ELECTRONICALLY FILED - 2025 Nov 10 11:39 AM - HORRY - COMMON PLEAS - CASE#2024CP2600567
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STATE OF SOUTH CAROLINA COUNTY OF HORRY Select Portfolio Servicing, Inc., Plaintiff, v. Nicholas Wilson a/k/a Nicholas F. Wilson; SoFi Lending Corp.; Wells Fargo Bank, N.A.; and Midland Credit Management, Inc.; Defendants.	IN THE COURT OF COMMON PLEAS DOCKET NO.: 2024CP2600567 ORDER DENYING DEFENDANT'S MOTION TO DISMISS AND DEFENDANT'S MOTION TO STAY

RECEIVED
Dec 11 2025
SC Court of Appeals

This matter came before the Court at a hearing on September 25, 2025, on the following motions filed by Defendant Nicholas Wilson a/k/a Nicholas F. Wilson ("Wilson"):

1) "Motion to Dismiss Based on Compulsory Counterclaims Filed in Earlier Case Under Rules 12 and 13, SCRCP" filed on January 16, 2025 (hereafter the "Motion to Dismiss"); and
2) "Joint Motion to Stay Foreclosure Action" filed on April 8, 2025 (hereafter the "Motion to Stay").

Wesley D. Few, Esquire, appeared on behalf of Wilson. Sean M. Foerster, Esquire, appeared on behalf of Plaintiff Select Portfolio Servicing, Inc. ("SPS"). Based on arguments of counsel and other credible evidence presented at the September 25, 2025, hearing, the Court denies the Motion to Dismiss and the Motion to Stay.

FINDINGS OF FACT

This foreclosure action arises out of allegations of Wilson's default under the terms of the Note and Mortgage at issue for his failure to make the monthly payment due for March 1, 2021, and all payments thereafter.

Due to Wilson's loan default, his loan was accelerated and SPS now seeks to foreclose the mortgage securing that loan (hereafter the "Mortgage") against a property owned by Wilson that is comprised of the following three tracts: Tract A containing 1.29 acres, Tract B containing 3.77 acres, and Tract C containing 2.70 acres (hereafter collectively the "Property"). SPS has waived its right to a personal judgment against Wilson for any deficiency remaining on the mortgage debt after the foreclosure sale of the Property.

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On March 21, 2024, Wilson was properly served with process in this action, but he failed to timely file an answer or other response to the Complaint and was held in default. When Wilson was served in March of 2024, he was aware that he had defaulted on his mortgage as of March 1, 2021, and was subject to the remedy of foreclosure. Wilson was also aware of a pending lawsuit he had filed against the sellers and others associated with the sale of the subject property and the dispute over the property's driveway. *See Nicholas F. Wilson v. Janet P. Gochenour et al*., C/A # 2023CP2602475 (Horry County Court of Common Pleas)(filed April 19, 2023)(hereafter the "2023 Action").

A Certification of Default was filed in this action on April 23, 2024. Wilson filed a Motion to Set Aside Default on June 21, 2024. An Order denying Wilson's Motion to Lift Default was issued March 4, 2025. Wilson filed a Motion for Reconsideration regarding the Order denying Wilson's request to lift default. The Motion for Reconsideration was denied March 25, 2025.

Wilson filed a Motion to Dismiss on January 16, 2025, and a Motion to Stay April 8, 2025. The Motion to Dismiss was not filed until approximately nine months after the time to answer the Complaint had passed.

On April 8, 2025, the final foreclosure hearing took place in this action, but the Court took SPS's foreclosure claim under advisement until after Wilson's Motion to Dismiss and Motion to Stay could be properly noticed, heard, and decided.

Both of Wilson's motions revolve around the 2023 Action. In the 2023 Action, Wilson seeks, among other relief, a declaration as to his rights in a separate parcel not encumbered by the Mortgage: Tract "D" containing 0.49 acres and which contains the driveway to the Property (hereafter the "Driveway Parcel"). The crux of the 2023 Action is that Wilson believed he would be receiving fee simple title to the Driveway Parcel from the seller when he purchased the Property in March 2020, but instead received only an easement interest[1] in the Driveway Parcel through that sale. In that action, Wilson has asserted various causes of action against the seller, the closing attorney, the realtor, and other parties who may claim an interest in the Driveway Parcel.

One of the defendants in the 2023 Action was the original mortgagee of record with respect to the Mortgage—Mortgage Electronic Registration Systems, Inc., or "MERS"—who Wilson named only because he "on information and belief…expected [it] to claim an interest in the

[1] A "Right of Way Easement" recorded on April 7, 1978, in the Office of the Register of Deed for Horry County in Book 607 at Page 687 provides access for the Property.

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[Driveway Parcel] by virtue of [the Mortgage]…" and "based on its anticipated claim to have a mortgage lien on the property."

With respect to MERS and the Mortgage, Wilson's Complaint in the 2023 Action asserted only a single cause of action for "Declaratory Judgment" in which he alleged that "MERS is expected to and may claim an interest in property that [seller] was contractually obligated to convey to [Wilson], but failed to do so…" and that "[b]ut for the fraudulent representations relied upon by [Wilson], MERS would have a mortgage on [Wilson]'s property, including the driveway." In that cause of action, Wilson sought relief only in the form of an "order from this Court declaring his ownership of the driveway."

Wilson's Complaint in the 2023 Action did not seek rescission or reformation of the Mortgage.

In the 2023 Action, Flagstar Bank, N.A. ("Flagstar")—who had been assigned the Mortgage by then and was eventually substituted in place of MERS—filed an Answer, Counterclaims, and Crossclaims in which it asserted a contingent counterclaim and crossclaim for declaratory judgment contending that if Wilson was correct that he was supposed to receive title to the Driveway Parcel, then the Mortgage should also cover it.

However, after Flagstar assigned the Mortgage to SPS, SPS moved to substitute itself as a defendant into the 2023 Action and filed a Motion to Dismiss whereby it "disclaim[ed] interested party status to [Wilson]'s declaratory judgment action and withdr[ew] the affirmative counter and cross claim for declaratory judgment asserted by Flagstar."

As it currently stands, SPS does not seek to foreclose the Mortgage against or sell the fee simple title to the Driveway Parcel through this foreclosure action and SPS has withdrawn its claim to a mortgage lien on the fee simple title to the Driveway Parcel in the 2023 Action.

Procedurally, this foreclosure action and the 2023 Action are in two completely different stages. A final foreclosure hearing was already held in this case and, in light of this Order, SPS may now proceed with seeking the entry of a Judgment of Foreclosure and Sale.

The 2023 Action, on the other hand, still has a long way to go: with the exception of certain limited discovery, that action is currently stayed pending an appeal by Wilson to the South Carolina Court of Appeals from interlocutory orders that dismissed his claims against two of the defendants, denied his motion to alter or amend the dismissal order, and denied his motion to amend his

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complaint in that action. *See Nicholas F. Wilson v. Janet P. Gochenour et al.*, Appellate Case No. 2024-000440 (Ct. App. filed March 18, 2024).

Meanwhile, Wilson has not made a mortgage payment in over four years while SPS and his prior mortgage servicers have been paying his property taxes, hazard insurance premiums, and private mortgage insurance premiums during that time.

Nonetheless, Wilson's Motion to Stay seeks a stay of this foreclosure pending the outcome of the 2023 Action.

Alternatively, Wilson's Motion to Dismiss seeks a dismissal of this foreclosure under two different procedural arguments. First, Wilson seeks dismissal under Rule 12(b)(8), SCRCP, based on the argument that the scope of the mortgage is already being litigated in the 2023 Action and, therefore, the parties and the issues are substantially the same in both proceedings. Second, Wilson seeks dismissal under Rule 13(a), SCRCP, based on the argument that SPS's foreclosure claim in this action was a compulsory counterclaim to the 2023 Action.

CONCLUSIONS OF LAW

The Court denies both of Wilson's motions for the following reasons:

1. Wilson's Motion to Dismiss is denied.

Wilson is in default so his Motion to Dismiss, in which he raises issues of compulsory counterclaims, is untimely, moot, and, therefore, denied.

a. The Motion to Dismiss is untimely.

The general rule is that a Motion to Dismiss is filed before the defendant files an Answer.

The Motion to Dismiss is untimely to the extent that it is made pursuant Rule 12(b)(8), SCRCP. "Every defense, in law or fact, to a cause of action in any pleading, whether a claim, counterclaim, cross-claim or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: … (8) another action is pending between the same parties for the same claim." Rule 12(b)(8), SCRCP.

"A motion making any of these defenses shall be made before pleading if a further pleading is permitted." Rule 12(b), SCRCP (emphasis added).

"A defense … that another action is pending between the same parties for the same claim is waived (A) if omitted from a motion in the circumstances described in subdivision (g) or (B) if

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it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course." Rule 12(h)(1), SCRCP (emphasis added).

"Rule 12(b)(8) is a waivable defense." Professor James F. Flanagan *et al*., South Carolina Civil Procedure § 12.C.7 (2020 Edition).

Wilson was required to assert his defense under Rule 12(b)(8) in either a pre-answer motion or within a pleading. Wilson defaulted by failing to plead in response to the complaint within the time permitted by the rules and the Court denied his request for relief from the entry of default. Wilson did not file the Motion to Dismiss until after his default, and no other pleadings were permitted at the time that he filed it. Wilson's motion is therefore untimely, and he has waived any defense based on Rule 12(b)(8).

The Motion to Dismiss is also untimely to the extent that it is made pursuant Rule 13(a), SCRCP.

The failure to plead a Rule 13(a) compulsory counterclaim bars its litigation in a subsequent case under principles of *res judicata*. *Jaynes v. Cty. of Fairfield*, 303 S.C. 434, 438, 401 S.E.2d 183, 185 (Ct. App. 1991)(holding that plaintiffs' complaint was barred by *res judicata* since it was a Rule 13(a) compulsory counterclaim to an earlier action).

Res judicata is an affirmative defense that must be pleaded. *Dawkins v. Mozie*, 399 S.C. 290, 294, 731 S.E.2d 342, 345, (Ct. App. 2012)(*citing RIM Assocs. v. Blackwell*, 359 S.C. 170, 182, 597 S.E.2d 152, 159 (Ct. App. 2004).

"An affirmative defense is waived if not pled." *Id*.

Here, Wilson was required to assert an affirmative defense of *res judicata* based on Rule 13(a) within a pleading. By defaulting and failing to plead in response to the Complaint, Wilson waived that affirmative defense. His Motion to Dismiss based on a waived affirmative defense under Rule 13(a) is therefore untimely.

b. Rule 12(b)(8) is inapplicable because there is no other action pending between the parties for the same claim.

There is no action "pending between the same parties for the same claim" as required for dismissal under Rule 12(b)(8). This action involves a claim for foreclosure of the lien of the Mortgage against only Tracts A, B, and C based on Wilson's loan default in March 2021. The 2023 Action, on the other hand, involves a claim seeking a "declaratory judgment" as to Wilson's

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ownership of the Driveway Parcel based on issues arising out of the property purchase transaction in March 2020. The 2023 Action includes no claim for rescission or reformation of the Mortgage, or any other type of claim challenging the enforceability of the lien of the Mortgage against Tracts A, B, and C.

Because this action involves different claims and different requested relief from the 2023 Action, Rule 12(b)(8) is inapplicable.

c. Rule 13(a) is inapplicable because SPS's foreclosure claim was not a compulsory counterclaim to the 2023 Action.

SPS's foreclosure claim in this action was not a compulsory counterclaim to the 2023 Action because it does not arise out of the same transaction or occurrence as Wilson's claims in that action.

"A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the same transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction." Rule 13(a), SCRCP (emphasis added).[2]

SPS's action to foreclose the mortgage did not arise out of the same transaction or occurrence giving rise to the 2023 Action against the sellers and others associated with the purchase of the Property. SPS's right to foreclose remains intact, and SPS is not seeking foreclosure of the Driveway Parcel currently in dispute as part of the 2020 purchase of the Property. The Property was purchased at the March 2020 closing and Wilson defaulted on this loan in March of 2021. The two transactions are mutually exclusive. The 2023 Action involves a dispute over whether a driveway was to be included in the purchase and this action involves default on a loan. Wilson defaulted on this loan two years (March of 2021) before pursuing claims in the

[2] The parties argued about the appropriate test to be applied by the Court in determining whether SPS's foreclosure claim was a compulsory counterclaim given the South Carolina Supreme Court's prospective abolishment of the "logical relationship" test effective August 9, 2023—several months after the filing of the 2023 Action—in favor of a "plain language of the rule" test. *Deutsche Bank Nat'l Tr. Co. v. Estate of Houck*, 440 S.C. 409, 412-13, 892 S.E.2d 280, 282 (2023)("We now hold that in cases commenced on or after the effective date of this opinion, the question of whether a counterclaim is compulsory is governed by the plain language of Rule 13(a)."). These arguments are irrelevant as the Court concludes that SPS's foreclosure claim is not a compulsory counterclaim under either test.

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2023 Action regarding the inclusion of the driveway as part of the purchase. Wilson should have continued paying his loan payments as he pursued a remedy regarding the driveway issue. SPS's right to foreclose upon the loan default is unaffected by the 2023 Action.

For these reasons, SPS was not required to plead the foreclosure claim as a compulsory counterclaim in the 2023 action.

2. Wilson's Motion to Stay is denied.

Wilson's Motion to Stay is also denied as it would be inequitable to bar SPS from its right to pursue the remedy of foreclosure as Wilson pursues the 2023 Action which is currently on appeal.

"The granting of a motion for a stay of proceedings rests entirely within the discretion of the trial [court]." *Thompson v. Swicegood*, 430 S.C. 648, 659, 845 S.E.2d 920, 925 (Ct. App. 2020)(*quoting City of Spartanburg v. Belk's Dep't Store of Clinton*, 199 S.C. 458, 20 S.E.2d 157, 167 (1942)).

"An equitable stay may be invoked if justified by circumstances which outweigh any potential harm to the party against whom it is operative." *Merritt Bros. v. Marine Midland Realty Credit Corp*., 307 S.C. 213, 216, 414 S.E.2d 167, 169 (1992). "In making this determination, the court must weigh competing interests and maintain an even balance." *Id*. (*quoting United States Central Building Supply, Inc. v. Wilke*, 685 F. Supp. 936, 938 (D.C. Md. 1988)).

"Where the same parties and the same subject matter are involved in both an action at law and a suit in equity, the pendency of one may authorize a stay of proceedings in the other, the facts and circumstances in each particular case determining in large measure whether the stay should or should not be granted." *Rush v. Thompson*, 203 S.C. 106, 114, 26 S.E.2d 411, 414 (1943)(*quoting* 1 C.J.S. Actions § 133).

"To obtain a stay of a later action, as a general rule, it is necessary that the two suits involve the same claims, concern the same subject matter, involve the same issues, and seek the same relief." 1 Am. Jur. 2d Actions § 68. "In order to prevail on the issue of a stay, the party requesting a stay must make out a clear case of hardship or inequity in being required to go forward." 1 Am. Jur. 2d Actions § 67. "Considerations that may serve the trial court in the exercise of its discretion in granting or denying a stay include expense and convenience, availability of witnesses, the stage to which proceedings in the action have already progressed, and the possibility of prejudice resulting from the stay." *Id*.; *see also Rush v. Thompson*, 203 S.C. 106, 114, 26 S.E.2d 411, 414

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(1943)(considering the prejudice to the other party as a factor when deciding whether to stay court proceedings).

a. The outcome of the 2023 Action will make no difference to the outcome of this foreclosure action.

As discussed *supra* in section 1(c) above, this foreclosure action involves different issues and different requested relief than the 2023 Action. Whether or not Wilson is entitled to fee simple title to the Driveway Parcel in the 2023 Action has no bearing on his March 2021 loan default, on the amount of the current debt secured by the Mortgage, or on SPS's right to enforce the Mortgage against Tract A, Tract B, and Tract C. Wilson has not identified any issue to be litigated in the 2023 Action that will make a difference in this foreclosure action.

b. A stay of the foreclosure would result in prejudice to SPS.

SPS will be prejudiced by having to wait for the final adjudication of the 2023 Action because SPS, not Wilson, is currently paying the property taxes, hazard insurance premiums, and mortgage insurance premiums. SPS is also having to incur property inspection charges to monitor the condition of its loan collateral.

Every day that this foreclosure action is delayed is another day that SPS suffers the loss of the use of the money that was loaned to Wilson—money which he stopped repaying over four years ago. Wilson should have continued making his mortgage loan payments while he pursued his remedies in the 2023 Action, but he failed to do so.

c. This action is in a completely different procedural stage than the 2023 Action.

The cases are in two completely different stages. The foreclosure case has already had its final hearing and will be concluded shortly, while the 2023 Action may be several years away from a complete adjudication due to Wilson's pending appeal from interlocutory orders in that action.

d. Wilson has identified no economic benefit to the Court or the parties from a stay of the foreclosure action.

Finally, Wilson has failed to proffer any argument that wasteful duplication will occur if this foreclosure case goes forward before the 2023 Action is adjudicated.

For these reasons, it would be inequitable to bar SPS from its right to pursue the remedy of foreclosure while Wilson pursues the 2023 Action.

IT IS THEREFORE ORDERED THAT:

1. Wilson's "Motion to Dismiss Based on Compulsory Counterclaims Filed in Earlier Case Under Rules 12 and 13, SCRCP" filed on January 16, 2025, is DENIED; and

2. Wilson's "Joint Motion to Stay Foreclosure Action" filed on April 8, 2025, is DENIED.

AND IT IS SO ORDERED.

[Court's signature page to follow]

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FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF HORRY
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2024CP2600567

Select Portfolio Servicing, Inc.

PLAINTIFF(S)

Nicholas Wilson a/k/a Nicholas F. Wilson; SoFi Lending Corp.; Wells Fargo Bank, N.A.; and Midland Credit Management, Inc.;

DEFENDANT(S)

Submitted by:
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Attorney for: ☒ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT**. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT**. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** *(CHECK APPLICABLE BOX)*: ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.
Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

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		$
		$
		$

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.
Note: Title abstractors and researchers should refer to the official court order for judgment details.
E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Master in Equity **Judge Code** **Date**

For Clerk of Court Office Use Only

This judgment was entered on the day of , 20 and a copy mailed first class or placed in the appropriate attorney's box on this day of , 20 to attorneys of record or to parties (when appearing pro se) as follows:

Sean M. Foerster, Esquire
Rogers Townsend, LLC
P.O. Box 100200
Columbia, SC 29202-3400
ATTORNEY(S) FOR THE PLAINTIFF(S) (23945.1)

Wesley D. Few, Esquire
Post Office Box 9398
Greenville, South Carolina 29604
ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

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Horry Common Pleas

Case Caption: Select Portfolio Servicing Inc VS Nicholas Wilson, defendant, et al

Case Number: 2024CP2600567

Type: Master/Order/Other

So Ordered

s/Alan D. Clemmons 3088 Master in Equity