STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	CASE NO. 2016-CP-40-07662
Nicholas L. Pettit, as Personal Representative of the Estate of Charles A. Pettit, deceased, **Plaintiff,** **vs.** **Audrey E. Volonis and Ryan D. Volonis** **Defendants.**	**ORDER DENYING PLAINTIFF'S MOTION TO REFER TO MASTER IN EQUITY**

On May 10, 2018, Plaintiff, Nicholas L. Pettit, as Personal Representative of the Estate of Charles A. Pettit, moved pursuant to Rules 53 and 71, South Carolina Rules of Civil Procedure, to seek this Court's Order referring the case to the Master in Equity. This motion was heard on July 12, 2018. Attorney Leonard R. Jordan, Jr. was present for the Plaintiff and Attorney Todd R. Lyle was present for the Defendants.

FACTS & PROCEDURAL HISTORY

On June 15, 2004, Defendant Audrey Volonis purchased the property located at 802 Huntington Avenue, situated in Richland County, South Carolina (hereinafter "Subject Property").[1] On April 1, 2008, Defendant Audrey Volonis deeded the property to both herself, and her son, Defendant Ryan D. Volonis.[2] On April 17, 2008, Defendants took out a mortgage in the amount of $55,000 on the Subject Property, secured by a promissory note payable to the lender, Charles A. Pettit.[3] This note was scheduled to mature on April 1, 2014.[4] This property was and is the primary residence of Defendant Ryan D. Volonis.

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[1] According to the deed filed in the Richland County Register of Deeds in Book 946 at Page 3103.
[2] *Id.* in Book 1422 at Page 3944.
[3] *Id.* in Book 1422 at Page 3947; see also Plaintiff's Complaint, Para. 6—8.
[4] *See* Plaintiff's Complaint, Para. 6—8.

On January 6, 2016, Charles A. Pettit died as a result of injuries he received from a motor vehicle accident in late 2015.[5] Charles Pettit's brother, Nick Pettit, was appointed as the Personal Representative ("PR") of his brother's estate.[6] On December 30, 2016, Plaintiff filed a Lis Pendens and Complaint alleging a mortgage foreclosure and demanding a deficiency judgment against Defendants Audrey E. Volonis and Ryan D. Volonis. According to the Complaint, Plaintiff alleges that no payments were made on the note.[7] On February 21, 2017, Defendants filed an Answer and Counterclaim and demanded a jury trial. In their Answer, Defendants included the defenses of Payment, Setoff/Credit as well as Accord and Satisfaction.

Defendants also included a Counterclaim in their Answer. Defendants sought the counterclaim of a declaratory judgment, asking the court to hold that the Plaintiff should be compelled to satisfy the mortgage as the Defendants allege that the mortgage and note are extinguished as the debt was paid, cancelled or forgiven.[8] On February 24, 2017, Plaintiff filed its reply to Defendants Counterclaim.

On April 30, 2018, Defendants filed an Amended Answer and Counterclaim and included the Counterclaims of Liability for Failure to File Mortgage Satisfaction and for Slander of Title.[9] Defendants, again, demanded a jury trial. In total, the Defendants alleged three counterclaims: (1) Declaratory Judgment; (2) Liability for Failure to Satisfy the Mortgage; and (3) Slander of Title. On May 10, 2018, Plaintiff filed its Notice of Motion and Motion for Order of Reference seeking this Court to refer the matter to the Master in Equity.

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[5] Plaintiff's Complaint, Para. 10; see also Estate of Charles A. Pettit, 2016-ES-40-00037.
[6] *See* Estate of Charles A. Pettit, 2016-ES-40-00037
[7] Plaintiff's Complaint, Para. 14
[8] *See* Defendants' First Answer, Para. 41.
[9] On September 12, 2017, Defendants filed a Motion to Amend their Answer to include the Counterclaim of Liability for Failure to Satisfy Mortgage, pursuant to S.C. Code Ann. §29-3-320 (et seq). However, due to an administrative error, this Motion was never placed on the non-jury roster. Both parties consented to allow Defendants to file a Second Amended Answer and Counterclaim on April 24, 2018. The Chief Administrative Judge signed this consent Order on April 25, 2018.

LEGAL ANALYSIS

A mortgage foreclosure is an action in equity. *Collier v. Green*, 244 S.C. 367, 370, 137 S.E.2d 277, 279 (1964). However, "[w]hether 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). While a foreclosure is an action in equity, counterclaims—including those counterclaims raised in equitable actions—may be entitled to a jury trial. *Wachovia Bank Nat'l Ass'n v. Blackburn*, 407 S.C. 321, 329—30, 755 S.E.2d 437, 441—42 (2014). The proper analysis for determining the method of trial for legal and equitable issues in complaints and counterclaims was recently modified in 2014. *See id.*

> (1) If both the complaint and the counterclaims are in equity, then the matter is triable by the court.
> (2) If both [the complaint and the counterclaim] are at law, the issues are triable by a jury.
> (3) If the complaint is equitable and the counterclaim is legal and permissive, the defendant waives his right to a jury trial.
> (4) If the complaint is equitable and the counterclaim is legal and compulsory, the plaintiff or the defendant has a right to a jury trial on the counterclaim unless a valid jury trial waiver exists that encompasses the counterclaim. If such a waiver does not exist, the proper procedure for handling the counterclaim is as follows:
> a. The trial judge may, pursuant to Rule 42(b), order separate trials of the legal and equitable claims, or may order the claims tried in a single proceeding.
> b. If separate trials are ordered, the judge must determine which issues are to be tried first. If there are factual issues common to both claims, absent the most imperative circumstances, the at law claim must be tried first. If there are no common factual issues, it is within the trial judge's discretion which claim will be tried first.
> c. If the claims are to be tried in a single proceeding and there are factual issues common to both claims, the jury shall first determine the legal issues. The court may then determine the equitable claims, but the jury's determination of the common factual issues shall be binding upon the court.

Id., 407 S.C. at 329—30, 755 S.E.2d at 441—42.

Therefore, the proper analysis in determining whether a foreclosure involving counterclaims may be tried in front of a jury or by the judge depends on whether the remedy sought is in law or in equity and also whether the counterclaims are permissive or compulsive. *See id.*

DISCUSSION

1. The Defendants Filed Counterclaims Seeking a Legal Remedy

Generally, equitable relief is only available when no adequate remedy at law exists. *Santee Cooper Resort, Inc., v. S.C. Pub. Serv. Comm'n,* 298 S.C. 179, 185, 379 S.E.2d 119, 123 (1989). "An 'adequate' remedy at law is one which is as certain, practical, complete, and efficient to attain the ends of justice and its administration as the remedy in equity." *Id.*

South Carolina law, through its incorporation of the common law of England, recognizes a cause of action for slander of title, thus, providing a remedy at law. *Huff. v. Jennings,* 319 S.C. 142, 148, 459 S.E.2d 886, 890 (Ct. App. 1995).[10] Moreover, the creation of a statute will also provide a remedy at law. *See Key Corp. Capital, Inc. v. Cnty of Beaufort,* 373 S.C. 55, 61, 644 S.E.2d 675, 678 (2007) *citing S.C. Pub. Serv. Comm'n,* 298 S.C. at 185, 379 S.E.2d at 123 (1989) (holding that a court's equitable powers must yield to an unambiguously worded statute providing relief). Indeed, a statute will provide a party with a legal remedy. *Id.*

Here, on February 21, 2017, Defendants filed their Answer and Counterclaim with respect to the foreclosure action. In this Answer, the Defendants demanded a jury trial. On April 30, 2018, Defendants filed their Second Amended Answer and Counterclaim and again demanded a jury trial. Contained in this Answer, the Defendants alleged the counterclaims of seeking a declaratory judgment, liability for failure to satisfy the mortgage as well as slander of title. The liability for

[10] The *Jennings* Court further stated, "S.C. Code Ann. §14-1-50 (1976) provides 'All, and every part, of the common law of England, where it is not altered by the Code or inconsistent with the Constitution or laws of this State, is hereby continued in full force and effect in the same manner as before the adoption of this section.'"

failure to satisfy the mortgage provides a legal remedy by statute. *See* S.C. Code Ann. §29-3-320; *see also Cnty of Beaufort,* 373 S.C. at 61, 644 S.E.2d at 678 (2007). The slander of title counterclaim also provides a legal remedy. *See Jennings,* 319 S.C. at 148, 459 S.E.2d at 890 (Ct. App. 1995).

In sum, Defendants timely demanded a jury trial. Defendants also filed counterclaims seeking a declaratory judgment, liability for failure to satisfy the mortgage and slander of title. These counterclaims provide the Defendants a remedy at law.[11]

2. <u>The Counterclaims are Compulsive</u>

A counterclaim is compulsory if it arises out of the same transaction or occurrence as the opposing party's claim. *See N.C. Fed. Sav. & Loan Ass'n. v. DAV Corp.,* 298 S.C. 514, 517, 381 S.E.2d 903, 905 (S.C. 1989) *citing* Rule 13(a), SCRCP. Claims that arise out of a separate transaction than the subject matter of the opposing party's claims are, instead, permissive. *See* Rule 13(b), SCRCP.

The purpose of the rule governing counterclaims is to prevent multiplicity of actions and to achieve resolution in one single lawsuit of all disputes arising out of common matters. *Beach Co. v. Twillman, Ltd.*, 351 S.C. 56, 62, 566 S.E.2d 863, 865 (S.C. App. 2002). Indeed, the rules of procedure "shall be construed to secure the just, speedy, and inexpensive determination of every action." *Id. citing* Rule 1, SCRCP. Simply put, a counterclaim is compulsive if there is a logical relationship between the claim and counterclaim. *See DAV Corp.,* 298 S.C. at 518, 381 S.E.2d at 905 (S.C. 1989).

[11] A Declaratory Judgment can seek a remedy in equity or in law and depends on the underlying issues of the matter. *See Auto-Owners Ins. Co. v. Rhodes,* 405 S.C. 584, 593, 748 S.E.2d 781, 785 (2013). However, this Court need not determine whether the remedy for the Defendants' Declaratory Judgment counterclaim is equitable or legal because the other two Counterclaims seek a legal remedy.

In a foreclosure action, when a defendant's answer includes a counterclaim that affects the enforceability of the promissory note, this counterclaim will satisfy this logical relationship such that the counterclaim is compulsive.[12] *See id.; but see Advance Intern., Inc. v. N.C. Nat'l Bank of S.C.,* 316 S.C. 266, 269—70, 449 S.E.2d 580, 582—83 (Ct. App. 1994)) (holding a counterclaim brought in a foreclosure action was permissive because the counterclaims did ***not*** affect the enforceability of the underlying note)[13] (emphasis added). Simply put, a counterclaim to a foreclosure action is compulsory if it there is a logical relationship between the counterclaim and the enforceability of the guaranty agreement.[14] *See S.C. Cmty Bank v. Salon Prox, LLC* 420 S.C. 89, 97, 800 S.E.2d 488, 492 (Ct. App. 2017) *citing Carolina First Bank v. BADD, LLC,* 414 S.C. 289, 295, 778 S.E.2d 106, 109 (2015).

Here, Plaintiff filed a foreclosure action and the counterclaims are compulsive. The Defendants' counterclaims are compulsive because they most certainly have a logical relationship to the enforceability of the note and mortgage. Defendants allege that the debt has been paid, cancelled or otherwise forgiven and that the note and mortgage are not enforceable.[15]

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[12] The *DAV Corp* Court, which adopted the logical relationship test, held that five of the defendants' six counterclaims were compulsive because they were logically related to the enforceability of a promissory note. In *DAV Corp*, the court held that the counterclaim regarding a subsequent oral agreement involving additional mortgage financing was logically related to the enforceability of the agreement. *Id.*, 298 at 518, 381 S.E.2d at 905. The *DAV Corp* Court's holding is very persuasive to this Court's decision.

[13] In *Advance Intern., Inc. v. N.C. Nat'l Bank of S.C.,* 316 S.C. 266, 449 S.E.2d 580 (Ct. App. 1994), the court held that a counterclaim was permissive when the counterclaim did not dispute the lender's right to foreclose the mortgage when the counterclaim merely alleged unclean hands of a party involved in a separate transaction. *Id.* 316 S.C. at 270, 449 S.E.2d at 583. (*N.C. Nat'l Bank of S.C.,* 320 S.C. 532, 466 S.E.2d 367 vacated a portion of the original opinion on an issue unrelated to this matter).

[14] In *S.C. Cmty Bank v. Salon Prox, LLC,* 420 S.C. 89, 800 S.E.2d 488 (Ct. App. 2017), the Mortgagor defendant asserted that its counterclaims met the logical relation to the foreclosure claim because the counterclaim arose out of the origination and administration of the subject mortgage. *Id.* at 420 S.C. at 96, 800 S.E.2d at 492. The *Salon Prox, LLC* Court agreed stating, "[t]he substance of [Mortgagor's] . . . claim alleges [Mortgagee] engaged in a pattern of reneging upon promises to modify or otherwise restructure loans . . . [w]ere this allegation true, it could affect the loan's enforceability. *Id.* at 420 S.C. at 97, 800 S.E.2d at 492.

[15] During argument for this motion hearing, Plaintiff erroneously relied upon *Carolina First Bank v. BADD, LLC,* 414 S.C. 289, 295, 778 S.E.2d 106, 109 (2015). The *BADD, LLC,* Court is easily distinguishable from the matter before this Court. In *BADD LLC,* the Defendant brought a Civil Conspiracy counterclaim based on the Defendants' changing of a corporate Board member, two years after the execution of the promissory notes at issue. "In other

Moreover, in the interest of avoiding a multiplicity of actions in this matter, it would further support this Court's determination that the counterclaims are compulsive. *See Beach Co. v. Twillman, Ltd.*, 351 S.C. 56, 62, 566 S.E.2d 863, 865 (S.C. App. 2002). Indeed, following the *Blackburn* analysis, if this Court were to determine the Counterclaims are permissive, this would result in a very confusing and inefficient result. *See Wachovia Bank Nat'l Ass'n v. Blackburn*, 407 S.C. 321, 329—30, 755 S.E.2d 437, 441—42 (2014). Following the *Blackburn* analysis, because the counterclaims seek a law at remedy, those issues must be tried first.[16] *See id.* Moreover, the issues decided by a jury are binding on the court.[17] Simply put, if the counterclaims were permissive, this Court would then first decide the merits of a slander of title action and liability under S.C. Code Ann. §29-3-320, **before** determining the merits of the foreclosure action. This result is illogical.[18]

CONCLUSION

Plaintiff filed a foreclosure action, which is an action in equity. However, Defendants have filed Counterclaims which are compulsive and seek a remedy at law. The counterclaims are logically related to the enforceability of the underlying note and mortgage which are the subject of this foreclosure action. Thus, the counterclaims arise out of the same transaction and occurrence and are therefore compulsive. Moreover, the counterclaims seek a remedy at law. Slander of title recognizes such a remedy at law as does the counterclaim seeking the Plaintiff's liability, under

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words, the civil conspiracy claim presumes the enforceability of the guaranty agreements because the allegations, if true, would not render the guarantees unenforceable. *Id.* 414 S.C. at 295, 778 S.E.2d at 109.

[16] "[A]bsent the most imperative circumstances, the law claim must be tried first." Rule (4)(b), under *Blackburn.*

[17] [T]he jury shall first determine the legal issues. The court may then determine the equitable claims, but the jury's determination of the common factual issues shall be binding upon the court." Rule (4)(c), under *Blackburn.*

[18] The *Blackburn* Court provided the framework for this analysis, but ultimately ruled that the defendant waived their right to a jury trial because a valid jury waiver was contained in the contents of the mortgage agreement that was the source of the underlying foreclosure action. Here, Plaintiff failed to plead that the Defendants waived their right to a jury trial or has made no mention of it otherwise. As such, in following the *Blackburn* analysis, Defendants Audrey Volonis and Ryan Volonis did not waive their right to a jury trial.

S.C. Code Ann. §29-3-320, because the remedy is provided by statute. As such, this matter should be tried, in toto, before a jury.

Therefore, it is ORDERED that the Plaintiff's motion to refer this matter before the Master in Equity is DENIED.

IT IS SO ORDERED.

The Honorable Jocelyn Newman
Fifth Judicial Circuit

Columbia, South Carolina
August 6, 2018

Richland Common Pleas

Case Caption:	Nicholas L Pettit , plaintiff, et al vs Audrey E Volonis , defendant, et al
Case Number:	2016CP4007662
Type:	Order/Other

So Ordered

Jocelyn Newman