STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF DORCHESTER	)	FOR THE FIRST JUDICIAL CIRCUIT
1st Franklin Financial Corporation,	)	CASE NO.: 2017-CP-18-00819
Plaintiff,	)	**AMENDED ORDER ON PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT**
vs.	)	
Roby A. Adams,	)	
Defendant.	)	

THIS MATTER came before this Court upon the motion of Plaintiff, 1st Franklin Financial Corporation ("1st Franklin" or "Plaintiff") for partial summary judgment. A hearing before the undersigned was held on March 5, 2020. This Amended Order supersedes this Court's prior Order on Plaintiff's Motion for Partial Summary Judgment entered on April 13, 2020.[1]

In its motion, 1st Franklin moves for summary judgment, as to liability only, on its affirmative claim for breach of the Loan Agreement entered into between 1st Franklin and Defendant Roby A. Adams ("Adams" or "Defendant"). In addition, 1st Franklin requests that this Court find that certain conduct of Plaintiff alleged in Defendant's counterclaims is not "unconscionable conduct" under S.C. Code § 37-5-108(2) or otherwise actionable conduct that support Defendant's counterclaims. For the reasons set forth below, 1st Franklin's motion is granted.

FACTUAL BACKGROUND

On October 23, 2015, Defendant entered into a Loan Agreement with 1st Financial wherein 1st Financial agreed to loan money to Defendant, and Defendant agreed to repay the loan in

[1] On April 2020, 1st Franklin filed a motion pursuant to Rule 60(a) of the South Carolina Rules of Civil Procedure to correct a clerical mistake in the order entered on April 13, 2020. The court hereby grants the motion and enters this Amended Order.

installments. (*See* Compl., Exhibit A). During his deposition, the Defendant testified that he signed the Loan Agreement. (*See* Roby Adams Depo. Jan. 17, 2019 at 14:23-15:1) (hereinafter "Adams Depo."). Defendant does not dispute that he failed to pay 1st Franklin in accordance with the Loan Agreement, and he does not dispute that he owes some amount to 1st Franklin. (*Id*. at 17:23-25). Defendant testified that he cannot recall whether he made any payments towards the loan, and that he is unsure of the exact amount that he owes 1st Franklin. (*Id*. at 15:21-16:7).

On September 22, 2016, 1st Franklin filed suit against Defendant in the Magistrate's Court for Dorchester County alleging that Defendant defaulted under the Loan Agreement and owed, at that time, $4,342.16.[2] On December 5, 2016, Defendant filed an Answer and Counterclaims denying liability and asserting counterclaims against 1st Franklin for violations of the South Carolina Consumer Protection Code ("SCCPC"), violations of the South Carolina Unfair Trade Practices Act ("SCUTPA") and negligence *per se.*

On April 26, 2017, Defendant filed his First Amended Answer and Counterclaims wherein he claimed damages in excess of the Magistrate's Court jurisdictional limit. As a result, in May 2017, this case was transferred to the Court of Common Pleas for Dorchester County. On August 29, 2019, Defendant filed his Second Amended Answer and Counterclaims.[3] Defendant asserts counterclaims against 1st Franklin for (1) violation of the South Carolina Consumer Protection Code ("SCCPC"), (2) violation of the South Carolina Unfair Trade Practices Act ("SCUPTA"), and (3) negligence *per se*. Defendant's counterclaims rely heavily on section 37-5-108(2) of SCCPC which prohibits "unconscionable conduct in collecting a debt." Relevant to the subject

[2] Prior to the subject action, on April 19, 2016, 1st Franklin filed suit against Defendant in the Magistrate's Court for Dorchester County based upon the same Loan Agreement, *1st Franklin Financial Corporation v. Roby A. Adams*, Civil Action 2016-CV-18-10302148. That action was dismissed *without prejudice* based upon 1st Franklin's failure to file documentation relating to non-lawyer representation of a corporation in Magistrate's Court pursuant to S.C. Code Ann. § 33-1-103.

[3] 1st Franklin's Motion for Summary Judgment was previously scheduled to be heard on July 16, 2019. However, prior to hearing 1st Franklin's motion, the court heard and granted Defendant's motion to file a Second Amended Complaint. As a result, the court continued 1st Franklin's Motion for Summary Judgment.

motion, Defendant claims that 1st Franklin is liable to Defendant because it filed two separate lawsuits, filed four months apart, which alleged different amounts were owed by Defendant. (*See* Second Amended Answer and Counterclaims ¶ 12). The first lawsuit alleged $4,351.24 was owed. (*Id*.). The subject lawsuit, filed following dismissal of the first, alleges $4,342.16 is owed. (*Id*.). Thus, the subject action claims $9.08 less than the first lawsuit. (*Id*.). Additionally, Defendant claims 1st Franklin is liable to Defendant because the Dorchester County Sheriff's Office served Defendant's neighbor with the previously filed and subsequently dismissed lawsuit. Finally, Defendant claims that 1st Franklin is liable to Defendant because 1st Franklin engaged in the unauthorized practice of law when it failed to file a form evidencing the corporation's intent to proceed in Magistrate's Court without representation by an attorney.[4] In addition to giving rise to liability under the SCCPC, Defendant asserts these actions, in addition to allegedly violating of the SCCPC, also support his causes of action for violation of the SCUTPA and negligence *per se*.

LEGAL STANDARD

Rule 56, SCRCP, requires the entry of summary judgment when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See Fleming v. Rose*, 350 S.C. 488, 494, 567 S.E.2d 857, 860 (2002). Although the moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact, "this initial responsibility may be discharged by 'showing' – that is, pointing out to the trial court – that there is an absence of evidence to support the nonmoving party's case." *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991). Once the moving party makes this demonstration, the opposing party "must, under Rule 56(e), do more than simply show some metaphysical doubt as to the material facts but must come forward with specific facts showing that

[4] Defendant also claims that alleged communications from 1st Franklin to Defendant after Defendant was represented by counsel give rise to liability. 1st Franklin did not move for summary judgment on those allegations. As such, those allegations are not addressed in this Order.

there is a *genuine issue for trial*." *Id.* (emphasis in original); *Midland Mut. Life Ins. Co. v. Harrell*, 331 S.C. 394, 397, 503 S.E.2d 189, 190 (Ct. App. 1998). The nonmoving party must specifically set forth such facts, "as would be admissible in evidence," to show that a true jury issue exists. *See* S.C. R. Civ. P. 56(e).

The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder. *Dawkins v. Fields*, 354 S.C. 58, 580 S.E.2d 433 (2003); *George v. Fabri*, 345 S.C. 440, 548 S.E.2d 868 (2001). Under South Carolina law, where "plain, palpable and indisputable facts exist on which reasonable minds cannot differ," summary judgment in favor of the moving party is proper. *Williams v. Chesterfield Lumber Co.*, 267 S.C. 607, 610, 230 S.E.2d 447, 448 (1976).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. The Court Grants 1st Franklin Motion for Summary Judgment on its Claim for Breach of the Loan Agreement.

1st Franklin moves for summary judgment, as to liability only, on its affirmative claim for breach of the Loan Agreement. An action under a note is an action for breach of contract. *See Hotel & Motel Holdings, LLC v. BJC Enterprises, LLC*, 414 S.C. 635, 780 S.E.2d 263 (Ct. App. 2015). "The elements for a breach of contract are the existence of a contract, its breach, and damages caused by such breach." *S. Glass & Plastics Co. v. Kemper*, 399 S.C. 483, 491–92, 732 S.E.2d 205, 209 (Ct.App.2012). The court finds there is no genuine issue of material fact as to the three required elements.

It is uncontested that the Loan Agreement created an enforceable contractual relationship between 1st Franklin and Defendant. Defendant admits that he entered into the Loan Agreement and agreed to be bound by the terms therein. (*See* Roby Adams Depo., Jan. 17, 2019, 14:23-15:1) (hereinafter "Adams Depo."). Defendant also admits that he breached the Loan Agreement by failing to make payments when due, and he further admits that he owes some amount to 1st

Franklin. (*Id*. at 16:5-8; 17:23-25; 36:11-13). Hence, no genuine issue of material fact exists that 1st Franklin and Defendant entered into a contract, Defendant breached the contract, and that 1st Franklin has been damaged. The only question remaining on Plaintiff's contract action is the amount of the contractual damage sustained by the Plaintiff.

The court considered the arguments made by Defendant's counsel at the hearing but finds them to be without merit. The court finds that the deposition testimony attached to Plaintiff's memorandum is properly before the court despite Defendant's argument that it has not been authenticated. Rule 56(c), SCRCP specifically contemplates that the court will consider deposition testimony at the summary judgment stage. *See* Rule 56(c), SCRCP. Additionally, as to the argument that the Loan Agreement has not been properly authenticated, the court finds that it is self-authenticating under Rule 902(9), SCRE as a commercial paper or related document. Finally, Defendant's deposition testimony acknowledging the Loan Agreement negates counsel's argument under the best evidence rule, Rule 1002, SCRE. Again, during his deposition, Defendant acknowledged signing the Loan Agreement and his agreement to be bounds by its terms. (*See* Adams Depo., 14:23-15:1).

1st Franklin is entitled to summary judgment on the issue of Defendant's liability under the Loan Agreement. The court declines to enter judgment at this time and will address the issue of damages at subsequent proceedings in this matter.

II. 1st Franklin's Motion for Judgment as to Defendant's Counterclaims is Granted.

Defendant's Second Amended Answer and Counterclaims asserts causes of action against 1st Franklin for (1) violation of the South Carolina Consumer Protection Code ("SCCPC"), (2) violation of the South Carolina Unfair Trade Practices Act ("SCUPTA"), and (3) negligence *per se*. Defendant's counterclaims rely heavily on S.C. Code Ann. § 37-5-108(2) of the SCCPC. Section 37-5-108(2) provides a private cause of action "if the court *as a matter of law* finds that a

person has engaged in, is engaging in, or is likely to engage in unconscionable conduct in collecting a debt." (emphasis added). S.C. Code Ann. § 37-5-108(5) sets forth "factors" to be given "consideration" when a court analyzes whether a debt collector has engaged in "unconscionable conduct in collecting a debt" under section 37-5-108(2). Defendant, relying on certain factors under section 37-5-108(5), alleges that 1st Franklin engaged in "unconscionable conduct in collecting a debt".

Relevant to this motion, 1st Franklin asserts that (1) the different amounts alleged in the two complaints, (2) the Dorchester County Sheriff's Office serving Defendant's neighbor, and (3) the allegations regarding the unauthorized practice of law do not, as a matter of law, constitute "unconscionable conduct in the collection of a debt." *See* S.C. Code Ann. § 37-5-108(2). 1st Franklin seeks an order barring Plaintiff from introducing testimony or evidence at trial relating to these allegations.

A. 1st Franklin is Entitled to Summary Judgment on Defendant's Claim that it Falsely Represented the Amount Owed by Defendant.

In April 2016, 1st Franklin filed an action in Magistrate's Court seeking damages in the amount of $4,351.24. *See 1st Franklin Financial Corporation v. Roby A. Adams*, Civil Action 2016-CV-18-10302148. That action was subsequently dismissed without prejudice. *See id*. In June 2016, 1st Franklin filed this action seeking $4,342.16 in damages, $9.08 less than the prior lawsuit. Based on the differing amount in the two complaints, Defendant alleges that 1st Franklin violated the SCCPC because it "falsely represented" the amount owed by Defendant. (*See* Second Amended Answer and Counterclaims ¶ 12). Defendant relies on S.C. Code § 37-5-108(5)(c)(1) which prohibits "using fraudulent, deceptive, or misleading representations in connection with the collection of a consumer credit transaction", including false representations of the "character, amount, or legal status of any debt". *See* S.C. Code §§ 37-5-108(2) and 37-5-108(5)(c)(1).

1st Franklin's argues the $9.08 discrepancy between the amounts claimed to be owed, cannot, as a matter of law, be characterized as "fraudulent, deceptive, or misleading" or "unconscionable." *See* S.C. Code § 37-5-108(2). 1st Franklin claims it voluntarily corrected and reduced the amount it claimed from Defendant without any request or insistence from Defendant when it filed the second action. 1st Franklin further argues that Defendant's deposition testimony makes clear that he is wholly unaware of the amount actually owed to 1st Franklin and merely relies on the fact that the two complaints contained different amounts. (*See* Adams Depo. 17:17-18).

Defendant argues that the deposition testimony of Theresa Scherwin, 1st Franklin's branch manager, precludes the grant of summary judgment in favor of 1st Franklin. More specifically, Defendant contends that because Ms. Schwerin was unable to adequately explain why the amounts differing amount set forth in the two complaints, factual issues remain that prevent the entry of summary judgment. Defendant also argues that 1st Franklin's admission that the first collection lawsuit's demand for $9.08 more than was actually due from Defendant on this debt was a "scrivener's error" constitutes an admission by 1st Franklin that this unintentional overcharge was a false representation of the amount of the debt due to them.

After considering the hearing the arguments of counsel and the filings, including the deposition testimony submitted by Defendant's counsel, the court holds that 1st Franklin is entitled to summary judgment on Defendant's claim that Plaintiff falsely represented the amount owed by Defendant. A complaint consists of allegations that must be proven by a ponderance of the evidence before a plaintiff is entitled to recover. Pleadings are privileged. *See Pond Place Partners, Inc. v. Poole*, 351 S.C. 1, 22, 567 S.E.2d 881, 892 (Ct. App. 2002). Accepting Defendant's argument would lead to a finding of liability any time an amount alleged in a complaint by a creditor is, for whatever reason, found to be incorrect. Such a rule would have a

chilling effect on creditors pursuing debts they are rightfully owed and likely lead to a significant increase in claims by debtors seeking to avoid debts on technicalities. The proper response to the incorrect allegation is simply to deny it and demand strict proof.

This action has been pending for over three years. In three years of litigation Defendant has provided no evidence in the record upon which the court could find that 1st Franklin falsely represented the amount owed in a manner that could, even viewed in the light most favorable to defendant, be characterized as "fraudulent, deceptive, or misleading" or "unconscionable." *See* S.C. Code § 37-5-108(2). At the summary judgment stage, the opposing party "must, under Rule 56(e), do more than simply show some metaphysical doubt as to the material facts but must come forward with specific facts showing that there is a genuine issue for trial." *Baughman*, 306 S.C. at 115, 410 S.E.2d at 545.

B. The Court Finds, as a Matter of Law, that the Alleged Service of the Summons and Complaint on Defendant's Neighbor is Not Unconscionable Conduct

Defendant also alleges that 1st Franklin is liable for damages due to the Dorchester County Sheriff's Office serving Defendant's neighbor with the previously filed and subsequently dismissed lawsuit. Defendant alleges this act constitutes a violation of S.C. Code Ann. § 37-5-108(5)(b)(4), which prohibits a debt collector from communicating "with anyone other than the consumer, his attorney, a consumer reporting agency if otherwise permitted by law, the attorney of the creditor or debt collector, unless the consumer or a court of competent jurisdiction has given prior direct permission" regarding the debt. Acknowledging that 1st Franklin did not directly communication with any other person regarding the debt, Defendant seeks to impose liability by claiming that the Dorchester County Sheriff's Office was 1st Franklin's agent. (*See* Second Amended Answer and Counterclaims ¶ 16).

The Dorchester County Sheriff's Office was not acting as 1st Franklin's agent when it served the complaint. Rather, it was carrying out its statutory mandate to carry out service of

process for the courts of this state. S.C. Code Ann. § 23-15-40 provides that "[t]he sheriff or his regular deputy, on the delivery thereof to him, shall serve, execute and return every process, rule, order or notice issued by any court of record in this State or by other competent authority." No agency relationship existed. Even assuming that an agency relationship existed, 1st Franklin still would not be liable because the Sheriff's Office acted outside of the scope of its authority in serving Defendant's neighbor. 1st Franklin correctly named Defendant in the pleadings. The Sheriff's Office, pursuant to its statutory authority, was instructed by the court to carry out service upon Defendant, not Defendant's neighbor. A principal is not liable for the acts of an agent which are outside the agent's scope of authority. *See* 2A C.J.S. Agency § 457. Thus, even assuming *arguendo* that the Sheriff's Office was acting as 1st Franklin's agent, it clearly acted outside the scope of its authority.

Furthermore, regardless of the agency issue, the court holds that the Dorchester County Sheriff's Office mistakenly serving Defendant's neighbor cannot, as a matter of law, be reasonably construed as 1st Franklin engaging "unconscionable conduct in collecting a debt". Code Ann. § 37-5-108(5) sets forth "factors" to be given "consideration" when determining whether a debt collector has engaged in unconscionable conduct. "The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." *Halsey v. Simmons*, --S.E.2d -- No. 2017-001459, 2020 WL 593950, at *5 (S.C. Ct. App. Jan. 22, 2020). The court finds that the legislature did not intend to impose strict liability for the factors set forth in section 37-5-108(5). Rather, the legislature intended to provide the courts deference to determine, as a matter of law, whether certain actions constituted unconscionable conduct. Defendant's proposed interpretation of the statute whereby any violation of the factors set forth in section 37-5-108(5) gives rise to liability is in direct conflict with the actual language of the statute. The statute is clear that a court must find, as a matter of law, that a debt collector acted unconscionably. *See* S.C. Code Ann. § 37-5-

108(2). There is no evidence upon which this Court could find that 1st Franklin engaged in unconscionable conduct by virtue of the Dorchester County Sheriff's Office mistakenly serving Defendant's neighbor.

C. The Court Finds, as a Matter of Law, that the Alleged Unauthorized Practice of Law Does Not Support a Private Cause of Action

Defendant also alleges that 1st Franklin engaged in the unauthorized practice of law; and therefore, is liable to Defendant. Defendant claims 1st Franklin engaged in the unauthorized practice of law by failing to file a form evidencing the corporation's intent to proceed in Magistrate's Court without representation by an attorney

As an initial matter, there has been no finding that 1st Franklin engaged in the unauthorized practice of law, and such a finding rests within the exclusive jurisdiction of the Supreme Court of South Carolina. The South Carolina Supreme Court has the duty to regulate the practice of law in this state and, accordingly, has the authority to define what constitutes the unauthorized practice of law. The South Carolina Constitution provides "[t]he Supreme Court shall have jurisdiction over the admission to the practice of law...." S.C. Const. art. V. § 4; *see also* S.C. Code Ann. § 40–5–10 (2001) ("The inherent power of the Supreme Court with respect to regulating the practice of law, determining the qualifications for admission to the bar and disciplining, suspending and disbarring attorneys at law is hereby recognized and declared."). An action to determine whether an individual or entity has engaged in the unauthorized practice of law must be a request for declaratory relief brought in the original jurisdiction of the Supreme Court. *Hambrick v. GMAC Mortg. Corp.*, 370 S.C. 118, 121, 634 S.E.2d 5, 7 (Ct. App. 2006). There has been no adjudication by the Supreme Court that 1st Franklin engaged in the unauthorized practice of law.

Additionally, even if there was an explicit finding that 1st Franklin engaged in the unauthorized practice of law, it could not support Defendant's counterclaims because the Supreme Court of South Carolina has plainly held that "there is no private right of action for the

unauthorized practice of law." *Linder v. Ins. Claims Consultants, Inc.*, 348 S.C. 477, 497, 560 S.E.2d 612, 623 (2002). In *Linder*, although it acknowledged the statute prohibiting the unauthorized practice of law, S.C. Code Ann. §40-5-310, the Supreme Court held that the statute did not "sanction a private cause of action." *Id.* Therefore, it held that South Carolina law precludes private citizens from suing for money damages based on an allegation of the unauthorized practice of law. *Id.*; *see also Hambrick*, 370 S.C. at 121, 634 S.E.2d at 7.[5]

Furthermore, in *Hambrick*, the Court of Appeals, relying on *Linder's* prohibition against a private cause of action, held that the allegation that a party engaged in the unauthorized practice of law cannot be used to support or prove another cause of action. *Hambrick*, 370 S.C. at 124, 634 S.E.2d at 8. In *Hambrick*, the court explicitly rejected the plaintiffs' attempt "[t]o get around *Linder*" by alleging the unauthorized practice of law to support various other causes of action. *Id.* Plaintiff's claim concerning 1st Franklin's alleged unauthorized practice of law fails.

Additionally, our Supreme Court

CONCLUSION

After carefully considering the pleadings, memoranda, applicable law and arguments of counsel, the court finds and so holds that 1st Franklin is entitled to summary judgment as to Defendant's liability under the Loan Agreement. The court will determine the damages to be awarded to 1st Franklin, if any, following trial.

Plaintiff's motion for summary judgment as to Defendant's counterclaims alleging that Plaintiff falsely represented the amount of the debt, relating to the Dorchester County Sheriff's Office serving Defendant's neighbor and alleging that 1st Franklin engaged in the unauthorized practice of law is also granted. Defendant is barred from presenting testimony or evidence at any

[5] See, Ex Parte: Edward J. Westbrook, Petitioner, In Re: The Murkin Group, LLC, Respondent. Appellate Case No. 2018-002263. The question of unauthorized practice of law is within exclusive jurisdiction of the South Carolina Supreme Court. Mr. Westbrook, lawyer for the debtor, raised the unauthorized practice of law of a collection agency in a direct petition to the Supreme Court.

future proceedings in this matter relating to the alleged false representation of the amount of the debt, service by the Dorchester County Sheriff's Office, or the alleged unauthorized practice of law.

AND IT IS SO ORDERED!

-Electronic Signature Page Follows-

Dorchester Common Pleas

Case Caption: 1st Franklin Financial VS Roby A Adams

Case Number: 2017CP1800819

Type: Order/Other

So Ordered

s/James E. Chellis, Master in Equity, SCJD#3078