

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY

R. Markley Dennis, Jr., Presiding Judge, Ninth Judicial Circuit

Appellate Case No. 2014-001791
Trial Court Case No. 2012-CP-10-01844

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APR 16 2015

SC Court of Appeals

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 IndyMac Mortgage Services,

Defendants,

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

REPLY BRIEF OF APPELLANTS

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ARGUMENT

I. The circuit court's affects a substantial right and is immediately appealable.

The general rule is that only final judgments are appealable. Culbertson v Clemens, 322 S.C. 20, 23, 471 S.E.2d 163, 164 (1996). However, there is an exception to this general rule in Section 14-3-330(2) of the South Carolina Code which allows appeals from interlocutory orders which “affect a substantial right.” S.C. Code Ann. § 14-3-330(2) (2007). The mode of trial is a substantial right and orders affecting it must be appealed immediately. Lester v. Dawson, 327 S.C. 263, 266, 491 S.E.2d 240, 241 (1997) When a trial court’s order deprives a party of a mode of trial to which it is entitled to as a matter of right, such order is immediately appealable. Salmonsens v. CGD, Inc., 377 S.C. 442, 452, 661 S.E.2d 81, 87 (2008) (quoting Flagstar Corp. v. Royal Surplus Lines, 341 S.C. 68, 72, 533 S.E.2d 331, 322 (2000)). The traditional analysis of the denial of a mode of trial involves a determination of whether a party is erroneously denied a jury trial in actions at law, or required to proceed before a jury in an equity case. Id. at 453, 661 S.E.2d at 87. The policy considerations underlying the immediate appealability of orders affecting the mode of trial are not only avoiding “piecemeal litigation,” but also allowing for the correction of errors which would be lost if not immediately appealed. See Hagood v. Sommerville, 362 S.C. 191, 195-96, 607 S.E.2d 707 (S.C. 2005).

Actions to foreclose a real estate mortgage are actions in equity. Hayne Fed. Credit Union v. Bailey, 327 S.C. 242, 489 S.E.2d 472 (1997); Collier v. Green, 244 S.C. 367, 137 S.E.2d 277 (1964); The Smith Companies of Greenville, Inc., v. Hayes, 311 S.C. 358, 428 S.E.2d 900 (Ct. App. 1993), First Fed. Sav. Bank. v. Knauss, 296 S.C. 136, 370 S.E.2d 906 (Ct App. 1988). In equity, the parties are not entitled, as a matter of right, to a trial by jury. Williford v. Downs, 265 S.C. 319, 321, 218 S.E.2d 242, 243 (1975). A defendant who brings a permissive legal

counterclaim in an equity action waives his right to a jury trial. See Blackburn, 407 S.C. at 329-30, 755 S.E.2d at 441-42 (2014); Edwards v. Timmons, 297 S.C. 314, 316, 377 S.E.2d 97, 97 (1988) (citing Johnson v. South Carolina Nat'l Bank, 292 S.C. 51, 354 S.E.2d 895 (1987)).

Requiring a party to proceed before a jury on a permissive legal counterclaim denies them the non-jury trial to which they are entitled as a matter of law. The cases cited by Respondents are inapposite. Lester v. Dawson involved a motion under Rule 38(a), SCRPC, in an action for recovery of attorney's fees, which was held to be a legal action. Lester, 327 S.C. at 266-67, 491 S.E.2d at 241-42. Dawson argued that his appeal was not untimely because the rule from Creed v. Stokes, 285 S.C. 542, 331 S.E.2d 351 (1985), applied only where the order of a jury trial was discretionary under Rule 39(b), SCRPC. Id. This reasoning was rejected by the court because Dawson did not argue, either in the trial court or on appeal, that the decision to order a jury trial was ever discretionary. Id. at 267, 491 S.E.2d at 242. As in Lester, Respondents' motion was and is based on their entitlement to a jury trial as of right. Hannah v. United Refrigeration Services, Inc. is inapposite for the same reason. Hannah v. United Refrigeration Servs., Inc., 305 S.C. 394, 409 S.E.2d 360, 361 (1991). Hannah involved a ruling on a Rule 39(b), SCRPC motion which is within the discretion of the trial judge. Appellants do not argue the timeliness of Respondents jury demand under Rule 38(b), SCRPC, which would bring the transfer to the jury docket within the circuit court's discretion. Rather, Appellants dispute Respondent's right to a jury trial at all on the basis that they waived this right by bringing a permissive legal counterclaim in Appellant's equitable foreclosure action. Requiring Appellants to proceed before a jury would deny them the right they have to proceed non-jury which they have as a matter of law regarding these counterclaims. As such, the circuit court's order affects a substantial right and must be appealed immediately.

II. Respondents' counterclaims are permissive legal counterclaims and Respondents have thus waived their right to a jury trial by bringing them in Appellants' equitable foreclosure action.

Actions to foreclose a real estate mortgage are actions in equity. Hayne Fed. Credit Union v. Bailey, 327 S.C. 242, 489 S.E.2d 472 (1997); Collier v. Green, 244 S.C. 367, 137 S.E.2d 277 (1964); The Smith Companies of Greenville, Inc., v. Hayes, 311 S.C. 358, 428 S.E.2d 900 (Ct. App. 1993); First Fed. Sav. Bank. v. Knauss, 296 S.C. 136, 370 S.E.2d 906 (Ct. App. 1988). A defendant who brings a permissive legal counterclaim in an equity action waives his right to a jury trial. See Blackburn, 407 S.C. at 329-30, 755 S.E.2d at 441-42; Edwards, 297 S.C. at 316, 377 S.E.2d at 97 (citing Johnson v. South Carolina Nat'l Bank, 292 S.C. 51, 354 S.E.2d 895 (1987)).

Rule 13, SCRCF governs counterclaims. A counterclaim is compulsory if it arises out of the same transaction or occurrence as the opposing party's claim. Rule 13(a), SCRCF, Wells Fargo Bank, N.A. v. Smith, 398 S.C. 487, 495, 730 S.E.2d 328, 332-33 (Ct. App. 2012). Claims arising out of separate transactions or occurrences than the subject matter of the opposing party's claim are permissive. Rule 13(b), SCRCF. South Carolina has adopted the "logical relationship test" to determine whether a counterclaim is compulsory. N.C. Fed. Sav. Bank & Loan Ass'n v. DAV Corp., 298 S.C. 514, 517, 381 S.E.2d 903, 905 (1989). In a foreclosure action, a determination of whether a counterclaim is compulsory depends on whether the counterclaim would affect the lender's right to enforce the note and foreclose the mortgage. See Wells Fargo Bank, 398 S.C. at 496, 730 S.E.2d at 333; see also N.C. Fed. Sav. & Loan Ass'n, 298 S.C. 518-19, 381 S.E.2d at 905. In a foreclosure action, the relevant "transaction or occurrence" giving rise to the foreclosure action is the execution of the Note and Mortgage and subsequent default thereunder. Other courts applying the logical relationship test look to whether "the issues of law

and fact raised by the claims are largely the same and whether substantially the same evidence would support or refute both claims.” Sanders v. First Nat’l Bank & Trust Co. in Great Bend, 936 F.2d 273, 277 (6th Cir. 1991) (citing Moore v. N.Y. Cotton Exch., 270 U.S. 593 (1926)). “A claim has a logical relationship to the original claim if it arises out of the same aggregate of operative facts as the original claim in two senses: (1) that the same aggregate of operative facts serves as the basis of both claims; or (2) that the aggregate core of facts upon which the original claim rests activates additional legal rights in a party defendant that would otherwise remain dormant.” Londono v. Turkey Creek, Inc., 609 So.2d 14, 20 (Fla. 1992) (quoting Revere Copper & Brass, Inc. v. Aetna Casualty & Surety Co., 426 F.2d 709, 715 (5th Cir. 1970)).

Appellants filed a non-jury mortgage foreclosure action against Respondents in the Charleston County Court of Common Pleas on March 16, 2012. Respondents’ Motion at 1. After removal to federal court and subsequent remand to state court, Appellants filed an amended complaint on November 21, 2013. See Exhibits A and C to Respondents’ Motion. Respondents filed an answer on December 6, 2013, which included affirmative defenses and a counterclaim and demanded a jury trial. Respondents’ Motion at 2; Exhibit D to Respondents’ Motion. The counterclaim is based on allegations that Appellants’ predecessor in interest improperly handled Respondents’ loan modification reviews and acted in bad faith when it refused to agree to a proposed sale of the property in February 2012. See Exhibit D to Respondents’ Motion at pp. 8–9. However, Appellants’ foreclosure action is based on Respondents’ admitted default under the terms of the note and mortgage in April 2011. See Exhibit C to Respondents’ Motion at p.4 Paragraph 22, and Exhibit D to Respondents’ Motion at p. 4, Paragraph 22.

In the recent case of Carolina First Bank, etc. v. BADD, L.L.C., et al., Opinion No. 27486, __ S.C. __, __ S.E.2d. __ (S.C. January 28, 2015), the South Carolina Supreme Court

reversed the Court of Appeals and held that a defendant in a foreclosure action was not entitled to a jury trial based on his counterclaims, which, while legal, were permissive. The Court held that the foreclosure defendant had waived his right to a jury trial by asserting permissive counterclaims in an equitable foreclosure action.

The Court in BADD, L.L.C. found that a civil conspiracy counterclaim by McKown, a personal guarantor and a member of the defendant L.L.C, did not arise out of the pertinent transaction or occurrence (the guaranty agreements) because it bore no logical relationship to either the execution or enforceability of those guaranty agreements. The Court cited N.C. Fed. Sav. & Loan Ass'n, 298 S.C. at 518-19, 381 S.E.2d at 905-06; as well as Advance Int'l, Inc. v. N.C. Nat'l Bank of S.C., 316 S.C. 266, 270-71, 449 S.E.2d 580, 582-83 (Ct. App. 1994), *aff'd in part, vacated on other grounds*, 320 S.C. 532, 486 S.E.2d 367 (1996) (finding claims of fraud, negligence, and unfair trade practices in a foreclosure action were not compulsory because those claims did not affect the enforceability of the note). Accordingly the Court held that McKown waived his right to a jury trial by asserting the civil conspiracy counterclaim in a foreclosure action because the claim was permissive as it did not arise out of the same transaction or occurrence as the execution of the guaranty agreements.

Likewise rejecting McKown's argument that his breach of contract counterclaim was compulsory, the BADD, L.L.C. Court stated that "McKown's 'breach of covenant of good faith and fair dealing' claim depends on a purported conspiracy that took place, if at all, two years after the guarantees had been executed. This claim does not arise out of the underlying transaction or occurrence because it does not affect the execution or enforceability of the guaranty agreements. We therefore hold McKown waived his right to a jury trial by asserting a permissive counterclaim in the foreclosure action "

The fact scenario and result in BADD, L.L.C. are similar and comparable to the instant case in two important ways: One, in that Respondents' counterclaims in the instant case bear no logical relationship to the Respondents' execution of the Note and Mortgage or the enforceability of those instruments; and Two, because the conduct complained of by the Respondents in the instant action, i.e., Appellants' declining to offer Respondents a loan modification and refusing to approve a short sale proposal made by Respondents, both occurred long after the execution of (and years of performance under) the Note and Mortgage, and thus Respondents' counterclaims do not and cannot arise out of the underlying transaction or occurrence because their counterclaims do not and cannot affect enforceability of those loan instruments.

Here, Respondents argue that a logical relationship exists because the factual basis for the counterclaims stems from Appellants' conduct after the default and less than one month prior to the filing of the foreclosure action. In the foreclosure action, the relevant question is whether Respondents are in default of the Note and Mortgage. Relevant facts include the payment history, the amount owed under the Note, and the relevant obligations of each party under the Note and Mortgage. By contrast, Respondents' counterclaims focus on whether or not Appellants acted improperly by refusing to agree to the proposed sale of the property. The only common denominator other than the parties is that the property sought to be sold is subject to the Mortgage. Unlike the cases cited by Respondents, no agreement, oral or otherwise, was ever entered purporting to modify the Note and Mortgage. The relevant transaction for the purposes of determining whether or not the counterclaims are compulsory ended when Respondents defaulted on the Note and Mortgage. As they are based on events occurring some ten months after the grounds for foreclosure arose, the counterclaims are not logically related to the foreclosure action, and are properly classified as permissive counterclaims. Respondents have

thus waived their right to a jury trial on these claims by bringing them as a counterclaim in the equitable foreclosure action. Therefore, Appellants have the right, as a matter of law, for these counterclaims to be heard non-jury. For this reason, the circuit court's ruling that Respondents' counterclaims were compulsory counterclaims is reversible error, because Respondents' claims bear no logical relationship to Appellants' foreclosure action for enforcement of the note and mortgage.

III. Rule 53(b) does not provide a right to a jury trial where it has been waived.

Respondents argue that regardless of whether the counterclaims are deemed permissive or compulsory, they are entitled to a jury trial pursuant to Rule 53(b), SCRPC. This rule provides for referral to a master-in-equity or special referee in an action for foreclosure. Rule 53(b), SCRPC. Regarding jury trials, it provides "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." *Id.* (emphasis added). Rule 38, SCRPC governs jury trials as of right. Rule 38, SCRPC. The right of trial by jury exists only in those cases where the parties would have been entitled to it at the time of the adoption of the South Carolina Constitution. *Lester*, 327 S.C. at 267, 491 S.E.2d at 242. The relevant question is generally if the action is legal or equitable. *Id.* In equity, the parties are not entitled, as a matter of right, to a trial by jury. *Williford*, 265 S.C. at 321, 218 S.E.2d at 243. "The right to a jury trial ... is expressly preserved by Rule 38(a), unless the right is waived." *First Palmetto State Bank v. Boyles*, 302 S.C. 136, 138, 394 S.E.2d 313, 315 (1990). If a complaint is equitable and the counterclaim is a compulsory legal counterclaim, the defendant has a right to a jury trial. *C & S Real Estate Servs.*, 290 S.C. at 302, 350 S.E.2d at 193. However, a defendant who brings a permissive legal counterclaim in an equity action waives his right to a jury trial. *See Blackburn*, 407 S.C. at 329-

30, 755 S.E.2d at 441–42 (2014), Edwards v. Timmons, 297 S.C. 314, 316, 377 S.E.2d 97, 97 (1988) (citing Johnson v South Carolina Nat’l Bank, 292 S.C. 51, 354 S.E.2d 895 (1987)). “A mortgage foreclosure is an action in equity.” U.S. Bank Trust Nat’l Ass’n v. Bell, 385 S.C. 364, 373, 684 S.E.2d 199, 204 (Ct. App. 2009).

Appellants filed an action for mortgage foreclosure on March 16, 2012. Mortgage foreclosure actions are equitable actions for which there is no right to trial by jury. Rule 53(b), SCRPC, provides a mechanism for parties to request a jury trial on those issues to which a right to a jury trial exists. It does not grant a new right to a jury trial, but rather provides a procedure for the exercise of a party’s right to a jury trial preserved by Rule 38, SCRPC. If the right is waived, it does not exist. First Palmetto State Bank, 302 S.C. at 138, 394 S.E.2d at 315. As discussed at length above, Respondents’ counterclaims are not compulsory counterclaims for which the right to a jury trial is preserved, but rather permissive legal counterclaims. By bringing these permissive counterclaims in the equitable foreclosure action, Respondents have waived their right to a trial by jury on those issues. As such, Rule 53(b) does not entitle Respondents to a trial by jury. For this reason, the circuit court’s ruling is in error and should be overturned.

CONCLUSION

Respondents have waived their right to a jury trial by bringing permissive counterclaims in an equitable foreclosure action. This Court should reverse the order of the circuit court.

Deutsche Bank National Trust Company, etc
v Thomas C Stevenson III et al
Case No 2012-CP-10-01844
Appellate Case No 2014-001791
REPLY BRIEF OF APPELLANT

Respectfully submitted,

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IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY

R. Markley Dennis, Jr., Presiding Judge, Ninth Judicial Circuit

Appellate Case No 2014-001791

Deutsche Bank National Trust Company, as
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Trust 2007-A2, Mortgage Pass-Through
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v

Thomas C. Stevenson III, Irven M
Stevenson, National Bank of South
Carolina nka Synovus Bank and South
Carolina Department of Revenue, and
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Of whom Thomas C. Stevenson III
And Irven M. Stevenson are

Respondents

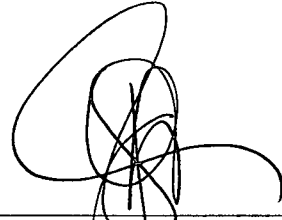
PROOF OF SERVICE

I certify that on the 13th day of April, 2015, I served the *Reply Brief of Appellants* on J. Rutledge Young, Jr., Esq. of Duffy & Young, LLC, attorney of record for Respondents, Thomas M. Stevenson and Irven M. Stevenson; Tara E. Naufal, Esq., of Adams and Reese, LLP, attorney of record for Defendant National Bank of South Carolina n/k/a Synovus Bank (not a Respondent to this appeal) and Milton G. Kimpson, Esq., attorney for Defendant South Carolina Department of Revenue (not a Respondent to this appeal), by depositing a copy in the U.S. Mail, postage prepaid, to their offices at 96 Broad Street, Charleston, South Carolina 29401, 211 King Street, Suite 330, Charleston, South Carolina 29401, and Post Office Box 12265, Columbia, South Carolina 29211, respectively.

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REPLY TO:
CHARLESTON LITIGATION

April 13, 2015

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APR 16 2015

SC Court of Appeals

RE: *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 v Thomas C. Stevenson III and Irven M Stevenson, National Bank of South Carolina nka Synovus Bank, South Carolina Department of Revenue, and OneWest Bank FSB, including its division known as Indy Mac Mortgage Services*
Appellate Case No.: 2014-001791
Our File No.: 52310.47707

Dear Ms. Kitchings:

Enclosed please find the *Reply Brief of Appellants* and the related *Proof of Service* which we have prepared in connection with the above referenced appeal. It would be greatly appreciated if you would file same and return the file-stamped copies in the enclosed envelope.

If you have any questions or concerns, please contact me at your convenience.

With warmest regards, I am

Sincerely,

Jennifer L. Ellis
Litigation Paralegal

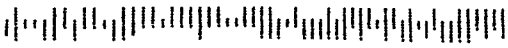
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