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

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

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?

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 used primarily for personal purposes and therefore was exempt from the statute?

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 S. Kagan made to Mrs. Simchon?

STATEMENT OF THE CASE

On August 31, 2015, Jeffery S. Kagan filed a suit against Sam Simchon, Bay Island Sportswear, Inc., Bay Island, LLC, and D. Renee Simchon. All Defendants filed an Answer. The Complaint contained causes of action for Breach of Contract, Breach of Contract Accompanied by Fraudulent Act, Promissory Estoppel, and Intentional Infliction of Emotional Distress. The Defendants timely filed Answers to all the counts.

The Defendants Sam Simchon, Bay Island Sportswear, Inc., and Bay Island, LLC were dismissed as Defendants and are not involved in this appeal. The Cause of Action for Breach of Contract Accompanied by Fraudulent Intent, Promissory Estoppel and Intentional Infliction of Emotional Distress were also dismissed in pre-trial proceedings. Some of the alleged loans in the cause of action for Breach of Contract were dismissed.

As a result of the Pre-trial Motions and Rulings, the case evolved to a single loan made by Mr. Kagan to the Defendant D. Renee Simchon in the amount of $210,000.00. Ms. Simchon then filed for Summary Judgment on that loan alleging that the loan violated the Lender Statute of Frauds, S.C. Code of Laws § 37-10-107 and was also barred by the statute of limitations. By Order of Robert F. Addy, Jr., presiding Judge, dated February 21, 2017 and received by the attorney for Mr. Kagan on March 6, 2017, Summary Judgment was granted in favor of Mrs. Simchon. Mr. Kagan filed his Notice of Appeal on March 31, 2017.

FACTS

Since 1993, Jeffrey S. Kagan had been an employee of various companies owned by Sam Simchon, the husband of D. Renee Simchon. On October 26, 2010, Mr. Kagan

lent Mrs. Simchon $210,000.00 to cover the bulk of a loan that Mrs. Simchon had on a house located at 40 Ridgewood Dr., Waterloo, SC. The documents provided by the County Bank reflect that Mr. Kagan transferred the money from his account to the loan account of Renee Simchon.[1] Rec. on App. at 58 and 118 ll 10-24. The bank records further show that on October 26, 2010, $243,928.28 was applied to the loan in the name of Renee Simchon. This amount apparently did not pay off the entire mortgage as it was not satisfied until the house was sold. The house was owned jointly between Mrs. Simchon and Mark Alan Wagner and Virginia Florence Wagner.[2] Mr. And Mrs Wagner were making payments to Mrs. Simchon on the loan she had with the County Bank. Rec. on App. at 68 and 250. Mr. Kagan testified that the loan was to be re-paid when Mrs. Simchon sold the Ridgewood Drive property. Mrs. Simchon agreed to pay Mr. Kagan any interest payments made by the Wagners. Mr. Kagan was to assume the risk of the Wagner's not making the payments. As she testified "If the property took a year to sell and he had to wait on his money, that wasn't going to be my problem." Rec. on App. at 68 and 250, ll 19-20.

The property was sold on March 11, 2011. The mortgage in the original amount of $249,000.00 was satisfied on March 14, 2011. Mrs. Simchon testified that she gave

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Mrs. Simchon testified she "didn't touch any $210,000." Rec. on App. at 244 - 245. Technically this statement is correct as the money was transferred directly to the loan account of Mrs. Simchon.

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Notwithstanding the fact that she signed the deed and had a mortgage on the property to the County Bank, Mrs. Simchon denied she owned the property. Rec. on App. at 239-240.

her husband $180,000 of the money intended for Mr. Kagan from the sale of the Ridgewood Drive property. Her testimony was that Mr. Kagan had told her he wanted the money to be put into "something safe." Rec. on App. at 68 and 252, l 19. She elected to give the $180,000.00 to her husband for Mr. Kagan to invest in cotton futures. In the discovery provided in this matter, on April 21, 2011, $180,000.00 was invested in an account with ADM Investor Services, Inc. in Chicago, IL. The account was in the name of Bay Island Sportswear. Rec. on App. at 102.

Mr. Kagan testified that when he learned that the property had been sold and he had not received a re-payment of the money he loaned Mrs. Simchon, he contacted Mrs. Simchon who informed him she had given the money to her husband. Mrs. Simchon testified she gave the money to Mr. Simchon at the request of Mr. Kagan. Mr. Kagan denied he ever gave her permission to give the money to Mr. Simchon. Rec. on App. at 61 and 133 l 16 to 134, l 5. The money was not invested in the name of Mr. Kagan.

Upon receiving the information that the money had been given to Mr. Simchon, Mr. Kagan contacted Mr. Simchon, who at that time was still his employer. After contacting Mr. Simchon about the money, he received a check from "Sam Simchon Investment Account" in the amount of $31,616.46. The testimony established this was the interest and principle from the original $210,000.00, plus some accrued interest. This left a balance due of $180,000.00. Mrs. Simchon testified that this was the amount Mr. Kagan told her to write him from the proceeds of the closing on the Ridgewood Drive property. Rec. on App. at 68 and 252, ll 18-23; 258, ll 5-8.

Mr. Kagan testified he then looked to Mr. Simchon to repay the money he had lent

to Mrs. Simchon. Over the next several years, Mr. Simchon made various payment to Mr. Kagan on this loan and on other loans that are not involved in this transaction. Rec. on App. at 63 and 143, ll 16-19; 205, ll 17-24. Records of Mr. Kagan reflect that payments were made to Mr. Kagan by Mr. Simchon through November 12, 2013.

Mr. Kagan was terminated in April of 2014. Rec. on App. at 64 and 165, ll 13-18. He filed the present suit on August 31, 2015.

ARGUMENT

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?

In *Sea Cove Dev., LLC v. Harbourside Cmty. Bank*, 387 S.C. 95, 106, 691 S.E.2d 158, 164 (2010) the South Carolina Supreme Court said:

> Section 37–10–107 provides in relevant part that no person may maintain an action for failure to perform an alleged promise or agreement to loan money in excess of $50,000 unless the party bringing the action "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."

This case does not involve a failure to perform an alleged promise to borrow money. In this case, both parties agree that the money was lent. Both parties agreed on the amount of money lent. In *Sea Cove Dev., LLC*, the Court further noted "The Circuit Court found Sea Cove's claims were subject to the writing requirement of Section 37–10–107 because its members sought a loan from Harbourside for an amount in excess of $50,000." *Id.* at 106, 691 S.E.2d at 164. Here neither party is seeking a loan. The loan has been made.

The enactment of lender liability statutes of fraud was brought about when many large lenders were subject to large suits based on the alleged failure to lend money as allegedly promised. Such actions resulted in several multi-million dollar verdicts. As

one report said, "One of the principal legal developments of the past decade has been the dramatic increase in the number of lawsuits brought against banks and other lending institutions by their borrowers and the concomitant emergence of an area of law devoted to lender liability." John L. Culhane, Jr., Dean C. Gramlich, *Lender Liability Limitation Amendments to State Statutes of Frauds,* 45 BUS. LAW. 1779 (1990). *See, also Whitney Nat. Bank v. Rockwell,* 661 So. 2d 1325, 1329 (La. 1995)("These statutes were enacted primarily to limit the most frequent lender liability claims—those which involve assertions of breach of oral agreements to lend, to refinance or to forbear from enforcing contractual remedies—by requiring a writing as a prerequisite for a debtor to sue a lender and thus precluding debtors from bringing claims based on oral agreements."); *Univex Int'l, Inc. v. Orix Credit All., Inc.*, 914 P.2d 1355, 1358 (Colo. 1996) ('The legislature enacted the statute of frauds applicable to credit agreements in an effort to discourage lender liability litigation and to promote certainty in credit agreements.") Such laws were passed to make suits against the lenders for breach of contract to lend money more difficult.

The plain wording of the statute supports this concept. As applies to this case, the statute refers to "(a) to lend or borrow money." It does not refer to money borrowed or money lent. If person A lends person B money and lends it to them by a check or direct deposit to their account, the Defendant could contend that the lender of that money cannot maintain an action to collect that loan because it is not evidence by writing as required by the statute. To make this statute applicable to situations such as this case, would promote fraud and not deter it. As one author noted "Statutes of frauds are

designed to prevent the perpetration of fraud by perjury."

Stephanie J. Shafer, *Limiting Lender Liability Through the Statute of Frauds*, COLO. LAW., September 1989, at 1725. In this case, both parties admit the $210,000.00 was in fact lent by Mr. Kagan to Mrs. Simchon. No fraud by perjury exists in this case. The only dispute is whether the money was repaid.

In the alternative, the statute should not apply to a situation, such as here, where both parties admit the money was loaned and the only dispute is whether the money has been repaid. To hold otherwise would permit Mr. Kagan to be defrauded out of his money that both parties admit he lent to Mrs. Simchon. To permit the denial of his recovery on this technicality would be a miscarriage of justice. As has been said by one Court "In the early days of our jurisprudence, many actions were brought to a summary conclusion by reason of mistakes as to form. These decisions resulted frequently in miscarriages of justice. The only meritorious result of dismissing suitors on technicalities was to create a bar adept in the science of pleading. For many years the trend has properly been in the other direction. The aim of Courts and Legislatures is to abolish technicalities and enable suitors to have the merits of their controversies fully tried." *Wilson v. Dairymen's League Co-op. Ass'n*, 105 N.J.L. 188, 190, 143 A. 454, 455 (1928). The technical defense asserted by the Defendant in this case should be denied.

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 money used primarily for personal purposes and, therefore, was

exempt from the statute?

Jeffery Kagan is not a commercial lender. D. Renee Simchon is also not a commercial lender. She financed this house in an attempt to re-sell the house and make a profit. Her loan to the County Bank was a personal loan secured by the real estate. While she was in the real estate business, this loan was not in the name of her two real estate companies - Greenwood Reality and Greenwood Reality on Lake Greenwood. Rec. on App. at 299, ll 15-17. No evidence exists that the proceeds from the fund were deposited in any business account.[2]

Excluding personal loans from the operation of this statute is in keeping with its purpose. As noted above, the purpose of the statute is to protect lenders who were being sued for failure to lend money when the agreement to make the loan was not in writing. Damages from such a breach of contract, could and have exceeded millions of dollars. A personal loan does not have the potential for causing such a loss. Few, if any, collateral damages would flow from the failure to make a personal loan. If the purpose of the loan is in dispute, this would preclude the lower court from granting summary judgment. "Whether a loan is for personal or business purposes appears to be a factual question to be answered only after evaluating the circumstances surrounding the transaction." *Conrad v. Smith*, 42 Wash. App. 559, 563, 712 P.2d 866, 868 (1986).

The phrase "personal, family or household purposes" is a phrase "borrowed from

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While the testimony shows that $180,000.00 was deposited in a business account of Mrs. Simchon's husband, according to Mrs. Simchon this was done at the request of Mr. Kagan. Mr. Kagan has denied this. Regardless, placing this money in the business account of Mr. Simchon did not make the loan to Mrs. Simchon a business loan.

Section 103(h) of the Truth-in-Lending Act and should be interpreted in a manner consonant with the Act and with Section 226.2(a)(12) of its implementing regulation Z." Culhane and Gramlich, at 1795. In making this determination, the personal nature of the loan is not to be looked at from the perspective of the loan by the County Bank to Mrs. Simchon, but from the perspective of the relationship between Mr. Kagan, as lender, and Mrs. Simchon as borrower. As between these two parties, the loan was simply a personal loan to help Mrs. Simchon with the benefit to Mr. Kagan of receiving some interest on his money.

In *Tower v. Moss*, 625 F.2d 1161 (5th Cir. 1980), the Court found that the loan was personal even though the loan was on a house in which the Plaintiff had previously resided and was being renovated to make it habitable for a tenant paying a modest amount of rent. The Court said, "Under these factual circumstances evaluated in their totality, we conclude that the purpose of this credit transaction was 'primarily for personal, family, household, or agricultural purposes.' Under these facts, the Truth in Lending disclosure requirements do apply to this credit transaction." *Id* at 1166–67. In making a determination as to whether the loan is for personal purposes, this Court should also consider that under the Truth-in-Lending Act, Mr. Kagan would not qualify as a creditor. A creditor is defined as:

> [A] person who both (1) regularly extends, whether in connection with loans, sales of property or services, or otherwise, consumer credit which is payable by agreement in more than four installments or for which the payment of a finance charge is or may be required, and (2) is the person to whom the debt arising from the consumer credit transaction is initially payable on the face of the evidence of indebtedness or, if there is no such evidence of indebtedness, by agreement.

15 U.S.C. §1602 (g)

If, as the cases have said in making a determination as to whether the loan is business or personal, the totality of the circumstances must be examined. This would include the purpose by which Mr. Kagan was making the loan. According to his deposition, he was simply making a personal loan to help her pay off a loan she had with the County Bank. It was simply an accommodation to her. Rec. on App. at 58 and 117, l 7 to 118, l 2.) His intent was to simply help her out. As a Florida Court has said, "It has been held that the use of the money, property, or services which is the subject of the underlying transaction and not the subjective motivation of the borrower controls when determining whether the transaction is exempt." *Maddox v. St. Joe Papermakers Fed. Credit Union,* 572 So. 2d 961, 962–63 (Fla. Dist. Ct. App. 1990). If Mrs. Simchon believed it to be a business loan, then a factual issue exists which should be resolved by a jury.

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?

The testimony at the depositions establishes that Jeffery Kagan, after Mrs. Simchon gave the proceeds from the sale of the house to her husband, looked to Sam Simchon to pay off the loan to Mrs. Simchon. Rec. on App. at 62 and 139, l 14 to 62 and 140, l 6; 63 and 143, ll 16-19; 176, ll 18-24). This testimony creates a jury question as to whether the statute of limitations has run.

A partial payment by the debtor or her agent would toll the statute of limitations. As the South Carolina Supreme Court has said, "At trial, there was testimony of partial payment of the alleged debt which would have tolled the Statute of limitations. The existence of a partial payment then became a question of fact for the jury. It was error to grant the motion for an involuntary nonsuit with this factual issue in dispute." *Westbury v. Bauer*, 284 S.C. 385, 387, 326 S.E.2d 151, 153 (1985).

The deposition testimony establishes that Mr. Kagan stated Sam Simchon owed him money from several loans, including the loan made to Mrs. Simchon. Mr. Kagan testified that after Mrs. Simchon gave his money to her husband, he looked to him for payment. This position is supported by the fact that the $31,616.46 payment on the debt was paid from an account belonging to Mr. Simchon. Rec. on App. at 74. After that, the record establishes that numerous payments were made to Mr. Kagan up until November 6, 2013. Mr. Kagan in his documents consolidated several loans he had with Mr. Simchon. Included on the list was the loan to Mrs. Simchon. Rec. on App. at 103. No testimony in this record establishes that Mr. Simchon designated to which account the money should be paid. As a result Mr. Kagan was free to attribute the payment to any past due account he elected.

The Colorado Supreme Court was faced with, as a matter of first impression, the question of whether a creditor is entitled to attribute a payment that is not designated to any account the creditor chooses. The Court said the issue to be " If a creditor on multiple debts applies an undesignated partial payment by the debtor to a debt on which the statute of limitations has *not yet* run, will the payment toll the statute of limitations on

that debt?" *Drake v. Tyner*, 914 P.2d 519, 523 (Colo. App. 1996)(emphasis in original). The Court then concluded:

> Courts in other jurisdictions have held that when a debtor makes an undesignated payment on multiple debts before the limitations period has expired, the creditor retains the discretion to apply such payment to any debt not yet barred. Accordingly, we hold that when a creditor on multiple debts applies an undesignated partial payment by the debtor to a debt on which the statute of limitations has not yet run, the payment tolls the statute of limitations on that debt.
> *Id.* at 523 (internal citation omitted)

The same principle should be established here. At the very least, a jury question is created as to whether the statute of limitations has run.

It also matters not that the payment was made by Mr. Simchon rather than Mrs. Simchon. When Mrs. Simchon gave the money to her husband, she, by her actions, made Mr. Simchon the agent for the money. A payment by an agent also tolls the statute of limitations. "A part payment, sufficient to renew the running of the statute of limitations against a debt owing by the principal, may be made by an agent authorized to act in this respect." 51 AM. JUR. 2d *Limitation of Actions* § 338 (2017). Again, at the very least, a jury question exists as to the question of agency.

CONCLUSION

For the foregoing reasons this Court should reverse the decision of the lower court and hold that S. C. Code § 37-10-710 does not apply to a case where the loan has been completed and does not apply to the personal loan in this case. Secondly, the Court should hold that the partial payment tolled the statute of limitations in this matter.

January 22, 2018

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CERTIFICATE OF COUNSEL

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

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