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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court Of Appeals

APPEAL FROM SPARTANBURG COUNTY
Master-in-Equity

Gordon G. Cooper, Master-in-Equity

Case No. 2012-CP-42-3027
Appellate Case No. 2014-000600

Deutsche Bank National Trust Company, as Trustee for Argent Securities, Inc., Asset-Backed Pass-Through Certificates, Series 2004-W11, ... Respondent,

v.

Geary Thomas Dooly and Eleanor S. Dooly ..... Appellants.

AMENDED FINAL BRIEF OF RESPONDENT DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR ARGENT SECURITIES, INC., ASSET-BACKED PASS-THROUGH CERTIFICATES, SERIES 2004-W11

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COUNTER-STATEMENT OF THE CASE

Appellants' Statement of Facts is plagued with numerous distortions and material omissions. Respondent Deutsche Bank National Trust Company, as Trustee for Argent Securities, Inc., Asset-Backed Pass-Through Certificates, Series 2004-W11 ("Respondent" or "Deutsche Bank") therefore sets forth a complete and accurate factual statement as follows:

This is a foreclosure action resulting from Appellants defaulting under the terms of the Note and Mortgage. (Compl.; R. 35–80.) On or about July 30, 2004, Appellants signed a promissory note ("Note") to Argent Mortgage Company, LLC ("Argent") for a $152,800.00 loan secured by a mortgage ("Mortgage") on the property located at 690 Zion Hill Road, Spartanburg, South Carolina (the "Property"). (Compl., ¶¶ 13–14, and Exs. B & C; R. 37–38, 46–63.) The Note was later assigned to Respondent Deutsche Bank, who is the current holder of the Note. (Compl., ¶ 19, and Ex. D; R. 38, 64.) Appellants subsequently defaulted under the terms of the Note and Mortgage, thereby

forcing Deutsche Bank to commence the instant foreclosure action on July 19, 2012 against Appellants. (Compl., ¶ 24; R. 39–40.)

Appellants, proceeding *pro se*, filed an Answer to Deutsche Bank's Complaint asserting the counterclaims for lack of standing and recoupment. (Answer; R. 81–86.) On January 10, 2013, Deutsche Bank filed a motion to dismiss Appellants' counterclaims. (Mot. Dismiss (Jan. 10, 2013); R. 196–197.) This motion was heard before Judge Roger L. Couch, Circuit Court Judge ("Judge Couch") on May 23, 2013. Liberally construing Appellants' pleading, Judge Couch issued an Order dismissing Appellants' counterclaims for failure to state affirmative claims for relief, granting Deutsche Bank's motion to dismiss, and referring this case to the Master-In-Equity. (Order (July 1, 2013); R. 29–34.) Because Appellants were proceeding *pro se*, Judge Couch gave Appellants leave to amend their answer within thirty (30) days of the date of his Order. (Id.; R. 33.) Respondents did not appeal this Order.

In response to Judge Couch's Order, Appellants filed their "3rd Amended Counterclaim, as Answer to Counter/Plaintiff's Complaint" ("3rd Amended Answer and Counterclaims") on June 20, 2013. (Am. Answer; R. 300–344.) The counterclaims contained in Appellants' 3rd Amended Answer and Counterclaims are the same two causes of action— lack of standing and recoupment— asserted in their previous Answer, which were dismissed. (Answer; R. 81–86; Am. Ans.; R. 300–344.)

On July 31, 2013, Appellants filed an untimely Motion to Reconsider, thirty (30) days after Judge Couch issued his July 1, 2013 Order dismissing their Counterclaims. (Mot. Reconsider; R. 345–352.) Because Appellants had asserted the same counterclaims asserted in their previous Answer and Counterclaims that were dismissed by Judge

Couch, Deutsche Bank filed a second motion to dismiss Appellants' counterclaims on August 1, 2013. (Answer; R. 81–86; Am. Answer; R. 300–344; Mot. Dismiss (Aug. 1, 2013); R. 366–368.)

Deutsche Bank requested the Master-In-Equity dismiss Appellants' counterclaims because they are the same counterclaims dismissed by Judge Couch, whose Order was unappealed and constituted the law of the case, and also because Appellants' counterclaims fail to state cognizable claims for relief for the same reasons asserted in Deutsche Bank's first motion to dismiss. (Mot. Dismiss (Aug. 1, 2013); R. 366–368.)

The Honorable Gordon G. Cooper, Master-In-Equity for Spartanburg County ("Master-In-Equity"), held a hearing on December 11, 2013 on Deutsche Bank's Motion to Dismiss. (Order (Dec. 31, 2013); R. 3–8.) The Master-In-Equity issued an Order on December 31, 2013 finding Appellants' counterclaims fail to state a claim for which relief can be granted on the following grounds: (1) Appellants' counterclaims challenging Deutsche Bank's standing and seeking recoupment are the same claims that Appellants asserted in their original Answer and Counterclaims; (2) Judge Couch's July 1, 2013 Order dismissing Appellants' counterclaims was not appealed by Appellants and therefore, constituted the law of the case barring Appellants' counterclaims; and (3) Appellants' counterclaims constitute affirmative defenses under South Carolina law and fail to state affirmative claims for relief. (*Id.*)

This appeal followed.

ARGUMENT

I. APPELLANTS' CLAIMS ARE NOT PRESERVED FOR APPELLATE REVIEW.

A. The Master-in-Equity Did Not Rule on Several Issues Raised by Appellants in This Appeal; Therefore, They Are Not Preserved for Appellate Review and Appellants' Appeal Should Be Denied.

Appellants raise several issues that were not raised or ruled on by the Master-In-Equity. As such, these issues were not preserved for appellate review. Appellants' brief is admittedly difficult to follow, because Appellants are proceeding *pro se*. However, liberally construing Appellants' initial appellate brief, they appear to assert several issues and arguments, which were not presented to or ruled upon by the Master-In-Equity; therefore, those claims are not preserved for appellate review.

Specifically, Appellants assert the following issues and/or arguments, which were not raised or ruled upon by the Master-In-Equity: (1) whether there was "fraud, deception, and bad faith facts throughout the subject case"; (2) whether Deutsche Bank failed to "establish authority and jurisdiction to act on behalf of Deutsche Bank National Trust Company"; (3) whether Deutsche Bank failed "to reply, defend, or comply with the allegations presented in the 3rd Amended Counterclaim, as Answer to Counter Plaintiff's Complaint"; (4) whether the subject case was "referred to Master-In-Equity Court in error due to the Clerk of Court misfiling Appellant's 3rd Amended Counterclaim, as Answer to Counter Plaintiff's Complaint"; (5) whether the Circuit Court failed to hear Appellants' Motion to Reconsider; (6) whether the Master-In-Equity erred in focusing the hearing on "the erroneous statement of Counsel that the 3rd Amended Answer and Counterclaim were identical whereas one consisted of 10 pages, and the 3rd Amended was 111 pages"; (7) whether the Master-in-Equity erred in denying Appellants' motion for an extension at the hearing so that Appellants could prepare an argument for why the claims asserted in the 3rd Amended Answer and Counterclaims where different than the claims dismissed by Judge Couch; (8) whether it was "just for Judge Couch to make a ruling to Dismiss in

favor of the Motion with no argument from the Defendant since he was deprived, by the fraudulent acts of counsel, of document being discussed"; (9) whether Judge Couch erroneously referred the case to the Master-In-Equity due to Appellants' 3rd Amended Answer and Counterclaims being "lost"; (10) whether Judge Couch's failure to hold a hearing on the Motion to Reconsider needs to be "rectified"; (11) whether the "many acts of bad faith, of fraudulent activity on the part of Counsel, as well as unknown 'bad' acts causing harm to the Defendants such as (a) loss of filing, (b) mailing Judge Couch's Order to me at a non-existent address, and others" constitute "grounds to dismiss this entire case"; and (12) whether "Judge Cooper act[ed] in bad faith by conducting the case on biased testimony and statement of false facts made by counsel, and by disallowing Appellant adequate time to review and compare documents." (Appellants' Br. at ii, 6–11.)

First, Appellants failed to present any evidence of wrongdoing by Respondent, and Respondent denies any and all wrongdoing in the instant matter. More importantly, none of the issues raised by Appellants in their appeal were heard or decided by the Master-in-Equity. In ruling upon Deutsche Bank's Motion to Dismiss, the Master-In-Equity heard and decided only two issues: (1) whether the Master-In-Equity had jurisdiction; (2) whether Appellants' counterclaims failed to state claims for which relief can be granted. (Order (Dec. 31, 2013); R. 3–8.)

The Master-In-Equity held that Judge Couch's July 1, 2013 Order vested him with jurisdiction to decide the Motion to Dismiss. (Hearing Tr. 9:6–9, 9:15–16, 19:5–8 (Dec. 11, 2013); R. 17, 27.) Second, the Master-In-Equity dismissed Appellants' counterclaims finding the claims asserted in Appellants Second and Third Amended

Answers and Counterclaims were the same and previously dismissed by Judge Couch; unappealed, Judge Couch's Order became the law of the case. (Hearing Tr. 19:5–15 (Dec. 11, 2013); R. 27; Order 3 (Dec. 31, 2013); R. 7.) The Master-in-Equity further held that Appellants' counterclaims challenging Deutsche Bank's standing to pursue this foreclosure action and seeking recoupment were affirmative defenses and failed to state affirmative claims for relief. (Order at 3 (Dec. 31, 2013); R. 7.)

"It is well settled that . . . an appellate court cannot address an issue unless it was raised to, and ruled upon by, the trial court." Smith v. Phillips, 318 S.C. 453, 455, 458 S.E.2d 427, 429 (1995) (citing Beaufort Cnty. v. Butler, 316 S.C. 465, 451 S.E.2d 386 (1994)); Bank of New York v. Sumter Cnty., 387 S.C. 147, 159, 691 S.E.2d 473, 479 (2010) ("It is axiomatic that an issue cannot be raised for the first time in a post-trial motion."); Transp. Ins. Co. and Flagstar Corp. v. South Carolina Second Injury Fund, 389 S.C. 422, 431, 699 S.E.2d 687, 691 (2010) ("Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court."); Hobbithouser, LLC v. Crosby, No. 2008-UP-339, 2008 WL 9842624 (Ct. App. July 7, 2008) (holding "[b]ecause this argument was not raised to or ruled upon by the master, it is not preserved for our review").

Appellants' appeal raises several issues, which even when liberally construed, were clearly not presented before the Master-In-Equity and were not ruled on by the Master-In-Equity. Therefore, they were not preserved for appellate review and cannot be addressed by this Court. Respondent requests this Court deny Appellants' appeal.

B. Appellants Failed to Sufficiently Argue Their Claims and Have Not Cited Any Legal Authority in Support of Their Claims; Therefore, They Are Not Preserved for Appellate Review and Appellants' Appeal Should Be Denied.

Furthermore, the Court should deny Appellants' appeal based on their failure to sufficiently argue or cite any legal authority in support of their arguments.

Where an "appellant fails to provide arguments or supporting authority for his assertion," "he is deemed to have abandoned this issue." First Sav. Bank v. McLean, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994). "Mere allegations of error are not sufficient to demonstrate an abuse of discretion. On appeal, the burden of showing abuse of discretion is on the party challenging the trial court's ruling." Id.; Tirado v. Tirado, 339 S.C. 649, 655, 530 S.E.2d 128, 131 (Ct.App.2000) (holding that an issue which is not supported by authority or sufficiently argued is not preserved for appellate review).

Here, Appellants fail to cite to any authority in support of their arguments on appeal. The two cases referenced in their argument section do not apply to any argument on appeal. Appellants cite two cases in support of Appellants bringing this appeal *pro se* and the Court must construe liberally all pleadings by Appellants. (Appellants' Br. 6 (citing Hanes v. Kerner, 404 U.S. 520 (1972) (regarding a prisoner's pro se lawsuit); Birl v. Estelle, 660 F. 2d 592 (5th Cir. 1981) (discussing a defendant's pro se habeas corpus action).) Neither of these cases apply to the issues raised by Appellants' appeal.

The only other case cited by Appellants is Connally v. General Construction Co., which is cited in support of their argument that Respondent's failure to respond to "Defendant's Affidavit of Declarations" containing forty-two (42) declarations relating to this case is "acquiescence" to their truth. (Appellants' Br. 5–6 (citing Connally v. Gen. Constr. Co., 269 U.S. 385, 391, 46 S. Ct. 126 (1926).)This case is an injunction lawsuit relating to the enforcement of a wage payment statute and is also inapplicable to the instant case.

Therefore, because Appellants failed to cite to any legal authority, they have failed to preserve all issues raised on appeal and Appellants' appeal should be denied.

II. THE MASTER-IN-EQUITY HAD PROPER JURISDICTION TO HEAR AND RULE ON DEUTSCHE BANK'S MOTION TO DISMISS

A. Judge Couch's July 1, 2013 Order Vested the Master-In-Equity With Jurisdiction

Judge Couch's Order issued on July 1, 2013 vested jurisdiction with the Master-In-Equity to hear and rule on Deutsche Bank's Motion to Dismiss. On the Form 4 of the Order, Judge Couch handwrote the following order, "Counterclaims dismissed and matter is referred to the Master-In-Equity for Spartanburg County." Accordingly, based on the face of the Form 4 Order, this matter was referred to the Master-in-Equity.

B. Any Ambiguity in Judge Couch's Order Is Resolved in Favor of Vesting the Master-In-Equity With Jurisdiction

To the extent that any ambiguity arises from the Order, the handwritten order on the Form 4 controls, as it most clearly establishes Judge Couch's intent. Therefore, the Master-in-Equity had jurisdiction to hear and rule on Deutsche Bank's Motion to Dismiss.

"[I]n construing an ambiguous order . . . , the determinative factor is to ascertain the intent of the judge who wrote the order." Widewater Square Assocs. v. Opening Break of Am., Inc., 314 S.C. 149, 151, 442 S.E.2d 185, 186 (Ct. App. 1994) aff'd as modified, 319 S.C. 243, 460 S.E.2d 396 (1995) (citing Eddins v. Eddins, 304 S.C. 133, 135, 403 S.E.2d 164, 166 (Ct. App. 1991)); Weil v. Weil, 299 S.C. 84, 382 S.E.2d 471 (1989)). Further, "'the interpretation or construction of a judgment must be characterized by justice and fairness.'" Eddins, 304 S.C. at 136, 403 S.E.2d at 166 (quoting 46 Am.Jur.2d Judgments § 73 (1969)).

Here, Judge Couch's handwritten order contained on the face of the Form 4 clearly establishes his intent to transfer the case to the Master-In-Equity. Consequently, the Master-In-Equity had jurisdiction to hear and rule on Deutsche Bank's motion to dismiss and Appellants' appeal should be denied.

III. THE MASTER-IN-EQUITY PROPERLY DISMISSED APPELLANTS' COUNTERCLAIMS

The Master-In-Equity properly dismissed Appellants' counterclaims under SCRCP 12(b)(6). First, the Master-In-Equity correctly found that the counterclaims asserted in Appellants' in their 3rd Amended Answer and Counterclaims challenging Deutsche Bank's standing to pursue this foreclosure action and seeking recoupment are the same claims that Appellants alleged in their original complaint, which Judge Couch dismissed in his Order of July 1, 2013. Appellants did not appeal Judge Couch's order; therefore, this unappealed ruling constitutes the law of the case. Second, the Master-In-Equity agreed with Judge Couch's analysis of South Carolina law and correctly held that Appellants' counterclaims constitute affirmative defenses and fail to state affirmative claims for relief. Therefore, the Master-In-Equity's Order should be affirmed and Appellants' appeal denied.

A. Appellants Asserted the Same Claims in Their Third Amended Answer and Counterclaims That Were Previously Dismissed by Judge Couch's Order; Unappealled, That Order Consitutes the Law of the Case.

The Master-In-Equity correctly found that the counterclaims asserted in Appellants' in their 3rd Amended Answer and Counterclaims challenging Deutsche Bank's standing to pursue this foreclosure action and seeking recoupment are the same claims that Appellants alleged in their original complaint. Judge Couch previously dismissed these claims in his Order of July 1, 2013, finding they constituted affirmative

defenses and failed to state affirmative claims for relief. Unappealed, Judge Couch's order constitutes the law of the case. See ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997) ("There was no appeal of the master's ruling . . . . This unappealed ruling is the law of the case." (citing In re: Morrison, 321 S.C. 370, 468 S.E.2d 651 (1996)); Mickle v. Blackmon, 255 S.C. 136, 142, 255 S.E.2d 548, 550 (1970) (holding "the law of the case means only that neither party can challenge the soundness of the doctrine, where applicable, in subsequent proceedings in the same cause"). Therefore, the Master-In-Equity's Order should be affirmed and Appellants' appeal denied.

B. The Master-In-Equity Properly Dismissed Appellants' Counterclaims for Failing to State Claims for Which Relief Can Be Granted.

The Master-In-Equity, agreed with Judge Couch's December 31, 2013 Order and correctly ruled under South Carolina law that Appellants' counterclaims challenging Deutsche Bank's standing to pursue this foreclosure action and seeking a recoupment constitute affirmative defenses and fail to state affirmative claims for relief.

i. The Master-In-Equity Properly Dismissed Appellants' Counterclaim Challenging Deutsche Bank's Standing Because It Constitutes an Affirmative Defense, Not an Affirmative Claim for Relief.

As an initial matter, Appellants' counterclaim challenging Deutsche Bank's standing to foreclose upon the Property was properly dismissed by the Master-In-Equity because it constitutes an affirmative defense rather than a cognizable claim for relief. (See Glynn v. First Union Nat'l Bank, 912 So.2d 357, 358 (Fla. Ct. App. 2005) ("There is no question that lack of standing is an affirmative defense that must be raised by the defendant . . . ."); Deutsche Bank Nat'l Trust Co. v. Pietranico, 928 N.Y.S.2d 818, 823 (2011) (holding the defendant waived the right to assert standing as a defense by failing

to assert it as an affirmative defense in an answer); Kohout v. Bank of America Home Loans, Civil Action No. 10-02811, 2011 WL 3798222, at *5 (D. Colo. July 29, 2011) (explaining that a debtor's claim challenging the standing of a party's right to foreclose constitutes "a defense to the foreclosure action and not an independent claim for relief").) Indeed, South Carolina does not recognize a freestanding cause of action for robosigning, and Appellants are unable to convert an affirmative defense to Deutsche Bank's allegations into an independent counterclaim where no such cause of action is recognized under South Carolina law. See Cole Vision Corp. v. Hobbs, 394 S.C. 144, 153-54, 714 S.E.2d 537, 542 (2011). Therefore, the Master-In-Equity properly dismissed Appellants' counterclaim for failure to constitute an affirmative claim for relief.

Notwithstanding Appellants' failure to plead an affirmative claim for relief, dismissal of Appellants' claim is warranted because it is well-settled that a debtor lacks standing to challenge an assignment of mortgage to which he was not a party. Under fundamental South Carolina contract law, parties with no connection to a contract do not have standing to challenge the contract. See Windsor Green Owners Ass'n, Inc. v. Allied Signal, Inc., 362 S.C. 12, 17, 605 S.E.2d 750, 752 (Ct. App. 2004) ("Generally, one not in privity of contract with another cannot maintain an action against him in breach of contract, and any damage resulting from the breach of a contract between the defendant and a third party is not, as such, recoverable by the plaintiff." (quoting Bob Hammond Constr. Co. v. Banks Constr. Co., 312 S.C. 422, 424, 440 S.E.2d 890, 891 (Ct. App. 1994)). To the contrary, only intended beneficiaries, not incidental or consequential beneficiaries, can enforce a contract. Goode v. St. Stephens Methodist Church, 329 S.C. 433, 445, 494 S.E.2d 827, 833 (Ct. App. 1997). Numerous courts applying these

fundamental contract-standing principles to mortgage assignments hold that a nonparty to a mortgage assignment lacks standing to challenge it. See, e.g., R.J. Griffin & Co. v. Beach Club II Homeowners Ass'n, 384 F.3d 157, 164 (4th Cir. 2004) (applying South Carolina law); Breus v. McGriff, 413 S.E.2d 538, 539 (Ga. Ct. App. 1991) ("[S]trangers to [an] assignment contract . . . have no standing to challenge its validity."). Indeed, the United States District Court for the District of South Carolina has reached the identical conclusion, reasoning, "Plaintiff is only a party to the Mortgage and, because the Assignment is a separate contract to which Plaintiff is not a party, she cannot question its validity." Reese v. U.S. Bank Nat'l Ass'n, No. 11-2990, 2012 WL 1952819, at *3 (D.S.C. Apr. 30, 2012).

These same traditional contract principles apply when borrowers challenge a mortgage assignment on the ground that it was robosigned. Numerous courts have addressed this issue and found that debtors who were not parties to the documents lack standing to challenge their validity simply because they were robosigned. See, e.g., Neal v. Bank of America, N.A., No. 12–08104, 2012 WL 3638762, at *4 (D. Ariz. Aug. 24, 2012) (rejecting plaintiff's argument that the assignment of the deed of trust and the substitution of trustee are forgeries, were robosigned, and are therefore invalid under state statute because "Plaintiff, who is not a party to either the assignment or the substitution of trustee . . . does not have standing to challenge the validity of these documents"); Javaheri v. JPMorgan Chase Bank, N.A., No. 10–08185, 2012 WL 3426278, at *6 (C.D. Cal. Aug. 13, 2012) (holding that "[w]hile the allegation of robo-signing may be true, . . . [the plaintiff] lacks standing to seek relief under such an allegation," noting "District Courts in numerous states agree"); Kuc v. Bank of America., NA, No. 12-08024, 2012

WL 1268126, at *2 (D. Ariz. Apr. 16, 2012) ("[P]laintiff, as a third-party borrower, does not have standing to challenge the validity of any allegedly 'robosigned' recorded assignments."). As one court explained:

> Contrary to Plaintiff's assertions, robo-signing of the Assignment of Deed of Trust and/or the Appointment of Successor Trustee would not render these agreements—let alone the underlying debt obligation—void *ab initio*. At bottom, the alleged misconduct had no bearing whatsoever upon Plaintiff's obligation to make her mortgage payments. Thus, even assuming *arguendo* that Plaintiff's allegations of robo-signing are now pled with sufficient particularity, these allegations fail to state a claim as a matter of law.

Brodie v. Nw. Trustee Servs., Inc., No. 12-0469, 2012 WL 6192723, at *2–*3 (E.D. Wash. Dec. 12, 2012) (holding that "the allegations of robo-signing . . . fail as a matter of law because plaintiff lacks standing to challenge the allegedly fraudulent agreements" and noting that "[s]everal courts faced with similar allegations of robo-signing have concluded that a borrower lacks standing to challenge an allegedly fraudulent assignment of a deed of trust and/or appointment of a successor trustee").

In this case, Appellants' purported challenge to the Assignment of Mortgage is precisely the type of claim that courts across the country consistently have rejected. It is indisputable that Appellants were not parties to the assignment upon which their counterclaim is based. Because Appellants were not parties to the Assignment of Mortgage, it necessarily follows that they did not incur any cognizable injury as a result of the assignment. Instead, the only injury Appellants face is the foreclosure of their home, which is a direct result of their default under the terms of the Note and Mortgage. Appellants are simply unable to show that robosigning had any impact whatsoever upon their obligation to make their mortgage payments. Thus, because Appellants have no interest in the assignment documents and have incurred no injury as a result of the

assignment, the law is clear that they lack standing to bring claims based upon the Assignment of Mortgage. See Wilson v. JP Morgan Chase Bank, N.A., No. 11-00135, 2012 WL 603595, at *4 (N.D. Ga. Feb. 24, 2012) (citing *Reynolds v. JPMorgan Chase Bank N.A.*, No. 11-311, 2011 WL 5835925, at *3 (M.D. Ga. Nov. 21, 2011) (holding that "[a]side from the fact that plaintiff has alleged no facts whatsoever to show that the Assignment was 'robo-signed,' this claim must fail because 'there is no such cause of action'" under state law)).

Appellants are unable to convert an affirmative defense to Deutsche Bank's allegations into an independent counterclaim where no such cause of action is recognized under South Carolina law. See Cole Vision Corp. v. Hobbs, 394 S.C. 144, 153-54, 714 S.E.2d 537, 542 (2011). Accordingly, the Master-In-Equity correctly dismissed Appellants' counterclaims for failing to state a claim for which relief can be granted, and therefore, the Court of Appeals should affirm the Master-In-Equity's Order and deny Appellants' appeal.

ii. The Master-In-Equity Properly Dismissed Appellants' Counterclaim Seeking Recoupment Because It Constitutes an Affirmative Defense, Not An Affirmative Claim for Relief.

The Master-In-Equity also properly dismissed Appellants' second counterclaim for recoupment, as the Supreme Court of South Carolina has squarely held that no such cause of action exists in South Carolina.

"Recoupment . . . is the right of the defendant to cut down or diminish the claim of the plaintiff in consequence of his failure to comply with some provision of the contract sought to be enforced, or because he has violated some duty imposed upon him by law in the making or performance of that contract." Tuloka Affiliates, Inc. v. Moore, 275 S.C. 199, 202, 268 S.E.2d 293, 295 (1980). The Supreme Court of South Carolina

has observed that "[a] recoupment, unlike a counterclaim, only reduces the plaintiff's claim; it does not allow recovery of an affirmative money judgment for any excess over that claim." Id. A claim for recoupment, therefore, may serve as a defense but it does not constitute a claim for affirmative relief. See id. ("Despite appellants' use of the terms 'second defense and counterclaim,' we are convinced that what was actually pled was not a claim for affirmative relief but rather was in the nature of a recoupment defense."). Because Appellants are simply unable to convert an affirmative defense to Deutsche Bank's allegations into an independent counterclaim where no such cause of action is recognized under South Carolina law, *see* Cole Vision Corp. v. Hobbs, 394 S.C. 144, 153-54, 714 S.E.2d 537, 542 (2011), the Master-In-Equity properly dismissed Appellants' second counterclaim for recoupment. Therefore, the Court of Appeals should affirm the Master-In-Equity's Order and deny Appellants' appeal.

IV. THE MASTER-IN-EQUITY DID NOT ERR IN REFUSING TO CONTINUE THE HEARING.

Appellants' argument that the Master-In-Equity erred in refusing to permit Appellants additional time during the hearing to review Appellants' original and amended Answer and Counterclaims so that they could distinguish between the counterclaims also fails. (*See* Appellant Br. 8.) The South Carolina Supreme Court has clearly held that a "motion for continuance is within the sound discretion of the trial court and the ruling will not be reversed without a clear showing of abuse." First Sav. Bank v. McLean, 314 S.C. 361, 362, 444 S.E.2d 513, 514 (1994) (citing South Carolina Dep't of Soc. Servs. v. Broome, 307 S.C. 48, 413 S.E.2d 835 (1992)). In the instant case, Appellants had notice that Deutsche Bank was moving to dismiss their counterclaims on the grounds that they were the same counterclaims asserted in the original Answer and

Counterclaims, because this argument was contained in Deutsche Bank's Memorandum in Support of Its Motion to Dismiss, which Appellants received seventy-two (72) hours before the Hearing on December 11, 2013. (Resp't Mem. in Supp. Mot. to Dismiss 3; R. 355 ("[L]iberally construing their pleading, Defendants appear to allege the same two (2) causes of action asserted in their initial Answer.").) It was within the Master-In-Equity's discretion to deny Appellants' motion for time to review their pleadings and the Master-In-Equity did not abuse his discretion in doing so. Therefore, Appellants' argument fails and the Court of Appeals should affirm the Master-In-Equity's Order dismissing Appellants' counterclaims and deny Appellants' appeal.

V. PUBLIC POLICY REQUIRES APPELLANTS' APPEAL BE DENIED AND THEIR COUNTERCLAIMS DISMISSED.

As this case drags on toward its second anniversary, the time has come for the court to put a stop to Appellants' bad faith efforts to use legal proceedings solely to delay the foreclosure. Appellants have never denied that they are in default under the terms of the Note and Mortgage. Rather their sole grounds contesting the foreclosure were lack of standing and recoupment, which do not constitute grounds for relief for the reasons discussed in this Brief. The loss of a home is a difficult challenge for all individuals; however, Appellants' baseless legal maneuvers to delay this case and the eminent foreclosure, are an attack on the rights that the legal system is designed to protect. Deutsche Bank has been deprived of twenty-one (21) months of income on the underlying property during the pendency of this action and continues to be damaged by the accruing interest. Furthermore, as the Appellants realize that the inevitable foreclosure is imminent, Deutsche Bank faces an increasing risk that Appellants will damage or defer necessary maintenance on the collateral. Therefore, public policy

supports denying Appellants' appeal and affirming the Master-In-Equity's order dismissing their counterclaims.

CONCLUSION

For the reasons stated, Appellants' issues on appeal are not preserved for appellate review because they failed to sufficiently argue and support their arguments with legal authority, and because the Master-In-Equity did not rule on certain issues. Further, the undisputed facts in the record show clearly that the Master-In-Equity had jurisdiction and properly dismissed Appellants' counterclaims. Finally, public policy supports denying Appellants' appeal and affirming the Master-In-Equity's dismissal of counterclaims. Respondent Deutsche Bank therefore respectfully requests that the Court affirm the Circuit Court's grant of motion to dismiss in its favor and deny Appellants' appeal.

[SIGNATURE PAGE FOLLOWS]

Respectfully submitted,

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Greenville, South Carolina

January 23, 2015

THE STATE OF SOUTH CAROLINA
In the Court Of Appeals

APPEAL FROM SPARTANBURG COUNTY
Master-in-Equity

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Deutsche Bank National Trust Company, as Trustee for Argent Securities, Inc., Asset-Backed Pass-Through Certificates, Series 2004-W11, ... Respondent,

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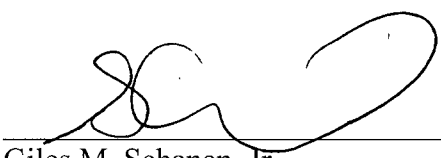
CERTIFICATE OF COUNSEL

The undersigned counsel certified that this Amended Final Brief complies with Rule 211(b), SCACR.

Greenville, South Carolina
January 23, 2015



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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court Of Appeals

APPEAL FROM SPARTANBURG COUNTY
Master-in-Equity

Gordon G. Cooper, Master-in-Equity

Case No. 2012-CP-42-3027
Appellate Case No. 2014-000600

Deutsche Bank National Trust Company, as Trustee for Argent Securities, Inc., Asset-Backed Pass-Through Certificates, Series 2004-W11, ... Respondent,

v.

Geary Thomas Dooly and Eleanor S. Dooly ..... Appellants.

PROOF OF SERVICE

I, the undersigned Senior Paralegal of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Respondent, do hereby certify that I have served all parties in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings: AMENDED FINAL BRIEF OF RESPONDENT DEUTSCHE BANK NATIONAL TRUST COMP ANY, AS TRUSTEE FOR ARGENT SECURITIES, INC., ASSET-BACKED PASS-THROUGH CERTIFICATES, SERIES 2004-WII

Party Served: Geary Thomas Dooly
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January 23, 2014