

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

MAR 13 2014

SC COURT OF APPEALS

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

ORIGINAL

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.

FINAL BRIEF OF APPELLANT

Robert H. Jordan, SC Bar No. 13612
Merritt G. Abney, SC Bar No. 71893
NELSON MULLINS RILEY & SCARBOROUGH LLP
Post Office Box 1806 (29402-1806)
Charleston, SC 29401-2239
(843) 853-5200

Attorneys for Appellant HSBC Mortgage Corporation, USA

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF ISSUES ON APPEAL	1
I. The trial court erred by finding that the Otterbeins have a right to a jury trial because their counterclaims sound in equity.....	1
II. In the alternative, if the Otterbeins' counterclaims do not sound in equity, the trial court erred by finding that they have a right to a jury trial on these claims because these counterclaims are permissive and the Otterbeins therefore waived their right to a jury trial by asserting these claims in this equitable action.	1
STATEMENT OF THE CASE.....	2
STATEMENT OF FACTS	3
ARGUMENT	4
I. The Counterclaims Are Equitable.....	5
A. The Counterclaims for Unjust Enrichment, Declaratory and Injunctive Relief, and Accounting Are Equitable.....	6
B. The Otterbeins's Claims for Breach of the Covenant of Good Faith and Fair Dealing and Negligent Misrepresentation are Equitable Because the Main Purpose Is to Obtain Equitable Relief.	7
II. Even If the Counterclaims Are Not Equitable, They Are Permissive Because They Do Not Relate to Enforceability Of The Note And Mortgage.....	12
CONCLUSION.....	14

TABLE OF AUTHORITIES

Cases

<u>Barnes v. Johnson</u> , 402 S.C. 458, 742 S.E.2d 6 (Ct. App. 2013).....	11
<u>Bell v. Mackey</u> , 191 S.C. 105 3 S.E.2d 816 (1939)	13
<u>Byrd v. King</u> , 245 S.C. 247, 140 S.E.2d 158, (1965)	7
<u>Byrn v. Walker</u> , 275 S.C. 83, 267 S.E.2d 601 (1980)	6
<u>Collier v. Green</u> , 244 S.C. 367, 137 S.E.2d 277 (1964)	6
<u>Columbia Wholesale Co. v. Scudder May N.V.</u> , 312 S.C. 259, 440 S.E.2d 129 (1994)	7
<u>Crewe v. Blackmon</u> , 289 S.C. 229, 345 S.E.2d 754 (Ct. App. 1986)	8
<u>Flagstar Corp. v. Royal Surplus Lines</u> , 341 S.C. 68, 533 S.E.2d 331 (2000)	5
<u>Floyd v. Floyd</u> , 306 S.C. 376, 412 S.E.2d 397 (1991)	8
<u>General Plywood Corp. v. Richard Jones</u> , 216 S.C. 322, 57 S.E.2d 636 (1950)	6
<u>Great-West Life & Annuity Ins. Co. v. Knudson</u> , 534 U.S. 204, 122 S.Ct. 708, 151 L.Ed.2d 635 (2002).....	7
<u>Hampton v. Haley</u> , 403 S.C. 395, 743 S.E.2d 258 (2013)	7
<u>Ins. Fin. Servs., Inc. v. S.C. Ins. Co.</u> , 271 S.C. 289, 247 S.E.2d 315 (1978).	5, 8
<u>Key Corporate Capital, Inc. v. County of Beaufort</u> , 373 S.C. 55, 644 S.E.2d 675, (2007)	7
<u>Lester v. Dawson</u> , 327 S.C. 263, 491 S.E.2d 240 (1997)	5

<u>McConnell, et al. v. Barnes, et al.</u> , 142 S.C. 112, 140 S.E. 310 (1927)	12
<u>Mortgage Electronic Systems, Inc. v. White</u> , 384 S.C. 606, 682 S.E.2d 498 (Ct. App. 2009).....	5, 13
<u>N.C. Federal Savings and Loan Ass'n v. DAV Corp.</u> , 298 S.C. 514, 381S.E.2d 903 (1989)	13
<u>Pelfrey v. Bank of Greer</u> , 270 S.C. 691, 244 S.E.2d 315 (1978)	5
<u>Rogers v. Nation</u> , 284 S.C. 330, 326 S.E.2d 182 (Ct. App. 1985).....	13
<u>Rosenbaum v. S-M-S</u> 32, 311 S.C. 140, 427 S.E.2d 897 (1993).....	9, 12, 13
<u>Rushing v. McKinney</u> , 370 S.C. 280, 633 S.E.2d 917 (Ct. App. 2006)	11
<u>S.C. Nat'l Bank v. Johnson</u> , 285 S.C. 80, 328 S.E.2d 75 (1985)	6
<u>Verenes v. Alvanos</u> , 387 S.C. 11, 690 S.E.2d 771 (2010).....	8
<u>Wallace v. Milliken & Co.</u> , 305 S.C. 118, 406 S.E.2d 358 (1991)	7
<u>Wells Fargo Bank v. Smith</u> , 398 S.C. 487, 730 S.E.2d 328 (Ct. App. 2012)	5, 8, 12, 13, 14
<u>Wells Fargo Bank, N.A. v. Barker</u> , Op. No. 2012-UP-551 (Ct. App. 2012).....	8, 12
<u>Williams v. Wilson</u> , 349 S.C. 336, 563 S.E.2d 320 (2002)	7
Statutes	
S.C. Code Ann. § 12-61-20.....	9
S.C. Code Ann. § 29-3-610 to -790	12
Other Authorities	
<u>1 Am. Jur. 2d, Actions</u> § 7 (1962).....	8
Rules	
SCRCP Rule 59(e).....	2

STATEMENT OF ISSUES ON APPEAL

- I. The trial court erred by finding that the Otterbeins have a right to a jury trial because their counterclaims sound in equity.
- II. In the alternative, if the Otterbeins' counterclaims do not sound in equity, the trial court erred by finding that they have a right to a jury trial on these claims because these counterclaims are permissive and the Otterbeins therefore waived their right to a jury trial by asserting these claims in this equitable action.

STATEMENT OF THE CASE

Appellant HSBC Mortgage Corporation, USA ("HSBC") brought this action to foreclose upon a residential real estate mortgage. (R. 27). Respondents Frederick J. Otterbein, IV a/k/a Frederick John Otterbein, IV ("Frederick Otterbein") and Heather H. Otterbein ("Heather Otterbein" and, jointly with Frederick Otterbein, the "Otterbeins") answered and asserted counterclaims against HSBC for 1) breach of the covenant of good faith and fair dealing; 2) declaratory and injunctive relief; 3) unjust enrichment; 4) negligent misrepresentation; and 5) an accounting (collectively, the "Counterclaims"). (R. 38-45). The Otterbeins' Counterclaims are based upon the allegations that 1) HSBC failed to adequately review and approve their application for a loan modification under the Home Affordable Modification Program ("HAMP")¹ or other loan modification program; 2) that HSBC misrepresented to the Otterbeins that their loan would be or was likely to be modified; and 3) that HSBC improperly charged the Otterbeins late fees and filed a foreclosure action after allegedly promising them a loan modification. (*Id.*). The Otterbeins demanded a jury trial on all claims. (*Id.*).

On March 12, 2013, HSBC moved to strike the jury demand and requested a bench trial on all claims. (R. 196). The Court held a hearing on the motion on April 17, 2013 (R. 216-225), and subsequently denied it via Form 4 Order issued on April 18, 2013. (R. 8). HSBC timely filed a Motion to Alter or Amend pursuant to SCRCP Rule 59(e) on May 6, 2013 (R. 212), which the Court denied via Form 4 Order issued on July 9, 2013. (R. 10-11). HSBC appeals the determination that the Otterbeins are entitled to a

¹ The Secretary and Director of the Federal Housing Finance Agency created the Home Affordable Modification Program ("HAMP") under Congressional authority granted by the federal Emergency Economic Stabilization Act of 2008, Division A of Pub.L. 110-343, 122 Stat. 3765, enacted October 3, 2008.

jury trial on the Counterclaims.

STATEMENT OF FACTS

On December 21, 2007, Bradford Mortgage Company ("Bradford") made a loan to the Otterbeins in the amount of \$417,000.00 (the "Loan"). (R. 28 at ¶¶ 6-7). The Otterbeins executed and delivered to Bradford a promissory note, under which they agreed to make monthly interest payments in the amount of \$1,824.38 beginning on February 1, 2008. (R. 66). The Loan was secured by a mortgage on the Otterbeins' residence located in Berkeley County, South Carolina. (R. 71). The Note and Mortgage were subsequently assigned to HSBC. (R. 28 at ¶¶ 6-7).

In 2009, the Otterbeins began requesting a loan modification from HSBC due to their inability to make their monthly mortgage payments. (R. 120 at ¶ 11).² Effective July 27, 2009, HSBC and the Otterbeins entered into a forbearance agreement, in which the Otterbeins represented that they were unable to afford their Loan payments and that, as a result, they were in default or would become in default in the near future. (R. 100 at ¶ 1). HSBC agreed to suspend any scheduled foreclosure provided the Otterbeins made timely reduced payments pursuant to the schedule set forth in the agreement. (R. 101 at ¶ 2A; R. 98 at ¶ 11). The Forbearance Agreement had a six-month term and expired on February 1, 2010. (R. 101 at ¶ 2). The agreement expressly provided that, upon termination of the Forbearance Agreement, any pending foreclosure action may be resumed without further notice to the Otterbeins. (*Id.*).

The Otterbeins made payments under the Forbearance Agreement for the six-month period while their request for a permanent Loan modification was under review.

² The Otterbeins' factual allegations are taken as true solely for purposes of this appeal.

(R. 98 at ¶ 11). On February 26, HSBC informed the Otterbeins via letter that the forbearance period was completed. (R. 153; R. 98 ¶ 11). The Otterbeins claim that throughout this period, HSBC representatives told them that their loan modification request likely would be approved. (R. 209, lines 5-12 and R. 210, lines 12-16; R. 205, lines 11-19 and R. 206, lines 8-14). On May 24, 2010, HSBC filed this action seeking to foreclose the Mortgage. (R. 12). Via letter dated July 1, 2010, HSBC informed the Otterbeins that their loan modification request was denied. (R. 155).

After subsequent modification requests while this action was pending, on July 6, 2011, HSBC and the Otterbeins entered into a HAMP agreement, which permanently modified the terms of the Note and Mortgage (the "Modification Agreement"). (R. 86-96). The Modification Agreement reinstated the Loan and thereby resolved HSBC's foreclosure claim. (R. 52-53). Despite entering into the Modification Agreement, the Otterbeins refused to dismiss the Counterclaims.

ARGUMENT

The trial court committed an error of law when it determined that the Otterbeins are entitled to a jury trial on the Counterclaims. See Wells Fargo v. Smith, 398 S.C. 487, 491, 730 S.E.2d 328, 330 (Ct. App. 2012) (a ruling on motion to strike jury demand may be overturned based on error of law without deference to trial court). Although the Otterbeins styled two of the Counterclaims as legal claims, the relief sought reveals their equitable nature and the Otterbeins' intent to avoid the statutory process governing foreclosure actions. As such, they are not entitled to a jury trial. Moreover, even if the court concludes the Counterclaims are not equitable, they are permissive, and the Otterbeins are not entitled to a jury trial on these claims because they have waived the

right to a jury trial by asserting them in an equitable proceeding.

I. The Counterclaims Are Equitable.

“Generally, the relevant question in determining the right to trial by jury is whether an action is legal or equitable; there is no right to trial by jury for equitable actions.” Mortgage Electronic Systems, Inc. v. White, 384 S.C. 606, 682 S.E.2d 498 (Ct. App. 2009) (citing Lester v. Dawson, 327 S.C. 263, 267, 491 S.E.2d 240, 242 (1997)). Because the right to proceed in the proper mode of trial is a substantial right, a court should not erroneously require a party to proceed before a jury in an equity case. Flagstar Corp. v. Royal Surplus Lines, 341 S.C. 68, 72, 533 S.E.2d 331, 333 (2000). A jury trial right does not arise in connection with a case to be tried within the equitable jurisdiction of the court. Pelfrey v. Bank of Greer, 270 S.C. 691, 244 S.E.2d 315 (1978).

"Characterization of an 'action as equitable or legal depends on the [counterclaimant's] main purpose' in bringing the action." Smith, 398 S.C. at 494, 730 S.E.2d at 332. (quoting Ins. Fin. Servs., Inc. v. S.C. Ins. Co., 271 S.C. 289, 293, 247 S.E.2d 315, 318 (1978)). "The main purpose of the action should generally be ascertained from the body of the [pleading]. However, if necessary, resort may also be had to the prayer for relief and any other facts and circumstances which throw light upon the main purpose of the action. The nature of the issues raised in the pleadings and character of relief sought under them determines the character of an action as legal or equitable." Id. (internal citations omitted); see also S.C. Nat'l Bank v. Johnson, 285 S.C. 80, 82, 328 S.E.2d 75, 76 (1985) (holding main purpose of action was to seek rescission even though permitted to maintain action for damages in the same complaint).

A foreclosure action is an equitable action. Collier v. Green, 244 S.C. 367, 370,

137 S.E.2d 277, 279 (1964). The South Carolina Supreme Court has held that "[t]he purpose of the foreclosure is to fully determine the entire controversy while at the same time protecting the rights of all parties, to determine the amount of the debt in order to disburse the proceedings of the sale, and should there be a deficiency, the Court of Equity may give relief by way of a personal judgment." See General Plywood Corp. v. Richard Jones, 216 S.C. 322, 325 57 S.E.2d 636, 636 (1950). Further, "[w]here in actions of foreclosure, the defendant sets up a defense and/or a counterclaim affecting the consideration, and arising out of the transaction in which the mortgage or lien was created, the authorities hold that the issues thus raised are equitable and are to be tried by the court upon its equity side." Collier at 371, 137 S.E.2d at 280; see also Byrn v. Walker, 275 S.C. 83, 85, 267 S.E.2d 601, 602 (1980) (counterclaims in a foreclosure action that affect the validity of a mortgage lien or the amount due are equitable in nature). Thus, any counterclaims in a foreclosure action that go to the validity of the lien or question the amount due upon the debt secured by the mortgage are equitable, and a defendant has no right to a jury trial on such claims. Id.

A. The Counterclaims for Unjust Enrichment, Declaratory and Injunctive Relief, and Accounting Are Equitable.

The Counterclaims for unjust enrichment, declaratory and injunctive relief, and accounting are plainly equitable in nature. Unjust enrichment, accounting, and requests for injunctive relief are *always* equitable causes of action. Columbia Wholesale Co. v. Scudder May N.V., 312 S.C. 259, 261, 440 S.E.2d 129, 130 (1994) (unjust enrichment); Byrd v. King, 245 S.C. 247, 255, 140 S.E.2d 158, 161 (1965) (accounting); Hampton v. Haley, 403 S.C. 395, 409, 743 S.E.2d 258, 265 (2013) (injunction). "Whether an action for declaratory relief is legal or equitable in nature depends on the plaintiff's main

purpose in bringing the action.” Williams v. Wilson, 349 S.C. 336, 340, 563 S.E.2d 320, 322 (2002). In this case, the Otterbeins' claim for declaratory relief is combined with a claim for "injunctive relief" and expressly seeks the equitable remedies of rescission, injunction, restitution and disgorgement. (R. 42-43 at ¶¶ 27-32). These are equitable remedies. See Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 215-16, 122 S.Ct. 708, 151 L.Ed.2d 635 (2002); see also Key Corporate Capital, Inc. v. County of Beaufort, 373 S.C. 55, 63, 644 S.E.2d 675, 679 (2007) (Toal, C.J. dissenting) (noting disgorgement results from the equitable remedy of restitution); Wallace v. Milliken & Co., 305 S.C. 118, 120, 406 S.E.2d 358, 359 (1991) (stating restitution is an equitable remedy). The Otterbeins do not even request legal damages in connection with these causes of action. Id. As such, these Counterclaims are equitable, and the Otterbeins are not entitled to a jury trial on any of these claims.

B. The Otterbeins' Claims for Breach of the Covenant of Good Faith and Fair Dealing and Negligent Misrepresentation are Equitable Because the Main Purpose Is to Obtain Equitable Relief.

The Otterbeins' claims for breach of the implied covenant of good faith and fair dealing and negligent misrepresentation are equitable regardless of how they styled the claims in their pleadings. Characterization of a claim as equitable or legal depends on the plaintiff's "main purpose" in bringing it. Smith, at 495, 730 S.E.2d at 332, n.4 (quoting Floyd v. Floyd, 306 S.C. 376, 380, 412 S.E.2d 397, 399 (1991)). "[A]n action sounding in law may be transformed to one in equity because equitable relief is sought." Ins. Fin. Servs., Inc. v. S.C. Ins. Co., 271 S.C. 289, 293, 247 S.E.2d 315, 318 (1978) (citing 1 Am. Jur. 2d, Actions § 7 (1962)); see also Verenes v. Alvanos, 387 S.C. 11, 17, 690 S.E.2d 771, 773 (2010) (claim for breach of fiduciary duty, while ordinarily legal, held to be

equitable where primary relief sought was restitution and disgorgement); Crewe v. Blackmon, 289 S.C. 229, 232-33, 345 S.E.2d 754, 756-57 (Ct. App. 1986) (concluding that although a complaint included allegations of fraud and misrepresentation, the action was one in equity when primary relief sought was equitable in nature). Where the primary purpose of a counterclaim in a foreclosure action is to halt the foreclosure, South Carolina courts have characterized the counterclaim as equitable regardless of the legal theory asserted. 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); White, at 614, 682 S.E.2d at 502 (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).³

Moreover, the South Carolina Supreme Court has previously rejected attempts by litigants to "earn" the right to a jury trial in an equitable action. In Rosenbaum v. S-M-S 32, the plaintiff purchased real property at a tax sale and filed an action to clear title pursuant to S.C. Code Ann. § 12-61-20. The defendant answered by way of general denial and asserted a counterclaim for trespass to try title, seeking damages for trespass and demanding a jury trial. 311 S.C. 140, 141, 427 S.E.2d 897, 897 (1993). The circuit court struck the counterclaim because the plaintiff had asserted an equitable claim seeking a remedy under a process expressly provided for purchasers at tax sales by statute. Id. at 141-142, 427 S.E.2d at 897. The Supreme Court affirmed the circuit

³ While this Court's unpublished decision in Barker is not binding precedent, it is informative for purposes of this appeal.

court's decision, holding that the defendant could not "evade the intent of the legislature and obtain the right to a jury trial by interposing a counterclaim designed the thwart the reasonable and practical implication of Chapter 61." Id.

In the instant case, the main purpose of the Otterbeins' Counterclaims is to stop the foreclosure and obtain a loan modification. The Counterclaim for breach of the implied covenant of good faith and fair dealing is expressly based upon HSBC's alleged failure to properly administer the HAMP by failing to offer the Otterbeins loss mitigation options, its alleged failure to timely and properly review their loan modification application, and its pursuit of a foreclosure and imposition of late fees while the parties were allegedly engaged in loss mitigation negotiations. (R. 41 at ¶ 24). Similarly, the Counterclaim for negligent misrepresentation is based upon the allegation that HSBC misrepresented the availability of, and the Otterbeins' eligibility for, a loan modification. (R. 44 at ¶ 38).

Moreover, the Otterbeins' deposition testimony makes clear that the relief they seek in connection with these Counterclaims is in the nature of promissory estoppel. The only "agreement" HSBC allegedly breached was the alleged oral assurance that the Otterbeins were likely to be approved for a loan modification. At his deposition, Defendant Frederick J. Otterbein, IV testified:

- Q. Okay. Did anybody on the phone ever promise you a modification or anything like that?
- A. They said that, "You're looking good."
- Q. Okay. "You're looking good."
- A. I remember hearing that plenty of times.
- Q. Okay. Any -- but they never offered you a specific term saying: "Here -- here's your loan" --
- A. No. They were always pretty vague.

....

- Q. Then what are you saying? What contract are you saying my client breached?
- A. Good-faith contract.
- Q. Okay. Is it written or verbal?
- A. Verbal.

(R. 209, lines 5-12 and R. 210, lines 12-16). At her deposition, Defendant Heather H. Otterbein testified:

- Q. All right. Can you tell me what that counterclaim [breach of contract and fair dealing] is about? What you're claiming my client did wrong?
- A. Your client should've just dealt with me in good faith. I had to call every day, I never received correspondence for anybody, was not allowed to speak with a supervisor, I was never -- not one time after calling every day, got a return call to speak with anybody about it...

....

- Q. All right. When you say breach of contract, what contract are you alleging they breached?
- A. The contract that I had -- well, I guess the contract verbally with them, every day I talked to them. Everything will be fine, don't worry; don't worry,...

(R. 205, lines 11-19 and R. 206, lines 8-14). The Otterbeins do not claim that the Plaintiff breached a specific written term of the Note and Mortgage. Instead, they claim that HSBC's alleged statements regarding the status of their loan modification requests should preclude HSBC from foreclosing the Mortgage. (*See id.*). Although styled as legal counterclaims, the Counterclaims for breach of the covenant of good faith and fair dealing and negligent misrepresentation in fact seek the equitable remedy of promissory estoppel.⁴ Rushing v. McKinney, 370 S.C. 280, 289, 633 S.E.2d 917, 922 (Ct. App.

⁴ Promissory estoppel requires proof of: (1) a promise with unambiguous terms; (2) reasonable reliance upon the unambiguous promise; (3) foreseeability of the promisee's reliance; and (4) injury sustained in relying on the promise because of the promisor's inconsistent disposition. Barnes v. Johnson, 402 S.C. 458, 469, 742 S.E.2d 6, 11 (Ct. App. 2013).

2006) (promissory estoppels is equitable cause of action). The primary relief they seek is to halt the foreclosure and obtain a modification of their Loan.

Moreover, a review of the Otterbeins' pleadings reveals the equitable nature of the relief they seek. Tellingly, the prayer for relief seeks to "rescind the underlying mortgage transactions" and to "[D]eclare the subject mortgage void". (R. 44-45). They request that the Court prevent enforcement of the Note and Mortgage and "enjoin the pending foreclosure actions [sic]". (Id.). They also expressly request modification of the loan and restitution of allegedly excess payments made to HSBC under the Loan. (R. 42 at ¶ 30). Equitable relief is not just the only relief pled, it is the only relief the Otterbeins could conceivably be entitled to under the operative facts. Although they include a request for "damages", the only conceivable damage is any late fees paid to HSBC after the loan modification allegedly should have been granted, i.e. restitution. At bottom, the Counterclaims seek nothing more than equitable relief. As such, the Counterclaims for breach of the implied covenant of good faith and fair dealing and for negligent misrepresentation are equitable, and the Otterbeins are not entitled to a jury trial on these claims. See Smith, at 496-497, 730 S.E.2d at 333; White, at 614, 682 S.E.2d at 502; Barker, Op. No. 2012-UP-551, at *2.

Furthermore, under the Supreme Court's decision in Rosenbaum, the Otterbeins may not "earn" the right to a jury trial in this equitable foreclosure action by styling their allegations as legal counterclaims. 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 and seek a deficiency in an equitable action decided by

the court. 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).

Like the defendant in Rosenbaum, the Otterbeins improperly attempt to earn the right to a jury trial by camouflaging their request for equitable relief as legal counterclaims. A litigant may not alter the character of a equitable claim merely by calling it a legal claim. The South Carolina Supreme Court has previously articulated this long established principle of law and common sense, stating, "Generally...it may be said that the essential-character of the cause of action, and the remedy or relief it seeks, as shown by the allegations of the [pleading], determine whether a particular action is at law or equity, **unaffected by the conclusions of the pleader or what the pleader calls it, or the prayer for relief...**" Rogers v. Nation, 284 S.C. 330, 332, 326 S.E.2d 182, 183 (Ct. App. 1985) (quoting Bell v. Mackey, 191 S.C. 105, 119, 3 S.E.2d 816, 822 (1939)) (emphasis added). Therefore, consistent with Rosenbaum, this Court should not permit the Otterbeins to evade the statutory scheme created by the Legislature for resolving foreclosure actions. Their request for a jury trial should be stricken.

II. Even If the Counterclaims Are Not Equitable, They Are Permissive Because They Do Not Relate to Enforceability Of The Note And Mortgage.

In order for the Otterbeins to be entitled to a jury trial, the Counterclaims must be legal **and** compulsory. See Smith, 398 S.C. 487, 498, 730 S.E.2d 328, 333. As noted above, because the Otterbeins' Counterclaims are equitable in nature, they are not entitled to a jury trial. Therefore, no further inquiry should be necessary. However, even if the

Counterclaims were deemed to be legal claims, they are permissive and the Otterbeins still are not entitled to a jury trial.

Under South Carolina law, "[i]f the complaint is equitable and the counterclaim legal and compulsory, the defendant has the right to a jury trial on the counterclaim." Mortgage Electronic Systems, Inc. v. White, 384 S.C. 606, 682 S.E.2d 498 (Ct. App. 2009). However, if a defendant asserts a counterclaim which is not legal and compulsory in an equitable action, he waives any right to a jury trial on that counterclaim. See N.C. Federal Savings and Loan Ass'n v. DAV Corp., 298 S.C. 514, 516, 381 S.E.2d 903, 904 (1989). Foreclosure proceedings are equitable proceedings in South Carolina. See, e.g., DAV Corp., 298 S.C. at 516, 381 S.E.2d at 904 (referring to foreclosure proceeding as equitable).

A counterclaim is compulsory only where there is a "logical relationship" between the complaint and the counterclaim. Wells Fargo Bank v. Smith, 398 S.C. 487, 495, 730 S.E.2d 328, 333 (Ct. App. 2012). In the foreclosure context, there is a logical relationship between the counterclaim and the complaint only when the counterclaim bears upon the enforceability of the loan documents. Id. In Smith, this Court applied this test and determined that the defendant's counterclaim for violation of the attorney-preference statute was not logically related to the foreclosure complaint, even though the claims arose out of the same transaction, because a violation of the statute would not affect the enforceability of the promissory note and mortgage. Id. at 499, 730 S.E.2d at 334-335.

In the present case, the Otterbeins' Counterclaims for breach of the implied covenant of good faith and fair dealing and negligent misrepresentation are permissive

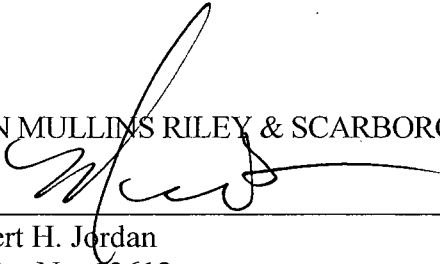
counterclaims under Smith and prior South Carolina law. The claims do not challenge the enforceability of the Loan documents. Rather, they are based upon conduct alleged to have occurred years *after* their execution of the Loan documents, namely, the alleged failure to properly review and respond to the Otterbeins' loan modification requests. (R. 41, ¶ 24; R. 44, ¶ 38). HSBC's obligation to properly administer HAMP and to provide other loss mitigation options, if any, did not arise from the Loan documents. HAMP did not even exist when the closing on the Loan took place in 2007. Because all of the events on which the Counterclaims are based necessarily occurred years after the closing, like the claims for violation of the attorney-preference statute at issue in Smith, the Counterclaim allegations in this case do not relate to the enforceability of the Loan documents.

The Counterclaims are related to post-closing activities and cannot be logically related to enforcement of the Note and Mortgage. Consequently, even if the main purpose of the Counterclaims was not to obtain equitable relief, the Otterbeins would not be entitled to a jury trial because the Counterclaims are permissive. The trial court therefore committed reversible error by finding that the Otterbeins are entitled to a jury trial on the Counterclaims.

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.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

Robert H. Jordan

SC Bar No. 13612

E-Mail: robert.jordan@nelsonmullins.com

Merritt G. Abney

SC Bar No. 71893

E-Mail: merritt.abney@nelsonmullins.com

151 Meeting Street / Sixth Floor

Post Office Box 1806 (29402-1806)

Charleston, SC 29401-2239

(843) 853-5200

*Attorneys for Appellant HSBC Mortgage Corporation,
USA*

March 11, 2014

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

The Honorable R. Markley Dennis, Jr.,
Berkeley County
Trial Court 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,

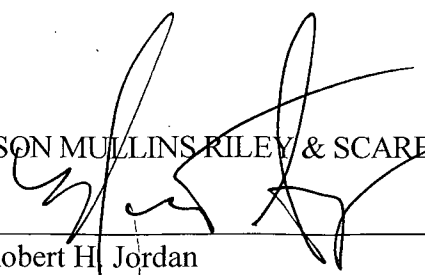
Of whom

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

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the Final Brief of Appellant
complies with the Supreme Court Order dated August 13, 2007 regarding personal
identifiers and sensitive information.

[SIGNATURE BLOCK ON FOLLOWING PAGE]



NELSON MULLINS RILEY & SCARBOROUGH LLP

By: _____

Robert H. Jordan

SC Bar No. 13612

E-Mail: robert.jordan@nelsonmullins.com

Merritt G. Abney

SC Bar No. 71893

E-Mail: merritt.abney@nelsonmullins.com

151 Meeting Street / Sixth Floor

Post Office Box 1806 (29402-1806)

Charleston, SC 29401-2239

(843) 853-5200

*Attorneys for Appellant HSBC Mortgage Corporation,
USA*

March 11, 2014

THE STATE OF SOUTH CAROLINA

In the 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.

PROOF OF SERVICE

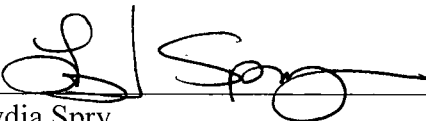
I HEREBY CERTIFY that I have served the **FINAL BRIEF OF APPELLANT** on
Respondents and Defendants by depositing copies of it in the United States Mail, postage
prepaid, addressed to the below Counsel of Record:

Mary Leigh Arnold, Esquire
Mary Leigh Arnold, P.A.
749 Johnnie Dodds Blvd., Suite B
Mt. Pleasant, SC 29464
(843) 971-6053
Attorney for Respondents

Chris B. Staubes, III, Esquire
Clawson & Staubes, LLC
126 Seven Farms Drive, Suite 200

Charleston, SC 29492-8144
(843) 577-2026

Attorney for Defendants First Federal Savings and Loan Association a/k/a First Federal Savings and Loan Association of Charleston

By: 
Lydia Spry
Administrative Assistant to Merritt G. Abney
Nelson Mullins Riley & Scarborough, LLP

March 11, 2014