

The South Carolina Court of Appeals

First Citizens Bank and Trust Company, Inc.,
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, Inc.,
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.,

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

Appellate Case No. 2014-001634

ORDER

This appeal and cross-appeal concern an order of a special circuit judge that granted summary judgment in part and denied summary judgment in part. Respondent/Appellant Clyde B. Livingston has filed a motion to dismiss the appeal filed by Appellant/Respondent First Citizens Bank and Trust Company, Inc. We grant Livingston's motion and dismiss First Citizens' appeal.

I. Procedural History¹

An exhaustive chronological history illustrates the premise for First Citizens' appeal and the basis for arguments it makes in its return to Livingston's motion to dismiss. In 2000, Livingston obtained two loans from First Citizens' predecessor-in-interest: (1) a home equity line of credit for \$57,000 and (2) a mortgage for \$30,500.² Livingston defaulted on both loans in 2006, and First Citizens filed separate foreclosure actions on the loans in February 2007. Livingston answered and counterclaimed in March 2007, and in August he filed a motion for summary judgment on one of the foreclosure claims and motions to amend his answers. In December 2007, after a master-in-equity granted the motions to amend but denied the motion for summary judgment, Livingston filed a motion to reconsider the master's order. Eight months later, in August 2008, the master denied Livingston's motion and issued an order (a) severing Livingston's counterclaims from the foreclosure actions, (b) ruling Livingston had a right to a jury trial on his counterclaims, (c) returning the counterclaims to the circuit court, and (d) staying First Citizens' foreclosure actions pending resolution of Livingston's counterclaims.

In May 2009, First Citizens amended its complaint in one of the foreclosure actions, and Livingston filed an answer alleging the same counterclaims as before but also adding an additional counterclaim. In July 2009, First Citizens filed a motion for summary judgment, and after no action was taken by the court, filed another summary judgment motion in March 2010. In June 2010, a circuit court judge finally issued an order summarily disposing of two of Livingston's counterclaims.

In 2012 and 2013, First Citizens filed motions for summary judgment on Livingston's remaining counterclaims, and the matter was consolidated and

¹ These facts appear in Livingston's motion to dismiss, First Citizens' return, Livingston's reply, and the parties' initial briefs.

² The loans covered separate properties in Orangeburg County.

referred to a special circuit judge. In April 2014, the special circuit judge issued an order granting summary judgment in part and denying summary judgment in part. In his order, the special circuit judge (1) granted First Citizens' motion for summary judgment on Livingston's unfair trade practices counterclaim, (2) denied First Citizens' motion for summary judgment on Livingston's remaining three counterclaims (breach of contract, attorney-preference violations, and libel), and (3) denied First Citizens' motion to strike Livingston's demand for a jury trial.

First Citizens and Livingston filed motions for reconsideration, and the special circuit judge issued an order denying both motions. First Citizens appealed the special circuit judge's orders, and Livingston filed a cross-appeal. Six months later, and after First Citizens had already filed its initial brief, Livingston decided to file a motion to dismiss First Citizens' appeal.

II. Livingston's Motion to Dismiss and First Citizens' Return in Opposition

Livingston argues in his motion to dismiss that this Court cannot consider the merits of First Citizens' appeal because the appeal arises from the denial of a motion for summary judgment. *See Bank of New York v. Sumter Cnty.*, 387 S.C. 147, 154, 691 S.E.2d 473, 477 (2010) (stating "it is well-settled that an order denying summary judgment is never reviewable on appeal"). First Citizens acknowledges in its return that orders denying summary judgment are virtually never appealable, but contends the protracted litigation in this case presents a compelling circumstance warranting immediate appellate review of the portion of the special circuit judge's order denying summary judgment and the motion to strike Livingston's demand for a jury trial. *See Davis v. Lunceford*, 287 S.C. 242, 242-43, 335 S.E.2d 798, 799 (1985) (allowing an appeal of the denial of summary judgment to proceed in the third appeal of a medical malpractice action that had been pending for thirteen years).

III. This Court's Order

After careful contemplation of the procedural history, the parties' arguments, and appellate precedent, we grant Livingston's motion and dismiss First Citizens' appeal. *See Olson v. Faculty House of Carolina, Inc.*, 354 S.C. 161, 168, 580 S.E.2d 440, 444 (2003) ("We adhere to recent precedent and hold that the denial of a motion for summary judgment is not appealable, even after final judgment."); *Watson v. Underwood*, 407 S.C. 443, 459 n.12, 756 S.E.2d 155, 164 n.12 (Ct. App. 2014) ("The denial of summary judgment is never appealable, even after final judgment."); *Proctor v. Whitlark & Whitlark, Inc.*, 406 S.C. 225, 226 n.1, 750

S.E.2d 93, 93 n.1 (Ct. App. 2013) (declining to address the appellants' issue challenging the circuit court's denial of their motion for summary judgment).

Having summarized the facts underlying this appeal, we recognize the procedural morass that has resulted in large part from Livingston's litigious approach to this legal action and that has delayed resolution of an otherwise straightforward issue: foreclosure of two loans for which he is in default. The facts and dates speak for themselves. Livingston has taken full advantage of the legal system to forestall First Citizens from obtaining a judgment of foreclosure against him. First Citizens cannot prosecute its foreclosure actions until Livingston's legal counterclaims are fully adjudicated. However, despite the exception our supreme court carved out in *Lunceford* thirty years ago, we are constrained to follow our current appellate precedent precluding consideration of the merits of an order denying summary judgment. *Compare Lunceford*, 287 S.C. at 242-43, 335 S.E.2d at 799 (considering the merits of an order denying summary judgment), *with Olson*, 354 S.C. at 168, 580 S.E.2d at 444 (stating modern appellate precedent forbids consideration of the merits of an order denying summary judgment). We therefore grant Livingston's motion to dismiss First Citizens' appeal.

Notwithstanding our dismissal of First Citizens' appeal, we order that no further extensions will be granted in Livingston's cross-appeal, except in the most extraordinary circumstances. With the dismissal of First Citizens' appeal, Livingston becomes the primary appellant. Livingston may serve and file a reply brief within ten days of the date of this order, and thereafter he must serve and file the record on appeal in accordance with Rule 210, SCACR. The parties then must comply with Rule 211, SCACR, in serving their final briefs, and should expect that no extensions will be granted.

 C.J.
FOR THE COURT

Columbia, South Carolina

FILED

April 13, 2015

cc: Andrew Sims Radeker, Esquire
Allen Mattison Bogan, Esquire
Erik Tison Norton, Esquire
Tara C. Sullivan, Esquire