UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	CASE NO. 98-80469
Roxanne Turner,	CHAPTER 7
Debtor.	JUDGE MASSEY

ORDER DENYING PETITION FOR PAYMENT OF UNPAID FUNDS AND NOTICE TO DEBTOR THAT SHE IS ENTITLED TO SEEK PAYMENT OF $2,371.96 HELD IN THE COURT'S REGISTRY

On December 19, 2005, DriveTime Automotive Group, Inc. filed a Petition for Payment of Unpaid Funds in the amount of $2,371.96 from the Court's registry with respect to a proof of claim filed in this case in 1999 by Cygnet Financial Services Inc. Having carefully reviewed the petition and the record in this case, the Court holds that the Petition fails to state a claim upon which relief can be granted for the following reasons.

Debtor Roxanne Turner filed this case under Chapter 13 on December 8, 2002. On January 15, 1999, Cygnet Financial Services, Inc., as loan servicer for First Merchant Acceptance Corporation, filed a proof of claim, designated on the claims register as proof of claim no. 2, in the amount of $11,677.80 as a secured claim. The collateral is described in the proof of claim as a 1995 Oldsmobile Achieva. Cygnet asserted no unsecured claim. As the proof of claim shows, the amount of debt as of the petition date was only $7,196.00. Cygnet incorrectly added unearned interest in the amount of $4,481.74 to the amount of the debt on the petition date.

An over-secured creditor is entitled to interest on its claim so long as it is over-secured. Cygnet had no way of knowing how long it would take for it to be paid on its claim, and therefore the amount of unearned interest on its contract with Debtor was not necessarily the amount of interest to which it might have been ultimately entitled. One thing is clear, however, and that is that in asserting that it held a fully secured claim in the amount of $11,677.80, when its payoff on the petition date was $7,196.00, Cygnet in effect contended that its collateral was worth $11,677.80. That this assertion may have been the result of incompetence in filling out the claim form is irrelevant.

On May 27, 1999, Debtor converted the case to one under Chapter 7. The United States Trustee appointed Paul H. Anderson, Jr. as the Chapter 7 Trustee. Almost immediately thereafter, Ms. Turner had a change of heart and moved to reconvert the case to one under Chapter 13. The Court granted that motion in an Order entered on September 10, 1999. The Chapter 13 case was again unsuccessful, and in an Order entered on May 18, 2001, the Court granted the Chapter 13 Trustee's motion to reconvert the case to one under Chapter 7. According to her final report, the Chapter 13 Trustee paid Cygnet $2,382.64. Paul H. Anderson, Jr. was again appointed Chapter 7 Trustee. The Chapter 7 Trustee did not sell or otherwise administer the Oldsmobile Achieva, which was apparently repossessed by Cygnet or its principal, First Merchant.

The Chapter 7 Trustee objected to Cygnet's proof of claim in February 2002, noting that the claim was filed as fully secured and that Cygnet had not shown that it had liquidated its collateral. The Trustee moved in the objection for an order pursuant to Bankruptcy Rule 3012, requiring Cygnet to prove the value of this collateral. Bankruptcy Rule 3012 states:

> The court may determine the value of a claim secured by a lien on property in which the estate has an interest on motion of any party in interest and after a hearing on notice to the holder of the secured claim and any other entity as the court may direct.

In a Chapter 7 case in which a creditor claims to be over-secured, it would rarely, if ever, make sense to invoke Rule 3012. If Ms. Turner's car were worth more than the debt, the Trustee would have attempted to sell it. The market would determine the value. In fact, he abandoned it. There was no reason to value the collateral in the circumstances in this case because the secured creditor had not asserted that it held an unsecured claim.

The Trustee first scheduled a hearing on the objection for April 16, 2002 and served it on Cygnet at an Arizona address. The Trustee then obtained a new hearing date for May 14, 2002, and served a second notice of hearing on Cygnet at its address in its proof of claim on April 19, 2002.

Bankruptcy Rules 3007 and 9006 then and now require 33 days' notice for a hearing on an objection to a claim served by mail. Only 25 days had elapsed between April 19, 2003 and May 14, 2002. Cygnet did not appear at the May 14 hearing, and the Court noted the problem with the timing of the notice of the hearing. To resolve this problem, the Court permitted the Trustee to present an order to the Court, which the Court entered on May 24, 2002, giving Cygnet ten days from entry of the Order within which to file a written response to the objection and to request a hearing. The Order further provided that if Cygnet failed to file a response, it would have no unsecured claim, which it did not have anyway because it never filed a proof of an unsecured claim. Cygnet never filed a response or requested a hearing.

A trustee has a duty to liquidate estate property, 11 U.S.C. § 704, after which the trustee distributes the cash on hand in accordance with the distribution scheme set out in section 726 of

the Bankruptcy Code. Section 726 permits a trustee to pay, in the order specified, allowed administrative expenses and allowed unsecured claims to the extent that funds are available. Section 726(a)(4) authorizes a Chapter 7 trustee to pay an allowed secured claim only after payment of general allowed unsecured claims and only to the extent that such a secured claim is for a fine, penalty or forfeiture or for multiple, exemplary or punitive damages and then only to the extent of the actual pecuniary loss suffered by the holder of the claim.

Cygnet's proof of a secured claim did not involve a fine, penalty or forfeiture or multiple, exemplary or punitive damages. In order to have had an allowed unsecured claim, Cygnet would have had to amend its proof of claim to assert a deficiency claim, which it never did. The Court's May 24, 2002 Order confirmed what the claim stated, which was that it was not an unsecured claim, when it disallowed the claim as unsecured in the absence of a response from Cygnet. Therefore, the Trustee had no authority to pay anything to Cygnet.

Notwithstanding that Cygnet never filed a proof of an unsecured claim and that the May 24 Order disposed of any unsecured claim that Cygnet might have had, the Trustee filed a distribution report on August 27, 2002, which the office of the United States Trustee approved, providing for a payment from estate funds to Cygnet in the amount of $2,371.96, which is the amount the Trustee subsequently paid into the Court's registry.

Union Planters Bank, N.A. filed the only other claim in this case, contending that it was fully secured by Debtor's residence. The Chapter 7 Trustee sold the residence and paid Union Planters's claim at the closing. Hence, the funds remaining in the Trustee's account should have been paid to Debtor. Debtor may file a petition for payment of those funds to her.

It is not uncommon for Chapter 7 trustees in this district to object to allowed, fully secured claims, apparently to have the comfort of an order confirming what the record in the case shows. But if a secured creditor has not asserted on the record or privately to the trustee that it holds an unsecured claim, section 726(a) provides all the comfort needed and makes such an objection unnecessary.

In its Petition for Payment of Unpaid Funds, DriveTime Automotive Group, Inc. contends that its former name was Ugly Duckling Corporation and that Exhibit A to the Petition shows that "Cygnet Financial Services is a subsidiary of Ugly Duckling Corporation." Exhibit A is a copy of what purports to be parts of the annual report on Form 10K of Ugly Duckling Corporation filed with the Securities and Exchange Commission in April 2000. The fourth and fifth pages of Exhibit A purport to be a list of subsidiaries, presumably of Ugly Duckling, though nothing in Exhibit A explicitly so states. On the fifth page, "Cygnet Financial Services, Inc." is listed and opposite its name under the heading "jurisdiction of incorporation" is "Arizona."

The Petition fails to show that the "Cygnet Financial Services, Inc." that filed proof of claim no. 2 in this case is the same "Cygnet Financial Services, Inc." mentioned in Ugly Duckling's 2000 annual report on Form 10-K. The entity that filed proof of claim no. 2 did so in its capacity as servicing agent for First Merchant Acceptance Corporation, indicating that First Merchant was the owner of the claim. The Petition does allege that DriveTime holds an assignment of proof of claim no. 2 or otherwise owns the claim against Debtor that First Merchant apparently owned in 1999. (There is a one page document attached to the Petition that states that "Cygnet Financial Services" was as of November 23, 2004 "retained to service the following portfolios: First Merchants Acceptance Corporation," but the Petition does not mention that

document or otherwise show that the document was accurate in 2004 or is accurate now or that the portfolio to be serviced includes the debt proof of which was filed as proof of claim no. 2.)

In short, Petitioner has failed to allege facts showing that it holds, or has any interest in, proof of claim no. 2 or that the funds in the Court's registry are properly payable to the holder of proof of claim no. 2.

For these reasons, it is

ORDERED that the petition for payment of unclaimed funds filed by DriveTime Automotive Group, Inc. is DENIED. The Clerk is directed to serve a copy of this Order on counsel for DriveTime Automotive Group, Inc., Debtor, Debtor's counsel, the former Chapter 7 Trustee and the United States Trustee, and

NOTICE IS HEREBY GIVEN TO DEBTOR THAT SHE MAY FILE A PETITION FOR PAYMENT OF FUNDS PAID BY THE TRUSTEE INTO THE REGISTRY OF THIS COURT.

Dated: January 17, 2006.

James E. Massey

JAMES E. MASSEY
U.S. BANKRUPTCY JUDGE