

STATE OF SOUTH CAROLINA
 COUNTY OF ORANGEBURG
 IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2007-CP-38-00196

and

CASE NO. 2007-CP-38-00201

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 ETN
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First Citizens Bank and Trust Company, Inc.	Clyde B. Livingston, et al
PLAINTIFF(S)	DEFENDANT(S)

Submitted by: Master-In-Equity Judge

Attorney for : Plaintiff Defendant
 or
 Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE**

BOX):

- Affirmed; Reversed; Remanded; Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

Order denying both Motions for Reconsideration

This order ends does not end the case.

TEST: TRUE COPY
 Winnie B. Clark
 CLERK OF COURT

Additional Information for the Clerk :

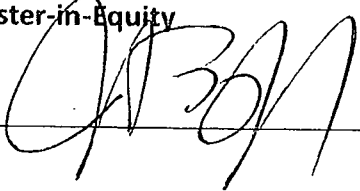
INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes -----below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Master-in-Equity 	Judge's Code: 3077	Date: July 7, 2014
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For Clerk of Court Office Use Only

This Order was entered on the day of and a copy mailed first class or placed in the appropriate attorney's box on this day of , 2014 to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)	ATTORNEY(S) FOR THE DEFENDANT(S)
Erik T. Norton	Andrew S. Radeker
	CLERK OF COURT

Court Reporter:

STATE OF SOUTH CAROLINA,)
)
COUNTY OF ORANGEBURG)

COURT OF COMMON PLEAS
C. A. NO. 2007-CP-38-00196

ATTEST: TRUE COPY

C. A. NO. 2007-CP-38-00201

Wynne B. Clark
CLERK OF COURT
ORANGEBURG COUNTY, SC

First Citizens Bank and Trust Company,)
Inc.)

Plaintiff,)

vs.)

Clyde B Livingston, et al,)

Defendants.)

ORDER DENYING
MOTIONS TO RECONSIDER

FILED
APR 17 2014
CLERK OF COURT
ORANGEBURG COUNTY, SC

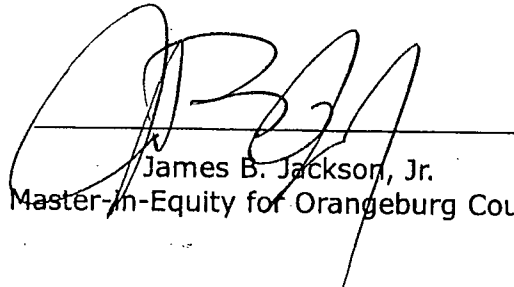
This matter comes before the Court on a Motion filed by the Plaintiff for the Court to reconsider its denial of Summary Judgment on the counterclaims filed by the Defendant:

Clyde B. Livingston, alleging Breach of Contract, Violation of Attorney Preference Statute and denying Plaintiff's Motion to Strike Defendant Livingston's demand for to a jury trial. The Court has reconsidered its original decision in this matter and has read the memorandum of law and accompanying case materials provided by Eric Norton, attorney for the Plaintiff. For the reasons set forth in the original Order issued by this Court dated April 10, 2014, and recorded on April 17, 2014, I am denying the Plaintiff's Motion for Reconsideration. I believe that my original Order is the correct decision in these matters. Additionally, Andrew Radeker, attorney for defendant Clyde B Livingston, also filed a motion for reconsideration asking the Court to reconsider its decision in granting summary judgment as to their counterclaim for Unfair Trade Practice. I have considered all of his arguments and materials submitted and for the reasons set forth in the Court's original Order, I am denying the Defendant's Motion for

QJM #1

Reconsideration. The Court feels that all of these matters were correctly decided in it's original Order.

IT IS THEREFORE ORDERED that the Motions for Reconsideration filed by both the Plaintiff and the Defendant, Clyde B. Livingston, are hereby denied for the reasons set forth in the Court's original Order dated April 10, 2014, and recorded on April 17, 2014.



James B. Jackson, Jr.
Master-in-Equity for Orangeburg County

Orangeburg, S.C.
July 2, 2014

JBJ #2

STATE OF SOUTH CAROLINA
 COUNTY OF ORANGEBURG
 IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2007-CP-38-00196 and
 2007-CP-38-00201

First Citizens Bank and Trust Company	vs	Clyde B Livingston, et al
PLAINTIFF(S)		DEFENDANT(S)
Submitted by: Master-In-Equity Judge		Attorney for : <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant or <input type="checkbox"/> Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
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- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE)**

BOX):

- Affirmed; Reversed; Remanded; Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court.

FILED FOR
 CLERK OF COURT
 ORANGEBURG COUNTY, SC
 APR 11 2007
 ATTEST, TRUE COPY

This order <input type="checkbox"/> ends <input type="checkbox"/> does not end the case.		
Additional information for the Clerk :		Winnie B. Clark CLERK OF COURT ORANGEBURG COUNTY, SC
INFORMATION FOR THE JUDGMENT INDEX		
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes ———below.		
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
If applicable, describe the property, including tax map information and address, referenced in the order:		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil

Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Special Circuit Court Judge 	Judge's Code: 2097	Date: April 9, 2014
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For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)	ATTORNEY(S) FOR THE DEFENDANT(S)
	CLERK OF COURT

Court Reporter:

STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG

First Citizens Bank and Trust Company,
Inc.,

Plaintiff,

vs.

Clyde B. Livingston; Technico Marketing
& Distribution, Inc.; B. Livingston and
Charlotte V. Livingston; American First
Federal Inc.; Citibank South Dakota,
N.A.; Branch Banking and Trust
Company of South Carolina; G&G
Rentals; Miller Communications, Inc.;
and Wells Fargo Bank, N.A.,

Defendants.

STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG

First Citizens Bank and Trust Company,
Inc.,

Plaintiff,

vs.

Clyde B. Livingston; American First
Federal Inc.; Citibank South Dakota,
N.A.; Branch Banking and Trust
Company of South Carolina; G&G
Rentals; Miller Communications, Inc.;
and Wells Fargo Bank, N.A.,

Defendants.

IN THE COURT OF COMMON PLEAS

CASE NO. 2007-CP-38-196

ORDER GRANTING SUMMARY
JUDGMENT IN PART, DENYING
SUMMARY JUDGMENT IN PART,
AND DENYING PLAINTIFF'S
MOTION TO STRIKE JURY DEMAND

FILED FOR RECORD
VIRGINIA S. CLARK
CLERK OF COURT
ORANGEBURG COUNTY, SC
2007 APR 17 PM 4:12

CASE NO. 2007-CP-38-201

ATTEST: TRUE COPY
Winnys B. Clark
CLERK OF COURT
ORANGEBURG COUNTY, SC

This matter comes before me upon the motions of the Plaintiff seeking summary judgment as to Defendant Livingston's remaining counterclaims in the above-captioned action and seeking that Defendant Livingston's demand for a jury trial be stricken, thereby demanding referral to the Master-in-Equity for a bench trial in accordance with S.C. Code Annotated § 29-3-

CBM #1

10 *et seq.* This motion was heard on December 11, 2013. Erik T. Norton, Esquire, attended the hearing on behalf of the Plaintiff. Andrew S. Radeker, Esquire, attended the hearing on behalf of Defendant Livingston. The Court requested post-hearing briefing from the parties whose counsel attended the hearing, and both those parties submitted briefs.

This case was brought as a foreclosure action, seeking foreclosure of a mortgage given in the year 2000 by Defendant Livingston to Orangeburg National Bank to secure a home equity line of credit. Some of Defendant Livingston's counterclaims were already disposed of by Order of the Honorable Diane S. Goodstein filed June 14, 2010, which ruled on a motion of the Plaintiff for summary judgment as to the counterclaims. The remaining counterclaims are for violation of S.C. Code Ann. § 37-10-102, commonly referred to as the attorney-preference statute, for breach of contract, for violation of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, *et seq.*, and for libel. As further explained below, the Court grants the Plaintiff's summary judgment as to the Unfair Trade Practices Act counterclaim, denies the summary judgment motion as to the other remaining counterclaims, and denies the Plaintiff's motion to strike Defendant Livingston's jury demand.

SUMMARY JUDGMENT STANDARD

Under South Carolina law, "summary judgment may be rendered only when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Additionally, it must be shown that further inquiry into the facts of the case is not desirable to clarify the application of the law." Folkens v. Hunt, 290 S.C. 194, 196, 348 S.E.2d 839, 841 (Ct. App. 1986).



“All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party. Even when there is no dispute as to the evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied.” Nelson v. Charleston County Parks & Recreation Comm., 362 S.C. 1, 605 S.E.2d 744 (Ct. App. 2004). If “the parties vehemently dispute the inferences and conclusions to be drawn from the undisputed facts, . . . that simply establishes that summary judgment is not appropriate[.]” Montgomery v. CSX Transp., Inc., 656 S.E.2d 20, 29 (S.C. 2008).

“When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party. Moreover, since it is a drastic remedy, summary judgment should be cautiously invoked so that a litigant will not be improperly deprived of a trial on disputed factual issues.” Englert, Inc. v. LeafGuard USA, Inc., 377 S.C. 129, 133-34, 659 S.E.2d 496, 498 (2008). “If triable issues exist, those issues must go to the jury.” Schmidt v. Courtney, 357 S.C. 310, 592 S.E.2d 326 (Ct. App. 2003).

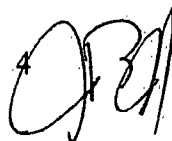
In 2009, the South Carolina Supreme Court clarified earlier confusion about whether a scintilla of evidence is sufficient to defeat summary judgment. Hancock v. Mid-South Management Co., Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 802-3 (2009). In Hancock, the Court held that “in cases applying the preponderance 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.” Id. More than a scintilla is required only in cases requiring heightened burdens of proof or applying federal law. Id. Accordingly, when the ordinary burden of proof is applicable, only a scintilla of evidence is required to withstand summary judgment. Id.

BREACH OF CONTRACT

As to this counterclaim, the Plaintiff's motion for summary judgment centers on an argument that the three-year statute of limitations on a breach of contract claim had run at the time this claim was brought. Most at-law claims in this State, including a claim for breach of contract, have a three-year statute of limitations under S.C. Code Ann. § 15-3-530. South Carolina follows the discovery rule with regard to that statute. See S.C. Code Ann. § 15-3-535. "Under the discovery rule, the statute of limitations begins to run from the date the injured party either knows or should know, by the exercise of reasonable diligence, that a cause of action exists for the wrongful conduct." True v. Monteith, 327 S.C. 116, 119, 489 S.E.2d 615, 616 (1997).

A defense that a claim is barred by a statute of limitations is an affirmative defense. Eldridge v. Eldridge, 398 S.C. 113, 120, 728 S.E.2d 24, 27 (2012); Arant v. Kressler, 327 S.C. 225, 228 n. 1, 489 S.E.2d 206, 208 n. 1 (1997); Glenn v. Sch. Dist. No. Five of Anderson Cty., 294 S.C. 530, 533, 366 S.E.2d 47, 49 (Ct. App. 1988). "The burden of establishing the bar of the statute of limitations rests upon the one interposing it, and when the testimony is conflicting upon the question, it becomes an issue for the jury to decide." Turner v. Milliman, 381 S.C. 101, 110, 671 S.E.2d 636, 641 (Ct. App. 2009). Only "when there is no conflicting evidence or only one reasonable inference can be drawn from the evidence [does] the determination . . . become[] a matter of law[.]" Id.

Here, viewed in the light most favorable to Defendant Livingston, the evidence tends to show that Orangeburg National Bank, predecessor-in-interest to the Plaintiff, unilaterally imposed an unwritten condition on making the entire \$57,000.00 of the subject line of credit available to Defendant Livingston, limiting him to \$45,000.00 (in contradiction of the written



agreement document) unless and until he repainted his house. Defendant Livingston testified that he repainted the house and informed the bank of that, but the bank would not then allow him to borrow on the credit line beyond \$45,000.00.

The Plaintiff argues that the statute of limitations on the breach of contract claim began to run at the closing (and thus ran more than three years before this action was brought); however, the Court disagrees. The statute of limitations period on this claim could not have begun to run until the bank had received information that Defendant Livingston had painted his house and then refused to allow him to borrow on the credit line beyond \$45,000.00. There is nothing in the record that tells the Court when it was that those events happened. Accordingly, the Plaintiff has not established the burden it carries to show as a matter of law that the statute of limitations on this claim has run.

ATTORNEY-PREFERENCE VIOLATION

The testimony in record is consistent that there was no lawyer, representing Livingston or otherwise, present at the closing of the credit line mortgage. The Plaintiff relies on a attorney preference form signed by Defendant Livingston with a pre-typed date indicating execution prior to closing and argues that this shows compliance with the attorney preference statute even despite the non-attendance of a lawyer at the closing. The Plaintiff further argues that this claim is barred by the statute of limitations.

A person has the right to be represented by an attorney of his own choice, without conflicts of interest, in a mortgage closing. See Doe v. McMaster, 355 S.C. 306, 585 S.E.2d 773, 777-78 (2003); State v. Buyers Service Co., Inc., 292 S.C. 426, 357 S.E.2d 15 (1987). The right to be represented by an attorney of one's own choice is a substantial right. Hagood v. Sommerville, 362 S.C. 191, 607 S.E.2d 707 (2005).

In pertinent part, S.C. Code Ann. § 37-10-102 provides:

Whenever the primary purpose of a loan that is secured in whole or in part by a lien on real estate is for a personal, family or household purpose -

(a) The creditor must ascertain prior to closing the preference of the borrower as to the legal counsel that is employed to represent the debtor in all matters of the transaction relating to the closing of the transaction and except in the case of a loan on property that is subject to the South Carolina Horizontal Property Act (Section 27-31-10 et seq.) the insurance agent to furnish required hazard and flood property insurance in connection with the mortgage and comply with such preference.

The creditor may comply with this section by:

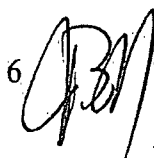
(1) including the preference information on or with the credit application so that this information shall be provided on a form substantially similar to a form distributed by the administrator; or

(2) providing written notice to the borrower of the preference information with the notice being delivered or mailed no later than three business days after the application is received or prepared. If a creditor uses a preference notice form substantially similar to a form distributed by the administrator, the form is in compliance with this section.

Providing a borrower with an attorney preference form at closing *always* violates this section. That is what Defendant Livingston's deposition, taken in the light most favorable to him, establishes is what occurred here. He testified that a form indisputedly signed at closing and the attorney preference form with the pre-typed date appeared to have been signed on the same day.

A statute in the same chapter as the attorney preference statute, S.C. Code Ann. § 37-10-105, provides the remedies for a violation of § 37-10-102, states:

A) If a creditor violates a provision of this chapter, the debtor has a cause of action, other than in a class action, to recover actual damages and also a right in an action, other than in a class action, to recover from the person violating this chapter a penalty in an amount determined by the court of not less than one thousand five hundred dollars and not more than seven thousand five hundred

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dollars. No debtor may bring a class action for a violation of this chapter. **No debtor may bring an action for a violation of this chapter more than three years after the violation occurred, except as set forth in subsection (C).** The three-year statute of limitations applies to actions commenced after May 2, 1997. No inference should be drawn as to the applicable statute of limitations for any pending actions. This subsection does not bar a debtor from asserting a violation of this chapter in an action to collect a debt which was brought more than three years from the date of the occurrence of the violation as a matter of defense by recoupment or set-off in such action.

(B) No creditor may be held liable in an action brought under this section for a violation of this chapter if the creditor shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid the error.

(C) If the court finds as a matter of law that the agreement or transaction is unconscionable pursuant to Section 37-5-108 at the time it was made, or was induced by unconscionable conduct, the court may, in an action other than a class action:

(1) refuse to enforce the agreement, or a term, or part of the agreement or transaction that the court determines to have been unconscionable at the time it was made;

(2) enforce the remainder of the agreement without the unconscionable term or part, or limit the application of the unconscionable term or part to avoid an unconscionable result;

(3) rewrite or modify the agreement to eliminate an unconscionable term, part, or result and enforce the new agreement; or

(4) award:

(a) not more than the total amount of the loan finance charge and allow repayment of the unpaid balance of the loan without any finance charge;

(b) not more than double the amount of the excess loan finance charge or other charges or fees actually received by the creditor or paid by the debtor to a third party; and

(c) attorney's fees and costs.

An action pursuant to this subsection may not be brought after the original scheduled maturity date of the debt.

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(D) In an action in which it is found that a creditor has violated this chapter, the court shall award to the debtor the costs of the action and to his attorneys their reasonable fees. In determining attorneys' fees, the amount of the recovery on behalf of the debtor is not controlling.

(Emphasis added.)

Per the terms of the line of credit agreement document, the credit line matured in 2005. The Plaintiff initiated the instant action on or about February 15, 2007. Livingston subsequently asserted his counterclaims on or about November 28, 2007, well after the loan matured. However, important to the outcome of the Plaintiff's summary judgment motion is that the Plaintiff brought the instant action against Defendant Livingston, not the other way around.

Defendant Livingston argues that this claim falls under S.C. Code Ann. § 37-10-105(C), and the Court agrees. In Wachovia Bank, N.A. v. Coffey, 389 S.C. 68, 698 S.E.2d 244 (Ct. App. 2010), *aff'd as modified* 404 S.C. 421, 746 S.E.2d 35 (2013), the Court of Appeals held that a mortgagee was barred from enforcing, at law or in equity, any rights it might otherwise have had that arose from a note and mortgage, because the mortgage loan was closed through the unauthorized practice of law. The court noted that "[t]he unauthorized practice of law is inherently prejudicial to not only the parties involved in the instant transaction but also the public at large[.]" noting that the reason for requiring lawyers to supervise mortgage loan closings "is for the protection of the public from the potentially severe economic and emotional consequences which may flow from erroneous advice given by persons untrained in the law." *Id.* at 76. The Supreme Court favorably cited this passage from Coffey in Matrix Financial Services Corp. v. Frazer, 394 S.C. 134, 714 S.E.2d 532, 534 (2011), which noted that "closing a loan without the supervision of an attorney constitutes the unauthorized practice of law." Where there is an attorney preference violation and the closing of a loan without the supervision of a

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duly licensed attorney, the transaction “was induced by unconscionable conduct[.]” Also, the Plaintiff’s unilateral imposition of conditions on credit at odds with the note could be seen by a reasonable factfinder as unconscionable conduct.

Also, the purpose of §§ 37-10-102 and -105, as well as the purpose of the Consumer Protection Code in general, is to protect consumers, and these statutes are to be liberally construed to that end. S.C. Code Ann. § 37-1-102; King v. Am. Gen. Finance, Inc., 386 S.C. 82, 89, 90, 687 S.E.2d 321, 324 (2009); Davis v. Nationscredit Fin. Services Corp., 326 S.C. 83, 484 S.E.2d 471 (1997); Camp v. Springs Mtg. Corp., 310 S.C. 514, 426 S.E.2d 304 (1992). With that in mind, Defendant Livingston points the Court to S.C. Code Ann. § 37-5-205, which provides that a debtor may *always* raise a violation of the Consumer Protection Code, or at least a violation of Chapter 5 of the Consumer Protection Code, as a setoff against the debtor’s obligation in a case where he is defending a claim on the debt brought against him, regardless of whether the statute of limitations for a claim based on the violation would ordinarily have run. The language of S.C. Code Ann. § 37-10-105(C) refers to a statute in Chapter 5 of the Consumer Protection Code, S.C. Code Ann. § 37-5-108 with regard to whether a transaction was unconscionable. It seems that Chapter 5 of Title 37, including S.C. Code Ann. § 37-5-205, does apply to a right of action under S.C. Code Ann. § 37-10-105. Accordingly, the Court must deny the Plaintiff’s motion for summary judgment as to this claim; however, the Court notes that the effect of Defendant Livingston prevailing on this claim may only be to reduce debt owed by him to the Plaintiff and not to affirmatively obtain any judgment against the Plaintiff above that amount, as that would violate the statute of limitations.

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LIBEL

The Honorable Diane S. Goodstein addressed Defendant Livingston's libel claim in an order (which granted a summary judgment motion by the Plaintiff in part and denied it in part) filed June 14, 2010, in this action as follows:

Turning to Defendant Livingston's libel counterclaim, the Court concludes that there are sufficient facts in the record such that there is a genuine issue of material fact concerning this claim. To prove libel, a claimant must show publication by the adverse party of a false statement about the claimant having a defamatory meaning, with knowledge of the statement's falsity or with reckless or negligent disregard thereof, and presumed damages or special damages. See Parker v. Evening Post Publishing Co., 317 S.C. 236, 452 S.E.2d 640 (Ct. App. 1994). The deposition of Linda O'Dell shows that the Plaintiff likely engaged in credit reporting concerning the delinquency of the loan subject of this action. If the underlying transaction is void for illegality, as Defendant Livingston claims, then the credit reporting was false. White v. J.M. Brown Amusement Co., Inc., 360 S.C. 366, 601 S.E.2d 342 (2004) ("general rule, well established in South Carolina, is that courts will not enforce a contract when the subject matter of the contract or an act required for performance violates public policy as expressed in constitutional provisions, statutory law, or judicial decisions"). Further, viewed in the light most favorable to Defendant Livingston, the Plaintiff damaged his credit by reporting this information when it knew of the facts that made the transaction tainted with illegality.

Judge Goodstein did not address Plaintiff's arguments advanced for the first time here that the Fair Credit Reporting Act ("FCRA") preempted the libel claims, or that Defendant Livingston had not come forward with evidence to show that he the loans at issue had been reported to credit reporting agencies or did damage to his credit in light of existing judgments against Defendant Livingston. Defendant Livingston counters by arguing that his deposition testimony that now he has "no credit" points to the existence of a genuine issue of material fact as to whether the Plaintiff's credit reporting has harmed his credit. He argues that merely because a person has already had some injury (whether from his own fault or another's) does not



allow a tortfeasor to escape liability for injuring him further. He further argues that the Plaintiff's unilateral imposition of extra terms on the line of credit at issue provides a basis for finding the loan to be illegal, independent of the unauthorized practice of law. As to preemption, Defendant Livingston argues that a South Carolina federal district court has found that the Fair Credit Reporting Act does not preempt common law claims founded upon acts done with malice, citing Barnhill v. Bank of America, N.A., 378 F.Supp.2d 696 (D.S.C. 2005). He argues that "malice" in this context is knowledge of the statements' falsity or reckless disregard for their truth or falsity. The thrust of Defendant Livingston's argument concerning malice and preemption is that the Plaintiff knew it had not complied with the terms of the agreement and that it could not lawfully report Defendant Livingston to credit reporting agencies as delinquent when the Plaintiff was the first to breach the agreement.

The undersigned believes that he lacks authority to countermand Judge Goodstein's decision and declines to do so. See Charleston County Dept. of Social Services v. Father, 317 S.C. 283, 288, 454 S.E.2d 307, 310 (1995) (holding that a trial judge cannot over rule an order from another trial judge).

UNFAIR TRADE PRACTICES

To recover under the South Carolina Unfair Trade Practices Act, a party must show: (1) the opposing party engaged in an unfair or deceptive act in the conduct of trade or commerce; (2) the unfair or deceptive act affected public interest; and (3) the claimant suffered damages as a result. Wright v. Craft, 372 S.C. 1, 23, 640 S.E.2d 486, 498 (Ct. App. 2006). Defendant Livingston argues that there is a genuine issue of material fact as to when the statute of limitations period on this claim began to run, and the Court agrees with that, in accordance with the discussion above about the breach of contract claim. That, however, does not save Defendant

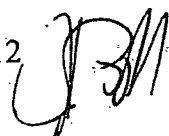


Livingston's Unfair Trade Practices Act claim from summary judgment. Because the acts subject of this claim are not unfair and deceptive acts in trade or commerce that affected the public interest, the Plaintiff's motion for summary judgment on this counterclaim is granted. See Beattie v. Nations Credit Financial Services Corp., 69 Fed. Appx. 585, 586 (4th Cir. 2003) (finding no evidence of any unfair or deceptive act that violated the public interest).

In a light favorable to Defendant Livingston, the record indicates that the bank simply renege on its own agreement with Defendant Livingston by refusing him access to the remainder of his credit line. These actions are not immoral or offensive to public policy. Further, in a typical case where a contract is breached, there will be no effect on the public interest. The isolated nature of a breach of contract under typical circumstances makes potential for repetition or other impact on the public interest all but impossible. See Perry v. Green, 313 S.C. 250, 437 S.E.2d 150 (Ct. App. 1993); Columbia East Assocs. V. Bi-Lo, Inc., 299 S.C. 515, 522, 386 S.E.2d 259, 263 (Ct. App. 1989); S.C. Nat. Bank v. Silks, 295 S.C. 107, 111, 367 S.E.2d 421, 423 (Ct. App. 1988); Key Co., Inc. v. Fameco Distributors, Inc., 292 S.C. 524, 357 S.E.2d 476 (Ct. App. 1987). As Defendant Livingston has failed to adduce evidence tending to show satisfaction of the first two elements of an Unfair Trade Practices claim, the Plaintiff's motion for summary must be granted as to this claim.

JURY TRIAL

The Honorable O. Davie Burgdorf, in unappealed rulings on Defendant Livingston's Motion for Summary Judgment and to Amend in the form of Orders dated December 11, 2007 and August 4, 2008, determined that Defendant Livingston has the right to a jury trial on his counterclaims in this action. Plaintiff argues that Judge Burgdorf did not have the benefit of Defendant Livingston's clear articulation of damages provided after this hearing, nor did Judge

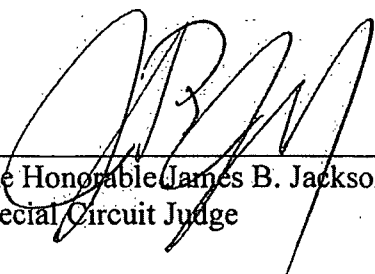


Burgdorf have the benefit of the decision rendered by the Supreme Court of South Carolina in Wells Fargo Bank, N.A. v. Smith, 398 S.C. 487, 730 S.E.2d 328 (2012). However, I find that Judge Burgdorf's ruling is the law of the case, and the Plaintiff would be stuck with this result even if it were wrong. Ulmer v. Ulmer, 369 S.C. 486, 490, 632 S.E.2d 858; 861 (2006); Cherry v. Myers Timber Co., Inc., 404 S.C. 596, 598 n. 3, 745 S.E.2d 405, 406 n. 3 (Ct. App. 2013). As the Court is without authority to countermand Judge Burgdorf's decision in this regard, this point bears no further analysis. See Charleston County DSS, 317 S.C. at 288. Accordingly, the Plaintiff's motion to strike Defendant Livingston's jury demand and refer the case to the master-in-equity is denied.

Accordingly, it is therefore hereby ORDERED that:

1. The Plaintiff's motion for summary judgment as to Defendant Livingston's counterclaim for violation of the Unfair Trade Practices Act is granted;
2. The Plaintiff's motion for summary judgment as to Defendant Livingston's remaining counterclaims is denied; and
3. The Plaintiff's motion to strike Defendant Livingston's jury demand and for a bench trial before the Master-in-Equity is denied.

And IT IS SO ORDERED.



The Honorable James B. Jackson, Jr.
Special Circuit Judge

Orangeburg, South Carolina

April 10, 2014

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