

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM KERSHAW COUNTY

Court of Common Pleas

Robert E. Hood, Circuit Court Judge

RECEIVED

MAY 31 2016

SC Court of Appeals

Case No. 2015-CP-28-00383

Appellate Case No. 2016-001025

U.S. Bank National Association, as Trustee for the registered holders of Credit Suisse Seasoned Loan Trust 2006-1, Home Equity Pass-Through Certificates, Series 2006-1,.....Appellant,

Anita Joye Bethea a/k/a Anita Joy; Jackson D. Joye, Jr. a/k/a Jackson Joy, Jr.,.....Respondents.

MEMORANDUM REGARDING APPEALABILITY

INTRODUCTION

This is an action to foreclose upon real property located in Kershaw County, South Carolina. On April 16, 2015, the Plaintiff filed the instant foreclosure action. On May 13, 2015, counsel for Defendant Anita Joye Bethea served an Answer with Counterclaims requesting a jury trial. The Plaintiff filed a Motion for Reference and to Strike Jury Demand along with a Memorandum in Support on February 18, 2016.

Oral arguments on Plaintiff's Motion to Refer and to Strike Jury Demand were held on April 14, 2016 before the Honorable Robert E. Hood. Notice was received by the Plaintiff on

April 28, 2016 that Judge Hood ruled that the Defendant was entitled to a jury trial on the alleged violation of the South Carolina Unfair Trade Practices Act. Plaintiff timely filed a Motion to Reconsider under Rule 59(e) SCRCP on April 26, 2016 regarding Judge Hood's ruling that the Defendant was entitled to a jury trial on the alleged violation of the SCUTPA. Plaintiff received notice that the Motion to Reconsider was denied on April 29, 2016. Plaintiff received notice of the filing of the Order Denying Plaintiff's Motion to Reconsider on May 10, 2016. Plaintiff timely sent a Notice of Appeal regarding Judge Hood's Order allowing Defendant to proceed with a jury trial on May 12, 2016.

ARGUMENT

Judge Hood's Order of Reference granting a jury trial to the Defendant on the issue of an alleged violation of the South Carolina Unfair Trade Practices Act directly affects the mode of trial, and any decision which affects the mode of trial is immediately appealable.

South Carolina has recognized that the circuit court and the master-in-equity are separate modes of trial. In fact, it has long been law in South Carolina that there are three general modes of trial, "by jury, by the court and by referees." *Chapman v. Lipscomb*, 15 S.C. 470, 474 (1881). Orders affecting the mode of trial affect a substantial right and must be appealed immediately. *Frampton v. S. Carolina Dep't of Transp.* 406 S.C. 377, 385-86, 752 S.E.2d 269, 274 (Ct. App. 2013). An order affecting the granting or denial of a jury demand is immediately appealable. *See Truluck v. Snyder*, 362 S.C. 108, 112, 606 S.E.2d 792, 794 (Ct. Att. 2004); *C&S Real Estate Services, Inc. v. Massengale*, 290 S.C. 299, 350 S.E.2d 191 (1986). An order regarding the right of a party to be entitled to a jury trial affects the mode of trial and constitutes a final order for the purpose of filing an appeal under S.C. Code Ann. §62-1-308(3) (1987 and Supp. 2003). *Truluck*, 362 S.C. 108 at 112, 606 S.E. 2d 792 at 794. Such orders cannot be challenged in an appeal from final judgment. *See Lester v. Dawson*, 327 S.C. 263, 491 S.E.2d 240 (1997). Therefore, orders granting or denying the right to a jury trial must be appealed immediately. *Truluck*, 362 S.C. 108 at 112, 606 S.E.2d 792 at 794 (citing, *Satcher v. Satcher*, 351 S.C. 477, 490, 570 S.E.2d 535, 542 (Ct. App. 2002)).

"If the complaint is equitable and the counterclaim is legal and permissive, ***the defendant waives his right to a jury trial.***" *C&S Real Estate Servs. Inc. v. Massengale*, 290 S.C. 299, 301-302, 350 S.E.2d 191, 193 (1986), *modified by Johnson v. S.C. Nat'l Bank*, 292 S.C. 51, 354 S.E.2d 315, 318 (1987) (emphasis added)(stating a defendant waives his right to a jury trial by asserting a permissive counterclaim in an equitable action).

By granting the Respondent a jury trial on her claim of an alleged violation of the South Carolina Unfair Trade Practices Act, the Court has denied the Appellant the proper mode of trial. By asserting a legal and permissive counterclaim in an equitable action for foreclosure, the Respondent waived her right to a jury trial. This has the exact same effect as a jury trial waiver in a contract, she cannot have a jury trial on any of the raised counterclaims. Appellant properly moved to strike the jury demand and sought a bench trial in front of the Master-in-Equity for Kershaw County.

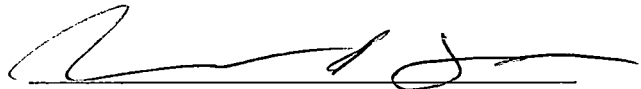
The proper action under Rules 53 and 71 SCRPC would be to strike the jury demand and refer the matter in whole to the Master-in-Equity. This is further evidenced by the Supreme Court of South Carolina Administrative Order 2010-07-15-01 which states, "It is ordered that Clerks of Court sign Orders of Reference pursuant to Rule 53(b), SCRPC in foreclosure actions, default cases, or an action where the parties consent. Circuit Judges shall also continue to sign Orders of Reference." The unambiguous language stating that Circuit Judges and Clerks of Court are ordered to sign Orders of Reference in foreclosure cases plainly shows that a bench trial with the Kershaw County Master-in-Equity is the proper mode of trial in this matter.

Even if the Circuit Judge decided not to refer the matter in whole to the Master-in-Equity, allowing the Respondent to have a jury trial on her counterclaim for an alleged violation of the South Carolina Unfair Trade Practices Act is an improper mode of trial and immediately appealable. If the Appellant was to be found to have violated the South Carolina Unfair Trade Practices Act, the only relief available would be money damages. For a counterclaim to be compulsory it must affect the enforceability of the note and mortgage, merely being awarded money damages has absolutely no effect whatsoever on the enforceability of the note and mortgage. *See Advance Intern., Inc. v. N.C. Nat'l Bank of S.C.*, 316 S.C. 266, 269-270, 449 S.E.2d 80, 582 (Ct. App. 1994), *aff'd in part, vacated in part*, 320 S.C. 532, 466 S.C.2d 367 (1996)(finding claims of fraud, negligence, and unfair trade practices in a foreclosure action were not compulsory because those claims did not affect the enforceability of the note). As was stated previously, the Respondent is not entitled to a jury trial on her counterclaim for an alleged violation of the SCUTPA. By raising a permissive counterclaim in an equitable action for foreclosure she has waived her right to a jury trial. Allowing a jury trial for this counterclaim is the wrong mode of trial and, therefore, immediately appealable.

CONCLUSION

Since the Circuit Judge's Order allowing the Respondent's counterclaim for an alleged violation of the South Carolina Unfair Trade Practices Act to proceed to a jury trial would be in improper mode of trial, this Order is immediately appealable, and, under South Carolina law, must be immediately appealed or the right to appeal this Order is waived.

BROCK & SCOTT, PLLC



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ATTORNEY FOR THE APPELLANT

May 26, 2016

Columbia, South Carolina

Other Counsel of Record:

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Attorney for the Respondent

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

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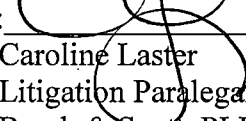
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Anita Joye Bethea a/k/a Anita Joy; Jackson D. Joye, Jr. a/k/a
Jackson Joy, Jr.,.....Respondents.

PROOF OF SERVICE

I HEREBY CERTIFY that on May 27, 2016 I have served the **Memorandum Regarding Appealability** on all counsel of record in this action by depositing copies of it in the United States Mail, postage prepaid, addressed to the below:

Brian L. Boger, Esq,
Law Offices of Brian L. Boger
P.O. Box 65
Columbia, SC 29202
Attorney for Defendant Anita Joye Bethea a/k/a Anita Joy

By: 
Caroline Laster
Litigation Paralegal to William P. Stork
Brock & Scott, PLLC

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May 27, 2016

The South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Re: U.S. Bank National Association, as Trustee for the registered holders of
Credit Suisse Seasoned Loan Trust 2006-1, Home Equity Pass-Through
Certificates, Series 2006-1 v. Anita Joye Bethea a/k/a Anita Joy; Jackson
D. Joye, Jr. a/k/a Jackson Joy, Jr., et al
Case#: 2015-CP-28-00383
B&S file #: 14-26604

Enclosed please find the original with copies of the same of the requested **Memorandum regarding Appealability**.

We ask that a clocked copy be forwarded to our office in the enclosed envelope. If you have any questions, or require any further information, please do not hesitate to contact my office.

Sincerely,

Caroline Laster
Litigation Paralegal to William P. Stork
Brock & Scott, PLLC

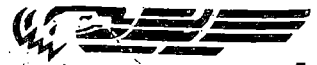
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Enclosures
Brian L. Boger, Esq

14-26604

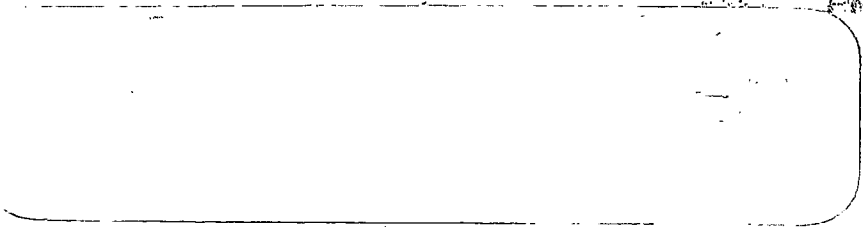
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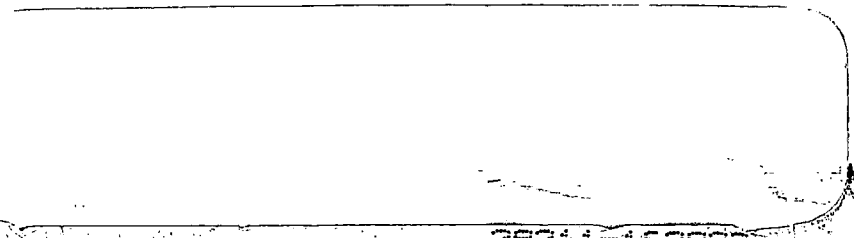
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