THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas
George C. James, Jr., Circuit Judge

Appellate Case No. 2012-213309
Common Pleas Case No.: 2010-CP-28-01197

US Bank National Association Successor Trustee to LaSalle Bank National Association, as Trustee under the Pooling and Servicing Agreement, dated as of April 1, 2002, among Asset Backed Funding Corporation, Litton Loan Servicing LP and LaSalle Bank National Association, ABFC Asset Backed Certificates, Series 2002-SB-1.....Respondent,

v.

Kelly Burr, FIA Card Services, N.A., Discovery Bank, Issuer of the Discover Card, Unifund CCR Partners, Defendants,

Of Whom Kelley Burr is .....Appellant.

RETURN TO PETITION FOR REHEARING EN BANC

Sean A. O'Connor (SC Bar No.: 68382)
FINKEL LAW FIRM LLC
4000 Faber Place Drive | Suite 450
North Charleston, South Carolina 29405
843-577-5460
soconnor@finkellaw.com
Attorney for Respondents

June 1, 2015

ARGUMENT

I. Any error the court of appeals may have committed in treating U.S. Bank's motion as a motion for summary judgment was harmless because there were other valid grounds upon which to affirm the trial court.

Appellant contends that the court of appeals erred in treating the circuit court's dismissal of Burr's affirmative defenses was a grant of summary judgment. Petition for Rehearing at 2; U.S. Bank National Assn. v. Burr, Op. No. 2015-UP-091 (S.C. Ct. App., filed Feb. 25, 2015). Rule 12(c), SCRCP, provides that "[i]f, on motion for judgment on the pleadings, matters outside the pleadings are presented... the motion shall be treated as one for summary judgment...." Rule 12(c), SCRCP. U.S. Bank does not dispute Appellant's contention that it was not necessary or correct for the subject motion to have been treated as a motion for summary judgment, as the circuit court apparently only examined the Certification of Mortgagor Noncompliance, which was attached to the pleadings, and not other facts outside the pleadings. Petition for Rehearing at 4. A copy of a document which is an exhibit to a pleading is part of the pleading for all purposes if a copy is attached to such a pleading. Rule 10(c), SCRCP; Brazell v. Windsor, 384 S.C. 512, 516, 682 S.E.2d 824, 826 (2009). Brazell held that a motion under Rule 12(b)(6), SCRCP, was not converted into a motion for summary judgment where the trial court considered a document attached to and incorporated by reference into the complaint. Brazell, 384 S.C. at 516, 682 S.E.2d at 826. However, if the court of appeals' conversion of the motion was error, it was harmless because there were other valid grounds to support this court's decision to affirm the circuit court's granting of U.S. Bank's motion to dismiss and strike, including that Appellant's counterclaim was moot and that the trial court did correctly find and rule that Appellant had failed to prosecute her counterclaim.

Judgment will not be reversed for insubstantial errors not affecting the result. Jensen v. Conrad, 355 S.E.2d 291, 293, 292 S.C. 169 (Ct. App. 1987). "Alleged errors which the record conclusively shows could not have affected the decision and judgment work no prejudice and constitute no ground for reversal." Banister v. Lollis, 190 S.E. 511, 513, 183 S.C. 218 (1937). Any inaccuracy in the court's statement of a party's position is of no consequence where the court would have been required to reach the same result had the court stated appellant's position correctly. Beard v. South Carolina Tax Comm'n, 230 S.C. 357, 95 S.E.2d 628, 636 (1956). When, on consideration of the whole record, the judgment is plainly right, the court will not reverse for errors of law which did not affect the merits. Lowe v. Mills, 77 S.E. 135, 137, 93 S.C. 420 (1913).

As explained further below, given the other valid bases to affirm, the decision to convert the motion to a Rule 56 motion, if determined to be erroneous, could not have affected the decision, and did not prejudice Appellant, thus it constitutes no grounds for reversal. This court should not reverse its opinion based upon an error of law which did not affect the merits.

For these reasons, Appellant's counterclaims and defenses were properly dismissed and struck and the Petition for Rehearing should be denied.

II. U.S. Bank was not required to plead or prove mootness for the circuit court to dismiss Defendant's counterclaims on that grounds.

The basis for the circuit court's dismissal under Rules 12(c) and 12(f) was mootness. A lack of a justiciable controversy means that any moot claims are insufficient as a matter of law. Holden v. Cribb, 349 S.C. 132, 135, 137-138, 561 S.E.2d 634, 636-38 (Ct. App. 2002). Justiciability, whether the litigation presents an active case or controversy, is a threshold inquiry for any court. Id., 349 S.C. 132, 137, 561 S.E.2d at 637, quoting Lennon v. S.C. Coastal Council, 330 S.C. 414, 415, 498 S.E.2d 861, 864 (1996). The concept of justiciability encompasses

ripeness, mootness, and standing. Id. (citing Jackson v. State, 331 S.C. 486, 490 n.2, 489 S.E.2d 915, 917 n.2 (1997)). "'A case becomes moot when judgment, if rendered, will have no practical effect upon [an] existing controversy.'" Id. at 137–38, 561 S.E.2d at 637 (quoting Seabrook v. City of Folly Beach, 337 S.C. 304, 306, 523 S.E.2d 462, 463 (1999)) (alteration in original).

U.S. Bank was not required to plead mootness as a defense or argue that the pleadings failed to state a claim for that reason, because mootness, as a threshold issue, may be raised *sua sponte*. See Eagle Container Co., LLC v. Cnty. of Newberry, 366 S.C. 611, 634, 622 S.E.2d 733, 745 (Ct. App. 2005), rev'd on other grounds, 379 S.C. 564, 666 S.E.2d 892 (2008) (holding ripeness may be raised *sua sponte*); Carolina Alliance for Fair Employment v. South Carolina Dep't of Labor, Licensing, & Regulation, 337 S.C. 476, 485, 523 S.E.2d 795, 800 (Ct. App. 1999). Additionally, U.S. Bank's answer asserted failure to state a claim under Rule 12(b)(6) as a defense. (R. p. 25.)

There are three exceptions to the mootness doctrine: (1) if the issue is capable of repetition but evading review; (2) to "decide questions of imperative and manifest urgency to establish a rule of future conduct in matters of important public interest" and (3) "if the trial court's decision may affect future events or have collateral consequences for the parties." Id. at 138, 561 S.E.2d at 637–38. (quoting Curtis v. State, 345 S.C. 557, 568, 549 S.E.2d 591, 596 (2001)). However, all authority dealing with exceptions to mootness is in the context of a moot appeal and whether the appellate court can take jurisdiction, not the trial court's jurisdiction. See Id.; Byrd v. Irmo High Sch., 321 S.C. 426, 430–32, 468 S.E.2d 861, 864 (1996); Darden v. S.C. Dep't of Highways & Pub. Trans., 291 S.C. 270, 353 S.E.2d 279 (1987).

Here, all of Appellant's counterclaims are premised on U.S. Bank's failure to offer her a "reconsideration of her payment amounts." (R. pp. 17-18, 21.) U.S. Bank has offered Appellant

this opportunity, not only through the foreclosure intervention process mandated by the 2011 Administrative Order, but also prior to the institution of this action through HAMP. (See R. p. 17, p. 66 ln. 23-25, p. 69 ln. 20 – p. 70 ln. 15, p. 84-85.) Appellant claims there is no evidence in the record that U.S. Bank offered her a modification opportunity which complied with the 2011 Administrative order and HAMP. Petition for Rehearing at 9. That allegation is unsubstantiated and is simply incorrect. In fact, the fact that Appellant was offered such an opportunity was acknowledged and conceded by her counsel at the motion hearing. (R. p. 70 ln. 13-15.) Accordingly, any order from the circuit court preserving Appellant's counterclaims would have no practical effect.

None of the mootness exceptions apply because Appellant's claim of mootness goes to the justiciability of the initial action, not this appeal, which is also moot for the same reasons. While the failure of a loan servicer to consider a borrower for foreclosure intervention is capable of repetition, Appellant has not shown how this question usually becomes moot before it can be reviewed by the courts. See Byrd, 321 S.C. at 431–32, 468 S.E.2d at 864. Appellant's claims do not implicate any imperative or urgent questions, as the stay imposed by the mandatory foreclosure intervention program under the 2011 Administrative Order prevents a plaintiff from proceeding with foreclosure without offering a borrower the opportunity to be considered for foreclosure intervention. See In re Mortgage Foreclosure Actions, 396 S.C. at 211–13, 720 S.E.2d at 909. Additionally, the third exception, having collateral consequences for the parties, is not implicated because Appellant has already received exactly what she sought – an offer for loan modification. Though Appellant also asks for damages, any damages, according to her counterclaim, would arise from a failure to offer her a loan modification, yet clearly no such failure occurred. Therefore, U.S. Bank was not required to raise the issue of mootness for the

circuit court to correctly dismiss Appellant's counterclaims for mootness.

For these reasons, Appellant's counterclaims and defenses were properly dismissed and struck and the Petition for Rehearing should be denied.

III. The court of appeals properly affirmed the circuit court's granting of U.S. Bank's motion to dismiss and strike, as the court correctly held that Appellant failed to prosecute her counterclaim.

In addition to mootness, any error by the court of appeals in treating the subject motion by U.S. Bank as a motion for summary judgment would be harmless also because Appellant has failed to prosecute her counterclaims. An action may be dismissed for failure to prosecute either pursuant to Rule 41(b), or *sua sponte* by the trial court as part of its inherent power to manage its own affairs. Rule 41(b), SCRCP; Crestwood Golf Club, Inc. v. Potter, 328 S.C. 201, 211–12, 493 S.E.2d 826, 832 (1997) (citing Small v. Mungo, 254 S.C. 438, 442, 172 S.E.2d 802, 803 (1970) ("[I]t is within the inherent power of the court to dismiss an action for failure to prosecute"); 24 Am.Jur.2d Dismissal, Discontinuance and Nonsuit 48 (1983) ("Such power is deemed to be necessarily vested in trial courts to manage their own affairs so as to achieve orderly and expeditious disposition of cases.")). Rule 41(b), SCRCP, governs dismissals for failure to prosecute and states that a party may move for dismissal of an action "[f]or failure of the plaintiff to prosecute or to comply with these rules or *any* order of court." Id. (emphasis added). This also applies to counterclaims, cross-claims and third party claims. Crestwood Golf Club, 328 S.C. at 211, 493 S.E.2d at 832. A single instance of nonfeasance may be sufficient ground for dismissal for failure to prosecute. McComas, 368 S.C. at 74, 626 S.E.2d at 910 (Anderson, J., dissenting) (citing Joyner v. Glimcher Props., 356 S.C. 460, 589 S.E.2d 762 (2002)). Moreover, Rule 41(b) does not explicitly require unreasonable neglect for dismissal to be proper. Id. at 75, 626 S.E.2d at 910.

The Foreclosure Intervention process established by the 2011 Administrative Order is not merely voluntary "settlement negotiations," as Appellant contends. Appellant's Initial Brief at 13–14. Rather, the foreclosure intervention required by the Administrative Order is a mandatory "process to ensure that lenders and eligible homeowners have an opportunity for meaningful discussion about possible settlement options." South Carolina Judicial Dep't, Frequently Asked Questions (FAQ) in South Carolina Master-in-Equity Court, South Carolina Judicial Dep't. 9–10 (2011), http://www.sccourts.org/selfhelp/FAQMIE.pdf (2011). This process was imposed to reduce the workload on courts and reduce the number of unresolved foreclosure actions. In re Mortgage Foreclosure Actions, 396 S.C. at 210, 720 S.E.2d at 905. As such, it is more analogous to mediation proceedings in counties that mandate alternative dispute resolution prior to trial. See Hopkins v. Harrell, 352 S.C. 517, 574 S.E.2d 747 (Ct. App. 2002) (affirming dismissal for failure to participate in mandatory mediation). A party is deemed to be bound by the acts of his attorney-agent and is considered to have notice of all facts for which notice can be charged to his attorney. Link v. Wabash R. Co., 370 U.S. 626, 634, 82 S. Ct. 1386 (1962) (affirming court's *sua sponte* dismissal for failure to prosecute where attorney failed to attend a pretrial conference).

Here, the foreclosure intervention process is judicially mandated and failure to participate in it is analogous to failing to participate in mandatory mediation. Appellant's counsel was aware of the communications from U.S. Bank regarding this process. (R. p. 68 ln. 6-14); Under Link, this is imputed to Appellant, as Appellant's counsel conceded at the hearing. (R. p. 70 ln 3-10). Thus, the circuit court had the inherent power to dismiss Appellant's counterclaims for failure to prosecute for failing to participate in the judicially mandated foreclosure intervention process, and doing so was not an abuse of discretion.

In McComas v. Ross, South Carolina adopted the four factor analysis used by the Fourth Circuit for dismissals under Rule 41(b). McComas, 368 S.C. at 63, 626 S.E.2d at 904. The Fourth Circuit has stated that there are four factors which should be considered in determining whether a dismissal was proper under Rule 41(b). McCargo v. Hedrick, 545 F.2d 393, 396 (4th Cir. 1976); McComas, 368 S.C. at 63, 626 S.E.2d at 904. First, the reviewing court must consider the plaintiff's degree of personal responsibility. McComas, 368 S.C. at 63; 626 S.E.2d at 904 (citing Hillig v. Comm'r of Internal Revenue, 916 F.2d 171, 174 (4th Cir. 1990)) (applying the four Fourth Circuit factors). Second, the court should consider the amount of prejudice caused to the defendant by the delay. McCargo, 545 F.2d at 396. Third, whether "the record indicate[s] a drawn out history of deliberately proceeding in a dilatory fashion." Id. (quoting Reizakis v. Loy, 490 F.2d 1132, 1135 (4th Cir. 1076)). Finally, the court should determine if the trial court considered less drastic sanctions than dismissal. McCargo, 545 F.2d at 396 (quoting Reizakis).

The circuit court considered each factor from McComas in issuing its decision, and addressed them directly in its Oct. 1 Order. That the circuit court considered each factor shows that the court did not abuse its discretion since the discussion of each factor includes supporting facts and the use of the McComas factors is not an error of law. Here, Appellant's defenses and counterclaims are based on a series of allegations regarding U.S. Bank's alleged failure to offer her a loan modification or allow her to participate in HAMP. (R. pp. 32-33). The circuit court explicitly found that in advancing her counterclaim which sought a modification, Appellant had a duty to submit her information for review and to comply with the 2011 Administrative Order. (R. p. 2); In re Mortgage Foreclosure Actions, 396 S.C. 209, 720 S.E.2d 908 (2011). Appellant's answer and counterclaim admits that she failed to submit all necessary information for review

(R. p. 17) and this failure to provide information has continued. (See R. pp. 33, 84).

The failure to provide these documents derives directly from Appellant, not from any failure on the part of her counsel. (R. p. 61 ln. 11-25). Moreover, by failing to provide documentation after electing to participate in foreclosure intervention under the 2011 Administrative Order, Appellant violated a court order. In re Mortgage Foreclosure Actions, 396 S.C. at 212, 720 S.E.2d at 909. This is sufficient for dismissal under Rule 41(b), SCRCP. See Therens v. Faircloth, 291 S.C. 451, 354 S.E.2d 54 (Ct. App. 1987) (affirming circuit court's dismissal for defendant's failure to comply with United States District Court order).

Contrary to Appellant's contentions, the rule's statement of "failure to comply with any court order" is not limited to orders from the trial court. The plain meaning of "any" refers to all applicable court orders, regardless of the issuing court. As it is undisputed that this action is subject to the requirements of the 2011 Administrative Order, which imposes obligations on both parties, failure to comply with this order falls squarely within the type of discretionary dismissals contemplated by Rule 41(b), SCRCP. Appellant also incorrectly asserts that dismissal is not an available remedy for failure to comply with the 2011 Administrative Order, when in fact dismissal is authorized, as are any other sanctions that are within the court's discretion. In Re Mortgage Foreclosure Actions, 396 S.C. at 214, 720 S.E.2d at 910 ("In the event the Court determines that any party to the foreclosure action, or their acting agent, has failed to comply with the terms of this order, or has not attempted to reach an agreement for foreclosure intervention in good faith, the Court may, in its discretion, impose such sanctions as it determines to be reasonable and just under the circumstances....").

Similar to the case of Georganne Apparel, Inc. v. Todd, 303 S.C. 87, 399 S.E.2d 16 (Ct. App. 1990) (court upheld dismissal for failure to prosecute and found prejudice to defendant

where action had been filed 2½ years prior and the defendants had incurred $65,000.00 in legal fees to various firms). Id. at 90, 399 S.E.2d at 18, 18 n.*. Here the circuit court correctly found that U.S. Bank has suffered prejudice by this delay, as it expended time and expense in attempts to respond to Appellant's demands for modification, followed up with her regarding modification, and sought documentation from Appellant and her counsel in order to comply with the 2011 Administrative Order (R. p. 2.). Additionally, U.S. Bank suffered prejudice in the delay in proceeding with its foreclosure claim. Finally, the Court noted that the subject property is physically deteriorating. (R. p. 66.) These circumstances are comparable to that of Georganne Apparel, and are sufficient for a conclusion that U.S. Bank has suffered prejudice by the delay.

As to the third factor, the circuit court correctly found that Appellant's history of proceeding in a dilatory fashion was shown by the events listed in the Certification of Mortgagor Noncompliance and in the motion that is the subject of this appeal. (R. p. 2.) Additional support for this finding is derived from Appellant's own Answer, which admits that some documents required by U.S. Bank were not submitted (R. p. 17) and from Appellant's failure to undertake any discovery on her counterclaims. (R. p. 66.) As twenty-two months had passed since the institution of this action at the time the motion was heard, the court could conclude that this was the result of conscious or willful failure or refusal by Appellant to proceed on her counterclaims, which were not stayed by the 2011 Administrative Order. (See R. p. 70 ln. 22 – p. 71 ln. 20) (noting that the foreclosure could not proceed on the merits prior to the Certification of Noncompliance, but that this did not stay the counterclaims). The Certification of Mortgagor Noncompliance was filed with the court, becoming part of the record. (R. pp 84-85.) Moreover, Appellant's answer, also a part of the record, admits to failing to provide documentation. (R. p. 17.)

In regard to the fourth factor requiring the trial court's consideration of alternative sanctions, it is stated explicitly in the Oct. 1 Order that the court considered "another court order directing compliance" with the requirements of the loan modification process. The court concluded, however, that such an order "would provide no incentive for Burr to act." (R. p. 2.) This consideration was sufficient to satisfy the requirement that the court consider sanctions other than dismissal. McComas requires only that the trial court consider alternative sanctions, not that it must attempt them before proceeding with dismissal.

Finally, Appellant confuses the court's inherent power to dismiss claims for failure to prosecute and the procedural process available under Rule 41(b). Crestwood Golf Club, Inc. v. Potter, 328 S.C. 201, 211, 493 S.E.2d 826, 832 (1997). The court's authority to order dismissals *sua sponte* does not require analysis under the four McComas factors. See Id. Therefore, it was not an error of law to conclude that the four McComas factors were satisfied, and the grant of dismissal under Rule 41(b) was not an abuse of discretion.

For these and all the foregoing reasons, Appellant's counterclaims and defenses were properly dismissed and struck and the Petition for Rehearing should be denied.

Respectfully submitted,

Sean A. O'Connor (SC Bar No.: 68382)
FINKEL LAW FIRM LLC
4000 Faber Place Drive | Suite 450
North Charleston, South Carolina 29405
843-577-5460
soconnor@finkellaw.com
Attorney for Respondents

June 1, 2015

THE STATE OF SOUTH CAROLINA
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APPEAL FROM KERSHAW COUNTY
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v.

Kelly Burr, FIA Card Services, N.A., Discovery Bank, Issuer of the Discover Card, Unifund CCR Partners, Defendants,

Of Whom Kelley Burr is .....Appellant.

PROOF OF SERVICE

I hereby certify that on the 1st day of June, 2015, I served a copy of the *Return to Petition for Rehearing or Rehearing En Banc* by placing a copy of same in the United States Mail, proper postage prepaid, addressed as follows:

Andrew S. Radeker, Esq.
Harrison & Radeker, P.A.
Post Office Box 50143
Columbia, South Carolina 29250

Sean A. O'Connor (SC Bar No.: 68382)
FINKEL LAW FIRM LLC
4000 Faber Place Drive | Suite 450
North Charleston, South Carolina 29405
843-577-5460
soconnor@finkellaw.com
Attorney for Respondents

FINKEL
LAW FIRM LLC

SEAN A. O'CONNOR, ESQUIRE
SOCONNOR@FINKELLAW.COM

REPLY TO:
CHARLESTON LITIGATION

June 1, 2015

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: US Bank National Association Successor Trustee to LaSalle Bank National Association, as Trustee under the Pooling and Servicing Agreement, dated as of April 1, 2002, among Asset Backed Funding Corporation, Litton Loan Servicing LP and LaSalle Bank National Association, ABFC Asset Backed Certificates, Series 2002-SB-1 v. Kelley Burr, FIA Card Services, N.A., Discovery Bank, issuer of the Discover Card and Unifund CCR Partners
Appellate Case No.: 2012-213309
Our File No.: 52310.45979

Dear Jenny:

Enclosed please find *Respondent's Return to Petition for Rehearing or Rehearing En Banc* which has been prepared in connection with the above referenced matter. We respectfully request that you file same and return the file-stamped copies in the enclosed envelope.

If you have any questions, please do not hesitate to contact my office.

With warmest regards, I am

Very truly yours,

FINKEL LAW FIRM

Sean A. O'Connor

SAO:jle
Enclosure

cc: Andrew S. Radeker, Esq. (w/encl.)