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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

The Honorable Jennifer B. McCoy, Circuit Court Judge

Appellate Case No. 2024-001925
Case No. 2024-CP-08-01342

South Carolina Federal Credit Union. ....Respondent,

v.

Thames Holdings 7 LLC and Richard Nathaniel Thames A/K/A Richard N. Thames, Defendants,
of which Richard Nathaniel Thames is the ....Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. WERE APPELLANT'S ARGUMENTS PRESERVED FOR APPEAL?

II. EVEN IF APPELLANT'S ARGUMENTS WERE PRESERVED FOR APPEAL, DID APPELLANT ESTABLISH A SUFFICIENT FACTUAL RECORD WITH THE TRIAL COURT TO SUPPORT HIS ARGUMENTS ON APPEAL?

III. DO APPELLANT'S ARGUMENTS ON APPEAL, EACH OF WHICH ARISE FROM CLAIMS OF VIOLATIONS OF THE FAIR DEBT COLLECTION PRACTICES ACT, APPLY TO RESPONDENT?

STATEMENT OF THE CASE

This case is a collections action brought by South Carolina Federal Credit Union ("Respondent") against Richard Nathaniel Thames ("Appellant") and Thames Holdings 7 LLC ("Holdings") seeking a judgment based upon Appellant's guaranty (the "Guaranty") of a business credit card account (the "Account") issued by Respondent to Holdings, Appellant's business. Respondent commenced its action by filing its Summons and Complaint against Appellant and Holdings on May 9, 2024. Appellant filed a *pro se* Answer on June 24, 2024.[1]

On July 18, 2024, Respondent filed and served its Motion for Summary Judgment (the "Motion"), supported by the Affidavit of Sonya Medlock, a Legal Coordinator with Respondent. A hearing on the Motion was scheduled for September 18, 2024, via WebEx, and Appellant was served with notice of the hearing on September 6, 2024. Appellant did not file or serve any opposing affidavits in advance of the hearing on the Motion.

The hearing on the Motion was conducted via WebEx as scheduled on September 18, 2024, by the Hon. Jennifer B. McCoy (the "Trial Court"), with Respondent represented by counsel and Appellant appearing *pro se*. At the hearing, Respondent relied on Ms. Medlock's Affidavit to establish the uncontested facts of the case—that Holdings had opened the credit card Account with Respondent, that Appellant had guaranteed Holdings' obligations to Respondent under the Account, that Holdings failed to make the payments due on the Account, and that as a result, Appellant was liable for the Account balance pursuant to the Guaranty. Appellant did not

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[1] Holdings, which is not a party to this appeal, did not answer or otherwise respond to the Summons and Complaint. As a result, orders (a) placing Holdings in default and (b) granting Respondent judgment by default against Holdings were entered by the Hon. Jennifer B. McCoy on October 17, 2024.

submit any opposing affidavits or other discovery authorized by Rule 56(c), SCRCP, at the hearing to controvert Ms. Medlock's Affidavit.

At the conclusion of the hearing on the Motion, Judge McCoy found that no issue of material fact existed and that Respondent was entitled to summary judgment on its claim against Appellant. A written order granting Respondent's Motion and awarding Respondent judgment against Appellant in the sum of $51,234.76, plus prejudgment interest at the Account rate of 15.50% from December 28, 2023, through the date of judgment, was subsequently filed by Judge McCoy on September 24, 2024 (the "Order"). On December 2, 2024, Appellant filed his Notice of Appeal of the Order.[2]

STANDARD OF REVIEW

"Appellate courts review summary judgment determinations using the same standard as the circuit court." *Isaac v. Onions*, 445 S.C. 525, 532, 915 S.E.2d 492, 496 (2025) (citing *Braden's Folly, LLC v. City of Folly Beach*, 439 S.C. 171, 190, 886 S.E.2d 674, 684 (2023)). "Rule 56(c) of the South Carolina Rules of Civil Procedure provides that the moving party is entitled to summary judgment 'if the [evidence before the court] show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Kitchen Planners, LLC v. Friedman*, 440 S.C. 456, 459, 892 S.E.2d 297, 299 (2023) (alterations in original) (quoting Rule 56(c), SCRCP) (eliminating the "mere scintilla" standard and holding the proper standard for summary is the "genuine issue of material fact" standard set forth in the text of Rule 56(c), SCRCP).

[2] Appellant's Notice of Appeal states that Appellant received written notice of the Order on November 4, 2024.

"In determining whether any triable issue of fact exists, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the non-moving party." *Isaac*, 445 S.C. at 533, 915 S.E.2d at 496 (quoting *Summer v. Carpenter*, 328 S.C. 36, 42, 492 S.E.2d 55, 58 (1997)). However, "it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine." *Kitchen Planners*, 440 S.C. at 462, 892 S.E.2d at 301).

"When a party makes no factual showing in opposition to a motion for summary judgment, the trial 'court must grant summary judgment to the moving party if, under the facts presented, the latter is entitled to summary judgment as matter of law.'" *ABB, Inc. v. Integrated Recycling Grp. of SC, LLC*, 432 S.C. 545, 551, 854 S.E.2d 171, 174 (Ct. App. 2021) (quoting *Coker v. Cummings*, 381 S.C. 45, 55, 671 S.E.2d 383, 388 (Ct. App. 2008). "[T]o resist a motion for summary judgment, the nonmoving party must come forward with specific facts showing genuine issues necessitating trial." *Id.* at 551-52, 854 S.E.2d at 174 (quoting *NationsBank v. Scott Farm*, 320 S.C. 299, 303, 465 S.E.2d 98, 100 (Ct. App. 1995); see also Rule 56(e), SCRCP ("When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.").

FACTS

The uncontested facts in this case are as set forth in the uncontroverted Affidavit of Sonya Medlock, a Legal Coordinator with Respondent, filed and served with the Motion.

On August 2, 2022, Appellant, on behalf of Holdings as its owner, executed a credit card application requesting that Respondent issue Holdings the business credit card Account. (Medlock Aff. ¶ 5 and Exhibit 1; R. pp. 5.52-5.53 and 5.54-5.55). Appellant approved Holdings' credit card application and issued the Account to Holdings subject to the terms of Appellant's Business Credit Card Agreement (Medlock Aff. ¶ 6 and Exhibit 2; R. pp. 5.53 and 5.56-5.64). As set forth in the terms of the Business Credit Card Agreement, Holdings agreed to, among other things, make the required monthly payments, the accrual of interest at a variable rate on unpaid balances, and Respondent's right to accelerate the Account balance in the event of default (Medlock Aff. Exhibit 2; R. pp. 5.58-5.59).

In connection with Holdings' application for the Account, Appellant also executed a Business Credit Card Guaranty Agreement (the "Guaranty Agreement"), which set forth the terms of the Guaranty by Appellant of payment of all amounts owed by Holdings under the Business Credit Card Agreement. (Medlock Aff. ¶ 7 and Exhibit 3; R. pp. 5.53 and 5.65-5.67). Section 1 of the Guaranty Agreement provides, in relevant part:

> The Guarantor unconditionally and irrevocably guarantees to the Credit Union and its successors, endorsees, transferees and assigns, as primary obligor and not merely as surety, the punctual payment of all sums now owing or that may in the future be owing by the Borrower with respect to all future advances of credit under the Business Credit Card Agreement, when the same are due and payable, whether on demand, at stated maturity, by acceleration or otherwise, and whether for principal, interest purchase price, margin or additional payments, fees, expenses, costs of replacement transactions, indemnification or otherwise (all of the foregoing sums being the "Liabilities").

(Medlock Aff. Exhibit 3; R. pp. 5.65).

Holdings defaulted under the Business Credit Card Agreement by failing to make the monthly payments due on the Account. (Medlock Aff. ¶ 8; R. pp. 5.53). As a result of Holdings' default, Respondent accelerated the Account balance as provided under the Business Credit Card

Agreement (Medlock Aff. ¶ 8; R. pp. 5.53). As of December 28, 2023, the full amount due and payable under the Business Credit Card Agreement was $51,234.76, plus interest thereafter at a rate of 15.50%. (Medlock Aff. ¶ 9 and Exhibit 4; R. pp. 5.53 and 5.68). Under the Guaranty Agreement, Guarantor is liable for payment for this amount. (Medlock Aff. Exhibit 3 at § 2; R. pp. 5.65 ("The Guarantor guarantees that the Liabilities shall be paid strictly in accordance with the terms of the Business Credit Card Agreement … .")). This action followed.

ARGUMENT[3]

I. APPELLANT FAILED TO PRESERVE HIS ARGUMENTS FOR APPEAL.

Appellant raises two issues on appeal. First, Appellant asserts that the Trial Court "erred in failing to consider the violations of federal law and principles of fair dealing committed by SCFCU, which include misrepresentations and failure to provide proper notice." (Appellant's Brief, p. 4). Second, Appellant asserts that Respondent's "misconduct, including false representations about the debt and the failure to give proper notice before filing suit, warrant reversal." (*Id.*).

Neither of these issues were properly preserved for appeal. Under South Carolina law, "[i]t is well settled that, but for a very few exceptional situations not present here, an appellate court cannot address an issue unless it was raised to, <u>and ruled upon by</u>, the trial court." *Mercer v. Phillips*, 318 S.C. 453, 455, 458 S.E.2d 427, 429 (1995) (citing *Beaufort County v. Butler*, 316 S.C. 468, 451 S.E.2d 386, 388 (1994) (emphasis added). See also, *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) ("If the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party must file a motion to alter or

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[3] In addition to the arguments set forth herein, Respondent would also request that the Court of Appeals affirm for any ground appearing on the record as provided by Rule 220(c), SCACR.

amend the judgment in order to preserve the issue for appellate review."). Here, the Trial Court did not rule on either issue raised by Appellant on appeal in the Order. As such, Appellant's arguments are not preserved.

II. APPELLANT FAILED TO ESTABLISH A FACTUAL BASIS FOR HIS ARGUMENTS BEFORE THE TRIAL COURT.

Even had Appellant preserved his arguments for appeal, there were no facts raised before the Trial Court that would support Appellant's arguments.

Appellant's first argument on appeal is that the Trial Court erred in ignoring alleged violation of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692, *et seq*. (the "FDCPA") by Respondent. (Appellant's Brief p. 8). Appellant's second and third arguments are that Respondent's alleged failure to provide the validation notice required under the FDCPA and alleged misrepresentations regarding the debt owed by Appellant warrant reversal and that the Trial Court's refusal to consider these alleged violations render the judgment entered against Appellant invalid. (*Id.*). In support of this proposition, Appellant's brief claims that an (unidentified) employee of Respondent told Appellant that Appellant did not need to repay the outstanding balance of the Account and that Appellant would not be personally liable for the Account balance. (*Id.* at p. 7). Appellant further claims that Respondent failed to send a written validation notice prior to commencing this action. (*Id.*).

However, none of these "claims" made upon appeal by Appellant were introduced by Appellant as "facts" before the Trial Court. Except as provided by Rule 212 and Rule 208(b)(1)(C) and (2), SCACR, an appellate court will not consider any fact that does not appear in the record on appeal. Rule 210(h), SCACR. The appellant has the burden of presenting a record sufficient to allow the appellate court to make a decision. *Helms Realty, Inc. v. Gibson-Wall Co.*, 363 S.C. 334, 611 S.E.2d 485 (2005). Here, Appellant did not present the Trial Court

with any opposing affidavit in opposition to summary judgment, or any other admissible evidence that would support Appellant's arguments. As such, Appellant is estopped from now asserting any additional facts on appeal, and in the the absence of having established a factual record supporting his arguments, Appellant is unable to succeed on any of his arguments on appeal.

III. THE FDCPA DOES NOT APPLY TO RESPONDENT OR THE ACCOUNT.

Even if Appellant had preserved his arguments for appeal and had established a sufficient factual record in support thereof with the Trial Court, Appellant's appeal would still fail because Appellant's claims of FDCPA violations by Respondent—which underly all of Appellant's arguments on appeal—do not apply to (a) claims of first party collectors such as Respondent or (b) business debts such as those that arose under the Account.[4]

A. The FDCPA does not apply to a creditor such as Respondent attempting to collect its own debt.

The FDCPA was enacted "to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not completely disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses." 15 U.S.C. § 1692(e). "The [FDCPA] prohibits 'debt collector[s]' from making false or misleading representations and from engaging in various abusive and unfair practices" in communicating with consumers during the debt collection

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[4] The Table of Authorities in Appellant's Brief also lists S.C. Code Ann. § 39-5-850, which addresses certain prohibited activities under the the South Carolina Unfair Trade Practices Act. (Appellant's Brief, p. 3). However, Appellant does not discuss S.C. Code Ann. § 39-5-850 elsewhere within Appellant's Brief and therefore any argument that S.C. Code Ann. § 39-5-850 applies to Respondent is deemed abandoned. See *Fields v. Melrose Ltd. Partnership*, 312 S.C. 102, 106, 439 S.E.2d 283, 285 (Ct. App. 1993) (issue "not argued in the brief is deemed abandoned and will not be considered by the appellate court").

process. *Heintz v. Jenkins*, 514 U.S. 291, 292, 115 S. Ct. 1489, 131 L. Ed. 2d 395 (1995). Under the FDCPA, a "debt collector" is defined as:

> any person who uses any instrumentality or interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another.

15 U.S.C. § 1692a(6). However, creditors collecting their own debts are not subject to the FDCPA. See, e.g., *Serfass v. CIT Grp./Consumer Fin., Inc.*, No. 8:07-cv-00090-GRA, 2008 U.S. Dist. LEXIS 9294, at *6 (D.S.C. Feb. 7, 2008) ("As a creditor collecting its own debts, CIT is not regulated by [the FDCPA].").

In his arguments on appeal, each of Appellant's FDCPA allegations relate to conduct of Respondent as a creditor collecting its own debts. (Appellant's Brief pp. 5 and 7). Because creditors collecting their own debts are not regulated by the FDCPA, Appellant cannot look to any alleged violations by the FDCPA of Respondent, a creditor, as a basis for appeal.

B. The FDCPA does not apply to business debts such as those under the Account.

It is well settled that "a threshold requirement for application of the FDCPA is that the prohibited practices are used in an attempt to collect a 'debt.'" *Mabe v. G. C. Servs. Ltd. P'ship*, 32 F.3d 86, 88 (4th Cir. 1994). The term "debt" is defined by the FDCPA as

> any obligation or alleged <u>obligation of a consumer</u> to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction <u>are primarily for personal, family, or household purposes</u>, whether or not such obligation has been reduced to judgment.

15 U.S.C. § 1692a(5) (emphasis added). Therefore, the FDCPA only applies to "consumer debts" incurred "primarily for personal, family, or household purposes." *Mabe*, 32 F.3d at 88 (citing *Bloom v. I.C. Sys., Inc.*, 972 F.2d 1067, 1068 (9th Cir. 1992)). It follows that the FDCPA does not apply to business debts. Respondent, as the party asserting the FDCPA, bears the burden of

establishing that the debt at issue is a consumer debt. See *Boosahda v. Providence Dane LLC*, 462 F. App'x 331, 336 (4th Cir. 2012).

Here, the only evidence in the record shows that the debt at issue arises from the business credit card Account issued to Holdings, a South Carolina business entity, and guaranteed by Appellant pursuant to the business Guaranty Agreement, which clearly demonstrate that the debt was not a consumer debt, but rather the business debt of Holdings, which was guaranteed by Appellant. Appellant provided no evidence to the contrary. As such, there can be no FDCPA violation by Respondent.

CONCLUSION

As set forth above, Appellant's appeal cannot succeed for several reasons. First, Appellant has failed to preserve his arguments asserted for appeal. Second, Appellant failed to establish an evidentiary record at the Trial Court establishing the facts Appellant attempts to rely on as the basis of his appeal. Finally, the legal basis Appellant raises for his appeal—alleged violations of the FDCPA by Respondent—fail because the FDCPA does not apply to (a) a creditor such as Respondent collecting its own debts or (b) business debts such as those giving rise to the Account. Therefore, for the foregoing reasons, Respondent respectfully requests that this Court affirm the Order of the Honorable Jennifer B. McCoy filed on September 24, 2024, granting summary judgment in favor of Respondent against Appellant pursuant to his Guaranty of the Account.

Respectfully submitted,

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CERTIFICATE OF RESPONDENT'S COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

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