

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas
Cynthia Graham Howe, Master in Equity

Case No.: 2013-CP-26-02528
Appellate Case No. 2016-001550

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SC COURT OF APPEALS

Branch Banking and Trust Company.....Respondent,

v.

Cindy B. Hunt, Willow Greens Homeowners Association, Inc.,
C.J. Developers, LLC..... Defendants,

Of whom Cindy B. Hunt is theAppellant.

FINAL BRIEF OF THE RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE MASTER ABUSE HER DISCRETION IN DENYING HUNT'S MOTION TO ALTER OR AMEND THE ORDER DENYING HUNT'S MOTION FOR A DEFAULT JUDGMENT ON THE AMENDED COUNTERCLAIMS WHERE BB&T TIMELY FILED A MOTION TO DISMISS THE AMENDED COUNTERCLAIMS BEFORE ITS TIME TO SERVE A REPLY HAD EXPIRED AND WHERE THE MASTER GRANTED BB&T'S MOTION TO DISMISS THE AMENDED COUNTERCLAIMS?**

- II. DID THE MASTER ABUSE HER DISCRETION IN DENYING HUNT'S MOTION TO ALTER, AMEND, OR VACATE THE ORDER DENYING HUNT'S MOTION FOR ATTORNEY'S FEES AND COSTS WHERE HUNT WAS NOT A PREVAILING PARTY, HUNT HAD NO CONTRACT, STATUTE, OR COURT RULE ENTITLING HER TO ATTORNEY'S FEES OR COSTS, AND HUNT WAS NOT REPRESENTED BY AN ATTORNEY IN THIS ACTION?**

- III. DID THE MASTER ABUSE HER DISCRETION IN DENYING HUNT'S MOTION TO VOID THE ORDER OF JANUARY 13, 2015, FOR LACK OF JURISDICTION WHERE, ALTHOUGH THE ORDER WAS ENTERED WHILE THE CASE WAS REMOVED TO FEDERAL COURT, IT MERELY MEMORIALIZED THE MASTER'S ORAL RULING AND FORM 4 ORDER FROM BEFORE THE REMOVAL?**

- IV. DID HUNT PRESERVE FOR REVIEW BY THE COURT HER ARGUMENT THAT BB&T ENGAGED IN FORUM SHOPPING AND VEXATIOUS LITIGATION?**

STATEMENT OF THE CASE

On April 16, 2013, Respondent Branch Banking and Trust Company (“BB&T”) filed this foreclosure action against Appellant Cindy B. Hunt (“Hunt”). (R. pp. 264-267.) On August 2, 2013, Hunt voluntarily appeared in the action by filing an Answer and Counterclaims. (R. pp. 273-275; R. pp. 277-298.) On September 6, 2013, BB&T filed a motion to dismiss Hunt’s counterclaims. (R. pp. 424-428.)

On November 4, 2013, the circuit court referred the action to the Master in Equity for Horry County (the “Master”). (R. p. 59.)

At a hearing on May 20, 2014, the Master granted BB&T’s Motion to Dismiss as to all of Hunt’s counterclaims without prejudice, but gave Hunt leave to amend them. (R. pp. 557-828.)

On June 6, 2014, Hunt filed and served by mail a “First Amended Counterclaims and Defenses” asserting seven counterclaims against BB&T based on three main factual allegations¹:

- That BB&T improperly treated Hunt’s Payable on Death/Revocable Trust Account (“POD account”) as a joint account with the POD account’s beneficiary, Costella Hunt Davis, and that BB&T allegedly disclosed information about the POD account to the beneficiary;
- That Hunt’s customer profile with BB&T showed the existence of what she believed to be two loans that did not belong to her—identified on the customer profile as “transfer management” and “portfolio”; and
- That BB&T improperly exercised its right of set-off against Hunt’s POD account

¹ Hunt previously tried and failed to sue BB&T based on these allegations in three different federal court actions, all of which were dismissed. See *Hunt v. Branch Banking and Trust Company et al.*, C/A # 4:09-cv-02151-JMC (D.S.C. filed Aug. 13, 2009); *Hunt v. Branch Banking and Trust Company et al.*, C/A # 4:11-cv-00870-MGL (D.S.C. filed Apr. 12, 2011); *Hunt v. Branch Banking and Trust Company*, C/A # 4:12-cv-02216-MGL (D.S.C. filed Aug. 6, 2012).

to recover money after Hunt cashed a check with BB&T that was later subject to a stop payment by the issuing agency.

(R. pp. 299-336.)

On June 25, 2014, before its time to Reply to the amended counterclaims had expired, BB&T filed a motion to dismiss Hunt's amended counterclaims. (R. pp. 430-431.)

On September 30, 2014, Hunt filed a "Motion for Default Judgment" seeking to hold BB&T in default on her amended counterclaims. (R. pp. 533-537.) The motion was based on Hunt's belief that BB&T's response to her amended counterclaims by way of a motion to dismiss did not stay the time for BB&T to file a Reply to the amended counterclaims. (*Id.*)

On October 14, 2014, the Master held a hearing on BB&T's Motion to Dismiss Hunt's Amended Counterclaims and on Hunt's Motion for Default Judgment. (R. pp. 828-958.) At the hearing, the Master orally granted BB&T's Motion to Dismiss as to all of Hunt's amended counterclaims and denied Hunt's Motion for Default Judgment. (R. p. 954, lines 9-12.) At the end of the hearing, the Master requested a proposed order from BB&T's counsel granting the Motion to Dismiss. (R. p. 954, line 24.)

On October 23, 2014, the Master emailed Hunt with the following written ruling:

Your motion for entry of default judgment against BB&T (for failing to reply to your Amended Counterclaims) is denied as moot. Once I dismissed your Amended Counterclaims, your motion became moot. By way of sustaining ground, Rule 12(a)(1) stayed the time to respond to your amended counterclaim until after the Court ruled on BB&T's motion to dismiss your counterclaims. Accordingly, BB&T could not have been in default of your amended counterclaims because it moved to dismiss your counterclaims under Rule 12(b)(6), SCRCP, and I did not grant the motion until last week. Because I granted the motion, BB&T does not need to reply to your counterclaims. It cannot be in default for failing to file and serve a reply. We will prepare a Form Order.

(R. p. 1903.)

On October 28, 2014, the Master entered a Form 4 Order stating:

Defendant Cindy B. Hunt's Motion for Entry of Default Judgment Against Plaintiff BB&T is hereby denied as moot. 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. As such, there are no remaining counterclaims to which the Plaintiff could be considered in default."

(R. pp. 87-88.)

Also on October 28, 2014, BB&T's counsel provided the Master with the requested proposed order by email. (R. pp. 1904-1905.)

On October 30, 2014, Hunt filed a "Motion to alter or amend the Judgment/Orders of the Court under SCRCP 59(e)" asking the Master to alter or amend her denial of the "Motion for Default Judgment" on the same grounds as set forth in the original motion—that BB&T's motion to dismiss her amended counterclaims did not stay the time for BB&T to file a Reply to the amended counterclaims. (R. pp. 1073-1086.)

On November 10, 2014, unhappy with the dismissal of her counterclaims and denial of her motion for a default judgment, Hunt filed a Notice of Removal of this case in the United States District Court for the District of South Carolina. *See BB&T v. Hunt et al.*, C/A # 4:14-CV-4352 (D.S.C., filed Nov. 10, 2014).

On January 13, 2015, the Master entered a written order granting BB&T's Motion to Dismiss Hunt's Amended Counterclaims to formalize her oral ruling from the hearing on October 14, 2014, and the Form 4 Order entered on October 28, 2014. (R. pp. 99-107.)

On May 8, 2015, the District Court determined that the case was not removable to federal court and entered an order remanding the case back to the Master. *See Opinion and Order, BB&T v. Hunt et al.*, C/A # 4:14-CV-4352 (D.S.C., filed May 8, 2015).

On May 27, 2015, Hunt filed a "Motion under SCRCP 41" in which she requested attorney's fees and costs from BB&T 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. (R. pp. 1087-1094.)

On June 3, 2015, the Master entered a Form 4 Order denying Hunt's "Motion under SCRCF 41." (R. pp. 137-138.)

On August 11, 2015, Hunt filed two motions: 1) a "Motion: Lack of Jurisdiction, SCRCF 59 and SCRCF 60 re Order filed on 1/13/2015" asking the Master to alter or amend the Order of January 13, 2015, on the grounds that the Master lacked jurisdiction to enter that order while the case was removed to federal court, and 2) a "Motion: Lack of Jurisdiction, SCRCF 59 and SCRCF 60" asking the Master to alter or amend the denial of Hunt's request for fees and costs on the same grounds as set forth in the "Motion under SCRCF 41." (R. pp. 1095-1099, 1101-1106.)

On November 10, 2015, the Master held a hearing on the following motions:

1. Hunt's "Motion to alter or amend the Judgment/Orders of the Court under SCRCF 59(e)" filed on October 30, 2014 (concerning the denial of Hunt's Motion for Default Judgment);
2. Hunt's "Motion: Lack of Jurisdiction, SCRCF 59 and SCRCF 60 re Order filed on 1/13/2015" filed on August 11, 2015 (concerning Master's Order of January 13, 2015, dismissing Hunt's amended counterclaims);
3. Hunt's "Motion: Lack of Jurisdiction, SCRCF 59 and SCRCF 60" filed on August 11, 2015 (concerning the Master's denial of Hunt's request for fees and costs).

(R. pp. 959-1071.)

On June 15, 2016, the Master entered an Order denying all three of these motions. (R. pp. 139-146.) As to the "Motion to alter or amend the Judgment/Orders of the Court under SCRCF

59(e)”, the Master held that there was no error of law in the prior order denying Hunt’s Motion for Default Judgment, no intervening change in the law controlling this issue, and no new evidence that would affect the prior order. (*Id.*) As to the “Motion: Lack of Jurisdiction, SCRCP 59 and SCRCP 60 re Order filed on 1/13/2015”, the Master concluded that the Order of January 13, 2015, was not void for lack of jurisdiction because its entry in no way caused the case to “proceed” during the removal period in violation of 28 U.S.C. § 1446(d). (*Id.*) As to the “Motion: Lack of Jurisdiction, SCRCP 59 and SCRCP 60”, the Master held that there was no error of law in the prior order denying Hunt’s request for attorney’s fees and costs because Hunt was not a prevailing party, had no contract, statute, or court rule entitling her to attorney’s fees, and was not represented by an attorney in this action. (*Id.*)

On July 25, 2016, Hunt filed a Notice of Appeal from the Master’s Order of June 15, 2016. On August 2, 2016, Hunt filed an Amended Notice of Appeal, but still only appealing from the Master’s Order of June 15, 2016.

Hunt does not appeal from the Master’s Orders of October 28, 2014 (denying her motion for default judgment), January 13, 2015 (dismissing her counterclaims), or June 3, 2015 (denying her motion for fees and costs). Rather, she appeals only from the Master’s decision not to alter, amend, or vacate those orders under Rules 59(e) or 60(b), SCRCP.

STANDARD OF REVIEW

The Court may affirm for any ground appearing in the record. Rule 220(c), SCACR; *see also Mortgage Elec. Sys., Inc. v. White*, 384 S.C. 606, 614, 682 S.E.2d 498, 502 n. 2 (Ct. App. 2009)(citing *I'On v. Town of Mt. Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000)).

The trial court's decision whether to grant or deny a motion under either Rule 59(e) or 60(b), SCRCR, will not be disturbed on appeal absent a showing of an abuse of that discretion. *See Pollard v. County of Florence*, 314 S.C. 397, 402, 444 S.E.2d 534, 536 (Ct. App. 1994); *BB&T v. Taylor*, 369 S.C. 548, 551, 633 S.E.2d 501, 502-03 (2006). "An abuse of discretion arises where the judge issuing the order was controlled by an error of law or where the order is based on factual conclusions that are without evidentiary support." *Taylor*, 369 S.C. at 551, 633 S.E.2d at 503.

ARGUMENTS

The Court must affirm the Master's Order entered on June 15, 2016, for the following reasons:

- 1. The Master did not abuse her discretion in denying Hunt's motion to alter or amend the order denying Hunt's motion for a default judgment on the amended counterclaims because BB&T timely filed a motion to dismiss the amended counterclaims before its time to serve a Reply had expired and the Master granted BB&T's motion to dismiss the amended counterclaims.**

In the Order entered on June 15, 2016, the Master correctly concluded that there was no error in her previous order denying Hunt's Motion for Default Judgment on the grounds of mootness.

"A case becomes moot when judgment, if rendered, will have no practical effect upon [an] existing controversy." *Holden v. Cribb*, 349 S.C. 132, 137, 561 S.E.2d 634, 637 (Ct. App. 2002).

Once the Master granted BB&T's Motion to Dismiss as to all of Hunt's amended counterclaims at the hearing on October 14, 2014, it became impossible for BB&T to be held in default on those counterclaims and it rendered Hunt's motion for a default judgment moot.

The Master also correctly concluded that there was no error in denying Hunt's Motion for Default Judgment because BB&T's timely² filing of a motion to dismiss Hunt's amended counterclaims stayed the time for a Reply to those amended counterclaims. Rule 12(a)(1), 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 rather than having to file a Reply. Contrary to Hunt's assertion, Rules 12(g) and 12(h) were inapplicable to the issue and did not prohibit BB&T from filing a motion to dismiss the amended counterclaims.

Therefore, the Master did not abuse her discretion in denying Hunt's "Motion to alter or amend the Judgment/Orders of the Court under SCRPC 59(e)" of October 30, 2014.

- 2. The Master did not abuse her discretion in denying Hunt's motion to alter, amend, or vacate the order denying Hunt's motion for attorney's fees and costs because Hunt was not a prevailing party, Hunt had no contract, statute, or court rule entitling her to attorney's fees or costs, and Hunt was not represented by an attorney in this action.**

In the Order entered on June 15, 2016, the Master correctly concluded that there was no error in the Form 4 Order entered on June 3, 2015, because Hunt is not entitled to recover attorney's fees and costs from BB&T in this case.

² Hunt served the First Amended Counterclaims and Defenses on BB&T by regular mail on June 6, 2014. Pursuant to Rules 15(a) and 6(e), SCRPC, BB&T had 20 days, or until June 26, 2014, to serve either a motion or Reply to the counterclaims.

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).

Even if a party prevails, "[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 prevailed, Hunt cited no contract or statute entitling her to attorney's fees and costs. Hunt relied solely upon Rule 41(d), SCRPC, 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), SCRPC (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. Further, Rule 41, SCRPC, does not apply to federal court actions. Therefore, the Master correctly concluded that Hunt had no right to attorney's fees or costs under Rule 41(d) in this case.

Finally, the Master correctly concluded that 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. Whether Hunt had legal representation at certain points in her federal cases against BB&T is irrelevant to her liability for attorney's fees with respect to this case.

Therefore, the Master did not abuse her discretion in denying Hunt's request to alter, amend, or vacate the Form 4 Order entered on June 3, 2015.

3. The Master did not abuse her discretion in denying Hunt's motion to void the Order of January 13, 2015, for lack of jurisdiction because, although the Order was entered while the case was removed to federal court, it merely memorialized the Master's oral ruling and Form 4 Order from before the removal.

In the Order entered on June 15, 2016, the Master correctly concluded that the Order of January 13, 2015, was 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).

In a procedurally similar and instructive case, the United States District Court for the District of Utah decided the issue of whether a written 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 on the same day that 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 Master’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 Master’s earlier, pre-removal ruling at the hearing on October 14, 2014. As in *Pebble Creek*

Homes, BB&T's counsel emailed a proposed order to the Master prior to removal. Further, the Master emailed her ruling in writing to Hunt on October 23, 2014, which was prior to removal, and then entered a Form 4 Order concerning her ruling on October 28, 2014, which was also prior to removal.

To hold that the Master lacked jurisdiction to enter the Order of January 13, 2015, would encourage disgruntled state court litigants such as Hunt to go judge-shopping by racing to remove actions to federal court before the entry of a formal order after incurring an adverse ruling.

Therefore, the Master did not abuse her discretion in denying Hunt's "Motion: Lack of Jurisdiction, SCRCF 59 and SCRCF 60 re Order filed on 1/13/2015" of August 11, 2015.

4. Hunt failed to preserve for review by the Court her argument that BB&T engaged in forum shopping and vexatious litigation.

Hunt failed to preserve for review by the Court the argument in her Appellant's Brief that BB&T engaged in forum shopping and vexatious litigation. "It is well settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved." *Pye v. Estate of Fox*, 369 S.C. 555, 565, 633 S.E.2d 505, 510 (2006). "If the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party must file a motion to alter or amend the judgment in order to preserve the issue for appellate review." *I'On, L.L.C.*, 338 S.C. at 422, 526 S.E.2d at 724; *see also* Rule 59(e), SCRCF. This preservation requirement "prevents a party from keeping an ace card up his sleeve—intentionally or by chance—in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case." *Id.*

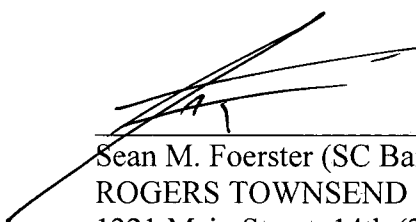
The Master has never ruled on this issue and Hunt did not raise it in any of the three motions to alter, amend, or vacate whose denial is at issue in this appeal. (*See* "Motion to alter

or amend the Judgment/Orders of the Court under SCRPC 59(e)” filed on October 30, 2014; “Motion: Lack of Jurisdiction, SCRPC 59 and SCRPC 60 re Order filed on 1/13/2015” filed on August 11, 2015; “Motion: Lack of Jurisdiction, SCRPC 59 and SCRPC 60” filed on August 11, 2015.)

CONCLUSION

Based on the foregoing and any additional sustaining grounds appearing in the record, BB&T respectfully requests that the Court affirm the Master’s Order entered on June 15, 2016.

Respectfully submitted,



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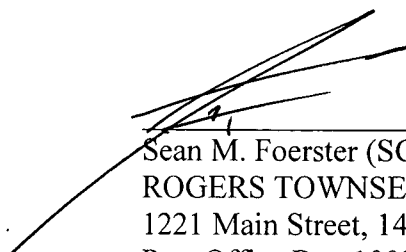
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Of whom Cindy B. Hunt is theAppellant.

CERTIFICATE OF COUNSEL

The undersigned attorney hereby certifies that the Final Brief of the Respondent complies with Rule 211(b), SCACR.



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