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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Jocelyn Newman, Presiding Judge

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SC Court of Appeals

Case No. 2016-CP-40-07662

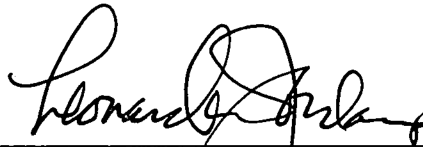
Appellate Case No. 2018

Nicholas L. Pettit, as Personal Representative of the Estate of Charles A. Pettit, deceased,... Appellant,

v.

Audrey E. Volonis and Ryan D. Volonis,... Respondents.

[INITIAL] BRIEF OF APPELLANT



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January 7, 2019

TABLE OF CONTENTS

Page

Table of Authorities ii

Statement of Issues on Appeal 1

Statement of the Case 1

Statement of the Facts 2

Introduction; Standard of Review 2

Arguments

I. THE PRIMARY ACTION, BEING A MORTGAGE FORECLOSURE ACTION, IS AN ACTION IN EQUITY, WITH NO RIGHT TO TRIAL BY JURY 3

II. TO HAVE A RIGHT TO A JURY TRIAL ON A COUNTERCLAIM, DEFENDANTS MUST SHOW THAT A COUNTERCLAIM IS BOTH LEGAL AND COMPULSORY. 3

III. EACH OF DEFENDANTS' COUNTERCLAIMS IS PERMISSIVE 4

IV. THE ORDER DOES NOT ADDRESS WHETHER DEFENDANTS' COUNTERCLAIMS WERE PERMISSIVE OR COMPULSORY 9

V. DEFENDANTS' COUNTERCLAIMS DID NOT ARISE OUT OF THE TRANSACTION OR OCCURRENCE THAT IS THE SUBJECT OF PLAINTIFF'S CLAIM AND ARE, THEREFORE, NOT COMPULSORY COUNTERCLAIMS 11

VI. THERE IS NO "LOGICAL RELATIONSHIP' BETWEEN PLAINTIFF'S CLAIM AND ANY COUNTERCLAIM 13

VII. IF DEFENDANTS' COUNTERCLAIMS ARE DETERMINED TO BE BOTH LEGAL AND COMPULSORY, THE TRIAL COURT MUST ORDER SEPARATE TRIALS...15

Conclusion 16

TABLE OF AUTHORITIES

Cases **Page**

Advance Int'l v. North Carolina Nat'l Bank, 316 S.C. 266, 499 S.E.2d 580 (Ct. App. 1994) 15

Advance Int'l v. North Carolina Nat'l Bank, 320 S.C. 532, 466 S.E.2d 367 (1996) 15

Auto-Owners Ins. Co. v. Rhodes, 405 S.C. 584, 748 S.E.2d 781 (2013)............................4, 5

Beach Co. v. Twillman, Ltd., 351 S.C. 56, 566 S.E.2d 863 (Ct. App. 2002) 13, 14

Carolina First Bank v. BADD, LLC 414 S.C. 289, 778 S.E.2d 106 (2015) 11, 12, 14, 15, 16

Collier v. Green, 244 S.C. 367, 137 S.E.2d 277 (1964) 3

Dykeman v. Wells Fargo Home Mortgage, Inc., 381 S.C. 333, 673 S.E.2d 804 (2009) 6

Flagstar Corp. v. Royal Surplus Lines, 341 S.C. 68, 533 S.E.2d 331 (2000) 2, 15

Green v. Lewis Truck Lines, Inc., 314 S.C. 303, 443 S.E.2d 906 (1994) 3

Hough v. Ag S. Farm Credit ASA, 2018 U.S. Dis. LEXIS 46962 (2018) 14

Huff v. Jennings, 319 S.C. 142, 459 S.E.2d 886 (Ct. App. 1995) 8

Lester v. Dawson, 327 S.C. 263, 491 S.E.2d 240 (1997) 3, 15

Middleton v. Eubank, 388 S.C. 8, 694 S.E.2d 31 (Ct. App. 2010) 5

North Carolina Federal Sav. & Loan Asso. v. DAV Corp., 294 S.C. 27, 362 S.E.2d 308 (Ct. App. 1987) 13

Perpetual Bldg. & Loan Ass'n of Anderson v. Braun, 270 S.C. 338, 242 S.E.2d 407 (1978) 3

Solley v. Navy Fed. Credit Union, Inc., 397 S.C. 192, 723 S.E.2d 597 (Ct. App. 2012) 8

Stone v. Thompson, 418 S.C. 599, 795 S.E.2d 49 (Ct. App. 2016) 2

Verenes v. Alvanos, 387 S.C. 11, 690 S.E.2d 771 (2010) 3

Wachovia Bank Nat'l Ass'n v. Blackburn, 407 S.C. 321, 755 S.E.2d 437 (2014) 3, 4, 13

Wells Fargo Bank, N.A. v. Smith, 398 S.C. 487, 730 S.E.2d 328 (Ct. App. 2012) 14

Statutes, Court Rules and Other Authorities

S.C. Code Ann. §29-3-310...5, 6, 7

S.C. Code Ann. §29-3-320...5, 6, 10

Rule 13(a), (b), SCRCP...11, 13, 14

Rule 42(b), SCRCP...4, 15

Restatement (Second) of Torts §623A (1977) 8

STATEMENT OF ISSUES ON APPEAL

ARE ANY OF DEFENDANTS' COUNTERCLAIMS LEGAL AND COMPULSORY ENTITLING RESPONDENTS TO A TRIAL BY JURY?

IF DEFENDANTS HAVE A RIGHT TO A JURY TRIAL ON ONE OR MORE OF THEIR COUNTERCLAIMS, ARE THEY ENTITLED TO HAVE THIS CASE TRIED, IN TOTO, BEFORE A JURY, AS DIRECTED BY THE APPEALED ORDER?

STATEMENT OF THE CASE

On December 30, 2016, Plaintiff filed a Lis Pendens and Summons and Complaint (R.p. ____) for foreclosure of his note and mortgage and demanding a deficiency judgment against Defendant, Ryan D. Volonis. On February 21, 2017, Defendants filed an Answer and Counterclaim (R.p. ____) and demanded a jury trial. On February 24, 2017, Plaintiff filed a Reply. (R.p. ______)

On April 30, 2018, Defendants filed a Second Amended Answer and Counterclaim (R.p. ____) and asserted three counterclaims: (1) Declaratory Judgment; (2) Liability for Failure to Satisfy the Mortgage; and (3) Slander of Title. On December 18, 2018, Plaintiff filed a Reply to Amended Answer and Counterclaim. (R.p. ____)

On May 10, 2018, Plaintiff filed a Notice of Motion and Motion for Order of Reference (R.p. ____) requesting that this mortgage foreclosure action be referred to the Master in Equity. By Order Denying Plaintiff's Motion to Refer to Master in Equity filed on September 6, 2018 (the "Order") (R.p. ____), Plaintiff's Motion was denied, and the court ordered that the case be tried, in toto, before a jury.

On October 5, 2018, Plaintiff filed a Notice of Appeal. (R.p. ____)

STATEMENT OF FACTS

On June 15, 2004, Defendant, Audrey E. Volonis, purchased the property located at 802 Huntington Avenue, situated in Richland County, South Carolina (hereinafter, the "Property"). On April 1, 2008, Defendant, Audrey E. Volonis, conveyed the Property to Audrey E. Volonis and Ryan D. Volonis.

On April 17, 2008, Defendant, Ryan D. Volonis, executed a Balloon Note in favor of Charles A. Pettit in the amount of $55,000.00, and Defendants (together) mortgaged the Property to Charles A. Pettit to secure said Balloon Note.

On January 6, 2016, Charles A. Pettit died as a result of injuries he received from a motor vehicle accident. Mr. Pettit's brother, Nicholas L. Pettit, was appointed as the Personal Representative of the Estate of Charles A. Pettit, deceased.

As a consequence of the failure of Defendants to pay in full by maturity the indebtedness evidenced by Plaintiff's Balloon Note and mortgage, Plaintiff, in his capacity as Personal Representative of the Estate of Charles A. Pettit, deceased, instituted this suit to collect the indebtedness evidenced by the Balloon Note and secured by the mortgage on the Property.

INTRODUCTION; STANDARD OF REVIEW

"When a trial court's order deprives a party of a mode of trial to which it is entitled as a matter of right, the order is immediately appealable." *Stone v. Thompson*, 418 S.C. 599, 606, 795 S.E.2d 49, 53 (Ct. App. 2016).

"That analysis proceeds by determining whether or not a party . . . is erroneously required to proceed before a jury in an equity case." *Flagstar Corp. v. Royal Surplus Lines*, 341 S.C. 68, 72, 533 S.E.2d 331, 333 (2000).

"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).

"Appellate courts may decide questions of law with no particular deference to the circuit court's findings." *Wachovia Bank Nat'l Ass'n v. Blackburn*, 407 S.C. 321, 328, 755 S.E.2d 437, 441 (2014).

In interpreting the meaning of the South Carolina Rules of Civil Procedure, the Court applies the same rules of construction used to interpret statutes. *Green v. Lewis Truck Lines, Inc.*, 314 S.C. 303, 304, 443 S.E.2d 906, 907 (1994).

ARGUMENTS

I. THE PRIMARY ACTION, BEING A MORTGAGE FORECLOSURE ACTION, IS AN ACTION IN EQUITY, WITH NO RIGHT TO TRIAL BY JURY.

It is well-settled that Plaintiff's case, being a mortgage foreclosure action, is an action in equity. *Collier v. Green*, 244 S.C. 367, 370, 137 S.E.2d 277, 279 (1964). This result is unchanged where the action also seeks a deficiency judgment. *Perpetual Bldg. & Loan Ass'n of Anderson v. Braun*, 270 S.C. 338, 342, 242 S.E.2d 407, 409 (1978).

"Generally, the relevant questions in determining the right of trial by jury is whether an action is legal or equitable; there is no right to trial by jury for equitable actions." *Lester v. Dawson*, 327 S.C. 263, 267, 491 S.E.2d 240, 242 (1997).

II. TO HAVE A RIGHT TO A JURY TRIAL ON A COUNTERCLAIM, DEFENDANTS MUST SHOW THAT A COUNTERCLAIM IS BOTH LEGAL AND COMPULSORY.

For a defendant to be entitled to a jury trial on a counterclaim raised in an equitable action, he must show that the counterclaim is both legal and compulsory. "If the Complaint is equitable and the counterclaim is legal and compulsory, the plaintiff or the defendant has a right to a jury

trial ***on the counterclaim***. . ." *Wachovia Bank Nat'l Ass'n v. Blackburn*, 407 S.C. 321, 329-30, 755 S.E.2d 437, 441-42 (2014). (emphasis added)

If this can be shown, the "trial judge may, pursuant to Rule 42(b) [SCRCP], order separate trials of the legal and equitable claims, or may order the claims tried in a single proceeding." *Id.*

III. EACH OF DEFENDANTS' COUNTERCLAIMS IS PERMISSIVE.

Defendants have asserted three (3) counterclaims, as set forth hereinafter:

A. Declaratory Judgment. Defendants' allegations via counterclaim are as follows:

40. The Plaintiff holds no note or mortgage on the subject property.
41. If the court determines that the Plaintiff holds a mortgage on the subject property, it is unenforceable and must be satisfied as the underlying promissory note has been paid, cancelled, or forgiven.
42. There is a justiciable controversy about these matters.
43. The Defendants are entitled to declaratory judgment in their favor concerning the same.
44. Except as otherwise stated below, Defendants reassert each and every defense and answer contained in the previously filed Answer and Counterclaim.
45. Except as otherwise stated below, each assertion set forth in the counterclaim is incorporated herein by reference as if here set forth verbatim.

(R.p. ____)

Other than identifying this counterclaim, the Order only provides that, "Defendants sought the counterclaim of a declaratory judgment, asking the court to hold that the Plaintiff should be compelled to satisfy the mortgage as the Defendants alleged that the mortgage and note are extinguished as the debt was paid, cancelled or forgiven," (R.p. ____) and the following footnote:

> A Declaratory Judgment can seek a remedy in equity or in law and depends on the underlying issues of the matter. See *Auto-Owners Ins. Co. v. Rhodes*, 405 S.C. 584, 593, 748 S.E.2d 781, 785 (2013). However, this Court need not determine whether the remedy for the Defendants' Declaratory Judgment counterclaim is equitable or legal because the other two Counterclaims seek a legal remedy.
> (R.p. ____)

No argument specifically regarding this counterclaim was made by Defendants' counsel at

the motion hearing. Based upon the footnote quoted above and comments of Defendants' counsel made at the hearing,[1] it appears that Defendants abandoned any argument that they are entitled to a jury trial on the declaratory judgment counterclaim.

In any event, it is well-settled that, "[a] suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue." See *Auto-Owners Ins. Co. v. Rhodes, supra;* see also *Middleton v. Eubank*, 388 S.C. 8, 14, 694 S.E.2d 31, 34 (Ct. App. 2010). Since the underlying issue (the foreclosure of the mortgage) is equitable, this counterclaim must also be construed to be equitable, in which case there is no need to reach the issue of "permissive vs. compulsory."

Notwithstanding, this counterclaim is nothing more than a restatement of Defendants' defense to the Complaint. It is entirely dependent upon proof that the "promissory note has been paid, cancelled, or forgiven" (R.p. ___), which is no different than the defensive allegations found elsewhere is the Second Amended Answer and Counterclaim. (R.p. ____)

B. <u>Liability for Failure to Satisfy the Mortgage</u>. Defendants' allegations via counterclaim are as follows:

> 46. It has been more than three months since the Plaintiff received the letter that is shown as Exhibit A to this pleading.
> 47. The Plaintiff has not repaired to the proper office (the Richland County Register of Deeds) to enter satisfaction of the mortgage subject of this case.
> 48. The Plaintiff is liable for all damages, penalties, attorneys' fees, and relief available under S.C. Code Ann. §29-3-320 et. seq. (see exhibits A, B and C).
>
> (R.p. _____)

This counterclaim is, apparently, based upon S.C. Code Ann. §§29-3-310 and 320, which provide, in relevant part, as follows:

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1 "The counterclaims that we've sought are - - at least, two of the three are seeking legal remedy, one by statute." (R.p. ____)

§29-3-310. Request for entry of satisfaction.

Any holder of record of a mortgage ***who has received full payment or satisfaction*** or to whom a legal tender has been made of his debts, damages, costs, and charges secured by mortgage of real estate shall, at the request by certified mail or other form of delivery with a proof of delivery of the mortgagor or of his legal representative or any other person being a creditor of the debtor or a purchaser under him or having an interest in any estate bound by the mortgage and on tender of the fees of office for entering satisfaction, within three months after the certified mail, or other form of delivery, with a proof of delivery, request is made, enter satisfaction in the proper office on the mortgage which shall forever thereafter discharge and satisfy the mortgage. (emphasis added)

§29-3-320. Liability for failure to enter satisfaction.

Any holder of record of a mortgage having received such payment, satisfaction, or tender as aforesaid who shall not, by himself or his attorney, within three months after such certified mail, or other form of delivery, with the proof of delivery, request and tender of fees of office, repair to the proper office and enter satisfaction as aforesaid shall forfeit and pay to the person aggrieved a sum of money not exceeding one-half of the amount of the debt secured by the mortgage, or twenty-five thousand dollars, whichever is less, plus actual damages, costs, and attorney's fees in the discretion of the court, to be recovered by action in any court of competent jurisdiction within the State. And on judgment being rendered for the plaintiff in any such action, the presiding judge shall order satisfaction to be entered on the judgment or mortgage aforesaid by the clerk, register, or other proper officer whose duty it shall be, on receiving such order, to record it and to enter satisfaction accordingly. . . .

The Supreme Court, in *Dykeman v. Wells Fargo Home Mortgage., Inc.*, 381 S.C. 333, 340, 673 S.E.2d 804, 807 (2009), held that the first element under section 29-3-310 which must "be established by the mortgagor to trigger the substantial penalty and related relief in section 29-3-320 [is] that ***he has made full payment*** of his 'debts.' Including applicable 'damages, costs and charges.'" (emphasis added)

Defendants have not pled or otherwise asserted that Plaintiff has "received full payment, satisfaction, or tender" (see §29-3-320); and to the contrary, they make a special effort to avoid alleging that *full payment* of the debt was made. The Second Amended Answer and Counterclaim uses the following artful phrases:

Defenses
"note has been paid, cancelled or forgiven" (R.p. ____) (twice)
"payment, cancellation or forgiveness of said promissory note" (R.p. ____)
"debt was paid, cancelled or forgiven" (R.p. ____)
"the payments made" (R.p. ____)

Counterclaims
"note has been paid, cancelled, or forgiven" (R.p. ____)
"note being cancelled, satisfied or otherwise, forgiven" (R.p. ____)
"note and mortgage were cancelled, satisfied or otherwise forgiven" (R.p. ____)

With regard to the statutory penalty for the failure to satisfy a mortgage, Defendants are required to prove that the holder of the mortgage "has received full payment or satisfaction or to whom a legal tender has been made of his debts, damages, costs and charges secured by mortgage of real estate." See §29-3-310. This requires a completely different factual showing than Plaintiff's claim involves.

This counterclaim is basically a restatement of Defendants' defensive allegations found elsewhere is the Second Amended Answer and Counterclaim (except that no allegation of "paid" is to be found), with a claim of a statutory penalty, which is altogether unrelated to Plaintiff's Complaint.

C. Slander of Title. Defendants' allegations via counterclaim are as follows:

50. As referenced above, the Defendants have demanded that Plaintiff satisfy the mortgage with the public records of the Richland County Register of Deeds based on the mortgage and note being cancelled, satisfied or otherwise, forgiven by the lender.
51. *At all times relevant, this lien was a false statement as the note and mortgage were cancelled, satisfied or otherwise forgiven.*
52. The unsatisfied mortgage was and is derogatory to the Defendants' title to real property, that being Defendant Ryan Volonis' personal dwelling.
53. As a result of the filed lien, Defendant did incur damages rendered the title unmarketable. *The amount Plaintiff claims it is owed is above and beyond what is actually owed.* Because of this lien, Defendants personal dwelling did diminish in value in the eyes of third parties. Defendants have suffered damages in an amount to be determined by a jury.

(R.p. _____) (emphasis added)

Interestingly, Defendants acknowledge, in Paragraph 53 (immediately above), that Plaintiff is "actually owed" an amount of money, which is evidenced and secured by his note and mortgage. This acknowledgement is quite glaring in light of Defendants' defenses/claims that the debt was "cancelled, satisfied or otherwise forgiven."

In raising a common law claim of slander of title, the claimant "must establish (1) the publication (2) with malice (3) of a false statement (4) that is derogatory to [claimant's] title and (5) causes special damages (6) as a result of diminished value of the property in the eyes of third parties." *Huff v. Jennings*, 319 S.C. 142, 149, 459 S.E.2d 886, 891 (Ct. App. 1995). According to the Restatement (Second) of Torts §623A (1977), cited in *Huff*, one who publishes a false statement may be liable for damages if "he acts in reckless disregard of its truth or facility." *Id.* at 149.

The facts of this case (including Defendants' allegations) do not support a claim of slander of title, as the mortgage in question was neither published "with malice"[2] (it was voluntarily issued to Plaintiff by Defendants) nor was "a false statement" (it is a routine lien on real property to secure a debt).

The counterclaim for slander of title must be premised upon "[w]rongfully recording an unfounded claim against the property of another. . . ." *Id.* To sustain this cause of action, there must be a publication of a false statement, which was false or unfounded at the time of publication.

Defendants incorrectly assert, in Paragraph 51, that "*[a]t all relevant times*, this lien was a false statement as the note and mortgage were cancelled, satisfied or otherwise forgiven." (emphasis added) This allegation would have one believe that the mortgage was false (unfounded)

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2 "Malice merely means a lack of legal justification . . . ." *Solley v. Navy Fed. Credit Union, Inc.*, 397 S.C. 192, 204, 723 S.E.2d 597, 603 (Ct. App. 2012).

when it was recorded. To the contrary, Defendants' Answer to Plaintiff's Complaint admits the execution of the Balloon Note and the mortgage without asserting that the mortgage was, at the point of recording, a false statement. (R.p. ____)

No matter how artfully pled, a cause of action for slander of title does not lie against a voluntary publication by the very parties now complaining that the publication was false or unfounded.

This counterclaim is directed at an entirely well-founded lien placed upon the Property, as a consequence of Defendants' direct and voluntary involvement in such act. As such, this counterclaim is misplaced under the facts of this case.

This counterclaim is basically a restatement of Defendants' defensive allegations found elsewhere is the Second Amended Answer and Counterclaim (also with no allegation of "paid," except through a reference to previous allegations), with a claim of a common law remedy, which is altogether unrelated to Plaintiff's Complaint.

In summary, all three of Defendants' counterclaims are permissive because they involve completely separate and distinct facts from the facts involved in Plaintiff's Complaint. They do not arise out of the execution of the loan documents (the transaction) nor do they attack Plaintiff's right to foreclose his mortgage. Defendants were not compelled to raise these permissive counterclaims in response to Plaintiff's foreclosure suit. By electing to raise them in this case, Defendants waived their right (if any) to a jury trial on any of these claims.

IV. THE ORDER DOES NOT ADDRESS WHETHER DEFENDANTS' COUNTERCLAIMS WERE PERMISSIVE OR COMPULSORY.

No mention is made in the Order[3] that Defendants' counterclaims are compulsory. The

3 Composed by Defendants' counsel.

Order ignores the declaratory judgment counterclaim altogether with regard to the issues of "legal vs. equitable" and "permissive vs. compulsory." While the Order goes to some length to address whether or not the other counterclaims (for the failure to satisfy a mortgage and for slander of title) are legal (as opposed to equitable), nothing specific to these counterclaims is mentioned in the Order with regard whether or not they are compulsory.

The only statement in the Order, which is not a quote from or a reference to other cases examining the distinction between permissive and compulsory, which presumably makes some reference to Defendants' counterclaims, is the following illogical comment: "Simply put, if the counterclaims were permissive, this Court would then first decide the merits of a slander of title action and liability under S.C. Code Ann. §29-3-320 **before** determining the merits of the foreclosure action. This result is illogical." (R.p. ____)

If Defendants' counterclaims (brought in an equitable action) were permissive, the right to a jury trial would be waived; and the trial judge would decide issues in the manner and order he deems to be appropriate.

The Order simply concludes that, "[t]he Defendants' counterclaims are compulsive (sic) because they most certainly have a logical relationship to the enforceability of the note and mortgage . . . [and that] the counterclaims arise out of the same transaction and occurrence and are therefore compulsive (sic)." (R. pp. ____) The Order should have addressed specifically how these counterclaims arose out of the transaction, which occurred many years earlier, and how they have a logical relationship to the enforceability of the note and mortgage, pointing to something more informative than the defensive allegations pled by Defendants outside of the counterclaims. By just making the conclusory statement that the counterclaims arose out of the transaction and are logically related to the note and mortgage, the Order demonstrates a failure to analyze the

circumstances and make appropriate findings and conclusions in that regard.

V. DEFENDANTS' COUNTERCLAIMS DID NOT ARISE OUT OF THE TRANSACTION OR OCCURRENCE THAT IS THE SUBJECT OF PLAINTIFF'S CLAIM AND ARE, THEREFORE, NOT COMPULSORY COUNTERCLAIMS.

Rule 13(a), SCRCP, provides, in relevant part, as follows:

> **(a) Compulsory Counterclaims**. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, ***if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim*** and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction . . . . (emphasis added)

Rule 13(b), SCRCP, provides as follows:

> **(b) Permissive Counterclaims**. A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.

Plaintiff's foreclosure action is centered entirely on the obligations and remedies created by the note and mortgage, which were exchanged between the parties, as a part of a 2008 mortgage loan (the "transaction") made by the lender (Plaintiff's predecessor). Defendants admit the origination and securing of the subject obligation, with the loan documents (Balloon Note and mortgage) executed by them as a part of the transaction. (R.p. ____) Defendants' counterclaims did not arise out of this transaction. In fact, they arose for the first time in 2017, **nine (9) years after** this transaction. They do not directly involve the subject mortgage loan. Defendants allege that they have been damaged because Plaintiff (or his predecessor) failed to enter a satisfaction of his mortgage following the alleged forgiveness of the debt by the lender (former holder of the note and mortgage) at some, undesignated point, many years after this transaction. (Plaintiff denies this allegation.)

"[T]he "transaction or occurrence" for the purpose of determining the compulsory character of [a] counterclaim is the ***execution*** of the [contract or obligation]." *Carolina First Bank*

v. BADD, L.L.C., 414 S.C. 289, 296, 778 S.E.2d 106, 109 (2015). (emphasis added)

A "claim does not arise out of the underlying transaction or occurrence [if] it does not affect the ***execution or enforceability*** of the [contract or obligation]." *Id.* (emphasis added)

None of Defendants' counterclaims involve the execution and delivery of, or the consideration exchanged for, Plaintiff's loan documents.

None of Defendants' counterclaims attack the validity of the note and mortgage or specifically challenge Plaintiff's right to enforce the remedies contained in Plaintiff's note and mortgage – certainly no more so, or differently, than do Defendants' defensive allegations.

None of Defendants' counterclaims address the administering of the mortgage loan by Plaintiff (or his predecessor) or the construction of the terms and conditions contained in the loan documents.

Instead, they allege that the mortgage now causes damage to Defendants under two legal theories completely unrelated to the loan transaction. The damages sought by Defendants stem, not from the transaction or even the terms of the transactional documents, but from the alleged inaction (failure to satisfy the mortgage of record) by Plaintiff (or his predecessor), first raised many years after the transaction occurred, which did not arise out of the same transaction or occurrence as the execution of the note and mortgage.

This alleged inaction (failure to satisfy the mortgage of record) had nothing to do with the transaction and does not affect the enforceability of the note and mortgage. Defendants' default under the note and mortgage occurred years before Defendants first raised their claims that Plaintiff failed to satisfy the mortgage of record;[4] and in any event, such alleged inaction would not have

4 Defendants have not asserted that their claims arose prior to their breach of Plaintiff's loan documents.

avoided the default.

This alleged inaction is premised upon the alleged forgiveness of the debt. Logically, the occurrence of the alleged forgiveness of the debt, itself, would not have arisen out of the transaction (the execution of the note and mortgage), so the obvious conclusion is that the alleged inaction did not arise out of said transaction.

"By definition a counterclaim is compulsory only if it arises out of the same transaction as the opposing party's claim. Rule 13(a), SCRCP." *North Carolina Federal Sav. & Loan Asso. v. DAV Corp.*, 298 S.C. 514, 517, 381 S.E.2d 903, 905 (1989). As Defendants' counterclaims don't arise out of the said transaction, they are, therefore, permissive.

VI. THERE IS NO "LOGICAL RELATIONSHIP" BETWEEN PLAINTIFF'S CLAIM AND ANY COUNTERCLAIM.

As stated in the Order, ". . . a counterclaim is compulsive (sic) if there is a logical relationship between the claim and the counterclaim. See *DAV Corp.*, 298 S.C. at 518, 381 S.E.2d at 905 (S.C. 1989)." (R.p. ____)

In *Beach Co. v. Twillman, Ltd.*, 351 S.C. 56, 61, 566 S.E.2d 863, 865 (Ct.App. 2002), this Court found that, "[b]y definition, a counterclaim is compulsory only if it arises out of the same transaction or occurrence as the opposing party's claim . . . [and] [t]he test for determining if a counterclaim is compulsory is whether there is a 'logical relationship' between the claim and the counterclaim." (internal citations omitted)

Under the "logical relationship" test, if prevailing on a counterclaim would affect Plaintiff's right to enforce the subject note and mortgage, "there is a logical relationship between the counterclaim and the underlying suit, and the counterclaim is therefore compulsory." *Wachovia Bank, N.A. v. Blackburn, supra,* citing *N.C. Fed. Sav. & Loan Ass'n v. DAV Corp., supra.*

None of Defendants' counterclaims arise out of the transaction or occurrence because they have "no logical relationship to either the ***execution or enforceability*** of the [note and mortgage]." *Carolina First Bank v. BADD, LLC, supra,* at 295. (emphasis added)

In *Hough v. Ag S. Farm Credit ASA*, 2018 U.S. Dis. LEXIS 46962 (2018), the United States District Court for the District of South Carolina, citing *Wells Fargo Bank, N.A. v. Smith*, 398 S.C. 487, 496, 730 S.E.2d 328, 333 (Ct. App. 2012), stated that "[a] counterclaim is compulsory if there is a logical relationship between the claim and the counterclaim . . . [and] [i]n the foreclosure context, this determination is made by 'asking whether the counterclaim would affect the lender's right to enforce the note and foreclose the mortgage." See *Beach Co. v. Twillman, Ltd., supra.*[5]

Plaintiff's claim is founded on his right to enforce the note and mortgage as a consequence of Defendants' default on the terms of repayment. Defendants' counterclaims deal solely with Plaintiff's alleged failure to satisfy the mortgage of record. Defendants' counterclaims involve completely different facts and proof than does Plaintiff's claim. They require, and are premised upon, proof that, years after the loan transaction, Plaintiff's predecessor forgave (or some other similar verb) the debt, which Plaintiff denies.

Plaintiff's right to enforce his note and mortgage is not contested by Defendants' counterclaims. Such contest is raised by defenses contained in Defendants' Answer (portion of their Second Amended Answer and Counterclaim). As the defenses are introduced in response to Plaintiff's equitable cause of action, they become part of the equitable nature of this case.

There is no logical relationship between Plaintiff's claim and Defendants' counterclaims. Defendant's counterclaims are, therefore, permissive.

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5 The South Carolina Reporter's Note following Rule 13 "notes that South Carolina's Rule 13(a) is the same as the federal rule on counterclaims. Accordingly, we may rely on federal law to interpret our Rule 13." *Id.* at 62.

VII. IF DEFENDANTS' COUNTERCLAIMS ARE DETERMINED TO BE BOTH LEGAL AND COMPULSORY, THE TRIAL COURT MUST ORDER SEPARATE TRIALS.

As previously quoted, "there is no right to trial by jury for equitable actions." *Lester v. Dawson, supra.* Plaintiff's mortgage foreclosure case is equitable, and Plaintiff is entitled to have equitable issues decided by the court. See *Carolina First Bank v. BADD, LLC, supra*, at 293.

Plaintiff is entitled to a non-jury trial of his mortgage foreclosure case. The Order erroneously requires that Plaintiff's case proceed before a jury. See *Flagstar Corp. v. Royal Surplus Lines, supra.*

By concluding that, ". . . this matter should be tried, in toto, before a jury" (R.p. ___), the Order fails to protect Plaintiff's right to have his equitable case heard and decided by the court without a jury.

"The trial court would have had to order separate trials if indeed the claims were compulsory and had been asserted in the foreclosure action. Where a complaint is equitable and the counterclaim, for which a jury trial is requested, is legal and compulsory, the trial court ***must order separate trials*** pursuant to Rule 42(b), SCRCP." *Advance Int'l v. North Carolina Nat'l Bank*, 316 S.C. 266, 270, 499 S.E.2d 580, 583 (Ct. App. 1994), affirmed in part; vacated in part by *Advance Int'l v. North Carolina Nat'l Bank*, 320 S.C. 532, 533, 466 S.E.2d 367 (1996). (emphasis added)

The facts and issues in this case logically require that Plaintiff's Complaint be determined first. If Plaintiff prevails on his Complaint, Defendants' counterclaims would fail.[6] In other words, if Plaintiff prevails on his Complaint, there is no reason to have a bifurcated trial.

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6 The counterclaims are premised upon a failure to satisfy the mortgage (the cited statutes require a showing of "full payment, satisfaction or tender"); so if the Complaint prevails, obviously Plaintiff is not guilty of failing to satisfy the mortgage.

CONCLUSION

There is nothing in the record to support: (1) that any of Defendants' counterclaims arose from the mortgage loan transaction; or (2) that there is a logical relation between Plaintiff's claim (to enforce the remedies under the note and mortgage) and Defendants' claims (based upon separate and distinct facts).

Defendants' counterclaims are, therefore, permissive. By electing to raise permissive counterclaims in this case, Defendants waived their right (if any) to a jury trial on any of these claims. See *Carolina First Bank v. BADD, LLC, supra*, at 296-97.

For the reasons stated, this Court should reverse the Order Denying Plaintiff's Motion to Refer to Master and direct that this case be referred to the Master in Equity for Richland County for final disposition.

Respectfully submitted,

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Columbia, South Carolina
January 7, 2019

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Jocelyn Newman, Presiding Judge

Case No. 2016-CP-40-07662

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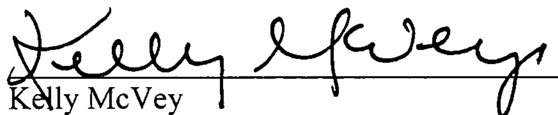
SC Court of Appeals

Appellate Case No. 2018

CERTIFICATE OF MAILING

I, Kelly McVey, of Jordan Law Firm, attorney for the Appellant, Nicholas L. Pettit, as Personal Representative of the Estate of Charles A. Pettit, deceased, hereby certify that I have, this 7th day of January, 2019, served copies of the attached [Initial] Brief of Appellant upon Todd R. Lyle, Esquire, attorney for the Respondents, Audrey E. Volonis and Ryan D. Volonis, by mailing a copy thereof, postage prepaid, to the address indicated below:

Todd R. Lyle, Esquire
Reeves & Lyle
P.O. Box 11126
Columbia, SC 29211



Kelly McVey