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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

James B. Jackson, Jr., Special Circuit Court Judge

Case No. 2007-CP-38-00196 and 2007-CP-38-0201
Appellate Case No. 2014-001634

First Citizens Bank and Trust Company, Inc., ... 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 Bank and Trust Company of South Carolina, G&G Rentals, Miller Communications, Wells Fargo Bank, N.A, ...

Defendants,

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

And

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

v.

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

Defendants,

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

FIRST CITIZENS' FINAL REPLY BRIEF

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Statement of Issues on Appeal

I. **Did the trial court err in denying First Citizens' requests for a bench trial based on the law of the case doctrine?**

II. **Did the circuit court err in denying First Citizens' motions to strike Livingston's jury trial request and its demand for a bench trial because his counterclaims are permissive?**

Argument

I. The trial court erred in denying First Citizens' requests for a bench trial based on the law of the case doctrine.

The master-in-equity's December 11, 2007 Order granting Livingston's motions to amend his answers did not finally determine the mode of trial issues raised by First Citizens' demand for a bench trial. The mode of trial for Livingston's counterclaims in these foreclosure actions was never before the master-in-equity. As a result, First Citizens did not waive right to appeal by not appealing the December 11, 2007 Order. Further, the denial of First Citizens' motions to strike based on the law of the case doctrine is erroneous as a matter of law. Reversal is warranted and the Court should order the entire action tried by bench trial before the master-in-equity.

A. The master-in-equity's Orders returned the newly added claims to the Circuit Court as required by Rule 53, SCRCP.

On May 15, 2007, these foreclosure actions were referred to the master-in-equity. (Mot. and Order of Reference, C.A. No. 2007-CP-38-196; R. 447; Mot. and Order of Reference, C.A. No. 2007-CP-38-201; R. 449.) On August 9, 2007, Livingston filed motions to amend his answers in both actions to assert counterclaims. (Mot. Amend Answer, C.A. No. 2007-CP-38-196; R. 463; Mot. Amend Answer, C.A. No. 2007-CP-38-201; R. 465.) Livingston's motions to amend were heard on December 3, 2007. (Order Granting Mot. Amend, C.A. No. 2007-CP-38-196; R.5; Order Granting Mot. Amend, C.A. No. 2007-CP-38-201; R. 9.) Livingston filed and served his proposed amended answers on the day of the hearing. (Am. Answer and Countercl., C.A. No. 2007-CP-38-196; R. 115; Am. Answer and Countercl., C.A. No. 2007-CP-38-201; R. 125.) At the hearing, the only issue before the master was whether the motions to amend should be

granted or denied on the basis of prejudicial delay. (Order Granting Mot. Amend, C.A. No. 2007-CP-38-196; R. 5; Order Granting Mot. Amend, C.A. No. 2007-CP-38-201; R. 9.) The master determined that the motions should be granted, severed the counterclaims, and returned them to the circuit court. (*Id.*)

Under Rule 53 of the South Carolina Rules of Civil Procedure,

> In an action where the parties consent, in a default case, or 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 or the clerk of court. . . . Any party may request a jury pursuant to Rule 38 on any or all issues triable of right by a jury and, ***upon the filing of a jury demand, the matter shall be returned to the circuit court.***

Rule 53(b), SCRCP (emphasis added).[1] Thus, upon Livingston's demand for jury trials in his Amended Answers, the master's December 11, 2007 Order properly returned the counterclaims to the circuit court. (*See* Am. Answer and Countercl., C.A. No. 2007-CP-38-201; R. 125; Am. Answer and Countercl., C.A. No. 2007-CP-38-196; R. 115.) The master was *required* to do so, and he had no discretion to determine whether Livingston actually had a right to a jury. Consistent with Rule 53, SCRCP, the December 11, 2007 Order does not order that the action proceed before a jury in circuit court; instead, it merely returns the counterclaims to the circuit court. Merely returning the counterclaims does not address—much less conclusively and finally determine—whether Livingston was actually entitled to a jury trial. As a result, the December 11, 2007 Order did not

[1] The Reporter's Note appended to the 2002 amendment to Rule 53 further establishes that, upon a jury demand, the master must always order the return of the action to the circuit court. The Note states, "[i]f there are counterclaims requiring a jury trial, any party may file a demand for a jury under Rule 38 and the case ***will be returned*** to the circuit court." Rule 53, SCRCP, Note to 2002 Amendment (emphasis added).

determine any substantial rights and First Citizens did not waive its current appeal by not appealing the December 11, 2007 Order.

The Consent Orders entered into by the parties to resolve the improper service of the orders of reference did not authorize the master to determine whether Livingston was entitled to a jury trial. The Consent Orders at issue state 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.

(Consent Order, C.A. No. 2007-CP-38-196; R. 1-2; Consent Order, C.A. No. 2007-CP-38-201; R. 3-4.) The Consent Orders merely reinforce that, upon the filing of a jury demand, the counterclaims were to be returned to the circuit court, consistent with the mandates of Rule 53, SCRCP. The December 11, 2007 Order indicates that the master-in-equity did not consider the consent orders in determining whether the action should be returned to the circuit court, stating that they were only "pointed out" by counsel for Livingston "at the close of the hearing." (Order Granting Mot. Amend, C.A. No. 2007-CP-38-196; R. 6; Order Granting Mot. Amend, C.A. No. 2007-CP-38-201; R. 10.)

Hence, as shown by the Record and supported by Rule 53, the master-in-equity properly returned the action to the circuit court upon Livingston's demand for a jury trial

but did not make any determinations as to his entitlement to try those claims before a jury.

B. First Citizens did not waive its ability to appeal the mode of trial issues presented in this case.

First Citizens never moved for the master-in-equity to strike Livingston's jury demand, so no order by the master-in-equity decided the mode of trial issue on the counterclaims. As shown above, the master-in-equity simply returned the counterclaims to the circuit court as required by Rule 53—no more. First Citizens did not waive its right to appeal the most recent orders finally deciding the mode of trial issues.

Cases holding that a party waived its right to appeal the denial of a protected mode of trial by failing to immediately appeal the order arise in the context of an order directly granting or denying a motion demanding a jury or nonjury trial. *See, e.g.*, *Lester v. Dawson*, 327 S.C. 263, 265, 491 S.E.2d 240, 241 (1997) (order denying motion for jury trial); *Edwards v. Timmons*, 297 S.C. 314, 315, 377 S.E.2d 97, 97 (1988) (order denying request for jury trial); *Creed v. Stokes*, 285 S.C. 542, 542, 331 S.E.2d 351, 352 (1985) (order referring an action to a master); *Mortgage Elec. Sys., Inc. v. White*, 384 S.C. 606, 612, 682 S.E.2d 498, 501 (Ct. App. 2009) (order denying jury demands); *Bowers v. Thomas*, 373 S.C. 240, 244, 644 S.E.2d 751, 752 (Ct. App. 2007) (order denying request for jury trial); *Shah v. Richland Mem'l Hosp.*, 350 S.C. 139, 145, 564 S.E.2d 681, 684 (Ct. App. 2002) (order granting motion for nonjury trial); *Preferred Sav. Bank, Inc. v. Elkholy*, 303 S.C. 95, 98, 399 S.E.2d 19, 21 (Ct. App. 1990) (order denying motion to transfer case to jury calendar and order denying motion for jury trial); *First Union Nat. Bank of S. Carolina v. Soden*, 333 S.C. 554, 565, 511 S.E.2d 372, 377 (Ct. App. 1998) (order denying demand for jury trial). None of these cases arise in a similar

context to Livingston's argument here, that the December 11, 2007 Order granting the motions to amend also conclusively determined the tangential mode of trial issue. The constitutionally proper judicial means for making such a determination represented by the list of above cases are similar to the procedural context here—where First Citizens directly moved to strike Livingston's jury demands before the circuit court and noticed an appeal after its bench trial demand was denied.

Livingston cites to *McLaughlin v. Strickland*, 279 S.C. 513, 515-16, 309 S.E.2d 787 (Ct. App. 1983), to support his argument that an order that affects a substantial right must be immediately appealed regardless of the name of the order or motion. (Brief of Respondent/Appellant at p. 6.) *McLaughlin* is inapposite to the instant action. In *McLaughlin*, the order being appealed from refused the defendant leave to file an untimely answer, which effectively prevented the defendant from contesting the case on the merits—thus directly affecting a substantial right. *Id.* at 516, 309 S.E.2d at 790. The denial of the right to file an answer in *McLaughlin* was a final order on that right. On the contrary, the December 11, 2007 Order merely granted Livingston the right to amend his answer; it did not effectively foreclose First Citizens from contesting the counterclaims on their merits like barring a defendant from answering does. (Order Granting Mot. Amend, C.A. No. 2007-CP-38-196; R. 5; Order Granting Mot. Amend, C.A. No. 2007-CP-38-201; R. 9.) Nor did the December 11, 2007 Order foreclose First Citizens' right to file demand a bench trial with the circuit court and seek to have the jury trial demands stricken. Instead, the order granting the motions to amend only allowed Livingston to amend and returned the counterclaims to the circuit court, priming the mode of trial issue for resolution before the circuit court. It did not make a final determination on the mode

of trial prior to the counterclaims being returned to the circuit court without considering motions or arguments on that issue. The mode of trial issue was not directly addressed until First Citizens moved the circuit court to strike Livingston's jury trial request and demanded a bench trial.

The larger implication of Livingston's argument that the December 11, 2007 Order conclusively foreclosed First Citizens' right to a bench trial is that every time a defendant asserts counterclaims in a contested foreclosure or other action before a master-in-equity and demands a jury trial, the master's order granting the motion to amend would either affect the defendant's substantial right (by returning the counterclaims to the circuit court pursuant to Rule 53, SCRCP) or the plaintiff's (by *not* doing so). *Every* such order granting amendment would require an appeal to this Court or the aggrieved party would waive their constitutional right to their mode of trial—even though neither party had yet moved for a specific mode of trial.[2] Such an interpretation contravenes the purpose of South Carolina Code Section 14-3-330, which is intended to minimize interlocutory appeals to orders that "in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action." S.C. Code Ann. § 14-3-330(2).

An order granting leave to amend does not make any final determinations as to mode of trial issues—it cannot and does not. Reversal is necessary.

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[2] As stated above, the consent orders entered in these actions do not distinguish this case procedurally from any other action before a master-in-equity. The master was required to return the counterclaims pursuant to Rule 53(b), SCRCP, regardless of the consent order. Thus, under Livingston's argument, the master would conclusively determine the critical mode of trial issue with *every* amendment.

C. The law of the case doctrine is inapplicable.

The trial court also erred in holding the law of the case doctrine barred it from considering First Citizens' motion to strike and demand for a bench trial.

As noted above, the December 11, 2007 Order did not command that First Citizens proceed in the circuit court before a jury or foreclose First Citizens' ability to move to strike Livingston's newly-asserted jury demands, so it did not affect a substantial right and thus was not immediately appealable under Section § 14-3-330. *See Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013) ("The doctrine of the law of the case applies to an order or ruling which finally determines a substantial right." (citation omitted)). Accordingly, it was not an unappealed final judgment, and the law of the case doctrine is inapplicable. *See Bone v. U.S. Food Serv.*, 399 S.C. 566, 576, 733 S.E.2d 200, 205 (2012) ("Where the party is not yet able to appeal due to the lack of a final judgment, the issue is not precluded by the law of the case doctrine as there was no prior opportunity for appeal.").

The circuit court erred in denying First Citizens' motions demanding a bench trial on the basis of the law of the case doctrine and in not addressing First Citizens' motions to strike on their merits. This Court should reverse the circuit court's decision on First Citizens' motions to strike, strike the jury demands, and remand to the circuit court with instructions to refer the entire action to the master-in-equity for a bench trial.[3]

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[3] Although the Court dismissed the portion of First Citizens' appeal relating to the circuit court's denial of summary judgment, similar erroneous law of the case analysis was used to deny Livingston's motion for summary judgment on Livingston's libel counterclaim in action 196. (Order Granting Summ. J. in Part, Den. Summ. J. in Part, and Den. Pl.'s Mot. Strike Jury Demand at 11; R. 44.) This Court should correct the improper applications of the law of the case doctrines and direct the lower court to address Livingston's summary judgment arguments on their merits as well because law of the case is not applicable to an

II. The circuit court erred in denying First Citizens' motions to strike Livingston's jury trial request and its demand for a bench trial because his counterclaims are permissive.

The remaining counterclaims in this action, as pled, are permissive. As a result, Livingston is not entitled to a jury trial on those counterclaims as he waived any such right by filing the claims in response to First Citizens' foreclosure complaint.

While Livingston disputes the merits of the *BADD* decision, *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),[4] he hardly contests First Citizens' arguments that he is not entitled to a jury trial on his counterclaims. Livingston's request that this Court rely on the logical relationship test as expounded in *N. Carolina Fed. Sav. & Loan Ass'n v. DAV Corp.*, 298 S.C. 514, 381 S.E.2d 903 (1989), ignores our Supreme Court's decision in *Blackburn*, which recognized the limits of the "logical relationship" test in the foreclosure context. *Wachovia Bank, Nat'l Ass'n v. Blackburn*, 407 S.C. 321, 328, 755 S.E.2d 437, 440-41 (2014). In *Blackburn*, the Supreme Court stated that a "logical relationship" exists between counterclaims asserted in a foreclosure action and the foreclosure suit "[i]f the defendant's prevailing on his counterclaim would affect the bank's right to enforce the note and foreclose the mortgage. *Id.* at 331, 755 S.E.2d at 442 n.7. The only relief that Livingston requests in his counterclaims is monetary damages. (Answer to Am. Compl.,

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order denying summary judgment. *See Crosswell Enters., Inc. v. Arnold*, 309 S.C. 276, 279, 422 S.E.2d 157, 159 (Ct. App. 1992) ("The denial of a motion for summary judgment does not bar a party from making a later motion for summary judgment based on matters not involved in the decision on the first motion.").

[4] *BADD* is currently on rehearing before the Supreme Court as the Court requested further briefing on the issues which involve whether a Guarantor in a foreclosure action is entitled to a jury trial pursuant to S.C. Code Ann. § 29-3-660. *BADD's* outcome on rehearing will not directly affect any issues raised in this case. The analysis contained in this brief as to Livingston's counterclaims stands regardless of whether the Supreme Court amends its decision in *BADD*.

C.A. No. 2007-CP-38-196 at ¶¶ 46, 49, 63; R. 159-61; Am. Answer and Countercl. C.A. No. 2007-CP-38-201 at ¶ 33; R. 129.) All of Livingston's counterclaims are thus permissive because, even if he were to prevail on all of his counterclaims and obtain monetary damages (by way of setoff if the remaining balances exceed any amount of damage awarded to Livingston), First Citizens would still be entitled to foreclose on the mortgages. Livingston has been in default on the loans for eight years, and success on his counterclaims would not change that fundamental fact.

A. Livingston's libel claim is permissive.

Livingston's counterclaim for libel in action 196 is undoubtedly permissive as pled. The premise of the libel counterclaim is that First Citizens published allegedly false statements to credit reporting agencies by stating he was in default and that First Citizens was entitled to foreclose. (Answer to Am. Compl., C.A. No. 2007-CP-38-196, at ¶¶ 56-63; R. 161.) The alleged reporting to the credit agencies occurred after the loan closing and is necessarily dependent on the existence of the loans. First Citizens' alleged reporting of Livingston's negative credit events to credit reporting agencies has no relevance or relationship to the enforceability of the mortgage. Even if First Citizens had published false statements, it would still be entitled to foreclose. Accordingly, the libel claim is permissive, and Livingston waived his right to jury trial on this claim by asserting it as a counterclaim to the foreclosure action. *See Blackburn*, 407 S.C. at 329-30, 755 S.E.2d at 441-42. In tacit recognition of its permissive nature, Livingston does not include libel in his list of counterclaims supposedly arising out of the loan origination. (Brief of Respondent/Appellant at p. 12.) The circuit court erred in failing to strike Livingston's jury demand on his libel counterclaim.

B. Livingston's attorney-preference claim is only a recoupment defense in this action—not actually a claim.

Livingston also has no right to jury trial on his attorney-preference counterclaim. The counterclaim was expressly limited by the circuit court to a recoupment defense. (Order Granting Summ. J. in Part, Den. Summ. J. in Part, and Den. Pl.'s Mot. Strike Jury Demand at 9; R. 42.) As a result, there is no longer any "counterclaim" to be tried before a jury and only an equitable defense remains. *See Bateman v. Rouse*, 358 S.C. 667, 674, 596 S.E.2d 386, 389 (Ct. App. 2004) (finding that recoupment was an equitable defense for determination by the court). The circuit court erred in denying First Citizens' motion to strike the jury demand on Livingston's attorney preference counterclaim.[5]

C. Livingston is not entitled to a jury trial on his breach of contract counts as, even if he prevails, the underlying enforceability of the note and mortgage will not be affected and he could only receive a setoff for any award in connection with these claims.

Livingston's breach of contract counterclaims are also permissive. Livingston argues that his breach of contract counterclaims are compulsory because, "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." (Brief of Respondent/Appellant at p. 10.) Livingston's assertion is incorrect; whether Livingston is entitled to monetary damages for purported breaches of the note has no impact on whether the mortgage may be enforced. Any damages he may win would be setoff against the amounts owed on the loans.

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[5] The portion of the argument on the attorney-preference claim is one that really only concerns procedure as the trial court properly labeled it a defense but failed to strike the jury demand—apparently as an oversight, but the court did not fix it on rehearing.

The counterclaims in *DAV Corp.* were recognized as compulsory because they "would have ***avoided default*** on the note . . . ." *N. Carolina Fed. Sav. & Loan Ass'n v. DAV Corp.*, 298 S.C. 514, 518, 381 S.E.2d 903, 905 (1989) (emphasis added). None of Livingston's counterclaims—that First Citizens failed to provide a notice of right to cure before foreclosing, failed to allow him access to a larger line of credit, and made inconsistent representations about the amount of his debt—would have avoided his default and thus affected First Citizens' right to foreclose. *See U.S. Bank Trust Nat. Ass'n v. Bell*, 385 S.C. 364, 374-75, 684 S.E.2d 199, 205 (Ct. App. 2009) (stating that the elements of a foreclosure cause of action are the existence of a debt and default on that debt by the mortgagor). Even if Livingston were to succeed on his claims that First Citizens breached the terms of both notes, he only requests and could only be entitled to monetary damages—and First Citizens *still* would be entitled to foreclose the mortgages because Livingston has been in default on both loans for over eight years.

To the extent Livingston's allegations of unfairness are cognizable, which First Citizens denies, they should be raised as equitable defenses before the master—a point that Livingston does not contest in his Respondent's brief. *See id.* ("Once the debt and default have been established, the mortgagor has the burden of establishing a defense to foreclosure such as lack of consideration, payment, or accord and satisfaction."). This Court should not allow Livingston to manufacture jury trials on allegations of inequitable behavior and, in doing so, delay two foreclosures for over eight years merely by asserting those allegations under the label of a cause of action that is traditionally legal in nature rather than properly asserting them as equitable defenses in the first place. *See Rosenbaum v. S-M-S 32*, 311 S.C. 140, 142, 427 S.E.2d 897, 897 (1993) (stating that a

defendant "cannot 'earn' the right to a jury trial" by bringing an inappropriate legal counterclaim rather than the appropriate equitable claim).

Even if accepted as counterclaims and as true, Livingston's allegations of breaches of the notes only entitle him to monetary damages and do not affect First Citizens' right to foreclose the mortgages. This Court should strike Livingston's jury demands, remand both actions to the master-in-equity, and realign Livingston's breach of contract and attorney preference "counterclaims" as equitable defenses to the foreclosure action.

Conclusion

The Court should reverse the circuit court's order denying First Citizens' demands for a bench trial on Livingston's counterclaims for alleged violation of the attorney preference statute, breach of contract, and libel, and remand this action for further proceedings before the master-in-equity.

[Signature page follows]

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned certifies that this First Citizens' Final Reply Brief complies with Rule 211(b), SCACR.

SIGNATURE PAGE ATTACHED

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Columbia, South Carolina
July 15, 2015

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

James B. Jackson, Jr., Special Circuit Court Judge

Case Nos. 2007-CP-38-0196 and Case No. 2007-CP-38-0201
Appellate Case No. 2014-001634

First Citizens Bank and Trust Company, Inc., ... 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 Bank and Trust Company of South Carolina, G&G Rentals, Miller Communications, Wells Fargo Bank, N.A,..... Defendants,

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

And

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

v.

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

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

PROOF OF SERVICE

I, the undersigned Paralegal of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Appellant/Respondent, do hereby certify that I have served all counsel in this action with a copy of the document(s) hereinbelow specified

by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Document(s):	FIRST CITIZENS' FINAL REPLY BRIEF CERTIFICATE OF COUNSEL, RULE 211(b), SCACR
Counsel Served:	Andrew S. Radeker, Esquire Harrison & Radeker, P.A. PO Box 50143 Columbia, SC 29250

Tracy Slice Moore

July 15, 2015