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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
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.

APPELLANT'S REPLY BRIEF

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REPLY TO RESPONDENTS' BRIEF

Pursuant to Rule 208(a)(3), SCACR, Appellant replies to Respondents' Brief as follows:

1. Respondents' Characterization of the Facts of this Case Have No Place in This Appeal.

In their Statement of the Case and Statement of the Facts, Respondents assert that Tommy Rush did not default on his loan because "Appellant deployed materially defective title instruments when it sought to enforce the loan," more particularly described as alleged defects in the mortgage assignments in this case. *See* Respondents' Brief, pp. 1 and 3. Respondents also assert as a fact that a Lost Note Affidavit was backdated by the mortgage servicer in an effort to cure a "critical 19-year chain of title chasm." Respondents' Brief, p. 3. Respectfully, Respondents' assertions are unproven and have no place in this appeal.

A statement of facts within an appellate brief must be relevant to the issues on appeal and cite to the record on appeal. Rule 208(b)(1)(E) and (2), SCACR. Because this appeal concerns a motion to strike a jury demand pertaining to counterclaims raised in an equitable action, the facts of the case have not yet been adjudicated. Thus, facts alleged in the Complaint and in Respondents' counterclaims are the operative facts to determine whether the circuit court erred in finding that Respondents' second, third and fifth counterclaims arise from the same transaction or occurrence that is the subject matter of the Appellant's claim. Appellant's statement of facts properly cite to its Complaint filed against Respondents.

In contrast, although Respondents raise allegations in its Brief concerning defective mortgage assignments and an overall defective "chain of title," none of Respondents' counterclaims actually allege a defective chain of assignments or that the mortgage servicer allegedly backdated a Lost Note Affidavit. *See* Answer and Counterclaim (Aug. 10, 2020). Respondents' focus on these alleged facts distracts from the real issues here and in any event lack merit as a matter of law. *See In re Guy*, 552 B.R. 89, 99 (Bankr. D.S.C. 2016) (stating that an assignment of a mortgage is a separate contract to which the borrower is not a party and thus the borrower lacks standing to attack assignments or question their validity); *Bank of Am., N.A. v. Draper*, 405 S.C. 214, 220, 746 S.E.2d 478, 481 (Ct. App. 2013) (stating that a note secured by a mortgage automatically carries with it the mortgage, regardless of whether the mortgage was assigned to the note holder or whether the assignment of a mortgage was ever recorded in the Register of Deeds); *BAC Home Loan Servicing, L.P. v. Kinder*, 398 S.C. 619, 623-24, 731 S.E.2d 547, 549 (2012) ("An assignment does not have to be recorded in order to be effective."); S.C. Code Ann. § 36-3-804 (1976 as amended through 2007) (setting forth the requirements that must be met in order to enforce a lost note).

Further, Respondents' Brief refers to portions of the order on appeal concerning the circuit court's denial of Appellant's motion for partial summary judgment which was heard along with its motion to strike Respondents' jury demand. *See* Respondents' Brief, p. 1-2. Specifically, Respondents quoted the circuit court's statement that "it appears that there are defects in the corrective assignment executed by Plaintiff in 2021, as there were in the stricken corrective assignment executed in 2013." Respondents' Brief, p. 1. "A denial of a motion for summary judgment decides nothing about the merits of the case." *Ballenger v. Bowen*, 313 S.C. 476, 477, 443 S.E.2d 379, 380 (1994). Therefore, any discussion within the circuit court's order on appeal that addresses Appellant's motion for partial summary judgment should not be considered here at all.

2. The Logical Relationship Test Applies to this Case.

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 Supreme Court held that in cases commenced on or after August 9, 2023, the logical relationship test no longer applies. 440 S.C. 409, 412, 892 S.E.2d 280, 281 (2023). Appellant's case was commenced on July 1, 2020. Thus, the logical relationship test applies in deciding this appeal. Yet Respondents, as an additional sustaining ground, ask this Court to construe any application of Rule 13, SCRCP, beyond the plain language of the Rule as mere dicta and argue that "there is no good reason" to apply the logical relationship test in this appeal. Respondents' Brief, pp. 7-8. This court lacks the authority to rule against prior published precedent from the South Carolina Supreme Court and is bound by its decisions. *State v. Cheeks*, 400 S.C. 329, 342, 733 S.E.2d 611, 618 (Ct. App. 2012), *aff'd as modified*, 408 S.C. 198, 758 S.E.2d 715 (2014); S.C. Const. art. V, § 9. This Court should disregard Respondents' call to ignore the Supreme Court's ruling that the logical relationship test applies to cases commenced before August 9, 2023.

Even if this Court grants a motion from the Respondents to argue against precedent, the plain language of Rule 13, SCRCP, would yield the same result as Appellant argued in its main Brief. In *Deutsche*, this Court began its analysis by identifying the occurrence at issue in a foreclosure action – the mortgagor's default on the note. *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, 508, 863 S.E.2d 829, 833 (Ct. App. 2021), *aff'd as modified*, 440 S.C. 409, 892 S.E.2d 280 (2023). Nothing about this conclusion relied on the logical relationship test – "that a claim is compulsory in a foreclosure action when, if the allegation were true, it could affect the enforceability of the loan." *Id.*; *see also N. Carolina Fed. Sav. & Loan Ass'n v. DAV Corp.*, 298 S.C. 514, 518, 381 S.E.2d 903, 905 (1989) (stating the logical relationship test as whether there is a logical relationship between the enforceability of the note which is the subject of the foreclosure action and the joint venture agreement relied upon in the counterclaims, such that performance on the joint venture agreement would have avoided default on the note).

And Respondents did not take issue with the Court of Appeal's decision in *Deutsche* that the occurrence in a foreclosure action is the borrower's default. Such failure to respond should be viewed as a concession that default on the loan is indeed the operative occurrence. *See First Union Nat. Bank of S.C. v. FCVS Commc'ns*, 321 S.C. 496, 502, 469 S.E.2d 613, 617 (Ct. App. 1996), *rev'd in part*, 328 S.C. 290, 494 S.E.2d 429 (1997) (noting that respondent's failure to respond to an argument could amount to conceding the unaddressed argument).

Applying Rule 13(a), SCRCP, Respondents' declaratory judgment counterclaim seeking to strike a prepayment penalty within the mortgage does not arise from Mr. Rush's default on the note. The prepayment penalty automatically terminated many years ago, and Respondents' counterclaim does not assert that prepayment penalty somehow prevented Mr. Rush from making his mortgage payments. Respondent's SCUPTA counterclaim alleges that the lender wrongfully induced Mr. Rush to close on the loan. Again, Respondents' allegation that the lender, in 2002, engaged in deceptive and fraudulent acts in closing the loan, does not arise from Mr. Rush's default on the loan in 2013. *See e.g. Carolina First Bank v. BADD, L.L.C.*, 414 S.C. 289, 296, 778 S.E.2d 106, 110 (2015) (holding breach of contract counterclaim was permissive because it depended on the alleged conspiracy "that took place, if at all, two years after the guarantees had been executed"). And the same goes for Respondents' negligence counterclaim alleging that the lender breached its duty of care by inducing and closing on a loan that was unconscionable and without the benefit of Mr. Rush choosing another attorney other than the one that was present at the closing. This negligence claim does not arise from Mr. Rush's default on the loan but rather, the closing on the loan that occurred a decade prior to Mr. Rush's default on the loan. Respondents' counterclaims are permissive, not compulsory. As such, Appellant is entitled to a nonjury trial on Respondents' counterclaims.

3. Respondents' Arguments Concerning Their SCUTPA Counterclaim are Flawed.

As an additional sustaining ground, Respondents argue that their SCUTPA counterclaim is compulsory because this Court in S.C. *Community Bank v. Salon Proz,* 420 S.C. 89, 800 S.E.2d 488 (Ct. App. 2017) ruled that a SCUTPA counterclaim brought by Salon Proz was a compulsory counterclaim. Respondents' Brief, p. 6. "Whether a counterclaim is logically related to the initial claim depends upon the facts of each case." *Beach Co. v. Twillman, Ltd*., 351 S.C. 56, 61, 566 S.E.2d 863, 865 (Ct. App. 2002). The facts in *Salon Proz* are distinguishable from the facts here.

In *Salon Proz*, the SCUTPA counterclaim alleged that the 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." *Salon Proz*, at 97, 492. If the bank promised a loan modification to Salon Proz but reneged on that promise, the Court found that set of facts could affect the bank's ability to enforce the note. The *Salon Proz* court did not provide any detail about what the SCUTPA counterclaim specifically alleged, but South Carolina courts are familiar with loan modifications that may defer the outstanding loan balance or extend the loan maturity date for example, to avoid foreclosure. *See In re Mortgage Foreclosure Actions, 396 S.C. 209, 211, 720 S.E.2d 908, (Mem)–909 (2011), decision rescinded sub nom. Re Rescission of Admin. Ords. Governing Mortg. Foreclosure Actions*, 442 S.C. 384, 899 S.E.2d 596 (2023) (defining "foreclosure intervention" as "any policy, process or procedure employed by a Mortgagee for the purpose of seeking a resolution of a foreclosure action by loan modification or other means of loss mitigation."). Under these facts, the SCUTPA counterclaim was compulsory.

Here, Respondents' SCUTPA counterclaim alleges that:

> … in inducing and closing the loan with Defendants, New Century Mortgage Corporation 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.[1] Answer and Counterclaim, ¶ 35 (Aug. 10, 2020).

The facts alleged in Respondents' SCUPTA counterclaim concern the inducing and closing of loan, whereas the main action here is an action to foreclose on the note, triggered by the default on the loan many years after the loan was closed. Respondents claim in their Brief they pled that the lender "committed substantial underwriting violations affecting the viability of loan," but nowhere in their counterclaim do they actually allege that such wrongdoing effected the viability of the loan. Respondents' SCUPTA counterclaim, if proven, would not be remedied by rendering the note unenforceable. Instead, S.C. Code Ann. § 39-5-140(a) provides for recovery of up to three times the actual damages sustained, which is exactly what Respondents sought in their SCUPTA, not rescission of the note.[2] Answer and Counterclaim, p. 7. Any remedy of rescission or voiding the note is simply not available under SCUPTA. Under these facts, if true, there is no logical relationship between Respondents' counterclaim and the enforcement of the note at issue in the foreclosure action.

[1] Respondents assert in their Brief, without development of any supporting facts in this case, that Appellant's conduct also "violates the Ability-to-Repay rule under the Truth in Lending Act by failing to properly evaluate Tommy Rush's capacity to repay the loan." Respondents' Brief, p. 7 fn.2. Because this allegation is not found within Respondent's SCUPTA counterclaim, this Court should disregard Respondents' assertion. Further, 15 U.S.C. § 1639c was enacted in 2010 as part of the Dodd-Frank Act (PL 111-203), its corresponding regulations were enacted in 2013, *see* 78 Fed. Reg. 6408-01 (Jan. 30, 2013), and took effect on January 10, 2014, long after the loan at issue was originated in 2002.

[2] In an effort to avoid the conclusion that their SCUPTCA counterclaim does not affect the enforceability of the Note, Respondents state in their Brief that their Answer and Counterclaim seek "other relief as it deems necessary or proper" and an "order dismissing the Plaintiff's Complaint." Neither of these prayers for relief are relevant to the SCUPTA counterclaim because SCUPTA makes clear that its remedies are, and dismissal of a complaint and the catchall "any other necessary or proper relief" are not included as a remedy. Courts cannot rewrite statutes to add remedies that the legislature chose not to include. *See S.C. Pub. Int. Found. v. Wilson*, 447 S.C. 203, 217, 924 S.E.2d 163, 170 (2025) ("we cannot rewrite a statute to suit our own policy preferences").

4. Origination or Execution of the Note is not the Operative Transaction or Occurrence Here.

As additional sustaining grounds, Respondents argue that the transaction or occurrence at issue in their second, third and fifth counterclaims is the origination, closing and execution of the Note, at times citing to *Carolina First Bank v. BADD, LLC*, 414 S.C. 289, 778 S.E.2d 106 (2015) for the proposition that Respondents' counterclaims are compulsory when it bears a relationship to either the execution of the Note or the enforcement of the Note. Respondents' Brief, pp. 4, 6, 8, 9, 10. A close reading of *BADD* reveals Respondents' error. In *BADD*, a bank brought a commercial foreclosure action against BADD and also sought judgment against a personal guarantor of the notes so that the bank could seek a personal deficiency judgment against the guarantor if the foreclosure sale did not yield enough to cover BADD's debt. 414 S.C. 289, 291-293, 778 S.E.2d 106, 107-108 (2015). The guarantor answered and brought counterclaims of civil conspiracy and breach of contract against the bank. *Id*. at 292, 107. The *BADD* Court found that the execution of the guaranty agreements, not the note, was the transaction or occurrence that gave rise to the guarantor being named as a defendant in the foreclosure action. The Court did not consider the execution of the note as the relevant occurrence in relation to the counterclaims. Respondents misread *BADD* in asserting that the execution of the note is the occurrence rather than the default on the note.

What is more, it is well settled that the enforcement of the note due to the borrower's default on that note is the occurrence at issue in a foreclosure action. *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, 508, 863 S.E.2d 829, 833 (Ct. App. 2021), *aff'd as modified*, 440 S.C. 409, 892 S.E.2d 280 (2023); *Wachovia Bank, Nat. Ass'n v. Blackburn*, 407 S.C. 321, 331, 755 S.E.2d 437, 442 (2014); *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); *N. Carolina Fed. Sav. & Loan Ass'n v. DAV Corp.*, 298 S.C. 514, 518, 381 S.E.2d 903, 905 (1989). Applying this test in foreclosure actions with no other contract at issue other than the note, "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." *Blackburn*, 407 S.C. 321, 331, 755 S.E.2d 437, 442 (2014). It is this test that must be applied to Respondents' SCUPTA, negligence and declaratory counterclaims.

5. Respondents' Assertion that They Only Need to Show One Counterclaim as Compulsory to be Entitled to a Jury Trial on All Claims is not Correct.

In a footnote, Respondents state that "[t]he 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 <u>to be entitled to a jury trial on all claims</u>," citing to *Salon Proz*, at 96, 800 S.W.2d at 491-92 (emphasis added). Respondents' Brief, p. 9, fn. 4. Respondents' novel reading of *Salon Proz* is mistaken.

In *Salon Proz*, this Court cited to *Wachovia Bank Nat'l Assoc. v. Blackburn*, 407 S.C. 321, 755 S.E.2d 437 (2014) in which the Supreme Court laid out the rules to determine whether counterclaims are entitled to a jury trial or nonjury trial. *Id.* at 328, 441. If a complaint is equitable and the counterclaim is legal and compulsory, then the trial judge may order separate trials for the equitable claims and legal claims or try all claims in a single proceeding. *Id*. If tried in a single proceeding, the judge determines the equitable claims and the jury determines the facts concerning the legal claims. *Id*. The *Solon Proz* court found that SCUPTA counterclaim was legal and compulsory, and remanded "with instructions that the case be returned to the jury docket for further proceedings, including a hearing before the circuit court to determine the nature of any remaining counterclaims and any request for an order of reference as to equitable matters." Clearly, the court was contemplating that the trial judge decide whether the defendant's remaining counterclaims were legal and compulsory. If a single proceeding was held to try both jury and nonjury claims, then the case would be assigned to the jury trial docket with equitable and permissive claims decided by the judge. *Id*. at 329, 441. Respondents' reading of *Salon Proz* is contrary to this Court's own words in *Salon Proz* as well as the procedural framework set forth in *Blackburn*.

CONCLUSION

For these reasons, Appellant respectfully requests that this Court reverse the lower court's orders denying Appellant its right to a nonjury trial on Respondent's Second, Third and Fifth Counterclaims.

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