

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ROME DIVISION**

IN RE: :
 : Chapter 13
FREDDIE FITZGERALD CHRISTOPHER, :
 :
 : Case No. 06-42452-pwb
Debtor. :
 :
_____ :

**ORDER WITH REGARD TO PETITION OF
AUTO FINANCE PARTNERS, LLC, FOR PAYMENT OF
UNCLAIMED FUNDS OF D & G AUTOS SALES**

The Chapter 13 Trustee in this case disbursed \$16,409.42 on a proof of claim [Claim No. 3] filed on January 12, 2007 by D & G Auto Sales (the "Creditor"). See Trustee's Final Report and Account [Docket No. 43]. It appears that the claim was for a debt secured by a motor vehicle. Although the Debtor later surrendered the motor vehicle under a modification to his plan [Docket Nos. 33, 36], the Creditor did not amend its proof of claim to account for any proceeds realized from any disposition of the collateral, and no one sought a reduction in the amount of the claim for that reason.

The Chapter 13 Trustee paid \$12,107.53 of the amount disbursed on the claim into the registry of this Court as unclaimed funds pursuant to 11 U.S.C. § 347(a). [Docket No. 40]. Dilks & Nopik, LLC, purporting to be acting under a power of attorney executed by Tim Kincaid, as a lawyer for Auto Finance Partners, LLC, has filed an application for the funds on behalf of Auto Finance Partners, LLC (the "Claimant"), asserting that it is the "successor in interest" to the Creditor. [Docket No. 46].

Section 347(a) provides for disbursement of unclaimed funds pursuant to chapter 129 of title 28 of the United States Code. The applicable provisions of chapter 129 direct the

Court to disburse unclaimed funds to the “rightful owners,” 28 U.S.C. § 2041, upon “full proof of the right thereto.” 28 U.S.C. § 2042.

Under chapter 129's requirements and due process principles, the Court has the duty to make sure that unclaimed funds are disbursed to their true owner. *Cf. Leider v. United States*, 301 F.3d 1290, 1296 (Fed. Cir. 2002). Because the Court typically considers an application for unclaimed funds payable on a proof of claim in a bankruptcy case *ex parte*, the Court must insist on a claimant's exact compliance with legal requirements relating to the authority of an individual or entity to act on behalf of the claiming party and a definitive showing that it is actually entitled to the funds. *See generally In re Applications for Unclaimed Funds*, 341 B.R. 65, 73-75 (Bankr. N.D.Ga. 2005) (summarizing this Court's requirements for authorizing disbursement of unclaimed funds).

The Claimant's application has three problems. First, nothing in the application establishes that Mr. Kincaid is authorized to act on behalf of the Claimant except his own statement. A client may, of course, authorize a lawyer to take action on its behalf, and the Court does not require an attorney who appears in a matter in this Court to establish his authority. But a lawyer's authority to execute a formal document must ordinarily be shown in some manner other than the lawyer's assertion of it, particularly when the document is executed for use in a court and the lawyer is not representing the client in the court.

Here, Mr. Kincaid has not appeared in this case or acted in any capacity to provide legal services. The application must, therefore, show that he, like any other representative of an entity, has authority to act on its behalf. In the absence of such a showing, the Court cannot permit the disbursement of unclaimed funds because it must be satisfied that the

owner of the funds has authorized their payment to the person seeking them.

Second, the application does not establish that Auto Finance Partners, LLC, is the entity that filed the proof of claim on account of which the Trustee disbursed the funds in question. It appears that the Claimant held a security interest in the Creditor's accounts receivable. A creditor with a security interest in a borrower's account receivable acquires the right to collect the account receivable after the borrower's default based on the borrower's grant of a security interest in the account and the exercise of remedies after default that transfer the right to collect to the creditor. In effect, therefore, the creditor's rights with regard to the receivable are the same as those of an assignee.

The proper way for an assignee who claims an interest in unclaimed funds payable with regard to a proof of claim filed by the assignor is to follow the procedures in Fed. R. Bankr. P. 3001(e). See *In re Applications for Unclaimed Funds*, *supra*, 341 B.R. at 72. Because the holder of the claim entitled to the unclaimed funds as a matter of record in this case is the Creditor, not the Claimant, the Court cannot authorize disbursement of the funds to the Claimant.

The third problem is that the Claimant has not shown the existence of a lawful debt to which the funds may be applied. In this regard, a creditor's application for unclaimed funds must affirmatively show that the applicant has a "present entitlement to the unclaimed funds sought." *In re Acker*, 275 B.R. 143, 145 (Bankr. D.D.C. 2002). A creditor does not have the required present entitlement if its claim has been paid or if there is no enforceable claim after it took possession of its collateral. Thus, an applicant seeking unclaimed funds due to distributions that were made on account of a secured claim must show that the debt has not

been satisfied (through payment or repossession) and that an amount is currently due and payable to which the unclaimed funds may lawfully be applied. Claimant is referred to *In re Scott*, 346 B.R. 557 (Bankr. N.D. Ga. 2006), for further explanation of these principles.

Furthermore, in the case of a claim secured by a motor vehicle, disbursement of unclaimed funds should not occur in the absence of a showing that the creditor has cancelled its lien or that it is not required to do so. In this case, the modified plan provided for the surrender of the collateral, but the record contains no accounting for the disposition of the vehicle or the application of any proceeds from a sale to the debt. The Debtor or the Chapter 13 Trustee, therefore, may have some interest in all or part of the unclaimed funds, depending on the amount, if any, that the debt in question was reduced by application of proceeds from any sale of the collateral.

The application here does not explain whether the holder of the claim disposed of the collateral and does not provide an accounting with regard to the proceeds of any disposition of the collateral. The Court, therefore, cannot determine whether the holder of the claim is entitled to all, part, or none of the unclaimed funds because it cannot determine the extent to which a debt still exists.

Based on the foregoing, it is hereby **ORDERED and ADJUDGED** as follows:

1. That the petition of Auto Finance Partners, LLC, for disbursement of unclaimed funds payable on the proof of claim filed by D & G Auto Sales be, and the same hereby is, **DENIED**, without prejudice; and

2. That any further application for the unclaimed funds in question shall be served on the Debtor, the Debtor's counsel, and the Chapter 13 trustee.

SO ORDERED this 21 day of March, 2012.


Paul W. Bonapfel
United States Bankruptcy Judge

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