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

APPEAL FROM COURT OF COMMON PLEAS
Aiken County, South Carolina

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

**SOHAIL ABDULLA,**
APPELLANT

v.

**SOUTHERN BANK,**
RESPONDENT



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# RESPONDENT'S FINAL BRIEF

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# RESPONDENT'S DESIGNATION OF MATTER INCLUDED IN RECORD ON APPEAL

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The following is included in the Record on Appeal:

1. Plaintiff's Complaint dated February 7, 2017 **(R-1)**
2. Defendant's Answer and Counterclaim dated April 19, 2017 **(R-16)**
3. Order Dismissing Case for Lack of Jurisdiction dated May 11, 2018 **(R-1)**
4. Transcript of Motion to Dismiss Hearing on April 2, 2018 **(R-80)**
5. Defendant's Motion to Dismiss with attached Affidavit of Ralph Dickey, dated February 2, 2018 **(R-24)**
6. Plaintiff's Response to Motion to Dismiss with attached Affidavit of Plaintiff, dated March 29, 2018 **(R-58)**

7. Defendant's Supplemental Response to Plaintiff's Response to Defendant's Motion to Dismiss dated April 2, 2018 **(R-66)**
8. Plaintiff's 1st Proposed Order Denying Motion to Dismiss as submitted to Judge Murphy, dated on or before April 12, 2018 **(R-53)**
9. Defendant's Letter Response to Plaintiff's 1st Proposed Order Denying Motion to Dismiss, dated April 12, 2018 **(R-133)**
10. Plaintiff's 2nd Proposed Order submitted to the Court Denying Motion to Dismiss, dated April 16, 2018 **(R-76)**
11. Defendant's Letter Response to Plaintiff's 2nd Proposed Order, dated April 16, 2018 **(R-139)**
12. Plaintiff's Motion to Reconsider Order Dismissing Case for Lack of Jurisdiction, dated May 21, 2018 **(R-62)**
13. Defendant's Response to Plaintiff 's Motion to Reconsider, dated May 29, 2018 **(R-69)**
14. Defendant's Response to Interrogatories and Request for Production of Documents, dated July 13, 2017 **(R-50)**
15. Consent Scheduling Order, dated February 22, 2018 **(R-7)**
16. Deposition of Sohail Abdulla, dated March 15, 2018 **(R-143)**
17. Defendant's Proof of Claim, dated March 22, 2007 **(R-100)**
18. Defendant's Amended Proof of Claim, dated September 20, 2011 **(R-137)**
19. Defendant's Vault Ledger, dated March 9, 2004 **(R-49 and R-138)**
20. Email from Tucker Player, dated May 19, 2017 **(R-159)**

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## CERTIFICATION OF COUNSEL

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Counsel for Respondent hereby certifies that the Designation of Matter contains all material proposed to be included by Respondent and not any other material.

This 18th day of August, 2020.

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# TABLE OF AUTHORITIES

## CASES



## STATUTES

## STATEMENT OF THE CASE

Appellant's Statement of the Case is correct (provided that his first sentence refers only to the date his complaint was filed) for the most part, but it is seriously misleading with regard to the timing of Respondent's motion to dismiss. This is important because of Appellant's incorrect and disingenuous claim that Respondent waived its defense that there is no personal jurisdiction over Respondent in South Carolina. Respondent raised this defense fully in its answer. In response to a specific request from Appellant, and without waiving its defense of lack of personal jurisdiction, Respondent agreed to limited discovery in an effort to sustain collegiality among counsel and to facilitate possible settlement. Now, Appellant seeks to take advantage of this to claim waiver of Respondent's jurisdictional defense, even though a Consent Scheduling Order specifically preserves Respondent's jurisdictional defense. This is further addressed in argument below.

## STATEMENT OF ISSUES ON APPEAL

Appellant's Statement of the Issues on Appeal, referring without specification to "numerous errors of fact" and "numerous errors of law", is so vague as to be meaningless and certainly does comply with Appellate Rule 208(b)(1)(B). Respondent perceives only two issues:

1. Did the Circuit Court err in sustaining Respondent's defense of lack of personal jurisdiction under the Long Arm Statute; and

2. Did the Circuit Court err is finding that Respondent never waived this defense?

## STANDARD OF REVIEW

Appellant apparently contends (Appellant's Brief, p. 7) that the same standard of review applies to all three of his assignments of alleged error. Although he refers to "numerous errors of fact" and "numerous errors of law", he apparently complains only that the Court erred in sustaining Respondent's claim of lack of personal jurisdiction and in finding that Respondent had not waived this defense. Based upon this interpretation of Appellant's claims, Respondent largely agrees with Appellant's statement of the applicable standard of review. As Appellant states, the question of personal jurisdiction is for the trial court to determine, and the trial court's decision is to be sustained "unless wholly unsupported by the evidence or manifestly influenced or controlled by error of law". *Industrial Equipment Co. v. Frank G. Hough Co.*, 218 S.C. 169, 173, 61 S.E.2d 884, 885 (1950). Respondent agrees that the proper standard for review of the question of waiver is the same.

However, Appellant obscures the issue by referring to a "prima facie showing". Although Appellant actually made no prima facie showing of jurisdiction, the parties in fact submitted factual affidavits which show the *undisputed* facts that the Court's finding of no jurisdiction is correct.

## STATEMENT OF THE FACTS

Instead of stating the facts applicable to each of his arguments, as contemplated by Appellate Rule 208(b)(1)(E), Appellant has included a separate statement as above designated. Because Appellant has inextricably mingled false statements and true statements of fact concerning both his claims as to the existence of jurisdiction and to waiver thereof, Respondent in the interest of clarity incorporates separate statements of facts as to these two issues below. However, also in the interest of clarity, Respondent deems it necessary to point out the seriously misleading deficiencies of Appellant's separate "Statement of the Facts".

It is not true (as claimed in the first paragraph of Appellant's Statement) that Respondent's original proof of claim (March 22, 2007) in bankruptcy "asserted under oath that it held certain jewelry and other valuables owned by Appellant in its vault as collateral . . ." It is therefore untrue and misleading to say (as Appellant says) that Respondent later "directly contradicted" its proof of claim. All this is indeed immaterial to any issue now before this Court, but Respondent does not wish to be deemed to have admitted it. Respondent respectfully refers to its argument below at pp. 13.

Appellant's statements at the fourth paragraph of its alleged Statement of Facts are misleading in the extreme. Appellant neglects to mention that Respondent properly preserved its jurisdictional defense at every point. Respondent respectfully refers to its argument below at pp. 14.

## ARGUMENT

### A. Issue Number One (labeled by Appellant as "I' and "III")

***The Circuit Court did not err in ruling that it does not have jurisdiction over Respondent on the basis of S.C. Code Section 32-2-803(4)***

Appellant's sole theory for sustaining personal jurisdiction over Respondent is that Respondent supposedly committed the tort of conversion (in Georgia) by taking to its own use certain jewelry and other personal property held by Respondent (in Georgia) as loan collateral in Georgia, and that this occurred after Appellant, a Georgia resident at the time of the loan, moved to South Carolina in 2010. Respondent discusses the undisputed facts of the relationship between Appellant and Respondent below, which demonstrate without question that there is no legitimate South Carolina interest in this matter. However, first Respondent wishes to point out the absurdity of Appellant's jurisdictional theory, even if the facts were as Appellant claims.

Appellant admits that the tangible personal property which he claims Respondent converted, was originally given into the possession of Respondent, a Georgia bank, by Appellant in Georgia, at a time when Appellant was himself a Georgia resident, for the lawful purpose of serving as collateral for a loan made by Respondent to Appellant's corporation in Georgia. He admits that this collateral was held in Georgia by Respondent at all relevant times. He further claims (without any evidence) that Respondent subsequently converted this property to its own use, at a time after Appellant moved to South Carolina. His sole basis for asserting South Carolina personal jurisdiction is that, if Respondent wrongfully applied this collateral to Appellant's debt (which it did not), and that this happened after Appellant moved to South Carolina (which it did not), somehow that subjects Respondent to South Carolina personal jurisdiction.

In other words, taking my wallet in Georgia makes the taker subject to South Carolina jurisdiction if I happen to live in South Carolina.

If South Carolina attempted to justify its jurisdiction on such a basis, it would obviously fall afoul of the due process requirements of the United States Constitution. However, South Carolina has not attempted any such folly. Jurisdiction over Respondent in this case must be sustained, if at all, under S.C. Code Section 36-2-803(a)(4), which reads as follows:

(4) "causing tortious injury or death in this state by an act or omission outside the state if he regularly does or solicits business or engages in any other persistent conduct or derives substantial revenue from the goods used or consumed or services rendered in the state;". A person includes....corporation, partnership, association or any other legal or commercial entities....S.C. Code Annotated 36-2-801—definitions. Appellant's Appeal is totally void of any reference to any specific subpart of S.C. Code Ann. 36-2-803.

Further and most important, the South Carolina Long Arm Statute, Section 36-2-803, is subject to the bounds of constitutional due process and may be applied only when the Defendant had such minimum contacts with South Carolina that maintenance of the action does not offend traditional notions of fair play and substantial justice. Atlantic Soft Drink Company of Columbia, Inc. v. South Carolina Nat. Bank (S.C. 1985) 287 S.C. 228, 336 S.E. 2d 876. See also State v. NV Sumatra Tobacco Trading Company (S.C. 2008) 379 S.C. 81, 666 S.E. 2d 218. The Courts have further gone on to provide that for purposes of meeting due process requirements to assert jurisdiction over non-resident Defendant, it is essential in each case that there be some act by which the Defendant purposefully avails itself of the privilege of conducting activities within the forum state, invoking the benefits and protections of its laws. Moosally vs. W.W. Norton and Co., Inc. (S.C. App. 2004) 358 S.C. 320, 594 S.E. 2d 878. See also Coggeshall v. Reproductive Endocrine Associates of Charlotte (S.C. 2007) 376 S.C. 12, 655 S.E. 2d 476. As in the case of Southern Bank, the question of *in personam* jurisdiction over a foreign corporation is one which must be resolved upon the facts of each particular case. A determination of whether a Court can exercise personal jurisdiction over a non-resident involves a two-step analysis: 1) a trial Judge must determine that the Long Arm Statute applies, and 2) the trial Judge must determine that the non-resident's contacts with the State are sufficient to satisfy due process requirements. *International Mariculture Resources v. Grant* (S.C. App. 2009) 336 S.C. 434, 520 S.E. 2d 160. See also *Engineeer Products v. Cleveland Crane & Engineering* (S.C. 1974) 262 S.C. 1, 201 S.E. 2d 921.

Appellant did not allege, and did not even attempt to show, that Respondent has come anywhere even close to meeting the last requirement of the statute, which requires certain minimum contacts with South Carolina so as to make assertion of South Carolina jurisdiction fair and reasonable. On the contrary, the undisputed facts show that Respondent has no such connection with South Carolina, and that the transaction out of which this claim arises has no connection with South Carolina either.

By way of background, Appellant and his corporation, Sportsman's Link, Inc. were long time banking customers with Respondent, Southern Bank, from on or about the early 1990s up through and including the year 2008. Southern Bank, f/k/a Bank of Burke County, Georgia, is incorporated and organized in the State of Georgia and only has locations in the State of Georgia. Appellant, up until 2008, was always a resident of the State of Georgia during all loan transactions with Southern Bank. Appellant's business, Sportsman's Link, Inc., a Georgia corporation, was located at 596 Bobby Jones Expressway, Augusta, Richmond County, Georgia. Appellant was sole shareholder and President of said corporation. (Exhibit 5--Affidavit in Support of Defendant's Motion to Dismiss).

Sportsman's Link, Inc. filed Chapter 11 Bankruptcy in the United States Bankruptcy Court, Southern District of Georgia, Augusta Division, Case No. 07-10454-JSD, on March 13, 2007. Southern Bank held a secured interest in all inventory, fixtures, equipment, etc. of Sportsman's Link, Inc. At the time of filing, Southern Bank filed a secured Proof of Claim in the amount of $853,718.96. In addition to all the inventory, equipment and fixtures of the business, Appellant was also a personal Guarantor of the loan and had pledged jewelry as collateral on behalf of Sportsman's Link, Inc. which was held in the vault of Southern Bank. This loan matured and was last renewed by and between Appellant and Respondent on April 30, 2007 in the State of Georgia. A final loan transaction by and between Appellant and Respondent on a different loan was signed in the State of Georgia on July 25, 2008, while Appellant was a resident of the State of Georgia. Appellant admits both in his Affidavit dated March 28, 2018 (R-131) and his Deposition (R-144, pg. 5, line 4) dated March 15, 2018, that he did not become a resident of the State of South Carolina until 2010, and further, has never transacted any business or executed any loan documentation with Respondent in the State of South Carolina (See Motion to Dismiss Affidavit, R-29). See also Deposition (R-145, page 11, line 9 through 15). Sportman's Link, Inc. Chapter 11 bankruptcy was subsequently converted to a Chapter 7 by the Bankruptcy Court on July 22, 2008 whereupon the business was closed and liquidated by judicial bankruptcy sale. Appellant immediately

left the United States for the Middle East until he returned in 2010 to the State of South Carolina (R-144).

Appellant alleges that Respondent filed a fraudulent Proof of Claim (R-100) on March 2, 2007 whereby it showed that Respondent still held a secured interest in the contents of the bank vault. Contrary to Appellant's allegation, Respondent filed a true and correct Proof of Claim as to all loan documentation, guaranties, etc. that were in existence at the time when Appellant's corporation, Sportsman's Link, Inc., filed Chapter 11 bankruptcy. It was not until shortly after the bankruptcy filing that Respondent checked the contents of the vault and confirmed the jewelry had been removed with authorization of Respondent, on March 9, 2004. As set forth in Appellant's Initial Brief dated December 5, 2019 and the Affidavit of Sohail Abdulla, it is not until **2016** that Appellant ever brought up the alleged unknown whereabouts of the contents of the vault.

Appellant filed the subject Complaint (R-11) in the Court of Common Pleas, Second Judicial Circuit, Aiken County, South Carolina on February 7, 2017. Appellant alleged wrongful conversion against Respondent for jewelry that was held in the vault of Respondent since 1997 and was held as collateral for the Sportsman's Link, Inc. loan with Respondent in the State of Georgia. Appellant alleged jurisdiction and venue in the Complaint as follows:

1. Plaintiff is a citizen and resident of Aiken County, South Carolina.
2. Defendant is a Georgia corporation with its main office in Waynesboro, Georgia, and
3. Jurisdiction is proper pursuant to the South Carolina Long Arm Statute.

There are no other allegations in Plaintiff's Complaint alleging or asserting how Long Arm Jurisdiction would apply. There was no reference to S.C. Code Annotated Sect. 36-2-803, or any reference to subparts 1-8 of the Statute. Further, as of the filing of the Complaint, Respondent could not confirm the address of Appellant until his deposition was taken on March 15, 2018 (R-143, page 4, line 19, page 5, line 4). Respondent timely filed its Answer and Counterclaim on April 19, 2017. In its

Answer, Respondent, as set forth in its Second Defense, specifically denied that it was subject to the South Carolina Long Arm Statute and specifically reserved all legal rights contesting jurisdiction in South Carolina under the South Carolina Long Arm Statute (R-16).

Respondent filed its Motion to Dismiss and Affidavit (R-24) on February 2, 2018. Subsequent to that date, on February 22, 2018, a Consent Scheduling Order was entered by and between the parties by the Honorable William P. Keesley, Chief Administrative Judge, 2nd Judicial Circuit (R-7). The Consent Scheduling Order specifically referenced that "Defendant's Motion to Dismiss which is currently scheduled to be heard April 2, 2018." The Order also provided the matter would not be eligible for trial before June 15, 2018.

Prior to this date on May 19, 2017, Appellant's counsel emailed Respondent's counsel and requested he be allowed to send "some general discovery requests to see if your proof with regards to the removal of the jewelry? If there is nothing in there, then my advice would be for this to go away immediately." (R-159). Subject to Defendant's reservation of right as to jurisdiction, Respondent filed a Response to Appellant's First Interrogatories and Request for Production of Documents. Answer to Interrogatory No. 5 specifically listed the full names of two (2) bank employees who witnessed the release "rel" of all collateral in the vault owned by Sohail Abdulla on March 9, 2004. Attached was the bank vault Ledger which clearly confirmed the collateral was released ("rel" 3-09-04, SH, KSC") (R-51, R-49, R-138--Response to Interrogatories and Request for Documents).

On March 29, 2018, just prior to the scheduled Motion to Dismiss hearing, Appellant filed a Response to the Motion to Dismiss (R-58--Response to Motion to Dismiss). In his Response, Appellant reaffirmed that he was not a resident of South Carolina until 2010. He stated he had filed Chapter 11 Bankruptcy and that Respondent had filed a Proof of Claim (R-100) in 2007. More importantly, Appellant stated "On September 20, 2011, Defendant (Respondent) filed an "Amended Claim" in the same bankruptcy court, also under oath, declaring it still held the same items belonging to Plaintiff in its

vault. Neither of these claims were ever amended." Appellant went on to state "Defendant certified, under oath, that it still held Plaintiff's valuables in its vault on September 20, 2011. Defendant cannot change its story now that it is convenient to do so." Appellant argued that Defendant was barred by the Doctrine of Equitable Estoppel from now claiming the contents of the vault were taken *prior* to the bankruptcy proceeding. Unfortunately, for Appellant, his interpretation of the Proof of Claim was totally incorrect and false. To the contrary, Respondent filed an ***unsecured*** Amended Proof of Claim (R-137) which clearly indicated that Respondent held no further collateral of Sportsman's Link, Inc. or any of the collateral set forth in the underlying Promissory Note and Security Agreement, including contents held in the bank vault which were in fact released March 9, 2004 (R-138). Appellant's Response went on to argue that because Respondent had filed an Amended Proof of Claim on September 20, 2011 allegedly showing that Respondent still held the contents of the vault on that date, then by the mere fact that Appellant had moved to South Carolina in the year 2010, this would be considered "a tortious act in whole or in part of this state" which applies to injuries resulting from out-of-state acts or admissions. Appellant went so far as to state "in this case, the tort complained of by Plaintiff (conversion) occurred while Appellant was a citizen of South Carolina." In other words, Appellant's entire legal argument for jurisdiction was based upon the incorrect interpretation that Respondent had filed a "secured" Amended Proof of Claim in 2011, when in fact, the claim was filed as unsecured (R-137). Keep in mind that this allegation was also made knowing full well that Respondent had already provided through correspondence and Request for Production of Documents and Interrogatories, proof that the items in question had been released to Appellant March 9, 2004. Appellant's Response to Respondent's Motion to Dismiss, dated March 29, 2018, was the first time Respondent was given any information concerning Appellant's actual but incorrect theory of Long Arm Jurisdiction in the State of South Carolina.

On April 2, 2018 prior to the hearing on Motion to Dismiss, Respondent also filed a Supplemental Response to Appellant's Response to Defendant's Motion to Dismiss (R-66) which outlined the complete fallacy of Appellant's legal argument of Long Arm Jurisdiction based upon an entirely wrong interpretation of facts.

At the Motion to Dismiss hearing on April 2, 2018, Respondent informed the Court that Appellant's entire claim of jurisdiction was premised upon an alleged conversion (tort) occurring on or after 2010, based solely on the 2011 Proof of Claim that Appellant incorrectly interpreted as a "secured claim" that allegedly showed the jewelry was still in the possession of Respondent. Without the Proof of Claim argument there is no viable allegation of conversion after 2010 (i.e. tortious injury) (R-80--Transcript). Appellant attempted to salvage his argument by stating "it's not that they committed a tort in filing a claim with the Bankruptcy Court, it's that they told the Bankruptcy Court they had it and we didn't find out they didn't until after Mr. Abdulla became a resident of this state. And "*if*" the jewelry was removed or converted while he was a resident of South Carolina, the Long Arm Statute applies.....that's how judicial estoppel and Long Arm Statute work to give this Court jurisdiction." (See R-80--Transcript pg. 15, lines 6-18). Again, as stated above, Appellant incorrectly informs the Circuit Court that we told the Bankruptcy Court that we had the jewelry by the unsecured Proof of Claim filed September 20, 2011. Appellant's argument of collateral estoppel against Respondent goes out the window because of Appellant's incorrect interpretation of the 2011 Proof of Claim. The 2007 Proof of Claim is immaterial since Appellant admits he did not move to South Carolina until 2010. Furthermore, Appellant does not like to mention that we have evidentiary proof from the records of Respondent confirming the jewelry in question was removed from the bank vault on March 9, 2004.

Appellant also argued to the Court that "our argument is it was taken out of the vault and was either converted or negligently allowed to leave the vault *after* Mr. Abdulla was a citizen of South Carolina. That is a tort that causes damages in this state which is clearly under the Torts Claim Act....

(R-80—Transcript, pg. 14) the tort occurred while he was a citizen of South Carolina and jurisdiction applies." This rationale also clearly shows that Appellant was still arguing, incorrectly, that the 2011 Proof of Claim (R-137) was filed as secured. For Appellant to now argue that he "never claimed that the filing of the bankruptcy Proof of Claim constituted a tort" is disingenuous at best. Without Appellant's incorrect argument about the 2011 Proof of Claim, Appellant has no other evidence to refute Respondent's evidence which shows the contents of the vault were removed March 9, 2004 (R-138). The Proof of Claim and alleged conversion argument go hand in hand.

Appellant again argues the theory of jurisdiction was "clearly" laid out in the Complaint and further supported by the Affidavit of Plaintiff. Although Appellant alleges that jurisdiction is proper pursuant to the South Carolina Long Arm Statute, there is nothing further in the Complaint that would show any type of basis for Long Arm jurisdiction. Appellant further states, "Respondent converted the property of Appellant while he was a resident of South Carolina." How Appellant can make this absurd statement is beyond belief. Evidence in the record clearly shows that contents were removed March 9, 2004. Respondent's unsecured Proof of Claim dated September 20, 2011 clearly negates Appellant's "judicial estoppel" argument and Appellant's contrived theory that somehow Respondent removed the contents of the vault on or after the year 2010. These are the indisputable facts that the lower Court was presented with when it issued its Order Dismissing the case.

At the conclusion of the hearing, Judge Murphy indicated she was taking the matter under advisement. As set forth in the transcript, Respondent had prepared a proposed Order which was presented to the Court (See R-80 Transcript of Hearing, page 19, line 16).

Subsequent to the hearing on April 2, 2018, Appellant submitted his own "1st" proposed Order Denying Motion to Dismiss (R-53) to Judge Murphy. Respondent filed a Letter Brief with the Court, dated April 12, 2018 (R-133), pointing out Appellant's lack of legal understanding with respect to Respondent's unsecured Proof of Claim. To the amazement of Respondent, Appellant's proposed Order

stated again "Defendant never amended that claim to indicate that Plaintiff took or was in possession of the items it originally claimed it held in the vault." Even though this issue was discussed in detail at the Motion to Dismiss hearing and in Respondent's Supplemental Response to Plaintiff's Response to Defendant's Motion to Dismiss, Appellant still did not comprehend the facts. Appellant went on to argue again in his proposed Order that "Defendant certified, under oath, that it still held Plaintiff's valuables in its vault on September 20, 2011." ".....when a party has formerly asserted a certain version of the facts in litigation, he cannot later change those facts when the initial version no longer suits him." Needless to say, Respondent has never changed its version of the facts.

Upon Appellant receiving Respondent's Letter Brief of April 12, 2018 (R-133) pointing out the numerous inconsistencies, Appellant then submitted a "*2nd*" proposed Order (R-76) to the Court to which Defendant responded in Letter Brief dated April 16, 2018 (R-139). In Appellant's second proposed Order, the argument of jurisdiction based upon an Amended Proof of Claim dated September 20, 2011 which was used to allege proof of timing of conversion (tort) against Appellant, after he moved to South Carolina, was entirely removed from the proposed Order. In effect, this was an acknowledgement by Appellant that no personal jurisdiction existed in the State of South Carolina. Appellant's second proposed Order changed the entire argument to focus on the timing of Respondent's Motion to Dismiss and disingenuously argued that Respondent had "waived any defense it had to personal jurisdiction under the law established in *Maybank*." Appellant did not bother to inform the Court that a Consent Scheduling Order had been entered by the Court February 22, 2018 which clearly acknowledged and reserved Respondent's rights under its previously filed Motion to Dismiss, dated February 2, 2018 (R-7--Scheduling Order).

On May 11, 2018 (and May 22, 2018), the Court issued its Order Dismissing Case for lack of personal jurisdiction in the State of South Carolina (R-1). On May 21, 2018, Appellant filed his Motion to Reconsider (R-62) including twelve (12) designations of error. In Error #2, Appellant stated "Plaintiff

has never argued that Defendant's filing of an unsecured Amended Proof of Claim on September 20, 2011 was a tortious act which conferred Long Arm Jurisdiction over Defendant. Such an allegation does not exist in any pleading, motion or other filing with this Court." Appellant merely argues semantics to cover up his mistake. This argument is wholly contradicted by Appellant's Response to Motion to Dismiss and attached Affidavit dated March 29, 2018, as well as Appellant's first proposed Order Denying Motion to Dismiss. Appellant's entire argument of a Tort (conversion) is tied to his misinterpretation of the filing of the 2011 Amended Proof of Claim. Without any evidence that Respondent still held the collateral in 2011, Appellant is forced to acknowledge the fact the collateral was released from the bank in 2004 which is six (6) years prior to Appellant moving to South Carolina. Appellant's argument for jurisdiction has been a moving target and an ever evolving manipulation of facts. Respondent filed a Response to Plaintiff's Motion to Reconsider dated May 29, 2019 (R-69). Every numeration of error was addressed in Respondent's Response. Appellant argued in the Motion to Reconsider, and continues to argue in his appeal, that "that the theory of jurisdiction was clearly laid out in the Complaint and further supported by the Affidavit of Plaintiff" (SeeR-62--Motion to Reconsider, Paragraph 11). How Appellant can continue to make such assertions given the facts and evidence presented in this case is beyond rational comprehension.

More important is Appellant's total omission to cite a specific subpart of S.C. Annotated Sect. 36-2-803, upon which he relies to confirm Long Arm Jurisdiction. Appellant continuously alleges "tortious act" while he was a resident of South Carolina. Clearly, 36-2-803 (3)-Commission of a Tortious Act in Whole or in Part in this State; does not apply. Appellant acknowledges that the collateral in question was held in the bank vault of Southern Bank in Waynesboro, Georgia at all times. Since Appellant is relying on 36-2-803 (4), Appellant still has not met his burden of proof. Subpart 4 specifically provides "causing tortious injury or death in this state by an act or omission outside the state if he regularly does or solicits business, engages in any other persistent conduct, or derives substantial

revenue from the goods used or consumed or services rendered in the state". Neither Appellant's Complaint nor his Affidavit allege that Respondent regularly does or solicits business.....engages in any other specific conduct, or derives substantial revenue, etc. As cited in *International Mariculture Res. v. Grant*, determination of personal jurisdiction over a non-resident involves a two-step analysis: 1) Trial Judge must determine that the Long Arm Statute applies and 2) the Trial Judge must determine that the non-resident's contacts with the state are sufficient to satisfy due process requirements. Appellant conveniently omits any discussion or analysis of this very crucial requirement. Appellant's theory of jurisdiction was clearly not laid out in the Complaint or his Affidavit. Appellant literally has no justification whatsoever under any legal theory he has proposed for Long Arm jurisdiction against Respondent in the State of South Carolina.

The docket shows the case was dismissed effective May 11, 2018. Although Appellant had filed a Motion to Reconsider, no official denial of that Motion to Reconsider was filed by the Court until June 13, 2019 (R-8). During that one year period, there was no follow-up by Appellant with Judge Murphy requesting that the Motion to Reconsider be ruled upon. It was Respondent who subsequently followed-up with Judge Murphy on the issue of Motion to Reconsider. This was due to the fact that Appellant now has since filed a ***second*** lawsuit against in the State of South Carolina, Case No. 2018-CP-02-02912, where Appellant is now arguing a different theory of jurisdiction involving the same underlying Promissory Note and Security Agreement by and between Respondent and Sportsman's Link, Inc., along with other numerous other frivolous allegations involving the other Georgia loans. Respondent filed a Motion to Dismiss for lack of jurisdiction in that case which is still pending.

## B. Issue Number Two (as labeled by Appellant)

***The Circuit Court did not err in finding that Respondent has not waived its jurisdictional defense by unreasonable delay under Maybank v/ BB&T Corp., 416 S.C. 541, 787 S.E.2d 498 (2016)***

Appellant claims that the Circuit Court erred in finding that Respondent's participation in certain limited discovery, before obtaining a ruling on personal jurisdiction, constitutes a waiver *by implication* of Respondent's defense of personal jurisdiction, even though set out clearly and indeed comprehensively in its Answer "Second Defense". The Circuit Court correctly applied the test of *Maybank v. BB&T Corp.*, 416 S.C. 541, 787 S.E.2d 498 (2016). Its reasons for finding no waiver are clearly stated in its Order at p. 4. The court below clearly points out the two relevant points. First, the court notes that the discovery in question was conducted as an accommodation to Appellant in the hope that such might "expedite the disposition of the case". Second, the court points out that the discovery addressed questions directly relating to Appellant's jurisdictional theory. To find an implied waiver under these circumstances would be to allow Appellant to use his own lack of candor, stonewalling and delay against Respondent. Respondent's counsel does not wish to embitter this issue or to make any unseemly comments, but he must confess to a feeling of being taken advantage of.

The facts of *Maybank* are not remotely close to the fact scenario in the present case. At the specific request of Appellant, Respondent responded to Plaintiff's First Interrogatories and Request for Production of Documents., rather than insisting on a ruling first on the personal jurisdiction defense, because Appellant through counsel by email dated May 19, 2017 (R-159), stated, "I understand the claims of the bank and I have my own concerns about some of the issues. Can I just send you some general discovery requests to see your proof with regards to the removal of the jewelry? It may expedite the disposition of this case..... If nothing is there, then my advice will be for this to go away immediately." (R-139--Letter Brief, dated April 16, 2018, pg. 3, 2nd paragraph with attached email, etc.)

The responses and documents provided to Appellant in Responses to Interrogatories and Request for Production of Documents (R-50) on July 13, 2017, clearly showed that all contents of the vault were removed March 9, 2004. The full names of the individuals who witnessed the removal were also provided. Respondent also provided written verification from the bank vault Ledger. Needless to say, this was just a ploy by Appellant to continue further discovery.

Respondent also allowed Appellant to take the deposition of Mr. Ralph Dickey on March 15, 2018. Respondent did this as a concession so that it could take a brief deposition of Appellant, Sohail Abdulla, to confirm when Appellant actually moved to the State of South Carolina. In that deposition, Appellant confirmed, under oath, that "I have been living in Aiken (SC) since 2010." (R-143--Deposition, pg. 5, line 4). Further, Respondent also asked Appellant "but all the loans you did with Southern Bank, formerly known as Bank of Burke County, all these were done in Georgia, correct?" to which Appellant responded, "Yes." (R-143--Deposition, page 11, lines 9-15). Up until this point in time, Respondent had ***no*** information to verify Appellant's current address. Respondent wanted this information in preparation for Respondent's Motion to Dismiss hearing which was already scheduled for April 2, 2018.

Most importantly, Appellant knows full well that Respondent never intended to waive its jurisdictional defense and did nothing that would justify the implication that it did waive it. Specifically, Appellant and Respondent, by and through their attorneys, entered into a Consent Scheduling Order with the Circuit Court, said Order being entered February 22, 2018 (R-7). This Order was entered three (3) weeks before the March 15, 2018 depositions and approximately five (5) weeks prior to the already scheduled April 2, 2018 Motion to Dismiss hearing. The Order clearly provides that 1) discovery will be complete on or before May 30, 2018, and 2) this matter will not be eligible for trial before June 15, 2018. The Order specifically provides these discovery and trial timelines to allow "the Court to hear Defendant's Motion to Dismiss which is currently scheduled for April 2, 2018." Respondent's Motion

to Dismiss and Affidavit had been filed February 2, 2018 prior to the entering of this Order. Appellant's lack of candor to this Court with respect to this issue is distressing. It is, in fact, Appellant who has waived this argument.

## CONCLUSION

Respondent never waived its defense of lack of personal jurisdiction. Appellant understandably attempted to obscure his theory of personal jurisdiction, but he finally admitted that it is based on the theory that Respondent committed a tort outside of South Carolina (alleged conversion of assets held in Georgia, by acts in Georgia). This means that Respondent, to be subject to such personal jurisdiction, not only would have to have committed a tortious act outside of South Carolina (which Respondent did not), which caused injury within South Carolina (which any alleged conversion of Georgia assets, even if such had occurred, would not have done), but also that Respondent would have to have "regularly [done] or solicit[ed] business or engag[ed] in any other persistent conduct or deriv[ed] substantial revenue from goods used or consumed or services rendered in the state". S.C. Code 36-2-803(a)(4). Not only did Appellant not allege this, but Respondent, after Appellant had conducted discovery, provided *uncontradicted* proof that it did not do any of these things.

Accordingly, Respondent requests this Court affirm the lower Court's Order Dismissing the case for lack of jurisdiction and Appellant's Appeal be denied pursuant to Rule 220(c).

This 18th day of August, 2020.

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# THE SOUTH CAROLINA COURT OF APPEALS

SOHAIL ABDULLA, Appellant

v.

SOUTHERN BANK, Respondent

APPELLATE CASE NO. 2019-001142

RECEIVED
Aug 18 2020
SC Court of Appeals

THE HONORABLE MAITE MURPHY
AIKEN COUNTY
TRIAL COURT CASE NO. 2017CP0200283

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## CERTIFICATE OF COUNSEL

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The undersigned, as attorney for Respondent, SOUTHERN BANK, hereby certifies that a Respondent's Final Brief has been submitted in accordance with Rule 211(b)(1)(2).

This 18th day of August, 2020.

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