

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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OCT 09 2014

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

SC Court of Appeals

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

Case No. 2012-CP-10-01844

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 n/k/a Synovus Bank, South Carolina Department of Revenue, and OneWest Bank FSB, including its division known as Indy Mac Mortgage Services,

Defendants,

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

**RESPONDENTS' REPLY IN FURTHER SUPPORT OF MOTION TO
DISMISS APPEAL**

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Appellant's memorandum opposing Respondents' Motion to Dismiss should fail for the simple and fundamental reason that the Order at issue is not immediately appealable. As the Appellant concedes, as a general rule, only final judgments are appealable. Otherwise interlocutory Orders are only immediately appealable where they affect a "substantial right." Here, the Order does not affect a substantial right of the Appellant because there is no *right* to a non-jury trial. Conversely, the South

Carolina precedent is clear that a defendant is entitled to a jury trial on compulsory legal counterclaims even where asserted in an equitable action. For these reasons, Respondents' Motion to Dismiss the Appeal should be granted.

I. The Order is not immediately appealable because it does not affect a substantial right.

To be immediately appealable, a trial court order must deprive the Appellant of a mode of trial to which it is entitled as a matter of right. See Cobb v. S.C. Dep't of Transp., 365 S.C. 460, 636, 618 S.E.2d 299, 300 (2005) (order immediately appealable only where it "deprives a party of a mode of trial to which that party is entitled *as a matter of right*") (emphasis added), Hagood v. Sommerville, 362 S.C. 191, 196, 607 S.E.2d 707, 709 (2005); see also Senter v. Piggly Wiggle Carolina Co., 341 S.C. 74, 78, 533 S.E.2d 575, 577 (2000) ("The majority of cases requiring immediate appeal involve review of denials of trial by jury and are based on the public policy consideration of advancing the constitutional mandate to preserve the right to trial by jury inviolate"); Lester v. Dawson, 327 S.C. 263, 266, 491 S.E.2d 240, 241 (1997) (distinguishing between appeal denial of trial by jury as of right and by judicial discretion, and holding that the former is immediately appealable while the latter is not).

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Appellant does not have a *right* to a non-jury trial. Hannah v. United Refrigeration Servs., Inc., 305 S.C. 394, 394, 409 S.E.2d 360, 361 (1991) (holding there is no right, as a matter of law, to a non-jury trial). Therefore, the Order granting the Respondents' motion to transfer their counterclaims is interlocutory, and this Court does not have jurisdiction over this action. See Brown v. Greenwood School Dist. 50 Bd. of Trustees, 344 S.C. 522, 524-25, 544 S.E.2d 642, 643 (Ct. App. 2001).

II. Respondent has a right to jury trial with respect to compulsory counter-claims.

Even if the Order was immediately appealable, the Respondents' right to jury trial with respect to their compulsory, legal counterclaims is firmly established by South Carolina precedent. Pursuant to South Carolina Rule of Civil Procedure 13(a), a defendant is required to plead as a counterclaim any claim arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim. The Respondents' counterclaims for violation of the South Carolina Unfair Trade Practices Act, breach of duty of good faith, negligence, and conspiracy are all legal counterclaims. Plantation Fed. Bank v. Gray 401 S.C. 507, 509, 737 S.E.2d 515, 516 (Ct. App. 2013) (holding counterclaims for breach of contract, breach of fiduciary duty, and violations of the South Carolina Unfair Trade Practices Act were compulsory legal counterclaims when brought in a foreclosure action). The Order rightly determined that Respondents' counterclaims were both legal and compulsory, and as such the Respondents are "entitled to a jury trial on these compulsory counterclaims if legal in nature even though asserted in an equitable action." C & S Real Estate Servs., Inc. v. Messengale, 209 S.C. 299, 301, 350 S.E.2d 191, 192 (1986); see also Johnson v. South Carolina Nat'l Bank, 292 S.C. 51, 55-56, 354 S.E.2d 895, 897 (1987) ("if the complaint is equitable and the counterclaim is legal and compulsory, the plaintiff or the defendant has a right to a jury trial on the counterclaim"); Plantation Fed. Bank, 401 S.C. at 510, 737 S.E.2d at 517 (Ct. App. 2013) (citing Johnson to hold defendants entitled to jury trial on compulsory legal counterclaims in foreclosure action).

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As the South Carolina Supreme Court held in February of this year when it clarified the “the proper analysis for determining the trial of legal and equitable issues in complaints and counterclaims,” if the complaint is equitable and the counterclaim is legal and compulsory, the plaintiff or the defendant has a right to a jury trial on the counterclaim unless a valid jury trial waiver exists that encompasses the counterclaim. Wachovia Bank, Nat. Ass'n v Blackburn, 407 S.C. 321, 329, 755 S.E.2d 437, 441 (2014). If such a waiver does not exist, the proper procedure for handling the counterclaims is as follows:

- (a) The trial judge may, pursuant to Rule 42(b), order separate trials of the legal and equitable claims, or may order the claims tried in a single proceeding.
- (b) If separate trials are ordered, the judge must determine which issues are to be tried first. If there are factual issues common to both claims, absent the most imperative circumstances, the at law claim must be tried first. If there are no common factual issues, it is within the trial judge's discretion which claim will be tried first.
- (c) If the claims are to be tried in a single proceeding and there are factual issues common to both claims, the jury shall first determine the legal issues. The court may then determine the equitable claims, but the jury's determination of common factual issues shall be binding upon the court.

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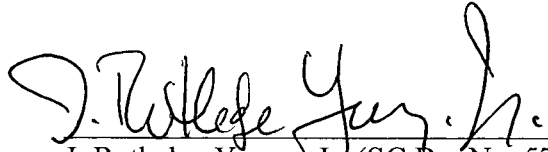
407 S.C. 321, 330, 755 S.E.2d 437, 442.

If there are factual issues common to both claims, absent the “most imperative circumstances,” the “at law” claim must be tried first Johnson 292 S.C. at 56, 354 S.E.2d at 897 (quoting Beacon Theatres, Inc. v. Westover, 359 U.S. 500, (1959)); see also Plantation Fed. Bank v. Gray, 401 S.C. at 510, 737 S.E.2d at 517 (reversing the master’s decision to allow a foreclosure action to proceed prior to a jury trial on legal counterclaims).

CONCLUSION

WHEREFORE, the Respondents respectfully request this Court grant their instant Motion to Dismiss the Appeal.

Respectfully submitted,



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Julie L. Moore (SC Bar No. 78677)

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October 6th, 2014
Charleston, South Carolina

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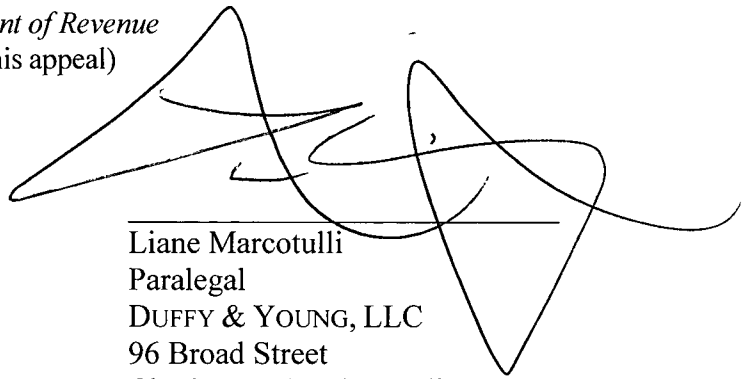
PROOF OF SERVICE

I, Liane Marcotulli, paralegal with Duffy & Young, LLC, certify that I have served **RESPONDENTS' REPLY IN FURTHER SUPPORT OF MOTION TO DISMISS APPEAL** on Appellants by U.S. mail on October 6, 2014 by depositing a copy of it to their attorneys of record as shown below:

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October 6, 2014
Charleston, South Carolina

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ATTORNEYS AT LAW

October 6, 2014

VIA U.S. MAIL

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
1205 Pendleton Street
Columbia, South Carolina 29201

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RE: Deutsche Bank v. Thomas Stevenson III
Civil Action No.: 2012-CP-10-01844
Appellate No.: 2014-001791

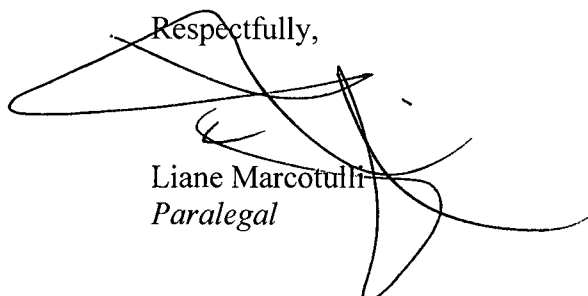
Dear Ms. Kitchings:

Enclosed please find one (1) original and seven (7) copies of Respondents' Reply in Further Support of Motion to Dismiss and Proof of Service in the above-referenced appeal. I would appreciate it if you would please file the originals and return one (1) file-stamped copy of the Reply and Proof of Service to our office in the envelope provided here for your convenience.

Should you have any questions or concerns, please do not hesitate to contact me.

Thank you for your assistance.

Respectfully,


Liane Marcotulli
Paralegal

Enclosures

cc: Sean A. O' Connor, Esq.
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