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THE STATE OF SOUTH CAROLINA
In The Supreme Court

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.

BRIEF OF PETITIONER

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QUESTION 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 by paying the purchase price to Dealership. The Dealership assigned its rights to Coastal who also retained a purchase money security interest in the Vehicle. (R., p. 2) 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. (R., p. 43) In October 2009, Coastal asserted the security interest and repossessed the Vehicle from Brown. Coastal gave Brown notice of Coastal’s intent to sell the Vehicle. (R. p. 28) Coastal sold the Vehicle on November 19, 2009. (R., p.19, 34) Coastal applied the proceeds of the sale to the alleged balance owed by Brown that was secured by the vehicle. (R., p. 27) Coastal sent a letter, dated November 24, 2009, to Brown stating the post-sale accounting. (R., p. 36) Brown made no further payments. (R., p. 3)

Coastal filed this action on October 21, 2013 seeking a judgment against Brown for an alleged deficiency 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. 4). On November 21, 2013, Brown filed an Answer asserting 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 (2005). (R., p. 12)

In its Complaint, Coastal asserted a cause of action for debt collection as stated in the caption (R. p. 2). 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 (2005). (R., p. 37) 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”.

It is undisputed that this action was filed more than three years after the cause of action arose. The sale of the collateral was prior to November 24, 2009—the date of the deficiency letter. (R. p. 8, 36).

Coastal claimed that the applicable statute of limitations is contained in S. C. Code Ann. § 36-2-725 (2003), which is applicable to breach of contract actions for the sale of goods. (R., pp. 43-47) Brown argued that this statute of limitations does not apply to the facts of her case because the action is related to the security interest rather than the sale itself. (R., p.48-50)

The Honorable R. Markley Dennis, Jr. denied Coastal’s motion and granted Brown’s motion for summary judgment finding that the statute of limitations found in S.C. Code Ann §15-3-530 (2005) governs and dismissing the case with prejudice. (R., pp. 66-67). The Final Order was filed on September 16, 2014. (R., p. 55-57).

Coastal filed the Notice of Appeal on September 26, 2014. (R., p. 59) Without oral argument

the Court of Appeals issued an Opinion on June 30, 2016. The Court of Appeals reversed the trial court's order 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 (2003) (hereinafter referred to as "Article 2") applied. *Coastal Federal Credit Union v. Angel Latoria Brown*, 417 S.C. 544 (Ct. App. 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. On August 9, 2017 this Court granted Brown's Petition for Writ of Certiorari.

STANDARD OF REVIEW

This matter is before this Court to review the Court of Appeals' decision finding the statute of limitations in an action for recovery of a deficiency after sale of collateral under S.C. Code Ann. §36-9-615(d) (2003) (hereinafter referred to as "Article 9") is the one found in Article 2. The question presented here raises a novel question of law: Whether the statute of limitations contained in the South Carolina Uniform Commercial Code (hereinafter SCUCC) Article 2 applies to an action arising out of the enforcement of a security interest by use of SCUCC Article 9. The standard of review includes application of statutory interpretation and the standard of review applicable to a novel issue.

The interpretation of a statute is a question of law for the court. *Jennings v Jennings*, 401 S.C. 1, 736 S.E.2d 242 (2012). The Court is free to decide questions of law with no particular deference to the lower court. *See* S.C. Const. art. V, §§ 5 and 9; S.C. Code Ann. §§ 14-3-320 and - 330 (1976 & Supp.1999); S.C. Code Ann. § 14-8-200 (Supp.1999) (granting Supreme Court and

Court of Appeals the jurisdiction to correct errors of law in both law and equity actions); *I'On L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000).

“In a case raising a novel issue of law regarding the interpretation of a statute, the appellate court is free to decide the question with no particular deference to the lower court.” *Sloan v. S.C. Bd. of Physical Therapy Exam'rs*, 370 S.C. 452, 466, 636 S.E.2d 598, 605 (2006). “The appellate court is free to decide the question based on its assessment of which interpretation and reasoning would best comport with the law and public policies of this state and the Court's sense of law, justice, and right.” *Id.* at 467, 636 S.E.2d at 605–06. *Lambries v. Saluda County Council*, 409 S.C. 1, 760 S.E.2d 785(2014)

INTRODUCTION

There is no consistent rationale among the states regarding the proper statute of limitations to be applied in the case of an action for a deficiency arising out of a secured transaction. The minority of cases opine that an action to recover a balance due after repossession and sale of collateral is governed by Article 9 rather than Article 2 of the UCC. Because Article 9 does not provide a specific statute of limitations, courts holding this view conclude that their state's statute of limitations in its general statute applies. A majority of courts engage in limited analysis of the issue and simply rely on a 1966 New Jersey case that held deficiency claims to be governed by Article 2. *Associates Discount Corp v. Palmer*, 219 A.2d 858 (N.J. 1966).

The correct view is exemplified by *North Carolina Nat. Bank v. Holshouser*, 38 N.C. App. 165, 247 SE.2d 645 (Ct. App.1978). In that case the N.C. Court of Appeals found the deficiency action is not one for a breach of contract for sale under Article 2. Rather, the Court distinguished between the sales aspect of the transaction under Article 2 (four year statute of limitations) and its security aspects (ten year statute of limitations under general state statute). The same is true of the opinion of the Ohio Court of Appeals in *BancOhio Nat. Bank v. Freeland* 468 N.E.2d 941 (Ohio Ct. App. 1984) wherein the same distinction resulted in the application of the general state statute of limitations of fifteen years rather than the Article 2 statute of limitations of four years.

In some states, like South Carolina, the rationale used in *Holshouser* and *Freeland* has the opposite effect and results in the application of a general state statute of limitations (three years) that is less than that of SCUCC Article 2 (six years).

ARGUMENT

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

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 dissent in the South Carolina Court of Appeals decision correctly articulates the reasoning for the applicable statute of limitations being three years as set out in S.C. Code Ann. § 15-3-530 (2005). The dissent argued that the action is for the collection of a debt arising from a security

interest rather than the enforcement of the sale contract. Other courts are divided when posed with the question presented here. The dissent is correct.

Both the majority opinion and the dissent cite a Florida State Business Review Article that thoroughly analyzes the issue. Richard H. Nowka, *The Secured Party Fiddles While the Article 2 Statute of Limitations Clock Ticks- Why the Article 2 Statute of Limitations Should Not Apply to Deficiency Actions*, 7 Fla. St. U. Bus. Rev. 1, 5 (2008). The Nowka article is cited for its review of the majority and minority view on the question presented herein. However, the Article points out the failure of a majority of courts to rely on the Official Comments to Article 2 when determining the applicable statute of limitations. But Nowka goes much further and concludes that Article 2 does not govern the deficiency action statute of limitations. After examining the relevant sections of Articles 2 and 9, the Official Comments to those sections, prior uniform acts, the origin and nature of the remedy, and court decisions, Nowka arrives at the conclusion reached by the trial court in this case: The appropriate statute of limitations for recovery of a deficiency arising after the repossession and sale of personal property collateral is that applicable to actions originating from a secured transaction, not the Article 2 statute of limitations. *Id. at 3*

- a. **Coastal operated as a financing agent receiving a transfer of a security interest although in the form of a contract for sale, and such a disguised financial transaction is excluded from Article 2 of the SCUCC.**

The underlying transaction involved both a sale and a security interest. Coastal's role as financing agent reflects its intent to operate as a secured lender in a security transaction. Because Coastal was operating as a secured lender attempting to collect upon a debt, the language of S. C.

Code Ann. §36-2-102 (2003) removes this action to collect a deficiency claim from the six year statute of limitations under SC Code Ann. § 36-2-725 (2003) that applies to the sale of goods:

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 (2003). 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 agent. This distinction was noted in the S.C. 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. (Brackets added)

Brown purchased the Vehicle from the Dealership, who then immediately assigned the contract to Coastal to finance the sale. Brown received title to the Vehicle and Coastal paid the Dealership. At that point the sale is completed as the seller is paid. What remains is a security interest. The installment contract itself is a disguised financial transaction. The Article 2 statute of limitations applies to the sales aspect of contracts rather than the security interest. A seller's remedies are generally described in Article 2 where the buyer does not yet possess the goods. See S.C. Code Ann. §36-2-703 (2003). This indicates that the security interest would be dealt with outside of Article 2. Coastal's remedies in the underlying case come from Article 9 Secured Transactions. See S.C. Code Ann. §§36-9-101(et. Seq.) (2003)

b. **A deficiency following the repossession and sale of collateral is created under and governed by Article 9 of the SCUCC.**

Brown's liability for a deficiency after the sale of the Vehicle is created by Article 9. See SC Code Ann. § 36-9-615(d) (2003). Coastal exercised its remedy of repossession. (R., P.2.) Coastal gave Brown notice of the intended sale. (R. p. 28) Coastal sold the Vehicle. (R. p. 36) Coastal gave Brown notice of the deficiency. (R. p. 36) Coastal filed an action to make Brown liable for the deficiency. (R. p. 2), All steps created by Article 9. Coastal even agreed in its brief that it exercised this right as provided under SCUCC Article 9. The right of repossession is provided when a security interest in goods is retained. SC Code Ann. § 36-9-609 (2003). Coastal as the secured party exercised this right based on that security interest. *Id.* Coastal then sold the Vehicle as allowed under SC Code Ann. § 36-9-610(a) (2003). The resulting deficiency became a debt, which included interest and fees, established under Article 9. Coastal's action is therefore not simply an action for the balance of the sales price (which had already been fully paid by the funds provided by Coastal), but rather an action for a debt arising from Article 9 remedies.

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 enforcing a security interest. In *U.S. Trust Co. v. Melchiono*, 1997 Mass. App. Div. 60, the court held that a security interest in an automobile and the subsequent action for a deficiency after repossession and sale was governed by Article 9 of the Uniform Commercial Code, and refused to apply the statute of limitations in Article 2 of the Uniform Commercial Code.

This Court should follow the rationale stated in those cases and hold that the general three year statute of limitations applies.

SCUCC Article 2 has no bearing on this case 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 agent and retained a purchase money security interest in the Vehicle purchased by Brown. This is clear from the gravamen of the Complaint. The deficiency alleged is an unsecured debt because Coastal exercised its SCUCC Article 9 remedies when it repossessed and sold the Vehicle. 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. 8, 36). The Complaint itself is also captioned as “debt collection.” (R., p. 2). There is no statute of limitations under Article 9, leaving the applicable statute of limitations of three years as set out in S.C. Code Ann. § 15-3-530 (2005).

CONCLUSION

For the reasons stated, Petitioner asks the Court to reverse the decision of the Court of Appeals and find that the applicable statute of limitations in an action to collect a deficiency following the repossession and sale of collateral is found in S.C. Code Ann. § 15-3-530 (2005) and

is three years.

September 15, 2017

Respectfully submitted,



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S.C. SUPREME COURT

R. Markley Dennis, Jr., Circuit Court Judge

Appellate Case No. 2016-002124

Coastal Federal Credit Union.....Respondent

v.

Angel Latoria Brown.....Petitioner

CERTIFICATE OF SERVICE

The undersigned attorney certifies that a true copy of the Brief of Petitioner has been served upon opposing counsel by mailing the true copy in an envelope properly addressed via Federal Express this 18th day of September, 2017.

Addressed as set forth below:

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