STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

CHARNA HENSON, AS TRUSTEE OF THE LEWIS C. MASON REVOCABLE TRUST DATED SEPTEMBER 6, 2001, AS AMENDED AND RESTATED JUNE 19, 2008, D/B/A L. C. MASON ENTERPRISES,

Plaintiff,

vs.

NABIL E. SALEH, AMANDA SHADON MILLER AND SPARKLE CITY MOTORS,

Defendants.

FINAL ORDER

2018-CP-42-03579

This Final Order is issued after a two-plus-day civil non-jury trial, post-trial briefings, an initial Form 4 ruling, subsequent arguments and proposed orders. It is issued with considerable reflection and deliberation.

BACKGROUND

The litigation arose out of a long term successful and profitable business relationship between the Plaintiff and Defendant Saleh that began in 2007. Plaintiff is an automobile auction business which also provides floor-planning credit/financing for used car wholesalers.[1] Plaintiff became acquainted with Defendant Saleh years earlier when he worked for a national franchised

[1] Plaintiff is a trust established in 2001 as a holding entity for a floor plan lending company established in the 1970's. The plaintiff also owns and operates Upstate Auto Auction, which auctions vehicles owned by dealers to other dealers and to the general public. While the auto auction and the floor planning are two separate businesses, the floor planning operation can serve, as in the present case, as a feeder of vehicles for the auction.

car dealership in Spartanburg. In 2007, Saleh began his wholesale used car company – Sparkle City Motors. Plaintiff served as the floor planner for much of Saleh's inventory.[2]

As previously stated, the business relationship shared between the Plaintiff and the Defendant Saleh was profitable and beneficial to both for many years. They also developed a personal friendship. The successfulness of their business relationship was evidenced by the growth of the line of credit extended by the Plaintiff to Defendant Saleh from $350,000 in 2008 to $940,000 in 2015.[3]

In the 2015/2016 time period the harmonious business relationship began changing when Defendant's Saleh's business took a dramatic downturn.[4] The cause for the sudden change in the Defendant's Saleh's business was not established at trial—and is not relevant to the present decision. What is relevant is that the Plaintiff and Defendant Saleh, nonetheless, continued their business relationship even though Saleh had already defaulted under the floor plan terms for

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[2] Prior to conducting the trial, this Court had only a general knowledge of the used car wholesale floor planning business. Neither side of this case called an expert witness to assist the Court's understanding. Based upon the trial presentations, a floor plan can be described as a line of credit meant to fund a dealer's automobile inventory. Once a particular automobile is sold, the dealer pays back the original loan amount plus any interest and fees. Typically, when the dealer obtains an automobile using the credit provided through the floor plan, the floor planner (here the plaintiff) holds the title to the automobile. Once the dealer sells the automobile, the floor planner releases the title to the dealer upon payback.

Even though neither party presented an expert witness to assist this Court's understanding of used car wholesale floor planning, an internal document from Mason Motors, Inc., was presented. This document revealed the following:

> EFFECTIVE, JAN. 1ST, 2008, ALL VEHICLES THAT ARE FLOORED BY L.C. MASON ENTERPRISE FLOORPLAN COMPANY WILL BE SUBJECT TO THE FOLLOWING CRITERIA:
>
> ALL VEHICLES FLOORPLANNED WILL ONLY BE FUNDED THE MONETARY AMOUNT OF AVERAGE BLACK BOOK VALUE MINUS MILEAGE. THERE WILL BE NO EXCEPTIONS TO THIS RULE.

[3] From the explanations offered during the trial, this Court concludes, $940,000 was the line of credit available to Defendant Saleh through the floor plan. $940,000 was not necessarily the amount he owed to the Plaintiff.

[4] The cause for the sudden downturn was not proven at trial. Defendant Saleh suggested the significant event causing his business' reversal of fortune was a bad business decision to place his inventory with a car retailer that had unlawfully disposed of much of the inventory without Defendant Saleh being paid. When this event occurred, the Plaintiff repossessed the inventory which was subject to the Plaintiff's floor plan.

At the trial the Plaintiff suggested other reasons unrelated to a bad business decision by Defendant Saleh that caused his business's sudden reversal.

hundreds of thousands of dollars, Plaintiff had repossessed Saleh's floor plan's collateral, and had sold Saleh's collateral at its auction business.

Defendant Saleh's dealer license came under scrutiny during this downturn period. In 2016, after his dealer license was investigated by the South Carolina Department of Motor Vehicles, Defendant Saleh brought Defendant Miller[5] into the business. Miller and Saleh were romantically involved and shared a child at the time she was added to the license. The Plaintiff was not a stranger to Saleh's and Miller's relationship. They all maintained an amicable friendship. Again, Miller was added to the business so Saleh could continue his business. Sparkle City Motors remained alive and the Plaintiff continued doing business with Saleh.

After Defendant Miller's name was placed on the license, the Plaintiff obtained Defendant Miller's signature on certain documents.[6] Even after Defendant Miller's name was added to the business, the Plaintiff continued to deal with Defendant Saleh and viewed him as Sparkle City Motors. Plaintiff memorialized its ongoing business relation with Saleh by bestowing Saleh the 2017 best-selling customer award.

In 2017, when the floor plan payments became delinquent, the complaint[7] alleges that Saleh was using money to make improvements to Miller's home, where he was living at that time. Plaintiff sought Miller to pledge her home as collateral for Saleh/Sparkle City's Motor's debts. Miller declined.[8]

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[5] Based on the information presented at trial, the conclusion is obvious that Defendant Miller was brought into the business solely because of the personal relationship she had with Defendant Saleh. At this time, they were romantically involved and shared a child. Nothing was presented to indicate she made a financial contribution to the business. Subsequently, the personal relationship between Miller and Saleh ended.

[6] At trial, Defendant Miller disputed that all of the documents bearing her signature that she actually signed. One of the disputed signatures was to Security Agreement and Personal Guarantee.

[7] Complaint paragraph 18.

[8] Prior to issuing this Order, this Court expressed its concern as to the credibility of some positions asserted by the Plaintiff and Defendant Saleh. The assertion of an equitable mortgage on Miller's personal real property and use of its automobile floor planning practice, secured by non-automobile collateral---of questionable value---to pay off real property improvements highlights this Court's concerns about Plaintiff's business practices. Moreover,

Not long thereafter, the once profitable business relationship ended. The inventory securing the floor plan was voluntary surrendered to the Plaintiffs.[9]

THE LAWSUIT

In 2018, the present litigation was filed by plaintiff reciting five (5) causes of actions (1) Default on Promissory Note, (2) Conversion, (3) Equitable Mortgage, and (4) Breach of Contract, and (5) Breach of Contract accompanied by Fraudulent Activity.[10]

Saleh answered denying the allegations and asserted counterclaims of (1) Breach of Contract, (2) Conversion, (3) Tortious Interference with Contractual Relations, (4) Unfair Trade Practices, (5) Conspiracy, and (6) Violation of SC Code Section 39-3-10.

Miller answered and asserted the Counterclaims of (1) Civil Conspiracy, and (2) Fraud.

A non-jury civil trial was conducted on September 19-21, 2023.[11]

During the course of the trial, either through ruling on motions or voluntary decision by the party asserting the claim, the causes of action to be decided were reduced to Plaintiff's claims of (1) Default on a Promissory Note, (2) Breach of Contract and (3) Breach of Contract Accompanied by Fraudulent Acts; Saleh's claims against the Plaintiff for (1) Breach of

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Miller's home was constructed by her father. Plaintiff attended a pool party at the home at a time prior to the alleged pool construction. If the representations made by Saleh referenced in the complaint were ever said by him, they proved to be untrue from the evidence presented at trial.

[9] Complaint paragraph 21.

[10] Defendant Miller was made a party to litigation based on the allegation she became a beneficial owner of Sparkle City at some point subsequent to 2007. Complaint ¶ 7.

[11] The Plaintiff was represented by Attorney Gary L. Compton of the Spartanburg County Bar. The Defendants Nabil E. Saleh and Sparkle City Motors ("Saleh") were represented by Attorney Andrew J. Johnston, and the Defendant Amanda Shadon Miller ("Miller") was represented by Attorney Scott F. Talley, also of the Spartanburg County Bar. During the trial, testimony was received from each of the parties and two employees of the plaintiff. Hundreds of pages of documents, a large number being cancelled checks containing handwritten notes, were admitted into evidence from both sides.

Contract and (2) Unfair Trade Practices; and Miller's claims against the Plaintiff for Fraud and Defamatory Comments.[12]

As indicated in this Court's previous Form 4 filing, Plaintiff met its burden of proof as to the Default and Promissory Note and Breach of Contract causes of action (these two causes of actions are one in the same) against Defendant Saleh.

Defendant Saleh has met his burden of proof of establishing his Unfair Trade Practices Act claim against the Plaintiff.

This Court cannot find that the Plaintiff has met her burden of proof as to Defendant Miller. Also, this Court cannot find that Defendant Miller has met her burden of proof as to the counterclaims she asserted against the Plaintiff.

DISCUSSION

Plaintiff's entitlement to a verdict as to Saleh is clear. Saleh did not comply with the terms of the floor planning agreement. The problem with Plaintiff's claim is that while Plaintiff's entitlement to a verdict is clear, the amount of the verdict is not established with credible evidence. Plaintiff seeks a judgment in the significant amount of $690,759.68. Due to Plaintiff's method of internal bookkeeping, this method of bookkeeping also supported a counter analysis that supported Saleh's claims against the Plaintiff. An independent witness—like an accountant—would have been beneficial to establish either party's case and provide credibility. Using Plaintiff's methodology, this Court was presented hundreds of checks and deposits---many containing numerous handwritten entries---that required parol testimony for explanation. This methodology of proof of a $690,759.68 debt is self-evident of its need for verification, of its vulnerability to attack, and its likelihood of being misunderstood to an independent fact finder.

[12] The Plaintiff seeks attorney's fees pursuant to the terms of the Promissory Note, Personal Guarantees and Security Agreements, and Saleh seeks attorney's fees pursuant to the Unfair Trade Practices Act.

Moreover, as presented at trial, the debt sought to be recovered is the debt associated with the floor plan. Even though the "note" and/or "security agreement" and "floor plan" listed the amount as $940,000, the amount owed was always tied to the amount loaned which was tied to the vehicles---collateral---offered by Saleh. Based on the trial evidence, the debt sought to be collected was never $940,000. Once the collateral was repossessed by the Plaintiff, Plaintiff's business model was to sell the vehicle's through its own auction business. Whatever amount was received from the auction was or should be applied to the total amount owed by Saleh. Due to Plaintiff's methodology of bookkeeping, it appears that, after the auction, the amount of debt claimed did not decrease, but rather increased. Additionally, during the trial, this Court received testimony that a "fee" was charged by Plaintiff on the collateral. The documents offered by Plaintiff establishing the debt contains no reference to or definition of a "fee". Also, while these documents discussed that "interest" will be paid by the debtor, these documents are silent as to what the percentage amount is or how it will be calculated.[13]

Also, while neither party presented expert testimony to enlighten this Court on the industry standard for a used car wholesale floor planning operation---Plaintiff's and Saleh's testimony were in conflict as to industry standards---two (2) internal documents provided clarity as to Plaintiff's standards. First, the January 8, 2008 policy statement declares all vehicles will be only funded the monetary amount of average Black Book value minus the mileage and the March 10, 2016, declares, in part, at least three (3) events that will result in suspension of a dealer's floor plan (refusal to pay debt exceeding floor plan, a unit being over 60 days old, and vehicles that are over one-year-old). Loss of floor plan financing is clear.

[13] In debt collection cases, the quality of evidence used to support a debt approaching $700,000.00, is customarily very detailed in its terminology.

Even though Saleh's 2015 default and significant loss to the floor plan was not disputed, Plaintiff, in clear violation of its own rules, continued to do business with Saleh.

Additionally, Plaintiff violated its own standards when it accepted undervalued and non-automobiles as collateral. Not only did the use of non-automobile and undervalued collateral violate Plaintiff's own rules, the alleged purpose for the credit---home improvements---was ultra vires to the Plaintiff's business. See Footnote #2.

There are numerous reasons as to why liability for the debt will not extend to Defendant Miller. Even if Miller signed the documents, the 2016 floor plan debt is the identical debt that Saleh signed for in 2015. Thus, no new consideration existed. Also, it appears clear that Miller brought no monetary consideration or value to the business. Moreover, after Saleh's license was investigated by regulatory authorities, Miller's name was used in order that Saleh could continue his wholesale business. Likewise, Plaintiff knew Miller brought nothing to the business, but Plaintiff was able to continue its business with Saleh. A continuation of business with Saleh that was in violation of its own policy.

As previously stated, even though Miller's name was added, Plaintiff continued to treat the business relationship as one with Saleh. While Miller presented sufficient evidence to establish a conspiracy between Plaintiff and Saleh to evade regulatory investigation/compliance so that their business relationship could continue, Miller has failed to prove that she was damaged---she is not damaged only because Plaintiff's claim against her is not granted.

As referenced at trial and in the previous issued Form 4, Plaintiff has no equitable mortgage to Miller's real estate. The analysis offered in the Form 4 is incorporated by reference. This Court also notes that Plaintiff's factual justification for asserting an equitable mortgage at

trial proved not to be credible. Plaintiff's trial position was significantly different than these offered in the Complaint ¶ 17 and ¶ 29 to 31.

As referenced in the previous issued Form 4, this Court's opinion is that Saleh has met his burden of establishing Plaintiff engaged in Unfair Trade Practices Act violations. The South Carolina Unfair Trade Practices Act ("SCUTPA) "prohibits 'unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce …'[14] Trade or commerce is defined as 'the advertising, offering for sale, sale or distribution of any services and property … and … any other … thing of value ….'"[15] The SCUTPA does not define the term "unfair," but SCUTPA is modeled after the language of the Federal Trade Commission Act, which is useful for guidance.[16] The FTC Policy Statement on Unfairness provides the following general characteristics of an unfair practice claim "(1) whether the practice injures consumers; (2) whether it violates established public policy; (3) whether it is unethical or unscrupulous.[17] To maintain a private cause of action under SCUTPA, a plaintiff must establish: (1) the defendant engaged in an unlawful practice; (2) the plaintiff suffered actual, ascertainable, damages as a result of the defendant's use of the unlawful trade practice; and (3) the unlawful trade practice engaged in by the defendant had an adverse impact on the public interest."[18] As established during prior hearings, in the Form 4, and in this Order, Plaintiff has engaged in practices that violate its own internal regulations in its business dealing with Saleh. While the Plaintiff contends none of the moneys it collected after the 2015-16 collapse of

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[14] S.C.Code Ann. § 39-5-20 (1985).
[15] *Foggie v. CSX Transportation, Inc.*, 315 S.C. 17, 431 S.E.2d 587, 591 (1993); S.C. Code Ann. § 39-5-10(b) (1985).
[16] See S.C. Code Ann. § 56-15-30(b) (2015) ("In construing paragraph (a) the courts may be guided by the definitions in the Federal Trade Commission Act (15 U.S.C. 45).").
[17] *Freeman v. J.L.H. Invs.*, LP, 414 S.C. 362, 385, 778 S.E.2d 902, 914 (2015); see also *State v. Ortho-McNeil-Janssen Pharm., Inc.*, 414 S.C. 33, 70-71, 777 S.E.2d 176, 196 (2015). (recognizing that the language in SCUTPA is modeled after the Federal Trade Commission Act).
[18] *Bessinger v. Food Lion, Inc.*, 305 F. Supp.2d 574 (D.S.C. 2003) (citing *Havird Oil Co., Inc. v. Marathon Oil Co., Inc.*, 149 F.3d 283 (4th Cir. 1998)).

Saleh's business was related to the 2015-16 floor plan, this Court finds the evidence in this record supports a different conclusion. Thus, as previously referenced, Plaintiff violated its own standards by continuing to floor plan Saleh's business.

Concerning also was the use of undervalued collateral and collateral that is obviously not automobiles as part of its wholesale used car floor planning business. This was an admitted ultra vires use of Plaintiff's floor plan business.

Most concerning as an act that constitutes an unfair act of trade is continuing to engage in the wholesale floor planning business with Saleh when it was known that the regulatory agency charged with the responsibility of protecting the general public was investigating his license and, with such knowledge continuing to do business with Saleh under a name placed on the license with no equitable stake in the company or special expertise.

Notwithstanding, that the record before this Court established an Unfair Trade Practice violation, the same record does not support a monetary award to Saleh. Similar to the lack of confidence in the quality of Plaintiff's bookkeeping and accounting methods, the same challenges of confidence exist in Saleh's evidence. Again, no third party was present to assist with the accounting.

Based on the record before this Court, this Court will find the Plaintiff is entitled to a verdict against Defendant Saleh in the amount of Two Hundred Seventy-Nine thousand, four hundred and thirty-five ($279,435.00). This represents the value of the unused inventory that was voluntarily surrendered by the Defendant Saleh in 2018. If the Plaintiff's had complied with its internal policy of valuation, this property did, or should, have been sold at the Plaintiff's auction for a value equal to or close to the floor planned amount.[19]

[19] Plaintiff's counsel is asked to submit an updated petition and affidavit that relate to the attorney fees issue that does not involve the Defendant Miller.

IT IS SO ORDERED.

Electronic Signature to Follow

J. MARK HAYES, II,
JUDGE OF THE SEVENTH
JUDICIAL CIRCUIT

Spartanburg Common Pleas

Case Caption: Charna Henson, As Trustee VS Nabil E. Saleh , defendant, et al

Case Number: 2018CP4203579

Type: Order/Other

IT IS SO ORDERED

s/ J. Mark Hayes, II #2132