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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Jeffrey S. Kagan, Appellant

v.

D. Renee Simchon, Respondent

Appellate Case № 2017-000810

RECEIVED
MAR 03 2020
SC Court of Appeals

Appeal From Greenwood County
Heard May 16, 2019 - Filed February 12, 2020

Opinion № 5713

Petition for Rehearing

Pursuant to Rule 221 of the South Carolina Appellate Court Rules, Jeffrey S. Kagan hereby requests that this Court re-hear this matter based upon the following:

1. As to the Statute of Limitations issues, this Court acknowledges that the evidence in this case shows Mr. Kagan, “[S]tated his agreement with Husband to consolidate all three loans was based on ‘a handshake, a look in the eye and a personal relationship.’” *Kagan v. Simchon*, Op. № 5713, (S.C.Ct. App filed February 12, 2020) (Shearouse Adv.Sh. № 7 at 45, 55). This evidence alone is sufficient to create a jury question as to whether the loans were consolidated. If a factual question exists as to whether the loans were consolidated, then a factual question exists as to whether the payments on the loans were a payment on the loan in question.

2. This Court failed to consider the argument in the brief that a partial payment by the debtor or the agent of the debtor is sufficient to toll the statute of limitations. As the money due to Mr. Kagan was given by Ms. Simchon to her husband, a factual question exists as to whether Mr. Simchon by the actions of Ms. Simchon had designated Mr. Simchon as her agent. Regardless of whether the loans were consolidated, the payment by the agent of Ms. Simchon created at the very least a factual issue as to whether the statute of limitations was tolled.

3. This Court failed to consider that even if the loans were no consolidated, then Mr. Kagan had the option of electing to which loan he desired to make the payment. The testimony creates at least a jury issue as to which loan Mr. Kagan applied the payment. A payment made by an agent of the principle also tolls the statute of limitations.

3. As to the defense of the action as to S. C. Code § 37-10-107, this Court failed to consider that the Plaintiff placed the entire code section in the memorandum which includes on its face the fact that the code section is only applicable to “an action for legal or equitable relief or a defense based upon a failure to perform an alleged performance, undertaking, accepted offer, or agreement: (a) to lend or borrow money.” Rec. on App. at 51. The lower court had before it the full statute to review. As noted by this Court, the lower court did not list any reason for its ruling. This Court, therefore cannot assume the lower court did not consider this issue.

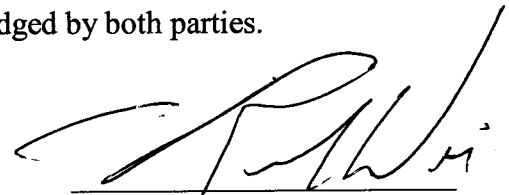
In the event this Court is unsure as to whether the lower Court ruled on the specific issue presented in this appeal, this Court should remand the matter back to the lower court for a definitive ruling on the issue. As the South Carolina Supreme Court has said, “Since it is a drastic remedy, summary judgment ‘should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues.’” *Baughman v. Am. Tel. & Tel. Co.*,

306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991)(internal citations omitted). Here, as this Court noted in the opinion, both parties agree a loan for \$180,000 was in fact made by Mr. Kagan to Ms. Simchon. This Court has now precluded Mr. Kagan from ever recovering the money he lent based upon an order below that may or may not have been considered by the lower court judge. This Court has ruled because the judge was silent and Mr. Kagan's counsel below was not clear, the drastic remedy of a summary judgment should be invoked to prevent Mr. Kagan from recovering on a debt that Ms. Simchon admits was made.

3. This Court failed to consider that a statement that "The S.C. Consumer Protection Code does not apply to this loan" fails to preserve the issue argued in the brief on appeal as to why the S.C. Code § 37-11-107 specifically does not apply. The statement in the memorandum as to why the code section does not apply would and should include all the reasons as to why it does not apply. This issue as to the inapplicability of S.C. § 37-10-107 to a loan that has been made was raised by the memorandum.

For the foregoing reasons, this Court should rehear this matter and reverse the decision of the lower court or remand to the lower court for a specific ruling on whether S. C. Code § 37-10-107 applies to a loan that has in fact been made and acknowledged by both parties.

February 27, 2020



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Attorney for Jeffrey S. Kagan

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

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SC Court of Appeals

Jeffrey S. Kagan, Appellant,

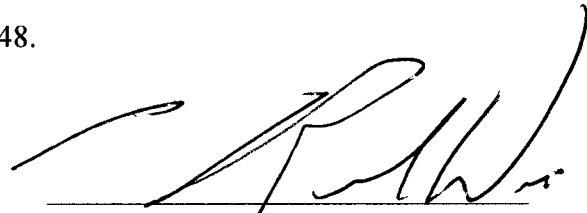
vs.

D. Renee Simchon Respondent

CERTIFICATE OF SERVICE

I hereby Certify that I am the attorney for the Appellant in the above entitled case. That on February 27, 2020, I did deposit in the United States Mail with proper postage affixed thereto, a copy of the Petition for Rehearing in the above case addressed to J. Walker Coleman, IV, Meg E. Sawyer, K&L Gates, 134 Meeting Street, Ste. 500, Charleston, SC 29401, and Edward S. McCallum, III, PO Box 148, Greenwood SC 29648.

2-27, 2020



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February 27, 2020

VIA FACSIMILE and U.S. MAIL
803-734-1496 1839

Jenny Abbott Kitchings, Clerk
SC Court of Appeals
P.O. Box 11629
Columbia, SC 29211

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MAR 03 2020
SC Court of Appeals

Re: Jeffrey S. Kagan vs D. Renee Simchon, Case No. 2017-000810

Dear Ms. Kitchings:

I am enclosing herewith for filing the original and six copies of the Petition for Rehearing together with the original Certificate of Service and a check for the filing fee in the amount of Fifty (\$50.00) Dollars regarding the above matter. Your help is greatly appreciated.

With kindest regards, I am

Very truly yours,

C. Rauch Wise

C. Rauch Wise

CRW/slt
Enclosure

cc Edward S. McCallum, III
Meg Elizabeth Sawyer
J. Walker Coleman, IV
Jennifer Hess Thiem

LAW OFFICE OF
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MAR 08 2021

SC Court of Appeals

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