

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.,)
TONY BRUNSON HOMES, INC.,)

FILED
at 4 O'clock & 19 min. P.M.
Date: 5-13-93

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

Defendants, CIT Group/Sales Financing, Inc. and CIT Financial Corporation (collectively "CIT"), request 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. At issue is the relevancy of consumer notices and notice to dealers. Relevant to this issue are the following facts. The Chapter 7 trustee, James D. Walker, Jr., as plaintiff, represents the bankruptcy estates of a group of mobile home dealerships ("dealers"). CIT purchased from the dealers retail installment contracts executed by mobile home purchasers. When a mobile home purchaser defaulted on an installment contract CIT disposed of the mobile home, which in some instances resulted in a deficiency. In some instances where CIT repossessed and sold a mobile home, the mobile home purchaser was provided with notice of the disposition of the collateral. Under a "Dealer Underlying

Agreement" ("dealer agreement") between each dealer and CIT, the dealer is obligated to make good on any loss suffered by CIT occasioned by the default. To better secure this obligation CIT retains in various reserve "accounts" maintained in its financial records a percentage of the proceeds from each installment contract bought from the dealer. Under the dealer agreement, a dealer's reserve account can be drawn on to the extent of losses incurred by CIT on any installment contracts purchased from that dealer. In this adversary proceeding, plaintiff seeks to recover pursuant to 11 U.S.C. §§542 and 543 dealer reserve funds withheld by CIT.

CIT contends that whatever right the dealers had to notice of the sale of repossessed mobile homes, each dealer waived such right in paragraph 7 of the dealer agreement.¹ CIT contends pre-

¹Paragraph 7 of each dealer agreement provides:

Our [the dealer] rights and obligations as stated herein shall apply until all contracts purchased by you [CIT] hereunder are fully paid, and shall not be affected by your extensions of time to, your agreement to revise or adjust the obligation of, or the release by operation of law or otherwise of, persons obligated under or in connection with said contracts, nor by your permitting a customer under a contract to sell or transfer the mobile home. Until we discharge our obligations with respect to any contract or mobile home, we will hold any mobile home purchased by us from you and not fully paid for in cash, as security for all our obligations to you hereunder and, as to any mobile home delivered by you to us and not purchased or paid for by us, we will, at our risk and expense, but as your property, store the mobile home and deliver it to you on demand. If we default on any obligation hereunder we will be responsible for any

default waiver is authorized by Official Code of Georgia Annotated (O.C.G.A.) §11-9-207(1). CIT also maintains that its right under the dealer agreement to charge installment contract losses against a dealer's reserve account "does not depend on the preservation of deficiencies against customers." Letter brief dated March 24, 1993, p. 1. Plaintiff argues that each dealer, and upon the filing of each Chapter 11 case the then debtor-in-possession² and in each Chapter 7 case the trustee, is a "debtor" under O.C.G.A. §11-9-504(3), which requires the secured party to give the "debtor" reasonable notice of a sale of collateral. Plaintiff argues that paragraph 7 of the dealer agreements does not contain language which

loss incurred by you in selling, directly or through a consignee, any repossessed or recovered mobile home at public or private sale, for cash or on credit, held with or without notice. Only cash actually collected by you in such sale, excluding the portion thereof applicable to your finance charges, shall be applied in reduction of your loss. You may purchase at any such sale. Notices to us may be given, and demands upon us may be made, hereunder either orally or by mail or telegram sent to our last address shown on your records. If, at the time you repossess or recover a mobile home, we are not doing business as a going concern or are in default to you under this or any other agreement or obligation, notice and demand otherwise required . . . are waived. No waiver or change of any part of this Agreement shall be binding on you unless evidenced by a writing, signed by one of your officers. On and after the date this Agreement becomes effective through your acceptance of it, it shall replace any prior agreement or understandings, either oral or written, between us covering the same subject, neither of us shall be bound to anything not expressed in it, and it shall govern all contracts thereafter bought by you from us. It shall inure to and bind our respective successors and assigns and any present or future company affiliated with you which may transact business with us hereunder.

²On November 2, 1987 Lease/Purchase Corporation, Hutchinson Homes, Inc. and Velstar Enterprises filed Chapter 11 bankruptcy petitions with this court, case numbers 87-11177, 87-11178 and 87-11179, respectively. By order dated October 24, 1988 the Chapter 11 petitions were converted to Chapter 7.

constitutes waiver under Georgia law, and that even if it does, such a waiver is void. Plaintiff argues that the consumer notices to mobile home purchasers do not satisfy O.C.G.A. §10-1-36, which increased dealer risk, discharging the dealer as surety on the underlying debt obligation pursuant to O.C.G.A. §10-7-22.

Georgia law provides that

[u]nless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor, if he has not signed after default a statement renouncing or modifying his right to notification of sale.

O.C.G.A. §11-9-504(3).³ A "debtor," as that term is used in O.C.G.A. §11-9-504(3), is

the person who owes payment or other performance of the obligation secured, whether or not he owns or has rights in the collateral, and includes the seller of accounts or chattel paper. Where the debtor and the owner of the collateral are not the same person, the term 'debtor' means the owner of the collateral in any provision of the article dealing with the collateral, the obligor in any provision dealing with the obligation, and may include both where the context so requires[.]

O.C.G.A. §11-9-105(d). In Barbree v. Allis-Chalmers Corp., 250 Ga. 409, 297 S.E.2d 465 (1982), the Georgia Supreme Court held, based on O.C.G.A. §11-9-105(d)'s definition of "debtor," that "one who is a

³There is no dispute that the transactions at issue, the assignments by dealers of installment contracts to CIT, are secured transactions governed by O.C.G.A. §11-9-101 et seq.

seller of chattel paper [see O.C.G.A. §11-9-105(b)], whether or not he is the owner of the underlying collateral, with full recourse against him in the event of a deficiency is a debtor entitled to notice of the post-default proceedings disposing of the collateral pursuant to [O.C.G.A. §11-9-504(3)]." Id., 297 S.E.2d at 467. Each dealer is potentially liable under the dealer agreement for any loss incurred by CIT on an installment contract, chattel paper, purchased from that dealer, including any deficiency on the sale of a repossessed mobile home.⁴ Therefore, under Barbree each dealer is

⁴Paragraph 3 of the dealer agreement provides:

If you [CIT] receive less than the full amount owed on any contract purchased from us [the dealer], then to the extent of the amount unpaid: (a) any holdback with respect to that contract shall first be reduced and then (b) our reserved payment account shall be charged with any amount credited thereto with respect to that contract. To the extent that said reduction and chargeback exceed the related holdback and the then credit balance in our reserved payment account, the difference shall be forthwith paid by us to you. You shall be deemed to have received less than the full amount owed on a contract if you collect less than (a) the sum of the original unpaid contract balance (including finance, insurance and other charges included therein), plus all amounts subsequently added to the customer's obligations under the contract, plus your expenses, if any, for repossession, recovery, storage, court costs, disbursements and attorney's fees in enforcing the contract and the security, less (b) all your unearned finance charges (as determined under generally accepted accounting principles), insurance premium refunds returned to you, and any collision allowance made to us under paragraph 4(c). The difference between (a) and (b) shall be considered the amount unpaid for purposes of this Agreement.

When due to repossession, acceleration, default, prepayment or any other cause, you collect (as determined under generally accepted accounting principles), less than the full amount of the finance charges on any contract, our reserved payment account shall be

a "debtor" for purposes of O.C.G.A. §11-9-504(3).

Georgia case law has not specifically addressed the issue of whether a bankruptcy trustee, or debtor-in-possession, may be a "debtor" for purposes of O.C.G.A. §11-9-504(3); however, under the rationale of Barbree, the debtor-in-possession in each Chapter 11 case and the Chapter 7 trustee in each Chapter 7 case became a "debtor" entitled to notice under O.C.G.A. §11-9-504(3) upon the filing of the respective bankruptcy petitions. The filing of a bankruptcy petition creates a bankruptcy estate. 11 U.S.C. §541(a). The trustee or debtor-in-possession functionally serves as owner of the estate's assets, see In re: Angel, 142 B.R. 194 (Bankr. S. D. Ohio 1992), In re: Floca, 126 B.R. 274 (Bankr. W.D. Tex. 1991), whose interest in the bankruptcy estate is taken subject to all claims and defenses available against the debtor, In re: Buttes Resources Co., 89 B.R. 613, 617 (S.D. Tex. 1988), see generally Bank of Marin v. England, 385 U.S. 99, 87 S.Ct. 274, 17 L.E.2d 197 (1966), In re: Schauer, 835 F.2d 1222 (8th Cir. 1987), Houis v. Wright, 757 F.2d 714 (4th Cir. 1985), In re: Career Consultants, Inc., 84 B.R. 419 (Bankr. E.D. Va. 1988), including a deficiency claim by a secured party. Thus, in the event of a deficiency, the

charged with that proportion of any amounts credited thereto with respect to that contract as the amount of the finance charge thereon not collected by you bears to the total finance charge thereon and, to the extent that the credit balance in that account is insufficient to absorb such charge, the difference shall be forthwith returned by us to you.

secured party has "full recourse" as a claimant against the bankruptcy estate to recover the deficiency. See Barbree, supra, 297 S.E.2d at 467. Under Barbree, a bankruptcy trustee or debtor-in-possession is clearly a "debtor" for purposes of O.C.G.A. §11-9-504(3). Therefore, in each of the above bankruptcy cases, upon the filing of the bankruptcy petition CIT was required by O.C.G.A. §11-9-504(3) to provide the trustee (or the debtor-in-possession in those cases originally filed under Chapter 11, then the trustee following their conversion to Chapter 7) with notice of the sale of any mobile home repossessed by CIT in connection with a customer's default on an installment contract sold to CIT by the dealer.

CIT's argument that O.C.G.A. §11-9-207(1) authorizes a pre-default waiver of the secured party's duties under O.C.G.A. §11-9-504(3) is incorrect. CIT's duties under O.C.G.A. §11-9-504(3) could not be waived prior to default. O.C.G.A. §11-9-501(3).⁵ See also Branam v. Equico Lessors, Inc., 255 Ga. 718, 342 S.E.2d 671, 674 (1986) (holding that a pre-default waiver of O.C.G.A. §11-9-504(3)'s requirements is legally non-binding on a guarantor); U.S. v. Contestabile, ___ F.2d ___, 1993 WL 106414 (11th Cir. 1993)

⁵O.C.G.A. §11-9-501(3) provides:

To the extent that they give rights to the debtor and impose duties on the secured party, the rules stated in the subsections referred to below may not be waived . . . :

(b) Subsection (3) of Code Section 11-9-504

(following Branan, supra). CIT misreads O.C.G.A. §11-9-207(1),⁶ which subsection mandates that a secured party exercise "reasonable care" in preserving collateral in the secured party's possession. The thrust of the second sentence in O.C.G.A. §11-9-207(1), which permits the parties to waive rights in chattel paper against "prior parties," concerns the secured party's duty to record an instrument, see Congress Financial Corp. v. Sterling-Coin Op. Machinery Corp., 456 F.2d 451 (3rd Cir. 1972), and does not apply here. Generally, the provisions of O.C.G.A. §11-9-101 et seq. may be waived, O.C.G.A. §11-1-102(3), but not if otherwise provided in a specific section. Id. O.C.G.A. §11-9-501(3) states that a secured party's duties under O.C.G.A. §11-9-504(3) cannot be waived. CIT has not alleged that after default any dealer, debtor-in-possession, or trustee waived their right to notice. See O.C.G.A. §11-9-504(3). Further, CIT's contractual right to charge installment contract losses against dealer reserve accounts does not supersede the requirements of O.C.G.A. §11-9-504(3).

A failure to comply with O.C.G.A. §11-9-504(3) does not bar CIT from collecting a deficiency claim by recouping any loss from the reserve account. In Emmons v. Burkett, 256 Ga. 855, 353

⁶O.C.G.A. §11-9-207(1) states:

A secured party must use reasonable care in the custody and preservation of collateral in his possession. In the case of an instrument or chattel paper reasonable care includes taking necessary steps to preserve rights against
prior parties unless otherwise agreed.

S.E.2d 908 (1987), the Georgia Supreme Court adopted the "rebuttable presumption rule":

[I]f a creditor fails to give notice or conducts an unreasonable sale, the presumption is raised that the value of the collateral is equal to the indebtedness. To overcome this presumption, the creditor must present evidence of the fair and reasonable value of the collateral and the evidence must show that such value was less than the debt. If the creditor rebuts the presumption, he may maintain an action against the debtor or a guarantor for any deficiency. Any loss suffered by the debtor as a consequence of the failure to give notice or to conduct a commercially reasonable sale is recoverable under [O.C.G.A.] §11-9-507 and may be set off against the deficiency.

Id., 353 S.E.2d at 910 (citation omitted). Where CIT failed to comply with O.C.G.A. §11-9-504(3) in disposing of a repossessed mobile home, including failing to give the dealer, debtor-in-possession, or Chapter 7 trustee the required notice of any such sales, and cannot overcome the rebuttable presumption described in Burkett, supra, CIT is precluded from recovering a deficiency on the sale from the dealer or dealer's bankruptcy estate and therefore may not charge an asserted deficiency claim against the dealer's reserve account.

Consumer notices are irrelevant in this case. See O.C.G.A. §10-1-36.⁷ Assuming CIT failed to comply with O.C.G.A.

⁷O.C.G.A. §10-1-36 provides:

When any motor vehicle [see O.C.G.A. §10-1-2(a)(5)] has been repossessed after default in accordance with Part 5 of Article 9 of Title 11, the seller or holder shall not be entitled to recover a deficiency against the buyer unless

within ten days after the repossession he forwards by registered or certified mail to the address of the buyer shown on the contract or later designated by the buyer a notice of the seller's or holder's intention to pursue a deficiency claim against the buyer. The notice shall also advise the buyer of its rights of redemption, as well as his right to demand a public sale of the repossessed motor vehicle. In the event the buyer exercises his right to demand a public sale of the goods, he shall in writing so advise the seller or holder of his election by registered or certified mail addressed to the seller or holder at the address from which the seller's or holder's notice emanated within ten days after the posting of the original seller's or holder's notice.

In the event of election of public sale by the buyer, the seller or holder shall dispose of said repossessed motor vehicle at a public sale as provided by law, to be held in the state and county where the original sale took place, or the state and county where the motor vehicle was repossessed, or the state and county where the motor vehicle was repossessed, or the state and county of the buyer's residence, at the seller's election.

This Code section is cumulative of Part 5 of Article 9 of Title 11 and provides cumulative additional rights and remedies which must be fulfilled before any deficiency claim will lie against a buyer, and nothing herein shall be deemed to repeal said part.

⁸O.C.G.A. §10-1-36 does not apply to the dealers. A "buyer" under O.C.G.A. §10-1-36 is a "person who buys goods or obtains services from a retail seller in a retail installment transaction and not principally for the purpose of resale." O.C.G.A. §10-1-2(a)(8). In the transactions at issue the dealers are sellers of chattel paper, not persons who bought goods or obtained services from a retail seller. Moreover the transactions at issue, the sale of chattel paper, are not "retail installment transactions." See O.C.G.A. §10-1-2(a)(10).

O.C.G.A. §10-7-22 does not discharge the dealers of their obligations under the dealer agreement. O.C.G.A. §10-7-22 provides, "Any act of the creditor, either before or after judgment against the principal, which injures the surety or increases his risk or exposes him to greater liability shall discharge him" However, "[a] party may consent in advance to the conduct of future transactions and will not be heard to 'claim his own discharge' upon the occurrence of that conduct." Thurmond v. Georgia R.R. Bank & Trust Co., 162 Ga. App. 245, 290 S.E.2d 126, 128 (1982). Cf. Panasonic Indus. Co. v. Hall, 197 Ga. App. 860, 399 S.E.2d 733 (1990); Anderton v. Certainteed Corp., 201 Ga. App. 538, 411 S.E.2d 558 (1991). Each dealer consented in advance to CIT's possible noncompliance with O.C.G.A. §10-1-36 with respect to the sale of repossessed mobile homes. (See note 1, supra). Therefore, O.C.G.A. §10-7-22 does not discharge any dealer of its obligations under its dealer agreement with CIT.

SO ORDERED.

JOHN S. DALIS
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia
this 13th day of May, 1993.