THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Thomas A. Russo, Circuit Judge

Common Pleas Case No. 2011-CP-32-3461
Appellate Case No. 2014-001766

Wells Fargo Bank, N.A.,.....Respondent,

v.

Gisela B. Moore, Thomas J. Moore a/k/a Tom J. Moore, and John Moore, Appellants.

INITIAL REPLY BRIEF OF APPELLANTS

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STATEMENT OF ISSUES

I. **Has the Respondent mischaracterized the nature of the Appellants' counterclaims?**

II. **Since the Appellants argued to the circuit court the issue of whether the Respondent owns the note and mortgage and the circuit court ruled on that in its order, was it necessary for the Appellants to have included this in their motion to reconsider for it to be preserved now?**

III. **Does the Appellants' right to assert counterclaims against the Respondent exist regardless of whether the South Carolina Consumer Protection Code applies, as it arises under the common law and the Uniform Commercial Code?**

IV. **Do important policy considerations support upholding the right to trial by jury in this case?**

ARGUMENT

The Appellants (hereinafter "the Moores") submit this reply brief to address matters raised by the Respondent (hereinafter "Wells Fargo") in its brief in this case. Rather than simply rehash the arguments presented in the Moore's appellants' brief, this reply brief is an attempt to concisely address new arguments raised in Wells Fargo's brief.

I. Wells Fargo's brief mischaracterizes the nature of the Moores' counterclaims.

Wells Fargo argues that the instant case is not "a situation where a plaintiff supposedly owes a defendant monies," quoting Carolina Mechanical Contractors, Inc. v. Yeargin Const. Co., Inc., 261 S.C. 1, 12, 198 S.E.2d 224, 230 (1973). Wells Fargo argues "that is clearly not the situation here" and "[t]here is no suggestion that Wells Fargo owes [the Moores] any money." (Initial Brief of Respondent p. 5.)

That is not true, though. This is a situation in which Wells Fargo owes the Moores money. As an example, when the record is viewed, as it must be, in the light most favorable to the Moores, it indicates that Wells Fargo took two large lump sum payments from the Moores without crediting that money to the loan balance. That is a breach of the note and mortgage, under which the only thing the obligee/mortgagee is allowed to do with money it receives as a payment on the mortgage debt is to apply it to the debt in accordance with the terms of the loan documents. (R. pp. ___; Affidavit of Weatherly – Exhs. A & B.) Wells Fargo owes them the money it took from them. Further, if "there is a genuine issue of material fact as to whether the payment for $2,148.69 that [Wells Fargo] received on August 25, 2011 was sufficient

to bring the loan current[,]" then there is a genuine issue of material fact about whether Wells Fargo followed the process madated by the mortgage in order for acceleration of the debt to take place and whether Wells Fargo brought this foreclosure action when the debt had not been accelerated, in violation of the mortgage's terms. (R. pp. ____; Order granting summary judgment and reference p. 3; Affidavit of Weatherly – Exh. B p. 13; Transcript of May 13 hearing p. 14 ln. 23-25; Transcript of Dec. 9 hearing p. 13 ln. 9-13) see Southern Atlantic Financial Services, Inc. v. Middleton, 356 S.C. 444, 448, 449 n. 4, 590 S.E.2d 27 (2003) (where pre-acceleration notice required by contract, giving of notice per contract is precondition to acceleration). That is a breach of contract, and Wells Fargo is liable for – i.e., owes the Moores money for – all damage that proximately results from the breach. See Fuller v. Eastern Fire & Cas. Ins. Co., 240 S.C. 75, 124 S.E.2d 602, 610 (1962) (elements of breach of contact action). Wells Fargo is right that "payment is a defense, not a counterclaim" (Initial Brief of Respondent p. 4), and the Moores id assert payment issues by way of defense (R. pp. ___; answer and counterclaim p. 3). Their breach of contract claim, though it bears some factual overlap with a payment defense, is not a disguised payment defense, as Wells Fargo argues. It is its own claim for damages. That is a counterclaim. It is the same with the claim for violation of the Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, *et seq.*

Wells Fargo made conspicuous use of the word "clearly" in arguing this issue in its brief, for example, stating that "[t]his is clearly not a counterclaim, but simply a defense to the foreclosure action." (Initial Brief of Respondent p. 7.) An examination of when Wells Fargo uses this word in its brief reveals that it does so

when the proposition to which the word is attached is anything but clear. Wells Fargo cannot make something true by saying "It's true!" and it cannot make something clear by saying "It's clear." Use of the word "clearly" is not an acceptable substitute for a well-reasoned argument, which is lacking on the contentions Wells Fargo calls clear.

In addition, Wells Fargo's argument about Wachovia Bank Nat'l. Ass'n. v. Beane, 397 S.C. 612, 725 S.E.2d 715 (Ct. App. 2012) is misplaced. This court upheld the master-in-equity's decision to limit the Beanes' "amendment only to allow the Beanes' setoff claim" and not to allow the Beanes to amend to seek "recovery beyond the amount due on the note" as an act within the master's discretion concerning amendment of pleadings. Id. at 619. Beane does not state and in no way stands for the proposition that one cannot assert a counterclaim like any of those asserted by the Moores, even where there is no dispute at all that the defendants owe money to the plaintiff.

The crux of Wells Fargo's argument in this regard is that "it is the plaintiff, Wells Fargo, that is owed money" and that the Moores are at most "entitled to a credit against the mortgage loan balance." (Initial Brief of Respondent p. 5.) Wells Fargo has missed the point here, in much the same way that the circuit court did. It does not matter that the way that Wells Fargo may – and that is just *may* – end up paying the Moores the money it owes is through a reduction in debt owed to Wells Fargo once judgment is rendered in the Moores' favor on one or more of their counterclaims. The manner in which a judgment is paid does not determine the nature of a claim. The Moores' claims against Wells Fargo are counterclaims.

II. The Moores argued to the circuit court the issue of whether Wells Fargo owns the note and mortgage, and the circuit court ruled on that

issue in its order. It was not necessary for the Moores to have included this in their motion to reconsider for it to be preserved now.

Wells Fargo argues that the issue of whether Wells Fargo own both the note and mortgage is not preserved for this court's review "because it was not addressed in the Order of the lower court, nor was it raised in [the Moores'] motion to reconsider." (Initial Brief of Respondent p. 6.) Because this issue was raised to the lower court and the court ruled on it in its initial order, it was not necessary for the Moores to have addressed this in their motion to reconsider in order for this point to be preserved for review now.

It is "[w]here a matter is not ruled on by the circuit court [that] the issue is not preserved for appellate review unless the complaining party moves to amend the judgment pursuant to Rule 59(e)." Vespazziani v. McAlister, 307 S.C. 411, 413, 415 S.E.2d 427, 428 (Ct. App. 1992). Rule 59 motions are not necessary to preserve issues that have been ruled upon by the circuit court; rather, "they are used to preserve issues that have been raised to the trial court but not yet ruled upon by it." Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E.2d 731, 734 (1998); accord Bailey v. Segars, 346 S.C. 359, 365, 550 S.E.2d 910, 913 (Ct. App. 2001).

No magic words are required to be said below in order that an issue be preserved for review on appeal. See e.g. Toole v. Toole, 260 S.C. 235, 240, 195 S.E.2d 389, 390-91 (1973); State v. Russell, 345 S.C. 128, 546 S.E.2d 202 (Ct. App. 2001) (issue was preserved even though defendant did not use the exact words "corpus delecti" in his request for directed verdict); In re: Robert D., 340 S.C. 12, 530 S.E.2d 137 (Ct. App. 2000) *overruled on other grounds by* State v. Liverman, 398 S.C. 130, 727 S.E.2d 422 (2012) (although party did not specifically mention any

constitutional provisions to the trial court, the record reflected that he complained the testimony would violate his right of confrontation). Here, it is plain that the Moores raised this issue at the hearing on Wells Fargo's motions. (R. pp. ___: Transcript of May 13 hearing p. 17 ln. 12 through p. 18 ln. 2.) Wells Fargo does not contend otherwise. The Moores' attorney described the issue and stated "there's an issue as to whether or not the plaintiff is even actually the owner of the mortgage." (R. pp. ___; Transcript of May 13 hearing p. 18 ln. 1-2.) The circuit court ruled on this argument in its order that granted partial summary judgment and referred the case to the master-in-equity, stating in the "findings of fact" portion of the order that "[t]he loan was subsequently assigned to [Wells Fargo]." (R. pp. ____; Order granting partial summary judgment and referring case p. 1.) Just because the circuit court did not spend a lot of time discussing this in its order does not mean that it did not address it.

This argument is preserved for review. Further, the reason why Bank of Am., N.A. v. Draper, 405 S.C. 214, 746 S.E.2d 478 (Ct. App. 2013), does not establish that Wells Fargo owns the mortgage involved in this case is shown by the logic of the Moores' argument in their appellants' brief in this case. To sum it up, when a note and mortgage are not owned by the same person, the note-owner's transfer of the note, even if accompanied by an intent to transfer the mortgage too, simply cannot take ownership of the mortgage away from a different person, the *mortgage*'s owner.

III. The common law is a source of a note debtor's right to assert a counterclaim against an assignee that is based on the actions of the original lender, as is the Uniform Commercial Code.

Wells Fargo intimates that this court should disregard the law stated in Rosemond v. Campbell, 288 S.C. 516, 343 S.E.2d 641 (Ct. App. 1986), because that

case involved a provision of the South Carolina Consumer Protection Code that is not involved here. The point Wells Fargo misses is that Rosemond discusses *common law* principles that are the source of a note debtor's right to assert a counterclaim against an assignee that is based on the actions of the original lender, as shown in the emphasized quotation from Rosemond below:

> *At common law*, an assignee's rights can be no greater than those of his assignor. Dixie Wood Preserving Co. v. Albert Gersten & Associates, 244 S.C. 57, 135 S.E.2d 368 (1964). Consequently, the assignee of a debt takes the obligation subject to all *claims* and defenses the obligor may have against the assignor. Id. However, absent an agreement to the contrary, the common law assignee takes only the benefits, not the burdens of the assigned obligation. Koppers Company v. Kaiser Aluminum and Chemical Corp., 9 N.C. App. 118, 175 S.E.2d 761 (1970). Thus, as against the assignee, the obligor can only *assert a claim* defensively when the assignee seeks to enforce the obligation; he has no common law right to sue the assignee affirmatively on a claim against the assignor arising from the underlying obligation. Langel v. Betz, 250 N.Y. 159, 164 N.E. 890 (1928); Pargman v. Maguth, 2 N.J.Super. 33, 64 A.2d 456 (1949).

288 S.C. at 522-23 (emphasis added).

It is not the consumer protection code that is the source of the Moores' right to assert claims against the original lender against Wells Fargo in this case.

In its brief Wells Fargo now hints, for the first time in this case, at being a holder in due course, thus intimating that claims against the original lender will not lie against it. (Initial Brief of Respondent pp. 8-9.) Accordingly, the Moores address this argument now. I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 418 n. 6, 526 S.E.2d 716 (2000) (appellant may address additional sustaining ground arguments in reply brief).

As noted in Rosemond,

> A person taking a negotiable instrument as a "holder in due course" takes it free from all claims to it on the part of any person and free from all "personal" defenses of any party to the instrument with whom the holder has not dealt.
>
> . . .
>
> A "holder in due course" is a person who is a holder of a negotiable instrument, who took it for value, in good faith, without notice that it is overdue or has been dishonored or of any defense against or claim to it on the part of any person.

Rosemond, 288 S.C. at 523 & 523 n. 3.

Status as a holder in due course is an affirmative defense, to be raised by the holder, to defenses and counterclaims raised by a defendant in an action by the holder of a note. South Carolina's version of the Uniform Commercial Code so provides, as follows:

> If a defense or claim in recoupment is proved, the right to payment of the plaintiff is subject to the defense or claim, except to the extent the plaintiff proves that the plaintiff has rights of a holder in due course which are not subject to the defense or claim.

S.C. Code Ann. § 36-3-308(b). Further, courts across the country agree that holder in due course status is an affirmative defense. E.g., Jackson v. Mundaca Fin. Servs., 76 S.W.3d 819 (Ark. 2002); Colonial Enters., Inc. v. Harris, 276 Ala. 292, 161 So.2d 495, 499 (Ala. 1964); Watson Coatings, Inc. v. Am. Express Travel Related Servs., Inc., 436 F.3d 1036, 1044 (8th Cir. 2006); Assoc. Bank N. v. Busche, 695 N.W.2d 903 (Wis. App. 2004).

Wells Fargo did not adduce any evidence of *any* of the elements of a holder in due course defense to the Moore's claims arising from the conduct of the original lender. Facts concerning these things are entirely absent from the affidavit Wells Fargo offed in support of its motion. (R. pp. ___; Affidavit of Weatherly.) Moreover, Wells Fargo did not plead anything about being a holder in due course in its reply to the Moores' counterclaims. (R. pp. ___; Reply to answer and counterclaim.) It cannot rely on an affirmative defense it did not plead. Rule 8(c), SCRCP. It is usually improper (as it is here) to argue that one is entitled to summary judgment on the basis of affirmative defenses one has not pled. Unisun Ins. v. Hawkins, 342 S.C. 537, 543, 537 S.E.2d 559, 562 (Ct. App. 2000). While "[a]ll pleadings shall be so construed as to do substantial justice to all parties[,]" Rule 8(f), SCRCP, courts "will not, however, write into the pleadings allegations and defenses that are not presented." Unisun Ins., 342 S.C. at 541-42. Having failed to plead or prove a holder in due course defense to any of the Moore's counterclaims, Wells Fargo cannot succeed on that basis now as an additional sustaining ground.

IV. Important policy considerations support upholding the right to trial by jury in this case.

Wells Fargo argues against the Moores having a jury trial in this case as though it would be an awful thing for their claims to be tried by a jury. The Moores do not see it that way, and they hope this court does not see it that way, either.

By order of April 9, 2015, the Supreme Court of South Carolina granted rehearing in Carolina First Bank v. BADD, L.L.C., Op. No. 27486 (S.C. Sup. Ct. filed Jan. 28, 2015) (Shearouse Adv. Sh. No. 4 at 21), undoing what was arguably the most restrictive reading of what constitutes a compulsory counterclaim in a mortgage

foreclosure action handed down since the adoption of the South Carolina Rules of Civil Procedure. Carolina First Bank v. BADD, L.L.C., App. Case No. 2013-00107 (S.C. Sup. Ct. Order dated April 9, 2015).

The compulsory, at-law counterclaims made in this action, on which a jury trial has been demanded, cannot lawfully be referred to the master-in-equity. Wachovia Bank, N.A. v. Blackburn, 407 S.C. 321, 755 S.E.2d 437 (2014); Johnson v. S.C. Nat. Bank, 292 S.C. 51, 54-56, 354 S.E.2d 895 (1987). In N.C. Fed. Sav. & Loan Ass'n v. DAV Corp., 298 S.C. 514, 518, 381 S.E.2d 903, 905 (1989), the Supreme Court adopted the "logical relationship" test for determining whether a counterclaim is compulsory and held DAV's counterclaim was compulsory because "there [was] a logical relationship between the enforceability of the note which [was] the subject of the foreclosure action and the validity of the purported oral agreement which, if performed, would have avoided default on the note by the joint venture." The Court made clear the reason for doing so: of the four tests considered by the Court for whether a counterclaim is compulsory, the Court settled on the "logical relationship test," which is "by far the most widely accepted *because of its flexibility*." Id. (emphasis added). What that "flexibility" means is shown by what the Court did in the DAV case, a case in which the plaintiff's claim was for foreclosure of a mortgage.

The Court's description of DAV's counterclaims follows:

> 1) breach of a subsequent oral contract to arrange additional financing for interest payments and construction costs;

2) breach of the joint venture agreement as parent company of joint venturer NCF by bringing the foreclosure action;

3) breach of fiduciary duty to co-joint venturers;

4) wrongful dissolution of the joint venture by failing to voluntarily refrain from foreclosure as agreed;

5) violation of the Unfair Trade Practices Act by breaching the oral agreement;

6) breach of two subsequent oral contracts to purchase DAV's interest in the joint venture.

Id. at 517.

The Court, in a decision that has never been overruled, held that all but the sixth counterclaim on this list was compulsory. Id. at 518. *All* of those counterclaims were based on events that occurred after the execution of the loan documents. Id. The logical relationship that each of those counterclaims had to the plaintiff's foreclosure claim was that each counterclaim arose out of the parties' relationship that was the subject of the foreclosure claim, dealt with the manner in which the loan was administered, or both. Id.

Here, some of the counterclaims the Moores asserted arise out of the origination of the loan and some of them arise out of the administration of the loan. There is significant overlap in the instant case between the facts underlying the origination of the loan and the claim based on the representation that the property would be taxed at the residential rate. Also, the common factual background to the issues concerning whether Wells Fargo has a right to bring this action and whether Wells Fargo breached the terms of the mortgage document by bringing it is plain to see. The issues regarding what Wells Fargo did with the Moores' lump sum

payments, and whether John Moore's most recent payment was sufficient to bring the loan current, fall squarely within the same factual arena from which Wells Fargo's claim based on default of the loan arises.

The Court in DAV noted the following:

> Clearly, there is a logical relationship between the enforceability of the note which is the subject of the foreclosure action and the validity of the purported oral agreement which, if performed, would have avoided default on the note by the joint venture.

DAV, 298 S.C. at 518. If DAV's counterclaims were compulsory, the Moores' certainly are.

The touchstone of the logical relationship test of whether a counterclaim is compulsory or permissive is its *breadth* – flexible breadth, but breadth nonetheless. Among the reasons for this breadth and flexibility is the concern the Supreme Court expressed in cases where both legal and equitable claims were present that "caution should be taken to assure that, under the circumstances of the case, a joint trial will not deprive a party of his right to a full jury trial of legal issues." Johnson, 292 S.C. at 55. When the Supreme Court had occasion to rein in the "main purpose" rule in an effort to keep that body of jurisprudence from heading in a dangerous direction, it stated that concern, as follows:

> We are concerned that, as courts have sought to ascertain the "main purpose" of lawsuits, the pendulum appears to have swung with steadied progress toward decisions tending to place within the sole purview of the equity judge issues properly triable only by jury.

Floyd v. Floyd, 306 S.C. 378, 380, 412 S.E.2d 397, 399 (1991). The concern expressed in Floyd was that courts "not deprive litigants of the right to a jury trial where appropriate." Id.

If this court must determine a close question of whether a legal counterclaim is compulsory, entitling the parties to a jury trial on it, this court should err, if at all, on the side of caution. And the side of caution is the side on which the counterclaimant has the right to a jury trial. After all, it is the right to have a trial by jury that is constitutionally enshrined. Vice-versa is not true; there is no right not to have a jury be part of one's trial. See Patterson v. McNeill & Assocs., Inc., 312 S.C. 471, 441 S.E.2d 328, 329 (Ct. App. 1994).

Further, a broad but flexible conception of the compulsory/permissive counterclaim distinction, geared toward preserving the jury trial right, especially in a case of doubt, dovetails neatly with the purpose behind the requirement of Rule 13(a), SCRCP, that compulsory counterclaims a defendant has against a plaintiff must be asserted in the same suit. Rule 13(a)'s purpose is "to prevent multiplicity of actions and to achieve resolution in a single lawsuit of all disputes arising out of common matters." Beach Co. v. Twillman, Ltd., 351 S.C. 56, 62, 566 S.E.2d 863 (Ct. App. 2002). The idea is to have everything about a given matter between the same parties decided in the same case.

A counterclaim is compulsory "if it arises out of the same transaction or occurrence as the opposing party's claim[,]" which ascertained by determining whether there is "*any* logical relationship between the claim and the counterclaim[.]" DAV, 298 S.C. at 517, 518 (emphasis added). That logical relationship is not limited

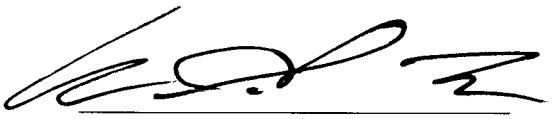
to whether success on the counterclaim renders the plaintiff's claim unwinnable. Too narrow a construction of the logical relationship test has the effect of doing away with the very flexibility that was the reason for the Supreme Court's choice of the logical relationship test. Id. at 518.

The Moores have the right to a jury trial on their counterclaims, and that is not a bad thing.

CONCLUSION

The circuit court erred in granting summary judgment on the Moores' counterclaims and in referring this case to the master-in-equity. The court should reverse the grant of summary judgment, reverse the reference to the master-in-equity, and remand the case for a jury trial.

Respectfully submitted,



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April 27, 2015

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PROOF OF SERVICE

I certify that I served the foregoing initial reply brief of appellants to be included in record on appeal by depositing a copy of it on the date shown below in the United States Mail, postage prepaid, addressed as follows:

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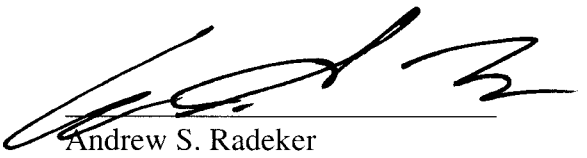

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April 27, 2015

VIA HAND DELIVERY
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Clerk of Court, Court of Appeals of South Carolina
1220 Senate Street
Columbia, South Carolina 29201

Re: Wells Fargo Bank, N.A. v. Gisela B. Moore, et al.
Common Pleas Case No.: 2011-CP-32-3461
Appellate Case No. 2014-001766

Dear Ms. Kitchings:

Enclosed herewith for filing in the above-referenced case are an original and one copy of the appellants' initial reply brief, with attached proof of service thereof.

Kindly file these documents and return a file-stamped copy thereof to the bearer of this letter. Of course, if you or your staff have any questions or concerns, please do not hesitate to contact me.

With kind regards, I am,

Very truly yours,
HARRISON & RADEKER, P.A.

Andrew S. Radeker

ASR/

Enclosures

cc: Thomas E. Lydon, Esq.