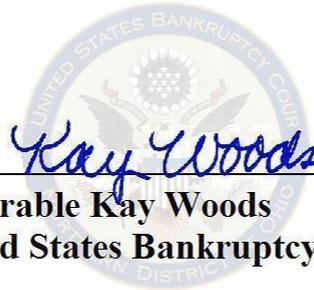


IT IS SO ORDERED.



Dated: April 06, 2007  
09:16:55 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

NOT INTENDED FOR NATIONAL PUBLICATION

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The following opinion is not intended for national publication and carries limited precedential value. The availability of this opinion by any source other than [www.ohnbuscourts.gov](http://www.ohnbuscourts.gov) is not the result of direct submission by this Court. The opinion

is available through electronic citation at [www.ohnb.uscourts.gov](http://www.ohnb.uscourts.gov) pursuant to the E-Government Act of 2002 (Pub. L. No. 107-347).

This cause is before the Court on David A. Flynn and David A. Flynn, Inc.'s Consolidated Motion for Judgment on the Pleadings ("Motion for Judgment") filed by David A. Flynn and David A. Flynn, Inc. (collectively "Flynn") on February 21, 2007. On March 5, 2007, General Motors Acceptance Corporation ("GMAC") filed Memorandum of Plaintiff GMAC LLC in Opposition to David A. Flynn and David A. Flynn, Inc.'s Consolidated Motion for Judgment on the Pleadings ("Response").

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. STANDARD OF REVIEW**

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

After the pleadings are closed but within such a 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)). However, 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)). 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. 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 (collectively "Mercures") 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, 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 each and (iii) an amount for the returnable parts inventory.

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 ("Original Complaint"). On November 1, 2006, GMAC filed Motion of Plaintiff GMAC LLC for Leave to File First Amended Supplemental Complaint, *Instanter* ("Motion to Amend"), which sought to amend and supplement the Original Complaint pursuant to FED. R. CIV. P. 15(a) and (d). On December 1, 2006, the Court issued a Memorandum Opinion and Order ("Dec. 1 Opinion and Order") denying in part and granting in part the Motion to Amend. The Dec. 1 Opinion and Order (i) denied GMAC the right to assert the proposed causes of actions because GMAC lacked standing, and (ii) granted GMAC two weeks to supplement the

Original Complaint to allege certain factual events that occurred subsequent to the Original Complaint. These facts included Flynn's failure to pay (i) the last \$125,000.00 installment under the Sale Agreement, and (ii) at least \$60,000.00 in returnable parts inventory.<sup>1</sup> The Court ruled that GMAC was not permitted to supplement the complaint with any other facts and/or allegations. (Dec. 1 Opinion at 10; Order at 1-2.) On December 15, 2006, GMAC filed First Supplemental Complaint to Determine Validity, Extent and Priority of Liens ("Supplemental Complaint"). Flynn filed Consolidated Answer of Defendants David A. Flynn and David A. Flynn, Inc. on January 15, 2007.

Flynn also responded to the Supplemental Complaint by filing the Motion for Judgment.

In the Motion for Judgment, Flynn alleges that:

- ▶ Paragraphs 1, 2, 3, 4 and 5 of the Supplemental Complaint allege entirely new facts with respect to the parties and the action, which allegations are not found in the [O]riginal Complaint.
- ▶ Paragraph 7 of the Supplemental Complaint contains an allegation attempting to confer jurisdiction, which allegation is not found in the [O]riginal Complaint.
- ▶ Paragraph 11 of the Supplemental Complaint alleges new fact (sic) with respect to an alleged breach of a specific purported agreement, which purported agreement is not identified in the [O]riginal Complaint.
- ▶ Paragraph 24 of the Supplemental Complaint alleges new facts with respect to the alleged failure to make a second installment payment.

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<sup>1</sup> The Dec. 1 Opinion and Order also encompassed GMAC's right to supplement the Original Complaint with the second \$125,000.00 installment payment, which Flynn has failed to pay. *Infra* p. 9.

- ▶ Paragraph 26 of the Supplemental Complaint adds new facts with respect to the alleged total indebtedness.
- ▶ Paragraph 27 of the Supplemental Complaint adds new allegations with respect to the nature and extent of GMAC's alleged interest.
- ▶ Paragraphs 11 and 18 of the Supplemental Complaint allege new facts with respect to proceedings in the Cuyahoga County Common pleas (sic) action with respect to the Mercures.

(Motion for Judgment at 2.) Flynn also alleges that, pursuant to the Dec. 1 Opinion and Order, GMAC does not have standing to seek certain relief requested in the Supplemental Complaint. (Motion for Judgment at 2-3.) GMAC responded to the Motion for Judgment by stating the Motion for Judgment "lacks any factual or legal support" and Flynn "made no showing whatsoever that [Flynn is] entitled to judgment as a matter of law." (Response at 9.) The Court agrees with GMAC's statements.

### **III. ANALYSIS OF ARGUMENTS**

Flynn's argument has (at least) two glaring flaws. First, despite the name in the caption, Flynn has not moved for judgment on the pleadings. Judgment on the pleadings may be granted when the facts - as set forth in the pleadings alone - viewed in a light favorable to the non-moving party, establish that (i) plaintiff has met or failed to meet its burden or (ii) defendant has established a complete defense. The Court cannot look to any facts outside the pleadings when ruling on a motion for judgment on the pleadings.

Despite captioning the pleading as a motion for judgment on the pleadings, Flynn makes no effort whatsoever to demonstrate that the facts alleged in the Supplemental Complaint and Flynn's Answer entitle Flynn to judgment. Instead, Flynn seeks to have this Court

determine (i) the adequacy of the Supplemental Complaint, and (ii) the standing of GMAC, which are not proper purposes of a motion for judgment on the pleadings. If Flynn took issue with any of the averments in the Supplemental Complaint, the appropriate pleading would have been a motion to strike the offensive allegations pursuant to Fed. R. Civ. P. 12(f). Alternatively, if Flynn questioned GMAC's standing to bring a cause of action, the appropriate pleading would have been a motion to dismiss pursuant to Fed. R. Civ. P. 12(b).

Second, it appears that Flynn failed to make even a cursory comparison of the Supplemental Complaint with the Original Complaint and/or the Dec. 1 Opinion and Order. As a consequence, the Motion for Judgment fails to raise any meaningful or thoughtful arguments. Flynn's purpose in filing the Motion for Judgment is unfathomable because the allegations in the Supplemental Complaint either (i) are not new or are authorized because of change of circumstances,<sup>2</sup> or (ii) are indubitably within the four corners of the Dec. 1 Opinion and Order. As a result, the Court denies the Motion for Judgment.

As set forth below, Flynn's Motion for Judgment lacks merit.

**A. Flynn's Argument that Averments in the Supplemental Complaint Extend "Well Beyond" the Dec. 1 Opinion and Order**

Flynn alleges that it is entitled to judgment on the pleadings because Paragraphs 1 through 5 "allege entirely new facts with respect to the parties and the action, which allegations are not found in the [O]riginal Complaint." (Motion for Judgment at 2.)

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<sup>2</sup> GMAC points out that the Supplemental Complaint eliminated the reference to the Debtor's chapter 11 case since it had been converted and added identifying information about new parties.

Paragraph 1 of the Supplemental Complaint alleges that GMAC is a limited liability company organized under Delaware law with a principal place of business in Michigan and that GMAC conducts business in Ohio. Paragraph 2 alleges that David A. Flynn is a citizen of Ohio and the owner of David A. Flynn, Inc. Paragraph 3 states that David A. Flynn, Inc. is an Ohio corporation with a principal place of business in Ohio, which regularly conducts business in Ohio.<sup>3</sup> Paragraph 4 alleges that Debtor is organized under Ohio law and that Debtor filed a bankruptcy petition with this Court; this paragraph is almost identical to Paragraph 1 in the Original Complaint. Paragraph 5 sets forth facts about the Escrow Agents and that GMAC has the "first priority perfected security interest" in the Escrowed Amount.

Paragraphs 1 through 5 of the Supplemental Complaint merely identify parties. Furthermore, these paragraphs are procedural and are in no way outcome determinative. Even if, *arguendo*, there was a basis for the Court to strike these paragraphs, such action would have no bearing on whether Flynn is entitled to judgment on the pleadings. The Court finds Flynn's protestations about paragraphs 1 through 5 to be unwarranted.

Flynn complains that "Paragraph 7 of the Supplemental Complaint contains an allegation attempting to confer jurisdiction, which allegation is not found in the [O]riginal Complaint." (*Id.*) Apparently Flynn failed to read Paragraph 1 of the Original Complaint, which is almost identical to Paragraph 7 of the Supplemental Complaint. Not only is Flynn factually wrong, a

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<sup>3</sup> Paragraphs 2 and 3 are the only procedural paragraphs that directly refer to Flynn.

jurisdictional averment such as Paragraph 7 is necessary in an adversary proceeding. See FED. R. BANKR. P. 7008.

Flynn objects to the first sentence in Paragraph 11 of the Supplemental Complaint because it "alleges new facts with respect to an alleged breach of a specific purported agreement, which purported agreement is not identified in the [O]riginal Complaint."

(*Id.*) This objection rings hollow, however, because the first sentence in Paragraph 11 is nearly identical to Paragraph 6 of the Original Complaint.

Flynn alleges that Paragraphs 24 - 27 contain new facts with respect to (i) Flynn's failure to make the second and third installment payments of \$125,000.00 each, (ii) Flynn's total indebtedness, and (iii) the amount Flynn owes for the returnable parts inventory. All of these new allegations, however, are squarely within the four corners of the Dec. 1 Opinion and Order. The Dec. 1 Opinion and Order authorized GMAC to amend its Original Complaint to include amounts that became due after the filing of the Original Complaint and that are currently due and owing by Flynn under the Sale Agreement. Paragraphs 24 - 27 set forth such allegations and are, therefore, permitted by the Dec. 1 Opinion and Order.<sup>4</sup> As a result, these averments were properly included in the Supplemental Complaint.

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<sup>4</sup> The Dec. 1 Opinion and Order only referenced supplementation regarding the last installment payment and returnable parts inventory due and owing under the Sale Agreement; however, the Court's intent was to permit GMAC to include all facts relating to amounts owed that occurred subsequent to filing the Original Complaint. The second installment payment was not mentioned in the Dec. 1 Opinion and Order because GMAC failed to mention it in the Motion to Amend. No party is prejudiced by permitting GMAC to include allegations regarding the second installment.

Flynn complains that the second sentence of Paragraph 11 and Paragraph 18 of the Supplemental Complaint "allege new facts with respect to the proceedings in the Cuyahoga County Common pleas (sic) action with respect to the Mercures." (*Id.*) Paragraph 11 of the Supplemental Complaint merely updates Paragraph 6 of the Original Complaint.<sup>5</sup> The ruling in the state court action is a supplemental fact and is for background purposes only. Paragraph 18 of the Supplemental Complaint is identical to Paragraph 13 of the Original Complaint. Additionally, Paragraph 18 has nothing to do with the Cuyahoga Court of Common Pleas proceeding against the Mercures, but instead sets forth the security agreement between Midway and GMAC. Hence, Flynn's umbrage about this paragraph is entirely misplaced.

As expressly shown above, Flynn's allegations that the referenced paragraphs were "well beyond" the supplemental facts authorized by the Dec. 1 Opinion and Order are completely erroneous. All of the complained-of averments were either made in the Original Complaint or were authorized by the Dec. 1 Opinion and Order. Moreover, even if these paragraphs were stricken,<sup>6</sup> Flynn would not be entitled to judgment on the pleadings.

#### **B. Flynn's Argument that GMAC Lacks Standing**

Flynn alleges that GMAC seeks relief beyond the validity, extent and priority of its alleged lien. Specifically, Flynn complains that Paragraph 3 of the Supplemental Complaint's Prayer

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<sup>5</sup> GMAC disingenuously labeled the ruling by the Cuyahoga County Court of Common Pleas against the Mercures as the "Midway Obligation." Since Debtor was not a party to that action, the ruling is not the amount Midway owes GMAC, but is, instead, the amount to which the Mercures' guarantee extends.

<sup>6</sup> There appears to be no legal basis to strike any of the referenced paragraphs.

for Relief seeks to have Flynn and the Escrow Agents directly pay GMAC the amount due and owing under the Sale Agreement. Flynn argues that the Dec. 1 Opinion and Order determined that GMAC lacked standing to pursue additional relief beyond the determination of the validity, extent and priority of GMAC's alleged lien. (Motion for Judgment at 2-3.) First, as previously stated, a motion for judgment on the pleadings is not the correct procedural vehicle to determine standing. Second, the Dec. 1 Opinion and Order did not require GMAC to change its Prayer for Relief, but only prohibited GMAC from adding new causes of action because the causes of action proposed by GMAC belong to Trustee. The Dec. 1 Opinion and Order did not address the causes of action asserted by GMAC in the Original Complaint. Since the Prayer for Relief in the Supplemental Complaint is identical to Paragraph 3 of the Original Complaint's Prayer for Relief, GMAC has not exceeded the authorization in the Dec. 1 Opinion and Order.

As GMAC so succinctly stated: "Flynn . . . fail[s] to make any legal argument whatsoever in support of [the] contention" that Flynn is entitled to judgment on the pleadings. (Response at 2.) In denying the Motion for Judgment, this Court whole-heartedly concurs.

#### **IV. CONCLUSION**

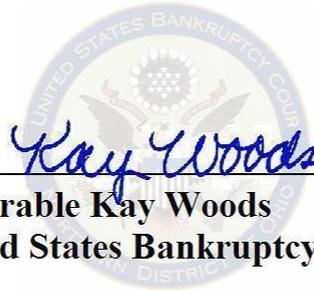
After reviewing the Motion, Response, the Dec. 1 Opinion and Order, the Original Complaint, and the Supplemental Complaint, this Court determines that (i) the Motion for Judgment is procedurally fatally defective, and (ii) Flynn's alleged problems with the Supplemental Complaint are legally insufficient to grant it any type of relief. For the reasons set forth above, the Motion for

Judgment is denied in its entirety. Additionally, no party is permitted to file any dispositive motion without prior leave of Court.

An appropriate order will follow.

# # #

IT IS SO ORDERED.



Dated: April 06, 2007  
09:16:55 AM

Honorable Kay Woods  
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO

IN RE:	*	
	*	
MIDWAY MOTOR SALES, INC.,	*	
	*	CASE NUMBER 04-4272
Debtor.	*	
	*	
*****	*	
	*	
GENERAL MOTORS ACCEPTANCE CORP.,	*	
	*	ADVERSARY NUMBER 04-4147
Plaintiff,	*	
	*	
vs.	*	
	*	
MIDWAY MOTOR SALES, INC.,	*	
et al.,	*	HONORABLE KAY WOODS
	*	
Defendants.	*	
	*	

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O R D E R  
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For the reasons set forth in this Court's Memorandum Opinion entered on this date, David A. Flynn and David A. Flynn, Inc.'s Consolidated Motion for Judgment on the Pleadings (Doc. # 92) filed by David A. Flynn and David A. Flynn, Inc. on February 21, 2007 is denied in its entirety. Furthermore, the parties are

prohibited from filing any new dispositive motions without leave of Court.

**IT IS SO ORDERED.**

# # #