THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

Case No. 2012-CP-42-02714

Arthur State Bank,

Respondent,

v.

Quentin S. Broom, Jr., Amy B. Broom a/k/a Amy Broom, Ann G. Broom, and Russell A. Broom,

Appellants.

INITIAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT CORRECTLY FIND THAT THE GRAMM-LEACH-BLILEY ACT ("ACT") DID NOT PREVENT ARTHUR STATE BANK ("BANK") FROM RESPONDING TO A VALIDLY ISSUED SUBPOENA?

2. DID THE TRIAL COURT CORRECTLY FIND THAT THE ACT DOES NOT CREATE A PRIVATE RIGHT OF ACTION?

3. DID THE TRIAL COURT CORRECTLY DISMISS THE APPELLANTS' COUNTERCLAIMS FOR BREACH OF CONTRACT AND NEGLIGENCE BECAUSE THE BANK DID NOT BREACH ANY DUTY OR CONTRACT IN RESPONDING TO A VALIDLY ISSUED SUBPOENA?

STATEMENT OF THE CASE AND FACTS

The parties are in general agreement as to the posture of this appeal and the state of the pleadings and the summary judgment evidence. The Bank brought this action seeking to foreclose on certain loans secured by mortgages on properties owned or subject to a power of attorney by Quentin Broom, Amy Broom, Ann Broom, and Russell Broom (collectively, "Appellants").[1] (Complaint, R. at ____). The Bank further seeks a deficiency judgment against Quentin Broom. (*Id.*, R. at ____).

Appellants have all purported to assert counterclaims against Arthur State Bank ("Bank"), stemming from the Bank's compliance with a subpoena ("subpoena") duly issued from the Court of Common Pleas in Spartanburg County in the matter of *Quentin S. Broom v. Ten State Street, LLP*, C/A No. 08-CP-42-3397 ("Ten State Street Case").[2] (Amended Answer and Counterclaims, R. at ____). The three counterclaims are as follows: (1) violation of the Gramm-Leach-Bliley Act, 15 U.S.C. §§ 6801 *et seq.* ("Act"); (2) breach of contractual provisions of the loan documents regarding disclosure of Appellants' non-public account information; and (3) negligence with regard to Appellants' non-public account information. (*Id.*, R. at ____).

Appellants have not alleged that the subpoena issued in the Ten State Street Case was facially invalid or defective. Appellants further concede that Quentin Broom, by and through his counsel in the Ten State Street Case, was aware of the subpoena. (Broom Affidavit at ¶¶ 2-3, R. at ____). There is no evidence that any party made a motion to quash the subpoena in the Ten State Street Case or that any party moved for a protective

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[1] Quentin Broom is the husband of Amy Broom and the son of Ann Broom. (Broom Affidavit at ¶ 3, R at ____).

[2] The only common party between this case and Ten State Street Case is Quentin Broom. (*See* Broom Affidavit at ¶ 2, R. at ____).

order. (*See* Broom Affidavits, R. at ____). Lastly, there is no evidence that any information relating to Russell Broom was released in response to the subpoena. (*See* Broom Affidavits, R. at ____).

The Bank replied to the counterclaims and later filed a motion to dismiss the counterclaims on the basis that they failed to state a claim. (Reply and Motion, R. at ____). After a hearing and consideration of the parties' respective filings, arguments, and affidavits, the trial court converted the motion to dismiss into a motion for summary judgment and dismissed the counterclaims as a matter of law. (Order, R. at ____). The trial court found that there was no violation of the Act, that there was no private right of action under the Act, and that the Bank did not breach any contract or common law duty in responding to the subpoenas. (*Id.*, R. at ____). Appellants have appealed those rulings.

STANDARD OF REVIEW

Summary judgment is warranted when there is no genuine issue of material fact and it appears that the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Material facts are those identified by controlling substantive law as essential elements of claims and defenses. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A court must view the facts and inferences reasonably drawn from them in the light most favorable to the non-moving party. *Baughman v. AT&T*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991). If a motion has been properly made and supported in accordance with Rule 56, the non-moving party may not rest on its pleadings but must come forward with specific facts showing that there is a genuine issue for trial. Rule 56(e), SCRCP; *Belton v. Cincinnati Ins. Co.*, 360 S.C. 575, 580, 602 S.E.2d 389, 392 (2004).

ARGUMENTS

I. The trial court correctly dismissed the Appellants' counterclaims because the Bank did not violate the Act by complying with judicial process in responding to the subpoena.

Appellants contend the Bank violated the Act by disclosing non-public account information in responding to the subpoena.[3] However, nothing in the Act prevents the Bank from responding to validly issued judicial process, such as a subpoena or discovery request. The trial court found that there was not a violation of the Act because the Bank was responding to a "duly issued subpoena in a judicial proceeding" and therefore was covered by an exception to the notice provisions found in the Act. (Order at 6, R. at ____).

The Act provides that a financial institution may not disclose to a nonaffiliated third person "any nonpublic personal information." 15 U.S.C. § 6802(a). The Act then sets forth exceptions to this prohibition against disclosure of nonpublic personal information and states that:

> Subsections (a) and (b) shall not prohibit the disclosure of nonpublic personal information— . . .
>
> (8) to comply with Federal, State, or local laws, rules, and other applicable legal requirements; to comply with a properly authorized civil, criminal, or regulatory investigation or subpoena or summons by Federal, State, or local authorities; or to respond to judicial process or government regulatory authorities having jurisdiction over the financial institution for examination, compliance, or other purposes as authorized by law.

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[3] The Bank notes that there is no evidence in the record showing that the Bank disclosed any non-public information regarding Russell Broom. For that reason, any claims asserted on his behalf were properly dismissed and may be affirmed by this Court pursuant to Rule 220, SCACR, even if this Court finds that the Act prevented the Bank from responding to the subpoena.

15 U.S.C. § 6802(e)(8). For purposes of this appeal, the inquiry before the Court is whether this exception applies.

Appellants have not cited any case conferring liability on a financial institution under facts similar to those presented here. This is because courts have found that this exception applies generally to financial institutions responding to any judicial process. *See Martino v. Barnett*, 595 S.E.2d 65, 72 (W. Va. 2004) ("[W]e conclude that the [Act] . . . allow[s] the use of any judicial process expressly authorized by statute or court rule, whether by way of discovery or for any other purpose expressly authorized by law, to obtain information relevant to the proceeding to which the judicial process relates. . . ."); *Ex parte Nat'l W. Life Ins. Co.*, 899 So.2d 218, 225-26 (Ala. 2004) (finding independent judicial process exception applicable to all items falling within plain meaning of judicial process).

The judicial process exception applicable in this case is separate and distinct from the exception provided for government regulators. *See Marks v. Global Mortg. Group, Inc.*, 218 F.R.D. 492, 496 (S.D.W. Va. 2003). In reaching this result, the *Marks* court reasoned,

> The phrase "to respond to judicial process" is syntactically separate and distinct from the phrase "to respond to ... government regulatory authorities having jurisdiction over the financial institution for examination, compliance, or other purposes as authorized by law." *See* § 6802(e)(8). Thus, the "judicial process" exception is independent from, and in addition to, the exception permitting disclosure to comply with a government regulatory investigation. Furthermore, the legislative history indicates that the House Bill, which added the privacy protections to the [Act], envisaged an independent judicial process exception. *See* H.R. 74, 106th Cong. 93, 108–09, 124 (1999) (discussing a judicial process exception without reference to "government regulatory authorities having jurisdiction over

> the financial institution for examination, compliance, or other purposes as authorized by law").

Id. Therefore, Appellants' argument that this exception is limited to governmental agency investigations is directly contradicted by the case law and the legislative history of the Act.

Subpoenas fall under the general description of judicial process. *See* Rule 45, FRCP, Practice Commentary, C45–5 (stating that "a subpoena is of course a judicial 'process'"); *Ex parte Nat'l W. Life Ins. Co.*, 899 So.2d at 225 n. 2 (quoting same in discussion of what constitutes judicial process). Rule 45, SCRCP, is similar to the federal rule and provides that subpoenas are issued from the court. *See* Rule 45(a), SCRCP. An attorney authorized to practice before the court may also "issue and sign a subpoena on behalf of a court." Rule 45(a)(3), SCRCP. Moreover, the court has the power to find a non-responding person in contempt for failure to respond to a subpoena. Rule 45(e), SCRCP. Therefore, the fact that an attorney, rather than a judge or clerk of court, signed the subpoena at issue does not change the nature of the instrument as one of "judicial process."

This result is supported by cases finding that discovery requests, which are always issued by counsel, constitute judicial process for purposes of this exception. *See KnifeSource, LLC v. Wachovia*, 2007 WL 2326892, *1 (D.S.C. August 10, 2007) ("Courts have previously held that this exception 'permits a financial institution to disclose the non-public personal financial information of its customers to comply with a discovery request.'"); *Marks* at 496 ("When a party must disclose information pursuant to a discovery request, the party is responding to judicial process."). These cases make clear that the exception applies to any judicial process issued in the course of discovery,

whether the involved account holders are parties to the underlying litigation or not. For example, in *KnifeSource*, the court required a bank to respond to the plaintiff business's discovery requests seeking information about the accounts of a former employee and non-party to the action. *Id.* Similarly, in *Marks*, the court required a bank to respond to discovery requests "seeking information about loans that the [bank] had issued to other customers." *Marks* at 493.

Although the cases note that there are means of reducing the risk of harm for materials produced pursuant to discovery requests through the use of protective orders, the cases do not condition the applicability of the exception found in § 6802(e)(8) on whether there is a protective order. *See KnifeSource* at *1 (citing presence of a confidentiality order as an additional reason for compelling production of account information in response to a discovery request). If Quentin Boom or any of the Appellants had concerns, they were free to seek relief from the court in the Ten State Street Case by filing a motion to quash or a motion for a protective order.

Quite simply, nothing in the Act provides the Bank with a basis for failing to respond to a duly issued subpoena. Therefore, the trial court properly dismissed the Appellants' counterclaim under the Act and the counterclaims for negligence and breach of contract.

II. There is no private right of action for violations of the Act.

In any event, "[n]o private right of action exists for an alleged violation of the [Act]." *Dunmire v. Morgan Stanley DW, Inc.*, 475 F.3d 956, 960 (9th Cir. 2007); *see also Borinski v. Williamson*, 2004 WL 433746 (N.D. Tex. March 1, 2004) ("[T]he [Act] does not provide a private right of action for a financial institution's violation of the

[Act's] privacy provisions."); *Abdelfattah v. U.S. Dep't of Homeland Sec.*, 893 F. Supp. 2d 75, 83 (D.D.C. 2012) ("Finally, the Court notes that '[n]o private right of action exists for an alleged violation of the [Act].'"); *Wells Fargo Bank v. Jenkins*, 744 S.E.2d 686, 687 (Ga. 2013) (dismissing state law negligence claim alleging violation of the Act on grounds that the Act does not create a private right of action and does not create a duty for purposes of negligence claim); *see also* 15 U.S.C. § 6805 ("This subchapter and the regulations prescribed thereunder shall be enforced by the Federal functional regulators, the State insurance authorities, and the Federal Trade Commission with respect to the financial institutions and other persons subject to their jurisdiction....").

These cases are consistent with the general rules in South Carolina for determining whether a statute creates a private right of action. In this state, the question of whether the legislature intended to create a private cause of action for either violation of a statute or failure to perform a statutory duty is determined based on the statute itself. *Patterson v. I.H. Servs. Inc.*, 295 S.C. 300, 308, 368 S.E.2d 215, 220 (Ct. App. 1988). The primary consideration in deciding whether a private cause of action should be implied under a statute is legislative intent. *Dorman v. Aiken Commc'ns, Inc.*, 303 S.C. 63, 67, 398 S.E.2d 687, 689 (1990); *Whitworth v. Fast Fare Mkts. of S.C., Inc.*, 289 S.C. 418, 420, 338 S.E.2d 155, 156 (1985). As stated in *Whitworth*:

> The legislative intent to grant or withhold a private right of action for the violation of a statute, or the failure to perform a statutory duty, is determined primarily from the form or language of the statute. . . . In this respect, the general rule is that a statute which does not purport to establish a civil liability, but merely makes provision to secure the safety or welfare of the public as an entity is not subject to a construction establishing a civil liability.

Nothing in the Act purports to impose civil liability. Instead, the Act provides that it is to be enforced by state and federal regulators. 15 U.S.C. § 6805. Therefore, the Appellants do not have a private cause of action under the Act, even if this Court finds the exception found in § 6802(e)(8) does not apply in this case.

III. The Bank did not breach any duty in contract or in tort in responding to the subpoena.

A. The Bank's Privacy Notice states that it will not disclose information except as "permitted by law."

Appellants contend that by responding to the subpoena in the Ten State Street Case, the Bank breached its contractual obligations arising out of the loan documents that provide the basis of the Bank's foreclosure action. Specifically, Appellants assert that as part of the loan documents, the Bank provided to them certain "Notice[s] of Your Financial Privacy Rights" (collectively, "Privacy Notice") with which the Bank allegedly failed to comply. The Privacy Notice states that, "[Arthur State Bank] will not disclose information about you to anyone except as disclosed in this policy *or as permitted by law*." (Privacy Notice, emphasis added; Banks Affidavit; R. at ____).

Nothing in the loan documents attached as exhibits to the Bank's complaint or the Privacy Notice states or provides that the Bank agrees *not* to comply with a duly issued subpoena in a judicial proceeding. (Loan Documents; Privacy Notice; R. at ____). Rather, the Privacy Notice expressly states and reserves the right to disclose information "as permitted by law."

Without an order quashing the subpoena, the Bank was obligated to comply with it. *Rycroft v. Gaddy*, 281 S.C. 119, 123, 314 S.E.2d 39, 42 (Ct. App. 1984) ("Since the subpoenae were valid on their face, the bank had no duty to inquire into the circumstances behind the subpoenae as a bank cannot refuse to give information

concerning an account when questioned in response to a lawful subpoena."). Nothing in the Privacy Notice or the loan documents prohibited or prevented the Bank from responding to the subpoena as required by law.

Moreover, as discussed above, nothing in the Act prevented the Bank from responding to the subpoena. To the contrary, the cases cited show that the Act does not change a financial institution's obligations under the Rules of Civil Procedure. A party may not use the Act as a shield to prevent it from responding to discovery or subpoenas. *See Marks* at 496. Contrary to the Appellants' argument, nothing in the Act shifts the burden for noncompliance under Rule 45, SCRCP, from the Bank to the party about whom information was sought. The Bank remains in jeopardy of contempt for noncompliance, not the objecting account holder. Therefore, nothing in the Act or Rule 45, SCRCP, has eroded the rule in *Rycroft*. For these reasons, the trial court correctly dismissed Appellants' counterclaim for breach of contract.

B. The Act does not create and the Bank did not assume a duty not to respond to a duly issued subpoena.

Appellants' counterclaim for the Bank's alleged negligence in disclosing non-public account information to unauthorized third parties also fails as a matter of law because the Bank did not breach any duty in complying with a duly issued subpoena in a pending legal action. *Rycroft*, 281 S.C. at 124, 314 S.E.2d at 43 ("Communications in judicial proceedings are absolutely privileged and are immune from an action for an invasion of privacy."). In *Rycroft*, the bank was not negligent in failing to inquire beyond the face of a valid subpoena before responding because the bank could not refuse to give information concerning an account in response to a lawful subpoena. Nothing in the

Bank's Privacy Notice creates any duty on the part of the bank to protect Appellants' information in a way that would violate the Bank's duty to respond to a valid subpoena.

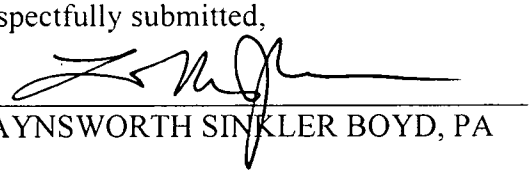
As argued above, responding to a subpoena falls under the judicial process exception to the Act and is not a violation of the Act. A subpoena response is permitted and required by the South Carolina Rules of Civil Procedure. Failure to comply with a valid subpoena could subject the bank to contempt. *See* Rule 45(e), SCRCP.

In this case, it is undisputed that the Bank was served with a valid subpoena in the Ten State Street Case and that no motion to quash was filed. The Bank had no duty to do anything other than to comply with and respond to the subpoena. Accordingly, the trial court correctly dismissed Appellants' negligence counterclaim.

CONCLUSION

For all of the above reasons, the trial court correctly dismissed the Appellants' counterclaims in this matter. Accordingly, the judgment must be affirmed.

Respectfully submitted,



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February 25, 2014

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Appellants.

RESPONDENT'S DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL

Respondent Arthur State Bank does not propose any additional materials be included in the Record on Appeal beyond those items previously designated by the Appellants.

I certify that this designation contains no matter which is irrelevant to this appeal.

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February 25, 2014

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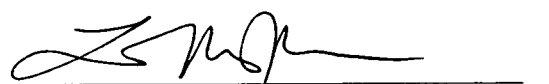
PROOF OF SERVICE

I certify that I have served the Initial Brief of Respondent and Designation of Matter to be Included in Record on Appeal by depositing a copy of it in the U.S. Mail on February 25, 2015, addressed to the attorneys of record for Appellants: L. Lee Plumblee, Esq., Eppes & Plumblee, P.A., Post Office Box 10066, Greenville, South Carolina 29603.

HAYNSWORTH SINKLER BOYD, PA



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February 25, 2014

Via Hand Delivery
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Re: *Arthur State Bank v. Quentin S. Broom, Jr., Amy B. Broom aka Amy Broom Ann G. Broom, and Russell A. Broom*
Case No. 2012-CP-42-2714
Appellate Case No. 2013-001967
HSB File No. 10325.0048

Dear Ms. Kitchings:

Enclosed herewith for filing, please find an original and one (1) copy of the Initial Brief of Respondent and Designation of Matter to be Included in the Record on Appeal regarding the above-referenced matter, together with a Proof of Service. Please file the originals and return clocked copies to me via my courier.

Very truly yours,

Louise M. Johnson

LMJ/jlc
Enclosures

cc: (via U.S. Mail)
L. Lee Plumblee, Esq.