

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,

vs.

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

Defendants.

**ORDER DENYING IN PART AND  
GRANTING IN PART PLAINTIFF'S  
MOTION TO RECONSIDER**

On June 26, 2025, the Court denied Plaintiff's Motion for Partial Summary Judgment and Motion to Strike Jury Demand. On July 7, 2025, Plaintiff filed their Motion to Reconsider the June 26, 2025, Order. In their Motion to Reconsider, Plaintiff argues, among other things, that the following counterclaims are equitable in nature and, thus, do not satisfy the first element required to establish a claimant's right to a jury trial, as set forth in Wachovia Bank, Nat. Ass'n v. Blackburn, 407 S.C. 321, 755 S.E.2d 437 (2014): (1) Defendants' counterclaim for accounting; and (2) Defendants' counterclaim for unconscionability for violations under S.C. Code Ann. §§ 37-5-108 and 37-10-102.

The purpose of a motion under Rule 59(e), SCRPC, to alter or amend a judgment is to request the trial judge "reconsider matters properly encompassed in a decision on the merits." Arnold v. State, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992). Consequently, a party usually is allowed to ask the court to reconsider its decision even

if it means rehashing all or part of an argument previously presented. See Elam v. SCDOT, 361 S.C. 9, 22, 602 S.E.2d 772, 779 (2004). A party may choose to file such a motion when they believe the court misunderstood, failed to fully consider, or failed to rule on, an argument or issue, and the party wishes for the court to reconsider or rule on the argument or issue. See id. at 24, 602 S.E.2d at 779.

After reviewing the Motion to Reconsider and supporting memoranda, this Court finds that Defendants' counterclaims for accounting and unconscionability are both equitable in nature. Because a finding that the two counterclaims are equitable does not satisfy the first element of the Blackburn test, Defendants are not entitled to a jury trial on the accounting and unconscionability counterclaims. The Court still holds, however, that the remaining counterclaims are compulsory, which satisfies the second element of the Blackburn test, and that Defendants are entitled to a jury trial on those remaining claims.

Therefore, the Court, in its discretion, declines to hold a hearing to address the motion and, as decided on the record, briefs, and applicable law, respectfully declines to alter, amend, or vacate the prior order, as to all remaining arguments raised on Plaintiff's Motion to Reconsider, see Rule 59(f), SCRCP; Pollard v. City of Florence, 314 S.C. 397, 401-02, 444 S.E.2d 534, 536 (Ct. App. 1994), and amends the Court's June 26, 2025, Order as follows:

This matter came before the Court at a hearing on Plaintiff's Motion for Summary Judgment as to all of Defendants counterclaims in the above-captioned action, as well as Plaintiff's Motion to Strike Defendants' Jury Demand, on May 21, 2025. This is a contested mortgage foreclosure action in which Defendants have raised counterclaims for violation of S.C. Code Ann §§ 37-10-102 (commonly called the attorney preference statute) and

37-5-108 based on unconscionability, 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.*, for accounting, and for 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. See 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 there are defects in the corrective assignment executed by Plaintiff in 2021, as there were in the stricken corrective assignment executed in 2013. 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. See 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. See Hahn v. Smith, 154 S.E. 112 (S.C. 1930).

Regarding Defendants' 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). See 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 section 37-5-108, the court may refuse to enforce the agreement. See 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 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 Plaintiff's ability to enforce the mortgage, one cannot determine whether Plaintiff is the appropriate party to move for summary judgment against Defendants. Furthermore, when viewed in the light most favorable to Defendants, there is a genuine question of material fact regarding whether the contract at issue can be deemed unconscionable, and as such, a question of genuine fact exists as to Defendants counterclaims.

Regarding 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 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).

As to whether the counterclaims are legal or equitable in nature, after reviewing the record and the pleadings by the Defendants in their answer, the Court finds that the accounting counterclaim and the unconscionability counterclaims are equitable in nature and that all remaining counterclaims are legal in nature. Thus, Defendants are not entitled to a jury trial as to the accounting and unconscionability counterclaims.

From there, it must be determined whether the remaining 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.* The Court finds a logical relationship exists between the remaining counterclaims and the enforceability of the mortgage and that Defendants are entitled to a jury trial as to those counterclaims.

Therefore, it is hereby ORDERED that Plaintiff's Motion for Partial Summary Judgment is denied. Furthermore, Plaintiff's Motion to Strike Defendants' Jury Demand is granted as to the accounting and unconscionability counterclaims by denied as to all remaining counterclaims.

IT IS SO ORDERED

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Charles J. McCutchen  
Presiding Circuit Judge

July \_\_\_\_, 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/Other

IT IS SO ORDERED

Charles J. McCutchen