THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

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SC Court of Appeals

Lisa Lee Smith, Special Referee

Appellate Case No. 2017-002608

Federal National Mortgage Association ("Fannie Mae"),
a corporation organized and existing under
the laws of the United States of America, — Respondent,

v.

D. Randolph Whitt and Pearce W. Fleming, — Defendants,

Of whom D. Randolph Whitt is the, — Appellant.

INITIAL BRIEF OF RESPONDENT

Magalie A. Creech (S.C. Bar 78855)
FINKEL LAW FIRM LLC
Post Office Box 41489
Charleston, South Carolina 29423
Telephone: (843) 577-5460
Facsimile: (866) 800-7954
mcreech@finkellaw.com
Attorneys for Respondent

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STATEMENT OF ISSUES ON APPEAL

I. Whether the Special Referee erred by finding that Appellant is not entitled to a jury trial on his Counterclaims.

II. Whether the Order Denying Appellant's Motion to Transfer this action to the jury roster is immediately appealable.

III. Whether the Special Referee erred by finding Appellant's jury demand was stricken by a prior unappealed final order.

STATEMENT OF THE CASE

This is an appeal from an order denying Appellant's motion to transfer this foreclosure action to the jury trial roster of the Lexington County Court of Common Pleas over two years after it was referred in its entirety to a Special Referee. Appellant disputes that the corresponding order, which struck his demand for a jury trial, constitutes a final appealable order. Appellant litigated both the foreclosure and his counterclaims before the Special Referee in the two year period following the reference, during which an order granting Respondent partial summary judgment on its claim for foreclosure was entered. Appellant now seeks a determination that he is entitled to a jury trial on his counterclaims, and that the Special Referee erred in denying his motion to transfer the action the Circuit Court for a jury trial.

Respondent commenced a foreclosure action against Appellant by the filing of a Lis Pendens, Summons, Complaint, and Notice of Foreclosure Intervention on August 1, 2014. (Initial Pleadings). Respondent's Complaint alleges that Appellant and Robin F. Whitt executed a mortgage on June 26, 1998, which constitutes a purchase money mortgage against the subject property (Mortgage). (Compl. ¶ 6; ¶ 8). The Complaint further alleges the Mortgage secures a promissory note from Robin F. Whitt (Borrower) in the amount of $120,275.00 (Note), and that the payments due and owing under the Note and Mortgage are in default since November 1, 2013. (Compl. ¶ 5; ¶ 15). A Denial of Foreclosure Intervention pursuant to the 2011-05-02-01

Administrative Order of the Supreme Court was filed on January 26, 2015, based upon the Borrower's default on a trial payment plan. (Denial FCI). A corresponding Certification of Compliance with the 2011-05-02-01 Administrative Order was filed on March 2, 2015. (Certification of Compliance). Appellant did not file any objection to the Certification of Compliance.

In the interim, Appellant served an Answer demanding a jury trial on February 2, 2015, which asserted unclean hands and failure to state a claim as defenses. (Answer). On March 27, 2015, Appellant served an Amended Answer and Counterclaim demanding a jury trial.[1] (Amended Answer). Appellant's Amended Answer admits Appellant's execution of the Mortgage, and asserts Counterclaims styled as "breach of contract- duty of good faith and fair dealing" and "dual tracking/CFPB Regs." (Amended Answer ¶¶ 9-15). Respondent filed a Reply on April 6, 2015 (Reply), and moved to strike Appellant's demand for a jury trial and for mandatory reference to the Master in Equity (Mtn. Strike).[2] The case was called to the non-jury roster for the Lexington County Court of Common Pleas on June 5, 2015, the Honorable William P. Keesley presiding, at which Appellant failed to appear. (See 2015 Order to Strike and Refer). An Order Striking Appellant's Jury Demand and for Mandatory Order of Reference to Lisa L. Smith as Special Referee (2015 Order to Strike and Refer) was issued by Judge William P. Keesley on June 11, 2015. (2015 Order to Strike and Refer). Appellant was served with the filed 2015 Order to Strike and Refer on August 20, 2015. (Certificate of Service). Appellant did not file a motion under Rule 59, SCRCP or appeal the 2015 Order to Strike and Refer.

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[1] It appears neither Appellant's Answer nor Appellant's Amended Answer and Counterclaim was filed with the court based upon the public index.

[2] By Order entered April 17, 2015, the Honorable James O. Spence, Master in Equity, recused himself from hearing this matter due to a conflict.

Thereafter, a Summary Judgment Motion[3] filed by Respondent was heard by the Special Referee and granted, resulting in a Judgment and Order of Foreclosure and Sale entered on May 6, 2016. (Judgment). After Appellant sought and obtained relief from the Judgment of Foreclosure under Rules 59 and 60, SCRCP (Order to Vacate), Respondent filed a second Motion for Summary Judgment which was heard by the Special Referee on November 16, 2016 (Mtn. Summary Judgment). Appellant appeared at the hearing and offered an Affidavit and Memorandum in opposition to the Motion. (Memo. & Aff. in Opp.) After the Special Referee held the record open for additional submissions by the parties, an Order Granting Summary Judgment in Part was entered on April 10, 2017 (2017 Order Granting Partial Summary Judgment). (Order Partial Summary Judgment). The Special Referee granted summary judgment as to liability on the foreclosure and damages in the amount of the unpaid principal balance under the Note and Mortgage and the interest accruing thereon. (Order Partial Summary Judgment ¶¶ 1-13). Summary judgment was denied as to the debt amounts over the unpaid principal balance and interest, and on Appellant's Counterclaims. (Order Partial Summary Judgment ¶ 13). Appellant did not file a motion under Rule 59, SCRCP or appeal the 2017 Order Granting Partial Summary Judgment.

On August 8, 2017, the Special Referee set the remaining issues for a merits hearing to be held on September 22, 2017. (SR Ltr. dated August 8, 2017). Appellant then filed a Motion to Transfer the action to the jury roster on September 6, 2017. (Mtn. Transfer). Respondent filed a Response to the Motion to Transfer on September 14, 2017, to which Appellant filed a Reply on September 15, 2017. The Motion to Transfer was heard by the Special Referee on September 22, 2017, at which all parties were present. (See 2017 Order). By Order entered November 27,

[3] Respondent's Motion was based, in part, upon Appellant's failure to answer Requests for Admission pursuant to Rule 36(a), SCRCP. Appellant did not serve any responses to Respondent's discovery requests.

2017, the Motion to Transfer was denied (2017 Order Denying Motion to Transfer or 2017 Order). (2017 Order).

Appellant served a Notice of Appeal of the 2017 Order Denying Motion to Transfer on December 21, 2017. (Not. Appeal).

STANDARD OF REVIEW

"An appellate court may determine the question of appealability of a decision from a lower court as a matter of law." *See* S.C. Code Ann. § 14-3-330 (1976 & Supp. 2009) (creating appellate jurisdiction in law cases); S.C. Code Ann. § 14-8-200(a) (Supp. 2009) (setting forth the appellate jurisdiction of the court of appeals); *City of Newberry v. Newberry Elec. Coop., Inc.*, 387 S.C. 254, 256, 692 S.E.2d 510, 512 (2010) ("Statutory interpretation is a question of law."). "An order denying a party a jury trial is not immediately appealable unless it deprives him of a mode of trial to which he is entitled as a matter of right." *C & S Real Estate Services, Inc. v. Massengale*, 290 S.C. 299, 350 S.E.2d 191 (1986).

"A mortgage foreclosure is an action in equity." *Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 248, 489 S.E.2d 472, 475 (1997). "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." *Wachovia Bank, Nat'l Ass'n v. Blackburn v. Blackburn*, 407 S.C. 321, 328, 755 S.E.2d 437, 441 (2014). However, "[w]hether 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). "Appellate courts may decide questions of law with no particular deference to the circuit court's findings." *Id.* at 15, 690 S.E.2d at 772-73. "Findings by a master-in-equity with which the circuit court concurs will not be disturbed on appeal unless without evidentiary support." *Edwards v. Timmons*, 297 S.C. 314, 315, 377 S.E.2d 97, 97 (*citing Townes Assoc., Ltd. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976)).

ARGUMENT

I. Appellant is not entitled to a jury trial on his Counterclaims because Appellant's Counterclaims are permissive and Appellant waived any right to a jury by implication.

"Generally, the relevant question in determining the right to trial by jury is whether an action is legal or equitable. . . " *Lester v. Dawson*, 327 S.C. 263, 267, 491 S.E.2d 240, 242 (1997). Because a foreclosure action is one sounding in equity, a party is not entitled, as a matter of right, to a jury trial. *Wachovia Bank, Nat'l Ass'n v. Blackburn*, 407 S.C. 321, 328, 755 S.E.2d 437, 441 (2014). A party asserting a legal counterclaim in an equitable foreclosure action is entitled to a jury trial only "if the counterclaims are legal and compulsory." *Carolina First Bank v. BADD, L.L.C.*, 414 S.C. 289, 295, 778 S.E.2d 106, 109 (2015). "A counterclaim is compulsory if it arises out of the same transaction or occurrence as the party's claim." *Id.* (citing Rule 13(a), SCRCP). If a complaint is equitable and a counterclaim is legal and permissive, the defendant waives his right to a jury trial. *C & S Real Estate Servs., Inc. v. Massengale*, 290 S.C. 299, 301-02, 350 S.E.2d 191, 193 (1986).

Moreover, in addition to relinquishing a right to a jury trial by permissive counterclaim, a party can also waive their right to a jury trial by implication. "It is case law in our State that by agreeing to a reference of the issues, a party thereby waives any right to a trial by jury." *Ervin Co. v. R.R. March, Inc.*, 274 S.C. 532, 534, 265 S.E.2d 520, 521 (1980) (holding appellants effectively waived their right to a trial by jury by moving for change of venue after the case was transferred to nonjury roster instead of appealing).

Here, Judge Keesley correctly found in the 2015 Order to Strike and Refer, Appellant waived his right to a jury trial by asserting permissive legal counterclaims in response to Respondent's equitable foreclosure action. The factual allegations upon which Appellant's

Counterclaims for "breach of contract- duty of good faith and fair dealing" and "dual tracking/CFPB Regs." are exclusively centered upon conduct which Appellant alleges occurred after the admitted default in payments under the Note and Mortgage. Appellant seeks damages, which is all to which he would be entitled under the law. However, neither counterclaim, if successful, could preclude enforcement of the Note and Mortgage. Further, as is addressed in Section III below, the Note and Mortgage have already been enforced in an unappealed summary judgment order dated April 10, 2017. As such, Appellant's Counterclaims bear no logical relationship to Respondent's action for foreclosure and are permissive, and thus preclude Appellant from a jury trial.

Assuming, *arguendo*, that Appellant's counterclaims were compulsory, he waived this right to a jury trial by consenting to the Special Referee's adjudication of the summary judgment motion on the foreclosure and counterclaims, failing to object to same, and failing to appeal the subsequent grant of partial summary judgment on liability and damages on the foreclosure. Additionally, by appearing and litigating the merits of the Counterclaims for over two years following the reference, Appellant consented to having those issues heard and adjudicated by a Special Referee and thus waived any right to a jury trial by implication.

A. The Special Referee correctly held that the Appellant's Counterclaims are permissive and bear no logical relationship for the foreclosure.

Appellant argues his counterclaims are compulsory and legal. To analyze the merits of the Appellant's contention, we must determine if Appellant's counterclaim for breach of the implied covenant of good faith and fair dealing, and "dual tracking" were: (1) compulsory or permissive, and (2) legal or equitable in nature. A counterclaim is compulsory "if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim." Rule 13(a), SCRCP. Both claims seek only "damages" and "statutory damages as found appropriate

by the court." "In a foreclosure action, a counterclaim arises out of the same transaction or occurrence and is thus compulsory, when there is a 'logical relationship' between the counterclaim and the enforceability of the guaranty agreement." *BADD, L.L.C.*, 414 S.C. at 295, 778 S.E.2d at 109. As the court stated in *C & S Real Estate*, when a complaint is equitable, such as a foreclosure action, and the counterclaims are legal and permissive, the defendant waives their right to a jury trial. *C & S Real Estate Servs., Inc.*, 290 S.C. at 301-02, 350 S.E.2d at 193.

The implied covenant of good faith and fair dealing "exists in every contract". *Williams v. Riedman*, 339 S.C. 251, 267, 529 S.E.2d 28, 36 (Ct. App. 2000). Furthermore, the implied covenant of good faith and fair dealing is not an independent cause of action separate from a claim for breach of contract. *RoTec Servs., Inc. v. Encompass Servs., Inc.*, 359 S.C. 467, 473, 597 S.E.2d 881, 884 (Ct. App. 2004). In general, in a breach of contract action, the plaintiff may recover any damages that flow from the breach of the contract. *Hyload, Inc. v. Pre-Engineered Products, Inc.*, 308 S.C. 277, 417 S.E.2d 622 (Ct. App. 1992). Thus, a claimant may recover damages for a claim of a breach of the implied covenant of good faith and fair dealing the same way they would for a general breach of contract action. *RoTec Servs., Inc.*, 359 S.C. at 473, 597 S.E.2d at 884.

According to the Consumer Financial Protection Bureau ("CFPB"), dual tracking is where a servicer moves forward with foreclosure proceedings while simultaneously working with the borrower to avoid foreclosure. *See* Press Release, Consumer Financial Protection Bureau, CFPB Rules Establish Strong Protections for Homeowners Facing Foreclosure (Jan. 17, 2013), *available at* http://www.consumerfinance.gov/newsroom/consumer-financial-protection-bureau-rules-establish-strong-protections-for-homeowners-facing-foreclosure/. That regulation was enacted by the CFPB at 12 C.F.R. § 1024.41(f) which, among other things, prohibits a

servicer from beginning a foreclosure proceeding if a borrower has submitted a complete loss mitigation application within 120 days of delinquency subject to certain exceptions. 12 C.F.R. § 1024.41(a) allows a borrower to enforce the provisions of that section, including § 1024.41(f)'s prohibition on dual tracking, under section 6(f) of the Real Estate Settlement Procedure Act ("RESPA"), 12 U.S.C. § 2605(f), which includes a private right of action for damages. *See Houle v. Green Tree Servicing*, No. 14-cv-14654, 2015 WL 1867526, at *3 (E.D. Mich. Apr. 23, 2015) ("Borrowers have a private right of action against lenders who evaluate a loss mitigation application while at the same time pursuing foreclosure."); *see also Kilgore v. Ocwen Loan Servicing*, LLC, No. 13–cv–5473, 2015 WL 698108, at *9 (E.D.N.Y. Mar. 6, 2015) (noting that the private right of action is available for violations of 12 C.F.R. § 1024.41(c)).

Under RESPA, only a borrower may bring a claim, and even though RESPA does not define borrower, courts have consistently held that "a borrower is someone who either signed the note or who is otherwise obligated under the mortgage." *See Ocampo v. Carrington Mortgage Services*, 288 F. Supp. 3d 1327 (S.D. Fla. 2017) (holding plaintiff lacked standing because he was no longer a borrower when his debt was discharged in bankruptcy). Here, Appellant is concededly not a borrower under RESPA, and therefore, does not have standing to sustain a claim under RESPA. He admittedly did not sign the Note. However, even assuming Appellant is a borrower under RESPA, both the alleged breach of the implied covenant of good faith and fair dealing, as well as the "dual tracking" counterclaims, only can afford the Appellant with damages. These are legal remedies, as well as permissive counterclaims, because they do not have any logical relation to the foreclosure action.

In *Mortgage Electronic Systems Inc. v. White*, this Court needed to determine whether the defendants were entitled to a jury trial on their counterclaim. 384 S.C. 606, 614, 682 S.E.2d 498,

502 (Ct. App. 2009). This Court analyzed whether a counterclaim for fraud was permissive or compulsory, and, whether it was legal or equitable. *Id.* First, the counterclaim was compulsory because the fraud that was alleged arose out of the same mortgage transaction as MERS' claim. Next, the Court had to determine whether the counterclaim was legal or equitable. *Id.* The Court stated a "cause of action for fraud may be at law or in equity, depending on the remedy sought". *Id.* The defendants' counterclaim was found to be equitable because their primary relief sought was for rescission, rather than damages. *Id.* (citing *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 95, 594 S.E.2d 485, 494 (Ct. App. 2004)) (Rescission is an equitable remedy that attempts to undo a contract from the beginning as if the contract had never existed). Therefore, because defendants were only seeking equitable relief, they were not entitled to a jury trial. *Id.*

Moreover, in *BADD*, the Supreme Court held a guarantor waived his right to a jury trial on counterclaims for civil conspiracy and breach of contract asserted in an action to foreclose two mortgages for which the guarantor had executed a personal guaranty to repay the underling debt. 414 S.C. at 291, 778 S.E.2d at 107. The Supreme Court determined guarantor had waived his right to a jury trial because his counterclaims were permissive. *Id.* The Court held the execution of the guaranty agreements was the "transaction or occurrence" and guarantor's "civil conspiracy counterclaim [did] not arise out of that transaction or occurrence because it [bore] no logical relationship to either the execution or enforceability of the guaranty agreements." *Id.* Specifically, the alleged conspiracy took place two years after guarantor executed the guaranty and, in effect, the counterclaim "presume[d] the enforceability of the guaranty agreements because the allegations, if true, would not render the guarantees unenforceable." *Id.* at 295–96, 778 S.E.2d at 109. Likewise, the Court held the breach of contract counterclaim was permissive

because it depended on the alleged conspiracy "that took place, if at all, two years after the guarantees had been executed." *Id.* at 296, 778 S.E.2d at 110.

Conversely, this Court has determined a mortgagor's counterclaim for violation of the S.C. Unfair Trade Practices Act was compulsory, where the mortgagor's allegations that the bank "engaged in a pattern of reneging upon promises to modify or otherwise restructure loans, including, but [not] limited to, the [mortgagor's] loan" could, if true, affect the loan's enforceability. *See S.C. Community Bank v. Salon Proz, LLC*, 420 S.C. 89, 97, 800 S.E.2d 499 (Ct. App. 2017); *see also N.C. Fed. Sav. & Loan Ass'n v. DAV Corp.*, 298 S.C. 514, 518-19, 381 S.E.2d 903, 904-05 (1989) (holding a counterclaim alleging violation of the UTPA by breach of an oral agreement was both legal and compulsory).

Here, Appellant's Answer and Counterclaim makes no factual allegations whatsoever which, if true, could preclude the enforcement of the Note (which he admittedly did not execute) and the Mortgage (which he admittedly did execute). Appellant's sole factual allegations are that:

> 1) Respondent failed to handle information provided by Appellant and failed to give any meaningful review to such material.
>
> 2) Respondent has asserted Appellant defaulted on a trial payment plan, even though no offer of a trial payment plan was ever made to Appellant.
>
> 3) Respondent has asserted that Defendant is not eligible for a modification, after asserting that a modification had been offered and while continuing to solicit information (which duplicates information previously submitted) to allow further consideration of a modification.
>
> 4) Respondent's inattention and failure to exercise due care in dealing with this matter is evidenced by Respondent's request that Appellant execute an IRS form for two completely irrelevant tax years, failing to respond when notified of this error until several months later, after the Appellant had supposedly defaulted on a trial payment plan.

Appellant has never amended his Answer to assert additional claims or allege different facts. As they stand before the court, Appellant has asserted two counterclaims which only entitle him to damages if he prevails: (1) breach of the implied covenant of good faith and fair dealing and (2) CFPB's dual tracking provisions under RESPA.

To reiterate, it is undisputed that Appellant is not obligated to pay the amounts due under the Note. For that reason, any trial plan or other offer would not have been sent to him, but rather the Borrower, and any foreclosure intervention mandated by the 2011-05-02-01 Supreme Court Order would have been to review his availability for an assumption and possible modification. "Where a defendant in an equitable action asserts a compulsory counterclaim that alleges actions at law, both the plaintiff and the defendant have a right to have a jury trial on the issues raised by the compulsory legal counterclaim. *Johnson v. South Carolina Nat'l Bank*, 292 S.C. 51, 54, 354 S.E.2d 895, 896 (1987). If there are factual issues common to both the legal and equitable claims, the legal claim, "absent the most imperative circumstances," must be tried, that is, disposed of, first. *Id.* at 56, 354 S.E.2d at 897; *see also Gardner v. Travis*, 316 S.C. 315, 450 S.E.2d 54 (Ct. App. 1994) (vacating and remanding master's order which entered findings on both legal and equitable issues, where compulsory legal counterclaims for: (1) return of the sums paid on the notes, plus treble damages and (2) actual and punitive damages for abuse of process and outrage, were previously bifurcated from equitable foreclosure and to be tried by jury).

Here, the Note and Mortgage have already been enforced, and all that remains to be established are the debt amounts above the unpaid principal and accrued interest. Any successful prosecution of Appellant's Counterclaims would entitle him to money damages at best, but cannot substantively or procedurally impact the already adjudicated grant of foreclosure.

B. Appellant's reliance on *Plantation Federal Bank v. Gray* is misplaced.

Appellant relies on *Plantation Federal Bank v. Gray* to support his contention that there are questions of fact regarding the Counterclaims that are "so closely related to the foreclosure," they render the Counterclaims compulsory. 401 S.C. 507, 737 S.E.2d 515 (Ct. App. 2013) (holding mortgagee's equitable foreclosure action could not be heard before jury trial of mortgagor's compulsory legal counterclaims). Unfortunately for Appellant, the reliance he places upon *Gray* is as illusory as his argument that he is somehow entitled to a jury trial on his counterclaims, where liability and damages in the minimum amount of $89,776.15, together with annual interest thereon at 7.50% since October 1, 2013, **have already been established**. *Gray* is entirely distinguishable from the instant case because it did not involve any inquiry as to whether the mortgagor was entitled to a jury trial on her counterclaims or whether her counterclaims were compulsory. *Id.* Instead, the Court of Appeals found it was error to conduct the trial on the equitable foreclosure before the trial on the legal counterclaims, where the claims had been bifurcated and separate trials were ordered. *Id.* at 510-11, 737 S.E.2d at 517. Also significant was that there was no dispute as the compulsory nature of the counterclaims. *Id.* at 510, 737 S.E.2d at 517 ("Bank did not dispute that Gray's counterclaims were compulsory but argued that extenuating circumstances, namely that the lot's vacancy and Bank's continued expenditures to maintain the property, warranted trying the foreclosure action before Gray's legal counterclaims.")

Here, even putting aside for a moment the unappealed grant of summary judgment as to liability and damages as to principal and interest on the foreclosure—none of Appellant's allegations have anything to do with the enforceability of the Note and Mortgage and the default in payments. As was addressed in Judge Keesley's 2015 Order, all Appellant's allegations

center on purported loss mitigation improprieties occurring after the default in payments which have absolutely no bearing whatsoever on the claim for foreclosure. *Gray*'s analysis centered entirely upon whether it was error to have allowed the trial on the foreclosure to proceed before the jury trial on Gray's legal counterclaims; none of its discussion addressed whether the counterclaims were permissive rather than compulsory—a fact which the Special Referee correctly concluded rendered *Gray* irrelevant to Appellant's argument. Furthermore, as noted by the Court in *Gray*, "[i]f there are no common factual issues, it is within the trial judge's discretion which claim will be tried first." *Id.* at 510, 737 S.E.2d at 517 (*citing Johnson v. S.C. Nat'l Bank*, 292 S.C. 51, 56, 354 S.E.2d 895, 897 (1987)).

C. Appellant waived any right to a jury trial by implication.

Notwithstanding the above, by appearing and litigating the merits of the Counterclaims for well over two years following the reference, Appellant consented to having those issues heard and adjudicated by the Special Referee and thus waived any right to a jury trial by implication. "It is settled case law in our State that by agreeing to a reference of the issues, a party thereby waives any right to a trial by jury." *Ervin Co. v. R.R. March, Inc.*, 274 S.C. 532, 544, 265 S.E.2d 520, 521 (1980) (holding appellants effectively waived right to trial by jury by moving for change of venue after case was transferred to nonjury roster instead of appealing); *see also Gilford v. S.C. Nat. Bank*, 257 S.C. 374, 186 S.E.2d 258 (1972) (finding appellants impliedly waived right to jury trial by failing to move for same in trial court prior to hearing before master in equity); *Hodges Concrete Prods., Inc. v. Fletcher*, 284 S.C. 191, 324 S.E.2d 343 (Ct. App. 1984) (holding motion for continuance of hearing before master and agreement to hear matter on certain date constituted waiver of right to jury trial); *Richland Cnty. v. Lowman*, 307 S.C. 422, 415 S.E.2d 433 (Ct. App. 1992) (finding landowners waived right to jury trial by

consenting to reference; master's recusal with subsequent reference to special referee did not withdraw consent where consent order did not indicate waiver was limited or conditional); *contra Sunamerica Fin. Corp. v. Equi-Data, Inc.*, 299 S.C. 175, 383 S.E.2d 8 (1989) (concluding no implied waiver of jury trial occurred where appellant timely demanded jury trial, never withdrew demand, and renewed demand after submission of master's report).

Ervin is directly on point. There, the Supreme Court found the appellants reaffirmed their waiver of a jury trial by referring an action at law to the master in equity by general order of reference and subsequently failing to appeal an order assigning the case to the nonjury roster of cases prior to its disposition by the master. *See Ervin*, 274 S.C. at 544, 265 S.E.2d at 521. The *Ervin* appellants then attempted to move for a change of venue to the court of common pleas, which was also denied and no appeal was taken. *Id.* The Supreme Court reasoned that the foregoing constituted a general appearance invoking the court's personal jurisdiction, and thus appellants' motion to restore the matter to the jury trial roster was properly denied. *Id.*

Here, Appellant reaffirmed his previous jury trial waiver (asserting permissive legal claims in an equitable action) by appearing at multiple hearings before the Special Referee and arguing the merits of his Counterclaims. Appellant's general appearance invoked the court's personal jurisdiction. This coupled with Appellant's failure to object to the adjudication of his Counterclaims before the Special Referee at any point in those two plus years, constitutes a waiver of jury trial by implication. Arguing the merits of Appellant's Counterclaims at the summary judgment hearing and seeking relief from the Judgment and Order of Foreclosure which dismissed his Counterclaims are unequivocal acts, inconsistent with an intention to preserve any right to a jury trial Appellant may have had. It is irrelevant that Appellant did not formally withdraw his request for a jury trial, because it was expressly stricken by order of the

court and Appellant had already waived his right to a jury trial by asserting permissive legal Counterclaims in response to the foreclosure.

II. The 2017 Order denying Appellant's Motion to Transfer is not immediately appealable because it neither involves the merits of the case nor affects a substantial right.

Section 14-3-330 of the South Carolina Code limits the Court of Appeals' ability to hear appeals. S.C. Code § 14-3-330 (Supp. 2011). Only final judgments and certain interlocutory orders are appealable. *Id.* "It is well settled that an interlocutory order is not immediately appealable unless it involves the merits of the case or affects a substantial right." *Brown v. County of Berkeley*, 366 S.C. 354, 361, 622 S.E.2d 533, 537 (2005) (citing S.C. Code Ann. § 14-3-330 (Supp. 2003)); *Mid-State Distributors, Inc. v. Century Importers,* 310 S.C. 330, 334-35, 426 S.E.2d 777, 780 (1993); *Shields v. Martin Marietta Corp.*, 303 S.C. 469, 470, 402 S.E.2d 482, 483 (1991). "To involve the merits of a case, the order must "finally determine some substantial matter forming the whole or a part of some cause of action or defense." *Brown*, 366 S.C. at 361, 622 S.E.2d at 537. "To affect a substantial right, the order must determine the action and prevent a judgment from which an appeal might be taken or discontinue the action." *Id.; see also C & S Real Estate Services, Inc. v. Massengale*, 290 S.C. 299, 350 S.E.2d 191 (1986) (dismissing mortgagor's appeal of order denying her jury trial on all but one of six counterclaims, on grounds that order was not immediately appealable; held: mortgagor was not entitled to jury trial on equitable counterclaims and permissive legal counterclaims and, thus, was not deprived of mode of trial to which she was entitled as matter of right).

The 2017 Order Denying Appellant's Motion to Transfer is not an immediately appealable order because it neither involves the merits of the case nor affects a substantial right. The 2017 Order did not finally determine any matter which forms the basis of any of Appellant's

claims or defenses; indeed, it is undisputed that those claims remain before the court for adjudication and were not impacted in any way by the denial of the Motion to Transfer. Instead, the 2017 Order restated Judge Keesley's 2015 ruling that Appellant had waived his right to a jury trial on legal Counterclaims asserted in response to Respondent's equitable foreclosure and concluded that, as such, the 2015 Order to Strike and Refer was a final appealable order.

The 2017 Order went on to address language in Judge Keesley's 2015 Order to Strike and Refer which Appellant argued was conditional on further action or review by the Special Referee. The Special Referee expressly rejected this argument, finding that Appellant had not amended his Counterclaims or asserted any additional causes of action subsequent to the reference to which he would be entitled to a jury trial. Therefore, Judge Keesley's 2015 Order to Strike and Refer was not subject to revision and left no additional action to be taken. Appellant appears to misinterpret the Special Referee's power to transfer *subsequent legal compulsory* claims brought before the court to the jury roster as authority to overrule Judge Keelsey's 2015 determination that Appellant was not entitled to a jury trial on his Counterclaims. Neither the plain language of the 2015 Order to Strike and Refer, nor the black letter law of this State, can be reasonably interpreted to reach such an outcome.

The 2017 Order Denying Motion to Transfer did not strike Defendant's jury demand, nor determine the mode of trial. As such, it is not an order involving a substantial right, or final order. Therefore, the Motion to Transfer and resulting 2017 Order is not subject to appellate review. For these reasons, the 2017 Motion to Transfer was properly denied.

III. Appellant's jury demand was stricken by the unappealed 2015 Final Order.

"[A]n unappealed ruling, right or wrong, is the law of the case." *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012). An order denying a request for a jury trial involves the mode of trial, affects substantial rights under section 14-3-330(2) of the South Carolina Code, and is immediately appealable. *See Bateman v. Rouse*, 358 S.C. 667, 674, 596 S.E.2d 386, 391 (Ct. App. 2004). "The failure to immediately appeal an order affecting the mode of trial constitutes a waiver of the right to appeal these issues." *Id.*; *see also Edwards v. Timmons*, 297 S.C. 314, 316, 377 S.E.2d 97, 97 (1988) (holding that the trial court's unappealed order of reference to a master-in-equity became the law of the case); *Creed v. Stokes*, 285 S.C. 542, 542-43, 331 S.E.2d 351, 351-52 (1985) (finding the appellant waived his objection to the order of reference by not immediately appealing the order). An order that affects the mode of trial affects substantial rights, and therefore, must be immediately appealed. *First Union Nat. Bank of S.C. v. Soden*, 333 S.C. 554, 565, 511 S.E.2d 372, 377 (Ct. App. 1998). Failure to immediately appeal this type of order constitutes a waiver of the right to appeal that issue. *Id.*

The 2015 Order to Strike and Refer transferred the case in its entirety pursuant to Rule 53(b), SCRCP, thus leaving no question that the Special Referee had jurisdiction to hear Appellant's Counterclaims and has already, in fact, considered those claims with Appellant's consent as is more fully articulated in Section I. By failing to appeal the 2015 Order to Strike and Refer, this Court lacks jurisdiction to consider whether Appellant was entitled a jury trial on the legal Counterclaims Appellant asserted in response to Respondent's equitable foreclosure. Consequently, Judge Keesley's analysis of whether the Counterclaims were logically related to

the foreclosure and ultimate ruling that Appellant waived his right to a jury trial stand as the law of the case.

Appellant's subsequent 2017 Motion to Transfer can be likened to the procedural posture in *Lester v. Dawson*. 327 S.C. 263, 491 S.E.2d 240 (1997). In *Lester*, an attorney brought an action to collect attorney's fees from a client. *Id.* at 265, 491 S.E.2d at 240. The circuit court denied at least two pre-trial motions for a jury trial made by the client, and placed the case on the non-jury roster. *Id.* Rather than appealing the denial of the motion for a jury trial, the client renewed his motion that the case be transferred to the jury roster at trial. *Id.* The circuit court found the question moot because the client had not appealed from the previous order. *Id.* The Supreme Court agreed, finding the client waived his right to a jury trial by not immediately appealing the order denying his motion for a jury trial. *Id.* at 266-67, 491 S.E.2d at 240-41. Similarly here, Appellant's failure to appeal the 2015 Order to Strike and Refer constitutes a waiver of the right to appeal Judge Keelsey's rulings that: (1) the Counterclaims are permissive, (2) that Appellant waived the right to a jury trial by asserting permissive counterclaims in an equitable foreclosure, and (3) that Appellant's jury demand should be stricken. Appellant is therefore barred from appealing those issues.

Even more closely analogous is the order of reference and resulting determination by this Court in *Crewe v. Blackmon* that a seller of real property had waived his right to a jury trial on his counterclaim for breach of contract asserted in a buyer's action for reformation and specific performance of the subject contract. 289 S.C. 229, 345 S.E.2d 745 (1986). There, the circuit court referred the case to a master in an order which provided, "[i]f during the reference there should appear legal issues suitable for resolution by a jury, those issues will be reserved for a trial by jury." *Id.* at 230, 345 S.E.2d at 755. The seller objected to the reference on the grounds

that he was entitled a jury trial on his counterclaim. *Id.* After the circuit court overruled and vacated the master's report in the buyer's favor and ordered a jury trial on the seller's counterclaim for breach of contract, buyer appealed. On appeal, this Court found seller's argument that he did not waive his right to a jury trial because he "steadfastly opposed" the reference and his claim for breach of contract is an action at law unavailing. *Id.* at 232, 345 S.E.2d at 756. In its decision, the Court concluded that even though allegations of fraud and misrepresentation were asserted in buyer's complaint, her action was one in equity. *Id.* at 232, 345 S.E.2d at 757. The Court cited the 1912 Supreme Court decision in *Welborn v. Cobb*, which held that there is no constitutional right to a jury trial for a non-compulsory counterclaim for damages asserted in an equitable action. *Id.* (citing *Welborn v. Cobb*, 92 S.C. 384, 75 S.E. 691 (1912)). The Supreme Court later relied on *Welborn* when it held, "[b]y electing to assert its counterclaim in response to [plaintiff's] equitable action, [defendant] waived its right to a jury trial." *John D. Hollingsworth on Wheels v. Akron Corp.*, 273 S.C. 461, 463, 257 S.E.2d 165, 166 (1979).

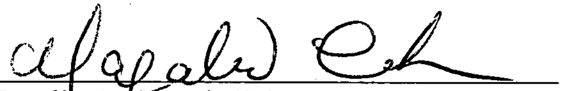
Thus, the 2015 Order to Strike and Refer stands as the law of the case and bars Appellant's attempt to relitigate these issues in the 2017 Motion to Transfer. Therefore, this Court lacks jurisdiction to consider whether Appellant was entitled a jury trial on the legal Counterclaims Appellant asserted in response to Respondent's equitable foreclosure.

CONCLUSION

For all the reasons set forth herein, this Court should affirm the trial court's order denying Appellant's Motion to Vacate the Judgment of Foreclosure and Sale.

Respectfully submitted,

FINKEL LAW FIRM LLC



Magalie A. Creech (SC Bar 78855)
P.O. Box 41489
Charleston, South Carolina 29423
T: 843.577.5460
F: 866.800.7954
mcreech@finkellaw.com
Attorney for Respondent

May 31, 2018

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTONCOUNTY
Court of Common Pleas

Lisa Lee Smith, Special Referee

RECEIVED
JUN 04 2018
SC Court of Appeals

Appellate Case No. 2017-002608

Federal National Mortgage Association ("Fannie Mae"), a corporation organized and existing under the laws of the United States of America, Respondent,

v.

D. Randolph Whitt and Pearce W. Fleming, Defendants,

Of whom D. Randolph Whitt is the, Appellant.

PROOF OF SERVICE

I certify that I have served the *Respondent's Initial Brief and Designation of Matter* by depositing a copy of same in the United States Mail, postage prepaid, on May 31, 2018, addressed to Appellant, D. Randolph Whitt, at 344 Blossom View Ct., West Columbia, South Carolina 29170 and to Defendant, Pearce W. Fleming, at 3723 Linwood Rd., Columbia, South Carolina 29205-2545.

Magalie A. Creech (SC Bar 78855)
FINKEL LAW FIRM LLC
Post Office Box 41489
Charleston, South Carolina 29423
Telephone: (843) 577-5460
Facsimile: (866) 800-7954
mcreech@finkellaw.com
Attorney for Respondent

MAGALIE A. CREECH
MCREECH@FINKELLAW.COM

REPLY TO:
CHARLESTON LITIGATION

May 31, 2018

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JUN 04 2018
SC Court of Appeals

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: Federal National Mortgage Association v. D. Randolph Whitt, et al.
Appellate Case No.: 2017-002608
Our File No.: 66040.49237

Dear Ms. Kitchings:

Enclosed for filing is the *Respondent's Initial Brief and Designation of Matter* and related *Proof of Service* in the above-referenced case, which we kindly ask you to file and return in the attached, self-addressed, stamped envelope.

Should you have any questions concerning this matter, please do not hesitate to contact our office at your earliest convenience.

With kind personal regards, we are

Yours very truly,

FINKEL LAW FIRM

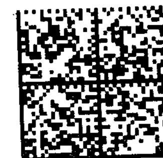
Magalie A. Creech

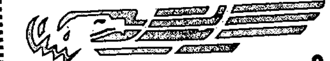
CC: D. Randolph Whitt, Esquire
Pearce W, Fleming, Esquire

COLUMBIA
1201 Main Street, Suite 1800
Post Office Box 1799 (29202)
Columbia, SC 29201
Tel: (803) 765-2935
Fax: (803) 252-0786

CHARLESTON
LITIGATION, REAL ESTATE & REO
4000 Faber Place Drive, Suite 450
Post Office Box 41489 (29423)
North Charleston, SC 29405
Tel: (843) 577-5460
Fax: (843) 577-5135

CHARLESTON
FORECLOSURE
4000 Faber Place Drive, Suite 450
Post Office Box 71727 (29415)
North Charleston, SC 29405
Tel: (843) 577-5460
Fax: (843) 725-0015





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FINKEL
LAW FIRM LLC

P.O. Box 41489
Charleston, SC 29423

DFC

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

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