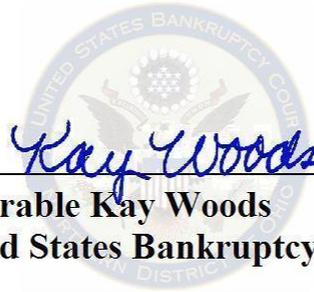


IT IS SO ORDERED.



Dated: June 27, 2007
04:45:31 PM

Honorable Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:

MOUNTAIN CHEVROLET BUICK, INC.,

Debtor.

CASE NUMBER 06-40187

HONORABLE KAY WOODS

M E M O R A N D U M O P I N I O N
(NOT INTENDED FOR NATIONAL PUBLICATION)

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.ohnb.uscourts.gov is not the result of direct submission by this Court. The opinion is available for electronic citation at www.ohnb.uscourts.gov pursuant to the E-Government Act of 2002 (Pub. L. No. 107-347).

Before the Court is Trustee's Motion to Enforce Automatic Stay Regarding State Court Actions by GMAC to Pursue Claims Arising Out of Transfers Giving Rise to Claims for Preferential Transfer and

Fraudulent Conveyances ("Motion to Enforce Stay") filed by Mark A. Beatrice, Chapter 7 Trustee ("Trustee") on January 26, 2007. General Motors Acceptance Corporation ("GMAC") filed Creditor GMAC's Memorandum in Opposition to Mark A. Beatrice, Chapter 7 Trustee's Motion to Enforce Automatic Stay ("Opposition") on February 15, 2007. The Court held a hearing on March 8, 2007 at which Trustee and GMAC appeared through counsel.

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

I. PROCEDURAL BACKGROUND

Debtor Mountain Chevrolet Buick, Inc. ("Debtor") filed a voluntary petition pursuant to chapter 11 of the Bankruptcy Code on February 27, 2006. In response to a motion filed by Debtor to appoint a chapter 11 trustee, Trustee was selected as the chapter 11 trustee on March 8, 2006 (Doc. # 11) and approved by this Court on March 9, 2006 (Doc. # 15). By Order dated July 6, 2006, this case was converted to case under chapter 7 (Doc. # 63). After conversion, Trustee continued as the chapter 7 trustee.

GMAC sought and obtained relief from stay with respect to certain real and personal property of Debtor, as follows: certain vehicles that previously constituted Debtor's inventory (Doc. #31, Order dated March 8, 2006); real property utilized by Debtor for its business operations (Doc. # 52, Order dated May 31, 2006); and certain equipment, fixtures and inventory (Doc. # 78, Order dated October 4, 2006). Despite GMAC's understanding of application of the automatic stay in 11 U.S.C. § 362, GMAC never sought or

obtained relief from stay to pursue any lawsuit, cause of action or collection efforts against property of the bankruptcy estate.

II. POSITIONS OF THE PARTIES

Trustee argues in its Motion to Enforce Stay that the automatic stay applies to two lawsuits that GMAC is pursuing and for which GMAC has not obtained relief from the stay. These two lawsuits are: (i) Case No. 2006-CV-0050 in Columbiana County Court of Common Pleas ("Columbiana Court") in which GMAC has filed a complaint against Debtor; two of Debtor's owner/officers, Clayton Cline and Floyd Cline; twenty other named defendants; and numerous John Doe defendants ("Lawsuit 1"); and (ii) GMAC v. Packer Thomas & Co. and Charles George, Case No. 2007-CV-015 in the Columbiana Court ("Lawsuit 2")(collectively "state court actions").

After Debtor filed its petition, several non-debtor defendants in Lawsuit 1 moved the Columbiana Court to stay the case based upon the application of the automatic stay. On March 1, 2006, the Columbiana Court ruled that GMAC could proceed on its claims against the non-bankrupt defendants without violating the automatic stay.

Trustee contends that GMAC's pursuit of these two lawsuits violates the automatic stay because GMAC is, in essence, seeking to collect from third parties on causes of action that belong to the bankruptcy estate and can only be pursued by Trustee.

GMAC counters that the GMAC could proceed on its claims for monetary damages against the non-debtor defendants without violating the automatic stay. GMAC also points out that Lawsuit 1 has been pending for approximately one year with Trustee's knowledge and without Trustee's objection thereto. GMAC further states that Trustee has actually been cooperating with GMAC in conducting discovery in Lawsuit 1.

III. ANALYSIS

Despite certain changes to § 362 of the Bankruptcy Code in the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA") in October 2005, which is applicable to this case, those changes do not affect the extent of the stay applicable to Lawsuits 1 and 2. Section 362 provides, in relevant part:

(a) Except as provided in subsection (b) of this section, a petition filed under section 301 . . . of this title . . . operates as a stay, applicable to all entities, of --

(1) the commencement or continuation, including the issuance or employment of process, or a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title; . . .

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

11 U.S.C. § 362(a)(West 2006).

The automatic stay remains in place until either (i) the conclusion of the case or (ii) a party obtains an order from the bankruptcy court modifying or lifting the stay. See 11 U.S.C. § 362(c); *In re Parker*, 154 B.R. 240, 241-42 (Bankr. S.D. Ohio 1993)

Pursuant to § 362(c), only the Bankruptcy Court can provide parties relief from stay. "On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying or conditioning such stay - [.]" 11 U.S.C. § 362(d) (West 2006).

As a consequence, the order of the Columbiana Court, to the extent that it permits GMAC to proceed with certain claims in

Lawsuit 1 in contravention of the automatic stay, is without force or effect. If the automatic stay in § 362 is applicable to those claims, the Columbiana Court has no authority to terminate or modify the stay. Thus, the fact that the Columbiana Court denied the request of non-debtor parties to stay Lawsuit 1 on the basis of Debtor's bankruptcy is of no relevance in the Court's consideration of the instant Motion to Enforce Stay.

Furthermore, because the automatic stay arises by operation of law, Trustee's knowledge and/or participation in the state court actions has no effect on the automatic stay. At most, evidence of Trustee's acquiescence in the state court actions would go to the willfulness of GMAC's violation of the automatic stay, rather than the existence of the violation.

Although the parties have focused on § 362 of the Bankruptcy Code, § 541 of the Bankruptcy Code, which defines property of the bankruptcy estate as "all legal or equitable interests of the debtor in property as of the commencement of the case" wherever located and by whomever held, is equally applicable. 11 U.S.C. § 541(a)(1) (West 2006). GMAC should be enjoined from pursuing Lawsuits 1 and 2 because GMAC does not have standing to seek recovery of property of the bankruptcy estate. Only Trustee can recover, on behalf of the estate, any (i) preferential payments pursuant to § 547 of the Bankruptcy Code, and (ii) fraudulent conveyances pursuant to § 548 of the Bankruptcy Code. See *In re Gibson Group, Inc.*, 66 F.3d 1436 (6th Cir. 1995); see also *Jefferson County Bd. of County Commissioners v. Voinovich (In re V Companies)*, 292 B.R. 290 (6th Cir. 2003)(recognizing the continuing viability of the rule announced in *Gibson Group*).

GMAC has filed a proof of claim (secured)(Claim No. 50) against Debtor's estate in the amount of \$2,486,996.77 based on its

alleged first priority security interest in all of Debtor's property. Although GMAC purports to only be pursuing its "own" causes of action in Lawsuits 1 and 2, these causes of action, however styled, are all attempts to collect on the debt that Debtor owes to GMAC.

For example, in Lawsuit 2, GMAC alleges that it seeks only to recover its own damages as a result of the alleged conversion of its property by Packer Thomas and Charles George. This "conversion" claim, however, is an attempt to obtain from those defendants money or property that Debtor transferred to them prior to the Petition Date. This Court does not have all of the material facts before it, but because GMAC asserts that Debtor transferred two vehicles to these defendants in whole or partial payment of a pre-petition debt Debtor owed for accounting services, this transfer may constitute a preferential payment. If the transfer of these vehicle does constitute a preferential payment, only Trustee can pursue this cause of action on behalf of the estate. To the extent such transfer may constitute a fraudulent transfer, this cause of action also may only be pursued by the Trustee. GMAC has no independent cause of action against Packer Thomas or Charles George for conversion that is not based on the alleged contractual liability of Debtor to GMAC.

The same is true with respect to the causes of action asserted by GMAC against the non-debtor defendants in Lawsuit 1 wherein GMAC is attempting to assert causes of action that belong solely to Trustee.

This issue comes sharply into focus when one considers the nature of the "damages" that GMAC seeks in Lawsuits 1 and 2. These "damages" directly relate to GMAC's alleged security interest in Debtor's inventory. In other words, these "damages" are not

independent of the debt that Debtor owes to GMAC. In the unlikely event that Trustee collects sufficient assets to pay GMAC's secured claim in full, what becomes of the amounts GMAC recovers from the non-debtor defendants? There would be no justification for GMAC to receive more than the amount of its secured claim because the alleged fraudulent transfers and conversion claims are, in reality, collection efforts by GMAC with respect to the debt that Debtor owes to it.

GMAC cites to cases which it contends support its position that a transferee may be subject to pay more than one recovery. Each of the cases in GMAC's Opposition is factually distinguishable from the instant facts. First, each of the cases cited deal with purchasers of goods subject to properly filed UCC statements in which the purchaser did not determine whether the lien had been released prior to taking possession of the collateral. In the instant case, many - if not all - of the transfers in question were made by Debtor to satisfy antecedent debts. The recipient of a payment in goods rather than in cash is not in the same position as a purchaser who voluntarily and freely seeks to acquire certain goods. Additionally, if there was an antecedent debt that Debtor attempted to satisfy, GMAC has not been damaged. If Debtor had paid cash to these non-debtor defendants to satisfy the antecedent debts, GMAC would have to recognize that, to the extent such cash payments were preferences (providing they fell within the requisite time periods), these payments could only be pursued by Trustee. If Debtor had paid cash, the cash on hand to which GMAC asserts a security interest would have been depleted by the amount of such payments. Either the cars would have remained in Debtor's inventory or the cash would have remained in Debtor's accounts. The transfer by Debtor of vehicles from its inventory to satisfy

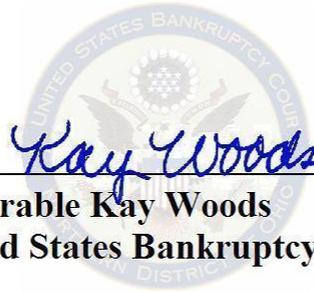
antecedent debts puts GMAC in the same position it would have been in if Debtor had satisfied such debts with cash.

In summary, § 362 is applicable because GMAC is attempting, through Lawsuits 1 and 2, to collect from third parties the debt Debtor owes to GMAC. Thus, the automatic stay is still in full force and effect because GMAC has not sought modification of the stay from this Court. Moreover, GMAC does not have standing to pursue the causes of action in Lawsuits 1 and 2 because they belong to the bankruptcy estate, and GMAC has not followed the *Gibson Group* test to obtain derivative standing. Accordingly, Trustee's Motion is granted and GMAC is enjoined from pursuing Lawsuits 1 and 2.

An appropriate Order will follow.

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IT IS SO ORDERED.



Dated: June 27, 2007
04:45:31 PM

Honorable Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:

MOUNTAIN CHEVROLET BUICK, INC.,

Debtor.

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CASE NUMBER 06-40187

HONORABLE KAY WOODS

O R D E R

For the reasons set forth in the Court's Memorandum Opinion, this Court grants Trustee's Motion to Enforce Automatic Stay Regarding State Court Actions by GMAC to Pursue Claims Arising Out of Transfers Giving Rise to Claims for Preferential Transfer and Fraudulent Conveyances.

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