

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
In the Court of Common Pleas
Roger M. Young, Circuit Court Judge

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OCT 28 2013
S.C. Supreme Court

Lower Court Case Nos. 2009-CP-10-07515, -07517; 07518; and 2010-CP-10-09959
Appellate Court Case No. 2012-205647

James J. Kerr, Crayton Walters, and J.T. Main, LLC, Appellants

v.

Branch Banking and Trust Company, Successor in merger to Branch Banking and Trust Company of SC, a/k/a BB&T, and James Edahl, Respondents,

Ron Konersmann, Appellant,

v.

Branch Banking and Trust Company, Successor in merger to Branch Banking and Trust Company of SC, a/k/a BB&T, and James Edahl, Respondents,

John Voytko, Appellant,

v.

Branch Banking and Trust Company, Successor in merger to Branch Banking and Trust Company of SC, a/k/a BB&T, and James Edahl, Respondents,

Patricia Konersmann, Appellant,

v.

Branch Banking and Trust Company, Successor in merger to Branch Banking and Trust Company of SC, a/k/a BB&T, and James Edahl, Respondents.

RETURN AND OBJECTION OF RESPONDENTS TO APPELLANTS'
MOTION TO REMAND TO THE HONORABLE
ROGER M. YOUNG OR, IN THE ALTERNATIVE,
TO SUPPLEMENT RECORD ON APPEAL

Respondents Branch Banking and Trust Company, successor in merger to Branch Banking and Trust Company of South Carolina, a/k/a BB&T ("BB&T"), and James Edahl ("Edahl", and together with BB&T, "Respondents"), hereby object to the Appellants' Motion to Remand to the Honorable Roger M. Young Or, in the Alternative, to Supplement Record on Appeal (the "Motion") filed by the Appellants Patricia Konersmann, James J. Kerr, Crayton Walters and J.T. Main, LLC (the "Moving Appellants") on or about October 22, 2013.¹ The Motion should be denied.

At the outset, it must be noted that the Moving Appellants cite no rule, statute or other authority upon which their requested relief would be granted, instead making reference only to the purported purpose of preventing "an injustice." Motion, p. 2.² The Motion seeks to use testimony from a deposition in a case not before this Court, and in which the Appellants are not parties, as the basis for remand of this case to the Circuit Court or the addition of that deposition testimony in the record on this appeal. The Motion should be denied for a number of reasons, each of which alone is sufficient for denial, including the following:

1. The Motion seeks relief which bears no relation to this appeal. This appeal involves an order dismissing the Appellants' claims against Respondents based on the pleadings, pursuant

¹ The Motion states that, "The remaining Appellants are filing with this Court a similar motion." Motion, footnote 3. To date, Respondents have not been provided with a copy of any motion by the other Appellants. Respondents received service of the Motion on October 24, 2013.

² The Moving Appellants state that they "recognize this Motion is uncommon." Motion, p. 2. They neither cite nor mention any precedent for the relief they seek in the Motion.

to South Carolina Rule of Civil Procedure 12(b)(6). The Moving Appellants' attempt to interject witness testimony – taken from another case – into this appeal is both puzzling and improper.

2. The Moving Appellants mischaracterize the decision rendered by Judge Young in his Order Amending Order Granting Defendants' Motion to Dismiss Amended Complaint With Prejudice Dated November 16, 2011 filed on June 15, 2012 (the "Appealed Order") [Record on Appeal, Volume I of II, p. 0027 - 0035]. The decision does not hinge solely on the application of S.C. Code § 37-10-107. The Appealed Order states at least two reasons why all of the Appellants' claims should be dismissed, and three reasons why the claims under the South Carolina Unfair Trade Practices Act (SCUTPA) should be dismissed. *See* Appealed Order, Legal Analysis subheadings A, B and C. The Appealed Order holds that the claims should be dismissed because (a) the Appellants do not have a written agreement with BB&T, but rely upon the written agreement between Skywaves I Corporation ("Skywaves") and BB&T, and the Appellants' claims against Respondents are thus barred by § 37-10-107, and (b) the Appellants were not customers of BB&T, and Respondents did not owe any duty to the Appellants. *See* Appealed Order, Legal Analysis subheadings A (pp. 0029-0034) and B (p. 0034). The Appealed Order further holds that, with respect to the SCUTPA claims, the Appellants "have not pled sufficient allegations to support a claim for violation of the SCUTPA." *Id.*, p. 0034-0035.

3. As stated in the Appealed Order, none of the Appellants were party to the agreement which the Moving Appellants assert has been orally amended, and "Each of the claims is based upon alleged representations made by Defendants to Skywaves." Appealed Order, p. 0030. The decision in the Appealed Order is not based on the terms of the agreement between BB&T and Skywaves; rather, the decision in the Appealed Order held that there was no written agreement between the *Appellants* and Respondents, as required under S.C. Code § 37-10-107 for the

Appellants to proceed with their claims against Respondents. The testimony cited by the Moving Appellants goes to the agreement between *Skywaves* and BB&T; and, with regard to the cited testimony, the Appealed Order does not include any discussion or even a mention of the question of whether BB&T had agreed to extend credit to Skywaves upon purchase orders or a site plan. Accordingly, the testimony cited by the Moving Appellants in the Motion – taken in another case, involving other parties – is irrelevant to this appeal.³

4. Similarly, whether or not the agreement between BB&T and Skywaves was orally modified is immaterial to the decision in the Appealed Order. The lower court did not base the decision on modification vs. non-modification of the agreement. The Appealed Order holds that § 37-10-107 precludes the Appellants' claims as a matter of law because there is no written agreement between Respondents and the Appellants as required under the statute.

5. The timing of the Motion is improper. The Motion was filed approximately two weeks prior to the scheduled oral argument in this appeal, even though the deposition testimony cited by the Moving Appellants occurred on October 2, 2013, some twenty days prior to the filing of the Motion. Respondents received service of the Motion on October 24, 2013, and by this timing, Respondents had approximately three business days in which to respond to the Motion. Given the timing of the Motion and the irrelevant testimony it seeks to interject into this appeal, it appears that the Motion was filed to cause disruptive effect.

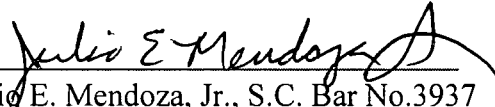
6. Respondents maintain that it is not proper to brief and argue the alleged oral modification of the agreement between BB&T and Skywaves, and the alleged effect of any modification, in this appeal, particularly in the context of the Motion. However, in the event the

³ The Moving Appellants also misspeak when they indicate that "Appellants' counsel deposed James Edahl . . .". Motion, p. 3. The deposition was taken by the attorney for Skywaves, which is the plaintiff in the other case. See Exhibit B to the Motion, deposition transcript pp. 2 – 4. Upon information and belief, the plaintiff in that case is actually the trustee for the bankruptcy estate of Skywaves.

Court were inclined to address those issues, Respondents request that they be allowed to properly brief the issues for presentation to the Court.

For the reasons set forth above, Respondents pray that the Court deny the Motion.

RESPECTFULLY SUBMITTED on this the 28th day of October, 2013.


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PROOF OF SERVICE

I, Jane E. Brown, hereby certify that a copy of the RETURN AND OBJECTION OF RESPONDENTS TO APPELLANTS' MOTION TO REMAND TO THE HONORABLE ROGER M. YOUNG OR, IN THE ALTERNATIVE, TO SUPPLEMENT RECORD has been served upon counsel of record by depositing a copy of the same, first-class postage prepaid, in the United States Mail, on the 28th day of October 2013 to the addresses shown below:

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