THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
James B. Jackson, Jr., Master-In-Equity
Trial Court Case No. 2011CP3801392

Appellate Case No. 2015-001112

South Carolina Federal Credit Union. .....Respondent,

v.

Dorothy Harley Sistrunk a/k/a Dorothy Harley-Sistrunk a/k/a Dorothy A. Harley a/k/a Dorothy Sistrunk .....Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

This case is a collections action brought by South Carolina Federal Credit Union ("Respondent") against Appellant Dorothy Harley Sistrunk a/k/a Dorothy Harley-Sistrunk a/k/a Dorothy A. Harley Sistrunk a/k/a Dorothy Sistrunk ("Appellant") for a judgment on the balance owed on Appellant's Open-End Fixed Rate of Interest Personal Access Line of Credit Account ("PAL Account") with Respondent. Respondent commenced its action by filing its Complaint on November 23, 2011. (R. p. 35-39). Appellant filed an Answer and Counterclaims, pro se, on December 21, 2011. (R. p. 40-77).

On April 25, 2012, and May 11, 2012, Appellant and SCFCU, respectively, filed motions for summary judgment. (R. p. 78-79 and 119-120). The Honorable Diane S. Goodstein heard the motions on July 10, 2012. Appellant's motion was denied orally at the hearing and then pursuant a Form 4 order entered October 22, 2012. (R. p. 217). Judge Goodstein agreed to withhold judgment on Respondent's motion for summary judgment to allow Respondent to address issues raised by the court at the hearing.

Prior to the trial court's issuing a ruling on Respondent's motion for summary judgment, on November 19, 2013, Appellant filed a pleading styled as "Request to Submit for a Decision Pursuant to Rule 56(e), SCRCP," which appeared to be a second motion for summary judgment on her counterclaims. (R. p. 254-274). In response, Respondent filed a renewed motion for summary judgment as to Respondent's complaint and Appellant's counterclaims. (R. p. 304-305). The

Honorable James B. Jackson, Jr. heard Appellant's request to submit and Respondent's renewed motion for summary judgment on April 10, 2014, denying both because numerous issues of fact were in dispute that necessitated a trial; a Form 4 order to that effect was entered by Judge Jackson on April 23, 2014. (Appendix to the Record on Appeal ("R.App.") p. 1-2).

At the conclusion of the April 10 hearing, the parties consented to refer the matter to Judge Jackson, as Master-in-Equity, for a non-jury trial, and a Form 4 order referring the matter to Judge Jackson was entered on April 30, 2014. (R. p. 1-2).

A non-jury trial was conducted on February 18, 2015, at which testimony and documentary evidence were introduced by Respondent and Appellant. At the conclusion of the trial, Judge Jackson took the matter under advisement. A written order granting judgment in favor of Respondent in the amount of $4,625.82 was subsequently filed by the trial court on March 26, 2015. (The "Order"; R. p. 3-5).

On April 6, 2015, Appellant filed a "Motion To Alter Or Amend The Order Of Judgment Pursuant To Rule 59(e), SCRCP." (R. p. 384-385). On April 8, 2015, Appellant filed a "Motion For A New Trial Pursuant To Rule 52(b), SCRCP And In Conjunction With Her Motion To Alter Or Amend The Order Of Judgment Pursuant To Rule 59(c), SCRCP That Was Filed On April 6, 2015." (R. p. 433-435). Judge Jackson denied both of these motions pursuant to a Form 4 order filed April 20, 2015, on the basis that neither motion raised any new issues not considered in the Order. (R. p. 6-7). On May 1, 2015, Appellant filed a "Motion To Set Aside The Judgment And Vacate The Order Ending This Case Due To Judicial Errors That Do Not

Comply With Rules 42(b), 52(b), 54(b), 56(c)-(d), 60(b)(3), SCRCP, South Carolina's Policies of Law, Precedents And The 7th Amend. To The Constitution Of The United States Of America." (R. p. 436-441). Appellant's May 1 motion was denied by the trial court's order filed on May 21, 2015, which further clarified that any other motions filed by Appellant, as well as any counterclaims of Appellant, were denied and further directed that any further action by any party be in the form of an appeal for the South Carolina Court of Appeals. (The "May 21 Order"; R. p. 10-12). On May 22, 2015, Appellant filed her Notice of Appeal of the Order.

FACTS

The facts in this case are generally as set forth in the Order. On September 5, 2002, Appellant became a member of Respondent by executing that certain Member 1 Plan Application ("Application") in order to obtain an automobile loan from Respondent, which has since been paid in full (the "Auto Loan"). (R.App. p. 4-5). Upon executing the Application, Appellant agreed to the terms and conditions of Respondent's Membership and Account Agreement and Credit and Security Agreement (the "Agreement"; R.App. p. 6-15), including addendum(s) thereto (the "Addendum"; R.App. p. 16-18) and Credit Insurance Certificate (the "Certificate"; R.App. p. 19-20). (*See* Application; R.App. p. 5). Appellant also agreed that the terms and conditions of the Agreement, Addendum, and Certificate would apply to all future extensions of credit or advances to Appellant by Respondent. (Order; R. p. 3-4).

In requesting the Auto Loan, Appellant also elected credit disability and credit life insurance coverage (the "Insurance"), which authorized SCFCU to add the premiums for the Insurance to her loan balance each month and notified the Appellant that she had the right to stop the Insurance by notifying SCFCU in writing. (*See* Certificate; R.App. p. 20). Appellant's Insurance coverage election applied to all eligible future extensions of credit or advances made by Respondent to Appellant and would continue to do so unless cancelled by Appellant. (Order; R. p. 4).

The Agreement also required Appellant to examine each statement received for irregularities and notify Respondent within thirty-three (33) days of the mailing of

any statement of any unauthorized items drawn on the account; failure to timely examine statements (or notify Respondent of any statements not received) and dispute any unauthorized charge would waive Respondent's liability for any such charge. Agreement (Agreement; R.App. p. 10-11, ¶ 24). Additionally, the Agreement provided that Appellant could make future requests thereunder for additional extensions of credit, which would also be governed by the terms of the Agreement and associated documents. (Agreement; R.App. p. 12).

In February 2003, Appellant electronically requested from Respondent an additional extension of credit in the amount of $5,500.00 and was advised by Respondent on February 24, 2003 via e-mail that Appellant had been approved for a PAL Account in the amount of $5,500.00 at a rate of 15% interest. (R. p. 650). On or about February 28, 2003, Respondent mailed to Appellant a check for the PAL Account proceeds in the amount of $5,500.00, along with an Open-End Disbursement Receipt Plus of even date. (The "Receipt"; R. p. 647-48). The Receipt clearly establishes that the PAL Account is an open-ended line of credit. (Receipt; R. p. 647). The Receipt also provides that by endorsing the check or having the loan proceeds deposited into Appellant's account, Appellant agreed to make payments in accordance with the terms of the Agreement. (Receipt; R. p. 647). In the more than eight (8) years Appellant received statements and paid on the PAL Account, Appellant never objected to or disputed any charges on her statement as unauthorized, and Judge Jackson found that the payment history submitted at trial was accurate. (R. p. 4). Appellant also never timely notified Respondent of her desire to cancel the

credit disability and credit life insurance coverage she originally requested on the Auto Loan, and therefore credit disability and credit life insurance coverage were applied to the PAL Account. (R. p. 4).

Respondent subsequently requested two additional, smaller advances under the PAL Account, a $350 advance on November 22, 2006 and a $500 advance on October 25, 2007. (*See* Account Statements, R.App. p. 117 and 139; Account Summary, R.App. p. 662-63). While Appellant made payments on the account in the amount of $110.00 per month for some time, the outstanding balance on Appellant's account as of January 1, 2011 was $4,625.82.[1] (R.App. p. 221; *see generally*, R. App. p. 21-242). At that time, Appellant's PAL Account was in payment default, and Respondent subsequently initiated this action.

[1] The trial court found that the credit life and credit disability premiums plus the contract interest rate of 15% per annum resulted in little of Appellant's payments being applied to principal. (R. p. 4).

ARGUMENT[2]

I. STANDARD OF REVIEW.

It is unquestioned that an action to collect on a debt pursuant to a contract, such as is the case here, is an action at law. *See, e.g., Williams v. Riedman*, 339 S.C. 251, 259, 529 S.E.2d 28, 32 (Ct. App. 2000) (breach of contract is an action at law). The matter was tried by Judge Jackson without a jury pursuant to the consent of the parties. In an action at law tried without a jury, an appellate court "views the trial court's findings of fact as equivalent to a jury's findings in a law action, and will not disturb the findings unless the Court views the trial court's findings to be without reasonable evidentiary support." *Abbeville County Sch. Dist. v. State*, 410 S.C. 619, 629, 767 S.E.2d 157, 162 (2014). *See also, Moseley v. All Things Possible*, 395 S.C. 492, 495, 719 S.E.2d 656, 658 (2011). Therefore, an appellate court's scope of review of such matters generally extends only to corrections of errors of law. *Id.* "The rule is the same whether the judge's findings are made with or without a reference." *Townes Associates, Ltd. v. Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976).

II. APPELLANT FAILED TO FURNISH A SUFFICIENT RECORD TO ALLOW THE COURT OF APPEALS TO CONDUCT A MEANINGFUL REVIEW.

Under South Carolina law, an appellant has the burden of providing the appellate court with a sufficient record upon which the court can make its decision.

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[2] In addition to the arguments set forth herein, Respondent would also request that the Court of Appeals affirm for any ground appearing on the record as provided by Rule 220(c), SCACR.

Germain v. Nichol, 278 S.C. 508, 509, 299 S.E.2d 335, 335 (1983); *D & D Leasing Co. v. Gentry*, 298 S.C. 342, 344, 380 S.E.2d 823, 824 (1989) ("The burden was on Petitioner, as appellant, to furnish a sufficient record from which an intelligent review could be conducted."). For example, in *Germain*, the appellant asserted that the evidence did not justify an award of actual damages against it. In affirming the trial court, our Supreme Court held that because the appellant had failed to present any of the trial testimony, the appellant had failed to satisfy is burden of providing a sufficient record. *Germain*, 278 S.C. at 509, 299 S.E.2d at 335. Similarly, in *Broom v. Southeastern Highway Contracting Co.*, 291 S.C. 93, 352 S.E.2d 302 (Ct. App. 1986), the appellant failed to include transcripts of the proceedings being appealed. The Court of Appeals found that, as a result, it knew nothing about the showing, if any, made by the appellant to the trial court. *Broom*, 291 S.C. at 97, 352 S.E.2d at 304. Affirming the trial court, the Court of Appeals then held that, because the appellant had failed to satisfy its burden of furnishing a sufficient record, it "must assume the regularity of the proceedings below and the correctness of the ruling appealed from." *Id. See also*, *Hamilton v. Greyhound Lines East*, 281 S.C. 442, 316 S.E.2d 368 (1984) (dismissing appeal in which appealing party failed to carry burden of furnishing a sufficient record); *Goode v. St. Stephens United Methodist Church*, 329 S.C. 433, 447, 494 S.E.2d 827, 834 (Ct. App. 1997) (where an appellant fails to provide an adequate record on an issue, the appellate court must affirm the trial court).[3]

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[3] While the South Carolina Supreme Court recently held in *Woodson v. DLI Props, LLC*, 406 S.C. 517,

Here, Appellant has not ordered a transcript of the February 18, 2015 trial hearing as required by Rule 207(a), SCACR, and has, in fact, filed pleadings with this Court affirmatively stating that she will not order the transcript. *See* Appellant's Certification That No Transcript Will Be Ordered. Appellant's failure to order the transcript is fatal to her appeal. Appellant's appeal is of the Order, which was issued based upon the evidence presented at the trial hearing, and the trial court was only permitted to consider the evidence presented at trial in making its findings of fact and conclusions of law set forth in the Order. Because the trial court could only consider evidence presented at trial, the transcript is necessary in order to create a sufficient record on which the Court of Appeals can review the trial court's decision for determination of any error. Because Appellant has failed to satisfy her burden to create a sufficient record on appeal, her appeal should be denied and the trial court's order affirmed.

III. APPELLANT'S INITIAL BRIEF RELIES ON NUMEROUS EXHIBITS AND FACTS NOT PRESENTED AT TRIAL.

Appellant's initial brief relies on numerous exhibits and "facts" which were not presented or made part of the record at trial, the verification of which cannot be made due to Appellant's failure to request a transcript. Therefore, it would be improper for an appellate court to consider these "facts" for purposes of appeal. *See*

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753 S.E.2d 428 (2014), that, in the context of an appeal from a grant of summary judgment, a transcript may not be necessary where the depositions, interrogatories, affidavits, and other evidentiary material presented to the trial court are provided upon appeal, such is not the case here. This appeal is from a bench trial verdict rather than summary judgment, and therefore, unlike in *Woodson*, the trial court was only permitted to consider the evidence presented at trial. In the absence of the trial

Rule 210(c), SCACR (record on appeal "shall not, however, include matter which was not presented to the lower court or tribunal.").

Moreover, Respondent vehemently disputes that any false, deceptive, or otherwise misleading evidence was presented at trial, and the undersigned represents to the Court that any evidence presented and/or statements made at trial were, to the best of his knowledge, true and correct.

IV. RESPONDENT'S RESPONSES TO APPELLANT'S ARGUMENTS.

Respondent initially notes that many of the arguments raised by Appellant in her brief cite to South Carolina Rules of Civil Procedure which apply to motions for summary judgment, dismissal, and other matters which are irrelevant at trial. To the extent that Appellant cites any rules which apply to pretrial issues as a basis for arguments raised on appeal, those rules are inapplicable because the Order and post-trial motions being appealed were issued as a result of a trial on the merits, and any pretrial matters are not the subject of this appeal.

A. The Trial Court Properly Exercised Subject Matter Jurisdiction.

Appellant argues that the trial court lacked jurisdiction to issue the Order. This contention is in error. First, the South Carolina Constitution, Art. V, § 11 clearly grants circuit courts with general jurisdiction in civil matters: "The Circuit Court shall be a general trial court with original jurisdiction in civil and criminal cases, except those cases in which exclusive jurisdiction shall be given to inferior courts,

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transcript, it is impossible for an appellate court to determine what evidence was presented which lead to the trial court's decision.

and shall have such appellate jurisdiction as provided by law." No inferior court has exclusive jurisdiction to hear breach of contract matters, and thus, as the court of general jurisdiction, the trial court had subject matter jurisdiction to properly issue the Order. For the same reason, Appellant's contention the complaint should be dismissed because the trial court lacked subject matter jurisdiction pursuant to Rule 12(b)(1), SCRCP, also fails.

Appellant also contends that no complaint was ever filed with respect to the PAL Account. Such is clearly not the case, as, a complaint seeking a judgment on the PAL Account was filed on November 23, 2011 and a certificate of service of the complaint on Respondent was filed on December 15, 2011. (R.App. p. 3). Moreover, according to her designation of the record, Appellant filed an answer to the complaint on December 21, 2011 (*see* R. p. 40-77) – it is unclear how Appellant could have answered a complaint that did not exist. As such, any contention that no complaint exists is patently false.

B. Appellant Has Not Established That The Trial Court Abused Its Discretion.

Appellant contends that the trial court abused its discretion by granting judgment in favor of Respondent because issues of fact and law existed. In making this argument, Appellant appears to assert that the PAL Account never existed, despite the fact that she made payments on the loan for a number of years. Similarly, any arguments that the PAL Account was not an open-end extension of credit fail because the Receipt clearly states that the PAL Account is an open-end account. (Receipt; R. p. 647).

Appellant also erroneously concludes that because she used the proceeds of the initial PAL Account distribution to purchase a mobile home, the PAL Account was somehow transformed into a mobile home loan. Of course, the fact that she used the PAL Account proceeds to purchase a mobile home does not transform the unsecured PAL Account into a mobile home loan; as an unsecured line of credit, Appellant was free to use the proceeds for any reason she chose. Moreover, Respondent did not retain any security interest in the mobile home. As such, any contention that the trial court erred by finding the PAL Account was an open-ended loan is in error.

Appellant also alleges that the trial court did not consider certain exhibits filed by Appellant during the course of litigation. However, to the extent these exhibits were not introduced at trial, the trial court properly did not consider them in issuing the Order.

Finally, Respondent reiterates that as a result of Appellant's failure to include a transcript of the trial hearing in the record on appeal, there is an insufficient record on which the Court of Appeals can determine reversible error by the trial court, and that therefore Appellant cannot prevail on any allegations of error related to the trial court's weighing or interpretation of the evidence.

C. Appellant Has Not Established Any Error Of Fact Or Law Committed By The Trial Court That Could Result In Reversal Of The Order.

Appellant's brief sets forth a number of theories alleging that the trial court made various errors of fact or law. Appellant's claims of error generally fall into the

following categories, each of which are discussed below: (a) the trial court did not consider Appellant's assertions contained in pleadings and improperly admitted Respondent's evidence; (b) the trial court did not rule on Appellant's counterclaims and/or affirmative defenses; (c) Appellant was improperly denied a jury trial; and (d) the trial court should have tried Appellant's counterclaims separately.

a. The Trial Court Correctly Refused to Consider "Facts" Set Forth In Appellant's Pleadings Which Were Not Presented At Trial, And Appellant Has Failed To Establish A Sufficient Record To Contest Evidence Admitted At Trial.

Appellant contends that the trial court erred by not considering "facts" set forth in Appellant's pleadings, which were not submitted as evidence at trial, in reaching the decision set forth in the Order. However, as previously noted above, the only evidence that a trial court should consider is that provided at trial. While a trial court may also take judicial notice of adjudicative—*i.e.*, generally-known, not subject to reasonable dispute—facts pursuant to Rule 201, SCRE, none of the facts at issue in this matter are either generally known or not subject to reasonable dispute. Therefore, the trial court correctly declined to consider Appellant's pleadings.

As to Appellant's contention that Respondent submitted false testimony or evidence or misrepresented material facts, such contention is, in addition to being patently false, a matter on which an insufficient record exists due to Appellant's failure to request a transcript of the trial hearing. As such, there is no basis for reversing these evidentiary admissions by the trial court.

b. The Trial Court Properly Denied Appellant's Counterclaims and/or Affirmative Defenses.

Appellant argues that the trial court erred by not ruling on her counterclaims, which include Appellant's counterclaims of Truth in Lending Act and South Carolina Unfair Trade Practices Act violations, prior to issuing the Order. Respondent first notes that while not explicitly denied in the Order, the trial court's subsequent May 21 Order clarifies that all of Appellant's counterclaims had been denied. (R. p. 11). As such, the trial court has ruled on the viability of Appellant's counterclaims and Rule 54(b), SCRCP, is not implicated. Similarly, in rendering judgment in favor of Respondent, the trial court implicitly rejected any of Appellant's affirmative defenses.

Moreover, because Appellant failed to request a transcript of the trial hearing, the Court of Appeals is left without a sufficient record on which to determine the validity of Appellant's counterclaims or affirmative defenses and, as such, the trial court's Order should be affirmed.

c. Appellant Waived Her Right To A Jury Trial.

Appellant next claims that she was improperly denied the right to a jury trial. However, Appellant acknowledges that she consented to the matter being tried through a bench trial and, in fact, cites authority for the proposition that by participating in a bench trial without objection, a party waives its right to a jury trial. Final Brief of Appellant, p. 41 (citing *Wilcher v. City of Wilmington*, 139 F.3d 366 (3rd Cir. 1998)) (once a party makes a timely demand for jury trial, party waives that right when it participates in a bench trial without objection)). Here, Appellant consented to a nonjury trial after the parties' summary judgment motions were denied

at the April 10, 2014 hearing and then participated in the February 18, 2015 bench trial conducted by Judge Jackson without objection. As such, any claims of error arising from an asserted right to a jury trial fail.

As to Appellant's claim that the trial court should have informed her of her right to a jury trial, no transcript from that hearing has been ordered or designated for inclusion in the record by Appellant, and therefore this Court is left without a sufficient record on which to make such a determination. Moreover, in any event, the trial court is not Appellant's attorney, and it is not the court's function to provide any party with legal advice regarding the effect of the party's decisions in the course of litigation, including the decision to consent to a bench trial. As such, there is no merit to Appellant's contention regarding waiver of jury trial.

d. The Trial Court Correctly Tried All Matters Together.

Finally, Appellant claims that the trial court erred by not trying Appellant's counterclaims separately pursuant to Rule 42(b), SCRCP. However, the case law cited by Appellant, *Johnson v. South Carolina Nat'l Bank*, 292 S.C. 51, 354 S.E.2d 895 (1987) and *First-Citizens Bank & Trust Co. v. Hucks*, 305 S.C. 296, 408 S.E.2d 222 (1991), refers to cases in which a plaintiff filed a complaint seeking equitable claims and the defendant filed legal counterclaims. Because Respondent's action based upon Appellant's breach of contract is a legal action, *see, e.g.*, *Williams v. Riedman*, 339 S.C. at 259, 529 S.E.2d at 32, both *Johnson* and *Hucks* are inapposite, and the trial court was not required to try Appellant's counterclaims separately.

CONCLUSION

As set forth above, as a result of Appellant's failure to order or include in the designation of record the trial transcript, she has failed to meet her burden to establish a sufficient record on which this Court may rule. Appellant also improperly attempts to rely on evidence that was not presented at trial and thus is not properly before this Court on appeal. Moreover, the vast majority of her contentions of error relate to the trial court's findings of fact, which are subject to a highly deferential standard, and any asserted errors of law are misguided. Therefore, for the foregoing reasons, Respondent respectfully requests that this Court affirm the Order of the Honorable James B. Jackson, Jr., Master in Equity for Orangeburg County, entered on May 21, 2015, 2014, granting summary judgment in favor of Respondent against Appellant pursuant to her obligations under PAL Account.

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE WITH RULE 211(b), SCACR

The undersigned hereby certifies that the foregoing ***FINAL BRIEF OF RESPONDENT*** complies with the requirements of Rule 211(b), SCACR.

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PROOF OF SERVICE

This is to certify that I have this day served the Appellants in the foregoing matter with a copy of the foregoing ***FINAL BRIEF OF RESPONDENT*** by depositing same in the United States Mail with adequate postage affixed thereon to ensure delivery, addressed as follows:

Dorothy Harley Sistrunk
423 Bayne Street
Orangeburg, SC 29115

March 18, 2016

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