

IN THE UNITED STATES BANKRUPTCY COURT FOR THE
WESTERN DISTRICT OF MISSOURI

IN RE:)
)
RITA ANNETTE BERRY,) Case No. 11-40322
)
Debtor.)

ORDER DENYING MOTION TO IMPOSE AUTOMATIC STAY AND TO
COMPEL TURNOVER OF PROPERTY
AND
AWARDING DAMAGES FOR VIOLATION OF THE UNIFORM
COMMERCIAL CODE

Debtor Rita Annette Berry filed a motion seeking to impose the automatic stay and to compel the turnover of a vehicle against St. Paul Monument of Faith / Next Level Preowned Cars and Clifford A. Jackson. This is a core proceeding under 28 U.S.C. § 157(b)(2)(E), (G), and (O), over which the Court has jurisdiction pursuant to 28 U.S.C. §§ 1334(b), 157(a), and 157(b)(1).

Dr. Clifford A. Jackson is a bishop at St. Paul Monument of Faith Church. The Church is associated with a used car operation known as Next Level Preowned Cars. Dr. Jackson testified that Next Level Preowned Cars sells the Church's inventory of cars as they get older or high mileage and need to be replaced. It would appear from a bank statement offered as evidence at the hearing that Next Level Preowned Cars is a d/b/a of the Church.¹ Dr. Jackson testified that he has known the Debtor

¹ See Exhibit 2.

personally for many years. The Debtor testified that, when she began looking to buy a car, a friend suggested she contact Dr. Jackson about it.

On November 4, 2009, the Debtor signed an Agreement for the Sale of Goods, pursuant to which she agreed to purchase a 2000 Mercedes Benz from the seller, “St. Paul Monument of Faith Church / Next Level Preowned Cars.”² Dr. Jackson signed the Agreement on behalf of the seller. In sum, the Agreement provided for St. Paul to sell the Mercedes to the Debtor for a price of \$8,500, plus “carrying charges” of \$1,470. The Agreement provided for the Debtor to make a down payment of \$1,500, and 24 equal monthly payments of \$350 to be made on the fourth of each month.³ The Agreement further provided that “[t]itle to and ownership of the goods [the Mercedes] shall not pass from Seller to Buyer until Buyer has paid in full the purchase price to Seller.” Pursuant to the Agreement, the title remained in the name of St. Paul Monument of Faith Church and Dr. Jackson retained possession of such title. The

² Exhibit 1. A search of the Missouri Secretary of State’s website reveals a not-for-profit corporation named “St. Paul Monument of Faith Church,” for which Dr. Jackson was the registered agent, but that entity was administratively dissolved in 1992. It also shows a not-for-profit corporation called “The St. Paul Monument of Faith Church of God in Christ,” of which Dr. Jackson was the registered agent, which was administratively dissolved in 2003. Similarly, the records show a for-profit corporation, for which Dr. Jackson is identified as the registered agent, called “Next Level Pre-Owned Auto Sales, Inc.” That entity was administratively dissolved on January 25, 2005. Hereafter, St. Paul Monument of Faith Church d/b/a Next Level Preowned Cars will sometimes be referred to as “St. Paul.”

³ According to the Debtor, the down payment was reduced to \$1,000 because she had to make repairs to the car shortly after initially obtaining possession of it.

parties did not execute a security agreement as part of the transaction, nor did St. Paul file a UCC financing statement.

Although the payment due date under the Agreement was the fourth of each month, Dr. Jackson testified that he agreed to allow the Debtor to make payments on the last day of the month because it coincided with her pay schedule at work. The Debtor testified that her practice was to give Dr. Jackson three post-dated checks at a time, for \$350 each, to cover the next three payments due. Dr. Jackson would hold the checks until the last day of each of the following three months. As each of the respective payments came due on the last day of the month, Dr. Jackson filled in his own name as the payee, endorsed the check, and presented it to the bank for payment.⁴ As relevant here, in October or November 2010, the Debtor gave Dr. Jackson three postdated checks. One of the checks was dated December 31, 2010, in the amount of \$350, representing the December payment. On or about January 4, 2011, Dr. Jackson filled in his name as payee on the check, endorsed it, and deposited it into the account of St. Paul Monument of Faith d/b/a Next Level Pre Owned Cars.

On January 5, 2011, Bank Midwest declined payment on the December 31

⁴ Although Dr. Jackson filled his own name in as “payee” on the checks, the statement from the bank showed that the returned check had been deposited into an account in the name of St. Paul Monument of Faith d/b/a Next Level Pre Owned Cars. *See* Exhibit 2. However, as noted above, there appears to be no active entity with either the name St. Paul Monument of Faith Church or Next Level Pre Owned Cars.

check, stamping it with the notation “unlocate acct.”⁵ This was because Bank Midwest had recently sold its WalMart Store branches to another bank, Academy Bank.⁶ The Debtor banked at one of Bank Midwest’s WalMart branches. As a result, effective December 10, 2010, the bank’s routing number on the Debtor’s checks was no longer good. In other words, she had sufficient funds in her account to cover the check, but due to the change in the identity of the branch where the Debtor banked, the check could not be honored as presented.

On January 24, 2011, while the Debtor was at work, Dr. Jackson repossessed the Mercedes from the parking lot of the Debtor’s employer. Although Dr. Jackson testified that he had conversations with the Debtor and left her messages about making the check good, he provided her with no written notice of default or his intent to repossess the car. The Debtor discovered that the car had been repossessed when she went out from her work to drive to a sales appointment.

That same day, January 24, 2011, Dr. Jackson sold the Mercedes “as-is” for \$3,500 cash⁷ to another long-time friend, Sheena A. Brown, who had told him she was in need of a car right away. Dr. Jackson testified he believed the Mercedes was worth

⁵ Exhibit 2.

⁶ Exhibit A.

⁷ See Exhibits 4, 5, and 7.

\$5,000 - \$5,600 at that time. Dr. Jackson did not provide notice of this sale to the Debtor. Dr. Jackson transferred title to the Mercedes to Ms. Brown that same day, January 24, 2011.⁸

The Debtor filed her Chapter 13 bankruptcy petition on January 26, 2011. On February 3, 2011, she filed the instant motion to enforce the stay and for turnover of the Mercedes. No response was filed, but Dr. Jackson, along with counsel, appeared on behalf of St. Paul at a hearing.

Section 362(a) of the Bankruptcy Code provides a comprehensive list of actions against debtors and property of the estate that are stayed by the filing of a bankruptcy petition.⁹ Because the repossession and sale of the Mercedes to Ms. Brown all occurred prior to the filing of the Debtor's bankruptcy petition, St. Paul did not violate the stay by repossessing and selling the Mercedes. In addition, because the Mercedes was not property of the Debtor's bankruptcy estate, she is not entitled to turnover of it under § 542 of the Bankruptcy Code.¹⁰

Although the Bankruptcy Code may not offer the Debtor a manner to get the

⁸ Exhibit 7.

⁹ 11 U.S.C. § 362(a).

¹⁰ The Debtor was, however, entitled to turnover of her personal belongings which were in the car when it was repossessed. At the hearing, counsel for St. Paul stated that he had made those personal belongings available to the Debtor and, although she had not yet picked them up, they were available for her to do so.

Mercedes back from Ms. Brown at this point, the Debtor is not left without a remedy under Missouri law.

Section 301.210 of the Missouri Statutes provides, in relevant part:

1. In the event of a sale or transfer of ownership of a motor vehicle or trailer for which a certificate of ownership has been issued, the holder of such certificate shall endorse on the same an assignment thereof, with warranty of title in form printed thereon, and prescribed by the director of revenue, with a statement of all liens or encumbrances on such motor vehicle or trailer, and deliver the same to the buyer at the time of the delivery to him of such motor vehicle or trailer

* * *

4. It shall be unlawful for any person to buy or sell in this state any motor vehicle or trailer registered under the laws of this state, unless, *at the time of the delivery thereof*, there shall pass between the parties such certificates of ownership with an assignment thereof, as provided in this section, and the sale of any motor vehicle or trailer registered under the laws of this state, without the assignment of such certificate of ownership, shall be fraudulent and void.¹¹

In other words, Missouri law requires that, when a motor vehicle is sold, the certificate of title must be delivered to the buyer at the same time that the vehicle is delivered to the buyer. “Missouri law is clear that the certificate of ownership provisions of § 301.210 are absolute and mandatory and must be rigidly enforced. Failure to comply with the requirements of § 301.210 results in a void and fraudulent sale, and

¹¹ Mo. Rev. Stat. § 301.210.1 and 4 (emphasis added).

ownership does not pass.”¹²

The Agreement in this case, which provided for delivery of the vehicle to the Debtor at about the time of the Agreement, but expressly provided for St. Paul to retain title until the purchase price was paid in full, violated Missouri law.¹³ Thus, the Agreement was “fraudulent and void” under § 301.210.4.

However, both the Missouri Court of Appeals and the Eighth Circuit have recognized that, despite the fact that such a contract is fraudulent and void, a buyer under such a contract is not without remedy. In *Antle v. Reynolds*,¹⁴ the Missouri Court of Appeals was faced with the question of whether a vehicle buyer who asserted a cause of action under the Missouri Merchandising Practices Act would be prohibited from asserting the cause of action because the seller had not transferred the title at the time of the sale, in violation of § 301.210. The buyers of the disputed vehicle, which had been returned to the seller, sued the seller for out-of-pocket interest and fees, based on, *inter alia*, fraud and alleged violations of the MMPA in connection with the transaction. Ruling in favor of the seller, the trial court found that there could be no violation of the MMPA because there had been no “sale” under § 301.210. The Court

¹² *Shivers v. Carr*, 219 S.W.3d 301, 303-04 (Mo. Ct. App. 2007) (citing *Herbert v. Harl*, 757 S.W.2d 585, 590 (Mo. 1988)).

¹³ *Antle v. Reynolds*, 15 S.W.3d 762 (Mo. Ct. App. 2000).

¹⁴ 15 S.W.3d 762 (Mo. Ct. App. 2000).

of Appeals reversed on that issue, holding that, despite the language of § 301.210.4 rendering these transactions “fraudulent and void”:

In order of the statute to make sense, we have to say that it applies to *purchases* of vehicles without contemporaneous transfers of title. Similarly, we can say that § 407.025 [of the MMPA] applies to *purchases* of vehicles in the same sense, whether such purchase is with or without a transfer of title. In other words, § 407.025 is concerned only with the substance of the transaction, not with whether the transaction is ultimately void and unenforceable as a matter of specific performance or of contract damages.¹⁵

Hence, the Missouri Court of Appeals held, the violation of § 301.210 did not bar the buyers’ claim under the MMPA.

Similarly, relying on *Antle v. Reynolds*, the Eighth Circuit Court of Appeals has held that violation of § 301.210 does not bar a claim under the Uniform Commercial Code:

To hold that a transaction that is not a legally valid sale under section 301.210 cannot give rise to a cause of action under the U.C.C. would leave without legal recourse those individuals who have been adversely affected by transactions such as that perpetuated by Regency and FPA, in which cars routinely are “sold” without title in violation of section 301.210. Such an outcome would defeat the purpose of the Missouri U.C.C. and section 301.210, which is “to protect the innocent and guileless from the machinations and wiles of the wicked.”¹⁶

In other words, recognizing that unscrupulous dealers could avoid laws requiring

¹⁵ *Id.* at 766.

¹⁶ *Williams v. Regency Fin. Corp.*, 309 F.3d 1045, 1049 (8th Cir. 2002) (*quoting Antle v. Reynolds*, 15 S.W.3d at 767)).

perfection of liens and protection of consumers by arranging transactions in violation of § 301.210, the courts hold that, while the language of § 301.210 renders transactions such as the one here “fraudulent and void,” such a transaction can still form the basis of a cause of action for violations of the UCC and other laws intended to protect consumer buyers of vehicles, such as the MMPA.¹⁷

Section 400.2-401 of the Missouri Statutes, which governs sales where the seller attempts to reserve title, provides, in relevant part:

(2) Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his or her performance with reference to the physical delivery of the goods, despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place; and in particular and despite any reservation of a security interest by the bill of lading. . . .¹⁸

In *Dean Machinery Co. v. Union Bank*, the Missouri Court of Appeals construed this statute as follows:

Title passes from the seller to the buyer, therefore, when the seller and buyer demonstrate the intent to effect a sale and the seller physically delivers the goods to the buyer *irrespective of the fact that the contract states that title does not pass until receipt of payment.*¹⁹

¹⁷ See *Antle v. Reynolds*, 15 S.W.3d 762.

¹⁸ Mo. Rev. Stat. § 400.2-401(2). Although sales of and security agreements in vehicles usually fall under the motor vehicle statutes as opposed to the UCC, the Missouri Supreme Court has held that a used motor vehicle can constitute “goods” under the UCC. See *Herbert v. Harl*, 757 S.W.2d 585, 588 (Mo. 1988).

¹⁹ *Dean Machinery Co. v. Union Bank*, 106 S.W.3d 510, 516 (Mo. Ct. App. 2003).

The statute further provides:

(1) Title to goods cannot pass under a contract for sale prior to their identification to the contract (section 400.2-501), and unless otherwise explicitly agreed the buyer acquires by their identification a special property as limited by this chapter. *Any retention or reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest.* Subject to these provisions and to the provisions of the article on secured transactions (article 9), title and/or ownership to goods passes from the seller to the buyer in any manner and on any conditions explicitly agreed on by the parties.

In *In re Communications Co. of America, Inc.*, on which the *Dean Machinery* Court relied, the Court relied on these statutes to hold that a provision in an equipment sales agreement purporting to reserve title in the seller only reserved a security interest in the equipment and, therefore, the buyer was the owner of the equipment even though it did not pay the entire purchase price.²⁰

I recognize, as the *Dean Machinery* Court did, that the statute provides that it does not apply when the parties “explicitly agree” otherwise. The Agreement in this case explicitly agrees otherwise – namely, that “[t]itle to and ownership of the [Mercedes] shall not pass from Seller to Buyer until Buyer has paid in full the purchase price to Seller.” However, as discussed above, that aspect of the Agreement, which reserved title in St. Paul, is illegal and void under Missouri law. As a result,

²⁰ 84 B.R. 822, 823-24 (Bankr. M.D. Fla. 1988) (relied on by *Dean Machinery*, 106 S.W.3d at 517).

I conclude that § 400.2-401(1) and (2) should apply as if the Agreement did not contain the illegal reservation of title. That being the case, the transaction must be viewed as one where ownership (title) passed to the Debtor at the time of delivery of the Mercedes to her, and that St. Paul reserved only a security interest in it.

As discussed above, in *Williams*, even though the transaction was void under § 301.120, the Eighth Circuit remanded the case to the District Court to determine whether damages would be appropriate for a commercially unreasonable sale under the then-current version of Article 9 of the UCC. Based on that, and § 400.2-401, which provide that St. Paul retained a security interest in the Mercedes, I conclude that an analysis of the Debtor's damages should likewise be determined under revised Article 9.

Article 9 provides that, after default, a secured party may repossess the collateral.²¹ After repossession, “the secured party may dispose of the collateral, by sale or otherwise, so long as every aspect of the disposition is ‘commercially reasonable.’”²²

In order to be commercially reasonable, the UCC contains certain notice

²¹ Mo. Rev. Stat. § 400.9-609; *Mancuso v. Long Beach Acceptance Corp.*, 254 S.W.3d 88, 91 (Mo. Ct. App. 2008).

²² *Mancuso v. Long Beach Acceptance Corp.*, 254 S.W.3d at 91; Mo. Rev. Stat. § 400.9-610.

requirements. Section 400.9-611(b) requires that a secured party that disposes of collateral under section 400.9-610 shall provide the debtor with reasonable notice of its intent to sell the collateral.²³ “The notification must be reasonable as to the manner in which it is sent, its timeliness (i.e., a reasonable time before the disposition is to take place), and its content.”²⁴ Section 400.9-612 provides that the question of whether notification is sent within a reasonable time is a question of fact.²⁵

The Eighth Circuit has held that, under Missouri law, oral notice is not *per se* unreasonable so as to render the disposition invalid, but it does prohibit any right to deficiency.²⁶ Here, the evidence was that Dr. Jackson never provided written notice to the Debtor of default, repossession, or disposition of the Mercedes. He did, however, call her and leave her messages and texts about the unpaid check. I will assume, for the sake of argument, that Dr. Jackson’s phone calls and texts were reasonable as to the manner of notice.

However, they were deficient in content. Section 400.9-614 states that, in a

²³ *Id.* Section 400.9-611(b) provides that, with certain exceptions not applicable here, “a secured party that disposes of collateral under section 400.9-610 shall send to [the debtor] a reasonable authenticated notification of disposition.”

²⁴ Uniform Commercial Code Comment 2.

²⁵ Mo. Rev. Stat. § 400.9-612(a).

²⁶ *See Smith v. Mark Twain Nat’l Bank*, 805 F.2d 278 (8th Cir. 1986) (interpreting former section 400.9-504(3), the comparable provision of § 400.9-611 of Revised Article 9).

consumer transaction such as this, a notification of disposition must contain certain information, including, *inter alia*, the method of intended disposition, that the debtor is entitled to an accounting, a description of liability for a deficiency, and so forth.²⁷ A particular form is suggested, but is not mandatory.²⁸ Nevertheless, “[a] creditor is held to the requirement of strict compliance with these notice provisions.”²⁹ “Any doubt about what constitutes strict compliance is resolved in the debtor’s favor.”³⁰ Further, “[t]he purpose of the notice requirement is to apprise the debtor of the details of the disposition so that [she] may take appropriate action to protect [her] interest.”³¹ “Proper notice gives the debtor the opportunity (1) to discharge the debt and reclaim the collateral, (2) to find another purchaser, or (3) to verify that the sale is conducted in a commercially reasonable manner.”³²

Here, although the evidence was that Dr. Jackson phoned the Debtor about making the check good, there was no evidence that he notified her that he intended to sell the Mercedes to Ms. Brown, or otherwise dispose of it, at all. Further, because

²⁷ Mo. Rev. Stat. § 400.9-614.

²⁸ Mo. Rev. Stat. § 400.9-614(2) and (3).

²⁹ *Mancuso*, 254 S.W.3d at 92.

³⁰ *Id.*

³¹ *Id.* at 95 (citation and internal quotation marks omitted).

³² *Id.*

the disposition occurred on the same day as the repossession, the Debtor had no opportunity to discharge the debt and reclaim the Mercedes, find another purchaser, or verify that the sale to Ms. Brown was commercially reasonable. The notice was, therefore, insufficient and unreasonable.

In addition to the insufficient notice of disposition, I find that the manner of disposition was also commercially unreasonable. Section 400.9-427 provides that, although the fact that a greater amount could have been obtained by a different disposition is not of itself sufficient to preclude commercial reasonableness,³³ a disposition of collateral is made in a commercially reasonable manner if it is made:

- (1) In the usual manner on any recognized market;
- (2) At the price current in any recognized market at the time of the disposition; or
- (3) Otherwise in conformity with reasonable commercial practices among dealers in the type of property that was the subject of the disposition.³⁴

The evidence was that St. Paul sold the Mercedes “as is” to Ms. Brown for \$3,500 cash on the same day the car was repossessed. Dr. Jackson testified that it was worth \$5,000 to \$5,600 at the time. The Debtor’s attorney suggested at the hearing that the N.A.D.A. value may have been as high as \$8,000, but offered no evidence of that.

³³ Mo. Rev. Stat. § 400.9-627(a).

³⁴ Mo. Rev. Stat. § 400.9-627(b).

Although a low price is not determinative as to commercial unreasonableness:

The U.C.C., however, does not sanction unreasonably low prices; it instead encourages the secured party to obtain the best resale price in order to reduce the possibility and amount of any deficiency. Any price insufficiency is a factor important, but not decisive, to commercial reasonableness. In order to constitute evidence of commercial unreasonableness, a price insufficiency must be coupled with evidence showing that the secured party neglected the obligations of good faith, diligence, reasonableness and care under § 400.1-102(3) in disposing of the collateral. Evidence that the secured party was scrupulous as to every procedure required by § 400.9-504(3) [§ 400.9-610 under revised Article 9] and was free from self-dealing indicates that the secured party met its duty to act in good faith.³⁵

The evidence here was that Ms. Brown, who was a long-time friend of Dr. Jackson, contacted him and said she needed a car right away. He then repossessed the Mercedes and sold it to Ms. Brown that same day for less than what he even concedes was the car's value.³⁶ This manner of disposition was not scrupulous to the requirements of the UCC, did not evidence good faith, diligence, reasonableness and

³⁵ *Kennedy v. Fournie*, 898 S.W.2d 672, 680 (Mo. Ct. App. 1995). Section 400.1-102(3) still provides that "The effect of provisions of this chapter may be varied by agreement, except as otherwise provided in this chapter and except that the obligations of good faith, diligence, reasonableness and care prescribed by this chapter may not be disclaimed by agreement but the parties may by agreement determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable."

³⁶ It was not even clear from the record as to whether Dr. Jackson had cleaned the Debtor's belongings out of the car before he sold it to Ms. Brown. More specifically, one of the issues raised by the Debtor's motion was that she had requested the return of her belongings, which included some work equipment owned by her employer, but was denied that request. It was not until the eve of the hearing that St. Paul's counsel advised the Debtor's counsel that he had her belongings at his office. It was unclear at the hearing where those belongings had been in the interim.

care, and, further, suggests self-dealing because of his friendship with Ms. Brown.

I find, based on insufficient notice and the manner of sale, that St. Paul's disposition of the Mercedes was not commercially reasonable.

Section 400.9-625 provides the remedies for a secured party's failure to comply with the UCC. In sum, as relevant here, that section provides that "a person is liable for damages in the amount of any loss caused by a failure to comply with this article."³⁷ Damages for violation of the requirements of Article 9 "are those reasonably calculated to put an eligible claimant in the position that it would have occupied had no violation occurred."³⁸

In view of the fact that returning the Mercedes to the Debtor is not possible because it has been sold to Ms. Brown, who this Court finds was a good faith purchaser despite the sale's commercial unreasonableness, the closest measure of damages to put the Debtor in the position she would have occupied had St. Paul not sold the car in a commercially unreasonable manner is actual damages. As stated above, Dr. Jackson testified that he believed the car was worth as much as \$5,600. Although the Debtor's attorney mentioned a value of \$8,000, she offered no evidence of such value. As such, I find that the Mercedes was worth \$5,600 when it was sold.

³⁷ Mo. Rev. Stat. § 400.9-625(b).

³⁸ Uniform Commercial Code Comment 3.

According to the evidence at trial, the Debtor had twelve payments of \$350 each, including the missed December payment, remaining under the Agreement. Thus, after paying an additional \$4,200, she would have owned the car, which was worth \$5,600. Her actual damages, therefore, are \$1,400.

ACCORDINGLY, the Debtor's request for imposition of the automatic stay and for turnover of the Mercedes is DENIED. The Clerk of the Court shall enter judgment for damages for violation of § 301.210 and the Uniform Commercial Code in favor of the Debtor, and against St. Paul Monument of Faith Church and Dr. Clifford A. Jackson, jointly and severally, in the amount of \$1,400. If not done so already, Dr. Jackson should immediately give to the Debtor all personal belongings that were in the vehicle at the time of repossession.

IT IS SO ORDERED.

/s/ Arthur B. Federman
Bankruptcy Judge

Date: