

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF DORCHESTER

PORTFOLIO RECOVERY
ASSOCIATES, LLC ASSIGNEE OF
SYNCHRONY BANK/H H
GREGG,

Civil Action No. 2018CP1800729

Plaintiff,

vs.

ORDER

JENNIFER CAMPNEY

Defendant

JENNIFER CAMPNEY

Third-Party

Plaintiff,

vs.

COOLING & WINTER, LLC

Third-Party Defendant

RECEIVED

Jun 25 2020

SC Court of Appeals

THIS CAUSE, came before the Court on October 23, 2019 for a Bench Trial. The Plaintiff was represented by Joseph E Brown and the Defendant was represented by John R. Cantrell, Jr.

The Plaintiff called Larry Andrews, a custodian of records for Portfolio Recovery Associates, LLC (hereinafter referred to as "PRA"). Mr. Andrews testified to the Business Record foundation for the admission of several exhibits. The following exhibits were introduced over Defendant's objections: Exhibit 1 – Bill of Sale; Exhibit 2 – Load Data; and, Exhibit 3 – Billing Statements from Synchrony Bank. Mr. Andrews testified that the information contained in the Load Data document was information provided to PRA from the original creditor Synchrony Bank. He also testified he was familiar with the standard operating procedures of Synchrony bank and that pursuant to federal law and their standard operating procedures, billing statements are mailed out to the consumer every 30 days. He also stated that

payments were received on this account up until October 15, 2014. The account was charged off on May 22, 2015 with an outstanding balance of \$4,274.78. PRA filed the instant lawsuit seeking \$4,236.78 under an Account Stated theory of recovery. Mr. Andrews testified that at no time while the account was open, after the account was charged off, and prior to suit being filed did PRA or the original creditor receive any written or verbal dispute from the Defendant regarding the amount owed or any particular charges.

The Defendant, Jennifer Campney, testified that she had an H H Gregg credit card, she received monthly billing statements and made payments on the account. When asked if she received the last billing statement, she stated that she was not sure.

1. Plaintiff has proven Defendant's indebtedness under an Account Stated theory.

The Plaintiff seeks recovery in this case under an account stated theory. The essential elements of account stated are: 1) that the account is actually stated; and 2) that the parties either expressly or impliedly agreed that it is a true statement and is due to be paid then or at some other specified time. At trial the Plaintiff proved that an account stated cause of action was established by the Plaintiff (or Plaintiff's assignor) by mailing monthly billing statements with a specified due date, and the Defendant making payments on the account without disputing any charges found on the billing statement. The Court is not required to find that the defendant expressly agreed to the account stated, but that the defendant impliedly agreed by her actions. Evidence of the Defendant's implied agreement includes the fact that monthly billing statements were mailed to the Defendant, the Defendant made payments, and the Defendant failed to dispute the charges or balance on the statements.

In Gwathmey vs. Burgiss, 88 S. E. 816 (SC 1916), the court held, "Where a creditor sends to his debtor a statement of the account between them and the debtor assents to the balance stated, then the account between them ceases to be an open account and becomes an account stated." The court went on to hold that "this was at first confined to accounts between merchants but the trend of modern decisions is to open the doors to persons other than merchants." Id. The court stated that "assent might be expressed or implied from the circumstances." Id.

Based on the testimony of the witnesses in this case, and the Court's weighing the

credibility of each, the court finds that the Plaintiff has proven an account stated and that the Defendant owes the amount plead in Plaintiff's complaint under an account stated theory.

2. Defendant has failed to prove liability under her Counterclaims.

Defendant's Counterclaims allege liability under the South Carolina Consumer Protection Code (hereinafter "SCCPC"), the Fair Debt Collection Practices Act (hereinafter "FDCPA"), the South Carolina Unfair Trade Practices Act (hereinafter "SCUTPA"), and under general negligence per se theories. Defendant alleges three instances of conduct by Plaintiff and Plaintiff's counsel that violate the aforementioned theories of recovery as follows: 1) Defendant alleges that it was improper for Plaintiff's counsel to sign the affidavit and itemization in this case due to a lack of personal knowledge, 2) Defendant alleges that a right to cure notice was a necessary prerequisite to Plaintiff's lawsuit, and that Plaintiff failed to send the right to cure notice, and 3) Defendant alleges that Plaintiff and Plaintiff's counsel falsely represented the amount due in this case by filing this lawsuit for \$4,236.78, while an Affidavit executed by the original creditor reflects that \$4,274.78 is due. For the reasons that follow, Defendant has failed to prove liability on her Counterclaims.

a. Defendant failed to prove liability for her claim that Plaintiff's counsel improperly executed the affidavit and itemization in this case.

The first violation alleged in the Counterclaim and Third Party Complaint is that PRA and PRA's counsel, Cooling & Winter, LLC, violated the South Carolina Consumer Protection Code (hereinafter referred to as SCCPC) and the Fair Debt Collection Practices Act (hereinafter referred to as FDCPA) by PRA's counsel signing and filing the affidavit and itemization without having personal knowledge of the facts contained therein.

When reviewing the Counterclaim and third party complaint, the court must first determine whether the claims were filed within the appropriate statute of limitations. The statute of limitation for a Fair Debt Collection Practices Act violation is one year. The affidavit and itemization was filed in Magistrate court on January 4, 2017, and the counterclaim and third party complaint were filed on April 20, 2018. The Court finds that this claim was filed outside the FDCPA's one year statute of limitation, therefore, Defendant's FDCPA claim is barred.

The Court additionally finds that the Defendant's Counterclaim and Third Party Complaint fails on the merits. Rule 11 SCRCF states that, "Affidavits or verifications

authorized or permitted under these rules shall be written statements or declarations by a party *or his attorney of record* or of a witness” (emphasis supplied). In this case, Plaintiff’s attorney of record, Joseph E. Brown, testified that he signed the affidavit based on the business records provided to the firm by the Plaintiff. He reviewed the business records and verified the amount on the affidavit was the correct amount being sought by the Plaintiff.

The South Carolina Supreme Court held “that Rule 11(c) allows an attorney of record to sign VSAs in connection with debt collection proceedings.” BB & T OF SOUTH CAROLINA v. Fleming, 360 S.C. 341, 345 (S.C., 2004). The case at bar was initially filed in Magistrate court. The affidavit and itemization was filed using the form drafted, approved and promulgated by the South Carolina Supreme Court. When approving the form titled “Affidavit and itemization of Accounts”, the SC Supreme Court placed “Plaintiff (or his Attorney)” above the affiant’s signature line. By doing this, the SC Supreme Court anticipated that an attorney would sign the affidavit.

Accordingly, the court finds that the signing of the Affidavit and Itemization of Account by Plaintiff’s attorney of record in this case, Joseph E. brown, was proper.

b. Defendant failed to prove liability for her claim that Plaintiff improperly filed this action without first sending a Right to Cure notice.

Defendant’s counterclaim and third party complaint alleges that PRA and its counsel, Cooling & Winter, LLC, violated the SCCPC and the FDCPA by failing to send Defendant a Notice of Consumer’s Right to Cure. The court first finds that there is not a FDCPA violation due to the claim being filed outside the one year statute of limitation. This suit was filed in Magistrate court on January 4, 2017 and the counterclaim and third party complaint were filed on April 20, 2018.

Defendant’s Counterclaim also fails on the merits. Defendant alleges that Plaintiff failed to send Defendant a notice of right to cure under S.C. Code Ann. § 37-5-110, however this statute is not applicable to the debt at issue in this case. A plain reading of S.C. Code Ann. § 37-5-110 shows that it applies only “to a secured or unsecured consumer credit transaction...” The SCCPC defines a “consumer credit transaction” as “a consumer credit sale (Section 37-2-104) or consumer loan (Section 37-3-104) or a refinancing or consolidation thereof, a consumer lease (Section 37-2-106), or a consumer rental-purchase agreement (Section 37-2-701).” S.C.

Code Ann. § 37-1-301(11). The SCCPC goes on to specifically **exclude** credit card debts such as the Defendant's debt in this case. ("Unless the sale is made subject to this title by agreement (Section 37-2-601), "consumer credit sale" **does not include**: (a) a sale in which a seller allows the buyer to purchase goods or services pursuant to a lender credit card or similar arrangement, or..." S.C. Code Ann. § 37-2-104(2))(emphasis supplied).

South Carolina courts have applied a similar analysis. In Bracken v. Simmons First National Bank, 2014 WL 2613175 (D.S.C. 2014), the court held "the SCCPC specifically excludes transaction involving lenders like the defendant from the definition of a 'consumer credit sale' and thus from the definition of a 'consumer credit transaction under S.C. Code Ann. Section 37-5-198(2)." Also in footnote 2, the court found the transaction was not a "consumer Loan".

In addition to the SCCPC's being inapplicable to the debt at issue in this case, the Right to Cure notice provisions do not apply to assignees and law firms as alleged by Defendant. According to S.C. Code Ann. Sections 37-5-110 and 37-5-111, a "creditor may provide the notice of right cure to the consumer." A "creditor" is defined as "the person who grants credit in a consumer credit transaction or, except as otherwise provided, an assignee of a creditor's right to payment, but use of the term does not in itself impose on an assignee any obligation of his assignor. In the case of credit granted pursuant to a credit card, the 'person who grants credit' is the card issuer and not another person honoring the credit card." S.C. Code Ann. Section 37-1-201 (7) (c).

The last payment on the account at issue in this case was made on October 15, 2014. The account was not an open account nor were monthly payments being made on the account. The account was assigned/sold to PRA in an attempt to collect on a charged off account. Therefore neither the assignor nor the assignee had any expectation that payments were being made or would be made on the account. Therefore PRA and Cooling & Winter, LLC do not fall within the definition of a creditor.

Based on the foregoing, the Court finds that no right to cure letter was required to be sent prior to commencement of this action.

- c. **Defendant failed to prove liability for her claim that Plaintiff and Plaintiff's counsel misrepresented the amount owed.**

Defendant's counterclaim and third party complaint alleging that PRA and Cooling & Winter, LLC, violated the SCCPC and FDCPA by misrepresentation of the amount owed must fail. Defendant claims that two different amounts were alleged in an affidavit filed in response to her Motion for Summary Judgment.¹ Larry Andrews testified that the amount of the debt that was charged off by Synchrony Bank and sold and assigned to PRA was \$4,274.78, which was the amount owed and requested from the defendant prior to suit being filed. This is evident from the Load Data sheet, plaintiff's exhibit "2". Mr. Andrews testified that the information contained on the exhibit was provided to PRA from Synchrony Bank. The amount due on the account is listed as "current balance" on the exhibit. Mr. Andrews further testified that this amount is due under a contract theory of recovery. However, Plaintiff's lawsuit was filed using an account stated theory of recovery and sought only \$4,236.78, which is the amount reflected on the last billing statement contained in Plaintiff's Exhibit 3. Accordingly, both \$4,274.78 and \$4,236.78 are "correct" amounts due, albeit under different legal theories.

Based on the foregoing, the Court hereby finds that neither Plaintiff nor Plaintiff's Counsel have misrepresented the amount due in this case and Defendant's counterclaims must fail.

As to the Defendant's counterclaim and third party plaintiff's complaint where it is alleged that PRA and the firm, Cooling & Winter, LLC, violated South Carolina Unfair trade practice, the court finds that the act or practice in this case was neither unfair nor deceptive. Therefore there was no violation of the South Carolina Unfair Trade Practices.

As to the Defendant's counterclaim and third party plaintiff's complaint where it is alleged that PRA and the firm, Cooling & Winter, LLC were negligent per se for violating any statute, rule or law, since there were no violations, the court finds there was no negligence per se.. As set out above, the court finds that PRA and/or Cooling & Winter, LLC did not violate any statute, rule or law.

Based upon the documents admitted into evidence and the testimony presented and the

¹ Defendant also alleged for the first time at trial that Defendant sent letters to defendant with an incorrect amount on July 8, 2015 and October 7, 2015. Claims related to these letters were not raised in Defendant's counterclaim, are beyond the applicable statute of limitations, and also fail on the merits based on the following analysis.

credibility of the witnesses, the Court finds in favor of the Plaintiff on Plaintiff's claim and finds for the Plaintiff on the Defendant's Counterclaim, and finds for the third party Defendant in the third party complaint and, it is hereby:

ORDERED, ADJUDGED AND DECREED that the Plaintiff, PORTFOLIO RECOVERY ASSOCIATES, LLC ASSIGNEE OF SYNCHRONY BANK/H H GREGG, have and recover from the Defendant, Jennifer Campney, the amount of \$4,236.78 plus court costs in the amount of \$414.73;

Find for the Plaintiff in the Defendant's counterclaim and the defendant will not recover anything from the Plaintiff; and,

Find for the third party Defendant in the Third Party Complaint and the Third Party Plaintiff will not recover anything from the third party defendant.

AND IT IS SO ORDERED.

By: _____

The Honorable Diane S. Goodstein
First Judicial Circuit

_____, South Carolina

_____, 2019

Jun 25 2020

SC Court of Appeals

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2018CP1800729

PORTFOLIO RECOVERY ASSOCIATES, LLC
ASSIGNEE OF SYNCHRONY BANK /H H GREGG

JENNIFER CAMPNEY

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: Joseph E. Brown, SC Bar #9085
Luke R. Hoopes, SC Bar #103644
S. Louis Schiappa, SC Bar #102134
Attorney for: Plaintiff
Defendant
or
Self-
Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
ACTION DISMISSED (CHECK REASON): Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other
ACTION STRICKEN (CHECK REASON): Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other
DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX): Affirmed; Reversed; Remanded; Other

IT IS ORDERED AND ADJUDGED: X See attached order (formal order to follow) Statement of Judgment
By the Court:

ORDER INFORMATION

The order ends does not end the case.
Additional Information for the Clerk:

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below

Table with 3 columns: Judgment in Favor of (List name(s) below), Judgment Against (List name(s) below), Judgment Amount To Be Enrolled (List amounts(s) below). Row 1: PORTFOLIO RECOVERY ASSOCIATES, LLC ASSIGNEE OF SYNCHRONY BANK /H H GREGG, JENNIFER CAMPNEY, \$4,651.51

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge

Judge Code

Date



Dorchester Common Pleas

Case Caption: Portfolio Recovery Associates LLC , plaintiff, et al VS Jennifer
Campney , defendant, et al
Case Number: 2018CP1800729
Type: Order/Judgment and Form 4

This Order is Hereby GRANTED!

S/ Diane S. Goodstein (2112)