THE STATE OF SOUTH CAROLINA
In The SUPREME COURT

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Steven H. John, Circuit Court Judge

Case No: 2010-CP-26-8505
Appellate Case Number: 2013-000107

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

v.

BADD, LLC and William M. McKown, ... Respondents.

RESPONDENTS' BRIEF ON ORDER GRANTING PETITION FOR REHEARING

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STATEMENT OF ISSUES ON APPEAL

Whether a guarantor who is joined as a party to a foreclosure action pursuant to S.C. Code Ann. § 29-3-660 is entitled to a jury trial?

Whether McKown has a right to a jury trial based on his counterclaims of civil conspiracy and breach of contract?

STATEMENT OF THE CASE

Carolina First Bank (the "Bank") sued BADD, LLC (the "Debtor") and sought damages as a result of a breach of a note and to foreclose upon a mortgage given by the Debtor to the Bank. See Record at p. 24. With its complaint, the Bank made a motion to refer the matter to the Master-in-Equity pursuant to Rule 53(b) of the South Carolina Rules of Civil Procedure (the "Rules"). See Record at p. 75. The complaint also has a cause of action against and seeks specific relief against William M. McKown (the "Guarantor" or "McKown", jointly with Debtor the "Respondents") based upon his independent and completely separate guarantee agreement. See Record at p. 24, ¶38. Both the Debtor and the Guarantor timely answered, demanded a jury trial and brought a counterclaim that seeks to preserve their breach of contract cause of action against the Plaintiff for its breach of the same guarantee and note that occurred prior to the alleged breach by the Respondents. See Record p. 79- 84.

The Court scheduled a hearing on the motion to refer, but prior to the hearing, the Debtor and the Guarantor moved to amend their Answer and Counterclaim to provide greater specificity to the second counterclaim, to include a counterclaim for civil conspiracy underlying the breach of the note and guarantee and to bring a third party complaint. See Record at p. 90- 116 (the "Amended Answer"). At the hearing on the Motion to Refer, the Court granted the motion to amend and indicated that it would consider the motion and the response based upon the averments of the

Amended Answer. See Record at 130, lines 4-7. The Court found that the Counterclaims and Third Party Complaint were permissive, that the Defendants had waived their right to a jury trial because they were permissive and referred the entire matter to the Master-in-Equity. See Record at p. 1-8. On Appeal, the Court of Appeals reversed and remanded the Court's order holding the action against the Guarantor was legal in nature and, therefore, the Trial Court erred in referring the entire matter to the Master-in-Equity. See Order of Court of Appeals.

STANDARD OF REVIEW

In interpreting the meaning of statutes and the South Carolina Rules of Civil Procedure, the Court applies the same rules of construction used to interpret statutes. *Green v. Lewis Truck Lines, Inc.*, 314 S.C. 303, 443 S.E.2d 906 (1994). Similarly, "whether a party is entitled to a jury trial is a question of law," and the court may decide questions of law with "no particular deference to the [circuit] court." *Verenes v. Alvanos*, 387 S.C. 11, 15, 690 S.E.2d 771,772-73.

FACTS

In March and April 2008, the Debtor borrowed money from the Bank and purchased three warehouse units in a building that contained seven total units (the "Warehouse Units") and pledged the Warehouse Units as collateral for the loan from the Bank. See Record at p. 18-19, ¶ 12, 13, 14, and 16; Record at p. 107-116 (the "Amended Answer"), ¶22 and 23. In 2009, Charles A. Christenson ("Christenson") who was a member of the Debtor was having financial problems and brought a third party in to take over his obligations. Record at p. 111, ¶27. Pursuant to the Amended Answer, this third party was allowed to take over the operations of the Debtor and pursuant to an alleged conspiracy with the Bank, proceeded to create a default in the loan obligations and guarantee in an effort to allow the Bank to foreclose on the Warehouse Units so that he could purchase the property

at a significantly reduced price at a foreclosure sale. Record p. 112-113, ¶31 through 38. Because of the default, the Plaintiff foreclosed against the debtor and sought legal remedies against McKown on a claim for breach of contract on the Guarantee. Record at p. 8, ¶38.

LEGAL ARGUMENT

The appropriate reading of S.C. Code Ann. § 29-3-660 under the South Carolina Constitution is one that provides a guarantor a right to trial by jury. The statutes in no way limits the power of a court to use a trial by jury to adjudge the matter asserted against a guarantor. Similarly, the ordinary and natural reading of the text protecting this right of a trial by jury has been the interpretation the Courts of South Carolina and has been used since the inception of such actions. Finally, the legal counterclaims regarding the conspiracy to and breach of the guarantee asserted in direct response to the legal claims for breaching that same guarantee brought by the Bank entitle Mckown to a right to trial by jury.

I. *South Carolina's foreclosure statutes in no way limit the ability for the Court to adjudge the legal claims asserted against a guarantor through the use of a trial by jury.*

In interpreting a statute, the Court must first consider and determine the intent of the enacting body. See *Brown v. Sikes*, 188 S.C. 288, 198 S.E. 854, 855 (1938). Further, the court must ascertain this intent from "the words used and the subject-matter to which the statute relates." *Lytle v. S. Ry. Carolina Div.*, 171 S.C. 221, 171 S.E. 42, 43 (1933) (citing *Petri v. Commercial Nat. Bank*, 142 U.S. 644, 650, 12 S. Ct. 325, 326, 35 L. Ed. 1144 (1892)). Similarly, every presumption must be made in favor of reading a statute so as to avoid drawing into question whether it will be declared unconstitutional unless its invalidity appears so clearly as to leave no doubt that it conflicts with the constitution. See *Gold v. S.C. Bd. of Chiropractic Examiners*, 271 S.C. 74, 78, 245 S.E.2d 117,

119–20 (1978). The intent of the legislature, as evidenced by the text and subject matter of the statute can in no way be read as limiting the adjudication of legal matters to the equity court. Such a reading is not only unnatural and unreasonable, but such a reading would clearly render the statute as unconstitutional. Further, the jurisprudence interpreting and applying the statute and its antecedents have read it to include the right to trial by jury. Finally, the genesis and purpose of the statute clearly contemplate the ability of actions against guarantors being heard before a trial by jury.

A. The words used and subject matter to which the statute relates makes clear the intent of the legislature was never to limit the hearing of such legal matters to the equity court.

The foreclosure statutes as enacted and embodied in S.C. Code Ann. § 29-3-610 et seq. establishes a method of bringing a mortgage foreclosure suit to have a mortgaged property sold and the proceeds of sale applied against the debt secured by the property. Similarly, the South Carolina Rules of Civil Procedure provide for additional guidance of how such a foreclosure action may be conducted. See SCRCP Rules 53 and 71. The relevant section of the foreclosure statute regarding the joining of actions against guarantors states:

> In actions to foreclose mortgages ... if the mortgage debt be secured by the covenant or obligation of any person other than the mortgagor the plaintiff may make such person a party to the action and the court may adjudge payment of the residue of such debt remaining unsatisfied after a sale of the mortgaged premises against such other person and may enforce such judgment as in other cases.

S.C. Code Ann. § 29-3-660. A plain reading of this statute can be read as providing for the joining of a guarantor within a foreclosure action. A guarantor can be reasonably described as an obligation of a person supporting the debt. See *Black's Law Dictionary* (10th ed. 2014)(defining a guarantee as "a promise to answer for the payment of some debt"); see contra S.C. Code Ann. § 36-9-102 (defining guarantee as a "supporting obligation" and not an obligation "securing" a debt). Thus,

whether a guarantor may be joined to an action to foreclose appears to be within a reasonable reading of the statute and is not raised. The operable language for purposes of the issue presented, however, is not one of whether joinder is proper, but whether a master in equity is granted the sole power through this statute to decide legal controversies in an action where the guarantor is joined. The plain reading of the statute does not provide for such an interpretation and, therefore, should not be read for such a proposition.

The operative language of the statute regarding who has the right to make the legal determination is most reasonably read to include a trial by jury. The specific language pertaining to the right to decide the legal matters and whether there remains a right to trial appears to be asserted in "the court may adjudge." How this Court will define the scope of the term "Court" appears to be the central issue in determining the impact of the statute. "A statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers." *Sloan v. S.C. Bd. of Physical Therapy Exam'rs*, 370 S.C. 452, 468, 636 S.E.2d 598, 606–07 (2006). Similarly, even the "[s]ubtle [...] construction of statutory words for the purpose of expanding a statute's operation is prohibited. *Walton v. Walton*, 282 S.C. 165, 318 S.E.2d 14 (1984). The construction limiting the term "court" to be only the court of equity requires that this Court read the word "court" so as to expand its operation and limit its scope in such a way that previous readings of the term in prior versions of this statute and other statutes within this Article are no longer applicable. Such a reading, therefore, must necessarily fail.

The term "Court" in this statute is most reasonably read to include other branches of the courts of South Carolina in conjunction with the equity court. The South Carolina Rules of Civil Procedure, when addressing proceedings of foreclosure specifically states "[a]ctions to foreclose

liens or obtain partition of real property shall be tried by **the court**, and shall **ordinarily** be referred to a master pursuant to Rule 53." SCRCP 71 (emphasis added). Similarly "[i]n an 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." SCRCP 53 (emphasis added). These rules and the words contained therein would appear to be superfluous and meaningless were the term "Court" in the statute at issue be read to require all causes of action be referred to the equity court as opposed to "ordinarily" or that they "may be referred." Reading the statute so as to provide the circuit court the ability to hear certain causes of action, especially legal actions, would more reasonably suit the wording of the statute.

In fact, this is how the Courts of South Carolina have read this term in the past. The term "court" as used in this statute has repeatedly been read not only to limit the ability of the Equity Court to render such a judgment, but, to the contrary, to provide exclusive jurisdiction to the circuit court in actions such as the present action against the Guarantor. In *Gray v. Toomer*, the Court required that a money judgment be had through the circuit court as opposed to the equity court. 39 S.C.L. 261, 262 (S.C. App. L. 1852). Similarly, in *Hall v. Young*, an award of a deficiency judgment was held to be within the jurisdiction of the circuit court. 29 S.C. 64 (1888). Again in *Williams v. Beard*, the Supreme Court held the court of equity could only award relief in the form of the sale of property in foreclosure proceeding, reserving certain actions to the Circuit Court. 1 S.C. 309, 324 (1870). Then in *Anderson v. Pilgram*, noting that as the mortgagee is required to bring the action first to the circuit court in order to have the sale ordered by the Equity Court, it was held the circuit court was also able to hear the action for the personal judgment. 30 S.C. 499, 9 S.E. 587 (1889). Finally, in the Supreme Court's decision in *Perpetual Bldg. & Loan Ass'n of Anderson v. Braun*, the Court

affirmed the circuit court's award of deficiency. 270 S.C. 338, 242 S.E.2d 407 (1978). Reading the term "Court" to limit whether only the Equity Court has the power to render judgment on legal matters not only is not the most reasonable reading, but also disregards centuries of jurisprudence.

In addition, and perhaps more importantly, the term "court" has yet to be read as precluding the use of trial by jury for the rendering of such a judgment. Perhaps the best example of this is the Supreme Court's decision in *Welborn v. Cobb*, 92 S.C. 384, 75 S.E. 691 (1912). The Supreme Court in *Cobb,* while discussing the joinder of claims under the laws enacted in 1894 which similarly contained the operable language "the court may adjudge", gave no import to the language as impacting the right to trial by jury. *Id.* In the ninth paragraph of the Supreme Court's opinion in *Cobb*, the court made clear that a trial by jury on the claims brought against the guarantor could and were, in fact, heard before a jury. *Id.* at 694. The action against the guarantor regarding the deficiency, was both joined in the foreclosure action and heard by the jury. *Id.* South Carolina jurisprudence has continuously interpreted the term "court" in such statutes to not preclude the use of trial by jury. A reading to the contrary is not appropriate.

B. An interpretation limiting the term "Court" to only include the Equity Court renders the statute, at the very least, with the appearance that it may be unconstitutional.

Reading the statute so as to allow for a guarantor to retain his right to trial by jury is not only the most practical, reasonable, and fair way of interpreting the statute, but also allows the statute to be read in accordance with the South Carolina Constitution. South Carolina courts have long held that the "Legislature is, practically, omnipotent in the matter of legislation, except insofar as it is restrained by the Constitution, either expressly or by necessary implication." *Floyd v. Parker Water & Sewer Sub Dist.*, 203 S.C. 276, 17 S.E.2d 223, 226 (1941). "When the issue is the

constitutionality of a statute, every presumption will be made in favor of its validity and no statute will be declared unconstitutional unless its invalidity appears so clearly as to leave no doubt that it conflicts with the constitution." *Gold*, at 78, 245 S.E.2d 117, 119–20. Reading the term "court" so as to limit the jurisdiction of such judgments to the equity court would have the effect of removing the guarantor's constitutional right to trial by jury on actions at law against it. While a guarantor has always had the right to waive his right to a trial by jury, a mere statute may not remove this right under South Carolina law. Thus, not only would such a reading be strained and grossly expand the impact of the words used, but it would also render the statute unconstitutional. See *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011)("courts will reject a statutory interpretation that would lead to an absurd result").

Article 1, Section 14 of the South Carolina Constitution plainly states "[t]he right of trial by jury shall be preserved inviolate." This Supreme Court has held that:

> "the great right of trial by jury has existed from time immemorial in all those forms of actions at common law which were in use before the adoption of the Code, such as assumpsit, debt, [and] covenant, [...] and no doubt such right exists in the actions provided by the code as a substitute for these common-law actions [...]"

Frazee v. Bratton, 26 S.C. 348, 2 S.E. 125, 127 (1887). As an action on a guarantee is necessarily an action seeking money damages and a remedy at common law, it would have afforded the guarantor a right to have the case tried by jury in the Circuit Court. See *Smith & Co. v. Bryce*, 17 S.C. 538 (1882)(a suit seeking ordinary remedy at common law entitles a defendant to have his case tried by a jury); *Airfare, Inc. v. Greenville Airport Comm'n*, 249 S.C. 265, 269, 153 S.E.2d 846, 848 (1967)(holding an action for damages for a breach of contract is an action at law and either party has the right of trial by jury). The Supreme Court in *Johnson v. South Carolina National Bank*,

specifically held that an action against a guarantor was legal and that it entitled the guarantor a jury trial. 292 S.C. 51, 354 S.E.2d 895 (1987); see also *S. Bank & Trust Co. v. Harley*, 295 S.C. 423, 368 S.E.2d 908 (1988)(holding that an action on a guarantee seeking a deficiency was an action of law); *TranSouth Fin. Corp. v. Cochran*, 324 S.C. 290, 478 S.E.2d 63 (Ct. App. 1996)("it is well settled that a guarantor's liability is an independent contractual obligation"). The guarantor's right to trial by jury for legal actions brought against it cannot be removed through a strained reading of the statute limiting the term "court" to the equity court.

C. Reading the term "Court" to provide for the circuit court, and by extension the use of a trial by jury, to hear the legal action brought against a guarantor is consistent with the purpose and development of the Statute.

The genesis and development of the statute, and the foreclosure statutes generally, provides further support that the joinder of a guarantor to a foreclosure action would not have removed his right to have the legal matters heard in a trial by jury. Prior to 1791, South Carolina, with its legal precedents in English law, initially adopted a title theory of mortgages. Under this theory, the borrower legally owns the property during the term of the mortgage. This theory of mortgage law necessarily entailed a distinct delineation of the actions against the borrower's rights relating to the property (his right of redemption) and the actions against the borrower's personal obligation on the note. Under the initial law in South Carolina, a mortgagor would bring a foreclosure action against the borrower so as to remove the borrower's right of redemption. This action was considered *in rem* as it necessarily effected, and only effected, the borrower's equitable rights in the real property. Such an action was brought before the Chancery Court, as the order of the Chancery Court only effected the equitable rights of the borrower. If the lender wished to have a personal judgment against the borrower, the lender was required to bring a separate action in the court of common law in an *in*

personam action on the note. Similarly, any action against a guarantor was necessarily brought in the court of common pleas as it sought a personal judgment. It is with this legal backdrop that the right to trial by jury was memorialized in the first Constitution of South Carolina in 1790.

In *McConnell et al. v. Barnes et al.*, this Court addressed the development of foreclosure actions after the adoption of the 1790 Constitution:

> after the passage of the act of 1791, which declared that the fee to mortgaged property should continue in the mortgagor (the mortgagee having only a lien thereon), the change of the law created also a change in the practice, and that it became proper to include in a decree of foreclosure a direction to report the deficiency, after applying the proceeds of sale to the mortgage debt, and to then allow the mortgagee a judgment for the deficiency.

Later, the act of 1894 was passed [the present genesis of Section 29-3-650], allowing the mortgagee, in the action of foreclosure, to include in the decree a personal judgment against the mortgagor for the amount of the mortgage debt ; that judgment be entered up, constituting a lien upon all other real estate, and later to be credited with the net proceeds of the foreclosure sale.

142 S.C. 112, 140 S.E. 310 (1927). The Court then goes to great lengths to describe the inherent powers of the special referee in the Equity Court and how that power extends to issuing reports while the power to render a judgment still lies with the circuit court. Id. The Court then reverses the lower court's decision that the power to order sale of the property is equivalent to the power to render a judgment. While never directly addressed, the Courts of South Carolina, in applying the changes in the developing foreclosure statutes, have never limited or prohibited the Circuit Court's ability, through the use of a trial by jury, to adjudge matters properly before it. There is no jurisprudence to support the idea that the use of the term "Court" should be read as limiting the power to adjudge to the equity court. To the contrary, the Courts of South Carolina have steadfastly held to the fundamental understanding that while foreclosure actions have continued to consolidate contemporaneous actions that may touch and concern the underlying obligations, the right to trial

by jury continues. See *Mitchell v. Hamilton*, 98 S.C. 289, 82 S.E. 425, 427 (1914)(In an action of foreclosure "[a]ll issues--both legal and equitable--can be disposed of in one action," but "the legal must be submitted to a jury, and the equitable must be tried by the court."); See also *Cobb*, supra. A reading that limits the scope of the court that may adjudge the legal matters to only the court in equity is not in accord with the development of the statute and should, therefore, be ignored.

Any reading by this Court of S.C. Code Ann. § 29-3-660 necessarily requires that the constitutional right to trial by jury be retained. The intent of the enacting body as evidenced by the operative language of the statute regarding who has the right to render the judgment is most reasonably read to include a trial by jury. The term "court" has repeatedly been read to include a trial by jury and to not reduce jurisdiction to only the court of equity. Further, reading the statute so as to allow for a guarantor to retain his right to trial by jury allows the statute to be read in accordance with the South Carolina Constitution. Finally, the genesis of the statute provides further support that the joinder of a guarantor to a foreclosure action would not have removed his right to have the legal matters heard in a trial by jury. Thus, a guarantor who is joined as a party to a foreclosure action pursuant to S.C. Code Ann. § 29-3-660 is entitled to a jury trial.

II. *The legal counterclaims regarding the breach of the guarantee asserted in direct response to the legal claims for breaching that same guarantee, entitle Mckown the right to a trial by jury.*

Under South Carolina law, the counterclaims, as alleged by McKown, are afforded the right to trial by jury. Both the action against McKown and the counterclaims alleged against the Bank are "at law," and therefore triable by jury. In *Wachovia Bank, Nat. Ass'n v. Blackburn*, this Supreme Court had the opportunity to provide the proper analysis for determining the trial of legal and equitable issues in complaints and counterclaims as follows:

> "(1) If both the complaint and the counterclaim are in equity, the entire matter is triable by the court. (2) If both are at law, the issues are triable by a jury. (3) If the complaint is equitable and the counterclaim is legal and permissive, the defendant waives his right to a jury trial. (4) 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..."

407 S.C. 321, 329-30, 755 S.E.2d 437, 441-42 (2014). The compulsory counterclaims regarding the Bank's breach of the Guarantee and the underlying conspiracy that lead to that breach entitle McKown to a trial by jury as the Plaintiff's action can only be held as one at law and the counterclaims are properly described as compulsory.

A. The action by the Bank and the counterclaims to that action by McKown are both legal and afford him the right to a trial by jury as to counterclaims.

The action by the Bank against McKown, while joined to an action to foreclose on a separate mortgage is nothing more than an action seeking damages from an alleged breach of a contract between the Bank and McKown. To be clear, a party can never "foreclose" on a guarantee. A party cannot avail itself of S.C. Code Ann. § 29-3-660 if all it seeks is money damages on a guarantee. Whether the action is considered an action for deficiency judgment is irrelevant. Such an action has always been construed in South Carolina as a separate and distinct legal action. See *Lowndes v. McCabe Fertilizer Co.*, 157 S.C. 371, 154 S.E. 641, 643 (1930)(itself and many of the cases cited within it being cases wherein the breach of a guarantee was determined by a jury); *see also Johnson*, supra. In *Johnson*, whether a suit for breach of a guarantee was legal or equitable was determinative as to whether the right to a trial by jury was afforded. *Id.* The Supreme Court held that the alleged breach of the guarantee was a legal Counterclaim and that it entitled the Johnsons to a jury trial. *Id.* Thus, the legal claim for breach of contract alleged against McKown necessarily provides him with the right to trial by jury.

The issue presented has been answered in dicta by the Supreme Court in *Cobb*, supra. The facts in *Cobb* are not that dissimilar to those in this action. The plaintiff in *Cobb* brought a foreclosure action against the mortgagor and an action for money damages against the guarantor. In the plaintiff's action against the guarantor, the plaintiff alleges that the mortgagor had an equitable cause of action against the guarantor and the guarantor proceeded to raised a legal defense against such a claim. On Appeal, the guarantor argues that it should have been entitled to a trial by jury as to that specific defense. The Supreme Court held that:

> "Where a defendant sets up, as a defense to an equitable cause of action, facts which grow out of that cause of action, or the transaction which gave rise to it, and are so interwoven with it as to be inseparable from it, the defense partakes of the nature of the cause of action and is equitable, and not triable by jury, as of right."

Id. Thus, the equitable claim, oddly alleged by plaintiff on mortgagors behalf, precluded the right to a trial by jury as to the defense to the proposed equitable action. The Court then immediately states that "**unquestionably**, if the facts constituting that counterclaim had been set up in a separate action by the defendant against the plaintiff, the action would have been **legal, and triable by jury**." Id. (Emphasis added). This principle is perfectly depicted in the fact that the legal defenses alleged by the guarantor against the plaintiff in the underlying action in *Cobb* directly resulted in a trial by jury. The issue before this Court is similar as the counterclaims were alleged to an action on a guarantee, joined with a foreclosure action, not to the equitable claims regarding the underlying mortgage or note. Thus, the result should be the same and McKown should be provided the right to a trial by jury.

B. The counterclaims alleged by McKown arise out of the breach of the guarantee action brought by the Bank and are compulsory.

While the previous analysis should preclude any need to consider whether the counterclaims are compulsory, South Carolina law would similarly support the right to a trial by jury due to their

compulsory nature. There should be no argument that the counterclaims for breach of contract and conspiracy to breach a contract seeking money damages are legal counterclaims. See *Airfare, Inc.*, supra (holding an action for damages for a breach of contract is an action at law and either party has the right of trial by jury). The analysis of whether the counterclaims are compulsory for purposes of a right to a trial by jury only arises in the event the initial cause of action is found to be equitable.[1] See *Blackburn*, supra. Under South Carolina law, however, the counterclaims raised by McKown would be found compulsory and afforded the right to trial by jury regardless.

Under South Carolina law, the counterclaims asserted by McKown are logically related to the breach of contract action brought by the Bank. Counterclaims are governed by Rule 13, SCRCP, which provides:

> A pleading shall state as a [compulsory] counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.

Rule 13(a), SCRCP. Thus, a counterclaim is compulsory "if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim." Rule 13(a), SCRCP; *see also Mortgage Elec. Sys., Inc. v. White*, 384 S.C. 606, 614, 682 S.E.2d 498, 502 (S.C. Ct. App. 2009).

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[1] The use of the "main purpose" rule should not enter the Court's analysis in this particular action as the main purpose rule is only properly applied to actions joined against a single party and should not be extended to permissive claims joined against third parties. Such a consideration would have the ridiculous consequence of having parties join unrelated permissive claims for purposes of removing constitutional rights to a trial by jury. "When properly applied, the 'main purpose' rule reduces the complexity of litigation and does not deprive litigants of the right to a jury trial where appropriate." *Floyd v. Floyd*, 306 S.C. 376, 380, 412 S.E.2d 397, 399 (1991). If applied, however, it should result in favor of the Bank's action specifically against McKown as being legal as it seeks only money damages.

This Court has gone on to hold that a counterclaim is compulsory only if a "logical relationship" exists between the claim and the counterclaim. See *North Carolina Fed. Sav. & Loan Ass'n v. DAV Corp.*, 298 S.C. 514, 381 S.E.2d 903 (1989). Whether a counterclaim is logically related to the initial claim depends upon the facts of each case. See *Beach Co. v. Twillman, Ltd.*, 351 S.C. 56, 61, 566 S.E.2d 863, 865 (Ct. App. 2002)(finding a logical relationship between an action on a contract and the counterclaims for breach of the same contract); *First–Citizens Bank & Trust Co. v. Hucks*, 305 S.C. 296, 298, 408 S.E.2d 222, 223 (1991)(finding a logical relationship between a trustee regarding the administration of a trust and a legal counterclaim alleging that the trustee breached a fiduciary duty); *DAV Corp.*, supra (finding a logical relationship between an action on a note brought by the lender to foreclose and the validity of a purported oral agreement modifying the note alleged by the borrower).

The United States Supreme Court, when describing the benefit of the logical relationship test, held

> "'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. [...] That they are not precisely identical, or that the counterclaim embraces additional allegations [...] does not matter. To hold otherwise would be to rob this branch of the rule of all serviceable meaning, since the facts relied upon by the plaintiff rarely, if ever, are, in all particulars, the same as those constituting the defendant's counterclaim."

Moore v. New York Cotton Exchange, 270 U.S. 593, 610, 46 S.Ct. 367, 371, 70 L.Ed. 750, 757 (1926). The present actions both involve the construction of the underlying note, mortgage, guarantee, and other contractual understandings between the parties. Whenever two courts look at the same contract, differing interpretations are possible, even if not likely. Even if both courts read the contract in the same way, one of them will have spent its time doing so unnecessarily. This is the

sort of exercise that the compulsory counterclaim rule seeks to avoid, just as it also seeks to prevent inconsistent outcomes. *See also Keith A. Keisser Ins. Agency, Inc. v. Nationwide Mut. Ins. Co.*, 246 F. Supp. 2d 833, 836 (N.D. Ohio 2003)(holding claims alleging that the other party breached one or more of their contractual obligations to the other brought in response to action for breach are inherently logically related).

The Bank is misguided in its reliance on the decision in *DAV Corp.* for the premise that timing is critical to the analysis. In *DAV Corp.*, five of the six counterclaims were held to be compulsory legal counterclaims that had a logical relationship with the foreclosure action. All five of these compulsory counterclaim had one thing in common, they all went to the issue of the alleged breach by the plaintiff. The court held that they were compulsory because they challenged the issue of breach and whether the plaintiff was entitled to enforce the documents it was relying upon for the foreclosure action. While identifying that the execution of the notes and the alleged breaches by the defendant were different, this Court held that such counterclaims "clearly" have a logical relationship to the original action. Id. 298 S.C. 514, 518, 381 S.E.2d 903, 905. Clearly, in this case, the counterclaims are compulsory and the trial court erred in finding them permissive and referring this matter to the master in equity.

Here, the Bank seeks to foreclose upon a debt and seeks money damages under a claim for breach of a guarantee. McKown challenged that debt and alleged (1) the potential involvement of the Bank in a conspiracy relating to the administration of that debt; (2) breach of the guarantee; and (3) the breach of the covenant of good faith and fair dealing through actions taken by the Bank. Each of these counterclaims are compulsory counterclaims. Each of these counterclaims relates to the administration of the debt, and whether the Plaintiff has the right to foreclose on this property.

Under South Carolina law, a party seeking redress under a contract must first show that they have fulfilled their duties under that same contract. *Hyder v. Metro. Life Ins. Co.*, 183 S.C. 98, 190 S.E. 239, 244 (1937)("in order for one party to recover of another party upon a mutual, dependent contract, the plaintiff must allege performance of all conditions precedent on his part"). So, as alleged in the counterclaims, the breach of the Debtor was chronologically after the breach by the Bank and therefore "logically related." Simply, because the Bank breached the contract first, it no longer has the right to enforce the contracts. The simplistic chronological approach to determining the logical relationship between the complaint and the counterclaims is not only flawed but further supports the claim that such actions are logically related. In this case, the counterclaims allege breaches beginning in 2009 and the complaint alleges a breach in September 2010. So, as alleged in the counterclaims, the breach of the Debtor was chronologically after the breach by the Bank and therefore "logically related."

The facts underlying both the action by the Bank against McKown and the counterclaims clearly demonstrates their logical relationship. The right to bring the action against McKown arose as a direct result of the actions complained of by McKown in his counterclaims. While the action by the Bank is predicated on the existence of a contract, the action arose upon the breach of the contract and not upon the execution. Under long established law in South Carolina, the mere fact that a person has entered into a contract with another does not give a right to a cause of action. *Tillinghast v. Boston & Port Royal Lumber Co.*, 39 S.C. 484, 18 S.E. 120 (1893) overruled on other grounds by *Hendrix v. Hendrix*, 296 S.C. 200, 371 S.E.2d 528 (1988). The Supreme Court in *Tillinghast* explained the nature of when an action arises as follows;

The mere fact that a person has entered into a contract with another can give no cause

> of action, and none can arise until there is some breach of such contract, which, therefore, must be regarded as the cause of action. The contract may give a party the right to demand its performance according to its terms, but there is no delict, and no cause of action, until the other party refuses or neglects to perform some duty required of him by the terms of the contract.

Id. at 123. The Bank brought the action against McKown after an alleged failure to fulfill a term of the contract between them. Mckown raised counterclaims alleging the Bank is unable to require fullfilment of those terms as the Bank had breached the contract by creating the event that caused McKown's alleged breach. Thus, the facts that underpin the Bank's right to bring this action also underpin Mckown's and the actions should be considered logically related.

C. Whether the counterclaims are found to be permissive or compulsory should not result in a waiver of McKown's right to trial by jury under South Carolina law.

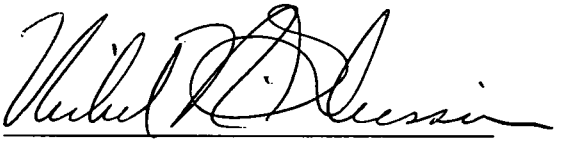
South Carolina law and Rule 13, SCRCP avoids placing McKown in the dilemma of waiving the right to a trial by jury as to its counterclaims by having brought them in this breach of contract action. If it is uncertain whether a counterclaim is compulsory or permissive, the pleader may simply plead the claim and make demand for a jury trial on it. *Keels v. Pierce*, 315 S.C. 339, 433 S.E.2d 902 (1993). If it is compulsory, he retains his right to a jury trial. *See Johnson*, 292 S.C. 51, 354 S.E.2d 895. If it is permissive, the court, on its own motion or the motion of the pleader, may order a separate trial of the counterclaim pursuant to Rule 42(b) to avoid prejudice to the pleader's right to a jury trial. See Rule 13(i), SCRCP. Thus, only when it is clear the action is equitable and the counterclaim is permissive is such analysis proper. *See Keels,* supra. In such a situation, the pleader is on notice that "asserting an obviously permissive counterclaim, which under the Rule 13 could be asserted in a separate jury trial, waives the right to trial by jury by operation of law." *Id.*, 315 S.C. at 341-342, 433 S.E.2d at 903. However, if uncertainty exists, the pleader does not waive his right

to a jury trial if the court later decides the claim is permissive. *Id.* The analysis is not needed in this action, however, as the action by the Bank is legal.

CONCLUSION

The trial court made clear legal error in finding that the separate claim against the Guarantor did not entitle McKown to a jury trial on the Bank's complaint against him. The trial court made clear error when it found McKown had waived his right to a jury. The trial court made clear legal error when it found McKown's counterclaims were not compulsory based upon a simplistic, and mistaken, chronological analysis. And, the trial court made clear error when it referred this matter to the Master-in-Equity.

Respectfully submitted,

By: 

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THE STATE OF SOUTH CAROLINA
In The SUPREME COURT

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Steven H. John, Circuit Court Judge

Case No: 2010-CP-26-8505
Appellate Case Number: 2013-000107

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

v.

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

of whom BADD, L.L.C. and William McKown are Respondents.

CERTIFICATE OF SERVICE

I certify that I have served the Respondents' Brief on Order Granting Petition for Rehearing by depositing a copy of it in the United States Mail, postage prepaid, on May 12, 2015, addressed to the attorneys of record as follows:

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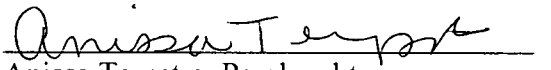
By: 

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