

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas

George C. James, Jr., Circuit Judge

Appellate Case No. 2012-213309
Common Pleas Case No. 2010-CP-28-1197

U.S. Bank National Association Successor trustee to LaSalle Bank National Association, as trustee under the Pooling and Servicing Agreement, dated as of April 1, 2002, among Asset Backed Funding Corporation, Litton Loan Servicing LP and LaSalle Bank National Association, ABFC Asset Backed Certificates, Series 2002-SB-1,.....Respondent,

v.

Kelley Burr; FIA Card Services, N.A.; Discovery Bank, Issuer of the Discover Card; Unifund CCR Partners; Defendants,

Of Whom Kelley Burr is.....Appellant.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES

- I. Did the circuit court err in dismissing Appellant's counterclaims and striking her affirmative defenses for failure to prosecute where Respondent's motion to dismiss and strike was not based on any set of facts that amount to a failure to prosecute?

- II. Did the circuit court err in dismissing Appellant's counterclaims and striking her affirmative defenses for failure to prosecute where Respondent's motion to dismiss and strike was not supported by an affidavit or other cognizable evidence?

- III. Did the circuit court err in dismissing Appellant's counterclaims for mootness where the Respondent did not show that a judgment on the merits of those claims would have no practical effect upon the controversy between the parties?

- IV. Did the circuit court err in dismissing Appellant's counterclaims and striking her affirmative defenses on the basis of Rules 12(c) and 12(f), SCRCR, where the Respondent advanced no argument that a ruling in its favor was proper under the standards applicable to those rules and neither rule provided for such a ruling here?

STATEMENT OF THE CASE

The Respondent, U.S. Bank National Association as successor trustee to LaSalle Bank National Association, as Trustee under the Pooling and Servicing Agreement, dated as of April 1, 2002, among Asset Backed Funding Corporation, Litton Loan Servicing LP and LaSalle Bank National Association, ABFC Asset Backed Certificates, Series 2002-SB1 (hereinafter “U.S. Bank”), sued the Appellant, Kelley Burr (hereinafter “Burr”), filing a summons and complaint seeking foreclosure of a mortgage on November 1, 2010. (R. pp. ____; Summons and Complaint.) Burr answered and counterclaimed through her then-counsel, David P. Reuwer, Esquire. (R. pp. ____; Answer and Counterclaims.) Burr’s defenses and counterclaims centered on common factual allegations that “Burr and her husband provided [U.S. Bank] and/or its successor trustee with detailed information and documentation upon request of [U.S. Bank,]” that U.S. Bank’s authorized agents and employees “stated and represented to [Burr] that she would be taken care of not losing her residential home so long as she participated in the Home Affordable Modification Program [(hereinafter ‘HAMP’),]” that Burr “did cooperate and agree to participate in [HAMP,]” and that U.S. Bank “did not conduct a fair reasonable, comprehensive analysis nor reconsideration of her home mortgage payment amount problem, and that the Plaintiff never intended to actually do so.” (R. pp. ____; Answer and Counterclaims pp. 2-3.) Burr pled defenses and counterclaims labeled as “unclean hands,” “breach of contract,” “fraud and misrepresentation in the inducement,” “unfair trade practices,” “in pari delicto,” and “residential home.” (R. pp. ____; Answer and Counterclaims pp. 3-6.) Burr alleged U.S. Bank “breached the terms of

the contract [evidenced by the note and mortgage] and its duty to service the agreement in good faith” and that U.S. Bank “stated and represented over time and telephone calls and correspondence that it would reconsider and help [Burr] into an affordable loan modification, such that she would not lose her residential home.” (R. pp. ____; Answer and Counterclaims pp. 4, 5.) U.S. Bank pled numerous defenses to Burr’s counterclaims. (R. pp. ____; Plaintiff’s Answer to Defendant Burr’s Counterclaims.) Those defenses did not include mootness. (R. pp. ____; Plaintiff’s Answer to Defendant Burr’s Counterclaims.)

On May 2, 2011, Chief Justice Jean H. Toal of the Supreme Court of South Carolina issued In re: Mortgage Foreclosure Actions, 396 S.C. 209, 210, 720 S.E.2d 908 (2011) (South Carolina Supreme Court Administrative Order 2011-05-02-01), which sets out a framework for notifying mortgagor defendants in actions seeking mortgage foreclosure of owner-occupied dwellings of those defendants’ right to foreclosure intervention, as well as a process for the conclusion of foreclosure intervention efforts, generally in one of three ways: 1) successful settlement of the claim for foreclosure through foreclosure intervention, 2) good-faith attempts to settle the foreclosure claim that do not succeed in resolving the foreclosure, despite the participation of both mortgagor and mortgagee in the foreclosure intervention process, and 3) failure of the mortgagor defendant to participate in the foreclosure intervention process, either through failure to respond to the notice of right to foreclosure intervention at all or through completion of the foreclosure intervention process in a way that does not result in resolution of the foreclosure because of the mortgagor’s failure to provide necessary information. Id. at 211-14. U.S. Bank

served Burr's then-counsel with a notice of right to foreclosure intervention on July 25, 2011. (R. pp. ____; Notice of Right to Foreclosure Intervention and certificate of service thereof.) U.S. Bank's counsel and Burr's attorney at that time communicated about the notice, and U.S. Bank re-sent the notice on August 9, 2011. (R. pp. ____; Certification of Mortgagor Noncompliance p. 1.) On October 26, 2011, U.S. Bank's counsel served a certification that Burr had "failed, refused, or voluntarily elected not to participate in any foreclosure intervention process[.]" stating that despite U.S. Bank extending the deadline for Burr to submit documents and records for evaluation in the foreclosure intervention process, "[n]o documents or records were ever received by [U.S. Bank's] counsel." (R. pp. ____; Certification of Mortgagor Noncompliance pp. 1-2 & certificate of service of same.)

On April 17, 2012, U.S. Bank served the motion that is subject of this appeal, stating that Burr "has failed to prosecute and even has defeated her own counterclaims by not responding to [U.S. Bank's] efforts to offer her a loan modification proposal, in addition to not providing information to allow consideration of Burr for a modification. Therefore, pursuant to Rule 12(c), 12(f), and 41(b), S.C. Rules of Civil Procedure, U.S. Bank hereby moves to dismiss Burr's counterclaims and to strike her defenses." (R. pp. ____; Motion to Dismiss Counterclaims and to Strike Defenses.) The motion asserted that Burr's defenses and counterclaims against U.S. Bank are "all based primarily on an alleged failure to 'conduct a fair, reasonable, comprehensive analysis' and 'reconsideration of her home mortgage amount problem[.]'" contended that Burr failed to prosecute her claims by failing to engage in the foreclosure intervention process, and contended that Burr's claims were moot

because U.S. Bank had offered Burr a modification proposal on January 10, 2012, to which offer she never responded. (R. pp. ____; Motion to Dismiss Counterclaims and to Strike Defenses pp. 1, 4-5.) Attached to the motion were the certification of mortgagor noncompliance that U.S. Bank had already filed and printouts of email messages between U.S. Bank's attorney, that lawyer's paralegal, and Burr's then-counsel. (R. pp. ____; Exhibits to Motion to Dismiss Counterclaims and to Strike Defenses.) No testimony, by affidavit or otherwise, was served with or ever offered in support of the motion. (R. pp. ____; Exhibits to Motion to Dismiss Counterclaims and to Strike Defenses; Memorandum in Support of Motion to Reconsider p. 2; Transcript p. 14 ln. 11-15, p. 16 ln. 23-24, p. 19 ln. 4-5.)

A hearing on U.S. Bank's motion was set for Thursday, September 13, 2012. (R. pp. ____; Order filed Oct. 1, 2012, p. 1; Transcript p. 1 (cover page).) On the evening of September 10, 2012, Burr hired new counsel, the undersigned, who took over representation from Burr's previous attorney and filed a notice of appearance on the day of the motion hearing. (R. pp. ____; Transcript p. 4 ln. 4-12, p. 13 ln. 4-6; Notice of Appearance.)

U.S. Bank's counsel focused argument at the hearing on its contention that Burr had failed to prosecute her counterclaims by failing to respond to overtures to engage in foreclosure intervention. (R. pp. ____; Transcript p. 5 ln. 10 – p. 12 ln. 25, p. 18 ln. 9 – p. 19 ln. 3, p. 19 ln. 22 – p. 20 ln. 4.) U.S. Bank's counsel's only argument with regard to Rule 12(c), SCRCP, was that Burr's counterclaims were moot because U.S. Bank offered her a modification. (R. pp. ____; Transcript p. 10 ln.

1-5, p. 12 ln. 10-16.) U.S. Bank's counsel did not advance an argument at the hearing concerning Rule 12(f), SCRCF. (R. pp. ____; Transcript pp. 1-21.)

In response to U.S. Bank's argument, Burr's new counsel argued at the hearing that Burr's previous attorney's conduct in failing to "pay the attention to settlement negotiations that maybe ought to have been paid" did not amount to a failure to prosecute. (R. pp. ____; Transcript p. 13 ln. 6-11, 19-25, p. 14 ln. 1-9.) Burr's new counsel also argued that there was no factual material in the record tending to establish mootness of the counterclaims and that Burr's claim that U.S. Bank promised Burr a modification and then reneged on that promise before the lawsuit was commenced was not moot and would not be subject to a motion for judgment on the pleadings. (R. pp. ____; Answer and Counterclaims pp. 2-3; Transcript p. 16 ln. 21 – p. 17 ln. 7.) Burr's counsel made an oral motion to amend the answer and counterclaim, stating, "I hadn't really been in this case long enough to find out exactly what it is that I want to add, but I know I want it to read differently from the way it reads now." (R. pp. ____; Transcript p. 17 ln. 8-16.)

The court announced at the hearing that it was "going to grant the motion to strike the counterclaims" and stated that, to make a motion to amend, Burr would need to make a written motion with a proposed amended pleading attached. (R. pp. ____; Transcript p. 20 ln. 15-25.) Upon inquiry from Burr's counsel, the court noted that its ruling was "[n]ot prejudicial to your right to make a motion [to amend], but that doesn't mean it's going to be amended, and whoever hears that motion can perhaps look at my Order and determine whether or not your proposed amendments

fall outside – or fall inside or outside what I’ve dismissed.” (R. pp. ____; Transcript p. 21 ln. 1-8.)

In an order filed October 1, 2012, the court granted U.S. Bank’s motion, ruling that “[b]ased on the arguments presented by counsel, the documents and evidence presented, and Rules 41(b) and Rules 12(c) and 12(f) of the South Carolina Rules of Civil Procedure, Plaintiff’s Motion for to Dismiss Defendant Burr’s Counterclaims and to Strike Affirmative Defenses is hereby GRANTED.” (R. pp. ____; Order pp. 1, 4.) The court found that Burr engaged in a failure to prosecute and that the four factors relevant to whether to grant a dismissal for failure to prosecute in McComas v. Ross, 368 S.C. 59, 626 S.E.2d 902 (Ct. App. 2006), were met in this case. (R. pp. ____; Order pp. 2-3.) The court also ruled that “Burr’s claims are moot because they are based on an alleged scenario of her not being offered a loan modification” since U.S. Bank “offered Burr a modification proposal on January 10, 2012, and no evidence shows that Burr responded to this offer until April.” (R. pp. ____; Order pp. 3-4.)

Burr made a timely motion to reconsider in which she noted the arguments her counsel made at the hearing and also pointed out that U.S. Bank “did not advance any arguments concerning [the standards applicable to motions under Rules 12(c) and 12(f)], and the Court’s order does not contain any analysis of whether these standards were met[,]” with Burr stating that “Rules 12(c) and 12(f), SCRCPP, do not provide an appropriate basis for the Court’s decision.” (R. pp. ____; Motion to Reconsider; Memorandum in Support of Motion to Reconsider.) The court denied this motion,

without a hearing, in a one-sentence order filed October 16, 2012. (R. pp. ____; Order on Motion to Reconsider.) This appeal followed.

STATEMENT OF FACTS

Burr did not engage in any behavior that could reasonably be construed as a failure to prosecute. She apparently failed to provide U.S. Bank with the documents that it stated it needed to evaluate her for a loan modification, but that was, at most, a failure to engage in settlement negotiations. (R. pp. ____; Memorandum in Support of Motion to Reconsider p. 2; Transcript p. 13 ln. 6-11.) That is not a failure to prosecute. (R. pp. ____; Memorandum in Support of Motion to Reconsider pp. 1-2; Transcript p. 13 ln. 10-11, p. 13 ln. 19 – p. 14 ln. 9, p. 15 ln. 15-21.) U.S. Bank noted no instance of Burr not appearing at a roster meeting or other court event and no instance of Burr failing to participate in discovery. (R. pp. ____; Motion to Dismiss Counterclaims and to Strike Defenses; Memorandum in Support of Motion to Reconsider p. 2; Transcript.) Also, the remedy under the operative administrative order for a mortgagor defendant's failure to participate in foreclosure intervention negotiation is not the dismissal of counterclaims or the striking of defenses. (R. pp. ____; Memorandum in Support of Motion to Reconsider p. 2; Transcript p. 15 ln. 15-21.)

What happened here is that Burr's previous attorney failed to do a good job (or much of a job at all) in participating in settlement negotiations with U.S. Bank. (R. pp. ____; Motion to Dismiss Counterclaims and to Strike Defenses; Certification of Mortgagor Noncompliance; Transcript p. 5 ln. 25 – p. 11 ln. 5, p. 13 ln. 6-9.) Burr fired that lawyer and hired another one. (R. pp. ____; Transcript p. 4 ln. 4-12, p. 13

In. 4-6; Notice of Appearance.) In the meantime, U.S. Bank had served and filed a certification of Burr's failure to participate in the foreclosure intervention process, which allowed the foreclosure action to proceed. (R. pp. ____; Certification of Mortgagor Noncompliance); see In re: Mortgage Foreclosure Actions, 396 S.C. at 212.

U.S. Bank never established that the court could afford Burr no practical relief as to the controversy subject of her counterclaims and defenses. (R. pp. ____; Memorandum in Support of Motion to Reconsider p. 3; Transcript p. 16 ln. 21 – p. 17 ln. 7.) U.S. Bank never put the documents showing the terms of the modification it proposed to Burr in the record. Nothing before the court showed that any modification U.S. Bank offered complied with applicable HAMP directives or other standards, nor was there anything before the court tending to show whether the terms of the proposed modification were the same as, better than, or worse for Burr than what she was promised. (R. pp. ____; Memorandum in Support of Motion to Reconsider p. 3.) For example, U.S. Bank never put anything into the record showing whether its proposed modification contemplated an increase in the amount of principal to recast fees and costs related to the foreclosure action as part of the loan's modified principal. Burr pled that U.S. Bank had promised her a modification and then reneged on that promise, which could not be made moot simply by U.S. Bank later offering Burr a modification. (R. pp. ____; Answer and Counterclaims pp. 2-3; Memorandum in Support of Motion to Reconsider p. 3; Transcript p. 16 ln. 21 – p. 17 ln. 7.) Burr did not solely seek a modification as the relief to be granted on her claims; she also sought an award of damages. (R. pp. ____; Answer and

Counterclaims pp. 4, 5-6, 7; Memorandum in Support of Motion to Reconsider p. 3.) U.S. Bank adduced no evidence at all to the effect that the court could afford Burr no practical relief as to the existing controversy between the parties. (R. pp. ____; Memorandum in Support of Motion to Reconsider p. 3.)

U.S. Bank never even argued, much less established, that Burr's answer and counterclaim failed to state facts sufficient to constitute a cause of action or that in some other way *the pleadings* demonstrated that Burr was not entitled to prevail on her counterclaims. (R. pp. ____; Memorandum in Support of Motion to Reconsider pp. 3-4.) Similarly, U.S. Bank never established or even argued that Burr's answer and counterclaim pled a legally insufficient defense or pled redundant, immaterial, impertinent, or scandalous matter. (R. pp. ____; Memorandum in Support of Motion to Reconsider pp. 3-4.) The court never ruled that either of those things were true; in fact, the court's ruling is expressly based on U.S. Bank's contentions as to facts that do not appear from the pleadings and were not presented through any affidavit or other testimony. (R. pp. ____; Order; Memorandum in Support of Motion to Reconsider pp. 3-4.)

The circuit court simply decided that it was proper to dismiss Burr's counterclaims and strike her defenses because she failed to participate in foreclosure intervention, even though the operative Supreme Court administrative order provides that what is to happen in such circumstances is just for the foreclosure action to proceed. In re: Mortgage Foreclosure Actions, 396 S.C. at 212.

STANDARD OF REVIEW

“When reviewing a motion to dismiss for failure to prosecute pursuant to Rule 41(b), SCRPC, an appellate court may reverse the trial court’s decision upon an abuse of discretion. An abuse of discretion occurs when the conclusions of the trial court are either controlled by an error of law or are based on unsupported factual conclusions.” In re: Care and Treatment of Miller, 393 S.C. 248, 256, 713 S.E.2d 253, 257 (2011).

Rule 12(c), SCRPC, provides for a judgment on the pleadings in a proper case. The standard of whether such a motion should be granted is the same as for a motion under Rule 12(b)(6), SCRPC, and the appellate court applies the same standard to the review of an order granting such a motion. See Russell v. City of Columbia, 305 S.C. 86, 406 S.E.2d 338 (1991); Falk v. Sadler, 341 S.C. 281, 533 S.E.2d 350 (Ct. App. 2000); Fireman’s Ins. Co. v. Cincinnati Ins. Co., 302 S.C. 234, 394 S.E.2d 855 (Ct. App. 1990).

Rule 12(f), SCRPC, provides that the Court “may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent or scandalous matter.” A motion to strike that challenges a theory of recovery pled by the non-movant is in the nature of a motion to dismiss under Rule 12(b)(6), SCRPC. McCormick v. England, 328 S.C. 627, 494 S.E.2d 431 (Ct. App. 1997).

“A motion to dismiss a counterclaim must be based solely on the allegations set forth in the counterclaim. See Rule 12(b)(6), SCRPC; Baird v. Charleston County, 333 S.C. 519, 527, 511 S.E.2d 69, 73 (1999). ‘A Rule 12(b)(6) motion may not be sustained if facts alleged and inferences reasonably deducible therefrom would

entitle the [complainant] to any relief on any theory of the case.’ Stiles v. Onorato, 318 S.C. 297, 300, 457 S.E.2d 601, 602-3 (1995). The question is whether in the light most favorable to the complainant, and with every doubt resolved on his behalf, the counterclaim states any valid claim for relief. Toussaint v. Ham, 292 S.C. 415, 416, 357 S.E.2d 8, 9 (1987). The counterclaim should not be dismissed merely because the trial court doubts the complainant will prevail in the action. Id.” Charleston County Sch. Dist v. Laidlaw Transit. Inc., 348 S.C. 420, 559 S.E.2d 362 (Ct. App. 2001) (citations in original). In deciding a motion for judgment on the pleadings, the trial court may not consider matters outside the allegations of the pleadings. Falk, 341 S.C. at 281; Firemen’s Ins. Co., 302 S.C. at 234.

ARGUMENT

I. Since Burr did not do anything that amounted to a failure to prosecute, the circuit court erred in dismissing her counterclaims and striking her affirmative defenses for an ostensible failure to prosecute.

U.S. Bank’s motion and the circuit court’s decision were based on conduct that, while regrettable, did not constitute failure to prosecute. (R. pp. ____; Memorandum in Support of Motion to Reconsider pp. 1-2; Transcript p. 13 ln. 6-11, p. 13 ln. 19 – p. 14 ln. 9, p. 15 ln. 15-21.) Black’s Law Dictionary defines “prosecute” as “[t]o commence and carry out a legal action[.]” The leading recent South Carolina reported case analyzing a dismissal for failure to prosecute, McComas v. Ross, dealt with a situation in which the plaintiff in that case did not show up on time at the courtroom for the trial. 368 S.C. at 60-61. That is the sort of conduct that would trigger an analysis of whether a failure to prosecute has occurred, and then an analysis of whether that failure to prosecute warrants dismissal. Cf. id. at 60-64.

Older South Carolina cases concerning dismissals for failure to prosecute also deal most often with failure of a plaintiff to attend trial. See Small v. Mungo, 254 S.C. 438, 175 S.E.2d 802 (1970) (dismissal for failure to prosecute affirmed where plaintiff and counsel did not appear when case called for trial); Bond v. Corbin, 68 S.C. 294, 47 S.E. 374 (1904) (dismissal for failure to prosecute affirmed where plaintiff did not show up for trial at pre-set time and date and still failed to attend after two continuances given so that he could get to trial). One case deals with a dismissal for failure to prosecute where the plaintiff repeatedly failed to meet its procedural requirements of the “Summons (Complaint Not Served)” procedure, which no longer exists. Don Shevey & Spires, Inc. v. American Motors Realty Corp., 279 S.C. 58, 301 S.E.2d 757 (1983). Other cases deal with dismissals for something that is not strictly failure to prosecute but is a bit different, the failure to comply with court orders. See Orlando v. Boyd, 320 S.C. 509, 466 S.E.2d 353 (1996) (reversal of exclusion of expert witness for failure to comply with order and following grant of summary judgment based on inability to offer expert testimony because of exclusion); Georganne Apparel, Inc. v. Todd, 303 S.C. 87, 399 S.E.2d 16 (Ct. App. 1990) (affirmation of dismissal for failure to comply with conditions of order); Therens v. Faircloth, 291 S.C. 451, 354 S.E.2d 54 (Ct. App. 1987) (affirmation of dismissal for failure to comply with conditions of order in prior case).

Here, we do not have a failure of Burr to comply with an order. The only order that was at issue in this matter at the time U.S. Bank’s motion was heard was the Supreme Court of South Carolina’s order in In re: Mortgage Foreclosure Actions, 396 S.C. at 209-14. Burr cannot have failed to comply with that order, because that

order did not require her to do anything; rather, that administrative order puts requirements on foreclosure plaintiffs and simply sets out a mechanism for foreclosure defendants, like Burr, to request foreclosure intervention if they want it. Id. at 211-12. Further, the remedy under that order for a situation in which the mortgagor defendant ignores foreclosure intervention efforts after requesting foreclosure intervention is for the plaintiff to deny foreclosure intervention on that basis and have its lawyer serve and file a notice of denial of foreclosure intervention so that the case may proceed. Id. at 212.

What happened in this case was not the kind of thing that is a failure to prosecute. (R. pp. ____; Memorandum in Support of Motion to Reconsider pp. 1-2; Transcript p. 13 ln. 6-11, p. 13 ln. 19 – p. 14 ln. 9, p. 15 ln. 15-21.) U.S. Bank could not point to even one instance of Burr not appearing at a roster meeting or other court event and could point out no instance of Burr failing to participate in discovery. (R. pp. ____; Motion to Dismiss Counterclaims and to Strike Defenses; Memorandum in Support of Motion to Reconsider p. 2; Transcript.) Everything of which U.S. Bank complained, and everything the circuit court found as a basis for its decision, dealt with Burr's failure to participate in a process of resolving this case by *neither* party prosecuting the claims in this case. (R. pp. ____; Order; Motion to Dismiss Counterclaims and to Strike Defenses; Transcript p. 5 ln. 10 – p. 12 ln. 25, p. 18 ln. 9 – p. 19 ln. 3, p. 19 ln. 22 – p. 20 ln. 4.) U.S. Bank never complained of Burr having failed to do something to advance the prosecution of her counterclaims, and the circuit court did not find she engaged in such behavior. (R. pp. ____; Order; Motion to Dismiss Counterclaims and to Strike Defenses; Transcript p. 5 ln. 10 – p. 12 ln. 25,

p. 18 ln. 9 – p. 19 ln. 3, p. 19 ln. 22 – p. 20 ln. 4.) The circuit court stated that “Burr ‘has been given abundant opportunity to litigate[.]’” quoting Georganne Apparel, but conduct concerning litigation or the opportunity to litigate was not what was the subject of U.S. Bank’s motion or the grounds on which the circuit court based its order; rather, the circuit court based its order on failure to engage in settlement negotiations. (R. pp. ____; Order; Motion to Dismiss Counterclaims and to Strike Defenses; Transcript p. 5 ln. 10 – p. 12 ln. 25, p. 18 ln. 9 – p. 19 ln. 3, p. 19 ln. 22 – p. 20 ln. 4.) The circuit court never should have begun the four-factor analysis under McComas, because that is the analysis of whether *a failure to prosecute* warrants dismissal. 368 S.C. at 63.

When a failure to prosecute has occurred, the court applies the four-factor analysis set out in McComas: “(1) the plaintiff’s degree of personal responsibility; (2) the amount of prejudice caused by the defendant; (3) the presence of a drawn out history of deliberately proceeding in a dilatory fashion; and (4) the effectiveness of sanctions less drastic than dismissal.” Id. Since there was no failure to prosecute, that analysis does not fit well here.

As to Burr’s personal responsibility, this factor refers to a litigant’s personal responsibility for a failure to prosecute; as discussed above, there was no such failure here. (R. pp. ____; Memorandum in Support of Motion to Reconsider pp. 1-2; Transcript p. 13 ln. 6-11, p. 13 ln. 19 – p. 14 ln. 9, p. 15 ln. 15-21.) Also, U.S. Bank’s counsel acknowledged at the motion hearing that she would “admit that it is probably not this borrower’s hundred percent fault that this has happened[.]” (R. pp. ____; Transcript p. 10 ln. 11-12.)

Further, U.S. Bank made no showing of prejudice to it because of something that Burr did, and the circuit court made no findings supportive of the existence of prejudice. Any time and money U.S. Bank expended in attempting settlement negotiations with Burr were not as a result of any failure on her part to prosecute her claims; indeed, the circuit court's order notes that "U.S. Bank has expended time and expenses before and since the filing of the Complaint." (R. p. ___; Order p. 3.) Moreover, prejudice is "[d]amage or detriment to one's legal rights or claims[.]" Black's Law Dictionary 545 (2d pocket ed 2001) (definition of prejudice). What U.S. Bank argued and the circuit court found does not constitute prejudice. This Court recently rejected a similar argument (in a foreclosure case concerning a different procedural issue) that a bank should be allowed to proceed with trial of its foreclosure claim before a jury trial was held on a defendant's counterclaims. Plantation Fed. Bank v. Gray, 401 S.C. 507, 737 S.E.2d 515 (Ct. App. 2013). The bank "argued that the foreclosure action should proceed because the value of the lot was declining based on the general state of the economy and because Bank would have to pay taxes on the lot to prevent it from being sold at a tax sale scheduled for later in the year." Id. at 517. In rejecting this argument, this Court noted that "[t]hese circumstances would possibly, if not likely, occur in every foreclosure action currently pending." Id. To show prejudice, U.S. Bank would have to show more than that it has spent money on this foreclosure case or on attempted negotiations with Burr (which, as discussed below, is not something of which it actually made a showing).

With regard to any history of proceeding in a dilatory fashion, as discussed above, U.S. Bank could not point to one court or discovery event that was delayed by

anything Burr did or did not do. This factor is concerned with the party's history of proceeding in a dilatory fashion *in the prosecution of her case*, not in settlement negotiations about whether the case will be resolved by consent. See *McComas*, 368 S.C. at 64.

Further, as for whether less drastic sanctions might be effective, the blanket statement that “another court order directing compliance would provide no incentive for Burr to act” lacks evidentiary support: first, because there was never any court order directing her to act in the first place and, second, because neither U.S. Bank nor the circuit court could point to a thing that Burr was supposed to have done in the prosecution of her counterclaims that she did not do. (R. pp. ___; Order p. 3.)

In short, the circuit court simply decided that it was proper to dismiss Burr's counterclaims and strike her defenses not because she failed to prosecute them but, rather, because she failed to participate in foreclosure intervention. (R. pp. ___; Order.) The operative Supreme Court administrative order provides that what is to happen in such circumstances is just for the foreclosure action to proceed, not for a mortgagor defendant's claims to be dismissed and her defenses stricken. In re: Mortgage Foreclosure Actions, 396 S.C. at 212. U.S. Bank had already served and filed its certification when it made its motion; there was nothing procedurally to delay trial of the case. See id.

The circuit court dismissed Burr's counterclaim and struck her defenses on the basis of something that does not constitute a failure to prosecute. The circuit court's decision was controlled by an error of law: a misconception of what a failure to

prosecute is and is not. That is an abuse of discretion and is reversible error. Miller, 393 S.C. at 256.

II. As U.S. Bank's motion to dismiss and strike was not supported by an affidavit or other cognizable evidence, the circuit court erred in dismissing Burr's counterclaims and striking her affirmative defenses on the basis of the mere contentions of U.S. Bank's counsel.

Arguments of counsel are not evidence. Trivelas v. S.C. Dept. of Transportation, 348 S.C. 125, 141, 558 S.E.2d 271, 279 (Ct. App. 2001); Higgins v. MUSC, 326 S.C. 592, 599 S.E.2d 269, 272 (Ct. App. 1997); Historic Charleston Foundation v. Krawcheck, 313 S.C. 500, 508 n. 7, 443 S.E.2d 401, 406 n. 7 (Ct. App. 1994); Gilmore v. Ivey, 290 S.C. 53, 58, 348 S.E.2d 180, 183 (Ct. App. 1986). Arguments of counsel were all that supported U.S. Bank's motion. (R. pp. ____; Motion to Dismiss Counterclaims and to Strike Defenses & exhibits thereto; Transcript p. 16 ln. 21 – p. 17 ln. 7.)

In its order, the circuit court made findings of fact solely on the basis of the unsworn contentions of U.S. Bank's counsel, which the circuit court apparently accepted as established, proven truths. (R. pp. ____; Order.) This was error. Id. In fact, there was no cognizable evidence before the court tending to establish that anything U.S. Bank contended was true actually was, except for the dates of service and filing of the notice of right to foreclosure intervention and the certification of mortgagor noncompliance. (R. pp. ____; Notice of Right to Foreclosure Intervention; Certification of Mortgagor Noncompliance.) While this is true of every purported factual finding made by the circuit court, it is particularly apparent concerning the circuit court's findings with regard to U.S. Bank having spent money because of Burr's lack of response in settlement negotiations and with regard to the finding that

Burr had been offered a modification that made her counterclaims moot. (R. pp. ___; Order.)

“In general a case becomes moot when the issues presented are no longer ‘live’ or the parties lack a legally cognizable interest in the outcome.” U.S. v. (Under Seal), 819 F.2d 1139 (4th Cir. 1987) (internal quotation marks omitted) (quoting Leonard v. Hammond, 804 F.2d 838, 842 (4th Cir. 1986)). Usually, a determination of mootness is necessarily a factual determination. Cf. id. As discussed above, we know nothing about what the terms of the proposed modification were, and all we have to go on about whether one was offered to Burr is the unsworn representation of U.S. Bank. That is not a factual record that could support a determination of mootness.

The circuit court’s decision is based on unsupported factual conclusions. Hence, the grant of U.S. Bank’s motion constitutes an abuse of discretion and is reversible error. Miller, 393 S.C. at 256.

III. The circuit court erred in dismissing Burr’s counterclaims for mootness where U.S. Bank did not show that a judgment on the merits of those claims would have no practical effect upon the controversy between the parties.

A case is nonjusticiable for mootness where, if the party prevails, it has become impossible for the court to grant him any “effectual relief” that would have “practical legal effect upon the existing controversy.” Curtis v. State, 345 S.C. 557, 567, 549 S.E.2d 591, 596 (2001) (internal quotation marks omitted). U.S. Bank did not show that Burr’s counterclaims are moot.

As noted above, U.S. Bank made no factual showing about whether a modification was offered to Burr, what its terms were, whether those terms were

better or worse than what U.S. Bank had promised her before, or anything about it at all. Nonetheless, the circuit court found that this had happened and that it made Burr's claims moot. (R. pp. ____; Order p. 3-4.) Even if, however, there were a sufficient showing in the record that U.S. Bank had offered Burr a modification, that would not be tantamount to a showing that something has happened to make it so that Burr has sustained no damages as a result of U.S. Bank breaking its promise to modify her loan, and *that* is what U.S. Bank would have had to prove in order for Burr's claims seeking damages to be moot. See id. That did not happen. The circuit court's ruling that Burr's counterclaims are moot was reversible error, both because it is based on unsupported factual conclusions and because it is controlled by an error of law concerning what mootness is.

IV. The circuit court erred in dismissing Burr's counterclaims and striking her affirmative defenses on the basis of Rules 12(c) and 12(f), SCRCF, where U.S. Bank advanced no argument that a ruling in its favor was proper under the standard applicable to those rules and neither rule provided for such a ruling here.

U.S. Bank's counsel's only argument with regard to Rule 12(c), SCRCF, was that Burr's counterclaims were moot because U.S. Bank offered her a modification. (R. pp. ____; Transcript p. 10 ln. 1-5, p. 12 ln. 10-16.) U.S. Bank never argued that Burr's answer and counterclaim failed to state facts sufficient to constitute a cause of action or that in some other way *the pleadings* demonstrated that Burr was not entitled to prevail on her counterclaims. (R. pp. ____; Motion to Dismiss Counterclaims and Strike Defenses; Memorandum in Support of Motion to Reconsider pp. 3-4; Transcript.) The circuit court did not rule that Burr's answer and counterclaim failed to state facts sufficient to constitute a cause of action or that in

some other way the pleadings demonstrated that Burr was not entitled to prevail on her counterclaims. (R. pp. ____; Order.)

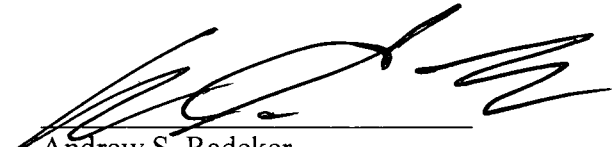
U.S. Bank's counsel did not advance an argument at the hearing concerning Rule 12(f), SCRCF. (R. pp. ____; Transcript pp. 1-21.) U.S. Bank never argued that Burr's answer and counterclaim pled a legally insufficient defense or pled redundant, immaterial, impertinent, or scandalous matter. (R. pp. ____; Memorandum in Support of Motion to Reconsider pp. 3-4; Transcript.) The circuit court never ruled that Burr's answer and counterclaim pled a legally insufficient defense or pled redundant, immaterial, impertinent, or scandalous matter. (R. pp. ____; Order.) Indeed, as noted above, the circuit court's ruling was expressly based on U.S. Bank's contentions as to facts that do not appear from the pleadings. (R. pp. ____; Order; Memorandum in Support of Motion to Reconsider pp. 3-4.) A determination that Burr's counterclaims and defenses were moot could not be a proper subject of a motion for judgment on the pleadings in any event, since U.S. Bank did not plead mootness as a defense. (R. pp. ____; Plaintiff's Answer to Defendant Burr's Counterclaims.)

The circuit court's decision is apparently grounded in the misconception of law that Rules 12(c) and 12(f) provide for a dismissal and the striking of defenses on the basis of things that are not set out in the pleadings. They do not. See Charleston County Sch. Dist., 348 S.C. at 420. This error of law is an abuse of discretion and an error properly reversible by this Court.

CONCLUSION

There was no failure to prosecute here, and the circuit court's decision is controlled by errors of law and unsupported factual contentions. This Court should reverse the decision of the circuit court.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Andrew S. Radeker', written over a horizontal line.

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June 10, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas
George C. James, Jr., Circuit Judge

Appellate Case No. 2012-213309
Common Pleas Case No. 2010-CP-28-1197

U.S. Bank National Association Successor trustee to LaSalle
Bank National Association, as trustee under the Pooling and
Servicing Agreement, dated as of April 1, 2002, among
Asset Backed Funding Corporation, Litton Loan Servicing LP
and LaSalle Bank National Association, ABFC Asset Backed
Certificates, Series 2002-SB-1,.....Respondent,

v.

Kelley Burr; FIA Card Services, N.A.; Discovery Bank, Issuer
of the Discover Card; Unifund CCR Partners; Defendants,

Of Whom Kelley Burr is.....Appellant.

PROOF OF SERVICE

I certify that I served the foregoing initial brief of Appellant by depositing a
copy of it on the date shown below in the United States Mail, postage prepaid,
addressed as follows:

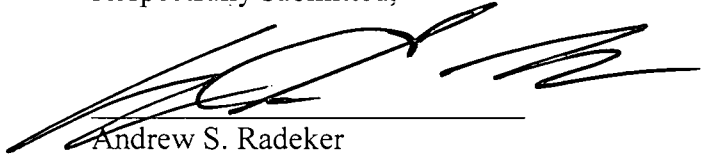
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RECEIVED
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SC Court of Appeals

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Of Whom Kelley Burr is.....Appellant.

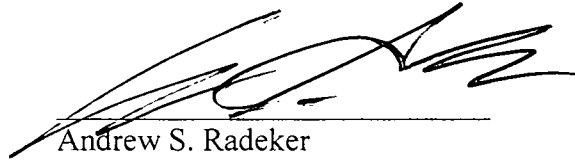
DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL

Appellant proposes the following to be included in the Record on Appeal:

1. Order filed October 1, 2012, on plaintiff's motion to dismiss counterclaims and to strike defenses;
2. Order filed October 16, 2012, denying motion to reconsider;
3. Summons and Complaint;
4. Answer and Counterclaims;
5. Plaintiff's Answer to Defendant Burr's Counterclaims;
6. Motion to Dismiss Counterclaims and to Strike Defenses, with its exhibits;
7. Motion to Reconsider, with Memorandum in Support of Motion to Reconsider;
8. Transcript of Sept. 13, 2012, hearing;
9. Notice of Right to Foreclosure Intervention;
10. Certificate of Mortgage Noncompliance; and
11. Notice of Appearance of Andrew S. Radeker.

I certify that this designation contains no matter which is irrelevant to this appeal.

Respectfully submitted,

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Of Whom Kelley Burr is.....Appellant.

PROOF OF SERVICE

I certify that I served the foregoing designation of matter to be included in
record on appeal by depositing a copy of it on the date shown below in the United
States Mail, postage prepaid, addressed as follows:

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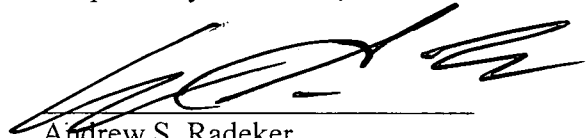
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