

**THE STATE OF SOUTH CAROLINA  
In the Court of Appeals**

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**APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas**

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**Perry H. Gravely, Circuit Judge**

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**Appellate Case No.: 2018-002070**

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

**v.**

**D. Bruce Wolff.....Appellant**

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**INITIAL BRIEF OF RESPONDENT**

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**B. LINDSAY CRAWFORD, III SC BAR # 6510  
THEODORE VON KELLER SC BAR # 5718  
SARA C. HUTCHINS SC BAR # 72879  
B. LINDSAY CRAWFORD, IV SC BAR # 101707  
CRAWFORD & VON KELLER, LLC  
POST OFFICE BOX 4216  
COLUMBIA, SOUTH CAROLINA 29240  
(803) 790-2626  
ATTORNEYS FOR RESPONDENT**

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**STATEMENT OF ISSUE ON APPEAL**

- I. **Did the court err in granting Wells Fargo summary judgment when there was no genuine issue regarding any material fact and Wolff admitted in his pleadings that he had obtained the Business Line of Credit, admitted that he utilized the Business Line of Credit and failed to set forth any specific facts showing that there was a genuine issue for trial.**

## STATEMENT OF THE CASE

Respondent, Wells Fargo Bank, NA (hereinafter “Wells Fargo”) filed a complaint seeking collection of a debt on a business line of credit in the amount of \$78,000 as to Appellant D. Bruce Wolff (hereinafter referred to as “Wolff”) on June 22, 2017. (R.p. \_\_\_) The complaint was personally served on Wolff on June 25, 2017. (R.p. \_\_\_\_\_) Wolff filed a pro se answer to the Complaint on July 24, 2017 (R.p. \_\_\_)

On February 14, 2018, Wells Fargo filed its motion for summary judgment supported by the affidavit of Amanda Layton. (R.p. \_\_\_) Wolff responded to the motion for summary judgment by filing a document entitled “Answer to Motion for Summary Judgment” on February 23, 2018. (R.p. \_\_\_) On April 12, 2018, Wells Fargo filed the supplemental affidavit of Erica Mendoza in support of its motion for summary judgment (hereinafter referred to as “Mendoza affidavit”) (R.p. \_\_\_)

Wells Fargo’s motion for summary judgment was heard by The Honorable Allison Renée Lee on May 22, 2018. By Order dated May 22, 2018 and filed May 23, 2018, The Honorable Allison Renée Lee ordered Wolff to “obtain counsel within 30 days, not later than June 22, 2018 or proceed pro se.” (R. p. \_\_\_)

Wells Fargo’s motion for summary judgment was rescheduled for Monday, August 6, 2018. Wolff was provided notice of the rescheduled hearing by Notice of Hearing dated July 22, 2018. (R. p. \_\_\_)

On Friday, August 3, 2018, Wolff, proceeding pro se, filed an affidavit in opposition to the motion for summary judgment. (R. p. \_\_\_)

On Monday, August 6, 2018, Theodore von Keller appeared on behalf of Wells Fargo and Wolff once again appeared pro se. (R. p. \_\_\_) After consideration of the pleadings and

arguments of the parties, The Honorable Perry H Gravely granted Wells Fargo's motion summary judgment. (R p. \_\_\_)

Appellant Wolff moved to alter or amend the grant of summary judgment on August 24, 2018, which was denied by order entered November 1, 2018. (R p. \_\_\_)

Appellant Wolff filed his notice of appeal on November 20, 2018. (R p. \_\_\_)

### **STATEMENT OF FACTS**

On April 14, 1999, Wolf obtained a line of credit with Wachovia Bank in the amount of \$78,000 pursuant to the terms of the Business BankLine Note and Agreement. The line of credit had a variable rate of interest. (Mendoza Affidavit R. p. \_\_\_ ) Immediately thereafter on April 15, 1999, Wolff utilized the line of credit to take a direct advance in the amount of \$78,000.

In 2010, Wells Fargo acquired the assets of Wachovia Bank and transitioned all Wachovia accounts to Wells Fargo. (Mendoza Affidavit R p. \_\_\_ ) In order for the previous Wachovia account to be accepted by Wells Fargo, Wolff was provided with an authorization form setting forth the new terms and conditions of the Wells Fargo BusinessLine line of credit. (Mendoza Affidavit R. p. \_\_\_ ) Wolff executed the Wells Fargo BusinessLine authorization form on November 29, 2010. By executing the Wells Fargo BusinessLine authorization form Wolff certified that he had read and agreed with the terms and conditions on the reverse side of the authorization form including the personal guarantee. (Mendoza Affidavit R. p. \_\_\_)

In regards to the interest rate on the new Wells Fargo line of credit, the terms and conditions specified that in regards to a line of credit with a variable rate of interest, such as Wolff's, the variable rate, "... will be determined for each monthly billing cycle by taking the highest Wells Fargo Prime Rate in effect during the Determination Date Range and adding a Spread. The Bank initially determines your Spread based on the evaluation of your credit risk.

The Bank may subsequently change the Spread at Bank's sole discretion" (Mendoza Affidavit R. p.\_\_\_\_)

Wolff continued to utilize the line of credit and make payments up to and including October 30, 2015. (Mendoza Affidavit R.p.\_\_\_\_) On May 4, 2012, Wolff's monthly statement advised him that beginning with the June 2012 statement, a new interest rate would apply. (Mendoza Affidavit R.p.\_\_\_\_) Contemporaneously with the May 4, 2012 letter, Mr. Wolff was informed that the interest rate was going to increase and that he could elect to either close the account, pay it off or except the new terms. (Mendoza Affidavit R.p.\_\_\_\_)

On June 5, 2012, the monthly statement reflected an increase in the interest rate from 3.75% to 6.25%. The balance at that time on the account was \$74,940.26. (Mendoza Affidavit R. p.\_\_\_\_)

The September 4, 2013, statement advised Mr. Wolff that beginning with the October 2013 statement, the new interest rate would apply. (Mendoza Affidavit R.p.\_\_\_\_) The October 3, 2013 statement reflected an increase in the annual interest rate from 6% to 7.25%. (Mendoza Affidavit R.p.\_\_\_\_)

On December 16, 2015, the Wells Fargo prime rate increased by .25% and, effective with the January 5, 2016 statement, Wolff's interest rate was increased from 7.25% to 7.5%. (Mendoza Affidavit R.p.\_\_\_\_)

The last payment received on the account was October 30, 2015, at which point the outstanding balance was \$68,083.13 and the account was closed by statement dated November 4, 2015. (Mendoza Affidavit R.p.\_\_\_\_)

Wells Fargo commenced this collection action on June 22, 2017 seeking judgment in the amount of \$70,473.34. (R.p.\_\_\_\_) Wolff filed a pro se answer on July 24, 2017. (R. p.\_\_\_\_)

Eight months after filing the complaint, Wells Fargo moved for summary judgment based on the affidavit of Amanda Layton. (R.p.\_\_\_\_\_) Nine days later on February 23, 2018, Wolff responded to the motion for summary judgment by filing a document entitled “Answer to Motion for Summary Judgment” in which he indicated his intention to hire legal counsel. (R. p.\_\_\_\_\_)

On April 12, 2018, Wells Fargo filed the supplemental affidavit of Erica Mendoza in support of its motion for summary judgment. (R.p.\_\_\_\_\_) The affidavit, with extensive exhibits, specifically detailed Wolff’s opening of the Business Bankline of Credit from Wachovia Bank on April 14, 1999, Wolff’s utilization of the line of credit on April 15, 1999 in the amount of \$70,000, the acquisition of the line of credit account by Wells Fargo in 2010 and the execution of the new Wells Fargo Business Line of Credit Customer Agreement by Wolff on November 29, 2010, whereby Wolff agreed to the new terms from Wells Fargo. (Mendoza affidavit R.p.\_\_\_\_\_) Ms. Mendoza’s affidavit further detailed the fact that the new Wells Fargo business line of credit was subject to a variable interest rate and attached notices of the increases in the interest rate and monthly statements reflecting the increases of the interest rate from 2012 up to October 30, 2015. (Mendoza affidavit R.p.\_\_\_\_\_) Ms. Mendoza’s affidavit further stated that the past due amount was a liquidated amount in the sum of \$70,473. (Mendoza affidavit R. p.\_\_\_\_\_)

On May 22, 2018, the motion for summary judgment came before The Honorable Allison Renée Lee. (R.p.\_\_\_\_\_) Mr. Wolff and counsel who had not been retained appeared at the hearing and requested a continuance so that Wolff might obtain legal counsel. (R.p.\_\_\_\_\_) By Order dated May 23, 2018, The Honorable Allison Renée Lee ordered Wolff to retain counsel by June 22, 2018 or proceed pro se. (R. p.\_\_\_\_\_)

No counsel made an appearance and the rescheduled hearing on Respondent's motion for summary judgment was scheduled. A notice of hearing was served on Wolff on July 11, 2018. (R.p. \_\_\_\_ ) The rescheduled hearing was set for Monday, August 6, 2018. On Friday, August 3, 2018 before the Monday, August 6, 2018 hearing, Wolff filed an affidavit in opposition to the motion for summary judgment. (R.p.\_\_\_\_)

At the hearing on Monday, August 6, 2018, in response to questions from The Honorable Perry Gravely, Wolff admitted that he had received the money on the line of credit and indicated that he intended to file a motion to amend the [sic]complaint (his answer) and file a counterclaim. (R.p.\_\_\_\_ Transcript p.\_\_\_\_ ln ) After consideration of the filings and oral argument, the court found that Wolff had failed to raise a disputed issue of material fact and granted Wells Fargo's motion for summary judgment. (R.p.\_\_\_\_)

This appeal followed.

### ARGUMENT

**I. The lower court did not err in granting Wells Fargo Summary Judgment because there was no genuine issue regarding any material fact that Wolff utilized the line of credit incurring a debt, voluntarily agreed to continue with the line of credit after the acquisition by Wells Fargo and accepted the new terms regarding the variable interest rate, and thereafter defaulted under the contract leaving a liquidated debt in the amount of \$70,473.**

#### **A. Summary Judgment Standard**

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Harris v. Anderson County Sheriff's Office*, 381 S.C. 357, 673 S. E. 2d 423 (SC. 2009). When plain, palpable and indisputable facts

exist on which reasonable minds cannot differ, summary judgment should be granted. *USAA Property and Cas. Insurance Co. v. Clegg*, 377 S.C. 643, 661 S. E. 2d 791 (S. C. 2008). Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings but rather must come forward with specific facts showing there is a genuine issue for trial. *Singleton v. Shearer*, 377 S.C. 185, 659 S. E. 2d 196 (S.C. App 2008). If he does not so respond, summary judgment, if appropriate, shall be entered against him. Rule 56, SCRPC.

**B. The undisputed facts support the grant of summary judgment.**

The trial judge correctly concluded that, in his Answer, Wolff admitted the existence of the line of credit contract between the parties and the utilization of the line of credit. The trial judge also correctly concluded that Wolff failed to come forward with specific facts showing there was a genuine issue for trial. Wolff presented no facts or evidence to counter the Mendoza affidavit and accompanying exhibits. Summary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner. *M&M Group Inc. v. Holmes*, 379 S.C. 468, 666 S.E. 2d 262 (Ct. App 2008).

**1. In his pleadings Wolff admitted the contract between the parties and that he had accepted Wells Fargo's terms**

"The elements for a breach of contract are the existence of a contract, its breach and damages caused by such breach". *S. Glass & Plastics Co. v. Kemper*, 399 S.C. 483, 491-92, 732 S.E. 2d 205, 209 (Ct. App. 2012). In its Complaint, Wells Fargo alleged the existence of a contract (the Wells Fargo Bank N.A. BusinessLine of Credit), that pursuant to its rights under the said contract it had declared all sums due and payable, and that it was entitled to judgment.

(R.p.\_\_\_\_) Specifically, in paragraph four of its Complaint, Wells Fargo pleaded the existence of the initial Business BankLine Note and Agreement with Wachovia Bank. (R.p.\_\_\_\_) In his answer, Wolff made no responsive allegation to the existence of the initial Business BankLine Note and Agreement with Wachovia Bank and only denied that a copy of the Contract was attached as Exhibit A. (R. p.\_\_\_\_)

It is elementary that, “[a]verments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading.” Rule 8(d), SCRCF. Wolff therefore admitted obtaining the initial Wachovia line of credit.

In paragraph five of its complaint, Wells Fargo pled that, “on or about November 29, 2010, the Defendant signed the Wells Fargo Authorization Form converting the business line of credit from Wachovia Bank, N.A. to a Wells Fargo N.A. Business Line of Credit. A copy of the Wells Fargo Authorization Form is attached as EXHIBIT B” (R.p.\_\_\_\_). Defendant Wolff’s response admitted the allegations of paragraph five of the complaint that he signed the authorization form allowing for the conversion of the Wells Fargo line of credit, but disputed that the new agreement with Wells Fargo allowed the increase in the interest rate for the line of credit.

In sum, at the time of the hearing on the Motion for Summary Judgment, Wolff was bound, pursuant to Rule 8(d), SCRCF, by his admissions that he had entered into a Business BankLine Note and Agreement with Wachovia Bank, and that he later signed the authorization form, converting the Wachovia line of credit into a Wells Fargo Business Line of Credit.

(R.p.\_\_\_\_) By admitting that he signed the Wells Fargo authorization form in his Answer, Wolff admitted that by signing it he accepted its terms.

**2. At the summary judgment hearing Wolff also admitted all elements of the contract and the default**

On August 6, 2018, at the hearing on the motion for summary judgment, when questioned by the trial judge as to why Wells Fargo was not entitled to judgment, Wolff responded “I’m not denying that I received the money.” (R.p.\_\_\_\_). When further questioned by the court as to whether he received the funds subject to the agreement Wolff again responded “I did, and in the answer to the complaint I said I didn’t deny, that I would make an offer to them...” (R.p.\_\_\_\_). Wolff further expressed his intention to utilize certain stock certificates allegedly in the possession of Wells Fargo to pay off his home loan and, “this loan” [the Wells Fargo line of credit] (R.p.\_\_\_\_).

In sum, at the motion for summary judgment hearing, Wolff, in response to the query from the trial judge, admitted the agreement between the parties, the receipt of the funds from the line of credit and that he owed Wells Fargo a debt. (R.p.\_\_\_\_).

**3. Wolff failed to raise any specific facts showing any genuine issue of material fact in dispute.**

S.C. law is clear that, [t]o resist a motion for summary judgment, the nonmoving party must come forward with specific facts showing genuine issues necessitating trial. *NationsBank v. Scott Farm*, 320 S. C. 299, 465 S. E. 2d 98 (S. C. App. 1995) (emphasis added). In the present case, Wells Fargo moved for summary judgment based on the detailed affidavit that established the following facts:

1. That Wolff entered into a Business Bank Line of Credit with Wachovia Bank in the amount of \$78,000 on April 14, 1999. (Mendoza affidavit R.p.\_\_\_\_)

2. That Wolff took a Line of Credit direct advance in the amount of \$78,000 on April 15, 1999. (Mendoza affidavit R.p. \_\_\_\_\_)
3. That Wells Fargo acquired the assets of Wachovia Bank, including Wolff's account, in 2010. (Mendoza affidavit R.p. \_\_\_\_\_)
4. That on November 29, 2010, Wolff signed the Wells Fargo Business Line Authorization Form certifying that he read and agreed to the terms and conditions on the reverse side of the authorization form, including the personal guarantee. (Mendoza affidavit R.p. \_\_\_\_\_)
5. That the Business Line Customer Agreement with Wells Fargo informed Wolff that the interest rate on unpaid balances was a variable rate and subject to change based on the banks evaluation of Wolff's credit risk. (Mendoza affidavit R.p. \_\_\_\_\_)
6. That Wolff utilized the Line of Credit and continue to make purchases and payments up to October 13, 2015. (Mendoza affidavit R.p. \_\_\_\_\_)
7. That Wolff was informed on May 4, 2012, June 5, 2012, September 4, 2013, and January 5, 2016 that the interest rate on the unpaid balances was changing. (Mendoza R.p. \_\_\_\_\_)
8. That the last payment received from Wolff was on October 30, 2015 and that the liquidated balance was \$70,473. (Mendoza R.p. \_\_\_\_\_).

In response to these detailed, supported specific facts, Wolff's Affidavit only stated the following general conclusive allegations:

1. He was unable to find an executed copy of the April 14, 1999 Agreement. (Wolff affidavit R.p. \_\_\_\_\_)

2. He disputed the validity and terms of the authorization form which he considered null and void, unconscionable and outrageous. (Wolff affidavit R.p. \_\_\_\_\_)
3. He disputed making any purchases after November 29, 2010. (Wolff affidavit R.p. \_\_\_\_\_)
4. He did not agree to accept any terms or conditions authorizing a change in interest rates. (Wolff affidavit R.p. \_\_\_\_\_).

No specific facts opposing the Mendoza affidavit are provided.

These general denials do not meet the test of opposing a Motion for Summary Judgment supported by an affidavit and are properly disregarded as “conclusory,” See, *Schmidt v. Courtney*, 357 S.C. 310, 592 S. E. 2d 326 (S.C. App. 2003). This court considered a similar unsubstantiated affidavit in *Champion International Corp. v Eubanks*, 291 S.C. 359 353 S.E. 2d 800 (Ct. App 1987). In *Champion*, supra, the Court held, “[t]he affidavit for the most part contains assertions that contradict aspects of Champion’s proof though mere unsubstantiated conclusory statements of fact. These bare conclusions are not sufficient to overcome Champion’s initial showing...” Id at 883.

Equally here, Wolff’s affidavit responds to the detailed, substantiated allegations of the Mendoza affidavit with the conclusory statement, “I contest...” This is insufficient to preclude summary judgment. “A party cannot escape summary judgment in the mere hope that something may develop at trial” *Hammond v Scott*, 268 S.C. 137, 223 S.E. 2d 336, 339 (1977).

More specifically, Wolff’s affidavit also contradicts Wolff’s own position. Page 24 of Wolff’s affidavit, for example, is a May 14, 2010 letter to Wolff from Wells Fargo advising him that the Wachovia BusinessLine of Credit account was now part of Wells Fargo and that changes would appear in June 2010. (Wolff affidavit R.p. \_\_\_\_\_) The letter states that the enclosed

Customer Agreement Addendum contains information about the changes to the account terms effective June 2010. (Wolff affidavit R.p.\_\_\_\_\_) Despite his assertions to the contrary, Wolff's own exhibits to his Affidavit reflect that information was relayed to him by Wells Fargo about the change in the account terms effective June 2010.

Wolff's affidavit then attaches a copy of the Wells Fargo authorization form bearing Wolff's signature in November 29, 2010, six months after the May 14, 2010 letter. This is the same Wells Fargo business line authorization form attached to the affidavit of Erica Mendoza as Exhibit C. Wolff's attachments, however, bears the handwritten terms "subject to approval and new written agreement with same terms and rec. for collateral". (Wolff affidavit R.p.\_\_\_\_\_) Curiously, on this Exhibit is also the handwritten designation "added 7-6-18." (R.p.\_\_\_\_\_) Wolff's handwritten additions to the Business Line Authorization Form were apparently added one year after the filing of the summons and complaint and fail to support Wolff's intention that he did not accept the terms and conditions of the new Wells Fargo credit line account in 2010. (R.p.\_\_\_\_\_)

Finally, on Page 30 of his Affidavit, the copy of the Wells Fargo BusinessLine Terms and Conditions which bears Wolff's signature states, "by signing the front of this authorization form, I accept on behalf of the business named on the reverse ("Customer") the terms and conditions of this authorization including the terms and conditions of the Wells Fargo BusinessLine Customer Agreement that has been provided to Customer with this authorization" (R.p.\_\_\_\_\_) Wolff's Affidavit and its attachments therefore corroborate that he was aware of and accepted the Wells Fargo BusinessLine terms and conditions on the new Line of Credit.

In sum, Wolff's affidavit raised no disputed issues of fact, but it corroborates the allegations in the Affidavit of Erica Mendoza in support of Wells Fargo's Motion for Summary

Judgment. When reasonable minds cannot differ on plain, palpable and indisputable facts, summary judgment should be granted. *Singleton v. Shearer*, 377 S.C. 185, 659 S. E. 2d 196 (S. C. App 2008). Summary judgment is appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner: *M&M Group, Inc. v. Holmes*, 379 S.C. 468, 666 S. E. 2d 262 (S.C. App. 2008). Wolff offered no specific facts showing a genuine issue in dispute in opposition to Wells Fargo's motion for summary judgment and summary judgment was appropriate.

4. **The Wells Fargo line of credit was a new contract accepted by Wolff.**

In his Brief, Wolff argues that he made no charges on the account after November 29, 2010 and, therefore, Wells Fargo could not change the interest rate on the line of credit retroactively for existing charges. (R.p.\_\_\_\_, Brief at p. 14, affidavit of Wolff p.1, 2 transcript p. 10 in 18-21). In sum, argues Wolff, Wells Fargo could not change the interest rate after November 29, 2010 unless he made new charges, which he asserts, he did not. This argument, however, is contradicted by Wolff's own affidavit and its attachments.

For example, the attachments to Wolff's own affidavit establish that he was informed in advance that the Wachovia line of credit would be converted to a new Wells Fargo line of credit with new terms of credit, and that he utilized the new line of credit with the new terms. In the attachment to Wolff's affidavit is a form Wells Fargo letter dated May 14, 2010 alerting Wolff about upcoming changes to the Wachovia line of credit. (R.p.\_\_\_\_) Also, attached is a form letter dated September 28, 2010 which advises Wolff that the previous Wachovia line of credit is to be converted to a Wells Fargo line of credit with different terms.(R.p.\_\_\_\_)

The Wells Fargo BusinessLine authorization form bearing his signature dated December 2010, which Wolff attached as an exhibit, informs Wolff that by signing the front of the

authorization form, "I accept on behalf of the business named on reverse ("Customer") the terms and conditions of this authorization, including the terms and conditions of the Wells Fargo BusinessLine Customer Agreement that has been provided to Customer with this authorization." (R.p. \_\_\_\_ ) Additionally, Wolff attaches a letter from Wells Fargo dated April 19, 2011 that recognizes that, as he authorized, the Wells Fargo business line of credit, (formerly a Wachovia account) has been converted to a Wells Fargo BusinessLine line of credit.(emphasis added) (R.p. \_\_\_\_ ) The attachments to Wolff's earlier Answer of Defendant D. Bruce Wolff to Motion for Summary Judgment filed by Plaintiff also reflect that Wolff made payments on the new Wells Fargo credit line in May 2012, June 2012, January 2015 and February 2015.(R.p. \_\_\_\_ )

In sum, by Wolff's own attachments to his affidavit and Answer to Motion for Summary Judgment he establishes all of the elements of a new contract: offer, acceptance and valuable consideration. *Carolina Amusement Co. Inc. v. Connecticut Nat'l Ins. Co.*, 313 S.C. 215, 437 S. E. 2d 122 (Ct. App. 1993). These attachments establish that Wells Fargo made an offer to him per a new credit line, he accepted the offer, made payments under it and the consideration was the ongoing use of the line of credit. A contract is an obligation which arises from actual agreement of the parties manifested by words, oral or written or by conduct. *Gaskins v. Blue Cross-Blue Shield of South Carolina*, 271 S.C. 101, 245 S. E. 2d 598 (1978).

Wolff's argument that the interest rate could not change, therefore, ignores Wolff's own admissions as established by the attachments to his affidavit. These attachments and Wolff's Answer to the Motion for Summary Judgment unequivocally establish the creation of a new contract between Wolff and Wells Fargo with new terms and conditions. Wolff's attachments and affidavit corroborate the Mendoza affidavit that a new line of credit with new terms and conditions was offered to Wolff, accepted by Wolff, and utilized by Wolff. Wolff's argument

that the new Wells Fargo line of credit could not change the interest rate retroactively ignores Wolff's own admissions and summary judgment was appropriate.

**5. The material issues Wolf asserts are in dispute were not properly before the court.**

In his brief, Wolff asserts that if he were permitted to amend and assert defenses of failure to mitigate damages and unclean hands, the existence of genuine issues of material fact would become even more apparent. Unfortunately, Wolff never made a motion to amend his answer and, at the time of the motion for summary judgment hearing, the issues of failure to mitigate damages and unclean hands were not properly before the court. As noted by the trial judge:

THE COURT: I know you got some other issues, but those are not in front of me.  
(transcript, p.14. ln.12-13).

The court correctly held that , as required by 56 SCRCPP ,”the judgment sought shall be rendered forthwith if 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”(emphasis added). The issues Wolff now seeks to assert as being disputed were not in the pleadings and therefore were not properly to be considered by the court.

**C. Wolff never made a motion to amend his answer.**

Wolff contends that he was denied the opportunity to amend his answer, however, that assertion is not borne out in the record. The motion for summary judgment hearing was held on August 6, 2018, approximately 14 months after the filing of the summons and complaint.

(R.p. \_\_\_\_\_) At no point did Wolff ever file a motion to amend. More importantly, no request

to amend was ever made by Wolff. At the motion for summary judgment hearing Wolff made the following response to the trial judge's query:

THE COURT: All right. Anything else you need me to consider?"

MR. WOLFF: I'd like for you to consider that there is a material issue about a contract dispute, and that I intend to file a motion to amend the complaint[sic], and that I intend to file a counterclaim" (emphasis added). (R.p. \_\_\_\_\_; transcript p.12, ln. 5-10)

Wolff made no motion to amend his complaint, did not request permission to file an amendment, and did not ask for a continuance in order to file an amendment. He merely expressed a future intention. There was no motion before the court and the court may not amend without a formal motion. See, *Norwest Props., LLC v. Strebler*, 424 S.C. 671, 819 S.E. 2d 154 (Ct. App 2018).

**6. Rule 220 ( c)- Wolff's affidavit was untimely**

As set forth earlier, Wolff filed his pro se answer on July 24, 2017. (R.p. \_\_\_\_\_) Wells Fargo's motion for Wells Summary Judgment was filed on February 14, 2018, over one year later. (R.p. \_\_\_\_\_) The first hearing on Well Fargo's Motion for Summary Judgment was on May 22, 2018, more than three months after the filing of the motion. (R.p. \_\_\_\_\_) The second, and final Motion for Summary Judgment hearing was on August 6, 2018, approximately six months after the filing of the Motion for Summary Judgment. (R.p. \_\_\_\_\_) Wolff filed his Affidavit Friday, August 3, 2018. (R.p. \_\_\_\_\_) The Summary Judgment hearing was the following Monday, August 6, 2018. (R.p. \_\_\_\_\_) Rule 6(d), SCRCF requires opposing affidavits to be served not later than two days before the hearing. (R.p. \_\_\_\_\_) Rule 6(a), SCRCF states, "when the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays and holidays shall be excluded in the computation." (R.p. \_\_\_\_\_) While the

trial judge indicated that he had reviewed the affidavit (R.p. \_\_\_\_; transcript p. 14, In. 7-8) Wolff's Affidavit was untimely and should not have been considered. If the untimely affidavit was excluded, Wolff made no response to the motion for summary judgment and the grant of summary judgment was proper. Rule 56, SCRPC. Under Rule 220(c) SCACR, the court can affirm a judgment on any grounds appearing in the record of appeal. (R.p. \_\_\_\_\_) *State v Byers*, 392 S.C. 438, 710 S.E. 2d 55 (2011).

**D. Wolff never conducted discovery or requested a continuance to do so.**

Wolff asserts that the circuit judge erred in granting summary judgment before Wolff had engaged in discovery and that he had stated his desire to engage in discovery about the facts of the case. (R.p. \_\_\_\_; transcript p.12 ln. 13-14). To the contrary, the Record is clear that Wolff never conducted discovery, asked to conduct discovery or requested a continuance in order to conduct discovery. It is well-established in South Carolina that summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery. *Lanham v. Blue Cross and Blue Shield of South Carolina, Inc.*, 349 S. C. 356, 563 S. E. 2d 331 (2002). (Emphasis added) However, in the present case, Wolff never conducted discovery or requested to conduct discovery in the 13 months from the filing of his answer to the hearing on the motion for summary judgment. Wolff had a full and fair opportunity to conduct discovery for thirteen (13) months, but failed to do so.

More importantly, no request for a continuance was made nor did Wolff point out in any specific manner how he would be prejudiced by his inability to conduct discovery. See, e.g. *Middleborough Horizontal Prop. Regime Council v. Montedison*, 320 S. C. 470, 460 S.E. 2d 765 (Ct. App. 1995). In the Middleboro case, the court rejected the Defendant's argument that the trial court's grant of summary judgment was inappropriate inasmuch as it did not have a full

and fair opportunity to conduct discovery holding, “Montedison advances no good reason why four months was insufficient time... to develop documentation in opposition to the motion for summary judgment. Further, the record discloses Montedison made no formal motion for continuance or pointed out in any specific manner how it would be prejudiced by its inability to conduct discovery” *Id.* at 479-80,465 S.E.2d at 771.

The same result applies here. Wolff never requested discovery, never made a formal motion for continuance or pointed out to the trial judge how he was prejudiced by his inability to conduct discovery. Any failure to conduct discovery is a result of Wolff’s own inaction and dilatory conduct. *John Doe v. Batson*, 345 S. C. 316, 548 S. E. 2d 854 (2001). Also, Wolff at no time asserted to the trial court that outstanding discovery should preclude summary judgment. “Generally, the contention of the opposing party that he was not given sufficient time to present matter in opposition cannot be successfully made for the first time on appeal. Having not been raised in the trial court, the issue is not preserved for appellate review” *Baughman v. AT&T*, 306 S. C. 101, 410 S. E. 2d 537 (1991).

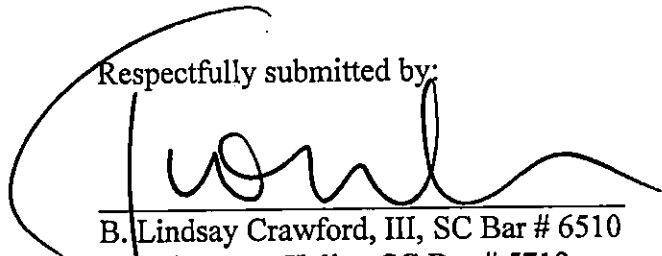
**E. Wolff failed to raise the issue of discovery in the Motion for Reconsideration and it is not preserved**

It is well established that an argument is not preserved if it is not specifically raised in the motion for reconsideration. Here, Wolff did not assert the failure to conduct discovery in his motion for reconsideration and it is not preserved. *Dodge v. Dodge*, 332 S.C. 401, 505 S.E. 2d 344 (Ct. App 1998).

**CONCLUSION**

The trial judge correctly concluded that there was no genuine issue of material fact and Wells Fargo was entitled to judgment as a matter of law and that Wells Fargo is entitled to judgment against Wolff in the amount of \$70,473 and the order of summary judgment should be affirmed.

Respectfully submitted by:



B. Lindsay Crawford, III, SC Bar # 6510  
Theodore von Keller, SC Bar # 5718  
Sara C. Hutchins SC Bar # 72879  
B. Lindsay Crawford, IV SC Bar #101707  
P.O. Box 4216  
Columbia, SC 29240  
(803) 764-7444  
Email: ted@crawfordvk.com

Attorneys for Respondent

August 22, 2019

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

**RECEIVED**  
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SC Court of Appeals

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

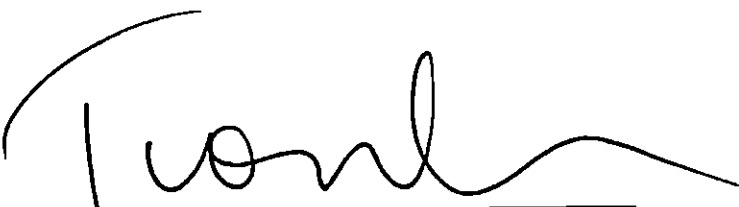
v.

D. Bruce Wolff ..... Appellant.

PROOF OF SERVICE

I, Theodore von Keller, an employee of Crawford & von Keller LLC, Attorneys for the Respondent, certify that I have served a copy of the Initial Brief of Respondent, by mailing it to their last known address, by depositing it in the United States Mail, postage prepaid, addressed as to counsel of record at:

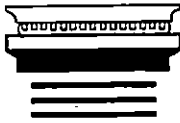
Andrew S. Radeker  
Harrison, Radeker & Smith, P.A.  
Post Office Box 50143  
Columbia, South Carolina 29250



B. LINDSAY CRAWFORD, III SC BAR # 6510  
THEODORE VON KELLER SC BAR# 5718  
SARA C. HUTCHINS SC BAR #72879  
B. LINDSAY CRAWFORD, IV SC BAR #101707  
CRAWFORD & VON KELLER, LLC  
POST OFFICE BOX 4216  
COLUMBIA, SOUTH CAROLINA 29240  
(803) 790-2626  
ATTORNEYS FOR RESPONDENT

August 22, 2019

Columbia, South Carolina



**CRAWFORD & VON KELLER, LLC**

August 22, 2019

**VIA HAND DELIVERY**

Jenny Abbott Kitchings, Clerk of Court  
South Carolina Court of Appeals  
1220 Senate Street  
Columbia, SC 29201

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**AUG 28 2019**

**SC Court of Appeals**

**RE: Wells Fargo Bank, N.A. vs. D. Bruce Wolff**  
**Appellate Case No.: 20118-002070**  
**Our File No.: 3323.0264**

Dear Ms. Kitchings:

Enclosed please find the original and 2 copies of Appellant's Initial Brief, Designation of Matter to be Included in the Record on Appeal, and Proof of Service. Please file the original and return 2 clocked copies of the same.

Should you require anything further please do not hesitate to contact me.

Sincerely,

Theodore von Keller

Enclosure(s)

cc: Andrew S. Radeker (w/enclosures)