THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LANCASTER COUNTY
In the Circuit Court
Brian Gibbons, Circuit Court Judge
William C. Tindal, Special Referee

Appellate Case No. 2018-001823

Lower Court Case No. 2017-CP-29-00872

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.

INITIAL BRIEF OF RESPONDENT FIRST CITIZENS BANK & TRUST COMPANY

JOHN MARTIN FOSTER

John Martin Foster (SC Bar No. 2086)
Post Office Box 106
Rock Hill, South Carolina

Attorney for Appellant Linda P. Faulkner

ROBINSON GRAY STEPP & LAFFITTE, LLC

J. Kershaw Spong (SC Bar No. 5289)
Mary McDonald Campolong (SC Bar No. 102317)
1310 Gadsden Street
Post Office Box 11449
Columbia, SC 29211

Attorneys for Respondent First Citizens Bank & Trust Company

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STATEMENT OF THE CASE

Respondent, First-Citizens Bank & Trust Company ("FCB") filed a summons and complaint on August 9, 2017, seeking to foreclose on two properties in Lancaster County secured by mortgages given by Appellant Linda P. Faulkner ("Faulkner") to First Citizens Bank and Trust Company, Inc., to which FCB is a successor in interest. (Complaint). One mortgage was executed in 2005, and the other mortgage was executed in 2008. (Complaint). The 2005 mortgage was given as security for loan documents executed the same day as that mortgage, May 20, 2005, and the 2008 mortgage, as well as the 2005 mortgage, acted as security for loan documents executed on December 27, 2010.

Faulkner filed an "Answer and Counterclaim Jury Trial Demanded" on December 29, 2017 (the "Answer").[1] (Answer). As defenses to the complaint, Faulkner alleged FCB expressly waived any claim of default under "said mortgage;"[2] FCB's actions created an implied waiver of any claim of default under "said mortgage;" FCB violated the Truth in Lending Act, 15 U.S.C. §§ 1601 – 1667 (2018), and Federal Reserve Board Regulation Z, 12 C.F.R. § 226 (2019), and FCB is liable to Faulkner for damages from this violation; third parties hired by FCB violated the Unfair Debt Collection Act, 15 U.S.C. § 1692 (2018); and FCB breached a duty of good faith to Faulkner. (Answer). Faulkner did not allege in her Answer that FCB was equitably estopped from foreclosing.[3]

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[1] As to the other defendants, Founders Federal Credit Union filed an Answer on August 22, 2017, admitting it is the holder of an unpaid judgment and asking the Court for notice of proceedings going forward. CACH, LLC filed no Answer in the case and on January 29, 2018, J. Kershaw Spong, attorney for FCB, filed an Affidavit of Default with respect to CACH, LLC.

[2] It is unclear from the document which mortgage Faulkner is referring to.

[3] FCB filed a Reply to Counterclaim, denying every defense not expressly admitted, arguing the statute of limitations precludes Faulkner from asserting a counter-claim under the Truth in Lending Act, asserting FCB does not meet the definition of debt collector in the Unfair Debt Collections

FCB sought to strike Faulkner's jury demand and have the foreclosure matter referred to a special referee. On January 29, 2018, FCB mailed to the Lancaster County Clerk of Court (1) a Motion for Order of Reference and Certificate of Service and (2) a Motion to Strike Jury Demand and Certificate of Service. (Letter to The Honorable Jeff L. Hammond, January 29, 2018 with Attached Motions). The Motion to Strike Jury Demand was filed on January 31, 2018, and that same day, the Circuit Court ordered that Faulkner's Jury Demand was stricken. (Motion to Strike Jury Demand; Order (Striking Jury Demand) (1.31.2019)). The Motion for Order of Reference was filed on February 2, 2018 and that same day, the Lancaster County Clerk of Court referred the matter to William C. Tindal as Special Referee. (Motion for Order of Reference; Order of Reference and Setting Compensation of Special Referee (2.2.2018)). No hearing was held on either of FCB's motions.

On February 22, 2018, Faulkner moved to alter or amend both the Order Striking Jury Demand and the Order of Reference.[4] (Notice and Motion to Alter or Amend). Faulkner alleged: she had raised defenses which entitled her to a jury trial; because she was entitled to a jury trial, the foreclosure suit should not have been referred to a special referee; and the motions by FCB were decided without notice to her and without opportunity to be heard. (Notice and Motion to Alter or Amend). On September 25, 2018, the circuit court held a hearing on the motion to alter

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Act and has no knowledge of the actions of any alleged third parties, denying any breach of a covenant of good faith and fair dealing, and claiming Faulkner failed to state facts to support any cause of action and asking the Court to dismiss Faulkner's claims pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure. (Reply to Counterclaim)

[4] Faulkner actually filed a "Motion to Alter or Amend Judgment Pursuant to: Rule 59(a), S.C.R.P." However, all parties and the court treated such motion as one made under Rule 59(e) of the South Carolina Rules of Civil Procedure.

or amend—which was attended and argued by both counsel for Faulkner and FCB. (Transcript). On October 2, 2018, the circuit court filed an order denying Faulkner's motion to alter or amend its two orders. (Order Denying Rule 59 Motion). Thus, the jury demand was stricken and the matter was referred to the special referee.

Faulkner filed a Notice of Appeal with this Court on October 11, 2018, appealing the circuit court's orders striking Faulkner's jury demand and referring the matter to the special referee. In her brief before this Court, Faulkner alleges: (1) that she was not timely served with FCB's motions to strike the jury demand or to refer the case to the special referee and (2) that the defenses of waiver, equitable estoppel, and violation of the truth in lending act are compulsory counterclaims and, thus, entitled to a jury trial. Faulkner's allegations are misleading because (a) Faulkner's allegations of waiver, equitable estoppel, and violation of the Truth in Lending Act are defenses, and thus are not entitled to a jury trial; (b) Faulkner never raised the issue of equitable estoppel before the circuit court; and (c) Faulkner was properly served and the circuit court properly ruled on both of FCB's motions.

STANDARD OF REVIEW

"A mortgage foreclosure is an action in equity." *Wachovia Bank, Nat. Ass'n v. Blackburn*, 407 S.C. 321, 328, 755 S.E.2d 437, 440–41 (2014) (quoting *Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 248, 489 S.E.2d 472, 475 (1997)). "In an appeal from an action in equity tried by a judge, appellate courts may find facts in accordance with their own views of the preponderance of the evidence." *Id.* (citing *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775–76 (1976))). "However, '[w]hether a party is entitled to a jury trial is a question of law.'" *Id.* (quoting *Verenes v. Alvanos*, 387 S.C. 11, 15, 690 S.E.2d 771, 772 (2010)). "Appellate courts

may decide questions of law with no particular deference to the circuit court's findings." *Id.* (citing 387 S.C. at 15, 690 S.E.2d at 772–73).

ARGUMENT

I. DO THE DEFENSES TO FORECLOSURE RAISED IN APPELLANT'S ANSWER ENTITLE APPELLANT TO A JURY TRIAL?

Faulkner alleges that the circuit court's order striking her jury demand was improper because her defenses of waiver and violation of the Truth in Lending Act are entitled to a jury trial. However, Faulkner's claims cannot be entitled to a jury trial because only counterclaims, not defenses, can trigger a requirement for jury trial.

A foreclosure action is an action in equity and is not entitled to a jury trial. *Wachovia Bank National Association v. Blackburn*, 407 S.C. 321, 328, 755 S.E.2d 437, 441 (2014). However, counterclaims to a foreclosure action may be entitled to a jury trial. As the court explained in *Blackburn*:

> (1) If both the complaint and 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 unless a valid jury trial waiver exists that encompasses the counterclaim . . . .

407 S.C. at 329-30, 755 S.E.2d at 441-42.

Faulkner claims that waiver, equitable estoppel, and violation of the Truth in Lending Act are counterclaims entitled to a jury trial, but they are actually defenses raised by Faulkner. A defense is "a defense to each cause of action asserted." Rule 8(b), SCRCP. A counterclaim shows "the pleader is entitled to relief" and includes a "prayer or demand for judgment for the relief." Rule 8(a), SCRCP. Faulkner's defenses of waiver, equitable estoppel, and violation of the Truth in

Lending Act are arguments as to why Faulkner believes FCB cannot be successful in its suit against her, not counterclaims asserting any basis on which Faulkner is entitled to relief against FCB. *See First South Bank v. Rosenberg*, 418 S.C. 170, 183-84, 790 S.E.2d 919, 926-27 (Ct. App. 2016) (comparing defenses to counterclaims and determining negligence and breach of contract were both counterclaims).

First, her prayer for relief as to waiver, Faulkner only asks the Court to dismiss the claims FCB has against Faulkner. Faulkner does not ask for any relief independent of FCB's action.

Second, as to Faulkner's Truth in Lending Act allegations, these also must be classified as a defense and not a counterclaim. Under the Truth in Lending Act, a claim for violation of the Act may only be brought "within one year from the date of the occurrence of the violation." 15 U.S.C. § 1640(e). Faulkner alleges FCB's violation of the Truth in Lending Act occurred in March 2008, eleven (11) years ago. (Answer ¶ 21). Since the statute of limitations for claims under the Truth in Lending Act (the "Act") has run, Faulkner cannot assert a counterclaim for a violation of the Act.

However, Faulkner may still assert a defense under the Truth in Lending Act. In a foreclosure action, "a consumer may assert a violation by a creditor" of certain parts of the Act, "as a matter of *defense by recoupment or setoff* without regard for the time limit on a private action for damages under subsection (e)." 15 U.S.C. § 1640(k)(1) (emphasis added). The statute allowing Faulkner to assert a violation of the Truth in Lending Act, section 1640(k)(1), defines Faulkner's Truth in Lending allegation as a defense, not a counterclaim. Additionally, in *Tuloka Affiliates, Inc. v. Moore*, 275 S.C. 199, 202, 268 S.E.2d 293, 295 (1980), the Supreme Court of South Carolina found—prior to the enactment of section 1640(k)(1)—a "defense and counter-claim" under the Act in response to a foreclosure action after the one year statute of limitations had expired

was an equitable defense, not a counter-claim. Thus, it is clear Faulkner's Truth in Lending Act allegations are a defense and no jury trial is appropriate.

II. IS THE QUESTION OF WHETHER THE DEFENSE OF EQUITABLE ESTOPPEL IS ENTITLED TO A JURY TRIAL PROPERLY BEFORE THIS COURT WHEN IT WAS NEITHER RAISED TO OR RULED UPON BY THE CIRCUIT COURT?

Appellant, for the first time on appeal, raises a defense of equitable estoppel. A party "must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments." *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). Preservation rules are "meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments. *Id.* Here, the circuit court had no opportunity to consider the facts, law, or arguments regarding equitable estoppel. Faulkner did not raise the issue of equitable estoppel in her Answer. Faulkner did not raise the issue of equitable estoppel in her motion for reconsideration. Faulkner did not raise the issue of equitable estoppel in the hearing before the circuit court. As this issue was never raised before the circuit court, it cannot now be presented for the first time on appeal.

III. IS THE ISSUE OF TIMELY SERVICE UPON APPELLANT PROPERLY BEFORE THIS COURT GIVEN THAT THE COURT RECONSIDERED ITS INITIAL ORDERS AND ISSUED A SUBSEQUENT ORDER AFTER A FULL HEARING?

A court is entitled to strike a jury demand "upon motion or its own initiative" if it finds that a right to a jury trial on any or all issues does not exist. Rule 39(a), SCRCP. After striking a jury demand, a court is entitled to refer a foreclosure matter to a master in equity or a special referee. "Actions to foreclose liens . . . shall ordinarily be referred to a master pursuant to Rule 53" of the South Carolina Rules of Civil Procedure. Rule 71(a), SCRCP. Rule 53(b) provides: "In an action where the parties consent, in a default case, or an action for foreclosure, some or all of the causes of action in a case may be referred to a master or special referee by order of a circuit court judge

or the clerk of court." In an administrative order issued in 2010, former Chief Justice Toal expressly found either a circuit court judge or a clerk of court could sign an Order of Reference in foreclosure actions. *Orders of Reference in Foreclosure Cases*, 2010-07-15-01 (July 15, 2010).

Here, FCB mailed its motions to strike the jury demand and to refer the matter to a special referee to the clerk of court to be filed. (Letter to The Honorable Jeff L. Hammond, January 29, 2018 with Attached Motions). Simultaneously, FCB served notice to Faulkner via mail of the same. (Certificate of Service for Motion to Strike Jury Demand; Certificate of Service for Motion for Order of Reference). However, notwithstanding Faulkner's motions, the Rules of Civil Procedure would have (a) allowed the circuit court to strike the jury demand upon its own initiative, Rule 39(a), SCRCP, and (b) after the jury demand was stricken, allowed either the circuit court or the clerk of court to refer the matter to a special referee, Rules 71(a) and 53(b), SCRCP. Though Faulkner complains that the court ruled on both motions without allowing Faulkner an opportunity to respond and without a hearing, this was not an error. Upon motion or upon its own initiative a circuit court may strike a jury demand, and in a foreclosure matter, a clerk of court may refer the case to a special referee.

Further, though Faulkner complains that the circuit court ruled on FCB's motions to strike the jury demand and for order of reference prior to Faulkner actually receiving the notice or having an opportunity to respond, any error was cured by Faulkner's motion to alter or amend both orders. In *Universal Benefits, Inc. v. McKinney*, 349 S.C. 179, 183-84, 561 S.E.2d 659, 661-62 (Ct. App. 2002), this Court determined that when the plaintiff was afforded written notice of an order dismissing its action and the opportunity to move for reconsideration, even when the plaintiff may not have received notice of the initial hearing, there was no denial of due process. Here, Faulkner was heard on the issues raised in her Rule 59 motion to reconsider the orders. After Faulkner's

motion, each party submitted memoranda on the issues and the circuit court held a hearing on September 25, 2018, which was attended by counsel for both Faulkner and FCB. Thus, Faulkner had the opportunity to be heard before the circuit court at a hearing on both the motion to strike and the motion to refer the matter to a special referee.

CONCLUSION

Faulkner raises many issues and facts in her appellate brief which are misleading or were not raised before the circuit court. Faulkner's appeal should be denied because the circuit court properly ruled on FCB's motions to strike the jury demand and to refer the case to a special referee. Faulkner's claims of waiver, equitable estoppel, and violation of the Truth in Lending Act are all defenses—rather than counter-claims—and thus, Faulkner was not entitled to a jury trial and the circuit court's order striking Faulkner's jury demand was proper. Additionally, Faulkner's claim of equitable estoppel was not raised to or ruled on by the circuit court and, thus, is not preserved for review by this Court. Finally, Faulkner's claim that she was not timely served with the notice of FCB's motions is misleading as (1) the circuit court acted within its discretion to both strike Faulkner's jury demand and refer the matter to a special referee, and (2) any service issues were resolved by the hearing before the circuit court on Faulkner's Rule 59(e) motion. For the foregoing reasons, Faulkner's appeal should be denied, and the orders of the circuit court should be affirmed.

Signature Page to Follow

Respectfully submitted,

ROBINSON GRAY STEPP & LAFFITTE, LLC

By: _____

J. Kershaw Spong (Bar No. 5289)
Mary M. Campolong (Bar No. 102317)
1310 Gadsden Street
Post Office Box 11449
Columbia, South Carolina 29211
(803) 227-1101
kspong@robinsongray.com
mcampolong@robinsongray.com

Attorneys for Respondent First-Citizens Bank & Trust Company

Columbia, South Carolina
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PROOF OF SERVICE

I certify that I have served the Initial Brief of Respondent First Citizens Bank & Trust Company dated May 20, 2019, on the following counsel or persons of record:

John Martin Foster
Post Office Box 106
Rock Hill, SC 29731
Attorney for Appellant

By depositing the same with the United States mail, with sufficient first class postage attached, properly addressed to the respective last known address of the attorney set out above, pursuant to Rule 262(b), S.C.A.C.R.

May 20, 2019

ROBINSON GRAY STEPP & LAFFITTE, LLC.

By: _____

J. Kershaw Spong [SC Bar # 5289]
Mary L. McDonald [SC Bar #102317]
ROBINSON GRAY STEPP & LAFFITTE, LLC
P.O. Box 11449
Columbia, SC 29211
(803) 929-1400
Email: kspong@robinsongray.com
mmcdonald@robinsongray.com

Attorneys for Respondent First Citizens Bank & Trust Company