THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENWOOD COUNTY

Court of Common Pleas

Hon. Frank R Addy, Jr , Circuit Court Judge

Case № 2017-000810

Jeffrey S. Kagan, ... Appellant,

vs.

D. Renee Simchon ..... Respondent

INITIAL REPLY BRIEF OF APPELLANT

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Question I

Did the lower court err in granting summary judgment on the ground that the loan in question was barred by S.C. Code of Laws § 37-10-107 when the action by Jeffery S. Kagan was to enforce a loan made and not an action for failure to perform an alleged promise or agreement to loan money?

Renee Simchon is simply incorrect when she contend that S. C. Code § 37-10-107 applies to a loan that was made and not repaid. The plain reading of the statute says "an alleged promise, undertaking, accepted offer, commitment, or agreement (a) to lend or borrow money." This simply means that if one party promises to make a loan for over $50,000, it must be in writing. This position is established in *Branch Bank & Tr. Co. v. Tech. Sols., Inc.*, No. 3:13-CV-01318-JFA, 2014 WL 691656, at 3 (D.S.C. Feb. 21, 2014) where the court said "Defendants have alleged that Plaintiff made 'a promise to Defendants to provide funding.'" This case does not involve a promise to make a loan in the future as existed in *Branch Bank* case. This case involves a loan that has been made. The basic facts of *Sea Cove Dev., LLC v. Harbourside Cmty. Bank*, 387 S.C. 95, 97, 691 S.E.2d 158, 164 (2010) as stated by the Court are "Sea Cove Development, LLC (Sea Cove) brought this action for breach of contract and promissory estoppel against Harbourside Community Bank and Harbourside Mortgage Company (Harbourside) after its loan application was denied." A loan application was denied. No loan was ever made.

The unpublished opinion of *Berlinsky v. Palmetto Fed. Sav. Bank of S.C.*, No. 2008-UP-231, 2008 WL 9841492 (S.C. Ct. App. Apr. 15, 2008) cited by Mrs. Simchon is also

not helpful to her case.[1] The facts as stated by the court were " In his complaint, Berlinsky alleged he had to seek alternative financing with another lending institution at a higher percentage rate with a longer amortization and incurred closing costs of $3,100 as a result of the Bank [f]ailing to honor its ban commitment." Again, no loan was ever actually made. The suit was over a promise to make a loan. Mrs. Simchon has not cited any case from South Carolina or any other state with a similar law where the law has been applied to a loan that was actually made.

Furthermore, in her statement of the facts Mrs. Simchon admits a loan was made. She stated "Rather than repay Mr. Kagan the full $210,000.00, Mrs. Simchon gave Mr. Kagan a check for $31,616.46 on March 21, 2011, and transferred $180,000.00 of the sales proceeds to Mr. Simchon to invest on behalf of Mr. Kagan, which is what Mrs. Simchon believed Mr. Kagan wanted her to do." Br. of Resp. at 5. In order to "repay," the money had to have been paid originally and there was an obligation to repay. Thus, Mrs. Simchon admits she borrowed $210,000.00 from Mr. Kagan. South Carolina Appellate Court Rule 208(E)(2) provides "If a respondent does include his own statement of the case, he shall be bound by the matters stated or alleged in his statement of the case." Thus, the original loan in the amount of $210,000.00 is admitted.

Thus, the Respondent is asking this Court to grant summary judgment on an action to repay the loan which Mrs. Simchon admits was made because Mr. Kagan cannot produce a writing. To do so, would enable Mrs. Simchon to perpetuate a fraud by the use of a Statute of

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[1] This unpublished opinion should not have been cited. *See*, South Carolina Appellate Court Rule 268(d)(2). This case does not directly involve the cited case.

Fraud. As one court has said " [T]he purpose of the Statute of Frauds is to prevent frauds, not to enable a party to perpetrate a fraud by using the statute as a sword rather than a shield" *Pinkava v. Yurkiw*, 64 A.D.3d 690, 692, 882 N.Y.S.2d 687, 689 (2009) *See also*, *Fannin v. Cratty*, 331 Pa. Super. 326, 332, 480 A.2d 1056, 1059 (1984) ("It is to be used as a shield and not as a sword, as it was designed to prevent frauds, not to encourage them.)

Mrs. Simchon also contends that the statute is applicable because it includes the word "modify." Again the plain wording of the statute says to the contrary. As applied to the word "modify" the statute says "an alleged promise, undertaking, accepted offer, commitment, or agreement (b) to renew, modify, amend or cancel a loan of money . . . ." The statute refers to a promise to renew, a promise to modify, a promise to amend or a promise to cancel a loan of money. This case does not involve a promise to do any of those things. This case is about a loan that both parties acknowledge was actually made. Mrs. Simchon has cited no South Carolina cases or cases from other states that have a similar law to support her position. The reason for the lack of such cases is no court has ever attempted to apply the statute to a loan that both parties admit was made.

Mrs. Simchon also contends that the issue set forth in this brief is not preserved. First, this is a motion for summary judgment and not a order after a final hearing where the parties have testified. As the South Carolina Supreme Court has said "[S]ummary judgment should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues." *Baughman v. American Telephone and Telegraph Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991). If counsel below did not artfully articulate his basis for denying summary judgment, this Court should not deprive a party of their right to a hearing on the merits when in

fact a true factual issue exists on another theory. As the South Carolina Supreme Court has said "Even when there is no dispute as to the evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied." *Bloom v. Ravoira*, 339 S.C. 417, 422, 529 S.E.2d 710, 712 (2000). Under these principles, the law should be looked at in the light most favorable to the non moving party. If under any interpretation of the law summary judgment should not be granted, this Court should not affirm the granting of summary judgment because the law was not precisely argued below. If the law as argued by Mr. Kagan in his brief is correct, this Court simply cannot conclude that Mrs. Simchon is entitled to a judgment as a matter of law. This Court can only conclude Mrs. Simchon is entitled to a judgment as a matter of incorrect application of the law.

Mrs. Simchon has further argued that Mr. Kagan was negligent because he did not reduce the loan to a writing. As both parties admit this loan was in fact made, there is no need for Mr. Kagan to reduce it to writing.

Question II

Did the lower court err in granting summary judgment on the ground that the loan in question was barred by S.C. Code of Laws § 37-10-107 when the action was on a loan for loan of money used primarily for personal purposes and therefore was exempt from the statute?

Mrs. Simchon has not disputed that Mr. Kagan is not a commercial lender. Nor has she disputed that the loan was not in the name of her company but to her individually. As such this creates at least a factual issue as to whether the loan was for personal purposes. As such, even if Mr. Kagan is not successful on his first issue, at the least there is a jury question as to whether this

loan was personal between to individuals or a business loan that just happened not to be in the name of her company.

Question III

Did the acceptance of payments from Sam Simchon or his company on the loan to D. Renee Simchon toll the statute of limitations as to the $180,000.00 loan Jeffery Kagan made to Mrs. Simchon?

Mrs. Simchon argues that because payments were made by Mr. Simchon, they would not be payments on the debt of Mrs. Simchon. Mrs. Simchon admits that he made her husband her agent as to the loan when she gave Mr. Kagan's money to her husband. Interestingly, Mrs. Simchon has produced no document attesting to Mr. Kagan's consented to this transfer. As noted in the opening Brief, Mrs. Simchon had testified she believed Mr. Kagan wanted to invest in something safe. Cotton futures, or any futures for that matter, would hardly qualify as "something safe."

When Mr. Simchon made payments to Mr. Kagan he had the right to believe they were payments on the loan he had made to Mrs. Simchon. Nothing in this record establishes the belief is not a reasonable inference from the facts and the relationship between the parties. The fact that Mr. Simchon was dismissed as a party is of no importance as he was merely acting as the agent of Mrs. Simchon. As noted in the opening brief, at least a factual issue exist as to whether the payments were in fact payments on the loan to Mrs. Simchon. Mrs. Simchon admits payments were made to Mr. Kagan by Mr. Simchon. This alone would create a factual issue as to the purpose of the payments.

Question IV

Mr. Kagan waived his right to bring claims for breach of contract and breach of contract accompanied by fraudulent act.

Mr. Kagan assumes this issue is argued as additional sustaining grounds for the decision below. Mr. Kagan has no quarrel that a breach of contract and a breach of contract with fraudulent intent may be waived. *McKay v. Anheuser-Busch, Inc.*, 199 S.C. 335, 19 S.E.2d 457 (1942). In the case the Court said "The principle is well settled that a person who has been injured by the fraud of another may by conduct inconsistent with an intention to sue for damages for the fraud waive the right to sue just as he may waive any other cause of action." *Id.*at 335, 19 S.E.2d at 462. Here no conduct indicating a waiver exists. Acknowledging that Mrs. Simchon had without autorizatin given his money to Mr. Simchon is hardly as basis for saying as a matter of law Mr. Kagan waived any claim against Mrs. Simchon. This is even more true when Mr. Simchon made somewhat regular payments to Mr. Kagan. And even more so when Mr. Kagan remained in the employment of Mr. Simchon.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the opening brief this Court should reverse this decision of the lower court and remand the matter for a trial on the merits.

December 7, 2017

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AFFIDAVIT OF SERVICE

PERSONALLY appeared before me, Sandy Traynham who, after being duly sworn, deposes and says that she is the Secretary for C. Rauch Wise, Attorney for the Appellant in the above entitled case. That on December 7, 2017, she did deposit in the United States Mail with proper postage affixed thereto, a copy of the Petition for Extension in the above case addressed to J. Walker Coleman, IV, Meg E. Sawyer, K&L Gates,, 134 Meeting Street, Ste. 500, Charleston, SC 29401, and Edward S. McCallum, III, PO Box 148, Greenwood SC 29648.

Sandy Traynham

Sworn to and Subscribed
before me this 7th day
of December, 2017

Notary Public for South Carolina
My Commission Expires: 12/7/2019

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December 7, 2017

Jenny Abbott Kitchings, Clerk
SC Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: Jeffrey S. Kagan vs D. Renee Simchon, Case No. 2017-000810

Dear Ms. Kitchings:

I am enclosing herewith the original and one (1) copy of the Initial Reply Brief together with the original Affidavit of Service regarding the above matter. Your help is greatly appreciated.

With kindest regards, I am

Very truly yours,

C. Rauch Wise

CRW/slt
Enclosure

cc Edward McCallum
J. Walker Coleman, IV

LAW OFFICE OF
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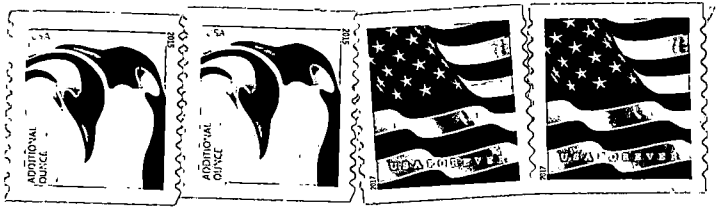

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