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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Bentley D. Price
South Carolina Circuit Court Judge

Appellate Case No. 2020-001204

TEMISAN ETIKERENTSE and IJOEMA ETIKERENTSEAppellants,

v.

SPECIALIZED LOAN SERVICING, LLC Respondent.

APPELLANTS’ RETURN TO RESPONDENT’S MOTION TO STRIKE

INTRODUCTION

Specialized Loan Servicing, LLC’s (“SLS” or “Respondent”) Motion to Strike asks the court to ignore a fundamental tenet of the Supremacy Clause of the United States Constitution, [Art. VI, Clause 2], which provides “[t]he States cannot, in the exercise of control over local laws and practice, vest state courts with power to violate the supreme law of the land.” *Kalb v. Feuerstein*, 308 U.S. 433, 439 (1940).

Respondent seeks to strike matters designated by Appellant for inclusion in the record and a major portion of Appellant’s brief. According to the Respondent, the South Carolina Court of Appeals’ power to proceed with (and determine) a controversy is established under state rules of issue preservation and preclusion. However, that misguided concept of jurisdiction has been universally rejected for over two centuries when federal law is applicable.

The term “jurisdiction” is “a word of many, too many meanings.” *Limehouse v. Hulsey*, 404 S.C. 93, 104 744 S.E.2d. 566 (2013) (quoting *Rockwell Int’l Corp. v. U.S.*, 549 U.S. 457, 467, 127 S.Ct. 1397 (2007)). The *Limehouse* Court held:

“The word “jurisdiction” does not in every context connote subject matter jurisdiction ... Jurisdiction is generally defined as ‘the authority to decide a given case one way or the other. Without jurisdiction, a court cannot proceed at all in any cause; jurisdiction is the power to declare law, and when it ceases to exist, the only function remaining to a court is that of announcing the fact and dismissing the cause.’”

Limehouse, 404 S.C. at 104, 744 S.E.2d at 572 (quoting *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94 (1998)); see also Toal, *et al.*, APPELLATE PRACTICE IN SOUTH CAROLINA 3D. (2016), at 109.

Here, we are dealing with “subject matter jurisdiction.” *Limehouse*, 404 S.C. at 104, 744 S.E.2d at 572. Subject matter jurisdiction “is determined by the state constitution and statutory law.” APPELLATE PRACTICE IN SOUTH CAROLINA 3D., at 110; *State v. Gorie*, 256 S.C. 539, 541, 183 S.E.2d 334 (1971)(“The jurisdiction of a court ... over the subject matter of a proceeding depends upon the authority granted by the Constitution and laws of the state, and is fundamental ... it cannot be waived even by consent ...”).

But Federal law is enforceable in state courts because the U.S. Constitution – and laws passed pursuant to it – are as much laws in the States as laws passed by the state legislature. See *Minneapolis & St. Louis R. Co. v. Bombolis*, 241 U. S. 211, 222 (1916) (“[T]he governments and courts of both the Nation and the several States [are not] strange or foreign to each other in the broad sense of that word, but [are] all courts of a common country, all within the orbit of their lawful authority being charged with the duty to safeguard and enforce the right of every citizen without reference to the particular exercise of governmental power from which the right may have

arisen, if only the authority to enforce such right comes generally within the scope of the jurisdiction conferred by the government creating them.”).

Accordingly, because “[i]t is clearly within Congress’ powers to establish an exclusive federal forum to adjudicate issues of federal law in a particular area that Congress has the authority to regulate under the Constitution,” **federal law** can, by operation of the Supremacy Clause, **pre-empt state law** that gives our courts jurisdiction over certain controversies. *International Longshoremen’s Association, AFL-CIO v. Davis*, 476 U.S. 380, 388 (1986).

In *Construction Laborers v. Curry*, 371 U. S. 542 (1963), the United States Supreme Court made clear that when a state proceeding or regulation is claimed to be pre-empted, the issue is a choice-of-forum rather than a choice-of-law question. *Id.* at 546-48. As such, it is a question whether the State (or another entity) has jurisdiction over the dispute. If there is pre-emption, then **state jurisdiction is extinguished** and a state court will have no subject matter jurisdiction to adjudicate the issue. “In such cases, any judgment issued by the state court will be *void ab initio* because subject matter jurisdiction is pre-empted.” *Longshoremen*, 476 U.S. at 392 (emphasis in original).

ARGUMENT

Because Appellant has raised pre-emption of a South Carolina’s regulatory or adjudicatory powers, “[s]uch a determination of congressional intent and of the boundaries and character of a pre-empting congressional enactment is one of federal law. Pre-emption, the practical manifestation of the Supremacy Clause, **is always a federal question.**” *Longshoremen*. 476 U.S. at 388 (emphasis added). Accordingly, Respondent’s motion to strike portions of Appellant’s designation of matter and of its argument, is misplaced. Appellant is raising federal pre-emption, and pre-empted matters trump state rules of issue preservation and preclusion.

In order for a South Carolina court to overcome deciding the **federal** question of jurisdiction, any “asserted non-federal ground must independently and adequately support the judgment.” *Abie State Bank v. Bryan*, 282 U.S. 765, 773 (1931). To constitute an “independent” state bar, the state law basis for the decision must not be interwoven with federal law and rest purely on state law grounds. *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983); *Harris v. Reed*, 489 U.S. 255, 265 (1989). A state law or procedural rule is “adequate” if it is “firmly established” and “regularly followed.” *Beard v. Kindler*, 558 U.S. 53, 60 (2009) (quoting *Lee v. Kemna*, 534 U.S. 362, 375 (2002)).

A. Respondent’s Motion cannot be an “independent” state ground.

Because “[t]he Supremacy Clause supplies a rule of priority,” *Virginia Uranium, Inc. v. Warren*, 587 U. S. ___, 139 S.Ct. 1894, 1901 (2019), the court must first address the Appellant’s question as to whether the Circuit Court has appellate jurisdiction over: (1) a final unappealed order of a federal bankruptcy court and (2) over a federal agency’s findings in a Consent Order. *Ake v. Oklahoma*, 470 U.S. 68, 75 (1985) (“[W]hen resolution of the state procedural law question depends on a federal constitutional ruling, the state-law prong of the court’s holding is not independent of federal law”). As “the point is not whether state law gives the state courts jurisdiction over particular controversies but whether jurisdiction provided by state law is itself pre-empted by federal law,” any procedural ruling would therefore implicate an underlying question of federal law and state law is not an independent and adequate state ground to support the Circuit Court’s judgment. *Longshoremen*, 476 U.S. at 388.

B. Respondent’s Motion is not an “adequate” state ground.

In reality, Respondent wants the court to invoke a state procedural rule *inapplicable* to claims of federal subject matter jurisdiction. See *Toal et al.*, APPELLATE PRACTICE IN SOUTH

CAROLINA 3D. (2016), at 190 (explicitly noting subject matter jurisdiction as the first exception to issue preservation rules). Also, in South Carolina, the trial court’s lack of subject matter jurisdiction may be raised at any time, even for the first time on appeal. See *In re November 4, 2008 Bluffton Town Council Election*, 385 S.C. 632, 637, 686 S.E.2d. 683 (2009); *State v. Gentry*, 363 S.C. 93, 101-102, 610 S.E.2d 494, 499 (2005). Moreover, the lack of subject matter jurisdiction may not be waived, even by consent of the parties, and should be taken notice of by this Court. *Anderson v. Anderson*, 299 S.C. 110, 115, 382 S.E.2d 897, 900 (1989). *State v. Gorie*, 256 S.C. 539, 541 183 S.E.2d 334 (1971). Because subject matter jurisdiction refers to a courts’ power to hear and determine cases of a general class in which they belong, it is fundamental and cannot be waived. *Dove v. Gold-Kist Inc.* 314 S.C. 235, 238-239, 442 S.E.2d 556, 600-601 (1994).

The entire foundation of the Respondent’s Motion is therefore inapplicable; “state courts may not avoid deciding federal issues by invoking procedural rules that they do not apply evenhandedly to all similar claims.” *Hathorn v. Lovorn*, 457 U.S. 255, 263 (1982); see also *Barr v. City of Columbia*, 378 U. S. 146, 149 (1964) (“Our decisions stress that a state procedural ground is not ‘adequate’ unless the procedural rule is ‘strictly or regularly followed.’”).

Assuming, *arguendo*, that subject matter jurisdiction could be waived – which the South Carolina courts deny – Respondent fails to provide any “strictly or regularly followed” rule requiring a court to strike exhibits based solely on a party’s assertion that “these documents and their descriptions are insufficient to identify them with sufficient specificity.” [Resp. Mot., at 3]. The proper relief appears to be that Appellant should supplement the record. See SOUTH CAROLINA APPELLATE PRACTICE 3D., at 406 (“Failing to be clear is a common cause of the need to supplement the record”). Respondent simply cannot cite state court rules of issue preservation to overcome an argument for lack of subject-matter jurisdiction – much less federal subject-matter jurisdiction!

C. Respondent's Motion is misleading.

Appellant's *Initial Brief* itself refutes Respondent's claim of lack of specificity for the designated materials.

First, the "Chapter 7 Bankruptcy Petition" is referred to in its plain language with bankruptcy case (14-04497-dd) identified, as is the Discharge Order [ECF No. 24-2] and notification of the same sent to SLS and BANA [ECF No. 24-1]. SLS in specifically points to this order in its two letters purported to have offered Appellant a modification. These items are "Undisputed Facts in Record" in the Circuit Court's Order.

Similarly, the June 22, 2015 *Notice of Appearance and Request for Notice with Certificate of Service* was filed by attorney Lawrence Wilbur Johnson Jr., Esquire on behalf of *Specialized Loan Servicing LLC* as the "**creditor**," is identified as "[ECF No. 36]." So is the "Certification of Facts" attached thereto that specifically verifies under penalty of perjury that "movant" "has possession of the Note" and is "the assignee of the Mortgage," as "[ECF No. 37]." Both of these filings by SLS identified bankruptcy case 14-04497-dd in their headings, for which SLS was a party!

Furthermore, "Administrative Proceeding File No. 2020-BCFP-0002, In the Matter of Specialized Loan Servicing, Consent Order dated May 7, 2020," is not only referenced in the Circuit Court's Order, it is specifically stated as being reviewed by the Court in its decision making. Thus, Appellant is at a loss to explain exactly how Respondent cannot identify these materials, which is the basis of Section I of its motion.

D. Respondent's Motion is baseless.

"Whenever the right to property is claimed to have been changed under a judgment or decree by a court, and it is set up as a defense in another court, the jurisdiction of the former may

be inquired into.” *Williamson v. Berry*, 49 U.S. 495, 543 (1850). Aside from the fact that “LPS 7907-7954” are discovery items produced by SLS in this action, they further reveal that SLS sought the jurisdiction of the Bankruptcy Court to determine that it “has possession of the Note” and is “the assignee of the Mortgage,” as the basis for its relief from the automatic stay.

Therefore, Respondent’s argument is baseless. SLS is asking the Court of Appeals to preclude evidence: (1) to establish the bankruptcy court’s jurisdiction discharging Appellant under the Note, by finding it is has possession of the Note (i.e., it was the “holder”); and (2) was therefore the proper party to foreclose the mortgage; as well as (3) to ignore SLS acknowledged and sought such jurisdiction, which goes to proving lack of federal subject-matter jurisdiction. And SLS is asking the Court of Appeals to exclude this evidence on state court grounds, to boot! As demonstrated above, SLS’s request is improper in this context.

CONCLUSION

Federal law has long provided that: “Courts are constituted by authority and they cannot go beyond the power delegated to them. If they act beyond that authority, and certainly in contravention of it, their judgments and orders are regarded as nullities. They are not voidable, but simply void, and this even prior to reversal.” *Elliott v. Peirsol*, 1 Pet. 328, 344 (1828); *Old Wayne Mutual Life Association v. McDonough*, 204 U.S. 8 (1907). In more recent times, the United States Supreme Court has framed the issue more clearly, stating that: “the point is not whether *state* law gives the state courts jurisdiction over particular controversies but whether jurisdiction provided by state law is itself pre-empted by *federal* law.” *Longshoremen*, 476 U.S. at 388.

Respondent’s failure to prove, much less allege, that its Motion constitutes an independent and adequate state ground is fatal, and the Court of Appeals should deny Respondent’s Motion.

The court's power to proceed with and determine this controversy is not established under rules of issue preservation and preclusion, but rather of federal subject matter jurisdiction.

Respectfully submitted,

/s Robert B. Varnado

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that their *Appellants' Return to Respondent's Motion to Strike* in the above referenced case has been served upon counsel of record by mailing a copy in an envelope properly addressed with postage prepaid on this day to the following or via e-mail if so indicated:

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