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SC Court of Appeals

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

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.

INITIAL BRIEF OF RESPONDENTS

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August 4, 2026
Columbia, South Carolina

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STATEMENT OF ISSUES ON APPEAL

Respondents adopt Appellant's Statement of Issues on Appeal.

STATEMENT OF THE CASE

Respondents generally agree with Appellant's Statement of the Case except for the characterization that Respondent Tommy Rush[1] has "failed" to make payments on his mortgage loan since December 2012. There was no failure because Appellant deployed materially defective title instruments when it sought to enforce the loan. Further, the Respondents' counterclaims directly challenge the integrity of the loan closing and the foreclosure instruments and therefore share an inseparable, logical nucleus of operative facts with the Appellant's foreclosure action, making the counterclaims compulsory.

This is an appeal from two orders by the Honorable Charles J. McCutchen filed June 26, 2025, and July 30, 2025, respectively. The first order is an Order Denying Plaintiff's Motion for Partial Summary Judgment and Motion to Strike Jury Demand, and the second order is an Order Denying in Part and Granting in Part Plaintiff's Motion to Reconsider.

In his first order, Judge McCutchen notes the defects in the promissory note assignments executed by the plaintiff. "Here, it appears there are defects in the corrective assignment executed by Plaintiff in 2021, as there were in the stricken corrective assignment executed in 2013. The Plaintiff's corrective assignments do not mention assignment of the Promissory Note and only assign the mortgage. In a case involving a mortgage, the note and mortgage are inseparable; the former as essential, the latter as an incident. An assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity. *See Carpenter v. Longan*, 83 U.S. 271

[1] Any references herein to Tommy Rush are to include all Respondents- Mr. Rush, Asia T. Rush Family Trust, and Australia B. Rush 29016 as Trustee

(1872). The assignment of a note secured by a mortgage carries with it an assignment of the mortgage, but … the assignment of the mortgage alone does not carry with it an assignment of the note. *See Hahn v. Smith*, 154 S.E. 112 (S.C. 1930)."

He also concludes that there is a genuine issue of material fact with respect to whether the plaintiff owns or otherwise has the right to enforce the note and mortgage at issue and states "That is a question that is material to all the claims in this case." In conclusion, he finds that "a logical relationship exists between the counterclaims and the enforceability of the mortgage," and therefore the counterclaims are compulsory in nature and as such are entitled to a trial by jury.

In his second order, Judge McCutchen on reconsideration of his June 26, 2025, order, finds that the defendants' counterclaims for accounting and unconscionability are both equitable in nature and therefore not the subject of a jury trial. But the court held that the remaining counterclaims (which are the subject of this appeal) are compulsory, and the defendants are entitled to a jury trial on those remaining claims. The court further notes that this a contested mortgage foreclosure action in which defendants have raised counterclaims for declaratory judgment, for violation of the South Carolina Unfair Trade Practices Act, and for gross negligence. He goes on to conclude that there is a genuine issue of material fact with respect to whether plaintiff owns or otherwise has the right to enforce the note and mortgage at issue and "That is a question that is material to all the claims in this case."

In conclusion, the Circuit Court finds a logical relationship exists between the remaining counterclaims and the enforceability of the mortgage and that defendants are entitled to a jury trial as to these counterclaims.

STATEMENT OF FACTS

Respondents generally agree with Appellant's Statement of Facts except for the characterization that Respondent Tommy Rush "defaulted on his loan." There has been no default because the Appellant bank has no standing or right to enforce the note or mortgage. The Honorable Casey Manning issued an order in 2020 striking from the record a pertinent mortgage assignment. New Century Mortgage, as predecessor to the Appellant bank allegedly lost the note in 2002, and then Carrington Mortgage Services backdated a Lost Note Affidavit in 2021 in an attempt to patch this critical 19-year chain of title chasm. Respondent Tommy Rush has challenged the foreclosure claim and counterclaimed in part based upon these loan deficiencies and the deficiencies noted by Judge McCutchen in his first order dated June 26, 2025.

The Respondents also allege that the Appellant bank has engaged in unfair and corrupt behavior by violating the federal underwriting guidelines in arranging and approving a subprime loan, including, but not limited to, inflating the appraisal report associated with the property; by approving the loan by inflating the Respondents' qualifications; by preventing the Respondents from exercising their right to be represented by an independent attorney at the closing of the mortgage loan that is the subject of this case; by committing the unfair and corrupt acts as identified by the Final Report of Michael J. Missal, Bankruptcy Court Examiner, Case No. 07-10416 (DJC), including implementing a low-quality loan approval program for subprime loans for the purpose of enhancing the Appellant bank's ability to securitize and pool loans; and by filing a statutorily defective Assignment of Mortgage in the public records of Richland County, South Carolina, all of which prohibit a foreclosure of Respondents' mortgage loan.

RELEVANT LAW

The issues on appeal revolve around Rule 13(a) of the South Carolina Rules of Civil Procedure to determine the issue of compulsory counterclaims. The South Carolina Supreme Court in *North Carolina Fed. Savings & Loan Association v. Dav Corp.*, 298 S.C. 514, 381 S.E.2d 903 (1989) adopted a "logical relationship test" to determine whether the defendant's counterclaims were permissive or compulsory. Applying this test, the court concluded that all but one of the counterclaims were compulsory, in a case where the defendant had requested dismissal of a foreclosure action.

More recently, this Court in *South Carolina Community Bank v. Salon Proz, LLC*, 420 S.C. 89, 800 S.E.2d 488 (Ct. App. 2017), concluded that in a foreclosure action, a counterclaim arises out of the same transaction when there is a logical relationship between an unfair trade practices act counterclaim and the note and mortgage at issue. The defendant in *Salon Proz* sought a dismissal of the foreclosure complaint.

Both of the aforementioned cases allude to the enforceability of the note and that the counterclaims deemed compulsory affect the enforceability of the note and mortgage in foreclosure.

In *Carolina First Bank v. BADD, L.L.C.*, 414 S.C. 289, 778 S.E.2d 106 (2015) the Supreme Court held that a defendant's counterclaim for civil conspiracy in its answer to a bank's foreclosure complaint was permissive when it bore "no logical relationship to either the execution or the enforceability of the guaranty agreements." 414 S.C. at 295, 778 S.E.2d at 109. Therefore, the converse is true- a counterclaim is compulsory when it bears a relationship to <u>either</u> the execution <u>or</u> enforceability of the agreement at issue.

Finally, in *Deutsche Bank National Trust Company v. Estate of Houck*, 440 S.C. 409, 892 S.E.2d 280 (2023) the Supreme Court abolished the logical relationship test prospectively because when it was adopted in *North Carolina Federal Savings & Loan Association v. DAV Corp*, "we neither set forth factors to consider under the test nor explained whether the test expands or limits the scope of Rule 13(a)." Further, the Court found that "The test has since been cited and applied in a way that does not track Rule 13(a)." Ultimately, the Supreme Court held that in cases commenced on or after the effective date of its opinion, the question of whether a counterclaim is compulsory is governed by the plain language of Rule 13(a).

ARGUMENT

I. The Circuit Court correctly ruled that Defendants'/Respondents' Unfair Trade Practices Counterclaim is compulsory.

Respondent Tommy Rush has pled a Sixth Defense and Third Counterclaim for violations of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, et seq. He alleges that Appellant bank, in inducing the loan at issue, committed substantial underwriting violations by making a subprime loan to the 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. He also seeks dismissal of Appellant bank's foreclosure action.

This counterclaim is compulsory based upon Rule 13(a), SCRCP, and this Court's opinion in *South Carolina Community Bank v. Salon Proz, LLC*, 420 S.C.89, 800 S.E.2nd 488 (Ct. App. 2017). The Court of Appeals stated the well-founded rule that the defendant in *Salon Proz* was entitled to a jury trial in the foreclosure action if the counterclaims are legal and compulsory, and a counterclaim is compulsory if it arises out of the same transaction or occurrence as the plaintiff's claim. (Citing *Carolina First Bank v. BADD, LLC*, 414 S.C. 289, 295, 778 S.E.2nd 106, 109 (2015) and Rule 13(a), SCRCP.)

Salon asserted an Unfair Trade Practices Act counterclaim alleging that the plaintiff bank "engaged in a pattern of reneging upon promises to modify or otherwise restructure loans, including, but [not] limited to, the loan subject of this case." And this Court found that were this allegation true, it would affect the loan's enforceability, and therefore the Unfair Trade Practices Act counterclaim was both legal and compulsory. The same conclusion is correct here.

Respondent Tommy Rush has pled as both defense to the loan and as a counterclaim that the Appellant bank has committed substantial underwriting violations affecting the viability of the loan in foreclosure, and therefore the Unfair Trade Practices Act counterclaim is both legal and compulsory.

While the Appellant focuses it arguments on enforceability, the SCUTPA Sixth Defense and Counterclaim are compulsory under Rule 13(a), whether applied before the *Deutsche Bank* case or after. Any reference to enforceability is immaterial because it is *dicta* to the logical relationship test which was abolished in *Deutsche Bank*. Further, it is readily apparent that Respondent meets the "logical relationship test" whether applied before or after *Deutsche Bank*.

The Sixth Defense and Counterclaim asserts the Appellant's predecessor "in inducing and closing the loan with the Defendants . . . committed substantial underwriting violations by making the subprime loan to the 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." Further, in paragraph 39 of their Answer and Counterclaims, Respondents allege that "Therefore, the court should award the Defendants three times the actual damages sustained <u>and provide such other relief as it deems necessary or proper</u>." Finally, the Defendants seek in their prayer for relief "an order dismissing the Plaintiff's Complaint." Therefore, it is abundantly plain that the Sixth Defense and Counterclaim bears a logical relationship to either the execution or the enforceability of the note and mortgage which are the subject of Appellant's Complaint. *See Carolina First Bank v. BADD, LLC*, 414 S.C. 289, 295, 778 S.E. 2d 106, 109 (2015).

Rule 13(a) makes no reference to anything but the requirement that a compulsory counterclaim must arise out of the transaction or occurrence that is the subject matter of the opposing party's claim. In *Deutsche Bank*, the Supreme Court identified a defect in the prior applications of the logical relationship test "in a way that does not track Rule 13(a)."

Accordingly, it is reasonable to conclude that any application of Rule 13(a), to the extent it strays beyond its plain language- that a compulsory counterclaim must arise out of the transaction or occurrence that is the subject matter of the opposing party's claim- is nothing more than *dicta*. The only conclusion that is reasonable is that the plain language of Rule 13(a) is the proper way to test whether a counterclaim is compulsory or permissive. Either way, the SCUTPA counterclaim by the Respondent Tommy Rush is compulsory. It is compulsory under the logical relationship test and under the plain language of Rule 13(a) because "it arises out of the transaction or occurrence that is the subject matter of the [Appellant bank's] claim," i.e. a mortgage foreclosure which Mr. Rush seeks to dismiss.[2] Therefore, this Court should affirm the Circuit Court's ruling that Respondents' SCUTPA claim is a compulsory counterclaim to the underlying foreclosure action.

[2] Furthermore, the bank's conduct violates the Ability-to-Repay rule under the Truth in Lending Act by failing to properly evaluate Tommy Rush's capacity to pay back the loan. This violation can cross the line into an unfair trade practice under the South Carolina Unfair Trade Practices Act. Most importantly, a violation can be used as a legal defense against foreclosure for the life of the loan. In this case, Tommy Rush has sought dismissal of the complaint for foreclosure based upon his Sixth Defense and Third Counterclaim. *See Elliott v. First Federal Community Bank of Bucyrus*, 961 F.3d 395 (6th Cir. 2020).

II. The Circuit Court correctly ruled that Defendants'/Respondents' Gross Negligence Counterclaim is Compulsory.

Respondent Tommy Rush has pled that Appellant bank owed him a duty to induce and close the loan, which is the subject of this lawsuit, in accordance with law. More specifically, Tommy Rush alleges that the Appellant bank breached its duty of care by inducing and closing the loan in violation of statutory and common law provisions, to wit: (a) failing to offer Tommy Rush the opportunity to acquire the attorney of his choice; and (b) by inducing and closing a loan that was unconscionable from its inception. Based upon this defense and counterclaim, Respondents seek an order dismissing the Appellant's complaint.

Respondents' Eighth Defense and Fifth Counterclaim for gross negligence is a compulsory counterclaim under both the logical relationship test and Rule 13(a). Negligence is always a legal claim. *Solley v. Navy Fed. Credit Union, Inc.*, 397 S.C. 192, 202, 723 S.E.2d 597, 602 (Ct. App. 2012) ("An action in tort for damages is an action at law.") Respondents' counterclaim for gross negligence is compulsory under Rule 13(a) because every factual allegation underlying the claim arises from Appellant's conduct and breach of its duty to Respondents in originating and closing on the promissory note Appellant seeks to enforce. The requirements of Rule 13(a) are easily met here.

To the extent a pre-*Deutsche Bank* analysis is necessary,[3] this counterclaim also satisfies the logical relationship test. As previously stated, this defense and counterclaim arise out of

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[3] There is no good reason not to apply the plain language of Rule 13(a) in this case. The Circuit Court orders in this case were filed in June and July, respectively, 2025, long after the Supreme Court's opinion in *Deutsche Bank.* Therefore, there is no logical reason not to apply the plain language of Rule 13(a) – "if it [the counterclaim] arises out of the transaction or occurrence that is the subject matter of the opposing party's claim" – to this case. It is nonsensical to compound the conclusion in *Deutsche Bank* that the logical relationship test "has since [North Carolina Federal

Appellants deliberate and reckless actions in obtaining and closing on the note at issue. Just as the Court in *Salon Proz* held that a tort action[4] based on dishonest conduct related to the procurement of a promissory note could affect the note's enforceability, the enforceability of the note at issue here will likewise be affected if Respondents prevail on their counterclaim for gross negligence, as Respondents specifically request dismissal of Appellant's complaint in addition to an award of damages.

Accordingly, this defense and counterclaim is compulsory to Appellant's foreclosure action because the counterclaim bears a logical relationship to the Appellant's foreclosure complaint and/or arises out of the transaction or occurrence that is the subject matter of Appellant's foreclosure complaint as required under the plain language of Rule 13(a), SCRCP, or the logical relationship test. Therefore, this Court should affirm the Circuit Court's ruling that Respondents' Eighth Defense and Fifth Counterclaim for gross negligence is a compulsory counterclaim to the Appellant's foreclosure action.

Savings & Loan Association v. DAV Corp.] been cited and applied in a way that does not track Rule 13(a)."

To the extent this Court deems itself constrained by the prospective application of the plain rule 13(a), Respondents seek to argue against precedent under Rule 217, SCRAP. This Court should apply the plain language of Rule 13(a) to the Circuit Court orders in this case, made long after *Deutsche Bank* was decided.

[4] The court in *Salon Proz* solely addressed the Unfair Trade Practices Act claim, since counterclaimant only needed to show that at least one of its counterclaims was legal and compulsory to be entitled to a jury trial on all claims. *Salon Proz*, at 96, 800 S.E.2d at 491-92. Adopting the court's brief analysis in *Salon Proz*, it stands to reason that any action in tort alleging a bank's misconduct in obtaining a promissory note would necessarily affect the enforceability of the note.

III. The Circuit Court correctly ruled that Defendants'/Respondents' Declaratory Judgment Counterclaim is compulsory.

Respondent Tommy Rush has pled in a Fifth Defense and Second Counterclaim for a declaratory judgment that the prepayment penalty contained in the note at issue is an unenforceable penalty. This counterclaim is compulsory because Respondents seek declaratory relief from a provision contained in the note Appellant seeks to enforce in the underlying action.

A counterclaim or a crossclaim seeking declaratory relief, like any other counterclaim or crossclaim, is subject to the provisions of Rule 13. 6 Wright & Miller, *Federal Practice and Procedure* § 1410.1 (3d. ed. 2026). If a counterclaim for declaratory relief arises out of the same transaction or occurrence as plaintiff's claim, it is compulsory, and Rule 13(a) applies. *Id.*, *see also Deutsche Bank,* 440 S.C. at 412-13, 892 S.E.2d at 281-82.

Here, Respondents contend that the note Appellant seeks to enforce included an unenforceable penalty provision from its inception. Accordingly, Respondents' challenge to that provision arises out of the same transaction or occurrence as Appellant's claim to enforce the note because both claims are rooted in the validity and enforceability of the same instrument. There is no dispute that Respondents' counterclaim for declaratory judgment is compulsory under a Rule 13(a) analysis.

Even if the Court applies the logical relationship test, Respondents' counterclaim for declaratory judgment is compulsory because it directly challenges the execution of the note or the enforceability of a provision contained in the note at the time it was executed. Discovery of this claim involves investigation of the same facts surrounding the execution of the note and the alleged misconduct of Appellant while originating the loan. If Appellant included an unenforceable, or illegal, prepayment penalty within the note, Respondents are entitled to seek a declaration that the challenged provision is invalid and unenforceable. Because Appellant seeks to enforce the note in this foreclosure action, Respondents' counterclaim challenging the validity of one of its provisions bears a logical relationship to Appellant's claim and is therefore compulsory. The Circuit Court's ruling should be affirmed.

CONCLUSION

For the above reasons, this Court should affirm the Circuit Court with respect to denying Plaintiff's Motion to Strike the jury demand as to the remaining counterclaims for declaratory judgment, for violation of the South Carolina Unfair Trade Practices Act, and for gross negligence.

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