

11-15-2005

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

In re:)	Chapter 13
)	
Mark Leon Gibson,)	Case No. 05-40782-MGD
)	
Debtor.)	Judge Diehl
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Mark Leon Gibson,)	
)	
Movant,)	
)	
v.)	
)	
Citifinancial Auto Corporation)	
f/k/a TranSouth Financial Corporation,)	
)	
Respondent.)	
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**ORDER SUSTAINING DEBTOR'S OBJECTION
TO PROOF OF CLAIM**

The matter is before the Court on the Objection of Mark Leon Gibson ("Debtor") to the Proof of Claim filed by TranSouth Financial Corporation n/k/a Citifinancial Auto Corporation ("Respondent"). The parties stipulated as to the relevant facts and oral argument was held on September 28, 2005. Both parties filed additional memoranda of law. The Court, having considered the arguments and citations of authority provided by the parties, sustains Debtor's Objection to Respondent's Claim.

Debtor filed a Chapter 13 case on February 28, 2005. His Chapter 13 Plan (Paragraph 9.3) provided for the surrender of a 2004 Chevrolet Blazer to Respondent. The Plan also provided that any deficiency balance would be paid in full to protect the non-filing co-debtor. At

the time of the filing of the petition, Respondent held a claim in the amount of \$24,192.61 secured by the vehicle. On April 5, 2005, the day after the meeting of creditors was held, Respondent filed a Motion for Relief from Stay which represented that Respondent had possession of the vehicle and requested that "relief from the automatic stay be granted so as to allow Creditor to dispose of . . . [the vehicle] . . . in accordance with its contract and its state law remedies." A Consent Order, prepared by counsel for Respondent, was entered on April 7, 2005, prior to the scheduling of any hearing on the matter. It provided as follows:

[I]t is hereby ORDERED that the automatic stay of 11 U.S.C. § 362 is modified such that TranSouth Financial Corporation may exercise its state law remedies to obtain possession of the Collateral, a 2004 Chevrolet Blazer SUV, and to liquidate said collateral.

It is further ORDERED that all proceeds from the sale or other commercially reasonable disposition of the Collateral exceeding the amount of debt legally due and owing TranSouth Financial Corporation shall be promptly remitted to the Chapter 13 Trustee.¹

Debtor's Chapter 13 Plan was confirmed by Order entered on May 18, 2005. Respondent proceeded to sell the vehicle and filed an amended proof of claim in the amount of \$13,402.61. Respondent indicates that the amended claim represents the amount of the deficiency after applying the proceeds of the sale. The parties stipulate that Respondent did not provide Debtor the notice set out in O.C.G.A. §10-1-36 which provides in relevant part:

When any motor vehicle has been repossessed after default in accordance with Part 6 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 repossession he or she forwards by registered or certified mail or statutory

¹Respondent also filed a Motion for Relief from the Co-Debtor Stay on March 29, 2005. An Order, prepared by counsel for Respondent and granting that motion was entered by the Court on April 22, 2005 after the scheduled hearing on the motion. The co-debtor did not appear or oppose the relief sought. The Court has no information or evidence as to any actions taken with respect to the co-debtor and whether the co-debtor received any notices required by state law.

overnight delivery 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 his or her rights of redemption, as well as his or her right to demand a public sale of the repossessed vehicle.

The issue for the Court is whether Respondent, a lender who failed to provide the notice specified, should have its Proof of Claim for the amount of the deficiency allowed over the objection of the debtor.

Debtor relies on the case of *In re Dykes*, 287 B.R. 298 (Bankr. S.D. GA. 2002)(Dalis, B.J.) The Court in that case, under similar facts, held that the creditor was barred from filing a deficiency claim because the creditor had not complied with state law. The court explained: "The Bankruptcy Code does not determine debt. The Bankruptcy Code provides a framework for dealing with that debt established under non-bankruptcy law." *Id.* at 306. Debtor also argues that the stay relief granted to Respondent included only a modification of the stay to allow liquidation of the collateral and did not extend to an in personam claim.

In contrast, Respondent argues that the confirmed plan acknowledges that a deficiency claim will be paid and further argues that the practice in this District is to allow the filing of a deficiency claim without compliance with state law procedures and that the language used in Orders granting relief from stay does not typically include language which would allow the pursuit of a deficiency claim in accordance with state law. Respondent then requests that it be allowed to amend the language of the Order granting relief from stay to allow the filing of a deficiency claim.

The first question for the Court to consider is whether a creditor must comply with O.C.G.A. § 10-1-36 in order to have a deficiency claim allowed over the objection of a debtor or

other party in interest. The Eleventh Circuit addressed this issue in dicta in its opinion in *Bonapfel v. Nalley Motor Trucks (In re Carpet Center Leasing Company, Inc.)*, 991 F.2d 682, 685 (11th Cir. 1993) when it stated: “The Trustee appears to be correct in asserting that compliance with state law controls creditor’s right to claim, against a bankruptcy estate, a deficiency on a contract after foreclosure of a lien.”² Under Georgia law, a failure to comply with the Motor Vehicle Sales Finance Act (O.C.G.A. § 10-1-30 et al.) creates an absolute bar to any attempts to recover a deficiency claim against a borrower. *Bryant International, Inc. v. Crane*, 188 Ga. App. 736, 374 S.E. 2d 228 (1988); *Doughty v. Associates Commercial Corp.*, 152 Ga. App. 575, 263 S.E. 2d 493 (1979).

It is without dispute that if the automatic stay is lifted, the conduct of the parties is governed by applicable non-bankruptcy law. *In re Kahihikolo*, 807 F.2d 1540 (11th Cir. 1987), citing *Matter of Wiinslow*, 39 B.R. 869, 871 (Bankr. N.D. Ga. 1984) (“An Order which lifts the automatic stay returns the parties to the legal relationships that existed before the stay became operative.”). Putting these principles together, it follows that in order to establish a deficiency claim following the repossession and sale of a vehicle in a bankruptcy case, a creditor must show that it would be entitled to a deficiency claim under Georgia law.

The second question for the Court is whether Respondent, who concedes that it did not comply with the statutory requirements, should nonetheless be entitled to assert a deficiency

²The Trustee in that case had argued that the creditor’s failure to dispose of a number of tractors in accordance with the Georgia Motor Vehicle Sales Finance Act and the Georgia Commercial Code barred the assertion of a deficiency claim by the creditor. The Eleventh Circuit did not reach this issue, however, since it found that the creditor was not asserting a deficiency claim but was asserting an administrative claim under 11 U.S.C. § 507(b) for failure of adequate protection. The rationale urged by the Trustee, however, is applicable here: the existence of a claim for a deficiency must be established with reference to state law.

claim because (1) Respondent believed that the practice in the Northern District of Georgia was to allow the filing of a deficiency claim without such compliance or (2) Respondent was barred by the automatic stay from sending the notice required by O.C.G.A. §10-1-36.

With respect to the practice in this District, Respondent does not cite the Court to any reported decisions on the issue and the Court is not aware of any such cases. None of the cases for which Respondent provides Case Numbers in its brief involved even an objection to a claim.

Case No. 05-63073-MHM has an amended Proof of Claim filed by Ford Motor Credit following the grant of its motion for relief from stay. The amount of the claim is the same as the claim which it amends. Only the status has been changed from "secured" to "unsecured." There is no indication from the record: (1) whether there was sale after repossession; (2) whether a § 10-1-36 notice was sent; or (3) that any party in interest objected to the claim. Clearly, a debtor has the right to waive the right to insist on compliance with underlying state law process by not objecting to a claim, which is then deemed allowed in accordance with Section 502(a) of the Bankruptcy Code.

Case No. 05-91663-JEM contains a Consent Order *denying* relief from the stay and thus does not even involve a deficiency claim. Finally, Case No. 04-44172-MGD involves an Order which *vacates (not modifies)* the automatic stay in its entirety. There is no information as to whether the state law-required notices were given in that case, but no objection to the deficiency claim was filed. In sum, Respondent's argument as to the practice in this district, even if relevant, is not supported by any credible authority.

With respect to whether the automatic stay prevented Respondent from sending the requisite notice, the most obvious response is that Respondent drafted the language in the

Consent Order at issue. There is no indication that Respondent requested a *lifting* of the stay or any particular language as to the scope of a modification of the stay which would have more specifically allowed the sending of the Notice. Whatever relief is encompassed in the Order is the exact relief which the Creditor sought in the precise language chosen by Respondent.³

Respondent requests that to the extent the Order did not allow the sending of the notice, that it be amended to allow same. The problem with Respondent's request is that it is too late. The notice must be given within ten days of the repossession and more importantly *prior to the disposition or sale* of the vehicle. The purpose of the notice is to allow the debtor to protect himself by either redeeming the vehicle or requiring a public sale of the vehicle. A notice sent after disposition could not accomplish those goals.

Respondent also argues that the Chapter 13 Plan provision for a payment of the deficiency claim is the equivalent of a waiver of the debtor's rights under state law. Since the existence of a deficiency claim depends upon the appropriate compliance with state law, Respondent's argument must fail. Moreover, the plan's provision for payment of "any" deficiency claim is not the equivalent to the allowance of the claim. Clearly, in context, the word "any" means an allowed claim, not a filed claim. The plain language does not preclude debtor from asserting an objection based upon amount of or liability for the claim asserted.

³The Court does not need to decide whether the language "exercise of its state law remedies to obtain possession of the Collateral" includes the sending of the notice which includes notice to a borrower that she can insist upon a method of disposition of the vehicle.

Accordingly, Debtor's Objection is **SUSTAINED** and Respondent's claim is **DISALLOWED**.

This 15th day of November, 2005.

Mary Grace Diehl
Mary Grace Diehl
United States Bankruptcy Judge

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