

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Charles J. McCutchen, Circuit Court Judge
Civil Action No. 2020-CP-40-02998

Appellate Case No. 2025-001756

Deutsche Bank National Trust Company, as Trustee for New Century Home
Equity Loan Trust, Series 2003-2 Asset Backed Pass-Through
Certificates,.....Appellant,

v.

Tommy Rush, Asia T. Rush Family Trust, and Australia B. Rush 29016 as
Trustee,.....Respondents.

RETURN TO RESPONDENTS’ MOTION TO DISMISS

On February 11, 2026, Respondents filed a Motion to Dismiss Appellant’s Appeal for lack of appellate jurisdiction pursuant to Rule 221 and Rule 227, SCACR, and S.C. Code Ann. § 14-3-330. Respondents contend that the lower court orders denying Appellant’s right to a nonjury trial on Respondents’ counterclaims are interlocutory and therefore, not immediately appealable. Respectfully, Respondents’ motion lacks merit.

S.C. Code Ann. § 14-3-330(2) allows an appeal of an order “affecting a substantial right” when the order “in effect determines the action and prevents a judgment from which an appeal might taken” “Generally, this subsection has only been used when the trial order affected the ‘mode of trial’ because if those orders are not immediately appealed, no appellate review is

available to correct any error.” *Breland v. Love Chevrolet Olds, Inc.*, 339 S.C. 89, 93, 529 S.E.2d 11, 13 (2000). “Failure to immediately appeal such an order forever bars appellate review.” *Flagstar Corp. v. Royal Surplus Lines*, 341 S.C. 68, 72, 533 S.E.2d 331, 333 (2000). Here, the lower court orders on appeal affected the mode of trial by erroneously denying Appellant’s right to a nonjury trial on Respondent’s permissive counterclaims.

Appellant brought a foreclosure action against Respondents. Respondents answered and counterclaimed with five causes of action: 1) violation of attorney preference provision under S.C. Code Ann. § 37-10-102 and unconscionable conduct under S.C. Code Ann. § 37-10-105; 2) declaratory judgment that a prepayment penalty within the mortgage constitutes an unenforceable penalty; 3) violation of the S.C. Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10 *et seq.*; 4) an accounting; and 5) gross negligence. Respondents demanded a jury trial. Appellant moved to strike Respondents’ demand for a jury trial, arguing that Appellant was entitled to a nonjury trial on its foreclosure action and all counterclaims.

“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.” *Lester v. Dawson*, 327 S.C. 263, 267, 491 S.E.2d 240, 242 (1997). “If the complaint is equitable and the counterclaim is legal and permissive, the defendant waives his right to a jury trial.” *Wachovia Bank, NA. v. Blackburn*, 407 S.C. 321, 330, 755 S.E.2d 437, 441 (2014). South Carolina courts have applied the “logical relationship” test to determine whether a counterclaim is compulsory or permissive.¹ *N.C. Fed. Sav. & Loan Assn. v. DAV Corp.*, 298 S.C. 514, 519, 381 S.E.2d 903, 906 (1989). If

¹ In *Deutsche Bank Nat'l Tr. Co. as Tr. for NovaStar Mortg. Funding Tr., Series 2007-1 NovaStar Equity Loan Asset Backed Certificates, Series 2007-1 v. Est. of Houck*, the South Carolina Supreme Court ruled that “in cases commenced on or after the effective date of this opinion, the question of whether a counterclaim is compulsory or permissive is governed by the plain language of Rule 13(a).” 440 S.C. 409, 412–13, 892 S.E.2d 280, 282 (2023). Because this case was commenced prior to *Est. of Houck*, the “logical relationship” test applies.

prevailing on a counterclaim bears no logical relationship to Appellant's right to enforce the note and foreclose on the mortgaged property, then Respondents' counterclaims are permissive and therefore, Respondents have waived their right to a jury. *Blackburn*, 407 S.C. at 330, n.7, 755 S.E. 2d at 442, n.7 (citation omitted).

In its Order denying Appellant's motion to strike Respondents' jury demand, the lower court ruled that all of Respondents' counterclaims were legal in nature and compulsory. Order, filed June 26, 2025. Upon Appellant's motion to reconsider, the lower court corrected this error, finding that Respondents' counterclaims for accounting and unconscionability were equitable and therefore, subject to a nonjury trial. Order, filed July 30, 2025. However, the lower court reiterated its error that Respondent's counterclaims for a declaratory judgment, unfair trade practices, and gross negligence were legal and compulsory. *Id.* This appeal concerns the lower court's decision that these latter three counterclaims are subject to a jury trial, thereby depriving Appellant of a mode of trial to which it is entitled.

Applying the "logical relationship" test to Respondents' counterclaim seeking a declaratory judgment that a prepayment penalty within the Note is unenforceable, the relevant rider to the Note states that the prepayment penalty expires two years after the execution date of October 31, 2002. If the allegations of a counterclaim, if true, render a Note unenforceable, then there is a logical relationship between the foreclosure action and the counterclaim, thus making the counterclaim compulsory. *Carolina First Bank v. BADD, L.L.C.*, 414 S.C. 289, 295, 778 S.E.2d 106, 109 (2015). But here, if the prepayment penalty within the Note is unenforceable, the remaining provisions of the Note would still be enforceable. Because the counterclaim does not have a logical relationship to the enforceability of the Note in a foreclosure action, this counterclaim is permissive and thus Plaintiff is entitled to a nonjury trial. *See id.*

In Respondents' counterclaim seeking damages for alleged violations of the Unfair Trade Practices Act, the actions that they complain of are: 1) the Lender committing substantial underwriting violations by making a subprime loan to Defendants more risky by offering an interest-only loan and by calculating the Defendants' ability to pay based solely on the interest only and not on the adjusted rate; and 2) reducing loan quality to increase the amount of subprime loans to facilitate the pooling and securitization of mortgage loans as described by a Final Report of Michael J. Missal, Bankruptcy Court Examiner, Case No. 07-10416. Answer and Counterclaim, pp. 6-7. These acts involve the inducement of the loan and the closing of the loan, which are distinct from enforcement of the Note. *See Deutsche Bank Nat'l Tr. Co. as Tr. for NovaStar Mortg. Funding Tr., Series 2007-1 NovaStar Equity Loan Asset Backed Certificates, Series 2007-1 v. Est. of Houck*, 434 S.C. 500, 507–08, 863 S.E.2d 829, 833 (Ct. App. 2021), *aff'd as modified*, 440 S.C. 409, 892 S.E.2d 280 (2023) (holding that a claim of violation of the Attorney Preference Statute was permissive, not compulsory, because the alleged failure to comply with this Statute involved the execution of loan documents and the closing of the mortgage, whereas the foreclosure action involved the Mortgagor's default on the Note). Further, should Respondents prevail on this counterclaim, their remedy is actual and treble damages, which would not affect the ability of Appellant to enforce the Note. *See Carolina First Bank v. BADD, L.L.C.*, 414 S.C. 289, 295, 778 S.E.2d 106, 109 (2015). Because the counterclaim does not have a logical relationship to the enforceability of the Note in a foreclosure action, this counterclaim is permissive and thus Appellant is entitled to a nonjury trial.

Respondents' negligence counterclaim alleges that their lender breached its duty of care by inducing and closing the mortgage loan, which proximately caused damages. Answer and Counterclaim, p. 8. If Appellant was found negligent, that does not prevent Appellant from

enforcing the Note. Because the counterclaim does not have a logical relationship to the enforceability of the Note in a foreclosure action, this counterclaim is permissive and thus Appellant is entitled to a nonjury trial. *Advance Int'l, Inc. v. N. Carolina Nat. Bank of S.C.*, 316 S.C. 266, 269, 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) (upholding the lower court's ruling that claim for negligence was permissive, not compulsory, because negligence did not affect the enforceability of the Note).

Appellant has shown enough here to support this Court's denial of Respondents' motion. *Flagstar Corp. v. Royal Surplus Lines*, 341 S.C. 68, 73, 533 S.E.2d 331, 333 (2000) ("... some minimal inquiry will always be necessary on the part of an appellate court considering the appealability of an order which is alleged to have deprived a party of a mode of trial."). Respondents' motion to dismiss this appeal should be denied.

s/ M. McMullen Taylor
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PROOF OF SERVICE

I certify that I have caused to be served **APPELLANT’S RETURN TO
RESPONDENTS’ MOTION TO DISMISS APPEAL** in the above-captioned matter via email
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