

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Perry H. Gravely, Circuit Court Judge
Robin B. Stilwell, Circuit Court Judge

RECEIVED

Dec 08 2020

SC Court of Appeals

Case No. 2019-001565

Wells Fargo Bank, N. A. Plaintiff – Respondent

v.

Michelle Hodges, Individually and as Personal Representative
of the Estate of Ruth Ladson Witherspoon; Stanley Witherspoon;
SC Housing Corp.; and Twin Creeks Homeowners Association,
Inc. Defendants,

Of Whom Michelle Hodges, in her Individual capacity,
is the Appellant.

AMENDED INITIAL BRIEF

Michelle Hodges, Pro Se Appellant
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Simpsonville, SC 29681
864-714-5263
Certified mail to: PO Box 95
Mauldin, SC 29662

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STATEMENT OF THE ISSUES ON APPEAL FOR ORDER DATED 4/29/2019

1. Did the circuit court commit reversible error, abuse its discretion and violate my due process rights, in denying my motion to amend my 6th amended answer?

STATEMENT OF THE ISSUES ON APPEAL FOR ORDER DATED 8/7/2019

2. Did the Circuit Court err in granting Summary Judgment in favor of Wells Fargo?
3. Did the Circuit Court's Order violate my due process rights?
4. Did the circuit court err in its ruling that the pre signed interrogatory verifications were acceptable?
5. Did the circuit court err in deciding the facts and not framing the issues before referring the case to the master?
6. Did the circuit court err in granting the Plaintiff's motion to strike jury trial?
7. Did the circuit court err in referring the case to the Master in Equity instead of holding that there was an issue for a jury ?

INFERENCE/AMBIGUITY

8. Did the court err in ruling that the loan was due for the 5/12017 payments.?

STATEMENT OF THE CASE

1. On 3/28/2012 My Mother Ruth Ladson Witherspoon signed a Note and Mortgage in favor or NVR Financial.
2. Wells Fargo became the servicer in April of 2012
3. On 7/5/2015, my Mother passed away while she was receiving assistance from SC Help.
4. The SC Help program is a home retention program that issued grants, in the form of a silent second mortgage and was funded by the state.

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5. The most significant requirements of the program were that the property must be owner occupied and when the program stops making the mortgage payments, the owner must remain in the home for 3 years after the payment assistance stops or the silent second mortgage will become all due and payable.
6. The payment assistance began with the September 2014 payment and stopped with the last payment of September 1, 2016 and a Satisfaction of Mortgage recorded on 9/13/2019.
7. All proceeds went to Wells Fargo and if Wells Fargo had foreclosed between 9/1/2016 and 9/1/2019, Wells Fargo would have had to pay the \$36,000.00 back to the SC program.
8. I had not been aware that a Warranty Deed was recorded with the Mortgage that extinguishes the debt and allows me to avoid probate.
9. The Warranty Deed shows Heirs as joint tenants with Ruth Ladson Witherspoon (heirs/survivors - that would be me and my brother Stanley G. Witherspoon)
10. When I called SC Help, I informed them of my Mother's passing and inquired about their programs and explained that I still did not have a job.
11. The representative stated she would call me back and she did a few days later and stated that they could continue the program, because I am a relative and I occupy the home.
12. In November of 2016, Wells Fargo informed me that I was due for the December 1, 2016 payment.
13. In November of 2016, I applied for a loan modification, as I was afraid I would not be able to make the payments. In November I got a part time job and kept my full time job.

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14. I searched for an Assignment of the Note and Mortgage in favor of Wells Fargo and only found an Assignment of Mortgage dated January 17, 2017, which was recorded when the loan was delinquent and due for December 1, 2016.

15. April 5 of 2017 Wells Fargo issued an escrow statement, claiming that there was an escrow shortage of \$3249.95, which was a fraudulent misrepresentation, since the state had been making the payments for 28 months, prior to the program ending 9/1/2016 and before Wells Fargo paid the taxes 11/20/2016.

16. I applied for a loan modification and that was denied

1. On December, 22, 2017, the Plaintiff (Wells Fargo) filed a Summons and Complaint bringing an action against me, in my individual capacity and as the Personal Representative of the Estate of Ruth Ladson Witherspoon, et al... and I answered the complaint and have filed amendment in my individual capacity only. I filed this appeal in my individual capacity only, as I have not come to this court in a representative capacity.(R. ___(Complt)

2. On January 2, 2018, Wells Fargo, further filed a "Certificate of None Owner Occupancy"(R. ___ Cert of NOO)

3. On January 25, 2018, I answered the complaint, (R. ___Ans.), in my individual capacity as I inherited, via joint tenancy with my brother.

4. On July 2018, I had been granted leave to file a 6th Amended answer, which was filed with the court on 7/30/2018.

5. On 3/15/2019 I filed a Motion for leave to file a 7th Amended, followed by a corrected motion dated April 12, 2019. The motion shows I relied on rule 15, established no prejudice as Notice was given and the Plaintiff had an opportunity to refute the claims, discovery not complete and no trial date had been set.



6. On April 29, 2019, the Court issued an order denying my Motion for leave to amend my Seventh amended answer stating ““This matter comes before the Court pursuant to Plaintiff’s motion to Alter or Amend her Complaint for a seventh Time. The Motion is respectfully denied”.

(R. __ Order 4/29/2019)

7. On June 14, 2019 I filed a Motion to Compel responses to fourth set of interrogatories.

8. On June 20, 2018 Wells Fargo filed a Motion for summary judgment (R. ____ Plaintiff’s MSJ).

9. On July 12, 2019 I filed a Memorandum in opposition of the MSJ with an Affidavit (R. __ Defend. Memo in OPP to MSJ)

10. On July 19, 2019 Wells Fargo filed a Reply in Support of its MSJ.(R. __ Plaintiff’s Reply in support of MSJ)

11. On July 24, 2019 an Order was issued and the court made the following rulings in the following items listed below:

- a. The Court Denied Defendant’s motion for sanction, and the Order
- b. states “Defendant Hodges advised that she was only going forward on the Plaintiffs failure to respond to various requests to admit relating to the genuineness and authenticity of documents....Plaintiff would agree To supplement the Plaintiff’s previous response for any requests which specifically related to the authenticity of documents within 10 days from the date of this order.
- c. the Court Denied Defendant’s Motion to compel, the Order states “Defendant Hodges, also indicated that the discovery responses had not been properly verified since the date of the verification was



before the date of the responses”. “The Court finds that this does not make the verification defective and was within the S.C. Rules of Civil Procedure relating to discovery”.

- d. Item 4, The Court removed the case from the 8/5/2019 term of Court and the matter will be referred to the Master in equity
- e. The court stated “the court preliminarily granted Plaintiff’s motion to strike Defendant’s right to a jury trial. (R. ___ Order 7/24/2019)

12. On August 5, 2019 I timely filed a motion for reconsideration of the referral to the Master in equity.(R. ___ Def. Mo for recon 8/5/2019)

13. On August 7, 2019, the court filed its final judgment, and ordered the following:

- a. Wells Fargo’s motion for Summary Judgment is granted in its entirety.
- b. Defendant’s counterclaims are hereby dismissed with prejudice.
- c. Defendant’s affirmative defenses of lack of subject matter jurisdiction, fraud on the court and lack of standing are hereby dismissed with prejudice;
- d. Wells Fargo’s Motion to Strike Jury Demand is granted in its entirety
- e. Action referred to the Master in Equity.(R. ___ Judgment 8/7/2019)

14. On August 16, 2019 I filed a motion for reconsideration of the dismissal of all defenses, which includes the defense of unclean hands, all counter claims , granting Summary Judgment, referral to the master and the striking of the jury trial. (R. ___ Def Mo for Recon8/16/2019)

15. On September 6, 2019 I filed a Notice of Appeal and provided a proof of service on September 16, 2019.

(R. ___ NOA 9/6/2019)



STANDARD OF REVIEW

The South Carolina Appellate courts have held that "A motion to amend pleadings is within the sound discretion of the trial judge" *Health Promotion Specialists, LLC v. S.C. Bd. of Dentistry*, 403 S.C. 623, 632, 743 S.E.2d 808, 812 (2013) (citing *Foggie v. CSX Transp., Inc.*, 315 S.C. 17, 22, 431 S.E.2d 587, 590 (1993)). ".....and his actions will not be disturbed on appeal absent an abuse of discretion. (See *Porter Bros., Inc. v. Specialty Welding Co.*, 286 S.C. 39, 331 S.E. (2d) 783 (Ct. App. 1985)

South Carolina, public policy under Rule 15(a) strongly favors amendments and the court is encouraged to freely grant leave to amend. See "Parker v. Spartanburg Sanitary sewer Dist., 362 S.E. 276, 286, 607 S.E.2d 7111, 717 (Ct. App. 2005). And Rule 15a states, leave shall be freely given when justice so requires and does not prejudice any other party.

Article V, § 5 of the South Carolina Constitution provides in relevant part that the Appellate court's jurisdiction in cases of equity requires that it review the findings of fact as well as the law. It is well settled that the court of appeals may reverse a finding of fact by the circuit court (in a case of equity) when the appellant satisfied the court that the preponderance of the evidence is against the finding of the circuit court. See *Finley*, 55 S. C. 202, 33 S. E. at 360-61.

Therefore the standard of review is de novo based upon the preponderance of the evidence and there must be a showing of an abuse of discretion.

Tanner v. Florence County Treasurer, 521 S.E 2d 153, 336 S. C. 559(1999).

Forrester v. Smith & Steele Builders, Inc., 295 S. C. 504, 507, 369 S.E. 2d 156, 158 (Ct. App. 1988)(stating "proper reasons")

Kurschner v. City of Camden Planning Comm'n, 376 S. C. 165, 171, 656 S.E. 2d 346, 350 (2008)

ARGUMENT

Based on prior precedent the preponderance of the evidence appears to be against the finding of the circuit court's ruling, as shown below:

- a. When I filed a Motion to amend my sixth amended answer, Wells Fargo did not serve or file a responsive pleading that established prejudice, concerning my motion for leave to amend my sixth amended answer. Yet the Circuit court issued an Order of denial. The Public policy of Rule 15a, under the South Carolina Rules of Civil procedure, states "a party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within fifteen days after service of the named amended pleading, whichever period may be the longer".. Per the court of appeals the burden of proof of prejudice is on the opposing party (Tanner v. Florence County Treasurer") and the court of appeal further held that if prejudice is not plead, then there is no reason to deny the motion. (Love v. State). The court of appeal further stated that when a court's ruling is controlled by an error of law there is an abuse of discretion.
- b. Where the Supreme court has articulated the legal analysis which should be utilized ("[T]he mere recital of the discretionary decision is not sufficient to bring into operation a

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determination that discretion was exercised. It should be stated on what basis that discretion was exercised."./opinion/1315169/state-v-smith/)

- c. The circuit court's Order states that the amendment has come before this court for a seventh time. Rule 15a does not limit the number of times a motion for leave to amend pleadings can be filed. The court of appeals has previously held that when a court's decision is controlled by an error of law, there is an abuse of discretion.
- d. Further the number of times that a motion for leave to amend is filed, is not one of the above listed substantial reasons for a denial of the motion. The court of appeals has held that without a proper denial reason there has been an abuse of discretion see *Forrester v. Smith & Steele Builders, Inc.*
- e. The circuit court's order does not show that prejudice or substance was determined.

See Patton, 420 S.E. at 490, 804 S.E. 2d at 262(stating "the Circuit court should have considered whether the defendants were prejudiced by the amendment, or whether there was some other substantial reason to deny it")

A court's failure to exercise its discretion is in and of itself an abuse of discretion, per the SC Supreme court, see (*State v. Hawes*, 411 S.C. 188, 191, 767 S.E.2d 707, 708 (2015) (quoting *Samples v. Mitchell*, 329 S.C. 105, 114, 495 S.E.2d 213, 218 (Ct. App. 1997)



- f. The circuit court's order states this was the filing of a seventh amended answer. And the South Carolina Supreme court held in *Kurschner v. City of Camden Planning Comm'n*, 376 S. C. 165, 171, 656 S.E. 2d 346, 350 (2008) In cases where important decisions turn on questions of fact, due process is implicated. The circuit court's decision to deny my application to amend my sixth amended answer, based solely on the fact that it was my sixth amended answer and without a determination of prejudice or substance; appears that the circuit court violated my due process right to be protected from a mistaken or unjustified deprivation of my right to be heard in a meaningful way, as this led to a decision based on summary judgment, rather than what the court prefers a decision based on the merits.
- g. The seventh amended answer that I submitted to the court was not futile, as it contained a defense that would have prevented summary judgment. My seventh amended answer stated that Wells Fargo was not the holder in due course, as on 1/20/2017, Wells Fargo recorded an assignment of mortgage when it knew the loan was delinquent, as it is the servicer of the loan. This prevented Wells Fargo from obtaining rights to enforce a foreclosure, per South Carolina Code SECTION 36-3-203(b).
- h. I further raised the issue of Joint tenancy, by way of claiming successor in interest to my Mother, in my 7th amended answer page 20 item 24.

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STANDARD OF REVIEW

The appellate court review the granting of summary judgment under the same standard applied by the trial court pursuant to Rule 56, SCRCP Brockbank v. Best Capital Corp., 341-S.C. 372, 379, 534 S. E. 2d 688, 692 (2000).

ARGUMENT

The Issue was raised as to whether or not I am the owner of the subject property by the Plaintiff in its motion for summary judgment pg 9 item c, states that I was just in possession of the property. In my Sixth Amended Answer page 2, item 5. I claimed 50% ownership of the subject property and that my rights were acquired by a special warranty deed and I attached a copy of the warranty Deed to my Affidavit in opposition to the Plaintiff's motion for summary judgment page 23 of affidavit. Without a determination, as to whether or not I am the owner there is no way for the court to determine if I have a claim of possessory of the subject property. Under the US and South Carolina constitutions, I have a right to own property and per South Carolina Code SECTION 29-3-10, the Plaintiff had a right to be determined to be the owner of money lent and I had a right to a determination, as owner of the land and without that determination, my property rights are taken away without Notice and an opportunity and this appears to be a violation of my due process rights.



STANDARD OF REIVEW

The South Carolina Court of Appeals has held that Agency is a question of fact. *Gathers v. Harris Teeter Supermarket*, 282 S.C. 220, 317 S.E.2d 748 (Ct.App.1984). The Court of Appeals has further held that based on the preponderance of evidence Article V, § 5 of the South Carolina Constitution provides in relevant part that our appellate jurisdiction in cases of equity requires that we "review the findings of fact as well as the law." This constitutional provision was adopted as article V, § 4 of the Constitution of 1895.[2]

ARGUMENT

The question as to whether or not a Fiduciary duty was owed, was raised. However, the court has held that in order to determine if a duty exists, it must be determined, as to whether or not a legal relationship existed. Based on the Deposition/evidence submitted by the Plaintiff, attached to its motion for summary judgment, as Exhibit "A: I stated facts to support an agency relationship. I state that an agency relationship was formed out of the mortgage contract with me, as Principal and Wells continued in an Agent role, when my Mother passed away. I reposed a special trust in Wells, as I had to periodically certify for the payments to continue to go to Wells Fargo after my Mother's passing, and Wells Fargo was aware that I reposed a special trust in it, as it was continuing to receive payments from the SC Help program after my mother's passing. An Agency relationship had already been established, as Wells Fargo was continuing to pay the taxes and insurance on my behalf. The South Carolina Supreme Court has held that if there are any facts tending to prove the relationship of agency, it then becomes a question for the jury, citing *Fernander v. Thigpen*, 278 S.C. 140, 293 S.E.2d 424 (1982). However, in this case this was not acknowledged by the circuit court.

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R_____Deposition pages 67, 68, 8s 85, 86

ARGUMENT

The Plaintiff raised the issue that it was the Holder in due Course, and entitled to summary judgment as a matter of law. However South Carolina Code SECTION 36 -3-301 in order to be a Holder in due course with rights to enforce the instrument must be in possession of the original note, must not have had knowledge that the loan was delinquent and not have committed fraud to be a holder in due course with rights to The Circuit granted summary judgment however, the did Not provide any evidence showing that it did not take ownership, when the loan was delinquent.

R_____Defendant's memo in opposition

ARGUMENT UNCLEAN HANDS

ARGUMENT

Wells Fargo received \$36,000.00 from the State of South Carolina via the SC help program, when I asked for a full accounting via interrogatory, there was no response. The program lasted for 28 months the mortgage payment was not over \$1160.00 per month. In October of 2016, Wells Fargo informed me that I was due for the December payment. The December payment was not made until 2/6/2017. In April I received a statement from Wells Fargo that that there was an escrow shortage, when SC help had made the payment over the last 28 months. There was no escrow shortage, evidenced by the Mortgage statements. However, during discovery, when I began to present the mortgage statements Wells Fargo made the motion for summary judgment, so that discovery could not be completed. Wells Fargo misappropriated the funds, the last payment made by SC help was 9/1/2016. Wells Fargo advised me that I was due for the December, so no

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payments were made for October and November of 2016. And Wells Fargo had alleged to me, maybe SC Help had made those 2 payments. In April of 2017 Wells Fargo sent me a escrow statement stating that there was an escrow shortage, when Wells Fargo was attempting to extort the funds from me, while paying my taxes at a non owner occupied rate and claiming that the last payment made was in May. When according to the Mortgage the payment that I gave to Wells Fargo, was required to be paid back to the escrow account, instead Wells Fargo is using that payment to claim that a payment was made in May, when I made that payment, I thought that it was going to be applied to the escrow account. And if the evidence is viewed in the light most favorable to the non moving party, it appears that there is no evidence that the loan is due for the 5/12017 payment. R_____Deposition

ARGUMENT

The Attorney for Wells Fargo used presigned verifications with the interrogatories, which is fraud upon the court and in every other state this fraud upon the court and grounds for disbarment. The circuit did not weigh the attorney signature against Rule 11, which states that the attorney's signature is only a certification that he believes that what he signed it correct. And this has no bearing on interrogatories that are required to be verified. A presigned verification is not a verification at all. R_____Interrogatories

ARGUMENT

I raised the issue of Joint Tenancy in my Third Amended Answer and page 86 of the exhibits, is a copy of the Warranty Deed. (again in my proposed 7th amended answer, I mentioned successor in interest). I provided a copy of Warranty Deed with my Affidavit

A handwritten signature consisting of the number '16' is enclosed within a hand-drawn circle. The signature is written in blue ink.

in opposition to the plaintiff's motion for summary judgment. In south Carolina under 27-7-40 (a)(ii), in the case of joint tenants, when one joint tenant dies the property vests in the other joint tenants and does not pass through to probate, therefore 6 Young Harris was never a probate asset, even though we now have a Deed of Distribution, as Tenants in Common. R_____ Warranty Deed and Deed of Distribution

ARGUMENT

I raise the issue here of the non claim statute under the South Carolina Probate Code 62-3-803(b)(2) per the South Carolina Supreme court this issue can be raised at anytime (Beach First Nat'l Bank v. Gurhnam, 407 S.C. 194, 205, 754 S. E. 2d 875, 881 (2014)). Under the non claim statute all claims of creditor's against decedent Heirs which arose before the death of the decedent must be brought within 1 year South Carolina Probate Code 62-3-803(b)(2) and this was not done by the Respondent. Any other claim, under 62-3-803(c)(1) within the later of 8 months. And this is where the Plaintiff's fraud happened. In the deposition there is an ambiguity on page 26 paragraph 12 the Plaintiff claimed via its attorney that the loan was due for the May 1, 2017 payment, as the last payment was made on 6/16/2017 and Wells Fargo applied the payment to the loan for the April payment. Under this scenario Wellls Fargo would have foreclosed within 8 months of default. However, according to the Mortgage page 4, item 3 (application of payments) shows in what order the payments must be made First to the Mortgage insurance, 2nd to the taxes and hazard insurance, third interest due on the note and fourth the principal of the Note. So, the payment made in June, should have been applied as above and not as the April payment. Wells Fargo, had advised me that I was due for the December 2016 payment. When in fact the loan was due for the October 2016 payment and it appears

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that this is how Wells Fargo created the escrow shortage however, when the payments are properly applied the loan was due for October 2016 and I made December, January and February payments and properly applying the last payment to the escrow account the loan was due for the March payment this would mean that Wells Fargo did not foreclose within 8 months, as required above. R_____ Copy of Mortgage

ARGUMENT

The South Carolina supreme court has held that Summary judgment is inappropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. See *McCall v. Batson*, 285 S. E. 243, 329 S. e. (2d) 741 (1985). I filed a motion to compel responses, which included the complaint about the presigned interrogatories, which was to be heard at the same hearing as the motion for summary judgment. This court had the appearance of bias, as when I explained to the Judge that I did not have notes with me, as I was very nervous and left my notes at home and this was translated into – I didn't want to be heard on the issue. Judge Miller was originally set to hear the motions but Respondent's counsel wanted Judge Gravely to hear the case.

R_____ see attached Notice of Hearing showing Judge Miller was set to hear the case and motion to compel responses to interrogatories and 7/24/19 order.

ARGUMENT

The Circuit court granted Respondent motion to strike my jury demand. However, rule 38(a) stated the right of a trial by jury as declared by the Constitution or as given by a statute of South Carolina shall be preserved to the parties inviolate. The Respondent's Motion to strike did not raise any issue concerning an Agency relationship, which the

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South Carolina Supreme court has stated is a matter of fact for a jury to decide. Since the motion did not pertain to any of my claims, I simply restated the jury demand, which does not constitute a waiver and it appears that my jury demand should stand.

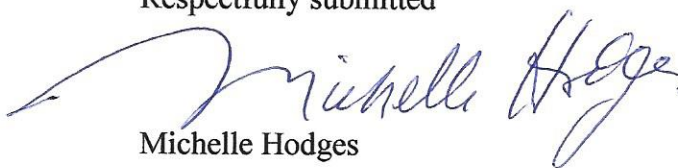
ARGUMENT

I raised the issue of an Agency relationship in the Deposition and per the South Carolina Supreme court any facts that establish an agency relationship must be heard by a jury.

Therefore it appears that the Circuit Court's order of referral to the Master in equity is a violation of my substantial rights to a jury trial to be heard on the facts, as I have not waived my right to a jury trial and it appears that this is an abuse of discretion.

At the hearing I objected to every issue that was raised by the Plaintiff, however, I cannot afford the transcript and when I reached out to the reporter, she indicated that the way in which the hearing was conducted, I could not select the portions of the transcript that I desire.

Respectfully submitted

 12/2/2020

Michelle Hodges

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