

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas
George C. James, Jr., Circuit Judge

Appellate Case No. 2012-213309
Common Pleas Case No. 2010-CP-28-1197

RECEIVED

JUL 20 2015

S.C. Supreme Court

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.

APPENDIX

Andrew S. Radeker
Harrison & Radeker, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
Attorney for Petitioner

Sean A. O'Connor
Finkel Law Firm, LLC
Post Office Box 41489
Columbia, South Carolina 29423
(843) 577-5460
Attorney for Respondent

INDEX

OPINION OF COURT OF APPEALS AND DOCUMENTS REGARDING REHEARING

Court of Appeals Unpub. Op. No. 2015-UP-091 (filed Feb. 25, 2015).....	1
Petition for rehearing and memorandum in support.....	4
Letter from Clerk of Court of Appeals requesting return to petition for rehearing.....	19
Return to petition for rehearing.....	20
Order of Court of Appeals denying petition for rehearing.....	31
Letter from Clerk of Court of Appeals enclosing order on petition for rehearing.....	33

BRIEFS

Final Brief of Appellant.....	35
Final Brief of Respondent.....	60
Final Reply Brief of Appellant.....	83

RECORD ON APPEAL

Cover page for Record on Appeal.....	93
Index to Record on Appeal.....	94
Order on motion to dismiss counterclaims and strike defenses.....	95
Order on motion to reconsider.....	99
Order substituting counsel.....	100
Summons and Complaint.....	102
Answer and Counterclaims.....	109
Plaintiff's Answer to Defendant Burr's Counterclaims.....	117
Motion to Dismiss Counterclaims and Strike Defenses (with exhibits).....	126

Motion to Reconsider (with supporting memorandum).....	143
Transcript of motion hearing.....	150
Notice of right to foreclosure intervention.....	172
Certification of mortgagor noncompliance.....	178
Notice of Appearance.....	181
Certificate of Appellant’s Counsel.....	182

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

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 Appellant.

Appellate Case No. 2012-213309

Appeal From Kershaw County
George C. James, Jr., Circuit Court Judge

Unpublished Opinion No. 2015-UP-091
Heard December 9, 2014 – Filed February 25, 2015

AFFIRMED

Andrew Sims Radeker, of Harrison & Radeker, P.A., of
Columbia, for Appellant.

Sean A. O'Connor, of Finkel Law Firm, LLC, of North
Charleston, for Respondent.

PER CURIAM: Kelly Burr appeals the trial court's dismissal of her defenses and counterclaims in U.S. Bank's foreclosure action. We affirm.

The trial court was correct in dismissing Burr's defenses and counterclaims for mootness. We agree with the trial court that a judgment in her favor would have no practical effect on the controversy. As Burr had been offered the primary relief which she sought, a negotiated loan modification, we agree with the trial court's dismissing her counterclaims and defenses. "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) (omitted quotation marks). Burr sought a modification of her mortgage. U.S. Bank offered a modification and continued to make efforts to work with Burr on her loan modification throughout the litigation.

We also agree with the trial court's dismissing Burr's affirmative defenses. As the trial court looked beyond the pleadings to the loan modification process, we review the court's dismissal of Burr's affirmative defenses as a grant of summary judgment. *See* Rule 12(c), SCRPC ("If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56,"); *Brown v. James*, 389 S.C. 41, 47 n.5, 697 S.E.2d 604, 607 n.5 (Ct. App. 2010) (applying the standard of review for summary judgment and explaining that in considering matters outside of the pleadings, the trial court effectively treated defendant's Rule 12(b)(6), SCRPC, motion to dismiss as a Rule 56, SCRPC, motion for summary judgment); *Gilbert v. Miller*, 356 S.C. 25, 27, 586 S.E.2d 861, 862 (Ct. App. 2003) (holding that when the trial court considers matters outside the pleadings, the motion to dismiss is converted to one for summary judgment). Summary judgment is appropriate if there is "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRPC. Before and after U.S. Bank's foreclosure action, Burr did not provide the documents requested by U.S. Bank, which made U.S. Bank unable to complete the loan modification offered to Burr. Her defenses and counterclaims were reviewed by the trial court, deemed insufficient, and dismissed.

We decline to address Burr's remaining issues because we find the prior issues are dispositive. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating an appellate court need not address remaining issues when disposition of prior issue is dispositive).

AFFIRMED.

HUFF, SHORT, and KONDUROS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas

George C. James, Jr., Circuit Judge

Appellate Case No. 2012-213309
Common Pleas Case No. 2010-CP-28-1197

RECEIVED

MAR 12 2015

SC Court of Appeals

75327

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.....Appellant.

PETITION FOR REHEARING OR REHEARING *EN BANC*
AND MEMORANDUM IN SUPPORT

Appellant, Kelley Burr (hereinafter, sometimes, "Burr"), hereby moves and
petitions, pursuant to Rules 219 and 221(a), SCACR, as well as all other applicable
law, for an order granting rehearing or rehearing *en banc* in this case and submits the
memorandum below in support of the same. Appellant respectfully submits that the
court may have overlooked or misapprehended certain points in this case, as the
following shows:

I. This was not a summary judgment motion.

This court's opinion states that "[a]s the trial court looked beyond the pleadings to the loan modification process, we review the court's dismissal of Burr's affirmative defenses as a grant of summary judgment." U.S. Bank National Assn. v. Burr, Op. No. 2015-UP-091 (S.C. Ct. App. filed Feb. 25, 2015). The lower court, however, did not treat the motion as one for summary judgment. The Respondent (hereinafter "U.S. Bank") agrees. In U.S. Bank's brief in this case, it stated that "U.S. Bank's motion was not considered as a motion for summary judgment[.]" (Final Brief of Respondent p. 12.) Burr never raised any issue about this below or in her briefs in this case, since conversion of U.S. Bank's motion to one for summary judgment was never an issue in this case – it did not happen. U.S. Bank never argued that the motion had been converted to one for summary judgment; hence, Burr never made any argument about that. See I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 418 n. 6, 526 S.E.2d 716 (2000) (appellant may address in reply brief additional sustaining ground arguments made by respondent).

Like Rule 12(b)(6), Rule 12(c), SCRCP, provides that:

If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

The Supreme Court of South Carolina has spoken to how materially identical language in Rule 12(b)(6), SCRCP, is to be interpreted. In Brown v. Leverette, 291 S.C. 364, 367, 353 S.E.2d 697, 699 (1987), the Court ruled that the trial court erred in treating a motion to dismiss as one for summary judgment where "[t]he trial court

gave no notice to the parties that it was going to consider the affidavits and hear the 12(b)(6) motion as a motion for summary judgment.” Twelve years later, the Court cited Brown in stating the following:

We have interpreted this language as meaning “the trial court may treat a 12(b)(6) motion as a motion for summary judgment and consider matters presented outside the pleadings if the parties are afforded a reasonable opportunity to respond to such matters in accordance with Rule 56(c) and (e) of the South Carolina Rules of Civil Procedure. The notice provisions in Rule 56 are incorporated into Rule 12(b)(6).” Brown v. Leverette, 291 S.C. 364, 367, 353 S.E.2d 697, 698-99 (1987); see also Johnson v. Dailey, 318 S.C. 318, 457 S.E.2d 613 (1995). In Brown, we found the trial court had not given notice to the parties that it was going to consider the affidavits and hear the 12(b)(6) motion as a motion for summary judgment. Thus, the supporting affidavits in Brown were improperly considered by the trial court in ruling on the 12(b)(6) motion.

...

... We find that the trial court improperly converted County’s 12(b)(6) motions into summary judgment motions. ...

... the trial court did not give notice to the parties prior to the hearing that it was going to consider affidavits and hear the 12(b)(6) motions as motions for summary judgment. The first indication that County’s 12(b)(6) motions would be converted to summary judgment motions was the trial court’s order of dismissal. Under these facts, the trial court erred in converting County’s 12(b)(6) motions into motions for summary judgment.

Baird v. Charleston Cnty., 333 S.C. 519, 527-28, 511 S.E.2d 69 (1999). The Court noted that “[p]roviding notice” – from the context, plainly meant to refer to notice that the motion would be treated as one for summary judgment – “prior to the hearing is essential under Rule 56(c). . . . However, there is no evidence in this case suggesting Doctors had any notice prior to the hearing, in compliance with Rule 56,

SCRCP, that the trial court would look beyond the pleadings in considering County's 12(b)(6) motions." Id. at 528 n. 6.

The Court has adhered to this principle through time. In 2011, the Court, in discussing this subject, stated that it "recognize[s] that a motion to dismiss may be converted into a motion for summary judgment when the court considers matters outside the pleadings[.]" but, "in order for the conversion to take place, the parties must be afforded a reasonable opportunity to introduce evidentiary matters of their own." Charleston Cnty. Sch. Dist. v. Harrell, 393 S.C. 552, 559 n. 4, 713 S.E.2d 604, 608 n. 4 (2011) (internal quotation marks omitted). Here, Burr was given no such notice, no such opportunity. Nothing would have tipped Burr off that the motion might be treated as one for summary judgment, since nothing that can be used to support a motion for summary judgment was served with U.S. Bank's motion; all that was served with it was an unsworn certification of mortgagor noncompliance signed by U.S. Bank's lawyer. In fact, at *no point* did U.S. Bank ever offer any testimony, by affidavit or otherwise, in support of its motion. (R. pp. 38-47, 52, p. 69 ln. 11-15, p. 71 ln. 23-24, p. 74 ln. 4-5.) It would have been improper for the circuit court to convert U.S. Bank's motion into one for summary judgment. Maybe that is why U.S. Bank acknowledged that its "motion was not considered as a motion for summary judgment[.]" (Final Brief of Respondent p. 12.)

In Brown, the Court rebuked the trial court for its improper procedure in implicitly converting the 12(b)(6) motion into one for summary judgment, stating that "[t]he first indication that the respondents' affidavits would be used to support the 12(b)(6) motion was the trial court's order of dismissal." 291 S.C. at 367. In Baird, the Court issued a similar rebuke, as "[t]he first indication that County's 12(b)(6)

motions would be converted to summary judgment motions was the trial court's order of dismissal." 333 S.C. at 528. In the instant case, the first indication that U.S. Bank's motion would be converted into one for summary judgment was *when this court issued its opinion on appeal*. Even U.S. Bank says that converting its motion to one for summary judgment was something the circuit court did *not* do. (Final Brief of Respondent p. 12.)

It is dubious to say that U.S. Bank's motion was really one for judgment on the pleadings, anyway. While U.S. Bank dropped a citation to Rule 12(c) into its written motion, a look at the text of the motion reveals plainly that U.S. Bank's contention was that Burr's defenses should be stricken and her counterclaims dismissed under Rule 41(b), SCRCF, for failure to prosecute. (R. pp. 32-48.) U.S. Bank's counsel focused argument at the hearing on its contention that Burr had failed to prosecute her counterclaims by failing to respond to overtures to engage in foreclosure intervention. (R. p. 60 ln. 10 – p. 67 ln. 25, p. 73 ln. 9 – p. 74 ln. 3, p. 74 ln. 22 – p. 75 ln. 4.) U.S. Bank's counsel's only argument with regard to Rule 12(c), SCRCF, was that Burr's counterclaims were moot because U.S. Bank offered her a modification. (R. p. 65 ln. 1-5, p. 67 ln. 10-16.) That was something U.S. Bank never pled; thus, it is hard to imagine how that could be the subject of a motion for judgment on the pleadings. (R. pp. 23-30.) It was also something U.S. Bank never offered any *factual material* to support. (R. pp. 38-47, 52, p. 69 ln. 11-15, p. 71 ln. 23-24, p. 74 ln. 4-5.) Burr could not possibly have been on notice that anyone would consider this motion one for summary judgment.

Rule 220(c), SCACR, provides that this court "may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal." It

does not, however, permit this court to affirm on a ground that does *not* appear in the record on appeal. Nothing in the record in this case shows a conversion of U.S. Bank's motion to a summary judgment motion. Indeed, the position of *U.S. Bank* – the *Respondent* – is that no conversion to a summary judgment motion occurred. (Final Brief of Respondent p. 12.)

Appellant respectfully submits that this court overlooked or misapprehended that no conversion of U.S. Bank's motion to a summary judgment motion occurred. To affirm on this basis was error.

II. If this had been a summary judgment motion, U.S. Bank could not have prevailed on it.

Even if U.S. Bank's motion had been for summary judgment, it could not have prevailed on the record (or lack thereof) that was before the circuit court. Accordingly, even if this court still believes that U.S. Bank's motion was converted to one for summary judgment, reversal is required.

Facts presented to the court for consideration in support of or opposition to a motion for summary judgment must be admissible evidence, with the caveat that affidavits are used in place of what would be live testimony at a trial. See Dawkins v. Fields, 354 S.C. 58, 67-68, 580 S.E.2d 433, 438 (2003); Saro v. Ocean Holiday Partnership, 314 S.C. 116, 121, 441 S.E.2d 835, 838 (Ct. App. 1994). Rule 56 notes this itself; summary judgment shall be granted “if the *pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any*, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Rule 56(c), SCRPC (emphasis added).

It is only “*when a motion for summary judgment is made and supported as provided in this rule*” that the non-movant is required to meet the motion with factual

material that shows there is a genuine issue for trial. Rule 56(e), SCRCF (emphasis added). Under Rule 56, SCRCF, “the party seeking summary judgment has the initial responsibility of demonstrating the absence of any genuine issue of material fact.” Baughman v. American Telephone & Telegraph Co., 306 S.C. 101, 115, 410 S.E.2d 537, 545-46 (1991). “The party seeking summary judgment has the burden of clearly establishing *by the record properly before the court* the absence of a triable issue of fact.” Owens v. Magill, 308 S.C. 556, 562, 419 S.E.2d 786, 790 (1992) (emphasis added). “A party who fails to show the absence of genuine issue of material fact is not entitled to summary judgment even though his adversary does not come forward with opposing materials.” Standard Fire v. Marine Contracting, 301 S.C. 418, 421, 392 S.E.2d 460, 462 (1990).

Arguments of counsel are not evidence. Trivelas v. S.C. Dept. of Transportation, 348 S.C. 125, 141, 558 S.E.2d 271, 279 (Ct. App. 2001); Higgins v. MUSC, 326 S.C. 592, 599 S.E.2d 269, 272 (Ct. App. 1997); Historic Charleston Foundation v. Krawcheck, 313 S.C. 500, 508 n. 7, 443 S.E.2d 401, 406 n. 7 (Ct. App. 1994); Gilmore v. Ivey, 290 S.C. 53, 58, 348 S.E.2d 180, 183 (Ct. App. 1986). Arguments of counsel were all that supported U.S. Bank’s motion. (R. pp. 32-47, p. 71 ln. 21 – p. 72 ln. 7.) No testimony, by affidavit or otherwise, was served with or ever offered in support of the motion. (R. pp. 38-47, 52, p. 69 ln. 11-15, p. 71 ln. 23-24, p. 74 ln. 4-5.)

In its order, the circuit court made findings of fact solely on the basis of the unsworn contentions of U.S. Bank’s counsel, which the circuit court apparently accepted as established, proven truths. (R. pp. 1-4.) This was error. Id. In fact, there was no cognizable evidence before the court tending to establish that anything U.S.

Bank contended was true actually was, except for the dates of service and filing of the notice of right to foreclosure intervention and the certification of mortgagor noncompliance. (R. pp. 78-86.) A certification of mortgagor noncompliance under In re: Mortgage Foreclosure Actions, 396 S.C. 209, 210, 720 S.E.2d 908 (2011) (South Carolina Supreme Court Administrative Order 2011-05-02-01) – an unsworn document – is not cognizable evidence at summary judgment of anything it states. See Rule 56(c), SCRPC. This is further supported by the Supreme Court’s administrative order itself, 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.” In re: Mortgage Foreclosure Actions, 396 S.C. at 213. A foreclosure plaintiff’s lawyer’s certification of mortgagor noncompliance is not the kind of document a court may consider on a motion for summary judgment brought by that foreclosure plaintiff. See Rule 56(c), SCRPC; Dawkins, 354 S.C. at 67-68; Trivelas, 348 S.C. at 141; Higgins, 599 S.E.2d at 272; Saro, 314 S.C. at 121; Historic Charleston Foundation, 313 S.C. at 508 n. 7; Gilmore, 290 S.C. at 58.

Rule 12(c)’s provision that “[i]f, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment” does not mean that if *any documents* other than the pleadings are offered to the court, the court should consider them as though they were properly cognizable for summary judgment purposes, regardless of whether they actually are. The rule that the evidence offered at summary judgment must be what would be admissible at trial still applies. See Dawkins, 354 S.C. at 67-68; Saro, 314 S.C. at 121. U.S. Bank did not offer any such

evidence here. Burr pointed out to the circuit court that U.S. Bank had presented no affidavit or other cognizable factual material to the court. (R. p. 69 ln. 11-15.)

Appellant respectfully submits that this court overlooked or misapprehended that summary judgment would not have been proper on this record even if U.S. Bank's motion had been converted into one for summary judgment.

III. U.S. Bank neither pled nor proved mootness.

A case is nonjusticiable for mootness where, if the party prevails, it has become impossible for the court to grant him any "effectual relief" that would have "practical legal effect upon the existing controversy." Curtis v. State, 345 S.C. 557, 567, 549 S.E.2d 591, 596 (2001) (internal quotation marks omitted). "In general a case becomes moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." U.S. v. (Under Seal), 819 F.2d 1139 (4th Cir. 1987) (internal quotation marks omitted) (quoting Leonard v. Hammond, 804 F.2d 838, 842 (4th Cir. 1986)). Usually, a determination of mootness is necessarily a factual determination. Cf. id. U.S. Bank did not show that Burr's counterclaims are moot.

U.S. Bank never established that the court could afford Burr no practical relief as to the controversy subject of her counterclaims and defenses. (R. p. 53, p. 71 ln. 21 – p. 72 ln. 7.) U.S. Bank never put the documents showing the terms of the modification it proposed to Burr (or claimed it proposed to her) in the record. Nothing before the court showed that any modification U.S. Bank offered complied with applicable HAMP directives or other standards, nor was there anything before the court tending to show whether the terms of the proposed modification were the same as, better than, or worse for Burr than what she was promised. (R. p. 53.) For

example, U.S. Bank never put anything into the record showing whether its proposed modification contemplated an increase in the amount of principal to recast fees and costs related to the foreclosure action as part of the loan's modified principal. Burr pled that U.S. Bank had promised her a modification and then reneged on that promise, which could not be made moot simply by U.S. Bank later offering Burr a modification. (R. pp. 16-17, 53, p. 71 ln. 21 – p. 72 ln. 7.) Burr did not solely seek a modification as the relief to be granted on her claims; she also sought an award of damages. (R. pp. 18, 19-20, 21, 53.) U.S. Bank adduced no evidence at all to the effect that the court could afford Burr no practical relief as to the existing controversy between the parties. (R. p. 53.)

U.S. Bank made no factual showing about whether a modification was offered to Burr, what its terms were, whether those terms were better or worse than what U.S. Bank had promised her before, or anything about it at all. Nonetheless, the circuit court found that this had happened and that it made Burr's claims moot. (R. pp. 3-4.) Even if, however, there were a sufficient showing in the record that U.S. Bank had offered Burr a modification, that would not be tantamount to a showing that something has happened to make it so that Burr has sustained no damages as a result of U.S. Bank breaking its promise to modify her loan, and *that* is what U.S. Bank would have had to prove in order for Burr's claims seeking damages to be moot. See id. That did not happen. The circuit court's ruling that Burr's counterclaims are moot was reversible error, both because it is based on unsupported factual conclusions and because it is controlled by an error of law concerning what mootness is.

Frankly stated, this court's opinion on this point is directly at odds with the law. The court writes that Burr's counterclaims and defenses were moot because "Burr had been offered the primary relief which she sought, a negotiated loan modification," but mootness does not depend on whether a court can afford a party the *primary* relief she seeks. Mootness depends on whether the occurrence of some event has made it *impossible* for a court to afford the party *any* effectual relief. Curtis, 345 S.C. at 567.

Appellant respectfully submits that this court overlooked or misapprehended what it is that U.S. Bank would have had to show in order for a determination that Burr's defenses and counterclaims were moot to be proper.

IV. The court's analysis does not hew to any rule that permits the dismissal of any claim or the striking of any defense.

This court's opinion states that Burr's "defenses and counterclaims were reviewed by the trial court, deemed insufficient, and dismissed." *Exactly*. That is exactly the point of this appeal. That is exactly the problem with the circuit court's order. A court is not permitted to simply "review" a party's defenses or claims, according to no rule or precedent's analytical framework, and then dismiss them. Such is quietly among the worst of what the judiciary has ever done, because to do so is to abandon the principle of the rule of law. What should govern in our courts ought to be our rules of court, not arbitrary, *ad hoc* decisionmaking. See Rule 1, SCRCPP ("[t]hese rules govern the procedure in all South Carolina courts in all suits of a civil nature"). The "review" conducted by the circuit court was not according to any rule or recognized process. "The law recognizes two kinds of errors: trial errors and structural defects. The former are subject to 'harmless error' analysis while the latter are not. . . . [S]tructural defects in the constitution of the trial mechanism defy

analysis by harmless error standards.” LaSalle Bank Nat’l. Ass’n. v. Davidson, 386 S.C. 276, 280, 688 S.E.2d 121, 123 (2009) (internal quotation marks omitted). Structural defects are errors in the very way that the process of deciding the issue is set up. Id. When a proceeding is structurally defective, nothing but reversal can cure such a defect. See id.

As discussed above, the rubric of summary judgment does not countenance the circuit court’s ruling in this case. As discussed in Burr’s briefs, no failure to prosecute – the circuit court’s stated basis for its ruling – occurred here. Burr notes that this court did not say that one did. Also as discussed in Burr’s briefs, the pleadings in this case could not have afforded the court with a basis to render a judgment on the pleadings. The circuit court did what a court is never permitted to do: end a party’s claims and defenses solely on the basis of unsupported and unsworn contentions of fact made by the other party’s lawyer. See Trivelas, 348 S.C. at 141; Higgins, 599 S.E.2d at 272; Saro, 314 S.C. at 121; Historic Charleston Foundation, 313 S.C. at 508 n. 7; Gilmore, 290 S.C. at 58.

This court affirmed that. There is a problem with that.

Appellant respectfully submits that this court overlooked or misapprehended that neither the circuit court’s analysis in reaching its decision nor this court’s analysis in affirming that decision square with any rule that permits the dismissal of any claim or the striking of any defense.

V. Rehearing or rehearing *en banc* is warranted. This is a case of first impression about the Administrative Order, and this opinion represents a departure from precedent of this court and the Supreme Court.

An *en banc* rehearing “ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its

decisions, or (2) when the proceeding involves a question of exceptional importance.” Rule 219(a), SCACR. “[W]hile Rule 219 lists certain grounds on which rehearing *en banc* may be granted, it provides only that rehearing *en banc* ‘ordinarily will not be ordered’ except upon the listed grounds. Rule 219, SCACR (2007) (emphasis added). The Court of Appeals has discretion as to whether or not to accept rehearing[.]” Williamson v. Middleton, 383 S.C. 490, 494, 681 S.E.2d 867, 869 (2009).

This is an appropriate case for *en banc* rehearing. For one thing, this decision is inconsistent with other decisions of this court regarding conversion of motions directed at pleadings into motions for summary judgment, as well as Supreme Court decisions, as discussed above. Martin v. Companion HealthCare Corp., 357 S.C. 570, 593 S.E.2d 624 (Ct. App. 2004); Pitts v. Jackson Nat. Life Ins. Co., 352 S.C. 319, 574 S.E.2d 502 (Ct. App. 2002); Higgins v. MUSC, 326 S.C. 592, 486 S.E.2d 269 (Ct. App. 1997).

For another, this case involves a question of exceptional importance. Whether a court is permitted to dismiss or strike a foreclosure defendant’s claims and defenses for failure to participate in the foreclosure intervention process – as a judgment on the pleadings, dismissal for failure to prosecute, or anything else – is a question of first impression in this state, as well as being utterly at odds with the Supreme Court’s administrative order governing foreclosures, as discussed in Burr’s briefs. The operative Supreme Court administrative order provides that what is to happen in such circumstances is just for the foreclosure action to proceed, not for a mortgagor defendant’s claims to be dismissed and her defenses stricken. In re: Mortgage Foreclosure Actions, 396 S.C. at 212.

VI. Burr points the court to her briefs in this case.

In addition to the matters discussed above, Burr incorporates into this petition as if here set forth verbatim her final briefs in this case.

WHEREFORE Appellant prays for an order granting rehearing or rehearing *en banc* in this case.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Andrew S. Radeker', is written over a horizontal line.

Andrew S. Radeker
Harrison & Radeker, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
Attorney for Appellant

March 12, 2015

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas
George C. James, Jr., Circuit Judge

RECEIVED

MAR 12 2015

SC Court of Appeals

Appellate Case No. 2012-213309
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.....Appellant.

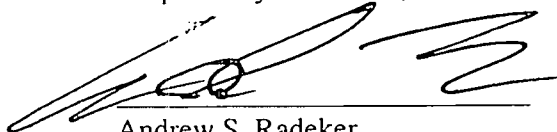
PROOF OF SERVICE

I certify that I served the foregoing petition for rehearing or rehearing *en banc*
and memorandum in support by depositing a copy of it on the date shown below in
the United States Mail, postage prepaid, addressed as follows:

Sean A. O'Connor, Esq.
Finkel Law Firm, LLC
P.O. Box 41489
Charleston, SC 29423

March 12, 2015

Respectfully submitted,



Andrew S. Radeker
Harrison & Radeker, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
Attorney for Appellant



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1220 SENATE STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

May 21, 2015

Mr. Andrew Sims Radeker, Esquire
PO Box 50143
Columbia SC 29250

Re: U.S. Bank v. Kelley Burr
Appellate Case No. 2012-213309

Dear Counsel:

This will acknowledge receipt of your Petition for Rehearing and Petition for Rehearing En Banc.

By copy of this letter, opposing counsel is requested to file an original return to this motion no later than ten (10) days from the date of this letter.

Very truly yours,

V. Claire Allen, Deputy

CLERK

cc: Sean A. O'Connor, Esquire

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas
George C. James, Jr., Circuit Judge

Appellate Case No. 2012-213309
Common Pleas Case No.: 2010-CP-28-01197

RECEIVED
JUN 04 2015
SC Court of Appeals

US 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.

Kelly Burr, FIA Card Services, N.A., Discovery
Bank, Issuer of the Discover Card, Unifund CCR
Partners, Defendants,

Of Whom Kelley Burr is Appellant.

RETURN TO PETITION FOR REHEARING EN BANC

Sean A. O'Connor (SC Bar No.: 68382)
FINKEL LAW FIRM LLC
4000 Faber Place Drive | Suite 450
North Charleston, South Carolina 29405
843-577-5460
soconnor@finkellaw.com
Attorney for Respondents

June 1, 2015

ARGUMENT

- I. Any error the court of appeals may have committed in treating U.S. Bank's motion as a motion for summary judgment was harmless because there were other valid grounds upon which to affirm the trial court.**

Appellant contends that the court of appeals erred in treating the circuit court's dismissal of Burr's affirmative defenses as a grant of summary judgment. Petition for Rehearing at 2; U.S. Bank National Assn. v. Burr, Op. No. 2015-UP-091 (S.C. Ct. App., filed Feb. 25, 2015). Rule 12(c), SCRCP, provides that "[i]f, on motion for judgment on the pleadings, matters outside the pleadings are presented... the motion shall be treated as one for summary judgment...." Rule 12(c), SCRCP. U.S. Bank does not dispute Appellant's contention that it was not necessary or correct for the subject motion to have been treated as a motion for summary judgment, as the circuit court apparently only examined the Certification of Mortgagor Noncompliance, which was attached to the pleadings, and not other facts outside the pleadings. Petition for Rehearing at 4. A copy of a document which is an exhibit to a pleading is part of the pleading for all purposes if a copy is attached to such a pleading. Rule 10(c), SCRCP; Brazell v. Windsor, 384 S.C. 512, 516, 682 S.E.2d 824, 826 (2009). Brazell held that a motion under Rule 12(b)(6), SCRCP, was not converted into a motion for summary judgment where the trial court considered a document attached to and incorporated by reference into the complaint. Brazell, 384 S.C. at 516, 682 S.E.2d at 826. However, if the court of appeals' conversion of the motion was error, it was harmless because there were other valid grounds to support this court's decision to affirm the circuit court's granting of U.S. Bank's motion to dismiss and strike, including that Appellant's counterclaim was moot and that the trial court did correctly find and rule that Appellant had failed to prosecute her counterclaim.

Judgment will not be reversed for insubstantial errors not affecting the result. Jensen v. Conrad, 355 S.E.2d 291, 293, 292 S.C. 169 (Ct. App. 1987). "Alleged errors which the record conclusively shows could not have affected the decision and judgment work no prejudice and constitute no ground for reversal." Banister v. Lollis, 190 S.E. 511, 513, 183 S.C. 218 (1937). Any inaccuracy in the court's statement of a party's position is of no consequence where the court would have been required to reach the same result had the court stated appellant's position correctly. Beard v. South Carolina Tax Comm'n, 230 S.C. 357, 95 S.E.2d 628, 636 (1956). When, on consideration of the whole record, the judgment is plainly right, the court will not reverse for errors of law which did not affect the merits. Lowe v. Mills, 77 S.E. 135, 137, 93 S.C. 420 (1913).

As explained further below, given the other valid bases to affirm, the decision to convert the motion to a Rule 56 motion, if determined to be erroneous, could not have affected the decision, and did not prejudice Appellant, thus it constitutes no grounds for reversal. This court should not reverse its opinion based upon an error of law which did not affect the merits.

For these reasons, Appellant's counterclaims and defenses were properly dismissed and struck and the Petition for Rehearing should be denied.

II. U.S. Bank was not required to plead or prove mootness for the circuit court to dismiss Defendant's counterclaims on that grounds.

The basis for the circuit court's dismissal under Rules 12(c) and 12(f) was mootness. A lack of a justiciable controversy means that any moot claims are insufficient as a matter of law. Holden v. Cribb, 349 S.C. 132, 135, 137-138, 561 S.E.2d 634, 636-38 (Ct. App. 2002). Justiciability, whether the litigation presents an active case or controversy, is a threshold inquiry for any court. Id., 349 S.C. 132, 137, 561 S.E.2d at 637, quoting Lennon v. S.C. Coastal Council, 330 S.C. 414, 415, 498 S.E.2d 861, 864 (1996). The concept of justiciability encompasses

ripeness, mootness, and standing. Id. (citing Jackson v. State, 331 S.C. 486, 490 n.2, 489 S.E.2d 915, 917 n.2 (1997)). “A case becomes moot when judgment, if rendered, will have no practical effect upon [an] existing controversy.” Id. at 137–38, 561 S.E.2d at 637 (quoting Seabrook v. City of Folly Beach, 337 S.C. 304, 306, 523 S.E.2d 462, 463 (1999)) (alteration in original).

U.S. Bank was not required to plead mootness as a defense or argue that the pleadings failed to state a claim for that reason, because mootness, as a threshold issue, may be raised *sua sponte*. See Eagle Container Co., LLC v. Cnty. of Newberry, 366 S.C. 611, 634, 622 S.E.2d 733, 745 (Ct. App. 2005), rev’d on other grounds, 379 S.C. 564, 666 S.E.2d 892 (2008) (holding ripeness may be raised *sua sponte*); Carolina Alliance for Fair Employment v. South Carolina Dep’t of Labor, Licensing, & Regulation, 337 S.C. 476, 485, 523 S.E.2d 795, 800 (Ct. App. 1999). Additionally, U.S. Bank’s answer asserted failure to state a claim under Rule 12(b)(6) as a defense. (R. p. 25.)

There are three exceptions to the mootness doctrine: (1) if the issue is capable of repetition but evading review; (2) to “decide questions of imperative and manifest urgency to establish a rule of future conduct in matters of important public interest” and (3) “if the trial court’s decision may affect future events or have collateral consequences for the parties.” Id. at 138, 561 S.E.2d at 637–38. (quoting Curtis v. State, 345 S.C. 557, 568, 549 S.E.2d 591, 596 (2001)). However, all authority dealing with exceptions to mootness is in the context of a moot appeal and whether the appellate court can take jurisdiction, not the trial court’s jurisdiction. See Id.; Byrd v. Irmo High Sch., 321 S.C. 426, 430–32, 468 S.E.2d 861, 864 (1996); Darden v. S.C. Dep’t of Highways & Pub. Trans., 291 S.C. 270, 353 S.E.2d 279 (1987).

Here, all of Appellant’s counterclaims are premised on U.S. Bank’s failure to offer her a “reconsideration of her payment amounts.” (R. pp. 17-18, 21.) U.S. Bank has offered Appellant

this opportunity, not only through the foreclosure intervention process mandated by the 2011 Administrative Order, but also prior to the institution of this action through HAMP. (See R. p. 17, p. 66 ln. 23-25, p. 69 ln. 20 – p. 70 ln. 15, p. 84-85.) Appellant claims there is no evidence in the record that U.S. Bank offered her a modification opportunity which complied with the 2011 Administrative order and HAMP. Petition for Rehearing at 9. That allegation is unsubstantiated and is simply incorrect. In fact, the fact that Appellant was offered such an opportunity was acknowledged and conceded by her counsel at the motion hearing. (R. p. 70 ln. 13-15.) Accordingly, any order from the circuit court preserving Appellant's counterclaims would have no practical effect.

None of the mootness exceptions apply because Appellant's claim of mootness goes to the justiciability of the initial action, not this appeal, which is also moot for the same reasons. While the failure of a loan servicer to consider a borrower for foreclosure intervention is capable of repetition, Appellant has not shown how this question usually becomes moot before it can be reviewed by the courts. See Byrd, 321 S.C. at 431–32, 468 S.E.2d at 864. Appellant's claims do not implicate any imperative or urgent questions, as the stay imposed by the mandatory foreclosure intervention program under the 2011 Administrative Order prevents a plaintiff from proceeding with foreclosure without offering a borrower the opportunity to be considered for foreclosure intervention. See In re Mortgage Foreclosure Actions, 396 S.C. at 211–13, 720 S.E.2d at 909. Additionally, the third exception, having collateral consequences for the parties, is not implicated because Appellant has already received exactly what she sought – an offer for loan modification. Though Appellant also asks for damages, any damages, according to her counterclaim, would arise from a failure to offer her a loan modification, yet clearly no such failure occurred. Therefore, U.S. Bank was not required to raise the issue of mootness for the

circuit court to correctly dismiss Appellant's counterclaims for mootness.

For these reasons, Appellant's counterclaims and defenses were properly dismissed and struck and the Petition for Rehearing should be denied.

III. The court of appeals properly affirmed the circuit court's granting of U.S. Bank's motion to dismiss and strike, as the court correctly held that Appellant failed to prosecute her counterclaim.

In addition to mootness, any error by the court of appeals in treating the subject motion by U.S. Bank as a motion for summary judgment would be harmless also because Appellant has failed to prosecute her counterclaims. An action may be dismissed for failure to prosecute either pursuant to Rule 41(b), or *sua sponte* by the trial court as part of its inherent power to manage its own affairs. Rule 41(b), SCRCP; Crestwood Golf Club, Inc. v. Potter, 328 S.C. 201, 211–12, 493 S.E.2d 826, 832 (1997) (citing Small v. Mungo, 254 S.C. 438, 442, 172 S.E.2d 802, 803 (1970) (“[I]t is within the inherent power of the court to dismiss an action for failure to prosecute”); 24 Am.Jur.2d Dismissal, Discontinuance and Nonsuit 48 (1983) (“Such power is deemed to be necessarily vested in trial courts to manage their own affairs so as to achieve orderly and expeditious disposition of cases.”)). Rule 41(b), SCRCP, governs dismissals for failure to prosecute and states that a party may move for dismissal of an action “[f]or failure of the plaintiff to prosecute or to comply with these rules or *any* order of court.” Id. (emphasis added). This also applies to counterclaims, cross-claims and third party claims. Crestwood Golf Club, 328 S.C. at 211, 493 S.E.2d at 832. A single instance of nonfeasance may be sufficient ground for dismissal for failure to prosecute. McComas, 368 S.C. at 74, 626 S.E.2d at 910 (Anderson, J., dissenting) (citing Joyner v. Glimcher Props., 356 S.C. 460, 589 S.E.2d 762 (2002)). Moreover, Rule 41(b) does not explicitly require unreasonable neglect for dismissal to be proper. Id. at 75, 626 S.E.2d at 910.

The Foreclosure Intervention process established by the 2011 Administrative Order is not merely voluntary “settlement negotiations,” as Appellant contends. Appellant’s Initial Brief at 13–14. Rather, the foreclosure intervention required by the Administrative Order is a mandatory “process to ensure that lenders and eligible homeowners have an opportunity for meaningful discussion about possible settlement options.” South Carolina Judicial Dep’t, Frequently Asked Questions (FAQ) in South Carolina Master-in-Equity Court, South Carolina Judicial Dep’t. 9–10 (2011), <http://www.sccourts.org/selfhelp/FAQMIE.pdf> (2011). This process was imposed to reduce the workload on courts and reduce the number of unresolved foreclosure actions. In re Mortgage Foreclosure Actions, 396 S.C. at 210, 720 S.E.2d at 905. As such, it is more analogous to mediation proceedings in counties that mandate alternative dispute resolution prior to trial. See Hopkins v. Harrell, 352 S.C. 517, 574 S.E.2d 747 (Ct. App. 2002) (affirming dismissal for failure to participate in mandatory mediation). A party is deemed to be bound by the acts of his attorney-agent and is considered to have notice of all facts for which notice can be charged to his attorney. Link v. Wabash R. Co., 370 U.S. 626, 634, 82 S. Ct. 1386 (1962) (affirming court’s *sua sponte* dismissal for failure to prosecute where attorney failed to attend a pretrial conference).

Here, the foreclosure intervention process is judicially mandated and failure to participate in it is analogous to failing to participate in mandatory mediation. Appellant’s counsel was aware of the communications from U.S. Bank regarding this process. (R. p. 68 ln. 6-14); Under Link, this is imputed to Appellant, as Appellant’s counsel conceded at the hearing. (R. p. 70 ln 3-10). Thus, the circuit court had the inherent power to dismiss Appellant’s counterclaims for failure to prosecute for failing to participate in the judicially mandated foreclosure intervention process, and doing so was not an abuse of discretion.

In McComas v. Ross, South Carolina adopted the four factor analysis used by the Fourth Circuit for dismissals under Rule 41(b). McComas, 368 S.C. at 63, 626 S.E.2d at 904. The Fourth Circuit has stated that there are four factors which should be considered in determining whether a dismissal was proper under Rule 41(b). McCargo v. Hedrick, 545 F.2d 393, 396 (4th Cir. 1976); McComas, 368 S.C. at 63, 626 S.E.2d at 904. First, the reviewing court must consider the plaintiff's degree of personal responsibility. McComas, 368 S.C. at 63; 626 S.E.2d at 904 (citing Hillig v. Comm'r of Internal Revenue, 916 F.2d 171, 174 (4th Cir. 1990)) (applying the four Fourth Circuit factors). Second, the court should consider the amount of prejudice caused to the defendant by the delay. McCargo, 545 F.2d at 396. Third, whether "the record indicate[s] a drawn out history of deliberately proceeding in a dilatory fashion." Id. (quoting Reizakis v. Loy, 490 F.2d 1132, 1135 (4th Cir. 1076)). Finally, the court should determine if the trial court considered less drastic sanctions than dismissal. McCargo, 545 F.2d at 396 (quoting Reizakis).

The circuit court considered each factor from McComas in issuing its decision, and addressed them directly in its Oct. 1 Order. That the circuit court considered each factor shows that the court did not abuse its discretion since the discussion of each factor includes supporting facts and the use of the McComas factors is not an error of law. Here, Appellant's defenses and counterclaims are based on a series of allegations regarding U.S. Bank's alleged failure to offer her a loan modification or allow her to participate in HAMP. (R. pp. 32-33). The circuit court explicitly found that in advancing her counterclaim which sought a modification, Appellant had a duty to submit her information for review and to comply with the 2011 Administrative Order. (R. p. 2); In re Mortgage Foreclosure Actions, 396 S.C. 209, 720 S.E.2d 908 (2011). Appellant's answer and counterclaim admits that she failed to submit all necessary information for review

(R. p. 17) and this failure to provide information has continued. (See R. pp. 33, 84).

The failure to provide these documents derives directly from Appellant, not from any failure on the part of her counsel. (R. p. 61 ln. 11-25). Moreover, by failing to provide documentation after electing to participate in foreclosure intervention under the 2011 Administrative Order, Appellant violated a court order. In re Mortgage Foreclosure Actions, 396 S.C. at 212, 720 S.E.2d at 909. This is sufficient for dismissal under Rule 41(b), SCRCP. See Therens v. Faircloth, 291 S.C. 451, 354 S.E.2d 54 (Ct. App. 1987) (affirming circuit court's dismissal for defendant's failure to comply with United States District Court order).

Contrary to Appellant's contentions, the rule's statement of "failure to comply with any court order" is not limited to orders from the trial court. The plain meaning of "any" refers to all applicable court orders, regardless of the issuing court. As it is undisputed that this action is subject to the requirements of the 2011 Administrative Order, which imposes obligations on both parties, failure to comply with this order falls squarely within the type of discretionary dismissals contemplated by Rule 41(b), SCRCP. Appellant also incorrectly asserts that dismissal is not an available remedy for failure to comply with the 2011 Administrative Order, when in fact dismissal is authorized, as are any other sanctions that are within the court's discretion. In Re Mortgage Foreclosure Actions, 396 S.C. at 214, 720 S.E.2d at 910 ("In the event the Court determines that any party to the foreclosure action, or their acting agent, has failed to comply with the terms of this order, or has not attempted to reach an agreement for foreclosure intervention in good faith, the Court may, in its discretion, impose such sanctions as it determines to be reasonable and just under the circumstances....").

Similar to the case of Georganne Apparel, Inc. v. Todd, 303 S.C. 87, 399 S.E.2d 16 (Ct. App. 1990) (court upheld dismissal for failure to prosecute and found prejudice to defendant

where action had been filed 2½ years prior and the defendants had incurred \$65,000.00 in legal fees to various firms). Id. at 90, 399 S.E.2d at 18, 18 n.*. Here the circuit court correctly found that U.S. Bank has suffered prejudice by this delay, as it expended time and expense in attempts to respond to Appellant's demands for modification, followed up with her regarding modification, and sought documentation from Appellant and her counsel in order to comply with the 2011 Administrative Order (R. p. 2.). Additionally, U.S. Bank suffered prejudice in the delay in proceeding with its foreclosure claim. Finally, the Court noted that the subject property is physically deteriorating. (R. p. 66.) These circumstances are comparable to that of Georganne Apparel, and are sufficient for a conclusion that U.S. Bank has suffered prejudice by the delay.

As to the third factor, the circuit court correctly found that Appellant's history of proceeding in a dilatory fashion was shown by the events listed in the Certification of Mortgagor Noncompliance and in the motion that is the subject of this appeal. (R. p. 2.) Additional support for this finding is derived from Appellant's own Answer, which admits that some documents required by U.S. Bank were not submitted (R. p. 17) and from Appellant's failure to undertake any discovery on her counterclaims. (R. p. 66.) As twenty-two months had passed since the institution of this action at the time the motion was heard, the court could conclude that this was the result of conscious or willful failure or refusal by Appellant to proceed on her counterclaims, which were not stayed by the 2011 Administrative Order. (See R. p. 70 ln. 22 – p. 71 ln. 20) (noting that the foreclosure could not proceed on the merits prior to the Certification of Noncompliance, but that this did not stay the counterclaims). The Certification of Mortgagor Noncompliance was filed with the court, becoming part of the record. (R. pp 84-85.) Moreover, Appellant's answer, also a part of the record, admits to failing to provide documentation. (R. p. 17.)

In regard to the fourth factor requiring the trial court's consideration of alternative sanctions, it is stated explicitly in the Oct. 1 Order that the court considered "another court order directing compliance" with the requirements of the loan modification process. The court concluded, however, that such an order "would provide no incentive for Burr to act." (R. p. 2.) This consideration was sufficient to satisfy the requirement that the court consider sanctions other than dismissal. McComas requires only that the trial court consider alternative sanctions, not that it must attempt them before proceeding with dismissal.

Finally, Appellant confuses the court's inherent power to dismiss claims for failure to prosecute and the procedural process available under Rule 41(b). Crestwood Golf Club, Inc. v. Potter, 328 S.C. 201, 211, 493 S.E.2d 826, 832 (1997). The court's authority to order dismissals *sua sponte* does not require analysis under the four McComas factors. See Id. Therefore, it was not an error of law to conclude that the four McComas factors were satisfied, and the grant of dismissal under Rule 41(b) was not an abuse of discretion.

For these and all the foregoing reasons, Appellant's counterclaims and defenses were properly dismissed and struck and the Petition for Rehearing should be denied.

Respectfully submitted,



Sean A. O'Connor (SC Bar No.: 68382)

FINKEL LAW FIRM LLC

4000 Faber Place Drive | Suite 450

North Charleston, South Carolina 29405

843-577-5460

soconnor@finkellaw.com

Attorney for Respondents

June 1, 2015

The South Carolina Court of Appeals

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 Appellant.

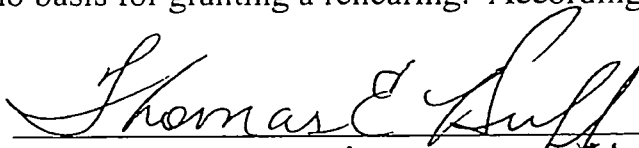
Appellate Case No. 2012-213309

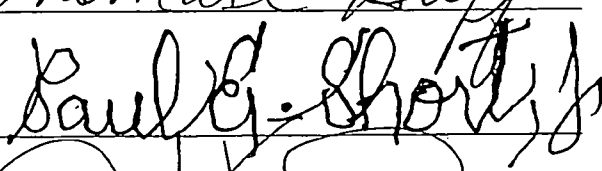
ORDER

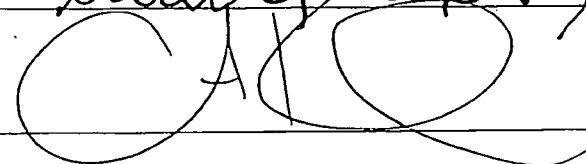
After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

FILED

June 18, 2015



J.


J.


J.

Columbia, South Carolina

cc:

Andrew Sims Radeker, Esquire

Sean A. O'Connor, Esquire



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1220 SENATE STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

June 23, 2015

Mr. Andrew Sims Radeker, Esquire
PO Box 50143
Columbia SC 29250

Mr. Sean A. O'Connor, Esquire
4000 Faber Place Drive
Suite 450
North Charleston SC 29405-8578

Re: U.S. Bank v. Kelley Burr
Appellate Case No. 2012-213309

Dear Counsel:

Enclosed is a copy of an order of the panel denying your petition for rehearing. Your petition for rehearing en banc was distributed to the judges, but it has been rejected. *See* Rule 219, SCACR.

The time for filing a petition for writ of certiorari will be calculated from the date of this letter.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Jenny A. Kitchings".

CLERK

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas

George C. James, Jr., Circuit Judge

Appellate Case No. 2012-213309
Common Pleas Case No. 2010-CP-28-1197

RECEIVED
OCT 17 2013

SC Court of Appeals

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.....Appellant.

FINAL BRIEF OF APPELLANT

Andrew S. Radeker
Harrison & Radeker, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
Attorney for Appellant

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas

George C. James, Jr., Circuit Judge

Appellate Case No. 2012-213309
Common Pleas Case No. 2010-CP-28-1197

RECEIVED

OCT 17 2013

SC Court of Appeals

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.....Appellant.

FINAL BRIEF OF APPELLANT

Andrew S. Radeker
Harrison & Radeker, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
Attorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF ISSUES	1
STATEMENT OF THE CASE	2
STATEMENT OF THE FACTS	7
STANDARD OF REVIEW	9
ARGUMENT	11
I. Since Burr did not do anything that amounted to a failure to prosecute, the circuit court erred in dismissing her counterclaims and striking her affirmative defenses for an ostensible failure to prosecute.	11
II. As U.S. Bank’s motion to dismiss and strike was not supported by an affidavit or other cognizable evidence, the circuit court erred in dismissing Burr’s counterclaims and striking her affirmative defenses on the basis of the mere contentions of U.S. Bank’s counsel.	16
III. The circuit court erred in dismissing Burr’s counterclaims for mootness where U.S. Bank did not show that a judgment on the merits of those claims would have no practical effect upon the controversy between the parties.	18
IV. The circuit court erred in dismissing Burr’s counterclaims and striking her affirmative defenses on the basis of Rules 12(c) and 12(f), SCRPC, where U.S. Bank advanced no argument that a ruling in its favor was proper under the standard applicable to those rules and neither rule provided for such a ruling here.	19
CONCLUSION	20

TABLE OF AUTHORITIES

CASES

<u>Baird v. Charleston County,</u> 333 S.C. 519, 511 S.E.2d 69 (1999)	10
<u>Bond v. Corbin,</u> 68 S.C. 294, 47 S.E. 374 (1904)	11
<u>Charleston County Sch. Dist v. Laidlaw Transit, Inc.,</u> 348 S.C. 420, 559 S.E.2d 362 (Ct. App. 2001)	10, 20
<u>Curtis v. State,</u> 345 S.C. 557, 549 S.E.2d 591 (2001)	18
<u>Don Shevey & Spires, Inc. v. American Motors Realty Corp.,</u> 279 S.C. 58, 301 S.E.2d 757 (1983)	12
<u>Falk v. Sadler,</u> 341 S.C. 281, 533 S.E.2d 350 (Ct. App. 2000)	10, 11
<u>Fireman's Ins. Co. v. Cincinnati Ins. Co.,</u> 302 S.C. 234, 394 S.E.2d 855 (Ct. App. 1990)	10, 11
<u>Georganne Apparel, Inc. v. Todd,</u> 303 S.C. 87, 399 S.E.2d 16 (Ct. App. 1990)	12, 13
<u>Gilmore v. Ivey,</u> 290 S.C. 55, 348 S.E.2d 180 (Ct. App. 1986)	16, 17
<u>Higgins v. MUSC,</u> 326 S.C. 592, 599 S.E.2d 269 (Ct. App. 1997)	16, 17
<u>Historic Charleston Foundation v. Krawcheck,</u> 313 S.C. 500, 443 S.E.2d 401 (Ct. App. 1994)	16, 17
<u>Leonard v. Hammond,</u> 804 F.2d 838 (4th Cir. 1986)	17
<u>McComas v. Ross,</u> 368 S.C. 59, 626 S.E.2d 902 (Ct. App. 2006)	6, 11, 13, 14, 15
<u>McCormick v. England,</u> 328 S.C. 627, 494 S.E.2d 431 (Ct. App. 1997)	10

<u>In re: Care and Treatment of Miller,</u> 393 S.C. 248, 713 S.E.2d 253 (2011)	9, 16, 17
<u>In re: Mortgage Foreclosure Actions,</u> 396 S.C. 209, 720 S.E.2d 908 (2011)	3, 8, 9, 12, 13, 16
<u>Orlando v. Boyd,</u> 320 S.C. 509, 466 S.E.2d 353 (1996)	12
<u>Plantation Fed. Bank v. Gray,</u> 401 S.C. 507, 737 S.E.2d 515 (Ct. App. 2013)	15
<u>Russell v. City of Columbia,</u> 305 S.C. 86, 406 S.E.2d 338 (1991)	10
<u>Small v. Mungo,</u> 254 S.C. 438, 175 S.E.2d 802 (1970)	11
<u>Stiles v. Onorato,</u> 318 S.C. 297, 457 S.E.2d 601 (1995)	10
<u>Therens v. Faircloth,</u> 291 S.C. 451, 354 S.E.2d 54 (Ct. App. 1987)	12
<u>Toussaint v. Ham,</u> 292 S.C. 415, 357 S.E.2d 8 (1987)	10
<u>Trivelas v. S.C. Dept. of Transportation,</u> 348 S.C. 125, 558 S.E.2d 271 (Ct. App. 2001)	16, 17
<u>U.S. v. (Under Seal),</u> 819 F.2d 1139 (4th Cir. 1987)	17

COURT RULES

Rule 12(b)(6), SCRCP	10
Rule 12(c), SCRCP	4, 5, 6, 7, 10, 19, 20
Rule 12(f), SCRCP	4, 5, 6, 7, 10, 19, 20
Rule 41(b), SCRCP	4, 6, 9

OTHER SOURCES

Black's Law Dictionary	11, 14
------------------------------	--------

STATEMENT OF ISSUES

- I. Did the circuit court err in dismissing Appellant's counterclaims and striking her affirmative defenses for failure to prosecute where Respondent's motion to dismiss and strike was not based on any set of facts that amount to a failure to prosecute?**
- II. Did the circuit court err in dismissing Appellant's counterclaims and striking her affirmative defenses for failure to prosecute where Respondent's motion to dismiss and strike was not supported by an affidavit or other cognizable evidence?**
- III. Did the circuit court err in dismissing Appellant's counterclaims for mootness where the Respondent did not show that a judgment on the merits of those claims would have no practical effect upon the controversy between the parties?**
- IV. Did the circuit court err in dismissing Appellant's counterclaims and striking her affirmative defenses on the basis of Rules 12(c) and 12(f), SCRPC, where the Respondent advanced no argument that a ruling in its favor was proper under the standards applicable to those rules and neither rule provided for such a ruling here?**

STATEMENT OF THE CASE

The Respondent, U.S. Bank National Association as 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-SB1 (hereinafter "U.S. Bank"), sued the Appellant, Kelley Burr (hereinafter "Burr"), filing a summons and complaint seeking foreclosure of a mortgage on November 1, 2010. (R. pp. 8-14.) Burr answered and counterclaimed through her then-counsel, David P. Reuwer, Esquire. (R. pp. 15-22.) Burr's defenses and counterclaims centered on common factual allegations that "Burr and her husband provided [U.S. Bank] and/or its successor trustee with detailed information and documentation upon request of [U.S. Bank,]" that U.S. Bank's authorized agents and employees "stated and represented to [Burr] that she would be taken care of not losing her residential home so long as she participated in the Home Affordable Modification Program [(hereinafter 'HAMP'),]" that Burr "did cooperate and agree to participate in [HAMP,]" and that U.S. Bank "did not conduct a fair, reasonable, comprehensive analysis nor reconsideration of her home mortgage payment amount problem, and that the Plaintiff never intended to actually do so." (R. pp. 16-17.) Burr pled defenses and counterclaims labeled as "unclean hands," "breach of contract," "fraud and misrepresentation in the inducement," "unfair trade practices," "in pari delicto," and "residential home." (R. pp. 17-20.) Burr alleged U.S. Bank "breached the terms of the contract [evidenced by the note and mortgage] and its duty to service the agreement in good faith" and that U.S. Bank "stated and

represented over time and telephone calls and correspondence that it would reconsider and help [Burr] into an affordable loan modification, such that she would not lose her residential home.” (R. pp. 18, 19.) U.S. Bank pled numerous defenses to Burr’s counterclaims. (R. pp. 23-30.) Those defenses did not include mootness. (R. pp. 23-30.)

On May 2, 2011, Chief Justice Jean H. Toal of the Supreme Court of South Carolina issued In re: Mortgage Foreclosure Actions, 396 S.C. 209, 210, 720 S.E.2d 908 (2011) (South Carolina Supreme Court Administrative Order 2011-05-02-01), which sets out a framework for notifying mortgagor defendants in actions seeking mortgage foreclosure of owner-occupied dwellings of those defendants’ right to foreclosure intervention, as well as a process for the conclusion of foreclosure intervention efforts, generally in one of three ways: 1) successful settlement of the claim for foreclosure through foreclosure intervention, 2) good-faith attempts to settle the foreclosure claim that do not succeed in resolving the foreclosure, despite the participation of both mortgagor and mortgagee in the foreclosure intervention process, and 3) failure of the mortgagor defendant to participate in the foreclosure intervention process, either through failure to respond to the notice of right to foreclosure intervention at all or through completion of the foreclosure intervention process in a way that does not result in resolution of the foreclosure because of the mortgagor’s failure to provide necessary information. Id. at 211-14. U.S. Bank served Burr’s then-counsel with a notice of right to foreclosure intervention on July 25, 2011. (R. pp. 78-83.) U.S. Bank’s counsel and Burr’s attorney at that time communicated about the notice, and U.S. Bank re-sent the notice on August 9, 2011.

(R. p. 84.) On October 26, 2011, U.S. Bank's counsel served a certification that Burr had "failed, refused, or voluntarily elected not to participate in any foreclosure intervention process[,]" stating that despite U.S. Bank extending the deadline for Burr to submit documents and records for evaluation in the foreclosure intervention process, "[n]o documents or records were ever received by [U.S. Bank's] counsel." (R. pp. 84-86.)

On April 17, 2012, U.S. Bank served the motion that is subject of this appeal, stating that Burr "has failed to prosecute and even has defeated her own counterclaims by not responding to [U.S. Bank's] efforts to offer her a loan modification proposal, in addition to not providing information to allow consideration of Burr for a modification. Therefore, pursuant to Rule 12(c), 12(f), and 41(b), S.C. Rules of Civil Procedure, U.S. Bank hereby moves to dismiss Burr's counterclaims and to strike her defenses." (R. pp. 32-48.) The motion asserted that Burr's defenses and counterclaims against U.S. Bank are "all based primarily on an alleged failure to 'conduct a fair, reasonable, comprehensive analysis' and 'reconsideration of her home mortgage amount problem[,]'" contended that Burr failed to prosecute her claims by failing to engage in the foreclosure intervention process, and contended that Burr's claims were moot because U.S. Bank had offered Burr a modification proposal on January 10, 2012, to which offer she never responded. (R. pp. 32, 35-36.) Attached to the motion were the certification of mortgagor noncompliance that U.S. Bank had already filed and printouts of email messages between U.S. Bank's attorney, that lawyer's paralegal, and Burr's then-counsel. (R. pp. 38-47.) No testimony, by

affidavit or otherwise, was served with or ever offered in support of the motion. (R. pp. 38-47, 52, p. 69 ln. 11-15, p. 71 ln. 23-24, p. 74 ln. 4-5.)

A hearing on U.S. Bank's motion was set for Thursday, September 13, 2012. (R. pp. 1, 56.) On the evening of September 10, 2012, Burr hired new counsel, the undersigned, who took over representation from Burr's previous attorney and filed a notice of appearance on the day of the motion hearing. (R. p. 59 ln. 4-12, p. 68 ln. 4-6, p. 87.)

U.S. Bank's counsel focused argument at the hearing on its contention that Burr had failed to prosecute her counterclaims by failing to respond to overtures to engage in foreclosure intervention. (R. p. 60 ln. 10 – p. 67 ln. 25, p. 73 ln. 9 – p. 74 ln. 3, p. 74 ln. 22 – p. 75 ln. 4.) U.S. Bank's counsel's only argument with regard to Rule 12(c), SCRCF, was that Burr's counterclaims were moot because U.S. Bank offered her a modification. (R. p. 65 ln. 1-5, p. 67 ln. 10-16.) U.S. Bank's counsel did not advance an argument at the hearing concerning Rule 12(f), SCRCF. (R. pp. 56-76.)

In response to U.S. Bank's argument, Burr's new counsel argued at the hearing that Burr's previous attorney's conduct in failing to "pay the attention to settlement negotiations that maybe ought to have been paid" did not amount to a failure to prosecute. (R. p. 68 ln. 6-11, 19-25, p. 69 ln. 1-9.) Burr's new counsel also argued that there was no factual material in the record tending to establish mootness of the counterclaims and that Burr's claim that U.S. Bank promised Burr a modification and then reneged on that promise before the lawsuit was commenced was not moot and would not be subject to a motion for judgment on the pleadings.

(R. pp. 16-17, p. 71 ln. 21 – p. 72 ln. 7.) Burr’s counsel made an oral motion to amend the answer and counterclaim, stating, “I hadn’t really been in this case long enough to find out exactly what it is that I want to add, but I know I want it to read differently from the way it reads now.” (R. p. 72 ln. 8-16.)

The court announced at the hearing that it was “going to grant the motion to strike the counterclaims” and stated that, to make a motion to amend, Burr would need to make a written motion with a proposed amended pleading attached. (R. p. 75 ln. 15-25.) Upon inquiry from Burr’s counsel, the court noted that its ruling was “[n]ot prejudicial to your right to make a motion [to amend], but that doesn’t mean it’s going to be amended, and whoever hears that motion can perhaps look at my Order and determine whether or not your proposed amendments fall outside – or fall inside or outside what I’ve dismissed.” (R. p. 76 ln. 1-8.)

In an order filed October 1, 2012, the court granted U.S. Bank’s motion, ruling that “[b]ased on the arguments presented by counsel, the documents and evidence presented, and Rules 41(b) and Rules 12(c) and 12(f) of the South Carolina Rules of Civil Procedure, Plaintiff’s Motion for to Dismiss Defendant Burr’s Counterclaims and to Strike Affirmative Defenses is hereby GRANTED.” (R. pp. 1, 4.) The court found that Burr engaged in a failure to prosecute and that the four factors relevant to whether to grant a dismissal for failure to prosecute in McComas v. Ross, 368 S.C. 59, 626 S.E.2d 902 (Ct. App. 2006), were met in this case. (R. pp. 2-3.) The court also ruled that “Burr’s claims are moot because they are based on an alleged scenario of her not being offered a loan modification” since U.S. Bank

“offered Burr a modification proposal on January 10, 2012, and no evidence shows that Burr responded to this offer until April.” (R. pp. 3-4.)

Burr made a timely motion to reconsider in which she noted the arguments her counsel made at the hearing and also pointed out that U.S. Bank “did not advance any arguments concerning [the standards applicable to motions under Rules 12(c) and 12(f)], and the Court’s order does not contain any analysis of whether these standards were met[.]” with Burr stating that “Rules 12(c) and 12(f), SCRCF, do not provide an appropriate basis for the Court’s decision.” (R. pp. 49-55.) The court denied this motion, without a hearing, in a one-sentence order filed October 16, 2012. (R. p. 5.) This appeal followed.

STATEMENT OF FACTS

Burr did not engage in any behavior that could reasonably be construed as a failure to prosecute. She apparently failed to provide U.S. Bank with the documents that it stated it needed to evaluate her for a loan modification, but that was, at most, a failure to engage in settlement negotiations. (R. p. 52, p. 68 ln. 6-11.) That is not a failure to prosecute. (R. pp. 51-52, p. 68 ln. 10-11, p. 68 ln. 19 – p. 69 ln. 9, p. 70 ln. 15-21.) U.S. Bank noted no instance of Burr not appearing at a roster meeting or other court event and no instance of Burr failing to participate in discovery. (R. pp. 32-47, 52, 59-76.) Also, the remedy under the operative administrative order for a mortgagor defendant’s failure to participate in foreclosure intervention negotiation is not the dismissal of counterclaims or the striking of defenses. (R. p. 52, p. 70 ln. 15-21.)

What happened here is that Burr's previous attorney failed to do a good job (or much of a job at all) in participating in settlement negotiations with U.S. Bank. (R. pp. 32-47, 84-85, p. 60 ln. 25 – p. 66 ln. 5, p. 68 ln. 6-9.) Burr fired that lawyer and hired another one. (R. p. 59 ln. 4-12, p. 68 ln. 4-6, p. 87.) In the meantime, U.S. Bank had served and filed a certification of Burr's failure to participate in the foreclosure intervention process, which allowed the foreclosure action to proceed. (R. pp. 84-86); see In re: Mortgage Foreclosure Actions, 396 S.C. at 212.

U.S. Bank never established that the court could afford Burr no practical relief as to the controversy subject of her counterclaims and defenses. (R. p. 53, p. 71 ln. 21 – p. 72 ln. 7.) U.S. Bank never put the documents showing the terms of the modification it proposed to Burr in the record. Nothing before the court showed that any modification U.S. Bank offered complied with applicable HAMP directives or other standards, nor was there anything before the court tending to show whether the terms of the proposed modification were the same as, better than, or worse for Burr than what she was promised. (R. p. 53.) For example, U.S. Bank never put anything into the record showing whether its proposed modification contemplated an increase in the amount of principal to recast fees and costs related to the foreclosure action as part of the loan's modified principal. Burr pled that U.S. Bank had promised her a modification and then reneged on that promise, which could not be made moot simply by U.S. Bank later offering Burr a modification. (R. pp. 16-17, 53, p. 71 ln. 21 – p. 72 ln. 7.) Burr did not solely seek a modification as the relief to be granted on her claims; she also sought an award of damages. (R. pp. 18, 19-20, 21, 53.) U.S. Bank

adduced no evidence at all to the effect that the court could afford Burr no practical relief as to the existing controversy between the parties. (R. p. 53.)

U.S. Bank never even argued, much less established, that Burr's answer and counterclaim failed to state facts sufficient to constitute a cause of action or that in some other way *the pleadings* demonstrated that Burr was not entitled to prevail on her counterclaims. (R. pp. 53-54.) Similarly, U.S. Bank never established or even argued that Burr's answer and counterclaim pled a legally insufficient defense or pled redundant, immaterial, impertinent, or scandalous matter. (R. pp. 53-54.) The court never ruled that either of those things were true; in fact, the court's ruling is expressly based on U.S. Bank's contentions as to facts that do not appear from the pleadings and were not presented through any affidavit or other testimony. (R. pp. 1-4, 53-54.)

The circuit court simply decided that it was proper to dismiss Burr's counterclaims and strike her defenses because she failed to participate in foreclosure intervention, even though the operative Supreme Court administrative order provides that what is to happen in such circumstances is just for the foreclosure action to proceed. In re: Mortgage Foreclosure Actions, 396 S.C. at 212.

STANDARD OF REVIEW

"When reviewing a motion to dismiss for failure to prosecute pursuant to Rule 41(b), SCRCF, an appellate court may reverse the trial court's decision upon an abuse of discretion. An abuse of discretion occurs when the conclusions of the trial court are either controlled by an error of law or are based on unsupported factual conclusions." In re: Care and Treatment of Miller, 393 S.C. 248, 256, 713 S.E.2d 253, 257 (2011).

Rule 12(c), SCRPC, provides for a judgment on the pleadings in a proper case. The standard of whether such a motion should be granted is the same as for a motion under Rule 12(b)(6), SCRPC, and the appellate court applies the same standard to the review of an order granting such a motion. See Russell v. City of Columbia, 305 S.C. 86, 406 S.E.2d 338 (1991); Falk v. Sadler, 341 S.C. 281, 533 S.E.2d 350 (Ct. App. 2000); Fireman's Ins. Co. v. Cincinnati Ins. Co., 302 S.C. 234, 394 S.E.2d 855 (Ct. App. 1990).

Rule 12(f), SCRPC, provides that the Court “may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent or scandalous matter.” A motion to strike that challenges a theory of recovery pled by the non-movant is in the nature of a motion to dismiss under Rule 12(b)(6), SCRPC. McCormick v. England, 328 S.C. 627, 494 S.E.2d 431 (Ct. App. 1997).

“A motion to dismiss a counterclaim must be based solely on the allegations set forth in the counterclaim. See Rule 12(b)(6), SCRPC; Baird v. Charleston County, 333 S.C. 519, 527, 511 S.E.2d 69, 73 (1999). ‘A Rule 12(b)(6) motion may not be sustained if facts alleged and inferences reasonably deducible therefrom would entitle the [complainant] to any relief on any theory of the case.’ Stiles v. Onorato, 318 S.C. 297, 300, 457 S.E.2d 601, 602-3 (1995). The question is whether in the light most favorable to the complainant, and with every doubt resolved on his behalf, the counterclaim states any valid claim for relief. Toussaint v. Ham, 292 S.C. 415, 416, 357 S.E.2d 8, 9 (1987). The counterclaim should not be dismissed merely because the trial court doubts the complainant will prevail in the action. Id.” Charleston County Sch. Dist v. Laidlaw Transit, Inc., 348 S.C. 420, 559 S.E.2d 362

(Ct. App. 2001) (citations in original). In deciding a motion for judgment on the pleadings, the trial court may not consider matters outside the allegations of the pleadings. Falk, 341 S.C. at 281; Firemen's Ins. Co., 302 S.C. at 234.

ARGUMENT

I. Since Burr did not do anything that amounted to a failure to prosecute, the circuit court erred in dismissing her counterclaims and striking her affirmative defenses for an ostensible failure to prosecute.

U.S. Bank's motion and the circuit court's decision were based on conduct that, while regrettable, did not constitute failure to prosecute. (R. pp. 51-52, p. 68 ln. 6-11, p. 68 ln. 19 – p. 69 ln. 9, p. 70 ln. 15-21.) Black's Law Dictionary defines "prosecute" as "[t]o commence and carry out a legal action[.]" Black's Law Dictionary 566 (2d pocket ed 2001). The leading recent South Carolina reported case analyzing a dismissal for failure to prosecute, McComas v. Ross, dealt with a situation in which the plaintiff in that case did not show up on time at the courtroom for the trial. 368 S.C. at 60-61. That is the sort of conduct that would trigger an analysis of whether a failure to prosecute has occurred, and then an analysis of whether that failure to prosecute warrants dismissal. Cf. id. at 60-64.

Older South Carolina cases concerning dismissals for failure to prosecute also deal most often with failure of a plaintiff to attend trial. 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). One case deals with a

dismissal for failure to prosecute where the plaintiff repeatedly failed to meet its procedural requirements of the “Summons (Complaint Not Served)” procedure, which no longer exists. Don Shevey & Spires, Inc. v. American Motors Realty Corp., 279 S.C. 58, 301 S.E.2d 757 (1983). Other cases deal with dismissals for something that is not strictly failure to prosecute but is a bit different, the failure to comply with court orders. See Orlando v. Boyd, 320 S.C. 509, 466 S.E.2d 353 (1996) (reversal of exclusion of expert witness for failure to comply with order and following grant of summary judgment based on inability to offer expert testimony because of exclusion); Georganne Apparel, Inc. v. Todd, 303 S.C. 87, 399 S.E.2d 16 (Ct. App. 1990) (affirmation of dismissal for failure to comply with conditions of order); Therens v. Faircloth, 291 S.C. 451, 354 S.E.2d 54 (Ct. App. 1987) (affirmation of dismissal for failure to comply with conditions of order in prior case).

Here, we do not have a failure of Burr to comply with an order. The only order that was at issue in this matter at the time U.S. Bank’s motion was heard was the Supreme Court of South Carolina’s order in In re: Mortgage Foreclosure Actions, 396 S.C. at 209-14. Burr cannot have failed to comply with that order, because that order did not require her 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. Id. at 211-12. Further, 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.

What happened in this case was not the kind of thing that is a failure to prosecute. (R. pp. 51-52, p. 68 ln. 6-11, p. 68 ln. 19 – p. 69 ln. 9, p. 70 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 participate in discovery. (R. pp. 32-47, 52, 59-76.) Everything of which U.S. Bank complained, and everything the circuit court found as a basis for its decision, dealt with Burr's failure to participate in a process of resolving this case by *neither* party prosecuting the claims in this case. (R. pp. 1-4, 32-47, p. 60 ln. 10 – p. 67 ln. 25, p. 73 ln. 9 – p. 74 ln. 3, p. 74 ln. 22 – p. 75 ln. 4.) U.S. Bank never complained of Burr having failed to do something to advance the prosecution of her counterclaims, and the circuit court did not find she engaged in such behavior. (R. pp. 1-4, 32-47, p. 60 ln. 10 – p. 67 ln. 25, p. 73 ln. 9 – p. 74 ln. 3, p. 74 ln. 22 – p. 75 ln. 4.) The circuit court stated that "Burr 'has been given abundant opportunity to litigate[,]" quoting Georganne Apparel, but conduct concerning litigation or the opportunity to litigate was not what was the subject of U.S. Bank's motion or the grounds on which the circuit court based its order; rather, the circuit court based its order on failure to engage in settlement negotiations. (R. pp. 1-4, 32-47, p. 60 ln. 10 – p. 67 ln. 25, p. 73 ln. 9 – p. 74 ln. 3, p. 74 ln. 22 – p. 75 ln. 4.) The circuit court never should have begun the four-factor analysis under McComas, because that is the analysis of whether *a failure to prosecute* warrants dismissal. 368 S.C. at 63.

When a failure to prosecute has occurred, the court applies the four-factor analysis set out in McComas: “(1) the plaintiff’s degree of personal responsibility; (2) the amount of prejudice caused by the defendant; (3) the presence of a drawn out history of deliberately proceeding in a dilatory fashion; and (4) the effectiveness of sanctions less drastic than dismissal.” Id. Since there was no failure to prosecute, that analysis does not fit well here.

As to Burr’s personal responsibility, this factor refers to a litigant’s personal responsibility for a failure to prosecute; as discussed above, there was no such failure here. (R. pp. 51-52, p. 68 ln. 6-11, p. 68 ln. 19 – p. 69 ln. 9, p. 70 ln. 15-21.) Also, U.S. Bank’s counsel acknowledged at the motion hearing that she would “admit that it is probably not this borrower’s hundred percent fault that this has happened[.]” (R. p. 65 ln. 11-12.)

Further, U.S. Bank made no showing of prejudice to it because of something that Burr did, and the circuit court made no findings supportive of the existence of prejudice. Any time and money U.S. Bank expended in attempting settlement negotiations with Burr were not as a result of any failure on her part to prosecute her claims; indeed, the circuit court’s order notes that “U.S. Bank has expended time and expenses before and since the filing of the Complaint.” (R. p. 3.) Moreover, prejudice is “[d]amage or detriment to one’s legal rights or claims[.]” Black’s Law Dictionary 545 (definition of prejudice). What U.S. Bank argued and the circuit court found does not constitute prejudice. This Court recently rejected a similar argument (in a foreclosure case concerning a different procedural issue) that a bank should be allowed to proceed with trial of its foreclosure claim before a jury trial was held on a

defendant's counterclaims. Plantation Fed. Bank v. Gray, 401 S.C. 507, 737 S.E.2d 515 (Ct. App. 2013). The bank "argued that the foreclosure action should proceed because the value of the lot was declining based on the general state of the economy and because Bank would have to pay taxes on the lot to prevent it from being sold at a tax sale scheduled for later in the year." Id. at 517. In rejecting this argument, this Court noted that "[t]hese circumstances would possibly, if not likely, occur in every foreclosure action currently pending." Id. To show prejudice, U.S. Bank would have to show more than that it has spent money on this foreclosure case or on attempted negotiations with Burr (which, as discussed below, is not something of which it actually made a showing).

With regard to any history of proceeding in a dilatory fashion, as discussed above, U.S. Bank could not point to one court or discovery event that was delayed by anything Burr did or did not do. This factor is concerned with the party's history of proceeding in a dilatory fashion *in the prosecution of her case*, not in settlement negotiations about whether the case will be resolved by consent. See McComas, 368 S.C. at 64.

Further, as for whether less drastic sanctions might be effective, the blanket statement that "another court order directing compliance would provide no incentive for Burr to act" lacks evidentiary support: first, because there was never any court order directing her to act in the first place and, second, because neither U.S. Bank nor the circuit court could point to a thing that Burr was supposed to have done in the prosecution of her counterclaims that she did not do. (R. p. 3.)

In short, the circuit court simply decided that it was proper to dismiss Burr's counterclaims and strike her defenses not because she failed to prosecute them but, rather, because she failed to participate in foreclosure intervention. (R. pp. 1-4.) The operative Supreme Court administrative order provides that what is to happen in such circumstances is just for the foreclosure action to proceed, not for a mortgagor defendant's claims to be dismissed and her defenses stricken. In re: Mortgage Foreclosure Actions, 396 S.C. at 212. U.S. Bank had already served and filed its certification when it made its motion; there was nothing procedurally to delay trial of the case. See id.

The circuit court dismissed Burr's counterclaim and struck her defenses on the basis of something that does not constitute a failure to prosecute. The circuit court's decision was controlled by an error of law: a misconception of what a failure to prosecute is and is not. That is an abuse of discretion and is reversible error. Miller, 393 S.C. at 256.

II. As U.S. Bank's motion to dismiss and strike was not supported by an affidavit or other cognizable evidence, the circuit court erred in dismissing Burr's counterclaims and striking her affirmative defenses on the basis of the mere contentions of U.S. Bank's counsel.

Arguments of counsel are not evidence. Trivelas v. S.C. Dept. of Transportation, 348 S.C. 125, 141, 558 S.E.2d 271, 279 (Ct. App. 2001); Higgins v. MUSC, 326 S.C. 592, 599 S.E.2d 269, 272 (Ct. App. 1997); Historic Charleston Foundation v. Krawcheck, 313 S.C. 500, 508 n. 7, 443 S.E.2d 401, 406 n. 7 (Ct. App. 1994); Gilmore v. Ivey, 290 S.C. 53, 58, 348 S.E.2d 180, 183 (Ct. App. 1986). Arguments of counsel were all that supported U.S. Bank's motion. (R. pp. 32-47, p. 71 ln. 21 – p. 72 ln. 7.)

In its order, the circuit court made findings of fact solely on the basis of the unsworn contentions of U.S. Bank's counsel, which the circuit court apparently accepted as established, proven truths. (R. pp. 1-4.) This was error. Id. In fact, there was no cognizable evidence before the court tending to establish that anything U.S. Bank contended was true actually was, except for the dates of service and filing of the notice of right to foreclosure intervention and the certification of mortgagor noncompliance. (R. pp. 78-86.) While this is true of every purported factual finding made by the circuit court, it is particularly apparent concerning the circuit court's findings with regard to U.S. Bank having spent money because of Burr's lack of response in settlement negotiations and with regard to the finding that Burr had been offered a modification that made her counterclaims moot. (R. pp. 1-4.)

"In general a case becomes moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." U.S. v. (Under Seal), 819 F.2d 1139 (4th Cir. 1987) (internal quotation marks omitted) (quoting Leonard v. Hammond, 804 F.2d 838, 842 (4th Cir. 1986)). Usually, a determination of mootness is necessarily a factual determination. Cf. id. As discussed above, we know nothing about what the terms of the proposed modification were, and all we have to go on about whether one was offered to Burr is the unsworn representation of U.S. Bank. That is not a factual record that could support a determination of mootness.

The circuit court's decision is based on unsupported factual conclusions. Hence, the grant of U.S. Bank's motion constitutes an abuse of discretion and is reversible error. Miller, 393 S.C. at 256.

III. The circuit court erred in dismissing Burr's counterclaims for mootness where U.S. Bank did not show that a judgment on the merits of those claims would have no practical effect upon the controversy between the parties.

A case is nonjusticiable for mootness where, if the party prevails, it has become impossible for the court to grant him any "effectual relief" that would have "practical legal effect upon the existing controversy." Curtis v. State, 345 S.C. 557, 567, 549 S.E.2d 591, 596 (2001) (internal quotation marks omitted). U.S. Bank did not show that Burr's counterclaims are moot.

As noted above, U.S. Bank made no factual showing about whether a modification was offered to Burr, what its terms were, whether those terms were better or worse than what U.S. Bank had promised her before, or anything about it at all. Nonetheless, the circuit court found that this had happened and that it made Burr's claims moot. (R. pp. 3-4.) Even if, however, there were a sufficient showing in the record that U.S. Bank had offered Burr a modification, that would not be tantamount to a showing that something has happened to make it so that Burr has sustained no damages as a result of U.S. Bank breaking its promise to modify her loan, and *that* is what U.S. Bank would have had to prove in order for Burr's claims seeking damages to be moot. See id. That did not happen. The circuit court's ruling that Burr's counterclaims are moot was reversible error, both because it is based on unsupported factual conclusions and because it is controlled by an error of law concerning what mootness is.

IV. The circuit court erred in dismissing Burr's counterclaims and striking her affirmative defenses on the basis of Rules 12(c) and 12(f), SCRCF, where U.S. Bank advanced no argument that a ruling in its favor was proper under the standard applicable to those rules and neither rule provided for such a ruling here.

U.S. Bank's counsel's only argument with regard to Rule 12(c), SCRCF, was that Burr's counterclaims were moot because U.S. Bank offered her a modification. (R. p. 65 ln. 1-5, p. 67 ln. 10-16.) U.S. Bank never argued that Burr's answer and counterclaim failed to state facts sufficient to constitute a cause of action or that in some other way *the pleadings* demonstrated that Burr was not entitled to prevail on her counterclaims. (R. pp. 32-37, 53-54, 59-76.) The circuit court did not rule that Burr's answer and counterclaim failed to state facts sufficient to constitute a cause of action or that in some other way the pleadings demonstrated that Burr was not entitled to prevail on her counterclaims. (R. pp. 1-4.)

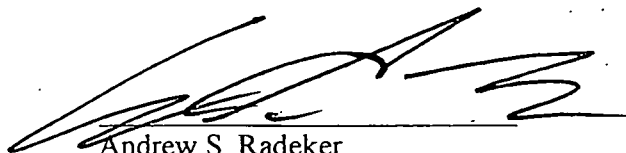
U.S. Bank's counsel did not advance an argument at the hearing concerning Rule 12(f), SCRCF. (R. pp. 59-76.) U.S. Bank never argued that Burr's answer and counterclaim pled a legally insufficient defense or pled redundant, immaterial, impertinent, or scandalous matter. (R. pp. 53-54, 59-76.) The circuit court never ruled that Burr's answer and counterclaim pled a legally insufficient defense or pled redundant, immaterial, impertinent, or scandalous matter. (R. pp. 1-4.) Indeed, as noted above, the circuit court's ruling was expressly based on U.S. Bank's contentions as to facts that do not appear from the pleadings. (R. pp. 1-4, 53-54.) A determination that Burr's counterclaims and defenses were moot could not be a proper subject of a motion for judgment on the pleadings in any event, since U.S. Bank did not plead mootness as a defense. (R. pp. 23-30.)

The circuit court's decision is apparently grounded in the misconception of law that Rules 12(c) and 12(f) provide for a dismissal and the striking of defenses on the basis of things that are not set out in the pleadings. They do not. See Charleston County Sch. Dist., 348 S.C. at 420. This error of law is an abuse of discretion and an error properly reversible by this Court.

CONCLUSION

There was no failure to prosecute here, and the circuit court's decision is controlled by errors of law and unsupported factual contentions. This Court should reverse the decision of the circuit court.

Respectfully submitted,



Andrew S. Radeker
Harrison & Radeker, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
Attorney for Appellant

October 17, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas

George C. James, Jr., Circuit Judge

Appellate Case No. 2012-213309
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,.....Appellant.

FINAL BRIEF OF RESPONDENT

Sean A. O'Connor (S.C. Bar No. 68382)
Finkel Law Firm, LLC
Post Office Box 41489
Charleston, South Carolina 29423
(843) 577-5460
soconnor@finkellaw.com
Attorney for Respondent

RECEIVED

OCT 29 2013

SC Court of Appeals

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

STATEMENT OF ISSUES ON APPEAL 1

STATEMENT OF THE CASE..... 2

STANDARD OF REVIEW 5

ARGUMENT.....7

I. The circuit court did not err in dismissing Appellant’s counterclaims and striking her affirmative defenses for a failure to prosecute..... 7

II. The circuit court did not err in dismissing Appellant’s counterclaims and striking her affirmative defenses without the submission of affidavits or other admissible evidence. 12

III. The circuit court did not err in dismissing Appellant’s counterclaims for mootness. 14

IV. The circuit court did not err in dismissing Appellant’s counterclaims and striking her affirmative defenses on the basis of Rules 12(c) and 12(f), SCRCR because Appellant’s claims are moot. 16

CONCLUSION..... 18

TABLE OF AUTHORITIES

CASES

<u>Alladin Plastics, Inc., v. Wintenna, Inc.</u> , 301 S.C. 90, 390 S.E.2d 370 (Ct. App. 1990)....	6, 13, 14
<u>Brandt v. Gooding</u> , 368 S.C. 618, 627, 630 S.E.2d 259, 264 (2006)	13
<u>Brandt v. Gooding</u> , 368 S.C. 618, 630 S.E.2d 259 (2006)	13
<u>Brazell v. Windsor</u> , 384 S.C. 512, 516, 682 S.E.2d 824, 826 (2009).....	13, 14
<u>Brown v. Coastal States Life Ins. Co.</u> , 264 S.C. 190, 194, 213 S.E.2d 726, 728 (1975).....	6
<u>Byrd v. Irmo High Sch.</u> , 321 S.C. 426, 468 S.E.2d 861 (1996).....	15, 16
<u>Carolina Alliance for Fair Employment v. South Carolina Dep't of Labor, Licensing, & Regulation</u> , 337 S.C. 476, 523 S.E.2d 795 (Ct. App. 1999).....	17
<u>Crestwood Golf Club, Inc. v. Potter</u> , 328 S.C. 201, 493 S.E.2d 826 (1997)	7, 12
<u>Curtis v. State</u> , 345 S.C. 557, 568, 549 S.E.2d 591, 596 (2001)	15
<u>Darden v. S.C. Dep't of Highways & Pub. Trans.</u> , 291 S.C. 270, 353 S.E.2d 279 (1987)	15
<u>David v. McLeod Reg'l Med. Ctr.</u> , 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006).....	6
<u>Diminich v. 2001 Enters. Inc.</u> , 292 S.C. 141, 355 S.E.2d 275 (Ct. App. 1987)	5
<u>Eagle Container Co., LLC v. Cnty. of Newberry</u> , 366 S.C. 611, 622 S.E.2d 733 (Ct. App. 2005), rev'd on other grounds, 379 S.C. 564, 666 S.E.2d 892 (2008)	17
<u>Evening Post Pub. Co. v. Berkeley Cnty. Sch. Dist.</u> , 392 S.C. 76, 708 S.E.2d 745 (2011)	6
<u>Fickling v. City of Charleston</u> , 372 S.C. 597, 643 S.E.2d 110 (Ct. App. 2007).....	13
<u>Fireman's Ins. Co. of Newark, New Jersey v. Cincinnati Ins. Co.</u> , 302 S.C. 234, 394 S.E.2d 855 (Ct. App. 1990).....	5, 12, 16, 17
<u>First Sav. Bank v. McLean</u> , 314 S.C. 361, 444 S.E.2d 513 (1994)	5

<u>Georganne Apparel, Inc. v. Todd</u> , 303 S.C. 87, 399 S.E.2d 16 (Ct. App. 1990).....	10, 11
<u>Higgins v. Medical Univ.</u> , 326 S.C. 592, 486 S.E.2d 269 (Ct. App. 1997).....	14
<u>Hillig v. Comm’r of Internal Revenue</u> , 916 F.2d 171, 174 (4th Cir. 1990).....	9
<u>Holden v. Cribb</u> , 349 S.C. 132, 561 S.E.2d 634 (Ct. App. 2002).....	14, 17
<u>Hopkins v. Harrell</u> , 352 S.C. 517, 574 S.E.2d 747 (Ct. App. 2002).....	8
<u>In re: Mortgage Foreclosure Actions</u> , 396 S.C. 209, 720 S.E.2d 908 (2011).....	3, 8, 9, 10, 11, 16
<u>Jackson v. State</u> , 331 S.C. 486, 490 n.2, 489 S.E.2d 915, 917 n.2 (1997).....	14
<u>Joyner v. Glimcher Props.</u> , 356 S.C. 460, 589 S.E.2d 762 (2002)	7
<u>Kiriakides v. Sch. Dist. of Greenville Cnty.</u> 382 S.C. 8, 675 S.E.2d 439 (2009).....	5
<u>Layman v. State</u> , 376 S.C. 434, 444, 658 S.E.2d 320, 325 (2008)	5
<u>Lennon v. S.C. Coastal Council</u> , 330 S.C. 414, 415, 498 S.E.2d 861, 864 (1996).....	14
<u>Link v. Wabash R. Co.</u> , 370 U.S. 626, 82 S. Ct. 1386 (1962).....	8
<u>Lydia v. Horton</u> , 343 S.C. 376, 540 S.E.2d 102 (Ct. App. 2000), <u>rev’d on other grounds</u> , 355 S.C. 36, 583 S.E.2d 750 (2003).....	5, 12, 16
<u>Lydia</u> , 343 S.C. at 380, 540 S.E.2d at 105.....	14
<u>Mayes v. Paxton</u> , 313 S.C. 109, 437 S.E.2d 66 (1993).....	6, 17
<u>McCargo v. Hedrick</u> , 545 F.2d 393 (4th Cir. 1976)	8, 9
<u>McComas v. Ross</u> , 368 S.C. 59, 626 S.E.2d 902 (Ct. App. 2006)	4, 5, 7, 8, 9, 12
<u>Reizakis v. Loy</u> , 490 F.2d 1132, 1135 (4th Cir. 1076)	9
<u>Robinson v. Code</u> , 384 S.C. 582, 682 S.E.2d 495 (Ct. App. 2009).....	6, 17
<u>Rosenthal v. Unarco Indus.</u> , 278 S.C. 420, 297 S.E.2d 638 (1982).....	5, 16
<u>Russell v. City of Columbia</u> , 301 S.C. 117, 390 S.E.2d 463 (Ct. App. 1989).....	5, 17

<u>Seabrook v. City of Folly Beach</u> , 337 S.C. 304, 306, 523 S.E.2d 462, 463 (1999).....	15
<u>Small v. Mungo</u> , 254 S.C. 438, 175 S.E.2d 802 (1970)	5, 7, 13
<u>Therens v. Faircloth</u> , 291 S.C. 451, 354 S.E.2d 54 (Ct. App. 1987)	10, 13

OTHER AUTHORITIES

South Carolina Judicial Dep't, <u>Frequently Asked Questions (FAQ) in South Carolina Master-in-Equity Court</u> , South Carolina Judicial Dep't. (2011), http://www.sccourts.org/selfhelp/FAQMIE.pdf (2011)	8
--	---

RULES

Rule 10(c), SCRCP	13
Rule 12(b)(6).....	3, 17
Rule 12(c), SCRCP	passim
Rule 56, SCRCP.....	6, 12
Rule 12(f), SCRCP.....	passim
Rules 41(b), SCRCP	passim

TREATISES

24 Am. Jur.2d Dismissal, Discontinuance and Nonsuit 48 (1983).....	7
--	---

STATEMENT OF ISSUES ON APPEAL

- I. The circuit court was correct in dismissing Burr's counterclaims and striking her affirmative defenses for failure to prosecute under Rule 41(b), SCRCP.
- II. The circuit court was correct in granting U.S. Bank's motion to dismiss and strike because it was not required to be supported by an affidavit.
- III. The circuit court did not err in dismissing Burr's counterclaims for mootness.
- IV. The circuit court did not err in granting U.S. Bank's motion to dismiss and strike under Rules 12(c) and 12(f), SCRCP.

STATEMENT OF THE CASE

On or about October 31, 2001, Kelley Burr ("Appellant") executed and delivered a note and mortgage ("Mortgage") in the principal amount of \$100,800.00 to EquiSource Home Mortgage Corp. (R. p. 11.) This Mortgage was recorded on November 5, 2001, in the Kershaw County Register of Deeds Office in Mortgage Book 1072 at Page 142. (R. p. 11.) The real property encumbered by this Mortgage is known as 1128 Bayview Drive, Lugoff, SC, 29078 ("Property"). (R. p. 11.) U.S. Bank National Association as 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-SB1 ("U.S. Bank") filed a summons and complaint against Appellant seeking foreclosure of the Mortgage on November 1, 2010. (R. pp. 8-14.) In the Complaint, U.S. Bank stated that the loan servicer for the Mortgage was participating in the Home Affordable Modification Program ("HAMP"), but the loan was "not eligible for modification because the borrower did not provide all necessary documents after those documents had been requested." (R. p. 10.)

Appellant, through her then-counsel David P. Reuwer, Esquire, answered and counterclaimed on December 20, 2010. (R. pp. 15-22.) Burr asserted defenses and counterclaims of unclean hands, breach of contract, fraud and misrepresentation in the inducement, unfair trade practices, *in pari delicto*, and residential home. (R. p. 17.) These defenses and counterclaims were based on U.S. Bank's alleged failure to "conduct a fair, reasonable, comprehensive analysis" and "reconsideration of her home mortgage amount problem." (R. pp. 16-19.) U.S. Bank answered and asserted various defenses, including

Defendant's lack of capacity, authority or standing (R. p. 32) and failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6), SCRCP (R. p. 25.).

On May 2, 2011, Chief Justice Toal of the South Carolina Supreme Court issued an Administrative Order titled In re: Mortgage Foreclosure Actions, 396 S.C. 209, 720 S.E.2d 908 (2011) ("Administrative Order"). This Administrative Order imposed an automatic stay in foreclosure actions and required plaintiffs seeking foreclosure of owner-occupied dwellings to notify defendants of the right to foreclosure intervention. Id. at 211, 720 S.E.2d at 909. The Administrative Order also imposed a mandatory foreclosure intervention process in all owner-occupied foreclosure actions. Id. Under the Administrative Order, foreclosure actions could proceed upon certification from the Plaintiff either that the mortgagor had failed to respond or comply with the foreclosure intervention process, or that participation in the process by both parties did not resolve the matter. Id. at 211–21; 720 S.E.2d at 909.

Pursuant to the Administrative Order, U.S. Bank served Appellant's then-counsel with a notice of right to foreclosure intervention on July 25, 2011. (R. pp. 78-81.) After communications with Appellant's then-counsel, U.S. Bank resent the notice on August 9, 2011. (R. p. 84.) On October 27, 2011, U.S. Bank filed a Certification of Mortgagor Noncompliance stating that Appellant had "failed, refused, or voluntarily elected not to participate" in the process, and stated that despite several communications with Appellant's then-counsel and extending the deadline for receipt of information from Appellant, "[n]o documents or records were ever received...." (R. pp. 84-85.) U.S. Bank had several other communications with Appellant's counsel in regards to foreclosure intervention after filing the Certification of Mortgagor Noncompliance, but Appellant's counsel failed to respond to messages and

Appellant, through counsel, failed to provide the documents requested for a modification proposal. (R. pp. 33, 61-63.)

On April 18, 2012, U.S. Bank filed a Motion to Dismiss Counterclaims and Strike Defenses, which is the subject of this appeal. (R. pp. 32-48.) This motion was based on Appellant's failure to respond to U.S. Bank's efforts to offer her a loan modification proposal and Appellant's failure to provide information to allow consideration of a modification, and argued that Appellant had defeated her own counterclaims by failing "to acknowledge the relief offered to her." (R. pp. 33, 37.) U.S. Bank sent a modification proposal to Appellant's counsel on January 10, 2012, but no response to this was received until shortly before the motion was heard. (R. pp. 32-48, 62-63.)

A hearing on the motion was held on September 13, 2012. (R. p. 56.) The court made an oral ruling from the bench granting U.S. Bank's motion to strike the counterclaims. (R. p. 75.) In a corresponding written order filed October 1, 2012 ("Oct. 1 Order"), the court granted U.S. Bank's motion under Rules 41(b), 12(c) and 12(f), SCRCP. (R. pp. 1-4.) The court found that Appellant had failed to prosecute and specifically stated the four relevant factors under McComas v. Ross, 368 S.C. 59, 626 S.E.2d 902 (Ct. App. 2006), had been satisfied. (R. pp. 2-3.) Additionally, the court found that Appellant's claims were moot. (R. pp. 3-4.)

Appellant served a Motion to Reconsider and supporting Memorandum on October 9, 2010. (R. pp. 49-55.) This motion was denied by the court on October 16, 2012. (R. p. 5.) Appellant filed a Notice of Appeal on October 31, 2012.

STANDARD OF REVIEW

Dismissals for failure to prosecute under Rule 41(b), SCRCF, are within the discretion of the trial court judge and will not be disturbed on appeal absent a clear showing of an abuse of discretion. McComas v. Ross, 368 S.C. 59, 62, 626 S.E.2d 902, 904 (Ct. App. 2006 (citing Small v. Mungo, 254 S.C. 438, 442, 175 S.E.2d 802, 804 (1970))). “An abuse of discretion occurs when the conclusions of the trial court are either controlled by an error of law or are based on unsupported factual conclusions.” Kiriakides v. Sch. Dist. of Greenville Cnty. 382 S.C. 8, 20, 675 S.E.2d 439, 445 (2009) (quoting Layman v. State, 376 S.C. 434, 444, 658 S.E.2d 320, 325 (2008)). “On appeal, the burden of showing abuse of discretion is on the party challenging the trial court’s ruling.” First Sav. Bank v. McLean, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994).

“On appeal from an order granting a Rule 12(c) motion the reviewing court may not consider matters outside the pleadings.” Fireman’s Ins. Co. v. Cincinnati Ins. Co., 302 S.C. 234, 326, 394 S.E.2d 855, 856 (Ct. App. 1990). “The Rule 12(c) motion admits the well pleaded facts in the complaint and the court must take those well pleaded factual allegations as true.” Id. “The motion does not admit the inferences drawn by the plaintiff from the facts nor does it admit conclusions of law.” Id. (citing Russell v. City of Columbia, 301 S.C. 117, 390 S.E.2d 463 (Ct.App.1989)). Motions for judgment on the pleadings will be sustained only if the pleadings are so defective that taking all the facts alleged in the pleadings as admitted, no cause of action or defense is stated. Lydia v. Horton, 343 S.C. 376, 380, 540 S.E.2d 102, 105 (Ct. App. 2000), rev’d on other grounds, 355 S.C. 36, 583 S.E.2d 750 (2003) (citing Rosenthal v. Unarco Indus., Inc., 278 S.C. 420, 297 S.E.2d 638 (1982); Diminich v. 2001 Enters. Inc., 292 S.C. 141, 355 S.E.2d 275 (Ct. App. 1987)).

Under Rule 12(c), SCRCF, if the trial court considers matters outside the pleadings, it is

treated as a motion for summary judgment under Rule 56, SCRCP. Evening Post Pub. Co. v. Berkeley Cnty. Sch. Dist., 392 S.C. 76, 80–81, 708 S.E.2d 745, 747 (2011). When reviewing a grant of summary judgment, the appellate court applies the same standard as the circuit court. Id. at 81, 708 S.E.2d at 748. Summary judgment is appropriate when there is no genuine issue of material fact such that the moving party is entitled to prevail as a matter of law. Rule 56, SCRCP; Evening Post Pub. Co., 392 S.C. at 81, 708 S.E.2d at 748. The reviewing court must view the evidence and all reasonable inferences in the light most favorable to the non-moving party. Id. at 81–82, 708 S.E.2d at 748 (quoting David v. McLeod Reg'l Med. Ctr., 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006)).

Motions to strike under Rule 12(f), SCRCP, are largely within the discretion of the circuit court. Robinson v. Code, 384 S.C. 582, 682 S.E.2d 495, 496 (Ct. App. 2009) (citing Brown v. Coastal States Life Ins. Co., 264 S.C. 190, 194, 213 S.E.2d 726, 728 (1975)). The grant of a motion to strike will not be reversed except for an abuse of discretion or error of law. Id. In ruling on a motion to strike under Rule 12(f), SCRCP, the question is “whether a party should be allowed to plead a defense or other matter, not whether there are facts supporting what has been pleaded.” Alladin Plastics, Inc. v. Wintenna, Inc., 301 S.C. 90, 93, 390 S.E.2d 370, 372 (Ct. App. 1990). Where facts bearing on the sufficiency of the challenged defenses are clear and undisputed, trial on the merits is not required to determine the sufficiency of those defenses as a matter of law. Mayes v. Paxton, 313 S.C. 109, 115, 437 S.E.2d 66, 69 (1993).

ARGUMENT

I. The circuit court did not err in dismissing Appellant's counterclaims and striking her affirmative defenses for a failure to prosecute.

An action may be dismissed for failure to prosecute either pursuant to Rule 41(b), or *sua sponte* by the trial court as part of its inherent power to manage its own affairs. Rule 41(b), SCRCP; Crestwood Golf Club, Inc. v. Potter, 328 S.C. 201, 211–12, 493 S.E.2d 826, 832 (1997) (citing Small v. Mungo, 254 S.C. 438, 442, 172 S.E.2d 802, 803 (1970) (“[I]t is within the inherent power of the court to dismiss an action for failure to prosecute”); 24 Am. Jur.2d Dismissal, Discontinuance and Nonsuit 48 (1983) (“Such power is deemed to be necessarily vested in trial courts to manage their own affairs so as to achieve orderly and expeditious disposition of cases.”)). Rule 41(b), SCRCP, governs dismissals for failure to prosecute and states that a party may move for dismissal of an action “[f]or failure of the plaintiff to prosecute or to comply with these rules or *any* order of court.” Id. (emphasis added). This also applies to counterclaims, cross-claims and third party claims. Crestwood Golf Club, 328 S.C. at 211, 493 S.E.2d at 832. A single instance of nonfeasance may be sufficient ground for dismissal for failure to prosecute. McComas, 368 S.C. at 74, 626 S.E.2d at 910 (Anderson, J., dissenting) (citing Joyner v. Glimcher Props., 356 S.C. 460, 589 S.E.2d 762 (2002)). Moreover, Rule 41(b) does not explicitly require unreasonable neglect for dismissal to be proper. Id. at 75, 626 S.E.2d at 910.

The Foreclosure Intervention process established by the 2011 Administrative Order is not merely “settlement negotiations,” as Appellant contends. Appellant’s Initial Brief at 13–14. Rather, the foreclosure intervention mandated by the Administrative Order is a “process to ensure that lenders and eligible homeowners have an opportunity for meaningful discussion

about possible settlement options.” South Carolina Judicial Dep’t, Frequently Asked Questions (FAQ) in South Carolina Master-in-Equity Court, South Carolina Judicial Dep’t. 9–10 (2011), <http://www.sccourts.org/selfhelp/FAQMIE.pdf> (2011). This process was imposed to reduce the workload on courts and reduce the number of unresolved foreclosure actions. In re Mortgage Foreclosure Actions, 396 S.C. at 210, 720 S.E.2d at 905. As such, it is more analogous to mediation proceedings in counties that mandate alternative dispute resolution prior to trial. See Hopkins v. Harrell, 352 S.C. 517, 574 S.E.2d 747 (Ct. App. 2002) (affirming dismissal for failure to participate in mandatory mediation). A party is deemed to be bound by the acts of his attorney-agent and is considered to have notice of all facts for which notice can be charged to his attorney. Link v. Wabash R. Co., 370 U.S. 626, 634, 82 S. Ct. 1386 (1962) (affirming court’s *sua sponte* dismissal for failure to prosecute where attorney failed to attend a pretrial conference).

Here, the foreclosure intervention process is judicially mandated and failure to participate in it is analogous to failing to participate in mandatory mediation. Appellant’s counsel was aware of the communications from U.S. Bank regarding this process. (R. p. 68 ln. 6-14.) Under Link, this is imputed to Appellant, as Appellant’s counsel conceded at the hearing. (R. p. 70 ln. 3-10.) Thus, the circuit court had the inherent power to dismiss Appellant’s counterclaims for failure to prosecute for failing to participate in the judicially mandated foreclosure intervention process, and doing so was not an abuse of discretion.

In McComas v. Ross, South Carolina adopted the four factor analysis used by the Fourth Circuit for dismissals under Rule 41(b). McComas, 368 S.C. at 63, 626 S.E.2d at 904. The Fourth Circuit Court of Appeals has stated that there are four factors which should be considered in determining whether a dismissal was proper under Rule 41(b). McCargo v. Hedrick, 545 F.2d

393, 396 (4th Cir. 1976); McComas, 368 S.C. at 63, 626 S.E.2d at 904. First, the reviewing court must consider the plaintiff's degree of personal responsibility. McComas, 368 S.C. at 63; 626 S.E.2d at 904 (citing Hillig v. Comm'r of Internal Revenue, 916 F.2d 171, 174 (4th Cir. 1990)) (applying the four Fourth Circuit factors). Second, the court should consider the amount of prejudice caused to the defendant by the delay. McCargo, 545 F.2d at 396. Third, whether "the record indicate[s] a drawn out history of deliberately proceeding in a dilatory fashion." Id. (quoting Reizakis v. Loy, 490 F.2d 1132, 1135 (4th Cir. 1076)). Finally, the court should determine if the trial court considered less drastic sanctions than dismissal. McCargo, 545 F.2d at 396 (quoting Reizakis).

The circuit court considered each factor from McComas in issuing its decision, and addressed them directly in its Oct. 1 Order. That the circuit court considered each factor shows that the court did not abuse its discretion since the discussion of each factor includes supporting facts and the use of the McComas factors is not an error of law. Here, Appellant's defenses and counterclaims are based on a series of allegations regarding U.S. Bank's alleged failure to offer her a loan modification or allow her to participate in HAMP. (R. pp. 32-33.) The circuit court explicitly found that in advancing her claims for a modification, Appellant had a duty to submit her information for review and that she had a duty to comply with the 2011 Administrative Order. (R. p. 2.) In re Mortgage Foreclosure Actions, 396 S.C. 209, 720 S.E.2d 908 (2011). Appellant's answer and counterclaim admits that she has not submitted all necessary information for review (R. p. 17) and this failure to provide information has continued. (See R. pp. 33, 84.) The failure to provide these documents derives directly from Appellant, not from any failure on the part of her counsel. (R. p. 61 ln. 11-25.) Moreover, by failing to provide documentation after electing to participate in foreclosure intervention under the 2011 Administrative Order,

Appellant violated a court order. In re Mortgage Foreclosure Actions, 396 S.C. at 212, 720 S.E.2d at 909. This is sufficient for dismissal under Rule 41(b), SCRCP. See Therens v. Faircloth, 291 S.C. 451, 354 S.E.2d 54 (Ct. App. 1987) (affirming circuit court's dismissal for defendant's failure to comply with United States District Court order).

Contrary to Appellant's contentions, the rule's statement of "failure to comply with any court order" is not limited to orders from the trial court. The plain meaning of "any" refers to all applicable court orders, regardless of the issuing court. As it is undisputed that this action is subject to the requirements of the 2011 Administrative Order, which imposes obligations on both parties, failure to comply with this order falls squarely within the type of discretionary dismissals contemplated by Rule 41(b), SCRCP. Appellant also incorrectly states that dismissal is not an available remedy for failure to comply with the 2011 Administrative Order, when in fact dismissal is authorized, as are any other sanctions that are within the court's discretion. In Re Mortgage Foreclosure Actions, 396 S.C. at 214, 720 S.E.2d at 910 ("In the event the Court determines that any party to the foreclosure action, or their acting agent, has failed to comply with the terms of this order, or has not attempted to reach an agreement for foreclosure intervention in good faith, the Court may, in its discretion, impose such sanctions as it determines to be reasonable and just under the circumstances....").

In the case of Georganne Apparel, Inc. v. Todd, 303 S.C. 87, 399 S.E.2d 16 (Ct. App. 1990), the court upheld a dismissal for failure to prosecute and found prejudice to the defendant where the action had been filed two and one-half years prior and the defendants had incurred sixty-five thousand dollars in legal fees to various firms. Id. at 90, 399 S.E.2d at 18, 18 n.*. Here the circuit court correctly found that U.S. Bank has suffered prejudice by this delay, as it expended time and expense in attempts to respond to Appellant's demands for modification, and

in attempts to follow up with her regarding modification. (R. p. 2.) This time and expense included time seeking documentation from Appellant and her counsel in order to comply with the 2011 Administrative Order, In re Mortgage Foreclosure Actions, 396 S.C. 209, 720 S.E.2d 908 (2011). (R. p. 2.) Additionally, U.S. Bank suffered prejudice in the delay in proceeding with its foreclosure claim as Appellant's claims are based on the availability of a loan modification, but she has failed to participate and respond to this process, which has been more than exhausted. (R. pp. 2, 35-36.) Finally, the Court noted that the subject property is physically deteriorating. (R. p. 66.) These circumstances are comparable to that of Georganne Apparel, and are sufficient for a conclusion that U.S. Bank has suffered prejudice by the delay.

As to the third factor, the circuit court correctly found that Appellant's history of proceeding in a dilatory fashion was shown by the events listed in the Certification of Mortgagor Noncompliance and in the motion that is the subject of this appeal. (R. p. 2.) Additional support for this finding is derived from Appellant's own Answer, which admits that some documents required by U.S. Bank were not submitted (R. p. 17) and from Appellant's failure to conduct discovery on her counterclaims. (R. p. 66.) As twenty-two months had passed since the institution of this action at the time the motion was heard, the court could conclude that this was the result of conscious and deliberate failure by Appellant to proceed on her counterclaims, which were not stayed by the 2011 Administrative Order. (See R. p. 70 ln. 22 – p. 71 ln. 20.) (noting that the foreclosure could not proceed on the merits prior to the Certification of Noncompliance, but that this did not stay the counterclaims). The Certification of Mortgagor Noncompliance was filed with the court, becoming part of the record. (R. pp. 84-85.) Moreover, Appellant's answer, also a part of the record, admits to failing to provide documentation. (R. p. 17.)

Finally, in regard to the fourth factor requiring the trial court's consideration of alternative sanctions, it is stated explicitly in the Oct. 1 Order that the court considered "another court order directing compliance" with the requirements of the loan modification process. The court concluded, however, that such an order "would provide no incentive for Burr to act." (R. p. 2.) This consideration was sufficient to satisfy the requirement that the court consider sanctions other than dismissal. McComas requires only that the trial court consider alternative sanctions, not that it must attempt them before proceeding with dismissal.

Additionally, Appellant confuses the court's inherent power to dismiss claims for failure to prosecute and the procedural process available under Rule 41(b). Crestwood Golf Club, Inc. v. Potter, 328 S.C. 201, 211, 493 S.E.2d 826, 832 (1997). The court's authority to order dismissals *sua sponte* does not require analysis under the four McComas factors. See Id. Therefore, it was not an error of law to conclude that the four McComas factors were satisfied, and the grant of dismissal under Rule 41(b) was not an abuse of discretion.

II. The circuit court did not err in dismissing Appellant's counterclaims and striking her affirmative defenses without the submission of affidavits or other admissible evidence.

The circuit court's findings are not findings of fact, and, as U.S. Bank's motion was not considered as a motion for summary judgment under Rule 56, SCRCP, it was not required to be supported by affidavits or other evidence. (R. p. 2.) Rule 12(c), SCRCP, states that "[i]f, on a motion for judgment on the pleadings, matters outside the pleadings are presented ... the motion shall be treated as one for summary judgment...." Id. However, this rule also contemplates that judgment on the pleadings may be had without reference to external matters. See Id.; Lydia v. Horton, 343 S.C. 376, 381, 540 S.E.2d 102, 105 (Ct. App. 2000), rev'd on other grounds, 355 S.C. 36, 583 S.E.2d 750 (2003) (citing Firemen's Ins. Co. v. Cincinnati Ins. Co., 302 S.C. 234,

394 S.E.2d 855 (Ct. App. 1990) (“On review of the motion, the court may not consider matters outside the pleadings.”)). Rule 12(f), SCRCF, contains no reference to matters outside the pleadings. Id. As the question in ruling on a motion under Rule 12(f) is whether the defense should be allowed to be plead, not whether there are facts supporting what has been pleaded, consideration of matters outside the pleadings is unnecessary. See Alladin Plastics, Inc. v. Wintenna, Inc., 301 S.C. 90, 93, 390 S.E.2d 370, 372 (Ct. App. 1990).

Likewise, Rule 41(b) does not require the submission of supporting affidavits. Rule 41(b), SCRCF. This rule does provide for the court to make findings of fact in actions where the court acts as a trier of fact and the defendant moves for dismissal under this rule after plaintiff has presented his evidence. Id. However, this procedure is the equivalent of a motion for a directed verdict in a non-jury case. See Fickling v. City of Charleston, 372 S.C. 597, 599 n.1, 643 S.E.2d 110, 112 n.1 (Ct. App. 2007) (noting that directed verdicts are available only in jury trials, but that dismissal may be had under Rule 41(b), SCRCF in actions without a jury). It is not the only path for dismissal under this rule. See Therens, 291 S.C. at 452, 354 S.E.2d at 55 (dismissing for failure to comply with United States District Court order); Small v. Mungo, 254 S.C. 438, 175 S.E.2d 802 (1970) (dismissing for failure to appear for trial); Brandt v. Gooding, 368 S.C. 618, 627, 630 S.E.2d 259, 264 (2006) (affirming dismissal as sanction for contempt and perpetrating a fraud on the court). These types of dismissals do not require the trial court to make findings of fact.

A copy of a document which is an exhibit to a pleading is part of the pleading for all purposes if a copy is attached to such a pleading. Rule 10(c), SCRCF; Brazell v. Windsor, 384 S.C. 512, 516, 682 S.E.2d 824, 826 (2009). Brazell held that a motion under Rule 12(b)(6), SCRCF, was not converted into a motion for summary judgment by considering a document

attached to and incorporated by reference into the complaint. Brazell, 384 S.C. at 516, 682 S.E.2d at 826.

The circuit court properly considered the Certification of Mortgagor Noncompliance in considering U.S. Bank's motion, as this is a pleading that was part of the record before the court and attached as an exhibit to the motion. It was, like the document in Brazell, part of the pleadings since it was required to be filed with the court. While Appellant is correct that factual statements of counsel ordinarily may not be considered by the court in determining whether a genuine issue of material fact exists, Higgins v. Medical Univ., 326 S.C. 592, 599, 486 S.E.2d 269, 272 (Ct. App. 1997), when deciding a motion for judgment on the pleadings or a motion to strike, the court is not looking at material facts. See Rule 12(c), (f), SCRCP; Alladin Plastics, Inc. v. Wintenna, Inc., 301 S.C. 90, 93, 390 S.E.2d 370, 372 (Ct. App. 1990) (stating that motions to strike do not deal with factual support of what has been pleaded); Lydia, 343 S.C. at 380, 540 S.E.2d at 105. As the Certification of Mortgagor Noncompliance and Plaintiff's Answer and Counterclaims were the documents considered by the circuit court in making its decision, it was not an abuse of discretion to grant U.S. Bank's motion without any supporting affidavits or the submission of other evidence.

III. The circuit court did not err in dismissing Appellant's counterclaims for mootness.

The circuit court ruled that Appellant's claims were moot as an additional basis for dismissal. (R. p. 2.) Justiciability, whether the litigation presents an active case or controversy, is a threshold inquiry for any court. Holden v. Cribb, 349 S.C. 132, 137, 561 S.E.2d 634, 637 (Ct. App. 2002) (quoting Lennon v. S.C. Coastal Council, 330 S.C. 414, 415, 498 S.E.2d 861, 864 (1996)). The concept of justiciability encompasses ripeness, mootness, and standing. Id. (citing Jackson v. State, 331 S.C. 486, 490 n.2, 489 S.E.2d 915, 917 n.2 (1997)). "A case

becomes moot when judgment, if rendered, will have no practical effect upon [an] existing controversy.” Id. at 137–38, 561 S.E.2d at 637 (quoting Seabrook v. City of Folly Beach, 337 S.C. 304, 306, 523 S.E.2d 462, 463 (1999)) (alteration in original). There are three exceptions to the mootness doctrine: (1) if the issue is capable of repetition but evading review; (2) to “decide questions of imperative and manifest urgency to establish a rule of future conduct in matters of important public interest” and (3) “if the trial court’s decision may affect future events or have collateral consequences for the parties.” Id. at 138, 561 S.E.2d at 637–38. (quoting Curtis v. State, 345 S.C. 557, 568, 549 S.E.2d 591, 596 (2001)). However, all the cases dealing with exceptions to mootness are in the context of a moot appeal and whether the appellate court can take jurisdiction, not the trial court’s jurisdiction. See Id.; Byrd v. Irmo High Sch., 321 S.C. 426, 430–32, 468 S.E.2d 861, 864 (1996); Darden v. S.C. Dep’t of Highways & Pub. Trans., 291 S.C. 270, 353 S.E.2d 279 (1987).

Here, all of Appellant’s counterclaims are premised on U.S. Bank’s failure to offer her a “reconsideration of her payment amounts.” (R. pp.17-18, 21.) U.S. Bank has offered Appellant this opportunity, not only through the foreclosure intervention process mandated by the 2011 Administrative Order, but also prior to the institution of this action through HAMP. (See R. p. 17, p. 66 ln. 23-25, p. 69 ln. 20 – p. 70 ln. 15, p. 84-85.) Any order from the circuit court in Appellant’s favor on her counterclaims would not grant her this modification opportunity. Appellant has already been offered a modification, as conceded by her counsel at the motion hearing. (R. p. 70 ln. 13-15.) Accordingly, any order from the circuit court preserving her counterclaims would have no practical effect. None of the mootness exceptions apply because Appellant’s claim of mootness goes to the justiciability of the initial action, not this appeal, which is also moot for the same reasons. While the failure of a loan servicer to consider a

borrower for foreclosure intervention is capable of repetition, Appellant has not shown how this question usually becomes moot before it can be reviewed by the courts. See Byrd, 321 S.C. at 431–32, 468 S.E.2d at 864. Appellant’s claims do not implicate any imperative or urgent questions, as the stay imposed by the mandatory foreclosure intervention program under the 2011 Administrative Order prevents a plaintiff from proceeding with foreclosure without offering to participate in foreclosure intervention. See In re Mortgage Foreclosure Actions, 396 S.C. at 211–13, 720 S.E.2d at 909. Additionally, the third exception, having collateral consequences for the parties, is not implicated because Appellant has already received exactly what she sought – an offer for loan modification. Therefore, the circuit court did not err in dismissing Appellant’s counterclaims for mootness.

IV. The circuit court did not err in dismissing Appellant’s counterclaims and striking her affirmative defenses on the basis of Rules 12(c) and 12(f), SCRPC because Appellant’s claims are moot.

Rule 12(c) states “after the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings.” Rule 12(c), SCRPC. A judgment on the pleadings is proper if there is no issue of fact raised by the complaint which, if resolved in favor of the plaintiff, would entitle him to judgment. Lydia v. Horton, 343 S.C. 376, 540 S.E.2d 102, 105 (Ct. App. 2000), rev’d on other grounds, 355 S.C. 36, 586 S.E.2d 750 (2003). Where the pleadings are fatally deficient in substance or fail to state a good cause of action in favor of the plaintiff and against the defendant, judgment on the pleadings is proper. Rosenthal v. Unarco Indus., 278 S.C. 420, 422, 297 S.E.2d 638, 640 (1982). Where the pleadings disclose all facts necessary, the Court may exercise its discretion. Id. In ruling on a Rule 12(c) motion, the court does not admit the inferences drawn by the plaintiff from the facts nor does it admit conclusions of law. Firemen’s Ins. Co. of Newark, New Jersey v. Cincinnati Ins. Co., 302 S.C. 234, 236, 394

S.E.2d 855, 856 (Ct. App. 1990) (citing Russell v. City of Columbia, 301 S.C. 117, 390 S.E.2d 463 (Ct. App. 1989)). The court may not consider matters outside the pleadings. Id.

Rule 12(f) states “Upon motion pointing out the defects complained of, and made by a party before responding to a pleading or... upon the court’s own initiative, at any time the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent or scandalous matter.” Rule 12(f), SCRPC. Where defenses are insufficient as a matter of law, the grant of a motion to strike is not error. See Mayes v. Paxton, 313 S.C. 109, 437 S.E.2d 66 (1993) (affirming decision to strike defenses of contributory negligence and assumption of risk where facts were clear and undisputed). The grant of a motion to strike will not be reversed absent an abuse of discretion or error of law. Robinson v. Code, 384 S.C. 582, 585, 682 S.E.2d 496, 496 (Ct. App. 2009).

The basis for the circuit court’s dismissal under Rules 12(c) and 12(f) was mootness, discussed above. A lack of a justiciable controversy means that any moot claims are insufficient as a matter of law. See Holden, 349 S.C. 132 at 135, 137–38, 561 S.E.2d at 634, 636–38. U.S. Bank was not required to plead mootness as a defense or argue that the pleadings somehow failed to state a claim for that reason. Additionally, U.S. Bank’s answer asserted failure to state a claim under Rule 12(b)(6) as a defense. (R. p. 25.) Mootness, as a threshold issue, may be raised *sua sponte*. See Eagle Container Co., LLC v. Cnty. of Newberry, 366 S.C. 611, 634, 622 S.E.2d 733, 745 (Ct. App. 2005), rev’d on other grounds, 379 S.C. 564, 666 S.E.2d 892 (2008) (holding ripeness may be raised *sua sponte*); Carolina Alliance for Fair Employment v. South Carolina Dep’t of Labor, Licensing, & Regulation, 337 S.C. 476, 485, 523 S.E.2d 795, 800 (Ct. App. 1999). Appellant’s counterclaims and defenses are based on the alleged failure to offer her a loan modification. (R. pp. 16-18.) Appellant’s counterclaims sought a modification offer. (R.

p. 21.) A modification would prevent the foreclosure from occurring. A grant of judgment in Appellant's favor would not have given her the modification she sought. Further, Respondent was at the time of the motion hearing working with and has continued to work with Appellant toward a modification, which efforts were unaffected by the trial court's dismissal of the counterclaims. (R. p. 62 ln. 20 – p. 64 ln. 6.) Because U.S. Bank had offered a modification, a reversal of the circuit court's Oct. 1 Order would have no practical effect. As the circuit court properly found that Appellant's claims were moot because U.S. Bank had offered her a modification, and mootness may be raised *sua sponte*, Appellant's counterclaims and defenses were properly dismissed and struck.

CONCLUSION

For all the foregoing reasons, the Order of the circuit court dismissing Appellant's counterclaims and striking her defenses should be affirmed.

Respectfully submitted,

FINKEL LAW FIRM LLC



Sean A. O'Connor (S.C. Bar No. 68382)

P.O. Box 41489

Charleston, SC 29423

Telephone: (843) 577-5640

Facsimile: (843) 577-5135

soconnor@finkellaw.com

October 24, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas

George C. James, Jr., Circuit Judge

Appellate Case No. 2012-213309
Common Pleas Case No. 2010-CP-28-1197

RECEIVED

OCT 17 2013

SC Court of Appeals

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.....Appellant.

FINAL REPLY BRIEF OF APPELLANT

Andrew S. Radeker
Harrison & Radeker, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
Attorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF ISSUES	1
ARGUMENT	2
I. U.S. Bank’s conception of what the Administrative Order requires and how it operates is at odds with the language of the order.	2
II. Statements in U.S. Bank’s own brief demonstrate that the circuit court’s decision could not be a proper product of a motion to strike or a motion for judgment on the pleadings.	4
a. A certification of mortgagor noncompliance with the Administrative Order is not a pleading.	4
b. The circuit court used only contentions of fact that were outside the pleadings to reach its decision.	5
c. The circuit court did what a court is never permitted to do.	6
III. The things Burr failed to do are not things that would have advanced the prosecution of her counterclaims.	6
CONCLUSION	7

TABLE OF AUTHORITIES

CASES

<u>Charleston County Sch. Dist v. Laidlaw Transit, Inc.</u> , 348 S.C. 420, 559 S.E.2d 362 (Ct. App. 2001)	6
<u>Falk v. Sadler</u> , 341 S.C. 281, 533 S.E.2d 350 (Ct. App. 2000)	5, 6
<u>Fireman’s Ins. Co. v. Cincinnati Ins. Co.</u> , 302 S.C. 234, 394 S.E.2d 855 (Ct. App. 1990)	5, 6
<u>McCormick v. England</u> , 328 S.C. 627, 494 S.E.2d 431 (Ct. App. 1997)	5
<u>In re: Care and Treatment of Miller</u> , 393 S.C. 248, 713 S.E.2d 253 (2011)	3
<u>In re: Mortgage Foreclosure Actions</u> , 396 S.C. 209, 720 S.E.2d 908 (2011)	2, 3, 5
<u>Russell v. City of Columbia</u> , 305 S.C. 86, 406 S.E.2d 338 (1991)	5
<u>Shirley’s Iron Works, Inc. v. City of Union</u> , 743 S.E.2d 778 (S.C. 2013)	4
<u>S.C. Nat’l. Bank v. Joyner</u> , 289 S.C. 382, 346 S.E.2d 329 (Ct. App. 1986)	4

COURT RULES

Rule 7(a), SCRCP	4
Rule 12(b)(6), SCRCP	5
Rule 12(c), SCRCP	5, 6
Rule 12(f), SCRCP	6
Rule 6, ADR Rules	3
Rule 10(b), ADR Rules	3

STATEMENT OF ISSUES

- I. Does the Respondent argue an interpretation of In re: Mortgage Foreclosure Actions, 396 S.C. 209, 210, 720 S.E.2d 908 (2011) (South Carolina Supreme Court Administrative Order 2011-05-02-01) that is at odds with the plain language of that order?**
- II. Does the Respondent's own brief contain statements that show that the circuit court's decision could not have been a proper product of a motion to strike or a motion for judgment on the pleadings?**
- III. Are the things that Appellant failed to do things that would have advanced the prosecution of her counterclaims?**

ARGUMENT

I. U.S. Bank's conception of what the Administrative Order requires and how it operates is at odds with the language of the order.

The Respondent (hereinafter "U.S. Bank") argues that "the circuit court had the inherent power to dismiss Appellant's counterclaims for failure to prosecute for failing to participate in the judicially mandated foreclosure intervention process[.]" (Initial Brief of Respondent p. 9.) U.S. Bank likens the requirements made of mortgage foreclosure plaintiffs under In re: Mortgage Foreclosure Actions, 396 S.C. 209, 210, 720 S.E.2d 908 (2011) (South Carolina Supreme Court Administrative Order 2011-05-02-01), to mandatory mediation, stating that "failure to participate in it is analogous to failing to participate in mandatory mediation" and thus provided a basis for the circuit court's decision to dismiss the Appellant (hereinafter "Burr")'s counterclaims and strike her affirmative defenses. (Initial Brief of Respondent p. 9.) U.S. Bank's argument in this regard is flawed in at least two respects.

First, U.S. Bank fails to recognize that the Administrative Order makes no requirements at all of someone in Burr's position. It simply provides that *if* a mortgagor defendant in a foreclosure case 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 plaintiff. Id. at 211-14. Compliance with the Administrative Order is mandated *for the plaintiff*. A foreclosure defendant may comply with the order by doing nothing at all, since the order does not require a foreclosure defendant to do

anything. It provides for what may happen if a foreclosure defendant does not do certain things, but it does not require the defendant to do them. Id. U.S. Bank's argument that the circuit court was within the law in dismissing Burr's counterclaims and striking her defenses because of a perceived failure on her part to fulfill requirements under the Administrative Order cannot be correct.

Second, U.S. Bank's argument ignores that the Administrative Order already provides for what happens if a foreclosure defendant does not submit the documents the plaintiff requires to process the defendant for foreclosure intervention: the plaintiff serves a notice of denial of foreclosure intervention, and the case stops being stayed and proceeds. Id. at 212. That happened. (R. p. 62 ln. 11-14, p. 71 ln. 12-18.) The Alternative Dispute Resolution Rules to which U.S. Bank alludes allow for dismissal of a party's claims for failure to comply with those Rules' mediation requirement (which applies to all parties in the case) in an extreme case because there is a Rule that provides for that as a possible result of noncompliance with the ADR Rules. Rules 6 and 10(b), S.C. ADR Rules. Here, the Administrative Order provides that what is to happen in circumstances like those in this case is just for the case to proceed. In re: Mortgage Foreclosure Actions, 396 S.C. at 212, 213. U.S. Bank, however, wanted more than that, and the circuit court erroneously agreed to give U.S. Bank what it wanted, visiting a draconian punishment on Burr for her failure to meet nonexistent requirements. (R. pp. 1-4.) If that is not an abuse of discretion, it is hard to think of what would be. See In re: Care and Treatment of Miller, 393 S.C. 248, 256, 713 S.E.2d 253, 257 (2011).

II. Statements in U.S. Bank's own brief demonstrate that the circuit court's decision could not be a proper product of a motion to strike or a motion for judgment on the pleadings.

a. A certification of mortgagor noncompliance with the Administrative Order is not a pleading.

Despite U.S. Bank's claim that it is, a certification of a mortgagor defendant's noncompliance with the Administrative Order is not a pleading. We know that because we have a Rule of Civil Procedure that states the pleadings that are allowed in the courts of common pleas in South Carolina, as follows:

Pleadings. There shall be a complaint and an answer; and a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if a person who was not an original party is summoned under Rule 14, and there shall be a third-party answer, if a third-party complaint is served. No other pleadings shall be allowed, except that the court may order a reply to an answer or a third-party answer; and there may be a reply to affirmative defenses as provided in Rule 8(c).

Rule 7(a), SCRPC.

A certification of the sort U.S. Bank contends is a pleading is not listed in Rule 7(a), SCRPC. In fact, the express declaration that "[n]o other pleadings shall be allowed" is dispositive of U.S. Bank's argument. Rule 7(a), SCRPC. Furthermore, a certification of mortgagor noncompliance with the Administrative Order is not *like* what is listed in Rule 7(a). "It is elementary that the principal purpose of pleadings is to inform the pleader's adversary of legal and factual positions which he will be required to meet on trial" of the case. Shirley's Iron Works, Inc. v. City of Union, 743 S.E.2d 778, 785 (S.C. 2013) (quoting S.C. Nat'l. Bank v. Joyner, 289 S.C. 382, 387, 346 S.E.2d 329, 332 (Ct. App. 1986)). The pleadings allowed by Rule 7(a) do

that. A certification of mortgagor noncompliance with the Administrative Order does not inform anyone of issues for trial in the case; rather, it just brings an end to the stay of the action under the Administrative Order and allows the case to proceed to a resolution of the issues that *are* framed by the pleadings. In re: Mortgage Foreclosure Actions, 396 S.C. at 212, 213.

b. The circuit court used only contentions of fact that were outside the pleadings to reach its decision.

U.S. Bank is wrong to argue that the circuit court's decision was a proper product of a motion to strike or for judgment on the pleadings, since the circuit court expressly based its decision on contentions of fact that are not in the pleadings. (R. pp. 1-4, 8-31, 53-54.) As discussed above, a certification of a mortgagor defendant's noncompliance with the Administrative Order is not a pleading and does not have any of the fundamental attributes of a pleading. The circuit court based its decision on the certification of noncompliance and on U.S. Bank's attorney's mere arguments to the court.

Rule 12(c), SCRPC, provides for a judgment on the pleadings in a proper case, and the standard of whether such a motion should be granted is the same as for a motion under Rule 12(b)(6), SCRPC. See Russell v. City of Columbia, 305 S.C. 86, 406 S.E.2d 338 (1991); Falk v. Sadler, 341 S.C. 281, 533 S.E.2d 350 (Ct. App. 2000); Fireman's Ins. Co. v. Cincinnati Ins. Co., 302 S.C. 234, 394 S.E.2d 855 (Ct. App. 1990). Similarly, a motion to strike that challenges a theory of recovery pled by the non-movant is in the nature of a motion to dismiss under Rule 12(b)(6), SCRPC. McCormick v. England, 328 S.C. 627, 494 S.E.2d 431 (Ct. App. 1997).

Accordingly, when directed at a counterclaim, such a motion “must be based solely on the allegations set forth in the counterclaim.” Charleston County Sch. Dist v. Laidlaw Transit, Inc., 348 S.C. 420, 559 S.E.2d 362 (Ct. App. 2001). On such a motion, the trial court may not consider matters outside the allegations of the pleadings. Falk, 341 S.C. at 281; Firemen’s Ins. Co., 302 S.C. at 234.

Here, the circuit court *only* based its decision on unpled contentions of fact made by U.S. Bank’s counsel. U.S. Bank admits in its brief that its motion was not converted into one for summary judgment. That U.S. Bank contends that Rule 12(c) or 12(f), SCRPC, permitted the circuit court to strike Burr’s defenses and dismiss her counterclaims on the basis of an unpled mootness defense and assertions of fact that are not contained in the pleadings cannot withstand the most cursory logical scrutiny.

c. The circuit court did what a court is never permitted to do.

The circuit court did what a court is never permitted to do: end a party’s claims and defenses solely on the basis of unsupported and unsworn contentions of fact made by the other party’s lawyer. As discussed above, what the circuit court was really doing was not deciding a motion directed at the sufficiency of Burr’s pleading. Nor was it making a decision on the basis of some factual record: no testimony, by affidavit or otherwise, was served with or ever offered in support of the motion. (R. pp. 38-47, 52, p. 69 ln. 11-15, p. 71 ln. 23-24, p. 74 ln. 4-5.)

III. The things Burr failed to do are not things that would have advanced the prosecution of her counterclaims.

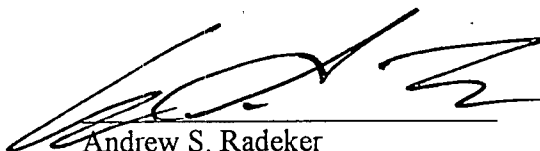
Everything U.S. Bank complained of in its motion that Burr failed to do were things that would have assisted with and provided information for use in settlement negotiations. All of them were things that might have helped this case to be resolved

through foreclosure intervention, which would be a resolution under which *neither* party would prosecute any claims in this case. (R. pp. 1-4, 32-47, p. 60 ln. 10 – p. 67 ln. 25, p. 73 ln. 9 – p. 74 ln. 3, p. 74 ln. 22 – p. 75 ln. 4.) None of them would have done anything to advance the prosecution of her counterclaims. For the circuit court to equate Burr's failure to do those things with a failure to prosecute her counterclaims is on its face a misconception of the law, and to end her claims and defenses as a result of that misconception was a plain abuse of discretion.

CONCLUSION

U.S. Bank's arguments are incorrect, as was the circuit court's ruling. This Court should reverse decision of the circuit court and remand this case.

Respectfully submitted,



Andrew S. Radeker
Harrison & Radeker, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
Attorney for Appellant

October 17, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas
George C. James, Jr., Circuit Judge

Appellate Case No. 2012-213309
Common Pleas Case No. 2010-CP-28-1197

RECEIVED
OCT 17 2013
SC Court of Appeals

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.....Appellant.

RECORD ON APPEAL

Andrew S. Radeker
Harrison & Radeker, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
Attorney for Appellant

Sean A. O'Connor
Finkel Law Firm, LLC
Post Office Box 41489
Columbia, South Carolina 29423
(843) 577-5460

Attorneys for Respondent

INDEX

Order on motion to dismiss counterclaims and strike defenses.....	1
Order on motion to reconsider.....	5
Order substituting counsel.....	6
Summons and Complaint.....	8
Answer and Counterclaims.....	15
Plaintiff's Answer to Defendant Burr's Counterclaims.....	23
Motion to Dismiss Counterclaims and Strike Defenses (with exhibits).....	32
Motion to Reconsider (with supporting memorandum).....	49
Transcript of motion hearing.....	56
Notice of right to foreclosure intervention.....	78
Certification of mortgagor noncompliance.....	84
Notice of Appearance.....	87
Certificate of Appellant's Counsel.....	88

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS,
COUNTY OF KERSHAW) FIFTH JUDICIAL CIRCUIT

U.S. BANK NATIONAL) Civil Action No. 2010-CP-28-1197
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,)

Plaintiff,)

vs.)

KELLEY BURR, FIA Card Services,)
N.A.; Discovery Bank, Issuer of the)
Discover Card; Unifund CCR Partners,)

Defendants.)

ORDER ON PLAINTIFF'S
MOTION TO DISMISS
COUNTERCLAIMS AND
TO STRIKE DEFENSES

This matter is before the Court on Plaintiff U.S. Bank National Association's, as trustee for the above-referenced trust ("U.S. Bank"), Motion to Dismiss Defendant's Counterclaims and to Strike Defenses ("Motion"), which was filed on April 18, 2012. Counsel for U.S. Bank and counsel for Defendant Kelley Burr ("Burr") presented arguments at a hearing on September 13, 2012.

Pursuant to the S.C. Supreme Court Administrative Order, 2011-05-02-01 ("Foreclosure Intervention Order"), Plaintiff served its Notice of Foreclosure Intervention on July 25, 2011. Through this case, Plaintiff has made extensive efforts to provide Burr with an opportunity to be considered for a loan modification, including offering Burr a modification proposal, as described in detail in Plaintiff's Motion and in Plaintiff's

ATTEST True, Correct & Certified
Copy of Original on File in this
Court

[Signature]
Clerk of Court Kershaw County

Certification of Noncompliance with the Foreclosure Intervention Process, which it filed on October 27, 2011.

Pursuant to Rule 41(b), a counterclaim defendant may move for dismissal of claims against it for the counterclaim plaintiff's failure to prosecute. Burr asserts the following defenses and counterclaims against Defendant, all based primarily on an alleged failure to "conduct a fair, reasonable, comprehensive analysis" and "reconsideration of her home mortgage amount problem": a) unclean hands; b) breach of contract; c) fraud and misrepresentation in the inducement; d) violation of the S.C. Unfair Trade Practices Act; e) in pari delicto; f) residential home. (Answer and Counterclaims, ¶ 11).

The Court "must consider four factors before dismissing a case for failure to prosecute: (1) the plaintiff's degree of personal responsibility; (2) the amount of prejudice caused the defendant; (3) the presence of a drawn out history of deliberately proceeding in a dilatory fashion; and (4) the effectiveness of sanctions less drastic than dismissal." *McComas v. Ross*, 368 S.C. 59, 626 S.E.2d 902 (Ct. App. 2006) (citing *Hillig v. Comm'r of Internal Revenue*, 916 F.2d 171, 174 (4th Cir.1990)).

In addition to the test to determine whether a party has failed to prosecute its claims, the Foreclosure Intervention Order also creates responsibilities for both the mortgagee and mortgagor in a foreclosure action. That order was entered to address the "difficulty in making final disposition of these actions as a result of failed or delayed loss mitigation efforts between lender-servicers and mortgagor-debtors. As a result, the number of unresolved foreclosure actions has increased, with a resulting burden on the resources of the Court before which the action is pending." Order at *1. The Foreclosure Intervention Order requires that the mortgagee notify the mortgagor of the availability of

foreclosure intervention options, and the mortgagor has 30 days to proceed with foreclosure intervention. *Id.* at 3. The foreclosure hearing can proceed after the mortgagee's counsel certifies that it has complied with the Foreclosure Intervention Order. *Id.* This action was subject to the Foreclosure Intervention Order.

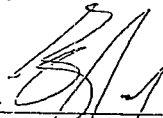
First, regarding Burr's degree of personal responsibility, although Burr had counsel in this action who was acting on her behalf, she remains personally responsible for the foreclosure intervention process and submitting her information for a modification review. Second, regarding the amount of prejudice caused to the counterclaim defendant, U.S. Bank has expended time and expenses before and since the filing of the Complaint. Third, regarding the presence of a drawn out history of deliberately proceeding in a dilatory fashion, the history of U.S. Bank's attempts to work with Burr are described in detail in Plaintiff's Certification of Noncompliance and in this Motion. Fourth and finally, regarding the effectiveness of sanctions less drastic than dismissal, another court order directing compliance would provide no incentive for Burr to act. Thus, Burr "has been given abundant opportunity to litigate. There is a limit beyond which the court should allow a litigant to consume the time of the court and to prolong unnecessarily time, effort, and costs to defending parties." *Georganne Apparel, Inc. v. Todd*, 303 S.C. 87, 92, 399 S.E.2d 16, 19 (Ct. App. 1990).

In addition to failing to prosecute her claims, Burr's claims are moot because they are based on an alleged scenario of her not being offered a loan modification. *See Darden v. S.C. Dep't of Highways and Pub. Trans.*, 291 S.C. 270, 353 S.E.2d 279 (1987) (finding the case moot because an effective date had passed, so "there remain[ed] no actual case or controversy, and a judgment rendered by this Court would have no practical legal effect upon the existing case"). Plaintiff offered Burr a modification

proposal on January 10, 2012, and no evidence shows that Burr responded to this offer until April. A judgment in her favor would have no practical effect on her counterclaims because she already has been offered the primary relief that she sought: "For an Order granting the Defendant a fair, reasonable, comprehensive, and thorough reconsideration and modification of the terms of the contract, as [allegedly] was promised by the Plaintiff, to determine an affordable amount of mortgage payment." (Answer and Counterclaims, paragraph beginning WHEREFORE, sub B.)

Based on the arguments presented by counsel, the documents and evidence presented, and Rules 41(b) and Rules 12(c) and 12(f) of the South Carolina Rules of Civil Procedure, Plaintiff's Motion for to Dismiss Defendant Burr's Counterclaims and to Strike Affirmative Defenses is hereby GRANTED.

AND IT IS SO ORDERED.



George C. James, Jr.
Circuit Court Judge

Sumter, South Carolina

9/26, 2012

STATE OF SOUTH CAROLINA)
COUNTY OF KERSHAW)

IN THE COURT OF COMMON PLEAS
THIRD JUDICIAL CIRCUIT
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, 202, among)
Asset Backed Funding Corporation,)
Little Loan Servicing LP and LaSalle)
Bank National Association, ABFC)
Asset Backed Certificates, Series)
2002-SB-1,)

Plaintiff,)

vs)

Kelley Burr, FIA Card Services,)
N.A.; Discovery Bank, Issuer of the)
Discover Card; Unifund CCR)
Partners,)

Defendants,)

ORDER

2012 OCT 16 AM 11:08
CLERK OF COURT
KERSHAW COUNTY, S.C.

The defendant Kelley Burr's motion for reconsideration is denied.

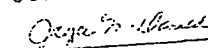
AND IT IS SO ORDERED.


George C. James, Jr.
Circuit Court Judge

Sumter, South Carolina

October 15, 2012

ATTEST True, Correct & Certified
Copy of Original on File in this
Court


Clerk of Court Kershaw County

STATE OF SOUTH CAROLINA)
)
COUNTY OF KERSHAW)

IN THE COURT OF COMMON PLEAS FOR
THE THIRD JUDICIAL CIRCUIT
CIVIL ACTION 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

Plaintiff,

v.

Kelley Burr, FIA Card Services, N.A.,
Discovery Bank, Issuer of the Discover
Card; Unifund CCR Partners,

Defendants.

ORDER SUBSTITUTING COUNSEL

FILED FOR RECORD
2013 JAN 18 PM 3:26
JOSE HERNANDEZ
CLERK OF COURT
KERSHAW COUNTY, S.C.

IT APPEARS TO THE COURT that Plaintiff, 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, ("Plaintiff") has designated Attorney Sean A. O'Connor of Finkel Law Firm LLC as local counsel of record in place of Attorney Carmen Harper Thomas of Nelson Mullins Riley & Scarborough LLP.

Therefore, good and sufficient cause having been shown,

IT IS ORDERED that:

1. Finkel Law Firm LLC shall be substituted as counsel of record for Plaintiff;
2. Finkel Law Firm LLC shall receive copies of all pleadings, notices, orders, correspondence, and all other relevant documents pertaining to the within captioned action.

S/ D. Thomas Cooper, Jr.
Presiding Judge
Third Judicial Circuit

Dated: 1-18, 2013

ATTEST True, Correct & Certified
Copy of Original on File in this
Court

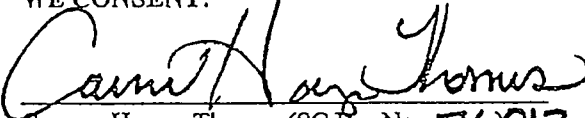
[Signature]
Clerk of Court Kershaw County

U.S. National Association et al. v. Kelley Burr et al.
Order Substituting Counsel
Page 2

WE MOVE:


Sean A. O'Connor (SC Bar No.: 68382)
FINKEL LAW FIRM LLC
P.O. Box 41489
Charleston, South Carolina 29423
Telephone: (843) 577-5460
Facsimile: (843) 577-5135
soconnor@finkellaw.com

WE CONSENT:


Carmen Harper Thomas (SC Bar No. 76012)
Nelson Mullins Riley & Scarborough LLP
1320 Main Street / 17th Floor
Columbia, South Carolina 29201
Telephone: (803) 799-2000
Facsimile: (803) 255-5932
Carmen.thomas@nelsonmullins.com

STATE OF SOUTH CAROLINA
COUNTY OF KERSHAW

U.S. Bank National Association as 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-SB1,

Plaintiff,

v.

Kelley Burr; FIA Card Services, N.A.; Discover
Bank, Issuer of the Discover Card; Unifund CCR
Partners;

Defendant(s).

(013644-01047)

IN THE COURT OF COMMON PLEAS
DOCKET NO.

2010-CP-28-1197

SUMMONS AND NOTICES
(NON-JURY)
FORECLOSURE OF REAL ESTATE
MORTGAGE
Deficiency Judgment Waived

FILED FOR RECORD
2010 NOV -1 PM 12:58
JOYCE HEDGECOCK
CLERK OF COURT
KERSHAW COUNTY, S.C.

TO THE DEFENDANT(S) ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to appear and defend by answering the Complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your Answer on the subscribers at their offices, 220 Executive Center Drive, Suite 109, Post Office Box 100200, Columbia, South Carolina 29202, within thirty (30) days after the service hereof, exclusive of the day of such service, except that the United States of America, if named, shall have sixty (60) days to answer after the service hereof, exclusive of the day of such service; and if you fail to do so, judgment by default will be rendered against you for the relief demanded in the Complaint.

YOU WILL ALSO TAKE NOTICE that Plaintiff will move for an order of reference or that the Court may issue a general order of reference of this action to a master in equity/special referee, pursuant to Rule 53, of the South Carolina Rules of Civil Procedure.

TO MINOR(S) OVER FOURTEEN YEARS OF AGE, AND/OR TO MINOR(S) UNDER FOURTEEN YEARS OF AGE AND THE PERSON WITH WHOM THE MINOR(S) RESIDES, AND/OR TO PERSONS UNDER SOME LEGAL DISABILITY:

YOU ARE FURTHER SUMMONED AND NOTIFIED to apply for the appointment of a guardian ad litem within thirty (30) days after the service of this Summons and Notice upon you. If you fail to do so, application for such appointment will be made by U.S. Bank National Association as 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-SB1.

Kevin T. Hardy

Rogers Townsend & Thomas, PC
ATTORNEYS FOR PLAINTIFF

Samuel C. Waters (SC Bar #5958)
Reginald P. Corley (SC Bar #69453)
Ellie C. Floyd (SC Bar #68635)
Eve Moredock Stacey (SC Bar #5300)
Robert P. Davis (SC Bar #74030)
Shawn R. Willis (SC Bar #71155)
Benjamin J. Powell (SC Bar #77205)
Kelsey K. Brockbank (SC Bar #77519)
220 Executive Center Drive, Suite 109
Columbia, SC 29210

Cheryl H. Fisher (SC Bar #15213)
Jennifer W. Rubin (SC Bar #16727)
Michael P. Morris (SC Bar #73560)
Mary R. Powers (SC Bar #16534)
William S. Koehler (SC Bar #74935)
Kevin T. Hardy (SC Bar #76015) ✓
John P. Fetner (SC Bar #77460)
Vance L. Brabham, III (SC Bar #71250)
Post Office Box 100200 (29202)
(803) 744-4444

Columbia, South Carolina
October 29, 2010

STATE OF SOUTH CAROLINA
COUNTY OF KERSHAW

U.S. Bank National Association as 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-SB1,

Plaintiff,

v.

Kelley Burr; FIA Card Services, N.A.; Discover Bank, Issuer of the Discover Card; Unifund CCR Partners;

Defendant(s).

(013644-01047)

IN THE COURT OF COMMON PLEAS
DOCKET NO.

2010-CP-28-1197

COMPLAINT

(NON-JURY)

FORECLOSURE OF REAL ESTATE
MORTGAGE
Deficiency Judgment Waived

FILED FOR RECORD
2010 NOV - 1 PM 12:58
JOYCE P. COBBALD
CLERK OF COURT
KERSHAW COUNTY, S.C.

Plaintiff alleges:

1. This is an action for the foreclosure of a mortgage upon certain real estate in Kershaw County, South Carolina.
2. Pursuant to S.C. Code Section 33-15-101, Plaintiff is a corporation or other legal entity doing business in the State of South Carolina.
3. Plaintiff has the legal right to enforce the negotiable instrument secured by the Mortgage and is the real party in interest as defined by Rule 17(a) of the South Carolina Rules of Civil Procedure.
4. The Plaintiff's servicing agent for the mortgage loan described in this foreclosure action is participating in the Home Affordable Modification Program ("HMP"), but the subject loan is not eligible for modification because the borrower did not provide all necessary documents after those documents had been requested.
5. Some lien on or interest in the real estate, the subject of this action, may be claimed

by the Defendant(s) herein.

6. The Defendant(s) herein described as judgment creditors have by filing said judgments designated their attorney entering the judgment as their agent for service of process under the provisions of South Carolina Code Section 15-35-840.

7. Heretofore, on or about October 31, 2001, Kelley Burr made, executed and delivered a certain Fixed Rate Note ("Note") in the principal sum of \$100,800.00, payable in monthly installments.

8. In order to secure the payment of the Note according to the terms and conditions thereof, Kelley Burr made, executed and delivered unto EquiSource Home Mortgage Corp. a certain real estate mortgage ("Mortgage") covering the following described property and any and all improvements to the property, including but not limited to a mobile/manufactured home:

All that certain piece, parcel or lot of land containing 1.01 acres, more or less, with improvements thereon, situate, lying and being near the Community of Lugoff, in Wateree Township, County of Kershaw, State of South Carolina, and being more particularly shown on that plat prepared for James T. Burr and Kelly Burr by Donald G. Platt, RLS dated April 30, 1985 and recorded in the Office of the Clerk of Court for Kershaw County in Plat Book 37 at Page 1288; said property is bounded as follows: North by lands now or formerly of S. Cassidy and a portion of lands of J. Sweatt; East by Block A, Lot 7; South by Bayview Drive (S-28-900); and West by lands now or formerly of Earl F. Watts and Phillip P. Watts.

This being the same property conveyed to James T. Burr and Kelley Burr by deed of Earl F. Watts and Phylis Watts, dated May 1, 1985 and recorded May 23, 1985 in Book IV at Page 1915; subsequently, James T. Burr conveyed his one-half interest in the subject property to Kelley Burr by deed dated July 19, 1996 and recorded July 22, 1996 in Book 445 at Page 24 in the Office of the Clerk of Court for Kershaw County.

Property Address: 1128 Bayview Dr
Lugoff, SC 29078

TMS# 296-14-00-015A

9. The Mortgage was signed, witnessed and probated October 31, 2001; thereafter the Mortgage was recorded in the Office of the RMC/ROD for Kershaw County on November 5, 2001, in Mortgage Book 1072 at Page 142.

10. The Mortgage evidences and secures the repayment of money advanced by Plaintiff or its predecessor in interest to, or on behalf of, the mortgagor(s) and constitutes a first lien on the mortgaged premises.

11. Any notice required by the terms of the Note and Mortgage or by state or federal laws has been given to the applicable Defendant(s).

12. After all payments received by the Plaintiff have been credited to the subject loan, the loan is in default and due for May 5, 2009, and the conditions of the Note and Mortgage have been broken. Plaintiff elects to and does declare the entire balance of said indebtedness due and payable, and

that there is due on the Note and Mortgage as of May 5, 2009, the principal sum of \$96,974.63, with interest from April 5, 2009, advances, late charges, and also for the costs and disbursements of this action, including attorney's fees.

13. Plaintiff's right to a personal or deficiency judgment pursuant to South Carolina Code Sections 29-3-650 and 29-3-660 is expressly waived.

14. Pursuant to the terms of the Mortgage, Plaintiff has employed counsel to prosecute this action and a reasonable value of services of counsel in this action is the sum as the Court may find appropriate.

15. Plaintiff may be forced to pay sums for taxes and insurance and costs for securing the property, which sums, according to the terms of the Mortgage, should be added to the amount of the debt.

16. Pursuant to the terms of the Mortgage and applicable state law, Plaintiff requests the mortgage be foreclosed and that the property be sold at public auction in accordance with law, subject to any liens for taxes, special assessments of record against such property, and existing easements or restrictions of record.

17. The hereinafter named Defendant(s) may have some interest in or lien upon the premises covered by the Mortgage set forth above, or some part thereof, but that such interests or liens are junior and subsequent to the lien of Plaintiff's Mortgage or, if specified below, have been paid in full and either should be satisfied of record or the lien released from the subject real estate. Said liens or interests are of record in the Office of the RMC or Clerk of Court of the aforesaid county and are described as follows:

A. FIA Card Services, N.A., by virtue of a judgment against Kelley B. Burr in favor of MBNA America Bank, N.A. in the amount of \$14,374.86, dated January 20, 2006 and recorded on January 20, 2006 in Judgment Roll No. 46320 FIA Card Services, N.A. is successor in interest to MBNA America Bank, N.A.

B. Discover Bank, Issuer of the Discover Card, by virtue of a judgment against Kelley B. Burr in the amount of \$7,365.34, dated January 18, 2007 and recorded on January 18, 2007 in Judgment Roll No. 06-CP-26-718

C. Unifund CCR Partners, by virtue of a judgment against Kelley B. Burr in the amount of \$4,906.31, dated February 2, 2008 and recorded on February 12, 2008 in Judgment Roll No. 07-CP-28-923

D. Unifund CCR Partners, by virtue of a judgment against Kelley B. Burr in the amount of \$12,706.09, dated February 12, 2008 and recorded on February 12, 2008 in Judgment Roll No. 07-CP-28-978

WHEREFORE, having fully set forth its Complaint, Plaintiff prays that this Honorable Court inquire into the matters as set forth herein and:

(1) Under the direction of this Court, ascertain and determine the amount due upon the Note and Mortgage held by Plaintiff together with attorney's fees and costs of this action.

(2) Declare Plaintiff's Mortgage a first lien and render judgment of foreclosure for the amount so found to be due and owing thereon, together with any ad valorem taxes, or insurance premiums, and any other expenses which may be due and have been advanced by Plaintiff, with reasonable attorney's fees, and for the costs of this action.

(3) Order the reimbursement of all costs for inspecting and securing the property incurred by the Plaintiff as a result of the delinquency.

(4) Appoint a Receiver to collect the rents, issues, profits or designated sums from the mortgagor(s), and/or the grantee(s) of the mortgagor(s), and/or tenant(s) occupying or exercising control over the mortgaged premises and hold the same subject to the further order of this Court.

(5) Under the direction of this Court, sell the mortgaged premises, bar any equity of redemption, and apply the proceeds of sale as follows:

First, to the costs and expenses of the within action and sale;

Second, to the payment and discharge of the amount due on Plaintiff's Note and Mortgage, together with attorney's fees as aforesaid; and

Third, to the distribution of any surplus pursuant to Rule 71, of the South Carolina Rules of Civil Procedure;

(6) Issue an order directing the Sheriff of Kershaw County, South Carolina, to place the successful purchaser at said foreclosure sale in possession of the property should the same become necessary;

(7) Order such other and further relief as may be just and proper.

Kevin T Hardy

Rogers Townsend & Thomas, PC
ATTORNEYS FOR PLAINTIFF

Samuel C. Waters (SC Bar #5958)
Reginald P. Corley (SC Bar #69453)
Ellie C. Floyd (SC Bar #68635)
Eve Moredock Stacey (SC Bar #5300)
Robert P. Davis (SC Bar #74030)
Shawn R. Willis (SC Bar #71155)
Benjamin J. Powell (SC Bar #77205)
Kelsey K. Brockbank (SC Bar #77519)
220 Executive Center Drive, Suite 109
Columbia, SC 29210

Cheryl H. Fisher (SC Bar #15213)
Jennifer W. Rubin (SC Bar #16727)
Michael P. Morris (SC Bar #73560)
Mary R. Powers (SC Bar #15534)
William S. Koehler (SC Bar #74935)
Kevin T. Hardy (SC Bar #76015)
John P. Fetner (SC Bar #77460)
Vance L. Brabham, III (SC Bar #71250)
Post Office Box 100200 (29202)
(803) 744-4444

Columbia, South Carolina
October 29, 2010

STATE OF SOUTH CAROLINA)
)
 COUNTY OF KERSHAW)
)

IN THE
 COURT OF COMMON PLEAS
 FOR THE FIFTH JUDICIAL CIRCUIT

CP
 Docket No.: 2010-DR-28-1197

U.S. BANK NATIONAL as)
 ASSOCIATION Successor trustee to)
 LaSalle Bank National Association,)
 et. al.)

PLAINTIFF)

V.)

ANSWER AND COUNTERCLAIMS

KELLEY BURR; et. al.)

DEFENDANTS)
 _____)

NOW COMES the Defendant, Kelley Burr, by and through her attorney, David Paul Reuwer, Esquire, who herein files her Answer and Counterclaims to the Plaintiff's Complaint for Foreclosure of Real Estate Mortgage and would respectfully show unto this Honorable Court as follows:

FOR A FIRST DEFENSE

1. Each and every allegation of Plaintiff's Complaint not specifically admitted or qualified is expressly denied.
2. Defendant Burr admits the allegations contained in paragraphs 1, 7, 8, 9, 13.
3. Defendant Burr denies each and every one of the allegations contained in paragraphs 4, 12, 16.
4. Defendant Burr lacks sufficient information and knowledge to answer or otherwise respond to each and every one of the allegations contained in paragraphs 2, 3, 6, 10, 11, 14,

15, and 17 and to the extent a response is required, Defendant Burr denies the allegations contained in those paragraphs.

5. Defendant Burr admits the allegation in paragraph 5 that she, Kelley Burr, has an equitable interest in the subject real estate, but she is without sufficient information and knowledge to answer or otherwise respond to whether or not other defendants have a lien or interest in the real estate.

6. Where portions of a paragraph's allegations in the Complaint have been admitted, the remainder of the allegations in the said paragraph is hereby denied unless separately and specifically admitted or qualified.

**FOR A SECOND DEFENSE AND COUNTERCLAIM
BURR'S FACTUAL ALLEGATIONS**

7. The Defendant realleges each and every allegation in paragraphs 1 through 6 fully incorporated herein as if set forth verbatim and specifically averred herein.

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.

11. The Defendant is informed and believes that the Plaintiff did not conduct a fair, reasonable, comprehensive analysis nor reconsideration of her home mortgage payment amount problem, and that the Plaintiff never intended to actually do so.

FOR A THIRD DEFENSE AND COUNTERCLAIM

UNCLEAN HANDS

12. The Defendant realleges each and every allegation in paragraphs 1 through 11 fully incorporated herein as if set forth verbatim and specifically averred herein.

13. Plaintiff's claims are barred, in whole or in part, by the doctrine of unclean hands.

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 a 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 his work in the aftermath of Hurricane Hugo 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 thorough reconsideration of her payment amounts.

FOR A FOURTH DEFENSE AND COUNTERCLAIM

BREACH OF CONTRACT

19. That the Defendant realleges each and every allegation in paragraphs 1 through 18 fully incorporated herein as if set forth verbatim and as specifically averred herein.

20. The contract exists between the Plaintiff and the Defendant, as evidenced by the note and mortgage, as also between predecessor in interest and its successor.

21. Plaintiff has breached the terms of the contract and its duty to service the agreement in good faith when dealing with the Defendant.

22. Plaintiff's breach actually, directly and proximately caused Defendant Burr to suffer damages, including but not limited to monetary loss, stress, sleeplessness, severe frustration, and infliction of distress.

FOR A FIFTH DEFENSE AND COUNTERCLAIM

FRAUD AND MISREPRESENTATION IN THE INDUCEMENT

23. That the Defendant realleges each and every allegation in paragraphs 1 through 22 fully incorporated herein as if set forth verbatim and as specifically averred herein.

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.

25. The note and mortgage are void by Plaintiff's fraud and misrepresentation in the inducement.

FOR A SIXTH DEFENSE AND COUNTERCLAIM

UNFAIR TRADE PRACTICES

26. That the Defendant realleges each and every allegation in paragraphs 1 through 25 fully incorporated herein as if set forth verbatim and as specifically averred herein.

27. Plaintiff communicates and does business state-wide with the general public, of whom the Defendant Burr is one member. Plaintiff engages the general public and its acts concern the public at large.

28. Plaintiff's conduct including but not limited to leading a stressed adult to think that she is being helped, for that issues be reconsidered, and that modification of payment amount will take place reasonably and in a timely manner, all the while lengthening the defaulted payments and foreclosing on the subject property constitutes unfair and deceptive trade practices, or anywise deceptive acts or course of conduct. Such Plaintiff's conduct was performed in the course of trade and commerce in the State of South Carolina in willful violation of the South Carolina Unfair Trade Practices Act, S.C. Code sections 39-5-10 (1976, as amended) et. seq.

29. The above described unfair and deceptive trade practices on the part of the Plaintiff are capable of repetition that will adversely effect the general public.

30. The Plaintiff's unlawful course of conduct constituted a willful and knowing violation of the Unfair Trade Practices Act; such that the Defendant Burr is informed and believes that this Court should award three (3) times the actual damages sustained and should anyway allow punitive damages to be determined by a jury. The Court, upon finding said statutory violation, should also award reasonable attorney's fees and costs.

31. The Defendant is informed and believes that she is entitled to a judgment against the Plaintiff for said damages and fees and costs as may be determined by a jury.

FOR A SEVENTH DEFENSE AND COUNTERCLAIM

IN PARI DELICTO

32. That the Defendant realleges each and every allegation in paragraphs 1 through 31 fully incorporated herein as if set forth verbatim and as specifically averred herein.

33. The Plaintiff's claims are barred, in whole or in part, by the doctrine of *in pari delicto*.

FOR AN EIGHTH DEFENSE AND COUNTERCLAIM

RESIDENTIAL HOME

34. That the Plaintiff realleges each and every allegation in paragraphs 1 through 33 fully incorporated herein as if set forth verbatim and as specifically averred herein.

35. The Defendant is informed and believes that it is in the best interests of justice and equity, as well as for the Defendant's health, safety and welfare, to remain within the subject real property as it is her residence and home, until this matter can be set and heard for a trial.

WHEREFORE the Defendant Burr prays this Honorable Court to be granted the following relief:

- A. For an Order dismissing the Plaintiff's Complaint with prejudice.
- B. For an Order granting the Defendant a fair, reasonable, comprehensive, and thorough reconsideration and modification of the terms of the contract, as was promised by the Plaintiff, to determine an affordable amount of mortgage payment.
- C. For an Order granting an award in three times the amount of actual damages sustained plus punitive damages to be determined by a jury.
- D. Upon a finding of fraud, misrepresentation and/or statutory violation, for costs and attorney fees of defending against this foreclosure and for prosecuting this petition of counterclaims.
- E. For an Order determining that the Plaintiff's legal action is barred.
- F. For an Order determining that the Plaintiff's note and mortgage are void; and
- G. For such other and further relief as this Court may deem equitable, just and proper.

December 20, 2010
at Camden, South Carolina

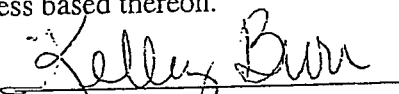
by: 
DAVID P. REUWER, Bar # 70696
ATTORNEY for ~~DAVID P. BURR~~ DEFENDANT
306 Hampton Park
P.O. Box 1776
Camden, SC 29021
803.549.6710
808.425.7136 Fax

STATE OF SOUTH CAROLINA)
)
COUNTY OF KERSHAW)

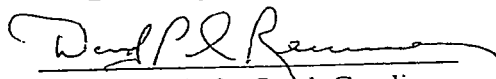
VERIFICATION

Personally appeared me, the Defendant, Kelley Burr, who being duly sworn says:

- (a) That this Deponent has read the allegations contained in the attached pleadings consisting of seven pages;
- (b) That the attached pleadings were prepared by this Deponent's attorney based upon information this Deponent has personally furnished to said attorney;
- (c) That the allegations contained in the attached pleadings are true and correct, and are based upon the personal knowledge of this Deponent, except for those allegations which are based upon this Deponent's information and belief and, as to those, this Deponent verily believes the same to be true;
- (d) That the Deponent has authorized said attorney to file the attached pleadings, to present the same to the Court and secure any necessary pleadings, to present the same to the Court and secure any necessary Orders based thereon and to secure service upon the adverse party of the attached pleadings and necessary process based thereon.


KELLEY BURR

SUBSCRIBED AND SWORN before me
this 20 day of December, 2010


Notary Public for South Carolina
My commission expires: August 27, 2013

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS,
) FIFTH JUDICIAL CIRCUIT
COUNTY OF KERSHAW)

U.S. BANK NATIONAL) Civil Action No. 2010-CP-28-1197
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,)

Plaintiff,)

vs.)

KELLEY BURR, FIA Card Services,)
N.A.; Discovery Bank, Issuer of the)
Discover Card; Unifund CCR Partners,)

Defendants.)

PLAINTIFF'S ANSWER TO
DEFENDANT BURR'S
COUNTERCLAIMS

FILED FOR RECORD
2011 FEB 24 PM 3:56
JOYCE McDONALD
CLERK OF COURT
KERSHAW COUNTY, S.C.

Reserving all rights and remedies available to it, Plaintiff 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 ("U.S. Bank"), answering Defendant Kelley Burr's ("Defendant") Counterclaims, would respectfully show as follows:

FOR A FIRST DEFENSE TO THE ANSWER

1. Unless expressly admitted herein, every allegation contained in the Counterclaims is denied.
2. Paragraphs 1, 2, 3, 4, 5, and 6 respond to the allegations of U.S. Bank's complaint, and therefore, U.S. Bank is not required to respond to these paragraphs.

**FOR AN ANSWER
TO THE SECOND DEFENSE AND COUNTERCLAIM**
(Burr's Factual Allegations)

3. U.S. Bank denies the allegations of Paragraphs 7, 8, 9, 10, and 11.

FOR AN ANSWER TO THE THIRD DEFENSE AND COUNTERCLAIM
(Unclean Hands)

4. U.S. Bank denies the allegations of Paragraphs 12, 13, 14, and 15.

5. Responding to Paragraph 16, U.S. Bank is without knowledge or information sufficient to form a belief as to the truth of Defendant's allegations as to the reasons he could not provide documents. U.S. Bank denies the remaining allegations of Paragraph 16.

6. U.S. Bank denies the allegations of Paragraphs 17 and 18.

FOR AN ANSWER TO THE FOURTH DEFENSE AND COUNTERCLAIM
(Breach of Contract)

7. U.S. Bank denies the allegations of Paragraph 19.

8. Responding to Paragraph 20, U.S. Bank admits that it is the owner of the note and mortgage and is entitled to enforce its rights thereunder. U.S. Bank craves reference to any other "contract" between the parties. U.S. Bank denies the remaining allegations of Paragraph 20.

9. U.S. Bank denies the allegations of Paragraphs 21 and 22.

FOR AN ANSWER TO THE FIFTH DEFENSE AND COUNTERCLAIM
(Fraud and Misrepresentation in the Inducement)

10. U.S. Bank denies the allegations of Paragraphs 23, 24, and 25.

FOR AN ANSWER TO THE SIXTH DEFENSE AND COUNTERCLAIM
(Unfair Trade Practices)

11. U.S. Bank denies the allegations of Paragraph 26.

12. To the extent that Paragraph 27 asserts conclusions of law, U.S. Bank is not required to respond, but U.S. Bank denies any allegations of Paragraph 27 to which it is required to respond.

13. U.S. Bank denies the allegations of Paragraph 28.

14. To the extent that Paragraphs 29, 30, and 31 assert conclusions of law, U.S. Bank is not required to respond, but U.S. Bank denies any allegations of Paragraphs 29, 30, and 31 to which it is required to respond.

FOR AN ANSWER TO THE SEVENTH DEFENSE AND COUNTERCLAIM
(In Pari Delicto)

15. U.S. Bank denies the allegations of Paragraphs 32 and 33.

FOR AN ANSWER TO THE SIXTH DEFENSE AND COUNTERCLAIM
(Residential Home)

16. U.S. Bank denies the allegations of Paragraphs 34 and 35.

17. U.S. Bank denies the allegations in the Paragraph beginning WHEREFORE and the subparagraphs labeled A, B, C, D, E, F, and G.

FOR A SECOND DEFENSE

18. Defendant's Counterclaims fail to state facts sufficient to constitute a cause of action against U.S. Bank and must be dismissed pursuant to Rule 12(b)(6), S.C. Rules of Civil Procedure.

FOR A THIRD DEFENSE

19. At all times, U.S. Bank has acted in good faith and in a reasonable manner to comply with all applicable state and federal laws with respect to its dealings with Defendant; because U.S. Bank's actions concerning Defendant were taken in good faith and in a reasonable manner, Defendant is precluded from recovery against U.S. Bank.

FOR A FOURTH DEFENSE

20. U.S. Bank states that if Defendant has been injured or otherwise damaged, which allegations are specifically denied, such injury or damage was the result, in whole or in part, of independent and intervening or superseding causes over which U.S. Bank had no control nor in any way participated.

FOR A FIFTH DEFENSE

21. If Defendant incurred any loss or damage as alleged in the Counterclaims, such loss or damage resulted from the acts of omissions of another party or parties over whom U.S. Bank neither exercised nor had any right of control, for which U.S. Bank is not responsible, and whose conduct U.S. Bank had no duty or reason to anticipate or control.

FOR A SIXTH DEFENSE

22. U.S. Bank would show that, even in the event it did not comply with the alleged obligations or procedures purportedly identified in Defendant's Counterclaims, which is expressly denied, any alleged noncompliance with said obligations or procedures would not have been intentional and would have resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid the error, and therefore, Defendant's claims are barred.

FOR A SEVENTH DEFENSE

23. Defendant's claims may be barred, in whole or in part, by any or all of the doctrines of waiver, unclean hands, in pari delicto, fraud, accord and satisfaction, estoppel, consent, release, or ratification and adoption.

FOR AN EIGHTH DEFENSE

24. Defendant's claims may be barred, in whole or in part, by the statute of frauds.

FOR A NINTH DEFENSE

25. Defendant's claims may be barred, in whole or in part, by the doctrine of payment and voluntary payment.

FOR A TENTH DEFENSE

26. U.S. Bank incorporates by reference all of the terms, conditions, exclusions, exceptions, and limitations of any contracts which U.S. Bank has the right to enforce with Defendants, and would show that U.S. Bank has performed all of its obligations under any such contract. U.S. Bank further pleads the terms and conditions of that contract as a complete defense and bar to this action. In addition, U.S. Bank would show Defendant's prior breach of any contract as a bar to its claims for relief.

FOR AN ELEVENTH DEFENSE

27. The damages allegedly recoverable by Defendant, if any, which U.S. Bank denies, must be reduced by any amount of damages caused by Defendant's failure to mitigate such damages in whole or in part.

FOR A TWELFTH DEFENSE

28. Plaintiff, its assignors, or its predecessor in interest advanced a sum of money to Defendant, which Defendant promised to repay in full at the rate of interest agreed upon. If the relief Defendant seeks is granted, Plaintiff is entitled to repayment of the sums advanced, plus interest and other relief allowed by the Note and Mortgage.

FOR A THIRTEENTH DEFENSE

29. U.S. Bank would show that any actions or omissions alleged by the Defendant do not constitute a violation of the South Carolina Unfair Trade Practices Act and the Act does not apply because U.S. Bank operated in a regulated industry.

FOR A FOURTEENTH DEFENSE

30. U.S. Bank would show that the alleged acts of U.S. Bank, or its predecessors or assignors, which are expressly denied, do not affect the public interest but are essentially private in nature and, therefore, the South Carolina Unfair Trade Practices Act is inapplicable.

FOR A FIFTEENTH DEFENSE

31. U.S. Bank would show that Defendant failed to satisfy one or more conditions precedent to any contract, and, therefore, Defendant cannot recover for breach of contract.

FOR A SIXTEENTH DEFENSE

32. U.S. Bank would show that Defendant lacks the capacity, authority, and standing to assert some or all of the claims asserted in the Answer and Counterclaim.

FOR A SEVENTEENTH DEFENSE

33. U.S. Bank would show that an award of punitive damages would violate the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution and Article I, Section 3 of the South Carolina Constitution in that:

- a. the judiciary's ability to correct a punitive damages award only upon a finding of passion, prejudice, or caprice is inconsistent with due process guarantees;
- b. any award of punitive damages serving a compensatory function is inconsistent with due process guarantees;

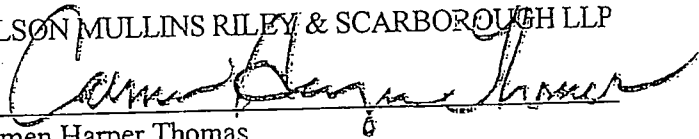
- c. any award of punitive damages based upon the wealth of U.S. Bank violates due process guarantees;
- d. the jury's unfettered power to award punitive damages in any amount it chooses is wholly devoid of meaningful standards and is inconsistent with due process guarantees;
- e. an excessive award of punitive damages violates the due process guarantees of U.S. Bank;
- f. an award of punitive damages that is neither reasonable nor proportionate to the alleged wrong committed is irrational, arbitrary, furthers no legitimate purpose, and is an unconstitutional deprivation of the property of U.S. Bank;
- g. an award of punitive damages that is grossly disproportionate to any compensatory damages awarded violates U.S. Bank's due process guarantees;
- h. an award of punitive damages based solely on vicarious liability or the doctrine of respondeat superior is violative of due process guarantees;
- i. due to the lack of standards for determining punitive damages, U.S. Bank lacks fair notice of the punishment to which they could be subjected;
- j. even if it could be argued that the standard governing the imposition of punitive damages exists, the standard is void for vagueness;
- k. an award of punitive damages that does not comport with the three guideposts articulated in *State Farm Mutual Automobile Insurance Company v. Campbell* fails to satisfy constitutional due process guarantees; and
- l. the Defendant's claim for punitive damages violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and Article I, Section 3 of the South Carolina Constitution in that the amount of punitive damages is based upon the wealth of U.S. Bank.

FOR AN EIGHTEENTH DEFENSE

34. U.S. Bank specifically reserves the right to amend its Answer to the Counterclaims to supplement with any additional defenses that may be revealed during the course of discovery or otherwise.

WHEREFORE, having fully answered the Counterclaims of Defendant, U.S. Bank prays that the Counterclaims be dismissed, with prejudice, and for such other and further relief as the Court may deem just and proper.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

Carmen Harper Thomas

SC Bar No. 76012

E-Mail: carmen.thomas@nelsonmullins.com

B. Rush Smith III

SC Bar No. 12941

E-mail: rush.smith@nelsonmullins.com

1320 Main Street / 17th Floor

Post Office Box 11070 (29211-1070)

Columbia, SC 29201

Tel: (803) 255-9385

Fax: (803) 255-5932

Columbia, South Carolina

February 18, 2011

CERTIFICATE OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for , do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings:

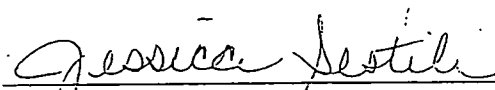
Plaintiff's Answer to Defendant Burr's Counterclaims

Counsel Served:

David P. Reuwer
306 Hmapton Park
P.O. Box 1776
Camden, SC 29021

Roy Boggs
FIA Card Services, N.A.
1300 Pickens Street
Columbia, SC 29201

FILED FOR RECORD
2011 FEB 24 PM 3:56
JOYCE McDONALD
CLERK OF COURT
KERSHAW COUNTY, S.C.



Jessica Sestili
Administrative Assistant

February 18, 2011

STATE OF SOUTH CAROLINA)
)
COUNTY OF KERSHAW)
)

IN THE COURT OF COMMON PLEAS,
FIFTH JUDICIAL CIRCUIT

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,)

Plaintiff,)

vs.)

KELLEY BURR, FIA Card Services,)
N.A.; Discovery Bank, Issuer of the)
Discover Card; Unifund CCR Partners,)

Defendants.)

Civil Action No. 2010-CP-28-1197

JOYCE McDONALD
CLERK OF COURT
KERSHAW COUNTY, S.C.

2012 APR 18 AM 11:52

FILED FOR RECORD

PLAINTIFF'S
MOTION TO DISMISS
COUNTERCLAIMS AND
TO STRIKE DEFENSES

Defendant Kelley Burr ("Burr") has failed to prosecute and even has defeated her own counterclaims by not responding to Plaintiff U.S. Bank National Association's ("U.S. Bank") efforts to offer her a loan modification proposal, in addition to not providing information to allow consideration of Burr for a modification. Therefore, pursuant to Rules 12(c), 12(f), and 41(b), S.C. Rules of Civil Procedure, U.S. Bank hereby moves to dismiss Burr's counterclaims and to strike her defenses. U.S. Bank's motion is based on the following grounds:

1. Burr asserts the following defenses and counterclaims against Defendant, all based primarily on an alleged failure to "conduct a fair, reasonable, comprehensive analysis" and "reconsideration of her home mortgage amount problem":
a) unclean hands; b) breach of contract; c) fraud and misrepresentation in the inducement;

d) violation of the S.C. Unfair Trade Practices Act; e) in pari delicto; f) residential home.

(Answer and Counterclaims, paragraph 11).

FACTS

2. Through this case, Plaintiff has made extensive efforts to provide Burr with an opportunity to be considered for a loan modification, including offering Burr a modification proposal, as described in detail below.

3. Plaintiff served its Notice of Foreclosure Intervention on July 25, 2011, pursuant to the S.C. Supreme Court Administrative Order, 2011-05-02-01.

4. Plaintiff's counsel filed the Certification of Noncompliance with the Foreclosure Intervention Process on October 27, 2011, detailing the numerous unsuccessful attempts to gain information from Burr in order to consider her for a loan modification. See Certification, attached as Exhibit A.

5. Since the Certification was filed, additional efforts have been made to offer foreclosure intervention to Burr, through her counsel, including an actual loan modification proposal:

- a. November 23, 2011- Plaintiff's counsel called Burr's counsel. Burr's counsel indicated that he had submitted modification documents, although Plaintiff's counsel had not received them. Burr's counsel followed up that call with an email. See Email from David Reuwer to Carmen Thomas (Nov. 23, 2011), attached as Exhibit B. Burr's counsel faxed minimal documents to Plaintiff's counsel, presumably to initiate a modification review.
- b. November 23, 2011- Plaintiff's counsel replied to Burr's counsel's email, but Plaintiff's counsel never received a response to this

- reply, including any necessary documents. See Email from Carmen Thomas to David Reuwer (Nov. 23, 2011), Exhibit B.
- c. December 6, 2011- Plaintiff's counsel called and emailed Burr's counsel regarding the outstanding information and whether Burr would withdraw the counterclaims. See Email from Carmen Thomas to David Reuwer (Dec. 6, 2011), Exhibit B. Plaintiff's counsel never received a response to the voice mail message and email.
 - d. On January 10, 2012, Plaintiff's counsel sent a modification proposal to Burr's counsel by mail and email, and also notified him by voice mail that the proposal was forthcoming. See Email from Jessica Sestili to David Reuwer (Jan. 10, 2010), attached as Exhibit C (confidential attachment omitted). The letter requested a response by January 31, 2012.
 - e. On January 18, 2012, Plaintiff's counsel followed up with Burr's counsel by leaving another voice mail and sending another email. See Email from Carmen Thomas to David Reuwer (Jan. 18, 2012), Exhibit C.
 - f. On February 28, 2012, Plaintiff's counsel called Burr's counsel and spoke briefly with him. However, Burr's counsel was unable to talk because he was meeting with someone. Therefore, counsel planned to talk on February 29, 2012 at 8:30 a.m. Plaintiff's counsel left a voice mail for Burr's counsel at 8:30 a.m. and at

11:00 a.m. on February 29th, including in the 11:00 a.m. message a request for Burr to withdraw her counterclaims.

- g. Neither Burr nor her counsel ever responded to the modification proposal or reached out to Plaintiff's counsel to provide information or otherwise respond to Plaintiff's efforts.

LAW AND ANALYSIS

6. Pursuant to Rule 41(b), a counterclaim defendant may move for dismissal of claims against it for the counterclaim plaintiff's failure to prosecute.

7. The Court "must consider four factors before dismissing a case for failure to prosecute: (1) the plaintiff's degree of personal responsibility; (2) the amount of prejudice caused the defendant; (3) the presence of a drawn out history of deliberately proceeding in a dilatory fashion; and (4) the effectiveness of sanctions less drastic than dismissal." *McComas v. Ross*, 368 S.C. 59, 626 S.E.2d 902 (Ct. App. 2006) (citing *Hillig v. Comm'r of Internal Revenue*, 916 F.2d 171, 174 (4th Cir.1990)).

8. Regarding Burr's degree of personal responsibility, even before this action was filed on November 1, 2010, Burr did not provide the documents needed to evaluate her for a loan modification. When information was requested again through the foreclosure intervention process, she provided only a few documents, which were insufficient for the review. By her own nonresponsiveness over 17 months, Burr is personally responsible for her own failure to prosecute her claims.

9. Regarding the amount of prejudice caused to the counterclaim defendant, U.S. Bank has expended time and expenses before and since the filing of the complaint. Burr's claims are based only on the modification process, and the process has been more than exhausted. Thus, Burr "has been given abundant opportunity to litigate.

There is a limit beyond which the court should allow a litigant to consume the time of the court and to prolong unnecessarily time, effort, and costs to defending parties.” *Georganne Apparel, Inc. v. Todd*, 303 S.C. 87, 92, 399 S.E.2d 16, 19 (Ct. App. 1990).

10. Regarding the presence of a drawn out history of deliberately proceeding in a dilatory fashion, the history of U.S. Bank’s attempts to work with Burr are described in detail in the Certification of Noncompliance, attached as Exhibit A.

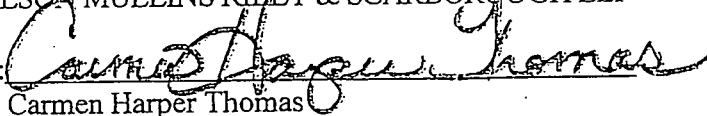
11. Finally, regarding the effectiveness of sanctions less drastic than dismissal, Burr has already shown inattention to the foreclosure intervention process ordered by the South Carolina Supreme Court, so another court order directing compliance would provide no incentive for action.

12. In addition to failing to prosecute her claims, Burr’s claims are moot because they are based on an alleged scenario of her not being offered a loan modification. *See Darden v. S.C. Dep’t of Highways and Pub. Trans.*, 291 S.C. 270, 353 S.E.2d 279 (1987) (finding the case moot because an effective date had passed, so “there remain[ed] no actual case or controversy, and a judgment rendered by this Court would have no practical legal effect upon the existing case”). As explained above, Plaintiff offered Burr a modification proposal on January 10, 2012. Burr never responded to this offer. A judgment in her favor would have no practical effect on her counterclaims because she already has been offered the primary relief that she sought: “For an Order granting the Defendant a fair, reasonable, comprehensive, and thorough reconsideration and modification of the terms of the contract, as [allegedly] was promised by the Plaintiff, to determine an affordable amount of mortgage payment.” (Answer and Counterclaims, paragraph beginning WHEREFORE, sub B.)

13. Burr has not cooperated in any respect with her own responsibilities in working toward some type of foreclosure intervention. She has not taken any steps toward prosecuting her counterclaims, and now that she has failed to acknowledge the relief offered to her, her own actions defeat her counterclaims.

For these reasons, Plaintiff requests that this Court order dismissal of Burr's counterclaims for failure to prosecute pursuant to Rule 41(b), SCRPC, and order Burr's defenses be stricken pursuant to Rule 12(f), SCRPC.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

Carmen Harper Thomas

SC Bar No. 76012

E-Mail: carmen.thomas@nelsonmullins.com

B. Rush Smith III

SC Bar No. 12941

E-mail: rush.smith@nelsonmullins.com

1320 Main Street / 17th Floor

Post Office Box 11070 (29211-1070)

Columbia, SC 29201

Tel: (803) 255-9385

Fax: (803) 255-5932

Columbia, South Carolina

April 17, 2012

EXHIBIT A

Certification of Mortgagor Noncompliance

STATE OF SOUTH CAROLINA
COUNTY OF KERSHAW

) IN THE COURT OF COMMON PLEAS,
) FIFTH JUDICIAL CIRCUIT
)

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,

Plaintiff,

vs.

KELLEY BURR, FIA Card Services,
N.A.; Discovery Bank, Issuer of the
Discover Card; Unifund CCR Partners,

Defendants.

Civil Action No. 2010-CP-28-1197

FILED
OCT 27 AM 11:49
CLERK OF COURT
SOUTH CAROLINA

CERTIFICATION OF
MORTGAGOR NONCOMPLIANCE
(Administrative Order 2011-05-02-01)

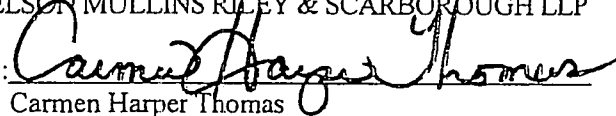
The Plaintiff by and through its undersigned attorney does hereby certify as follows:

- 1) That this is an action for the foreclosure of owner occupied real property.
- 2) That pursuant to Supreme Court Administrative Order 2011-05-02-01:
 - a) Based on the following, the Mortgagor has been served with the required notice of rights.
 - a. On July 25, 2011, Plaintiff served the Notice of Defendant's Right to Foreclosure Intervention ("Notice") on opposing counsel, which was filed on July 26, 2011.
 - b. On August 8 and 9, 2011, counsel for the parties communicated about the Notice, with Plaintiff re-sending the Notice on August 9, 2011.
 - b) Based on the following, the Mortgagor has failed, refused, or voluntarily elected not to participate in any foreclosure intervention process:

- a. The deadline to respond was August 24, 2011, based on the July 25, 2011 service date, or was September 8, 2011, based on re-sending the Notice on August 9, 2011.
- b. From August 19 to September 21, 2011, counsel for the parties communicated regarding the status of Mortgagor's documents and records for foreclosure intervention.
- c. On September 26, 27, and 29, 2011, a paralegal in Plaintiff's counsel's office left voice mails with Mortgagor's counsel regarding the status of the foreclosure intervention information.
- d. On October 4, 2011, Plaintiff's counsel wrote Mortgagor's counsel regarding the foreclosure intervention process, giving a final deadline of October 14, 2011 to receive information from Mortgagor.
- e. No documents or records were ever received by Plaintiff's counsel.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By:



Carmen Harper Thomas

SC Bar No. 76012

E-Mail: carmen.thomas@nelsonmullins.com

B. Rush Smith III

SC Bar No. 12941

E-mail: rush.smith@nelsonmullins.com

1320 Main Street / 17th Floor

Post Office Box 11070 (29211-1070)

Columbia, SC 29201

Tel: (803) 255-9385

Fax: (803) 255-5932

Columbia, South Carolina

October 26, 2011

CERTIFICATE OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for , do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings:

Certification of Mortgagor Non-Compliance

Counsel Served:

David P. Reuwer
306 Hampton Park
P.O. Box 1776
Camden, SC 29021

Roy Boggs
FIA Card Services, N.A.
1300 Pickens Street
Columbia, SC 29201

2011 OCT 27 AM 11:19
RECEIVED
CLERK OF COURT
S.C.

Jessica Sestili
Jessica Sestili
Administrative Assistant

October 26, 2011

EXHIBIT B

Email from David Reuwer to Carmen Thomas (Nov. 23, 2011)

Email from Carmen Thomas to David Reuwer (Nov. 23, 2011)

Email from Carmen Thomas to David Reuwer (Dec. 6, 2011)

From: Carmen Thomas
To: "David Paul Reuwer"
Cc: Meredith Keane
Subject: FW: US Bank v. Burr
Date: Tuesday, December 06, 2011 3:33:24 PM
Attachments: 2011.10.27 Certification of Mortgagor Noncompliance [filed] - 4831-9708-0333 v 1.pdf

David,

Can you please respond regarding the issues in my 11/23/11 email by Friday, December 8th? I just left you a voice mail to be sure you knew I was trying to get in touch with you about these issues. If we don't hear from you by Friday, we will need to proceed with the foreclosure. To that end, if you cannot respond by this Friday, please let us know if you will consent to withdrawing the counterclaims and allowing my client to proceed with the foreclosure.

Thanks.

Carmen

Carmen Harper Thomas
 Nelson Mullins Riley & Scarborough LLP
 carmenhthomas@nelsonmullins.com
 (803) 255-9385 o
 (803) 255-5932 f

From: Carmen Thomas
Sent: Wednesday, November 23, 2011 5:09 PM
To: David Paul Reuwer
Cc: Meredith Keane
Subject: RE: US Bank v. Burr

David,

Thanks for sending those materials today.

We made numerous efforts to contact your office regarding the foreclosure intervention process. Because I've made a certification to the court about those efforts, we need evidence that these materials were sent to us previously if we are to attempt to undo what the certification has done.

Also, this package, even if sent in the appropriate timeframe, is materially deficient. The income/expenses for household statement appears to be incomplete, with empty boxes

and question marks. I don't see the 3rd page that is the signature page. The cover sheet to the form requests several documents, and I don't see them in what you've sent, including but not limited to bank statements. The divorce decree refers to at least four bank accounts. I also do not see any documentation of income. Also, I cannot tell when the documents were signed because the dates are illegible. This may affect the ability to use these documents for any potential modification review. Please provide legible copies or tell me when they were signed.

Before we proceed with getting additional documentation from Ms. Burr, please send proof that this package was sent to me before today.

Please also confirm that you received the Certification of Noncompliance that we filed on 10/27/11 and that I mentioned on the phone earlier today. I attached the filed copy.

Thanks.

Carmen

Nelson Mullins

Carmen H. Thomas
Associate
carmen.thomas@nelsonmullins.com
Nelson Mullins Riley & Scarborough LLP
Meridian, 17th Floor
1320 Main Street, Columbia, SC 29201
Tel: 803.255.9385 Fax: 803.255.5932
www.nelsonmullins.com
(View Bio)

From: David Paul Reuwer [mailto:davidreuwer3@aol.com]
Sent: Wednesday, November 23, 2011 3:18 PM
To: Carmen Thomas
Subject: US Bank v. Burr

Dear Carmen:

Thank you for your courtesy phone call this morning to my office about Kelly Burr.

I have pulled the file and sending you by fax the requested Modification papers (6pgs) and unfiled 2008 Tax Return (6pgs) and Temporary Divorce Order (5pgs) which I have previously sent you to send to MakingHomeAffordable program, as filled in by Kelly Burr.

I am working Friday and all next week, of course, and trying to talk with my client before Monday.

I would like to discuss procedurally the next step with you at your earliest when you come back in from

the holiday.
Have a blessed Thanksgiving.

David Paul Reuwer LLC
Attorney at Law
P.O. Box 1776
Camden, SC 29021
803.549.6710

EXHIBIT C

Email from Jessica Sestili to David Reuwer (Jan. 10, 2010)
Email from Carmen Thomas to David Reuwer (Jan. 18, 2012)

From: Carmen Thomas
To: "davidreuwer3@aol.com"
Cc: Meredith Keane
Subject: RE: US Bank v. Kelley Burr
Date: Wednesday, January 18, 2012 4:13:00 PM

David,

I just left you another voice mail following up on this letter we mailed and emailed last week. Please respond to confirm whether or not you have received any of my communications. Thanks.

Carmen

From: Jessica Sestili
Sent: Tuesday, January 10, 2012 2:29 PM
To: davidreuwer3@aol.com
Cc: Carmen Thomas
Subject: US Bank v. Kelley Burr

Mr. Reuwer,

Please find attached correspondence from Attorney Thomas in the above-referenced matter.
Thank you.

Nelson Mullins

Jessica Sestili
Administrative Assistant
jessica.sestili@nelsonmullins.com

Nelson Mullins Riley & Scarborough LLP
Meridian, 17th Floor
1320 Main Street, Columbia, SC 29201
Tel: 803.255.5535
www.nelsonmullins.com

CERTIFICATE OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for , do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings:

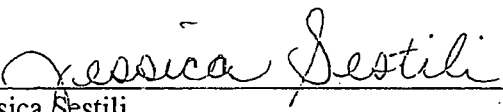
Plaintiff's Motion to Dismiss Counterclaims and to Strike Defenses

Counsel Served:

David P. Reuwer
306 Hampton Park
P.O. Box 1776
Camden, SC 29021

Roy Boggs
FIA Card Services, N.A.
1300 Pickens Street
Columbia, SC 29201

FILED FOR RECORD
2012 APR 18 AM 11:52
JOYCE McDONALD
CLERK OF COURT
KENSICAW COUNTY, S.C.



Jessica Sestili
Administrative Assistant

April 17, 2012

STATE OF SOUTH CAROLINA

COUNTY OF KERSHAW

IN THE COURT OF 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,

Plaintiff,

vs.

Kelley Burr, FIA Card Services, N.A.;
Discovery Bank, Issuer of the Discover
Card; Unifund CCR Partners,

Defendants.

MOTION TO RECONSIDER

2012 OCT 12 AM 9:42
CLERK OF COURT
KERSHAW COUNTY, S.C.

TO: THE HONORABLE GEORGE C. JAMES, JR., CIRCUIT JUDGE; AND
THE PLAINTIFF AND ITS ATTORNEY, CARMEN H. THOMAS, ESQ.:

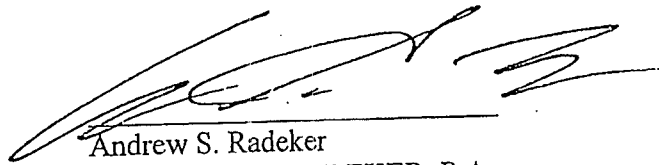
YOU WILL PLEASE TAKE NOTICE that Defendant Kelley Burr (hereinafter "the Defendant") moves before this Court pursuant to Rules 52(b) and 59(e), SCRCP, as well as pursuant to all other applicable law, in the above-captioned action for an Order that reconsiders and/or alters or amends this Court's Order dated September 26, 2012, and filed October 1, 2012¹, that granted the Plaintiff's motion to dismiss the Defendant's counterclaims and strike the Defendant's affirmative defenses.

The grounds for this motion are more particularly shown in the attached memorandum, which is incorporated herein by reference as if here set forth verbatim.

¹ The Plaintiff received written notice of the entry of this Order on October 2, 2012.

Consultation by the undersigned with opposing counsel about the substance of this motion in advance of the making hereof would have served no useful purpose.

Respectfully submitted,



Andrew S. Radeker
HARRISON & RADEKER, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
(803) 779-6700 (facsimile)
drew@harrisonfirm.com (email)

ATTORNEY FOR DEFENDANT
KELLEY BURR

Columbia, South Carolina
October 9, 2012

STATE OF SOUTH CAROLINA

COUNTY OF KERSHAW

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,

Plaintiff,

vs.

Kelley Burr, FIA Card Services, N.A.;
Discovery Bank, Issuer of the Discover Card; Unifund CCR Partners,

Defendants.

IN THE COURT OF COMMON PLEAS

Case No. 2010-CP-28-1197

MEMORANDUM IN SUPPORT OF
MOTION TO RECONSIDER

2012 OCT 12 AM 9:42
KERSHAW COUNTY, S.C.
CLERK OF COURT

Defendant Kelley Burr (hereinafter "the Defendant") hereby submits this memorandum in support of the Defendant's motion in the above-captioned action for an Order that reconsiders and/or alters or amends this Court's Order dated September 26, 2012, and filed October 1, 2012¹, that granted the Plaintiff's motion to dismiss the Defendants' counterclaims and strike the Defendant's affirmative defenses.

NO FAILURE TO PROSECUTE WAS SHOWN

The Plaintiff's motion was based on conduct that, while regrettable, did not constitute failure to prosecute. Black's Law Dictionary defines "prosecute" as "[t]o commence and carry out a legal action[.]" The leading (and perhaps only) reported South Carolina case analyzing a dismissal for failure to prosecute, McComas v. Ross, 368 S.C. 59, 626 S.E.2d 902 (Ct. App. 2006), dealt a situation in which the plaintiff in that case did not show up on time at the

courtroom for the trial. That is the sort of conduct that would trigger an analysis of whether a failure to prosecute that warrants dismissal has occurred.

Here, what happened was, at most, a failure to engage in settlement negotiations. That is not a failure to prosecute. The Plaintiff noted no instance of the Defendant not appearing at a roster meeting or other court event and no instance of the Defendant failing to participate in discovery. The remedy for noncompliance with a mortgagor's responsibilities under the operative administrative order is not the dismissal of counterclaims or the striking of defenses. The conduct complained of by the Plaintiff does not consist of a failure to prosecute; thus, the Court should not have reached the four-factor analysis discussed in McComas.

As to the Defendant's personal responsibility, this factor refers to the Defendant's personal responsibility for a failure to prosecute; as discussed above, there was no such failure here. In that same vein, any time and expenses the Plaintiff expended in attempting settlement negotiations with the Defendant were not as a result of any failure on her part to prosecute her claims; indeed, the Court's order notes that the Plaintiff "has expended time and expenses before and since the filing of the Complaint." With regard to any history of proceeding in a dilatory fashion, the Plaintiff could not point to one court or discovery event that was delayed by anything the Defendant did. Further, as for whether less drastic sanctions might be effective, the blanket statement that "another court order directing compliance would provide no incentive for Burr to act" lacks evidentiary support.

No affidavit or other cognizable evidence was put forth in support of the Plaintiff's motion. With no factual record to support its contentions, the Plaintiff's motion should have been denied.

¹ The Plaintiff received written notice of the entry of this Order on October 2, 2012.

The Defendant's claims are not moot. Nothing before the Court showed that any modification the Plaintiff offered complied with applicable Home Affordable Modification Program directives or other standards. Additionally, the Defendant pled that the Plaintiff had promised her a modification and then reneged on that promise, which could not be made moot simply by the Plaintiff offering the Defendant a modification. The Defendant did not solely seek a modification as the relief to be granted on her claims. The burden was on the Plaintiff to prove mootness, and no such proof was adduced.

RULES 12(c) AND 12(f) DID NOT APPLY

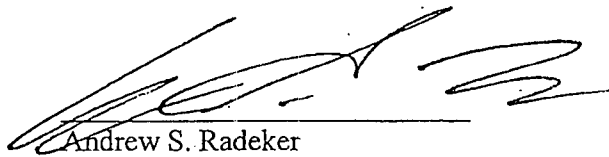
"A motion to dismiss a counterclaim must be based solely on the allegations set forth in the counterclaim. See Rule 12(b)(6), SCRPC; Baird v. Charleston County, 333 S.C. 519, 527, 511 S.E.2d 69, 73 (1999). "A Rule 12(b)(6) motion may not be sustained if facts alleged and inferences reasonably deducible therefrom would entitle the [complainant] to any relief on any theory of the case." Stiles v. Onorato, 318 S.C. 297, 300, 457 S.E.2d 601, 602-3 (1995). The question is whether in the light most favorable to the complainant, and with every doubt resolved on his behalf, the counterclaim states any valid claim for relief. Toussaint v. Ham, 292 S.C. 415, 416, 357 S.E.2d 8, 9 (1987). The counterclaim should not be dismissed merely because the trial court doubts the complainant will prevail in the action. Id." Charleston County Sch. Dist v. Laidlaw Transit, Inc., 348 S.C. 420, 559 S.E.2d 362 (Ct. App. 2001). This is the standard that applies to a motion under Rule 12(c), SCRPC. Rule 12(f), SCRPC, provides that the Court "may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent or scandalous matter."

The Plaintiff did not advance any arguments concerning these standards, and the Court's order does not contain any analysis of whether these standards were met. Rules 12(c) and 12(f), SCRCF, do not provide an appropriate basis for the Court's decision.

CONCLUSION

The Court erred in its ruling. The ends of justice require that the Court reconsider and undo its previous ruling.

Respectfully submitted,



Andrew S. Radeker
HARRISON & RADEKER, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
(803) 779-6700 (facsimile)
drew@harrisonfirm.com (email)

ATTORNEY FOR DEFENDANT
KELLEY BURR

Columbia, South Carolina
October 9, 2012

STATE OF SOUTH CAROLINA

COUNTY OF KERSHAW

IN THE COURT OF 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,

Plaintiff,

vs.

Kelley Burr, FIA Card Services, N.A.;
Discovery Bank, Issuer of the Discover
Card; Unifund CCR Partners,

Defendants.

CERTIFICATE OF SERVICE

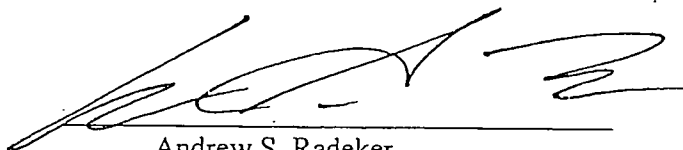
2012 OCT 12 AM 9:43
JOYCE HARRIS
CLERK OF COURT
KERSHAW COUNTY, S.C.

I, Andrew S. Radeker, an attorney with the law firm of Harrison & Radeker, P.A., attorneys for Defendant Kelley Burr, do hereby certify that I have, on this the 9th day of October, 2012, served the foregoing document in the above-captioned action by depositing the same in the United States Mail, first class, postage prepaid, with the return address clearly noted, addressed as follows, to wit:

The Hon. George C. James, Jr.
Circuit Judge
P.O. Box 1716
Sumter, SC 29150

Carmen H. Thomas, Esq.
Nelson Mullins Riley & Scarborough, LLP
P.O. Box 11070
Columbia, SC 29211-1070

Roy Boggs, Esq.
Korn Law Firm, PA
1300 Pickens St.
Columbia, SC 29201



Andrew S. Radeker

STATE OF SOUTH CAROLINA)
COUNTY OF KERSHAW) IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT
2010-CP-28-1197

U.S. Bank National Association)
VS.) Transcript of Record
Kelley Burr, et al.)

September 13, 2012
Camden, South Carolina

B E F O R E:

The Honorable George C. James, Jr.

A P P E A R A N C E S:

Carmen Harper Thomas, Esquire
Columbia, South Carolina

Attorney for the Plaintiff

Andrew S. Radeker, Esquire
Columbia, South Carolina

Attorney for the Defendant

SHIRLEY G. BROOM
CIRCUIT COURT REPORTER
SIXTEENTH JUDICIAL CIRCUIT

I N D E X

WITNESS

DIRECT CROSS RE-DIRECT RE-CROSS

(No testimony taken)

E X H I B I T S

EXHIBIT NO.	DESCRIPTION	ID	EV
-------------	-------------	----	----

(No Exhibits)

4

1 The Court - This is your motion to dismiss
2 counterclaims and strike defenses.

3 Ms. Thomas - Yes, Your Honor.

4 The Court - All right, Mr. Radeker, just for the
5 Clerk of Court's purposes, has there been any formal
6 relief of Mr. Reuwer and you being substituted?

7 Mr. Radeker - I understand he's sending me a
8 Notice of Substitution of Counsel. I filed a notice of
9 appearance this morning --

10 The Court - That's good enough.

11 Mr. Radeker - -- just so the record will reflect
12 that I'm here.

13 The Court - That's fine. All right, just wanted
14 to make sure that as we go further they know who to send
15 things to. Okay. First if you would, tell me a little
16 bit about the case and how we got to where we are and then
17 you can start.

18 Ms. Thomas - I will, Your Honor. This is a
19 foreclosure. I represent U.S. Bank. Again, my name's
20 Carmen Thomas.

21 The Court - All right.

22 Ms. Thomas - And U.S. Bank filed the foreclosure
23 in 2010, November 1st of 2010 and the borrower is due for
24 a May 5th, 2009 payment as reflected in the complaint, so
25 that -- the loan is overdue by several years. The --

1 The Court - Is this proceeding subject to any of
2 those restrictions that the Chief Justice has put on
3 anything?

4 Ms. Thomas - It is very subject to one of the
5 administrative orders. That is the essence really of why
6 we're here.

7 The Court - Okay.

8 Ms. Thomas - And I will talk about that.

9 The Court - All right.

10 Ms. Thomas - The borrower, Kelley Burr, answered
11 on -- we filed the complaint on November 1st of 2010. She
12 answered on December 20th and served counterclaims against
13 us that essentially we didn't consider her fairly for a
14 loan modification. And this is before the administrative
15 order on foreclosure intervention. We answered the
16 counterclaims in February of 2011, then in May 2nd of 2011
17 Chief Justice Toal issued the Foreclosure Intervention
18 Order requiring that we serve a Notice of Foreclosure
19 Intervention, and so we served that on her on July 25th.

20 The Court - Of '11?

21 Mr. Thomas - Of 2011, yes, sir, just a couple of
22 months after that -- the Order was issued, once we, you
23 know, figured out what to do with it really. So we served
24 that Notice of Foreclosure Intervention. As you can see -
25 - and we filed a Certificate of Non-Compliance. That

6

1 details our efforts to get Defendant Burr to engage in the
2 foreclosure intervention process. We filed that about
3 ninety days after. We're required to allowed thirty days
4 after that, but we followed up with her attorney numerous
5 times and finally after we filed a Certificate of Non-
6 Compliance, we got a couple of documents back that were
7 some kind of effort I think to try to comply, but they had
8 blanks in them and --

9 The Court - And what do those documents consist
10 of?

11 Ms. Thomas - Those were documents to consider
12 her for a loan modification.

13 The Court - Like income records?

14 Ms. Thomas - No income records were included,
15 Your Honor. The form itself have many blanks and question
16 marks written on it. It was missing a signature page. It
17 had a tax return, a draft tax return that she'd obviously
18 provided her attorney but it was not a final tax return
19 which was one of the things that's required. No bank
20 statements were included and we note from the Divorce
21 Decree that there were at least five bank accounts. So it
22 was a completely deficient package. We couldn't do
23 anything with it, so we followed up and asked for more
24 documents.

25 The Court - Is that the package that was

1 contemplated by the Chief Justice's Order?

2 Ms. Thomas - That's a package we sent with the
3 Notice of Foreclosure Intervention that said, here, we
4 need this information to evaluate for a loan modification.
5 We received that. We -- so we served the Notice of
6 Foreclosure Intervention as I said in July. We received
7 that information in November of 2011, and then didn't
8 receive any other complete -- no other information until
9 a couple of weeks ago. We eventually felt like we needed
10 to move to dismiss the counterclaims, because we're bound
11 by the Order. We can't move forward with a foreclosure
12 until we've certified non-compliance. We've got --

13 The Court - But you've done that.

14 Ms. Thomas - We have done that. So we have the
15 counterclaims and to resolve the counterclaims we've moved
16 to dismiss those here based on failure to prosecute,
17 because that administrative order overlays on any
18 foreclosure action, the obligations that we have and that
19 the borrower has to participate in the foreclosure
20 intervention process. We have gone over and beyond -- can
21 see by our Certification of Non-Compliance and then this
22 motion reflects the time-line of contacts that we've
23 reached out over and over again to borrower's prior
24 counsel to try to offer her the modification. We actually
25 sent her a modification offer on January 10th and got no

8

1 response, like I said, until a real response a couple of
2 weeks ago. We had a phone conversation in April with the
3 borrower and her lawyer to talk about it and they were
4 going to go get documents, but we -- we have not received
5 anything. And that Foreclosure Intervention Order I
6 believe was intended to both provide borrowers an
7 opportunity for foreclosure intervention which we've
8 clearly given, but also to keep these cases from getting
9 bogged down on dockets and to move them forward. And
10 that's what's happened with this case. For it to be able
11 to go forward, we need to resolve the counterclaims and
12 then move forward with the foreclosure, and honestly,
13 right now we are still trying to work on modification with
14 her, but the property's in such disrepair now that we've
15 got to get an appraisal and she knows that we're waiting
16 to get an appraisal on the property because her prior
17 counsel has said that the value is so low that we need to
18 know that before we agree to a modification.

19 The Court - Is your position that that current
20 effort -- that modification is more of a business decision
21 than a legally binding requirement on you?

22 Ms. Thomas - Right, Your Honor, and just based
23 on entries (sic) for her to still not give up.

24 The Court - So if that non-compliance is rubber-
25 stamped or said by a Court that yes, you've done all you

1 could do, you would still be as a practical matter trying
2 to work with her?

3 Ms. Thomas - Yes, Your Honor.

4 The Court - All right.

5 Ms. Thomas - I mean it's always in our interest
6 to have a conforming loan on the books, so we um --

7 The Court - Okay, and you want -- what are their
8 -- what are her counterclaims based on? I see in your
9 motion that they're all based on lack of assistance to get
10 some relief.

11 Mr. Thomas - Allegedly not considering her for
12 a loan modification.

13 The Court - All right.

14 Ms. Thomas - And we -- we've done that. We've
15 actually -- we've considered what we could and tried to
16 get more documents and have, like I said, actually offered
17 a loan modification with a -- with terms and a payment
18 amount and, you know, everything she needed to know to
19 decide -- or even to tell us -- or, you know, rejected at
20 the time, say no, I want to negotiate. We got nothing
21 like --

22 The Court - All right. Okay.

23 Ms. Thomas - -- that for months and months and
24 months. And so we have two grounds for our motion to
25 dismiss, one was failure to prosecute under Rule 41(B) and

10

1 then also judgment on the pleadings based on Rule 12(C)
2 because the relief that she seeks, which is to have
3 reconsideration and an offer of a modification, we've done
4 that. We can't do anything else to give her that relief,
5 so we considered that that claim for relief is moot. The
6 grounds for considering failure to prosecute are the
7 degree of personal responsibility, the amount of prejudice
8 to the defendant, history of proceeding in a deliberately
9 dilatory fashion and effectiveness in sanctions less
10 drastic. First, about the degree of personal
11 responsibility, I will admit that it is probably not this
12 borrower's hundred percent fault that this has happened,
13 but she has a role in the process, and the analysis is her
14 degree of responsibility. She provided some documents to
15 her lawyer at some point after the Notice of Foreclosure
16 Intervention, because we got those documents in November
17 about, you know, four or five months after. So we know
18 that she has been engaged in the process. She also has
19 talked to him at least we know in April, so -- and she's
20 not been making payments on this loan since 2009. I can't
21 imagine that she has just totally let the whole thing go,
22 and if she has, that is her fault for doing that and not
23 following up. The amount of prejudice to the defendant,
24 there are obviously financial implications; interests has
25 continued to accrue this entire time. We've had more

1 property inspections fees, my time and other time in my
2 office has been spent trying to follow-up regularly and
3 move this forward and provide her with opportunity for a
4 modification and it's just gotten to an absurd point by
5 now.

6 The Court - And the security is deteriorating --

7 Ms. Thomas - Yes, Your Honor, it -- we found
8 that out recently that it has gotten to a point inside
9 where -- I mean I think the floors are falling in and
10 things like that. We haven't gotten inside to look at it
11 yet, but that is a huge concern for us. History of
12 proceeding in a deliberately dilatory fashion, I've
13 described all this in the motion and it's tedious to go
14 through and I don't know if you want to see it, but there
15 is that history there. She has not engaged in any other
16 action to proceed with her counterclaims. They were filed
17 in -- on December 20th of -- of 2010. She's done no
18 discovery, no motions. We haven't served discovery, Your
19 Honor, because of the stay from the Foreclosure
20 Intervention Order. So after we filed the Certificate of
21 Non-Compliance we moved forward with this motion, you
22 know, taking the next step to try to resolve the
23 counterclaims and then, of course, our next step after
24 this would be to move forward with foreclosure if this
25 modification doesn't work out.

12

1 The Court - All right.

2 Mr. Thomas - And then the effective of sanctions
3 less drastic, she's had these counterclaims pending and I
4 -- they obviously haven't been an incentive for her to
5 participate and prosecute this action, so I don't know
6 what other incentive there could be.

7 The Court - Okay. All right, anything else?

8 Ms. Thomas - We had the other ground of
9 mootness, Your Honor, and I think that's pretty clear.

10 The Court - Mootness is kind of tied to
11 everything you've already talked about.

12 Ms. Thomas - Right, Your Honor, but it's -- the
13 41(B) basis for a dismissal is judgment on the pleadings
14 and then mootness is under 12(C) judgment on the pleadings
15 because of her claim for relief, and that it is moot.
16 There's no -- no point in going forward with it, and --

17 The Court - All right.

18 Ms. Thomas - -- we don't want to waste the
19 Court's time and our time with having these counterclaims
20 continue to be pending. We would have to come back or
21 either deal with them at a foreclosure hearing later if
22 this modification doesn't work out, so --

23 The Court - Okay.

24 Ms. Thomas - -- we just -- we want some
25 assurance that we can go forward with this action. Thank

1 you.

2 The Court - All right, Mr. Radeker.

3 Mr. Radeker - Thank you, Your Honor. I'll do
4 what I can with this. I am newly in this case, just got
5 hired the end of the day on Monday and just -- just now
6 appearing on this. Plainly I would say that through her
7 predecessor counsel, my client didn't pay the attention to
8 settlement negotiations that maybe ought to have been paid
9 apparently. I mean you can -- you can look at what's here
10 and see that, but I'm not sure that failure to engage in
11 settlement negotiations amounts to a failure to prosecute.

12 The Court - Well, failure to -- but the
13 settlement negotiations were the modification process, not
14 truly settlement, but loan modifications.

15 Mr. Radeker - So -- well, Your Honor, yes. I
16 mean and it's clear from looking at the counterclaims here
17 that, you know, one of the things she asked for is process
18 me for a loan modification here. That's obvious. But at
19 the same time, I mean that's not failure to show up for a
20 hearing about what the issues are in the case. It's not
21 failure to participate in the discovery process. So I'd
22 say that while it is something and it's not good for this
23 to have happened the way that it's happened, I don't think
24 it is what failure to prosecute is. I think that that's
25 just something else. I mean there's -- the McComas case

14

1 which is really just about -- really the only substantive
2 case that I know of to deal with failure to prosecute in
3 the state, what was at issue in that case was whether the
4 plaintiff's failure to show up on time for her trial
5 constituted failure to prosecute. Arguably if it did, the
6 Court determined that because she was trying to get there
7 and just didn't make it on time, that it didn't amount to
8 it on appeal, but this is just something of an entirely
9 different character. I don't doubt that the e-mails
10 attached to this motion are authentic or that they were
11 sent or anything like that, but this motion does list a
12 number of things as having happened, that there's really
13 no factual material here to show that they did happen or
14 didn't happen, there's no affidavits or anything like that
15 to show that. Her counterclaims and defenses, while they
16 do largely focus on saying process me for a modification,
17 what is also here are allegations that the plaintiff had
18 promised to give her a modification and reneged on that
19 promise.

20 The Court - But has she taken advantage of the
21 modification entreaties you know, whether -- whether
22 they're -- you know, however you want to couch them -- if
23 her counterclaim -- if any counterclaim is based on them
24 not offering her a modification, well, the case was
25 basically stayed or is stayed to allow that to happen. In

1 other words, she's getting -- or they're offering what she
2 asked for. Has she taken advantage of it?

3 Mr. Radeker - Well, Your Honor, I -- I would say
4 that I'm not sure whether she personally was actually
5 aware of many of these communications incited in the
6 plaintiff's motion. I understand that she's got a lawyer
7 and usually the -- any neglect of the attorney would be
8 imputed to the client as Your Honor mentioned in the
9 previous hearing --

10 The Court - Right.

11 Mr. Radeker - -- but in any event, you know, --
12 I mean there is here noted that while it might not have
13 been too timely, there was a response to the latest
14 settlement proposal and that negotiations are on-going in
15 that regard. Also the question of whether the matter
16 remained stayed under the administrative order and whether
17 she's failed to prosecute the counterclaims are not the
18 same question is what I would say. The Court can say,
19 well, we're done with the mandatory stay under this Order,
20 but not agree that there's been failure to prosecute such
21 that the counterclaim --

22 The Court - Can you prosecute a counterclaim
23 during a stay?

24 Ms. Thomas - Your Honor, the stay applies to our
25 prosecution of the foreclosure action, so we can't proceed

16

1 on the merits.

2 The Court - How long has it been stayed?

3 Ms. Thomas - Well, I think under the Order it
4 would not be stayed after we filed that Certificate of
5 Non-Compliance.

6 The Court - When did the -- when did the stay
7 start? It's got to be November.

8 Ms. Thomas - Well, we filed the Notice of
9 Foreclosure Intervention in July 2011 and then the
10 Certificate of Non-Compliance -- I'm sorry --

11 The Court - I thought it was November of '11.

12 Mr. Radeker - Your Honor, I believe that under
13 the Order that the stay would've been in effect is when
14 the Order went in effect. So as of the -- May of 2011 and
15 it would've gone until the Certificate was filed.

16 The Court - When was the Certificate of Non-
17 Compliance filed?

18 Ms. Thomas - October 27th of 2011.

19 The Court - Okay. All right, go ahead, Mr.
20 Radeker?

21 Mr. Radeker - Thank you, Your Honor. I'd also
22 note as to the mootness argument, that mootness would need
23 to be shown factually again; -- this -- no real factual
24 material here in the record. You know, as to her claim
25 that, you know, they promised her a modification and

1 reneged on that promise before the lawsuit that are
2 commenced, that wouldn't be subject to the motion for
3 judgment on the pleadings --

4 The Court - Is that actionable?

5 Mr. Radeker - Well, I mean it might be
6 actionable on a number of theories, negligence
7 misrepresentation, promissory estoppel perhaps. So --
8 also, we make a oral motion here to -- to be granted a
9 leave to amend the answer and counterclaim in this case.
10 Haven't been in this case long enough really to find out
11 exactly what --

12 The Court - What do you want to add?

13 Mr. Radeker - Well, I was about to say, I hadn't
14 really been in this case long enough to find out exactly
15 what it is I want to add, but I know I want it to read
16 differently from the way it reads now.

17 The Court - All right. Well, that I understand
18 what you're saying and we'll get to that in a minute, but
19 Ms. Thomas, how about the fact that there are no
20 affidavits and no -- nothing other than what you say?

21 Ms. Thomas - Well, I signed this pursuant to
22 Rule 11 and that is my commitment that these things are
23 true in the motion.

24 The Court - Okay. All right, Mr. Radeker --

25 Ms. Thomas - I stand by them. I know that they

18

1 haven't.

2 The Court - All right, Mr. Radeker, anything
3 else?

4 Mr. Radeker - Not on that motion. I mean I --
5 if you want to argue the motion to amend separate --

6 The Court - All right, we'll get to that in just
7 a second. Here's what my ruling -- Do you have anything
8 else to say?

9 Ms. Thomas - Well, Your Honor, I wanted to
10 mention that one of my points was going to be that I stand
11 by what is in this pursuant to Rule 11. I signed this.
12 I don't know whether these things are true, and Mr.
13 Radeker mentioned that this isn't like the case where the
14 woman didn't show up for trial. No, it's not, but that
15 there are other cases that aren't that same situation
16 where a party, you know, didn't engage in the process.
17 That's what failure to prosecute is about. In this
18 situation with a Foreclosure Intervention Order, I'm not
19 sure what else this could be other than a failure to
20 prosecute and participate in the action. We've done what
21 we can. We've filed a Certificate of Non-Compliance. We
22 now have tried to take a step to -- to get the
23 counterclaims out of the action, and we're moving forward.
24 She's not doing anything and has not done anything. He
25 also mentioned her awareness of the proceedings and what

1 was going on, and I know that she was clearly aware. She
2 was not paying her mortgage this entire time. And that
3 fact is what is underlying in the case.

4 Mr. Radeker - And I would just like to note for
5 the record -- talk about the affidavit from a procedural
6 basis. I do not believe that Ms. Thomas is attempting to
7 mislead this Court about anything..

8 The Court - I know that.

9 Ms. Thomas - I know you don't.

10 The Court - Okay, I guess the -- I frankly don't
11 doubt anything that she said, but what I'm struggling with
12 is at this stage whether or not I can dismiss
13 counterclaims based on pre-foreclosure proceeding
14 representations that she claims were made, but then again,
15 the relief that she said she was promised under HAMP I
16 guess. Is that what it is? Home Affordable --
17 Affordability Modification?

18 Ms. Thomas - Yes, Your Honor.

19 The Court - That's what she claims that she was
20 promised beforehand. Is that the same modification that
21 you say you've been trying to do during this stay period?

22 Ms. Thomas - No, Your Honor. The failure to
23 prosecute goes to her conduct in the whole action, not
24 just whether or not those counterclaims are valid. She --
25 you know, it is supposed to recognize when a party has

20

1 engaged the judicial system and then not taken advantage
2 of it and not wisely used the Courts and the other
3 parties' resources and this case has just sat around for
4 so long while we've tried to do so much that --

5 The Court - But could you do anything from May
6 until October?

7 Ms. Thomas - You mean because of the stay?

8 The Court - Yes, ma'am. Couldn't do anything.
9 Neither one of you could do anything with the action.

10 Ms. Thomas - She could. She could've proceeded
11 on her counterclaims. The stay affects our ability to
12 proceed on the merits of the foreclosure.

13 The Court - All right, anything else?

14 Ms. Thomas - No, Your Honor.

15 The Court - All right, what I'm going to do is
16 I'm going to grant the motion to strike the counterclaims.
17 Mr. Radeker, you mentioned that you want to move to amend?

18 Mr. Radeker - That's correct, Your Honor.

19 The Court - You can do that and that will have
20 to be heard, because you have to -- I don't think you can
21 move to amend and kind of state some cloudy things you
22 might want to allege. I think the proper thing would be
23 to move to amend with a proposed amended counterclaim
24 attached to your Motion and you'll just have to let the
25 chips fall on that.

1 Mr. Radeker - So this ruling would not be
2 prejudicial to us making a motion to amend --

3 The Court - Not prejudicial to your right to
4 make a motion, but that doesn't mean it's going to be
5 amended, and whoever hears that motion can perhaps look at
6 my Order and determine whether or not your proposed
7 amendments fall outside -- or fall inside or outside what
8 I've dismissed.

9 Mr. Radeker - Thank you, Your Honor.

10 The Court - Okay?

11 Ms. Thomas - Thank you, Your Honor.

12 The Court - Could you send me an Order in Word
13 format?

14 Ms. Thomas - Yes, Your Honor.

15 The Court - Copy Mr. Radeker with the Order and
16 thank you for your presentations.

17 Ms. Thomas - Thank you.

18 Mr. Radeker - Thank you, Your Honor.

19 (End of transcript)

20

21

22

23

24

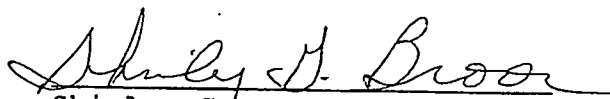
25

Certificate

I, Shirley G. Broom, the undersigned Court Reporter, hereby certify that the foregoing 22 pages constitute a true record of proceedings taken in the case of U.S. Bank National Association vs. Kelley Burr, et al. as taken by me at the time and place stated.

I do further certify that the persons were present as stated, that I am not of Counsel for, related to, or in the employee of any of the parties to this action and that I have no interest whatsoever in the outcome of this case.

This the 13th day of Nov., 2012.


Shirley G. Broom
Circuit Court Reporter
Sixteenth Judicial Circuit

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
 COUNTY OF KERSHAW) FIFTH JUDICIAL CIRCUIT

U.S. BANK NATIONAL) Civil Action No. 2010-CP-28-1197
 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) NOTICE OF DEFENDANTS' RIGHT
 Corporation, Litton Loan Servicing LP) TO FORECLOSURE
 and LaSalle Bank National Association,) INTERVENTION PURSUANT TO
 ABFC Asset Backed Certificates, Series) S.C. SUPREME COURT
 2002-SB-1,) ADMINISTRATIVE ORDER NO.
) 2011-05-02-01

Plaintiff,)

vs.)

KELLEY BURR, FIA Card Services,)
 N.A.; Discovery Bank, Issuer of the)
 Discover Card; Unifund CCR Partners,)

Defendants.)

FILED FOR RECORD
 2011 JUL 26 PM 1:57
 JUDGE HEDONALD
 CLERK OF COURT
 KERSHAW COUNTY, S.C.

TO: DEFENDANT KELLEY BURR THROUGH DAVID P. REUWER,
 ATTORNEY FOR DEFENDANT

1. You have a right to "Foreclosure Intervention."

As the Defendant in this case, you have a right to be considered for "Foreclosure Intervention" for the purpose of seeking a resolution of this foreclosure action.

Under the South Carolina Supreme Court's Administrative Order No. 2011-05-02-01 (a copy of the entire order is attached), "Foreclosure Intervention" means any policy, process, or procedure employed by Plaintiff 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 (hereinafter referred to as "the Trustee") for the purpose of seeking a resolution of a foreclosure action. Depending on your loan and circumstances, you may qualify for Foreclosure Intervention.

2. You have thirty days to act, and if you fail or refuse to participate in the Foreclosure Intervention process, this foreclosure action will proceed.

If you fail or refuse to participate in the Foreclosure Intervention process within thirty days of the date of service of this Notice, the foreclosure action will proceed. If you voluntarily elect not to participate in the Foreclosure Intervention process within thirty days of the date of service of this Notice, this foreclosure action will proceed.

Attached to this Notice is a Request to Participate in Foreclosure Intervention and related information on a potential loan modification. Also, the website for Litton Loan Servicing, the servicer of your loan, has additional information concerning potential alternatives to foreclosure at https://www.littonloan.com/fin_info1.asp.

3. To participate in the Foreclosure Intervention process, follow these instructions.

If you want to participate in Foreclosure Intervention, sign and return the Request to Participate in Foreclosure Intervention that is enclosed with this letter and return it by mail to the following:

Nelson Mullins Riley & Scarborough, LLP
ATTN: Brian A. Calub
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, South Carolina 29201

This law firm represents the Trustee. After the law firm receives your Request to Participate in Foreclosure Intervention, it will contact you requesting additional information.

You will be required to provide documents and records that will be used to evaluate your eligibility for foreclosure intervention.

After receiving all of the required documents and records, the Trustee will evaluate your eligibility and you will be notified about whether you qualify for a loan modification or other means of loss mitigation that could resolve the foreclosure action. If you qualify, the Trustee will propose an Agreement to be signed by the parties and filed with the Court.

4. If you have any information or data that you would like for the Trustee to consider, please send it in with your Request to Participate in Foreclosure Intervention.

If you would like the Trustee to consider any other information or data pertaining to your mortgage loan or personal circumstances, please send it with the Request to Participate in Foreclosure Intervention.

5. The Trustee cannot communicate with you directly about the Foreclosure Intervention process and foreclosure. The Trustee must communicate with you through its lawyers.

Under the South Carolina Supreme Court's Administrative Order No. 2011-05-02-01, the Trustee cannot communicate with you directly about Foreclosure Intervention or foreclosure, and you have the right to communicate with and otherwise deal with the Trustee through its attorneys, the law firm of Nelson Mullins Riley and Scarborough, L.L.P. ("Nelson Mullins"). Nelson Mullins does not represent you.

NELSON MULLINS RILEY & SCARBOROUGH, LLP

By: Brian A. Calub

Brian A. Calub

E-Mail: brian.calub@nelsonmullins.com

B. Rush Smith III

E-Mail: rush.smith@nelsonmullins.com

1320 Main Street / 17th Floor

Columbia, SC 29201

Telephone: (803) 799-2000

Attorneys for 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

Columbia, South Carolina
July 25, 2011

STATE OF SOUTH CAROLINA)
COUNTY OF KERSHAW) IN THE COURT OF COMMON PLEAS
) FIFTH JUDICIAL CIRCUIT

U.S. BANK NATIONAL) Civil Action No. 2010-CP-28-1197
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,)
) Plaintiff,)
) vs.)
) KELLEY BURR, FIA Card Services,)
N.A.; Discovery Bank, Issuer of the)
Discover Card; Unifund CCR Partners,)
) Defendants.)

REQUEST TO PARTICIPATE IN
FORECLOSURE INTERVENTION

FILED FOR RECORD
2011 JUL 26 PM 1:57
JOYCE H. DONALD
CLERK OF COURT
KERSHAW COUNTY, S.C.

I hereby elect to participate in the Foreclosure Intervention process. I agree to provide any and all documents required to evaluate my eligibility for foreclosure intervention, and I authorize the law firm of Nelson Mullins Riley & Scarborough LLP to communicate with me by telephone, mail, e-mail, and any other means regarding the Foreclosure Intervention process.

Kelley Burr

This Request for Foreclosure Intervention should be returned to:

Nelson Mullins Riley & Scarborough, LLP.
ATTN: Brian A. Calub
1320 Main Street / 17th Floor
Columbia, South Carolina 29201

CERTIFICATE OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Plaintiffs, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings:

NOTICE OF DEFENDANTS' RIGHT TO
FORECLOSURE INTERVENTION PURSUANT TO
S.C. SUPREME COURT ADMINISTRATIVE
ORDER NO. 2011-05-02-01

Counsel Served:

David P. Reuwer
306 Hampton Park
P.O. Box 1776
Camden, SC 29021

Roy Boggs
FIA Card Services, N.A.
1300 Pickens Street
Columbia, SC 29201

FILED FOR RECORD
2011 JUL 26 PM 1:57
JOSEPH DONALD
CLERK OF COURT
KENSINGTON COUNTY, S.C.



Kelli Diamond Martin
Administrative Assistant

July 25th, 2011.

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS,
) FIFTH JUDICIAL CIRCUIT
COUNTY OF KERSHAW)

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,)

Plaintiff,)

vs.)

KELLEY BURR, FIA Card Services,)
N.A.; Discovery Bank, Issuer of the)
Discover Card; Unifund CCR Partners,)

Defendants.)

Civil Action No. 2010-CP-28-1197

FILED
CLERK OF COURT
KERSHAW COUNTY, S.C.
2011 OCT 27 AM 11:49

CERTIFICATION OF
MORTGAGOR NONCOMPLIANCE
(Administrative Order 2011-05-02-01)

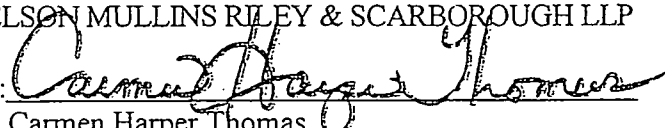
The Plaintiff by and through its undersigned attorney does hereby certify as follows:

- 1) That this is an action for the foreclosure of owner occupied real property.
- 2) That pursuant to Supreme Court Administrative Order 2011-05-02-01:
 - a) Based on the following, the Mortgagor has been served with the required notice of rights.
 - a. On July 25, 2011, Plaintiff served the Notice of Defendant's Right to Foreclosure Intervention ("Notice") on opposing counsel, which was filed on July 26, 2011.
 - b. On August 8 and 9, 2011, counsel for the parties communicated about the Notice, with Plaintiff re-sending the Notice on August 9, 2011.
 - b) Based on the following, the Mortgagor has failed, refused, or voluntarily elected not to participate in any foreclosure intervention process:

- a. The deadline to respond was August 24, 2011, based on the July 25, 2011 service date, or was September 8, 2011, based on re-sending the Notice on August 9, 2011.
- b. From August 19 to September 21, 2011, counsel for the parties communicated regarding the status of Mortgagor's documents and records for foreclosure intervention.
- c. On September 26, 27, and 29, 2011, a paralegal in Plaintiff's counsel's office left voice mails with Mortgagor's counsel regarding the status of the foreclosure intervention information.
- d. On October 4, 2011, Plaintiff's counsel wrote Mortgagor's counsel regarding the foreclosure intervention process, giving a final deadline of October 14, 2011 to receive information from Mortgagor.
- e. No documents or records were ever received by Plaintiff's counsel.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By:


Carmen Harper Thomas

SC Bar No. 76012

E-Mail: carmen.thomas@nelsonmullins.com

B. Rush Smith III

SC Bar No. 12941

E-mail: rush.smith@nelsonmullins.com

1320 Main Street / 17th Floor

Post Office Box 11070 (29211-1070)

Columbia, SC 29201

Tel: (803) 255-9385

Fax: (803) 255-5932

Columbia, South Carolina

October 26, 2011

CERTIFICATE OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for , do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings:

Certification of Mortgagor Non-Compliance

Counsel Served:

David P. Reuwer
306 Hampton Park
P.O. Box 1776
Camden, SC 29021

Roy Boggs
FIA Card Services, N.A.
1300 Pickens Street
Columbia, SC 29201

FILED FOR RECORD
2011 OCT 27 AM 11:49
CLERK OF COURT
Kershaw County, S.C.



Jessica Sestili
Administrative Assistant

October 26, 2011

STATE OF SOUTH CAROLINA

COUNTY OF KERSHAW

IN THE COURT OF 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,

Plaintiff,

vs.

Kelley Burr, FIA Card Services, N.A.;
Discovery Bank, Issuer of the Discover
Card; Unifund CCR Partners,

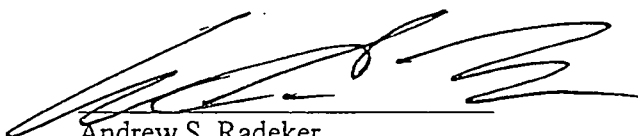
Defendants.

NOTICE OF APPEARANCE

FILED FOR RECORD
2012 SEP 13 AM 8:55
JOYCE McDONALD
CLERK OF COURT
KERSHAW COUNTY, S.C.

The undersigned hereby gives notice of his appearance on behalf of Defendant Kelley Burr in the above-captioned matter and requests that all notices and other filings, documents, and materials in this matter be furnished to him at the address below.

Respectfully submitted,



Andrew S. Radeker
HARRISON & RADEKER, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
(803) 779-6700 (facsimile)
drew@harrisonfirm.com (email)

ATTORNEY FOR DEFENDANT
KELLEY BURR

Columbia, South Carolina
September 13, 2012

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas

George C. James, Jr., Circuit Judge

Appellate Case No. 2012-213309
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.....Appellant.

CERTIFICATE OF COUNSEL

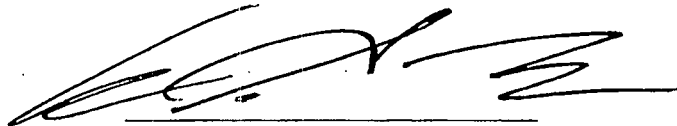
I certify that the Record on Appeal contains all material proposed to be
included by any of the parties and not any other material.

Respectfully submitted,

RECEIVED

OCT 17 2013

SC Court of Appeals



Andrew S. Radeker
Harrison & Radeker, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
Attorney for Appellant

September 27, 2013