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
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 RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. The circuit court was correct in dismissing Burr's counterclaims and striking her affirmative defenses for failure to prosecute under Rule 41(b), SCRCP.

II. The circuit court was correct in granting U.S. Bank's motion to dismiss and strike because it was not required to be supported by an affidavit.

III. The circuit court did not err in dismissing Burr's counterclaims for mootness.

IV. The circuit court did not err in granting U.S. Bank's motion to dismiss and strike under Rules 12(c) and 12(f), SCRCP.

STATEMENT OF THE CASE

On or about October 31, 2001, Kelley Burr ("Appellant") executed and delivered a note and mortgage ("Mortgage") in the principal amount of $100,800.00 to EquiSource Home Mortgage Corp. R. pp. ___; Summons and Complaint ¶ 7. This Mortgage was recorded on November 5, 2001, in the Kershaw County Register of Deeds Office in Mortgage Book 1072 at Page 142. R. pp. ___; Summons and Complaint ¶ 9. The real property encumbered by this Mortgage is known as 1128 Bayview Drive, Lugoff, SC, 29078 ("Property"). R. pp. ___; Summons and Complaint ¶ 8; Lis Pendens. 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 ("U.S. Bank") filed a summons and complaint against Appellant seeking foreclosure of the Mortgage on November 1, 2010. R. pp. ___; Summons and Complaint. In the Complaint, U.S. Bank stated that the loan servicer for the Mortgage was participating in the Home Affordable Modification Program, but the loan was "not eligible for modification because the borrower did not provide all necessary documents after those documents had been requested." R. pp.___; Summons and Complaint ¶ 4.

Appellant, through her then-counsel David P. Reuwer, Esquire, answered and counterclaimed on December 20, 2010. R. pp. ___; Answer and Counterclaims. Burr asserted defenses and counterclaims of 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 ¶ 11. These defenses and counterclaims were based on U.S. Bank's alleged

failure to "conduct a fair, reasonable, comprehensive analysis" and "reconsideration of her home mortgage amount problem." R. pp. __; Answer and Counterclaims ¶¶ 8–11, 16, 24. U.S. Bank answered and asserted various defenses, including Defendant's lack of capacity, authority or standing. R. pp. __; U.S. Bank's Answer ¶ 32, and failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6), SCRCP. R. pp.___; U.S. Bank's Answer ¶ 18.

On May 2, 2011, Chief Justice Toal of the South Carolina Supreme Court issued an Administrative Order titled In re: Mortgage Foreclosure Actions, 396 S.C. 209, 720 S.E.2d 908 (2011) ("Administrative Order"). This Administrative Order imposed an automatic stay in foreclosure actions and required plaintiffs seeking foreclosure of owner-occupied dwellings to notify defendants of the right to foreclosure intervention. Id. at 211, 720 S.E.2d at 909. The Administrative Order also imposed a mandatory foreclosure intervention process in all owner-occupied foreclosure actions. Id. Under the Administrative Order, foreclosure actions could proceed upon certification from the Plaintiff either that the mortgagor had failed to respond or comply with the foreclosure intervention process, or that participation in the process by both parties did not resolve the matter. Id. at 211–21; 720 S.E.2d at 909.

Pursuant to the Administrative Order, U.S. Bank served Appellant's then-counsel with a notice of right to foreclosure intervention on July 25, 2011. R. pp.___; Notice of Right to Foreclosure Intervention. After communications with Appellant's then-counsel, U.S. Bank resent the notice on August 9, 2011. R. pp. __; Certification of Mortgagor Noncompliance ¶ 2(a). On October 27, 2011, U.S. Bank filed a Certification of Mortgagor Noncompliance stating that Appellant had "failed, refused, or voluntarily elected not to participate" in the process, and stated that despite several communications with Appellant's then-counsel and extending the deadline

for receipt of information from Appellant, "[n]o documents or records were ever received...." R. pp. ___; Certification of Mortgagor Noncompliance ¶ 2(b). U.S. Bank had several other communications with Appellant's counsel in regards to foreclosure intervention after filing the Certification of Mortgagor Noncompliance, but Appellant's counsel failed to respond to messages and Appellant, through counsel, failed to provide the documents requested for a modification proposal. R. pp. ___; Motion to Dismiss Counterclaims and Strike Defenses at 2–4; Transcript of September 13, 2012 motion hearing ("Transcript") p.6 line 3 – p. 7 line 6, p.7 line 20 – p. 8 line 5.

On April 18, 2012, U.S. Bank filed a Motion to Dismiss Counterclaims and Strike Defenses, which is the subject of this appeal. R. pp. __; Motion to Dismiss Counterclaims and Strike Defenses. This motion was based on Appellant's failure to respond to U.S. Bank's efforts to offer her a loan modification proposal and Appellant's failure to provide information to allow consideration of a modification, and argued that Appellant had defeated her own counterclaims by failing "to acknowledge the relief offered to her." R. pp. ___; Motion to Dismiss Counterclaims and Strike Defenses ¶¶ 2, 5(d), 13. U.S. Bank sent a modification proposal to Appellant's counsel on January 10, 2012, but no response to this was received until shortly before the motion was heard. R. pp. ___; Motion to Dismiss Counterclaims and Strike Defenses at 3–4; Transcript p. 7 line 24 – p. 8 line 2.

A hearing on the motion was held on September 13, 2012. R. pp. ___; Transcript p. 1. The court made an oral ruling from the bench granting U.S. Bank's motion to strike the counterclaims. R. pp. __; Transcript p. 20, line 15–25. In a corresponding written order filed October 1, 2012 ("Oct. 1 Order"), the court granted U.S. Bank's motion under Rules 41(b), 12(c)

and 12(f), SCRCP. R. pp. ___; Oct. 1 Order pp. 1, 4. The court found that Appellant had failed to prosecute and specifically stated the four relevant factors under McComas v. Ross, 368 S.C. 59, 626 S.E.2d 902 (Ct. App. 2006), had been satisfied. R. pp. __; Oct. 1 Order pp. 2–3. Additionally, the court found that Appellant's claims were moot. R. pp. ___; Oct. 1 Order pp. 3–4.

Appellant served a Motion to Reconsider and supporting Memorandum on October 9, 2010. R. pp. ___; Motion to Reconsider; Memorandum in Support of Motion to Reconsider. This motion was denied by the court on October 16, 2012. R. pp. __; Order on Motion to Reconsider. Appellant filed Notice of Appeal on October 31, 2012. R. pp.___; Notice of Appeal.

STANDARD OF REVIEW

Dismissals for failure to prosecute under Rule 41(b), SCRCP, are within the discretion of the trial court judge and will not be disturbed on appeal absent a clear showing of an abuse of discretion. McComas v. Ross, 368 S.C. 59, 62, 626 S.E.2d 902, 904 (Ct. App. 2006 (citing Small v. Mungo, 254 S.C. 438, 442, 175 S.E.2d 802, 804 (1970)). "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." Kiriakides v. Sch. Dist. of Greenville Cnty. 382 S.C. 8, 20, 675 S.E.2d 439, 445 (2009) (quoting Layman v. State, 376 S.C. 434, 444, 658 S.E.2d 320, 325 (2008)). "On appeal, the burden of showing abuse of discretion is on the party challenging the trial court's ruling." First Sav. Bank v. McLean, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994).

"On appeal from an order granting a Rule 12(c) motion the reviewing court may not consider matters outside the pleadings." Fireman's Ins. Co. v. Cincinnati Ins. Co., 302 S.C. 234, 326, 394 S.E.2d 855, 856 (Ct. App. 1990). "The Rule 12(c) motion admits the well pleaded facts in the complaint and the court must take those well pleaded factual allegations as true." Id. "The motion does not admit the inferences drawn by the plaintiff from the facts nor does it admit conclusions of law." Id. (citing Russell v. City of Columbia, 301 S.C. 117, 390 S.E.2d 463 (Ct.App.1989)). Motions for judgment on the pleadings will be sustained only if the pleadings are so defective that taking all the facts alleged in the pleadings as admitted, no cause of action or defense is stated. Lydia v. Horton, 343 S.C. 376, 380, 540 S.E.2d 102, 105 (Ct. App. 2000), rev'd on other grounds, 355 S.C. 36, 583 S.E.2d 750 (2003) (citing Rosenthal v. Unarco Indus., Inc., 278 S.C. 420, 297 S.E.2d 638 (1982); Diminich v. 2001 Enters. Inc., 292 S.C. 141, 355 S.E2d 275 (Ct. App. 1987).

Under Rule 12(c), SCRCP, if the trial court considers matters outside the pleadings, it is

treated as a motion for summary judgment under Rule 56, SCRCP. Evening Post Pub. Co. v. Berkeley Cnty. Sch. Dist., 392 S.C. 76, 80–81, 708 S.E.2d 745, 747 (2011). When reviewing a grant of summary judgment, the appellate court applies the same standard as the circuit court. Id. at 81, 708 S.E.2d at 748. Summary judgment is appropriate when there is no genuine issue of material fact such that the moving party is entitled to prevail as a matter of law. Rule 56, SCRCP; Evening Post Pub. Co., 392 S.C. at 81, 708 S.E.2d at 748. The reviewing court must view the evidence and all reasonable inferences in the light most favorable to the non-moving party. Id. at 81–82, 708 S.E.2d at 748 (quoting David v. McLeod Reg'l Med. Ctr., 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006)).

Motions to strike under Rule 12(f), SCRCP, are largely within the discretion of the circuit court. Robinson v. Code, 384 S.C. 582, 682 S.E.2d 495, 496 (Ct. App. 2009) (citing Brown v. Coastal States Life Ins. Co., 264 S.C. 190, 194, 213 S.E.2d 726, 728 (1975)). The grant of a motion to strike will not be reversed except for an abuse of discretion or error of law. Id. In ruling on a motion to strike under Rule 12(f), SCRCP, the question is "whether a party should be allowed to plead a defense or other matter, not whether there are facts supporting what has been pleaded." Alladin Plastics, Inc. v. Wintenna, Inc., 301 S.C. 90, 93, 390 S.E.2d 370, 372 (Ct. App. 1990). Where facts bearing on the sufficiency of the challenged defenses are clear and undisputed, trial on the merits is not required to determine the sufficiency of those defenses as a matter of law. Mayes v. Paxton, 313 S.C. 109, 115, 437 S.E.2d 66, 69 (1993).

ARGUMENT

I. The circuit court did not err in dismissing Appellant's counterclaims and striking her affirmative defenses for a failure to prosecute.

An action may be dismissed for failure to prosecute either pursuant to Rule 41(b), or *sua sponte* by the trial court as part of its inherent power to manage its own affairs. Rule 41(b), SCRCP; Crestwood Golf Club, Inc. v. Potter, 328 S.C. 201, 211–12, 493 S.E.2d 826, 832 (1997) (citing Small v. Mungo, 254 S.C. 438, 442, 172 S.E.2d 802, 803 (1970) ("[I]t is within the inherent power of the court to dismiss an action for failure to prosecute"); 24 Am. Jur.2d Dismissal, Discontinuance and Nonsuit 48 (1983) ("Such power is deemed to be necessarily vested in trial courts to manage their own affairs so as to achieve orderly and expeditious disposition of cases.")). Rule 41(b), SCRCP, governs dismissals for failure to prosecute and states that a party may move for dismissal of an action "[f]or failure of the plaintiff to prosecute or to comply with these rules or *any* order of court." Id. (emphasis added). This also applies to counterclaims, cross-claims and third party claims. Crestwood Golf Club, 328 S.C. at 211, 493 S.E.2d at 832. A single instance of nonfeasance may be sufficient ground for dismissal for failure to prosecute. McComas, 368 S.C. at 74, 626 S.E.2d at 910 (Anderson, J., dissenting) (citing Joyner v. Glimcher Props., 356 S.C. 460, 589 S.E.2d 762 (2002)). Moreover, Rule 41(b) does not explicitly require unreasonable neglect for dismissal to be proper. Id. at 75, 626 S.E.2d at 910.

The Foreclosure Intervention process established by the 2011 Administrative Order is not merely "settlement negotiations," as Appellant contends. R. pp. ___; Appellant's Initial Brief at 13–14. Rather, the foreclosure intervention mandated by the Administrative Order is a "process to ensure that lenders and eligible homeowners have an opportunity for meaningful discussion

about possible settlement options." South Carolina Judicial Dep't, Frequently Asked Questions (FAQ) in South Carolina Master-in-Equity Court, South Carolina Judicial Dep't. 9–10 (2011), http://www.sccourts.org/selfhelp/FAQMIE.pdf (2011). This process was imposed to reduce the workload on courts and reduce the number of unresolved foreclosure actions. In re Mortgage Foreclosure Actions, 396 S.C. at 210, 720 S.E.2d at 905. As such, it is more analogous to mediation proceedings in counties that mandate alternative dispute resolution prior to trial. See Hopkins v. Harrell, 352 S.C. 517, 574 S.E.2d 747 (Ct. App. 2002) (affirming dismissal for failure to participate in mandatory mediation). A party is deemed to be bound by the acts of his attorney-agent and is considered to have notice of all facts for which notice can be charged to his attorney. Link v. Wabash R. Co., 370 U.S. 626, 634, 82 S. Ct. 1386 (1962) (affirming court's *sua sponte* dismissal for failure to prosecute where attorney failed to attend a pretrial conference).

Here, the foreclosure intervention process is judicially mandated and failure to participate in it is analogous to failing to participate in mandatory mediation. Appellant's counsel was aware of the communications from U.S. Bank regarding this process. R. pp. ___; Transcript p. 13 line 6–14. Under Link, this is imputed to Appellant, as Appellant's counsel conceded at the hearing. R. pp. ____; Transcript p. 15 line 3–10. Thus, the circuit court had the inherent power to dismiss Appellant's counterclaims for failure to prosecute for failing to participate in the judicially mandated foreclosure intervention process, and doing so was not an abuse of discretion.

In McComas v. Ross, South Carolina adopted the four factor analysis used by the Fourth Circuit for dismissals under Rule 41(b). McComas, 368 S.C. at 63, 626 S.E.2d at 904. The Fourth Circuit Court of Appeals has stated that there are four factors which should be considered in determining whether a dismissal was proper under Rule 41(b). McCargo v. Hedrick, 545 F.2d

393, 396 (4th Cir. 1976); McComas, 368 S.C. at 63, 626 S.E.2d at 904. First, the reviewing court must consider the plaintiff's degree of personal responsibility. McComas, 368 S.C. at 63; 626 S.E.2d at 904 (citing Hillig v. Comm'r of Internal Revenue, 916 F.2d 171, 174 (4th Cir. 1990)) (applying the four Fourth Circuit factors). Second, the court should consider the amount of prejudice caused to the defendant by the delay. McCargo, 545 F.2d at 396. Third, whether "the record indicate[s] a drawn out history of deliberately proceeding in a dilatory fashion." Id. (quoting Reizakis v. Loy, 490 F.2d 1132, 1135 (4th Cir. 1076)). Finally, the court should determine if the trial court considered less drastic sanctions than dismissal. McCargo, 545 F.2d at 396 (quoting Reizakis).

The circuit court considered each factor from McComas in issuing its decision, and addressed them directly in its Oct. 1 Order. That the circuit court considered each factor shows that the court did not abuse its discretion since the discussion of each factor includes supporting facts and the use of the McComas factors is not an error of law. Here, Appellant's defenses and counterclaims are based on a series of allegations regarding U.S. Bank's alleged failure to offer her a loan modification or allow her to participate in HAMP. R. pp. ___; Motion to Dismiss Counterclaims and Strike Defenses at 1. The circuit court explicitly found that in advancing her claims for a modification, Appellant had a duty to submit her information for review and that she had a duty to comply with the 2011 Administrative Order. R. pp. ___; Oct. 1 Order at 3; In re Mortgage Foreclosure Actions, 396 S.C. 209, 720 S.E.2d 908 (2011). Appellant's answer and counterclaim admits that she has not submitted all necessary information for review. R. pp. ___; Ans. ¶16, and this failure to provide information has continued. See R. pp. ___; Certification of Mortgagor Noncompliance at 2; Motion to Dismiss Counterclaims and Strike Defenses at ¶ 5.

The failure to provide these documents derives directly from Appellant, not from any failure on the part of her counsel. R. pp. ___; Transcript p. 6, line 11–25. Moreover, by failing to provide documentation after electing to participate in foreclosure intervention under the 2011 Administrative Order, Appellant violated a court order. In re Mortgage Foreclosure Actions, 396 S.C. at 212, 720 S.E.2d at 909. This is sufficient for dismissal under Rule 41(b), SCRCP. See Therens v. Faircloth, 291 S.C. 451, 354 S.E.2d 54 (Ct. App. 1987) (affirming circuit court's dismissal for defendant's failure to comply with United States District Court order).

Contrary to Appellant's contentions, the rule's statement of "failure to comply with any court order" is not limited to orders from the trial court. The plain meaning of "any" refers to all applicable court orders, regardless of the issuing court. As it is undisputed that this action is subject to the requirements of the 2011 Administrative Order, which imposes obligations on both parties, failure to comply with this order falls squarely within the type of discretionary dismissals contemplated by Rule 41(b), SCRCP. Appellant also incorrectly states that dismissal is not an available remedy for failure to comply with the 2011 Administrative Order, when in fact dismissal is authorized, as are any other sanctions that are within the court's discretion. In Re Mortgage Foreclosure Actions, 396 S.C. at 214, 720 S.E.2d at 910 ("In the event the Court determines that any party to the foreclosure action, or their acting agent, has failed to comply with the terms of this order, or has not attempted to reach an agreement for foreclosure intervention in good faith, the Court may, in its discretion, impose such sanctions as it determines to be reasonable and just under the circumstances....").

In the case of Georganne Apparel, Inc. v. Todd, 303 S.C. 87, 399 S.E.2d 16 (Ct. App. 1990), the court upheld a dismissal for failure to prosecute and found prejudice to the defendant

where the action had been filed two and one-half years prior and the defendants had incurred sixty-five thousand dollars in legal fees to various firms. Id. at 90, 399 S.E.2d at 18, 18 n.*. Here the circuit court correctly found that U.S. Bank has suffered prejudice by this delay, as it expended time and expense in attempts to respond to Appellant's demands for modification, and in attempts to follow up with her regarding modification. R. pp.___, Oct. 1 Order at 3. This time and expense included time seeking documentation from Appellant and her counsel in order to comply with the 2011 Administrative Order, In re Mortgage Foreclosure Actions, 396 S.C. 209, 720 S.E.2d 908 (2011). R. pp. ___, Oct. 1 Order at 3. Additionally, U.S. Bank suffered prejudice in the delay in proceeding with its foreclosure claim as Appellant's claims are based on the availability of a loan modification, but she has failed to participate and respond to this process, which has been more than exhausted. R. pp. ____; Oct. 1 Order at 3-4; Motion to Dismiss Counterclaims and Strike Defenses at ¶ 9. Finally, the Court noted that the subject property is physically deteriorating. Transcript p. 11, line 6–10. These circumstances are comparable to that of Georganne Apparel, and are sufficient for a conclusion that U.S. Bank has suffered prejudice by the delay.

As to the third factor, the circuit court correctly found that Appellant's history of proceeding in a dilatory fashion was shown by the events listed in the Certification of Mortgagor Noncompliance and in the motion that is the subject of this appeal. R. pp. ___; Oct. 1 Order at 3. Additional support for this finding is derived from Appellant's own Answer, which admits that some documents required by U.S. Bank were not submitted. R. pp. ____; Answer and Counterclaim ¶ 16, and from Appellant's failure to conduct discovery on her counterclaims. R. pp. ___; Transcript p. 11, line 15–17. As twenty-two months had passed since the institution of

this action at the time the motion was heard, the court could conclude that this was the result of conscious and deliberate failure by Appellant to proceed on her counterclaims, which were not stayed by the 2011 Administrative Order. See R. pp. ___; Transcript p. 15 line 22 – p. 16 line 20 (noting that the foreclosure could not proceed on the merits prior to the Certification of Noncompliance, but that this did not stay the counterclaims). The Certification of Mortgagor Noncompliance was filed with the court, becoming part of the record. R. pp. ___; Certification of Mortgagor Noncompliance. Moreover, Appellant's answer, also a part of the record, admits to failing to provide documentation. R. pp. ___; Answer and Counterclaim ¶ 16.

Finally, in regard to the fourth factor requiring the trial court's consideration of alternative sanctions, it is stated explicitly in the Oct. 1 Order that the court considered "another court order directing compliance" with the requirements of the loan modification process. The court concluded, however, that such an order "would provide no incentive for Burr to act." R. pp. ___; Oct. 1 Order at 3. This consideration was sufficient to satisfy the requirement that the court consider sanctions other than dismissal. McComas requires only that the trial court consider alternative sanctions, not that it must attempt them before proceeding with dismissal.

Additionally, Appellant confuses the court's inherent power to dismiss claims for failure to prosecute and the procedural process available under Rule 41(b). Crestwood Golf Club, Inc. v. Potter, 328 S.C. 201, 211, 493 S.E.2d 826, 832 (1997). The court's authority to order dismissals *sua sponte* does not require analysis under the four McComas factors. See Id. Therefore, it was not an error of law to conclude that the four McComas factors were satisfied, and the grant of dismissal under Rule 41(b) was not an abuse of discretion.

II. The circuit court did not err in dismissing Appellant's counterclaims and striking

her affirmative defenses without the submission of affidavits or other admissible evidence.

The circuit court's findings are not findings of fact, and, as U.S. Bank's motion was not considered as a motion for summary judgment under Rule 56, SCRCP, it was not required to be supported by affidavits or other evidence. R. pp. ___; Oct. 1 Order at 4. Rule 12(c), SCRCP, states that "[i]f, on a motion for judgment on the pleadings, matters outside the pleadings are presented ... the motion shall be treated as one for summary judgment...." Id. However, this rule also contemplates that judgment on the pleadings may be had without reference to external matters. See Id.; Lydia v. Horton, 343 S.C. 376, 381, 540 S.E.2d 102, 105 (Ct. App. 2000), rev'd on other grounds, 355 S.C. 36, 583 S.E.2d 750 (2003) (citing Firemen's Ins. Co. v. Cincinnati Ins. Co., 302 S.C. 234, 394 S.E.2d 855 (Ct. App. 1990) ("On review of the motion, the court may not consider matters outside the pleadings.")). Rule 12(f), SCRCP, contains no reference to matters outside the pleadings. Id. As the question in ruling on a motion under Rule 12(f) is whether the defense should be allowed to be plead, not whether there are facts supporting what has been pleaded, consideration of matters outside the pleadings is unnecessary. See Alladin Plastics, Inc. v. Wintenna, Inc., 301 S.C. 90, 93, 390 S.E.2d 370, 372 (Ct. App. 1990).

Likewise, Rule 41(b) does not require the submission of supporting affidavits. Rule 41(b), SCRCP. This rule does provide for the court to make findings of fact in actions where the court acts as a trier of fact and the defendant moves for dismissal under this rule after plaintiff has presented his evidence. Id. However, this procedure is the equivalent of a motion for a directed verdict in a non-jury case. See Fickling v. City of Charleston, 372 S.C. 597, 599 n.1, 643 S.E.2d 110, 112 n.1 (Ct. App. 2007) (noting that directed verdicts are available only in jury

trials, but that dismissal may be had under Rule 41(b), SCRCP in actions without a jury). It is not the only path for dismissal under this rule. See Therens, 291 S.C. at 452, 354 S.E.2d at 55 (dismissing for failure to comply with United States District Court order); Small v. Mungo, 254 S.C. 438, 175 S.E.2d 802 (1970) (dismissing for failure to appear for trial); Brandt v. Gooding, 368 S.C. 618, 627, 630 S.E.2d 259, 264 (2006) (affirming dismissal as sanction for contempt and perpetrating a fraud on the court). These types of dismissals do not require the trial court to make findings of fact.

A copy of a document which is an exhibit to a pleading is part of the pleading for all purposes if a copy is attached to such a pleading. Rule 10(c), SCRCP; Brazell v. Windsor, 384 S.C. 512, 516, 682 S.E.2d 824, 826 (2009). Brazell held that a motion under Rule 12(b)(6), SCRCP, was not converted into a motion for summary judgment by considering a document attached to and incorporated by reference into the complaint. Brazell, 384 S.C. at 516, 682 S.E.2d at 826.

The circuit court properly considered the Certification of Mortgagor Noncompliance in considering U.S. Bank's motion, as this is a pleading that was part of the record before the court and attached as an exhibit to the motion. It was, like the document in Brazell, part of the pleadings since it was required to be filed with the court. While Appellant is correct that factual statements of counsel ordinarily may not be considered by the court in determining whether a genuine issue of material fact exists, Higgins v. Medical Univ., 326 S.C. 592, 599, 486 S.E.2d 269, 272 (Ct. App. 1997), when deciding a motion for judgment on the pleadings or a motion to strike, the court is not looking at material facts. See Rule 12(c), (f), SCRCP; Alladin Plastics, Inc. v. Wintenna, Inc., 301 S.C. 90, 93, 390 S.E.2d 370, 372 (Ct. App. 1990) (stating that

motions to strike do not deal with factual support of what has been pleaded); Lydia, 343 S.C. at 380, 540 S.E.2d at 105. As the Certification of Mortgagor Noncompliance and Plaintiff's Answer and Counterclaims were the documents considered by the circuit court in making its decision, it was not an abuse of discretion to grant U.S. Bank's motion without any supporting affidavits or the submission of other evidence.

III. The circuit court did not err in dismissing Appellant's counterclaims for mootness.

The circuit court ruled that Appellant's claims were moot as an additional basis for dismissal. R. pp.___; Oct. 1 Order at 3. Justiciability, whether the litigation presents an active case or controversy, is a threshold inquiry for any court. Holden v. Cribb, 349 S.C. 132, 137, 561 S.E.2d 634, 637 (Ct. App. 2002) (quoting Lennon v. S.C. Coastal Council, 330 S.C. 414, 415, 498 S.E.2d 861, 864 (1996)). The concept of justiciability encompasses ripeness, mootness, and standing. Id. (citing Jackson v. State, 331 S.C. 486, 490 n.2, 489 S.E.2d 915, 917 n.2 (1997)). "'A case becomes moot when judgment, if rendered, will have no practical effect upon [an] existing controversy.'" Id. at 137–38, 561 S.E.2d at 637 (quoting Seabrook v. City of Folly Beach, 337 S.C. 304, 306, 523 S.E.2d 462, 463 (1999)) (alteration in original). There are three exceptions to the mootness doctrine: (1) if the issue is capable of repetition but evading review; (2) to "decide questions of imperative and manifest urgency to establish a rule of future conduct in matters of important public interest" and (3) "if the trial court's decision may affect future events or have collateral consequences for the parties." Id. at 138, 561 S.E.2d at 637–38. (quoting Curtis v. State, 345 S.C. 557, 568, 549 S.E.2d 591, 596 (2001)). However, all the cases dealing with exceptions to mootness are in the context of a moot appeal and whether the appellate court can take jurisdiction, not the trial court's jurisdiction. See Id.; Byrd v. Irmo High Sch., 321 S.C. 426,

430–32, 468 S.E.2d 861, 864 (1996); Darden v. S.C. Dep't of Highways & Pub. Trans., 291 S.C. 270, 353 S.E.2d 279 (1987).

Here, all of Appellant's counterclaims are premised on U.S. Bank's failure to offer her a "reconsideration of her payment amounts." R. pp.___; Answer and Counterclaim ¶¶ 11, 18, paragraph beginning WHEREFORE, sub B. U.S. Bank has offered Appellant this opportunity, not only through the foreclosure intervention process mandated by the 2011 Administrative Order, but also prior to the institution of this action through HAMP. See R. pp.___; Notice of Mortgagor Noncompliance, Answer and Counterclaim ¶ 16, Transcript pp. 11 line 23-25, 14 line 20 – 15 line 15. Any order from the circuit court in Appellant's favor on her counterclaims would not grant her this modification opportunity. Appellant has already been offered a modification, as conceded by her counsel at the motion hearing. R. pp. ___; Transcript p. 15, line 13–15. Accordingly, any order from the circuit court preserving her counterclaims would have no practical effect. None of the mootness exceptions apply because Appellant's claim of mootness goes to the justiciability of the initial action, not this appeal, which is also moot for the same reasons. While the failure of a loan servicer to consider a borrower for foreclosure intervention is capable of repetition, Appellant has not shown how this question usually becomes moot before it can be reviewed by the courts. See Byrd, 321 S.C. at 431–32, 468 S.E.2d at 864. Appellant's claims do not implicate any imperative or urgent questions, as the stay imposed by the mandatory foreclosure intervention program under the 2011 Administrative Order prevents a plaintiff from proceeding with foreclosure without offering to participate in foreclosure intervention. See In re Mortgage Foreclosure Actions, 396 S.C. at 211–13, 720 S.E.2d at 909. Additionally, the third exception, having collateral consequences for the parties, is not implicated

because Appellant has already received exactly what she sought – an offer for loan modification. Therefore, the circuit court did not err in dismissing Appellant's counterclaims for mootness.

IV. The circuit court did not err in dismissing Appellant's counterclaims and striking her affirmative defenses on the basis of Rules 12(c) and 12(f), SCRCP because Appellant's claims are moot.

Rule 12(c) states "after the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." Rule 12(c), SCRCP. A judgment on the pleadings is proper if there is no issue of fact raised by the complaint which, if resolved in favor of the plaintiff, would entitle him to judgment. Lydia v. Horton, 343 S.C. 376, 540 S.E.2d 102, 105 (Ct. App. 2000), rev'd on other grounds, 355 S.C. 36, 586 S.E.2d 750 (2003). Where the pleadings are fatally deficient in substance or fail to state a good cause of action in favor of the plaintiff and against the defendant, judgment on the pleadings is proper. Rosenthal v. Unarco Indus., 278 S.C. 420, 422, 297 S.E.2d 638, 640 (1982). Where the pleadings disclose all facts necessary, the Court may exercise its discretion. Id. In ruling on a Rule 12(c) motion, the court does not admit the inferences drawn by the plaintiff from the facts nor does it admit conclusions of law. Firemen's Ins. Co. of Newark, New Jersey v. Cincinnati Ins. Co., 302 S.C. 234, 236, 394 S.E.2d 855, 856 (Ct. App. 1990) (citing Russell v. City of Columbia, 301 S.C. 117, 390 S.E.2d 463 (Ct. App. 1989)). The court may not consider matters outside the pleadings. Id.

Rule 12(f) states "Upon motion pointing out the defects complained of, and made by a party before responding to a pleading or... upon the court's own initiative, at any time the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent or scandalous matter." Rule 12(f), SCRCP. Where defenses are insufficient as a matter of law, the grant of a motion to strike is not error. See Mayes v. Paxton, 313 S.C. 109, 437

S.E.2d 66 (1993) (affirming decision to strike defenses of contributory negligence and assumption of risk where facts were clear and undisputed). The grant of a motion to strike will not be reversed absent an abuse of discretion or error of law. Robinson v. Code, 384 S.C. 582, 585, 682 S.E.2d 496, 496 (Ct. App. 2009)

The basis for the circuit court's dismissal under Rules 12(c) and 12(f) was mootness, discussed above. A lack of a justiciable controversy means that any moot claims are insufficient as a matter of law. See Holden, 349 S.C. 132 at 135, 137–38, 561 S.E.2d at 634, 636–38. U.S. Bank was not required to plead mootness as a defense or argue that the pleadings somehow failed to state a claim for that reason. Additionally, U.S. Bank's answer asserted failure to state a claim under Rule 12(b)(6) as a defense. R. pp. ___; U.S. Bank's Answer ¶ 18. Mootness, as a threshold issue, may be raised *sua sponte*. See Eagle Container Co., LLC v. Cnty. of Newberry, 366 S.C. 611, 634, 622 S.E.2d 733, 745 (Ct. App. 2005), rev'd on other grounds, 379 S.C. 564, 666 S.E.2d 892 (2008) (holding ripeness may be raised *sua sponte*); Carolina Alliance for Fair Employment v. South Carolina Dep't of Labor, Licensing, & Regulation, 337 S.C. 476, 485, 523 S.E.2d 795, 800 (Ct. App. 1999). Appellant's counterclaims and defenses are based on the alleged failure to offer her a loan modification. R. pp. ___; Answer and Counterclaims ¶¶ 8–11, 16, 24. Appellant's counterclaims sought a modification offer. R. pp.___; Answer and Counterclaims, paragraph beginning WHEREFORE sub. B. A modification would prevent the foreclosure from occurring. A grant of judgment in Appellant's favor would not have given her the modification she sought. Further, Respondent was at the time of the motion hearing working with and has continued to work with Appellant toward a modification, which efforts were unaffected by the trial court's dismissal of the counterclaims. R. pp. ____; Transcript p. 7 line

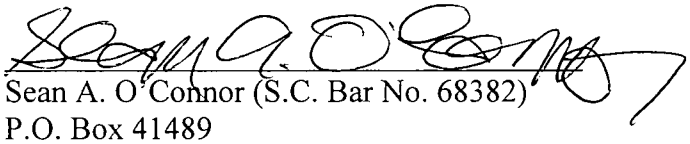
20 – p. 9 line 6. Because U.S. Bank had offered a modification, a reversal of the circuit court's Oct. 1 Order would have no practical effect. As the circuit court properly found that Appellant's claims were moot because U.S. Bank had offered her a modification, and mootness may be raised *sua sponte*, Appellant's counterclaims and defenses were properly dismissed and struck.

CONCLUSION

For all the foregoing reasons, the Order of the circuit court dismissing Appellant's counterclaims and striking her defenses should be affirmed.

Respectfully submitted,

FINKEL LAW FIRM LLC



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August 9, 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,

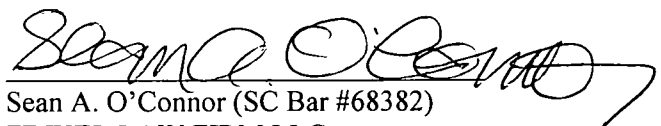
v.

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 have served the *Initial Brief of Respondent* by depositing a copy of same in the United States Mail, postage prepaid, on August 9, 2013, addressed to Appellant's attorney of record, Andrew S. Radeker, Harrison & Radeker, P.A., Post Office Box 50143, Columbia, South Carolina 29250.



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August 9, 2013