STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON)	CIVIL ACTION: 05-CP-10-5115

Sandra Singleton and
Dianne Singleton, as
Personal Representative of
the Estate of
Edith Singleton,

Plaintiffs,

vs.

CMH Homes, Inc.,
Waterfield Mortgage Co., Inc.,
Allied Home Mortgage
Capital Corporation,
Federal Guaranty
Mortgage Co.,
Union Federal Bank,
A.G.T. Business Development
Archie Jones,
Lonnie Stroud,
RGS Appraisal Services, Inc.,
Barbara Turner,
Deana Turner,
Grant Wallace,
GRW Leasing & Repairs,
Wade Harmon, and
Harmon's Construction Co.,

Defendants.

ORDER

Date of Hearing:	August 14, 2007
Trial Judge:	Deadra L. Jefferson
Plaintiff's Attorney:	John Cooper, Esq., Cain Denny, Esq.
Defendants' Attorneys:	Benjamin McCoy, Esq., James Christman, Esq., Clayton Custer, Esq., Richard Farrier, Esq., Katie Parham, Esq., Krista McGuire, Esq., Joe Dusenbury, Esq., Robert Jordon, Esq.
Court Reporter:	Pam Faucette

This matter came before the Court on August 14, 2007 on Plaintiffs' Motion for Partial Summary Judgment that neither Union Federal Bank nor Waterfield Mortgage Co., Inc. is a

Holder in Due Course. Present at the hearing were Plaintiff's attorneys John Cooper and Cain Denny, as well as Defendant's attorney Katie Parham.

UNDISPUTED FINDINGS OF FACT

This is an Unfair Trade Practices Act case regarding the sale of a modular home. Plaintiffs allege fraud at the closing and defects in the home. The closing occurred on May 13, 2005. Union Federal Bank did not have an agent at the closing. Union Federal Bank conceded at the hearing that the closing attorney did not represent them.

On May 13, 2005, Federal Guaranty Mortgage Company ("Federal Guaranty") originated the note and mortgage. The note and mortgage were made payable to Federal Guaranty. On May 31, 2005, Union Federal Bank wired $156,543.26 to Federal Guaranty; however, Union Federal Bank did not take an assignment of the note and mortgage at that time. Plaintiffs refused to make payments on the loan.

On September 7, 2005, Waterfield Mortgage Company, of which Union Federal Bank is a subsidiary, sent a letter to Plaintiff Sandra Singleton stating that the loan was in default for non-payment. At the hearing on August 14, 2007, Union Federal Bank admitted that it was on notice of the default at the time Waterfield sent this letter to Ms. Singleton.

On December 19, 2005, Plaintiffs filed this action. On September 6, 2006, Union Federal Bank filed a Counterclaim against the Plaintiffs alleging that the loan had been in default since July 1, 2005.

On September 20, 2006, more than a year after the loan had been in default, Union Federal Bank took an assignment of the loan from Federal Guaranty. Union Federal Bank did not have any agent in possession of the instrument prior to taking the assignment of the loan from Federal Guaranty on September 20, 2006. On September 20, 2006, the assignment made the loan payable to Union Federal Bank; that was the first time the instrument was endorsed to

Union Federal Bank. Waterfield Mortgage Co., Inc. conceded at the August 14, 2007, hearing that it is not a holder in due course.[1] The only remaining issue is whether Union Federal is a holder in due course.

SUMMARY JUDGMENT STANDARD

Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c) SCRCP; Pittman v. Grand Strand Entm't, Inc., 363 S.C. 531, 611 S.E.2d 922 (2005); B & B Liquors, Inc. v. O'Neil, 361 S.C. 267, 603 S.E.2d 629 (Ct. App. 2004). In determining whether any triable issue of fact exists, the evidence and all inferences that can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party. Medical Univ. of South Carolina v. Arnaud, 360 S.C. 615, 602 S.E.2d 747 (2004); Rife v. Hitachi Constr. Mach. Co., Ltd., 363 S.C. 209, 609 S.E.2d 565 (Ct. App. 2005). If triable issues exist, those issues must go to the jury. Mulherin-Howell v. Cobb, 362 S.C. 588, 608 S.E.2d 587 (Ct. App. 2005).

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, admissions on file, and any affidavits 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. Rule 56(c), SCRCP; Helms Realty, Inc. v. Gibson-Wall Co., 363 S.C. 334, 611 S.E.2d 485 (2005); BPS, Inc. v. Worthy, 362 S.C. 319, 608 S.E.2d 155 (Ct. App. 2005). All ambiguities, conclusions, and inferences arising in and from the evidence are to be viewed in a light most favorable to the non-moving party. Willis v. Wu, 362 S.C. 146, 607 S.E.2d 63 (2004).

[1] The facts as stated are uncontested by the parties.

Even when there is no dispute as to 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'n, 362 S.C. 1, 605 S.E.2d 744 (Ct. App. 2004).

The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact. McCall v. State Farm Mut. Auto. Ins. Co., 359 S.C. 372, 597 S.E.2d 181 (Ct. App. 2004).

Because it is a drastic remedy, summary judgment should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial on disputed factual issues. Helena Chem. Co. v. Allianz Underwriters Ins. Co., 357 S.C. 631, 594 S.E.2d 455 (2004); Hawkins v. City of Greenville, 358 S.C. 280, 594 S.E.2d 557 (Ct. App. 2004).

CONCLUSIONS OF LAW

The Court finds, viewing the evidence in the light most favorable to the non-moving party, that the Plaintiffs have shown there exists no genuine issue of material fact; therefore, the Plaintiff's motion is granted. Union Federal Bank and Waterfield Mortgage Co. are not holders in due course because they did not meet the requirements under the applicable statutes to become a holder in due course under these facts.

"Holder" as Defined by § 36-1-201(20)

A "holder" is defined by statute as "a person who is ***in possession*** of a document of title or an instrument or certificated instrument security drawn, issued, or ***endorsed to him*** or to his order or to bearer or in blank." S.C. Code Ann. § 36-1-201(20) (emphasis added). Thus, for a person to be a holder of "order paper," such as the instrument in the present case, (1) the person must be in possession of the instrument and (2) the instrument must be endorsed to him.

"Negotiation" as Defined by § 36-3-202

The means by which one becomes a holder is also defined by statute. "Negotiation is the transfer of an instrument in such a form that the transferee becomes a holder. . . " S.C. Code Ann. § 36-3-202 (2006). "If the instrument is payable to order it is negotiated by *delivery* with any necessary *indorsement.*" S.C. Code Ann. § 36-3-202 (emphasis added). Thus, as with the definition of "holder," the definition of "negotiation" requires (1) delivery and (2) endorsement.

In the present case, the instrument was first made payable to Federal Guaranty on May 13, 2005. More than a year later, on September 20, 2006, the instrument was made payable to Union Federal Bank by an assignment. Union Federal Bank argues that wiring the funds gave it possession of the instrument and made it a holder in due course. However, under the plain language of the applicable statutes, wiring money alone does not and did not make Union Federal Bank a holder without (1) possession of the instrument and (2) endorsement of the instrument to it.

"Holder in Due Course" as Defined by § 36-3-302

A "holder in due course" is defined by statute as "*a holder* who *takes the instrument* (a) for value; and (b) in good faith; *and* (c) *without notice that it is overdue* or has been dishonored or of any defense against or claim to it on the part of any person." S.C. Code Ann. § 36-3-302 (emphasis added).

In the present case, Union Federal Bank did not take the instrument or become a holder until September 20, 2006, because that was the first time (1) it had possession of the instrument and (2) the instrument was endorsed to it.. By September 20, 2006, Union Federal Bank had notice that the instrument was overdue. At the hearing, Union Federal admitted that it knew the instrument was overdue at the time Waterfield Mortgage Co, Inc. sent notice of default to Ms. Singleton. That notice was sent on September 7, 2005. Independently, in Union Federal Bank's

Counterclaim in this action filed September 6, 2006, it alleged that the instrument had been overdue since July 1, 2005, more than a year before September 20, 2006.

Union Federal Bank Could Have Avoided this Situation

At the hearing, Union Federal Bank requested equitable relief. "No person shall be allowed to reap the benefits arising from his own wrongful acts." Taff v. Smith, 114 S.C. 306, 103 S.E. 551, 553 (1920).

Union Federal Bank could have avoided this situation and become a holder in due course under the applicable statutes by taking the assignment when it wired the money to Federal Guaranty; however, it waited more than a year to take possession of the instrument and to have the instrument endorsed to it. While this Court is sympathetic to Union Federal Bank's situation, as a matter of law, it is not a holder in due course because it did not take possession or have the instrument endorsed to it more than a year until after it knew the instrument was in default.

The Defendants seek to have the Court ignore statutory construction and exercise equitable principles to provide Union Federal with Holder in Due Course protection. While this Court is sympathetic to Union Federal Bank's situation, "[i]f a statute's language is plain, unambiguous, and conveys a clear meaning, the rules of statutory interpretation are not needed and the [C]ourt has no right to impose another meaning....Instead, the words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation. Moreover, it is beyond this Court's power to effect a change in the statutes enacted by the Legislature." Key Corporate Capital, Inc. v. County of Beaufort, 373 S.C. 55, 59, 644 S.E.2d 675, 677 (2007).

Here, the statute's language is clear and unambiguous, and its application to the uncontroverted facts is susceptible of only one inference. Further, there is no factual or legal basis for the Court to fashion an equitable remedy. Moreover, our Supreme Court has held that

"a court's equitable powers must yield in the face of an unambiguously worded statute." Key Corporate Capital, Inc, 373 S.C. at 61, 644 S.E.2d at 678.

With regard to Waterfield Mortgage Co, Inc., counsel conceded at the hearing that it is not a holder in due course.

Authority Cited by Union Federal Bank[2]

The precedent cited by Union Federal Bank is not binding on the court because they are unrelated federal law, and further, these cases are distinguishable from the present facts. First, in *A.I. Credit Corp.*, the promissory note was destroyed while in possession of the attorney for the defendants against whom the plaintiff sought to enforce the note. A.I. Credit Corp. v. Gohres, 299 F.Supp. 2d 1156 (D. Nev. 2004). Those facts are different from the facts in the present case. In the present case, the mortgage note and instrument were not destroyed. Nothing beyond the control of Union Federal Bank occurred to those instruments. Rather, Union Federal Bank plainly failed to take assignment or delivery of those instruments for over a year.

Union Federal Bank also cites Billingsley v. Kelly, 261 Md. 116, 274 A.2d 113, 115 (Md. 1971); Bankers Trust (Delaware) v. 236 Beltway Investment, 865 F.Supp. 1186 (E.D.Va. 1994); and Corporacion Venezolano de Fomento v. Vintero Sales Corp., 452 F.Supp. 1108 (S.D.N.Y. 1978). Those cases concern constructive possession; however, each of those cases is factually different from the case at bar in two material ways. First, there was constructive possession in each of those cases because an agent was holding the note on behalf of the party claiming to be the holder in due course. In contrast, in the present case, Union Federal Bank admitted at the hearing that it had no agent through whom it could claim constructive possession. In *Billingsley*, the Court of Appeals of Maryland stated, ". . . it is undisputed that Billingsley was holding the note for Huffner." Billingsley, 274 A.2d 113, 118. In *Bankers Trust (Delaware)*, the United

[2] Union Federal Bank's proposed order cites authority which was not cited at the motion hearing.

States District Court for the Eastern District of Virginia stated: "After the execution of the pooling agreement in 1987, Bankers Trust stored the Note in the vault at the offices of its sister company, BTC." Bankers Trust, 865 F.Supp. 1186, 1195. In *Corporation Venezolana de Formento,* the United States District Court for the Southern District of New York relied on the agent's action in taking delivery of the note when saying that delivery was proper because "constructive delivery may be accomplished through the vehicle of an agent." Corporacion Venezolana de Fermento, 452 F.Supp. 1108, 1117, 1118, n. 9. Thus, the cases cited by Union Federal Bank rely on the need for an agent to be in possession in order to claim constructive possession.

Second, in the cases cited by Union Federal Bank, the notes were endorsed to the parties claiming holder in due course status. Here, the mortgage and note were not endorsed to Union Federal Bank until after it knew about the default. In *Billingsley,* the parties cross-claimed for payment of four notes. Billingsley, 274 A.2d 113, 115. The Court of Appeals of Maryland indicated that each of the notes was endorsed to the party claiming payment. Id. In *Bankers Trust (Delaware),* the United States District Court for the Eastern District of Virginia took into account that the mortgages were transferred and specifically stated: "An assignee may become a holder in due course provided the assignor properly negotiates the note by indorsement *and* delivery." (emphasis added). 865 F.Supp. at 1195-1996. In *Corporacion Venezolana de Fermento*, the United States District Court for the Southern District of New York stated: "The certificates contain variations in language but, in substance, 'irrevocably assign' to each intervenor the amount of its participation in the Notes...." Corporatcion Venezolana de Formento, 452 F.Supp. at 1116. Thus, the cases cited by Union Federal Bank are both distinguishable and do not constitute precedent for this court's ruling.

Finally, it is well settled that a claim to holder in due course status requires both (1) possession (either actual or constructive possession through an agent) and (2) endorsement. The following is stated in Am.Jur. 2nd Bills and Notes, § 248:

> A holder in due course must be a holder. Since "holder" is defined as either a person in possession of bearer paper or the person in possession of an instrument payable to an identified person if the person in possession is that identifiable person, and since negotiation is defined as the transfer of possession of an instrument by a person other than the issuer to a person who thereby becomes a holder, it follows that a person cannot be a holder in due course of an instrument by transfer which does not amount to a negotiation.

In the present case, there is no evidence that a negotiation of the subject instrument, as defined by S.C. Code Ann. § 36-3-302, occurred prior to Union Federal Bank's learning that the instrument was in default.

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for Partial Summary Judgment that neither Union Federal Bank nor Waterfield Mortgage Co., Inc. is a Holder in Due Course is hereby GRANTED.

IT IS HEREBY ORDERED, ADJUDGED, and DECREED that neither Union Federal Bank nor Waterfield Mortgage Co., Inc. is a holder in due course with regard to the subject mortgage.

IT IS SO ORDERED!

November 20, 2007
Charleston, South Carolina

The Honorable Deadra L. Jefferson
Ninth Judicial Circuit