

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Tanya A. Gee, Circuit Court Judge

Appellate Case No. 2015-001187

Autovest, LLC..... Appellant,

v.

Portia Smith a/k/a Portia Sentenial Smith, for herself and on behalf of
all other similarly situated individuals Respondent.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF THE ISSUE ON APPEAL

Is a Lawsuit to Collect a Deficiency Balance That Arises Out of a Secured Transaction Under Article 9 of the Uniform Commercial Code Subject to the Article 2 Statute of Limitations?

STATEMENT OF THE CASE

Appellant commenced this action on March 6, 2014, seeking to collect a deficiency balance on an automobile loan that was declared to be in default in 2008. Appellant was thereafter granted leave to amend its Complaint to correct the exhibits attached to the Complaint.

In response to the complaint, Respondent Portia Smith filed an Answer and Counterclaims in which she asserted as an affirmative defense that Appellant's claim was barred by the statute of limitations. On February 17, 2015, Respondent filed a Motion for Partial Summary Judgment based on the statute of limitations defense. A hearing on the Motion was held before the Honorable Tonya A. Gee on April 16, 2015.

On April 23, 2015, Judge Gee entered an Order Granting Respondent's Motion for Partial Summary Judgment. On May 1, 2015, Appellant filed a Motion to Reconsider. By Order dated May 14, 2015, the Motion to Reconsider was denied. On May 28, 2015, Appellant filed this appeal.

STATEMENT OF FACTS

On October 29, 2006, Respondent Portia Smith ("Smith") purchased a used car from Carmax. In connection with the purchase, Smith executed a Buyer's Order that described the car she was buying, calculated the purchase price of the car, and described the warranties provided by Carmax (Buyer's Order). That same day, Smith executed a Retail Installment Contract to finance the purchase of the car. The Retail Installment Contract set forth the terms of the financing, including the interest rate, the amount financed, the amount of the monthly payments, and the collateral for the financing. According to the Retail Installment Contract, the financing was being provided by Wells Fargo Auto Finance, Inc. (Retail Installment Contract).

Smith failed to make payments when due on the Retail Installment Contract, and Wells Fargo sent notice of right to cure default in 2008 (Complaint, Exhibit J). Smith was unable to cure the default, and Wells Fargo repossessed her car. Wells Fargo sent Smith notice of its intent to sell the car on January 19, 2009, and sold the car at a private sale on February 10, 2009 (Complaint, Exhibits I and K). Following the sale of the car, Wells Fargo then sent Smith a notice of deficiency balance due on February 13, 2009 (Complaint, Exhibit I).

The Retail Installment Contract was subsequently assigned to Appellant by Wells Fargo on April 30, 2011 (Assignment of Installment Contract). This action to collect the deficiency balance due on the Retail Installment Contract was filed on March 6, 2014. The last payment made by Smith on the Retail Installment Contract was on November 17, 2008, more than five years before this lawsuit was filed (Complaint, Exhibit A).

ARGUMENTS

I. THE LOWER COURT PROPERLY CONCLUDED THAT A CAUSE OF ACTION ARISING OUT OF A SECURED TRANSACTION GOVERNED BY ARTICLE 9 OF THE UNIFORM COMMERCIAL CODE IS NOT SUBJECT TO THE ARTICLE 2 STATUTE OF LIMITATIONS.

A. Standard of Review

"The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder." *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). Summary judgment is proper when there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002), *citing* Rule 56(c), SCRCF. For the purpose of the motion for partial summary judgment, Smith did not dispute the facts alleged by Appellant concerning the loan that is the subject of this action. Therefore, there were no issues of fact, only questions of law on which summary judgment is appropriate.

B. A Cause of Action For Breach of Contract That Arises Out of a Secured Transaction Under Article 9 is Subject to the Three-Year Statute of Limitations in Section 15-3-530(1) of the South Carolina Code.

The issue presented in this appeal is whether the cause of action asserted by Appellant is subject to the three-year statute of limitations contained in Section 15-3-530(1) of the South Carolina Code for breach of contract actions, or the six-year statute of limitations contained in Article 2 of the Uniform Commercial Code, South Carolina Code Section 36-2-725. A review of the South Carolina Commercial Code establishes that the six-year statute of limitations contained in Section 36-2-725 is intended to apply to breach of warranty claims and other claims related to goods that were sold, but not to a

debt collection action that arises out of a secured transaction. Specifically, Section 36-2-102 of the South Carolina Code provides that a contract for sale of goods that is intended to operate as a secured transaction is not subject to Article 2 of the Uniform Commercial Code. As stated in the South Carolina Reporter's Comments, "Expressly excluded [from Article 2] are transfers of a security interest in goods which are covered under Article 9, Secured Transactions." S.C. Code §36-2-102, S.C. Reporter's Comments.

In this case, the contract for the sale of the car to Smith was contained in the Buyer's Order. The Buyer's Order described the car she was buying, calculated the purchase price of the car, and described the warranties provided by the seller (Buyer's Order). The Retail Installment Contract set forth the terms of the financing, including the interest rate, the amount financed, the amount of the monthly payments, and the collateral for the financing (Retail Installment Contract). Also, the exhibits attached to Appellant's pleadings confirm that its assignor, Wells Fargo, believed that this was a secured transaction governed by Article 9, as evidenced by the notice of intent to sell that it mailed to Smith in order to comply with Section 36-9-614 of the South Carolina Code (Exhibit K). Therefore, the Retail Installment Contract was intended to operate as a separate secured transaction governed by Article 9 of the UCC, rather than Article 2 of the UCC.

Although no South Carolina appellate courts have addressed this issue, appellate courts in North Carolina have held that debt collection actions arising out of secured transactions are subject to the general statute of limitations for breach of contract, rather than the statute of limitations contained in Article 2 of the UCC. *See, NCNB v. Holshouser*, 38 N.C. App. 165, 247 S.E.2d 645 (1978) (holding that the six-year statute

of limitations in Article 2 did not apply to an action to collect a debt arising out of the purchase money financing of an automobile).

In support of its position that this contract is subject to the six-year statute of limitations contained in Section 36-2-275, Autovest relies on *Atlas Food Systems and Services, Inc. v. Crane National Vendors, Inc.*, 319 S.C. 556, 462 S.E.2d 858 (1995). However, it appears that case involved Article 2 breach of warranty claims asserted by a purchaser against the seller of vending machines, not a secured transaction. *See, Atlas Food Systems and Services, Inc. v. Crane National Vendors, Inc.*, 99 F.3d 587 (4th Cir. 1996). Therefore, the holding in *Atlas Food Systems* is not determinative of the statute of limitations in a debt collection action that arises out of an Article 9 secured transaction.

Appellant also cites a number of cases from other jurisdictions for the proposition that the Article 2 statute of limitations applies to an action to collect a deficiency balance arising out of a secured transaction. However, a careful review of these cases indicates that several are distinguishable. For example, in *Massey-Ferguson Credit Corp. v. Casaulong*, 62 Cal. App. 3d 1024, 133 Cal. Rptr. 497 (1976, 3d Dist.) and *Worrel v. Farmers Bank of Del.*, 430 A.2d 469 (1981 Del. Supp.), the issue before the courts was when the statute of limitations started to run, not which statute applied. Also, in *Chaney v. Fields Chevrolet Co.*, 264 Or. 21, 503 P.2d 1239 (1972), the court held that the UCC statute of limitations did not apply to the facts of that case.

Three of the cases cited by Appellant did involve an analysis of whether the collection of a deficiency balance was governed by the Article 2 statute of limitations. *See, First Nat'l Bank v. Chase*, 118 N.M. 783, 887 P.2d 1250 (1994); *Assocs. Disc. Corp. v. Palmer*, 47 N.J. 183, 219 A.2d 858 (1966); *Indus. Valley Bank & Trust Co., v. Sharpe*,

15 Pa. D. & C.3d 506 (1980). However, in those cases, the Article 2 statute of limitations was shorter than the general statute of limitations that would apply to an Article 9 cause of action. In each case, the statute of limitations for an Article 2 cause of action was four years, while the general statute of limitations was six years. The courts in those cases held that the shorter, four-year statute of limitations applied and dismissed the lenders' actions to collect a deficiency balance. Likewise, the North Carolina Court of Appeals in *Holshouser, supra*, also found the shorter statute of limitations was applicable to an action to collect a deficiency balance.

In summary, the contract for the sale of the car to Smith was contained in the Buyer's Order. The Retail Installment Contract was intended to operate as a separate secured transaction governed by Article 9 of the UCC, rather than Article 2 of the UCC. Therefore, the general statute of limitations for breach of contract found in Section 15-3-530(1) of the South Carolina Code applies to Appellant's debt collection action against Smith.

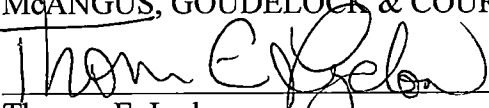
II. THE TRIAL COURT PROPERLY GRANTED THE MOTION FOR PARTIAL SUMMARY JUDGMENT BECAUSE APPELLANT'S BREACH OF CONTRACT CLAIM IS SUBJECT TO THE THREE-YEAR STATUTE OF LIMITATIONS.

The last payment on the Retail Installment Contract was made by Smith on November 17, 2008 (Complaint, Exhibit A). This action was not filed until March 6, 2014. Therefore, Appellant's breach of contract claim against Respondent is barred by the three-year statute of limitations contained in Section 15-3-530(1) of the South Carolina Code.

CONCLUSION

The breach of contract claim asserted by Appellant in this case arises out of a secured transaction that is governed by Article 9 of the Uniform Commercial Code. Therefore, the six-year statute of limitations contained in Article 2 of the Uniform Commercial Code does not apply. Because this claim is subject to a three-year statute of limitations, the lower court properly granted Smith's motion for partial summary judgment. The Order of the lower court should, therefore, be affirmed.

McANGUS, GOUDELOCK & COURIE, L.L.C.



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January 20, 2016

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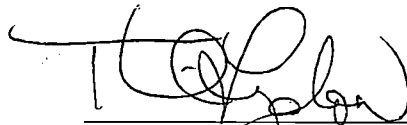
v.

Portia Smith a/k/a Portia Sentenial Smith, for herself and on behalf of
all other similarly situated individuals Respondent.

PROOF OF SERVICE

I hereby certify that I have this 20th day of January, 2016, served Respondent's Initial Brief and Designation of Matter to be Included in the Record on Appeal by mailing a copy, postage prepaid, in the United States mail, with sufficient postage affixed as follows:

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January 20, 2016

BY HAND DELIVERY

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

**Re: Autovest, LLC v. Portia Smith
Appellate Case No. 2015-001187**

Dear Ms. Kitchings:

Enclosed for filing are an original and two copies of Respondent's Initial Brief. Please file the original brief and return the clocked-in copies to me via my courier.

Thank you for your assistance.

Sincerely,


Thomas E. Lydon

Enclosures

cc: Gregory P. Cowan, Esquire
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