IT IS ORDERED as set forth below:

Date: October 14, 2014

Wendy L. Hagenau

Wendy L. Hagenau
U.S. Bankruptcy Court Judge

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

In re: LEANNE LINDA POLKE, Debtor.	CASE NO. 14-66844-WLH CHAPTER 13
LEANNE LINDA POLKE, Plaintiff, v. DAVID FREDERICK & MELODY SMITH, Defendants.	ADVERSARY NO. 14-5277

ORDER ON DEFENDANT'S MOTION FOR RECONSIDERATION OF ORDER AFTER TRIAL

This matter came before the Court on David Frederick's ("Defendant") Motion for Reconsideration of Order After Trial and Notice of Deadline Related to Damages ("Motion") (Docket No. 22). A hearing was held on the Motion on October 7, 2014. Ashley A. DiGiulio

appeared on behalf of Leanne Linda Polke ("Plaintiff/Debtor"), and David M. Wittenberg appeared for the Defendant.

Procedural Posture

On September 23, 2014, the Court held a trial on Plaintiff's complaint for turnover and damages for violation of the automatic stay. Based upon the evidence presented, the Court ruled from the bench and issued a written Order (i) denying the request for turnover, (ii) denying the request for damages under 11 U.S.C. § 362, and (iii) ruling that Plaintiff was "entitled to damages under the Georgia Commercial Code" ("Order") (Docket No. 12).

Defendant filed the Motion, arguing (i) the Court did not identify in the Order the portion of the "Georgia Commercial Code it was relying on"; (ii) the Court exceeded its jurisdiction by finding a violation of Georgia state law; (iii) the Defendant did not have an opportunity to contest the Court's findings by brief or otherwise; (iv) the Court should not award damages under O.C.G.A. § 11-9-625 *et seq.* when the Plaintiff did not request damages under the Georgia Commercial Code; and (v) Defendant "had no knowledge" the Georgia Commercial Code was going to be relied upon.

The Court's Prior Ruling

The Court's oral ruling of September 23, 2014 is incorporated herein.

Findings of Fact

Ms. Polke, owned a 2012 Kia Optima. Prior to the bankruptcy filing, Ms. Polke entered into a title pawn agreement with 1st Franklin. No other persons held a lien on the Kia's title. Ms. Polke had difficulty making the payments on the title pawn. Ms. Polke knew the Fredericks through Mr. Frederick's son, and entered into discussions with Mr. Frederick and his wife, India Frederick, about loaning her funds to allow her to pay off the debt to 1st Franklin. On or around

July 17, 2014, the Fredericks paid $8,125.00 to 1st Franklin, which then released the car title to the Fredericks. Once the Fredericks received the title from 1st Franklin, Ms. Polke signed the title over to Mr. Frederick, such that Mr. Frederick was the sole title holder. Ms. Polke understood Mr. Frederick held the title in the same way 1st Franklin held the title; she did not understand she was signing the car over to him to dispose of as he wished.

Ms. Polke's understanding of the transaction is further evidenced by two documents executed concurrently with the payoff of 1st Franklin: a "Secured Promissory Note" ("Note") and a "Security Agreement" ("Security Agreement" or "Agreement"). Under the terms of these documents, Ms. Polke was to pay Mr. Frederick $10,200.00 at 0% interest in equal monthly payments of $566.67 over a period of 18 months. The parties testified that at the end of the 18 month payment period, Ms. Polke would own the Kia free and clear of any claim of the Fredericks, and the Security Agreement by its written provisions terminated once all obligations under the Note were satisfied.

The five-page Note refers to Mr. Frederick as "Holder" and Ms. Polke is identified as "Borrower." The Note contains the following provision: "5. SECURITY FOR PAYMENT. This Note is secured with vehicle title for 2012 KIA OPTIMA VIN #5XXGR4A64CG002702 with approximately 51,600 miles bearing Georgia Tag PJE 3412 expiring DEC 2014." The remedies upon default section of the Note permit Mr. Frederick to take possession of the collateral, to sell or lease or dispose of the collateral, and to "[e]xercise all rights and remedies of a secured party under applicable law."

The seven-page Security Agreement identifies Mr. Frederick as "Lender" and Ms. Polke as "Borrower." The Security Agreement contains the following clause: "WHEREAS, in order to induce the Lender to continue to extend credit to the Borrower in the form of the Loan as

evidenced by the Note, the Borrower desires to enter into this Security Agreement." The Security Agreement makes Borrower liable for "all costs incurred by the Lender in establishing, determining, continuing, or defending the validity or priority of its security interest" (emphasis is added). Under provision 3 of the Security Agreement, "Secured Property" is defined as "all of Borrower's right, title, and interest in the following described property . . . Vehicle Title of 2012 KIA OPTIMA." Provision 4 of the Security Agreement states: "Borrower hereby pledges and grants to the Lender a continuing security interest in and to the Secured Property in order to secure the full and timely payment of the Indebtedness." The representations and warranties in the Agreement include, "Borrower is authorized and empowered to enter into this Security Agreement, and to pledge the Secured Property to the Lender," and the Secured Property was to remain free and clear of liens, including unpaid taxes, other than the Lender's rights pursuant to the Agreement and Note. Borrower was required to "execute and deliver to the Lender any financing statements" that may be required to "establish and maintain a perfected security interest in the Secured Property as security for the Indebtedness."

The Security Agreement and Note provide that Mr. Frederick would keep the Kia in storage for the first 6 months of the agreement and if all payments were made, Ms. Polke would get possession of the vehicle at the end of that period. Although not contained in the written provisions of either the Note or the Security Agreement, the Fredericks and Ms. Polke made a side agreement whereby Ms. Polke was permitted to drive the Fredericks' Mazda while the Kia was in storage.

The first payment under the agreement was due August 1, 2014. When Ms. Polke did not make the August 1, 2014 payment, the Fredericks agreed to give Ms. Polke until August 15, 2014 to make the payment. Ms. Polke asserted she tried to make the payment by August 15,

2014, but was unable to do so for various reasons that were out of her control. Nevertheless, the first payment was not made. The Fredericks then contacted Defendant Melody Smith, a friend of Ms. Frederick's from Tennessee, whom they believed to be in the market for a newer vehicle and offered to sell her the Kia. Ms. Smith purchased the car on August 27, 2014 for $12,185.00. Ms. Polke received no advance notice of the sale and was not offered an opportunity to redeem the vehicle prior to the sale. Ms. Frederick testified she knew the car was worth more than Ms. Smith paid, but the Fredericks arrived at the price based on the amount owed on the Note, the storage fees, and attorney's fees. Ms. Polke filed her Chapter 13 case on August 29, 2014 and initiated this adversary proceeding on September 3, 2014.

Conclusions of Law

In order to determine whether (i) turnover of the Kia is warranted, and (ii) a stay violation occurred, the Court must first rule on the nature of the transaction, as that controls the rights of the parties to the vehicle. Mr. Frederick argues the agreement with Ms. Polke was not a secured transaction, but a transfer of ownership of the vehicle from Ms. Polke to Mr. Frederick. Ms. Polke's position is the agreement was intended to create a secured transaction. Property interests are determined by state law. Butner v. United States, 440 U.S. 48, 55 (1979).

Under Georgia law, the label parties assign to a transaction is not determinative as to the ultimate nature of that transaction. Courts will look behind the supposed form of the transaction to the substance to determine whether a security interest is created or an out-and-out transfer has occurred. For example, Georgia courts have found "disguised secured transactions" when the agreement was labeled as a "conditional sale," where personal property is sold and delivered, conditioned upon the seller retaining title until the purchase price is paid in full. Nix v. Farmers

Mut. Exch. of Calhoun, 218 F.2d 642, 645 (5th Cir. 1955). Such a conditional sale is deemed to be a secured transaction subject to Article 9. O.C.G.A § 11-1-201(37).

Similarly, courts have found a "disguised secured transaction" with a so-called lease, where the debtor makes periodic payments on property under a "lease," but title passes to the debtor upon completion of the payments. Where the transaction at issue appears to otherwise qualify as a secured transaction, i.e., the "lessee" takes title once all of the payments are made without any additional consideration, under Georgia law it is a secured transaction governed by Article 9, notwithstanding the characterization of the transaction by the parties. See, e.g., Walton v. Howard, 198 Ga. App. 804, 805 (1991); Mejia v. Citizens & S. Bank, 175 Ga. App. 80, 81 (1985). In cases such as these, where the Court finds the transaction to be a disguised security agreement, the title holder's only interest in the property is a security interest. See First Nat. Bank of Atlanta v. Strother Ford, Inc., 188 Ga. App. 749, 750 (1988).

Even in the case of vehicle pawn transactions, where the pawn company holds the title in its name, the transaction at issue is a secured transaction. In re Ballard, 2010 WL 4501891 (Bankr. M.D. Ga. Nov. 2, 2010). There are specific statutes that govern title pawns, which afford fewer protections than the Commercial Code, but such transactions still do not constitute an absolute sale. See O.C.G.A. §§ 44-14-131, 44-14-403.

Reviewing the facts of this case, the Court concludes the transaction was a secured transaction, governed by the Georgia Commercial Code. O.C.G.A. § 11-9-101 *et seq*. The agreement between the parties was called a Security Agreement and Secured Promissory Note and was replete with references to Mr. Frederick as a secured party. The documents identify the Kia as serving as collateral for the loan. By everyone's account, and under the terms of the Security Agreement, the Kia was to be Ms. Polke's once she made all of the payments.

All of the foregoing are indicia of a secured transaction, not an absolute sale. Even if Mr. Frederick believed the agreement with Ms. Polke was to be like the prior transaction with 1st Franklin, Mr. Frederick did not comply with the title pawn statutes, either in the form of documentation or the procedures on default.

Ms. Polke defaulted under the Note and Security Agreement when she failed to make the payment by either August 1, 2014 or August 15, 2014, or even by August 27, 2014. After the default, the rights of the parties are those set out in the Georgia Commercial Code, which requires notice before a car is sold, or notice that the secured party intends to keep the car in full satisfaction of the debt. O.C.G.A. § 11-9-610, 614, and 620–622. A debtor has the right to redeem the collateral; i.e., to pay the secured party in full within a certain period of time in exchange for return of the collateral. O.C.G.A. § 11-9-623. Although the documents here contained a waiver of Ms. Polke's right of redemption, that provision is unenforceable under the Georgia Code. O.C.G.A. § 11-9-602(11).

Despite not complying with any of the requirements of Georgia law, Mr. Frederick sold the vehicle to Ms. Smith for $12,185.00. The sale was consummated with the delivery of the vehicle in exchange for payment, Bank S., N.A. v. Zweig, 217 Ga. App. 77, 77–78 (1995), which occurred on August 27, 2014. The Court entered an order on September 9, 2014 directing Mr. Frederick not to negotiate the check, but the Court concludes the sale was nevertheless consummated.

A secured party's disposition of collateral after default transfers to a transferee for value all of the debtor's rights to the collateral, discharges the security interest under which the disposition is made, and discharges any subordinate security interest. A transferee that acts in good faith takes free of any other rights or interests in the collateral, even if the secured party

failed to comply with the requirements under the Commercial Code, or of any judicial proceeding. O.C.G.A. § 11-9-617.

Under Georgia law, value in this context means "consideration," as opposed to reasonably equivalent value. O.C.G.A. § 11-1-201(44). Although the Kia may be worth more than the price paid by Ms. Smith, the $12,185.00 qualifies as "value." Ms. Smith's good faith is a closer question given that Ms. Smith was not a traditional arm's-length purchaser and she was aware the Fredericks were unhappy with the transaction with Debtor. But, there was no evidence she knew of any uncertainty about the title, or had any reason to believe Mr. Frederick did not have the right to transfer the title to her. See O.C.G.A. § 11-9-617; In re Allred, 2007 WL 2916194, at *3 & n.15 (Bankr. D. Utah July 30, 2007) (construing the same provision under the Utah Uniform Commercial Code). As such, Ms. Smith's rights are those of a good faith transferee for value pursuant to O.C.G.A. § 11-9-617.

The sale of the vehicle to Ms. Smith extinguished Ms. Polke's, and therefore the bankruptcy estates', interest in the vehicle. Motors Acceptance Corp. v. Rozier, 278 Ga. 52, 54 (2004). That is not the end of the story, though. Although Georgia law does not prohibit the disposal of collateral absent compliance with the Georgia Commercial Code, a debtor is entitled to seek damages where a secured lender fails to provide any notice of his or her intent to dispose of the collateral or otherwise fails to comply with the law. O.C.G.A. § 11-9-625; see also Ogletree v. Brokers S., Inc., 192 Ga. App. 53, 55 (1989). It is undisputed that Mr. Frederick did not give Ms. Polke notice of his intention to sell the Kia, thus he is subject to a damage claim.

Motion to Reconsider

At the hearing on the Motion to Reconsider, the Court reviewed with Defendant/Movant's counsel the portion of the Order which he wished the Court to reconsider.

Counsel made it clear that the only portion of the Order he was challenging on the Motion to Reconsider was the portion that provided, "Plaintiff is entitled to damages under the Georgia Commercial Code". A motion to reconsider is governed by Fed. R. Civ. P. 59, made applicable hereto by Fed. R. Bankr. P. 9023. A motion to alter or amend a judgment may not be used "to raise arguments available but not advanced at the hearing." In re Kellogg, 197 F.3d 1116, 1120 (11th Cir. 1999). Such a motion is appropriate to correct a manifest error of fact or law, or to present newly discovered evidence. Id. Courts have broad discretion to grant or deny a motion to reconsider. Id. at 1119.

In reviewing the Order, the Court concludes the Order misstated the Court's ruling. The Court should have stated that the Plaintiff is entitled to make a claim for damages under the Georgia Commercial Code rather than appearing to rule the Plaintiff was entitled to damages. The Court will issue contemporaneously herewith an amendment to the Order clarifying this point. The Debtor is entitled to make a claim for damages which the Court will hear, but the Court has not ruled the Plaintiff has yet established a claim for damages or the amount, if any, of such damages.

By separate order, the Court has granted the Debtor's Motion to Amend the Complaint to specifically allege a claim for damages under the Georgia Commercial Code. Pursuant to that order, Defendant has the opportunity to answer the amended complaint and raise any objections to the claim for damages, including the authority or jurisdiction of the Court to hear such claim. With the amendment to the Order, the grant of Debtor's Motion to Amend the Complaint, and the issuance of this order, the bases of Defendant's Motion to Reconsider have all been addressed. This order identifies the portions of the Georgia Commercial Code on which the Court relied, although it was also discussed in the Court's oral ruling. Plaintiff's amendment

clarifies the request for damages and the Defendant has the right to raise any objections to the claim and the Court's authority and jurisdiction to hear it. SO ORDERED.

END OF DOCUMENT

DISTRIBUTION LIST

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