

SUPERIOR COURT OF CALIFORNIA, COUNTY OF RIVERSIDE

TITLE: CAPITAL ONE BANK V. BASSHAM	DATE & DEPT: D5	NUMBER: RIC1119712
COUNSEL:	REPORTER: SUPERIOR COURT OF CALIFORNIA COUNTY OF RIVERSIDE	FILED JUL 25 2012 P. Vang-Ly
PROCEEDING: Ruling on Submitted Matter		

The complaint and cross-complaint were tried to the Court without a jury in less than ~~one day~~, and taken under submission. No statement of decision was requested. Accordingly, the parties have forfeited their right to a statement of decision. (Cal. Rules of Court, rule 3.1590(n).) The Court now rules as follows.

Summary of Ruling

The plaintiff shall recover nothing on its complaint. The cross-complainant shall recover statutory penalties of \$1,000, together with its costs of suit, including attorney's fees.

Analysis

The Customer Agreement that controls the credit card account which is the subject of this action contains a choice of law provision selecting the laws of Virginia to govern the agreement. (The copyright on the form Customer Agreement introduced by the Bank post-dates the time when defendant Bassham actually opened his account. But no objections were made to this exhibit. Neither side indicated that the exhibit contained material terms which varied from the form Customer Agreement in effect at the time defendant opened the account.) It is undisputed that Virginia's statutes of limitations apply in this action. The disputed issue is which of Virginia's laws to apply: its three-year statute or its five-year statute.

As to that issue, the Court adopts the analysis in the opinion of the Attorney General of Virginia, a copy of which is attached to plaintiff Bank's Request for Judicial Notice as Exh. JN-3. The five-year limitation period provided by Virginia Code §8.01-246(2) will apply even though the terms of a contract are found in a series of documents, but only if one of the documents both refers to and incorporates the others and is signed by the cardholder. The authorities provided by the parties also support this conclusion.

(Contrary to defendant's contention, the Customer Agreement could constitute a completed written agreement under Virginia law even though terms such as the interest rate may be subject to unilateral amendment by the Bank. Nothing prevents a potential cardholder from agreeing to be bound by such provision at the time an account is opened. Thereafter, nothing appears to be left open for future negotiation and further agreement.)

Craig G. Riemer, Judge
P. Vang-Ly (vis), Clerk

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Here, however, the Bank provided no document signed by defendant which referenced or incorporated the Customer Agreement. Accordingly, the Court finds that the three-year statute of limitations provided by Virginia Code §8.01-246(4) controls in this case. Given the undisputed facts, the Court concludes that plaintiff's claims are time-barred. Judgment shall be entered for defendant on the complaint.

With respect to the cross-complaint, the Court finds no support for plaintiff/cross-defendant's claim that a cause for violation of the Rosenthal Fair Debt Collection Practices Act must be pleaded with such particularity that the statute of limitations has to be specifically alleged.

It appears that attempts to collect a potentially time-barred debt that is otherwise valid may not necessarily violate the Act so long as there is no actual or threatened litigation. (See *Freyermuth v. Credit Bureau Services* (2001) 248 F.3d 767.) However, where, as here, a collection action is instituted, there is a violation of the Act. (See *Kimber v. Federal Fin'l Corp.* (1987) 668 F. Supp. 1480; *McCullough v. Johnson, Rodenburg & Lauinger* (2008) 587 F.Supp.2d 1170.)

In the absence of any evidence of actual damages, the Court awards cross-complainant a statutory penalty in the amount of \$1,000.00 against cross-defendant Bank pursuant to Civil Code section 1788.30, subdivision (b). Although the prosecution of an action on a time-barred debt may violate multiple provisions of the California fair debt collection practice law, the Court declines to impose multiple statutory penalties for the same wrongful act.

The Bank argues that it is entitled to a setoff against cross-complainant's award even though its debt is time-barred. (Relying on, e.g., *Birman v. Loeb* (1998) 64 Cal.App.4th 502, 518.) However, this action does not involve cross-demands for money which existed at the same time when neither demand was time-barred within the meaning of Code of Civil Procedure section 431.70. The Bank is not entitled to a setoff.

The cross-complainant is also awarded its costs and reasonable attorney fees pursuant to Civil Code section 1788.30, subdivision (c), to be sought post-judgment pursuant to CRC rules 3.1700, 3.1702.

Defendant/cross complainant shall submit and serve a proposed judgment in conformity with this decision forthwith.

Craig G. Riemer, Judge
P. Vang-Ly (vis), Clerk