

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

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John C. Hayes, III, Circuit Court Judge

SC Court of Appeals

Case No. 2009-CP-46-1673

Yadkin Valley Bank & Trust, Respondent,

v.

Oaktree Homes, Inc., Dawne M. Ras and
Thomas C. Ras, Daniel Simpson, Above All
Services, Inc., Carter Lumber Company, Efficient
Painting Contractors, Inc., Creative Concepts, and
Solid As A Rock, Inc., Defendants,

Of whom

Oaktree Homes, Inc., is the Appellant.

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TABLE OF CONTENTS

Table of Authorities	ii
Statement of Issues on Appeal	1
Statement of the Case	1
Statement of Facts	3
Argument	7
I. The Circuit Court Erred In Basing Its Grant of Summary Judgment on Oaktree's Failure to Produce A Written Loan Commitment From the Bank	8
A. When the Opposing Party Claims That a Contract Never Existed, the Law Allows a Party Claiming a Contract to Offer Oral Evidence of That Contract	9
B. The Circumstances Surrounding Oaktree's Request for Sanctions Suggest That Summary Judgment Was Premature	11
II. The Circuit Court's Alternative Bases for Summary Judgment Were Also Controlled by Errors	14
A. The Question Whether the July Loan Was Intended to Release the Bank's Liability for the 51-lot Loan Is a Question of Fact	14
B. The Question Whether the Parties Had a Binding Agreement Is a Question of Fact	15
C. The Conclusion That the Bank Did Not Owe Oaktree Any Duty of Care Is Inconsistent with the Law of Negligent Misrepresentation	16
III. The Circuit Court Erred in Holding That Oaktree's Counterclaims Were Permissive and That Oaktree Waived its Right to a Jury Trial ...	17
Conclusion	20

TABLE OF AUTHORITIES

Cases

(South Carolina)

<i>Aust v. Beard</i> , 230 S.C. 515, 96 S.E.2d 558 (1957)	8,9
<i>Beach Co. v. Twillman, Ltd.</i> , 351 S.C. 56, 566 S.E.2d 863 (Ct. App. 2002)	18
<i>C & S Real Estate Servs., Inc. v. Massengale</i> , 290 S.C. 299, 350 S.E.2d 191 (1986) ...	17
<i>Clark v. Cantrell</i> , 339 S.C. 369, 529 S.E.2d 528 (2000)	12
<i>deBondt v. Carlton Motorcars, Inc.</i> , 342 S.C. 254, 536 S.E.2d 399 (Ct. App. 2000) ...	17
<i>Evans v. Rite Aid Corp.</i> , 324 S.C. 269, 478 S.E.2d 846 (1996)	16
<i>Fields v. Reg'l Med. Ctr. Orangeburg</i> , 354 S.C. 445, 581 S.E.2d 489 (Ct. App. 2003)	11, 12
<i>Hughes v. Edwards</i> , 265 S.C. 529, 220 S.E.2d 231 (1975)	16
<i>Moore v. Weinberg</i> , 373 S.C. 209, 644 S.E.2d 740 (Ct. App. 2007)	14, 15
<i>Mullinax v. Bates</i> , 317 S.C. 394, 453 S.E.2d 894 (1995)	18
<i>Pee Dee Production Credit Ass'n v. Joye</i> , 284 S.C. 371, 326 S.E.2d 650 (1984)	11
<i>Player v. Chandler</i> , 299 S.C. 101, 382 S.E.2d 891 (1989)	15, 16
<i>Rhode v. Tuten</i> , 34 S.C. 496, 13 S.E. 676 (1891)	15
<i>Sea Cove Dev., LLC v. Harbourside Cmty. Bank</i> , 387 S.C. 95, 691 S.E.2d 158 (2010)	8
<i>Smith v. Canal Ins. Co.</i> , 275 S.C. 256, 269 S.E.2d 348 (1980)	7
<i>Windham v. Lloyd</i> , 253 S.C. 568, 172 S.E.2d 117 (1970)	11
<i>Young v. Independent Pub. Co.</i> , 273 S.C. 107, 254 S.E.2d 681 (1979)	9

(Other Jurisdictions)

Adam v. Jacobs, 950 F.2d 89 (2d Cir. 1991) 18

S. Constr. Co. v. Pickard, 371 U.S. 57 (1962) 18

Sue & Sam Mfg. Co. v. B-L-S Const. Co., 538 F.2d 1048 (4th Cir. 1976) 18

Woodruff Oil & Fertilizer Co. v. Portsmouth Cotton Oil Refining Corp.,
246 F. 375 (4th Cir. 1917) 11

Statutes and Other Authorities

S.C. Code Ann. § 37-10-107 (2002) 1, 8, 9

Rule 13, South Carolina Rules of Civil Procedure 17, 18

Rule 1002, South Carolina Rules of Evidence 9

Rule 1004, South Carolina Rules of Evidence 9

Rule 1008, South Carolina Rules of Evidence 10, 11

Rule 1008, Federal Rules of Evidence 10

Charles Alan Wright & Victor James Gold,
Federal Practice and Procedure (2000) 10, 11

STATEMENT OF ISSUES ON APPEAL

- I. Whether a Party May Satisfy the Requirements of Section 37-10-170 of the South Carolina Code — Commonly Referred to as the Lender Statute of Frauds — by Offering Oral Testimony That the Lender Executed a Written Commitment to Lend.
- II. Whether the Circuit Court Erred in Granting Summary Judgment on the Grounds That a Subsequent Loan Constituted a Novation, That the Parties Did Not Have a “Final” Loan Agreement, and That a Bank Does Not Owe a Potential Borrower any Duty of Care.
- III. Whether a Counterclaim Alleging Breach of a Promise to Lend Money Is a Compulsory Counterclaim in an Action to Foreclose on a Different Loan, from the Same Bank, and the Loans Are Related.

STATEMENT OF THE CASE

This is an appeal in an action to foreclose on several commercial loans. Although the borrowers ultimately did not contest the foreclosure, they pressed for a trial on several counterclaims related to a potential loan that the bank investigated but declined to fund. The circuit court granted the bank summary judgment on the counterclaims, relying primarily on the fact that the borrowers could not produce a written agreement related to the potential loan. The issues in this appeal are whether the circuit court erred in that decision and whether those counterclaims should be tried to a jury instead of a judge. The summary judgment issue involves section 37-10-107 of the South Carolina Code; commonly referred to as the Lender Statute of Frauds.

American Community Bank initiated this suit by filing a complaint on April 16, 2009. (R.p.29) (the complaint). The complaint sought to foreclose on four mortgages.

Oaktree Homes was the borrower in each transaction. Dawne Ras (the company president) and Tom Ras personally guaranteed each loan. The complaint named Oaktree and

the Rases as defendants. The other named defendants were included in the suit because they had judgments or liens against some of the relevant properties. See (R.p.30, ¶¶4-7).

Oaktree and the Rases answered, defending the foreclosure by claiming that the bank's suit was barred by the doctrine of unclean hands. (R.p.54) (the answer). They also brought three counterclaims against the bank, claiming that the bank had committed and then backed-out of a loan and that this had caused Oaktree to lose approximately \$2.5 million in profit. The counterclaims were breach of contract, breach of contract accompanied by a fraudulent act, and negligent misrepresentation. See (R.p.54). In an amended answer, Oaktree and the Rases added counterclaims for fraud, interference with contract, and a violation of the South Carolina Unfair Trade Practices Act. (R.p.84).

In February of 2010, the circuit court substituted Yadkin Valley Bank & Trust as the plaintiff. Yadkin had purchased American Community Bank. See (R.p.101).

A scheduling order set March 15, 2011, as the deadline for filing dispositive motions, and the parties filed five (5) motions on that deadline. Four of these motions were filed by the bank. The bank sought (1) summary judgment on its claims; (2) summary judgment on the breach of contract counterclaim; (3) summary judgment on the rest of the counterclaims; and (4) an order denying Oaktree a jury trial on the counterclaims. The only motion filed by Oaktree and the Rases was a motion for sanctions which alleged that the bank had not honored its discovery obligations.

The circuit court heard the motions on May 18, 2011. Oaktree and the Rases did not oppose summary judgment in favor of the bank on the bank's foreclosure claims, see (R.p.173, lines 3-17), and they also did not oppose summary judgment in favor of the bank

on the counterclaims for fraud, interference with contract, and a violation of the South Carolina Unfair Trade Practices Act. (R.p.262, lines 18-24) (transcript); (R.p.25) (the circuit court's order). The only remaining issues were the request for sanctions, the bank's request for summary judgment on the counterclaims for breach of contract, negligent misrepresentation, and breach of contract accompanied by a fraudulent act, and whether Oaktree had the right to a jury trial on those counterclaims.

In an order filed July 20, 2011, the circuit court granted the bank's motions and denied the request for sanctions. (R.p.1). On August 18, 2011, Oaktree served notice of this appeal.

STATEMENT OF FACTS

This case began as an action to foreclose on four commercial loans. The record refers to those loans as Palm Tree Cove Phase I, Palm Tree Cove Phase II, Trinity Ridge, and the Glynn. See, e.g. (R.p.2).

The counterclaims in this case relate to Palm Tree Cove Phase II, which is part of a residential subdivision on Lake Wylie in York County, South Carolina. In general, the alleged factual basis for Oaktree's counterclaims is that the bank backed out of funding a large loan for Palm Tree Cove Phase II "at the 11th hour" and that this led to a substantial loss of profits and, ultimately, the failure of Oaktree's business.

Tom Ras had been working in the construction business for several years by the time he and his wife formed Oaktree in or around 2004. Oaktree's original business model was building single family residential homes in York County. (R.p.323). Oaktree targeted York County because of its proximity to Charlotte, North Carolina, (R.pp.324-325), and its

business grew steadily between 2004 and 2007. For example, Oaktree had \$2 million in revenue in 2006 and over \$5 million in revenue in 2007. (R.pp.326-327).

At some point, Oaktree began investigating a much larger project, specifically, the purchase, resale, and development of 51 residential lots in the Palm Tree Cove Phase II subdivision. Grier Sandifer, a commercial loan officer at the Bank of York, indicated that he learned of Tom Ras's interest in this project "sometime before September of 2007." (R.pp.344-345). The project unfolded in this way: in December of 2007, Oaktree entered into a contract to purchase 51 lots in Palm Tree Cove Phase II from a real estate development company, Har-Lee LLC, for roughly \$4.4 million. (R.p.361). The contract contained different payment options, and the exact purchase price depended on which option Oaktree selected. (R.p.361, ¶1A). The contract was not contingent on Oaktree obtaining financing, which meant that by its terms, the contract obligated Oaktree to complete the purchase or (presumably) be liable for breach of contract. Based on the strength of this contract, Har-Lee was able to obtain a loan to fund the development of the property into a subdivision of "buildable lots" with the necessary utilities and the desired amenities. (R.pp.303-307). Har-Lee was responsible for financing and running this stage of the development, but the contract also specified that Oaktree would be hired to do some of the work. See (R.p.363) and (R.p.308, lines 18-21). The contract specified that the closing was set to occur no later than February 28, 2008.

The purchase did not close in February of 2008, and Oaktree continued to pursue the transaction in the months that followed. In May of 2008, Oaktree executed a contract to sell the 51 lots to another corporation, Palmetto Investment Holdings Group, for what the

contract describes as an “estimated” price of roughly \$6.7 million. (R.p.373). This meant that if Oaktree could obtain the property from Har-Lee, it could then sell that property for a substantial profit in relatively short order. That profit was not guaranteed — the contract called for Oaktree to “buy back” several individual lots if the Palmetto Group did not meet its own sales goal for the neighborhood, see (R.pp.288-289) — but with this contract in place, Oaktree had assembled the skeleton of a two-transaction project with a fairly high potential for profit. What held Oaktree back was the roughly \$4.4 million it needed to purchase the 51 lots from Har-Lee.

According to Oaktree, American Community Bank agreed to fund \$3.8 million of the loan plus the closing costs, and the Bank of York agreed to cover the rest. (R.p.332, lines 20-22; Supp.R.p.11, lines 1-11). Oaktree alleged American Community Bank obligated itself to the transaction through a commitment letter executed by Derek Franklin, a loan officer at the bank. Specifically, Oaktree alleged that Franklin brought the commitment letter to Oaktree’s offices, that the parties made written alterations to the letter and initialed the changes, that the parties executed the commitment letter, and that Franklin took the executed letter with him so he could develop a “clean” copy to execute at closing. Oaktree alleged this happened some time in May of 2008, but the bank denied such a letter ever existed.

A closing on the 51-lot purchase was scheduled for June 6, 2008, but that closing did not take place, see (R.pp.320-321), and American Community Bank ultimately declined to fund the 51-lot transaction. Instead, it funded Oaktree’s purchase of 11 of Har-Lee’s 51 lots in Palm Tree Cove Phase II. This purchase closed in July of 2008. See (R.p.347) (the note). Oaktree defaulted on this loan, the bank initiated this lawsuit seeking foreclosure, and

Oaktree brought its counterclaims related to the bank's failure to fund the 51-lot transaction.

The first issue the circuit court's summary judgment order addressed was whether Oaktree had a right to a jury trial on its counterclaims. The circuit court noted that breach of contract, negligent misrepresentation, and breach of contract accompanied by a fraudulent act were all "legal" claims, and the court held that Oaktree waived its right to a jury trial because those counterclaims were permissive and had been brought in response to an action for foreclosure, which sounds in equity. (R.pp.5-8).

The second issue the circuit court addressed was Oaktree's breach of contract claim. The circuit court held that the Lender Statute of Frauds required Oaktree to produce a written loan agreement and held that Oaktree could not "circumvent" this requirement by offering oral testimony that such a writing had existed. The court also held that an integration clause in the papers for the July loan (for 11 lots in Palm Tree Cove Phase II) barred the counterclaims because it indicated "that the loan documents constituted the entire understanding" between the parties, and that Franklin's having taken the alleged commitment letter with him to re-type and re-execute meant that the letter was not a "final" commitment. (R.pp.8-17).

As for the negligent misrepresentation and breach of contract accompanied by fraud claims, the circuit court held that both failed because Oaktree could not produce a written commitment to lend. (R.pp.17-19). The circuit court also held that there was no evidence of a fraudulent act accompanying the breach of any contract and that the bank did not owe Oaktree any duty outside of the alleged contractual relationship. (R.pp.17-19).

Oaktree's motion for sanctions arose out of the fact that the bank had physically destroyed some of its computers during this litigation and that the bank had not instituted a "litigation hold" — an instruction that the bank not destroy any relevant documents or information — until late in 2010, over a year and a half after this suit began. Oaktree argued that this conduct made it inequitable to allow the bank to use the lack of a written commitment to lend as a basis for summary judgment, but the circuit court denied this motion, observing that Oaktree did not have any physical proof that a commitment letter ever existed. The court opined that it could not sanction the bank for something Oaktree allegedly lost, and that there was no evidence of "willful disobedience." (R.p.20).

ARGUMENT

Oaktree is not separately appealing the grant of summary judgment with respect to its counterclaim for breach of contract accompanied by a fraudulent act. Breach of contract and breach of contract accompanied by a fraudulent act are not separate causes of action. See *Smith v. Canal Ins. Co.*, 275 S.C. 256, 260, 269 S.E.2d 348, 350 (1980).

The central issue in this case is whether a party may satisfy a statute of frauds by offering oral testimony that a written contract existed. The circuit court incorrectly held that a party may not. When one party alleges that a written contract existed and the other party denies it, the existence of the contract is a dispute for the fact-finder. For this reason, the circuit court erred in basing its ruling on Oaktree's failure to present written evidence of the bank's commitment to lend.

The alternative bases for the circuit court's summary judgment rulings were also controlled by errors. In order to find that the July loan acted as a novation between Oaktree

and the Bank, the circuit court had to find facts; specifically, a mutual intention to substitute a new obligation for an existing one. It also had to find facts in order to conclude that Derek Franklin's taking the commitment letter with him meant that the letter was not a "final" contract. As for the conclusion that the bank did not owe Oaktree any duty of care "outside" of the alleged contract, that is inconsistent with South Carolina's law on negligent misrepresentation. That law instructs that a party has a duty to exercise reasonable care in sharing information about a transaction when the party has a pecuniary interest in the transaction.

Finally, the circuit court erred in concluding that Oaktree's counterclaims were permissive. A counterclaim is compulsory when it has a logical relationship to the claim in the complaint, and although the 11-lot loan was a "separate" loan from the 51-lot loan, there was a relationship between those transactions.

I. The Circuit Court Erred In Basing Its Grant of Summary Judgment on Oaktree's Failure to Produce A Written Loan Commitment From the Bank.

The Lender Statute of Frauds is codified in section 37-10-107 of the South Carolina Code (2002), and it "precludes certain actions regarding loans for money where there is no writing evidencing the alleged promise or agreement." *Sea Cove Dev., LLC v. Harbourside Cmty. Bank*, 387 S.C. 95, 102, 691 S.E.2d 158, 161 (2010).

Although the Supreme Court has described this statute as "essentially a statute of frauds," *id.* at 105, 691 S.E.2d at 163, the Lender Statute of Frauds is more than that. "Part performance" and "equitable estoppel" are exceptions to the statute of frauds that were created by courts of equity because the court "[would] not permit a statute designed to

prevent frauds to be used as an instrument to effect a fraud.” *Aust v. Beard*, 230 S.C. 515, 522-23, 96 S.E.2d 558, 562 (1957) (describing part performance). The Lender Statute of Frauds does not allow these exceptions; it prevents *all* claims — “for legal or equitable relief,” section 37-10-107(1) — and it specifically lists equitable estoppel and part performance as being barred unless the statute’s writing requirement is satisfied. See § 37-10-107(2)(b) & (c). In pertinent part, the statute instructs that the party seeking to maintain the action or defense based on a promise to lend money must have received a writing. This writing must contain the material terms and conditions of the promise, and the lender or its agent must have signed the writing. § 37-10-107(1)(c).

The circuit court held that Oaktree could not meet this statute through offering oral testimony that such a writing had existed. That ruling is not correct.

A. When the Opposing Party Claims That a Contract Never Existed, the Law Allows a Party Claiming a Contract to Offer Oral Evidence of That Contract.

The question whether a party may admit oral evidence related to a contract depends on the nature of the disagreement. For example, when a party relies on a series of documents (instead of a single document) to satisfy the “writing” requirement of the statute of frauds, the terms of the agreement must appear in the four corners of the documents; a party cannot use oral evidence to prove the contract. See *Young v. Independent Pub. Co.*, 273 S.C. 107, 111, 254 S.E.2d 681, 683 (1979). Rule 1002 of the South Carolina Rules of Evidence, better known as the “best evidence rule,” generally requires that a party produce the original writing in order to prove the writing’s contents, but Rule 1004 instructs that the original is not required if it has been lost, cannot be obtained, or was last in the possession of the offering

party's opponent. Rule 1008 provides that questions like whether the original has been lost or cannot be obtained are for the court to determine in the same way it determines other questions of preliminary admissibility, but the rule also provides that "when an issue is raised [] whether the asserted writing even existed . . . the issue is for the trier of fact to determine as in the case of other issues of fact." Put differently, the rule says that when the plaintiff claims that a written contract existed and the defendant claims that it did not, this creates a question of fact for the fact finder.

The notes to Rule 1008 indicate that "[t]here are no cases discussing the role of the trier of fact in this area," but they also instruct that the rule is identical to Rule 1008 of the Federal Rules of Evidence. In explaining why the question of whether a writing has been lost is treated differently from the question of whether a writing ever existed, the 1972 Advisory Committee Notes instruct that some questions "go beyond the mere administration of the rule preferring the original and into the merits of the controversy." The notes give the example of a plaintiff who offers oral evidence of a contract and a defendant who denies that the contract existed; and the notes explain "[i]f the judge decides that the contract was never executed and excludes the secondary evidence, the case is at an end without ever going to the jury on a central issue." The notes explain that this provision of the federal rule "is designed to ensure treatment of these situations as raising jury questions."

Wright and Gold's treatise on Federal Practice and Procedure offers a similar justification. It explains that the question of whether a contract ever existed is the type of question that the jury "usually is both willing and able to decide," and that "withdrawing from the jury the power to decide these facts may significantly undermine the right to jury

trial because these facts often are intertwined with the central issues in the case.” 31 Charles Alan Wright & Victor James Gold, *Federal Practice and Procedure* § 8062 (2000).

This Court should hold that the circuit court’s recitation on this point of law is not correct. The circuit court’s order cited one case in which the claim was that the original had been lost and two cases where the claims related to the execution of the contract, but the bank’s claim in this case was that the Rases were lying and that no written agreement ever existed.¹ In “lost” contract cases, the trial court has the discretion to admit oral evidence of the contract, see *Windham*, 253 S.C. at 572-73, 172 S.E.2d at 119, and if the opposing party claims that a contract never existed, Rule 1008 instructs that the dispute generally goes to the fact-finder. The circuit court accordingly erred when it based its grant of summary judgment on Oaktree’s failure to produce a written loan commitment from the bank.

B. The Circumstances Surrounding Oaktree’s Request for Sanctions Suggest That Summary Judgment Was Premature.

“The decision of what kind and whether to impose discovery sanctions is left to the sound discretion of the circuit court.” *Fields v. Reg’l Med. Ctr. Orangeburg*, 354 S.C. 445, 457-58, 581 S.E.2d 489, 495 (Ct. App. 2003), *aff’d in part and rev’d in part*, 363 S.C. 19, 609 S.E.2d 506 (2005). This Court has instructed that “[i]n deciding what sanction to impose, the circuit court should weigh the nature of the interrogatories, the discovery posture

¹*Windham v. Lloyd* is a “lost” contract case. 253 S.C. 568, 172 S.E.2d 117 (1970). *Pee Dee Production Credit Ass’n v. Joye* involved a question whether the signature on the contract was genuine. 284 S.C. 371, 326 S.E.2d 650 (1984). *Woodruff Oil & Fertilizer Co. v. Portsmouth Cotton Oil Refining Corp.* involved a question whether a signer of the contract had authority to bind his employer. 246 F. 375 (4th Cir. 1917). These are the relevant decisions cited in the circuit court’s order. See (R.pp.13-14).

of the case, willfulness, and the degree of prejudice[.]” and also that “[a] circuit court’s failure to exercise discretion is itself an abuse of discretion.” *Id.* at 458, 581 S.E.2d at 495. A circuit court abuses its discretion when its ruling is based on an error of law or when its factual conclusions are without evidentiary support. *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000).

The first part of the circuit court’s ruling on the request for sanctions is based on circular analysis; it reasons that it “cannot” sanction the bank because Oaktree cannot prove that a loan commitment existed. (R.p.20). The existence of a contract was one of the central issues — if not *the* central issue — of Oaktree’s claims. By hitching the request for sanctions to Oaktree’s ability to prove that the contract existed, the circuit court was requiring Oaktree to prove its case on the merits.

And the fact of the matter is that Oaktree did offer evidence that tended to show *some* relevant information had been destroyed during the life of this litigation. The bank employee in charge of technology infrastructure explained that Derek Franklin’s e-mails were not retained after American Community Bank merged with Yadkin. (Supp.R.4, line 2 - p.6, line 17). Yadkin closed on the purchase of American Community Bank the day after the complaint in this lawsuit was filed. (R.pp.101-102). This employee testified that as far as he knew, there was no way to retrieve any e-mails that did not appear in the message archive. (Supp.R.p.6, line 24 - p.7, line 6).² This employee also testified that the bank had replaced “a large number of American Community Bank” computers and that the hard drives for the

²This employee explained that the bank retained the e-mail archives of 8 employees after the merger. The only retained e-mails of Franklin’s would be e-mails appearing in the archives for these other accounts. (Supp.R.p.5, line 3 - p.7, line 4).

replaced computers had been physically destroyed. (Supp.R.p.2, line 3 - p.3, line 2). This computer replacement occurred in the “middle” of 2009, see (Supp.R.p.2, lines 3-4), and the Court will recall that Oaktree brought its counterclaims in June of 2009 and served its first discovery requests in July of 2009. Franklin was still working for the bank when the bank brought this suit, Franklin’s first meeting with the bank’s lawyer occurred within 3 months of the bank filing suit, and yet the bank employee in charge of technology infrastructure testified that he had not been notified of a litigation hold until the end of 2010. (R.p.296, line 6 - p.297, line 25; p.312, lines 14-15). This employee also testified that he had not been asked to locate the computer Franklin used while working at the bank. (R.p.12, lines 1-5).

To be fair, correspondence from the bank’s lawyers showed that in January of 2011, the bank was making an effort to locate Franklin’s computer. See (R.p.385). Also, at the May 2011 hearing, the bank produced a copy of Franklin’s electronic calendar. See (R.p.388). But while it is fair to give the bank credit for those particular activities, two things the bank *did* with those activities was *unfair*. First, the bank suggested that producing Franklin’s calendar meant that no information had been destroyed. (R.p.109, ¶4). This was directly contrary to the IT officer’s testimony that Franklin’s e-mails are irretrievably gone. Second, the bank suggested that Franklin’s computer might still exist and spoke of discovery being an obligation that it would continue to fulfill, but in the next breath, the bank asked the circuit court to toss all of Oaktree’s claims on summary judgment. (R.p.214, line 20 - p.215, line 5; p.218, lines 1-25). This line of argument should not have been persuasive. If the search for relevant documents and information was ongoing, summary judgment was premature. See *Baughman v. Am. Tel. and Tel. Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 543-

44 (1991) (implying that summary judgment is premature when discovery is incomplete). And if Oaktree's claims were resolved on summary judgment, there would not be much "continuing" of any discovery obligation.

The Court should hold that the circuit court erred in conditioning sanctions on Oaktree's ability to produce the contract and that summary judgment was premature.

II. The Circuit Court's Alternative Bases for Summary Judgment Were Also Controlled by Errors.

Although Oaktree's failure to produce a written loan commitment was the primary ground for the circuit court's rulings, the circuit court's order also offered alternative bases for granting summary judgment. On the breach of contract claim, the circuit court held that an integration clause in the papers for the July 2008 loan barred the claim because it indicated that the loan documents constituted the entire understanding between the parties. (R.pp.15-16). The circuit court also held that Franklin's having taken the alleged commitment letter with him to re-type meant that the letter was not a "final" commitment. (R.p.14). As to the negligent misrepresentation counterclaim, the circuit court held that the bank did not owe Oaktree any duty outside of the alleged contractual relationship. (R.p.19). These rulings were not correct.

A. The Question Whether the July Loan Was Intended to Release the Bank's Liability for the 51-lot Loan Is a Question of Fact.

A "novation" is a defense to a breach of contract claim. This Court has defined a novation as "an agreement between all parties concerned for the substitution of a new obligation between the parties with the intent to extinguish the old obligation." *Moore v.*

Weinberg, 373 S.C. 209, 217-18, 644 S.E.2d 740, 744 (Ct. App. 2007). “The party asserting a novation has the burden of proving it[,]” and both parties “must consent that the new agreement is to replace the old one and their consent must be apparent.” *Id.* at 218, 644 S.E.2d at 744.

In order to find that the July loan acted as a novation between Oaktree and the Bank, the circuit court had to find facts; specifically, a mutual intention to substitute a new obligation for an existing one. In the posture of a summary judgment motion, this was not proper. For one thing, the bank denied any obligation ever existed with respect to the 51-lot transaction. Thus, under the bank’s theory of the case, there was no existing obligation for which the July 2008 loan would have substituted. Dawne Ras also indicated that the July transaction was an attempt to mitigate Oaktree’s damages. See (R.p.382). This is not the same thing as indicating that Oaktree intended to substitute the second transaction and discharge the bank’s alleged obligation with respect to the potential loan that fell apart. The relevant language from the July mortgage provides that the mortgage “constitutes the entire understanding and agreement . . . as to the matters set forth in this mortgage.” (R.p.356). That language does not indicate that the July mortgage is being substituted for a valid existing obligation.

B. The Question Whether the Parties Had a Binding Agreement Is a Question of Fact.

Whether a contract exists is a question of fact. *Rhode v. Tuten*, 34 S.C. 496, 500, 13 S.E. 676, 677 (1891). To have a valid contract, “there must be a meeting of the minds between the parties with regard to all essential and material terms of the agreement.” *Player*

v. *Chandler*, 299 S.C. 101, 105, 382 S.E.2d 891, 893 (1989) (emphasis removed from original). There is no contract so long as the parties envision that “something remains to be done to establish contract relations.” *Hughes v. Edwards*, 265 S.C. 529, 536, 220 S.E.2d 231, 234 (1975).

Like its ruling on novation, the circuit court had to find facts in order to conclude that Derek Franklin’s taking the commitment letter with him meant that the letter was not a “final” contract. When considered in the light most favorable to Oaktree, the testimony indicates that the Rases thought they had a binding commitment from the bank. Tom Ras testified that he signed a commitment letter in May of 2008. (R.p.328, lines 15-22). He explained that the commitment letter contained several errors, that the parties made changes to the commitment letter, that the parties made the decision to sign the letter, and that Franklin said that the terms of that letter “[would] hold.” (R.p.328- p.330, line 10). The bank and the circuit court focused on the fact that Tom testified Franklin took the executed letter in order to bring a “clean” letter to the closing, but the fact that the parties contemplated re-executing the contract does not mean that they intended the signing of the first contract to be a meaningless exercise. This was another dispute of fact, which the circuit court should not have resolved on summary judgment.

C. The Conclusion That the Bank Did Not Owe Oaktree Any Duty of Care Is Inconsistent with the Law of Negligent Misrepresentation.

As for the conclusion that the bank did not owe Oaktree any duty of care “outside” of the alleged contract, that is inconsistent with South Carolina’s law on negligent misrepresentation. In *Evans v. Rite Aid Corp.*, the Supreme Court recited:

In South Carolina, one may bring an action sounding in tort for negligent misrepresentation. A duty to exercise reasonable care in giving information exists when the defendant has a pecuniary interest in the transaction. The recovery of damages may be predicated upon a negligently made false statement where a party suffers either injury or loss as a consequence of relying upon the misrepresentation. These general rules have been applied ... to support the recognition of a negligent misrepresentation claim where the misrepresented fact(s) induced the plaintiff to enter a contract or business transaction.

324 S.C. 269, 274, 478 S.E.2d 846, 848 (1996) (citations and quotation marks omitted); see also *deBondt v. Carlton Motorcars, Inc.*, 342 S.C. 254, 266-67, 536 S.E.2d 399, 405-06 (Ct. App. 2000). Because South Carolina law instructs that a party has a duty to use reasonable care in giving information about a transaction when that party has a financial interest in the transaction, the Court should reverse the circuit court's conclusion that the bank did not owe Oaktree any duty of care.

III. The Circuit Court Erred in Holding That Oaktree's Counterclaims Were Permissive and That Oaktree Waived its Right to a Jury Trial.

The circuit court held that Oaktree waived its right to a jury trial on the counterclaims because those claims were permissive and had been brought in response to an action which sounds in equity. (R.pp.6-9). This Court should reverse that conclusion. Although the circuit court correctly recited the relevant test, it did not apply that test correctly.

A defendant waives his or her right to a jury trial on any legal counterclaims when those counterclaims are permissive and are asserted in response to a complaint that sounds in equity. *C & S Real Estate Services, Inc. v. Massengale*, 290 S.C. 299, 300-01, 350 S.E.2d 191, 193 (1986). Rule 13(a), SCRPC, gives a definition of a compulsory counterclaim, and the test for whether the counterclaim is compulsory "is whether there is a 'logical

relationship' between the claim and the counterclaim." *Beach Co. v. Twillman, Ltd.*, 351 S.C. 56, 61, 566 S.E.2d 863, 865 (Ct. App. 2002) (citing *Mullinax v. Bates*, 317 S.C. 394, 396, 453 S.E.2d 894, 895 (1995)).

The term "logical relationship" does not appear to have been strictly defined. One federal court described the test for a logical relationship as whether "the essential facts of the claims are so logically connected that considerations of judicial economy and fairness dictate that all the issues be resolved in one lawsuit." *Adam v. Jacobs*, 950 F.2d 89, 92 (2d Cir. 1991). The rule describes compulsory counterclaims as arising out of the same "transaction" as the claim in the complaint. Rule 13(a), SCRPC. This rule is identical to the Federal Rule, and one federal court has observed that "transaction" is "a word of flexible meaning" that describes a "series of occurrences depending not so much on the immediateness of their connection as upon their logical relationship." *Sue & Sam Mfg. Co. v. B-L-S Const. Co.*, 538 F.2d 1048, 1051 (4th Cir. 1976). That court observed "that the rule should be given a broad realistic interpretation to avoid a multiplicity of suits." *Id.*

Case law in South Carolina contains a similar instruction. This Court has recited that the purpose of having compulsory counterclaims "is 'to prevent multiplicity of actions and to achieve resolution in a single lawsuit of all disputes arising out of common matters.'" *Beach Co.*, 351 S.C. at 62, 566 S.E.2d at 865 (quoting *S. Constr. Co. v. Pickard*, 371 U.S. 57, 60 (1962)).

The question presented here is whether there is a logical relationship between the bank's foreclosure claim on Palm Tree Cove Phase II and Oaktree's counterclaims. The Court should answer that question "yes." Oaktree's counterclaims all arise out of the 51-lot

transaction for Palm Tree Cove Phase II, and Oaktree claimed that the later loan, which was the subject of the foreclosure claim, was an attempt to mitigate damages from the 51-lot transaction. (R.p.382). Although Oaktree's victory on a counterclaim would not absolve it of responsibility for the mortgage, the mortgage was part of the "series of occurrences" with respect to Oaktree's attempt to develop Palm Tree Cove Phase II.

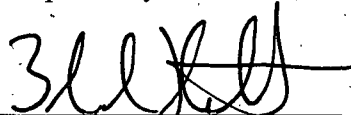
The bank's treatment of the loan in the foreclosure claim also tells the story of a logical relationship. The bank argued that the 11-lot transaction — the subject of one of the foreclosure claims — acted as a novation with respect to the alleged 51-lot transaction. (R.p.123). Here again, Oaktree's counterclaims would not necessarily affect the validity of the foreclosure claim, but a counterclaim need not extinguish liability on the principal claim in order to be compulsory; the test is whether the claim and counterclaim have a "logical relationship." To put the point simply, saying that one loan acted as a discharge of a previous agreement does nothing if not acknowledge that there is a relationship between the transactions. While this is not a case where the bank will necessarily have to prove facts that relate to any of Oaktree's counterclaims in the course of proving its foreclosure claim, the same cannot be said of the converse. Oaktree's damages claim involves the subject of the foreclosure claim, and at least one of the bank's defenses to the counterclaim for breach of contract relies on the paperwork for one of the bank's foreclosure claims. The Rases' testimony that the 51-lot transaction and the 11-lot transaction transactions were "separate" should not have controlled the analysis. See (R.p.338). The record describes a logical connection between them.

CONCLUSION

When one party alleges that a written contract existed and the other party denies it, the existence of the contract is a dispute for the fact-finder. In order to find that the July loan acted as a novation between Oaktree and the Bank, and in order to find that Derek Franklin's taking the commitment letter with him meant that the letter was not a "final" contract, the circuit court had to find facts. The conclusion that the bank did not owe Oaktree any duty of care "outside" of the alleged contract is inconsistent with South Carolina's law on negligent misrepresentation, and although the 11-lot loan was a "separate" loan from the 51-lot loan, there was a relationship between those transactions. This Court should accordingly reverse the grant of summary judgment in favor of Yadkin Valley Bank & Trust on Oaktree's counterclaims for breach of contract and negligent misrepresentation, and it should also reverse the grant of Yadkin's motion to deny Oaktree a jury trial on those counterclaims.

March 1, 2013

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

John C. Hayes, III, Circuit Court Judge

Case No. 2009-CP-46-1673

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MAR 28 2013
SC COURT OF APPEALS

Yadkin Valley Bank & Trust, Respondent,

v.

Oaktree Homes, Inc., Dawne M. Ras and
Thomas C. Ras, Daniel Simpson, Above All
Services, Inc., Carter Lumber Company, Efficient
Painting Contractors, Inc., Creative Concepts, and
Solid As A Rock, Inc., Defendants,

Of whom

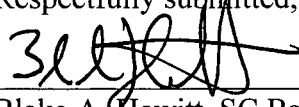
Oaktree Homes, Inc., is the Appellant.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 211(a), SCACR, I certify that the *Brief of Appellant* and the
Reply Brief comply with the provisions of Rule 211(b), SCACR, and with the August 13,
2007, Supreme Court Order regarding personal data identifiers.

/Signature page attached

Respectfully submitted,



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March 28, 2013

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Solid As A Rock, Inc., Defendants,

Of whom

Oaktree Homes, Inc., is the Appellant.

PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel for the Respondent with a copy of the *Certificate of Compliance* by mailing a copy of the same via United States Mail with first class postage prepaid to the following address:

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March 28, 2013
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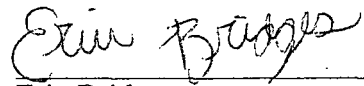
Oaktree Homes, Inc., is the Appellant.

PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel for the Respondent with a copy of the *Motion to File Supplemental Record on Appeal*, the conditionally filed *Supplemental Record on Appeal*, and the final *Brief of Appellant* and *Reply Brief* by mailing a copy of the same via United States Mail with first class postage prepaid to the following address:

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March 4, 2013
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