

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM LANCASTER COUNTY  
In The Circuit Court

Brian Gibbons, Circuit Court Judge  
William C. Tindal, Special Referee

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Appellate Case No. 2018-001823

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First Citizens Bank & Trust Company,

Respondent,

v.

Linda P. Faulkner a/k/a Linda Faulkner,  
Founders Federal Credit Union, and  
CACH, LLC,  
of whom Linda P. Faulkner is the

Appellant.

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INITIAL BRIEF OF APPELLANT

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28 AM.JUR.2D *Estoppel and Waiver* § 227 (2002)

## STATEMENT OF ISSUES ON APPEAL

- I. PROPER PROCEDURE ON MOTIONS REQUIRES TIMELY SERVICE UPON EXISTING PARTIES, AS WELL AS THE OPPORTUNITY TO BE HEARD.
- II. COMPULSORY COUNTERCLAIMS TO EQUITABLE ACTIONS ALLOW A PARTY THE RIGHT TO JURY TRIAL.
- III. WAIVER AND ESTOPPEL ARE COMPULSORY COUNTERCLAIMS.
- IV. A SETOFF CLAIM UNDER TRUTH IN LENDING IS A COMPULSORY COUNTERCLAIM.

## STATEMENT OF THE CASE

This foreclosure action was filed by the Respondent FIRST CITIZENS BANK & TRUST COMPANY on August 9, 2017. On January 2, 2018, the Appellant LINDA FAULKNER filed her Answer and Counterclaim advancing counterclaims and defenses for express and implied waiver by reason of accepting payments, Truth in Lending violations, violations of the Fair Debt Collections Act, and breach of good faith. She requested a jury trial.

A Motion to Strike Jury Demand and an Order granting that Motion were both filed January 31, 2018. No previous communication was received and no hearing was noticed for the Motion. The Certificate of Service for this Motion is dated January 29, 2018 and filed January 31, 2018.

A Motion to refer the case to a Special Referee and an Order granting that Motion were both filed February 2, 2018. No previous communication was received and no hearing was noticed for the Motion. The Certificate of Service for this Motion is dated January 29, 2018 and filed February 2, 2018.

Both Motion above were granted, and served on Appellant with a Certificate of Service dated February 7, 2018 and filed February 9, 2018.

On February 20, 2018, FAULKNER served her Motion under Rule 59, S.C.R.C.P. to set aside the Order striking the jury request and referring the case to a Special Referee. After hearing, the Circuit Court issued its Order filed October 2, 2018 denying Rule 59 relief. This appeal followed.

## ARGUMENT

### I. PROPER PROCEDURE ON MOTIONS REQUIRES TIMELY SERVICE UPON EXISTING PARTIES, AS WELL AS THE OPPORTUNITY TO BE HEARD.

Rule 5(a), S.C.R.C.P. states the proper procedure on notice of Motions. In relevant part, it states:

**(a)Service: When Required.** Unless otherwise ordered by the court because of numerous defendants or other reasons, all . . . (3) written motions, other than ones which may be heard *ex parte*; . . . shall be served upon each of the parties of record.

As of her Answer and Counterclaim filed January 2, 2018, the Appellant, by her counsel, was a party of record. The Motions to refer and to strike her jury request were not served upon her prior to their consideration and approval by the Circuit Court.

Rule 6(d), S.C.R.C.P. states the time for hearings on Motions. In relevant part, it states:

**(d) For Motions--Affidavits.** A written motion other than one which may be heard *ex parte*, and notice of the hearing thereof, shall be served not later than ten days before the time specified for the hearing, unless a different period is fixed by these rules or by an order of the court. Such an order may for cause shown be made on *ex parte* application.

The Motions in question were not served ten days prior to a hearing. There was no notice of any hearing. No order setting a different period exists. No application for *ex parte* status exists. To counsel's knowledge, those Motions are nowhere designated as capable of being submitted *ex parte*. The resulting Orders were improperly heard and granted.

### II. COMPULSORY COUNTERCLAIMS TO EQUITABLE ACTIONS ALLOW A PARTY THE RIGHT TO JURY TRIAL.

The Supreme Court has stated in *Wachovia Bank National Association v. Blackburn*, 407 S.C. 321, 755 S.E.2d 437 (2014) the controlling law as to jury trial requests:

“(1) If both the complaint and the counterclaim are in equity, the entire matter is triable

by the court.

- (2) If both are at law, the issues are triable by a jury.
  - (3) If the complaint is equitable and the counterclaim is legal and permissive, the defendant waives his right to a jury trial.
  - (4) If the complaint is equitable and the counterclaim is legal and compulsory, the plaintiff or the defendant has a right to a jury trial on the counterclaim. . . . “
- [*Id.*, 407 S.C. at 329-30, 755 S.E.2d at 441.]

Compulsory counterclaims are defined in Rule 13(a), S.C.R.C.P., which states in relevant part:

**(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.

### III. WAIVER AND ESTOPPEL ARE COMPULSORY COUNTERCLAIMS.

The language of Rule 13(a) obviously covers the claims of waiver, the TILA violation claim and the claim of bad faith, all of which arose out of the mortgage and its administration by the Respondent.

The Appellant FAULKNER has raised defenses to this foreclosure action which are both permissive and compulsory in nature. *See, e.g., Gardner v. Travis*, 316 S.C. 315, 450 S.E.2d 54, (Ct.App. 1994). Under our precedent, she is entitled to a jury trial as having advanced compulsory defenses; any Order striking her jury demand is improper to that extent. As the *Gardiner* Court stated in its ruling:

Where a defendant in an equitable action asserts a compulsory counterclaim that alleges actions at law, both the plaintiff and the defendant have a right to have a jury trial on the issues raised by the compulsory legal counterclaim. *Johnson [v. South Carolina Nat'l Bank]*, 292 S.C. at 54, 354 S.E.2d at 896. If there are factual issues common to both the legal and equitable claims, the legal claim, "absent the most imperative circumstances," must be tried, that is, disposed of, first. *Id.* at 56, 354 S.E.2d at 897. *See Harkey v. Texas*

Employers' Ins. Ass'n, 146 Tex. 504, 208 S.W.2d 919, 922 (1948) (holding issues are not "tried" merely by hearing the testimony); *People v. Bleecker St. & F.F. R.R.*, 67 Misc. 582, 124 N.Y.S. 786, 787 (1910) (holding the word "tried," as used in Code of Civil Procedure § 976, is synonymous with the words "disposed of").

[*Id.*, 316 S.C. \_\_\_, 450 S.E.2d 56; *matter in brackets added for clarity.*]

FAULKNER has plead express and implied waiver based upon the Respondent's draft of payments from 2011 through 2016, and after maturity of the debt. This is the second attempt at foreclosure on the part of the Respondent. Its previous action, filed as Civil Case No: 2014-CP-29-00954, was subject to the same defense and was dropped by the Respondent.

Equitable estoppel or waiver is a mixed question of law and fact. In *Southern Railway-Carolina Div. v. Howell*, 89 S.C. 391, 71 S.E. 972 (1911), our Supreme Court held, citing *Townes v. City Council of Augusta*, 29 S.C. 851, 52 S.E. 396 (1898):

When the facts relied on to create an estoppel are admitted, or undisputed, or ascertained by the proper tribunal, then whether such facts create an estoppel is a question of law for the decision of the judge; but when the facts relied on to create an estoppel are disputed, then the case must go to the jury, under proper instructions from the court as to what constitutes an estoppel, leaving it to the jury to determine whether the evidence establishes or not the facts necessary to create an estoppel.

[*Id.*, 52 S.C. at 855, 29 S. E. at 408; citation in text of *Southern Ry. v. Howell*, *supra*, is reversed.]

28 AM.JUR.2D *Estoppel and Waiver* § 227 (2002) states the same principle:

Ordinarily, the question of waiver is one of fact for a jury. That is to say, where the evidence concerning waiver, or an element or requisite thereof, is conflicting or disputed, or where more than one reasonable inference may be drawn from the evidence, the question of waiver is one of fact for the trier of facts. [Ftn.53 citing, *inter alia*, *Pence v. Langdon*, 99 U.S. 578, 25 L.Ed. 420 (1878).] In determining if a waiver has in fact occurred, a court must examine the acts, words or conduct of the parties.

[*Id.*; *footnotes omitted except as cited.*]

It is firmly settled that the question of the existence of an estoppel or waiver is to be settled by the trier of fact where there is a dispute as to the facts involving those doctrines. See *Southern R. Co. v. Day*, 140 S.C. 388, 138 S.E. 870 (1926); 28 AM.JUR.2D *Estoppel and Waiver* § 227 (2002). See, also, *Dowling v. National Exch. Bank of Boston*, 145 U.S. 512, 36 L.Ed. 795, 12 S.Ct. 928 (1892); *Leather Manuf'rs' Nat. Bank v. Morgan*, 117 U.S. 96, 29 L.Ed. 811, 6 S.Ct. 657 (1886); *Thompson v. First Nat. Bank of Toledo, Ohio*, 111 U.S. 529, 29 L.Ed. 507, 4 S.Ct. 689 (1884); *Hughes v. Cobb*, 195 Ga. 213, 23 S.E.2d 701 (1942); and *Rieves v. Smith*, 184 Ga. 657, 192 S.E. 372, 112 A.L.R. 368 (1937).

#### IV. A SETOFF CLAIM UNDER TRUTH IN LENDING IS A COMPULSORY COUNTERCLAIM.

On the TILA claim, FAULKNER would note that 15 U.S.C. § 1640(e) specifically provides:

This subsection does not bar a person from asserting a violation of this subchapter in an action to collect the debt which was brought more than one year from the date of the occurrence of the violation as a matter of defense by recoupment or set-off in such action, except as otherwise provided by State law.

In this case, FAULKNER has plead her TILA claims as a set-off. 15 U.S.C. § 1640(e) specifically provides, in relevant part:

[A]ny action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation . . . <sup>1</sup>

The Georgia Court of Appeals, in *Aycock v. Household Finance Corp. of Georgia*, 142 Ga.App. 207, 208, 235 S.E.2d 578, 580 (1977), in line with other Courts which have dealt with the issue, found that in a suit on a debt any truth-in-lending claims must be raised as compulsory counterclaims. Here, FAULKNER has thus raised that issue. See, also, *EX PARTE Fletcher*, 429 So.2d 1041 (Ala. 1982).

The alleged TILA violations, insofar as they plead for monetary damages and are dependent upon statutory interpretation, are legal in nature. Thus, the foreclosure complaint is

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<sup>1</sup> The omitted portion of the cited Statute contains an exception as to claims under 15 U.S.C. § 1639, which has no application in this case.

equitable and the TILA counterclaim is legal and compulsory; under the standard as set out in category No. 4 of *Wachovia Bank National Association v. Blackburn, supra*, FAULKNER has the right to a jury trial of her counterclaim.

#### CONCLUSION

The Orders striking the Appellant's jury demand and granting a referral were improperly served and improperly granted.

FAULKNER timely advanced compulsory defenses and counterclaims to the Respondent Bank's equitable claim for foreclosure, following category no. 4 in the list of possibilities set out in *Wachovia Bank National Association v. Blackburn, supra*. She is entitled to a jury trial of her counterclaims.

Respectfully submitted,



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April 4, 2019

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CERTIFICATE OF COUNSEL

The undersigned certifies that this final Brief of Appellants complies with Rule 211(b),  
S.C.A.C.R.

April 4, 2019

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Linda P. Faulkner a/k/a Linda Faulkner,  
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CACH, LLC,  
of whom Linda P. Faulkner is the

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CERTIFICATE OF SERVICE

I certify that, on the date below, I have served the initial Brief of Appellant and Designation of Matter to Be Included in the Record on Appeal on the following counsel of record:

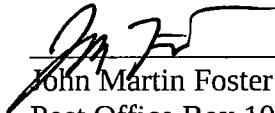
J. Kershaw Spong  
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by depositing the same with the United States mail, with sufficient first class postage attached, properly addressed to the clerk of the Court, and with a copy also directed to the respective last known address(es) of those attorney(s) and/or persons set out below; or

by hand delivering copies of the same to the following persons, or by leaving the same at that

person's office with that person's clerk or some other person in charge thereof, or by leaving it in a conspicuous place therein; of if the office was closed or the person to be served has no office, by leaving a copy at that person's dwelling place or usual place of abode with some person of suitable age and discretion then residing therein. all pursuant to Rule 262, S.C.A.C.R.

April 4, 2019



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April 4, 2019

The Honorable Jenny Abbott Kitchings  
Clerk of the South Carolina Court of Appeals  
Post Office Box 11629  
Columbia, SC 29211

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Re: First Citizens Bank & Trust Company, Inc.  
v. Linda P. Faulkner, *et al.*  
Case No.: 2017-CP-29-00872  
Appellate Case No. 2018-001823

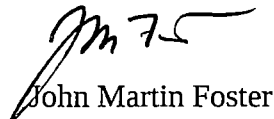
Dear Ms. Kitchings:

In accordance with Rule 208, S.C.A.C.R., enclosed herewith please find the original and one (1) copy each of the Appellant's Initial Brief and Designation of Matter to Be Included in the Record on Appeal, together with Certificate of Service for the same in the above referenced case.

By copy of this letter, I am serving the attorney for the Respondent with copies of the said Initial Brief and Designation of Matter, as evidenced by the Certificate of Service.

Please return the extra conformed copy to my office in the enclosed self-addressed, stamped envelope. As always, thank you, and your staff, for your assistance in these matters.

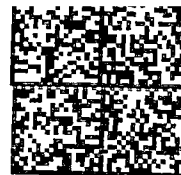
Sincerely yours,

  
John Martin Foster

jmf/  
enclosures

cc: Client File

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**TO:**

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