THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Robin B. Stilwell, Circuit Court Judge

Lower Court Case No. 2019-CP-23-0049

Appellate Case No. 2020-00023

James Bennet Schwiers, ……Respondent,

v.

Gene Baxley Schwiers, …… Appellant.

INITIAL BRIEF OF APPELLANT

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This is a family dispute that manifests itself in the form of a residential mortgage foreclosure action. The issue before the Court is whether Appellant Gene B. Schwiers is entitled to have a jury hear her counterclaims against her brother, Respondent James B. Schwiers. The circuit court concluded that Appellant was not entitled to a jury trial. She submits that the circuit court misapplied the law. Therefore, Appellant respectfully requests this Court to reverse the circuit court's decision and remand this case with instructions providing that her counterclaim should be tried before a jury.

STATEMENT OF ISSUE ON APPEAL

WHETHER THE CIRCUIT COURT ERRED BY FINDING THAT APPELLANT'S COUNTERCLAIMS WERE PERMISSIVE AND THEREFORE NOT ENTITLED TO A RESOLUTION BY JURY TRIAL.

STATEMENT OF THE CASE

On January 3, 2019 Respondent filed a mortgage foreclosure action in the Greenville County Court of Common Pleas. (Complaint). On May 2, 2019, Appellant answered, denying Respondent's right to the relief sought and filed counterclaims. (Answer & Counterclaim). On October 18, 2019, Respondent moved the circuit court for an order referring Respondent's complaint and Appellant's counterclaims to the master in equity. The Appellant opposed the motion. On November 18, 2019, the circuit court held a hearing on Respondent's motion. (Transcript). Thereafter, on November 27, 2019, the circuit court issued an order granting Respondent's motion. (Order Granting Motion for Reference).

On December 9, 2019, the Appellant filed a Rule 59(e), SCRCP, motion to alter or amend the order of reference, and on December 18, 2019, supplemented the motion with a memorandum of law. On December 20, 2019, the circuit court denied Appellant's motion to alter or amend.

(Order Denying Motion to Alter or Amend). Thereafter, On December 27, 2019, Appellant filed and served the notice of appeal.

STANDARD OF REVIEW

Whether a party is entitled to a jury trial is a question of law, which this Court reviews de novo. *Carolina First Bank v. BADD, LLC*, 414 S.C. 289, 292, 778 S.E.2d 106, 108 (2015). Furthermore, "[a]ppellate courts may decide questions of law with no particular deference to the circuit court's findings." *Wachovia Bank, Nat'l Assoc. v. Blackburn*, 407 S.C. 321, 328, 755 S.E.2d 437, 441 (2014).

ARGUMENTS

I. BECAUSE APPELLANT'S COUNTERCLAIMS ARE COMPULSORY, THE CIRCUIT COURT ERRED WHEN IT REFERRED THE ENTIRE CASE TO THE MASTER IN EQUITY.

A. Background Factual Allegations

The Respondent and Appellant executed a promissory note on November 10, 2005 (the "promissory note") in the amount of $526,322.89. (Complaint, ¶9). The purpose of the promissory note was to provide funds for Appellant to purchase a home in Greenville where she and her aging mother would reside. (Answer & Counterclaims, ¶¶39-40). In addition to executing the promissory note, Appellant executed a mortgage in favor of Respondent. (Complaint, ¶¶10-11). Prior to executing the promissory note, Appellant had located a suitable home with an asking price in the amount of $390,000. (Answer & Counterclaims, ¶¶ 37-38). The Respondent, however, did not approve of the lower priced home. (Answer & Counterclaims, ¶¶ 37-38). As a result, Appellant subsequently purchased the higher priced home.

Following the purchase, Appellant made monthly payments to Respondent until she lost her salaried employment in July of 2006 with a company previously known as MCI. (Answer &

Counterclaims, ¶ 42). In July 2006, Appellant visited Respondent at his former office at First Citizens Bank and attempted to provide him with two monthly loan payments. (Answer & Counterclaims, ¶ 43). Knowing that Appellant had lost her job, Respondent refused the payments. (Answer & Counterclaims, ¶ 43).

Approximately three months after their July 2006 meeting, Appellant and Respondent met at Respondent's home.[1] (Answer & Counterclaims, ¶ 45). During this meeting, Respondent told Appellant that if she (Appellant) cared for their mother, then Appellant did not have to worry about the 2005 promissory note. (Answer & Counterclaims, ¶ 45). In and around the time of the above described meeting and thereafter, Appellant and Respondent's mother experienced a host of medical problems, including cancer, open heart surgery, neck surgery, and back surgery. (Answer & Counterclaims, ¶ 46-47). At all times, Appellant has cared for their mother and ensured her daily needs were met. When this action was commenced, the parties' mother was 88-years old and confined to a wheelchair. (Answer & Counterclaims, ¶ 47).

The Appellant alleges that in consideration for her agreeing to provide for their mother, Respondent agreed to forgive all further indebtedness on the promissory note. (Answer & Counterclaims, ¶ 45, 60-63).

As further support for the existence of the agreement, Appellant further alleged that beginning in December of 2006 she was able to obtain salaried employment with a new company. (Answer & Counterclaims, ¶ 48). The Appellant remained employed with this new company from December 2006 until August 2015 when her position was eliminated in a corporate reorganization. (Answer & Counterclaims, ¶ 48). The Respondent knew that Appellant obtained the new

[1] The Respondent lives in a home located on real property owned by a limited partnership that Appellant and Respondent's mother created. (Answer & Counterclaims, ¶ 44). Both parties are limited partners in the limited partnership.

employment. (Answer & Counterclaims, ¶ 48). Nevertheless, and consistent with their agreement, Appellant provided for the care of their mother and Respondent never sought payments for the promissory note. (Answer & Counterclaims, ¶ 48).

Beginning in the Fall of 2018, Appellant alleges that Respondent decided not to honor the parties' agreement.[2] The Appellant alleged that Respondent began to "aggressively" try and resurrect the promissory note. (Answer & Counterclaims, ¶ 55). For twelve years Appellant upheld her end of the bargain, and in turn paid no monies to Respondent. (Answer & Counterclaims, ¶ 55). Twelve years later, however, Respondent began claiming that Appellant was in arrears on the promissory note and owed interest and late charges collectively totaling over $791,000. (Answer & Counterclaims, ¶ 55).

The Respondent's aggressive tactics ultimately culminated in the filing of this action. As a result, Appellant answered the complaint and filed counterclaims for: (1) breach of contract, (2) promissory estoppel, and (3) intentional infliction of emotional distress. The first and third counterclaims are relevant to this appeal. Both of these counterclaims are based upon Respondent's conduct toward Appellant regarding his (Respondent's) position that the promissory note is now enforceable.

B. The Circuit Court's Order

The Respondent moved the circuit court to refer the entire case to the master in equity. The Appellant opposed the motion and asserted her right to have a jury hear her counterclaims for breach of contract and intentional infliction of emotional distress. Following a hearing on the motion, the circuit court ruled in favor of Respondent. Specifically, the circuit court ruled that "the

[2] The Appellant believes the evidence will show that this conduct arose out of a dispute regarding the use and disposition of the limited partnership.

counterclaims asserted by Defendant are legal but permissive in that Defendant alleges breach of a 2006 agreement as opposed to the underlying 2005 Note and Mortgage." (Order of Reference). The circuit court further found that, "[t]he remaining Counterclaims stem from Plaintiff's alleged conduct after 2006. Thus, the Defendant has no right to a jury trial on these permissive counterclaims." (Order of Reference).

C. The Appellant's Counterclaims are Compulsory Because they Rise or Fall on the Question of Whether the Promissory Note is Enforceable

The circuit court misapplied controlling precedent. It improperly focused narrowly on whether the counterclaims were based upon conduct arising out of the execution of the promissory note and subsequent mortgage. A test for a compulsory counterclaim in a mortgage foreclosure action, however, looks more broadly to the question of whether the counterclaims arise out of the enforceability of the promissory note and mortgage. The Appellant's counterclaims are grounded in the question of whether the promissory note is enforceable. Accordingly, the counterclaims are compulsory.

"A party does not waive its right to a jury trial on a counterclaim asserted in an equity action if the counterclaim is legal[3] and compulsory in nature." *N.C. Fed. Savings & Loan Assoc. v. DAV Corp.*, 298 S.C. 514, 517, 381 S.E.2d 903, 905 (1989). "When a defendant in an equitable action asserts a compulsory counterclaim that alleges actions at law, both the plaintiff and the defendant have a right to have a jury trial on the issues raised by the compulsory legal counterclaim." *Plantation Fed. Bank v. Gray*, 401 S.C. 507, 510, 737 S.E.2d 515, 517 (Ct. App. 2013).

[3] The circuit court correctly found that these counterclaims were legal (as opposed to equitable) and that ruling has not been appealed.

The most recent analysis of this issue is found in the Supreme Court's opinion in *Carolina First Bank v. BADD, LLC*, 414 S.C. 289, 292, 778 S.E.2d 106, 108 (2015). The Court held that in a "foreclosure action, a counterclaim arises out of the same transaction or occurrence and is thus compulsory, when there is a 'logical relationship' between the counterclaim and the enforceability of the guaranty agreement." *Id.* at 295, 778 S.E.2d at 109. Here, the enforceability of the promissory note is the common thread in both Respondent's foreclosure case and Appellant's counterclaims.

The Appellant's counterclaims for breach of contract and intentional infliction of emotion distress are grounded in the allegation that the promissory note is not enforceable. Specifically, the breach of contract claim is predicated on Respondent's failure to abide by his agreement that Appellant had no obligation to make any further payments on the promissory note in return for Appellant taking care of their mother. (Answer & Counterclaim, ¶¶ 45-54, 59-63). Similarly, the claim for intentional infliction of emotional distress is predicated on Respondent's conduct toward Appellant related to his efforts to revive the promissory note and force Appellant (and her elderly mother) out of her home. (Defendant's Answer & Counterclaim, ¶¶ 55-58, 71-74). In sum, "there is a 'logical relationship' between the counterclaim and the enforceability of the guaranty agreement." *Id.* at 295, 778 S.E.2d at 109. Accordingly, Appellant is entitled to a jury trial on her counterclaims.

The opposite result was dictated in *BADD* based upon a clear separation between the enforceability of the note and the counterclaims in that case. In *BADD*, the debtor made counterclaims for civil conspiracy and breach of contract. Neither of the counterclaims, however, met the test articulated in *BADD* for a compulsory counterclaim.

The basic facts relevant to the counterclaims in *BADD* were as follows. The company (BADD) bought three warehouses and executed two promissory notes in furtherance of that endeavor. *Id.* at 291, 778 S.E.2d at 107. An individual named William McKown ("McKown") signed personal guarantees on the promissory notes. *Id.* at 291, 778 S.E.2d at 107. Two years after the purchase of the warehouses, an individual named William Rempher ("Rempher") was substituted into BADD as a member in place of another member (not McKown) that had apparently managed BADD. Rempher then took up the obligation to manage BADD. *Id.* at 295, 778 S.E.2d at 109.

McKown alleged that Rempher owned other warehouses outside of BADD and in another entity. *Id.* at 295, 778 S.E.2d at 109. McKown alleged that Rempher, as manager of BADD, began directing tenants away from BADD's warehouses and to those that Rempher held in a different entity. *Id.* at 295, 778 S.E.2d at 109. McKown alleged that the purpose of this conduct was to induce BADD to ultimately lack sufficient funds to meet its debt obligations, and default on the promissory notes. *Id.* at 295, 778 S.E.2d at 109. According to McKown, Rempher undertook this course of action because he ultimately wanted to purchase BADD's warehouses at below market value during an ultimate foreclosure sale. Finally, McKown alleged that the bank was in on the conspiracy. *Id.* at 295, 778 S.E.2d at 109.

Analyzing these facts, the Court held that the counterclaim for civil conspiracy was not compulsory. "Here, the execution of the guaranty agreements was the 'transaction or occurrence' that gave rise to McKown's inclusion in the Bank's foreclosure complaint." Id. at 295, 778 S.E.2d at 109. The Court further held that, "McKown's civil conspiracy 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." *Id.* at 295, 778 S.E.2d at 109 (emphasis added).

The *BADD* Court made a critical finding in its analysis that demonstrates Appellant's counterclaims are compulsory: "the civil conspiracy claim presumes the enforceability of the guaranty agreements because the allegations, if true, would not render the guarantees unenforceable." *Id.* at 296, 778 S.E.2d at 109. In direct contrast, Appellant's counterclaims presume the unenforceability of the promissory note. Here, Appellant's counterclaims, if true, would render the promissory note unenforceable. Said differently, Plaintiff's conduct treating the promissory note as enforceable gives rise to the subject counterclaims. *N.C. Fed. Savings & Loan Assoc. v. DAV Corp.*, 298 S.C. 514, 518, 381 S.E.2d 903, 905 (1989) (ruling in a mortgage foreclosure action that, "[c]learly there is a logical relationship between the enforceability of the note which is the subject of the foreclosure action and the validity of the purported oral agreement which, if performed, would have avoided default on the note"); *Gardner v. Travis*, 316 S.C. 315, 318, 450 S.E.2d 54, 56 (Ct. App. 1994) (reversing lower court in a mortgage foreclosure action and remanding for a jury trial on the counterclaims for, among others, "abuse of process[] and outrage[4]"). Because the counterclaims have a "logical relationship" to the "enforceability" of the note, each of them is compulsory.

CONCLUSION

The Appellant respectfully requests that the Court hold that the circuit court committed legal error when it found that her counterclaims were not compulsory. Based upon a finding that the circuit court erred, Appellant respectfully requests that the Court remand this case for her counterclaims to be decided by a jury.

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4 The claim of "outrage" is another name for the same claim of "infliction of emotional distress." *Ford v. Hutson*, 276 S.C. 157, 160, 276 S.E.2d 776, 777 (1981).

Respectfully submitted,

June 8, 2020

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PROOF OF SERVICE

I certify that on June 8, 2020, I served the Appellant's Initial Brief and Initial Designation of Matter to be Included in the Record on Appeal by sending a copy of the same to the email address for Respondent James B. Schwiers's counsel of record as identified in the Attorney Information System pursuant to Supreme Court *Order Re: Operation of the Appellate Courts During the Coronavirus Emergency* (g)(3). Specifically, I certify that a copy was sent to: jcassidy@roecassidy.com and ebarbery@roecassidy.com. A copy of the sent email is attached as *Exhibit 1* to this certificate of service.

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Schwiers v. Schwiwers, Appellate Case No. 2020-00023

Exhibit 1

E-mail Service of Initial Brief and Initial Designation of Record on Appeal to:

jcassidy@roecassidy.com and ebarbery@roecassidy.com

From: Burl Williams
To: Jim Cassidy; Ella Barbery
Subject: Schwiers v. Schwiers, Appellate Case No. 2020-000023
Date: Monday, June 8, 2020 3:05:00 PM
Attachments: image001.png
Initial Brief of Appellant.pdf
Initial Designation of ROA.pdf

Dear Jim and Ella:

Good afternoon. I trust you are both doing well. Attached please find Gene B. Schwiers's Initial Brief and Initial Designation of the Record on Appeal. Please respond with any questions.

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June 8, 2020

SENT VIA ALTERNATE METHOD FOR APPELLATE COURT FILINGS

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

Re: *James B. Schwiers v. Gene B. Schwiers, Appellate Case No. 2020-000023*

Dear Ms. Kitchings:

Enclosed please find Appellant Gene B. Schwiers' Initial Brief and Initial Designation of Matter to be Included in the Record on Appeal. Pursuant to the alternative method for appellate court filings I have uploaded these documents today.

Please contact my office with any questions.

Sincerely,

s/Burl F. Williams

CC: James H. Cassidy, Esq. (E-mail: jcassidy@roecassidy.com)
Ella S. Barberry, Esq. (E-mail: ebarbery@roecassidy.com)