

2011

Midland Funding LLC v. Kenneth Pipkin : Brief of Appellant

Utah Court of Appeals

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Johnson Mark LLC.

Kenneth Pipkin.

Recommended Citation

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Appeal No. 20110788-CA

IN THE UTAH COURT OF APPEALS

MIDLAND FUNDING LLC,

Plaintiff and Appellee

vs.

KENNETH PIPKIN,

Defendant and Appellant, Pro Se

On Appeal from the Fifth Judicial District Court, State of Utah,

Washington County, St. George Department,

Case No. 110500860

Judge Eric A. Ludlow

BRIEF OF THE APPELLANT

Defendant/Appellant requests oral arguments.

JOHNSON MARK LLC

P. O. Box 7811

Sandy, Utah 84091

KENNETH PIPKIN

P. O. Box 842272

UTAH DEPT 84784 SUTS

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Prior or Related Appeal:

None

STATEMENT SHOWING JURISDICTION OF THE APPELLATE

COURT

Pursuant to Utah Appellate Procedure §15.02 (2) (j), “cases transferred to the Court of Appeals from the Supreme Court”. Defendant/Appellant received letter stating that Case was assigned to the Utah Court of Appeals dated September 27, 2011.

STATEMENT OF THE ISSUES

1. Did the District Court err in its decision without considering Plaintiff/Appellee had violated Defendant/Appellant's Rights and requests for verification of alleged debt Pursuant to FDCPA? *See page. 5, Answer to Complaint.* "Defendant requested information listed on 1st Request for ORIGINAL Documentation and ORIGINAL contracts from Plaintiff on Date of June 18, 2010 (Copy attached as Exhibit "A")". *See page. 37, Memorandum in Support of Motion in Opposition to Motion for Summary Judgment.* "...Pursuant to the Fair Debt Collections Practices Act (FDCPA), there has been no documented evidence of alleged debt provided to Defendant by Plaintiff or any affiliated parties, alleged debt is null and void. Defendant has no access to information regarding alleged debt". *See Exhibits "A" through "E".*
2. Did the District Court err in its decision after Plaintiff/Appellee had neglected to cease collection activity after Defendant/Appellant had requested name and address of original creditor Pursuant to FDCPA? *See page 50, Motion to Dismiss* "Defendant has repeatedly requested Evidence of alleged debt Pursuant to Fair Debt Collection Practices Act (FDCPA), which gives Defendant certain Rights under FDCPA. *See page 65, Motion for Reconsideration.* "Defendant states that, to date as of this Motion, Plaintiff has disregarded Defendant's requests to produce to Defendant: (1) Documented evidence of alleged debt, (2) name and

address of original creditor and (3) name and address of current creditor(s).

Although Plaintiff neglected to produce any of requested evidence and address information, Plaintiff failed to cease collection of alleged debt. Defendant's first request was timely mailed to Plaintiff as required in FDCPA requirements". *See page 113, Motion for Expedited Post-Judgment Hearing.* "Defendant also requests the Court to consider Plaintiff's disregard of Defendant's Rights Pursuant to FDCPA as Defendant mailed, via Certified Mail, a request for original contract and name and address of original creditor, as well as name and address of current creditor". *See Exhibits "A" through "E".*

3. Did the District Court err in holding that, Pursuant to Rule 56(c), Plaintiff/Appellee had succeeded in "show[ing] that there was no genuine issue as to any material fact" after Defendant/Appellant raised questions regarding Plaintiff/Appellee's allegations of "Breach of Contract", without Plaintiff/Appellee presenting alleged contract to support said claim? *See page 37, Memorandum in Support of Motion in Opposition to Motion for Summary Judgment.* "Defendant does not dispute validity of age, competency or employment of Affiant. Affiant's affidavit does not provide documented evidence of alleged debt therefore is irrelevant". *See pages 52 and 53, Reply to Plaintiff's Opposition to Motion to Dismiss.* "Regarding Plaintiff's alleged "Breach of contract claim", (1) no contract has been provided to Defendant, or the Court (to Defendant's knowledge) as evidence of alleged debt, (2) Plaintiff has repeatedly disregarded

Defendant's requests for evidence of alleged debt, showing poor performance by the party (Plaintiff) seeking alleged recovery, (3) no evidence of alleged debt, namely "an original contract", has been provided to Defendant to support Plaintiff's alleged "breach of contract by (any) party", and (4) there has been no evidence of alleged debt presented to support alleged "damages"..... Therefore, as "not remembering" alleged debt is not evidence that alleged debt does not exist, Plaintiff alleging that alleged debt exists, without providing or presenting evidence of alleged debt, also is not evidence that alleged debt exists."

4. Did the District Court err in holding that Plaintiff/Appellee had produced sufficient evidence attached to Affidavit Pursuant to Rule 56(e) to establish a prima facie case? *See page 24, Affidavit of Myeah Struck*. "I have access to and have reviewed the records pertaining to...". *See Exhibit "4" of Plaintiff/Appellee's Memorandum in Support of Plaintiff's Motion for Summary Judgment, Pages 18 through 24. See page 126, Reply in Support of Motion for Expedited Post-Judgment Hearing*. "Defendant submits the same argument because Plaintiff has failed and continues to fail to present original contract which Plaintiff accuses Defendant of Breaching. In order for there to be a breach of contract, there must be a contract in existence, which Plaintiff has failed to present to create a prima facie case."

Although Defendant/Appellant preserved the above issues in the Trial Court, Defendant/Appellant feels that the above issues were ignored and unpreserved by the Plaintiff/Appellee and/or the Judge. Therefore, Defendant/Appellant requests the Court of Appeals to review the above non-preserved issues.

CONSTITUTIONAL PROVISIONS

None.

STATEMENT OF THE CASE

This is a simple case where Plaintiff/Appellee has failed to form a Prima Facie case and has violated Defendant/Appellant's Rights Pursuant to FDCPA.

STATEMENT OF THE FACTS

On or around May 30, 2010, Defendant/Appellant received letter from Plaintiff/Appellee's Attorney, Johnson Mark, Attorneys at Law (hereafter "Attorney"). Letter, attached as Exhibit "E", was dated May 27, 2010 and states, in part, "....Federal law gives you thirty days after you receive this letter to dispute the validity of the debt or any part of it.....If you do dispute it by notifying our firm in

writing to that effect, we will, as required by law, obtain and mail you proof of the debt. And if, within the same period, you request in writing the name and address of your original creditor, if the original creditor is different from the current creditor, we will furnish you with that information too.....If, however you request proof of the debt or the name and address of the original creditor within the thirty-day period that begins with your receipt of this letter, the law requires our firm to suspend our efforts to collect the debt (through a lawsuit, arbitration, or otherwise) until we mail the requested information to you.”

On June 18, 2010 Defendant/Appellant mailed, via certified mail to Plaintiff/Appellee’s Attorney, a letter (submitted as Exhibit “A” in District Court) requesting proof of alleged debt, along with name and address of original creditor. No response was received by Defendant/Appellant until, on March 7, 2011, nearly a year later, a Complaint and summons was served on Defendant/Appellant’s father, while Defendant/Appellant was in Texas visiting family. Defendant/Appellant filed Answer to Complaint on March 28, 2011.

On May 10, 2011, Defendant/Appellant received a letter from Plaintiff/Appellee’s Attorney requesting a Pre-Trial Conference. Certificate of Mailing on letter was typed “On April 21, 2011, I mailed.....” and the 21 was crossed off with pen and “26” was hand-written above the typed “21”. Postmark on the envelope containing the letter was 05/05/11. Subsequently, Defendant/Appellant received a

letter from the District Court, postmarked 05/11/11, on May 13, 2011. This “Notice of Pre-Trial Conference” was addressed, incorrectly, to Defendant/Appellant’s physical address: 675 N Lavritzen St #3, Hildale, UT 84784. Correct physical address is: 675 N Lauritzen St., Hildale UT 84784. U. S. Post Office usually delivers to: P. O. Box 842272, Hildale UT 84784, yet Defendant/Appellant did, in fact, receive the “Notice of Pre-Trial Conference” letter from the District Court.

On June 9, 2011, at the Pre-Trial Conference, Defendant/Appellant notified the District Court Judge that no response to Defendant/Appellant’s letter had been received. A representative for Plaintiff/Appellee’s attorney stated that “requested information had been sent but was rejected by U. S. Post Office and returned”.

The following day, on June 10, 2011, Defendant/Appellant mailed, via certified mail to Plaintiff/Appellee’s attorney, a “2nd Request and Demand.....” (submitted as Exhibit “B” in District Court) which requested the information a second time, along with a “copy of allegedly rejected Postmarked envelope that allegedly contained original evidence previously requested on June 18, 2010”. Subject line of Defendant/Appellant’s letter also notified Plaintiff/Appellee’s attorney that “This Demand is Pursuant to the Fair Debt Collection Practices Act”.

On or around July 7, 2011, Defendant/Appellant received Motion for Summary Judgment, Affidavit of Mycah Struck, Memorandum, Declaration of costs,

and Exhibit "A", general provisions of [non-specific] cardholder agreement from Plaintiff/Appellee's attorney. Defendant/Appellant filed Motion in Opposition to Summary Judgment, along with Memorandum and Exhibits "A" through "D".

On or around July 21, 2011, Defendant/Appellant received Reply in Support of Summary Judgment, Request to Submit for Decision, and unsigned Summary Judgment. On July 21, 2011, Defendant/Appellant filed a Reply in Opposition for Motion for Summary Judgment, Motion to Dismiss, and Order to Dismiss.

On August 2, 2011, the District Judge, signed Plaintiff/Appellee's Summary Judgment. Defendant/Appellant filed additional motions, including: Motion for Reconsideration, Motion for Expedited Post-Judgment Hearing, and Notice of Appeal, among others.

ARGUMENT

1. THE DISTRICT COURT ERRED IN ITS DECISION WITHOUT CONSIDERING PLAINTIFF/APPELLEE HAD VIOLATED DEFENDANT/APPELLANT'S RIGHTS AND REQUESTS FOR VERIFICATION OF ALLEGED DEBT PURSUANT TO FDCPA.

FDCPA was created to protect consumers from unfair debt collection practices of debt collectors, including attorneys. See HEINTZ et al. v. JENKINS, 514 U.S. 291 (1995). In this case, Plaintiff/Appellee has violated FDCPA after Defendant/Appellant requested verification of alleged debt. See Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. §§ 1692-1692p. § 809. Validation of debts (a)(4), and (b). See attached Exhibits "A" through "D". Defendant/Appellant has also verbally requested verification. Verification was requested by Defendant/Appellant, in writing, within 30 days of date on letter from Plaintiff/Appellee's attorney. As of the date of this Brief, no contract or verification has been presented to Defendant/Appellant by Plaintiff/Appellee, as evidence, proof, or otherwise. Defendant/Appellant has, in fact, received numerous mailings pertaining to Motions with the Court from Plaintiff/Appellee. Therefore, Plaintiff/Appellee has correct address of Defendant/Appellant, yet Defendant/Appellant has not received information requested from Plaintiff/Appellee, Pursuant to FDCPA. Wherefore, Plaintiff/Appellee is in violation of FDCPA and case brought before the District Court is unlawful and, therefore, harassment. See Eric M. PICHT and Shayleen M. Picht, Plaintiffs, v. Jon R. HAWKS, George E. Warner and Jon R. Hawks, Ltd., Defendants., 77 F.Supp.2d 1041 (1999), "The FDCPA is a remedial, strict liability statute which was intended to be applied in a liberal manner.... Proof of deception or actual damages is not necessary to make a recovery under the FDCPA."

**2. THE DISTRICT COURT ERRED IN ITS DECISION AFTER
PLAINTIFF/APPELLEE HAD NEGLECTED TO CEASE
COLLECTION ACTIVITY AFTER DEFENDANT/APPELLANT HAD
REQUESTED NAME AND ADDRESS OF ORIGINAL CREDITOR
PURSUANT TO FDCPA.**

Plaintiff/Appellee has violated FDCPA after Defendant/Appellant requested name and address of original creditor. See Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. §§ 1692-1692p, § 809. Validation of debts (a)(5) and (b). See attached Exhibits "A" through "D". Defendant/Appellant has also verbally requested information. Information was requested, in writing, within 30 days of date on letter from Plaintiff/Appellee's attorney by Defendant/Appellant. See attached Exhibit "E". As stated in Plaintiff/Appellee's letter, dated May 27, 2010, "If, however you request proof of the debt or the name and address of the original creditor within the thirty-day period that begins with your receipt of this letter, the law requires our firm to suspend our efforts to collect the debt (through a lawsuit, arbitration, or otherwise) until we mail the requested information to you." As of the date of this Brief, name and address of original creditor, as well as requested "proof" have not been presented to Defendant/Appellant by Plaintiff/Appellee, as evidence or otherwise, although

Plaintiff/Appellee filed a lawsuit. Therefore, Plaintiff/Appellee is in violation of FDCPA.

3. **THE DISTRICT COURT ERRED IN HOLDING THAT, PURSUANT TO UTAH RULES OF CIVIL PROCEDURE, RULE 56(c), PLAINTIFF/APPELLEE HAD SUCCEEDED IN “SHOW[ING] THAT THERE WAS NO GENUINE ISSUE AS TO ANY MATERIAL FACT” AFTER DEFENDANT/APPELLANT RAISED QUESTIONS REGARDING PLAINTIFF/APPELLEE’S ALLEGATIONS OF “BREACH OF CONTRACT”, WITHOUT PLAINTIFF/APPELLEE PRESENTING ALLEGED CONTRACT TO SUPPORT SAID CLAIM.**

Defendant/Appellant had, in fact, raised a genuine issue as to material fact in Defendant/Appellant’s MEMORANDUM IN SUPPORT OF MOTION IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT (page 37 in Trial Court records), among others, submitted in the District Court. “Defendant has no involvement with or any affiliation to MCM therefore has no familiarity in regards by which MCM creates and/or maintains its business records. Furthermore, Defendant has no access to information regarding alleged debt and cannot determine any validity of alleged debt without proper documented evidence of alleged debt as requested.”, and “Defendant has no access and has not been provided with evidence of alleged

debt therefore cannot determine any alleged balance information or validity of alleged debt". See Utah Rules of Civil Procedure 56(c).

See John YORGER, Plaintiff-Appellant, v. PITTSBURGH CORNING CORPORATION, Defendant-Appellee. 733 F.2d 1215, "...we cannot accept as an absolute requirement that a party opposing a motion for summary judgment must file an affidavit in order to preserve issues adequately mentioned in the response and elsewhere..... the party moving for summary judgment has the burden to show that he is entitled to judgment under established principles; and if he does not discharge that burden then he is not entitled to judgment. No defense to an insufficient showing is required."

See Johnny STILES, Plaintiff, v. HOME CABLE CONCEPTS, INC., et al., Defendants. AMERICAN GENERAL FINANCIAL CENTER, Plaintiff, v. Johnny STILES, Defendant. 994 F.Supp. 1410 (1998), where a contract was presented, as evidence, to remove "genuine issue of material fact". As of the date of this Brief, no contract or verification has been presented by Plaintiff/Appellee, as evidence or otherwise.

4. THE DISTRICT COURT ERRED IN HOLDING THAT

PLAINTIFF/APPELLEE HAD PRODUCED SUFFICIENT EVIDENCE ATTACHED TO AFFIDAVIT PURSUANT TO UTAH RULES OF CIVIL PROCEDURE, RULE 56(e) TO ESTABLISH A PRIMA FACIE CASE.

See Rule 56. Summary judgment. (e) “..... Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.” In this case, Plaintiff/Appellee’s only exhibit, exhibit “A” attached to Affidavit were some general provisions of a non-specific cardmember agreement. Nothing in Plaintiff/Appellee’s exhibit “A” mentioned Defendant/Appellant. Plaintiff/Appellee’s Affiant, Mycah Struck, stated in Affidavit, “I have access to and have reviewed the records pertaining to the account.....”. As such, no “records pertaining to the account” were attached thereto or served therewith.

See CELOTEX CORP. v. CATRETT, ADMINISTRATRIX OF THE STATE OF CATRETT, 477 U.S. 317 (1986) “The burden of establishing the nonexistence of a “genuine issue” is on the party moving for summary judgment....This burden has two distinct components: an initial burden of production, which shifts to the nonmoving party if satisfied by the moving party; and an ultimate burden of persuasion, which always remains on the moving party. ...The court need not decide whether the moving party has satisfied its ultimate burden of persuasion unless and until the court finds that the moving party has discharged its initial burden of

production...The burden of production imposed by Rule 56 requires the moving party to make a prima facie showing that it is entitled to summary judgment”.

CONCLUSION/RELIEF SOUGHT

Defendant/Appellant prays that the Court will forgive Defendant/Appellant's lack of form, nature, and understanding as Defendant/Appellant is acting Pro Se out of necessity. Plaintiff/Appellee has violated and continues to violate

Defendant/Appellant's Rights Pursuant to Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. §§ 1692-1692p. § 809. Validation of debts (b).

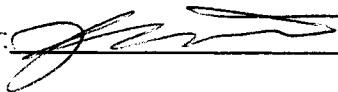
Defendant/Appellant requests the Court to consider and approach these violations with regard to Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. §§ 1692-1692p. § 813. Civil liability.

Further, Plaintiff/Appellee has failed to satisfy the burden of production Pursuant to Utah Rules of Civil Procedure, Rule 56, to make a prima facie showing that it is entitled to summary judgment. Defendant/Appellant requests the Court to reverse summary judgment and dismiss this case.

In the event the Court is unable to reverse summary judgment and/or dismiss case, Defendant/Appellant requests the Court to order, or have District Court order Plaintiff/Appellee to present original signed contract as evidence and proof, provide

verification of alleged debt and name and address of original creditor, and remand case to District Court for trial.

Respectfully submitted this 26th day of December, 2011.

By:  _____

Kenneth Pipkin, Pro Se

P. O. Box 842272

Hildale, UT 84784

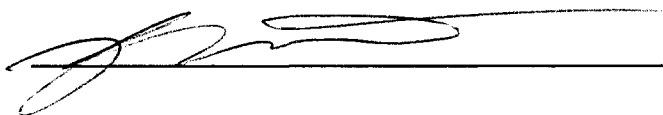
CERTIFICATE OF SERVICE

I, Kenneth Pipkin, hereby certify that on December 28th, 2011, I mailed two copies of Brief of the Appellant to:

JOHNSON MARK LLC

P. O. Box 7811

Sandy, Utah 84091

A handwritten signature in black ink, appearing to read 'Kenneth Pipkin', is written over a horizontal line.

Kenneth Pipkin

P. O. Box 842272

Hildale, UT 84784

ATTACHMENTS

Exhibit "A". Copy of Defendant/Appellant's "1st Request" for proof of [alleged] debt, name and address of original creditor, dated June 18, 2010.

Exhibit "B". Copy of Defendant/Appellant's "2nd Request and Demand" for proof of [alleged] debt, name and address of original creditor, dated June 10, 2011.

Exhibits "C" and "D". Copies of Certified Receipts for delivery confirmation of Exhibits "A" and "B".

Exhibit "E". Copy of 1st letter from Plaintiff/Appellee's attorney, dated May 27, 2010

EXHIBIT "A"

KENNETH PIPKIN

CERTIFIED RECEIPT # 7009 2250 0003 2205 4542

P.O. Box 842292

1 OF 2 ORIGINAL REQUESTS (2ND ORIGINAL IN POSSESSION OF SENDER)

Hildale, UT 84784

June 18, 2010

JOHNSON MARK LLC ATTORNEYS AT LAW

P.O. Box 7811

Sandy, UT 84091-7811

RE: 1st Request for ORIGINAL Documentation and ORIGINAL contracts (Reference # 370024)

This letter is in response to the letter sent to KENNETH PIPKIN from JOHNSON MARK LLC ATTORNEYS AT LAW on May 27, 2010. I am requesting all ORIGINAL signed contract(s) (NO copies), ORIGINAL security agreement(s) (NO copies), and all correspondence between KENNETH PIPKIN and JOHNSON MARK LLC ATTORNEYS AT LAW, MIDLAND FUNDING LLC, HSBC BANK NEVADA, N.A., and ANY other parties involved (collectively "all parties"). I am also requesting correspondence (including documentation of verbal correspondence) between "all parties".

Additionally, I am requesting the name and address of the original creditor, the name and address of the current creditor and ANY previous, current or future creditor(s), including "all parties".

I am also requesting the Total Amount Due, as of the date a reply is mailed.

Please mail all documentation, contracts, and correspondence within 30 days from receipt of this letter. If no reply is sent, we will assume this matter is closed.

Kenneth Pipkin

Agent for KENNETH PIPKIN

Exh. 2A "B"

KENNETH PIPKIN
P.O. Box 842272
Hildale, UT 84784

CERTIFIED RECEIPT # 7010 1670 0002 0082 6468
1 OF 2 ORIGINAL REQUESTS (2ND ORIGINAL IN POSSESSION OF SENDER)

June 10, 2011

JOHNSON MARK LLC ATTORNEYS AT LAW
P.O. Box 7811
Sandy, UT 84091-7811

RE: 2nd Request and Demand for ORIGINAL Documentation and ORIGINAL contracts (Reference # 370024). This Demand is Pursuant to the Fair Debt Collection Practices Act.

This letter is in response to the letter sent to KENNETH PIPKIN from JOHNSON MARK LLC ATTORNEYS AT LAW on May 27, 2010. I am demanding all ORIGINAL signed contract(s) (NO copies), ORIGINAL security agreement(s) (NO copies), and all correspondence between KENNETH PIPKIN and JOHNSON MARK LLC ATTORNEYS AT LAW, MIDLAND FUNDING LLC, HSBC BANK NEVADA, N.A., and ANY other parties involved (collectively "all parties"). I am also demanding correspondence (including documentation of verbal correspondence) between "all parties".

Additionally, I am demanding the name and address of the original creditor, the name and address of the current creditor and ANY previous, current or future creditor(s), including "all parties".

I am also requesting the alleged Total Amount Due, as of the date a reply is mailed.

Furthermore, as of the date of this letter, I am requesting copy of original allegedly rejected Postmarked envelope that allegedly contained original evidence previously requested on June 18, 2010.

Please mail all documentation, contracts, correspondence and copy of allegedly rejected Postmarked envelope within 30 days from receipt of this letter to requestors address listed above. If above requested evidence is not received within 30 days, we will assume this matter is moot.

Requestor cannot answer any Discovery processes until above evidence is produced.



Agent for KENNETH PIPKIN

Exhibit "B"

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on the 10th day of June 2011, I mailed a true and correct copy of Demandant's 2nd request and demand to the Plaintiff's address below:

William A. Mark (9602)
JOHNSON MARK LLC ATTORNEYS AT LAW
P. O. Box 7811
Sandy, UT 84091-7811

Kenneth Pipkin

Kenneth Pipkin

SENDER: COMPLETE THIS SECTION		COMPLETE THIS SECTION ON DELIVERY	
<p>■ Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.</p> <p>■ Print your name and address on the reverse so that we can return the card to you.</p> <p>■ Attach this card to the back of the mailpiece, or on the front if space permits.</p>		<p>A. Signature <input checked="" type="checkbox"/> Agent <input type="checkbox"/> Addressee</p> <p>X <i>[Signature]</i></p>	
<p>1. Article Addressed to:</p> <p>Johnson Mark LLC Attorneys at Law</p> <p>P.O. Box 7811</p> <p>Sandy, UT 84091-7811</p>		<p>B. Received by (Printed Name) <i>[Signature]</i> C. Date of Delivery</p>	
<p>2. Article Number (Transfer from service label) 7009 2250 0003 2205 4542</p>		<p>D. Is delivery address different from item 1? <input type="checkbox"/> Yes <input type="checkbox"/> No</p> <p>If YES, enter delivery address below:</p>	
<p>PS Form 3811, February 2004 Domestic Return Receipt 102595-02-M-1540</p>		<p>3. Service Type</p> <p><input type="checkbox"/> Certified Mail <input type="checkbox"/> Express Mail</p> <p><input type="checkbox"/> Registered <input type="checkbox"/> Return Receipt for Merchandise</p> <p><input type="checkbox"/> Insured Mail <input type="checkbox"/> C.O.D.</p>	
		<p>4. Restricted Delivery? (Extra Fee) <input type="checkbox"/> Yes</p>	

June 21, 2010

EXHIBIT
"C"

SENDER: COMPLETE THIS SECTION		COMPLETE THIS SECTION ON DELIVERY	
<p>■ Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.</p> <p>■ Print your name and address on the reverse so that we can return the card to you.</p> <p>■ Attach this card to the back of the mailpiece, or on the front if space permits.</p>		<p>A. Signature <input type="checkbox"/> Agent <input type="checkbox"/> Addressee</p> <p>X <i>[Signature]</i></p>	
<p>1. Article Addressed to:</p> <p>Johnson Mark LLC</p> <p>Attorneys at Law</p> <p>P.O. Box 7811</p> <p>Sandy, UT 84091-7811</p>		<p>B. Received by (Printed Name) <i>[Signature]</i> C. Date of Delivery</p>	
<p>2. Article Number (Transfer from service label) 7010 1670 0002 0082 6468</p>		<p>D. Is delivery address different from item 1? <input type="checkbox"/> Yes <input type="checkbox"/> No</p> <p>If YES, enter delivery address below:</p>	
<p>PS Form 3811, February 2004 Domestic Return Receipt 102595-02-M-1540</p>		<p>3. Service Type</p> <p><input type="checkbox"/> Certified Mail <input type="checkbox"/> Express Mail</p> <p><input type="checkbox"/> Registered <input type="checkbox"/> Return Receipt for Merchandise</p> <p><input type="checkbox"/> Insured Mail <input type="checkbox"/> C.O.D.</p>	
		<p>4. Restricted Delivery? (Extra Fee) <input type="checkbox"/> Yes</p>	

EXHIBIT
"D"

Jun 13, 2011

ATTORNEYS AT LAW
P.O. Box 7811
Sandy, UT 84091-7811



Exhibit "E"

TELEPHONE
1-888-599-6333

Reference # 370024

May 27, 2010

Our Client: MIDLAND FUNDING LLC

Original Creditor: HSBC BANK NEVADA, N.A.

KENNETH PIPKIN
PO BOX 842272
HILDALE UT 84784

Please remit payment to:
Johnson Mark LLC
P.O. Box 7811
Sandy, UT 84091-7811

Please Return Top Portion With Payment

Our law firm has been retained to collect from you the Total Amount Due below:

Account Number: 370024
Last Charge/Paid Date:

Account Balance:	\$	6148.03
Attorney/Collection Fee:	\$	0.00
Interest Owing:	\$	557.53
Total Amount Due:	\$	6705.56

To resolve this matter, you must either pay the Total Amount Due (unless it has already been paid) or call the law firm at 1-888-599-6333 and work out arrangements for payment. If you do neither of these things, our client may be entitled to file a lawsuit against you or take further action for the collection of this debt.

Federal law gives you thirty days after you receive this letter to dispute the validity of the debt or any part of it. If you do not dispute it within that period, we will assume that it is valid. If you do dispute it by notifying our firm in writing to that effect, we will, as required by law, obtain and mail to you proof of the debt. And if, within the same period, you request in writing the name and address of your original creditor, if the original creditor is different from the current creditor, we will furnish you with that information too.

The law does not require our client to wait until the end of the thirty-day period before pursuing their contractual rights against you to collect this debt. If, however, you request proof of the debt or the name and address of the original creditor within the thirty-day period that begins with your receipt of this letter, the law requires our firm to suspend our efforts to collect the debt (through a lawsuit, arbitration or otherwise) until we mail the requested information to you.

At this time, no attorney with this firm has personally reviewed the particular circumstances of your account, and no decision has been made to file a lawsuit. However, if you fail to contact this office, our client may consider additional remedies to recover the Total Amount Due. This is an attempt to collect a debt. Any information obtained will be used for that purpose. This communication is from a debt collector.

As of the date of this letter, you owe the Total Amount Due shown above. Because of interest and/or other charges (if any, as allowed by law), which may vary from day to day, the Total Amount Due on the day you pay may be greater than that shown above. For a current Total Amount Due, mail us a request or call 1-888-599-6333.

This law firm reports to a credit-reporting agency. Your failure to pay the Total Amount Due, or provide a dispute, may result in this account being reported as allowed by law.

We also accept payments by Visa, Mastercard, check-by-phone (ACH), Western Union, and MoneyGram.

To pay online visit www.payfirm.com

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ADDENDUM

CASES:

CELOTEX CORP. v. CATRETT, ADMINISTRATRIX OF THE ESTATE OF CATRETT, 477 U.S. 317 (1986)

"Summary judgment is appropriate where the court is satisfied "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. Rule Civ. Proc. 56(c). The burden of establishing the nonexistence of a "genuine issue" is on the party moving for summary judgment. 10A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2727, p. 121 (2d ed. 1983) (hereinafter Wright) (citing cases); 6 J. Moore, W. Taggart & J. Wicker, Moore's Federal Practice ¶ 56.15[3] (2d ed. 1985) (hereinafter Moore) (citing cases). See also, *ante*, at 323; *ante*, at 328 (WHITE, J., concurring). This burden has two distinct components: an initial burden of production, which shifts to the nonmoving party if satisfied by the moving party; and an ultimate burden of persuasion, which always remains on the moving party. See 10A Wright § 2727. The court need not decide whether the moving party has satisfied its ultimate burden of persuasion^[2] unless and until the court finds that the moving party has discharged its initial *331 burden of production. Adickes v. S. H. Kress & Co., 398 U. S. 144, 157-161 (1970); 1963 Advisory Committee's Notes on Fed. Rule Civ. Proc. 56(e), 28 U. S. C. App., p.

626. The burden of production imposed by Rule 56 requires the moving party to make a prima facie showing that it is entitled to summary judgment"

Eric M. PICT and Shayleen M. Picht, Plaintiffs, v. Jon R. HAWKS, George E. Warner and Jon R. Hawks, Ltd., Defendants., 77 F.Supp.2d 1041 (1999)

The FDCPA is a remedial, strict liability statute which was intended to be applied in a liberal manner. See McGowan v. King, Inc., 569 F.2d 845, 848 (5th Cir.1978). Proof of deception or actual damages is not necessary to make a recovery under the FDCPA. Baker v. G.C. Services Corporation, 677 F.2d 775, 780 (9th Cir.1982); Riveria v. MAB Collections, Inc., 682 F.Supp. 174, 175 (W.D.N.Y. 1988). Proof of one violation is sufficient to support a finding of summary judgment in favor of the Plaintiff in an FDCPA action. Bentley v. Great Lakes Collection Bureau, 6 F.3d 60, 62 (2nd Cir.1993); Cacace v. Lucas, 775 F.Supp. 502, 505 (D.Conn.1990). Whether the consumer owes the alleged debt has no bearing on a suit brought pursuant to the FDCPA. McCartney v. First City Bank, 970 F.2d 45 (5th Cir.1992); Baker v. G.C. Services Corp., 677 F.2d at 777 (9th Cir.1982). Determinations of whether the debt collector's conduct has violated the FDCPA are made from the perspective of the "least sophisticated consumer." FTC v. Raladam Co., 316 U.S. 149, 151-52, 62 S.Ct. 966, 968-69, 86 L.Ed. 1336 (1942); Exposition Press, Inc. v. FTC, 295 F.2d 869, 873 (2d Cir.1961), *cert. denied*, 370 U.S. 917, 82 S.Ct. 1554, 8 L.Ed.2d 497 (1962); Jeter v. Credit Bureau, Inc., 760 F.2d 1168, 1172-1175 (11th Cir.1985).

HEINTZ et al. v. JENKINS, 514 U.S. 291 (1995)

There are two rather strong reasons for believing that the Act applies to the litigating activities of lawyers. *First*, the Act defines the "debt collector[s]" to whom it applies as including those who "regularly collec[t] or attemp[t] to collect, directly or indirectly, [consumer] debts owed or due or asserted to be owed or due another." § 1692a(6). In ordinary English, a lawyer who regularly tries to obtain payment of consumer debts through legal proceedings is a lawyer who regularly "attempts" to "collect" those consumer debts. See, *e. g.*, Black's Law Dictionary 263 (6th ed. 1990) ("To collect a debt or claim is to obtain payment or liquidation of it, either by personal solicitation or legal proceedings").

Johnny STILES, Plaintiff, v. HOME CABLE CONCEPTS, INC., et al.

, Defendants. AMERICAN GENERAL FINANCIAL CENTER, Plaintiff, v.

Johnny STILES, Defendant. 994 F.Supp. 1410 (1998)

"The party asking for summary judgment "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the `pleadings, depositions, answers to interrogatories, and admissions on

file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Id.* at 323.

If the movant succeeds in demonstrating the absence of a material issue of fact, the burden shifts to the non-movant to establish, with evidence beyond the pleadings, that a genuine issue material to the non-movant's case exists."

"In deciding a motion for summary judgment, the evidence presented by the nonmovant must be believed and all justifiable inferences must be drawn in his favor. Anderson, 477 U.S. at 255. The facts, as viewed in that light, are as follows.

This is a satellite case. Plaintiff Johnny Stiles purchased a satellite television receiving system on or about January 31, 1994. To finance this purchase, Mr. Stiles applied for a revolving charge account with AGFC. See *Credit Application*, 3-31-94. On the application, there are four caveats printed in bold directly above the signature line. One of these states that

BY SIGNING BELOW YOU: . . .

(3) Agree that if this application is accepted and **credit** is extended by American General Financial Center, you will be bound by the terms of the Cardholder Agreement attached hereto, a copy of which has been provided to you.

Id. Mr. Stiles signed and dated the application below this statement, thereby binding himself to the cardholder agreement. *Id.*

The Cardholder Agreement establishes a number of duties for AGFC, as well as the credit card holder.”

John YORGER, Plaintiff-Appellant, v. PITTSBURGH CORNING CORPORATION, Defendant-Appellee. 733 F.2d 1215

“...we cannot accept as an absolute requirement that a party opposing a motion for summary judgment must file an affidavit in order to preserve issues adequately mentioned in the response and elsewhere. Moreover, defendant's argument ignores the fundamental rule that the burdens of establishing the absence of a genuine issue of material fact and the entitlement to judgment as a matter of law are on the movant. The nonmovant may not, of course, "rest upon the mere allegations or denials of his pleadings," Fed.R.Civ.P. 56(c), but rather must respond. Including an affidavit along with the response, however, is not an absolute requirement to oppose a summary judgment motion, particularly where summary judgment is improper. The Supreme Court decided this issue in *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142, wherein it held that "[w]here the evidentiary matter in support of the motion [for summary judgment] does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing evidentiary

matter is presented." 398 U.S. at 160, 90 S.Ct. at 1609-1610 (footnote omitted, emphasis in original) (quoting Advisory Committee Note on 1963 Amendment to Fed.R.Civ.P. 56(e)). The Court further observed that: It has always been perilous for the opposing party neither to proffer any countering evidentiary materials nor file a 56(f) affidavit. And the peril rightly continues [after the amendment to Rule 56(e)]. Yet the party moving for summary judgment has the burden to show that he is entitled to judgment under established principles; and if he does not discharge that burden then he is not entitled to judgment. No defense to an insufficient showing is required. 6 J. Moore, Federal Practice p 56.22, pp. 2824-2825 (2d ed. 1966) [amended 1982]."

RULES:

Utah Rules of Civil Procedure, Rule 56(c), Summary Judgment. Motion and proceedings thereon. The motion, memoranda and affidavits shall be in accordance with Rule 7. The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

Utah Rules of Civil Procedure, Rule 56(e), Summary Judgment. Form of affidavits; further testimony; defense required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. **Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.** The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the pleadings, but the response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. Summary judgment, if appropriate, shall be entered against a party failing to file such a response.

OTHER AUTHORITIES:

Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. §§ 1692-1692p.

§ 809. Validation of debts.

- (a) Within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall, unless the following information is contained in the initial

communication or the consumer has paid the debt, send the consumer a written notice containing—

(4) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and

(5) a statement that, upon the consumer's written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.

- (b) If the consumer notifies the debt collector in writing within the thirty-day period described in subsection (a) that the debt, or any portion thereof, is disputed, or that the consumer requests the name and address of the original creditor, the debt collector shall cease collection of the debt, or any disputed portion thereof, until the debt collector obtains verification of the debt or any copy of a judgment, or the name and address of the original creditor, and a copy of such verification or

judgment, or name and address of the original creditor, is mailed to the consumer by the debt collector. Collection activities and communications that do not otherwise violate this title may continue during the 30-day period referred to in subsection (a) unless the consumer has notified the debt collector in writing that the debt, or any portion of the debt, is disputed or that the consumer requests the name and address of the original creditor. Any collection activities and communication during the 30-day period may not overshadow or be inconsistent with the disclosure of the consumer's right to dispute the debt or request the name and address of the original creditor.

Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. §§ 1692-1692p.

§ 813. Civil liability.

(a) Except as otherwise provided by this section, any debt collector who fails to comply with any provision of this title with respect to any person is liable to such person in an amount equal to the sum of—

- (1) any actual damage sustained by such person as a result of such failure;
- (2) (A) in the case of any action by an individual, such additional damages as the court may allow, but not exceeding \$1,000; or

(B) in the case of a class action,

(i) such amount for each named plaintiff as could be recovered under subparagraph (A), and

(ii) such amount as the court may allow for all other class members, without regard to a minimum individual recovery, not to exceed the lesser of \$500,000 or 1 per centum of the net worth of the debt collector; and

(3) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court. On a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs.

(b) In determining the amount of liability in any action under subsection (a), the court shall consider, among other relevant factors—

(1) in any individual action under subsection (a)(2)(A), the frequency and persistence of noncompliance by the debt collector, the nature of such noncompliance, and the extent to which such noncompliance was intentional;
or

(2) in any class action under subsection (a)(2)(B), the frequency and persistence of noncompliance by the debt collector, the nature of such noncompliance, the

resources of the debt collector, the number of persons adversely affected, and the extent to which the debt collector's noncompliance was intentional.

(c) A debt collector may not be held liable in any action brought under this title if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.

(d) An action to enforce any liability created by this title may be brought in any appropriate United States district court without regard to the amount in controversy, or in any other court of competent jurisdiction, within one year from the date on which the violation occurs.

(e) No provision of this section imposing any liability shall apply to any act done or omitted in good faith in conformity with any advisory opinion of the Commission, notwithstanding that after such act or omission has occurred, such opinion is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.