IN THE CIRCUIT COURT OF FAYETTE COUNTY, WEST VIRGINIA

LESLIE TWEEDIE and
CHRISTINA WAUGH,
on behalf of themselves and
all others similarly situated, **Plaintiffs,**

v. **Civil Action No. 18-C-199**
Honorable Paul M. Blake, Jr.

US ASSET MANAGEMENT, INC., **Defendant.**

ORDER GRANTING US ASSET MANAGEMENT, INC.'S
MOTION FOR SUMMARY JUDGMENT

On August 28, 2020, the above styled matter came before the Court for a hearing on Defendant's Motion For Summary Judgment ("Motion"). Steven R. Broadwater, Jr., Esq., appeared on behalf of Plaintiffs Brenda Waugh ("Waugh") and Leslie Tweedie ("Tweedie") (hereinafter collectively "Plaintiffs"). Nicholas P. Mooney II, Esq., and Lawrence J. Bartel, Esq., appeared on behalf of Defendant, US Asset Management, Inc. ("USAM").

The crux of Plaintiff's claim for relief is that "USAM" purchased from AT&T debts owed by the Plaintiffs and then, allegedly outside the applicable statute of limitations for the sale of goods provided by the Uniform Commercial Code ("UCC"), attempted to collect the debts by sending letters to the Plaintiffs that allegedly utilized language that would lead the consumer to believe the debt was legally enforceable and/or letters that did not contain the time-barred debt disclosure required by W. Va. Code § 46A-2-128(f), in violation of the *West Virginia Consumer Credit and Protection Act*, W. Va. Code § 46A-1-101.

The Defendant argues the following points to support the Court granting Defendant's Motion For Summary Judgment: 1) The 10 year statute of limitations applies rather than the four

year statute of limitations provided by the UCC because it was a contract for services rather than a contract for goods and therefore the debt was not time barred; 2) In the alternative, if the Court finds that the contract is a hybrid contract for both services and goods, the Court should conduct the predominant factor test as outlined in Bonebrake v. Cox, 499 F.2d 951 (8th Cir. 1974) and Elkins Manor Associates v. Eleanor Concrete Works, 183 W. Va. 501, 396 S.E.2d 463 (1990), and determine that the predominant purpose test weighs in favor of the Defendant in that the contract was predominantly for phone services with the cell phone(s) received by the Plaintiffs only incidentally involved, thereby making the 10 year statute of limitations applicable and accordingly the defaulted debt enforceable; and 3) In the event that the Court finds in Plaintiffs' favor on the first two points, the Court should find that the Defendant has a viable bona fide error defense that would bar relief under the *West Virginia Consumer Credit and Protection Act.*

At the hearing in this matter, the Court proceeded to hear the argument and proffers of counsel regarding the pending Motion. The Court having fully considered the arguments of counsel, the record in this matter, and the relevant law, makes the following findings of fact and conclusions of law with respect to the Motion:

FINDINGS OF FACT

Findings of Fact regarding Christina Waugh

1. On or about October 25, 2008, Waugh opened a cell phone account with AT&T for cellular phone service and hot spot service.
2. At the time the account was opened, the Defendant received cellular devices for use with the service plan.

3. When deposed, Waugh conceded that she signed a contract by entering her signature on an IPAD type device accepting the terms of the AT&T contract for cellular and hot spot services.
4. The record evidence supports a finding that there was a written contract between Waugh and AT&T.
5. There is considerable disagreement between the parties regarding whether the cellular devices that were obtained by Waugh were part and parcel to the contract in contention or a consideration given for entering into the contract for services.
6. Waugh further testified during her deposition that it was her belief or understanding she was paying for the service plan and not for the cell phones.
7. Waugh received monthly statements and the statements she received were for charges relating to the cellular service and hot spot service provided to her by AT&T.
8. Waugh's account remained open until AT&T charged off Waugh's past due debt on or about June 28, 2010.
9. USAM purchased the debt owed on Waugh's contract from AT&T.
10. There is no record evidence that shows that Waugh's past due debt was related to the purchase of goods or a cell phone.
11. The record evidence shows that the defaulted debt sought to be recovered from Waugh by USAM is a debt related to monthly cell phone services and hot spot services previously provided by AT&T.
12. USAM sent a letter to Waugh on January 30, 2015, in an attempt to collect from her the outstanding AT&T debt.

13. It is undisputed that the letter did contain the word "settlement" and it did not contain the time-barred debt disclosure required by W. Va. Code § 46A-2-128(f).

14. The manner in which the term "settlement" was used in the letter sent by USAM to Waugh is not false, deceptive or misleading to a consumer.

15. Waugh's action hinges on whether the four year statute of limitations of the UCC applies rather than the standard ten year statute of limitations governing other contracts.

16. While significant argument can be had that the contract was purely a contract for services rather than goods, the Court gives the Plaintiff the benefit of the doubt in its determination of whether the contract is, at a minimum, a hybrid contract.

17. Since phones were received by Waugh at the time the contract was entered, the Court considers the contract between Waugh and AT&T a mixed or hybrid contract involving both services and goods.

Findings of Fact regarding Leslie Tweedie

18. On or about June 15, 2007, Tweedie applied for and opened an AT&T cellular phone account, which encompassed lines for two cellular phones.

19. At the time the account was opened, Tweedie received a blackberry device.

20. There is considerable disagreement between the parties regarding whether the blackberry device obtained by Tweedie was part and parcel to the agreement in contention, a consideration given for entering the contract for services, or a wholly separate purchase.

21. Deposition testimony of Tweedie reflects that Tweedie does not recall when she opened her AT&T account, where she opened her AT&T account, if she entered a contract for

one phone line or more, whether she received a service plan, if she picked a service plan, whether or not she signed any contract, or any specifics about the monthly bill or plan.

22. When deposed, Tweedie did recall that she received a monthly bill that was supposed to be a sum certain and that she received monthly statements from AT&T, which showed charges for her cellular phone service.

23. To a very great extent, Tweedie's deposition testimony reveals that, for the most part, she recalls almost nothing about her acquisition of the blackberry and cell phone services from AT&T.

24. USAM's Vice President of Operations, Ben Ribero, and Waugh both acknowledge and affirm that to obtain a cellular phone service plan from AT&T, a contract must be physically signed, either in paper or electronic form, before receiving the cellular service.

25. Sufficient evidence exists in the record of this matter to show that a monthly cellular phone account can only be opened upon the entry of a signed contract executed at the time of sale in store, on-line or otherwise.

26. Although Tweedie has no recollection of whether she signed a written contract or not when she obtained AT&T cellular phone service, there is sufficient record evidence to show that Tweedie did enter into a written contract at the time of obtaining the blackberry device and cellular service plan.

27. On or about March 13, 2009, the account was charged-off by AT&T after Tweedie's failure to pay her monthly bills for cellular phone service.

28. There is no record evidence that shows that Tweedie's past due debt was related to the purchase of a blackberry cellular device.

29. USAM purchased the debt owed on Tweedie's contract from AT&T.

30. USAM sent a letter to Tweedie on November 26, 2014, in an attempt to collect from her the outstanding AT&T debt.

31. The record evidence shows that the defaulted debt sought to be recovered from Tweedie by USAM was a debt related to monthly cell phone services previously provided by AT&T.

32. Even if a separate agreement for the purchase of a cell phone exists, there is no evidence that such contract was ever in default, that USAM purchased such contract from AT&T, or that USAM attempted to collect on such contract.

33. It is undisputed that the letter did not contain the time-barred debt disclosure required by W. Va. Code § 46A-2-128(f).

34. Tweedie's action hinges on whether the four year statute of limitations of the UCC applies rather than the standard ten year statute of limitations governing other contracts.

35. While significant argument can be had that the contract was purely a contract for services rather than goods, the Court gives the Plaintiff the benefit of the doubt in its determination of whether the contract is, at a minimum, a hybrid contract.

36. Since a blackberry cellular device was received by Tweedie at the time the contract was entered, the Court considers the contract between Tweedie and AT&T a mixed or hybrid contract involving both services and goods.

Findings of Fact regarding Plaintiffs' mutual claims

37. Both of the Plaintiffs' cases turn on whether the UCC's four year statute of limitations applies or, instead, the general ten year statute of limitations contained in W. Va. Code 55-2-6.

38. The UCC provides, in relevant part, "[a]n action for breach of any contract for sale [of a good] must be commenced within four years after the cause of action has accrued." W. Va. Code Ann. § 46-2-725(1) (West); *see also* SER Monongahela Power Co. v. Fox, 227 W. Va. 531, 711 S.E.2d 601, 74 UCC Rep. Serv. 2d 754, 2011.

39. "It is generally held that the statute of limitations contained in the Uniform Commercial Code, which is in W.Va.Code, 46–2–725, supercedes any general statute of limitations with regard to transactions involving the sale of goods." Syl. Pt. 8, Greer Limestone Co. v. Nestor, 175 W. Va. 289, 291, 332 S.E.2d 589, 591, 41 UCC Rep. Serv. 1730 (1985).

40. W. Va. Code also provides that "[e]very action to recover money, which is founded upon an award, or on any contract other than a judgment or recognizance, shall be brought within the following number of years next after the right to bring the same shall have accrued, that is to say: . . . if it be upon an award, or upon a contract in writing, signed by the party to be charged thereby, or by his agent, but not under seal, within ten years[.] W. Va. Code Ann. § 55-2-6 (West).

41. While not specifically adopted as controlling law in West Virginia, it appears the predominant factor test outlined in Bonebrake v. Cox, 499 F.2d 951 (8th Cir. 1974), discussed in Elkins Manor Associates v. Eleanor Concrete Works, 183 W. Va. 501, 396 S.E.2d 463 (1990), and applied in Bluefield Gas Co. v. Abbs Valley Pipeline, LLC, 76

UCC Rep. Serv. 2d 540, 2012 WL 40460 (S.D.W. Va. Jan. 9, 2012) (noting "[t]he 'predominant purpose' test has been followed by numerous jurisdictions, including courts in Virginia and West Virginia.") is the most appropriate and reliable test to determine whether the UCC's four year statute of limitations applies under the given circumstances. Princess Cruises v. GE, 143 F.3d 828 (4th Cir. 1998) (citing Coakley & Williams, 706 F.2d at 458).

42. "'The test for inclusion or exclusion is not whether they are mixed, but, granting that they are mixed, whether their predominant factor, their thrust, their purpose, reasonably stated, is the rendition of service, with goods incidentally involved (*e.g.*, contract with artist for painting) or is a transaction of sale, with labor incidentally involved (*e.g.*, installation of a water heater in a bathroom).'" Elkins Manor Assocs. v. Eleanor Concrete Works, Inc., 183 W. Va. 501, 507, 396 S.E.2d 463, 469, 13 UCC Rep. Serv. 2d 75, 1990 WL 125316 (1990) (quoting Bonebrake v. Cox, 499 F.2d 951 (8th Cir. 1974)).

43. The Court gives little weight to Plaintiffs' counsel's argument that the cell phones at issue in the cases at bar are stand-alone goods that a consumer would purchase independently of the cell phone service for the purpose of using the cell phone as a camera, calculator, or a compact computer device connected to residential wi-fi.

44. Although not a "paperweight" as asserted by Defendant's counsel, a cell phone may function in the manner described by Plaintiffs' counsel but that is not its legitimate primary function and for all intent and purpose the cell phone is essentially useless without connection and use of a cell phone service plan.

45. The Court does not operate in a vacuum, and, as such, it must acknowledge that it is everyday common knowledge that cell phone service providers often offer the newest and flashiest cell phone devices free, or at drastically reduced cost, simply to entice and induce customers to sign service contracts with a particular provider.

46. While from a subjective standpoint the consumer may agree to an extended service contract with a particular service provider so as to obtain the device for free, or at a reduced cost, from an objective standpoint the *primary, underlying purpose of the contract, as a whole, is the rendition of cell phone service*, not a transaction for the individual stand-alone device.

47. This is akin to an auto dealership offering a big screen television with the purchase of every new vehicle. While the consumer may need a vehicle and be drawn to purchase the vehicle from the specific dealer because of the free television, it cannot be said that the primary purpose and thrust of the contract was the television rather than the vehicle.

48. A clearer and even more comparable example would be an auto dealership offering an extended service warranty free, or at a drastically reduced rate, with the purchase of every new vehicle. Clearly it cannot be said that the primary purpose of such a contract is the service warranty rather than the vehicle.

49. In the cases at bar, the cell phone service ***is the vehicle***, with the individual marketing devices (cell phones and blackberry cellular devices) being the carrots to induce the customer to enter a contract with the particular service provider.

50. The Court's purpose here is not to critique a particular businesses' market strategies, but rather to determine what the ***primary purpose and thrust*** of the underlying contract is.

Conclusions of law regarding applicable statute of limitations

51. In Waugh's case, analysis under the predominant factors test outlined in *Bonebrake* clearly reveals that the contract entered between Waugh and AT&T was predominantly for the purpose of obtaining cell phone service and hot spot service with the receipt of phones being only incidentally involved.

52. As the hybrid contract is predominately for the rendition of service, rather than a good, the four-year statute of limitations put forth in W. Va. Code § 46-2-725 does not apply to Waugh's cell phone service contract with AT&T.

53. The ten year statute of limitations put forth in W. Va Code § 55-2-6 governs the cell phone service contract between Waugh and AT&T.

54. Accordingly, with regard to the letter sent to Waugh by USAM, the time-barred debt disclosures required by W. Va. Code § 46A-2-128(f) were not required as the debt USAM was attempting to collect was not time-barred.

55. In Tweedie's case, analysis under the predominant factors test outlined in *Bonebrake* clearly reveals that the contract entered between Tweedie and AT&T was likewise predominantly for the purpose of obtaining cell phone service with the receipt of the blackberry cellular device being only incidentally involved.

56. As the hybrid contract is predominately for the rendition of service, rather than a good, the four-year statute of limitations put forth in W. Va. Code § 46-2-725 does not apply to Tweedie's cell phone service contract with AT&T.

57. The ten year statute of limitations put forth in W. Va Code § 55-2-6 governs the cell phone service contract between Tweedie and AT&T.

58. Accordingly, with regard to the letter sent to Tweedie by USAM, the time-barred debt disclosures required by W. Va. Code § 46A-2-128(f) were not required as the debt USAM was attempting to collect was not time-barred.

59. Having found that the ten year statute of limitations for contracts is applicable to Plaintiffs' claims in this matter rather than the four year statute of limitations provided under the UCC, the Court must now turn its attention to *Defendant's Motion For Summary Judgment.*

Summary Judgement Findings of Fact and Conclusions of Law

60. "The summary judgment procedure provided by Rule 56 of the West Virginia Rules of Civil Procedure does not infringe upon the constitutional right of a party to a trial by jury; it is not a substitute for a trial, or a trial either by a jury or by the court of an issue of fact, but is a determination that, as a matter of law, there is no issue of fact to be tried." Syl. Pt. 7, Aetna Cas. & Sur. Co. v. Fed. Ins. Co. of New York, 148 W. Va. 160, 161, 133 S.E.2d 770, 772 (1963).

61. "A party who moves for summary judgment has the burden of showing that there is no genuine issue of fact and any doubt as to the existence of such issue is resolved against the movant for such judgment." Syl. Pt. 6, Aetna Cas. & Sur. Co. v. Fed. Ins. Co. of New York, 148 W. Va. at 161, 133 S.E.2d at 772.

62. "A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syl. Pt. 2, Painter v. Peavy, 192 W. Va. at 190, 451 S.E.2d at 756 (quoting Syl. Pt. 3, Aetna Casualty & Surety Co. v. Federal Insurance

Co. of New York, 148 W.Va. 160, 133 S.E.2d 770 (1963) and Syl. Pt. 1, Andrick v. Town of Buckhannon, 187 W.Va. 706, 421 S.E.2d 247 (1992)).

63. "The circuit court's function at [this] stage is not to weigh the evidence and determine the truth of the matter, but is [strictly] to determine whether there is a genuine issue for trial." Syl. Pt. 3, Painter v. Peavy, 192 W. Va. 189, 190, 451 S.E.2d 755, 756 (1994) (alteration from original).

64. "Summary judgment is appropriate where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove." Syl. Pt. 4, Painter v. Peavy, 192 W. Va. at 190, 451 S.E.2d at 756; *see also* Syl. Pt. 2, Williams v. Precision Coil, Inc., 194 W. Va. 52, 56, 459 S.E.2d 329, 333 (1995).

65. "Summary judgment is not a remedy to be exercised in the circuit court's option; it must be granted when there is no genuine dispute of a material fact." Powderidge Unit Owners Ass'n v. Highland Props., Ltd., 196 W. Va. 692, 698, 474 S.E.2d 872, 878 (1996) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986)).

66. "If the moving party makes a properly supported motion for summary judgment and can show by affirmative evidence that there is no genuine issue of a material fact, the burden of production shifts to the nonmoving party who must either (1) rehabilitate the evidence attacked by the moving party, (2) produce additional evidence showing the existence of a genuine issue for trial, or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f) of the West Virginia Rules of

Civil Procedure." Syl. Pt. 3, Williams v. Precision Coil, Inc., 194 W. Va. at 56, 459 S.E.2d at 333.

67. As this Court discussed *supra*, the cases at bar hinged on whether the UCC's four year statute of limitations was applicable to the contracts at issue as contract(s) for the sale of goods governed by the UCC, or, instead, contract(s) for services governed by the standard statute of limitations outlined in W. Va Code § 55-2-6.

68. As the Court found that the contracts at issue were for the rendition of services governed by the ten year statute of limitations provided in W. Va Code § 55-2-6, Plaintiffs' causes of action fail on their face as the debt was not time barred.

69. Being as the debt was not time barred, no genuine issue of material fact in issue remains, nor is further inquiry desirable or necessary to clarify the application of the law.

70. Defendant, US Asset Management, Inc., is entitled to summary judgment as a matter of law.

71. Accordingly, *Defendant's Motion For Summary Judgment* as to Plaintiffs Waugh and Tweedie should be granted.

Defendant's bonafide error defense

72. As the Court has concluded that Defendant's Motion should be granted, the Court finds it unnecessary to address Defendant's bonafide error defense.

NOW, THEREFORE, in consideration of all of the foregoing findings of fact and conclusions of law, the Court is of the opinion to, and hereby does, **GRANT** Defendant, US Asset Management, Inc.'s motion for summary judgment.

As this resolves all issues before the Court with regard to the two named Plaintiffs, the Court further **ORDERS** that the above styled matter shall be, and hereby is, **DISMISSED WITH PREJUDICE**, and stricken from the Court's active docket.

The objections and exceptions of the Plaintiff are noted and preserved for purposes of appeal.

The **Clerk** is directed to send an ***attest copy*** of this *Order Granting Us Asset Management, Inc. 'S Motion For Summary Judgment* to: **Steven R. Broadwater, Jr., Esq.**, *Hamilton, Burgess, Young & Pollard, pllc*, P.O. Box 959, Fayetteville, WV 25840; **Nicholas P. Mooney II, Esq.**, *Spilman Thomas & Battle, PLLC*, P.O. Box 273, Charleston, WV 25321; and **Lawrence J. Bartel, Esq.**, *Gordon Rees Scully Mansukhani, LLP*, Three Logan Square, 1717 Arch Street, Suite 610, Philadelphia, PA 19103.

ENTERED this 14th day of October 2020.

PAUL M. BLAKE, JR.
JUDGE

Paul M. Blake, Jr., Judge

A TRUE COPY of an order entered
October 14, 2020
Teste: Cookie L. Garrett
Circuit Clerk Fayette County, WV