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SC Court of Appeals

**THE STATE OF SOUTH CAROLINA
In the Court of Appeals**

**APPEAL FROM MARLBORO COUNTY
Court of Common Pleas**

**Michael S. Holt
Circuit Court Judge**

**Appellate Case No. 2024-000280
Marlboro County Case No. 2021-CP-34-00228**

Synchrony Bank, **Appellant,**

v.

Michael Hudson..... **Respondent**

INITIAL BRIEF OF RESPONDENT

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COUNTER-STATEMENT OF ISSUES ON APPEAL

I

Is the denial of Appellant's motion for summary judgment properly before this Court?

II

Was the Circuit Court's decision to dismiss this action for Appellant's refusal to mediate controlled by an error of law or unsupported by evidence?

COUNTER-STATEMENT OF THE CASE

The Appellant has failed to designate any documents for the Record on Appeal, and it has also not provided any citations to the record in its brief. *See* Rule 208(b)(4), SCACR (citations to record necessary); Rule 209(a), SCACR (appellant must serve designation of matter). Appellant’s failure to comply with the South Carolina Rules of Appellate procedure leaves this appeal without a record, and this Court must therefore disregard Appellant’s Statement of the Case. *See* Rule 210(h), SCACR (“Except as provided by Rule 212 and Rule 208(b)(1)(C) and (2), the appellate court will not consider any fact which does not appear in the Record on Appeal.”).

The Appellant did attach the January 23, 2024 order of the Circuit Court to its Notice of Appeal. This order arguably provides the only background this Court may consider in its analysis:

This matter comes before this Court on the parties’ cross-motions for summary judgment, which were heard by this Court on January 16, 2024, at the Marlboro County Courthouse. Plaintiff argues that there is no genuine issue of material fact regarding the existence of Defendant’s debt to the Plaintiff and is entitled to judgment as a matter of law. Defendant argues that this action should be dismissed for failure to comply with South Carolina’s Alternate Dispute Resolution Rules. After considering the submissions and arguments of counsel, this Court finds and concludes as follows.

Plaintiff’s Motion for Summary Judgment

This Court finds no material change in the proof for this motion from Plaintiff’s motion for summary judgment Judge Burch denied from the bench on June 20, 2023. This Court agrees with Judge Burch and finds there are genuine issues of material fact that must be considered by the jury, not by a judge. *See* Rule 56, SCRCP; *Kitchen Planners, LLC v. Freidman*, 440 S.C. 456, 892 S.E.2d 297 (2023). Plaintiff’s motion for summary judgment is denied.

Defendant's Motion for Summary Judgment

As to Defendant's motion for summary judgment, this Court will treat this as a motion for sanctions under Rule 10(b), SCADR, as that is the motion's stated basis. *See Richland County v. Kaiser*, 351 S.C. 89, 94, 567 S.E.2d 260, 262 (Ct. App. 2002) (The substance of the relief, not the form of the motion, is what matters.). This Court would note that the summons and complaint in this case [were] filed on August 23, 2021; according to South Carolina's ADR rules, this matter "shall" be mediated within 300 days after filing. Rule 5(f), SCADR. South Carolina's ADR rules provide for sanctions for violations of those rules without good cause. Rule 10(b), SCADR. Here, the parties have not mediated this matter in accordance with Rule 5(f) and no party has requested exemption from South Carolina's ADR requirement. Plaintiff argues that because no ADR notice was issued by this Court or the Clerk of Court, it is excused from ADR. This argument does not constitute "good cause" – our ADR rules clearly and unambiguously mandate ADR. Rule 3(a), SCADR.

Rule 10(b), [SCADR], provides any sanction under Rule 37(b), SCRCPP, is appropriate for violations of South Carolina's ADR Rules. Rule 37(b)(2)(C), SCRCPP, provides authority to dismiss an action. This Court also possesses the inherent power to control its dockets and manage its affairs, including the ability to strike pleadings. *See Crestwood Golf Club, Inc. v. Potter*, 328 S.C. 201, 211-212, 493 S.E.2d 826, 832 (1997). This case, which was filed in 2021, was to be tried on November 13, 2023. Defendant's October 11, 2023, motion to continue the trial noted, *inter alia*, that this action had not been mediated. After trial was continued, [...] instead of pursuing mediation the Plaintiff filed a second motion for summary judgment. This conduct is sufficiently intentional, the resolution of this matter has been sufficiently delayed, and the Defendant has been sufficiently prejudiced defending it to warrant the sanction of dismissal. Defendant's motion is granted, and this action is dismissed. Because this action cannot be refiled and served within the requisite limitations period, this dismissal is with prejudice. *See* Rule 3(a), SCRCPP; S.C. Code §§ 15-3-20 & 15-3-520.

Accordingly, it is **ordered**, **adjudged**, and **decreed** that Plaintiff's motion for summary judgment is **denied**, Defendant's motion for summary judgment (treated as a motion for sanctions) is **granted**, and this action is **dismissed with prejudice**.

It is so Ordered.

Synchrony Bank v. Hudson, No. 2021-CP-34-00228 (S.C. Ct. Comm. Pl. Order dated January 23, 2024) (emphasis in original).

STANDARD OF REVIEW

Summary Judgment

“In reviewing an order for summary judgment, the appellate court applies the same standard which governs the trial court under Rule 56 of the South Carolina Rules of Civil Procedure.” *M & M Grp., Inc. v. Holmes*, 379 S.C. 468, 473, 666 S.E.2d 262, 264 (Ct. App. 2008). “Summary judgment is appropriate when ‘the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.’” *Id.* (quoting Rule 56(c), SCRCP); *see also Kitchen Planners, LLC v. Friedman*, 440 S.C. 456, 892 S.E.2d 297 (2023) (affirming that only a genuine issue of material fact will defeat a motion for summary judgment). A material issue is one that constitutes a legal defense or that affects the result of the action. *PPG Indus., Inc. v. Orangeburg Paint & Decorating Ctr.*, 297 S.C. 176, 375 S.E.2d 331 (Ct. App. 1988).

“On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the appellant, the non-moving party below.” *Id.* (quoting *Willis v. Wu*, 362 S.C. 146, 151, 607 S.E.2d 63, 65 (2004)). Summary judgment should not be granted if further development of the facts would assist in the application of the law. *Mosteller v. Cty. of Lexington*, 336 S.C. 360, 362, 520 S.E.2d

620, 621 (1999). A court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony. *Id.*

Motion for Sanctions under Rule 10(b), SCADR

South Carolina's ADR rules provide a court may award "any lawful sanctions, including, but not limited to, the payment of attorney's fees, neutral's fees, and expenses incurred by persons attending the conference; contempt; and any other sanction authorized by Rule 37(b), SCRCF." Rule 10(b), SCADR. "A trial judge's exercise of his discretionary powers with respect to sanctions [under Rule 37] will not be disturbed on appeal absent a clear abuse of discretion." *Barnette v. Adams Bros. Logging, Inc.*, 355 S.C. 588, 593, 586 S.E.2d 572, 575 (2003). The burden is on the party appealing from the order to demonstrate the trial court abused its discretion. *Id.* An abuse of discretion occurs when the ruling is controlled by an error of law, or when based on factual conclusions, is without evidentiary support. *McKinney v. Pedery*, 413 S.C. 475, 482, 776 S.E.2d 566, 570 (2015).

ARGUMENT

I. Denial of Summary Judgment is not appealable.

It is well-settled in South Carolina that “the denial of a motion for summary judgment is not immediately appealable.” *Olson v. Fac. House of Carolina, Inc.*, 354 S.C. 161, 167, 580 S.E.2d 440, 443 (2003); *see also Ballenger v. Bowen*, 313 S.C. 476, 476, 443 S.E.2d 379, 380 (1994) (“This Court has repeatedly held that the denial of summary judgment is not directly appealable.”). Accordingly, the Circuit Court’s denial of Appellant’s motion for summary judgment must be affirmed.

II. The Circuit Court’s dismissal of this action was not controlled by an error of law, and all of the Circuit Court’s findings are supported by evidence.

While Respondent’s original motion was one for summary judgment, the Circuit Court correctly treated it as a motion for sanctions, as that was its stated basis. *See Richland County v. Kaiser*, 351 S.C. 89, 94, 567 S.E.2d 260, 262 (Ct. App. 2002) (The substance of the relief, not the form of the motion, is what matters.). Respondent has failed to show this Court how the following salient facts from the Circuit Court’s order are unsupported by the evidence:

- (1) This case was filed on August 23, 2021.
- (2) Rule 5(f), SCADR, states this case “shall” be mediated within 300 days after filing.
- (3) Respondent’s October 11, 2023, motion to continue trial noted this case had not yet been mediated.
- (4) After this motion, instead of seeking mediation the Appellant filed a second motion for summary judgment.

(5) Resolution of this action was delayed by this second motion for summary judgment.

(6) Respondent has been prejudiced in defending this matter.

Synchrony Bank v. Hudson, No. 2021-CP-34-00228 (S.C. Ct. Comm. Pl. Order dated January 23, 2024). Accordingly, the Circuit Court did not abuse its discretion.

Appellant also does not identify any errors of law in the Circuit Court's decision. Appellant argues its failure to mediate is excused because the Clerk of Court did not appoint mediators or issue a Notice of ADR pursuant to Rule 4(c), SCADR. (App. Br. pp. 9-10). However, Rule 10, SCADR, does not require these acts as conditions precedent to the imposition of sanctions. Further, the purpose of Rule 4(c) (to remind the parties of the obligation to mediate) was met when Respondent noted the case had not been mediated on October 11, 2023.

Appellant also argues the Circuit Court should have issued a rule to show cause under Rule 10(a), SCADR, instead of sanctioning Appellant. (App. Br. pp. 9-10). Rule 10(a) provides a court the authority to *sua sponte* issue a rule to show cause for failure to file a Proof of ADR. Rule 10(a), SCADR; *see also* Rule 7(f), SCADR (requirement to file Proof of ADR). This argument is a red herring - the Circuit Court sanctioned Appellant under Rule 10(b), which authorizes the court or the parties to move for sanctions for "violat[ing] any provision of the ADR Rules without good cause..." Rule 10(b), SCADR.

Rule 10(b), SCADR, allowed the Circuit Court to impose sanctions consistent with Rule 37(b), SCRCP, and it did exactly that. Though no case law exists to guide

a court applying sanctions under Rule 10(b), SCADR, dismissal under Rule 37, SCRCF, is appropriate in circumstances of willful conduct and/or gross indifference to the opposing party's rights. *See, e.g., McNair v. Fairfield Cty.*, 379 S.C. 462, 466, 665 S.E.2d 830, 832 (Ct. App. 2008). Not only is the mediation requirement of Rule 5(f), SCACR, explicit and unambiguous, the Appellant was reminded of this requirement on October 11, 2023. In response, the Appellant refused to mediate and instead proceeded with a second, frivolous, motion for summary judgment. This conduct is sufficiently intentional and grossly indifferent to Respondent's rights to warrant dismissal of this case. Because the statute of limitations for this claim passed long ago, dismissal with prejudice is appropriate, as the case could not be re-filed if the case had been dismissed without prejudice.¹ *See* Rule 3(a), SCRCF; S.C. Code §§ 15-3-20 & 15-3-520.

III. Appellant's failure to prosecute constitutes an additional sustaining ground to affirm.

This Court is empowered to "affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal." Rule 220(c), SCACR; *see also* Rule 208(b)(2), SCACR (Respondent may include additional sustaining grounds in brief.). This Court also possesses the inherent power to control its dockets and

¹ To the extent this case should have been dismissed without prejudice, said error is harmless. "[T]he harmless error rule embodies a commonsense principle our appellate courts have long recognized—'whatever doesn't make any difference, doesn't matter.'" *State v. Reyes*, 432 S.C. 394, 406, 853 S.E.2d 334, 340 (2020) (quoting *State v. Jolly*, 304 S.C. 34, 39, 402 S.E.2d 895, 898 (Ct. App. 1991)); *see also* Rule 61, SCRCF (harmless error to be disregarded).

manage its affairs, including the ability to strike pleadings. See *Crestwood Golf Club, Inc. v. Potter*, 328 S.C. 201, 211-212, 493 S.E.2d 826, 832 (1997); *Don Shevey & Spires, Inc. v. American Motors Realty Corp.*, 279 S.C. 58, 301 S.E.2d 757 (1983) (trial court may properly dismiss an action for plaintiff's unreasonable neglect in proceeding with his cause). The same facts set forth in Argument II also support dismissal of Appellant's case for its failure to prosecute this matter.

CONCLUSION

The Circuit Court must be affirmed.

Dated: 07/19/2024

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