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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
In the Court of Common Pleas
Roger M. Young, Circuit Court Judge

Lower Court Case Nos. 2009-CP-10-07515, -07517; 07518; and 2010-CP-10-09959
Appellate Court Case No. 2012-205647

James J. Kerr, Crayton Walters, and J.T. Main, LLC, Appellants

v.

Branch Banking and Trust Company, Successor in merger to Branch Banking and Trust Company of SC, a/k/a BB&T, and James Edahl, Respondents,

Ron Konersmann, Appellant,

v.

Branch Banking and Trust Company, Successor in merger to Branch Banking and Trust Company of SC, a/k/a BB&T, and James Edahl, Respondents,

John Voytko, Appellant,

v.

Branch Banking and Trust Company, Successor in merger to Branch Banking and Trust Company of SC, a/k/a BB&T, and James Edahl, Respondents,

Patricia Konersmann, Appellant,

v.

Branch Banking and Trust Company, Successor in merger to Branch Banking and Trust Company of SC, a/k/a BB&T, and James Edahl, Respondents.

RESPONDENTS' CONSOLIDATED RETURN TO APPELLANTS' MOTIONS TO RECONSIDER AND FOR REHEARING

Respondents Branch Banking and Trust Company, successor in merger to Branch Banking and Trust Company of South Carolina, a/k/a BB&T ("BB&T"), and James Edahl ("Edahl," collectively "Respondents"), hereby file a consolidated return to the Appellants' Motion to Reconsider Their Motion to Supplement Record on Appeal or Remand to the Honorable Roger M. Young filed by Appellants Patricia Konersmann, Kerr, Walters and J.T. Main, LLC (the "Kerr Appellants") and the Appellants' Motion for Clarification of the Order Entered October 31, 2013 By Chief Justice Jean H. Toal, And For Rehearing or Reconsideration by Entire Court of the Motions for Remand (collectively the "Motions") filed by Appellants Ron Konersmann and John Voytko (the "Voytko Appellants"). The Motions are procedurally improper and have no merit, and should be denied.

As a threshold matter, this Court should not even entertain the Motions because this Court's Order denying the Appellants' Motions to Remand (the "Original Motions")[1] did not have the effect of dismissing or finally deciding the Appellants' appeal. *See* Rule 221(c), SCACR ("The appellate court will not entertain petitions for rehearing on a motion or petition unless the action of the court on the motion or petition has the effect of dismissing or finally deciding a party's appeal."); *see also* Rule 240(i), SCACR. These rules simply do not permit any of the relief Appellants are requesting.

Separately, even if this Court were inclined to entertain the Motions, Appellants have not stated with particularity any points this Court overlooked or misapprehended. *See generally*

[1] The Kerr Appellant's Original Motion was denied on October 29, 2013; the Voytko Appellant's Original Motion was denied on October 31, 2013.

Rule 221(a), SCACR. Instead, they have merely reiterated their original argument and referred to portions of the oral argument. Furthermore, it appears that Appellants' primary motivation is to re-argue, ***for the third time***, the issues raised in their appeal. Thus, the Appellants have not provided any basis for a rehearing. *See Herron v. Century BMW*, 395 S.C. 461, 466, 719 S.E.2d 640, 643 (2012) ("The purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time.").

Addressing the merits, Appellants are essentially seeking a remand because they allege that Judge Young did not "know the true facts." However, in their complaints, Appellants alleged that BB&T agreed to advance funds to Skywaves based on site plans. (Kerr, *et al*,. Am. Compl. ¶ 31; P. Konersmann Compl. ¶ 27; Voytko Am. Compl. ¶¶ 22, 41(e); R. Konersmann Am. Compl. ¶¶ 22, 41(e)). In their Original Motions and in these Motions, Appellants submit that Mr. Edahl's subsequent "admission" has confirmed this allegation. However, Appellants fail to recognize the lens through which this Court (and the court below) viewed the facts: when considering a motion to dismiss, the trial court and the appellate court view the facts in a light most favorable to the plaintiff. *Flateau v. Harrelson*, 355 S.C. 197, 202, 584 S.E.2d 413, 415 (Ct. App. 2003). Therefore, Judge Young has already assumed that all of the allegations—including the site plan allegation—are correct. Accordingly, Mr. Edahl's "admission" confirmed, at most, something that has already been taken as true. Consequently, a remand would serve no practical purpose. *See McCall v. Finley*, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987) (recognizing the overriding rule of civil procedure which says: "whatever doesn't

make any difference, doesn't matter").[2]

For the reasons set forth above and in Respondents' Return and Objection to the Original Motions, Respondents pray that the Court deny the Motions.

RESPECTFULLY SUBMITTED on this the 20th day of November, 2013.

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[2] To the extent this Court chooses to consider any substantive points raised in the Motions, these points have already been addressed in the Return and Objection of Respondents to the Kerr Appellants' Original Motion. Respondents hereby incorporate the Return and Objection by reference. Furthermore, if the Court is inclined to afford the Appellants any relief as a result of these Motions, Respondents request the opportunity for a full briefing in order to respond to the approximately 40 page combined memorandum submitted by Appellants.

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PROOF OF SERVICE

I, Jane E. Brown, hereby certify that a copy of the RESPONDENTS' CONSOLIDATED RETURN TO APPELLANTS' MOTIONS TO RECONSIDER AND FOR REHEARING has been served upon counsel of record by depositing a copy of the same, first-class postage prepaid, in the United States Mail, on the 20th day of November 2013 to the addresses shown below:

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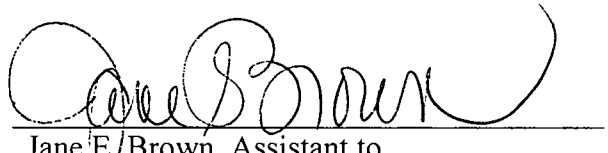

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