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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

Honorable S. Jackson Kimball III, Master-in-Equity

Case No. 2011-CP-46-04278
Court of Appeals No. 2015-001857

Bank of America, N.A., successor by merger to BAC Home Loans Servicing, LP, f/k/a Countrywide Home Loans Servicing, LP.....Respondent

v.

Michelle Minardi and Ameris Bank, Defendants,

of Whom Michelle Minardi is the .....Appellant

RESPONDENT BANK OF AMERICA, N.A.'S FINAL BRIEF

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I. Whether the circuit court erred in entering its February 2014 order of mandatory reference.

II. Whether the circuit court erred in denying Minardi's motion to alter or amend its order denying Minardi's motion to bifurcate and remand her counterclaims to the jury roster.

STATEMENT OF THE CASE

Bank of America, N.A., successor by merger to BAC Home Loans Servicing, LP f/k/a Countrywide Home Loans Servicing, LP ("Bank of America") commenced the underlying equitable action for foreclosure on November 11, 2011, alleging that Michelle Minardi defaulted on her promissory note executed on June 11, 2008 ("Note"). Pursuant to the terms of the Note, Minardi promised to pay Countrywide Bank the sum of $286,000.00, plus interest. The Note was secured by a mortgage ("Mortgage"), which Minardi executed the same day that she signed the Note, on the real property located at 1808 Sam Smith Road, Fort Mill, South Carolina, 29715.

In response to the foreclosure complaint, Minardi filed an answer and counterclaims in which she generally denied the allegations and asserted the counterclaims of breach of contract, negligence, violation of the federal Fair Debt Collection Practices Act ("FDCPA"), and violation of the South Carolina Supreme Court's Administrative Order No. 2011-05-02-01 for foreclosures ("Administrative Order"). She demanded a jury trial on these counterclaims. As the basis for her counterclaims, Minardi alleged that she and Bank of America entered into a Trial Payment Plan ("Trial Payment Plan" or "TPP") under the guidelines of the federal Home Affordable Modification Program ("HAMP") to determine if she qualified for a permanent modification of her Mortgage and Note. Minardi alleged that, under the terms of the Trial Payment Plan, she tendered a number of reduced mortgage payments to Bank of America, which Bank of America

accepted prior to rejecting a trial payment in 2011 and declaring her to be in default. Minardi further alleged that Bank of America improperly and negligently evaluated her application for a loan modification and denied her a permanent modification of her Note and Mortgage, in breach of the Trial Payment Plan. Finally, she claimed that Bank of America's filing of the underlying foreclosure action was in violation of the Administrative Order. (Am. R. pp. 17–22.) Bank of America timely filed its reply to these counterclaims. (Am. R. p. 28–33.)

On August 16, 2012, Bank of America filed its first motion for order of reference seeking to have the underlying foreclosure action referred to the Master-in-Equity, Judge S. Jackson Kimball, III. (Am. R. p. 36.) The motion came on for hearing before Judge Lee S. Alford on September 5, 2012. During that hearing, Judge Alford stated that he would deny the motion "at this time" and would provide Bank of America with the opportunity to file another motion for an order of reference after discovery had been conducted. (Sept. 5, 2012 Tr., Am. R. p 63, lines 16–24.) Two days later, Judge Alford entered an order denying the motion for reference, stating that the motion was "denied at this time." (Am. R. p. 69.)

On November 1, 2013, Bank of America filed another motion for an order of reference to refer the case to the Master-in-Equity, and Judge John C. Hayes, III, conducted a hearing on the motion on January 13, 2014 and took the matter under advisement. (Am. R. pp. 80–99.) On February 11, 2014, Judge Alford issued an order granting the motion for order of mandatory reference and referred the matter to Judge Kimball, as Master-in-Equity for York County. (Am. R. p. 102.) In that order, Judge Alford concluded that Minardi's counterclaims did not affect Bank of America's right to enforce the Note and to foreclose on the Mortgage, and that the Administrative Order "in no way applies" to the determination of whether Bank of America had the right to have the foreclosure action referred to the Master-in-Equity. The order further

provided that Judge Kimball "shall have the authority to enter final judgment in this case." (Am. R. p. 102.) Minardi did not appeal this order.

On February 2, 2015, Minardi filed a motion asking the Master-in-Equity to refer the case to mediation. (Am. R. p. 112.) A week later, she filed a motion for summary judgment alleging she was entitled to judgment as a matter of law and noticed the motion for hearing before the Master-in-Equity. (Am. R. pp. 118–154.) Both motions came on for hearing before Judge Kimball on February 18, 2015. (Feb. 18, 2015 Tr., Am. R. pp. 155–197.)

In support of her motion for summary judgment, Minardi provided the court with a memorandum of law to which she attached a March 25, 2010 letter from Bank of America that explained the loan modification application process. (Am. R. p. 136.) In this letter, Bank of America stated that Minardi had requested a loan modification and confirmed that the bank mailed her details of a "[HAMP] Trial Loan Modification Program," the terms of which required her to make three trial payments to be considered for a loan modification. (Am. R. p. 136.) The bank further explained, "[a]t the conclusion of the trial period, the [HAMP] Team will review your file *to determine if you qualify for a for a permanent loan modification*. . . . Please keep in mind that *review for a modification is not a guarantee of a rate reduction or any other change to the originating loan terms*." (Am. R. p. 136 [emphasis added]).

In Minardi's memorandum, she also provided a copy of the TPP, which included the following terms:

> Home Affordable Modification Trial Period Plan
>
> . . . .
>
> If I have not already done so, I am providing confirmation of the reason I cannot afford my mortgage payment and documents to permit verification of all of my income (except that I understand that I am not required to disclose any child support or alimony

> unless I wish to have such income considered) *to determine whether I qualify for the offer described in this Plan* (the "Offer"). I understand that after I sign and return two copies of this Plan to [Bank of America], [Bank of America] will send me a signed copy of this Plan *if I qualify for the Offer or will send me written notice that I do not qualify for the Offer*. This Plan *will not take effect* unless and until both I and [Bank of America] sign it and [Bank of America] provides me with a copy of this Plan with [Bank of America's] signature.
>
> . . . .
>
> [2G] *I understand that the Plan is not a modification of the Loan Documents* and that the Loan Documents will not be modified unless and until (i) *I meet all of the conditions required for modification*, (ii) I receive a fully executed copy of a Modification Agreement, *and* (iii) the Modification Effective Date has passed. I further understand and agree that [Bank of America] will not be obligated or bound to make any modification of the Loan Documents if I fail to meet any one of the requirements under this Plan.
>
> . . . .
>
> [4D] I agree . . . . [t]hat *all terms and provisions of the Loan Documents remain in full force and effect*; nothing in this Plan shall be understood or construed to be a satisfaction or release in whole or in part of the obligations contained in the Loan Documents. *[Bank of America] and I will be bound by, and will comply with, all of the terms and provision of the Loan Documents.*

(Am. R. pp. 138–140 [emphasis added]).

Before Judge Kimball entered his order denying the motion for summary judgment on March 30, 2015 (Am. R. pp. 217–218), Minardi moved to compel the deposition of Bank of America's designee, pursuant to Rule 30(b)(6) of the South Carolina Rules of Civil Procedure, and she noticed that motion for hearing before the Master-in-Equity. (Am. R. p. 198.) At the same time, Minardi also filed a motion to bifurcate and remand legal counterclaims, seeking a jury trial on her counterclaims, and a motion to amend pleadings, seeking leave of the court to

file an amended answer with additional counterclaims. (Am. R. pp. 215–216.) These motions came before Judge Kimball on April 14, 2015 (after the summary judgment motion had been denied). At the start of the hearing, Minardi informed the court that the Rule 30(b)(6) deposition was scheduled to occur in his office the next day, so the motion to compel was not argued. (April 14, 2015 Tr., Am. R. p. 221, lines 13–25 and p. 222, lines 1–4.)

Judge Kimball denied Minardi's motion to bifurcate and remand her counterclaims for a jury trial on May 20, 2015, but he granted her motion to amend, in part, allowing Minardi to file an amended answer to assert one additional counterclaim for breach of fiduciary duty. (Am. R. pp. 276–279.) Minardi filed her amended answer and counterclaims on May 29, 2015.

In her amended answer, Minardi added a single additional counterclaim for breach of fiduciary duty. (Am. R. p. 310.) In this counterclaim, she made the conclusory allegation that Bank of America "approved loss mitigation in the form of a loan modification pursuant to the Making Homes Affordable Program ('HAMP')"; that by entering into the alleged loan modification agreement, Minardi "reposed special confidence" in Bank of America in that "she would be allowed to consummate a loan modification"; that Bank of America "accepted the special confidence" when it accepted and credited Minardi's trial payments; and that Bank of America breached its fiduciary duty to Minardi when it rejected her trial payment on her Mortgage and cancelled the trial modification plan. (Am. R. pp. 310–311.) Minardi sought "actual and punitive damages" in the form of "lost economic opportunities, fraudulent fees, fines, interest, penalties and padding by Bank of America." (Am. R. p. 311.)

In its reply to Minardi's new pleading, Bank of America denied the allegations related to the breach of fiduciary duty counterclaim, save for its admissions that it was the mortgagor and Minardi the debtor; that a trial payment plan was offered to Minardi; and that Minardi tendered

trial plan payments. Bank of America denied other allegations and moved to dismiss the counterclaim for failure to state a claim, pursuant to Rule 12(b)(6), SCRCP. (Am. R. pp. 314–316.)

In addition to filing her amended answer and counterclaims, Minardi also filed a motion for reconsideration, pursuant to Rule 59(e), SCRCP, in which she asked the Master-in-Equity to alter or amend his ruling denying her motion to bifurcate and remand her counterclaims. (Am. R. pp. 282–283.) Bank of America opposed that motion.

Judge Kimball heard the motion for reconsideration on June 30, 2015. (June 30, 2015 Tr., Am. R. pp. 260–273.) In support of her motion, Minardi provided the court with: an October 18, 2010 letter addressed from Bank of America to Minardi (Am. R. p. 104), in which the bank informed Minardi that it had received her last installment payment due under "our Special Forbearance agreement" and instructed her to resume making her "normal monthly payments" (Am. R. p. 104); and, a December 6, 2010 letter from Bank of America to Minardi, in which the bank stated, "We strongly encourage you to continue making the *normal monthly payments* required under your original loan document to help avoid foreclosure" (Am. R. p. 105 [emphasis added]). As additional support for her motion, Minardi referenced the April 15, 2015 Rule 30(b)(6) deposition of Bank of America's designee. (June 30, 2015 Tr., Am. R. p. 262, lines 17–22; p. 266, lines 6–12.) That deposition testimony, however, was never entered into evidence.

In an order entered July 31, 2015, Judge Kimball denied Minardi's motion for reconsideration, concluding that Minardi had not presented any matter that had not been addressed expressly or implicitly in the order denying her motion to bifurcate and that there was

no basis for reconsideration or amendment of that order. (Am. R. p. 320-321.) From this order, Minardi timely appealed. (Am. R. pp. 322–323.)

STANDARD OF REVIEW

> A mortgage foreclosure is an action in equity. In an appeal from an action in equity tried by a judge, appellate courts may find facts in accordance with their own views of the preponderance of the evidence. However, [w]hether a party is entitled to a jury trial is a question of law. Appellate courts may decide questions of law with no particular deference to the circuit court's findings.

Wachovia Bank, Nat'l Ass'n v. Blackburn, 407 S.C. 321, 328, 755 S.E.2d 437, 440–41 (2014) (alteration in original) (internal citations and quotation marks omitted).

ARGUMENT

I. THE CIRCUIT COURT DID NOT ERR BY ORDERING MANDATORY REFERENCE.

The circuit court did not err by referring the underlying foreclosure action to the Master-in-Equity in its February 11, 2014 order. Although the question of whether the underlying action should have been referred to the Master-in-Equity was first addressed in the circuit court's September 7, 2012 order, that order expressly preserved the issue for consideration at a later time and did not preclude the subsequent order of reference in February 2014. Moreover, Minardi is precluded now from challenging the February 2014 order because she failed to appeal that order and because she subsequently participated in proceedings before the Master-in-Equity by litigating the merits of her motion for summary judgment and motion to compel mediation, without objecting to his appointment or authority.

A. The Issue of Referral to the Master-in-Equity Was Preserved for Later Determination.

Minardi mistakenly contends that the February 2014 order was erroneously entered based on her proposition that Judge Alford's September 2012 order, denying Bank of America's first

motion for an order of reference, became the law of the case and precluded reconsideration of the issue. (Appellant's Br. p. 18.) Although Bank of America did not appeal from the September 2012 order, it was not necessary to do so because Judge Alford's ruling expressly preserved the issue and provided Bank of America with the opportunity to file a subsequent motion for an order of reference to the Master-in-Equity.

To clarify the procedural history of this case, although Judge Alford signed the September 2012 order denying Bank of America's first motion for an order of reference, its subsequent motion for an order of reference was argued before Judge Hayes. Following the hearing on Bank of America's subsequent motion to refer the case to the Master-in-Equity, Judge Hayes entered a Form 4 Order on January 14, 2014, noting that the matter was being "taken under advisement." (Am. R. p. 99.) Then, on February 7, 2014, Judge Alford signed an order granting Bank of America's motion, and that order was entered on February 11, 2014. (Am. R. p. 102.) Minardi mistakenly states in her brief that Judge Hayes granted the motion for an order of reference (Appellant's Br. p. 17), when, in fact, the matter was referred to the Master-in-Equity by Judge Alford.

In light of Minardi's mistaken assertion that Judge Hayes granted Bank of America's motion for an order of reference, in conjunction with the fact that Judge Hayes presided over the hearing on the motion and took the matter under advisement, Minardi's argument could be construed as implying that Judge Hayes impermissibly modified or overruled Judge Alford's September 2012 order denying the first motion for an order of reference. Assuming, without conceding, that Minardi had proffered such an argument, the argument must fail.

"It is well settled that one circuit judge cannot set aside or modify the orders of another, *except in cases when the right to do so has been reserved to the succeeding judge*, or when it is

allowed by rule of court or statute." *Dukes & Dukes, Inc. v. Hygrade Food Products Corp.*, 236 S.C. 69, 74, 113 S.E.2d 254, 256 (1960) (emphasis added) (quoting *Nixon Grocery Co. v. Spann*, 108 S.C. 329, 94 S.E. 531, 534 (1917)). As Minardi acknowledges in her brief, Judge Alford's September 2012 order states that Bank of America's motion for an order of reference was being "denied *at this time*." (Am. R. p. 69; Appellant's Br. p. 16 (emphasis added).) Indeed, the transcript of the September 5, 2012 hearing on Bank of America's motion leaves no doubt that Judge Alford denied the motion with the express qualification that, after discovery had been conducted, Bank of America could again move for an order of reference:

[Judge Alford]:	I will deny your motions [sic] *at this time*.
[Bank of America's Counsel]:	Yes, Your Honor.
[Judge Alford]:	I will require you to comply with Discovery.
[Bank of America's Counsel]:	Yes, Your Honor.
[Judge Alford]:	And—and provide an explanation as to why [the loan modification] was denied, and then at that point *you can then move again to have counterclaim* [sic] if you think they are entitled to have it dismissed *and to refer it*.

(Sept. 5, 2012 Tr., Am. R. p. 63, lines 16–24 (emphasis added).)

Judge Alford's ruling is unambiguous. He denied the motion for an order of reference but expressly reserved the right to reconsider the issue at a later time, either by himself or by a succeeding judge. At the January 13, 2014 hearing on Bank of America's subsequent motion for

an order of reference, Judge Hayes found the intent of Judge Alford's ruling to be clear—and Minardi conceded the same:

[Judge Hayes]:	The question is whether this is a referral. And going back to Judge Alford *he said motion denied at this time which clearly indicates to me that he is leaving the door open*; that it [sic] to be raised again. Not that they're judge shopping and that he *by his wording in his Form 4 is saying come again.*
[Minardi's Counsel]:	I don't disagree with that, your Honor.

(January 13, 2014 Tr., Am. R. p. 97, lines 4–10 (emphasis added).)

Thus, when Bank of America filed a subsequent motion for an order of reference, the ruling in the February 2014 order referring the matter to the Master-in-Equity was entered in accordance with Judge Alford's September 2012 order. The February 2014 order was therefore proper—regardless of which judge granted the motion. *See Dukes*, 236 S.C. at 74, 113 S.E.2d at 256.

B. Minardi Is Precluded from Raising on Appeal the Issue of Mode of Trial.

Furthermore, even if this Court concludes that Judge Alford's September 2012 order did not preserve the issue of reference to the Master-in-Equity for reconsideration at a later time, Minardi is nevertheless precluded from raising this issue on appeal now for two distinct reasons: First, Minardi failed to appeal from the February 2014 order referring the matter to the Master-in-Equity, thereby establishing that order as the law of the case. Second, Minardi participated in proceedings before the Master-in-Equity without objecting to his appointment or authority to decide the matter, thereby waiving any objection to having the Master-in-Equity preside over the case.

1. Minardi's Failure to Appeal the February 2014 Order Established That Order as the Law of the Case.

Following the entry of the February 2014 order, Minardi did not file a motion for reconsideration or appeal from the order. Thus, although Minardi is correct in arguing that the "law of the case" doctrine applies in the underlying proceedings, Minardi is mistaken as to the effect of its application. The doctrine actually applies to the unchallenged February 2014 order, which became the law of the case and the final determination on the issue of mode of trial.

As the South Carolina Supreme Court has explained, "[i]ssues regarding mode of trial must be raised in the trial court at the first opportunity, and the order of the trial judge is immediately appealable. The failure to timely appeal the interlocutory order of the trial court effects a waiver of appeal rights." *Foggie v. CSX Transp., Inc.*, 315 S.C. 17, 23, 431 S.E.2d 587, 590 (1993) (internal citations omitted) (dismissing the appellant's argument regarding mode of trial because the issue was not preserved for appellate review); *see also First Union Nat'l Bank of S.C. v. Soden*, 333 S.C. 554, 565, 511 S.E.2d 372, 377–78 (Ct. App. 1998) (holding that the appellant's failure to appeal the denial of a motion for a jury trial precluded the Court of Appeals from addressing the issue).

While Minardi contends that the February 2014 order denied her right to a trial by jury on her legal and compulsory counterclaims, she did not appeal from the order. That failure to appeal is fatal to her appeal now. Even assuming *arguendo* that she had a right to a jury trial on her counterclaims, Minardi's failure to appeal from the February 2014 order established the order as the law of the case and precludes her present challenge to the order on appeal.

The South Carolina Supreme Court has left no doubt of this result. In *Creed v. Stokes*, 285 S.C. 542, 331 S.E.2d 351 (1985), that court recognized that the appellant was correct that he had a right to a jury trial instead of having the case decided by a master. But the appellant

"failed to appeal" the order of reference. *Id.* at 542–43, 331 S.E.2d at 352. That order, the supreme court explained, "should have been appealed immediately because it affected the mode of trial, a substantial right." *Id.* at 543, 331 S.E.2d at 352. Because the appellant did not appeal, that order "became the law of the case." *Id.*; *see also Soden*, 333 S.C. at 566, 511 S.E.2d at 378 ("Failure to challenge the ruling is an abandonment of the issue and precludes consideration on appeal. The unchallenged ruling, *right or wrong*, is the law of the case and requires affirmance." (emphasis added)). Here, the result is the same. Regardless of whether Minardi had a right to a jury trial, when she failed to appeal the February 2014 order, that order became the law of the case.

2. Minardi Waived Any Objection to the February 2014 Order by Participating in Proceedings Before the Master-in-Equity.

In addition to this appeal being barred by the law of the case doctrine, Minardi has also waived any objection to the order she may have had by her participation in proceedings before the Master-in-Equity. Participating in these proceedings is acquiescence to the Master-in-Equity's authority to decide the merits of the case, so Minardi cannot now challenge his appointment on appeal.

As this Court has established, when a party participates in proceedings before the Master-in-Equity without objection to his appointment, that party waives its right to contest the order of reference on appeal. In *Karl Sitte Plumbing Co., Inc. v. Darby Development Co. of Columbia, Inc.*, 295 S.C. 70, 72, 367 S.E.2d 162, 164 (Ct. App. 1988), this Court held that although the trial court erred in entering an order of reference, when the appellant "participated in the reference proceedings without objecting or excepting to the order of reference or to the master's appointment, authority, or jurisdiction," the appellant "waived any objection it might have had to the action being referred."

That rule controls the outcome of this case. Here, following the entry of the February 2014 order, Minardi not only failed to appeal from the order or file a motion for reconsideration, but she also actively participated in proceedings before the Master-in-Equity *without* objecting to the jurisdiction of the court to determine the matter. In fact, Minardi did more than simply participate: she proactively sought an adjudication of the merits of the case from the Master-in-Equity by filing her motion to compel the deposition of Bank of America's designee, her motion for summary judgment, and her motion to refer the case to mediation. During the hearing on these motions, Minardi never objected to the appointment of the Master-in-Equity or to his authority to rule on her motions. In fact, she argued the opposite, insisting that Judge Kimball did have the authority to rule on her motion for summary judgment and asking the Master-in-Equity to refer the case to mediation if he denied her motion for summary judgment. (Feb. 18, 2015 Tr., Am. R. p. 157, lines 22–24; p. 170, lines 14–19.)[1]

Because Minardi participated in these proceedings before the Master-in-Equity without objecting to his appointment or his authority to rule on the merits of the case—and indeed, affirming his authority to do so, *see Rawlinson Rd. Homeowners Ass'n, Inc. v. Jackson*, 395 S.C. 25, 36, 716 S.E.2d 337, 343 (Ct. App. 2011) (noting that a motion for summary judgment before a Master-in-Equity seeks an adjudication on the merits of the claims)—Minardi has waived her objection to the February 2014 order, *see Karl Sitte Plumbing*, 295 S.C. at 73, 367 S.E.2d at 164. Accordingly, any objection that Minardi has to the case being referred to the Master-in-Equity must fail.

[1] For clarification, Bank of America notes an apparent error in the transcript of the hearing on Minardi's motion for summary judgment. The transcript attributes the statements cited on page 16 to the Master-in-Equity. (Feb. 18, 2015 Tr., Am. R. p. 168, line 22.) However, it is apparent from the context of the argument—including the speaker's references to Bank of America's counsel (*id.* at p. 169, lines 9–10) and to the Master-in-Equity (*id.* at p. 169, line 23)—that the statements cited on page 16 of the transcript were, in fact, made by counsel for Minardi.

II. THE CIRCUIT COURT CORRECTLY DENIED MINARDI'S MOTION TO ALTER OR AMEND ITS ORDER DENYING HER MOTION TO BIFURCATE AND REMAND HER COUNTERCLAIMS TO THE JURY ROSTER.

Minardi's last three issues on appeal actually involve the same question. Regardless of how Minardi frames the issue, the result is the same: the Master-in-Equity did not err in denying her motion to bifurcate her counterclaims.

A. A Defendant in a Foreclosure Action Is Entitled to a Jury Trial on a Counterclaim Only if that Claim is a Compulsory Legal Counterclaim.

In *Blackburn*, the Supreme Court of South Carolina explained that "[a] mortgage foreclosure is an action in equity." 407 S.C. at 328, 755 S.E.2d at 440. Thus, "the parties are not entitled, as a matter of right, to a trial by jury." *Id.*, 755 S.E.2d at 441 (quoting *Williford v. Downs*, 265 S.C. 319, 321, 218 S.E.2d 242, 243 (1975)). But "counterclaims—including those raised in equitable actions—may, at times, be entitled to a jury trial." *Id.* The determination of whether a party raising a counterclaim in a foreclosure action is entitled to a jury trial on its counterclaim depends first on whether the counterclaim is an equitable counterclaim or a legal counterclaim. *See id.* at 328–29, 755 S.E.2d at 441. If the counterclaim is an equitable counterclaim, a party has no right to a jury trial. *Id.* If, however, the claim is a legal counterclaim, the party asserting the claim is entitled to a trial by jury on that claim *only* if the claim is a compulsory counterclaim that the party would have lost the right to make had the claim not been asserted in the same action. Alternatively, if the counterclaim is a legal but *permissive* counterclaim, asserting the claim in an equitable action constitutes a waiver of the right to a trial by jury. *Id.*

B. Minardi Is Not Entitled to a Jury Trial on Her Counterclaims Filed Before Entry of the February 2014 Order.

All of Minardi's counterclaims other than her breach of fiduciary duty counterclaim were included in her original answer and counterclaim. She is not entitled to a jury trial on any of these claims for two separate reasons. First, she has waived this argument. Second, these claims are permissive counterclaims.

1. Minardi is Precluded from Arguing the Issue of the Mode of Trial for Counterclaims Filed Before Entry of the February 2014 Order.

As discussed in Part I.B, Minardi is precluded from challenging the February 2014 order both because she failed to appeal from the order of reference (establishing it as the law of the case), and because she subsequently participated in proceedings before the Master-in-Equity without objection (thereby waiving her right to raise the issue on appeal). Consequently, the February 2014 order was a final determination of the mode of trial for all claims raised prior to the entry of that order. *See Creed*, 285 S.C. at 543, 331 S.E.2d at 352; *Karl Sitte Plumbing*, 295 S.C. at 72, 367 S.E.2d at 164.[2]

2. Minardi Is Not Entitled to a Jury Trial on The Counterclaims Pled before February 2014 Because They Are Permissive, Not Compulsory.

Assuming, *arguendo*, that Minardi is not precluded from arguing the issue of mode of trial for her counterclaims asserted prior to the February 2014 order, the circuit court did not err

[2] Even if Minardi's filing of the amended answer and counterclaim allows her to seek a jury trial on the new counterclaim raised in that pleading, it cannot undo her waiver of the right to appeal the referral to the Master-in-Equity on her other counterclaims that she pled before the February 2014 order. *See Mortg. Elec. Sys., Inc. v. White*, 384 S.C. 606, 612, 682 S.E.2d 498, 501 (Ct. App. 2009) (holding that borrowers waived a right to seek a jury trial on their initial counterclaims but had the right to seek a jury trial on a later-filed counterclaim). Permitting Minardi to undo her waiver would promote a type of procedural gamesmanship among litigants by allowing them to change previous tactical decisions or mistakes by filing new pleadings.

in denying her motion to alter or amend its decision to deny Minardi's motion to bifurcate and remand her counterclaims for a jury trial. In its May 2015 order, the circuit court correctly held that Minardi's counterclaims were *permissive* counterclaims, as they do not affect Bank of America's right to foreclose on Minardi's Mortgage, and because Minardi chose to raise her permissive counterclaims in an equitable proceeding, she waived her right to try those counterclaims before a jury. (Am. R. p. 278); *see Blackburn*, 407 S.C. at 328–29, 755 S.E.2d at 441.

Minardi's amended answer and counterclaims clearly establishes that the basis for her breach of contract and negligence counterclaims is her oft-repeated allegation that Bank of America failed to *properly evaluate her eligibility* for a HAMP loan modification by relying on non-HAMP guidelines:

> 8. Responding further to paragraph 16 [of Bank of America's complaint alleging that a HAMP loan modification was not approved because Minardi breached the terms of the HAMP TPP], [Minardi] would show and allege by way of its Second through Tenth defenses *and counterclaim* below that [Bank of America], a H[A]MP participating financial institution, *considered [Minardi] for a Bank of America in-house modification and not a modification under the H[A]MP program guidelines* and supplemental directives.
>
> 9. [Minardi] is informed and believes that the conduct of [Bank of America] described in paragraph (8) resulting in modification denial alleged to be a H[A]MP trial modification which never occurred. *Defendant [sic] instead evaluated [Minardi] under an alternative Bank of America modification.*
>
> . . . .
>
> 11. . . . [Minardi] is informed and believes that [Bank of America] has *sought to foreclose a H[A]MP eligible loan prior to properly evaluating Defendant Minardi specifically for a H[A]MP modification under H[A]MP guidelines* and supplemental directives.

. . . .

13. . . . [Bank of America] *has failed to consider Plaintiff [sic] for H[A]MP modification* and other loss mitigation options prior to commencing this foreclosure in violation of said administrative order.

. . . .

FIRST LEGAL COUNTERCLAIM
[Breach of Contract]

22. The above allegations are restated here and incorporated by reference as if set forth verbatim.

. . . .

26. That [Bank of America] has *improperly denied* [Minardi] a H[A]MP loan modification . . . .

. . . .

SECOND LEGAL COUNTERCLAIM
[Negligence]

30. The above defensive allegations are restated and incorporated by reference as if set forth verbatim.

. . . .

32. On information and belief, [Bank of America] has improperly declared [Minardi] in default of a H[A]MP modification and seeks to accelerate *after failing to properly evaluate [Minardi] for loan modification under the H[A]MP Making Homes Affordable Program ("H[A]MP")* prior to commencing this foreclosure action.

33. [Minardi] is informed and believes that [Bank of America], its servicer, agents, loan personnel, and employees were willful, wanton, negligent and careless by *failing to consider [Minardi] for H[A]MP loan modification options, and instead enrolling [Minardi] in loan modification options specifically offered through Bank of America, N.A. instead of a modification under H[A]MP guidelines.*

> 34. That [Bank of America's] *H[A]MP review and analysis* is therefore negligent, careless, willful, wanton and reckless *wherein it failed to properly evaluate [Minardi] for the H[A]MP program* as set forth by the Making Homes Affordable Modification Program.

(Am. R. pp. 304–307 (emphasis added).)

Indeed, at the hearing on her motion for summary judgment, Minardi's argument remained consistent with her pleading that Bank of America breached the TPP by failing to properly evaluate her application for a loan modification. After Judge Kimball reviewed the TPP and noted that the TPP had *not* been signed by Bank of America (February 18, 2015 Tr., Am. R. p. 162, lines 18–22), Minardi's counsel argued:

> And, if you read the [TPP], which is, I think, Exhibit C, you mention that it states that if all representations by [Minardi], in Paragraph 1 and Paragraph 2, continue to be true, in all respects, then after three trial modifications [payments], *they would evaluate her for a permanent modification.*

(February 18, 2015 Tr., Am. R. p. 164, lines 22–25, p. 11, lines 1–4 (emphasis added).) Minardi also conceded at this hearing that she was not alleging the existence of any loss mitigation agreement between Bank of America and Minardi other than the TPP. (February 18, 2015 Tr., Am. R. p. 185, lines 3–17.)

Subsequently, at the hearing on her motion to alter or amend the order denying her motion to bifurcate and remand her counterclaims, Minardi's argument remained consistent with her allegations that Bank of America had erroneously applied a non-HAMP, in-house "special forbearance agreement" when evaluating her eligibility for a HAMP-based loan modification. Minardi supported this argument by explaining to the court that in an October 18, 2010 letter from Bank of America to Minardi (Am. R. p. 104), Bank of America stated that it had applied non-HAMP guidelines to evaluate her application for a loan modification:

> [Bank of America] told her that date that she has made the last required payment under *a special forbearance agreement*. . . . [T]here's never been a forbearance applied for ever. She never applied for one, they never gave her one. They never even proposed that she accept one. But *the special forbearance agreement has been used as the justification in this case, and it's documented to say that she didn't qualify for the HAMP modification*. . . . [T]hey've taken that HAMP modification away from her *on the basis of excessive forbearance under their in-house special forbearance agreement*.

(June 30, 2015 Tr., Am. R. p. 266, lines 4–25 [emphasis added]).

It is clear from Minardi's amended answer and counterclaims, from her arguments on her motion for summary judgment, and from her arguments on her motion to alter or amend, that the primary allegation serving as the basis for her counterclaims for breach of contract and negligence is Bank of America's failure to properly *evaluate* her application for a HAMP loan modification, under HAMP guidelines, through its application of guidelines from an in-house, non-HAMP "special forbearance agreement." Thus, the breach of the TPP that Minardi alleges is not Bank of America's failure to *provide* her a loan modification, but is the bank's alleged failure to properly *evaluate* her application for a loan modification.

Indeed, an *evaluation* of Minardi's application for a loan modification is all that is promised by the March 25, 2010 letter from Bank of America that explains the loan-modification review process ("At the conclusion of the trial period, the [HAMP] Team will review your file *to determine if you qualify for a for a permanent loan modification*." (Am. R. p. 136 [emphasis added]) and by the express terms of the TPP ("[Bank of America] will send me a signed copy of this Plan *if I qualify for the Offer or will send me written notice that I do not qualify for the Offer*." (Am. R. p. 138 [emphasis added])). Additionally, the TPP states clearly that it is not a modification of Minardi's loan: "I understand that the Plan *is not a modification* of the Loan Documents." (Am. R. p. 140 [emphasis added]). Accordingly, the TPP is not a promise to

modify Minardi's Note and Mortgage, but it is merely an offer by Bank of America to evaluate Minardi's eligibility for a loan modification under HAMP guidelines. *See Bohnhoff v. Wells Fargo Bank, N.A.*, 853 F. Supp. 2d 849, 855 (D. Minn. 2012) (rejecting the argument that a TPP was a contract to modify a promissory note, noting that "the TPP specifically stated that it was 'not a modification of the Loan Documents,'" and concluding that "the TPP is an offer to consider modification, expressly conditioned on continued trial payments (for three months or longer) and other criteria"); *Sherman v. Litton Loan Servicing, L.P.*, 796 F. Supp. 2d 753, 762 (E.D. Va. 2011) (dismissing a claim for breach of contract related to a non-HAMP loan modification workout plan, concluding that "[o]bviously, the proposed Plan was merely an offer to consider [the borrower's] application").

As the TPP offers merely to evaluate Minardi's eligibility for a loan modification under HAMP guidelines—and expressly states that it is not a modification of Minardi's Note and Mortgage—Minardi's counterclaims for breach of contract and negligence related to the TPP do not affect Bank of America's right to foreclose on Minardi's Mortgage. Accordingly, these counterclaims are permissive counterclaims raised in an equitable action, constituting a waiver of her right to trial by jury. *See Blackburn*, 407 S.C. at 331 n.7, 755 S.E.2d at 442 n.7.

Minardi has similarly waived her right to a jury trial on the remaining counterclaim for alleged violations of the FDCPA. In this counterclaim, Minardi alleges that Bank of America has misrepresented the nature and character of Minardi's debt in its attempt to collect the debt. Yet, in Bank of America's October 18, 2010 letter, Bank of America informed Minardi that her three trial plan payments had been received and she should "resume making [her] normal monthly payments." (Am. R. p. 104.) And, again, in its December 6, 2010 letter, the bank told Minardi, "We strongly encourage you to continue making the *normal monthly payments* required

under your original loan document to help avoid foreclosure." (Am. R. p. 105 [emphasis added]). As Minardi has repeatedly asserted throughout the underlying proceedings, after receiving these letters, she continued making *reduced* trial plan payments, not her normal monthly mortgage payments—which remained due under the express terms of the TPP: "[N]othing in this Plan shall be understood or construed to be a satisfaction or release in whole or in part of the obligations contained in the Loan Documents." (Am. R. p. 140.)

The circuit court properly concluded that Minardi's FDCPA counterclaim related to Bank of America's activities attempting to collect on a debt after Minardi's default, bore no logical relationship to Bank of America's right to foreclose on her Mortgage, and was therefore a permissive counterclaim. (Am. R. p. 277.) The circuit court also recognized that whether Minardi was in default or current on her loan, a claim regarding a violation of the FDCPA would stand alone from the enforceability of the Note and Mortgage. (April 14, 2015 Tr., Am. R. p. 232, lines 11–18.) Within her claim for violation of the FDCPA, Minardi alleged that Bank of America filed the underlying foreclosure action in violation of the South Carolina Supreme Court's May 2, 2011 Administrative Order. (Am. R. p. 277.) Regardless of her allegation that the underlying action was commenced in violation of the Administrative Order, that order does not create a right to a jury trial; it merely provides that "the [c]ourt having jurisdiction over the foreclosure action shall hear and determine disputes" regarding compliance with the order. South Carolina Supreme Court Administrative Order No. 2011-05-02-01.

As Minardi's counterclaims do not bear a logical relationship to Bank of America's right to foreclose on Minardi's Mortgage, Minardi has raised permissive counterclaims in an equitable foreclosure proceeding and, thereby, waived her right to trial by jury. *See Blackburn*, 407 S.C. at

331 n.7, 755 S.E.2d at 442 n.7. Accordingly, the denial of her motion for reconsideration should be affirmed.

C. Minardi Is Not Entitled to a Jury Trial on Any Counterclaim Because She Seeks Equitable Relief.

Although Minardi has characterized her counterclaims for breach of contract, negligence, violation of the FDCPA, and breach of fiduciary duty as legal counterclaims to which she has a right to trial by jury, because the nature of the relief she seeks is equitable relief—a proper evaluation of her eligibility for a HAMP loan modification—her claims are equitable claims for which she has no right to a trial by jury.[3] Accordingly, the denial of her motion should be affirmed.

Regardless of the fact that Minardi styled her counterclaims as legal counterclaims, "an appellate court is not bound by a party's characterization of the actions. . . . Whether the action is one at law or in equity is determined by the nature of the pleadings and the character of the relief sought." *RIM Assocs. v. Blackwell*, 359 S.C. 170, 177–78, 597 S.E.2d 152, 156 (Ct. App. 2004); *see also Verenes v. Alvanos*, 387 S.C. 11, 17 n.5, 690 S.E.2d 771, 773 n.5 (2010) (noting that although in several prior opinions the court had stated that a claim for breach of fiduciary duty was a legal claim, "[w]e now take this opportunity to stress that an action for a breach of a fiduciary duty may sound in law *or equity* depending on the nature of the relief sought" (emphasis added)); *Ariail v. Ariail*, 295 S.C. 486, 491, 369 S.E.2d 146, 149 (Ct. App. 1988) (disregarding the label given by the parties to a cause of action and analyzing the claim based on the relief sought).

[3] The Master-in-Equity held that these claims were legal and permissive counterclaims. (Am. R. p. 278.) This Court, of course, may affirm on any basis appearing in the record. *See White*, 384 S.C. at 614 n.2, 682 S.E.2d at 502 n.2.

Minardi's claims for breach of contract, negligence, and breach of fiduciary duty are founded on her allegation that Bank of America *improperly evaluated* her application for a loan modification by applying non-HAMP guidelines in its evaluation. The relief available to Minardi is not a loan modification, given that a modification under the TPP was dependent on Minardi *qualifying* for a modification after *evaluation* of her application under HAMP guidelines. Instead, the character of relief available to Minardi—should she prevail on her counterclaims—would be a proper evaluation of her application by Bank of America using HAMP guidelines, in accordance with the terms of the TPP. Accordingly, the relief Minardi seeks is specific performance of the TPP. As "[s]pecific performance is an equitable remedy," *King v. Oxford*, 282 S.C. 307, 314, 318 S.E.2d 125, 129 (Ct. App. 1984), her counterclaims are founded in equity, and she is not entitled to a jury trial on equitable claims, *see RIM Assocs.*, 359 S.C. at 177–78, 597 S.E.2d at 156 (despite the party's characterization of its claim as a claim for "breach of contract," when the party sought the equitable remedy of specific performance, the claim was an equitable claim).

This rule that an otherwise legal claim may be equitable in nature depending on the primary relief sought applies even if a party to an action seeks monetary damages in addition to equitable relief. *See Ins. Fin. Servs., Inc. v. S.C. Ins. Co.*, 271 S.C. 289, 294, 247 S.E.2d 315, 318 (1978) (affirming the circuit court's transfer of the action to the equity calendar despite a party's request for "considerable damages," both actual and punitive, because the damages were "only incidental" to the equitable relief sought). Thus, when the primary remedy sought is equitable, the action will be an action in equity: "While [one party] will have to pay money . . . if the allegations are proven, that does not mean [the opposing party's] causes of action are legal in nature. Upon looking at the body of the complaint, the main purpose in bringing this action is

equitable, not legal." *Verenes*, 387 S.C. at 18, 690 S.E.2d at 774 (holding that, when the nature of relief sought pursuant to claim for breach of fiduciary duty an equitable remedy, there was no right to trial by jury).

Minardi pled her counterclaims for breach of contract, negligence, FDCPA, and breach of fiduciary duty alleging unspecified economic damages. (Am. R. pp. 19–23.) Even at the hearing on her motion to bifurcate and remand her counterclaims, Minardi acknowledged that she did not know what monetary damages she had incurred, aside from legal costs:

[Judge Kimball]:	What out-of-pocket money has she lost? Or —
[Minardi's Counsel]:	Aside from hiring counsel, I'm not sure.

(April 14, 2015 Tr., Am. R. p. 246, lines 8–10.)

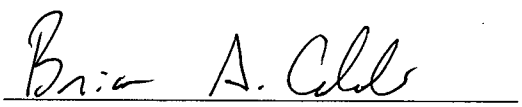
Indeed, Minardi primarily seeks enforcement of the terms that she purports are provided by the TPP. A careful review of her amended answer and counterclaims makes clear that specific performance of the TPP is what she really seeks. *Knight, Yancey & Co. v. Aetna Cotton Mills*, 80 S.C. 212, 61 S.E. 396, 398 (1908) (Woods, J., concurring) ("[T]he distinction [is] so important to be kept in mind between the cause of action and the relief sought. The cause of action, whether in tort or contract, consists of the primary right of the plaintiff with the defendant's corresponding primary duty to respect it, and the defendant's wrongful act or omission in violation of plaintiff's primary right. The remedy or relief asked is entirely different. The plaintiff may ask equitable relief for the invasion of a legal right . . . ."). Minardi's counterclaims therefore sound in equity. *See King*, 282 S.C. at 314, 318 S.E.2d at 129. And, the Master-in-Equity's adjudication of Minardi's counterclaims would not preclude her from recovering her alleged damages. *See Ins. Fin. Servs., Inc.*, 271 S.C. at 294, 247 S.E.2d at 318

("The trial of a case in a court of equity does not foreclose the award of damages."). In sum, Minardi has no right to a trial by jury for these counterclaims, and she was not prejudiced by the denial of her motion to reconsider the order denying her motion bifurcate and remand her counterclaims.

CONCLUSION

This Court should affirm the trial court's denial of Minardi's Rule 59(e) motion and let this matter proceed by non-jury adjudication.

This the 5th day of July 2016.



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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with Rule 211, SCACR.

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CERTIFICATE OF SERVICE

The undersigned certifies that *Respondent Bank of America's Final Brief* was served on appellant's counsel by depositing a copy thereof in the United States Mail, first class, postage prepaid, addressed to:

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