

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LANCASTER COUNTY
In The Circuit Court

Brian Gibbons, Circuit Court Judge
William C. Tindal, Special Referee

Appellate Case No. 2018-001823

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AUG 20 2021

S.C. SUPREME COURT

First Citizens Bank & Trust Company,

Respondent,

v.

Linda P. Faulkner a/k/a Linda Faulkner,
Founders Federal Credit Union, and
CACH, LLC,
of whom Linda P. Faulkner is the

Appellant.

PETITION FOR WRIT OF *CERTIORARI*

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Pursuant to Rules 242, S.C.A.C.R, the Petitioner prays for the issuance of a writ of *certiorari* to review the final decision of the Court of Appeals in this matter.

This Petition is based upon those certain points, factual and legal, which the Petitioner believes the Court of Appeals to have overlooked or misapprehended, as set out herein.

This Petition does not attempt to discuss each point raised on appeal, or addressed by the Court of Appeals in its decision. To the extent allowed, the Petitioner restates and by this reference reargues all matter set out in her Brief and referenced in the Record on Appeal.

CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on July 20, 2021.

QUESTIONS PRESENTED FOR REVIEW

- I. DO THE DEFENSES OF EXPRESS AND IMPLIED WAIVER ALLOW A DETERMINATION BY A JURY?
- II. DOES A CLAIM OF RECOUPMENT UNDER THE TRUTH IN LENDING ACT ALLOW A DETERMINATION BY A JURY?

STATEMENT OF THE CASE

Linda Faulkner was allowed to make a mortgage, originally in the amount of \$235,000.00 on her home. Her payments continued past the date of the balloon payment and into at least 2015. In 2014, the Respondent First Citizens made its first attempt at foreclosure in an action in Lancaster County.¹ The Appellant's response, as in this action, was to plead waiver of the right to foreclosure based upon the Bank's retention of the late payments.² She also requested a jury trial in that action. That action was dismissed by the Bank without prejudice.

This foreclosure action was filed by the Respondent Bank on August 9, 2017. On

¹ *First Citizens and Trust Company, Inc. v. Linda P. Faulkner*, C.A. 2014-CP-29-00954

² At original argument before the Circuit Court and by Motion before the Court of Appeals, Faulkner attempted to introduce the pleadings in the earlier case. Permission was refused by both Courts.

January 2, 2018, Faulkner her Answer and Counterclaim, claiming express and implied waiver by reason of the accepted payments, Truth in Lending violations, violations of the Fair Debt Collections Act, and breach of good faith. She again requested a jury trial.

Without notice to Faulkner, a Motion to Strike Jury Demand and an Order granting that Motion were filed January 31, 2018. Without notice to Faulkner, a Motion to refer the case to a Special Referee and an Order granting that Motion were filed February 2, 2018.

On February 20, 2018, Faulkner served her Rule 59 Motion to set aside the Orders striking the jury request and referring the case to a Special Referee. The Circuit Court issued its Order filed October 2, 2018 denying that relief. This appeal followed.

I. DO THE DEFENSES OF EXPRESS AND IMPLIED WAIVER ALLOW A DETERMINATION BY A JURY?

The Court of Appeals concluded that Faulkner's claims of express and implied waiver were not compulsory legal counterclaims that would have entitled her to a jury trial. [ORDER filed May 12, 2021, p.2, 1st Para.1]

Even if those claims are characterized as defenses instead of counterclaims, they are for a jury's determination and cannot be referred. In *Jones v. Barco, Inc.*, 159 S.E.2d 279, 250 S.C. 522 (1968), this Court, in discussing the effect of the former Code Section 10-1402, affirmed a party's right to a jury trial on legal issues in an equitable action.

In addition, the defense of waiver is compulsory. Rule 8(c), S.C.R.C.P states, in relevant part:

(c) Affirmative Defenses; Reply. In pleading to a preceding pleading, a party shall set forth affirmatively the defenses: . . . waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court shall treat the pleading as if there had been a proper designation.

[*Id.*, *emphasis added.*]

The Order of May 12th also concludes that such claims of waiver are equitable rather than legal. [ORDER filed May 12, 2021, p.2, 1st Para.1] This conclusion is contrary to precedent. The commentators of AMERICAN JURISPRUDENCE 2D state:

Ordinarily, the question of waiver is one of fact for the a jury. That is to say, where the evidence concerning waiver, or an element or requisite thereof, is conflicting or disputed, or where more than one reasonable inference may be drawn from the evidence, the question of waiver is one for the trier of facts. . . . So too, the sufficiency of the evidence relating to waiver is ordinarily for the jury.

[28 AM.JUR.2D *Estoppel and Waiver* § 174 (1994); *footnotes omitted.*]

If Faulkner's claims are considered as an estoppel, the conclusion is the same. Again, the commentators of AMERICAN JURISPRUDENCE 2D state:

Generally speaking, the existence of an estoppel in pais is a mixed question of law and fact. Where the trial is one by jury and the evidence is susceptible of different reasonable inferences, it is the duty of the court to charge and define the law applicable to estoppel, but it is the province of the jury to say whether the facts of the particular case constitute estoppel as defined by the Court. It is a firmly settled principle that the question of the existence of an estoppel is a question to be settled by the triers of facts – that is, the jury in the event of a jury trial, or the trial court in the event the proceedings involve trial without a jury – where there is a dispute as to the facts involving estoppel.

[28 AM.JUR.2D *Estoppel and Waiver* § 174 (1994); *footnotes omitted*, citing *Southern Ry. Co. v. Day*, 140 S.C. 388, 138 S.E. 870 (1926).]

II. DOES A CLAIM OF RECOUPMENT UNDER THE TRUTH IN LENDING ACT ALLOW A DETERMINATION BY A JURY?

The Order of May 12th, 2021 further concludes as follows:

Because the truth in lending violations allegedly occurred in 2008, they could not be the basis for any affirmative relief; rather, Faulkner could assert them only if she alleged an "equitable defense of recoupment." *See* 15 U.S.C.A. § 1640(e) (Supp. 2020) (stating "an action alleging a violation of federal truth in lending laws "may be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the

violation . . . "); *id.* (allowing assertion of a "violation of this subchapter in an action to collect [a] debt which was brought more than one year from the date of the occurrence of the violation as a matter of defense by recoupment or set-off in such action, except as otherwise provided by State law"); *Toluka [sic, for Tuloka] Affiliates, Inc. v. Moore*, 275 S.C. 199, 202, 268 S.E.2d 293, 295 (1980) (stating section 1640(e) "may not be used to defeat the equitable defense of recoupment" but "may be interposed to bar an affirmative counterclaim or set-off").

[ORDER filed May 12, 2021, p.3, 2nd Para.]

The Court accurately recites that Faulkner's claim, made after the basic Truth in Lending statute of limitation, is one of recoupment.

In *Curtis v. Loether*, 415 U.S. 189, 94 S.Ct. 1005, 39 L.Ed.2d 260 (1974), the United States Supreme Court was faced with the right to a jury trial in a matter of discrimination in housing under a Federal Statute. That Court held:

As the Court of Appeals [in the case below] observed, however, we have considered the applicability of the constitutional right to jury trial in actions enforcing statutory rights 'as a matter too obvious to be doubted.' 467 F.2d, at 1114. Although the Court has apparently never discussed the issue at any length, we have often found the Seventh Amendment applicable to causes of action based on statutes. *See, e.g., Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 477, 82 S.Ct. 894, 899, 8 L.Ed.2d 44 (1962) (trademark laws); *Hepner v. United States*, 213 U.S. 103, 115, 29 S.Ct. 474, 479, 53 L.Ed. 720 (1909) (immigration laws); *cf. Fleitmann v. Welsbach Street Lighting Co.*, 240 U.S. 27, 36 S.Ct. 233, 60 L.Ed. 505 (1916) (antitrust laws), and the discussion of *Fleitmann* in *Ross v. Bernhard*, 396 U.S. 531, 535 536, 90 S.Ct. 733, 736-737, 24 L.Ed.2d 729 (1970). Whatever doubt may have existed should now be dispelled. The Seventh Amendment does apply to actions enforcing statutory rights, and requires a jury trial upon demand, if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law. [*Id.*, 415 U.S. 194, 94 S.Ct. 1005, 39 L.Ed.2d 260 (1974); *footnotes omitted; matter in brackets added for clarity.*]

The Appellant contends the holding of *Curtis* is clear: a claim under a Federal statute,

such as the Truth in Lending Act, for damages entitles the claimant to the right to a jury trial on the issue of damages.

In application of this right, in *Mosley v. National Finance Co., Inc.*, 440 F.Supp. 621 (M.D. N.C. 1977), that Federal Court found that a determination of damages under the Truth in Lending Act could be submitted to a jury, and thus allowed the party's jury request.

Further, in *Barber v. Kimbrell's Inc.*, 577 F.2d 216 (4th Cir. 1978), *cert. denied*, 439 U.S. 934, 99 S.Ct. 329, 58 L.Ed.2d 330 (1978), the U.S. Court of Appeals for the Fourth Circuit upheld the Defendant's demand for a jury trial in a class action Truth in Lending Act suit.

In *Gnossos Music v. Mitken, Inc.*, 653 F.2d 117, 211 U.S.P.Q. 841 (4th Cir. 1981), the Fourth Circuit concluded that the reasoning of the United States Supreme Court in *Curtis* and of its earlier decision in *Barber* required the allowance of a jury trial in a claim under the Truth in Lending Act.

The Appellant is entitled to a determination of her damages under the Truth in Lending Act by a jury. The status of her claim as recoupment has no effect upon that right.

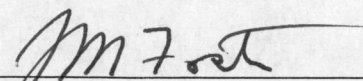
ARGUMENT: OTHER GROUNDS

As recited above and to the extent allowed, the Petitioner also restates and reargues by this reference all matter set out in her Brief and Petition for Rehearing.

CONCLUSION

For all the reasons set out and referenced above, the Petitioner prays that this Court shall issue its writ of *certiorari* to review the final decision of the Court of Appeals, and for any other relief to which she may be entitled in law or equity.

Respectfully submitted,



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August 18, 2021

Rock Hill, South Carolina