

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Augusta Division

IN RE:)	Chapter 13 Case
)	Number <u>96-11662</u>
AGNES WILLINGHAM,)	
)	
Debtor)	
_____)	
AGNES WILLINGHAM)	FILED
)	At 2 O'clock & 55 min. P.M.
)	Date: 11-4-97
Plaintiff)	
)	
vs.)	Adversary Proceeding
)	Number <u>97-01006A</u>
HAS OF GEORGIA, INC., D/B/A)	
DIRECT RENTAL CAR SALES, AND)	
CS FIRST BOSTON MORTGAGE)	
CAPITAL CORP. D/B/A/ AUTO)	
FLOW, INC.)	
)	
Defendants)	

ORDER

The debtor, Agnes Willingham, brought this adversary proceeding, regarding her October 1994 purchase of an automobile from HAS of Georgia, Inc. Defendants filed this Renewed Motion to Dismiss Counts Two and Three of Plaintiff's Complaint alleging a failure to state claims on which relief can be granted. The motion to dismiss

counts two and three is granted.

The Plaintiff, Agnes Willingham, filed this complaint against Defendants, HAS of Georgia, Inc., d/b/a Direct Rental Car Sales and CS First Boston Mortgage Corp., d/b/a Auto Flow, Inc., claiming in count two a violation of the Georgia Motor Vehicle Sales Finance Act ("GMVSFA") Official Code of Georgia Annotated ("O.C.G.A.") § 10-1-30 et seq. and claiming in count three a breach of duty of good faith by Defendants in violation of O.C.G.A. § 11-1-203.¹ Plaintiff's motion to amend the complaint was granted and allowed as was a second amended complaint. However, the second amended complaint did not alter the allegations of counts two and three. Count two was based on Defendants' alleged improper disclosure of the document preparation fee, down payment, "Gold Seal" fee and optional service contract charge (hereinafter "disputed fees") as components of the cash price rather than the finance charge. Plaintiff alleges a willful and intentional violation of the interest rate and disclosure provisions of O.C.G.A. § 10-1-33(b) and (d)², and the

¹O.C.G.A. § 11-1-203. Obligation of good faith.

Every contract or duty within this title imposes an obligation of good faith in its performance or enforcement.

²O.C.G.A. § 10-1-33 (GMVSFA). Finance charge limitations; assignment of contract.

(b) Such finance charge shall be computed on the unpaid balance on contracts payable in successive monthly payments substantially equal in amount. Such finance charge may be computed on the basis

failure accurately to disclose all "essential provisions" prior to the signing of the contract as required by O.C.G.A. § 10-1-32(a).³ Count three alleges the misrepresentation of the down payment and charging of a "Gold Seal" fee when neither existed breached the duty of good faith implied in O.C.G.A. § 11-1-203.

Plaintiff claims in count two that O.C.G.A. §§ 10-1-32(a) and 10-1-33(b) and (d) have been willfully violated by Defendants because the disputed charges were not accurately disclosed as components of the finance charge but, instead, in the cash price in violation of § 10-1-33. This inaccuracy creates a failure by Defendants to fulfill the disclosure requirements of § 10-1-32(a).

of a full month for any fractional month period in excess of ten days. A minimum finance charge of \$25.00 may be charged on any retail installment transaction. As used in this subsection, the term "unpaid balance" shall be determined in accordance with Section 226.8(c) of Regulation Z promulgated by the Board of Governors of the Federal Reserve System pursuant to Title I (Truth in Lending Act) and Title V (General Provisions) of the Consumer Credit Protection Act (Public Law 90-321, 82 Stat. 146 et seq.), as the same existed upon its becoming effective on July 1, 1969.

(d) Notwithstanding the provisions of subsection (a) of this Code section, a buyer and a seller may establish any finance charge agreed upon in writing by the parties where the amount financed is more than \$5,000.00.

³O.C.G.A. § 10-1-32 (GMVSA). Requirements for retail installment contracts; insurance; delinquency charges, attorneys' fees, and costs; receipts.

(a) A retail installment contract shall be in writing, shall be signed by both the buyer and the seller, and shall be completed as to all essential provisions prior to the signing of the contract by the buyer.

For either of Plaintiff's claims to succeed Georgia law must require these charges to be computed in the finance charge.

Neither section 10-1-33(d) nor any other Georgia statutory law requires inclusion of the disputed charges in the finance charge in amounts financed of \$5,000.00 or more for a motor vehicle, and Georgia case law also lacks such requirement. Case law does not limit the parties agreement to any financing charge of motor vehicles when the amount financed equals or exceeds \$5,000.00, and fails to require any of the disputed charges to be included in determining the financing charge. See Gibbs v. Green Tree Acceptance, Inc., 373 S.E.2d 637, 639-40 (Ga. App. 1988). Furthermore, the statute and cases do not require itemization of the charges included in a financing charge when the amount to be financed is over \$5,000.00.⁴ Gibbs holds that if the amount

⁴Plaintiff cites to Ford Motor Credit Co. v. Spann, 265 S.E. 2d 863, 865 (Ga. App. 1980), which holds § 10-1-33(b)'s "unpaid balance" requires itemized charges. However, § 7-4-3(a) enacted after Spann was decided makes § 10-1-33(b) provisions inapplicable to motor vehicle finance amounts of \$5,000.00 or more.

O.C.G.A. § 7-4-3. Finance charge on retail installment contracts for manufactured homes and motor vehicles subject to federal law; stating of federal provisions in contract.

(a) Notwithstanding the provisions of subsections (a) through (c) of Code Section 10-1-33, any retail installment contract pertaining to: . . .

(2) Any motor vehicle where the amount financed is \$5,000.00 or more may provide for such finance charge as the parties may agree in writing.

financed is less than \$3,000.00 for a mobile home, and consequently \$5,000.00 for a motor vehicle, the "determination of whether the components of the unpaid balance were sufficiently identified ... would be pertinent." Id. However, "where there are no finance charge limitations [for amounts financed of \$5,000.00 or more] obviously no violation of a finance charge limitation can occur." Id. This holding doesn't require itemization, much less a requirement the charges disputed in this case be included in the calculation to determine the financing charge.

The parties in this case agreed to the charges and payments. Section 10-1-33(d) requires that an agreement be reached and signed. Because no finance charge limits on the purchase exist, debtor does not have a GMVSFA claim based upon an inaccurate finance charge. Therefore, I find the failure of Defendants to include the disputed charges in the calculation of the finance charge does not create a § 10-1-33 violation for an amount financed of \$5,000.00 or more for a motor vehicle.

Plaintiff further contends in count two that the term "essential provisions" in § 10-1-32(a) requires the disputed charges to be a component of the finance charge for accuracy and consistency with the statute. If not included under the finance charge, Plaintiff alleges this "essential provision" is inaccurate, thus, proving

Defendants to be willfully in violation of the GMVSFA provision. For Plaintiff to succeed, Georgia law must require the disputed charges to be included as components in determining the finance charge. Georgia statutory and case law do not support such requirement.

In this case the disputed charges, finance charge and cash sales price are "essential provisions" because each are included in the contract. Cook-Davis Furniture Co., Inc. v. Duskin, 214 S.E. 2d 565, 568-69 (Ga. App. 1975). In fulfilling common law requirements, the included amounts are also disclosed as required by Vickery v. Mobil Home Indus., Inc., 320 S.E. 2d 633, 634 (Ga. App. 1984); and written in the contract and completed prior to signing as set out in Cook-Davis, 214 S.E. 2d at 568-69. Statutory and case law do not place further requirements on how charges must be calculated. Plaintiff's assertion under § 10-1-32(a) must fail because the "essential elements" are not inaccurate due to the placement of the disputed charges under the cash payment. I find that Plaintiff has failed to show that Defendants violated the "essential provisions" requirement of § 10-1-32(a).

Plaintiff claims in count three of her Complaint that Defendants violated a duty of good faith implied in the 1994 transaction under O.C.G.A. § 11-1-203 by misrepresenting the down payment and charging

a "Gold Seal" fee which does not exist. Notwithstanding my holding in William E. Woodrum, Jr., Trustee v. Ford Motor Credit Co., Ch. 7 Case No. 683-00116, Adv. No. 687-0037 (Bankr. S.D. Ga. March 3, 1989) (Dalis, J.) (compliance with duty of good faith and fair dealing in performance and enforcement of contract is question of fact to be resolved by trier of fact), O.C.G.A. § 11-1-203 does not create an independent cause of action for which relief can be granted. Optima Chemicals, Inc. v. Westinghouse Savannah River Co., No. 593-034, slip op. at 49-50 (S.D. Ga. June 12, 1995) (Edenfield, J.)⁵.

In Management Assistance v. Computer Dimensions, 546 F. Supp. 666 (N.D. Ga. 1982), aff'd without opinion sub nom., Computer Dimensions, Inc. v. Basic Four, Inc., 747 F.2d 708 (11th Cir. 1984), the U.S. District Court for the Northern District of Georgia held that in a breach of contract action a plaintiff 'cannot assert as an independent claim [the defendant's] alleged failure to deal in good faith.' Id. at 677. In addition to affirming Management Assistance, the Eleventh Circuit relied on the case in Alan's of Atlanta, Inc. v. Minolta Corp., 903 F.2d 1414,

⁵United States Court of Appeals for the Eleventh Circuit Rule 36-2 allows for unpublished decisions to be considered persuasive authority, as Optima Chemicals, Inc. will be considered in this case.

United States Court of Appeals for the Eleventh Circuit Rules Rule 36-2. Unpublished Opinions

An opinion shall be unpublished unless a majority of the panel decides to publish it. Unpublished opinions are not considered binding precedent. They may be cited as persuasive authority, provided that a copy of the unpublished opinion is attached to or incorporated within the brief, petition, motion or response in which such citation is made.

1429 (11th Cir. 1990), where it held that a covenant of good faith 'is not an undertaking that can be breached apart from [specific contract] terms.' Id. at 1429.

The only Georgia case that has discussed the issue is Lake Tightsqueeze v. Chrysler Fin., 210 Ga. App. 178 (1993), in which the

Georgia Court of Appeals stated in dicta that 'the failure to act in good faith in the performance of contracts or duties under the Uniform Commercial Code does not state an independent claim for which relief can be granted.' Id. at 181. In accordance with these cases, the Court finds that AFF/Optima cannot maintain an independent cause of action based on an alleged breach of an implied duty of good faith.

Id. Moreover, there is no indication in the text or comments of the U.C.C. that the section was meant to be remedial; instead, it is considered a

directive section. Management Assistance, 546 F. Supp. at 677 (citing Chandler v. Hunter, 340 So. 2d 818, 821 (Ala. Civ. App. 1976)). Accordingly, there is no independent cause of action for breach of duty of good faith in Georgia under O.C.G.A. § 11-1-203. Count three fails to state a claim on which relief can be granted.

It is therefore ORDERED that Defendants' Motion to Dismiss Counts Two and

Three of Debtor's Complaint for failure to state claims on which relief can be granted is granted.

JOHN S. DALIS
CHIEF UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia

this 3rd day of November, 1997.

