THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Diane S. Goodstein
Circuit Court Judge

Appellate Case No. 2020-000162

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

v.

Anthony Whitfield and Cindy Whitfield, Defendants

Anthony Whitfield,
Counterclaimant

v.

David Swanson, Counterclaim Defendant

of whom

Anthony Whitfield is the Appellant and David Swanson is the Respondent.

INITIAL REPLY BRIEF OF APPELLANT

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I. The lower court did not have the authority to strike Mr. Whitfield's jury demand because the civil conspiracy counterclaim asserted by Mr. Whitfield against Mr. Swanson is both legal and compulsory; whether the civil conspiracy occurred before or after the scheduled closing is of no consequence.

It is undisputed that the civil conspiracy counterclaim asserted by Mr. Whitfield against Mr. Swanson is a legal claim. The sole controversy surrounding this counterclaim stems from whether it is compulsory or permissive. If the counterclaim is compulsory, then Mr. Whitfield has a clear **right** to a jury trial on the claim. "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." *Wachovia Bank, N.A. v. Blackburn*, 407 S.C. 321, 330, 755 S.E.2d 437, 441 (2014).

As noted in Mr. Whitfield's Brief, the test for determining if a counterclaim is compulsory is whether there is a "logical relationship" between the claim and the counterclaim. *Mullinax v. Bates*, 317 S.C. 394, 396, 453 S.E.2d 894, 895 (1995). In a foreclosure action, the "logical relationship" test is performed by determining whether the counterclaim would affect the lender's right to enforce the note and foreclose the mortgage. *Advance Int'l, Inc. v. N.C. Nat'l Bank of S.C., 316 S.C. 266*, 449 S.E.2d 580 (Ct. App. 1994).

Respondent contends that there is no logical relationship between Mr. Whitfield's civil conspiracy counterclaim and Plaintiff Bank's right to enforce the note and foreclose on the Mortgage because the alleged conspiratorial acts (i.e. manufacturing a defense in order to justify reneging on the previously agreed-upon renewal terms and to foreclose on the Mortgage) occurred sometime after the June 28, 2012 closing fell through. This argument is flawed. It is of no consequence whether Mr. Swanson conspired with Plaintiff Bank to manufacture a bogus

defense before or after the closing date. Under either scenario, Plaintiff Bank used the alleged "advice of counsel defense" as justification for not renewing the loans and pursuing a foreclosure action. Said differently, even if the conspiratorial acts occurred after the June 28, 2012 closing, the acts would still have occurred prior to Plaintiff Bank's pursuit of a foreclosure action. Plaintiff Bank could have chosen to honor its agreement with Mr. Whitfield at any time following the scheduled closing date. Instead, it chose to pursue a foreclosure action.

A finding that Mr. Swanson conspired with Plaintiff Bank to manufacture a bogus defense—even after the scheduled closing date had passed—would have affected the Plaintiff bank's ability to subsequently enforce the note and foreclose on the mortgage. This was the Plaintiff Bank's only justification for reneging on the agreement and pursuing a foreclosure action. There is, accordingly, a logical relationship between Mr. Whitfield's civil conspiracy counterclaim and the foreclosure action. See *North Carolina Federal Sav. and Loan Ass'n v. Dav Corp.*, 268 S.C. 514, 381 SE.2d 903 (1989), wherein the South Carolina Supreme Court held that a Defendant's counterclaim in a mortgage foreclosure action was **compulsory** where the Defendant had (as in the present case) alleged that the Plaintiff Bank breached an oral agreement to modify the terms of the original loan and provide additional financing. ("Clearly, 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 the default on the note by joint venture." [Emphasis added] *Id.* at 268 S.C. 518). It was, therefore, an abuse of discretion for the lower court to find that no logical relationship existed between Mr. Whitfield's civil conspiracy counterclaim and the underlying foreclosure action.

It was also error to deny Mr. Whitfield his right to a jury trial. "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." *Wachovia Bank, N.A. v. Blackburn*, 407 S.C. 321, 330, 755 S.E.2d 437, 441 (2014). The lower court's finding that Mr. Whitfield is not entitled to a trial by jury as a matter of right should be reversed.

II. Mr. Whitfield's appeal of the lower court's order bifurcating the civil conspiracy counterclaim from the rest of the case and referring it to the Master in Equity is not moot because the order of reference affects the mode of trial and denies him a trial by jury.

The resolution of claims interposed between Mr. Whitfield and Plaintiff Bank does not render the bifurcation issue moot because the bifurcation order refers the bifurcated counterclaim to a bench trial, thereby affecting the mode of trial. "Issues regarding mode of trial must be raised in the trial court at first opportunity, and the order of the trial judge is immediately appealable." *Foggie v. CSX Transp.*, 313 S.C. 98, 103, 431 S.E.2d 587, 590 (1993). "Moreover, the failure to timely appeal an order affecting the mode of trial effects a waiver of the right to appeal that issue." *Lester v. Dawson*, 327 S.C. 263, 266, 491 S.E.2d 240, 241(1996), citing *Edwards v. Timmons*, 297 S.C. 314, 377 S.E.2d 97 (1988) (where appellant did not appeal the order referring matter to master in equity, she could not complain after final order that she was deprived of her right to a trial by jury), and *Creed v. Stokes*, 285 S.C. 542, 331 S.E.2d 351 (1985) (where appellant failed to timely appeal an order referring dispute to master in equity, appellant could not later complain that he had been entitled to a trial by jury).

In the present case, there does not exist "the most imperative circumstances" to warrant separate trials: nearly all of Mr. Whitfield's claims are grounded in the bank's failure to renew the loans. See *Gardner v. Travis*, 316 S.C. 316, 317-318, 450 S.E.2d 54, 56 (Ct. App. 1994). Mr. Swanson's alleged advice is the only reason that Plaintiff Bank did not close on Mr. Whitfield's loan renewals. (R.__). This decision to not close on the loan renewals served as a

catalyst for the alleged default, the ensuing foreclosure action, Mr. Whitfield's counterclaim against Mr. Swanson, and also Mr. Whitfield's crossclaim for contractual indemnification against Cindy Whitfield.

As set forth above and in Appellant's Brief, if Mr. Whitfield were to prevail in his civil conspiracy claim against Mr. Swanson, all other claims in this action would have been affected and, in effect, likely subsumed and rendered moot. There would have been no foreclosure action at all. Accordingly, it was a legal error to bifurcate Mr. Whitfield's compulsory counterclaim from the rest of the case. More importantly, because Mr. Whitfield's claim for civil conspiracy is a compulsory claim, it was error to refer this case to the Master in Equity for a bench trial. "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." *Wachovia Bank, N.A. v. Blackburn*, 407 S.C. 321, 330, 755 S.E.2d 437, 441 (2014). A bench trial on a compulsory counterclaim does not preserve inviolate Mr. Whitfield's right of trial by jury, as required under Rule 42(b), SCRCP. Accordingly, the lower court's Order should be reversed.

Conclusion

For each of the foregoing reasons, as well as those stated in Appellant's [Initial] Brief, the lower court's order should be reversed. A logical relationship exists between Mr. Whitfield's civil conspiracy counterclaim and Plaintiff Bank's ability to foreclose on the mortgage. The claim is compulsory, affording him the right to a jury trial.

In addition, it was error for the lower court to bifurcate Mr. Whitfield's claim from the rest of the case and refer it to the Master in Equity for a bench trial, because 1) a Defendant in an equitable action who asserts a compulsory counterclaim has a right to a jury trial, and 2) The reference to the Master in Equity for a bench trial will deprive Mr. Whitfield of his right to a full

jury trial of the legal issues in this case. The lower court's order should be reversed.

Respectfully submitted,

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October 26, 2020
Charleston, South Carolina

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The Honorable Diane S. Goodstein
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Anthony Whitfield is the Appellant and David Swanson is the Respondent.

PROOF OF SERVICE

I, the undersigned, certify that I have served *Appellant's Initial Reply Brief* on Respondent

David Swanson, by emailing a copy on October 26, 2020, addressed to his attorneys of record at the following email addresses: David W. Overstreet, Esq. (david@earhartoverstreet.com), Michael B. McCall, Esq. (mike@earhartoverstreet.com), and Steven R. Kropski, Esq. (steve.kropski@earhartoverstreet.com).

Pursuant to the May 29, 2020 Order of the Supreme Court, a copy of the aformentioned email correspondence is attached.

Respectfully submitted,

THE LAW OFFICE OF JESSE SANCHEZ, LLC

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Charleston, South Carolina
October 26, 2020

From: **Jesse Sanchez** jesse@jessesanchezlaw.com
Subject: Pinnacle Bank, as successor in interest to Bank of North Carolina, previous successor in interest to Harbor National Bank, Plaintiff, v. Anthony Whitfield and Cindy Whitfield, Defendants. AND Anthony Whitfield, Counterclaimant, v. David Swanson, Counterclaim Defendant, Of whom, Anthony Whitfield is the Appellant and David Swanson is the Respondent. Appellate Case No. 2020-000162
Date: October 26, 2020 at 11:55 PM
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Counsel,

Attached for service, please find Appellant's Initial Reply Brief which is being filed momentarily with the Court of Appeals via One Drive electronic submission.

Regards,

Jesse

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