

IT IS SO ORDERED.



Dated: November 21, 2006
01:16:04 PM

Honorable Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:	*	
	*	
MIDWAY MOTOR SALES, INC.,	*	
	*	CASE NUMBER 04-42726
	*	
Debtor.	*	
	*	
*****	*	
GENERAL MOTORS ACCEPTANCE CORP.,	*	
	*	ADVERSARY NUMBER 04-4147
Plaintiff,	*	
	*	
vs.	*	
	*	
MIDWAY MOTOR SALES, INC.,	*	
et al.,	*	HONORABLE KAY WOODS
	*	
Defendants.	*	
	*	

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

This cause is before the Court on Motion of the Trustee for an Order: (A) Striking the Second Through Seventh Affirmative Defenses of Defendants David A. Flynn and David A. Flynn, Inc. As They Relate to Count II of Trustee's Cross-Claims; and (B) Dismissing the Cross-Claim of Said Defendants With Memorandum in Support

("Motion to Strike") filed by Elaine B. Greaves, Chapter 7 Trustee in this case ("Trustee"), on January 20, 2006. On February 10, 2006, Defendants David A. Flynn and David A. Flynn, Inc. (collectively, "Flynn") filed Brief in Opposition to Motion to Strike ("Opposition"). The Court held a hearing on March 21, 2006 and took the matter under advisement pending resolution of the issues of abandonment of certain estate property and employment of Michael Gallo as counsel for the Trustee. Those matters have been resolved pursuant to Orders of this Court dated October 18, 2006 (Doc. Nos. 186 and 187 in the main bankruptcy case). As a consequence, this matter is ripe for decision.

This Court has jurisdiction pursuant to U.S.C. § 1334. Venue in this Court is proper pursuant to 28 U.S.C. §§ 1408 and 1409. This is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(B)(C)and (K). The following constitutes the Court's findings of fact and conclusions of law pursuant to FED. R. BANKR. P. 7052.

I. BACKGROUND AND HISTORY

The facts in this case are detailed and complicated. On June 3, 2004 (the "Petition Date"), Debtor Midway Motor Sales, Inc. ("Debtor") commenced this case by filing a voluntary petition pursuant to Chapter 11 of the Bankruptcy Code. By order entered on September 24, 2004, this case was converted to a proceeding under Chapter 7 of the Bankruptcy Code. Prior to the Petition Date, Michael and Carol Mercure were the sole shareholders of Debtor, which operated a business that sold General Motors vehicles. On or about April 21, 2004, Debtor entered into an agreement (the "Sale Agreement") with Flynn for the sale of Debtor's business assets, including the inventory and other assets,

but not the real estate or the shares of stock. Flynn's new business operated at the same location as Debtor's prior business under the name Performance GMAC. Pursuant to the Sale Agreement, Flynn became obligated to make certain periodic payments to Debtor. However, Flynn has refused to pay Debtor money that is due and owing under the Sale Agreement because of issues relating to the roll-back of certain odometers (the "Odometer Roll-Back").

General Motors Acceptance Corporation ("GMAC") alleges that it is entitled to any monies owed by Flynn to Debtor because, as the primary secured creditor, it held a security interest in all of Debtor's assets that were sold to Flynn. GMAC asserts that, since it did not consent to the sale or the release of its security interest, such security interest transferred to the proceeds of the sale. GMAC alleges that the total amount it is owed by Debtor - and, thus, its secured claim - is approximately \$1.6 Million. Of this amount, GMAC claims \$1.5 Million are damages owed by Debtor relating to the Odometer Roll-Back and \$90,000.00 represents payments due and owing under a floor plan financing agreement. In a separate state court action, GMAC also alleges that the Mercures owe it these same amounts based on the Mercures' guarantee of Debtor's indebtedness to GMAC.

A. The State Court Action

GMAC initiated a state court action against the Mercures to determine the validity of the Mercures' guarantee. Several months ago, the Cuyahoga Court of Common Pleas ("Common Pleas Court") granted summary judgment in favor of GMAC against the Mercures on the guarantee, but, at that time, the Common Pleas Court did not determine if the guarantee covered the Odometer Roll-Back damages.

During a telephonic status conference on November 6, 2006, counsel for GMAC and counsel for the Mercures represented that, in mid-October at approximately the same time that this Court entered its October 18, 2006 orders, the Common Pleas Court entered a decision in the state court case finding the Mercures liable to GMAC on the guarantee in the approximate amount of \$1.6 million. No party has yet filed any pleading in this case concerning the effect, if any, of the state court judgment on this adversary proceeding.

B. The Instant Adversary Proceeding

On August 11, 2004, GMAC initiated this Adversary Proceeding to determine the validity, extent and priority of its claim against Debtor, Flynn and numerous other parties. Because the Adversary Proceeding was filed prior to the conversion of the case to Chapter 7, there was no Chapter 7 trustee appointed at the time the Adversary Proceeding was commenced. After conversion, Trustee was substituted for Debtor as a party defendant and has actively participated in the Adversary Proceeding by filing an Answer, as well as counterclaims and cross-claims.

On February 4, 2005, the Court allowed the Mercures to intervene in the Adversary Proceeding because it sought to calculate and determine the amount and validity of Debtor's obligation for which Mercures are guarantors. On September 6, 2005, this Court granted the motion of the State of Ohio, Department of Taxation to intervene in this adversary proceeding. On that same day, the Court granted Trustee's oral motion for leave to file cross-claims against Flynn. By Order of the Court dated October 4, 2005, the Court granted Trustee additional time - until November 5, 2006 to file cross-claims against Flynn. Trustee filed

Cross-Claim of Elaine B. Greaves, Chapter 7 Trustee on November 4, 2006 ("Trustee's Cross-Claim") against Flynn, as well as Victor Javitch and Christopher A. DeVito as co-escrow agents, which consisted of two Counts. Count I was for breach of the Sale Agreement and demand for turnover of property of the estate, including the unpaid proceeds of that sale. Count II asserted that, to the extent the transfer of the Debtor's assets was done outside of the Sale Agreement, the transfer was made without adequate consideration. As a consequence, Count II seeks to avoid the transfer pursuant to 11 U.S.C. § 548(a).

After being granted a continuance to plead, Flynn filed Answer of Defendants David A. Flynn and David A. Flynn, Inc. To Cross-Claim of Elaine B. Greaves, Chapter 7 Trustee and Cross-Claim ("Flynn's Answer and Cross-Claim") on January 3, 2006. The instant Motion to Strike was filed thereafter. On February 10, 2006, Flynn filed Motion to Extend Proof of Claim Deadline ("Motion to Extend Deadline") in Debtor's main bankruptcy case, arguing that it should be allowed to assert claims against Debtor with respect to the sale. Trustee objected to the Motion to Extend Deadline on March 9, 2006, arguing that FED. R. BANKR. P. 9006(b) prohibited the Court from extending the deadline for filing proofs of claim because (i) Flynn failed to move for an extension of time prior to expiration of the deadline, and (ii) Flynn failed to state any facts that would constitute excusable neglect. A hearing on the Motion to Extend Deadline was held on March 16, 2006 and, for the reasons set forth in Trustee's objection, the Court entered an Order denying the Motion to Extend Deadline on March 17, 2006.

II. MOTION TO STRIKE

The Motion to Strike has two components: (i) Trustee moves to strike certain of Flynn's asserted defenses to Count II of Trustee's Cross-Claim and (ii) Trustee moves to dismiss Flynn's Cross-Claim. The Court will deal with each of these issues separately.

A. Dismissal of Cross-Claim

Trustee argues that Flynn's Cross-Claim should be dismissed because (i) Debtor is no longer a party to the Adversary Proceeding, (ii) Flynn's Cross-Claim is untimely, and (iii) Flynn has failed to plead fraud with specificity. Most of Flynn's Opposition deals with the issue of striking certain defenses to Count II. In response to the arguments concerning dismissal, Flynn merely states that the Motion to Extend Deadline was being filed contemporaneously with the Opposition. As set forth above, this Court denied the Motion to Extend Deadline, thus Trustee's argument that the Cross-Claim is untimely is meritorious. In addition, Trustee is correct that she has been substituted as the party defendant in place of Debtor since conversion of the case to Chapter 7. Trustee's argument that cross-claims can only be asserted against existing parties is also well taken. Since Flynn's Cross-Claim is directed to Debtor - not Trustee - it must be dismissed. Last, Trustee asserts that Flynn has failed to plead fraud with specificity. This argument also appears to be well taken since Flynn has failed to allege that Debtor had any information about Odometer-Rollback that Debtor concealed or failed to disclose (see ¶ 26 of Flynn's Cross-Claim).

As a consequence, Trustee's motion to dismiss Flynn's Cross-Claim is well taken.

B. Motion to Strike Certain Defense to Count II

Trustee also asks this Court to strike the second to seventh defenses Flynn has asserted to Count II of Trustee's Cross-Claim. Flynn asserts ten affirmative defenses in total. Only the second through seventh defenses are at issue and only their applicability to Count II is at issue. Trustee has not moved to strike the first, eighth, ninth or tenth defenses and also has not moved to strike any affirmative defenses to Count I. The defenses at issue are as follows:

- Second Affirmative Defense: barred by waiver.
- Third Affirmative Defense: barred by estoppel
- Fourth Affirmative Defense: barred by laches
- Fifth Affirmative Defense: barred by setoff
- Sixth Affirmative Defense: barred by accord and satisfaction
- Seventh Affirmative Defense: damages are the direct and proximate result of Debtor's negligence, recklessness, willful misconduct and/or fraud and/or negligence, recklessness, willful misconduct and/or fraud of Debtor's employees and/or agents.

Trustee asserts that, unlike Count I, where Trustee is stepping into the shoes of Debtor in asserting the breach of contract cause of action, Count II is an avoidance action pursuant to Chapter 5 of the Bankruptcy Code. Trustee cites *Boyle v. Wells (In re Gustav Schaefer Co.)*, 103 F.2d 237, 241 (6th Cir. 1939), *cert. denied*, 308 U.S. 579 (1939) for the proposition that "[w]hen seeking to avoid a Chapter 5 bankruptcy cause of action, however, the trustee is not asserting a claim belonging to the debtor but

asserting an action in a representative capacity for general unsecured creditors." (Motion to Strike at p. 5.)

Interestingly, Flynn also cites to the *Boyle* case for the proposition that "when a trustee attempts to assert a debtor's cause of action against a third party, the trustee unequivocally stands in the debtor's shoes and is subject to all valid claims and defenses, including inequitable conduct which the third party has against the debtor." (Opposition at pp. 4-5, emphasis in original.) Flynn argues that Trustee cannot ignore valid claims and defenses "simply because the debtor's actions/inactions can sound in fraud, in addition to numerous other causes of action...." (Opposition at p.5.) Flynn's point misses the mark. It is not the nature of the alleged defense that requires it to be stricken, but the nature of the Trustee's cause of action to which the defense is made. Trustee is not alleging that the defenses are not appropriately asserted against her in response to Count I, where the Trustee has, indeed, stepped into the shoes of Debtor. Trustee contends, instead, that when she asserts a cause of action for the benefit of the estate, such as the avoidance action in Count II, she is not stepping into the shoes of Debtor, but is representing the creditors. Trustee's position is fully supported by *Boyle*.

There was no privity between the trustee and the bankrupt. The former acquired title to the property by operation of law and the doctrine of estoppel is inapplicable.

Under Section 70(a), 11 U.S.C.A. § 110(a), the trustee acquires the title of the bankrupt to all of his property and possessions at the date the petition is filed, subject to valid claims, liens and equities enforceable against the bankrupt. Under Section 47a, as amended, 11 U.S.C.A. § 75(a), in determining conflict of title between the

trustee and third parties, his rights are to be determined as if he were a creditor holding a lien by legal or equitable proceedings at the time the petition was filed. The trustee represents the general creditors and in this capacity may assert claims, avoid preferences and collect assets where the bankrupt, if bankruptcy had not intervened, would be estopped. In re Kester, 2 Cir., 186 F. 127; Merchants' Nat. Bank v. Sexton, 228 U.S. 634, 645, 33 S.Ct. 725, 57 L.Ed. 908.

Boyle at 241. (Emphasis added.)

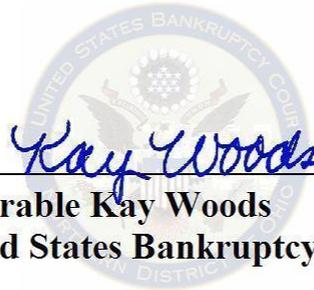
Count II of Trustee's Cross-Claim states a cause of action for avoidance. Under the facts pled, Trustee has not stepped into the shoes of the Debtor in Count II, but, rather, represents the creditors. As a consequence, the Motion to Strike is well taken regarding application of the second through seventh defenses to Count II.

For the foregoing reasons, the Motion to Strike the second to seventh affirmative defenses against Count II is well taken and is hereby granted. Flynn's Cross Claim will be dismissed and the second through seventh affirmative defenses will be stricken as to Count II.

An appropriate order will follow.

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IT IS SO ORDERED.



Dated: November 21, 2006
01:16:05 PM

Honorable Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

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MIDWAY MOTOR SALES, INC.,	*	
	*	CASE NUMBER 04-42726
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Debtor.	*	
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GENERAL MOTORS ACCEPTANCE CORP.,	*	
	*	ADVERSARY NUMBER 04-4147
Plaintiff,	*	
	*	
vs.	*	
	*	
MIDWAY MOTOR SALES, INC.,	*	
et al.,	*	HONORABLE KAY WOODS
	*	
Defendants.	*	
	*	

O R D E R

For the reasons in this Court's Memorandum Opinion entered on this date, the Court grants, in its entirety, Motion of the Trustee for an Order: (A) Striking the Second Through Seventh Affirmative Defenses of Defendants David A. Flynn and David A. Flynn, Inc. As They Relate to Count II of Trustee's Cross-Claims; and (B)

Dismissing the Cross-Claim of Said Defendants With Memorandum in Support ("Motion to Strike") filed by Elaine B. Greaves, Chapter 7 Trustee in this case ("Trustee"), on January 20, 2006.

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