THE STATE OF SOUTH CAROLINA
In the Court of Appeals

ORIGINAL

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case No. 2014-000377

DRV FONTAINE, LLC, ... Respondent,

v.

FONTAINE BUSINESS PARK, LLC, FONTAINE BUSINESS PARK 2, LLC, FONTAINE BUSINESS PARK 3, LLC, FONTAINE BUSINESS PARK 4, LLC, FONTAINE BUSINESS PARK 5, LLC, FONTAINE BUSINESS PARK 6, LLC, FONTAINE BUSINESS PARK 7, LLC, FONTAINE BUSINESS PARK 8, LLC, FONTAINE BUSINESS PARK 9, LLC, FONTAINE BUSINESS PARK 10, LLC, FONTAINE BUSINESS PARK 11, LLC, FONTAINE BUSINESS PARK 12, LLC, FONTAINE BUSINESS PARK 13, LLC, FONTAINE BUSINESS PARK 14, LLC, FONTAINE BUSINESS PARK 15, LLC, FONTAINE BUSINESS PARK 16, LLC, FONTAINE BUSINESS PARK 17, LLC, FONTAINE BUSINESS PARK 18, LLC, FONTAINE BUSINESS PARK 19, LLC, FONTAINE BUSINESS PARK 20, LLC, FONTAINE BUSINESS PARK 21, LLC, FONTAINE BUSINESS PARK 22, LLC, FONTAINE BUSINESS PARK 23, LLC, FONTAINE BUSINESS PARK 24, LLC, FONTAINE BUSINESS PARK 25, LLC, FONTAINE BUSINESS PARK 26, LLC, FONTAINE BUSINESS PARK 27, LLC, FONTAINE BUSINESS PARK 28, LLC, FONTAINE BUSINESS PARK 29, LLC, FONTAINE BUSINESS PARK 30, LLC, and FONTAINE BUSINESS PARK 31, LLC, ... Appellants.

FINAL BRIEF OF APPELLANTS

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II.

An order from one circuit judge is the law of the case and cannot be reversed by another circuit judge. Here, Judge Lee first ordered that the Plaintiff Investor's Motion for an Order of Reference would be deferred until the legal issues in the case were adjudicated. Accordingly, Judge Cooper's subsequent Order of Reference is invalid and must be reversed.

STATEMENT OF THE CASE

Thirty-two tenants-in-common (collectively, the "Owners")[1] own Fontaine Business Park, an office complex in Columbia, South Carolina which was managed by Fontaine Management, LLC prior to this litigation.[2] The Owners are parties to a commercial loan dating to December 2007 which requires them to maintain certain Reserve Accounts for items such as taxes, insurance, and capital improvements (the "Loan"). The Plaintiff, DRV Fontaine, LLC (the "Investor"), a Maryland entity with no commercial lending expertise or experience, bought the Loan from the original lender in April 2009.[3]

After a short time, the inexperienced Investor demanded increases of 1,037% and 756% to the Owners' monthly contributions to the Capital Expense and Rollover Reserve Accounts, respectively. The Owners immediately objected that these increases were unnecessary and commercially unreasonable. The Owners also made several good faith attempts to resolve the dispute, including the tendering of a voluntary payment of $736,000.00 to supplement the existing balances in the Reserve Accounts. While the dispute over those increases continued, the Investor then demanded an increase of 630% to the Tax and Insurance Reserve Account. The Owners promptly protested that increase as well.

Although the dispute over the commercial reasonableness of the Reserve increases continued and all payments of principal and interest under the Loan had been timely, on November 20, 2012, the Investor filed suit in the Court of Common Pleas for Richland County, South Carolina seeking to foreclose on Fontaine Business Park. (R. 49-50, *Compl.* pp. 26-27; R. 728, *Motion for Order of Ref.*, p. 2; R.

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[1] The tenants-in-common (also known as "TICs") are limited liability companies with the sequentially numbered names Fontaine Business Park, LLC through Fontaine Business Park 31, LLC.

[2] Fontaine Management, LLC is a corporate affiliate of one of the Owners, Fontaine Business Park, LLC.

[3] The Investor's primary business focus is on the acquisition of troubled real estate assets. For further reference, the Owners direct the Court to the Investor's website: http://www.drv-llc.com.

605, *Motion for Appt. of Receiver,* p. 3). The alleged defaults include the Owners' failure to make the increased contributions to the Reserve Accounts, and a related failure to make payments under the Loan after the Investor refused the Owners' request to apply a portion of the $736,000.00 excess reserve funds toward one of their monthly payments of principal and interest. (R. 44-48, *Compl.*, pp. 21-25, ¶¶ 95-126; R. 258, *Answer,* p. 30, ¶ 147).

The Owners answered the Investor's Complaint with numerous affirmative defenses, counterclaims, and a jury trial demand. (R. 252-267, *Answer,* pp. 24-27, ¶¶ 105-113 and pp. 27-39, ¶¶ 116-203; R. 340-342, *Suppl. Counterclaim,* pp. 1-3, ¶¶ 1-14). The Owners also opposed the Motion for Order of Reference and Motion for Appointment of Receiver. (R. 729-731, *Resp. in Opp. Ref.*, pp. 1-3; R. 631-634, *Resp. in Opp. Appt. Receiver,* pp. 1-4).

On February 1, 2013, the Honorable Alison Lee heard the Motion for Order of Reference (R. 733, *Notice of Motion Scheduling,* MORDRE, Jan. 4, 2013) and the Motion for Appointment of Receiver (R. 726, *Notice of Motion Scheduling,* MAPREC, Jan. 4, 2013). At the end of the hearing, Judge Lee took the Motions under advisement (R. 782-783, *Motion Hearing Trans.*, pp. 22-23). Judge Lee then entered her order on June 3, 2013, granting the Motion for Appointment of Receiver. (R. 9-11, *Order Appt. Rec.,* p. 9-11). The parties subsequently agreed to the appointment of CBRE Columbia as the Receiver (*Agreed Order,* pp. 1-2). In her Order Appointing Receiver, Judge Lee held that the Investor's Motion for Order of Reference should be held in abeyance pending resolution of the Owners' legal counterclaims (R. 2, *Order Appt. Rec.*, p. 2).

On August 7, 2013, the Investor filed a Motion to Strike the Owners' jury demand. (R. 350, *Motion to Strike,* p. 1). The Owners timely responded in opposition (R. 567, *Resp. Opp. Motion to Strike,* p. 6). The Motion to Strike was heard on January 13, 2014 before the Honorable G. Thomas Cooper, Jr. (R. 604, *Notice of Hearing,* MSTRIK, Dec. 18, 2013). At the conclusion of the hearing, Judge Cooper took the matter under advisement (R. 759, MSTRIK *Trans.*, p. 26).

In a written Order filed on January 27, 2014, Judge Cooper granted the Investor's Motion to Strike and struck the Owners' jury demand. (R. 20, *Order Granting Motion to Strike,* p. 9). Judge Cooper also referred the case to the Master in Equity (*Id.*), even though the Motion for Order of Reference was not before him, and Judge Lee had previously ordered the Motion for Order of Reference to be held in abeyance. (R. 733, *Notice of Hearing,* MORDRE, Jan. 4, 2013; R. 2, *Order Appt. Rec.*, p 2). The Owners filed a timely Notice of Appeal, bringing these issues to this Court. (R. 348, *Notice of Appeal*, Feb. 27, 2014).

STATEMENT OF THE FACTS

The Owners are the title owners of Fontaine Business Park, an office complex in Columbia, South Carolina which was managed by Fontaine Management, LLC prior to this litigation. The Owners are parties to a commercial loan dating to December 2007 which requires them to maintain certain Reserve Accounts for items such as taxes, insurance, and capital improvements (the "Loan"). The Investor, a Maryland entity with no commercial lending expertise or experience, bought the Loan from the original lender's assignee in April 2009.

After a short time, the inexperienced Investor demanded increases of 1,037% and 756% to the Owners' monthly contributions to the Capital Expense and Rollover Reserve Accounts, respectively. The Owners immediately objected that these increases were unnecessary and commercially unreasonable. The Owners also made several good faith attempts to resolve the dispute, including the tendering of a voluntary payment of $736,000.00 to supplement the existing balances in the Reserve Accounts. While the dispute over those increases continued, the Investor then demanded an increase of 630% to the Tax and Insurance Reserve Account. The Owners promptly protested that increase as well.

1. The Defendant owners of the Fontaine Business Park property (collectively, the "Owners") had an outstanding loan with a lender with substantial experience in commercial lending (the "Loan").

The Owners and the original lender, Greenwich Capital, entered into a loan secured by a Deed of Trust effective December 14, 2007 (the "Loan"). The parties' Loan Agreement established a Capital Reserve Account (R. 79, *Compl.*, Ex. A, *Loan Agreement*, § 3.4, p. 24 ("Loan Agreement"); R. 382, *Motion to Strike*, Ex. A)), a Rollover Reserve Account (R. 79-80, *Loan Agreement*, § 3.5, p. 24), and a Tax and Insurance Account (R. 23, *Loan Agreement*, § 3.3, p. 23), all of which would be funded by monthly contributions from the Owners. The original lender would hold the Reserve Account funds in trust

for the Owners' benefit for the purpose of maintaining Fontaine Business Park and paying the expenses of its operation (R. 77-82, *Loan Agreement*, § 3, pp. 22-27).

The Capital Expense Reserve Account exists to fund the necessary capital improvements to the Business Park (R. 24, *Loan Agreement*, § 3.5, p. 24). The Owners' initial monthly contribution to this Account was $5,249.00 (*Id.*). The lender could reassess and increase the amount of the monthly contribution in its "reasonable discretion" based upon its "then current underwriting standards" (*Id.*).

The Rollover Reserve Account exists to fund Approved Leasing Expenses, including real estate commissions, tenant improvements, and other actual out-of-pocket expenses associated with leasing space at the Business Park (R. 79-80, *Loan Agreement*, § 3.5, p. 24). The Owners made an initial deposit of $750,000.00 to fund the Rollover Reserve Account, and are required to maintain a minimum balance of $250,000.00. Beginning with the thirty-eighth payment under the Loan, the Owners began making monthly payments of $21,086.50 to the Rollover Reserve Account. Under the Rollover Reserve Account provision, the lender may increase or decrease the Owners' monthly payment, if it determines "in its reasonable judgment that the funds in the Rollover Reserve Account will be insufficient to pay (or in excess of) the amounts due or to become due for Approved Leasing Expenses." (R. 79-80, *Loan Agreement*, § 3.5, p. 24.)

The Tax and Insurance Account exists to fund the property taxes and insurance premiums for the Business Park each year (R. 78, *Loan Agreement*, § 3.3, p. 23). Under the original terms of the Loan Agreement, the Owners are required to pay one-twelfth of the taxes and insurance premiums that the lender estimates will be payable during the next year. The lender may increase the Owners' monthly contribution if it "determines in its reasonable judgment" that the funds in the Account will be insufficient to pay the taxes and premiums. Likewise, the lender may decrease the Owners' monthly contribution if the funds in the Account will exceed the amount of taxes and insurance premiums due. (R. 78, *Loan Agreement*, § 3.3, p. 23.)

2. The Plaintiff (the "Investor") had no previous experience or expertise in commercial lending, yet bought the Loan from the original lender as an investment.

Despite its lack of experience in commercial real estate lending, the Investor bought the Loan from the original lender--at a steep discount--in April 2009 (R. 569 & 572, *Memo. Opp. Motion to Strike*, Ex. A, *Deposition of Elliott Liffman*, pp. 14-16, 52 ("Liffman Dep.")). The Investor's principal, Elliott Liffman, had no education, training, or experience as a commercial real estate lender when his company purchased the Loan. (R. 569, *Liffman Dep.*, pp. 14-16). He had no education, training, or experience with underwriting reserve accounts in commercial real estate loans. (R. 569, *Liffman Dep.*, pp. 14-16). He has explained that his understanding of underwriting standards was "formed by [his] experience," although he had no experience from which to draw from when his company acquired the Loan (R. 570, *Liffman Dep.*, pp. 40). Moreover, Mr. Liffman has admitted that his "general interpretation" of underwriting standards is "not in the Loan Agreement" itself (R. 570, *Liffman Dep.*, pp. 37-38), and that he does not refer to the terms of the Loan Agreement to gain an understanding of the applicable underwriting standards (R. 570-571, *Liffman Dep.*, pp. 39-41). For that matter, he does not believe that he needs to be authorized by the Loan Agreement to do anything (R. 577 & 579, *Liffman Dep.*, pp. 139, 146).

3. Shortly after acquiring the Loan, the inexperienced Investor demanded a commercially unreasonable 1,037% increase to the monthly payments to be made to the Capital Expense Reserve Account.

In July 2011, the Investor notified Fontaine Management, LLC ("Management") that it had unilaterally reassessed the Capital Reserve Account. The Loan Agreement authorizes the Investor to reassess the monthly payment to the Capital Expense Reserve Account "in its reasonable discretion (based upon its then-current underwriting standards)" (R. 79, *Loan Agreement*, p. 24, ¶ 3.4; R. 573 & 574, *Liffman Dep.*, pp. 123-124, 127). However, the Investor reassessed the monthly payment to the Capital Reserve Account from the original amount of $5,249.00 to $54,476.34, an increase of 1,037%.

4. **Shortly after acquiring the Loan, the inexperienced Investor also demanded a commercially unreasonable 756% increase to the monthly payments to be made to the Rollover Reserve Account.**

At the same time, the Investor also notified Management that it had reassessed the monthly payment to the Rollover Reserve Account. The Loan Agreement authorizes the Investor "to increase (or decrease)" the monthly deposit to the Rollover Reserve Account "if the Lender determines in its reasonable judgment that the funds in the Rollover Reserve Account will be insufficient to pay (or in excess of) the amounts due or to become due for Approved Leasing Expenses". (R. 79-80, *Loan Agreement*, pp. 24-25, ¶ 3.5; R. 573-574, *Liffman Dep.*, pp. 123-124, 127). When the Investor increased the monthly payment to the Rollover Reserve Account, there were no amounts due, or to become due for Approved Leasing Expenses, and the Account balance was already over $600,000.00. (R. 594, *Memo. Opp. Motion to Strike*, Ex. C, *Deposition of Paula Mathews*, p. 61:19-23 ("Mathews Dep.")). Nevertheless, the Investor increased the monthly payment from the original amount of $21,086.50 to $159,472.91 (R. 592, *Mathews Dep.*, pp. 56:14-17). This reassessment constituted a one-time increase of 756%.

5. **Shortly after acquiring the Loan, the inexperienced Investor also demanded a commercially unreasonable 630% increase to the monthly payments to be made to the Tax and Insurance Reserve Account.**

In April 2012, the Investor notified the Owners that it was increasing the monthly payment to the Tax and Insurance Account from $722.00 to $5,272.97 (R. 909 & 958-961, *Liffman Dep.*, pp. 103:18-123:10 and Ex. 6). This reassessment constituted a one-time increase of 630%. The Investor claimed that the increase was to correct a projected shortfall based upon its unsubstantiated belief that the Owners' insurance premium was going to increase at least 46% from the previous years' premiums (*Id.*). The Owners objected and requested actual figures from their insurance agent (*Id.*). On June 11, 2012, Ronald Guerena of Marsh Risk and Insurance Service advised the Investor that the Owners' premium would increase only slightly (*Id.*). Mr. Guerena projected that the Owners' monthly

payment would be $3,100 (*Id.*). This information was ignored by the Investor, who continued insisting upon the 630% increase. (*Id.*).

6. The Owners immediately objected to the inexperienced Investor's reassessments of these Reserve Accounts as commercially unreasonable and unnecessary.

Upon receipt of the notice from the Investor concerning the reassessments, Management immediately objected to the reassessments on behalf of the Owners. (R. 953, *Liffman Dep.*, p. 165). Management also requested justification and substantiation of the reassessments under the provisions of the Loan Agreement. As Management suspected, the Investor did not reassess the monthly contribution to the Capital Expense Reserve Account based upon any underwriting standards (R. 571-572, 574-576, & 583, *Liffman Dep.*, pp. 44, 52, 127-135, 194; R. 586-589, *Memo. Opp. Motion to Strike*, Ex. B, *Plaintiff's Discovery Responses*, pp. 9-10, 13-14 ("*Discovery Responses*"); R. 593 *Mathews Dep.*, p. 60:22-24). Instead, the Investor based the reassessment on a three-year capital expense budget that it had requested from CBRE Columbia ("CBRE")[4], without providing notice to Management and the Owners as required under the Notice provision of the Loan Agreement. (R. 109, *Loan Agreement*, pp. 54, ¶ 6.1; R. 577-579 & 582, *Liffman Dep.*, pp. 137-146, 172). That budget was based on arbitrary and unrealistic assumptions provided by the Investor intended to maximize Reserve requirements. Consequently, the budget was excessive and hypothetical. Moreover, the budget resulted from the Investor's previous rejection of actual data provided by Management. (R. 592-593, 595-597, 599-601, *Mathews Dep.*, pp. 56:14-17, 57:16-24, 60:17-18, 71:18-24, 72:10-11, 72:19-22, 73:10, 103:17-19, 104:9-11, 109:7-17, 110:7-8, 123:13-18, 125:12-16 & 19, 127:4-11, 128:5-11). Finally, the Investor did not explain to CBRE, Management, or the Owners that it intended to use the theoretical budget to maximize reassessments of the Reserve Accounts. The Investor hid its intentions behind the claim

4 Management delegated the day-to-day operations of the Business Park to CBRE under an agreement, whereby CBRE acted under the direction of and reported to Management.

that it merely wanted to understand what might be expected in the coming years. (R. 577-579 & 582, *Liffman Dep.*, pp. 137-146, 172).

Before receiving the notice of the reassessments, the Owners and Management had no reason to believe that the information in the three-year capital budget would be used for the purpose of reassessing the Reserve Accounts. In other words, no one (other than the Investor) knew that the Investor intended for the theoretical budget to substitute for the "underwriting standards" dictated by the Loan Agreement. Notably, there is no provision in the Loan Agreement for a three-year capital budget, the Investor did not explain its true intentions, and a capital expense budget is not an underwriting standard. (R. 52-72, *Loan Agreement*, pp. (i)-(iii) and § 1 pp. 1-17; R. 577, *Liffman Dep.*, p. 137; R. 597-599 & 603, *Mathews Dep.*, pp. 103:8-13, 104:23-25, 105:10-19, 110:24-25, 188:9-11 & 16-18). In all respects, the Investor clearly was not acting in accordance with generally accepted standards in the commercial real estate lending industry. (R. 592, 597, 600 & 602, *Mathews Dep.*, pp. 53-54, 103:8-13, 124:21-24, 140:8-14 & 18).

7. The inexperienced Investor refused to explain or justify the increased payments to the Reserve Accounts, and threatened default if the Owners failed to comply with its demands.

The Owners repeatedly asked the Investor to justify and substantiate the reasonableness of these reassessments, including a request for a detailed written explanation of the reassessments and the underwriting guidelines upon which the reassessments were based (R. 955, 962 & 957, *Liffman Dep.*, p. 174, Ex. 10; Ex. 3, p. 155; R. 879-880, *Mathews Dep.*, Ex. 1, pp. 7-8). The only explanation the Investor ever provided concerned the increase to the Capital Reserve Account. The Investor explained that the reassessment to the Capital Reserve Account was based upon the three-year capital expense budget, and admitted that it was not based upon any underwriting standards. (R. 573-577, *Liffman Dep.*, pp. 123:11-138:2;R. 597, 892 & 896, *Mathews Dep.*, p. 101, Ex. 3, p. 163, Ex. 6).

The Owners asked the Investor to reassess the Capital Expense Reserve Account based upon accurate information. The Investor refused. The Owners asked the Investor to reassess the Rollover Reserve Account based upon the lack of approved leasing expenses and the current balance of that Account. The Investor refused (R. 962, *Liffman Dep.*, Ex. 10). The Owners asked the Investor to reassess the Tax and Insurance Account based upon information from the Owners' insurance agent. The Investor refused. (R. 873, *Mathews Dep.*, Ex. 1, pp. 6-7;R. 909-938, & 958, *Liffman Dep.*, pp. 103:18-132:10 & Ex. 6.)

8. **Even though all payments of principal and interest had been timely paid by the Owners, the inexperienced Investor subsequently declared the Loan in default because the Owners would not comply with its demands.**

The Investor declared the Owners in default under the Loan Agreement, largely because the Owners did not pay the reassessed monthly contributions to the Reserve Accounts. (R. 44-46, *Compl.*, pp. 21-23, ¶¶ 95-114; R. 242-247, *Answer*, pp. 14-19, ¶¶ 68-84). The Investor then commenced this suit to foreclose upon the Business Park.

ARGUMENT

I. THE OWNERS ARE ENTITLED TO A JURY TRIAL ON THEIR LEGAL COUNTERCLAIMS BECAUSE THE CONTRACTUAL JURY WAIVERS DO NOT EXTEND TO THE OWNERS' COUNTERCLAIMS.

A defendant in a foreclosure action is entitled to a jury trial on legal counterclaims in the absence of a valid waiver. Here, the jury waivers do not apply to the Owners' non-contractual counterclaims, including those for breach of fiduciary duty, economic duress, tortious interference with contractual and business relations, and unfair trade practices. Accordingly, the trial court erred in granting the Plaintiff Investor's Motion to Strike the Defendant Owners' jury trial demand.

Standard of Review

"Whether a party is entitled to a jury trial is a question of law." *Wachovia Bank, Nat. Ass'n v. Blackburn*, 407 S.C. 321, 328, 755 S.E.2d 437, 441 (2014), reh'g denied (Apr. 2, 2014) (quoting *Verenes v.*

Alvanos, 387 S.C. 11, 15, 690 S.E.2d 771, 772 (2010). Appellate courts may decide questions of law with no particular deference to the circuit court's findings. *Id.*

A. Legal counterclaims in an equitable action may require a jury trial.

Although a foreclosure action is an action in equity, "counterclaims—including those raised in equitable actions—may, at times, be entitled to a jury trial." *Id.* at 328-329, 755 S.E.2d at 441. As the South Carolina Supreme Court recently explained: "If the complaint is equitable and the counterclaim is legal and compulsory, the plaintiff or the defendant has a right to a jury trial on the counterclaim unless a valid jury trial waiver exists *that encompasses the counterclaim.*" *Id.* (Italics added.) If such a waiver does not exist, the proper procedure for handling the counterclaims is as follows:

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

Id. at 329-330, 755 S.E.2d at 441-442.

To be valid and enforceable, a jury waiver must be an intentional act and the intention to waive the related right must plainly appear. *Sunamerica Fin. Corp. v. Equi-Data, Inc.*, 299 S.C. 175, 179, 383 S.E.2d 8, 10 (Ct. App. 1989) (citing 47 Am.Jur.2d Jury § 81 at 696 (1969)). The right to trial by jury is a substantial right; therefore, contractual jury waiver provisions are strictly construed using their plain, ordinary, and popular meaning. *Beach Co. v. Twillman, Ltd.*, 351 S.C. 56, 64, 566 S.E.2d 863, 866 (Ct. App. 2002) (citing *N. Charleston Joint Venture v. Kitchens of Island Fudge Shoppe, Inc.*, 307 S.C. 533, 535, 416 S.E.2d 637, 638 (1992), and *Fritz–Pontiac–Cadillac–Buick v. Goforth*, 312 S.C. 315, 318, 440 S.E.2d 367,

369 (1994)). "Waiver of a jury trial . . . will not be implied in doubtful cases, and, in order to create a waiver by implication, unequivocal acts are necessary; further, it has been held that the waiver must of necessity be an intentional act." *Id.* (quoting 50 C.J.S. Juries § 90 at 797 (1947)); *Keels v. Pierce*, 315 S.C. 339, 342, 433 S.E.2d 902, 904 (Ct. App. 1993) (In absence of an express agreement or consent, a waiver of the right to a jury trial will not be presumed).

B. The Owners are entitled to a jury trial on their legal counterclaims that were not waived beforehand in the Loan Documents.

In their Answers, the Owners raised a litany of counterclaims that are quintessentially jury issues. Indeed, the essentia of the counterclaims fall squarely within the province of a jury. Among other things, the Owners have pleaded breach of fiduciary duty, tortious economic duress, tortious interference with contractual and business relations, and unfair trade practices. *Carolina First Bank v. BADD, LLC*, 400 S.C. 343, 733 S.E.2d 619 (S.C.App. Oct. 24, 2012), *certiorari granted* (May 8, 2014) (A defendant in a foreclosure action is entitled to a jury trial on breach of contract claims that are separate and distinct from the foreclosure action); *Verenes v. Alvanos*, 387 S.C. 11, 17, 690 S.E.2d 771, 773 (S.C. 2010) (An action seeking damages for breach of fiduciary duty is an action at law); *Solley v. Navy Federal Credit Union, Inc.*, 397 S.C. 192, 202, 723 S.E.2d 597, 602 (S.C.App. 2012) ("An action in tort for damages is an action at law"); *Byrd v. Livingston*, 398 S.C. 237, 241, 727 S.E.2d 620, 622 (S.C.Ct.App. 2012) ("An action to construe a contract is an action at law"); *Ahrens v. State*, 392 S.C. 340, 347-348, 709 S.E.2d 54, 58 (2011) ("An action seeking damages for breach of contract is an action at law").

The contractual jury trial waivers in the Loan Agreement and Mortgage do not apply to the Owners' counterclaims. The limited waiver in the Loan Agreement states:

> **10.8 Trial by Jury.** Each Borrower and Lender hereby agree not to elect a trial by jury of any issue triable of right by jury, and waive any right to trial by jury fully to the extent that any such right shall now or hereafter *exist with regard to the Loan Documents, or any claim, counterclaim or other action arising in connection therewith.* This Waiver of Right to Trial by Jury is given knowingly and voluntarily by each Borrower and Lender, and is intended to encompass individually each instance and each issue as to which the right to a trial by jury would otherwise accrue.

(R. 129-130, *Loan Agreement*, § 10.8, pp. 74-75) (All caps removed; Italics added.) The limited waiver in the Mortgage states:

> 22. **Waiver of Jury Trial.** Mortgagor hereby agrees not to elect a trial by jury of any issue triable of right by jury, and waives any right to trial by jury fully to the extent that any such right shall now or hereafter *exist with regard to this Mortgage or any other Loan Document, or any claim, counterclaim or other action arising in connection therewith.* This waiver of right to trial by jury is given knowingly and voluntarily by Mortgagor, and is intended to encompass individually each instance and each issue as to which the right to a trial by jury would otherwise accrue. Mortgagee is hereby authorized to file a copy of this Paragraph in any proceeding as conclusive evidence of this waiver by Mortgagor.

(R. 169, *Compl.*, Ex. C, *Mortgage*, § 22, p. 13 ("Mortgage") (All caps removed; Italics added.) Thus, by their plain terms, these waivers apply only to disputes concerning the terms of the "Loan Agreement," the "Mortgage," "any other Loan Document,"[5] and "any claim counterclaim, or other action in connection therewith."

The Owners' counterclaims for breach of fiduciary duty, economic duress, and tortious interference with contract do not exist "with regard to the Loan Agreement," the Mortgage," or "any other Loan Document". (R. 255-267, *Answer of Owner 1*, pp. 27-39; R. 297-309, R. 397-309, *Answer of Owners 2-31*, pp. 27-40). Nor are they connected "therewith." Those counterclaims arise from conduct that is not governed by terms expressed within the four corners of the Loan Agreement, Mortgage, and other Loan Documents. Instead, those counterclaims relate to the Investor's conduct and dealing with the Owners under rights and obligations that arise independently of the contractual agreements between the parties. The same is true of the unfair trade practices claim. All of these counterclaims may be litigated and decided without reference to the terms of the Loan Agreement,

5 In addition to the Loan Agreement and Mortgage, other "Loan Documents" include the related Promissory Note (*Compl.*, Ex. B), an Assignment of Leases and Rents (*Compl.*, Ex. D), an Assignment of Agreements, Licenses, Permits and Contracts (*Compl.*, Ex. E), a Loan Assumption Agreement (*Compl.*, Ex. F), and an Amendment to Loan Assumption Agreement (*Compl.*, Ex. I).

Mortgage, and other Loan Documents; yet they have such a logical relationship to the Loan that the Owners' success would prevent the Investor from foreclosing on the Mortgage.

As previously noted, the waiver provisions must be strictly construed according to their plain language and a waiver cannot be implied if there is any doubt. Here, the plain language of the waiver provisions is specifically tied (and therefore limited) to the "Loan Agreement," "Mortgage," and "Loan Documents." They do not include any language that can be construed as waiving all legal claims arising between the parties. They do not include any language that can be construed as waiving counterclaims for breach of fiduciary duty. They do not include any language that can be construed as waiving counterclaims for economic duress. They does not include any language that can be construed as waiving counterclaims for tortious interference with contractual or business relations. And they do not include any language that can be construed as waiving counterclaims of unfair trade practices. Indeed, the Investor did not make any attempt to demonstrate that those counterclaims "exist with regard to the Loan Documents." (R. 350, *Motion to Strike,* p. 1 ; R. 734-743 & 755-759, *MSTRIK Trans.,* pp. 1-10, 22-26).

The jury waiver at issue in *Wachovia Bank v. Blackburn* provides an insightful contrast. 407 S.C. 321, 325-326, 755 S.E.2d 437, 439 (2014). In that case, the jury waiver provided:

> **Waiver of Jury Trial**. To the extent permitted by applicable law, each of Borrower ... and Bank ... knowingly, voluntarily, and intentionally waives any right each may have to a trial by jury in respect of any litigation based on, or arising out of, under or in connection with this Note, the Loan Documents, or any agreement contemplated to be executed *in connection with this Note, or any course of conduct, course of dealing, statements (whether verbal or written) or actions of any party with respect hereto.* This provision is a material inducement to Bank to accept this Note....

Id. (All caps removed; Italics added). This jury waiver goes beyond the related "Note" and "Loan Documents" and includes, more broadly, "any course of conduct, course of dealing . . . or actions of any party with respect hereto." Relying on that language in particular, the Supreme Court concluded that the sales transaction that preceded the loan was included in the loan's jury waiver provision. *Id.* at

332, 755 S.E.2d at 443. For that reason, the Court concluded that the waiver applied to the defendants' counterclaims. *Id.* The jury waivers at issue in this case do not include language that extends the waivers beyond the terms of the written contracts between the parties. They do not make any reference to the course of conduct or course of dealing between the parties; nor do they refer to "actions of any party" with respect to the course of conduct and course of dealing. Accordingly, the jury waivers here must be construed strictly to claims for breach of the related written contracts.

C. The Investor failed to show that the Owners' counterclaims, which exist independently of the contractual relationship between the parties, are encompassed by the limited jury trial waivers.

The trial court erred in concluding that the Owners were not entitled to a jury trial on their counterclaims--presumably because the Investor was the first to file a complaint. In the trial court, the Investor argued that the Owners' "counterclaims do not change the equitable nature of the foreclosure action" (R. 737, *MSTRIK Trans*, p. 4). In that regard, the Investor's understanding of the governing law was simply incorrect. In fact, the opposite is true. The equitable nature of this foreclosure action does not change the legal nature of the Owners' counterclaims. Under a plain reading of the South Carolina Supreme Court's recent decision in *Wachovia Bank v. Blackburn*, 407 S.C. at 329-330, 755 S.E.2d at 441-442, there is no escaping the conclusion that the trial court erred: "If the complaint is equitable and the counterclaim is legal and compulsory, the plaintiff or the defendant has a right to a jury trial on the counterclaim unless a valid jury trial waiver exists that encompasses the counterclaim."

The trial court also erred in concluding that the waiver applied to the Owners' counterclaims in the absence of any showing in that regard from the Investor. As the movant, the Investor had the burden of showing that each of the Owners' counterclaims fell squarely within the terms of the waivers. The Investor made no such showing. Although the Investor argued generally that the waivers applied to counterclaims, the Investor made no showing that the counterclaims at issue "exist

with regard to the Loan Documents" or that they "exist with regard to the Mortgage or any other Loan Document" (R. 734-743 & 755-759, *MSTRIK Trans.*, pp. 1-10, 22-26). The waivers here expressly apply only to counterclaims raised in connection with the Loan Agreement, Mortgage, and other Loan Documents (R. 129-130, *Loan Agreement*, § 10.8, pp. 74-75; R. 169, *Mortgage*, § 22, p. 13). They do not apply to counterclaims that arise independently of the parties contractual relationship.

D. Even if the contractual jury waivers are otherwise applicable, the Investor should be equitably estopped from enforcing them because of its outrageous conduct.

This is no ordinary foreclosure action. Although the Investor has pleaded its case in the placid verbal veneer of a routine foreclosure action, Owners have demonstrated the rough-hewn reality of this matter through their Answers, Affirmative Defenses, and Counterclaims. The following facts, which have been developed during discovery, demonstrate the Investor's outrageous conduct:

(1) The Investor declared the Owners in default under the Loan Agreement, largely because the Owners did not pay the reassessed monthly contributions to the Reserve Accounts (R. 27-28, *Compl.*, pp. 21-23, ¶¶ 95-114; $. 242-247, *Answer*, pp. 14-19, ¶¶ 68-84).

(2) The Owners have raised various defenses that relate to the inherent invalidity of the reassessments to the Reserve Accounts (R. 252-255, *Answer*, pp. 24-27, ¶¶ 104-114).

(3) The Owners have alleged that the Investor breached the Loan Agreement when it requested a three-year capital expense budget and when it used that budget to reassess the Capital Expense Reserve Account (R. 242-247 & 255-264, *Answer*, pp. 14-19, ¶¶ 68-84 & pp. 27-36, ¶¶ 115-203).

(4) The Loan Agreement only authorizes the Investor to reassess the monthly payment to the Capital Expense Reserve Account "in its reasonable discretion (based upon its then-current underwriting standards)" (R. 79, *Loan Agreement*, p. 24, ¶ 3.4; R. 573-574, *Liffman Dep.*, pp. 123-124, 127).

(5) Elliott Liffman had no education, training, or experience as a commercial real estate lender when the Investor purchased the Loan Agreement (R. 569, *Liffman Dep.*, pp. 14-16).

(6) Mr. Liffman had no education, training, or experience with underwriting Reserve Accounts in commercial real estate loans when the Investor purchased the Loan Agreement (R. 569, *Liffman Dep.*, pp. 14-16).

(7) Mr. Liffman's understanding of underwriting standards was "formed by [his] experience" (R. 570, *Liffman Dep.*, pp. 40).

(8) Mr. Liffman's "general interpretation" of underwriting standards was "not in the Loan Agreement" (R. 570, *Liffman Dep.*, pp. 37-38).

(9) Mr. Liffman did not refer to the terms of the Loan Agreement to gain an understanding of the applicable underwriting standards. (R. 570, *Liffman Dep.*, pp. 39-41).

(10) Mr. Liffman does not believe that he needs to be authorized by the Loan Agreement to do anything. (R. 577 & 579, *Liffman Dep.*, pp. 139, 146).

(11) The Investor did not reassess the monthly contribution to the Capital Expense Reserve Account based upon any underwriting standards. (R. 57, 572, 574-576, & 583, *Liffman Dep.*, pp. 44, 52, 127-135, 194; R. 966-967, *Discovery Responses*, pp. 9-10, 13-14; R. 593, *Mathews Dep.*, p. 60:22-24).

(12) The reassessment of the Reserve Accounts was not the result of the exercise of "reasonable discretion," as required by the Loan Agreement, because they were excessive, hypothetical, and resulted from the Investor's previous rejection of actual data provided by Management. (R. 592-593, 595-597, 599-601, *Mathews Dep.*, pp. 56:14-17, 57:16-24, 60:17-18, 71:18-24, 72:10-11, 72:19-22, 73:10, 103:17-19, 104:9-11, 109:7-17, 110:7-8, 123:13-18, 125:12-16 & 19, 127:4-11, 128:5-11).

(13) The Investor reassessed the monthly payment for the Capital Reserve Account from the original amount of $5,249.00 to $54,476.34. (R. 574 & 580, *Liffman Dep.*, pp. 126-127, 163-164).

(14) The reassessment of the Capital Reserve Account amounted to a one-time increase of 1,037%. (R. 574 & 580, *Liffman Dep.*, pp. 126-127, 163-164).

(15) The Loan Agreement authorizes the Investor "to increase (or decrease)" the monthly deposit to the Rollover Reserve Account "if the Lender determines in its reasonable judgment that the funds in the Rollover Reserve Account will be insufficient to pay (or in excess of) the amounts due or to become due for Approved Leasing Expenses" (R. 79-80, *Loan Agreement*, pp. 24-25, ¶ 3.5; R. 573, *Liffman Dep.*, pp. 123-124, 127).

(16) The Investor increased the monthly deposit to the Rollover Reserve Account from $21,086.50 to $159,472.91. (R. 592, *Mathews Dep.*, pp. 56:14-17).

(17) The increase in the monthly deposit for the Rollover Reserve Account resulted in the imposition of a one-time increase of 756%. (R. 592, *Mathews Dep.*, pp. 56:14-17).

(18) When the Investor increased the monthly deposit to the Rollover Reserve Account, there were no amounts due or to become due for Approved Leasing Expenses and the account balance was over $600,000.00. (R. 594, *Mathews Dep.*, pp. 61:19-23).

(19) The Investor based its reassessment of the Reserve Accounts on a three-year capital expense budget that it requested from CBRE without providing notice to the Owners as required under the Notice provisions in the Loan Agreement. (R. 109, *Loan Agreement*, pp. 54, ¶ 6.1; R. 577-579 & 582, *Liffman Dep.*, pp. 137-146, 172).

(20) Mr. Liffman asked Sandra Johnson of CBRE for the three-year capital expense budget without explaining that he intended to use the budget to reassess the Reserve Accounts while hiding behind the claim that he simply wanted to understand what they expected in the coming years. (R. 577-579 & 582, *Liffman Dep.*, pp. 137-146, 172).

(21) The Owners had no reason to believe that the information would be used to reassess the Reserve Accounts because there is no provision in the Loan Agreement for a three-year capital budget and the Investor did not explain its true intentions. (R. 52-72, *Loan Agreement*, p. (i)-(iii) & § 1, pp. 1-17; R. 577, *Liffman Dep.*, p. 137; R. 597-599 & 603, *Mathews Dep.*, pp. 103:8-13, 104:23-25, 105:10-19, 110:24-25, 188:9-11 & 16-18).

(22) Upon receipt of the notice from the Investor concerning the reassessments, the Owners immediately objected to the reassessments because the reassessments were unreasonable and the three-year capital expense budget was not based upon the Owners' actual expectations. (R. 581, *Liffman Dep.*, p. 165).

(23) When the Investor reassessed the Reserve Accounts, it was not acting in accordance with generally accepted standards in the commercial real estate lending industry. (R. 592, 597, 600 & 602, *Mathews Dep.*, pp. 53-54, 103:8-13, 124:21-24, 140:8-14 & 18).

In these instances, the Owners have shown that the inexperienced Investor has engaged in conduct that is arbitrary, capricious, outrageous, and unconscionable. Moreover, the Investor's unconscionable conduct preceded and procured the Owners' alleged defaults under the Loan Documents. Indeed, the inexperienced Investor was the first party to breach the Loan Agreement when it required the creation of a three-year capital expense budget that was not provided for in the Loan Agreement, failed to do so in writing as required by the Loan Agreement, and used that budget—instead of any underwriting standards—to impose commercially unreasonable increases to the monthly Reserve Account payments. Under these circumstances, the Owners' demand for a jury trial on its counterclaims should be upheld.

"Equitable estoppel precludes a party from asserting rights he otherwise would have had against another when his own conduct renders assertion of those rights contrary to equity." *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 290, 733 S.E.2d 597, 601 (S.C.Ct. App. 2012) (quoting *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 417-418 (4th Cir. 2000)). To allow a party to disregard its obligations under a contract while claiming the benefits of the contract would disregard equity. Here, Mr. Liffman, the Investor's principal, has freely admitted in discovery that his "general interpretation" of underwriting standards was "not in the Loan Agreement" (R. 570, *Liffman Dep.*, pp. 37-38), that he did not refer to the terms of the Loan Agreement to gain an understanding of underwriting standards (R. 570-571, *Liffman Dep.*, pp. 39-41), and that he does not believe that he needs to be authorized by the Loan Agreement to do anything (R. 577 & 579, *Liffman Dep.*, pp. 139, 146). In other words, although the Investor is openly flouting its obligations and essentially re-writing the Loan Documents, it seeks to hold the Owners to strict adherence to those provisions of the Loan Documents that suit the Investor.

The jury trial waivers are just one example. The outrageous increases to the Reserve Accounts is another. The Investor was only authorized to impose commercially reasonable reassessments to the Reserve Accounts. Nevertheless, the Investor imposed increases of 1,037%, 756%, 630% on thirty days' notice. Then, the Investor used the unreasonable increases to substantiate the alleged defaults that preceded this foreclosure action. The improper nature of the Investor's conduct is unprecedented in normal business relationships. Given the Investor's disregard for the terms of the contract, as a general matter, and its disregard for the duty of good faith and fair dealing, in particular, equity dictates that the jury waivers at issue should be avoided.

II. THE ORDER OF REFERENCE IS INVALID UNDER THE LAW OF THE CASE DOCTRINE BECAUSE ONE CIRCUIT JUDGE HAD ALREADY DECIDED THAT THE MOTION WOULD NOT BE HEARD UNTIL ALL LEGAL ISSUES ARE RESOLVED.

An order from one circuit judge is the law of the case and cannot be reversed by another circuit judge. Here, Judge Lee first ordered that the Plaintiff Investor's Motion for an Order of Reference would be deferred until the legal issues in the case were adjudicated. Accordingly, Judge Cooper's subsequent Order of Reference is invalid and must be reversed.

One circuit judge has no power to review, revise, or reverse the decision of another circuit judge of the same court upon the same facts. *Ex parte State*, 263 S.C. 363, 210 S.E.2d 600, 601-602 (1974); *Cook v. Taylor*, 272 S.C. 536, 252 S.E.2d 923 (1979); *Department of Social Services v. Laura D.*, 386 S.C. 382, 688 S.E.2d 130 (2009). The ruling of the first judge is binding on all parties and, when left unappealed, becomes the law of the case. *Ex parte State*, at 601; see also *Enoree Baptist Church v. Fletcher*, 287 S.C. 602, 603, 340 S.E.2d 546, 547 (1986) (finding a circuit court judge cannot deny the use of an amended complaint in light of an order of another circuit court judge that permitted use of the amended complaint); see *Eldridge v. Eldridge*, 398 S.C. 113, 728 S.E.2d 24 (2012); *Richland County v. Palmetto Cablevision*, 261 S.C. 222, 199 S.E.2d 168 (1973) (stating an unchallenged ruling, right or wrong, is the law of the case).

Here, the Investor's Motion for Order of Reference was heard by Judge Alison Lee on February 1, 2013, and taken under advisement. (R. 733, *Notice of Motion Scheduling,* MORDRE, Jan. 4, 2013; R. 782-783, *Motion Trans.*, pp. 22-23). In the Order Appointing Receiver, Judge Lee ruled: "The Court declined to hear Plaintiff's Motion for Order of Reference pending the resolution of the legal claims asserted in this matter" (R. 2, *Order Appt. Rec.*, p. 2). That aspect of Judge Lee's decision has not been challenged by any party.

Thereafter, the Investor's Motion to Strike Jury Demand was heard before Judge G. Thomas Cooper, Jr. (R. 604, *Notice of Motion Scheduling*, MSTRIK, Dec. 18, 2013; R. 734, MSTRIK *Trans.*, Jan. 13, 2014). Although the Motion for Order of Reference was not before Judge Cooper, in granting the Investor's Motion to Strike, Judge Cooper further ordered that "the case should be referred to the Master-in-Equity for Richland County pursuant to Rules 71 and 53, SCRCP" (R. 20, *Order Granting Motion to Strike*, p. 9). Because Judge Lee had already ruled that Investor's Motion for Order of Reference would not be heard until the legal issues in the case were first resolved, Judge Cooper's order amounts to a review of the order of another circuit judge and improper reversal of that order.

The case of *Cook v. Taylor*, 272 S.C. 536, 252 S.E.2d 923 (1979) is directly on point. There, the South Carolina Supreme Court explained:

> . . . the defendant's attorney procured from Circuit Judge Klyde Robinson an order of reference to the master in equity. Upon learning of the order, counsel for the plaintiff moved before Circuit Judge Paul M. Moore to set aside the order of reference, " . . . on the ground that there are legitimate issues for determination by a jury." The motion came to be heard before Judge Moore, resulting in his order vacating the order of Judge Robinson; he then directed that the case be placed on the jury docket for trial.

Cook v. Taylor, 272 S.C. 536, 537, 252 S.E.2d 923, 924 (1979). On those facts, the Supreme Court held:

> The order of Judge Moore amounted to a review by him of the order of another circuit judge (Judge Robinson) and a reversal of the order of Judge Robinson because Judge Moore disagreed as to the proper mode of trial. Judge Moore did not have the power to set aside the order of his predecessor

Id. at 538, 252 S.E.2d at 924. Accordingly, the Supreme Court set aside Judge Moore's order. *Id.* This Court should do the same with Judge Cooper's Order of Reference, which effectively set aside Judge Lee's Order.

CONCLUSION

Premises considered, the Order Granting the Motion to Strike should be reversed, and this matter should be remanded for a jury trial. Alternatively, and in accordance with the law of the case, this matter should be remanded for a resolution of all legal issues before the Motion for Order of Reference is heard.

Date: January 30, 2015.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case No. 2014-000377

DRV FONTAINE, LLC, ... Respondent,

v.

FONTAINE BUSINESS PARK, LLC, FONTAINE BUSINESS PARK 2, LLC, FONTAINE BUSINESS PARK 3, LLC, FONTAINE BUSINESS PARK 4, LLC, FONTAINE BUSINESS PARK 5, LLC, FONTAINE BUSINESS PARK 6, LLC, FONTAINE BUSINESS PARK 7, LLC, FONTAINE BUSINESS PARK 8, LLC, FONTAINE BUSINESS PARK 9, LLC, FONTAINE BUSINESS PARK 10, LLC, FONTAINE BUSINESS PARK 11, LLC, FONTAINE BUSINESS PARK 12, LLC, FONTAINE BUSINESS PARK 13, LLC, FONTAINE BUSINESS PARK 14, LLC, FONTAINE BUSINESS PARK 15, LLC, FONTAINE BUSINESS PARK 16, LLC, FONTAINE BUSINESS PARK 17, LLC, FONTAINE BUSINESS PARK 18, LLC, FONTAINE BUSINESS PARK 19, LLC, FONTAINE BUSINESS PARK 20, LLC, FONTAINE BUSINESS PARK 21, LLC, FONTAINE BUSINESS PARK 22, LLC, FONTAINE BUSINESS PARK 23, LLC, FONTAINE BUSINESS PARK 24, LLC, FONTAINE BUSINESS PARK 25, LLC, FONTAINE BUSINESS PARK 26, LLC, FONTAINE BUSINESS PARK 27, LLC, FONTAINE BUSINESS PARK 28, LLC, FONTAINE BUSINESS PARK 29, LLC, FONTAINE BUSINESS PARK 30, LLC, and FONTAINE BUSINESS PARK 31, LLC, ... Appellants.

CERTIFICATE OF COUNSEL

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

This 30th day of January 2015.

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PROOF OF SERVICE

We certify that a copy of the Final Brief of Appellants was served on counsel for Appellee on January 30, 2015, by U.S. Mail, postage prepaid, addressed to Paul D. Murrill and Robert L. Widener, P.O. Box 11390, Columbia, S.C. 29211.

This 30th day of January 2015.

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