

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

Case No. 2012-CP-10-01844

Deutsche Bank National Trust Company, as Trustee of the IndyMac IMJA Mortgage Trust 2007-A2, Mortgage Pass-Through Certificates, Series 2007-A2 Under the Pooling and Servicing Agreement dated August 1, 2007,

Appellant,

v.

Thomas C. Stevenson, III and Irven M. Stevenson, National Bank of South Carolina n/k/a Synovus Bank, South Carolina Department of Revenue, and OneWest Bank FSB, including its division known as Indy Mac Mortgage Services,

Defendants,

Of whom Thomas C. Stevenson, III and Irven M. Stevenson are the Respondents.

INITIAL BRIEF OF RESPONDENTS

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STATEMENT OF ISSUE ON APPEAL

I. WHETHER THE TRIAL COURT ERRED IN RULING THAT RESPONDENTS HAD A RIGHT TO A JURY TRIAL ON THEIR COMPULSORY COUNTERCLAIMS.

STATEMENT OF THE CASE

Appellant originally filed a non-jury mortgage foreclosure action against Thomas C. Stevenson, III and Irven M. Stevenson (the "Stevensons"), among others, in the Charleston County Court of Common Pleas on March 16, 2012. Appellant amended its pleadings on November 21, 2013. (Amended Summons and Complaint). The Stevensons answered and counterclaimed for violation of the South Carolina Unfair Trade Practices Act, breach of duty of good faith, negligence, and conspiracy on December 6, 2013. (Answer and Counterclaims). On May 6, 2014, the Stevensons moved to transfer their Counterclaims to the jury roster and the trial court granted this motion on August 14, 2014 (the "Order"). (Motion to Transfer and August 14, 2014 Order). Appellant appealed the Order on August 21, 2014. (Notice of Appeal). On September 22, 2014, Respondents moved to dismiss this appeal for lack of appellate jurisdiction. (Motion to Dismiss). On October 24, 2014, the Court denied Respondents' motion but invited this issue to be addressed again on appeal.

STATEMENT OF THE FACTS

On July 6, 2007, the Stevensons signed a note secured by a mortgage on their primary residence at 173 Tradd Street in Charleston, South Carolina. (Note). In 2010, due to business reversals and financial hardship, the Stevensons were unable to pay the mortgage payments due on their primary residence and did not make any payments after April 1, 2011. (Answer, Countercls. & Third-Party Compl. ¶ 23).

Appellant and Plaintiff in the underlying action, Deutsche Bank National Trust Company, as Trustee of the IndyMac IMJA Mortgage Trust 2007-A2, Mortgage Pass-Through Certificates, Series 2007-A2 under the Pooling and Servicing Agreement dated August 1, 2007 ("IndyMac Mortgage Trust") was assigned the note and mortgage at issue in this case from the original lender IndyMac Bank, F.S.B. ("IndyMac Bank"). (Compl. ¶ 11-13, 17).

The federal government took control of IndyMac Bank in July 2008 in what was deemed at the time to be the second largest bank failure in United States history. (*Id.*). On July 11, 2008, IndyMac Bank was closed by the Office of Thrift Supervision and the FDIC was named Conservator. (*Id.*). On March 19, 2009, the FDIC sold IndyMac Bank to OneWest Bank and OneWest became the loan servicer of the Stevensons' IndyMac loan. (*Id.*). There are several other liens against the Stevensons' home, including liens of National Bank of South Carolina ("NBSC") and the South Carolina Department of Revenue ("SCDOR"). (*Id.* at ¶ 34).

The Stevensons' home was listed for sale on June 15, 2011, as part of a written Settlement Agreement with NBSC, which had a second lien on the property. (*Id.* at ¶ 35). No offers were made on the property for six months and the listing price was

subsequently reduced to \$1,295,000 in January of 2012. (*Id.* at ¶ 36). In February 2012, the Stevensons received the first and only offer to purchase the property for \$1,125,000 from a qualified and willing buyer. (*Id.* at ¶ 37). The Stevensons entered into a written Agreement to Buy and Sell Residential Real Estate on February 29, 2012, which Agreement was contingent on approval of the sale by the holder of all of the liens on the property. (Agreement to Buy and Sell Residential Real Estate). One week later, on March 6, 2012, Appellant filed this foreclosure action. (Compl.).

The Stevensons negotiated the lien held by NBSC (\$250,000 lien reduced to \$200,000) as well as the lien held by the SCDOR (\$57,500 for partial release of a \$219,000 tax lien). (HUD-1 Settlement Statement). The real estate agents and their attorneys and were able to negotiate a release of all secondary liens as well as a reduction in real estate commissions for the total sum of \$375,000—leaving a total of \$750,000 available to be paid to Appellant. (*Id.*). The closing was scheduled to occur before May 16, 2012. (Answer, Countercls. & Third-Party Compl. ¶ 40).

After extensive and intense negotiations with Appellant and the other lienholders to mitigate everyone's losses, all of the other lienholders agreed to take substantial discounts on their liens in order to allow the sale of the Stevensons' home to close. (*Id.* at ¶ 41). Because 173 Tradd Street was the Stevensons' primary residence, the lenders had state and federal duties to mitigate their losses by modifying their liens, which was done by all of the lenders and lienholders except for Appellant. (*Id.* at ¶¶ 41, 57). Even though Appellant knew its refusal to negotiate a reasonable settlement would result in the real estate contract being terminated by the buyer, Appellant refused to negotiate in good

faith and refused to agree to accept a reduced amount on the first mortgage lien so that the sale could be closed. (*Id.* at ¶ 58).

In response to the foreclosure action, the Stevensons counterclaimed that Appellant failed to reasonably and in good faith engage in loss mitigation efforts, failed and refused to comply with various federal rules and guidelines regarding loss mitigation and failed to comply with a South Carolina Supreme Court Order requiring mortgagors and mortgagees to negotiate and, when possible, consummate loss mitigation deals. (*Id.*; Supreme Court Order Dated May 2, 2011).

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 (citing *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.*

ARGUMENT

I. This appeal should be dismissed as interlocutory because Appellant is not entitled to a non-jury trial as a matter of right.

Because the trial court's Order granting the Stevensons' motion to transfer their counterclaims was interlocutory, it is not immediately appealable. The Court should dismiss this appeal for lack of jurisdiction. *See Brown v. Greenwood School Dist. 50 Bd. of Trustees*, 344 S.C. 522, 524-25, 544 S.E.2d 642, 643 (Ct. App. 2001) (dismissing an appeal because “[w]here an order is interlocutory, and thus not appealable, the notice of intent to appeal does not transfer jurisdiction to the [appellate] [c]ourt . . .”).

To be immediately appealable, a trial court order must deprive Appellant of a mode of trial to which it is entitled as a matter of right. “An order denying a party a jury

trial is not immediately appealable unless it deprives him of a mode of trial to which he is entitled as a matter of right.” *Brown*, 344 S.C. at 524, 544 S.E.2d at 643 (quoting *C & S Real Estate Servs. v. Massengale*, 290 S.C. 299, 300, 350 S.E.2d 191, 192 (1986)); see also *Hagood v. Sommerville*, 362 S.C. 191, 196, 607 S.E.2d 707, 709 (2005).

While a party may have a right to a jury trial, a party does not have a right to a non-jury trial. Our courts have previously held only that “[o]rders of the trial judge denying a request for a jury trial involve the mode of trial, affect substantial rights under section 14-3-330(2) . . . and are immediately appealable.” *Bateman v. Rouse*, 358 S.C. 667, 674, 596 S.E.2d 386, 389-90 (Ct. App. 2004) (emphasis added); see also *Senter v. Piggly Wiggly Carolina Co.*, 341 S.C. 74, 78, 533 S.E.2d 575, 577 (2000) (“The majority of cases requiring immediate appeal involve review of denials of trial by jury and are based on the public policy consideration of advancing the constitutional mandate to preserve the right to trial by jury inviolate”); *Lester v. Dawson*, 327 S.C. 263, 266, 491 S.E.2d 240, 241 (1997) (distinguishing between denial of trial by jury as of right and by judicial discretion, and holding that the former is immediately appealable while the latter is not). Even when a party has failed to make a timely motion for a jury trial, such failure does not create a right to a non-jury trial that renders a trial court’s ruling on such a motion immediately appealable. See *Hannah v. United Refrigeration Servs., Inc.*, 305 S.C. 394, 394, 409 S.E.2d 360, 361 (1991) (“A party’s failure to make a timely demand for a jury trial does not mean the opposing party acquires a right to have, as a matter of law, a non-jury trial”).

Because Appellant has no right to a non-jury trial with respect to the Counterclaims, the Order did not affect a substantial right of Appellant. This appeal is thus interlocutory and should be dismissed for lack of appellate jurisdiction.

II. Respondents are entitled to a jury trial because their Counterclaims are compulsory and logically related to Appellant's claims for relief.

Even if this Court determines that the Order is immediately appealable, Respondents' right to jury trial with respect to their Counterclaims is firmly grounded in established law. The Court should affirm the trial court's Order transferring Respondents' Counterclaims to the jury roster.

Pursuant to Rule 13(a) of the South Carolina Rules of Civil Procedure, a defendant is required to plead as a counterclaim any claim arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim. *See* Rule 13(a), SCRPC. It is undisputed that Respondents' Counterclaims for violation of the South Carolina Unfair Trade Practices Act, breach of duty of good faith, negligence, and conspiracy are all legal counterclaims. *Plantation Fed. Bank v. Gray*, 401 S.C. 507, 509, 737 S.E.2d 515, 516 (Ct. App. 2013) (holding counterclaims for breach of contract, breach of fiduciary duty, and violations of the South Carolina Unfair Trade Practices Act were compulsory legal counterclaims when brought in a foreclosure action).

The trial correctly determined that Respondents' counterclaims are compulsory, and as such Respondents are "entitled to a jury trial on these compulsory counterclaims if legal in nature even though asserted in an equitable action." *Messengale*, 209 S.C. at 301, 350 S.E.2d at 192; *see also Johnson v. South Carolina Nat'l Bank*, 292 S.C. 51, 55-56, 354 S.E.2d 895, 897 (1987) ("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”); *Plantation Fed. Bank*, 401 S.C. at 510, 737 S.E.2d at 517 (citing *Johnson* to hold defendants entitled to jury trial on compulsory legal counterclaims in foreclosure action).

Further, the trial court was within its discretion to order that Respondents’ Counterclaims be transferred to the jury roster and tried before the foreclosure action. (August 14, 2014 Order). The Supreme Court recently addressed the appropriate framework for determining when counterclaims may be submitted to a jury. *Wachovia Bank, N.A. v Blackburn*, 407 SC 321, 330-31, 755 S.E.2d 437, 441-42 (2014). The Court clarified the “the proper analysis for determining the trial of legal and equitable issues in complaints and counterclaims,” if the complaint is equitable and the counterclaim is legal and compulsory, a party has a right to a jury trial on the counterclaim unless a valid jury trial waiver exists that encompasses the counterclaim. *Id.* at 329, 755 S.E.2d at 441. The proper procedure for addressing 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.

407 S.C. at, 330, 755 S.E.2d at 442.

The merits of this appeal turn on whether the Counterclaims are compulsory or permissive. “By definition, a counterclaim is compulsory only if it arises out of the same transaction or occurrence as the opposing party's claim.” *Wells Fargo Bank, N.A. v. Smith*, 398 S.C. 487, 495, 730 S.E.2d 328, 332–33 (Ct. App. 2012). South Carolina has adopted the “logical relationship” test to determine whether a counterclaim is compulsory under this definition. *Blackburn*, 407 S.C. at 331, 755 S.E.2d at 442 (citations omitted). Under this test, “the ‘logical relationship’ determination is made by asking whether the counterclaim would affect the lender's right to enforce the note and foreclose the mortgage.” *Id.* If the defendant's prevailing on his counterclaim would affect a bank's right to enforce the note and foreclose the mortgage, there is a logical relationship between the counterclaim and the underlying suit, and the counterclaim is therefore compulsory. *Id.*; *see also N.C. Fed. Sav. & Loan Ass'n*, 298 S.C. 514, 518-19, 381 S.E.2d 903, 905 (1989) (holding counterclaims involving breach of an oral agreement purporting to modify a note that the bank was foreclosing on were logically related to the enforceability of the note and thus were compulsory); *Wells Fargo Bank*, 398 S.C. at 496, 730 S.E.2d at 333 (holding a counterclaim alleging a note was unconscionable was logically related to the enforceability of the note and thus was compulsory).

Appellant contends that the foreclosure claim and Respondents’ Counterclaims are separate transactions which are not logically related. The United States Supreme Court addressed the definition of “transaction” and the scope of the logical relationship test:

‘Transaction’ is a word of flexible meaning. It may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical

relationship. ... Essential facts alleged by appellant enter into and constitute in part the cause of action set forth in the counterclaim. That they are not precisely identical, or that the counterclaim embraces additional allegations ... does not matter.

Moore v. New York Cotton Exch., 270 U.S. 593, 610, 46 S. Ct. 367, 371 (1926).

Here, there is a logical relationship between the foreclosure action and the Counterclaims. The factual basis for the Counterclaims stems directly from Appellant's conduct in failing to modify the note or otherwise work with Respondents to avoid the necessity of the foreclosure action. As the basis for the foreclosure action, the note, the default on the note, and the parties' subsequent dealings with regard to the note—altogether—constitute one transaction. The transaction began when the note was signed and continued throughout default and foreclosure, during which Appellant's refusal to negotiate in good faith gave rise to the Counterclaims.

The Record plainly demonstrates that the “essential facts alleged by appellant constitute in part the cause of action set forth” in the Counterclaims. *Moore*, 270 U.S. at 610, 46 S. Ct. at 371. The allegations of Appellant's negligence and bad faith would not have occurred absent execution of the note, default and foreclosure. In other words, if the Stevensons did not default on the note, there would have been no foreclosure, no proposed loan workouts, nor any negligent acts of Appellant giving rise to the Counterclaims. Given South Carolina courts' flexible definition of “logical relationship,” the law clearly entitles the Stevensons to a jury trial on their Counterclaims. *See N.C. Fed. Sav. & Loan Ass'n*, 298 S.C. at 518-19, 381 S.E.2d at 905 (allegations of an oral agreement purporting to modify a note were logically related to the enforceability of the

note); *Wells Fargo Bank*, 398 S.C. at 496, 730 S.E.2d at 333 (allegations that note was unconscionable were logically related to the enforceability of the note).

Further, the Supreme Court's Order of May 2, 2011 supports the trial court's ruling that a logical relationship exists between a lender's mortgage foreclosure claim and the subsequent conduct of the lender in working with the defaulting homeowner to mitigate loss. The Order states that "[t]hroughout the foreclosure intervention process and the foreclosure action, the Mortgagee shall communicate with and otherwise deal with the Mortgagor . . . This includes, without limitation, submission of all required information, negotiations, and consummation of any loan modification or other loss mitigation agreement." (May 2, 2011 Order). Because this violation is part of the same transaction or occurrence giving rise to the Counterclaims, it supports the trial court's ruling that Respondents are entitled to a jury trial as to their Counterclaims.

Both Appellant's claims and the Stevensons' Counterclaims are part of a single transaction or occurrence that began when the note was signed and continued throughout the foreclosure process. Because the claims and Counterclaims are part of a single transaction or occurrence, they are logically related and compulsory. Respondents are entitled to a jury trial on the Counterclaims and the trial court should be affirmed.

III. As an additional sustaining ground, Respondents are entitled to a jury trial pursuant to Rule 53(b) of the South Carolina Rules of Civil Procedure.

The Stevensons are entitled to a jury trial pursuant to Rule 53(b) of the South Carolina Rules of Civil Procedure. Even if this Court were address the merits of this appeal and determine that no logical relationship exists between Appellant's foreclosure claim and the Counterclaims, Respondents are still entitled to a jury trial.

Rule 53(b) not only provides Respondents with an additional vehicle to pursue their right to a jury trial, but also provides and the Court with an additional basis to affirm the trial court's Order.¹ Rule 53(b) of the South Carolina Rules of Civil Procedure states, in part:

[a]n action for foreclosure, some or all of the causes of action in a case may be referred to a master or special referee by order of a circuit judge or the clerk of court. . . Any party may request a jury pursuant to Rule 38 on any or all issues triable of right by a jury and, upon the filing of a jury demand, the matter shall be returned to the circuit court.

Rule 53(b), SCRPC.

Even if the entire underlying case was referred to the Master-in-Equity, upon the Stevenson's filing a of jury demand "...the matter shall be returned to Circuit Court" for a jury trial. SCRPC 53(b). The practical result is that the Stevensons would be entitled to a jury trial pursuant to Rule 53(b) regardless of whether the Counterclaims are legal, compulsory and logically related to the transaction or occurrence giving rise to the

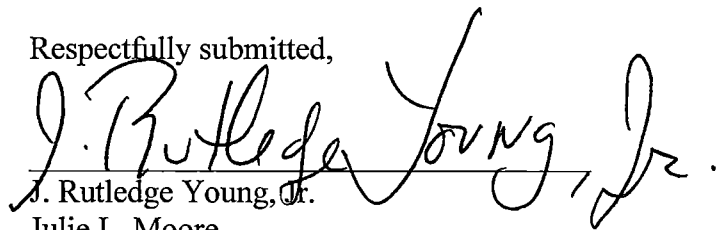
¹ A respondent "may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, even if those reasons have not been presented to or ruled on by the lower court." *S. Carolina Dep't of Labor, Licensing, & Regulation v. Chastain*, 392 S.C. 259, 262, 708 S.E.2d 818, 820 (Ct. App. 2011) (quoting *I'On LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000)). "The appellate court may review respondent's additional reasons and, if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment." *Id.*

foreclosure lawsuit, or the matter is referred to the Master-in-Equity. The Court should affirm the trial court for this additional reason.

CONCLUSION

This appeal should either be dismissed as interlocutory or this Court should affirm the trial court's Order transferring the Respondents' Counterclaims to the jury roster.

Respectfully submitted,



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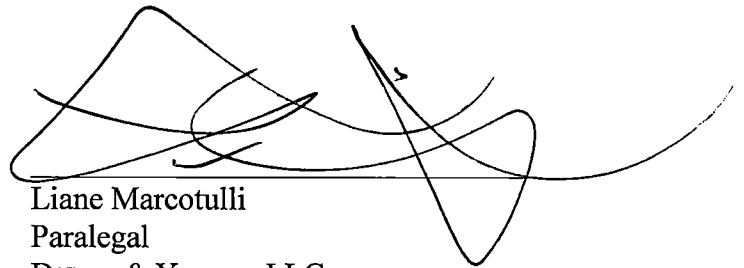
PROOF OF SERVICE

I, Liane Marcotulli, of Duffy & Young, LLC, certify that I have served the **INITIAL BRIEF OF RESPONDENTS** on Appellant by U.S. mail on April 1, 2015 by depositing a copy of it to its attorneys of record as shown below:

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The Honorable Jenny Abbott Kitchings
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RE: Deutsche Bank National Trust Company v. Thomas C. Stevenson, III, et al.
Civil Aciton No.: 2012-CP-10-01844
Appellate Case No.: 2014-001791

Dear Ms. Kitchings:

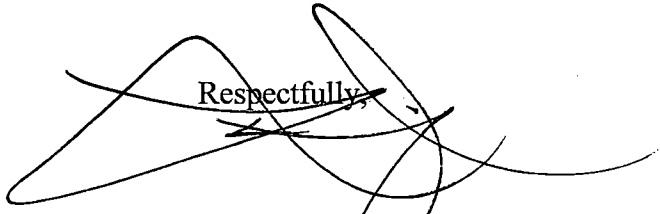
Enclosed for filing in the above-referenced matter, please find the following documents:

1. the original and one copy of Respondents' Initial Brief;
2. the original and one copy of Respondents' Proof of Service as to Respondents' Initial Brief;
3. the original and one copy of Respondents' Designation of Matter to be Included in the Record on Appeal; and
4. the original and one copy of Respondents' Proof of Service as to Respondents' Designation of Matter to be Included in the Record on Appeal.

Kindly return one stamped copy of each document to us in the envelope provided.

Thank you in advance for your assistance. Please do not hesitate to contact me with any questions or concerns.

Respectfully,


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April 1, 2015
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