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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LANCASTER COUNTY
In the Court of Common Pleas

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

Appellate Case No. 2021-000895

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 .....Petitioner.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF QUESTION PRESENTED

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

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

STATEMENT OF THE CASE

Respondent, First Citizens Bank & Trust Company ("FCB") filed a summons and complaint on August 9, 2017, seeking to foreclose on two separate mortgages given by Appellant Linda P. Faulkner ("Faulkner") to First Citizens Bank and Trust Company, Inc., to which FCB is a successor in interest. (R. 16-52). The first mortgage was executed in 2005, and the second mortgage was executed in 2008. (R. 37; R. 51)

Faulkner filed an "Answer and Counterclaim Jury Trial Demanded" on December 29, 2017.[1] (R. 53-61). As defenses to the complaint, Faulkner alleged FCB expressly waived any claim of default under "said mortgage;"[2] FCB's actions created an implied waiver of any claim of default under "said mortgage"; FCB violated the Truth in Lending Act, 15 U.S.C. § 1601 *et al*., and Federal Reserve Board Regulation Z, 12 C.F.R. § 226, and FCB is liable to Faulkner for damages from this violation; third parties hired by FCB violated the Unfair Debt Collection Act, 15 U.S.C. § 1692 *et al*.; and FCB breached a duty of good faith to Faulkner. (R. 53-61). Faulkner did not allege in her Answer that FCB was equitably estopped from foreclosing because it had previously filed foreclosure actions against Faulkner.

FCB filed a Reply to Counterclaim, denying every defense not expressly admitted, arguing the statute of limitations precludes Faulkner from asserting a counterclaim under the Truth in Lending Act; asserting FCB does not meet the definition of debt collector in the Unfair Debt Collections Act and has no knowledge of the actions of any alleged third parties; denying any breach of a covenant of good faith and fair dealing; and claiming Faulkner failed to state facts to

[1] As to the other defendants, Founders Federal Credit Union filed an Answer on August 22, 2017, admitting it is the holder of an unpaid judgment and asking the Court for notice of proceedings going forward. CACH, LLC filed no Answer in the case and on January 29, 2018, J. Kershaw Spong, attorney for FCB, filed an Affidavit of Default with respect to CACH, LLC.

[2] It is unclear from the document which mortgage Faulkner is referring to.

support any cause of action and asking the Court to dismiss Faulkner's claims pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure. (R. 62-64)

On January 29, 2018, FCB moved for the case to be referred to a Special Referee. (R. 71). At that time, Appellant's attorney John Martin Foster was served notice of the Motion for Order of Reference. (R. 74). On January 31, 2018, FCB moved to strike Faulkner's jury demand (R. 67-68) and, again, at that time, Appellant's attorney John Martin Foster was served notice of the Motion to Strike the Jury Demand. (R. 69). The Court granted both motions. (R. 1; R. 2-3). On January 31, 2018, the Circuit Court ordered that Faulkner's Jury Demand was stricken. (R. 1). On February 2, 2010, the clerk of court referred the matter to William C. Tindal as Special Referee. (R. 2-3). No hearing was held on either of FCB's motions.

On February 22, 2018, Faulkner moved to alter or amend both the Order of Reference and the Order Striking Jury Demand.[3] (R. 78-79). Faulkner alleged she had raised defenses which entitled her to a jury trial; because she was entitled to a jury trial, the foreclosure suit should not have been referred to a special referee; and the motions by FCB were decided without notice to her and without opportunity to be heard. (R. 78-79). On September 25, 2018, the circuit court held a hearing on the motion to alter or amend (R. 91-99)—which was attended and argued by both counsel for Faulkner and FCB—and on October 2, 2018, the circuit court filed an order denying Faulkner's motion to alter to amend its two orders, (R. 5-10).

Faulkner filed a Notice of Appeal with the court of appeals on October 11, 2018, appealing the circuit court's orders striking Faulkner's jury demand and referring the matter to the special referee. In her brief before the court of appeals, Faulkner alleged: (1) she was not timely served

[3] Faulkner actually filed a "Motion to Alter or Amend Judgment Pursuant to: Rule 59(a), S.C.R.P." However, all parties and the court treated such motion as one made under Rule 59(e) of the South Carolina Rules of Civil Procedure.

with FCB's motions to strike the jury demand or to refer the case to the special referee and (2) the defenses of waiver, equitable estoppel, and violation of the truth in lending act are in fact compulsory counterclaims and, thus, entitled to a jury trial. Faulkner's allegations were misleading because (a) Faulkner's allegations of waiver, equitable estoppel, and violation of the Truth in Lending Act are, in fact, defenses, and thus are not entitled to a jury trial; (b) Faulkner never raised the issue of equitable estoppel before the circuit court; and (c) Faulkner was properly served and the circuit court properly ruled on both FCB's motion to strike Faulkner's jury demand and FCB's motion to refer the case to a special referee.

The court of appeals denied Faulkner's appeal in an unpublished decision and without oral argument. *First Citizens Bank & Trust Co. v. Faulker*, Op. No. 2021-UP-162 (S.C. Ct. App. Filed May 12, 2021); App. 10-13. The court of appeals correctly determined "Faulkner's claims of express and implied waivers were not compulsory legal counterclaims that would have entitled her to a jury trial." *First Citizens Bank & Trust Co.* at 2; App. 11. They were defenses, not counterclaims, because the only relief Faulkner requested was dismissal of FCB's foreclosure action. *First Citizens Bank & Trust Co.* at 3; App. 12. Regarding Faulkner's request for actual and statutory damages for the alleged truth in lending violations, the court of appeals determined Faulkner's allegation could be asserted only as an equitable defense because it was alleged more than a year after the date of occurrence of the alleged violation. *Id.* Therefore, the court of appeals affirmed the circuit court's order striking Faulkner's jury trial demand and the order of reference to the special referee. *Id.*

Faulkner filed petition for rehearing, which the court of appeals denied. (App. 1). Faulkner then filed the petition to this Court to grant a writ of certiorari.

STANDARD OF REVIEW

"A mortgage foreclosure is an action in equity." *Wachovia Bank, Nat'l Ass'n v. Blackburn*, 407 S.C. 321, 328, 755 S.E.2d 437, 440-41 (2014) (quoting *Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 248, 489 S.E.2d 472, 475 (1997)). "In an appeal from an action in equity tried by a judge, appellate courts may find facts in accordance with their own views of the preponderance of the evidence." *Id.* (citing *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775–76 (1976)). "However, '[w]hether a party is entitled to a jury trial is a question of law.'" *Id.* (quoting *Verenes v. Alvanos*, 387 S.C. 11, 15, 690 S.E.2d 771, 772 (2010)). "Appellate courts may decide questions of law with no particular deference to the circuit court's findings." *Id.* (citing 387 S.C. at 15, 690 S.E.2d at 772-73).

ARGUMENT

I. Do the defenses of express and implied waiver allow a determination by a jury?

Faulkner, theoretically, argues she is entitled to a jury trial because her counterclaim of waiver is legal, rather than equitable, in nature. Using the framework from *Wachovia*, she would be entitled to a jury trial if she argued a compulsory legal counterclaim applied.[4] *See Wachovia*, 407 S.C. at 328, 755 S.E.2d at 440) ("A mortgage foreclosure is an action in equity."); *Wachovia*, 407 S.C. at 329, 755 S.E.2d at 441 ("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 unless a valid jury trial waiver exists . . . ."). However, Faulkner did not argue a counterclaim applied. She raised defenses, not counterclaims.

In comparing Rules 8 and 13 of the South Carolina Rules of Civil Procedure, the difference between defenses and claims or counterclaims becomes clear. A claim or counterclaim is active

[4] Faulkner argues waiver is a compulsory counterclaim because Rule 8(c), SCRCP, provides waiver is an affirmative defense.

and includes "a prayer or demand for judgment for the relief to which he deems himself entitled." In defining compulsory counterclaims, Rule 13(a), SCRCP, states "A pleading shall state as a counterclaim *any claim* . . . ." (emphasis added). Unlike a counterclaim which adds a new claim to proceedings, a defense exists to state why something is or is not true. *See* Rule 8(b), SCRCP ("A party shall state in short and plain terms the facts constituting his defenses to each cause of action asserted and shall admit or deny the averments upon which the adverse party relies.").

Faulkner did not make a new claim regarding waiver. She merely stated FCB would not be successful against her because FCB's actions were express and implied waivers of their right to foreclose. (R. 54-55). Her prayer for relief was for the circuit court to "Dismiss the action brought by [FCB] herein by reason of its waiver or implied waiver of the grounds for collection and foreclosure." (R. 59). Faulkner's defenses of express and implied waiver are arguments as to why Faulkner believes FCB cannot be successful in its suit against her, not counterclaims asserting any basis on which Faulkner is entitled to relief against FCB. *See First South Bank v. Rosenberg*, 418 S.C. 170, 183-84, 790 S.E.2d 919, 926-27 (Ct. App. 2016) (comparing defenses to counterclaims and determining negligence and breach of contract were both counterclaims). She does not assert claims, just reasons why she can defend herself against FCB's claim to foreclose.

Further, Faulkner, in her petition to this Court, does not even argue the waivers are counterclaims. Instead, she argues if they are defenses, they are legal matters for a jury to determine. (Pet. 4). Faulkner argues Rule 8(c), SCRCP, states waiver is an affirmative defense that must be plead. *Id.* However, the fact waiver is an affirmative defense does not mean the party pleading waiver is automatically entitled to a jury trial, nor that waiver is a counterclaim. Returning to *Wachovia*, a party may be entitled to a jury trial in an otherwise equitable case, such

as a foreclosure, if the party asserts a legal counterclaim; however, Faulkner does not assert a counterclaim.[5]

II. Does a claim of recoupment under the Truth in Lending Act allow a determination by a jury?

Under the Truth in Lending Act, a claim for violation of the Act may only be brought "within one year from the date of the occurrence of the violation." 15 U.S.C. § 1640(e). Faulkner claims FCB's violation of the Truth in Lending Act occurred in March 2008, eleven (11) years ago. (R. 56). So, Faulkner cannot assert a counterclaim for a violation of the Truth in Lending Act (the "Act"). However, in a foreclosure action, "a consumer may assert a violation by a creditor" of certain parts of the Act, "as a matter of defense by recoupment or setoff without regard for the time limit on a private action for damages under subsection (e)." 15 U.S.C. § 1640(k)(1). The statute allowing Faulkner to assert a violation of the Truth in Lending Act, section 1640(k)(1), defines the assertion as a defense, not a counterclaim. Further, in *Tuloka Affiliates, Inc. v. Moore*, 275 S.C. 199, 202, 268 S.E.2d 293, 295 (1980), the Supreme Court of South Carolina found—prior to the enactment of section 1640(k)(1)—a "defense and counterclaim" under the Act in response to a foreclosure action after the one-year statute of limitations had expired was an equitable defense, not a counterclaim. Thus, it is clear Faulkner's Truth in Lending Act allegations are a defense, equitable in nature, and therefore, no jury trial is appropriate.

[5] Faulkner also argues she should be entitled to a jury trial if her "claims are considered as an estoppel." (Pet. 5). Faulkner raised the defense of equitable estoppel for the first time on appeal to the court of appeals. A party "must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments." *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). Preservation rules are "meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments." *Id.* The circuit court had no opportunity to consider the facts, law, or arguments regarding equitable estoppel. Faulkner did not raise the issue of equitable estoppel in her Answer. Faulkner did not raise the issue of equitable estoppel in her motion for reconsideration. Faulkner did not raise the issue of equitable estoppel in the hearing before the circuit court. As this issue was never raised before the circuit court, it cannot now be presented on appeal.

Faulkner fails to notice the cases she cites as support she is entitled to a jury trial for FCB's alleged violation of the Truth in Lending Act are distinguishable. First, *Mosley v. National Finance Co., Inc.*, 440 F.Supp.621 (M.D.N.C. 1977) does not state whether the lawsuit was brought within one year of the violation. In *Barber v. Kimbrell's, Inc.*, 577 F.2d 216, 218 (4th Cir. 1978), the plaintiff filed the Truth in Lending Action within ten months of entering into a contract with the defendant, meaning the violation had to occur less than one year prior to the lawsuit being filed. Finally, Faulkner cites *Gnossos Music v. Mitken, Inc.*, 653 F.2d 117 (4th Cir. 1981) and concludes the Fourth Circuit "required the allowance of a jury trial in a claim under the Truth in Lending Act." (Pet. 7). *Gnossos Music* is a case regarding a jury trial for violation of the 1976 Copyright Act. *Gnossos Music*, 653 F.2d at 118. The Truth in Lending Act is mentioned two times in *Gnossos Music*, both of which are references to the analysis in *Barber*. *See Gnossos Music*, 653 F.2d at 119 ("The language of the Truth in Lending statute interpreted in Barber . . .); *Gnossos Music*, 653 F.2d at 120 ("Congress has given the fact-finder discretion in assessing damages in a number of statutes, including the Truth in Lending Act, *Barber, supra* . . . ." (citing *Barber*, 566. F.2d 117)).

Finally, even if this Court were to view Faulkner's Truth in Lending Act defense as a counterclaim and not a defense, Faulkner would not be entitled to a jury trial on such a claim because it would be a legal, permissive counterclaim. If a "complaint is equitable and the counterclaim is legal and permissive, the defendant waives his right to a jury trial." *Wachovia*, 407 S.C. at 329-30, 755 S.E.2d at 441-42. Permissive counterclaims are those which do not arise "out of the same transaction or occurrence that is the subject matter of the opposing party's claim." Rule 13(b), SCRCP. The loan documents at issue in the underlying foreclosure action were originated in May 2005 and March 2008, as modified by subsequent promissory notes. (R. 16-52). Faulkner claims, in her Answer, the Truth in Lending Act violation came in 2008. (R. 57-

58). Thus, any counterclaim related to a loan that occurred in March 2008 is from separate transaction or occurrence, a permissive counterclaim, and not entitled to a jury trial.

Conclusion

Faulkner raises two issues. Without citing authority allowing her to, she "also restates and reargues by this reference all matter[s] set out in her Brief and Petition for Rehearing." (Pet. 7). In the event Petitioner is allowed to do so, FCB also restates and reargues all prior filings with the courts. However, FCB sincerely doubts such a statement is an effective or allowable way to present an argument to this Court. This Court should deny Faulkner's petition for a writ of certiorari as Faulkner asserted merely defenses and is not entitled to a jury trial for those defenses.

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