

FORM 4

STATE OF SOUTH CAROLINA  
 COUNTY OF YORK  
 IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE  
 CASE NUMBER 2013CP4601986

York County	Cultural And Heritage Commission Of York County	Culture And Heritage Foundation Inc	Sustainable Development Group Inc
		SDG Properties LLC	CHF Property Managements LLC

PLAINTIFF(S)	DEFENDANT(S)
Submitted by: The Court	Attorney for: <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant <input type="checkbox"/> Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.  See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):  Rule 12(b), SCRPC;  Rule 41(a), SCRPC (Vol. Nonsuit);  
 Rule 43(k), SCRPC (Settled);  Other: \_\_\_\_\_
- ACTION STRICKEN (CHECK REASON):  Rule 40(j) SCRPC;  Bankruptcy;  
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  Other: \_\_\_\_\_
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):  
 Affirmed;  Reversed;  Remanded;  Other: \_\_\_\_\_

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:  See attached order; (formal order to follow)  Statement of Judgment by the Court:  
**ORDER INFORMATION**

**Order Denying Defendants' Motion to Dismiss Amend Complaint**

This order  ends  does not end the case.  
 Additional Information for the Clerk: \_\_\_\_\_

**INFORMATION FOR THE JUDGMENT INDEX**

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

*s/S. Jackson Kimball*  
 Circuit Court Judge

3063  
 Judge Code

10/14/2013

**For Clerk of Court Office Use Only**

This judgment was entered on October 24, 2013, and a copy mailed first class or placed in the appropriate attorney's box on October 24, 2013, to attorneys of record or to parties (when appearing pro se) as follows:

Brian A. Autry 1230 Main Street Suite 700 Columbia, SC  
29201

James W. Sheedy 11520 N. Community House Road Suite  
200 Charlotte, NC 28277

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

David Hamilton

Court Reporter

David Hamilton - Clerk of Court

**ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.**

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

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STATE OF SOUTH CAROLINA

COUNTY OF YORK

York County and Cultural and Heritage  
Commission of York County,

Plaintiffs,

vs.

Culture and Heritage Foundation, Inc.,  
Sustainable Development Group, Inc., SDG  
Properties, LLC, and CHF Property  
Management, LLC,

Defendants.

IN THE COURT OF COMMON PLEAS  
SIXTEENTH JUDICIAL CIRCUIT

Case No. 2013-CP-46-01986

ORDER DENYING DEFENDANTS'  
MOTION TO DISMISS AMENDED  
COMPLAINT

FILED  
2013 SEP 18 10 03 AM  
CLERK OF COURT  
SOUTH CAROLINA  
YORK COUNTY

This matter came before me on September 30, 2013, on the Defendants' Motion to Dismiss Amended Complaint, filed September 18, 2013. Present at the hearing were Brian A. Autry and Tracy T. Vann, attorneys for the Plaintiffs, and James W. Sheedy and Susan E. Driscoll, attorneys for Defendants.

#### BACKGROUND

The factual background preceding this action is contained in this court's prior order dated August 16, 2013, and filed August 22, 2013. That recitation of the underlying facts is incorporated herein by reference.

Plaintiffs commenced this action on or about June 28, 2013 by the filing and service of its Summons and Complaint. In response to Plaintiffs' Complaint, Defendants filed a Motion to Dismiss Complaint on July 9, 2013. By Order dated August 22, 2013, this Court denied Defendants' Motion to Dismiss. On August 23, 2013, Defendants moved the Court to reconsider its denial of Defendants' Motion to Dismiss. Defendants' Motion to Reconsider was denied by Form 4 Order, dated September 5, 2013. Within thirty days of Defendants' response to Plaintiffs' Complaint, on September 5, 2013, Plaintiffs filed an Amended Complaint to change, among other things, references to a "charitable trust" made in the original Complaint to that of "constructive trust." Hence, Plaintiffs pursue a constructive trust, as well as other claims related to the Defendants conducting business, including an accounting and claims for breach of fiduciary duty, among other claims.

Defendants now move to dismiss Plaintiffs' Amended Complaint. Defendants assert the



right to pursue their charitable activities in any manner consistent with their stated corporate purposes. Defendants deny any continuing connection or obligations to Plaintiffs.

### DISCUSSION

Defendants argue that Plaintiffs' Amended Complaint should be dismissed pursuant to Rules 12(b)(6), 12(b)(7) and 56(b) of the South Carolina Rules of Civil Procedure.

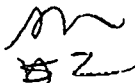
#### I. Motion to Dismiss – Rule 12(b)(6) and Rule 56, SCRPC.

As to Plaintiff's Motion to Dismiss pursuant to Rule 12(b)(6), a motion to dismiss a complaint for failure to state facts sufficient to constitute a cause of action is actually a motion for summary judgment when the court is asked to go outside the face of the complaint to rule on the motion. *Brazell v. Windsor*, 376 S.C. 83, 655 S.E.2d 736 (Ct.App. 2007). As with Defendants' previous Motion to Dismiss, Defendants have submitted or referenced multiple exhibits and affidavits in support of their Motion to Dismiss Amended Complaint and have posited their arguments on the same. The Motion to Dismiss Amended Complaint and Defendants' arguments related to the same contain essential factual assertions based on the extrinsic affidavits and exhibits. As a result, I find and conclude that Defendants' Motion to Dismiss Plaintiffs' Amended Complaint pursuant to Rule 12(b)(6) is essentially combined with Defendants' Motion pursuant to Rule 56, such that it is properly considered as a motion for summary judgment. No party is prejudiced by such a treatment.

Summary judgment is a drastic remedy and should be cautiously invoked to ensure a litigant is not improperly deprived of a trial or disputed factual issues. *Hooper v. Ebenezer Senior Svcs. & Rehabilitation Ctr.*, 377 S.C. 217, 226-27, 659 S.E.2d 213, 217 (Ct. App. 2008); *Helena Chem. Co. v. Allianz Underwriters Ins. Co.*, 357 S.C. 631, 644, 594 S.E.2d 455, 462 (2004); *B&B Liquors, Inc. v. O'Neil*, 361 S.C. 267, 270, 603 S.E.2d 629, 631 (Ct. App. 2004). Summary Judgment is inappropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. *Gadson v. Hembree*, 364 S.C. 316, 320, 613 S.E.2d 533, 535 (2005); *Montgomery v. CSX Transp., Inc.*, 362 S.C. 529, 542, 608 S.E.2d 440, 447 (Ct. App. 2004). Summary judgment should not be granted, even when there is no dispute as to evidentiary facts, if there is disagreement concerning the conclusion to be drawn from those facts. *Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 534 S.E.2d 672 (2000).

#### A. Constructive Trust.

Defendants argue that Plaintiffs claims related to its constructive trust theory must be proven by clear and convincing evidence, and that Plaintiffs would, therefore, be required to

  
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present more than a scintilla of evidence creating a genuine issue of fact for trial. While that is an accurate statement, it does not heighten Plaintiffs' burden beyond the general standard applicable to analyzing a directed verdict motion. See *Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991) (standard for summary judgment "mirrors" standard for directed verdict). Such analysis requires the court to find and conclude that the only reasonable inference to be drawn from the record as a whole, and viewed in the light most favorable to the non-moving party is the movant is entitled to judgment as a matter of law. Such a conclusion, in this instance, would not be appropriate.

"An action to declare a constructive trust is in equity." *Lollis v. Lollis*, 291 S.C. 525, 530, 354 S.E. 2d 559, 561 (1987). It "... results from fraud, bad faith, abuse of confidence, or violation of a fiduciary duty which gives rise to an obligation in equity to make restitution." *Id.*, 291 S.C. at 529, 354 S.E. 2d at 561. "It is resorted to by equity to vindicate right and justice or frustrate fraud." *Whitmire v. Adams*, 273 S.C. 453, 457, 257 S.E.2d 160, 163 (1979). "Actual fraud is not necessary, but such trust will arise whenever the circumstances under which property was acquired make it inequitable that it should be retained by him who holds the legal title." *Id.*, quoting *Bank of Williston v. Alderman*, 106 S.C. 386, 91 S.E. 296, 298 (1917).

While establishing a constructive trust does require proof by clear and convincing evidence, Plaintiffs are not required to prove their entire case at the summary judgment stage. Equitable claims are by their nature particularly fact dependent, and a claim of a constructive trust cannot be placed under a single factual framework. Rather, the claim must be viewed in light of all the surrounding facts and circumstances. *Chapman v. Southern Natl. Bank of South Carolina*, 302 S.C. 469, 395 S.E.2d 446 (Ct.App. 1990); *Halbersberg v. Berry*, 302 S.C. 97, 394 S.E.2d 7 (Ct.App. 1990).

The evidence in the record to date is susceptible to varied conclusions, depending on differing inferences drawn from the same facts. Such conclusions should be left for determination by a trier of fact. Therefore, it is inappropriate to grant judgment in favor of Defendants at this stage of the case without further development of the facts.

**B. Adequate remedy at law.**

Defendants also argue that Plaintiffs' equitable claims should be dismissed because Plaintiffs have an adequate remedy at law. As presented at this stage, Defendants' motion merely addresses the pleading of multiple causes of action seeking different relief. However, it is clear that one may assert a claim for equitable relief and a claim for damages in the same

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pleading. "A party may . . . state as many separate causes of action or defenses as he has regardless of consistency and whether based on legal or on equitable grounds or on both." Rule 8(e)(2), SCRCPP. "Under the . . . rules of civil procedure . . . , a plaintiff may join as alternate claims as many claims, legal or equitable, as he has against the opposing party, even if the claims are inconsistent." *Harper v. Ethridge*, 290 S.C. 112, 119, 348 S.E.2d 374, 377 (Ct.App. 1986). Thus, Defendants' argument fails, and they are not entitled to a dismissal of Plaintiffs' claim of a constructive trust on this basis.

**C. Discovery completion.**

"Summary judgment is a drastic remedy, which should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues. . . . This means, among other things, that summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery." *Lanham v. Blue Cross and Blue Shield of South Carolina, Inc.*, 349 S.C. 356, 363, 563 S.E.2d 331, 334 (2002), quoting *Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991).

In this case, Defendants have not yet responded to Plaintiffs' discovery requests. It is apparent that such discovery information may be necessary to enable Plaintiffs to establish one or more of their claims. To grant summary judgment at this point would be premature and inappropriate under South Carolina law.

For all of the reasons discussed above, Defendants' Motion to Dismiss pursuant to Rules 12(b)(6) and Rule 56 is denied.

**II. Motion to Dismiss - Rule 12(b)(7).**

Defendants' motion that asserting that Plaintiffs lack standing under Rule 12(b)(7), SCRCPP, incorporates by reference their arguments for dismissal of the original Complaint, which were previously argued before this Court on August 8, 2013. For the reasons set forth in the previous Order denying Defendants' Motion to Dismiss filed August 22, 2012, and Order denying Defendants' Motion to Reconsider filed September 6, 2013, Defendants' Motion to Dismiss the Amended Complaint pursuant to Rule 12(b)(7) for lack of standing is hereby denied.

**III. Action for Accounting.**

Defendants assert in their motion for a protective order that ". . . Plaintiffs have no right to an accounting from Defendants before Plaintiffs have proven their cause of action for an accounting . . ." I agree; however, I believe that Defendants confuse the ultimate remedy in an action for an accounting from the allegations and proof of the cause of action.



An action for an accounting is generally described as “[a] legal action to compel a defendant to account for and pay over money owed to the plaintiff but held by the defendant.” BLACK’S LAW DICTIONARY p. 21 (8<sup>th</sup> edition 2004). An action for an accounting is equitable in nature. *Lawson v. Rogers*, 312 S.C. 492, 435 S.E.2d 853 (1993). It is necessarily based on an existing or preexisting relationship between the parties to the action, and a corresponding legal duty owed one to the other. See, e.g., *Lawson, supra* (partnership); *Wise v. Picow*, 232 S.C. 237, 101 S.E.2d 651 (1958) (lease agreement); *Buffkin v. Strickland*, 280 S.C. 343, 312 S.E.2d 579 (Ct.App. 1984) (partnership); *Fryar v. Currin*, 280 S.C. 241, 312 S.E.2d 16 (Ct.App. 1984) (lease agreement).

Unquestionably, the relationship and corresponding duty must be proved before a plaintiff is entitled to an order granting relief in the form of an accounting and damages. As with any claim, a plaintiff must prove both the entitlement to the accounting, and present evidence as to the amount owed. An order granting an “accounting” will provide for payment by one party to another of an amount determined to be owed based on the evidence. The discussions of the evidence before the trial courts in *Lawson, Wise, Buffkin, and Fryar* all reveal this process.

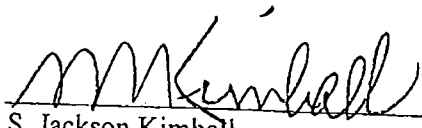
Defendants argue that by virtue of the discovery process, Plaintiffs are gaining an accounting without first proving their entitlement to such relief. However, the two are unrelated. Discovery is not the relief sought, and does not establish any obligation on the part of Defendants for an “accounting.” Discovery serves only as a mechanism to establish the right to relief, and the amount thereof. Plaintiffs must prove both a right to receive payment and the amount to which they are entitled before they can obtain an order for an “accounting,” establishing the form and amount of their relief. To prove both, they are entitled to discovery within the scope permitted by the applicable rules.

#### CONCLUSION

Therefore, based on the findings and conclusions set forth in the foregoing discussion, it is ordered that Defendants’ Motion to Dismiss Amended Complaint be denied.

AND IT IS SO ORDERED.

October 14, 2013



S. Jackson Kimball  
Special Circuit Court Judge  
York County

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