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Aug 26 2021
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

James O. Spence, Master-in-Equity

Appellate 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/Appellant,

v.

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

Of whom Patricia Owens a/k/a Patricia Ann Owens and Tammy M. Bailey are the.....Appellants/Respondents.

PETITION FOR REHEARING OR REHEARING *EN BANC*

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Appellants/Respondents (hereinafter "Bailey and Owens") hereby respectfully move and petition, pursuant to Rules 219 and 221(a), SCACR, as well as all other applicable law, for an order granting rehearing or rehearing *en banc* in this case and submits the memorandum below in support of the same. Appellants/Respondents, in an effort to keep this petition succinct, incorporates herein by reference their previously submitted briefs, making by reference those same arguments here.

This court's opinion merits a second look – if need be, by this court as a whole, *en banc*. See S.C. Code Ann. §§ 14-8-80 & -90. The master-in-equity was correct to rule that res judicata barred Respondent/Appellant (hereinafter "Deutsche Bank")'s foreclosure claim, as it was a compulsory counterclaim in the earlier action brought by Bailey and Owens.

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

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.

This court's 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 the precedent set in Carolina First Bank v. BADD, L.L.C., itself a foreclosure action, in which our Supreme 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). The 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 this court determined gave rise to Bailey and

Owens' claims in the 2013 action. See id. When the precedent of 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 opinion in the instant 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 the Supreme 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, the 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.

The Court held that 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.

As discussed in this court's opinion in the instant case, this court 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. Frankly, there is 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, this court's 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 opinion has effectively created a different compulsory/permissive analysis for foreclosure actions and other cases – essentially, a different law for banks.

This court's 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. First of all, there is no special law of res judicata and compulsory/permissive distinction that applies to foreclosure claims and not other claims.

Second, 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 in treating the analysis otherwise, indicating that this court must have overlooked or misapprehended the law in this regard.

This opinion has birthed a monstrous 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. This court should have reversed the denial of monetary relief under S.C. Code Ann. § 29-3-320.

As discussed in Bailey and Owens' briefs, the master erred by denying them relief under S.C. Code Ann. § 29-3-320, relief to which they were entitled under that statute. On rehearing, the court should reverse the master on that point alone and affirm his thorough and reasoned decision in all other respects.

IV. Rehearing *en banc* would be proper.

"A hearing or rehearing en banc is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance." Rule 219(a), SCACR.

Consideration by the full court appears necessary to secure or maintain the uniformity of this court's decisions, as well as to ensure adherence to Supreme Court precedent. Further, it is needed to ensure that the law remains the same for all who come before this state's courts.

WHEREFORE, Appellants/Respondents pray for an order granting rehearing or rehearing *en banc* in this case.

Respectfully submitted,

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August 26, 2021