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THE STATE OF SOUTH CAROLINA
In the Supreme Court

Dec 22 2021
S.C. SUPREME COURT

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appellate Case No. 2021-001292

Deutsche Bank National Trust Company, as Trustee for NovaStar Mortgage Funding Trust, Series 2007-1 NovaStar Equity Loan Asset Backed Certificates, Series 2007-1,.....Respondent,

v.

The Estate of Patricia Ann Owens Houck; Tammy M. Bailey; South Carolina Department of Motor Vehicles, Defendants,

Of whom the Estate of Patricia Ann Owens Houck and Tammy M. Bailey are the.....Petitioners.

REPLY TO RETURN
TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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Petitioners (hereinafter “Bailey and Owens”) hereby submit this reply to the Respondent (hereinafter “Deutsche Bank”)’s return to their petition for a writ of certiorari in this case.

REPLY ARGUMENT

Deutsche Bank’s return fails to provide argument that logically supports the Court of Appeals’ analysis. That analysis depends on what Deutsche Bank terms the “leading claim” distinction. Respectfully to the Court of Appeals, that distinction cannot withstand logical scrutiny. If one claim would affect the enforceability of another claim, the claims’ effect on each other is not changed by which one is brought as a plaintiff’s claim and which is brought as a counterclaim. Deutsche Bank’s argument illustrates that the Court of Appeals decided this case against both law and logic.

I. Deutsche Bank’s return acknowledges that its foreclosure claim would have affected Bailey and Owens’ claim for attorney preference violation with unconscionability in the 2013 action.

Deutsche Bank writes that “[t]his Court has held that the logical relationship determination [i.e., whether a counterclaim is compulsory under Rule 13(a), SCRCPP] is made by asking whether the counterclaim would affect a plaintiff’s right to enforce it’s [sic] claims.” (Return p. 12.) As discussed in the petition, the precedent this Court authored in Carolina First Bank v. BADD, L.L.C., 414 S.C. 289, 295, 296, 778 S.E.2d 106, 109, 110 (2015), and N.C. Fed. Sav. & Loan Ass’n v. DAV Corp., 298 S.C. 514, 518, 381 S.E.2d 903, 905 (1989), plainly provides that there is more to it than that: claims arising out of a common set of facts bear a compulsory relationship with one another, consistently with Rule 13(a)’s dictate that “[a] pleading shall state as a

counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it *arises out of the transaction or occurrence that is the subject matter of the opposing party's claim*[.]” (Emphasis added.)

Bailey and Owens, though, certainly acknowledge that, if a counterclaim would affect a plaintiff’s right to enforce his claim, it is compulsory. BADD, 414 S.C. at 295, 296; Wachovia Bank, N.A. v. Blackburn, 407 S.C. 321, 330 n. 7, 755 S.E.2d 437, 442 n. 7 (2014); DAV Corp., 298 S.C. at 518-19; S.C. Community Bank v. Salon Proz, LLC, 420 S.C. 89, 97, 800 S.E.2d 488, 492 (Ct. App. 2017). Indeed, Deutsche Bank seem at several points to echo Bailey and Owens’ arguments, just advocating for a different result with arguments that back up Bailey and Owens’.

Examining the claims at issue here, if we apply the test as articulated by Deutsche Bank – that the counterclaim (for foreclosure) would have affected the enforceability of the plaintiff’s claim (for violation of the attorney preference statute coupled with unconscionable terms or inducement by unconscionable conduct) – we find that the foreclosure claim is compulsory under that test.

As Deutsche Bank notes, a judgment that the note and mortgage were unenforceable was an available remedy if Bailey and Owens had succeeded in the 2013 action. (Return p. 15-16.) The remedies for a violation of the attorney preference statute, when coupled with an unconscionable agreement or transaction or inducement of the same by unconscionable conduct, are as follows:

(C) If the court finds as a matter of law that the agreement or transaction is unconscionable pursuant to Section 37-5-108 at the time it was made, or was induced by unconscionable conduct, the court may, in an action other than a class action:

(1) refuse to enforce the agreement, or a term, or part of the agreement or transaction that the court determines to have been unconscionable at the time it was made;

(2) enforce the remainder of the agreement without the unconscionable term or part, or limit the application of the unconscionable term or part to avoid an unconscionable result;

(3) rewrite or modify the agreement to eliminate an unconscionable term, part, or result and enforce the new agreement; or

(4) award:

(a) not more than the total amount of the loan finance charge and allow repayment of the unpaid balance of the loan without any finance charge;

(b) not more than double the amount of the excess loan finance charge or other charges or fees actually received by the creditor or paid by the debtor to a third party; and

(c) attorney's fees and costs.

S.C. Code Ann. § 37-10-105.

Had Deutsche Bank brought its counterclaim for foreclosure in the 2013 action and won on it, that would mean that the note and mortgage would be enforced under their terms. See U.S. Bank. Natl. Assn. v. Bell, 385 S.C. 364, 684 S.E.2d 199, 205 (Ct. App. 2009). That would have made it impossible for Bailey and Owens to achieve three of the four kinds of available relief under S.C. Code Ann. § 37-10-105(C). Where success on a counterclaim would make it impossible for a plaintiff to achieve three of the four kinds of relief she could have if she wins on her claim, that counterclaim affects the plaintiff's right to enforce her claims. Using the test as articulated by Deutsche Bank (Return p. 12), Deutsche Bank's counterclaim was compulsory in the 2013 action.

II. Judge Spence granted summary judgment on the claim under S.C. Code Ann. § 29-3-320 for failure to record a satisfaction document.

As it did below, Deutsche Bank contends that Judge Spence never ruled that it had violated S.C. Code Ann. § 29-3-320. The record shows Deutsche Bank is wrong to make that contention. Judge Spence found as follows:

The court concludes that *satisfaction*, within the meaning of S.C. Code Ann. § 29-3-310 and -320, embraces the discharge of the mortgage by operation of law, which extinguishes the mortgage. That is what has happened here, as the undisputed facts show. Bailey and Owens are entitled to summary judgment in their favor as to Deutsche Bank's liability to them under S.C. Code Ann. § 29-3-320.

(R. pp. 33-34.)

Under S.C. Code Ann. § 29-3-320, a party liable thereunder “shall forfeit and pay to the person aggrieved a sum of money not exceeding one-half of the amount of the debt secured by the mortgage, or twenty-five thousand dollars, whichever is less, plus actual damages, costs, and attorney’s fees in the discretion of the court[.]” The unambiguous language of the statute is “shall forfeit[.]” Id. “Ordinarily, the use of the word ‘shall’ in a statute means that the action referred to is mandatory.” S.C. Dept. of Hwys. & Pub. Transp. v. Dickinson, 288 S.C. 189, 191, 341 S.E.2d 134 (1986).

Having granted summary judgment in Bailey and Owens’ favor under S.C. Code Ann. § 29-3-320, Judge Spence was not at liberty to waive the consequences for Deutsche Bank.

III. Deutsche Bank’s argument and the Court of Appeals’ opinion run counter to the purpose of the compulsory counterclaim rule and res judicata, and its “leading claim” distinction does not make sense.

Rule 13(a)’s purpose is “to prevent multiplicity of actions and to achieve resolution in a single lawsuit of all disputes arising out of common matters.” Beach Co. v. Twillman, Ltd., 351 S.C. 56, 62, 566 S.E.2d 863 (Ct. App. 2002).

The South Carolina Reporter’s Note following Rule 13 states: “[c]ounterclaims arising out of the same transaction or occurrence that is the subject of the action are ‘compulsory’ under Rule 13(a) and are barred by res judicata or estoppel by judgment if not asserted.”

Beach Co., 351 S.C. at 62.

What Deutsche Bank argues and what the Court of Appeals held runs counter to this principle.

It also does not make sense. As it stands under the Court of Appeals’ opinion, two claims by opposing litigants that affect each other’s enforceability may bear a compulsory relationship or they may not, depending on which one was brought first (i.e., which, to use Deutsche Bank’s terminology, was the “leading claim”) – even though the claims present the same possibilities for inconsistent outcomes regardless of which is asserted by a plaintiff and which by a defendant. It bears mentioning that Deutsche Bank’s return sets forth no example of such a pairing of claims in which the identity of one claim as the “leading claim” makes a difference about whether the claims can produce inconsistent outcomes.

CONCLUSION

Deutsche Bank and Bailey and Owens already had a case together, a case that arose out of this note and mortgage and the events that created them, a case about

whether this note and mortgage were going to be enforceable or not. Deutsche Bank made the strategic decision not to bring a counterclaim for foreclosure in that case. This was despite Deutsche Bank's knowledge that it had the foreclosure claim at the time it answered in the 2013 action. Because "[a] pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim," Rule 13(a), SCRCF, Deutsche Bank did not have the option to hold its foreclosure claim back like a trump card – it had to play it or lose it. It chose not to play it. It lost it.

The Court of Appeals gave Deutsche Bank a pass on the consequences of its strategic choice. That was unfair, to be sure, but it also added much confusion to the law of compulsory counterclaims and res judicata in this state, enshrining in the law a contradiction to this Court's precedent and to the plain language of Rule 13(a).

This Court can and should correct that.

WHEREFORE, Bailey and Owens pray for this Court to issue a writ of certiorari to review the Court of Appeals' opinion and decision in this case.

Respectfully submitted,

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