

EXHIBIT I

330 S.C. 71
Supreme Court of South Carolina.

WILDER CORPORATION f/k/a Wilder Mobile
Homes, Inc., Respondent,
v.
Klaus WILKE and Rita E. Wilke, Petitioners.

No. 24770.

|
Heard Dec. 16, 1997.

|
Decided March 9, 1998.

Seller brought action to foreclose on a bond for title. The Circuit Court, Lexington County, George W. Jefferson, Master-In-Equity, found in favor of buyers. Seller appealed. The Court of Appeals, 324 S.C. 570, 479 S.E.2d 510, affirmed in part and reversed in part. Buyers appealed. The Supreme Court, Toal, J., held that: (1) seller did not waive objections to buyers' loan amortization schedule; (2) interest began to accrue on date the bond for title was signed; (3) evidence established that buyers made 179, rather than 180, payments to seller; and (4) seller preserved for appellate review the issue of whether post-judgment interest should have been applied to federal court judgment as a setoff against amounts owed by buyers.

Affirmed.

West Headnotes (10)

[1] **Appeal and Error**
⊕Necessity of Presentation in General

Issue cannot be raised for first time on appeal, but must have been raised to and ruled upon by trial judge to be preserved for appellate review.

332 Cases that cite this headnote

[2] **Trial**
⊕Objections and Exceptions

Objection must be sufficiently specific to inform trial court of the point being urged by objector.

16 Cases that cite this headnote

[3] **Trial**
⊕Documentary Evidence

Seller's objection to buyers' loan amortization schedule, in action to foreclose on a bond for title, was specific enough to allow trial judge to understand and rule upon alleged error, where it stated that seller objected to theories considered by accountant in doing the math.

Cases that cite this headnote

[4] **Appeal and Error**
⊕Necessity in General

Post-trial motions are not necessary to preserve issues that have been ruled upon at trial; they are used to preserve those that have been raised to trial court but not yet ruled upon by it.

249 Cases that cite this headnote

[5] **Appeal and Error**
⊕Necessity in General

Trial court ruled upon seller's objection to buyers' loan amortization schedule, in action to foreclose on a bond for title, when it expressly adopted buyers' amortization schedule in its order; accordingly, seller was not required to make post-trial motion to preserve issue for appeal.

14 Cases that cite this headnote

Cases that cite this headnote

[6]

Stipulations

☞ Construction and Operation in General

Seller did not waive objections to buyers' loan amortization schedule, in action to foreclose on a bond for title, by stipulating to accuracy of buyers' numerical calculations, since seller unequivocally objected to presumptions underlying those calculations.

Cases that cite this headnote

[10]

Appeal and Error

☞ Amount of Recovery or Extent of Relief

Seller's objection at trial, in action to foreclose on a bond for title, was sufficient to preserve for appellate review the issue of whether post-judgment interest should have been applied to federal court judgment as a set-off against amounts owed by buyers.

17 Cases that cite this headnote

[7]

Interest

☞ Loans and Advances

Where contract for payment of sum of money at future date provides that it is payable with interest, or is to bear interest, without specifying from what date interest is to be computed, it will be construed to bear interest from date of contract.

Cases that cite this headnote

Attorneys and Law Firms

****732 *73** Edward M. Woodward, Jr., of Woodward, Cothran & Herndon, Columbia, for petitioners.

John F. Emerson and William H. Short, Jr., both of Sinkler & Boyd, P.A., Columbia, for respondent.

Opinion

TOAL, Justice:

This case involves the foreclosure of a bond for title. Respondent, Wilder Corporation ("Seller"), brought this foreclosure action against petitioners, Klaus and Rita Wilke ("Buyer"), as a result of Buyer's indebtedness arising out of the sale of property. The master-in-equity found in favor of Buyer. The Court of Appeals affirmed in part and reversed in part. Buyer appeals the Court of Appeals' decision. We affirm.

[8]

Interest

☞ Time from Which Interest Runs in General

Since bond for title failed to specify interest accrual starting date, interest began to accrue on the date the bond for title was signed.

Cases that cite this headnote

FACTUAL/PROCEDURAL BACKGROUND

In 1979, Seller agreed to sell its mobile home park to Buyer in exchange for Buyer's motel and the additional sum of \$635,000. On January 25, 1980, the parties signed a bond for title memorializing the exchange and the \$635,000 debt. The bond for title provided that Buyer would pay monthly payments of \$5,658.80 to commence

[9]

Vendor and Purchaser

☞ Installments and Deferred Payments

Evidence in action to foreclose on a bond for title established that buyers made 179 payments to seller, rather than 180 payments reflected in buyers' loan amortization schedule.

March 1, 1980, and to continue until February 1, 1995, when a balloon payment of the remaining balance would be due. However, the contract reduced Buyer's first twenty payments by \$500, from \$5,658.80 a month to \$5,158.80 a month. Additionally, the bond for title allowed Buyer to defer a maximum of three months successive payments in the event occupancy at the mobile home park fell below 152 spaces. It also permitted the parties to set-off or add any claims or judgments arising under the terms of the agreement.

After Buyer took possession of the mobile home park on January 28, 1980, the parties executed a modification agreement which provided that Seller would pay Buyer a one-time payment of \$6,000 and that the bond for title would be reduced by \$500 per payment for the first twenty payments.¹ *74 Buyer began payment on the bond for title on March 1, 1980. However, in 1991, Buyer deferred payments for the months of September, October, and November due to low occupancy in the mobile home park.

Sometime during the repayment period, Buyer filed suit against Seller in federal district court concerning Seller's failure to connect the mobile home park to a sewage treatment facility, as required by the bond for title. On July 12, 1994, a federal district court issued a judgment against Seller in the amount of \$146,584.72.² The court further ordered post-judgment interest in the amount of 5.31% per annum.

After Buyer made the final monthly payment in January 1995, Seller sent Buyer a demand letter requesting \$512,557.61 for the balloon payment due February 1, 1995. Buyer tendered the sum of \$280,990.33 to Seller. Seller refused the tender and brought this foreclosure action against Buyer. Subsequent to the filing of this action, Buyer paid \$281,000 to Seller's attorneys pursuant to a motion for appointment of receiver.

A hearing was conducted before a master-in-equity on July 6, 1995. Both Buyer and Seller provided amortization schedules reflecting their views of Buyer's payment obligation. The master adopted Buyer's amortization schedule and made four conclusions of law: (1) the modification agreement modified the bond for title insofar as it reduced the principal amount by \$10,000; (2) Buyer properly credited the federal court judgment in the amount of \$146,584.72 on July 12, 1994. Moreover, no attempt to levy or otherwise execute the judgment was required in order to offset debt under the bond for title, and there was no requirement that Buyer wait to offset such judgment until such time as all appeals had been exhausted; (3) Buyer made or was excused from making

all scheduled payments under the bond for title, except for **733 the final balloon payment; and (4) the court agreed with the assumptions Buyer used in constructing the amortization schedule. Accordingly, the master ordered Buyer to pay a residual amount of \$811.72, plus interest accruing at 9.75%.

*75 The Court of Appeals affirmed the master's order except on four points. *See Wilder Corp. v. Wilke*, 324 S.C. 570, 479 S.E.2d 510 (1997). First, the Court of Appeals held that interest began to accrue on the loan from the date of signing, January 25, 1980, rather than the date of the first payment, March 1, 1980. Second, since the interest accrual date was January 25, 1980, the court held that the master erred in applying Buyer's first payment entirely toward principal. Third, the court found that the master incorrectly gave Buyer credit for 180 payments when the evidence supported only 179 payments. Finally, the Court of Appeals noted that Buyer's amortization schedule gave credit for the federal court judgment in the amount of \$147,289.53; the federal court judgment was \$146,584.72, with post-judgment interest accruing at the rate of 5.31% per annum. The court held that the master should have only deducted the actual amount of the judgment, \$146,584.72.

This Court granted Buyer's petition for a writ of certiorari to consider the following questions:

1. Did the Court of Appeals err in holding that Seller preserved or did not waive any objections to the calculations in Buyer's amortization schedule by stipulating to the accuracy of those calculations?
2. Did the Court of Appeals err in holding that interest began to accrue prior to the first payment?
3. Did the Court of Appeals err in holding that a payment had not been made or credited?
4. Did the Court of Appeals err in considering whether the trial court erred by adopting the figures in Buyer's amortization schedule as to the amount of the federal court judgment?

LAW/ANALYSIS%#H

A. WAIVER/PRESERVATION

Buyer argues that the following issues were not properly preserved for review by the Court of Appeals: (1) the date when interest started to accrue; (2) application of the first

payment to principal; (3) the number of payments made by Buyer; and (4) accrual of interest on deferred payments. In a related argument, Buyer contends that the Court of Appeals *76 erred in holding that Seller, by its stipulation, did not waive any objections to the calculations in Buyer's amortization schedule. It should be noted at the outset that Buyer has preservation problems of its own in that Buyer did not raise all of these issues to the Court of Appeals in its petition for rehearing. That said, we disagree with Buyer's contention that Seller waived or failed to preserve its position on these issues.

At trial, Seller's attorney made the following objection/stipulation when Buyer's amortization schedule was introduced into evidence:

We have an objection to the theories considered by [the accountant] in doing the math, but we have no objection to the way he did the math. We presume that if your honor rules and sustains [Buyer's] point on the theories, that the math will be correct.... [Buyer's amortization schedule] is a mathematical run of payments with certain presumptions made on theories propounded by [the accountant]. [The accountant] has run those numbers. And if [his] points are sustained by you, then [his] run of the numbers is accurate.

[1] [2] [3] It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review. *Creech v. South Carolina Wildlife and Marine Resources Dep't*, 328 S.C. 24, 491 S.E.2d 571 (1997). Moreover, an objection must be sufficiently specific to inform the trial court of the point being urged by the objector. *Broom v. Southeastern Highway Contracting Co.*, 291 S.C. 93, 352 S.E.2d 302 (Ct.App.1986). In this case, Seller's and Buyer's amortization schedules clearly conflicted **734 on the issues Buyer propounds as not having been preserved for appellate review. These issues were, in fact, integral to the computation of the final balances reached by either side. Thus, in this context, Seller's objection was specific enough to allow the trial judge to understand and rule upon the alleged error.

[4] [5] Buyer next argues that the trial judge failed to rule upon Seller's objection at trial. As such, Buyer contends that the above issues were not preserved for review

because Seller *77 failed to make a Rule 59(e) motion.³ We disagree. Post-trial motions are not necessary to preserve issues that have been ruled upon at trial; they are used to preserve those that have been raised to the trial court but not yet ruled upon by it. *Hubbard v. Rowe*, 192 S.C. 12, 5 S.E.2d 187 (1939). Here, the trial court ruled on Seller's objections by expressly adopting Buyer's amortization schedule in its order. Consequently, it was unnecessary for Seller to make any post-trial motions.

[6] Finally, we disagree that Seller, by its stipulation, waived any objections to Buyer's amortization schedule. Although stipulating to the accuracy of Buyer's numerical calculations, Seller unequivocally objected to the presumptions underlying those calculations. As discussed above, in the context of the case, Seller's objection was sufficiently specific to inform the trial judge of any error. Therefore, the Court of Appeals was correct in holding that Seller did not waive any objections to Buyer's amortization schedule.

B. INTEREST ACCRUAL DATE

Buyer argues that the Court of Appeals erred in finding that the interest accrual date began on January 25, 1980, rather than March 1, 1980. We disagree.

The bond for title was signed on January 25, 1980. It provided, in part:

[T]he aforesaid sum shall be payable in monthly installments of principal and interest at the rate of Nine and three-quarters per cent (9.75%) per annum at the office of the obligor.... Said monthly installments shall be in the amount of Five Thousand Six Hundred Fifty-eight and 80/100 Dollars (\$5,658.80) commencing on the 1st day of March, 1980, and on the 1st day of each month thereafter until the principal and interest are fully paid....

[7] [8] Where a contract for the payment of a sum of money at a future date provides that it is payable with interest, or is to bear interest, without specifying from what date the interest is to be computed, it will be construed to bear interest *78 from the date of the contract. *Graham v. Burgiss*, 78 S.C. 404, 59 S.E. 29 (1907); G.M.H., Annotation, *Construction of Contractual Provisions As To Interest As Regards Time From Which Interest Is To*

Be Computed, 69 A.L.R. 958 (1930). In this case, the bond for title failed to specify the interest accrual starting date; it merely designated when the loan payments were to begin. Therefore, interest began to accrue on January 25, 1980, the date the bond for title was signed.

C. NUMBER OF PAYMENTS

^[9] Buyer argues that the Court of Appeals erred in holding that Buyer should have been given credit for 179 payments instead of 180 payments. We disagree.

The Court of Appeals found that Buyer's list of payments, which the master admitted into evidence under a stipulation that it accurately reflected payments Buyer could prove, showed 175 payments having been made. The Court of Appeals added to this number the three payments deferred in 1991 and the January 1995 payment to arrive at 179 payments. Buyer's amortization schedule, on the other hand, showed 180 payments having been made.

In 1980, Buyer made 10 monthly installments. For fourteen years thereafter, Buyer made 12 monthly installments every year except for 1991 when Buyer deferred three payments. Therefore, excluding the three deferred payments and the January 1995 payment, Buyer made a total of 175 monthly payments. When the three deferred payments ~~**735~~ and the January 1995 payment are added, the total becomes 179 payments.

D. FEDERAL COURT JUDGMENT

Footnotes

- 1 This modification was made because the parties discovered inaccuracies in the mobile home park's monthly operating statement and difficulties with the South Carolina Department of Health and Environmental Control.
- 2 The federal district court judgment was affirmed by the Fourth Circuit Court of Appeals in *Wilke v. Wilder Corp.*, 74 F.3d 1235 (4th Cir.1996).
- 3 Rule 59(e), SCRPC, provides, "A motion to alter or amend the judgment shall be served not later than 10 days after receipt of written notice of the entry of the order."

^[10] Buyer argues that the Court of Appeals erred in considering the issue of whether post-judgment interest should have been applied to the federal court judgment as a set-off against amounts owed by Buyer. We disagree.

The Court of Appeals held that the amount of the set-off for the federal court judgment could not include any amounts for post-judgment interest. Buyer does not challenge the correctness of this holding, but simply argues that this issue was not preserved for review by the Court of Appeals. For the ~~*79~~ reasons outlined above, we find that Seller's objection at trial was sufficient to preserve this issue for appellate review. Moreover, the trial court ruled upon Seller's objection by expressly adopting Buyer's amortization schedule in its order.

CONCLUSION

For the foregoing reasons, the Court of Appeals' decision is **AFFIRMED**.

FINNEY, C.J., MOORE, WALLER and BURNETT, JJ., concur.

All Citations

330 S.C. 71, 497 S.E.2d 731

EXHIBIT II

351 S.C. 56
Court of Appeals of South Carolina.

The BEACH COMPANY, Respondent,
v.
TWILLMAN, LTD., d/b/a The Washington Pen
Company, Appellant.

No. 3532.
Submitted June 3, 2002.
Decided July 8, 2002.

Landlord brought action against tenant for breach of their lease agreement, and the tenant, requesting jury trial on the matter, counterclaimed for breach of contract by the landlord. The Circuit Court, Charleston County, Clifton Newman, J., granted the landlord's motion to strike both the counterclaim and the jury trial request. The tenant appealed. The Court of Appeals, Cureton, J., held that: (1) the tenant's counterclaim was compulsory; (2) the lease provision purporting to waive the tenant's right to assert compulsory counterclaims was unenforceable; (3) the tenant had waived its right to trial by jury; and (4) the provision by which the tenant, in contravention of the rules of civil procedure, had waived its right to assert compulsory counterclaims was severable from the remaining provisions of the lease, including the provision whereby the tenant had waived its right to trial by jury.

Affirmed in part and reversed in part.

West Headnotes (19)

[1] Courts
Effect of failure to assert or claim;
compulsory counterclaim

Rules of procedure, like statutes, should be given their plain meaning.

Cases that cite this headnote

[2] Set-Off and Counterclaim
Effect of failure to assert or claim;
compulsory counterclaim

By definition, a counterclaim is compulsory only if it arises out of the same transaction or occurrence as the opposing party's claim. Rules Civ.Proc., Rule 13(a).

3 Cases that cite this headnote

[3] Set-Off and Counterclaim
Effect of failure to assert or claim;
compulsory counterclaim

The test for determining if a counterclaim is compulsory is whether there is some "logical relationship" between the claim and the counterclaim; whether this "logical relationship" exists depends on the facts of each case. Rules Civ.Proc., Rule 13(a).

3 Cases that cite this headnote

[4] Set-Off and Counterclaim
Effect of failure to assert or claim;
compulsory counterclaim

Counterclaim for breach of contract, brought by tenant against landlord in response to the landlord's own breach of contract claim against the tenant, was compulsory, within the meaning of the rule of civil procedure governing counterclaims and cross-claims, as the parties' respective claims had arisen out of the same contract and thus were logically related to one another. Rules Civ.Proc., Rule 13(a).

Cases that cite this headnote

[5] Set-Off and Counterclaim
Effect of failure to assert or claim;

compulsory counterclaim

The purpose of the rule of civil procedure governing **counterclaims** is to prevent multiplicity of actions and to achieve resolution in one single lawsuit of all disputes arising out of common matters. Rules Civ.Proc., Rule 13(a).

Cases that cite this headnote

[6] **Judgment**

☞Matters for defense in former action as cause of action in second

If **compulsory counterclaims** are not raised in the first action, defendant is precluded from asserting those claims in any subsequent action. Rules Civ.Proc., Rule 13(a).

3 Cases that cite this headnote

[7] **Set-Off and Counterclaim**

☞Effect of failure to assert or claim; **compulsory counterclaim**

Georgia courts may rely upon federal law in interpreting the Georgia rule of civil procedure governing **counterclaims** and cross-claims. Rules Civ.Proc., Rule 13.

Cases that cite this headnote

[8] **Judgment**

☞Matters for defense in former action as cause of action in second

Judgment

☞Operation and effect

Federal law requires that **compulsory counterclaims** be pleaded and adjudicated or all right of action thereon is foreclosed. Fed.Rules Civ.Proc.Rule 13, 28 U.S.C.A.

Cases that cite this headnote

[9] **Set-Off and Counterclaim**

☞Effect of failure to assert or claim; **compulsory counterclaim**

Provision in lease agreement purporting to waive tenant's right to assert **compulsory counterclaims** in response to an action by the landlord for breach of the agreement was unenforceable; failure on the part of the tenant to assert its **compulsory counterclaims** would have resulted in its being precluded from raising such claims in any subsequent action. Rules Civ.Proc., Rule 13(a).

1 Cases that cite this headnote

[10] **Jury**

☞Form and sufficiency of waiver

One may contractually waive his or her right to trial by jury, but such waiver must be strictly construed as the right is substantial.

6 Cases that cite this headnote

[11] **Contracts**

☞Language of Instrument

Contract terms must be construed using their plain, ordinary, and popular meanings.

3 Cases that cite this headnote

[12] **Jury**

☞Form and sufficiency of waiver

Tenant against which landlord brought action for breach of lease agreement had waived its

right to trial by jury in signing the lease agreement, which unambiguously provided that "trial by jury shall be waived by both parties."

and intends that each and all of its parts, material provisions, and the consideration are common each to the other and interdependent.

1 Cases that cite this headnote

1 Cases that cite this headnote

[13] **Contracts**
☞ Enforcement of contract in general

An illegal contract is unenforceable.

2 Cases that cite this headnote

[17] **Contracts**
☞ Entire or Severable Contracts

A severable contract is one which is, in its nature and purpose, susceptible of division and apportionment, having two or more parts which are, on the basis of the parties' intentions, not necessarily dependent upon each other.

3 Cases that cite this headnote

[14] **Contracts**
☞ Contravention of law in general
Contracts
☞ Violation of Statute
Contracts
☞ Public Policy in General

Generally, courts will not enforce any contract which is violative of public policy, statutory law, or constitutional provisions.

3 Cases that cite this headnote

[18] **Contracts**
☞ Entire or Severable Contracts

The entirety or severability of any contract depends primarily upon the intent of the parties rather than upon the divisibility of the subject, although the latter aids in determining the intention.

Cases that cite this headnote

[15] **Contracts**
☞ Partial Illegality

Whether an illegal provision in an otherwise valid contract may be severed from the contract is dependent upon the intent of the parties.

2 Cases that cite this headnote

[19] **Landlord and Tenant**
☞ Legality of Object

Provision in lease agreement by which tenant, in contravention of the rules of civil procedure, had waived its right to assert **compulsory counterclaims** in the event that the landlord initiated an action against it for breach of the agreement was severable from the remaining provisions of the lease, including the provision whereby the tenant had waived its right to trial by jury; the right to trial by jury and the right to assert **compulsory counterclaims** were separate and distinct, one from the other. Rules Civ.Proc., Rule 13(a).

[16] **Contracts**
☞ Entire or Severable Contracts

A contract is entire, and not severable, when by its terms, nature, and purpose it contemplates

4 Cases that cite this headnote

Attorneys and Law Firms

****864 *59** Gregg Meyers, Charleston, for appellant.

Bruce A. Berlinsky, of Pritchard & Berlinsky, Charleston, for respondent.

Opinion

CURETON, J.

The Beach Company (Beach) initiated this breach of contract action against Twillman, Ltd. (Twillman). Twillman answered, requesting a jury trial and asserting a **counterclaim**. The trial court granted Beach's motion to strike the **counterclaim** and request for a jury trial. Twillman appeals. We affirm in part and reverse in part.

*60 FACTS

Twillman, as tenant doing business as the Washington Pen Company, and Beach, as landlord, entered into a five-year lease of a storefront located at 211 King Street in Charleston, South Carolina. Twillman has not paid all the rent due under the terms of the contract and is in default of the lease absent a justified excuse to the contrary. Section 27.16 of the "Miscellaneous Provisions" section of the lease, entitled "Waiver of **Counterclaim**" provides:

Tenant waives any and all right to trial by jury or to interpose any **counterclaim** in any summary proceeding for eviction or nonpayment of Rent. Any and all claims or '**counterclaims**' that may be asserted by Tenant shall only be made the subject of a separate action. In such separate action, it is agreed that trial by jury shall be waived by both parties.

At a hearing on the motion to strike, Beach argued the waiver provision should control and the court should grant the motion to strike the **counterclaim** and the

request for a jury trial. Twillman argued the lease provision violates South Carolina law governing **compulsory counterclaims** and jury trials. The trial court concluded:

****865** The Court finds that the lease agreement between the parties is controlling in determining this matter; that the parties have agreed in the lease that there will be no demand for jury trial or any jury trial on any issue relating to eviction or nonpayment of rent; that in a commercial lease setting the parties can make such an agreement and that type of an agreement is not against public policy or contrary to the judicial economy as compared with the right of a party to recover property and rent as may be applicable. The Court would therefore grant the motion of the plaintiff to strike the **counterclaim** and request for jury trial.

Twillman appeals.

DISCUSSION

Waiver of **Compulsory Counterclaim**

Twillman argues the trial court erred in granting Beach's motion to strike Twillman's **counterclaim**. Twillman first asserts its **counterclaim** is **compulsory**.

***61 Counterclaims** are governed by Rule 13, SCRPC, which provides:

A pleading shall state as a **[compulsory] counterclaim** any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.

Rule 13(a), SCRPC.

[1] [2] [3] “[R]ules of procedure, like statutes, should be given their plain meaning.” *Valentine v. Davis*, 319 S.C. 169, 173, 460 S.E.2d 218, 220 (Ct.App.1995). “By definition, a **counterclaim** is **compulsory** only if it arises out of the same transaction or occurrence as the opposing party’s claim.” *First-Citizens Bank & Trust Co. v. Hucks*, 305 S.C. 296, 298, 408 S.E.2d 222, 223 (1991). The test for determining if a **counterclaim** is **compulsory** is whether there is a “logical relationship” between the claim and the **counterclaim**. *Mullinax v. Bates*, 317 S.C. 394, 396, 453 S.E.2d 894, 895 (1995). Whether a **counterclaim** is logically related to the initial claim depends upon the facts of each case. *See Hucks*, 305 S.C. at 298, 408 S.E.2d at 223 (finding a logical relationship between a trustee regarding the administration of a trust and a legal **counterclaim** alleging that the trustee breached a fiduciary duty); *N.C. Fed. Sav. & Loan Ass’n v. DAV Corp.*, 298 S.C. 514, 518–19, 381 S.E.2d 903, 905 (1989) (finding a logical relationship between an action on a note brought by the lender to foreclose and the validity of a purported oral agreement modifying the note alleged by the borrower).

[4] Beach’s complaint alleges Twillman is in breach of the lease agreement. Twillman’s **counterclaim** alleges a breach of the same agreement by Beach. As we find these claims are logically related to each other, we agree Twillman’s **counterclaim** is **compulsory**.

Twillman next argues a **compulsory counterclaim** must have been pursued in Beach’s lawsuit or be forever waived, thus the trial court erred in striking the **counterclaim** based on the waiver in the lease agreement. We agree.

[5] *62 Rules of procedure “shall be construed to secure the just, speedy, and inexpensive determination of every action.” Rule 1, SCRCP. The purpose of Rule 13(a) is “to prevent multiplicity of actions and to achieve resolution in a single lawsuit of all disputes arising out of common matters.” *S. Constr. Co. v. Pickard*, 371 U.S. 57, 60, 83 S.Ct. 108, 9 L.Ed.2d 31 (1962) (interpreting the federal counterpart to South Carolina’s Rule 13(a)).

[6] [7] If a **compulsory counterclaim** is not raised in the first action, a defendant is precluded from asserting the claim in a subsequent action. *Crestwood Golf Club, Inc. v. Potter*, 328 S.C. 201, 217, 493 S.E.2d 826, 835 (1997). The South Carolina Reporter’s Note following Rule 13 states: “[c]ounterclaims arising out of the same transaction or occurrence that is the subject of the action are ‘**compulsory**’ under Rule 13(a) and are barred by res judicata or estoppel by judgment if not asserted.” The

Reporter’s Note also notes that South Carolina’s Rule 13(a) is the same as the federal rule on **counterclaims**. Accordingly, we may rely on federal law to interpret our Rule 13. *See Brown v. Leverette*, 291 S.C. 364, 366–67, 353 S.E.2d 697, 698–99 (1987) (utilizing federal law to interpret **866 a state rule that tracked the language of the corresponding federal rule).

When the Federal Rules of Civil Procedure were adopted in 1938, **counterclaims** were, for the first time, classified as either **compulsory** or permissive. W.R. Habeeb, Annotation, *Failure to Assert Matter as Counterclaim as Precluding Assertion Thereof in Subsequent Action, Under Federal Rules or Similar State Rules or Statutes*, 22 A.L.R.2d 621, 624 (1952). In December 1946, effective March 19, 1948, the Rule was amended into language similar to its current language.¹ The *63 purpose of the amendment was “to insure against the ‘undesirable possibility presented under the original rule whereby a party having a ... **compulsory counterclaim** could avoid stating it ... by bringing an independent action in another court after the commencement of the federal action but before serving his pleading in the federal action.’ ” *Sparrow v. Nerzig*, 228 S.C. 277, 283, 89 S.E.2d 718, 721 (1955) (quoting Rule 13, SCRCP, advisory committee’s notes on amendments).

[8] Federal Rule 13(a) was amended a second time effective July 1, 1963.² It now requires that a **compulsory counterclaim** be pleaded and adjudicated or all right of action thereon is foreclosed. *New Britain Mach. Co. v. Yeo*, 358 F.2d 397, 410 (6th Cir.1966). The rule prohibiting a party from asserting a **compulsory counterclaim** in a subsequent action under Federal Rule 13 is mandatory. *Id.*

[9] Given the express purpose behind the civil rules of procedure and the mandatory nature of **compulsory counterclaims**, we find the provision in the lease agreement purporting to waive Twillman’s right to assert a **compulsory counterclaim** in Beach’s breach of lease action is unenforceable. *See Loader Leasing Corp. v. Kearns*, 83 F.R.D. 202, 204 (W.D.Pa.1979) (finding that a **compulsory counterclaim** waiver provision is unenforceable in a federal forum); *Atl. Coast Line R. Co. v. U.S. Fid. & Guar. Co.* 52 F.Supp. 177, 189 (M.D.Ga.1943) (finding a contractual waiver of **compulsory counterclaims** provision not enforceable under Federal Rule 13 as the rule “prohibits the very thing which the parties contracted to do.”). Accordingly, we agree with Twillman the trial court erred in striking its **counterclaim** based on the waiver provision.

Waiver of Right to Jury Trial

Twillman also argues the waiver of its right to a jury trial was invalid. We disagree.

^[10] ^[11] A party may waive the right to a jury trial by contract. *N. Charleston Joint Venture v. Kitchens of Island* *64 *Fudge Shoppe, Inc.*, 307 S.C. 533, 535, 416 S.E.2d 637, 638 (1992). Such a waiver must be strictly construed as the right to trial by jury is a substantial right. *Id.* However, terms in a contract provision must be construed using their plain, ordinary and popular meaning. *Fritz-Pontiac-Cadillac-Buick v. Goforth*, 312 S.C. 315, 318, 440 S.E.2d 367, 369 (1994).

^[12] The waiver provision in the lease plainly provides that in any claim asserted by Twillman, "trial by jury shall be waived by both parties." We find the clause is a valid waiver of Twillman's right to a jury trial.

Severability

Twillman argues even if the right to jury trial was validly waived, the waiver clause cannot be severed from the remainder of Section 27.16, and the unenforceability of the waiver of a **compulsory counterclaim** renders the waiver of a jury trial likewise unenforceable. We disagree.

^[13] ^[14] ^[15] ^[16] ^[17] ^[18] An illegal contract is unenforceable. *Berkebile v. Outen*, 311 S.C. 50, 53 n. 2, 426 S.E.2d 760, 762 n. 2 (1993). "The general rule is that courts will not enforce a contract which is violative of public policy, statutory **867 law, or provisions of the Constitution." *Id.* Whether an illegal provision in an otherwise valid contract may be severed from the contract is a matter of the intent of the parties. *Scruggs v. Quality Elec. Servs., Inc.*, 282 S.C. 542, 545, 320 S.E.2d 49, 51 (Ct.App.1984).

A contract is entire, and not severable, when by its terms, nature, and purpose it contemplates and intends that each and all of its parts, material provisions, and the consideration are common each to the other and interdependent.

Footnotes

- ¹ Rule 13(a), FRCP, eff. March 19, 1948, reads:
A pleading shall state as a **counterclaim** any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction, except that such a claim need not be so stated if at the time the action was commenced the claim was the subject of another pending action.

A severable contract is one in its nature and purpose susceptible of division and apportionment, having two or more parts, in respect to matters and things contemplated and embraced by it, not necessarily dependent upon each other, nor is it intended by the parties that they shall be. The entirety or severability of a contract depends primarily upon the intent of the parties rather than upon the divisibility of the subject, although the latter aids in determining the intention.

*65 *Columbia Architectural Group, Inc. v. Barker*, 274 S.C. 639, 641, 266 S.E.2d 428, 429 (1980) (quoting *Packard & Field v. Byrd*, 73 S.C. 1, 6, 51 S.E. 678, 679 (1905)).

^[19] Reading Section 27.16 with or without the reference to the **counterclaim** provision, Twillman unequivocally "waive[d] any and all right to trial by jury." Twillman's right to a jury trial and its right to assert a **compulsory counterclaim** are separate and distinct rights. We find the portion of Section 27.16 in the lease agreement between Twillman and Beach that is adverse to Rule 13(a), SCRPC, regarding **compulsory counterclaims**, is severable from the remaining portion of the lease.

CONCLUSION

For the foregoing reasons, we find Twillman waived its right to a trial by jury but may assert its **compulsory counterclaim** to Beach's action for breach of the lease agreement. Accordingly, the order on appeal is

AFFIRMED IN PART and REVERSED IN PART.

STILWELL and SHULER, JJ., concur.

All Citations

351 S.C. 56, 566 S.E.2d 863

Sparrow v. Nerzig, 228 S.C. 277, 283, 89 S.E.2d 718, 721 (1955) (quoting the 1948 version of the federal rule).

2 See *Habeeb*, 22 A.L.R.2d at § 3 (Supp.1996).

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EXHIBIT III

259 S.C. 256
Supreme Court of South Carolina.

The STATE, Respondent,
v.
Hurley Alfred FUNDERBURK, Jr., Appellant.

No. 19480.
|
Sept. 11, 1972.

Defendant was convicted before the Court of General Sessions of Chesterfield County, J. A. Spruill, Jr., J., of grand larceny, and he appealed. The Supreme Court, Bussey, J., held that where demand for preliminary hearing, following arrest on two warrants issued by magistrate charging offenses of grand larceny and receiving stolen goods, was made ten days before convening of next term of Court of General Sessions but such hearing was not held until after indictment was submitted to grand jury and true bill returned, the Court was without jurisdiction and, the jurisdiction of the grand jury being coextensive with the criminal jurisdiction of the Court, the indictment was a nullity and conviction was required to be vacated.

Reversed.

West Headnotes (6)

- [1] **Criminal Law**
 ↳ Loss or divestiture of jurisdiction
Indictment and Information
 ↳ Organization and constitution of grand jury

Where demand for preliminary hearing, following arrest on two warrants issued by magistrate charging offenses of grand larceny and receiving stolen goods, was made ten days before convening of next term of Court of General Sessions but such hearing was not held until after indictment was submitted to grand jury and true bill returned, the Court was without jurisdiction and, the jurisdiction of the grand jury being coextensive with the criminal jurisdiction of the Court, the indictment was a nullity and conviction was required to be vacated. Code 1962, § 43-232; Const. art. 1, §

11.

3 Cases that cite this headnote

- [2] **Courts**
 ↳ Acts and proceedings without jurisdiction

Acts of a court with respect to a matter as to which it has no jurisdiction are void.

8 Cases that cite this headnote

- [3] **Grand Jury**
 ↳ Powers and Duties

The jurisdiction of a grand jury is coextensive with the criminal jurisdiction of the court in which it is impaneled and for which it is to make inquiry.

1 Cases that cite this headnote

- [4] **Criminal Law**
 ↳ Jurisdiction

Lack of jurisdiction of the cause or subject matter can be raised at any time, including for the first time on appeal to the Supreme Court.

13 Cases that cite this headnote

- [5] **Criminal Law**
 ↳ Jurisdiction

Contention that conviction before the Court of General Sessions was void in that court did not have jurisdiction because magistrate issuing warrant had not conducted preliminary hearing, on defendant's request, until after case had been

transmitted to the Court could properly be raised for first time on appeal from conviction; failure to appeal from denial of prior motions to dismiss or quash indictment or subsequent intermediate ruling again denying such motion on grounds of res judicata was no bar. Code 1962, § 43-232.

5 Cases that cite this headnote

[6]

Criminal Law

⊗ In Preliminary Proceedings

Where the state did not contend below that the phrase "at least ten days," in statute providing that request for preliminary hearing be made at least ten days before convening of next Court of General Sessions, contemplated ten clear days, excluding both day of service and convening day of Court and, therefore, that request exactly ten days before convening of next term was untimely, such issue was not mentioned in defendant's brief and was not passed on by courts below, contention was not properly before the Supreme Court for decision. Code 1962, § 43-232.

Cases that cite this headnote

Attorneys and Law Firms

*257 **521 Edward M. Leppard, of Leppard & Leppard, Chesterfield, for appellant.

*258 Solicitor Marion H. Kinon, Dillon, for respondent.

Opinion

*259 BUSSEY, Justice:

The defendant Funderburk appeals from his conviction on a charge of grand larceny at the May 1971 term of the Court of General Sessions for Chesterfield County. On May 4, 1970, he was arrested on two warrants issued by Magistrate Horton, charging him with the offenses of grand larceny and receiving stolen goods. He was

thereafter released on bail and on May 8th retained counsel who immediately served and filed with the magistrate a written demand for a preliminary hearing, which hearing was not held until October 2, 1970. In the meantime, the May term of court had commenced on May 18, 1970, and on that date an indictment based upon the aforesaid warrants was submitted to the grand jury and a true bill returned. The defendant was tried upon said indictment at a trial which commenced on October 12, 1970, and ended in a mistrial. Prior thereto, the defendant made a motion to dismiss and/or quash the indictment on the ground, inter alia, that under the facts and provisions of Code Section 43-232 the Court of General Sessions and the grand jury had no jurisdiction of the case at the time of the indictment and that *260 such was accordingly void. Judge Baker, the presiding judge, denied the motion and ruled that 'This court now has jurisdiction and it can be tried even though the indictment was returned at the May term and the preliminary hearing was held thereafter.'

**522 The cause came on again for trial on February 1, 1971, before Judge Weatherford and a jury and again resulted in a mistrial. Prior thereto defendant renewed his motion to quash which had been denied by Judge Baker. Judge Weatherford denied such motion, inter alia, for the reason that there had been no appeal from Judge Baker's holding, stating, 'I hold that it is now res judicata. I cannot grant the motion in the retrial of a mistried case * * *'

The case came on for trial again at the May 1971 term before Judge Spruill with the motion to quash again being renewed. Again the motion was denied, Judge Spruill pointing out the absence of any appeal or notice of intention to appeal from Judge Baker's ruling and saying, 'I am inclined to think that is the law of the case and I deny your motion on that ground.' The trial which ensued resulted in a conviction of the defendant on the grand larceny charge.

Section 43-232 of the Code reads as follows: 'When and how defendant may demand preliminary examination.

'Any magistrate who issues a warrant charging crime beyond his jurisdiction shall grant and hold a preliminary investigation of it upon the demand in writing of the defendant made at least ten days before the convening of the next court of general sessions, at which investigation the defendant may cross-examine the State's witnesses in person or by counsel, have the reply in argument if there be counsel for the State, and be heard in argument in person or by counsel as to whether a probable case has been made out and as to whether the case ought to be

dismissed by the magistrate and the defendant discharged without delay. When such a hearing has been so demanded the case shall not be transmitted to *261 the court of general sessions or submitted to the grand jury until the preliminary hearing shall have been had, the magistrate to retain jurisdiction and the court of general sessions not to acquire jurisdiction until after such preliminary hearing.'

[1] It will be noted that the demand for a preliminary hearing in this case was noticed exactly ten days before the convening of the next term of the Court of General Sessions. The record does not reflect any contention on the part of the State below that the demand for a preliminary hearing was not timely noticed and for the purpose of this appeal we treat the demand as having been timely made. Such being the case, it is quite clear that under the literal terms of the statute the Court of General Sessions had no jurisdiction of the case at the time of the indictment, to-wit: May 18, 1970. State v. Flintroy, 178 S.C. 89, 182 S.E. 311; State v. Adcock, 194 S.C. 234, 9 S.E.2d 730; State v. Nesmith, 213 S.C. 60, 48 S.E.2d 595; Blandshaw v. State, 245 S.C. 385, 140 S.E.2d 784; State v. Sanders, 251 S.C. 431, 163 S.E.2d 220.

[2] [3] We think it elementary, with no need for citation of authority, that the acts of a court with respect to a matter as to which it has no jurisdiction are void. The jurisdiction of a grand jury is co-extensive with the criminal jurisdiction of the court in which it is impaneled and for which it is to make inquiry. 42 C.J.S. Indictments and Informations s 17, page 855; 38 C.J.S. Grand Juries s 34b, page 1029. The court being without jurisdiction, the indictment in this case was a nullity.

[4] [5] It is elementary that lack of jurisdiction of the cause or subject matter can be raised at any time, including for the first time on appeal in this Court. State v. Castleman, 219 S.C. 136, 64 S.E.2d 250; State v. Adams, 73 S.C. 435, 53 S.E. 538. Accordingly, it is immaterial that the defendant failed to appeal from the earlier **523 ruling of Judge Baker or the intermediate ruling of Judge *262 Weatherford, even if it be assumed that he had the right to do so.

[6] In its brief the State apparently concedes the invalidity

of the indictment for lack of jurisdiction if the demand for a preliminary hearing was timely made in accordance with the provisions of Code Sec. 43—232. It argues, however, that the language 'at least ten days', contained in the statute, contemplated ten clear days, excluding both the day of service, May 8, and May 18th, the convening day of the court, and that, hence, the demand was not timely served. As previously noted, the record does not reflect that this contention was made or relied upon below; it is not mentioned in appellant's brief and appears for the first time in the brief for the State. It is well settled that where a particular question or issue has not been raised below and has not in anywise been passed upon by the lower court, it is not properly before us for decision. See numerous cases collected in West's South Carolina Digest, Appeal and Error, ¶¶169, and Criminal Law, ¶¶1028. Such contention not being properly before us, we refrain from passing thereupon and intimate no opinion as to any possible merit such contention might have if timely made.

Having concluded that the defendant was tried and convicted upon an indictment which was a nullity, it follows that he was convicted in violation of Article I, Section 17 of the Constitution, as amended, now Article I, Section 11. His conviction is accordingly vacated.

The foregoing conclusions make it unnecessary to pass upon the other questions raised, none of which will necessarily arise again should the defendant hereafter be tried upon a valid indictment.

Reversed.

MOSS, C.J., and LEWIS, BRAILSFORD and LITTLEJOHN, JJ., concur.

All Citations

259 S.C. 256, 191 S.E.2d 520

EXHIBIT IV

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

IN THE COURT OF COMMON PLEAS
Case No. 2015-CP-42-2482

ATCF REO HOLDINGS LLC,

Plaintiff,

vs.

James K. Hazel, Jr., Prime Asset Fund III, LLC, John Doe and Mary Roe, representing all unknown persons having or claiming to have any right, title, or interest in or to, or lien upon, the real estate described as 517 Wildwood Drive, Spartanburg County, SC, their heirs and assigns, and all other persons, firms, or corporations entitled to claim under, by or through the above-named Defendant(s), and all other persons or entities unknown claiming any right, title, interest, estate in, or lien upon, the real estate described as 517 Wildwood Drive, Spartanburg County, SC,

Defendants.

ORDER OF DEFAULT
(As to Only Prime Asset Fund III, LLC)
and
MANDATORY ORDER OF REFERENCE

2016 FEB 12 AM 9:05
FILED

VOID CLERKED IN ERROR

IT APPEARING from the Affidavit of A. Parker Barnes III, attorney for the Plaintiff, that Defendant Prime Asset Fund III, LLC has been duly served with the Notice of Lis Pendens, Civil Action Coversheet, Summons, and Complaint, and that more than thirty (30) days have elapsed during which no responsive pleadings were filed or served by this defendant; and

IT FURTHER APPEARING that this matter is before the Court on the Plaintiff's motion, pursuant to Rule 53(b), SCRCP, referring this action to the Honorable Gordon G. Cooper, Master in Equity for Spartanburg County; and

IT FURTHER APPEARING that the Plaintiff commenced this action in equity to quiet its tax title to certain real property located in Spartanburg County, South Carolina, and that this is

Masters Cost Paid
Date 12-30-15
\$ 100.00

a proper matter to be referred to a Master in Equity pursuant to Rule 53, SCRPC, for the purpose of making appropriate findings of facts and conclusions of law with the authority to enter a final judgment in this case and with any appeal from the final judgment in this case directly to the South Carolina Court of Appeals;

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendant Prime Asset Fund III, LLC is in default and a judgment to be determined at a hearing to be held shall be filed in favor of the Plaintiff; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this action is referred to the Honorable Gordon G. Cooper, Master in Equity for Spartanburg County, to take testimony arising under the pleadings, to make findings of fact and conclusions of law, with authority to dispose of any and all issues, and enter a final judgment in the case, pursuant to Rule 53, SCRPC. Any appeal from the final judgment entered by the Master in Equity shall be made directly to the South Carolina Court of Appeals.

AND IT IS SO ORDERED.

February 12, 2015

M. Hope Blackley / ~~Allyson Annan Mills~~
Presiding Judge
M. HOPE BLACKLEY, CLERK OF COURT

2015 FEB 12 AM 9:15
M. HOPE BLACKLEY

Miller, Alexzandra

From: Shaffer, Carol [cshaffer@hsblawfirm.com]
Sent: Thursday, February 11, 2016 2:59 PM
To: Miller, Alexzandra
Subject: Voicemail

I got your voicemail today and I realized that I forgot to send you the email authorizing the entry of default. I believe you were calling on two cases and you are authorized to enter the "entry of default" for both of them. If you need anything else, please let me know.

Thanks
Carol

**Haynsworth
Sinkler Boyd, P.A.**

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