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TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2013-CA-001514-MR

CAROL HARRELL

APPELLANT

v. APPEAL FROM NELSON CIRCUIT COURT
HONORABLE CHARLES C. SIMMS III, JUDGE
ACTION NO. 12-CI-00661

UNIFUND CCR PARTNERS

APPELLEE

OPINION
VACATING AND REMANDING

** ** * ** * ** *

BEFORE: CAPERTON,¹ COMBS, AND VANMETER, JUDGES.

COMBS, JUDGE: Carol Harrell appeals the order of the Nelson Circuit Court dismissing her counterclaim against Unifund CCR Partners pursuant to the provisions of Kentucky Rule[s] of Civil Procedure (CR) 12.02. The circuit court concluded that the prayer for statutory prejudgment interest included in Unifund's

¹ Judge Caperton concurred in this opinion prior to Judge Debra Lambert being sworn in on January 5, 2015, as Judge of Division 1, Third Appellate District. Release of this opinion was delayed by administrative handling.

collection action against Harrell did not violate the federal Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692, *et. seq.* Therefore, the court dismissed Harrell's counterclaim. In harmony with the recent decision of the United States Court of Appeals in *Stratton v. Portfolio Recovery Associates, LLC*, 770 F.3d 443 (6th Cir. 2014), we are persuaded to vacate the order and to remand for further proceedings.

Harrell entered into a credit card agreement with Citibank in September 2007. She utilized the revolving credit that Citibank extended to her, but she eventually defaulted on her promise to repay the debt to Citibank. By January 18, 2011, Citibank deemed Harrell's account to be severely delinquent. As a result, it "charged off" the account with an outstanding, unpaid balance of \$1,472.58. Citibank also stopped sending monthly billing statements to Harrell and stopped adding default interest at its contract rate of 27.24% to the outstanding balance. Citibank was acting in compliance with 12 C.F.R. § 226.5(b)(2)(1), which sets forth the regulations implementing the FDCPA.

In November 2011, Citibank sold and assigned the account to Pilot Receivables Management, LLC. Pursuant to an agreement between Pilot Receivables and Unifund, Unifund was assigned the right to collect the outstanding debt.

On April 10, 2012, Unifund filed a collection action against Harrell in the Nelson District Court. In its complaint, Unifund sought to recover the unpaid balance plus statutory prejudgment interest pursuant to the provisions of Kentucky

Revised Statute[s] (KRS) 360.010. Unifund's complaint alleged that its damages equaled "the amount of the remaining charged-off balance of \$1472.58 plus interest currently accruing (and continuing to accrue) at the rate of eight percent (8%) per annum on the charged-off balance from the charge-off date of 01/18/2011 (which currently totals \$92.56)"

In an amended answer filed on September 19, 2012, Harrell asserted a counterclaim against Unifund in which she alleged that Unifund's request for statutory prejudgment interest violated provisions of the federal Fair Debt Collection Practices Act. Harrell alleged that Unifund was not entitled to recover interest from the date of Citibank's charge off since Unifund had not acquired the account by assignment from Citibank until some ten months later. She claimed that Unifund's allegation that interest was owed was false or misleading. The action was transferred to the Nelson Circuit Court because Harrell's counterclaim purported to be a class action.

On October 8, 2012, Unifund filed a motion to dismiss the counterclaim. Unifund argued that Harrell had failed to state a claim for which relief could be granted, contending that Citibank's decision to charge off the account did not operate to waive Unifund's right to collect interest at Kentucky's statutory rate. It also claimed that the demand for statutory interest included in its complaint did not violate provisions of the Fair Debt Collection Practices Act.

The Nelson Circuit Court concluded -- as a matter of law -- that Unifund's claim for prejudgment interest did not violate the provisions of the Fair Debt

Collection Practices Act. Thus, it granted Unifund's motion to dismiss. With Unifund's collection action still pending, the Nelson Circuit Court transferred the case back to district court and designated its order dismissing Harrell's counterclaim as final and appealable. The Nelson Circuit Court denied Harrell's subsequent motion to alter, amend, or vacate. This appeal followed.

The Nelson Circuit Court granted Unifund's motion to dismiss for failure to state a claim upon which relief would be granted pursuant to the provisions of CR 12.02. Courts are authorized to grant a motion pursuant to this rule only where "it appears the pleading party would not be entitled to relief under any set of facts which could be proved in support of his claim." *Pari-Mutuel Clerks' Union v. Kentucky Jockey Club*, 551 S.W.2d 801, 803 (Ky.1977). A pure question of law is involved in a dismissal for failure to state a claim upon which relief can be granted. Thus, our review is *de novo*. *Fox v. Grayson*, 317 S.W.3d 1 (Ky.2010).

The Fair Debt Collection Practices Act was enacted to deter abusive debt collection practices by debt collectors. The Act prohibits a wide variety of specific conduct; but it also broadly prohibits harassing, unfair, or deceptive debt collection practices, enabling courts to address other abusive conduct. 15 U.S.C. §§ 1692(d)-1692(f). In her counterclaim, Harrell alleged that Unifund engaged in deceptive, unfair, and unconscionable debt collection practices in violation of provisions of the Fair Debt Collection Practices Act by seeking to recover statutory prejudgment interest in addition to the full principal amount of her debt.

On appeal, Harrell contends that the trial court erred in concluding that the claim for statutory interest included in Unifund's complaint did not violate the provisions of 15 U.S.C. § 1692(e)(2)(A). We agree that it erred in failing to determine that the FDCPA had been violated.

The provisions of 15 U.S.C. § 1692(e)(2)(A) expressly prohibit debt collectors from falsely representing "the character, amount or legal status of any debt." Harrell argues that Citibank waived its right to charge interest once it charged off her account and that Citibank's waiver is binding upon Unifund. Thus, she contends that Unifund's demand for statutory interest is perforce a false representation of the amount of her debt and, consequently, a violation of the provisions, spirit, and intent of the FDCPA.

In recently considering this argument in the same context, the Sixth Circuit Court of Appeals reviewed a state court action to collect a debt that included a request for statutory interest where contract interest had been waived. The Sixth Circuit concluded that the collection action constituted an attempt to collect an amount that was not permitted by law. *Stratton, supra*.

In its decision, the *Stratton* court directly addressed and relied upon provisions of KRS 360.010(1), which provides, in relevant part, as follows:

The legal rate of interest is eight percent (8%) per annum, but any party or parties may agree, in writing, for the payment of interest in excess of that rate...and any such party or parties, and any party or parties who may assume or guarantee any such contract or obligation, shall be bound for such rate of interest as is

expressed in any such contract, obligation, assumption, or guaranty, and no law of this state prescribing or limiting interest rates shall apply to any such agreement or to any charges which pertain thereto or in connection therewith....

The *Stratton* court further observed as follows:

Nothing in the statute suggests that a contracting party retains the option to charge statutory interest. Rather, Kentucky's usury statute states a default rule – it applies until displaced by a contract, whereupon the contracting parties and their assignees shall be bound by the terms of their agreement and the statutory rate shall not apply.

Stratton, 770 F.3d at 447. The court reasoned that a party's right to collect statutory interest is **forever extinguished** once it agrees to collect an interest rate specified by the terms of its contract. Thus, if a creditor has waived its right to collect interest at the contractually agreed upon rate, its assignee can never resurrect the right to collect interest at the statutory rate.

Furthermore, the federal circuit court concluded that an attempt to collect statutory interest under these circumstances could, in fact, constitute a violation of the FDCPA as amounting to an unfair or deceptive practice. While we agree with Unifund that not every violation of state law can be converted to a federal claim under the provisions of the FDCPA, we are persuaded by the federal circuit court's conclusion that a false representation included in the allegations of a debt collector's complaint can be actionable. Where Unifund alleged that Harrell

owed interest that had been waived under principles of contract law and statutory construction, we conclude that it is not entitled to a summary dismissal of her claim that it violated provisions of the FDCPA.

We are mindful of *Embs v. Pepsi-Cola Bottling Company of Lexington, Kentucky, Inc.*, 528 S.W.2d 703 (Ky.1975), which holds that a state court is not bound by the holding of a federal court that construes state law in the course of a diversity action. However, we are persuaded that the sound reasoning of the *Stratton* court does not supplant but properly comports with the statutory language of KRS 360.010(1). Nothing in Kentucky's statute -- by specific language, implication, or innuendo -- contravenes the purpose and spirit of the Fair Debt Collection Practices Act.

We vacate the Nelson Circuit Court's order dismissing. This matter is remanded for further proceedings.

CAPERTON, JUDGE, CONCURS.

VANMETER, JUDGE, DISSENTS.

BRIEF FOR APPELLANT:

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ORAL ARGUMENT FOR
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