

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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ORIGINAL

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

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Case No. 2014-CP-10-1827

Appellate Case No. 2014-002079

*RECEIVED*

MAR 26 2015

SC Court of Appeals

Coastal Federal Credit Union.....Appellant,

v.

Angel Latoria Brown..... Respondent.

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BRIEF FOR RESPONDENT

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Matthew M. Billingsley, S C. Bar #: 76095  
Kirby Mitchell, S.C. Bar #: 11640  
SOUTH CAROLINA LEGAL SERVICES  
2803 Carner Avenue  
North Charleston, SC 29405  
(843) 266-2174

Attorneys for Respondent

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**STATEMENT OF ISSUES ON APPEAL**

- I     **THE TRIAL COURT APPLIED THE CORRECT STATUTE OF LIMITATIONS AND ITS GRANT OF SUMMARY JUDGMENT SHOULD BE AFFIRMED.**
  
- II.   **THE DENIAL OF APPELLANT’S MOTION FOR SUMMARY JUDGMENT ON THE MERITS IS NOT APPEALABLE.**
  
- III   **THE COURT DID NOT RELY ON THE SCCPC OR THE FDCPA IN THE ORDER GRANTING SUMMARY JUDGMENT BASED ON THE APPLICABLE STATUTE OF LIMITATIONS.**

## STATEMENT OF THE CASE

Appellant Coastal Federal Credit Union (“Appellant”) filed this action on October 21, 2013 in the Court of Common Pleas for Chesterfield County (R , p 2). Appellant sought a judgment against the Respondent Angel Latoria Brown (“Respondent”) for an alleged deficiency in the amount of \$11,120.41 resulting after repossession and the sale of a 2008 Suzuki Forenza, purchased by Respondent under a retail installment sales contract (R , p 2). On November 21, 2013, Respondent filed an Answer to the Complaint and asserted affirmative defenses, including the defense Appellant’s action was barred by the three-year statute of limitations contained in S C. Code Ann. § 15-3-530 (2013). (R., p. 12). Respondent’s Answer also requested a change of venue to Charleston County. (R., p. 12). On January 7, 2014, the parties entered a Consent Order to Change Venue to Charleston County where the Court of Common Pleas issued a new docket number (R., p. 15)

Appellant and Respondent each filed a Motion for Summary Judgment based on the pleadings Appellant filed its motion on April 28, 2014 seeking judgment for the relief requested in the Complaint (R , pp. 17-39) Respondent filed her motion on June 18, 2014 seeking to dismiss Appellant’s case with prejudice based on the statute of limitations set out in S. C. Code Ann. § 15-3-530 (2013). Appellant and Respondent each submitted a memoranda of law in support of their respective Motions. (R., pp 43-52). The Honorable R. Markley Dennis, Jr heard both motions on August 1, 2014. (R., pp. 61-68). After argument, Judge Dennis granted Respondent’s motion and denied Appellant’s motion at the hearing. (R., pp. 66-67). An Order was issued and filed on September 16, 2014. (R , pp 55-57). Appellant served its Notice of Appeal on Respondent’s Counsel of Record on September 26, 2014 (R , p. 59).

## FACTS

On May 4, 2008, Respondent purchased a 2008 Suzuki Forenza (the “Vehicle”) from a South Carolina retail car dealership, Johnny’s Subaru Isuzu, LLC (the “Dealership”). Appellant provided financing for the purchase and the Dealership assigned its rights to the Appellant (R., p. 2) Appellant retained a purchase money security interest in the Vehicle (R , p 2). Respondent’s monthly payments to Appellant were set at \$366 32, which began on June 18, 2008 (R , p 2)

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

Appellant filed this action on October 21, 2013 (R , p 2). In its Complaint, Appellant 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 Respondent. (R , p 2).

On November 21, 2013, Respondent filed an Answer to the Complaint asserting as an affirmative defense that Appellant’s action is barred by the three year statute of limitations as Appellant sought to collect a debt that resulted from their security interest in the Vehicle (R , p. 12)

On March 17, 2014, pursuant to a Consent Order to Change Venue, filed January 7, 2014, venue of this action was transferred from Chesterfield County to Charleston County. (R , p. 15)

On April 28, 2014, Appellant filed a Motion for Summary Judgment seeking judgment for the relief requested in the Complaint. (R., p. 17) Respondent filed a Motion for Summary Judgment seeking to dismiss Appellant's case with prejudice based on the statute of limitations set out in S. C. Code Ann. § 15-3-530 (2013) which 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). Respondent filed an affidavit to support her motion. (R., p. 41)

Appellant 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)

Appellant and Respondent each submitted a memorandum of law in support of their respective motions. Respondent sought summary judgment based on Appellant filing its Complaint more than three years after the last item proved under the statute of limitations set out in S. C. Code Ann. § 15-3-530 (2013).

Appellant sought summary judgment on its deficiency claim based on the allegations contained in the Complaint. Appellant 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, however, 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., pp. 61-68) Judge Dennis questioned Appellant on the specific issue of the deficiency arising from the repossession and sale of the car. (R., pp. 66-

67) He thereafter denied Appellant's motion and granted Respondent'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).

Appellant filed the Notice of Appeal on September 26, 2014

## ARGUMENT

### STANDARD OF REVIEW

"An appellate court reviews the granting of summary judgment under the same standard applied by the trial court under Rule 56(c), SCRPC " *Hooper v Ebenezer Senior Servs & Rehab Ctr.*, 386 S.C. 108, 114, 687 S E 2d 29, 32 (2009) (citing *Brockbank v Best Capital Corp* , 341 S.C 372, 379, 534 S.E.2d 688, 692 (2000)). "...Pursuant to Rule 56(c), SCRPC: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Austin v Beaufort Cnty Sheriff's Office*, 377 S.C 31, 34, 659 S.E.2d 122, 123 (2008) citing *Burriss v Anderson County Bd of Educ* , 369 S C 443, 633 S.E.2d 482 (2006); *Dawkins v Fields*, 354 S C 58, 580 S.E.2d 433 (2003)

**I. THE TRIAL COURT'S DECISION SHOULD BE AFFIRMED BECAUSE IT APPLIED THE CORRECT STATUTE OF LIMITATIONS**

There is no genuine dispute of material facts of this case. Appellant alleged the last payment by Respondent was July 28, 2009. (R., p. 9). Appellant repossessed the Vehicle on October 22, 2009. (R., pp. 18-20) The Vehicle was sold on November 19, 2009 (R., pp 18-20) Appellant sent Respondent a deficiency letter on November 24, 2009 (R., p. 8). Appellant filed its Complaint on October 21, 2013, more than three years after the sale of the car. These facts are undisputed. The sole issue that this Court must consider is whether, as a matter of law, the three year statute of limitations under S.C Code Ann § 15-3-530 (2013) or the six year statute of limitations under S C Code Ann. § 36-2-725 (2013) applies to the instant Action.

**A. The Three Year Statute of Limitations Applies to an Action to Collect a Debt Based Upon a Security Interest.**

The applicable statute of limitations in this case is three years under S.C. Code § 15-3-530 (2013). The transaction involved both a sale and a security interest. Appellant'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 state of limitations does not apply as the action by Appellant is directly related to the security interest rather than the sale of the Vehicle. Appellant acted as the financing agency and retained a purchase money security interest in the Vehicle purchased by Respondent. (Appellant's Brief, p. 8) The alleged debt arose from a deficiency after a repossession and sale of the Vehicle. The deficiency alleged becomes an unsecured debt as the Vehicle is disposed. The actions taken by Appellant were those to collect a debt based upon the retained security interest. Appellant acknowledged as much in its letter to Respondent, 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 Appellant 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. Appellant acknowledges that it retained a security interest in the Vehicle (R., p. 2). Respondent purchased the car from the Dealer and the contract noted it would be assigned to Appellant. (R., p. 2). Appellant’s role in the transaction was that of financing agency

Appellant’s action is based on the security interest it retained rather than the sales aspect of the contract. This is clear from the gravamen of the Complaint. The resulting claim for a debt collection is, therefore, not a breach of contract claim under SC Code Ann. § 36-2-725 (2013)

Appellant exercised its remedy of repossession. (R., p. 3) Appellant states 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). Appellant as the secured party exercises this right based on that security interest. *Id* Accordingly the statute of limitations for a breach of contract claim under SC Code Ann. § 36-2-725 (2013) would not apply as Appellant is acting on its security interest rather than the sale aspect of the contract. Accordingly, the decision of the trial court should be affirmed.

**B. The Cases Cited By Appellant Do Not Support  
The Application of a Six Year Statute of Limitations.**

Appellant argues that the statute of limitations for a contract for the sale of goods under the UCC, which is six years, applies to its Complaint. SC Code § 36-2-725 (2013). There are no reported South Carolina cases that support Appellant's bald assertion that the seller/financer in a deficiency action is entitled to a six year statute of limitations. Such a lengthened statute of limitations period would afford an additional and improper advantage to the seller/financer over the consumer, whereas a three-year statute of limitations provides some protection for the consumer.

In support of its argument, Appellant argues that the Uniform Commercial Code Chap. 2 statute of limitations should apply. In support of this argument, Appellant cites two cases for the proposition that the action is solely a suit for breach of a Chapter 2 Sales Contract. (Appellant's Brief, p 8) *See Brewer v Stokes Kia, Isuzu, Subaru, Inc* , 364 S.C 444, 613 S.E.2d 80 (S.C. App. 2005), *Singleton v Stokes Motors, Inc* , 358 S.C. 269, 595 S E 2d 461 (S.C. 2004) Neither case, however, deals with the issue that is the crux of this appeal – the applicable statute of limitations issue. In *Brewer*, the issues were whether there was an enforceable agreement and whether the dealer had a right to repossess the car. *Brewer v Stokes Kia*, 364 S C. 444, 451, 613 S.E 2d 802, 812 (Ct App 2005) In *Brewer*, the buyer brought an action against a seller regarding whether there was an enforceable agreement and whether the dealership was entitled to repossess the car. *Id.* In *Singleton*, the Court looked directly to the claims of the buyer based on Chapter 9 of the S C Uniform Commercial Code. *Singleton v Stokes Motors, Inc.*, 358 S.C 269, 595 S E 2d 461 (S.C. 2004). Tellingly, neither of these cases support the proposition that the instant action is governed by a six year statute of limitations. Moreover, neither case involved the security portion of the sales transaction – which is at issue in this case

**C. Other Jurisdictions Have Found That Actions To Recover A Deficiency After Repossession And Resale Were Not Under Chapter 2 Of The UCC And That Statute Of Limitations Did Not Apply.**

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 Chapter 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 Chapter 2 of the Uniform Commercial Code applies to the sales aspect of the transaction whereas Chapter 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 Chapter 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 Chapter 9 applies to the instant action and that the general three year statute of limitations applies. Accordingly, this Court should affirm the decision of the trial court granting summary judgment to Respondent

**II. THE DENIAL OF APPELLANT'S MOTION FOR SUMMARY JUDGMENT ON THE MERITS IS NOT APPEALABLE.**

A denial of a motion for summary judgment is not appealable. *Ballenger v Bowen*, 313 S.C. 476, 443 S.E.2d 379 (1994) In *Ballenger*, the Court noted that:

[T]he denial of summary judgment does not finally determine anything about the merits of the case and does not have the effect of striking any defense since that defense may be raised again later in the proceedings. Therefore, an order denying a motion for summary judgment is not appealable

*Id.* at 477. The denial of summary judgment is not appealable even after final judgment. See generally *Olson v Faculty House of Carolina, Inc*, 354 S.C. 161, 580 S.E.2d 440 (2001) (listing cases holding that denial of summary judgment is not appealable)

In its brief, Appellant requests that this Court reverse the denial of its Motion for Summary Judgment and, then, grant its motion. The Supreme Court has ruled on this precise issue. The denial of Appellant's Motion for Summary Judgment cannot be appealed, and concomitantly, cannot be reversed. Accordingly, the Court should affirm the denial of the Motion for Summary Judgment.

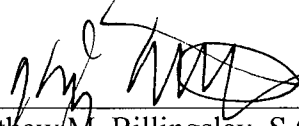
**III. THE COURT DID NOT RELY ON THE SCCPC OR THE FDCPA IN THE ORDER GRANTING SUMMARY JUDGMENT BASED ON THE APPLICABLE STATUTE OF LIMITATIONS.**

In its final order, the Court stated that the SCPCCA and the FDCPA applied to this action (R , p. 56). This reference was merely incidental and was not relied on by the court in rendering a decision on the applicable contract statute of limitations. (R , pp 55-58). Therefore, as the Court granted no relief with respect to the SCPCA or the FDCPA, there is no relief available to the Appellant related to the SCPCA and the FDCPA. Indeed, the Appellant had not stated what the application or lack thereof of these statutes would affect with respect to their claim. Accordingly, the Court should dismiss this portion of the appeal.

**CONCLUSION**

For the foregoing reasons, the decision of the Circuit Court Ninth Judicial Circuit for Charleston County of South Carolina granting Respondent summary judgment and denying Appellant summary judgment should be affirmed.

Respectfully Submitted,



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Matthew M. Billingsley, S.C Bar #: 76095  
Kirby Mitchell, S C. Bar #: 11640  
SOUTH CAROLINA LEGAL SERVICES  
2803 Carner Avenue  
North Charleston, SC 29405  
843-266-2174  
Attorneys for Respondent

North Charleston, SC  
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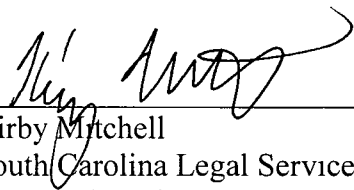
Angel Latoria Brown . . . . .Respondent.

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CERTIFICATION OF COUNSEL

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The undersigned hereby certifies that this Reply Brief complies with Rule 211(b),  
SCACR.

  
\_\_\_\_\_  
Kirby Mitchell  
South Carolina Legal Services  
701 South Main Street  
Greenville, SC 29601  
(864) 679-3247

March 20, 2015

Attorney for Respondent