[Cite as *Asset Acceptance L.L.C. v. Caszatt, et al.*, 2012-Ohio-1886.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

ASSET ACCEPTANCE LLC,	:	**O P I N I O N**
Plaintiff-Appellant,	:	
- vs -	:	**CASE NO. 2011-L-080**
SEAN C. CASZATT,	:	
Defendant-Appellee,	:	
ASSET CAPITAL CORP., et al.,	:	
Defendants-Appellants.	:	

Civil Appeal from the Lake County Court of Common Pleas, Case No. 08 CV 002587.

Judgment: Appeal dismissed.

Boyd W. Gentry, Law Office of Boyd W. Gentry, LLC, 9 East Dayton Street, West Alexandria, OH 45381 (For Appellants).

Anand N. Misra, The Misra Law Firm, L.L.C., 3659 Green Road, Suite 100, Beachwood, OH 44122, and *Robert S. Belovich*, 9100 South Hills Blvd., Suite 300, Broadview Heights, OH 44147 (For Appellee).

MARY JANE TRAPP, J.

{¶1} Asset Acceptance LLC, appeals from a judgment of the Lake County Court of Common Pleas certifying a class for the claim that it violated the federal Fair Debt Collection Practices Act ("FDCPA") by filing time-barred lawsuits to collect credit card debts. This is the second appeal regarding the class certification issue in this

case. In the prior appeal, the trial court denied class certification and we reversed, holding that this FDCPA case should be maintained as a class action and directing the trial court to certify the class. On remand, the trial court certified the class, from which Asset Acceptance now appeals. As we explain below, R.C. 2505.02(B)(5) does not grant us jurisdiction to entertain this second appeal. Therefore, we dismiss the appeal for lack of final appealable order.

First Appeal

{¶2} Asset Acceptance LLC (hereafter "Asset"), is engaged in the business of purchasing charged-off consumer debts and enforcing the debts in courts of various states. On June 6, 2008, it filed a lawsuit against Sean C. Caszatt in Painesville Municipal Court to collect a credit card debt.[1] The date of delinquency for Mr. Caszatt's account was October 2001. The pertinent credit card agreement provision stated: "No matter where you live, this Agreement and your Credit Card Account are governed by federal law and by New Hampshire law." New Hampshire has a three-year statute of limitations for collections of credit card debts.

{¶3} Mr. Caszatt's filed a counterclaim alleging Asset's internal guidelines applied Ohio's 15-year statute of limitations for written contracts, even for accounts with a choice-of-law provision where the choice-of-law state law, such as New Hampshire, imposes a much shorter statute of limitations for collections of credit card debts. Mr. Caszatt alleged this standard practice by Asset violated R.C. 2305.03(B), which provides that a shorter period of limitations from a foreign state is enforceable in cases filed in Ohio. He claimed Asset's practice of filing time-barred lawsuits against

1. The case was later transferred to the Lake County Court of Common Pleas due to Mr. Caszatt's counterclaim, which he sought to pursue as a class action.

consumers is unfair, unconscionable, and a misrepresentation in violation of consumer protection statutes. Mr. Caszatt sought class certification for his claim.

Proposed Class

{¶4} The class proposed by Mr. Caszatt essentially consisted of consumers against whom Asset had filed a lawsuit in Ohio to collect a credit card debt beyond the statute of limitations under Ohio law or law of the choice-of-law state specified in the credit card's terms and conditions. In his motion for class certification, Mr. Caszatt described the class as: "all persons against whom plaintiff Asset LLC has filed a lawsuit in Ohio, to collect a credit card debt, where the credit card agreement contained a choice of law provision, applying the law of a state other than Ohio, the lawsuit was filed on or after June 6th, 2006, and the lawsuit was filed after the statute of limitations had expired under the law of Ohio or under the law of the choice-of-law state."

Grounds for Class Certification

{¶5} Mr. Caszatt sought class certification under all three grounds provided in Civ.R. 23(B)(3), claiming that Asset would be subject to incompatible standards of conduct absent class certification; that declaratory and injunctive relief requiring Asset to refrain from ignoring the choice of law provision is proper; and that common questions of law or fact predominate over individual questions and class action is a superior method of adjudication of the instant matter.

{¶6} The trial court denied certification. The court found the class to be identifiable, and also found the prerequisites of Civ.R. 23(A) – impracticality/numerosity, commonality, typicality, and adequate representation – were met in this case. However,

the trial court found that a class action could not be maintained because none of the Civ.R. 23(B) requirements were satisfied.

{¶7} Civ.R. 23(B) permits a class action to be brought if: "(1) a series of separate actions would create a risk of inconsistent adjudications or incompatible standard of conduct for the party opposing the class action; (2) injunctive relief would be an appropriate remedy for the entire class; or (3) common questions of law or fact predominate over questions involving only individual members of the class and class treatment is the superior method of resolving the controversy." The trial court found none of these requirements were met.

{¶8} Mr. Caszatt appealed from the trial court's denial of class certification, in *Asset Acceptance LLC v. Caszatt*, 11th Dist. No. 2009-L-090, 2010-Ohio-1449 ("*Asset I*"). On appeal, the main issue was whether the proposed class action could be certified under Civ.R. 23(B)(3). We framed the underlying issue in *Asset I* as "whether Asset's practice of applying Ohio's statute of limitations despite the choice of law provision in the credit card's terms and conditions violated R.C. 2305.03(B) and, therefore, the FDCPA and Ohio's CSPA." *Id*. at ¶37. We described Mr. Caszatt's efforts, in essence, as attempting to certify the class of credit card debtors sued in Ohio by Asset whose credit card terms and conditions contained the choice of law provision mandating the application of the law of another state with a shorter period of limitations for credit card debt collections. *Id.*

{¶9} After analyzing the proposed class under the predominance and superiority tests, a unanimous panel from this court decided that the class could be

certified under Civ.R. 23(B)(3), and that the trial court erred in denying class certification.

{¶10} Regarding predominance, we stated "the common overarching issue is whether Asset's purported standardized practice of employing Ohio's 15-year statute of limitations violated the FDCPA and Ohio's CPSA by filing suits barred by the time period imposed by the state identified in the choice of law provision in the credit card's terms and conditions." *Id.* at ¶43.

{¶11} Regarding superiority, we reasoned that "[c]lass action is particularly appropriate in a case like this where the unsophisticated consumers-debtors most likely are not aware of a statute of limitations defense." *Id*. at ¶64, citing *Ramirez v. Palisades Collection LLC*, 250 F.R.D. 366, 374 (N.D.Ill.2008). We explained that such consumers-debtors are unlikely to seek or to be able to afford representation to pursue their individual claim, and therefore, the variance in size and disparity in individual consumer/debtor's recovery in this case does not undermine the superiority of the case proceeding as a class action. *Id*.

{¶12} As we emphasized, this credit card debt collection case concerned Asset's alleged practice of filing collection lawsuits that are time-barred under the law of the state identified in the choice of law provisions against consumers likely unaware of the statute of limitation defense. *Id*. at ¶73. "We cannot conceive of a case more suited for class action treatment. This is exactly the type of cases contemplated by Civ.R. 23(B)(3) in which a class action would 'achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated.'" *Id*. quoting *Cope v.*

Metro. Life Ins. Co., 82 Ohio St.3d 426, 430 (1998). Asset did not appeal our decision to the Supreme Court of Ohio.

Procedural History After Remand

{¶13} After the trial court denied Mr. Caszatt's motion for class action certification and before he filed a notice of appeal in *Asset I*, the parties filed cross motions for summary judgment on Asset's debt collection action against Mr. Caszatt. The court stayed the proceedings on these motions pending *Asset I*. After remand, the court entertained the cross motions for summary judgment and granted summary judgment in favor of Mr. Caszatt on Asset's claim against him for nonpayment on account on the ground that it was time-barred.[2]

{¶14} Regarding Mr. Caszatt's counterclaim against Asset alleging: (1) violation of the FDCPA; (2) violation of the Ohio Consumer Sales Practices Act; (3) violation of the Deceptive Trade Practices Act; (4) defamation; (5) abuse of process; and (6) civil conspiracy, the trial court granted summary judgment in favor of Asset, except for the FDCPA claim.

{¶15} The trial court's judgment left the FDCPA claim for trial and Asset Acceptance did not appeal this judgment. Subsequently, the trial court held a hearing

2. In its judgment granting summary judgment in favor of Mr. Caszatt on the debt claim, the court stated the resolution of the matter depended on whether Asset's claim against Mr. Caszatt was barred by the statute of limitations. The court addressed the initial issue of whether it could consider the exhibit attached by Asset to its motion for summary judgment which showed a waiver clause in Mr. Caszatt's credit card terms and condition; the waiver clause stated the credit card user waived any applicable statute of limitations. The court refused to consider the waiver clause because Asset did not meet its evidentiary burden under Civ.R 56; specifically, it failed to incorporate that exhibit by reference to a properly-framed affidavit pursuant to Civ.R. 56(E). The trial court explained that, therefore, Asset's claim against Mr. Caszatt could not be resolved by construing the claim as involving a written agreement containing a waiver clause. Instead, the court applied Ohio's six-year statute of limitations for unwritten contracts prescribed in R.C. 2305.07 in Asset's debt collection suit against Mr. Caszatt. Because the cause of action accrued in 2001, the court found Asset's claim against Mr. Caszatt was time-barred.

on a motion for sanctions filed by Mr. Caszatt alleging discovery violations. Asset, apparently for the first time, requested an order from the trial court implementing this court's decision. Mr. Caszatt filed a proposed judgment entry for the class certification; Asset filed objections to it.

{¶16} On June 10, 2011, the court issued a judgment entry, certifying the class as follows: "all persons against whom Asset LLC has filed a lawsuit in Ohio, to collect a credit card debt, where the credit card agreement contained a choice of law provision, applying the law of a state other than Ohio. Further the lawsuit was filed on or after June 6th, 2006, and was filed after the statute of limitations had expired under the law of Ohio or under the law of the choice-of-law state." The court also stated Mr. Caszatt shall serve as the class representative.

{¶17} Additionally, the trial court denied Mr. Caszatt's motion for sanctions, noting that Asset did not object to his list of requested discovery.

{¶18} Asset appeals from this judgment, assigning the following errors for our review:

{¶19} "[1.] The trial court abused its discretion when it certified a class of persons whose claims could be based on unwritten agreements.

{¶20} "[2.] The trial court abused its discretion when it appointed Sean Caszatt as class representative because it found that he was not a party to a written credit card agreement.

{¶21} "[3.] The trial court abused its discretion when it certified a fail-safe class.

{¶22} "[4.] The trial court abused its discretion when it ordered Asset to produce discovery absent class members when such evidence cannot be used to satisfy the requirements of Civ.R. 23."

{¶23} Mr. Caszatt filed a merit brief as well as a motion to dismiss, asserting that this court lacks jurisdiction to entertain this second appeal regarding the class certification. We agree.

Jurisdiction for Reviewing Class Action Certification: R.C. 2505.02(B)(5)

{¶24} As an initial matter, we note that the law regarding class certifications in relation to final appealable orders has a long and tortured history in this state. *See Rosette v. Countrywide Home Loans, Inc*., 8th Dist. Nos. 86823 and 86970, 2006-Ohio-4488, ¶6, citing 50 Clev. St. L. Rev. 595, Gary L. Garrison 2002-2003. The question of whether a certification of a class is a final appealable order became settled when the General Assembly revised R.C. 2505.02. R.C. 2505.02(B)(5) now expressly states that a final appealable order includes "[a]n order that determines that an action may or may not be maintained as a class action." By enacting R.C. 2505.02(B)(5), the General Assembly expressly designated that judgments determining whether a case may be maintained as a class action are final appealable orders. *See*, *e.g., Blumenthal v. Medina Supply Co.*, 139 Ohio App.3d 283 (8th Dist.2000) (an order determining class certification constitutes a final appealable order pursuant to R.C. 2505.02(B)(5)).

{¶25} Pursuant to R.C. 2505.02(B)(5), therefore, there was a final appealable order in *Asset I*, as it was an order "that determines that an action may or may not be maintained as a class action." We held that the instant FDCPA action should be maintained as a class action and directed the trial court to certify the class. Asset did

not appeal our decision to the Supreme Court of Ohio, and the trial court, on remand, certified the class as we ordered. The trial court's wording of the certified class may be somewhat cumbersome, but our reading of it indicates it is consistent with our opinion.

{¶26} On appeal, Asset does not seem to dispute – and it could not – our holding that this case should be certified as a class action. Rather, Asset appears to be disputing the makeup of the members of the class. Unlike the first appeal, which challenged an order determining whether the action "may or may not be maintained as a class action," the trial court's judgment certifying the class on remand pursuant to our directive does not fit under R.C. 2505.02(B)(5).

{¶27} We have *already* entertained, in the first appeal, whether the FDCPA claim regarding Asset's alleged practice of filing time-barred suits to collect credit card debts could be maintained as a class action, and we have directed the trial court to conduct further proceedings in this case as a class action. R.C. 2505.02(B)(5) does not grant us jurisdiction to review the issue regarding the exact makeup of the class members at this juncture.

{¶28} We find this case analogous to *Gabbard v. Ohio Bureau of Workers' Comp*., 10th Dist. Nos. 02AP-976 and 02AP-1168, 2003-Ohio-2265. In that case, the plaintiffs in a class action sought to modify the class definition and the trial court denied it. The Tenth District held that such an order was not final appealable, reasoning that the legislature did not enact R.C. 2505.02(B) to allow a party to appeal every time a trial court modified the membership of a class. *Id.* at ¶29. "This decision of the legislature is consistent with the efficient operation of the trial courts. Maximum discretion for management of a class action once certified must be vested in the trial judges so they

can manage such complex litigation as efficiently as possible. An appeal, with its attendant delay, every time the trial court amended the membership of the class, would unnecessarily delay already lengthy litigation." *Id.* "R.C. 2505.02(B)(5) allows appeals from the initial decision to certify or not to certify a class, but does not provide for an appeal of trial court decision to modify or not to modify the class membership. If an appeal were allowed in the latter situation, each time an individual member of the class requested to be removed from the class, one of the remaining parties could appeal. A party who wished to delay the litigation could delay the litigation indefinitely by pursuing said appeals." *Id*. at ¶33. The cogent reasoning given by the Tenth District is equally applicable to this case.

{¶29} Asset claims this case should be distinguished from *Gabbard*. It alleges that in this case the trial court's class definition *expanded* the class, whereas the trial court in *Gabbard refused* to expand the class. *Even if, arguendo*, the trial court in this case did expand the class, this is not a distinction which would allow us to apply R.C. 2505.02(B) differently. The Tenth District obviously did not make this distinction, as it stated that R.C. 2505.02(B)(5) "does not provide for an appeal of trial court decision *to modify or not to modify the class membership*." (Emphasis added.) *Id.* at ¶33. We similarly read the statute as not providing for an appeal from an amendment of the membership of the class.

{¶30} R.C. 2505.02(B)(5) does not grant this court jurisdiction to review the trial court's order certifying the class on remand, after this court had determined this case may be maintained as a class action. We lack a final appealable order and, therefore, do not have jurisdiction to consider this appeal.

{¶31} The appellee's motion to dismiss appeal for lack of jurisdiction is granted and the appeal is dismissed.

CYNTHIA WESTCOTT RICE, J.,

THOMAS R. WRIGHT, J.,

concur.