

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM BERKELEY COUNTY
Court of Common Pleas
R. Markley Dennis, Jr., Circuit Court Judge

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FEB 13 2015

SC Court of Appeals

Case No. 10-CP-08-1707
Appellate Case No. 2013-001531
Opinion No. 2015UP029

HSBC Mortgage Corporation, USA.....Appellant,

v.

Frederick J. Otterbein, IV a/k/a Frederick John Otterbein, IV, Heather H. Otterbein, and
First Federal Savings and Loan Association a/k/a First Federal Savings and Loan
Association of CharlestonDefendants,

Of whom

Frederick J. Otterbein, IV a/k/a Frederick John Otterbein, IV and Heather H. Otterbein,
areRespondents.

PETITION FOR REHEARING

Pursuant to Rule 221, SCACR, HSBC Mortgage Corporation, USA ("HSBC") hereby petitions for rehearing of this Court's January 14, 2015 Unpublished Opinion No. 2015UP029 ("the Opinion") in the above-captioned appeal. The Court should grant rehearing and issue a revised opinion in favor of HSBC striking Respondents Heather H. Otterbein and Frederick J. Otterbein IV's ("Respondents") demand for a jury trial on their counterclaims for breach of contract and negligent misrepresentation and referring this action to the Master-in-Equity for a bench trial based on the grounds set forth herein.

Introduction

The Court held the Respondents are entitled to a jury trial on counterclaims for breach of the covenant of good faith and fair dealing and negligent misrepresentation (the "counterclaims") asserted in response to HSBC's foreclosure suit. The Court's decision was made prior to the recently decided South Carolina Supreme Court's decision in *Carolina First Bank v. BADD, L.L.C.*, which supports HSBC's argument that Respondents' counterclaims are permissive and should, therefore, be tried nonjury. No. 2013-000107, 2015 WL 340791, *3 (S.C. Jan. 28, 2015). Additionally, the Court's holding overlooks prior decisions of our appellate courts which support Respondents' position. Specifically, the Court failed to apply the "logical relationship" test followed in *BADD* which this Court also used in *Wells Fargo Bank, NA v. Smith*, in determining whether counterclaims were compulsory or permissive. 398 S.C. 487, 495, 730 S.E.2d 328, 333 (Ct. App. 2012). Application of the logical relationship test to the facts in this case demonstrates the Respondents' counterclaims are permissive and must be tried nonjury. Finally, the Court failed to determine the "primary purpose" of the relief sought in deciding whether the Respondents' counterclaims were equitable or legal. Precedent requires the Court to determine the "primary purpose" of the relief sought in the counterclaims and had the Court engaged in this analysis, it would have determined the relief sought was equitable and no right to jury trial existed. Accordingly, rehearing is necessary because the Court's decision does not comport with South Carolina law and should be revised to strike Respondents' jury demand on the counterclaims.

Law/Analysis

I. **The Supreme Court's recent decision in *Carolina First Bank v. BADD, L.L.C.* necessitates a rehearing.**

Under South Carolina law, "[i]f the complaint is equitable and the counterclaim legal and compulsory, the defendant has the right to a jury trial on the counterclaim." *Mortgage Electronic Systems, Inc. v. White*, 384 S.C. 606, 614, 682 S.E.2d 498, 502 (Ct. App. 2009) (citing *C & S Real Estate Servs., Inc. v. Massengale*, 290 S.C. 299, 302, 350 S.E.2d 191, 193 (1986)). However, if a defendant asserts a counterclaim which is not legal and compulsory in an equitable action, he waives any right to a jury trial on that counterclaim. *See N. Carolina Fed. Sav. & Loan Ass'n v. DAV Corp.*, 298 S.C. 514, 517, 381 S.E.2d 903, 905 (1989). Foreclosure proceedings are equitable proceedings in South Carolina. *See, e.g., DAV Corp.*, 298 S.C. at 516, 381 S.E.2d at 904.

In the *BADD* case, the Supreme Court analyzed whether a guarantor's counterclaims for civil conspiracy and breach of contract asserted in response to a lender's foreclosure action, including a claim for deficiency judgment, were compulsory or permissive. *BADD*, 2015 WL 340791 at *3. In the context of a foreclosure action, the Court noted that a counterclaim is compulsory if it "arises out of the same transaction or occurrence" and where "there is a '**logical relationship**' between the counterclaim and enforceability of the guaranty agreement." *Id.* (citing *DAV Corp.*, 298 S.C. at 518-19, 381 S.E. 2d at 905-906) (emphasis added). Applying this test to the allegations supporting the guarantors counterclaims for civil conspiracy and breach of contract, the Court found the allegations did not arise out of the same transaction – the execution of the guaranty agreement – but instead arose out of conduct alleging occurring two years after the

execution of the guaranty agreement and which did not affect the enforceability of the guaranty agreement. *Id.* at *3-4. Accordingly, the Supreme Court held the guarantors were not entitled to a jury trial on their counterclaims. *Id.* at *4.

In this case, the transaction forming the basis of HSBC's foreclosure suit included a promissory note and mortgage agreement ("the loan documents") executed on December 21, 2007. As in *BADD*, the alleged wrongful conduct supporting Respondents' counterclaims occurred years later in 2009 and 2010. More importantly, the Respondents' allegations against HSBC do not challenge the enforceability of the loan documents. Instead, Respondents counterclaims are directed at HSBC's post-closing conduct in administering the Home Affordability Modification Program ("HAMP") and other loss mitigation options not provided for in the loan documents. (R. 41, ¶ 24; R. 44, ¶ 38). Notably, the Respondents' counterclaims do not cite a single provision in the loan documents which HSBC allegedly breached or which would support Respondents' counterclaims. The counterclaims do not, therefore, logically relate to the enforceability of the loan documents and HSBC's right to foreclose. Based on the recent decision in *BADD*, HSBC contends a rehearing is warranted and the Court should reverse its decision.

II. The *BADD* decision builds off of pre-existing common law which the Court failed to consider or properly interpret.

Prior to the *BADD* decision, the Supreme Court adopted the "logical relationship" test to determine if counterclaims asserted in a foreclosure action were compulsory or permissive. *See N.C. Fed. Sav. & Loan Ass'n v. DAV Corp.*, 298 S.C. 514, 518, 381 S.E.2d 903, 905 (1989). This Court has likewise used the "logical relationship" test in foreclosure cases to determine whether a counterclaim is compulsory or permissive. *Wells Fargo Bank, NA v. Smith*, 398 S.C. 487, 730 S.E.2d 328

(Ct.App.2012)(depublished, 2014 WL 2887651 (S.C.). Though recently unpublished and of no precedential impact, *Smith* is instructive. In *Smith*, this Court applied the logical relationship test and determined that the defendant's counterclaim for violation of the attorney-preference statute was not logically related to the foreclosure complaint, even though the claims arose out of the same transaction, because a violation of the statute would not affect the enforceability of the promissory note and mortgage. *Id.* at 499, 730 S.E.2d at 334-35. As a result, the Court in *Smith* struck the defendant's jury demand. *Id.* at 499, 730 S.E.2d at 335.

In its Opinion, this Court cited the "logical relationship" test in a string citation but did not provide any analysis as to how the test applied to the facts alleged in Respondents' counterclaims. As argued above, Respondents' counterclaims focus on HSBC's alleged extra-contractual conduct not its conduct under the terms and conditions of the loan documents and thus have no bearing on the enforceability of the loan documents. Given that the Respondents' entered into a permanent loan modification agreement after suit was filed but prior to this appeal, it is undisputed that the enforceability of the loan documents is not at issue. To the extent Respondents have any counterclaims which survived loan modification, those claims are inarguably permissive as the Respondents ratified the loan documents through a modification. Based on the holding in *BADD*, application of the logical relationship test on rehearing will necessitate the Court revise its Opinion and strike Respondents' jury demand.

III. The Court failed to determine the "main purpose" of the relief sought in determining whether the counterclaims were equitable or legal.

Characterization of a claim as equitable or legal depends on the plaintiff's "main purpose" in bringing it. *Smith*, 398 S.C. at 495, 730 S.E.2d at 332 n.4 (*quoting*

Floyd v. Floyd, 306 S.C. 376, 380, 412 S.E.2d 397, 399 (1991)). “[A]n action sounding in law may be transformed to one in equity because equitable relief is sought.” *Ins. Fin. Servs., Inc. v. S.C. Ins. Co.*, 271 S.C. 289, 293, 247 S.E.2d 315, 318 (1978) (citing 1 Am. Jur. 2d, Actions § 7 (1962)); *see also Verenes v. Alvanos*, 387 S.C. 11, 18, 690 S.E.2d 771, 774 (2010) (claim for breach of fiduciary duty, while ordinarily legal, held to be equitable where primary relief sought was restitution and disgorgement); *Crewe v. Blackmon*, 289 S.C. 229, 232-33, 345 S.E.2d 754, 756-57 (Ct. App. 1986) (concluding that although a complaint included allegations of fraud and misrepresentation, the action was one in equity when primary relief sought was equitable in nature). Where the main or primary purpose of a counterclaim in a foreclosure action is to halt the foreclosure, South Carolina courts have characterized the counterclaim as equitable regardless of the legal theory asserted. *See, e.g., Smith*, 398 S.C. at 496-497, 730 S.E.2d at 333 (counterclaim for common law unconscionability deemed equitable where primary purpose was to have mortgage declared void); *White*, 384 S.C. at 614, 682 S.E.2d at 502-3 (counterclaim for fraud deemed equitable where primary relief sought was to have mortgage declared void); *Wells Fargo Bank, N.A. v. Barker*, Op. No. 2012-UP-551 (Ct. App. 2012) (counterclaim for alleged predatory lending deemed equitable where primary purpose was to prevent foreclosure and compel lender to modify loan terms).¹

Though the "main purpose" test was briefed and argued by both sides in this appeal, the Court's Opinion does not address the test. Rather, the Opinion summarily concludes the counterclaims are legal without analyzing the main purpose of the counterclaims and the relief they seek. The entire point of HSBC's appeal on the

¹ While this Court's unpublished decision in *Barker* is not binding precedent, it is informative for purposes of this motion for rehearing.

equitable nature of the counterclaims was to demonstrate that despite pleading legal claims, the Respondents' main purpose was to obtain equitable relief, thus demonstrating the equitable nature of the claims. HSBC contended that Respondents could not convert equitable claims in to legal claims through artful pleading.² The Court's Opinion simply does not address this argument and the above-cited authority supporting HSBC's position.

As HSBC argued in its briefing and at oral argument, Respondents pleading demonstrates the "main purpose" of the counterclaims was to obtain equitable relief. The prayer for relief seeks to "rescind the underlying mortgage transactions" and to "[D]eclare the subject mortgage void". (R. 44-45). Additionally, Respondents request the Court prevent enforcement of the Note and Mortgage and "enjoin the pending foreclosure actions [sic]". (*Id.*). Respondents further request modification of the loan and restitution of allegedly excess payments made to HSBC under the Loan. (R. 42 at ¶ 30). Although Respondents include a request for "damages" in their pleading, the only conceivable damage is any late fees paid to HSBC after the loan modification allegedly should have been granted, i.e. restitution. At their core, the counterclaims seek nothing more than equitable relief. As such, the counterclaims are equitable and the Respondents are not entitled to a jury trial on these claims. *See Smith*, 398 S.C. at 496-497, 730 S.E.2d at 333; *White*, 384 S.C. at 614, 682 S.E.2d at 502; *Barker*, Op. No. 2012-UP-551 at *2. Based on the foregoing, HSBC submits rehearing is necessary in order that the Court apply the "main purpose" test to determine the Respondents main purpose in bringing the counterclaims which, in turn, will necessitate a revised Opinion striking the jury demand.

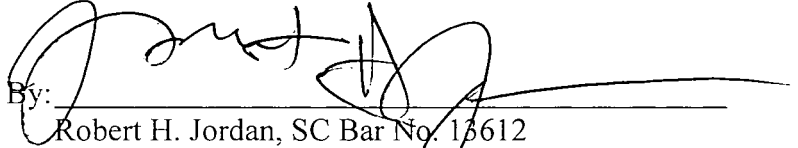
² "Generally...it may be said that the essential character of the cause of action, and the remedy or relief it seeks, as shown by the allegations of the [pleading], determine whether a particular action is at law or equity, **unaffected by the conclusions of the pleader or what the pleader calls it, or the prayer for relief...**". *Rogers v. Nation*, 284 S.C. 330, 332, 326 S.E.2d 182, 183 (Ct. App. 1985) (*quoting Bell v. Mackey*, 191 S.C. 105, 119, 3 S.E.2d 816, 822 (1939)) (emphasis added).

Conclusion

Based on the foregoing arguments of law, rehearing is warranted and the Court should issue a revised Opinion striking Respondents' jury demand on counterclaims for breach of contract and negligent misrepresentation and referring the matter to the Master-in-Equity for a bench trial.

Respectfully submitted,

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Charleston, South Carolina

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PROOF OF SERVICE

I HEREBY CERTIFY that I have served the **PETITION FOR REHEARING** on Respondents and Defendants by depositing copies of it in the United States Mail, postage prepaid, addressed to the below Counsel of Record:

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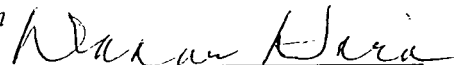
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February 12, 2015

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