THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Robert E. Hood, Circuit Judge

Appellate Case No. 2019-000719

Carrington Mortgage Services, LLC,.....Respondent,

v.

Paul R. Watson,.....Appellant.

FINAL REPLY BRIEF OF APPELLANT

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STATEMENT OF ISSUES

I. **Did the lower court err in striking Appellant's jury demand on legal counterclaims asserted in response to Respondent's mortgage foreclosure and reformation claims, especially where the claims arose out of Respondent's breach of the mortgage contract and where success on the claims would prove the grounds of Appellant's affirmative defenses to Respondent's claims?**

ARGUMENT

I. There is not a different, "foreclosure action" rule for determining whether a counterclaim is permissive or compulsory.

In an attempt to justify its disregard for the precedent of First-Citizens Bank & Trust Co. v. Hucks, 305 S.C. 296, 298, 408 S.E.2d 222, 223 (1991), and Jaynes v. County of Fairfield, 303 S.C. 434, 435-36, 438 & n. 1, 401 S.E.2d 183 (Ct. App. 1991), the Respondent, Carrington Mortgage Services, LLC (hereinafter "Carrington"), contends that "our courts have announced a more specific rule in determining the logical relationship in foreclosure actions." (Final Brief of Respondent p. 12.) Our courts have not done that.

There is no such special, "more specific" rule. In foreclosure actions, the rule applicable to determining whether a counterclaim is permissive or compulsory is Rule 13(a), SCRCP, under which a counterclaim is compulsory "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." Id. That is a generally applicable rule, and neither the rules of civil procedure nor precedent interpreting them contains any exception to this rule for foreclosure actions. Id.

Indeed, the case in which the Supreme Court announced what the appropriate test is to determine what "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim" and is, thus, a compulsory counterclaim under Rule 13(a), SCRCP, was itself a foreclosure action. N.C. Fed. Sav. & Loan Ass'n v. DAV Corp., 298 S.C. 514, 518, 381 S.E.2d 903, 905 (1989). Never once since has the

Supreme Court or this court held or even stated in dicta that the compulsory/permissive analysis is different in foreclosure actions from what it is in other sorts of cases.

This court and the Supreme Court have had occasion to analyze whether particular counterclaims in mortgage foreclosure actions were compulsory or permissive. E.g., Carolina First Bank v. BADD, L.L.C., 414 S.C. 289, 295, 296, 778 S.E.2d 106, 109, 110 (2015); S.C. Community Bank v. Salon Proz, LLC, 420 S.C. 89, 97, 800 S.E.2d 488, 492 (Ct. App. 2017). That is a far cry from creating a special rule in this context for foreclosure cases.

Rules of procedure are construed like statutes. Beach Co. v. Twillman, Ltd., 351 S.C. 56, 61, 566 S.E.2d 863 (Ct. App. 2002). There is one rule, not multiple rules, applicable to whether a counterclaim is compulsory. Rule 13(a), SCRCP. To create the exception for which Carrington argues would violate the principle that a court is not permitted "[t]o impute an exception that would require us to read language into [a] statute that is not there." First Citizens Bank & Trust Co., Inc. v. Blue Ox, LLC, 422 S.C. 461, 812 S.E.2d 418, 423 (Ct. App. 2018). Our courts have not done that, and this court should not do it now. See id.

The reason that Carrington makes this argument is transparent: Carrington does not like what Jaynes and Hucks stand for. For Carrington to ground its argument in the contention that the law of this state contains a nonexistent special rule simply illustrates that Carrington's position lacks support in the law.

II. Carrington asks this court to ignore that Watson's affirmative defenses matter a great deal to whether his counterclaims are compulsory.

Carrington argues that the Appellant, Paul R. Watson (hereinafter "Watson")'s "argument on his affirmative defenses has no bearing on the permissive nature of his

counterclaims." (Final Brief of Respondent p. 11.) Carrington asks this court to ignore aspects of this case that are relevant and important to whether his counterclaims are compulsory.

As discussed in Watson's appellant's brief, the same facts that would prove Watson's counterclaims would prove his affirmative defenses. (R. pp. 33-37.) As also discussed in Watson's appellant's brief, if the affirmative defenses are proven, Watson will win the case, and Carrington will not be able to enforce the note and mortgage subject of its claim against Watson. Arnold v. City of Spartanburg, 201 S.C. 523, 23 S.E.2d 735, 738 (1943); Masonic Temple, Inc. v. Ebert, 199 S.C. 5, 18 S.E.2d 584, 591 (1942); U.S. Bank. Natl. Assn. v. Bell, 385 S.C. 364, 684 S.E.2d 199, 205 (Ct. App. 2009).

Carrington repeats throughout its brief the refrain that counterclaims in a foreclosure action are compulsory if success on them would render the note and mortgage unenforceable. If Watson's counterclaims are proven, the facts underlying the affirmative defenses will also be proven, the note and mortgage will be unenforceable in this case.

III. The conclusory and unsupported arguments in this appeal are made by Carrington, not Watson, and Watson has not abandoned any of his arguments.

Watson's appellant's brief lays out cogent, succinct arguments, not conclusory ones. Watson's arguments are supported by the authority cited in his brief. That brief speaks for itself in this regard.

The party that makes conclusory arguments in its brief is Carrington. Over and over, Carrington simply states – without offering any supporting reasoning – that

Watson's counterclaims do not affect the enforceability of the note and mortgage. That is not even argument – it is merely repetition of the conclusion that Carrington wants this court to reach. *Why* do Watson's counterclaims not affect the enforceability of the note and mortgage? *How* is it that Watson's counterclaims cannot create a result in this case that makes Carrington unable to enforce the note and mortgage? Carrington never answers or attempts to answer these basic questions. The party that "fails to make any arguments in the body of [its] brief, beyond mere conclusory statements, or discuss how the circuit court [did not err] in finding the counterclaims were permissive" is Carrington. (Final Brief of Respondent p. 15.) Carrington has abandoned arguments on appeal. See Jinks v. Richland Cnty., 355 S.C. 341, 344 n. 3, 585 S.E.2d 281, 283 n. 3 (2003); Jones v. S.C. Dept. of Health & Envtl. Control, 384 S.C. 295, 317, 682 S.E.2d 282, 294 (Ct. App. 2009).

Carrington contends, one must infer from its brief, that Watson should have repetitiously laid out the same argument for each of his counterclaims separately. (Final Brief of Respondent p. 16.) But, as Watson pointed out in his appellant's brief, all of his counterclaims (as well as his affirmative defenses) are based on the same set of facts, as is plain from reading his answer and counterclaim. (R. pp. 33-37.) It is not necessary to lay out separate analyses for each counterclaim. The analysis under Rule 13(a), SCRCP, looks to the set of facts involved and that set of facts' relationship to the plaintiff's claim. See DAV Corp., 298 S.C. at 517-18.

Given that Watson's brief contains eleven pages of argument about why his counterclaims are compulsory, analyzing the relevant case law on this point and applying it to the instant case, Watson is somewhat baffled by Carrington's statement

that he has not really offered argument against the proposition that his counterclaims are permissive. If a party argues that a traffic light was red, he does not have to also offer a separate argument that the same light was not green.

IV. Carrington has tried to slip a contested matter into its statement of the case.

A respondent is not required to put a statement of the case in its brief, but, if it does, it must comply with the requirement that a statement of the case "shall not contain contested matters[.]" Rule 208(b)(1)(C)&(b)(2), SCACR. One supposes that it is in an attempt to evade this requirement that Carrington averred in its statement of the case that it "secured and presented the property, as permitted under the mortgage contract." (Final Brief of Respondent p. 1.) That is a contested matter. In invading Watson's property and locking him out of it, Carrington violated the terms of its mortgage agreement with Watson. (R. p. 22 ¶ 5.) Watson does not expect Carrington to agree, but it at least ought to agree that there is a contest about that.

V. Carrington has tried something similar with its footnote about whether the property was vacant.

In that same vein, Carrington appears to contend that it has no liability to Watson because Watson does not contend the property was not vacant. (Final Brief of Respondent p. 7 n. 2.) The property being vacant is completely inconsistent with Watson's pleadings and argument. (R. pp. 31-38, p. 57 ln. 2-14.) Watson does not have to have been sleeping at the property for it not to be vacant. See Black's Law Dictionary (9th ed) (definition of "vacant"). Further, one wonders why Carrington bothers to say this at all, since this appeal is not about the merits of Watson's claims but, rather, is about whether he has the right to a jury trial on them.

VI. Carrington offers no alternative to the logical and efficient reading of the compulsory counterclaim analysis in Watson's brief. Instead, Carrington misstates Watson's argument.

In misstating Watson's discussion of the purpose of the compulsory counterclaim rule, Carrington belittles precedent authored by this court. (Final Brief of Respondent p. 12-13.) The purpose of the compulsory counterclaim rule is "to prevent multiplicity of actions and to achieve resolution in a single lawsuit of all disputes arising out of common matters." Beach Co., 351 S.C. at 62. Watson has never agued that this means that "all counterclaims asserted by defendants have a right to a jury trial[,]" as Carrington claims. (Final Brief of Respondent p. 13.) What Watson has done is go through an analysis, supported at each turn by precedent, of why Carrington's and the lower court's narrow view of the rule is incorrect, why that incorrect analysis does not serve the purpose of the rule, and why Watson's counterclaims are and ought to be compulsory. As discussed above, Carrington offers no alternative analysis, just the chanting of its mantra that Watson's counterclaims do not affect whether Carrington can enforce the note and mortgage in this case.

What Carrington says is, "Watson is wrong, and I am right." What Carrington does not say is whether it makes any sense for Carrington's position to be right. Because Carrington cannot show how a decision in its favor would support not just the rule but also the rationale behind it, Carrington attacks Watson for doing so.

That Carrington feels the need to misstate Watson's argument is entirely consistent with its failure to provide any reasons why it would make sense for this court to see the law the way Carrington does.

VII. The courts of this state are required to resolve close questions on the side of preserving the right to trial by jury.

Carrington again fails to grasp the significance of precedent that says that a waiver of the right to trial by jury is not lightly inferred. (Final Brief of Respondent p. 13-14.) That Watson's counterclaims are compulsory is clear; however, should this court disagree and find that unclear or susceptible of more than one interpretation, existing precedent indicates that this court should then come down on the side of preserving Watson's right to trial by jury.

In a case discussing possible waiver of a jury trial right by pleading a counterclaim in an equitable action, this court has stated that "[t]he right of trial by jury is highly favored, and waivers of the right are always strictly construed and not lightly inferred or extended by implication." Keels v. Pierce, 315 S.C. 339, 342, 433 S.E.2d 902, 904 (Ct. App. 1993). In Keels, this court rejected the idea of a harsh waiver rule where the compulsory or permissive nature of a counterclaim is unclear. 315 S.C. at 341-42. Concerned with the idea that a litigant might forgo bringing what turned out to be a compulsory counterclaim for fear of losing his right to a jury trial, this court stated that "Rule 13, SCRCP, does not place a pleader in this dilemma. If it is uncertain whether a counterclaim is compulsory or permissive, the pleader may simply plead the claim and make demand for a jury trial on it." Keels, 315 S.C. at 341. If the claim is later found to be permissive, this court held, "the court, on its own motion or the motion of the pleader, may order a separate trial of the counterclaim pursuant to Rule 42(b) to avoid prejudice to the pleader's right to a jury trial." Id. at 341-42. The rule of waiver of the right to trial by jury "applies only when it is clear the counterclaim is

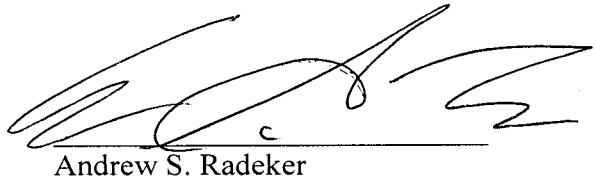
permissive[,]" and, "if uncertainty exists, the pleader does not waive his right to a jury trial if the court later decides the claim is permissive." Id. at 342.

Carrington has failed to demonstrate why this precedent is not the law. Instead, Carrington says that Watson is arguing something he is not and then argues against that imaginary argument.

CONCLUSION

This court should reverse the lower court's decision to grant Carrington's motion to strike Watson's jury demand and should remand this case for trial, with Watson's counterclaims to be tried by a jury.

Respectfully submitted,



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CERTIFICATE OF COUNSEL
REGARDING COMPLIANCE WITH RULE 211(b), SCACR

I certify that the foregoing final brief complies with Rule 211(b), SCACR.

Respectfully submitted,

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