

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Joseph M. Strickland, Master-in-Equity

Appellate Case No. 2024-001719

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SC Court of Appeals

U.S. Bank Trust National Association, not in its Individual Capacity, but solely as owner Trustee for the Legacy Trust 2020-GSI, Rushmore Loan Servicing and Goldman Sach Mortgage Company, U.S. Bank and U.S. Bank National Association,.....Respondent,

vs.

Jacob Fulks; Florene Fulks,.....Appellants.

APPELLANTS JACOB FULKS AND FLORENE FULKS
FINAL REPLY BRIEF

Respectfully submitted,

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Florene Fulks

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Abbreviations

Record on Appeal – ROA

Motion - Mtn

Complaint – Compl

Transfer - Trans

Answer – Answ.

Master in Equity - MIE

Dismiss – Dism.

Counterclaims - CC

Appellants Jacob and Florene Fulks respectfully submit this Reply Brief in response to the Initial Brief of Respondent, U.S. Bank Trust National Association, and request that this Court reverse the Master-in-Equity's dismissal of their Amended Counterclaims and denial of their Motion to Transfer and Motion to Amend. This brief is due on or before April 19, 2025, however because April 19, 2025, fall on a weekend this brief was submitted on April 20, 2025 and is timely.

I. ARGUMENT

A. BY APPEALING THE DENIAL OF MOTION TO TRANSFER BACK TO CIRCUIT, APPELLANTS ARE EFFECTIVE APPEALING THE ORDER OF REFERENCE AND DID NOT WAIVED THEIR RIGHT TO A JURY TRIAL

Respondent argues that the Order of Reference, entered before Appellants' jury demand, permanently vested jurisdiction in the Master and waived any jury right. This is incorrect.

On April 2, 2024, at the first opportunity and before any substantive issues were ruled upon by the master-in-equity (MIE), The Fulks move the MIE to return the case back to the circuit court. In their motion, The Fulks discussed and opposed the order of reference. This motion by The Fulks made it clear that they opposed the order of reference thus appealing the denial of this motion is effectively appealing the order of reference. More importantly for this court analysis, Respondents did not object or file any opposition brief to The Fulks' motion to transfer in the Master court and cannot argue on appeal about any issue related to the order of reference/motion to transfer. "These broad assertions failed to preserve appellate arguments relating to the order of reference/motion to transfer and respondents have waived any arguments on this issue. See *Doe v. Doe*, 634 SE 2d 51, 212 - SC: Court of Appeals 2006. Furthermore, "[i]t is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733. Respondents assert that The Fulks was required to file Rule 59 motion to preserve the issue for appellate review. The Fulks motion to transfer specifically addressed the order of

reference (ROA 85-104) and that motion was verbally denied in open court by the Master as the hearing transcript (ROA 5-23) shows. Rule 59 motions are not necessary to preserve issues that have been ruled upon at trial, *Id at 77*.

The South Carolina Rules of Civil Procedure make clear that the filing of a jury demand requires a return to Circuit Court if the issue is triable by jury. Rule 53(b), SCRCP, states:

"Any party may request a jury pursuant to Rule 38 on any or all issues triable of right by a jury and, upon the filing of a jury demand, the matter shall be returned to the circuit court." (emphasis added)

The South Carolina Court of Appeals in *S.C. Cmty. Bank v. Salon Proz, LLC*, 420 S.C. 89, 96, 800 S.E.2d 488, 491 (Ct. App. 2017) held:

"Rule 53(b) gives clerks the power to refer some or all causes of action in a foreclosure case when a party has not yet made a jury demand under Rule 38."

In this case, Appellants filed their Answer and Counterclaims demanding a jury trial on February 8, 2024, (ROA 35) after the Order of Reference (ROA 1) was entered but before the Master ruled on any substantive issues. This distinguishes the present case from *Creed v. Stokes*, 285 S.C. 542, 331 S.E.2d 351 (1985), where the failure to appeal an order of reference *after* denial of a jury trial constituted waiver. Moreover, Rule 38(b), SCRCP, provides: "Any party may demand a trial by jury of any issue triable of right by a jury..."

As earlier stated, Respondent's failure to object or oppose The Fulks motion to transfer back for a jury trial constituted waiver on this issue. Nevertheless, Respondent's position that the jury demand was untimely ignores that the right to jury trial is preserved if asserted before substantive rulings. Here, the jury demand preceded any dispositive action and addressed legal claims seeking money damages.

B. THE MASTER ERRED IN DISMISSING COUNTERCLAIMS THAT WERE LEGAL AND COMPULSORY.

The Master dismissed counterclaims for negligent misrepresentation, fraudulent concealment, negligent infliction of emotional distress, and statutory violations. Under *Deutsche Bank Nat'l Tr. Co. v. Estate of Houck*, 440 S.C. 409, 892 S.E.2d 280 (2023), the Supreme Court held:

"The question of whether a counterclaim is compulsory is governed by the plain language of Rule 13(a)." Id. at 413, 892 S.E.2d at 282.

Rule 13(a), SCRPC, requires a counterclaim if it "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim."

Appellants' counterclaims arise from the same mortgage loan and foreclosure proceeding. For instance, the negligent misrepresentation claim stems from statements made during the loan servicing period, and the statutory claims challenge the validity of the loan origination. These issues are intertwined with Respondent's foreclosure claim. In *Collier v. Green*, 244 S.C. 367, 137 S.E.2d 277 (1964), the Court explained:

"Where... the defendant sets up a defense and/or a counterclaim affecting the consideration, and arising out of the transaction in which the mortgage or lien was created, the authorities hold that the issues thus raised are equitable and are to be tried by the court upon its equity side."

Here, Appellants also assert legal claims independent of equitable foreclosure defenses. These include claims for damages and consumer protection violations that are legal in nature and thus triable by jury.

C. THE MASTER'S FAILURE TO REDUCE ORAL RULINGS TO WRITING DOES NOT BAR REVIEW

Respondent argues that the Master's oral denial of the Motion to Transfer and Motion to Amend are unappealable because no written order was entered. First, The Fulks repeatedly requested by email that the court issue a written order regarding the denial but the court failed to do so.

Even still, courts have recognized exceptions where the record clearly reflects the ruling. See *Summersell v. S.C. Dep't of Pub. Safety*, 337 S.C. 19, 22, 522 S.E.2d 144, 145-46 (1999) (issues not explicitly ruled upon must be raised by post-trial motion, but clarity in transcript may suffice). Furthermore, the Master was asked directly by Ms. Fulks to permit amendment, and the request was clearly denied on the record. Rule 15(a), SCRPC, provides that leave to amend "shall be freely given when justice so requires." Respondents did not object to the Fulks request in the trial court nor have they shown in the MIE court or on appeal how it would be prejudice by an such an amendment, especially considering no discovery or scheduling order had been established.

Respondent allege that The Fulks have already amend once as a matter of course. However, in this case no discover had yet taken place and courts often grant leave to amend after discovery. When a trial court finds a complaint fails "to state facts sufficient to constitute a cause of action" under Rule 12(b)(6), the court should give the plaintiff an opportunity to amend the complaint pursuant to Rule 15(a) before filing the final order of dismissal. See *Foman v. Davis*, 371 U.S. 178, 179, 182, 83 S.Ct. 227, 228, 230, 9 L.Ed.2d 222, 224, 226 (1962) (where a complaint is dismissed "for failure to state a claim upon which relief might be granted," leave to amend the complaint "should, as the rules require, be `freely given'"

Denying a pro se litigant or any litigant the right to amend without explanation or consideration is an abuse of discretion. As held in *Maybank 2754, LLC v. Zurlo*, 444 S.C. 47, 63, 906 S.E.2d 94, 103 (Ct. App. 2024).

Rule 15(a), SCRPC, "strongly favors amendments and the court is encouraged to freely grant leave to amend." *Patton v. Miller*, 420 S.C. 471, 489, 804 S.E.2d 252, 261-62 (2017) (quoting *Parker v. Spartanburg Sanitary Sewer Dist.*, 362 S.C. 276, 286, 607 S.E.2d 711, 717 (Ct. App. 2005)). Under Rule 15(a), the Master should have considered whether the defendants were prejudiced by the amendment, or

whether there was some other **substantial reason to deny it.**" *Id.* at 490, 804 S.E.2d at 262. The burden is on the party opposing the motion to amend to show prejudice. *Id.* at 491 n.9, 804 S.E.2d at 262 n.9.

"In the absence of any apparent or declared reason—such as undue delay, bad faith[,] or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be "freely given." *Maybank, Id.* at 83.

D. THE COURT HAS JURISDICTION TO REVIEW THE DENIAL OF AMENDMENT

Respondent argues the Court lacks jurisdiction because Appellants did not specifically mention the denial of the oral motion to amend in the Notice of Appeal. The denial of leave to amend is incorporated into the The Fulks appeal(ROA 125-129) of the granting of Respondents motion to dismiss counterclaims. Furthermore, the Notice included the transcript of the hearing where denial of the Motion to Transfer and leave to amend was issued and the request to amend arose from the same hearing.

The South Carolina Appellate Court Rules do not require hyper-technical identification of each oral ruling when they are part of the same proceeding and transcript. This Court has authority to consider all rulings from that hearing, especially if they were briefed.

II. CONCLUSION

For the foregoing reasons, Appellants respectfully request this Court reverse the dismissal of their Amended Counterclaims¹, vacate the denial of their Motion to Transfer and Motion to Amend, and remand this case for trial by jury on the legal issues presented.

¹ Respondents also argue that Appellants added Rushmore Loan Servicing and Goldman Sach Mortgage Company to the case without leave to join. However, because U.S. Bank Trust National Association is listed whether the other two entities have appeared or is properly joined at this point in the litigation is immaterial.

Respectfully submitted,

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April 19, 2025