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SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

James E. Chellis, Master-In-Equity

Case No.: 2017-CP-18-00819

Appellate Case No.: 2020-001127

Estate of Roby A. Adams.....Appellant

v.

1st Franklin Financial Corporation.....Respondent.

RESPONDENT'S RETURN TO APPELLANT'S PETITION FOR REHEARING OR REHEARING EN BANC

INTRODUCTION

Respondent 1st Franklin Financial Corporation ("1st Franklin" or "Respondent") hereby submits its Return in Opposition to the Petition for Rehearing or Rehearing En Banc (the "Petition") filed by Appellant Estate of Roby A. Adams ("Adams" or "Appellant"). Appellant offers no new or compelling reason to overturn this Court's unanimous opinion affirming the Master-in-Equity's decision in favor of 1st Franklin.[1] Instead, Appellant simply restates arguments

[1] 1st Franklin Financial Corporation v. Estate of Roby A. Adams, Unpublished Opinion No. 2023-UP-024 (Ct. App. Filed Jan. 25, 2023).

already considered and rejected by this Court. As more fully explained below, Appellant's Petition should be denied.

ARGUMENT

I. APPELLANT'S PETITION DOES NOT SATISFY THE STANDARD FOR REHEARING OR REHEARING EN BANC.

Rehearing is only appropriate when the losing party can demonstrate that the Court misapprehended or overlooked their argument. *Kennedy v. S.C. Retirement Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001) (citing Rule 221(a), SCACR). The purpose of a petition for rehearing is not to give parties an opportunity to have the case considered by the appellate court for a second time. *See id*. Appellant's Petition references the standard for rehearing under Rule 221(a) in passing but fails to "state with particularity the points supposed to have been overlooked or misapprehended by the court" as is required by Rule 221(a), SCACR. This Court's opinion demonstrates that it considered all of the issues relevant to this appeal and correctly rejected the arguments raised by Appellant. Rehearing under Rule 221(a), SCACR is not warranted.

Appellant similarly fails to satisfy the standard for rehearing en banc. Rule 219, SCACR provides that "rehearing en banc is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance." Rule 219, SCACR. Once again, Appellant ignores the applicable standard and fails to state why rehearing en banc is necessary or appropriate in this case. Appellant characterizes the issue on appeal as an "issue of first impression" and does not argue the opinion is inconsistent with prior decisions. (*See* Appellant's Petition for Rehearing or Rehearing En Banc (hereinafter "Appellant's Petition for Rehearing"), at *1). Appellant also does not argue that the appeal "involves a question of exceptional importance" such that rehearing en banc or rehearing is needed. Appellant clearly fails to satisfy the high burdens for rehearing or rehearing en banc.

II. THIS COURT CORRECTLY HELD THAT THE LEGISLATURE DID NOT INTEND TO IMPOSE STRICT LIABILITY FOR ALLEGED VIOLATIONS OF THE "FACTORS" SET FORTH IN SECTION 37-5-108(5).

Like the Master-in-Equity, this Court correctly determined that Section 37-5-108 is not a strict liability statute. Under the clear and unambiguous language of the statute, a court has discretion, after considering the statutory "factors," to determine whether a creditor has engaged in unconscionable conduct in collecting a debt. This Court properly rejected Appellant's argument that Section 37-5-108 requires a finding of liability for any violation of the "factors" set forth in § 37-5-108(5).

Section 37-5-108(2) provides:

> [w]ith respect to a consumer credit transaction, if the court as a matter of law finds that a person has engaged in, is engaging in, or is likely to engage in unconscionable conduct in collecting a debt arising from that transaction…the consumer has a cause of action to recover actual damages and…a right to recover from the person violating this section a penalty in the amount determined by the court of not less than one hundred dollars nor more than one thousand dollars.

S.C. Code Ann. § 37-5-108(2). Thereafter, section 37-5-108(5) states "in applying [S.C. Code section 37-5-108(2)] ***consideration shall be given to each of the following factors***" before setting forth conduct the court should consider when deciding whether a creditor "has engaged in, is engaging in, or is likely to engage in unconscionable conduct" in violation of section 37-5-108(2) (emphasis added). The statute is clear that liability arises only "if the court as a matter of law finds that a person has engaged in, is engaging in, or is likely to engage in ***unconscionable conduct*** in collecting a debt." S.C. Code Ann. § 37-5-108(2) (emphasis added). The statute goes on to state that parties "shall be afforded a reasonable opportunity to present evidence . . . to aid the court in ***making the determination"*** of whether a party engaged in unconscionable conduct. *See* S.C. Code Ann. § 37-5-108(3) (emphasis added). Finally, the statute is clear that section 37-5-108(5) sets forth "factors" to be given "consideration" in determining whether a creditor has engaged in unconscionable conduct. Appellant's interpretation, which would require a finding of liability if a

creditor engaged in any conduct listed as a "factor" under section 37-5-108(5), ignores the plain language of the statute.

The argument that Section 37-5-108 should be construed as a strict liability statute because the Fair Debt Collection Practices Act ("FDCPA") has been held to be a strict liability statute is unpersuasive. The language of the FDCPA is decidedly different than that of Section 37-5-108. The FDCPA plainly states that certain conduct is a violation of the statute. *See e.g.*, 15 U.S.C. § 1692(e) ("Without limiting the general application of the foregoing, the following conduct is a violation of this section").[2] Unlike the FDCPA, Section 37-5-108(5) does not explicitly state that the listed conduct gives rise to liability. Instead, as set forth above, it sets forth "factors" to be given "consideration" by the court when deciding whether a creditor has engaged in unconscionable conduct. The argument that this Court should ignore the plain language of Section 37-5-108 simply because another statute within the South Carolina Consumer Protection Code references the FDCPA fails. The actual language of Section 37-5-108 controls, and this Court correctly held that the statute gives a court discretion, after considering statutory factors, when deciding whether a creditor has engaged in unconscionable conduct.

Appellant's reliance on the FDCPA is also misplaced because the FDCPA does not apply when, like here, a lender attempts to collect its own debt. The FDCPA only applies to third-party debt collectors. *See Volden v. Innovative Fin. Sys. Inc*., 440 F.3d 947, 949 (8th Cir. 2006) (stating the FDCPA creates causes of action against debt collectors, not creditors); *Newman v. Boehm, Pearlstein & Bright, Ltd*., 119 F.3d 477, 482 n.3 (7th Cir. 1997) (stating "[t]he FDCPA applies only to the debt collection activities of a third party who is collecting a debt owed to another"). It

[2] Other provisions of the FDCPA are also clear that other conduct is "a violation" of the FDCPA. *See e.g.*, 15 U.S.C.A. §1692(f) (A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. Without limiting the general application of the foregoing, ***the following conduct is a violation of this section***….) (emphasis added).

is undisputed that this case involves 1st Franklin's efforts to collect its own debt. Thus, the FDCPA is wholly irrelevant to this case whether cited as direct authority or by way of analogy.

Appellant's reliance on *In re Zenner*, 348 S.C. 499, 501, 560 S.E.2d 406, 407 (2002) is equally unpersuasive. *In re Zenner* is an opinion on an attorney discipline matter with no discussion whatsoever of whether judges are given deference when deciding whether a creditor has violated Section 37-5-108. *Id*. at 505—07, 560 S.E.2d at 409—10. *In re Zenner* is irrelevant to the issues that are the subject of this appeal.

III. THIS COURT PROPERLY AFFIRMED THE MASTER-IN-EQUITY'S GRANT OF PARTIAL SUMMARY JUDGMENT IN FAVOR OF 1ST FRANKLIN.

Appellant continues to argue that 1st Franklin must be held liable because it filed two separate lawsuits, five months apart, which alleged that different amounts were owed by Appellant. Based solely on the fact that this action alleged that Appellant owed $9.08 less than the amount alleged in the prior lawsuit,[3] Appellant claims that 1st Franklin falsely represented the amount of the debt in violation of Section 37-5-108. As an initial matter, Appellant's Petition mischaracterizes the evidence in the record and the Master-in-Equity's order. 1st Franklin denies that it "falsely represented" the amount owed by Appellant, and the Master-in-Equity never held that 1st Franklin made a false representation. Appellant incorrectly states that 1st Franklin admitted violating Section 37-5-108 and that the Master-in-Equity found that 1st Franklin violated the statute. 1st Franklin and the Master-in-Equity only acknowledged that the two complaints alleged different amounts were owed.

Addressing the merits of Appellant's claim, after considering the record, both the Master-in-Equity and this Court correctly held that 1st Franklin's $9.08 reduction in the amount alleged to

[3] The prior action, *1st Franklin Financial Corporation v. Roby A. Adams*, Civil Action 2016-CV-18-10302148, was dismissed *without prejudice* following Adams's objection to 1st Franklin's failing to file documentation relating to non-lawyer representation of a corporation in Magistrate's Court.

be owed was not unconscionable conduct. There is absolutely no evidence in the record to support a finding that 1st Franklin engaged in unconscionable conduct. Appellant's interpretation of the statute, where good-faith mistakes and clerical errors are characterized as "false representations" which require a finding of liability, is counter to the statute's goal of discouraging unfair and deceptive collection practices. In this case, Appellant has done nothing more than point to the fact that the two complaints alleged different amounts were owed. This Court correctly held that more is required to survive summary judgment. *Baughman v. Am. Tel. & Tel. Co.,* 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991) (At the summary judgment stage, the opposing party "must come forward with specific facts showing that there is a genuine issue for trial.").

IV. THIS COURT PROPERLY AFFIRMED THE MASTER-IN-EQUITY'S DENIAL OF ADAMS' RULE 59 MOTION.

This Court also correctly ruled that the Master-in-Equity's denial of Appellant's Rule 59(e), SCRCP motion was not an abuse of discretion. Appellant argues that the Master-in-Equity's order lacked the necessary level of detail or findings, and therefore, denial of the motion was an abuse of discretion. However, as this Court noted in its opinion, Rule 52(a) is clear that "[f]indings of fact and conclusions of law are unnecessary" in orders addressing Rule 59, SCRCP motions. This case is easily distinguishable from the case relied on by Appellant, *Lollis v. Dutton,* 421 S.C. 467, 486, 807 S.E.2d 723, 733 (Ct. App. 2017). In *Lollis*, the trial court's original and the order denying the subsequent Rule 59(e), SCRCP motion contained no explanation or reasoning of the court's decision. Here, unlike in *Lollis*, the court's order granting 1st Franklin's motion for summary judgment order details the arguments made by both parties, explicitly states that the court considered the arguments of the parties, and then includes detailed reasoning for its decision. After Appellant filed his Rule 59(e), SCRCP motion, the Master-in-Equity set a brief scheduling, which allowed briefing from both parties. After the submission of memorandum by both parties, the

Master-in-Equity denied Adams' motion. The Master-in-Equity's Form 4 denial of the Rule 59(e), SCRCP motion was not an abuse of discretion.

CONCLUSION

For these reasons set forth above, this Court correctly affirmed the Master-in-Equity's grant of partial summary judgment in favor of 1st Franklin. Appellant's Petition for Rehearing or Rehearing En Banc should be denied.

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PROOF OF SERVICE

I, Gina A. Cornwell, hereby certify that on March 1, 2023, I served a copy of the Respondent's Return to Appellant's Petition for Rehearing or Rehearing En Banc on the following counsel, by electronic mail addressed to the following attorney of record:

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March 1, 2023

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