THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY
COURT OF COMMON PLEAS
THE HONORABLE JOSEPH M. STRICKLAND
MASTER IN EQUITY

APPELLATE CASE NO. 2014-002627
CIVIL ACTION NO. 2011-CP-40-7187

South Carolina Community Bank,

RESPONDENT,

versus

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 BRIEF OF RESPONDENT

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COUNTERSTATEMENT OF THE CASE

Respondent South Carolina Community Bank (the "Bank") initiated foreclosure proceedings against Appellant Salon Proz, LLC by way of a Complaint filed on October 26, 2011 seeking to foreclose on the mortgage given by Salon Proz on real property located in Richland County.[1] [R.pp. 10-33; Complaint.] On November 23, 2011, Salon Proz answered and asserted five counterclaims: (1) breach contract[2]; (2) slander of title; (3) violations of usury law; (4) predatory lending; and (5) unclean hands. [R.pp. 34-42; Answer and Counterclaim.] The Bank answered the counterclaims of Salon Proz on December 19, 2011, denying the material allegations of the counterclaims. [R.pp. 44-46; Reply.] The Bank thereafter moved to dismiss the counterclaims of Salon Proz on January 19, 2012. [R.pp. 51-52; Motion.]

On or about January 25, 2012, the Bank served a Motion to Refer the foreclosure action to the Master-in-Equity upon Andrew A. Aun, the attorney representing Salon Proz at that time. The Bank filed this motion pursuant to Rule 53(b), SCRCP which permits referral of some or all of the causes of action in a foreclosure action to the master by order of a circuit judge or the clerk of court. [R.pp 55-57; Motion and Certificate of Service.] Salon Proz did not file any response or objection to this Motion to Refer.

On February 14, 2012, the Clerk of Court for Richland County signed an Order of Reference and filed the same on February 17, 2012. The Clerk of Court ordered that the

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[1] The Bank also named as defendants Columbia Empowerment Zone, Inc. d/b/a The Columbia Empowerment Zone and Frank Mitchell because these defendants were junior lienholders with respect to the lien being foreclosed by the Bank.

[2] Salon Proz labeled this counterclaim "Breach of Implied Covenant of Good Faith and Fair Dealing," but there is no independent cause of action for breach of the implied covenant of good faith and fair dealing separate from the claim for breach of contract. RoTec Servs., Inc. v. Encompass Servs., Inc., 359 S.C. 467, 473, 597 S.E.2d 881, 884 (Ct. App. 2004).

case be referred to the Master-in-Equity "to take testimony, determine the issues involved and report his findings of fact and conclusions of law to this Court with all convenient dispatch, with leave to make findings of fact and conclusions of law as to any special matter, with authority to enter final judgment herein." [R.p. 4-6; Order.] Salon Proz did not appeal or file any motion to reconsider or any other objection to the filed Order of Reference. [R.pp. 91, ll. 19-21; 96, ll. 3-8; 120, ll. 7-18.]

Over six months later, on August 31, 2012, Salon Proz filed a motion to transfer the case to the general docket for jury cases. The motion sought to vacate the previously filed and unappealed Order of Reference [R.pp. 58-60; Motion.] Salon Proz was now represented by different counsel, the same counsel representing Salon Proz in this appeal. Id.

Salon Proz then filed a motion to amend its answer and counterclaim on September 14, 2012. The motion sought leave to assert amended counterclaims for (1) violation of the Unfair Trade Practices Act; (2) breach of contract; (3) breach of contract accompanied by fraudulent intent; (4) slander of title; (5) defamation; and (6) negligent misrepresentation. [R.pp. 62-74; Motion and Proposed Answer and Counterclaim.]

A hearing was held before The Honorable Joseph M. Strickland, Master-in-Equity for Richland County, on March 21, 2013. [R.p. 88.] The Master heard several pending motions of the parties, including the motions of Salon Proz to transfer the case to the jury docket and amend the answer and counterclaim, as well as the Bank's motion to dismiss the counterclaims. [R.pp. 90-110.] The Master orally denied the motion of Salon Proz to transfer the case to the jury docket and granted its motion to amend its answer and counterclaims. [R.pp. 13, ll. 20-23; 110, ll. 10-11.] The proposed answer and

counterclaim previously submitted by Salon Proz was accepted as filed. [R.p. 113, ll. 19-25.] The Bank filed its reply to the amended answer and counterclaim on March 28, 2013. [R.pp. 48-49; Reply.]

On June 21, 2013, the Master filed his written order denying the motion of Salon Proz to transfer the case to the jury docket and granting its motion amend its answer and counterclaims. [R.pp. 1-2; Order.] Salon Proz moved for reconsideration of the Master's Order on June 28, 2013. [R.pp. 76-86; Motion.]

On September 17, 2013, a second hearing was held before the Master on the motion of Salon Proz to reconsider the court's denial of its motion to transfer the case to the jury docket. [R.pp. 116-124; 126.] The Master orally denied the motion to reconsider, which was followed by the court's written order denying the same filed on November 7, 2014. [R.pp. 126, ll. 10-11; 3; Order.] Salon Proz filed and served its Notice of Appeal on December 2, 2014.

ARGUMENT

I. Pursuant to the plain and unambiguous language of South Carolina Rule of Civil Procedure 53(b), the Clerk of Court had the authority to refer this foreclosure action to the Master-In-Equity.

Salon Proz contends the Clerk of Court did not have the power and authority pursuant to Rule 53(b), SCRCP to refer this foreclosure action to the Master-In-Equity where Salon Proz asserted counterclaims for breach of contract, slander of title, and violation of usury and predatory lending laws in its original answer. Salon Proz argues that the Order of Reference is therefore void. The argument of Salon Proz is not supported by the language of Rule 53(b).

Under Salon Proz's interpretation of Rule 53(b), it believes the Clerk of Court cannot refer a foreclosure cause of action when other claims are also asserted in the case. The plain and unambiguous language of Rule 53(b), however, expressly permits the Clerk of Court to refer "some or all of the causes of action" in a foreclosure case to the master: "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." Rule 53(b) (emphasis added).

If the language of a rule of civil procedure is "plain, unambiguous, and conveys a clear meaning, interpretation is unnecessary and the stated meaning should be enforced." Ex parte Wilson, 367 S.C. 7, 15, 625 S.E.2d 205, 209 (2005). The explicit language of Rule 53(b) permits the Clerk of Court to refer ***all*** of the causes of action asserted in a foreclosure case to the master. There is no limitation on which or what causes of action may be referred in a foreclosure action – the rule states "**all**." The rule does not

distinguish between claims asserted by the plaintiff and counterclaims asserted by the defendant. Again, the rule states "**all**" causes of action in a foreclosure case may be referred.

The language of Rule 53(b) is straightforward and does not support the contorted assertion of Salon Proz that the rule prohibits the referral of an action for foreclosure when other claims are also asserted in the case. The interpretation of Rule 53(b) by Salon Proz directly contradicts the unequivocal language of the rule allowing the referral by the clerk of "some or all of the causes of action" in a foreclosure action.

Pursuant to Rule 53(b), the Clerk of Court had the power and authority to issue the Order of Reference in this case. Having been properly issued by the Clerk of Court pursuant to the authority provided in Rule 53(b), the Order of Reference is not void for want of subject matter jurisdiction or for any other reason. The groundless argument of Salon Proz to the contrary must be rejected by this Court.

II. Where Salon Proz failed to immediately appeal the Order of Reference referring this foreclosure action to the Master-In-Equity, Salon Proz waived any right it had to a jury trial.

The Master did not err in denying the motion of Salon Proz to transfer the case to the jury docket where the unappealed Order of Reference was the law of the case. The Order of Reference was filed by the court on February 17, 2012. [R.pp. 4-6; Order.] Salon Proz neither moved for reconsideration of this Order of Reference nor appealed the order. [R.pp. 91, ll. 19-21; 96, ll. 3-8; 120, ll. 7-18.] Six months passed before Salon Proz filed its motion to transfer the case to the general docket for jury cases. [R.pp. 58-60; Motion.]

This State's Supreme Court has held that orders affecting the mode of trial affect substantial rights under S.C. CODE ANN. § 14-3-330(3) and must be immediately appealed. Lester v. Dawson, 327 S.C. 263, 266, 491 S.E.2d 240, 241 (1997). The failure to timely appeal an order affecting the mode of trial effects a waiver of the right to appeal that issue. Id. If an order which affects the mode of trial is not immediately appealed, it becomes the law of the case. Creed v. Stokes, 285 S.C. 542, 542-43, 331 S.E.2d 351, 352 (1985) (holding where appellant failed to timely appeal an order referring dispute to master-in-equity, appellant could not later complain that he had been entitled to a trial by jury); see also Edwards v. Timmons, 297 S.C. 314, 377 S.E.2d 97 (1988) (concluding appellant's failure to immediately appeal order referring matter to the master-in-equity was the law of the case).

Because Salon Proz did not appeal the Order of Reference, it became law of the case. By the time Salon Proz filed its motion to transfer the case to the jury docket, the

mode of trial had been finally determined. Salon Proz waived any right to a jury trial by failing to immediately appeal the Order of Reference.

In its appellant's brief, Salon Proz suggests that it did not receive notice of the Order of Reference and therefore did not waive its right to a jury trial. A review of the record in this case, however, dispels this contention. Salon Proz offered no evidence below that it did not receive notice of the Order of Reference. It instead attempted to improperly shift the burden of proof onto the Bank to show that Salon Proz received an order that the Clerk of Court filed and mailed.

At the March 21, 2013 hearing, counsel for Salon Proz argued that nothing in the record indicated that the Order of Reference was ever provided to Salon Proz or its previous attorney, Mr. Aun. [R.p. 94, ll. 13-15.] Salon Proz made this same argument at the motion for reconsideration hearing held on September 17, 2013, and again implies in its appellant's brief that the Bank has not established that Salon Proz's predecessor counsel was aware of the entry of the Order of Reference. [R.p. 118, ll. 8-11.]

The Order of Reference was filed by the court and presumptively mailed by the court to the attorneys on record with the court which at the time of filing included Mr. Aun. [R.pp. 4-6 (Order); 97, ll. 11-14.] The court did not direct the Bank to serve this Order of Reference. The presumption is therefore that the Clerk of Court fulfilled its duty by mailing the order filed by the court to the attorneys of record, including Mr. Aun. See Howell v. Littlefield, 211 S.C. 462, 468, 46 S.E.2d 47, 49 (1947) (observing presumption is always in favor of a public official's correct performance of duty); Rice v. Bamberg, 72 S.C. 384, 51 S.E. 987, 987 (1905) ("[I]n the absence of proof to the

contrary, the presumption is that these officers performed the duties required of them . . . . ").

Salon Proz has never at any point in this case offered any evidence to rebut the presumption that the court mailed the Order of Reference to Mr. Aun and that Mr. Aun received the order. Salon Proz did not offer or attempt to offer any testimony of Mr. Aun by way of affidavit or otherwise to establish whether or not Mr. Aun received a copy of the filed Order of Reference. Salon Proz did not overcome the presumption that Mr. Aun was mailed a copy of the Order of Reference by the court and accordingly had notice of the entry of the Order of Reference.

By failing to perfect an immediate appeal from the Order of Reference, Salon Proz waived[3] any right it may have had to a jury trial in this foreclosure action, including any right to jury trial it may have had on its counterclaims. Salon Proz nevertheless argues that it is still entitled to a jury trial because it only waived its right to a jury trial on the issues pled in its original answer and counterclaim and not the issues presented by its amended answer and counterclaim.

The case had already been referred in its entirety to the Master-In-Equity, and Salon Proz waived any rights it may have had to a jury trial when it did not immediately appeal the order referring the case. Almost seven months after the Order of Reference was entered, Salon Proz filed a motion to amend its answer and counterclaim after having waived any right to a jury trial. The filing of this amended pleading did not resurrect this

[3] Salon Proz cited to several cases in its brief which observe that the waiver of the right to trial by jury is strictly construed, but these cases refer to waiver by contract and not waiver by way of a failure to appeal. See Broome v. Watts, 319 S.C. 337, 340-41, 461 S.E.2d 46, 48 (1995); North Charleston Joint Venture v. Kitchens of Island Fudge Shoppe, Inc., 307 S.C. 533, 535, 416 S.E.2d 637, 638 (1992); Beach Co. v. Twillman, Ltd., 351 S.C. 56, 63-64, 566 S.E.2d 863, 866 (Ct. App. 2002).

right which had already been waived. The matter of a jury trial here was an issue committed to the discretion of the circuit court once it was waived. See King v. Shorter, 291 S.C. 501, 354 S.E.2d 402 (Ct. App. 1987) (holding trial court did not abuse its discretion in allowing amended answer asserting unfair trade practice counterclaim but denying motion to transfer case to jury calendar where right to jury trial had been previously waived).

Here, the Master did not abuse his discretion in denying Salon Proz's motion to transfer the case to the jury docket even though the Master allowed Salon Proz to amend its answer and counterclaims. The new claims do not create any new issues of fact. Both the original answer and counterclaim and amended answer and counterclaim are based on underlying factual allegations that the Bank breached its contract with Salon Proz, misrepresented that Salon Proz would ultimately receive a lower interest rate than received through loan modification, restructuring, or otherwise, conducted itself with unclean hands with respect to the loan at the center of this foreclosure action, slandered the title to Salon Proz's property, and denied Salon Proz the right to settle or cure the default with the Bank. [R.pp. 38-41; 67-72; Original Answer and Counterclaim, ¶¶ 31, 37-39, 41-43, 46, 48, 50; Amended Answer and Counterclaim, ¶¶ 29-30, 34, 40-42, 54, 60-67, 71, 74-87, 89.] At the very least, Salon Proz most certainly waived its right to a jury trial on its two breach of contract claims and slander of title claim where those claims were raised in the original answer and counterclaim.

Salon Proz was not entitled to jury trial as a matter of right based on the filing of the amended answer and counterclaim as they contain essentially the same factual allegations and defenses to the debt no matter how Salon Proz may have labeled the

defenses and counterclaims in its amended pleading. The Master committed no abuse of discretion in denying Salon Proz's motion to transfer to the jury docket after Salon Proz had waived that right. See King, 291 S.C. at 502, 354 S.E.2d at 403.

Accordingly, where Salon Proz failed to immediately appeal the Order of Reference filed by the Clerk of Court, Salon Proz waived any right to a jury trial because the order referring all causes of action asserted in the foreclosure action to the Master-In-Equity became law of the case. After Salon Proz waived its right to a jury trial, the Master did not err in denying Salon Proz's motion to transfer the case to the jury docket. This Court should affirm the Master's order denying the motion of Salon Proz to transfer the case to the jury docket.

III. The Master did not err in denying Salon Proz's motion to transfer this foreclosure action to the jury docket where (1) the entire action, including defenses and counterclaims, lies in equity; and/or (2) Salon Proz is not entitled to a jury trial to the extent the asserted counterclaims are permissive.

The above inquiry should end the analysis, and this Court should determine that by failing to immediately appeal the Order of Reference, Salon Proz waived any right to thereafter demand a jury trial. If, however, this Court should disagree and find that Salon Proz had not waived its right to a jury trial with respect to any of the asserted counterclaims, the demand of Salon Proz that the case be transferred to the jury docket nevertheless fails where the counterclaims asserted by Salon Proz in this equitable action are either, or both, equitable and permissive.

"Generally, the relevant question in determining the right to trial by jury is whether an action is legal or equitable; there is no right to trial by jury for equitable actions." Lester v. Dawson, 327 S.C. 263, 267, 491 S.E.2d 240, 242 (1997). "The character of an action as legal or equitable depends on the relief sought." Cedar Cove Homeowners Ass'n, Inc. v. DiPietro, 368 S.C. 254, 258, 628 S.E.2d 284, 286 (Ct. App. 2006). "[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); 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 most of the relief sought was equitable in nature because the relief sought was reformation of a contract).

A foreclosure action is one sounding in equity, and therefore, a party is not entitled as a matter of right to a jury trial. Wachovia Bank, Nat'l Ass'n v. Blackburn, 407

S.C. 321, 328, 755 S.E.2d 437, 440 (2014). A counterclaim raised in an equitable action may, in certain circumstances, be entitled to a jury trial but only if the counterclaim is legal and compulsory. If a complaint is equitable and the counterclaim is legal and permissive, the defendant waives its right to a jury trial. Id. at 328-30, 755 S.E.2d at 441-42.

A. Pursuant to the Order of Reference, the Master had authority to determine whether or not Salon Proz was entitled to a jury trial on its asserted counterclaims.

It first appears that Salon Proz has contested the authority of the Master to determine whether the counterclaims asserted by Salon Proz were legal and compulsory and thus entitled to be decided by a jury. Salon Proz contends that upon its filing of a jury demand, the case should have been automatically returned to the circuit court for a ruling on whether the counterclaims were legal and compulsory.

Rule 53(b) provides that "[a]ny 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) (emphasis added). Only jury demands of those issues triable of right by a jury trigger the matter's return to the circuit court. The return to the circuit court is not automatic. There must first be a determination as to whether the action contains any issues to which the party is entitled as a matter of right to have heard by a jury.

When the case has been referred to the master, the master makes the determination as to whether the party demanding a jury trial is entitled to such unless the order of reference limits the master from doing so. Once a matter is referred to a master, Rule 53(c) provides the master "shall exercise all power and authority which a circuit

judge sitting without a jury would have in a similar matter." Therefore, when a case is referred to a master under Rule 53, the master is given the power to conduct hearings in the same manner as the circuit court unless the order of reference specifies or limits the master's powers. Smith Cos. of Greenville, Inc. v. Hayes, 311 S.C. 358, 360, 428 S.E.2d 900, 902 (Ct. App. 1993).

The Order of Reference in this case authorized the Master to "take testimony, determine the issues involved and report his findings of fact and conclusions of law to this Court with all convenient dispatch, with leave to make findings of fact and conclusions of law as to any special matter, with authority to enter final judgment herein." [R.p. 5; Order.] There were no limits placed on the Master to conduct the reference. See Bonney v. Granger, 292 S.C. 308, 322, 356 S.E.2d 138, 147 (Ct. App. 1987). Accordingly, it was permissible for the Master, rather than the circuit court, to determine whether or not Salon Proz was entitled to a jury trial.

B. Salon Proz is not entitled to a jury trial on its asserted counterclaims because the entire action lies in equity.

As stated above, a foreclosure action is an equitable action. Collier v. Green, 244 S.C. 367, 370, 137 S.E.2d 277, 279 (1964). Further, "[w]here, in actions of foreclosure, defendant sets up a defense and/or counterclaim affecting the consideration, and arising out of the transaction in which the mortgage or lien was created, the authorities hold that the issues thus raised are equitable and are to be tried by the court upon its equity side." Id. at 371, 137 S.E.2d at 280; see also Byrn v. Walker, 275 S.C. 83, 85, 267 S.E.2d 601, 602 (1980) (observing counterclaims in foreclosure action that affect the validity of a mortgage lien or the amount due are equitable in nature).

In Collier, the assignee of a mortgage brought a foreclosure action against the mortgagor. Id. at 368, 137 S.E.2d at 278. The mortgagor admitted to execution and delivery of the note and mortgage but alleged that the assignment was fraudulent and sought a jury trial on that issue. Id. at 369, 137 S.E.2d at 279. In affirming the trial court's order referring the entire case to the master-in-equity, the Supreme Court initially noted that a foreclosure action is an action in equity and concluded the nature of the action does not change to one at law by virtue of the fact that the defendant asserts counterclaims related to the amount due on the loan. Id. at 371, 137 S.E.2d at 280. As support for its decision, the Court cited to its prior opinions in foreclosure cases holding that where the defenses and counterclaims bear primarily upon the amount due, the entire case, including the defenses and counterclaims, remains one in equity. Id. at 371-72, 137 S.E.2d at 280 (citations omitted).

Thus, where 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. Id. ("Nor is the nature of the action changed by reason of the fact that the defendants have, in their answers, set up defenses and counterclaims based upon alleged misrepresentations in the transaction upon which the plaintiff's note and pledge are predicated. The questions raised by these defenses and counterclaims directly affect the validity of the plaintiff's lien and the question as to the amount due upon the debt secured by the lien.") (citations omitted).

The South Carolina Supreme Court has furthermore rejected attempts by litigants 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 for by statute for purchasers at tax sales. Id. at 141-42, 427 S.E.2d at 897. The Supreme Court affirmed the circuit court's ruling, 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 to thwart the reasonable and practical implication of Chapter 61." Id. at 143, 427 S.E.2d at 898.

In this case, although Salon Proz asserts various theories of recovery in its amended answer and counterclaim, a necessary element of each of its claims is that it is not in default and the Bank is not entitled to foreclose. Underpinning several of Salon Proz's counterclaims, including the two breach of contract claims and the negligent misrepresentation claim, is Salon Proz's allegation that it is not in default on the subject loan because the Bank reneged on a promise to modify or restructure the terms of the loan. [R.pp. 70-73; Amended Answer and Counterclaim, ¶¶ 60-67, 70-72, 88-95.] Implicit in each of these counterclaims is that the note and mortgage of the subject loan are not enforceable because the Bank breached its alleged promise to modify the terms of the loan and/or that a different amount would have been due on the loan had the Bank modified the terms of the loan as allegedly promised.

Salon admitted at the March 21, 2013 hearing before the Master that what it was seeking the court to do was "enforce the agreement that was actually reached between the

parties . . . to uphold the agreement that was actually reached by the parties, which would provide for a significantly lower interest rate, lower payments; she wouldn't be in default of that." [R.pp. 106, l. 23 – 107, l. 20.] This type of relief which Salon Proz seeks is equitable. See Shaw v. Aetna Cas. & Sur. Ins. Co., 274 S.C. 281, 285, 262 S.E.2d 903, 905 (1980) (characterizing the reformation of a contract as equitable relief).

The remaining counterclaims of Salon Proz - slander of title, defamation, and violation of the Unfair Trade Practices Act – challenge the Bank's right to foreclosure indirectly. For example, both counterclaims for slander of title and defamation 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 the Bank has published false statements that it is. The Unfair Trade Practices claim requires Salon Proz to prove 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.

If 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 amount due on the loan.

Under Collier, therefore, the counterclaims do not change the character of this equitable action to one at law, and Salon Proz has no right to a jury trial on any issue. Regardless of how Salon Proz has styled its counterclaims, the primary purpose of these counterclaims is to attack the enforceability of the subject note and mortgage and halt the foreclosure. "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, or the prayer for relief . . . ." 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)).

Furthermore, under the Supreme Court's decision in Rosenbaum, Salon Proz may not earn the right to a jury trial in this equitable foreclosure action by styling its allegations as legal counterclaims. 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. South Carolina Rule of Civil Procedure also provides that foreclosure actions "shall be tried by the court, and shall ordinarily be referred to a master." This codified a process established by the Act of 1791 which integrated the actions of foreclosure and the action for deficiency after the sale into one equitable action without the right to a jury trial. See McConnell v. Barnes, 142 S.C. 112, 140 S.E. 310 (1927). Consistent with Rosenbaum, this Court should not permit Salon Proz to evade the statutory scheme created by the Legislature for resolving foreclosure actions. Despite Salon Proz's contention that its counterclaims are legal, the main purpose of these counterclaims is to avoid the foreclosure and evade the statutory foreclosure regime established by Title 29 and Rule 71 of the South Carolina Rules of Civil Procedure. This case being an action in equity, Salon Proz is not entitled to a trial by jury as a matter of right.

C. Salon Proz is not entitled to a jury trial on its asserted counterclaims to the extent the counterclaims are permissive.

In the alternative, and to the extent this Court has not already determined Salon Proz waived its right to a jury trial on the asserted counterclaims or to the extent this

Court has not already determined that the asserted counterclaims are equitable in nature, Salon Proz is not entitled to a jury trial on its counterclaims for violations of the Unfair Trade Practices Act, slander of title, and defamation where these counterclaims are permissive rather than compulsory. By definition, a counterclaim is compulsory only "if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim . . . ." Rule 13(a), SCRCP. The test for determining whether a counterclaim is compulsory is if there is a "logical relationship" between the claim and the counterclaim. Mullinax v. Bates, 317 S.C. 394, 396, 453 S.E.2d 894, 895 (1995). In the foreclosure context, there is a logical relationship between the counterclaim and the complaint only when the counterclaim bears upon the enforceability of the loan documents. N.C. Fed. Savings & Loan Ass'n v. DAV Corp., 298 S.C. 514, 518, 381 S.E.2d 903, 905 (1989).

The Unfair Trade Practices Act, slander of title, and defamation counterclaims do no bear directly upon the enforceability of the loan documents. The Unfair Trade Practices claim is based upon an alleged pattern of conduct taken by the Bank with respect to other transactions outside of the relationship between the Bank and Salon Proz. [R.p. 69; Amended Answer and Counterclaim, ¶¶ 54-56.] See Advance Int'l, Inc. v. N.C. Nat'l Bank of S.C., 316 S.C. 266, 270–71, 449 S.E.2d 580, 582–83 (Ct. App. 1994), aff'd in part, vacated on other grounds, 320 S.C. 532, 466 S.E.2d 367 (1996) (finding claim of unfair trade practices in a foreclosure action was not compulsory because claim did not affect the enforceability of the note).

Salon Proz's claims for slander of title and defamation are also permissive because they are based allegations that the Bank published false information about Salon

Proz or its property. There counterclaims are not compulsory because they do not directly affect the enforceability of the note secured by the mortgage which is the "transactions or occurrence" that is the subject of the Banks' foreclosure complaint.

By electing to bring these permissive counterclaims in response to a foreclosure complaint, Salon Proz waived its right to a jury trial. The Master did not err in denying Salon Proz's motion to transfer these claims to the jury docket.

CONCLUSION

For the reasons set forth herein, Respondent South Carolina Community Bank respectfully requests that this Court affirm the Master-in-Equity's denial of Appellant Salon Proz's motion to transfer this foreclosure action to the jury docket. The Order of Reference was properly issued by the Clerk of Court pursuant to the power and authority provided under Rule 53(b). Salon Proz thereafter failed to immediately appeal this Order of Reference which affected the mode of trial. The referral of the entire action to the Master became law of the case resulting in Salon Proz's waiver of any right it had to a jury trial.

Should this Court decide that Salon Proz did not waive its right to a jury trial with respect to any of the asserted counterclaims, Salon Proz is nonetheless not entitled to a jury trial as a matter of right. The counterclaims raised by Salon Proz, despite their label as legal counterclaims, sound in equity because these counterclaims relate to the amount due on the subject loan and challenge the Bank's right to foreclose, an issue to be decided by the court and not a jury based upon the South Carolina statutory foreclosure regime contained in Title 29 and Rule 71 of the South Carolina Rules of Civil Procedure. In addition, Salon Proz's particular counterclaims for unfair trade practices, slander of title, and defamation are permissive and by asserting them in this action, Salon Proz has waived its right to a jury trial on those claims.

To the extent this Court determines that any counterclaims asserted by Salon Proz are legal and compulsory and entitled to be heard by a jury, only those particular counterclaims should be transferred back to the circuit court. The Bank's foreclosure

claims and any equitable and/or permissive counterclaims were properly referable to the Master and should remain referred pursuant to Rule 53(b).

Respectfully submitted,

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October 12, 2015.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR.

Respectfully submitted,

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October ~~6~~ 12, 2015.

CERTIFICATE OF SERVICE

I, the undersigned, attorney for Respondent South Carolina Community Bank, do hereby certify that I have this date served two copies of the foregoing Final Brief of Respondent, dated October ~~6~~ 12, 2015, by causing the same to be deposited in a United States Postal Service mailbox, postage prepaid, addressed to counsel of record as indicated below:

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