

IN THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM CHARLESTON COUNTY

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

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Case No. 2012-CP-10-01844

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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, and OneWest Bank FSB,  
including its division known as Indy Mac  
Mortgage Services,

Appellants,

v.

Thomas C. Stevenson III and Irven M.  
Stevenson,

Respondents.

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INITIAL BRIEF OF APPELLANTS

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**SC Court of Appeals**

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**STATEMENT OF ISSUE ON APPEAL**

- I. The circuit court erred in granting Stevensons' Motion to Transfer to the Jury Roster because Respondents have waived their right to a jury trial on their permissive legal counterclaims.**

## STATEMENT OF THE CASE

On or about July 6, 2007, Thomas Stevenson and Irven Stevenson (“Respondents”) executed and delivered a note and mortgage (“Mortgage”) in the principal amount of \$975,000.00 to Indy Mac Bank, F.S.B. Complaint ¶¶ 11, 12. This Mortgage was recorded on July 20, 2001 in the RMC Office for Charleston County in Mortgage Book A633 at Page 892. Complaint ¶ 16. The real property encumbered by this Mortgage is known as 173 Tradd Street, Charleston, SC 29401 (“Property”). Complaint ¶ 12, Lis Pendens. This mortgage was subsequently assigned to 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, (“Appellant”) by Assignment of Mortgage dated February 15, 2012 and recorded February 22, 2102 in Book 0234 at Page 773 in the RMC Office for Charleston County, South Carolina. Complaint ¶ 16. Appellant filed a summons and complaint against Respondents seeking foreclosure of the Mortgage on March 6, 2012. After removal to federal court and subsequent remand to state court, Appellant filed an Amended Complaint on November 22, 2013.

Respondents, through counsel, answered and counterclaimed on December 6, 2013 and demanded a jury trial. Answer and Counterclaims. Respondents asserted defenses and counterclaims of unclean hands, waiver, failure to mitigate, unfair trade practices, breach of the duty of good faith, negligence and conspiracy. Answer and Counterclaims ¶¶ 26-110. These defenses and counterclaims are based on Appellants’ predecessor in interest’s alleged improper handling of Respondents’ loan modification reviews and alleged bad faith refusal to agree to a short sale of the property in February 2012.

On May 5, 2014, Respondents filed a Motion to Transfer their counterclaims to the jury

roster, which is the subject of this appeal. Motion to Transfer. A hearing on the motion was held on July 30, 2014. The court ruled from the bench that Respondents' motion would be granted and issued a Form 4 order stating same. In a corresponding written order filed August 14, 2014, the court granted Respondents' motion finding that Respondents' counterclaims for unfair trade practices, breach of the duty of good faith, negligence, and conspiracy were compulsory legal counterclaims. Appellant filed a Notice of Appeal on August 21, 2014.

### **STANDARD OF REVIEW**

A mortgage foreclosure is an action in equity. Wachovia Bank, Nat. Ass'n v. Blackburn, 407 S.C. 321, 328, 755 S.E.2d 437, 440-41 (2014) (quoting Hayne Fed. Credit Union v. Bailey, 327 S.C. 242, 248, 489 S.E.2d 472, 475 (1997)). However, whether a party is entitled to a jury trial is a question of law which may be decided without deference to the circuit court's findings. Id.; 775 S.E.2d at 441 (citing Verenes v. Alvanos, 387 S.C. 11, 15, 690 S.E.2d 771, 772 (2010)).

### **ARGUMENT**

#### **I. The circuit court erred in granting Defendant's motion to transfer because defendants are not entitled to a jury trial as of right.**

Actions to foreclose a real estate mortgage are actions in equity. Hayne Fed. Credit Union, 327 S.C. 242, 489 S.E.2d 472; Collier v. Green, 244 S.C. 367, 137 S.E.2d 277 (1964); The Smith Cos. of Greenville 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). If any action is one in equity, it is to be tried by the court, and the defendant is not entitled to a jury trial. Loyola Fed. Sav. Bank v. Thomasson Properties, 318 S.C. 92, 456 S.E.2d. 423 (Ct. App. 1995); C & S Real Estate Servs. v. Massengal, 290 S.C. 299, 350 S.E.2d

191 (1986); Pelfrey v. Bank of Greer, 270 S.C. 691, 244 S.E.2d 315 (1978); Collier, 244 S.C. 367, 137 S.E.2d 277. 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., 290 S.C. at 302, 350 S.E.2d at 193. However, a defendant who brings a permissive legal counterclaim in an equity action waives his right to a jury trial. See Blackburn, 407 S.C. at 329-30, 755 S.E.2d at 441-42 (2014); Edwards v. Timmons, 297 S.C. 314,316, 377 S.E.2d 97, 97(1988) (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), SCRCP. Claims arising out of separate transactions or occurrences than the subject matter of the opposing party’s claim are permissive. Rule 13(b), SCRCP.

**A. The grant of jury trial affects a substantial right and is thus immediately appealable.**

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, 297 S.C. 314, 377 S.E.2d 97 (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.

While South Carolina has not directly addressed the issue, other courts have held that orders *either granting or denying* a party's motion for a jury trial affect a substantial right and are immediately appealable. McCall v. McCall, 138 N.C. App. 706, 531 S.E.2d 894, 895 (N.C. Ct. App. 2000) ("Our courts have long held that orders either denying or granting a party's motion for a jury trial do affect a substantial right and are thus immediately appealable."); Faircloth v.

Beard, 320 N.C. 505, 507, 358 S.E.2d 512, 514 (1987), *abrogated in part by* Kiser v. Kiser, 325 N.C. 502, 385 S.E.2d 487 (1989) (“If a denial of jury trial affects a substantial right which would be lost absent a review prior to final determination the requirement that a case will be tried by a jury should have the same effect.”).

Appellants filed a non-jury mortgage foreclosure action against Respondents in the Charleston County Court of Common Pleas on March 16, 2012. After removal to federal court and subsequent remand to state court, Appellants filed an amended complaint on November 21, 2013. Respondents filed an answer on December 6, 2013, which included affirmative defenses and a counterclaim alleging violation of South Carolina’s Unfair Trade Practices Act (“SCUPTA”), breach of the duty of good faith, negligence and conspiracy and demanded a jury trial. 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. However, Appellants’ foreclosure action is based on Respondents’ admitted default under the terms of the note and mortgage in April 2011, some ten months prior to the actions which form the basis of Respondents’ claims against Appellant. As further discussed below, regardless of whether Respondents prevail in the counterclaims, Appellants’ right to enforce the note and foreclose the mortgage are unaffected. Respondents have thus waived their right to a jury trial on these claims by bringing them as a counterclaim in the equitable foreclosure action when no logical relationship exists. Therefore, Appellants have the right, as a matter of law, for these counterclaims to be heard non-jury. The circuit court’s order granting Respondents’ motion to transfer to the jury roster denies Appellants their right to a non-jury trial. As such it affects a substantial right and must be appealed immediately.

**B. 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 Appellants' equitable foreclosure action.**

Actions to foreclose a real estate mortgage are actions in equity. Hayne Fed. Credit Union, 327 S.C. 242, 489 S.E.2d 472; Collier, 244 S.C. 367, 137 S.E.2d 277; The Smith Cos. of Greenville, Inc., v. Hayes, 311 S.C. 358, 428 S.E.2d 900; First Fed. Sav. Bank, 296 S.C. 136, 370 S.E.2d 906. In equity, the parties are not entitled, as a matter of right, to a trial by jury. Williford, 265 S.C. at 321, 218 S.E.2d at 243. A defendant who brings a permissive legal counterclaim in an equity action waives his right to a jury trial. See Blackburn, 407 S.C. at 329-30, 755 S.E.2d at 441-42; 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)).

Counterclaims are either permissive or compulsory. Rule 13, SCRPC. "By definition, a counterclaim is compulsory only if it arises out of the same transaction or occurrence as the opposing party's claim." Wells Fargo Bank, N.A. v. Smith, 398 S.C. 487, 495, 730 S.E.2d 328, 332-33 (Ct. App. 2012); see also Rule 13(a), SCRPC. Claims that arise out of separate transactions or occurrences than the subject matter of the opposing party's claims are, instead, permissive. Rule 13(b), SCRPC. The South Carolina Supreme Court has adopted the "logical relationship test" to determine whether a counterclaim is compulsory. See N.C. Fed. Sav. & Loan Ass'n v. DAV Corp., 298 S.C. 514, 517, 381 S.E.2d 903, 905 (1989). Specifically within the context of an action for foreclosure, the determination of whether a counterclaim is compulsory is made by asking whether the counterclaim would affect the lender's right to enforce the note and foreclose the mortgage. See Wells Fargo Bank, 398 S.C. at 496, 730 S.E.2d at 333; see also N.C. Fed. Sav. & Loan Ass'n, 298 S.C. 518-19, 381 S.E.2d at 905.

The thrust of Respondents' counterclaims is that the prior servicer and Appellants' predecessor in interest improperly handled Respondents' loan modification reviews and allegedly acted in bad faith when it refused to agree to a short sale of the property in February 2012. Regardless of whether Respondents could prevail on their claims that post-foreclosure loss mitigation efforts were improperly handled, that could not affect Appellants' right to enforce the note and foreclose the mortgage. Importantly, the alleged conduct which Defendants contend gives rise to their claims occurred after Respondents' undisputed default under the terms of the note and mortgage.

It is worth nothing that examination of the gravamen of Respondents' claims reveals that they are spurious and in fact rather appalling. Respondents' claims are based on Appellants' non-acceptance of a \$750,000 settlement and payoff offer by Respondents which would have followed the sale of the property to a willing buyer in March 2012. The sale price per the contract was \$1,125,000, with \$375,000 of those proceeds to be paid to two subordinate lien holders and for realtor commissions. Appellant not surprisingly refused to release the mortgage lien under those terms. Respondents curiously contend that Appellants' non-acceptance of the \$750,000 payoff offer violated the duty of good faith in contractual relations. This argument is wholly untenable given that Appellant no duty under any theory to accept an offer that was at least \$184,292.47 less than the principal balance due under the Note and Mortgage, particularly when the total balance due would have been available from the proceeds of the sale, had Respondents not arranged without Appellants' consent to pay \$375,000 to subordinate lien holders and realtors.

Borrowers have further alleged that it was wrongful or improper for Plaintiff to have refused to modify the mortgage Loan, and that Borrowers were entitled to the modification and

that Plaintiff was obligated to make the modification. Thomas Stevenson admitted in his sworn deposition that at the time he applied for modification of a loan whose balance was over \$900,000, he was unemployed [T. Stevenson Deposition Transcript pp. 103-04], had no assets other than the subject Tradd Street Property [T. Stevenson Dep. Transcr. p. 31], had a \$2 million money judgment against him on which nothing has been paid or is being paid, had a federal and state tax liens of some \$885,000 against him [T. Stevenson Dep. Transcr. p. 89], and had no income whatsoever other than a monthly \$10,000 loan from his son's father-in-law [T. Stevenson Dep. Transcr. p. 91], which Thomas Stevenson acknowledged covered his and his wife's living expenses only and nothing else. [T. Stevenson Dep. Transcr. p. 100]. Thomas Stevenson admitted that he declined to identify or document the source of this personal loan on Borrowers' loan modification application. [T. Stevenson Dep. Transcr. p. 62]. About this, Thomas Stevenson testified, "the contributor does not want to be identified, and, therefore, I understand that the amount of the contribution of 10 -- it's 10,000, cannot be considered." [T. Stevenson Dep. Transcr. p. 95] Thomas Stevenson further acknowledged that when he last made mortgage payments on the subject Loan, the monthly payment was some \$6,300.00. He further testified that the monthly payment he could afford to make if the Loan were to be modified as desired by Borrowers would be "have to be close to \$1500 or a thousand dollars a month." [T. Stevenson Dep. Transcr. p. 100].

At any rate, as Appellants' foreclosure action is centered entirely on the obligations created by the note and mortgage and Respondents' default thereunder, Respondents' legal counterclaims do not and cannot arise from the same transaction or occurrence as Appellants' foreclosure action and are thus necessarily permissive. By asserting these permissive legal claims in the instant foreclosure action, Respondents waived their right to a jury trial. See

Blackburn, 407 S.C. 321 (finding that where the complaint is equitable and the counterclaim is legal and permissive, the defendant waives his right to a jury trial). Furthermore, affirmative defenses raised in response to an equitable cause of action are inherently equitable in nature, and not triable by a jury. See Farley v. Matthews, 186 S.C. 294, 167 S.E. 502 (1933). This being an action for foreclosure of a mortgage and, as such, an action in equity, it was an appropriate matter to be referred to the Master in Equity. See Collier, 244 S.C. 346, 137 S.E.2d 277. Thus, it was error for the circuit court not to strike the jury demand and refer the case. See Pelfrey, 270 S.C. at 695, 244 S.E.2d at 317 ( “[t]he lower court was therefore *in error in refusing the motion of appellant for an order of reference* and in refusing to strike from the amended complaint the phrase ‘the plaintiff demands a jury trial.’”) (emphasis added).

Because Respondents’ claims bear no logical relationship to Appellants’ enforcement of the note and mortgage in this foreclosure action, they are permissive in nature. Accordingly, the Respondents are not entitled to a jury trial in this foreclosure action. The circuit court’s ruling that Respondents’ counterclaims were compulsory counterclaims is reversible error, because Respondents’ claims bear no logical relationship to Appellants’ foreclosure action for enforcement of the note and mortgage.

### CONCLUSION

Respondents have waived their right to a jury trial by bringing permissive counterclaims in an equitable foreclosure action. This Court should reverse the order of the circuit court.

Deutsche Bank National Trust Company, etc.  
v. Thomas C. Stevenson III et al.  
Case No. 2012-CP-10-01844  
Appellate Case No. 2014-001791  
INITIAL BRIEF OF APPELLANT

Respectfully submitted,

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January 5, 2015

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**SC Court of Appeals**

IN THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM CHARLESTON COUNTY

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

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Appellate Case No. 2014-001791  
Trial Court Civil Action No. 2012-CP-10-1844

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Deutsche Bank National Trust Company, as  
Trustee of the IndyMac IMJA Mortgage  
Trust 2007-A2, Mortgage Pass-Through  
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August 1, 2007,

Appellant,

v.

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

Defendants,

Of whom Thomas C. Stevenson III  
And Irven M. Stevenson are

Respondents.

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PROOF OF SERVICE

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I certify that on the 5th day of January, 2015, I served *Initial Brief of Appellants* and the *Designation of Matter to be Included in the Record on 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. Naufal, 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,

Deutsche Bank National Trust Company, etc.  
v. Thomas C. Stevenson III et al.  
Case No. 2014-001791  
PROOF OF SERVICE  
Page 2 of 2

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REPLY TO:  
CHARLESTON LITIGATION

January 5, 2015

The Honorable Jenny Abbott Kitchings  
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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 *Initial Brief of Appellants, Designation of Matter to be Included in the Record on Appeal* and the related *Proof of Service* which we have prepared in connection with the above referenced appeal. It would be greatly appreciated if you would file same and return the file-stamped copies in the enclosed envelope.

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

With warmest regards, I am

Sincerely,

  
Jennifer L. Ellis  
Litigation Paralegal

:jle  
Enclosure

cc: J. Rutledge Young, Jr., Esq.  
Tara E. Naufal, Esq.  
Milton E. Kimpson, Esq.

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