

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF

ANDERSON AUTO CO., INC.,

DEBTOR

FRANK LEAHY CHEVROLET, INC.,
a Corporation,

Plaintiff

vs.

ANDERSON AUTO CO., INC.,
a Corporation
GENERAL MOTORS ACCEPTANCE
CORPORATION, a Corporation,

Defendants

CASE NO. BK81-430

A81-478

MEMORANDUM

In this adversary proceeding, plaintiff has proceeded against General Motors Acceptance Corporation for a determination that plaintiff's rights are superior to certain cash proceeds now held in escrow pending resolution of the dispute between the parties.

The facts are not substantially in dispute. Prior to Anderson Auto's filing bankruptcy, it purchased from Frank Leahy Chevrolet an automobile, giving in payment a check for the purchase price. Prior to the sale, GMAC had financed the automobile's acquisition cost in the hands of Frank Leahy Chevrolet. Upon the occurrence of the transaction and delivery of the check by Anderson Auto to Frank Leahy Chevrolet, Frank Leahy Chevrolet paid the floor plan price to GMAC to release the security interest held by GMAC on the automobile. Possession of the automobile was delivered to Anderson Auto who, in turn, approached GMAC, its regular floor-plan financier, for financing of the purchase price. GMAC agreed to provide financing and issued a check for the purchase price (and other proceeds) to Anderson Auto.

In fact, the check delivered by Anderson Auto to Frank Leahy Chevrolet was never honored.

Frank Leahy Chevrolet now claims entitlement to the proceeds of the sale of the automobile in question, the automobile itself having previously been sold and the proceeds escrowed. Defendant GMAC claims the proceeds as a secured lender.

Plaintiff's theory is that Anderson Auto never received good title to the automobile because the sale was conditioned upon

payment of the check and that condition was never fulfilled. This theory is premised on U.C.C. §2-511. Thus, the argument is that GMAC could acquire no security interest in the automobile since Anderson Auto had a voidable title only. Plaintiff goes on to argue that since Anderson Auto had a voidable title only, Anderson Auto could transfer no good title to GMAC unless GMAC qualified as a good-faith purchaser for the value under Uniform Commercial Code §2-403(1)(b).

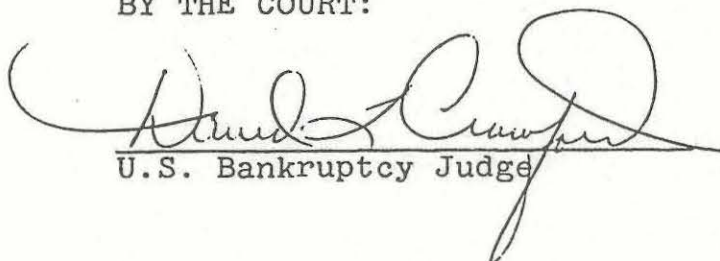
Plaintiff argues that GMAC is a merchant with regard to the goods and that under the Uniform Commercial Code definitions of a merchant, 2-104 and 2-103, a merchant is required to act with "honesty in fact" and in a commercially reasonable manner. However, I am unable to conclude that GMAC is, in fact, a merchant. GMAC cannot be said, under the facts presented, to be "a person who deals in goods of the kind" here involved. The evidence before me discloses that GMAC is a financing agency only and is not a dealer in automobiles. The fact that its business is focused on financing the purchase of automobiles does not make it, in my view, a "merchant" as that word is used in the Uniform Commercial Code. Accordingly, plaintiff's argument that GMAC did not act in a commercially reasonable manner is unavailable to it.

In accordance with the foregoing, my finding is in favor of GMAC and against Frank Leahy Chevrolet. I should add that the result is consistent with my observation that Frank Leahy Chevrolet sold an automobile to Anderson Auto and delivered the automobile and the MSO to the debtor on the faith of a check presented to it. To do so is to invite danger and, the loss has fallen to the plaintiff.

A separate order is entered in accordance with the foregoing.

DATED: March 24, 1982.

BY THE COURT:


U.S. Bankruptcy Judge

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