

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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OCT 17 2016

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

S.C. SUPREME COURT

R. Markley Dennis, Jr., Circuit Court Judge

Opinion No. 5421 (S.C. Ct. App. filed June 30, 2016)

Coastal Federal Credit Union,

Respondent,

v.

Angel Latoria Brown,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on September 15, 2016.

QUESTIONS PRESENTED

1. **Did the Court of Appeals err in holding that the applicable statute of limitations in an action to collect a deficiency following the repossession and sale of collateral is six years under Article 2 of the Uniform Commercial Code?**

STATEMENT OF THE CASE

On May 4, 2008, Angel Brown (“Brown”) purchased a 2008 Suzuki Forenza (the “Vehicle”) from a South Carolina retail car dealership, Johnny’s Subaru Isuzu, LLC (the “Dealership”). Coastal Federal Credit Union (“Coastal”) provided financing for the purchase and the Dealership assigned its rights to the Coastal, who also retained a purchase money security interest in the Vehicle. (R., p. 2) Angel Brown’s monthly payments to Coastal were set at \$366.32, which began on June 18, 2008. (R., p. 2)

Beginning in July 2009, Angel Brown was unable to continue making the monthly payments to Coastal Federal Credit Union. In October 2009, Coastal asserted the security interest and repossessed the Vehicle from Brown. Coastal sold the Vehicle on November 19, 2009. Coastal then applied the proceeds of the sale to the alleged balance owed by Brown. Coastal sent a letter, dated November 24, 2009, to Brown stating the post-sale accounting. (R., p. 2) Brown made no further payments. (R., p. 2)

Coastal filed this action on October 21, 2013 seeking a judgment against Brown for an alleged deficiency in the amount of \$11, 120.41 resulting from the repossession and the sale of the Vehicle, purchased by Brown under a retail installment sales contract (R, p. 2). On November 21, 2013, Brown filed an Answer to the Complaint and asserted affirmative defenses, including the defense that Coastal's action was barred by the three-year statute of limitations contained in S. C. Code Ann. § 15-3-530 (2013). (R., p. 12)

In its Complaint, Coastal asserted a cause of action for debt collection. The gravamen of the Complaint is the collection of the debt – the deficiency after the proceeds of the sale of the Vehicle were applied to the balance owed by Brown. (R., p. 2).

On April 28, 2014, Coastal filed a Motion for Summary Judgment seeking judgment for the relief requested in the Complaint. (R., p. 17) Brown filed a Motion for Summary Judgment seeking to dismiss Coastal's case with prejudice based on the statute of limitations set out in S. C. Code Ann. § 15-3-530 (2013). That section states that certain actions shall be brought “[w]ithin three years: (1) an action upon a contract, obligation, or liability, express or implied, excepting those provided for in Section 15-3-520”. (R., p. 37) Brown filed an affidavit to support her motion. (R., p. 41).

Coastal did not dispute that it filed this action more than three years after the last payment transaction. (R., p. 43) The last payment, repossession, and sale all occurred in 2009, more than three years prior to the filing of the action in the Court of Common Pleas. (R., p. 43).

Coastal sought summary judgment on its deficiency claim based on the allegations contained in the Complaint. Coastal further claimed that the applicable statute of limitations to this Action is contained in S. C. Code Ann. § 36-2-725 (2013), which is applicable to breach of

contract actions for the sale of goods. (R., p. 43) This statute of limitations does not apply to this case as the action is related to the security interest of the transaction rather than the sale itself.

The Court of Common Pleas held a hearing on both motions before the Honorable R. Markley Dennis, Jr. on August 1, 2014. (R., p. 61-68). Judge Dennis questioned Coastal on the specific issue of the deficiency arising from the repossession and sale of the car. (R., pp. 66-67) He denied Coastal's motion and granted Brown's motion for summary judgment dismissing the case with prejudice. (R., pp. 66-67). The Final Order was filed on September 16, 2014. (R., p. 55).

Coastal filed the Notice of Appeal on September 26, 2014. Briefing and the Record on Appeal were finalized on May 9, 2015. Without oral argument the Court of Appeals issued an Opinion on June 30, 2016. The Court of Appeals reversed as to the issue of the statute of limitations finding the six year statute of limitations set out in S. C. Code Ann. § 36-2-725 (2013) applied in this case and that Coastal filed its action within six years, reversing the grant of Petitioner's Motion for Summary Judgment. *Coastal Federal Credit Union v. Angel Latoria Brown*, Published Opinion No. 5421 (filed June 30, 2016). On July 8, 2016 Brown filed a timely petition for rehearing *en banc* with the South Carolina Court of Appeals who denied the petition on September 15, 2016. Petitioner seeks a writ of certiorari to review that decision.

ARGUMENT

1. THE APPLICABLE STATUTE OF LIMITATIONS IN AN ACTION TO COLLECT A DEFICIENCY FOLLOWING THE REPOSSESSION AND SALE OF COLLATERAL IS THREE YEARS.

The issue in this case, determining the applicable statute of limitations in an action to collect a deficiency following the repossession and sale of collateral, is one of first impression in South Carolina. The South Carolina Court of Appeals decision contains a thoughtful dissent that correctly articulates the reasoning for the applicable statute of limitations being three years as set out in S.C. Code § 15-3-530 (2013). Respondent's cause of action "does not arise from a breach of the *sales* contract under the SCUCC; rather, it is a debt collection action on the security interest, not arising under the SCUCC" (Opinion (dissent) p. 9). Other courts are divided when posed with the question at issue. While the majority of jurisdictions follow the view that an action for a deficiency as in this case relates to the sales aspect of the contract, the dissent's view that the action is more closely related to the security aspect of the transaction is the correct one.

In *North Carolina Nat'l Bank v. Holhouser*, 38 N.C. App. 165, 247 S.E.2d 645 (1978), the court did not apply the statute of limitations in Article 2 of the Uniform Commercial Code to an action to collect on a deficiency after repossession and sale of an automobile. In that case, the court stated that Article 2 of the Uniform Commercial Code applies to the sales aspect of the transaction whereas Article 9 of the Uniform Commercial Code applies to the security interest aspect of the transaction. *Id.* Similarly, in *Banc Ohio Nat'l Bank v. Freeland*, 13 Ohio App. 3d 245, 13 Ohio B.R. 298, 468 N.E.2d 941 (1984), the court held the statute of limitations in Article 2 of the Uniform Commercial Code did not apply to a deficiency action of an automobile. This

Court should follow the rationales stated in those cases and hold that Article 9 applies to the instant action and that the general three year statute of limitations applies.

The applicable statute of limitations in this case is three years under S.C. Code § 15-3-530 (2013). The underlying transaction involved both a sale and a security interest. Coastal's role as financing agency reflects its intent to operate as a secured lender in a security transaction, which removes this action to collect on a deficiency claim from the six year statute of limitations under SC Code Ann. § 36-2-725 (2013) based upon S. C. Code Ann. §36-2-102. The six year statute of limitations does not apply as the action by Coastal is directly related to the security interest rather than the original sale of the Vehicle. Coastal acted as the financing agency and retained a purchase money security interest in the Vehicle purchased by Brown. (Brown's brief p.8) The alleged debt arose from a deficiency after a repossession and sale of the Vehicle. The deficiency alleged is an unsecured debt as the Vehicle is disposed. The actions taken by Coastal were those to collect a debt based upon the retained security interest. Coastal acknowledged as much in its letter to Brown, dated November 24, 2009, stating the intent of the letter is to collect a debt. (R., p. 36). The Complaint itself is also captioned as "debt collection." (R., p. 2).

Because Coastal was operating as a secured lender attempting to collect upon a debt, Chapter 2 of the S.C. Uniform Commercial Code does not apply. To wit:

Unless the context otherwise requires, this Chapter applies to transactions in goods; it does not apply to any transaction which although in the form of an unconditional contract to sell or present sale is intended to operate only as a security transaction nor does this chapter impair or repeal any statute regulating sales to consumers, farmers or other specified classes of buyers.

S. C. Code Ann. §36-2-102. Coastal acknowledges that it retained a security interest in the Vehicle. (R., p. 2). Brown purchased the car from the Dealer and the contract noted it would be

assigned to Coastal. (R., p. 2) Coastal's role in the transaction was that of financing agency.

Coastal's action is based on the security interest it retained rather than the sales aspect of the original contract. This is clear from the gravamen of the Complaint. The resulting claim for debt collection is not a breach of contract claim under SC Code Ann. § 36-2-725 (2013). Coastal exercised its remedy of repossession. (R., P.2.) Coastal stated in its brief that it exercised this right as provided under Chapter 9 of the S.C. Uniform Commercial Code. There is no statute of limitations under that Chapter 9. The right of repossession is provided when a security interest is retained. SC Code Ann. § 36-9-609 (2013). Coastal as the secured party exercised this right based on that security interest. *Id.* Coastal then sold the Vehicle and the resulting deficiency became a debt resulting from the remaining amount owed, which included interest and fees. The resulting debt is related to the security aspect of the original transaction. The statute of limitations for a breach of contract claim under SC Code Ann. § 36-2-725 (2013) would not apply as Coastal is acting on its security interest rather than the sale aspect of the original contract.

CONCLUSION

For the reasons stated, petitioner asks the Court to grant the petition for a writ of certiorari.

Respectfully submitted,

October 13, 2016



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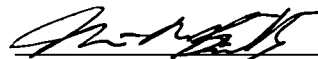
Angel Latoria Brown.....Petitioner

CERTIFICATE OF SERVICE

The undersigned attorney certifies that a true copy of the Petition for a Writ of Certiorari of Petitioner has been served upon opposing counsel by mailing the true copy in an envelope properly addressed with postage prepaid this 13th day of October, 2016.

Addressed as set forth below:

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