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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

James B. Jackson, Jr., Special Circuit Judge

Common Pleas Case Nos. 2007-CP-38-196 & 2007-CP-38-201
Appellate Case No. 2014-001634

First Citizens Bank and Trust Company,.....Appellant/Respondent,

v.

Clyde B. Livingston; Technico Marketing & Distribution, Inc.; B. Livingston and Charlotte V. Livingston; American First Federal Inc.; Citibank South Dakota, N.A.; Branch Banking and Trust Company of South Carolina; G&G Rentals; Miller Communications, Inc.; and Wells Fargo Bank, N.A., Defendants,

Of whom Clyde B. Livingston is the.....Respondent/Appellant.

And

First Citizens Bank and Trust Company,.....Appellant/Respondent,

v.

Clyde B. Livingston; American First Federal Inc.; Citibank South Dakota, N.A.; Branch Banking and Trust Company of South Carolina; G&G Rentals; Miller Communications, Inc.; and Wells Fargo Bank, N.A., Defendants,

Of whom Clyde B. Livingston is the.....Respondent/Appellant.

MOTION FOR PARTIAL DISMISSAL OF APPELLANT/RESPONDENT'S APPEAL AND MEMORANDUM IN SUPPORT

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(803) 779-2211
Attorney for Respondent/Appellant

Respondent/Appellant hereby moves pursuant to Rules 201 and 260, SCACR, and all other applicable law, for an order that dismisses Appellant/Respondent's appeal to the extent that it is an appeal of the denial of summary judgment, which is not appealable. The grounds for this motion are set forth below.

The denial of summary judgment is never appealable. As Appellant/Respondent's initial brief makes plain, one of the things Appellant/Respondent is appealing is the denial of its summary judgment motion. That simply cannot be done.

Appellant/Respondent cites Watson v. Underwood, 407 S.C. 443, 459, 756 S.E.2d 155 (Ct. App. 2014), and Morris v. Anderson Cnty., 349 S.C. 607, 564 S.E.2d 649 (2002), for the proposition that the denial of summary judgment is appealable where an appealable issue is before the court. This is incorrect for a couple of reasons.

To the extent that Morris stood for this proposition, it was overruled by Olson v. Faculty House of Carolina, Inc., 354 S.C. 161, 580 S.E.2d 440 (2003). In Olson, the Supreme Court definitively clarified that the denial of summary judgment is not appealable, ever, even when an indisputably appealable issue is before the court, and overruled cases that had held to the contrary. Id. at 168 & n. 8. That is borne out by the decisions in this area that have been issued since Olson, for example, Fisher v. Stevens, 355 S.C. 290, 298, 584 S.E.2d 149 (Ct. App. 2003) ("denial of a motion for summary judgment is not directly appealable, even after final judgment"), Wright v. Craft, 372 S.C. 1, 640 S.E.2d 486, 504 (Ct. App. 2006) (order denying motion for summary judgment not appealable), Proctor v. Whitlark, 406 S.C. 225, 226 n. 1, 750

S.E.2d 93, 93 n. 1 (Ct. App. 2013)("orders denying summary judgment are not appealable"), and Sims v. Amisub of S.C., Inc., 408 S.C. 202, 758 S.E.2d 187 (Ct. App. 2014) (same). The cases cited in Olson as being expressly overruled, 354 S.C. at 168 & n. 8, were cases in which appellate review of an order denying summary judgment was undertaken on the grounds that another, appealable issue was before the court – the same thing that Appellant/Respondent now asks this court to do. Tanner v. Florence City-Cnty. Bldg. Comm'n., 333 S.C. 549, 553, 511 S.E.2d 369 (Ct. App. 1998); Anthony v. Padmar, Inc., 307 S.C. 503, 513, 415 S.E.2d 828, 835 (Ct. App. 1991); Garrett v. Snedigar, 293 S.C. 176, 183 n. 2, 359 S.E.2d 283, 287 n. 2 (Ct. App. 1987).

Because, even after Olson, litigants have repeatedly attempted to do what the Appellant/Respondent is attempting to do now, this court has had a number of occasions to issue reminders of the law in this area. In 2011, this court noted that an order denying summary judgment "is not appealable under any circumstance." Thornton v. SCE&G, 391 S.C. 297, 301, 705 S.E.2d 475, 477 (Ct. App. 2011). Last year, citing Olson, this court made note of the fact that an order denying summary judgment "is never appealable." Kinard v. Richardson, 407 S.C. 247, 754 S.E.2d 888, 897 (Ct. App. 2014).

Watson v. Underwood, the very case cited by Appellant/Respondent, is one of those reminder decisions. 756 S.E.2d at 160, 162-63. One of the trial court's decisions Watson attempted to appeal in that case was the denial of a summary judgment motion. Id. This court adhered to the Supreme Court's controlling precedent, noting that "[b]ecause the denial of a motion for summary judgment

cannot be appealed, we cannot consider this issue." Id. at 163. The ordinarily unappealable order that the court noted it could have considered (but did not) in Watson was the denial of a petition to terminate a trust. Id. at 163-64.

The denial of summary judgment is not just *ordinarily* unappealable; it "is never appealable." Kinard, 754 S.E.2d at 897. Appellant/Respondent's appeal of the denial of summary judgment simply will not lie.

The court should not be taken in by Appellant/Respondent's unwarranted *ad hominem* attack. Appellant/Respondent writes that "these foreclosure actions have been pending for seven years. The Court can permit the foreclosure actions to proceed and end the tireless re-pleading and procedural machinations by the debtor," stating that the court should review and reverse an unappealable decision for that reason. (Initial Appellant's Brief of Appellant/Respondent p. 24.)

First, these foreclosure actions have not been pending for seven years because Respondent/Appellant made that so. This is Appellant/Respondent's case, in the sense that it brought the case, not Respondent/Appellant. If neither the circuit court nor Appellant/Respondent has taken steps to bring the case to a conclusion, that is not because Respondent/Appellant has done something to prevent them from doing that. To what "tireless re-pleading" does Appellant/Respondent refer? Respondent/Appellant made a motion to amend, which was granted, years ago, and then pled in response to Appellant/Respondent's amended complaints. What "procedural machinations" have been foisted on Appellant/Respondent in this case? Respondent/Appellant demanded a jury trial on his counterclaims and, years ago, the

master-in-equity ruled that he was entitled to one. The master-in-equity, years ago, bifurcated the case, over Respondent/Appellant's objection. It is Appellant/Respondent who brought this appeal, not the other way around. In its zeal to demonize Respondent/Appellant, Appellant/Respondent has accused him of "tireless re-pleading and procedural machinations" that he has not undertaken.

Second, Appellant/Respondent has engaged in the logical fallacy of an *ad hominem* attack. "*Ad hominem* arguments, of course, constitute one of the most common errors in logic: Trying to win an argument by calling your opponent names ('Jane you ignorant etcetera . . .') only shows the paucity of your own reasoning." Huntington Beach City Council v. Superior Ct., 115 Cal. Rptr. 2d 439, 448, 94 Cal. App. 4th 1417, 1430 (Cal. App. 2002). Appellant/Respondent probably does not like Respondent/Appellant much, but the merits of neither party's character is at issue in this appeal.

Briefing on the merits of whether Appellant/Respondent should have been granted summary judgment would be inefficient, costly, and purposeless. Sometimes, this court has dealt with issues of appealability that motions have brought before the court by declining to dismiss the appeal but directing the parties to address the issue in their briefs. That is not what the court should do here with regard to the portion of Appellant/Respondent's appeal that seeks review of the denial of summary judgment.

For Respondent/Appellant's counsel to devote time and energy to briefing the merits of why the circuit court was right to deny Appellant/Respondent summary judgment would be a significant waste of that time and energy, as it would ultimately

prove to be just an exercise in futility. The court, bound by precedent, would not reach the issue. For the court to read the portions of the parties' briefs that would deal with whether Appellant/Respondent should have been granted summary judgment would be similarly pointless, a poor use of judicial resources. For Respondent/Appellant to incur the increased cost of having printed and bound multiple copies of a brief that has been necessarily lengthened by his counsel's argument, made just to be safe, on the merits of that issue would be nothing more than a waste of money. No one, not even Appellant/Respondent, is well served by the parties' briefing the issues surrounding whether the circuit court was right to deny summary judgment. (Respondent/Appellant would have no problem with the court allowing Appellant/Respondent to omit the section of its initial brief that deals with the denial of summary judgment from its final brief, thus shortening Appellant/Respondent's brief, as well.)

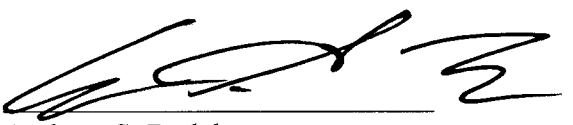
Respondent/Appellant should not have to brief (and this court should not have to read briefs on) the issues raised by an appeal of something that "is not appealable under any circumstance." Thornton, 391 S.C. at 301.

Time. Respondent/Appellant believes that the pendency of this motion stays all deadlines in this appeal pursuant to Rule 240(b), SCACR; however, to the extent necessary, Respondent/Appellant moves for an extension of his time to serve and file an initial respondent's brief (and designation of matter to be included in the record on appeal) to Appellant/Respondent's appellant's brief to 30 days from the issuance of the order that decides this motion or such other reasonable deadline as this court sets. For the reasons discussed above, there is good cause for such an extension.

The court should publish an order granting this motion. Though this court does not typically publish its orders on motions, it certainly can. The Appellate Court Rules contemplate that occasionally orders, not just opinions, will be published. See Rule 268(d)(1), SCACR. This is a proper situation for the court to publish its order granting this motion to dismiss. Apparently, there is a significant portion of the bar that needs to be again reminded that "orders denying summary judgment are not appealable." Proctor v. Whitlark, 406 S.C. at 226 n. 1.

WHEREFORE Respondent/Appellant prays for an order dismissing Appellant/Respondent's appeal to the extent that it is an appeal of the denial of summary judgment.

Respectfully submitted,



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February 14, 2015

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PROOF OF SERVICE

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

A. Mattison Bogan, Esq.
Erik T. Norton, Esq.
Tara C. Sullivan, Esq.
Nelson Mullins Riley & Scarborough LLP
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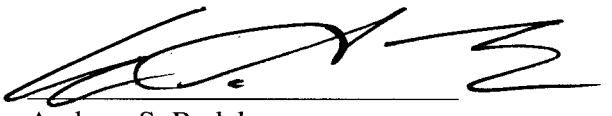
February 14, 2015



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February 14, 2015

VIA HAND DELIVERY (ON FEBRUARY 16)
The Hon. Jenny Abbott Kitchings
Clerk of Court, Court of Appeals of South Carolina
Edgar Brown Building
1205 Pendleton Street
Columbia, South Carolina 29201

Re: First Citizens Bank, etc. v. Clyde B. Livingston, et al.
Appellate Case No. 2014-001634

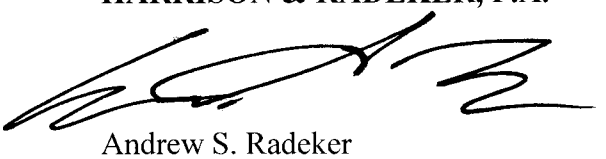
Dear Ms. Kitchings:

Enclosed herewith for filing in the above-referenced case are an original and seven copies of a motion partial dismissal of the appellant/respondent's appeal, with attached proof of service thereof. Also enclosed is this firm's check in the amount of $25.00 as the motion fee.

Kindly file these documents and return a file-stamped copy to this office in the stamped and addressed envelope enclosed. Of course, if you or your staff have any questions or concerns, please do not hesitate to contact me.

With kind regards, I am,

Very truly yours,
HARRISON & RADEKER, P.A.



Andrew S. Radeker

ASR/

Enclosures

cc: A. Mattison Bogan, Esq.
Erik T. Norton, Esq.
Tara C. Sullivan, Esq.