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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Diane S. Goodstein, Circuit Court Judge
Maite Murphy, Circuit Court Judge

Appellate Case No. 2020-000935

Portfolio Recovery Associates, LLC
Assignee of Synchrony Bank/HH Gregg

Respondent,

v.

Jennifer Campney

Appellant.

and

Jennifer Campney

Third-party Plaintiff

v.

Cooling & Winter, LLC

Third-party Defendant,

Of whom Jennifer Campney is the Appellant

MOTION TO STRIKE AND IN LIMINE

John R. Cantrell, Jr.
Cantrell Legal, PC
108 Phillips Ct.
St. Matthews, SC 29135
(843) 797-2454
Attorney for Appellant

Pursuant to Rules 11(a) & 12(f), SCRCP, Rules 402 & 403, SCRE, and Rules 208(b)(1)(B), 208(b)(2) & 404(i), SCACR, and the doctrine of procedural due process, which protection is guaranteed under the Constitutions of both the United States and South Carolina, Appellant Jennifer Campney hereby files this Motion to Strike and In Limine as is more particularly described below. Prior to filing this motion, Appellant's counsel sent opposing counsel an email regarding these issues on April 6, 2023, but received a response later that day stating that due to the holiday weekend, opposing counsel would not be able to respond until Monday, April 10, 2023. Unfortunately, counsel for Appellant has already planned to be out of town on vacation during the week of April 10-15, 2023. Since oral argument in this case has already been scheduled for May 1, 2023 and is only a few weeks away, Appellant believes that further communication cannot be timely held. Appellant also believes that further communication regarding this motion would serve no useful purpose, at least in regards to the new arguments raised in Respondent's brief indicated below, since Respondent has taken the position in that brief that these new arguments on appeal are properly before this court.

MOTION TO STRIKE RESPONDENT'S FILED BRIEFS

Respondent has filed two briefs in this appeal. Respondent's Final Brief was filed on March 26, 2021 and Respondent's Brief in Response to the South Carolina Department of Consumer Affairs' amicus brief ("Brief in Response to SCDCA") was filed on August 25, 2021. Both of those briefs were signed by Ms. Caren Enloe, who has been admitted *pro hac vice* under the supervision of Mr. J. Ronald Jones, Jr., but neither of these briefs were signed by Mr. Jones. Appellant believes that the failure of Mr. Jones to sign both of these briefs violates both Rule 11(a), SCRCP and Rule 404(i), SCACR. Appellant therefore requests that this court take such action as may be appropriate for this rule violation, including the consequences indicated in Rule

11(a), SCRCP. Respondent's counsel were notified of these apparent rule violations by email on April 6, 2023.

MOTION TO STRIKE NEW ARGUMENTS ON APPEAL

In Respondent's Brief in Response to SCDCA, Respondent raises new arguments on appeal that were not presented to the trial court. Respondent is aware that it is making new arguments on appeal, as can be seen by footnote 5 in this brief, but believes that it is proper to raise these new arguments on appeal, with which belief Appellant respectfully disagrees. In particular, in this brief, Respondent raises new arguments about federal preemption of state law and significant impairment under S.C. Code Sec. 37-5-109(2). For the reasons below, Appellant ask this court to strike those new arguments and disregard them when considering this case.

First, Appellant believes that Respondent's Brief in Response to SCDCA does not properly state in the Issues on Appeal section of that brief Respondent's alleged additional sustaining grounds that Respondent argues in its brief. Regarding an Appellant's brief, "[o]rdinarily, no point will be considered which is not set forth in the statement of the issues on appeal." Rule 208(b)(1)(B), SCACR. "The respondent is not required to set out a separate statement of the issues on appeal in his brief, unless the respondent is dissatisfied with the appellant's statement of the issues. Rule 208(b)(2), SCACR. In addition to restating the issues, the respondent can also identify other issues that may provide a basis for affirmance. *Id.*; *see* Rule 220(c), SCACR; *I'on, L.L.C. v. Town of Mt. Pleasant,* 338 S.C. 406, 526 S.E.2d 716(2000)." Jean Hoefer Toal, *et al.*, *Appellate Practice in South Carolina* p. 429 (3rd ed.2016). As will be noted on page 1 of Respondent's Brief in Response to SCDCA, Respondent states as the only issue on appeal the following: "DID THE TRIAL COURT ERR IN RULING THE SOUTH CAROLINA CONSUMER PROTECTION CODE DOES NOT APPLY TO AN

ASSIGNEE'S COLLECTION ON A CONSUMER CREDIT CARD DEBT?" Respondent does not separately identify any other issues. Appellant therefore believes that Respondent's preemption issue should not be considered by this court, since that is how Appellant believes the court would treat an appellant's failure to separately state any issues in the Statement of Issues on Appeal. Similarly, this statement of the issue on appeal by Respondent does not include the new significant impairment argument either, so this argument should not be considered by the court as well due to that failure. Indeed our Supreme Court appears to adopt this reading of the appellate rules in the *I'on* case cited above, at page 420, where they cite Rule 208(b)(1)(B) in reference to a respondent's duty to state additional sustaining grounds in its issues on appeal.

Second, Appellant believes that Respondent failed to raise the new issues first raised in its Brief in Response to SCDCA in a timely manner. As was stated by former CJ Toal in her *Appellate Practice* book mentioned above, "…the purpose of the [appellant's] reply brief is to reply to any new arguments the respondent may have set forth in his brief. … Further, under the present rules, the appellant receives notice of the respondent's additional sustaining grounds through the respondent's brief. *See* Rule 208(b)(2), SCACR ("Respondent's brief may also contain argument asking the court to affirm for any ground appearing in the record as provided by Rule 220(c)."); *I'on, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000) (explaining the process for addressing additional sustaining grounds). Thus, the appellant may address those additional grounds in the reply brief." *Appellate Practice* at page 436. However, in this case that was not possible, since Respondent did not include those additional sustaining grounds in its Final Brief, but instead waited until about 5 months later to raise these additional sustaining grounds in its Brief in Response to SCDCA, which meant that Appellant was prejudiced by being unable to include any response to these new arguments in her Reply brief. The SCDCA requested permission to reply to Respondent's Brief in Response to SCDCA, but permission was denied by this court on October 18, 2021. Appellant cannot

properly respond to these new arguments during the limited amount of time allowed for oral argument, and should not be required to do so, since Respondent failed to raise them in a timely manner. As stated by our Supreme Court in the *I'on* case cited above, "[o]f course, a respondent may abandon an additional sustaining ground under the present rules—just as a respondent could under the former rules—by failing to raise it in the appellate brief." *I'on* at page 420. Appellant believes, like CJ Toal in her *Appellate Practice* book cited above, that the appellate brief referred to is Respondent's Final Brief, to which Appellant could have responded, and not Respondent's Brief in Response to SCDCA, to which no party in this case was given an opportunity to respond.

Third, Appellant believes that Respondent does not meet the required standard for making new arguments for additional sustaining grounds in this case. In footnote 5 of its Brief in Response to SCDCA, Respondent states its belief that the trial court ruled that "no notice of right to cure letter was required to be sent prior to the commencement of this action." (R. p. 15) and then cites a case decided in 1886 standing for the proposition that this court may affirm the trial court's judgment for any reason appearing in the record on appeal. However, Appellant wants the court to note that Respondent's quote was incomplete. What the trial court order actually said was as follows: "Based on the foregoing, the Court finds that no right to cure letter was required to be sent prior to commencement of this action." (R. p. 15). So, the reasons appearing in the record on appeal for the trial court's ruling that no right to cure letter was required to be sent are found in the trial court's order on pages 14-15 of the record on appeal. There were only two reasons given in the trial court's order for this ruling. One was the trial court's reliance upon the faulty reasoning stated in the referenced *Bracken* district court case about why a consumer credit card is not a consumer loan or a consumer credit transaction under the SCCPC. The other reason

is the trial court's belief that the SCCPC only applies to original creditors and not to assignees, which faulty argument the SCDCA responded to comprehensively on pages 12-19 of its amicus brief. Those were the only two reasons that the trial court gave for finding that Respondent was not required to send a notice of right to cure before filing suit. Notably absent from those two reasons was Respondent's new argument about federal preemption. Therefore, federal preemption was not "any reason appearing in the record on appeal" to support the trial court's ruling or to allow that new issue to be raised for the first time on appeal. It is odd that Respondent chose to cite the 1886 case of *Ketchin v. McCarley* in footnote 5 in support of its argument, instead of the more modern and more frequently cited *I'on L.L.C. v Town of Mt. Pleasant* case cited above. However, reference to the *I'on* case reveals the following statement: "The basis for respondent's additional sustaining grounds must appear in the record on appeal, but other requirements contained in former rules and pre-1990 precedent no longer apply. (citations omitted) … The appellate court may review respondent's additional reasons and, if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment. An appellate court may not rely on Rule 220(c), SCACR, when the reason does not appear in the record, or when the court believes it would be unwise or unjust to do so in a particular case. It is within the appellate court's discretion whether to address any additional sustaining grounds. [9]" *I'on* at page 420. Regarding Respondent's new argument about significant impairment under S.C. Code Sec. 37-5-109(2), Appellant does not see where this reason appears in the record on appeal either, but unlike the federal preemption argument, Respondent does not acknowledge this as a new argument. However, it appears to appellant that it is just as infirm as the federal preemption argument, and for the same reasons. The court should therefore strike both of these arguments from Respondent's Brief in Response to SCDCA

and choose to ignore them when deciding the pending appeal.

MOTION IN LIMINE REGARDING NEW ARGUMENTS ON APPEAL

In addition to Appellant's request that the court strike the new arguments indicated above from Respondent's Brief in Response to SCDCA, Appellant also moves in limine to prevent Respondent from raising any new arguments, including Respondent's new arguments regarding federal preemption and significant impairment under S.C. Code Sec. 37-5-109(2), at oral argument in this appeal. Appellant's reasons for this request are the same as the reasons stated above requesting that the court strike these arguments from Respondent's Brief in Response to SCDCA and disregard them, since it would do Appellant little good for the court to strike them from the brief, but then allow them to be presented anyway at oral argument.

ALTERNATIVE RELIEF

In the alternative, if for any reason the court believes that it was not improper for Respondent to raise any of these new arguments on appeal at the time Respondent raised them, Appellant asks that the court recognize, based on the *I'on* case cited above, at page 420, and as cited on page 6 of this Motion, that the court still has discretion to choose not to address these new arguments on appeal, since neither Appellant nor Amicus SCDCA have been given an opportunity to respond in writing to the arguments. Appellant believes that this court will have better opportunities to explore these new arguments in future cases where these issues have been properly raised and ruled upon in the lower court. Indeed, as our Supreme Court further stated in the *I'on* case cited above, at page 421, "[i]n clarifying the law, we do not mean to dilute the important principle that all parties should raise all necessary issues and arguments to the lower court and attempt to obtain a ruling. While the current rules do not require the respondent to present an issue to the lower court in order to raise it as an additional sustaining ground, an

appellate court is less likely to rely on such a ground when the respondent has failed to present it to the lower court. In such cases, the appellate court likely would perceive it as being unfair or unwise to resolve a case on a ground never mentioned by the respondent prior to appeal. Stated another way, the respondent may raise an additional sustaining ground that was not even presented to the lower court, but the appellate court is likely to ignore it.[11]" Therefore, if for any reason the court doesn't believe it was improper for Respondent to raise these new issues on appeal, the court should still not base any ruling on these arguments. However, it would be best if this court were to grant both Appellant's Motion to Strike and her Motion In Limine, since otherwise Appellant's counsel will be prejudiced by having to both make arguments on the issues properly raised below and the new issues, and having to do so in only 20 minutes of time, less any time required to respond to questions from the court. In the new arguments contained in Respondent's Brief in Response to SCDCA, there are many references to the National Bank Act, and about 15 references to various provisions in the Code of Federal Regulations regarding the regulation of national banks, in addition to numerous cases that were mentioned as well, which couldn't even be addressed orally in 20 minutes if Appellant had nothing else to do during oral argument, which would be fundamentally unfair to Appellant. If the court does choose to exercise discretion not to consider the new arguments on appeal, then Appellant respectfully requests that the court provide notice of this decision as soon as possible so that the parties can properly prepare for oral argument.

PROCEDURAL DUE PROCESS CONCERNS

In addition to the arguments above, and by incorporating the facts stated above in this section, Appellant believes that the court should also grant Appellant's Motion to Strike and In Limine due to procedural due process concerns. The doctrine of procedural due process requires

both adequate notice of any arguments that Respondent might make in an appeal and a meaningful opportunity to be heard when responding to those arguments. *Huellmantel v. Greenville Hospital System*, 303 S.C. 549, 553, 402 SE 2d 489 (Ct. App. 1991) citing U.S. Supreme Court cases. Since Respondent did not include these new arguments in its Final Brief, Appellant did not have an opportunity to respond in her Reply Brief. Amicus SCDCA was also denied an opportunity to reply to these new arguments. If Appellant is forced to respond orally to these substantial new arguments in less than 20 minutes at oral argument, Appellant will not have a meaningful opportunity to be heard, and the process will be fundamentally unfair since Respondent suffered no similar limitations when Respondent was given 30 days to respond to the SCDCA amicus brief in writing. Appellant therefore believes that procedural due process concerns also suggest that the court should not allow these new arguments to be considered in this appeal.

CONCLUSION

Appellant therefore requests that the appellate court take the following actions:

1. Grant Appellant's Motion to Strike both of Respondent's filed briefs due to violations of Rule 11(a), SCRCP and Rule 404(i), SCRCA, or take such other action as may be appropriate for these violations,
2. Grant Appellant's Motion to Strike any new arguments raised in Respondent's Brief in Response to SCDCA, including the federal preemption argument and the significant impairment argument under S.C. Code Sec. 37-5-109(2),
3. Grant Appellant's Motion in Limine to prevent Respondent from raising any new arguments at oral argument in this appeal, including the federal preemption argument and the significant impairment argument under S.C. Code Sec. 37-5-109(2),

4. In the alternative, if the court for any reason does not find that the new arguments are improperly presented on appeal, then choose to exercise discretion to ignore the new arguments and notify the parties of this decision at the court's earliest convenience,
5. Grant Appellant's motions indicated above due to the procedural due process concerns indicated above,
6. Award Appellant such attorney fees and costs as may be appropriate under Rule 11(a), SCRCP or any other available authorities for having to bring this Motion due to any rule violations by Respondent that this court may find,
7. For such other relief as may seem appropriate to the court.

Dated this April 7, 2023

/s/ John R. Cantrell, Jr.

John R. Cantrell, Jr.
Cantrell Legal, PC
108 Phillips Ct.
St. Matthews, SC 29135
(843) 797-2454
Attorney for Appellant

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Of whom Jennifer Campney is the Appellant

CERTIFICATE OF SERVICE

I certify that I have on this day served a copy of Appellant's Motion to Strike and in Limine upon all parties to this action by email only at the following addresses:

Caren D. Enloe at cenloe@smithdebnamlaw.com
J. Ronald Jones, Jr. at RJones@smithdebnamlaw.com
Attorneys for Respondent

Carolyn Grube Lybarker at CLybarker@scconsumer.gov
Kelly H. Rainsford at KRainsford@scconsumer.gov
Attorneys for Amicus Curiae South Carolina Department of Consumer Affairs

April 7, 2023

/s/ John R. Cantrell, Jr.
Cantrell Legal, PC
108 Phillips Ct.
St. Matthews, SC 29135
(843) 797-2454
Attorney for Appellant

CANTRELL LEGAL PC
108 PHILLIPS CT
ST. MATTHEWS, SC 29135-8582
843-797-2454 (voice/fax)
Email: johncantrelljr@gmail.com

April 7, 2023 VIA EMAIL AND USPS FIRST CLASS MAIL

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

RE: Portfolio Recovery Associates LLC v. Jennifer Campney
Appellate Case No. 2020-000935

Dear Miss Kitchings:

Enclosed for filing with the court please find Appellant's Motion to Strike & In Limine along with a check for the $50.00 filing fee.

Also, I hereby certify that I have served a copy of this letter on all other parties to this appeal by simultaneous email only as indicated in the proof of service attached to the motion.

/s/ John R. Cantrell, Jr.
Cantrell Legal PC
108 Phillips Ct.
St. Matthews, SC 29135-8582
(843) 797-2454
Attorney for Appellant