

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY

R. Markley Dennis, Jr., Presiding Judge, Ninth Judicial Circuit

Case No. 2012-CP-10-01844
Appellate Case No. 2014-001791

Deutsche Bank National Trust Company, as
Trustee of the IndyMac IMJA Mortgage
Trust 2007-A2, Mortgage Pass-Through
Certificates, Series 2007-A2 under the
Pooling and Servicing Agreement dated
August 1, 2007,

Appellants,

v.

Thomas C. Stevenson III and Irven M.
Stevenson, National Bank of South Carolina
nka Synovus Bank, South Carolina Department
of Revenue, and OneWest Bank FSB,
including its division known as Indy Mac
Mortgage Services,

Defendants,

Of which Thomas C. Stevenson III and Irven M. Stevenson are the Respondents.

OPPOSITION TO RESPONDENTS'
MOTION TO DISMISS APPEAL

RECEIVED

SEP 29 2014

SC Court of Appeals

Appellants Deutsche Bank National Trust Company, as Trustee of the IndyMac IMJA Mortgage Trust 2007-A2, Mortgage Pass-Through Certificates, Series 2007-A2 under the Pooling and Servicing Agreement dated August 1, 2007 (“Deutsche Bank”), and OneWest Bank FSB, including its division known as Indy Mac Mortgage Services (“OneWest Bank/IndyMac”), by and through their undersigned counsel, submit the herein opposition to Respondents’ Motion to Dismiss Appeal. The Court should deny the Respondents’ motion based on the following:

1. The Order is immediately appealable as it affects a substantial right.

Generally, only final judgments are appealable. Culbertson v. Clemens, 322 S.C. 20, 23, 471 S.E.2d 163, 164 (1996). However, Section 14-3-330(2) of the South Carolina Code allows appeal from interlocutory orders which affect a “substantial right.” S.C. Code Ann. § 14-3-330(2) (2007). “Orders affecting the mode of trial affect substantial rights under S.C. Code Ann. § 14-3-330(2) (1977) and must, therefore, be appealed immediately.” Lester v. Dawson, 327 S.C. 263, 266, 491 S.E.2d 240, 241 (1997); Foggie v. CSX Transp., 313 S.C. 98, 431 S.E.2d 587 (1993) (“Issues regarding mode of trial must be raised in the trial court at the first opportunity, and the order of the trial judge is immediately appealable.”). When a trial court’s order deprives a party of a mode of trial to which it is entitled to as a matter of right, such order is immediately appealable. Salmonsens v. CGD, Inc., 377 S.C. 442, 452, 661 S.E.2d 81, 87 (2008) (quoting Flagstar Corp. v. Royal Surplus Lines, 341 S.C. 68, 72, 533 S.E.2d 331, 222 (2000)). The traditional analysis of the denial of a mode of trial involves a determination of whether a party is erroneously denied a jury trial in actions at law, or required to proceed before a jury in an equity case. Id. at 453, 661 S.E.2d at 87.

Orders affecting the right to jury trial are immediately appealable and must be raised in court at the first opportunity. Lester, 327 S.C. at 266, 491. S.C. at 241. The failure to timely

appeal orders affecting the mode of trial effects a waiver of the right to appeal that issue. Id.; see also Edwards v. Timmons, 297 S.C. 314, 377 S.E.2d 97 (1988)) (where appellant did not appeal the order referring matter to master in equity, she could not complain after final order that she was deprived of her right to a trial by jury); Creed v. Stokes, 285 S.C. 542, 331 S.E.2d 351 (1985) (where appellant failed to timely appeal an order referring dispute to master in equity, appellant could not later complain that he had been entitled to a trial by jury).

In Frampton v. South Carolina Dept. of Transp., 406 S.C. 377, 752 S.E.2d 269 (Ct. App. 2013), the DOT requested a non-jury trial for a phase of the case, but did not appeal the order denying its motion. Id. at 386, 752 S.E.2d at 274. This Court held that the DOT did not preserve the issue for appeal because it did not immediately appeal the trial court's denial of its motion to transfer the case to the non-jury docket. Id. Under the reasoning in Frampton, where a party is denied the ability to proceed non-jury and has a right to do so, this is a denial of a mode of trial which must be appealed immediately.

Appellants are appealing the Circuit Court's Order transferring Respondents' counterclaims to the jury roster on the grounds that Respondents' legal counterclaims are permissive. The Order at issue in this appeal affects both Respondents' right to a jury trial, well established as a substantial right, but also Appellant's right to proceed non-jury should this Court ultimately hold that Respondents' counterclaims are permissive and that Respondents have waived their right to a jury trial on these issues. Requiring Appellant to proceed before a jury on these counterclaims and then later appeal the finding that the counterclaims are not, in fact, permissive would deny Appellants the mode of trial to which they are entitled as a matter of law. As such, the Order affects the mode of trial and is required, under the logic of Frampton, to be appealed immediately.

A. Appellants are entitled to a non-jury trial as matter of right because Respondents waived their right to a jury trial by bringing permissive legal counterclaims in Appellant's equitable foreclosure action.

Actions to foreclose a real estate mortgage are actions in equity. Hayne Fed. Credit Union v. Bailey, 327 S.C. 242, 489 S.E.2d 472 (1997); Collier v. Green, 244 S.C. 367, 137 S.E.2d 277 (1964); The Smith Companies of Greenville, Inc., v. Hayes, 311 S.C. 358, 428 S.E.2d 900 (Ct. App. 1993); First Fed. Sav. Bank. v. Knauss, 296 S.C. 136, 370 S.E.2d 906 (Ct. App. 1988). In equity, the parties are not entitled, as a matter of right, to a trial by jury. Williford v. Downs, 265 S.C. 319, 321, 218 S.E.2d 242, 243 (1975). Where the complaint is in equity but the counterclaim is both legal and compulsory, the defendant has the right to a jury trial on the counterclaim. C & S Real Estate Servs., Inc. v. Massengale, 290 S.C. 299, 302, 350 S.E.2d 191, 193 (1986). However, a defendant who brings a permissive legal counterclaim in an equity action waives his right to a jury trial. See Wachovia Bank, Nat'l Ass'n v. Blackburn, 407 S.C. 321, 329–30, 755 S.E.2d 437, 441–42 (2014); Edwards, 297 S.C. at 316, 377 S.E.2d at 97 (citing Johnson v. South Carolina Nat'l Bank, 292 S.C. 51, 354 S.E.2d 895 (1987)). Compulsory counterclaims arise “out of the transaction or occurrence that is the subject matter of the opposing party’s claim.” Rule 13(a), SCRPC. Claims arising out of separate transactions or occurrences than the subject matter of the opposing party’s claim are permissive. Rule 13(b), SCRPC.

Appellants filed a non-jury mortgage foreclosure action against Respondents in the Charleston County Court of Common Pleas on March 16, 2012. Respondents’ Motion at 1. After removal to federal court and subsequent remand to state court, Appellants filed an amended complaint on November 21, 2013. See Exhibits A and C to Respondents’ Motion. Respondents filed an answer on December 6, 2013, which included affirmative defenses and a counterclaim

and demanded a jury trial. Respondents' Motion at 2; Exhibit D to Respondents' Motion. The counterclaim is based on allegations that Appellants' predecessor in interest improperly handled Respondents' loan modification reviews and acted in bad faith when it refused to agree to a proposed sale of the property in February 2012. See Exhibit D to Respondents' Motion at pp. 8-9. However, Appellants' foreclosure action is based on Respondents' admitted default under the terms of the note and mortgage in April 2011. See Exhibit C to Respondents' Motion at p.4 Paragraph 22, and Exhibit D to Respondents' Motion at p. 4, Paragraph 22. As they are based on events occurring some ten months after the grounds for foreclosure arose, the counterclaims are not logically related to the foreclosure action, and are properly classified as permissive counterclaims. Respondents have thus waived their right to a jury trial on these claims by bringing them as a counterclaim in the equitable foreclosure action. Therefore, Appellants have the right, as a matter of law, for these counterclaims to be heard non-jury.

Hannah v. United Refrigeration Svcs., 305 S.C. 394, 409 S.E.2d 360 (1991), cited by Respondents, is inapposite. Hannah involved a ruling on a Rule 39(b), SCRCF motion which is within the discretion of the trial judge. Appellants do not argue the timeliness of Respondents jury demand under Rule 38(b), SCRCF, which would bring the transfer to the jury docket within the circuit court's discretion. Rather, Appellants dispute Respondent's right to a jury trial at all on the basis that they waived this right by bringing a permissive legal counterclaim in Appellant's equitable foreclosure action.

Therefore, Respondent's Motion to Dismiss the Appeal should be DENIED.

(SIGNATURE ON FOLLOWING PAGE)

Case No. 2012-CP-10-01844
Appellate Case No. 2014-001791
OPPOSITION TO RESPONDENTS'
MOTION TO DISMISS APPEAL

Respectfully submitted,



Sean A. O'Connor (SC Bar # 68382)

FINKEL LAW FIRM LLC

4000 Faber Place Drive, Suite 450

North Charleston, South Carolina 29405

Telephone: 843.577.5460

Facsimile: 866.800.7954

soconnor@finkellaw.com

*Attorney for Plaintiff/Appellant Deutsche Bank
National Trust Company and Defendant/Appellant¹
OneWest Bank FSB*

September 25, 2014

¹ Deutsche Bank and OneWest Bank/IndyMac are not adverse and have no claims against one another. This action includes a third party complaint by Defendants Stevenson against OneWest Bank/IndyMac. The trial court caption apparently evolved to its current form following court orders by the U.S. District Court prior to remand as well as the Court of Common Pleas for Charleston County following remand. Plaintiff submits that the caption currently in use incorrectly blends the captions of the first party and third party complaints, which is not what any court order would have required or intended, but nonetheless it has not been corrected and has been in use by all counsel for more than two years.

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY

R. Markley Dennis, Jr., Presiding Judge, Ninth Judicial Circuit

Case No. 2012-CP-10-01844
Appellate Case No. 2014-001791

Deutsche Bank National Trust Company, as
Trustee of the IndyMac IMJA Mortgage
Trust 2007-A2, Mortgage Pass-Through
Certificates, Series 2007-A2 under the
Pooling and Servicing Agreement dated
August 1, 2007,

Appellants,

v.

Thomas C. Stevenson III and Irven M.
Stevenson, National Bank of South Carolina
nka Synovus Bank, South Carolina Department
of Revenue, and OneWest Bank FSB,
including its division known as Indy Mac
Mortgage Services,

Defendants,

RECEIVED

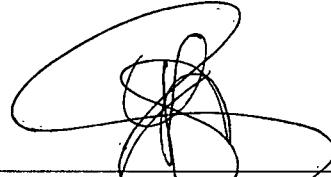
Of which Thomas C. Stevenson III and Irven M. Stevenson are the Respondents. SEP 29 2014

SC Court of Appeals

PROOF OF SERVICE

I certify that on the 25th day of September 2014, I served the *Opposition to Respondents' Motion to Dismiss Appeal* on J. Rutledge Young, Jr., Esq. of Duffy & Young, LLC, attorney of record for Respondents, Thomas M. Stevenson and Irven M. Stevenson; Tara E. Naful, Esq., of Adams and Reese, LLP, attorney of record for Defendant National Bank of South Carolina n/k/a

Synovus Bank (not a Respondent to this appeal) and Milton G. Kimpson, Esq., attorney for Defendant South Carolina Department of Revenue (not a Respondent to this appeal), by depositing a copy in the U.S. Mail, postage prepaid, to their offices at 96 Broad Street, Charleston, South Carolina 29401, 211 King Street, Suite 330, Charleston, South Carolina 29401, and Post Office Box 12265, Columbia, South Carolina 29211, respectively.



Jennifer L. Ellis
Litigation Paralegal
FINKEL LAW FIRM, LLC
4000 Faber Place Drive | Suite 450
Charleston, South Carolina 29405
T: 843.577.5460
F: 866.800.7954

September 25, 2014

Respondents' counsel:

J. Rutledge Young, Jr.
DUFFY & YOUNG, LLC
96 Broad Street
Charleston, SC 29401
843.720.2044
843.720.2047 (fax)
jry@duffyandyoung.com

*Attorney for Defendants/Respondents Thomas C.
Stevenson III and Irven M. Stevenson*

Tara E. Naful
ADAMS AND REESE LLP
211 King Street, #330
Charleston, SC 29401
Direct: 843.410.1102
Direct Fax: 843.302.8212
tara.naful@arlaw.com

*Attorney for Defendant National Bank of South
Carolina nka Synovus Bank (not a Respondent to
this appeal)*

Milton G. Kimpson
Chief Counsel
Office of Gen. Counsel for Tax and Reg. Svcs.
SC Department of Revenue
P.O. Box 12265
Columbia, SC 29211
Office: 803.898.5131
Fax: 803.896.0171
KimpsoM@sctax.org
*Attorney for Defendant SC Department of
Revenue (not a Respondent to this appeal)*

FINKEL LAW FIRM LLC

JENNIFER L. ELLIS, PARALEGAL
JELLIS@FINKELLAW.COM

REPLY TO:
CHARLESTON LITIGATION

September 25, 2014

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: *Deutsche Bank National Trust Company, as Trustee of the IndyMac IMJA Mortgage Trust 2007-A2, Mortgage Pass-Through Certificates, Series 2007-A2 under the Pooling and Servicing Agreement dated August 1, 2007 v. Thomas C. Stevenson III and Irvan M. Stevenson, National Bank of South Carolina nka Synovus Bank, South Carolina Department of Revenue, and OneWest Bank FSB, including its division known as Indy Mac Mortgage Services*
Appellate Case No.: 2014-001791
Our File No.: 52310.47707

Dear Ms. Kitchings:

Enclosed please find a *Opposition to Respondents' Motion to Dismiss Appeal* and the related *Proof of Service* which needs to be filed in connection with the above referenced matter. We would request that you please file same and return a file-stamped copy to our office in the enclosed envelope.

If you have any questions or concerns, please contact me at your convenience.

With kind personal regards, I am

Sincerely,

Jennifer L. Ellis
Litigation Paralegal

:jle
Enclosure

cc: J. Rutledge Young, Jr., Esq. (w/encl.)
Tara E. Naufal, Esq. (w/encl.)
Milton E. Kimpson, Esq. (w/encl.)

RECEIVED
SEP 29 2014
SC Court of Appeals

COLUMBIA
1201 Main Street, Suite 1800
Post Office Box 1799 (29202)
Columbia, SC 29201
Tel: (803) 765-2935
Fax: (803) 252-0786

CHARLESTON
Litigation, Real Estate & REO
4000 Faber Place Drive, Suite 450
Post Office Box 41489 (29423)
North Charleston, SC 29405
Tel: (843) 577-5460
Fax: (843) 577-5135

CHARLESTON
Foreclosure
4000 Faber Place Drive, Suite 450
Post Office Box 71727 (29415)
North Charleston, SC 29405
Tel: (843) 577-5460
Fax: (843) 725-0015

FINKEL
LAW FIRM LLC

4000 FABER PLACE DRIVE | SUITE 450
NORTH CHARLESTON | SOUTH CAROLINA | 29405

jle 52310.47707

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RECEIVED

SEP 29 2014

SC Court of Appeals

