STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CIVIL ACTION NO.: 2005-CP-10-5115
Sandra Singleton et al,	)	
	)	
Plaintiffs,	)	
	)	**FINAL ORDER**
vs.	)	
	)	
CMH Homes, Inc. et al,	)	
	)	
Defendants.	)	
	)	

FILED
2009 JUN 26 PM 12: 10
JULIE J. ARMSTRONG
CLERK OF COURT
BY

This matter came before this Court for trial on March 25, 2009 on Huntington National Bank's counterclaim for foreclosure against the Plaintiffs.[1] Having considered the testimony, exhibits, and the arguments of counsel, this Court concludes that judgment for $216,218.90 should be entered for Huntington National Bank on its foreclosure counterclaim; however, the proceeds will be subject to an equitable set-off in the amount of $369,845.90 from an existing judgment of the Plaintiffs against Defendant's predecessor in interest to the note and mortgage.

Background

1. On May 13, 2005, the Plaintiffs closed their loan with Federal Guaranty Mortgage Co. ("FederalGuaranty"). On May 31, 2005, FederalGuaranty sold the note and mortgage to Union Federal (which subsequently became Huntington) for $156,543.26. Despite transferring the purchase funds, Union Federal did not obtain the note and mortgage.

2. On December 19, 2005, Plaintiffs Sandra Singleton and her mother, Edith Singleton ("Singletons"), filed this action regarding the sale of a modular home against various defendants, including the original lender, FederalGuaranty.

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[1] Attorneys John Hughes Cooper and John Townsend Cooper of John Hughes Cooper, P.C. and Cain Denny of Cain Denny, P.A. appeared for Plaintiffs. Attorneys Robert J. Thomas and Sean M. Forester of Rogers Townsend and Thomas, P.A., appeared for Defendant/Counterclaimant Huntington National Bank.

3. The Singletons' Complaint asserted, alternatively, Unfair Trade Practices, Fraud, Rescission, and other causes of action regarding the subject loan.

4. FederalGuaranty failed to answer and asserted no foreclosure counterclaim due to becoming insolvent. However, Union Federal did file an answer.

5. On June 30, 2006, Union Federal filed a foreclosure action on Plaintiff's loan, but agreed to dismiss the action without prejudice and bring it as a counterclaim to the original action with Plaintiff's consent.

6. On July 24, 2006, the Honorable Daniel F. Pieper issued a final default judgment against FederalGuaranty for $396,845.90 from claims originating out of the subject loan.

7. More than a month after entry of the final default judgment against FederalGuaranty, on September 11, 2006, Union Federal Bank, alleging that it was the holder of the promissory note, filed an Amended Answer asserting a counterclaim against the Singletons for foreclosure.

8. On September 20, 2006, over a year after making payment to FederalGuaranty, Union Federal Bank had the note and mortgage indorsed[2] and delivered to it. At the time of delivery, Union Federal had full knowledge of the present action and default judgment filed against FederalGuaranty.

9. On March 4, 2007, Edith Singleton died, and, by Order of the Honorable Deadra L. Jefferson filed November 2, 2007, Dianne Singleton, as Personal Representative of Edith Singleton's estate, substituted for Edith Singleton.

10. By a Consent Order issued by the Honorable Thomas L. Hughston, Jr., and filed April 3, 2007, Huntington's foreclosure counterclaim in this matter was stayed until the

[2] Per spelling in S.C. Code Ann. § 36-3-204. Indorsement.

completion of the Singletons' jury trial against another defendant, Allied Home Mortgage Capital Corporation.

11. On November 20, 2007, the Honorable Deadra L. Jefferon issued an Order granting partial summary judgment against Union Federal Bank in which she concluded that Union Federal Bank was not a "holder in due course." ("Jefferson Order") The basis of this Order analyzed Union Federal's failure to properly negotiate the loan due to the lack of indorsement and delivery. No appeal was taken from this Order.

12. By a Consent Order issued by the Honorable Markley Dennis and filed December 14, 2007, Huntington National Bank ("Huntington") substituted for Union Federal Bank as its successor in interest on the basis that Sky Bank acquired Union Federal Bank and then merged into Huntington.

13. On March 28, 2008, Everhome Mortgage Company ("Everhome"), an entity unrelated to Huntington or Union Federal Bank, served a separate foreclosure action on the Singletons, Civil Action 2006-CP-10-2552, which it had filed but not served on the Singletons on June 30, 2006.

14. On July 2, 2008, Everhome and Huntington, which were represented by the same law firm, filed a Motion for Substitution of Huntington for Everhome on the basis that Huntington was the "true owner and holder of the subject note and mortgage." On July 3, 2008, Plaintiffs filed a Memorandum in Opposition to that Motion.

15. On July 8, 2008, in a Consent Order resolving various motions issued by the Honorable Roger M. Young, Everhome voluntarily dismissed its action, Civil Action 2006-CP-10-2552.

16. By a Consent Order of Reference issued by the Honorable Roger M. Young and filed October 3, 2008, in accordance with Rule 53, SCRCP, Huntington's foreclosure counterclaim in this action was referred to this Court for final resolution.

17. Huntington's foreclosure counterclaim was tried before this Court on March 25, 2009.

18. There was due to Huntington on the loan as of March 25, 2009 (the date of the hearing), the sum of $216,218.90 which consists of the following:

Principal (on which no payment was ever made)	$156,740.00
Interest from June 1, 2005, through March 25, 2009	$32,229.68
Pro rate MIP/PMI	$121.08
Escrow advances for insurance and taxes	$21,173.84
Late Charges	$1,794.87
Two property inspections at $12 each	$24.00
Recoverable Balance	$4,135.43
Total	$216,218.90

Findings of Fact

19. Pursuant to Rule 56(d), SCRCP, specific findings of fact determined by Judge Jefferson's November 20, 2007 Order are undisputed and deemed established:

> Rule 56. SUMMARY JUDGMENT
>
> . . . (d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case . . . the court at the hearing of the motion, by examination of the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It may thereupon make an order specifying the facts that appear without substantial controversy . . . Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

Rule 56(d), SCRCP.

20. The closing in which the Singletons purchased the subject home occurred on May 13, 2005. (Jefferson Order, p. 2).

21. On May 13, 2005, FederalGuaranty Mortgage Company ("FederalGuaranty") originated the note and mortgage. (Jefferson Order, p. 2).

22. The note and mortgage were made payable to FederalGuaranty. (Jefferson Order, p. 2).

23. On May 31, 2005, Union Federal Bank wired $156,543.26 to FederalGuaranty; however, Union Federal Bank did not take an assignment of the note and mortgage at that time. (Jefferson Order, p. 2).

24. Plaintiffs refused to make payments on the loan. (Jefferson Order, p. 2).

25. Union Federal Bank's counterclaim alleged that the loan had been overdue since July 1, 2005. (Jefferson Order, pp. 5 – 6).

26. Huntington and Union Federal Bank admitted in their 30(b)(6) deposition given by Dana M. Farthing, the transcript of which was entered into the record at trial, that the loan went into default after July 1, 2005:

> Q All right. So after July the 1st of 2005 this loan would have been in default?
> A That's my understanding.
>
> (30(b)(6) Deposition of Huntington and Union Federal Bank given by Dana M. Farthing, p. 29, lines 1 – 3).

27. On September 7, 2005, a subsidiary of Union Federal Bank, Waterfield Mortgage Company, sent a letter to Plaintiff Sandra Singleton stating that the loan was in default for non-payment. (Jefferson Order, p. 2).

28. Union Federal Bank was on notice of the default at the time Waterfield Mortgage Company sent the September 7, 2005 letter to Sandra Singleton. (Jefferson Order, p. 2).

29. On December 19, 2005, Plaintiffs filed this action. (Jefferson Order, p. 2).

30. 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 FederalGuaranty. (Jefferson Order, p. 2) (emphasis added).

31. Huntington argued that, at the closing, the closing attorney had the Singletons, "sign an acknowledgment that the loan was going to be transferred to Union Federal and that they should be making their payments to Union Federal," citing Defendant's Exhibit 7, labeled, "Notice of Assignment, Sale, or Transfer of Servicing Rights;" however, Huntington's witness, Diane Critchet, Senior Vice President in Mortgage Banking for Huntington, admitted on cross-examination that an assignment of the servicing rights for a loan is not the same as an assignment of the note and mortgage:

> Q Is the servicing agreement the same as a note and mortgage?
> A No. The ownership interest is different - - can be different in a note verses the servicing rights.
>
> (Trial Tr. p. 72, lines 16 – 20).
>
> * * * *
>
> Q Well, I mean there could be another document that assigns the note, could be another document that assigns the mortgage. But that particular document only assigns the servicing rights; is that correct.
> A Not the assignment. It's notice to the customer that the servicing rights are going to be assigned.
> Q Right.
> A Yes, sir.
> Q But that's not the same as assigning the ownership of the note and mortgage?
> A Yes, sir, that's not the same.
>
> (Tr. p. 74, line 7 – 19).

32. During the foreclosure trial, Huntington asserted that prior to May 31, 2005, "the note was indorsed and sent by overnight delivery to Union Federal, and upon receiving that note Union Federal wired the funds to Federal Guaranty."

33. However, these assertions conflict with the findings in Judge Jefferson's Order.

34. Further, Huntington presented insufficient evidence to support these allegations at trial. Huntington's Vice President in Mortgage Banking, Dana Critchet, testified that the normal practice was for the payee to receive the note before making the wire transfer, but Huntington offered no evidence that actually happened in this case.

35. In its 30(b)(6) deposition, Huntington admitted that waiting until much later to execute the assignment was "pretty common practice:"

> Q Have you ever advised a client or company for which you work to wait until much later to execute the assignment?
> A No.
> Q That's not preferred procedure, is it?
> MS. PARHAM: Objection, form of the question.
> A Do you prefer that procedure?
> Q I would not prefer that procedure but it's pretty common practice in the industry.
>
> (30(b)(6) Deposition of Union Federal Bank/Huntington, p. 42, lines 12 – 21).

36. Huntington offered evidence that the Singletons signed acknowledging transfer of the servicing rights, but it admitted that transfer of the servicing rights is different from the transfer of a note and mortgage.

37. Huntington's Vice President of Mortgage Banking, Dana Critchet, admitted on cross-examination that the only evidence to suggest that Union Federal received the note prior to the wire transfer was the wire transfer itself:

> Q Well, do you have any evidence other than the wire transfer advice that the note was sent to Union Federal before September 2006?

A No. The Purchase Advice and the wire confirmation, we would have to have, the normal course because I wasn't there, we'd have to have the note before we send our money to the seller of the loan.

(Tr. p. 82, lines 17 – 24).

* * * *

Q Okay. So the only evidence you have is just the wire transfer.
A Yes, sir.

(Tr. p. 84, lines 8 – 10).

38. As found in Judge Jefferson's Order, Union Federal Bank did not have any agent in possession of the instrument prior to taking the assignment of the loan from FederalGuaranty on September 20, 2006. (Jefferson Order, p. 2).

39. Also as reflected in Judge Jefferson's Order, at the August 14, 2007 hearing on the Singletons' Motion for Partial Summary Judgment, Union Federal Bank admitted that it never had even constructive possession of the instrument prior to the September 20, 2006 assignment:

> In contrast [to cases cited by Union Federal Bank], in the present case, Union Federal Bank admitted at the hearing that it had no agent through whom it could claim constructive possession.
>
> (Jefferson Order, p. 7).

40. On September 20, 2006, the assignment made the loan payable to Union Federal Bank; that was the first time the instrument was indorsed to Union Federal Bank. (Jefferson Order, p. 2).

41. In its 30(b)(6) deposition, Union Federal admitted that the assignment of the mortgage was not executed until September 20, 2006 and that was not a "safe practice:"

Q All right. And why was the assignment of the mortgage not executed until September the 20th, 2006?
A Probably just one of those items that didn't get taken care of at the time the loan was transferred. It's not unusual. Oftentimes

assignments don't come, you know, right away after a loan is purchased. It would be months afterwards before they're received and recorded.

Q It's not usually years after, is it?
A It's been known to happen.
Q It's not a good practice, is it?
A For the party acquiring the loan, no, that's not a safe practice. But it's – unfortunately, when there's a lot of mortgages being transferred around it does occur.

(30(b)(6) Deposition of Union Federal Bank/Huntington by Dana M. Farthing, p.23, line 15 – p. 24, line 5).

42. In the present case, the note and mortgage instruments were not destroyed. (Jefferson Order, p. 7).

43. In the present case, there is no evidence that "negotiation" of the subject instrument occurred prior to Union Federal Bank's learning that the instrument was in default. (Jefferson Order, p. 2).

44. During the foreclosure trial, Huntington argued that Union Federal Bank would not have made the May 31, 2005 wire transfer without first obtaining possession of the note; however, Judge Jefferson's Order determined that Union Federal Bank did not have an agent in possession of the instrument prior to the assignment of the loan from FederalGuaranty on September 20, 2006. (Jefferson Order, p. 2).

45. Union Federal Bank could have avoided its situation and become a holder in due course by taking the assignment when it wired the funds to FederalGuaranty; however, it waited over a year to take possession of the instrument and to have the instrument indorsed to it. (Jefferson Order, p. 6).

46. Per the Order of the Honorable Daniel F. Pieper (July 24, 2006), the allegations of the Singleton's Complaint that FederalGuaranty's actions were knowing violations of the South Carolina Unfair Trade Practices Act are deemed admitted. (Pieper Order, p. 2).

Conclusions of Law

A. HOLDER IN DUE COURSE

1. As determined in Judge Jefferson's Order, with regard to the subject note and mortgage, Union Federal was not a "holder in due course."

2. Huntington, as the successor in interest to Union Federal, is not a "holder in due course."

3. Union Federal Bank did not acquire the right to sue on the note until it took possession and received indorsement of the note on September 20, 2006.

4. Per S.C. Code Ann. § 36-3-301, persons entitled to enforce an instrument are, "(i) the holder of the instrument; (ii) a nonholder in possession of the instrument who has the rights of a holder; or (iii) a person not in the possession of the instrument who is entitled to enforce the instrument pursuant to Section 36-3-309 or 36-3-418(d)." Sections 36-3-309 and 36-3-418(d) pertain to when instruments have been lost or destroyed.

5. Union Federal Bank was not entitled to enforce the instrument under § 36-3-301(i), because it did not become a "holder" until September 20, 2006, the first time it took possession of the instrument and had the instrument indorsed to it. (Jefferson Order, p. 2). Per S.C. Code Ann. § 36-3-201(a), "negotiation" is required to become a "holder." Under S.C. Code Ann. § 36-3-201(b), "negotiation" requires transfer of possession of the instrument and its indorsement by the holder, which, in the present case, as found by Judge Jefferson's Order, did not occur until September 20, 2006:

> 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 indorsed to it.
>
> (Jefferson Order, p. 5).

6. Union Federal Bank was not entitled to enforce the instrument under §36-3-301(ii) as a nonholder in possession with the rights of a holder, because, without regard to whether it had the rights of a holder, as found in Judge Jefferson's Order, it did not have an agent in possession of the instrument until September 20, 2006:

> Union Federal Bank did not have an agent in possession of the instrument prior to taking the assignment of the loan from Federal Guaranty on September 20, 2006.
>
> (Jefferson Order, p. 2).

7. Union Federal Bank was not entitled to enforce the instrument under § 36-3-301(iii) because, without regard to whether it had rights of a holder, in the present case, as required by that subsection, the instrument was not lost or destroyed. (Jefferson Order, p. 2):

> Those facts [in *A.I. Credit Corp. v. Gohres*, 299 F.Supp. 2d 1156 (D. Nev. 2004)] 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.
>
> (Jefferson Order, p. 7).

8. Huntington argues that after the wire transfer, FederalGuaranty was not the real party in interest to assert a foreclosure counterclaim, because, it asserts, thereafter, only Union Federal Bank was entitled to enforce the note and mortgage; however, prior to September 20, 2006, only FederalGuaranty was entitled to enforce the note and mortgage.

9. "A person who is not a holder or transferee cannot enforce the instrument, even if he or she is in possession of the instrument, or is the payee or the beneficial owner of the instrument." 10 C.J.S. Bills and Notes § 277 (2008) (Persons entitled to sue; plaintiffs).

10. One becomes a "holder" by negotiation, which, for an instrument payable to an identified person, requires (1) transfer of possession of the instrument and (2) its indorsement by the holder. S.C. Code Ann. § 36-3-201.

11. "For a person to qualify as a 'transferee' of an instrument, the instrument must have been delivered to that person." South Carolina Reporter's Comments to S.C. Code Ann. § 36-3-203.

12. In the present case, until September 20, 2006, Union Federal was not a "holder" because it did not have possession or indorsement, and it was not a "transferee" because it had not taken delivery.

13. Huntington argued in its Memorandum of Facts and Issues submitted at trial ("Memorandum") that, after the wire transfer, Union Federal Bank had the right to enforce the instruments based not on legal title but its beneficial or equitable interest.

14. Huntington's Memorandum argued, "Analogous is the status of a purchaser under a contract to buy real estate. Until there is a closing, the purchaser does not have *legal title* to the property and cannot sell or mortgage it, but he has enforceable ownership rights and an insurable interest in the property."

15. However, for negotiable instruments, a strict statutory code (S.C. Code Ann. 36-3-200 et al) exists which allows only the party with *legal title*, not beneficial or equitable title, to enforce an instrument.

16. "[I]n an action on a note, the real party in interest is the person or entity holding legal title to the note. Thus, the legal owner of a promissory note may maintain a cause of action even though the actual or beneficial ownership of the note lies in another, and the beneficial owner of a promissory note is not even a necessary party to a suit on a note." 10 C.J.S. Bills and Notes § 277 (Persons entitled to sue; plaintiffs) (2008).

17. "Indeed, it is the legal ownership, not the beneficial ownership, that must be proved to enforce a promissory note. Standing to enforce a note is broader than just actual ownership of the beneficial interest in the note." 10 C.J.S. Bills and Notes § 277 (Persons entitled to sue; plaintiffs) (2008).

18. Proof of possession is essential for standing to enforce payment on an instrument. *See* Official Comment 1, S.C. Code Ann. § 36-3-203 (Supp. 2008)("Although a document may effectively give Y a claim to ownership of the instrument, Y is not the person entitled to enforce the instrument until Y obtains possession of the instrument.")

19. Huntington also argues that the findings of Judge Pieper's Order are not binding on the defendants not in default due to his own handwritten addition; however, since Huntington negotiated the loan after the Order was issued, I conclude as a matter of law that it stands in the shoes of FederalGuaranty and is subject to Judge Pieper's Order.

B. ASSIGNMENT

20. Huntington is the successor in interest and the down-stream assignee of the note and mortgage from FederalGuaranty. In acquiring the instruments, Huntington could take no more than FederalGuaranty could give. Without holder in due course status, Huntington took the instruments subject to the defenses the Singletons could assert against FederalGuaranty.

21. The general rule is that the assignee has no greater rights than the assignor had at the time of the assignment. 5 S.C. Jur. Assignments § 43 (Rights of Assignee); *W.M. Kirkland, Inc. v. Providence Washington, Inc.*, 264 S.C. 573, 216 S.E.2d 518 (1975); *Standard Oil Co. of N.J. v. Powell Paving & Contracting Co.*, 139 S.C. 411, 138 S.E. 184 (1926).

22. An assignee is subject to the defenses between the assignor and debtor that existed at the time of the assignment and prior to the time that the debtor received notice of the

assignment. 5 S.C. Jur. Assignments § 43 (Rights of Assignee); *Dixie Wood Preserving Co. v. Albert Gersten & Assocs.*, 244 S.C. 57, 135 S.E.2d 368 (1965); *Patten v. Mutual Ben. Life Co.*, 192 S.C. 189, 6 S.E.2d 26 (1939); *Yancey v. Stark*, 132 S.C. 171, 129 S.E. 81 (1925).

23. Under the language of S.C. Code Ann. § 36-3-306 (2006), as it was worded at the time Union Federal became a "holder," unless a party has the rights of a holder in due course, it is "subject to all defenses which would be available to any action in simple contract:[3]

> § 36-3-306. Rights of one not a holder in due course.
> Unless he has the rights of a holder in due course any person takes the instrument subject to . . .(b) all defenses of any party which would be available in an action on simple contract; . . .
>
> S.C. Code Ann. § 36-3-306 (2006).

24. Because Union Federal Bank was not a holder in due course, it took the note and mortgage subject to the defenses Plaintiffs could assert against FederalGuaranty.

25. Huntington's argument that the Singletons acknowledged notice of the transfer of the note and mortgage from FederalGuaranty to Union Federal based on Defendant's Exhibit 7, "Notice of Assignment, Sale, or Transfer of Servicing Rights," fails because, as admitted by Huntington's Vice-President of Mortgage Banking, Diane Critchet, a servicing agreement is not the same as a note and mortgage, and ownership of servicing rights can be different from ownership of a note. (Tr. p. 72, lines 16 – 20).

26. "With the development of the secondary market, it has become common for the mortgagee to sell the notes and mortgages to investors while retaining the servicing of the notes and mortgages that were sold . . . In some situations, the note and mortgage are sold to an investor with servicing retained by the original mortgagee . . . In other

[3] Certain amendments, effective July 1, 2008, changed the wording of S.C. Code Ann. § 36-3-306.

situations, the ownership of the note and mortgage may be retained while the right to service the note and mortgage is sold to a third-party servicer." 27 S.C. Jur. Mortgages § 181.

C. EQUITABLE SET-OFF

27. At the time Union Federal Bank took assignment of the note and mortgage on September 20, 2006, Plaintiffs had a significant defense against those instruments.

28. The Singletons had a total offset based on their default judgment against FederalGuaranty in the amount of $396,845.90, an amount more than twice the $156,543.26 loan and an amount greater than the $216,218.90 claimed at the foreclosure trial by Huntington.

29. The right of a recoupment or equitable set-off allows one party to set off against the claim of the other that which such other owes to him and when the debts arise from a mutual source. *Carwile, Rec'r v. Metropolitan Life Ins. Co.*, 136 S.C. 179, 197, 134 S.E. 285 (1926). "The doctrine of recoupment rests upon the principle that it is just and equitable to settle in one action, thus avoiding a multiplicity of suits, all claims growing out of the same contract or transaction." 3 Story, Eq. Jur. (14th Ed.), § 1878.

30. This doctrine grows out of the inherent power of a Court of Equity to do justice between the parties and in avoidance of a multiplicity of suits. It operates only by way of abatement of the claim against which it is opposed, and does not entitle the party asserting it to a judgment for any difference as a counterclaim. Even if there were a question of mutuality of the demands, it is well recognized that in equity a set-off does not have to meet the requirements for a counterclaim under the Code. *Carwile, Rec'r*, 136 S.C. 197; *Falconer v. Powe*, Bailey, Eq., 156. *North Chicago Rolling Mill v. St. Louis Steel Co.*, 152 U.S. 596; 14 S.Ct., 710; 38 L.Ed., 565. *Smith v. Perry*, 197 Mo., 438; 95 S.W. 337.

31. The Courts have uniformly applied the principle of equitable set-off with great liberality to prevent injustice even in cases where elements requisite to legal set-off have been lacking. The Courts have repeatedly held that the absence of strict mutuality does not prevent the allowance of an equitable set-off, where justice demands it. The very fact of insolvency of a creditor against whom a set-off is claimed creates an equity permitting the set-off. As said by the Supreme Court of the United States in *North Chicago R.M. Co. v. St. Louis O. & S. Co.*, 152 U.S. 596; 38 L.Ed., 565: "By the decided weight of authority it is settled that the insolvency of the party against whom the set-off is claimed is sufficient ground for equitable interference".

32. I find that due to Defendant being the assignee of the note and mortgage, thereby not a holder in due course, they took the loan subject to the default judgment and therefore subject to an equitable set-off at the time the mortgage is foreclosed upon.

D. COUNTERCLAIM

33. The Singletons proffer a second defense which alleges that FederalGuaranty's failure to bring a compulsory counterclaim of foreclosure in response to the first action filed 12/19/2005 should be a complete bar to the foreclosure.

34. Huntington's attorneys in this action defended two of the defendants, Waterfield Mortgage Company ("Waterfield") and its subsidiary Union Federal Bank (Union Federal), and filed answers on their behalf. This is significant for reasons that will appear *infra*.

35. On June 30, 2006, Huntington's attorneys in this action filed a separate action on behalf of Huntington, *sub nom* Everhome Mortgage Company (a loan servicer for Union Federal), as Plaintiff against the Singletons seeking to foreclose the mortgage on their modular home and the lot on which it had been placed. At the Singletons' request, that

foreclosure action was dismissed without prejudice, and Union Federal (now Huntington)[4] agreed to assert its foreclosure action as a counterclaim in the present action. *See Union Federal's Amended Answer, Counterclaim, and Third Party Complaint seeking foreclosure* filed September 11, 2006.

36. The parties also consented to stay the foreclosure counterclaim and let the Singletons' action against Allied Home Mortgage Capital Corporation ("Allied") – the one defendant that had not defaulted and not settled – to go forward as a jury trial. *See Consent Order Staying Foreclosure Counterclaim and Third Party Counterclaims* filed April 3, 2007.[5] The Singletons stipulated that the issues asserted in the jury trial were not being asserted against Huntington. All other issues were referred to the undersigned Master in Equity.

37. I find that if FederalGuaranty had been the "real party in interest," a counterclaim seeking foreclosure of the mortgage would have been permissive, not compulsory. The issue is controlled by *C&S Real Estate Services, Inc. v. Massengale*, 290 S.C. 299, 301-302, 350 S.E.2d 191, 301 (1986) as modified by *Johnson v. South Carolina National Bank*, 292 S.C. 51, 54, 354 S.E.2d 895, 301 (1987).[6] Here, the gravamen of the Complaint brought

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[4] The name of the Foreclosing Plaintiff was first changed to Union Federal Bank and later to Huntington.

[5] Settlements were collected from some of the defendants but not Allied. The case went to trial against Allied the week of July 28, 2008, and resulted in a verdict that exonerated Allied. Although the Singletons received no damages as a result of the trial, they received $110,000 from the defaulting and settling defendants. Those funds were held in escrow by agreement. Plaintiffs' attorneys made a claim against those funds for 40% attorneys' fees ($44,000) and costs in the amount of $28,867.36. That claim was recently allowed by Order of Judge Deadra L. Jefferson. The balance is still held in escrow.

[6] The rules in *C&S Real Estate Services v. Massengale,* as modified in *Johnson v. South Carolina Nat. Bank,* are:

(1) If both the complaint and the counterclaim are in equity, the entire matter is triable by the court.

(2) If both 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 legal and compulsory, the defendant has the right to a jury trial on the counterclaim. In that case, the proper procedure 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.

by the Singletons was injury caused by breach of warranty in the sale of the modular home, fraud, rescission, breach of contract, negligence, strict liability, unfair trade practices, estoppel, reformation, and specific performance. Although rescission is an equitable cause of action, Plaintiffs elected to seek a monetary judgment and not pursue their equitable remedies (trial transcript at p 11, lines 8-17).

38. Although Union Federal Bank did not effectively negotiate the note and mortgage until September 20, 2006, I find that Union Federal's original answer in this action and filing of a separate foreclosure action on June 30, 2006, in conjunction with Plaintiff's consent to bringing the foreclosure as a counterclaim have effectively preserved Huntington's right of foreclosure. In addition, although rescission was originally pled, the Plaintiffs' elected to pursue their legal remedy for damages. A foreclosure counterclaim sounds in equity and follows Plaintiffs' claims which are legal. *See* Rules 38 & 39, SCRCP.

CONCLUSION

For the foregoing reasons, this Court finds that the Singletons have a significant offset to the debt owed to Huntington National Bank's foreclosure counterclaim based on their ability to set-off that debt from the default judgment against FederalGuaranty. The set-off may well exceed the amount of the debt. However, Huntington retains the right under the note and mortgage to proceed with its foreclosure sale to establish the value of the property. Whatever proceeds are

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(c) If there are factual issues common to both claims, absent the "most imperative circumstances," ... the "at law" claim must be tried first. The clerk of court shall immediately place the "at law" action at the top of the trial roster.
(d) If there are no common factual issues, it is within the trial judge's discretion which claim will be tried first.
(d) 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 common factual issues shall be binding upon the court.

obtained through the foreclosure sale shall be subject to the Plaintiffs' equitable set-off in the amount of $369,845.90; any overage shall be payable to Huntington on its note.

IT IS THEREFORE ORDERED:

1. Plaintiffs' Renewed Motion for Summary Judgment is granted in part and denied in part, and Huntington is granted judgment on its foreclosure counterclaim.

2. There is due on the Note and Mortgage set forth in the Counterclaim the sum of $216,218.90 as of March 25, 2009, the date of the hearing, together with interest at the rate provided in the Note from the March 25, 2009.

3. Huntington shall have judgment as demanded against Plaintiffs in such amount, net of any commission on sale, pursuant to S.C. Code Ann. Sec. 29-3-650.

4. The amount of debt shall accrue interest at the note rate, and together with such interest shall constitute the total judgment debt due Huntington.

5. The amount of the judgment shall be subject to increase to permit Huntington to recover additional costs, commissions and expenses not included in the minimum deposit previously made in compliance with S.C. Code Ann. §14-11-310 (1976). It may also increase to include supplemental compensation for attorney's services not contemplated herein. Any attorney's fee awarded must comply with the seven factors discussed in the holding of *Blumberg v. Nealco, Inc.*, 310 S.C. 492, 427 S.E.2d 659 (1993). Jurisdiction over the fee award and total debt is reserved to facilitate the assessment and payment of any such costs and/or supplemental compensation. Such additional costs, commissions and expenses may be established by affidavit and may be adjudicated by the court without further hearing.

6. Plaintiffs shall be liable for the aforesaid judgment including interest at the rate provided by law on or before the date of sale of the property hereinafter described.

7. On default of payment at or before the time herein indicated, the mortgaged premises described in the Complaint, as hereinafter set forth, shall be sold by the Master in Equity at public auction, at the Charleston County Courthouse, in the City of Charleston, County and State aforesaid on the next available sales date at 11:00 AM, or on some convenient sales day hereafter (and should the regular day of judicial sales fall on a legal holiday, then and in such event, the sales day shall be on the next business day succeeding such holiday), on the following terms, that is to say:

a. For cash: The Master in Equity will require a deposit of 5% on the amount of the bid (in cash or equivalent) same to be applied to purchase price if compliance is made, but in the event compliance is not made, the deposit may be forfeited without further hearing and applied first to costs of the action and then to Huntington's debt. Should the successful bidder at the regularly conducted sale fail or refuse to either make the required deposit at time of bid or comply with the other terms of the bid within 30 days, then the property may be re-sold on the same terms and conditions on the same or some subsequent Sales Day, but at the risk of the defaulting bidder(s).

b. The sale shall be subject to taxes and assessments, existing easements and restrictions and easements and restrictions of record, and any other senior encumbrances.

c. Purchaser must pay for any statutory commission on sale from the proceeds of sale.

d. Purchaser must pay for deed preparation, costs of recording the deed, and transfer taxes on the deed.

8. A personal or deficiency judgment having been demanded, the sale will remain open for thirty (30) days pursuant to S.C. Code Ann. Sec. 15-39-720 (1976).

9. Huntington may waive any of its rights, including its right to a deficiency

judgment in accordance with Rule 71, South Carolina Rules of Civil Procedure, if enacted at least five (5) days prior to sale.

10. The Master in Equity will, by advertisement according to law, give notice of the time and place of such sale and the terms thereof and will execute to the purchaser, or purchasers, a deed to the premises sold. Huntington, or any other party to this action, may become a purchaser at such sale, and if, upon such sale being made, the purchaser, or purchasers, should fail to comply with the terms thereof within 30 days after date of sale, then the Master in Equity may advertise the said premises for sale on the next or some other subsequent sales day at the risk of the highest bidder and so from time to time thereafter until a full compliance shall be secured.

11. In the event an agent of Huntington does not appear at the time of sale, the within property shall be withdrawn from sale and sold at the next available sales date upon the same terms and conditions as set forth in this Judgment of Foreclosure and Sale or such terms as may be set forth in a supplemental order.

12. If Huntington should be the successful bidder at the said sale, for a sum not exceeding the amount of costs, expenses and the indebtedness of Huntington in full, Huntington may pay to the Master in Equity only the amount of the costs and expenses crediting the balance of the bid on Huntington's indebtedness.

13. The Master in Equity will apply the proceeds of the sale as follows:

FIRST: To the payment of the costs and expenses of this action;

NEXT: To the payment of the judgment in favor of Sandra and Dianne Singleton, as Personal Representatives of the Estate of Edith Singleton, in the amount of the debt ($396,845.90) and interest or so much thereof as the purchase money will pay on the same. If the proceeds of sale, net of any commission on sale, be insufficient to pay the Judgment amount

herein be awarded, the parties hereto granted such Judgment shall continue to have judgment demanded against FederalGuaranty, for the unpaid amount remaining. Such judgment, after crediting the proceeds of sale, net of any commission on sale, shall be entered without further notice or hearing.

NEXT: Any surplus should be held pending further Order of this court.

14. In the event the successful bidder is other than the Plaintiffs in possession herein, the Sheriff of Charleston County is ordered and directed to eject and remove from the premises the occupant(s) of the property sold, together with all personal property located thereon, and put the successful bidder or his assigns in full, quiet, and peaceable possession of said premises without delay, and to keep said successful bidder or his assigns in such peaceable possession.

15. In the event the successful bidder is other than the Plaintiffs in possession and the occupants have voluntarily vacated the premises or have been ejected from the premises leaving furnishings, fixtures and items not subject to the Huntington's Mortgage in said premises, Huntington is authorized to remove therefrom all furnishings, fixtures and items not subject to the lien of Huntington's Mortgage, which personal property, being deemed abandoned, shall be removed by Huntington or its agents from the subject property by placing said personal property on the public street or highway or by any other means.

16. Plaintiffs and all persons whosoever claiming under Plaintiffs are forever barred and foreclosed of all right, title, interest, equity of redemption or lien in the said mortgaged premises so sold, or any part thereof.

17. In accordance with Rule 77(d), SCRCP, the Clerk of Court shall serve a notice of entry of this Judgment upon all parties not in default for failure to appear herein.

18. The deed of conveyance made pursuant to said sale shall contain the

names of only the first-named Plaintiffs' and Defendant Huntington National Bank, and the Plaintiffs who were the titleholder(s) of the mortgaged property at the time of the filing of the notice of pendency of the within action, and the name of the grantee; and the Register of Deeds/Clerk of Court is authorized to omit from the indices pertaining to such conveyance the names of all parties not contained in said deed.

19. The undersigned will retain jurisdiction to do all necessary acts incident to this foreclosure including, but not limited to, the issuance of a Writ of Assistance.

20. The following is a description of the premises herein ordered to be sold:

All that certain lot, piece, or parcel of land, with the buildings and improvements thereon, situate, lying and being on James Island, in the County and State aforesaid, shown and designated as Lot No. 4 on a plat made by K.T. Dubis, PE & LS, dated May 4, 1996 and recorded in the RMC for Charleston County in Plat Book DA, at Page 836. Reference is made to the aforesaid plat for a more full and complete description.

This being the same property conveyed to Edith Singleton by Deed of Benjamin Brown dated June 27, 1996 and recorded July 3, 1996 in Book 271 at Page 298; subsequently Edith Singleton conveyed a one half undivided interest to Sandra L. Singleton by Deed dated May 13, 2005 and recorded June 24, 2005 in Book 542 at Page 621.

Property Address: 1957 Hollings Road
Charleston , SC 29412

TMS# 340-01-00-083

IT IS SO ORDERED!

The Honorable Mikell R. Scarborough
Charleston County, Master-in-Equity

June 25, 2009

Charleston, South Carolina