

STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTON

) IN THE COURT OF COMMON PLEAS  
) NINTH JUDICIAL CIRCUIT  
) CASE NO.: 2012-CP-10-5887

Pinnacle Bank, as successor in interest to  
Bank of North Carolina, previous successor  
in interest to Harbor National Bank

Plaintiff,

vs.

Anthony Whitfield and  
Cindy Whitfield,

Defendants.

Anthony Whitfield,

Counterclaimant

vs.

David Swanson, Counterclaim Defendant

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FEB 03 2020

ORDER

SC Court of Appeals

BY

JULIE J. ARMSTRONG  
CLERK OF COURT

2019 OCT 16 PM 12:23

FILED

Before the Court is Counterclaim Defendant David Swanson's motion requesting Defendant Anthony Whitfield's counterclaim for civil conspiracy against Swanson and Pinnacle Bank be bifurcated, that the jury demand be struck as to the civil conspiracy counterclaim, and that the bifurcated civil conspiracy counterclaim be referred to the master in equity. A hearing was held on October 7, 2019 where the Court heard arguments of counsel for all parties. After careful consideration of the submissions, arguments of counsel and the relevant legal authority, the Court grants Mr. Swanson's motion.

I

The current matter is a foreclosure lawsuit by Pinnacle Bank, as successor in interest to Bank of North Carolina, previous successor in interest to Harbor National Bank. Defendant Whitfield has asserted multiple counterclaims in this foreclosure action. In Defendant Whitfield's Fifth Amended Answer, Affirmative Defenses, Crossclaim and Counterclaims, Whitfield asserts

counterclaims for (1) Breach of Contract, (2) Negligent Misrepresentation, (3) Fraud in the Inducement, (4) Violation of Federal Trade Commission Act Section 5(a) 15 U.S.C. §45 as made applicable through S.C. Code §39-5-10 et seq, (5) Promissory Estoppel/Detrimental Reliance, (6) Breach of Contract Accompanied by a Fraudulent Act, and (7) Tortious Interference with Prospective contractual Relations, all against Pinnacle Bank only, and (9) Civil Conspiracy against Pinnacle Bank and David Swanson (as an additional counterclaim defendant)<sup>1</sup> and (10) a cross-claim against Cindy Whitfield for Equitable Indemnity.

The current motion relates solely to the ninth counterclaim for civil conspiracy, which is the only cause of action including Swanson as a party. The issue currently before the Court is whether Defendant Whitfield is entitled to a jury trial as a matter of right on his civil conspiracy counterclaim to the foreclosure complaint, and if the civil conspiracy claim should be bifurcated and tried in a separate non-jury proceeding. To aid in the disposition of this motion, a brief factual background of Mr. Swanson's connection to the litigation is as follows.

In 2007, Whitfield entered into several loan agreement secured by real property with Harbor National Bank. One of the subject loans was secured by the real property located at 1055 Black Rush Circle, Mount Pleasant, SC 29466 ("Black Rush Property")<sup>2</sup>. (Pl. Compl. ¶16; Ex. C to Pl. Compl.). The maturity date on the subject promissory note was May 3, 2012. (Pl. Compl. Ex. A.).

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<sup>1</sup> Whitfield's eighth counterclaim also asserted against additional counterclaim defendant Swanson for Abuse of Process was dismissed by an order entered November 8, 2017 granting in part Swanson's motion for summary judgment.

<sup>2</sup> Loans secured by other real property in Dorchester and Berkeley Counties are the subject of separate foreclosure actions between Plaintiff and Defendants in those respective counties. Mr. Swanson is not a party to the Dorchester or Berkeley foreclosure actions.

In or about January 2012, Mr. Whitfield alleges that he and Harbor National representatives discussed renewing his loans. (Defs. 5<sup>th</sup> Am. Ans., Aff. Def., Crossclaim and Counterclaims ¶¶28-29). Mr. Whitfield alleges that on June 26, 2012, Harbor National Bank's vice president signed a loan commitment letter to Mr. Whitfield outlining the terms and conditions of his loan renewals. (Id. ¶31).

Mr. Whitfield further alleges that the parties attended an anticipated closing of the loan renewals on June 28, 2012 wherein the Harbor National Bank representative "informed Mr. Whitfield that a signed endorsement from a title company was needed so that Mr. Whitfield's ex-spouse Cindy Whitfield would not be required to sign the loan documents for the Black Rush Property." (Id. ¶¶32, 37). According to Whitfield, the closing attorney advised him the endorsement could not be procured, that his ex-wife would not sign the mortgage to the Black Rush Property, and that ultimately all of his properties secured by loans from Harbor National Bank then became the subject of foreclosure proceedings. (Id. ¶¶32-33). Whitfield contends that he subsequently learned that a title endorsement was not required to close the loan renewals and asserts that Plaintiff breached an alleged agreement to renew the loans. (Id. ¶33).

After the loan renewals did not close, Plaintiff initiated the current foreclosure action. During the course of this foreclosure action, Mr. Whitfield conducted depositions of Harbor National Bank representative Scott Warren and Mr. Swanson. Mr. Swanson is an attorney who advised Harbor National Bank on certain matters. Both Warren and Swanson testified in their depositions that in a phone call on or prior to June 28, 2018, Swanson recommended that Harbor National Bank get a title endorsement for the Black Rush Property. (See, Id. at ¶¶74-79).

In his civil conspiracy counterclaim, Whitfield alleges that the alleged phone call between Warren and Swanson wherein Swanson recommended Harbor National Bank obtain a title endorsement *did not* occur before the anticipated closing of the loan renewals. Whitfield instead alleges that Harbor National Bank and Swanson conspired to give false deposition testimony for the purpose of justifying Harbor National Bank's request for a title endorsement.

In the operative pleading, Mr. Whitfield's civil conspiracy counterclaim alleges:

74. Mr. Scott Warren claims he called Mr. David Swanson for the advice to procure a title endorsement to renew the loan for the Black Rush Property.

75. Mr. Swanson claims that Mr. Scott Warren called him regarding the anticipated closing between Mr. Whitfield and Harbor National Bank, said closing to occur on June 28, 2012.

76. Despite providing such sworn testimony by each Mr. Scott Warren and Mr. David Swanson that this advice was given and received before the June 28, 2012 closing, there is no evidence of any such phone call as the phone records from Mr. David Swanson's cell phone and his office line show no records of a phone call from Mr. Scott Warren cell phone or office line in June of 2012.

77. Because the telephone records show the phone call never occurred, the sworn testimony that the call was made, when in fact evidence shows it was not made at the time, was given with the ulterior purpose of fabricating a legal defense for the bank's failure to renew its contractual obligations to renew Mr. Whitfield's loans.

78. Mr. David Swanson has represented that Scott Warren called him regarding an anticipated closing, in which he gave advice to Mr. Warren to procure a title endorsement. As alleged previously, Mr. Swanson and his law firm have no proof the advice was ever given as there is no engagement letter, fee agreement, correspondence, records of any kind, opinion letters, or billing entries at the firm to corroborate the legal defenses that Mr. Swanson provided the information at the time he claims the advice was made. Additionally, there is no evidence of the communication itself from Mr. Warren's cell phone or office line to Mr. Swanson's cell phone or office line, further evidence that the communication was never made, when Mr. Swanson and Mr. Warren claim it was.

79. The sworn testimony that the call was placed before closing, when in fact it was not, was a willful or overt act, done with the intent and collateral objective of furnishing a legal defense (advice of counsel) for the bank and injuring Mr. Whitfield.

(Def's 5th Am Ans, Aff. Def., Crossclaim and Counterclaims ¶¶74-79)(emphasis in original pleading).

As is clear from the factual allegations supporting the civil conspiracy counterclaim, the civil conspiracy claim does not arise out of the underlying loans or prospective loan renewals, but rather, out of activity that took place after the alleged loan renewals did not close.

## II

Mr. Swanson argues that the civil conspiracy counterclaim is a permissive counterclaim under Rule 13, SCRPC and therefore, Mr. Whitfield is not entitled to a jury trial as of right on the civil conspiracy counterclaim. Whitfield, on the other hand, argues that the civil conspiracy counterclaim arises out of the same transactions and occurrences as the underlying loan and alleged renewal transactions. The Court finds that the civil conspiracy counterclaim is permissive, and therefore, Whitfield is not entitled to a jury trial as of right on the civil conspiracy counterclaim.

"Generally, the relevant question in determining the right to trial by jury is whether an action is legal or equitable...." *Lester v. Dawson*, 327 S.C. 263, 267, 491 S.E.2d 240, 242 (1997). Because a foreclosure action is one sounding in equity, a party is not entitled, as a matter of right, to a jury trial. *Wachovia Bank, Nat'l Ass'n v. Blackburn*, 407 S.C. 321, 328, 755 S.E.2d 437, 441 (2014). A party is entitled to a jury trial in an equitable action "only if the counterclaims are legal and compulsory." *Carolina First Bank v. BADD, L.L.C.*, 414 S.C. 289, 295, 778 S.E.2d 106, 109 (2015). "By definition, a counterclaim is compulsory only if it arises out of the same transaction or occurrence as the opposing party's claim." *Blackburn*, 407 S.C. at 330-331, 755 S.E.2d at 442. When a defendant asserts permissive counterclaims which are legal in nature, he waives the

right to a jury trial on these issues. *C&S Real Estate Services, Inc., v. Massengale*, 290 S.C. 299, 301, 350 S.E.2d 191, 193 (1986).

Under South Carolina law, whether a counterclaim is compulsory or permissive is viewed through the logical relationship test. "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. 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." *Blackburn*, A407 S.C. at fn7, 755 S.E.2d at fn7 (internal citations omitted).

Here, the civil conspiracy counterclaim has no logical relationship to Pinnacle Bank's right to enforce the note and foreclose the mortgage. The alleged facts supporting the civil conspiracy counterclaim--that Swanson and Harbor National Bank conspired to give false testimony for the purpose of providing an *after-the-fact* justification for Harbor National Bank's request for a title endorsement--relate to activity that occurred after Mr. Whitfield's loans were not renewed. Accordingly, the outcome of the civil conspiracy counterclaim will not affect the enforceability of the note and mortgage, will not affect whether Harbor National Bank had an obligation to renew Mr. Whitfield's the loans, and will not affect Whitfield's other counterclaims alleging improper acts against the bank with respect to the original loans and the failed alleged loan renewals.

The Court finds that Mr. Whitfield's civil conspiracy counterclaim is a permissive counterclaim asserted in an equitable foreclosure action, and therefore, Mr. Whitfield is not entitled to a jury trial as of right on his civil conspiracy counterclaim. Accordingly, upon motion of counterclaim defendant Swanson pursuant to Rule 39(a)(2), SCRCP, the civil conspiracy counterclaim shall be tried by non-jury trial.

### III

Mr. Swanson also moves for an order bifurcating the civil conspiracy claim from the other claims and counterclaims asserted in the litigation.

Rule 42(b), SCRCP provides that "the court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claims, counterclaims, or third-party claims, or issues, always preserving inviolate the right to trial by jury as declared by the Constitution or as given by statute of the State." Bifurcation is proper where the issues in the case are complex, and bifurcation helps to clarify or simplify the issues. *Durham v. Vinson*, 360 S.C. 639, 602 S.E.2d 760 (2004).

Here, counterclaim defendant Swanson is only a party to one cause of action asserted in the complex litigation between Pinnacle Bank and Mr. Whitfield. Pursuant to this order, the Court has determined that Whitfield's civil conspiracy counterclaim is not entitled to a jury trial as of right. Likewise, as discussed herein, the outcome of the civil conspiracy cause of action will not affect the remainder of the claims asserted between the parties.

As the Court has determined that no logical relationship exists between Mr. Whitfield's civil conspiracy counterclaim and the foreclosure action or Mr. Whitfield's other counterclaims to which Mr. Swanson is not a party, the Court finds that bifurcation of the civil conspiracy counterclaim is prudent. Bifurcation of the civil conspiracy counterclaim will simplify the evidence and issues presented before the jury, will avoid the inconvenience of forcing those witnesses and parties only material to the civil conspiracy claim to attend a lengthy trial regarding the other counterclaims asserted by Whitfield, and will aid in avoiding jury confusion over which facts are relevant to the claims that are to be decided by the jury rather than by the Court.

Accordingly, the Court finds that the civil conspiracy claim should be bifurcated and tried in a separate trial conducted non-jury.

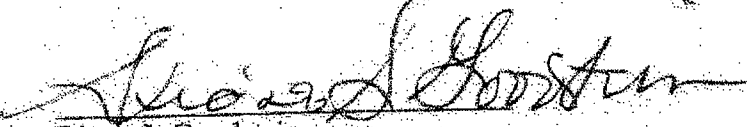
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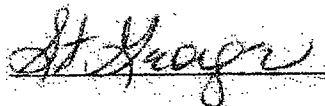
For the reasons stated herein, the Court grants the motion of counterclaim defendant David Swanson. Therefore, it is hereby

ORDERED, that the Defendant Whitfield's civil conspiracy counterclaim shall be bifurcated from the trial of all other claims in the subject litigation and shall proceed in a non-jury trial; and it is further

ORDERED, that this Order shall apply only to the civil conspiracy counterclaim asserted by Defendant Anthony Whitfield and shall not affect any of the remaining claims, counterclaims, or crossclaims asserted between the parties to this litigation, the trial of which is set to begin October 21, 2019 and shall proceed.

IT IS SO ORDERED!

  
Diane S. Goodstein  
Circuit Court Judge

 St. George, South Carolina