

IN THE STATE OF MICHIGAN

APPEAL FROM THE COURT OF APPEALS

APPEAL FROM THE WAYNE COUNTY CIRCUIT COURT
HONORABLE MICHAEL SAPALA (Ret.)

GEORGE BADEEN/ALL OTHERS SIMILARLY
SITUATED and MIDWEST RECOVERY AND
ADJUSTMENT, INC.,

Plaintiffs-Appellants,

v

PAR, INC., d/b/a PAR NORTH AMERICA,
REMARKETING SOLUTIONS, CENTERONE
FINANCIAL SERVICES, L.L.C., FIRST
NATIONAL REPOSSESSORS, INC.,
MILLENNIUM CAPITAL AND RECOVERY
CORPORATION, RENOVO SERVICES, L.L.C.,
RENAISSANCE RECOVERY SOLUTIONS,
INC., ASR NATIONWIDE, L.L.C., THE M.
DAVIS COMPANY, INC., d/b/a U.S.A.
RECOVERY SOLUTIONS, REPOSSESSORS,
INC., AMERICAN RECOVERY SERVICE, INC.,
DIVERSIFIED VEHICLE SERVICES, INC.,
NATIONAL ASSET RECOVERY CORP.,
CONSUMER FINANCIAL SERVICES, L.L.C.,
TD AUTO FINANCE, L.L.C., TOYOTA MOTOR
CREDIT CORPORATION, NISSAN MOTOR
ACCEPTANCE CORPORATION, SANTANDER
CONSUMER U.S.A., PNC BANK, N.A., BANK
OF AMERICA, N.A., FIFTH THIRD BANK, and
THE HUNTINGTON NATIONAL BANK,

Defendants-Appellees,

and

MV CONNECT, L.L.C., d/b/a IIA, L.L.C., GE
MONEY BANK, and MANHEIM RECOVERY
SOLUTIONS,

Defendants.

FOR PUBLICATION

April 11, 2013

9:05 a.m.

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No. 302878

Wayne Circuit Court

LC No. 10-004053-CZ

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**Application for Leave to Appeal
ORAL ARGUMENT REQUESTED**

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STATEMENT OF APPEAL

Plaintiff/Appellant files this appeal from an opinion and order dated February 14, 2011, where trial court granted defendants' motion for summary disposition pursuant to MCR 2.116(C)(8), and the Court of Appeals' Opinion and Order, dated April 10, 2013, affirming that ruling. Exhibit 1, Trial Court Opinion; Exhibit 2, Court of Appeals Opinion.

STATEMENT OF QUESTION INVOLVED

Whether the trial court and Court of Appeals erred in granting defendant/appellees' motion for summary disposition on the grounds that defendant Forwarders do not have to be licensed even though they are indirectly involved in collections and by ignoring the plain meaning of the statute and interpreting it in such a manner as to render the wording meaningless surplusage?

Plaintiff-Appellants say: "Yes"

Defendant-Appellees say: "No"

Trial Court said: "No"

Court of Appeals said: "No"

This Court should answer "Yes"

STATEMENT OF FACTS

George Badeen has been a licensed "Owner Manager" of the automobile repossession agency Midwest Recovery and Adjustment, Inc., for over a decade. He worked his way up from an entry level employee to accounts manager prior to obtaining an ownership interest. All told, he has over 30 years of experience in the collection business. He currently sits on the Collection Practices Board, representing his profession in the administrative board created under the Occupational Practices Code.

Midwest Recovery and Adjustments, Inc., is a licensed collection agency bonded to repossess vehicles. Midwest was one of the very first third party repossession agencies to operate in the state of Michigan, and has been in business for decades.

George noted an alarming trend starting several years back. Large scale clients with whom he had a long standing business relationship with started firing Midwest. He would receive a letter informing him that he would no longer be directly hired by his clients, and would instead have all of the work he had been doing routed through a "forwarding service."

These forwarding services would contract with lending institutions to be the "one stop" shop for collection services. Exhibit 3, Forwarder Websites. A lending institution could turn over delinquent accounts from all over the country to one collection agency, the forwarder, who would then sub out the work. Exhibit 3, Forwarder Websites.

At issue here, many of these forwarding services would solicit work from lending institutions for accounts in the State of Michigan, but would do so without a license. They would then manage all aspects of the repossession, transport, liquidation, servicing, and money transfers of the account. Exhibit 3, Forwarder Websites.

Consequently, George would be contacted by the forwarders, who would inform him if

he wanted to keep servicing the accounts that had been his, he would have to accept far less pay from the Forwarder. Exhibit 4, Chrysler Letter. In many instances, this meant taking the exact same accounts at more than off half his regular rates.

The trend continued, until eventually forwarding companies held roughly 70% of the market share of repossession work in Michigan. George managed to survive in the industry by continuing to provide high quality service to local banks and credit unions, but his business clearly suffered.

PROCEDURAL HISTORY

George Badeen originally, for himself and on behalf of a proposed class, filed his original complaint in this matter asserting that the Forwarder defendants were illegally engaged in collection activities in violation of the Occupational Code of Michigan, and that the Lender defendants were in violation of the Collection Practices Act for hiring unlicensed collectors. George shortly thereafter amended his complaint in order to straighten out the parties. Service was then effectuated.

A motion for summary disposition was filed in response to the First Amended Complaint. In the meantime, PAR filed a Notice Of Failure to File A Motion for Class Certification. Cross motions regarding the matter were filed, and a hearing was held. The trial judge ultimately determined that George was unable to seek certification of a class. The class certification issue was resolved by the Court of Appeals, and is not part of this application for leave.

However, at the hearing on the class certification issue, the parties entered into a stipulation allowing a Second Amended Complaint and resolving a pending motion for summary disposition. George subsequently filed that complaint on or about September 8, 2010, adding his company, Midwest Recovery and Adjustments, Inc, as a plaintiff. Defendants once again filed

for summary disposition, this time pursuant to MCR 2.116(C)(8).

The trial court judge heard oral argument on the matter on January 28, 2011. On February 14, 2011, the judge issued an opinion, finding that the Forwarder defendants did not require a license pursuant to Michigan law, that since Forwarders did not need a license, Lender defendants were not in violation of Michigan law for hiring them, and dismissing the case. Exhibit 1, Trial Court Opinion.

George timely appealed to the Court of Appeals. The Court of Appeals issued an opinion on April 11, 2013. The opinion overturned the disputed class certification issue. However, the opinion affirmed the trial court judge's interpretation of the Occupational Code. Exhibit 2, Court of Appeals Opinion.

WHY FORWARDERS MUST BE LICENSED

It is unlawful for a person to engage in an occupation regulated under the Occupation Code: "A person *shall not engage in or attempt to engage in* the practice of an occupation regulated licensed by this act unless the person possesses a license or registration issued by the Department for the occupation" (Emphasis added.) MCL 339.601(1). Pursuant to the Occupational Code Article on debt collection, a collection agency "[m]eans a person *directly or indirectly engaged in soliciting a claim for collection*...arising out of an expressed or implied agreement." (Emphasis added.) MCL 339.901(b).

The defendants referred to as Forwarding Companies in the complaint have not sought and/or maintained a collection agency license in the State of Michigan. All of these companies solicit the business of the defendants referred to as Lending Institutions in the complaint in violation of Michigan law.

LEGAL ARGUMENT

1. The trial court erred in granting defendant/ appellee's motion for summary disposition.

a. Standard of Review

A trial court's decision to grant summary disposition is reviewed *de novo*. *Rossow v Brentwood Farms Dev, Inc*, 251 Mich.App. 652, 657 (2002).

b. Appellee Forwarders are unlawfully collecting without a license.

Defendant forwarding companies have violated the law. The Occupational Code makes it illegal for a person to engage in any occupation regulated under the Act without having a license. MCL 339.601(1) provides: "A person shall not *engage in or attempt to engage in* the practice of an occupation regulated by this act unless the person possesses a license or registration issued by the Department for the occupation." (Emphasis added). The Occupational Code goes on to define a "collection agency" regulated under the Code as any person "soliciting a claim for collection *OR* collecting or attempting to collect a claim owed or due or asserted to be owed or due another, or repossessing or attempting to repossess a thing of value rising from an expressed agreement." (Emphasis added). Specifically, MCL 339.901(b) defines a collection agency as follows:

"Collection agency' means a person directly or indirectly engaged in soliciting a claim for collection *OR* collecting or attempting to collect a claim owed or due or asserted to be owed or due another persons, or repossessing or attempting to repossess a thing of value owed or due or asserted to be owed or due another person, arising out of an expressed or implied agreement."

(Emphasis added) MCL 339.901(b).

It is illegal for Lenders, as regulated people under the Regulation of Collection Practices Act, to hire an unlicensed collection agency:

A regulated person shall not... (s) [employ] a person required to be licensed under article 9 of Act No. 299 of the Public Acts of 1980, being sections 339.901 to 339.916 of the Michigan compiled laws, to collect a claim unless that person is licensed....

MCL 445.252.

The trial court and the Court of Appeals ruled that the statute is unambiguous in that Forwarders do not have to be licensed.

1. The Statute Unambiguously Requires Forwarders to Be Licensed.

“The primary purpose of statutory interpretation is to ascertain and give effect to the intent of the legislature.” *Casey v Henry Ford Health System*, 235 Mich App 449, 450 (1999). However, “[w]here the statutory language is clear and unambiguous, a court must apply it as written.” *Casey, supra*.

Appellee forwarding companies have violated The Occupational Code by engaging in the practice of a collection agency in Michigan by soliciting collection work from third parties, attempting to collect claims in Michigan, and attempting to repossess vehicles in Michigan within the meaning the of the Act. The fact that they “forward” the work onto licensed collection agencies is irrelevant. Forwarders advertise themselves as repossession and collection agencies.

Appellees routinely “seek to obtain by persuasion, entreaty, or formal application” an “obligation to pay money or a thing of value” “owed or due another” for collection. MCL 339.901(b). It is the solicitation *to the Lender* to collect claims “owed or due another” (the Lender) that triggers the licensing requirements of the statute. Any slippery slope arguments relating to Badeen’s trade association and the Post Office clearly fail because the act of soliciting the business is what triggers the licensing requirement.

Indeed, very near and dear to the hearts of all counsel involved, is the ethical restriction

on “soliciting” work as an attorney. “A lawyer shall not solicit professional employment...” MRPC 7.3(a). Clearly, no one involved in the legal field can reasonably argue that “solicit” does not mean asking for work.

Forwarders clearly solicited the work from the defendant lending institutions resulting in their having contracts with the lending institutions to collect the debts in the State of Michigan. This interpretation of the law is backed up by the Michigan DLEG. Exhibit 5, Complaint Response.

The defendant-appellees’ position is that “soliciting a claim for collection” means attempting to collect the debt *from the borrowers*. This is an absurd argument directly in opposition to the plain and unambiguous language of the statute. Soliciting a claim, for Forwarders, means the same thing it does for attorneys. That is, attempting to get accounts to work.

Defendant-Appellees arguments that Forwarders are not collection agencies under the Occupational Code is without any merit whatsoever because they clearly solicited the collection claims from Lender defendants and injected themselves into the collection process.

The trial court and Court of Appeals interpretations of the statute would render part of the statute nugatory. That statute reads “[d]irectly or indirectly engaged in soliciting a claim for collection *OR* collecting or attempting to collect a claim owed...” MCL 339.901(b).

The lower courts ruled that “soliciting a claim for collection” means to approach debtors. However, this interpretation renders “or collecting or attempting to collect a claim” meaningless surplusage. If the legislature had meant “soliciting a claim for collection” to mean “collecting on the debt,” why is the second clause there at all? The inclusion of the second clause has a different meaning. Under the rules of statutory construction, “[w]hen construing a statute, the

court should presume that every word has some meaning and should avoid any construction that would render the statute, or any part of it, surplusage or nugatory.” *Helder v North Pointe Ins Co*, 234 Mich App 500, 504 (1999). Clearly, even if judicial construction of the statute is appropriate, the lower courts’ interpretations fly in the face of the well defined rules of construction.

2. Forwarders are “indirectly” involved in collections.

Appellee Forwarders are indirectly involved in collection work due to their soliciting of accounts from Appellee Lenders. In fact, they admit this! Exhibit 6, Millennium Response to Administrative Complaint (admitting they are indirectly involved in the repossession of assets).

After repossession, the forwarder would then arrange to have the vehicle transported to an auction center, liquidated for the benefit of the lender, do the necessary vehicle title work, and then arrange to have the proceeds sent to the lender. Exhibit 3, Forwarder Websites. For example, Par North America’s website says that Par is “a nationwide provider of vehicle transition services including repossession, remarketing, titling, skip-tracing, lease end-of-term and collections/loan-servicing.” Exhibit 3, Forwarder Websites. Defendant Millennium Capital and Recovery Corporation’s website says “[Millennium] provides one-stop, nationwide solutions for financial institutions looking to streamline their collateral recovery and debt resolution processes...we have full-service capabilities from rural America to the nation’s largest cities in all 50 states...” Exhibit 3, Forwarder Websites.

This is yet another example of violation of the Occupational Code. Because Forwarders admit to indirectly being involved in collections, they have violated the code to such an extent that Badeen can proceed regardless of the “solicit” issue.

Forwarders have injected themselves into the stream of events whereby Michigan citizens

are the subject of secured collateral repossessions. It is clear that Forwarders have positioned themselves to indirectly be involved in the collection process, and as such are required to be licensed. All of their arguments are simply an attempt to circumvent the licensing requirements of the statute. By using the phrase "or indirectly," the legislature clearly intended to close the loophole that the trial court created for appellees.

C. Conclusion

The trial court clearly erred when it ruled that the Forwarders did not have to be licensed.

RELIEF REQUESTED

Therefore, plaintiff/appellants George Badeen and Midwest Recovery and Adjustment's, Inc., request this court overturn the trial court's ruling. As a matter of law, summary disposition is inappropriate.

Respectfully Submitted,

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