

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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

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MAY 20 2020

S.C. SUPREME COURT

Case No.: 2013-CP-26-02528
Unpublished Opinion No. 2019-UP-389 (S.C. Ct. App. filed December 18, 2019)
Appellate Case No. 2020-000510

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 the Petitioner.

**RETURN TO
PETITION FOR WRIT OF CERTIORARI**

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Respondent Branch Banking and Trust Company (the “Respondent”) opposes the “Motion/Petition for Writ of Certiorari” (“Petition”) of Petitioner Cindy B. Hunt (“Hunt”) on the following grounds:

QUESTIONS PRESENTED FOR REVIEW

- I. Do any special and important reasons exist for the Court to issue a Writ of Certiorari?**
- II. Did the Court of Appeals err 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?**

STATEMENT OF THE CASE

On April 16, 2013, Respondent filed this foreclosure action against Hunt in the lower court. (App. pp. 264-267.) On August 2, 2013, Hunt voluntarily appeared *pro se* in the action by filing an Answer and Counterclaims. (App. pp. 273-275; App. pp. 277-298.) On September 6, 2013, Respondent filed a motion to dismiss Hunt’s counterclaims. (App. pp. 424-428.)

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

At a hearing on May 20, 2014, the Master granted Respondent’s Motion to Dismiss as to all of Hunt’s counterclaims without prejudice, but gave Hunt leave to amend them. (App. pp. 557-828.)

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

¹ Hunt previously tried and failed to sue Respondent based on these allegations in three different federal court actions, all of which were dismissed. *Hunt v. Branch Banking and Trust Company et al.*, C/A # 4:09-cv-02151-JMC (D.S.C. filed Aug. 13, 2009)(disposed through the granting of BB&T’s motion to dismiss); *Hunt v. Branch Banking and Trust Company et al.*, C/A # (D.S.C.

- That Respondent improperly treated Hunt’s Payable on Death/Revocable Trust Account (“POD account”) as a joint account with the POD account’s beneficiary, Costella Hunt Davis, and that Respondent allegedly disclosed information about the POD account to the beneficiary;
- That Hunt’s customer profile with Respondent showed the existence of what she believed to be two loans that did not belong to her—identified on the customer profile as “transfer management” and “portfolio”; and
- That Respondent improperly exercised its right of set-off against Hunt’s POD account to recover money after Hunt cashed a check with Respondent that was later subject to a stop payment by the issuing agency.

(App. pp. 299-336.)

On June 25, 2014, before its time to Reply to the amended counterclaims had expired, Respondent filed a motion to dismiss Hunt’s amended counterclaims. (App. pp. 430-431.)

On September 30, 2014, Hunt filed a “Motion for Default Judgment” seeking to hold Respondent in default on her amended counterclaims. (App. pp. 533-537.) The motion was based on Hunt’s belief that Respondent’s response to her amended counterclaims by way of a motion to dismiss did not stay the time for Respondent to file a Reply to the amended counterclaims.

(*Id.*)

On October 14, 2014, the Master held a hearing on Respondent’s Motion to Dismiss Hunt’s Amended Counterclaims and on Hunt’s Motion for Default Judgment. (App. pp. 828-958.) At the hearing, the Master orally granted Respondent’s Motion to Dismiss as to all of

filed Apr. 12, 2011) (disposed through the granting of BB&T’s motion to dismiss); *Hunt v. Branch Banking and Trust Company*, C/A # 4:12-cv-02216-MGL (D.S.C. filed Aug. 6, 2012)(filed in state court by Hunt, removed to federal court by BB&T, and then ultimately withdrawn by Hunt after BB&T filed a motion to dismiss).

Hunt's amended counterclaims and denied Hunt's Motion for Default Judgment. (App. p. 954, lines 9-12.) At the end of the hearing, the Master requested from Respondent's counsel a proposed order granting the Motion to Dismiss. (App. p. 954, line 24.)

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

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

(App. p. 1903.)

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

Defendant Cindy B. Hunt's Motion for Entry of Default Judgment Against Plaintiff BB&T is hereby denied as moot. All counterclaims asserted by Defendant in this action were previously dismissed by the Court following an October 14, 2014 hearing regarding Plaintiff's Motion to Dismiss the First Amended Counterclaims of Defendant Cindy B. Hunt. As such, there are no remaining counterclaims to which the Plaintiff could be considered in default."

(App. pp. 87-88.)

Also on October 28, 2014, Respondent's counsel provided the Master with the requested proposed order by email. (App. pp. 1904-1905.)

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

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

On January 13, 2015, the Master entered a written order granting Respondent's Motion to Dismiss Hunt's Amended Counterclaims to formalize her oral ruling from the hearing on October 14, 2014, and the Form 4 Order entered on October 28, 2014. (App. pp. 99-107.)

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

On May 27, 2015, Hunt filed a "Motion under SCRPC 41" in which she requested attorney's fees and costs from Respondent under Rule 41(d), SCRPC, on a theory that the dismissals of her three federal court lawsuits against Respondent somehow triggered this rule in her favor. (App. pp. 1087-1094.)

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

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

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

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

(App. pp. 959-1071.)

On June 15, 2016, the Master entered an Order denying all three of these motions. (App. pp. 139-146.) As to the "Motion to alter or amend the Judgment/Orders of the Court under SCRCF 59(e)", the Master held that there was no error of law in the prior order denying Hunt's Motion for Default Judgment, no intervening change in the law controlling this issue, and no new evidence that would affect the prior order. (*Id.*) As to the "Motion: Lack of Jurisdiction, SCRCF 59 and SCRCF 60 re Order filed on 1/13/2015", the Master concluded that the Order of January 13, 2015, was not void for lack of jurisdiction because its entry in no way caused the case to "proceed" during the removal period in violation of 28 U.S.C. § 1446(d). (*Id.*) As to the "Motion: Lack of Jurisdiction, SCRCF 59 and SCRCF 60", the Master held that there was no error of law in the prior order denying Hunt's request for attorney's fees and costs because Hunt was not a prevailing party, had no contract, statute, or court rule entitling her to attorney's fees, and was not represented by an attorney in this action. (*Id.*)

On July 25, 2016, Hunt filed a Notice of Appeal to the South Carolina Court of Appeals from the Master's Order of June 15, 2016. On August 2, 2016, Hunt filed an Amended Notice of Appeal, but still only appealing from the Master's Order of June 15, 2016.

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

On December 18, 2019, the Court of Appeals issued an opinion finding that 1) the Master did not abuse her discretion in denying Hunt's motion to alter, amend, or vacate the order that dismissed her amended counterclaims for lack of jurisdiction because the Master issued a Form 4 order that denied Hunt's motion for default judgment and confirmed the dismissal of her amended counterclaims prior to Hunt filing the notice of removal, 2) the Master did not err in denying Hunt's motion for default judgment on her amended counterclaims on the ground of mootness, 3) the Master did not err in declining to find Respondent engaged in forum shopping and vexatious litigation as that issue was not preserved for review, and 4) 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. *Branch Banking and Trust Company v. Cindy B. Hunt et al.*, Unpublished Op. No. 2019-UP-389 (S.C. Ct. App. filed December 18, 2019).

On January 2, 2020, Hunt filed a Petition for Rehearing. On February 20, 2020, the Court of Appeals entered an Order denying Hunt's Petition for Rehearing.

Hunt now petitions for a writ of certiorari from this Court to review the final decision of the Court of Appeals. The Petition presents only a single question for this Court to review: whether Hunt is entitled to attorney's fees and costs. In the Petition, Hunt also makes a motion

pursuant to Rule 11, SCRCF, arguing that the foreclosure complaint filed by Respondent in the lower court was frivolous and barred by *res judicata* or estoppel.

ARGUMENTS

I. No special and important reasons exist for the Court to issue a Writ of Certiorari.

Hunt's Petition does not meet the "special and important" standard required by Rule 242(b), SCACR.

"A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons." Rule 242(b), SCACR. Reasons that may justify this Court's review of a decision of the Court of Appeals include the following: (1) where there are novel questions of law; (2) where there is a dissent in the decision of the Court of Appeals; (3) where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court; (4) where substantial constitutional issues are directly involved; and (5) where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court. *Id.*

Hunt's Petition presents no novel questions of law; rather, the question presented in the Petition can be answered (and was answered by the Court of Appeals) by resorting to existing case law and the South Carolina Rules of Civil Procedure.

None of the judges on the Court of Appeals issued a dissenting opinion. Hunt's Petition does not involve any substantial constitutional issues or federal questions, and the opinion of the Court of Appeals does not conflict with any decision of this Court or the United States Supreme Court.

Because Hunt's Petition fails to present any of the traditional special and important reasons that justify this Court's review of a decision of the Court of Appeals, the Court must deny her Petition.

II. The Court of Appeals did not err 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) or 53(b)(3), SCRPC (which are inapplicable in this case). Therefore, there is no error by the Court of Appeals for this Court to review on the issue of whether Hunt is entitled to attorney's fees and costs in this action.

Attorney's fees are generally awardable only to a prevailing party. "A prevailing party has been defined as ... [t]he one who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not to the extent of the original contention [and] is the one in whose favor the decision or verdict is rendered and judgment entered." *Heath v. Cty. of Aiken*, 302 S.C. 178, 182-83, 394 S.E.2d 709, 711 (1990).

Even if a party prevails, "[i]n South Carolina, the authority to award attorney's fees can come only from a statute or be provided for in the language of a contract." *Seabrook Island Prop. Owners' Ass'n v. Berger*, 365 S.C. 234, 238-39, 616 S.E.2d 431, 434 (Ct. App. 2005). "There is no common law right to recover attorney's fees." *Id.*

Hunt's Petition fails to identify a single issue or motion in this case on which she has prevailed. Even if she had prevailed, Hunt has cited no contract or statute entitling her to attorney's fees and costs.

Hunt's reliance upon Rule 41(d), SCRPC, for her claim to attorney's fees and costs is misguided. Rule 41(d) concerns successive voluntary dismissals by a plaintiff and authorizes the

payment of costs only, not attorney's fees. Rule 41(d), SCRCF ("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."); *Shuler v. Crook*, 290 S.C. 538, 541, 351 S.E.2d 862, 863 (1986)("The general rule, however, is that attorney fees are not included in the term 'costs' in the absence of some statutory provision, rule of court, or contract of the parties.").

Respondent has not voluntarily dismissed any case against Hunt in which it was the plaintiff. In Hunt's federal lawsuits against Respondent, Hunt was the plaintiff and Respondent was the defendant. All three actions were dismissed by court orders, not by voluntary dismissals. Further, Rule 41, SCRCF, does not apply to federal court actions. Therefore, Hunt had no right to attorney's fees or costs under Rule 41(d) in this case.

Hunt's reliance on Rule 55(b)(3), SCRCF, for her claim for attorney's fees and costs is equally misguided as that rule applies only in the context of default judgments, and there has been no default judgment entered against Respondent in this action. *See* Rule 53(b)(3), SCRCF ("If a party seeks to recover attorneys fees in connection with a default judgment...").

Finally, a *pro se* litigant such as Hunt, whether an attorney or layperson, does not become liable for or subject to fees charged by an attorney. *Calhoun v. Calhoun*, 339 S.C. 96, 100, 529 S.E.2d 14, 17 (2000). Hunt has represented herself throughout this case, and therefore she has not incurred any attorney's fees. Whether Hunt had legal representation at certain points in her federal cases against BB&T is irrelevant to her liability to pay attorney's fees with respect to this case.

Therefore, the Court of Appeals did not err 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.

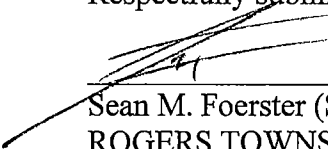
III. Hunt's motion pursuant to Rule 11, SCRPC, is not properly made to this Court.

The Court must disregard Hunt's motion because: 1) a motion is not permitted within a petition for a writ of certiorari, *see* Rule 242, SCACR (setting forth the permitted contents of a petition), and 2) Hunt's motion is made pursuant to the South Carolina Rules of Civil Procedure, which only apply in the lower courts of civil jurisdiction, *see* Rule 81, SCRPC ("These rules, or any of them, shall apply to every trial court of civil jurisdiction within this state...[and] shall apply insofar as practicable in magistrate's courts, probate courts, and family courts to the extent they are not inconsistent with the statutes and rules governing those courts")(emphasis added).

CONCLUSION

No special and important reasons exist for this Court to issue a Writ of Certiorari in this matter. Based on the foregoing, the Court must deny Hunt's Motion/Petition for a Writ of Certiorari.

Respectfully submitted,



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