

RECEIVED

Aug 24 2022

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Diane S. Goodstein
Circuit Court Judge

Appellate Case No. 2020-000162

Pinnacle Bank, as successor in
interest to Bank of North
Carolina, previous successor
in interest to Harbor National
Bank, Plaintiff

v.

Anthony Whitfield and Cindy
Whitfield, Defendants

Anthony Whitfield,
Counterclaimant

v.

David Swanson, Counterclaim
Defendant

of whom

Anthony Whitfield is the Appellant and David Swanson is the Respondent.

APPELLANT'S PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, Appellant Anthony Whitfield, through his undersigned attorney, hereby petitions this Honorable Court for a rehearing in connection with the

unpublished opinion issued in this case, filed on August 10, 2022 and attached hereto (Opinion No. 2022-UP-334). Appellant respectfully submits that the following points have been overlooked or misapprehended by the Court:

I. Appellant has a right to a jury trial because his civil conspiracy counterclaim is both legal and compulsory. “If the complaint is equitable and the counterclaim is legal and compulsory, the plaintiff or the defendant has a right to a jury trial on the counterclaim.” *Wachovia Bank, N.A. v. Blackburn*, 407 S.C. 321, 330, 755 S.E.2d 437, 441 (2014). Appellant has a right to a jury trial because he meets the criteria set forth in *Blackburn*. Specifically, the underlying complaint is equitable and the counterclaim is legal and compulsory.

A. The complaint is equitable. As a preliminary matter, it is undisputed that Pinnacle Bank’s underlying foreclosure action is equitable in nature. “A mortgage foreclosure is an action in equity.” *Id.* 407 S.C. at 328, 755 S.E.2d at 440, quoting *Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 248, 489 S.E.2d 472, 475 (1997). (Appellant’s Final Brief, p. 6)

B. The civil conspiracy counterclaim is legal. It is also undisputed that Appellant’s counterclaim for civil conspiracy is legal in nature. See *McMillan v. Oconee Memorial Hosp., Inc.*, 626 S.E.2d 884, 886, 367 S.C. 559 (2006), stating “An action for civil conspiracy is an action at law.” (Appellant’s Final Brief, p. 6)

C. The civil conspiracy counterclaim is compulsory because it affects Plaintiff Bank’s ability to enforce the subject note and foreclose the mortgage. The test for determining if a counterclaim is compulsory is whether there is a “logical relationship” between the claim and the counterclaim. *Mullinax v. Bates*, 317 S.C. 394, 396, 453 S.E.2d 894, 895 (1995). In a foreclosure action (as is the case here), the “logical relationship” test is performed by determining whether the counterclaim would affect the lender’s right to enforce the note and foreclose the mortgage.

Advance Int'l, Inc. v. N.C. Nat'l Bank of S.C., 316 S.C. 266, 449 S.E.2d 580 (Ct. App. 1994), aff'd in part, vacated in part, 320 S.C. 532, 466 S.E.2d 367 (1996).

Appellant's civil conspiracy counterclaim asserts that Respondent David Swanson and Plaintiff Bank conspired with one another to fabricate a legal defense (i.e., the Plaintiff Bank's asserted "advice of counsel" defense was not based in fact) as a pretext for Plaintiff Bank's failure to close on loans it was obligated to renew. (R. pp. 170-171). Appellant asserts that no such legal consultation ever occurred between Respondent and Plaintiff Bank, and that Plaintiff Bank was therefore unjustified in reneging on its obligation to renew the maturing loans for an additional five-year term and at a reduced rate. (R. pp 170-171).

There is a logical relationship between Appellant's civil conspiracy counterclaim and the underlying foreclosure action because proving civil conspiracy would affect Plaintiff Bank's ability to enforce the note and foreclose the mortgage. Indeed, Plaintiff Bank's "advice of counsel" defense was its *sole* justification for reneging on its obligation to renew the maturing loans. (Appellant's Final Brief, p. 2; R. at p. 98). Had Plaintiff Bank not reneged on its obligation, the underlying note would not have matured and the foreclosure action would never have occurred.

Appellant's civil conspiracy counterclaim is compulsory because a finding that Respondent and Plaintiff Bank conspired to fabricate the "advice of counsel" defense would eliminate Plaintiff Bank's ability to enforce the note and foreclose the mortgage. "If defendant's prevailing on his counterclaim would affect the bank's right to enforce the note and foreclose on the mortgage, there is a logical relationship between the counterclaim and the underlying suit, and the counterclaim is therefore compulsory." *Blackburn*, 407 S.C. at 330 n.7, 755 S.E.2d at 442 n.7.

In addition, the facts in this case mirror the facts in *North Carolina Federal Sav. and Loan Ass'n v. Dav Corp.*, 268 S.C. 514, 381 SE.2d 903 (1989), wherein the South Carolina Supreme Court held that Defendant's counterclaim in a mortgage foreclosure action was compulsory where the Defendant had (as in the present case) alleged that Plaintiff Bank breached an oral agreement to modify terms of the original loan and provide additional financing. "Clearly, there is a **logical relationship** between the enforceability of the note which is the subject of the foreclosure action and the validity of the purported oral agreement which, if performed, would have avoided the default on the note by joint venture." [Emphasis added] *Id.* at 268 S.C. 518. In the present case, not only was there an oral agreement to renew the loans, the loans were fully underwritten and approved by the bank, new loan documents had been drafted and were ready for execution, and it was only at the closing table that the bank reneged. (R. p. 159-160).

Appellant respectfully submits that this Court erred in affirming the lower court's order striking Appellant's jury demand because A) there is indeed a logical relationship between the complaint and the counterclaim and B) under *Blackburn*, Appellant has a right to a jury trial on his civil conspiracy counterclaim because the complaint is equitable and the counterclaim is both legal and compulsory. Accordingly, Appellant respectfully requests that this court vacate its unpublished opinion and find that Appellant has a right to a jury trial because he meets the criteria set forth in *Blackburn*.

II. Appellant's settlement with Plaintiff Bank does not render the bifurcation issue moot because the bifurcation order still acts as an order of reference that affects the mode of trial by improperly referring the civil conspiracy counterclaim to a bench trial and denying Appellant of his right to a jury trial.

The resolution of claims interposed between Appellant and Plaintiff Bank does not render the bifurcation issue moot because the bifurcation order still refers the civil conspiracy counterclaim to a bench trial, thereby affecting the mode of trial. (R. at p. 8). As discussed above and in Appellant’s Briefs, Appellant has a right to a jury trial on his civil conspiracy counterclaim because the complaint is equitable and the counterclaim is legal and compulsory. The order of reference contained within the subject bifurcation order deprives Appellant of this right. See also *Gardner v. Travis*, 450 S.E.2d 54, 56, 316 S.C. 315, 318 (Ct. App. 1994), stating, “In determining whether to order separate trials or a single proceeding, ‘caution should be taken’ by the trial court ‘to assure that, under the circumstances of the case, a joint trial will not deprive a party of his right to a full jury trial of legal issues.’” [Emphasis added]

In addition, while Rule 42(b), SCRCP, sets forth the conditions under which separate trials may be ordered, it also expressly preserves a party’s right to a jury trial:

(b) Separate Trials. The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Constitution or as given by a statute of the State. [Emphasis added]

Even if bifurcation were appropriate—and Appellant asserts that it is not—the subject order fails to preserve Appellant’s right to a jury trial on the civil conspiracy counterclaim. Accordingly, Appellant respectfully submits that this court should vacate its unpublished opinion and find that Appellant has a right to a jury trial pursuant to the criteria set forth in *Blackburn*.

CONCLUSION

Based on the forgoing, Appellant respectfully requests that this court vacate its unpublished opinion and find that Appellant has a right to a jury trial pursuant to the criteria set

forth in *Blackburn*. Appellant has a right to a jury trial because the complaint is equitable and the counterclaim is legal and compulsory. The civil conspiracy counterclaim is compulsory because it affects Plaintiff Bank's ability to enforce the subject note and foreclose the mortgage. In addition, Appellant's settlement with the Plaintiff Bank does not render the bifurcation issue moot because the bifurcation order still acts as an order of reference that affects the mode of trial by improperly referring the civil conspiracy counterclaim to a bench trial and denying Appellant of his right to a jury trial.

Respectfully submitted,

s/Jesse Sanchez

Jesse Sanchez

The Law Office of Jesse Sanchez, LLC

98 ½ Broad Street, Suit B

Charleston, South Carolina 29401

(843) 814-8181

Daniel S. Slotchiver

Andrew J. McCumber

Slotchiver & Slotchiver, LLP

751 Johnnie Dodds Boulevard, Suite 100

Mount Pleasant, South Carolina 29464

(843) 577-6531

Brent S. Halversen

Halversen & Halversen, LLC

751 Johnnie Dodds Blvd., Suite 200

Mount Pleasant, SC 29464

(843) 284-5790

August 24, 2022

Charleston, South Carolina

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Pinnacle Bank, as successor in interest to Bank of North
Carolina, previous successor in interest to Harbor National
Bank, Plaintiff,

v.

Anthony Whitfield and Cindy Whitfield, Defendants.

AND

Anthony Whitfield, Counterclaimant,

v.

David Swanson, Counterclaim Defendant,

Of whom, Anthony Whitfield is the Appellant and David
Swanson is the Respondent.

Appellate Case No. 2020-000162

Appeal From Charleston County
Diane Schafer Goodstein, Circuit Court Judge

Unpublished Opinion No. 2022-UP-334
Submitted July 27, 2022 – Filed August 10, 2022

AFFIRMED

Daniel Scott Slotchiver and Andrew Joseph McCumber, both of Slotchiver & Slotchiver, LLP, of Mount Pleasant; Jesse Sanchez, of The Law Office of Jesse Sanchez, LLC, of Charleston; and Brent Souther Halversen, of Halversen & Halversen, LLC, of Mount Pleasant, all for Appellant.

Steven Raymond Kropski, Michael B. McCall, and David W. Overstreet, all of Earhart Overstreet, LLC, of Charleston, for Respondent.

PER CURIAM: Anthony Whitfield appeals the circuit court order striking the jury demand for his civil conspiracy counterclaim against David Swanson and bifurcating it to the master in equity. Whitfield argues the circuit court erred in finding his civil conspiracy counterclaim was permissive rather than compulsory. We affirm pursuant to Rule 220(b), SCACR.

1. The trial court properly struck the jury demand for the civil conspiracy counterclaim because it correctly determined it was permissive rather than compulsory. *See Wachovia Bank, Nat. Ass'n v. Blackburn*, 407 S.C. 321, 328, 755 S.E.2d 437, 441 (2014) ("[W]hether a party is entitled to a jury trial is a question of law. Appellate courts may decide question of law with no particular deference to the circuit court's findings." (citation omitted) (quoting *Verenes v. Alvanos*, 387 S.C. 11, 15, 690 S.E.2d 771, 772-73 (2010))); Rule 39(a), SCRCP ("The trial of all issues so demanded shall be by jury, unless . . . the court[,] upon motion or its own initiative[,] finds that a right of trial by jury of some or all of those issues does not exist."); *S.C. Dep't of Com., Div. of Pub. Rys. v. Clemson Univ.*, 432 S.C. 352, 363, 851 S.E.2d 735, 741 (Ct. App. 2020) ("[I]f the circuit court finds a right of trial by jury of some or all of the issues does not exist, a jury trial is not required[,] even if the parties have demanded one."); *Blackburn*, 407 S.C. at 330, 755 S.E.2d at 441 ("If the complaint is equitable and the counterclaim is legal and permissive, the defendant waives his right to a jury trial."); Rule 13(b), SCRCP (providing a permissive counterclaim is "any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim"); *Blackburn*, 407 S.C. at 330 n.7, 755 S.E.2d at 442 n.7 (2014) ("If the defendant's prevailing on his counterclaim would affect the bank's right to enforce the note and foreclose the mortgage, there is a logical relationship between the

counterclaim and the underlying suit, and the counterclaim is therefore compulsory.").

2. Because of the other parties' settlement, the bifurcation issue is moot; therefore, we need not address that issue. *See Skydive Myrtle Beach, Inc. v. Horry Cnty.*, 428 S.C. 638, 642, 837 S.E.2d 485, 487 (2020) ("A case is moot 'when judgment, if rendered, will have no practical legal effect upon existing controversy.'" (quoting *Mathis v. S.C. State Highway Dep't*, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973))); *Sloan v. Friends of Hunley, Inc.*, 369 S.C. 20, 26, 630 S.E.2d 474, 477 (2006) ("A moot case exists where a judgment rendered by the court will have no practical legal effect upon an existing controversy because an intervening event renders any grant of effectual relief impossible for the reviewing court.").

AFFIRMED.¹

THOMAS, MCDONALD, and HEWITT, JJ., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

RECEIVED

Aug 24 2022

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Diane S. Goodstein
Circuit Court Judge

Case No. 2012-CP-10-02758
Appellate Case No. 2020-000162

Pinnacle Bank, as successor in interest to
Bank of North Carolina, previous successor in
interest to Harbor National Bank, Plaintiff

v.

Anthony Whitfield and Cindy Whitfield,
Defendants

Anthony Whitfield, Counterclaimant

v.

David Swanson, Counterclaim Defendant

of whom

Anthony Whitfield is the Appellant and David Swanson is the Respondent.

PROOF OF SERVICE

I, the undersigned, certify that I have served *Appellant's Petition for Rehearing* on

Respondent David Swanson, by emailing a copy on August 24, 2022, addressed to his attorneys of record at the following email addresses: David W. Overstreet, Esq. (david@earhartoverstreet.com), Michael B. McCall, Esq. (mike@earhartoverstreet.com), and Steven R. Kropski, Esq. (steve.kropski@earhartoverstreet.com).

Pursuant to Rule 262(C)(3), SCACR, and the Order of The Supreme Court of South Carolina, RE: Methods of Electronic Filing Under Rule 262 of the South Carolina Appellate Court Rules (as Amended May 6, 2022), a copy of the email to counsel is attached.

Respectfully submitted,

THE LAW OFFICE OF JESSE SANCHEZ, LLC

s/Jesse Sanchez

Jesse Sanchez (SC Bar No. 101906)

The Law Office of Jesse Sanchez, LLC

98 ½ Broad Street, Suite B

Charleston, South Carolina 29401

(843) 814-8181 Telephone

(843) 284-3953 Fax

jesse@jessesanchezlaw.com

Attorney for Appellant

Charleston, South Carolina
August 24, 2022

From: Jesse Sanchez jesse@jessesanchezlaw.com 
Subject: Anthony Whitfield v. David Swanson // 2020-000162
Date: August 24, 2022 at 2:34 PM
To: david@earhartoverstreet.com, mike@earhartoverstreet.com, Steve Kropski steve.kropski@earhartoverstreet.com,
Brent Halversen Brent@halversenlaw.com, Dan dan@slotchiverlaw.com, Andrew J. McCumber andrew@slotchiverlaw.com,
Susan Maulden paralegal@slotchiverlaw.com



Counsel,

Attached for service, please find Appellant's Petition for Rehearing and corresponding cover letter, which are being filed momentarily with the South Carolina Court of Appeals via electronic OneDrive submission.

Regards,

Jesse

--

Jesse Sanchez
The Law Office of Jesse Sanchez, LLC
98 1/2 Broad Street, Suite B
Charleston, SC 29401
P: (843) 814-8181
F: (843) 284-3953
jesse@jessesanchezlaw.com

CONFIDENTIALITY NOTICE

This electronic mail transmission and any accompanying documents constitute information belonging to the sender and may be confidential and legally privileged. This information is intended only for the use of the individual or entity to whom it is addressed. If you are not the intended recipient, any disclosure, copying, distribution, or action taken in reliance on the contents of the information contained in this transmission is strictly prohibited. If you have received this transmission in error, please immediately notify us by telephone at (843) 814-8181 and delete the message. Thank you.



2020-000162-
Whitfie...22.pdf



2020-000162-
Whitfie...ing.pdf



2020-000162-
Whitfie...34 .pdf

August 24, 2022

VIA ONEDRIVE ELECTRONIC SUBMISSION

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201



RE: Pinnacle Bank, as successor in interest to Bank of North Carolina, previous successor in interest to Harbor National Bank, Plaintiff, v. Anthony Whitfield and Cindy Whitfield, Defendants. AND Anthony Whitfield, Counterclaimant, v. David Swanson, Counterclaim Defendant, Of whom, Anthony Whitfield is the Appellant and David Swanson is the Respondent. Appellate Case No. 2020-000162

Dear Ms. Kitchings:

Enclosed herewith, please find the following for filing with the Court:

1. Appellant Anthony Whitfield's *Petition for Rehearing*.
2. The *corresponding Proof of Service*, evidencing service on all counsel of record for the above-captioned appeal by electronic mail.
3. A copy of Opinion No. 2022-UP-334, filed on August 10, 2022, from which this *Petition for Rehearing* is made.

In addition, a check for the fifty dollar (\$50.00) filing fee has been placed in today's outgoing mail.

Thank you for your assistance with this matter. Should you have any questions or wish to discuss the filing, please do not hesitate to contact me directly.

Sincerely,

s/Jesse Sanchez

Jesse Sanchez

Cc (Via Email Only): Daniel S. Slotchiver, Esquire
Andrew J. McCumber, Esquire
Brent Halversen, Esquire
David W. Overstreet, Esquire
Michael B. McCall, Esquire
Steven R. Kropski, Esquire

THE LAW OFFICE OF JESSE SANCHEZ, LLC

98½ Broad Street, Suite B, Charleston, SC 29401 P: 843.814.8181 F: 843.284.3953
jesse@jessesanchezlaw.com jessesanchezlaw.com