Circuit Court for Baltimore City
Case No. 24-O-17001437

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2778

September Term, 2018

SPENCER ARRINGTON

v.

OCWEN LOAN SERVICING, LLC

Fader, C.J.,
Beachley,
Wilner, Alan M.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Wilner, J.

Filed: December 26, 2019

FACTUAL AND PROCEDURAL BACKGROUND

This case began in July 2017 as a foreclosure action filed in the Circuit Court for Baltimore City by substitute trustees Carrie Ward and others (whom we henceforth shall refer to collectively as Ward). The action, commenced by an Order to Docket, was based on a default on a promissory note secured by a deed of trust on residential property owned by appellant. The debt was owed to HSBC Bank USA, as trustee of the Fieldstone Mortgage Investment Trust Series 2006-3. Appellee, Ocwen Loan Servicing, LLC, was identified as the servicer for the owner of the debt but was not a party to the case as initially filed.

The case was captioned, and remained captioned, *Carrie Ward v. Spencer Arrington*. In accordance with the court's Differentiated Case Management Plan, adopted pursuant to Rules 16-105(b)(5) and 16-302(a), the case was assigned to Track 8, which is reserved for foreclosure actions involving residential real property. Track 8 cases are not routinely referred for scheduling conferences and are not subject to the kind of procedural time deadlines applicable to general civil cases.

In November 2017, Arrington filed what he termed a Counter Complaint against appellee Ocwen for breach of contract (Count I), defamation (Count II), violation of the Maryland Mortgage Fraud Protection Act (Md. Code, Real Property Article, Title 7, Subtitle 4) (MMFPA) (Count III), detrimental reliance/promissory estoppel (Count IV), and a declaratory judgment that Arrington's loan was current and that Ocwen acted with unclean hands and was not entitled to any equitable relief (Count V). Neither HSBC nor

the substitute trustees were named as counter-defendants; nor was any wrongdoing alleged on their part. The only counter-defendant was Ocwen.[1]

The alleged breach of contract was based on allegations that Ocwen and appellant had entered into a loan modification agreement and that Ocwen breached the agreement by refusing to accept monthly payments tendered by Arrington. The alleged defamation involved prefiling false statements made by Ocwen that Arrington was past due on his loan and in default when the default "was created solely by Ocwen's incompetence and reckless disregard for its duties as a mortgage servicer." Count III alleged Ocwen's knowing conduct to defraud Arrington by dishonest statements and omissions and "willful refusal to know the true facts." Count IV charged that Ocwen led appellant reasonably to believe that he was eligible for a loan modification under the Home Affordability Modification Program (HAMP) which induced him to make monthly payments that Ocwen then rejected. A jury trial was requested on the counter-complaint.

Contemporaneously, Arrington filed two motions. One was for a track reassignment to Track 3, which is reserved for civil cases and provides for a scheduling conference and various procedural deadlines, including discovery. Arrington asserted that a scheduling order would be necessary to guide the parties and the court and preserve Arrington's right to a jury trial on the "law" counts before the equitable remedy of foreclosure was permitted to proceed.

[1] That counter complaint, and the two amended versions of it, are sometimes referred to as a counterclaim. We shall use those terms interchangeably.

The second motion was to stay or dismiss the foreclosure action on the ground that the statutorily required notice of intent to foreclose was sent to the wrong address. Accepting that that may have been the case, the substitute trustees filed a motion for voluntary dismissal of the foreclosure action, without prejudice. Arrington objected to the dismissal unless he would be able to pursue his counterclaim. On January 31, 2017, the motion to dismiss the foreclosure action was granted without prejudice, but the counterclaim was not dismissed and was directed to "proceed in the normal course."

In April 2018, Ocwen moved to dismiss the counterclaim on the ground that Arrington had failed to plead sufficient facts to sustain any of his claims. Arrington responded with an amended counterclaim that sought to convert his individual claims into a class action based on a new allegation that Ocwen had unlawfully charged him and the class members property inspection fees.

Arrington identified himself as the "named plaintiff." Two classes also were identified – a **State Law Class** consisting of those persons in Maryland for whom Ocwen had acted as a mortgage servicer/lender within three years before commencement of the action and had charged their mortgage accounts with property inspection fees and costs, and a **Usury Class**, consisting of those persons in Maryland for whom Ocwen had acted as a mortgage servicer/lender and had charged their mortgage loan accounts with property inspection fees and costs, and whose accounts had not been satisfied more than six months before commencement of the action.

The thrust of the new claim was that (1) with exceptions not relevant to the case, Maryland law (Md. Code, § 12-121 of the Commercial Law Article (CL), which is part of the State usury law), prohibits a lender from imposing a lender's inspection fee in connection with a loan secured by residential real property, (2) in a settlement agreement with the Maryland Commissioner of Financial Regulation, Ocwen had agreed to reimburse borrowers for the improper assessment of such fees, but (3) Ocwen had concealed Arrington's identity from the Commissioner and failed to refund those fees. On behalf of himself and the class members, he asked that Ocwen be ordered to disgorge all inspection fees, forfeit to him and the Usury Class members a statutory penalty of $500 pursuant to CL § 12-114(a), and pay the counter-plaintiffs' attorneys' fees and litigation costs.

As with the initial counter complaint, Ocwen was the only named defendant. No claim was made against the substitute trustees or the owner of the deed of trust debt. Arrington did allege that Ocwen, by acquiring the servicing rights with respect to Arrington's loan, acted as a mortgage lender.[2]

[2] Ocwen acquired Arrington's account from a predecessor servicer identified only as Litton. Part of the alleged basis for Ocwen's alleged misconduct was that, in acquiring Litton's accounts, Ocwen inherited Litton's outdated and incompatible computer system (along with an outdated and incompatible computer system from another servicer Ocwen acquired) which, at least in part, accounted for its inability to keep proper track of payments made by Arrington.

Ocwen's immediate response was to remove the action to the U.S. District Court pursuant to 28 U.S.C. § 1446, but, upon Arrington's opposition, Ocwen consented to a remand back to the Circuit Court and, with that consent, the case was remanded. On July 24, 2018, following the remand, Arrington filed a Second Amended Class Counter Complaint (SACC), which is the pleading now before us. Apart from complaining about the improper removal to the Federal Court, the major changes were (1) to add another named plaintiff to the action, Verdell Small, and (2) to add two additional subclasses. It was claimed that Ms. Small had been charged both a property inspection fee and an allegedly unlawful fee for processing payments made by electronic means (speedpay fees).

The two additional subclasses were a **State Law Speedpay Class** and a **Usury Speedpay Class**. Except that the reference was to speedpay fees rather than property inspection fees, the new classes were defined in the same manner as the property inspection fee classes.

Ocwen moved to strike the SACC for four reasons: (1) Maryland law permits only a party to litigation to file a counterclaim, and Small was not then a party but only a putative class member; (2) Md. Rule 2-331(c) requires that any party joined in a counterclaim be designated and served as a defendant, not a plaintiff; (3) absent a cognizable counterclaim against an original party, Rule 2-331 does not provide for claims against third parties; and (4) the SACC constituted a new and untimely claim that prejudiced Ocwen. In a contemporaneous motion, Ocwen moved to realign the parties,

and argued that, unless they were realigned, the pleading must be dismissed, and even if they **were** realigned, the proceeding still must be dismissed subject to being properly refiled as a class action.[3] In a response, Arrington and Small indicated no objection to realigning the parties, provided that doing so would not render the motion to strike moot or provide grounds for further removal to Federal Court.

There was extensive discussion at the hearing on the motion about the practical difficulties of continuing the case as it was then structured. As we have observed, foreclosures on residential real property (Track 8) are treated differently from other civil actions, in part because of the general nature of foreclosure cases and in part because of statutory requirements not applicable to ordinary civil cases.[4] Residential foreclosure cases are not set in for scheduling conferences; there are no processing deadlines as there are for other civil actions; and, while subject to special mediation procedures under Rule 14-209.1, they are not referred to the mediation procedures in place for other civil

[3] The basis of the motion to realign was that (1) the case was captioned as *Ward v. Arrington*, (2) with the dismissal of the foreclosure action, Ward was no longer a party and there was no longer a plaintiff, (3) no claims were being asserted against the former plaintiffs (Ward), (4) no claims remained by Ward against Arrington (the defendant), and (5) the only remaining claimants were Arrington and Small, who should be designated as plaintiffs, and the only remaining person claimed against was Ocwen, which should be designated as the defendant.

[4] In that discussion, references were made to the fact that the case, as then structured, was an "O" case as opposed to a "C" case. We are advised that those references are to internal codes used by the court for docketing and procedural purposes. "O" refers to a foreclosure case involving residential real property (Track 8); "C" refers to a general civil action (Track 3).

actions. As noted, although Arrington seemed to have no general problem with converting the action to a civil action track, there was concern on his part about whether filing a new complaint would allow the case to be removed again to Federal Court.

Ultimately, the court determined that the SACC could not be maintained within the existing "O" action, for two reasons. First, the court concluded that under both Rule 2-331 and *Fairfax Sav. v. Kris Jen Ltd*, 338 Md. 1 (1995) (misstated in the transcript as the *Christian* case), only an existing party to an underlying claim can assert a counterclaim, and Ms. Small was not an existing party, and that a counterclaim must be related to the primary claim. The court concluded that Ms. Small's claim, to the extent based on the speedpay fee, was not related.to the dispute between Arrington and Ocwen or between Ward and Arrington. The court questioned whether **any** class action involving additional plaintiffs would be permissible but concluded that it did not have to reach that issue.

Because Ms. Small's claim was impermissible, the court (1) dismissed the SACC without prejudice and without consideration of the validity of the claims made by Arrington or Small; (2) denied all other pending motions as moot; (3) assessed costs related to the counterclaim against Arrington and Small and costs related to the original filing against the substitute trustees; and (4) directed the clerk to close the action. It was

clear from the court's oral remarks that Arrington and Small would be able to refile the action as a "C" (Track 3) civil case. This appeal, by Arrington, is from that Order.[5]

DISCUSSION

Arrington takes issue with both prongs of the court's reasoning. He claims that, under Rules 2-331(c), 2-212, and 2-141, a non-party to the action may be made a party plaintiff through a counterclaim and notes that no objection was made by Ocwen to the first amended complaint that added other plaintiffs as class members. He argues that the court dismissed the SACC because of the inconvenience of proceeding as an "O" case, which constituted an abuse of discretion. He contends that his claims, whether viewed as individual claims or class member claims, were not contingent on the Order to Docket and should have been permitted to proceed, and, finally, he urges that Ms. Small's claims should not have been split from the action.

Standard of Review

This appeal presents a mixed standard of review. To the extent the trial court's decision was based on its construction of the relevant Rules and cases, issues of law are presented, and our review as to them is *de novo*. *Steele v. Diamond Farm Homes*, 464 Md. 364, 375 (2019); *Lamson v. Montgomery County*, 460 Md. 349, 360 (2018). To the

[5] The only Notice of Appeal was filed by Arrington. Small did not appeal.

extent that its ultimate decision to dismiss the SACC was a discretionary one, we look to see if, in our view, it constituted an abuse of that discretion, essentially whether "no reasonable person would take the view adopted by the trial court" or whether the court acted "without reference to any guiding rules or principles." *Dabbs v. Anne Arundel Co.*, 458 Md. 331, 347 (2018). We shall find no error of law and no abuse of discretion.

What Is Before Us

As a preface, we need to make clear what this appeal is about and what it is not about. Other than being assessed court costs, Arrington did not lose this case. No rulings of substance were made that would preclude Arrington from presenting his claims against Ocwen to the court or to a jury. He simply was told that, as this no longer was a foreclosure case, he could not proceed as if it was, but that he (and Small) were free to proceed with every claim they made as a Track 3 civil action, properly captioned, which Arrington, on several occasions, had himself asked for or acquiesced in. All of the issues presented in this appeal – the proper construction of Rules 2-331, 2-212, and 2-341 – go only to whether there was a solid basis for the court's insisting that, if the case was to proceed, it does so in a refiled form as a general civil action for damages and related relief. It is in that context that we review the issues presented to the trial court and its ultimate decision.

It would be deceptively easy to jump directly to determine whether the court's action constituted an abuse of discretion, but because that ruling, at least in part, arose

from the court's interpretation of several Rules, we need to examine them as well, particularly because they are argued in this appeal.

Is A Counterclaim Allowed In A Foreclosure Action

The Rules governing foreclosures involving real property, and in particular, residential property, were substantially rewritten during the period from 2009 through 2013, mostly to implement statutory changes made during that time period. There is nothing in those Rules that even mentions, much less affirmatively authorizes or precludes, the filing of counterclaims in foreclosure actions.

In *Fairfax Sav. v. Kris Jen Ltd.*, *supra,* 338 Md. 1, 22 (1995), the Court of Appeals held that, under the then-current foreclosure Rules, lender liability claims that were presented by a mortgagor in a separate, subsequent complaint directly against the lender could have been presented in a counterclaim in the foreclosure action. That holding, at least in part, was relevant to whether their presentation in a separate and subsequent complaint following a foreclosure action was barred by *res judicata*.[6] In a

[6] The precursor of *Fairfax* was a foreclosure action by Fairfax against Kris Jen's commercial property. It was not a residential foreclosure. The court ratified the sale and the auditor's report, thereby adjudicating that there had been a default on the loan. Prior to entry of the final order of ratification, Kris Jen filed a separate civil action against Fairfax for damages arising from conduct that allegedly induced the default and that violated a workout agreement between the parties. One of the issues was whether that separate action was barred by *res judicata*, and one sub-issue was whether Kris Jen's claims could have been presented as a counterclaim in the foreclosure action. The Court held that those claims could have been raised in a counterclaim in that action but, as Maryland does not **require** existing claims to be presented in a counterclaim, *res judicata*

cautionary footnote to that holding, however, the Court added that "[a]lthough there is no theoretical obstacle to docketing a counterclaim by the mortgagor in a mortgage foreclosure proceeding, there are innumerable practical difficulties," several of which were cited as examples, including the observation that ""[o]bviously the judicial sale cannot be consolidated with trial of the counterclaim." *Id.* In the context of this case, that cautionary statement is as significant as the ruling itself.

That statement in *Fairfax*, tempered by the cautionary note, remains the law, there having been no subsequent decision from the Court of Appeals disavowing it. *See Cohn v. Charles*, 857 F. Supp. 2d 544 (D. Md. 2012). We therefore must accept that counterclaims are not absolutely precluded in foreclosure cases. Ocwen does not argue otherwise. It seeks, instead, to limit that holding to what was before the Court, namely, that a counterclaim against the lender – the plaintiff – is permissible. Even in that setting, the *Kris Jen* Court expressed qualms as to how the two actions could proceed coherently.

Here, in contrast, the counterclaim is not against the lender, but a third party. No claims are made by Arrington (or Small) against the lender or the substitute trustees, who were not alleged to have done anything wrong. Moreover, the nature of a foreclosure action has changed considerably since *Fairfax* was decided, at least with respect to

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could not be based on Kris Jen's failure to use that approach. Ultimately, the Court did apply *res judicata* to Kris Jen's claim that there was no foreclosure-triggering default, as that would contradict the judgment entered in the foreclosure action. *Fairfax, supra*, 338 Md. at 31.

foreclosures involving residential property pursuant to a power of sale. Although it remains an *in rem* proceeding, except to the extent that a deficiency judgment is sought, the procedural requirements have changed significantly.

In 1995, an Order to Docket was not regarded as a pleading (*see Saunders v. Stradley*, 25 Md. App. 85, 95 (1975)) and service of process on the homeowner was not required. *See* former Md. Rule W 72e. The only document that needed to be served on the homeowner was a statement of the mortgage debt, and even that was not necessary if the mortgagee filed the statement with the court. Former Rule W 72d. The only mention of an answer or a hearing was that neither was necessary. Former Rule W72e. The only notice unconditionally required to be given to the homeowner was notice of the sale, by certified mail. Former Rule W74c.

Former Rule W76b. did allow for an injunction to stay foreclosure, if filed by a party to the mortgage, but the granting of an injunction was not allowed unless the petitioner stated under oath (1) whether any amount was due and payable and, if so, whether he or she had paid that sum into court and that the entire debt had been fully paid, or (2) that there was no default in the mortgage or that some fraud was used by the mortgagee in **obtaining** the mortgage. There was no mention whatsoever of the right to file a counterclaim. In holding that an Order to Docket was not a pleading, the *Stradley* Court observed:

> "[T]he order need not make factual allegations sufficient to show a right to proceed. No process is issued or served upon the filing of an order. It is not designed to be answered, denied, or traversed, so as to arrive at issues.

> It neither broadens nor narrows the scope of the court's function in the case. It does not, without more, call upon the court to decide whether a complaining party is entitled to any equitable relief."

25 Md. App. at 95.

That has changed, both by Rule and by statute, with respect to foreclosures on residential property. Although no process issues when the proceeding is commenced by an Order to Docket, the current Rules expressly provide for much greater notice to the homeowner and for expanded challenges to the foreclosure. A 45-day notice of intent to foreclose must be served on the homeowner. The Order to Docket must be accompanied by specific relevant documents and served on the borrower (who is normally the homeowner). Rule 14-209. Rule 14-211 provides an expanded right of the homeowner to challenge the proposed foreclosure and, if the motion is facially compliant with the Rule, a hearing must be held. In contrast to Former Rule W76, which restricted motions to enjoin the foreclosure to situations where the debt had been paid, there was no default, or the mortgagee used fraud in obtaining the mortgage, Rule 14-211 allows the homeowner to contest the validity of the lien or the right of the plaintiff to foreclose in the pending action. If, as was the case, the *Kris Jen* Court allowed a counterclaim against the lender under the old, more restrictive Rules, there should be no general preclusion of that under the current ones.

That does not answer the question of what kind of counterclaim should be permitted, much less against whom. For that, we need to examine the Rules that deal more specifically with counterclaims and amendments to pleadings.

Rule 2-331

Rule 2-331 which, though captioned "Counterclaim and cross-claim," deals as well with third-party claims. It may be helpful, at the outset, to define those terms. Using *Black's Law Dictionary* (11th ed.) as our general reference, a counterclaim is "a claim for relief asserted against **an opposing party** after an original claim has been made (p. 376)[7]; a cross-claim is "a claim asserted between **codefendants or co-plaintiffs** in a case and that relates to the subject of the original claim or counterclaim" (p. 404); and a third-party complaint is "a complaint filed by the defendant against a third party, **alleging that the third party may be liable for some or all of the damages that the plaintiff is trying to recover from the defendant** (page 303) (Emphasis added).

Rule 2-331(a) permits a **party** to an action to assert, as a counter claim, "any claim that **the party** has against any opposing party, whether or not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim." Section (b) permits a **party** to assert, as a cross-claim, any claim that **the party** has

[7] Compare *Imbesi v. Carpenter Realty*, 357 Md. 375, 380 (2000), defining "counterclaim" as "the assertion of a right to have an affirmative judgment against the adversary based upon a setoff or a recoupment."

against a co-party "arising out of the transaction or occurrence that is the subject matter either of the original action or relating to any property that is the subject matter of the original action."

From the very wording of these sections, it is clear that only a party to the action may file a counterclaim or a cross claim. *See Pharmaceia v. WSSC*, 85 Md. App. 555, 561 (1991) ("An obvious predicate to the proper filing of a counterclaim, therefore, is that the counterclaimant be a party to the action.").

Ms. Small clearly was not a named party to the action prior to the filing of the SACC; nor, obviously, were the members of the two new proposed classes. If Ms. Small had been charged a property inspection fee, she possibly may have been a potential member of the class posited in the first amended complaint, but we shall follow the lead of the United States Supreme Court in holding that a putative member of an uncertified class is not a party to the action until such time as the class, with her in it, is certified. *See Smith v. Bayer Corporation*, 564 U.S. 299, 313 (2011), regarding as a "novel and surely erroneous argument" that "a nonnamed class member is a party to the class-action litigation *before the class is certified*." *See also In re Cmty. Bank of N. Va.*, 418 F.3d 277, 313 (3d Cir. 2005), recognizing that no traditional attorney-client relationship exists between class counsel and unnamed members of the class prior to certification. Accordingly, Ms. Small had no standing to join as a plaintiff under either § (a) or § (b). [8]

[8] Arrington argues that, because Ocwen failed to move to dismiss the First Amended Complaint that added a putative class that potentially included Ms. Small, it waived its

The focus then is on Rule 2-331(c), which permits a person **not a party** to the action to be "made a party to a counterclaim or cross-claim and **shall be served as a defendant** in an original action." (Emphasis added). Arrington regards the bolded language – shall be served as a defendant – as merely a notice provision; Ocwen reads it as a strict limitation – that the new person may be joined only as a defendant, not as an additional counterclaimant. The Rule appears to be ambiguous in that regard, and we are unable to find any precedent one way or the other (nor has any been presented to us).

We think that Ocwen has the better argument. For one thing, § (c) is not necessary for the purpose of adding a new co-plaintiff. If a nonparty wishes to join an ongoing action as a co-plaintiff, he or she may do so by filing a motion to intervene pursuant to Rule 2-214. Notice is given to the existing parties, and, in deciding whether to grant the motion, the court must consider whether intervention will unduly delay or prejudice the parties. The choice to become a plaintiff should be a voluntary one. Unless **required** to be joined pursuant to Rule 2-211 (which was not the case here), given the financial and other consequences of joining ongoing litigation as a plaintiff and possibly being unable to control or have any significant say in the prosecution of the case, a person should not be dragooned into such a status, which Arrington's interpretation of Rule 2-331(c) would permit.

right to move to dismiss the SACC. We reject that argument. Because none of the unnamed members of the putative class identified in the First Amended Complaint had the status of parties, there was no basis for a motion to dismiss on that ground.

Apart from that, the requirement of service as a defendant in Rule 2-331(c) has meaning. The Rule was derived from former Rule 314, which combined elements of both current Rule 2-331 and current Rule 2-211. Rule 314 c. stated that, when the presence of an additional party is required for the granting of complete relief in the determination of a counterclaim or cross-claim, the court "shall order him to be brought in **as a defendant.**" **(**Emphasis added). Section d.3. added that if another person is made a party **pursuant to section c**, the Rules governing service of process shall apply. Because section c. applied only to added **defendants**, however, § d.3. did as well. The revision simply split the old Rule without any evident intent to allow a person to be forcibly added as a plaintiff when it is not necessary for complete relief to do so.

What is being served under the Rule is process, not just some lesser form of notice. A plaintiff does not have to be served with process; defendants do, precisely because service of that process subjects the person to the jurisdiction of the court, whether he or she wishes to be or not.

Rules 2-212 and 2-341

Arrington belatedly seeks to justify the addition of Ms. Small and the two new classes under Rules 2-212 (permissive joinder of parties) and 2-341 (amendment of pleadings). We note first that the SACC referenced only Rule 2-331(c) as the basis for the pleading. In his memorandum opposing the motion to strike the SACC and during the hearing on that motion, Arrington mentioned Rule 2-341 several times, but he never

asserted Rule 2-212 as a basis for that pleading, and the court made no mention of it. The issue as to Rule 2-212, therefore, has been waived; we cannot find legal error or an abuse of discretion in misinterpreting or ignoring a Rule that was never argued.

Rule 2-341(a), in relevant part, permits a party to file an amendment to a pleading without leave of court provided that it is filed prior to the date set in a scheduling order or, if there is no such order, no later than 30 days before a scheduled trial date. Under section (c) of the Rule, an amendment may seek to change the nature of the action or add new parties. Amendments are to be freely allowed when justice so permits. Section (d) requires that, if a new party is added by amendment, the amending party must cause a summons and complaint (and other papers) to be served on the new party.

Unlike our construction of Rule 2-331(c), additional plaintiffs may be added under Rule 2-341. *See Crowe v. Houseworth*, 272 Md. 481 (1974) interpreting former Rule 320, the predecessor to Rule 2-341. Although prior leave of the court is not required if, as here, the addition is timely, the court does have control over whether the addition will be accepted. Section (a) permits other parties to the action, within 15 days after service of the amendment, to move to strike the amendment "setting forth reasons why the court should not allow the amendment." Ocwen timely filed such a motion.[9]

[9] The SACC was filed on July 24, 2017 and, according to Ocwen, was served on August 10. The motion to strike was filed August 13, 2017.

The court did not strike the SACC on the ground that Ms. Small or the two new classes could not be added as additional plaintiffs. Its holding was that, if they were to be added, the case could not proceed as an "O" case. That was a discretionary call. The question is whether, in light of any possible alternative, the court abused that discretion. The same question arises under Rule 2-506 (Voluntary Dismissal), which was given scant attention by the parties, but which we turn to now.

Rule 2-506

At the critical time, Rule 2-506(a) permitted (and still permits) a party who has filed a complaint to dismiss all or part of the complaint without leave of court by filing a notice of dismissal before the adverse party files "an answer." Unless allowed under that section, § (c) provides that the plaintiff may dismiss the claim only by order of the court and on such terms as the court deems proper. Section (c) further provided at the time that, if a counterclaim was filed before the filing of a plaintiff's motion for voluntary dismissal, the action shall not be dismissed over the objection of the party who filed the counterclaim unless the counterclaim can remain pending for independent adjudication by the court.[10]

[10] We note that Rule 2-506(c) was amended effective July 1, 2019, to provide that, if a third-party claim is filed prior to the filing of the motion for voluntary dismissal of the action, the court may not dismiss a third-party claim that is non-derivative and, if refiled, would be barred by limitations. That amendment is not applicable in this case.

The question has been raised whether an Order to Docket, which was the device used in this case to commence the foreclosure action, constitutes a "complaint" for purposes of sections (a) and (c) of that Rule and whether the initial counterclaim filed by Arrington constitutes an "answer" for purposes of (c). In *Saunders v. Stradley*, 25 Md. App. 85, 95, *supra*, this Court held that an order to docket was not a "pleading." Rule 1-202(u). defines "pleading" as including a "complaint" and a number of other submissions, but not an Order to Docket.

That holding was based largely on the fact that, under the Rules at the time, no process was issued on the filing of an Order to Docket and no response was required or anticipated. As we observed above, although **process** still is not issued, with the more extensive **service** requirements and the greater ability to respond to the Order to Docket, for purposes of Rule 2-506, courts have more recently given such an Order an equivalent status of a pleading. *See Cohn v. Charles*, *supra*, 857 F. Supp. 544, 548 and *Azzam v. Echehoyen*, 2010 WL 1256627 (Circ. Ct. Fred. Co. (2010)). There is a basis for that interpretation. Rule 1-321 requires every pleading to be served on the other parties. Rule 14-209 requires an Order to Docket to be served on the owner. An Order to Docket now must be served on the borrower/homeowner.

Indeed, the parties here assumed that to be the case, as Ocwen filed a motion seeking court approval to dismiss the foreclosure action and, by conditionally assenting to that motion, Arrington at least tacitly acknowledged that § (c) was applicable. For the

same reasons, we construe the counterclaim filed by Ocwen as the equivalent of an answer for purposes of Rule 2-506(c).

The court complied with the version of Rule 2-506 then applicable and allowed the counterclaim to continue, notwithstanding the dismissal of the foreclosure action, but subject to further consideration under Rule 2-341. The court's ultimate conclusion was a discretionary one based on Rule 2-341.

The Ultimate Question

Under Rules 2-341 and 2-506 and in light of *Fairfax*, we come to the ultimate question of whether the court's dismissal of the case without prejudice constituted an abuse of its discretion. One of the few things Arrington and Ocwen agreed upon was that the case should not proceed as it was then structured. It was no longer a foreclosure action and **should** not, and, as a practical matter, **could** not, proceed as if it were. Neither the trustees nor the owner of the debt remained as parties; Arrington was no longer a defendant; he and Small were the only named plaintiffs, and there were four classes of putative plaintiffs; Ocwen was the only defendant. There needed to be a complete realignment of the parties, and, with that, treatment of the case as a complex civil action assigned to Track 3.

What were the competing considerations in deciding how to achieve those ends? It certainly seemed clear that the SACC would have to be completely rewritten. It could no longer be cast as a counter complaint but would have to be structured as a complaint

by the two named plaintiffs and the four putative classes against Ocwen. Because there no longer was a foreclosure action, issues of the kind noted in *Fairfax* about proceeding on parallel tracks with law and equitable claims would either not be present or present in much diminished form. An answer would need to be filed to the new complaint. All that would need to be done whatever approach was chosen.

Dismissing the pending action without prejudice and the filing of a new complaint had the merit of simplicity, especially as there was no limitations defense that could be raised with respect to the new pleading. The new case would be placed on a Track 3 docket, and, following a scheduling conference, time deadlines for further discovery and motion practice could be set. Although, in his brief, Arrington asserts that the court "should have implemented other options" and "endeavored to maintain the SACC," he does not tell us what the other options were or how the SACC could be maintained as a counterclaim. If the SACC was not to be dismissed, it would have to be amended somehow through interlineated strikeouts and underlining that would be so extensive as to make the document virtually unreadable.

The only downside raised by Arrington to the court's approach was the prospect that, if a new complaint was filed, Ocwen may make a second attempt to remove the case to Federal court, and the court gave consideration to that prospect. It is a matter of speculation whether Ocwen would make that attempt, or whether, if it did, it would be successful.

Apart from that, Arrington chose to present his claims through a counter claim to the foreclosure action. That was done when his only claims against Ocwen were personal to him. Even assuming that, under *Fairfax*, he had that right, once the foreclosure action was dismissed, he created the very problem, or at least exacerbated it, by converting his personal claims to a class action and maintaining that action as a counterclaim to a non-existing claim instead of converting it to a separate action, as Kris Jen did in *Fairfax*. He created the very problem that he now agrees truly is a problem in need of a solution. Even if his concern about the prospect of a second removal to Federal Court is a legitimate concern, it cannot overwhelm the court's legitimate reluctance to have the case continue as a counterclaim to a claim that no longer exists as a thoroughly inappropriate Track 8 case for no reason other than to preclude Ocwen from possibly exercising a right it may have under Federal law. We find no legal error or abuse of discretion in the court's judgment.

JUDGMENT AFFIRMED; APPELLANTS TO PAY THE COSTS.