

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

APPEAL FROM HORRY COUNTY
Court of Common Pleas

FEB 20 2015

The Honorable Steven H. John, Circuit Court Judge

S.C. Supreme Court

Case No. 2010-CP-26-08505
Appellate Case No. 2013-000107

Carolina First Bank n/k/a TD Bank, NA, Petitioner,

v.

BADD, LLC, William McKown and Charles
A. Christenson, Defendants,

Of whom BADD, LLC and William McKown
are Respondents.

BADD, LLC and William McKown, Third-Party Plaintiffs,

v.

William Rempher, Third Party Defendant.

**PETITIONER TD BANK'S RETURN IN OPPOSITION
TO THE PETITION FOR REHEARING**

Petitioner TD Bank (the "Bank") hereby files this opposition to Respondents' Petition for Rehearing. This Court should summarily deny Respondents BADD, LLC and William McKown's ("Respondents") Petition for Rehearing.

The Court's January 28, 2015 Opinion in *TD Bank, N.A. v. BADD, LLC, et. al*, Op. No. 27486 (S.C. Sup. Ct. filed Jan. 28, 2015) (Shearouse Adv. Sh. No. 4 at 21) (the "Opinion") is correct in every respect. No jury trial rights exist for Respondents in this foreclosure matter for the reasons stated in the Court's Opinion, as the Bank briefed to the Court, as argued at oral argument, and as detailed herein.

Summary of Reasons for Denial

First, Respondents' Petition does not raise a single point of law or case or issue this Court overlooked or misapprehended or failed to consider. Instead, the Opinion corrects the legal errors committed by the Court of Appeals and accurately sets forth the law of this State as it has existed since the adoption of the Constitution of 1868 and as codified by S.C. Code Ann. § 29-3-660. Here, the Bank properly joined its request for a deficiency judgment against the Guarantor William McKown in the foreclosure action as provided by § 29-3-660. This has been permissible since 1791, as accurately noted by this Court. Never has a request for a deficiency judgment in a foreclosure action given rise to a right to a jury trial for a guarantor (or any other party) in a foreclosure action. Instead, as has been the case since 1791, the request for a deficiency arises in equity. The very authorities cited by Respondents in their Petition contradict their argument, as detailed below.

Second, this Court properly determined that the counterclaims for civil conspiracy and breach of contract are permissible as pled in this action and that Respondents waived any right to a jury trial by filing the claims in this foreclosure action. The relief sought would not undo the underlying loan transaction, the facts alleged occurred after the making of the loan thereby demonstrating no logical relationship to the enforceability of the loan obligations, and, therefore, the claims were properly held to be permissible.

Argument

I. The Court correctly held that a request for a deficiency judgment in a foreclosure action lies in equity.

This Court correctly determined that no jury trial rights arise in connection with a request for a deficiency judgment in a foreclosure action—even against a guarantor.

Missing from Respondents' Petition is any authority as to the source of their purported right to a jury trial on a request for a deficiency judgment. This information is lacking because just the opposite is true—no right to a jury trial exists here.

A. *The Act of 1791 contradicts Respondents' position and the guaranty is a debt for monies lent covered by the Act.*

As correctly held by the Court, through the Act of 1791, the South Carolina Legislature changed the nature of a mortgage from that of a conveyance on condition to a lien. *Perpetual Bldg. and Loan Ass'n of Anderson v. Braun*, 270 S.C. 338, 341-42, 242 S.E.2d 407, 409 (1978). This permitted the mortgagee to bring its foreclosure action and request for a deficiency judgment in one action at equity. Thus, at the time of the adoption of The South Carolina Constitution of 1868, no jury trial right existed in a foreclosure action seeking a deficiency judgment in the same action. *See Mims Amusement Co. v. S.C. Law Enforcement Div.*, 366 S.C. 141, 145, 621 S.E.2d 344, 345-46 (2005) (“The right to a trial by jury is guaranteed in every case in which the right to a jury was secured at the time of the adoption of the Constitution in 1868.”). In *McConnell, et al. v. Barnes, et al.*, 142 S.C. 112, 140 S.E. 310 (1927), this Court previously recognized that the Act of 1791 determined that a judgment for deficiency is an incident of the relief sought in a foreclosure action based on the integration of the action for foreclosure and the deficiency after sale.

Respondents suggest that because the word “guaranty” or “guarantor” do not appear in the Act of 1791, the right to a jury trial for a guarantor was unaffected by the change in the nature of foreclosure actions in our State. Such a position ignores the plain language of the Act. The Act addressed “pledge[s] for the payment of the principal and interest due on the debt meant to be secured.” (*See* Petition at Exhibit 2, p. 1.) It was

adopted to provide “for the easier and speedier advancement of justice, in obtaining the payment of debts secured by mortgage” (*Id.* at Exhibit 2, p. 2.) Further, the Act empowered “the judges of the said court to hear all motions, and to make all orders necessary in any cause previous to the hearing and *making the final decree.*” (*Id.* at Exhibit 1, p. 5 (emphasis added)).¹ This power included the ability “to order the sale of the mortgaged property for the satisfaction of the monies secured by the said mortgage” because “the mortgagee as owner of the money lent or *due*, shall be entitled to recover satisfaction for the same out of the land in the manner above set forth.” (Petition at Exhibit 2, pp. 2-3 (emphasis added)). The Act of 1791 clearly contemplated the ability to obtain payment of funds due through a foreclosure action. The Act would encompass guaranties because a guaranty is a promise to make good on funds lent or due and is defined as “a promise to answer for the payment of some debt” *Black’s Law Dictionary* (10th ed. 2014).

B. *S.C. Code Ann. § 29-3-660 provides for the same result contemplated by the Act of 1791.*

1. § 29-3-660 is not unconstitutional.

Respondents, for the first time in this action, imply that S.C. Code Ann. § 29-3-660 is unconstitutional to the extent it deprives the Guarantor of a jury trial right on the request for a deficiency judgment. An issue cannot be raised for the first time on appeal, much less on rehearing. *See, e.g., McClurg v. Deaton*, 395 S.C. 85, 87, 716 S.E.2d 887,

¹ The Act’s inclusion of the well-recognized proposition of law that “suits in equity shall not be sustained in any case where plain and adequate remedy can be had at common law” does not change the power of the courts to determine how much is owed following a foreclosure sale since foreclosure can only be had at *equity*.

888 n.2 (2011) (“It is axiomatic that an issue cannot be raised for the first time on rehearing.”). Thus, the Court should reject any such point on issue preservation grounds.

In addition, Respondents repeatedly refer to 29-3-660 as a “secondary source.” A statute, codified by the General Assembly, is not a secondary source. It is the law of the State of South Carolina which litigants and this Court must follow. *See Bentley v. Spartanburg Cnty.*, 398 S.C. 418, 426, 730 S.E.2d 296, 301 (2012) (“Nevertheless, we [the Supreme Court of South Carolina] are interpreters not legislators and are bound by the language of section 42-1-160 as written.”); *Citizens’ Bank v. Heyward*, 135 S.C. 190, 133 S.E. 709, 713 (1925) (stating that, where the General Assembly has passed a statute, “[t]he General Assembly has spoken . . . and this court has no power to decide otherwise.”).

2. § 29-3-660 provides that the Court will determine the amount of any deficiency following a foreclosure sale of real property.

Consistent with the provisions of the Act of 1791 cited above, today’s Code contains the same structure and provides that the mortgagee is “entitled to recover satisfaction for such money out of the land by *foreclosure and sale according to law.*” S.C. Code Ann. § 29-3-10 (emphasis added). In codifying these rights, the General Assembly then established the mechanism—“according to law”—through which a mortgagee can obtain payment for the money *lent or due* under a mortgage contract—foreclosure sale and deficiency judgment. The General Assembly empowered the court, not a jury, with the duty to determine whether payment for any remaining indebtedness is owed by a mortgagor or guarantor. The Code states:

In actions to foreclose mortgages *the court may adjudge and direct the payment* by the mortgagor of any residue of the mortgage debt that may remain unsatisfied after a sale

of the mortgaged premises in cases in which the mortgagor shall be personally liable for the debt secured by such mortgage *and if the mortgage debt be secured by the covenant or obligation of any person other than the mortgagor the plaintiff may make such person a party to the action and the court may adjudge payment* of the residue of such debt remaining unsatisfied after a sale of the mortgaged premises against such other person and may enforce such judgment as in other cases.

S.C. Code Ann. § 29-3-660 (emphasis added). The Code specifically provides the ability to join the guarantor in the foreclosure action and empowers the court to adjudge payment, as rightly recognized by this Court's Opinion.

The precise grounds offered by Respondents were expressly rejected by this Court in *General Plywood Corp. v. Richard Jones*. 216 S.C. 322, 57 S.E.2d 636 (1950). This Court noted: “[a]ppellant further contends that, since respondent does not waive a deficiency judgment, the matter is for determination by a jury and not referable.” *General Plywood Corp.* at 327, 57 S.E.2d at 638. This Court disagreed and held that “[t]he purpose of the foreclosure is to fully determine the entire controversy while at the same time protecting the rights of all parties, to determine the amount of the debt in order to disburse the proceedings of the sale, and should there be a deficiency, the *Court of Equity* may give relief by way of a personal judgment.” *Id.* (emphasis added).

Similarly, in *Welborn v. Cobb*, the foreclosure complaint was filed against the mortgagor and the mortgagee sought a deficiency against the guarantor in the complaint. 92 S.C. 384, 75 S.E. 691 (1912). The guarantor claimed the Bank improperly named him in the action. *Id.* The Court rejected the argument and held that the mortgagee “had the right to proceed against both at the same time and in the same action.” *Id.* at 387, 75 S.E. at 692-93. The Court found, contrary to the guarantor's arguments, that the action for a

deficiency was properly “united in the complaint.” *Id.* at 388, 75 S.E. at 693. The Court went on to find that the foreclosure complaint “states only one cause of action.” *Id.* In reaching this decision, this Court cited to Section 188 of the South Carolina Code, which provided:

[i]f the mortgage debt be secured by the covenant or obligation of any person other than the mortgagor, the plaintiff may make such person a party to the action, and ***the Court*** may adjudge payment of the residue of such debt remaining unsatisfied after a sale of the mortgaged premises against such other person, and may enforce such judgment as in other cases.

Id. at 387, 75 S.E. at 693 (emphasis added). The quoted provision is identical to the provisions in today’s Code found at Section 29-3-660. Thus, it has long been recognized by this Court that the General Assembly devised a structure by and through which a mortgagee could obtain judgment in a foreclosure action against a guarantor for a deficiency in an action at equity, should such a deficiency remain following the foreclosure sale. This history has its origins from the Act of 1791.

C. *None of the cases now cited by Respondents recognize a right to a jury trial for a guarantor in a foreclosure action when real property interests are affected nor do the cases prohibit the court, sitting in equity, to render the amount due following sale.*

Remarkably, the cases cited by Respondents belie the very points they seek to raise. Respondents’ misapprehension of these authorities gives the impression that the Court “missed” something. It did not.

In *Gray v. Toomer*, the Court of Appeals held the exact opposite of what Respondents offer. The court stated, “[t]he decree in the case before us establishes a sum of money to be due by the defendants in the original bill . . . and not only subjects the land in dispute to the payment of it, ***but also directs that the balance, if any, after the***

sale of the land, shall be paid out of the estate of their testator.” Gray v. Toomer, 39 S.C.L. (5 Rich.) 261 (1852) (quoting Blake & Heyward (Bail. Eq.) 208 (1831)). Based on this conclusion, the court denied the debtor-defendants’ motion for a new trial or non-suit. Id. This result is the same result compelled by this Court’s Opinion in the instant matter.

Similarly, in *Anderson v. Pilgram*, this Court held, “in this State, where the mortgagee, in an action to foreclose, as it is called, is not confined in his remedy to the mortgaged property, but may also obtain a personal judgment—the proceeding being *in personam* as well as *in rem*” 30 S.C. 499, 503, 9 S.E. 587, 588 (1899). Moreover, *Anderson* expressly cited to *Gray v. Toomer* on this point. *Id.* at. 503, 9 S.E. at 588. Hence, like *Gray*, the *Anderson* case is equally unhelpful to Respondents and confirms this Court’s Opinion is correct and has been for over 125 years.

Respondents also trumpet the decision in *Sollee & Warley v. Meugy*. This case is not a foreclosure case. Instead, it is an action involving a personal guaranty on an account for monies advanced for the purchase of goods. *Sollee & Warley v. Meugy*, 17 S.C.L. (1 Bail.) 620 (1830). Any analysis from that case does not address the circumstances of this matter which involves the foreclosure of real property.

Respondents then cite to *McLaurin v. Hodges*, 43 S.C. 187, 20 S.E. 991 (1895) claiming that it demonstrates why a jury trial right exists in a foreclosure action based on a defendants’ defense of usury and counterclaim for repayment of interest. Respondents have misread *McLaurin*. It in fact unequivocally states that no right to a jury trial exists in a foreclosure action no matter the defense or counterclaim:

[i]t seems to us that these two defences [sic] of the defendant are so interwoven in the plaintiff’s mortgage,

which is but a security to the debt, and cannot exist without such debt, that if they subsist, they make up a part of the very entity of the action. That questions of fact arise in equity causes, and have to be decided there, is notorious. And we cannot see why the defendant can demand as a legal right to have them tried apart from the plaintiff's action, which is clearly equitable in its nature.

Id. at 192, 20 S.E. at 993. Thus, *McLaurin* also holds the exact opposite of what Respondents recite as its result. Contrary to Respondents' position, the *McLaurin* court ordered "the cause be remanded to the Circuit Court, for the trial of the whole case in that court on its equity side." *Id.* at 193, 20 S.E. at 993.

II. The Court's Opinion does not alter the Court's prior jurisprudence respecting guaranties.

Respondents claim the Court ignored its past precedent in *C&S Nat'l. Bank of SC v. Lanford*. The Court did not overlook such case law. *Lanford* is a case that involved only an action on a guaranty against a guarantor. *C&S Nat'l. Bank of SC v. Lanford*, 313 S.C. 540, 543, 443 S.E.2d 549, 550 (1994). No foreclosure of real property was sought in that action. *Id.* Thus, all monies owed and due were sought by the bank from the guarantor. Significantly, in *Lanford*, no property was sold, nor were any monies applied from any foreclosure sale prior to rendering a judgment for the deficiency as is sought in this action.

III. Respondents' counterclaims were properly determined to be permissive.

Respondents' counterclaims for civil conspiracy and breach of contract are permissive as pled. Hence, Respondents waived any potential right to a jury trial concerning those claims by filing them in this foreclosure action.

- A. *Every one of Respondents' claims contains a third-party claim, thereby making the claims for civil conspiracy and breach of contract permissive.*

This Court correctly held that all third-party claims are permissive. Respondents' claims are jointly labeled as counterclaims against TD Bank and "cause[s] of action" against the third-party Defendant Rempher for civil conspiracy and breach of contract. (App. 99; 102.) Accordingly, each of these claims is jointly asserted against the third-party Defendant Rempher and the Bank.

The law is clear that all third-party claims are by their nature deemed permissive by the courts. *N.C. Federal Savings and Loan Ass'n v. DAV Corp.*, 298 S.C. 514, 519, 381 S.E.2d 903, 906 (1989) (holding third-party claims brought in a foreclosure action to be permissive); *Tatnall v. Gardner*, 350 S.C. 135, 137, 564 S.E.2d 377, 378 (Ct. App. 2002) (holding all third-party claims to be permissive); *see also* Rule 14(a), SCRCF (providing a defendant *may* implead a third-party (emphasis added)).

Here, by joining each claim against the third-party, Respondents have waived any right to a jury trial on the claims on this basis in addition to the other reasons stated by the Court in its Opinion.

- B. *Neither of the remaining counterclaims logically relate to the enforceability of the note, mortgage, or guaranty in the foreclosure action.*

Respondents continue to contend timing does not matter in determining the relationship of the claims. But for the claims to logically relate under Respondents' theory of the case, timing matters in this action as to whether the underlying transaction is enforceable. *See DAV Corp.*, 298 S.C. 518, 381 S.E.2d at 905 (applying the logical relationship test and determining whether the counterclaims affected the enforceability of the note). Timing is important in establishing whether a logical relationship exists to

determine if the same set of occurrences are involved. For example, in *Mullinax v. Bates*, this Court focused on the timing of events in finding that claims arising subsequent to the execution of the contract had no logical relationship to the enforceability of the contract. 317 S.C. 394, 396, 453 S.E.2d 894, 896 (1995). This Court determined that because of the timing of the events, as pled, no logical relationship between the counterclaims and the foreclosure action existed.

Moreover, the Court correctly determined that the relief sought by the Respondents demonstrates that the damages sought stem not from the transactional documents or underlying obligations, but instead from acts alleged to have occurred in the course of later events that do not affect the enforceability of the note and underlying documents. Respondents essentially allege that through allegedly negligent business management and self-serving control of revenues, Respondents' business counterparts allowed the debt obligations to go into default to Respondents' detriment. (App. 98-105.) The Respondents' theory is that—over a year after the execution of the loan documents—TD Bank engaged in a conspiracy that caused Respondents to default so the bank's alleged co-conspirator could buy the property at the foreclosure sale. (App. 100-102 at ¶¶ 27-37.) As a result of such alleged conduct, the Respondents seek special damages. (App. 102 at ¶ 38.) Respondents then rely on the contractual documents (instead of claiming them to be unenforceable), allege the bank breached the agreements, and seek damages from the alleged breach. (App. 102.) Respondents also allege that TD Bank has interfered with its prospective contractual relationships with potential tenants to rent the units and Respondents seek damages for the alleged tort. (App. 103 at ¶¶ 45, 48.) Last, Respondents claim the alleged co-conspirator mismanaged the properties and breached

his fiduciary duties, causing damage to Respondents. (App. 103-104 ¶¶ 49-53.) Based on these claims, Respondents pray for money damages and costs and fees. (App. 104 WHEREFORE ¶¶ b, c, d.)

Respondents chose to file these claims in this foreclosure action. The act of doing so waived their right to a jury trial on the claims. Simply put, the claims and relief sought do *not* seek to undo the transaction that is the basis for the foreclosure action. No uncertainty exists or could be alleged on these counterclaims and third-party claims and whether they were permissive.

The claims presume the enforceability of the guaranty and the allegations would not undo the transaction. Therefore, Respondents' claims do not have a logical relationship to the enforceability of the transaction and are permissive.

Conclusion

The court should deny the Petition for Rehearing. The Opinion did not overlook or misapprehend any points necessary for resolution of the issues in this matter. The Court should issue the remittitur to permit this equitable action to proceed before the Master-in-Equity.

[signature page attached]

Respectfully submitted,

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Columbia, South Carolina
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v.

William Rempher, Third Party Defendant.

PROOF OF SERVICE

I, the undersigned, of the law offices of Nelson Mullins Riley & Scarborough
LLP, attorneys for Carolina First Bank n/k/a TD Bank, NA, do hereby certify that I have
served all counsel in this action with a copy of the pleading(s) hereinbelow specified by
to the following address(es):

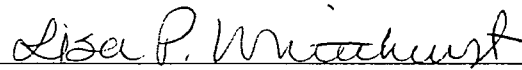
Pleadings:

**Petitioner TD Bank's Return in Opposition to the
Petition for Rehearing**

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February 20, 2015

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S.C. Supreme Court

The Honorable Daniel E. Shearouse
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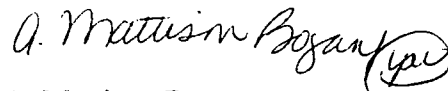
RE: Carolina First Bank n/k/a TD Bank, NA v. BADD, LLC, William McKown and
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Rempher
Horry County Civil Action No. 2010-CP-26-08505
SC Court of Appeals Appellate Case No. 2011-187747
SC Supreme Court Appellate Case No. 2013-000107
Our File No. 04387/01819

Dear Mr. Shearouse:

Enclosed please find the original and seven copies of Petitioner TD Bank's Return in Opposition to the Petition for Rehearing in regard to the above-referenced matter. We would ask that you file the original and return a clocked-in copy to us via our courier.

By copy of this letter to counsel of record, we are serving them with a copy of this return.

Very truly yours,



A. Mattison Bogan

AMB:lpw
Enclosures

cc: Richard R. Gleissner, Esquire
C. Leigh Andrew, Esquire