

State Court Collections - South Carolina

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I. Learn About Your Client and the Debtor.

Before you accept a collection case, make sure you know your client's business and the debtor's business.

Make sure your client has standing to sue in South Carolina. For any creditor, that means that the debt on which it is seeking to collect was properly assigned to it. For a business creditor, that also means that the business has a certificate of authority to transact business in the state of South Carolina. See S.C.Code Ann. § 33-15-102(a), (e); S.C.Code Ann. § 33-15-103; A Fast Photo Exp., Inc. v. First Nat. Bank of Chicago, 369 S.C. 80, 630 S.E.2d 285 (Ct.App. 2006).

Make sure that you have a basis for the exercise of personal jurisdiction over the debtor. See S.C. Code Ann. § 36-2-803 (long arm statute); Cockrell v. Hillerich & Bradsby Co., 363 S.C. 485, 611 S.E.2d 505 (2005).

Make sure your client has realistic expectations and knows the potential costs and potential outcome of the collection case. A client with unrealistic expectations may some day have another name – "legal malpractice plaintiff".

Always have a written engagement letter that sets forth any fee arrangement and payment terms. You do not want to become a creditor of your client.

It is a rare case where you would accept a collection case on a contingency basis, primarily because of the risk of counter-claims, the exemptions available to an individual debtor in South Carolina and the likelihood that actual payment of any judgment could be several years in the future. Rule 1.5 of the Rules of Professional Conduct, codified at South Carolina Appellate Court Rule 407, requires that all contingent fee agreements be in writing. That would include contingent fee agreements for collection cases.

II. Make Sure Your Client Has Complied with the Law.

Ensure your client gives you all the documents you need before filing the action.

If the debt is a business debt, make sure that any demand letter or notice of default required by the contract, note or invoice in default has been sent as required.

If the debt is a consumer debt, make sure, not only that the demand letter has been sent, but that the demand letter complies with the Fair Debt Collections Practices Act (15 U.S.C. §1692 et seq.) and the South Carolina Consumer Protection Code (S.C. Code Ann. §37-1-301 et seq.).

Make sure the debtor is not in bankruptcy and is still alive. If the debtor is bankrupt, the automatic stay of 11 U.S.C. §362 bars a lawsuit against the debtor. Instead of a lawsuit, the creditor would file a proof of claim with the Bankruptcy Court.

If the debtor is dead, she cannot be sued. Instead of a lawsuit, the creditor would file a claim against the debtor's estate in Probate Court, not a lawsuit. ***Tip 1:*** *If no probate estate has been opened and your claim is secured, you may want to file an action directly against her heirs at law to foreclose your security interest or recover your collateral.*

III. **Make Sure You Do Not Miss a Statute of Limitations.**

S.C. Code Ann. §15-3-530 is the general three year statute of limitations for an action on a contract, which begins to run on the date the action accrues. Maier v. Tietex Corp., 331 S.C. 371, 500 S.E.2d 204 (Ct.App. 1998). A cause of action accrues when the contract is breached or broken. Richland-Lexington Airport Dist. v. American Airlines, Inc., 306 F.Supp.2d 548 (D.S.C. 2002). That is typically the latter of the date of default in payment under the contract or the date of last payment. S.C. Code Ann. § 15-3-120.

A promissory note payable on demand, with or without interest, is due immediately and the statute of limitations runs from the date of the execution of the note. Coleman v. Page's Estate, 202 S.C. 486, 25 S.E.2d 559 (1943).

If your Summons and Complaint is not served within the statute of limitations, actual service must be accomplished not later than one hundred twenty days after filing. Rule 3(a)(2), SCRCP; S.C. Code Ann. § 15-3-20 (B).

There are certain events that can toll the statute of limitations, such as the debtor's absence from the state (S.C. Code Ann. § 15-3-30), the debtor's minority (S.C. Code Ann. § 15-3-40) or the debtor's insanity (S.C. Code Ann. § 15-3-40). Unfortunately, the debtor's insanity may not be apparent until he files a counter-claim!

Tip 2: *If it looks like the statute of limitations has run, see if a longer statute of limitations could apply to the debt. S. C. Code Ann. § 15-3-520 provides for a 20 year statute of limitations on (a) an action upon a bond or other contract in writing secured by a mortgage of real property and (b) an action upon a sealed instrument. S.C. Code Ann. § 36-2-725 provides for a 6 year statute of limitations on a sealed contract for sale or an offer to buy or sell goods.*

IV. Make Sure You File Your Lawsuit in the Proper Court.

A. Magistrate's Court. It has concurrent civil jurisdiction in actions arising on contracts for the recovery of money only, if the sum claimed does not exceed \$7,500. S.C. Code Ann. § 22-3-10. Most plaintiffs in Magistrate's Court do not have an attorney since a business may be represented in Magistrate's Court by a non-lawyer officer, agent or employee and even an attorney licensed in another jurisdiction. The filing fee in Magistrate's Court is \$80, roughly half of the filing fee in Circuit Court. Magistrate's Court is the People's Court and has its own set of Rules. Magistrates appointed before 1989 did not have to be high school graduates. Magistrates appointed between 1989 and 2001 were required to have received at least a high school diploma or the equivalent. Magistrates initially appointed after January 1, 2001, were required to have at least a two-year college degree, while those appointed for the first time since 2005 must have at least a four-year degree. In Magistrate's Court, your judge may be your car mechanic. He will be puzzled as to why you are in his court representing a plaintiff who could be representing itself.

B. Circuit Court. The vast majority of collection cases brought by lawyers involve more than \$7,500 and are filed in the Court of Common Pleas (a/k/a the Circuit Court). Circuit Court Judges are attorneys appointed by the legislature and have been subjected to judicial screening. Judges travel around the state and are typically not assigned a specific collection case unless it has turned into a nightmare. The judge who hears the first motion in a case may very well not be the judge who hears the second motion in the same case.

C. Venue. A collection action must be filed in the county in which either the property securing the claim is located (S.C. Code § 15-7-10) or in the county where it properly may be brought and tried against the defendant according to the provisions of S.C. Code Ann. § 15-7-30 (some of which are as clear as mud). This is the reason all contracts should contain a forum or venue clause!

A collection action against a resident individual/corporation or foreign corporation having a certificate of authority to do business in South Carolina must be brought in the county in which the individual either resides/has its principal place of business at the time the cause of action arose OR where the most substantial part of the alleged act or omission giving rise to the cause of action occurred. (S.C. Code Ann. § 15-7-30 (C), (E), (F)).

A collection action against a nonresident individual defendant must be brought in the county in which the most substantial part of the alleged act or omission giving rise to the cause of action occurred, the county where the individual plaintiff resides at the time the cause of action arose OR the county of the plaintiff's principal place of business at the time the cause of action arose. (S.C. Code Ann. § 15-7-30 (D)).

Owning property and transacting business in a county is insufficient in and of itself to establish the principal place of business for a corporation for purposes of S.C. Code Ann. § 15-7-30.

V. Read, re-read and Follow the South Carolina Rules of Civil Procedure.

Rule 4 governs service of process. ***Tip 3:*** *Don't be cheap – always personally serve your summons and complaint on the defendant so that you have good service.*

Rule 5 states what pleadings are required and allowed and provides rules for motions. Unlike in other states and in federal courts, memoranda in support of the motion are not required to be filed with the motion. Unless the court instructs you otherwise, memoranda may be presented to the court on the day of the hearing. **Tip 4:** *Always file a verified complaint or an affidavit of statement of account along with your Complaint. That makes obtaining a default judgment easier.* **Tip 5:** *Make sure your Complaint asks for all relief to which your client is entitled (i.e. attorney fees under the contract, interest and late fees) and that supporting documents showing your entitlement to the additional relief are attached.* **Tip 6:** *When filing a Summons and Complaint, do not forget the Civil Action Coversheet, the \$150 filing fee and an extra copy of everything with a return postage paid envelope in which clocked copies will fit.* **Tip 7:** *When filing a motion, do not forget the Motion Information Form and Coversheet, the \$25 motion fee payable to the clerk, and an extra copy of everything with a return postage paid envelope in which filed copies will fit.* **Our judicial system cannot afford to pay postage to send clocked copies and, unfortunately, we do not yet have electronic filing in state court.**

Rule 12 (a) states that, within 30 days after service, a defendant shall serve his response to the Complaint, a party shall serve her response to a cross-claim and a party shall serve its response to a counter-claim. **Tip 8:** *Service means hand delivery or snail mail, not e-mail and not overnight mail.* **Tip 9:** *Counter-claims are the primary reason you should never take a collection case on a contingency basis. Counter-claims are a creditor attorney's nightmare. Counter-claims by a pro se debtor are a creditor attorney's equivalent of the ninth level of hell.*

Rule 6 (a) provides that, if the due date of a response is a Saturday, Sunday or holiday, the response period runs until the end of the next day which is neither a Saturday, Sunday or holiday. Rule 6 (b) provides that five days are added to the statutory response period if service is made by mail. If you don't want to give your opponent 5 extra days to respond to discovery, serve it by hand delivery.

Rule 55 governs default judgments, which are very important and may be the best outcome in collection cases. To obtain a default judgment, you need to establish that the defendant was properly served with the Summons and Complaint. *See Tip 3 above since you will need to file an Affidavit of Default, stating how the defendant was served and, if the defendant is an individual, that she was not in the military at the time of service of the Summons and Complaint before you can obtain a default judgment.*

Rule 55(b)(1) allows for entry of judgment for a liquidated amount or sum certain by the Court upon motion or application and upon affidavit of the amount due. *You will need to file a Motion Information Form and Coversheet and pay \$25 to file your motion for default or proposed order of default. If you have followed Tips 4 and 5 above, this should be easy.*

Rule 55(b)(2) applies to unliquidated claims, which require a trial or hearing. Hopefully, you have followed the tips above so that your claim is liquidated.

Rule 55(b)(3) states what to do when you are seeking attorney fees in connection with a default. You must specify in your motion that attorney fees are sought, file an affidavit of attorney fees, and mail a notice of the motion and affidavit to the defaulted party, which gives him 10 days to object before the Court will award you attorney fees. **Tip 10:** *Judges sometimes do not want to award*

your full amount of attorney fees so make sure they are proportionately reasonable to the size of the amount you are seeking.

VI. Don't Start a Claim and Delivery Action Unless You and the Client Know What to Expect.

Under S.C. Code Ann. § 15-7-10, the claim and delivery action must be filed where the subject matter is situated (where the property is located).

The plaintiff, in an action to recover the possession of personal property, may, at the time of issuing the summons, or at any time before answer, claim the immediate delivery of such property. (S.C. Code Ann. § 15-69-10).

When a delivery is claimed an affidavit must be made by the plaintiff or by someone on his behalf showing: (1) That the plaintiff is the owner of the property claimed, particularly describing it, or is lawfully entitled to the possession thereof by virtue of a special property therein, the facts in respect to which shall be set forth; (2) That the property is wrongfully detained by the defendant; (3) The alleged cause of the detention thereof, according to the affiant's best knowledge, information and belief; (4) That the property has not been taken for a tax, assessment or fine pursuant to a statute or seized under an execution or attachment against the property of the plaintiff or, if so seized, that it is by statute exempt from such seizure; and

(5) The actual value of the property. (S.C. Code Ann. § 15-69-30).

The plaintiff shall attach to the affidavit a notice of a right to a preseizure hearing which shall notify the defendant that within five days from service thereof, he may demand such hearing by notifying the clerk of court in writing and present such evidence touching upon the probable validity of the plaintiff's claim for immediate possession, and defendant's right to continue in possession. (S.C. Code Ann. § 15-69-40).

The plaintiff must post a bond for double the value of the property or he will get no immediate relief. The sheriff serves the affidavit, notice and bond on the defendant. If the defendant (1) fails to demand a preseizure hearing within five days of service, or (2) after such hearing the judge shall find that plaintiff's claim for immediate possession should be allowed, or (3) the clerk of court or judge finds that a preseizure hearing has been previously waived in writing as provided in this chapter, or (4) the clerk of court or judge finds, as provided in this chapter, that there is a probability that the subject property is in immediate danger of being destroyed or concealed by the possessor of such property, then the clerk of court or judge shall endorse upon the affidavit for possession a direction to the sheriff requiring him to take the property described therein from the defendant and keep it, to be disposed of according to law. (S.C. Code Ann. § 15-69-50).

VII. Don't Seek a Pre-judgment Attachment Unless You and Your Client Know What to Expect.

These are very much like a claim and delivery action and require an affidavit, a warrant for attachment and a bond to be served by the sheriff.

As with claim and delivery, an affidavit setting forth the grounds for the attachment, set forth in S.C. Code Ann. § 15-19-10, must be filed. (S.C. Code Ann. §15-19-50). The form affidavit is included in the statutes at S.C. Code Ann. §15-19-60.

The amount of the bond is discretionary and may be much lower than in a claim and delivery action (\$250 is the minimum bond for Circuit Court and \$25 is the minimum bond for Magistrate's court). (S.C. Code Ann. § 15-19-80). The form of bond is included in the statutes at S.C. Code Ann. § 15-19-90.

The warrant of attachment must be obtained from a judge, clerk of the court or magistrate in which or before whom the action is brought or from a circuit judge. (S.C. Code Ann. §15-19-40). The warrant form is included in the statutes at S.C. Code Ann. § 15-19-110.

As with a claim and delivery action, the sheriff is charged with serving the required documents on the debtor. The sheriff is required to immediately attach all the real estate of the debtor and all his personal estate, including money and bank notes, except such real and personal estate as is exempt from attachment, levy or sale by the Constitution, and shall take into his custody all books of account, vouchers and papers relating to the property, debts, credits and effects of the debtor, together with all evidences of his title to real estate, all of which he shall safely keep, to be disposed of as directed in this article. (S.C. Code Ann. § 15-19-230).

Whenever the defendant shall have appeared in such action he may apply to the officer who issued the attachment or to the court for an order to discharge the attachment, and, if such order be granted, all the proceeds of sales and moneys collected by such officer and all property attached remaining in his hands shall be delivered or paid by him to the defendant or his agent and released from the attachment. (S.C. Code Ann. § 15-19-300).

To get his property released, the defendant must post a bond for double the amount claimed in the Complaint. (S.C. Code Ann. § 15-19-310).

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VIII. Know the Exemptions and Tell Your Client About Them.

The exemptions are lavish by South Carolina standards. Current exemptions include the homestead exemption of \$53,375, the motor vehicle exemption of \$5,350, the household goods exemption of \$4,275, the jewelry exemption of \$1,075, the liquid assets exemption of \$5,350, the tools of the trade exemption of \$1,600 and a wildcard exemption of \$5,350.

Additionally, social security benefits, most pension plans, alimony, child support, individual retirement accounts are also exempt, as are the debtor's wages.

Keep in mind, exemptions apply only to individuals (real people).

What do these exemptions mean for creditors? It means that an unsecured creditor will most likely not collect a penny from an individual debtor. *This is yet another reason not to take a collection case on a contingency fee basis.*

IX. Tell Your Client What She Can Expect to Receive in a Successful Collection Case.

She will receive a piece of paper called a “Judgment”, which, along with \$5.26, will purchase her a veggie burger and a large diet coke at the Devine Street Burger King.

Next week, we’ll discuss how to collect judgments.