THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Joseph M. Strickland, Master-in-Equity

Appellate Case No. 2014-002627
Common Pleas Case No. 2011-CP-40-7187

South Carolina Community Bank,.....Respondent,

v.

Salon Proz, LLC, Columbia Empowerment Zone, Inc. d/b/a The Columbia Empowerment Zone, and Frank Mitchell, Defendants,

Of which Salon Proz, LLC is the.....Appellant.

FINAL REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

COURT RULES

STATEMENT OF ISSUES

I. **Did the master-in-equity err in denying Appellant's motion to transfer the case to the general docket for jury cases where the clerk of court had signed and filed an order referring both a foreclosure claim and compulsory, at-law counterclaims to the master-in-equity and no waiver of Appellant's jury demand had occurred?**

II. **Did the master-in-equity err in denying Appellant's motion to transfer the case to the general docket for jury cases where the Appellant's amendment of its answer and counterclaim, which was granted after the order referring the case had been entered, demanded a jury trial and created new issues of fact in addition to those posed by the original answer and counterclaim?**

ARGUMENT

Respondent South Carolina Community Bank (hereinafter "SCCB")'s brief presents a "heads I win, tails you lose" set of arguments to this court. SCCB's arguments are readily dispelled when precedent and logic are applied to the record in this case.

I. SCCB's main argument is based on outdated, abrogated law that did not survive the adoption of Rule 13(a), SCRCP.

SCCB's main argument now can be summed up in the following quotation from its brief:

> [W]here a defendant asserts counterclaims in a foreclosure action that go to the plaintiff's right to foreclosure 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.

(Initial Brief of Respondent p. 15.) For this proposition, SCCB cites Collier v. Green, 244 S.C. 367, 137 S.E.2d 277 (1964), and Byrn v. Walker, 275 S.C. 83, 267 S.E.2d 601 (1980), relying heavily on Collier for its contention that counterclaims raised in a foreclosure action that arise out of the transaction in which the mortgage was originated or relate closely to the facts underlying the foreclosure claim sound in equity. (Initial Brief of Respondent pp. 14-17.)

A significant problem with the logic behind this argument is that the cases on which it is based predate the adoption on July 1, 1985, of the South Carolina Rules of Civil Procedure. The adoption of the Rules of Civil Procedure, particularly Rule 13(a), SCRCP, changed everything with regard to when a defendant's counterclaim in a foreclosure action entitles him to a jury trial.

The reason the Collier and Byrn cases reach the conclusion they do about counterclaims in a foreclosure action is because, "[p]rior to the adoption of the South Carolina Rules of Civil Procedure, a defendant in a mortgage foreclosure, an action in equity, had no right to a jury trial on a legal counterclaim." C & S Real Estate Services, Inc. v. Massengale, 290 S.C. 299, 300, 350 S.E.2d 191, 193 (1986), *modified by* Johnson v. S.C. Nat. Bank, 292 S.C. 51, 354 S.E.2d 895 (1987). A legal counterclaim "could be asserted in the foreclosure action if it arose out of the same transaction; however, the counterclaim was not mandatory." Id. at 301. Accordingly, the defendant waived his right to a jury trial on the claim (and, if the claim was closely related enough to the facts of the foreclosure claim, caused it to sound in equity) by making the non-mandatory choice to present it as a counterclaim in the foreclosure action. See id. at 300-01; Byrn, 275 S.C. at 85; Collier, 244 S.C. at 371-72.

Rule 13(a) turned the pre-rule analysis exemplified by Collier on its head. Under the 1985-present civil procedure rubric, a defendant in an equitable action who raises a counterclaim that "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim[,]" Rule 13(a), SCRCP, "is entitled to a jury trial on these compulsory counterclaims if legal in nature even though asserted in an equitable action." C & S, 290 S.C. at 301. That is because "Rule 13(a), SCRCP, now *requires* a defendant to plead as a counterclaim any claim arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim." Id. (emphasis added). Because a defendant in a foreclosure action has *no choice* but to assert a legal counterclaim that "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim[,]" Rule 13(a), SCRCP, or lose it forever, he *must* retain

his right to a jury trial on that counterclaim, since that right is "preserved inviolate" under the South Carolina Constitution. S.C. Const. art. I, § 14.

The counterclaims asserted in the amended answer and counterclaim of the Appellant, Salon Proz, LLC (hereinafter "Salon Proz"), are as follows:

1. Violation of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, *et seq.*;
2. Breach of contract (including, but not limited to, through breach of the covenant of good faith and fair dealing);
3. Breach of contract accompanied by fraudulent act;
4. Slander of title;
5. Libel; and
6. Negligent misrepresentation.

(R. pp. 69-73.) The remedy sought by each of the counterclaims is the recovery of a money judgment for damages. (R. pp. 69-73.)

All of these counterclaims sound in law. Moore v. Crowley & Assoc., Inc., 254 S.C. 170, 174 S.E.2d 340 (1970) (action for breach of contract is at law); Moosally v. WW Norton & Co., Inc., 358 S.C. 320, 594 S.E.2d 878 (Ct. App. 2004) (discussing "tort of libel"); Pond Place Partners, Inc. v. Poole, 351 S.C. 1, 567 S.E.2d 881 (Ct. App. 2002) (slander of title is a tort); Foxfire Village, Inc. v. Black & Veatch, Inc., 304 S.C. 366, 404 S.E.2d 912 (Ct. App. 1991) (characterizing breach of contract accompanied by fraudulent act as action at law); Payne v. Holiday Towers, Inc., 283 S.C. 210, 321 S.E.2d 179 (Ct. App. 1984) (action for violation of Unfair Trade Practices Act is in the nature of action at law); Redwend Ltd. Partnership v. Edwards, 354 S.C. 459, 581

S.E.2d 496 (Ct. App. 2003) (negligent misrepresentation sounds in tort). "Under the common law, legal actions for the recovery of money were triable by a jury." Cooper v. Poston, 326 S.C. 46, 48, 483 S.E.2d 750 (1997). Consequently, our South Carolina Constitution preserves the right to a jury trial in an action in which the claimant seeks a money judgment. Id. A money judgment is what Salon Proz's counterclaims seek.

Despite SCCB's allusion to the contrary, Salon Proz has not made a reformation claim. (Initial Brief of Respondent pp. 16-17.) "Reformation is the remedy by which writings are rectified to conform to the actual agreement of the parties." Crewe v. Blackmon, 289 S.C. 229, 234, 345 S.E.2d 754, 757 (Ct. App. 1986). "Before equity will reform an instrument, it must be shown by clear and convincing evidence not simply that there was a mistake on the part of one of the parties, but that there was a mutual mistake. A mutual mistake is one whereby both parties intended a certain thing but because of a mistake in drafting did not get what they intended." Timms v. Timms, 290 S.C. 133, 137, 348 S.E.2d 386, 389 (Ct. App. 1986) (internal citation omitted). Salon Proz's claims do not ask the court to take contractual documents and make them different on the basis of a mutual mistake. (R. pp. 69-73.) They allege, instead, that there is no note and that the parties' actual agreement was not put in writing and is different from what SCCB claims that it is. (R. pp. 69-73.) The only way that Salon Proz's claims could be transformed in ones sounding in equity would be to apply the abrogated law of Collier and its pre-Rule 13 ilk.

SCCB has premised the bulk of its argument on outdated, abrogated law that ignores the effect of the adoption of Rule 13(a), SCRCP, on the law in this area.

II. SCCB makes an unavailing attempt to distinguish away the principle that a purported waiver of the right to a jury trial is strictly construed.

SCCB points out that in its brief Salon Proz cited cases dealing with purported contractual jury trial waivers for the proposition that a claimed waiver of the right to trial by jury is to be strictly construed. (Initial Brief of Respondent p. 9 n. 3.) That is of no moment. There is a South Carolina case discussing possible waiver of a jury trial right by pleading a counterclaim that may be compulsory and may be permissive in an equitable action that states that "[t]he right of trial by jury is highly favored, and waivers of the right are always strictly construed and not lightly inferred or extended by implication." Keels v. Pierce, 15 S.C. 339, 342, 433 S.E.2d 902, 904 (Ct. App. 1993).

III. Rosenbaum is distinct, different, and inapplicable.

The opinion in Rosenbaum v. S-M-S 32, 311 S.C. 140, 427 S.E.2d 897 (1993), cited by SCCB, is not applicable to this case. Rosenbaum deals with a specific statute, S.C. Code Ann. § 12-16-10, *et seq.*, that the court in that case saw as the comprehensive statutory scheme, sounding in equity, for the litigation of the validity of tax titles. 311 S.C. at 142-43. The Rosenbaum court indeed noted the "unique circumstances existing in a tax forfeiture acquisition[.]" Id. at 143. To attempt to analogize the interposition of at-law counterclaims in a foreclosure action with the situation in Rosenbaum not only ignores this language of the court but also ignores Supreme Court jurisprudence such as N.C. Fed. Sav. & Loan Ass'n v. DAV Corp., 298 S.C. 514, 518, 381 S.E.2d 903, 905 (1989), discussed in Salon Proz's appellant's brief, which was itself a situation in which the plaintiff's claim was for foreclosure but the right to a jury trial on at-law counterclaims was upheld. To the extent that there actually is any conflict between Rosenbaum and our state Supreme Court's jurisprudence, the latter controls.

IV. SCCB's argument that Salon Proz's counterclaims are permissive contradicts its own main argument.

SCCB argues that Salon Proz's counterclaims for slander of title, libel, and violation of the Unfair Trade Practices Act are permissive because they "do not bear directly upon the enforceability of the loan documents." (Initial Brief of Respondent p. 19.) SCCB concedes that Salon Proz's claims for negligent misrepresentation, breach of contract, and breach of contract accompanied by fraudulent act are compulsory, not permissive, as it has failed to argue otherwise. First Union Nat. Bank v. FCVS Communications, 321 S.C. 496, 502, 469 S.E.2d 613, 617 (Ct. App. 1996) (where respondent fails to respond to issue in respondent's brief, court may treat failure to respond as concession that appellant is correct).

SCCB's argument that counterclaims for slander of title, libel, and violation of the Unfair Trade Practices Act are permissive has something of a problem, though, in that it contradicts assertions made in the main argument in SCCB's brief. In that argument, SCCB states that "a necessary element of *each* of [Salon Proz's] claims is that it is not in default and the Bank is not entitled to foreclose." (Initial Brief of Respondent p. 16.) In the argument it puts first in its brief, SCCB writes that the counterclaims it calls permissive *do* "challenge that Bank's right to foreclosure" and "require Salon Proz to prove that the note and mortgage are unenforceable and/or that Salon Proz is not in default on the loan" and that "it would not have defaulted on the loan had the Bank not engaged in a pattern of reneging upon promises to modify or restructure loans." (Initial Brief of Respondent p. 17.) Going further to illustrate the logical relationship that SCCB believes – when it suits it – that Salon Proz's counterclaims have to the foreclosure claim, SCCB states that "[i]f the court determines

that Salon Proz defaulted on the subject loan, then all six of Salon Proz's counterclaims will fail as a matter of law. Thus, each of its claims bears upon the amount due on the loan." (Initial Brief of Respondent p. 17.) According to SCCB, "the primary purpose of these counterclaims is to attack the enforceability of the subject note and mortgage[.]" (Initial Brief of Respondent p. 17.) In its argument that Salon Proz has made permissive counterclaims, however, it writes that the "counterclaims are not compulsory because they do not directly affect the enforceability of the note secured by the mortgage which is the 'transaction or occurrence' that is the subject of the Bank's foreclosure complaint." (Initial Brief of Respondent p. 20.) SCCB contends one thing when it serves its argument and something completely opposite when it serves a different argument. This court should not brook such Janus-faced advocacy.

Further, South Carolina law on the treatment of at-law counterclaims as permissive or compulsory in an equitable action does not require the harsh result sought by SCCB, not at all. In the Keels case cited above, this court rejected the idea of a harsh waiver rule where the compulsory or permissive nature of a counterclaim is unclear. 315 S.C. at 341-42. Concerned with the idea that a litigant might forgo bringing what turned out to be a compulsory counterclaim for fear of losing his right to a jury trial, this court stated that "Rule 13, SCRCP, does not place a pleader in this dilemma. 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, 315 S.C. at 341. If the claim is later found to be permissive, this court held, "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." Id. at 341-42. The rule of waiver of the right to trial by jury "applies only when it is clear the counterclaim is permissive[,]" and, "if uncertainty exists, the pleader does not waive his right to a jury trial if the court later decides the claim is permissive." Id. at 342.

V. SCCB's presumptive-receipt-of-notice-of-the-entry-of-the-order-of-reference argument makes a logical leap and runs counter to what little law we have had in this area.

There is not much law in South Carolina on contested positions about when or whether a litigant (or his counsel) received written notice of the entry of an order. What law there is, though, does not support SCCB's argument that it must be presumed, in the total absence of any evidence that this happened, that the clerk of court mailed the filed order of reference to Salon Proz's predecessor counsel, that he received the mailed order, and that all of that happened at a time that precluded any challenge being made to the order of reference.

Rather than supporting SCCB's argument of a presumption to this effect, the sparse case law in our state on this issue indicates such a presumption does not exist and that receipt of written notice of an order's entry is not something that our courts merely presume. In Canal Ins. Co. v. Caldwell, 338 S.C. 1, 4-5, 524 S.E.2d 416 (Ct. App. 1999), this court made a determination that a motion to alter or amend was untimely where the *evidence in the record* showed "there [was] no question that [the movant's counsel] received written notice of the entry of the judgment" more than 10 days before the motion was made. In USAA Property & Cas. Ins. Co. v. Clegg, 377 S.C. 643, 661 S.E.2d 791, 794 (2008), the Supreme Court rejected a contention that USAA's motion to reconsider was untimely even where a party, Lambrecht, "filed an

affidavit from his attorney and an accompanying facsimile transmittal sheet which indicated that Lambrecht's attorney had faxed a letter to USAA's counsel [more than 10 days before the motion was made] which stated that he had received a copy of the circuit court's order." While the Court rejected the argument that the motion was untimely based on deference to the trial court's credibility determination, the analysis in that case indicates *that* is the level of proof required to make an argument about when a party received written notice of an order. Id. at 795.

Here, the lower court made no findings about when or whether Salon Proz received notice of the order of reference. (R. pp. 1-3.) Moreover, nothing even close to the evidence presented in the USAA case was put before the court here. SCCB's only (and dubious) argument is that there is a presumption that the clerk of court mailed the order to Salon Proz's attorney, but even that is not proof that he *received* written notice of the entry of the order. The record contains no evidence of such receipt.

VI. There is, and must be, an implicit requirement that Rule 53(b) does not authorize a clerk of court to refer non-referable causes of action.

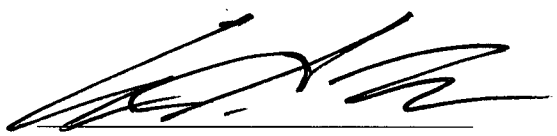
Under Rule 53(b), a clerk of court's power to issue an order of reference is limited to specifically enumerated situations, as it should be. That power must be narrowly construed. Were it otherwise, clerks of court, not judges, would be empowered to determine the merits of whether a case may be properly referred. To allow clerks of court the authority to issue orders of reference of the kind SCCB claims was proper here would place the decision of issues that implicate litigants' constitutional rights in the hands of someone who, despite what may even be the best

intentions, does not have the experience, training, education, and, above all, lawful authority of a judge. The implications are frightening.

CONCLUSION

SCCB's arguments fall flat. Salon Proz is entitled to a jury trial on its counterclaims. This court should reverse and remand accordingly.

Respectfully submitted,



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Of which Salon Proz, LLC is the.....Appellant.

CERTIFICATE OF COUNSEL

I certify that the foregoing brief complies with Rule 211(b), SCACR.

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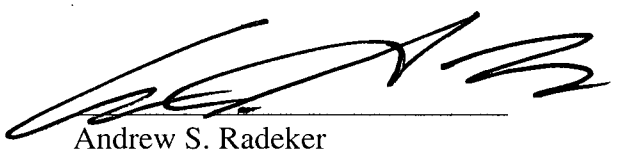

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