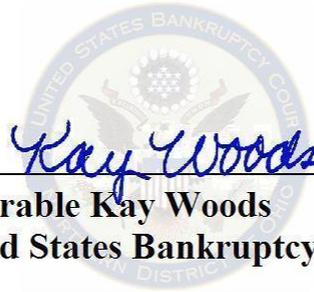


IT IS SO ORDERED.



Dated: February 07, 2007
09:07:43 AM

Honorable Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:	*	
	*	
MOUNTAIN CHEVROLET BUICK, INC.,	*	
	*	CASE NUMBER 06-40187
Debtor.	*	
	*	
*****	*	
	*	
MARK A. BEATRICE, Chapter 7,	*	
Trustee, et al.,	*	
	*	ADVERSARY NUMBER 06-4097
Plaintiffs,	*	
	*	
vs.	*	
	*	
GENERAL MOTORS ACCEPTANCE	*	
CORPORATION,	*	
	*	THE HONORABLE KAY WOODS
Defendant.	*	
	*	

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 on the First Cause of Action in the Complaint and the Counterclaim filed on behalf of Defendant/Counterclaim

Plaintiff General Motors Acceptance Corporation ("GMAC") on October 31, 2006, and the Motion for Summary Judgment¹ on the First and Second Causes of Action in the Complaint filed on behalf of Plaintiff/Counterclaim Defendant Home Savings and Loan Company of Youngstown ("Bank") on December 5, 2006.

The Bank filed its Response in Opposition to GMAC's Motion for Judgment on the Pleadings on December 5, 2006, and GMAC filed its Reply in support of its Motion for Judgment on the Pleadings on January 5, 2007. GMAC filed its Opposition Brief to the Bank's Motion for Summary Judgment on January 5, 2007, and the Bank filed its Reply Brief in support of its Motion for Summary Judgment on January 15, 2007.

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)(K). The following constitutes the Court's findings of fact and conclusions of law pursuant to FED. R. BANKR. P. 7052.

The Complaint sets forth four causes of action, however, only the first two causes of action, which are asserted by the Bank, are addressed in the parties' respective motions. The First Cause of Action seeks a determination of the priority of the Bank's lien versus the lien of GMAC on Debtor Mountain Chevrolet Buick, Inc.'s

¹Although the Bank captioned its Motion as a Motion for Summary Judgment, the attachments to the Motion do not include any documents that were not attached to the Complaint in this case. Because the Bank does not rely on any evidence outside of the pleadings in this matter, and the applicable legal standard is the same, the Court will treat the Bank's motion as a Motion for Judgment on the Pleadings.

("Mountain Chevrolet") general tangible and intangible personal property including Mountain Chevrolet's good will. The Second Cause of Action seeks a determination of the priority of the Bank's lien versus the lien of GMAC on specific tangible personal property of Mountain Chevrolet. The Counterclaim sets forth a single cause of action in which GMAC requests a determination of the priority of its lien versus the Bank's lien on Mountain Chevrolet's general personal tangible and intangible property.

I. Standard of Review

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). However, a court may consider exhibits to a motion for judgment on the pleadings where the exhibits are incorporated by reference in the plaintiff's complaint and are central to the plaintiff's claim. *Weiner v. Klais & Co.*, 18 F.3d 86, 89 (6th Cir. 1997). 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.

II. Facts

The following facts are undisputed and are taken from the Complaint, Answer, Counterclaim, and the Bank's Answer to Counterclaim. Mountain Chevrolet operated an automobile dealership at 415 E. Sixth Street, East Liverpool in Columbiana County, Ohio. (Compl. ¶ 6.) Mountain Chevrolet filed its Chapter 11 petition on February 27, 2006. (Compl. ¶ 1.)

The tangible personal property that is the subject of the

motions pending before the Court was placed in "Pods" storage units by GMAC. (Compl. ¶¶ 8, 21, GMAC Ans. ¶17.) The general intangible property that is the subject of the motions before the Court is represented by proceeds generated by the sale of Mountain Chevrolet's good will and business records to Power-Pontiac GMC Co. for \$200,000.00, with \$20,000.00 in sale proceeds earmarked for unsecured creditors. (Countercl. ¶ 19.)

The determination of whether GMAC or the Bank holds the first lien on the tangible personal property contained in the "Pods" and the proceeds from the sale of Mountain Chevrolet's good will and business records requires the analysis of three security agreements executed by Mountain Chevrolet, two in favor of GMAC and one in favor of the Bank, as well as several U.C.C. Financing Statements ("Financing Statements") filed on behalf of GMAC and the Bank.

On October 1, 2002, GMAC obtained Mountain Chevrolet's written authorization to file a Financing Statement naming GMAC as the secured party and Mountain Chevrolet as the debtor and describing the collateral as follows:

Motor vehicles, trailers, semi-trailers, and accessories, and the replacement parts for any of these; and general intangibles; contract rights, chattel paper, present and future accounts and assignments of accounts including, but not limited to, those arising out of the sale or lease thereof, including rents receivables under leases and rental agreements.

(Letter Authorizing GMAC to File Financing Statement (attached to Counterclaim at Exhibit B); see also Countercl. ¶ 4, Bank Answer ¶ 3).

As a result, on October 2, 2002, GMAC file Financing Statement

with the Ohio Secretary of State, which identifies Mountain Chevrolet as the debtor and describes the collateral subject to the Financing Statement as follows:

Motor vehicles, trailers, semi-trailers, and accessories, and the replacement parts for any of these; and general intangibles; contract rights, chattel paper, present and future accounts and assignments of accounts including, but not limited to, those arising out of the sale or lease thereof, including rents receivables under leases and rental agreements.

(Financing Statement dated October 2, 2002 (attached to Complaint as Exhibit C and Counterclaim at Exhibit A); see also Countercl. ¶ 3, Bank Answer ¶ 2).

Five days later, on October 7, 2002, Mountain Chevrolet executed and delivered to the Bank a Loan and Security Agreement in order to secure a \$195,000.00 loan. (Loan and Security Agreement dated October 7, 2002 (attached to Complaint at Exhibit D and Counterclaim at Exhibit D.)) In that document, Mountain Chevrolet provided the following collateral as security for the loan:

Collateral shall mean all [Mountain Chevrolet's] present and future right, title, and interest in and to any and all of the personal property of [Mountain Chevrolet], whether such property is now existing or hereafter created, acquired or arising and wherever located from time to time, including without limitation: (i) accounts; (ii) chattel paper; (iii) inventory, exclusive of all vehicle inventory; (iv) goods; (v) equipment; (vi) instruments; (vii) investment property; (viii) documents; (ix) commercial tort claims; (x) deposit accounts; (xi) letter-of-credit rights; (xii) investment property; (xiii) supporting obligations; and (xiv) proceeds and products.

(*Id.*; see also Countercl. ¶ 6, Bank Answer ¶ 5).

Five days after executing the Loan and Security Agreement, on October 10, 2002, the Bank filed a Financing Statement with the

Ohio Secretary of State, which identifies Mountain Chevrolet as the debtor and describes the collateral subject to the Financing Statement as follows:

All personal property of [Mountain Chevrolet] of every kind and nature, wherever located, whether now owned or hereafter acquired, including without limitation, the following categories of property defined in Revised Article 9 of the Uniform Commercial Code: goods (including inventory, exclusive of vehicle inventory, equipment and accessions thereto), instruments (including promissory notes), documents, accounts (including health-care insurance receivables), chattel paper (whether tangible or electronic), deposit accounts, letter-of-credit rights (whether or not the letter of credit is evidenced by a writing), commercial tort claims, securities and all other investment property, general intangibles (including payment intangibles and software), supporting obligations and any and all proceeds of the foregoing.

(Financing Statement dated October 10, 2002 (attached to Complaint at Exhibit E and Counterclaim at E); see also Countercl. ¶ 7, Bank Answer ¶ 5).

On that same day, Mountain Chevrolet and GMAC executed a Wholesale Security Agreement which provides that, in exchange for GMAC's financing of vehicle inventory, Mountain Chevrolet would provide GMAC with a security interest in the vehicle inventory:

The collateral subject to this Wholesale Security Agreement is new vehicles held for sale or lease and used vehicles acquired from manufacturers or distributors and held for sale or lease, and all vehicles of like kinds or types now owned or hereafter acquired from manufacturers, distributors or sellers by way of replacement, substitution, addition or otherwise, and all additions and accessions thereto and all proceeds of such vehicles, including insurance proceeds.

(Wholesale Security Agreement dated October 10, 2002 (attached to Complaint as Exhibit B and Counterclaim as Exhibit C); see also

Countercl. ¶ 5, Bank Answer ¶ 4).

Approximately two and a half years later, on March 3, 2005, Mountain Chevrolet executed a General Security Agreement in favor of GMAC pursuant to which Mountain Chevrolet granted a security interest to GMAC in the following property:

any and all of the following described property in which [Mountain Chevrolet] now or hereafter acquires an interest, wherever located, in whatever form, and in any and all proceeds thereof: inventory, equipment, fixtures, accounts receivable, contract rights, securities, cash, general intangibles, documents, instruments, chattel paper; investment property and commercial tort claims.

General Security Agreement dated March 3, 2005 (attached to Complaint at Exhibit F and Counterclaim as Exhibit F); *see also* Countercl. ¶ 9, Bank Answer ¶ 7).

Four days later, on March 7, 2005, GMAC filed two Financing Statements with the Ohio Secretary of State, which identify Mountain Chevrolet as the debtor and describe the collateral subject to the Financing Statements as follows:

Accounts, Contract Rights, Money, Receivables, Factory Open Accounts of [Mountain Chevrolet] now existing or hereafter arising from [GMAC] . . .

Inventory, equipment, fixtures, accounts receivable, contract rights, securities, cash, general intangibles, documents, instruments, chattel paper, investment property and commercial tort claims.

(Financing Statements dated March 7, 2005 (attached to Complaint at Exhibit G and Counterclaim as Exhibits G and H); *see also* Countercl. ¶¶ 10-11, Bank Answer ¶¶ 8-9).

III. Analysis

GMAC contends that R.C. § 1309.322, captioned "Priorities among conflicting security interests in and agricultural liens on same collateral," governs the issues before the Court. R.C. § 1309.322, which codifies the "first to file or perfect" rule, reads, in pertinent part:

(A) Except as otherwise provided in this section, priority between conflicting security interests . . . in the same collateral shall be determined according to the following rules:

(1) Conflicting perfected security interests . . . rank according to priority in time of filing or perfection . . .

(B) For the purpose of division (A)(1) of this section:

(1) The time of filing or perfection as to a security interest in collateral is also the time of filing or perfection as to a security interest in proceeds . . .

OHIO REV. CODE ANN. § 1309.322 (West 2006).

In further support of its argument, GMAC cites an example provided in the Official Comment section of the statute:

4. Competing Perfected Security Interests. When there is more than one perfected security interest, the security interests rank according to priority in time of filing or perfection. "Filing," of course, refers to the filing of an effective financing statement. "Perfection" refers to the acquisition of a perfected security interest, *i.e.*, one that has attached and as to which any required perfection step has been taken.

Example 1: On February 1, A files a financing statement covering a certain item of Debtor's equipment. On March 1, B files a financing statement covering the same equipment. On April 1, B makes a loan to Debtor and obtains a security interest in the equipment. On May 1, A makes a loan to Debtor and obtains a security interest in the same collateral. A has priority even though B's

loan was made earlier and was perfected when made. It makes no difference whether A knew of B's security interest when A made its advance.

Id.

The Bank, on the other hand, argues that GMAC's reliance on R.C. § 1309.322 is misplaced. The Bank asserts that the statute and the foregoing example govern priority between competing *perfected* security interests and GMAC did not have a perfected security interest on October 2, 2002.

According to the Bank:

It was not until March 3, 2005, upon execution of the General Security Agreement, which is almost three (3) years after [the Bank] had already properly perfected its security interest, that [Mountain Chevrolet] created a security interest in favor of GMAC with respect to its "general intangibles", "accounts" and "chattel paper". Consequently, Mountain Chevrolet's October 2, 2002, UCC Financing Statement could not perfect a security interest which did not exist.

(Bank's Response in Opposition at p. 14 (emphasis in original)).

Although the Bank concedes that "[t]here is no dispute as to when the security agreements were executed, the language set forth in each security agreement and when the miscellaneous U.C.C. Financing Statements were filed of record," (See Bank's Response in Opposition at p. 3), the Court finds that the pleadings do not establish whether GMAC gave value in exchange for the execution of the General Security Agreement, and, therefore, was perfected as a matter of law. Consequently, the cross motions for judgment on the pleadings must both fail as a matter of law.

In order for a security interest to "attach," or, in other words, be enforceable against the debtor, three requirements must

be met: (i) value must be given by the creditor; (ii) the debtor must have rights in the collateral; and, for the purposes of this case, (iii) the parties must enter into a security agreement. OHIO REV. CODE ANN. § 1309.203 (West 2006). Attachment is an essential element of perfection. OHIO REV. CODE ANN. § 1309.308 (West 2006).

Here, GMAC does not allege that it gave value for the General Security Agreement on March 3, 2005. In its Counterclaim, GMAC simply alleges that “[o]n March 3, 2005, Mountain entered into a valid General Security Agreement with GMAC that included the following property. . . .” (Countercl. ¶ 9.) Likewise, the General Security Agreement itself reads, in pertinent part, “For the purpose of securing the payment and performance of any and all obligations, loans, credit extensions, indebtedness, liabilities, and duties, whether contingent or matured, now or hereafter owing to General Motions Acceptance Corporation, and for other good and valuable consideration, the receipt and sufficiency of which are acknowledged. . . .” (General Security Agreement ¶ 1.)

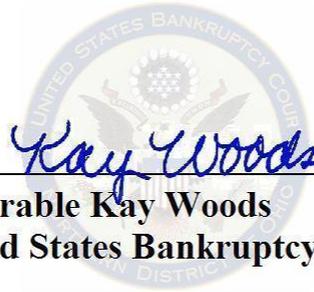
Unlike the Wholesale Security Agreement, which was executed in exchange for new vehicle financing, and the Loan and Security Agreement, which was executed in exchange for the \$195,000.00 loan, there is no representation that GMAC provided value in exchange for the execution of the General Security Agreement.

Essentially, GMAC contends that its security interest in Mountain Chevrolet’s general intangibles and certain tangible personal property was perfected upon attachment on March 3, 2005 since the applicable requirement for perfection (the filing of a

Financing Statement) occurred on October 2, 2002. See OHIO REV. CODE ANN. § 1309.308(A). However, because the pleadings do not contain an uncontested assertion that GMAC gave value for the General Security Agreement, the Court finds that a material issue of fact exists which prevents the Court from entering judgment on behalf of either party.

An appropriate Order will follow.

IT IS SO ORDERED.



Dated: February 07, 2007
09:07:44 AM

Honorable Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:	*	
	*	
MOUNTAIN CHEVROLET BUICK, INC.,	*	
	*	CASE NUMBER 06-40187
Debtor.	*	
	*	
*****	*	
	*	
MARK A. BEATRICE, Chapter 7,	*	
Trustee, et al.,	*	
	*	ADVERSARY NUMBER 06-4097
Plaintiffs,	*	
	*	
vs.	*	
	*	
GENERAL MOTORS ACCEPTANCE	*	
CORPORATION,	*	
	*	THE HONORABLE KAY WOODS
Defendant.	*	
	*	

O R D E R

For the reasons set forth in the Court's Memorandum Opinion, this Court denies the Motion for Judgment on the Pleadings on the First Cause of Action in the Complaint and the Counterclaim filed

on behalf of Defendant/Counterclaim Plaintiff General Motors Acceptance Corporation, and denies the Motion for Summary Judgment on the First and Second Causes of Action in the Complaint filed on behalf of Plaintiff/Counterclaim Defendant Home Savings and Loan Company of Youngstown. A telephonic status conference is scheduled for March 12, 2007 at 10:30 a.m.