

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2012-CP-32-2816

FV-I, Inc. etc.,

Bryon J. Dolan, et al.,

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: Andrew S. Radeker

Attorney for : Plaintiff Defendant
or
 Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRCP; Rule 41(a), SCRCP (Vol. Nonsuit); Rule 43(k), SCRCP (Settled); Other _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRCP; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):** Affirmed; Reversed; Remanded; Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case

Additional Information for the Clerk : Plaintiff has 45 days to elect to bifurcate case if it so chooses.


INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A	N/A	N/A
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.


Circuit Court Judge

2153
Judge Code

9/26/13
Date

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20__ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20__ to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter: _____

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

FV-I, Inc., in trust for Morgan Stanley
Mortgage Capital Holdings LLC,

Plaintiff,

vs.

Bryon J. Dolan; Lisa S. Dolan; First
Citizens Bank and Trust Company, Inc.;
Wells Fargo Bank, N.A.; Branch Banking
and Trust Company;

Defendants.


IN THE COURT OF COMMON PLEAS

Case No. 2012-CP-32-2816

ORDER ON PLAINTIFF'S MOTION
TO STRIKE JURY DEMAND AND
REFER CASE

This matter came before me at a hearing on July 16, 2013, of the Plaintiff's motion to strike the jury demand of Defendants Bryon J. Dolan and Lisa S. Dolan (hereinafter "the Defendants") and to refer this case to the Lexington County Master-in-Equity. Charles S. Gwynne, Jr., Esquire, argued the motion for the Plaintiff, and Andrew S. Radeker, Esquire, did so for the Defendants. After due consideration, the Court denies the motion to refer the case to the Master-in-Equity and denies in part and grants in part the motion to strike the Defendants' jury demand.

This is a mortgage foreclosure action which the Defendants have asserted defenses and counterclaims. The Defendants pled three counterclaims: 1) for an accounting, 2) for violation of the South Carolina Unfair Trade Practices Act, and 3) for breach of contract. The Plaintiff and the Defendants agree that the claims for foreclosure and for an accounting sound in equity and, thus, that neither party has the right to a jury trial on those claims. The Plaintiff's motion thus concerns the at-law counterclaims, which are those for breach of contract and violation of the Unfair Trade Practices Act.

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In Johnson v. S.C. Natl. Bank, our Supreme Court set out “the proper analysis for determining the trial of legal and equitable issues in complaints and counterclaims” as follows:

- (1) If both the complaint and the counterclaim are in equity, the entire matter is triable by the court.
- (2) If both are at law, the issues are triable by a jury.
- (3) If the complaint is equitable and the counterclaim is legal and permissive, the defendant waives his right to a jury trial.
- (4) If the complaint is equitable and the counterclaim legal and compulsory, the plaintiff or the defendant has a right to a jury trial on the counterclaim. In that case, the proper procedure is as follows:

- (a) The trial judge may, pursuant to Rule 42(b), order separate trials of the legal and equitable claims, or may order the claims tried in a single proceeding.

- (b) If separate trials are ordered, the judge must determine which issues are to be tried first. If there are factual issues common to both claims, absent the “most imperative circumstances,” Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 79 S. Ct. 948, 3 L.Ed.2d 988 (1959), the “at law” claim must be tried first. If there are no common factual issues, it is within the trial judge's discretion which claim will be tried first.

- (c) If the claims are to be tried in a single proceeding and there are factual issues common to both claims, the jury shall first determine the legal issues. The court may then determine the equitable claims, but the jury's determination of common factual issues shall be binding upon the court.

292 S.C. 51, 55-56, 354 S.E.2d 895, 897 (1987).

Accordingly, the Court's analysis for each of the two counterclaims at issue turns on whether the counterclaim is compulsory. As discussed below, the Court determines that the breach of contract counterclaim is compulsory and the Unfair Trade Practices Act claim is not.

In June of 2012, the Court of Appeals in Wells Fargo Bank, N.A. v. Smith addressed whether three counterclaims at issue there – common law unconscionability, statutory unconscionability, and violation of the attorney preference statute – were compulsory counterclaims in a mortgage foreclosure action. 398 S.C. 487, 493-99, 730 S.E.2d 328, 331-35 (Ct. App. 2012). The Court of Appeals discussed the test for determining whether a counterclaim is compulsory as follows:

“By definition, a counterclaim is compulsory only if it arises out of the same transaction or occurrence as the opposing party’s claim.” First-Citizens Bank & Trust Co. of S.C. v. Hucks, 305 S.C. 296, 298, 408 S.E.2d 222, 223 (1991); see also Rule 13(a), SCRPC. 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 N.C. Fed. Sav. & Loan Ass'n v. DAV Corp., 298 S.C. 514, 518, 381 S.E.2d 903, 905 (1989), our supreme court adopted the “logical relationship” test and held DAV’s counterclaim was compulsory because “there [was] a logical relationship between the enforceability of the note which [was] the subject of the foreclosure action and the validity of the purported oral agreement which, if performed, would have avoided default on the note by the joint venture.” In essence, the “logical relationship” determination is made by asking whether the counterclaim would affect the lender’s right to enforce the note and foreclose the mortgage. Advance Intern., Inc. v. N.C. Nat'l Bank of S.C., 316 S.C. 266, 269-70, 449 S.E.2d 580, 582 (Ct.App.1994), aff'd in part, vacated in part, 320 S.C. 532, 466 S.E.2d 367 (1996). Here, there is a “logical relationship” between the enforceability of the Note, which is the subject of the foreclosure action, and the allegation that the Mortgage between Wells Fargo and Smith is unconscionable. If Smith prevails on his unconscionability claim, it will affect Wells Fargo’s right to enforce the Note and foreclose the Mortgage. Therefore, Smith’s common law unconscionability counterclaim is compulsory under the “logical relationship” test.

Id. at 495-96.

The Wells Fargo v. Smith court determined that Smith’s claim based on violation of the attorney preference statute – which apparently only sought relief under subsection (A) of S.C.

Code Ann. § 37-10-105 – was an at-law claim but was not compulsory because the “counterclaim has no ‘logical relationship’ to the enforceability of the Note and Mortgage[,]” since, if he prevailed on the claim, “Smith would only be entitled to actual damages and a possible penalty between \$1,500 and \$7,500” and would not be entitled to “rescission of the Note and Mortgage[.]” Wells Fargo, 398 S.C. at 499.

The Defendants argue that, to the extent that the Court of Appeals stated in Wells Fargo v. Smith that a counterclaim in a mortgage foreclosure action is compulsory *only* if “the counterclaim would affect the lender’s right to enforce the note and foreclose the mortgage[,]” the Court of Appeals departed from precedent and is wrong. The Defendants argue the correct test is whether the counterclaims arises out of the same transactions or occurrences as the Plaintiff’s claim. Regardless of the merits of the Defendants’ argument on that point, however, this Court is constrained by precedent to follow Wells Fargo v. Smith, which holds that a counterclaim in a mortgage foreclosure action is compulsory only if it has a logical relationship to the enforceability of the note and mortgage. In other words, under the Wells Fargo v. Smith test, if success on the counterclaim would mean that the plaintiff *cannot* prevail on its foreclosure claim, then the counterclaim is compulsory.

The Defendants’ breach of contract claim is compulsory. The gist of the claim is that the Plaintiff or a predecessor in interest entered into a settlement or modification of the loan at issue, that the Defendants performed their duties under that arrangement (until the Plaintiff prevented them from performing further), and that the Plaintiff breached its contractual duties to the Defendants under the note and mortgage as modified by the settlement. If what the Defendants allege is true, then they are not in default of the note and mortgage, and the Plaintiff thus cannot


enforce the note or be granted foreclosure of the mortgage. This is the essence of a compulsory counterclaim.

The Defendants argue that their Unfair Trade Practices Act claim is compulsory because it arises out of the same set of facts (i.e., transactions and occurrences) as do several of their defenses to the foreclosure claim, and because it arises out of the same set of facts as their compulsory breach of contract claim. They also argue that the claim is compulsory because it arises out of the administration of the loan, which is necessarily a part of the Plaintiff's case. The Court disagrees. Under the Wells Fargo v. Smith test, this counterclaim would be compulsory only if it would necessarily affect the Plaintiff's right to enforce the note and foreclose the mortgage. If the Defendants prevail on their Unfair Trade Practices Act claim, that will not necessarily mean that the Defendants have proven a set of facts that makes it impossible for the Plaintiff to succeed on its foreclosure claim. It would be possible both for the Defendants to prevail on this counterclaim and also for the Plaintiff to prevail on its claim at the same trial. Accordingly, the Defendants' Unfair Trade Practices Act counterclaim is permissive.

As the master-in-equity cannot conduct a jury trial, the entire case cannot be referred to the master-in-equity, which is what the Plaintiff sought in its motion. The Defendants noted at the hearing that they would not oppose this case being bifurcated, with the foreclosure claim being tried by the master-in-equity, so long as the jury issues are tried first. Therefore, the Plaintiff has until 45 days after the entry of this Order (to give time for any appeal) to elect that this case be bifurcated in that manner if it chooses to do so.

It is therefore hereby ORDERED as follows:

1. The Plaintiff's motion to refer this case to the master-in-equity is denied;

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2. The Plaintiff's motion to strike the Defendants' jury demand as to their breach of contract counterclaim is denied, and this counterclaim shall be tried by a jury;
3. The Plaintiff's motion to strike the Defendants' jury demand as to their Unfair Trade Practices Act counterclaim is granted, and this counterclaim shall be tried by the Court; and
4. The Plaintiff has until 45 days from the entry of this Order to elect that this case be bifurcated, with the foreclosure claim being tried by the master-in-equity, so long as the jury issues are tried first.

AND IT IS SO ORDERED.



The Honorable Edgar W. Dickson
Circuit Judge

September 26, 2013

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