89163

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
DeAndrea Benjamin, Circuit Court Judge

Case No. 2016-001019

U.S. Bank, National Association, as trustee for the Holders of the Banc of America Funding Corporation, 2008-FTI, — Respondent,

v.

Rhonda Lewis Meisner a/k/a Rhonda L. Meisner, Bank of America, N.A. and SCBT — Appellant.

PETITION FOR REHEARING

SUMMARY

The appellant respectfully petitions this Court pursuant to SCACR Rule 221 of this Court's decision of February 13, 2019 that dismissed the appeal. This unanimous Court held in equitable cases, the counter claims must be logically related to the ability of the plaintiff to foreclose the mortgage.

This Court's Previous Holdings

This Court also found in *South Carolina Community Bank*, that an allegation that the plaintiff bank violated the UTPA was logically related to the enforceability of the note and mortgage. *South Carolina Community Bank, Respondent, v. Salon Proz, LLC, Columbia Empowerment Zone, Inc. d/b/a The Columbia Empowerment Zone and Frank Mitchell, Defendants, Of Which Salon Proz, LLC* is the Appellant. Appellate Case No. 2014-02627. Decided April 26, 2017. Additionally, SCRCP Rule 13(a) provides that a counter claim is compulsory if it arises out of the same transaction and occurrence.

In this case, just like this Court found in *South Carolina Community Bank v. Solan Proz, LLC*, the appellant alleged the respondent U.S. Bank National Association, violated the UTPA by filing a foreclosure action when its predecessor in title breached the repayment agreement *elected as a term in the note* associated with the mortgage that is the subject of the foreclosure action.1 (**R. Vol. I. p. 48 ¶80)**. (emphasis by the appellant).

This Court also found standing and the real party in interest goes to the ability of the plaintiff to get the requested relief (foreclosure of the mortgage). The ability of the plaintiff to foreclose is dependent on the underlying terms of the note and mortgage contracts. U.S. Bank filed for foreclosure on March 31, 2014;however, the mortgage

---

1 The appellant requested the note be added to the record. The note was filed ;however a review of the record on appeal does not include the note.

was not conveyed to U.S. Bank from Bank of America until April 2nd and was notarized April 3rd of 2014 which was *after* the lawsuit was filed. **(R. Vol. II. P. 260).**

The very note associated with this mortgage foreclosure, included the requirement that mortgage payments would be drafted by the bank automatically, if this was an elected as a term of the note. **(R. Vol. II p.257 ¶ 7.)** This election to have the payments drafted, was made by the parties to the note and mortgage agreements,(Bank of America and the appellant) and was included in the note document itself. **(R. Vol. II p.257 ¶ 7.)** The note further provided *and required* that once the appellant elected to pay via automatic drafting, the bank then assumed the duty to draft the payments. **(R. Vol. II p.257 ¶ 7).** The only provision contained (within the body of the note) that allowed for the bank to cease automatic deductions required the appellant to notify Bank of America, in writing of the change in the terms of the repayment of the note, which never occurred. **(R. Vol. II p.257 ¶ 7).** However, Bank of America and/or U.S. Bank breached the underlying note contract by failing to debit as agreed appellant's bank account and then transferred the same note and mortgage that *included* the debit requirement months later to U.S. Bank, who then filed for foreclosure. (emphasis by appellant).

ARGUMENT

This Court previously held "A mortgage and a note are separate securities for

the same debt, and a mortgagee who has a note and a mortgage to secure a debt has the option to either bring an action on the note or to pursue a foreclosure action." *U.S. Bank Trust Nat'l Ass'n v. Bell*, 385 S .C. 364, 374, 684 S.E.2d 199, 204 (Ct.App.2009). "Generally, the party seeking foreclosure has the burden of establishing the existence of the debt *and the mortgagor's default* on that debt." Id. at 374–75, 684 S.E.2d at 205 (emphasis by appellant). "Once the debt and default have been established, the mortgagor has the burden of establishing a defense to foreclosure such as lack of consideration, payment, or accord and satisfaction." *Id.*

Because the requirement to debit the bank account was included in the note itself, a fact finder could find that Bank of America and/or U.S. Bank breached the note agreement associated with the mortgage. U.S. Bank was assigned the note that Bank of America and the appellant agreed to. It is axiomatic that terms of the note and mortgage cannot be changed by either the assignor or the assignee, which included the requirement to debit. As such, foreclosure is not an available remedy because the respondents caused and/ or perpetuated the breach by the failure to debit and then accelerate the loan.

In this case, the counter claim specifically alleged :

1. Appellant Rhonda Meisner denied she caused the default. **(R. Vol. I p.37 ¶ 16).**

2. Appellant Rhonda Meisner elected to have payments drafted in the

original note agreement documents of the parties. **(R. Vol. I .p.39 ¶ 30)**

3. The terms of the note required the Bank of America, N.A (defendant and cross claimant) to automatically debit once this term was elected by the Appellant. **(R. Vol. I. p. 39 ¶33; p. 40:1-5)**

4. Appellant Rhonda Meisner never requested the bank to cease deductions.**(R. Vol. I pl 40 ¶ 34).**

5. Appellant Rhonda Meisner alleged Bank of America ceased the debits and caused the default. **(R. Vol. I pl 40 ¶ 34 ¶37).**

6. Appellant Rhonda Meisner alleged Bank of America had a duty to continue debiting the account. **(R. Vol. I pl 40 ¶ 35).**

7. Appellant Rhonda Meisner alleged Bank of America could and did change the amounts of the debits. **(R. Vol. I pl 40 ¶ 36)**.

8. Bank of America breached the note agreement by failing to debit the payments for the mortgage and failing to transfer the debiting requirement to U.S. Bank. **(R. Vol. I pl 42 ¶ 48 ¶52)**.

9. The appellant Rhonda Meisner also alleged that U.S. Bank assumed an already defaulted loan making them a third-party debt collector under U.C.C. **(R. Vol. I p. 40 ¶46 ¶ 52)**.

10. The above terms were incorporated in the request for declaratory judgment making it an offensive declaratory judgment and a legal counterclaim. **(R. Vol. I p. 44 ¶ 54 p. 45 ¶54:1-7)**.

11. Among other things the declaratory judgment requested the Court to determine the real party in interest, the proper owner of the note

and mortgage, the rights and obligations of the parties regarding the note and mortgage, including the co-defendants. **(R. Vol. I p. 44 ¶ 54)**

12. The declaratory judgment action also requested the Court determine that respondent U.S. Bank's failure to draft payments from appellant Meisner's bank account was the cause of the breach. **(R. Vol. I p. 44 ¶ 56).**

13. The counter claim also argued that U.S. Bank violated the unfair Trade Practices Act UTPA by filing suit on a loan breached by their predecessor in title.**(R. Vol. I. p.48 ¶ 80).**

Real Party in interest -Declaratory Judgement

The lower court ruling was based on the answer, counter, and cross claims filed on August 10, 2015 which alleged counter claims for declaratory judgment, breach of contract, breach of contract accompanied by a fraudulent act *and* violation of UTPA by initiating this foreclosure action. **(R Vol. I.p.2:7-13).**

The respondent U.S. Bank understood that there was a breach of contract counter claim, a breach of contract accompanied by a fraudulent act, and violation of UTPA for filing the lawsuit on an instrument that was breached by its predecessor in title. **(R. Vol. I p.48 ¶ 80)** In fact, the respondent *specifically denied* the counterclaim that it violated the UTPA.**(R. Vol. I. p. 63 ¶ 39).**

The respondent represented, based on its filings, that the breach of contract occurred July of 2013.**(R. Vol. I. p. 16 ¶ 15**). The respondent represented that the note and mortgage was assigned April 2 or 3, 2014 based on the dated assignment. Because

of the respondent's own pleadings, it has admitted it was assigned a defaulted note and mortgage. As such, a jury could find the respondent is a third-party debt collector that has not been damaged.

The South Carolina Supreme Court's opinion in *Verenes v. Alvanos* Right to Jury Trial based on Totality of Facts and Prayer for Relief

Characterization of an "action as equitable or legal depends on the appellant's 'main purpose' in bringing the action." *Ins. Fin. Servs., Inc. v. S.C. Ins. Co.*, 271 S.C. 289, 293,247 S.E. 2d S.E. 2d 315 (1978) (citations omitted). "The main purpose of the action should generally be ascertained from the body of the complaint." *Id.* (citation omitted). "However, if necessary, resort may also be had to the prayer for relief and any other facts and circumstances which throw light upon the main purpose of the action." *Id.* (citation omitted). The nature of the issues raised by the pleadings and character of relief sought under them determines the character of an action as legal or equitable. *Bell v. Mackey*, 191 S.C 105, 119-20, 3 S.E.2d 816, 822 (1939) (citations omitted).

Here, the counter claims and the prayer for relief provide for access to jury trial based on the holdings in *Verenes*. *Verenes v. Alvanos*, 387 S.C. 11, 15 690 S.E. 2d 771, 772 (2010) The prayer for relief requested:

1. The Plaintiff US Bank is a third-party debt collector pursuant to article 3 of the UCC.

2. The co-defendant Bank of America, N.A. caused the default of the mortgage and note by their actions.
3. A finding the Plaintiff US Bank abused the process of the Courts and has damaged the defendant Rhonda Meisner and US Bank's actions warrant actual and punitive damages to be proved at trial.
4. A finding that co-defendant Bank of America, N.A. slandered the title of defendants' Rhonda Meisner's property located at 406 Koon Store Road, Columbia, SC 29203 by not removing the mortgage lien from 2005and therefore damaged defendant Meisner.
5. A finding that co-defendant's Bank of America's failure to remove the liens associated with the 2005 mortgage that was satisfied violated S.C. Code Ann.§ 29-3-310 warranting recovery via S.C. Code Ann. §29-3-320.
6. A determination that the counterclaims and the cross claims warrant a jury trial and for transfer to the jury roster and for referral to ADR.

CONCLUSION

It is axiomatic that a party cannot fail to perform an elected portion of a contract and subsequently transfer the mortgage to another entity (respondent) and then claim a jury trial is not available for the very breach the cross defendant caused. South Carolina affords the opportunity of a jury demand for counter claims that are logically related to the ability of the respondent to foreclose. The appellant argues this should be true of a cross

claimant when the predecessor in title is the breaching party and the instrument is transferred after the breach, indeed after the lawsuit was filed.

The respondents should not be allowed to further breach the note contract then deny a jury trial to the appellant when the counter and cross claims for breach of contract are specifically related to the respondent's ability to foreclose. Particularly when the respondent, U.S. Bank, for all intents and purposes, based on its own pleadings, is a third-party debt collector that abused the foreclosure process of the courts.

This Court's ruling in this case is counter to this Court's previous ruling in *South Carolina Community Bank* because the appellant alleged a counterclaim that is a violation of the UTPA by U.S. Bank filing a foreclosure agreement when its predecessor in title and/or servicing caused the breach. This Court's ruling should consider the South Carolina Supreme Court's ruling in *Verenes* and as such evaluate both the prayer for relief and the offensive declaratory judgment action and counter and cross claims and determine a jury trial is warranted.

Here, there is

1. No valid jury waiver
2. A counter claim and a cross claim based on the respondents and its predecessor in title's breach of the documents that are the subject of the foreclosure action,

3. A claim for abuse of process due to U.S. Bank's referral to the Master in Equity with findings of fact and conclusions of law as determined by the Clerk of Court.
4. A cross claim that allows for a jury trial and if a trial court or jury found the assignments of the mortgage occurred after the lawsuit was filed as the documents reflect then the real party in interest would be Bank of America, warranting a jury trial on this claim alone.

For the above reasons and all references to the record, the appellant respectfully requests this Honorable Court of Appeals to reconsider its decision of February 13, 2019 and remand the case back to the Circuit Court with instructions to add the case to the jury roster.

Respectfully Submitted,

February 28, 2019

Rhonda L. Meisner
P.O. Box 689
Blythewood, SC 29016
Pegasus333@icloud.com
(803)206-3402

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
DeAndrea Benjamin, Circuit Court Judge

Case No. 2016-001019

U.S. Bank, National Association, as trustee for the Holders of the Banc of America Funding Corporation, 2008-FTI,

Respondent,

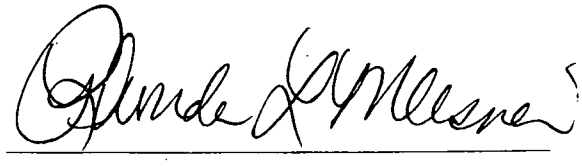
v.

Rhonda Lewis Meisner a/k/a Rhonda L. Meisner, Bank of America, N.A. and SCBT

Appellant.

PROOF OF SERVICE PETITION FOR REHEARING

The appellant certifies she has served a copy of the petition for rehearing on all parties that have submitted a brief by mailing a copy of her PETITION FOR REHEARING to :**Trent M. Grissom McGuire Woods, LLP 201 N.Tryon Street Suite 3000 Charlotte, NC 28202 postage pre-paid**



Rhonda Lewis Meisner, Appellant
Post Office Box 689
Blythewood, South Carolina 29016
Pegasus333@icloud.com
(803) 206-3402

February 28, 2019