THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
DeAndrea Benjamin, Circuit Court Judge

Case No. 2016-001019

U.S. Bank, National Association, as trustee for the Holders of the Banc of America Funding Corporation, 2008-FTI, — Respondent,

v.

Rhonda Lewis Meisner a/k/a Rhonda L. Meisner, Bank of America, N.A. and SCBT — Appellant.

INITIAL BRIEF ~~AND DESIGNATION OF MATTER~~

2/10/2017

Rhonda Meisner, Appellant
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ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT DETERMINED THE PLAINTIFF WAS THE REAL PARTY IN INTEREST TO PURSUE FORECLOSURE.

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III. THE TRIAL COURT ERRED IN DETERMINING THE DEFENDANT WAS NOT ENTITLED TO A JURY TRIAL.

STANDARD OF REVIEW

The appellate courts review a motion to dismiss de- novo. This Court also makes legal findings with no deference to the court below. Whether a party is entitled to a jury trial is a question of law, which the appellate Courts review de-novo. Wachovia Bank, Nat. Ass'n v. Blackburn, 407 S.C. 321, 328, 755 S.E.2d 437, 441 (2014). Here, the question of whether the cross and counter claims for

breach of contract, breach of contract accompanied by a fraudulent act and the abuse of process counter claims are compulsory; is a question of law. When an order deprives a party of a mode of trial to which that party is entitled as a matter of right, the order is immediately appealable and failure to do so forever bars appellate review. Flagstar Corp. v. Royal Surplus Lines, 341 S.C. 68, 533 S.E.2d 331 (2000). The appellate Court is not bound by the trial court's legal conclusions. I'On, LLC v. Town of Mount Pleasant, 338 S.C. 406, 411 526 S.E. 2d 718, 718-719 (2000); S.C. Const. art V, § 5 (providing the state's appellate courts have jurisdiction to correct trial court's erroneous legal findings in law and equity cases); S.C. Code Ann. §§ 14-3-320 & 14-8-200 (1976 & Supp. 2001) (providing this state's appellate courts have jurisdiction to correct trial court's erroneous findings of law in equity cases).

STATEMENT OF THE CASE

U.S. Bank "US Bank" initiated a foreclosure action (first mortgage) on March 31, 2014 against the appellant, Rhonda Meisner "Meisner" and attached an assignment of the note and mortgage from Bank of America, N.A. "Bank of America" to US Bank, that was dated April 2, 2014. The assignment was notarized on April 3, 2014, by a notary, in a different state. (2014-CP-40-02063) **(hearing June 10, 2014 p. 8:23-25; 9:1-2).** Bank of America and SCBT (SCBT) were also named defendants.

Previously, SCBT, (second mortgage) a junior lien holder, (in the same property), filed a foreclosure action and named both Bank of America and Meisner as defendants. In the earlier case (2013-CP-40-07144), Bank of America answered the suit and claimed ownership of the same note and mortgage (first mortgage) that U.S. Bank now claims. **(hearing June 10, 2014 p. 3:10-15) (R.___).** Bank of America also claimed ownership of a different note and mortgage that had been paid off years earlier, (HELOC)(R___).

The appellant filed a motion to dismiss pursuant to S.C.R.P. Rule 12(b)(7) and 12(b)(8) based on Bank of America and U.S. Bank's claimed ownership in the same note and mortgage in the previously filed suit by SCBT and requested that U.S. Bank's foreclosure action be dismissed and the cases consolidated for adjudication. **(R.p.__)(hearing June 10. 2014 p. __)**

A hearing was held on the motion on June 10, 2014; however, prior to the hearing, SCBT voluntarily dismissed Bank of America as a defendant and changed SCBT's cause of action to a suit on a note, which SCBT also subsequently dropped and dismissed. During the June 10, 2014 hearing, appellant Meisner argued the case should be dismissed based on the defective assignment of the note and mortgage which occurred after the lawsuit was filed. **(R.p.__) (June 10. 2014 hearing p.9:5-11,17-25;10:1-15).** The Court denied all motions. **(R.p.__)** Meisner filed a motion to alter and amend and requested a ruling on the alternative oral

motions to dismiss based on the fact the plaintiff/respondent presented inadequate evidence that it owned the note and mortgage at the time U.S. Bank filed the lawsuit **(hearing June 10, 2014 p.17:14-26).** Additionally, because U.S. Bank claimed the default occurred prior to the assignment of the note and mortgage based on the date of the filings, U.S. Bank would be considered a third- party creditor because they purchased and assumed the note and mortgage after U.S. Bank said Meisner defaulted. (R.p. ___).

The appellant, Rhonda Meisner, filed a motion to dismiss based on lack of standing because the lawsuit was filed on March 31, 2014 and U.S. Bank attached an assignment dated April 2, 2014 and notarized April 3, 2014. **(hearing June 10, 2014 p. ___)** Meisner claimed U.S. Bank was not the real party in interest based on Bank of America's reported claim to the note and mortgage that U.S. Bank was seeking to foreclose. **(hearing June 10, 2014 p. ___)** The challenge to real party in interest and standing was subsequently determined by this Court as interlocutory, so the appeal was dismissed. (R. ___)

Subsequently, the plaintiff U.S. Bank submitted an Order of referral for the foreclosure action to the Clerk of Court for signature and execution. **(R.p.___)** The Order created by the U.S. Bank, and presented to the Clerk of Court for execution, included findings of fact and conclusions of law. **(R.p.__)** The South Carolina rules of civil procedure do not provide a mechanism for the clerk of court to make

findings of fact and conclusions of law. (R.p.__) Whether U.S. Bank's attempt to fast track the foreclosure and circumvent the S.C. Rules of Civil Procedure is an abuse or process and a malicious prosecution is a question for the jury.

ARGUMENT

I. The Trial Court erred in holding that U.S. Bank was the real party in interest that possessed the requisite standing to foreclose on the note and mortgage.

The assignment of the mortgage from Bank of America to U.S. Bank is a defective instrument and was executed after the lawsuit was filed. Therefore, the Court should have found, the respondent was not the real party in interest because the note and mortgage were not properly assigned by Bank of America into U.S. Bank before U.S. Bank filed this lawsuit. **(R.p.__)** South Carolina law requires a lawsuit to be brought in the name of the real party in interest. The defendant has the obligation to object early in the litigation, or risk waiver of the objection to the real party in interest if the objection is not raised early. WeSavFinancial Corp. v. Lingefelt, 316 S.C. 442, 450 S.E.2d 580 (1994).

Standing must be determined prior to the Court having a justiciable controversy. As the Supreme Court ruled in Lennon, "[A] threshold inquiry for any court is a determination of justiciability, i.e. whether the litigation presents an active case or controversy. 'No justiciable controversy is presented unless the plaintiff has standing to maintain the action.'" Lennon v. South Carolina Coastal

Council, 330 S.C. 414, 415, 498 S.E. 2d 906, 906 (Ct. App. 1998) The Supreme Court of the United States ruled that the only party that has standing to sue in a mortgage foreclosure action is the holder of both the note and the mortgage. Carpenter v Longen, 83 U. S. 16 Wall. 271 (1872). As the Supreme Court in Carpenter noted, "[T]his case is a different one from what it would be if the mortgage stood alone, or the note was non- negotiable or had been assigned after maturity". Id. at note 2. "[T]he note and mortgage are inseparable; the former as essential, the latter as an incident. An assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity." Id. at note 3. Here, the note and mortgage were assigned after the alleged default making the owner of the note and mortgage a third- party debt collector. This assignment occurred after the initiation of the foreclosure action, so at the time the action was filed, there is no evidence U.S. Bank had standing (ownership of the note and mortgage) to pursue the foreclosure action. (R.___)

The Parties representations to the Court suggest the "real party in interest" is Bank of America, N.A., as the assignment of the note and mortgage occurred, *after the breach in contract and after the lawsuit* was filed in the Court. (emphasis by appellant). Therefore, U.S. Bank is a third- party creditor because they received the assignment after the loan was in default status. This is due to the fact a real party in interest is for the benefit of the defendant. The requirement to object early

avoids multiple suits by multiple plaintiffs by requiring the defendant to speak early in the litigation, if the plaintiff has not been properly identified. Here, both Bank of America and U.S. Bank have claimed ownership of the same note and the same mortgage (albeit in different lawsuits). The banks representations, created a genuine issue as to the proper plaintiff, the real party in interest, and whether the plaintiff/respondent, U.S. Bank had standing to initiate the foreclosure action. **(R.p.__)** The Court should have dismissed the lawsuit without prejudice based on the defective assignment and/or require the respondent/plaintiff to provide proof that U.S. Bank was the proper plaintiff, as the determination of the real party in interest affects the answer to the lawsuit and indeed the course of the lawsuit. (R.__). In this case, it is the co-defendant and/or the plaintiff that the appellant alleges is the "breacher" of the contract. The determination of which entity owned the note and mortgage at the time of the alleged breach is central to the counter-claims and cross-claims in this lawsuit as appellant Meisner alleges as do the appellees that Bank of America owned the note and mortgage at the time of the breach. (R.__).

Therefore, the Court should have found the assignment of the note and mortgage was not properly executed and did not transfer ownership of the note and the mortgage from Bank of America to the respondent/plaintiff U.S. Bank.

(R.p.__). In addition to the assignment and notarization being defective, it was executed and notarized after the foreclosure action was filed. (R.p. __).

Bank of America represented to the Circuit Court, in an earlier foreclosure action, that Bank of America possessed an ownership interest in the very same note and mortgage. **(R p. ___) (June 10, 2014 hearing p. 3: 3-10; 21:4-9).** The representation of Bank of America to the Court creates a material controversy regarding the real party in interest and the ownership of the note and mortgage as both U.S. Bank and Bank of America, the predecessor in title, claim ownership. **(R.p.___). (Bank of America answer to 2013-CP-40-07144). (hearing June 10, 2014 p. 21:4-15)** The representation of the plaintiff is that the note and mortgage were assigned, after Bank of America breached the contract, which made Bank of America, N.A. the real party in interest instead of U.S. Bank. **(Hearing June 10, 2014 p. 17 lines 2-8)**.

Bank of America and appellant Meisner executed the note and the mortgage in 2003 (R.p.__). The executed note agreement, contained a clause that Bank of America would automatically draft payments for the mortgage. This automatic drafting via agreement, would continue until appellant Meisner requested in writing, to cease the debits. Appellant Meisner never requested cessation of the debits. **(R.__)** As such, any transfer of the instrument, (the note and mortgage previously owned by Bank of America) would include the terms of the instrument

including the requirement to draft the payments from appellant Meisner's bank account as usual.

U.S. Bank alleged in its complaint and asserted that it is the successor in interest to Bank of America; however, the evidence (the assignment) to support the assertions may not be legally sufficient to support the assertions. FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 231, (1990) holding modified by City of Littleton, Colo. v. Z.J. Gifts *D-4, L.L.C.*, 541 U.S. 774 (2004) ("It is a long-settled principle that standing cannot be inferred argumentatively from averments in the pleadings, but rather must affirmatively appear in the record.") (internal quotation marks and citations omitted).Ctr. for Legal Reform v. Rakowsky, C/A No. 3:14-cv-01674-JFA (D.S.C. Nov. 14, 2014). Here, the assignment of the note and mortgage purported to occur on April 2, 2014 and notarized a day later while the alleged breach of contract occurred purportedly in 2013. Therefore, there is no injury to U.S. Bank as it purchased or was assigned a "breached contract" and as such is a third- party creditor, that is not entitled to foreclosure because its predecessor in interest, Bank of America, was the breaching party.

II. The trial court erred in determining the counter claims were permissive.

A. The breach of Contract Claims against Bank of America and U.S. Bank are compulsory because Bank of America's breach is specifically related to enforcement of the note and the ability to foreclose.

"Whether a party is entitled to a jury trial is a question of law". Verenes v. Alvanos, 387 S.C. 11, 15 690 S.E. 2d 771, 772 (2010). I'On, L.L.C. v. Town of Mount Pleasant, 338 S.C. 406, 411, 526 S.E.2d 716, 718-19 (2000); see also S.C. Const. art. V, § 5 (providing this state's appellate courts have jurisdiction to correct trial court's erroneous legal findings in law and equity cases) The Court should have found the breach of contract cross claims and abuse of process claims against U.S. Bank, were legal and compulsory because the contract breach is the basis for U.S. Bank's purported right to foreclose. Bank of America claimed an interest in the note and mortgage and U.S. Bank's foreclosure filing suggested the breach of contract occurred prior to receiving the assignment from Bank of America. (R___). It is axiomatic that a breaching party cannot seek restitution for his own breach.

The assignee of a contract receives the complete terms of the contract in the assignment. An assignment is the act of transferring to another all or part of one's property, interest, or rights. Black's Law Dictionary 119 (6th ed. 1992). It includes transfers of all kinds of property, including negotiable (and non-negotiable) instruments. Id. The assignment of an account involves the transfer to the assignee the right to have money, when collected, applied to the payment of his

debt. Id. The interest in the property assigned can be present, future, or contingent; it may represent contract rights to money, property, or performance, or rights to causes of action. 5 S.C. Jur. Assignments § 2 (2006). There are three elements that constitute an assignment: (1) an assignor; (2) an assignee; and (3) transfer of control of the thing assigned from the assignor to the assignee. Donahue v. Multimedia, Inc., 362 S.C. 331, 338, 608 S.E.2d 162, 165 (Ct. App. 2005) (citing Leon v. Martinez, 638 N.E.2d 511 (N.Y. 1994)). "An assignment of a right is a manifestation of the assignor's intention to transfer it by which the assignor's right to performance by the obligor is extinguished in whole or in part and the assignee acquires a right to such performance." Restatement (Second) of Contracts § 317(1) (1981). An assignee stands in the shoes of its assignor. Twelfth RMA Partners, L.P. v. Nat'l Safe Corp., 335 S.C. 635, 639-40, 518 S.E.2d 44, 46 (Ct. App. 1999) ("[T]he assignee should have all the same rights and privileges, including the right to sue . . . as the assignor.").

Bank of America, the original creditor, as part of the terms in the contract of the note, placed an automatic payment draft provision into the note contract. (R.___) U.S. Bank represented that it owned the note and the mortgage via assignment unto it by Bank of America. Therefore, the terms of the note and the mortgage were adopted and gained by U.S. Bank which included the requirement to draft payments from Meisner's account. If this Court determines that U.S. Bank

received the contract via assignment before the breach, then U.S. Bank was obligated to draft the mortgage payments, which was an unambiguous term that was elected at the time of execution of the contract and Meisner never rescinded the draft authorization. However, if the Court determines U.S. Bank received the assignment after the breach then U.S. Bank is a third- party debt collector. During the June 10, 2014 hearing the plaintiff admitted that it gained all of the rights under the note via the assignment **(hearing June 10, 2014 p.20:16-20)**

Appellant Meisner contends she did not default on the loan as she did not request the automatic payments to cease being drafted and Bank of America or U.S. Bank was obligated to continue debiting the account based on the terms of the contract. The provision of the contract required that once elected by the borrower, Bank of America (or any entity with the rights to the contract) would continue to draft payments from Meisner's account to pay the monthly mortgage payments pursuant to the contract unless the notified in writing Meisner to cease the automatic debits and payments. **(R.p.__)** Bank of America breached the contract by ceasing automatic debits and payments without receiving a request in writing. Therefore, as the breacher of the contract neither Bank of America nor U.S. Bank should be allowed to foreclose.

B. The trial court erred in determining the abuse of process counterclaims claims were permissive.

A foreclosure lawsuit is the mechanism or process by which the owner of a note and mortgage holder enforces a note and mortgage contract. The plaintiff must be owed money to pursue the foreclosure. South Carolina is a judicial foreclosure state; therefore, the South Carolina rules of civil procedure for foreclosure must be followed. A manipulation or violation of the South Carolina rules of civil procedure or a manipulation of the foreclosure statutes results in an abuse of process. Abuse of process has been described as "the employment of legal process for some purpose other than that [for] which it was intended by the law to effect-the improper use of a regularly issued process. Huggins v. Winn-Dixie Greenville, Inc., 249 S.C. 206, 210, 153 S.E.2d 693, 695 (1967) (quoting 34 Am. Jur. Malicious Prosecution § 3, at 704) The elements of abuse of process are "an ulterior purpose and a willful act in the use of the process not proper in the regular course of the proceedings." Hainer v. American Med. Int'l, Inc., 328 S.C. 128, 136-37, 492 S.E.2d 103, 107 (1997). In Heintz v. Jenkins, 514 U.S. 291 (1995), the United States Supreme Court held that litigation conduct of attorneys in collecting consumer debts is not exempt from the Fair Debt Collections Protection Act, rejecting arguments of the collection bar to the contrary. The legal question of whether the breach occurred before assignment and therefore, U.S. Bank is a third- party debt collector would impose liability for the actions during litigation.

However, even without this determination, South Carolina law provides relief for the tort of abuse of process.

South Carolina law allows for the Clerk of Court to refer an *uncontested* foreclosure complaint to the Master in Equity pursuant to SCRCP Rule 53. However, a plain reading of the complete statute makes clear that a referral to the Master in Equity by the Clerk of Court is only appropriate in an uncontested foreclosure or a default case and specifically provides the case be returned to the circuit court when any party requests a jury trial. S.C.R.C.P. Rule 53 provides in part:

> **(b) References.** In an action where the parties consent, in a default case, or an action for foreclosure, some or all the causes of action in a case may be referred to a master or special referee by order of a circuit judge or the clerk of court. In all other actions, the circuit court may, upon application of any party or upon its own motion, direct a reference of some or all of the causes of action in a case. *Any party may request a jury pursuant to Rule 38 on any or all issues triable of right by a jury and, upon the filing of a jury demand, the matter shall be returned to the circuit court.* A case shall not be referred to a master or special referee for making a report to the circuit court. The clerk shall promptly provide the master or special referee with a copy of the order of reference. (*emphasis added by appellant*).

A plain reading of the complete statute indicates when a jury trial is requested as an answer prior to referral, a circuit court judge must make findings of fact and conclusions of law to make the referral to the Master in Equity.

It is inappropriate for the Clerk of Court to make the referral. If this were not the case, an extra step would be required once the case was referred to the Master in Equity. Pursuant to Rule 38 when a party requests a jury trial the Master in Equity Judge must return those causes of action to the circuit court that are triable by jury. Additionally, the Clerk of Court even if the Clerk is an attorney under the laws of South Carolina cannot make findings of fact and conclusions of law. Because the Order was signed outside of a hearing and without the benefit of briefs, it is unclear whether the Clerk of Court reviewed the pleadings prior to making conclusions of law based on the facts in this case, However, South Carolina law specifically precludes anyone other than a jury or a judge to make findings of fact and conclusions of law. Particularly when the Clerk of Court is not a licensed attorney. (R.__)

Here, U.S. Bank drafted an order of referral, with knowledge that it was a contested foreclosure with a jury trial demand, that made findings of fact and conclusions of law and presented the order to the Clerk of Court for signature and referral to "fast track" the foreclosure process to deny the appellant of her rights under the foreclosure statutes, the appraisal statutes, and a jury trial pursuant to the South Carolina Constitution and the U.S. Constitution.

U.S. Bank by drafting an order that did not follow South Carolina law and volitionally involved the Court in a back- door attempt to circumvent the legitimate

court processes by presenting the Order to the Clerk of Court for signature and execution. The actions of U.S. Bank were in direct conflict with South Carolina foreclosure statutes and the S.C. rules of civil procedure and its actions were implemented to gain the collateral advantage of a quick foreclosure.

The Appellant argued that the actions of U.S. Bank were capable of replication because U.S. Bank owns thousands of notes and mortgages and therefore, had the potential of affecting many more South Carolina residents if the actions of U.S. Bank were replicated without censure from the Court.

This form of abuse of process is particularly egregious because many of the citizens of South Carolina do not understand the role and function of the Clerk of Court and the potential to abuse the process may be missed by the defendant or the defendant's attorney. This abuse of process is particularly egregious because it has the potential to deny many more South Carolina defendants of their rights under the foreclosure statutes, the appraisal statutes and the South Carolina constitution, while giving the plaintiff the benefit of the deficiency statutes and a quick foreclosure.

The appellant was damaged by the actions of U.S. Bank because their actions added incremental stress, significant incremental research time in defending the action, and expenses for copying, gas, parking and motions fees.

The actions of U.S. Bank might have succeeded had the appellant not noticed the order that was signed by the Honorable Jeannette McBride was contrary to South Carolina law. Another defendant, in the stress of legal proceedings generally, and of foreclosure proceedings specifically, might not recognize that Ms. McBride did not have the authority, pursuant to the South Carolina Constitution and law, to sign the order. Because U.S. Bank is a large multinational bank it should be not only punished for its attempt to circumvent the system, but a jury should have the opportunity to decide whether punitive damages should be awarded to deter U.S. Bank along with other banks from circumventing, short circuiting, or abusing the process of the system. As such, the appellant avers, she should have a right to a jury trial for the actions of Bank of America and U.S. Bank in the prosecution of their claims and the plaintiff's attempts to manipulate the system.

C. The Cross-Claim against Bank of America for failure to satisfy a mortgage provides for a jury trial.

The cross-claim against Bank of America for failure to satisfy a mortgage that has been satisfied provides for a jury trial. To trigger the penalty and related relief provided in S.C. Code Ann. § 29-3-320, § 29-3-310 requires the mortgagor or purchaser under him to establish (1) he has made full payment of his debts, including any applicable damages, costs, and charges; (2) he has made a request by certified mail or other form of delivery with a proof of delivery the mortgage be

satisfied of record; (3) he has made a tender of fees of office for entering satisfaction; and (4) the mortgagee has failed to enter satisfaction in the proper office on the mortgage within three months of the request. Dykeman v. Wells Fargo Home Mortg., Inc., 381 S.C. 333, 340, 673 S.E.2d 804, 807 (2009). " For liability to attach under the applicable statutes, payment of the mortgage is 'only the first step in the mortgage satisfaction process... he had to satisfy the condition precedent of making a request for [the mortgagee] to record his mortgage as satisfied.'" Id. at 339, 673 S.E.2d at 807 (alterations by court) (quoting Bostic v. Am. Home Mortg. Servicing, Inc., 375 S.C. 143, 154, 650 S.E.2d 479, 485 (Ct. App. 2007)). "A request, to trigger the statutory penalty, may not be implied or inferred. The request must affirmatively convey to the mortgagee that a recording of the satisfaction is sought." Id. (citation omitted). However, section 29-3-310 does not mandate a written request. Bostic, 375 S.C. at 155, 650 S.E.2d at 485. The statute is satisfied if the aggrieved party (1) makes a verbal or written request expressing his desire for the mortgagee to satisfy the mortgage and (2) demonstrates that the mortgagee has received or agreed to this request. Id.

III. The Trial Court erred in determining the defendant was not entitled to a jury trial.

The appellant, in addition to a filed motion to dismiss and motion for damages under the S.C. Code Ann. § 29-3-320 also requested a declaratory

judgment action. The requested declaratory judgment action is to determine the rights and responsibilities of each of the parties under the note and mortgage. The action argued the Bank should be estopped from foreclosure because it was the Bank of America or its assignee U.S. Bank that stopped drafting and applying the payments as agreed in the contract and was therefore the breaching party.

"A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue." Felts v. Richland Cnty., 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991). Here, the declaratory judgment requests the Court to determine the "breaching party" to the contract and which entity Bank of America, U.S. Bank or appellant Meisner was the breaching entity. As such, the declaratory judgment, while advanced in an equitable case is legal in nature and as such provides a basis for a jury trial because it encompasses compulsory counter-claims and cross-claims.

The declaratory action filed has both defensive and offensive components because the declaratory judgment action requests the Court to determine the rights between and among the parties and to determine the rights and responsibilities of the parties under the note and mortgage. Here, U.S. Bank alleges in the complaint the note and mortgage were assigned unto them on April 2, 2014 and that the default occurred in 2013. U.S. Bank's allegations mean the contract was breached prior to the transfer via assignment unto it. Therefore, the cross claims for breach

of contract are sufficiently related to the breach of the note and mortgage by U.S. Bank's predecessor in interest and therefore provides a basis for a jury trial as the breach is related to U.S. Bank's ability to foreclose on the mortgage. Additionally, because U.S. Bank reportedly received the assignment after the breach of contract, U.S. Bank is a third- party debt collector.

The South Carolina Supreme Court has interpreted SCRCP Rule 13(a) that a counterclaim is compulsory when there is a logical relationship between the claim and the counterclaim. North Carolina Federal Sav. and Loan Ass'n v. DAV Corp., 381 S.E. 2d 903, 905 (S.C. 1989). "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." Beach Co. v. Twillman, Ltd., 566 S.E. 2d 863, 865 (S.C. Ct. App. 2002)(quoting S. Const. Co. v. Pickard, 371 U.S. 57 (1962) (interpreting the federal counterpart to Rule 13(a), SCRCP)). Additionally, a defendant's failure to assert a compulsory counterclaim precludes her from asserting the claim in a subsequent action. Beach Co. 566 S.E. 2d at 865 (citing Crestwood Golf Club Inc., v. Potter, 493 S.E. 2d 826,835 (S.C. 1997).

Likewise, when the cross claim is against the predecessor in interest and a declaratory judgment is requested to determine the legal rights and obligations of the parties, the appellant avers the cross claims must be adjudicated in the same proceeding and in the same way as a compulsory counterclaim, therefore cross-

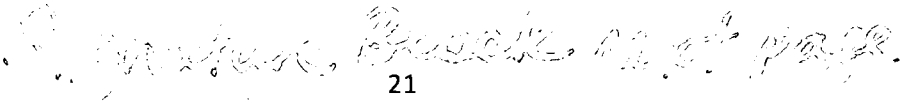
claims and counter claims that have a logical relationship to enforcement of the note and mortgage in a foreclosure action entitle the appellant to a jury trial. This is particularly true when the breaching party, by the claims advanced by the appellee and the co-defendant, is the co-defendant.

The broad language in the declaratory judgment act allows the court to reshuffle the deck if the predecessor in interest is shown to be the breaching party and therefore the "real party in interest" to determine the rights and obligations of the parties and to determine if foreclosure is available as a remedy. This determination is a legal conclusion which provides the basis for a jury trial. Additionally, if the evidence, as the appellant avers, proves that Bank of America breached the contract, foreclosure would be an unavailable remedy for both Bank of America and U.S. Bank.

IV. Conclusion

For the above reasons and all references to the Record on Appeal, the appellant, Rhonda Meisner, respectfully requests this Honorable Court to determine that she is entitled to a jury trial for the determination of the counter claims and cross claims for breach of contract; the counter claim for abuse of process; the cross claim for failure to satisfy a mortgage and remand the case back to the circuit court to be added to the jury roster.

Respectfully Submitted,



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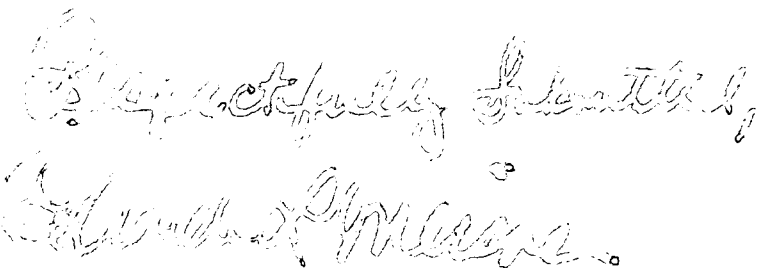

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