RECEIVED
Nov 05 2021
S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appellate (Court of Appeals) Case No. 2018-000436

Deutsche Bank National Trust Company, as Trustee for NovaStar Mortgage Funding Trust, Series 2007-1 NovaStar Equity Loan Asset Backed Certificates, Series 2007-1,……………………………………………………………………………...Respondent,

v.

The Estate of Patricia Ann Owens Houck; Tammy M. Bailey; South Carolina Department of Motor Vehicles, Defendants,

Of whom the Estate of Patricia Ann Owens Houck and Tammy M. Bailey are the...Petitioners.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

Andrew S. Radeker
S.C. Bar No. 73743
Sarah M. Larabee
S.C. Bar No. 105298
Harrison, Radeker & Smith, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
drew@harrisonfirm.com
sarah@harrisonfirm.com
Attorneys for Petitioners

INTRODUCTION

This petition asks this Court to issue a writ of certiorari to review the Court of Appeals' published opinion in Deutsche Bank National Trust Company v. Estate of Houck, Op. No. 5844 (S.C. Ct. App. filed August 11, 2021) (Shearouse Adv. Sh. No. 27 at 86). The Court of Appeals' opinion contravenes this Court's precedent – and logical, common-sense principles – concerning res judicata and compulsory counterclaims. In its opinion, the Court of Appeals has carved out, for a special class of mostly moneyed litigants, a special, unwarranted exception to generally applicable law – an exception that contravenes both the Rules of Civil Procedure and settled principles this Court has already firmly established. If this Court does not grant certiorari and reverse, the Court of Appeals' opinion in this case will have made an unfair double standard part of the law of this state.

CERTIFICATE OF COUNSEL

The Court of Appeals issued its opinion in this case on August 11, 2021. Counsel for the Petitioners certifies that the petition for rehearing was served and filed on August 26, 2021. The petition for rehearing was finally ruled on by the Court of Appeals by an order filed on October 6, 2021. This petition for a writ of certiorari is timely served and filed.

QUESTIONS PRESENTED

1) Did the Court of Appeals err in reversing the grant of summary judgment to Petitioners on Respondent's foreclosure claim?

2) Did the Court of Appeals err in failing to reverse the master-in-equity's decision to create a mechanism for Respondent to avoid liability under S.C. Code Ann. § 29-3-320, even though the master found all elements mandating such liability had been proven as a matter of law?

STATEMENT OF THE CASE

This case was brought before Court of Appeals as a cross-appeal from an order by the Honorable James O. Spence that:

1) Granted the Petitioners (hereinafter "Bailey and Owens") summary judgment against the Respondent (hereinafter "Deutsche Bank") on Deutsche Bank's mortgage foreclosure claim (and its reformation claim); and,
2) While deciding that the elements were all met of mandatory liability on Bailey and Owers' counterclaim under S.C. Code Ann. § 29-3-310 and -320 for failure to record a mortgage satisfaction document, allowed Deutsche Bank to escape financial consequences for that liability if it recorded a satisfaction within a certain time frame.

Deutsche Bank filed this lawsuit on October 19, 2016, against Bailey and Owens, seeking foreclosure of a mortgage and seeking reformation of that mortgage. (R. pp. 76-98.) Bailey and Owens answered and counterclaimed. (R. pp. 99-115.) Bailey and Owens asserted the defenses of res judicata, collateral estoppel, laches, unclean hands, waiver, and setoff or credit. (R. pp. 107-09.) Bailey and Owens also asserted counterclaims for a declaratory judgment that Deutsche Bank holds no mortgage on the subject property or, in the alternative, that the mortgage is

unenforceable, for liability under S.C. Code Ann. § 29-3-320 for failure to record satisfaction of the mortgage after due request, and for violation of S.C. Code Ann. § 37-10-102 (usually referred to as the attorney preference statute.) (R. pp. 109-10.) The case was referred to the Honorable James O. Spence, as Master-in-Equity for Lexington County. (R. pp. 51-52.)

Deutsche Bank moved for summary judgment in its favor as to each of Bailey and Owens' counterclaims. (R. pp. 165-69.) Bailey and Owens moved for 1) summary judgment in their favor as to Deutsche Bank's claim for foreclosure, 2) summary judgment in their favor as to their counterclaim seeking a declaratory judgment, and 3) summary judgment on liability in their favor as to their counterclaim under S.C. Code Ann. § 29-3-320 for failure to enter satisfaction of the mortgage. (R. pp. 124-25.)

The master denied Deutsche Bank's motion for summary judgment and granted Bailey and Owens' motion, ruling that, under the undisputed facts, Deutsche Bank's foreclosure claim was a compulsory counterclaim in the previously concluded case of Tammy M. Bailey, et al. v. Novastar Mortgage, Inc., et al., Case No. 2013-CP-32-02210, in which Deutsche Bank was a defendant, because, if Bailey and Owens had prevailed in that case, that could have resulted in a judgment that the note and mortgage were unenforceable under S.C. Code Ann. § 37-10-105(C). (R. pp. 23, 27.) The master ruled that the res judicata effect of the end of the Bailey v. Novastar case precluded the foreclosure claim and satisfied the mortgage by operation of law. (R. pp. 23, 27, 33-34, 36-37.) The master also granted summary judgment in Bailey and Owens' favor as to liability under S.C. Code Ann. § 29-3-320 for Deutsche Bank's failure to record a satisfaction document within three months of a duly made request for the same under

S.C. Code Ann. § 29-3-310. (R. pp. 36-37.) The master, however, provided Deutsche Bank a mechanism under which it could escape monetary liability under S.C. Code Ann. § 29-3-320 by recording a mortgage satisfaction document within a time frame set by the master. (R. pp. 36-37.) The allowance of that escape from liability was the subject of Bailey and Owens' appeal to the Court of Appeals.

The note and mortgage involved in this case were dated June 15, 1998, and were given by Owens, who was then the owner of the subject property, to NovaStar Mortgage, Inc. (R. pp. 80-81, 246-53.) The note document contained a balloon provision under which, even if all the monthly payments under the note were made timely and made in their required amounts, a substantial principal balance came due on July 1, 2013, the note's maturity date. (R. p. 246.) The mortgage was recorded on July 2, 1998, in the office of the Lexington County Register of Deeds, and assignments were recorded noting the transfer of the note and mortgage to Deutsche Bank. (R. p. 81.)

Bailey is Owens' daughter and the grantee of a deed of the subject property from her mother through a deed executed and recorded after the subject mortgage. (R. p. 3.)

The note matured on July 1, 2013, and, as Bailey and Owens admitted, Deutsche Bank's complaint alleged that "[t]he installments of principal and interest falling due from and after July 1, 2013 have not been paid although demand for payment thereof has been made." (R. pp. 4, 82.) Deutsche Bank admitted the allegations of Bailey and Owens' counterclaim for liability under S.C. Code Ann. § 29-3-320 for failure to record a satisfaction of the mortgage after request, except Deutsche Bank denied that the mortgage had been satisfied.

The parties agreed, and public records show, that the Bailey v. Novastar action occurred, that Deutsche Bank was a defendant in that case, and that the case was tried to a final judgment in favor of Deutsche Bank and the other defendants in that case. (R. p. 6, p. 185 ln. 9-23, pp. 370-525.)

The Bailey v. Novastar case was filed on June 27, 2013. (R. pp. 377-96.) In that case, Bailey and Owens asserted various claims against Deutsche Bank, most of which arose from the execution of the subject note and mortgage and the circumstances surrounding that. (R. pp. 7, 380-96.) Among the claims asserted in Bailey v. Novastar was a claim that sounded under S.C. Code Ann. § 37-10-105(C) against NovaStar and Deutsche Bank (as NovaStar's assignee) for violation of S.C. Code Ann. § 37-10-102 (commonly referred to as the attorney preference statute, under which a mortgage lender is required to ascertain a borrower's preference as to the legal counsel she desires to represent her in the mortgage loan closing) coupled with unconscionable loan terms or inducement of the mortgage loan by unconscionable conduct. (R. pp. 380-84.) Bailey and Owens' contention concerning the claims was that NovaStar did not ascertain Owens' preference as to legal counsel and allowed the loan to be closed without attorney supervision, and, as a result, that the balloon aspect of the note was kept hidden from Owens when she signed the signature page of the note document. (R. pp. 381-84.)

Among the relief provided for in S.C. Code Ann. § 37-10-105(C) is for a court to "refuse to enforce the agreement, or a term, or part of the agreement or transaction that the court determines to have been unconscionable at the time it was made." S.C. Code Ann. § 37-10-105(C). The prayer in the Bailey v. Novastar complaint stated that

Bailey and Owens sought, *inter alia*, "all relief available under S.C. Code Ann. § 37-10-105(C)[.]" (R. p. 387.)

Deutsche Bank served its answer in the Bailey v. Novastar case on September 26, 2013. (R. pp. 6, 397-406.) In a filing made in Bailey v. Novastar, Deutsche Bank stated that Bailey and Owens' claims in that case "ar[ose] out of a purported mortgage refinancing loan transaction involving a balloon note in 1998 by Plaintiff Owens" and "relate solely to [that] closing[.]" (R. pp. 409, 411, 418.) At no time did Deutsche Bank assert a counterclaim for foreclosure in the Bailey v. Novastar action, despite the fact that the subject note had matured at the time Deutsche Bank served its answer. (R. pp. 8, 246, 397-406.)

Bailey v. Novastar was tried to a jury and resulted in a verdict for Deutsche Bank and the other defendants on September 15, 2015. (R. pp. 370-71.) Bailey and Owens' motion for a new trial in that case was denied by order filed June 24, 2016. (R. p. 374.) No appeal was taken in that case.

In the instant case that is subject of this appeal, the master analyzed the history and meaning of the law of res judicata in South Carolina in some depth, concluding that the failure of Deutsche Bank to raise its foreclosure claim in Bailey v. Novastar resulted in the final judgment in that case having res judicata effect on that claim. (R. pp. 27, 33-34.)

On cross-appeals, the Court of Appeals reversed the grant of summary judgment, ruling in Deutsche Bank's favor, and remanded the case. Bailey and Owens petitioned for rehearing or rehearing *en banc*, and that petition was denied.

This petition for certiorari followed.

ARGUMENT

The Court of Appeals' opinion departs from existing law and creates an anti-consumer, pro-financial institution double standard in the law of compulsory counterclaims and res judicata. The heart of the Court of Appeals' opinion is contained in the following excerpt:

> We acknowledge DAV Corp.; BADD, L.L.C.; and Salon Proz, LLC all held that a claim is compulsory in a foreclosure action when, if the allegation were true, it could affect the enforceability of the loan. However, this case differs from the foregoing cases because here the prior action was not a foreclosure action.

I. The opinion finds the foreclosure claim was permissive in the 2013 action for reasons that contradict existing precedent.

"Rules of procedure, like statutes, should be given their plain meaning." Beach Co. v. Twillman, Ltd., 351 S.C. 56, 61, 566 S.E.2d 863 (Ct. App. 2002). The language of Rule 13(a) mandates that "[a] pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim[.]" Rule 13(a)'s purpose is "to prevent multiplicity of actions and to achieve resolution in a single lawsuit of all disputes arising out of common matters." Beach Co., 351 S.C. at 62.

> The South Carolina Reporter's Note following Rule 13 states: "[c]ounterclaims arising out of the same transaction or occurrence that is the subject of the action are 'compulsory' under Rule 13(a) and are barred by res judicata or estoppel by judgment if not asserted."

Beach Co., 351 S.C. at 62.

The Court of Appeals' decision turns on the conclusion that Deutsche Bank's foreclosure claim was not a compulsory counterclaim required by Rule 13(a), SCRCP, to be raised in Bailey v. Novastar, an action that sought "all relief available under S.C. Code Ann. § 37-10-105(C)[.]" (R. p. 387.) That included the relief available in S.C. Code Ann. § 37-10-105(C)(1), (2), and (3), which expressly provided for the non-enforcement or modified enforcement of the note and mortgage – which neither Deutsche Bank nor the Court of Appeals disputes. The Court of Appeals stated, "the question is whether a counterclaim for foreclosure in the 2013 Action [i.e., Bailey v. Novastar] would have affected Mortgagor's claims under the Attorney Preference Statute and the SCUTPA."

The Court of Appeals got the answer to that question wrong.

Whether the claim in Bailey v. Novastar for violation of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, *et seq.*, would have been affected by Deutsche Bank raising and prevailing on its foreclosure claim is not the issue before this Court, nor was it before the Court of Appeals. A successful result on their unfair trade practices act claim would have gotten Bailey and Owens only damages under S.C. Code Ann. § 39-5-140, and there is no inherent inconsistency between such a result and a judgment in favor of Deutsche Bank on a mortgage foreclosure counterclaim in that action.

If Deutsche Bank had counterclaimed for foreclosure in the 2013 action and won on the counterclaim, that would have most certainly affected the enforceability of Bailey and Owens' claim in that action for attorney preference violation coupled with unconscionability. Deutsche Bank's success on the foreclosure claim, which sought

enforcement of the note and mortgage per their written terms, would have taken some available relief under the attorney preference claim off the table entirely. See S.C. Code Ann. § 37-10-105(C)(1-3). It would have been impossible in the 2013 action for a court both to enforce the note and mortgage as written (Deutsche Bank winning on the foreclosure claim) and award relief to Bailey and Owens under S.C. Code Ann. § 37-10-105(C)(1), (2), or (3), all of which provided for the non-enforcement or modified enforcement of the note and mortgage if Bailey and Owens had won on their claim. The court in Bailey v. Novastar could not have both adjudged the note and mortgage unenforceable – a victory for Bailey and Owens on their claim – and adjudged it enforceable – a victory for Deutsche Bank on its foreclosure claim.

The Court of Appeals' opinion does not square with an examination of the relief available under these two claims.

The Court of Appeals' opinion found that "the foreclosure claim did not arise out of the same transaction or occurrence that was the subject matter of the 2013 Action." Accordingly, the court found that the foreclosure counterclaim Deutsche Bank had and could have brought at the time it answered in the 2013 action was permissive, rather than compulsory.

The opinion decides that the 2013 action and the instant foreclosure action arose out of different occurrences, respectively, the execution of the loan documents and mortgage closing and default under the note. That decision, however, runs contrary to precedent.

The opinion contravenes Carolina First Bank v. BADD, L.L.C., itself a foreclosure action, in which this Court, citing the rule that a counterclaim is compulsory

if it has a "logical relationship" to the transaction or occurrence subject of the opposing party's claim, held that a counterclaim is compulsory in such a debt collection action if it arises out of the execution of the documents that form the basis of the plaintiff's claim. 414 S.C. 289, 295, 296, 778 S.E.2d 106, 109, 110 (2015). This Court in BADD emphasized that "the 'transaction or occurrence' for the purpose of determining the compulsory character of [the] counterclaim is the execution" of those documents. Id. at 296. Under that precedent, the transaction or occurrence giving rise to Deutsche Bank's foreclosure claim was (or at the very least included) the execution of the loan documents and mortgage closing – the very same transaction or occurrence the Court of Appeals determined gave rise to Bailey and Owens' claims in the 2013 action. See id. When BADD is applied to this case, Deutsche Bank's foreclosure claim can only be reckoned as having been a compulsory counterclaim in the 2013 action. See id.

The Court of Appeals' opinion also does not square with N.C. Fed. Sav. & Loan Ass'n v. DAV Corp., 298 S.C. 514, 518, 381 S.E.2d 903, 905 (1989), a foreclosure action with counterclaims, in which this Court adopted the "logical relationship" test for determining whether a counterclaim is compulsory. The Court held that most of DAV's counterclaims were compulsory because "there [was] a logical relationship between the enforceability of the note which [was] the subject of the foreclosure action and the validity of the purported oral agreement which, if performed, would have avoided default on the note[.]" Id. The Court made clear the reason for doing so: of the four tests considered by the Court for whether a counterclaim is compulsory, this Court settled on the "logical relationship test," which is "by far the most widely accepted because of its flexibility." Id.

In the DAV case, the plaintiff's claim was for foreclosure of a mortgage, and the Court's described of DAV's counterclaims as follows:

> 1) breach of a subsequent oral contract to arrange additional financing for interest payments and construction costs;
>
> 2) breach of the joint venture agreement as parent company of joint venturer NCF by bringing the foreclosure action;
>
> 3) breach of fiduciary duty to co-joint venturers;
>
> 4) wrongful dissolution of the joint venture by failing to voluntarily refrain from foreclosure as agreed;
>
> 5) violation of the Unfair Trade Practices Act by breaching the oral agreement;
>
> 6) breach of two subsequent oral contracts to purchase DAV's interest in the joint venture.

Id. at 517.

All but the sixth counterclaim on this list was compulsory. Id. at 518. The logical relationship that each of those counterclaims had to the plaintiff's foreclosure claim was that each counterclaim arose out of the parties' relationship that was the subject of the foreclosure claim, dealt with the manner in which the loan was administered, or both. Id.

When the precedent of DAV Corp. is applied, it also gives a positive result for whether Deutsche Bank's foreclosure claim was compulsory in the 2013 action under the logical relationship test, as the unconscionable attorney preference violation claim in the 2013 action had *more* to do with the foreclosure claim than the claim in DAV Corp. had to do with the compulsory counterclaims there. Id. at 517-19. They arose out of the same relationship and more closely so than the DAV Corp. claims, and, as

discussed above, they affect each other's enforceability at least as much, if not more than, the opposing claims in DAV Corp. did. Id. at 517-19.

Not only is the instant decision inconsistent with this Court's precedent, the Court of Appeals is also inconsistent with itself. It determined in S.C. Community Bank v. Salon Proz, LLC, 420 S.C. 89, 97, 800 S.E.2d 488, 492 (Ct. App. 2017), that a claim for violation of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, *et seq.*, was compulsory in a mortgage foreclosure action because it could affect the enforceability of the loan. There is *much* more mutual incompatibility of claims enforcement involved in this case between the 2013 action and Deutsche Bank's foreclosure claim than there was in Salon Proz, 420 S.C. at 97.

DAV Corp., BADD, and Salon Proz may be boiled down to this: there are at least two recognized ways a counterclaim may be compulsory. If a counterclaim arises out of the same set of facts as the plaintiff's claim, it is compulsory. BADD, 414 S.C. at 295, 296; DAV Corp., 298 S.C. at 518-19; Salon Proz, 420 S.C. at 97. If success on a counterclaim could affect the enforceability of the plaintiff's claim, it is compulsory. BADD, 414 S.C. at 295, 296; DAV Corp., 298 S.C. at 518-19; Salon Proz, 420 S.C. at 97. Here, the relationship between the attorney preference with unconscionability claim in the 2013 action and Deutsche Bank's foreclosure claim had both.

In addition, the Court of Appeals' opinion is unduly focused on whether declaring the note and mortgage unenforceable was specifically prayed for in the complaint in the 2013 action. Never once has any case analyzing whether a counterclaim was compulsory or permissive taken that into account. Nor is there any reason to take it into account. For one thing, the content of the prayer in a contested

case is usually unimportant to the relief available on a claim. "Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings." Rule 54(c), SCRCP.

For another, at the heart of this case is whether Deutsche Bank's foreclosure claim is barred by res judicata, which "bars a second suit where there is (1) identity of parties; (2) identity of subject matter; and (3) adjudication of the issue in the first suit." Judy v. Judy, 393 S.C. 160, 173, 712 S.E.2d 408, 412 (2011). Res judicata bars the parties to the first case "from raising any issues which were adjudicated in the former suit *and any issues which might have been raised in the former suit*" – even if they were not pled at all, much less specifically prayed for. Id. at 414 (emphasis added, quoting Plum Creek Dev. Co. v. City of Conway, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999)).

But, even if the specific content of the prayer in the 2013 action complaint were to matter to the analysis, Bailey and Owens specifically prayed for "all relief available under S.C. Code Ann. § 37-10-105(C)[.]" (R. p. 387.) That included the relief available under S.C. Code Ann. § 37-10-105(C)(1), (2), and (3), which provided for the non-enforcement or modified enforcement of the note and mortgage.

Not only has the opinion in this case contradicted precedent, it has turned a blind eye to what relief was actually sought in the 2013 action.

The court must have overlooked or misapprehended the law in reaching its conclusion in this case, and rehearing should be granted.

II. The Court of Appeals has effectively created a different compulsory/permissive analysis for foreclosure actions and other cases – essentially, a different law for banks.

The Court of Appeals' opinion states as follows:

> We acknowledge DAV Corp.; BADD, L.L.C.; and Salon Proz, LLC all held that a claim is compulsory in a foreclosure action when, if the allegation were true, it could affect the enforceability of the loan. However, this case differs from the foregoing cases because here the prior action was not a foreclosure action.

The 2013 action was, indeed, not a foreclosure action. But Deutsche Bank's claim at issue is a foreclosure claim. There is no special law of res judicata and compulsory/permissive distinction that applies to foreclosure claims and not other claims.

The compulsory counterclaim principle runs (as it must) with equal force in both directions, such that it applies equally to claims whether they are or could asserted by a plaintiff or a defendant. It is the *relationship* between the claims that informs whether they are compulsory or permissive with regard to one another. DAV Corp., 298 S.C. at 518-19. The compulsory/permissive analysis and is, as it has to be, the same when a plaintiff asserts Claim A and a defendant has Claim B as a counterclaim as it when a plaintiff asserts Claim B and a defendant has Claim A as a counterclaim. The conclusion of whether the counterclaim is compulsory or permissive has to be the same, because the *relationship* between the claims is the same – either they have a logical relationship to one another or they do not. Id. The claimants' roles as plaintiff and defendant do not change the analysis if those roles are switched. See id. The court's opinion errs in treating the analysis otherwise, indicating that the Court of Appeals must have overlooked or misapprehended the law in this regard.

This opinion has created a most inappropriate, illogical, and ill-conceived distinction, a compulsory/permissive analysis that is different for foreclosure actions than it is for other claims. Effectively, this creates the unsavory, unjust, and unfair result of a different law for banks. Our system depends upon the law being the same for everyone, and the opinion in this case chips away at this bedrock principle. This is wrong and should be undone.

III. The Court of Appeals should have reversed the denial of monetary relief under S.C. Code Ann. § 29-3-320.

Monetary relief under S.C. Code Ann. § 29-3-320 in mandatory when the statute has been violated; thus, the master denied Bailey and Owens relief to which they were entitled under that statute. This Court should grant certiorari, reverse the Court of Appeals, reverse the master on this one point alone and reinstate his thorough and reasoned order in all other respects.

CONCLUSION

Certiorari is more than just proper in this case. Certiorari is needed here. As it stands under the Court of Appeals' opinion, the law of this state about res judicata and compulsory counterclaims is inconsistent with itself – which is bad enough – but also now contains a pro-bank, anti-consumer special rule. That rule is this: If a consumer is sued for foreclosure and has a counterclaim that could render the note and mortgage unenforceable, that is a counterclaim Rule 13(a) requires him to raise or lose forever. If the roles are simply reversed, however, and the consumer sues the bank on his claim first, the bank has the option at its pleasure to bring foreclosure as a counterclaim or not, without consequences if it does not – even though the relationship between the claims is exactly the same.

WHEREFORE, Bailey and Owens pray for this Court to issue a writ of certiorari to review the Court of Appeals' opinion and decision in this case.

/s/ Andrew S. Radeker
Andrew S. Radeker
S.C. Bar No. 73743
Sarah M. Larabee
S.C. Bar No. 105298
Harrison, Radeker & Smith, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
drew@harrisonfirm.com
sarah@harrisonfirm.com
Attorneys for Petitioners

November 5, 2021