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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Donald B. Hocker, Circuit Judge

Appellate Case No. 2022-000704

South Carolina Community Bank,..…………...……………………...…...Respondent,

v.

Salon Proz, LLC, Columbia Empowerment Zone, Inc. d/b/a The Columbia Empowerment Zone, and Frank Mitchell, Defendants,

Of whom Salon Proz, LLC is the……………………………………………Appellant.

PETITION FOR REHEARING OR REHEARING *EN BANC*

Appellant ("Salon Proz"), along with Yvonne Jones, Office Suites, LLC, and The Event Hall, LLC, to the extent there is any order or decision against them, hereby respectfully moves and petitions, pursuant to Rules 219 and 221(a), SCACR, as well as all other applicable law, for an order granting rehearing or rehearing *en banc* in this case and submits the memorandum below in support of the same.

ARGUMENT[1]

A panel of this court has affirmed the lower court's decision to 1) sanction a non-party to whom no process had ever been directed, of whom no personal jurisdiction was ever obtained, and who was not the entity sought to be sanctioned in

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[1] Salon Proz's briefs are incorporated herein by reference.

any of the proceedings that led to the appealed orders, 2) issue sanctions when the same court had already determined that the procedural requisites for sanctions had not been met, 3) issue sanctions quite harsh in character (striking of counterclaims) that bore no relation to the conduct that ostensibly provided the basis for sanctions, and 4) refer the case to the master-in-equity in defiance of the law of the case that Salon Proz has the right to a jury trial on its counterclaims.

This court's purpose is to reverse error by lower courts. The appealed orders are rife with errors, most of them of a fundamental character. Salon Proz calls on this court to fulfill its responsibility to reverse the lower court's errors here. Salon Proz has pointed them out and has put them squarely before the court. The undersigned counsel for Salon Proz cannot understand why this court believes the law allows the lower court's rulings to stand.

I. The lower court never obtained or even attempted to obtain personal jurisdiction over Yvonne Jones, Office Suites, LLC, or The Event Hall, LLC. The court was without the power to impose sanctions or anything else on those entities.

Neither Yvonne Jones, Office Suites, LLC, nor The Event Hall, LLC have ever been parties to this case. (R. p. 135, p. 192 ln. 1-8.) The panel here wrote that S.C. Code Ann. § 36-2-802 allowed the court to exercise personal jurisdiction over Jones, but nothing in that statute eliminates the procedural prerequisites for personal jurisdiction, none of which were present here with regard to these non-party entities. "A court usually obtains personal jurisdiction by the service of the summons and complaint." Stearns Bank Nat'l Ass'n v. Glenwood Falls, LP, 373 S.C. 331, 644 S.E.2d 793, 796 (Ct. App. 2007). It is also possible to obtain jurisdiction over a non-party, usually for a limited purpose, through the issuance and service of a rule to

show cause. Ex parte S.C. Dept. of Revenue, 350 S.C. 404, 407-08, 566 S.E.2d 196 (Ct. App. 2002). Here, neither Jones, nor The Event Hall, nor Office Suites was ever joined as a party through the service of a summons, nor was any rule to show cause directed at any of them. (R. pp. 2, 24-33, 101-06.)

In the panel's opinion, this court wrote that "Jones signed the note and mortgage agreement with SCCB and is therefore a party to the foreclosure action, and subject to the Receivership Order." That is simply not true. Jones signed those documents in her representative capacity; in other words, Salon Proz signed them and Jones just made Salon Proz's mark. Moreover, though, even if Jones were a party to each and every part of the loan arrangement, that would not make her a party to this action, to which she has never been made a party. (R. pp. 2, 24-33, 101-06.) There is no law that supports the idea that one who is a party to some contractual arrangements but is not named as a party to a lawsuit somehow really is a party to that lawsuit. The panel's opinion repeatedly conflates Jones and Salon Proz, but they are distinct entities. "A corporation is not a natural person and maintains a separate and distinct identity apart from its shareholders." Mangum v. Maryland Cas. Co., 330 S.C. 573, 576, 500 S.E.2d 125 (Ct. App. 1998). This "principle is equally applicable, whether the corporation has many or only one stockholder." Id. (quoting Costas v. First Fed. Sav. & Loan Ass'n, 283 S.C. 94, 102, 321 S.E.2d 51, 56 (1984)).

The panel that issued the decision subject of this petition wrote that "Jones filed an answer, appeared in court, and defended the case without raising an objection to personal jurisdiction." Nothing of the sort ever occurred. One wonders where the panel could have gotten such an idea. Jones gave an affidavit and appeared in court

to testify – *as a witness*. Jones never answered any process in this matter, and it is easy to see why: none was ever directed to her. There was never anything for Jones to answer. There was never an attempt made to exercise personal jurisdiction over Jones until Judge Hocker surprisingly ordered sanctions against this non-party.

Further, even if the panel believes that *substantively* these entities ignored the corporate form, the panel cannot ignore that none of them except Salon Proz was ever made a party to the case; *procedurally*, a decision to ignore the corporate form was not possible. The lower court never gained the personal jurisdiction of these entities that would it would have needed in order to disregard the corporate form. In every case in which our courts have allowed the separate personhood of corporate entities to be ignored, all of those entities were parties over which the court had already obtained personal jurisdiction. E.g., Stoneledge at Lake Keowee Owners' Assn., Inc. v. IMK Development Co., LLC, 435 S.C. 109, 120, 866 S.E.2d 542, 548 (2021); Pertuis v. Front Roe Restaurants, Inc., 423 S.C. 640, 643-57, 817 S.E.2d 273 (2018). Entering orders disregarding the distinction between Salon Proz, Jones, Event Hall, or Office Suites was not procedurally possible in the instant case, since the prerequisite jurisdiction over Jones, Event Hall, and Office Suites was never obtained. When it comes to affecting the rights of an entity, obtaining personal jurisdiction over that entity is not a step a court can skip.

As for the indication in the court's opinion that the receivership order provided the requisite personal jurisdiction, the undersigned simply points out the lack of legal support for this notion and notes that it would have been impossible for the receivership order to have affected the rights of The Event Hall and Office Suites

– non-parties to this case – to collect rents owed to them under their leases with their tenants, who are also not parties.

Action was taken by the lower court against entities of which the court never gained personal jurisdiction. The court must have overlooked or misapprehended the law, the record, or both in reaching its decision in this regard, and rehearing should be granted.

II. In the case here at issue, the court lacked the procedural prerequisites to sanction Salon Proz.

Judge Hocker ruled that the required procedural requisites for contempt sanctions had not been met. (R. p. 2.) The Respondent did not appeal that ruling. It is, thus, the law of the case that the procedural requirements for a contempt proceeding were absent. See, e.g., Carolina Chloride, Inc. v. Richland Cnty., 394 S.C. 154, 714 S.E.2d 869 (2011) (unappealed ruling is the law of the case). The orders subject of this appeal are internally inconsistent. (R. p. 136.) One expressly decides that the proper procedure for contempt sanctions was not followed and declines to impose sanctions on a contempt basis. (R. pp. 2, 136.) The other, on the basis of contempt, sanctions Salon Proz by striking its counterclaim. (R. pp. 7-8, 136.)

The contempt that the Respondent contended occurred was constructive contempt, defined as contempt occurring outside the presence of the court, as opposed to in the courtroom or otherwise in the presence of the court. Toyota of Florence, Inc. v. Lynch, 314 S.C. 257, 267, 442 S.E.2d 611, 617 (1994). Constructive contempt proceedings must be brought by a rule to show cause based upon an affidavit or verified petition. Id. Failure of the proceedings to be brought in this way "is a fatal

defect." Id. In an unappealed ruling, the lower court decided that the procedural requirements to sanction Salon Proz had not been met. (R. pp. 101-32, p. 194 ln. 12-16.) Salon Proz, thus, could not lawfully be held in contempt. See id.

As noted in Salon Proz' motion to reconsider, "[t]he only theoretically possible basis for sanctions here would be for contempt, but, as the court has ruled, contempt sanctions would not be proper procedurally. No basis for sanctions remained." (R. p. 136.) Indeed, SCCB sought sanctions only for violation of court orders. (R. pp. 101-06.) There was indeed no other possible basis for sanctions other than contempt. See State ex rel. McLeod v. Hite, 272 S.C. 303, 251 S.E.2d 746 (1979) (nature of contempt sanctions is to ensure enforcement of judgments); State v. Goff, 228 S.C. 17, 88 S.E.2d 788 (1955) (same). As the requirements for contempt sanctions were not met, contempt was taken off the table as an available basis for sanctions. Toyota of Florence, 314 S.C. at 267.

The panel decision in this case discusses substantive contempt powers but does nothing to address that the lower court decided that the procedural requisites to get to make a contempt decision were not met. Similarly to what is noted above, when it comes to the fundamental procedural requirements to do something, courts do not get to skip steps to get to the part at the end.

The court must have overlooked or misapprehended the law, the record, or both in reaching its decision in this regard, and rehearing should be granted.

III. The law of the case barred reference to the master-in-equity.

It is also the law of this case that Salon Proz is entitled to a jury trial on its counterclaims, as this court's decision that Salon Proz has the right to a jury trial on

those counterclaims was not challenged by the Respondent and is a final determination on that matter. S.C. Community Bank v. Salon Proz, LLC, 420 S.C. 89, 800 S.E.2d 488 (Ct. App. 2017).

This action should not have been referred to the master-in-equity, who cannot conduct jury trials. Rule 53, SCRCP. Reference to a master-in-equity does not serve as a punishment; rather, it is only appropriate where there is no right to a jury trial or none has been demanded. See Rule 53, SCRCP. Here, this case was referred to the master-in-equity at a time when compulsory at-law counterclaims were still pending, and this was error. Salon Proz, 420 S.C. at 97. The order referring the case to the master-in-equity was issued before the order that struck the counterclaims. At that time, it had already been finally established in this case that reference of these counterclaims to the master-in-equity is unlawful. Id.

The court must have misapprehended the law or the record in this regard.

IV. Neither the rationale given by the lower court nor the one by this court survives any logical scrutiny at all.

The undersigned and the panel of this court that issued the opinion in this case obviously do not agree on what the record reflects about *why* Salon Proz took the actions it did that the lower court determined violated earlier orders. But, even if some sanction against Salon Proz were proper, the sanctions imposed here would still be inappropriately harsh. (R. p. 136.) The record lacks support for the imposition of a sanction as harsh as dismissal of the counterclaims, let alone dismissal with prejudice *and* payment of fees and costs. (R. p. 136.)

The lower court made the conclusion – without supporting findings and without support in the record – that failure to comply with the receivership orders

hindered the Respondent's ability to defend against Salon Proz's counterclaims. (R. pp. 8, 137-38.) No such hindrance occurred, and none was shown. (R. pp. 139-98, 216-85.) It makes no logical sense that any noncompliance with the orders at issue would have affected the ability to defend against the counterclaims in any way. (R. pp. 137-38.) The counterclaims are not about the matters subject of the receivership orders, and compliance with the orders would not help or do anything to maintain the ability to meet the counterclaims on their merits. (R. pp. 52-56.) Notwithstanding the circuit court's conclusory assertion, noncompliance with the orders did not affect the defense of the counterclaims in any way, and the sanction of dismissing and striking the counterclaims was anything but tailored to the conduct that was before the court. (R. p. 8.) Frankly, the panel's opinion in this case is similarly lacking in any explanation or underpinning logic that would connect ability to defend the counterclaims with whether there was compliance with orders concerning receivership.

The court in both of its orders, and now this court, has stated that the case had been pending for nearly 11 years and that no mortgage payments had been made. (R. pp. 2, 7-8.) This case has indeed been pending for a long time. Salon Proz did not cause that. Indeed, at every turn, Salon Proz has cooperated in and sometimes led the charge to get this case on trial and motions dockets. (R. p. 137, p. 150 ln. 1-10.)

But, moreover, the length of time the case has been pending has no logical connection to the issues that were before the court on SCCB's motion for sanctions. (R. pp. 101-06.) Salon Proz not making mortgage payments is not a permissible basis for sanctions. The lower court's orders assume, wrongly, that SCCB is entitled to

victory in this case. (R. pp. 1-9, 137.) Whether SCCB or Salon Proz has the right to prevail remains to be proven. The circuit court did what is unfortunately quite common in our legal system: it assumed that, since a bank brought a foreclosure action, it must be entitled to win it. (R. pp. 1-9, 137.) This is not the law. In accordance with the general principle that in a civil action the plaintiff bears the burden of proof, it is incumbent upon the party seeking foreclosure of a mortgage to prove all the elements of its case. See Baugh & Sons Co. v. Graham, 150 S.C. 398, 401, 148 S.E. 220 (1926) (plaintiff bears burden of proof in civil case); Paramount Fund, Inc. v. Cusaac, 282 S.C. 497, 499, 319 S.E.2d 354, 355 (Ct. App. 1984) ("[i]n an action to foreclose a mortgage on real property, the mortgagee has the burden of proving a disputed mortgage by the preponderance of the evidence"). The lower court, it seems, sanctioned Salon Proz for asserting counterclaims at all, for not lying down and taking whatever SCCB would have the courts do to Salon Proz.

Now this court has upheld this sanction, which bears no relation to the conduct for which it is an ostensible punishment.

The court must have misapprehended the law or the record in this regard.

V. Rehearing *en banc* is warranted and advisable.

"A hearing or rehearing en banc is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance." Rule 219(a), SCACR.

As discussed above, this panel's decision contradicts established law of this state, even on as fundamental a principle as personal jurisdiction. Consideration by the full court is needed to secure and maintain decisional uniformity.

Rehearing, preferably in an *en banc* format, should be granted.

WHEREFORE, Appellant prays for an order granting rehearing or rehearing *en banc* in this case.

Respectfully submitted,

/s/ Andrew S. Radeker
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PROOF OF SERVICE

I certify that I have served the foregoing petition for rehearing on the date given below by emailing it to counsel for the Respondent at the address(es) noted below.

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/s/ Andrew S. Radeker
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January 28, 2026