THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Charles B. Simmons, Jr., Special Circuit Court Judge

Case No. 10-CP-23-10047

TD Bank National Association,
Successor by Merger to Carolina
First Bank ..... Respondent

v.

Copper Lakes, LLC f/k/a Tall Pines
Investments, LLC; Grande Dunes
Development Company, and Silver
Real Estate Fund I., L.P., ... Defendants,

of whom

Silver Real Estate Fund I, L.P. is ..... Appellant.

REPLY BRIEF OF APPELLANT

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ARGUMENT

I. The holding in *Carolina First Bank v. BADD, LLC,* controls in this case and requires that Order of Reference be vacated.

Respondent incorrectly claims that this Court's recent decision in *Carolina First Bank v. BADD, LLC*, 400 S.C. 343, 347, 733 S.E.2d 619 (Ct. App. 2012), reh'g denied (Dec. 21, 2012), does not control in this case. However, that case clearly held that when a bank asserted claims under a guaranty agreement within a foreclosure, the guarantor was entitled to a jury trial on the legal claims, whether or not counterclaims were present.

In the *BADD*, case, a third-party guarantor argued that the circuit court erred in referring the bank's claim on a guaranty to the master.[1] *Id.* This Court noted that:

> in instances where legal and equitable issues or rights are asserted in the same complaint, the legal issues are for determination by a jury and the equitable issues are to be decided by the court.

Id., 400 S.C. at 346 (internal citation omitted). Respondent tries to avoid the decision in *BADD*, arguing that because the defendant's right to a jury trial was based on the fact that enforceability of a guarantee was in dispute and that he had asserted counterclaims against the bank. Respondent claims that Appellant is not entitled to jury trial because it did not dispute the guaranty and counterclaims were asserted. However, the opinion in *BADD* does not hinge on the presence of counterclaims or the defenses asserted by *BADD*, but on the fact that bank's claim on the guaranties was legal:

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[1]The circuit court found that the main purpose of the action --i.e., the foreclosure-- was equitable in nature and referred both the foreclosure and the guaranty claims to the master and the plaintiff appealed.

> McKown argues that Carolina First's claim again him for any indebtedness resulting after the sale of the subject properties is a breach of contract claim arising from the Guaranties and is legal in nature....We agree.

Id. at 345, 733 S.E2d at 620. The Court noted that the relevant question in determining whether there was a right to a jury trial was whether an action was equitable or legal, and found:

> A mortgage foreclosure is an action in equity. **However, it is well settled that a guarantor's liability is an independent contractual obligation. Accordingly, a claim to recover on a guaranty agreement is one at law, even if the plaintiff seeks a deficiency judgment resulting from the foreclosure of real property.**

Id. at 345-346, 733 S.E.2d at 620 (internal quotations and citations omitted, emphasis added). The Court reversed the lower court's order referring the matter to the master. It is clear that the presence of counterclaims was an ancillary issue which supported the Court's initial conclusion that the bank's guaranty claims were legal and entitled to a jury trial:

> ...we hold the circuit court erred in referring Carolina First's claim against McKown arising from the Guaranties to the master. This claim was separate and distinct from the foreclosure action and was legal in nature. Accordingly, McKown was entitled to a jury trial on this claim, and we reverse the circuit court's order referring this claim to the master.

Id. at 347, 733 S.E.2d at 620-621. In other words, it is the nature of claim brought by the bank that triggers the right to jury trial. Only after making that determination, did the Court add:

> Further, the filing of a legal counterclaim in response to an equitable complaint amounts to a waiver of the right to a trial by jury only when the counterclaim is permissive.

Id. at 347, 733 S.E.2d at 621(emphasis added).

In this case, just as in *BADD*, Respondent has brought a foreclosure action (sounding in equity) and a deficiency judgment under the Guaranty (sounding in law). The presence of

this legal claim against Appellant, on an independent obligation, requires that Appellant be given a jury trial, regardless of defenses or counterclaims asserted. Thus, the Order of Reference to the Master was in error.

II. Section 29-3-660 does not require deficiency claims to be determined by the Master.

Respondent next argues that S.C. Code §29-3-660 mandates that a deficiency judgment is part and parcel of a foreclosure and is to be decided by the court and not a jury. However, Respondent ignores the fact that there is a difference between a deficiency judgment against the mortgagor, and one against a third-party guarantor.[2] Section 29-3-660 states:

> In actions to foreclose mortgages the court may adjudge and direct the payment by the mortgagor of any residue of the mortgage debt that may remain unsatisfied after a sale of the mortgaged premises in cases in which the mortgagor shall be personally liable for the debt secured by such mortgage and if the mortgage debt be secured by the covenant or obligation of any person other than the mortgagor the plaintiff may make such person a party to the action and the court may adjudge payment of the residue of such debt remaining unsatisfied after a sale of the mortgaged premises against such other person and may enforce such judgment as in other cases.

S.C. Code 29-3-660 (Supp. 2011).

Section 29-3-660 does not address the mode of trial, but simply provides that a party who has secured the mortgage debt may be made a party to the foreclosure action if a deficiency is sought.[3] The fact that the statute provides that the "court may adjudge the

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[2]While the *BADD* case did not address this code section, it clearly recognized that deficiency judgment sought against a guarantor was entitled to a jury trial.

[3]A review of the history of Section 29-3-660 proves that this section was only intended to address the joining of claims. Section 29-3-660 was previously contained in a Section 487 of the 1942 code, which was entitled"What causes of action may be joined," and stated that "a plaintiff may unite, in the same complaint, several causes of action, whether they be such as have

payment of the residue" does not eliminate a seventh amendment right a jury trial, but simply sets forth which matters can be joined in one action. Section 29-3-660 simply does not mandate a mode of trial, and reliance on this statute is misplaced.[4]

Respondent also cites to the 2002 Notes to Rule 53, SCRCP, as support for the argument that only counterclaims are entitled to a jury trial. The portion Respondent relies upon only addresses a straight foreclosure and a case in which counterclaims are present:

> The 2002 amendment permits referral of foreclosure cases to the master-in-equity by order of the clerk of court. If there are counterclaims requiring a jury trial, any party may file a demand for jury under Rule 38 and the case will be returned to the circuit court.

Rule 53, SCRCP, Note to 2002 Amendment. The Notes do not address a foreclosure accompanied by a deficiency judgment sought against a third-party guarantor and offer no support to Respondent.

In addition, section 29-3-660 cannot be interpreted to deprive Appellant of its constitutional right to a jury trial. The South Carolina Constitution art. I, § 14 provides "[t]he right to a trial by jury shall be preserved inviolate." This guarantee preserves the right to a jury trial in those cases where jury trials were allowed at the time of the adoption of the Constitution in 1868. *Medlock v. 1985 Ford F-150 Pick Up,* 308 S.C. 68, 417 S.E.2d 85 (1992). Respondent argues that at the time of the adoption of the Constitution, foreclosure

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heretofore denominated legal or equitable, or both...." Section 487, S.C. Code of Laws (1942). That section did not address the modes of trial.

[4]Furthermore, the reference to "the court" in that section further supports Appellant's alternate argument that there might be three modes of trial - by jury, by the court and by masters/special referees (see p. 5, *infra*), and if Appellant is not entitled to a jury trial, it is at least entitled to a trial by the Circuit Court. See, *Chapman v. Lipscomb*, 15 S.C. 470, 474 (1881)(discussing the three modes of trial).

and deficiency judgment were equitable matters not entitled to a jury. However, Respondent ignores the fact the issue here does not involve a deficiency against the mortgagor, but "**an independent contractual obligation**"[5] **of a guarantor.** Respondent's claims against Appellant, for the recovery of money based on this "independent contractual obligation" is a legal claim, which would have been entitled to jury trial prior to the adoption of the Constitution. Thus, the constitutional declaration that "the right of jury trial shall remain inviolate" would apply here. *See, Collier v. Green*, 244 S.C. 367, 373, 137 S.E.2d 277, 281 (1964)("To the Court belongs all issues of law and chancery, and to the jury all questions of fact in cases at law for the recovery of money or any specific real or personal property").[6]

Alternatively, even if Appellant is not entitled to a jury trial because S.C. Code § 29-3-660 only provides that "the court" may determine a deficiency judgment, the proper "mode of trial" for Appellant is before a Circuit Court Judge, not the Master-in-Equity. This State has recognized that the circuit court and the master-in-equity are separate modes of trial. In fact, the South Carolina Supreme Court has held that there are three modes of trial:

> The code was designed to establish a system of civil procedure in the courts of this state, one of the features of which was, that in certain cases there might be **three modes of trial - by jury, by the court and by referees**; and the real question is, whether the master's act... was designed to abolish the last mode of trial in those counties where the office of master was established. The title of that act, to which we are at liberty to refer with a view to ascertain its object, is as follows: "An act to repeal the 294th, 295th, 296th, 297th and 436th sections of the code of procedure within the counties

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[5]*BADD,* 400 S.C. at 346 .

[6]Respondent claims that Appellant's failure to complete the rest of the sentence -- " 'the right of a jury trial shall remain inviolate' does not apply to cases within the equitable jurisdiction of the court" -- negates Appellant's argument. However, that phrase has no effect because a legal claim on an independent contract for the recovery of money has always been a legal, not equitable, claim and the right to jury trial remains.

> herein mentioned, so as to abolish the use of referees in the said counties, and to establish in their stead the office of master."

Chapman v. Lipscomb, 15 S.C. 470, 474 (1881) (emphasis added). The *Chapman* Court further held that the purpose of the act was "not to abolish *the third mode of trial* provided for in the code, nor was it merely to abolish the use of referees, but rather to substitute" the office of the master for the referees. *Id.* (emphasis in original). The only matter that is subject to a compulsory, *ex parte* referral to a master is a pure foreclosure. The action against Appellant is a deficiency judgment seeking a money judgment from a third party guarantor. Thus, Appellant is entitled to a specific mode of trial -- either a trial by jury (as discussed above) or a trial by the circuit court, not the master.

III. The proper procedure for referral was not followed, and the Order of Reference should be vacated.

Respondent argues that Rules 53 and 71, SCRCP authorize the clerk to file actions like this one to the master-in-equity without consent. However, Rules 53 and 71 do not address a case like the instant one, in which there is a third party guarantor. Those rules only address straight foreclosures.

Rule 53(b), SCRCP, states: "In an action where the parties consent, in a default case, or an action for foreclosure, some or all of the causes of action may be referred to a master or special referee by order of a circuit court judge or the clerk of court." Rule 71 also only addresses foreclosure, and incorporates the limitations of Rule 53:

> Actions to foreclose liens or obtain partition of real property shall be tried by the court, and shall ordinarily be referred to a master pursuant to Rule 3.

Rule 71(a), SCRCP. Because the order of reference was *ex parte*,[7] the court must narrowly construe Rules 53 and 71. *See also, e.g., Granny Goose Foods, Inc. v. Teamsters,* 415 U.S. 423, 94 S.Ct. 1113, 39 L.Ed.2d 435 (1974)(circumstances justifying the issuance of an *ex parte* order are extremely limited).[8] Here, the rules only provide that for pure foreclosures to be referred, not actions for foreclosure and deficiency judgment. See Rule 53(b) and 71(a), SCRCP. In this case, the claims go beyond a "pure" foreclosure and seek a deficiency judgment against the guarantor, Appellant Silver Real Estate; thus, the matter cannot be unilaterally sent to the Master without Appellant's consent. Therefore, the lower court erred in refusing to vacate the improper Order of Reference.

IV. The lower court's orders are immediately appealable as they deprive Appellant of a substantial right and a mode of trial.

Certain orders are immediately appealable even if not final. S.C. Code Ann. § 14-3-330. "An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any

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[7]Respondent disputes that the order was *ex parte*, arguing that all parties were served with the Motion for Reference. However, the term "ex parte" is Latin and means "on or from one party only." Blacks Law Dic. (9th Ed. 2009). Here, the motion was made by Respondent on October 13, 2011, and was signed by the clerk and filed in just a matter of days, without a hearing or consent of Appellant. (Motion and Order, R.pp. 154; 1).

[8]The Supreme Court in that case noted that the restrictions on *ex parte* orders (in that case, a TRO) reflected " the fact that our entire jurisprudence runs counter to the notion of court action taken before reasonable notice and an opportunity to be heard has been granted both sides of a dispute." *Id.* at 438-39, 94 S.Ct. 1113 (internal citation omitted). *See also, Martin's Herend Imports, Inc. v. Diamond & Gem Trading USA, Co.*, 112 F.3d 1296, 1306 (5th Cir. 1997)("Given the draconian nature of this *ex parte* remedy, providing for the seizure of defendant's wares and records without prior notice to the defendant and with the assistance of law enforcement officers, we believe that it should be narrowly construed.")

part thereof or any pleading in any action[.]" S.C. Code Ann. § 14-3-330(2). Immediate appeals under this section have been allowed in situations where the substantial right could not be vindicated on appeal after the case. *Breland v. Love Chevrolet Olds, Inc.*, 339 S.C. 89, 259 S.E.2d 11 (2000). An order of reference that deprives a party of a mode of trial affects a substantial right, and is immediately appealable. *Breland, supra.* For example, where a party has a right to a jury trial because the litigation concerned a land title dispute, an order referring the matter to a master was in error and should have been immediately appealed. *Creed v. Stokes*, 285 S.C. 542, 543, 331 S.E.2d 351, 352 (1985).

As set forth more fully in Section I, Appellant is entitled to a jury trial.[9] Thus, the order of reference was improper and affects a substantial right and mode of trial of Appellant.

Rule 53(b), SCRCP, states: "In an action where the parties consent, in a default case, or an action for foreclosure, some of all of the causes of action may be referred to a master or special referee by order of a circuit court judge or the clerk of court." However, where an order of reference is sought *ex parte*, the court must narrowly construe the rule: "Strict construction of reference statutes is supported by the rationale that the validity of the referee system depends upon strict compliance with the statute, so that a trial referee does not encroach upon, or unconstitutionally compete with other constitutional courts." 66 Am.Jur.2d References § 6, citing *Great Country Bank v. Pastore*, 241 Conn. 423, 696 A.2d 1254 (1997).

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[9]Alternatively, Appellant is entitled to a trial by the Circuit Court, not the Master-in-equity.

Here, the lower court did not have the consent of Appellant to refer the case to the Master in Equity. The lower court did not strictly comply with Rule 53, depriving Appellant of a mode of trial, which also renders an interlocutory appeal appropriate. The only claim against Appellants is a claim at law for the recovery of money, based on the independent obligation of Appellant, which entitles Appellant to a jury trial. *Collier v. Green*, 244 S.C. 367 (1964); *BADD, supra.* Rule 53 only allows "an **action for foreclosure**" to be referred without consent; the rule does not include actions for deficiency judgments against third party guarantors.[10] The relief sought by Respondent also included a deficiency judgment against third party guarantor (Appellant). As explicitly acknowledged in the *BADD* opinion, the right to a jury trial was triggered by the claim against the guarantor and the lower court could not properly refer a case to the master without the consent of Appellant.[11]

Respondent relies on *C&S Real Estate Service, Inc. v. Massengale*, 290 S.C. 299, 350 S.E.2d 191 (1986), for its argument that denial of a jury trial is not immediately appealable. However, C&S does not apply here. In that matter, the appellant claimed a

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[10]Respondent has argued that the action for deficiency judgment is equitable and merely incidental to foreclosure and that a guarantor against who, a deficiency judgment is sought is not entitled to a jury trial. However, the cases upon which Respondent rely for this argument are not applicable here. Respondent first cites *Fed'l Land Bank of Columbia, v. Davant*, 292 S.C. 172, 355 S.E.2d 293 (Ct. App. 1987). That case held that a the court can enter a deficiency judgment claim against the mortgagor when the debt remains unsatisfied after a foreclosure sale. That case does not consider the issue of a deficiency judgment against a guarantor. Likewise, Respondent's other case, *Perpetual Bldg. and Loan of Anderson v. Braun*, 270 S.C. 238, 242 S.E.2 407 (1978), merely allowed a plaintiff to recover a deficiency judgment against a mortgagor, despite that it was not specifically demanded in the complaint, because a deficiency was incidental to the foreclosure against the mortgagor. That case also did not address any claims against a guarantor.

[11]Alternatively, as set forth in Section II, S.C. Code § 29-3-660 entitles Appellant to a trial by the Circuit Court, not the Master-in-Equity, and the case should not have been referred.

right to jury trial due to counterclaims asserted against an equitable action. However, because the counterclaims were permissive, rather than compulsory, the Court found that the appellant had waived the right to a jury trial. Here, there has been no waiver by Appellant.

In summary, Appellant is entitled to a specific mode of trial, either a trial by jury or a trial by the circuit court, not the master, and the Orders of the lower court deprive Appellant of that mode of trial. Under either scenario, an interlocutory appeal under S.C. Code § 14-3-330 is proper.[12]

CONCLUSION

As set forth herein, the holding in *Carolina Bank v. BADD, LLC* controls, and Appellant is entitled to a jury trial on the claim for deficiency judgment under the guaranty. Furthermore, because the proper procedure was not followed, the Order of Reference must be vacated. Finally, the orders on appeal affect Appellant's mode of trial and thus are immediately appealable.

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[12]In Footnote 10 of its Brief, Respondent also claims that the foreclosure claim should be remanded to the Master-in-Equity for trial. Respondent argues that Rule 205, SCACR, allows a lower court to proceed with matters not affected by the appeal. Respondent claims that the foreclosure action against Copper Lakes should be remanded for a hearing before the master and a foreclosure sale, if necessary. However, here, the Copper Lakes foreclosure is intertwined with the deficiency judgment sought by Appellant and the subject of this appeal. "Where there is a single order that is appealable in part, **the entire order should be considered on appeal.**" *Rice Hope Plantation v. South Carolina Pub. Serv. Auth.*, 216 S.C. 500, 59 S.E.2d 132(1950) *overruled on other grounds, McCall v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985) (emphasis added). In other words, the Court cannot sever part of the order and allow lower court proceedings while another part of the same order is on appeal.

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Brief complies with Rule 242, SCACR, and with the August 13, 2007 Order of the South Carolina Supreme Court which requires redaction of certain personal identifying information.

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