IN THE SUPREME COURT OF VIRGINIA

AT RICHMOND

Record No. 180979

GLORIA B. LANE

Appellant

v.

BAYVIEW LOAN SERVICING, LLC; EQUITY TRUSTEES, LLC, AS SUBSTITUTE TRUSTEE; and ERIC CHARLES VON ALLMAN

Appellees

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

AUTHORITIES AND ARGUMENT 2

1. All Aspects of the First Action Establish that the Petition Sought a Temporary Injunction (Assignments of Error 1 and 2) 2

2. Mrs. Lane and BWW Law Group Were Not at Issue in the First Action, Rendering the Injunction Order Interlocutory (Assignments of Error 1 and 2) 4

3. The Conduct of BWW Law Group Is Readily Divisible from the Conduct of Bayview 7

4. The Finding that Mrs. Lane Named an Improper Party Rendered All Other Findings in the Injunction Order Superfluous (Assignments of Error 1 and 2) 8

5. Issue Preclusion (Collateral Estoppel) Is Not Subsumed Into Rule 1:6 (Assignments of Error 1 and 2) 9

CONCLUSION 10

TABLE OF AUTHORITIES

Cases

First Va. Bank-Colonial v. Baker, 225 Va. 72, 81, 301 S.E.2d 8, 13 (1983).7

Funny Guy, LLC v. Lecego, LLC, 293 Va. 135, 143, 795 S.E.2d 887, 890 (2017).....6, 9

Lee v. Spoden, 290 Va. 235, 250, 776 S.E.2d 798, 806 (2015) 9

McLane v. Vereen, 278 Va. 65, 67-68, 677 S.E.2d 294, 295-96 (2009).....6

Potts v. Mathieson Alkali Works, 165 Va. 196, 181 S.E. 521 (1935) ...4, 5, 6

Snead v. Bendigo, 240 Va. 399, 402, 397 S.E.2d 849, 851 (1990) 8

Waterfront Marine Constr. v. N. End 49ers Sandbridge Bulkhead Grps. a, 251 Va. 417, 427 n.2, 468 S.E.2d 894, 900 (1996).....8

Other Authorities

Ballentine's Law Dictionary (2010).....5

Rules

Va. Sup. Ct. R. 1:4(e).....5

Va. Sup. Ct. R. 1:6.....9

Va. Sup. Ct. R. 3:19(a).....5

Va. Sup. Ct. R. 3:20.....6

Treatises

1 Bryson on Virginia Civil Procedure § 8.07 (2018).....4, 5

1 Virginia Civil Procedure § 14.11 (2018).....9

1 Virginia Remedies § 51-5 (2018). 3

INTRODUCTION

The trial court improperly ruled that the Injunction Order[1] in the First Action, which involved Mrs. Lane and BWW Law Group only, barred Mrs. Lane from pursuing her claims in the Amended Complaint[2] against Appellees, Bayview Loan Servicing, LLC ("Bayview") and Eric Charles Von Allman ("Mr. Von Allman").[3] In making this ruling, the trial court necessarily found that the First Action and the Amended Complaint arose from the same conduct, transaction, or occurrence and that the First Action resulted in a decision on the merits by a final judgment. As set forth in Mrs. Lane's Opening Brief and buttressed below, the First Action involved the separate and distinct conduct of BWW Law Group such that the Second Action asserted a separate cause of action against Appellees, and, in any event, the First Action never resulted in a decision on the merits by a final judgment. Appellees attempt to argue otherwise, but a fair assessment of the actual

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[1] The term "Injunction Order" in this brief refers to the trial court's January 20, 2017 Order denying the Petition for Injunction (the "Petition") filed by Appellant, Gloria B. Lane ("Mrs. Lane"), against BWW Law Group, LLC ("BWW Law Group") in the matter styled as *Gloria B. Lane, Petitioner, et als. v. Substitute Trustee BWW Law Group, LLC* – Case Number CL16000991-00 (the "First Action").

[2] The term "Amended Complaint" in this brief refers to the Amended Complaint filed in this case (the "Second Action") in the trial court.

[3] Equity Trustees, LLC, the third defendant in the Second Action, has not filed a brief. Therefore, the term "Appellees" in this brief refers to the two Appellees who filed briefs, i.e. Bayview and Mr. Von Allman.

course of the First Action establishes that it cannot be the basis for either *res judicata* (claim preclusion) or collateral estoppel (issue preclusion) with respect to the Second Action. Accordingly, this Court should reverse the decision of the trial court to sustain Bayview's Plea of *Res Judicata* and dismiss the Amended Complaint, with prejudice as to Bayview, Mr. Von Allman, and Equity Trustees.

AUTHORITIES AND ARGUMENT

1. All Aspects of the First Action Establish that the Petition Sought a Temporary Injunction (Assignments of Error 1 and 2)

Appellees take great pains to characterize the First Action as seeking a permanent injunction, but all aspects of that proceeding establish that it was conducted on an emergency basis because Mrs. Lane sought a temporary, not permanent, reprieve from foreclosure. Mrs. Lane submits that the procedural conduct of the First Action underlies the merit of her appeal. The First Action followed the course of a proceeding for a temporary injunction:

1. The trial court conducted its hearing *on the second day after the filing of the Petition that was not a Saturday, Sunday, or legal court holiday*;

2. The Petition and Summons were served on BWW Law Group on the same day as the hearing; and

3. The trial court entered the Injunction Order even though BWW Law Group never filed a responsive pleading to the Petition.

Neither Bayview nor Mr. Von Allman truly addresses these aspects of the First Action. Instead, Appellees summarily contend that Mrs. Lane sought a permanent injunction. However, it is clear that by prevailing in the First Action, Mrs. Lane would not have obtained a permanent reprieve from foreclosure on the residence. If the trial court granted the Petition in the First Action, there would have been no permanent alteration of the "legal relations of [Mrs. Lane and BWW Law Group]." 1 Virginia Remedies § 51-5 (2018). In other words, an Order granting the Petition would have maintained the existing relationship between Mrs. Lane and BWW Law Group. The Petition itself only refers to the sale scheduled for January 4, 2017 and cannot be construed, even in the light most favorable to Appellees, to seek to permanently enjoin foreclosure action by BWW Law Group, much less Bayview. Tellingly, Mr. Von Allman admits that the January 3, 2017 proceeding in the First Action constituted an emergency hearing. Von Allman Br. at 11. The trial court proceeding on January 3, 2017 was an emergency hearing on a Petition for temporary injunction, which means that the Injunction Order cannot form the basis for a finding of claim preclusion to bar the relief sought by Mrs. Lane in the Second Action. Accordingly, the trial

court deprived Mrs. Lane of her day in court by barring the claims in the Second Action, and that decision should be reversed in this appeal.

2. Mrs. Lane and BWW Law Group Were Not at Issue in the First Action, Rendering the Injunction Order Interlocutory (Assignments of Error 1 and 2)

It is undisputed that BWW Law Group never filed a responsive pleading in the First Action, rendering the Injunction Order interlocutory as a matter of law. Bayview and Mr. Von Allman make tortuous arguments in an effort to avoid the import of *Potts v. Mathieson Alkali Works*, 165 Va. 196, 181 S.E. 521 (1935). Nonetheless, *Potts* remains good law and is directly applicable to this appeal. In Virginia, a cause is not matured until "the defendant has put in his response or the time allowed therefore has expired." 1 Bryson on Virginia Civil Procedure § 8.07 (2018). *Potts* specifically recognizes that "no court can…render its judgment upon a right, however meritorious, which has not been pleaded and claimed," yet Appellees argue that the trial court entered final judgment for BWW Law Group even though it never filed a responsive pleading. *Potts*, 165 Va. at 207, 181 S.E. at 525.

Without any legal support, Mr. Von Allman contends that trial courts may enter final judgment after an emergency hearing. Assuming *arguendo* that a hypothetical situation could be conceived in which final judgment on the merits is rendered after an emergency hearing, it is a bridge too far to

argue that the trial court rendered final judgment on the Petition after an emergency hearing and prior to the filing of any written response by BWW Law Group. Mr. Von Allman further contends that Mrs. Lane's position is such that "there could never be a judgement [sic] order based on *ex parte* proof." Von Allman Br. at 12. Of course, all, or nearly all, *ex parte* decisions and orders are temporary until there is full notice and opportunity to be heard. However, *ex parte* proof may be presented in a default context because the parties *are at issue* by virtue of defendant's default and the operation of Rule 3:19(a) and Rule 1:4(e). *See* 1 Bryson on Virginia Civil Procedure § 8.07 (2018). In other words, the defendant in default has effectively "answered" by admitting the facts pled in the complaint. Like most of Mr. Von Allman's arguments, his contention regarding *ex parte* proof fails to withstand even slight scrutiny.

Unable to fully grapple with *Potts*, Bayview seeks to redefine the term "at issue." However, as shown above, the defendant in a cause in Virginia must either respond or fail to respond within the time allotted for that cause to mature. 1 Bryson on Virginia Civil Procedure § 8.07 (2018); *see also* Ballentine's Law Dictionary (2010) ("[t]he status of a case at bar, in reference to the pleadings, where the issues of fact are completely drawn, so that the case can come before the trier of fact, whether court or jury"). *Potts* means

what it says: judgment may not be rendered unless a right has been "pleaded and claimed." *Potts*, 165 Va. at 207, 181 S.E. at 525. Whether the parties are at issue in a cause matters, as recognized by this Court in Rule 3:20: "[a]ny party may make a motion for summary judgment at any time after the parties *are at issue*." Va. Sup. Ct. R. 3:20.

McLane v. Vereen is readily distinguishable from this case because the trial court proceedings appear to have followed the normal course, i.e. complaint, responsive pleading, and then final order. 278 Va. 65, 67-68, 677 S.E.2d 294, 295-96 (2009). *McLane* involved normal procedural conduct in the trial court, not an emergency hearing mere days after the filing of the complaint with no responsive pleading filed by the defendant. Even though Bayview and Mr. Von Allman had no involvement in the First Action, they seek to elevate the Injunction Order beyond its clearly interlocutory status, thereby depriving Mrs. Lane of her "one full, fair hearing" against the proper parties. *Funny Guy, LLC v. Lecego, LLC*, 293 Va. 135, 143, 795 S.E.2d 887, 890 (2017).

Because the parties were not at issue in the First Action, the cause in the Petition never matured, and the trial court could not enter final judgment against Mrs. Lane and in favor of BWW Law Group. Nothing in the Appellees' briefs effectively rebuts this conclusion.

3. The Conduct of BWW Law Group Is Readily Divisible from the Conduct of Bayview

Bayview and Mr. Von Allman improperly attempt to invoke claim preclusion to bar Mrs. Lane's claims against them, even though they were uninvolved in the First Action and engaged in separate and distinct conduct from BWW Law Group. The trial court specifically found in the Injunction Order that BWW Law Group had been improperly named in the First Action. (JA 183). In other words, the Petition sought a temporary injunction to stop a *prospective foreclosure* by BWW Law Group, which, as the trial court recognized, was not the correct party to enjoin from foreclosing on the residence. (JA 183). Simply put, Mrs. Lane had no cause of action to assert against BWW Law Group, so there were no "operative facts…giv[ing] rise to [a] right of action" against BWW Law Group. *First Va. Bank-Colonial v. Baker*, 225 Va. 72, 81, 301 S.E.2d 8, 13 (1983). Therefore, the cause of action at issue in the Amended Complaint necessarily differed from the absent cause of action in the First Action. The Appellees fail to effectively address this point because they are unable to do so. Bayview and Mr. Von Allman's conduct at issue in the Second Action is readily divisible from the conduct of BWW Law Group in the First Action, rendering claim preclusion inapplicable to Mrs. Lane's claims in the Second Action.

4. The Finding that Mrs. Lane Named an Improper Party Rendered All Other Findings in the Injunction Order Superfluous (Assignments of Error 1 and 2)

In the first "finding" paragraph of the Injunction Order, the trial court made stated the following: "[b]ecause the Plaintiff has failed to name Equity Trustees, LLC as a party to this action, injunctive relief is not warranted in this matter." (JA 183). Effectively, this is the first legal finding in the Injunction Order. Because the trial court found that Mrs. Lane named an improper party in the Petition, each of the remaining legal findings in the Injunction Order is unnecessary to the outcome of the First Action. Because Bayview's compliance with the pre-acceleration requirement of the deed of trust was not essential to the Injunction Order, Mrs. Lane's claim in Count One of her Amended Complaint cannot be barred by issue preclusion. *See Snead v. Bendigo*, 240 Va. 399, 402, 397 S.E.2d 849, 851 (1990). Bayview contends that the trial court would have granted injunctive relief in the First Action if it had found a deficiency in the pre-acceleration notice. This contention conflicts with the plain language of the Injunction Order, and "a court speaks through its orders." *Waterfront Marine Constr. v. N. End 49ers Sandbridge Bulkhead Grps. a*, 251 Va. 417, 427 n.2, 468 S.E.2d 894, 900 (1996). Other than the finding that BWW Law Group was not a proper party to the First

Action, the Injunction Order consisted of superfluous findings amounting to advisory opinions, which cannot be used to establish issue preclusion.

5. Issue Preclusion (Collateral Estoppel) Is Not Subsumed Into Rule 1:6 (Assignments of Error 1 and 2)

Mr. Von Allman continues to incorrectly assert that "collateral estoppel…is subsumed into the provisions of Rule 1:6" because "Rule 1:6…does not mention issues preclusion or collateral estoppel." Von Allman Brief. at 16. Unmentioned in this assertion is the fact that Rule 1:6 is actually entitled, "Res Judicata *Claim Preclusion*." Va. Sup. Ct. R. 1:6 (emphasis supplied). If Mr. Von Allman is right on this point, then Professor Sinclair and Mr. Middleditch must be wrong:

> Collateral Estoppel or 'Issue Preclusion' is Not Affected….Virginia has an often-articulated multi-part test for determining whether collateral estoppel bars relitigation of a fact previously decided. That issue is not currently causing difficulty in Virginia practice, and no proposal for change was warranted regarding collateral estoppel. The Rule scheduled to become effective July 1, 2006 deals only with res judicata and claim preclusion in a second suit, not collateral estoppel.

1 Virginia Civil Procedure § 14.11 (2018). Contrary to Mr. Von Allman's assertions, Virginia law related to issue preclusion is unchanged by Rule 1:6. *See Lee v. Spoden*, 290 Va. 235, 250, 776 S.E.2d 798, 806 (2015); *Funny Guy, LLC*, 293 Va. at 142, 795 S.E.2d at 890.

CONCLUSION

WHEREFORE, Mrs. Lane prays that the Supreme Court of Virginia reverse the April 26, 2018 Order and May 14, 2018 Order of the trial court and remand the Second Action to the trial court for trial on the Amended Complaint.

Respectfully submitted,

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CERTIFICATE

Pursuant to Rule 5:26(h) of the Rules of the Supreme Court of Virginia, counsel for the Appellant, Gloria B. Lane, certifies that on March 1, 2019, the undersigned counsel:

1. Complied with the requirements of Rules 26 of the Rules of the Supreme Court of Virginia with regard to the filing and service of this Reply Brief of Appellant;

2. Caused an electronic version, in Portable Document Format (PDF), of the Reply Brief of Appellant signed by counsel of record for the Appellant with the Clerk of this Court by electronic transmission in accordance with the VACES Guidelines and User's Manual using the Virginia Appellate Court eBriefs System;

3. Will cause to be filed in the Office of the Clerk of this Court, within one (1) business day, three (3) printed copies of this Reply Brief of Appellant;

4. Caused to be e-mailed on opposing counsel a copy of this Reply Brief of Appellant as set forth below:

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5. This Reply Brief of Appellant does not exceed fifteen (15) pages, excluding its cover page, table of contents, table of authorities, and certificate.

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