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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM FAIRFIELD COUNTY
Circuit Court

Brian M. Gibbons, Presiding Judge

Appellate Case No. 2024-001015

Founders Federal Credit Union,..... Respondent,

v.

Gardevious Lavar Lyles,.....Appellant.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. The South Carolina Commercial Code limits a drawee bank from recovering the value of a draft when a person takes an instrument in good faith and for value. Does this prevent a bank from obtaining a judgment against someone depositing a check for the sale of property?

II. An award of attorney's fees requires statutory language or an agreement providing for that award. Does a consumer lending agreement, unrelated to standard account features, permit a bank to recover attorney's fees in a debt collection action relating to a checking account?

III. Does the delayed filing of a supporting affidavit and failure to disclose the affiant in discovery unfairly prejudice the opposing party?

STATEMENT OF THE CASE

This is a collection action for the balance of a stopped check six days after deposit. Gardevious Lyles maintained checking and savings accounts with Founders Federal Credit Union. (Ord. ¶ 2, Apr. 25, 2024; R. at ___). On July 2, 2021, Lyles deposited three checks from Carolina Trucking, Inc., a customer of the Bank of Clarendon, and made payable to Lyles at the Credit Union. (Ord. ¶ 3; Tr. 8:17; R. at ___). Lyles received $10,000.00 cash in exchange for the checks, and deposited the remaining $8,524.00 into his account with the Credit Union. (Ord. ¶ 4; R. at ___). Six days later, the issuing bank notified the Credit Union the check had been dishonored by the issuing bank. (Ord. ¶ 3; Tr. 10:8–9; R. at ___). The stop payment was ordered by the issuer. (Tr. 8:25; R. at ___). Lyles had a negative balance of $7,427.04 after the Credit Union instantly settled the stopped payment. (Ord. ¶ 3; Tr. 5:5; R. at ___).

The Credit Union filed a motion for summary judgment against Lyles seeking a monetary judgment for the negative balance. (Ord. ¶ 3; Tr. 4:19; R. at ___). Additionally, the Credit Union sought attorneys' fees and costs in the amount of $4,635.00. (Ord. ¶ 13; R. at ___). The Credit Union asserted the fees were incurred as a result of "having worked 13.40 hours on the matter" and "anticipates Maynard Nexsen will bill Credit Union additional fees in the amount of . . . $1,500 to conduct the hearing." (Aff. of Pl. Attorneys' Fees; R. at ___). The affidavit also stated that counsel for the Credit Union "believes attorneys' fees and costs . . . are reasonable given the six factors laid out by the South Carolina Supreme Court." *Id.* The Credit Union stated the "Consumer Lending Plan" was an agreement between both parties to provide for attorneys' fees in the event of collection. (Ord. ¶ 1; R. at ___). The trial court was persuaded by this argument awarding summary judgment on both the amount of the negative balance and attorneys' fees totaling a combined $12.062.04 against Lyles. (Ord. p. 3; Tr. 5:14–17; R. at ___).

STANDARD OF REVIEW

"In determining whether summary judgment is appropriate, the evidence and its reasonable inferences must be viewed in the light most favorable to the nonmoving party." *Baughman v. American Tel. & Tel. Co.*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991). "Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Lanham v. Blue Cross & Blue Shield of S.C. Inc*., 349 S.C. 356, 362, 563 S.E.2d 331, 333 (2002). "[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." *Hancock v. Mid-S. Mgmt. Co., Inc.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

ARGUMENT

I. THE CREDIT UNION DOES NOT HAVE A RIGHT TO RECOVER FROM LYLES.

South Carolina Code Section 36-3-418 allows banks to seek restitution for drafts accepted by mistake. S.C. Code Ann. § 36-3-418. A check is elsewhere defined in the code as "a draft, other than a documentary draft, payable on demand and drawn on a bank." S.C. Code Ann. § 36-3-104(f). A bank may collect the balance of a check from the person benefitting from the check when the bank mistakenly believes the check was not stopped under Section 36-4-403 or mistakenly believes the signature was authorized. S.C. Code Ann. § 36-3-418(a). This restitution is prohibited from "a person who took the instrument in good faith and for value or who in good faith changed position in reliance on the payment or acceptance." S.C. Code Ann. § 36-3-418(c).

The case of *First American Bank* shows the drawer bank is properly held liable for the balance when there is a holder in due course. *First Am. Bank v. Litchfield Co. of S.C., Inc.*, 291 S.C. 240, 353 S.E.2d 143 (Ct. App. 1987). In *First American Bank*, Jensen Farley deposited a

check with First American where he held a checking account. *Id.*, at 242, 353 S.E.2d 145. That same day, Litchfield orally placed a stop payment order on the check. *Id.* This Court ultimately held that a drawer of a check generally has the right to stop payment on a check, but remains liable on the instrument to a holder in due course. *Id.*, at 245, 353 S.E.2d at 144. In that case, Litchfield was liable for the balance of the stopped check to First American and Jensen Farley was separately liable because he was not a holder in due course. *Id.*

A holder in due course is one who takes an instrument (1) for value; (2) in good faith; and (3) without notice that it is overdue, has been dishonored, or of any defense or claim against it. S.C. Code Ann. § 36-3-302 (2023). A person has notice of a fact when he has actual knowledge or notice or, from all the facts and circumstances known to him at the time in question, he has reason to know that it exists. S.C. Code Ann. § 36-1-202; *Specialty Flooring Co. v. Palmetto Fed. Sav. Bank*, 302 S.C. 107, 394 S.E.2d 13 (Ct. App. 1990).

It is undisputed that Lyles accepted the check in payment for several trucks. (Tr. 8:17–18; R. at ___). Further, it is not alleged that Lyles acted in bad faith or was aware of any defects, fraud, or defenses against the value of the check. Section 36-3-418(c) of the South Carolina Commercial Code prohibits the Credit Union from revoking acceptance on the check when Lyles took the check for value and in good faith. The Credit Union honored the check as it was deposited and credited Lyles' account for the amount of the check $16,000. (Complaint, ¶ 6: R. at ____). Six days after honoring the check, the Credit Union received notice that the writer's bank canceled the check. (Compl. ¶ 7: R. at ____). The Credit Union then debited Lyles' account for the check it had previously honored due to a stop payment issued by the depositary bank. (Compl. ¶ 7-9: R. at ____).

Therefore, there is a genuine issue of material fact as to whether the Credit Union is entitled to recover anything against Lyles as he deposited the check received for value in good faith and the Credit Union honored by crediting his account and cashing the check.

II. THE ORDER IMPROPERLY AWARDS ATTORNEYS' FEES.

The Plaintiff cannot recover attorney's fees unless it is allowed by contract or statute. *Baron Data Sys., Inc. v. Loter*, 297 S.C. 382, 383, 377 S.E.2d 296, 297 (1989).

In this case, the affidavit seeking attorneys' fees was filed less than two days before the hearing which is improper under 56(c) of the South Carolina Rules of Civil Procedure. The Credit Union filed the affidavit on April 9, 2024, at 3:12 pm. (Aff of Att'y Fees and Costs, April 9, 2024: R. at ____). The hearing for the motion for summary judgment took place on April 11, 2024. (Notice of Hr'g, March 12, 2024: R. at ____). This means that the Credit Union filed the affidavit seeking attorneys' fees one day and eighteen hours before the motion hearing for summary judgment.

Further, this agreement does not reference or include the checking account which is the subject of this lawsuit. The Order awards attorneys' fees on the basis of a loan agreement submitted with the affidavit of Daniel Hinson. (Order Grant Summ. J. filed 4-25-24 ¶13: R. at ____). This "Consumer Lending Plan" does not address or relate to any checking account. Instead, it indicates on Page 1 that:

> This Consumer Lending Plan, which includes the Credit Agreement, Security Agreement, Truth-in-Lending Statement, and all Advance Receipts ("Plan") becomes a binding legal contract with regard to each advance as soon as you take an advance, and will govern the terms of all loans that you obtain under the Plan.

Consumer Lending Plan attached as Exhibit A. (citation)

There is no mention of a loan made to Lyles because the Credit Union did not loan money to Lyles. The Credit Union does not allege the Consumer Lending Plan applies to credits on

pending transactions. Instead, the Credit Union honored the check Lyles presented for payment which was issued to him by a third-party on a third-party bank. (Tr. 8:20–22; R. at ____). The affidavit of Daniel Hinson, upon which this Court relies for its ruling of summary judgment, does not allege that there was a lending agreement. It alleges that the Credit Union honored a check which Lyles presented. (Aff. In Supp. Of Pl. Mot. For Summ. J. April 9, 2024: R. at ____). There is no allegation that Lyles forged the check or that the check was improperly drawn. The only allegations in the Affidavit is that the check was issued to Lyles, he deposited it with the Credit Union, the Credit Union honored the check, and six days later, the Credit Union attempted to dishonor the check it had earlier honored on the basis that the issuer of the check sent a stop payment order. (Aff. In Supp. Of Pl. Mot. For Summ. J. as to Def. Gardevious Lavar Lyles April 9, 2024 p. 2:3–8: R. at ____). Thus, the Court improperly relied on the Consumer Lending Plan in its ruling and in its award of attorneys' fees to the Credit Union.

Finally, the Credit Union's affidavit does not provide sufficient facts to support the factors required to justify an award of attorneys' fees.

In determining an award of reasonable attorney's fees, this Court must consider: (1) the nature, extent and difficulty of legal services rendered; (2) the time and labor necessarily devoted to the case; (3) the professional standing of counsel; (4) the contingency of compensation; (5) the fee customarily charged in the locality for similar services; and (6) the beneficial results obtained. *Baron Data Sys., Inc. v. Loter*, 297 S.C. 382, 384 –85, 377 S.E.2d 296, 297 –98 (1989). With regard to the contingency of compensation and the beneficial results obtained, the financial abilities of both parties and the potential financial impact of an unfavorable ruling of attorney's fees are to be considered. *Mitchell v. Mitchell*, 283 S.C. 87, 89, 320 S.E.2d 706, 707 (1984). No single factor is determinative. *Baron Data Sys., Inc. v. Loter*, 297 S.C. at 384, 377 S.E.2d at 297.

Failure to provide facts sufficient to support each factor warrants a reversal and remand to the trial court. *Blumberg v. Nealco*, 310 S.C. 492, 494, 427 S.E.2d 659, 661 (1993).

Here, the Credit Union has failed to include facts sufficient for this Court to consider the six factors for awarding reasonable attorney's fees. The Credit Union's affidavit provides the number of hours worked by Maynard Nexsen through January 8, 2024 and their hourly rate. (Aff. Of Atty's Fees and Costs, 1:4: R. at ____). However, the affidavit fails to explain the nature, extent and difficulty of the legal services rendered. While the affidavit provides a total estimate on the hourly rate and hours devoted to the case, the affidavit lacks detail on the type of work performed during those hours and fails to differentiate between the amount of time spent by attorneys and paralegals. The Credit Union's counsel contends that she is an attorney with Maynard Nexsen. (Aff. Of Atty's Fees and Costs, 1:1: R. at ____). The Attorney for the Credit Union did not describe her own professional standing at Maynard Nexsen or provide her resume in support. The contingency factor is irrelevant here because this is not a contingency case. As to the fifth factor, the Credit Union's affidavit does not compare the fees charged by Maynard Nexsen with other firms offering similar legal services in the same locale. The Credit Union's affidavit merely describes the hourly rate and hours worked through January 8, 2024 at Maynard Nexsen. (Aff. of Atty's Fees and Costs, 1:4: R. at ____). As to the sixth factor, the affidavit does not address the financial abilities of both parties and the potential impact of an unfavorable attorney's fees ruling on each party.

Therefore, the trial court erred in awarding attorney's fees to the Credit Union against Lyles because the Credit Union failed to provide sufficient evidentiary support for each factor. Consequently, the award should be reversed and remanded to the trial court to make a proper finding of fact.

III. THE TRIAL COURT IMPROPERLY DENIED A CONTINUANCE AFTER THE CREDIT UNION UNTIMELY FILED ITS AFFIDAVIT AND FAILED TO DISCLOSE THE AFFIANT IN DISCOVERY.

The court improperly relied upon the affidavit in support of summary judgment as it was filed less than forty-eight hours before the hearing. The affidavit was filed Tuesday, April 9, 2024, at 3:12 pm. The hearing took place Thursday, April 11, 2024, at 9:30 am. Thus, the affidavit was filed less than forty-three hours before the hearing. According to Rule 6(d) of the South Carolina Rules of Civil Procedure, an affidavit shall be served with a motion. The motion in this matter was served February 9, 2024, roughly two months before the hearing. But, no affidavit was served with it. Instead, the Credit Union waited until less than two days before the hearing to serve the affidavit. This did not give Lyles sufficient opportunity to respond to the affidavit. The court should not have relied on the affidavit which was served less than two days before the hearing improperly prejudicing Lyles as he did not have an opportunity to respond as required by the South Carolina Rules of Civil Procedure.

In addition, the affiant Daniel Hinson was not disclosed in discovery responses. The Credit Union responded to the Defendant's standard interrogatories but did not disclose Hinson as a witness. The Defendant's first interrogatory is taken from Rule 33 of the South Carolina Rules of Civil Procedure and asks that the Credit Union "Give the names and addresses of persons known to the Plaintiff or counsel to be witnesses concerning the facts of the case and indicate whether or not written or recorded statements have been taken from the witnesses and indicate who has possession of such statements." The Credit Union's answer to this discovery request lists three people – Jeanne Barton, Dave Hanoka, and Casey Welch. Ms. Barton is listed as the Litigation Coordinator for the Credit Union; Hanoka is listed the Fraud Investigator for the Credit Union; and Casey Welch is listed as the Share Recovery Department for the Credit Union. (Plaintiff's

Answers to Defendant's First Set of Interrogatories, R. p. _____). No one submitted an affidavit. Instead, an affidavit was submitted less than two days before the hearing by a witness who was not disclosed in discovery despite the Defendant's request that all witnesses be disclosed. For this reason, the Court improperly relied upon the affidavit of Daniel Hinson.

Hinson's affidavit indicates in Paragraph 1 that the matters he testifies to are within his personal knowledge and based upon papers and files of the Credit Union which were in his possession. Despite this knowledge and the possession of documents referenced in his affidavit, Hinson was never disclosed as a witness.

CONCLUSION

We ask this Court to reverse the trial court's grant of summary judgment because Appellee is not entitled to judgment as a matter of law under the terms of payment for acceptance by mistake and no agreement exists to support an award of attorney's fees. Further, the trial court abused its discretion in relying on the testimony of an undisclosed affiant.

Respectfully submitted,

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