

6.1 Answer and Counterclaim Filed on Behalf of a Service Member Who Alleged That Her Leased Car Was Refinanced Deceptively and Then Illegally Repossessed

FORD MOTOR CREDIT COMPANY,
a corporation,
Plaintiff,

IN THE COUNTY COURT,
IN AND FOR DUVAL COUNTY,
FLORIDA

vs.

CASE NO.: [No.]
DIVISION: N

[DEFENDANT],
Defendant,

AMENDED ANSWER, AFFIRMATIVE DEFENSES AND COUNTERCLAIMS

AMENDED ANSWER

The Defendant, [DEFENDANT], now know as [Defendant] (hereinafter "[Defendant]"), by and through her undersigned attorney, files this her Amended Answer to the Plaintiff's Complaint and says:

1. The Defendant admits the allegations contained in Paragraph 1 of Plaintiff's Complaint for jurisdictional purposes only.
2. As to Paragraph 2 of the Complaint, the Defendant denies she executed the written document attached to the Complaint. The Defendant is without knowledge and, therefore, denies the remainder of the allegations contained in Paragraph 2.
3. The Defendant denies she is in default of the contract attached as an exhibit to the Plaintiff's Complaint and further denies Plaintiff has complied with all conditions precedent of the contract and Florida law. [Defendant] denies she owes sums to the Plaintiff arising from the contract attached as an exhibit to the Complaint.

4. The Defendant denies the allegations contained in Paragraph 4 of the Plaintiff's Complaint for reasons which will be further stated in her affirmative defenses and counterclaim below.

5. As to Paragraph 5 of the Plaintiff's Complaint, the Defendant is without knowledge as to the truth or falsity of the allegations contained therein and, therefore, denies the same.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

Violations of Article 9, Uniform Commercial Code, Secured Creditors

6. For purposes of this affirmative defense, [Defendant] realleges and incorporates by reference herein the allegations contained in Paragraphs 1 through 18 of her Counterclaims and the allegations contained in Count One of her Counterclaims.

7. Plaintiff's repossession and subsequent sale of the subject vehicle was not conducted in a commercially reasonable manner within the meaning of Sections 679.610(2), 679.611(2)(3), 679.12 and 679.14, *Fla. Stat.*.

8. FMCC is not entitled to a deficiency judgment because of its failure to comply with the Florida Statutes law as referenced in Paragraph 7 above as is provided by §§679.625, 679.626 and 679.627, *Fla. Stat.*

SECOND AFFIRMATIVE DEFENSE

Violations of Article 9, Uniform Commercial Code, Secured Creditors

9. For purposes of this affirmative defense, [Defendant] realleges and incorporates by reference herein the allegations contained in Paragraphs 1 through 18 of her Counterclaims and the allegations contained in Count One of her Counterclaims.

10. Plaintiff failed to provide to [Defendant], prior to the repossession sale, a description of any liability for a deficiency, a telephone number at which she could obtain information regarding the amount needed to redeem the vehicle, a telephone number or mailing address from which additional information concerning the disposition and obligation secured is available as is required by §679.614(14), *Fla. Stat.*

11. Plaintiff failed to provide [Defendant] with an opportunity to redeem the vehicle as required by §679.623, *Fla. Stat.*.

12. FMCC is not entitled to a deficiency judgment because of its failure to comply with the Florida Statutes law as referenced in Paragraphs 10 and 11 above as is provided by §§679.625, 679.626 and 679.627, *Fla. Stat.*

THIRD AFFIRMATIVE DEFENSE

Violations of the Uniform Commercial Code

13. For purposes of this affirmative defense, [Defendant] realleges and incorporates by reference herein the allegations contained in Paragraphs 1 through 18 of her Counterclaims and the allegations contained in Count One of her Counterclaims.

14. FMCC failed to provide [Defendant] with an accounting prior to repossession so she could attempt to pay the debt in full in violation of §679.210, *Fla. Stat.*, therefore, FMCC is not entitled to the entry of a deficiency judgment.

FOURTH AFFIRMATIVE DEFENSE

Violations of the Florida Deceptive and Unfair Trade Practices Act

15. For purposes of this affirmative defense, [Defendant] realleges and incorporates by reference herein the allegations contained in Paragraphs 1 through 18 of her Counterclaims and the allegations contained in Count Two of her Counterclaims.

16. FMCC is not entitled to a deficiency judgment because of its unfair, deceptive and unconscionable practices committed by FMCC.

FIFTH AFFIRMATIVE DEFENSE

Violations of the Florida Consumer Collection Practices Act

17. For purposes of this affirmative defense, [Defendant] realleges and incorporates by reference herein the allegations contained in Paragraphs 1 through 18 of her Counterclaims and the allegations contained in Count Three of her Counterclaims.

18. FMCC is not entitled to a deficiency judgment because of its violations of the Florida Consumer Collection Practices Act.

SIXTH AFFIRMATIVE DEFENSE

Violations of the Uniform Commercial Code's Duty of Good Faith and Fair Dealing

19. For purposes of this affirmative defense, [Defendant] realleges and incorporates by reference herein the allegations contained in Paragraphs 1 through 18 of her Counterclaims and the allegations contained in Count One of her Counterclaims.

20. FMCC failed to act in good faith and failed to deal fairly with [Defendant] in the subject transaction as is required by §671.203, *Fla. Stat.*, therefore, FMCC is not entitled to a deficiency judgment.

COUNTERCLAIMS

1. The Counterclaim/Plaintiff, [Defendant], (“[Defendant]”) is an individual who resides in Jacksonville, Duval County, Florida.

2. The Counterclaim/Defendant, FMCC MOTOR CREDIT COMPANY (“FMCC”) is a Florida corporation that at all times material hereto was doing business in Jacksonville, Duval County, Florida.

3. The Court has jurisdiction over these claims as they arise out of the transaction which is the subject matter of the Plaintiff’s Complaint.

FACTUAL ALLEGATIONS

4. On or about December 5, 1998, [Defendant] executed a lease for a 1999 FMCC Explorer, VIN [VIN] from Mike Davidson. A copy of FMCC’s lease is attached hereto and incorporated herein as “Exhibit A.”

5. Upon information and belief this lease was assigned to FMCC.

6. On or about January 16, 2001, [Defendant] entered military duty in the United States Army. After she was initially stationed for boot camp in Fort Jackson, South Carolina, she was deployed to Kaiserslautern, Germany.

7. The FMCC lease expired in March, 2001, while [Defendant] was in boot camp so she sent her elderly aunt, Runell Hollis, to return the vehicle to FMCC via Power of Attorney. A copy of the Power of Attorney is attached hereto and is incorporated herein as Exhibit “B” and is by this reference incorporated herein.

8. [Defendant] specifically instructed Ms. Hollis to return the leased vehicle, therefore, her authority, as agent, was solely to return the vehicle.

9. A FMCC representative told the elderly aunt she would not be allowed to return the vehicle and, instead, required the elderly aunt to sign a separate financing contract which is the subject of this case. A copy of this contract is attached hereto and incorporated herein as Exhibit “C.”

10. Pursuant to 50 U.S.C. §535, [Defendant] had the right to terminate the FMCC lease at any time after entry into the military service. Under these circumstances, [Defendant] could have terminated the lease and paid any amounts due on a prorated basis. 50 U.S.C. §535(e).

11. Pursuant to 50 U.S.C. §532, FMCC did not have the right to rescind or terminate [Defendant]'s lease without a court order.

12. The FMCC actions described in Paragraphs 9 and 10 of the Counterclaims above constitute criminal and civil violations of 50 U.S.C. §§532 and 535.

13. The residual value of the subject vehicle was \$12,075.30. The principal amount of the new financing agreement which FMCC required the elderly aunt to sign was \$14,666.02. FMCC also sold the elderly aunt a service contract and GAP insurance which she did not benefit from for a total premium of \$1,210.00. The total principal amount of the new, subject loan was \$15,864.37 complete with the inflated lease pay off, insurance and official fees added.

14. After [Defendant] learned FMCC had tricked the elderly aunt into signing the new financing agreement which exceeded the authority bestowed by the attached Power of Attorney and despite [Defendant]'s rights under the Servicemembers' Civil Relief Act, [Defendant] felt she had no other choice but to continue to make the monthly payments.

15. Later [Defendant] requested that FMCC allow her to bring the car to Germany. FMCC required her to complete and sign a FMCC form request prior to relocating the vehicle. In this form, [Defendant] provided her address, duration of deployment and two references in Germany to FMCC. The form was sent to FMCC, effectively canceling her Power of Attorney, and her request was approved. A copy of this form is attached hereto and incorporated herein as Exhibit "D."

16. [Defendant] paid FMCC from April, 2001 until December, 2002. She could not continue to make the payments with her limited military pay as a result of living away from home in Germany. She was able to collect approximately \$9,000.00 from her relatives to pay the debt in full and requested a pay off figure from FMCC so she could make an offer of payment to them.

17. When FMCC failed to provide the accounting, [Defendant] asked them to come repossess the vehicle. FMCC repossessed the vehicle from [Defendant] at her address in Germany in February, 2003.

18. [Defendant] did not receive a notice of her right to redeem the vehicle after it was repossessed and FMCC failed to inform her of the date on or after which the vehicle would be sold.

COUNT ONE
UNIFORM COMMERCIAL CODE: SECURED TRANSACTIONS

19. [Defendant] sues FMCC for statutory damages pursuant to Section 679.601, *Fla. Stat.*.

20. [Defendant] realleges the allegations contained in Paragraphs 1 through 18, inclusive, above and incorporates the same by reference herein.

21. Th vehicle which is the subject of the above-styled case was purchased primarily for personal, household or family use, and therefore, falls within definition of "Consumer goods" contained in Section 679.1021(w), *Fla. Stat.*.

22. [Defendant] is a "debtor" as defined by Section 679.1021(bb), *Fla. Stat.*, and FMCC is a "secured party" as defined by Section 679.1021(sss), *Fla. Stat.*

23. The subject finance contract contained the following language:

NOTICE - Any holder of this consumer credit contract is subject to all claims and defenses which the debtor could assert against the seller of goods or services obtained pursuant hereto or with the proceeds hereof. Recovery hereunder by the Debtor shall not exceed amount paid by the debtor hereunder.

24. Section 671.203, *Fla. Stat.* requires that dealers act in good faith in the financing of the sale of motor vehicles.

25. Section 679.610(2), *Fla. Stat.* mandates that every aspect of a disposition of collateral after repossession, including the method, manner, time, place, and other terms, must be commercially reasonable.

26. Sections 679.611(2)(3), 679.12, and 679.14, *Fla. Stat.*, mandates that FMCC provide to [Defendant] notification of the type of sale at which the repossessed vehicle will be sold, an accounting of the unpaid indebtedness and the date and time of a public sale or the time after which any other disposition is to be made.

27. Section 679.614(1), *Fla. Stat.* mandates that FMCC provide [Defendant], prior to disposition, a description of any liability for a deficiency, a telephone number at which she could obtain information regarding the amount needed to redeem the vehicle, a telephone number or mailing address from which additional information concerning the disposition and obligation secured is available.

28. Section 679.623, *Fla. Stat.* gives [Defendant] the right to redeem the vehicle subsequent to repossession.

29. Lastly, §679.210, *Fla. Stat.* gives [Defendant] the right to request an accounting of the unpaid obligations secured by the collateral at any time.

30. During the course of the transaction with [Defendant], FMCC violated the above-referenced provisions of Florida law by failing to provide her with an accounting prior to repossession, notify her of the right to redeem the vehicle, the required deficiency information, the type of repossession sale which would occur or the date on or after which the repossession sale would take place.

31. It has been necessary for [Defendant] to retain Jacksonville Area Legal Aid, Inc., to provide her defense and prosecute civil litigation. Her counsel has incurred and will continue to incur costs and other related expenses during the course of this action and her counsel is entitled to reimbursement of her costs and attorney fees pursuant to the terms of the Act.

32. As a result of the above-stated violations, FMCC is not entitled to a deficiency judgment, is liable to [Defendant] in an amount not less than the credit service charge plus ten percent (10%) of the principal amount of the obligation and is liable to [Defendant] in the amount of \$500.00 pursuant to §§679.625 and 679.626, *Fla. Stat.*

WHEREFORE, [Defendant] requests this Court to dismiss the Plaintiff's Complaint with prejudice, enter a judgment against FMCC awarding her statutory damages as provided by §679.507(1), *Fla. Stat.*, attorneys fees and costs and such other and further relief this Court deems just and proper.

COUNT TWO
FLORIDA DECEPTIVE AND UNFAIR TRADE PRACTICES ACT

33. This is an action for an injunctive and declaratory relief and for damages pursuant to the Florida Deceptive and Unfair Trade Practices Act, Chapter 501, Part II, *Fla. Stat.*, (hereinafter referred to as "FDUTPA" or the "Act") and the regulations promulgated pursuant to the Act.

34. [Defendant] realleges the allegations contained in Paragraphs 1 through 18, inclusive, above and incorporates the same by reference herein.

35. At all times relevant hereto [Defendant] was a "consumer" as defined by §501.203(7) *Fla. Stat.*.

36. At all times relevant hereto FMCC is and was engaged in "trade or commerce" as defined by §501.203(8) *Fla. Stat.*.

37. FMCC is prohibited from engaging in unfair, deceptive or unconscionable acts or practices in the conduct of its consumer transactions.

38. [Defendant] entered into a lease agreement with FMCC prior to entering the military service. During her tenure in the military service, she attempted to return the subject car as allowed by 50 U.S.C. §535. FMCC refused [Defendant]'s efforts to return the subject vehicle and refused to allow her to do so. Instead, FMCC took advantage of and coerced her elderly aunt to enter into an inflated financing agreement in violation of the Servicemembers' Civil Relief Act, 50 U.S.C. §535. [Defendant] had the right to return the car at any time during her term of service and could have canceled the lease altogether.

39. Additionally, pursuant to Section 50 U.S.C. §532, FMCC did not have the right to rescind or terminate [Defendant]'s lease without a court order. FMCC could have been required to repay [Defendant] all or part of the prior installment payments as a condition of terminating the lease contract and resuming possession of the property.

40. FMCC deprived [Defendant] of the rights provided by 50 U.S.C. §§532 and 535 and coerced her, through her elderly aunt, to continue the transaction under more expensive and victimizing terms.

41. Additionally, FMCC failed to provide the statutory notices required by the Florida Uniform Commercial Code, Secured Transactions as is more particularly described in Count One above.

42. Lastly, FMCC violated the Florida Consumer Collection Practices Act by failing to allow [Defendant] to pursue her rights provided by the Servicemembers' Civil Relief Act as is more particularly described in Count Three below.

43. As a result of FMCC's unfair, deceptive and unconscionable actions as described herein, [Defendant] was damaged in the following ways:

- a. lost the opportunity to exercise her rights under the federal Servicemembers' Civil Relief Act;
- b. she was became committed to the terms of a financing agreement which she could not afford which led to a repossession; and
- c. she lost the opportunity to redeem the vehicle to avoid the consequences of repossession.

44. It has been necessary for [Defendant] to retain Jacksonville Area Legal Aid, Inc., to provide her defense and prosecute civil litigation based upon the Act. Her counsel has incurred and will continue to incur costs and other related expenses during the course of this action and her counsel is entitled to reimbursement of her costs and attorney fees pursuant to §§501.2105(1)(3) and 501.211, *Fla. Stat.*.

WHEREFORE, [Defendant] requests this Court to enter a judgment against FMCC and therein to:

A. Declare the above-referenced practices to be in violation of the Florida Deceptive and Unfair Trade Practices Act;

B. Temporarily and permanently enjoin FMCC from pursuing any claims against [Defendant] which resulted from actions taken in violation of FDUTPA and otherwise engaging in unfair and deceptive trade practices;

C. Award [Defendant] actual and statutory damages as provided by §501.211(2), Fla. Stat.;

D. Award attorney's fees and costs pursuant to §§501.2105(1)(3) and 501.211, Fla. Stat.;

E. Grant such other and further relief as may be deemed just and proper.

COUNT THREE
FLORIDA CONSUMER COLLECTION PRACTICES ACT

45. [Defendant] realleges the allegations contained above in Paragraphs 1 through 18, and incorporates the same herein by reference.

46. [Defendant] is a consumer who purportedly owed a consumer loan debt to FMCC as these terms are defined by §§559.55(1) and (2), Fla.Stat.

47. FMCC is a creditor as this term is defined by §§559.55(3), Fla.Stat.

48. FMCC violated the Act by asserting the existence of a legal right when such person knows that the right does not exist by overreaching and requiring her, through her elderly aunt, to execute an inflated financing agreement despite [Defendant]'s right to return the vehicle to FMCC without penalty because of her entry into the military.

49. As a result of the above-referenced violations of the Act, [Defendant] has been damaged in that she has been the subject of a repossession and is now the defendant in a lawsuit filed by FMCC.

50. As a result of these violations, FMCC is liable to [Defendant] in the amount of actual damages or \$1,000.00, whichever is greater, together with court costs and attorneys fees, as provided by §559.77, *Fla.Stat.*.

51. It has been necessary for [Defendant] to retain Jacksonville Area Legal Aid, Inc., to provide her defense and prosecute civil litigation based upon the Act. Her counsel has incurred and will continue to incur costs and other related expenses during the course of this action and her counsel is entitled to reimbursement of her costs and attorney fees pursuant to §§559.77, *Fla. Stat.*.

WHEREFORE, [Defendant] requests this Court to enter a judgment against FMCC awarding her statutory damages, attorney's fees and costs as provided by §559.77, *Fla. Stat.* and granting such other and further relief as may be deemed just and proper.

DEMAND FOR JURY TRIAL

[Defendant] requests a trial by jury of all issues and claims so triable.

JACKSONVILLE AREA LEGAL AID, INC.

By _____
LYNN DRYSDALE, ESQUIRE
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to C.
Suzanne Hollifield, Esquire, Bray & Singletary, P.A., P.O. Box 53197, Jacksonville,
Florida, 32201 by U.S. Mail this _____ day of May, 2004.

ATTORNEY