

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

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

RECEIVED
JAN 23 2020
SC Court of Appeals

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

v.

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

Of whom Cindy B. Hunt is theAppellant.

**RESPONDENT'S RETURN TO
APPELLANT'S AMENDED PETITION FOR REHEARING**

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Trust Company

January 23, 2020

Pursuant to the Court's request, Respondent Branch Banking and Trust Company ("Respondent") submits the following Return to the Amended Petition for Rehearing of Appellant Cindy B. Hunt ("Hunt"):

ARGUMENTS

I. THE COURT CORRECTLY HELD THAT THE MASTER DID NOT ABUSE HER DISCRETION IN DENYING HUNT'S MOTION TO ALTER, AMEND, OR VACATE THE ORDER THAT DISMISSED THE AMENDED COUNTERCLAIMS.

Hunt fails to state with particularity any valid points supposed to have been overlooked or misapprehended by the Court in affirming the Master's denial of Hunt's "Motion: Lack of Jurisdiction, SCRCP 59 and SCRCP 60 re Order filed on 1/13/2015" of August 11, 2015.

"In order to prevail on a petition for rehearing, appellants must demonstrate the Court overlooked or misapprehended their argument." *Kennedy v. S.C. Ret. Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001)(citing Rule 221(a), SCACR).

The Court correctly noted that removal proceedings impact the jurisdiction of a state court only after the time of filing of a copy of the notice of removal with the clerk of the state court. *See* 28 U.S.C. § 1446(d); *Limehouse v. Hulsey*, 404 S.C. 93, 105, 744 S.E.2d 566, 573 (2013). Prior to Hunt filing the notice of removal on November 10, 2014, the Master had already:

- issued an oral order on October 14, 2014, stating she would dismiss Hunt's amended counterclaims (R. p. 954, lines 9-12);
- emailed this ruling to the parties on October 23, 2014 (R. p. 1903); and
- issued a Form 4 order on October 28, 2014, that denied Hunt's motion for default judgment and confirmed the dismissal of her amended counterclaims.

Hunt's petition faults the Court for not addressing whether the Order of January 13, 2015, is void for lack of jurisdiction (Appellant's Am. Pet. Reh'g p. 1), but that Order merely memorialized the Master's earlier, pre-removal dismissal of Hunt's amended counterclaims. Hunt's petition fails to show that the pre-removal dismissal of her amended counterclaims was controlled by an error of law or based on factual conclusions that are without evidentiary support. Therefore, the Master did not abuse her discretion in denying Hunt's "Motion: Lack of Jurisdiction, SCRCP 59 and SCRCP 60 re Order filed on 1/13/2015" of August 11, 2015.

Hunt's petition further argues that the Court's opinion deprives her of due process. (Appellant's Pet. Reh'g p. 5.) However, because Hunt failed to argue that point in her Appellant's brief, it is outside of the scope of the Court's review of her rehearing request. *See Kennedy*, 349 S.C. at 532, 564 S.E.2d at 322 ("The argument [in the appellants' petition for rehearing] was not considered because it was never presented to this Court."). Therefore, the Court must deny Hunt's petition for rehearing on this issue.

II. THE COURT CORRECTLY HELD THAT THE MASTER DID NOT ERR IN DENYING HUNT'S MOTION FOR DEFAULT JUDGMENT ON HER AMENDED COUNTERCLAIMS.

Hunt fails to state with particularity any valid points supposed to have been overlooked or misapprehended by the Court in affirming the Master's denial of Hunt's motion for default judgment on her amended counterclaims.

The Court correctly affirmed the Master's ruling on the ground of mootness. Once the Master made the decision to dismiss Hunt's amended counterclaims at the hearing on October 14, 2014, the underlying basis of Hunt's motion for a default judgment—the necessity of a reply from Respondent to those amended counterclaims—disappeared. After that point, any ruling on Hunt's motion for default judgment would have had no practical effect upon the case. Therefore,

the Master did not err in denying Hunt's motion to alter or amend Form 4 Order entered October 28, 2014.

Hunt's petition contends that her amended counterclaims were not actually dismissed until the Order of January 13, 2015—the same order that she continues to insist is void for lack of jurisdiction because of its entry during the removal period. (Appellant's Am. Pet. Reh'g p. 8.) However, Hunt's argument ignores the fact that the Master's oral order on October 14, 2014, dismissed the amended counterclaims. This oral order rendered moot Hunt's request for a default judgment on the same amended counterclaims being dismissed.

Hunt faults the Court for addressing only the denial of Hunt's motion for a default judgment and not addressing Hunt's request for an *entry* of default against Respondent—as if it matters.¹ (Appellant's Am. Pet. Reh'g p. 15.) However, this Court was tasked only with reviewing the Master's decision to deny Hunt's request for a default judgment against Respondent. The decision whether or not to make an entry of default against a party belongs to the clerk of court, not the Master. Rule 55(a), SCRCP (“When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter his default upon the calendar (file book).”)(emphasis added). Whether or not the clerk of court erred by not making an entry of default against Respondent was not before the Court in this appeal. *See State v. Austin*, 306 S.C. 9, 19, 409 S.E.2d 811, 817 (Ct. App. 1991)(“Appellate courts in this state, like

¹ The Court's reasoning for affirming the Master's denial of Hunt's request for a default judgment against Respondent pursuant to Rule 55(b), SCRCP, would be equally applicable to any denial of a request for an entry of default against Respondent pursuant to Rule 55(a), SCRCP—both requests were rendered moot when the Master dismissed the amended counterclaims.

well-behaved children, do not speak unless spoken to and do not answer questions they are not asked.”). Therefore, the Court must deny Hunt’s petition for rehearing on this issue.

III. THE COURT CORRECTLY HELD THAT HUNT FAILED TO PRESERVE FOR REVIEW THE ARGUMENT THAT BB&T ENGAGED IN FORUM SHOPPING AND VEXATIOUS LITIGATION.

Hunt fails to state with particularity any valid points supposed to have been overlooked or misapprehended by the Court in finding this issue unpreserved for review. The Master has never ruled on this issue and Hunt did not raise it in any of the three motions to alter, amend, or vacate whose denial is at issue in this appeal. Hunt’s petition concedes that “the record on appeal does not include an Order that uses the words: Forum Shopping and Vexatious Litigation.” (Appellant’s Am. Pet. Reh’g p. 21.)

Rather, Hunt’s petition suggests that she preserved the issue by raising it in her three previous federal court cases against Respondent. However, those cases are dismissed and are not being reviewed by this Court. Hunt had a duty to preserve the issue for appellate review within *this* action by making the argument within a motion to alter or amend. *See Pye v. Estate of Fox*, 369 S.C. 555, 564, 633 S.E.2d 505, 510 (2006) (“It is well settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved.”); *I’On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (“If the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party must file a motion to alter or amend the judgment in order to preserve the issue for appellate review.”) Because she failed to do so, the Court must deny Hunt’s petition for rehearing on this issue.

IV. THE COURT CORRECTLY HELD THAT THE MASTER DID NOT ABUSE HER DISCRETION IN DENYING HUNT'S MOTION TO ALTER, AMEND, OR VACATE THE ORDER THAT DENIED HUNT'S MOTION FOR ATTORNEY'S FEES AND COSTS.

Hunt fails to state with particularity any valid points supposed to have been overlooked or misapprehended by the Court in affirming the Master's denial of Hunt's motion to alter, amend, or vacate the order that denied Hunt's motion for attorney's fees and costs. Hunt was not a prevailing party in this case, was not represented by an attorney in this case, and had no right to attorney's fees and costs under the Rule 41(d), SCRCPC (which is inapplicable in this case).

While Hunt argues that the "prevailing party" rule does not necessarily require her to prevail on all issues in order to be entitled to attorney's fees (Appellant's Am. Pet. Reh'g p. 32), her petition fails to identify a single issue or motion in this case on which she has prevailed.

Hunt continues to insist that Rule 41(d), SCRCPC, entitles her to attorney's fees, but also continues to fail to articulate how that rule is applicable when Respondent has never voluntarily dismissed any case against Hunt in which it was the plaintiff. *See* Rule 41(d), SCRCPC ("If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.") (emphasis added).

Hunt asks this Court to ignore its own precedent prohibiting *pro se* litigants from recovering attorney's fees and to instead follow Alaskan state case law construing the Alaskan state rules of civil procedure. *Compare Calhoun v. Calhoun*, 339 S.C. 96, 100, 529 S.E.2d 14, 17 (2000) (finding *pro se* litigants, whether an attorney or lay person, may not recover attorney's fees), *with Sherry v. Sherry*, 622 P.2d 960, 965 (Alaska 1981)(holding that a defendant who was an attorney appearing *pro se* could receive an award of attorney's fees under Alaska Civil Rule

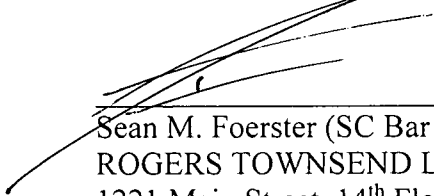
41(a)). However, because Hunt failed to make this argument against precedent in her Appellant's Brief, the Court cannot consider it now. *See Kennedy*, 349 S.C. at 532, 564 S.E.2d at 322 ("The argument [in the appellants' petition for rehearing] was not considered because it was never presented to this Court.").

Likewise, the Court cannot consider Hunt's argument that the Master abused her discretion in denying Hunt's "Motion under SCRPC 41" of May 27, 2015, without a hearing (Appellant's Am. Pet. Reh'g p. 31), because Hunt also failed to make this argument in her Appellant's brief. *Id.* Therefore, the Court must deny Hunt's petition for rehearing on this issue.

CONCLUSION

Based on the foregoing, the Court must deny Hunt's Amended Petition for Rehearing.

Respectfully submitted,



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Of whom Cindy B. Hunt is the Appellant.

PROOF OF SERVICE

I HEREBY CERTIFY that I have served the Respondent's Return to Appellant's Amended Petition for Rehearing on January 23, 2020, by depositing a copy in the United States Mail, postage pre-paid, addressed to the following party of record:

Cindy B. Hunt, *pro se*
195 D Willow Green Drive
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January 23, 2020

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SC Court of Appeals

Via Hand Delivery

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals Clerk of Court
1220 Senate Street
Columbia, South Carolina 29201

RE: *Branch Banking and Trust Company vs. Cindy B. Hunt, Willow Greens Homeowners Association, C.J. Developers, LLC*
Appellate Case # 2016-001550
Our File # 504335-3166

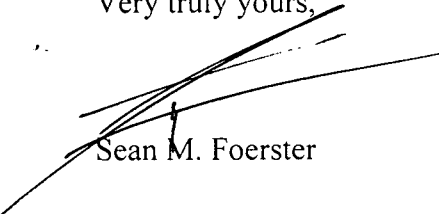
Dear Ms. Kitchings:

Enclosed are the original and seven copies of Respondent's Return to Appellant's Amended Petition for Rehearing and a Proof of Service in reference to the above matter.

By copy of this correspondence, I am serving a copy of this motion on the Appellant.

Please return a filed copy of this document to me with the courier.

Very truly yours,



Sean M. Foerster

/tds
Enclosure

cc:
Cindy B. Hunt
195 D Willow Green Drive
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