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April 15, 2021

The South Carolina Court of Appeals
Attn: V. Clarie Allen, Chief Deputy Clerk
1220 Senate Street
Columbia, South Carolina 29201

Re: Nationstar Mortgage v. Louise Doyle
Appellate Case No. 2021-000333

Dear Madam Clerk:

Our office represents Nationstar Mortgage LLC ("Nationstar"), the Appellant in the above referenced matter. Pursuant to the Court's request, please consider this letter Nationstar's memorandum addressing the issue of appealability.

I. Introduction.

Nationstar contends that the Order entered by The Honorable Letitia Verdin dated February 23, 2021 (the "Order") is immediately appealable. The Order states in pertinent part that Nationstar's "Motion to Refer to Master-in-Equty is denied." The Motion before the Circuit Court was not simply a Motion to Refer to the Master-in-Equity, but instead was a Motion for Non-Jury Adjudication and For Order of Reference (the "Motion"). A copy of the Motion is appended hereto for the Court's convenience. Because the Order deprives Nationstar of the mode of trial, to which it is entitled, it affects a substantial right under S.C. Code Ann. § 14-3-330(2) and is immediately appealable.

II. Relevant Procedural History.

Nationstar filed this foreclosure action on September 17, 2015. On January 5, 2016, Respondents Doyle and McGahee (collectively "Respondents") filed an answer and asserted counterclaims against Nationstar for alleged violations of 12 U.S.C. § 2605 (Real Estate Settlement Procedures Act or "RESPA"), Negligence, Breach of Contract and South Carolina Unfair Trade Practices Act ("SCUPTA"). Respondents demanded a jury trial.

Nationstar considered the Respondent's counterclaims to be permissive rather than compulsory and sought Respondents consent to a referral to the Master-In-Equity. Respondents would not provide a waiver of the jury trial demand and would not consent to a referral to the Master-In-Equity.

On June 8, 2020, Nationstar filed the Motion seeking non-jury adjudication and an order of reference. While the Motion did request an order of reference to the Master-In-Equity, that request was tangential and secondary to the request for non-jury adjudication of both Nationstar's foreclosure and Respondents' counterclaims.

III. The Order Affects Mode of Trial.

Respondents' counterclaims, all of which stem from an alleged violation of RESPA for failure to respond to a Qualified Written Request, are permissive and by asserting them in the foreclosure action, Respondents have waived their right to a jury trial. *See Wachovia Bank, Nat. Ass'n v. Blackburn*, 407 S.C. 321, 330, 755 S.E.2d 437, 441-42 (2014); *C&S Real Estate Servs., Inc. v. Massengale*, 290 S.C. 299, 301-02, 350 S.E.2d 191, 193 (1986) (holding that defendant had no right to a trial by jury on permissive counterclaims filed in foreclosure action); *John D. Hollingsworth on Wheels, Inc. v. Arkon*

Corp., 273 S.C. 461, 257 S.E.2d 165 (1979) (holding that because defendant elected to assert permissive counterclaim in response to Plaintiff's equitable action, Defendant waived its right to a jury trial). By denying the Motion, the lower court has deprived Nationstar of the mode of trial to which it is entitled.

The Motion provides legally supported arguments outlining Nationstar's position that the entire case is subject to non-jury adjudication, including a detailed analysis of whether the counterclaims are legal or equitable and permissive or compulsory. These arguments are central to the issue of whether a party is entitled to a jury trial. *See Motion generally*. Judge Verdin's classification as the Motion as a "Motion to Refer to Master-In-Equity" does not change the form and substance of the Motion, which is at heart, a motion for non-jury adjudication.

It is undisputed that Respondents are not entitled to a jury trial for Nationstar's foreclosure action. Foreclosure actions are actions in equity and in equity, the parties are not entitled, as a matter of right, to a jury trial. *Williford v. Downs*, 265 S.C. 319, 321, 218 S.E.2d 242, 243 (1975). Therefore, the primary issue before the trial court was whether Respondents were entitled to a jury trial on their counterclaims.

Respondents have waived their right to a jury trial because the counterclaims are permissive. "By definition, a counterclaim is compulsory only if it arises out of the same transaction or occurrence as the opposing party's claim." *First-Citizens Bank & Trust Co. of S.C. v. Hucks*, 305 S.C 296, 298, 408 S.E.2d 222, 223 (1991); Rule 13(a) SCRCP. To determine whether a party's claims arise out of the same transaction or occurrence, South Carolina has adopted the "logical relationship" test. *N. Carolina Fed. Sav. & Loan Ass'n*

v. DAV Corp., 298 S.C. 514, 518, 381 S.E.2d 903, 905 (1989). In foreclosure actions, the "logical relationship" determination is made by asking 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, 269-70, 449 S.E.2d 580, 582 (Ct. App. 1994), *aff'd in part, vacated in part,* 320 S.C. 532, 466 S.E.2d 367 (1996), *see also Blackburn,* 407 S.C. at 331-32, 755 S.E.2d at 442-43 ("Wachovia's action is a foreclosure action centered entirely on obligations created by the loan documents. If the sale was separate from the loan, then the counterclaims involving the sale did not 'aris [e] out of the transaction or occurrence that is the subject matter of the opposing party's claim.' "). Each of Respondents' counterclaims, which all stem from Nationstar's alleged failure to respond to a QWR, in violation of RESPA, are permissive. Therefore, any order that compels Nationstar to a jury trial is in error. See *Alston v. Limehouse*, 61 S.C. 1, 39 S.E.2d 192 (1901). (holding that the order of the lower court denying a compulsory reference of the issues affects the mode of trial and that "it is well settled beyond controversy in this state that it is error, from which an appeal will lie, to deny a party a mode of trial to which it is entitled by law").

Simply put, the Order does not simply deny Nationstar an order of reference to which it is entitled, it also grants Respondents a jury trial that they are not entitled to. In doing so, the Order affects a substantial right and is immediately subject to appellate review.

IV. Nationstar's Immediate Appeal of the Order is Appropriate.

It is well settled in South Carolina that "Orders affecting the mode of trial affect substantial rights under S.C. Code Ann. § 14-3-330 (2) and must, therefore, be appealed immediately." *First Union Nat. Bank of S.C. v. Soden*, 333 S.C. 554,565, 511 S.E.2d 372, 377 (Ct. App. 1998). And that the "failure to immediately appeal an order affecting the mode of trial effects a waiver of the right to appeal that issue." *Id.* Nationstar must seek redress from the Court of Appeals or it will forever waive its right to contest the denial of its Motion. For this reason alone, Nationstar should be granted the opportunity for appellate review of the Order.

V. Conclusion.

For the foregoing reasons, Nationstar respectfully requests that this Court allow the appeal to proceed.

Sincerely,

Amanda K. Cutler

Enclosures
cc: Brian A. Calub, Esq. (via email to BCalub@mcguirewoods.com)
Marcus Wesley Meetze, Esq.
Reginald Patrick Corley, Esq.
William Price Stork, Esq.
Bank of America, N.A.
June McGahee

STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE	IN THE COURT OF COMMON PLEAS THIRTEENTH JUDICIAL CIRCUIT
Nationstar Mortgage LLC, Plaintiff, v. Louise M. Doyle, June McGahee, Bank of America, N.A., and Dorothy M. Rabon Defendants,	CASE NO.: 2020-CP-23-01663

PLAINTIFF'S MOTION FOR NON-JURY ADJUDICATION OF ACTION AND FOR ORDER OF REFERENCE

Because this case concerns an equitable action of foreclosure, Plaintiff Nationstar Mortgage LLC ("Nationstar") respectfully asks the court to issue an order of reference for non-jury adjudication of this entire lawsuit by the master-in-equity for Greenville County pursuant to Rule 53(b) of the South Carolina Rules of Civil Procedure.

BACKGROUND

This lawsuit arises out of Nationstar's foreclosure of a promissory note and mortgage because Defendant Louise M. Doyle ("Doyle"), the maker of the note at issue, became delinquent on her repayment obligations. In response to Nationstar's foreclosure complaint, Doyle filed counterclaims for alleged violations of 12 U.S.C. § 2605, Negligence, Breach of Contract and South Carolina Unfair Trade Practices Act ("SCUTPA"). Ans. & Countercl. ¶¶ 25-45.

According to Doyle, Nationstar was negligent in servicing her loan by mis-accounting for payments and balances, in not correcting Doyle's account or provide an explanation as to why it is believed the account was correct. Countercl. ¶¶ 28 – 33. Doyle further alleges that Nationstar violated 12 U.S.C.§ 2605 by not making appropriate corrections to her account. Nationstar

complied with 12 C.F.R. § 1024.36(b) despite the fact that the purported Qualified Written Request "QWR") was not properly served by Doyle. Plaintiff's allegations, however, simply concern Nationstar's pursuit of the remedy of foreclosure after a default by Doyle and how payments were applied to her account, which are all equitable in nature. *See Wachovia Bank, N.A. v. Blackburn*, 407 S.C. 321, 755 S.E.2d 437 (2014) ("A mortgage foreclosure is an action in equity."); *Carolina First Bank v. BADD, L.L.C.*, 414 S.C. 289, 294, 778 S.E.2d 106, 108 (2015) ("The power to render a deficiency judgment is included within the jurisdiction of courts of equity."). A foreclosure action is an action in equity and the nature of the action does not change to one at law by virtue of the fact that the defendant asserts counterclaims related to the amount due on the loan. *Collier v. Green,* 244 S.C. 367, 371, 137 S.E.2d 277, 280 (1964). Thus, Doyle's counterclaims are equitable in nature and she is not entitled to a jury trial on this claim.

Doyle further alleges that Nationstar breached its duty by failing to comply with applicable laws and regulations, and failing to exercise that degree of care and caution. Countercl. ¶¶ 34-36. Doyle also alleges that Nationstar breached the implied covenant of good faith and fair dealing and the contract by failing to comply with applicable laws and regulations. Countercl. ¶¶ 37-40. Doyle's final allegation is that Nationstar violated SCUTPA. Doyle alleges that Nationstar operated its business in a manner which constitutes unfair and/or deceptive acts and/or practices in the course of trade and/or commerce. Countercl. ¶¶ 41-45.

Even if Doyle's counterclaims are viewed as legal causes of action, she is not entitled to a jury trial because the counterclaims are permissive, and she waived her right to a jury trial by alleging the claim in this foreclosure action. To this end, Nationstar's foreclosure action and Doyle's counterclaims should be tried as a non-jury action before the master-in-equity for Greenville County, South Carolina.

STANDARD FOR DECISION

The right to proceed in the proper mode of trial is a substantive right, and a court cannot require a party to proceed before a jury in an equity case. *See Flagstar Corp. v. Royal Surplus Lines,* 341 S.C. 68, 72, 533 S.E.2d 331, 333 (1978) (addressing mode of trial analysis). A defendant in a foreclosure action is entitled to a jury trial on a counterclaim only if that claim is a compulsory legal counterclaim. The South Carolina Supreme Court's analysis in *Wachovia Bank, N.A. v. Blackburn* determines whether an entire case or portions of it should be referred to a master-in-equity for non-jury adjudication. *See* 407 S.C. 321, 755 S.E.2d 437 (2014). In *Blackburn*, the Supreme Court of South Carolina explained that "[a] mortgage foreclosure is an action in equity." 407 S.C. at 328, 755 S.E.2d at 440. Thus, "the parties are not entitled, as a matter of right, to a trial by jury." *Id.*, 755 S.E.2d at 441 (quoting *Williford v. Downs*, 265 S.C. 319, 321, 218 S.E.2d 242, 243 (1975)).

Nevertheless, "counterclaims—including those raised in equitable actions—may, at times, be entitled to a jury trial." *Id.* Whether a party raising a counterclaim in a foreclosure action is entitled to a jury trial on its counterclaim depends, first, on whether the counterclaim is an equitable counterclaim or a legal counterclaim. *See id.* at 328–29, 755 S.E.2d at 441. If the counterclaim is an equitable counterclaim, a party has no right to a jury trial. *Id.* If the claim is a legal counterclaim, the party asserting the claim is entitled to a jury trial on that claim *only* if the claim is a compulsory counterclaim that the party would have lost the right to make had the claim not been asserted in the same action. *Wachovia Bank, N.A. v. Blackburn*, 407 S.C. at 328–29, 755 S.E.2d at 441. Alternatively, if the counterclaim is a legal but *permissive* counterclaim, asserting the claim in an equitable action constitutes a waiver of the right to a trial by jury. *Id.* Legal counterclaims asserted in a foreclosure proceeding are permissive unless they are logically related to the enforceability of the note. *See N.C. Fed. Sav. & Loan Ass'n v. Corp.*, 298 S.C. 514, 519,

381 S.E.2d 903, 906 (1989) (adopting logical relationship test to determine whether counterclaims alleged in foreclosure action were permissive or compulsory to determine mode of trial issues).

ARGUMENT

Adjudication of Nationstar's foreclosure action and Doyle's counterclaims by non-jury trial before the master-in-equity is appropriate for the following reasons: First, Nationstar's equitable foreclosure action precludes trial by jury of this action as a matter of right. In a foreclosure action, the determination of all issues relating to the amount due on the loan and the plaintiff's right to foreclosure are for the court, not a jury, based upon the South Carolina statutory regime contained in Title 29 and Rule 71 of the South Carolina Rules of Civil Procedure. Second, Doyle's counterclaims are equitable that have been raised in Nationstar's equitable foreclosure action. Indeed, the counterclaims are neither legal nor compulsory. Because the entire action sounds in equity, Doyle is not entitled to a jury trial, as of right, for any matters at issue in this equitable foreclosure action. However, even if the counterclaims are viewed as legal causes of action, the counterclaims are permissive, and Doyle waived her right to a jury trial by alleging the permissive counterclaim in this equitable foreclosure action.

I. Doyle is not entitled to a jury trial for Nationstar's foreclosure action.

Under South Carolina law, Nationstar's equitable foreclosure action is subject to non-jury adjudication by the master-in-equity. *See Carolina First Bank v. BADD, LLC*, 414 S.C. at 293, 778 S.E.2d at 108 ("Because a foreclosure action is one sounding in equity, a party is not entitled, as a matter of right, to a jury trial."); S.C. R. Civ. P. 53(b) ("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…."). Accordingly, Doyle is not entitled to a jury trial of Nationstar's foreclosure action.

II. Because Doyle's counterclaims concern the amount due on the debt by addressing the application of payments and a false default, it is an equitable claim that is subject to bench trial before the master-in-equity.

Doyle's counterclaims sound in equity. In a mortgage foreclosure action, counterclaims relating to the plaintiff's right to foreclose or the amount due on the debt secured by the mortgage are merely part of the equitable action, and the defendant has no right to a jury trial on such claims. *Collier v. Green,* 244 S.C. at 371-72, 137 S.E.2d at 280; *see also Bryn v. Walker*, 275 S.C. 83, 267 S.E.2d 601 (1980) (counterclaims in a foreclosure that affect the validity of a mortgage lien or the amount due are equitable in nature).

In *Collier,* the assignee of a mortgage brought a foreclosure action against the mortgagor. *Collier*, 244 S.C. at 368, 137 S.E.2d at 278. The mortgagor admitted execution of and delivery of the note and mortgage, but alleged that the assignment was fraudulent and sought a jury trial on that issue. *Id.* at 369, 137 S.E.2d at 279. In affirming the trial court's order referring the entire case to the master-in-equity, the South Carolina Supreme Court initially noted that a foreclosure is an action in equity and concluded that the nature of the action does not change to one at law by virtue of the fact that the defendant asserts counterclaims related to the amount due on the loan. *Id.* at 371, 137 S.E.2d at 280. To support its conclusion, the Court cited to its prior opinions in foreclosure cases holding that where the defenses and counterclaims bear primarily upon the amount due, the entire case, including the defenses and counterclaims, remains one in equity. *See id.* (citing cases). Thus, under South Carolina law, where a defendant asserts counterclaims in a foreclosure that go to the plaintiff's right to foreclosure or challenge the amount due upon the debt secured by the mortgage, the counterclaims are merely part and parcel of the equitable action, and a defendant has no right to a jury trial for such claims. *Id.*

Further, the South Carolina Supreme Court rejected attempts by litigants to "earn" the right to a jury trial in an equitable action. In *Rosenbaum v. S-M-S 32*, the plaintiff purchased real

property at a tax sale and filed an action to clear title pursuant to S.C. Code Ann. § 12-61-20. *Rosenbaum v. S-M-S* 32, 311 S.C. 140, 141, 427 S.E.2d 897, 897 (1993). The defendant filed an answer with a general denial, and the defendant asserted a counterclaim for trespass to try title and seek damages. The defendant demanded a jury trial. *Id.* at 141-42, 427 S.E.2d 897. The Supreme Court affirmed the trial court's decision, holding that the defendant could not "evade the intent of the legislature and obtain the right to a jury trial by interposing a counterclaim designed to thwart the reasonable and practical implication of Chapter 61." *Id.* The trial court struck the counterclaims because the plaintiff had asserted an equitable claim seeking a remedy via a non-jury process expressly provided by statute for purchasers at tax sales. *Id.*

In her counterclaims, Doyle alleges that Nationstar "mis-accounted payments" and created a false default as a result of the bad accounting. Countercl. *passim*. Here, Doyle's claims simply concern determining if a default occurred, and, if so, the total amount owed under the note and mortgage. To this end, the allegations giving rise to her counterclaims do not change the equitable character of the action, and Doyle is not entitled to a jury trial on any issue. *See Collier*, 244 S.C. at 371, 137 S.E.2d at 280; *Bank of New York Mellon , as Successor Trustee under NovaStar Mortgage Funding Trust, Series 2004-1 v. Lindsay,* Op. No. 2015-UP-208 (Ct. App. 2015) (holding that borrower's eight counterclaims based on a lender's alleged misapplication of payments were equitable in nature because they ultimately relate to the amount due on the underlying debt) (unpublished).

Furthermore, under the Supreme Court's decision in *Rosenbaum*, Doyle may not "earn" the right to a jury trial in this equitable foreclosure action by styling her allegations as legal counterclaims. Like the plaintiff in *Rosenbaum*, Nationstar brought this action pursuant to a statutory scheme created by the legislature that provides for a non-jury trial. Here, S.C. Code Ann. § 39-3-610 to 790 provides a procedure by which a mortgagee may foreclose in an equitable action

decided by the court. Consistent with the statutory scheme, Rule 71, S.C.R.C.P., also provides that foreclosure actions "shall be tried by the court, and shall ordinarily be referred to a master." This codified a process established by the Act of 1791, which integrated the action of foreclosure and the action for deficiency after sale into one equitable action, without the right to a jury trial. *See Carolina First Bank v. BADD, LLC*, 414 S.C. at 293, 778 S.E.2d at 108 (referencing the role played by the Act of 1971 in vesting courts of equity with jurisdiction to decide mortgage related disputes); *McConnell, et al. v. Barnes, et al.,* 142 S.C. 112, 140 S.E. 310 (1927) (noting that the Act of 1791 integrated the action for foreclosure and the action for the deficiency after sale, abandoning the strict distinction between action in rem and in personam). Therefore, consistent with *Rosenbaum*, the court should grant this motion and issue an order of reference of this entire action because Doyle is not entitled to evade the statutory scheme for resolving foreclosure actions by bench trial.

III. In the alternative, if Doyle's counterclaims are viewed as legal causes of action, the counterclaims are permissive, and Doyle has waived her right to jury trial.

If the Court were to disagree that Doyle's counterclaims are equitable in nature, she is still not entitled to a jury trial for counterclaims because they are permissive rather than compulsory. In the foreclosure context, there is a logical relationship between the counterclaim and the complaint only when the counterclaim bears upon enforceability of the loan documents. *Advance Intern., Inc. v. N.C. Nat'l Bank of S.C.*, 316 S.C. 266, 269-70, 499 S.E.2d 580, 582 (Ct. App. 1994), *aff'd in part, vacated in part on other ground,* 320 S.C. 532, 466 S.E.2d 367 (1996).

Here, none of Doyle's counterclaims challenge the enforceability of the loan documents. Even though the counterclaims are based on the alleged mis-application of payments that issue only goes to the question of whether Doyle defaulted on the loan. Doyle has not expressly pled that the loan would not have been in default but for the mis-application of her payments.

Therefore, Doyle's counterclaims are permissive and she waived the right to a jury trial by asserting permissive causes of action in this equitable foreclosure proceeding. *See N.C. Federal Savings and Loan Ass'n v. DAV Corp.*, 298 S.C. 514, 516, 381 S.E.2d 903, 904 (1989); *Johnson v. S.C. Nat'l Bank*, 292 S.C. 51, 54, 354 S.E.2d 895, 897 (1987) (summarizing analysis for determining the trial of legal and equitable issues in complaints and counterclaims and holding "[i]f the complaint is equitable and the counterclaims is legal and permissive, the defendant waives her right to a jury trial.").

CONCLUSION

WHEREFORE, Plaintiff Nationstar Mortgage LLC respectfully requests that the court grant this motion and issue an order of reference to the master-in-equity for non-jury adjudication of Nationstar's foreclosure and Doyle's counterclaims.

Dated: 8th day of June, 2020.

Respectfully submitted,

NATIONSTAR MORTGAGE LLC
By Counsel

/s/ Amanda K. Cutler
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **PLAINTIFF'S MOTION FOR NON-JURY ADJUDICATION OF ACTION AND FOR ORDER OF REFERENCE** has been served this day upon the parties to this action via electronic filing or by United States Mail, addressed to the following:

Marcus W. Meetze
PO Box 81118
Simpsonville, SC 29680
Attorney for Defendants Louise Doyle & June McGahee
Served via ECF

Dorothy M. Rabon
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This the 8th day of June, 2020.

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April 15, 2021

VIA FEDEX OVERNIGHT DELIVERY
TRACKING NO. 7860 1063 5533

The Honorable V. Claire Allen
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: *Nationstar Mortgage LLC, Appellant v. Louise M. Doyle, June McGahee, Bank of America, N.A. and Dorothy Rabon, Respondents*
Appellate Case No. 2021-000333

Dear Ms. Kitchings:

Enclosed for filing is the memorandum addressing the issue of appealability as requested in your correspondence dated April 7, 2021

Additionally, a duplicate copy of the Memorandum is enclosed which we would ask that you file-stamp and return to us in the enclosed self-addressed stamped envelope.

Thank you for your kind assistance in this matter. Please do not hesitate to contact us if you have any questions.

Sincerely,

Amanda K. Cutler

/akc
Enclosures

Cc: Marcus W. Meetze, Esq.
Reginald Corley, Esq.
William Stork, Esq.
Dorothy Rabon
Bank of America, N.A.