THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CLARENDON COUNTY
Court of Common Pleas
Kristi F. Curtis, Circuit Judge

Appellate Case No. 2020-001490
Common Pleas Case No. 2020-CP-14-00023

New Residential Mortgage, LLC, ... Plaintiff,

v.

Todd S. Crawford, Tricia L. Crawford, William T. Geddings, Jr., Jane U. Geddings, and USAA Federal Savings Bank, ... Defendants,

Of Whom William T. Geddings, Jr. and Jane U. Geddings are the ..... Appellants-Respondents,

and

New Residential Mortgage LLC is the ..... Respondents-Appellant,

and USAA Federal Savings Bank is the .....Respondent.

FINAL APPELLANTS' BRIEF OF APPELLANTS-RESPONDENTS

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STATEMENT OF ISSUES

I. Where the circuit court had reconsidered its judgment on the pleadings as to Appellants-Respondents' at-law counterclaims, allowing Appellants-Respondents to amend and replead those counterclaims, did the circuit court err in failing to undo its decision that had struck Appellants-Respondents jury demand and referred the case to the master-in-equity?

STATEMENT OF THE CASE

Respondent-Appellant New Residential Mortgage LLC (hereinafter "New Residential") brought this action for mortgage foreclosure against Appellants-Respondents (hereinafter "the Geddings"), Todd and Tricia Crawford, and Respondent USAA Savings Bank (hereinafter "USAA"), the latter alleged to hold a second-priority mortgage lien on the subject real property. (R. pp. 9-18.) The Crawfords had given the mortgages at issue, and they later deeded their interest in the property to the Geddings. (R. pp. 13, 23.) The Geddings answered, counterclaimed, and cross-claimed, asserting counterclaims and crossclaims against New Residential and USAA for negligence, unjust enrichment, and violation of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, *et seq.*, bringing within their Unfair Trade Practices claim allegations that the original creditor for the mortgage loan violated is S.C. Code Ann. § 37-10-102, commonly referred to as the attorney preference statute. (R. pp. 21-27.) The Geddings' claims concerned the events of the closing of the mortgage (the attorney preference claim) and the taking of possession of the property by the mortgagee or mortgagees and alleged mishandling of that. (R. pp. 20-27.)

New Residential and USAA moved for judgment on the pleadings on the Geddings' claims. (R. pp. 57-75, 79-88.) New Residential also moved to strike the Geddings' jury demand and for the case to be referred to the master-in-equity. (R. pp. 76-78.) The Honorable Kristi F. Curtis heard the motions. (R. pp. 97-131.) Judge Curtis granted the motions for judgment on the pleadings as to all of the Geddings' counterclaims except for their unjust enrichment claim. (R. pp. 1-4.) As the only claims then left in the case sounded in equity, Judge Curtis struck the Geddings' jury

demand and referred the case to the master-in-equity, without deciding whether the at-law counterclaims were compulsory. (R. pp. 1-4.)

The Geddings moved to reconsider the judgment on the pleadings and the striking of their jury demand and reference to the master-in-equity. (R. pp. 89-96.) Judge Curtis granted the motion to reconsider as to the judgment on the pleadings, changing her ruling to allow the Geddings to amend and replead the claims she had previously dismissed. (R. pp. 5-8.) Her order on the motion to reconsider did not, however, state anything about changing her ruling that struck the Geddings' jury demand and referred the case to the master-in-equity. (R. pp. 5-8.) The Geddings filed an amended pleading that re-pled their at-law counterclaims and in which they repeated their demand for a jury trial. (R. pp. 45-56.)

This appeal followed.

STANDARD OF REVIEW

"Whether a party is entitled to a jury trial is a question of law." Verenes v. Alvanos, 387 S.C. 11, 15, 690 S.E.2d 771, 772 (2010). "An appellate court may decide questions of law with no particular deference to the [lower] court." Id. at 15.

ARGUMENT

I. Judge Curtis' reconsideration order did not address where her changed decision left the Geddings' jury demand. That needs to be addressed.

Judge Curtis quite correctly granted the Geddings' motion to reconsider as to the judgment on the pleadings, applying the principle that, "[u]nder Rules 12(b)(6) and 15(a), the circuit court may not dismiss a claim with prejudice unless the plaintiff is given a meaningful chance to amend the complaint, and after considering the amended

pleading, the court is certain there is no set of facts upon which relief can be granted." Skydive Myrtle Beach, Inc. v. Horry Cnty., 426 S.C. 175, 189, 826 S.E.2d 585, 592 (2019). Her reconsideration order, though, left the Geddings' jury demand stricken and the case referred to the master-in-equity, because it did nothing to address whether her previous order should be changed in that regard. (R. pp. 1-8.)

As a result, despite the Geddings having pled compulsory (as discussed below) at-law counterclaims and properly demanded a jury trial on them, their jury demand is stricken and the case is referred to the master-in-equity, who cannot conduct jury trials. (R. pp. 1-8, 50-55.) For whatever reason, the reconsideration order did not rectify this, but it should have. The circuit court erred in not ruling on and not granting the Geddings' motion to reconsider in this regard. (R. pp. 5-8, 95.)

II. The law in South Carolina about what makes a counterclaim compulsory.

"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 and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction." Rule 13(a), SCRCP (emphasis added). Such claims are usually referred to as compulsory counterclaims. "A pleading *may* state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim." Rule 13(b), SCRCP (emphasis added). Such claims are usually referred to as permissive counterclaims.

Compulsory, at-law counterclaims made by a defendant in a case in which the plaintiff has asserted only causes of action that sound in equity must be tried by a jury

if a jury demand has been made on the claim. Wachovia Bank, N.A. v. Blackburn, 407 S.C. 321, 330, 755 S.E.2d 437, 441 (2014); Johnson v. S.C. Nat. Bank, 292 S.C. 51, 54-56, 354 S.E.2d 895 (1987). Conversely, a defendant waives his right to a jury trial if he asserts a legal but permissive counterclaim where the plaintiff's complaint pleads only equitable causes of action. Blackburn, 407 S.C. at 330; Johnson, 292 S.C. at 54-56.

What is more difficult in many cases than it seems in the abstract is determining whether a counterclaim is compulsory or permissive. This court has held in this context that "[t]he right of trial by jury is highly favored, and waivers of the right are always strictly construed and not lightly inferred or extended by implication." Keels v. Pierce, 315 S.C. 339, 342, 433 S.E.2d 902, 904 (Ct. App. 1993); accord Broome v. Watts, 319 S.C. 337, 340, 461 S.E.2d 46 (1995) (same principle, different context); North Charleston Joint Venture v. Kitchens of Island Fudge Shoppe, Inc., 307 S.C. 533, 535, 416 S.E.2d 637 (1992) (same principle, different context); Beach Co. v. Twillman, Ltd., 351 S.C. 56, 64, 566 S.E.2d 863 (Ct. App. 2002) (same principle, different context).

Our Supreme Court has developed a test to determine what "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim" and is, thus, a compulsory counterclaim. Rule 13(a), SCRCP. In 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, 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.

In Carolina First Bank v. BADD, L.L.C., 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 a foreclosure action if it arises out of the execution of the documents that form the basis of the plaintiff's claim or affects the enforceability of the plaintiff's claim. 414 S.C. 289, 295, 296, 778 S.E.2d 106, 109, 110 (2015). The Court there found that the counterclaims were not compulsory where they both assumed the enforceability of the guaranty agreements subject of the plaintiff's claim and did not arise from the events of the execution of the guaranty documents. Id. at 296. The Court stated that the claims did "not arise out of the underlying transaction or occurrence because [they do] not affect the execution or enforceability of the guaranty agreements." Id.

Only one reported case since BADD has discussed that decision in the context of whether a counterclaim is compulsory. In S.C. Community Bank v. Salon Proz, LLC, 420 S.C. 89, 97, 800 S.E.2d 488, 492 (Ct. App. 2017), this court determined a claim for violation of the Unfair Trade Practices Act was compulsory, citing BADD as authority.

> For example, the UTPA claim is an action at law seeking treble damages. The substance of Salon's UTPA claim alleges Bank "engaged in a pattern of reneging upon promises to modify or otherwise restructure loans, including, but [not] limited to, the loan subject of this case." Were this allegation true, it could affect the loan's enforceability. Cf. BADD, 414 S.C. at 296, 778 S.E.2d at 109 (holding a counterclaim was permissive when its allegations, if true, would not have rendered the guaranty agreements unenforceable). Therefore, we find the UTPA claim was both legal and compulsory. See N.C. Fed. Sav. & Loan Ass'n v. DAV Corp., 298 S.C. 514, 518-19, 381 S.E.2d 903, 904-05 (1989) (holding a counterclaim alleging violation of the UTPA by breach of an oral agreement was both legal and compulsory).

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.

III. The counterclaims here are compulsory, and, because they are pending, the court should reverse the striking of the Geddings' jury demand and reference to the master-in-equity.

a. These are compulsory counterclaims.

The counterclaims here – which either arise out of the origination of the mortgage or have to do with the mortgagor-mortgagee relationship – are compulsory. (R. pp. 21-27, 50-55, 95, 145-48.) Instructive in this regard is this court's summary of what must be shown in mortgage foreclosure actions:

> Generally, the party seeking foreclosure has the burden of establishing the existence of the debt and the mortgagor's default on that debt. Once the debt and default have been established, the mortgagor has the burden of establishing a defense to foreclosure such as lack of consideration, payment, or accord and satisfaction.

U.S. Bank. Natl. Assn. v. Bell, 385 S.C. 364, 684 S.E.2d 199, 205 (Ct. App. 2009) (footnote omitted).

The Geddings' at-law claims have to do with the creation of the mortgagor-mortgagee relationship (the attorney preference violation claim under S.C. Code Ann.

§§ 37-10-102 and -105) and the conduct of the mortgagee within that relationship, exceeding its rights (unlawfully taking possession of the property and damaging it or allowing it to become damaged). (R. pp. 21-27, 50-55, 95, 145-48, 151-62.) Not only do the Geddings plead claims that arise out of the same set of facts as the plaintiff's claim, the facts of the counterclaims also go to whether the Geddings have a defense to New Residential's plaintiff's claim. (R. pp. 20-27, 48-55, 91-95, 145-48.)

Bell never purported to give an exhaustive, exclusive list of affirmative defenses to mortgage foreclosure. See id. Like the defenses listed in Bell, the Geddings' affirmative defenses, which include unclean hands, have the potential to defeat the mortgage foreclosure claim. (R. pp. 20-27, 48-55, 91-95, 145-48.) If the Geddings prove their unclean hands defense arising out of those same facts, they will have proven a defense that has the potential to defeat New Residential's foreclosure claim in this case, as "the Court of Equity will refuse to lend its aid to one who has been guilty of inequitable conduct in the subject matter." Masonic Temple, Inc. v. Ebert, 199 S.C. 5, 18 S.E.2d 584, 591 (1942); accord Arnold v. City of Spartanburg, 201 S.C. 523, 23 S.E.2d 735, 738 (1943).

The same facts that underlie the unclean hands defense form the basis of the counterclaims. (R. pp. 20-27, 48-55, 91-95, 145-48.) In Salon Proz, this court held a counterclaim was compulsory where "it *could* affect the loan's enforceability." 420 S.C. at 97 (emphasis added). If the Geddings' counterclaims are tried to a jury, as they should be, "[t]he court may then determine the equitable claims, but the jury's determination of common factual issues shall be binding upon the court." Blackburn, 407 S.C. at 330. Accordingly, victory for the Geddings on any of their counterclaims

would necessarily determine that the facts exist that form the basis of their affirmative defenses to the foreclosure claim – and that would affect the enforceability of the mortgage by New Residential. (R. pp. 20-27, 48-55, 91-95, 145-48.) That is the essence of a compulsory counterclaim.

The Geddings' counterclaims that arise out of the closing of the mortgage, the mortgaged property, and the mortgagee taking unlawful liberties with the mortgaged property outside of what the mortgage allows. (R. pp. 20-27, 48-55, 91-95, 145-48.) The foreclosure claim and these counterclaims all concern the same relationship between the parties. (R. pp. 11-16, 20-27, 48-55, 91-95, 145-48.) In Jaynes v. County of Fairfield, the Jaynes were defendants in an earlier road-closing action brought by Fairfield County that concerned, *inter alia*, whether a road was public property – a case that Fairfield County lost. 303 S.C. at 435-36, 438 & n. 1. This court held that the Jaynes' later inverse condemnation action against the county about that road was barred by res judicata, since the claims were about the same road and bore a logical relationship to one another. Id. The claims arose out of a common matter: the road and who owned it. Id.

In First-Citizens Bank & Trust Co. v. Hucks, a case in which the compulsory or permissive nature of a counterclaim was put in issue by a jury demand on the counterclaim, the Supreme Court's analysis was as follows:

> In the instant case, the trustee's equity action seeks a declaration of rights arising in the administration of a trust. The legal counterclaim alleges that the trustee has breached its contractual agreement and fiduciary duty. We find that there is a logical relationship between the counterclaim and the claim. Hence the counterclaim is compulsory, and appellants are entitled to a jury trial on their counterclaim.

305 S.C. 296, 298, 408 S.E.2d 222, 223 (1991). Again, the claims arose out of a common matter or set of transactions: the trust and its administration. Id.

The purpose of the compulsory counterclaim rule 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. If the scope of what is a compulsory counterclaim were instead limited to a counterclaim that would of necessity preclude success on the opposing claim, Jaynes and Hucks could not have been decided in the way that they were. Hucks, 305 S.C. at 298; Jaynes, 303 S.C. at 435-36, 438 & n. 1.

In addition to arising out of a common transaction or occurrence – the mortgage, its origination, and the conduct of the mortgagor-mortgagee relationship – the counterclaims are compulsory because they have the potential to prevent New Residential from prevailing on its claims. Because the counterclaims arise out of the same set of facts as New Residential's claim, they are compulsory. BADD, 414 S.C. at 295, 296; DAV Corp., 298 S.C. at 518-19; Salon Proz, 420 S.C. at 97. Because the counterclaims could affect the enforceability of New Residential's claim, they are compulsory. BADD, 414 S.C. at 295, 296; DAV Corp., 298 S.C. at 518-19; Salon Proz, 420 S.C. at 97. Accordingly, the Geddings retain their right to a jury trial. Blackburn, 407 S.C. at 330; Johnson, 292 S.C. at 54-56.

b. Doubt about the propriety of a jury demand is to be resolved in favor of the right to trial by jury.

"The right of trial by jury is highly favored, and waivers of the right are always strictly construed and not lightly inferred or extended by implication." Salon Proz, 420 S.C. at 94 (quoting Keels, 315 S.C. at 342 (Ct. App. 1993)); accord Broome, 319 S.C.

at 340 (same); North Charleston Joint Venture, Inc., 307 S.C. at 535; Beach Co., 351 S.C. at 64. If there is doubt, the thing to do is to uphold the right to trial by jury. That would be to err, if at all, on the side of caution. And the side of caution is the side on which the Geddings have the right to a jury trial. After all, it is the right to have a trial by jury that is constitutionally enshrined. S.C. Const. art. I, § 14. Vice-versa is not true; there is no right to exclude a jury from being part of one's trial. See Patterson v. McNeill & Assocs., Inc., 312 S.C. 471, 441 S.E.2d 328, 329 (Ct. App. 1994).

When the Supreme Court had occasion to rein in the "main purpose" rule in an effort to keep that body of jurisprudence from heading in a dangerous direction, it stated as follows:

> We are concerned that, as courts have sought to ascertain the "main purpose" of lawsuits, the pendulum appears to have swung with steadied progress toward decisions tending to place within the sole purview of the equity judge issues properly triable only by jury.

Floyd v. Floyd, 306 S.C. 378, 380, 412 S.E.2d 397, 399 (1991). The concern expressed by the Court in Floyd was that courts "not deprive litigants of the right to a jury trial where appropriate." Id.

The touchstone of the logical relationship test of whether a counterclaim is compulsory or permissive is its *breadth* – flexible breadth, but breadth nonetheless. Among the reasons for this breadth and flexibility is the concern the Supreme Court has expressed in cases where both legal and equitable claims were present that "caution should be taken to assure that, under the circumstances of the case, a joint trial will not deprive a party of his right to a full jury trial of legal issues." Johnson, 292 S.C. at 55.

Further, a broad but flexible conception of the compulsory/permissive counterclaim distinction, geared toward preserving the jury trial right, especially in a case of doubt, dovetails neatly with the purpose behind the requirement of Rule 13(a), SCRCP, that compulsory counterclaims a defendant has against a plaintiff must be asserted in the same suit. 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 idea is to have everything about a given matter between the same parties decided in the same case. Id.

A counterclaim is compulsory "if it arises out of the same transaction or occurrence as the opposing party's claim[,]" which is ascertained by determining whether there is "*any* logical relationship between the claim and the counterclaim[.]" DAV Corp., 298 S.C. at 517, 518 (emphasis added). Too narrow a construction of the logical relationship test has the effect of doing away with the very flexibility that was the reason for the Supreme Court's choice of the logical relationship test. Id. at 518.

Accordingly, if this court reckons the question is close or is in doubt about whether the Geddings' counterclaims are compulsory, this court should take the side of protecting the Geddings' constitutional right to trial by jury. Johnson, 292 S.C. at 55.

CONCLUSION

This court should reverse the circuit court's decision to grant the motion to strike the Geddings' jury demand and refer the case to the master-in-equity, and this court should remand this case for trial, with the Geddings' at-law counterclaims to be tried by a jury.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I certify that the foregoing final brief complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I certify that I have served the foregoing final brief on the date given below by emailing it to opposing counsel at the addresses noted below.

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