

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

U.S. Bank Trust, N.A. as Trustee for LSF10  
Master Participation Trust,

PLAINTIFF,

VS.

Austin A. Lowery a/k/a Austin Lowery a/k/a  
Austin Allen Lowery a/k/a Allen Lowery,  
individually; Austin A. Lowery a/k/a Austin  
Lowery a/k/a Austin Allen Lowery a/k/a  
Allen Lowery, individually, and as Heir or  
Devisee of the Estate of Lisa D. Lowery,  
Deceased; South Carolina Department of  
Revenue; The United States of America  
acting by and through its agency, Department  
of the Treasury – Internal Revenue Service;  
and Elizabeth A. Lowery,

DEFENDANT(S).

IN THE COURT OF COMMON PLEAS

CASE NO. 2019-CP-42-02270

**ORDER GRANTING PLAINTIFF  
PARTIAL SUMMARY JUDGMENT**

**RECEIVED**

**Mar 30 2022**

**SC Court of Appeals**

This matter came before me for a virtual hearing on January 31, 2022, pursuant to the Plaintiff's US Bank Trust, NA's (Plaintiff or U.S. Bank) motion for summary judgment. Present at the virtual hearing were J. Derrick Jackson and Reginald P. Corley for the Plaintiff and Andrew Radeker for the Defendant Austin Lowery. After carefully considering the pleadings on file, briefs and exhibits for and against the motion, and arguments of counsel, this court concludes that summary judgment should be granted as to the issue of liability for the foreclosure and the Defendant Austin A. Lowery's (Defendant or Lowery) affirmative defenses of unconscionability, res judicata and release. The only issues remaining after this order are the amount of the debt and the amount of Defendant's set off/recoupment.

### **FACTUAL/PROCEDURAL BACKGROUND**

The parties previously filed cross motions for summary judgment in this case which resulted in two orders by the Honorable Gordon G. Cooper filed May 10, 2021 (Denying Defendant's motions for summary judgment on counterclaims and Plaintiff's claim) and May 20, 2021 (Granting Plaintiff's partial motion for summary judgment as to offensive use of the claim of unconscionability and limited use to an affirmative defense and setoff). These orders recite the background facts of this case and are incorporated by reference.

Subsequent to these orders, the matters remaining for this court are Defendant's affirmative defenses of unconscionability, res judicata and release, the Plaintiff's foreclosure and Defendant's counterclaim based on the alleged violation of the attorney preference statute.

### **STANDARD OF REVIEW**

A trial court should grant a motion for summary judgment 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 a judgment as a matter of law." Rule 56(c), SCRCP; *see also Tupper v. Dorchester County*, 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997); *Wells v. City of Lynchburg*, 331 S.C. 296, 301, 501 S.E.2d 746, 749 (Ct. App. 1998). In reviewing the grant of a summary judgment motion, this court applies the same standard which governs the trial court: summary judgment is proper when "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP; *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 114-15, 410 S.E.2d 537, 545 (1991). Under Rule 56(c), SCRCP, the party seeking summary judgment has the initial burden of demonstrating the absence of a genuine issue of material fact. *Trivelas v. South Carolina Dep't of Transp.*, 348 S.C. 125, 130, 558 S.E.2d

271, 273 (Ct.App.2001). Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. Rather, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial. Rule 56(c), SCRCP; *SSI Med. Servs., Inc. v. Cox*, 301 S.C. 493, 497, 392 S.E.2d 789, 792 (1990); *Peterson v. W. Am. Ins. Co.*, 336 S.C. 89, 94, 518 S.E.2d 608, 610 (Ct.App.1999). *Regions Bank v. Schmauch*, 582 S.E.2d 432, 354 S.C. 648 (S.C. App. 2003).

### **DEFENDANT'S AFFIRMATIVE DEFENSES**

In his answer and in opposition to summary judgment, Lowery raised several affirmative defenses; however, as set forth below, there are no genuine issues of material fact as to these defenses and U.S. Bank is entitled to summary judgment as a matter of law.

### **RES JUDICATA**

Lowery first asserts that the bank is barred from filing the present foreclosure by the doctrine of res judicata. Lowery contends that the court's prior striking of a foreclosure action filed by Household Finance Corporation, II<sup>1</sup> (HFC II) filed July 26, 2013, precludes the bank from bringing the current foreclosure action. This contention lacks merit as can be seen from the face of the Form 4 Order striking the prior foreclosure action. (See Exhibit to Lowery's Brief in Opposition) Under the doctrine of res judicata, a litigant is barred from raising issues previously adjudicated between the parties in a subsequent action. *See Hilton Head Ctr. of S.C., Inc. v. Pub. Serv. Comm'n of S.C.*, 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987). Res judicata requires three elements: (1) a judgment that is final, valid, and on the merits; (2) the parties in the second action are identical to those in the first; and (3) the subsequent action must involve a subject matter

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<sup>1</sup> US Bank's predecessor in title and assignor.

properly included in the first action. *See Owenby v. Owens Corning Fiberglas*, 313 S.C. 181, 183, 437 S.E.2d 130, 132 (Ct. App. 1993) (citing *Laffitte v. Tucker*, 216 S.C. 201, 57 S.E.2d 255 (1950)). In this case, while it may be debatable whether the parties and the subject matter are identical<sup>2</sup>, assuming arguendo these elements are satisfied, there never was an adjudication on the merits or final judgment in the first foreclosure. On its face, the Form 4 order strikes (but does not dismiss) the case pursuant to Rule 40(j) for failure to prosecute. Defendant argues this order is equivalent to an order of dismissal under Rule 41 “for other reasons” because the parties did not consent and therefore was with prejudice and adjudication on the merits. However, it was obvious the court did not intend for the dismissal to be under Rule 41 or with prejudice. The court could have checked the boxes for dismissal and for Rule 41 but did not. More importantly, the order expressly provided for the parties to be able to restore the action when they were ready to proceed. Thus, the order could not have been a final judgment on the merits for res judicata purposes.

### **RELEASE**

Lowery also argues that US Bank’s foreclosure action must fail because it released its mortgage. This argument too must fail. On September 24, 2002, Lowery executed a mortgage to HFC II securing the promissory note as part of the closing for refinancing his construction loan with SunTrust Bank. This mortgage was recorded in REM 2782 at Page 874 on September 26, 2002. The legal description of this mortgage mistakenly referenced the entire 53.73-acre tract which was in Lowery’s deed acquiring the property, rather than the 5.0-acre parcel subsequently surveyed by Lowery (and which also was mortgaged by SunTrust). Lowery

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<sup>2</sup> Arguably, Household Finance Corp, II and US Bank are not identical, although US Bank is a successor by assignment and arguably payments accruing after the case was dismissed are different.

admits this 53.73-acre mortgage was never valid<sup>3</sup> and that he only intended to mortgage the 5.0-acre tract.<sup>4</sup> Upon discovery of the error in the legal description of the recorded mortgage, HFC II requested Lowery to return and sign a mortgage with the correct legal description for the 5.0-acre tract. Lowery did so on September 30, 2002, and this mortgage was recorded on October 4, 2002, in the Office of the Register of Deeds for Spartanburg County in Book 2789 at Page 575.

The court also notes from Exhibit 10 to the Plaintiff's Return to Defendant's Summary Judgment that the title insurance policy excepted to the first mortgage with an incorrect legal description from coverage in Schedule B and stated it was to be released.

There are no genuine issues of material fact that Lowery intended to and did execute a mortgage on the five-acre tract which is the subject of this foreclosure. Lowery admits that it was always his intent to mortgage the 5.0-acre tract,<sup>5</sup> and Lowery also admits to giving HFC II a mortgage on the 5.0 acres in his answer to the original foreclosure pleadings brought by HFC II (US Bank's predecessor in title).<sup>6</sup>

Having admitted to giving Plaintiff a mortgage on this property, it is incumbent on the Defendant Lowery to prove as an affirmative defense that the 5.0-acre mortgage has been released or satisfied. The only evidence offered by Lowery in response to summary judgment is the recorded release of the prior recorded mortgage which Lowery admits contained an incorrect legal description and was recorded in error.

U.S. Bank recorded a document entitled "RELEASE OF MORTGAGE, Mortgage/Record Book 2782 at Page 874." (Exhibit 9). In that document, US Bank released the

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<sup>3</sup> Exhibit 6 to US Bank Return to Summary Judgment, Defendants Answer to Interrogatory 23.

<sup>4</sup> Lowery Affidavit, ¶9.

<sup>5</sup> See Lowery Affidavit, ¶9.

<sup>6</sup> See Lowery Answer to HFC II Amended Complaint paragraphs 3 and 14 and generally US Bank Return to Lowery Motion for Summary Judgment, p. 9

property from “liens under that certain Mortgage dated September 24, 2002, from Austin A. Lowery, recorded in the office of the ROD/RMC/Clerk of Court for Spartanburg County on September 26, 2002, in Mortgage/Record Book 2782 at Page 874 and assigned to U.S. Bank Trust, N.A., as Trustee for LSF10 Master Participation Trust by assignment dated June 26, 2018, and recorded July 3, 2018, in Book 5469 at Page 795.” The language used by US Bank is very specific and intentional. This Release by its express language applied to that specific mortgage and no other.

Lowery admits that well prior to this release, Lowery executed another mortgage for 5.0 acres, in accordance with the intent of the parties, which was recorded on October 4, 2002, in the Office of the Register of Deeds for Spartanburg County in Book 2789 at Page 575. (Exhibit 7, 5.0-acre mortgage).

A plain reading of the recorded release shows that it only released the property from the lien of the invalid mortgage dated September 24, 2002, from Austin A. Lowery, recorded in the office of the Register of Deeds for Spartanburg County on September 26, 2002, in Mortgage/Record Book 2782 at Page 874. There is no mention or description of the subsequent mortgage dated September 30, 2002, and recorded on October 4, 2002, in the Office of the Register of Deeds for Spartanburg County in Book 2789 at Page 575 (Exhibit 7, 5.0-acre mortgage), even though it was already filed and of record at the time the release was executed and recorded.

Finally and most importantly, the court notes the comment from Judge Cooper in his order denying Defendant’ motion for summary judgment on the grounds of the release, “that there is no genuine issue of material fact as it would, under the facts and circumstances, be inequitable for Defendant to receive \$304,040.62 from Plaintiff which funds were in fact used to

benefit the Defendant and it being clear that Defendant intended to and did give a mortgage to HFC II on the 5.0 acre parcel.”

This court concludes that there are no genuine issues of material fact that Lowery intended to and did give Plaintiff a mortgage on the 5.0 tract in consideration of the loan and to secure the promissory note. The court further concludes that Lowery has not provided sufficient facts to create a genuine issue of material fact that this subsequent mortgage for 5.0 acres was released.

### **UNCONSCIONABILITY**

In a prior order, Judge Cooper granted Plaintiff partial summary judgment on the Defendant’s claim of unconscionability as it related to the offensive use to the extent the Defendant sought a money judgment and attorney’s fees and costs against Plaintiff as assignee from HFC II. Judge Cooper’s order was without prejudice to Lowery’s right to raise his counterclaim as an equitable and statutory defense for the purpose of setoff or recoupment.

S.C. Code Ann. §37-5-108(c) allows the court to use its equitable powers and discretion if it finds as a matter of law (a) the agreement or transaction to have been unconscionable at the time it was made, or to have been induced by unconscionable conduct. Lowery bases his unconscionability argument on several factors which he argues collectively support a finding of unconscionability.

First, he asserts that the violation of the attorney preference statute is unconscionable conduct.<sup>7</sup> This same argument was raised and rejected in *Lackey v. Green Tree Financial Corp.*, 330 S.C. 388, 498 S.E.2d 898 (S.C. App. 1998). In *Lackey*, the trial court held that an arbitration clause included in a retail installment contract for the purchase of a manufactured home was

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<sup>7</sup> This is also the basis of a separate counterclaim for set-off and recoupment which will be addressed later in this order.

unconscionable and unenforceable, in part, because Green Tree failed to comply with the attorney-preference statute, “thereby denying each buyer the right to consult counsel.” *Id.* at 330 S.C. 398. The South Carolina Supreme Court rejected this conclusion and stated, “Contrary to the holding of the trial court in this case, we do not read *First Baptist Church of Timmonsville* to establish a bright line test rendering an arbitration clause unenforceable where a contract somehow prevents a party from consulting a lawyer. But even if it did, there is nothing in the contract which prevented respondents from consulting legal counsel.” *Lackey* at 399.

Furthermore, Lowery has failed to point out what provision or provisions in the promissory note or the mortgage which are unconscionable which counsel would have allegedly protected him from. Plaintiff served discovery requesting this information but has received no answer or response.

Lowery also argues that the absence of counsel at the closing is unconscionable conduct. While there is no doubt about the benefits of counsel at a closing, the court is mindful of the distant closing date and the circumstances of a closing which occurred almost twenty years ago. "In determining unconscionability, courts are limited to considering facts and circumstances existing when the contract was executed." *Hardee v. Hardee*, 348 S.C. 84, 95-96, 558 S.E.2d 264, 269-70 (Ct.App.2001) (citing Restatement (Second) of Contracts § 208 (1981)), *aff'd* as modified, 355 S.C. 382, 585 S.E.2d 501 (2003). During that time, closings did occur without the presence of counsel. *Matrix*<sup>8</sup> was decided almost a decade later, prospectively applying the unclean hands doctrine to potentially preclude equitable remedies to a lender of a loan closed without an attorney. *Id.* 714 S.E.2d at 535. Also, again, Lowery fails to show or allege how the absence of counsel materially prejudiced him in the terms of the note or mortgage.

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<sup>8</sup> *Matrix Financial Serv. Corp.. v. Frazer*, 394 S.C. 134, 714 S.E.2d 532 (S.C. 2011)

Lowery does claim in his affidavit that HFC II promised he could refinance to a 5% rate if he made his payments for one year. However, the promissory note, which Lowery is charged with reading, provides for a reduction in rate of .50% at the end of the third year (36<sup>th</sup> month), fourth year (48<sup>th</sup> month), and fifth year (60<sup>th</sup> month) if Lowery makes his payments within 30 days of their due date and does not file bankruptcy. (Exhibit 3, page 2, "Adjustment to Contract Rate.") Lowery did not make it to 36 months and there is no evidence that he requested the refinance or offered payments at the 5% rate.

Lowery also points to the different legal descriptions in the mortgages that were recorded; however, this was quickly corrected and Lowery admits that the 5.0 acre mortgage which is being foreclosed it was he intended and did execute. The other mortgage with the incorrect description was released.

Unconscionability is characterized by the "absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms which are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Fanning v. Fritz's Pontiac-Cadillac-Buick Inc.*, 322 S.C. 399, 402, 472 S.E.2d 242, 245 (1996) (emphasis added) (citing *Jones Leasing v. Gene Phillips and Assocs.*, 282 S.C. 327, 318 S.E.2d 31 (Ct.App.1984)).

In this case, Lowery has offered no evidence that he could not have sought a loan elsewhere or that the terms of his loan were "so oppressive that no reasonable person would make them." Lowery admits as much by failing to respond to the Plaintiffs Requests for Admission alleging these same points.<sup>9</sup> Indeed, Lowery made payments for a little over 18

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<sup>9</sup> See exhibits attached to Plaintiff's Motion for summary Judgment including Requests for Admission served October 5, 2021.

months on the promissory note and the mortgage. The HUD-1 Closing Statement reflects that Lowery had several debts paid and walked away from closing with \$13,535. (See Plaintiff's Exhibit 4<sup>10</sup>) It would be inequitable to allow Lowery to receive this benefit, fail to make payments since 2004 and then argue his note and mortgage are unenforceable because of unconscionability.

In short, Lowery has failed to come forward with sufficient facts which would create a genuine issue of material fact to lead this court to conclude that the agreement or transaction to have been unconscionable at the time it was made, or to have been induced by unconscionable conduct. Therefore, US Bank is entitled to summary judgment as a matter of law.

### **FORECLOSURE**

Lowery admits to not paying his note and mortgage since 2004. Plaintiff alleges in the Second Amended Complaint that Lowery is due for installments after April 30, 2004. Lowery further admits to giving HFC II (the U.S. Bank's predecessor in title) a mortgage on 5.0 acres of land to secure payment. US Bank filed an affidavit of indebtedness alleging the amount due; however, this affidavit was incomplete. The court agrees with Defendant that additional information needs to be provided to determine the amount of the debt; accordingly, Plaintiff is granted summary judgment as to liability for foreclosure, but Plaintiff must file and serve affidavits regarding the amounts at issue at least three days prior to a final hearing.

### **ATTORNEY PREFERENCE VIOLATION**

The attorney preference provisions of S.C. Code Ann. §37-10-102 require a creditor to ascertain prior to closing the preference of the borrower as to the legal counsel that is employed to represent the debtor in all matters of the transaction relating to the closing of the transaction.

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<sup>10</sup> Plaintiff's exhibits filed with the Return in Opposition to Lowery's motion for Summary Judgment as to Plaintiff's claims.

A creditor can either obtain this information as part of the loan application or in a written notice to the borrower no later than three days after the application is received.

In this case, Lowery signed an attorney preference form (Exhibit to Lowery's Memo in Opposition to Summary Judgment) on the date of closing indicating "None". The form contains a fax stamp of 9/18 but Lowery asserts in his affidavit that it was "among the documents" we signed at closing. Plaintiff, who is an assignee, admits that almost eighteen years after the closing it has no evidence to refute Lowery's claim. The court also notes on the Hud-1 closing statement that the Lender is listed as the settlement agent and that no fees were charged for an attorney.

This court concludes that there is sufficient evidence to support a violation of the attorney's preference statute; however, as indicated in the previous discussion the court does not find that it rises to the level of unconscionability. Lowery may submit by affidavit the amounts for which he contends is entitled by way of set-off or recoupment at least three days prior to a final hearing.

**THEREFORE, IT IS HEREBY ORDERED AS FOLLOWS:**

Plaintiff is granted summary judgment as to Defendant's affirmative defenses of res judicata, release and unconscionability.

Plaintiff is granted summary judgment as to Defendant's liability for foreclosure subject to submitting by affidavit appropriate documentation supporting the amount of the debt at least three days prior to a final hearing.

Defendant is granted judgment by way of offset only for an attorney preference violation subject to submitting the amount claimed for the offset by way of affidavit at least three days prior to a final hearing.

**IT IS SO ORDERED.**

Spartanburg, South Carolina  
Dated: \_\_\_\_\_

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Judge Shannon M. Phillips  
Master-In-Equity, Spartanburg County



Spartanburg Common Pleas

**Case Caption:** Us Bank Trust Na As Trustee For Lsf10 Master Participation T VS  
Austin A Lowery , defendant, et al  
**Case Number:** 2019CP4202270  
**Type:** Master/Order/Other

IT IS SO ORDERED.

s/ Shannon M. Phillips - 3087