THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

The Honorable Diane Schafer Goodstien, Circuit Court Judge

Case No. 2011-CP-18-1013

Appellate Case No. 2013-002066

The Bank of New York Mellon, as Successor Trustee under NovaStar Mortgage funding Trust, Series 2004-1,.....Appellant,

v.

Rachel R. Lindsay; Jeffery Wayner; Tammy Wayner; Tiffany Spann-Wilder, Esq.; The Steinberg Law Firm; and United States of America, Acting by and through its agency, the Internal Revenue Service; Defendants,

Rachel R. Lindsay .....Respondent,

v.

Saxon Mortgage Services, Inc.,.....Appellant.

FINAL BRIEF OF RESPONDENT

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

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ATTORNEYS FOR RESPONDENT
(RACHEL R. LINDSAY)

March 13, 2014

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III. In the State of South Carolina when both legal and equitable issue are in dispute it is well established that legal matters will be entertained first by the jury and matters of equity entertained last by the judge, consequently, is it necessary or required for the motion hearing judge to specify and label each claim and counterclaim asserted in the case when one legal and compulsory counterclaim is identified?

STATEMENT OF THE CASE

The Bank of New York Mellon, Successor Trustee under NovaStar Mortgage funding Trust, Series 2004-1, (*lender/holder of note and mortgage*) filed a foreclosure action against the Defendant Rachel Lindsay (*borrower*) (R. pp. 29-40). Lindsay filed an Answer and Counterclaim against "Bank of New York" and Third Party Complaint against Third Party Defendant Saxon Mortgage Services, Inc., (*servicer*). (R. pp. 57-84), demanding a trial by jury. "Bank of New York" and "Saxon Mortgage" filed an Answer (R. pp. 85-95), and Reply. (R. pp. 96-106). Appellants filed a Joint Motion for a Non-Jury Trial in Equity Court and to Strike the Jury Trial Demand on March 22, 2013. (R. pp. 115-118). The Respondent Lindsay filed a Memorandum of Law in Opposition to Appellants' Motion for a Non-Jury Trial in Equity Court and to Strike the Jury Trial Demand. (R. pp. 119-125). The Honorable Diane Schafer Goodstein issued an Order denying the Apellants' motion on August 14, 2013. (R. pp. 22-25). The Appellant filed a Motion to Alter or Amend pursuant to Rule 59(e) on August 15, 2013. (R. pp. 126-131). The Honorable Diane Schafer Goodstein issued a Form 4 Order denying the Apellants' motion on August 22, 2013. (R. pp. 26-28). The Appellant filed the subject appeal objecting to the Court Order recognizing and acknowledging the Respondent Lindsay's right to a trial by a jury of her peers.

Procedural History - Case Filings.

I. **FIRST CASE FILING** (Case No. 2008-CP-18-02543):

1. The Appellant "Bank of New York Mellon" filed a Lis Pendens, Summons and Complaint on October 8, 2008. (R. pp. 29-40).
   a. Causes of Action against "Lindsay"
      (1) Foreclosure

2. An Order of Judgment of Foreclosure and Sale was filed on January 14, 2009. (R. pp. 1-8).
3. The Defendant "Lindsay" filed a Motion for Temporary Restraining Order & Show Cause Order on January 30, 2009. (R. pp. 107-114).
4. An Order Vacating Judgment and Dismissing Action was filed on April 2, 2009. (R. pp. 9-12).

II. **SECOND CASE FILING** (Case No. 2009-CP-18-01311) :

1. The Appellant "Bank of New York Mellon" filed a Lis Pendens, Summons and Complaint on May 13, 2009. (R. pp. 46-56).
   a. Causes of Action against "Lindsay"
      (1) Foreclosure
2. The Defendant "Lindsay" filed an Answer and Counterclaim and Third Party Complaint (i.e., against Saxon Mortgage Services, Inc. –Third Party Defendant) on June 16, 2009. (R. pp. 57-84).
   a. Counterclaims against "Bank of New York" and Third Party Complaint Causes of Action against "Saxon Mortgage":
      (1) Breach of Contract
      (2) Negligence
      (3) Fraud
      (4) Negligent Misrepresentation
      (5) Promissory Estoppel
      (6) Violation of the South Carolina Unfair Trade Practices Act
      (7) Quantum Meruit/Unjust Enrichment
      (8) Intentional Infliction of Emotional Distress/Outrage
      (9) Invasion of Privacy
      (10) Defamation/Libel Per Se

(11) Intentional Interference with Contract

(12) Intentional Interference with Prospective Economic Advantage

(13) Declaratory Judgment for Compliance with Homeowner Affordability and Stability Plan

(14) Declaratory Judgment for correction of credit report

3. A Consent Order pursuant to S.C. R. Civ. P. Rule 40(j) was filed on June 1, 2010 removing the case from the active docket. (R. pp. 12-17).

III. **THIRD (CURRENT) CASE FILING** (Case No. 2011-CP-18-01013) :

1. A Joint Consent Motion to Restore and Proposed Order was filed on May 20, 2011. (R. pp. 18-21).

STATEMENT OF FACTS

Respondent "Lindsay" executed and delivered a promissory note in the amount of $140,250.00 and mortgage of property bearing TMS: 171-06-01-016-000 to Universal Mortgage Consulting, LLC on February 13, 2004. Appellant "Saxon Mortgage" became the servicer of the loan on behalf of Appellant "Bank of New York Mellon" which allegedly through assignment(s) of the note and mortgage became the holder of the of the note and mortgage. Said Appellant failed to apply payments made by the Lindsay. Appellants filed negative actions against Lindsay's credit which has caused Lindsay to have a lower credit score and wrongfully filed the above referenced foreclosure actions against the Lindsay which has also adversely impacted Lindsay's credit. Appellants' Motion for Summary Judgment has been denied in the case at hand. Saxon Mortgage Services, Inc., Appellant, acts as the servicer of the mortgage loan held by Appellant "The Bank of New York Mellon, as Successor Trustee under NovaStar Mortgage funding Trust, Series 2004-1". Said Appellant Saxon acted as agent or apparent agent of the Appellant

"Bank of New York Mellon"; all acts of said Appellant were within the scope of its authority or agency, and/or were ratified by Appellant "Bank of New York Mellon", alluding to the doctrine of *respondeat superior*. On or about the early spring or summer of 2008, Respondent Lindsay "Rachel Lindsay" provided five months of payments to the Appellants in the amount of $6,557.04 to be applied accordingly. Neither of the Appellants applied these payments to Respondent Lindsay's account. However, said payment cleared Respondent Lindsay's bank on or about June 19, 2008. In the Fall of 2008, the Appellant brought a foreclosure suit (Case #. 2008-CP-18-2543) against the same parties as in this matter, which resulted in a judgment against the Respondent Lindsay. However, Respondent Lindsay was never served with a Summons and Complaint nor served any notices of hearing(s) in Case #:2008-CP-18-2543. (R. pp. 61 - 63). Upon Respondent Lindsay's hiring of legal counsel after finding out that her property had be surreptitiously foreclosed on, Appellant acknowledged the aforementioned payment had not been applied and agreed to apply this previously made payment to Respondent Lindsay's account in or around the first months of 2009. Appellant dismissed the prior foreclosure action Case #:2008-CP-18-2543 by Stipulation of Dismissal of Foreclosure Action and Cancellation of Lis Pendens dated March 20, 2009 and filed on April 2, 2009. (R. pp. 41-45). Respondent Lindsay with her attorney communicated on numerous occasions with Appellants by telephone and by e-mail regarding correction of Respondent Lindsay's account. Appellant supervisor and employee, Sharon Cotton, indicated via numerous e-mails that this payment would be applied to Respondent Lindsay's account. The Appellants failed to properly apply payments to Respondent Lindsay's account. Respondent Lindsay made additional payments to Appellant for which she received no credit. Also, Appellants failed to apply these additional loan payments to Respondent

Lindsay's account. Respondent vehemently declares and asserts that her money was stolen. Appellants refused to modify Respondent Lindsay's loan after numerous discussions and requests for the same. The Appellant "Bank of New York Mellon" on May 13, 2009 filed a foreclosure action Case #:2009-CP-18-1311 against Defendant Lindsay. (R. pp.46-56). On May 28, 2010 the Appellant "Bank of New York Mellon" pursuant to SCRCP Rule 40(j) dismissed the action. (R. pp. 13-17). On May 17, 2011 the parties consented to restoring this case under Case#:2011-CP-18-1013. (R. pp. 18-21). Appellants reported negative late payments and foreclosure on Respondent Lindsay's credit report. Respondent Lindsay has suffered a myriad of damages, attorney fees, costs, expenses, emotional distress, damage to her credit report, and other harm due to the improper actions/inactions of the Appellants.

ARGUMENT

The die is not cast in the "non-jury realm of civil litigation" just because a Bank is the first to file a Complaint asserting a foreclosure action against a borrower. If the borrower could have filed a Complaint, first, alleging certain legal causes of action entitling him/her to a jury trial for wrongs or breaches perpetrated by the Bank, then, s/he should be entitled to have his/her counterclaims heard by a jury of his/her peers. In the scenario where a borrower files a Complaint (*demanding a jury trial*) and the Bank asserts a counterclaim alleging a foreclosure cause of action, said equitable counterclaim would not facilitate nor require the removal of the case from the "jury trial docket" to "non-jury trial docket".

I. LINDSAY HAS ASSERTED LEGAL AND EQUITABLE CAUSES OF ACTION IN HER ANSWER, COUNTERCLAIM AND THIRD PARTY COMPLAINT AND INTENDS TO AMEND HER ANSWER, COUNTERCLAIM AND THIRD PARTY COMPLAINT TO INCLUDE THE CLAIM OF *"CONVERSION"* A PURE LEGAL CAUSE OF ACTION.

The legal causes of action already pled by Respondent Lindsay are as follows: Breach of Contract, Negligence, Fraud, Negligent Misrepresentation, Violation of the South Carolina Unfair Trade Practices Act, Invasion of Privacy, Intentional Infliction of Emotional Distress/Outrage, Defamation/Libel Per Se, Intentional Interference with Contract, Intentional Interference with Prospective Economic Advantage, justify the judicial determination that the Lindsay is entitled to a jury trial in the case at hand. (R. pp. 57-84).

The Appellants converted the Respondent's money (funds earmarked to make mortgage payments) to its/their own use. Conversion is a wrongful act emanating from either a wrongful taking or wrongful detention. Moore v. Weinberg, 373 S.C. 209, 227, 644 S.E.2d 740, 749 (Ct. App. 2007). The Respondent Lindsay intends to make a motion to amend her Answer and Counterclaim to include the cause of action of "Conversion" upon obtaining leave of court pursuant to S.C. R. Civ. P. Rule 15(a).[1] Conversion is defined as "the unauthorized assumption and exercise of the rights of ownership over goods or personal chattels belonging to another, to the alteration of their condition or to the exclusion of the rights of the owner." Mullis v. Trident Emergency Physicians, 351 S.C. 503, 507, 570 S.E.2d 549, 550-51 (Ct. App. 2002). "An action for damages for conversion is an action at law." Blackwell v. Blackwell, 289 S.C. 470, 471, 346 S.E.2d 731, 732 (Ct. App. 1986). But for said conversion of the mortgage money payments this foreclosure action would have never been filed against the Respondent. The Bank in the case at hand used the Respondent Lindsay's mortgage payments for its own devices, failed to give credit to

[1] **SCRCP Rule 15(a) Amendments.** ..... *a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires and does not prejudice any other party.* ..... .

the Respondent Lindsay for making said payments, and, then held the Lindsay in default for failing to make said payments. Surely, this is a question of fact for a jury to determine regarding a legal cause of action. Conversion is definitely a legal and compulsory counterclaim and third party claim which would entitle Respondent to a trial by jury.

Appellant argues misapplication of payments were just an accounting error. Lindsay argues that the funds were intentionally misapplied which is tantamount to the funds being fraudulently converted for the benefit of the Appellant all to the detriment of the Lindsay (i.e., stolen). It is up to a jury to determine whether this money was stolen or simply negligently misapplied through an accounting error. Even if it were simply an accounting error that error caused "Lindsay" to suffer in a myriad of ways as set out in the subject Answer, Counterclaim and Third Party Complaint (R. pp. 57-84). Lenders and servicers regularly refuse to take monthly payments once a foreclosure action has been filed. It is very disingenuous for the "Bank of New York Mellon" and "Saxon Mortgage" to argue that Respondent "Lindsay" is living in the home without making payment. They refused payment. "Lindsay" has in fact asserted the causes of action (e.g., Quantum Meruit/Unjust Enrichment, Fraud, Negligence, etc.....) alleging damages for loss of her money. Query: *Where is the $6.557.04 in payments? What did lender or servicer do with these funds?* Again, Respondent "Lindsay" contends that these funds have been taken by lender and/or servicer (i.e., Appellants). If these funds had been applied to the Respondent Lindsay's loan records/payment history the Appellant "Bank of New York Mellon" would have never considered Lindsay to be "in default" and would have never filed the first foreclosure action in 2008. The filing of the foreclosure action has caused the Respondent Lindsay to suffer in the eyes of her customers and their tenants. Lindsay "Lindsay" owns and operates 1 Sterling Place, LLC a real estate management company,

and one of the tenants she deals with failed to make a monthly payment and he came to her office to discuss the matter and averred that "*Lindsay does not make her payments why should I*". The fact is, that the foreclosure (Case No. 2008-CP-18-02543) became public record in the Office of the Dorchester County Clerk of Court placing the foreclosure information regarding the "Lindsay" on the internet for the whole world to see. (R. pp.29-40). In the first case filing, Lindsay was never served with the Summons and Complaint, resulting in that case being dismissed, after the damage had been done to Respondent Lindsay's reputation as a result of Libel[2]. In the 2008 case, the Appellant erroneously obtained an Order of Foreclosure and Sale and published in the local newspaper that the Respondent Lindsay 's house would be auctioned off at a foreclosure sale. (R. pp. 1-8). This action amounts to defamation basically announcing that Rachel Lindsay is/was not fit to conduct the business of her chosen profession which that of a "Property Manager" (i.e., person *in the business of managing matters pertaining real estate for land/home owners).* Respondent Lindsay also suffered on a social level as a result of the defamation. The Appellant knew or should have known that "Lindsay" did not receive service of process yet Appellant obtained judgment and published in the newspaper anyway. The Appellant "Bank of New York Mellon" had a complete disregard for Lindsay 's "right to due process"[3] and a complete disregard for the damages and suffering its actions would cause the Respondent "Lindsay".

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[2] South Carolina Constitution. Declaration of Rights, Section 16. Libel. In all indictments or prosecutions for libel, the truth of the alleged libel may be given in evidence, and the jury shall be the judges of the law and facts. (1970 (56) 2684; 1971 (57) 315.) Note: This concept has been recognized in criminal cases, thus, it is and/or should be extended to civil cases, for it is a question of fact in either event.

[3] As a result of the 2008 foreclosure action, the Respondent "Lindsay" was going to be erroneously removed from her home and put out on the street via a wrongful foreclosure wherein she was never served with the Summons and Complaint. The circumstances in that case were dire and extremely important to the "Lindsay", yet, the Appellant failed to serve "Lindsay". The Appellant went

This case is about more than foreclosure, it is about wrongful foreclosure, a lender fraudulently stealing money from one of its borrowers, Breach of Contract; Negligence; Fraud; Negligent Misrepresentation; Promissory Estoppel; Violation of the South Carolina Unfair Trade Practices Act; Quantum Meruit/Unjust Enrichment; Intentional Infliction of Emotional Distress/Outrage; Invasion of Privacy; Defamation/Libel Per Se; Intentional Interference with Contract; Intentional Interference with Prospective Economic Advantage; Declaratory Judgment for Compliance with Homeowner Affordability and Stability Plan; Declaratory Judgment for correction of credit report, and "Conversion" . Lindsay in her Answer, Counterclaim and Third Party Complaint has demanded a trial by a jury of her peers. (R. pp. 57-84). Pursuant to Constitutional Law and South Carolina Law

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through with the publication of the foreclosure even after it negligently filed the 2008 foreclosure action and even after it knew or should have known that the 2008 filing was erroneous because of the missing funds which were in the possession of the Appellant , furthermore, the action was tainted due to failure to serve the Lindsay.

All individuals have a constitutional right to due process under the Constitution of the State of South Carolina and Constitution of the United States America. This concept should apply in both criminal and civil cases. The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. "*Due process is a flexible concept, and the requirements of due process in a particular case are dependent upon the importance of the interest involved and the circumstances under which the deprivation may occur*". S.C.N.B. v. Central Carolina Livestock Market, 289 S.C. 309, 345 S.E.2d 485 (1986). The U.S. Constitution, prohibits all levels of government from arbitrarily or unfairly depriving individuals of their basic constitutional rights to life, liberty, and property. The Due Process Clause of the Fifth Amendment, ratified in 1791, asserts that no person shall "*be deprived of life, liberty, or property, without due process of law*." This amendment restricts the powers of the federal government and applies only to actions by it. The Due Process Clause of the Fourteenth Amendment, ratified in 1868, declares, "*[N]or shall any State deprive any person of life, liberty, or property, without due process of law*" (§ 1). The Constitution of the State of South Carolina, Article 1, Section 3. states that "*The privileges and immunities of citizens of this State and of the United States under this Constitution shall not be abridged, nor shall any person be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws.*" The Appellant participates in HASP a program funded and created by the federal government. The Appellant in the action was acting on behalf of the federal government in some of its dealing with the Respondent "Lindsay". The Lindsay s right to due process should have been protected.

the Respondent Lindsay has a right to a trial by jury, and, therefore, demands a jury trial and contests the Appellants' efforts to have this matter referred.

A. Right to Trial by Jury

The South Carolina Constitution preserves the right of trial by jury only in those cases in which parties would have been entitled to it at the time of the adoption of the Constitution. Lester v. Dawson, 327 S.C. 263, 267, 491 S.E.2d 240, 242 (1997). According to South Carolina Rules of Civil Procedure, Rule 38-Jury Trial of Right (a) Right Preserved. *The right of trial by jury as declared by the Constitution or as given by a statute of South Carolina shall be preserved to the parties inviolate.* Issues of fact in an action for the recovery of money or of specific real or personal property must be tried by a jury, unless a jury trial be waived. "Generally, the relevant question in determining the right to trial by jury is whether an action is legal or equitable; there is no right to trial by jury for equitable actions." Lester, 327 S.C. at 267, 491 S.E.2d at 242 . Whether an action is legal or equitable is primarily determined by the allegations in the complaint. See Nat'l Bank of South Carolina v. Daniels, 283 S.C. 438, 440, 322 S.E.2d 689, 690 (Ct. App. 1984). Where legal and equitable issues or rights are raised in the same complaint, the legal issues are for determination by a jury and the equitable issues are for determination by the court. Floyd v. Floyd, 306 S.C. 376, 379, 412 S.E.2d 397, 398-99 (1991). Furthermore, either party may demand a trial by jury of any issue triable by jury. See S.C. R. Civ. P. Rule 38 (b).[4]

[4] Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor[e] in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be endorsed upon a pleading of the party.

B. Types of Counterclaims

Counterclaims are governed by S.C. R. Civ. P. Rule 13, which provides:

> **13(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.*
>
> **13(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. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought the suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13.

The purpose of Rule 13(a) is "to prevent multiplicity of actions and to achieve resolution in a single lawsuit of all disputes arising out of common matters." S. Constr. Co. v. Pickard, 371 U.S. 57, 60 (1962) "Rules of procedure, like statutes, should be given their plain meaning." Valentine v. Davis, 319 S.C. 169, 173, 460 S.E.2d 218, 220 (Ct. App. 1995). "By definition, a counterclaim is compulsory only if it arises out of the same transaction or occurrence as the opposing party's claim." First-Citizens Bank & Trust Co. v. Hucks, 305 S.C. 296, 298, 408 S.E.2d 222, 223 (1991). The test for determining if a counterclaim is compulsory is whether there is a "logical relationship" between the claim and the counterclaim. Mullinax v. Bates, 317 S.C. 394, 396, 453 S.E.2d 894, 895 (1995). Whether a counterclaim is logically related to the initial claim depends upon the facts of each case. See Hucks, 305 S.C. at 298, 408 S.E.2d at 223 (finding a logical relationship between a trustee regarding the administration of a trust and a legal counterclaim alleging that the trustee breached a fiduciary duty); N.C. Fed. Sav. & Loan Ass'n v. DAV Corp.,

298 S.C. 514, 518-19, 381 S.E.2d 903, 905 (1989) (finding a logical relationship between an action on a note brought by the lender to foreclose and the validity of a purported oral agreement modifying the note alleged by the borrower). If a compulsory counterclaim is not raised in the first action, a defendant is precluded from asserting the claim in a subsequent action. Crestwood Golf Club, Inc. v. Potter, 328 S.C. 201, 217, 493 S.E.2d 826, 835 (1997).[5]

II. LINDSAY HAS ASSERTED LEGAL CLAIMS, COMPULSORY CLAIMS, EQUITABLE CLAIMS AND PERMISSIVE CLAIMS, NEVERTHELESS, LINDSAY'S RIGHT TO A JURY TRIAL REMAINS VALID DUE THE LEGAL AND COMPULSORY CLAIMS ASSERTED WHICH BASED ON THE FACTS OF THIS CASE ARE AND SHOULD BE INCLUDED IN LINDSAY'S ANSWER, COUNTERCLAIM AND THIRD PARTY COMPLAINT.

The Defendant Lindsay asserted compulsory Counterclaims and Claims raising legal issues while at all times demanding a trial by jury. If the complaint is equitable and the counterclaim is legal and compulsory the defendant has a right to a jury trial on the counterclaim. C&S Real Estate Services, Inc., v. Massengale, 290 S.C. 299, 302, 350 S.E.2d 191, 193 (1986). The Appellant attempts to classify the Respondent Lindsay's Counterclaims and Third Party Plaintiff's Claims as being entirely equitable in nature. For example, Fraud and Negligent Misrepresentation are not equitable in nature, therefore, Appellants argument and classification is faulty and erroneous. The Appellant stole money and attempted to steal the Lindsay's house without even notifying her of the initial lawsuit Case #:2008-CP-18-2543. (R. p. 163, line 19 – p. 166, line 7). Violation of the South Carolina Unfair Trade Practices Act Intentional Interference with Existing Contracts,

[5] The South Carolina Reporter's Note following Rule 13 states: "[c]ounterclaims arising out of the same transaction or occurrence that is the subject of the action are 'compulsory' under Rule 13(a) and are barred by res judicata or estoppel by judgment if not asserted."

Breach of Contract, Negligence, Intentional Interference with Prospective Contractual Relations, Intentional Infliction of Emotional Distress/Outrage, Invasion of Privacy/Intrusion Upon Solitude, and Defamation/Libel *Per Se* are all legal in nature. Although other claims or counterclaims may be considered equitable in nature; there are sufficient compulsory claims/counterclaims which have been asserted which arise out of the same transaction and occurrence logically relating back to the wrongful acts of the Appellant to warrant a trial by jury. But for the Appellant's action of stealing Lindsay's money this legal action would have never be filed in the first place.

A. Lindsay Has Asserted Several Equitable Counterclaims Against the Bank, Such As Promissory Estoppel, Unjust Enrichment and Declaratory Relief.

It is acknowledged that Promissory Estoppel and Unjust Enrichment are equitable causes of action, also, the two requests for Declaratory Relief in the Answer, Counterclaim, and Third Party Complaint filed by Lindsay are likewise equitable in nature, so what! The Respondent also counterclaimed with several legal causes of action. According to the case of Johnson v. South Carolina Nat'l Bank, 292 S.C. 51, 55, 354 S.E.2d 895, 897 (1987), if both the legal claims and the equitable claims are to be tried in a single proceeding, the legal issues are to be determined first, and the findings of the jury are binding on the court.

B. The Primary Purpose of the Claims Asserted by Lindsay is to Seek Justice and to Obtain Compensation for Damages Sustained by Lindsay as a Result of the Bank Converting Lindsay's Mortgage Payments to the Bank's Own Use and the Resulting Detrimental Ramifications and Effects said Theft/Conversion Had on Lindsay Financially, Psychologically and Physically.

Respondent Lindsay has a right to defend and protect herself and to sue for damages incurred by her as a result of the wrongs perpetrated against her by the Appellants. One can glean Respondent's motivations from the arguments delineated herein which explain

why she is justified in filing the subject Answer, Counterclaim and Third Party Complaint. Moreover, it is a question for the jury to determine whether or not any or all of Respondent's counterclaims and third party claims are valid.

C. The Third Party Complaint Against Saxon is mandatory.

Appellant Saxon was acting on behalf of Appellant "Bank of New York Mellon" and pursuant to the doctrine of "*Respondeat Superior*"[6] the Appellant "Bank of New York Mellon" is responsible for the acts and omissions of its agent (i.e., Saxon). For example, Appellant "Saxon" stole the funds paid by Lindsay and then allow Lindsay to be foreclosed on, therefore, "Saxon" is liable to Lindsay for said act, likewise, the "Bank of New York Mellon" is responsible for the actions of Saxon. Lindsay had no choice but to file the Third Party Complaint against Saxon or risk having those causes of action being lost forever (e.g., pursuant to the doctrine of laches, the expiration of the statute of limitations, etc.....).(R. pp. 57-84). In the interest of judicial economy, prudence, logic, and common sense it was mandatory upon Lindsay to file the Third Party Complaint against Saxon.

D. The Counterclaims against Appellant are compulsory and actually could have been asserted in a Complaint against the Bank.

As argued above this case is about more than foreclosure it is about wrongful foreclosure, a lender fraudulently stealing money for one of its borrowers, Breach of Contract; Negligence; Fraud; Negligent Misrepresentation; Promissory Estoppel;

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[6]"*Respondeat Superior*"- The maxim means that a master is liable in certain cases for the wrongful acts of the his servant, and a principal for those of his agent. **Black's Law Dictionary, Fifth Edition**
The doctrine of *respondeat superior* rests upon the relation of master and servant. A plaintiff seeking recovery from the master for injuries must establish that the relationship existed at the time of the injuries, and also that the servant was then about his master's business and acting within the scope of his employment. An act is within the scope of a servant's employment where reasonably necessary to accomplish the purpose of his employment and in furtherance of the master's business. These general principles govern in determining whether an employer is liable for the acts of his servant. Lane v. Modern Music, Inc., 244 S.C. 299, 136 S.E.2d 713 (1964).

Violation of the South Carolina Unfair Trade Practices Act; Quantum Meruit/Unjust Enrichment; Intentional Infliction of Emotional Distress/Outrage; Invasion of Privacy; Defamation/Libel Per Se; Intentional Interference with Contract; Intentional Interference with Prospective Economic Advantage; Declaratory Judgment for Compliance with Homeowner Affordability and Stability Plan; Declaratory Judgment for correction of credit report, and "Conversion". The main legal and compulsory counterclaims and claims asserted are Breach of Contract, Negligence, Fraud, Negligent Misrepresentation, Conversion, etc..... The Respondent Lindsay asserted compulsory Counterclaims and Claims raising legal issues while at all times demanding a trial by jury. If the complaint is equitable and the counterclaim is legal and compulsory the defendant has a right to a jury trial on the counterclaim. C&S Real Estate Services, Inc., v. Massengale, 290 S.C. 299, 302, 350 S.E.2d 191, 193 (1986).

III. THE MODE OF TRIAL FOR THIS CASE WHICH INVOLVES BOTH LEGAL AND EQUITABLE CAUSES OF ACTION IS NOT UNIQUE AND SHALL BE HANDLED AS IS TRADITIONAL AND CUSTOMARY PURSUANT TO SOUTH CAROLINA JURISPRUDENCE.

The jury shall first decide the basic facts of this case and the trial judge assigned to handle the case at hand shall dictate how he or she wishes to conduct the trial. Where legal and equitable issues or rights are raised in the same complaint, the legal issues are for determination by a jury and the equitable issues are for determination by the court (i.e, presiding judge). Floyd v. Floyd, 306 S.C. 376, 379, 412 S.E.2d 397, 398-99 (1991). The jury will make its determination on the legal issues and after that point it shall be necessary for the judge to determine the equitable issues. If both the legal claims and the equitable claims are to be tried in a single proceeding, the legal issues are to be determined first, and the findings of the jury are binding on the court. Johnson v. South Carolina Nat'l Bank,

292 S.C. 51, 55, 354 S.E.2d 895, 897 (1987). A motion hearing judge is not required to give the Appellant a complete road map for the "actual trial" at a motion hearing stage of the litigation. Nevertheless, failure on the part of the judge to specify and categorize each cause of action in the case at hand would be at worse considered a "harmless error".

CONCLUSION

The Respondent Lindsay has filed an Answer, Counterclaim and Third Party Complaint asserting both legal and equitable issues, most compulsory and some which may be considered permissive counterclaims and claims. Thus pursuant to South Carolina law, in order to prevent a multiplicity of actions and to achieve resolution in a single lawsuit of all disputes arising out of common matters this case should be determined by jury trial with the jury making those determinations customarily decided by a jury and the judge making judicial and equitable determinations customarily decided by a judge.

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