

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

Opinion No. 5421 (S.C. Ct. App. Filed June 30, 2016)
Appellate Case No. 2016-002124

Coastal Federal Credit Union,

Respondent

v.

Angel Latoria Brown,

Petitioner

BRIEF OF RESPONDENT

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OCT 17 2017

S.C. SUPREME COURT

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QUESTION PRESENTED

Did the Court of Appeals err in holding that the applicable statute of limitations to file suit to collect the remaining balance due on the purchase price of a motor vehicle is the 6-year statute of limitations set forth in § 36-2-725 of Chapter 2 of the South Carolina Uniform Commercial Code?

STATEMENT OF THE CASE

1. On or about May 4, 2008, the Petitioner entered into a retail installment sale contract (the "Contract") with an auto dealership for the purchase and financing of a 2008 Suzuki Forenza, VIN #KL5JD56Z38K748968 (the "Vehicle"). (R., p.2).

2. Pursuant to the terms of the Contract, the Petitioner agreed to pay the dealership the agreed upon purchase price for the Vehicle via 72 monthly payments of \$366.32 each beginning June 18, 2008. (R., p.2)

3. Pursuant to the terms of the Contract, the Petition granted the dealership as purchase money security interest in the Vehicle to provide the dealership with an additional means of getting paid for the agreed-upon purchase price of the Vehicle, in the event the Petitioner breached her promise to voluntarily pay said amount.

4. The Contract as a whole was assigned to the Respondent by the dealership, that being both the Petitioner's promise to pay the agreed-upon purchase price for the Vehicle and her pledge of a security interest in the Vehicle to back up that promise to pay. (R., p.2)

5. In July 2009, the Petitioner ceased making the payments due under the Contract prior to the entire agreed-upon purchase price for the Vehicle having been paid to Respondent.

6. As a result, Respondent exercised its right under the Contract and applicable law to repossess and sell the Vehicle and apply the sales proceeds to the balance remaining due on the purchase price of the Vehicle. (R., p.2)

7. The sales proceeds received for the Vehicle were insufficient to pay the entire balance remaining due on the purchase price of the Vehicle, so Respondent thereafter made demand on the Petitioner to honor her promise to pay the entire agreed-upon purchase price for the Vehicle. (R., p.2)

8. The Petitioner refused to honor her promise to pay the full amount of the agreed-upon purchase price for the Vehicle, as a result of which Respondent filed suit against Petitioner seeking judgment against her for the then-remaining amount due under the Contract. (R., p.2)

9. In the trial court, the Petitioner asserted that the applicable statute of limitations for Respondent to file such an action was the three (3) year statute of limitations applicable to breach of contract actions in general. (R., p. 37)

10. Respondent asserted that the applicable statute of limitations was the six (6) year statute of limitations applicable to breach of contract actions arising from the sale of goods. (R., p.43)

11. The trial court found in favor of Petitioner and granted Petitioner's motion for summary judgment on the statute of limitations issue, dismissing the case with prejudice. (R., pp. 66-67)

12. Respondent timely appealed and on June 30, 2016, the Court of Appeals reversed the trial court on the issue of the applicable statute of limitations, although one of the reviewing justices dissented.

13. Petitioner timely filed a petition with the Court of Appeals for a rehearing *en banc*, which petition was denied by the Court of Appeals on September 15, 2016.

14. Petitioner then filed a petition for a *writ of certiorari* asking this Court to review the underlying decision of the Court of Appeals, which was granted on August 9, 2017.

ARGUMENT

A. The Court Of Appeals Appropriately Rejected The Petitioner’s “Form Over Substance” Argument. As noted in the Court of Appeals decision, the substantial majority of jurisdictions which have addressed this issue have applied the Article 2 statute of limitations to suits for a debtor’s breach of an instalment sales contract. Each of these courts have reached the conclusion that an action seeking payment of the remaining balance due for the contract price of pledged goods is more closely related to the sales aspect of a combination sale/security interest contract than to the security aspect of such contract. In agreeing with the reasoning of these courts, the Court of Appeals correctly found that a “deficiency suit” such as the one in issue in this case is, in substance, an Article 2 action to recover that part of the sales price of the pledged goods which remains unpaid by the buyer after the seller has fully completed the exercise of all of its Article 9 rights granted under the same contract. In that regard, the Court of Appeals correctly found that the minority view to the contrary “mistakes the true character” of such an action, since the security aspect of the contract is not at all what the seller is actually seeking to enforce in a “deficiency suit.”

B. The Court of Appeals Correctly Determined That Respondent Acted As More Than Just The “Financing Agency” In The Transaction. As duly recognized by the

Court of Appeals, Respondent's legal relationship to Petitioner was much more than merely acting as her "financing agency." As the unconditional assignee of the Petitioner's contract with the dealership for the purchase and financing of the Vehicle, Respondent stepped into the shoes of the dealership *vis-à-vis* the Petitioner in all legal respects. In that regard, Respondent did not just obtain the right to collect the full agreed-upon purchase price for the Vehicle from Petitioner and the right to enforce the security interest pledged by Petitioner in the Vehicle. In fact, Respondent became a holder in due course under the Contract pursuant to its "holder clause," which expressly states in pertinent part:

NOTICE; ANY HOLDER OF THE CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF.

As such, Respondent also became fully subject to any claims Petitioner might have asserted regarding irregularities in the sale transaction and/or defects in the Vehicle that could have entitled her to recover any monies she had already paid for the Vehicle, and/or excuse her from making any further payments due under the Contract. Clearly, even after assignment to Respondent, the Contract remained a sales contract for the Vehicle, with a pledge of the Vehicle as collateral for the agreed-upon sales price, as duly noted by the Court of Appeals.

C. The Court Of Appeals Correctly Determined That The Instant Action Is An Exercise of Respondent's Article 2 Rights And Not Its Article 9 Rights. While there is no dispute that the Contract contains the pledge of a security interest in the Vehicle that invokes various provisions of Article 9, the Court of Appeals also correctly rejected Petitioner's assertion that the instant action is an action based on Respondent's security

interest in the Vehicle rather than the sales aspect of the Contract. While Article 9 gives secured creditors various rights with respect to recovering and selling collateral after default, and entitles debtors to various types of notice and other protections in connection therewith, a creditor's legal right to sue a debtor who has defaulted in paying the agreed-upon price for goods purchased under a sales contract does not derive from Article 9 – hence the absence of any statute of limitations in Article 9 with respect to filing such an action. A secured creditor is legally entitled to sue for the balance of its purchase price even if it is unwilling and/or unable to exercise its concomitant Article 9 rights provided in the sales contract. For example, the debtor could have effectively hidden or moved the collateral from the creditor's reach. Alternatively, the collateral could have been destroyed and the creditor paid the value of the collateral from an insurance company, or not paid for the collateral at all if no insurance coverage existed. The creditor might also have decided to abandon the collateral, if it had depreciated to such a point that it did not make economic sense for the creditor to spend the money for recovery, or the vehicle had been impounded or stored and made subject to a priming lien in too large an amount for it to make economic sense for the creditor to pay off such lien to recover the vehicle. As acknowledged by the Court of Appeals, the fact that a creditor has in fact exercised its Article 9 rights alone does not impair or extinguish any of the creditor's other rights under the sales contract, specifically including its right to recover *at any time* the remaining balance of the agreed-upon purchase price for those goods, plus any interest and collection costs specifically provided by the sales contract.

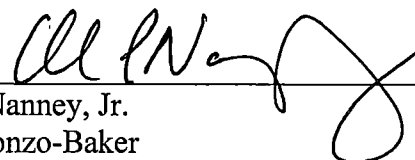
So while Respondent *was* willing and able in this case to exercise its Article 9 rights with respect to the Vehicle, the pending civil action filed by Respondent against Petitioner thereafter does not have as its gravamen any element of those Article 9 rights.

Instead, as correctly noted by the Court of Appeals, the instant “deficiency” action is “nothing but a simple *[i/n personam]* action for that part of the sales price which remains unpaid after [Respondent] has exhausted [its] rights under Article 9 by selling the collateral; it is an action to enforce the obligation of [Petitioner] to pay the full sale price to the seller, an obligation which is an essential element of all sales and which exists whether or not the sale is accompanied by a security arrangement.” *Coastal Fed. Credit Union v. Brown*, 417 S.C. 544 (Ct. App. 2016) citing *Associates. Disc. Corp. v. Palmer*, 219 A.2d 858, 861 (N.J. 1966).

CONCLUSION

In sum, the Contract began as a sales and financing agreement in the hands of the dealership and remained a sales and financing contract after assignment to Respondent. When the instant action was filed against Petitioner, Respondent had fully exercised all of its Article 9 rights provided by the Contract, and now seeks to recover from Petitioner only the remaining balance due on the agreed upon sales price for the Vehicle. Accordingly, the pending action relates to the sales portion of the Contract, not the secured transaction portion of the Contract, and is therefore properly governed by the six-year statute of limitations found in Article 2. Therefore, Respondent respectfully requests this Court affirm the decision of the Court of Appeals on this statute of limitations issue in its entirety.

October 16, 2017

A handwritten signature in black ink, appearing to read "D. Nanney, Jr.", written over a horizontal line.

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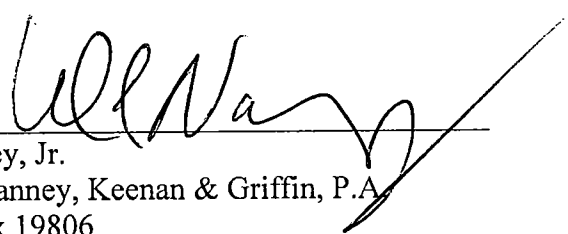
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PROOF OF SERVICE

I certify that I have served the foregoing Brief of Respondent on Petitioner's counsel of record by depositing a true copy of it in the United States Mail, postage prepaid, on October 16, 2016, addressed to Matthew M. Billingsley, 2803 Carner Avenue, North Charleston, SC 29405.

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