STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
OTHA DELANEY,	)	CASE NO. 2011-CP-10-7166
PLAINTIFF,	)	
vs.	)	ORDER GRANTING MOTION TO DISMISS
FIRST FINANCIAL OF CHARLESTON, INC.,	)	
DEFENDANT.	)	

This matter comes before the Court upon Defendant's Motion to Dismiss Plaintiff's Complaint. Defendant contends that the Plaintiff's claim, and thus all putative class claims, are time barred by the applicable statute of limitations. Having fully considered the allegations of the Complaint in the light most favorable to the Plaintiff, the Court finds that Defendant's Motion should be GRANTED.

FACTUAL & PROCEDURAL BACKGROUND

On October 12, 2007, Plaintiff entered into a Retail Installment Sales Contract (hereinafter referred to as "RISC") with Coliseum Motors for the purchase of a 2003 Chevrolet pick-up truck, intended for Plaintiff's own personal use. (Compl. ¶ 9) This RISC was then assigned to Defendant First Financial by Coliseum Motors, thus making First Financial a secured party in the consumer goods transaction. (Compl. ¶ 10) After Plaintiff failed to make payments, First Financial lawfully repossessed the vehicle. (Compl. ¶ 11) First Financial then sent the Plaintiff a "NOTCE OF PRIVATE SALE OF COLLATERAL" (hereinafter "Notice of Sale") and accompanying letter on May 2, 2008 to advise Plaintiff of its intention to sell the repossessed

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collateral. (Compl. ¶ 14) Plaintiff claims this Notice of Sale failed to comply with South Carolina law. (Compl. ¶ 13) Over seven months later, on December 15, 2008, First Financial sold the collateral. (Compl. ¶ 12) Plaintiff filed the above-captioned lawsuit on October 3, 2011, alleging that 1) the Notice of Sale of collateral that First Financial sent to the Plaintiff was insufficient under South Carolina law, specifically S.C. Code Ann. § 36-9-613 and 614, and that 2) as a result, Plaintiff is entitled to a statutory relief pursuant to S.C. Code Ann. § 36-9-625(c)(2). (Compl. ¶ 14, 22, and 25) Plaintiff, as a representative of the putative class, seeks this recovery on behalf of putative class members. (Compl. ¶ 18).

Defendant First Financial moved to dismiss Plaintiff's Complaint asserting that the Plaintiff's claims are subject to a one year statute of limitations set forth in S.C. Code Ann. § 15-3-570 which would render Plaintiff's Complaint untimely as matter of law. The basis for this argument rests on two grounds: 1) The relief sought by the Plaintiff is in the nature of a "statutory penalty" and the action is therefore governed by the provisions of S.C. Code Ann. § 15-3-570; and 2) that Plaintiff's sole cause of action accrued upon receipt of the "NOTICE OF PRIVATE SALE OF COLLATERAL." In the alternative, Defendant asserts that because this action accrued upon Plaintiff's receipt of the Notice of Sale, a three year statute of limitations, if applied, still renders the Plaintiff's action untimely as a matter of law.

STANDARD OF REVIEW

In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the court must base its ruling solely on allegations set forth in the complaint. *Spence v. Spence*, 368 S.C. 106, 116, 628 S.E.2d 869, 874 (2006). While the allegations must be viewed in the light most favorable to the non- moving party, the motion must be granted if facts and inferences reasonably deducible from them show that Plaintiff could not

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prevail on any theory of the case. *Gray v. State Farm Auto Ins. Co.*, 327 S.C. 646, 491 S.E.2d 272 (Ct. App. 1997). Where the facts plead in the Complaint demonstrate that the Plaintiff's sole cause of action is time-barred, judgment as a matter of law is proper at the 12(b)(6) stage. *Flateau v. Harrelson*, 355 S.C. 197, 584 S.E.2d 413 (Ct. App. 2003).

LAW & ANALYSIS

I. The Remedy Sought By The Plaintiff Is A Statutory Penalty

This Court finds that the Plaintiff's sole cause of action requests an award which should be deemed a statutory penalty. A statutory penalty is defined as "a penalty imposing automatic liability on a wrongdoer for a violation of a statute's terms without reference to any actual damages suffered." *Black's Law Dictionary* 1181 (8th ed. 2005) Plaintiff seeks relief "for each class member pursuant to UCC 36-9-625(c)(2) in the amount of the finance charge plus ten percent of the principal amount of the obligation applicable to that class member's contract." (Compl. ¶ 25(c)). This statutory provision is cited as the only basis for recovery in this matter. As the legislative comments to § 36-9-625(c)(2) note, this relief is to be awarded "in any event" and "regardless of any injury that may have resulted." S.C. Code Ann. § 36-9-625(c)(2) cmt 4. Based on this language, I find that this fixed formula is not remedial in nature but rather serves the purpose of imposing automatic liability for "every noncompliance." *Id.*

While the proposed award is based on each class member's respective contractual obligations, this fact alone does not demonstrate that the award is remedial in nature. Conversely, this fact exhibits only that the severity of the penalty fluctuates depending on the finance charge in an effort deter noncompliance. Notably, Plaintiff has not sought any actual damages nor is there any evidence on the face of Plaintiff's Complaint to show that cognizable

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actual damages have been suffered. Rather, Plaintiff alleges only that a statute has been violated and he is a consumer entitled to relief pursuant to that statute.

Additionally, I find that classifying the Plaintiff's desired recovery as a statutory penalty is consistent with South Carolina law. On no less than three occasions, the South Carolina Supreme Court has identified this ***exact provision*** as awarding a "statutory penalty." *See Singleton v. Stokes Motors, Inc.*, 358 S.C. 369, 595 S.E.2d 461 (2004)("[Plaintiffs] claimed that they were entitled to collect the minimum statutory penalty")[1]; *Crane v. Citicorp Nat'l Serv., Inc.*, 313 S.C. 70, 437 S.E.2d 50 (1993)("the statutory penalty is evidence of the legislature's recognition that the small amount of compensatory damages that may be proven in a consumer goods repossession and sale would be insufficient to ensure creditor compliance with the Code's provisions.")[2]; *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 534 S.E.2d 688 (2000)("a debtor may seek to recover the statutory penalty"). Indeed, in *Crane,* the Supreme Court not only identified Plaintiff's desired relief as a statutory penalty but also articulated the underlying legislative purpose in creating the penalty provision: the minimal amount of actual, compensatory damages available in scenarios similar to the instant matter would make enforcement less desirable. *Id.* Thus, the penalty provision incentivizes compliance with South Carolina law by providing a larger recovery otherwise not available.

Furthermore, because S.C. Code Ann. § 36-9-625(c)(2) is based on a uniform UCC model statute, other courts have also examined the appropriate classification of this statutory award. In *Beard v. Vanderbilt Mortg. & Fin., Inc.* 2008 WL 2323235 (M.D.T. June 2, 2008), the Middle District of Tennessee analyzed the precise scenario now before this Court. In granting the defendant's motion to dismiss, the court found that the putative class action, requesting relief

[1] Although the Court in *Singleton* was analyzing the provisions of former Section 9-507(1), current § 36-9-625(c)(2) embodies nearly identical language for its provisions on recovery related to improper notice of sale.
[2] Please See Footnote 1.

under the identical 47-9-625(c)(2) of the Tennessee Code of Laws, was seeking a statutory penalty that subjected the plaintiff to a one year statute of limitations. In ruling on this issue, the court found that any holding which defined 47-9-625(c)(2) as remedial would be contrary to established Tennessee case law. *Id.* at 4 ("The Court cannot agree with the Plaintiff that §47-9-625(c)(2) is primarily remedial in light of the Tennessee Court of Appeals cases describing that section as a statutory penalty……"). As previously noted, South Carolina case law is equally supportive in defining the provisions of S.C. Code Ann. § 36-9-625(c)(2) as a statutory penalty. Based on the foregoing, I find that S.C. Code Ann. 36-9-625(c)(2) provides for a statutory penalty and the controlling limitations period should be either S.C Code Ann. § 15-3-570 or § 15-3-540(2), respectively one or three years.

II. S.C. Code Ann. § 36-2-725(1) Is Not Applicable To Plaintiff's Claims.

Although Plaintiff contends that the timeliness of this matter should be dictated by the six year statute of limitations found in S.C. Code Ann. § 36-2-725, the Court finds this argument unavailing for a variety of reasons. First and foremost, the explicit language of that statute limits its application to cases where a breach of contract for the sale of goods is at issue. Plaintiff has not plead a breach of contract cause of action nor does he allege any contract having ever been breached. This Court finds that the Plaintiff may not now invoke the benefits and protections of cause of action that has not been plead.

Secondly, the instant matter concerns the sufficiency of a notice of sale prior to the disposition of collateral. Therefore, this case deals entirely with Article 9's provisions concerning secured transactions. Article 2's provisions pertaining to the sale of goods are wholly irrelevant to any allegation set forth in Plaintiff's Complaint.

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Lastly, to the extent § 36-2-725 could otherwise be applied, this Court finds that general rules of statutory construction prevent the application of the six year statute of limitations. One of the universal maxims of statutory construction is that a specific statute prevails over a more general one. *Mims v. Alston*, 312 S.C. 311, 440 S.E.2d 357 (1994). Having found the Plaintiff's desired recovery is in fact a statutory penalty, both S.C. Code Ann. § 15-3-570 and S.C. Code Ann. § 15-3-540(2) speak more directly to the actual allegations in this lawsuit. Wherefore, the Court finds § 36-2-725 to be inapplicable to the instant case.

III. Plaintiff's Complaint Is Time-Barred Under Either a One Year or Three Year Statute of Limitations

Having found that the recovery which Plaintiff seeks is a statutory penalty, the sole question remaining before this Court is whether the provisions of S.C. Code Ann. § 15-3-570 or S.C. Code Ann. § 15-3-540 controls the limitations period in this matter. Both statutes pertain to actions seeking a penalty and provide a one and three year statute of limitations respectively. §'s 15-3-570 and 15-3-540 provide as follows:

> S.C. Code Ann. § 15-3-570
>
> "An action upon a statute for a penalty or forfeiture given, in whole or in part, to any person who will prosecute for it must be commenced within one year after the commission of the offense."
>
> S.C. Code Ann. § 15-3-540
>
> "Within three years"
>
> "(2) An action upon a statute for a penalty or forfeiture when the action is given to the party aggrieved or to such party and the State, except when the statute imposing it prescribes a different limitation."

While either statute might be reasonably applied to this matter, the Court need not decide this inquiry as Plaintiff's cause of action accrued upon receipt of the alleged noncompliant

Notice of Sale and either statute would therefore serve as a bar to Plaintiff's recovery. As demonstrated by Plaintiff's Complaint, Plaintiff received the alleged unlawful Notice of Sale on or around May 2, 2008, and did not file suit under October of 2011, more than five months after the longer statute had run.

For purposes of § 15-3-570, the statute specifically informs that the commission of the offense serves as the date of accrual. Undoubtedly, since Plaintiff alleges that the Notice of Sale failed to comply with South Carolina law, the offense in this case occurred upon delivery and receipt of that Notice of Sale, and under § 15-3-570, the statute would begin to run in May of 2008 and expire in May of 2009. Plaintiff's Complaint does not allege that the sale of the repossessed vehicle violated any provision of South Carolina law and no offense was alleged to have occurred upon disposition in December of 2008. Without question, the only offense which Plaintiff alleges concerns the adequacy of the notice provided prior to sale.

While § 15-3-540(2) does not specifically delineate a date of accrual, I find that the alleged commission of the offense should similarly serve as the commencement of the three year statute of limitations found in § 15-3-540. Unlike an action for actual or compensatory damages, Plaintiff's action for a penalty focuses on a specific act of non-compliance by the Defendant that awards automatic relief. The right to bring the action and thus the proper date of accrual should be determined by the date on which that alleged noncompliance occurred. However, this date of accrual would also coincide with the date on which the Plaintiff either knew or should have known that a violation had occurred.

Furthermore, I find that the legislature intended §'s 15-3-570 and 15-3-540 to have similar dates of accrual. Both govern actions for a statutory penalty and are nearly identical in language but for the length of the limitations period. Given that the legislature specifically

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enumerated the date of accrual for penalty actions under § 15-3-570 to be the date of the commission of the offense, this Court sees no logical purpose in creating an alternative date of accrual for penalty actions under § 15-3-540(2).

For the foregoing reasons, I find and hold that the Plaintiff's claims, and thus all putative class claims, are time-barred and Defendant's MOTION IS HEREBY GRANTED.

The Honorable Stephanie P. McDonald
Circuit Judge

Charleston, South Carolina
April 29, 2013

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