

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

James B. Jackson, Jr., Special Circuit Judge

Common Pleas Case Nos. 2007-CP-38-196 & 2007-CP-38-201
Appellate Case No. 2014-001634

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SC Court of Appeals

First Citizens Bank and Trust Company,.....Appellant/Respondent,

v.

Clyde B. Livingston; Technico Marketing & Distribution, Inc.; B. Livingston and Charlotte V. Livingston; American First Federal Inc.; Citibank South Dakota, N.A.; Branch Banking and Trust Company of South Carolina; G&G Rentals; Miller Communications, Inc.; and Wells Fargo Bank, N.A., Defendants,

Of whom Clyde B. Livingston is the.....Respondent/Appellant.

And

First Citizens Bank and Trust Company,.....Appellant/Respondent,

v.

Clyde B. Livingston; American First Federal Inc.; Citibank South Dakota, N.A.; Branch Banking and Trust Company of South Carolina; G&G Rentals; Miller Communications, Inc.; and Wells Fargo Bank, N.A., Defendants,

Of whom Clyde B. Livingston is the.....Respondent/Appellant.

RESPONDENT/APPELLANT'S INITIAL RESPONDENT'S BRIEF

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STATEMENT OF ISSUES

- I. Was the trial court correct to deny the Respondent's motion to strike the Appellant's jury demand and refer his counterclaims to the master-in-equity?

STATEMENT OF THE CASE

Community Resource Bank, N.A., which was formerly known as Orangeburg National Bank, brought these foreclosure actions against the Respondent/Appellant, Clyde B. Livingston (hereinafter "Livingston"), seeking mortgage foreclosure. (R. pp. ____; -196 summons and complaint; -201 summons and complaint.) Community Resource Bank, N.A., later merged into First Citizens Bank and Trust Company, Inc., the Appellant/Respondent in this case, and the case captions were amended to note that. (R. pp. ____; -196 order amending caption; -201 order amending caption.) First Citizens Bank and Trust Company, Inc., Community Resource Bank, N.A., and Orangeburg National Bank are all referred to hereinafter as "the Bank." The parties and the circuit court have treated these cases as though they are consolidated even though no formal order consolidating them has been issued.

Livingston materially agrees with the statement of the case as presented by the Bank in its appellant's brief in this case. Livingston points out that he and the Bank entered into consent orders (identical in each of the two actions subject of this appeal) regarding Livingston's motions to quash the *ex parte* orders of reference and to amend. (R. pp. ____; consent orders in -196 action and -201 action filed November 7, 2007). The consent orders provided as follows:

This matter comes before me upon the motion of Defendant Clyde B. Livingston to quash the Order of Reference issued in this action on the grounds that such Order was proposed and issued without notice to Defendant Livingston. The Plaintiff and Defendant Livingston have agreed to the resolution of this motion through this Order.

Accordingly, it is therefore hereby ORDERED that:

1. The validity of the Order of Reference in this action is confirmed;
2. If Defendant Livingston's motion to amend is granted and in his amended answer Defendant Livingston asserts any counterclaim to which he has the right to a trial by jury and requests a jury trial thereon, this action shall be returned to the circuit court; and
3. If Defendant Livingston's motion to amend is granted and in his amended answer Defendant Livingston does not assert any counterclaim to which he has the right to a jury trial, or if Defendant Livingston's motion to amend is not granted, this action shall remain within the jurisdiction of the undersigned Master-in-Equity.

And IT IS SO ORDERED.

(R. pp. ____; consent orders in -196 action and -201 action filed November 7, 2007.)

Following the entry of these consent orders, the Honorable O. Davie Burgdorf ruled in December of 2007 that Livingston had the right to a jury trial on his counterclaims and returned them to the circuit court. (R. pp. ____; Orders in -196 & -201 actions filed December 14, 2007.) The Bank made no motion for Judge Burgdorf to reconsider that ruling.

No appeal was taken from Judge Burgdorf's orders ruling that Livingston has the right to a jury trial on his counterclaims. In January of 2013, the Bank made motions to strike Livingston's jury demand and to refer his counterclaims to the master-in-equity. (R. pp. ____; motions to strike and refer in -196 & -201 actions.) It is the denial of those motions by the Honorable James B. Jackson, Jr., sitting as special circuit judge, that is the subject of the Bank's appeal.

STANDARD OF REVIEW

“Whether a party is entitled to a jury trial is a question of law.” Verenes v. Alvanos, 387 S.C. 11, 15, 690 S.E.2d 771, 772 (2010). “An appellate court may decide questions of law with no particular deference to the [lower] court.” Id. at 15.

ARGUMENT

- I. **The law of the case doctrine prohibited Judge Jackson from disturbing Judge Burgdorf’s ruling that Livingston has the right to a jury trial, and Judge Jackson was right to deny the Bank’s motion to strike the jury demand.**

An unappealed order, right or wrong, is ordinarily the law of the case and prohibits reexamination of the issue at a later point in the case. Ulmer v. Ulmer, 369 S.C. 486, 490, 632 S.E.2d 858, 861 (2006); Charleston Lumber Co. v. Miller Housing Corp., 338 S.C. 171, 525 S.E.2d 869 (2000); Cherry v. Myers Timber Co., Inc., 404 S.C. 596, 598 n. 3, 745 S.E.2d 405, 406 n. 3 (Ct. App. 2013). “Under the law of the case doctrine, a party is precluded from re-litigating issues decided in a lower court order, when the party voluntarily abandons its appeal of that order.” Hudson ex rel. Hudson v. Lancaster Convalescent Ctr., 407 S.C. 112, 119, 754 S.E.2d 486, 490 (2014).

Here, the Bank abandoned its appeal of Judge Burgdorf’s 2007 decision that Livingston has a right to a jury trial on his counterclaims. The Bank now makes the bold assertion that Judge Burgdorf’s order did “not make any binding conclusions of law by stating that the counterclaims asserted a right to a trial by jury” (Initial Appellant’s Brief of Appellant/Respondent pp. 10-11); however, no authority is presented for this proposition, and it is against the language of the order, which quite

plainly decides that Livingston has asserted “counterclaims on which he has the right to a trial by jury.” (R. pp. ___; orders in -196 & -201 actions filed December 14, 2007.) The Bank’s argument that this order does not make binding conclusions of law is reminiscent of S.C. Dept. of Probation, Parole and Pardon Servs. ex. rel. State v. Reynolds, 343 S.C. 465, 540 S.E.2d 480, 482 n. 1 (Ct. App. 2000), in which this court declined “to consider argument because there is no citation of authority, and it is so conclusory as to be an abandonment of this issue on appeal.”

The Bank’s argument is flawed in another way, as well. By consent order, the parties agreed that Judge Burgdorf, in the context of deciding Livingston’s motion to amend, would determine the issue of whether Livingston had the right to a jury trial and whether the case would be returned to the circuit court. (R. pp. ___; consent orders in -196 action and -201 action filed November 7, 2007.) Judge Burgdorf did that. (R. pp. ___; orders in -196 & -201 actions filed December 14, 2007.)

It is well settled that “[t]he failure to immediately appeal an order affecting the mode of trial constitutes a waiver of the right to appeal these issues.” Bateman v. Rouse, 358 S.C. 667, 674, 596 S.E.2d 386 (Ct. App. 2004). An order that refuses a reference is immediately appealable if “the trial judge in refusing a reference did so upon the erroneous belief that the cause of action was a legal one.” Williford v. Downs, 265 S.C. 319, 321, 218 S.E.2d 242 (1975); accord Mountain Lake Colony v. McJunkin, 308 S.C. 202, 204, 417 S.E.2d 578 (1992) (same). Not only was the Bank *able* to appeal immediately Judge Burgdorf’s decision that Livingston has the right to a jury trial on his counterclaims, the Bank *had to* appeal that decision immediately to

prevent its failure to do so from being “a waiver of the right to appeal these issues.”
Bateman, 358 S.C. at 674.

The Bank cannot escape the effect of its failure to appeal a mode of trial ruling by Judge Burgdorf made at the same time as he ruled on the motion to amend when the Bank agreed by consent order that Judge Burgdorf should rule on that mode of trial issue in that very context. (R. pp. ____; consent orders in -196 action and -201 action filed November 7, 2007.) “Ordinarily, where a judgment or order is entered by consent, it is binding and conclusive and cannot be attacked by the parties[.]” as “a consent order is an agreement of the parties, under sanction of the court[.]” Johnson v. Johnson, 310 S.C. 44, 46, 425 S.E.2d 46, 48 (Ct. App. 1992). Judge Burgdorf’s order that decided the motion to amend and whether Livingston has a right to a jury trial on his counterclaims specifically stated that the mode of trial issue was being decided in that order pursuant to the parties’ earlier consent order. (R. pp. ____; orders in -196 & -201 actions filed December 14, 2007.)

Further, our statute governing appealability, S.C. Code Ann. § 14-3-330, speaks in terms of what an order *does* with regard to whether the order is immediately appealable, not what the order is called or what motion brought the matter before the court. This is consistent with this court’s decision in McLaughlin v. Strickland, 279 S.C. 513, 515-16, 309 S.E.2d 787 (Ct. App. 1983), in which this court held that the ruling on a motion to serve a late answer – ordinarily not an immediately appealable decision – was immediately appealable where it affected a substantial right and, thus, fell within a subsection of S.C. Code Ann. § 14-3-330. Judge Burgdorf issued an order in 2007 that determined the mode of trial for Livingston’s counterclaims. The

Bank is bound by its decision not to challenge that order. (R. pp. ____; orders in -196 & -201 actions filed December 14, 2007.)

Further, Judge Jackson was not permitted to reach a different decision from the one Judge Burgdorf reached about what Judge Burgdorf decided in his order, including the issue of whether Livingston is entitled to a jury trial on his counterclaims. See Charleston County Dept. of Social Services v. Father, 317 S.C. 283, 288, 454 S.E.2d 307, 310 (1995) (holding that a trial judge cannot over rule an order from another trial judge).

This court should affirm the denial of the Bank's motion to strike Livingston's jury demand and refer his counterclaims to the master-in-equity.

II. Livingston's at-law counterclaims are compulsory in any event.

All of Livingston's counterclaims involve the facts involved in the origination and administration of the loans at issue. (R. pp. ____; amended answer and counterclaim in -196 action; amended answer and counterclaim in -201 action; answer and counterclaim to amended complaint in -196 action.) That makes them compulsory under a correct analysis of what a compulsory counterclaim is.

Compulsory, at-law counterclaims made by a defendant in a case in which the plaintiff has asserted only causes of action that sound in equity must be tried by a jury if a jury demand has been made on the claim. 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). What is more difficult in many cases than it seems in the abstract is determining whether a counterclaim is compulsory or permissive.

In January of 2015, the Supreme Court of South Carolina issued its opinion 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), handing down what was arguably the most restrictive reading of what constitutes a compulsory counterclaim in a mortgage foreclosure action given by the Supreme Court since the adoption of the South Carolina Rules of Civil Procedure. In April of 2015, the Supreme Court granted rehearing in that case, taking away the precedential effect of its January decision. Carolina First Bank v. BADD, L.L.C., App. Case No. 2013-00107 (S.C. Sup. Ct. Order dated April 9, 2015). In BADD, the Court held that a guarantor who was sued on a cause of action to collect on his guaranty brought in the same case as a foreclosure claim had not asserted compulsory counterclaims, stating as follows:

Here, the execution of the guaranty agreements was the “transaction or occurrence” that gave rise to McKown [the guarantor]’s inclusion in the Bank’s foreclosure complaint. McKown’s civil conspiracy counterclaim does not arise out of that transaction or occurrence because it bears no logical relationship to either the execution or enforceability of the guaranty agreements.

BADD, Op. No. 27486 (Shearouse Adv. Sh. No. 4 at 26).

This represented a radical departure from the Court’s previous jurisprudence in this area. Never before had our Supreme Court limited what the “transaction or occurrence” giving rise to a claim for debt collection to the *execution* of the contract documents. Up to that point, the Supreme Court’s jurisprudence in this area embraced a far wider set of matters relating to the parties’ relationship as being what arises out of the same transaction or occurrence as the opposing party’s claim.

In N.C. Fed. Sav. & Loan Ass'n v. DAV Corp., 298 S.C. 514, 518, 381 S.E.2d 903, 905 (1989), the bedrock case of modern South Carolina jurisprudence in this area, the Supreme Court adopted the “logical relationship” test (still our test today) 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;
- 3) wrongful dissolution of the joint venture by failing to voluntarily refrain from foreclosure as agreed;
- 4) violation of the Unfair Trade Practices Act by breaching the oral agreement;
- 5) 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 compulsory 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.

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, Livingston's certainly are. For instance, the facts underlying Livingston's breach of contract claim concerning the line of credit bear directly on whether the Bank can recover on its claim against him for breach of the line of credit agreement – which is what the Bank seeks to do in this case. (R. pp. ____; complaint in -196 action; amended complaint in -196 action; amended answer and counterclaim in -196 action; answer and counterclaim to amended complaint in -196 action.) “It is an elementary principle that one who seeks to recover damages for the breach of a contract, to which he was a party, must show that the contract has been performed on his part, or at least that he was at the

appropriate time able, ready, and willing to so perform it.” Parks v. Lyons, 219 S.C. 40, 48, 64 S.E.2d 123, 126 (1951).

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.

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), SCRPC, 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. See id. That is good policy. The piecemeal litigation that will ensue from a narrow reading of what is a compulsory counterclaim is not.

A counterclaim is compulsory “if it arises out of the same transaction or occurrence as the opposing party’s claim[.]” which is ascertained by determining whether there is “*any* logical relationship between the claim and the counterclaim[.]” DAV, 298 S.C. at 517, 518 (emphasis added). Too narrow a construction of the

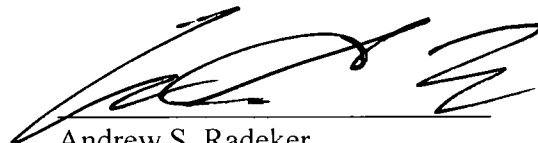
logical relationship test has the effect of doing away with the very flexibility that was the reason for the Supreme Court's choice of the logical relationship test. Id. at 518.

BADD was indeed a bad decision. If the Court reaches the same result after rehearing, the BADD decision should be overruled. But here, some of Livingston's counterclaims, or at least his counterclaims for breach of contract, violation of the attorney preference statute, and for violation of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, *et seq.* even meet the BADD standard of arising (at least in part, as to the breach of contract and Unfair Trade Practices claims) out of the origination of the loan. (R. pp. ____; complaint in -196 action; amended complaint in -196 action; amended answer and counterclaim in -196 action; answer and counterclaim to amended complaint in -196 action.)

CONCLUSION

The circuit court was correct to deny the Bank's motion to strike Livingston's jury demand and refer this case. This court should affirm that ruling.

Respectfully submitted,



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