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JAN 02 2018

SC Court of Appeals

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF CHARLESTON )

IN THE COURT OF COMMON PLEAS  
NINTH JUDICIAL CIRCUIT

The Bank of New York Mellon, f/k/a )  
The Bank of New York, as successor-in- )  
interest to JP Morgan Chase Bank, N.A., )  
as Trustee for Bear Stearns Asset )  
Backed Securities Trust 2006-SD3, )  
Asset Backed Certificates, Series 2006- )  
SD3, )

Plaintiff, )

vs. )

Carl D. Hamm; Jan H. Jernigan n/k/a Jan )  
Hamm; Mortgage Electronic )  
Registration Systems, Inc., as nominee )  
for Countrywide Home Loans, Inc.; )  
United States of America, acting by and )  
through its agency the Internal Revenue )  
Service; and Midland Funding, LLC., )

Defendant. )

Civil Action No. 2012-CP-10-7008

**Order Granting Motion to Strike Jury**  
**Demand and for Bench Trial and for**  
**Reference to the Master-in-Equity**

BY

JULIE J. ARNISTFONG  
CLERK OF COURT

2017 OCT 20 PM 3:28

FILED

**BEFORE THE COURT** is Plaintiff The Bank of New York Mellon, f/k/a The Bank of New York, as successor-in-interest to JP Morgan Chase Bank, N.A., as Trustee for Bear Stearns Asset Backed Securities Trust 2006-SD3, Asset Backed Certificates, Series 2006-SD3's ("Plaintiff") Motion to Strike the Jury Demand and for Entry of an Order of Reference Granting Plaintiff's Demand for a Bench Trial before the Master-In-Equity. A hearing was held on this matter on August 28, 2017, at which Brian M. Barnwell, Esq. appeared on behalf of Plaintiff and Mary L. Arnold, Esq. appeared on behalf of Defendants Carl D. Hamm and Jan H. Jernigan n/k/a

Jan Hamm (“Defendants”).<sup>1</sup> After consideration of the pleadings, the parties’ written submissions, and oral argument of counsel, the Court finds as follows:

**FINDINGS OF FACT**

1. Plaintiff commenced this foreclosure action by way of a complaint filed on October 29, 2012.

2. Plaintiff’s action is based on Defendants’ alleged default of a \$263,500 promissory note signed by Mr. Hamm on September 19, 2005, and secured by a mortgage signed on the same day by both Defendants.

3. Defendants filed an Answer and Counterclaim on October 16, 2013.<sup>2</sup>

4. Defendants allege that in 2009 Plaintiff and/or its servicer engaged in a “never ending cycle” of loss mitigation reviews for the purpose of charging additional interest and fees. Despite these numerous reviews, Plaintiff did not modify Defendants’ loan.

5. Defendants also allege that the note and mortgage were not properly assigned to Plaintiff and, therefore, Plaintiff lacked standing to enforce them.

6. Based on these allegations Defendants assert counterclaims for accounting, breach of contract of good faith and fair dealing, unjust enrichment, negligent misrepresentation, violation of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, *et seq.* (“SCUTPA”), declaratory relief, and abuse of legal process. Defendants’ counterclaims seek equitable relief, monetary damages, and attorneys’ fees.

7. Defendants demanded a jury trial on their counterclaims.

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<sup>1</sup> Plaintiff’s motion and a notice of the hearing were served on all named defendants that have appeared in this action. Mr. and Mrs. Hamm, through their counsel, were the only defendants to attend the hearing, presumably because they are the only defendants to have demanded a jury trial.

<sup>2</sup> Prior to filing their Answer and Counterclaim, Defendants filed a motion to dismiss on January 1, 2013, arguing that Plaintiff lacked standing to enforce the note and mortgage. After converting the motion to dismiss to a motion for summary judgment, the Court denied Defendants’ motion on September 30, 2013.

8. After Defendants filed their counterclaims, the parties engaged in a lengthy loss mitigation review, which was completed on or about November 9, 2016.

9. On June 5, 2017, Plaintiff filed the instant motion.

### ANALYSIS AND CONCLUSIONS

10. “Generally, the relevant question in determining the right to a trial by jury is whether an action is legal or equitable; there is no right to a trial by jury for equitable actions.” *Lester v. Dawson*, 327 S.C. 263, 267, 491 S.E.2d 240, 242 (1997). “The character of an action as legal or equitable depends on the relief sought.” *Cedar Cove Homeowners Ass’n v. DiPietro*, 368 S.C. 254, 258, 628 S.E.2d 284, 286 (Ct. App. 2006). “[A]n action in law may be transformed to one in equity because equitable relief is sought.” *Ins. Fin. Servs. Inc. v. S.C. Ins. Co.*, 271 S.C. 289, 293, 247 S.E.2d 325, 318 (1978).

11. “[T]here is no right to trial by jury for equitable actions.” *Mortgage Electronic Systems, Inc. v. White*, 384 S.C. 606, 682 S.E.2d 498 (Ct. App. 2009) (citing *Lester v. Dawson*, 327 S.C. 263, 267, 491 S.E.2d 240, 241 (1997)). “Because a foreclosure action is one sounding in equity, a party is not entitled, as a matter of right, to a jury trial.” *Carolina First Bank v. BADD, L.L.C.*, 414 S.C. 289, 293, 778 S.E.2d 106, 108 (2015).

12. A borrower that asserts a counterclaim to an equitable foreclosure action waives all right to a jury trial unless the counterclaim is both “legal and compulsory.” *Id.* at 295, 778 S.E.2d at 109 (citing Rule 13(a), SCRPC).

13. “A counterclaim is compulsory if it arises out of the same transaction or occurrence as the party’s claim.” *Id.* In a foreclosure action, a counterclaim arises out of the same transaction or occurrence if there is a “logical relationship” between the counterclaim and the “execution or enforceability” of the note and mortgage. *Id.*

**Defendants' equitable counterclaims**

14. The South Carolina Supreme Court has held that counterclaims challenging the standing of a plaintiff to foreclose or the amount that is owed on a debt are part of the equitable foreclosure action and the defendant has no right to a jury trial on such claims. *Collier v. Green*, 244 S.C. 367, 371-72, 137 S.E.2d 277, 280 (1964) (holding no right to jury trial where defendant's counterclaims and defenses alleged that note was not assigned to the plaintiff and challenged the amount due on the note).

15. Defendants' breach of contract, abuse of process, and declaratory judgment counterclaims are based on the allegation that Plaintiff lacks standing to foreclose because the note and mortgage were not properly assigned to it after the loan's origination.

16. Under *Collier*, these claims are equitable and do not entitle Defendants to a jury trial. *Collier*, 244 S.C. at 371-72, 137 S.E.2d at 280; *see also MERS v. White*, 384 S.C. 606, 614, 682, S.E.2d 498, 502 (Ct. App. 2009) (holding that declaratory judgment counterclaim is equitable where it seeks to have a mortgage declared void).

17. Defendants' accounting and unjust enrichment claim challenge the manner in which Plaintiff applied Defendants' payments to the loan.

18. These claims are also equitable and do not entitle Defendants to a jury trial. *Collier*, 244 S.C. at 371-72, 137 S.E.2d at 280; *see also Historic Charleston Holdings, LLC v. Mallon*, 381 S.C. 417, 427, 673 S.E.2d 448, 453 (2009) (accounting claims are equitable); *Regions Bank v. Wingard Prop., Inc.*, 394 S.C. 241, 256-57, 715 S.E.2d 348, 356 (Ct. App. 2011) (unjust enrichment claims are equitable).

19. Additionally, Defendants' challenges to Plaintiff's standing and handling of loan payments do not challenge the execution or enforceability of the note and mortgage. Therefore,

even if these claims were legal, they would be permissive counterclaims that do not entitle Defendants to a jury trial. *Carolina First Bank*, 414 S.C. at 295, 778 S.E.2d at 109.

**Defendants' permissive legal counterclaims**

20. When a counterclaim asserted in a foreclosure action arises from a separate transaction or occurrence taking place after the loan's origination, there is not a logical relationship between that counterclaim and the execution or enforceability of the note and mortgage. Thus, such claims are permissive and do not give rise to the right for a jury trial. *Carolina First Bank*, 414 S.C. at 296, 778 S.E.2d at 110 (holding a breach of contract counterclaim did not arise out of the same transaction or occurrence as a foreclosure where it was based on the allegation that the bank conspired to prevent the borrower from obtaining financing two years after the subject loan originated).

21. Defendants' breach of contract, SCUTPA, and negligent misrepresentation counterclaims arise from the allegation that in 2009, four years after the loan's origination, Plaintiff started a lengthy loss mitigation review process for the purpose of charging additional fees and interest. Despite numerous reviews, Plaintiff did not give Defendants a loan modification.

22. Because these counterclaims arose years after the loan's origination and do not challenge the execution or enforceability of the note and mortgage, they are permissive and do not give Defendant the right to a jury trial. *Carolina First Bank*, 414 S.C. at 296, 778 S.E.2d at 110; see also *Advance Int'l, Inc. v. N.C. Nat'l Bank of S.C.*, 316 S.C. 266, 270-71, 449 S.E.2d 580, 582-83 (Ct. App. 1994), *aff'd in part, vacated in part on other grounds*, 320 S.C. 532, 466 S.E.2d 367 (1996) (holding claims seeking damages for fraud, negligence, and unfair trade practices would not be compulsory counterclaims in equitable foreclosure action because they did not affect enforceability of the note and mortgage being foreclosed).

**Defendants' affirmative defenses**

23. Defendants also assert a number of affirmative defenses. These defense arise from the same allegations discussed above and, therefore do not entitle Defendants to a jury trial.

24. Additionally, a party cannot demand a jury trial based on defenses to an equitable cause of action. *See Farley v. Matthews*, 168 S.C. 294, 167 S.E. 502, 505 (1933).

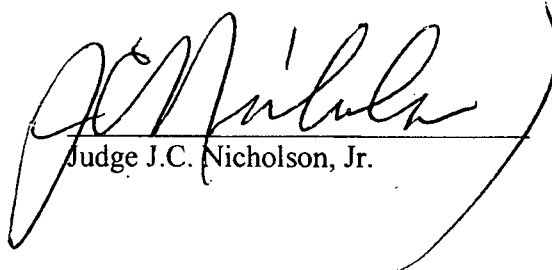
**NOW, THEREFORE**, based on the foregoing, the Court **GRANTS** Plaintiff's Motion, **STRIKES** Defendants' jury demand, and **ORDERS** that this case shall be decided by a bench trial.

**IT IS FURTHERER ORDERED** that this case is hereby referred to the Honorable Mikell R. Scarborough, Master in Equity for Charleston County, South Carolina, who shall exercise all the power set forth under Rule 53(c), SCRPC, including, but not limited to, directing entry of final judgment in this matter. Pursuant to Rule 53(e), any appeal from the final judgment entered by the Master in Equity shall be to the Supreme Court of South Carolina or the Court of Appeals as provided by the South Carolina Appellate Court Rules. If Defendants object to referring this case to the Master in Equity, they must file their objection within ten (10) days of the entry of this Order or it shall be deemed waived.

IT IS SO ORDERED.

October 20, 2017

Charleston, South Carolina

  
Judge J.C. Nicholson, Jr.

**RECEIVED**  
JAN 02 2018  
SC Court of Appeals

**EXHIBIT B**

STATE OF SOUTH CAROLINA  
 COUNTY OF CHARLESTON  
 IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2012-CP-10-7008

RECEIVED  
 JAN 02 2018  
 SC Court of Appeals

The Bank of New York Mellon, et al.  
 PLAINTIFF(S)

Carl D. Hamm, et al.  
 DEFENDANT(S)

Submitted by:	Attorney for : <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant
	or <input type="checkbox"/> Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.  See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):**  Rule 12(b), SCRPC;  Rule 41(a), SCRPC (Vol. Nonsuit);  Rule 43(k), SCRPC (Settled);  Other
- ACTION STRICKEN (CHECK REASON):**  Rule 40(j), SCRPC;  Bankruptcy  Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  Other
- STAYED DUE TO BANKRUPTCY**
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**  
 Affirmed;  Reversed;  Remanded;  Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:  See attached order (formal order to follow)  Statement of Judgment by the Court: Defendants' Motion for Reconsideration filed on October 30, 2017, is respectfully Denied without a rehearing.

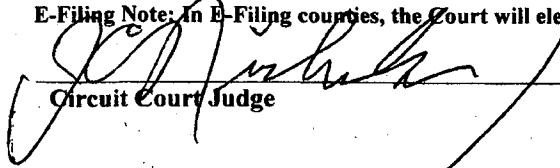
ORDER INFORMATION

This order  ends  does not end the case.  
 Additional Information for the Clerk : \_\_\_\_\_

INFORMATION FOR THE JUDGMENT INDEX		
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.		
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A		
If applicable, describe the property, including tax map information and address, referenced in the order: N/A		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

  
 Circuit Court Judge

2117  
 Judge Code

11/30/2017  
 Date