield Dep. 33:19-25), confirm that the civil conspiracy counterclaim *does not* relate to the enforceability of the note and

mortgage, nor the transactions or occurrences in which the note and mortgage were originated. Accordingly, the civil conspiracy counterclaim is clearly permissive.

It is well established in this Court that an order striking a jury demand related to a permissive counterclaim asserted in a foreclosure action is not immediately appealable. *C&S Real Estate Servs., Inc. v. Massengale*, 290 S.C. 299, 300. 350 S.E..2d 191, 192 (1986).

Accordingly, the appeal should be dismissed, as Whitfield cannot immediately appeal the trial court's order striking the jury demand where he has waived his right to a jury trial.

B. The trial court did not need Whitfield's consent to exercise her inherent authority to order that the civil conspiracy counterclaim be tried non-jury

As a second argument in opposition to Respondent's motion to dismiss the appeal, Whitfield contends that because he did not consent to withdrawal of the jury demand (which was initially made by both parties to this appeal), that the Court was without authority to strike the jury demand. This argument is without merit as a matter of law.

According to Whitfield, the analysis of this issue stops at Rule 38(d), SCRPC because Whitfield did not consent to withdrawal of the jury demand. Stated differently, Whitfield suggests that the trial court has no power to order a non-jury trial once a party has demanded a jury trial, regardless of whether or not the claim is entitled to a jury trial as of right.

However, Rule 38 does not create a right to a jury trial where one does not exist. Rather, it provides the mechanism for demanding a jury trial on "issue[s] *triable of right by a jury* . . ." and is limited to "issues so triable" by jury. Here, the permissive counterclaim for civil conspiracy was not a claim triable of right by a jury.

Equally unavailing is Whitfield's argument that a party's jury demand under Rule 38 usurps the trial court's authority to strike that demand. This argument is dispelled by Rule 39, SCRPC, which provides that "[w]hen a trial by jury had been demanded as provided in Rule 38 .

. . . [t]he trial of all issues so demanded shall be by jury, unless . . . *the court upon motion or its own initiative finds that a right of trial by jury of some or all of those issues does not exist.*” (emphasis added).

Rule 39, SCRCP provides that the trial court has the inherent authority to order a case be tried non-jury regardless of whether or not a party has moved to have the case tried non-jury, i.e. *on its own initiative*. Thus, although in this case, Respondent did move to strike the jury demand, Judge Goodstein could have ordered the case be tried non-jury without a motion, on her own initiative. Rule 38(d) does not preempt Rule 39, and with or without a motion to strike the jury demand, the trial court is wholly within its right to order a non-jury trial of a claim that is not entitled to a jury trial as of right.

Accordingly, the trial court had the authority to order a non-jury trial of the civil conspiracy counterclaim, and properly did so.

C. Bifurcation of the civil conspiracy counterclaim does not impact the mode of trial

As an initial matter, as Whitfield has settled his case with all parties other than Respondent, Respondent’s appeal of this portion of the order is moot.

Notwithstanding that the appeal of the trial court’s bifurcation order is no longer ripe, Whitfield argues that this appeal is different than *Flagstar Corp. v. Royal Surplus Lines*, 341 S.C. 68, 73, 533 S.E.2d 331, 333-334 (2000) because Judge Goodstein *also* ordered that the counterclaim proceed in a non-jury trial.

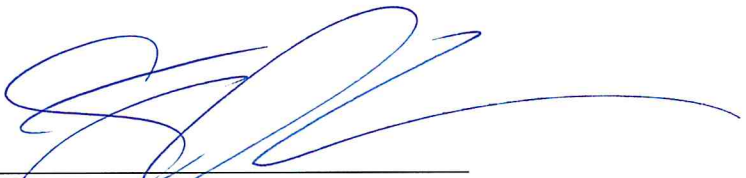
However, an order bifurcating the civil conspiracy counterclaim is not inextricably intertwined with Judge Goodstein’s ruling striking the jury demand. A bifurcated trial of the civil conspiracy counterclaim could just as easily move forward as a jury trial (although, Whitfield is not entitled to a jury trial on this counterclaim).

Flagstar dictates that “trial of all issues in a single proceeding is not a mode of trial to which the parties are entitled as of right.” *Id.* Thus, the order bifurcating the entire civil conspiracy counterclaim from the other causes of action pending between the parties did not affect a mode of trial to which Whitfield was entitled as a matter of right.

Accordingly, the trial court’s order bifurcating the civil conspiracy counterclaim is not immediately appealable and should be dismissed.

WHEREFORE, Respondent respectfully requests that this Court dismiss the appeal.

This 31st day of August, 2020



DAVID W. OVERSTREET
MICHAEL B. McCALL
STEVEN R. KROPSKI
Earhart Overstreet LLC
P.O. Box 22528
(843) 972-9404
Attorneys for Respondent David Swanson

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Of Whom Anthony Whitfield is the Appellant and David Swanson is the Respondent.

PROOF OF SERVICE

I certify that I have served Respondent's Reply in Support of Motion to Dismiss Appeal upon Appellant on 31, 2020, by email addressed to Appellant's attorneys of record as follows:

Jesse Sanchez, Esq.
The Law Office of Jesse Sanchez, LLC
91 ½ Broad Street, Suite B
Charleston, SC 29401
jesse@jessesanchezlaw.com

Brent S. Halversen, Esq.
Brent Souther Halversen, LLC
751 Johnnie Dodds Blvd., Suite 200
Mount Pleasant, SC 29464
brent@halversenlaw.com

Daniel S. Slotchiver, Esq.
Andrew J. McCumber, Esq.
Slotchivere & Slotchiver, LLP
751 Johnnie Dodds Blvd., Suite 100
Mount Pleasant, SC 29464
dan@slotchiverlaw.com
andrew@slotchiverlaw.com

Attorneys for Appellant

This 31th day of August, 2020.



Steven R. Kropski

August 31, 2020

VIA U.S. MAIL and FAX

Jenny Abbott Kitchings, Clerk
V. Claire Allen, Deputy Clerk
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211
803-734-1839

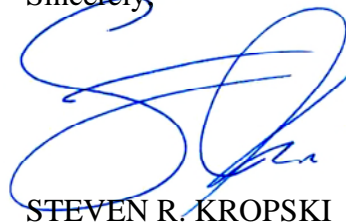
RECEIVED
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Re: Anthony Whitfield, Appellant v. David Swanson, Respondent
Appellate Case No.: 2020-000162

Dear Ms. Kitchings and Ms. Allen:

Enclosed please find ***Respondent David Swanson's Reply in Support of Motion to Dismiss Appeal.*** Please do not hesitate to contact me with any questions or concerns.

Sincerely,



STEVEN R. KROPSKI

SRK/shb
Enclosures

cc: Daniel S. Slotchiver, Esquire (via U.S. mail only)
Andrew J. McCumber, Esquire (via U.S. mail only)
Brent S. Halversen (via U.S. mail only)
Jesse Sanchez, Esquire (via U.S. mail only)