THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Jocelyn Newman, Presiding Judge

Case No. 2016-CP-40-07662

Appellate Case No. 2018-001797

Nicholas L. Pettit, as Personal Representative of the Estate of Charles A. Pettit, deceased,..... Appellant,

v.

Audrey E. Volonis and Ryan D. Volonis,..... Respondents.

REPLY BRIEF

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REPLY TO RESPONDENTS' ARGUMENTS

I. Respondents' Counterclaims are Without Factual Support.

As stated in the Brief of Respondents (p. 18), "Defendants' counterclaims are based on damages incurred from Plaintiff's failure to satisfy the mortgage when properly demanded."

a. Nothing in the **First Counterclaim (Declaratory Judgment)** requests any legal remedy. It simply reasserts "each and every defense and answer contained in the previously filed Answer and Counterclaim." (R.p. 45) In this counterclaim, Defendants seek no affirmative relief other than stating that Plaintiff's mortgage "must be satisfied as the underlying promissory note has been paid, cancelled or forgiven." No factual support for this statement is to be found anywhere in Defendants' pleading.[1]

As argued in the Brief of Appellant (p. 5), Defendants abandoned this counterclaim.

b. The **Second Counterclaim (Liability for Failure to Enter Satisfaction)** simply asserts that, "The Plaintiff is liable for all damages, penalties, attorneys' fees, and relief available under S.C. Code Ann. §29-3-320 et seq. (see exhibits A, B and C)" (R.p. 45), without setting forth any factual allegations whatsoever in support of this assertion.

Since this counterclaim is not founded upon factual allegations set forth in this counterclaim (specifically or by reference), it is altogether without support and must be ignored.

c. Contrary to the Second Counterclaim, the **Third Counterclaim (Slander of Title)** does "re-allege their previous allegations" (R.p. 45), but it remains clear that this counterclaim addresses the identical matter as the Second Counterclaim: the failure to enter a satisfaction.

While this counterclaim alleges that "the note and mortgage were cancelled, satisfied or otherwise forgiven" (R.p. 45), there is no factual allegation anywhere in Defendants' pleading

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1 "Defendants' pleading" refers to the Second Amended Answer and Counterclaim.

tending to explain the circumstances leading to, or resulting in, this conclusory allegation.

According to Rule 8(a), SCRCP, "[a] pleading which sets forth a cause of action [including a counterclaim] shall contain . . . a short and plain statement of the facts showing that the pleader is entitled to relief . . . ." No facts showing that Defendants are entitled to any relief sought by the counterclaims can be found.

The Brief of Respondents states that, "Defendants again allege that through a combination of payments, accord and satisfaction and setoff or credits, the loan was extinguished." (p. 11) First of all, Plaintiff questions the use of the word "again." There is no allegation in the Defendants' pleading using these combination of words: "combination of payments, accord and satisfaction and setoff or credits," except, arguably, the following:

- The Defendants are entitled to the requisite satisfaction of the underlying mortgage based on the payments made by the Defendants. (R.p. 44)
- The Defendants are entitled to all appropriate offers or credits as may be just and applicable. (R.p. 44)

II. Relief Under §§29-3-310 and 320 is Premised Upon Receipt of Payment.

a. There is no factual allegation anywhere in Defendants' pleading that supports or otherwise addresses the premise of §§29-3-310 and 320: that the holder of the mortgage received full payment or satisfaction of the mortgage loan. In order for Defendants' counterclaims to have any viability, Defendants must, at least, allege facts (not just conclusions) showing that Plaintiff "received full payment or satisfaction" (quoted from §29-3-310). These statutes require this showing in order to trigger the remedies provided.

b. There is no factual allegation (or even a conclusory statement) anywhere in Defendants' pleading that:

- the mortgagee "received full payment"

- the mortgagee "received . . . satisfaction"
- "a legal tender [has] been made of his debts . . . secured by mortgage of real estate"

(quoted from **§29-3-310**); or

- the mortgagee "received such payment"
- the mortgagee "received . . . satisfaction"
- the mortgagee "received . . . tender"

(quoted from **§29-3-320**).

When claiming relief pursuant to these statutes, the obvious key word is "received." Defendants must plead facts showing that Plaintiff "received full payment or satisfaction." Defendants focus instead on distinguishing the terms "full payment" and "satisfaction." In doing so, they define "satisfaction" as the "giving of something" to extinguish an obligation. (R. Brief, p. 6) There must be a "giving," just as there must be a "receiving." Defendants, however, have made no effort to state facts showing either a "giving" or a "receiving."

c. Defendants have not pled that Plaintiff has "received full payment, satisfaction, or tender." The counterclaims do not state that full payment of the note has been received by Plaintiff. To the contrary, they make a special effort to avoid alleging that full payment of the debt or some form of satisfaction was received. As stated in the Brief of Appellant (p. 7), Defendants' pleading uses the following artful, conclusory allegations:

Defenses
"note has been paid, cancelled or forgiven" (R.p. 41) (twice)
"payment, cancellation or forgiveness of said promissory note" (R.p. 41)
"debt was paid, cancelled or forgiven" (R.p. 43)
"the payments made" (R.p. 44)

Counterclaims
"note has been paid, cancelled, or forgiven" (R.p. 44)
"note being cancelled, satisfied or otherwise, forgiven" (R.p. 45)
"note and mortgage were cancelled, satisfied or otherwise forgiven" (R.p. 45)

Defendants' counterclaims are necessarily dependent upon the proof by Defendants that Plaintiff received full payment or satisfaction of the mortgage loan. Defendant's pleading does not state any facts demonstrating that they paid in full or satisfied the mortgage loan. Unless they plead and prove that Plaintiff received full payment or satisfaction of the mortgage loan, Defendants' claims are baseless.

Defendants make an exhaustive effort to expand the threshold premise of §§29-3-310 and 320, finally declaring that these "statutes apply where a mortgage 'has been fully paid, released, satisfied, discharged, or extinguished.'" (R. Brief, p. 9) It would have been more helpful if Defendants had introduced facts to support one or more of these conclusory terms.

III. Logical Relationship Test.

a. Defendants tout the "logical relationship test" adopted by the Supreme Court in *N.C. Fed. Sav. & Loan Ass'n v. DAV Corp.*, 298 S.C. 514, 518, 381 S.E.2d 903, 905 (1989), wherein the Court held that, "there [was] a logical relationship between the counterclaim and the underlying suit, and the counterclaim is therefore compulsory," notwithstanding that the counterclaim did not deal with the execution of the underlying instruments.

DAV Corp. is a 1989 case, and this issue has been addressed on several (or more) occasions since then. In the more-recent case of *Carolina First Bank v. BADD, L.L.C.*, 414 S.C. 289, 295-296, 778 S.E.2d 106, 109 (2015), for example, the Supreme Court held that a civil conspiracy counterclaim in a foreclosure action was permissive "as it does not arise out of the same transaction or occurrence as the execution of the guaranty agreements," finding that such counterclaim "does not arise out of that transaction or occurrence because it bears no logical relationship to either the execution or enforceability of the guaranty agreements."

Defendants claim that the existence of the unsatisfied mortgage now causes damage to

them under legal theories completely unrelated to the loan transaction; but the damages sought by Defendants stem, not from the transaction or even the terms of the transactional documents, but from the alleged inaction (failure to satisfy the mortgage of record) by Plaintiff (or his predecessor), first raised many years after the loan transaction occurred.

b. The actual wording of Rule 13(a), SCRCP, should be considered. This Rule, in relevant part, provides that, "[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 . . . ." If this Rule had intended to, it could have easily stated, "if it arises out of the subject matter of the opposing party's claim." Instead of "arises out of the subject matter," this Rule limits "compulsory" counterclaims to those which arise "out of the transaction or occurrence." In other words, if a defendant's claim arises, generally speaking, out of the subject matter of a plaintiff's claim, it would not be compulsory unless "it arises out of the transaction or occurrence that is the subject matter."

Importantly, the appealed Order makes no mention that (or how) the counterclaims arose out of the transaction or occurrence.

Defendants' counterclaims are not compulsory because none of them arise out of the transaction or occurrence of Plaintiff's loan. None of Defendants' counterclaims:

- involve the execution and delivery of, or the consideration exchanged for, Plaintiff's loan documents.
- attack the validity of the terms of the note and mortgage.
- challenge Plaintiff's right to enforce the remedies contained in Plaintiff's note and mortgage – certainly no more so, or differently, than do Defendants' defensive allegations in their pleading.
- address the administering of the mortgage loan by Plaintiff (or his predecessor) or the construction of the terms and conditions contained in the loan documents.

IV. If Defendants are Entitled to a Jury Trial on One or More of Their Counterclaims, There Must be Separate Trials.

If Defendants prevail on their argument that at least one of their counterclaims is both legal and compulsory and is, therefore, entitled to a jury trial, that outcome must not ignore that Plaintiff is entitled to a non-jury trial on his equitable claim. (See A.Brief, p. 15)

The appealed Order, which improperly directed that, ". . . this matter should be tried, in toto, before a jury" (R.p. 8), fails to protect Plaintiff's right to a non-jury trial on his equitable claim.

Importantly, the "in toto" directive was not the result of a motion by Defendants that the parties' respective claims be combined for purposes of trial. The appealed Order was issued as a result of Plaintiff's Motion for Order of Reference, not as a result of a motion by Defendants seeking a jury trial of all claims and issues.

The Brief of Respondents (pp. 3-4) cites *Wachovia Bank Nat'l Ass'n v. Blackburn*, 407 S.C. 321, 755 S.E.2d 437 (2014), for the following holdings: "While a foreclosure is an action in equity, counterclaims – including those counterclaims raised in equitable actions – may be entitled to a jury trial" and ". . . the 'trial judge may, pursuant to Rule 42(b)[SCRCP], order separate trials of the legal and equitable claims, or may order the claims tried in a single proceeding.'"(407 S.C. at 328-329) Plaintiff agrees, generally, with the initial holding and with a portion of the second holding, and he would point out that Rule 42(b) actually states nothing about combining the trial of legal and equitable claims in "a single proceeding." The quoted statement from *Blackburn* conflicts with the following holding in *Advance Int'l v. North Carolina Nat'l Bank*, 316 S.C. 266, 270, 499 S.E.2d 580, 583 (Ct. App. 1994), affirmed in part; vacated in part by *Advance Int'l v. North Carolina Nat'l Bank*, 320 S.C. 532, 533, 466 S.E.2d 367 (1996):

The trial court would have had to order separate trials if indeed the claims were

> compulsory and had been asserted in the foreclosure action. Where a complaint is equitable and the counterclaim, for which a jury trial is requested, is legal and compulsory, the trial court must order separate trials pursuant to Rule 42(b), SCRCP.

That said, the said quote from *Blackburn* may be of some value, as, according to that case, it is **the trial judge** who would make the call with regard to separate trials, not, as here, a judge hearing a motion (Plaintiff's Motion for Order of Reference), who is incorrectly referred to in the Brief of Respondent as "the trial judge." (p. 18)

V. Plaintiff's Claim Must be Tried First.

It would be illogical to require that Defendants' counterclaims be tried first (i.e. that Defendants be required to prove their case first before any effort is made to determine whether or not Plaintiff's claims under his note and mortgage remain enforceable). In order to address Defendants' counterclaims, there must, first, be a decision that Plaintiff's note is unenforceable (due to its being paid in full or satisfied). Defendants must prevail on their Answer (their defenses) – effectively overcome (quash) Plaintiff's claim to foreclosure – before the matters raised in the counterclaims can be considered.

If Plaintiff's claim prevails (if the loan indebtedness and security remain valid and enforceable), Defendants' counterclaims logically fail.

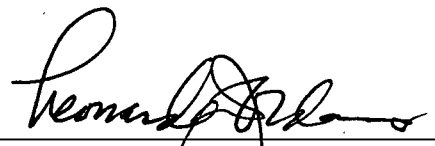
CONCLUSION

Especially as related to mortgage foreclosures, which, in South Carolina, are routinely adjudicated on a non-jury basis, if defendants are entitled to a jury trial on counterclaims simply by demanding a jury trial based upon unsupported, conclusory allegations, this would create chaos in the mortgage lending business.

Defendants' counterclaims are not compulsory, and Defendants are not entitled to a jury

trial on their counterclaims. Even if one counterclaim were found to be compulsory and entitled to a jury trial, Plaintiff's equitable claim should, first, be tried in a bench trial, followed by a jury trial of Defendants' counterclaim(s) only if Plaintiff's claim is denied.

Respectfully submitted,



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