

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

The Honorable Diane Schafer Goodstein, Circuit Court Judge

Case No. 2011-CP-18-1013

Appellate Case No. 2013-002066

Bank of New York Mellon, as Successor Trustee under Appellant,
NovaStar Mortgage Funding Trust, Series 2004-1

v.

Rachel R. Lindsay, Jeffrey Wayner, Tammy Wayner,
Tiffany Spann-Wilder, Esq., The Steinberg Law Firm
and United States of America acting by and through its
agency, the Internal Revenue Service, Defendants,

Of Whom Rachel R. Lindsay is the Respondent.

Rachel R. Lindsay Respondent,

v.

Saxon Mortgage Services, Inc. Appellant.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUES ON APPEAL1

I. The trial court erred by finding that Lindsay is entitled to a jury trial because the entire action lies in equity1

II. The trial court erred by finding that Lindsay has a right to a jury trial because none of Lindsay's counterclaims are legal and compulsory1

III. The trial court erred by failing to specifically identify which claims it concluded Lindsay is entitled to a trial by jury upon, a critical mode of trial determination.....1

STATEMENT OF THE CASE.....2

STATEMENT OF FACTS3

ARGUMENT.....5

I. The Entire Action is One in Equity.....5

II. Each of Lindsay's Individual Claims Is Either Permissive or Equitable.9

A. Lindsay's Counterclaims for Promissory Estoppel, Unjust Enrichment and Declaratory Relief Are Equitable.10

B. Lindsay's Claims Based Upon Misapplication of Payments Are Equitable Because the Main Purpose of the Claims Is to Prevent Foreclosure.10

C. Lindsay's Third-Party Claims Against Saxon are Permissive.13

D. Lindsay's Counterclaims Against Plaintiff Are Permissive.13

III. The Trial Court Failed to Specify Which Claims are Subject to Trial by Jury, Thereby Leaving the Mode of Trial Unclear.14

CONCLUSION.....15

TABLE OF AUTHORITIES

CASES

<u>Advance Int'l, Inc. v. N.C. Nat'l Bank,</u> 316 S.C. 266, 270-271; 449 S.E.2d 580 (Ct. App. 1994)	14
<u>Bell v. Mackey,</u> 191 S.C. 105, 3 S.E.2d 816 (1939)	11
<u>Byrn v. Walker,</u> 275 S.C. 83, 267 S.E.2d 601, (1980)	6
<u>C & S Real Estate Servs., Inc. v. Massengale,</u> 290 S.C. 299, 350 S.E.2d 191, (1986)	9
<u>Collier v. Green,</u> 244 S.C. 367, 137 S.E.2d 277 (1964)	6, 8
<u>Columbia Wholesale Co. v. Scudder May N.V.,</u> 312 S.C. 259, 440 S.E.2d 129, (1994)	9
<u>Crewe v. Blackmon,</u> 289 S.C. 229, 232-33, 345 S.E.2d 754, 756-57 (Ct. App. 1986)	10
<u>Flagstar Corp. v. Royal Surplus Lines,</u> 341 S.C. 68, 533 S.E.2d 331 (2000)	5
<u>Floyd v. Floyd,</u> 306 S.C. 376, 412 S.E.2d 397 (1991)	10
<u>Gaymon v. Richland Memorial Hosp.,</u> 327 S.C. 66, 488 S.E.2d 332, (1997)	14
<u>Hagood v. Sommerville,</u> 362 S.C. 191, 607 S.E.2d 707 (2005)	15
<u>Ins. Fin. Servs., Inc. v. S.C. Ins. Co.,</u> 271 S.C. 289, 247 S.E.2d 315 (1978)	10
<u>Johnson v. S.C. Nat'l Bank,</u> 292 S.C. 51, 354 S.E.2d 895 (1987)	9
<u>Lester v. Dawson,</u> 327 S.C. 263, 491 S.E.2d 240 (1997)	5
<u>McConnell, et al. v. Barnes, et al.,</u> 142 S.C. 112, 140 S.E. 310 (1927)	8

<u>Mortgage Elec. Sys., Inc. v. White,</u> 384 S.C. 606, 682 S.E.2d 498 (Ct. App. 2009).....	5, 11, 12
<u>N.C. Fed. Sav. & Loan Assoc. v. DAV Corp.,</u> 298 S.C. 514, 381 S.E.2d 903, (1989)	12
<u>N.C. Federal Savings and Loan Ass'n v. DAV Corp.,</u> 298 S.C. 514, 381 S.E.2d 903 (1989).....	9
<u>Parrish v. Allison,</u> 376 S.C. 308, 656 S.E.2d 382 (Ct. App. 2007).....	8
<u>Pelfrey v. Bank of Greer,</u> 270 S.C. 691, 244 S.E.2d 315 (1978)	6
<u>Rogers v. Nation,</u> 284 S.C. 330, 326 S.E.2d 182 (Ct. App. 1985).....	11
<u>Rosenbaum v. S-M-S 32,</u> 311 S.C. 140, 427 S.E.2d 897 (1993)	7, 8
<u>Rushing v. McKinney,</u> 370 S.C. 280, 633 S.E.2d 917, 922 (Ct. App. 2006).....	9
<u>Tatnall v. Gardner,</u> 350 S.C. 135, 564 S.E.2d 377 (Ct. App. 2002).....	12
<u>Wells Fargo Bank v. Smith,</u> 398 S.C. 487, 730 S.E.2d 328, (Ct. App. 2012)	9, 10, 11, 12, 13
<u>Wells Fargo Bank. N.A. v. Barker,</u> Op. No. 2012-UP-551 (Ct. App. 2012)	11, 12
<u>Williams v. Wilson,</u> 349 S.C. 336, 563 S.E.2d 320, (2002)	10
<u>Winter v. U.S. Fidelity & Guaranty Co.,</u> 240 S.C. 561, 126 S.E.2d 724 (1962).....	14
 <u>STATUTES</u>	
S.C. Code Ann. § 12-61-20.....	7
S.C. Code Ann. § 14-3-330(2)	15
S.C. Code Ann. § 29-3-610 to -790	8
 <u>OTHER AUTHORITIES</u>	
<u>1 Am. Jur. 2d, Actions § 7</u> (1962).....	10

RULES

S.C. R. Civ. P. 42(b) 14

S.C. R. Civ. P. 715, 11

S.C. R. Civ. P.59(e).....2

S.C. Rules Civ. Proc. 38, 39..... 14

STATEMENT OF ISSUES ON APPEAL

- I. The trial court erred by finding that Lindsay is entitled to a jury trial because the entire action lies in equity
- II. The trial court erred by finding that Lindsay has a right to a jury trial because none of Lindsay's counterclaims are legal and compulsory
- III. The trial court erred by failing to specifically identify which claims it concluded Lindsay is entitled to a trial by jury upon, a critical mode of trial determination.

STATEMENT OF THE CASE

The Bank of New York Mellon, as Successor Trustee under NovaStar Mortgage Funding Trust, Series 2004-1 (the "Bank") initiated foreclosure proceedings against Rachel R. Lindsay ("Lindsay" or "Respondent") by way of a Complaint filed on May 13, 2009, seeking solely to foreclose on the mortgage given by Lindsay on real property located in Charleston County. (See generally Complaint, R. ____). On June 16, 2009, Lindsay answered and asserted numerous counterclaims against the Bank, along with third-party claims against Saxon Mortgage Services, Inc. ("Saxon"), a servicer for the subject loan. (See generally Answer & Counterclaim, R. ____). Lindsay demanded a jury trial on all counterclaims asserted against the Bank and Saxon (jointly "Appellants"). Id. All of Lindsay's counterclaims arise in connection with events occurring after the closing of the loan.

On March 22, 2013, Appellants filed a Joint Motion for a Non-Jury Trial in the Equity Court and to Strike the Jury Demand. (Pl's. 3/22/13 Motion, R. ____). The Court held a hearing on the motion on May 24, 2013 (Transcript of Hearing; R. ____), and subsequently denied it via an Order issued on August 14, 2013. (8/14/13 Order R. ____). Appellants timely filed a Motion to Alter or Amend pursuant to SCRCR Rule 59(e) on August 15, 2013 (Pl's 8/15/13 Motion, R. ____), which the Court denied via Form 4 Order issued on August 22, 2013. (8/22/13 Order R. ____). Appellants appeal the determination that Lindsay is entitled to a jury trial.

STATEMENT OF FACTS

On February 13, 2004, Universal Mortgage Consulting, LLC ("Universal") made a loan to Lindsay in the amount of \$140,250.00 (the "Loan"). (Complaint ¶ 6, R. ____). Lindsay executed and delivered to Universal a promissory note, under which she agreed to make timely monthly interest-only payments at a variable rate for a fixed term. (Promissory Note, R. ____). The Loan was secured by a mortgage on Lindsay's residence located in Dorchester County, South Carolina. (Mortgage, R. ____). The Note and Mortgage were subsequently assigned to the Bank. (Compl. ¶ 10, R. ____).

After Lindsay defaulted on the Loan, on October ____, 2008, the Bank filed a foreclosure action against her (the "First Foreclosure", R. ____). Prior to the foreclosure sale, the First Foreclosure was voluntarily dismissed without prejudice after Lindsay disputed whether or not certain payments were properly applied to the Loan. (R. ____). On May 13, 2009, the Bank filed a second foreclosure action. (See generally Complaint, the "Second Foreclosure", R. ____). In both actions, the Bank expressly waived any right to a deficiency judgment against Lindsay. (Id. ¶ 14, R. ____).

On June 16, 2009, Lindsay answered the Second Foreclosure Complaint and asserted counterclaims and crossclaims against Appellants for breach of contract, negligence, fraud in the inducement, negligent misrepresentation, promissory estoppel, violation of the South Carolina Unfair Trade Practices Act, unjust enrichment, intentional infliction of emotional distress, invasion of privacy, defamation, intentional interference with existing contracts, intentional interference with prospective contractual relations, a declaratory judgment for compliance with the Homeowner Affordability and Stability Plan and U.S. Treasury Supplemental Directive 09-01, and an injunction requiring correction of

credit reporting related to the Loan. (See generally Answer & Counterclaim, R. ____). Lindsay demanded a jury trial on all claims. (Id., R. ____).

Lindsay's 26 causes of action are based primarily upon the allegation that in the Summer 2008, she sent the Loan servicer, Saxon, a payment in the amount of \$6,557.04, which she intended for Saxon to apply toward her delinquent balance on the Loan. (Ans. & Ctrclm. ¶ 25, R. ____). According to Plaintiff, the Bank and Saxon did not apply this payment and other unspecified payments appropriately. (Id. at ¶¶ 30, 34-36). In addition, Lindsay alleges that the Bank refused to grant her requests for a loan modification and provided derogatory information about her Loan to credit reporting agencies. (Id. at ¶¶ 37-38). Thus, Lindsay asserts four basic categories of allegedly wrongful conduct by the Bank and Saxon: 1) alleged misapplication of Lindsay's Loan payments (breach of contract, negligence, unjust enrichment); 2) allegedly false statements to the effect that certain errors related to her Loan account would be corrected (fraud in the inducement, negligent misrepresentation, promissory estoppel); 3) allegedly inaccurate statements to the public – via the foreclosure pleadings – and to credit reporting agencies about the status of the Loan (negligence, invasion of privacy, defamation, intentional interference with existing and prospective contracts, declaratory judgment); and 4) alleged failure to modify the terms of the Loan at Lindsay's request (declaratory judgment).¹ (Id., R. ____). Lindsay seeks equitable and injunctive relief, along with actual and punitive damages in an unspecified amount. (Id., R. ____).

¹ The Complaint does not specify a particular basis for the claims for intentional infliction of emotional distress or violation of the SCUTPA.

ARGUMENT

Appellants are entitled to a bench trial because this action is one for foreclosure, which is an action in equity. The trial court has ordered the trial to proceed in an improper mode. In a foreclosure action, the determination of all issues relating to the amount due on the loan and the plaintiff's right to foreclose are for the court, not a jury, based upon the South Carolina statutory foreclosure regime contained in Title 29 and Rule 71 of the South Carolina Rules of Civil Procedure. In any event, the particular counterclaims and third-party claims asserted by Lindsay in this case are equitable in nature, such that she has no right to a jury trial on any claim. Moreover, Lindsay's claims relate to events that occurred years after the creation of the subject promissory note and mortgage, which means they do not attack the enforceability of the underlying Loan obligations and are therefore permissive claims. Because the entire action sounds in equity, and, in any event, none of the individual claims are legal and compulsory, Lindsay is not entitled to a jury trial on any issue in this equitable foreclosure action. The entire matter must be tried by the court.

I. The Entire Action is One in Equity

“Generally, the relevant question in determining the right to trial by jury is whether an action is legal or equitable; there is no right to trial by jury for equitable actions.” Mortgage Elec. Sys., Inc. v. White, 384 S.C. 606, 682 S.E.2d 498 (Ct. App. 2009) (citing Lester v. Dawson, 327 S.C. 263, 267, 491 S.E.2d 240, 242 (1997)). The right to proceed in the proper mode of trial is a substantial right, and a court should not erroneously require a party to proceed before a jury in an equity case. Flagstar Corp. v. Royal Surplus Lines, 341 S.C. 68, 72, 533 S.E.2d 331, 333 (2000). Conversely, a jury trial right does not arise

in connection with a case to be tried within the equitable jurisdiction of the court. Pelfrey v. Bank of Greer, 270 S.C. 691, 244 S.E.2d 315 (1978).

A foreclosure action is an equitable action. Collier v. Green, 244 S.C. 367, 370, 137 S.E.2d 277, 279 (1964). Further, “[w]here in actions of foreclosure, 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.” Id. at 371, 137 S.E.2d at 280; see also Byrn v. Walker, 275 S.C. 83, 267 S.E.2d 601, (1980) (counterclaims in a foreclosure action that affect the validity of a mortgage lien or the amount due are equitable in nature). In Collier, the assignee of a mortgage brought a foreclosure action against the mortgagor. Id. at 368, 137 S.E.2d at 278. The mortgagor admitted to execution and delivery of the note and mortgage but alleged that the assignment was fraudulent and sought a jury trial on that issue. Id. at 369, 137 S.E.2d at 279. In affirming the trial court’s order referring the entire case to the master in equity, the Supreme Court initially noted that a foreclosure is an action in equity and concluded that the nature of the action does not change to one at law by virtue of the fact that the defendant asserts counterclaims related to the amount due on the loan. Id. at 371, 137 S.E.2d at 280. As support for its decision, the Court cited to its prior opinions in foreclosure cases holding that where the defenses and counterclaims bear primarily upon the amount due, the entire case, including the defenses and counterclaims, remains one in equity. Id. at 371-372, 137 S.E.2d at 280 (citations omitted).² Thus, where a defendant

² Obviously, if a defendant could convert an equitable foreclosure action to an action at law simply by artfully pleading any defense to the debt as a counterclaim, then the

asserts counterclaims in a foreclosure action that go to the plaintiff's right to foreclose or challenge the amount due upon the debt secured by the mortgage, the counterclaims are merely part and parcel of the equitable action, and a defendant has no right to a jury trial on such claims. Id.

Moreover, the South Carolina Supreme Court has rejected attempts by litigants to "earn" the right to a jury trial in an equitable action. In Rosenbaum v. S-M-S 32, the plaintiff purchased real property at a tax sale and filed an action to clear title pursuant to S.C. Code Ann. § 12-61-20. The defendant answered by way of general denial and asserted a counterclaim for trespass to try title, seeking damages for trespass and demanding a jury trial. 311 S.C. 140, 141, 427 S.E.2d 897, 897 (1993). The circuit court struck the counterclaim because the plaintiff had asserted an equitable claim seeking a remedy via a non-jury process expressly provided by statute for purchasers at tax sales. Id. at 141-142, 427 S.E.2d at 897. The Supreme Court affirmed the circuit court's decision, holding that the defendant could not "evade the intent of the legislature and obtain the right to a jury trial by interposing a counterclaim designed to thwart the reasonable and practical implication of Chapter 61." Id.

In the instant action, although Lindsay asserts various different theories of recovery, a necessary element of each of her claims is that she is not in default and Plaintiff is not entitled to foreclose. Several of the claims, such as the claims for breach of contract, directly allege improper accounting on the Loan. Other claims challenge Plaintiff's right to foreclose indirectly. For example, even Lindsay's claim for defamation based on the

plaintiff's right to an order of reference in foreclosure actions would be completely eviscerated resulting in an improper mode of trial in every foreclosure action.

allegedly false allegations contained in the Complaint would require her to prove that the statements pled therein regarding her default on the Loan were untrue. See Parrish v. Allison, 376 S.C. 308, 656 S.E.2d 382 (Ct. App. 2007) (a false statement is an element of claim for defamation). All 26 of Lindsay's causes of action fail as a matter of law if the Court determines that she defaulted on the Loan. Thus, each of her claims bears upon the amount due. Under Collier, therefore, the counterclaims and third-party claims do not change the character of this equitable action to one at law, and Lindsay has no right to a jury trial on any issue.

Furthermore, under the Supreme Court's decision in Rosenbaum, Lindsay may not "earn" the right to a jury trial in this equitable foreclosure action by styling her allegations as legal counterclaims. Like the plaintiff in Rosenbaum, the Bank brought this action pursuant to a statutory scheme created by the legislature that provides for a non-jury trial. Specifically, S.C. Code Ann. § 29-3-610 to -790 provides a procedure by which a mortgagor may foreclose in an equitable action decided by the court. SCRPC 71 also provides that foreclosure actions "shall be tried by the court, and shall ordinarily be referred to a master." This codified a process established by the Act of 1791, which integrated the actions of foreclosure and the action for deficiency after sale into one equitable action, without the right to a jury trial. See McConnell, et al. v. Barnes, et al., 142 S.C. 112, 140 S.E. 310 (1927). Therefore, consistent with Rosenbaum, this Court should not permit Lindsay to evade the statutory scheme created by the Legislature for resolving foreclosure actions. Her request for a jury trial should be stricken.

II. Each of Lindsay's Individual Claims Is Either Permissive or Equitable.

The above inquiry should end the analysis, and the Court should determine this entire proceeding, counterclaims and defenses included, is an equitable action. However, an examination of the particular defenses, counterclaims, and cross-claims may also be called for as in more recent times our courts have stated that “[i]f the complaint is equitable and the counterclaim legal and compulsory, the defendant has the right to a jury trial on the counterclaim.” N.C. Federal Savings and Loan Ass’n v. DAV Corp., 298 S.C. 514, 516, 381 S.E.2d 903, 904 (1989) (citing C & S Real Estate Servs., Inc. v. Massengale, 290 S.C. 299, 302, 350 S.E.2d 191, 193 (1986)). If a defendant asserts a counterclaim which is not legal and compulsory in an equitable action, he waives any right to a jury trial on that counterclaim. See id.; Johnson v. S.C. Nat’l Bank, 292 S.C. 51, 54, 354 S.E.2d 895, 897 (1987) (summarizing the proper analysis for determining the trial of legal and equitable issues in complaints and counterclaims, holding, “[i]f the complaint is equitable and the counterclaim is legal and permissive, the defendant waives his right to a jury trial”). Because foreclosure proceedings are equitable proceedings in South Carolina, Lindsay has no right to a jury trial on any claim she has asserted in this action that is not both legal and compulsory. Wells Fargo Bank v. Smith, 398 S.C. 487, 494, 730 S.E.2d 328, 332 (Ct. App. 2012). Should the Court decide that it is necessary to examine each of Lindsay's claims to determine whether it is permissive or compulsory and legal or equitable, the outcome is the same: Lindsay has no right to a jury trial.

A. Lindsay's Counterclaims for Promissory Estoppel, Unjust Enrichment and Declaratory Relief Are Equitable.

First, Lindsay's claims for promissory estoppel, unjust enrichment and declaratory relief are plainly equitable in nature. Promissory estoppel and unjust enrichment are *always* equitable causes of action. Rushing v. McKinney, 370 S.C. 280, 289, 633 S.E.2d 917, 922 (Ct. App. 2006) (promissory estoppel);) Columbia Wholesale Co. v. Scudder May N.V., 312 S.C. 259, 261, 440 S.E.2d 129, 130 (1994) (unjust enrichment). "Whether an action for declaratory relief is legal or equitable in nature depends on the plaintiff's main purpose in bringing the action." Williams v. Wilson, 349 S.C. 336, 340, 563 S.E.2d 320, 322 (2002). In this case, Lindsay's two separate causes of action for declaratory judgment seek, respectively, an injunction requiring Appellants to modify the terms of her Loan and another injunction requiring correction of alleged errors contained in her credit reports. (Answer & Counterclaim ¶¶ 140, 144, R. ____). Neither claim seeks recovery of damages. Id. As such, her counterclaims for declaratory relief are equitable. Lindsay therefore is not entitled to a jury trial on any of these claims.

B. Lindsay's Claims Based Upon Misapplication of Payments Are Equitable Because the Main Purpose of the Claims Is to Prevent Foreclosure.

Second, Lindsay's claims based upon alleged misapplication of Loan payments are necessarily equitable in nature regardless of how Lindsay has styled them in the Answer & Counterclaim.³ Characterization of a claim as equitable or legal depends on the plaintiff's

³ This category of claims clearly includes the causes of action for breach of contract, negligence, and unjust enrichment, which are expressly based upon Appellants' alleged misapplication of Loan payments, but also includes any other claims to the extent that they are based upon improper accounting on the Loan.

“main purpose” in bringing it. Smith, at 495, 730 S.E.2d at 332, n.4 (quoting Floyd v. Floyd, 306 S.C. 376, 380, 412 S.E.2d 397, 399 (1991)). “[A]n action sounding in law may be transformed to one in equity because equitable relief is sought.” Ins. Fin. Servs., Inc. v. S.C. Ins. Co., 271 S.C. 289, 293, 247 S.E.2d 315, 318 (1978) (citing 1 Am. Jur. 2d, Actions § 7 (1962)); see also Crewe v. Blackmon, 289 S.C. 229, 232-33, 345 S.E.2d 754, 756-57 (Ct. App. 1986) (concluding that although a complaint included allegations of fraud and misrepresentation, the action was one in equity when primary relief sought was equitable in nature). “Generally...it may be said that the essential character of the cause of action, and the remedy or relief it seeks, as shown by the allegations of the [pleading], determine whether a particular action is at law or equity, **unaffected by the conclusions of the pleader or what the pleader calls it....**” Rogers v. Nation, 284 S.C. 330, 332, 326 S.E.2d 182, 183 (Ct. App. 1985) (quoting Bell v. Mackey, 191 S.C. 105, 119, 3 S.E.2d 816, 822 (1939) (emphasis added)).

Where the primary purpose of a counterclaim in a foreclosure action is to halt the foreclosure, South Carolina courts have characterized the counterclaim as equitable regardless of how the claim is styled. See e.g. Smith, at 496-497, 730 S.E.2d at 333 (counterclaim for common law unconscionability deemed equitable where primary purpose was to have mortgage declared void); White, at 614, 682 S.E.2d at 502 (counterclaim for fraud deemed equitable where primary relief sought was to have mortgage declared void); Wells Fargo Bank, N.A. v. Barker, Op. No. 2012-UP-551 (Ct. App. 2012) (counterclaim

for alleged predatory lending deemed equitable where primary purpose was to prevent foreclosure and compel lender to modify loan terms).⁴

Likewise, in the instant case, the main purpose of Lindsay's claims alleging that Appellants misapplied her Loan payments is naturally to avoid the foreclosure and evade the statutory foreclosure regime established by Title 29 and Rule 71 of the South Carolina Rules of Civil Procedure. In her Answer & Counterclaim, Lindsay expressly seeks denial of Plaintiff's request for foreclosure and public sale of her property, an order requiring Plaintiff and/or Saxon to modify her loan to allow her keep her property, and dismissal of all costs requested by Plaintiff. (See Answer & Counterclaim at Prayer for Relief, R. ___). Indeed, it is difficult to imagine what other relief Lindsay could possibly be entitled to in connection with this category of claims. Although Lindsay also seeks damages, any alleged damage could have resulted only from the Bank and/or Saxon's allegedly false statements about the Loan, not the misapplication of payments. Lindsay's counterclaims based upon the latter amount to nothing more than defenses to the foreclosure and are therefore necessarily equitable in nature. See Smith, at 496-497, 730 S.E.2d at 333; White, at 614, 682 S.E.2d at 502; Barker, Op. No. 2012-UP-551, at *2. As a result, Lindsay's claims for breach of contract, negligence, unjust enrichment, and any other claims based upon the alleged misapplication of payments, are equitable, and she is not entitled to a jury trial on these claims.

⁴ While this Court's unpublished decision in Barker is not binding precedent, it is informative for the purposes of this appeal.

C. Lindsay's Third-Party Claims Against Saxon are Permissive.

Next, a third-party claim is *always* permissive, regardless of its relationship to the claims asserted in the underlying action. N.C. Fed. Sav. & Loan Assoc. v. DAV Corp., 298 S.C. 514, 519, 381 S.E.2d 903, 906 (1989); Tatnall v. Gardner, 350 S.C. 135, 139, 564 S.E.2d 377, 378 (Ct. App. 2002). Thus, by impleading Saxon into this foreclosure action, Lindsay waived any right to a jury trial on her third-party claims to the extent that any of them are deemed to be legal, rather than equitable. Id.

D. Lindsay's Counterclaims Against Plaintiff Are Permissive.

Finally, a counterclaim is compulsory only where there is a "logical relationship" between the complaint and the counterclaim. Wells Fargo Bank v. Smith, 398 S.C. 487, 495, 730 S.E.2d 328, 333 (Ct. App. 2012). In the foreclosure context, there is a logical relationship between the counterclaim and the complaint only when the counterclaim bears upon the enforceability of the loan documents. Id. In Smith, the Court of Appeals applied this test and determined that the defendant's counterclaim for violation of the attorney-preference statute was not logically related to the foreclosure complaint because a violation of the statute would not affect the enforceability of the promissory note and mortgage. Id. at 499, 730 S.E.2d at 334-335.

In the present case, Lindsay's counterclaims are permissive under Smith and prior South Carolina law. None of her claims challenge the enforceability of the Loan documents. Rather, each claim is based upon conduct alleged to have occurred years *after* Lindsay's execution of the Loan documents. The claims for invasion of privacy and defamation, for example, are based upon allegedly false statements made by Plaintiff about Lindsay to the public and to credit reporting agencies regarding the delinquent status of her

Loan. (Answer & Counterclaim ¶¶ 108, 114-118, R.____). Similarly, her claims for interference with existing and prospective contractual relations allege that Plaintiff caused third parties to deny her credit and to refuse to do business with her. (Answer & Counterclaim ¶¶ 128, 132-133, R.____). Like the claims for violation of the attorney-preference statute at issue in Smith, these allegations do not relate to the enforceability of the loan documents.

Even Lindsay's counterclaims for breach of contract, negligence, and unjust enrichment, which are based expressly upon Plaintiff's alleged misapplication of Loan payments, do not bear upon the *enforceability* of the underlying Loan documents. At most, the allegations go to the question of whether Lindsay defaulted on the Loan, but Lindsay has not even expressly pled that the Loan would not have been in default but for the alleged misapplication. Because the counterclaims do not contest enforceability, they are permissive. By electing to bring such counterclaims in response to a foreclosure complaint, Lindsay waived her right to a jury trial. The trial court therefore committed reversible error by finding that Lindsay is entitled to a jury trial.

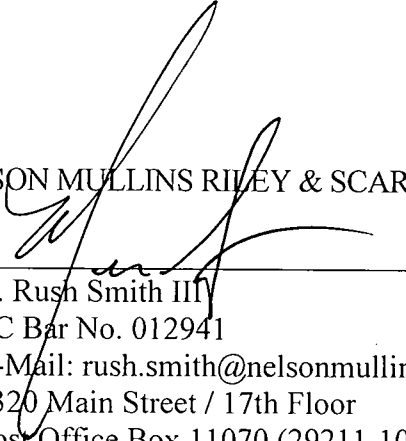
III. The Trial Court Failed to Specify Which Claims are Subject to Trial by Jury, Thereby Leaving the Mode of Trial Unclear.

Lindsay is not entitled to a jury trial on any claim in this action. However, the trial court also committed reversible error by failing to specify the claim(s) on which it determined that Lindsay is entitled to a jury trial. Gaymon v. Richland Memorial Hosp., 327 S.C. 66, 68, 488 S.E.2d 332, 333 (1997) (legal and equitable issues in same action must be determined separately and plaintiff not entitled to jury trial on equitable issues); Winter v. U.S. Fidelity & Guaranty Co., 240 S.C. 561, 573, 126 S.E.2d 724, 730 (1962)

(where legal and equitable issues and rights are asserted in the same complaint, legal issues are for determination by a jury and equitable issues for the judge); Advance Int'l. Inc. v. N.C. Nat'l Bank, 316 S.C. 266, 270-271; 449 S.E.2d 580, 583 (Ct. App. 1994), reh'g denied, aff'd in part, vacated in part, 320 S.C. 532, 466 S.E.2d 367 (where a complaint is equitable and the counterclaim, for which a jury trial is requested, is legal and compulsory, the trial court must order separate trials pursuant to Rule 42(b), SCRCF). Appellants are entitled to determination of particular issues under the proper mode of trial and to notice prior to trial of the manner in which each issue will be determined. See id.; see also S.C. Rules Civ. Proc. 38, 39 (providing for notice to litigants regarding mode of trial as to particular issues in dispute). If this Court finds that any of Lindsay's claims are subject to jury determination, then it should specify which claims will be tried by the jury and which claims will be determined by the court. The failure to do so is error. The South Carolina appellate courts have recognized that the mode of trial is a critical issue that must be determined prior to trial. See Hagood v. Sommerville, 362 S.C. 191, 196, 607 S.E.2d 707, 709 (2005) ("we repeatedly have held that the denial of a party's right to a particular mode of trial is immediately appealable as a substantial right under Section 14-3-330(2)") (listing cases).

CONCLUSION

For the foregoing reasons, Appellants respectfully request that this Court reverse the circuit court's ruling that Lindsay is entitled to a jury trial. In the alternative, Appellants request that the Court specify which claims should be tried by the jury and which claims should be determined by the court.



NELSON MULLINS RILEY & SCARBOROUGH LLP

By: _____

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*Attorneys for Plaintiff The Bank of New York Mellon, as
Successor Trustee under NovaStar Mortgage Funding
Trust, Series 2004-1 and Third-Party Defendant Saxon
Mortgage Services, Inc.*

Charleston, South Carolina
November 15, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

NOV 22 2013

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

SC Court of Appeals

The Honorable Diane Schafer Goodstein, Circuit Court Judge

Case No. 2011-CP-18-1013

Appellate Case No. 2013-002066

Bank of New York Mellon, as Successor Trustee under
NovaStar Mortgage Funding Trust, Series 2004-1 Appellant,

v.

Rachel R. Lindsay, Jeffrey Wayner, Tammy Wayner, Tiffany
Spann-Wilder, Esq., The Steinberg Law Firm and United
States of America acting by and through its agency, the
Internal Revenue Service, Defendants,

Of Whom Rachel R. Lindsay is the Respondent.

Rachel R. Lindsay Respondent,

v.

Saxon Mortgage Services, Inc. Appellant.

APPELLANTS' DESIGNATION OF MATTER TO BE INCLUDED
IN THE RECORD ON APPEAL

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Pursuant to Rule 209, SCACR, Appellants Bank of New York Mellon, as Successor Trustee under NovaStar Mortgage Funding Trust, Series 2004-1, and Saxon Mortgage Services, Inc., hereby designate the following materials for inclusion in the record on appeal. Undersigned counsel certifies, pursuant to Rule 209(c), SCACR, that the designation contains no matter which is irrelevant to the appeal.

ORDERS

1. Order Vacating Judgment and Dismissing Action in Civil Action No. 2008-CP-02543, filed January 15, 2010;
2. Order in Civil Action No.: 2011-CP-1013 issued August 14, 2013;
3. Form 4 Order in Civil Action No.: 2011-CP-1013 issued August 22, 2013;

PLEADINGS

3. Complaint in Civil Action No.: 2008-CP-18-02543, filed October 8, 2008;
4. Complaint in Civil Action No.: 2011-CP-1013 (formerly 2009-CP-18-1311), filed May 13, 2009;
5. Answer, Counterclaim and Third Party Complaint in Civil Action No.: 2011-CP-1013 (formerly 2009-CP-18-1311), filed June 16, 2009;

MOTIONS

6. Joint Motion for a Non-Jury Trial in the Equity Court and to Strike the Jury Demand of Lindsay filed March 22, 2013;
7. Motion to Alter or Amend pursuant to SCRCR Rule 59(e) filed August 15, 2013;

TRANSCRIPTS

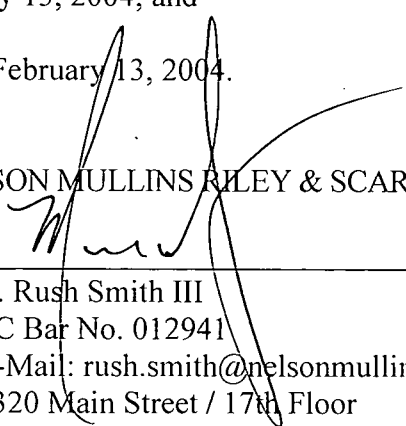
8. Transcript of Hearing, May 24, 2013;

OTHER DOCUMENTS

9. Mortgage dated February 13, 2004; and
10. Promissory Note dated February 13, 2004.

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Attorneys for Appellants

Charleston, South Carolina

November 20, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

The Honorable Diane Schafer Goodstein, Circuit Court Judge

Case No. 2011-CP-18-1013

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Rachel R. Lindsay, Jeffrey Wayner, Tammy Wayner,
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and United States of America acting by and through its
agency, the Internal Revenue Service, Defendants,
Of Whom Rachel R. Lindsay is the Respondent.

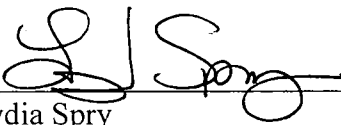
Rachel R. Lindsay Respondent,

v.

Saxon Mortgage Services, Inc. Appellant.

PROOF OF SERVICE

I HEREBY CERTIFY that I have served the **APPELLANTS' DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL** on Respondents and Defendants by depositing copies of it in the United States Mail, postage prepaid, addressed to the below Counsel of Record:

By:  _____
Lydia Spry
Administrative Assistant to Merritt G. Abney and
Dow A. Davidson
Nelson Mullins Riley & Scarborough, LLP

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
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Bank of New York Mellon, as Successor Trustee under NovaStar Mortgage Funding Trust, Series 2004-1 Appellant,

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Rachel R. Lindsay, Jeffrey Wayner, Tammy Wayner, Tiffany Spann-Wilder, Esq., The Steinberg Law Firm and United States of America acting by and through its agency, the Internal Revenue Service, Defendants,

Of Whom Rachel R. Lindsay is the Respondent.

Rachel R. Lindsay Respondent,

v.

Saxon Mortgage Services, Inc. Appellant.

PROOF OF SERVICE


I HEREBY CERTIFY that I have served the **INITIAL BRIEF OF APPELLANT** on Respondents and Defendants by depositing copies of it in the United States Mail, postage prepaid, addressed to the below Counsel of Record:

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