IT IS ORDERED as set forth below:

Date: December 15, 2014

Wendy L. Hagenau

Wendy L. Hagenau
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	)	CASE NO. 14-66844-WLH
LEANNE LINDA POLKE,	)	CHAPTER 13
Debtor.	)	JUDGE WENDY L. HAGENAU
LEANNE LINDA POLKE,	)	
Plaintiff,	)	
v.	)	ADV. PROC. NO. 14-5277
DAVID FREDRICK *(sic)* and MELODY SMITH,	)	
Defendants.	)	

PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW AS TO COUNT I
AND ORDER OF ABSTENTION AS TO COUNTS II AND III

This matter came before the Court for trial on the Plaintiff's Amended Complaint [Docket No. 34] after notice. Defendant Fredrick (hereinafter "Frederick") contends the claims set out in the Amended Complaint are not core and does not consent to the Court's entry of final

judgment on those claims. Plaintiff disagrees and alleges the claims in the Amended Complaint are core proceedings. The Court must first determine its jurisdiction and authority to enter a final judgment before proceeding with the resolution of the matter. This adversary proceeding, however, has quite a history, an understanding of which is necessary.

Plaintiff, who is the Debtor, filed a complaint for turnover and damages on September 3, 2014 ("Turnover Complaint"), alleging that both Defendants violated the automatic stay when Defendant Frederick sold the Debtor's vehicle to Defendant Smith immediately pre-petition. Plaintiff alleged the vehicle was property of the estate and should be turned over. Plaintiff alleged that the Turnover Complaint was a core proceeding, and the Defendants admitted the allegation.

The Court held a trial on September 23, 2014, on the Turnover Complaint. The Court ruled orally at the conclusion of the trial that the agreement at issue was a security agreement, the Debtor had defaulted under the security agreement, Defendant Frederick had the right to sell the vehicle but had not followed the procedures required by the UCC as incorporated into the Georgia Commercial Code ("GCC"), and Defendant Smith was nevertheless a good-faith purchaser such that the Debtor's rights in the vehicle had terminated pre-petition. The Court entered orders [Docket Nos. 12 and 13] confirming the oral ruling and directing Defendant Frederick to negotiate the check for the purchase of the vehicle. Defendant Frederick's counsel was directed to hold $1,985 from the check pending further order of the Court. A further order was entered at Docket No. 37 permitting Defendant Frederick to hold the funds, rather than his counsel. Defendant Frederick continues to hold the funds. After a motion for reconsideration by Defendant Frederick, the Court entered another order at Docket No. 28 setting out its findings of fact, conclusions of law and reasoning (the "Turnover Order"). The Court had authority to enter the Turnover Order as a final order, since the matter arose under the Bankruptcy Code and was a

core proceeding determining property of the estate and the right to turnover. 28 U.S.C. § 157(b)(a) and (E).

The Court then permitted Plaintiff to amend her Complaint to clarify the basis for her claim for damages and to include any damages arising from Defendant Frederick's failure to comply with the GCC. Debtor amended her complaint on October 21, 2014 [Docket No. 34] ("Amended Complaint"). In the Amended Complaint, Plaintiff seeks damages for the violation of the GCC which this Court found occurred in its Turnover Order. Plaintiff also seeks damages for fraud and deceit (Count II) and constructive fraud (Court III).[1]

JURISDICTION

Bankruptcy courts are courts of limited jurisdiction and federal courts have an independent duty to inquire into subject matter jurisdiction. Galindo-Del Valle v. Attorney Gen., 213 F.3d 594, 598 n.2 (11th Cir. 2000). Bankruptcy courts have subject matter jurisdiction over "civil proceedings arising under title 11, or arising in or related to cases under title 11." See 28 U.S.C. § 1334(a)(b); see also L.R. 83.7A N.D. Ga. "Arising under" jurisdiction involves "a substantive right created by the Bankruptcy Code," while "arising in" jurisdiction pertains to claims that are "not based on any right expressly created by title 11, but nevertheless could have no existence outside of bankruptcy." Grausz v. Englander, 321 F.3d. 467, 471 (4th Cir. 2003). Typically, the facts giving rise to a claim "arising in" a bankruptcy case occur during the course of the bankruptcy case. See Mercer v. Allen, 2014 WL 185252 (M.D. Ga. Jan. 15, 2014); In re Taylor, 2006 W.L. 6591616 (Bankr. N.D. Ga. May 4, 2006). "Related to" jurisdiction is the "minimum." Ger. Am. Capital Corp. v. Oxley Dev. Co., LLC (In re Oxley Dev. Co., LLC), 493 B.R. 275, 283 (Bankr. N.D. Ga. 2013). Related to jurisdiction exists over proceedings where the

[1] Defendant Melody Smith is still identified in the Amended Complaint as a defendant. Nevertheless, a review of the Amended Complaint demonstrates that there are no allegations with respect to Ms. Smith in the Amended Complaint. The Court's Turnover Order disposed of all claims against Ms. Smith.

outcome "could alter the debtor's rights, liabilities, options, or freedom of action" and would "impact[] upon the handling and administration of the bankrupt estate." Miller v. Kemira, Inc. (In re Lemco Gypsum, Inc.), 910 F.2d 784, 788 (11th Cir. 1990).

The Debtor's claims for damages under the GCC and for fraud do not arise under the Bankruptcy Code. The claims arose pre-petition, either upon the Debtor's entry into the transaction with Defendant Frederick or upon the sale of the car, but in neither event did the claims arise in the bankruptcy case. The claims, however, are related to the bankruptcy case because the claims are assets of the Debtor and therefore property of the estate under 11 U.S.C. § 541. As "related to" claims, the Court has jurisdiction to hear them under 28 U.S.C. § 1334(a), (b). See also Local Rule 83.7(a), N.D. Ga.

The next question is whether the cause of action is "core". By statute a number of matters are identified as core. See 28 U.S.C. § 157. But as the recent Supreme Court decision in Stern v. Marshall reminds courts, the statutory delineation of core is insufficient to determine whether the Constitution permits a bankruptcy court to decide the matter. A matter is constitutionally core if "the action at issue stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process." Stern v. Marshall, 131 S. Ct. 2594, 2618 (2011). Bankruptcy courts may enter final orders only in those matters that are "core." Where a matter is non-core, the bankruptcy court may hear the matter, but can only make proposed findings of fact and conclusions of law absent consent of the parties. Oxley Dev. Co., 493 B.R. at 284 & n.12.

The Court concludes the Debtor's remaining claims are non-core. This is an action to recover on pre-petition claims which do not "stem[] from the bankruptcy itself". The Defendant has not filed a proof of claim since his claim was resolved by the sale of the car, so Debtor's GCC and fraud claims would not "necessarily be resolved in the claims allowance process." See Humboldt Express, Inc. v. Wise Co., Inc. (In re Apex Exp. Corp.), 190 F.3d 624, 631 & n.7 (4th

Cir. 1999); see also Cibro Petroleum Prods., Inc. v. City of Albany (In re Winimo Realty Corp.), 270 B.R. 108, 120 (S.D.N.Y. 2001). Absent consent of the parties, this Court is confined to entering proposed findings of facts and conclusions of law.

The Court may also abstain from hearing a non-core matter. Abstention of a proceeding arising under Title 11, or arising in or related to cases under Title 11, is permitted "under proper circumstances," where "it is more appropriate to have a state court hear certain matters of state law." 28 U.S.C. § 1334(c)(1); Hospitality Ventures/Lavista v. Heartwood 11, L.L.C., (In re Hospitality Ventures/Lavista), 314 B.R. 843, 850 (Bankr. N.D. Ga. 2004). The court has discretion to abstain under 28 U.S.C. § 1334(c)(1) if abstention is "in the interest of justice, or in the interest of comity with State courts or respect for State law." "Permissive abstention permits a bankruptcy court to abstain from hearing a particular proceeding 'arising under,' 'arising in' or 'related to' a case under Title 11." McDaniel v. ABN Amro Mortgage Grp., 364 B.R. 644, 649 (S.D. Ohio 2007). "The court may abstain upon request of a party or *sua sponte*." Carver v. Carver, 954 F.2d 1573, 1579 (11th Cir. 1992); accord Bricker v. Martin, 348 B.R. 28, 33 (W.D. Pa. 2006) aff'd, 265 F. App'x 141 (3d Cir. 2008).

Courts employ a multifactor test to determine whether abstention is appropriate. The factors used by the Eleventh Circuit are:

> (1) the effect, or lack thereof, on the efficient administration of the bankruptcy estate if the discretionary abstention is exercised,
> (2) the extent to which state law issues predominate over bankruptcy issues,
> (3) the difficulty or unsettled nature of the applicable state law,
> (4) the presence of related proceedings commenced in state court or other non-bankruptcy courts,
> (5) the jurisdictional basis, if any, other than § 1334,
> (6) the degree of relatedness or remoteness of the proceedings to the main bankruptcy case,
> (7) the substance rather than the form of an asserted "core" proceeding,
> (8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court,
> (9) the burden on the bankruptcy court's docket,

(10) the likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties,
(11) the existence of a right to jury trial, and
(12) the presence in the proceeding of non-debtor parties.

Ret. Sys. of Alabama v. J.P. Morgan Chase & Co., 285 B.R. 519, 530–31 (M.D. Ala. 2002) (citing Cassidy v. Wyeth-Ayerst Labs. Div. of Am. Home Products Corp., 42 F. Supp. 2d 1260, 1263 (M.D. Ala. 1999)); see also Official Unsecured Creditors' Comm. of Hearthside Baking Co., Inc. v. Cohen (In re Hearthside Baking Co., Inc.), 391 B.R. 807, 817 (Bankr. N.D. Ill. 2008). These factors are non-exclusive, and "what these factors seek to do is implement the function and purpose served by abstention under § 1334(c)(1): in deference to federalism, ensure that the jurisdiction of the bankruptcy court is exercised only when appropriate to the expeditious disposition of bankruptcy cases." Graham v. Yoder Machinery Sales (In re Weldon F. Stump & Co.), 373 B.R. 823, 828 (Bankr. N.D. Ohio 2007) (citation omitted).

Considering the foregoing, the Court abstains from hearing the fraud, deceit and constructive fraud counts, but does not abstain from hearing the GCC damage claim. All of the claims are related to the bankruptcy case, but only the GCC damage claim is a natural extension of the issues the Court has already resolved regarding the disposition of the car. The Court necessarily determined whether Defendant Frederick complied with the GCC in the Court's determination of the turnover request. Once the Court concluded Defendant Frederick's actions violated the GCC, the only remaining question was the amount of any damages. The fraud claims, however, have never been determined and relate to the outset of the transaction, as opposed to the disposition of the car. Defendant Frederick has not filed a proof of claim in the case, and may be entitled to a jury trial on these claims. The issues are state-law issues and these claims are easily severable from the GCC related claims the Court has already adjudicated. As to the GCC damage claim, however, the Court will enter proposed Findings of Fact and

Conclusions of Law pursuant to 28 U.S.C. § 157(c)(1). The Court incorporates the final Findings of Fact and Conclusions of Law which are enumerated in the Turnover Order.

DAMAGES

The Court has already held that Debtor defaulted under her agreement with Defendant Frederick and Defendant Frederick was entitled to repossess the car, but he did not give Debtor the proper notice of sale and right to redeem. The sale resulted in the satisfaction of the debt. Debtor claims, and the Fredericks agreed, the car was worth more than the sales price to Ms. Smith of $12,185. Debtor claims she is entitled to a surplus of more than the $1,985 Defendant Frederick is holding.

The Georgia Code, O.C.G.A. § 11-9-625(d) provides that a debtor whose deficiency is eliminated by a sale which violates the GCC may still recover for a lost surplus. The surplus is the difference between the value of the car and the amount of the debt. Nat'l Hous. P'ship v. Mun. Capital Appreciation Partners I, L.P., 935 A.2d 300, 314 (D.C. 2007) (citing Md. Code Ann., Com. Law § 9–625(d) and 4 WHITE & SUMMERS, UNIFORM COMMERCIAL CODE, § 34–18 at 461–62 (4th ed. 1995)). The Court, therefore, must determine the value of the car and the amount of the debt. Value is not defined in the Commercial Code, unlike the Bankruptcy Code, e.g. 11 U.S.C. § 506(a)(2). Value under the GCC is fair market value, or fair reasonable value. See e.g., Versey v. Citizens Trust Bank, 306 Ga. App. 479, 482 (2010); Nat'l Hous. P'ship, 935 A.2d at 314.

The evidence of value submitted by the parties consisted of NADA and Edmunds valuations together with testimony from the parties about the value and condition of the car and photos of it. The condition of the car is critical to determining its value. The vehicle at issue is a 2012 Kia Optima 4-cylinder sedan, 4-door EX Turbo. The vehicle was purchased by the Debtor's mother in October 2013 for $25,836. The Debtor's mother gave her the vehicle at that

time, and it had approximately 16,000 miles on it. However, by the time the vehicle was taken into Defendant Frederick's possession in July 2014, the security agreement stated the car had 51,600 miles on it, an increase of over 35,000 miles in approximately nine months. The vehicle was operational, with no mechanical defects or inoperable or missing equipment or trim. The Debtor had painted the wheels of the car black after her receipt of the car. The car was very dirty in terms of trash and general dirt, but the only permanent damage was a cigarette burn in the headliner. The Debtor performed no major repairs on the vehicle during the nine months she possessed it, but had the oil changed at least once. The Debtor also replaced one tire, but it was with a used tire. All four tires were worn and would need to be replaced after the next 5,000 miles. Defendant Frederick testified that the sale of the car to Ms. Smith was for $12,185, but he believed the value was greater. He chose the sale price in order to recover his debt plus attorney's fees and was not looking to make money on the sale of the car. Ms. Frederick also testified she knew the car was worth more than the amount for which it was sold.

The NADA value for the car ranged from $14,175 for a rough trade-in to $18,900 for clean retail. Edmunds' values ranged from $14,861 for a trade-in to $17,459 for dealer retail. All values on the Edmunds report assumed the car was in clean condition. The meanings of the vehicle condition terms used by each valuation service are important in choosing the correct value. The NADA defines rough condition as:

> Significant mechanical defects requiring repairs in order to restore reasonable running condition; paint, body and wheel surfaces have considerable damage to their finish, which may include dull, faded or oxidized paint, small to medium-sized dents, frame damage, rust or obvious signs of previous repairs; interior reflects above-average wear, with inoperable equipment, damaged or missing trim, and heavily soiled permanent imperfections on the headliner, carpet and upholstery; may have a branded title; vehicle will need substantial reconditioning and repair to be made ready for resale; some existing damage may be difficult to restore.

NADA defines average as:

> Mechanically sound but may require some repairs/servicing to pass all necessary inspections; paint, body and wheel surfaces have moderate imperfections and an average finish which can be improved with restorative repair; interior reflects some soiling and wear in relation to vehicle age, with all equipment operable or requiring minimal effort to make operable; clean title history; vehicle will need a fair degree of reconditioning to be made ready for resale.

NADA defines clean as:

> No mechanical defects and passes all necessary inspections with ease; paint, body and wheels may have minor surface scratching with a high gloss finish; interior reflects minimal soiling and wear, with all equipment in complete working order; vehicle has a clean title history; vehicle will need minimal reconditioning to be made ready for resale.

Edmunds' definitions of condition are as follows:

- Outstanding – Exceptional mechanical, exterior and interior condition; requires no reconditioning.
- Clean – Some normal wear but no major mechanical or cosmetic problems; may require limited reconditioning.
- Average – May have a few mechanical and/or cosmetic problems and may require a considerable amount of reconditioning.
- Rough – Several mechanical and/or cosmetic problems requiring significant repairs.
- Damaged – Major mechanical and/or body damage that may render it in non-safe running condition.

Given the condition of the vehicle, the Court concludes this vehicle was in average condition under both the NADA and the Edmunds definitions. The car had no mechanical defects and no inoperable equipment or missing trim. It had a dirty interior, painted wheels and needed tires, but can be reconditioned.

Under the NADA guide, the trade-in value for a car like the Debtor's in average condition as of September 22, 2014 was $15,375, which includes a deduction for excess miles. Clean retail value under the NADA guide was $18,900. The Edmunds' valuation dated October 6, 2014 states values based on clean condition, not average condition. Edmunds reported the

vehicle in clean condition was worth $14,861 at trade-in, $16,236 in a private party sale, and $17,459 at dealer retail. Since these values are based on clean condition, and the Court has found the vehicle to be in average condition, the Court will reduce the values by $2,000, an amount the Court deems sufficient to adjust for the difference in condition.[2] The range of trade-in values is then from approximately $12,861 (Edmunds' trade-in as adjusted) to $15,300 (NADA's average trade-in).

The values stated in the Edmunds and NADA guides are not completely comparable as the Edmunds guide includes a private party sale value which is not included in the NADA guide. Using the analysis above, the private party sale of the Debtor's vehicle would be approximately $14,236 according to Edmunds. The private party sale price is particularly relevant here since that is how Defendant Frederick disposed of the vehicle.

Moreover, the relevant date for the purpose of determining the value of the vehicle is the date the car was sold, August 27, 2014. Versey, 306 Ga. App. at 483. While both the Edmunds and NADA valuations are close in time to the sale (September and October), the Court recognizes that vehicles depreciate daily. The Court finds that as of August 27, 2014, adding $200 back for depreciation between the date of the sale and the date of the valuations, the range of trade-in values for the car was between $13,061 (Edmunds) and $15,500 (NADA). The Edmunds private party valuation under this analysis would be approximately $14,436. After consideration of all the evidence, the Court finds the value of the vehicle is $15,000.

The next question in fixing the Debtor's surplus is the amount of debt to be satisfied by the value of the car. The debt in the agreement is stated at $10,200; no interest accrues. Defendant Frederick contends the debt should be increased by the cost of insuring and storing the vehicle, and by attorney's fees. The Court concludes Defendant Frederick is not entitled to

[2] The NADA appears to adjust down approximately $1,000 for the difference between clean and average trade-in.

the insurance and storage costs. Unlike a typical security agreement, the insurance and storage costs were not caused by the Debtor's default or Defendant's repossession of the car. They were part of the original transaction because the car was being held in storage from the outset of the transaction. Defendant Frederick testified the debt was $10,200 as opposed to the $8,125 paid to 1st Franklin because he needed payments of $567 to cover his expenses of keeping the car in storage. Nothing in the agreement imposes the cost of storing the vehicle or insuring the vehicle on the Debtor during the first six months of the contract. The insurance and storage costs incurred by Defendant Frederick were for only the first month within the term of the original agreement, so these costs are included in the $10,200 balance due.

The note and security agreement provide for the recovery of reasonable attorney's fees. However, O.C.G.A. § 13-1-11 provides that an attorney fee provision is enforceable only if the creditor has sent a letter to the debtor giving the debtor ten days to pay the principal amount in full before the attorney's fees are added. No evidence was presented that any such letter was ever sent, so collection of attorney's fees is improper. The debt, therefore, is $10,200, which means the surplus is $4,800 ($15,000 value minus $10,200 debt).

Ms. Polke has also asked for additional damages related to the loss of the use of the vehicle, the gas money paid for friends to take her to work, and for lost wages. She claims she could have redeemed the car had she received the required notice of sale. See Ogletree v. Brokers S., Inc., 192 Ga. App. 53, 55 (1989). The Court concludes though the Plaintiff has not proven she could have redeemed the car. Ms. Polke never made a payment to 1st Franklin, and she never made a payment to Defendant Frederick. Plaintiff testified she pawned the title in November 2013 to 1st Franklin, which eventually repossessed the vehicle. During the eight-month period 1st Franklin held the title, Ms. Polke did not make a payment on the car because

she did not have the money, despite the fact she was working during that period. She has no history of making payments on this vehicle.

The Debtor testified she had completed an application for financing with a new lending institution in order to redeem the vehicle from Defendant Frederick. The application was in the early stages of consideration, however. The Court also notes that, when she needed to pay off the debt to 1st Franklin, she borrowed the money from Defendant Frederick, not a lending institution, and the terms of his agreement required she give up her car to be stored for six months. Surely she would not have entered into the unconventional agreement with Defendant Frederick if she could have simply borrowed the money from a lending institution. Only about six weeks expired between Defendant Frederick paying 1st Franklin and Defendant Frederick's sale of the car, so there is no reason to believe this alleged redemption would have been successful.

Because of the nature of this agreement, the consequential damages the Debtor alleges and her lost wages are not recoverable. The Debtor never had possession of the car. The car was always in the Fredericks' possession. This is not a situation where a wrongful foreclosure or wrongful repossession occurred. There, a plaintiff can allege she would have had a car to drive if it had not been wrongfully repossessed or sold. Here, as previously ruled, Defendant Frederick was always in possession of the car, and had the right to sell it. Since the Debtor was without the Kia in any event, no additional damages are recoverable.

The Debtor also seeks attorney's fees. The general rule in Georgia is that each party bears its own costs and attorney's fees unless a contract provision or specific statute provides otherwise. Woods v. Hall, 315 Ga. App. 93, 97 (2012). The GCC does not provide for recovery of attorney's fees. The Plaintiff did not plead for the recovery of attorney's fees under O.C.G.A. § 13-6-11 (stubbornly litigious, acted in bad faith, or caused Plaintiff unnecessary trouble and

expense). Had she pled recovery under O.C.G.A. § 13-6-11, the evidence would not support an award of attorney's fees as to Plaintiff's claim that she was damaged due to a lack of notice of sale. Defendant Frederick prevailed that he had the right to sell the car and the car was sold to a good-faith purchaser.

Similarly, no basis for the recovery of punitive damages exists. Punitive damages can be awarded in the event of willful misconduct, malice, fraud, wantonness, oppression or an entire want of care raising a presumption of conscious indifference to the consequences. O.C.G.A. § 51-12-5.1; see also Hillman v. Gen. Motors Acceptance Corp., 210 Ga. App. 837, 839 (1993). The Court concludes that with respect to the disposition of the car, none of those criteria has been established. Defendant Frederick had a right to sell the car. The issue here is a failure of notice. No evidence has been presented that the failure of notice was done willfully, maliciously, or fraudulently.

Based upon the Proposed Findings of Fact and Conclusions of Law contained herein, the undersigned respectfully recommends that the Plaintiff recover damages in the amount $4,800 pursuant to Count I of the Complaint, $1,985 of which is being held by Defendant Frederick. The Clerk is directed to transmit these Proposed Findings of Fact and Conclusions of Law along with the record in this adversary proceeding to the Clerk for the United States District Court for the Northern District of Georgia, to serve a copy of the same on the parties, and to note the date of service on the parties on the docket of this proceeding.

END OF ORDER

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