THE STATE OF SOUTH CAROLINA
In The South Carolina Court of Appeals

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SC Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

Hon. S. Jackson Kimball III
Master in Equity

Case no. 2011-CP-46-4278
Appellant Case No.: 2015-001857

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

vs.

Michelle Minardi and Ameris Bank, Defendants,
of whom Michelle Minardi is the ....APPELLANT

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. WAS IT ERROR FOR THE CIRCUIT COURT TO ORDER MANDATORY REFERENCE WHERE THERE EXISTED EVIDENCE OF LENDER NON-COMPLIANCE WITH THE ADMINISTRATIVE ORDER, COMPULSORY CONDUCT, AND PLAINTIFF FAILED TO SEEK RECONSIDERATION OF THE SEPTEMBER 6, 2012 ORDER?

II. DID THE MASTER IN EQUITY'S ORDER OF JULY 29, 2015 DEPRIVE DEFENDANT OF PROCEDURAL DUE PROCESS AFFECTING MODE OF TRIAL AND SUBSTANTIVE RIGHTS?

III. DID THE MASTER IN EQUITY ERROR AS A MATTER OF LAW IN DETERMINING DEFENDANT'S COUNTERCLAIMS TO BE PERMISSIVE VS. COMPULSORY WHERE THE FACTS AND EVIDENCE EXHIBIT LENDER-CREATED DEFAULT?

IV. WAS IT ERROR FOR THE MASTER TO RULE DEFENDANT HAD WAIVED RIGHTS TO JURY TRIAL AND ORDER LEGAL CLAIMS TRIED WITHIN THE FORECLOSURE ACTION WERE A LOGICAL RELATIONSHIP EXISTED AS TO DEFAULT?

PROCEDURAL STATEMENT OF THE CASE

This is a foreclosure case arising out of York County. Plaintiff Bank of America, N.A. initiated the foreclosure seeking to foreclose Minardi's owner occupied primary residence at 1808 Sam Smith Road in Fort Mill. The filing of the summons and complaint occurred on November 11, 2011. (R. at 11). Defendant responded by Objecting to Compulsory Reference, and by filing an Answer and Legal Counterclaims on January 11, 2012. (R.p. 17-26). By its complaint Bank of America alleged default as of the May 1, 2010 payment. [R. p. 13 at ¶14] Ms. Minardi's counterclaim claims alleged, *inter alia,* compulsory conduct involving Bank of America's rejection of her payment in May, 2011 tendered after completion of the Making Homes Affordable ("HAMP") program. (R. p. 86 at 12-17). Bank of America confirmed that it is a HAMP participating financial institution. (R. p. 13 at ¶16). Minardi's proposed expert in loss mitigation, George Hunter, confirms the same. (R. p. 43 at ¶2). The loan is owned by Freddie Mac.

In this case, there is a unilateral rejection of payments occurring May 1, 2011 after the bank accepts (and credits) some thirteen (13) payments. (R. p. 104). Bank of America, in fact, granted a HAMP trial modification to Defendant on or about March 1,

2010. (R. p. 138). Later, the lender rejects payments (R. p. 141) and discontinues the program citing "*excessive forbearance*" (R. p. 105 at ¶5) under its "*special forbearance program*". (R. p. 104 at ¶1). This occurs five (5) months prior to initiating foreclosure proceedings. (R. p. 105). Defendant's proposed expert and affiant confirms that the loan, originally a Countrywide Home Loans, Inc. note and mortgage, was eligible for modification pursuant to HAMP. (R. p. at 43). The affidavit of George Hunter filed in this case September 5, 2012 has never been refuted by Bank of America. Evidence shows the lender wrongly charging late charges during pendency of the trial modification efforts. (R. p. 46 at 13); (R. p. 151 at lines 6 and 8).

The first Rule 53 SCRCP motion for mandatory reference in this case was brought by Plaintiff on September 5, 2012 (R. p. 49). The hearing occurred before Circuit Judge Lee S. Alford. By order dated September 6, 2012 Judge Alford denied mandatory reference by Form 4 Order. The order recites only "motion denied *at this time* (sic)". (R. p. 99). To the extent that it affects mode of trial, noteworthy Bank of America never appeals or seeks reconsideration of the Order. Over a year later, on November 1, 2014, Plaintiff files a *secondary* motion for reference before the Hon. John C. Hayes. (R. p. 72). The motion came before the circuit court, on January 13, 2014 for oral argument. (R. p. 88). In opposition to the motion, Defendant argued there had, in fact, been no substantive changes since the first September 6, 2012 Order, and that Plaintiff's non-compliance with the administrative order governing foreclosures had not been cured. (R. p. 63 at 21-24).

At oral argument, Defendant provided a time line showing nothing had changed in status since Judge Alford's order, (factually or legally). (R. p. 79). Only time had passed. Defendant argued Plaintiff was *still* not in compliance with the administrative

order. Defendant argued Bank of America could not, in light of this fact, create the very default they alleged justified the basis of their foreclosure action and that it was compulsory conduct. (R. p. 63 at ¶1); (R. p. 86 at 12); (R. p. 94 at 22-25). Judge Hayes viewed the case as a 2011 matter, and issued an Order Granting Plaintiff's Motion for Order of Mandatory Reference on February 7, 2014. (R. p. 89 at 14). The case is referred to Master in Equity S. Jackson Kimball III for further proceedings. (R. p. 102).

After the case is referred, discovery ensues wherein documents are produced by Bank of America showed (a) grant of a HAMP trial modification pursuant to the Making Homes Affordable Program, yet oddly (b) rejection of permanent modification under the guise of "*excessive forbearance*" under "*special forbearance*" that Bank of America, N.A. cites as "***our*** (sic) *Special Forbearance*". (R. p. 104). Business records generated from Bank of America sent direct to Michelle Minardi evidence this; they are never produced in discovery by Bank of America as between the lawyers. Noteworthy is that Minardi never requested a forbearance of any type from the lender. The HAMP trial modification is the only program evidenced by discovery in this case. (R. p. 138). The program was offered, and accepted, in March, 2010. (R. p. 134-101). Minardi commenced modified payments in April, 2010. (R. p. 139). The bank confirms in October, 2010 she has made the last of the three trial plan payments. (R. p. 104). The lender then continues to accept payments, however, through April, 2011. In Answer, and by Affirmative Defense, Minardi had alleged equitable estoppel, novation, and accord and satisfaction concerning the original year 2008 Countrywide note. (R. p. 19).

Procedurally, almost a full year of stalemate ensues in the litigation between the parties; the parties engage in limited discovery consisting of written demands. The

written discovery exchanged confirmed Bank of America was, at all relevant times, accepting payments. Plaintiff deposes Minardi July 16, 2014. However, it literally requires a motion to compel the Rule 30(b)(6) deposition for the Defense to be able to officially depose Bank of America's designee. (R. p. 221). Pursuant to Defendants *Second* Rule 30(b)(6) Amended notices, *finally*, on April 15, 2015 Diane Deloney appears in South Carolina for Bank of America. (Id. at 24).

The deposition is the first factual and evidentiary illustration confirming that within the dispute and ongoing loss mitigation efforts, the parties are not comparing *apples to apples*, or *oranges to oranges*, so to speak. Rather, Bank of America had somehow produced (in mid-HAMP efforts) its home-grown version of a HAMP modification. *e.g, Bank of America has produced an "Orple"*, literally, labelled by the bank as "***our*** Special Forbearance" program. (R. p. 104 at ¶1). *But See* (R. p. 105). Noteworthy is that Minardi never applies for this "*special forbearance*" program, *ever*. (R. p. 105; 138). Minardi applied for a HAMP modification, *specifically*. (R. p. 137). Appellant respectfully avers that it is the quintessential *bait and switch* prior to the bank initiating wrongful foreclosure in violation of the administrative order of the Supreme Court 2011-05-02-01. (R. p. 138) *but* compare (R. p. 141). Documentary evidence reveals compulsory conduct. The "logical relationship" consists of lender rejection of payments as a prelude to initiating foreclosure. The master, viewing these facts erroneously in favor of Plaintiff, hits the nail on the head: "If they had not *declared her in default*, (sic) in the trial modification agreement, they couldn't have enforced the note and mortgage." (R. p. 242 at 4-7). The issue largely ignored is that Minardi had long

completed loss mitigation; and the lender created the alleged default. (R. p. 237 at 1-5); (R. p. 238 at 8-9).

It is completely ignored by the master in analysis of permissive vs. compulsory counterclaims during the Defendant's motion and argument for Remand and Bifurcation. (R. p. 272 at 9-10). The MIE, like the circuit court, viewed this case as a mechanical 2011 foreclosure matter that needed to be cleared from the court roster. (R. p. 175 at 7-12); (R. p. 89 at 14-15); (R. p. 248 at 23-25). In so viewing the case, the Master erroneously determines Minardi waived her rights to jury. "*..[T]he issue is not whether she gets a trial on her counterclaims, the issue is whether by asserting them in this foreclosure action she's waived her right to jury trial. And I find and confirm that she's done that. She has a trial, it's just non-jury, because the counterclaims are indeed permissive.* (sic)" (R. p. 271 at 17-22). Non-compliance with the administrative order is completely viewed in favor of the lender, or largely ignored. (R. p. 102). So is the documentary evidence showing the "bait and switch" and the fact that there exists a logical relationship in the default. (R. p. 272 at 9); (R. p. 293 at (a)) fn.#1); (R. p. 320 at ¶5, line 1).

While illustrating the bait and switch with the lender's very own documents, Defendant filed its Motion to Compel under the Administrative Order with the Master in Equity. The motion was filed February 2, 2015 seeking to have the master in equity ***compel mediation*** pursuant to authority granted under the administrative order. (R. p. 112); (R. p. 157 at 18-25). The master likewise denied the motion for mediation, citing *futility* (R. p. 192 at 8-11) given the balanced owed under the 2008 note, (emphasis), and failing to consider HAMP modification performance. (R. p. 232 at 18-23). The defendant's attempts to illustrate the difference between apples and oranges is ignored by

the Master entirely, despite appearing in official bank records. The court instead engages Defendant regarding the waiver of deficiency and why she would want to contest loss of the home given the outstanding balance, (now impacted by years of fines, penalties and interest) where Bank of America created the very default alleged in the complaint. (R. p. 188 at 12-19).

Minardi next motions the court for Summary Judgment on February 9, 2015. Defendant alleged that there existed no genuine issue of fact for trial because Plaintiff had initiated, and maintained, the foreclosure in violation of the Supreme Court's Administrative Order 2011-05-02-01. Defendant alleged Plaintiff had done so by filing for foreclosure where Plaintiff had denied Defendant a fair opportunity to *consummate completed* loss mitigation, specifically the HAMP trial modification. The lender had informed Mindardi in October 18, 2010 she had made the last of the first three required trial payments. (R. p. 299 at ¶1). By Form 4 Order dated March 26, 2015 the Master denied summary judgment, viewing the evidence and all inferences, erroneously, in favor of Bank of America. (R. p. 188 at 11-19). The more important consideration for the court was immediate scheduling of the foreclosure trial (R. p. 175 at 7-12); (R. p. 217 at ¶4) and ignoring that a logical relationship implicated the default alleged by the lender as part of a feigned excessive forbearance.

Both the Order and file stick notes from court staff evidence that the file would be retained by the Master who had ordered scheduling of the year 2011 equitable claims and counterclaims (together) as soon as the nonjury docket would permit. The MIE denied to render judgment "*on the legal issues presented.*" (R. p. 217). The order failed to specify what legal issues, and what facts, made inappropriate the denial of summary judgment on

March 26, 2015. Plaintiff had indicated in its motion that the court was presented with a *pure question of law* pertaining to compliance with the administrative order. Plaintiff's own business records were used in support of Defendant's arguments, to no avail. The Master ordered that the case was to be disposed of as soon as possible (R. p. 217). The order set in stone discovery deadlines, and motion deadlines, in further establishing a first available date for trial on June 4, 2015. (R. p. 217). While deposition scheduling of Plaintiff personnel had been problematic, Defendant was finally able to schedule and conduct the Rule 30(b)(6) deposition of Plaintiff's designee in Fort Mill on April 15, 2014 (under threat of motion to compel). (R. p. 221 at 13-25); (R. p. 222 at 1-2). The deposition occurred the very next day. The designee appeared with no documents of its own pursuant to the Duces Tecum *Second* Amended deposition notice. It highlighted the "bait and switch" whereby Plaintiff granted one program, and rejected relief to the borrower (who had successful performed) under the guise of a different program entirely. (R. p. 138); (R. p. 139).

Minardi later motions the court to Bifurcate and Remand her Legal Counterclaims to Circuit Court. Oral argument was heard April 14, 2015. Minardi also sought to amend pleadings to add counterclaim causes of action for Breach of Fiduciary Duty. By Order dated May 19, 2015 the Master denied Minardi's motion to bifurcate and Remand. The Master ordered the counterclaims to be heard non-jury "*in the same trial as Plaintiff's claim for foreclosure of its mortgage.*" (sic). (R.p. 279 at ¶1). Appellant respectfully asserts abuse of discretion at this juncture. Referring to the BADD case cited by plaintiff counsel, the court goes on to opine "In fact, this – I want to say the last two weeks, I read another case that tightens the target more. The foreclosure has to do with whether she's in

default under the note and mortgage…". The court ignores entirely not only that the note and mortgage factually may have been modified by HAMP trial plan, but fails to view most favorable to Defendant that – as of May 1, 2010 – *there is no default.* Discovery confirms Minardi was actively making payment. As of May, 2011, there exists a logical relation as to the ceasing of payment. (R. p. 240 at 9-14).

After the Rule 30(b)(6) deposition, Defendant timely filed a motion pursuant to Rule 59(e) SCRCP for reconsideration inquiring what Minardi's damages were. (R. p. 281). The master denied reconsideration. The Master inquired what Minardi's damages were, and if the note would remain enforceable or not; the MIE finding "she" would still "owe the debt", yet ignoring that the 2008 note may factually have been modified. The court failed to view Minardi's successful performance, and the bait and switch, in a light most favorable to the defendant. (R. p. 234 at 1-17). Minardi respectfully alleges both legal error and abuse of discretion by the Circuit Court and the Master in Equity, asserting it was error to deny Minardi adjudication of her legal counterclaims by jury, first in priority; and error to require her case to be adjudicated in the same proceeding as the Plaintiff's foreclosure. The court's order and ruling prejudiced Defendant by forcing simultaneous trial of legal and equitable claims, and by permitting Bank of America to go forward on its foreclosure at the first opportunity where no prejudice existed to Plaintiff. Minardi respectfully asserts that it was error to order her legal counterclaims tried in the same proceeding pursuant to *Johnson v. S.C. Nat'l Bank*, 292 S.C. 51, 54, 354 S.E. 2d 895, 896 (1987) particularly where the enforceability of a year 2008 note and mortgage has been subject to ongoing (or arguably completed) loss mitigation--the HAMP trial modification specifically. Appellant respectfully avers that as to *note enforceability*, the

factual question of what "contract" or "note" was enforceable post HAMP modification efforts, *while extremely rare in jurisprudence*, nonetheless should properly have been reserved for the jury under these circumstances. Appellant respectfully avers that the court's Orders deprived Minardi of her day in court, and more importantly, procedural due process of law. From these Orders defendant now appeals to this court.

STATEMENT OF THE FACTS

Michelle Minardi is a self-employed single mother, whose hardship began with the loss of her youngest child to death in year 2009. (R. p. 133). During the child's last illness Ms. Minardi was unable to work. She fell into arrears on her Countrywide mortgage (later acquired through merger by Plaintiff / Respondent herein). Upon recovering from the hardship, she contacted her South Carolina Senator Lindsay Graham. The senator recommended Minardi seek help from her Bank of America, her new servicer, via the government's *then-new* Making Homes Affordable Program ("HAMP"). At its core, this action involves a Countrywide Home Loans, Inc. note and mortgage originated in year 2008. The loan closed June 11, 2008, wherein Michelle Minardi agreed to pay to Countrywide Bank, FSB, the sum of Two Hundred Eight-Six Thousand and no/100 ($286,000.00) Dollars. (R. p. 11 at ¶4). Noteworthy is the lender alleges default in the May, 2010 payment in their complaint. (R. p. 13 at ¶14). Freddie Mac is the owner of the loan.

After recovering from the death of her child, Minardi successfully negotiated a trial payment plan with Plaintiff. The evidence is undisputed that Minardi applied for a HAMP modification. (R. p. 138). Bank of America approved Minardi. (R. p. 139). In March, 2010 Bank of America granted her a trial plan with payments of $874.33. Ms.

Minardi commenced payments in April, 2010. The trial period plan was to include three (3) payments before Minardi could be considered for a permanent modification. (R. at p. 139). Minardi successfully navigates the program and tenders well more than the three consecutive payments. Per Bank of America letter dated October 18, 2010 the lender acknowledges that Minardi successfully made the last required trial modification payment pursuant to "***our Special Forbearance Agreement***" [emphasis]. (R. p. 299). Here is where the bad faith is first manifested. The permanent modification is never forthcoming. The lender instructs Minardi to keep making payments until they can provide the promised permanent modification. Id. It is not disputed that even more payments are accepted. Noteworthy is that at no time does Bank of America not continue to accept (and credit) payments until May, 2011. Minardi ultimately makes thirteen (13) consecutive monthly payments to the lender, while operating under the anticipation of a permanent modification (one that the lender has promised under HAMP). On payment number fourteen, Bank of America rejects tender unexpectedly. (R. p. 141). The fourteenth payment is returned by regular mail without notice. The payment history produced by Bank of America in discovery confirms the acceptance and credit of Minardi's payments until rejection of the payment occurring May, 2011. (R. p. 301 at ¶5).

Bank of America – months later - notifies Ms. Minardi that she has failed to qualify for permanent modification due to "*excessive forbearance*" (sic). (R p. 301). The lender then initiates this foreclosure action November 11, 2011. The Complaint alleges borrower default as of May, 2010 – the very month in which they accepted her first trial modification under the HAMP program. (R. p. 13 at ¶14). In fact, documentary evidence

confirms this is not the case; Minardi was making trial payments to Bank of America from May of 2010 through April of 2011, nearly *twelve months of accepted payments.* Minardi alleged by legal counterclaims, *inter alia*, that Bank of America filed its foreclosure in violation of the administrative order of the Supreme Court. Minardi also alleged that Bank of America had failed to permit her to consummate the HAMP modification after she successfully made three (3) required trial payments. The false assurances of permanent modification later culminate in typical claims of "*failure to provide follow up information*" and "*excessive forbearance*" feigned as a "special forbearance" program, now justification for the Bank's foreclosure. The evidentiary dilemma for Bank of America in this case is the feigned May, 2010 default and their unilateral rejection of payment under the bait and switch. Minardi, through counsel, has long alleged non-compliance with the administrative order of the Supreme Court.

STANDARD OF REVIEW

Whether a party is entitled to a jury trial is a question of law, which this court reviews de novo, owing no deference to the lower court. When a defendant in an equitable action asserts a compulsory counterclaim that alleges actions at law, *both* the Plaintiff and the Defendant have a right to have a jury trial on the issues raised by the compulsory legal counterclaim. *Johnson v. S.C. Nat'l Bank*, 292 S.C. 51, 54, 354 S.E.2d 895, 896 (1987). If there are factual issues common to both the legal and equitable claims, the legal claim "*absent the most imperative circumstances*," must be tried, that is, *disposed of, first*. Id. at 56, 354 S.E.2d at 897. In such cases, the United States Supreme Court has cautioned that the discretion to try an equitable claim first "is very narrowly limited and must, whenever possible, be exercised to preserve jury trial." *Beacon*

Theatres, Inc. v. Westover, 359 U.S. 500, 510, 79 S.Ct. 948, 3 L.E.2d 988 (1959). Accordingly, the Court indicated that such discretion should only be exercised in the face of "irreparable harm" to the Plaintiff if the legal claims were to be tried first. Id. "If there are no common factual issues, it is within the trial judge's discretion which claim will be tried first." *Johnson*, 292 S.C. at 56, 354 S.E.2d at 897. The South Carolina Constitution provides that the right to trial by jury shall be preserved inviolate. S.C. Const. art. I §14. "Generally, the relevant question is determining the right to trial by jury is whether an action is legal or equitable." *Lester v. Dawson*, 327 S.C. 263, 267, 491 S.E.2d 240, 242 (1997). Because a foreclosure action is one sounding in equity, a party is not entitled, as a matter of right, to a jury trial. *Wachovia Bank Nat. Ass'n v. Blackburn*, 407 S.C. 321, 328, 755 S.E.2d 437, 441 (2014). A defendant is entitled to a jury trial on his counterclaims in an equitable action only if the counterclaims are legal and compulsory. See Rule 13(a), SCRCP. A counterclaim is compulsory if it arises out of the same transaction or occurrence as the party's claim. *Id.* In a foreclosure action, a counterclaim arises out of the same transaction or occurrence and is thus compulsory, when there is a "logical relationship" between the counterclaim and enforceability of the guaranty agreement. *Cf. N.C. Fed. Sav. & Loan Ass'n*, 298 S.C. at 518-19, 381 S.E.2d at 905-906. (*finding a foreclosure defendant was entitled to jury trial because his counterclaims that the bank breached subsequent oral contracts to arrange additional financing were compulsory because they bore a logical relationship to the enfordeability of the note*).

Although as a general rule contracts are to be construed by the court, where a contract is capable of more than one construction, the question of what the parties intended becomes one of fact to be submitted to the jury. *Soil Remediation Co. v. Nu-Way*

Envtl., Inc., 325 S.C. 231, 482 S.E.2d 554 (1997). The issue of existence of a contract is a question of fact for the jury when its existence is questioned and the evidence is either conflicting or gives rise to more than one inference. *Small v. Springs Indus., Inc.*, 292 S.C. 481, 357 S.E.2d 452 (1987). Whether a party is entitled to a jury trial is a question of law, which the Supreme Court has stated is reviewed de novo, owing no deference to the decision of the court below. *See, Carolina First Bank, n/k/a T.D. Bank, N.A. v. BADD, L.L.C.*, Op. No. 27486 (S.C. Sup. Ct. filed Jan. 1, 2015) [citing *Cf. Wachovia Bank, Nat. Ass'n v. Blackburn*, 407 S.C. 321, 328, 755 S.E.2d 437, 441 (2014)].

ARGUMENT

I. WAS IT ERROR FOR THE CIRCUIT COURT TO ORDER MANDATORY REFERENCE WHERE THERE EXISTED EVIDENCE OF LENDER NON-COMPLIANCE WITH THE ADMINISTRATIVE ORDER, COMPULSORY CONDUCT, AND PLAINTIFF FAILED TO SEEK RECONSIDERATION OF THE SEPTEMBER 6, 2012 ORDER?

Yes. Judge Lee S. Alford's Order of September 6, 2012 is never challenged by Plaintiff under either Rule 59(e) or Rule 60, SCRCP. The Form 4 order stated, "motion denied *at this time*" (sic). The order, nevertheless, preserved the status quo and was predicated upon plaintiff's *continued acceptance* of payments and the affidavit of George Hunter filed by Defendant regarding loss mitigation. (R. p. 42). At the point of September 6, 2012 Defendant had demonstrated, without dispute, the lender was accepting payment as of May, 2010 (*the alleged month of default entitling Plaintiff to foreclosure*). Defendant did so utilizing Plaintiff's own production of the loan payment history produced in discovery. (R. p. 150-154). Defendant had argued Plaintiff noncompliance with the administrative order governing foreclosures. Defendant has also argued compulsory conduct of lender-creating default as of May, 2010 where *no default actually*

existed. Defendant argued the lender's rejection of payment was the commonality, or "logical relation", inherent in Minardi's legal counterclaims. The order of Judge Alford is never challenged and is the law of the case effective September 6, 2012. Plaintiff files a secondary motion seeking mandatory reference over one year later.

By motion dated November 1, 2014 Plaintiff's secondary motion is filed with the court. Plaintiff seeks mandatory reference, *again,* which is granted by Hon. John C. Hayes. Prior to this, there is no challenge of the circuit court's ruling by Judge Alford. There was no motion to reconsider, alter or amend. A motion under Rule 59(e) shall be served not later than 10 days after receipt of written notice or entry of the Order. *See,* Rule 59(e) SCRCP. Plaintiff files nothing new, until November 1, 2014. There is no Rule 60 motion showing anything new. In fact, the timeline, facts and law evidence *nothing has changed* since the first Order denying Plaintiff to mandatory reference. Judge Alford's Order established the law of the case as of September 6, 2012 thru February 7, 2014. Noteworthy is that oral argument occurs before Judge Hayes, reviewing the Order of Judge Alford. The Order is signed by Judge Lee S. Alford, however, after oral argument occurred before Judge Hayes. (R. p. 102). Appellant respectfully avers it was an abuse of discretion affecting mode of trial issues as the case is referred to the Master in Equity, setting the state for compounding of error of law.

It is a fundamental rule of law that an appellate court will affirm the ruling by a lower court if the offended party does not challenge that ruling. *Bailes v. Young*, 315 S.C. 166, 432 S.E.2d 482 (1993). *Lindsay v. Lindsay*, 328 S.C. 329, 491 S.E.2d 583 (Ct. App. 1997). Failure to challenge the ruling is an abandonment of the issue and precludes consideration on appeal. *Id.* An unappealed order, right or wrong, is ordinarily the law of

the case. *Charleston Lumber Co. v. Miller Hous. Corp.*, 338 S.C. 171, 525 S.E.2d 869 (2000); *Resolution Trust Corp. v. Eagle Lake & Golf Condominiums*, 310 S.C. 473, 427 S.E.2d 646 (1993) (the trial judge's procedural ruling is the law of the case since it has not been appealed); *Anderson v. Short*, 323 S.C. 522, 476 S.E.2d 475 (1996) (where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the new law of the case). Appellant respectfully asserts that so it is in the case at bar.

Appellant respectfully asserts that it was procedural error to refer the case by way of second motion, given the first Order which had established, *without challenge*, the law of the case. Appellant respectfully avers it was abuse of discretion by the circuit court at this juncture to fail to consider the compulsory nature of Defendant's counterclaims, and appropriately rule on the same as a matter of law, prior to mandatory reference. While the court takes the matter under advisement, the court viewed the case as a 2011 foreclosure matter still on the circuit court roster as of year 2014. By Order dated February 7, 2014 (entered 2/11/2014) the court issues its mandatory order of reference irrespective of the lender's conduct under the administrative order. It did so without consideration of the logical relationship of the lender's rejection of payment and the alleged default. (R. p. 188 at 21-25). As to the forthcoming permanent modification, the MIE correctly makes note of how the default has been framed and alleged by the lender. (R. p. 188 at 22-25; p. 189 at 1-2).

II. DID THE MASTER IN EQUITY'S ORDER OF JULY 29, 2015 DEPRIVE DEFENDANT OF PROCEDURAL DUE PROCESS AFFECTING MODE OF TRIAL AND SUBSTANTIAL RIGHTS?

Yes. Appellant respectfully avers that this court is presented with the very rare circumstance of a wrongful foreclosure where there is compulsory conduct and logical relationship implicating default. The South Carolina Constitution art. I, §14 provides that the right to a jury trial shall be preserved inviolate. *See also*, Rule 38 SCRCP. Appellant acknowledges that typically, because a foreclosure action is one sounding in equity, a party is not entitled, as a matter of right, to a jury trial. *Wachovia Bank, Nat. Ass'n v. Blackburn*, 407 S.C. 321, 328 755 S.E.2d 437, 441 (2014). What distinguishes this case from *Carolina First Bank v. BADD, LLC* case is that here the lender seeks no deficiency and this is not a case predicated on guaranty of a third party. *The question becomes what entitles Plaintiff to foreclosure, exactly and was there a logical relationship.* Paragraph (14) of the Complaint establishes this. The lender alleged default (ceasing of payment) as of May, 2010. If, in fact, Minardi is making (and the lender accepting and crediting) payments, was the foreclosure filed in violation of the administrative order of the Supreme Court? Does it constitute compulsory conduct (breach of contract, novation, accord, satisfaction) where the lender manipulated default by rejecting payment? The MIE recognized the fact-intensive nature of the inquiry, essentially shifting both ways in its analysis but yet ignoring lender non-compliance with the administrative order. (R. p. 253 at 11-23).

III. DID THE MASTER IN EQUITY ERROR AS A MATTER OF LAW IN DETERMINING DEFENDANT'S COUNTERCLAIMS TO BE PERMISSIVE VS. COMPULSORY WHERE THE FACTS AND EVIDENCE EXHIBIT LENDER-CREATED DEFAULT?

Yes. A counterclaim is compulsory if it arises out of the same transaction or occurrence as the party's claim. Here the Plaintiff's claim is foreclosure entitlement, falsely predicated on a May, 2010 default and ceasing of payment. *See*, Rule 13(a) SCRCP. Was there a logical relationship between note enforceability in this case and the counterclaims? Appellant respectfully avers "yes" for three (3) reasons: (1) the servicer in this case rejects payment creating the default; (2) it accepts and credits Minardi's payments; and (3) the servicer falsely puts Minardi into a HAMP trial modification that she complies with, yet *reneges* under justification of failure to qualify for their "Special Forbearance" program, whereunder (despite strict and substantial performance by Minardi) they allege "excessive forbearance". The documentary evidence is undisputed and overwhelming. The lender offered (under debtor solicitation) a HAMP trial modification. The program is accepted by Minardi. (R. p. 135, 138). Valuable consideration exchanges hands. The lender notifies Minardi she has made the last of three required payments. (R. p. 299 at ¶1). Valuable consideration *continues* to change hands. Bank of America continues to accept and credit payment. They do so under false assurance of a forthcoming permanent modification. Minardi was tendering payments pursuant to the HAMP trial program. (R. p. 139; 141; 150-154). *Was the June 11, 2008 Note modified by the parties' conduct?* Arguably not, because the Lender, hoping nobody will notice, replaces a HAMP modification with its own Special Forbearance program. (R. p. 299 at ¶1). It is undisputed in this case the foreclosure commences after rejection

of the May, 2010 payment. This occurs via lender conduct, it is not created by Minardi. As of May, 2010 the Lender has set about a course of conduct that is not only compulsory in nature (arising out of the same transaction or occurrence as the ceasing of payment, specifically), its subsequent November 11, 2011 foreclosure action is filed in violation of the Supreme Court's administrative order 2011-05-02-01. Minardi has been denied a fair opportunity to consummate loss mitigation. Specifically, loss mitigation under the HAMP program.

IV. WAS IT ERROR FOR THE MASTER TO RULE DEFENDANT HAD WAIVED RIGHTS TO JURY TRIAL AND ORDER LEGAL CLAIMS TRIED WITHIN THE FORECLOSURE ACTION WERE A LOGICAL RELATIONSHIP EXISTED AS TO DEFAULT?

Yes. Under the court's Order of July 29, 2015 the irreparable harm that would occur by simultaneous trial of legal counterclaims and the plaintiff's foreclosure would prejudice Defendant, <u>not</u> Plaintiff. Appellant respectfully avers this case represents the very narrow and limited class of foreclosure case where the United States Supreme Court has cautioned that the discretion to try and equitable claim first "is very narrowly limited and must, whenever possible, be exercised to preserve jury trial." *Plantation Federal Bank v. Peggy B. Gray*, 401 S.C. 507, 737 S.E. 515 (2013). (citing *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 79 S.Ct. 948, 3 L.Ed.2d 988 (1959). What is the irreparable harm that Plaintiff would suffer vs. preservation of Defendant's rights to jury trial? The answer lies in Minardi has never acted inequitably and changed position in reliance. Defendant complied with every request of the lender. (R. p. 150-154). The lender's own documents evidence full compliance by Minardi. (R. p. 299). The only legal justification Plaintiff can reach for, at the point of litigation, is their allegations of failure of Minardi

(after trial payment plan compliance), to provide more and more information. Minardi had, in fact, provided, ad nauseam, any and all documents the lender required by and through counsel.

CONCLUSION

Appellant respectfully asserts that the master committed both error of law and abuse of discretion by ruling that Bank of America could proceed with its foreclosure action as soon as the docket permitted, forcing simultaneous trial of the legal and equitable claims. The Master errors in finding note enforceability equated to Minardi's waiver of right to trial by jury, erroneously characterizing her counterclaims as permissive. The Master expressly noted for the record, then ignores the patent logical relationship created by lender-created default. Four (4) years had elapsed since Bank of America unilaterally rejected Minardi's May, 2011 payment. The payments accepted and credited by the lender, prior to this, occurred under the HAMP trial plan Minardi successfully complied with this plan. The documentary evidence in this case confirms that Bank of America *created the default*, Michelle Minardi *did not*. The ceasing of payment arises out of Bank of America's own compulsory conduct. Defendant Minardi respectfully avers that rejection of payments while loss mitigation was in progress (or arguably had been successfully completed) formed the same transaction, occurrence, and sequence of events that form the alleged default in the case. Instead of permitting consummation of the HAMP modification, the loss mitigation is terminated by the lender. It does so months later under guise of "special forbearance" program and their determination of "excessive forbearance" under something other than HAMP. Stated more direct, here the *alleged default* under HAMP trial mod, extended to defendant by

Plaintiff, was the "transaction or occurrence" and "logical relationship" that gave rise to Minardi's legal counterclaims within the foreclosure. *See*, SCRCP 13(a). (R. p. 94 at 22-24). A counterclaim is compulsory if it arises out of the same transaction or occurrence as the party's claim. Id. The court expressly found a "logical relationship" between the counterclaims and enforceability of the note, yet later retracts the finding. (R. p. 241 at 1-15). *See*, *Cf. N.C. Fed. Sav. & Loan Ass'n*, 298 S.C. at 518-19, 381 S.E.2d at 905-906; *Advance Int'l Inc. v. N.C. Nat'l Bank of S.C.*, 316 S.C. 266, 270-271, 449 S.E.2d 580, 582-83 (Ct. App. 1994), *aff'd in part, vacated on other grounds*, 320 S.C. 532, 486 S.E.2d 367 (1996).

"If they had not declared her in default, in the trial modification agreement, they couldn't have enforced the note and mortgage. (R. p. 242 at 4-6); (R. p. 247 at 7-17). So I find that there is, in this ---and these facts – and the BAC (sic) case says that. Because it is a fact intensive thing, I find that there is some logical relationship between the breach of contract and the enforceability of the note and mortgage. Thus, that that is a compulsory legal counterclaim and is entitled to be bifurcated and tried before a jury." Id. The April 14, 2015 hearing transcript evidences the court grappling with damage issues (R. p. 244 at 3-8) not yet before the Court and note enforceability before changing position "*Okay. Well, I'm going to reverse myself. I think that the breach of contract claim is not logically related to the enforceability of the note and mortgage. And thus, the counterclaim is not compulsory. And the right to a jury trial has been waived...*" (R. p. 252 at 13-16). "*Because, when the dust settles, she still owes the money....she's still going to have to pay the debt.*" Id. at 19. "*[I]'ll say I'm going to reverse myself. I've talked myself right out of it.*" "*Now, all that means is she gets to try the case, but it just*

won't have a jury trial, and all of it will be tried together." (Id. 253 at 21-23). As argued by defense counsel, "*what the contract now is, subsequent to the modification, I think, is to be determined by a trier of fact...*". (R. p. 259 at 2-6). The court completely ignores lender-created default, non-compliance with the administrative order, and the fact that the year 2008 Countrywide note may have been modified, factually, by the parties' conduct.

The documentary evidence is undisputed in this case. Bank of America granted defendant a trial mod, *specifically*, under the Making Homes Affordable Trial Program ("HAMP"). They reject and obstruct *consummation* the very same trial mod predicated on Bank of America's "*Special Forbearance*" program. The lender's business records state affirmatively that Minardi made the last payment required. Discovery, viewed improperly by the court in a light most favorable to Plaintiff, confirms that no documents exist to show Defendant ever applied for (or was offered) Bank of America's version of HAMP, e.g. the "Special Forbearance". As a prelude to wrongful foreclosure, Bank of America reneges on the false promises it made to Minardi under HAMP. It does so under feigned "*excessive forbearance*". The question of what note and agreement, exactly, was enforceable in foreclosure was, in this case, properly a question reserved for the trier of fact. Appellant respectfully asserts she was constitutionally entitled to jury trial of her compulsory legal counterclaims in this instance, first in priority. Minardi respectfully asserts her claims were entitled to adjudication by jury prior to the Bank being able to proceed with foreclosure proceedings before the Master in Equity.

Appellant respectfully prays that the Court of Appeals reverse and remand this case for jury trial.

Respectfully submitted,

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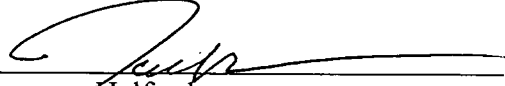

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June 30, 2016

THE STATE OF SOUTH CAROLINA
In The South Carolina Court of Appeals

RECEIVED
JUL 13 2016
SC Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

Hon. S. Jackson Kimball III
Master in Equity

Case no. 2011-CP-46-4278
Appellant No.: 2015-001857

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

vs.

Michelle Minardi and Ameris Bank,
of whom Michelle Minardi is the ....APPELLANT

CERTIFICATION OF APPELLANT COUNSEL

Pursuant to SCACR 201(g), the undersigned here certifies that the Final Brief of Appellant contains all material proposed to be included by any of the parties and no other materials.

July 12, 2016

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PROOF OF SERVICE

I certify that I am the attorney for the Appellant in the above-captioned matter and that I did on July 12, 2016 serve one copy of the Final Brief of Appellant on counsel for the party listed below by depositing the same in the United States mail, postage prepaid, and addressed as follows:

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