

In re Reed, 179 B.R. 353 (Bankr.S.D.Ga., Mar 30, 1995)  
IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA  
Augusta Division

IN RE:	)	Chapter 12 Case
	)	Number <u>94-10105</u>
THOMAS OLIN REED, SR.	)	
	)	
Debtor	)	
_____	)	
CLARK CREDIT CORPORATION, INC.	)	FILED
	)	at 3 O'clock & 46 min. P.M.
Movant	)	Date: 3-30-95
	)	
vs.	)	
	)	
FARMERS & MERCHANTS BANK	)	
	)	
Respondent	)	

**ORDER**

Pursuant to notice hearing was held on the motion for relief from the stay of 11 U.S.C. § 362(a) brought by Clark Credit Corporation, Inc. ("Clark") a creditor, seeking permission to foreclose its security interest on collateral securing an obligation of the debtor to Clark. Farmers & Merchants Bank ("F & M") objected to Clark's motion and asserted a first priority lien on the collateral on which Clark seeks to foreclose. By jointly prepared "Stipulated Facts" and individually submitted briefs, the parties

have submitted the issue to me of whether the first priority security interest held by Clark was terminated by payment from F & M of the indebtedness for which Clark's security interest was originally granted. No evidence was introduced at hearing, so I base my findings of fact and conclusions of law sustaining the objection solely on the documents submitted.

Clark claims its security instrument and right to foreclose on certain farm equipment is a Retail Installment Contract executed by Mr. Reed, the debtor, on March 10, 1990. The contract was assigned to Clark from Palmer Equipment Company. The dispute is essentially over the effect of the "Security Interest and Cross Security" clause of the instrument under which Clark claims its first priority interest. This clause provides that the collateral shall also secure future advances and that payoff of the original debt does not extinguish Clark's security interest<sup>1</sup>. Subsequently,

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<sup>1</sup>This clause provides:

SECURITY INTEREST AND CROSS SECURITY: To secure the obligations under this Contract and all other obligations, whether now existing or hereafter arising under any other agreement, owed to SELLER or CHASE, SELLER reserves title to and BUYER grants to SELLER a security interest under the Uniform Commercial Code in the Equipment and in all attachments, accessories, tires, replacements or repairs placed on the Equipment now or in the future, plus leases, rental agreements, chattel paper and proceeds of any of the foregoing (including insurance proceeds). **The cross security granted by the BUYER to SELLER herein shall survive the payment of all indebtedness owed by BUYER under this Contract, unless prohibited by applicable law.**

Mr. Reed executed another Retail Installment Contract on August 15, 1991 in favor of Palmer Equipment Company, which was also assigned to Clark. The security interest granted under each contract was perfected by UCC filings showing Clark as the assignee; the first UCC filing covers the property purchased under the first retail installment contract, and the second UCC filing covers the property purchased under the second retail installment contract.

Clark argues that its lien arises from the future advance clause in both retail installment contracts, see footnote 1, supra. Dagnet clauses such as shown in footnote 1 are permitted under the Commercial Code of Georgia: "Obligations covered by a security agreement may include future advances or other value whether or not the advances or value are given pursuant to commitment . . . ." O.C.G.A. § 11-9-204(c). Clark correctly points out that under ordinary circumstances such a clause will operate to secure later loans under an earlier agreement containing such a clause. This result cannot obtain, however, under the present circumstances, where the effect of the payoff is to operate as an accord and satisfaction of Clark's interest under the March 10, 1990 contract.

F & M asserts that its payoff of the original indebtedness

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Upon assignment of this Contract by SELLER, CHASE will be deemed the only party with a security interest in the collateral described in this paragraph. (Emphasis added) (Clark is apparently the successor in interest to Chase as this distinction was not noted by either party.)

on the debtor's behalf constitutes an accord and satisfaction of Clark's interest, extinguishing Clark's security interest in the collateral and placing F & M in the first priority lien position with regard to that collateral.

Accord and satisfaction occurs where the parties to an agreement, by a subsequent agreement, have satisfied the former agreement, and the latter agreement has been executed. The execution of a new agreement may itself amount to a satisfaction of the former agreement, where it is so expressly agreed by the parties; and, without such agreement, if the new promise is founded on a new consideration, the taking of it is a satisfaction of the former agreement.

O.C.G.A. § 13-4-101. The burden of proving accord and satisfaction is on the party pleading such. M. Walter & Co. v. North Highland Assembly of God, Inc., 188 Ga. App. 852, 854, 374 S.E.2d 792, 794 (1988). F & M relies on Citizens & Southern National Bank v. Abbott, 158 Ga. App. 651, 281 S.E.2d 625 (1981), as support for its position that payoff of the original indebtedness accomplished an accord and satisfaction of Clark's claim under the March 10, 1990 contract and released the security interest held by Clark. In Abbott the Georgia Court of Appeals held that the bank's security interest in an automobile was extinguished by the payoff of the indebtedness on the vehicle by the debtor's former wife, Mrs. Abbott. Mrs. Abbott had been awarded the automobile in a divorce

proceeding and inquired of the bank the amount due under the note (on which her former husband was the obligor). The Court of Appeals found that payment of the stated balance of the obligation constituted an accord and satisfaction, estopping C & S from denying that the obligation was satisfied and asserting an interest against the car under another obligation of the former husband's under the future advance clause. The Court of Appeals noted that when the bank failed to interpose a claim to the car as security for another obligation, any such claim was lost.

Based upon the "Stipulated Facts" I cannot distinguish this case from Abbott. The holding in Abbott rests on the bank's failure to interpose its claim to the car under the future advance clause when Mrs. Abbott inquired as to the amount needed to satisfy the obligation and here Clark failed to interpose its claim to the collateral under the future advance clause when the amount needed to satisfy the obligation was requested. Based on the only evidence I have before me, I must conclude that Mr. Reed was told by Clark that the amount needed to satisfy his obligation under the March 10, 1990 note was \$3,925.24, subsequently tendered by F & M. Along with the payoff F & M delivered to Clark a letter requesting copies of the satisfied documents, a further allusion to the intent of the parties to wholly satisfy all obligations secured by the equipment.

F & M's position is supported not only by the Abbott

decision but by statutory authority. Under O.C.G.A. § 13-4-103, acceptance of a payment made on condition can constitute an acceptance of the condition:

(a) Except as otherwise provided in this Code section, an agreement by a creditor to receive less than the amount of his debt cannot be pleaded as an accord and satisfaction unless it is actually executed by the payment of the money, the giving of additional security, the substitution of another debtor, or some other new consideration.

(b) Acceptance by a creditor of a check, draft, or money order marked "payment in full" or with language of equivalent condition, in an amount less than the total indebtedness, shall not constitute an accord and satisfaction unless:

(1) A bona fide dispute or controversy exists as to the amount due; or

(2) Such payment is made pursuant to an independent agreement between the creditor and debtor that such payment shall satisfy the debt.

Application of this Code section would require that the tender be made on the condition that Clark's claims under the note and security agreement would be wholly satisfied. F & M's letter accompanying the payoff check states,

December 13, 1993

Clark Credit Corporation

P.O. Box 419314  
Kansas City, MO 64141-6314

RE: Thomas Olin Reed  
Account No. 04-21-7933 19-1076-8

Ladies/Gentlemen:

Please find enclosed our Cashier's check, no. 43147, in the amount of \$3,042.49. This check represents the payoff on the above loan, as verified by telephone this morning by Mr. Reed.

Please mail ALL satisfied documents directly to me at the above address. Please call me at (706) 678-2187 if you have any questions or comments.

Sincerely,

FARMERS & MERCHANTS BANK  
/s/ Gerald O. Norman  
President and CEO

Based on the "Stipulated Facts" and the letter which accompanied the payoff check, I find that the tender was made on the condition and with the understanding that Mr. Reed's obligation to Clark under the instrument would be satisfied and lien released.

Clark points out that in Abbott, the amount of payoff was requested by a transferee of the collateral seeking to terminate all other interests in the vehicle. On such request, the bank failed to state its additional interest in the vehicle under the future advance clause of the original note and subsequent loans. This failure to assert further claims against the vehicle when the

transferee sought to satisfy the obligation to the bank yielded an estoppel of the bank to claim that its interest was not satisfied. However, Clark maintains that this case is distinguishable from Abbott in that here the debtor himself requested the amount of payoff, not a third party transferee as in Abbott. The distinction is irrelevant. The dispute in both cases is between the third-party payor of the note and the original lender. It is insignificant that the payoff amount was obtained by Mr. Reed. I find that Abbott is controlling in this case and that as in Abbott an estoppel has arisen here.

F & M has established by a preponderance of the evidence that Clark stated the amount required to satisfy Mr. Reed's obligation on the note, and that it tendered that amount with a letter reiterating F & M's intent of satisfying Clark's interest in the collateral altogether. This sequence of events established an accord and satisfaction estopping Clark from claiming any further interest in the equipment. The lien of Clark has been extinguished, and the first priority lien in the collateral is held by F & M.

It is therefore ORDERED that the motion of Clark Credit Corporation, Inc. seeking relief from the stay of 11 U.S.C. § 362(a) is denied.

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JOHN S. DALIS  
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia  
this 30th day of March, 1995.