

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

MAY 08 2017

SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
The Honorable DeAndrea Gist Benjamin, District Court Judge

Case No. 2014-CP-40-02063

Appellate Case No. 2016-001019

U.S. Bank, National Association, as trustee for the Holders of The Banc of America Funding Corporation, 2008-FT1 Trust, Mortgage Pass-Through Certificates, Series 2008-FT1,Respondent,

v.

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

Of whom Rhonda Lewis Meisner is theAppellant.

RESPONDENT'S INITIAL BRIEF

Trent M. Grissom
S.C. Bar No. 77718
MCGUIREWOODS LLP
201 North Tryon Street, Suite 3000
Charlotte, NC 28202
Tel: (704) 343-2000
Fax: (704) 444-8738

Attorney for Respondent U.S. Bank, National Association, as trustee for the Holders of The Banc of America Funding Corporation, 2008-FT1 Trust, Mortgage Pass-Through Certificates, Series 2008-FT1

Date: May 8, 2017

TABLE OF CONTENTS

	Page
STATEMENT OF ISSUES ON APPEAL	1
STATEMENT OF THE CASE.....	1
A. U.S. Bank Filed For Foreclosure As A Result Of Appellant’s Default On Her Loan	1
B. Meisner Files A Motion To Dismiss, Which The Trial Court Denies.....	2
C. The First Order of Reference is Entered but Subsequently Vacated	3
D. Meisner Files an Amended Answer and Counterclaims and U.S.....	5
STANDARD OF REVIEW	6
ARGUMENT	6
I. THE ISSUE OF WHETHER THE FORECLOSURE ACTION SHOULD BE DISMISSED DUE TO U.S.....	6
II. THE TRIAL COURT DID NOT ERR IN STRIKING MEISNER’S REQUEST FOR A JURY TRIAL	9
A. Meisner Has No Right to a Jury Trial for Her Counterclaims for Declaratory Judgment or Breach of Contract Because She Seeks Equitable Relief.....	11
B. Meisner Has No Right to a Jury Trial for Her Counterclaim for Abuse of Process Because the Counterclaim is Permissive	15
C. Meisner Has No Right to a Jury Trial for Her Cross-claim that Bank of America Failed to File a Satisfaction of Mortgage Because the Counterclaim is Permissive.....	18
CONCLUSION.....	20

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Ariail v. Ariail</i> , 295 S.C. 486, 369 S.E.2d 146 (Ct. App. 1988).....	10
<i>Black v. Lexington Sch. Dist. No. 2</i> , 327 S.C. 55, 488 S.E.2d 327 (1997)	13
<i>Clark v. Hargrave</i> , 323 S.C. 84, 473 S.E.2d 474 (Ct. App. 1996).....	10
<i>Cowburn v. Leventis</i> , 366 S.C. 20, 619 S.E.2d 437 (Ct. App. 2005).....	9
<i>Doe v. S.C. Med. Malpractice Liab. Joint Underwriting Ass'n</i> , 347 S.C. 642, 557 S.E.2d 670 (2001)	14, 15
<i>Elam v. S.C. Dep't of Transp.</i> , 361 S.C. 9, 602 S.E.2d 772 (2004)	8
<i>Englert, Inc. v. Netherlands Ins. Co.</i> , 315 S.C. 300, 433 S.E.2d 871 (Ct. App. 1993).....	18
<i>Felts v. Richland Cty.</i> , 303 S.C. 354, 400 S.E.2d 781 (1991). (Appellant's In. Br. p. 19.).....	12
<i>Gaddy v. Douglass</i> , 359 S.C. 329, 597 S.E.2d 12 (Ct. App. 2004).....	12
<i>Glasscock, Inc. v. U.S. Fid. & Guar. Co.</i> , 348 S.C. 76, 557 S.E.2d 689 (Ct. App. 2001).....	17, 18
<i>Ins. Fin. Servs., Inc. v. S. Carolina Ins. Co.</i> , 271 S.C. 289, 247 S.E.2d 315 (1978)	10, 14, 15
<i>Jinks v. Richland Cty.</i> , 355 S.C. 341, 585 S.E.2d 281 (2003)	16, 18
<i>Jones v. SC Dep't of Health & Envtl. Control</i> , 384 S.C. 295, 682 S.E.2d 282 (Ct. App. 2009).....	16, 18
<i>Lowcountry Open Land Trust v. Charleston S. Univ.</i> , 376 S.C. 399, 656 S.E.2d 775 (Ct. App. 2008).....	12

<i>McChurg v. Deaton</i> , 395 S.C. 85, 716 S.E.2d 887 (2011)	17, 18
<i>Mobley Co. v. McLucas</i> , 99 S.C. 99, 82 S.E. 986 (1914)	14
<i>Mortgage Elec. Sys., Inc. v. White</i> , 384 S.C. 606, 682 S.E.2d 498 (Ct. App. 2009).....	11, 12
<i>N.C. Fed. Sav. & Loan Ass'n v. DAV Corp.</i> , 298 S.C. 514, 381 S.E.2d 903 (1989)	19
<i>Noisette v. Ismail</i> , 304 S.C. 56, 403 S.E.2d 122 (1991)	8
<i>RIM Associates v. Blackwell</i> , 359 S.C. 170, 597 S.E.2d 152 (Ct. App. 2004).....	10, 12
<i>Sloan v. Greenville Cty.</i> , 356 S.C. 531, 590 S.E.2d 338 (Ct. App. 2003).....	13, 14
<i>Sullivan Co., Inc. v. New Swirl, Inc.</i> , 313 S.C. 34, 437 S.E.2d 30 (1993)	18
<i>Verenes v. Alvanos</i> , 387 S.C. 11, 690 S.E.2d 771 (2010)	14
<i>Wachovia Bank, Nat'l Ass'n v. Blackburn</i> , 407 S.C. 321, 755 S.E.2d 437 (2014)	6, 9, 10, 11, 12, 17, 19
Other Authorities	
SCRCP Rules 12(b)(7) and 12(b)(8).....	2, 3, 4, 7
SCRCP Rule 12(b)(8)(9).....	2, 3, 7
SCRCP Rule 13(g).....	19
SCRCP Rule 59(e)	3, 6, 7, 9
SCRCP Rules 59(e) and 60.....	4
SCRCP Rule 59(g).....	4, 8
SCRCP Rule 208(b).....	20

STATEMENT OF ISSUES ON APPEAL

- I. WHETHER THE TRIAL COURT CORRECTLY DETERMINED THAT U.S. BANK WAS THE REAL PARTY IN INTEREST THAT POSSESSED THE REQUISITE STANDING TO PURSUE THE FORECLOSURE ACTION
- II. WHETHER THE TRIAL COURT CORRECTLY DETERMINED THE COUNTERCLAIMS WERE PERMISSIVE.
- III. WHETHER THE TRIAL COURT CORRECTLY DETERMINED THE APPELLANT WAS NOT ENTITLED TO A JURY TRIAL.

STATEMENT OF THE CASE

A. U.S. Bank Filed For Foreclosure As A Result Of Appellant's Default On Her Loan.

U.S. Bank, National Association, as trustee for the Holders of The Banc of America Funding Corporation, 2008-FT1 Trust, Mortgage Pass-Through Certificates, Series 2008-FT1 ("U.S. Bank"), commenced the underlying equitable action for foreclosure on March 31, 2014 ("Foreclosure Action"), alleging that Rhonda Meisner ("Meisner") defaulted on her promissory note executed on August 13, 2003 ("Note"). Pursuant to the terms of the Note, Meisner promised to pay Bank of America, N.A. ("BANA") the sum of \$61,516.00, plus interest. The Note was secured by a mortgage ("Mortgage") (collectively, the "Loan"), which Meisner executed the same day that she signed the Note, on the real property located at 406 Koon Store Road, Columbia, South Carolina ("the Property").

In the Complaint, U.S. Bank alleged that it was the holder of the Note and the Mortgage and named two additional defendants that it alleged may claim an interest in the Property, South Carolina Bank and Trust, N.A. ("SCBT") and BANA. (R. pp. __.) U.S. Bank alleged that BANA may claim an interest in the Property stemming from a

mortgage executed in 2005. (R. pp. __.) As for SCBT, U.S. Bank alleged that it might claim an interest in the Property stemming from a 2007 mortgage, executed by Meisner in favor of SCBT, and a deficiency judgment entered against Meisner in Richland County in 2012. (R. pp. __.)

In response, Meisner filed an Answer on May 23, 2014 asserting affirmative defenses as well as counterclaims for: (1) breach of contract, alleging that the “Plaintiffs” failed to resolve an escrow dispute before transferring the servicing of the loan; and (2) a declaratory judgment seeking a determination the parties’ right under the Note and Mortgage as well as appraisal rights for the Property (“Original Answer”). (R. pp. __.)

B. Meisner Files A Motion To Dismiss, Which The Trial Court Denies.

On May 6, 2014, Meisner filed a motion to dismiss the Foreclosure Action pursuant to “S.C. Code Ann. Rule 12(b)(8)(9) [sic]”¹ (“Motion to Dismiss”), and, on June 4, 2014, she filed a memorandum of law in support of the Motion (“Memorandum”). (R. pp. __.) As stated in her Motion to Dismiss and supporting Memorandum, Meisner alleged that the Foreclosure Action should be dismissed because U.S. Bank failed to timely respond to a complaint filed by SCBT in a separate foreclosure action against Meisner, in November 2013, in which SCBT sought to foreclose a junior mortgage on the Property (Case No. 2013-CP-40-7144) (“SCBT Foreclosure”). (R. pp. __.)

Meisner’s Motion to Dismiss came on for a hearing on June 10, 2014. At the hearing, U.S. Bank argued that SCBT’s foreclosure of its junior lien, had no effect on the validity of U.S. Bank’s senior lien at issue in this action. (June 10, 2014 T. pp. 7:9–8:13.)

¹ Meisner erroneously states in her Initial Brief that she filed her Motion to Dismiss pursuant to SCRCP Rule 12(b)(7) and 12(b)(8). (Appellant’s In. Br. p. 3.) The Record shows, however, that Meisner’s Motion to Dismiss was filed pursuant “S.C. Code Ann. Rule 12(b)(8)(9).” (R. pp. __.)

Consequently, U.S. Bank argued that its failure to timely respond to the complaint in the SCBT Foreclosure could not serve as a basis for the dismissal of the Foreclosure Action under Rule 12(b)(8), SCRCP. (*Id.*)

During the hearing, Meisner attempted to challenge U.S. Bank's standing to maintain the Foreclosure Action based on her allegation that the Assignment of Mortgage was defective. (June 10, 2014 T. pp. 8:21–9:11.) The Trial Court, however, informed Meisner that it could not hear her argument regarding the Assignment of Mortgage as Meisner had not filed a motion on the issue with the Court. (June 10, 2014 T. pp. 9:3–12.) Although Meisner stated that she had filed a motion challenging U.S. Bank's standing (June 10, 2014 T. p. 9:7–8), the Record shows no such motion was filed—and, in her subsequent Rule 59(e) motion (discussed below), Meisner conceded that she made an *oral* motion challenging U.S. Bank's standing at the June 10th hearing.

C. The First Order of Reference is Entered but Subsequently Vacated.

While Meisner's Motion to Dismiss was still pending, U.S. Bank filed a Motion to Strike Jury Trial Demand and for Mandatory Order of Reference, on June 23, 2014, arguing that Meisner's counterclaims were not legal counterclaims as they did not affect U.S. Bank's right to enforce the Note and Mortgage. U.S. Bank therefore sought an order referring the entire matter to the Master-in-Equity. (R. pp. __.)

On June 27, 2014, the Court entered an order denying Meisner's Motion to Dismiss ("Order Denying Motion to Dismiss"). In the Order, the Trial Court noted that, although Meisner cited Rules 12(b)(8) and (9), SCRCP, as grounds for her Motion to Dismiss, Rule 12(b)(9) did not exist; therefore, the Court only addressed Meisner's Motion pursuant Rule 12(b)(8). (R. pp. __.) The Court denied the Motion to Dismiss

because it concluded Meisner's default under the Note and Mortgage was "entirely unrelated to her performance under the terms of [her] loan agreement with SCBT[.]"

In a motion filed on June 30, 2014, pursuant to Rules 59(e) and 60, SCRC, Meisner asked the Trial Court to amend the Order Denying Motion to Dismiss, and for relief from the Order ("Motion for Reconsideration"). (R. pp. __.) Meisner asked the Court to reconsider its ruling under Rule 12(b)(8) and noted that the Court had not ruled on her oral motion at the June 10, 2014 hearing challenging the assignment of the Mortgage to U.S. Bank. (R. pp. __.) The Trial Court denied Meisner's Motion for Reconsideration, in a Form 4 order on September 5, 2014, stating that it did not receive a copy of the motion as required by Rule 59(g), SCRC ("Order Denying Motion for Reconsideration"). (R. pp. __.) Meisner appealed the Order Denying Motion to Dismiss and the Order Denying Motion for Reconsideration. This Court dismissed the appeal as interlocutory in an order entered November 19, 2014. (R. p. __.)

On July 24, 2014, the Clerk of Court entered an order striking Meisner's demand for a jury trial and referring the matter to the Master-in-Equity ("First Order of Reference"). (R. pp. __.) The Master-in-Equity, Judge Strickland, vacated the First Order of Reference, on January 15, 2015, concluding that the Order was inadvertently signed by the Clerk of Court but should have been signed by a Circuit Court Judge. (R. p. __; Dec. 16, 2015 T. pp. 13:17-14:5.)

D. Meisner Files an Amended Answer and Counterclaims and U.S. Bank Obtains an Order of Mandatory Reference.

On August 10, 2015, Meisner filed an amended answer and counterclaims (“Amended Answer”)² asserting various affirmative defenses and counterclaims for: (1) declaratory judgment to determine the real party in interest; (2) breach of contract against Bank of America; (3) breach of contract accompanied by a fraudulent act against Bank of America; (4) abuse of process against U.S. Bank; (5) failure to file a satisfaction of mortgage against Bank of America; (6) slander of title against Bank of America; and (7) slander of title, based in equity, against SCBT. (R. pp. __.)

After filing its Reply to Meisner’s Amended Answer (R. pp. __), U.S. Bank again sought an order of reference when it filed a Motion to Strike Jury Trial Demand and for Mandatory Order of Reference on October 28, 2015 (“Motion for Order of Reference”). U.S. Bank’s Motion for Order of Reference was heard on December 16, 2015. (Dec. 16, 2015 T. p. 1.)

On April 13, 2016, the Trial Court entered an order striking Meisner’s demand for a jury trial and referred the matter to a Master-in-Equity (“Second Order of Reference”). (R. pp. __.) In the Second Order of Reference, the Trial Court concluded that Meisner’s counterclaims and cross-claims, if proven true, would not have any impact on the enforceability of the Note and Mortgage, and were, therefore, permissive. (R. pp. __.) Because Meisner raised the permissive counterclaims and cross-claims in the equitable foreclosure proceedings, the Trial Court concluded that Meisner had waived her right to a jury trial and referred the matter to the Master-in-Equity. (R. pp. __.)

² For clarification, U.S. Bank notes that Meisner titled her Amended Answer as her “First Amended Complaint.” (R. p. __.)

Meisner filed a Motion to Alter and Amend Ruling Pursuant to SCRPC Rule 59-e [sic] (“Motion to Amend”) on April 20, 2016. (R. pp. __.) However, no order ruling on Meisner’s Motion to Amend appears in the Record.

Meisner filed a Notice of Appeal from the Second Order of Reference on May 12, 2016.

STANDARD OF REVIEW

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

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

ARGUMENT

I. THE ISSUE OF WHETHER THE FORECLOSURE ACTION SHOULD BE DISMISSED DUE TO U.S. BANK’S ALLEGED LACK OF STANDING WAS NOT PRESERVED FOR REVIEW.

In her first argument, Meisner contends that the Trial Court erred in holding that U.S. Bank was the real party in interest with standing to foreclose the Note and Mortgage. Meisner, however, has failed to preserve this issue for appellate review as Meisner failed to obtain a ruling from the Trial Court on the issue of U.S. Bank’s standing in either the Order Denying Motion to Dismiss or the Second Order of Reference.

In support of her argument that U.S. Banked lacked standing, Meisner cites the transcript of the June 10, 2014 hearing on her Motion to Dismiss and contends that the Trial Court should have dismissed the Foreclosure Action based on an allegedly defective

assignment of the Note and Mortgage. (Appellant's In. Br. pp. 5–9.) In her Motion to Dismiss and supporting Memorandum, Meisner argued that the Foreclosure Action should be dismissed because, she alleged, U.S. Bank failed to timely respond to a complaint filed by SCBT in the SCBT Foreclosure—a separate foreclosure action against Meisner based on a separate promissory note. (R. pp. __.) U.S. Bank argued that SCBT's foreclosure of its junior lien had no effect on the validity of U.S. Bank's senior lien in this Foreclosure Action. (June 10, 2014 T. pp. 7:9–8:13.) Consequently, U.S. Bank argued its failure to timely respond to the complaint in the SCBT Foreclosure could not serve as a basis for the dismissal of the Foreclosure Action under Rule 12(b)(8), SCRCP. (*Id.*)

Meisner attempted to challenge U.S. Bank's standing to maintain the Foreclosure Action based on her allegation that the Assignment of Mortgage was defective. (June 10, 2014 T. pp. 8:21–9:11.) The Trial Court, however, informed Meisner that it could not hear her argument regarding the Assignment of Mortgage as Meisner had not filed a motion on the issue with the Court. Although Meisner stated that she had filed a motion challenging U.S. Bank's standing (June 10, 2014 T. p. 9:7–8), the Record shows no such motion was filed. Additionally, in her subsequent Rule 59(e) motion (discussed below), Meisner conceded that she made an oral motion challenging U.S. Bank's standing at the June 10th hearing.

On June 27, 2014, the Court entered its Order Denying Meisner's Motion to Dismiss. In the Order, the Trial Court noted that, although Meisner cited Rule 12(b)(8) and (9), SCRCP, as grounds for her Motion to Dismiss, Rule 12(b)(9) did not exist; therefore, the Court only addressed Meisner's Motion pursuant Rule 12(b)(8). The Court

denied the Motion to Dismiss because it concluded Meisner's default under the Note and Mortgage was "entirely unrelated to her performance under the terms of [her] loan agreement with SCBT[.]" (R. pp. __.)

In her Motion for Reconsideration, Meisner asked the Trial Court to amend the Order Denying Motion to Dismiss and for relief from the Order stating that the court had not ruled on her oral motion challenging U.S. Bank's standing. (R. pp. __.) The Trial Court, however, denied the Motion for Reconsideration for Meisner's failure to provide the court with a copy as required by Rule 59(g), SCRPC. *See* SCRPC 59(g) ("A party filing a written motion under this rule shall provide a copy of the motion to the judge within ten (10) days after the filing of the motion."). Meisner makes no argument on appeal that the Trial Court erred in denying her Motion to Dismiss for her failure to comply with Rule 59(g), SCRPC. (Appellant's In. Br. pp. 5-9.)

Similarly, in the Second Order of Reference, the Trial Court did not address the issue of U.S. Bank's standing. In her subsequent Motion to Amend, Meisner noted the absence of a ruling on the issue in the Second Order of Reference and requested that the Trial Court amend the Order. (R. pp. __.) Meisner, however, filed her Notice of Appeal without obtaining a ruling on her Motion to Amend.

Because the Trial Court did not rule on the issue of U.S. Bank's standing in its Order Denying Motion to Dismiss or its Second Order of Reference, and because Meisner failed to obtain a ruling on the issue with either her Motion for Reconsideration or her Motion to Amend, she failed to preserve the issue for review. *See Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 23, 602 S.E.2d 772, 779-80 (2004) ("Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower

court.”); *Noisette v. Ismail*, 304 S.C. 56, 58, 403 S.E.2d 122, 124 (1991) (holding that although an issue was argued before the trial court, because the trial court did not explicitly rule on the issue, and the appellant did not make a Rule 59(e) motion to amend to obtain a ruling, the issue was not preserved for appellate review); *Cowburn v. Leventis*, 366 S.C. 20, 41, 619 S.E.2d 437, 449 (Ct. App. 2005) (“When a trial court makes a general ruling on an issue, but does not address the specific argument raised by a party, that party must make a Rule 59(e) motion asking the trial court to rule on the issue in order to preserve it for appeal.”).

II. THE TRIAL COURT DID NOT ERR IN STRIKING MEISNER’S REQUEST FOR A JURY TRIAL.

The Trial Court did not err by referring the Foreclosure Action to the Master-in-Equity in its Second Order of Reference. In her counterclaims for breach of contract and declaratory judgment, Meisner seeks *equitable* relief for which she has no right to a trial by jury. Additionally, Meisner has waived any right to a jury trial on her remaining counterclaims and her cross-claims as they are *permissive* claims raised in an equitable foreclosure proceeding. Specifically, Meisner’s abuse of process claim is based on activities alleged to have occurred *during* the course of the Foreclosure Action and, therefore, is unrelated to the enforceability of the Note and Mortgage. Similarly, Meisner’s cross-claim against Bank of America for failure to file a satisfaction of mortgage is a permissive claim as it is unrelated to the enforceability of the Note and Mortgage by U.S. Bank.

In *Blackburn*, the Supreme Court of South Carolina explained that “[a] mortgage foreclosure is an action in equity.” 407 S.C. at 328, 755 S.E.2d at 440. Thus, “the parties are not entitled, as a matter of right, to a trial by jury.” *Id.* at 328, 755 S.E.2d at 441

(quoting *Williford v. Downs*, 265 S.C. 319, 321, 218 S.E.2d 242, 243 (1975)). But, “counterclaims—including those raised in equitable actions—may, at times, be entitled to a jury trial.” *Id.* The determination of whether a party raising a counterclaim in a foreclosure action is entitled to a jury trial on its counterclaim depends first on whether the counterclaim is an *equitable* counterclaim or a *legal* counterclaim. *See id.* at 328–29, 755 S.E.2d at 441.

If the claim is a legal counterclaim, the party asserting the claim is entitled to a trial by jury on that claim *only* if the claim is a compulsory counterclaim—a claim that “arises out of the same transaction or occurrence as the opposing party’s claim” and which the party would have lost the right to make had the claim not been asserted in the same action. *Id.* at 330, 755 S.E.2d at 441 (citation and quotation marks omitted). Furthermore, a compulsory counterclaim “affect[s] the bank’s right to enforce the note and foreclose the mortgage.” *See id.* at 330 n.7, 755 S.E.2d at 442 n.7. Alternatively, if the counterclaim is a legal but *permissive* counterclaim, asserting the claim in an equitable action constitutes a waiver of the right to a trial by jury. *Id.* at 330, 755 S.E.2d at 441. For *equitable* counterclaims, however, a party has no right to a jury trial. *Id.* at 329, 755 S.E.2d at 441.

Furthermore, “[w]hether the action is one at law or in equity is determined by the nature of the pleadings and the character of the relief sought.” *RIM Associates v. Blackwell*, 359 S.C. 170, 177–78, 597 S.E.2d 152, 156 (Ct. App. 2004); *Clark v. Hargrave*, 323 S.C. 84, 86, 473 S.E.2d 474, 476 (Ct. App. 1996) (same). Thus, “an action sounding in law may be transformed to one in equity because equitable relief is sought.” *Ins. Fin. Servs., Inc. v. S. Carolina Ins. Co.*, 271 S.C. 289, 294, 247 S.E.2d 315,

318 (1978). Accordingly, “an appellate court is not bound by a party’s characterization of the actions” and may disregard such labels. *RIM Associates v. Blackwell*, 359 S.C. 170, 177–78, 597 S.E.2d 152, 156 (Ct. App. 2004); *Ariail v. Ariail*, 295 S.C. 486, 491, 369 S.E.2d 146, 149 (Ct. App. 1988) (disregarding the label given by the parties to a cause of action and analyzing the claim based on the relief sought). Additionally, even though a counterclaim may be compulsory as it arose out of the “same transaction or occurrence as the opposing party’s claim,” *Balckburn*, 407 S.C. at 330, 755 S.E.2d at 441, where the main purpose of the counterclaim is equitable relief, the counterclaim is properly regarded as sounding in equity, *see Mortgage Elec. Sys., Inc. v. White*, 384 S.C. 606, 615, 682 S.E.2d 498, 502 (Ct. App. 2009) (holding no right to jury trial of a *compulsory* counterclaim where the relief sought was *equitable*).

A. Meisner Has No Right to a Jury Trial for Her Counterclaims for Declaratory Judgment or Breach of Contract Because She Seeks Equitable Relief.

Meisner has characterized her counterclaims for declaratory judgment and breach of contract as legal and compulsory counterclaims for which she claims a right to trial by jury. Because the counterclaims do not affect U.S. Bank’s right to enforce the Note and foreclose the Mortgage, the Trial Court properly found the counterclaims to be *permissive*. Alternatively,³ because, the nature of the relief Meisner seeks is primarily equitable in nature—that U.S. Bank be estopped from foreclosing the Mortgage—her counterclaims are equitable claims for which she has no right to a trial by jury. Accordingly, the Second Order of Reference should be affirmed.

³ While the Trial Court concluded these counterclaims were permissive counterclaims (R. p. __), this Court may affirm on any basis appearing in the record. *See White*, 384 S.C. at 614 n.2, 682 S.E.2d at 502 n.2

In support of these counterclaims, Meisner alleges that Bank of America failed to draft her monthly payments and apply them to her account. (R. p. __ (Amend. Answer ¶ 34.) Assuming *arguendo* that Bank of America did cease Meisner's monthly draft payments, that fact does not affect U.S. Bank's right to enforce the Note and foreclose the Mortgage, rendering her counterclaims to be permissible. *See Blackburn*, 407 S.C. at 330 n.7, 755 S.E.2d at 442 n.7. Having raised permissible counterclaims in an equitable foreclosure action, Meisner has waived her right to a jury trial. *See id.* at 330, 755 S.E.2d at 441.

Alternatively, the Second Order of Reference may be affirmed as the relief which Meisner seeks is equitable relief, for which she has no right to a trial by jury. *See id.* at 329, 755 S.E.2d at 441. As Meisner notes, "a suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue." *Felts v. Richland Cty.*, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991). (Appellant's In. Br. p. 19.) While the declaratory judgment action in *Felts* was characterized as an action in law, the action sought the interpretation of a contract solely to determine if the plaintiff was defined as an employee under the contract at issue. *See id.* When, however, a party files a declaratory judgment action primarily seeking equitable relief the claim is properly considered to sound in equity. *See Lowcountry Open Land Trust v. Charleston S. Univ.*, 376 S.C. 399, 406 n.4, 656 S.E.2d 775, 779 n.4 (Ct. App. 2008) (holding that declaratory judgment action sounded in equity where the primary relief sought was the equitable relief of specific performance, rejecting the argument that the necessity of interpreting the contract meant the action was an action at law); *Gaddy v. Douglass*, 359 S.C. 329, 333, 597 S.E.2d 12, 14 (Ct. App. 2004) (concluding that a declaratory judgment action seeking

to revoke a power of attorney sounded in equity). Similarly, a claim for breach of contract may sound in equity when equitable relief is sought. See *RIM Associates*, 359 S.C. at 177–78, 597 S.E.2d at 156 (concluding that, despite the party’s characterization of its claim as a claim for “breach of contract,” when the party sought the equitable remedy of specific performance, the claim was an equitable claim). Here, although Meisner asserts that her counterclaims for declaratory judgment and breach of contract are legal counterclaims, it is apparent from the pleadings and her arguments on appeal that the primary relief she seeks is *equitable*, precluding her right to a jury trial.

In support of her breach of contract counterclaim, Meisner alleges that BANA breached the terms of the Note before assigning it to U.S. Bank. (Appellant’s In. Br. p. 12.) As a result, she contends “neither Bank of America nor U.S. Bank should be allowed to foreclose.” (*Id.*) As for her counterclaim for declaratory judgment, she contends, “[t]he requested declaratory judgment action is to determine the rights and responsibilities of each of the parties under the [N]ote and [M]ortgage. The action argued the Bank should be *estopped* from foreclosure” (Appellant’s In. Br. p. 19 (emphasis added).) Thus, for both counterclaims, Meisner seeks the *equitable* remedy of estoppel, for which she has no right to a trial by jury. See *Black v. Lexington Sch. Dist. No. 2*, 327 S.C. 55, 62 n.1, 488 S.E.2d 327, 331 n.1 (1997) (“[E]quitable estoppel is an equitable issue to be determined by the judge rather than by the jury.”).

Meisner also erroneously contends that the determination of the rights and obligation of the parties under the Note and Mortgage—the determination of the “real party in interest” with standing—is a “legal conclusion which provides the basis for a jury trial.” (Appellant’s In. Br. p. 21.) But, the determination of a question of law as to

whether a party has standing to sue under a contract does not transform an action in equity into an action in law. *See Sloan v. Greenville Cty.*, 356 S.C. 531, 545, 590 S.E.2d 338, 345–46 (Ct. App. 2003) (concluding that while the defendant asserted the main purpose of the declaratory judgment action was to *construe a written contract*—including whether the plaintiff had standing to sue under the contract—when the remedy sought by the plaintiff was equitable, the action was appropriately characterized as equitable). That the finder of fact will have to determine standing in an equitable action does not, therefore, provide Meisner the right to a jury trial. *See id.*

This rule that an otherwise legal claim may be equitable in nature depending on the primary relief sought applies even if a party to an action seeks monetary damages in addition to equitable relief. *See Mobley Co. v. McLucas*, 99 S.C. 99, 99, 82 S.E. 986, 986 (1914) (holding that the defendant in a foreclosure action was *not* entitled to a jury trial on his counterclaim for damages arising out of the plaintiff's alleged failure to perform its obligations in the contract); *Ins. Fin. Servs., Inc.*, 271 S.C. at 294, 247 S.E.2d at 318 (affirming the circuit court's transfer of the action to the equity calendar despite a party's request for "considerable damages," both actual and punitive, because the damages were "only incidental" to the equitable relief sought); *Doe v. S.C. Med. Malpractice Liab. Joint Underwriting Ass'n*, 347 S.C. 642, 645, 557 S.E.2d 670, 672 (2001) (concluding that where the plaintiff's "main purpose" of the action was equitable relief the action sounded in equity despite the plaintiff's prayer for money damages). Thus, when the primary remedy sought is equitable, the action will be an action in equity: "While [one party] will have to pay money . . . if the allegations are proven, that does not mean [the opposing party's] causes of action are legal in nature. Upon looking at the body of the complaint,

the main purpose in bringing this action is equitable, not legal.” *Verenes v. Alvanos*, 387 S.C. 11, 18, 690 S.E.2d 771, 774 (2010) (holding that, when the nature of relief sought pursuant to claim for breach of fiduciary duty was an equitable remedy, there was no right to trial by jury).

Meisner seeks both equitable relief and monetary damages in her claims for declaratory judgment and breach of contract accompanied by a fraudulent act.⁴ (R. pp. __ §§ 60, 61, 80.) A careful review of her Amended Answer makes clear, however, that estopping U.S. Bank from foreclosing the Note and Mortgage is what Meisner really seeks. Meisner’s counterclaims therefore sound in equity. *See Ins. Fin. Servs., Inc.*, 271 S.C. at 294, 247 S.E.2d at 318; *Doe*, 347 S.C. at 645, 557 S.E.2d at 672. Additionally, the Master-in-Equity’s adjudication of Meisner’s counterclaims would not preclude her from recovering her alleged damages. *See Ins. Fin. Servs., Inc.*, 271 S.C. at 294, 247 S.E.2d at 318 (“The trial of a case in a court of equity does not foreclose the award of damages.”). In sum, Meisner has no right to a trial by jury for these counterclaims.

B. Meisner Has No Right to a Jury Trial for Her Counterclaim for Abuse of Process Because the Counterclaim is *Permissive*.

⁴ Although Meisner claimed damages in her counterclaim against Bank of America for breach of contract accompanied by a fraudulent act, she did not plead a claim for relief in her breach of contract counterclaim against Bank of America. (R. pp. __ (Amend. Answer. p. 12).)

Meisner's counterclaim for abuse of process against U.S. Bank is based solely on her allegations relating to U.S. Bank's actions *after* the default on the Note and *during the course of* the Foreclosure Action. As such, the claim is wholly unrelated to the enforceability to of the Note and Mortgage, and the Trial Court properly concluded that Meisner's counterclaim was a *permissive* counterclaim, and Meisner waived her right to a trial by jury by raising the claim in an equitable proceeding.

On June 23, 2014, U.S. Bank filed its First Motion to Strike Jury Trial Demand and for Mandatory Order of Reference along with a proposed order of reference to strike Meisner's demand for a jury trial. The Clerk of Court entered the First Order of Reference on July 24, 2014. On January 15, 2015, however, the Master-in-Equity entered an order *vacating* the First Order of Reference, concluding that the Order was inadvertently signed by the Clerk of Court but should have been signed by a Circuit Court Judge. (R. p. __; Dec. 16, 2015 T. pp. 13:17–14:5.) Months later, when Meisner filed her Amended Answer, she pled—for the first time—a counterclaim for abuse of process alleging that the Clerk of Court was without authority to sign the First Order of Reference and that U.S. Bank “willfully and wantonly” filed the proposed Order and sought the Clerk's signature in order to “fast track the foreclosure process.” (R. pp. __ (Amend. Answer pp. 15–18).)

On appeal, Meisner contends that the Trial Court erred in concluding that her counterclaim for abuse of process is a permissive counterclaim. (Appellant's In. Br. pp. 12–17.) Yet, she makes no argument on appeal as to how the counterclaim is a compulsory counterclaim. (*See id.*) In her Initial Brief, Meisner discusses the general concept of an abuse of process claim and expands on her allegations that U.S. Bank

improperly sought an order of reference from the Clerk of Court, but she fails to make any argument as to how the Trial Court erred in concluding that her counterclaim was *unrelated* to the execution of the Note and Mortgage or their enforceability. (R. pp. ___ (Order of Reference pp. 2–3)). Without making any argument as to *how* the Trial Court erred, Meisner has abandoned this issue on appeal. *See Jinks v. Richland Cty.*, 355 S.C. 341, 344 n.3, 585 S.E.2d 281, 283 n.3 (2003) (concluding that issue raised in appellant’s brief was abandoned when appellant provided no argument on the issue); *Jones v. SC Dep’t of Health & Envtl. Control*, 384 S.C. 295, 317, 682 S.E.2d 282, 294 (Ct. App. 2009) (argument abandoned where appellant failed to explain *how* the trial court erred).⁵

Assuming *arguendo* that Meisner’s allegations regarding U.S. Bank’s filing of the First Motion to Strike Jury Trial Demand and for Mandatory Order of Reference are true, U.S. Bank’s attempt to obtain an order of mandatory reference from the Clerk of Court determining the mode of trial of the Foreclosure Action would *not* affect its right to commence and maintain the Foreclosure Action as the holder of the Note. Because the determination of U.S. Bank’s right to enforce the Note and foreclose the Mortgage is *independent* of the determination of whether it impermissibly sought the First Order of Reference during the Foreclosure Action, her abuse of process counterclaim is a *permissive* counterclaim. *See Blackburn*, 407 S.C. at 330 n.7, 755 S.E.2d at 442 n.7

⁵ Having failed to make *any* argument in her Initial Brief regarding how the Trial Court erred in striking her demand for a jury trial on her counterclaim for abuse of process, Meisner is precluded from raising the issue in a reply brief. *See McClurg v. Deaton*, 395 S.C. 85, 87, 716 S.E.2d 887, 888 (2011) (“It is axiomatic that an issue cannot be raised for the first time in a reply brief.”); *Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 692 (Ct. App. 2001) (holding that even if an argument is raised in an initial brief, if the argument is conclusory and unsupported by authority, the argument is not preserved for review and the appellant is precluded from *more fully addressing the issue* in a reply brief).

(counterclaims are permissive if they do not affect the lender's right to enforce the note and foreclose the mortgage). Assuming *arguendo* that Meisner's abuse of process counterclaim is a legal counterclaim, because Meisner raised the permissive counterclaim in an equitable foreclosure action, she has waived her right to trial by jury on the claim. *See id.* at 332, 755 S.E.2d at 443 (concluding that raising permissive legal counterclaims in an equitable action constitutes waiver of the right to a jury trial).

C. Meisner Has No Right to a Jury Trial for Her Cross-claim that Bank of America Failed to File a Satisfaction of Mortgage Because the Counterclaim is *Permissive*.

Next, Meisner erroneously contends that the Trial Court erred in finding that her cross-claim against Bank of America alleging its failure to satisfy the Mortgage was a permissive cross-claim.

As an initial matter, Meisner has abandoned this issue on appeal as she has failed to provide *any* argument in her Initial Brief as to how she is entitled to a jury trial on this cross-claim. Beyond her conclusory one-sentence assertion that “[t]he cross-claim against Bank of America for failure to satisfy a mortgage that has been satisfied provides for a jury trial[.]” Meisner provides no argument as to *how* the Trial Court erred. (Appellant's In. Br. pp. 17–18.) Additionally, while Meisner discusses the general concept of a claim for failure to satisfy a mortgage, she fails to make *any* allegations or provide *any* argument regarding Bank of America's alleged failure to satisfy the Mortgage. (*Id.*) As such, she has failed to preserve the issue for review. *See Englert, Inc. v. Netherlands Ins. Co.*, 315 S.C. 300, 304 n.2, 433 S.E.2d 871, 873 n.2 (Ct. App. 1993) (concluding that appellant's one-sentence argument was too conclusory to preserve an issue for appellate review); *Sullivan Co., Inc. v. New Swirl, Inc.*, 313 S.C. 34, 36, 437 S.E.2d 30, 31 (1993) (an appellant's general and unsupported statements that it was

damaged by respondent's failure to act may be disregarded by the appellate court); *see also Jinks*, 355 S.C. at 344 n.3, 585 S.E.2d at 283 n.3; *Jones*, 384 S.C. at 317, 682 S.E.2d at 294.⁶

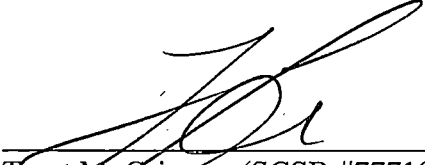
Furthermore, had Meisner preserved this issue for review, the Trial Court properly stuck her demand for a jury trial on her cross-claim alleging that Bank of America failed to file a satisfaction of her Mortgage. Rule 13(g) of the South Carolina Rules of Civil Procedure provides that “[a] pleading *may* state as a cross-claim any claim by one party against a co-party” Rule 13(g), SCRPC (emphasis added). As such, “[g]enerally, cross-claims are permissive[.]” *N.C. Fed. Sav. & Loan Ass’n v. DAV Corp.*, 298 S.C. 514, 519, 381 S.E.2d 903, 906 (1989). As Meisner has raised a permissive crossclaim against Bank of America in U.S. Bank’s foreclosure action, she has waived her right to a jury trial on this issue. *See Blackburn*, 407 S.C. at 330, 755 S.E.2d at 441.

⁶ Having failed to make *any* argument in her Initial Brief regarding as to how the Trial Court erred in striking her demand for a jury trial on this cross-claim, Meisner is precluded from more fully addressing the issue in a reply brief. *See McClurg*, 395 S.C. at 87, 716 S.E.2d at 888; *Glasscock*, 348 S.C. at 81, 557 S.E.2d at 69.

CONCLUSION

For the reasons and authorities stated above, this Court should affirm the Trial Court's Order Denying Motion to Dismiss and the Second Order of Reference and let this matter proceed by non-jury adjudication.

This the 8th day of May, 2017.



Trent M. Grissom (SCSB #77718)
MCGUIREWOODS, LLP
201 North Tryon Street, Suite 3000
Charlotte, North Carolina 28202
Telephone: (704) 343.2162
Facsimile: (704) 444.8819
*Attorneys for Respondent U.S. Bank,
National Association, as trustee for the
Holders of The Banc of America Funding
Corporation, 2008-FT1 Trust, Mortgage
Pass-Through Certificates, Series 2008-FT1*

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with Rule 208(b), SCACR.



Trent M. Grissom

RECEIVED
MAY 08 2017
SC Court of Appeals

CERTIFICATE OF SERVICE

The undersigned certified that *Respondent U.S. Bank's Initial Brief* was served on the parties to this action by depositing a copy thereof in the United States Mail, first class, postage prepaid, addressed to:

Rhonda Meisner
P.O. Box 689
Blythewood, SC 29016
Pegasus333@icloud.com
Pro Se Appellant

Magalie A. Creech, Esquire
Finkel Law Firm LLC
P.O. Box 41489
Charleston, SC 29423
mcreech@finkellaw.com

Jake Barker
Graybill Vinzani and Lansche, LLC
225 Seven Farm Drive
Suite 107
Charleston, SC 29492
JBarker@glvlawfirm.com

Ed Grimsley
Grimsley Law Firm, LLC
P.O. Box 11682
Columbia, SC 29210
EGrimley@Grimsleylaw.com

Jonathan Milling
The Milling Law Firm
1614 Taylor Street
Columbia, SC 29201
JMM@Millinglaw.net

This the 8th day of May, 2017.



Trent M. Grissom

RECEIVED

MAY 08 2017

SC Court of Appeals