

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Branch Banking and Trust Company,

Plaintiff,

vs.

Cindy B. Hunt; Willow Greens Homeowners  
Association, Inc.; CJ Developers, LLC,

Defendants.

IN THE COURT OF COMMON PLEAS

DOCKET NO.: 2013-CP-26-2528

RECEIVED ORDER

JUL 25 2016

SC Court of Appeals

2016 JUN 15 AM 8:57  
CLERK OF COURT

This matter came before the Court at a hearing on November 10, 2015, regarding Defendant Cindy B. Hunt's ("Hunt") motions to alter or amend the following three orders entered in this case:

- Form 4 Order entered October 28, 2014, denying Hunt's Motion for Default Judgment;
- Order entered on January 13, 2015, granting Plaintiff Branch Banking and Trust Company's ("BB&T") Motion to Dismiss regarding Hunt's counterclaims; and
- Form 4 Order entered on June 3, 2015, denying Hunt's Motion under SCRCP 41 for attorney's fees and costs.

Hunt appeared *pro se*. Sean M. Foerster, Esquire, appeared at the hearing on behalf of BB&T. For the reasons set forth herein, the Court denies all three of Hunt's motions to alter or amend the above listed orders.

Relevant Facts

Hunt asks the Court to alter or amend the following three orders entered in this case:

1. Form 4 Order entered on October 28, 2014.

On September 30, 2014, Hunt filed a "Motion for Default Judgment" seeking to hold BB&T in default on her amended counterclaims. The motion was based on Hunt's belief that BB&T's response to her amended counterclaims by way of a motion to dismiss was improper, and that BB&T's motion to dismiss did not stay the time for it to file a responsive pleading.

At a hearing on October 14, 2014, the Court dismissed all of Hunt's amended counterclaims. On October 28, 2014, the Court entered a Form 4 Order denying Hunt's "Motion

COA

for Default Judgment” on the grounds of mootness given the dismissal of the amended counterclaims.

On October 30, 2014, Hunt filed a “Motion to alter or amend the Judgment/Orders of the Court under SCRCP 59(e)” asking the Court to alter or amend its denial of her “Motion for Default Judgment” on the grounds that BB&T’s motion to dismiss her amended counterclaims was improper and that BB&T should have filed a responsive pleading.

2. Order entered on January 13, 2015.

On June 25, 2014, BB&T filed a Motion to Dismiss Hunt’s Amended Counterclaims. At a hearing on October 14, 2014, the Court orally granted BB&T’s motion and requested that BB&T’s counsel prepare and provide it with a proposed formal order. In the meantime, on October 28, 2014, the Court entered a Form 4 Order stating: “All counterclaims asserted by Defendant in this action were previously dismissed by the Court following an October 14, 2014 hearing regarding Plaintiff’s Motion to Dismiss the First Amended Counterclaims of Defendant Cindy B. Hunt.” Also on October 28, 2014, BB&T’s counsel provided the Court with the requested proposed order by email.

On November 10, 2014, Hunt filed a Notice of Removal concerning this case in the United States District Court for the District of South Carolina. *BB&T v. Hunt et al.*, C/A # 4:14-CV-4352 (filed Nov. 10, 2014).

On January 13, 2015, the Court entered a written order granting BB&T’s Motion to Dismiss Hunt’s Amended Counterclaims to formalize its ruling on October 14, 2014, and the Form 4 Order entered on October 28, 2014.

On May 8, 2015, the District Court remanded the case back to this Court.

On August 11, 2015, Hunt filed a “Motion: Lack of Jurisdiction, SCRCP 59 and SCRCP 60” asking the Court to alter or amend the Order of January 13, 2015, on the grounds that the Court lacked jurisdiction to enter that order while the case was removed to federal court.

3. Form 4 Order entered on June 3, 2015.

On May 27, 2015, Hunt filed a “Motion under SCRCP 41” in which she requested attorney’s fees and costs under Rule 41(d), SCRCP, on a theory that the dismissals of her three federal court lawsuits against BB&T somehow triggered this rule in her favor.

On June 3, 2015, the Court entered a Form 4 Order denying her motion for fees and costs.

On August 11, 2015, Hunt filed a "Motion: Lack of Jurisdiction, SCRPC 59 and SCRPC 60" asking the Court to alter or amend its denial of her request for fees and costs.

Conclusions of Law

The Court denies all three of Hunt's motions to alter or amend for the following reasons:

1. The Court did not err in denying Hunt's Motion for Default Judgment Against BB&T.

Hunt's motion to alter or amend the Form 4 Order entered October 28, 2014, does not present any clear error of law on the part of the Court, any intervening change in the law controlling this issue, or any new evidence that would affect the Court's denial of her motion for a default judgment against BB&T. Her motion simply rehashes her argument that BB&T's motion to dismiss her amended counterclaims was improper and that it should have filed a responsive pleading instead.

3  
CAH

The Court's dismissal of Hunt's amended counterclaims at the hearing on October 14, 2014, rendered her motion for a default judgment on those counterclaim moot. *Holden v. Cribb*, 349 S.C. 132, 137, 561 S.E.2d 634, 637 (Ct. App. 2002) ("A case becomes moot when judgment, if rendered, will have no practical effect upon [an] existing controversy."). Even if her motion had not been mooted, the Court would have still denied Hunt's motion for default judgment because the rules of civil procedure permitted BB&T to file a motion to dismiss the amended counterclaims in lieu of a responsive pleading, despite having earlier filed a previous motion to dismiss her original counterclaims. Rule 12(a), SCRPC ("The service of a motion permitted under this rule alters these periods of time as follows ... if the Court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 15 days after notice of the Court's action..."). Because Hunt's amended counterclaims constituted a new pleading, BB&T was permitted to respond by way of a new motion to dismiss. Rules 12(g) and 12(h) were inapplicable to BB&T's motion to dismiss the amended counterclaims.

For these reasons, the Court denies Hunt's motion to alter or amend <sup>the</sup> Form 4 Order entered October 28, 2014.

2. The Notice of Removal did not deprive the Court of jurisdiction to enter the Order of January 13, 2015.

The Order of January 13, 2015, is not void for lack of jurisdiction because its entry was merely a ministerial act based on a decision rendered prior to removal that in no way caused the case to "proceed" during the removal period.

The filing of a notice of removal prohibits the state court from "proceeding" until the case is remanded. 28 U.S.C. § 1446(d) ("Promptly after the filing of such notice of removal of a civil action the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.")

However, only "the state court's power to render the particular judgment requested, [is] suspended or held in abeyance until a determination [is] made as to whether the cases involved a federal question more appropriately decided by the federal court." *Limehouse v. Hulsey*, 404 S.C. 93, 106, 744 S.E.2d 566, 573 (2013)(emphasis added).

4  
GAA  
In a procedurally similar and instructive case, the United States District Court for the District of Utah decided the issue of whether an order entered after removal concerning a ruling made pre-removal violated § 1446(d). *Pebble Creek Homes, LLC v. Upstream Images, LLC*, 547 F. Supp. 2d 1214 (D. Utah 2007). In *Pebble Creek Homes*, the state court ruled on a motion at a hearing thirteen days before the defendant filed a notice of removal. *Id.* at 1216. A proposed order was submitted to the state court the same day as the defendant filed the notice of removal. *Id.* The state court then signed and entered its written order on the motion two days after removal. *Id.*

The Utah District Court held that the "entrance of an order [two days after removal] was simply a ministerial act that did not involve further proceedings within the meaning of the federal removal statute." *Id.* at 1218. The Utah District Court reasoned that

The only act that Judge Pullan took subsequent to the removal was on July 25, 2007, when he performed the ministerial function of signing and entering the order reflecting his earlier, in-court ruling on July 10, 2007. Because this final, essentially clerical task in no way affected the merits of the already-adjudicated issue disputed by the parties, the court finds that the state court order does not violate § 1446(d). To hold otherwise would enable defendants to effectively nullify dispositive rulings made at state court hearings by rushing to remove the case before the administrative entrance of the written version of the decision.

*Id.* at 1218-19.

As in *Pebble Creek Homes*, the Court's entry of the Order of January 13, 2015, did not

cause the case to "proceed" any further during the removal period. It merely memorialized the Court's earlier, pre-removal ruling at the hearing on October 14, 2014, and Form 4 Order entered on October 28, 2014.

For these reasons, the Court denies Hunt's "Motion: Lack of Jurisdiction, SCRCF 59 and SCRCF 60" filed herein on August 11, 2015.

3. Hunt is not entitled to attorney's fees and costs.

Hunt is not entitled to attorney's fees and costs because she is not a prevailing party, no contract, statute, or court rule entitles her to attorney's fees, ~~and she is not represented by an attorney.~~ <sup>nor is she</sup> ~~represented by an attorney.~~

First, attorney's fees are generally awardable only to a prevailing party. "A prevailing party has been defined as ... [t]he one who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not to the extent of the original contention [and] is the one in whose favor the decision or verdict is rendered and judgment entered." *Heath v. Cty. of Aiken*, 302 S.C. 178, 182-83, 394 S.E.2d 709, 711 (1990).

Second, "[i]n South Carolina, the authority to award attorney's fees can come only from a statute or be provided for in the language of a contract." *Seabrook Island Prop. Owners' Ass'n v. Berger*, 365 S.C. 234, 238-39, 616 S.E.2d 431, 434 (Ct. App. 2005). "There is no common law right to recover attorney's fees." *Id.*

Hunt has not prevailed on any of her claims or defenses in this case. Even if she had, she has cited no contract or statute entitling her to attorney's fees and costs. She relies solely upon Rule 41(d), SCRCF, for her claim to attorney's fees and costs.

"If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order." Rule 41(d), SCRCF (emphasis added). "The general rule, however, is that attorney fees are not included in the term 'costs' in the absence of some statutory provision, rule of court, or contract of the parties." *Shuler v. Crook*, 290 S.C. 538, 541, 351 S.E.2d 862, 863 (1986).

Rule 41(d) concerns successive voluntary dismissals by a plaintiff and authorizes the payment of costs only, not attorney's fees. BB&T has not voluntarily dismissed any case against Hunt in which it was the plaintiff. In Hunt's federal lawsuits against BB&T, Hunt was the

plaintiff and BB&T was the defendant. All three actions were dismissed by court orders, not by voluntary dismissals. Therefore, Rule 41(d) is inapplicable.

Finally, a *pro se* litigant, whether an attorney or layperson, does not become liable for or subject to fees charged by an attorney. *Calhoun v. Calhoun*, 339 S.C. 96, 100, 529 S.E.2d 14, 17 (2000). Hunt has represented herself throughout this case, and therefore she has not incurred any attorney's fees.

For these reasons, Hunt's "Motion: Lack of Jurisdiction, SCRCP 59 and SCRCP 60" filed on August 11, 2015, is denied.

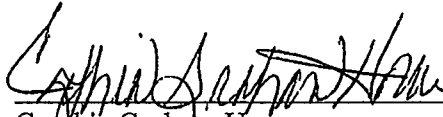
NOW, THEREFORE, it is ordered that:

1. The following motions of Defendant Cindy B. Hunt are DENIED:

- a. "Motion to alter or amend the Judgment/Orders of the Court under SCRCP 59(e)" filed herein on October 30, 2014, to the extent it pertained to the Form 4 Order entered October 28, 2014;
- b. "Motion: Lack of Jurisdiction, SCRCP 59 and SCRCP 60 re Order filed on 1/13/2015" filed herein on August 11, 2015; and
- c. "Motion: Lack of Jurisdiction, SCRCP 59 and SCRCP 60" filed herein on August 11, 2015.

AND IT IS SO ORDERED.

*6*  
*CPH*  
June 14, 2016

  
Cynthia Graham Howe  
Master in Equity for Horry County