THE STATE OF SOUTH CAROLINA
In The Supreme Court
On Certiorari to the Court of Appeals

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S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Stephanie P. McDonald, Circuit Court Judge

Opinion No. 5442 (S.C. Ct. App. filed Sept. 28, 2016)

Appellate Case No. 2017-000683

OTHA DELANEY ..... **Petitioner**

-vs-

FIRST FINANCIAL OF CHARLESTON, INC. ..... **Respondent**

REPLY BRIEF OF PETITIONER/APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

ARGUMENTS

I. First Financial's Argument that the Court Lacks Appellate Jurisdiction Is No Longer before this Court.

In its Respondent's Brief First Financial of Charleston, Inc. ("First Financial) argues that this Court "lost appellate jurisdiction" to grant Petitioner Otha Delaney's ("Delaney's") Petition for Certiorari and to decide the merits of his Petition. Br. of Resp., p.p. 12-16. Delaney respectfully submits First Financial's argument is no longer before the Court. What First Financial seeks in re-making this argument is a re-hearing on its Motion to Dismiss – a Motion it filed on May 15, 2017 on these same grounds and which the Court denied on March 28, 2018.

The Court of Appeals has also considered this issue twice. The underlying facts are that the Court of Appeals denied Delaney's appeal on September 28, 2016. App. p.p. 184-99. On October 18, 2018, Delaney filed and served by mail his Motion for Extension of Time to file his Petition for Rehearing due to ongoing disruptions from Hurricane Matthew, a filing which was made one day later than a Petition for Rehearing would have been due by this Court's order extending appellate deadlines due to the storm, but before remittitur. *See,* S.C. Ct. Order No. 2016-10-10-1 ("Re: Hurricane Matthew."); *See,* Letter of First Financial dated October 28, 2016, acknowledging the time limit for the Court of Appeals to receive a petition for rehearing was October 17, 2016. App. p.p. 204.

The next day *after* Delaney's filing, on October 19, 2016, the Court of Appeals sent down the remittitur to the lower court. App. p. 203. Therefore, his Motion for Extension of Time to file his Rehearing Petition was filed, served, and pending in the Court of Appeals on October 18, 2016, one day before the Court of Appeals sent down the remittitur, and thus one day before appellate jurisdiction was lost due to the remittitur. *See,* Rule 262(b)(2), SCACR (Motions for extensions of time are filed as of the date they are placed into the mail, properly addressed to the Court of

Appeals and served upon opposing counsel.) *See, Wise v. S.C. Dept. of Corrections,* 372 S.C. 173, 174, 642 S.E.2d 551 (SC 2007) (The appellate courts lose jurisdiction when a motion to extend or expand time to file the petition for rehearing is filed after remittitur. "On December 28, 2006, appellant filed a motion for enlargement of time in this Court. By order dated January 4, 2007, the motion was denied because the sending of the remittitur ended appellate jurisdiction over the matter.")

First Financial opposed Delaney's pending Motion to Extend Time by a Letter to the Court of Appeals dated October 28, 2016, on grounds that the remitter stripped the court of appellate jurisdiction and that it could not be recalled. App. p.p. 204-5. The Court of Appeals did not agree, and on November 2, 2016, issued its Order finding that "[i]t is now necessary for this Court to recall the remittitur[.]" App. p. 207. On November 3, 2016, the Court of Appeals issued a second Order granting Delaney's Motion to Extend Time to file his Rehearing Petition by November 18, 2016, which Delaney filed on that date. App. p. 208.

The Court of Appeals was then presented with First Financial's jurisdictional arguments for a second time on January 11, 2017, by way of the Respondent's Return to Appellant's Petition for Rehearing. App. p.p. 228-32. In that Return First Financial raised the same arguments and relied upon the same cases and appellate court rules as in its Letter. *Id.* While the Court of Appeals did not expressly address First Financial's arguments, it clearly did not agree that it lacked appellate jurisdiction to hear Delaney's Petition. Instead, on February 16, 2016, it issued its Order denying his Petition for Rehearing *on the merits.* ("[T]he Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing.") App. p. 235.

At that point in time First Financial did *not* file a cross-Petition for Certiorari on grounds that there was no appellate jurisdiction after the recall of the remitter. Instead, it proceeded with a separate Motion to Dismiss, filed in this Court on May 15, 2017. The Motion to Dismiss sets forth in detail First Financial's same arguments and authority that it had relied upon in the Court of Appeals in both its Letter and in its Return; it was opposed by Delaney's briefing; and, it was followed by First Financial's arguments in Reply. On March 28, 2018, this Court issued an Order denying the Motion to Dismiss. Accordingly, this matter has been fully presented and it has been decided with finality adversely to First Financial by Order of this Court. First Financial cites no rules, statutes, cases or changes in the law which would require this Court to re-hear the same question now by way of its responsive briefing.

To the extent that First Financial includes in its Respondent's Brief new argument in support of its position that this Court lacks appellate jurisdiction – namely, that continuing the case after the remitter was recalled would also violate First Financial's due process and equal protections (*See,* Br. of Resp., p.p. 15-16) – such argument was *not* made to the Court of Appeals or in its Motion to Dismiss when it certainly could have been. That argument is thus *not* preserved, even if it were proper for First Financial to continue to litigate the jurisdictional question after denial of its Motion to Dismiss. Alternatively, and in the event Delaney is wrong about the procedural posture of this issue, he stands upon and incorporates all of his previous responses and arguments as they appear in this record.

II. The One-Year Statute of Limitations at § 15-3-570 Does Not Apply to this Case.

First Financial asserts that even if Delaney's cause of action under § 36-9-611 accrued at disposition, rather than notification of disposition, it is still untimely because it is controlled by the one-year limitations statute at § 15-3-570, SC Code Ann. (2005). Br. of Resp., p.p. 17-18. First

Financial argues this is so because the "statutory damages" which he seeks under § 36-9-625(c)(2) of the UCC are in the nature of a penalty. *Id.*

Even if, *arguendo,* this last point is correct, First Financial never attempts to address the relevant issue which Delaney requests this Court to decide, namely, *which* penal limitations period would then apply: the one-year penal limitations statute at § 15-3-570 or the three-year penal limitations statute at § 15-3-540(2), SC Code Ann. (2005). [1]

Both statutes include some of the exact same wording:

> *An action upon a statute for a penalty or forfeiture* given, in whole or in part, to any person who will prosecute for it must be commenced within one year after the commission of the offense. If the action be not commenced within the year by a private party it may be commenced within two years thereafter on behalf of the State by the Attorney General or the solicitor of the circuit where the offense was committed, unless a different limitation be prescribed in the statute under which the action is brought.

§ 15-3-570 (emphasis added.)

> Within three years: ... (2) *An action upon a statute for a penalty or forfeiture* when the action is given to the party aggrieved or to such party and the State, except when the statute imposing it prescribes a different limitation.

§ 15-3-540(2) (emphasis added.)

Therefore, both statutes are potentially applicable to a "statute for a penalty." However, the difference between the two turns upon who has the right to recover the penalty at issue. Section 15-3-540(2) requires the penal action to be given to the party "aggrieved" or to that party and the State. Section 15-3-570 does not mention an "aggrieved" party, but is given "in whole or in part, to any person who will prosecute for it." Therefore, Section § 15-3-570 either: 1) does *not* apply

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[1] Delaney's alternative position before the trial court and the Court of Appeals was that even if the UCC's "statutory damages" remedy at issue is properly deemed "penal," it was controlled by the three-year limitations period at § 15-3-540(2). *Delaney v. First Financial of Chas., Inc.*, 418 S.C. 209, 212, 991 S.E. 2d 546, 547 (SC App. 2016), App. p. 185. ("In the alternative, Delaney argued that if the [statutory damages] recovery is a penalty rather than a compensable remedy, the action is governed by the three-year statute of limitations [at § 15-3-540(2)].")

to actions brought by the "aggrieved" party, and thus applies to actions that must be brought exclusively by third parties acting as informers or private attorney generals or by the State, or 2) it includes an action given to an "aggrieved" party, but also any other persons "who will prosecute for it." *Pressley v. Tupperware Long Term Disability Plan,* 553 F.3d 334, 339 (4th Cir. 2009) ("Section 15-3-570...was clearly intended to encompass more persons than only 'the party aggrieved' (if it was meant to encompass 'the party aggrieved' at all.")) Either way, the more specific statute at § 15-3-540(2) for the party "aggrieved" applies to this case as Delaney's UCC claim can only be brought by him as "the debtor" to the secured contract with First Financial. ("Thus, Appellant was the only person who could have brought an action to recover a statutory penalty because he was the debtor at the time Respondent allegedly failed to provide reasonable notice of disposition of the collateral." *Delaney v. First Financial,* 418 S.C. at 223, 991 S.E.2d at 553, (J. Thomas, *concurring in part, dissenting in part*).) App. p. 195.

The only authority which First Financial relies upon for its argument that the one-year statute is applicable to the instant case is *Ardis v. Ward,* 321 S.C. 65, 467 S.E.2d 742 (SC 1996). Br. of Resp., p. 17. In *Ardis,* this Court was *not* called to decide which of the two limitations statutes at issue here applied to an action to recover a statutory penalty. However, to the extent that it is relevant, *Ardis* supports Delaney's position.

The question in *Ardis* was what was the correct limitations period for an action brought by a third party seeking to recover a statutory penalty for another's gambling loss. S.C. Code Ann. § 32-1-10 permitted a person to bring an action to recover his own gambling loss within three months of the loss, and § 32-1-20 permitted a third party to bring an action for another party's gambling loss when the gambler did not bring his own action within those three months. *Ardis v. Ward,* 467 S.E.2d 743-44. Section § 32-1-20, however, did not include a limitations period for the third-party

action. The Supreme Court found § 32-1-20 to be "in the nature of a penalty" as contemplated by § 15-3-570, and the Court applied it to that action which was exclusively given to a non-aggrieved, third party. *Ardis,* 467 S.E.2d at 744. Therefore, *Ardis* does not advance First Financial's argument that § 15-3-570 must apply to Delaney's claim.

III. Delaney's Cause of Action against First Financial for Its Alleged Failure to Comply with § 36-9-611 Accrues at Disposition, not Notification of Disposition.

First Financial fails to address the question Delaney has raised, that is, he asks this Court to determine what are the elements of his UCC statutory cause of action arising under the statutory language of § 36-9-611, and thus what must he establish for his cause of action to accrue as a complete and present claim against the secured party. Nor does First Financial challenge his position that the express statutory language of § 36-9-611(b), requiring "a secured party *that disposes of collateral under § 36-9-610*" to send him "reasonable notification," is both unambiguous and controlling.

Instead, First Financial focuses almost exclusively upon § 36-9-625 ("*Remedies* for the secured party's failure to comply with chapter.") (emphasis added.) Br. of Resp. p.p. 5-12. Therefore, First Financial's position appears to be that regardless of the express elements of his cause of action under § 36-9-611 that Delaney has the burden of proving, it accrues at notification. This is so, according to First Financial, because the applicable monetary recoveries subsections at § 36-9-625(b)-(c)(1) and 625(c)(2) for both actual or statutory damages respectively, would then eliminate this very element of a "secured party *that disposes of collateral*" from his cause of action, rendering this statutory language superfluous to his claim.

On the one hand, First Financial argues that the "statutory damages" at the § 36-9-625(c)(2) is a penalty. Br. of Resp. p.p. 17-18. On the other hand, it asks this Court to interpret § 36-9-611

broadly such that, in a consumer goods transaction, a secured party which admittedly fails to send a reasonable notification to the debtor, but who does not dispose of collateral, is subject to the same penalty as one who sells the collateral. If there was no requirement that the secured party send the debtor the reasonable notification in the first place under § 36-9-611 (because it was not a "secured party that disposes of collateral under § 36-9-610"), First Financial fails to explain how or even why that secured party is liable to the debtor for a statutory penalty based upon his non-existent non-compliance with § 36-9-611. *See, State ex rel. Calliso v. Nat'l. Linen Serv. Corp.*, 225 S.C. 232, 234, 81 S.E.2d 342, 343 (1954) ("The prime rule [for a statutory penalty] requires strict construction of a statutory provision which would work a forfeiture or inflict a penalty.")

Delaney respectfully submits that this is an odd interpretation of the statutory scheme. Generally speaking, statutory remedies in the form of a monetary recovery would not be expected to apply until and unless the moving party established a non-compliance under all elements of the section for which the remedy provides redress. In the case of consumer goods under the UCC, the two potential monetary damages remedies – either in the form of actual damages in the amount of debtor's "loss caused by [the secured party's] failure to comply with this chapter" (§ 36-9-625(b)), or as a sum which the UCC calls "statutory damages" against "a secured party [that] failed to comply with this part" [*i.e.*, Part 6 ("Default")] (§ 36-9-625(c)(2) – would not be expected to apply until and unless the secured party failed to comply with some underlying section found within Article 9 or Part 6, such as § 36-9-611(b). Accordingly, any monetary recovery requires proof of noncompliance with an underlying section within Article 9 or Part 6. [2]

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[2] Based upon its misreading of the Official Comments First Financial argues that "any provisions of this Chapter" means some part of a statute or one element of a statute and not the complete underlying section. Br. Resp. p. 6. What the Comment actually provides is: "Unlike under former Section 9-507, however, subsections (a) [for injunctive relief] and (b) [for actual damages] are not limited to noncompliance with the provisions of this Part of Article 9. Rather they apply to any noncompliance with any provision in this Article." Official Comment 1 to UCC § 9-625. There is no indication that the word "provision" refers to less than the statute at issue, such as a mere clause found with that statute. As the South Carolina Reporter notes: "Under subsection (b) and (c)(1) [for actual damages]

Since the only other statutes at issue in the present case, § § 36-9-613 and 614, are definitional statutes – merely setting forth what content is required for a "reasonable notification" and do not mention either the secured party or the debtor – those statutes can only impose their requirements when there is also secured party who is required to comply with § 36-9-611. Official Comment to UCC § 9-613. ("To comply with the "reasonable authenticated notification requirement" of *Section 9-611(b),* the contents of the notification must be reasonable.) Therefore, a secured party can provide notification of disposition that includes legally insufficient contents, or a notification is not timely, or that is provided orally instead of "sent," but if the secured party is not required to send "reasonable notification" under § 36-9-611 to that debtor in the first place, the secured party has *not* "failed to comply with the requirements of this part [Part 6 ("Default.")."

The parties apparently agree that § 36-9-625(a) provides for injunctive relief, but not money damages, when the debtor establishes that the "secured party *is not proceeding in accordance"* with Article 9. (emphasis added.) Br. of Resp. p. 6. When proceeding under this remedy the parties agree that the court may only "order or restrain the collection, enforcement, or disposition of collateral under appropriate terms and conditions." § 36-9-625(a). *Id.*

Where the parties differ, however, is that First Financial argues that the two other remedies – one for actual damages under§ 36-9-625(b)-(c)(1) or statutory damages under § 36-9-625(c)(2) – applies *at the same time* as the injunctive remedy, and thus the statute of limitations accrues whenever the secured party "is not proceeding in accordance with this chapter." Br. of Resp. p. 6-7. ("Thus it is plain that if, for instance, a secured party was to send an insufficient notification of disposition, a debtor could, even before disposition, bring a claim not only for injunctive relief

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a secured party is liable for actual damages for the amount of any loss cause by a failure to comply with the requirements *of the statute.*" South Carolina Reporters Comments to § 36-9-625.

under subsection (a)... but also subsection [(b)] for the loss cause by [the] failure to comply with this chapter.") *Id.*

Delaney disagrees. First Financial overlooks the different language used in § 36-9-625 as to *when* the debtor make seek redress under § 36-9-625. It provides in relevant part:

> (a) If it is established that a secured party *is not proceeding in accordance with this chapter* [Article 9] a court may order or restrain collection, enforcement or disposition of collateral on appropriate terms. ...
>
> (b) Subject to subsections (c)(d) and (f), a person is liable for *damages in the amount of any loss caused by the secured party's failure to comply with this chapter* [Article 9]. Loss caused by failure to comply may include loss resulting from the debtor's inability to obtain, or increased cost of alternative financing.
>
> ... (c)(2) if the collateral is consumer goods, a person that was a debtor or a secondary obligor at the time a *secured party failed to comply with this part* [*i.e.*, Part 6 ("Default")] may recover for that failure in any event an amount not less than the credit service charge plus ten percent of the principal amount of the obligation[.]

§ 36-9-625 (emphasis added.)

Thus injunctive relief is permitted when the secured party merely "is not proceeding in accordance with this chapter" and does not require the debtor's proof of non-compliance with the elements of an underlying section within Article 9 or Part 6. Damages, on the other hand, apply at a different time, or there would be no need for the legislature to use such different language as to their availability. There would simply be no reason for the Commission on Uniform Laws or the South Carolina legislature to use such different language as to when the different remedies were available if it did not mean different things.

CONCLUSION

Petitioner Otha Delaney hereby requests that this Court rule that his claim against Respondent First Financial of Charleston, Inc., 1) accrues at disposition of his collateral instead of notification of disposition, and 2) is timely filed because the one-year limitations provisions of § 36-9-570, SC Code Ann., are not applicable to his claim.

Respectfully submitted,

/s/ 

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