THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Robin B. Stilwell, Circuit Court Judge

Case No. 2020-000023

James Bennett Schwiers ……..... Respondent,

v.

Gene Baxley Schwiers …..... Appellants.

RESPONDENT'S FINAL BRIEF

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WHETHER THE CIRCUIT COURT CORRECTLY GRANTED RESPONDENT'S MOTION TO COMPEL REFERENCE IN A FORECLOSURE ACTION BY FINDING THAT APPELLANT'S COUNTERCLAIMS WERE PERMISSIVE AND HER RIGHT TO A JURY TRIAL WAS WAIVED.

STATEMENT OF CASE

James Bennett Schwiers (hereinafter "Respondent" or "J.B."), is the holder of a certain promissory note and mortgage dated November 5, 2005 executed by Gene Baxley Schwiers (hereinafter "Appellant"). On January 3, 2019, J.B. filed a Foreclosure Complaint against Appellant in the Greenville County Court of Common Pleas, seeking to enforce his rights and remedies under the promissory note and mortgage due to the Appellant's failure to pay (hereinafter "Complaint"). On May 2, 2019, Appellant filed an Answer, Affirmative Defenses to Foreclosure Complaint, and Counterclaim, denying the relief sought and asserting counterclaims against J.B. for breach of contract, promissory estoppel, and intentional infliction of emotional distress (hereinafter "Answer & Counterclaim"). Appellant also demanded a jury trial. J.B. timely replied to the counterclaims on May 29, 2019, denying the allegations (hereinafter "Reply").

On October 18, 2019, J.B. filed a Notice of Motion and Motion for Order of Reference, seeking to have the action referred to the Honorable Charles B. Simmons, Jr., Master-in-Equity for Greenville County, pursuant to Rules 53(b) and 71(a) of the South Carolina Rules of Civil Procedure (hereinafter "Motion"). A hearing on the Motion was held before the Honorable Robin B. Stilwell on November 18, 2019. Both parties appeared at the hearing by and through their respective counsel.

After hearing arguments from counsel and reviewing the applicable law, Judge Stilwell issued an order dated November 27, 2019, granting the Respondent's Motion and referring the case to the Master-in-Equity (hereinafter "Order"). In reaching its decision, the Court found that (1) the counterclaims asserted by Appellant are legal but permissive because they stem from an alleged breach of a 2006 oral agreement as opposed to the underlying 2005 note and mortgage and

(2) the counterclaims pertain to J.B.'s alleged conduct after 2006. Thus, the Court held that Appellant had no right to a jury trial on the permissive counterclaims. (R. p. 1).

On December 9, 2019, Appellant filed a Motion to Reconsider, which was denied by Judge Stillwell by Order dated December 20, 2019. This appeal followed.

FACTS

Respondent and Appellant are brother and sister. Appellant lived in Atlanta, GA, but in 2003 relocated to Greenville, SC. (R. p. 24, ¶ 36). In 2005, Appellant began searching for a home in the area and eventually found a house located in the Stonebrook Farm neighborhood for a purchase price of $524,000. Appellant could not afford the cost of the home and was unable to secure traditional financing for its purchase from a commercial lender due to her credit history. (R. p. 24-25, ¶ 39). Both Appellant and their mother began pressuring J.B. to finance the purchase price of the home. (R. p. 41, ¶ 9). Although J.B. encouraged Appellant to look at other homes, as he not only felt the Stonebrook Farm property was too expensive but was also more than what was reasonably necessary to accommodate her needs, he eventually agreed to provide financing to Appellant for the purchase of the home upon assurance from both his sister and mother that he would not suffer any loss in the event of non-payment. (R. p. 41, ¶ 9).

J.B. loaned the money to Appellant to purchase the home, the closing on which occurred on November 10, 2005. In return, Appellant executed and delivered a promissory note to J.B., thereby promising to pay the principal sum of Five Hundred Twenty-Six Thousand Three Hundred Twenty-Two and 89/100 Dollars ($526,322.89), together with interest (hereinafter "Note"). (R. p. 8, ¶ 9; p. 12). As security for the Note, Appellant also executed and delivered to J.B. a mortgage on the Stonebrook Farm home for the amount of the Note, which was properly recorded in the

Greenville County Register of Deeds at Book 4468, Page 304 (hereinafter "Mortgage"). (R. pp. 8-9, ¶ 10; pp. 13-17). Appellant admitted to signing the Note and Mortgage, agreeing to the payment terms contained therein. (R. p. 20, ¶¶ 7, 9; p. 25, ¶ 40).

In 2006, shortly after the purchase of the home, Appellant lost her job and was unable to continue making payments to J.B. on the Note. (R. p 26, ¶ 42; p. 41, ¶ 12). In response, J.B. deferred payments due on the Note for a period of time until the Appellant was able to resume making same. Eventually, Appellant secured new employment; however, she chose to spend her money frivolously, leaving no money left to pay J.B. (R. p. 42, ¶ 18). To date, the Note remains unpaid and this lawsuit was initiated.

Appellant contends that sometime in 2006, J.B. orally agreed to forgive the remaining debt due and owing on the Note and has asserted counterclaims related to the breach of the alleged 2006 oral agreement for which she demands a jury trial. (*See generally* R. pp. 19-39). The Appellant also contends that the agreement between them actually related to the forgiveness of interest and late fees only and that she is still indebted to J.B. for the amount he actually advanced for the purchase of the house. (R. p.28, ¶ 50; p. 29, ¶ 55; p. 30, ¶ 56). In support of her position that the purported agreement related to the forgiveness of interest and late fees only, Appellant referenced two emails from J.B. dated February 9, 2017 and April 17, 2018, wherein he suggested that a sale of the home in the $620,000 range would "put some money in your pocket" above the amount owed. (R. p. 29, ¶ 55; p. 30, ¶ 56; pp. 36-38). She also referenced an email she had written to J.B. dated April 16, 2018, wherein she acknowledged her continued obligation to pay J.B. Specifically, she stated ***"I also want out of Stonebrook Farm and want to be able to sale [sic] the house and give you back what is owed."*** (R. pp. 38-39) (*emphasis added*).

Neither the Note nor the Mortgage have been marked released, cancelled, or satisfied, and J.B. remains the owner and holder. (R. p. 9, ¶ 15). The Appellant has continued to express her intent to pay J.B. the principal he advanced for the purchase of the home.[1] (R. p. 28, ¶ 50; p. 54, lines 6-9).

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 (2014). However, whether a party is entitled to a jury trial is a question of law, which is subject to *de novo* review on appeal. *Carolina First Bank v. BADD, L.L.C.*, 414 S.C. 289, 292, 778 S.E.2d 106, 108 (2015). Under a *de novo* standard of review, the appellate court has jurisdiction to view findings of facts and law in accordance with its own view of the evidence but is not required to disregard the findings of the court below. *Pinckney v. Warren*, 344 S.C. 382, 387–88, 544 S.E.2d 620, 623 (2001). Moreover, the appellant is not relieved of his burden of convincing the appellate court the lower court committed error in its findings. *Id*.

[1] As noted by Appellant in an introductory paragraph on page 1 of the Initial Brief of Appellant, there is a family dispute that is distinct and separate from the residential mortgage foreclosure action. However, Appellant continues to intertwine the family dispute and the foreclosure action. The issue before the Court is whether the Appellant's counterclaims are permissive, allowing for the matter to be referred to the Master-in-Equity. The Circuit Court correctly concluded that these counterclaims were permissive. Thus, the Appellant is not entitled to a jury trial. The Respondent respectfully requests this Court to affirm the Circuit Court's decision and allow this matter to move forward before the Master in Equity.

ARGUMENT

1. THE CIRCUIT COURT CORRECTLY GRANTED RESPONDENT'S MOTION TO REFER THIS MATTER TO THE MASTER-IN-EQUITY BECAUSE APPELLANT'S COUNTERCLAIMS ARE PERMISSIVE AND SHE WAIVED HER RIGHT TO A JURY TRIAL BY ASSERTING THEM IN AN EQUITABLE ACTION.

J.B.'s foreclosure action is an action in equity. Parties are not entitled to a jury trial as a matter of right in equitable actions. *Blackburn*, at 328, 755 S.E.2d at 441. Nonetheless, under certain circumstances, counterclaims asserted to an equitable claim may be entitled to a jury trial.

As explained by the Supreme Court in *Wachovia Bank, Nat. Ass'n v. Blackburn*:

1. If both the complaint and the 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.

Blackburn, at 328, 755 S.E.2d at 441. By definition, a counterclaim is compulsory only if it arises out of the same transaction or occurrence as the opposing party's claim. *Id.* at 330, 755 S.E.2d at 442. If the counterclaim arises out of a separate transaction or occurrence, then the counterclaim is deemed permissive. *Id.* at 331, 755 S.E.2d at 442; S.C. Rule Civ. Pro. 13(b).

In a foreclosure action, the underlying "transaction or occurrence" for the purpose of determining the compulsory character of a counterclaim is the execution of the loan documents on which the lender has sued. *See BADD* at 295, 778 S.E.2d at 109 (the execution of the guaranty agreements was the transaction or occurrence). Only when the counterclaim affects the lender's

right to enforce the underlying note and foreclose the mortgage would the counterclaim bear a "logical relationship" to the transaction and be deemed compulsory. *Id.* Whether a counterclaim is logically related to the underlying claim, however, depends upon the facts of each case. *Beach Co. v. Twillman, Ltd.*, 351 S.C. 56, 61, 566 S.E.2d 863, 865 (Ct. App. 2002).

In *Carolina First Bank v. BADD, LLC*, the South Carolina Supreme Court considered whether or not the defendant was entitled to a jury trial on his civil conspiracy and breach of contract counterclaims brought in a foreclosure action in which he was being sued as a guarantor. In holding that the execution of the guaranty agreement was the "transaction or occurrence" for the purpose of determining the nature of the counterclaims, the Supreme Court went on to hold that both of defendant's counterclaims were permissive and that he waived his right to a jury trial. In reaching this conclusion, the Court noted that the actions giving rise to the counterclaims occurred two years after the execution of the guaranty agreement at issue and had no logical relationship to either the execution or enforceability of the guaranty agreement. *BADD* at 296, 778 S.E.2d at 110. This case is similar to *BADD*, in that the Appellant's counterclaims at issue bear no logical relationship to the execution or enforceability of the Note and Mortgage.

The "transaction or occurrence" that forms the basis of J.B.'s foreclosure action is the execution of the Note and Mortgage on November 10, 2005. Appellant's counterclaims for breach of contract and intentional infliction of emotional distress, however, do not arise from the execution of the original 2005 loan documents. Rather, they arise from a separate, oral agreement that the Appellant contends was made in 2006, at least one year after the Note and Mortgage were executed. As a result, the Circuit Court correctly held that the counterclaims for breach of contract and intentional infliction of emotional distress, while legal, were permissive and that Appellant had no right to a jury trial on either.

Appellant's Breach of Contract Counterclaim is Permissive and was Properly Referred to the Master-in-Equity.

In the Appellant's Initial Brief, it was specifically noted that her "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 in return for Appellant taking care of their mother." (Appellant's Initial Br. p. 6). The agreement that the Appellant is referencing is a purported conversation that took place in 2006. The Appellant has made no allegations that the 2005 Note and Mortgage were improperly executed or that they were otherwise rendered unenforceable due to conduct surrounding their execution. In fact, the Appellant has even admitted to executing the 2005 Note and Mortgage and to making payments on the Note in accordance with its terms until she became financially distressed, thereby acknowledging both the validity and enforceability of the documents. (R. p. 20, ¶¶ 7, 9; p. 25, ¶ 40; p. 26, ¶ 42).

Although the Appellant contends that an alleged subsequent oral agreement rendered the 2005 Note and Mortgage unenforceable, that fact is not supported by the evidence. A closer reading of her pleadings actually reveals that any alleged agreement reached between Appellant and her brother in 2006 was for the forgiveness of interest and late fees on the Note only and not forgiveness of the entire loan balance or cancellation of the Mortgage. More specifically, Appellant stated that "J.B. understood that he had agreed with Gene Baxley not to charge her for interest and late charges," which she claims he acknowledged in an email dated February 9, 2017. (R. pp. 29-30, ¶ 55). Appellant also stated that J.B. "acknowledged that he and Gene Baxley had agreed that he would not be collecting interest and late charges under the 2005 Promissory Note" in an email dated April 17, 2018. (R. p. 30, ¶ 56). Furthermore, in an email from Appellant to J.B. dated April 16, 2018, Appellant acknowledged her continued obligation to J.B. under the Note and Mortgage

by stating "I . . . want to be able to sale [sic] the house and give you back what is owed," (R. p. 30, ¶ 56; pp. 38-39), and has repeatedly expressed her intent to do so. (R. p. 28, ¶ 50; R. p. 51, lines 12-24; p. 54, lines 6-9). By acknowledging her intent and obligation to at least pay the outstanding principle due, and by also recognizing that J.B. would be paid when the house is sold, Appellant has effectively confirmed the continued enforceability of the Note and Mortgage. Appellant, however, has chosen to ignore these assertions, but these are facts which cannot go ignored.

Simply stated, there is no logical relationship between Appellant's breach of contract claim and J.B.'s underlying foreclosure action. Based on the facts of this case, the Circuit Court correctly concluded that the Appellant's breach of contract claim was legal but permissive because it arises out of a separate and distinct oral agreement the parties may or may not have reached in 2006 and not out of the same transaction or occurrence that forms the basis of J.B.'s foreclosure action, i.e., the execution of the 2005 Note and Mortgage. (R. p. 1). As a result, the Circuit Court correctly held that Appellant waived her right to a jury trial on the breach of contract claim and referred the matter to the Master-in-Equity.

Appellant's Counterclaim for Intentional Infliction of Emotional Distress is Permissive and was Properly Referred to the Master-in-Equity.

Like with her breach of contract claim, Appellant's claim for intentional infliction of emotional distress flows from a separate and distinct oral agreement that was allegedly entered into in 2006 and does not arise out of the same transaction and occurrence giving rise to J.B.'s foreclosure action – the execution of the Note and Mortgage on November 10, 2005. As specifically pointed out in her brief, the claim "is predicated on Respondent's conduct toward Appellant related to his efforts to revive the promissory note . . . ," (Appellant's Initial Br. p. 6), which she contends began in the Fall of 2018. (Appellant's Initial Br. p. 4). According to the

Appellant, the basis for the alleged misconduct "came about during squabbles about who's going to control a farm in Mauldin." (R. p. 54, lines 10-13; Appellant's Initial Br. p. 4 n.2). The reason for the alleged misconduct is not an issue before this Court. However, based on the Appellant's own assertions, it is undeniable that the supporting facts giving rise to the emotional distress claim have nothing to do with the execution, validity, or enforceability of the 2005 Note and Mortgage.

Appellant's claim for intentional infliction of emotional distress is not grounded in the allegation that the 2005 Note and Mortgage are unenforceable. In fact, it is dependent on establishing the existence of a separate and distinct oral agreement allegedly formed in 2006 and proving certain conduct on the part of J.B. in response to an alleged breach of that purported 2006 agreement - conduct that occurred more than twelve years after the Note and Mortgage were executed. Even if the allegations are true, Appellant's counterclaim for emotional distress simply has no bearing on the overall validity and/or enforceability of the 2005 Note and Mortgage and does not in any way affect J.B.'s right to enforce the Note and foreclose the Mortgage. Therefore, the Circuit Court properly held that Appellant's emotional distress counterclaim was permissive because it is not logically related to the underlying foreclosure action and, consequently, she had no right to a jury trial.

2. THE CIRCUIT COURT CORRECTLY GRANTED RESPONDENT'S MOTION TO REFER THIS MATTER TO THE MASTER-IN-EQUITY BECAUSE THE RELIEF SOUGHT BY THE APPELLANT IS EQUITABLE IN NATURE.

Even if this Court were to find that the Appellant's breach of contract and intentional infliction of emotional distress counterclaims were compulsory, she still would not be entitled to a jury trial because the claims are equitable in nature. There is a long-established principle that "an action sounding in law may be transformed to one in equity because equitable relief is sought."

Ins. Fin. Servs., Inc. v. S.C. Ins. Co., 271 S.C. 289, 293, 247 S.E.2d 315, 318 (1978); *see also Crewe v. Blackmon*, 289 S.C. 229, 232–33, 345 S.E.2d 754, 756–57 (Ct.App.1986) (concluding that although a complaint included allegations of fraud and misrepresentation, the action was one in equity when most of the relief sought was equitable in nature); *Cedar Cove Homeowners Ass'n v. DiPietro*, 368 S.C. 254, 258, 628 S.E.2d 284, 286 (Ct.App.2006)(stating "The character of an action as legal or equitable depends on the relief sought."). Whether an action is characterized as equitable or legal ultimately depends on the claimant's main purpose in bringing the action. *Verenes v. Alvanos*, 387 S.C. 11, 16, 690 S.E.2d 771, 773 (2010). In ascertaining the main purpose of an action, the Court may look to the body of the pleadings, the prayer for relief, and any other facts and circumstances. *Id*.

In this case, the main purpose of the Appellant's claims and the primary remedy sought is the enforcement of the alleged 2006 agreement on which she contends her brother has reneged. Enforcement of a contract equates to specific performance, which is sounded in equity.[2] *Campbell v. Carr*, 361 S.C. 258, 262, 603 S.E.2d 625, 627 (Ct. App. 2004).

To establish a cause of action for specific performance, a court must find that (1) there is clear evidence of a valid agreement; (2) the agreement had been partly carried into execution on one side with the approbation of the other; and (3) the party who comes to compel performance has performed his or her part, or has been and remains able and willing to perform his or her part of the contract. *Ingram v. Kasey's Assocs.*, 340 S.C. 98, 106, 531 S.E.2d 287, 291 (2000). Upon reviewing the Appellant's pleadings, she is asking that the Court find that (1) the parties entered

[2] In addition to claims for breach of contract and intentional infliction of emotional distress, Appellant also pled promissory estoppel as a counterclaim, in which she asked that Respondent be "estopped from denying the duties and obligations under the parties' 2006 agreement …." (R. p. 33).

into a valid, oral agreement in 2006, wherein J.B. agreed to forgive the outstanding loan obligation on the 2005 Note and Mortgage in exchange for her taking care of their mother; (2) Appellant performed in accordance with their agreement; and (3) J.B. should be estopped from denying his duties and obligations under the terms of the alleged 2006 agreement and ordered to cancel the debt. (R. pp. 28-29, ¶ 52; p. 29, ¶¶ 53-55; p. 30, ¶ 56; p. 31, ¶¶ 61-63; p. 33, ¶ 69; Appellant's Initial Br. p. 6). Although Appellant has asked for monetary damages, all her claims are contingent upon upholding and enforcing this purported 2006 oral agreement, and the primary relief the Appellant is seeking is clearly specific performance. Therefore, even if this Court were to disagree with the lower court's finding that the counterclaims were permissive, the Circuit Court still correctly held that the Appellant was not entitled to a jury trial because the main purpose of her claims and the primary relief sought is sounded in equity.

3. OVERTURNING THE CIRCUIT COURT'S DECISION IN THIS CASE WOULD BE AGAINST PUBLIC POLICY.

If the Court were to agree with and adopt Appellant's broad interpretation of the law so that she would be entitled to a jury trial, it would be inviting a flood of frivolous actions clogging the court's jury dockets. By granting every claimant a right to a jury trial simply because he asserted a counterclaim based on allegations that the parties entered into a subsequent oral agreement that cancelled the underlying debt of an otherwise valid and enforceable loan as the Appellant contends, then every foreclosure action would be subject to a jury trial. There would be nothing preventing a debtor from filing a counterclaim, whether factually sound or not, for the purpose of delaying and hindering the collection efforts of a bona fide debt, thereby prejudicing creditors and resulting in unnecessary and frivolous use of time and resources of the judicial system.

Judge Stilwell recognized this slippery slope when he pointed out that historically "people were bringing a lot of spurious counterclaims alleging that they had a right to a jury trial," and that "[i]t was just delaying these foreclosure proceedings." (R. p. 56, lines 19-22). He went on to say that the "Supreme Court was really struggling with this because of the . . . very practical matters of judicial economy." (R. p. 57, lines 12-14). Under the facts of this case - where the Appellant has admitted to the validity and enforceability of the Note and Mortgage in 2005 but contends that the debt was later cancelled by an alleged oral agreement reached in 2006, yet her own pleadings identify statements and representations inconsistent with that contention and actually confirm the enforceability of the 2005 documents – finding that Appellant is entitled to a jury trial would have a thwarted affect and lead to the problems Judge Stilwell expressly identified. Therefore, the only justifiable solution in this case is to affirm the Order referring the matter to the Master-in-Equity.

CONCLUSION

The evidence presented to and relied upon by the Circuit Court established that the counterclaims asserted by the Appellant, while legal, were permissive and were not logically related to the execution or enforcement of the 2005 Note and Mortgage. The Appellant admitted that she executed the Note and Mortgage and for a time made payments in accordance with the terms of the Note and Mortgage, thereby acknowledging the validity and enforceability of the underlying loan obligation. Although she contends that she and her brother entered into a subsequent oral agreement in 2006 that changed and/or modified the payment terms of the Note, her counterclaims stem from the alleged breach of that 2006 agreement and do not arise out of the execution of the 2005 Note and Mortgage, which is the underlying transaction and occurrence giving rise to J.B.'s foreclosure action. Accordingly, there is no logical relationship between Appellant's counterclaims and the enforceability of the underlying Note and Mortgage, and the

Circuit Court correctly held that the counterclaims were permissive and Appellant had no right to a jury trial on them.

For the reasons set forth above, the Circuit Court's Order of November 27, 2020, should be affirmed.

Respectfully submitted,
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