RECEIVED
May 27 2021
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LANCASTER COUNTY
In The Circuit Court

Brian Gibbons, Circuit Court Judge
William C. Tindal, Special Referee

Appellate Case No. 2018-001823

First Citizens Bank & Trust Company,

Respondent,

v.

Linda P. Faulkner a/k/a Linda Faulkner,
Founders Federal Credit Union, and
CACH, LLC,
of whom Linda P. Faulkner is the

Appellant.

PETITION FOR REHEARING

The Appellant as Petitioner petitions for a rehearing of the matter above under Rules 221(a) and 240, S.C.A.C.R.

This Appeal is from the Orders of the Circuit Court striking the jury request and referring the case to a Special Referee. The Appeal was dismissed by Order of this Court in its Unpublished Opinion No. 2021-UP-162, filed May 12, 2021.

BACKGROUND

The Respondent First Citizens Bank & Trust Company has filed to foreclose the Appellant. Among other defenses, Mrs. Faulkner has plead express and implied waiver based upon that Respondent's draft of payments from 2011 through 2016, and after maturity of the debt. This is the second attempt at foreclosure on the part of the Respondent. Its previous

action, filed as Civil Case No: 2014-CP-29-00954, was subject to the same defense and was dropped by the Respondent.

WAIVER AND ESTOPPEL

This Court concludes that Faulkner's claims of express and implied waiver were not compulsory legal counterclaims that would have entitled her to a jury trial. [ORDER filed Mary 12, 2021, p.2, 1st Para.1]

First, even if the said claims are characterized as defenses rather than counterclaims, they are still for a jury's determination and cannot be referred. In *Jones* v. *Barco, Inc.*, 159 S.E.2d 279, 250 S.C. 522 (1968), our Supreme Court, in discussing the effect of the former Code Section 10-1402, affirmed a party's right to a jury trial on legal issues in an equitable action.

Second, the defense of waiver is clearly compulsory. Rule 8(c), S.C.R.C.P states, in relevant part:

> **(c) Affirmative Defenses; Reply.** In pleading to a preceding pleading, a party shall set forth affirmatively the defenses: . . . waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court shall treat the pleading as if there had been a proper designation.
> [*Id.*, *emphasis added*.]

The Order of May 12th also concludes that such claims of waiver are equitable rather than legal. [ORDER filed Mary 12, 2021, p.2, 1st Para.1] This conclusion is contrary to precedent. The commentators of AMERICAN JURISPRUDENCE 2D state:

> Ordinarily, the question of waiver is one of fact for the a jury. That is to say, where the evidence concerning waiver, or an element or requisite thereof, is conflicting or disputed, or where more than one reasonable inference may be drawn from the evidence, the question of waiver is one for the trier of facts. . . . So too, the sufficiency of the evidence relating to waiver is ordinarily for the jury.
> [28 AM.JUR.2D *Estoppel and Waiver* § 174 (1994); *footnotes omitted*.]

This conclusion is backed by the leading South Carolina case of *Planters' Bank* v. *Lummus Cotton Gin Co.*, 132 S.C. 16, 128 S.E. 876, 41 A.L.R. 592 (125). That case involved the question of whether a bank had knowingly waived, or was estopped from maintaining, its lien on certain machinery. Having reviewed the record, our Supreme Court affirmed the Appellant's right to take the question of the Bank's intention in its action – and thus the question of waiver -- to the jury. The Bank's intention in knowingly accepting payments after maturity of the mortgage is precisely the question raised by the pleadings in this case.

Considered as an estoppel, the conclusion is the same. Again, the commentators of AMERICAN JURISPRUDENCE 2D state:

> Generally speaking, the existence of an estoppel in pais is a mixed question of law and fact. Where the trial is one by jury and the evidence is susceptible of different reasonable inferences, it is the duty of the court to charge and define the law applicable to estoppel, but it is the province of the jury to say whether the facts of the particular case constitute estoppel as defined by the Court. It is a firmly settled principle that the question of the existence of an estoppel is a question to be settled by the triers of facts – that is, the jury in the event of a jury trial, or the trial court in the event the proceedings involve trial without a jury – where there is a dispute as to the facts involving estoppel.
>
> [28 AM.JUR.2D *Estoppel and Waiver* § 174 (1994); *footnotes omitted*, citing *Southern Ry. Co. v. Day*, 140 S.C. 388, 138 S.E. 870 (1926).]

TRUTH IN LENDING

The Order of May 12th, 2021 further concludes as follows:

> Although Faulkner requested actual and statutory damages as well as attorney's fees on her claim for truth in lending violations, this request is not dispositive on the question of whether the claim was legal or equitable. . . . Because the truth in lending violations allegedly occurred in 2008, they could not be the basis for any affirmative relief; rather, Faulkner could assert them only if she alleged an "equitable defense of recoupment." *See* 15 U.S.C.A. § 1640(e) (Supp. 2020) (stating "an action alleging a violation of federal truth in lending laws "may be brought in any United States district court, or in any other court of competent

jurisdiction, within one year from the date of the occurrence of the violation . . . "); *id.* (allowing assertion of a "violation of this subchapter in an action to collect [a] debt which was brought more than one year from the date of the occurrence of the violation as a matter of defense by recoupment or set-off in such action, except as otherwise provided by State law"); *Toluka [sic,* for *Tuloka] Affiliates, Inc.* v. *Moore*, 275 S.C. 199, 202, 268 S.E.2d 293, 295 (1980) (stating section 1640(e) "may not be used to defeat the equitable defense of recoupment" but "may be interposed to bar an affirmative counterclaim or set-off').

The Court accurately states the dates involved in the case and concludes that the Appellant's claim is one of recoupment. It accurately recites that such a claim made after the Truth in Lending statute of limitation is one of recoupment. Thus, the United States Supreme Court has held:

> [R]ecoupment is in the nature of a defense arising out of some feature of the transaction upon which the plaintiff's cause of action is grounded. Such a defense is never barred by the statute of limitations so long as the main action itself is timely.
>
> [*United States* v. *Dalm*, 494 U.S. 596, 599, 110 S.Ct. 1361, 1370, 109 L.Ed.2d 548 (1990), quoting *Bull* v. *United States*, 295 U.S. 247, 55 S.Ct. 695, 79 L.Ed. 1421 (1935).]

The Appellant acknowledges that in *Tuloka Affiliates, Inc.* v. *Moore*, 275 S.C. 199, ___, 268 S.E.2d 293. 295 (1980) our Supreme Court characterized such a claim as "the equitable defense of recoupment." This fact, however, does not settle the issue of the Appellant's right to a jury trial.

In *Curtis* v. *Loether*, 415 U.S. 189, 94 S.Ct. 1005, 39 L.Ed.2d 260 (1974), the United States Supreme Court was faced with the right to a jury trial in a matter of discrimination in housing under a Federal Statute. That Court held:

> As the Court of Appeals [in the case below] observed, however, we have considered the applicability of the constitutional right to jury trial in actions enforcing statutory rights 'as

a matter too obvious to be doubted.' 467 F.2d, at 1114. Although the Court has apparently never discussed the issue at any length, we have often found the Seventh Amendment applicable to causes of action based on statutes. *See, e.g., Dairy Queen, Inc.* v. *Wood*, 369 U.S. 469, 477, 82 S.Ct. 894, 899, 8 L.Ed.2d 44 (1962) (trademark laws); *Hepner* v. *United States*, 213 U.S. 103, 115, 29 S.Ct. 474, 479, 53 L.Ed. 720 (1909) (immigration laws); *cf. Fleitmann* v. *Welsbach Street Lighting Co.*, 240 U.S. 27, 36 S.Ct. 233, 60 L.Ed. 505 (1916) (antitrust laws), and the discussion of *Fleitmann* in *Ross* v. *Bernhard*, 396 U.S. 531, 535 536, 90 S.Ct. 733, 736-737, 24 L.Ed.2d 729 (1970). Whatever doubt may have existed should now be dispelled. The Seventh Amendment does apply to actions enforcing statutory rights, and requires a jury trial upon demand, if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law.

[*Id.*, 415 U.S. 194, 94 S.Ct. 1005, 39 L.Ed.2d 260 (1974); *footnotes omitted; matter in brackets added for clarity*.]

The Appellant contends the holding of *Curtis* is clear: a claim under a Federal statute for damages entitles the claimant to the right to a jury trial on issues of damages.

In application of this right, in *Mosley* v. *National Finance Co., Inc.*, 440 F.Supp. 621 (M.D. N.C. 1977), that Federal Court found that a determination of damages under the Truth in Lending Act could be submitted to a jury, and thus allowed the Defendant's jury request.

Further, in *Barber* v. *Kimbrell's Inc.*, 577 F.2d 216 (4th Cir. 1978), *cert. denied*, 439 U.S. 934, 99 S.Ct. 329, 58 L.Ed.2d 330 (1978), the Fourth Federal Circuit upheld the Defendant's demand for a jury trial in a class action Truth in Lending Act suit.

In *Gnossos Music* v. *Mitken, Inc.*, 653 F.2d 117, 211 U.S.P.Q. 841 (4th Cir. 1981), the Fourth Circuit concluded that the reasoning of the United States Supreme Court in *Curtis* and of its earlier decision in *Barber* required the allowance of a jury trial in a claim under the Truth in Lending Act.

The Appellant is entitled to a determination of her damages under the Truth in Lending Act by a jury. The status of her claim as recoupment has no effect upon that right.

CONCLUSION

The Appellant timely plead for a jury determination of her affirmative defenses and counterclaims. The Order of the Circuit Court overruling that plea, and its referral of all issues to the Special Referee was improper.

For all the reasons set out and referenced herein, the Appellant as Petitioner requests that this matter be reheard by the Court of Appeals, that the Order of May 21st, 2021 be reversed, and for any other relief to which they may be entitled in law or equity.

Respectfully submitted,

John Martin Foster
Post Office Box 106
Rock Hill, S.C.29731-6106
Attorney for Petitioner/Appellant

December 17, 2019

Rock Hill, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
May 27 2021
SC Court of Appeals

APPEAL FROM LANCASTER COUNTY
In The Circuit Court

Brian Gibbons, Circuit Court Judge
William C. Tindal, Special Referee

Appellate Case No. 2018-001823

First Citizens Bank & Trust Company,

Respondent,

v.

Linda P. Faulkner a/k/a Linda Faulkner,
Founders Federal Credit Union, and
CACH, LLC,
of whom Linda P. Faulkner is the

Appellant.

CERTIFICATE OF SERVICE

I certify that I have served the Petition for Rehearing, dated May 27, 2021, on the following counsel or persons of record on the date stated below by depositing the same with the United States mail, with sufficient first class postage attached, properly addressed to the clerk of the Court, and with a copy also directed to the respective last known address(es) of those attorney(s) and/or persons set out below;

J. Kershaw Spong
Mary McDonald Campolong
Sowell Gray Robinson Stepp & Lafitte, LLC
Post Office Box 11449
Columbia. SC 29211
Attorneys for Respondent

John Martin Foster
Attorney for Petitioner/Appellant
SC Bar No. 2086
Post Office Box 106
Rock Hill, S.C. 29731
803 324-8100
803 324-8109: Fax
jmfoster@comporium.net

May 27, 2021

Rock Hill, South Carolina