THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Perry H. Gravely, Circuit Judge

Appellate Case No. 2018-002070

Wells Fargo Bank, N.A.,.....Respondent,

v.

D. Bruce Wolff,.....Appellant.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

The Respondent, Wells Fargo Bank, N.A. (hereinafter "Wells Fargo") sued the Appellant, D. Bruce Wolff (hereinafter "Wolff"), claiming that Wolff breached a line of credit agreement and that he owed Wells Fargo $70,473.34 as a result. (R. pp. ___; summons and complaint.) This is an appeal of the grant of summary judgment against Wolff in that case and the denial of Wolff's motion to reconsider the grant of summary judgment. (R. pp. ___; order granting summary judgment; order denying motion to reconsider.)

The complaint alleged that Wolff entered into the credit line with Wachovia Bank, N.A. and that Wells Fargo "is successor and [sic: in] interest to Wachovia Bank, N.A." (R. pp. ___; complaint p. 1.) Wells Fargo attached what it claimed to be one document, as Exhibit A to its complaint, that appears actually to be a combination of three documents – an unsigned Wachovia "Business BankLine Note and Agreement[,]" a signed "Statement of Purpose for an Extension of Credit Secured by Margin Stock (Federal Reserve Form U-1)[,]" and what seems to be a signed "South Carolina – Line of Credit Direct Advance" Wachovia receipt. (R. pp. ___; complaint p. 1 & Exh. A.) Wells Fargo also attached a two-page document as Exhibit B to its complaint, labeled "Your Wells Fargo BusinessLine Authorization Form" and signed by Wolff and dated November 29, 2010. (R. pp. ___; complaint p. 2 & Exh. B.) Wells Fargo alleged that the authorization form document "convert[ed] the business line of credit from Wachovia Bank., N.A. to a Wells Fargo Bank, N.A. Business Line of Credit." (R. pp. ___; complaint p. 2.)

The Wachovia note and agreement document contains the following language:

Finance Charge (Interest). The Borrower agrees to pay a Finance Charge calculated under the formula set out in the Variable Rate paragraph below. There will be no Finance Charge until a loan is made on the Account and then a Finance Charge will be imposed on the average of the daily principal balances outstanding on the Account (average daily balance) for the number of days in the billing cycle. The Finance Charge will be calculated for the entire billing cycle based on the periodic rate in effect at the end of the billing cycle. (a) The Finance Charge on each advance to the Account begins to accrue on the date of each such advance. No time period exists within which any credit extended may be repaid without incurring a Finance Charge. (b) The interest rate applicable to the Account will increase if the lowest Prime Rate listed in the Money Rate section of the Eastern Edition of *The Wall Street Journal* increases. If *The Wall Street Journal* Prime Rate decreases the interest rate will be reduced. (c) The Lender computes the Finance Charge on the Account by applying the periodic rate to the average daily balance of the Account (including current transactions). The daily balance of the Account is computed at the end of each banking day by deducting from the previous daily balance the amount of all payments, credits, unpaid Finance Charge, and delinquency charges, and adding the amount of any new loans to determine the daily balance. The daily balances for the billing cycle are added up and the total divided by the number of days in the billing cycle. This result is the average daily balance. (d) The amount of the Finance Charge will be determined (monthly when the Account statement is rendered) by multiplying the average daily balance by the number of days in the billing cycle, and by multiplying the product by the daily periodic rate.

Variable Rate: The Annual Percentage Rate for each billing cycle will be 0.5000 % in excess of the lowest Prime Rate listed in the Money Rate section of the Eastern Edition of *The Wall Street Journal* as of five (5) banking days before the beginning of the calendar month during which the billing cycle begins (the "*WSJ* Prime Rate"). The periodic payment will increase if the *WSJ* Prime Rate increases unless the periodic payment is the minimum amount. There is no limitation on such increase except such limitations as may be imposed by law. If the Account is declared due and payable upon

> default, the Lender will compute the Finance Charge for each billing cycle at a rate per annum equal to 18.0% not to exceed the maximum rate permitted by applicable law.
>
> . . .
>
> **Security Interest.** . . . to secure the indebtedness evidence by this Agreement, together with any extensions, modifications, or renewals thereof, in whole or in part, as well as all other indebtedness, obligations and liabilities of the Borrower to the Lender, no existing or hereafter incurred or arising (hereinafter sometimes referred to as the "Obligations"), the Borrower and all other pledgors of the Collateral to this Agreement (hereafter collectively the "Pledgor") hereby grants to the Lender a security interest in and security title to, and hereby assign, pledge, transfer and convey to the Lender the following described property:
>
> Collateral more particularly described in Securities Pledge Agreement dated April 14, 1999 between Borrower and Lender

(R. pp. ___; complaint Exh. A.)

The Wells Fargo authorization form says nothing about changing the interest terms of the Wachovia credit line. (R. pp. ___; complaint Exh. B.)

Wolff answered, *pro se*, asserting that Wells Fargo had incorrectly taken the position that it had changed the terms of the credit line. (R. pp. ___; answer.) Wolff's answer stated that he "has repeatedly asked for, but not received[,]" a full and itemized accounting concerning how Wells Fargo applied payments on the credit line, and he prayed for an accounting in his answer. (R. pp. ___; answer pp. 2, 3.)

Wells Fargo served and filed a motion for summary judgment, along with an affidavit of a Wells Fargo employee named Amanda Layton. (R. pp. ___; motion for summary judgment; affidavit of Layton.) Exhibit C to that affidavit contains the same two-page authorization form that was Exhibit B to Wells Fargo's complaint but also

contains two documents, which the affidavit does not purport to authenticate in any way, labeled as a Wells Fargo "BusinessLine Customer Agreement Effective April 1, 2010" and a Wells Fargo "BusinessLine Customer Agreement Effective August 1, 2013[.]" (R. pp. ___; affidavit of Layton Ex. C.) Layton's affidavit also stated "[t]hat the Defendant continued to utilize the line of credit and continued to make purchases and payments up to and including October 30, 2015[,]" and "[t]hat the last payment received by the Defendant was on October 30, 2015 as evidence by the monthly invoice attached hereto as Exhibit D." (R. pp. ___; affidavit of Layton p. 1.) The affidavit ends with the statement "[t]hat there is currently due and owing the amount of $70,473.34 in unpaid charges on the line of credit" but contains no calculations or other explanation of how that figure was determined. (R. pp. ___; affidavit of Layton p. 2.)

Wolff served and filed a document styled as "Answer of Defendant D. Bruce Wolff to Motion for Summary Judgment Filed by Plaintiff" with which he provided four pages of monthly account statements for the credit line sent to him by Wells Fargo. (R. pp. ___; answer to motion for summary judgment & Exh. A.) Wolff described the account statements "as an example of material fact of this dispute and why Wells Fargo Bank, N.A. can make national headline news." (R. pp. ___; answer to motion for summary judgment p. 1.) The statements, which range from 2012 to 2015, show Wells Fargo's use of an "annual interest rate" that increased over time, from 3.75 percent to 7.25 percent. (R. pp. ___; answer to motion for summary judgment Exh. A.) The statements also showed the amount of the monthly payment stated to be due increasing, from $331.00 in May of 2012 to $1,191.00 in February of 2015. (R. pp. ___; answer to motion for summary judgment Exh. A.)

Wells Fargo filed a document entitled "Supplemental Affidavit of Erica Mendoza"[1] that attached some letters from Wells Fargo to Wolff, along with the same exhibits that were attached to Layton's affidavit. (R. pp. ___; affidavit of Mendoza & exhs.) Though the Mendoza affidavit did not distinguish between the 2010 and 2013 customer agreement documents, which were still presented as part of Exhibit C to the affidavit, it did identify "the BusinessLine Customer Agreement with Wells Fargo effective April 1, 2010" as being "attached hereto as Exhibit C[.]" (R. pp. ___; affidavit of Mendoza p. 1.)

That customer agreement document contains a provision for calculating the finance charge, i.e., interest, thereunder at the Wells Fargo Prime Rate, set by Wells Fargo, and provides as follows:

> . . . Use of the Account, SUPERCHECKS drafts or a BusinessLine MasterCard card ("BusinessLine Card"), or a request for a transfer from the Account by anyone authorized by the Customer, shall be evidence the Customer's acceptance of the terms and conditions of this Agreement, including but not limited to applicable Finance Charges and Other Charges. . . .
>
> . . .
>
> **WHEN FINANCE CHARGE BEGINS.** The Periodic Finance Charge for Purchases and Advances begins on the date the transaction was made.

(R. pp. ___; affidavit of Mendoza Exh. C April 1, 2010, agreement document p. 1, 3-4.)

Like Layton's affidavit, Mendoza's affidavit ends with the statement "[t]hat there is currently due and owing the amount of $70,473.34 in unpaid charges on the

[1] No other affidavit of Erica Mendoza had ever been filed.

line of credit" but contains no calculations or other explanation of how that figure was determined. (R. pp. ___; affidavit of Mendoza p. 2.)

Wolff served and filed an affidavit in opposition to Wells Fargo's motion. (R. pp. ___; affidavit of Wolff.) In it, Wolff noted that Wells Fargo had not produced a signed copy of the agreement that created the credit line account. (R. pp. ___; affidavit of Wolff p. 1.) Wolff also stated as follows:

> I contest because I did not utilize the line of credit to make any purchases after November 29, 2010. I did not agree to accept any terms or conditions that suggest I authorized Wells Fargo to change the interest rate spread at the Bank's sole discretion nor did I agree to any changes at any time at the sole discretion of a financial business regulated by the Office of the Controller [sic] of the Currency. The first paragraph of the BusinessLine Customer Agreement Effective April, 2010 clearly states that "Use of the Account[,] SUPERCHECKS drafts or a BusinessLine Mastercard card (BusinessLine Card) or a request for a transfer from the Account by anyone authorized by the Customer, shall be evidence the Customers acceptance of the terms and conditions of this Agreement . . .["]
>
> . . .
>
> The first paragraph of the BusinessLine Customer Agreement Effective APRIL 1, 2010 is very clear and is the same information I received from [Wells Fargo Vice-President, Business Direct Line of Credit] Steve Milani's letters and from the telephone call center. (see below)
>
> I contest, because I never agreed to the new terms.
>
> I contest, because I did not utilize the line of credit to make any purchases after November 29, 2010 and I did not agree to any new terms that changed the interest rate, the APR, or the Spread.
>
> . . .

I contest because I did not agree to anything beyond Wall Street Journal published rate plus .50[.]

. . .

Wells Fargo lost over 1/8 of one million dollars ($125,000) in . . . pledged certificates and failed to acknowledge it or make any entry.

. . .

In May 2010 I received a letter from Steve Milani . . . informing me I would see important changes to the Wachovia Business Line of Credit ending in 4266 beginning in June. The letter referred to the reverse side plus an Addendum that did not exist. . . . There is no language that relates to interest Rate change from prime + .50, APR, or interest rate Spread.

. . .

I received a Letter dated September 29, 2010 from Steve Milani . . . telling me I am being converted to a Wells Fargo Business Line of Credit during the weekend October 9, 2010 and that my account number will not change. However, on the second page it clearly says – Unless noted the original loan agreement will still apply, but use of any checks or transfer shall be evidence of Acceptance of some sort of Addendum terms and conditions of something that is not listed with this letter or the previous letter. <u>There is no mention of interest rate, APR, or changes in the interest rate spread.</u>

I Called the 800-number listed on the letter and asked to speak with Steve Milani. He was not available. I was told that the account would be converted automatically, but that I must sign the authorization form immediately and return by December 1, 2010 or the account would be terminated or that the payments would increase drastically or that there would be a demand payment. I became very concerned about drastic changes because I worked so hard to negotiate the prime + .50 interest rate and that all financial conditions are subject to change, but I was assured that unless I made any advances or used any new unwanted checks or credit card that the original agreement would apply as stated in the letter from Steve

> Milani dated September 29, 2010. . . . I signed the authorization form expecting a more formal agreement to arrive later. There is no mention of interest rate, APR, or changes in interest rate spread.
>
> . . .
>
> Next letter from Steve Milani is April 19, 2011 welcoming me to a new account with a new account number and talking about providing unwanted checks and an unwanted Mastercard. There is no mention of interest rate, APR, or changes in interest rate spread.

(R. pp. ___; affidavit of Wolff pp. 1-4.) The Milani letters referred to are attached to Wolff's affidavit. (R. pp. ___; affidavit of Wolff, letter exhs.)

Wells Fargo's motion was heard on August 6, 2018. (R. pp. ___; transcript p. 1.) In response to Wells Fargo's argument that Wolff was liable for changes interest rate terms, Wolff responded that "the other authorization form [i.e., the Wells Fargo authorization form], I never did advance any monies. There were no considerations. They told me if I didn't do that, then that signed authorization form would be null and void." (R. pp. ___; transcript p. 10 ln. 18-21.) Wolff stated that "there is a material fact about a contract dispute[.]" (R. pp. ___; transcript p. 12 ln. 7-8.) He stated twice that he intended to move to amend his pleadings and once that he would like to conduct some discovery. (R. pp. ___; transcript p. 10 ln. 24, p. 12 ln. 8-10, 13-14.)

The circuit court granted Wells Fargo's motion for summary judgment and gave judgment for Wells Fargo in the amount of $70,473.34. (R. pp. ___; order granting motion for summary judgment.) The order granting summary judgment states, among other things:

> That Defendant admits in his affidavit that he executed the Authorization Form and utilized the Line of Credit after transition to Wells Fargo.

> . . .
>
> That the Defendant continued to utilize the Line of Credit and continue to make purchases and payments up to and including October 30, 2015.
>
> . . .
>
> The court finds as a fact that the Plaintiff has met its burden of proof in this breach of contract action by establishing the contract, its breach and the damages caused by such breach.
>
> . . .
>
> The Court finds as a fact that the affidavit of the Defendant is insufficient to create a genuine issue of fact necessary to defeat Plaintiff's Motion for Summary Judgment due to a total absence of competent evidence showing that Defendant did not enter into the BusinessLine Line of Credit and thereafter utilize the Line of Credit with Plaintiff or that the sum sought by Plaintiff is inaccurate.
>
> At the Motion for Summary Judgment hearing, the Defendant indicated to the court that he intended to amend his answer to assert a counterclaim, however, the Defendant filed his initial pro se answer on July 24, 2017 and obtained a continuance at the first Motion for Summary Judgment hearing on May 22, 2018 indicating that he desired counsel, which he did not. The court finds as a fact therefore that the Defendant has unreasonably delayed in seeking to amend his pleadings and that any amendment would prejudice Plaintiff.

(R. pp. ___; order granting motion for summary judgment pp. 1, 2-3.)

Wolff obtained counsel and timely moved the circuit court to reconsider its order. (R. pp. ___; motion to reconsider.) The court denied the motion to reconsider. (R. pp. ___; order denying motion to reconsider.)

This appeal followed.

STANDARD OF REVIEW

Summary judgment. When reviewing the grant of a summary judgment motion, this court applies the same standard that governs the trial court under Rule 56(c), SCRCP. Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). That standard is that "summary judgment may be rendered only when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Additionally, it must be shown that further inquiry into the facts of the case is not desirable to clarify the application of the law." Folkens v. Hunt, 290 S.C. 194, 196, 348 S.E.2d 839, 841 (Ct. App. 1986).

"All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party. 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." Nelson v. Charleston County Parks & Recreation Comm., 362 S.C. 1, 605 S.E.2d 744 (Ct. App. 2004). If "the parties vehemently dispute the inferences and conclusions to be drawn from the undisputed facts, . . . that simply establishes that summary judgment is not appropriate[.]" Montgomery v. CSX Transp., Inc., 656 S.E.2d 20, 29 (S.C. 2008).

"When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party. Moreover, since it is a drastic remedy, summary judgment should be cautiously invoked so that a litigant will not be improperly deprived of a trial on disputed factual

issues." Englert, Inc. v. LeafGuard USA, Inc., 377 S.C. 129, 133-34, 659 S.E.2d 496, 498 (2008).

In 2009, the South Carolina Supreme Court clarified earlier confusion about whether a scintilla of evidence is sufficient to defeat summary judgment. Hancock v. Mid-South Management Co., Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 802-3 (2009). In Hancock, the Court held that "in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." Id. More than a scintilla is required only in cases requiring heightened burdens of proof or applying federal law. Id. Accordingly, when the ordinary burden of proof is applicable, only a scintilla of evidence is required to withstand summary judgment. Id.

"Because summary judgment is a drastic remedy, it must not be granted until the opposing party has had a full and fair opportunity to complete discovery." Schmidt v. Courtney, 357 S.C. 310, 592 S.E.2d 326 (Ct. App. 2003) (internal quotation marks omitted); accord Lanham v. Blue Cross and Blue Shield of South Carolina, Inc., 349 S.C. 356, 363, 563 S.E.2d 331, 334 (2002); Doe v. Batson, 345 S.C. 316, 322, 548 S.E.2d 854, 857 (2001); Baughman v. American Telephone and Telegraph Co., 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991).

Motion to amend. Leave to amend a pleading shall be freely given when justice so requires and the grant of such leave does not work prejudice to the other party. Rule 15, SCRCP, strongly favors amendment, and courts are encouraged to freely grant leave to amend. Stanley v. Kirkpatrick, 357 S.C. 169, 174, 592 S.E.2d 296, 298 (2003). While motions to amend are addressed to the sound discretion of the trial

court, the party opposing amendment has the burden of establishing that the motion should not be granted. Foggie v. CSX Transportation, Inc., 313 S.C. 98, 103, 431 S.E.2d 587, 590 (1993). To successfully oppose a motion to amend, the party opposing the motion must establish that it would be prejudiced by the amendment. Stanley, 357 S.C. at 174. "The prejudice Rule 15 envisions is a lack of notice that the new issue is to be tried and a lack of opportunity to refute it." Id.

"An abuse of discretion occurs when the conclusions of the trial court are either controlled by an error of law or are based on unsupported factual conclusions." In re: Care and Treatment of Miller, 393 S.C. 248, 256, 713 S.E.2d 253, 257 (2011).

ARGUMENT

I. Summary judgment was precluded by a genuine issue of material fact about whether Wolff agreed to Wells Fargo's purported changes to the terms of the credit line.

There is nothing "that allows a party to alter the terms of a bilateral contract by unilateral modification." Sauner v. Pub. Serv. Auth., 354 S.C. 397, 405, 581 S.E.2d 161 (2003). "Once the bargain is formed, and the obligations set, a contract may only be altered by mutual agreement and for further consideration." Layman v. State, 368 S.C. 631, 630 S.E.2d 265, 269 (2006); Lee v. Univ. of S.C., 407 S.C. 512, 757 S.E.2d 934 (2014) (quoting Layman). "[O]ne party to a contract may not unilaterally alter its terms." 17A Am. Jur. 2d Contracts § 507. An "agreement" that can have its terms changed by one party's unilateral fiat is not an agreement at all. See id.

Accordingly, if the terms of the credit line were modified in this case, it was only to the extent agreed upon by the parties and for further consideration. The parties here agreed that Wells Fargo's new interest rate would apply, but to transactions in

which the customer (here, Wolff) drew on the line of credit after the execution of the Wells Fargo account authorization form, not to apply retroactively to transactions in which the customer had already used the credit line before the form was executed. (R. pp. ___; affidavit of Mendoza Exh. C April 1, 2010, agreement document p. 1, 3-4.) The language in the 2010 customer agreement bears this out. (R. pp. ___; affidavit of Mendoza Exh. C April 1, 2010, agreement document p. 1, 3-4.) After describing the new periodic finance charge (i.e., interest rate) that will be applicable going forward, the agreement document states that "[t]he Periodic Finance Charge for Purchases and Advances begins on the date the transaction was made." (R. pp. ___; affidavit of Mendoza Exh. C April 1, 2010, agreement document p. 3-4.) In other words, for each new transaction in which the customer uses the credit line after signing on to have Wells Fargo administer the account, the new Wells-Fargo-prime-rate interest rate applies. (R. pp. ___; affidavit of Mendoza Exh. C April 1, 2010, agreement document p. 3-4.) This is consistent with the language in the beginning of the agreement document that provides that "*[u]se* of the Account, SUPERCHECKS drafts or a BusinessLine MasterCard card ("BusinessLine Card"), or a request for a transfer from the Account by anyone authorized by the Customer, shall be evidence the Customer's acceptance of the terms and conditions of this Agreement[.]" (R. pp. ___; affidavit of Mendoza Exh. C April 1, 2010, agreement document p. 1) (emphasis added).

If there is any doubt about how the agreement document should be interpreted, all ambiguities are to be resolved against Wells Fargo, who created the document, and in favor of Wolff, the non-drafting party. It is well settled that ambiguous language in a contract document should be interpreted strongly in favor of the party who did not

draft the document and against the party who did. E.g., So. Atlantic Financial Servs., Inc. v. Middleton, 356 S.C. 444, 447, 590 S.E.2d 27, 29 (2003); Mid-Continent Refrigerator Co. v. Way, 263 S.C. 101, 109, 208 S.E.2d 31, 35 (1974). Any conflict between clauses or other ambiguity in a contract must be resolved in favor of the non-drafting party. Mid-Continent Refrigerator, 263 S.C. at 109. If ambiguity in the agreement document shows that it could mean that the new interest rate would apply only if Wolff used the credit line going forward, Wolff is entitled to the benefit of that interpretation at summary judgment. So. Atlantic Financial Servs., 356 S.C. at 447; Mid-Continent Refrigerator, 263 S.C. at 109; Nelson, 362 S.C. 1. That is a reasonable interpretation of the contractual language at issue.

That the change to interest rate terms applies only if the customer draws on the credit line going forward is also consistent with what Wells Fargo personnel told Wolff when they wrote him about it and when they spoke about it. (R. pp. ___; affidavit of Wolff p. 4 & Sept. 29, 2010, letter exh.) "The conduct of the parties is entitled to great weight in interpreting an ambiguous contract." Langston v. Niles, 265 S.C. 445, 458, 219 S.E.2d 829, 834 (1975). In cases of doubt, the interpretation of a contract that the evidence shows was shared by both parties to it is determinative. Kitchens v. Lee, 221 S.C. 59, 66, 69 S.E.2d 67, 69 (1952). Here, the evidence indicates that, at the time that Wolff signed the Wells Fargo authorization form, both he and Wells Fargo interpreted the agreement to mean that the new interest rate applied only to future uses of the credit line by Wolff. (R. pp. ___; affidavit of Wolff p. 4.)

And, as he always maintained throughout the case, Wolff never drew down on the line of credit after signing the Wells Fargo authorization. (R. pp. ___; affidavit of

Wolff pp. 1, 2; transcript p. 10 ln. 18-21.) Twice in his affidavit, Wolff states "I did not utilize the line of credit to make any purchases after November 29, 2010." (R. pp. ___; affidavit of Wolff pp. 1, 2.)

The presence of these facts in the record is quite significant. The show the existence of a genuine issue of truly material fact. As the Mendoza affidavit makes plain and outright states, Wells Fargo applied the Wells-Fargo-prime-rate interest formula to increase the interest rate on the balance of the credit line. (R. pp. ___; affidavit of Mendoza.) Under the terms of the parties' agreement, however, Wells Fargo was not permitted to do that unless Wolff used the credit line after November 29, 2010. "It is an elementary principle that one who seeks to recover damages for the breach of a contract, to which he was a party, must show that the contract has been performed on his part, or at least that he was at the appropriate time able, ready, and willing to so perform it." Parks v. Lyons, 219 S.C. 40, 48, 64 S.E.2d 123, 126 (1951); accord Hyder v. Metro. Life Ins. Co., 183 S.C. 98, 190 S.E. 239, 244 (1937); 17A Am. Jur. 2d Contracts §§ 704, 719, 737-38, 740; Ralph King Anderson, Jr., South Carolina Requests to Charge – Civil, 2002, §§ 19-18, 19-19, 19-21. Viewing the record in the light most favorable to Wolff, the court should have concluded that Wolff could prevail in the case because Wells Fargo, being in breach of the agreement first, was not entitled to recover for any later breach of the contract by Wolff.

Moreover, this factual dispute shows that Wells Fargo has not proven all the terms of the agreement. "It is elemental, and requires no citation of authority for the proposition that before a party can recover for the breach of a contract, that he must allege and prove by competent, relevant testimony each one of the material elements

of the contract sued on." Rabon v. State Finance Corp., 203 S.C. 183, 185, 26 S.E.2d 501, 502 (1943); accord Ringer v. Graham, 293 S.C. 238, 359 S.E.2d 523 (Ct. App. 1987) (burden on plaintiff to prove all terms essential to creation of a contract). Wells Fargo did not prove what interest terms were applicable.

This record shows the existence of a genuine issue of material fact, and it was reversible error for the circuit court to grant summary judgment.

II. The circuit judge should have allowed Wolff to amend his pleadings.

The party opposing a proposed amendment of a pleading has the burden of establishing that the motion should not be granted. Foggie, 313 S.C. at 103. To successfully oppose a motion to amend, the party opposing the motion must establish that it would be prejudiced by the amendment. Stanley, 357 S.C. at 174. "The prejudice Rule 15 envisions is a lack of notice that the new issue is to be tried and a lack of opportunity to refute it." Id.

Here, the circuit court decided that delay by Wolff in seeking to amend constituted prejudice to Wells Fargo. (R. pp. ___; order granting summary judgment p. 3.) That was reversible error. "Delay in seeking leave to amend pleadings, regardless of the length of delay, will not ordinarily be held to bar an amendment in the absence of a finding of prejudice." Forrester v. Smith & Steele Builders, 295 S.C. 504, 508, 369 S.E.2d 156, 159 (Ct. App. 1988). Delay is not prejudice, id.; rather, "[t]he prejudice Rule 15 envisions is a lack of notice that the new issue is to be tried and a lack of opportunity to refute it." Stanley, 357 S.C. at 174. Wells Fargo did not demonstrate that, nor does the record show it.

Our Supreme Court recently noted that "[u]nder Rules 12(b)(6) and 15(a), the circuit court may not dismiss a claim with prejudice unless the plaintiff is given a meaningful chance to amend the complaint, and after considering the amended pleading, the court is certain there is no set of facts upon which relief can be granted." Skydive Myrtle Beach, Inc. v. Horry County, Op. No. 27867 (S.C. Sup. Ct. App. filed March 13, 2019) (Shearouse Adv. Sh. No. 11 at 27, 37). There is no reason for motions for summary judgment to be treated differently.

III. The record showed the existence of genuine issues of material fact about Wells Fargo's failure to mitigate damages and its unclean hands.

If Wolff were permitted to amend and assert defenses like failure to mitigate damages and unclean hands, the existence of genuine issues of material fact would become even more apparent.

Unclean hands "must be understood to refer to some misconduct in regard to the matter in litigation of which the opposite party can, in good conscience, complain in a Court of equity." Arnold v. City of Spartanburg, 201 S.C. 523, 23 S.E.2d 735, 738 (1943). Here, Wells Fargo did at least three things that, viewed in the light most favorable to Wolff, show a fact issue about whether an unclean hands defense applies. Wells Fargo told Wolff that the Wells Fargo prime rate interest calculation method would only apply if he used the credit line going forward, then turned around and applied that method even though he did not. (R. pp. ___; affidavits of Wolff, Layton, and Mendoza.) Wells Fargo refused to give Wolff an accounting of how it calculated the interest rate and applied payments. (R. pp. ___; answer; affidavit of Wolff.) Wells Fargo also failed to safeguard the stock certificates in its possession that served as

collateral for the credit line and were worth more than enough to pay it off. (R. pp. ___; affidavit of Wolff.)

Further, Wells Fargo's failure to safeguard the stock certificates that served as collateral gives rise to a failure to mitigate damages defense. E.g., Small v. Springs Industries, Inc., 300 S.C. 481, 388 S.E.2d 808 (1990) (obligation to mitigate damages).

IV. The circuit judge erred in granting summary judgment before Wolff had engaged in discovery.

Wolff stated his desire to engage in discovery about the facts of this case. (R. pp. __; transcript p. 12 ln. 13-14.) It is well established that summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery. Lanham, 349 S.C. at 363; Batson, 345 S.C. at 322; Baughman, 306 S.C. at 112; Schmidt, 357 S.C. 310. In the absence of discovery, summary judgment will not be granted unless the opposing party has procrastinated in making use of discovery methods or extraordinary circumstances exist. Baird v. Charleston County, 333 S.C. 519, 529, 511 S.E.2d 69, 75 (1999).

In Baughman, our Supreme Court, in determining that a grant of summary judgment should be reversed because the plaintiffs had not had a full and fair opportunity to complete discovery, "acknowledge[d] that more than three years elapsed between the filing of these actions and the final granting of partial summary judgment as to personal injury." Here, nothing like that length of delay in engaging in discovery had occurred.

It was reversible error for the circuit court to grant summary judgment against Wolff without allowing him to engage in discovery first.

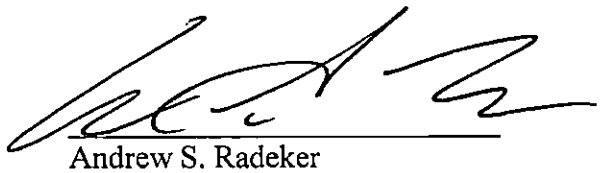
V. The record does not contain sufficient material to establish the absence of a true factual dispute about the amount Wells Fargo claims to be owed.

The Mendoza and Layton affidavits do not establish all applicable interest rate changes, when they occurred, whether they adhered to whichever formula was the proper one, or even how much of the debt that the circuit court adjudged to be due Wells Fargo was principal and how much was interest. (R. pp. ___; affidavits of Layton and Mendoza.) Even if Wells Fargo were entitled to some form of summary judgment, which it was not, that would be a partial summary judgment on liability only, not one that determined that Wells Fargo had established the debt amount it only summarily claimed. Rule 56(c), SCRCP.

CONCLUSION

There were genuine issues of material fact here that precluded the grant of summary judgment the circuit court made in favor of Wells Fargo. For multiple reasons, the circuit court erred, in important and reversible ways. This court should correct that error, reverse the grant of summary judgment and the denial of Wolff's motion to amend, and remand this case for further proceedings.

Respectfully submitted,



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July 8, 2019

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Perry H. Gravely, Circuit Judge

Appellate Case No. 2018-002070

Wells Fargo Bank, N.A.,.....Respondent,

v.

D. Bruce Wolff,.....Appellant.

PROOF OF SERVICE

I certify that I served the foregoing initial brief of appellant in this case by depositing a copy of it on the date shown below in the United States Mail, postage prepaid, addressed as follows:

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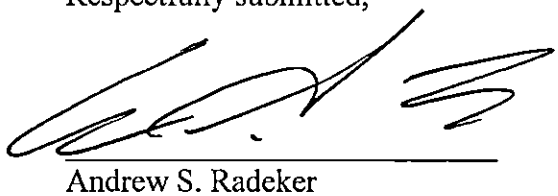
July 8, 2019

Respectfully submitted,



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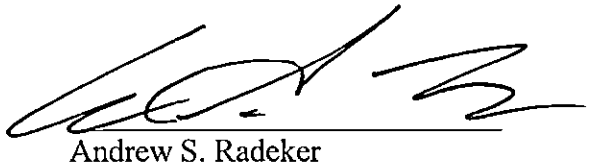

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