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.

FINAL REPLY BRIEF OF APPELLANT

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STATEMENT OF ISSUES

I. **Did the circuit court err in granting Respondent's motion for summary judgment where the record showed the existence of a genuine issue of material fact about whether Appellant agreed to changes to the terms of the business credit line at issue?**

II. **Did the circuit court err in granting Respondent's motion for summary judgment where Appellant sought to amend his answer to raise defenses indicated by the record to exist?**

III. **Did the circuit court err in granting Respondent's motion for summary judgment where Appellant sought to engage in discovery?**

IV. **Did the circuit court err in granting Respondent's motion for summary judgment where the record showed the existence of a failure to mitigate damages or unclean hands defense?**

V. **Even if it were proper to grant Respondent's motion for summary judgment on liability, did the circuit court err in granting it in full where the record did not contain necessary factual material to determine whether the amount sought by Respondent was actually the correct amount owed?**

ARGUMENT

I. Wells Fargo is missing the point. The question was not whether Wolff had a line of credit agreement with Wells Fargo but, rather, what that agreement's terms were.

To put it bluntly, the Respondent, Wells Fargo Bank, N.A. (hereinafter "Wells Fargo"), is missing the point. The question is not whether the Appellant, D. Bruce Wolff (hereinafter "Wolff"), had a line of credit agreement with Wells Fargo. The factual question at the heart of this case is whether Wells Fargo treated Wolff's line of credit account in accordance with the terms of the agreement actually applicable to the account. If it did not, it is not entitled to a judgment that is based on its unilaterally imposed terms to which the parties never agreed. See Lee v. Univ. of S.C., 407 S.C. 512, 757 S.E.2d 934 (2014); Layman v. State, 368 S.C. 631, 630 S.E.2d 265, 269 (2006); Sauner v. Pub. Serv. Auth., 354 S.C. 397, 405, 581 S.E.2d 161 (2003); 17A Am. Jur. 2d Contracts § 507.

Wolff's credit line was entered into with Wachovia Bank, N.A. on certain specified terms. (R. pp. 21-26.) That credit line is the same one at issue in this case; however, Wells Fargo claims its terms have changed.

Any change to the terms of the credit line was only to the extent agreed upon by the parties. See Lee, 407 S.C. at 512; Layman, 630 S.E.2d at 269; Sauner, 354 S.C. at 405; 17A Am. Jur. 2d Contracts § 507. Wells Fargo makes much mention of it sending letters to Wolff stating that new terms applied to his account, but that does not mean anything, because Wells Fargo cannot unilaterally change the terms of a contract. See Lee, 407 S.C. at 512; Layman, 630 S.E.2d at 269; Sauner, 354 S.C. at 405; 17A Am. Jur. 2d Contracts § 507. Under the terms of the document that actually modified

the contract, Wolff and Wells Fargo agreed that Wells Fargo's new interest rate would apply, but to transactions in which 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. 118, 120-21.)

The Eric Mendoza affidavit filed by Wells Fargo states that Wells Fargo applied the Wells-Fargo-prime-rate interest formula to increase the interest rate on the balance of the credit line. (R. pp. 105-06.) 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. As he always maintained throughout the case, Wolff never drew down on the line of credit after signing the Wells Fargo authorization. (R. p. 47 ln. 18-21, pp. 158, 159.) There is a genuine issue of material fact here about whether Wells Fargo breached the parties' agreement by improperly increasing the interest rate and payment amounts by applying "terms" to this account to which the parties never agreed. See Ringer v. Graham, 293 S.C. 238, 359 S.E.2d 523 (Ct. App. 1987); Parks v. Lyons, 219 S.C. 40, 48, 64 S.E.2d 123, 126 (1951); Rabon v. State Finance Corp., 203 S.C. 183, 185, 26 S.E.2d 501, 502 (1943); 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. The record here contains evidence that tends to contradict that the interest and payment terms on this line of credit are what Wells Fargo says they are. That precluded summary judgment from being properly granted.

II. Wolff's affidavit in opposition to the summary judgment motion was not just a collection of conclusory statements, and Wells Fargo's material offered in support of its motion was far more conclusory than Wolff's material opposing it.

Wells Fargo contends that Wolff only made conclusory statements in his affidavit and that he was opposing a detailed factual showing by Wells Fargo. The truth is far from that.

Twice in his affidavit, Wolff states "I did not utilize the line of credit to make any purchases after November 29, 2010." (R. pp. 158, 159) It is difficult to think of how much detail Wolff could have supplied about not using the line of credit other than to say he did not do it. He did, though, supply ample and detailed testimony about the context in which he did not use the line of credit after November 29, 2010, as well as the facts that show why that means Wells Fargo's claimed interest rate and increased payment terms do not apply to the account at issue. (R. pp. 158-98.) Wolff points the court to pages 6 through 8 of his final appellant's brief, in which especially material and detailed paragraphs from Wolff's affidavit are quoted.

Wells Fargo's evidence in support of its motion, though, is not nearly so detailed. The affidavits it offered merely state the conclusion that "the Defendant continued to utilize the line of credit and continued to make purchases and payments up to and including October 30, 2015[,]" without offering any detail about that. (R. pp. 54, 105.) Given that the facts on this point are critical to the outcome of the case, it is surprising that Wells Fargo has the gall to accuse Wolff of making conclusory statements about this. See Dawkins v. Fields, 354 S.C. 58, 668, 580 S.E.2d 433, 438 (2003) (court will not consider affiant's conclusory averments in summary judgment proceedings); Cox & Floyd Grading, Inc. v. Kajima Construction Services, Inc., 356

S.C. 512, 516-17, 589 S.E.2d 789 (Ct. App. 2003) (same). The kettle is not black, but the pot is.

III. Wolff's affidavit was timely.

Wells Fargo contends that Wolff's submission of his affidavit was untimely because he submitted it on Friday, August 3, and the summary judgment hearing was on Monday, August 6.

That is just not correct. While the clerk of court's filing stamp is a little blurry, a close look at it reveals that its date is August 2. (R. p. 158.) That is two workdays before the motion was heard. That is timely. Rules 6(a) & 56(c), SCRCP.

IV. Wolff made a motion to amend.

Wells Fargo contends that Wolff did not make a motion to amend. That, too, is incorrect.

In the Norwest Properties case cited by Wells Fargo, this court reversed a judgment awarding special damages to a litigant that did not plead special damages, as required by Rule 9(g), SCRCP. Norwest Props., LLC v. Strebler, 424 S.C. 617, 624-27, 819 S.E.2d 154, 158-60 (Ct. App. 2018). That party tried to argue that there had been an amendment by implied consent, but the court noted that the opposing party had vigorously opposed the special damages evidence and the record showed there was no consent; thus, a formal motion would have had to be made and granted for an amendment to have occurred, and no such motion was made. Id.

Here, however inartfully it may have been stated by Wolff as a *pro se* litigant, the transcript of the hearing shows that Wolff made a motion to amend, something that appears to have been clear to both the circuit judge and Wells Fargo's counsel. (R. p.

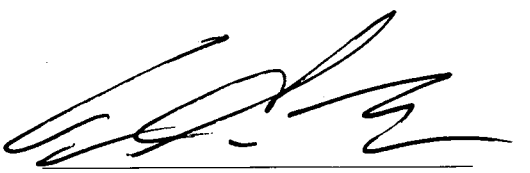
3, p. 47 ln. 24-25, p. 49 ln. 8-10, p. 50 ln. 12-16.) Wolff made an oral motion to amend, as contemplated by Rule 7(b)(1), SCRCP. (R. p. 47 ln. 24-25, p. 49 ln. 8-10.) This was understood by Wells Fargo's counsel, who argued against the motion to amend. (R. p. 50 ln. 12-16.) It was understood by the judge, who ruled on "Defendant's oral Motion to Amend his answer" in the order that granted summary judgment. (R. p. 3.)

Wolff's motion to amend having been heard, argued against, and ruled on, Wells Fargo cannot now complain that this motion was never made.

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. Wolff's timely affidavit in opposition to Wells Fargo's motion sets out in detail why Wells Fargo was not entitled to summary judgment. Wolff made a motion to amend, which should have been granted. 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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December 2, 2019

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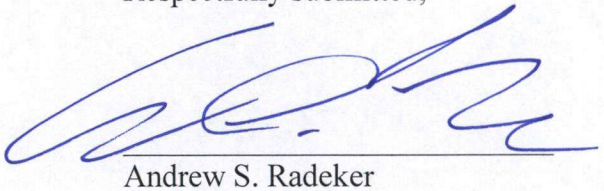
CERTIFICATE OF COUNSEL
REGARDING COMPLIANCE WITH RULE 211(b), SCACR

I certify that the foregoing final brief complies with Rule 211(b), SCACR.

Respectfully submitted,



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