THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

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

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

PETITIONER'S REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI

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Petitioner Kelley Burr, who was the Appellant below and is hereinafter, sometimes, referred to as "Burr," hereby submits this reply to the return submitted by the Respondent (hereinafter "U.S. Bank") to Burr's petition for the issuance of a writ of certiorari to review the final decision of the Court of Appeals in this case. As the return was served on August 19, 2015, and August 29 was a Saturday, this reply is timely.

Burr will try to avoid simply repeating what is said in her petition.

ARGUMENT IN REPLY

I. U.S. Bank's contention that the certification of mortgagor noncompliance was attached to a pleading is unsupportable.

U.S. Bank appears to have shifted its focus away from the argument it made in its brief to the Court of Appeals that the certification of mortgagor noncompliance is or was a pleading. In light of the explicit limitations in Rule 7(a), SCRCP, on what pleadings there may be in an action, that argument was untenable, anyway. A certification of mortgagor noncompliance submitted under In re: Mortgage Foreclosure Actions, 396 S.C. 209, 720 S.E.2d 908 (2011) (South Carolina Supreme Court Administrative Order 2011-05-02-01) (hereinafter "the Administrative Order") is plainly not one of the listed pleadings in Rule 7(a), which states that "[n]o other pleadings shall be allowed[.]"

U.S. Bank now contends, though, that U.S. Bank's motion to strike or dismiss was a pleading and that the certification of mortgagor noncompliance was properly considered by the court as a part of the pleadings because the certification was "attached as an exhibit to the motion." (Return to Petition for Certiorari pp. 11, 14.) That is both

against the plain language of Rule 7, SCRCP, and would create an absurd result were this court to say that is the law.

Applying Rule 7(a) to the record in this case, the only conclusion the Rule allows about what the pleadings are is that they are the complaint, the answer and counterclaim, and the reply (which U.S. Bank labeled an "answer") to the counterclaim. (Appx. pp. 102-25.) The certification of mortgagor noncompliance was not attached to any of those documents, nor was it referenced in any of those documents, nor did it even exist at the time those documents were created. (Appx. pp. 102-25, 178-80.) This case is certainly not like Brazell v. Windsor, 384 S.C. 512, 682 S.E.2d 824 (2009), in which a settlement statement document was explicitly referenced in and incorporated into the complaint but was not actually attached to the complaint.

Motions are not pleadings. In fact, Rule 7, SCRCP, along with specifically limiting pleadings to what 7(a) states are allowed, also expressly separates pleadings and motions into two subsections of the Rule, as follows:

> (a) Pleadings. There shall be a complaint and an answer; and a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if a person who was not an original party is summoned under Rule 14, and there shall be a third-party answer, if a third-party complaint is served. No other pleadings shall be allowed, except that the court may order a reply to an answer or a third-party answer; and there may be a reply to affirmative defenses as provided in Rule 8(c).
>
> (b) Motions and Other Papers.
>
> 1) An application to the court for an order shall be by motion which, unless made during a hearing or trial in open court with a court reporter present, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is

fulfilled if the motion is stated in a written notice of the hearing of the motion.

2) The rules applicable to captions, signing, and other matters of form of pleadings apply to all motions and other papers provided for by these rules.

Rule 7(a) & (b), SCRCP.

This is no mere technicality. Think of the implications of accepting what U.S. Bank argues as the law. If a motion counted as a pleading for purposes of a motion for judgment on the pleadings, a party could attach any document it wanted to a motion, call the motion a "motion for judgment on the pleadings," and argue that the attached document entitles it to judgment on the pleadings. The circular logic of this is profoundly absurd.

The paradigmatic example of when a motion for judgment on the pleadings is proper is when an answer admits all of the material facts pled in a complaint. To broaden the concept of a motion for judgment on the pleadings to embrace U.S. Bank's contention would swallow not just Rule 7 but the whole rulebook.

II. The Alladin Plastics case cited by U.S. Bank supports Burr's argument that the circuit court strayed from the proper analysis under a motion to strike.

U.S. Bank cites Alladin Plastics, Inc. v. Wintenna, Inc., 301 S.C. 90, 93, 390 S.E.2d 370, 372 (Ct. App. 1990), for the proposition that "[a]s 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." (Return to Petition for Certiorari p. 13.) An examination of Alladin Plastics shows that it not only stands for the proposition that consideration of matters outside the pleadings is "unnecessary," it also stands for the proposition that

do so is improper, at least where the motion to strike challenges the legal sufficiency of what is pled as a claim or defense, as here. From the Alladin Plastics opinion:

> Alladin argues, as an additional sustaining ground, that "there are no facts whatsoever in the record to support a jurisdictional challenge of the Tennessee judgment." In other words, Alladin argues even if the Circuit Court erred in ruling the Tennessee judgment cannot be challenged for lack of jurisdiction, nevertheless, the decision of the Circuit Court should be affirmed because there is no evidence the Tennessee Court did not have jurisdiction to render the judgment. This argument demonstrates a misconception of the nature of a motion to strike. Such a motion seeks to have stricken from a pleading "any insufficient defense or any redundant, immaterial, impertinent or scandalous matter." S.C.R.C.P. Rule 12(f). In ruling on such a motion, a Court decides whether a party should be allowed to plead a defense or other matter, not whether there are facts supporting what has been pleaded.

301 S.C. at 93.

This is consistent with the principle that a motion to strike that challenges a theory of recovery pled by the non-movant is in the nature of a motion to dismiss under Rule 12(b)(6), SCRCP. McCormick v. England, 328 S.C. 627, 494 S.E.2d 431 (Ct. App. 1997). "A motion to dismiss a counterclaim must be based solely on the allegations set forth in the counterclaim. See Rule 12(b)(6), SCRCP; Baird v. Charleston County, 333 S.C. 519, 527, 511 S.E.2d 69, 73 (1999).

In Robinson v. Code, a later opinion by this court that cites Alladin Plastics, this court reinforced the principle that a motion to strike looks to what is asserted in the pleading, as illustrated by the following:

> Code filed a motion to strike pursuant to Rule 12(f), SCRCP. "In ruling on such a motion, a Court decides whether a party should be allowed to plead a defense or other matter, not whether there are facts supporting what has been pleaded." Alladin Plastics, Inc. v. Wintenna, Inc., 301 S.C. 90, 93, 390 S.E.2d 370, 372 (Ct. App. 1990).

> Code moved to strike all allegations pertaining to smoke detectors on the basis that Article 11 does not create a cause of action for failure to install smoke detectors.

384 S.C. 562, 682 S.E.2d 495, 497 (Ct. App. 2009). Code's motion to strike was based on what was pled in the complaint and challenged its legal sufficiency. Id. That is a proper motion to strike. Id. at 497-98.

Since Burr's pleadings here contained none of the "facts" upon which the circuit court relied in reaching its decision (Appx. pp. 95-98, 109-116), the circuit court went beyond the scope of the proper analysis, which directly led to the decision at issue.

III. U.S. Bank says Burr's counsel said something he did not say.

In its return, U.S. Bank states the following:

> Appellant [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 Appellant was offered such an opportunity was acknowledged and conceded by her counsel at the motion hearing*. (App'x p. 164 ln. 13-15.)

(Return to Petition for Certiorari p. 16 (emphasis added).)

Burr correct to point out that there is no such evidence in the record. But Burr must take particular issue with U.S. Bank's statement that Burr's counsel "acknowledged and conceded" that Burr had been offered a modification that complied with the Administrative Order and the Home Affordable Modification Program. He most certainly did not.

The portion of the hearing transcript cited by U.S. Bank is as follows, with the exact lines cited by U.S. Bank italicized:

> . . . I mean, there is here noted that while it might not have *been too timely, there was a response to the latest settlement proposal and the negotiations are on-going in that regard. Also the question of whether the matter*

> remained stayed under the administrative order and whether she's failed to prosecute the counterclaims are not the same question is what I would say.

(Appx. p. 164 ln. 12-18 (emphasis added). That is a far cry from a concession that U.S. Bank offered Burr a modification that complied with the Administrative Order and HAMP. Further examination of the transcript pages around this show that there is no reasonable interpretation that Burr's counsel was saying anything like U.S. Bank now claims he said. (Appx. pp. 162-67.)

It is telling that U.S. Bank believes it has to ground its opposition to this court granting certiorari in a concession that was never made.

IV. Unless the pleadings themselves demonstrate mootness or there has been some change in the law making a claim moot, mootness has to be demonstrated through a factual record.

U.S. Bank dances around squarely coming out and saying that its argument is that a court can declare a claim to be moot based on purported facts that do not appear in the record, but that is the essence of what U.S. Bank argues in its return. That is not only incorrect but also frightening in its implications.

A case is nonjusticiable for mootness where, if the party prevails, it has become impossible for the court to grant him any "effectual relief" that would have "practical legal effect upon the existing controversy." Curtis v. State, 345 S.C. 557, 567, 549 S.E.2d 591, 596 (2001) (internal quotation marks omitted). "In general a case becomes moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." U.S. v. (Under Seal), 819 F.2d 1139 (4th Cir. 1987) (internal quotation marks omitted) (quoting Leonard v. Hammond, 804 F.2d 838, 842 (4th Cir. 1986)).

Typically, a determination of whether a claim is moot will be a factual one because it would normally be incumbent upon the court to receive evidence of the

factual occurrences that a party contends have made the claim moot. Otherwise, how would a court determine that something has happened that makes it impossible for the court to grant any "effectual relief" that would have "practical legal effect upon the existing controversy[?]" Curtis, 345 S.C. at 567.

Burr recognizes that, occasionally, situations can arise in which a claim can be determined to be moot without reference to a factual record – but these instances are rare. This is not such a situation. If the facts alleged in the claimant's pleading itself show that the claim is moot, then, obviously, no reference to a factual record is necessary to make that determination. Also, a claim may be made moot by a change in the law, as occurred, for example, in the case of Occupy Columbia v. Haley, 922 F.Supp.2d 524, 530 (D.S.C. 2013), in which the district court held that protesters' claim seeking injunctive relief from an unconstitutional policy about use of the State House grounds was moot where a statute that was constitutional had been passed that prohibited much of the specific conduct the protesters sought to engage in.

Neither one of these situations, however, is present in this case. Here, the circuit court determined Burr's claims to be moot, not on the basis of her pleading, of a change in the law, or a factual record, but solely on the argument of U.S. Bank's counsel.

V. U.S. Bank's contention that Burr somehow did not comply with the Adminstrative Order is against the language of that order, which did not require her to do anything.

Just as it did below, U.S. Bank contends that somehow Burr "violated" the Administrative Order, though what term of that order she supposedly violated remains a question U.S. Bank has left unanswered. That is because it cannot answer it. The Administrative Order makes no requirements at all of a mortgagor defendant but simply provides that *if* such a defendant wants to engage the foreclosure plaintiff in foreclosure intervention discussions, the defendant *may* do so by notifying the plaintiff's counsel

in the way described in the order. In re: Mortgage Foreclosure Actions, 396 S.C. at 211-12. The rest of the process spelled out in the Administrative Order consists of requirements the order makes of the foreclosure plaintiff. Id. at 211-14. A foreclosure defendant may comply with the order by doing nothing at all, since the order does not require a foreclosure defendant to do anything. It provides for what may happen if a foreclosure defendant does not do certain things, but it does not require the defendant to do them. Id.

The process under the Administrative Order is not much like mandatory mediation at all. Where mediation is mandatory, *both* parties are required to do certain things. The process under the Administrative Order is mandatory *for the plaintiff.*

VI. Burr's counterclaims being stricken or dismissed was by no means a forgone conclusion.

U.S. Bank agrees that its motion was not one for summary judgment and that it was not converted into one for summary judgment; rather, it hints that the Court of Appeals' decision should not be reversed because the circuit court's ruling and the Court of Appeals' affirmation of that ruling reached the correct result anyway. Given the absence of any factual record or averments in the pleadings to support the circuit court's ruling or the Court of Appeals' decision, it was by no means a foregone conclusion that Burr would have lost on U.S. Bank's motion if either court had applied the correct analysis. Indeed, the result reached is wrong any way one looks at it.

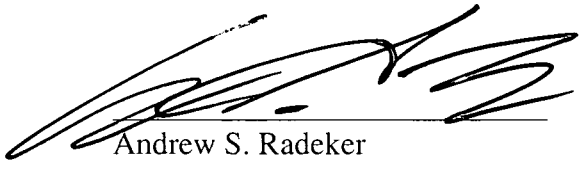
VII. Striking and dismissing defenses and counterclaims for not participating in foreclosure intervention is against the letter and the spirit of the Administrative Order.

The remedy under the Administrative Order for a situation in which the mortgagor defendant ignores foreclosure intervention efforts after requesting foreclosure intervention is for the plaintiff to deny foreclosure intervention on that basis

and have its lawyer serve and file a notice of denial of foreclosure intervention so that the case may proceed. Id. at 212. It is not for the foreclosure defendant to suffer a setback, of any kind, on the merits of her defenses or counterclaims. The Administrative Order provides that "[n]o document, statement or evidence of any kind shared, released or exchanged exclusively for purposes of foreclosure intervention pursuant to this order shall be admissible as evidence in any subsequent proceeding." Id. at 213. The purpose of the Administrative Order is to foster settlement negotiations in mortgage foreclosure actions, not to create a substantive trap for foreclosure defendants. To use the Administrative Order as a club with which to strike a foreclosure defendant is to demonstrate a cruel ignorance of what was intended by the order.

WHEREFORE, the Petitioner prays for an Order granting a writ of certiorari to review the final decision of the Court of Appeals in this case.

Respectfully submitted,



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

PROOF OF SERVICE

I certify that I served the foregoing reply to return to petition for writ of certiorari by depositing a copy of each of them on the date shown below in the United States Mail, postage prepaid, addressed as follows:

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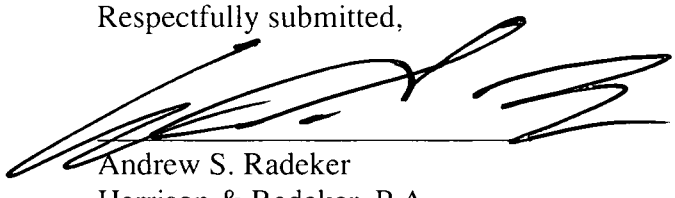
August 31, 2015

Respectfully submitted,



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