

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

RECEIVED

The Honorable Diane Schafer Goodstein, Circuit Court Judge
July 5 2015

Case No. 2011-CP-18-1013

SC Court of Appeals

Appellate Case No. 2013-002066

Bank of New York Mellon, as Successor Trustee under NovaStar Mortgage Funding Trust, Series 2004-1 Appellant,

v.

Rachel R. Lindsay, Jeffrey Wayner, Tammy Wayner, Tiffany Spann-Wilder, Esq., The Steinberg Law Firm and United States of America acting by and through its agency, the Internal Revenue Service, Defendants,

Of Whom Rachel R. Lindsay is the Respondent.

Rachel R. Lindsay Respondent,

v.

Saxon Mortgage Services, Inc. Appellant.

**RETURN IN OPPOSITION
TO RACHEL LINDSAY'S PETITION FOR REHEARING**

Bank of New York Mellon, as Successor Trustee under NovaStar Mortgage Funding Trust, Series 2004-1 (the "Bank"), and Saxon Mortgage Services, Inc. ("Saxon", jointly, "Appellants"), hereby file this opposition to Respondent Rachel R. Lindsay's ("Lindsay") Petition for Rehearing.

Lindsay's Petition does not raise a single point of law or case or issue this Court overlooked or misapprehended or failed to consider. The Court's Opinion in *Bank of New York Mellon v. Lindsay*, Op. No. 2015-UP-208 (S.C. Ct. App. filed April 22, 2015) (the

“Opinion”) is correct in every respect. Lindsay has no right to a jury trial in this foreclosure action for the reasons stated in the Court’s Opinion, as the Appellants briefed to the Court, as argued at oral argument, and as detailed herein.

This Court should deny Lindsay’s Petition for Rehearing for three primary reasons. First, the Court correctly determined that Lindsay is not entitled to a jury trial because all of her claims asserted in this case are equitable or permissive or both. Second, the Court did not misconstrue or misapply *Carolina First Bank v. BADD, L.L.C.*, Op. No. 27486 (S.C. Sup. Ct. filed Jan. 28, 2015), and, in any event, *Carolina First Bank* did not represent a change from prior law regarding the proper mode of trial in a foreclosure action. Third, Lindsay’s attempt to distinguish *Carolina First Bank* from the instant case is unavailing.

I. The Court correctly determined that Lindsay is not entitled to a jury trial because all of her claims asserted in this case are equitable or permissive or both.

The Opinion accurately sets forth the law of this State. A foreclosure action is an equitable action. *Collier v. Green*, 244 S.C. 367, 370, 137 S.E.2d 277, 279 (1964). Where the defendant asserts counterclaims in a foreclosure action that merely go to the plaintiff’s right to foreclose or challenge the amount due upon the debt secured by the mortgage, the counterclaims are merely part and parcel of the equitable action, and a defendant has no right to a jury trial on such claims. *Collier*, 244 S.C. at 371-72, 137 S.E.2d at 280; *see also Carolina First Bank*, at 24 (referencing the role played by the Act of 1791 in vesting courts of equity with jurisdiction to decide “mortgage-related disputes”). Thus, the Court correctly concluded that Lindsay’s claims related to Appellants’ alleged misapplication of mortgage loan payments bears directly upon the amount due on the loan and falls squarely within the jurisdiction of the Master-in-Equity to determine the amount due in foreclosure

actions. *See id.* Therefore, Lindsay is not entitled to a jury trial on her causes of action related to the alleged misapplication of her payments.

Moreover, the Court correctly concluded that Lindsay's legal styling of these causes of action does not determine whether they are legal or equitable. Lindsay can style her claim as one for conversion, fraud, or any other legal theory, but colorful pleading cannot change the fact that the substance of her claim is that she does not owe the amount that the Bank alleges is past due on her mortgage loan and that the court should not allow the Bank to foreclose. No matter how she styles the claim, and regardless of whether she requests unspecified damages, the essential question in this suit is equitable—namely, whether Lindsay is in default on her mortgage and, if so, the amount of the debt. Those are the primary questions that the Master-in-Equity exists to answer. (*See* Appellants' Brief at Sections I. and II.B; Appellants' Reply Brief at Section I.B.)

If Lindsay could transform this equitable action into one at law, and thereby obtain a jury trial, simply by framing as a legal counterclaim her argument that foreclosure is improper, then the defendant would be entitled through artful pleading to a jury trial in every foreclosure case. By merely denying default or the amount alleged to be due, and characterizing the plaintiff's effort to foreclose as a breach of the note and mortgage, fraud, or some other legal theory, the defendant would always overcome a plaintiff's motion for a non-jury trial. That is not the law in South Carolina, and our courts have previously looked beyond the defendant's own characterization of his counterclaims in foreclosure actions to determine whether the essence of the claim is legal or equitable. *See, e.g., Collier*, 244 S.C. at 371-72, 137 S.E.2d at 280; *Mortgage Electronic Systems, Inc. v. White*, 384 S.C. 606, 614, 682 S.E.2d 498, 502 (Ct. App. 2009) (counterclaim for fraud

deemed equitable where primary relief sought was to have mortgage declared void). Hence, this Court correctly looked beyond Lindsay's characterization of her claims to find that the claims related to the alleged misapplication of payments are equitable and that Lindsay is not entitled to a jury trial on these claims.

This Court also properly determined that Lindsay's claims based upon Appellants' allegedly false statements about the status of Lindsay's mortgage loan are permissive as pled in this action and that Lindsay waived any right to a jury trial by filing the claims in this foreclosure action. *See* Rule 13(a), SCRCF ("A pleading shall state as a 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."); *Carolina First Bank*, at 26 (holding a counterclaim is compulsory only if it arises out of the same transaction or occurrence as the plaintiff's claim); *N.C. Fed. Sav. & Loan Ass'n v. DAV Corp.*, 298 S.C. 514, 519, 381 S.E.2d 903, 905 (1989) (holding a foreclosure defendant's counterclaim alleging the plaintiff's breach of two agreements to purchase the defendant's interest in a joint venture was permissive because the alleged agreements did not affect the enforceability of the note). The relief sought in connection with these claims would not undo the underlying loan transaction and the facts alleged occurred years *after* the making of the loan, thereby demonstrating no logical relationship to the enforceability of the loan obligations. Thus, the claims were properly held to be permissive. *Id.*

Furthermore, the Court correctly determined that all of Lindsay's third-party claims against Saxon are permissible because third-party claims are *always* permissive in nature.

See Rule 14(a), SCRCP (“At any time after commencement of the action a defending party, as a third-party plaintiff, *may* cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff’s claim against him.” (emphasis added)); *Carolina First Bank*, at 22-23 n.2 (noting that the third-party claims of a foreclosure defendant against the plaintiff’s alleged co-conspirator were permissive); *N.C. Fed. Sav. & Loan*, 298 S.C. at 519, 381 S.E.2d at 906 (“Generally, cross-claims are permissive, as are third party claims.” (citations omitted)). Thus, Lindsay waived her right to a jury trial on these claims by asserting them in this foreclosure action. *Id.*

Moreover, Lindsay’s claims are jointly asserted in her pleadings against the Bank and Saxon. By joining each claim against the third-party defendant Saxon, Lindsay has waived any right to a jury trial on the claims on this basis in addition to the other reasons stated by the Court in its Opinion.

For all of these reasons, the Court properly determined that Lindsay is not entitled to a jury trial on any claim asserted in this action.

II. The Court’s Opinion does not erroneously extend the Supreme Court’s holding in *Carolina First Bank*.

Lindsay argues that this Court erroneously extended the holding in *Carolina First Bank* beyond what the Supreme Court intended. (Petition at 2.) Specifically, Lindsay asserts that this Court held in the Opinion that “once a party to a foreclosure action files just one permissive counterclaim that said party waives the right to a jury trial, whether or not the party has also asserted a compulsory counterclaim.” (Petition at 2.)

The Opinion says no such thing. In the Opinion, this Court recognized that a foreclosure defendant is entitled to a jury trial on a counterclaim that is both legal and

compulsory. *Bank of New York Mellon*, Op. No. 2015-UP-208, at 2-3. Upon closely examining substance of Lindsay's allegations (as opposed to Lindsay's legal styling of her claims), however, the Court determined that each of Lindsay's claims is equitable or permissive or both. *Bank of New York Mellon*, at 3-4. In other words, the Court correctly concluded that Lindsay did not assert a counterclaim that is both legal and compulsory in this foreclosure action, and therefore she is not entitled to a jury trial on any claim. (*Id.*)

Moreover, this Court's conclusion that Lindsay has no right to a jury trial did not require reliance upon *Carolina First Bank*, much less an *extension* of the Supreme Court's holding in that case. It has long been the law of this State that a foreclosure defendant is entitled to a jury trial only on a claim that is *both* legal *and* compulsory. *See, e.g., White*, 384 S.C. at 614, 682 S.E.2d at 502 (holding that the determination of whether a foreclosure defendant is entitled to a jury trial requires the court to analyze whether each counterclaim is 1) compulsory or permissive, and 2) legal or equitable in nature). In the Opinion, this Court applied the same analytical framework for mode of trial issues in foreclosure cases that existed prior to the Supreme Court's decision in *Carolina First Bank*. Thus, this Court did not improperly extend the holding of *Carolina First Bank* in any respect.

III. Lindsay's attempts to distinguish *Carolina First Bank* from the instant case are unavailing.

Although the Supreme Court's decision in *Carolina First Bank* was not essential to this Court's conclusions in the instant case, *Carolina First Bank* is of course controlling authority as the Supreme Court's most recent pronouncement of the law related to mode of trial in foreclosure cases. Lindsay's attempts to distinguish *Carolina First Bank* from the instant case are unavailing.

Although she lists five alleged distinctions between *Carolina First Bank* and this case (Petition, at 2-4), her list consists essentially of two primary grounds. First, Lindsay argues that the defendant who sought a jury trial in *Carolina First Bank* (“McKown”) was merely a guarantor who allegedly had no interaction with the lender, while Lindsay is the primary borrower and had significant direct interaction with the mortgage servicer. (*Id.* at 2-3.) Second, Lindsay argues that there was no dispute in *Carolina First Bank* that the borrower was in default, while Lindsay alleges in this case that she made her payments timely and that Saxon misappropriated them. (*Id.*) In making these arguments, Lindsay misstates the facts of this case and *Carolina First Bank*, and, in any event, her alleged distinctions have no bearing upon the question of whether or not she is entitled to a jury trial.

Lindsay’s first alleged distinction—that McKown had no direct interaction with the lender—misstates the facts of *Carolina First Bank*. McKown was one of two members of BADD, LLC (“BADD”), the borrower on the subject loans, and a guarantor. *Carolina First Bank*, at 1. Nothing in opinion suggests that McKown had no interaction with the lender, and it would be extremely uncommon for a personal guarantor not to interact directly with the lender on behalf of himself and the borrower under such circumstances.

In any event, Lindsay fails to identify any reason why this alleged distinction matters for purpose of determining the defendant’s right to jury trial. In fact, neither the status of the defendant (i.e., borrower or guarantor), nor the degree of interaction between the defendant and the lender, has any bearing upon the analysis. Governing case law requires the court to focus instead on *the nature of the claims alleged*, specifically whether each counterclaim is compulsory or permissive, and legal or equitable. *White*, 384 S.C. at

614, 682 S.E.2d at 502. Thus, even if it were true that McKeown had no interaction whatsoever with the lender, that fact would not meaningfully distinguish *Carolina First Bank* from the instant case for purposes of the issue at hand.

Lindsay's second alleged distinction—that the borrower's default was undisputed in *Carolina First Bank*—is also factually inaccurate and irrelevant to the question whether Lindsay is entitled to a jury trial in this case. In *Carolina First Bank*, McKeown alleged in his counterclaim and third-party claim that the lender and the third-party defendant conspired to cause BADD's default. *Carolina First Bank*, at 3. In other words, McKeown alleged that BADD would not have defaulted but for the alleged conspiracy to which the lender was a party. *Id.* Thus, there was a dispute in *Carolina First Bank* regarding whether BADD was properly in default.

In any event, the alleged distinction is irrelevant because there can be no question that the central dispute in the instant case is an equitable one—namely, what is the amount due on the debt and is the Bank entitled to foreclose. Lindsay claims in her Petition that she made her loan payments to Saxon in a timely manner and that the filing of a foreclosure action was consequently improper. Appellants contend that Lindsay failed to make her monthly loan payments, both before and after she submitted the \$6,557.04 payment¹, and that she also failed to pay her property taxes or to properly insure the property as required by the loan documents. Thus, Appellants contend, Lindsay is in default under the loan documents, and foreclosure is proper, regardless of whether or not Saxon initially misapplied the \$6,557.04 payment upon receipt. This Court properly held

¹ In fact, Lindsay admits in her pleadings to failing to make timely loan payments. (R. at 62 ¶ 25) (“On or about the early spring or summer of 2008, [Lindsay] provided payment to the Plaintiff via Third-Party Defendant in the amount of approximately \$6,557.04 *to be applied to prior late payments.*”) (emphasis added).

that these are equitable determinations to be made by the Master-in-Equity. *See Collier*, 244 S.C. at 371-72, 137 S.E.2d at 280; *Carolina First Bank*, at 24. (See also Appellants' Brief at Sections I. and II.B; Appellants' Reply Brief at Section I.B.)

CONCLUSION

The Court should deny the Petition for Rehearing. The Opinion did not overlook or misapprehend any points necessary for resolution of the issues in this matter. The Court should issue the remittitur to permit this equitable action to proceed before the Master-in-Equity.

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Charleston, South Carolina

June 3, 2015

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Diane S. Goodstein, Circuit Court Judge

Case No. 2011-CP-18-1013

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SC Court of Appeals

The Bank of New York Mellon, as Successor Trustee
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v.

Rachel R. Lindsay, Jeffrey Wayner, Tammy Wayner,
Tiffany Spann-Wilder, Esq., The Steinberg Law Firm,
and United States of America acting by and through its
agency, the Internal Revenue Service,..... Defendants,

Rachel R. Lindsay..... Respondent

v.

Saxon Mortgage Services, Inc..... Appellant.

PROOF OF SERVICE

I HEREBY CERTIFY that I have served the **RETURN IN OPPOSITION TO RACHEL LINDSAY'S PETITION FOR REHEARING** on Respondent and Defendants by depositing copies of it in the United States Mail, postage prepaid, addressed to the below Counsel of Record:

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By:  _____
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June 3, 2015

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June 3, 2015

The Honorable Jenny Abbott Kitchings
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SC Court of Appeals

RE: The Bank of New York Mellon, as Successor Trustee under NovaStar Mortgage
Funding Trust, Series 2004-1 v. Rachel R. Lindsay, et al.
Appellate Case No. 2013-002066
Civil Action No.: 2011-CP-18-1013
Our File No.: 33576/01503

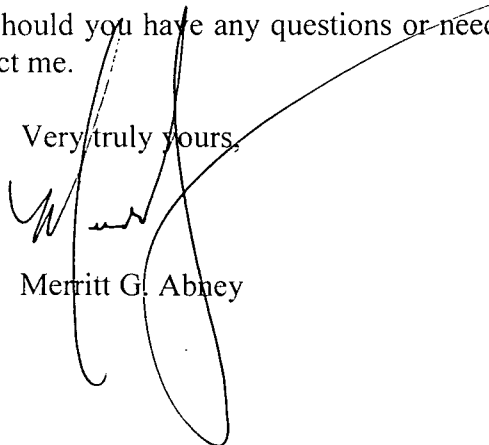
Dear Ms. Kitchings:

Enclosed are the original and one copy each of a Return in Opposition to Rachel Lindsay's Petition for Rehearing and Proof of Service in the above-referenced matter. We would appreciate it if you would file the original documents and return the clocked-in copies to us in the envelope provided.

By copy of this letter, we are serving this Return and Proof of Service on counsel for the Respondents and Defendants.

Your consideration is most appreciated. Should you have any questions or need any additional information, please do not hesitate to contact me.

Very truly yours,



Merritt G. Abney

MGA:ls

Enclosures

cc: G. Thomas Hill, Esq.
Matthew J. Modica, Esq.

Hasler

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