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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Diane S. Goodstein, Circuit Court Judge

Case No. 2011-CP-18-1013
Appellate Case No. 2015-001522

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

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 Petitioner.

Rachel R. Lindsay, Petitioner,

v.

Saxon Mortgage Services, Inc., Respondent.

RETURN TO THE PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

The Petition for a Writ of Certiorari in this matter should be denied. None of the factors in Rule 242(b), SCACR exist to justify the issuance of the writ. There is no Court of Appeals dissent, no constitutional issue, no federal question, no novel question of law, and no other “special and important” reason warranting certiorari. The Court of Appeals correctly determined, consistent with this Court’s precedent, that the Petitioner is not entitled to a jury trial in this foreclosure action because all of the claims she asserts are either equitable claims or permissive claims.

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

- I. Did the Court of Appeals correctly determine that Lindsay is not entitled to a jury trial on her claims related to alleged misapplication of her mortgage loan payments because these claims are equitable in nature?
- II. Did the Court of Appeals correctly determine that Lindsay is not entitled to a jury trial on her claims related to allegedly inaccurate statements made regarding the status of her mortgage loan because these claims are permissible rather than compulsory?
- III. Did the Court of Appeals correctly determine that Lindsay is not entitled to a jury trial on her third-party claims because these claims are permissive rather than compulsory?

COUNTER-STATEMENT OF THE CASE

The Bank of New York Mellon, as Successor Trustee under NovaStar Mortgage Funding Trust, Series 2004-1 (the “Bank”) filed the Complaint against Rachel R. Lindsay (“Lindsay” or “Petitioner”) on May 13, 2009, seeking solely to foreclose on a mortgage given by Lindsay on real property located in Dorchester County. (App. 54.) On June 16, 2009, Lindsay answered and asserted numerous counterclaims against the Bank. (App. 62.) In addition, Lindsay filed a third-party complaint against Saxon Mortgage Services, Inc. (“Saxon”), a servicer for the subject mortgage loan. (*Id.*) Lindsay pleaded all of her counterclaims and third-party claims, with the exception of the claims for negligence, jointly against the Bank and Saxon (jointly “Respondents”) and demanded a jury trial on all claims. (App. 68-84.)

On March 22, 2013, Appellants filed a Joint Motion for a Non-Jury Trial in the Equity Court and to Strike the Jury Demand. (App. 120.) The Court held a hearing on the motion on May 24, 2013 (App. 137), and subsequently denied the motion via an Order issued on August 14, 2013. (App. 27). Appellants timely filed a Motion to Alter or Amend pursuant to South Carolina Rule of Civil Procedure 59(e) on August 15, 2013. (App. 131). The trial court denied the motion via Form 4 Order issued on August 22, 2013. (App. 31.)

Appellants appealed the denial of their motion for a non-jury trial, and the Court of Appeals reversed. (App. 257.) The Court of Appeals held that Lindsay is not entitled to a jury trial on any claim because an action for foreclosure is a suit in equity, for which no right to a jury trial exists, and each claim asserted by Lindsay is either also equitable or is permissive, in which case Lindsay waived any right to a jury trial by asserting the claim in this foreclosure action. (App. 258-261.)

COUNTER-STATEMENT OF THE FACTS

On February 13, 2004, Universal Mortgage Consulting, LLC (“Universal”) made a loan to Lindsay in the amount of \$140,250.00 (the “Loan”). (App. 54 at ¶ 6.) Lindsay executed and delivered to Universal a promissory note, under which she agreed to make timely monthly interest-only payments at a variable rate for a fixed term. (App. 191.) The Loan was secured by a mortgage on Lindsay’s residence located in Dorchester County, South Carolina. (App. 174.) The Note and Mortgage were subsequently assigned to the Bank. (App. 55 at ¶ 10.)

After Lindsay defaulted on the Loan, on October 8, 2008, the Bank filed a foreclosure action against her (the “First Foreclosure”). (App. 37.) The Bank agreed to voluntarily dismiss the First Foreclosure action without prejudice after Lindsay disputed whether certain payments had been properly applied to the Loan balance. (App. 14.) On May 13, 2009, the Bank filed a second foreclosure action against Lindsay (the “Second Foreclosure”). (App. 54.) In both foreclosure actions, the Bank expressly waived any right to a deficiency judgment against Lindsay. (App. 56 at ¶ 15.)

On June 16, 2009, Lindsay filed an answer to the Second Foreclosure Complaint, in which she denied the amount alleged to be due on the Loan and denied that she was in default. She also asserted counterclaims and third-party against Respondents. (App. 62.) Lindsay’s claims against Respondents are based primarily upon the allegation they failed to give her credit for a payment she made on the Loan. (App. 66-68.) Specifically, Lindsay alleges that, in June 2008, she sent Saxon a payment in the amount of \$6,557.04, which she intended for Saxon to apply toward her delinquent balance on the Loan and to bring her current. (App. 67 at ¶ 25.)¹

¹ It is undisputed that the Loan was delinquent prior to this point. Lindsay even admits in her Counterclaim and Third-Party Complaint that she intended the \$6,557.04 payment, which was several times greater than her regularly-scheduled monthly mortgage payment, to be applied

Lindsay alleges that the Bank and Saxon did not properly apply this payment to reduce her Loan balance. (App. 67-68 at ¶¶ 26, 34.) Lindsay also alleges that Respondents made inaccurate statements to the public (in the foreclosure pleadings) and to credit bureaus regarding the status of the Loan. (App. 68 at ¶¶ 37-38.)²

Based upon the above conduct, Lindsay asserts claims against Respondents for breach of contract, negligence, fraud in the inducement, negligent misrepresentation, promissory estoppel, violation of the South Carolina Unfair Trade Practices Act, unjust enrichment, intentional infliction of emotional distress, invasion of privacy, defamation, intentional interference with existing contracts, intentional interference with prospective contractual relations, a declaratory judgment requiring the Bank to comply with the Homeowner Affordability and Stability Plan (“HASP”) and U.S. Treasury Supplemental Directive 09-01³, and an injunction requiring correction of credit reporting related to the Loan. (App. 62-84.) Lindsay seeks equitable and injunctive relief, along with actual and punitive damages in an unspecified amount. (App. 83-84.) She demanded a jury trial on all claims. (App. 62.)

toward prior missed Loan payments. (App. 67 at ¶ 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).

² Respondents acknowledge that the June 2008 payment was not properly applied to the Loan balance upon receipt, but they deny Lindsay’s suggestion that the payment would have cured her default or prevented a foreclosure. In short, the June 2008 payment was insufficient to cure the default, and Lindsay never tendered another payment after the June 2008 payment. While this action has been pending, Lindsay has continued to live in the residence without making a single mortgage payment for the past eight years.

³ In connection with the HASP claim, Lindsay seeks a mandatory injunction requiring Respondents to modify the terms of her Loan. (App. 83 at ¶ 140.)

ARGUMENT

This Court should deny the Petition. The Court of Appeals' decision is correct in all respects. The Court of Appeals properly held that Lindsay is not entitled to a jury trial in this foreclosure action because all of her claims are either equitable or permissive.

I. **The Court of Appeals correctly held that Lindsay is not entitled to a jury trial on her claims related to Respondents' alleged misapplication of payments because these claims are equitable.**

The Court of Appeals correctly determined that Lindsay's claims based upon Respondents' alleged failure to properly apply the June 2008 payment to reduce the Loan balance are equitable because they merely dispute the amount due on the underlying debt. It is axiomatic that a foreclosure action is an equitable action for which there is no right to a jury trial. *Wachovia Bank, Nat. Ass'n v. Blackburn*, 407 S.C. 321, 328, 755 S.E.2d 437, 441 (2014), reh'g denied (Apr. 2, 2014) (quoting *Williford v. Downs*, 265 S.C. 319, 321, 218 S.E.2d 242, 243 (1975)). The statutory regime applicable to foreclosure actions contained in Title 29 of the South Carolina Code is derived from the Act of 1791, which vested exclusive jurisdiction in courts of equity for foreclosure matters. *Carolina First Bank v. BADD, L.L.C.*, Op. No. 27486 (S.C. Sup. Ct. filed Jan. 28, 2015) (citing *Williams v. Beard*, 1 S.C. 309, 324 (1870)). In a foreclosure action, the determination of issues relating to the amount due on the loan is for the court, not a jury. *Collier v. Green*, 244 S.C. 367, 370, 137 S.E.2d 277, 279 (1964); S.C. R. Civ. P. 71 ("In foreclosure actions *the judge or master* shall compute the amount due the plaintiff and any other claimants, which amounts when determined shall be the total debt due to each.") (emphasis added). 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 determination by the court, 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 of Appeals correctly concluded that Lindsay’s claims related to Respondents’ alleged misapplication of Loan payments bear directly upon the amount due on the Loan and fall squarely within the jurisdiction of the master-in-equity to determine the amount due in foreclosure actions. *See id.*

Moreover, the Court of Appeals correctly concluded that Lindsay’s legal styling of these causes of action does not determine whether they are legal or equitable. “[A]n action sounding in law may be transformed to one in equity because equitable relief is sought.” *Ins. Fin. Servs., Inc. v. S.C. Ins. Co.*, 271 S.C. 289, 293, 247 S.E.2d 315, 318 (1978) (citing *1 Am. Jur. 2d, Actions* § 7 (1962)); *see also Crewe v. Blackmon*, 289 S.C. 229, 232-33, 345 S.E.2d 754, 756-57 (Ct. App. 1986) (concluding that although a complaint included allegations of fraud and misrepresentation, the action was one in equity when primary relief sought was equitable in nature). “Generally...it may be said that the essential character of the cause of action, and the remedy or relief it seeks, as shown by the allegations of the [pleading], determine whether a particular action is at law or equity, **unaffected by the conclusions of the pleader or what the pleader calls it....**” *Rogers v. Nation*, 284 S.C. 330, 332, 326 S.E.2d 182, 183 (Ct. App. 1985) (*quoting Bell v. Mackey*, 191 S.C. 105, 119, 3 S.E.2d 816, 822 (1939)) (emphasis added). Lindsay can style her claim related to misapplication of payments as one for negligence, fraud, or any other legal theory, but colorful pleading cannot change the fact that the substance of the claim is that she does not owe the amount that the Bank alleges is past due on the Loan and that the court should not allow the Bank to foreclose. No matter how Lindsay styles this claim, and

regardless of whether she requests unspecified damages, the essential question remains an equitable one—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, e.g.* S.C. Code Ann. §§ 29-3-650, 29-3-660 (providing that the determination of the debt and any deficiency are matters for determination by “the court”); S.C. Rule Civ. P. 71 (providing that foreclosure actions “shall be tried *by the court*, and shall ordinarily be referred to a master”) (emphasis added).

If Lindsay could obtain a jury trial by simply framing as a legal counterclaim her position that she does not owe the amount alleged by the Bank to be due on the Loan, 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, the Court of Appeals Court correctly looked beyond Lindsay’s styling of her claims to find that the claims related to the alleged misapplication of Loan payments are equitable and that Lindsay is not entitled to a jury trial on these claims.

Moreover, this Court has rejected similar attempts by litigants in other contexts to “earn” the right to a jury trial in an equitable action. In *Rosenbaum v. S-M-S 32*, the plaintiff purchased

real property at a tax sale and filed an action to clear title pursuant to S.C. Code Ann. § 12-61-20. The defendant answered by way of general denial and asserted a counterclaim for trespass to try title, seeking damages for trespass and demanding a jury trial. 311 S.C. 140, 141, 427 S.E.2d 897, 897 (1993). The circuit court struck the counterclaim because the plaintiff had asserted an equitable claim seeking a remedy via a non-jury process expressly provided by statute for purchasers at tax sales. *Id.* at 141-142, 427 S.E.2d at 897. This Court affirmed, holding that the defendant could not “evade the intent of the legislature and obtain the right to a jury trial by interposing a counterclaim designed the thwart the reasonable and practical implication of Chapter 61.” *Id.*

Like the plaintiff in *Rosenbaum*, the Bank brought this action pursuant to a statutory scheme created by the legislature that provides for a non-jury trial. Specifically, S.C. Code Ann. § 29-3-610 to -790 provides a procedure by which a mortgagor may foreclose in an equitable action decided by the court. SCRPC 71 also provides that foreclosure actions “shall be tried by the court, and shall ordinarily be referred to a master.” This codified the process established by the Act of 1791, which integrated the actions of foreclosure and the action for deficiency after sale into one equitable action, without the right to a jury trial. *See McConnell, et al. v. Barnes, et al.*, 142 S.C. 112, 140 S.E. 310 (1927). Therefore, consistent with *Rosenbaum*, the Court of Appeals correctly rejected Lindsay’s attempt to evade the statutory scheme created by the Legislature for resolving foreclosure actions by merely recasting an equitable dispute over the amount due on the Loan as a legal counterclaim.

The Court of Appeals also did not err by refusing to consider Lindsay’s statement (made for the first time in Respondent’s Brief to the Court of Appeals) that she *intends* to amend her Complaint to assert a claim for conversion. Because Lindsay did not plead a claim for

conversion in the trial court, or move to amend prior to this appeal, the issue of whether or not Lindsay would be entitled to a jury trial on a claim for conversion was not properly before the Court of Appeals. *Fraternal Order of Police v. South Carolina Dep't of Revenue*, 352 S.C. 420, 435, 574 S.E.2d 717, 725 (2002) (“Generally, claims or defenses not presented in the pleadings will not be considered on appeal.”). The law is clear that an appellate court may not consider an issue for the first time on appeal. *Wilder Corp. v. Wilke*, 330 S.C. 71, 75, 497 S.E.2d 731, 733 (1998) (“It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.”). Thus, the Court of Appeals correctly did not consider whether the amendment would entitle Lindsay to a jury trial.

In any event, even if Lindsay *had* pleaded a claim for conversion, the result would be the same. Lindsay is not entitled to a jury trial. Calling the claim “conversion” does not change the substance of the allegation, which is that Lindsay tendered the June 2008 payment to Respondents and that Respondents “failed to properly apply” it.⁴ (App. 68 at ¶ 34.) That allegation presents a quintessentially equitable dispute regarding the amount due on a mortgage loan, for which there exists no right to a jury trial. Thus, the Court of Appeals correctly determined that Lindsay is not entitled to a jury trial on her claims related to misapplication of Loan payments.

⁴ Similarly, on appeal, Lindsay has begun referring to Respondents’ misapplication of the June 2008 Loan payment as theft. (*See, e.g.*, Pet. for Cert. at 7 “Lindsay vehemently declares that her money was stolen.”). But Lindsay’s pleading in the trial court makes no allegations of theft. (App. 66-84.) Rather, Lindsay’s pleading reveals that what she refers to in her appellate briefing as theft is in reality nothing more than a hyperbolic re-characterization of her central complaint that the June 2008 payment was not properly credited to her Loan balance. (App. 67-68.)

II. The Court of Appeals correctly held that Lindsay is not entitled to a jury trial on her claims related to allegedly inaccurate statements made about the status of the Loan account because these claims are permissive rather than compulsory.

If a defendant asserts a counterclaim which is not legal and compulsory in an equitable action, he waives any right to a jury trial on that counterclaim. *N.C. Federal Savings and Loan Ass'n v. DAV Corp.*, 298 S.C. 514, 516, 381 S.E.2d 903, 904 (1989) (citing *C & S Real Estate Servs., Inc. v. Massengale*, 290 S.C. 299, 302, 350 S.E.2d 191, 193 (1986)); *Johnson v. S.C. Nat'l Bank*, 292 S.C. 51, 54, 354 S.E.2d 895, 897 (1987) (summarizing the proper analysis for determining the trial of legal and equitable issues in complaints and counterclaims, holding, “[i]f the complaint is equitable and the counterclaim is legal and permissive, the defendant waives his right to a jury trial”).

This Court has adopted the “logical relationship” test to determine whether a counterclaim is compulsory. *N.C. Fed. Sav. & Loan Ass'n*, 298 S.C. at 518, 381 S.E.2d at 905. In the foreclosure context, a logical relationship exists only if the counterclaim affects the lender’s right to enforce the note and foreclose the mortgage. *Wachovia Bank, N.A. v. Blackburn*, 407 S.C. 321, 330, 755 S.E.2d 437, 442 (S.C. 2014). If the defendant’s prevailing on his counterclaim would not affect the bank’s right to enforce the note and foreclose the mortgage, then there is no logical relationship between the counterclaim and the underlying suit, and the counterclaim is therefore permissive. *Id.*

The Court of Appeals properly applied the logical relationship test to determine that Lindsay’s claims based upon Respondents’ allegedly false statements about the status of the Loan are permissive rather than compulsory. With this category of claims, Lindsay alleges that Respondents made inaccurate statements concerning the status of the Loan (in the foreclosure pleadings and to credit bureaus), which allegedly harmed Lindsay’s reputation and ability to

obtain credit. (*See, e.g.*, App. 78 at ¶ 108; App. 79 at ¶¶ 114-118; App. 86 at ¶¶ 128, 132-133.) None of these claims challenge the enforceability of the Loan documents. Rather, the claims are based upon conduct alleged to have occurred several years *after* Lindsay's execution of the Loan documents. Nor would Lindsay's prevailing on the claims have any impact whatsoever on the Bank's ability to foreclose the mortgage. Because the claims have nothing to do with the enforceability of the Loan documents, and the relief sought in connection with these claims would not undo the underlying Loan transaction, the Court of Appeals properly determined that the claims are permissive and that Lindsay consequently waived any right to a jury trial on these claims by asserting them in this equitable action.

III. The Court of Appeals correctly held that Lindsay is not entitled to a jury trial on her third-party claims against Saxon because third-party claims are always permissive.

A third-party claim is *always* permissive, regardless of its relationship to the claims asserted in the underlying action. *N.C. Fed. Sav. & Loan Assoc. v. DAV Corp.*, 298 S.C. 514, 519, 381 S.E.2d 903, 906 (1989); *Tatnall v. Gardner*, 350 S.C. 135, 139, 564 S.E.2d 377, 378 (Ct. App. 2002); *see also* Rule 14(a), SCRCP (providing a defendant *may* implead a third-party) (emphasis added). Thus, by impleading Saxon into this foreclosure action, Lindsay waived any right to a jury trial on her third-party claims to the extent that any of them are deemed to be legal, rather than equitable. *Id.*

Moreover, all of Lindsay's claims, except for the negligence claims, are jointly asserted in her pleadings against the Bank and Saxon. By joining each of her claims against the Bank with the permissive third-party claims against Saxon, Lindsay has waived any right to a jury trial on these claims on this basis in addition to the other reasons stated by the Court of Appeals.

Lindsay is the master of her pleading and elected to bring claims as combined counter and third-party claims. In doing so, Lindsay waived her right to a jury trial on all combined claims.

IV. The Court of Appeals did not erroneously extend or misapply this Court's holding in *Carolina First Bank v. BADD, LLC* in deciding the instant appeal.

Lindsay also argues in her Petition that the Court of Appeals' ruling in this case was based upon an erroneous extension of this Court's holding in *Carolina First Bank*. (Pet. for Cert. at 10-12.) Specifically, Lindsay asserts that the Court of Appeals held 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." (Pet. for Cert. at 11-12.) But the Court of Appeals held no such thing. The Court of Appeals recognized that a foreclosure defendant is entitled to a jury trial on a counterclaim that is both legal and compulsory. (App. 258-259.) Upon closely examining substance of Lindsay's allegations (as opposed to Lindsay's legal styling of her claims), however, the Court of Appeals determined that each of Lindsay's claims is equitable or permissive. (*Id.*) 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 that she therefore is not entitled to a jury trial on any claim. (*Id.*)

Moreover, the Court of Appeals' 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 instant case, the Court of Appeals 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*. (App. 260.) Thus, this Court did not improperly extend the holding of *Carolina First Bank* in any respect.

Finally, Lindsay argues that the Court of Appeals overlooked certain factual differences between *Carolina First Bank* and the instant case. As previously noted, the Court of Appeals reached the correct result without regard to this Court's holding in *Carolina First Bank*. In any event, however, Lindsay's effort to distinguish *Carolina First Bank* from the instant case is unavailing.

Although she lists five alleged distinctions between *Carolina First Bank* and this case (Pet. for Cert. at 13-14), 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, whereas Lindsay is the primary borrower and had significant direct interaction with the mortgage servicer. (*Id.*) 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 *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 of whether the defendant is entitled to a jury trial on a counterclaim. 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.

Similarly, Lindsay's second alleged distinction—that the borrower's default was undisputed in *Carolina First Bank*, whereas Lindsay alleges essentially that she cured her default with the June 2008 Loan payment—completely misses the point. It is precisely because the crux of this dispute is over the amount due on the Loan that Lindsay is not entitled to a jury trial. The inquiry necessitated by Lindsay's claim that the payment was misapplied is a quintessentially equitable one—namely, what is the amount due on the Loan 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. Respondents contend that Lindsay failed to make her monthly Loan payments, both before and after she submitted the June 2008 Loan payment, and that she also failed to pay her property taxes or to properly insure the property as required by the loan documents. Thus, Respondents contend, Lindsay is in default under the loan documents, and foreclosure is proper, regardless of whether or not Saxon initially misapplied the June 2008 payment upon receipt. This Court properly held 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; S.C. Code Ann. § 29-3-650, 29-3-660; S.C. Rule Civ. P. 71.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Petition for Certiorari be denied.

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Charleston, South Carolina

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PROOF OF SERVICE

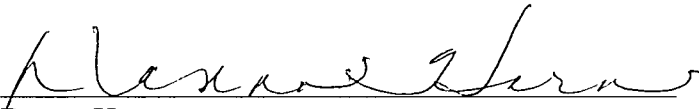
I HEREBY CERTIFY that I have served the **RETURN TO THE PETITION FOR A WRIT OF CERTIORARI** on Petitioner and Defendant by depositing copies of it in the United States Mail, postage prepaid, addressed to the below Counsel of Record:

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