

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE FLORENCE COUNTY COURT OF COMMON PLEAS

2015-CP-21-02153
(Appellate Case No. 2017-001814)

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SC Court of Appeals

CRJ Trust Company, LLC, Appellant

v.

S&S Sterling Properties, LLC and Shakil Kahn, Respondents.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE ISSUES ON APPEAL

- I. DID THE TRIAL JUDGE ERR IN DISMISSING THE DEFENDANT SHAKIL KHAN FROM THIS ACTION ON A MOTION FOR JUDGMENT ON THE PLEADINGS WHEN THAT DEFENDANT'S ANSWER DID NOT DENY HIS PERSONAL LIABILITY ON THE NOTE AND RAISED NO AFFIRMATIVE DEFENSES?**

- II. DID THE TRIAL JUDGE ERR IN DISMISSING THE DEFENDANT SHAKIL KHAN FROM THIS ACTION WHEN THE PROMISSORY NOTE BY ITS OWN TERMS PROVIDED FOR HIS PERSONAL LIABILITY AS MANAGING MEMBER OF S&S STERLING PROPERTIES, LLC?**

STATEMENT OF THE CASE/FACTS

This is an action by the Plaintiff (now Appellant) upon a promissory note for \$140,000.00 dated July 1, 2007, given by the Defendant S&S Sterling Properties, LLC, (Sterling or LLC) and personally guaranteed by the Defendant Shakil Khan (Khan) as managing member of that LLC per the express terms of the promissory note. (R.pp. 5-6) (Complaint at paragraphs 4 and 5). That promissory note, which was attached to the Complaint as an exhibit, explicitly states on page 5 "If Borrower or any other Obligor is a partnership and/or limited liability company, then all general partners or members thereof shall be liable jointly and severally, for all obligations under this note" This promissory note was signed by the Defendant Khan under the designation of "managing member" of the Defendant Sterling. The answers of both Sterling and Khan to the allegations of personal liability of Khan in paragraph 5 of the Complaint are as follows: "This Defendant would admit so much of paragraph 5 of the complaint." (R.pp. 15-18) (Answers). There is nothing more stated, no affirmative defense is raised in the answer of either Defendant, nor is there any specific (or even implied) denial of the personal liability of the Defendant Khan contained in either Answer. The Complaint was originally filed against both Defendants in Lexington County on February 23, 2015, but venue was later transferred to

Florence County by consent. The Defendant Khan moved for judgment on the pleadings per Rule 12(c), SCRCP, which was granted by the trial judge. (R.pp. 1-3) (March 21st order). The Plaintiff's motion to reconsider was denied, leading to the present appeal. (R.pp. 20-21; R.p. 4) (Motion for reconsideration filed April 4th and Order denying the same dated August 7th).

ARGUMENT

A motion for judgment on the pleadings per Rule 12(c), SCRCP, is very similar to a 12(b)(6) motion in that all of the factual allegations in the Complaint are deemed admitted for purposes of ruling upon the motion. In ruling upon a motion for judgment on the pleadings "the court must consider all properly pleaded factual allegations as admitted. Falk v. Sadler, 341 S.C. 281, 286, 533 S.E.2d 350 (Ct. App. 2000) (reversing order granting Rule 12(c) motion). In this case there has been no argument made that any of the factual allegations in the Complaint are legally deficient or unsound. A 12(c) motion goes directly to whether (or not) a viable cause of action is stated in the Complaint, but only after deeming the facts alleged in the Complaint as admitted. Diminich v. 2001 Enterprises, Inc., 292 S.C. 141, 355 S.E.2d 275 (Ct. App. 1986) (also reversing an order granting a 12(c) motion). The ability to prove the allegations, or whether some type of defense exists, is not relevant for purpose of ruling on a motion for judgment on the pleadings. Cricket Cove Ventures, infra.

In the case at bar the personal liability of the Defendant Khan is clearly and directly alleged in paragraph 5 of the Complaint. The basis of his personal liability is stated to derive from the terms of the parties' promissory note, which was attached as an exhibit to the Complaint. (R.pp. 8-12) (Id.). This, standing alone, is sufficient to defeat the motion for judgment on the pleadings.

Summary dismissal of actions is disfavored by the courts of this state and this is particularly true of dismissals pursuant to Rule 12(c). "...[A] judgment on the pleadings is considered to be a drastic procedure by our courts. The court should not dismiss the complaint merely because there exists doubt that the plaintiff will prevail in the action." Cricket Cove Ventures, LLC v. Gilland, 390 S.C. 312, 321, 701 S.E.2d 39 (Ct. App. 2010) (reversing the dismissal of a cause of action). Based upon the above, the dismissal of the Defendant Khan from this action was plain error: generally, as regards all the appropriate standard of review for orders of dismissal based upon Rule 12(c) and also, specifically, based upon the facts and pleading allegations in this particular matter, as will be discussed more fully below.

I. The trial judge erred in dismissing Khan from this action because he did not deny the allegations regarding his personal liability.

The Complaint at paragraph 5 alleges that the Defendant Khan was personally liable based upon the language of the promissory note. The pleading response of the Defendant Khan to this allegation of personal liability was as follows: "The Defendant would admit so much of the allegations of Paragraph 5 of the Complaint." (R.pp. 15-16) (Answer). Admittedly, this short response is odd and possibly may have been truncated from what was intended. It is impossible to say for certain what was intended. There was no affirmative defense avoiding liability raised by Khan. What is clear from the face of the pleadings, however, is that the Answer of the Defendant Khan in no way directly denied the specific allegation of personal liability. In deciding this Rule 12(c) motion, the trial judge was required to deem the allegation of personal liability in paragraph 5 of the Complaint regarding the personal liability of the Defendant Khan as being admitted. Diminich, supra. That alone was sufficient to require denial of the motion for judgment on the pleadings. Additionally, there was the express language

within the promissory note, which was specifically incorporated by reference into the Complaint, regarding the personal liability of the Defendant Khan. (R.p. 52) (Promissory note at page 5).

The order of the trial judge does not explicitly or even implicitly mention, address or discuss any of the following: (1) the pleading sufficiency of the Complaint, (2) the failure of the Defendant Khan to deny his personal liability in his Answer, or (3) the absence of an affirmative defense to avoid personal liability. Rather than deal with the above matters, which were relevant to the Rule 12(c) motion, the order of the trial judge somewhat strangely focused exclusively on the purported application of a certain provision of the Uniform Commercial Code (UCC) to that Defendant's signature on the promissory note.


The application of the UCC was not raised (or even mentioned) within the Answer of either Defendant. The Plaintiff specifically asserted the Defendants' pleading failure as a defense to the Rule 12(c) motion before the trial judge at the original hearing, in the motion for reconsideration, and at the hearing on the motion for reconsideration. (R.pp. 29-32; R.pp. 20-21; R.p. 44) (Hearing transcript at pages 5-8; the motion to reconsider at paragraphs 1 and 2; and the reconsideration hearing transcript at page 7). The trial judge did not even mention (much less actually consider) this issue within either his original order or the order denying reconsideration. Simply put, it was plain error for the trial judge to have granted the motion for judgment on the pleadings in light of the content of the actual pleadings in this matter. This is particularly true when the allegation regarding the personal liability of the Defendant Khan was to be deemed admitted (and, of course, as noted above, it appears that the Defendant Khan did actually admit that allegation in his Answer, whether or not he intended to). This error is even more manifestly clear in light of the failure of the order to really address the pleadings as required by Rule 12(c), but rather focus only on the supposed impact of the UCC.

II. The promissory note itself provided for the personal liability of the Defendant Khan.

As noted above, the order of the trial judge focused exclusively on the purported impact of South Carolina Code Section 36-3-402, which deals with signatures made in a representative capacity. Of course, the application of the UCC was never conceded by the Plaintiff nor raised by the Defendants in the pleadings. The promissory note provides at page 5: "If Borrower or any other Obligor is a partnership and/or limited liability company, then all general partners or members thereof shall be liable jointly and severally, for all obligations under this note" The Defendant Khan signed the promissory note as the managing member of the Defendant LLC. Accordingly, he was also personally liable on the promissory note per its terms and that was specifically alleged in paragraph 5 of the Complaint.

The application of Section 36-3-402 was the sole argument raised by the Defendant Khan. That section, generally speaking, provides that the default position of the UCC is that a signature in a representative capacity does not bind the signer personally. This argument of the Defendant Khan, however, does not take into consideration that the UCC also provides that the parties may vary the application of the default provisions of the UCC by agreement. See Section 36-1-302(a) ("... the effect of provisions of the Uniform Commercial Code may be varied by agreement.") and Section 36-1-302 (c) ("The presence in certain provisions of the Uniform Commercial Code of the phrase "unless otherwise agreed," or words of similar import, does not imply that the effect of other provisions may not be varied by agreement under this section."). There is nothing in Section 36-3-402 that precluded these parties from varying the effect of that provision by agreement, which is exactly what the parties in the case at bar did by including this language in the promissory note: "If Borrower or any other Obligor is a partnership and/or limited liability company, then all general partners or members thereof shall be liable jointly and

severally, for all obligations under this note” Accordingly, the trial judge erred in relying solely upon Section 36-3-402 regarding representative signatures when the provisions of the promissory notes itself provided otherwise, as permitted by Section 36-1-302. Interestingly, there does not seem to be any reported appellate decisions on either of these sections of the UCC, at least insofar as counsel for the Appellant was able to find using the Fast Case search engine available to members of the SC Bar. The trial judge simply refused to consider (or even address, even less, actually rule upon) the Plaintiff’s argument that Section 36-1-302 completely vitiated the Defendants’ reliance upon Section 36-4-402. (R.p. 21; R.p. 30; R.p. 43) (See Motion to Reconsider at paragraph 3; 2/27/17 hearing transcript at page 6; and 7/18/17 transcript at page 6, in which the counsel for the Appellant repeatedly raised this issue to the trial judge). The dismissal of the Defendant Khan should be reversed because the promissory note provided for the personal liability of the Defendant Khan as the managing member of the Defendant LLC.

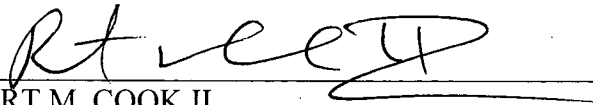


CONCLUSION

For the reasons stated above, or as made in the reply brief or at oral argument, the Appellant requests that this Court reverse the order of the trial judge dismissing the Defendant Shakil Khan from this lawsuit.

Respectfully submitted,

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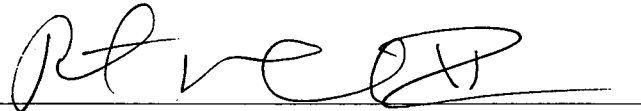
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February 20, 2018

CERTIFICATE

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

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