In the State of South Carolina
In the Court of Appeals

Appeal from Allendale County
Court of Common Pleas

Perry M. Buckner, III, Circuit Court Judge

Case No. 2011-CP-03-127

21st Mortgage Corporation..... Appellant

vs.

Robert Youmans and Tonya Stoney..... Respondents

Respondents' Brief

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Statement of the Issues

1. S.C. Code Ann. § 37-2-404(1) (1976) allows consumers to offset a debt buyer's claim for payment with "all claims and defenses of the consumer against the seller or lessor arising from the sale." Do "all claims" include a consumer's unpaid judgment and, if so, may the Court cull treble damages, attorney fees, and costs out of the offset?

2. In *Am. Fed. Bank, F.S.B. v. White*, 296 S.C. 165, 370 S.E.2d 923 (Ct.App. 1988), the Court calculated a consumer's offset against a debt buyer as of the time the consumer answered and counterclaimed in the collection action. Did the trial court properly apply this decision?

Statement of Facts

In March 2002, Robert Youmans paid $22,750 for a mobile home. Note, p. 2, R.p. 62. The contract for the sale obligated him to pay $59,397 over 20 years. Note, p. 1, R.p. 61.

The mobile home needed $11,424 in repairs. Judgment Against Seller, R.p. 59. Youmans later brought an Unfair Trade Practice Act claim against the seller for the cost of installing the promised central heat and air system and in fixing problems with the home's improper set-up. Complaint Against Seller, R.p. 84. He obtained a judgment for

$54,657. Judgment Against Seller, R.p. 58-60. The seller dissolved without paying anything. Summary-Judgment Order, p. 2 ¶ 5, R.p. 3.

Youmans enrolled the judgment in November 2004. Summary-Judgment Order, p. 2 ¶ 6, R.p. 3. Months later, 21st Mortgage, a Tennessee corporation, bought the remaining debt. Summary-Judgment Order, p. 2 ¶ 7, R.p. 3. The note is a form contract which warns 21st Mortgage, in all-cap letters, that "Any holder of this consumer credit contract is subject to all claims and defenses which the debtor could assert against the seller of goods and services obtained pursuant hereto or with the proceeds hereof." Note, p. 9, R.p. 20. In exchange, the note requires the seller to indemnify and hold the debt buyer harmless on claims that Youmans has against the seller and asserts against the assignee. Note, p. 11, R.p. 22.

For over five and a half years after Youmans's judgment was enrolled, he paid 21st Mortgage $21,247.60. He ultimately stopped paying because the mobile home was in terrible shape from the original defects and problems that prompted him to sue the seller. Summary-Judgment Order, p. 3, ¶¶ 9, 11, 13, R.p. 4. The mobile home's condition is bad; its floor is rotten. Summary-Judgment Order, p. 3, ¶ 12, R.p. 4. It is undisputed that the mobile home's fair market value is far less

than the amount 21st Mortgage claims is the remaining balance. Summary-Judgment Order, p. 4, ¶ 17, R.p. 5.

21st Mortgage filed an action to repossess the mobile home and for the right to pursue a deficiency. To protect family members who live in the mobile home, Youmans defended by raising his judgment against the seller. Summary-Judgment Order, p. 3 ¶¶ 8, 15, R.p. 4. By then, Youmans's payments to 21st Mortgage dropped the claimed balance due to an amount less than the face amount of his earlier judgment. Summary-Judgment Order, p. 2 ¶ 4, p. 3 ¶ 14, R.p. 3-4.

On cross-motions for summary judgment, the trial court ruled that S.C. Code Ann. § 37-2-404 allows Youmans to assert his judgment against the seller as a defense to 21st Mortgage's action, but reduced the then $144,701.93 judgment down to the amount that 21st Mortgage claimed when it received the answer and counterclaim. Summary-Judgment Order, p. 3, ¶¶ 14-15, R.p. 4. The court concluded that the competing claims offset each other, with neither party taking anything from the other. Summary-Judgment Order, pp. 4-7, R.p. 5-8.

Argument

21st Mortgage did not and could not appeal the denial of its motion

for summary judgment. *Proctor v. Whitlark & Whitlark, Inc.,* 406 S.C. 225, 226, n. 1, 750 S.E.2d 93, 93 n. 1 (Ct.App. 2013)(a denial of summary judgment is never appealable). So the most it can hope for is a remand for further proceedings over the dilapidated mobile home.

To urge further proceedings, 21st Mortgage argues that the Court should decide for itself what the law is. But the Legislature has already spoken. Section 37-2-404(1) is included as an addendum to this brief and allows consumers to assert against debt buyers "all claims" that consumers have against the seller. The only limit on the type of claim is that the claim must "aris[e] from the [consumer credit] sale or lease." Section 37-2-404(1) provides,

> With respect to a consumer credit sale or consumer lease, an assignee of the rights of the seller or lessor is subject to all claims and defenses of the consumer against the seller or lessor arising from the sale or lease of property or services, notwithstanding that the assignee is a holder in due course . . ..

The General Assembly then required that the consumer first pursue the seller, and capped the debt buyer's derivative liability at the balance due on the debt when the debt buyer gets written notice of the claim. S.C. Code Ann. § 37-2-404(2). The consumer does not have to

notify the debt buyer before pursuing the seller. Notice "may be given before the attempt" but is not required. *Id.*

In applying this statute, courts are "bound by the language of [the statute] as written." *Bentley v. Spartanburg County*, 398 S.C. 418, 426, 730 S.E.2d 296, 301 (2012). They may not create requirements even if the Court believes its additions further the legislative intent. *Grier v. AMISUB of South Carolina, Inc.*, 397 S.C. 532, 540, 725 S.E.2d 693, 698 (2012). And because § 37-2-404 is unambiguous, "the Court's inquiry is over, and the statute must be applied according to its plain meaning." *Jennings v. Jennings*, 401 S.C. 1, 4, 736 S.E.2d 242, 244 (2012).

The Court should give § 37-2-404 its plain meaning and affirm.

1. "All claims" include judgments against the seller.

21st Mortgage first wants the Court to decide for itself whether Youmans can use his judgment to offset its claims. But it is undisputed that the mobile home sale is a "consumer credit sale" and that the judgment arises from the sale. Summary-Judgment Order, p. 2 ¶ 2, p. 6, R.p. 3, 7. This triggers § 37-2-404(1).

Again, the statute permits consumers like Youmans to assert against debt buyers "all claims" that they have against the seller, so long as the claim arises from the consumer credit sale. Youmans's

judgment satisfies the statute's only restriction in that the claim arises from the sale. Courts may not add extra requirements. *Grier,* 397 S.C. at 540, 725 S.E.2d at 698.

Construing "all claims" to include judgments against a seller is also fully consistent with other statutory provisions. The statute, for example, requires consumers to pursue the seller before asserting the claim against the debt buyer. S.C. Code Ann. § 37-2-404(2). Requiring consumers to first pursue the seller, and then excluding consumers who pursue the seller to a judgment, is nonsensical. Given that a consumer must first purse the seller, one would think that pursuing the seller to a judgment makes § 37-2-404(1) more applicable, not less.

Other provisions answer 21st Mortgage's objection that the judgment was a default judgment. The seller had notice and opportunity to contest the mobile home's flawed set-up and missing central heat and air system. Summary-Judgment Order, p. 6, R.p. 7. Subsequent debt buyers are not entitled to the same opportunity.

The statute says that debt buyers "may be given" notice before a consumer pursues the seller but does not require it. S.C. Code Ann. § 37-2-404(2). Under 21st Mortgage's view, the permissive "may be given" language must be amended to require prior notice.

Beyond that, pinning derivative liability on a debt buyer's prior notice improperly reinstates a holder-in-due-course defense that does not exist under the statute. Under this defense, certain assignees are not liable for claims against an assignor unless they have prior notice of the claim. *Rosemond v. Campbell*, 288 S.C. 516, 523 n. 3, 343 S.E.2d 641, 645 n. 3 (Ct.App. 1986). But the statute holds buyers of consumer debt liable under the facts present here even if they are holders in due course. *Id.* at 524, 343 S.E.2d at 645 ("Section 37-2-404 subjects an assignee of the seller's rights to all claims and defenses of the consumer against the seller, even though the assignee is a holder in due course . . ."). Requiring that a debt buyer have prior notice of the consumer's claims against the seller resurrects a requirement that the General Assembly killed decades ago.

That is not all. Youmans had his final judgment against the seller months before 21st Mortgage even bought the form contract which warns it that debt buyers are subject to Youmans's claims against the seller. Summary Judgment Order, p. 2 ¶¶ 3, 6-7, R.p. 3, 7-8. Nothing in the statute suggests that debt buyers may attack a final judgment collaterally. Again, the statute does not even require that they get prior notice that the consumer is pursuing the seller.

The judgment's finality before 21st Mortgage bought the debt also leaves Youmans scratching his head. 21st Mortgage suggests that Youmans should have told it about the judgment as soon as it bought his debt. He wishes he had. If he had, Youmans could have offset the balance remaining on the note with the entire amount of his $54,657 judgment. Note, p. 1, R.p. 12; Judgment Against Seller, R.p. 58-60; Summary-Judgment Order, p. 3, ¶ 13 R.p. 4. As it is, Youmans overpaid 21st Mortgage $21,247.60. Summary-Judgment Order, p. 3, ¶ 13, R.p. 4. The summary-judgment order allows 21st Mortgage to keep the overpayment.

Lastly, 21st Mortgage's opening brief does not mention § 37-2-404(1) or attempt to parse which claims the statute allows consumers to assert against debt buyers. It waived any statutory analysis it may come up with later. *See McClurg v. Deaton,* 395 S.C. 85, 87 n. 2, 716 S.E.2d 887, 888 n. 2 (2011)("It is axiomatic that an issue cannot be raised for the first time in a reply brief.").

2. "All claims" include the entire judgment.

21st Mortgage also argues as a fallback that treble damages, attorney fees, and costs should be culled out of the offset because it is

unfair to penalize 21st Mortgage for the seller's misconduct. The statute's text, this Court's precedent, and the Supreme Court's view of attorney fees and costs show otherwise.

The General Assembly put liability for the seller's misconduct squarely on the debt buyers. It subjected them "to all claims and defenses of the consumer against the seller or lessor arising from the sale . . .." S.C. Code § 37-2-404(1). Plainly read, "all claims" include judgments based on treble damages and attorney fees — if the claim arises from a consumer credit sale. There is no other limitation.

This distinguishes 21st Mortgage's Ohio and West Virginia cases. Those courts construed contracts, not statutes. And they held that contracts which subject assignees to "all claims" do not mean it because the Federal Trade Commission once said that "all" does not mean "all."

A more recent decision notes that the Federal Trade Commission now says that all does mean all, and held that consumers may assert against debt buyers the seller's violation of a state consumer-protection statute. *Lafferty v. Wells Fargo Bank,* 213 Cal.App.4th 545, 558-563, 153 Cal.Rptr.3d 240, 249-253 (Cal.App. 2013). This decision and other decisions cited in *Lafferty* decline to read the Court's policy preferences into contracts, agreeing with the Federal Trade Commission's most

recent explanation that "all claims" deserves a plain reading. Our statute is entitled to the same plain reading.

The attempt to slice the judgment into parts also fails to account for the *Rosemond* decision. In that case, the trial court dismissed a consumer's attempt to hold a assignee liable for its assignor's fraud. This Court reversed. The Court first held that there was no evidence that the assignee committed fraud. *Rosemond,* 288 S.C. at 520-521, 343 S.E.2d at 643-644. The Court then held that § 37-2-404 still rendered the assignee liable for the assignor's fraud as a "derivative liability under the statute." *Id.* at 524-525, 343 S.E.2d at 646.

If the statute imposes derivative liability on an innocent assignee for an assignor's fraud, as *Rosemond* holds, it follows that the statute imposes derivative liability for an assignor's less culpable misconduct. Fraud requires intentional misconduct. *Id.* at 520, 343 S.E.2d at 644. Treble damages require only that the violator "knew or should have known" that its conduct was unfair or deceptive. S.C. Code § 39-5-140(d). And attorney fees are awarded for any violation of the Unfair Trade Practice Act. S.C. Code § 39-5-140(a).

Lastly, South Carolina law does not treat attorney fees and costs like punitive damages. The Supreme Court has specifically held that

statutorily-authorized attorney fees and costs do not duplicate punitive damages but serve to fully compensate victims for pursuing their statutory, private rights of action. *Austin v. Stokes-Craven Holding Corp.,* 387 S.C. 22, 55-57, 691 S.E.2d 135, 152-153 (2010). Once fees and costs are considered as compensation, as *Austin* suggests, the compensatory elements within Youmans's judgment still offset all of 21st Mortgage's claims.

On its face, Youmans's judgment against the seller includes $13,573 in actual damages, $13,573 in fees, and $540 in costs, for a total of $27,686. Judgment Against Seller, p. 2, R.p. 59. This $27,686 sum — without post-judgment interest accruing since 2004 — exceeds the $25,633.74 sum that 21st Mortgage sought as of the June 15, 2013 hearing. Summary Judgment Order, p. 3 ¶ 14, R.p. 4. Even with treble damages cut out, the judgment frees Youmans from the debt.

3. The trial court properly applied the *White* decision.

21st Mortgage lastly wants the Court to rule that the judgment from 2004 is not "written notice" under § 37-2-404(2). Yet the summary-judgment order never said that the judgment from 2004 satisfies § 37-2-404(2) and did not value the offset as of 2004. The trial court ruled that written notice later occurred when Youmans served his answer and

counterclaim on May 8, 2011, and valued the offset as of that date. Summary-Judgment Order, p. 3 ¶ 15, p. 6, R.p. 4, 7.

In *White*, the Court held that a consumer's counterclaim to a collection action constitutes the written notice required by S.C. Code § 37-2-404(2). It then applied this holding, ruling that the timing of the written notice (i.e., the filing of the answer and counterclaim) limited the consumer to recovering the amount of the assignee's deficiency, thus creating equal, offsetting judgments. *White*, 296 S.C. at 171-172, 370 S.E.2d at 927.

The trial court followed this decision scrupulously. When Youmans answered and counterclaimed on May 8, 2011, his judgment against the seller was worth $114,657.71 and 21st Mortgage's competing claim was for less than $25,633.74. Summary-Judgment Order, p. 3 ¶ 14, R.p. 4. On that same date, the amount of Youmans's judgment against the seller, even minus treble damages and post-judgment interest, still exceeded the highest amount that 21st Mortgage sought. Summary Judgment Order, p. 3 ¶ 14, R.p. 4. So the trial court properly ruled that the offsetting claims cleaned the slate.

The trial court's later reference to the judgment putting the world on notice in 2004 has nothing to do with § 37-2-404(2) or valuing the offset.

The court was instead responding to the purported unfairness from enforcing the Consumer Protection Code. The trial court was simply noting that a little due diligence from 21st Mortgage would have uncovered Youmans's judgment before it bought a note which warned it that debt buyers are subject to such claims. Summary-Judgment Order, p. 2 ¶ 3, pp. 6-7, R.p. 3, 7-8. Claiming unfairness is tough when you are wholly less than vigilant. As it is, 21st Mortgage's remedy is against the seller on the indemnity and hold-harmless rights that it purchased with the note. Contract, p. 11, R.p. 22.

Conclusion

A Tennessee debt buyer wants to kick a family out of their dilapidated mobile home because it bought a South Carolina note that says debt buyers are liable for the seller's misconduct. It then forged ahead without checking our judgment rolls or our Consumer Protection Code. Even now, 21st Mortgage ignores the statute governing which claims a consumer may assert against debt buyers.

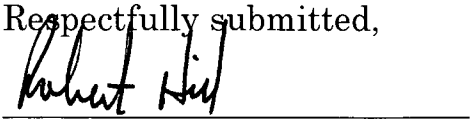
This statutory scheme sets checks and balances on everyone involved. Consumers may hold debt buyers liable for the seller's misconduct but must first pursue the seller. Even then, the debt buyer's

liability is capped at the amount the debt buyer is owed when it gets written notice of the claim. After the offset, the seller remains liable to the consumer for the consumer's excess damages and remains liable to indemnify the debt buyer on the derivative liability.

Youmans got the short end of the deal. His niece and her family get to live in a defective mobile home with rotten floors while his judgment against the seller — to fix the place — is reduced to a fraction of its value. 21st Mortgage gets to keep the $21,247.60 that Youmans could have avoided by asserting the offset earlier, and is free to try to recoup its losses from the seller.

The summary judgment should be affirmed. 21st Mortgage is in the business of buying consumer debt and knows the risks. Decline its invitation to ignore or mangle the General Assembly's decades-old consumer protections.

Respectfully submitted,



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Code of Laws of South Carolina 1976 Annotated
Title 37. Consumer Protection Code
Chapter 2. Credit Sales
Part 4. Limitations on Agreements and Practices

Code 1976 § 37-2-404

§ 37-2-404. Assignee subject to claims and defenses.

Currentness

(1) With respect to a consumer credit sale or consumer lease, an assignee of the rights of the seller or lessor is subject to all claims and defenses of the consumer against the seller or lessor arising from the sale or lease of property or services, notwithstanding that the assignee is a holder in due course of a negotiable instrument issued in violation of the provisions prohibiting certain negotiable instruments (§ 37-2-403).

(2) A claim or defense of a consumer specified in subsection (1) may be asserted against the assignee under this section only if the consumer has made a good faith attempt to obtain satisfaction from the seller or lessor with respect to the claim or defense and then only to the extent of the amount owing to the assignee with respect to the sale or lease of the property or services as to which the claim or defense arose at the time the assignee has written notice of the claim or defense. Written notice of the claim or defense may be given before the attempt specified in this subsection. For the purposes of this section, written notice is any written notification other than notice on a coupon, billing statement or other payment medium or material supplied by the assignee.

(3) For the purpose of determining the amount owing to the assignee with respect to the sale or lease:

(a) payments received by the assignee after the consolidation of two or more consumer credit sales, except pursuant to a revolving charge account, are deemed to have been applied first to the payment of the sales first made; if the sales consolidated arose from sales made on the same day, payments are deemed to have been applied first to the smallest sale; and

(b) payments received for a revolving charge account are deemed to have been applied first to the payment of finance charges in the order of their entry to the account and then to the payment of debts in the order in which the entries of the debts are made to the account.

(4) A card issuer, including a seller credit card issuer, is subject to the claims and defenses of the consumer arising from the sale or lease of property or services pursuant to the credit card in accordance with the provisions of § 37-3-411.

(5) An agreement may not limit or waive the claims or defenses of a consumer under this section.

Credits

HISTORY: 1962 Code § 8-800.194; 1974 (58) 2879; 1976 Act No. 686 § 17.

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Certificate of Rule 211(b), SCACR, Compliance

I certify that the Respondents' Final Brief complies with Rule 211(b), SCACR.

February 28, 2014

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Certificate of Service

I on February 28, 2014 served the Respondents' Final Brief and Certificate of Compliance by first class mail addressed to:

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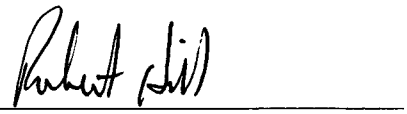

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