

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Lisa Lee Smith, Special Referee

Appellate Case No. 2020-001389
Case No. 2014-CP-32-02795

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S.C. SUPREME COURT

Federal National Mortgage Association ("Fannie Mae"),
a corporation organized and existing under
the laws of the United States of America,

Respondent,

v.

D. Randolph Whitt and Pearce W. Fleming,

Defendants,

Of whom D. Randolph Whitt is the,

Petitioner.

RESPONDENT'S RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Petitioner brings this action to obtain a determination that the Court of Appeals misinterpreted this Court's decision in *Johnson v. S.C. National Bank*, 292 S.C. 51, 354 S.E.2d 895 (1987), and overlooked its own decision in *Plantation Federal v. Gray*, 401 S.C. 507, 737 S.E.2d 515 (Ct. App. 2013) when it dismissed the Petitioner's appeal. Petitioner contends his counterclaims asserted in response to Respondent's foreclosure action are compulsory and legal based upon the aforementioned authority.

By way of procedural history, Respondent commenced a foreclosure action against Petitioner on August 1, 2014. (R. pp. 30-39). Petitioner served an Answer demanding a jury trial, which asserted unclean hands and failure to state a claim as defenses. (R. pp. 43-45). On March 27, 2015, Petitioner served an Amended Answer and Counterclaim demanding a jury trial.¹ (R. pp. 46-49). Petitioner's Amended Answer admits Petitioner's execution of the subject mortgage, and asserts counterclaims styled as "breach of contract- duty of good faith and fair dealing" and "dual tracking/CFPB Regs." (R. p. 47 ¶¶ 9-15). Respondent filed a Reply on April 6, 2015, and moved to strike Petitioner's demand for a jury trial and for mandatory reference to the Master in Equity.² (R. pp. 54-58). An Order Striking Petitioner's Jury Demand and for Mandatory Order of Reference to Lisa L. Smith as special referee (2015 Order to Strike and Refer) was issued by Judge William P. Keesley on June 11, 2015. (R. pp. 7-8). Petitioner was served with the filed 2015 Order to Strike and Refer on August 20, 2015. (R. p. 59). Appellant did not file a motion under Rule 59, SCRPC or appeal the 2015 Order to Strike and Refer.

¹ It appears neither Appellant's Answer nor Appellant's Amended Answer and Counterclaim was filed with the court based upon the public index.

² By Order entered April 17, 2015, the Honorable James O. Spence, Master in Equity, recused himself from hearing this matter due to a conflict.

Thereafter, Respondent was granted partial summary judgment on April 10, 2017 (2017 Order Granting Partial Summary Judgment). (R. pp. 9-16). The special referee granted Respondent summary judgment as to liability on the foreclosure and damages in the amount of the unpaid principal balance under the loan instruments and the interest accruing thereon. (R. p. 26 ¶¶ 1-13). Summary judgment was denied as to the debt amounts over the unpaid principal balance and interest, and on Petitioner's counterclaims. (R. p. 28 ¶ 13). Petitioner did not file a motion under Rule 59, SCRCP or appeal the 2017 Order Granting Partial Summary Judgment.

After the special referee set the remaining issues for a merits hearing, Petitioner filed a Motion to Transfer the action to the jury roster on September 6, 2017. (R. pp. 190-192). Respondent filed a Response to the Motion to Transfer on September 14, 2017 (R. pp. 193-194), to which Petitioner filed a Reply on September 15, 2017 (R. pp. 195-196). By Order entered November 27, 2017, the Motion to Transfer was denied (2017 Order Denying Motion to Transfer or 2017 Order). (R. pp. 2-6).

Petitioner served a Notice of Appeal of the 2017 Order Denying Motion to Transfer on December 21, 2017. (R. pp. 203-204). Petitioner raised two issues on appeal. First, Petitioner argued that the special referee erred in finding the 2017 Order was a final appealable order. Second, Petitioner argued that the special referee erred in finding Petitioner had no right to a jury trial.

On May 6, 2020, the Court of Appeals issued a decision dismissing the appeal. In its unpublished *per curiam* decision, the Court of Appeals held that Petitioner was not entitled to a trial by jury because the counterclaims he raised in response to Respondent's foreclosure action were legal and permissive. The Court of Appeals correctly concluded that Petitioner waived his right to a jury trial by asserting permissive legal counterclaims and, as such, a jury trial is not a

mode of trial to which Petitioner was entitled. The order from which Petitioner took his appeal was not immediately appealable in consequence, and the dismissal of the appeal based on a lack of jurisdiction was proper.

The Court of Appeals denied a petition for rehearing. Petition has now filed a petition for writ of certiorari.

DISCUSSION

I. The decision of the South Carolina Court of Appeals does not warrant the issuance of a writ of certiorari.

Rule 242(b), SCACR, sets forth the general factors considered by the Court in determining whether issues require review on certiorari. Respondent submits that a writ of certiorari is unwarranted in this case because none of the factors governing review are implicated here. Petitioner presents no novel question of law or federal question. The decision of the Court of Appeals was issued without a dissent, and is consistent with prior decisions of this Court. Specifically, the Court of Appeals correctly applied this Court's holding of *Johnson v. S.C. Nat'l Bank*. The Court of Appeals' ruling is also consistent with this Court's decision in *Carolina First Bank v. BADD, LLC* discussed below. Furthermore, this case does not involve constitutional issues because the order denying Petitioner a trial of his counterclaims was not immediately appealable.

Based upon the foregoing, there is no need for this Court to review the decision of the Court of Appeals.

II. The Court of Appeals was correct in its application of *Johnson v. S.C. National Bank*, and did not overlook *Plantation Federal v. Gray* in support of its dismissal of Petitioner's Appeal.

Petitioner argues his counterclaims are compulsory and legal based on *Johnson* and *Gray*. Petitioner, however, is mistaken because neither of these cases analyze the nature of counterclaims interposed in an equitable action.

In *Johnson*, this Court concluded that both plaintiffs and defendants have a right to a jury trial on compulsory legal counterclaims asserted in response to an equitable action. 292 S.C. at 54, 354 S.E.2d at 895. This Court went on to note that where a complaint is equitable and the counterclaim is legal and compulsory, the trial judge may order separate trials pursuant to Rule 42(b), SCRPC, or order the claims tried in a single proceeding. *Id.* at 55, 354 S.E.2d at 897. Furthermore, if issues common to both legal and equitable claims are to be tried in a single proceeding, the legal issues are to be determined first. *Id.* The compulsory and legal nature of the counterclaim for damages under a guaranty agreement was not in dispute in *Johnson*. Therefore, this decision offers no support for Petitioner's argument.

In *Gray*, a mortgagee amended her answer to assert counterclaims for breach of contract, breach of fiduciary duty, fraud, violations of the South Carolina Unfair Trade Practices Act, and tortious interference with economic opportunities in response to a foreclosure action. 401 S.C. at 509, 737 S.E.2d at 516. The mortgagor bank moved for a separate trial under Rule 42(b), SCRPC, and argued its foreclosure should be tried before the counterclaims. *Id.* Importantly, the bank did not dispute the compulsory and legal nature of the counterclaims, but instead argued that because the property was vacant and the bank had incurred expenses to maintain the property, trying the foreclosure before the counterclaims was warranted and did not prejudice the mortgagee. *Id.* The Court of Appeals cited *Johnson* in finding that it was error to try the

equitable foreclosure before the compulsory legal counterclaims; because the counterclaim allegations shared common questions of fact with the foreclosure, they should be tried first “absent the most imperative circumstances.” *Id.* at 511, 737 S.E.2d at 517. *Gray*’s analysis centered entirely upon whether it was error to have allowed the trial on the foreclosure to proceed before the jury trial on *Gray*’s legal counterclaims; none of its discussion addressed whether the counterclaims were permissive rather than compulsory- a fact which the special referee correctly concluded rendered *Gray* irrelevant to Petitioner’s argument. Therefore, this decision also offers no support for Petitioner’s argument.

A proper analysis of the nature of Petitioner’s counterclaims is found in this Court’s decision in *Carolina First Bank v. BADD, LLC*, 414 S.C. 289, 778 S.E.2d 106 (2015). This Court reversed the Court of Appeals’ ruling that a guarantor is entitled to a jury trial solely based upon a deficiency request, and found that a guarantor’s counterclaims for civil conspiracy and breach of contract were permissive and legal. *Id.* In concluding that the counterclaims were legal and permissive, this Court examined whether the allegations of each claim would render the guarantees unenforceable. *Id.* The claim for civil conspiracy presumed the enforceability of the guarantees and thus, if true, those allegations would not preclude enforcement of the guarantees. *Id.* at 295, 778 S.E.2d at 109. The claim for breach of contract based upon the covenant of good faith and fair dealing implied in the loan instruments was based on the allegation that a civil conspiracy took place two years after the execution of the guaranty agreements. *Id.* at 295, 778 S.E.2d at 110. For this reason, the breach of contract allegations, if true, would not render the guarantees unenforceable. As a result, this Court held that the guarantor had waived his right to a jury trial by asserting these permissive legal counterclaims in response to the foreclosure.


Even putting aside the unappealed grant of summary judgment as to liability and damages as to principal and interest on the foreclosure in this case, Petitioner fails to acknowledge the very basis of his claims and the relief sought. None of Petitioner's allegations have anything to do with the enforceability of the subject note and mortgage and the default in payments. All of Petitioner's allegations center on purported loss mitigation improprieties occurring after the default in payments, which have absolutely no bearing whatsoever on the claim for foreclosure. By asserting these permissive legal claims in Respondent's equitable action, Petitioner waived his right to a jury trial. The Court of Appeals' dismissal of Petitioner's appeal was therefore proper based on existing law.

CONCLUSION

For all the reasons set forth herein, the Respondent respectfully requests that this Court deny the Petitioner's petition for writ of certiorari.

Respectfully submitted,

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