

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA  
Augusta Division

IN RE:	)	Chapter 13 Case
	)	Number <u>91-10103</u>
MICHAEL CHRISTOPHER HILLMAN	)	
	)	
Debtor	)	
_____)	)	
	)	FILED
MICHAEL CHRISTOPHER HILLMAN	)	at 2 O'clock & 02 min. P.M.
	)	Date: 5-7-91
Plaintiff	)	
	)	
vs.	)	Adversary Proceeding
	)	Number <u>91-1028</u>
THE CITIZENS & SOUTHERN NATIONAL	)	
BANK AND s & h MOTORS d/b/a	)	
AUGUSTA MITSUBISHI	)	
	)	
Defendants	)	

**MEMORANDUM, ORDER AND JUDGMENT**

By this adversary proceeding, Michael Christopher Hillman, plaintiff and debtor in the underlying Chapter 13 proceeding seeks turnover of property of the estate from defendants, The Citizens & Southern National Bank (hereinafter "C&S") and S&H Motors d/b/a Augusta Mitsubishi (hereinafter "S&H") and an award of damages flowing from an alleged 362(a) stay violation. C&S and S&H deny the allegations of the complaint and by counterclaim S&H seeks to rescind the motor vehicle

conditional sales contract (hereinafter "contract") dated September 22, 1990 between it and the debtor and

recovery of compensatory and punitive damages for fraud. Based upon the evidence presented at trial, I make the following findings of fact and conclusions of law.

### **FINDINGS OF FACT**

1. Michael Hillman is the debtor in the underlying Chapter 13 proceeding in this court.
2. S&H is a corporation operating a car dealership in Richmond County, Georgia under the name of "Augusta Mitsubishi".
3. C&S is a national bank operating in Richmond County, Georgia.<sup>1</sup>
4. No objections have been raised to the jurisdiction of this court nor to the venue of this proceeding, and I find that venue and jurisdiction are appropriate in this core proceeding.
5. On or about September 22, 1990, the debtor executed the contract with S&H for the purchase of a 1990 Mitsubishi Eclipse automobile. At the time of the purchase, the debtor forged the signature of Merle E. Norris, as a co-buyer, to the contract, odometer disclosure statement, State of Georgia Motor

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<sup>1</sup>By appearing and contesting this matter on the merits C & S waived its defense of failure of debtor to perfect proper service of the complaint.

Vehicle Registration (MV-1) form and sales agreement. The debtor testified that he signed Mr. Norris' signature with Mr. Norris' permission and with the full knowledge of Mr. Chris Bonsecour, the sales

representative of S&H. Mr. Bonsecour had no recollection whatsoever of any transaction involving the debtor. Mr. Norris denies that he gave his permission to anyone to sign his name to any document regarding the purchase of a vehicle for the debtor. Having observed the demeanor of the witnesses and heard the testimony presented I find Mr. Bonsecour's total memory failure suspect, debtor's testimony false and the testimony of Mr. Norris credible and believable. From the totality of the evidence presented and reasonable inferences drawn therefrom, I find that the debtor duped Mr. Bonsecour into believing he had Mr. Norris' permission to sign Mr. Norris' name to the contract, that the debtor had no such permission and that Mr. Bonsecour knew the signature on the documents was not that of Mr. Norris.

6. As a part of the sales transaction, the debtor was required to tender a One Thousand No/100 (\$1,000.00) Dollar down payment and issued a check in that amount payable to "Augusta Mitsubishi" drawn against First Union National Bank of Georgia checking account number 6530603189. The check was negotiated and

returned marked "account closed". During the entire period that this account remained open the debtor never deposited a total of One Thousand and No/100 (\$1,000.00) Dollars to the account. There was never sufficient funds available in this account to honor this check and the debtor knew this fact.

7. Following the tender of the One Thousand and No/100

(\$1,000.00) Dollars down payment check and the execution and delivery of the contract, S&H transferred title to the automobile to the debtor and "Merle E. Norris." The contract was assigned to C&S.

8. The debtor has made no payments on the contract. Based upon a disability claim, partial payments have been made to C&S by the disability insurer.

9. On February 28, 1991 C&S repossessed the automobile.

10. On March 4, 1991, the debtor filed his Chapter 13 petition and on March 7, 1991 brought this adversary proceeding.

11. Subsequent to the repossession C&S learned of the forgery of Mr. Norris' signature and obtained a repurchase of the contract by S&H on March 25, 1991. S&H has possession of the automobile.

11. Upon demand by the debtor post bankruptcy filing for return of the vehicle, S&H refused contending it is entitled

to rescind the contract due to the debtor's fraudulent conduct.

#### **CONCLUSIONS OF LAW**

This court has recognized the obligation of a creditor to turnover property of the debtor under 11 U.S.C. §542 upon the filing for relief under the Bankruptcy Code. Blackmon v. MFC Financial Services, (In re: Blackmon), Chpt. 13 case No. 91-10089, Adversary No. 91-1009 (Bankr. S.D. Ga. Aug. Div., Dalis, J. March 22, 1991).

When turnover is demanded by a debtor under §542 and the entity in possession and control of the property refuses, this inaction constitutes an attempt "to exercise control over property of the estate" under 11 U.S.C. §362(a)(3). In re: Knaus, 889 F.2d 773 (8th Cir. 1989); Blackmon, supra.

The duty to turnover property is not contingent upon any predicate violation of the stay, any order of the court, or any demand by the creditor . . . Rather, the duty arises upon the filing of the bankruptcy petition. The failure to fulfill this duty, regardless of whether the original seizure was lawful, constitutes a prohibited attempt to 'exercise control over property of the estate' in violation of the automatic stay.

In re: Knaus, supra at 775.

In this case, S&H has by a preponderance of the evidence established grounds for rescission of the contract due to fraud. If a charge of fraud in the procurement of a contract

is substantiated, the written contract itself is voidable and subject to rescission at the election of the injured party. Cone Mills Corp. v. A.G. Estes Inc., 399 F.Supp. 938 (N.D. Ga. 1975). Upon rescission, the parties are placed back in the same position prior to the agreement. In this case, the rescission renders the vehicle not property of the estate and S&H is not subject to the stay provisions of 11 U.S.C. §362(a)(3) regarding the vehicle.

The essential elements of an action for fraud and deceit are:

1. that the debtor made representations:
2. at the time when he knew the representations were false;
3. that he made the false representations with an intention and purpose of deceiving S&H;
4. that S&H reasonably relied upon such representation; and
5. that S&H sustained a loss and damages as a proximate result of the false representations having been made.

Davi v. Shubert, 168 Ga. App. 420, 309 S.E.2d 415 (1983); Cone Mills Corp. v. A.G. Estes Inc., supra; American Food Servs., Inc. v. Goldsmith, 121 Ga. App. 686, 175 S.E.2d 57 (1970); McBurney v. Woodward, 84 Ga. App. 807, 67 S.E.2d 398 (1951). In this case the debtor tendered to S&H a check in the amount of One Thousand and No/100 (\$1,000.00) Dollars as down payment issued on a closed account in which the debtor never deposited a total of One

Thousand and No/100 (\$1,000.00) Dollars. The tender of this check was made with the intention and purpose of deceiving S&H and S&H reasonably relied upon this representation. This false representation was that the One Thousand and No/100 (\$1,000.00) Dollar check would be honored by the bank. In reliance S&H delivered the vehicle to the debtor, thereby suffering a loss, the vehicle.

Subsequent to obtaining possession of the automobile the debtor has made no payments to C&S or S&H. In order for a defrauded party to rescind a contract, it must promptly and upon discovery of the fraud offer to restore to the other party whatever has been

received of value by virtue of the contract. O.C.G.A. §13-4-60. In this case neither C&S nor S&H received anything of value from the debtor.

Having determined that the contract between the debtor and S&H is rescinded due to the fraudulent conduct of the debtor, the vehicle is not property of the estate subject to turnover under 542 and S&H is not subject to the stay of §362(a) as it pertains to the vehicle. Judgment is ORDERED entered in favor of defendants The Citizens & Southern National Bank and S & H Motors, Inc. d/b/a Augusta Mitsubishi against plaintiff, Michael Christopher Hillman on the plaintiff's complaint and on S&H's

counterclaim. The motor vehicle conditional sales contract between the parties dated September 22, 1990 is ORDERED rescinded.

Regarding S&H's claim for damages, under the facts of this case the recovery of monetary damages against the debtor is not appropriate. No monetary damages are awarded.

JOHN S. DALIS  
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia  
this 6th day of May, 1991.