Note: In the case title, an asterisk (*) indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2020-153

JULY TERM, 2021

Wells Fargo Bank, N.A., Trustee v. Fuad Ndibalema* et al.	}	APPEALED FROM:
	}	
	}	Superior Court, Washington Unit,
	}	Civil Division
	}	
	}	DOCKET NO. 207-4-18 Wncv
		Trial Judge: Timothy B. Tomasi

In the above-entitled cause, the Clerk will enter:

Defendant appeals the civil division's dismissal of this foreclosure action, arguing that the court failed to address his motion to amend his answer to add counterclaims against plaintiff. We remand for further proceedings consistent with this decision.

In April 2018, plaintiff filed this action to foreclose a mortgage on a residential property owned by defendant in Barre.[*] Defendant filed an answer in which he denied that plaintiff had standing to enforce the note and mortgage or that he owed a debt. He alleged that plaintiff violated the Real Estate Settlement Procedures Act and the Fair Debt Collection Practices Act, defamed him by filing suit against him, and engaged in a conspiracy related to the Gold Repeal Act. He requested damages and demanded a jury trial. Defendant subsequently moved for judgment by default on his counterclaim, which plaintiff opposed.

In August 2018, defendant filed a forty-five-page document, the title of which began: "Motion to Strike Counterclaim-Defendants' Opposition to Counterclaimant's Motion for Entry of Default . . . ." Several pages into this document, defendant requested permission to file an amended answer and counterclaims. He proposed to rename and renumber his original counterclaims and to add counterclaims that plaintiff violated 8 V.S.A. § 2922 and the federal Racketeering Influenced and Corrupt Organizations Act (RICO) by misrepresenting the property's value and the loan-to-value ratio during the mortgage lending process. He sought satisfaction of the mortgage, cancellation of the note, and damages of $1.6 million. Plaintiff opposed the motion to amend, arguing that the proposed counterclaims did not comply with Vermont Rule of Civil Procedure 8(a), plaintiff would be prejudiced by the amendment, and the amendment would be futile because defendant failed to state a claim under RICO or 8 V.S.A. § 2922.

[*] The complaint named several co-defendants, none of whom are parties to this appeal.

In February 2019, the court denied defendant's August 2018 motion as "moot," referring to a separate entry order in which it ruled that defendant's motion to dismiss was timely filed. The court appears to have overlooked defendant's request to amend his pleadings, because in a separate entry order denying defendant's motion to strike plaintiff's opposition to defendant's motion to amend his counterclaims, the court stated: "No motion to amend counterclaim was ever filed."

The court subsequently granted plaintiff's motion to dismiss defendant's counterclaims pursuant to Vermont Rule of Civil Procedure 12(b)(6). The decision only referred to the claims defendant raised in his original answer and not to the proposed RICO claim.

Defendant subsequently filed a motion "to correct clerical error." He argued, inter alia, that the court mistakenly stated in its February 2019 entry order that he had never moved to amend his counterclaims, because he had in fact done so in his August 2018 motion. The court denied the motion without comment.

Defendant then filed a motion for judgment on the pleadings, which included a request for the court to rule on his pending motion to amend his counterclaims. The court denied the motion for judgment on the pleadings as untimely and did not address the pending motion to amend.

A two-day bench trial took place in November 2019 and March 2020. Following trial, defendant filed a motion for partial judgment in his favor on the foreclosure action. He asked the court to rule on his motion to amend his counterclaims and to allow a separate trial on the counterclaims. In April 2020, the civil division issued a written order in which it determined that plaintiff had not proven that it had standing to foreclose the note and mortgage because plaintiff had failed to timely provide an original copy of an allonge giving plaintiff the right to enforce the note and had not provided evidence of the original assignment of the mortgage to plaintiff. The court accordingly dismissed plaintiff's complaint with prejudice. The court denied defendant's motion for partial judgment as moot.

Defendant moved for reconsideration, arguing that the court had not addressed his counterclaims and requesting a jury trial on those claims. The court denied the motion, stating that it had ruled in March 2019 that defendant's counterclaims were not cognizable as affirmative claims. This appeal followed.

On appeal, defendant argues that the court's decision must be reversed because it never addressed his motion to amend his counterclaims. Where, as here, permission is required to amend a pleading, Rule 15(a) provides that "leave shall be freely given when justice so requires." V.R.C.P. 15(a). "In considering motions under Rule 15(a), trial courts must be mindful of the Vermont tradition of liberally allowing amendments to pleadings where there is no prejudice to the other party." Colby v. Umbrella, Inc., 2008 VT 20, ¶ 4, 184 Vt. 1. However, the court may deny permission based on "(1) undue delay; (2) bad faith; (3) futility of amendment; and (4) prejudice to the opposing party." Perkins v. Windsor Hosp. Corp., 142 Vt. 305, 313 (1982). We review the court's decision on a motion to amend for abuse of discretion, Colby, 2008 VT 20, ¶ 4, "which requires a showing that the trial court has withheld its discretion entirely or that it was exercised for clearly untenable reasons or to a clearly untenable extent." HSBC Bank USA N.A. v. McAllister, 2018 VT 9, ¶ 8, 206 Vt. 445 (quotation omitted).

In this case, the court withheld its discretion entirely, because it simply never addressed defendant's motion to amend his counterclaims. We therefore agree that the matter must be remanded for the trial court to address defendant's August 2018 motion to amend in the first instance. Our holding should not be interpreted as a suggestion that defendant's motion must necessarily be granted; the merits of the motion are for the trial court to decide in the first instance.

It is unclear whether defendant also seeks to reverse the court's dismissal of his original counterclaims. Because we conclude that the matter must be remanded, we address this question in order to clarify the scope of issues remaining to be addressed below. We conclude that the court appropriately dismissed those claims. A claim may be dismissed under Rule 12(b)(6) if, "taking all of the nonmoving party's factual allegations as true, it appears beyond doubt that there exist no facts or circumstances that would entitle the [claimant] to relief." Alger v. Dep't of Lab. & Indus., 2006 VT 115, ¶ 12, 181 Vt. 309 (quotation omitted). Defendant's original answer raised certain affirmative defenses, including that plaintiff lacked standing to enforce the note. It also asserted counterclaims for defamation, violation of the Gold Repeal Act, and monetary damages. These counterclaims were unsupported by any factual allegations whatsoever and therefore failed to state a claim for which relief could be granted. See Colby, 2008 VT 20, ¶ 10 (affirming denial of amendment to add intentional-infliction-of-emotional-distress claim as futile under V.R.C.P. 12(b)(6) where amended complaint lacked any facts supporting elements of such claim). Dismissal of these counterclaims was proper.

To the extent that defendant seeks to overturn the judgment below on the basis that he was denied his right to a jury trial, this claim lacks merit. At the time of trial, the only issue before the court was plaintiff's claim for equitable relief in the nature of foreclosure. We have held that there is no right to a jury trial on such a claim. See Merchants Bank v. Thibodeau, 143 Vt. 132, 134 (1983). Even if such a right existed, the record supports the trial court's conclusion that defendant waived it. Despite demanding a jury in his original pleadings, defendant did not specifically object to the lack of a jury, and he participated fully at trial. We agree that this conduct constitutes a waiver. See CoxCom, Inc. v. Chaffee, 536 F.3d 101, 111 (1st Cir. 2008) (explaining that party's participation in bench trial without objection may constitute waiver of jury-trial right).

We also agree with plaintiff that, to the extent defendant seeks to challenge the trial court's decision dismissing plaintiff's foreclosure complaint, he lacks standing to do so because he was not adversely affected by the judgment. See In re M.C., 156 Vt. 642, 643, 590 A.2d 882, 882 (1991) ("[T]o establish standing, the rights of the party seeking to appeal must be adversely affected by the judgment."). To the contrary, defendant prevailed below. "[A] winner cannot appeal a judgment merely because there are passages in the court's opinion that displease him—that may indeed come back to haunt him in a future case." Abbs v. Sullivan, 963 F.2d 918, 924 (7th Cir. 1992).

Defendant argues, however, that the trial court improperly opined on the preclusive effect of its decision. Although we have discouraged this practice, we do not view it as a basis for reversing the judgment in this case. Rather, we have held that when a court chooses to address the preclusive effect of its decision, "its ruling is entirely prudential and not compelled by law, and it is generally the duty of the second trial court—which knows both what the earlier finding was and how it relates to a later case—to independently determine what preclusive effect a prior judgment may be given." Cenlar FSB v. Malenfant, 2016 VT 93, ¶ 42, 203 Vt. 23 (quotation omitted). Thus,

any arguments defendant has about the preclusive effect of the court's decision may be raised in a future case, if such case arises.

Remanded for the trial court to address defendant's August 2018 motion to amend his pleadings.

BY THE COURT:

Paul L. Reiber, Chief Justice

Harold E. Eaton, Jr., Associate Justice

William D. Cohen, Associate Justice