

IT IS SO ORDERED.



Dated: November 17, 2006
10:52:07 PM

Honorable Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

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|--------------------------------|---|--------------------------|
| IN RE: | * | |
| | * | |
| KON PIZANIAS & MARIA PIZANIAS, | * | |
| | * | CASE NUMBER 05-48369 |
| Debtors. | * | |
| | * | |
| ***** | * | |
| | * | |
| HANOVERTON MOTORCARS, INC., | * | |
| | * | ADVERSARY NUMBER 06-4121 |
| Plaintiff, | * | |
| | * | |
| vs. | * | |
| | * | |
| RICHARD G. ZELLERS, et al. | * | |
| | * | THE HONORABLE KAY WOODS |
| Defendants. | * | |
| | * | |

M E M O R A N D U M O P I N I O N

This matter is before the Court upon the Motion for Judgment on the Pleadings filed on behalf of Plaintiff Hanoverton Motorcars, Inc. ("Plaintiff") on September 25, 2006. With leave of Court, Defendant Richard Zellers, the Chapter 7 Trustee ("Trustee") filed his Response on November 1, 2006. Plaintiff filed a Reply without leave of Court on November 9, 2006.

This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334(b). Venue in this Court is proper pursuant to 28 U.S.C. §§ 1391(b), 1408, and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(E).

Judgment on the pleadings is governed by FED. R. CIV. P. 12(c), which is made applicable to this adversary proceeding pursuant to FED. R. BANKR. P. 7012. Rule 12(c) provides, in pertinent part:

After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings.

Judgment on the pleadings is proper when no material issue of fact exists and the party is entitled to judgment as a matter of law. *Paskvan v. Cleveland Civil Service Commission*, 946 F.2d 1233, 1235 (6th Cir. 1991).

In determining if a material issue of fact exists, the Court must construe the complaint in the light most favorable to the non-moving party, *Estill County Board of Education v. Zurich Insurance Co.*, 84 Fed. Appx. 516 (6th Cir. 2003), and take all well-pleaded material of the non-moving party as true. *United States v. Moriarty*, 8 F.3d 329, 332 (6th Cir. 1993) (quoting *Southern Ohio Bank v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 479 F.2d 478, 480 (6th Cir. 1973)). The Court is not required to accept "sweeping unwarranted averments of fact," *Official Committee of Unsecured Creditors v. Austin Financial Services, Inc. (In re KDI Holdings, Inc.)*, 277 B.R. 493, 502 (Bankr. S.D. N.Y. 1999) (quoting *Haynesworth v. Miller*, 820 F.2d 1245, 1254 (D.C. Cir. 1987)), or

"conclusions of law or unwarranted deduction." *In re KDI Holdings Inc.*, 277 B.R. at 502 (quoting *First Nationwide Bank v. Gelt Funding Corp.*, 27 F.3d 763, 771 (2d Cir. 1994)).

Finally, where the parties present matters outside the pleadings, the Court may exclude such matters or convert the Rule 12(c) motion to a motion for summary judgment. *Max Arnold & Sons, LLC v. W.L. Hailey & Company, Inc.*, 452 F.3d 494, 503 (6th Cir. 2006). Judgment on the pleadings may only be granted if the moving party is clearly entitled to judgment. *Southern Bank of Ohio*, 479 F.2d at 480.

In its Motion for Judgment on the Pleadings, Plaintiff writes, "Plaintiff shall rely upon the pleadings of record and the attached brief in support." (Mot. at p. 1.) However, in its brief in support, Plaintiff relies on a number of controverted facts as well as many additional facts that are not asserted in either the Complaint or the Answer. Likewise, Trustee, in his Response, premises his arguments against entry of judgment in favor of Plaintiff on facts outside the pleadings.

For instance, the first two paragraphs of Plaintiff's Statement of Facts in its brief in support read, in their entirety:

The operative facts are not in dispute, are set forth in the pleadings, and support judgment in favor of [Plaintiff] as a matter of law.

On August 30, 2005, the Debtors took possession of the Vehicle which they purchased from [Plaintiff.] To finance the Vehicle purchase, [Debtors] executed a Note in the principal amount of \$20,294.75, and delivered said Note to Co-defendant AmTrust Bank. Thereafter AmTrust tendered the loan proceeds to [Plaintiff]. Both Debtors

and AmTrust Bank knew and recognized the loan would be secured by a lien on the Vehicle.

(Mot. at p. 2.)

In fact, Trustee, in his Answer, denies for lack of knowledge that Debtors Kon and Maria Pizanias ("Debtors") took possession of the vehicle at issue in this case on August 30, 2005 or that Debtors delivered the alleged Note to AmTrust Bank. (Answer ¶ 3.) Furthermore, the remainder of the facts set forth in the quoted portion of the brief are not supported by averments in either the Complaint or the Answer. Therefore, contrary to Plaintiff's assertion in the Statement of Facts, there are operative facts that are either in dispute or that are not supported by the pleadings.

Trustee similarly relies upon additional and unsupported facts in his Response. Trustee argues that Judgment on the Pleadings is inappropriate in this case for two reasons: First, Trustee asserts that he relied upon the representations of Debtors in their schedules and counsel for AmTrust Bank in recovering and selling the vehicle. Trustee further asserts that, prior to the public auction, he received a telephone call from Attorney James Beck, who indicated that he represented Plaintiff and that Plaintiff wanted to make an offer to buy the vehicle from Trustee in order to recoup its losses. In fact, the alleged representations of Debtors, AmTrust Bank, and Attorney Beck do not appear anywhere in the pleadings.

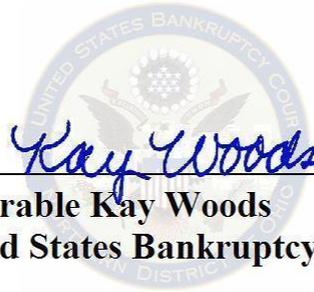
Simply stated, because both Plaintiff and Trustee rely on matters outside the pleadings in their respective briefs, Judgment

on the Pleadings is improper in this case. Furthermore, this Court cannot "convert" the Rule 12(c) motion into a motion for summary judgment because the parties have argued certain alleged facts, but have not presented the additional evidence in proper form. See FED. R. CIV. P. 56(c). As a consequence, this Court must exclude all matters outside the pleadings, and, therefore, the Motion for Judgment on the Pleadings must be denied as a matter of law.

An appropriate order will follow.

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IT IS SO ORDERED.



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O R D E R

For the reasons set forth in this Court's memorandum opinion entered on this date, the Motion for Judgment on the Pleadings filed on behalf of Plaintiff Hanoverton Motorcars, Inc. is denied.

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