THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

The Honorable Diane Schafer Goodstein, Circuit Court Judge

Case No. 2011-CP-18-1013

Appellate Case No. 2013-002066

Bank of New York Mellon, as Successor Trustee under NovaStar Mortgage Funding Trust, Series 2004-1 ..... Appellant,

v.

Rachel R. Lindsay, Jeffrey Wayner, Tammy Wayner, Tiffany Spann-Wilder, Esq., The Steinberg Law Firm and United States of America acting by and through its agency, the Internal Revenue Service, Defendants,

Of Whom Rachel R. Lindsay is the Respondent.

Rachel R. Lindsay ..... Respondent,

v.

Saxon Mortgage Services, Inc. ..... Appellant.

INITIAL REPLY BRIEF OF APPELLANTS

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I. LINDSAY'S ARGUMENT I

A. Lindsay Failed to Raise the Issue of Whether She Would Be Entitled to a Jury Trial on a Claim for Conversion Because She Did Not Plead the Claim in Her Answer & Counterclaim and She Did Not Move to Amend Her Pleading.

The gist of Lindsay's claims is that she allegedly made a payment to Saxon, which she intended to have applied toward several months of delinquent mortgage payments, and Saxon did not give her credit for it. In her latest effort to re-characterize this case as being about something other than the calculation of the amount past due on her mortgage loan, Lindsay informs the Court that she ***intends*** to amend her pleadings below to assert a claim for conversion. Because Lindsay did not plead a claim for conversion or move to amend prior to this appeal, however, this Court should not consider whether the amendment would entitle Lindsay to a jury trial. Fraternal Order of Police v. South Carolina Dep't of Revenue, 352 S.C. 420, 435, 574 S.E.2d 717, 725 (2002) ("Generally, claims or defenses not presented in the pleadings will not be considered on appeal."). The law is clear that an appellate court may not consider an issue for the first time on appeal. Wilder Corp. v. Wilke, 330 S.C. 71, 75, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."). Here, Lindsay did not plead a claim for conversion nor did she move to amend her complaint to assert one. Thus, the issue is not preserved for appellate review.

B. Lindsay Would Not Be Entitled to a Jury Trial on a Counterclaim or Third-Party Claim for Conversion.

Even if Lindsay *had* pleaded a claim for conversion, the result would be the same. Lindsay is not entitled to a jury trial. Lindsay can denominate her claim as one for conversion, fraud, or any other legal theory, but artful pleading cannot change the fact that the substance of her claim is that she does not owe the amount that the Bank alleges is past due on her mortgage and that the court should not allow the Bank to foreclose. No matter how she styles the claim, and regardless of whether she requests unspecified damages, the essential question in this suit is equitable – namely, whether Lindsay is in default on her mortgage and, if so, the amount of the debt. Those are the primary questions that the master-in-equity exists to answer. (See Appellants' Initial Brief at Sections I. and II.B).

If Lindsay could transform this equitable action into one at law, and thereby obtain a jury trial, simply by framing as a legal counterclaim her argument that foreclosure is improper, then the defendant would be entitled through artful pleading to a jury trial in every foreclosure case. By merely denying default or the amount due, and characterizing the plaintiff's effort to foreclose as a breach of the note and mortgage, fraud, or some other legal theory, the defendant would always overcome a plaintiff's motion for a non-jury trial. That is not the law in 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 of the claim is legal or equitable. See, e.g., Wells Fargo Bank, NA v. Smith, 398 S.C. 487, 496-497, 730 S.E.2d 328, 333 (Ct. App. 2012) (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). Hence, this Court should hold that the circuit court abused its discretion in failing to look beyond Lindsay's characterization of her claims and find that this entire foreclosure action – including the counterclaims and third-party claims – is equitable in nature and that Lindsay is not entitled to a jury trial.

II. LINDSAY'S ARGUMENT II

A. Lindsay's Third-Party Claims are Permissive.

Lindsay argues without citation to any authority that "it was mandatory [for her] to file the Third Party complaint against Saxon", apparently contending that her third-party claim was compulsory. A third-party claim is *always* permissive. N. Carolina Fed. Sav. & Loan Ass'n v. DAV Corp., 294 S.C. 27, 32, 362 S.E.2d 308, 310 (S.C. Ct. App. 1987) *aff'd in part, rev'd in part on other grounds*, 298 S.C. 514, 381 S.E.2d 903 (1989); Tatnall v. Gardner, 350 S.C. 135, 139, 564 S.E.2d 377, 378 (Ct. App. 2002); S.C. Rule of Civ. Proc. 14(a) ("[a]t any time after commencement of the action a defending party, as a third-party plaintiff, **may** cause a summons and complaint to be served upon a person not party to the action . . . .") (emphasis added). By impleading Saxon into this foreclosure action, Lindsay waived any right to a jury trial on her third-party claims to the extent that any of them are deemed to be legal, rather than equitable. DAV Corp., 294 S.C. at 32, 362 S.E.2d at 310-311.

III. LINDSAY'S ARGUMENT III

A. The Trial Court's Error in Failing to Specify the Claims on Which It Determined that Lindsay Is Entitled to a Jury Trial Was Not Harmless.

Lindsay argues that any error by the lower court in failing to specify the claims on which it determined that Lindsay is entitled to a jury trial was harmless because the legal

and equitable claims will be tried together in any event. Lindsay misstates the law. First, although the trial court *may* try legal and equitable claims together in a single proceeding, the court may also order separate trials pursuant to Rule 42(b). Johnson v. South Carolina Nat. Bank, 292 S.C. 51, 55, 354 S.E.2d 895, 897 (1987). By denying the motion for a non-jury trial outright, and failing to specify which issues must be tried by jury, the lower court denied the Bank and Saxon the opportunity to move for separate trials as to the claims that they are entitled to have decided by the Court. Even if the trial court ultimately elects to try the jury and non-jury claims in a single proceeding, the Bank and Saxon are entitled to determination of each claim in the proper mode of trial and to notice prior to trial of the manner in which each issue will be determined. See Hagood v. Sommerville, 362 S.C. 191, 196, 607 S.E.2d 707, 709 (2005) ("we repeatedly have held that the denial of a party's right to a particular mode of trial is immediately appealable as a substantial right under Section 14-3-330(2)") (listing cases). Consequently, the trial court's error in failing to identify the claims on which it found that Lindsay is entitled to jury trial was not harmless.

CONCLUSION

For the foregoing reasons, Appellants respectfully request that this Court reverse the circuit court's ruling that Lindsay is entitled to a jury trial. In the alternative, Appellants request that the Court specify which claims should be tried by the jury and which claims should be determined by the court.

[SIGNATURES ON FOLLOWING PAGE]

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Charleston, South Carolina

February 3, 2014

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SC Court of Appeals

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Of Whom Rachel R. Lindsay is the Respondent.

Rachel R. Lindsay ..... Respondent,

v.

Saxon Mortgage Services, Inc. ..... Appellant.

PROOF OF SERVICE

I HEREBY CERTIFY that I have served the **INITIAL REPLY BRIEF OF APPELLANTS** 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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February 3, 2014

Hand Delivered

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RE: The Bank of New York Mellon, as Successor Trustee under NovaStar Mortgage Funding Trust, Series 2004-1 v. Rachel R. Lindsay, et al.
Appellate Case No. 2013-002066
Civil Action No.: 2011-CP-18-1013
Our File No.: 33576/01503

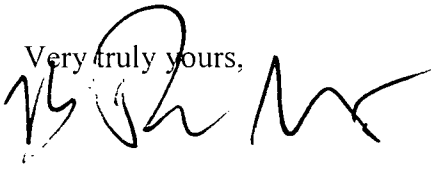
Dear Ms. Kitchings:

Enclosed are the original and one copy of the Reply Brief of Appellants and Proof of Service in the above-referenced action. We would appreciate it if you would file the original document and return a clocked in copy to us via our courier.

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

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

Very truly yours,



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Enclosures
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