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SC Court of Appeals

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.

FINAL BRIEF OF APPELLANT

Rhonda Lewis Meisner, Appellant
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July 7, 2017

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ARGUMENT

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

II. THE TRIAL COURT ERRED IN DETERMINING THE COUNTER CLAIMS WERE PERMISSIVE.

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) **(R. p. 20.) (R. p. 170:23-25;171-172:1-15).** 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. **(R. p. 165:10-15) (R.p.88-91:17) (R. p. 184 EXHIBITS 1-4).** Bank of America also claimed ownership of a different note and mortgage that had been paid off years earlier, (HELOC) **(R. p. 91:18) (R.p.184 EXHIBITS, 3,4).**

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.187, 88) (R. p. 164:17-21.)**

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. (R.p.192 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. 20) (R. p. 171:5-11,17-25;172:1-15).** The Court denied all motions. **(R. p. 8, 12)** 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 **(R. p.171:14-26; 172:1-15).** 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.16 ¶ 15) (R. p. 176:10-18.)**

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. **(R. 171:20-24)** 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. **(R. p. 16 ¶15.)** The challenge to real party in interest and standing was subsequently determined by this Court as interlocutory, so the appeal was dismissed. **(R. p. 1.)**

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.pp.206-210)** 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. pp. 6-8.)** 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. pp. 213-214.)** 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.187, 88) (R. p. 164:17-21.) (R. 184 EHIBITIS 1-4).** 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.p.187, 88) (R. p. 164:17-21.) (R. p.164 EXHIBITS 1-4)**

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. 20.) (R. p. 170:23-25;171-172:1-15.) (R.p.16 ¶ 15.) (R. p.164 EXHIBITS 1-4.)** 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.p.16 ¶ 15) (R. p. 170:23-25;171-172:1-15.)**. 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. p. 20.) (R. p. 170:23-25;171-172:1-15.) (R.p.16 ¶ 15.)**

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. 20.) (R. p. 170:23-25;171-172:1-15.) (R.p.16 ¶ 15.)**. In addition to the assignment and notarization being defective, it was executed and notarized after the foreclosure action was filed. **(R.p.15.)**

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.16¶ 15.) (R. p. 170:23-25;171-172:1-15.)** 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. 170:23-25;171-172:1-15.)** 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. **(R. p. 179:2-8)**.

Bank of America and appellant Meisner executed the note and the mortgage in 2003 **(R. p. 91¶ 17.) (R. p. 164 EXHIBITS 3,4).** 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.113:11-25; 114-117; 120:17-25; 121:1-3) (R. p. 184: EXHIBITS 3,4)** 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. **(R. p. 120:17-25; 121:1-3.) (R. p. 184: EXHIBITS 3,4)**

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. p. 20) (R. p. 171:5-11,17-25;172:1-15) (R. p. 113:11-25; 114-117; 120:17-25;121:1-3).** 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. p. 120:17-25; 121:1-3; 123:9-26; 124:1-19.**) 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 **(R. p. 117:5-8)**

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.105:10-17.)** 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.p.214-5.)**

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.

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.

APPELLANT'S INTRODUCTION OF ISSUES ON APPEAL

As an initial matter, the appellant avers all issues raised in her appeal are properly before this Honorable Court of Appeals. First, while the issues of standing and real party in interest were determined to be interlocutory by this Honorable Court

of Appeals, this determination did not remove the fact the issues were properly raised and ruled on by the lower court. In fact, the Order, from this Honorable Court, specifically noted that the appeal was based on both the lower Court's denial of the dismissal of the complaint and the lower Court's denial of the S. C. R. Civ. P. Rule 59 (e) motion. **(R.p.1.)**

Second, the respondents did not make a motion or argument for the exclusion of the S.C.R. Civ. P. Rule 59 (e) from the trial Court or from this Honorable Court's consideration either during a post-hearing motion or during the pendency of the appeal or prior to the issuance of this Honorable Court's remittur.

Third, the South Carolina Supreme Court has previously held a **second** S.C. R. Civ. P. Rule 59-e motion that contains some of the same arguments as the first S.C. R. Civ. P. Rule 59-e motion does not toll the time for appeal. Coward Hund, 336 S.C. 1, 518 S.E.2d 56; Quality Trailer, 349 S.C. 216, 562 S.E.2d 615; and Collins Music, 353 S.C. 559, 579 S.E.2d 524. As such, the trial Court's denial of the first S.C. R. Civ. R. 59-e denial did not toll the time for appeal; therefore, to avoid losing the opportunity to appeal the issue, it was necessary to file the appeal prior to the Lower Court's ruling.

Finally, it is the "first amended complaint" that is the subject of this appeal.

APPELLANT'S POSITION OF STATEMENT OF THE CASE

A. Appellant's reply to "U.S. Bank Filed for Foreclosure because 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"), did not own the note or the mortgage at the time they filed the foreclosure action pursuant to their own court filings; therefore, they assumed an already defaulted loan and as such suffered no injury. **(R. p. 20) (R. p. 171:5-11,17-25;172:1-15) (R. p. 113:11-25; 114-117; 120:17-25;121:1-3).** Bank of America, N.A. ("Bank of America"), U.S. Bank's predecessor in title claims an ownership interest in the very note U.S. Bank seeks to foreclose. **(R p.16 ¶ 15.) (R. p. 170:23-25;171-172:1-15.) (R. p. 177:17-19)** U.S. Bank, by the facts alleged in the complaint, and argued in open court may be considered a third- party debt collector due to the fact they assumed the note and mortgage after the alleged default occurred with another company. **(R. p. 100:10-12) (R.p.112:23-25; 113-114:1-6.) (R. p. 184 EXHIBITS 1-4.)**

Meisner purportedly defaulted on a loan to their predecessor in title, Bank of America and not with any loan owned by U.S. Bank. **(R. p. 100:10-12.) (R. p. 184 EXHIBITS 3, 4)** Additionally, Meisner argues because the requirement to debit her bank account, as elected as a term in the note, carried the obligation to debit to the new owner of the note. **(R. p. 105:10-25;106-108.) (R.p.184 EXHIBIT 3,4)** U.S.

Bank was not a party to the contract between Bank of America and Appellant Meisner, therefore they assumed or purchased an already defaulted loan and a breached contract and never suffered any injury in fact. **(R. p. 100:10-12.) (R. p. 184 EXHIBITS 3, 4)** Additionally, Bank of America, claimed an interest in not only the note and mortgage initiated in 2005, as the respondent notes in its initial brief, **(Initial brief of Respondent p. 1 last line; p.2.1)**, but also claimed an interest in the specific note that is subject of this appeal. **(R. p. 89 ¶ 8; p. 90 ¶13-16 p. 91 ¶17,18, ii, iii, iv.)**

B. Appellant's Reply to "Meisner Files a Motion to Dismiss, Which the Trial Court Denies."

The Appellant's Initial Brief accurately identified the motions by which she sought relief. **(App. In. Br. P. 3:8-12)** This is because the scrivener's error in the lower court's written motion, was corrected in the hearing before the Court. **(R. p. 164:17-24)** The Court accepted the correction via acknowledgement. **(R. p. 164:22-24)**. The Respondent noted the scrivener's error in its initial brief; however, importantly, the respondent did not note the Appellant's correction of the errors in front of the Court. **(In. Br. of Resp. p. 2 n. 1). (R. p. 164:17-21)** The memorandum in support of the motion to dismiss also specifically addressed the fact that Bank of America claimed an interest in the note and mortgage and noted the fact the assignment that purportedly transferred the instrument was notarized the day before

in Nevada and California. **(R. p. 191:17-22.)** The memo in support of the motion to dismiss was served on the defendants and filed with the Court in support of the motion to dismiss prior to the June 10, 2014 hearing and not only notes the duplication of the cases but specifically notes that both Bank of America and U.S. Bank claim ownership of the note and mortgage. **(R. p. 192: 16-19.)**

The question of real party in interest and whether the plaintiff had standing was brought up in the Def's Memorandum in Support of the Motion to Dismiss and was filed and served on the plaintiff prior to the June 10, 2014 hearing and therefore was properly before the Court. **(R. p. 189,193)**. The arguments were reiterated before the Court in the hearing held on June 10, 2014. **(R.p.171:12-25).** It was specifically pointed out to the Court that the assignments were attached as exhibits to the memorandum in support of dismissal, which pursuant to the Court's order was filed prior to the June 10th hearing. **(R. p. 171: 12-25; p. 10: 1-15.) (R. p. 184 EXHIBITS 3,4)**

The appellant avers that pursuant to S.C.R. Civ. P. Rule 12 (b), "no defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or *motion*". (emphasis by Appellant). Here, the claims for dismissal were referenced in both the memorandum in support of the motion to dismiss and the oral argument before the Court, with a court reporter present; therefore, **all** the reasons for the motion to dismiss were properly before the Court.

C. Appellant's Reply to "The First Order of Reference is Entered but Subsequently Vacated."

Respondents assert the Order of Reference signed by the Honorable Jeanette McBride was done so inadvertently. Whether the respondents filed the motion to strike and for mandatory Order of Reference was intentional and a violation of the South Carolina Rules of Civil Procedure is a question of law, a determination in the affirmative would provide a basis for a jury demand via an abuse of the foreclosure process. The appellant avers because the respondent objected to the Master in Equity's vacatur of the referral and argued before the Honorable DeAndrea Benjamin that the Clerk is required to sign the referral based on Rule 53, the motion for referral was intentional. **(R. p. 110:19-25; p. 111:1-8)**. This is because the referral contained findings of fact and conclusions of law. This argument was made in the "first amended complaint", the memorandum in opposition of the motion to strike the jury demand, and in oral argument. **(R. pp. 49-52 ¶86-105.) (R.p.212-214)**

D. Appellant's Reply to "Meisner Files an Amended Answer and Counterclaims and U.S. Bank Obtains an Order of Mandatory Reference.

After a hearing before the Honorable Casey Manning, who granted appellant's motion to amend the counterclaims and the cross claims after the Master in Equity determined the submitted mandatory reference was improper. **(R.p.13).** The, "first amended complaint" which included the prayer for relief from breach of contract, a breach of contract accompanied by a fraudulent act and the abuse of process claims,

also contained a request for the Court to "determine a question in actual controversy between or among the parties as to their respective rights and obligations under a note AND mortgage pertaining to real property...and to the Appellant filed an amended answer and amended counterclaims and crossclaims.

Respondents characterize the amended answer and counterclaim by the appellant as solely equitable in nature, the appellant disagrees with this assertion. A review of the declaratory judgment request in this case indicates the relief requested includes, a determination of the rights and obligations of the parties under a contract, which is a legal determination. Importantly, the respondent is not a party to the contract the appellant requests the Court to interpret. **(R. p. 124)** which includes a request for declaratory judgment that "determines the real party in interest." **Resp. Ini. Br. P. 5:5-6.** (R.__).

The Honorable DeAndrea Benjamin determined that the counterclaims were permissive; however, if Bank of America was determined to be the breaching party based on the terms of the contract, foreclosure is not available to the breaching party as a remedy. **(R.p.125:7-14).** The "first amended complaint" plainly states that Appellant Meisner was not the breaching party and that the respondent's predecessor in title, Bank of America was the breaching party, which would preclude foreclosure. **(R. pp39, 40 ¶¶33-41.)**

REPLY TO THE RESPONDENT'S ARGUMENT

I. THE ISSUE OF WHETHER THE FORECLOSURE ACTION SHOULD BE DISMISSED DUE TO U.S. BANK'S ALLEGED LACK OF STANDING IS PRESERVED FOR REVIEW.

First, and most importantly, this Honorable Court dismissed the previous appeal based on the Denial of the Motion to Dismiss and the Denial of The S.C. R. Civ. P. Rule 59(e) for the sole reason that the appeal was interlocutory in nature and therefore, not immediately appealable. The ruling by this Honorable Court did not address the Court's claim of non-receipt of a copy of the filed S. C. Civ. P. Rule 59 (e) motion and the respondents did not challenge or correct the ruling either in post-trial motions, during the appeal process or in their initial brief. The respondents could have challenged the jurisdiction of the Court of Appeals in the previous dismissal; however, they did not do so and the remittur was issued. Therefore, it is the law of the case that the issues were raised and ruled on by the lower court.

This Court has also previously held if the questions on appeal affects a substantial right, the case is immediately appealable. Here, even though interlocutory issues are included with immediately appealable issues, for the sake of judicial economy, this Honorable Court should consider all the issues in the appeal.

For purposes of S.C. Code Ann.§14-3-330 an order affects a substantial right when it "(a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c)strikes out an answer or any part thereof of any pleading in any action [.]

This appeal asks this Honorable Court of Appeals to answer the question of whether the counter claims and cross claims are compulsory and entitle the appellant to a jury trial and is therefore is immediately appealable. Appellant avers the cross claims and counter claims are compulsory and therefore immediately appealable. If this Honorable Court of Appeals agrees that the respondent does not own the note and the mortgage, then the respondent lacks standing to pursue the action.

The Appellant avers because the Trial Court ruled on the Motion to Dismiss and the Motion to Alter and Amend, the issue of standing and real party in interest is preserved for this Honorable Court's review. The Order of Dismissal from the Court of Appeals did not make any determinations or rule that the lower Court's failure to receive a copy of the motion was jurisdictional in nature and the respondents did not challenge this ruling; therefore, the respondent waived the arguments, as the remittur was remitted. **(R. p. 1).**

The issue of Standing and Real Party in Interest was properly before the Court.

S.C. R. Civ. P. Rule 7 (b)(1) provides that an application to the court for an order shall be by motion which, *unless made during a hearing or trial in open court with a court reporter present*, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion. In this case, the Appellant requested the case be dismissed for multiple reasons by motion, by memorandum and in open court, *with a court reporter present.* The Circuit Court denied the dismissal of the complaint based on S. C. R. Civ. P. Rule 8; However, S.C.R. Civ. P. Rule 7(b) (1) indicated all the arguments made to the Court during the Motion to Dismiss hearing, outlined in the Memorandum in Support of the Motion to Dismiss, and argued in Oral Argument *with a court reporter present* were properly before the Court and therefore included in this ruling.

Because the issues of standing and real party in interest were raised to the Court and ruled on, they are preserved for review. Additionally, because this Court has previously ruled a second S.C.R. Civ. P. Rule 59 (e) does not toll the time for appeal and the mode of trial is a substantial right, the appellant was required to appeal or lose the opportunity to do so.

II. THE TRIAL COURT ERRED IN STRIKING MEISNER'S DEMAND FOR A JURY TRIAL.

The respondent claims the prayer for relief is only equitable in nature and this simply is not so. The broad relief requested by the declaratory judgment which includes:

- the request to declare U.S. Bank as a third- party debt collector pursuant to article 3 of the UCC.
- a finding that U.S. Bank as a third- party debt collector abused the foreclosure process and warrants actual and punitive damages.
- A finding that co-defendant slandered the title
- A finding that Bank of America's failure to remove liens associated with the 2005 mortgage violated S.C. Code Ann. §29-3-310.
- Liens associated with SCBT be removed from the lis pendens
- A determination that the counter claims and the cross claims warrant a jury trial and for transfer to the jury roster and for referral to ADR.
- And for an order of all other such relief as may be appropriate and available under the law…, for attorney fees or the commensurate amount of damages of time spent and punitive judgments against the plaintiff and the co-defendant.

The prayer for relief is sufficiently broad such that not only equitable remedy is demanded. Specifically, whether the terms of the contract require the bank to continue drafting the payments and if so, then the bank is the breaching party. **(R. p.**

123:3-25; 124-126). If the bank is determined to be the breaching party then whether attorney's fees and costs are available pursuant to the terms of the note agreement.

Here, the respondent has requested attorney's fees associated with the foreclosure action based on the contract between the predecessor in title, Bank of America, who the appellant alleges breached the contract by not debiting her payments as required by the note. The appellant is unaware of a statute that provides for attorney's fees in South Carolina absent a contract for mortgage foreclosure actions. Because the declaratory judgment action requests a determination of whether attorney's fees are available under a contract this is an action at law. DePass v. Piedmont Interstate Fair Ass'n, 217 S.C. 38, 59 S.E.2d 495 (1950). (action for collection of attorneys' fee charged pursuant to contract between attorney and client constitutes an action at law giving rise to a right to jury trial)

While the attorney's right to collect the attorney's, fees awarded based on the proceeds of the contract (such as in a foreclosure action) is one in equity; the question of whether the contract provides for a third party (U.S. Bank) to collect attorney's fees from a contract when the predecessor in title is alleged to have breached the contract is a question of law. This determination rests solely on the determination that an amount owed on the note exceeds the amount owed by the breaching party to the non- breaching party. Just as the question of whether a party that breaches a note agreement can invoke the equitable right of foreclosure is a legal question. In

foreclosure actions, the amount owed is required to be determined prior to the foreclosure.

A. The Appellant has a Right to a Jury Trial when counterclaims for Declaratory Judgment affect the right of the Plaintiff to Foreclose.

In N.C. Fed. Sav. & Loan Assn, the Supreme Court of South Carolina held that a breach of an oral agreement purporting to modify a note that the bank was foreclosing on was logically related to the enforceability of the note and was thus compulsory. N.C. Fed. Sav. & Loan Assn, 298 S.C. 518–19, 381 S.E.2d at 905. Additionally, in C & S Real Estate Servs., Inc. v. Massengale, the Court found "Although the counterclaim includes a prayer for actual and punitive damages, the only actual damages alleged are those of Father in incurring attorney's fees and expenses to defend the action. The Whites failed to allege any damages they were seeking. Although Father may have been entitled to a jury trial, he failed to appeal the referee's order and he is not a party to this appeal." C & S Real Estate Servs., Inc. v. Massengale, 290 S.C. 299, 302, 350 S.E.2d 191, 193 (1986). In C&S, the Court embraced actual expenses such as attorney's fees, costs and damage to property via the lis pendens entitled parties to a jury trial. Here, the appellant requested such fees in addition to punitive damages and equitable remedies.

Most importantly in the declaratory judgment action is the request to determine that U.S. Bank is a third-party debt collector requiring an interpretation of the UCC. Taken the contract interpretation, cannot simply be categorized as equitable. Particularly when equitable foreclosure requires a determination that a certain amount is owed to the plaintiff more than the amount owed by the plaintiff prior to judgment and sale.

B. The Appellant has a Right to a Jury Trial when the abuse of process claim implicates the due process clause and claims special damages as part of the prayer for relief.

The appellant has alleged that based on the filings by the respondent, Bank of America appears to be the real party in interest because the assignment to U.S. Bank is defective. The appellant has claimed actual, special, and punitive damages against the respondent. **(R. pp. 35-59)** As such the claim is compulsory pursuant to C&S because a mortgage foreclosure lawsuit is the process to enforce the note and the mortgage and if this process results in tort damages more than the amounts owed, then there is no basis for the equitable remedy of foreclosure. This argument was made in the initial brief. Additionally, the initial brief argued because the actions of the clerk of court violated the law, the appellant should be entitled to a jury trial. The determination of whether the respondent is a third -party debt collector means the litigation conduct would be held against the respondent and was also argued in the initial brief and specifically categorized the actions of the respondent as a tort and

not an equitable injury. **(R. pp. 35-59).** The argument that because the "abuse of process" tort is capable of replication and creates a danger was also presented to the Court and argued on appeal. Additionally, This Court can interpret novel arguments without any deference to the Court below.

C. The appellant has a right to a trial by jury when the damages by the cross claimant are compulsory

As an initial matter, the respondent suggested no argument was made in the initial brief that the appellant was entitled to a jury trial. However, a review of appellant's initial brief plainly states the appellant is entitled to a jury trial via statute S.C. Code Ann. §29-3-310 and §29-3-320. Additionally, the appellant specifically alleges Bank of America claimed an ownership interest in the note and mortgage erroneously. **(In. Br. Of App.)** The statement that the appellant was entitled to a jury trial also noted the specific statute and the mechanism by which to make the claim.

Generally cross claims are permissive; however, in this case throughout the appeal, the appellant argued the parties are misaligned due to the defective assignment from Bank of America to U.S. Bank a central and critical issue on appeal is who owned the note when and whether their ownership in the note and mortgage and their actions in these proceedings provides a basis for remedy or a basis for punishment.

CONCLUSION

As such, the appellant avers all the counter claims and cross claims are compulsory and legal at this juncture until a determination of when the true breach of the contract occurred and by whom due to the underlying question of parties and how they should be aligned. For the reasons and the authorities stated above and in the initial brief, this Court should dismiss the claims against the appellant for lack of standing and remand the actions against the respondent and counter claimant Bank of America for a jury trial.

Respectfully Submitted,

July 7, 2017

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The appellant certifies this final brief complies with Rule211(b) SCACR.

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