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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

James E. Chellis, Master in Equity

Case No. 2020-001168

NCP PILGRIM, LLC Respondent,

v.

MARY LOU CERCOPELY, DAVID S. CLANCY, SOUTH CAROLINA FEDERAL CREDIT UNION, SOUTHCOAST COMMUNITY BANK, JOAN GEANURACOS and DAVID SEAN CLANCY,

Of whom MARY LOU CERCOPELY, DAVID S. CLANCY,
And DAVID SEAN CLANCY are the Appellants.

RESPONDENT NCP PILGRIM, LLC'S INITIAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

1. Did the Trial Court properly hold it had subject matter jurisdiction over this commercial foreclosure action based on its conclusion that the jurisdictional bar found in 12 U.S.C. §1821(d)(13)(D) of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, 12 U.S.C. §1811 *et seq.* ("FIRREA") does not preempt its authority under Rule 53, SCRCP?

STATEMENT OF THE CASE

A. Procedural History

This is an appeal of a commercial mortgage foreclosure action for a vacant commercial building located at 117 S. Cedar Street in Summerville, South Carolina ("Subject Property"). Respondent NCP Pilgrim, LLC ("NCP") as the holder of the subject Note and Mortgage, filed its Summons, Complaint, and Lis Pendens on November 15, 2018. (P. Ex. 11.) On January 4, 2019, this foreclosure action was referred to the Dorchester County Master in Equity ("MIE") pursuant to Rule 53, SCRCP.

Appellants Mary Lou Cercopely ("Cercopely"), David S. Clancy ("Clancy"), David Sean Clancy, and Defendant Southcoast Community Bank n/k/a Pinnacle Bank timely filed Answers. Specifically, Appellants Cercopely and Clancy (collectively "Appellants") filed an Answer and Counterclaim on January 23, 2019, which included a demand for a jury trial. A hearing was held on February 28, 2019, regarding, among other issues, Appellants' demand for a jury trial. Appellants' demand was denied by the MIE in the April 4, 2019 Order Denying Defendants Cercopely and Clancy's Demand for a Jury Trial, Granting Plaintiff's Motion to Amend, and Denying Plaintiff's Motion to Appoint a Receiver ("Order Denying Jury Trial"). The Order Denying Jury Trial was not appealed.

Shortly thereafter, Respondent filed its Amended Summons and Complaint on April 5,

2019 (P. Ex. 12), and Appellants filed their Amended Answer and Counterclaim on April 22, 2019. A foreclosure trial was held before the MIE on January 28, 2020 ("Trial"). At Trial, Appellants waived all defenses and counterclaims stated in their Amended Answer and Counterclaim and raised a new defense asserting that the Dorchester County Master in Equity lacked subject matter jurisdiction under FIRREA. Tr. 11:16-13:17; 42:19-44:13. Specifically, Appellants asserted that subject matter jurisdiction lies with the Federal Deposit Insurance Corporation ("FDIC") pursuant to 12 U.S.C. §1821(d)(13)(D). In examining the requirements of FIRREA found in §1821(d), the Trial Court held that NCP's action to foreclose was not a claim subject to the FDIC's administrative review process or the limitation on judicial review. (Master's Decree of Sale and Foreclosure, dated July 13, 2020 ("Decree") at 5-8.) Thus, the Trial Court concluded that its subject matter jurisdiction was not preempted by 12 U.S.C. §1821(d)(13)(D), awarded NCP a judgment against Clancy in the amount of $409,074.01, and ordered the subject property be sold at the upcoming foreclosure sale. (Decree at 11 & Supplemental Master's Decree of Sale and Foreclosure, dated August 5, 2020 ("Supplemental Decree") at 2.)

Subsequently, Appellants filed an Emergency Motion for Stay of Proceedings to Enforce Judgment or for Supersedeas Bond and To Impose Bond on Plaintiff, on July 14, 2020, which was ultimately denied by the MIE as premature in the August 5, 2020 Form Order. On July 23, 2020, Appellants filed a Motion to Reconsider the Decree of Foreclosure, based on their position that the MIE lacked subject matter jurisdiction under FIRREA. This Motion was also denied by the MIE on August 5, 2020, in the Order Denying Defendants Cercopely, Clancy, and David Sean Clancy's Motion to Reconsider ("Order Denying MTR"). Shortly thereafter, Appellants filed the instant Appeal with the South Carolina Court of Appeals on August 18, 2020 (Case No. 2020-001168).

On August 25, 2020, Appellants filed their Second Emergency Motion for Stay of

Proceedings to Enforce Judgment or for Supersedeas Bond and to Impose Bond on Plaintiff with the MIE ("Motion for Bond"). A hearing was held on Appellants' Motion for Bond on September 14, 2020, and on October 15, 2020, the MIE issued an Amended Order Imposing Supersedeas Bond ("Order Imposing Bond"). The Order Imposing Bond required the Appellants to post a bond of $172,000, along with a number of other reasonable requirements, with the Dorchester County Clerk of Court by 5:00 p.m. on November 30, 2020 to stay the December 1, 2020 judicial sale of the Subject Property. (Order Imposing Bond at 8-12.) This Order was not appealed.

On November 23, 2020, prior to the December 1, 2020 Judicial Sale, Appellants filed a Motion for Relief from Supercedeas, to Enjoin Master's Sale on 12/01/20, and to Transfer Appeal to the Supreme Court with the South Carolina Court of Appeals ("COA Motion"). The COA Motion was denied by the Court of Appeals on November 30, 2020.

Subsequently, Appellants failed to post a bond with the Dorchester County Clerk of Court by November 30, 2020, and thus failed to stay the sale under the MIE's Order Imposing Bond. Also, on November 30, 2020, NCP waived its right to a deficiency judgment against Clancy by filing its Notice of Plaintiff's Waiver of Right to Deficiency Judgment.

The Subject Property was sold on December 1, 2020, to NCP pursuant to that certain deed recorded with the Dorchester County Register of Deeds ("ROD") in Book RB 13053 at Page 266. Shortly after this sale, NCP learned that Appellants filed a Motion for Relief from Supercedeas, to Enjoin Master's Sale on 12/01/20, and to Transfer Appeal to the Supreme Court[1] (Case No. 2020-001574) and a Petition for Writ of Mandamus to Court of Appeals with the South Carolina Supreme Court[2] (Case No. 2020-1567), which are both currently under advisement with the South

[1] The South Carolina Supreme Court Clerk of Court indicated that this Motion would be construed as a motion to certify the appeal under Rule 204(b), SCACR.
[2] The South Carolina Supreme Court Clerk of Court indicated that this Petition would be construed as a request for relief under Rule 245, SCACR.

Carolina Supreme Court.

B. Factual History[3]

On or about June 10, 2004, Clancy borrowed $258,840 from Carolina Federal Savings Bank (“Carolina Federal”) as was evidenced by a customary Note ("Note"). (P. Ex. 1). This loan was secured by a first mortgage the Subject Property owned by Barbara A. Clancy ("Mortgage"). (P. Ex. 2). Pursuant to the Note, the loan had an original maturity date of June 10, 2009. Thereafter, Clancy and his mother signed two note and mortgage modifications on August 18, 2009, (P. Ex. 4) and on June 24, 2010 (P. Ex. 5). On or about October 13, 2012, Barbara Clancy passed away, leaving the Subject Property to her surviving children, Cercopely and Clancy.

On or about January 30, 2013, the FDIC, which had taken over Carolina Federal, sold the Note and Mortgage to CRE/ADC Venture, 2012–1 LLC (“CRE/ADC”) as evidenced by the Assignment of Real Estate Mortgage recorded with the ROD in Book 8718 at Page 33, the Assignment of Home Equity Variable Draw Agreement, and the Omnibus Assignment. (P. Exs. 6, 17, & 19). Thereafter, CRE/ADC sold the Note and Mortgage to NCP as evidenced by the Assignment of Mortgage or Other Security Instrument recorded with the ROD in Book RB 11512 at Page 126 and the Assignment of Home Equity Variable Draw Agreement. (P. Exs. 7 & 18). It is undisputed that NCP is the current owner and holder of the Note[4] and that Clancy has not made a payment on this Note since January 14, 2013. (Decree at 9); Tr. 9:24.

At Trial, Appellants' counsel explicitly waived all counterclaims and defenses except for Appellants' contention that FIRREA preempted the Trial Court's subject matter jurisdiction and

[3] NCP’s reading of Rule 208(b)(1)(C) SCACR is that disputed facts or matters should not be included in the Statement of Case. In order to avoid being bound by Clancy’s Factual History in its Statement of the Case under Rule 208(b)(2) SCACR, NCP has set forth a brief factual summary.

[4] As stated in the Decree, NCP is in possession of the Original Note and Original Mortgage, which was produced to Appellants' counsel on May 20, 2020, (Decree at 9). As that time, Appellants' counsel did not raise any objection to the authenticity of the Original Note and Original Mortgage. *Id.*

elected to not present any evidence. Tr. 11:16-13:17; 42:19-44:13. This waiver of all defenses and counterclaims except for lack of subject matter jurisdiction was very clear, as follows:

> MR. VARNADO: Your Honor, at this time Mr. Clancy will not put up a defense. And I'll prosecute his counterclaims. We are going to go on the -- saying respectfully that we believe that the Court does not have jurisdiction.
>
> THE COURT: So you're not going forward on your counterclaims? And you're resting your defense on the facts that this Court doesn't have jurisdiction over the matter because of the argument you made earlier?
>
> MR. VARNADO: Yes, sir.
>
> THE COURT: Thank you very much.
>
> ***
>
> MR. VARNADO: Your Honor, would you issue order a Form 4, or do you just want to wait until you decide everything on jurisdiction?
>
> THE COURT: On jurisdiction? Let me put that in the order itself. I guess -- and this is something you need to think about, if you appeal the case and its determined that I didn't have jurisdiction, are you reserving --I'm not sure if you're reserving your counterclaims? Or have you abandoned them all together?
>
> MR. VARNADO: I haven't abandoned them all together, but if an Appellate Court holds that you really did in fact have jurisdiction, then I think that I would --think that I would waive the counterclaims.
>
> THE COURT: That's what I would expect you --
>
> MR. VARNADO: But however if you --respectfully, if Your Honor didn't have jurisdiction, then everything would be to the -- I think that's what it is, Your Honor.
>
> MS. WILLIAMS: Your Honor, I guess it would be our position that either Mr. Varnado decides today to waive his counterclaims in full or he argues them today to preserve them for the record. If he does not argue them today, it would be our position that they're waived in full.
>
> THE COURT: Well, I think he said that. He understands that if the jurisdictional issues comes out different than what my decision has been and he is correct and I didn't have jurisdiction, then I couldn't have heard them anyway. But if I had jurisdiction and I'm affirmed on the remainder of the decision, then he will have waived his counterclaims as of this moment.

> ***
> THE COURT: Well, let me ask you this question. Let's suppose --I almost took this position earlier so I'm going to hold the question of jurisdiction in advance and hear the case but decide to go ahead and rule that I did have jurisdiction. And if I'm wrong, I can be corrected. **I didn't expect Mr. Varnado to waive his defenses, but nonetheless, that will be the result of his defenses if I'm affirmed on the jurisdiction.**

("Trial Waiver of Defenses"). *Id.* Thus, the only issue preserved for appeal is the issue of subject matter jurisdiction. *Gatewood v. Moses*, 39 S.C.L. 244, 247 (S.C. App. L. 1852) (appellant was not permitted to raise and discuss a legal ground expressly waived at the circuit court trial). All other arguments, including the validity of loan documents, standing, referral of this case to the MIE, and the procedural history of this matter, have been explicitly waived by Appellants and can no longer be argued before the Court. *Id.* *See also Bodkin v. Bodkin*, 388 S.C. 203, 228, 694 S.E.2d 230, 243 (Ct. App. 2010) (the court must accept stipulations as binding); *C.A.N. Enterprises, Inc. v. S.C. Health & Human Servs. Fin. Comm'n*, 2929 S.C. 556, 559, 357 S.E.2d 714, 715 (Ct. App. 1987), *aff'd* 296 S.C. 373, 373 S.E.2d 584 (1998) (stipulations are binding upon parties who make them).

C. Appellants' Statement of the Case Includes Information Not Properly Before the Court.

In their Brief, Appellants' Statement of the Case includes multiple statements and information that have not been entered into evidence in this matter and are not properly before the Court. Br. at 4-5. Specifically, NCP contends the following statements are improper because they rely on information and documents not entered into evidence at Trial and are not properly before this Court.

1. "To effectuate such an "acquisition," FDIC-R formed 'CRE/ADC Venture 2012-1, LLC' ("Company") on December 5, 2012 as its sole member." Br. at 4.
2. "Pursuant to the Contribution Agreement, the FDIC-R "*contributed in part and sold in*

part to the Company [FDIC-R's] the right title and interest to [certain assets]" including Clancy's HELOC. *See* Private Owner Interest Sale and Assignment Agreement ("Agreement"). [Assign. Agrm'nt]." Br. at 4.

3. "The Company then issued a promissory note payable to the FDIC in the amount of $71 million due December 11, 2019. [Prom. Note]." Br. at 4.
4. "After conducting a sealed bid auction for a forty percent (40%) limited liability company interest in the Company, the FDIC selected Colony Capital Acquisitions, LLC ("CCA") as the successful bidder." Br. at 4.
5. "CCA, as required under the Agreement, formed ColFin 2012 CRE ADC-1 Holdco, LLC ("Private Owner" or "PO") as the 40% limited liability company owner; FDIC-R retained a sixty percent (60%) interest in the Company." Br. at 4.
6. "The Agreement expressly states "that the Private Owner may not assign this Agreement or any of its rights, interests, or obligations hereunder. Any purported assignment or delegation in violation of this Agreement shall be null and *void ab initio.*" [POA Agm'nt]." Br. at 4-5.

These six (6) statements are not supported by any evidence presented at Trial. Additionally, throughout these six statements, Appellants reference a Contribution Agreement, Private Owner Interest Sale and Assignment Agreement, Promissory Note, and Private Owner Agreement, none of which were entered into evidence at Trial. As stated above, Appellants elected not to present any evidence at trial and Appellants cannot attempt to enter these statements as facts through their Initial Brief. *See Hodges v. Tarrant*, 31 S.C. 608, 9 S.E. 1038, 1039 (1889) (an alleged fact cannot be asserted for the first time in an appeal, it must also have been asserted in the underlying case). Thus, these documents are not properly before this Court and any information concerning them

should be disregarded. *Ravan v. Greenville Cty.*, 315 S.C. 447, 460, 434 S.E.2d 296, 304 (Ct. App. 1993) (the appellate court will not consider any fact which does not appear in the Record on Appeal).

STANDARD OF REVIEW

An action to foreclose a real estate mortgage is one in equity. *First Palmetto Sav. Bank, F.S.B. v. Patel*, 344 S.C. 179, 183, 543 S.E.2d 241, 243 (Ct. App. 2001). This characterization remains even when a counterclaim raises legal issues, such as the determination of subject matter jurisdiction. *See Peoples Fed. Sav. & Loan Ass'n v. Edwards*, 286 S.C. 475, 477, 334 S.E.2d 290, 291 (Ct. App. 1985). Therefore, this Court may find facts in accordance with its own view of the preponderance of the evidence. *Patel* at 183, 543 S.E.2d at 243.

ARGUMENT

I. THE TRIAL COURT PROPERLY RULED THAT FIRREA DID NOT APPLY AND THAT IT HAD SUBJECT MATTER JURISDICTION OVER RESPONDENT'S CLAIMS.

The Trial Court properly concluded that it had subject matter jurisdiction over NCP's claims under Rule 53, SCRCP because FIRREA section 1821(d)(13)(D) does not apply to NCP's claims. (Decree at 5-8). Subject matter jurisdiction is defined as "the power to hear and determine cases of the general class to which the proceedings in question belong." *Skinner v. Westinghouse Elec. Corp.*, 380 S.C. 91, 93-94, 668 S.E.2d 785, 796 (2008). "The question of subject matter jurisdiction is a question of law for the court." *Hammer v. Hammer*, 399 S.C. 100, 104-05, 730 S.E.2d 874, 876 (Ct. App. 2012). Here, the Trial Court properly concluded that it had subject matter jurisdiction to hear this matter pursuant to Rule 53, SCRCP and denied Appellants' demand for a jury trial based on the well-established principals outlined in *Carolina First Bank v. BADD, LLC*, 414 S.C. 289, 293, 778 S.E.2d 106, 108 (2015). (Order Denying Jury Trial at 2-4).[5]

[5] The Order Denying Jury Trial was not appealed.

Subsequently, the Trial Court concluded that this subject matter jurisdiction was not preempted by FIRREA, after engaging in a detailed review of the administrative claims process and jurisdictional bar established by FIRREA in §1821(d)(3)-(13) and the relevant national case law. (Decree at 5-8). Thus, the Trial Court properly concluded it had subject matter jurisdiction in this matter, as discussed in detail below.

A. <u>A Review of the FIRREA Administrative Claims Process and Jurisdictional Bar.</u>

A review of the FIRREA administrative claims process and jurisdictional bar as a whole reveals the Trial Court properly concluded it has subject matter jurisdiction in this matter. When determining the applicability of a statute, "the statute must be read as a whole and sections [that] are part of the same general statutory law must be construed together and each one given effect." *A.O. Smith Corp. v. S.C. Dep't of Health & Envtl. Control*, 428 S.C. 189, 203, 833 S.E.2d 451, 459 (Ct. App. 2019) (citing *CFRE, LLC v. Greenville Cty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) (quoting *S.C. State Ports Auth. v. Jasper Cty.*, 368 S.C. 388, 398, 629 S.E.2d 625, 629 (2006))). Appellants' argument ignores the statute as a whole and instead focuses solely on the language contained in a small sliver of the extensive FIRREA sections, namely, §1821(d)(13)(D). Their argument fails to consider that small section in light of the language contained in all of §1821(d). In essence, Appellants are asking the Court to put on blinders in its analysis of this issue. The proper method of statutory interpretation, as applied by the Trial Court, is to evaluate the language found in §1821(d)(13)(D) in light of the FIRREA statute as a whole.

FIRREA was enacted in 1989 as an emergency measure to enable the FDIC to expeditiously resolve and liquidate failed financial institutions throughout the country. *Tillman v. Resolution Tr. Corp.*, 37 F.3d 1032, 1035 (4th Cir. 1994). FIRREA sections 1821(d)(3)-(13) outline the FDIC's administrative claims review process and jurisdictional bar for those persons

making claims against a failed financial institution or seeking to adjudicate their rights against the failed institution. *See* 12 U.S.C. §1821(d)(3)-(13); *See e.g. Tillman at* 1035; *Freeman v. F.D.I.C.*, 56 F.3d 1394, 1399 (D.C. Cir. 1995). Specifically, §1821(d)(13)(D) requires persons making claims against a failed financial institution or seeking to adjudicate their rights against the failed institution to present their claims first to the FDIC through its administrative claims process ("Jurisdictional Bar"). *See* 12 U.S.C. §1821(d)(13)(D); *Tillman* at 1035; *Freeman* at 1399. Under the administrative claims process, a party seeking to assert a claim against a failed institution must present his claim to the receiver for an initial determination of whether the claim should be allowed within 90 days of the publication of notice by the receiver. 12 U.S.C. §1821(d)(3). The receiver then has 180 days after the claim is filed to determine whether to approve the claim. 12 U.S.C. §1821(d)(5)(A)(i). After the receiver's initial decision, or if the receiver makes no decision within the 180-day period, a claimant may file a suit on the claim in one of two designated federal courts within the specified time period. 12 U.S.C. §1821(d)(6)(A). Essentially, this statutory scheme provides a dispute resolution structure that allows the FDIC initially to collect assets, determine rights, and resolve claims **against** the failed institution before disputes over such matters can be heard in court. Thus, a review of the entirety of 12 U.S.C. §1821(d)(3)-(13) plainly shows the Jurisdictional Bar does not apply to Respondent's foreclosure case because the case is not making a claim against the failed financial institution, Carolina Federal, or against the receiver, the FDIC, in this action.

B. The Trial Court Properly Concluded that the FIRREA Administrative Claims Process and Jurisdictional Bar Did Not Apply.

As stated above, whether a federal statute preempts state law is a question of law for the court to decide. *Weston v. Kim's Dollar Store*, 385 S.C. 520, 536, 684 S.E.2d 769, 777 (Ct. App. 2009), aff'd and remanded, 399 S.C. 303, 731 S.E.2d 864 (2012). Here, the Trial Court property

ruled that FIRREA did not preempt its jurisdiction under Rule 53, SCRCP and therefore, the Trial Court had subject matter jurisdiction over this matter.

After conducting a detailed review of the language contained in §1821(d)(3)-(13) and the case law interpreting these sections, the Trial Court properly ruled that Respondent's claims were not subject to FIRREA because NCP was not making a single claim against the failed institution, Carolina Federal, or against the receiver, the FDIC, in this action. In reaching this conclusion, the Trial Court properly relied upon *Tillman* and *Freeman* to conclude that FIRREA section 1821(d)(13)(D) requires only those persons or entities making claims *against* a *failed financial institution* or seeking to adjudicate their rights *against* the *failed institution* to present their claims first to the FDIC through its administrative claims process. Ultimately, the Trial Court reasoned that NCP was simply seeking to exercise its lawful authority to enforce the Note and Mortgage it was assigned by virtue of the June 26, 2018 Assignments from CRE/ADC by filing a routine foreclosure action, which is not a claim subject to the administrative review process and the Jurisdictional Bar found in §1821(d)(13)(D). (P. Ex. 7 & 18).

This conclusion is consistent with a review of the national case law evaluating the applicability of the Jurisdictional Bar. Cases throughout the United States have repeatedly held it is abundantly clear the FDIC is authorized to pursue the foreclosure of a failed bank's assets. *Dittmer Properties, L.P. v. F.D.I.C.*, 708 F.3d 1011, 1011 (8th Cir. 2013); *Freeman* at 1399; *Lloyd v. F.D.I.C.*, 22 F.3d 335, 336-37 (1st Cir. 1994); J*oint Venture v. Onion, 938 F.2d 35, 39 (5th Cir. 1991), cert. denied, 502 U.S. 1057 (1992)*. Specifically, courts have recognized that the disposition of a failed bank's assets is one of the quintessential statutory powers of the FDIC as a receiver. *Pyramid Constr. Co. v. Wind River Petroleum, Inc.*, 866, F.Supp. 513, 517 (D. Utah 1994). These same courts have applied the well-established legal principle that an assignee has all the same

rights and privileges as the assignor to hold that a third-party who purchases an asset from the FDIC also has the authority to pursue the foreclosure of the assigned asset. *Dittmer* at 1017; *Twelfth RMA Partners, L.P. v. Nat'l Safe Corp.*, 335 S.C. 635, 640, 518 S.E.2d 44, 46 (Ct. App. 1999). *See also*, *Deutsche Bank Nat'l Tr. Co. v. Burke*, 902 F.3d 548, 552 (5th Cir. 2018); *Newman v. JP Morgan Chase Bank, N.A.*, 81 F. Supp. 3d 735, 745 (D. Minn. 2015); *Haynes v. JPMorgan Chase Bank, N.A.*, 466 F. App'x 763, 766 (11th Cir. 2012). Without this principle, it would be illogical for a third-party to ever accept an assignment of an asset from the FDIC, because without the ability to foreclose, the asset would be worthless.

Throughout the multiple cases ruling a third party could proceed with the foreclosure of an asset purchased by a third-party from the FDIC, not one case stated that the third-party purchaser was subject to the FDIC's administrative claims process or Jurisdictional Bar. *See* 122 A.L.R. Fed. 519. Instead, each court has repeatedly upheld the third-party's right to foreclose and did not impose a limitation on judicial review. Respondent has been unable to locate a single case adopting Appellants' position that a third-party purchaser of a loan from the FDIC cannot proceed with a judicial foreclosure and neither have Appellants. As there have been hundreds of thousands of such loans sold by the FDIC, it would seem logical there would be many reported cases supporting Appellants' argument. However, there are none.

Finally, it would be entirely illogical that a third party who purchases an asset from the FDIC would later have to get the FDIC's approval through the administrative claims process before it could exercise its rights under the terms of the asset. The FDIC's goal is to liquidate the assets of a failed financial institution in order to pay off the failed institution's creditors as quickly as possible. If an asset sold to a third-party purchaser is subject to the administrative claims process, there would be a substantial chilling effect upon the FDIC's ability to perform its statutory

functions as a receiver because no third-party would ever purchase an asset from a failed institution. This is especially true in this case where Respondent is attempting to foreclose the loan over seven (7) years after the FDIC took over the failed institution, Carolina Federal, and long after all of the time constraints of the administrative claims process have expired. *See* 12 U.S.C. §1821(d)(3)-(13). Thus, it would not only be impractical for Respondent to comply with the FDIC's administrative claims process, it would be impossible. As highlighted above, Appellant's arguments are at odds with the plain language and intent of FIRREA.

C. The FIRREA Administrative Claims Process and Jurisdictional Bar Do Not Preempt The Trial Court from Determining the Jurisdictional Bar Does Not Apply.

As outlined above, the Jurisdictional Bar only applies in two distinct scenarios, when a person is making a claim against a failed financial institution or seeking to adjudicate their rights against the failed institution. As the Trial Court properly concluded, neither of these two scenarios are present in Respondent's foreclosure action. As discussed below, the Trial Court had the authority to make such a conclusion.

Whether a federal statute preempts state law is a question of law for the trial court to decide. *Weston v. Kim's Dollar Store*, 385 S.C. 520, 536, 684 S.E.2d 769, 777 (Ct. App. 2009), aff'd and remanded, 399 S.C. 303, 731 S.E.2d 864 (2012). Courts should not lightly infer preemption. *Normandy Corp. v. S.C. Dep't of Transp.*, 386 S.C. 393, 409, 688 S.E.2d 136, 144 (Ct. App. 2009). Federal law may preempt state law in three distinct ways: "(1) Congress may expressly define the extent to which it preempts state law; (2) Congress may occupy a field of regulation, 'impliedly' preempting state law; or (3) a state law may be preempted to the extent it 'conflicts' with federal law." *Id.*

In their Initial Brief, Appellants appear to assert the argument that the mere possibility of the applicability of the Jurisdictional Bar automatically divests the Trial Court from subject matter

jurisdiction in this matter. This argument is incorrect. State courts as well as federal courts are entrusted with concurrent jurisdiction to try federal claims. *Haywood v. Drown*, 556 U.S. 729, 734-35 (2009). Furthermore, "the mere fact that a given federal law might 'apply' or even provide a federal defense to a state-law cause of action, is insufficient alone to establish federal question jurisdiction. To give rise to federal question jurisdiction, a court must find complete preemption." *Hart v. Bayer Corp.*, 199 F.3d 239, 244 (5th Cir. 2000) (citing *Franchise Tax Bd. of State of Cal. V. Constr. Laborers Vacation Tr. For S. California*, 463 U.S. 1, 23-24 (1983)).

The Jurisdictional Bar is distinct from other instances of federal preemption, such as the bankruptcy stay highlighted by Appellants in *Kalb v. Feuerstein*, 308 U.S. 433, 438-41 (1940). The plain language of the Jurisdictional Bar clearly indicates that Congress established two specific scenarios under which exclusive jurisdiction would lie with the FDIC. Thus, the Jurisdictional Bar falls squarely into the first way federal law may preempt state law and the plain language establishes the very limited extent to which exclusive jurisdiction would lie with the FDIC. As outlined above, those scenarios are when an individual is (1) making claims against a failed financial institution or (2) seeking to adjudicate their rights against the failed institution. *See* 12 U.S.C. §1821(d)(13)(D); *See e.g. Tillman* at 1035; *Freeman* at 1399. When a court determines that neither of those two specific scenarios apply, then the Jurisdictional Bar does not apply. Just as the Trial Court did in this matter.

Throughout their Initial Brief, Appellants repeatedly state that the FIRREA Jurisdictional Bar is indistinguishable from the jurisdictional bar analyzed in *Kalb*. (Br. at 14-15.) However, this statement is incorrect. The jurisdictional bar analyzed in *Kalb* is found in the Frazier-Lemke Act. *Kalb* at 436. The *Kalb* court found that the Frazier-Lemke Act's jurisdictional bar preempted all state mortgage foreclosures against farmers based on the Act's explicit and repeated language

establishing this complete preemption, such as "the prohibitions . . . shall apply to all judicial or official proceedings in any court or under the direction of any official, and shall apply to all creditors, public or private, and to all of the debtor's property, wherever located." *Id*. at 440-41. The language found in FIRREA's Jurisdictional Bar is clearly distinct from the broad reaching language relied on in *Kalb.* Thus, Appellants' argument is a misguided comparison.

Accordingly, the Trial Court possessed the necessary authority to properly conclude that FIRREA did not apply to Respondent's claims.

II. THE TRIAL COURT PROPERLY CONCLUDED THAT APPELLANTS' WAIVED ALL DEFENSES AND COUNTERCLAIMS, EXCEPT FOR LACK OF SUBJECT MATTER JURISDICTION.

As stated above, during Trial, Appellants expressly stipulated that they waived all potentially applicable defenses and counterclaims, with the exception of their sole argument that the Trial Court's subject matter jurisdiction was preempted by FIRREA. Tr. 42:19-44:13. Based on this express stipulation and waiver, the Trial Court properly concluded that Appellants waived any arguments that were outside the scope of their lack of subject matter jurisdiction argument. *See Bodkin* at 228, 694 S.E.2d at 243 (the court must accept stipulations as binding); *C.A.N. Enterprises, Inc.* at 559, 357 S.E.2d at 715 (stipulations are binding upon parties who make them); *Gatewood* at 247 (appellant was not permitted to raise and discuss a legal ground expressly waived at the circuit court trial). This same reasoning applies to the arguments contained in Appellants' Initial Brief that are outside the scope of their argument that the MIE lacks subject matter jurisdiction pursuant to the provisions of 12 U.S.C. §1821(d)(3)-(13), including their arguments related to the validity of NCP's chain of title regarding the Note and Mortgage and the validity of the Order of Reference. (Br. at 13-14; 16-21.)

A. The Trial Court Properly Concluded that Appellants' Trial Waiver of Defenses Included Any Argument Regarding the Validity of NCP's Chain of Title for the Note and Mortgage.

In its Order Denying MTR, the Trial Court properly concluded that Appellants' Trial Waiver of Defenses included a waiver of any argument related to the validity of NCP's chain of title regarding the Note and Mortgage. (Order Denying MTR at 2.) In their Brief, Appellants' appear to reassert their argument that NCP is not the valid owner and holder of the Note and Mortgage. Br. at 13-14; 17-21. This argument has no connection to Appellants' lack of subject matter jurisdiction argument. Thus, Appellants' expressly waived this argument at Trial, and it is not preserved for appellate review. *See S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301, 641 S.E.2d 903, 907 (2007) (quoting *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("it is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.")); *Gatewood* at 247 (appellant was not permitted to raise and discuss a legal ground expressly waived at the circuit court trial).

B. The Trial Court Properly Concluded that Appellants' Trial Waiver of Defenses Included Any Argument Regarding the Validity of the Order of Reference.

Similar to the reasoning outlined above, the Trial Court properly concluded that Appellants' Trial Waiver of Defenses included a waiver of Appellants' argument regarding the validity of the Order of Reference. This argument also has no connection to Appellants' lack of subject matter jurisdiction argument and was expressly waived at Trial. *See Bodkin* at 228, 694 S.E.2d at 243; *C.A.N. Enterprises, Inc.* at 559, 357 S.E.2d at 715.

In the alternative, if the Court determines Appellants did not previously waive this argument, it should be denied as untimely and improper. Specifically, Rule 53, SCRCP explicitly states that in "an action for foreclosure, some or all of the causes of action in a case may be referred

to a master or special referee by order of a circuit judge or the clerk of court." Here, NCP filed a foreclosure action on November 15, 2018, and the action was properly referred to the MIE on January 4, 2019, by the Dorchester County Clerk of Court. Subsequently, on January 23, 2019, Appellants filed an Answer demanding a jury trial. Pursuant to this demand, a hearing was held before the Trial Court on February 28, 2019. At that hearing, Appellants failed to raise an objection regarding the Trial Court's authority to rule on the jury trial demand and their request for a jury trial was denied (Order Denying Jury Trial at 2-4.) and elected not to appeal the Order of Reference or Order Denying Jury Trial. Additionally, Appellants failed to raise this argument at Trial or in the numerous other briefs filed with the Trial Court in this matter. Thus, Appellants failed to preserve this issue for appeal, and it can no longer be presented. *S.C. Dep't of Transp.* at 301, 641 S.E.2d at 907 (quoting *Wilder Corp.*at 76, 497 S.E.2d at 733 ("it is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.")).

III. ANY ARGUMENTS CONTAINED IN APPELLANTS' APPEAL REGARDING STAYING THE SALE OF THE SUBJECT PROPERTY ARE MOOT.

Respondent asserts that any arguments contained in Appellants' appeal regarding staying the sale of the Subject Property are moot because Appellants failed to comply with the statutory process to say a foreclosure sale. Also, the Subject Property was ultimately sold at the December 1, 2020 foreclosure sale. South Carolina law clearly states that the filing of a notice of appeal in a foreclosure case does not automatically stay the relief ordered in the decree of foreclosure and notice of sale. Rule 241(b)(4), SCACR. Instead, if a party wishes to stay a judgment directing the sale of land to satisfy a mortgage in connection with his appeal, he must move for an order imposing a supersedeas of matters decided in the order on appeal after service of the notice of appeal on all parties. Rule 241(c)(1), SCACR. S.C. Code Ann. § 18-9-170 explicitly outlines the

requirements of a supersedeas bond or undertaking required to obtain a stay in this situation.

In the instant matter, the MIE issued an Order Imposing Bond, according to the above legal authorities on October 15, 2020. Appellants failed to comply with any of the terms of this order. Appellants cannot now come to this Court seeking to Appeal the MIE's rulings without complying with the underlying statutes. In fact, Appellants' November 23, 2020 COA Motion was already denied by the Court of Appeals on these same grounds on November 30, 2020. Thus, any arguments regarding the stay of the sale of the Subject Property should be dismissed as moot.

CONCLUSION

Accordingly, for the reasons outlined above, the Trial Court properly concluded that the administrative process, and by the same vein, the jurisdictional bar established under FIRREA sections 1821(d)(3)-(13), does not apply to Respondent's claims in this action. Consequently, the Trial Court properly ruled that its subject matter jurisdiction was not preempted by FIRREA, and it had the jurisdictional authority to rule on Respondent's foreclosure claims in this matter.

Respectfully submitted,

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Hilton Head Island, South Carolina
January 22, 2021

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

James E. Chellis, Master in Equity

Case No. 2020-001567

NCP Pilgrim, LLC, Respondent,

v.

Mary Lou Cercopely; David S. Clancy; South Carolina Federal Credit Union; Southcoast Community Bank; Joan Geanuracos; David Sean Clancy, Defendants

Of whom Mary Lou Cercopely, David Clancy, and David Sean Clancy are Petitioners

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date indicated below counsel for Appellants was served with a copy of Respondent NCP Pilgrim, LLC's Initial Brief and its Designation of the Matter to be Included in the Record on Appeal by mailing a copy of the same via E-Mail and First Class, U.S. Mail, postage-paid on the date set forth below.

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January 22, 2021