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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Debra R. McCaslin, Circuit Court Judge

Appellate Case No.: 2022-000087

ARM Quality Builders, LLC d/b/a ARM Quality Builders, Appellant,

vs.

First Citizens Bank, Respondent.

INITIAL BRIEF OF APPELLANT

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Lexington, South Carolina
May 2, 2022

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STATEMENT OF THE CASE

On October 12, 2020, plaintiffs filed a Summons and a Complaint in this case in the Court of Common Pleas for Lexington County. The Complaint alleges that defendant was served with a subpoena dated October 25, 2017 requiring it to produce plaintiffs' check banking records. (Complaint at ¶ 5). The Complaint further alleges that plaintiffs timely filed and served a motion to quash, pursuant to Rule 45 of the South Carolina Rules of Civil Procedure, on November 6, 2017, but that before this date Defendant responded to the subpoena. (Complaint at ¶ 5). The Complaint alleges that defendant's response was premature, improper, negligent and in violation of Rule 45 of the South Carolina Rules of Civil Procedure. (Complaint at ¶ 7).

The subpoena referred to in the Complaint was issued in the case of Arm Quality Builders v. Joseph and Lycia Golson, Civil Action No. 2017-CP-32-02204. The request for subpoena was filed with the Court on or about October 25, 2017. The Motion to Quash was filed ***twelve days*** later on November 6, 2017. On May 5, 2018, the Court entered and order noting that, upon agreement of the parties, the Motion to Compel was being withdrawn condition that Mr. Mazloom's personal bank records would be subject to a confidentiality order in the case. (Order Granting Motion to Compel at 2-3, Arm Quality Builders v. Joseph and Lycia Golson, Civil Action No. 2017-CP-32-0220 (Lexington Co. Ct. Com. Pl. May 5, 2018).

STANDARD OF REVIEW

When reviewing the dismissal of an action pursuant to S.C.R. Civ. P. 12(b)(6), the appellate court applies the same standard of review as the trial court. If the facts alleged and inferences reasonably deducible from the allegations set forth in the complaint, viewed in the light most favorable to the plaintiff, entitle him to relief on any theory, dismissal under Rule 12(b)(6) is proper. The complaint should not be dismissed merely because the court doubts the

plaintiff will prevail in the action. *Doe v. Bishop of Charleston*, 407 S.C. 128, 754 S.E.2d 494 (Sup. Ct. 2013).

ARGUMENT I

DID THE COURT ERR IN CONCLUDING THAT SOUTH CAROLINA LAW DOES NOT RECOGNIZE A DUTY NOT TO DISCLOSE FINANCIAL RECORDS PURSUANT TO A SUBPOENA?

It has been widely recognized that a bank has a contractual duty not to disclose the financial records of its depositor. "A number of jurisdictions have held that a bank has an implied contractual duty to keep financial information concerning a depositor or loan customer confidential. Nonetheless, there is authority that a bank does not have a duty to keep financial information concerning a borrower or potential borrower confidential. On the other hand, at least one jurisdiction has concluded that the existence of such a duty is a question of fact, irregardless of whether a depositor or loan customer is involved." Edward L. Raymond, Jr., *Bank's Liability, Under State Law, For Disclosing Financial Information Concerning Depositor or Customer*, 81 A.L.R.4th 377, §§ 2[a], 3 (1990)

Similarly, several courts have recognized a cause of action for a bank's negligent or wrongful release of its customer's financial records. Id. at § 8[a] (*citing Milohnich v. First Nat'l Bank*, 224 So.2d 759 (Fla. Ct. App. 1969). In Milohnick, the plaintiff contended that the bank had released its confidential financial records to a third party. The Court found:

> The allegations of fact in this complaint are, in our opinion, sufficiently broad to charge that the defendant national bank breached an implied contractual duty to the plaintiff depositors by negligently, willfully, intentionally or maliciously disclosing information concerning its accounts to individual third parties. Id. at 760.

The Court quoted with approval the case of *Peterson v. Idaho First National Bank*, 83 Idaho 578, 367 P.2d 284 (1961), which stated:

> It is inconceivable that a bank would at any time consider itself at liberty to disclose the intimate details of its depositors' accounts. Inviolate secrecy is one of the inherent and fundamental precepts of the relationship of the bank and its customers or depositors. This high ethical standard is recognized by the defendant bank in the instant case...
>
> It is implicit in the contract of the bank with its customer or depositor that no information may be disclosed by the bank or its employees concerning the customer's or depositor's account, and that, unless authorized by law or by the customer or the depositor, the bank must be held liable for breach of the implied contract. Milohnick, 224 So.2d at 760.

See *Schoneweis v. Dando*, 231 Neb. 180, 188-91, 435 N.W.2d 666, 672-73 (Neb 1989)(discussing tort and contract theories of bank liability); *Macon County Livestock Market, Inc. v. Kentucky State Bank*, 724 S.W.2d 343 (Tenn 1986) (acknowledging duty not to disclose financial records); *Indiana Nat'l Bank v. Chapman*, 482 N.E.2d 474, 482-483 (Ind. Ct. App. 1985) (discussing tort of wrongful disclosure of bank records under Indiana law). See also, Robert B. Wessling, *Banking-Disclosure of Records-The Duty of a Bank as to Customer Information*, 60 Mich. L. Rev. 781, 782-84 (1962).

In *Sparks v. Union Trust*, 256 N.C. 478, 124 S.E.2d 365 (N.C. 1962), plaintiff contented that the bank was negligent in failing to reveal to him the financial condition of a depositor with whom he had contracted. The Court held:

> Banks are under no duty at law to warn the investing public as to the financial condition of their depositors.... What this Court said in Bank v. Finance Co., 192 N.C. 69, 133 S.E. 415, 48 A.L.R. 519 is apposite: "A national bank has no power to engage in the business of furnishing to depositors or to others gratuitously or for compensation, direct, or indirect, information as to the solvency, or condition or reputation, financial or otherwise, of persons, firms or corporations. An agreement to furnish such information is *ultra vires*..." 256 N.C. at 481.

It further stated:

> "Depositors have the right to secrecy. A bank therefore is under an implied obligation to keep secret its records of accounts, deposits, and withdrawals." Id.

The Court held plaintiff had failed to state a claim; the bank had no duty to inform him of the financial condition of a customer. Compare *State v. Melvin*, 86 N.C.App. 291, 357 S.E.2d 379 (N.C. Ct.App. 1987) (Constitutional right to privacy not implicated when bank responds pursuant to subpoena).

South Carolina follows these general principles. In Rycroft v. Gaddy, 281 S.C. 119, 314 S.E.2d 39 (S.C. Ct. App. 1984), plaintiff sued a bank for the torts abuse of process, invasion of privacy, and negligence. Plaintiff contended "that C & S was negligent in failing to look beyond the face of a valid subpoena (the validity of which Rycroft admits) to determine if litigation was pending and if the records were requested for a valid purpose." Id. at123. The Court held "[s]ince the subpoena were valid on their face, the bank had no duty to inquire into the circumstances behind the subpoena as a bank cannot refuse to give information concerning an account when questioned in response to a lawful subpoena." Id. In regards to the claim of abuse of process, the Court held: "[n]o cause of action for abuse of process lies against C & S as the bank caused no process to issue against Rycroft; rather, it merely responded to the subpoena." See, Swinton Creek Nursery v. Edisto Farm Credit, 334 S.C. 469, 481-83, 514 S.E.2d 126 (S.C. 1999)(discussing Rycroft and subsequent cases as breach of contract and confidentiality claims).

The court in Rycroft did not hold that there was an absence of tort liability against a bank for wrongful or negligent disclosure of bank records. In fact, it examined each claimed tort to see if plaintiff could meet the elements of that tort. It held that a bank had ***no duty*** to look "beyond the face" of a legally issued subpoena and ***investigate*** the "merits" of the subpoena. Plaintiff agrees wholeheartedly with this holding.

In this case, plaintiff is ***not*** contending defendant bank is negligent in failing to look beyond the face of a validly issued subpoena and investigate its merits. Plaintiff is contending that the bank was negligent in prematurely responding to the subpoena, thereby depriving him of his legal right to move to quash the subpoena.[1] See generally Philip Blumstein & Linda Pohly, *Confidentiality, Access and Certainty: Disclosure of Customer Bank Records*, 1 Ann. Rev. Banking L. 101 (1982) (discussing different common law theories of liability for wrongful disclosure of financial records).

Plaintiff moved to quash the subpoena on November 6, 2017, ***twelve*** days after it was issued, and four days ***before*** the subpoena commanded the bank to produce the bank records. Plaintiff could file a timely objection up until the time of the return on the subpoena. See e.g. United States v. International Business Machines, 70 F.R.D. 700 (D.N.T. 1976) (interpreting F.R.Civ.P Rule 45(b)); Ross v. Citieis Service Gas Co., 21 F.R.D. 34 (D. Mo. 1957). The subpoena required the bank records to be produced on November 10, 2017 at 5 pm. The subpoena does not say "on or before" November 10, 2017.

Plaintiff is simply asking defendant to wait and give it a reasonable opportunity to file a motion to quash, its legal right; it is not requiring defendant to hire attorneys to investigate the merits of the subpoena. This is not an unduly burdensome duty; the bank already has this duty in regards to subpoenas issued by federal agencies. The Financial Right to Privacy Act requires that the subject of a subpoena be given the opportunity to file a motion to quash, providing "[a] Government authority may obtain financial records under section 1102(2)... pursuant to an

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1 Plaintiff is NOT claiming a breach of fiduciary relationship. In South Carolina, the relationship between a bank and its customer is debtor-creditor; in the absence of facts showing that the bank undertook to advise its customer, it is not a fiduciary relationship. Regions Bank v. Schmauch, 354 S.C. 648, 671, 582 S.E.2d 432 (S.C. Ct. App. 2003). Cf. Brown v. Green Tree Fin. Servicing Corp., No. 2:06-2777-PMD, 2008 U.S. Dist. LEXIS 40491 at *32-33 (D.S.C. May 19, 2008)(insurance applicant)

administrative subpoena or summons otherwise authorized ***only if***: (3) ten days have expired from the date of service of the notice or fourteen days have expired from the date of mailing of notice to the customer and within such time period the customer has not filed a sworn statement and motion to quash..." 12 U.S.C. §3405(3) (2021).

This court should find that the bank had a duty to give plaintiff until November 10, 2017 to respond. While Rule 45(c) on its face seems more open ended, only requiring the Motion to be "timely filed," the Courts have interpreted the motion to be "timely" if filed any time up until the return date. The records were produced by the bank on November 7, 2017, one day after the motion to quash had been filed with the court.

Plaintiff has clearly stated a claim. The complaint states that defendant improperly, negligently and ***prematurely*** responded to the subpoena. It alleges that plaintiff timely filed a motion to quash on November 6, 2021. Ahmad Malzoom, who ***was not a party to the underlying action***, has clearly pled facts sufficient to state a claim against the bank for breach of contract and negligence in releasing his ***personal*** bank account records.

ARGUMENT II

DID THE COURT ERR IN FINDING THAT RULE 45 OF THE SOUTH CAROLINA RULES OF CIVIL PROCEDURE DOES NOT PROHIBIT PRODUCING BANKING RECORDS PRIOR TO THE SPECIFIED RETURN DATE?

In Bond v. Slavin, 157 Md. App. 340, 851 A.2d 598 (Md. Ct. App. 2004), appellant's attorneys issued a subpoena duces tecum to the Bank, requiring that a custodian of records or a corporate designee appear at the February 18th hearing and produce certain of Mrs. Bond's financial records—including Mr. and Mrs. Bond's joint accounts. Appellant argued that his financial records were wrongfully disclosed when his joint account was subpoenaed. The Court held:

> The subpoena at issue was served on Bank of America and commanded a custodian of records to "[p]ersonally appear and produce documents or objects: at Circuit Court for Baltimore City, Courthouse East, Family Division, Room 3, 1st Floor, 111 North Calvert Street, Balt., MD 21202 on Tuesday the 18th day of February, 2003 at 9:30 a.m." Instead, the Bank delivered the joint bank records of Mr. and Mrs. Bond to counsel for Mr. Slavin at a time prior to and place other
> than that specified in the subpoena. The Bank had no right to do so. ***When a court issues a subpoena duces tecum requiring a custodian of financial records to "personally appear and produce [financial records]" at a certain place on a certain date and time, the custodian cannot —without obtaining the permission of the person(s) whose financial records have been subpoenaed— produce those records at a different place on a different date.*** Such a subpoena "does not ... signify a delivery of the papers into the hands of the party calling for their production or of his counsel, or a submission of them to his examination...." Id. at 609.
>
> When documents that should be presented to the court on a particular date have been presented in advance of that date to the party who issued the subpoena, the fact that harm resulting from the premature production may be irreversible does not render the court powerless to fashion some form of meaningful relief. Id. at 610.

The Court found in favor of the appellant.

South Carolina recognizes that delivery of financial records prior to the date specified in the subpoena may support a motion to quash. In Estate of Watson v. Babb, No. 2007-UP-329, 1007 S.C. App. Unpub. LEXIS 374 (S.C. Ct. App. June 25, 2007), appellant contended that the trial court erred in not granting his motion to quash because the documents were delivered prior to the date specified in the subpoena. The Court held that the motion to quash was not timely under Rule 45 of the South Carolina Rules of Civil Procedure, having been filed more than 14 days after the subpoena was issued.[2] The Court further held "[m]oreover, we perceive no prejudice to Babb in the allegedly premature furnishing fo the records by the bank inasmuch as

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2 "A nonparty served with a subpoena has three options: it may: (1) comply with the subpoena; (2) serve an objection on the requesting party in accordance with Civil Rule 45(c)(2)(B), or (3) move to quash or modify the subpoena in accordance with Civil Rule 45(c)." Cap Call, LLC v. Foster, No. 15-60979, 2019 Bankr. LEXIS 1581 at *12-13 (Bankr. Mt. May 20, 2019). In this case, defendant did not comply with subpoena by producing the documents prior to the date specified in the subpoena. See argument II, below.

he does not content that the records were not discoverable. Thus, the bank's release of them before the deadline set out in the letter to Babb does not give rise to reversible error." Id. at *11.

Rule 45(C) of the South Carolina Rules of Civil Procedure is in accord with the holding in Bond. Rule 45(C) provides that a subpoena shall:

> (C) command each person to whom it is directed to attend and give testimony or produce and permit inspection and copying of designated books, documents or tangible things in the possession, custody or control of that person, or to permit inspection of premises, ***at a time and place therein specified***; S.C.R.Civ.P. 45(C)(2021) (emphasis added).

Rule 45(C) requires a ***specific*** date for the production of documents. The word "at" is "used as a function word to indicate age or position in time." MIRRIAM-WEBSTER'S COLLEGIATE DICTIONARY 77 (11th Ed. 2014). Rule 45 could have said "on or before" instead of "at"; it is clear that the subpoena must be returned at one ***specific*** place and time. This Court should not allow the defendant to contend that it complied with the subpoena duces tecum by responding ***before*** the date specified on the subpoena.

Federal courts interpreting Federal Rule 45, upon which South Carolina Rule is patterned, have effectively held, consistent with Bond, that a premature response does not comply with mandate of the subpoena. In Mann v. University of Cincinnati, 824 F. Supp 1190 (S.D. Oh. 1993), for example, defendant's counsel issued a subpoena for, and obtained copies of, plaintiffs' medical files while plaintiffs' attorney was considering the merits of giving the records in response to a request for production of documents. Before the date on the subpoena, defendant's counsel contacted the custodian of the medical records and convinced it that the only way to avoid appearing in court was to provide her the records ***before*** the return date on the subpoena.

After extensively discussing the history of Rule 45 and its purpose, the Court found "an attorney seeing document discovery [is] now under a heightened duty to properly notify other parties and to provide a reasonable time period for the subpoena recipient ***and other parties*** to object." Id. at 1201. In regards to defense counsel's actions to obtain the records before the return date on the subpoena, the court stated:

> [D]efendants' attorney violated both the letter and the spirit of the discovery rules in general and Rule 45 in particular by instructing the subpoena recipient via and ex parte communication that the only alternative to appearing at her law firm on April 9 with the documents listed was to provide those document ***before*** the subpoena production date. Nothing in Rule 45 requires a subpoena recipient to appear at the issuer's law firm to produce records, and nothing in Rule 45 authorizes an instruction to produce documents prior to the subpoena date. The form language on the reverse of the subpoena makes it clear that the recipient need not appear in person at the place of production so long as the records are provided. Defendants' argument that the recipient had to produce the records prior to the subpoena date to avoid contempt proceedings for failure to produce at the time and place designated on the subpoena is, frankly, ridiculous. Id. at 1202.

The court issued a protective order and imposed sanctions. See also Florida Media, Inc. v. World Publ'ns, LLC, 236 F.R.D. 693, 594 (M.D. Fla. 2006) ("The purpose of the 'prior notice' provision is to give an opposing party the opportunity to object to the subpoena ***prior to the date set forth in the subpoena...*** For an objection to be reasonably possible, notice 'must be given well in advance of the production date.'")(emphasis added).

In the case before this court, the subpoena requested financial records of a ***non-party*** in the case of Arm Quality Builders v. Joseph and Lycia Golson, namely, Ahmad Mazloom. The Bank produced Mr. Mazloom's private financial records ***days before*** the date specified in the subpoena. These records were irrelevant and were non-discoverable, unlike the financial records in Estate of Watson. They were produced at a different time then specified in the subpoena. Under Bond, the bank needed to obtain the permission of Mr. Mazloom before

producing the records early. Failure to do so is clearly prejudicial to the rights of Mr. Mazloom and is negligent.

Further, the defendant's actions were in violation of the spirit and the letter of Rule 45. Rule 45 was intended to give ***both the bank and plaintiff*** notice and a reasonable time to object or file a motion to quash. Allowing defendant to respond before the date set forth in the subpoena effectively denies plaintiff a reasonable time to file a motion to quash. The only possible interpretation of Rule 45 consistent with its language and history is that ***a premature response to a subpoena is no response*** and that defendant's release of confidential financial information was not authorized by law pursuant to a subpoena. The Court should find that plaintiff has clearly stated a claim.

ARGUMENT III

DID THE COURT ERR IN FINDING THAT A PARTY CANNOT SEEK MONETARY DAMAGES IN A NEW LATER LAWSUIT FOR A PERCEIVED VIOLATION OF THE SOUTH CAROLINA RULES OF CIVIL PROCEDURE AND PRIOR LITIGATION AND CANNOT SEEK TO COLLATERALLY CHALLENGE THE RULING OF THE COURT ON THE DISCOVERY ISSUES IN THAT PRIOR LITIGATION?

In the Plaintiffs' Notice of Motion and Motion Pursuant to Rules 52 and 59 of the SC Rules of Civil Procedure filed on December 20, 2021, the Plaintiffs requested the Court to amend its judgment in ruling that "a party cannot seek monetary damages in a new later lawsuit for a perceived violation of the South Carolina Rules of Civil Procedure in a prior litigation and cannot seek to collaterally challenge the ruling of the court on the discovery issues in that prior litigation." The Circuit Court quoted the following language in its Order Granting First Citizens Bank's Motion to Dismiss:

> "In an Order dated May 18, 2018 addressing discovery issues, including the subpoena at issue, the Court noted that "[t]he parties ... agreed to resolve an ancillary discovery matter relating to Plaintiffs' objection to Defendants' subpoena to First Citizens Bank" and that Counsel for Plaintiff "agreed and

> confirmed on the Record that Plaintiff withdraws its objection to the Subpoena" (May 18, 2018 Order pp.2-3). The Court went on to conclude "[a]ll records relating to any personal bank accounts maintained by Ahmad Mazeloom and produced by First Citizens Bank in response to Defendant's subpoena are discoverable [and subject to the confidentiality order] ..." A party cannot seek monetary damages in a new later lawsuit for a perceived violation of the South Carolina Rules of Civil Procedure in prior litigation and cannot seek to collaterally challenge the ruling of the court on the discovery issues in that prior litigation."

The ruling that "a party cannot seek monetary damages in a new later lawsuit for a perceived violation of the South Carolina Rules of Civil Procedure in prior litigation cannot seek to collaterally challenge the ruling of the court on the discovery issues in that prior litigation" is in error. Collateral estoppel and res judicata do not apply in that the Defendant was not a party to the underlying litigation in this case which is set forth in the Factual Procedure of the Order dated May 18, 2018. Also, the individual Plaintiff, Ahmad Mazloom, was not a party in this action at the time of the issuing of the Order which is set forth on this issued referred to in the said Order on page 3 and his personal checking records would not be subject to this Order. See Doe v. Bishop of Charleston, 407, S.C. 128, 754 S.E.2d 494 (page 4, Section II).

ARGUMENT IV

DID THE COURT ERR IN RULING THE PLAINTIFFS HAD NOT ALLGED DAMAGES?

Plaintiffs' Complaint indicated damages in a general form. Also, in the case sited by the Court, Lord v. D & J Enterprises, Inc., 407 S.C. 544, 757 S.E.2d 695 (2014) is a case that indicates that it is an opinion under Rule 268(d)(2) indicating that the case should not be cited for precedential value and should not be cited except in proceedings in which they are directly involved.

ARGUMENT V

DID THE COURT ERR IN NOT RULING ON PLAINTIFFS' CONTENTION THAT THIS CASE IS A NOVEL ISSUE IN THE STATE OF SOUTH CAROLINA?

The Plaintiffs' in its argument before the Court on the Motion to Dismiss by the Defendant raised the issue that the legal issues in this case involved a novel issue in the State of South Carolina. The Order of the Circuit Court did not rule on this argument. Plaintiffs, in its Motion to Reconsider, raised that question but the court denied the Plaintiffs' Motion to Reconsider. Unisys Corp. v. S.C. Budget & Control Bd. Div. of Gen. Servs. Info. Tech. Mgmt. Office, 346 S.C. 158, 165, 551 S.E.2d 263, 267 (2001) (See also Chestnut v. AVX Corp., 413 S.C. 224, 227, 776 S.E.2d 82, 84 (2015): "[N]ovel questions of law should not ordinarily be resolved on a Rule 12(b)(6) motion").

CONCLUSION

The decision of the Circuit Court should be reversed because the Defendant saw on the face of the subpoena that there was a certain date, time and place for responding to the subpoena. Defendant responded by mailing documents to the Plaintiffs' Golson's attorney prior to the designated date, time and place on said face of the subpoena. Defendant's early response negligently interfered with Plaintiffs' fourteen (14) day-time period to object to the issued subpoenas, which it did. The Appellant Court should reverse the decision of the Circuit Court based on the duty of the Defendant, as set out above, when there are clear court rules establishing how the Defendant was to respond to the subpoena and by not responding as set forth in the issued subpoena, it wrongly interred with Plaintiffs' objection rights. Plaintiff Ahmad Mazloom, individually, should not be estopped from making the claim that he has in his Summons and Complaint in that he was not a party Plaintiff to the previous lawsuit which the Defendant could

see from the face of the subpoena. Furthermore, if the Court determines it is a novel issue of any claim rights by the Plaintiffs, it should not be decided on a Motion to Dismiss.