

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Augusta Division

IN RE:)
)
LEASE PURCHASE CORPORATION)
)
Debtor)
_____)
)

Chapter 7 Case
Number 87-11177

JAMES D. WALKER, JR., TRUSTEE FOR)
LEASE PURCHASE CORPORATION,)
VELSTAR ENTERPRISES, INC.,)
JOHN GINN ENTERPRISES, INC.)
MIG INVESTMENT CO., INC.,)
RAY MORRIS HOUSING CENTER, INC.,)
CHARLES FLANDERS HOMES, INC.,)
BOB WRIGHT HOMES, INC.,)
VELSTAR INSURANCE AGENCY, INC.,)
HARRY LUCAS HOMES, INC.,)
HUTCHINSON HOMES, INC.,)
WREN HOMES OF AUGUSTA, INC.,)
HUTCHINSON HOMES OF THOMSON,)
WREN HOMES OF THOMSON, INC.,)
BOB WRIGHT ENTERPRISES, INC.,)
TERRY STULL HOUSING CENTER, INC.,)
BILL KINLAW HOUSING CENTER, INC.,)
RALPH SCURRY HOMES, INC.,)
HUTCHCO LEASING CORP., INC.,)
NEW ENVIRONS OF SC, INC.,)
RAY RADFORD HOMES, INC.,)
HUTCHINSON HOMES OF SC, INC.,)
TOWN & COUNTRY HOMES, INC.,)
TOWN & COUNTY HOMES,)
MARSHALL KING HOMES, INC.,)
EARL LOWE HOUSING CENTER INC.,)
J. R. GOSNELL HOMES, INC.,)
WARNER ROBBINS HOUSING CENTER,)
PEGGY'S MOBILE HOMES, INC.,)
GARY SMOAK HOUSING SHOWPLACE,)
GREENWOOD HOUSING CENTER, INC.,)
FIRST QUALITY HOUSING CENTER,)
INC., GLENN MANNING HOMES, INC.,)
JERRY SIMPKINS HOMES, INC.,)

FILED
at 3 O'clock & 01 min. P.M.
Date: 5-18-94

TONY BRUNSON HOMES, INC.,)
ED EDWARDS HOMES, INC.,)
CHARLES RAGAN HOMES, INC.,)
LARRY FISCHER HOMES, INC.,)
LARRY SHORT HOMES, INC.,)
RAY SOLLIE HOMES, INC.,)
BOB BRUNSON HOMES, INC., AND)
JIMMY PHILLIPS HOMES, INC.)

Plaintiff)

vs.)

CIT FINANCIAL SERVICES)
CORPORATION AND CIT GROUP/)
SALES FINANCING, INC.)

Defendants)

Adversary Proceeding
Number 90-1092

ORDER

On May 13, 1993 I entered an order responding to a request by defendants, CIT Group/Sales Financing, Inc. and CIT Financial Services Corporation ("CIT"), for a pretrial ruling "on the relevance of consumer notices of resale of consumer collateral (mobile homes) to CIT's right to charge losses against the collateral at issue in this case (the Reserves). . . ." Proposed Pretrial Order, p. 23. In response to the arguments of plaintiff and defendants, I determined that under Georgia law each dealer, the debtor-in-possession, or bankruptcy trustee is a "debtor" for purposes of O.C.G.A. § 11-9-504(3), entitled to the required notice under that section, May 13 Order, pp. 5-9, and that consumer notices required by O.C.G.A. § 10-1-36 are irrelevant insofar as O.C.G.A. § 10-7-22 does not discharge the dealers by virtue of CIT's alleged failure to comply with O.C.G.A. § 10-1-36 because the dealers consented in advance to such conduct. May 13 Order, pp. 11-13.

Subsequent to the May 13 Order, plaintiff filed a motion to alter or amend, asserting that I erroneously relied on the definition of "buyer" in O.C.G.A. § 10-1-2, the Retail Installment and Home Solicitation Sales Act, in ruling that O.C.G.A. § 10-1-36 does not apply to dealers. See May 13 Order, p. 12 n.8. Upon review, I determined that plaintiff was correct and that the proper Georgia Code sections governing the sale of mobile homes, the "Motor Vehicle Sales Finance Act" (MVSFA) - O.C.G.A. §§ 10-1-30 to 41, contained a different definition of "buyer". May 26 Order, pp. 4-5; see O.C.G.A. § 10-1-31(a)(8). However, I reaffirmed my ruling that each dealer consented in advance to CIT's possible noncompliance with O.C.G.A. § 10-1-36 as to notice given to consumers and that such consent precludes a dealer's discharge from liability under O.C.G.A. § 10-7-22 based on increase of risk. I determined that while O.C.G.A. § 10-1-37 precluded waiver of any provisions of Article 2 of Chapter 1 of Title 10, namely O.C.G.A. § 10-1-36, it did not preclude a waiver of O.C.G.A. § 10-7-22 which is part of Article 2 of Chapter 7 of Title 10. May 26 Order, pp. 5-6.

Relying on the definition of buyer found in O.C.G.A. § 10-1-31(a)(8) applicable to motor vehicle installment sales, in the motion to alter or amend and by letter received subsequent to the May 26 Order, the plaintiff raised the following new contentions regarding the notice required under O.C.G.A. § 10-1-36 not previously addressed by the parties:

1. That the dealers and the trustee would be considered "buyers" under O.C.G.A. § 10-1-

31(a)(8), and as such, are entitled to receive the notice set forth in O.C.G.A. § 10-1-36.

2. That the dealers and the trustee cannot waive that right, and any such waiver is unenforceable and void under O.C.G.A. § 10-1-37.

3. That, even if a proper notice were given to the dealer or the trustee under O.C.G.A. § 10-1-36, if a proper notice were not given to the consumer, then the trustee or the dealer could assert that as a defense to any deficiency claim under the authority of Brack Rowe Chevrolet Co. v. Walls, 201 Ga. App. 822, 412 S.E.2d 603 (1991).

4. That if CIT did not give this notice to both the consumers and to the dealers or the trustee, as the case may be, it has no right to a deficiency claim and no right to use dealer reserve accounts to satisfy any deficiency claim.

Defendants responded to these contentions now before me.

Under the MVSA a seller or holder of a retail installment contract is required to give notice to the "buyer" of the "seller or holder's intention to pursue a deficiency claim against the buyer." O.C.G.A. § 10-1-36. Buyer is defined as "a person who buys a motor vehicle from a retail seller not principally for the purpose of resale and who executes a retail installment contract in connection therewith or a person who succeeds to the rights and obligations of such person." O.C.G.A. § 10-1-31(a)(8).¹ The trustee contends that upon CIT's repossession of a mobile home securing a retail

¹A person is broadly defined to include "an individual, partnership, corporation, association, or any other group however organized."

installment contract the dealers, or their successor, the trustee, would be entitled to notice under O.C.G.A. § 10-1-36 as a "buyer".

The trustee's argument is one of first impression and no case law exists to support his contention. The definitional and substantive provisions of the MVSFA indicate that the consumer notice provision in O.C.G.A. § 10-1-36 was not meant to apply to the contractual arrangements entered into between a dealer and its financing source. Apart from the original motor vehicle purchaser, the only person entitled to the status of buyer under O.C.G.A. § 10-1-31(a) (8) is a person who "succeeds to the rights and obligations" of the original purchaser. This language simply accords "buyer" status to a subsequent transferee of the original purchaser who assumes the purchaser's obligations under the retail installment contract.

Under the MVSFA the dealer, the customer, and CIT each have a defined status; CIT is a "holder", the customer is a "buyer" and the dealer is a "seller". See O.C.G.A. § 10-1-31(a) (3), (8), (10).² When the legislature intended to give a defined party an additional status under the statute, it clearly and explicitly did so. See O.C.G.A. § 10-1-31(a) (3) at note 2 supra

²"Holder" of a retail installment contract means the retail seller of a 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. O.C.G.A. § 10-1-31(a) (3).

"Retail installment seller" or "seller" means a person engaged in the business of selling motor vehicles to retail buyers in retail installment transactions. O.C.G.A. § 10-1-31(a) (10).

"retail seller" is specifically designated as a "holder". The statute does not, however, define "buyer" to include a "seller".

The dealers or the trustee do not succeed to the rights and obligations of the buyer under the retail installment contract; a dealer's rights and obligations arise exclusively from the dealer underlying agreement executed by each dealer with CIT. The dealer agreements envision the dealer repurchasing the mobile home from CIT after repossession. If that obligation had been performed, the dealers would have then succeeded to the right of CIT to proceed as the secured party under the retail installment contract against the buyer. O.C.G.A. §§ 11-9-504(5); O.C.G.A. § 10-7-56.³ The dealers would not have succeeded to the rights of the buyer. That CIT might not properly send notice to consumers under O.C.G.A. § 10-1-36 and that as a subrogee of CIT's rights a dealer would be barred from pursuing a deficiency claim against a buyer is simply a risk inherent under the statute. See, e.g., Sikes & Swanson Pontiac-GMC Truck, Inc. v. Cantrell, 194 Ga. App. 818, 392 S.E.2d 36 (1990).

³O.C.G.A. § 11-9-504(5) provides:

A person who is liable to a secured party under a guaranty, indorsement, repurchase agreement or the like and who receives a transfer of collateral from the secured party or is subrogated to his rights has thereafter the rights and duties of the secured party. Such a transfer of collateral is not a sale or disposition of the collateral under this article.

O.C.G.A. § 10-7-56 provides:

A surety who has paid the debt of his principal shall be subrogated, both at law and in equity, to all the rights of the creditor and, in a controversy with other creditors, shall rank in dignity the same as the creditor whose claim he paid.

The trustee also argues that as a dealer can utilize the defense of the principal under O.C.G.A. § 10-7-2, a dealer therefore succeeds to the rights of a retail buyer and must be deemed a "buyer".⁴ The trustee's argument is based on the case of Brack Rowe Chevrolet Co. v. Walls, 201 Ga. App. 822, 412 S.E.2d 603 (1991). In that case, Brack Rowe Chevrolet ("Brack Rowe") sold a car to Walls under a retail installment contract and assigned its rights under the contract with recourse to General Motors Acceptance Corporation ("GMAC"). Walls later sold the car to Allen. A new retail installment sales contract from Walls to Allen was executed and assigned by Walls, with recourse, to GMAC. Brack Rowe subsequently executed a separate guaranty agreement with GMAC on the Allen obligation. After GMAC repossessed the car, Brack Rowe paid the balance owed to GMAC and received the car and an assignment of GMAC's rights. Brack Rowe sold the car and sued Walls for the deficiency under the guaranty she had executed with GMAC. After a jury found in favor of Walls, Brack Rowe appealed. The appellate court ruled that a denial of Brack Rowe's motion for a directed verdict was not error as material issues existed as to whether Allen had received the proper notice required by O.C.G.A. § 10-1-36 and that Walls could properly raise that failure as a defense to the

⁴O.C.G.A. § 10-7-2 provides in pertinent part:

The obligation of the surety is accessory to that of his principal; and, if the latter from any cause becomes extinct, the former shall cease of course, even though it is in judgment. .

. .

deficiency action.

However, though Walls did not raise a notice issue as to herself, as a guarantor of Allen's obligation Walls is entitled to assert all defenses available to Allen as the principal. O.C.G.A. § 10-7-2. 'Thus, in the absence of waiver or estoppel we see no reason why a guarantor may not assert the 'commercially reasonable' defense which would be available to his principal, the debtor, under [O.C.G.A. § 11-9-504(3)] in an action by the secured party against the guarantor for a deficiency judgment.' Vickers v. Chrysler Credit Corp., 158 Ga. App. 434, 436-37, 280 S.E.2d 842 (1981). The fact that Walls received proper notice does not estop her from benefitting from any notice defense asserted by Allen since the issue here is not whether Walls was notified, but whether, as guarantor, she may be discharged because her principal has a defense to the deficiency claim.

Brack Rowe Chevrolet Co., 201 Ga. App. at 824, 412 S.E.2d at 605.

While Brack Rowe Chevrolet Co. affirms that a guarantor of a buyer's obligation under a motor vehicle installment sales contract may assert a lack of proper notice to the buyer under O.C.G.A. § 10-1-36 as a defense to a deficiency action against it by a holder, it does not necessarily follow and Brack Rowe Chevrolet Co. does not hold that the ability to assert such a defense should entitle the guarantor to notice as a "buyer" under that section.⁵

⁵The court in Brack Rowe Chevrolet Co. merely states "Walls does not claim she was not notified of the sale. Reeves v. Habersham Bank, 254 Ga. 615, 620-622, 331 S.E.2d 589 (1985) (guarantor is considered debtor and must be given notice of the sale)." 201 Ga. App. at 824, 412 S.E.2d at 605. The implication of this statement and the reference to the Reeves decision indicates that the court was simply recognizing that Walls was entitled to the notice required by O.C.G.A. § 11-9-504 by virtue of her guarantor-debtor status. The court goes no further.

For a secured party to recover a deficiency claim against a buyer of motor vehicle, it must comply both with the notice and sale requirements of O.C.G.A. § 11-9-504 and with the additional notice requirements of O.C.G.A. § 10-1-36.⁶ By imposition of these additional requirements, O.C.G.A. § 10-1-36 clearly expands the protection given to consumer buyers of motor vehicles over that provided in O.C.G.A. § 11-9-504 for other purchasers of personalty in which a security interest is taken.

I have previously held that each dealer or the bankruptcy trustee by virtue of that party's status as a guarantor of the obligation of the buyer on the motor vehicle retail installment contract is a "debtor" entitled to the notice required by O.C.G.A. § 11-9-504. May 13 Order, pp. 7-9 (citing Barbree v. Allis-Chalmers Corp., 250 Ga. 409, 297 S.E.2d 465 (1982)). However, the ruling in Barbree rests on a determination that a guarantor or surety falls within the explicit definition of "debtor" found in O.C.G.A. § 11-9-

⁶Under O.C.G.A. § 11-9-504, the secured party must provide reasonable notification of the time and place of a public sale of the goods or the time after which any private sale is to be made and conduct the sale in a commercially reasonable manner. Failure to comply with those requirements creates a rebuttable presumption that the value of the collateral is equal to the indebtedness. See Emmons v. Burkett, 256 Ga. 855, 353 S.E.2d 908 (1987). Section 10-1-36, however, further requires the secured party to send the consumer buyer within ten days of repossession a notice of intent to pursue a deficiency claim and informing the buyer of his right of redemption and right to demand a public sale. Unlike the penalty imposed under O.C.G.A. § 11-9-504, failure to comply with these additional O.C.G.A. § 10-1-36 requirements is an absolute bar to a seller or holder's recovery of a deficiency from the consumer buyer. Bryant International, Inc. v. Crane, 188 Ga. App. 736, 374 S.E.2d 228 (1988).

105(d) and is entitled to the rights and remedies provided for a debtor. See O.C.G.A. § 11-9-501(2). As previously noted, however, there is no indication that the definition of "buyer" in O.C.G.A. § 10-1-31 was meant to include a guarantor. Thus, while O.C.G.A. § 10-1-36 expands the consumer notice requirements beyond that in O.C.G.A. § 11-9-504, it limits that additional protection to a narrower class of persons than does O.C.G.A. § 11-9-504 - to consumers buyers and transferees of such buyers who have assumed the obligations under the retail installment contracts. It does not provide that protection for guarantors. The trustee or the dealers are not "buyers" under O.C.G.A. § 10-1-31(a)(8) entitled to notice of a holder's intent to pursue a deficiency action under O.C.G.A. § 10-1-36.

The trustee also contends that any failure of CIT to give proper notice to the consumer buyer as delineated under O.C.G.A. § 10-1-36 may be asserted by the dealers as a defense against and absolute bar to CIT's recovery of any deficiency claim from the dealer reserves as O.C.G.A. § 10-1-37 provides that such notice cannot be waived. While Brack Rowe Chevrolet Co. does provide that a guarantor, such as the dealer or trustee, may assert lack of the notice required by O.C.G.A. § 10-1-36 to the consumer buyer as a defense to the assertion of a deficiency claim against the guarantor, it does not address whether a guarantor can waive such a

defense to a deficiency claim asserted under O.C.G.A. § 10-1-36.⁷

The issue of waiver of consumer notices was previously addressed in my May 26, 1993 Order where I determined that the dealer's consent to a sale "held with or without notice" in paragraph 7 of the dealer agreements precluded a discharge of the dealer's liability for a deficiency under O.C.G.A. § 10-7-22.⁸ This waiver of CIT's conduct is not barred by O.C.G.A. § 10-1-37 because a waiver of the dealer's right to receive a discharge under O.C.G.A. § 10-7-22, as a part of Article 2 of Chapter 7 of Title 10, is beyond the purview of the prohibition on waiver of the provisions of Article 2 of Chapter 1 of Title 10 contained in O.C.G.A. § 10-1-37. The same reasoning applies to the trustee's "new" argument, based on O.C.G.A. § 10-7-2, part of Article 1 of Chapter 7 of Title 10. The anti-waiver provisions of O.C.G.A. § 10-1-37 do not operate to preclude a dealer from waiving his right to assert a defense of the principal - a sale held without proper notice to the consumer - under O.C.G.A. § 10-7-2.

This holding is not inconsistent with the inability of a guarantor to legally waive predefault the notice required by

⁷There is no indication that any waiver of notice argument was ever asserted in the case either at the trial or appellate court. That the retail installment contract assigned with recourse by Walls to GMAC may have contained a waiver of notice is irrelevant.

⁸O.C.G.A. § 10-7-22 provides in pertinent part:

Any act of the creditor . . . which injures the surety or increases his risk of exposes him to greater liability shall discharge him. . . .

O.C.G.A. § 11-9-504(3). The anti-waiver provision of O.C.G.A. § 11-9-501(3) upon which that rule is based is only available to a guarantor because it has the protected status of a "debtor" under O.C.G.A. § 11-9-504. See Branan v. Equico Lessors, Inc., 255 Ga. 718, 342 S.E.2d 671 (1986). Similarly, the anti-waiver provision of O.C.G.A. § 10-1-37 is available only to those having the protected status of a "buyer" under the MVSFA; a position which the trustee or dealers do not occupy.

Additionally, the quoted portion of Vickers relied upon by the court in Brack Rowe Chevrolet Co., see supra, is not relevant to a waiver analysis as the parties contend. The Vickers quote in Brack Rowe Chevrolet Co. is simply used as authority for the proposition that a guarantor may utilize a defense of its principal in an action against the guarantor for a deficiency judgment which holding of Vickers remains viable. A further holding of Vickers that a guarantor may, predefault, waive the right to assert a defense to the notice and reasonableness requirements of O.C.G.A. § 11-9-504 has been clearly overruled by a subsequent line of decisions. See Barbree; Branan. However, this overruled holding of Vickers only concerns a guarantor's ability to waive the requirements of O.C.G.A. § 11-9-504, not the requirements of O.C.G.A. § 10-1-36. As there was no discussion of waiver under O.C.G.A. § 10-1-36 in Brack Rowe Chevrolet Co. and as the reliance on the quote from Vickers is explained on other grounds, I do not construe the court's use of that quote as any expression of their

view on the ability of a guarantor to waive the requirements of O.C.G.A. § 10-1-36.

Therefore, the notices required under O.C.G.A. §10-1-36 are irrelevant to the dispute between the parties in this adversary proceeding. This memorandum of law is incorporated in and made a part of the final pretrial order in this case.

The motion to alter or amend the order of May 13, 1993 is ORDERED denied.

JOHN S. DALIS
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia
this 18th day of May, 1994.