In the United States Bankruptcy Court
for the
Southern District of Georgia
Brunswick Division

In the matter of:	)	
	)	Chapter 13 Case
BELINDA JOYCE MILLER	)	
	)	Number 99-21232
Debtor	)	

MEMORANDUM AND ORDER

The Debtor in this case, Belinda Joyce Miller, filed a Chapter 13 petition on October 14, 1999. At the time of filing Debtor retained possession of a 1997 Oldsmobile Cutlass, which was later surrendered to Arcadia Financial, Ltd., on or after May 12, 2000. Arcadia then disposed of this collateral and filed a proof of claim in the amount of $9,611.66 for a deficiency, to which the Debtor objects, arguing that Arcadia did not meet the statutory requirements necessary to recover a deficiency claim as set forth in O.C.G.A. §10-1-36.

The Debtor testified, under oath at this hearing, that she surrendered the vehicle to Arcadia in May, and within 10 days received a certified letter of sale, but did not receive notice that Arcadia intended to pursue her for the deficiency. To support her objection, she cites O.C.G.A. §10-1-36, which states in part:

> When any motor vehicle has been repossessed after default in accordance with Part 5 of Article 9 of Title 11, the seller or holder shall not be entitled to recover a deficiency against the buyer unless within ten days after the repossession he forwards by registered or certified mail to the address of the buyer shown on the contract or later designated by the buyer a notice of the seller's or holder's intention to pursue a deficiency claim against the buyer.

A holder, as defined by O.C.G.A. §10-1-31, is "the retail seller of the motor vehicle under the contract, or if the contract is purchased by a sales finance company or another assignee, the sales finance company or other assignee at the time of the determination."

In response to the Debtor's objection, Arcadia cited Cherry v. General Motors Acceptance Corp., 116 B.R. 315 (Bankr. M.D. Ga. 1990)(Laney, J.) for the general rule that a proof of claim, timely filed and executed in accordance with bankruptcy rules, constitutes *prima facie* evidence of the validity and amount of a claim. That rule is overcome, however, and the burden of proof shifted, when the objecting party comes forth with evidence that places the claimant's entitlement at issue. Id. at 316. The Debtor's testimony in this matter was sufficient to shift the burden of proof to Arcadia, who presented no evidence and relied solely on Cherry v. General Motors Acceptance Corp.[1]

[1] While the main rule presented by Cherry is applicable, the outcome reached by Judge Laney is factually distinguishable from the case at bar. In Cherry, the underlying contract at issue presumably involved Alabama law, thus rendering the Georgia Motor Vehicle Sales Finance Act, which is controlling in this case, inapplicable. Judge Laney, in reaching his conclusion instead applied the UCC, which is inapplicable in the present instance. *See also In re* Brown, 221 B.R. 46 (Bankr. S.D. Ga. 1998)(Walker, J.)(following the general rule set forth in Cherry regarding proof of claim serving as *prima facie* evidence of validity of a claim, but also distinguishable on factual grounds as the deficiency claims at issue involved

Therefore, because the Debtor successfully shifted the burden of proof, and Arcadia failed to present any evidence to shift this burden back to the Debtor, the Debtor's objection to Claim 18 is sustained and the deficiency claim shall be disallowed.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This _____ day of February, 2001.

mobile homes and did not fall under the Georgia Motor Vehicles Sales Finance Act).