THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas
The Honorable Steven H. John, Circuit Court Judge

Case No. 2010-CP-26-08505
Appellate Case No. 2013-000107

Carolina First Bank n/k/a TD Bank, NA, ...	Petitioner,
v.	
BADD, LLC, William McKown and Charles A. Christenson, ...	Defendants,
Of whom BADD, LLC and William McKown are	Respondents.
BADD, LLC and William McKown, ...	Third-Party Plaintiffs,
v.	
William Rempher, ...	Third Party Defendant.

REPLY BRIEF OF PETITIONER TD BANK

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Table of Contents

Table of Authorities

Page(s)

Cases

Rules

Statutes

Other Authorities

Introduction

Respondents have chosen to ignore the nature of the action TD Bank filed against them. Taking their rationale to its end demonstrates its flaws. Respondents' argument can be summarized as follows:

> Because a debtor defaults on a mortgage loan (*i.e.*, breaches the agreement) and the bank files a foreclosure action due to that breach, a foreclosure action then is really just an action at law because it is ultimately due to the borrower's breach of a contract (*i.e.*, the mortgage loan).

Such an approach would render every foreclosure action in this state an action at law.

An action for a deficiency judgment against a guarantor who has pledged to make good on a note secured by a mortgage on real property lies in equity in a foreclosure action. This has been true since 1791. It was true in 1868 at the time the Constitution was adopted. It remains true today. The Constitution has not been amended on this point to provide Respondents a right to a jury trial in this regard.

As shown below, the cases that Respondents rely on for their arguments on the deficiency request do not arise in a foreclosure action, and those that do actually support TD Bank's position. Finally, the court of appeals improperly failed to address the nature of the counterclaims and third-party in this matter. When considered in the context of this action as Respondents pled their claims, each counterclaim and third-party claim is permissive and Respondents, therefore, waived any right to a jury trial they may have had on those claims.

This Court should reverse the court of appeals and refer this action to the master-in-equity for a bench trial. The trial court correctly found that none of the claims in this foreclosure action give rise to the right to a jury trial.

Argument

I. The request for a deficiency in a foreclosure action lies in equity.

The court of appeals erred in holding that a claim for a deficiency judgment is a separate breach of contract action (*i.e.*, a "legal" action as opposed to an equitable one). The request for a deficiency was not brought in a *separate* action. It is part of the foreclosure action brought pursuant to the provisions contained in Title 29 of the Code.

Missing from Respondent's brief is any authority as to the source of their purported right to a jury trial on a demand for a deficiency judgment. This information is lacking because just the opposite is true—no right to a jury trial exists here. The proper historical view of the nature of the request for a deficiency in the foreclosure action demonstrates no jury trial rights exist.

A. The Bank has not "waived' the Guarantor's right to a jury trial; no jury trial right exists respecting the deficiency.

In Section I of their brief, Respondents repeatedly assert the Bank cannot waive their right to a jury trial on the request for a deficiency judgment. The inquiry into the question regarding the deficiency request has nothing to do with waiver. The question is—do the Respondents have a right to a jury trial on a request for a deficiency in a foreclosure action? The answer is no.

Through the Act of 1791, the South Carolina Legislature changed the nature of a mortgage from that of a conveyance on condition to a lien. *Perpetual Bldg. and Loan Ass'n of Anderson v. Braun*, 270 S.C. 338, 341-42, 242 S.E.2d 407, 409 (1978). This permitted the mortgagee to bring its foreclosure action and request for a deficiency judgment in one action at equity. Thus, at the time of the adoption of The South Carolina Constitution of 1868, no jury trial right existed in a foreclosure action seeking a

deficiency judgment in the same action. *See Mims Amusement Co. v. S.C. Law Enforcement Div.*, 366 S.C. 141, 145, 621 S.E.2d 344, 345-46 (2005) ("The right to a trial by jury is guaranteed in every case in which the right to a jury was secured at the time of the adoption of the Constitution in 1868."). In *McConnell, et al. v. Barnes, et al.*, 142 S.C. 112, 140 S.E. 310 (1927), this Court, citing the Act of 1791, recognized that a judgment for deficiency is an incident of the relief sought in a foreclosure action based on the integration of the action for foreclosure and the deficiency after sale.

Today's Code contains the same structure and provides that the mortgagee is "entitled to recover satisfaction for such money out of the land by ***foreclosure and sale according to law***." S.C. Code Ann. § 29-3-10 (emphasis added). In codifying these rights, the General Assembly then established the mechanism—"according to law"—through which a mortgagee can obtain payment for the money lent or due under a mortgage contract—foreclosure sale and deficiency judgment. The General Assembly empowered the court, not a jury, with the duty to determine whether payment for any remaining indebtedness is owed by a mortgagor or guarantor. The Code states:

> In actions to foreclose mortgages ***the court may adjudge and direct the payment*** by the mortgagor of any residue of the mortgage debt that may remain unsatisfied after a sale of the mortgaged premises in cases in which the mortgagor shall be personally liable for the debt secured by such mortgage ***and if the mortgage debt be secured by the covenant or obligation of any person other than the mortgagor the plaintiff may make such person a party to the action and the court may adjudge payment*** of the residue of such debt remaining unsatisfied after a sale of the mortgaged premises against such other person and may enforce such judgment as in other cases.

S.C. Code Ann. § 29-3-660 (emphasis added). The Code specifically provides the ability to join the guarantor in the foreclosure action and empowers the court to adjudge

payment. In reversing the trial court, however, the court of appeals did not cite or analyze the sections contained in Title 29. The court of appeals' oversight and failure to adhere to the statutory regime necessitates reversal.

The precise grounds offered by Respondents and adopted by the court of appeals in its Opinion were expressly rejected by this Court in *General Plywood Corp. v. Richard Jones*. This Court noted: "[a]ppellant further contends that, since respondent does not waive a deficiency judgment, the matter is for determination by a jury and not referable." *General Plywood Corp.*, 216 S.C. 322, 325, 57 S.E.2d 636 (1950). This Court disagreed and 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." *Id.* (emphasis added).

Similarly, in *Welborn v. Cobb*, the foreclosure complaint was filed against the mortgagor and the mortgagee sought a deficiency against the guarantor in the complaint. *Welborn v. Cobb*, 92 S.C. 384, 75 S.E. 691 (1912). The guarantor claimed the Bank improperly named him in the action. *Id.* The Court rejected the argument and held that the mortgagee "had the right to proceed against both at the same time and in the same action." *Id.* at 387, 75 S.E. at 692-93. The Court found, contrary to the guarantor's arguments, that the action for a deficiency was properly "united in the complaint." *Id.* at 388, 75 S.E. at 693. The Court went on to find that the foreclosure complaint "states only one cause of action." *Id.* In reaching this decision, this Court cited to Section 188 of the South Carolina Code, which provided:

> [i]f the mortgage debt be secured by the covenant or obligation of any person other than the mortgagor, the

> plaintiff may make such person a party to the action, and ***the Court*** may adjudge payment of the residue of such debt remaining unsatisfied after a sale of the mortgaged premises against such other person, and may enforce such judgment as in other cases.

Welborn, 92 S.C. at 387, 75 S.E. at 693 (emphasis added). The quoted provision is identical to the provisions in today's Code found at Section 29-3-660. Thus, it has long been recognized by this Court that the General Assembly devised a structure by and through which a mortgagee could obtain judgment in a foreclosure action against a guarantor for a deficiency in an action at equity, should such a deficiency remain following the foreclosure sale.

B. None of the cases cited by Respondents recognize a right to a jury trial for a guarantor in a foreclosure action.

Respondents cite to six (6) cases purporting to stand for the proposition that an action for a deficiency against a guarantor is an action at law. Four (4) of these cases do not arise in connection with a foreclosure action, but instead involve separate actions based solely on contracts. Two (2) cases do arise in connection with foreclosures but directly contradict the point Respondent cites them for as to the deficiency request.

Johnson v. South Carolina Nat'l Bank, 292 S.C. 51, 354 S.E.2d 895 (1987) did not involve a foreclosure action or a request for a deficiency judgment. Instead, *Johnson* addressed a circumstance wherein the bank counterclaimed against the guarantor for *damages* under a guaranty agreement. *Id.* at 53, 354 S.E.2d at 896 (emphasis added). The Court held the Johnsons had a right to a jury trial on the bank's counterclaim for damages. *Id.* at 54, 354 S.E.2d at 896.

Respondents [and the court of appeals] cite to *Southern Bank and Trust Co. v. Harley*, 295 S.C. 423, 368 S.E.2d 908 (1988), claiming it demonstrates an action on a

guaranty is legal in nature. *Harley* does not support Respondents' argument. First, the underlying decision from the court of appeals reveals that the action on the guaranty was brought separate and apart from the foreclosure action. *Southern Bank and Trust Co. v. Harley*, 292 S.C. 340, 342, 356 S.E.2d 410 (Ct. App. 1987). Second, despite Respondents' reliance on *Harley*, in that case the court, ***not*** a jury, determined the deficiency amount. *Id.* at 424, 368 S.E.2d at 908. In the court of appeals' underlying decision in *Harley*, the court emphasized this point in stating that the "circuit court concluded the guaranty agreements placed a 'cap' . . . on the [g[uarantor's liability" and then "the court entered judgment." *Southern Bank and Trust Co. v. Harley*, 292 S.C. at 342, 356 S.E.2d at 410-11 (Ct. App. 1987). *Harley* thus refutes the idea that a jury determines the amount of a deficiency judgment.

Respondents, like the court of appeals, also rely on *TranSouth Fin. Corp. v. Cochran*. In *Cochran*, the court of appeals addressed a guaranty in connection with a promissory note securing an interest in dealer inventory. 324 S.C. 290, 292, 478 S.E.2d 63, 64 (Ct. App. 1996) (emphasis added). Unlike the present case, *Cochran* did not involve a foreclosure action or real property. The guaranty agreement in *Cochran* was executed in connection with a security interest in personal property—automobiles. *Id.* Hence, *Cochran* was not a foreclosure and the case was not commenced under the South Carolina Code provisions applicable to foreclosure actions upon which TD Bank's complaint was based.

Respondents also point to *Airfare, Inc. v. Greenville Airport Commission*, 249 S.C. 265, 153 S.E.2d 846 (1967). This case, however, involved a breach of contract claim for damages arising out of a lease agreement. *Id.* at 269, 153 S.E.2d at 848.

Airfare, Inc. did not involve a foreclosure action or a deficiency and stands for the non-controversial proposition that a stand-alone action for damages is an action at law.

Respondents then cite to *McLaurin v. Hodges*, 43 S.C. 187, 20 S.E. 991 (1895) in Section I of their brief, claiming that it demonstrates why a jury trial right exists in a foreclosure action based on a defendants' defense of usury and counterclaim for repayment of interest. Respondents have misread *McLaurin*. It in fact states unequivocally that no right to a jury trial exists in a foreclosure action no matter the defense or counterclaim:

> [i]t seems to us that these two defences [sic] of the defendant are so interwoven in the plaintiff's mortgage, which is but a security to the debt, and cannot exist without such debt, that if they subsist, they make up a part of the very entity of the action. That questions of fact arise in equity causes, and have to be decided there, is notorious. And we cannot see why the defendant can demand as a legal right to have them tried apart from the plaintiff's action, which is clearly equitable in its nature.

Id. at 192, 20 S.E. at 993. Thus, *McLaurin* holds the exact opposite of what Respondents recite as its result. Contrary to Respondents' position, the *McLaurin* court ordered "the cause be remanded to the Circuit Court, for the trial of the whole case in that court on its equity side." *Id.* at 193, 20 S.E. at 993.

Finally, Respondents cite to *C&S Nat'l Bank of S.C. v. Lanford*, 313 S.C. 540, 443 S.E.2d 549 (1994). However, *Lanford* did not involve a foreclosure action—it was a separate action on a guaranty. The court, however, and not a jury, entered judgment. *Id.* at 542, 443 S.E.2d at 550. *Lanford* thus also fails to assist Respondents.

The above-noted cases do not and cannot establish the right Respondents claim to have. The right does not exist. Accordingly, as existed at the time of the adoption of the

Constitution and as established by the General Assembly and this Court, the right to a deficiency judgment arises in connection with the foreclosure and the action is one that sounds only in equity.

II. The court of appeals improperly reversed on a ground not raised by Respondents.

In deciding to refer the matter to the master, the trial court also relied upon the "main purpose rule," and this ruling served as an independent basis for the trial court's order. Before the court of appeals, Respondents did not argue that the trial court's "main purpose" ruling was in error. Hence, right or wrong, that ruling became the law of the case. *See Buckner v. Preferred Mut. Ins. Co.*, 255 S.C. 159, 160-61, 177 S.E.2d 544 (1970) (holding that an unappealed ruling, right or wrong, is the law of the case). Respondents' failure to specifically raise this argument bars the court of appeals from using it as a basis for reversal. The court of appeals' reliance on the main purpose rule was improper. As a result, this constitutes grounds for reversal as well.

III. No uncertainty exists regarding the nature of Respondents' counterclaims and third-party claims.

First, Respondents have never before raised the argument that uncertainty existed regarding the nature of their counterclaims and third-party claims. Because it was not raised, neither the trial court nor the court of appeals considered or ruled on this issue. Therefore, it is not preserved. *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000) (ground not raised and ruled upon by the trial court is not preserved for appellate review).

Second, Respondents also appear to try and seek refuge in *Keels v. Pierce*, 315 S.C. 339, 433 S.E.2d 902 (Ct. App. 1993) for the proposition that where uncertainty

exists as to whether counterclaims are permissive or compulsory, under Rule 13, SCRCP, a party can file counterclaims and not risk waiving the right to a jury trial if the court later determines the counterclaims are permissive.[1] Respondents do not state or recite what the uncertainty about the nature of their counterclaims and third-party claims was when they filed the claims. In fact, in their Motion for Leave to File the First Amended Answer, Counterclaim, and Third Party Complaint, Respondents stated the counterclaims and third-party claims were compulsory. (App. 94.) Respondents did not allege any uncertainty. (App. 94-105.) Instead, they demanded a jury trial and unilaterally labeled their claims as "compulsory in nature" and as "an action at law." (App. 94; 98.)

Third, Respondents again misconstrue *Johnson* with respect to their contention that bringing their counterclaims and third-party claims in response to the foreclosure action did not waive their right to a jury trial. *Johnson* involved a separate action commenced by the debtor/guarantors. *Johnson*, 292 S.C. at 52, 354 S.E.2d at 895 ("the Johnsons brought suit against [the bank] to rescind a guaranty agreement . . ."). In *Johnson*, the only action that created a jury trial right was the bank's counterclaim for damages on the guaranty. *Id.* at 54, 354 S.E.2d at 896. The prior decision from the Supreme Court in an earlier appeal resulted in the case being placed on the non-jury roster because the Johnsons' rescission claim sounded in equity. *See Johnson v. South Carolina Nat'l Bank*, 285 S.C. 80, 328 S.E.2d 75 (1985). Only the bank's later counterclaim for damages revived the right to a jury trial for the debtor/guarantors.

In any event, this Court should find this issue unpreserved. To the extent this Court permits Respondents to raise it, the Court should reject the argument because

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[1] The court in *Keels* cited to Rule 42, SCRCP, stating that if the court determines the counterclaims were permissive, the claims can be tried separately.

Respondents' averments make clear they had no uncertainty as to the nature of the claims they raised.

IV. The court of appeals erred in failing to address Respondents' counterclaims and third-party claims. All the claims are permissive as pled in this action.

Due to the court of appeals' error regarding the nature of this foreclosure action and the request for a deficiency judgment, the court of appeals did not substantively address whether the Respondents' counterclaims and third-party claims were permissive or compulsory. Rather, the court of appeals summarily concluded that because it had determined that Respondents were entitled to a jury trial on the request for a deficiency, such meant that the Respondents were entitled to a jury trial on their counterclaims and third-party claims. Because the court of appeals erred in its analysis as to whether the request for a deficiency triggered a right to a jury trial, it also erred in failing to address the ruling of the trial court that the Respondents' counterclaims were permissive, thereby waiving any right to a jury trial concerning those claims.

A. Except for Respondents' unconscionability claim, every one of Respondents' claims contain a third-party claim, thereby making the claims for civil conspiracy, breach of contract, interference with prospective contractual relationships, and breach of fiduciary duty permissive.

Respondents' label their first counterclaim as one for unconscionability. No debate can be had that this claim is an equitable one. *Brown v. Greenwood Sch. Dist. 50 Bd. of Trs.*, 344 S.C. 522, 525, 544 S.E.2d 642, 643 (Ct. App. 2001). Respondents do not argue otherwise in their response brief. Tellingly, however, Respondents' "counterclaim" for unconscionability only asks for the Complaint to be dismissed as to McKown. (App. 99 at ¶ 20.) Thus, the "counterclaim" is not truly a claim but rather an affirmative defense asking for dismissal based on alleged unconscionable conduct.

Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 542 S.E.2d 360 (2001) (demonstrating unconscionability raised as an affirmative defense). Thus the "unconscionability" counterclaim is equitable or no claim at all—and it does not entitle Respondents to a jury trial regardless.

Respondents assert four other claims. Two claims are jointly labeled as counterclaims against TD Bank and "cause[s] of action" against the third-party Defendant Rempher for civil conspiracy and breach of contract. (App. 99; 102.) The remaining two claims are labeled as "cause[s] of action" solely against the third-party Defendant Rempher. (App. 103.) Accordingly, each and every one of these claims is asserted against the third-party Defendant Rempher.

The law is clear that all third-party claims are by their nature deemed permissive by the courts. *N.C. Federal Savings and Loan Ass'n v. DAV Corp.*, 298 S.C. 514, 519, 381 S.E.2d 903, 906 (1989) (holding third-party claims brought in a foreclosure action to be permissive); *Tatnall v. Gardner*, 350 S.C. 135, 137, 564 S.E.2d 377, 378 (Ct. App. 2002) (holding all third-party claims to be permissive); *see also* Rule 14(a), SCRCP (providing a defendant *may* implead a third-party) (emphasis added).

Here, by joining each claim against the third-party, Respondents have waived any right to a jury trial on the claims. The inquiry into the issue of permissive versus compulsory ends there. Respondents are the master of their claims and elected to bring claims as combined counter and third-party claims. No uncertainty existed that third-party claims are deemed permissive as of the time the Respondents filed the claims—the law was clear. Thus, Respondents filed the combined claims in this action "when it [was]

clear the [ ]claims were permissive." *Keels*, 315 S.C. at 342, 433 S.E.2d at 904. In doing so, Respondents waived their right to a jury trial.

B. Assuming arguendo the third-party nature of each claim is disregarded, none of the counterclaims or third-party claims logically relate to the enforceability of the note, mortgage, or guaranty in the foreclosure action.

Respondents contend timing does not matter in determining the relationship of the claims. But for the claims to logically relate under Respondents' theory of the case, timing matters in this action as to whether the underlying transaction is enforceable. *See DAV Corp.*, 298 S.C. 518, 381 S.E.2d at 905 (applying the logical relationship test and determining whether the counterclaims affected the enforceability of the note). Timing is important in establishing whether a logical relationship exists to determine if the same set of occurrences are involved. For example, in *Mullinax v. Bates*, this Court focused on the timing of events in finding that claims arising subsequent to the execution of the contract had no logical relationship to the enforceability of the contract. 317 S.C. 394, 396, 453 S.E.2d 894, 896 (1995).

The relief sought by the Respondents here reveals that the damages sought stem not from the transactional documents, but instead from acts alleged to have occurred in the course of later events that do not affect the enforceability of the note and underlying documents. Respondents essentially allege that through allegedly negligent business management and self-serving control of revenues, Respondents' business counterparts allowed the debt obligations to go into default to Respondents' detriment. (App. 98-105.) The Respondents' theory is that—over a year after the execution of the loan documents—TD Bank engaged in a conspiracy that caused Respondents to default so the bank's alleged co-conspirator could buy the property at the foreclosure sale. (App. 100-102 at

¶¶ 27-37.) As a result of such alleged conduct, the Respondents seek special damages. (App. 102 at ¶ 38.) Respondents then rely on the contractual documents (instead of claiming them to be unenforceable), allege the bank breached the agreements, and seek damages from the alleged breach. (App. 102.) Respondents also allege that TD Bank has interfered with its prospective contractual relationships with potential tenants to rent the units and Respondents seek damages for the alleged tort. (App. 103 at ¶¶ 45, 48.) Last, Respondents claim the alleged co-conspirator mismanaged the properties and breached his fiduciary duties, causing damage to Respondents. (App. 103-104 ¶¶ 49-53.) Based on these claims, Respondents pray for money damages and costs and fees. (App. 104 WHEREFORE ¶¶ b, c, d.)

Respondents chose to file these claims in this foreclosure action. The act of doing so waived their right to a jury trial on the claims. Simply put, the claims and relief sought do ***not*** seek to undo the transaction that is the basis for the foreclose action. No uncertainty exists or could be alleged on these counterclaims and third-party claims and whether they were permissive.

This Court should reverse the court of appeals and specifically address the nature of Respondents' counterclaims and third-party claims. The Court should hold that the claims all involve third-party claims and are permissive as a matter of law. Failing that, the Court should hold Respondents' claims do not have a logical relationship to the enforceability of the transaction and are, therefore, permissive.

Conclusion

No jury trial rights exist in this foreclosure action. The request for a deficiency against the guarantor does not create one. Respondents have not pled compulsory claims.

All are permissive in the context. As a result, the Court should reverse the court of appeals and remand this action to the master-in-equity to proceed with the foreclosure action, the counterclaims, and third-party claims at equity in a bench trial.

Signature Page Attached

Respectfully submitted,

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PROOF OF SERVICE

I, the undersigned, of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Carolina First Bank n/k/a TD Bank, NA, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by to the following address(es):

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