THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

Case No. 10-CP-08-1707

Appellate Case No. 2013-001531

HSBC Mortgage Corporation, USA.....Appellant,

v.

Frederick J. Otterbein, IV a/k/a Frederick John Otterbein, IV, Heather H. Otterbein, and First Federal Savings and Loan Association a/k/a First Federal Savings and Loan Association of Charleston .....Defendants,

Of whom

Frederick J. Otterbein, IV a/k/a Frederick John Otterbein, IV and Heather H. Otterbein, are .....Respondents.

INITIAL REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

ARGUMENT

I. The Counterclaims Are Equitable Despite the Otterbeins' Attempt to Style Them as Legal.

"A mortgage foreclosure is an action in equity." *Wells Fargo Bank, NA v. Smith,* 398 S.C. 487, 494, 730 S.E.2d 328, 332 (Ct. App. 2012) (*quoting, U.S. Bank Trust Nat'l Ass'n v. Bell*, 385 S.C. 364, 373, 684 S.E.2d 199, 204 (Ct. App. 2009)). The Otterbeins candidly admit that their counterclaims allege "in essence . . . wrongful foreclosure".[1] (Respondent's Br. 1). Thus, the parties agree that the crux of this case is whether or not HSBC was entitled to the equitable remedy of foreclosure. No matter how the Otterbeins style their counterclaims, and regardless of whether they request unspecified damages, the essential questions in this suit are equitable – namely, whether the Otterbeins were in default on their mortgage and, if so, the amount of the debt. Those are the primary questions that the master-in-equity exists to answer.

If the Otterbeins can transform this equitable action into one at law, and thereby obtain a jury trial, simply by framing as a legal counterclaim their argument that foreclosure is improper, then a foreclosure defendant would through artful pleading be entitled to a jury trial in every foreclosure case. By simply denying default or the amount due, and characterizing the plaintiff's effort to foreclose as a breach of the note and mortgage, the defendant would always be entitled to a jury trial. That is not the law in

[1] Because South Carolina is a judicial foreclosure state, it does not recognize a cause of action for wrongful foreclosure. *In re Mortg. Elec. Registration Sys. (MERS) Litig.*, MDL 09-2119-JAT, 2011 WL 4550189 (D. Ariz. Oct. 3, 2011) *recons. den.*, CV 10-1547-PHX-JAT, 2012 WL 932625 (D. Ariz. Mar. 20, 2012) ("South Carolina is a judicial foreclosure state and, thus, there is no cause of action for wrongful foreclosure."). In any event, even in those non-judicial foreclosure states where the claim is recognized, no cause of action arises until foreclosure sale actually occurs. *See e.g., Reese v. First Missouri Bank & Trust Co.*, 736 S.W.2d 371 (Mo. 1987); *Bank of New York Mellon v. Reyes*, 3D12-1900, 2013 WL 1136449 (Fla. Dist. Ct. App. Mar. 20, 2013); *Medlock v. Farmers State Bank of Texas Cnty.*, 696 S.W.2d 873 (Mo. Ct. App. 1985); *Aetna Fin. Co. v. Culpepper*, 171 Ga. App. 315, 320 S.E.2d 228 (1984); *Port City State Bank v. Leyco Const. Co.*, 561 S.W.2d 546 (Tex. Civ. App. 1977). In other words, there is no cause of action for wrongful *attempted* foreclosure, which is what the Otterbeins essentially allege in this case.

South Carolina, and this Court has repeatedly looked beyond the defendant's own characterization of his counterclaims in foreclosure actions to determine whether the essence the claim is legal or equitable. *See e.g. Smith*, at 496-497, 730 S.E.2d at 333 (counterclaim for common law unconscionability deemed equitable where primary purpose was to have mortgage declared void); *Mortgage Electronic Systems, Inc. v. White*, 384 S.C. 606, 614, 682 S.E.2d 498, 502 (Ct. App. 2009) (counterclaim for fraud deemed equitable where primary relief sought was to have mortgage declared void); *Wells Fargo Bank, N.A. v. Barker*, Op. No. 2012-UP-551 (Ct. App. 2012) (counterclaim for alleged predatory lending deemed equitable where primary purpose was to prevent foreclosure and compel lender to modify loan terms); *see also, Lucas v. United States Bank, N.A.*, 953 N.E.2d 457, 467 (Ind. 2011) (defendants not entitled to jury trial on ostensibly legal counterclaims where the essential issue for determination – whether the plaintiff was entitled to foreclosure – was equitable). Thus, this Court should look beyond the Otterbeins' characterization of their counterclaims and find that this entire foreclosure action – including the counterclaims – is equitable in nature and that the Otterbeins are not entitled to a jury trial.

II. The Dismissal of HSBC's Foreclosure Claim Does Not Create a Right to a Jury Trial.

The Otterbeins argue that because HSBC voluntarily dismissed its foreclosure claim after the parties agreed to modify the terms of the underlying mortgage (in order to allow the Otterbeins to avoid foreclosure), they should be entitled to a jury trial on their counterclaims. (Respondent's Br. at 10-11). The Otterbeins cite no authority for this position, and none exists because it defies logic. The Otterbeins are not entitled to a jury trial because all of their counterclaims are either equitable or permissive or both. The

equitable or legal nature of a counterclaim does not change merely by virtue of a voluntary dismissal of the plaintiff's claim. If the essence of the counterclaim was equitable from the outset of the litigation, there is no reason why dismissal of the plaintiff's claim should transform the claim into a legal claim. If the counterclaim is permissive, then the defendant waives his right to a jury trial by asserting in an action initiated in equity, and the Otterbeins cite no authority holding that dismissal of the foreclosure claim salvages the defendant's right to a jury trial on a permissive counterclaim. *See N.C. Fed. Sav. & Loan Ass'n v. DAV Corp.*, 294 S.C. 27, 30, 362 S.E.2d 308, 310 (1987) ("[W]here a defendant in an action *begun in equity* asserts a permissive counterclaim that is legal in nature, the defendant is deemed to have waived the right to a jury trial on the issues raised by the counterclaim."). (emphasis added). Consequently, HBSC's voluntary dismissal of the foreclosure claim has no bearing upon HSBC's motion to strike the jury demand.

III. HSBC's Arguments Based Upon *Rosenbaum v. S-M-S 32* Are Preserved.

The Otterbeins claim that HSBC failed to preserve its arguments based upon the South Carolina Supreme Court's decision in *Rosenbaum v. S-M-S 32*, 311 S.C. 140, 427 S.E.2d 897 (1993). HSBC has consistently argued to the circuit court and to this Court that the Otterbeins are not entitled through artful pleading to obtain a jury trial in an equitable proceeding, and *Rosenbaum* merely provides additional support for that argument. Like the plaintiff in *Rosenbaum*, HSBC brought this action pursuant to a statutory scheme created by the legislature that provides for a non-jury trial. Specifically, S.C. Code Ann. § 29-3-610 to -790 provides a procedure by which a mortgagor may foreclose in an equitable action decided by the court. SCRCP 71 also provides that

foreclosure actions "shall be tried by the court, and shall ordinarily be referred to a master." This codified a process established by the Act of 1791, which integrated the actions of foreclosure and the action for deficiency after sale into one equitable action, without the right to a jury trial. *See McConnell, et al. v. Barnes, et al.*, 142 S.C. 112, 140 S.E. 310 (1927). Therefore, consistent with *Rosenbaum*, this Court should not permit the Otterbeins to evade the statutory scheme created by the Legislature for resolving foreclosure actions. As for the Otterbeins' complaint that HSBC did not cite to *Rosenbaum* below, preservation rules do not prevent a litigant from citing additional authority on appeal in support of the same arguments made to the trial court. HSBC properly preserved its arguments below.

CONCLUSION

For the foregoing reasons, HSBC respectfully requests this Court reverse the circuit court's ruling that the Otterbeins are entitled to a jury trial.

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January 21, 2014

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Of whom

Frederick J. Otterbein, IV a/k/a Frederick John Otterbein, IV and Heather H. Otterbein, are .....Respondents.

PROOF OF SERVICE

I HEREBY CERTIFY that I have served the **INITIAL REPLY BRIEF OF APPELLANT** on Respondents and Defendants by depositing copies of it in the United States Mail, postage prepaid, addressed to the below Counsel of Record:

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January 21, 2014

Via Hand Delivery
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SC Court of Appeals
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RE: HSBC Mortgage Corporation, USA v. Frederick J. Otterbein, IV a/k/a Frederick John Otterbein, IV, Heather H. Otterbein and First Federal Savings and Loan Association a/k/a First Federal Savings and Loan Association of Charleston
Appellate Case No.: 2013-001531
Our File No.: 23282/01669

Dear Ms. Kitchings:

Enclosed are the original and one copy of Appellant's Initial Reply Brief and Proof of Service in the above-referenced matter. We would appreciate it if you would file the original documents and return clocked in copies to us via our courier.

By copy of this letter, we are serving this Brief on counsel for the Respondents and Defendants.

Your consideration is most appreciated. Should you have any questions or need any additional information, please do not hesitate to contact me.

Very truly yours,

Robert H. Jordan by permission

Robert H. Jordan

RHJ:ll
Enclosures

cc: Mary Leigh Arnold, Esq.
Chris B. Staubes, III, Esq. (both w/enclosures)