

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA  
Augusta Division

IN RE:	)	Chapter 13 Case
	)	Number <u>93-11793</u>
J. L. JONES	)	
	)	
Debtor	)	
_____	)	
J. L. JONES	)	
	)	
Movant	)	
	)	
vs.	)	
	)	
GENERAL MOTORS ACCEPTANCE	)	
CORPORATION	)	
	)	
Respondent	)	

**ORDER**

J. L. Jones, debtor in this Chapter 13 case objects to the claim of General Motors Acceptance Corporation (GMAC). GMAC filed an unsecured claim in the amount of \$15,160.02. The facts are not in dispute. The debtor is the owner of 1989 Oldsmobile 98 automobile manufacturer's ID No. 1GC3W54C7K1344225. GMAC financed the purchase of the automobile. The debtor filed for relief under Chapter 13 on November 3, 1993. By consent, relief from the stay of 11 U.S.C. §362(a) was granted "to permit GMAC to obtain possession and sell the motor vehicle pursuant to applicable state law. It

[was] the further order of the court that GMAC may file an Amended Proof of Claim to reflect any deficiency balance, but must file said claim within 60 days of [the order] date or be barred." On February 23, 1994 GMAC filed an unsecured claim in the amount of \$15,160.02. The debtor objects to this claim contending that GMAC failed to dispose of the collateral in a commercially reasonable manner. GMAC responded at hearing that the motor vehicle was wrecked prepetition without insurance, that the salvage value is less than the accumulated storage costs at the wrecker yard and that it has abandoned its collateral and seeks to participate in the case only as a general unsecured creditor. The debtor contends that by virtue of the stay relief, GMAC has acquired the motor vehicle, has failed to comply with the applicable provisions of Georgia law in disposing of the automobile and is therefore barred from seeking a deficiency.

The relief from the §362(a) stay does nothing more than release the party seeking relief from the stay, in this case GMAC, from the constraints of §362. The motion for relief from stay does not adjudicate the rights of the parties under State law. It merely affords the party seeking relief the opportunity to proceed under State law to the extent that the stay is modified.

There is nothing under Federal Bankruptcy law or applicable Georgia law which compels a creditor to accept its collateral. Under Georgia law, the remedies available to a secured

party upon default of a debtor are those provided by part V. of Georgia's Uniform Commercial Code ("U.C.C.") Article 9 and the security agreement. O.C.G.A. § 11-9-501.

Upon default by a debtor the secured party has various cumulative remedies available to him.

Once default has occurred, the creditor is authorized to take or retain possession of the collateral. [O.C.G.A. § 11-9-503]. He may then proceed to reduce his claim to judgment, to foreclose on the goods, to dispose of the collateral in a commercially reasonable manner, or to retain the goods in satisfaction of the debt. [O.C.G.A. §§ 11-9-501, 11-9-503, 11-9-504, 11-9-505]. Nothing in the Code prohibits the creditor in possession of the goods from proceeding in a judicial action on the note. The remedies are cumulative and the creditor is not required to reduce himself to the position of an unsecured creditor so long as he acts in a commercially reasonable manner and does not, by his actions or omissions, further impair the position of the debtor.

McCullough v. Mobiland, Inc., 139 Ga. App. 260, 228 S.E.2d 146, 148 (1976) (as quoted in ITT Terryphone Corp. v. Modems Plus, Inc., 171 Ga. App. 710, 320 S.E.2d 784, 786 (1984)).

In accordance with those provisions, upon default, a secured party can elect to proceed solely under the note without proceeding against the collateral. Sadler v. Trust Co. Bank of South Georgia, N.A., 178 Ga. App. 871, 344 S.E.2d 694 (1986); Candler I-20 Properties v. Inn Keepers Supply Co., 137 Ga. App. 94, 222 S.E.2d 881 (1975); Borden v. Pope Jeep Eagle, Inc., 200 Ga. App. 176, 407

S.E.2d 128 (1991).<sup>1</sup> A promissory note is an unconditional contract that the debtor will pay the creditor according to the tenor of the instrument and is sufficient in itself to support a cause of action or a claim in a bankruptcy case.<sup>2</sup> Tatum v. Bank of Cumming, 135 Ga. App. 675, 218 S.E.2d 677 (1975). "[T]here is no requirement . . . that the holder of the instrument attempt to collect against the collateral before proceeding against the indorsers or maker." Hurt v. Citizens Trust Co., 128 Ga. App. 224, 196 S.E.2d 349, 351 (1973). As stated in McCullough,

The existence of a security agreement in no way affects the existence of the debt. It merely provides the secured party with an immediate source of recovery in addition to the standard remedies of an unsecured creditor. . . . [T]he intent of the Code was to broaden the options open to a creditor after default rather than to limit them under the old theory of election of remedies.

228 S.E.2d at 148-49 (quoting Michigan National Bank v. Marston, 29 Mich. App. 99, 106, 185 N.W.2d 47, 50 (1970)) (emphasis added).

While a creditor is authorized to take or retain

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<sup>1</sup>The security agreement may, however, limit this right and require a creditor to proceed against the collateral to obtain payment of the debt. See Grace v. Golden, 206 Ga. App. 416, 425 S.E.2d 363, 365 (1992), cert. denied, (1993). There was no evidence in this case that the parties' security agreement contained such a provision.

<sup>2</sup>"The maker or acceptor engages that he will pay the instrument according to its tenor at the time of his engagement . . . ." O.C.G.A. § 11-3-413(1).

possession of the collateral upon default of a debtor, see O.C.G.A. § 11-9-503, nothing in the Code makes this course mandatory. The creditor may simply choose to leave the collateral with the debtor. In this case, GMAC never repossessed the vehicle in question, but simply chose to leave it at the salvage yard where debtor had left it. Outside the context of a bankruptcy case, if GMAC had taken possession, it would not be prevented from suing on the note to obtain payment, but would be liable to debtor for any damages due to impairment of the collateral which might result from a failure to make a commercially reasonable disposition after repossession. Henderson Few & Co. v. Rollins Communications, Inc., 148 Ga. App. 139, 250 S.E.2d 830, 832 (1978); Metter Banking Co. v. Millen Lumber & Supply Co., 191 Ga. App. 634, 382 S.E.2d 624, 629 (1989); ITT Terryphone Corp., 328 S.E.2d at 787; Borden, 407 S.E.2d at 133; Sadler, 344 S.E.2d at 695. In the absence of possession, however, the creditor has no duty to make a commercially reasonable disposition of its collateral and may proceed to act, as in this case, simply as an unsecured creditor.

In this case, GMAC has abandoned the collateral and seeks to proceed as a general unsecured creditor in this case.

It is therefore ORDERED that the objection of the debtor to the general unsecured claim of GMAC in the amount of \$15,160.02 is overruled.

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JOHN S. DALIS  
UNITED STATES BANKRUPTCY JUDGE

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Dated at Augusta, Georgia

this \_\_\_\_\_ day of July, 1994.