

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
The Honorable DeAndrea Gist Benjamin, District Court Judge

Case No. 2014-CP-40-02063
Appellate Case No. 2016-001019
Supreme Court Case No. 2019-000678

U.S. Bank, National Association, as trustee for the Holders of The Banc of America Funding Corporation, 2008-FT1 Trust, Mortgage Pass-Through Certificates, Series 2008-FT1,Respondent,

v.

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

Of whom Rhonda Lewis Meisner is thePetitioner.

**RESPONDENT'S RETURN TO PETITIONER'S
PETITION FOR WRIT OF CERTIORARI**

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Pass-Through Certificates, Series 2008-FT1*

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S.C. SUPREME COURT

Date: May 20, 2019

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

- I. Whether the denial of petitioner's request for a jury trial is immediately appealable.
- II. Whether petitioner has any basis for appealing the mode of trial.

COUNTER-STATEMENT OF THE CASE

I. U.S. BANK FILED FOR FORECLOSURE AS A RESULT OF PETITIONER'S DEFAULT ON HER LOAN.

U.S. Bank, National Association, as trustee for the Holders of The Banc of America Funding Corporation, 2008-FT1 Trust, Mortgage Pass-Through Certificates, Series 2008-FT1 ("U.S. Bank"), commenced the underlying equitable action for foreclosure on March 31, 2014 ("Foreclosure Action"), alleging that Rhonda Meisner ("Petitioner") defaulted on her promissory note executed on August 13, 2003 ("Note"). Pursuant to the terms of the Note, Petitioner promised to pay Bank of America, N.A. ("BANA") the sum of \$61,516.00, plus interest. The Note was secured by a mortgage ("Mortgage") (collectively, the "Loan"), which Petitioner executed the same day that she signed the Note, on the real property located at 406 Koon Store Road, Columbia, South Carolina ("the Property").

In the Complaint, U.S. Bank alleged that it was the holder of the Note and the Mortgage and named two additional defendants that it alleged may claim an interest in the Property, South Carolina Bank and Trust, N.A. ("SCBT") and BANA. (R. p. 15 ¶ 2.) U.S. Bank alleged that BANA may claim an interest in the Property stemming from a mortgage executed in 2005. (R. p. 17 ¶ 18(a).) As for SCBT, U.S. Bank alleged that it might claim an interest in the Property stemming from a 2007 mortgage, executed by Petitioner in favor of SCBT, and a deficiency judgment entered against Petitioner in Richland County in 2012. (R. p. 17 ¶ 18(b).)

In response, Petitioner filed an Answer on May 15, 2014 asserting affirmative defenses as well as counterclaims for: (1) breach of contract, alleging that the "Plaintiffs" failed to resolve an

escrow dispute before transferring the servicing of the loan; and (2) a declaratory judgment seeking a determination the parties' right under the Note and Mortgage as well as appraisal rights for the Property ("Original Answer"). (R. pp. 23-29.)

II. PETITIONER FILES A MOTION TO DISMISS, WHICH THE TRIAL COURT DENIES.

On May 6, 2014, Petitioner filed a motion to dismiss the Foreclosure Action pursuant to "S.C. Code Ann. Rule 12(b)(8)(9) [sic]" ("Motion to Dismiss"), and, on June 4, 2014, she filed a memorandum of law in support of the Motion ("Memorandum"). (R. pp. 187-193.) As stated in her Motion to Dismiss and supporting Memorandum, Petitioner alleged that the Foreclosure Action should be dismissed because U.S. Bank failed to timely respond to a complaint filed by SCBT in a separate foreclosure action against Petitioner, in November 2013, in which SCBT sought to foreclose a junior mortgage on the Property (Case No. 2013-CP-40-7144) ("SCBT Foreclosure"). (R. pp. 187-193.)

Petitioner's Motion to Dismiss came on for a hearing on June 10, 2014. At the hearing, U.S. Bank argued that SCBT's foreclosure of its junior lien, had no effect on the validity of U.S. Bank's senior lien at issue in this action. (June 10, 2014 T. pp. 7:9-8:13.) Consequently, U.S. Bank argued that its failure to timely respond to the complaint in the SCBT Foreclosure could not serve as a basis for the dismissal of the Foreclosure Action under Rule 12(b)(8), SCRPC. (*Id.*)

During the hearing, Petitioner attempted to challenge U.S. Bank's standing to maintain the Foreclosure Action based on her allegation that the Assignment of Mortgage was defective. (June 10, 2014 T. pp. 8:21-9:11.) The Trial Court, however, informed Petitioner that it could not hear her argument regarding the Assignment of Mortgage as Petitioner had not filed a motion on the issue with the Court. (June 10, 2014 T. pp. 9:3-12.) Although Petitioner stated that she had filed a motion challenging U.S. Bank's standing (June 10, 2014 T. p. 9:7-8), the Record shows no such

motion was filed—and, in her subsequent Rule 59(e) motion (discussed below), Petitioner conceded that she made an *oral* motion challenging U.S. Bank’s standing at the June 10th hearing.

III. THE FIRST ORDER OF REFERENCE IS ENTERED BUT SUBSEQUENTLY VACATED.

While Petitioner’s Motion to Dismiss was still pending, U.S. Bank filed a Motion to Strike Jury Trial Demand and for Mandatory Order of Reference, on July 24, 2014, arguing that Petitioner’s counterclaims were not legal counterclaims as they did not affect U.S. Bank’s right to enforce the Note and Mortgage. U.S. Bank therefore sought an order referring the entire matter to the Master-in-Equity. (R. pp. 206-210.)

On June 27, 2014, the Court entered an order denying Petitioner’s Motion to Dismiss (“Order Denying Motion to Dismiss”). In the Order, the Trial Court noted that, although Petitioner cited Rules 12(b)(8) and (9), SCRCP, as grounds for her Motion to Dismiss, Rule 12(b)(9) did not exist; therefore, the Court only addressed Petitioner’s Motion pursuant Rule 12(b)(8). (R. pp. 9-11.) The Court denied the Motion to Dismiss because it concluded Petitioner default under the Note and Mortgage was “entirely unrelated to her performance under the terms of [her] loan agreement with SCBT[.]”

In a motion filed on June 30, 2014, pursuant to Rules 59(e) and 60, SCRCP, Petitioner asked the Trial Court to amend the Order Denying Motion to Dismiss, and for relief from the Order (“Motion for Reconsideration”). (R. pp. 197-205.) Petitioner asked the Court to reconsider its ruling under Rule 12(b)(8) and noted that the Court had not ruled on her oral motion at the June 10, 2014 hearing challenging the assignment of the Mortgage to U.S. Bank. (R. p. 197.) The Trial Court denied Petitioner’s Motion for Reconsideration, in a Form 4 order on September 5, 2014, stating that it did not receive a copy of the motion as required by Rule 59(g), SCRCP (“Order Denying Motion for Reconsideration”). (R. p. 12.) Petitioner appealed the Order Denying Motion

to Dismiss and the Order Denying Motion for Reconsideration. The South Carolina Court of Appeals dismissed the appeal as interlocutory in an order entered November 19, 2014. (R. p. 1.)

On July 24, 2014, the Clerk of Court entered an order striking Petitioner's demand for a jury trial and referring the matter to the Master-in-Equity ("First Order of Reference"). (R. pp. 6-7.) The Master-in-Equity, Judge Strickland, vacated the First Order of Reference, on January 15, 2015, concluding that the Order was inadvertently signed by the Clerk of Court but should have been signed by a Circuit Court Judge. (R. p. 13; Dec. 16, 2015 T. pp. 13:17-14:5.)

IV. PETITIONER FILES AN AMENDED ANSWER AND COUNTERCLAIMS AND U.S. BANK OBTAINS AN ORDER OF MANDATORY REFERENCE.

On August 10, 2015, Petitioner filed an amended answer and counterclaims ("Amended Answer")¹ asserting various affirmative defenses and counterclaims for: (1) declaratory judgment to determine the real party in interest; (2) breach of contract against Bank of America; (3) breach of contract accompanied by a fraudulent act against Bank of America; (4) abuse of process against U.S. Bank; (5) failure to file a satisfaction of mortgage against Bank of America; (6) slander of title against Bank of America; and (7) slander of title, based in equity, against SCBT. (R. pp. 35-58.)

After filing its Reply to Petitioner's Amended Answer (R. pp. 59-67), U.S. Bank again sought an order of reference when it filed a Motion to Strike Jury Trial Demand and for Mandatory Order of Reference on October 28, 2015 ("Motion for Order of Reference"). U.S. Bank's Motion for Order of Reference was heard on December 16, 2015. (Dec. 16, 2015 T. p. 1.)

On April 13, 2016, the Trial Court entered an order striking Petitioner's demand for a jury trial and referred the matter to a Master-in-Equity ("Second Order of Reference"). (R. pp. 2-5.)

¹ For clarification, U.S. Bank notes that Petitioner titled her Amended Answer as her "First Amended Complaint." (R. p. 35.)

In the Second Order of Reference, the Trial Court concluded that Petitioner's counterclaims and cross-claims, if proven true, would not have any impact on the enforceability of the Note and Mortgage, and were, therefore, permissive. (R. p. 3.) Because Petitioner raised the permissive counterclaims and cross-claims in the equitable foreclosure proceedings, the Trial Court concluded that Petitioner had waived her right to a jury trial and referred the matter to the Master-in-Equity. (R. pp. 3-4.)

Petitioner filed a Motion to Alter and Amend Ruling Pursuant to SCRCP Rule 59-e [sic] ("Motion to Amend") on April 20, 2016. (R. pp. 247-250.) However, no order ruling on Petitioner's Motion to Amend appears in the Record.

Petitioner filed a Notice of Appeal from the Second Order of Reference on May 12, 2016. After the briefing was complete, the South Carolina Court of Appeals entered an Order dismissing Petitioner's appeal on the grounds that she had no right to a jury trial on the counterclaims and, therefore, the Order striking the jury trial request was not appealable. (Respondent's App. 1-3). Petitioner filed a timely Petition for Rehearing on that Order; however, on March 21, 2019, the Court of Appeals denied the Petition for Rehearing. (Respondent's App. 4-5). Petitioner filed the instant Petition for Certiorari with this Court on April 20, 2019, claiming that the following questions were presented for review:

1. Does petitioner have a right to a jury trial?
2. Does a South Carolina foreclosure defendant have a right to a jury trial when the parties are misaligned such that the co-defendant and assignee breached the note agreement prior to assignment to respondent?

3. Whether a jury trial is available to a defendant in a mortgage foreclosure action where the respondent bank abused the foreclosure process, the abuse of which involved the court's machinery?

ARGUMENT

In the petition for writ of certiorari, Petitioner focuses primarily on her contention that she was entitled to a jury trial on her counterclaims. However, for the reasons stated below, this argument lacks merit, as do the remaining arguments that they raise.² Therefore, the petition for writ of certiorari should be denied. *See* Rule 242(b), SCACR.

I. THE ORDER DENYING THE REQUEST FOR A JURY DEMAND IS NOT IMMEDIATELY APPEALABLE.

As an initial matter, it is axiomatic that an order which denies a request for a jury demand is not immediately appealable if the party requesting a jury trial does not have the right to a jury trial. *Williford v. Downs*, 265 S.C. 319, 321, 218 S.E.2d 242, 243 (1975). Accordingly, if the party requesting a jury trial does not have a right to a jury trial, the appeal should be dismissed. *Id.* In this case, as more thoroughly explained below, Petitioner does not have a right to a jury trial

² Petitioner briefly argues that U.S. Bank should not be considered a real party in interest because the default on the loan occurred while U.S. Bank's predecessor in interest held the Note. (Petitioner's Br. at 16). Petitioner does not cite any authority for this argument and does not present the issue of whether U.S. Bank was a real party in interest with standing to bring this action in her questions presented. Moreover, although Petitioner raised the issue of standing before the trial court, she has not obtained a ruling on that issue and, therefore, it is not preserved for appeal. *See Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 23, 602 S.E.2d 772, 779-80 (2004) ("Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court."); *Noisette v. Ismail*, 304 S.C. 56, 58, 403 S.E.2d 122, 124 (1991) (holding that although an issue was argued before the trial court, because the trial court did not explicitly rule on the issue, and the appellant did not make a Rule 59(e) motion to amend to obtain a ruling, the issue was not preserved for appellate review); *Cowburn v. Leventis*, 366 S.C. 20, 41, 619 S.E.2d 437, 449 (Ct. App. 2005) ("When a trial court makes a general ruling on an issue, but does not address the specific argument raised by a party, that party must make a Rule 59(e) motion asking the trial court to rule on the issue in order to preserve it for appeal.").

because two of her claims are equitable in nature, which does not require a jury trial, and the remaining claims are permissive counterclaims, meaning that Petitioner has waived her right to a jury trial on those claims by stating them in an equitable foreclosure action. *Wachovia Bank, Nat'l Ass'n v. Blackburn*, 407 S.C. 321, 328, 330 n.7, 755 S.E.2d 437, 440, 442 n.7 (2014) (stating that, if an equitable counterclaim is raised in a foreclosure action, then there is no right to a jury trial on that claim and where the counterclaim is permissive but raised in an equitable action, the right to a jury trial is waived). Accordingly, this Court should deny the petition for certiorari.

II. PETITIONER HAS NO BASIS FOR APPEALING THE MODE OF TRIAL.

In her petition, Petitioner claims that she is entitled to a jury trial on all of her counterclaims because she asserts that they are legal and compulsory. (*See generally* In. Br.). However, upon closer inspection of the actual counterclaims that were filed, this argument is erroneous. In her counterclaims for breach of contract and declaratory judgment, Petitioner seeks *equitable* relief for which she has no right to a trial by jury. Additionally, Petitioner has waived any right to a jury trial on her remaining counterclaims and her cross-claims as they are *permissive* claims raised in an equitable foreclosure proceeding. Specifically, Petitioner's abuse of process claim is based on activities alleged to have occurred *during* the course of the Foreclosure Action and, therefore, is unrelated to the enforceability of the Note and Mortgage. Similarly, Petitioner's cross-claim against Bank of America for failure to file a satisfaction of mortgage is a permissive claim as it is unrelated to the enforceability of the Note and Mortgage by U.S. Bank.

In *Blackburn*, the Supreme Court of South Carolina explained that “[a] mortgage foreclosure is an action in equity.” 407 S.C. at 328, 755 S.E.2d at 440. Thus, “the parties are not entitled, as a matter of right, to a trial by jury.” *Id.* at 328, 755 S.E.2d at 441 (quoting *Williford v. Downs*, 265 S.C. 319, 321, 218 S.E.2d 242, 243 (1975)). But, “counterclaims—including those raised in equitable actions—may, at times, be entitled to a jury trial.” *Id.* The determination of

whether a party raising a counterclaim in a foreclosure action is entitled to a jury trial on its counterclaim depends first on whether the counterclaim is an *equitable* counterclaim or a *legal* counterclaim. *See id.* at 328–29, 755 S.E.2d at 441.

If the claim is a legal counterclaim, the party asserting the claim is entitled to a trial by jury on that claim *only* if the claim is a compulsory counterclaim—a claim that “arises out of the same transaction or occurrence as the opposing party’s claim” and which the party would have lost the right to make had the claim not been asserted in the same action. *Id.* at 330, 755 S.E.2d at 441 (citation and quotation marks omitted). Furthermore, a compulsory counterclaim “affect[s] the bank’s right to enforce the note and foreclose the mortgage.” *See id.* at 330 n.7, 755 S.E.2d at 442 n.7. Alternatively, if the counterclaim is a legal but *permissive* counterclaim, asserting the claim in an equitable action constitutes a waiver of the right to a trial by jury. *Id.* at 330, 755 S.E.2d at 441. For *equitable* counterclaims, however, a party has no right to a jury trial. *Id.* at 329, 755 S.E.2d at 441.

Furthermore, “[w]hether the action is one at law or in equity is determined by the nature of the pleadings and the character of the relief sought.” *RIM Associates v. Blackwell*, 359 S.C. 170, 177–78, 597 S.E.2d 152, 156 (Ct. App. 2004); *Clark v. Hargrave*, 323 S.C. 84, 86, 473 S.E.2d 474, 476 (Ct. App. 1996) (same). Thus, “an action sounding in law may be transformed to one in equity because equitable relief is sought.” *Ins. Fin. Servs., Inc. v. S. Carolina Ins. Co.*, 271 S.C. 289, 294, 247 S.E.2d 315, 318 (1978). Accordingly, “an appellate court is not bound by a party’s characterization of the actions” and may disregard such labels. *RIM Associates v. Blackwell*, 359 S.C. 170, 177–78, 597 S.E.2d 152, 156 (Ct. App. 2004); *Ariail v. Ariail*, 295 S.C. 486, 491, 369 S.E.2d 146, 149 (Ct. App. 1988) (disregarding the label given by the parties to a cause of action and analyzing the claim based on the relief sought). Additionally, even though a counterclaim

may be compulsory as it arose out of the “same transaction or occurrence as the opposing party’s claim,” *Blackburn*, 407 S.C. at 330, 755 S.E.2d at 441, where the main purpose of the counterclaim is equitable relief, the counterclaim is properly regarded as sounding in equity, *see Mortgage Elec. Sys., Inc. v. White*, 384 S.C. 606, 615, 682 S.E.2d 498, 502 (Ct. App. 2009) (holding no right to jury trial of a *compulsory* counterclaim where the relief sought was *equitable*).

a. Petitioner Has No Right to a Jury Trial for Her Counterclaims for Declaratory Judgment or Breach of Contract Because She Seeks *Equitable* Relief.

Petitioner has characterized her counterclaims for declaratory judgment and breach of contract as legal and compulsory counterclaims for which she claims a right to trial by jury. (Petitioner’s Br. at 5-11). However, because the declaratory relief and breach of contract counterclaims do not affect U.S. Bank’s right to enforce the Note and foreclose the Mortgage, the Trial Court properly found the counterclaims to be *permissive*. Alternatively,³ because, the nature of the relief Petitioner seeks is primarily equitable in nature—that U.S. Bank be estopped from foreclosing the Mortgage—her counterclaims are equitable claims for which she has no right to a trial by jury. Accordingly, the petitioner for certiorari should be denied.

In support of these counterclaims, Petitioner alleges that BANA failed to draft her monthly payments and apply them to her account. (R. p. 40; Amend. Answer ¶ 34.) Assuming *arguendo* that BANA did cease Petitioner’s monthly draft payments, that fact does not affect U.S. Bank’s right to enforce the Note and foreclose the Mortgage because Plaintiff does not claim she was not in default, rendering her counterclaims to be permissible. *See Blackburn*, 407 S.C. at 330 n.7, 755

³ While the Trial Court concluded these counterclaims were permissive counterclaims (R. p. 4), this Court may affirm on any basis appearing in the record. *See White*, 384 S.C. at 614 n.2, 682 S.E.2d at 502 n.2

S.E.2d at 442 n.7. Having raised permissible counterclaims in an equitable foreclosure action, Petitioner has waived her right to a jury trial. *See id.* at 330, 755 S.E.2d at 441.

Alternatively, this petition should be denied because the relief which Petitioner seeks is equitable relief, for which she has no right to a trial by jury. *See id.* at 329, 755 S.E.2d at 441. “[A] suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue.” *Felts v. Richland Cty.*, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991). While the declaratory judgment action in *Felts* was characterized as an action in law, the action sought the interpretation of a contract solely to determine if the plaintiff was defined as an employee under the contract at issue. *See id.* When, however, a party files a declaratory judgment action primarily seeking equitable relief the claim sounds in equity. *See Lowcountry Open Land Trust v. Charleston S. Univ.*, 376 S.C. 399, 406 n.4, 656 S.E.2d 775, 779 n.4 (Ct. App. 2008) (holding that declaratory judgment action sounded in equity where the primary relief sought was the equitable relief of specific performance, rejecting the argument that the necessity of interpreting the contract meant the action was an action at law); *Gaddy v. Douglass*, 359 S.C. 329, 333, 597 S.E.2d 12, 14 (Ct. App. 2004) (concluding that a declaratory judgment action seeking to revoke a power of attorney sounded in equity).

Similarly, a claim for breach of contract may sound in equity when equitable relief is sought. *See RIM Associates*, 359 S.C. at 177–78, 597 S.E.2d at 156 (concluding that, despite the party’s characterization of its claim as a claim for “breach of contract,” when the party sought the equitable remedy of specific performance, the claim was an equitable claim). Here, although Petitioner asserts that her counterclaims for declaratory judgment and breach of contract are legal counterclaims, it is apparent from the pleadings and her arguments that the primary relief she seeks is *equitable*, precluding her right to a jury trial.

In support of her breach of contract counterclaim, Petitioner alleges that BANA breached the terms of the Note before assigning it to U.S. Bank. (Petitioner's Br. at 6-7) As a result, she contends that "foreclosure is not an available remedy." (Petitioner's Br. at 11). As for her counterclaim for declaratory judgment, in her Initial Brief filed before the Court of Appeals, she contends, "[t]he requested declaratory judgment action is to determine the rights and responsibilities of each of the parties under the [N]ote and [M]ortgage. The action argued the Bank should be *estopped* from foreclosure" (Petitioner's In. Br. p. 19 (emphasis added).) Thus, for both counterclaims, Petitioner seeks the *equitable* remedy of estoppel, for which she has no right to a trial by jury. *See Black v. Lexington Sch. Dist. No. 2*, 327 S.C. 55, 62 n.1, 488 S.E.2d 327, 331 n.1 (1997) ("[E]quitable estoppel is an equitable issue to be determined by the judge rather than by the jury.").

Moreover, Petitioner appears to erroneously contend that the determination of the rights and obligation of the parties under the Note and Mortgage—the determination of the real party in interest with standing—is a could provide the basis for a jury trial. (Petitioner's Brief at 16). However, the determination of a question of law as to whether a party has standing to sue under a contract does not transform an action in equity into an action in law. *See Sloan v. Greenville Cty.*, 356 S.C. 531, 545, 590 S.E.2d 338, 345–46 (Ct. App. 2003) (concluding that while the defendant asserted the main purpose of the declaratory judgment action was to *construe a written contract*—including whether the plaintiff had standing to sue under the contract—when the remedy sought by the plaintiff was equitable, the action was appropriately characterized as equitable). That the finder of fact will have to determine standing in an equitable action does not, therefore, provide Petitioner the right to a jury trial. *See id.*

This rule that an otherwise legal claim may be equitable in nature depending on the primary relief sought applies even if a party to an action seeks monetary damages in addition to equitable relief. *See Mobley Co. v. McLucas*, 99 S.C. 99, 99, 82 S.E. 986, 986 (1914) (holding that the defendant in a foreclosure action was *not* entitled to a jury trial on his counterclaim for damages arising out of the plaintiff's alleged failure to perform its obligations in the contract); *Ins. Fin. Servs., Inc.*, 271 S.C. at 294, 247 S.E.2d at 318 (affirming the circuit court's transfer of the action to the equity calendar despite a party's request for "considerable damages," both actual and punitive, because the damages were "only incidental" to the equitable relief sought); *Doe v. S.C. Med. Malpractice Liab. Joint Underwriting Ass'n*, 347 S.C. 642, 645, 557 S.E.2d 670, 672 (2001) (concluding that where the plaintiff's "main purpose" of the action was equitable relief the action sounded in equity despite the plaintiff's prayer for money damages). Thus, when the primary remedy sought is equitable, the action will be an action in equity: "While [one party] will have to pay money . . . if the allegations are proven, that does not mean [the opposing party's] causes of action are legal in nature. Upon looking at the body of the complaint, the main purpose in bringing this action is equitable, not legal." *Verenes v. Alvanos*, 387 S.C. 11, 18, 690 S.E.2d 771, 774 (2010) (holding that, when the nature of relief sought pursuant to claim for breach of fiduciary duty was an equitable remedy, there was no right to trial by jury).

Petitioner seeks both equitable relief and monetary damages in her claims for declaratory judgment and breach of contract accompanied by a fraudulent act.⁴ (Petitioner's Br. at 17-18). A careful review of her Amended Answer makes clear, however, that estopping U.S. Bank from foreclosing the Note and Mortgage is what Petitioner really seeks. (R. pp. 43-44.) (stating, under

⁴ Although Petitioner claimed damages in her counterclaim against Bank of America for breach of contract accompanied by a fraudulent act, she did not plead a claim for relief in her breach of contract counterclaim against Bank of America. (R. p. 46 (Amend. Answer. p. 12).)

her declaratory relief claim, that Petitioners seeks a declaration as to the real party in interest that owns the Note and Mortgage and the rights and responsibilities of the parties in this foreclosure action). Petitioner's counterclaims therefore sound in equity. *See Ins. Fin. Servs., Inc.*, 271 S.C. at 294, 247 S.E.2d at 318; *Doe*, 347 S.C. at 645, 557 S.E.2d at 672. Additionally, the Master-in-Equity's adjudication of Petitioner's counterclaims would not preclude her from recovering her alleged damages. *See Ins. Fin. Servs., Inc.*, 271 S.C. at 294, 247 S.E.2d at 318 ("The trial of a case in a court of equity does not foreclose the award of damages."). In sum, Petitioner has no right to a trial by jury for these counterclaims.

b. Petitioner Has No Right to a Jury Trial for Her Counterclaim for Abuse of Process Because the Counterclaim is *Permissive*.

Petitioner's counterclaim for abuse of process against U.S. Bank is based solely on her allegations relating to U.S. Bank's actions *after* the default on the Note and *during the course of* the Foreclosure Action. As such, the claim is wholly unrelated to the enforceability to of the Note and Mortgage, and the Trial Court properly concluded that Petitioner's counterclaim was a *permissive* counterclaim, and Petitioner waived her right to a trial by jury by raising the claim in an equitable proceeding.

On July 24, 2014, U.S. Bank filed its First Motion to Strike Jury Trial Demand and for Mandatory Order of Reference along with a proposed order of reference to strike Petitioner's demand for a jury trial. (R. pp. 206-210.) The Clerk of Court entered the First Order of Reference on the same day. (R. pp. 6-8.). On January 15, 2015, however, the Master-in-Equity entered an order *vacating* the First Order of Reference, concluding that the Order was inadvertently signed by the Clerk of Court but should have been signed by a Circuit Court Judge. (R. p. 13; Dec. 16, 2015 T. pp. 13:17-14:5.) Months later, when Petitioner filed her Amended Answer, she pled—for the first time—a counterclaim for abuse of process alleging that the Clerk of Court was without

authority to sign the First Order of Reference and that U.S. Bank “willfully and wantonly” filed the proposed Order and sought the Clerk’s signature in order to “fast track the foreclosure process.” (R. pp. 49-52 (Amend. Answer pp. 15–18).)

Petitioner now contends that the Trial Court erred in concluding that her counterclaim for abuse of process is a permissive counterclaim.⁵ (Petitioner’s Br. at 12). Yet, she makes no argument as to how the counterclaim is a compulsory counterclaim. (*See id.*) Petitioner fails to make any argument as to how the Trial Court erred in concluding that her counterclaim was *unrelated* to the execution of the Note and Mortgage or their enforceability. (R. pp. 3-4 (Order of Reference pp. 2–3)). Without making any argument as to *how* the Trial Court erred, Petitioner has abandoned this issue on appeal. *See Jinks v. Richland Cty.*, 355 S.C. 341, 344 n.3, 585 S.E.2d 281, 283 n.3 (2003) (concluding that issue raised in appellant’s brief was abandoned when appellant provided no argument on the issue); *Jones v. SC Dep’t of Health & Env’tl. Control*, 384 S.C. 295, 317, 682 S.E.2d 282, 294 (Ct. App. 2009) (argument abandoned where appellant failed to explain *how* the trial court erred).

Assuming *arguendo* that Petitioner’s allegations regarding U.S. Bank’s filing of the First Motion to Strike Jury Trial Demand and for Mandatory Order of Reference are true, U.S. Bank’s attempt to obtain an order of mandatory reference from the Clerk of Court determining the mode of trial of the Foreclosure Acton would *not* affect its right to commence and maintain the

⁵ Oddly, in the section on the abuse of process counterclaim, Petitioner mainly argues that she stated a counterclaim for a violation of the South Carolina Unfair Trade Practices Act (“UTPA”), which was a compulsory counterclaim and entitled her to a jury trial. (Petitioner’s Br. at 12-14). However, the Amended Answer did not contain a counterclaim for a violation of the UTPA and the only reference to a UTPA violation was in Petitioner’s Breach of Contract section, where Petitioner alleged in a conclusory fashion U.S. Bank violated the UTPA without making any additional allegations as to how the UTPA was violated. (R. p. 48, Amended Answer ¶ 80.) Thus, despite Petitioner’s argument, she did not allege any facts supporting a counterclaim for a violation of the UTPA.

Foreclosure Action as the holder of the Note. Because the determination of U.S. Bank's right to enforce the Note and foreclose the Mortgage is *independent of* the determination of whether it impermissibly sought the First Order of Reference during the Foreclosure Action, her abuse of process counterclaim is a *permissive* counterclaim. *See Blackburn*, 407 S.C. at 330 n.7, 755 S.E.2d at 442 n.7 (counterclaims are permissive if they do not affect the lender's right to enforce the note and foreclose the mortgage). Thus, even if Petitioner's abuse of process counterclaim is a legal counterclaim, because Petitioner raised the permissive counterclaim in an equitable foreclosure action, she has waived her right to trial by jury on the claim. *See id.* at 332, 755 S.E.2d at 443 (concluding that raising permissive legal counterclaims in an equitable action constitutes waiver of the right to a jury trial).

c. Petitioner Has No Right to a Jury Trial for Her Cross-claim that Bank of America Breached the Contract Because the claim is *Permissive*.

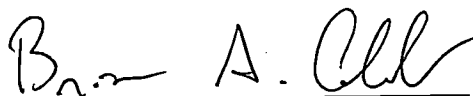
Next, Petitioner appears to contend that her cross-claim against BANA for breach of contract for failure to debit her account was somehow a compulsory counterclaim that requires a jury trial. (Petitioner's Br. at 6-8.). However, the Trial Court properly struck her demand for a jury trial on any cross-claims against BANA because Rule 13(g) of the South Carolina Rules of Civil Procedure provides that "[a] pleading *may* state as a cross-claim any claim by one party against a co-party" Rule 13(g), SCRPC (emphasis added). As such, "[g]enerally, cross-claims are permissive[.]" *N.C. Fed. Sav. & Loan Ass'n v. DAV Corp.*, 298 S.C. 514, 519, 381 S.E.2d 903, 906 (1989). As Petitioner has raised a permissive cross-claim against Bank of America in U.S. Bank's foreclosure action, she has waived her right to a jury trial on this issue. *See Blackburn*, 407 S.C. at 330, 755 S.E.2d at 441.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied, and U.S. Bank respectfully requests an award of all other just relief, including, but not limited to, an award of fees and costs for litigating the merits of the petition for writ of certiorari.

Respectfully submitted,

Respondent U.S. Bank, National Association, as trustee for the Holders of The Banc of America Funding Corporation, 2008-FT1 Trust, Mortgage Pass-Through Certificates; Series 2008-FT1
By counsel



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Attorney for Respondent

CERTIFICATE OF SERVICE

The undersigned certified that *Respondent's Return to Petitioner's Writ of Certiorari* was served on the parties to this action by depositing a copy thereof in the United States Mail, first class, postage prepaid, addressed to:

Rhonda Meisner
P.O. Box 689
Blythewood, SC 29016
Pegasus333@icloud.com
Pro Se Appellant
[Via First Class U.S. Mail & Certified U.S. Mail]

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S.C. SUPREME COURT


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This the 20th day of May, 2019.



Brian A. Calub

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<p>2. Article Number (Transfer from service label)</p> <p>7019 0160 0000 3744 0525</p>	<p>3. Service Type</p> <table border="0"> <tr> <td><input type="checkbox"/> Adult Signature</td> <td><input type="checkbox"/> Priority Mail Express®</td> </tr> <tr> <td><input type="checkbox"/> Adult Signature Restricted Delivery</td> <td><input type="checkbox"/> Registered Mail™</td> </tr> <tr> <td><input checked="" type="checkbox"/> Certified Mail®</td> <td><input type="checkbox"/> Registered Mail Restricted Delivery</td> </tr> <tr> <td><input type="checkbox"/> Certified Mail Restricted Delivery</td> <td><input checked="" type="checkbox"/> Return Receipt for Merchandise</td> </tr> <tr> <td><input type="checkbox"/> Collect on Delivery</td> <td><input type="checkbox"/> Signature Confirmation™</td> </tr> <tr> <td><input type="checkbox"/> Collect on Delivery Restricted Delivery</td> <td><input type="checkbox"/> Signature Confirmation Restricted Delivery</td> </tr> <tr> <td><input type="checkbox"/> Insured Mail</td> <td></td> </tr> <tr> <td><input type="checkbox"/> Insured Mail Restricted Delivery (over \$500)</td> <td></td> </tr> </table>	<input type="checkbox"/> Adult Signature	<input type="checkbox"/> Priority Mail Express®	<input type="checkbox"/> Adult Signature Restricted Delivery	<input type="checkbox"/> Registered Mail™	<input checked="" type="checkbox"/> Certified Mail®	<input type="checkbox"/> Registered Mail Restricted Delivery	<input type="checkbox"/> Certified Mail Restricted Delivery	<input checked="" type="checkbox"/> Return Receipt for Merchandise	<input type="checkbox"/> Collect on Delivery	<input type="checkbox"/> Signature Confirmation™	<input type="checkbox"/> Collect on Delivery Restricted Delivery	<input type="checkbox"/> Signature Confirmation Restricted Delivery	<input type="checkbox"/> Insured Mail		<input type="checkbox"/> Insured Mail Restricted Delivery (over \$500)	
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THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
The Honorable DeAndrea Gist Benjamin, District Court Judge

Case No. 2014-CP-40-02063
Appellate Case No. 2016-001019
Supreme Court Case No. 2019-000678

U.S. Bank, National Association, as trustee for the Holders of The Banc of America Funding Corporation, 2008-FT1 Trust, Mortgage Pass-Through Certificates, Series 2008-FT1,
.....Respondent,

v.

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

Of whom Rhonda Lewis Meisner is the.....Petitioner.

RESPONDENT'S APPENDIX

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

U.S. Bank, National Association, as trustee for the
Holders of The Banc of America Funding Corporation,
2008-FT1 Trust, Mortgage Pass-Through Certificates,
Series 2008-FT1, Respondent,

v.

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

Of whom Rhonda Lewis Meisner is the Appellant.

Appellate Case No. 2016-001019

Appeal From Richland County
DeAndrea G. Benjamin, Circuit Court Judge

Unpublished Opinion No. 2019-UP-066
Submitted January 1, 2019 – Filed February 13, 2019

APPEAL DISMISSED

Rhonda Lewis Meisner, of Blythewood, pro se.

Magalie Arcure Creech, of Finkel Law Firm LLC, and
Jacob Shuler Barker, of Graybill, Lansche & Vinzani,
LLC, both of Charleston; and Trent M. Grissom, of

McGuire Woods LLP, of Charlotte, North Carolina, all
for Respondent.

PER CURIAM: Dismissed pursuant to Rule 220(b), SCACR, and the following authorities: *Hagood v. Sommerville*, 362 S.C. 191, 194, 607 S.E.2d 707, 708 (2005) ("The right of appeal arises from and is controlled by statutory law."); S.C. Code Ann. § 14-3-330(2) (2017) ("[Our s]upreme [c]ourt shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal: . . . [a]n 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 part thereof or any pleading in any action . . ."); *Flagstar Corp. v. Royal Surplus Lines*, 341 S.C. 68, 72, 533 S.E.2d 331, 333 (2000) ("Pursuant to [section] 14-3-330(2), this [c]ourt has held on numerous occasions that when a trial court's order deprives a party of a mode of trial to which it is entitled as a matter of right, such order is immediately appealable."); *Williford v. Downs*, 265 S.C. 319, 321, 218 S.E.2d 242, 243 (1975) ("Ordinarily the granting or refusal of an order of reference is not appealable unless the granting of the reference deprives a party of a mode of trial to which he is entitled by law . . ."); *id.* ("Hence, the issue before the [c]ourt is whether the appellant is entitled to a jury trial [a]s a matter of right. If she is not, the appeal should be dismissed."); *id.* ("The only issue [that] must be decided is whether the case at bar is a legal or equitable action. If it is equitable, the order of reference is not directly appealable."); *Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 248, 489 S.E.2d 472, 475 (1997) ("A mortgage foreclosure is an action in equity."); *Wachovia Bank, Nat'l Ass'n v. Blackburn*, 407 S.C. 321, 328, 755 S.E.2d 437, 441 (2014) ("In equity the parties are not entitled, as a matter of right, to a trial by jury." (quoting *Williford*, 265 S.C. at 321, 218 S.E.2d at 243)); *id.* ("However, counterclaims—including those raised in equitable actions—may, at times, be entitled to a jury trial."); *id.* at 329, 755 S.E.2d at 441 ("If both the complaint and the counterclaim are in equity, the entire matter is triable by the court."); *id.* ("If both are at law, the issues are triable by a jury."); *id.* at 330, 755 S.E.2d at 441 ("If the complaint is equitable and the counterclaim is legal and permissive, the defendant waives his right to a jury trial."); *id.* at 330, 755 S.E.2d at 441-42 ("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 unless a valid jury trial waiver exists that encompasses the counterclaim."); *Blackburn*, 407 S.C. at 330 n.7, 755 S.E.2d at 442 n.7 ("We have previously adopted the 'logical relationship' test to determine whether a counterclaim is compulsory . . ."); *id.* ("Under this

test, 'the "logical relationship" determination is made by asking whether the counterclaim would affect the lender's right to enforce the note and foreclose the mortgage.'" (quoting *Wells Fargo Bank, Nat'l Ass'n v. Smith*, 398 S.C. 487, 496, 730 S.E.2d 328, 333 (Ct. App. 2012)); *id.* ("If the defendant's prevailing on his counterclaim would affect the bank's right to enforce the note and foreclose the mortgage, there is a logical relationship between the counterclaim and the underlying suit, and the counterclaim is therefore compulsory.").

APPEAL DISMISSED.¹

LOCKEMY, C.J., and THOMAS and GEATHERS, JJ., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

The South Carolina Court of Appeals

U.S. Bank, National Association, as trustee for the
Holders of The Banc of America Funding Corporation,
2008-FT1 Trust, Mortgage Pass-Through Certificates,
Series 2008-FT1, Respondent,

v.

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

Of whom Rhonda Lewis Meisner is the Appellant.

Appellate Case No. 2016-001019

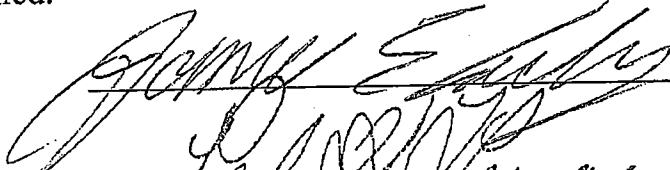
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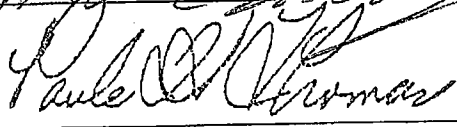
S.C. SUPREME COURT

ORDER


After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



C.J.



J.



J.

Columbia, South Carolina

FILED

cc:

March 21, 2019

Rhonda Lewis Meisner
Magalie Arcure Creech, Esquire
Jacob Shuler Barker, Esquire
Trent M. Grissom, Esquire
The Honorable DeAndrea G. Benjamin