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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Diane S. Goodstein
Circuit Court Judge

Opinion No. 2022-UP-334 (S.C. Ct. App. filed Aug. 10, 2022)

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 Petitioner and David Swanson is the Respondent

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PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioner Anthony Whitfield certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on September 22, 2022.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding that Petitioner's civil conspiracy counterclaim was permissive and compulsory where the counterclaim, if established, would have preempted (i.e. affected) the underlying foreclosure action brought by Plaintiff Bank?
2. Did the Court of Appeals err in holding that Petitioner was not entitled to a jury trial on his civil conspiracy counterclaim where the Complaint was equitable and the civil conspiracy counterclaim was both legal and compulsory?
3. Did the Court of Appeals err in refusing to address whether the circuit court had erred in bifurcating Petitioner's civil conspiracy claim from the foreclosure action where the bifurcation order refers the civil conspiracy counterclaim to a bench trial and expressly denies Petitioner's right to a jury trial, thereby affecting the mode of trial?

STATEMENT OF THE CASE

On September 7, 2012, Harbor National Bank, Plaintiff Pinnacle Bank's predecessor-in-interest, brought the present residential foreclosure action against Petitioner Anthony Whitfield and his ex-wife, Cindy Whitfield. (Complaint, R. pp. 19-48). The action involved a residential property located in Charleston County, commonly referred to in the pleadings as the "Black Rush Property".

The action was one of five (5) foreclosure lawsuits brought by Harbor National Bank against Mr. Whitfield in 2012 for loans made to him in 2007 and 2008, covering eight (8) residential properties located throughout Berkeley, Dorchester, and Charleston Counties. In March of 2014,

Harbor National Bank also brought a sixth foreclosure lawsuit against Mr. Whitfield in Dorchester County covering a ninth residential property.

In response to each of the lawsuits—including the present one—Mr. Whitfield filed counterclaims alleging, *inter alia*, that Plaintiff Harbor National Bank had agreed to renew the loans being foreclosed upon for an additional five-year term, breached that agreement, and caused him damages. (Defendant's Answer, R. pp. 49-61). Specifically, Mr. Whitfield's Answer and Counterclaim alleged (1) that he met with the president of Harbor National Bank on June 21, 2012, wherein an agreement was made to renew all nine of the loans for an additional five-year term at a reduced interest rate of 4.75%; (2) that a closing was scheduled for the following week on June 28, 2012 and attended by both Mr. Whitfield and a Harbor National Bank representative; and (3) that Harbor National Bank refused to close on any of the nine loan renewals at the closing. (Defendant's Answer, R. pp. 52-60).

As justification and defense for not closing on the loan renewals, Harbor National Bank contended during litigation, and after the foreclosure suit was filed, that it had sought and relied upon the advice of its counsel, David Swanson, Esq., in deciding not to close on any of Mr. Whitfield's loan renewals. (Pl's Memo in Support of Motion for Sum. Judgment, R. at p. 198). Specifically, Harbor National Bank, through its employee Scott Warren, claimed that in reliance upon Mr. Swanson's advice, Harbor National Bank had refused to renew the loan for the Black Rush

Property without a title endorsement or co-signature from Cindy Whitfield.[1] (Scott Warren Depo. Tr., R. p. 700, line 16 - p. 701, line 3; p. 709, lines 1-9; p. 729, lines 17-21).

Both Scott Warren and Mr. Swanson testified at their respective depositions that Mr. Warren had a telephone conversation with Mr. Swanson prior to the scheduled closing on June 28, 2020 and that Mr. Swanson had advised Mr. Warren that "under this set of facts" the Bank should get an endorsement from the title company. (Scott Warren Dep. Tr., R. p. 523, line 21 – p. 526, line 5; p. 527, lines 2-18; David Swanson Dep. Tr., R. p. 617, line 18 - p. 624, line 2; p. 641, line 23-p. 642, line 2; p. 644, lines 9-25; p. 766, line 20 - p. 767, line 3; p. 779, line 17 - p. 780, line 13). However, Mr. Swanson testified that he had not reviewed any documents or performed any legal research in rendering this advice and that he had not even been aware of the bank customer's name during the call despite a general policy of conducting conflict checks for incoming cases. (R. p. 617, lines 18- p. 619, line 2; p. 660, lines 1-13; p. 625, lines 8-11; p. 653, lines 1-6; p. 759, lines 11-13; p. 765, lines 6-10; p. 765, line 23-p.766, line 2; p. 767, lines 4- 10; p. 772, lines 11-15; p. 779, line 17 - p. 780, line 13.). Mr. Swanson also testified that he did not send any bills, record any time, or otherwise keep record of his phone call with Mr. Warren. (R. at Id.).

Subpoenaed telephone records reflected the absence of any calls from Mr. Warren's cell phone and/or office number to Mr. Swanson's cell phone and/or office number at the time and place claimed. (R. pp. 381-420).

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[1] Mark Weeks, Esq., the closing attorney for the loan renewal transaction, however, specifically testified that a title endorsement was **not necessary or required** for renewing the loan on the Black Rush Property and that he could have renewed any of the loans without a title endorsement or Ms. Cindy Whitfield's permission and/or authorization to renew the loans. (Memo in Opp. to Motion for Summ. Judgment, R. pp. 253-286). Additionally, according to affidavits on file, Mr. Weeks had no knowledge of Mr. Swanson be involved in the transaction or that the bank based its decision in not closing on Mr. Swanson's alleged advice. (R. pp. 317-320)

On January 8, 2016, as a result of discovery conducted in this case, including the depositions of Mr. Scott Warren, Mr. David Swanson, Mr. Mark Weeks, and multiple bank employees, Mr. Whitfield filed Defendant's Fifth Amended Answer, Affirmative Defenses, Crossclaim and Counterclaims ("Fifth Amended Answer"), in which he asserted counterclaims for Civil Conspiracy and Abuse of Process against both Mr. Swanson and the Plaintiff. (Fifth Amended Answer, R. pp. 153-175). The Civil Conspiracy counterclaim against Mr. Swanson alleged, *inter alia*, that both Mr. Swanson and the Plaintiff, through its employee Scott Warren, had provided false testimony that a call had occurred between the two of them prior to the closing; that phone records and other evidence produced during discovery demonstrate that no such call occurred; and that the sworn testimony provided by Mr. Swanson and Mr. Warren—in which they purport that Mr. Swanson advised the bank to procure a title endorsement in order to close on the loan—was given for the ulterior purpose of fabricating a defense as to the bank's failure to renew the loan in accordance with its contractual obligation. (R. pp. 170-171).

As with all previous pleadings filed by Mr. Whitfield, the Fifth Amended Answer demanded a jury trial. (R. pp. 153 and 174). Like the Fourth Amended Answer before it, the Fifth Amended Answer also asserted a cross-claim for Equitable Indemnity against Co- Defendant Cindy Whitfield. (R. pp. 172-173).

On February 18, 2016, David Swanson filed Third Party Defendant David Swanson's Answer to the Fifth Amended Answer. (R. pp. 189-194). Mr. Swanson's Answer also made a demand for a jury trial. (R. p. 189).

On July 28, 2017, Mr. Swanson filed a Motion for Summary Judgment on the Abuse of Process and Civil Conspiracy claims made against him by Mr. Whitfield.

On November 8, 2017, The Honorable J.C. Nicholson, Jr. entered an Order granting Mr. Swanson's Motion for Summary Judgment as to the Abuse of Process claim, but denying the Motion as to the Civil Conspiracy, finding that a genuine issue of material fact exists as to the claim. (R. pp. 5-8).

On March 8, 2019, David Swanson filed a Motion to Bifurcate the Claims Against Mr. Swanson, Strike Mr. Whitfield's Jury Trial Demand, and to Refer the Civil Conspiracy Claim to the Master-In-Equity for a Bench Trial. (R. pp. 321-373). On October 7, 2019, a hearing on Mr. Swanson's motion was heard before the Honorable Diane S. Goodstein. (R. pp. 1166-1202). An Order granting Mr. Swanson's Motion was entered on October 16, 2019. (R. pp. 9-16). The Order found, *inter alia*, that (1) the civil conspiracy counterclaim is permissive, not compulsory (2) that the counterclaim will not affect the enforceability of the note and mortgage, (3) that Mr. Whitfield is not entitled to a jury trial as of right on the civil conspiracy claim, (4) that no logical relationship exists between Mr. Whitfield's civil conspiracy counterclaim and the foreclosure action or Mr. Whitfield's other counterclaims, and (5) that bifurcation of the civil conspiracy claim is prudent.

On October 18, 2019, Mr. Whitfield filed Defendant Anthony Whitfield's Rule 52(b) Motion to Amend Finding and Rule 59 (e) Motion to Alter or Amend Order. (R. pp. 381-420). An Order denying Mr. Whitfield's Motion to Alter or Amend was entered in January 6, 2020. (R. pp. 17-18).

On February 3, 2020, Mr. Whitfield filed a Notice of Appeal. Thereafter, the parties filed their Final Briefs with the Court of Appeals. (App. pp. 1-54). On July 28, 2022, however, the Court of Appeals issued a letter stating that this case would be submitted on the record on appeal and briefs during the July 2022 term without oral argument.

On August 10, 2022, the Court of Appeals issued a per curiam, unpublished opinion, wherein it affirmed the circuit court's order, holding 1) that Mr. Whitfield's civil conspiracy counterclaim

was permissive rather than compulsory and that, as a result, he was not entitled to a jury trial, and 2) that the Court would not address the bifurcation issue raised in Mr. Whitfield's appeal because it had determined the issue was moot. (App. p. 55)

On August 24, 2022, Mr. Whitfield filed a Petition for Rehearing. (App. p. 58). On September 22, 2022, the Court of Appeals denied the Petition for Rehearing. (App. p. 71). **Mr. Whitfield seeks a Writ of Certiorari to review the Court of Appeal's unpublished opinion on the grounds that 1) the Court of Appeal's decision directly conflicts with the South Carolina Supreme Court's decision in *Wachovia Bank, N.A. v. Blackburn*, 407 S.C. 321, 330, 755 S.E.2d 437, 441 (2014), and *North Carolina Federal Sav. and Loan Ass'n v. Dav Corp.*, 268 S.C. 514, 381 SE.2d 903 (1989), and 2) the Court of Appeal's decision involves substantial constitutional issues, which directly affect Mr. Whitfield's right to a jury trial.**

ARGUMENTS

1. PETITIONER 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). Mr. Whitfield has a right to a jury trial because he meets the criteria set forth by this Court 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, at App. p. 11).

B. The civil conspiracy counterclaim is legal.

It is also undisputed that Mr. Whitfield'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, at App. p. 11).

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).

Mr. Whitfield's civil conspiracy counterclaim asserts that Respondent David Swanson and Plaintiff Bank conspired with one another to fabricate a bogus legal defense (i.e., they concocted Plaintiff Bank's "advice of counsel" defense) as a pretext for Plaintiff Bank's willful failure to close on loans it was obligated to renew. (R. pp. 170-171). Mr. Whitfield asserts that no such legal consultation ever occurred between Respondent David Swanson 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 Mr. Whitfield'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 at App. p. 7; 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.

Mr. Whitfield's civil conspiracy counterclaim is compulsory because a finding that Respondent and Plaintiff Bank conspired to fabricate the "advice of counsel" defense would directly undercut 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).

Petitioner respectfully submits that the Court of Appeals erred in affirming the lower court's order striking Petitioner's jury demand because A) there is indeed a logical relationship between the complaint and the counterclaim and B) under this Court's decisions in *Blackburn* and *North Carolina Federal Sav. and Loan Ass'n.,* Mr. Whitfield 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, Petitioner respectfully requests that this court reverse the Court of Appeal's unpublished opinion and find that Petitioner has a right to a jury trial because he meets the criteria set forth in *Blackburn* and *North Carolina Federal Sav. and Loan Ass'n.*

2. PETITIONER'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 A) IMPROPERLY REFERRING THE CIVIL CONSPIRACY COUNTERCLAIM TO A BENCH TRIAL AND B) DENYING PETITIONER OF HIS RIGHT TO A JURY TRIAL.

The resolution of claims interposed between Mr. Whitfield 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 Petitioner's Appellate Briefs, Petitioner 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 Petitioner 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.'" [Emphais 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 Petitioner asserts that it is not—the subject order fails to preserve Petitioner's right to a jury trial on the civil conspiracy counterclaim Accordingly, Petitioner respectfully submits that this Court should reverse the Court of Appeal's unpublished, per curiam opinion and find that Petitioner has a right to a jury trial pursuant to the criteria set forth in *Blackburn* and *North Carolina Federal Sav. and Loan Ass'n.*

CONCLUSION

Based on the forgoing, Petitioner respectfully requests that this Honorable Court reverse the Court of Appeal's unpublished opinion and find that Petitioner has a right to a jury trial pursuant to the criteria set forth in *Blackburn* and *North Carolina Federal Sav. and Loan Ass'n*. Mr. Whitfield 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, Mr. Whitfield'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 his right to a jury trial.

[Signature on following page]

Respectfully submitted,

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