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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 FINAL BRIEF

s/ M. McMullen Taylor

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STATEMENT OF ISSUES ON APPEAL

1. Did the Lower Court Err in Ruling that Respondents' Counterclaim for a Declaratory Judgment is a Compulsory Counterclaim?
2. Did the Lower Court Err in Ruling that Respondents' Counterclaim Asserting a Violation of the S.C. Unfair Trade Practices Act is a Compulsory Counterclaim?
3. Did the Lower Court Err in Ruling that Respondents' Counterclaim Asserting Gross Negligence is a Compulsory Counterclaim?

STATEMENT OF THE CASE

This appeal concerns a foreclosure action commenced by Plaintiff on July 1, 2020 seeking to foreclose on real property due to the failure of Borrower Tommy Rush to make any payments on his mortgage loan since December 2012. R. pp. 13-53. Tommy Rush, the Asia T. Rush Family Trust and Australia B. Rush 29016 ("Defendants") answered the Complaint, demanded a jury trial, and brought the following counterclaims:

- **First Counterclaim:** Violation of S.C. Code Ann. § 37-10-102 and § 37-5-108 of the S.C. Consumer Protection Code: Defendants allege that before the date of execution of the loan, the lender, New Century Mortgage Corporation, violated the attorney preference statute within the South Carolina Consumer Protection Code, S.C. Code Ann. § 37-10-102, which constituted unconscionable conduct under S.C. Code Ann. § 37-5-108. The loan was also allegedly induced by unconscionable conduct as identified by a Final Report of Michael J. Missal, Bankruptcy Court Examiner, Case No. 07-10416, thus violating S.C. Code Ann. § 37-5-108. Further, the loan was induced by unconscionable conduct by the lender and the closing attorney, due to their failure to inform the Defendants of the terms of the adjustable-rate note, which caused the loan

to become unaffordable once the interest rate adjusted; thus violating S.C. Code Ann. § 37-5-108.

- **Second Counterclaim:** Declaratory Judgment: Defendants seek to void as unenforceable a prepayment penalty within the Note at issue.
- **Third Counterclaim:** Violation of the South Carolina Unfair Trade Practices Act: Defendants allege that the following actions constitute unfair trade practices on the part of the lender: 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.
- **Fourth Counterclaim:** Accounting: Defendants allege that the lender employed deceptive and fraudulent accounting practices as shown in the Final Report of Michael J. Missal, Bankruptcy Court Examiner, Case No. 07-10416 and sought an accounting of the loan.
- **Fifth Counterclaim:** Gross Negligence: Defendants allege that the lender was grossly negligent by inducing and closing the loan that violated the attorney preference statute and the South Carolina Unfair Trade Practices Act as described above. R. pp. 54-63.

Plaintiff timely filed its Reply on August 18, 2020. Thereafter, on August 21, 2020, Defendants, believing that challenging a recorded mortgage assignment would defeat Plaintiff's standing to bring the foreclosure action, moved to strike from the public records of the Richland County Register of Deeds an assignment of mortgage recorded with the Richland County Register of Deeds due to the notary's commission being suspended at the time of the notary's acknowledgement. The circuit court

granted this motion on January 13, 2021. On May 4, 2021, Plaintiff moved to refer the case to the Master-In-Equity and the Clerk of Court then referred the case on May 6, 2021. The Richland County Master-In-Equity entered an order on May 11, 2021 recusing himself and referring the case to a Special Referee. On October 22, 2021, Defendants moved to set aside the reference to a Special Referee. On January 23, 2024, the circuit court granted Defendants' motion to set aside the reference to a Special Referee. A scheduling order was entered on October 15, 2024.

On March 19, 2025, Plaintiff filed a motion for partial summary judgment and a motion to strike Defendants' jury demand. R. pp. 65-66. On May 21, 2025, a hearing was held on the motions. R. pp. 98-130. The parties submitted proposed orders on June 20, 2025. R. pp. 77-88. On June 26, 2025, the circuit court denied Plaintiff's motion for partial summary judgment and motion to strike Defendant's jury demand. R. pp. 1-5. In this order, the circuit court ruled that all of Defendants' counterclaims were legal in nature and compulsory, thus Defendants were entitled to a jury trial on all their counterclaims. *Id.* at 4. Plaintiff timely moved to reconsider on July 7, 2025. R. pp. 89-97. In an order entered July 30, 2025, the circuit court granted in part and denied in part Plaintiff's motion to reconsider. R. pp. 6-12. The court corrected its previous order, ruling that the unconscionability counterclaim (First Counterclaim) and the accounting counterclaim (Fourth Counterclaim) were equitable, not legal, in nature. *Id.* at 7. However, the Court declined to revise his prior order ruling that the declaratory judgment counterclaim (Second Counterclaim), the unfair trade practices counterclaim (Third Counterclaim) and the gross negligence counterclaim (Fifth Counterclaim) were compulsory and therefore, Defendants were entitled to a jury trial on these three counterclaims. *Id.* at pp. 9-10. On August 29, 2025, Plaintiff noticed and served an appeal of the denial in the June 26, 2025 and July 30, 2025 orders of Plaintiff's motion to strike Defendant's jury demand for their Second, Third and Fifth Counterclaims.

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 argued that the lower court orders denying Appellant's right to a nonjury trial on Respondents' counterclaims were interlocutory and therefore, not immediately appealable. Appellant filed a return to this motion on February 19, 2026. This Court denied Respondents' motion on March 31, 2026.

STATEMENT OF FACTS

On October 31, 2002, Tommy Rush and delivered unto the lender, New Century Mortgage Corporation, a Note in the principal sum of \$306,000.00 Dollars with a variable rate of interest initially payable in monthly installments of principal and interest of \$2,459.95 beginning December 1, 2002. R. pp. 15-16 and pp. 20-25. To better secure the Note, Mr. and Mrs. Rush delivered a Mortgage to the lender, placing a lien on the property located at 453 Longtown Road in Richland County. R. pp. 15-16 and pp. 26-48. The Mortgage included a Prepayment Rider providing that the Rushes had a right to make prepayments of principal at any time; however, if the Rushes made a prepayment exceeding 20% of the principal amount loaned within two years from the date of the execution of the Mortgage, a prepayment charge would be imposed. R. p. 42. No prepayment charge would apply after October 31, 2004. *Id.* Mr. Rush defaulted on his loan for failing to make his mortgage payments from January 2013 onward. R. p. 17. Plaintiff Deutsche Bank National Trust Company, in its capacity as Trustee of the New Century Home Equity Loan Trust, Series 2003-2 Asset Backed Pass-Through Certificates, brought a foreclosure action against Defendants, asserting that it is entitled to enforce the Note. R. p. 15.

STANDARD OF REVIEW

Normally, “[t]he matter of striking from a pleading . . . is largely within the discretion of the trial judge” such that “[t]he granting . . . of a Motion to Strike . . . will not be reversed except for an abuse of discretion or unless the action of the trial judge was controlled by an error of law.” *Brown v. Coastal States Life Ins. Co.*, 264 S.C. 190, 194, 213 S.E.2d 726, 728 (1975). “Whether a counterclaim is compulsory is a question of law to be reviewed de novo.” *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*, 440 S.C. 409, 412, 892 S.E.2d 280, 281 (2023).

RELEVANT LAW

Because foreclosure sounds in equity, a party to a foreclosure action is not entitled to a jury trial as a matter of right. *Wachovia Bank, Nat’l Ass’n v. Blackburn*, 407 S.C. 321, 328, 755 S.E.2d 437, 441 (2014). Rather, a party to a foreclosure action is entitled to a jury trial only where he or she asserts a counterclaim that is both legal and compulsory. *Carolina First Bank v. BADD, L.L.C.*, 414 S.C. 289, 295, 778 S.E.2d 106, 109 (2015); *S.C. Cmnty. Bank v. Salon Proz, LLC*, 420 S.C. 89, 96, 800 S.E.2d 488, 492 (Ct. App. 2017); *cf. N.C. Fed. Sav. & Loan Ass’n v. DAV Corp.*, 298 S.C. 514, 517, 381 S.E.2d 903, 905 (1989) (“A party does not waive its right to a jury trial on a counterclaim asserted in an equity action if the counterclaim is legal and compulsory in nature.”).

A counterclaim is compulsory under Rule 13(a), SCRCP only “if it arises out of the transaction or occurrence that is the subject matter of the opposing party’s claim.” Counterclaims not arising out of the same transaction or occurrence of the leading claims are merely permissive. *See* Rule 13(b), SCRCP. The occurrence that gives rise to a foreclosure action is the borrower’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, 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).

South Carolina has applied the “logical relationship” test to determine whether a counterclaim is compulsory or permissive.¹ *N.C. Fed. Sav. & Loan Asso. v. DAV Corp.*, 298 S.C. 514, 519, 381 S.E.2d 903, 906 (1989). In the context of foreclosure litigation, if prevailing on a counterclaim bears no logical relationship to the enforcement of the note, then Respondents’ counterclaims are permissive and therefore, Respondents have waived their right to a jury. *Wachovia Bank, Nat’l. Ass’n v. Blackburn*, 407 S.C. at 330, n.7, 755 S.E. 2d at 442, n.7 (citation omitted); *Carolina First Bank v. BADD, L.L.C.*, 414 S.C. 289, 295, 778 S.E.2d 106, 109 (2015). “[T]here is no constitutional right to a jury trial for a non-compulsory counterclaim for damages asserted in an equitable action.” *Crewe v. Blackmon*, 289 S.C. 229, 233, 345 S.E.2d 754, 757 (Ct. App. 1986).

ARGUMENT

1. The circuit court erred in ruling that Defendant’s declaratory judgment counterclaim was compulsory.

In Respondents’ Second Counterclaim for a declaratory judgment, Respondents allege that, “upon information and belief, the alleged note at issue in this case contains a prepayment penalty provision, which constitutes an unenforceable penalty.” R. pp. 54-63. They seek a declaratory judgment that the prepayment penalty is unenforceable. *Id.* Without explanation, the lower court found that a logical relationship exists between this counterclaim and the enforceability of the mortgage. Respectfully, the lower court erred.

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.

The question at issue here is whether the allegations of the counterclaim, if true, along with the relief sought, would affect the enforcement of the Note in Appellant's foreclosure action. *Carolina First Bank v. BADD, L.L.C.*, 414 S.C. 289, 295-296, 778 S.E.2d 106, 109 (2015); *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). If so, then there is a logical relationship between the foreclosure action and the counterclaim, thus making the counterclaim compulsory, entitling Respondent to a jury trial. On the other hand, if the allegations of the counterclaim, along with the relief sought, do not affect the enforcement of the Note, then the counterclaim is permissive and Respondent has waived any right to a jury trial on this counterclaim. *Id.*

The prepayment provisions are contained in a prepayment rider to the Note at issue and states in relevant part:

If, within 24 months from the date of execution of the Security Instrument, I make a full prepayment or, in certain cases a partial prepayment, and the total of such prepayment(s) in any 12-month period exceeds TWENTY PERCENT (20%) of the original principal amount of this loan, I will pay a prepayment charge in an amount equal to the payment of 6 months advance interest on the amount by which the total of my prepayment(s) within that 12-month period exceeds TWENTY PERCENT (20%) of the original principal amount of the loan. Prepayment Rider (Oct. 31, 2002). R. p. 42.

The Security Instrument (i.e., the mortgage) was executed on October 31, 2002. R. pp. 26-40. The prepayment penalty expired on October 31, 2004. *Id.* On its face, the prepayment penalty is no longer enforceable, but for a different reason than the grounds alleged in Respondents' counterclaim.

Taking Respondents' allegations as true - that the prepayment penalty is unenforceable - a declaratory judgment to that effect would not render the remaining provisions of the Note unenforceable. If the prepayment penalty within the Note is unenforceable, that provision would be struck from the Note or otherwise deemed void; indeed, that is exactly what Respondents sought in

their counterclaim. However, the remaining provisions of the Note would still be enforceable. Because the counterclaim does not affect the enforcement of the Note in a foreclosure action, it is permissive and thus Appellant is entitled to a nonjury trial. Respectfully, the circuit court erred in finding that a logical relationship existed between an unenforceable prepayment provision within the Note and the enforcement of the Note as a whole, especially where, as here, Respondents sought a declaratory judgment that only the prepayment provision is unenforceable, not the entire Note.

2. The circuit court erred in ruling that Respondents' Unfair Trade Practice Counterclaim is compulsory.

In Respondents' counterclaim seeking damages for alleged violations of the Unfair Trade Practices Act, the actions that they complain of are: 1) the original lender committing substantial underwriting violations by making a subprime loan to Mr. Rush more risky by offering an interest-only loan and by calculating his ability to pay based solely on the interest only and not on the adjusted rate; and 2) the original lender 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).² Without explanation, the lower court found that a logical relationship exists between this counterclaim and the enforceability of the mortgage. Respectfully, the lower court erred.

The acts alleged within this counterclaim involve the inducement of the loan and the closing of the loan by the lender, which are distinct from Plaintiff's enforcement of the Note. *See 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) (ruling that counterclaim of unfair trade practices had no logical relationship to enforceability of Note); *e.g. Deutsche Bank Nat'l Tr. Co. as Tr.*

² This report was filed as part of New Century Mortgage Corporation's bankruptcy proceedings commenced in 2007.

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). The original lender's offer of an interest-only loan to Mr. Rush bears no relationship to the enforcement of the Note in which Mr. Rush promised to repay the loan. And facilitating the pooling of subprime loans into investment vehicles has no effect on the enforcement of the Note. Further, should Respondents prevail on this counterclaim, their remedy is actual and treble damages between \$1,500.00 to \$7,500.00, which has no effect on the enforcement of the Note. Because the counterclaim does not have a logical relationship to the enforcement of the Note in a foreclosure action, this counterclaim is permissive and thus Appellant is entitled to a nonjury trial.

3. The circuit court erred in ruling that Respondents' Negligence Counterclaim was compulsory.

Respondents' negligence counterclaim alleges that the lender breached its duty of care by inducing and closing the mortgage loan, which proximately caused damages. R. 61. Without explanation, the lower court found that a logical relationship exists between this counterclaim and the enforceability of the mortgage. Respectfully, the lower court erred.

If Appellant was found negligent, that does not prevent Appellant from enforcing the Note. The relief for negligence is monetary damages, not voiding 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).

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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