

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENWOOD COUNTY
Court of Common Pleas

The Honorable Frank R. Addy, Jr., Circuit Court Judge

Case No. 2015-CP-24-00892

Appellate Case No. 2017-00810

RECEIVED
JAN 26 2018
SC Court of Appeals

Jeffrey S. Kagan.....Appellant,

v.

D. Renee Simchon Respondent.

FINAL BRIEF OF RESPONDENT

K&L GATES LLP
J. Walker Coleman, IV
Meg E. Sawyer
134 Meeting Street, Suite 500
Charleston, SC 29401
(843) 579-5600
walker.coleman@klgates.com
meg.sawyer@klgates.com

Edward S. McCallum, III
Law Offices of Edward S. McCallum, III
P. O. Box 148
Greenwood, SC 29648
mccallum@greenwood.net

Attorneys for Respondent

TABLE OF CONTENTS

	Page
Table of Authorities	ii
STATEMENT OF THE ISSUES ON APPEAL.....	1
STATEMENT OF THE CASE.....	2
STATEMENT OF THE FACTS	4
ARGUMENT.....	6
I. The Circuit Court Properly Dismissed Mr. Kagan’s Remaining Claims Pursuant to the Statute.	6
A. The South Carolina Statute of Frauds Applies to Mr. Kagan’s Remaining Loan.	6
B. The Statute’s “Personal Purposes” Exemption Does Not Apply to the Second Loan.....	11
II. Mr. Kagan’s Remaining Claims Are Also Barred by the Statute of Limitations.	12
III. Mr. Kagan Waived His Right to Bring Claims for Breach of Contract and Breach of Contract Accompanied By Fraudulent Act.	15
CONCLUSION.....	16

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Berlinsky v. Palmetto Fed. Sav. Bank of S. Carolina</i> , No. 2008-UP-231, 2008 WL 9841492 (S.C. Ct. App. Apr. 15, 2008)	7
<i>Biales v. Young</i> , 315 S.C. 166, 432 S.E.2d 482 (1993)	15
<i>Branch Bank & Trust Co. v. Tech. Solutions, Inc.</i> , No. 3:13-CV-01318-JFA, 2014 WL 691656 (D.S.C. Feb. 21, 2014)	7
<i>Fullbright v. Spinnaker Resorts, Inc.</i> , 420 S.C. 265, 802 S.E.2d 794 (2017), <i>reh'g denied</i> (Aug. 22, 2017)	9
<i>Glover v. Lockheed Corp.</i> , 772 F. Supp. 898 (D.S.C. 1991)	14
<i>Jennings v. Jennings</i> , 401 S.C. 1, 736 S.E.2d 242 (2012)	9
<i>Johnson v. Lloyd</i> , 407 S.C. 610, 757 S.E.2d 705 (2014)	8
<i>Maher v. Tietex Corp.</i> , 331 S.C. 371, 500 S.E.2d 204 (Ct. App. 1998)	12
<i>McKay v. Anheuser-Busch, Inc.</i> , 199 S.C. 335, 19 S.E.2d 457 (1942)	15
<i>Prince v. Liberty Life Ins. Co.</i> , 390 S.C. 166, 700 S.E.2d 280 (Ct. App. 2010)	12
<i>Sea Cove Dev., LLC v. Harbourside Cmty. Bank</i> , 387 S.C. 95, 691 S.E.2d 158 (2010)	7
<i>Tower v. Moss</i> , 625 F.2d 1161 (5th Cir. 1980)	11, 12
<i>Wells Fargo Bank, N.A. v. Carter</i> , No. 9:14-127-SB, 2014 WL 11034776 (D.S.C. July 22, 2014)	14
<i>Westbury v. Bauer</i> , 284 S.C. 385, 326 S.E.2d 151 (1985)	13

<i>Wilson Group, Inc. v. Quorum Health Resources, Inc.</i> , 880 F. Supp. 416 (D.S.C. 1995).....	12
---	----

<i>Yadkin Valley Bank & Trust v. Oaktree Homes, Inc.</i> , No. 2014-UP-306, 2014 WL 3747342 (S.C. Ct. App. July 30, 2014).....	7
---	---

Statutes

S.C. Code Ann. § 15-3-530(1).....	12, 14
S.C. Code Ann. § 37-10-107.....	2, 6, 7
S.C. Code Ann. § 37-10-107(1).....	7
S.C. Code Ann. § 37-10-107(1)(a).....	8
S.C. Code Ann. § 37-10-107(1)(c).....	9
S.C. Code Ann. § 37-10-107(3)(a).....	11

Other Authorities

John L. Culhane & Dean C. Gramlich, <i>Lender Liability Limitation Amendments to State Statutes of Frauds</i> , 45 BUS. LAW. 1779 (1990)	9
S.C. R. App. P. 220(c)	15, 16

STATEMENT OF THE ISSUES ON APPEAL

- I. Whether the Circuit Court properly applied the South Carolina Lender Statute of Frauds to Mr. Kagan's remaining loan?
- II. Whether the Circuit Court properly found that Mr. Kagan's remaining claims against Mrs. Simchon were barred pursuant to the South Carolina Lender Statute of Frauds?
- III. In the alternative, whether the Circuit Court properly found that Mr. Kagan's remaining claims against Mrs. Simchon were barred pursuant to the statute of limitations?

STATEMENT OF THE CASE

On August 31, 2015, Appellant Jeffrey S. Kagan (“Mr. Kagan”) filed a Complaint in the Greenwood County Court of Common Pleas against Sam Simchon (“Mr. Simchon”), Bay Island Sportswear, Inc., Bay Island, LLC, and D. Renee Simchon (“Mrs. Simchon” or “Respondent”), (collectively, “Defendants”), alleging: (1) Breach of Contract, (2) Breach of Contract Accompanied by a Fraudulent Act and (3) Promissory Estoppel as applied to three loan transactions, and (4) Intentional Infliction of Emotional Distress. (R. pp. 24–26, ¶¶ 21–37.) On November 10, 2015, Defendants filed a Motion to Dismiss the Complaint in its entirety. After holding a hearing on February 8, 2016, the Circuit Court issued a Partial Order of Dismissal, dismissing Mr. Kagan’s first three causes of action as applied to two of the three loans at issue pursuant to the South Carolina Lender Statute of Frauds, S.C. Code Ann. § 37-10-107 (the “Statute”), and dismissing the fourth cause of action in its entirety. (Appendix to R. pp. 1A–14A, Motion to Dismiss Hearing Tr.; R. pp. 2–3.) As a result, only Mr. Kagan’s Breach of Contract, Breach of Contract Accompanied by a Fraudulent Act, and Promissory Estoppel claims pertaining to the one remaining loan remained (the “Remaining Claims”).

On March 28, 2016, Defendants filed a Motion to Amend the Caption to conform with the Circuit Court’s Partial Order of Dismissal and sought the removal of Mr. Simchon, Bay Island Sportswear, Inc., and Bay Island, LLC from the case. (R. pp. 5–6.) On April 15, 2016, the Circuit Court granted the motion and removed Mr. Simchon, Bay Island Sportswear, Inc., and Bay Island, LLC from the action, leaving Mrs. Simchon as the only remaining defendant. (R. p. 4.) On March 28, 2016, Mrs. Simchon filed an Answer and Counterclaim, (R. pp. 89–98), to which Mr. Kagan filed his Reply on April 21, 2016, (R. pp. 99–101).

On October 26, 2016, following the completion of discovery, Mrs. Simchon filed a Motion for Summary Judgment and supporting memorandum on the Remaining Claims, arguing

that each of the claims was barred by the Statute or, in the alternative, by the statute of limitations. (R. pp. 7–47.) The Circuit Court held a hearing on January 24, 2016, (R. pp. 322–38), during which Mr. Kagan submitted a Memorandum in Opposition to Mrs. Simchon’s Motion for Summary Judgment, (R. pp. 48–80). Mrs. Simchon filed a Reply in support of her Motion for Summary Judgment on January 25, 2016. (R. pp. 82–88.) On February 21, 2016, the Circuit Court issued an Order of Dismissal granting Mrs. Simchon’s motion in its entirety and dismissing all of the Remaining Claims. (R. p. 1.) Mr. Kagan filed his Notice of Appeal on March 31, 2017.

STATEMENT OF THE FACTS

Mr. Kagan is a former employee of Bay Island Sportswear, Inc., a company owned by Mrs. Simchon's husband, Mr. Simchon. (R. p. 23, ¶¶ 8–9.) Mr. Kagan claims that on June 15, 2009, he made a loan to Bay Island Sportswear, Inc. to be repaid with six percent (6%) annual interest (the "First Loan"). (R. p. 23, ¶¶ 7–10.) This agreement was never reduced to writing. (R. p. 23, ¶ 11.)

On October 26, 2010, Mr. Kagan alleges that he lent Mrs. Simchon \$210,000.00 to enable her to pay off a balloon mortgage owed on a piece of real estate in Waterloo, South Carolina (the "Second Loan"). (R. p. 23, ¶ 13; R. p. 28, lines 14:7–8.) Mrs. Simchon is a realtor and broker-in-charge at Greenwood Realty, (R. p. 57, lines 13:13–17), and is in the business of buying and selling various properties for commercial gain, (R. p. 68, lines 31:21–32:6). Mrs. Simchon had an interest in the Waterloo property and was acting as mortgagor at the time of the Second Loan. (R. p. 58, lines 14:1–9, 14:20–15:2.) Mrs. Simchon allegedly agreed to repay Mr. Kagan the \$210,000.00 when she sold the Waterloo property, along with six percent (6%) annual interest. (R. p. 23, ¶ 14; R. p. 61, lines 30:16–17.) Although Mr. Kagan's Complaint suggests that he and Mrs. Simchon memorialized this agreement in a written contract, (R. p. 23, ¶ 14), Mr. Kagan is unable to produce any such writing. (R. pp. 61–62, lines 33:15–34:6.) Mrs. Simchon is unaware that any such writing exists. (R. pp. 44–45, lines 28:6–29:9.)

On March 11, 2011, Mrs. Simchon closed on the Waterloo property. (R. p. 25, ¶ 27(a); R. p. 43, lines 21:16–17.) 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. (R. p. 29, lines 26:18–24; R. p. 31, lines 30:16–20; R. pp.

46–47, lines 32:11–33:1, 33:7–12; R. p. 68, lines 31:2–5; R. p. 69, lines 37:19–23; R. p. 74.) On or before March 21, 2011, Mrs. Simchon informed Mr. Kagan that she gave the money to her husband to invest on Mr. Kagan’s behalf, and Mr. Kagan called Mr. Simchon to confirm that he was in possession of the money. (R. p. 34, lines 41:16–18; R. p. 40, lines 100:8–9.)

Mr. Kagan did not object to the transfer of money to Mr. Simchon. (R. p. 34, lines 41:8–18; R. p. 37, lines 89:21–25.) Rather, as alleged by Mr. Kagan, he and Mr. Simchon agreed to add the balance of the Second Loan to the principal from the First Loan owed by Bay Island Sportswear, Inc., thereby creating a new combined obligation. (R. p. 24, ¶ 15; R. p. 28, lines 28:15–21; R. pp. 35–36, lines 71:16–72:3; R. p. 41, lines 108:10–13.) The agreement to combine the principals of the First and Second Loans was similarly not reduced to writing. (Appendix to R. p. 8A, lines 8:11–16, Motion to Dismiss Hearing Tr.; R. p. 33, lines 37:3–10.)

Finally, on or about November 12, 2013, Mr. Kagan allegedly made a loan to Mr. Simchon to be repaid at six percent (6%) annual interest (the “Third Loan”). (R. p. 24, ¶ 16.) According to Mr. Kagan, he and Mr. Simchon orally agreed to add the Third Loan to the combined principal owed from the First and Second Loans, thereby creating a new and final consolidated loan (the “Final Loan”). (R. p. 24, ¶ 17.) According to Mr. Kagan, the last payment that he received towards the Final Loan was in November 2013. (R. p. 24, ¶ 18; R. p. 71.)

ARGUMENT

I. The Circuit Court Properly Dismissed Mr. Kagan's Remaining Claims Pursuant to the Statute.

Mr. Kagan argues that the Circuit Court erred in dismissing his remaining claims pursuant to the Statute on the basis that the Statute purportedly does not apply to the Second Loan.¹ Alternatively, to the extent the Statute does apply, Mr. Kagan argues that the Second Loan falls under the Statute's "personal purpose" exemption and, therefore, is not barred by the Statute. Mr. Kagan further argues that his remaining claims are not barred by the statute of limitations, as his acceptance of payments from Mr. Simchon tolled the running of the statute as applied to the Second Loan. While it is unclear from the Final Order of Dismissal whether the Circuit Court dismissed Mr. Kagan's remaining claims on the basis of the Statute or the statute of limitations, either basis provides the Circuit Court with sufficient grounds to properly dismiss Mr. Kagan's remaining causes of action as a matter of law. Accordingly, the Circuit Court reached the proper conclusion in granting Mrs. Simchon's Motion for Summary Judgment and, for the reasons set forth below, in addition to any other ground appearing in the Record, Mrs. Simchon respectfully requests that the Circuit Court's order be affirmed.

A. The South Carolina Statute of Frauds Applies to Mr. Kagan's Remaining Loan.

The South Carolina Lender Statute of Frauds, S.C. Code Ann. § 37-10-107, prohibits certain legal or equitable claims unless there is a writing evidencing such a contract. Pursuant to the Statute

¹ Mr. Kagan's appeal challenges the Circuit Court's Final Order of Dismissal, which involved only the Second Loan. The First and Third Loans were previously dismissed on February 8, 2016, pursuant to the Circuit Court's Partial Order of Dismissal and are not at issue on appeal.

(1) No person may maintain an action for legal or equitable relief or a defense based upon a failure to perform an alleged promise, undertaking, accepted offer, commitment, or agreement:

(a) to lend or borrow money;

(b) to defer or forbear in the repayment of money; or

(c) *to renew, modify, amend, or cancel a loan of money* or any provision with respect to a loan of money, involving in any such case a principal amount in excess of fifty thousand dollars, unless the party seeking to maintain the action or defense has received a writing from the party to be charged containing the material terms and conditions of the promise, undertaking, accepted offer, commitment, or agreement and the party to be charged, or its duly authorized agent, has signed the writing.

S.C. Code Ann. § 37-10-107(1) (emphasis added). *See, e.g., Branch Bank & Trust Co. v. Tech. Solutions, Inc.*, No. 3:13-CV-01318-JFA, 2014 WL 691656, at *3 (D.S.C. Feb. 21, 2014) (finding that defendants' counterclaim for breach of contract fell within the purview of S.C. Code § 37-10-107 and therefore failed as a matter of law in the absence of a signed writing); *Yadkin Valley Bank & Trust v. Oaktree Homes, Inc.*, No. 2014-UP-306, 2014 WL 3747342, at *1 (S.C. Ct. App. July 30, 2014) (upholding the ruling to dismiss defendant's counterclaims, including breach of contract and breach of contract accompanied by a fraudulent act, because defendant was unable to produce a written loan agreement); *Sea Cove Dev., LLC v. Harbourside Cmty. Bank*, 387 S.C. 95, 107, 691 S.E.2d 158, 164 (2010) (concluding that plaintiff's breach of contract and promissory estoppel claims were subject to the lender statute of frauds and failed as a matter of law without a signed document showing an agreement); *Berlinsky v. Palmetto Fed. Sav. Bank of S. Carolina*, No. 2008-UP-231, 2008 WL 9841492, at *2 (S.C. Ct. App. Apr. 15, 2008) (upholding the dismissal of plaintiff's breach of contract claim and breach of contract accompanied by a fraudulent act claim in case involving loan over \$50,000).

On appeal, Mr. Kagan argues that the Statute does not apply in the instant case because there has been no failure “to perform an alleged promise to borrow money” as set forth by the “plain wording” in § 37-10-107(1)(a). (App. Br. at 6–8.) Mr. Kagan supports his argument by pointing to the purported general legislative intent behind lender statutes of fraud, and relying on two outdated state court cases from Louisiana and Colorado, neither of which include any mention of South Carolina’s Statute, legislative intent, or case law. Indeed, Mr. Kagan does not identify any South Carolina precedent whatsoever that would prohibit, or even question, application of the Statute to this case. Moreover, his own admissions demonstrate that the Second Loan falls squarely within the purview of the Statute and, as a result, the Circuit Court properly applied the Statute to the instant case.

As a threshold matter, Mr. Kagan failed to make the aforementioned argument at the Circuit Court level and, thus, cannot make this argument on appeal. “For an issue to be properly preserved it has to be raised and ruled on by the trial court.” *Johnson v. Lloyd*, 407 S.C. 610, 612, 757 S.E.2d 705, 706 (2014) (“An issue not properly preserved cannot be raised for the first time on appeal.”) (internal citations omitted). At the Circuit Court level, Mr. Kagan argued only that the Second Loan does not fall under the purview of the Statute because it is not characterized as a “consumer loan,” which, according to Mr. Kagan, is required to trigger the South Carolina Consumer Protection Code. (R. pp. 51–52.) Mr. Kagan did not challenge the application of the statutory language itself, or argue that the Statute applies only to cases in which there is a failed performance to “lend or borrow money.” Therefore, Mr. Kagan failed to preserve the argument for appeal.

Moreover, to the extent the Court considers Mr. Kagan’s unpreserved argument, Mr. Kagan heavily relies on an over-generalization of the legislative intent behind various lender

statutes of fraud. (App. Br. at 6–8.) Notwithstanding the fact that Mr. Kagan’s analysis fails to even mention the South Carolina Legislature or Statute, a court will not consider legislative intent where the statute’s language is unambiguous. *See, e.g., Jennings v. Jennings*, 401 S.C. 1, 4, 736 S.E.2d 242, 244 (2012) (noting that, “[w]here the language of the statute is unambiguous, the Court’s inquiry is over, and the statute must be applied according to its plain meaning”); *Fullbright v. Spinnaker Resorts, Inc.*, 420 S.C. 265, 802 S.E.2d 794, 797 (2017), *reh’g denied* (Aug. 22, 2017) (same). Here, the Statute’s language is clear and unambiguous and, thus, the Court need only look to the Statute’s plain meaning to assess whether the Statute is applicable to Mr. Kagan’s Second Loan.² *Id.*

While Mr. Kagan correctly states that subsection (1)(a) of the Statute prohibits an action based upon a failure to lend or borrow money, he conveniently ignores the entire scope of the Statute, which also prohibits an action for legal or equitable relief based upon a failure to perform an alleged promise “to renew, *modify*, or cancel a loan of money” if the principal amount is in excess of fifty thousand dollars (\$50,000.00) and there is no writing containing “the material terms and conditions of the promise.” S.C. Code Ann. § 37-10-107(1)(c). Giving these words their common and ordinary meaning, Mr. Kagan’s loans and the subsequent agreement to modify them clearly fall under the purview of the Statute. Mr. Kagan has repeatedly admitted that he entered into an oral agreement with Mrs. Simchon and others to add the Second and Third Loans to the principal of the First Loan, thereby modifying the individual loans to create a

² Moreover, Mr. Kagan’s legislative intent argument is belied by the support he cites in his Brief. Mr. Kagan cites to a legal article for the proposition that lender statutes of fraud were enacted to govern and limit actions by a debtor against a lender. (App. Br. at 6–7 (referencing John L. Culhane & Dean C. Gramlich, *Lender Liability Limitation Amendments to State Statutes of Frauds*, 45 BUS. LAW. 1779 (1990)).) Mr. Kagan fails to acknowledge, however, that the same article confirms that these statutes often apply “to both sides of a lending transaction,” which would include Mr. Kagan’s claims as a lender.

consolidated loan of \$391,000.00 to be repaid with six percent (6%) annual interest. (R. p. 24, ¶¶ 15, 17; R. p. 29, lines 26:14–16; R. p. 30, lines 28:15–22; R. p. 31, lines 30:9–11; R. p. 33, lines 37:3–10; R. p. 35, lines 71:23–24; App. Br. at 12 (stating that Mr. Kagan “consolidated” several loans, including the Second Loan); R. p. 71.) Mr. Kagan further admits that this agreement – to modify the structure of the First Loan so that it incorporates the subsequent loans and imposes an “all-inclusive” obligation that can be satisfied only by repayment of the entire \$391,000.00 – was never reduced to writing. (R. p. 24, ¶¶ 15, 17; R. p. 33, lines 37:3–10; Appendix to R. p. 8A, lines 8:11–16, Motion to Dismiss Hearing Tr.) What is more, although Mr. Kagan claims the Second Loan was executed pursuant to a written agreement, he has since admitted that he cannot produce any such writing, despite having over a year to do so. (R. pp. 61–62, lines 33:15–34:6; R. pp. 324–25, lines 3:24–4:8.) Thus, based on Mr. Kagan’s own admissions, the transaction in the instant case involves a modified commercial loan in excess of fifty thousand dollars (\$50,000.00) without any writing evidencing any such agreement, thereby falling squarely within the purview of the Statute’s plain language.

In a final effort to avoid application of the Statute, Mr. Kagan suggests that, even if the Statute applies to the instant case based on its plain meaning, application of the Statute would result in a “miscarriage[] of justice.” (App. Br. at 8.) Mr. Kagan cannot use his own negligence to circumvent application of the Statute. As stated by The Honorable Frank R. Addy, Jr. during the initial hearing on February 8, 2016, “courts have a difficult time enforcing agreements that just exist out there in the aether [*sic*] and they’re not reduced to writing. It does not take a lot of effort, obviously . . . It doesn’t have to be terribly fancy.” (Appendix to R. p. 12A, lines 12:10–18, Motion to Dismiss Hearing Tr.) By his own admissions, Mr. Kagan entered into three different loan transactions in relation to this case, and affirmatively modified those loans on two

separate occasions. (R. p. 24, ¶¶ 15, 17; R. p. 29, lines 26:14–16; R. p. 30, lines 28:15–22; R. p. 31, lines 30:9–11; R. p. 33, lines 37:3–10; R. p. 35, lines 71:23–24; R. p. 71.) Mr. Kagan had multiple opportunities to reduce any one of these agreements to some sort of basic writing, but repeatedly failed to do so. Therefore, the Circuit Court’s application of the Statute was just and proper, and should be affirmed by this Court.

B. The Statute’s “Personal Purposes” Exemption Does Not Apply to the Second Loan.

Pursuant to subsection (3)(a), the Statute does not apply to “a loan of money used primarily for personal, family, or household purposes.” S.C. Code § 37-10-107(3)(a). On appeal, Mr. Kagan argues that, even if the Statute applies to the instant case, the Second Loan is exempt under subsection (3)(a) as a loan used for “personal purposes.” Specifically, Mr. Kagan alleges that “the loan was simply a personal loan to help Mrs. Simchon with the benefit to Mr. Kagan of receiving some interest on his money” and “[h]is intent was simply to help her out.” (App. Br. at 9–11.) In support of his argument, Mr. Kagan attempts to compare the facts before this Court to a Fifth Circuit case, in which the Court characterizes a credit transaction as “personal” where the loan was used to renovate the borrower’s home. (App. Br. at 10 (referencing *Tower v. Moss*, 625 F.2d 1161 (5th Cir. 1980)).)

Mr. Kagan’s attempt to mischaracterize and downplay the significance of the Second Loan is convenient and misguided. It is undisputed that the Second Loan was used for purposes of Mrs. Simchon’s commercial livelihood, rather than for personal or household purposes. Mr. Kagan is well-aware that Mrs. Simchon works in the real estate business and invests in, purchases, and sells various properties. (R. p. 57, lines 13:13–17; R. p. 68, lines 31:21–32:6, 33:16–19.) Consistent with her ordinary business practices, Mrs. Simchon requested and used the Second Loan to cover a balloon payment due on a mortgage for a piece of property in which

she had a commercial interest. (R. p. 58, lines 14:1–15:2.) Unlike the borrower in *Tower*, who used the loan to improve a personal home in which she had lived for years and intended to return upon retirement, *Tower*, 625 F.2d at 1166, Mrs. Simchon regularly buys and sells properties as part of her commercial livelihood and sought the Second Loan to assist in the execution of a real estate transaction in furtherance of the same. (R. pp. 24–25, ¶¶15, 27.) Therefore, the Circuit Court correctly found that the Second Loan was not exempt as a “personal, family, or household” transaction under subsection (3)(a) and, for the reasons stated above, properly barred Mr. Kagan’s remaining claims under the Statute.

II. Mr. Kagan’s Remaining Claims Are Also Barred by the Statute of Limitations.

To the extent the Circuit Court viewed the loans separately, rather than as one consolidated loan under the Statute, dismissal of the Second Loan in its individual capacity was still proper pursuant to the statute of limitations. Under South Carolina law, actions for breach of contract and breach of contract accompanied by fraudulent act must be commenced within three (3) years. *See* S.C. Code Ann. § 15-3-530(1) (establishing that the statute of limitations for “an action upon a contract, obligations, or liability, express or implied,” is three (3) years); *see also Prince v. Liberty Life Ins. Co.*, 390 S.C. 166, 170, 700 S.E.2d 280, 282 (Ct. App. 2010) (applying S.C. Code § 15-3-530(1) to a breach of contract claim); *Wilson Group, Inc. v. Quorum Health Resources, Inc.*, 880 F. Supp. 416, 424 (D.S.C. 1995) (holding that S.C. Code Ann. § 15-3-530(1) governs a cause of action for breach of contract accompanied by fraudulent act). The statute of limitations begins to run on the date the aggrieved party “either discovered the breach, or could or should have discovered the breach through the exercise of reasonable diligence.” *Maher v. Tietex Corp.*, 331 S.C. 371, 377, 500 S.E.2d 204, 207 (Ct. App. 1998).

Mr. Kagan argues that his acceptance of payments from Mr. Simchon until November 6, 2013, tolled the statute of limitations as applied to the Second Loan. Specifically, Mr. Kagan claims that Mr. Simchon allegedly failed to designate the specific loan to which the payments applied and, as a result, Mr. Kagan may attribute the payments to the loan of his choice (e.g., the Second Loan).³ (App. Br. at 12.) Although the payments to which Mr. Kagan refers were executed by Mr. Simchon, rather than Mrs. Simchon, Mr. Kagan argues that Mr. Simchon acted as an “agent” of Mrs. Simchon with respect to the Second Loan and, thus, his payments tolled the statute of limitations as to that loan.

As an initial matter, Mr. Kagan does not offer any South Carolina case law that addresses whether an undesignated partial payment towards several loans may toll the statute of limitations as to any of those loans.⁴ Moreover, in a transparent attempt to circumvent the statute of limitations, Mr. Kagan’s argument attempts to create confusion surrounding repayment of the Second Loan where none exists. The Record is replete with evidence that Mr. Kagan knew that Mrs. Simchon breached the alleged agreement in March 2011, when she gave the proceeds from the Waterloo sale to her husband to invest on behalf of Mr. Kagan, rather than to Mr. Kagan directly. (R. p. 25, ¶ 27; R. p. 29, lines 26:21–24; R. p. 31, lines 30:16–20; R. p. 40, lines 100:8–9; R. pp. 143–44, lines 40:21–41:18.) Further, by Mr. Kagan’s own admissions, to the extent any repayment was made in relation to the Second Loan, “the last time Mrs. Simchon gave [Mr.

³ Here, Mr. Kagan’s argument implies that the parties treated the outstanding debt as one consolidated amount and that Mr. Simchon allegedly made repayments towards a single obligation. Thus, Mr. Kagan’s Brief actually supports the argument that the loans were modified into one consolidated obligation and, therefore, fall under the purview of the Statute.

⁴ In support of his argument, Mr. Kagan offers one South Carolina case that refers vaguely to the partial payment of an alleged debt. (App. Br. at 12 (referencing *Westbury v. Bauer*, 284 S.C. 385, 387, 326 S.E.2d 151, 153 (1985)).) Unlike the instant case, *Westbury* does not involve an undesignated payment made towards multiple loans and, therefore, is not binding, or even instructive, for purposes of this Court’s review.

Kagan] any money” with regard to this specific loan was on March 21, 2011, when Mrs. Simchon gave Mr. Kagan the check for \$31,616.46. (R. p. 32, lines 34:7–14; R. p. 74.)

Mr. Kagan attempts to argue that certain subsequent checks from Mr. Simchon are attributable to the Second Loan because Mr. Simchon acted as Mrs. Simchon’s agent in repaying the debt. Mr. Kagan’s argument asks this Court to assume facts that are not in the Record. Indeed, there is absolutely nothing in the Record that suggests Mrs. Simchon entered into an agreement with Mr. Simchon through which he agreed to act as her agent and assume the obligations related to the Second Loan. To the contrary, Mr. Simchon was dismissed from this action months ago – a motion to which Mr. Kagan filed no objections. (R. p. 4.) Accordingly, Mr. Kagan cannot argue after-the-fact that Mr. Simchon is somehow responsible for repayment of the Second Loan.

Viewing the facts as they appear in the Record, on or before March 21, 2011, Mr. Kagan became aware that Mrs. Simchon breached their alleged agreement by failing to give him the entire proceeds from the sale of the Waterloo property. (R. p. 25, ¶ 27; R. p. 29, lines 26:21–24; R. p. 31, lines 30:16–20; R. p. 40, lines 100:8–9; R. pp. 143–44, lines 40:21–41:18.) Thus, Mr. Kagan filed his Complaint against Mrs. Simchon a year after the statute of limitations had run on the Second Loan and the Circuit Court properly dismissed the Remaining Claims pursuant thereto.⁵

⁵ If the Court determines that the alleged agreement between the parties constitutes an express contract that is barred by the statute of limitations, Mr. Kagan’s promissory estoppel claim must also be dismissed because promissory estoppel is inapplicable in situations where an express contract exists. *Glover v. Lockheed Corp.*, 772 F. Supp. 898, 907 (D.S.C. 1991). In the alternative, if the Court determines that the alleged agreement constitutes an implied contract, thereby rendering the breach of contract claims inapplicable, Mr. Kagan’s promissory estoppel claim still fails as a matter of law because S.C. Code Ann. §15-3-530 (1) applies to implied contracts. See *Wells Fargo Bank, N.A. v. Carter*, No. 9:14-127-SB, 2014 WL 11034776, at *2

III. Mr. Kagan Waived His Right to Bring Claims for Breach of Contract and Breach of Contract Accompanied By Fraudulent Act.

In addition to the reasons set forth above, Mr. Kagan's breach of contract and breach of contract accompanied by fraudulent act claims must be dismissed because Mr. Kagan also accepted and ratified Mrs. Simchon's alleged breach of the agreement by failing to object to the transfer of money to Mr. Simchon.⁶ "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." *McKay v. Anheuser-Busch, Inc.*, 199 S.C. 335, 19 S.E.2d 457, 462 (1942) (also applying such cases of waiver to breaches of contract); *see also Biales v. Young*, 315 S.C. 166, 168, 432 S.E.2d 482, 484 (1993) (finding that the plaintiff was estopped from enforcing the disbursement procedures in the contract at issue because his conduct suggested acceptance of the breach of said contractual procedures). By his own admissions, Mr. Kagan did not object when Mrs. Simchon allegedly breached the agreement and gave her husband the proceeds from the sale of the Waterloo property. To the contrary, he allowed Mr. Simchon to invest the money and admits that he trusted Mr. Simchon's judgment. (R. p. 34, lines 41:15-18; R. pp. 37-38, lines 89:21-90:5). Because Mr. Kagan accepted Mrs. Simchon's alleged breach of the Second Loan by permitting Mr. Simchon to invest the money, he is estopped from raising his breach of contract and breach of contract accompanied by fraudulent act claims. Thus, at the very least, the Circuit Court reached the proper conclusion in dismissing Mr. Kagan's two breach of contract claims against Mrs. Simchon and should therefore be affirmed with respect to those causes of action.

(D.S.C. July 22, 2014) (agreeing that the unjust enrichment claim is a claim based on an implied contract, which is governed by South Carolina's three-year statute of limitations).

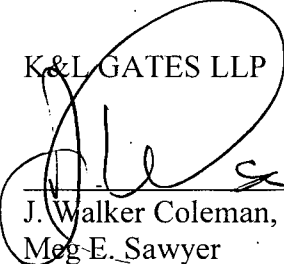
⁶ Pursuant to Rule 220(c), SCRAP, the appellate court may affirm a ruling on any grounds appearing in the Record on Appeal.

CONCLUSION

For the foregoing reasons, as well as for any other ground appearing on the Record as provided by Rule 220(c), SCRAP, Respondent D. Renee Simchon respectfully requests that the Circuit Court's order be affirmed.

Respectfully submitted,

K&L GATES LLP



J. Walker Coleman, IV

Meg E. Sawyer

134 Meeting Street, Suite 500

Charleston, SC 29401

(843) 579-5600

walker.coleman@klgates.com

meg.sawyer@klgates.com

Edward S. McCallum, III

Law Offices of Edward S. McCallum, III

P. O. Box 148

Greenwood, SC 29648

mccallum@greenwood.net

Attorneys for Respondent

January 24, 2018

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENWOOD COUNTY
Court of Common Pleas

The Honorable Frank R. Addy, Jr., Circuit Court Judge

RECEIVED

JAN 26 2018

SC Court of Appeals

Case No. 2015-CP-24-00892

Appellate Case No. 2017-000810

Jeffrey S. Kagan, ... Appellant,

v.

D. Renee Simchon Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

January 24, 2018

K&L GATES LLP

J. Walker-Coleman, IV

Meg Sawyer

134 Meeting Street, Suite 500

Charleston, SC 29401

(843) 579-5600

walker.coleman@klgates.com

meg.sawyer@klgates.com

Edward S. McCallum, III
Law Offices of Edward S. McCallum, III
P. O. Box 148
Greenwood, SC 29648
mccallum@greenwood.net

Attorneys for Respondent