STATE OF SOUTH CAROLINA
In the Court of Common Pleas

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

HON. MAITE M. MURPHY, CIRCUIT COURT JUDGE
Civil Action No.: 2017-CP-02-00283
Appellate Case No.: 2019-001142

SOHAIL ABDULLA …… APPELLANT

VS.

SOUTHERN BANK ……RESPONDENT

APPELLANT'S REPLY BRIEF

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I. A Note On The Ad Hominem Attacks

"Ad hominem is a notoriously weak logical argument. And is usually used to distract the focus of a discussion - to move it from an indefensible point and to attack the opponent."

~ Jim Butcher

Despite the tenets of the Lawyers Oath required of every member of the South Carolina Bar, some of my brethren cannot refrain from irrelevant personal attacks against opposing counsel. As this Court can see, Respondent's Brief is replete with ad hominem attacks. According to opposing counsel, my positions with this Court are "seriously misleading" (page 7 of Respondent's Brief), disingenuous (id.), contain "seriously misleading deficiencies" (page 8 of Respondent's Brief) and that I demonstrated a "lack of candor" with both the lower court and this Court.

None of this is true and I do not intend to address those portions irrelevant to the matter at hand. I would ask this court to disregard these attacks and focus on the actual evidence in the record and the precedent of this Court.

II. The Original Proof of Claim

Respondent also makes the unsupported claim that Appellant referred to the initial Proof of Claim as "fraudulent." Nowhere in any filing with the lower court or this Court did Appellant state that the original proof of claim was fraudulent. Appellant's argument now, as it was below, is that Respondent made a sworn statement to the United States Bankruptcy Court that it held the jewelry in its vault on March 23, 2007. No additional documents or amended documents were filed to indicate that the jewelry was removed in 2004, or was not in the possession of the bank during the pendency of the bankruptcy. The only change between the 2007 Proof of Claim and the 2011 Proof of Claim was the absence of a check on the collateral securing the loan that was the basis for the claim. Respondent attempts to extrapolate this single change to a full disclosure

that the bank never held the jewelry during the bankruptcy. The facts do not support such an argument.

Appellant's primary argument is based on judicial estoppel, in that Respondent cannot tell a tribunal one thing in 2007, and now present a completely different story when it suits its purposes. But even the change made in the amended proof does not leave the court with only one inference from these facts. What can be reasonably gleaned from the two proofs of claim is that sometime between March 23, 2007 and September 20, 2011, the jewelry was no longer collateral on for the loan. The logical assumption would be that that jewelry was sold along with all the other collateral at the bankruptcy auction. On August 24, 2015, Appellant learned that the jewelry proceeds were not applied to the bankruptcy when the final report was issued. He inquired again in 2016, learning for the first time that Respondent claimed the jewelry was removed in 2004.

Respondent makes numerous claims that the issue of whether the jewelry was in the vault is conclusively determined by a single sheet of paper that is nearly illegible and does not contain so much as a single name. The most important piece of evidence to respondent is a the "vault ledger" that purportedly shows when Appellant removed the items from the vault. Except it doesn't. The only thing the vault ledger demonstrates is that two people with the initials of SH and KSC did something with the vault on March 9, 2004. There is nothing signed by Appellant or any agent of Appellant stating that he received the jewelry or even authorized it s removal from the vault. There is nothing signed, sworn or otherwise verified by the mysterious SH or KSC concerning the jewelry or the whereabouts of that jewelry. Therefore, this claim by Respondent must be rejected.

III. Rule 803(A)(3)

Respondent repeatedly claims that Appellant never put forth a prima facie case of jurisdiction. This is incorrect. Appellant's theory of jurisdiction was based on factual assertions supported by the record. First, the bank had possession of the jewelry in March 2007 as they indicated in the original proof of claim. Second, Appellant moved to South Carolina in 2010, as he indicated in his affidavit. At no point prior to Appellant moving to South Carolina did anyone from Respondent inform him the jewelry was removed or not longer in the possession of Respondent. In 2011, the amended proof of claim was filed indicating the claim was no longer secured. This is the first time there is arguably any information that the bank might not have the jewelry in its vault. Regardless, the evidence supports the claim that the relationship between the parties continued after he moved to South Carolina, and that the conversion of the jewelry occurred after he moved. This is not contradicted by any evidence in the record beyond the infamous "vault ledger." Therefore, not only did the contract between the parties concerning the jewelry continue while Appellant was a citizen of this State, the tortious act of converting his property occurred in this state as his rights were extinguished and his property was lost while he was a citizen of this State. Therefore, 36-2-893(A)(3) supports long arm jurisdiction over this Defendant.

IV. Maybank V. BB&T and the "preservation of the defense"

Respondent makes numerous arguments about *Maybank* and the "preservation" of its defense. First and foremost, there was no preservation of the defense beyond the original assertion in Respondent's Answer. More importantly, under South Carolina law, the defense based on lack of jurisdiction is preserved if properly pled in the answer. Appellant does not now nor has he ever claimed the defense was not preserved in the Answer. Appellant's claim is based solely on the language in *Maybank* regarding unreasonable delay. As this Court Stated in *Maybank*, the fact

that a party preserved the defense in its Answer does not protect it from a claim of waiver if there is unreasonable delay in raising the issue with the court.

Respondent claims the Consent Scheduling Order "preserved" its defense based on lack of jurisdiction. This is simply incoherent. Respondent filed its motion to dismiss on February 2, 2018. The consent scheduling order was filed three weeks later. How, exactly, can an scheduling order preserve the right to file a motion that has already been filed?

There are several assertions that Appellant agreed to preserve the issue or that discovery was on jurisdictional issues only. These assertions are not true and, more importantly, not supported by the record.[1]

Ultimately, the only issue before this Court and the lower court was whether Respondent took actions that created a constructive waiver through unnecessary and unreasonable delay. Appellant's position is that *Maybank* requires an affirmative answer to that question and a reversal of the lower court. The Court in *Maybank* held that a Rule 12(h)(1), SCRCP, defense must be acted upon in a timely manner to be preserved. "A delay in challenging personal jurisdiction by motion to dismiss may result in waiver, even where the defense was asserted in a timely answer. … Rule 12(h), FRCP, sets only the outer limits of waiver; it does not preclude waiver by implication." *Maybank v. BB&T Corp*., 416 S.C. 541, 787 S.E.2d 498 (2016). In *Maybank*, the defendant raised the defense of lack of jurisdiction in its Answer, but failed to make a motion to dismiss until one month before trial. In addition, the defendant engaged in written discovery during the pendency of the action. Based on these facts, the Court found the defendant waived its defense based on lack of *in personam* jurisdiction.

[1] Respondent cites to Appellant's deposition, but it was never filed with the Court or served on Appellant, and therefore cannot be considered in this appeal.

The facts in this case are nearly identical to those in *Maybank*. On January 19, 2018, the parties received notice that this matter was scheduled for trial during the week of February 26, 2018. Defendant made this motion to dismiss two weeks after that notice, little more than three weeks before it was scheduled for trial. Also in this case, Defendant engaged in written discovery and took the deposition of Plaintiff. Respondent inexplicably and unreasonably delayed in seeking a dismissal, resulting in a waiver of that defense under *Maybank*.

According to Respondent, Appellant is a conman pursuing abusive and frivolous litigation with bad intent and no legitimate motive. According to Respondent, Appellant's counsel is disingenuous, misleading the courts, and displays a lack of candor arguing to the courts. According to Respondent, it was actually Appellant who engaged in "stonewalling and delay." (Respondent's Brief, Page 14). If any of this were true in any way, there is a simple question Respondent cannot answer:

Why did respondent wait a year before seeking to dismiss what is clearly a case of frivolous litigation?

Respondent cannot answer this question now as it could not answer it at the hearing before Judge Murphy. Therefore, *Maybank* controls and this matter should be remanded to move forward with trial.

V. What Respondent Failed to Address

The very first argument presented in Appellant's brief was that the lower court made substantive errors of fact that necessarily affected the outcome below, requiring a reversal. This point was never addressed by respondent. To be fair, it couldn't be addressed because the lower court relied on inaccurate facts to issue its ruling. The lower court ruled that Appellant claimed the filing of a bankruptcy proof of claim was a tortious act. There are no documents that support

that finding and counsel for Appellant specifically rejected such an argument at the hearing. Moreover, any judicial filing or act is protected under the theory of judicial immunity and/or absolute immunity. Yet, the very first sentence of the "Argument" section of the Order states that the entirety of the lower court's ruling is premised on this false finding of fact. It is clear that this factual finding is (1) false and (2) necessarily controlled the decision of the lower court. Therefore, the Order must be reversed on this error alone.

CONCLUSION

The lower court made numerous errors of law and fact that are completely unsupported by the record. This amounts to an abuse of discretion requiring reversal of the Order and remanding for further proceedings. Therefore, Appellant respectfully requests that this Court reverse the Order dismissing this case and remand for trial to take place at the earliest possible convenience.

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