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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Stephanie P. McDonald, Circuit Court Judge

On Certiorari to the Court of Appeals of South Carolina
Opinion No. 5442 (S.C. Ct. App. filed Sep. 28, 2016)

Appellate Case No. 2017-000683

OTHA DELANEY, ...PETITIONER

v.

FIRST FINANCIAL OF CHARLESTON, INC., ... RESPONDENT

PETITIONER'S REPLY TO RESPONDENT'S RETURN TO PETITION FOR A WRIT OF CERTIORARI

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INDEX

ARGUMENT

I. Respondent First Financial has failed to demonstrate that Petitioner Delaney's statutory damages remedy pursuant to § 36-9-625(c)(2) eliminates the disposition element from his cause of action against Respondent under § 36-9-611(b).

Petitioner Otha Delaney ("Delaney") submits his Reply to Respondent First Financial of Charleston, Inc.'s ("First Financial's) Return to Petition for a Writ of Certiorari. First Financial makes no arguments in its Return why the Writ should not be properly granted under the considerations set forth in Rule 242(b)(1) and(2), SCACR, arguing instead that the Court of Appeals did not err in its decision. Return at 1.

Delaney's position is that his UCC notification cause of action against First Financial pursuant to § 36-9-611(b), S.C. Code Ann. (2003), requires a "secured party *that disposes of collateral under § 36-9-610*" as one of the essential elements of that claim. [1] (emphasis added.) There must be a disposition to create a "secured party that disposes of collateral under § 36-9-610" and for the cause of action against First Financial to accrue for limitations purposes. First Financial never addresses in its fifteen pages of Return this emphasized statutory language; nor does it dispute Delaney's contention that this language is clear and unambiguous; nor does it attempt to explain why such language is not a controlling limitation on the type of secured party liable to him under § 36-9-611(b), *i.e.,* only one "that disposes of collateral under § 36-9-610."

Instead, First Financial's Return focuses almost exclusively on Delaney's remedies found within a separate UCC section, to wit: § 36-9-625, S.C. Code Ann. (2001), ("*Remedies for secured party's failure to comply with this chapter.*") It is worth noting at the outset that this is an odd approach. First Financial's argument is *not* that the remedies statute *adds* a requirement to a debtor's cause of action under § 36-9-611(b) in order to recover monetary damages – such as

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[1] "A secured party *that disposes of collateral under Section 36-9-610* shall send to the persons specified in subsection (c), [i.e., "the debtor" and "any secondary obligor"] a *reasonable* authenticated *notification of disposition.*" § 36-9-611(b). (emphasis added.)

his need to prove a causally-related loss to recover actual damages (§ 36-9-625(b)-(c)(1)), or to prove consumer goods to recover statutory damages (§ 36-9-625(c)(2)) – but that these remedies subsections actually *eliminate* an express element of the underlying, statutory cause of action. In other words, while his cause of action at § 36-9-611(b) unambiguously requires proof of a "secured party that disposes of collateral under § 36-9-610" to accrue, First Financial argues that when the debtor seeks to recover actual damages under § 36-9-625(b)-(c)(1), or statutory damages under § 36-9-625(c)(2), for "a secured party's failure to comply with this part," those remedies subsections must be read to eliminate this very element. Return at 4-5.

Delaney disagrees. While First Financial does seem to recognize that Delaney's cause of action is found at § 36-9-611(b) (Return at 2, fn. 4; 4), it also refers in other parts of its Return to the remedies statute at § 36-9-625 as a cause of action in and of itself (*i.e.,* "[t]he trial court's determination that *Mr. Delaney's cause of action under § 36-9-625(c)(2)* accrued on May of 2008…"). Return at 9 (emphasis added.) First, § 36-9-625 is clearly not the underlying cause of action statute, but as the section caption provides, it is a remedies section: "*Remedies* for the secured party's failure to comply with this chapter." (emphasis added.)

Here, § 36-9-611(b), Delaney's cause of action statute, provides the exact scope of duty that is being imposed upon a secured party – to "send reasonable authenticated notification of disposition." It also sets forth *what party* has the duty to act in compliance with this obligation – "a secured party that disposes of collateral under § 36-9-610". And, it provides *towards whom* that secured part must act in its obligation to send reasonable notification – the notification must be sent to "the debtor" and "any secondary obligor." Delaney has alleged that First Financial failed to act in compliance with this statute. Therefore, his remedy for monetary damages under § 36-9-625 for First Financial's alleged noncompliance simply would not apply unless all

elements of his claim under § 36-9-611(b) have first been proven. In any event, First Financial makes four arguments why the remedies statute at § 36-9-625 must be read to eliminate the disposition element of § 36-9-611(b):

1. First Financial argues that the disposition requirement was eliminated from the remedies statute found at former § 36-9-507(1) for a debtor's notification claim. [2] Return at 6-7. First Financial points out that the previous version of the remedies statute at former § 36-9-507(1) did contain language requiring a "disposition" as a prerequisite to recovery, but that language was "amended out of existence" from the current remedy statute at § 36-9-625. Return at 6. Therefore, according to First Financial, because the current version at § 36-9-625 no longer "contains [any] such language," the legislature clearly intended to "change the law" to eliminate the proof of disposition element in order for the debtor to recover monetary damages. Return at 6-7.

Delaney disagrees. This argument is also misleading as First Financial neglects to mention that while the UCC did in fact remove the "disposition" language from the remedy statute as it was in former § 36-9-507(1), it expressly and simultaneously *added* it to the current notification statute at § 36-9-611(b) – and where it was absent from the former notification statute at § 36-9-504(3).

A debtor's notification cause of action under former UCC § 9-504(3) provided in relevant part:

> [*R*]*easonable notification* of the time and place of a public sale or *reasonable notification* of the time after which any private sale or other intended disposition is to be made *shall be sent by the secured party* to the debtor[.]

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[2] Article 9 ("Secured Transactions") was revised by the Commission on Uniform Laws in 1999, and was adopted effective 2001 in South Carolina. "In July 2001, Article 9 was significantly revised[.]" *Singleton v. Stokes Motors, Inc.*, 358 S.C. 369, 375 at n. 3, 595 S.E.2d 461, 464 at n. 3 (2004).

Former UCC § 9-504(3), 10 Anderson U.C.C. § 9-504 (3d ed.) (emphasis added.) Thus former § 36-9-504(3), which adopted the model code, did not include any disposition language within that notification statute. Instead, it merely provided that reasonable notification "shall be sent *by the secured party* to the debtor[.]" (emphasis added.)

However, the current restriction concerning disposition was found under the former remedy statute at UCC § 9-507(1) instead:

> (1) If it is established that the secured party is not proceeding in accordance with the provisions of this Part, *disposition may be ordered or restrained* on appropriate terms and conditions. *If the disposition has occurred* the debtor or any person entitled to notification or whose security interest has been made known to the secured party prior to the disposition *has a right to recover from the secured party any loss caused by a failure to comply with this Part. If the collateral is consumer goods, the debtor has a right to recover* in any event an amount not less than the [statutory damages formula].

Former UCC § 9-507(1). 10 Anderson U.C.C. 9-507 (3d ed.) (emphasis added.)

Accordingly, as with the current scheme, the former version of the UCC never permitted a debtor to recover monetary damages for the secured party's failure to send reasonable notification of disposition unless, and for statute of limitations purposes, *until* the collateral was disposed of by the secured party. Under the former scheme as with the present scheme, the debtor could seek to enjoin a pending disposition before it occurred when the secured party "is not proceeding in accordance the provisions of this Part," but he could only recover monetary damages "if the disposition has occurred." Thus, far from eliminating the disposition requirement, the current notification statute at § 36-9-611(b) is consistent with this intention. Disposition has now been made an express element of a noncompliance cause of action under § 36-9-611(b), as no "secured party that disposes of collateral under § 36-9-610" is in existence until such a disposition occurs.

2. First Financial continues to argue that because the debtor is entitled to an injunctive remedy under § 36-9-625(a) when the secured party "is not proceeding in accordance with this chapter," this means that he can also recover statutory damages without proof of a disposition under § 36-9-611(b). Return at 5. Therefore, according to First Financial, the language of § 36-9-611(b) requiring a "secured party that disposes of collateral under § 36-9-610" should be ignored or read out of that statute when the debtor seeks statutory damages.

A comparison of the current statutory scheme with the former shows that the UCC always intended the "disposition" to serve as a bright line between the time when the debtor could enjoin a pending or anticipated disposition, versus recovering monetary damages after disposition, for the secured party's failure to send reasonable notification. As with both schemes, if the secured party "is not proceeding" in accordance with the UCC, the disposition could be restrained; but where the disposition had already occurred, the debtor may recover damages as he can no longer restrain a disposition that has already occurred. § 36-9-625(a). "Following former Section 9-507, under subsection (a) an aggrieved person may seek injunctive relief, and under subsection (b) the person may recover damages caused by noncompliance." Cmt. 2, Official Comment to UCC § 9-625.

The current version of § 36-9-625(a) now permits enjoining more than just the disposition as was permitted under former § 36-9-507(1), to include restraint of "*collection, enforcement or disposition* of collateral." § 36-9-625(a) (emphasis added.) However, as previously noted, § 36-9-611(b) added an element to the notification statute requiring a "secured party that disposes of collateral under § 36-9-610." Thus if the secured party now fails to send a reasonable notification of disposition, the debtor can still seek to enjoin the pending sale under § 36-9-625(a) because it "is not proceeding in accordance with this chapter." However, as was the

same under the former statutes, a debtor can recover monetary damages under § 36-9-625 for the secured party's failure to send reasonable notification only after disposition, when there is a "secured party that disposes of collateral under § 36-9-610."

3. First Financial argues that a debtor's right to recover statutory damages under § 36-9-625(c)(2) "is triggered by *any* noncompliance with that part [*i.e.,* Part 6 ("Default"] – not merely for the particular failure of compliance that Mr. Delaney alleges in this case – and it [the remedies statute] contains no language requiring a disposition of collateral as a prerequisite to the liability it establishes." Return at 6 (emphasis original.)

First, § 36-9-625(c)(2), the statutory remedies provision applicable to consumer transactions, "does not establish[]" any "liability" separate and apart from the underlying cause of action under Part 6 ("Default.") It is accurate to say that some causes of action arising under Part 6 do *not* require a disposition to be actionable for monetary damages. For example, § 36-9-609 permits the secured party to repossess collateral after debtor default.[3] If the secured party wrongfully repossesses collateral when the debtor is *not* in default, that debtor could recover statutory damages under § 36-9-625(c)(2) for the wrongful deprivation of his collateral even when the collateral is not disposed of, as § 36-9-609 does not require a disposition as an element of that statutory obligation. But that is not Delaney's cause of action. Section 36-9-611(b) clearly and specifically does require a "secured party that disposes of collateral" as an element of his claim, and thus it must be present for the cause of action to support statutory damages and for the claim to accrue for limitations purposes.

4. Finally, First Financial seems to argue that Delaney's cause of action accrues at notification because he alleges a claim based upon non-reasonable notification contents, and not for First Financial's failure to send any notification at all. ("To be clear, the essential premise of

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[3] "After default, a secured party may take possession of the collateral[.]" § 36-9-610(a).

Mr. Delaney's claim is that *the* notification of disposition that was actually sent to him by First Financial in May 2008 was insufficient, not that First Financial did not send him a notification of disposition.") Return at 7-8 (emphasis original.) This is meritless.

A cause of action under § 36-9-611(b) is for a secured party's failure to send the debtor reasonable notification of disposition when it is required to do so. There is no legal difference under § 36-9-611(b) when the secured party fails to send reasonable notification because the contents are not reasonable, or when it was not sent within a reasonable time before disposition, or when it fails to send any notice at all. Section 36-9-611(b) is not a "bad notice" cause of action. It equally applies to the secured party's obligation to send "reasonable notification" by "a secured party that disposes of collateral under § 36-9-610." Thus the legal result of all failure scenarios as set forth above is the secured party's noncompliance with § 36-9-611(b), giving rise to the debtor's right to recover monetary damages under § 36-9-625.

II. Petitioner Delaney's arguments concerning the appropriate statute of limitations are preserved.

First Financial argues that because Delaney did not raise the matter in his Petition for Rehearing, he may *not* now raise before this Court by way of his Petition for Certiorari whether his cause of action is controlled by a three-year limitations statute under § 15-3-540(2), S.C. Code Ann. (2005), versus a one year limitations statute under § 15-3-570, S.C. Code Ann. (2005) – if this Court agrees that his claim accrues at disposition instead of notification. Return at 10. Delaney disagrees.

As the Court of Appeals noted, Delaney argued in the trial court in the alternative, that even if his claim was for the recovery of a statutory penalty, it was timely under the three year statute at § 15-3-540(2) because it did not accrue until disposition. App. at 185. ("In the alternative, Delaney argued if the recovery is a penalty rather than a compensable remedy, the

action is controlled by the three-year statute of limitations provided at ...[§] 15-3-540(2).") However, the trial court declined to decide the matter, ruling that the claim accrued at notification and thus was untimely under both the one-year and the three-year statutes. App. at 187. Accordingly, the question of what statute would apply *if* the claim accrued at disposition instead of notification was raised in the trial court, but was not decided adversely to Delaney (or to First Financial) by that court.

Delaney also raised and preserved the issue in the alternative before the Court of Appeals, which also declined to reach the question for the same reasons as the trial court. App. at 190. ("Like the trial court, we find the controlling limitations period *is either* section 15-3-570 or section 15-3-540(2), respectively one or three years[.]") (emphasis added.) However, the Court of Appeals recognized that if the claim accrued at disposition rather than at notification, it would still be timely under the three year statute, *if* that is the correct statute to apply. App. at 192. ("[W]hether the action is barred depends upon when the action accrued.") Thus the alternative question was again raised and preserved in the Court of Appeals, but it was not decided by that court either.

Unlike alternative *rulings or decisions* by the Court of Appeals to support dismissal, this alternative issue was simply not decided by that court and therefore, there was no need to request it be reheard in the Petition for Rehearing, as it has never been decided adversely to Delaney (or to First Financial.) It was also not an overlooked issue or an omitted issue, as the Court of Appeals acknowledged it and addressed it, but declined to decide it. *See, e.g., Camp v. Spring Mortg. Corp.,* 310 S.C. 514, 516, 426 S.E.2d 304, 305 (S.C. 1993) ("Camp also contends his complaint sufficiently states a cause of action for interference with future contracts...The Court

of Appeals did not address this issue nor did Camp petition for rehearing for the court to consider it.")

Therefore, the alternative issue of which statute correctly applies will appropriately be addressed at remand, if this Court agrees with Delaney that his claim accrues at disposition rather than notification. Because, however, the question is a question of law and all facts such as the date of disposition are agreed upon as matters of record, this Court may decide it without remand, should it agree with Delaney's position concerning the appropriate accrual date. Under this posture of the case, it is also appropriate for Delaney to request in his Petition for Certiorari that he be allowed to brief the issue that the one-year statute does not apply, should it grant his Petition for Writ of Certiorari on his accrual question.

CONCLUSION

For the reasons set forth herein and in his Petition for a Writ of Certiorari to the Court of Appeals, Petitioner Delaney hereby requests that this Court grant his Petition.

Respectfully submitted,

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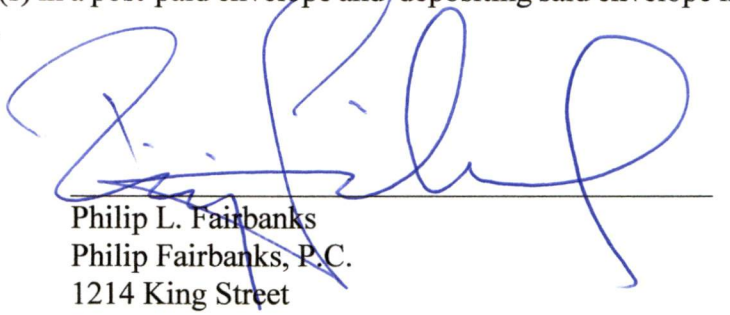
The undersigned hereby certifies that he has served the REPLY TO RETURN TO PETITION FOR A WRIT OF CERTIORARI on counsel for Respondent hereinafter named at the place and address stated below, by placing said document(s) in a post-paid envelope and depositing said envelope in the United States Mail on June 1, 2017.



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