

IT IS SO ORDERED.



Dated: December 01, 2006
11:28:04 AM

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 on Motion of Plaintiff GMAC LLC for Leave to File First Amended Supplemental Complaint, *Instanter* filed by General Motors Acceptance Corporation ("GMAC") on November 1, 2006 ("Motion for Leave"). On November 13, 2006, David A. Flynn and David A. Flynn, Inc. (collectively "Flynn") filed David A. Flynn

and David A. Flynn, Inc.'s Brief in Opposition to Motion of Plaintiff GMAC LLC for Leave to File First Amended Supplemental Complaint, *Instanter* (sic) ("Response"). On November 20, 2006, GMAC filed Reply Brief of Plaintiff GMAC LLC in Support of It's Motion for Leave to File a First Amended Supplemental Complaint, *Instanter* ("Reply Brief").

This Court has jurisdiction pursuant to 28 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

On June 3, 2004 ("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 ("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. The purchase price in the Sale Agreement was \$500,000.00 plus an amount for returnable parts due to General Motors Corporation (collectively the "Proceeds"). The Proceeds

were to be paid as follows: \$250,000.00 at the closing of the sale ("Closing"), \$125,000.00 on the first anniversary of Closing, \$125,000.00 on the second anniversary of Closing, and an amount for returnable parts, which was to be determined and paid after Closing. At Closing, Flynn paid \$58,039.98 (the "Escrowed Amount") to escrow agents Victor M. Javitch and Christopher A. DeVito (collectively "Escrow Agents"), who continue to hold the Escrowed Amount. Due to disputes relating to the roll-back of certain odometers (the "Odometer Roll-Back), Flynn has refused to pay Debtor (i) the remaining \$191,660.02 that was due at Closing, (ii) the two anniversary payments of \$125,000.00 and (iii) an amount for the returnable parts inventory.

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. GMAC alleges that the total amount it is owed by Debtor - and, thus, the amount of its secured claim - is approximately \$1.6 Million. Of this amount, GMAC claims approximately \$1.5 Million are damages relating to the Odometer Roll-Back and \$90,000.00 represents payments due and owing under a floor plan financing agreement.¹

1 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. 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 in this case, the Common Pleas Court entered

On August 11, 2004, GMAC initiated this Adversary Proceeding against Debtor, Flynn and numerous other parties to determine the validity, extent and priority of its claim. After conversion of Debtor's bankruptcy case from Chapter 11 to Chapter 7, Elaine B. Greaves, as the Chapter 7 Trustee ("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 and September 6, 2005, respectively, the Court allowed the Mercures and the State of Ohio Department of Taxation to intervene in the Adversary Proceeding. On November 4, 2005, with leave of the Court, Trustee filed Cross-Claim of Elaine B. Greaves, Chapter 7 Trustee ("Trustee's Cross-Claim") against Flynn and 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. Count II asserted that, to the extent the transfer of 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).

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,

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 filed any pleading in this case concerning the effect, if any, of the state court judgment on this adversary proceeding.

2006. On January 20, 2006, Trustee filed 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"). The Court entered an Order on November 21, 2006 granting Motion to Strike.

II. ARGUMENTS

GMAC argues that it needs to amend the Complaint ("Original Complaint"), pursuant FED. R. CIV. P. (a) and (d)², because, subsequent to commencing this case, Flynn has failed to pay the final installation payment under the Sale Agreement and the estimated amount due for returnable parts. (Motion for Leave p. 2.) GMAC specifically states:

GMAC needs to amend and supplement its complaint to (i) set forth the additional factual events and circumstance that have occurred since the filing of the original Complaint; (ii) assert the causes of action arising out of those events and circumstances; and (iii) obtain responsive pleadings from the intervening defendants to allow any party who claims an interest in the Sale Proceeds to assert their interest and/or claim.

(*Id.* at 3.)

The amendments, if granted, would include claims against Flynn for (i) unjust enrichment, (ii) impairment of security interest in collateral, (iii) conversion and (iv) various UCC claims. (*Id.*) GMAC also requests a jury trial in the First Amended Supplemental Complaint. GMAC argues that the Original Complaint can be amended

¹ FED. R. CIV. P. (a) and (d) apply to adversary proceedings pursuant to FED. R. BANKR. P. 7015.

and supplemented, pursuant to FED. R. CIV. P. (a) and (d), because the modifications are timely, meritorious, in good faith and do not unduly prejudice any defendant. (*Id.* at 4.)

Flynn counters that GMAC is seeking to assert non-core claims, which are not ripe and which are for the sole benefit of GMAC. (Response pp. 1-2 (unnumbered).) Flynn also states that if the Court grants the Motion for Leave it will not consent to a jury trial in this forum. (*Id.*)

In its Reply Brief, GMAC states that Flynn has failed to properly oppose the Motion for Leave because it did not address the criteria to amend and supplement a pleading, as set forth in FED. R. Civ. P. (a) and (d). (Reply Brief p. 1.) GMAC further asserts that objecting to a jury trial does not address the issue of whether the Court should grant the Motion for Leave. (*Id.* at 2-3.) GMAC also alleges that the issue of ripeness does not go to the standard under FED. R. Civ. P. (a) and (d). (*Id.* at 3-4.) Moreover, GMAC argues that the issue of whether this is a core proceeding should be addressed in a motion to dismiss rather than through this Motion for Leave. Alternatively, GMAC contends that, if the Court considers ripeness in addressing the Motion for Leave, the proposed counts are ripe because they relate to the Sale Agreement and they are the same issues asserted by Trustee against Flynn in Trustee's Cross-Claim. (*Id.* at 4-5.) GMAC finally states that if the Court does not grant the Motion for Leave, it will be forced to file a lawsuit against Flynn in state court. (*Id.* at 5.)

III. ANALYSIS

GMAC's Motion for Leave seeks to amend the Original Complaint pursuant to FED. R. CIV. P. 15(a) and to supplement the Original

Complaint pursuant to FED. R. CIV. P. 15(d). Although similar, these are two separate and distinct kinds of relief. Amending a complaint contemplates adding new parties or new causes of action. Supplementing a complaint encompasses adding new facts or information, but does not affect the number or identity of the parties or add new causes of action. Because GMAC attached its proposed Amended Complaint to the Motion for Leave, it is clear GMAC seeks to both (i) supplement the factual background and (ii) include several new and additional causes of action.

A. FED. R. CIV. P. 15(a)

GMAC asserts that it should be allowed to amend the Original Complaint pursuant to. FED R. CIV. P. 15(a), which provides in pertinent part:

Amendments. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

GMAC focuses on the phrase "leave shall be freely given." FED. R. CIV. P. 15(a). GMAC's focus, however, misses the mark. Leave should not be given (freely or otherwise) if justice does not require that the amendments be permitted. Justice does not require the Court to grant leave to a party that does not have standing to pursue the proposed new causes of action because doing so would only require the parties (and the Court) to invest unnecessary time and resources in dealing with a subsequent motion to dismiss.

Therefore, the first issue is whether GMAC has standing to assert the proposed counts. For the reasons set forth below, this Court finds that GMAC does not have standing to assert the proposed causes of actions in the Amended Complaint.

GMAC asserts that, as the party holding the first and best security interest in the Proceeds, it has the right and ability to pursue the causes of action against Flynn arising from and/or relating to the Sale Agreement. However, not only has the extent and amount of GMAC's security interest in the Proceeds not yet been determined, Debtor's intervening bankruptcy has changed the rights of individual creditors to pursue actions for their own benefit. GMAC's position is that, as the party with an all-encompassing security interest, it steps into the shoes of Debtor. However, those shoes are already being occupied by Trustee.

Section 541 of the Bankruptcy Code defines property of the estate. Section 541(a)(1) specifically states that the estate is comprised of "all legal or equitable interests of the debtor as of the commencement of the case." The legislative history of this section offers a more detailed definition of 11 U.S.C. § 541(a), as follows:

The commencement of a bankruptcy case creates an estate. Under paragraph (1) of subsection (a), the estate is comprised of all legal or equitable interest of the debtor in property, wherever located, as of the commencement of the case. **The scope of this paragraph is broad. It includes all kinds of property, including tangible or intangible, causes of action . . .**

11 U.S.C. § 541 (legislative history)(emphasis added). Furthermore, it is the Trustee's duty to "collect and reduce to money the property of the estate" for the benefit of all creditors

of the estate. 11 U.S.C. § 704(1).

The new causes of action that GMAC proposes to include in an amended complaint all deal with Flynn's failure to pay the Proceeds and the Escrow Agents' failure to release the Escrowed Amount to the estate. These causes of action all relate to or arise out of the Sale Agreement. Debtor - not GMAC - is a party to the Sale Agreement. Pursuant to the Sale Agreement, Debtor - not GMAC -- has the right to receive the Proceeds from Flynn. Debtor's right to receive the Proceeds arose pre-petition. Since Flynn failed to pay Debtor the Proceeds, Debtor appears to have a breach of contract action against Flynn, which is property of the estate pursuant to 11 U.S.C. § 541. Because any action against Flynn to recover Proceeds belongs to the estate, such cause(s) of action can only be pursued by Trustee. Trustee - not GMAC - has standing to collect the Proceeds.

In the instant case, Trustee has initiated Trustee's Cross-Claim against Flynn to collect the Proceeds. GMAC acknowledges Trustee's cause(s) of action in the Reply Brief and even compares the proposed counts in the Amended Complaint to Trustee's Cross-Claims. (Reply Brief at 4-5.) As set forth above, the Court has not yet determined the validity, extent and amount of GMAC's interest in the Proceeds (which is the purpose of this adversary proceeding). Unless and until Trustee abandons any and all causes of action relating to the Sale Agreement, GMAC may not pursue these same causes of action, in any court, because Trustee - not GMAC - owns such causes of action. If Trustee is awarded judgment on Trustee's Cross-Claims, GMAC will receive a distribution from the amount recovered. As a consequence, the Court finds that GMAC does

not have standing to maintain the causes of action relating to the Proceeds that it asserts in the Amended Complaint.

B. FED. R. CIV. P. 15(d)

GMAC also argues that it should be able to supplement its Original Complaint pursuant to FED. R. CIV. P. 15(d). FED. R. CIV. P. 15(d) states:

Supplemental Pleadings. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit the party to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.

GMAC seeks to supplement the Original Complaint with facts that occurred after the filing of the Original Complaint; *i.e.*, Flynn failed to pay (i) the last \$125,000.00 installment of the Sale Agreement and (ii) at least \$60,000.00 for returnable parts inventory. The Court will permit GMAC to supplement the Original Complaint to include these facts, but not any other facts and/or allegations. The Court will grant GMAC two weeks from the date of this memorandum opinion to supplement its Original Complaint.

IV. CONCLUSION

GMAC's Motion for Leave is granted in part and denied in part. GMAC's request to amend the Original Complaint to assert new causes of actions to recover the Proceeds is denied because GMAC lacks standing to pursue such claims. To the extent GMAC's Motion for Leave seeks to supplement the Original Complaint to include additional facts regarding Flynn's failure to make the last

installment payment and/or to pay for the returnable parts
inventory, such request is granted.

An appropriate order will follow.

###

IT IS SO ORDERED.



Dated: December 01, 2006
11:28:04 AM

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.	*	
	*	

O R D E R

For the reasons in this Court's Memorandum Opinion entered on this date, the Court grants in part and denies in part Motion of Plaintiff GMAC LLC for Leave to File First Amended Supplemental Complaint, *Instantly* filed on November 13, 2006. The Court denies GMAC's request to amend the Original Complaint to assert new causes

of action. The Court grants GMAC's request to supplement the Original Complaint to include facts regarding Flynn's failure to pay the last \$125,000.00 installment under the Sale Agreement and at least \$60,000.00 for returnable parts inventory. GMAC's request to supplement the Original Complaint with any other facts and/or allegations is denied. The Court will grant GMAC two weeks from the date of this Order to supplement its Original Complaint.

###