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S.C. Supreme Court

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Richland County Common Pleas Court
Hon. Alison Renee Lee
Docket Number: 2008-CP-40-1839

Latoya Brown..Petitioner,

vs.

Dick Smith Nissan, Inc. and Old Republic
Surety Company ....Respondents.

REPLY BRIEF OF PETITIONER

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ARGUMENTS

I.

The facts as found by the trial court are supported by the evidence in the case. Those facts constitute a violation of the Dealer's Act.

The Brief of Respondent relies on the assertion that Dick Smith had received funding for the Mazda automobile provisionally provided to Latoya Brown and asserts that any confusion about which car was funded was the fault of Sovereign Bank. Dick Smith asserts that the record at R-207 shows that Dick Smith received funding for the Mazda. That document shows that Dick Smith received funding for a car. The record at R-206 shows that the funding was for an Altima. That document shows approval of application number 2497943. That number appears on the Sovereign Bank Application Status (R-195). The assertion by Dick Smith and the Court of Appeals that Sovereign caused the confusion defies logic. That document does not identify the automobile which was funded. The accompanying letter (R-206) however, states that the contract funded was for a Nissan Altima. While Dick Smith calls this a mistake by Sovereign Bank, Dick Smith was wholly at fault.

Robert Hiller explained exactly the process by which financing was secured for an Altima and not for the Honda which Latoya Brown had in her possession. After expressing his preference for selling Nissans, Hiller set out Dick Smith's method of obtaining financing.

> Let's try to get the financing done. What we'll do is we'll just pick out a cheap car, let's see what the bank says, and once the bank says hey, we'll do whatever we'll do for her, then we can always change cars. . . .
> . . . .

> So I just wrote up maybe a buyer's order and give it to the finance guy so he can do what he do to get it financed.
>
> . . . .
>
> Once you get an approval, you can always change cars.
> R-92, lines 9 – 14, lines 22-25, R-101, lines 17-19

The documents in this case show that the plan was followed, except for the changing of the car for which funding was approved. Dick Smith sent an application for funding on a 2004 Nissan with 48, 433 miles on it (R-195). The Toyota mileage was 42,887. Latoya Brown's original deficiency letter stated that she owed money on a vehicle she never had. (R-36, lines 20 – 22). Obviously, Dick Smith requested and got funding on a car different from the one in possession of Latoya Brown. The trial judge had an abundance of evidence to hold, as she did (R-2) that Dick Smith received funding for an Altima. Dick Smith was required under the Buyer's Order to accept the return of Mazda.

This action is an action at law. See Adams v. Grant, 292 S.C. 581, 353 S.E.2d 142 (Ct. App. 1986). In considering whether the trial judge erred in failing to grant a directed verdict or judgment N.O.V. the evidence and all reasonable inferences must be taken most strongly against defendants and be considered in the light most favorable to plaintiff. See, e.g. Dowell v. Shun, 242 S.C. 403, 131 S.E.2d 155 (1963). The evidence and the reasonable inferences from it, require affirmation of the verdict in the trial court.

II.

<u>False representations by Dick Smith constitute additional violations of the Dealer's Act.</u>

The "big brother" fraternity explanation for the false statement that Latoya Brown was a family member of a fifteen year employee of Dick Smith is not an excuse for the misrepresentation. Latoya Brown was a recent graduate from Benedict and a friend of Robert Hiller (R-41, lines 2 – 13) Hiller had been working at Dick Smith for 15 years according to the loan application submitted to Sovereign Bank by Dick Smith. In view of the age difference it is unlikely there was sufficient interaction to warrant calling each other "family". The misrepresentation is not trivial. In this obviously close case, as to whether to provide funding, a lender might well believe payment was more like because of the relationship. Dick Smith did not explain the true relationship for the precise reason that it hoped to persuade a favorable decision on funding.

Latoya Brown called Hiller around June 23rd. Hiller told her Dick Smith was looking for funding. Ms. Brown told Hiller she would bring the car back. She was told, falsely, that such a return would go as a repossession (R-31, lines 5 – 22). This falsehood is an additional unfair and deceptive act.

Dick Smith asserts that it never claimed the amount of Latoya Brown's income and states that because the Sovereign Bank Application Status Letter (R-195) is generated by Sovereign it did not supply the inflated income of Latoya Brown. Such an explanation would require Sovereign to have approved an application without any information as to her income. Had Dick

Smith reported her actual income, Sovereign would either not have approved or would have required proof of her actual income. This document was shown to Latoya Brown as proof her loan was funded on the day she returned the Mazda. The document also misrepresented the make of the car that Sovereign would be looking for in the event of a default.

These additional acts were unfair and deceptive in violation of the Dealer's Act.

III.

The Statute of Limitations is no bar to the claim for a deficiency by Sovereign Bank nor is the fact that it is allegedly unliquidated.

Dick Smith in its Final Brief of Appellants in the Court of Appeals argued with respect to damages only that any deficiency assessed by Sovereign was barred by the Statute of Limitations. (Final Brief of Appellant in the Court of Appeals page ii, pages 18-20). The claim is in fact liquidated. The Statute of Limitation is an affirmative defense and acknowledgement of the debt tolls the statute.

If the new argument of counsel were to be considered, that argument does not weigh the considerations Latoya Brown has to make in deciding whether to satisfy the deficiency. If she does nothing, the repossession will remain on her credit record. Anything bought on credit will cost more. If she should chose to buy a house, the amount lost would be greater than paying to have the deficiency removed. Bringing an action against Sovereign Bank, even if successful, would require payment of attorney's fees, with a probable substantial upfront payment.

The decision to affirm the debt may have been the best available to Latoya Brown. Dick Smith, having caused the problem, is in no position to dictate Ms. Brown's choice of remedies. Had a different choice been made and damages from that choice tendered, Dick Smith would be contending that she should have made a less expensive choice.

The only ground raised by Dick Smith below with respect to damages is no reason to disturb the verdict by the trial judge.

CONCLUSION

The trial court judge had abundant evidence to conclude, as she did, that Sovereign Bank had funded an Altima. The opinion of the Court of Appeals in overlooking that finding, ignored long-standing rules of contract law. Under contract law, Latoya Brown was within her rights to return the car and Dick Smith was obliged to take it back. The damages incurred by Latoya Brown are not barred by the Statue of Limitations.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY MAIL

I, Melisa Y. McClurkin, employee of Johnson, Toal & Battiste, P.A., Attorneys for the Petitioner, in the above-captioned case, hereby certify that I have served the **Reply Brief of Petitioner** on J. Gregory Studemeyer, Counsel for Respondent, by mailing one copy of the same, postage prepaid and return address clearly indicated on said envelope on September 15, 2014, at the following address:

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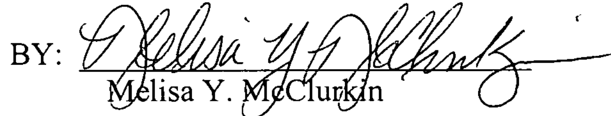
JOHNSON, TOAL & BATTISTE, P.A.

BY: 
Melisa Y. McClurkin

Columbia, South Carolina
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