STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF LEE) FOR THE THIRD JUDICIAL CIRCUIT
) Civil Action No. 2013-CP-31-00321
Laura Toney,)
)
Plaintiff,)
) **ORDER DENYING AMENDED**
v.) **MOTION FOR RECONSIDERATION**
)
LaSalle Bank National Association as)
Trustee for the Registered Holder of)
Structured Asset Securities Corporation,)
Structured Asset Investment Loan Trust,)
Mortgage Pass-Through Certificates,)
Series 2004-11, A/K/A Altisource Homes,)
Wayne Capell, Lee County Treasurer)
and Lee County Planning and Zoning,)
)
Defendants.)

THIS MATTER comes before the Court upon the Amended Motion for Reconsideration of Plaintiff Laura Toney seeking reconsideration of the Order issued by this Court on July 6, 2016, and filed on July 11, 2016.

Plaintiff submitted by U.S. mail a written copy of the motion along with attachments. Defendant submitted to the Court by U.S. mail a memorandum in opposition to the motion.

Having carefully considered submissions of the parties and applicable law, the Motion for Reconsideration is hereby DENIED.

AND IT IS SO ORDERED.

August 12, 2016
Date

Clifton Newman
Presiding Judge

STATE OF SOUTH CAROLINA)
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Laura Toney,) C.A. No. 2013-CP-31-00321
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Defendants.)
)

ORDER GRANTING THE MOTION TO DISMISS OF DEFENDANT U.S. BANK, GRANTING THE MOTION FOR SUMMARY JUDGMENT OF DEFENDANT LEE COUNTY, AND DENYING ALL MOTIONS OF PLAINTIFF LAURA TONEY

THIS MATTER came before the Court on March 30, 2016, for the resumption of a previously suspended hearing on all pending motions. Present before the Court were Attorneys Sean A. O'Connor, counsel for Defendant U.S. Bank, National Association, as Trustee for Structured Asset Securities Corporation, Structured Asset Investment Loan Trust, Mortgage Pass-Through Certificates, Series 2004-11 and Altisource Homes ("U.S. Bank"),[1] and Paul M. Fata, counsel for Defendant Lee County.[2] As explained further herein below, Plaintiff Laura Toney ("Plaintiff" or "Toney"), *Pro Se*, failed to appear at the hearing that had been duly noticed. Her absence was not excused by the Court.

[1] According to its filings, this Defendant is incorrectly named on page 1 of the Complaint as "LaSalle Bank National Association as Trustee for Structured Asset Securities Corporation, Structured Asset Investment Loan Trust, Mortgage Pass-Through Certificates, Series 2004-11, A/K/A AltiSource Homes."

[2] According to its filings and the statements of Attorney Fata, Lee County Defendants were incorrectly identified by Plaintiff in the Complaint and therefore were never properly served.

For the reasons set forth below in detail herein:

1. The Motion to Dismiss by Defendant U.S. Bank, including the related or predecessor entities identified in the caption, is GRANTED, and all claims by Toney against Defendant U.S. Bank and its related or predecessor entities are dismissed with prejudice;

2. The Motion for Summary Judgment by Defendant Lee County and any and all individual Lee County Defendants identified in the caption is GRANTED, and all claims by Toney against Defendant Lee County, including any and all individual Lee County Defendants, are dismissed with prejudice; and

3. All motions by Plaintiff Toney are DENIED with prejudice.

INTRODUCTION

The basis of this dispute is a parcel of real property situated in Lee County and known as 729 Chatman Street, Bishopville, South Carolina 29010 (the "subject property"). The entire procedural history of the various litigation involving Toney and the subject property as stated herein below is relevant and directly related to the motions disposed of in this Order, as it illustrates the extraordinarily lengthy period of time that Toney has been repeatedly asserting the same arguments and how many times those arguments have been rejected by state and federal courts over a period of more than nine years since the initial judgment of foreclosure and sale of the subject property that was filed on March 9, 2007. As reflected in court records, Toney has asserted the same claims and allegations that the subject foreclosure was somehow improper, apparently undeterred by the fact that those claims were previously rejected by the Special Referee in Lee County, the South Carolina Court of Appeals and the South Carolina Supreme Court, and later by the U.S. District Court

for the District of South Carolina and the U.S. Court of Appeals for the Fourth Circuit, after which the U.S. Supreme Court denied certiorari.

The statements contained in the detailed Procedural History herein are reflected in the public records of Lee County, South Carolina, the Court of Common Pleas for the Third Judicial Circuit, the Court of Appeals of South Carolina, the Supreme Court of South Carolina, the U.S. District Court for the District of South Carolina, the U.S. Court of Appeals for the Fourth Circuit, and the United States Supreme Court.

PROCEDURAL HISTORY

This litigated dispute between U.S. Bank and Toney regarding the subject property and the mortgage loan that encumbered it has been ongoing since July 2005. Toney refinanced the subject property on October 6, 2004. During the closing, Toney entered into and received a mortgage that was secured by the subject property. On July 21, 2005, Defendant LaSalle Bank National Association as Trustee ("LaSalle"), which had been assigned the subject mortgage, filed a mortgage foreclosure action against Toney in Common Pleas Court in Lee County designated Case No. 2005-CP-31-00169. Toney filed, through counsel, an answer and counterclaim (alleging a TILA violation) on August 17, 2005. Thereafter, LaSalle filed a motion for summary judgment. On February 16, 2007, a dispositive hearing was held on the foreclosure action and motion for summary judgment by LaSalle as to the counterclaim. A judgment of foreclosure was entered and the summary judgment motion by LaSalle was granted as to the counterclaim, per the Order and Judgment of Foreclosure and Sale dated March 9, 2007. On or about March 22, 2007, Toney filed an application for a temporary restraining order, preliminary injunction and permanent injunction in state court, both in Case No. 2005-CP-31-00169 and in a separately-

filed action designated Case No. 2007-CP-31-00066. On April 2, 2007, the court dissolved the temporary restraining order. On April 25, 2007, Toney filed a motion for reconsideration of the foreclosure judgment, which was eventually denied. On April 27, 2007, LaSalle filed a notice of eviction against Toney. On May 7, 2007, a foreclosure sale at public auction was held, and LaSalle was the successful bidder. On April 14, 2008 Toney filed a Rule 60(b), SCRCP, motion for relief from the foreclosure order, which was eventually denied. At some point after the sale, after the Rule 60(b) motion and other motions of Toney were denied, Toney filed an appeal with the South Carolina Court of Appeals. The matter was designated Appellate Case No. 2011-201266. The South Carolina Court of Appeals affirmed the decision of the trial court in Op. No. 2011-UP-334 dated June 27, 2011. Toney appealed to the South Carolina Supreme Court. The South Carolina Supreme Court denied Certiorari on December 20, 2012.

While her ultimately unsuccessful petition for certiorari to the South Carolina Supreme Court was pending, Toney filed an action in U.S. District Court, Case No. 3:11-cv-01686-MBS-JRM (D.S.C.), addressing the same subject property and mortgage loan dispute and attacking the state court result. On September 25, 2012, U.S. District Judge Margaret B. Seymour granted motions to dismiss by LaSalle and Ocwen, denied Toney's motion for entry of default, and adopted the Report and Recommendation of the U.S. Magistrate, which recommended that outcome. [ECF No. 90]. Toney appealed to the U.S. Court of Appeals for the Fourth Circuit, and the case was designated as Appeal No. 12-2364. The Fourth Circuit affirmed the trial court in an unpublished opinion dated February 28, 2013. Toney petitioned for hearing *en banc*, which was denied on April 4, 2013. Toney appealed to the United States Supreme Court, where the matter was designated as No. 13-404. The U.S. Supreme Court denied certiorari on December 2, 2013.

While her ultimately unsuccessful petition for certiorari to the U.S. Supreme Court was pending, Toney filed the instant action, Case No. 2013-CP-31-00321, on November 13, 2013, in Common Pleas Court in Lee County, once again addressing the same foreclosed subject property, same circumstances, and attacking the results of the prior litigation. The Defendants removed the action to U.S. District Court, asserting that the Lee County Defendants were fraudulently joined, which destroyed diversity. The action was designated as Case. No. 3:13-cv-03481-MBS-SVH in federal court. Toney filed a motion to remand, which was granted on August 4, 2014. [ECF No. 20].

In the instant state court action, known after remand as Case No. 2013-CP-31-00321, eight (8) motions were pending for lengthy periods of time by late 2015, some of them for nearly two years, including motions to dismiss filed by Defendants that dated back to the early days of the action. Part of the delay was due to the infrequency of court terms in Lee County; another reason was a recusal by Circuit Judge George C. James, Jr., who determined he had a conflict after having been adverse to Toney in an insurance coverage matter some years ago when he was in private practice.

All of the pending motions were set to be heard by this Court in Bishopville on November 30, 2015. Once the hearing began, the Court allowed Toney to argue first. She started by presenting to this Court, for the first time, a new motion requesting that Attorneys O'Connor and Fata be disqualified "for ethical reasons"; the motion was not on the public index, and Defendants have been given no prior notice of the motion. Toney orally argued this motion at length, after which Attorneys O'Connor and Fata argued in opposition. This Court denied the

motion from the bench for disqualification of Attorney Fata and Attorney O'Connor. A written order denying the motion was issued by this Court and filed on February 4, 2016.

Toney consented to the dismissal of Defendant US Bank Cust for Pro Cap III LLC ("Pro Cap"), which had purchased the subject property at a tax sale. By the time of the hearing on November 30, 2015, the tax sale had been vacated by Lee County upon the request of Pro Cap. At this point, Pro Cap no longer had any interest in the subject property, and Plaintiff had no basis for any claim against Pro Cap. The stipulation of dismissal of Defendant Pro Cap was filed on November 30, 2015.[3]

Toney then argued in support of her other motions, starting with a motion for default against Defendant U.S. Bank (named in the pleadings as LaSalle and Altisource). This Court took the motion for default by Toney under advisement. The Court instructed Attorney O'Connor to submit additional authority corroborating the position of U.S. Bank, which he did the next day on December 1, 2015, and copied Toney. The memorandum was file-stamped December 7, 2015.

At approximately 2:00 p.m. on November 30, 2015, after the motion hearing had been ongoing for about an hour, the Court took a break and instructed everyone to return by 2:30 p.m. At 2:30 p.m., Attorneys Fata and O'Connor had returned to the courtroom, but Toney was not present. I asked Attorneys Fata and O'Connor whether they had seen or talked to Toney, but they had not. This Court took up other matters not involving this action until 3:45 p.m., at which point Toney still had not returned. Attorneys Fata and O'Connor were instructed to submit proposed orders on all the pending motions, and they were excused. The next morning, on

[3] This made moot Plaintiff Toney's "Motion to Strike Defendant's Pro Capital Investor's Answer to Complaint and Motion to Strike all Documents and Filings from Federal Court," filed December 8, 2014.

December 1, 2015, this Court learned of a doctor's excuse regarding Toney. The Court notes that a similar circumstance occurred once before in this action. After these motions were scheduled for a hearing on February 13, 2015, Toney contacted the Lee County Clerk's Office by letter dated February 11, 2015, and requested a continuance on the basis that she was under the care of a doctor for an illness. The hearing was continued.

Following the alleged health incident on November 30, 2015, I called into court the person who signed the note from the health care facility that Toney checked into the day of the hearing. The individual stated that she did not know Toney was using the note for the purpose of explaining or excusing an absence from a court appearance. She also said that she would not have signed the note, had she known the purpose, because she was unable to diagnose Toney's condition or detect an illness on the part of Toney on November 30, 2015. The individual said that she would not sign a note under such circumstances in the future.

On January 6, 2016, Toney filed a motion seeking to have me recuse myself as presiding judge in this case. This was the posture of the action when the hearing on all pending motions resumed on March 30, 2016, at 12:00 p.m.

The morning of March 30, 2016, hours before the hearing was set to resume, Toney contacted this Court via email and requested cancellation or postponement of the hearing, claiming that she was ill and stating that she was at a health care facility.

RULING AND DECREE

This Court has carefully reviewed and considered the arguments of the parties, pleadings, briefs and memoranda on file, in addition to the arguments advanced on behalf of the parties at the hearing on March 30, 2016. Based upon this review, this Court rules and decrees as follows:

1. **Plaintiff's request for postponement or rescheduling of the hearing on March 30, 2016, requested via email on March 30, 2016, is denied.**

Upon careful consideration, this Court denies the last-minute email request by Toney on the morning of March 30, 2016, to postpone the hearing scheduled for 12:00 p.m. that day. Toney did not file a motion in connection with this request. After the hearing was scheduled for March 30, 2016, Toney sought by filing and by sending emails to the Court on or about March 22, 2016, to have it rescheduled based upon an assertion that she had "personal obligations for March 26-30, 2016." However, Toney failed to specify to the Court or provide any detail regarding those personal obligations. Accordingly, this Court finds the claim of unavailability by Toney on the date of the hearing lacks good and sufficient cause shown. The Court takes into account the previous instances during the pendency of this action in which it appeared that Toney sought to delay the progress of adjudicating this case by repeatedly seeking continuances and postponements of hearings based upon tenuous and uncorroborated assertions regarding her personal circumstances, including but not limited to the above-referenced credible statements of the individual who signed the note that Toney presented when she failed to return to court on November 30, 2015, after a brief break. This Court finds that the overall conduct of Toney in this regard demonstrates a propensity and pattern of abuse of the court system, and that her statements in this regard have not been credible. This Court will not reward such conduct by

granting another continuance that would prejudice the other parties whose attorneys appeared at the hearing as scheduled.

This Court further notes Order No. 2015-09-10-01 of the Supreme Court of South Carolina, outlining the Civil Motions Pilot Program,[4] which provides, in pertinent part: "[a]fter the submission of all timely filed briefs, the trial court may grant oral argument in its discretion or may rule without further notice on the written filings without scheduling oral argument." Here, the Court notes that Toney made a number of written filings setting forth her positions and arguments on all issues, including the pending motions, all of which have been duly considered. This Court therefore exercised its discretion to proceed with the hearing.

2. Plaintiff's Motions for Recusal are denied.

This Court denies the motions that this Court recuse itself from presiding over this action. Pursuant to Canon 3(E)(1) of the Judicial Code of Conduct, "[a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned...." Canon 3(E)(1), Rule 501, SCACR.

The judicial canons provide direction as to when disqualification may be necessary, including but not limited to, instances where:

> (1) the judge holds personal bias or prejudice towards a litigant or counsel or has personal knowledge of evidentiary facts in dispute in the proceeding; (2) the judge either worked on the case as a lawyer, a lawyer with whom the judge previously practiced law worked on the case while the judge was associated with the lawyer's firm, or the judge has been a material witness concerning the case; (3) the judge "knows" that he or a member of his

[4] *Available at* http://www.judicial.state.sc.us/whatsnew/displaywhatsnew.cfm?indexID=1042.

family (spouse, parent, or child) has more than a de minimus [sic] economic interest in the litigation and the litigation will "substantially affect[ ]" that interest; or (4) the judge or his spouse or a person within the third degree of relationship to them (or the spouse of such a person) is either a party or the officer, director, or trustee of a party, is a lawyer in the case, known to have more than a de minimus [sic] interest that could be substantially affected by the litigation, or, to the judge's knowledge, is likely to be a material witness in the proceeding. Canon 3(E)(1)(a)-(d).910; *Davis v. Parkview Apartments*, 409 S.C. 266, 284–85, 762 S.E.2d 535, 545 (2014), reh'g denied (Sept. 11, 2014).

"Under South Carolina law, if there is no evidence of judicial prejudice, a judge's failure to disqualify himself will not be reversed on appeal." *Davis, supra,* citing *Patel v. Patel*, 359 S.C. 515, 524, 599 S.E.2d 114, 118 (2004) (citation omitted); *Simpson v. Simpson*, 377 S.C. 519, 522, 660 S.E.2d 274, 276 (Ct. App. 2008); see also *Ellis v. Procter & Gamble Distrib. Co.*, 315 S.C. 283, 285, 433 S.E.2d 856, 857 (1993). In cases involving an alleged violation of Canon 3, an appellate court will affirm a trial judge's failure to disqualify himself only if there is no evidence of judicial prejudice. Appellate courts "accord great weight to the trial judge's assurance of his own impartiality." *Id.* It is the movant's responsibility to provide some evidence of the existence of the judge's impartiality. *Lyvers v. Lyvers*, 280 S.C. 361, 367, 312 S.E.2d 590, 594 (Ct. App. 1984) (citation omitted).

Applying the above standard, this Court finds no credible basis to any claim by Toney questioning the impartiality of this Court. Therefore, the motions for recusal are denied.

3. Defendant U.S. Bank's Motion to Dismiss against Plaintiff, filed December 1, 2014, is granted,[5] and the Motion for Sanctions is held in abeyance.

A. The Motion to Dismiss by U.S. Bank is granted on *res judicata* grounds.

As a threshold matter, it is appropriate for the Court to address *res judicata* at the Rule 12(b)(6) stage. *Res judicata* is an affirmative defense and is treated as a basis for dismissal under Rule 12(b)(6). *See Davani v. Va. Dep't of Transp.*, 434 F.3d 712, 720 (4th Cir. 2006) (*res judicata* or claim preclusion challenge is to be considered pursuant to Rule 12(b)(6)); *Andrews v. Daw*, 201 F.3d 521, 524 n.1 (4th Cir. 2000) (an affirmative defense such as *res judicata* may be raised under Rule 12(b)(6) "if it clearly appears on the face of the complaint.").

The foreclosure of the subject property was adjudicated with finality, with the judgment of foreclosure and sale of the subject property filed on March 9, 2007. The South Carolina Court of Appeals and the South Carolina Supreme Court affirmed that judgment. The same issues were re-litigated in the U.S. District Court for the District of South Carolina, where the lienholder and loan servicer of the same mortgage loan on the same subject property prevailed over Toney on those claims. The U.S. Court of Appeals for the Fourth Circuit affirmed and the U.S. Supreme Court denied certiorari.

Res judicata requires: "(1) identical parties or their privies; (2) identity of subject matter; and (3) adjudication of the issue in the former suit." *Ford v. Watson*, 282 S.C. 66, 316 S.E.2d 429 (Ct. App. 1987). An unsuccessful litigant is precluded from relitigating all claims that were actually litigated and any claims that could have been litigated. *Wold v. Funderburg*, 250 S.C.

[5] Seven days after removal to the U.S. District Court for the District of S.C., Defendant U.S. Bank timely filed in the court, pursuant to Rule 81(c)(2)(C) FRCP, a Motion to Dismiss for Failure to State a Claim [ECF No. 5, filed December 20, 2013.] Defendant U.S. Bank later filed in the same court an Amended Motion to Dismiss and Motion for Sanctions. [ECF No. 44, filed January 20, 2014.]

205, 157 S.E.2d 180 (1975). The doctrine of res judicata bears little, if any, relation to equitable estoppel, although it does bear some of the marks of estoppel by record, with the judgment of the court on the pleadings preventing those things found to be true from being relitigated between the same parties or their privies. 7 S.C. Jur. *Estoppel and Waiver* § 27.

Res judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties. *RIM Associates v. Blackwell*, 359 S.C. 170, 597 S.E.2d 152 (Ct. App. 2004). *Res judicata* bars not only the claims that were actually raised in a prior action, but also those issues which might have been raised in the former suit. *Id.*

In the instant case, the claims by Plaintiff Toney are barred by the doctrine of *res judicata* because all three elements are satisfied. First, the U.S. District Court for the District of South Carolina previously dismissed Plaintiff's claims on *res judicata* grounds, noting that "final judgment has been entered on the merits against Plaintiff in at least two prior civil actions, *LaSalle Bank v. Laura Toney*, Case No. 2005-CP-31-169 and *Laura A. Toney v. Ocwen Federal Bank*, Case No. 2010-CP-31-180." Case No. 3:11-cv-01686-MBS, ECF No. 90, Order and Opinion of Chief United States District Judge Margaret B. Seymour, filed September 25, 2012, at pp. 12–14.

Second, the allegations contained in the instant complaint stem from the same set of facts that gave rise to Plaintiff's claim for relief in the prior cases. As Judge Seymour noted in her 2012 Order and Opinion, at the heart of the prior cases was a dispute regarding "Defendants' entitlement to foreclosure of the Property versus Plaintiff's attempt to prevent the foreclosure of

the property." *Id.* Likewise, in this case, the Complaint is premised on the belief that "[t]he foreclosure of the Plaintiff's property was an illegal action." Compl. ¶ 3. The true nature of this case is further demonstrated by Plaintiff's numerous assertions that "she still possesses legal title to the premises." *Id.*; *see also id.* at ¶¶ 6-8, 12, and Compl. Prayer for Relief ¶¶ 1-5. The underlying dispute is identical.

Finally, the parties in this case are the same as in the prior cases: Laura Toney and U.S. Bank, successor in interest to LaSalle Bank.[6]

To the extent, if any, Plaintiff alleges claims not expressly mentioned in her prior suits, these claims are also barred by the doctrine of *res judicata* because Plaintiff had an opportunity to raise them. *RIM Associates v. Blackwell, supra*; *Peugeot Motors*, 892 F.2d at 359 (*res judicata* "prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceedings.") (quoting *Brown v. Felsen*, 442 U.S. 127, 131 (1979)).

For these reasons, it is appropriate for this Court to dismiss claims by Plaintiff on *res judicata* grounds as was done by the U.S. District Court for the District of South Carolina in 2012, which decision was affirmed on appeal and is now final. Thus, this Court so decrees.

B. The Motion by Defendant U.S. Bank pursuant to Rule 12(b)(6) is moot.

This Court has dismissed all claims by Toney against U.S Bank with prejudice on *res judicata* grounds. This motion is therefore moot.

[6] LaSalle Bank held the mortgage at the time of the 2007 foreclosure. LaSalle Bank has since transferred its interest to U.S. Bank. Because U.S. Bank is a successor in interest to LaSalle Bank, *res judicata* is equally applicable. Furthermore, collateral estoppel would bar Plaintiff's claims even if this suit involved different parties. *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 329 (1979) ("Defensive use of collateral estoppel precludes a plaintiff from relitigating identical issues by merely 'switching adversaries.'").

C. This Court makes no ruling on the assertion by Defendant U.S. Bank that it and its predecessors should be dismissed pursuant to Rules 12(b)(4) and 12(b)(5), SCRCP.

In light of Section 3.A of this Order, this Court finds it unnecessary to rule on the assertion of U.S. Bank that U.S. Bank and its predecessors should be dismissed pursuant to Rules 12(b)(4) and 12(b)(5), SCRCP. Accordingly, this Court declines to address that portion of the motion by U.S. Bank, finding it unnecessary and immaterial to the outcome.

D. This Court holds in abeyance the Motion for Sanctions by Defendant U.S. Bank against Plaintiff.

As part of its Motion to Dismiss, Defendant U.S. Bank moved and requested that Plaintiff be sanctioned for filing the instant suit on the grounds that:

> (1) Plaintiff has a long history of abusing the state and federal judicial systems with meritless and vexatious filings; (2) Plaintiff has attempted to prevent, dispute or otherwise thwart the lawful foreclosure and sale of the subject property more than ten times; (3) Plaintiff has filed a total of seven bankruptcy actions in the United States Bankruptcy Court for the District of South Carolina admittedly as an attempt to save her property; (4) said Bankruptcy Court banned Plaintiff from filing any actions for a period of one year; (5) Plaintiff has filed additional state court actions as to other pieces of property; and (6) Plaintiff includes baseless allegations in the instant litigation.[7]

Defendant U.S. Bank further asserts that the U.S. District Court for the District of South Carolina warned Toney in 2012 of the potential consequences of filing further legal actions regarding the foreclosure of the subject property stating that: "Plaintiff, however, ***is warned*** that

[7] Civil Action No. 3:11-cv-01686-MBS, Order and Opinion of Chief United States District Judge Margaret B. Seymour, ECF No. 90, filed September 25, 2012, at pp. 10-11.

filing future frivolous actions may result in appropriate sanctions against Plaintiff including any sanctions available under Fed. R. Civ. P. 11"[8] (emphasis added).

Although this Court seriously considers the facts and circumstances presented by U.S. Bank in its motion for sanctions, this Court finds that in the interest of justice, Toney should be allowed to address the motion in person. Although this Court does not condone or excuse Toney's absence, the Court holds this portion of U.S. Bank's motion in abeyance, with leave to revisit it. This Court therefore decrees that U.S. Bank is free to revisit this issue upon the scheduling of a separate hearing in Lee County. Such a hearing shall be scheduled through the Clerk of Court of Lee County upon the request of U.S. Bank. Once a hearing is scheduled, Toney shall be required to appear upon due notice of the date and time.

4. The Motion for Summary Judgment of Defendant Lee County filed on December 19, 2014, is granted, including its Motion for Sanctions against Toney.

A. The Motion for Summary Judgment of Defendant Lee County is granted.

Defendant Lee County, identified in the Complaint as "Wayne Capell, Lee County Treasurer and Lee County Planning and Zoning," moved before the Court for summary judgment under Rule 56, SCRCP, on the following grounds:

[8] Civil Action No. 3:11-cv-01686-MBS, Report and Recommendation of U.S. Magistrate Judge Joseph R. McCrorey, ECF No. 79, filed August 9, 2012, at p. 24.

Service was never completed upon Defendants "Wayne Capell, Lee County Treasurer and Lee County Planning and Zoning," and therefore they are not properly before this Court. Defendants "Wayne Capell, Lee County Treasurer and Lee County Planning and Zoning" were, at all times relevant to Plaintiff's claims, exercising their administrative duties and took no action that injured Plaintiff.

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Lanham v. Blue Cross & Blue Shield of S. Carolina, Inc.*, 349 S.C. 356, 361, 563 S.E.2d 331, 333 (2002), citing *Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991). Under Rule 56(c), SCRCP, the party seeking summary judgment has the initial burden of demonstrating the absence of a genuine issue of material fact. *Baughman*, 306 S.C. at 115, 410 S.E.2d at 545. With respect to an issue upon which the nonmoving party has the burden of proof, this initial responsibility may be discharged by pointing out to the trial court that there is an absence of evidence to support the nonmoving party's case. *Id.* In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party. *Summer v. Carpenter*, 328 S.C. 36, 492 S.E.2d 55 (1997). Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 534 S.E.2d 688 (2000). Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is disagreement concerning the conclusion to be drawn from those facts. *Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 534 S.E.2d 672 (2000).

Applying this standard and viewing all facts in the light most favorable to the non-moving party, i.e., Plaintiff, this Court finds that there is no genuine issue of material fact and the moving party, Defendant Lee County, is entitled to judgment as a matter of law. This Court finds that there is no dispute as to any material evidentiary facts or any legitimate disagreement concerning the conclusion to be drawn from those facts. For these reasons, this Court grants Defendant Lee County's motion for summary judgment pursuant to Rule 56, SCRCP.

B. The Motion for Sanctions by Defendant Lee County against Plaintiff is granted.

Defendant Lee County moved for sanctions against Toney pursuant to the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. § 15-36-10 *et seq.* (2005).

This Court finds it obvious that Plaintiff had no viable theories of recovery at any relevant time against Lee County or any individual Lee County Defendant. Plaintiff nonetheless named Lee County and the individual Lee County Defendants, causing the County to have to defend patently frivolous claims for over two years at the expense of the taxpayers. For these reasons, this Court sanctions Plaintiff Toney in the full amount of the reasonable attorneys' fees and costs incurred by Lee County in defending this action.

Attorney Fata is directed to submit to this Court an affidavit of said attorneys fees and costs incurred. After review, this Court will file a supplemental order stating the amount of the award against Toney in favor of Lee County. The order shall be filed in the public records as a money judgment.

5. "Motions for Rulings on Motions to Strike and Motion for Default" filed by Toney on September 25, 2014, are denied.

Having found and determined that Defendant U.S. Bank was not in default under applicable law, this Court denies the motion for default by Plaintiff Toney against Defendant U.S. Bank with prejudice.

A. Factual and procedural background as to this motion

Plaintiff filed the Summons and Complaint in this action on November 13, 2013. (See Lee County Public Index at sccourts.org.) Defendant removed the case to the United States District Court for the District of South Carolina, Columbia Division, on December 13, 2013. Case No. 3:13-cv-03481-MBS-SVH [ECF No. 1]. Defendant then timely filed in U.S. District Court a *Motion to Dismiss for Failure to State a Claim* on December 20, 2013. [ECF No. 5]. Defendant filed in U.S. District Court an *Amended Motion to Dismiss and Motion for Sanctions* (hereinafter "the Motion") on January 20, 2014. [ECF No. 44].

B. Ruling and decree as to this motion

i. Removal was timely.

The motion to dismiss filed in U.S. District Court by Defendant U.S. Bank is recognized as a valid responsive pleading and a defense within the meaning of the South Carolina Rules of Civil Procedure and the Federal Rules of Civil Procedure. Rule 12(a), SCRCP, states in part:

> A defendant shall serve his answer within 30 days after the service of the complaint upon him... The service of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the Court: (1) 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[.]

Moreover, Rule 12(b), SCRCP, requires that 12(b)(4), 12(b)(5) and 12(b)(6) defenses, as were

asserted here, must be raised by motion before further pleading.[9]

Defendant U.S. Bank's Motion to Dismiss was not heard or ruled upon and remained pending when the U.S. District Court remanded the case on August 5, 2014. [ECF No. 64]. Defendant U.S. Bank's Motion to Dismiss therefore remains pending and is now properly before this Court. Defendant's original motion to dismiss was timely filed more than ten months before Plaintiff filed her Motion for Default on September 25, 2014. The amended motion was filed some nine months before Plaintiff's Motion for Default.

At the hearing on Plaintiff's Motion for Default on November 30, 2015, Plaintiff first argued that Defendant U.S. Bank did not timely remove this action to federal court. This is inconsistent with the record, which reflects that the Complaint was filed on November 13, 2013, and was removed on December 13, 2013. Based upon these dates, even if the Complaint was served on the same day it was filed, removal was timely. Although removal to federal court is required to be filed within 21 days, based on the fact that an answer in federal court is due 21 days after service, the Defendants here had 30 days to remove. See 28 U.S.C. § 1446(b). It is clear that removal was timely and this Court therefore rejects the argument of Plaintiff as to this issue.

ii. Defendant U.S. Bank was not required to re-file its Motion to Dismiss in state court following remand.

Plaintiff argued that Defendant U.S. Bank (identified in the Complaint as LaSalle Bank

[9] "Every defense, in law or fact, to a cause of action in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state facts sufficient to constitute a cause of action, (7) failure to join a party under Rule 19, (8) another action is pending between the same parties for the same claim. **A motion making any of these defenses shall be made before pleading if a further pleading is permitted.**" Rule 12(b), SCRCP (emphasis added).

and Altisource) defaulted by failing to re-file its motion to dismiss in state court following remand.

Although no state or federal South Carolina authority exists addressing this specific issue, the authority in other jurisdictions that has addressed this issue appears to be consistent in holding that a motion to dismiss pending in federal court is not required to be re-filed in state court upon remand.

"[T]he state court ordinarily receives the case in the posture it is in when remanded and, thus, a pleading filed in federal court need not be refiled in state court." 77 C.J.S. Removal of Cases § 180. Several jurisdictions across the country have followed this black letter rule, as reflected in the decisions excerpted below. Currently, and going back as far as 1948, no jurisdictions require a motion to dismiss pending in federal court to be refiled in state court upon remand in order for such motion to dismiss to remain valid and in effect. More pertinently, for purposes of Plaintiff's motion, the pendency of a motion to dismiss in federal court at the time of remand renders a motion for default by the plaintiff upon remand ineffective, even where the motion to dismiss is not re-filed in state court.

> Whether the cases cited by Aetna and Hansen are distinguishable or whether they do in fact stand for the proposition that federal pleadings should be disregarded after remand, this court is of the opinion that the better rule favors giving continued effect to those pleadings. Adoption of the federal pleadings filed in this case would avoid the needless waste of time, effort and expense which would result from requiring counsel to duplicate in this court their actions of the past six years in the federal court. Such an unnecessary duplication of effort alone indicates the preferability of adopting the federal pleadings.
>
> Additionally, the adoption of the pleadings would result in the post-remand procedure in this court mirroring as nearly as possible the post-removal procedure in the federal court. Upon removal, the entire

> record is delivered to the clerk of the federal court and that court assumes its jurisdiction with the case in exactly the same position as when it was removed from the state court. Adoption of the federal pleadings would result in this court's renewing its jurisdiction with the case in exactly the same posture as when it was remanded from the federal court. Counsel has not suggested nor has the court discovered any convincing reason why this continuity in the proceedings is not preferable to the procedure urged by Hansen and Aetna.

Edward Hansen, Inc. v. Kearny Post Office Associates, 166 N.J. Super. 161, 170, 399 A.2d 319, 323 (Ch. Div. 1979).

> We believe the irregularity in the case before us, if it be an irregularity at all, in failing to refile the Motions to Dismiss in the state court following remand from the federal court is likewise inconsequential. We therefore hold that when filed the Motions to Dismiss were properly before the Federal District Court but that when the federal court ordered remand without having ruled upon such motions, they were properly ruled on by the state court without 'refiling' in the state court. Viles v. Sharp, 248 F. Supp. 271 (W.D. Mo. 1965). See Ayres v. Wiswall 112 U.S. 187, 5 S.Ct. 90, 28 L.Ed. 693 (1884); Ransom v. Sipple Truck Lines, Inc., 52 F. Supp. 521 (N.D. Iowa 1943); Olds v. Brown Shoe Co., 25 F. Supp. 880. (W.D. Mo. 1938). (Cases decided under predecessor statute to 28 U.S.C. § 1446 et seq.)

Citizens Nat. Bank of Grant Cty. v. First Nat. Bank in Marion, 165 Ind. App. 116, 124–25, 331 N.E.2d 471, 476–77 (1975).

> The time has past when technical rules were applied to those who sought unsuccessfully to remove cases to the federal courts. We therefore hold that a timely answer filed in district court following timely removal of the action is sufficient to prevent a default in a state court if the case is subsequently remanded from district court. Cotton v. Federal Land Bank of Columbia, supra. See Shelton v. Bowman Transportation Co., 140 Ga. App. 248(2), 230 S.E.2d 762 (1976). Accord Edward Hansen, Inc. v. Kearney Post Office Assoc., 166 N.J. Super. 161, 399 A.2d 319 (1979). Cf. Citizens Nat'l Bank v. First Nat'l Bank, 165 Ind. App. 116, 331 N.E.2d 471, 476–77 (1975); Bolden v. Brazile, 172 So.2d 304, 310 (La. App. 1965). The superior court erred in ruling that the defendants were in default on the claim for damages.

Teamsters Local 515 v. Roadbuilders, Inc. of Tennessee, 249 Ga. 418, 421, 291 S.E.2d 698, 701 (1982) overruled on other grounds by Shields v. Gish, 280 Ga. 556, 629 S.E.2d 244 (2006).

> State courts in New Mexico and Utah rendered opinions in the 1920s and 1930s that pleadings filed in federal court prior to remand to state court for want of jurisdiction were, essentially, a nullity because the federal court had lacked jurisdiction... However, "[t]here have been no cases since 1948 in which Tracy Loan & Trust Co. v. Mut. Life Ins. Co. [7 P.2d 279 (Utah 1932)] or Citizens' Light, Power & Tel. Co. v. Usnik [194 P. 862 (N.M. 1921)] have been followed." Laguna Village, Inc. v. Laborers' Int'l. Union of N. Am., Local Union No. 652, AFL CIO, 35 Cal. 3d 174, 180, 197 Cal. Rptr. 99, 103, 672 P.2d 882, 885 (1983).
>
> More recently, state courts have given effect to pleadings filed in federal court prior to a remand to state court. See, e.g., Laguna Village, Inc., 35 Cal. 3d at 180-182, 197 Cal. Rptr. at 102-104, 672 P.2d at 885–887; Williams v. St. Joe Minerals Corp., 639 S.W.2d 192, 194–195 (Mo. App. 1982); Teamsters Local 515 v. Roadbuilders, Inc., 249 Ga. 418, 421, 291 S.E.2d 698, 700-701 (1982); Citizens Nat'l. Bank v. First Nat'l. Bank, 165 Ind. App. 116, 125, 331 N.E.2d 471, 476–477 (1975).
>
> ...
>
> [R]equiring parties to file documents multiple times does not comport with considerations of judicial economy, especially where the document at issue is an answer that is directed at another party, rather than a request for action by the trial court. Accordingly, we hold that a party need not refile documents in the court of common pleas after a case is remanded from federal court so long as that party makes the trial court aware of the filing's existence and, if challenged, shows proof of service on the other party at the time the document was filed in federal court.

Banks v. Allstate Indemn. Co., 143 Ohio App. 3d 97, 99–101, 757 N.E.2d 776, 778–79 (2001). Accord: Mosby v. W. Anderson, 363 S.W.3d 397 (Mo. Ct. App. 2012), and JurisDictionUSA, Inc. v. Loislaw.com, Inc., 183 S.W.3d 560, 564 (Ark. 2004).

Based on this consistent ruling, as illustrated by the several authorities cited herein, Plaintiff's argument that Defendant U.S. Bank should be held in default for not re-filing its motion to dismiss in state court, which was timely and properly filed in federal court, necessarily fails. Based on the facts and procedural history of this case, as well as the weight of persuasive case law, the motion for default of Plaintiff against U.S. Bank is denied with prejudice.

6. **The "Motion to Strike the Defendants LaSalle Bank A/K/A Altisource Homes and Sanctions are Imposed on the Defendants for Fraud on the Court and Motion to Strike all Documents from Federal Court" filed by Plaintiff on December 8, 2014, is denied.**

After careful consideration, this Court finds that the motion by Plaintiff fails to identify relief which can be properly granted based upon the prevailing facts, circumstances, and the applicable substantive and procedural law. This Court notes that the motion contains several misstatements and mischaracterizations that do not warrant detailed analysis or discussion. Instead, this Court directs reference to Section 3.A of this order herein above. Accordingly, this motion by Plaintiff is denied with prejudice.

7. **The "Motion to Strike Defendants Mr. Wayne Capell, Lee County Treasurer and Lee County Planning and Zoning for Insufficiency of Service of Process" filed by Plaintiff on December 23, 2014, is denied.**

Upon review of this motion, this Court finds that it fails to identify relief which can be properly granted based upon all the prevailing facts, circumstances, and the applicable substantive and procedural law. The Court finds that the motion contains several misstatements and mischaracterizations which do not warrant detailed analysis or discussion. Instead, the Court directs reference to Section 4.A of this order herein above. This motion by Plaintiff is therefore denied with prejudice.

CONCLUSION

For the foregoing reasons and in accordance with this Order, this Court:

1. GRANTS the Motion to Dismiss by Defendant U.S. Bank, including the related or predecessor entities identified in the caption; therefore, all claims by Plaintiff Toney against Defendant U.S. Bank are dismissed with prejudice;

2. GRANTS the Motion to Dismiss by Defendant Lee County, including any and all individual Lee County Defendants identified in the caption; therefore, all claims by Plaintiff Toney against Defendant Lee County and any and all individual Lee County Defendants are dismissed with prejudice; and

3. DENIES all motions by Plaintiff Toney with prejudice.

Laura Toney v. LaSalle Bank National Association, etc., et al.
2013-CP-31-00321

ORDER GRANTING DEFENDANT
U.S. BANK'S MOTION TO DISMISS,
GRANTING DEFENDANT LEE COUNTY'S
MOTION FOR SUMMARY JUDGMENT,
AND DENYING ALL MOTIONS
BY PLAINTIFF LAURA TONEY

AND IT IS SO ORDERED.

Clifton Newman
Presiding Judge

July 6, 2016
Columbia, South Carolina