

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
Case No.: 2020-CP-40-02998

Deutsche Bank National Trust Company, as
Trustee for New Century Home Equity Loan
Trust, Series 2003-2 Asset Backed Pass-
Through Certificates

Plaintiff,

**ORDER DENYING PLAINTIFF'S
MOTIONS FOR
PARTIAL SUMMARY JUDGMENT AND
MOTION TO STRIKE JURY DEMAND**

vs.

Tommy Rush, Asia T. Rush Family Trust,
and Australia B. Rush 29016 as Trustee

Defendants.

This matter came before me at a hearing on the Plaintiff's Motion for Summary Judgment as to all of Defendant's counterclaims in the above-captioned action as well as the Plaintiff's Motion to Strike the Defendant's Jury Demand, on March 21, 2025. This is a contested mortgage foreclosure action in which the Defendants have raised counterclaims for violation of S.C. Code Ann § 37-10-102 (commonly called the attorney preference statute), for a declaratory judgment that a prepayment penalty provision in the subject note constitutes an unenforceable penalty, for violation of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, *et seq.*, and gross negligence. The parties supported and opposed the motions with factual material, and the record contains affidavits and deposition testimony.

It is well settled that “summary judgment may be rendered only when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Additionally, it must be shown that further inquiry into the facts of the case is not desirable to clarify the application of law. Folkens v. Hunt, 290 S.C. 194,196 348 S.E.2d 839,841 (Ct. App. 1986), “all ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party. Even when there is no dispute as to the evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied.” Nelson v. Charleston County Parks & Recreation Comm. 362 S.C. 1, 605 S.E.2d 744 (Ct. App. 2004). A fact is “material” if proof of its existence or non-existence would affect disposition of the case under applicable law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

Here, it appears that there are defects in the corrective assignment executed by the Plaintiff in 2021, as there were in the stricken corrective assignment executed in 2013. The Plaintiff’s corrective assignments do not mention assignment of the Promissory Note and only assign the mortgage. In a case involving a mortgage, the note and mortgage are inseparable; the former as essential, the latter as an incident. An assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity. Carpenter v. Longan, 83 U.S. 271 (1872). The assignment of a note secured by a mortgage carries with it an assignment of the mortgage, but... the assignment of the mortgage alone does not carry with it an assignment of the note. Hahn v. Smith, 154 S.E. 112 (S.C. 1930).

With regard to Defendant's counterclaims, South Carolina law states: No debtor may bring an action for a violation of this chapter more than three years after the violation occurred, except as set forth in subsection (C). S.C. Code Ann. § 37-10-105(a). For subsection (C) to apply, if the court finds as a matter of law that the agreement or transaction is unconscionable pursuant to § 37-5-108, the court may refuse to enforce the agreement. S.C. Code Ann. § 37-10-105(C). When viewed in the light most favorable to Defendants, there is a genuine issue of material fact present with respect to whether the Plaintiff owns or otherwise has the right to enforce the note and mortgage at issue. That is a question that is material to all the claims in this case. Without a further determination of the ability of the Plaintiff to enforce the mortgage, one cannot determine whether the Plaintiff is the appropriate party to move for summary judgment against the Defendant. Furthermore, when viewed in the light most favorable to the Defendants, there is a genuine question of material fact with regard to whether the contract at issue can be deemed unconscionable, and as such, a question of genuine fact exists as to the Defendant's counterclaims.

With regards to Plaintiff's Motion to Strike the Defendants Jury Demand it is well settled that because a foreclosure action is one sounding in equity, a party is not entitled, as a matter of right, to a jury trial." Carolina First Bank v. BADD, LLC, 414 S.C. 289, 778 S.E.2d 106 (2015). Because foreclosure actions are those in equity, defendants have a right to a jury trial only if their counterclaims are both legal and compulsory. Wachovia Bank Nat. Ass'n v. Blackburn. Characterization of a counterclaim depends on the parties main purpose in purpose in bringing the action. When a party seeks both money damages and equitable relief, characterization of the action as equitable or legal depends on the

party's "main purpose" in bringing the action. Johnson and Alessandro v. S.C. National Bank, 328 S.E.2d 75 (1985). After reviewing the record and the pleadings by the Defendant in their answer, it is obvious that the counterclaims are legal in nature.

From there, it must be determined whether the counterclaims are either compulsory or permissive in nature. In South Carolina, courts have applied the "logical relationship" test to determine whether the counterclaim is compulsory or permissive. N.C. Fed. Sav. & Loan Asso. V. DAV Corp, 298 S.C. 514,519, 381 S.E.2d 903,906 (1989). A counterclaim is compulsory if it arises out of the same transaction or occurrence as the party's claim. *Id.* In a foreclosure action, a counterclaim arises out of the same transaction or occurrence and is thus compulsory, when there is a "logical relationship" between the counterclaim and the enforceability of the guaranty agreement. *Id.*

I find a logical relationship exists between the counterclaims and the enforceability of the mortgage. As such, I find that the counterclaims are compulsory in nature and as such are entitled to a trial by jury.

Therefore, it is hereby ORDERED that the Motion for Partial Summary Judgment and the Motion to Strike Defendants Jury Demand is denied.

IT IS SO ORDERED

Charles J. McCutchen
Presiding Circuit Judge

Columbia, South Carolina
June 16, 2025



Richland Common Pleas

Case Caption: Deutsche Bank National Trust Company Trustee , plaintiff, et al vs
Tommy Rush , defendant, et al

Case Number: 2020CP4002998

Type: Order/Summary Judgment

IT IS SO ORDERED

Charles J. McCutchen