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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
The Honorable Bentley D. Price
Circuit Court Judge

Appellate Case No. 2021-000504
Circuit Court Case No. 2019-CP-07-02279

Wilmington Savings Fund Society FSB, not in its individual capacity, but solely as owner trustee for CSMC 2018-RPL6 Trust,

Respondent,

v.

Rex A. Field, Tracy L. Field, Dulamo Estates Homeowners' Association, Inc.,

Defendants,

Of whom Rex A. Field and Tracy Field are the

Appellants.

BRIEF OF RESPONDENT

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STATEMENT OF THE ISSUE ON APPEAL

1. Whether the trial court properly struck the Fields' jury demand in a foreclosure action where the Fields' nine (9) counterclaims were not a defense to, and did not affect the enforceability of, Wilmington's action for foreclosure, rendering the counterclaims permissive.

STATEMENT OF THE CASE

A. The Promissory Note and the Mortgage.

On or about October 7, 2005, Rex A. Field and Tracy L. Field executed and delivered a promissory note ("Note") in the principal sum of $359,000 in favor of E*Trade Mortgage Corporation. (R. p. 38, ¶ 6). To secure payment of the Note, the Fields made, executed, and delivered a real estate mortgage ("Mortgage") encumbering real property located at 1 Dulamo Bluff Road, Saint Helena Island, South Carolina (the "Property"). (R. pp. 38–39, ¶ 7). Through various transfers, the Mortgage was ultimately assigned to Wilmington Savings Fund Society, FSB, not in its individual capacity, but solely as owner trustee for CSMC 2018-RPL6 Trust ("Wilmington"). (R. p. 39, ¶ 9).

B. Default and Initiation of Foreclosure Action.

The Note came into default for failure to make payments on January 1, 2019 and all subsequent payments. (R. p. 40, ¶ 15).[1] On October 11, 2019,[2] with the Note remaining in default, Wilmington initiated this foreclosure action against the Fields. (R. pp. 35–43).[3] On October 17, 2019, the matter was referred to Marvin H. Dukes, III, Master in Equity. (R. pp. 5–7). However, on September 29, 2020, the trial court vacated the Order of Reference without prejudice. (R. pp. 8–10). The Fields had argued in their November 20, 2019 Motion to Vacate Order of Reference

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[1] Wilmington's predecessor in interest, CitiMortgage, Inc., filed an initial foreclosure action against the Fields in 2012. Following the dismissal of the Fields' counterclaims and third-party claims in the 2012 foreclosure action—but while that foreclosure action was pending—Mr. Field filed Chapter 13 bankruptcy approximately one hour before the final hearing scheduled in the 2012 foreclosure action. After Mr. Field voluntarily dismissed that bankruptcy petition, the parties entered a loan modification, and CitiMortgage, Inc. dismissed its claims in the initial foreclosure action without prejudice.

[2] For the sake of clarification, dates of filed documents referenced herein refer to the date of the file-stamp on the document (not the date of the signature of the parties or the Court).

[3] Dulamo Estates Homeowners' Association, Inc. ("Dulamo") was also initially named as a Defendant, but, upon determining Dulamo was not necessary to the action, Wilmington dismissed Dulamo from the lawsuit.

that the Order of Reference was entered before they were served with process, thus depriving them of the opportunity to object. (R. pp. 53–58). However, Judge Dukes' reasoning for vacating the Order of Reference is not explained in his Form 4 Order. (R. pp. 8–10).

C. Issues Surrounding Jury Demand.

On October 22, 2019, prior to responding to the Complaint, the Fields—proceeding *pro se* at the time—filed a standalone Demand for Jury Trial, in which they "demand[ed] a trial by jury on all issues triable by a jury." (R. p. 44). On November 18, 2019, also prior to responding to the Complaint, the Fields filed a document styled "Motion for Case to be Heard by Jury Pursuant [sic] SCRCP 38(b)," in which they made reference to their standalone jury demand, reasserted their jury demand, and proclaimed a broad reservation of rights as it relates to a trial by jury. (R. pp. 47–52).

Without disputing the Fields' assertion of a jury demand, Wilmington, on January 30, 2020, filed a Motion to Strike Defendants' Demand for Jury Trial (hereinafter, "Motion"), acknowledging the Fields' demand for a jury trial but arguing that the Fields were not entitled to have a jury decide a foreclosure action. (R. pp. 65–66). On February 14, 2020, the Fields filed an opposition to Wilmington's Motion, arguing primarily that the Motion was void because the matter should be stayed pending foreclosure intervention. (R. pp. 67–69).

Following a multitude of other motions and filings that are not at issue on appeal,[4] the Fields, on February 19, 2021, filed an Answer, Counterclaims and Third-Party Complaint ("Answer") (R. pp. 70–231), which they subsequently amended on March 25, 2021 ("First Amended Answer"). (R. pp. 456–604). Both the Answer and the First Amended Answer contain a jury demand. (R. p. 70; R. p. 456). The First Amended Answer is 149 pages, spans 924 numbered paragraphs, and includes 9 counterclaims/third-party claims, including (1) violation of South Carolina's Unfair Trade Practices Act ("SCUTPA"), S.C. Code Ann. § 39-5-10; (2) civil conspiracy; (3) fraud and misrepresentation; (4) slander of title by disparagement of title; (5) libel and slander; (6) violation of the Fair Debt Collections Practices Act, 15 U.S.C. § 1692, *et seq.*; (7) unjust enrichment; (8) quiet title to property; and (9) abuse of process. (R. pp. 573–602, ¶¶ 801–924). The Fields assert all of these claims against Wilmington and against all of the third-party defendants, which include the following: Federal National Mortgage Association (Fannie Mae); Wilmington Savings Fund Society, FSB (in its individual capacity); Christiana Trust Company of Delaware; DLJ Mortgage Capital Inc.; and Unknown Defendants 1–10. (R. pp. 573–602, ¶¶ 801–924).

[4] For instance, between February 14, 2020 and February 19, 2021, the Fields made the following filings: "Notice of Motion and Motion for Relief from Order of Reference Pursuant to SCRCP Rule 60; Affidavit" (filed March 16, 2020); "Motion for Continuance of Trial; Objections; Affidavit" (filed September 11, 2020); "Memorandum in Support of Motion to Vacate Order of Reference" (filed September 27, 2020); "Motion to Dismiss and for Sanctions" (filed October 26, 2020); "Affidavit in Support of Motion to Dismiss and Sanctions" (filed December 7, 2020); "Affidavit for Motion to Dismiss and Sanctions" (filed January 8, 2021); "Memorandum in Support of Motion to Dismiss and for Sanctions" (filed January 11, 2021); "Termination by Field Defendants of Andrew S. Radeker as Counsel" (filed January 21, 2021); "Notice of Mediation Pursuant to ADR Rule 6" (filed January 25, 2021); "Defendants' Notice of Motion and Motion to Compel Mediation" (filed February 4, 2021); and "Memorandum in Support of Motion to Compel Mediation" (filed February 12, 2021). For the avoidance of confusion, none of these filings or motions are at issue on appeal.

D. Hearing and Subsequent Ruling on Motion to Strike Jury Demand.

Following the Fields' Supplemental Memorandum in Opposition to [sic] Strike Jury Demand filed on April 13, 2021, which merely quotes from and attaches this Court's decision in *South Carolina Community Bank v. Salon Proz, LLC, et al.* (Case No. 2014-002627) (R. pp. 627–637), the trial court held a hearing on April 15, 2021. (R. pp. 1602–1629). The Honorable Bentley D. Price presided over the hearing, which was attended by counsel for Wilmington as well as the Fields, who appeared *pro se* after they terminated their lawyer in January 2021. The Court heard oral argument on Wilmington's Motion (*see* R. p. 1608, line 13 to R. p. 1612, line 24) as well as other pending motions that are not at issue on appeal.

Although Wilmington filed the Motion before the Fields filed their First Amended Answer (which contains nine (9) counterclaims and third-party claims), both parties argued the merits of Wilmington's Motion in light of the subsequently filed First Amended Answer. (R. p. 1609, lines 1–6 (Wilmington arguing that counterclaims must be legal and compulsory to be entitled to jury trial); R. p. 1612, lines 17–18 (Fields arguing: "We have at least nine counterclaims. Most of them are legal, or at law.")). Wilmington argued that the counterclaims were not compulsory "because if proven they would not affect the enforceability of the loan." (R. p. 1610, lines 9–10). The Fields focused primarily on this Court's decision in *Salon Proz* that the SCUTPA claim in the context of that case was legal and compulsory. (R. p. 1612, lines 9–24). Otherwise, the Fields—without identifying any specific counterclaim—argued that they "have at least nine counterclaims" (R. p. 1612, lines 17–18); that "[m]ost of them are legal, or at law" (R. p. 1612, line 18); and that they "believe that [their] claims are legal and compulsory" (R. p. 1612, line 24).

On April 20, 2021, Judge Price entered a Form 4 Order, granting Wilmington's Motion. (R. pp. 14–16). The Form 4 Order also denied or deferred other motions that are not at issue on appeal.

E. Notice of Appeal.

On May 13, 2021, the Fields filed a notice of appeal, indicating their intent to appeal from Judge Price's April 20, 2021 Order "granting Motion to Strike Jury Demand to Respondent." (R. p. 911). Therefore, the only Order on appeal is the portion of Judge Price's interlocutory Order granting Wilmington's Motion and striking the Fields' jury demand.[5]

[5] Confusingly, on May 11, 2021—*after* Judge Price struck their jury demand and two days *before* they noticed this appeal—the Fields filed another standalone "Demand for Jury Trial." And during this appeal, the Fields have continued to make numerous filings in the trial court, such as the following: "Motion for Continuance to Obtain New Counsel; Affidavit" (filed May 25, 2021); "Notice of Motion and Motion for Continuance of Motion for Summary Judgment Pursuant to SCRCP Rule 56(f) and to Deem Requests for Admissions Admitted for Failure to Comply with SCRCP Rule 36; Affidavit" (filed June 17, 2021); "Motion to Recuse the Honorable Bently [sic] D. Price; Affidavit" (filed June 21, 2021); "Motion to Reconsider Order Dated June 22, 2021 on Motion to Recuse the Honorable Bentley D. Price; Affidavit" (filed June 29, 2021); "Defendants' Affidavit of Documents in Opposition to Plaintiff's Motion for Summary Judgment" (filed June 30, 2021; spanning 195 pages and including 33 exhibits); "Defendants' Memorandum in Opposition to Plaintiff's Motion for Summary Judgment; Objections to Plaintiff's Affidavit/Exhibits" (filed June 30, 2021; spanning 64 pages of argument); Memorandum in Support of Motion to Recuse the Honorable Bentley D. Price; Affidavit" (filed July 2, 2021); "Motion for Rule to Show Cause as to Why Sanctions Should Not be Issued for Violation of Court Order; Affidavit" (filed July 7, 2021); "Notice: Plaintiff's Failure to Make or Cooperate in Discovery Pursuant to SCRCP Rule 37; Affidavit" (filed July 16, 2021); "Motion to Reconsider Order Filed July 12, 2021 on Motion to Recuse the Honorable Bentley D. Price; Affidavit" (filed July 22, 2021); "Notice of Motion and Motion to Dismiss for Lack of Personal Jurisdiction Pursuant to SCRCP 12(b)(2)" (filed July 30, 2021); "Notice: Third Partys' [sic] Failure to Make or Cooperate in Discovery Pursuant to SCRCP Rule 37; Affidavit" (filed August 6, 2021); "Memorandum in Support of Motion for Rule to Show Cause as to Why Sanctions Should Not be Issued for Violation of Court Order; Affidavit" (filed August 11, 2021); "Objection to Motion to Extend Time for Responses to Defendants' Interrogatories and for Request for Production of Documents" (filed October 28, 2021); and "Objection to Amended Motion to Extend Time for Responses to Defendants' Interrogatories and for Request for Production of Documents" (filed November 29, 2021). Wilmington's reason for providing this list to the Court is twofold: to emphasize that none of these filings are at issue in this narrow appeal, and to elucidate the tone and tenor of the Fields' approach to this litigation.

SUMMARY OF THE ARGUMENT

The trial court properly granted Wilmington's Motion to strike the Fields' jury demand. To be entitled to a jury trial in an equitable action such as an action for foreclosure, a defendant must assert one or more counterclaims that are both legal and compulsory. Even if any one of the nine counterclaims in the Fields' First Amended Answer were legal, none is compulsory. To be compulsory in this context, a counterclaim must be a defense to, or otherwise affect the enforceability of, Wilmington's foreclosure claim. The Fields' nine (9) counterclaims allege a broad conspiracy between Wilmington, Fannie Mae, and the other third-party defendants to defraud the Fields, other homeowners in South Carolina, and other homeowners across the country. Because these counterclaims do not affect (much less dispute) Wilmington's ability to establish the existence of the debt and the Fields' default on that debt, the counterclaims are not a defense to, and do not affect the enforceability of, Wilmington's foreclosure action. The Fields' counterclaims are, therefore, permissive, meaning they are not entitled to a jury trial.

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN STRIKING THE FIELDS' JURY DEMAND.

A. Standard of Review.

Normally, "[t]he matter of striking from a pleading . . . is largely within the discretion of the trial judge" such that "[t]he granting . . . of a Motion to Strike . . . will not be reversed except for an abuse of discretion or unless the action of the trial judge was controlled by an error of law." *Brown v. Coastal States Life Ins. Co.*, 264 S.C. 190, 194, 213 S.E.2d 726, 728 (1975). However, "[w]hether a party is entitled to a jury trial is a question of law," and "[a]n appellate court may decide questions of law with no particular deference to the trial court." *Verenes v. Alvanos*, 387 S.C. 11, 15, 690 S.E.2d 771, 772–73 (2010).

B. Under South Carolina Law, a Counterclaim is Compulsory in the Mortgage Lending Context if it Affects the Ability to Pursue, or Otherwise Serves as a Defense to, an Underlying Claim.

Because foreclosure sounds in equity, a party to a foreclosure action is not entitled to a jury trial as a matter of right. *Wachovia Bank, Nat'l Ass'n v. Blackburn*, 407 S.C. 321, 328, 755 S.E.2d 437, 441 (2014). Rather, a party to a foreclosure action is entitled to a jury trial only where he or she asserts a counterclaim that is both legal and compulsory. *Carolina First Bank v. BADD, L.L.C.*, 414 S.C. 289, 295, 778 S.E.2d 106, 109 (2015); *S.C. Cmnty. Bank v. Salon Proz, LLC*, 420 S.C. 89, 96, 800 S.E.2d 488, 492 (Ct. App. 2017); *cf. N.C. Fed. Sav. & Loan Ass'n v. DAV Corp.*, 298 S.C. 514, 517, 381 S.E.2d 903, 905 (1989) ("A party does not waive its right to a jury trial on a counterclaim asserted in an equity action if the counterclaim is legal and compulsory in nature.").

A counterclaim is either legal or equitable depending on the "'main purpose' in bringing the action," which can be gleaned from both "the body of the [pleading]" as well as "the prayer for relief and any other facts and circumstances which throw light upon the main purpose of the action." *Verenes*, 387 S.C. at 16, 690 S.E.2d at 773 (internal quotation marks omitted).

A counterclaim is compulsory under SCRCP 13(a) only "if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim." SCRCP 13(a). Counterclaims not arising out of the same transaction or occurrence of the leading claims are merely permissive. *See* SCRCP 13(b). South Carolina applies the logical relationship test in determining whether a counterclaim is compulsory. *See DAV Corp.*, 298 S.C. at 518, 381 S.E.2d at 905. Under this test, the logical relationship determination is made by asking whether the counterclaim would affect the plaintiff's right to enforce its claims. *See Blackburn*, 407 S.C. at 330 n.7, 755 S.E.2d at 442 n.7.

South Carolina courts in the mortgage foreclosure context have applied the logical relationship test by evaluating whether a successfully asserted counterclaim constitutes a defense to a plaintiff's cause(s) of action, which is typically a lender's action for foreclosure. For instance, in *DAV Corp.*, a lender commenced an action to foreclose on a note and mortgage given to a joint venture, and one of the parties comprising the joint venture ("DAV") asserted six counterclaims against the lender, including breach of a subsequent oral contract to provide additional funding and breach of a subsequent oral contract to purchase DAV's interest in the joint venture. *See* 298 S.C. at 516–17, 381 S.E.2d at 904. Because DAV demanded a jury trial on its counterclaims, the Supreme Court of South Carolina was forced to determine whether DAV's counterclaims were compulsory. *See id.* at 517, S.E.2d at 904. As to the breach of funding counterclaim, the Supreme Court found it to be compulsory because "if performed," the oral agreement "*would have avoided* default on the note by the joint venture." *Id.* at 518, 381 S.E.2d at 905 (emphasis added). As to the breach of purchase counterclaim, however, the Supreme Court deemed it merely permissive because if performed, the oral agreement would "not [have] affect[ed] the enforceability of the note." *Id.*

Similarly, in *Salon Proz*, a bank filed a foreclosure complaint, the mortgagor asserted various counterclaims, and – following an order of reference to a master in equity – the mortgagor sought to transfer the matter back to the general docket, arguing it was entitled to a jury trial because its counterclaims were legal and compulsory. 420 S.C. at 92, 800 S.E.2d at 489–90. Finding that at least one of the counterclaims – a SCUTPA claim alleging a pattern of reneging on promises to modify the loans – was compulsory, this Court explained: "Were this allegation true, it could affect the loan's enforceability." *Id.* at 97, 800 S.E.2d at 492.

On the other hand, where a counterclaim is not a defense to an underlying claim, South Carolina courts find it to be merely permissive. In *BADD*, a bank brought a foreclosure action against a mortgagor and a guarantor, and the guarantor asserted counterclaims for civil conspiracy and breach of contract, both based on an alleged conspiracy with a third party. 414 S.C. at 291–92, 778 S.E.2d at 107. The Supreme Court of South Carolina found these counterclaims to be merely permissive because "the allegations, if true, would not render the guarantees unenforceable." *Id.* at 296, 778 S.E.2d at 109; *see id.* 296, 778 S.E.2d at 110 ("does not affect the execution or enforceability of the guaranty agreements").

And in the reverse context in *Deutsche Bank National Trust Company v. Estate of Houck*, 434 S.C. 500, 863 S.E.2d 829 (Ct. App. 2021), this Court recently evaluated whether an action for foreclosure was a permissive or compulsory counterclaim in the context of an action initiated by mortgagors alleging violations of South Carolina's Attorney Preference Statute, S.C. Code Ann. § 37-10-102, and SCUTPA. *Id.* at 505–09, 863 S.E.2d at 832–34. This Court concluded that foreclosure was not a compulsory counterclaim because "[the lender's] foreclosure claim was not a defense to Mortgagors' allegations . . ., and had [the lender] raised the foreclosure claim . . ., it

would not have affected Mortgagors' allegations pertaining to the violation of the Attorney Preference Statute." *Id.* at 508, 863 S.E.2d at 833.

DAV Corp., *Salon Proz*, *BADD,* and *Houck* make clear that – in the mortgage lending context – a counterclaim has a logical relationship to an underlying claim, and is therefore compulsory, if it would operate as a defense to the underlying claim. Where the counterclaim would not affect the viability of the underlying claim, it is not compulsory.[6]

C. Because the Fields' counterclaims would not affect the enforceability of Wilmington's foreclosure, the trial court properly struck the Fields' jury demand.

The occurrence that gave rise to Wilmington's foreclosure action was the Fields' default on the Note. "[T]he party seeking foreclosure has the burden of establishing the existence of the debt and the mortgagor's default on that debt." *U.S. Bank Trust Nat'l Assn'n v. Bell*, 385 S.C. 364, 374–75, 684 S.E.2d 199, 205 (Ct. App. 2009). "Once the debt and default have been established, the mortgagor has the burden of establishing a defense to foreclosure such as lack of consideration, payment, or accord and satisfaction." *Id.*

The Fields' counterclaims present no such defense. The Fields argue only that "at least four (4) [of the counterclaims] seek recovery of monetary damages" and "four (4) would implicate enforceability of the note and mortgage." (Appellants' Brief at 9). On another occasion, the Fields

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[6] Rather than focus on any common usage and meaning of the phrase "logical relationship," this Court should instead construe that standard by looking to the construction given to the phrase by other South Carolina courts – e.g., *DAV Corp.*, *Salon Proz*, *BADD*, and *Houck* – in the mortgage lending context. *Cf. Gammons v. Domestic Loans of Winston-Salem, Inc.*, 423 F. Supp. 819, 821 (M.D.N.C. 1979) (finding lender's action on debt not a compulsory counterclaim in Truth in Lending Act action brought by borrower; explaining "While there appears to exist a logical relationship between the two claims, a precise examination undertaken in light of the different facts and law relevant to the separate claims reveals that the relationship is more illusory than real."); *Ball v. Conn. Bank & Trust Co.*, 404 F. Supp. 1, 4 (D. Conn. 1975) (explaining in same context, "wooden application of the common transaction label does not yield real judicial economy; any perceived logical nexus is conceptual, abstract, a formal characterization rather than a recognition of concrete advantage to be achieved through single forum adjudication of all the parties' opposing claims").

contend only that "[a]t least three (3) of defendant's at-law counterclaims" are allegedly compulsory. (*Id.* at 10–11). But in both scenarios, the Fields leave both Wilmington and this Court to guess the counterclaims to which they refer, on which they apparently rely. Even assuming *arguendo* that some of the Fields' counterclaims are legal, none of the counterclaims is compulsory.

The counterclaims (and third-party claims) in the Fields' First Amended Answer—spanning 286 numbered paragraphs—generally allege a broad conspiracy between Wilmington, Fannie Mae, and the other third-party defendants,[7] to defraud the Fields, other homeowners in South Carolina, and other homeowners across the country,[8] with a particular focus on the securitization and subsequent assignments of the Note. As it relates to the Fields' specific counterclaims, they generally allege as follows:

- **SCUTPA**: "elaborate scheme to defraud unsuspecting homeowners of their homes in South Carolina and nationally" (R. p. 574, ¶ 804); "notary fraud and regular pattern and practice of filing false and perjured documents in the public records" (R. p. 575–576, ¶ 813);

- **Civil Conspiracy**: "fraud upon Homeowners through fraudulent threats of foreclosure and fraudulent foreclosure filings" (R. p. 583, ¶ 841);

- **Fraud and Misrepresentation**: "statements as to alleged 'ownership' of the purported note and/or mortgage and the legal entitlement to demand monies from Homeowners and institute foreclosure proceedings were false statements of material fact" (R. p. 587, ¶ 856);

- **Slander of Title by Disparagement of Title**: "an improper foreclosure lawsuit and Lis Pendens which were false, done with malice, [and] published in the public records of the courts and property records of Beaufort County, SC which disparaged their property" (R. pp. 592–593, ¶ 883);

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[7] The Fields' third-party claims—regardless of their nature—do not entitle them to a jury trial because third-party claims are permissive. *See Dav. Corp.*, 298 S.C. at 519, 381 S.E.2d at 906.

[8] Despite the fact that the Fields plead their counterclaims as if they are asserted on behalf of a large group of allegedly aggrieved homeowners (akin to class action claims), the Fields are the only defendants at the trial court level (following Dulamo's dismissal, *see supra* n.3), and they are the only Appellants on appeal.

- **Libel and Slander**: "published statements and spoken statements concerning the Homeowners" including "statements to the effect that the Homeowners is [sic] currently delinquent in its payments," which statements "tended to impeach the honesty, integrity, virtue, creditworthiness, business soundness, and/or reputation of the Homeowners" (R. p. 595, ¶¶ 891–93);

- **Fair Debt Collections Practices Act**: "wrongfully, improperly, and illegally reported negative information as to the Homeowners to one or more Credit Reporting Agencies" (R. p. 596–597, ¶ 900);

- **Unjust Enrichment**: "wrongfully collected and/or attempted to collect payments from Defendants" (R. pp. 598–599, ¶ 913);

- **Quiet Title**: "Homeowners are entitled to quiet title" because "[t]he security was a 'securitized' bond deriving its value from the underlying mortgages of which the purported mortgage is no longer one" (R. pp. 599–600, ¶ 918); and

- **Abuse of Process**: "improper use of process by filing the Lis Pendens and Complaint" (R. p. 601, ¶ 922).[9]

None of these counterclaims is a defense to Wilmington's foreclosure action, nor do they affect the enforceability of Wilmington's foreclosure. The Fields are not contending that they are current on the Note or otherwise disputing their default. Instead, the Fields are making every

[9] Because the nature of these counterclaims—*i.e.*, legal or equitable, compulsory or permissive—is the only legal issue for this Court to decide on appeal, Wilmington would have expected the Fields to focus on which counterclaims allegedly support their argument, and why those counterclaims are purportedly legal and compulsory. Instead, the Fields' Appellants' Brief focuses on irrelevant details of the trial court proceedings (as explained below) and otherwise merely states "four (4) [of the counterclaims] would implicate enforceability of the note and mortgage." (Appellants' Brief at 9). Having failed to articulate the basis for their argument in their Appellants' Brief, the Fields have arguably abandoned the issue altogether. *See Carolina Renewal, Inc. v. S.C. Dep't of Transp.*, 385 S.C. 550, 557 & n.3, 684 S.E.2d 779, 783 & n.3 (Ct. App. 2009) (concluding that argument: "[n]one of the elements for res judicata, collateral estoppel, or issue preclusion are present in this case" was too conclusory to preserve appellate challenge to application of collateral estoppel, and deeming the issue abandoned). In the very least, the Fields should not be permitted to argue in their Reply Brief—*for the first time*—which counterclaims are legal and compulsory, and why, thereby depriving Wilmington of an opportunity to respond. *See Glasscock, Inc. v. U.S. Fidel. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 692 (Ct. App. 2001) ("[E]ven though [appellant] more fully addressed the issue in its reply brief, an argument made in a reply brief cannot present an issue to the appellate court if it was not addressed in the initial brief.").

possible argument in a last-ditch attempt to avoid foreclosure, even going so far as to allege "[i]t is legally impossible for any person or entity to have a valid and enforceable note to foreclose on the real property [of the] Homeowners." (R. p. 587, ¶ 857). Having failed to dispute or counter any of the elements Wilmington must prove to establish its foreclosure action, the Fields cannot show that any of their counterclaims affect the enforceability of the Note. As a result, the Fields are not entitled to a jury trial, and the trial court properly struck their jury demand.[10]

II. THE FIELDS' MYRIAD ARGUMENTS ARE EITHER WITHOUT MERIT, OR NOT RELEVANT TO THIS APPEAL, OR BOTH.

Although the Fields do not identify the counterclaims they believe are legal and compulsory, they do make myriad additional arguments that can be addressed summarily, either because they are irrelevant to the narrow issue on appeal, or they are without merit, or both:

- Ten-Day Notice of Hearing—The Fields repeatedly mention an alleged failure to properly notice a hearing (Appellants' Brief at 6–7), including in an apparent argument heading (*id.* at 3 ("NO TEN DAY NOTICE OF HEARING")), seemingly in reference to the requirement that notice of a hearing "shall be served not later than ten days before" the hearing. SCRCP 6(d). But the Fields did not make this argument with respect to the Motion before the trial court, so they cannot make it here on appeal. *See Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) ("It is axiomatic that an issue cannot be raised for the first time on appeal." (internal quotation marks omitted)).[11]

- Premature Striking of Jury Demand—The Fields also argue that the trial court erred in striking their jury demand because "discovery was yet incomplete" (Appellants' Brief at

[10] To the extent the Fields contend that their counterclaims challenge Wilmington's standing to enforce the Note (*see* Appellants' Brief at 11 (referring to "the legal concept of standing")), any such claim is permissive because "it does not affect the execution or enforceability of the [Note]," *BADD*, 414 S.C. at 296, 778 S.E.2d at 110. That is because Wilmington will appear at trial with the Note endorsed to bearer. *Compare* S.C. Code Ann. § 36-3-301 (providing that holder of an instrument is entitled to enforce it), *with id.* § 36-1-201(b)(21)(A) (providing that holder of an instrument includes "the person in possession of a negotiable instrument that is payable . . . to bearer"). Thus, regardless of the evidence the Fields might marshal or the arguments they might make, Wilmington will be able to establish its standing to enforce the Note by virtue of its possession of the Note. The Fields' counterclaims do not—and cannot—change that.

[11] The Fields did argue below that Wilmington failed to provide sufficient notice with respect to Wilmington's motion to dismiss. (*See* R. p. 1627, line 13 to R. p. 1628, line 12). But that motion is not at issue on appeal.

4) and the trial court did not know "what discovery may ultimately reveal" (*id.* at 10). But whether a party is entitled to a jury trial in an equitable action turns on whether the party's counterclaims are legal and compulsory, not the degree to which evidence developed in discovery may support those counterclaims. *See BADD*, 414 S.C. at 295–97, 778 S.E.2d at 109–10 (finding counterclaims permissive based on allegations as pled in counterclaims).

- Application of Logical Relationship Test—The Fields contend that the trial court "fail[ed] to engage in the logical relationship test" (Appellants' Brief at 7; *see id.* at 4, 6, 10), failed to follow and apply *DAV Corp.* (*id.* at 8), and instead followed some unspecified "out-dated, abrogated law that ignores the adoption of Rule 13(a) SCRCP" (*id.* at 9). To the contrary, the trial court heard arguments from both sides about whether the Fields' counterclaims were legal and compulsory, including references to *Salon Proz* and *BADD*—cases which follow *DAV Corp*—and references to the logical relationship test. (*See* R. p. 1608, line 13 to R. p. 1612, line 24). And the Fields briefed the issue at length. (*See* R. pp. 628–629 (block quoting portions of *Salon Proz* outlining logical relationship test)). After reviewing this briefing and hearing oral argument, the trial court indicated it would grant the Motion (R. p. 1626, lines 14–15), and it did so in a Form 4 Order (R. pp. 14–16).

- Waiver of Jury Demand—Relying on *Keels v. Pierce*, 315 S.C. 339, 433 S.E.2d 902 (Ct. App. 1993), the Fields argue that the trial court improperly inferred or presumed waiver of the Fields' jury demand. (Appellants' Brief at 6, 10). But in striking the Fields' jury demand, the trial court merely followed the Supreme Court's subsequent holding in *BADD* that a party waives their right to jury trial in a foreclosure action by asserting permissive counterclaims. *See* 414 S.C. at 296, 778 S.E.2d at 109–110.[12]

- Affirmative Defenses—The Fields make passing reference to affirmative defenses alleging that Wilmington does not have standing and/or is not the real party in interest. (Appellants' Brief at 10). But a party "is entitled to a jury trial on his counterclaims in an equitable action only if the *counterclaims*"—not affirmative defenses—"are legal and compulsory." *BADD*, 414 S.C. at 295, 778 S.E.2d at 109 (emphasis added).

- Factual Findings and Conclusions of Law—Although the Fields complain that the trial court granted the Motion via a Form 4 Order, "making absolutely no factual findings or conclusions of law" (Appellants' Brief at 11), "[f]indings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b)," SCRCP 52(a), and Rule 41 is inapplicable here.

[12] It is unclear whether this Court's statement in *Keels*—that "the court, on its own motion or the motion of the pleader, may order a separate trial of [a permissive] counterclaim pursuant to Rule 42(b) to avoid prejudice to the pleader's right to a jury trial," 315 S.C. at 341–42, 435 S.E.2d at 904—remains good law following the Supreme Court's subsequent decision in *BADD*, which makes clear that a party "waive[s] his right to a jury trial by asserting permissive counterclaims in an equitable action," 414 S.C. at 297, 778 S.E.2d at 110. Regardless, the Fields did not move the trial court for a separate trial, so the issue is not before this Court.

- Other Issues—Finally, the Fields' references to and arguments about their "motion to dismiss" (Appellants' Brief at 7), an alleged "non-concurrence between circuit judges" (*id.* at 8), the fact that Wilmington did not move to reconsider the order vacating the order of reference (*id.*), and the fact that the case remained on the "general docket" for over a year following the order vacating the order of reference (*id.*) all have no bearing on this narrow, interlocutory appeal.

CONCLUSION

For the foregoing reasons, Wilmington respectfully requests that the underlying decision be affirmed.

This 13th day of July 2022.

/s/ Jonathan E. Schulz

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
The Honorable Bentley D. Price
Circuit Court Judge

Appellate Case No. 2021-000504
Circuit Court Case No. 2019-CP-07-02279

Wilmington Savings Fund Society FSB, not in its individual capacity, but solely as owner trustee for CSMC 2018-RPL6 Trust,

Respondent,

v.

Rex A. Field, Tracy L. Field, Dulamo Estates Homeowners' Association, Inc.,

Defendants,

Of whom Rex A. Field and Tracy Field are the

Appellants.

RULE 211(b) CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing **BRIEF OF RESPONDENT** complies with SCACR 211(b) because it is identical to Respondent's previously filed Initial Brief of Respondent except for references to the record and correction of typographical errors and misspellings.

This the 13th day of July, 2022.

/s/ Jonathan E. Schulz
Jonathan E. Schulz (SC Bar No. 79850)