

**NEW CENTURY FINANCIAL SERVICES, INC., Plaintiff-Respondent,**

**v.**

**ANCA McNAMARA, Defendant-Appellant.**

No. A-2556-12T1.

**Superior Court of New Jersey, Appellate Division.**

Argued January 27, 2014.

Decided March 20, 2014.

Neil J. Fogarty argued the cause for appellant (Northeast New Jersey Legal Services, Inc., attorneys; Mr. Fogarty and Yongmoon Kim, of counsel and on the briefs).

Lawrence J. McDermott, Jr., argued the cause for respondent (Pressler and Pressler, L.L.P., attorneys; Mr. McDermott, on the brief).

Before Judges Yannotti and Ashrafi.

## **NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION**

PER CURIAM.

Defendant Anca McNamara appeals from an order entered by the Law Division on December 12, 2012, which denied her motion for summary judgment on her counterclaim against plaintiff New Century Financial Services, Inc., and granted summary judgment in favor of plaintiff on that claim. Defendant also appeals from the trial court's order of January 25, 2013, which denied her motion for reconsideration of the December 12, 2012 order. For the reasons that follow, we reverse and remand for further proceedings.

On July 13, 2012, plaintiff filed a complaint in the Special Civil Part, alleging that it was "now the owner" of defendant's account with Levitz Furniture store. Plaintiff claimed that the account was in default and \$950 was due, plus interest from May 10, 2012 to July 12, 2012. Plaintiff sought the amounts due, plus interest to the date of judgment, and costs of suit.

Defendant filed an answer. Defendant admitted she was the owner of the account but asserted, among other things, that the claim was barred by the applicable statute of limitations. Defendant raised an assortment of separate defenses and stated that the complaint should be dismissed with prejudice.

Defendant also asserted a counterclaim alleging that New Century violated the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C.A. § 1692 to 1692p. Defendant claimed that plaintiff violated the FDCPA by bringing a lawsuit on a debt that was time-barred under N.J.S.A. 12A:2-725. Plaintiff filed an answer to the counterclaim, in which it denied liability and raised an assortment of affirmative defenses.

On November 19, 2012, plaintiff filed a motion to dismiss defendant's counterclaim. On December 3, 2012, defendant filed a cross-motion for summary judgment. In support of her motion, defendant submitted a certification in which she stated that in July 2005, she "signed up" for a Levitz store credit card account to finance the purchase of furniture at the Levitz store. Defendant stated that she used the Levitz "store card" to buy furniture.

Defendant asserted that she "could not use the Levitz store card anywhere else but in Levitz to buy furniture." Defendant also asserted that she never used the Levitz card at any other time. She stated that she made payments on the card

until August 2006. She claimed that she "had trouble making payments on time in 2006 because of medical problems and complications." She made her last payment on August 25, 2006, which brought the balance on the account down to \$950. She said she was certain that she did not make any payments in 2007 or later.

Defendant attached certain documents pertaining to her Levitz account to her affidavit. Defendant also attached copies of plaintiffs interrogatories, supplemental interrogatories and second set of supplemental interrogatories, along with her answers. In addition, defendant attached a copy of the interrogatories and a request for admissions that were served upon plaintiffs attorney.<sup>[1]</sup>

On the trial date, December 12, 2012, the attorneys for the parties discussed the matter with the trial judge, after which plaintiff agreed to voluntarily dismiss its complaint. The judge then considered the parties' motions and placed her decision on the record.

The judge noted that in her counterclaim, defendant had alleged a violation of the FDCPA, specifically the alleged pursuit by plaintiff of a time-barred claim. Defendant had argued that plaintiff's claim was governed by the four-year statute of limitations in N.J.S.A. 12A:2-725, rather than the six-year limitations period under N.J.S.A. 2A:14-1. Defendant claimed that plaintiff brought the claim beyond the four years required by N.J.S.A. 12A:2-725.

The judge ruled that N.J.S.A. 2A:14-1 applied because this was not a claim arising from a breach of contract for the sale of goods, but rather a claim based on a "credit card debt." The judge entered an order dated December 12, 2012, dismissing plaintiff's claim and defendant's counterclaim.

Defendant thereafter filed a motion for reconsideration and argued that the judge erred by dismissing her claim. In support of the motion, defendant submitted a certification from her attorney, who said the case involved "a classic contract for the sale of goods on credit." Counsel again argued that the four-year limitations period in N.J.S.A. 12A:2-725 applied to this action. She maintained that the FDCPA claim was valid because plaintiff was a debt collector who filed a time-barred claim.

The judge considered defendant's motion on January 25, 2013. After hearing the arguments of counsel, the judge placed her decision on the record. She noted that plaintiff's attorney had claimed that the claim arose from a debt owed to a bank, not from the sale of goods. The judge stated that there was insufficient evidence before the court concerning the transaction.

Therefore, the judge said she could not determine whether plaintiff's claim arose from the collection of a debt or a contract for the sale of goods. The judge said that, because plaintiff had dismissed its complaint, this issue had not been adjudicated and would not be adjudicated. The judge entered an order dated January 25, 2013, denying the motion for reconsideration. This appeal followed.

Defendant argues that the trial judge erred by granting summary judgment to plaintiff on her counterclaim. She maintains that she presented sufficient evidence to support her claim that plaintiff violated the FDCPA by filing a claim that was barred by the applicable statute of limitations and the judge should have granted her cross-motion for summary judgment.

Summary judgment may be granted when there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. R. 4:46-2(c); Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). "An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact." R. 4:46-2(c). We apply this same standard when reviewing a trial court's order granting summary judgment. Liberty Surplus Ins. Corp. v. Nowell Amoroso, P.A., 189 N.J. 436, 445-46 (2007).

Here, defendant asserted a claim under the FDCPA, which prohibits a "debt collector" from "us[ing] any false, deceptive, or misleading representation or means in connection with the collection of any debt[.]" 15 U.S.C.A. § 1692e, including falsely representing "the character, amount, or legal status of any debt[.]" 15 U.S.C.A. § 1692e(2)(A). The FDCPA also precludes debt collectors from using any unfair or unconscionable means to collect a debt. 15 U.S.C.A. § 1692f.

In Huertas v. Galaxy Asset Management, 641 F.3d 28 (3d Cir. 2011), the debtor incurred credit-card debt, and the creditor retained another party to collect the debt. *Id.* at 31. The debtor alleged that the statute of limitations on the claim had run and the debt collector violated the FDCPA by sending him a letter attempting to collect on the time-barred debt. *Ibid.* The Federal District Court held that, although the expiration of the statute of limitations made the debt unenforceable, the debt itself was not extinguished, and the attempt to collect the debt was not a violation of the FDCPA. *Ibid.*

The Court of Appeals for the Third Circuit affirmed the dismissal of the claim, but for different reasons. *Id.* at 35. The court stated that under New Jersey law, after the statute of limitations has run, the debt is not extinguished but is unenforceable in a court of law. *Id.* at 32 (citing R.A.C. v. P.J.S., Jr., 192 N.J. 81, 98 (2007)). Therefore, the court ruled that a debt collector does not violate the FDCPA by seeking voluntary payment of the debt, provided that the collector "does not initiate or threaten legal action in connection with its debt collection efforts." *Id.* at 33.

In support of its decision, the court cited Beattie v. D.M. Collections, Inc., 754 F. Supp. 383, 393 (D. Del. 1991), in which the court stated that a debt collector violates the FDCPA if he threatens a lawsuit on a debt that he "knows or should know is unavailable or unwinnable by reason of a legal bar such as the statute of limitations[.]" Huertas, supra, 641 F.3d at 33. The court also cited Kimber v. Fed. Fin. Corp., 668 F. Supp. 1480, 1487 (M.D. Ala. 1987), where the court stated that a debt collector violates the FDCPA by initiating "a lawsuit on a debt that appears to be time-barred," without "having first determined after a reasonable inquiry that [the] limitations period has been or should be tolled[.]" Huertas, supra, 641 F.3d at 33.

As we have explained, defendant claimed that plaintiff violated the FDCPA by filing the lawsuit seeking to collect the monies allegedly due on her Levitz credit-card account. Plaintiff concedes that it is a "debt collector" for purposes of the FDCPA. Defendant alleges that the claim was time-barred. She contends that the complaint was filed beyond the time prescribed by N.J.S.A. 12A:2-725, which provides that a claim for breach of a contract of sale must be commenced within four years of its accrual. Defendant asserts that the general six-year limitations period for breach-of-contract claims in N.J.S.A. 2A:14-1 does not apply.

In Associates Discount Corp. v. Palmer, 47 N.J. 183 (1966), the defendant purchased an automobile from a dealership and executed a lease security agreement, which provided for installment payments. *Id.* at 185. The dealership assigned the agreement to plaintiff. *Ibid.* The defendant only made the first payment and agreed that the plaintiff could repossess the vehicle, which was thereafter sold at auction for less than the outstanding debt. *Ibid.*

Almost seven years after the auction date, the plaintiff filed a complaint against defendant seeking the deficiency. *Ibid.* The Court held that the agreement included a contract of sale and security transaction, and the claim arising from the agreement was subject to the four-year statute of limitations in N.J.S.A. 12A:2-725. *Id.* at 187-88.

Similarly, in Ford Motor Credit Co. v. Arce, 348 N.J. Super. 198 (App. Div. 2002), the defendant purchased a motor vehicle from a dealer and, as part payment, executed a retail installment sales contract, which was assigned to the plaintiff. *Id.* at 199. The defendant defaulted on the payments and voluntarily surrendered the vehicle to the plaintiff. *Id.* at 199-200. The vehicle was sold at auction, and five-and-one-half years later, the plaintiff filed a suit seeking to recover the deficiency owed on the installment sales contract. *Id.* at 200. We held that the four-year statute of limitations in N.J.S.A. 2A:2-725 applied and the claim was time-barred. *Id.* at 203.<sup>[2]</sup>

Here, the trial judge ruled that defendant had not presented sufficient evidence concerning the account so that a fact finder could determine that the Levitz account was an installment contract for the sale of goods, rather than a loan of money. However, the evidence that defendant submitted to the trial court established that the Levitz account was a contract for the sale of goods for which payments were due in installments.

In her certification, defendant stated that she opened the Levitz credit-card account, and she was allowed to use the credit card to purchase furniture in the Levitz store. According to defendant, the account could only be used in the Levitz store. Plaintiff presented no evidence disputing defendant's assertions.

Based on this evidence, we conclude, consistent with Palmer and Arce, that the Levitz credit card agreement was a contract for the sale of goods, which could be paid over time in accordance with the terms of the agreement. Therefore, the trial judge erred by finding that the evidence was insufficient to resolve this material issue of fact and by concluding that the issue could not be resolved because plaintiff had withdrawn its complaint.

Defendant further argues that the trial judge should have granted summary judgment to her on the counterclaim. As we have determined, defendant established that the four-year statute of limitations in N.J.S.A. 2A:2-725 applies to plaintiff's claim on the Levitz account.

However, to prevail on her claim under the FDCPA, defendant must show that: (1) plaintiff's claim was, in fact, barred by the statute; and (2) plaintiff knew or should have known that the claim was time-barred when it initiated the lawsuit. The trial judge did not address either issue.

Accordingly, we reverse the order granting summary judgment to plaintiff on defendant's counterclaim, and remand the matter to the trial court for further proceedings on the parties' motions for summary judgment.

Reversed and remanded for further proceedings in accordance with this opinion. We do not retain jurisdiction.

[1] It appears that plaintiff did not respond to the interrogatories, but defendant did not file a motion to compel plaintiff to provide answers.

[2] We note that, while not directly on point, in Sliger v. R.H. Macy & Co., Inc., 59 N.J. 465 (1971), the Court held that the State's usury law did not apply to a department store's revolving charge account because "an increase in price for a credit sale over the cash sale price is not a loan or forbearance of money." *Id.* at 469.

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