THE STATE OF SOUTH CAROLINA
In the Supreme Court

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

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AUG 28 2015
S.C. SUPREME COURT

Appellate Case No. 2015-001554
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 .....Petitioner.

AMENDED RETURN TO PETITION FOR WRIT OF CERTIORARI

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August 24, 2015

QUESTIONS PRESENTED

1) Did the Court of Appeals err in affirming the circuit court's decision to strike Petitioner's defenses and dismiss her counterclaims for failure to prosecute?
2) Did the Court of Appeals commit reversible error in affirming the circuit court on the basis that U.S. Bank's motion was converted into one for summary judgment?
3) Did the Court of Appeals err in affirming the circuit court's determination that Burr's counterclaims were moot?

STATEMENT OF THE CASE

On or about October 31, 2001, Kelley Burr ("Petitioner") executed and delivered a note and mortgage ("Mortgage") in the principal amount of $100,800.00 to EquiSource Home Mortgage Corp. (App'x p. 105.) This Mortgage was recorded on November 5, 2001, in the Kershaw County Register of Deeds Office in Mortgage Book 1072 at Page 142. (App'x p. 105.) The real property encumbered by this Mortgage is known as 1128 Bayview Drive, Lugoff, SC, 29078 ("Property"). (App'x p. 105.) U.S. Bank National Association as 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-SB1 ("U.S. Bank") filed a summons and complaint against Petitioner seeking foreclosure of the Mortgage on November 1, 2010. (App'x pp. 102-08.) In the Complaint, U.S. Bank stated that the loan servicer for the Mortgage was participating in the Home Affordable Modification Program ("HAMP"), but the loan was "not eligible for modification because the borrower did not provide all necessary documents after those documents had been requested." (App'x p. 104.)

Petitioner, through her then-counsel David P. Reuwer, Esquire, answered and

counterclaimed on December 20, 2010. (App'x pp. 109-16.) Burr asserted defenses and counterclaims of unclean hands, breach of contract, fraud and misrepresentation in the inducement, unfair trade practices, *in pari delicto*, and "residential home." (App'x p. 111.) These defenses and counterclaims were based on U.S. Bank's alleged failure to "conduct a fair, reasonable, comprehensive analysis" and "reconsideration of her home mortgage amount problem." (App'x pp. 110-13.) U.S. Bank answered and asserted various defenses, including Defendant's lack of capacity, authority or standing (App'x p. 122) and failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6), SCRCP (App'x p. 119.).

On May 2, 2011, Chief Justice Toal of the South Carolina Supreme Court issued an Administrative Order titled In re: Mortgage Foreclosure Actions, 396 S.C. 209, 720 S.E.2d 908 (2011) ("Administrative Order"). This Administrative Order imposed an automatic stay in foreclosure actions and required plaintiffs seeking foreclosure of owner-occupied dwellings to notify defendants of the right to foreclosure intervention. Id. at 211, 720 S.E.2d at 909. The Administrative Order also imposed a mandatory foreclosure intervention process in all owner-occupied foreclosure actions. Id. Under the Administrative Order, foreclosure actions could proceed upon certification from the Plaintiff either that the mortgagor had failed to respond or comply with the foreclosure intervention process, or that participation in the process by both parties did not resolve the matter. Id. at 211–21; 720 S.E.2d at 909.

Pursuant to the Administrative Order, U.S. Bank served Petitioner's then-counsel with a notice of right to foreclosure intervention on July 25, 2011. (App'x pp. 172-75.) After communications with Petitioner's then-counsel, U.S. Bank resent the notice on August 9, 2011. (App'x p. 178.) On October 27, 2011, U.S. Bank filed a Certification of Mortgagor Noncompliance stating that Petitioner had "failed, refused, or voluntarily elected not to

participate" in the process, and stated that despite several communications with Petitioner's then-counsel and extending the deadline for receipt of information from Petitioner, "[n]o documents or records were ever received...." (App'x pp. 178-79.) U.S. Bank had several other communications with Petitioner's counsel in regards to foreclosure intervention after filing the Certification of Mortgagor Noncompliance, but Petitioner's counsel failed to respond to messages and Petitioner, through counsel, failed to provide the documents requested for a modification proposal. (App'x pp. 127, 155-57.)

On April 18, 2012, U.S. Bank filed a Motion to Dismiss Counterclaims and Strike Defenses, which is the subject of this appeal. (App'x pp. 126-42.) This motion was based on Petitioner's failure to respond to U.S. Bank's efforts to offer her a loan modification proposal and Petitioner's failure to provide information to allow consideration of a modification, and argued that Petitioner had defeated her own counterclaims by failing "to acknowledge the relief offered to her." (App'x pp. 127, 131.) U.S. Bank sent a modification proposal to Petitioner's counsel on January 10, 2012, but no response to this was received until shortly before the motion was heard. (App'x pp. 126-42, 156-57.)

A hearing on the motion was held on September 13, 2012. (App'x p. 150.) The court made an oral ruling from the bench granting U.S. Bank's motion to strike the counterclaims. (App'x p. 169.) In a corresponding written order filed October 1, 2012 ("Oct. 1 Order"), the court granted U.S. Bank's motion under Rules 41(b), 12(c) and 12(f), SCRCP. (App'x pp. 95-98.) The court found that Petitioner had failed to prosecute and specifically stated the four relevant factors under McComas v. Ross, 368 S.C. 59, 626 S.E.2d 902 (Ct. App. 2006), had been satisfied. (App'x pp. 96-97.) Additionally, the court found that Petitioner's claims were moot. (App'x pp. 97–98.)

Petitioner served a Motion to Reconsider and supporting Memorandum on October 9, 2010. (App'x pp. 143-49.) This motion was denied by the court on October 16, 2012. (App'x p. 99.) Petitioner filed a Notice of Appeal on October 31, 2012. The Court of Appeals affirmed the circuit court's decision dismissing Burr's counterclaims and striking her affirmative defenses by unpublished opinion issued February 25, 2015. (App'x pp. 1-3.) Petitioner filed a petition for rehearing en banc on March 12, 2015. (App'x pp. 4-18.) U.S. Bank filed a return to Petitioner's petition for rehearing on June 1, 2015. (App'x pp. 20-30.) The Court of Appeals denied this petition by order dated June 18, 2015. (App'x pp. 31-32.) Petitioner filed a Petition for Writ of Certiorari on July 20, 2015.

In affirming the circuit court, the Court of Appeals found that judgment in Petitioner's favor would have no practical effect on the controversy as U.S. Bank had offered Petitioner a modification and continued to make efforts to work with her on a modification throughout the litigation. (App'x pp. 2-3.) The Court of Appeals further affirmed the dismissal of Petitioner's affirmative defenses, reasoning that as the trial court looked outside the pleadings to the loan modification process, the proper standard was to review the Rule 12(c), SCRCP, motion as a motion for summary judgment. (App'x pp. 2-3.)

I. 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 Petitioner failed to prosecute her counterclaim.

The Court of Appeals properly upheld the circuit court's finding that Petitioner 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 Petitioner contends. Petitioner'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. Petitioner's counsel was aware of the communications from U.S. Bank regarding this process. (App'x p. 162 ln. 6-14); Under Link, this is imputed to Petitioner, as Petitioner's counsel conceded at the hearing. (App'x p. 164 ln 3-10). Thus, the circuit court had the inherent power to dismiss Petitioner'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, Petitioner'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. (App'x pp. 126-27). The circuit court explicitly found that in advancing her counterclaim which sought a modification, Petitioner had a duty to submit her information for review and to comply with the 2011 Administrative Order. (App'x p. 96); In re Mortgage Foreclosure Actions, 396 S.C. 209, 720 S.E.2d 908 (2011). Petitioner's answer and counterclaim admits that she failed to submit all necessary information for review (App'x p. 111) and this failure to provide information has continued. (See App'x pp. 127, 178).

The failure to provide these documents derives directly from Petitioner, not from any failure on the part of her counsel. (App'x p. 155 ln. 11-25). Moreover, by failing to provide documentation after electing to participate in foreclosure intervention under the 2011 Administrative Order, Petitioner 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 Petitioner'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. Petitioner 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, 90, 399 S.E.2d 16, 18, 18 n.* (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), 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 Petitioner's demands for modification, followed up with her regarding modification, and sought documentation from Petitioner 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 Petitioner'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. (App'x p. 96.) Additional support for this finding is derived from Petitioner's own Answer, which admits that some documents required by U.S. Bank were not submitted (App'x p. 111) and from Petitioner's failure to undertake any discovery on her counterclaims. (App'x p. 160.) 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 Petitioner to proceed on her counterclaims, which were not stayed by the 2011 Administrative Order. (See App'x p. 164 ln. 22 – p. 165 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. (App'x pp 178-79.) Moreover, Petitioner's answer, also a part of the record, admits to failing to provide documentation. (App'x p. 111.)

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, Petitioner 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, Petitioner's counterclaims and defenses were properly dismissed and struck and the Petition for Certiorari should be denied.

II. 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.

Petitioner contends that the court of appeals erred in treating the circuit court's dismissal of her affirmative defenses as a grant of summary judgment. (App'x p. 5); 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 Petitioner'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. (App'x p. 7.) 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 the court's decision to affirm the circuit court's

granting of U.S. Bank's motion to dismiss and strike, including that Petitioner's counterclaim was moot and that the trial court did correctly find and rule that Petitioner 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 Petitioner'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 Petitioner. 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, Petitioner's counterclaims and defenses were properly dismissed and struck and the Petition for Certiorari should be denied.

III. The circuit court did not err in dismissing Petitioner's counterclaims and striking her affirmative defenses without the submission of affidavits or other admissible evidence.

The circuit court's findings are not findings of fact, and, as U.S. Bank's motion was not considered as a motion for summary judgment under Rule 56, SCRCP, it was not required to be

supported by affidavits or other evidence. (App'x p. 96.) Rule 12(c), SCRCP, states that "[i]f, on a motion for judgment on the pleadings, matters outside the pleadings are presented ... the motion shall be treated as one for summary judgment...." Id. However, this rule also contemplates that judgment on the pleadings may be had without reference to external matters. See Id.; Lydia v. Horton, 343 S.C. 376, 381, 540 S.E.2d 102, 105 (Ct. App. 2000), rev'd on other grounds, 355 S.C. 36, 583 S.E.2d 750 (2003) (citing Firemen's Ins. Co. v. Cincinnati Ins. Co., 302 S.C. 234, 394 S.E.2d 855 (Ct. App. 1990) ("On review of the motion, the court may not consider matters outside the pleadings.")). Rule 12(f), SCRCP, contains no reference to matters outside the pleadings. Id. As the question in ruling on a motion under Rule 12(f) is whether the defense should be allowed to be pled, not whether there are facts supporting what has been pled, consideration of matters outside the pleadings is unnecessary. See Alladin Plastics, Inc. v. Wintenna, Inc., 301 S.C. 90, 93, 390 S.E.2d 370, 372 (Ct. App. 1990).

Likewise, Rule 41(b) does not require the submission of supporting affidavits. Rule 41(b), SCRCP. This rule does provide for the court to make findings of fact in actions where the court acts as a trier of fact and the defendant moves for dismissal under this rule after plaintiff has presented his evidence. Id. However, this procedure is the equivalent of a motion for a directed verdict in a non-jury case. See Fickling v. City of Charleston, 372 S.C. 597, 599 n.1, 643 S.E.2d 110, 112 n.1 (Ct. App. 2007) (noting that directed verdicts are available only in jury trials, but that dismissal may be had under Rule 41(b), SCRCP in actions without a jury). It is not the only path for dismissal under this rule. See Therens, 291 S.C. at 452, 354 S.E.2d at 55 (dismissing for failure to comply with United States District Court order); Small v. Mungo, 254 S.C. 438, 175 S.E.2d 802 (1970) (dismissing for failure to appear for trial); Brandt v. Gooding, 368 S.C. 618, 627, 630 S.E.2d 259, 264 (2006) (affirming dismissal as sanction for contempt and

perpetrating a fraud on the court). These types of dismissals do not require the trial court to make findings of fact.

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 by considering a document attached to and incorporated by reference into the complaint. Brazell, 384 S.C. at 516, 682 S.E.2d at 826.

The circuit court properly considered the Certification of Mortgagor Noncompliance in considering U.S. Bank's motion, as this is a pleading that was part of the record before the court and attached as an exhibit to the motion. It was, like the document in Brazell, part of the pleadings since it was required to be filed with the court. While Petitioner is correct that factual statements of counsel ordinarily may not be considered by the court in determining whether a genuine issue of material fact exists, Higgins v. Medical Univ., 326 S.C. 592, 599, 486 S.E.2d 269, 272 (Ct. App. 1997), when deciding a motion for judgment on the pleadings or a motion to strike, the court is not looking at material facts. See Rule 12(c), (f), SCRCP; Alladin Plastics, Inc. v. Wintenna, Inc., 301 S.C. 90, 93, 390 S.E.2d 370, 372 (Ct. App. 1990) (stating that motions to strike do not deal with factual support of what has been pleaded); Lydia, 343 S.C. at 380, 540 S.E.2d at 105. As the Certification of Mortgagor Noncompliance and Plaintiff's Answer and Counterclaims were the documents considered by the circuit court in making its decision, it was not an abuse of discretion to grant U.S. Bank's motion without any supporting affidavits or the submission of other evidence.

IV. 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 Petitioner's counterclaims are premised on U.S. Bank's failure to offer her a "reconsideration of her payment amounts." (App'x pp. 111-12, 115.) U.S. Bank has offered Petitioner 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 App'x p. 111, p. 160 ln. 23-25, p. 164 ln. 20 – p. 165 ln. 15, p. 84-85.) Petitioner 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. (App'x p. 9.) That allegation is unsubstantiated and is simply incorrect. In fact, the fact that Petitioner was offered such an opportunity was acknowledged and conceded by her counsel at the motion hearing. (App'x p. 164 ln. 13-15.) Accordingly, any order from the circuit court preserving Petitioner's counterclaims would have no practical effect.

None of the mootness exceptions apply because Petitioner'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, Petitioner 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. Petitioner'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 Petitioner has already received exactly what she sought – an offer for loan modification. Though Petitioner 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 Petitioner's counterclaims for mootness.

For these and the foregoing reasons, the Court of Appeals was correct in affirming the circuit court's dismissal of Petitioner's counterclaims and defenses, and Petitioner's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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August 19, 2015

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AUG 28 2015

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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-28-1197

U.S. 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.

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

Of Whom Kelley Burr is.....Petitioner.

PROOF OF SERVICE

I certify that I have served the *Amended Return to Petition for Writ of Certiorari* on Kelley Burr by depositing a copy of it in the United States Mail, postage prepaid, on August 24, 2015, addressed to her attorney of record, Andrew S. Radeker, Post Office Box 50143, Columbia, South Carolina 29250.

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