

THIS OPINION IS NOT INTENDED FOR PUBLICATION

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

IN RE)	CASE NO. 99-52141	
)		
ROBERT ZECHMAN)	CHAPTER 13	
)		
DEBTOR(S))	JUDGE	MARILYN
SHEA-STONUM)		
)		
)	ORDER RE: DEBTOR'S	
)	OBJECTION TO PROOF OF	
)	CLAIM OF FIDELITY	
)	FINANCIAL SERVICES	

This matter came on for hearing on February 19, 2000 on debtor's objection (the "Objection") to a proof of claim filed by Fidelity Financial Services ("Fidelity"). Appearing for debtor at the February 19th hearing was Attorney John Cameron. Although Fidelity did not file a response to the Objection, Attorney Theodore Konstantinopoulos appeared at the hearing on Fidelity's behalf. During the hearing, the Court heard arguments of counsel and testimony from debtor. Documentary evidence was also presented. At the conclusion of the hearing the matter was taken under advisement.

This proceeding arises in a case referred to this Court by the Standing Order of Reference entered in this District on July 16, 1984. It is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(B) over which this Court has jurisdiction pursuant to 28 U.S.C. §1334(b). Based upon the pleadings filed herein, the Court makes the following findings of fact and conclusions of law.

FACTS

The parties do not dispute the following facts. On June 9, 1998, debtor and Fidelity entered into a loan agreement whereby Fidelity agreed to loan debtor

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approximately \$17,000.00. To secure that loan, debtor granted Fidelity a security interest in a 1991 Chevrolet pick-up truck and a 1998 Harley Davidson "fat boy" motorcycle (the "Motorcycle"). Concurrent with executing the loan agreement with Fidelity, debtor also executed an application for involuntary unemployment and disability insurance.

On July 4, 1999, debtor was involved in an accident while riding the Motorcycle. Due to that accident, debtor was hospitalized for several days. Sometime during debtor's hospitalization, the Motorcycle was repossessed by Fidelity and sometime shortly after debtor was released from the hospital, the Motorcycle was sold for less than the outstanding amount due on Fidelity's loan to debtor.

On July 16, 1999, debtor filed a chapter 13 bankruptcy petition. Fidelity is listed on debtor's Schedule D (Creditors Holding Secured Claims) as holding a fully secured claim in the amount of \$20,000.00. Fidelity's security for that claim is listed as the 1991 pick-up truck (valued in debtor's schedules at \$4,000.00) and the Motorcycle (valued in debtor's schedules at \$18,500.00). To date, debtor has not amended any of the schedules filed in this case.

On October 29, 1999, Fidelity filed a proof of claim in debtor's bankruptcy (the "Proof of Claim"). In the Proof of Claim, Fidelity indicates that it is owed \$3,727.16 and that, of that amount, \$3,550.50 is secured and \$176.66 is unsecured. To evidence the secured portion of its claim, Fidelity attached to the Proof of Claim a copy of a "Retail Installment Contract and Security Agreement" executed by debtor as well as a copy of the title to the 1991 pick-up truck.

In his Objection, debtor contends that the Proof of Claim should be disallowed because it is for the deficiency amount of the loan due and owing after Fidelity's sale of the Motorcycle and that, in selling the Motorcycle, Fidelity violated certain provisions of

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the Ohio Revised Code, the penalty for which is a denial of a creditor's right to pursue a deficiency claim. Debtor also contends that Fidelity improperly denied debtor's claim under his policy of involuntary unemployment and disability insurance. During the hearing on this matter, Fidelity argued that it complied with all necessary provisions of the Ohio Revised Code when disposing of the Motorcycle but that, even if it did violate the Ohio Revised Code, its Proof of Claim is not for a deficiency amount because the 1991 pick-up truck, which still acts as security for its loan to debtor, is worth more than the amount set forth in the Proof of Claim.

DISCUSSION

Once filed, a proof of claim constitutes prima facie evidence of the validity and amount of the claim and such claim is deemed allowed, unless a party in interest objects. 11 U.S.C. §502(a); Fed. R. Bank. P. 3001(f). The objecting party bears the initial burden of producing sufficient evidence to rebut the claimant's prima facie case. *See In re Forte*, 234 B.R. 607, 617 (Bankr. E.D.N.Y. 1999). If the objecting party meets its burden, the burden shifts back to the claimant to then prove its claim by a preponderance of the evidence. *Id.* It is ultimately for the claimant to prove its claim and not for the objector to disprove it. *Id.*

Through the Objection, debtor has challenged the prima facie validity of the Proof of Claim. Debtor's challenge to the Proof of Claim is premised upon Fidelity's alleged violation of certain provisions of the Ohio Revised Code as well as Fidelity's alleged nonpayment of involuntary unemployment disability insurance. Each of these arguments is discussed below.

Violations of the Ohio Revised Code: Ohio Revised Code §1309.47 addresses a secured party's right to dispose of collateral after default and provides, *inter alia*, the

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following:

(C) Disposition of the collateral may be by public or private proceedings and may be made by way of one or more contracts. Sale or other disposition may be as a unit or in parcels and at any time and place and on any terms but every aspect of the disposition, including the method, manner, time, place, and terms *must be commercially reasonable*. Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, *reasonable notification of the time and place* of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor. . . .

ORC §1309.47(C) (emphasis added). Section 1317.12 of the Ohio Revised Code provides as follows:

Notwithstanding any agreement to the contrary in a retail installment contract made on or after the effective date of this section, if collateral for a consumer transaction is taken possession of by the secured party on default, the secured party shall, within five business days after taking possession, send to the debtor a notice setting forth specifically the circumstances constituting the default and the amount by itemization that the debtor is required to pay to cure his default . . . A secured party who disposes of collateral without sending notice required by this section *may not recover the costs of retaking possession of the collateral and in not entitled to a deficiency judgment*.

ORC §1317.12 (emphasis added). A secured party's failure to comply with the provisions of Ohio Revised Code §§ 1309.47(C) and 1317.12 is an absolute bar to the recovery of a deficiency judgment. *Huntington Natl. Bank of Washington Courthouse v. Stockwell*, 460 N.E.2d 303, 10 Ohio App. 3d 30 (Ohio Ct. App. 1983).

During the hearing on this matter, debtor testified that after his July 4, 1999 accident he was hospitalized for approximately five days and that during this hospital stay, Fidelity repossessed the Motorcycle and sent debtor a notice of sale. Debtor also testified that he did not actually review that notice until he arrived home from his hospital stay and

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that the notice set forth the date and time of the sale but not the place where the sale would be held. Debtor claimed that the sale of the Motorcycle was scheduled for only one or two days after the date he actually reviewed the sale notice.

Neither party presented the Court with a copy of the referenced sale notice or offered explanation as to why a copy of that document was not available. During closing argument, counsel for Fidelity attempted to challenge debtor's testimony by pointing out that debtor could not accurately recall the exact date the sale notice was sent or the exact contents of that notice. Despite this attempted challenge, Fidelity did not provide the Court with any evidence to disprove that the sale notice was as debtor described - e.g., Fidelity did not chose to have a company representative testify about company policy of notifying debtors of a sale of repossessed collateral and did not present any evidence of form notices that Fidelity uses in such situations.

Based upon debtor's testimony, Fidelity's notice to debtor of its proposed sale of the Motorcycle did not comply with the requirements of ORC §1309.47(C) because it did not include any notification of where the sale of that collateral would be held.¹ It is also questionable as to whether Fidelity's actions relative to the Motorcycle were commercially reasonable given the very short time frame between debtor's accident and when the Motorcycle was repossessed and sold. The Court does not have to decide this issue, however, because the burden to prove commercial reasonableness rests with the secured party wishing to recover a deficiency. *Huntington Bank v. Freeman*, 560 N.E. 2d 251,

¹ Debtor did not testify as to whether or not the referenced sale notice contained information "setting forth specifically the circumstances constituting the default and the amount by itemization that debtor is required to pay to cure his default." Accordingly, the Court cannot rule on whether or not Fidelity also violated that provision of ORC §1317.12.

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255, 53 Ohio App. 3d 127, 129-30 (Ohio Ct. App. 1989). Because Fidelity failed to present any evidence or case authority to support its contention that it sold the Motorcycle in a commercially reasonable way, it has failed to meet this burden. Given Fidelity's failure to comply with the requirements of Ohio Revised Code §§ 1309.47(C) and 1317.12, it is barred by Ohio law from recovering any deficiency in the loan amount owed to it by debtor.

Based upon the foregoing, the Court finds that, to the extent the Proof of Claim is for a deficiency amount, debtor has produced sufficient evidence to rebut the prima facie validity of the Proof of Claim and that the burden to affirmatively prove the matter shifted to Fidelity. Because Fidelity was unable to convincingly contradict debtor's testimony and failed to present the Court with any evidence of its own, the Court finds that Fidelity failed to meet that burden. Accordingly, debtor's objection to allowance of the Proof of Claim in this regard is well taken.

The amount of the Proof of Claim (\$3,727.16) is less than the \$4,000.00 value debtor scheduled for the 1991 pick-up truck which still secures Fidelity's loan. As this file now stands, the Proof of Claim does not appear to be based upon a deficiency amount. However, during his testimony, debtor claimed that the value of the pick-up truck is much less than \$4,000.00. Despite this apparent dispute as to the valuation of the 1991 pick-up truck (which, of course, will dictate whether or not the Proof of Claim is based upon a deficiency amount), that matter is not before the Court and will not be dealt with in this Order.

Nonpayment of involuntary unemployment and disability insurance: During the hearing, debtor testified that at the same time he entered into the loan agreement with Fidelity he also purchased involuntary unemployment disability insurance to cover

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payments under that loan. Debtor also testified that, because of his motorcycle accident, he became disabled. In the Objection, debtor contends that Fidelity has denied debtor's claims under that insurance. To support that contention, debtor introduced into evidence multiple insurance documents which appear to have been drafted by the Lyndon Life Insurance Company (those documents were stapled together by debtor and introduced collectively at the hearing as "Debtor's Exhibit 1"). In many of those documents, debtor is identified as "debtor" and Fidelity is identified as "creditor" and "creditor beneficiary."

During his testimony, debtor claimed that at the time of his motorcycle accident, all payments due under the involuntary unemployment and disability insurance agreement were current. However, upon cross-examination, debtor conceded that, at the time he was injured, payments due under his loan with Fidelity were at least two months in arrears. Aside from debtor's explanation that the documents comprising Debtor's Exhibit 1 were the documents he signed to acquire involuntary unemployment and disability insurance, neither debtor nor Fidelity explained to the Court the interrelationship between debtor's loan agreement with Fidelity and Debtor's Exhibit 1. Therefore, it is unclear whether debtor's failure to make all payments due under his loan agreement with Fidelity has any bearing upon his right to receive payments under the involuntary unemployment disability insurance agreement with the Lyndon Life Insurance Company. Despite this uncertainty, a review of the documents included in Debtor's Exhibit 1 indicates that debtor's argument regarding Fidelity's denial of a claim under the policy of involuntary unemployment disability insurance is not supported by the evidence.

On the very first page of Debtor's Exhibit 1, item number 4 in the "Statement of Debtor" sets forth that "I am not self-employed, a seasonal worker, an independent contractor or full-time military personnel." Notwithstanding his testimony that he signed

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that document, debtor also testified that at the time of the motorcycle accident he was self-employed. At the bottom of this same first page, debtor's signature appears in both the space below the statement "I want involuntary unemployment disability insurance" and the space below the statement "I do not want/qualify for involuntary unemployment disability insurance." Nothing was provided to the Court to explain this obvious contradiction.

In addition to the aforementioned inconsistencies in Debtor's Exhibit 1, one provision in the multiple documents contained therein states that "[w]e will pay the monthly disability proceeds shown in the Schedule to the creditor beneficiary to pay off or reduced an insured's debt: (1) when we receive written proof that the insured: (a) became disabled due to injury or sickness; (b) has been disabled for more than the waiting period shown in the Schedule; and (c) has received health care." *See* the reverse side of pg. 3 of Debtor's Exhibit 1. During the hearing, debtor did not testify to or provide evidence that this written proof of disability requirement was met. Moreover, although debtor claims that "Fidelity. . .has denied Debtor's claim regarding said insurance," (*see* Objection at pg. 1), all of the definitional sections included in Debtor's Exhibit 1 define the referenced "we" in those documents as the Lyndon Life Insurance Company and not Fidelity.

Based upon the foregoing, the Court finds that, to the extent the Proof of Claim is for amounts that might otherwise have been covered under the policy of involuntary unemployment and disability insurance, debtor has not produced sufficient evidence to rebut the prima facie validity of the Proof of Claim. Accordingly, debtor's objection to allowance of the Proof of Claim in this regard is not well taken.

CONCLUSION

Based upon the foregoing, the Court finds that, to the extent that the Proof of

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Claim is based upon a deficiency between the amount debtor owed to Fidelity under the parties' loan agreement and the amount Fidelity realized on the sale of the Motorcycle, the Proof of Claim is not allowed. The Court further finds that, to the extent that the Proof of claim is for

amounts that debtor contends might otherwise have been covered under the policy of involuntary unemployment and disability insurance, the Proof of Claim is allowed.

IT IS SO ORDERED.

MARILYN SHEA-STONUM
Bankruptcy Judge

DATED: 3/2/00