

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

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SC Court of Appeals

Jeffrey S. Kagan.....Appellant,

v.

D. Renee SimchonRespondent.

APPENDIX to RECORD ON APPEAL

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STATE OF SOUTH CAROLINA
COUNTY OF GREENWOOD

IN THE COURT OF COMMON PLEAS

JEFFREY S. KAGAN,)
)
 PLAINTIFF,)
)
)
 -VS-)
)
 SAM SIMCHON, ET AL)
 DEFENDANTS.)
 _____)

CASE NO.: 2015-CP-24-00892

TRANSCRIPT OF RECORD

FEBRUARY 8, 2016
GREENWOOD, SOUTH CAROLINA

BEFORE:

THE HONORABLE FRANK R. ADDY, JR., JUDGE

APPEARANCES:

ATTORNEY FOR PLAINTIFF:

ROBERT JAMISON TINSLEY, JR., ESQUIRE

ATTORNEY FOR DEFENDANTS:

EDWARD S. MCCALLUM, III., ESQUIRE

TARA T. SCOTT, CVR
CIRCUIT COURT REPORTER

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1 THE COURT: We're going on the record in *Kagan v Simchon*
2 *and Bay Island Sportswear*. I think the only matter we're
3 addressing is the Defendant's Motion to Dismiss at this
4 particular point in time?

5 MR. COLEMAN: That is correct, Your Honor.

6 THE COURT: From my review of the file this action
7 apparently arises out of two or three loans. I think one
8 was reduced to writing. The Defendant is stating that two
9 others were not written down and there is also a motion
10 concerning an emotional distress claim with regard to the
11 Plaintiff's discharge or something that occurred during the
12 time that he was discharged. Is that kind of where we are?

13 MR. COLEMAN: Yes, Your Honor. That is correct.

14 THE COURT: Happy to hear from y'all.

15 MR. COLEMAN: Thank you, Your Honor. May it please the
16 Court. Walker Coleman and Ed McCallum on behalf of the
17 Defendants. This is our Motion to Dismiss.

18 Your Honor, as you know you and I were in law school
19 together so we've been doing this for a long time. Over the
20 years I have filed very few Motions to Dismiss, 12(b)(6)
21 Motions. I do it because most of them are, quite frankly, a
22 waste of time, the Court's time and the litigants' time. I
23 only do it when they really are clearly based on a complaint
24 and when the claims that have been alleged truly can be
25 dismissed as a matter of law based on the allegations in the

1 complaint. Even though we do not agree with a lot of the
2 allegations in the complaint, those are the allegations with
3 which we are dealing today.

4 So, Your Honor, as you stated before Mr. Kagan was an
5 employee of Bay Island Sportswear. Really between June of
6 2009 and November 2013 he alleged in the complaint to have
7 made three loans to the Defendants. Of those loans in the
8 complaint he admits that the first loan and the third loan
9 were -- they had an oral agreement. He alleged in the
10 complaint that the second loan that there was a writing.
11 The writing is not attached to the complaint and we have not
12 seen any evidence of that.

13 Your Honor, really here importantly at the time of the
14 third loan, which was in November of 2013, there was, based
15 on the allegations in the complaint, there was an oral
16 agreement to modify all of the three prior loans and to roll
17 them into one loan -- all of the principal amounts. So the
18 prior three loans were all modified at that point into one
19 loan and really that is something that from which Mr. Kagan
20 is to benefit, because obviously the issuer would approve on
21 a larger aggregated principal.

22 Of those loans Mr. Kagan's own allegations in his
23 complaint actually doom his claims for breach of contract,
24 for breach of contract accompanied by a fraudulent act, and
25 also promissory estoppel because that oral modification is

1 an express violation of the Lender Statute of Frauds. We
2 have a copy of that statute if Your Honor would like to see
3 a copy. We also have the fourth claim that is alleged --
4 and I will get into each one of these in more detail in a
5 moment. In the other claim, as Your Honor mentioned, is one
6 for intentional infliction of emotional distress based on
7 his termination from Bay Island Sportswear.

8 As Your Honor knows, there are no employment cases
9 where there is found an intentional infliction claim to
10 stand, to be legally viable, in an employment setting. I'll
11 get into some more specifics of that in just a minute. Your
12 Honor, do you have a copy of our memorandum?

13 THE COURT: It was just handed to me a moment ago. Yes.

14 MR. COLEMAN: Your Honor, once again the Lender Statute
15 of Frauds, which is codified section 35-10-107, it
16 precludes, as a matter of law, all legal and equitable
17 claims that are based, among several other things, on an
18 alleged verbal agreement to modify a limit. That is exactly
19 what we have here. In fact, in the complaint the Plaintiff
20 even mentions and refers to this aggregated loan as an all-
21 inclusive obligation. And because those claims, the breach
22 of contract claim, the breach of contract accompanied by a
23 fraudulent act, and the promissory estoppel claim, all
24 violate that statute because they were all, by the
25 Plaintiff's own admission, were all oral agreements. And,

1 Your Honor, we have in our brief we actually cite some cases
2 in which those same very claims were dismissed as a matter
3 of law based on the fact that the underlying loan at issue
4 was not reduced to writing.

5 Your Honor, with respect to the intentional infliction
6 of emotional distress claim, Judge Hodges and Judge Duffy
7 really have hit -- in two cases have kind of -- have really
8 explained well how that claim is perceived in employment
9 context. As Your Honor knows, in order to constitute a
10 violation of that claim the conduct has to be so extreme and
11 outrageous as to exceed all possible bounds of decency and
12 be regarded as utterly intolerable in a civilized community.
13 Judge Hodges, in the *Odom v CVS* case, held that in
14 employment context mere termination or unpleasant conduct by
15 supervisors does not rise to the level of actionable
16 outrage.

17 In the *Alonso v McAllister Towing* case, Judge Duffy
18 held that although termination is a stressful experience, it
19 does not constitute an act so severe that no reasonable
20 person could ever endure it. You also have a decision of
21 our State Supreme Court, the *Shipman v Glenn* case, which is
22 a 1994 decision, where you had facts where the Plaintiff
23 suffered from cerebral palsy. In that case the allegations
24 were that the Plaintiff was an employee who was just
25 embarrassed and ridiculed on a daily basis by the supervisor

1 and was forced out. The Court, even in that case, didn't
2 find that conduct worthy to actually find that to be a
3 viable claim as well.

4 So, Your Honor, based on the fact that three of the
5 Plaintiff's claims are a direct violation of the Lender
6 Statute of Frauds and the fact that the intentional
7 infliction claim just cannot stand in the employment
8 context, we would ask that the claim be dismissed with
9 prejudice. Thank you.

10 THE COURT: Mr. Tinsley?

11 MR. TINSLEY: Thank you, Your Honor. May it please the
12 Court. As you are aware we are here on a Motion to Dismiss.
13 No discovery has taken place. No answer in this case yet.
14 First, I would say that whether this Statute of Frauds
15 applies is somewhat fact dependent as subsection 3 goes into
16 what the law actually goes for. There is a writing out
17 there regarding -- I don't know if it's all one loan or
18 separate loans, but there is a writing that exists that
19 would, if authentic and what not, it would satisfy this
20 Statute of Frauds.

21 And also as to the intentional infliction of emotional
22 distress, it's -- as you know that's fact dependent. I know
23 it's a high bar to get an outrage claim to a jury, but we're
24 only at the Motion to Dismiss stage. I believe all we have
25 to do is properly plead it to survive at this stage, so I

1 would say that would satisfy it.

2 You know, at the time these loans were made Mr. Kagan
3 was an employee of Bay Island and Sam Simchon, and he was --
4 so while he would be the lender of the money as alleged in
5 the complaint, he was also -- he was being protected by a
6 fiduciary duty owed by his employer for a fair dealing with
7 him and not to take advantage of him. He was under the --
8 constantly told I'm going to be produced a writing. It
9 never was, so we would ask that the Court deny these motions
10 to dismiss, allow some discovery, and go from there.

11 THE COURT: Do you have a writing that references all
12 three loans or do you only have one that references the
13 second?

14 MR. TINSLEY: We do not and we're -- we have not -- I do
15 not have -- cannot hand you a writing referencing all three
16 loans at this point, no.

17 THE COURT: But your position is that one was prepared
18 and is in someone's possession?

19 MR. TINSLEY: Yes. The second one, and that's where the
20 discovery comes in and I think is appropriate for this case.

21 MR. COLEMAN: Your Honor, I'm sorry to interrupt. There
22 is alleged in the complaint -- they allege to have a writing
23 with respect to the second loan. That really is not
24 relevant here because the three prior loans were all rolled
25 into one loan by the Plaintiff's own admission here. The

1 Plaintiff admits there is no writing with respect to that
2 one, to the modification which is a direct violation to the
3 statute. Your Honor, I would just refer you in our brief to
4 the *Yadkin Valley Bank and Trust v Oaktree Homes* case. In
5 that case the Plaintiff alleged to have a writing as well,
6 but they weren't sure where it was. Just the allegation
7 that there might be a lost writing somewhere was not
8 sufficient to be dispositive in that case.

9 Your Honor, I would also say too, to the extent that,
10 again, I think really here for the purpose of this motion
11 what we're dealing with is just this modified loan which is
12 a direct violation of the statute. With respect, if Your
13 Honor does consider the three prior loans in their
14 individual state, obviously the first one and the third one,
15 by the Plaintiff's own admission, are oral and violate the
16 statute.

17 The second loan the Plaintiff claims to have a writing,
18 but has not produced the writing. That one actually
19 violates the statute of limitations. That the claim on that
20 loan, in and of itself, is not timely. And, in fact, that
21 loan pertains to an alleged breach that Mr. Kagan discovered
22 back on March 11, 2011. Therefore, under the discovery
23 rule, would have had three years from the time of discovery
24 of that alleged breach which would put the statute of
25 limitations running on March 11, 2014. This action was not

1 filed until August 20, 2015, so 17 months too late.

2 MR. TINSLEY: Judge, I would dispute that. They were
3 still making payments up until November 2013. Okay, he's
4 saying 2014, the complaint says 2013, but either way it
5 doesn't matter because it's within the three-year-statute so
6 the statute of limitations does not knock him out. The
7 payments -- we have evidence of the payments being made up
8 until he was terminated from his employment with Bay Island.
9 The money is still owed from that second loan. That is
10 supported by writing and it may wind up being a lost
11 writing, then I think we would probably have a burden of
12 proving that that existed by clear and convincing evidence
13 based off of research I've done on it. But that's later on
14 in the game I would say, a Motion to Dismiss based off of
15 the complaint.

16 THE COURT: Can I ask you this? Instead of what you
17 don't have, what do you have in the way of a writing that
18 evidences any of these loans? Emails?

19 MR. TINSLEY: Checks endorsed by the -- by the -- and
20 that's what we're going to, you know, in discovery. He's
21 going to get me -- I mean, I have evidence of payments. You
22 know, checks endorsed by Bay Island. Various things.

23 MR. COLEMAN: And, Your Honor, I think once again -- I
24 think where we were falling in the statute is under section
25 1 subsection (c). Again, the payments that they're alleging

1 were made prior to this modification occurring, so the
2 modification -- as the statute is very clear. Based on Mr.
3 Kagan's own allegations in the complaint that once it was
4 modified that modification of the statute requires it to be
5 reduced to writing and signed by the person being charged.
6 That never occurred by Mr. Kagan's own admission in the
7 complaint. And so it therefore directly violates the
8 statute and ought to be dismissed.

9 THE COURT: Mr. Tinsley, you raised -- you touched on a
10 moment ago a fiduciary relationship that perhaps existed
11 between the Plaintiff and the Defendants and the law is
12 pretty clear that a fiduciary relationship can, of course,
13 arise in an employment context but you didn't allege that in
14 your complaint.

15 MR. TINSLEY: I just -- I was just giving context that
16 in various writings Mr. Kagan -- you know, it's a unique
17 situation. Think this statute -- you know, it's got a mind
18 protecting consumers whereas now this is an employee going
19 after the employer, so it's a unique situation. Mr. Kagan
20 was told -- generally the lender is in the power position,
21 and that's not the case in this case. Mr. Kagan was told on
22 numerous occasions he alleges by Mr. Simchon, don't worry.
23 We'll get it all down in writing. But that never fully
24 materialized other than with the second loan.

25 MR. COLEMAN: Your Honor, all Mr. Kagan had to do was

1 reduce it to writing. Had he done that I wouldn't be here
2 in front of you arguing this motion right now. But the fact
3 that it was modified and it really doesn't have anything to
4 do with an employer/employee relation. It falls exactly
5 within the parameters of the statute. He reports to have
6 loaned money, under his own allegations, and he didn't
7 reduce it to writing and it violates the statute. The
8 statute actually protects lenders and consumers both.

9 THE COURT: All right. I'll take the matter under
10 advisement. Mr. Tinsley, in the "for what it's worth"
11 category my understanding for the reason for the statute is
12 clearly courts have a difficult time enforcing agreements
13 that just exist out there in the aether and they're not
14 reduced to writing. It does not take a lot of effort,
15 obviously. Person A agrees to loan Person B \$10,000.
16 Person B will repay \$10,000 at the rate of \$1,000 or \$100
17 for the next whatever years. It doesn't have to be terribly
18 fancy.

19 MR. TINSLEY: What do you do when your employer won't
20 sign? That's, you know --

21 THE COURT: You don't make the loan --

22 MR. TINSLEY: Well, he wanted money.

23 THE COURT: -- is the short answer.

24 MR. TINSLEY: I mean, after you've leant it and payments
25 have been made you're still being promised it, that the

1 writing will come out.

2 THE COURT: I'm not saying that you might not have a
3 cause of action as it relates to the second loan. That
4 might be enforceable. I don't know. But that's a matter
5 for another day. If the Court were to rule that the statute
6 applies for the reasons they have pointed out, maybe you
7 could seek enforcement of the second loan. I do not know.
8 That question is not before me today and I'm really not
9 inclined to take it up. The Court is going to take a look
10 at the Yadkin Valley case, Y-A-D-K-I-N Valley case. I'm not
11 terribly familiar with that one. I'll see what other
12 research I can dig up and I'll issue an order sometime in
13 probably the next couple of days.

14 MR. MCCALLUM: Your Honor, if you would like for us to
15 email you a copy of all of the cases cited in our brief we
16 will be happy to do that and copy Mr. Tinsley.

17 THE COURT: I can probably pull them up and it costs me
18 nothing for Westlaw, so -- it costs the State something, but
19 me nothing.

20 MR. COLEMAN: Your Honor, also if you would like us to
21 submit proposed orders we would be delighted to do that.

22 THE COURT: I will let you know whichever way I come
23 down on it. I'll let you know and you can send a proposed
24 order. Thank you.

25 - - - END OF REQUESTED TRANSCRIPT OF RECORD - - -

1 Certificate of Reporter
2

3 I, the undersigned, Tara T. Scott, Official Court
4 Reporter for the Eighth Judicial Circuit of the State of
5 South Carolina, do hereby certify that the foregoing is a
6 true, accurate, and complete transcript of record of all the
7 proceedings had and evidence introduced in the trial/hearing
8 of the captioned case, relative to appeal, in the Circuit
9 Court for Greenwood County, South Carolina, on the 8th day
10 of February, 2016.

11 I do further certify that I am neither of kin, counsel,
12 nor interest to any party hereto.

13

14

15

16

17

Tara T. Scott

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Tara T. Scott, CVR

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Circuit Court Reporter

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October 19, 2017

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