

**IN THE DISTRICT COURT OF FAULKNER COUNTY, ARKANSAS
CONWAY DIVISION**

PORTFOLIO RECOVERY ASSOCIATES, LLC

PLAINTIFF

V.

CASE NO. CV-13-423

LORETTA BURKS

DEFENDANT

**MOTION FOR NEW TRIAL PURSUANT TO RULE 60 (C) COMBINED
WITH BRIEF IN SUPPORT**

Comes now the Defendant, Loretta Burks, by and through her attorneys, Joel Hargis, the Hargis Law Firm and Kathy Cruz, the Cruz Law Firm, and for her motion for a new trial pursuant to Rule 60 (c) states:

1. The Plaintiff filed this case on May 31, 2013 and the Defendant was apparently served with a summons and complaint by mail on or about August 1, 2013, and she filed a pro se answer on August 9, 2013 denying that she was indebted to the Plaintiff or any of its assignors or alleged previous owners of this account.

2. The Defendant had previously been in direct contact with the alleged account originator, General Electric Credit Corporation, and its various successors or assignees and denied that she ever had an account with any party having an alleged interest in this case.

3. The Defendant had previously on August 21, 2012 executed a sworn Identity Theft Affidavit for this account after dealing with the original creditor by phone and after dealing with the Plaintiff by phone 9 months before the Plaintiff filed this case. The Defendant provided ID Theft affidavit to the Plaintiff with her pro se answer on August 9, 2013, and again with her pro se answers to discovery filed with this Court on October 11, 2013.

4. In fact, the Defendant, in a *pro se* capacity, timely answered all discovery and provided a copy of her sworn Identity Theft Affidavit denying that she had any liability as to the Plaintiff or any other party claiming any interest in this case.

5. In fact, such responses were filed of record by the Defendant.

6. On December 3, 2013 the Plaintiff sent the Defendant a letter stating, "There is some question regarding this matter, Could you please send some form of identification showing your date of birth" (EX 1)

7. The Defendant complied and sent a copy of her Arkansas Drivers' License to the Plaintiff, despite the Defendant's Drivers' License number and Social Security number already having been provided to the Plaintiff as that information was included in the ID Theft Affidavit included with

the Defendant's answer on August 9, 2013 and in response to discovery on October 11, 2013.

8. The Plaintiff then instead of taking any further action required by Rule 11, obtained several continuances of the trial setting from 2013 to 2015.

9. The Defendant was prepared to defend this case at every scheduled hearing date, but after the case being continued from 2013 to 2015, this pro se Defendant assumed that the Plaintiff would have to disclose to this Court the ID Theft Affidavit and other facts known to the Plaintiff, thus there was nothing the Defendant needed to say at any hearing, and she mistakenly assumed the Plaintiff would comply with ethical rules requiring candor toward this Court and disclose to this Court all information available to the Plaintiff that showed this account did not belong to the Defendant. Based on this faulty assumption this pro se Defendant failed to appear at the only hearing held in this case.

10. At no time did the Plaintiff ever amend its pleadings to conform to include a response or a defense to the Defendant's ID Theft affidavit.

11. To the best of her knowledge, the Defendant was never served a certified copy of the judgment, thus giving the Defendant two years to bring this action pursuant to Rule 60(c); but, even if such certified copy was provided to the Defendant, this Court maintains jurisdiction pursuant to Rule 60 (c) for a period of one year after the date the judgment was entered on January 20, 2015, which time has not yet expired.

12. As such, this Court maintains jurisdiction to hear this motion pursuant to Rule 60(c)(2).

13. Furthermore, Rule 60(c)(4) allows this Court to maintain jurisdiction for an unspecified period of time if fraud or misrepresentation is alleged.

14. After this Court entered judgment for \$6,016.07 on January 20, 2015, the Plaintiff caused a writ of garnishment to be issued for the amount of \$50,023.75 on March 16, 2015. Such amount includes \$43,265.82 of "Accumulated Interest." The Defendant was garnished pursuant to that writ of garnishment for \$3k.

15. Whether it was intentional fraud or gross misrepresentation to this Court, there is no conceivable way a \$6,016.07 judgment could

increase to a \$50,023.75 judgment in less than 60 days with no other action taken. Notwithstanding, the Plaintiffs sought and obtained a writ of garnishment for more than \$50,023.75; executed on such writ of garnishment; and, as of the date of this motion, has made no attempt to correct or amend that writ of garnishment

16. While the Plaintiffs may allege it is a bona fide business error, the bona fide business error can only be alleged to protect the Plaintiff from administrative errors for which the Plaintiff can show that there were proper procedures in place to prevent such errors. Surely the attorneys for the Plaintiffs have a copy of the judgment that clearly says the judgment is in the amount of \$6,016.07. Pursuant to Rule 11 of the Arkansas Rules of Civil Procedure, attorney must use due diligence to insure that writs of garnishment conform to the orders of this Court.

17. Inflating the garnishment amount from \$6,016.07 to \$50,023.75 is not an administrative error entitling the Plaintiff to a bona fide error defense. Pleading affirmatively, the Defendant states that such is a violation of Rule 11 and candor toward this Court.

18. Pleading affirmatively, the Plaintiff has a history of vigorously pursuing individuals in debt collection actions even though

those individuals do not owe the debts. Indeed, the Plaintiff has even argued in other cases that it is the individuals who must prove that they do not owe the debt as opposed to the Plaintiff proving that it is owed the debt.

WHEREFORE, the Defendant prays this Court grant her motion for a new trial pursuant to the grounds allowed under Rule 60(c) in that she provided documentation to the Plaintiff that this account was not her debt, quash the writ of garnishment for \$50,023.75, order the Plaintiffs to refund all amounts garnished under the unlawful writ of garnishment, for her costs and attorney fees, and for all other relief to which she may be entitled.

BRIEF IN SUPPORT OF MOTION FOR A NEW TRIAL

Comes now the Defendant, by and through her attorneys as above, and for her Brief in Support of her Motion for a New Trial states:

PROCEDURAL HISTORY

The procedural history of this case is as stated in the attached motion for a new trial.

FACTS

The facts of this case are as stated in the attached motion for a new trial.


THE LAW

Rule 60 allows for this Court to maintain jurisdiction for up to two years after the final judgment is entered and there is no limitation on this Court maintaining jurisdiction for the purposes of correcting the record using its inherent power, or for fraud or misrepresentation. Since this motion is filed within the one year allowed by Rule 60 when the Defendant did not appear for trial, this Court has jurisdiction to hear this motion.

Rule 11 requires all Arkansas attorneys to perform due diligence as to their factual allegations, and Arkansas Rules of Professional Conduct require all Arkansas attorneys to have candor toward the Court, which the Defendant now alleges would have required the Plaintiff to disclose to this Court that the Defendant was a victim of ID Theft.

Rule 11 also applies to the Writ of Garnishment that the Plaintiff caused to be issued wherein the Plaintiff added \$43,265.82 in interest on a \$6,016.07 judgment issued less than 60 days before the application was made for a Writ of Garnishment. Arkansas usury laws would mandate that this interest rate of over 600% is unlawful, and frankly it is incomprehensible.

Respectfully submitted,
Loretta Burks

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CERTIFICATE OF SERVICE

I, the undersigned attorney, do hereby certify that I have served a copy of the foregoing pleading on the Plaintiff to this action by mailing a copy thereof to the following on this 19th day of January, 2016:

Lori Withrow
Allen & Withrow
P.O. Box 17248
Little Rock, AR 72222



Kathy A. Cruz

EXHIBIT 1

Henry "Gus" Allen
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December 3, 2013

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Loretta Burks
51 Batesville Mountain Rd
Damascus, AR 72039

Re: Portfolio Recovery Associates, Llc v. Loretta Burks
Case No. CWCV-13-423

Dear Loretta Burks:

There is some question regarding this matter. Could you please send some form of identification showing your date of birth?

Thanks so much.

Yours very truly,



Lori Withrow

**This communication is from a debt collector and is an attempt to collect a debt.
Any information will be used for that purpose.**