

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

ON CERTIORARI TO THE COURT OF APPEALS
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.

REPLY BRIEF OF PETITIONER

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STATEMENT OF ISSUES/QUESTIONS PRESENTED

- I. Did the Court of Appeals err in affirming the circuit court's decision to strike and dismiss Petitioner's defenses and counterclaims for failure to prosecute or to comply with a court order where the circuit court's only asserted basis for doing so was Petitioner's failure participate in the foreclosure intervention process?
- II. Did the Court of Appeals err in affirming the circuit court on the basis that Respondent's motion was converted into one for summary judgment, where there is nothing in the record indicating such a conversion occurred or would have been proper?
- III. Did the Court of Appeals err in affirming the circuit court's determination that Petitioner's counterclaims were moot a) in the absence of any factual record and b) where her claims, and at least her claim for damages, were not shown to be moot?
- IV. Did the Court of Appeals err in affirming the circuit court's decision that struck Petitioner's defenses and dismissed her counterclaims where neither the circuit court's analysis in reaching its decision nor the Court of Appeals' analysis in affirming that decision square with any rule, statute, or other law that permits the dismissal of any claim or the striking of any defense?

ARGUMENT

Petitioner (hereinafter “Burr”) submits this brief in reply to the brief submitted by the Respondent (hereinafter “U.S. Bank”). The arguments U.S. Bank has advanced in its brief do not hold up to scrutiny.

I. The false premise that Burr’s pleadings admitted she had not fulfilled U.S. Bank’s requirements for a modification.

Most of U.S. Bank’s argument is premised upon a supposed admission in Burr’s answer and counterclaim that she failed to provide U.S. Bank with all the documents it required in order to process her for a modification. This both misrepresents what Burr’s answer and counterclaim says and ignores some of its more important allegations altogether.

U.S. Bank says that Burr “expressly acknowledged she did not provide U.S. Bank with all of the required financial documents requested by U.S. Bank to evaluate her loan for a HAMP modification. (App’x p. 111-12, ¶¶ 14, 16, 17.)” (Brief of Respondent p. 2.) That, however, is not what Burr’s answer and counterclaim actually says. The paragraphs U.S. Bank cites for this proposition, along with others to put those paragraphs in context, are as follows:

8. The Defendant Burr and her husband provided Plaintiff Bank and/or its successor trustee with detailed information and documentation upon request of the Plaintiff.

9. The Plaintiff, by and through its authorized agents and employees, stated and represented to the Defendant that she would be taken care of not losing her residential home so long as she participated in the Home Affordable Modification Program.

10. The Defendant did cooperate and agree to participate in the Home Affordable Modification Program.

...

14. Circumstances in the life of the Defendant and in the business of her husband have arisen seriously affecting her ability to make such large, monthly payments so as to necessitate a change in the amount of the payments, first on a temporary basis and then permanently.

15. Nearly three years ago, the Defendant Burr did voluntarily and knowingly request guidance, assistance, help, and anywise reconsideration of her mortgage into modification program determined for affordability.

16. In fact, the Defendant has granted information and provided documents to the Plaintiff as it requested in order to facilitate the reconsideration of the mortgage and subsequent modification. The Defendant's husband could not provide certain financial documents related to this work in the aftermath of Hurricane Hugo [sic: Katrina?] in New Orleans, Louisiana, because the same had not been provided to him, nor had he received full payment from all of that work.

17. These extenuating and unusual circumstances in the life of the Defendant and her husband also call for reconsideration and modification so that at least the payments may be made affordable as expeditiously as possible and pragmatic.

18. The Defendant Burr was led to believe by the Plaintiff's conduct that the Plaintiff would in fact give her a full, fair, comprehensive, and through reconsideration of her payment amounts.

...

24. Plaintiff stated and represented over time and telephone calls and correspondence that it would reconsider and help the Defendant into an affordable loan modification, such that she would not lose her residential home.

(Appx. pp. 110-13.)

Now, where in that is this supposed express acknowledgment that Burr “did not provide U.S. Bank with all of the required financial documents requested by U.S. Bank to evaluate her loan for a HAMP modification” upon which U.S. Bank bases almost all the argument in its brief? (Brief of Respondent p. 2.) It is not there. (Appx. pp. 109-115.) Burr’s answer and counterclaim does not say what U.S. Bank says it does at all; moreover, a reasonable reader could not reach U.S. Bank’s conclusion when viewing the answer and counterclaim in the light most favorable to Burr – the light required, given the procedural posture of this case. See Charleston County Sch. Dist v. Laidlaw Transit. Inc., 348 S.C. 420, 559 S.E.2d 362 (Ct. App. 2001); Fireman’s Ins. Co. v. Cincinnati Ins. Co., 302 S.C. 234, 236, 394 S.E.2d 855, 856 (Ct. App. 1990).

II. U.S. Bank’s attempted conflation of Rule 11 requirements with testimony.

U.S. Bank argues that its former counsel’s certification of mortgagor noncompliance was the functional equivalent of an affidavit because it “carried the weight and reliability of Rule 11, SCRCP[.]” (Brief of Respondent p. 12.) In this way, U.S. Bank says, it was not manifest error for the Court of Appeals to affirm the circuit court’s decision as one granting summary judgment.

The flaw in U.S. Bank’s argument is one of false equivalency. The Rule 11 provision invoked by U.S. Bank is the requirement that “[t]he written or electronic signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information and belief there is good ground to support it; and that it is not interposed for delay.” Rule 11(a), SCRCP. That falls short of what Rule 56, SCRCP, requires of affidavits used to support a summary judgment motion. “Supporting and opposing affidavits shall be

made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.” Rule 56(e), SCRCP. Not only does U.S. Bank’s lawyer’s certification not meet these latter requirements, it was 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”), which 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. Not only is the certification not an affidavit, the things in it are specifically *not* admissible. Id. This is consistent with the general rule that settlement negotiations are normally inadmissible. Rule 408, SCRE.

All pleadings, motions, and similar papers have the Rule 11 requirement U.S. Bank references. Rule 11(a), SCRCP. That does not transform them into affidavits or the functional equivalent thereof. Since U.S. Bank did not call its motion one for summary judgment, did not cite Rule 56, SCRCP, in its motion, and did not support its motion with any factual material, Burr was on no notice that U.S. Bank’s motion would be treated as one for summary judgment. (Appx. pp. 126-42.) Since U.S. Bank did not support its motion with factual material, it could not lawfully have won a motion for summary judgment. Rule 56(c), SCRCP.

III. A judgment on the pleadings on the basis of mootness cannot be lawfully granted if mootness has not been pled.

Despite U.S. Bank's protests to the contrary, it almost goes without saying that a judgment *on the pleadings* cannot be rendered on a ground of mootness if mootness is not a defense pled in the pleadings. See Rule 12(c), SCRCP.

IV. U.S. Bank is perfectly capable of providing Burr the same modification it promised her before this case began.

U.S. Bank tries to argue that the expiration of the Home Affordable Modification Program ("HAMP") means that it has no liability for renegeing on its promise to modify Burr's loan. (Brief of Respondent pp. 13-14.) U.S. Bank contends that it is now impossible for a modification of Burr's loan to happen.

No. Parties to mortgage loans modified them before HAMP came into being, and they will continue to be able to modify them now that HAMP has ended. A federal program does not have to exist in order for a mortgage loan to be modified. The ending of HAMP is not a prohibition on loan modifications. U.S. Bank is perfectly capable of entering into a loan modification with Burr on the exact same terms it promised to her, regardless of whether HAMP exists. The ending of HAMP certainly does not relieve U.S. Bank from liability for renegeing on a promise just because that promise had to do with a loan modification.

V. U.S. Bank's argument does not seem to know what a failure to prosecute is.

In its brief, U.S. Bank again accuses Burr of a failure to prosecute. U.S. Bank fails to realize, however, that the time for Burr to do anything more than she had already done to prosecute her claims – the time of trial – never came. See Small v. Mungo, 254 S.C. 438, 175 S.E.2d 802 (1970) (dismissal for failure to prosecute affirmed where

plaintiff and counsel did not appear when case called for trial); Bond v. Corbin, 68 S.C. 294, 47 S.E. 374 (1904) (dismissal for failure to prosecute affirmed where plaintiff did not show up for trial at pre-set time and date and still failed to attend after two continuances given so that he could get to trial). Conducting discovery and filing motions (Brief of Respondent p. 22) are not things that are necessary to the prosecution of a claim. Only two things are: 1) pleading the claim and 2) trying the claim. Burr did the first thing. (Appx. pp. 109-16.) The case was never called for trial, so she never got a chance to do the second. What happened in this case was not the kind of thing that is a failure to prosecute. (Appx. pp. 145-46, p. 162 ln. 6-11, p. 162 ln. 19 – p. 163 ln. 9, p. 164 ln. 15-21.) U.S. Bank could not point to even one instance of Burr not appearing at a roster meeting or other court event and could point out no instance of Burr failing to respond to any discovery requests served by U.S. Bank, since U.S. Bank did not serve any. (Appx. pp. 126-41, 146, 153-70.)

VI. U.S. Bank ignores Burr's claim for damages.

Burr pled that U.S. Bank had promised her a modification and then reneged on that promise. (Appx. pp. 110-11.) Burr did not solely seek a modification as the relief to be granted on her claims; she also sought an award of damages. (Appx. pp. 112, 113-14, 115, 147.) U.S. Bank's brief ignores that altogether. (Brief of Respondent.)

VII. There has been no finding or showing that Burr engaged in any bad faith conduct.

Unlike what U.S. Bank intimates, the Administrative Order did not require Burr or any other foreclosure defendant to do anything; rather, that administrative order puts requirements on foreclosure plaintiffs and simply sets out a mechanism for foreclosure defendants, like Burr, to request foreclosure intervention if they want it. In re:

Mortgage Foreclosure Actions, 396 S.C. at 211-12. 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. Id. 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. Provisions in the order for what may happen if a foreclosure defendant does not do certain things are not the same as requirements that the defendant do them. Id. In fact, the language U.S. Bank quotes as a supposed requirement of a defendant under the order comes from a section of the order that lists out the required content of a certification to be made by the foreclosure *plaintiff's* counsel. Id. at 211-12; (Brief of Respondent p. 25.)

So, to get around that, U.S. Bank tries to imply, without ever saying, that Burr has engaged in bad faith conduct. (Brief of Respondent p. 25.) No finding to that effect was ever made, and there is no evidence that Burr engaged in any bad faith conduct. All that happened was that, through her previous attorney, Burr “didn’t pay the attention to settlement negotiations that maybe ought to have been paid[.]” (Appx. p. 162 ln. 7-8.) What the sanctions provision of the Administrative Order is probably aimed at addressing is bad faith denials by foreclosure plaintiffs of applicants who qualify for modifications or other foreclosure intervention options. In re Mortgage Foreclosure Actions, 396 S.C. at 214. A foreclosure defendant could probably run afoul of this provision by submitting information he or she knows to be false in an effort to try to trick the plaintiff into agreeing to a modification – but that is not what

we have here. This case is just about a failure to respond to settlement overtures. (Appx. p. 162 ln. 7-8.)

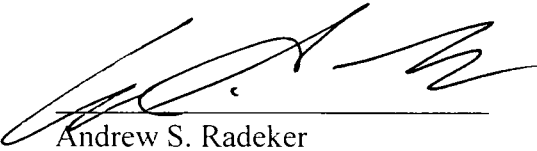
VIII. U.S. Bank ignores that the Administrative Order provides that all that is to happen in this situation is for the case to proceed.

The Administrative Order itself speaks to what is to happen in this very situation. The remedy under that 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. For U.S. Bank, this is an inconvenient truth – so it ignores this truth. In no other context do courts punish litigants merely for failure to engage in settlement negotiations. For the Administrative Order to provide for that to happen to parties who are among the most vulnerable – mortgage foreclosure defendants facing the loss of their homes – would be both cruel and absurd. The purpose of the Administrative Order is to foster settlement negotiations in mortgage foreclosure actions, not to create a substantive trap for foreclosure defendants. If the defendant does not engage in such settlement negotiations, fine – the case simply moves on, just as would any other unsettled case. *Id.*

CONCLUSION

There was no failure to prosecute here. There was no conversion to summary judgment here, and, even if there had been, U.S. Bank would not have been entitled to win such a motion. The Court of Appeals' decision and the circuit court's decision are controlled by errors of law and grounded in unsupported factual contentions. This Court should reverse those decisions and remand this case.

Respectfully submitted,



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PROOF OF SERVICE

I certify that I served the reply brief of petitioner in this case by depositing a copy of it on the date shown below in the United States Mail, postage prepaid, addressed as follows:

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