THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEE COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Appellate Case No. 2016-001989

Laura Toney, Appellant,

v.

LaSalle Bank National Association as Trustee for the Registered Holder of Structured Asset Securities Corporation, Structured Asset Investment Loan Trust, Mortgage Pass-Through Certificates, Series 2004-11, A/K/A Altisource Homes, Wayne Capell, Lee County Treasurer and Lee County Planning and Zoning, Respondents.

FINAL BRIEF OF RESPONDENT LASALLE BANK NATIONAL ASSOCIATION

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II. Did the Trial Court err in not entering a default against the LaSalle Defendants when they timely filed a motion to dismiss in the federal court after removal that became part of the trial court record on remand?

STATEMENT OF THE CASE

Since 2005, Appellant Laura Toney ("Toney") has been engaged in numerous frivolous attempts to avoid paying her mortgage in state and federal court, including attempted rescission, multiple attempts to vacate the properly entered final judgment of foreclosure, and bankruptcies that have been dismissed as filed in bad faith. These actions have been rejected by this Court as frivolous and barred by *res judicata.* Nevertheless, Toney has persisted and in 2013 brought the underlying action seeking to quiet title and invalidate the foreclosure judgment that was entered in 2007, and has clearly reached the unassailable realm of finality. Thus, this Court should put an end to this twelve-year saga and affirm the dismissal of Toney's latest frivolous lawsuit.

On October 6, 2004, Appellant Laura Toney ("Toney") refinanced the debt encumbering her real property located at 729 Chatman Street in Bishopville, South Carolina (the "Property"). On that date Toney signed an adjustable rate note for a loan in the amount of $76,500.00 and also signed a mortgage designating the property as collateral for the debt. The mortgage was subsequently assigned to LaSalle Bank ("LaSalle").[1] Toney made the monthly payments required under the note for December 2004, January 2005, February 2005 and March 2005. She made no further payments on the loan.[2] On June 14, 2005, Plaintiff sent a letter to LaSalle attempting to rescind the loan due to an alleged failure to make certain disclosures required by the Truth-in-Lending Act.[3]

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[1]R. pp. 0253 – 54.
[2]R. pp. 0255, 0179.
[3]R. pp. 1052 – 54.

i. The Foreclosure

On July 21, 2005, LaSalle filed a *lis pendens* and complaint in the Court of Common Pleas for the Third Judicial Circuit, Lee County, South Carolina, seeking to foreclose on the Property, which was designated civil action no. 2005-CP-31-169 (the "foreclosure action").[4] In her pro se answer, Toney admitted that she signed the subject note and mortgage and admitted she had failed to make the payments required under the note.[5]

During the pendency of the foreclosure, Toney filed four pro se Chapter 13 bankruptcy petitions. Under the provisions of the Bankruptcy Abuse Prevention and Consumer Protection Credit Act of 2005, no automatic stay was in effect during Toney's fourth Chapter 13 case[6] and she filed a pro se motion requesting that the Bankruptcy Court impose a stay. Toney's motion for a stay was denied by order filed February 15, 2007 and her Chapter 13 case was subsequently dismissed by order filed February 26, 2007.[7] The order of dismissal made a finding that Toney had filed the case in bad faith and sanctioned her with a one year ban on filing any further Chapter 13 cases.[8]

On March 29, 2006 LaSalle filed a motion for summary judgment.[9] A duly noticed hearing on LaSalle's motion for summary judgment was held on February 6, 2007. Neither Toney nor her attorney appeared at the hearing.[10] On March 15, 2007, the

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[4]R. pp. 0253 – 58. The full caption is *LaSalle Bank, National Association as Trustee for the registered holders of Structured Asset Securities Corporation, Structured Asset Investment Loan Trust, Mortgage Pass-Through Certificates, Series 2004-11, Plaintiff v. Laura Toney, Defendant.*
[5]R. pp. 0259 – 61.
[6]R. p. 0160.
[7]R. pp. 0168 – 72.
[8]*Id.*; R. p. 0162.
[9]R. pp. 0262 – 64.
[10]R. p. 0146.

Court entered a judgment of foreclosure which included a dismissal of Toney's counterclaim.[11] Toney did not timely appeal the Final Judgment.

Toney then filed a pro se Chapter 7 Bankruptcy Petition on April 13, 2007, which was dismissed by order filed May 15, 2007. The dismissal order included a finding that Toney had filed the Chapter 7 case in bad faith and sanctioned her by barring any further bankruptcy filings for one year.[12] None of the bankruptcy orders were appealed.[13]

ii. First State Court Action by Toney

Toney filed a separate civil action in the Court of Common Pleas in Lee County through different attorneys on March 23, 2007, seeking to vacate the foreclosure decree, which was designated Case No. 2007-CP-31-66. In that separate action Toney obtained, on the same day the suit was filed, an ex parte order granting an injunction as to the foreclosure sale. A hearing on the application for a temporary restraining order was held before the Honorable Clifton Newman on March 27, 2007. By order filed April 2, 2007, Judge Newman dissolved the temporary restraining order and dismissed the injunction action as improperly filed.[14] The order dissolving the restraining order and dismissing the action for an injunction was not appealed.[15]

Toney then filed a motion for reconsideration of the decision and for stay of enforcement of the foreclosure order pursuant to Rule 60, SCRCP on April 25, 2007.[16] On May 7, 2007, a foreclosure sale at public auction was held, and LaSalle was the successful bidder.[17] A supplemental order of reference referred the matter to the

[11]R. pp. 0149, 51.
[12]R. pp. 0158 – 59.
[13]R. p. 0274.
[14]R. pp. 0155 – 57.
[15]R. p. 0274
[16]R. pp. 0265 – 67.
[17]R. p. 0160.

Honorable Richard Booth, as the original trial judge in the foreclosure action had recused himself due to a judicial grievance filed against him by Toney. A hearing was held before Judge Booth on October 18, 2007. By order filed December 3, 2007, Judge Booth denied Toney's motion for relief under Rule 60(b), SCRCP.[18] Toney then filed another Chapter 13 Bankruptcy on December 30, 2008. That bankruptcy case was dismissed by order filed April 21, 2009.[19]

iii. Appeal of the Foreclosure Action

Following the dismissal of that bankruptcy case, Toney proceeded with an appeal of the denial of her Rule 60(b) motion in the foreclosure action, Case No. 2005-CP-31-169. The South Carolina Court of Appeals affirmed the trial court's decision in Op. No. 2011-UP-334, filed June 27, 2011.[20] Toney then appealed to the South Carolina Supreme Court, which denied Certiorari on December 20, 2012.[21]

iv. Federal Action by Toney

While her ultimately unsuccessful petition for certiorari to the South Carolina Supreme Court was pending, on July 13, 2011 Toney filed an action in U.S. District Court, Case No. 3:11-cv-01686-MBS-JRM (D.S.C.), which she titled "Complaint to Set Aside Fraudulent Transfer, and Fraud; Declaratory Judgment for Entry of Default, Gross Negligence, Emotional Distress, Deceptive and Unfair Trade Practices." It addressed the same Property and mortgage loan dispute and attacked the state court result.[22] On March 22, 2012, the court denied Toney's motion for injunctive relief,[23] adopting a Report and

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[18]R. pp. 0162 – 64.
[19]R. p. 0144.
[20]R. pp. 0173 – 74.
[21]R. p. 0228.
[22]R. pp. 0297 – 0371.
[23]R. pp. 0180 – 87.

Recommendation of the Magistrate.[24] On August 9, 2012, United States Magistrate Judge Joseph R. McCrorey entered a second Report and Recommendation, positing in detail that Plaintiff's case be dismissed because: (1) it was barred by the doctrine of *res judicata*; and (2) it failed to state any claim upon which relief could be granted.[25] On September 25, 2012, Chief United States District Judge Margaret B. Seymour adopted the Report and Recommendation and dismissed the case on *res judicata* grounds.[26]

v. Appeal of Federal Action by Toney

Toney appealed the order of dismissal to the U.S. Court of Appeals for the Fourth Circuit, which affirmed the trial court in an unpublished opinion dated February 28, 2013.[27] Toney petitioned for hearing *en banc*, which petition was denied on April 4, 2013.[28] Toney appealed to the United States Supreme Court, which denied certiorari on December 2, 2013.[29]

vi. The Instant Action

While her ultimately unsuccessful petition for certiorari to the U.S. Supreme Court was pending, Toney filed the instant action on November 13, 2013 in Common Pleas Court in Lee County, once again addressing the same foreclosed Property and same circumstances and again attacking the result of the 2005 foreclosure action.[30] In this action, Toney attempts to quiet title in the Property to herself, alleging that the foreclosure sale should be vacated because it was allegedly obtained illegally in violation

[24]R. pp. 0175 – 79.
[25]R. pp. 0188 – 0213.
[26]R. pp. 0214 – 27.
[27]R. pp. 0229 – 30.
[28]R. p. 0231.
[29]R. pp. 0332 – 52.
[30]R. pp. 0023 – 40.

of state and federal law, and seeks damages of ten million dollars.[31] Toney named as Defendants LaSalle Bank National Association As Trustee for the Registered Holders of Structured Asset Securities Corporation, Structured Asset Investment Loan Trust, Mortgage Pass-Through Certificates, Series 204-11 a/k/a AltiSource Homes[32] (hereinafter "the LaSalle Defendants"); Pro Capital Investors; and Wayne Capell, Lee County Treasurer, and Lee County Planning and Zoning (hereinafter "the Lee County Defendants").[33]

On December 13, 2013 the LaSalle Defendants removed the action to U.S. District Court, asserting that the Lee County Defendants were fraudulently joined in order to destroy diversity.[34] Seven days later, on December 20, 2013, the LaSalle Defendants timely filed in accordance with Rules 12(b)(4)–(6) and 81(c)(2)(C) of the Federal Rules of Civil Procedure a Motion to Dismiss and for Sanctions, alleging that based on the prior completed adjudication of the underlying foreclosure, the Complaint should be dismissed under the doctrine of *res judicata*, and that based on a prior order regarding possible sanctions for any further lawsuits filed by Toney, sanctions were warranted.[35] Attached to the Motion to Dismiss and for Sanctions was a copy of the Report and Recommendation of Magistrate Judge McCrorey and a copy of the Order and Opinion of Chief Judge Seymour in Case No. 3:11-cv-01686-MBS-JRM.[36]

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[31] *Id.*
[32] Although Toney raises certain allegations in the Complaint against Ocwen Loan Servicing, that entity was not named in nor served with the Complaint.
[33] R. pp. 0023 – 40.
[34] R. pp. 0019 – 40.
[35] R. 99. 0372 – 0415.
[36] *Id.*

On January 3, 2014 Toney filed a motion to remand.[37] On January 20, 2014 the LaSalle Defendants filed an Amended Motion to Dismiss and for Sanctions (hereinafter "Amended Motion to Dismiss"), arguing that in addition to the *res judicata* argument, the action should be dismissed for failure to state a claim upon which relief can be granted.[38] On March 11, 2014 the Magistrate issued a Report and Recommendation to remand to state court, stating, "If the district judge accepts this recommendation, **all other motions pending in this action will be included in the remand for state court disposition.**" (Emphasis added.)[39]

On August 4, 2014 the U.S. District Judge adopted the Report and Recommendation and granted Toney's Motion to Remand, finding that Toney had at least a possibility of recovering against the Lee County Defendants, and thus they were properly joined.[40] A certified copy of the Remand Order was served on the Clerk of Court for Lee County.[41]

On September 25, 2014 Toney filed a Motion for Default against the LaSalle Defendants.[42] On November 20, 2014 the LaSalle Defendants filed a renewed Motion to Dismiss, attaching a copy of the earlier, timely-filed Motion to Dismiss filed in the federal court action.[43] On December 1, 2014 the LaSalle Defendants filed a Response in Opposition to Plaintiff's Motion for Default and Second Amended Motion to Dismiss and for Sanctions.[44] Eventually all pending motions by the parties were set to be heard by The Honorable Circuit Judge Clifton Newman on November 30, 2015 (the "November

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[37]R. pp. 0090 – 0105.
[38]R. pp. 0444 – 89.
[39]R. pp. 0064 – 74.
[40]R. pp. 0075 – 83.
[41]R. p. 1055.
[42]R. pp. 0499 – 0513.
[43]R. p. 0159.
[44]R. pp. 0651 – 0781.

Hearing"), and the hearing began that afternoon in Bishopville, with Defendants' counsel and Toney in attendance.[45]

At the hearing, Toney argued for the first time that attorneys Paul M. Fata, counsel for the Lee County Defendants, and Sean A. O'Connor, counsel for the LaSalle Defendants, should be disqualified[46] and also that she was entitled to a default judgment against the LaSalle Defendants. After hearing argument, the court denied the motion to disqualify Defendants' counsel[47] and requested from counsel for the LaSalle Defendants an additional memorandum regarding the issue of whether a properly filed motion to dismiss in federal court prior to remand must be re-filed again with the state court after remand in order to avoid a default.[48] The supplemental memorandum was filed on behalf of the LaSalle Defendants on December 7, 2015.[49] The court then took a recess and advised all parties in attendance that the hearing would resume at 2:30 p.m. that same day.[50] Attorneys Fata and O'Connor returned after the recess, but Toney did not. The court then instructed Defendants' counsel to submit proposed orders and adjourned the hearing.[51] The following morning, on December 1, 2015 (the "December Hearing"), with no resumption of the hearing having been scheduled, Toney appeared in court, where, in response to Judge Newman's inquiry, she stated she had become ill the prior day and had gone to a health care facility.[52]

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[45]R. pp. 0939 – 98.
[46]R. pp. 0942 – 43.
[47]R. pp. 0086 – 89.
[48]R. p. 0992.
[49]R. pp. 0824 – 31.
[50]R. pp. 0990 – 91.
[51]R. p. 0994.
[52]R. pp. 0994 – 95.

Eventually the hearing was scheduled to be resumed on March 30, 2016, (the "March Hearing") with due notice to all parties.[53] Toney did not appear for this hearing. She did not file a motion for continuance or any other motion relating to her absence but instead sent emails to the court the morning of the hearing, asking to be excused from attending and requesting another continuance.[54] The court received the emails but proceeded with the hearing without Toney present.[55]

At this hearing, the court advised counsel for the LaSalle Defendants and the Lee County Defendants that after the November 30, 2015 hearing, he had called into court the person from the health facility Toney had checked into on November 30, 2015, to investigate Toney's statements to the court that she had become ill.[56] The witness testified that she was not able to diagnose any illness nor would she have signed the medical note at Toney's request had she known it was to be used as an excuse for absence from court.[57]

Relying on S.C. Supreme Court Administrative Order No. 2015-09-10-01, which permits the court to rule on pending motions without oral argument where briefs have been submitted, the court held that it could rule on the motions without oral argument from Toney, as she had made several filings in regard to all the pending motions.[58] The court further noted previous instances of Toney having repeatedly sought continuances, postponements and delays in the case based upon tenuous and uncorroborated assertions, and found that Toney's overall conduct had demonstrated a propensity and a pattern of

[53]R. p. 0832.
[54]R. p. 1056.
[55]R. pp. 1001, 0112.
[56]R. pp. 1004 – 05, 0114.
[57]R. p. 1005.
[58]R. pp. 1035 – 36, 0114.

abuse of the court system and that her prior statements in that regard had not been credible.[59]

After hearing argument from Defendants' counsel, the court orally denied Toney's motion for default against the LaSalle Defendants and granted the LaSalle Defendants' motion to dismiss based on *res judicata* grounds.[60] The court then stated it would give Toney 15 days after service of the proposed order to file a response,[61] which Toney did on May 20, 2016.[62] The court's written Order on all outstanding motions was filed on July 11, 2016 (hereinafter referred to as the "Order Granting Defendants' Motions"). It denied Toney's motion for default against the LaSalle Defendants and granted the LaSalle Defendants' motion to dismiss on *res judicata* grounds.[63] The Order Granting Defendants' Motions further found, among other things, that removal was timely, that the LaSalle Defendants had timely filed a Motion to Dismiss as a responsive pleading, and that the LaSalle Defendants were under no obligation to re-file the Motion to Dismiss in state court after the case was remanded.[64]

Toney filed a Motion for Reconsideration, in which she argued that Judge Newman should have recused himself, that there was a motion to dismiss and Rule 11 motion still pending, and that the LaSalle Defendants failed to file a timely Answer in state or federal court, again ignoring the LaSalle Defendants' timely filed Motion to Dismiss in accordance with Rule 81(c)(2)(C) of the Federal Rules of Civil Procedure, and arguing that because the Motion to Dismiss was filed in federal court on December 20,

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[59]R. pp. 1035, 0113 – 14.
[60] R. pp. 1035, 1038, 0106 – 0129.
[61]R. p. 1037.
[62]R. pp. 0833 – 46, 0847 – 55.
[63]R. pp. 0116 – 18, 0122 – 27.
[64]R. pp. 0122 – 27.

2013, 37 days after the state court action was filed, it was untimely, notwithstanding her acknowledgment that the case was timely removed to federal court on December 13, 2013, thirty days after suit was filed in state court.[65] The LaSalle Defendants filed a response to the Motion for Reconsideration on July 20, 2016 outlining how it failed to raise any new issues which had not already been presented to the court and addressed in the Order Granting Defendants' Motions.[66] On July 26, 2016, Toney filed an Amended Motion for Reconsideration, arguing that the March 30, 2016 hearing should not have gone forward because she was unavailable. The court denied the Amended Motion for Reconsideration on August 29, 2016.[67] On September 19, 2016 Toney filed a Notice of Appeal to this court.[68]

On March 16, 2017 Toney filed her "Corrected Initial Brief," in which she purports to assert four assignments of error based on her table of contents headings, all of which on their face fail to address the court's rulings as contained in the Order Granting Defendants' Motions and the Order Denying Plaintiff's Motion for Reconsideration. In substance the table of contents headings assert as follows:

1. Because the Appellant did not receive a Letter of Acceleration, the foreclosure did not follow the foreclosure laws of South Carolina.

2. Because the attorney committed fraud on the court, the Appellant should have been granted a new trial.

3. Because the attorney for the respondents did not enter an Order of Appearance, the case should have been dismissed.

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[65]R. pp. 0860 – 98.
[66]R. pp. 0856 – 59.
[67]R. p. 0084.
[68]R. pp. 0905 – 08.

4. Because the Appellant did not get an opportunity to present her case, her due process was violated.[69]

In noticeable contrast to the headings contained in her table of contents, however, Toney's brief itself argues only three issues:

1. Did the trial judge err in holding an ex-parte hearing when the Plaintiff was admitted into the hospital for a serious illness and notified the courts?

2. Did the trial judge err in ruling that the defendant did not have to file in state court after remand even if the defendant did not file a timely answer in state or federal court?

3. Did the trial judge err in allowing the attorney for the respondents to continue representation after the court was notified that the attorney was reprimanded by the commission on lawyer conduct for conflict of interest?[70]

In this Initial Brief the LaSalle Defendants will address only Toney's first and second arguments on appeal, as her third argument concerns exclusively the Lee County Defendants and Attorney Fata.

[69]R. p. 0910.
[70]R. pp. 0920 - 30.

STANDARD OF REVIEW

This Court should examine the denial of Toney's request for a continuance under the abuse of discretion standard. "The granting of a motion for a continuance is within the sound discretion of the trial court and will not be disturbed absent a clear showing of an abuse of discretion. Reversals for the denial of a continuance are about as rare as the proverbial hens' teeth." *State v. Colden*, 641 S.E.2d 912, 916 (S.C. Ct. App. 2007) (citations omitted). Whether holding a duly noticed hearing in the absence of one of the parties after the denial of a request for a continuance constitutes an ex parte hearing is a question of law. "[T]his Court reviews questions of law de novo." *Lambries v. Saluda County Council*, 409 S.C. 1, 7, 760 S.E.2d 785, 788 (2014).

Similarly, "[d]etermining the proper interpretation of a statute is a question of law . . . ." *Id.* Thus, the de novo standard of review is also applied to the issues of whether the motion to dismiss was timely filed under Federal Rule of Civil Procedure 81(c)(2) and whether the trial court properly considered the motion to dismiss that was filed in the federal court before remand. *Id.*

ARGUMENT

I. The trial judge did not err in proceeding with a duly noticed hearing in the absence of Plaintiff, and properly denied Plaintiff's request for continuance, where Plaintiff was given notice and opportunity to be heard both at the hearing and after the hearing, and her previous history of vague and unsupported excuses of illness was insufficient to warrant re-scheduling the hearing.

Contrary to Toney's argument, the trial judge did not conduct an improper *ex-parte* hearing. Toney was given proper notice and opportunity to be heard at two separate hearings. At the November hearing, she did not return to court after a short break despite the judge's clear instruction for all to do so; instead she failed to appear,

presenting what was later confirmed by the court to be a spurious excuse of an alleged medical condition. At the subsequent March hearing, once again properly noticed, which provided Toney a second opportunity to be heard, she once again failed to appear. She filed no motion and offered no valid justification for her absence, which the court found on the record to be the latest in a series of abusive contrivances by Toney in an effort to cause delay and avoid adjudication. Based on this pattern of misconduct by Toney, the court was justified in refusing to continue the March hearing and conducting it in her absence. Thus, this Court should reject Toney's arguments, and affirm.

"Generally, one who has notice and fails to appear cannot complain of an ex parte proceeding." *Bakala v. Bakala*, 352 S.C. 612, 623, 576 S.E.2d 156, 162 (2003) (citations omitted). When a party has notice of a hearing and intentionally fails to appear at the hearing, the absent party waives any objection to potential *ex parte* communication. *Id.* Thus, the prohibition against *ex parte* communications does not prevent a hearing from going forward when a party has notice of a hearing and fails to appear to avoid the consequences of the hearing.

Here, contrary to Toney's argument, the trial court afforded her sufficient due process, and in fact, one might argue more due process than she was entitled under the circumstances. Although she appeared and participated at the November Hearing, she failed to return after the court took a brief recess for lunch. Toney then appeared the next day in court claiming health issues, and advising the court that she had other motions that she wanted the court to consider. The Court then rescheduled the hearing to March 30, 2016, but Toney claimed that she would be unavailable, but without providing the court with any explanation. The judge advised the parties in attendance at the March hearing

that Toney had sent email communications that day advising that she fell ill, requiring her hospitalization[71], and that she requested a continuance.

The trial court then ruled that he would deny Toney's request for continuance based on her alleged illness, and in support of his decision, advised the parties in attendance that he had contacted the clinic employee who had previously provided Toney with a note regarding her alleged hospitalization when she failed to re-appear at the November hearing. The clinic employee testified that she would not have written Toney a doctor's note indicating that Toney was ill when she had not determined that she was, in fact, ill, had she known it was going to be used to get out of a court appearance. Thus, the trial court properly denied Toney's motion for continuance based on a pattern of abuse by Ms. Toney which pre-dated the November hearing.

In addition, the court advised that in reaching his decision to move forward with the hearing on the pending motions, he was relying on a new pilot program pursuant to S.C. Supreme Court Administrative Order No. 2015-09-10-01, that allows judges to rule on motions without a hearing, to streamline the dockets and move cases. Finally, the trial court gave Toney an additionally fifteen days to submit any additional written materials she wanted in support of her position, which she did. Thus, Toney was given equal opportunity to be heard because the trial court received and considered all filings made by Toney.

By giving her an additional fifteen days to submit written briefings, the trial court gave Toney more than ample opportunity to be heard than she was entitled. Thus, she suffered no prejudice, and without prejudice, the trial court's ruling cannot be overturned even in the case of *ex parte* communications. *Bakala*, 352 S.C. at 623, 576 S.E.2d at 162

[71] R. p. 1001.

("[A]lthough ex parte contacts are strongly disfavored, prejudice must be shown to obtain a reversal on this ground." (citing *Ellis v. Procter and Gamble Distrib. Co.,* 315 S.C. 283, 433 S.E.2d 856 (1993); *Burgess v. Stern,* 311 S.C. 326, 428 S.E.2d 880 (1993))). Because Toney was given sufficient notice and opportunity to be heard, exhibited a pattern of suspect excuses to delay the case, intentionally failed to return to a hearing after recess, skipped the rescheduled hearing entirely with no valid justification, and has failed to show prejudice, this Court should reject her argument regarding *ex parte* communications, and affirm the Order granting LaSalle Defendants' motion to dismiss.

II. The trial judge correctly denied Plaintiff's motion for default against the LaSalle Defendants and ruled that the LaSalle Defendants did not have to re-file their Motion to Dismiss in state court after remand when it was timely filed in federal court pursuant to the rules of procedure and the federal court's order.

Although Toney frames her second issue as whether the trial court erred in ruling that LaSalle did not have to file a responsive pleading in state court after the remand from federal court, her argument makes it clear that she believes that LaSalle should have been defaulted for failure to timely file an Answer in the federal court after removal. Toney's argument that LaSalle did not timely defend in federal court is belied by the facts of this case that show that the LaSalle Defendants timely filed a Motion to Dismiss in federal court. Moreover, LaSalle was not required to refile its motion to dismiss in state court after remand, a fact that is supported by both the case law as well as the federal court's ruling that all federal court filings would travel back to state court after remand. Thus, this Court should reject Toney's arguments, and affirm the dismissal of the case.

Much of Toney's argument section is not argument at all, but rather just quoting the case of *Limehouse v. Hulsey*, 397 S.C. 49, 723 S.E.2d 211 (Ct. App. 2011), *rev'd,* 404 S.C. 93, 744 S.E.2d 566 (2013). In *Limehouse*, a case was removed to federal court and

then subsequently remanded. The defendants, thinking the thirty-day period to answer began anew after remand, failed to answer, and a default was entered against them. *Id.*, 397 S.C. at 59, 723 S.E.2d at 216. The Court of Appeals of South Carolina declined to adopt a rule that a defendant gets a fresh thirty days after remand to answer. *Id.*, at 397 S.C. at 68, 723 S.E.2d at 221. The Court of Appeals found that default was proper because no matter whether it adopted a rule that the removal tolled the time remaining to answer under South Carolina law or whether the removing party subjected itself to the shorter deadline of Federal Rule of Civil Procedure 81(c)(2), the defendant failed to answer until even the more liberal deadline had expired. *Id.*, at 397 S.C. at 69; 723 S.E.2d at 222.[72]

However, *Limehouse* is distinguishable from this case because the defendant in *Limehouse* failed to file **any** defensive pleading or motion in the federal court before remand. Here, the LaSalle Defendants timely filed a motion to dismiss in Federal court. Thus, this Court should reject Toney's arguments.

Rule 12(a), SCRCP, states in relevant part:

> A defendant shall serve his answer within 30 days after the service of the complaint upon him . . . . The service of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the Court: (1) if the Court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 15 days after notice of the Court's action[.]

The defenses of (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state facts sufficient to constitute a cause of action, are three of the

[72]The Supreme Court of South Carolina reversed, but on the limited issue that the state court did not reacquire jurisdiction until after the federal district court mailed the certified copy of the remand order, rendering the trail court proceedings void. The Supreme Court agreed that the time to file a defensive pleading did not start anew after remand.

defenses that may be raised by motion before a responsive pleading, under SCRCP 12(b), and were raised in this case. The federal rules provide that:

> After removal, repleading is unnecessary unless the court orders it. A defendant who did not answer before removal must answer or present other defenses or objections under these rules within ***the longest of these periods:***
>
> (A) 21 days after receiving--through service or otherwise--a copy of the initial pleading stating the claim for relief;
>
> (B) 21 days after being served with the summons for an initial pleading on file at the time of service; or
>
> (C) 7 days after the notice of removal is filed.

Fed. R. Civ. P. 81(c)(2) (emphasis added).

Here, the motion to dismiss was timely filed in the federal court because it was filed within seven days of removal. Fed. R. Civ. P. 81(c)(2)(C). The only remaining issue is whether the Motion to Dismiss needed to be refiled in state court after the remand. Since there are no cases directly on point from the South Carolina appellate courts, we turn to other jurisdictions, where the overwhelming authority shows that the Motion to Dismiss did not need to be refiled.

"[T]he state court ordinarily receives the case in the posture it is in when remanded and, thus, a pleading filed in federal court need not be refiled in state court." 77 C.J.S. Removal of Cases § 180. "[A] timely answer filed in district court following timely removal of the action is sufficient to prevent a default in a state court if the case is subsequently remanded from district court . . . ." *McKethan v. Wells Fargo Bank, N.A.*, 334 Ga. App. 404, 408, 779 S.E.2d 671, 675 (2015) (citing *Teamsters Local 515 v. Roadbuilders, Inc. of Tennessee*, 249 Ga. 418, 421, 291 S.E.2d 698, 701 (1982) *overruled on other grounds by Shields v. Gish*, 280 Ga. 556, 629 S.E.2d 244 (2006)); *accord*

Draper v. Reynolds, 278 Ga. App. 401, 402, 629 S.E.2d 476, 478 (2006); *Falls v. Goldman Sachs Trust Co., N.A.*, No. 5:16-CV-740-FL, 2017 WL 1628885, at *5 (E.D.N.C. May 1, 2017) ("[T]he cases cited reflect the ***undisputed proposition*** that documents timely filed in federal court prior to remand must be given effect in the same proceeding once remanded to state court." (emphasis added) (citing *McKethan*, 779 S.E.2d at 674)).

The Court of Special Appeals of Maryland acknowledged that recognizing pleadings filed in federal court in a removed case after it is remanded back to state court has been the trend ever since the federal removal statutes were changed to remove a state court's jurisdiction to proceed once a removal petition is filed. *Swarey v. Stephenson*, 222 Md. App. 65, 90, 112 A.3d 534, 549 (2015) (collecting cases from multiple jurisdictions). Additionally, the Supreme Court of New Hampshire aptly explained the policy consideration for giving effect to pleadings and motions filed in federal court before remand to state court:

> Several policy considerations support giving effect to pleadings filed in federal court before remand to state court. The first is judicial efficiency and economy. *Laguna Vill., Inc. v. Laborers' Int'l Union of N. Am.*, 35 Cal. 3d 174, 181, 672 P.2d 882, 886 (1983). A state court's acceptance of federal pleadings in such circumstances "avoid[s] the needless waste of time, effort and expense which would result from requiring counsel to duplicate in [state] court their actions ... in the federal court." *Edward Hansen, Inc. v. Kearny Post Office Assocs.*, 166 N.J. Super. 161, 169, 399 A.2d 319, 323 (Ch. Div. 1979). The second is fairness: giving effect to a federal court pleading is not unfair to an opposing party when that party has been fully apprised of the federal court proceedings and of the remand to state court. *See Laguna Vill.,* 197 Cal.Rptr. 99, 672 P.2d at 886. The third is the policy of avoiding forfeiture of claims and resolving them on the merits. *Id.; see Lewellyn v. Follansbee,* 94 N.H. 111, 114, 47 A.2d 572 (1946). The final policy is comity: "Most essentially, federal and state courts are complementary systems for administering justice in our Nation[;] [c]ooperation and comity, not competition and conflict are

> essential in the federal design." *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 586, 119 S.Ct. 1563, 143 L.Ed.2d 760 (1999).

State v. Hess Corp., 159 N.H. 256, 262, 982 A.2d 388, 393 (2009) (alterations in original).

Some states have adopted a rule requiring a plaintiff to file a list of all the documents filed in federal court that are to be adopted in state court after remand and to provide a copy of those documents to the state court. *See Mosby v. W.-Anderson*, 363 S.W.3d 397, 400 (Mo. Ct. App. 2012) (citing Mo. Sup. Ct. R. 55.34(b)). However, South Carolina has no such rule.

Here, because the motion to dismiss was timely filed in the federal court, it was properly before the trial court as the trial court properly found. Toney was not prejudiced in any way by the fact that the trial court ruled on the motion to dismiss because she was clearly on notice of the motion, having been served with it before the remand to state court, and because the Federal Magistrate's Report and Recommendation that was adopted by the District Judge stated that the motion to dismiss would be sent back to state court. ("If the district judge accepts this recommendation, all other motions pending in this action will be included in the remand for state court disposition."). Based on this unanimous and uncontradicted rule, the trial court properly ruled on the motion to dismiss that was filed in the federal court. Furthermore, as stated above, Toney's appellate argument fails because the LaSalle Defendants timely filed the motion to dismiss in the federal court, and therefore, there was no basis for holding LaSalle in default. Thus, this Court should reject Toney's arguments, and affirm.

CONCLUSION

This Court should reject Toney's arguments for reversal of the dismissal order because she was not denied due process. No *ex parte* hearing occurred because Toney failed to appear for the duly noticed March 2016 hearing after the court declined to reschedule the hearing upon her request. Additionally, she was given the further opportunity to submit written briefs after the hearing, which she did and which were considered, alleviating any potential prejudice. Finally, Toney failed to argue or show any prejudice regarding any alleged *ex parte* hearing. Toney's second argument that a default should have been entered against the LaSalle Defendants also fails because the LaSalle's Defendants' motion to dismiss was timely filed in the federal court before remand, and the trial court properly ruled upon it without the need for the motion to be re-filed in state court after remand. Thus, this Court should reject Toney's arguments, and affirm.

Respectfully submitted,

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January 11, 2018

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEE COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Appellate Case No. 2016-001989

Laura Toney, Appellant,

v.

LaSalle Bank National Association as Trustee for the Registered Holder of Structured Asset Securities Corporation, Structured Asset Investment Loan Trust, Mortgage Pass-Through Certificates, Series 2004-11, A/K/A Altisource Homes, Wayne Capell, Lee County Treasurer and Lee County Planning and Zoning, Respondents.

CERTIFICATE OF COUNSEL

The undersigned counsel hereby certifies the Final Brief of Respondent LaSalle Bank complies with Rule 211(b), SCACR.

Respectfully submitted,

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