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JUDGE: M. A. Mahoney

PARTIES: Genesis Automotive, Inc., Mercury Finance Corporation of Alabama, Michael Dunn, Andrew's Imports, Inc., Dunn Motors, Wayne Roscoe, Kushlal Auto Sales, Doug Spicer, Spkcer's Auto Sales, Import Auto Salvage, Inc., Theodore L. Hall as Trustee

CHAPTER: 7

ATTORNEYS:

DATE: 7/3/96

KEY WORDS:

PUBLISHED:

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF ALABAMA

In Re

GENESIS AUTOMOTIVE, INC.,

Case No. 95-12872

Debtor.

MERCURY FINANCE CORPORATION OF ALABAMA

Plaintiff,

vs.

Adv. No. 96-1013

GENESIS AUTOMOTIVE, INC.,  
MICHAEL DUNN d/b/a DUNN MOTORS,  
ANDREW'S IMPORTS, INC.,  
WAYNE ROSCOE d/b/a KUSHLA AUTO SALES,  
DOUG SPICER d/b/a SPICER'S AUTO SALES,  
IMPORT AUTO SALVAGE, INC., and  
THEODORE L. HALL, Trustee.

Defendants.

**ORDER**

This matter is before the Court on the complaint of Mercury Finance Corporation of Alabama (Mercury) to determine the priority of conflicting claims involving two used automobiles. The Court has jurisdiction to hear this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the Order of Reference of the District Court. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). For the reasons indicated below, Mercury has security interests in both vehicles at issue; Messrs. Fuscitti and Dunn must turn over title to the vehicles to Mercury Finance so that it can be listed as first lienholder on the automobiles; and the purchasers, Ella Mae Gamble and Pinkie Marks, may have the vehicles titled in their names.

## FACTS

Genesis Automotive, Inc. (Genesis), a merchant selling used automobiles, operated a lot in Mobile, Alabama. Andrew's Imports, Inc. and Michael Dunn d/b/a Dunn Motors are merchants engaged in the business of buying and selling used automobiles. Andrew Fusciotti, a representative of Andrew's Imports, and Michael Dunn delivered used automobiles to Genesis with the expectation that the automobiles would be placed on the lot and sold by Genesis to individual consumers.

Fusciotti delivered a 1988 Cadillac Eldorado to Genesis on September 29, 1995. At that time, Fusciotti and a Genesis representative signed a consignment agreement. (Plaintiff's Exhibit 21) In an attempt to retain title, Fusciotti kept the certificate of title on the automobile. On October 6, 1995, Genesis sold the 1988 Cadillac Eldorado to Pinkie Marks. Marks made a down payment of \$1,000 cash and financed the unpaid balance of \$6,100. Marks entered into an installment sales contract-security agreement which gave Genesis a security interest in the automobile. (Plaintiff's Exhibit 23)

Dunn delivered a 1992 Mitsubishi Mirage to Genesis on October 11. In an attempt to retain title, Dunn kept the certificate of title on the automobile. On October 16, 1995, Genesis sold the 1992 Mitsubishi Mirage to Ella Mae Gamble. Gamble made a down payment of \$1,300 cash on the automobile and financed the unpaid balance of \$6,600. Gamble entered into an installment sales contract-security agreement which gave Genesis a security interest in the automobile. (Plaintiff's Exhibit 27)

Genesis assigned its security interests in the installment sales contracts- security agreements to Mercury. Genesis, a title agent for the Alabama Department of Revenue, prepared title applications on the automobiles and named Mercury as the first lienholder. (Plaintiff's

Exhibits 24 and 28) Genesis delivered to Mercury copies of the installment sales contracts and the title applications. Checks were issued to Genesis for the automobiles. (Plaintiff's Exhibits 25 and 29) Genesis did not pay either Fuscioni or Dunn out of the proceeds it received from Mercury. Consequently, Fuscioni and Dunn retained the certificates of title.

Marks and Gamble are currently making payments to Mercury on the automobiles they purchased from Genesis. The Alabama Department of Revenue will not issue certificates naming Mercury as first lienholder without the automobiles' current certificates of title. Genesis filed a Chapter 7 bankruptcy case on October 23, 1995. Mercury filed this adversary proceeding in order to secure the current certificates of title to allow the State of Alabama to reissue them with the indication of Mercury's lien claim. Mercury's suit originally involved additional merchants and ten certificates of title. Settlement was reached prior to trial on all but the two automobiles in question.

Mercury alleges that as a purchaser for value of the installment contracts it is entitled to the certificates of title. Defendants, Andrew's Import's, Inc. and Michael Dunn d/b/a Dunn Motors, allege that Mercury purchased the installment sales contracts with knowledge that Genesis did not have title to the vehicles; thus, Mercury is not a good faith purchaser of the installment contracts and is not entitled to have the certificates of title list Mercury as first lienholder with priority over their interests.

#### LAW

The real issue in this case is whether Mercury or Fuscioni and Dunn have a right to the proceeds of two installment sales contracts arising out of the sale of two automobiles. Marks and Gamble are paying for the two cars with monthly payments. Who should get the money and have the right to repossess the vehicles if there is a default?

A. Title to the Vehicles Sold to Marks and Gamble

Pinkie Marks and Ella Mae Gamble each went to Genesis, a dealer in used cars, and each purchased a car. The law is clear as to their right to obtain title to the vehicles they purchased.

They were good faith purchasers for value according to the evidence.

According to ALA. CODE § 7-2-403, title passes to a purchaser as follows:

(1) A purchaser of goods acquires all title which his transferor had or had power to transfer except that a purchaser of a limited interest acquires rights only to the extent of the interest purchased. A person with voidable title has power to transfer a good title to a good faith purchaser for value. When goods have been delivered under a transaction of purchase the purchaser has such power even though:

(a) The transferor was deceived as to the identity of the purchaser, or

(b) The delivery was in exchange for a check which is later dishonored, or

(c) It was agreed that the transaction was to be a “cash sale,” or

(d) The delivery was procured through fraud punishable as larcenous under the criminal law.

(2) Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in the ordinary course of business.

(3) “Entrusting” includes any delivery and any acquiescence in retention of possession regardless of any condition expressed between the parties to the delivery or acquiescence and regardless of whether the procurement of the entrusting or the possessor's disposition of the goods have been such as to be larcenous under the criminal law.

(4) The rights of other purchasers of goods and of lien creditors are governed by the articles on secured transactions (Article 9), bulk transfers (Article 6) and documents of title (Article 7).

Fusciotti and Dunn entrusted possession of the used automobiles to Genesis. Genesis was a merchant who dealt in used automobiles. Genesis sold the automobiles to Marks and Gamble. Marks and Gamble acquired all rights of Fusciotti and Dunn, including legal title, pursuant to § 7-2-403(2).

The nondelivery of the certificates of title did not prevent title from passing to the buyers. *Crum v. Southtrust Bank of Alabama, N.A.*, 598 So. 2d 867, 872 (Ala. 1992); *Wood Chevrolet Co., Inc. v. Bank of the Southeast*, 352 So. 2d 1350, 1352 (Ala. 1977). Any security interest claimed by Fusciotti and Dunn in the vehicles loses its effect upon sale to a consumer who purchases goods from a merchant in the business of selling goods of that kind. *First Dallas County Bank v. General Motors Acceptance Corp.*, 425 So. 2d 464, 465 (Ala. 1983). ALA. CODE § 7-9-307(1) states:

A buyer in ordinary course of business . . . takes free of a security interest created by his seller even though the security interest is perfected and even though the buyer knows of its existence.

Once title passed to Marks and Gamble, they “acquired the right to possess the certificates of title evidencing ownership of the used automobiles.” *Crum*, 598 So. 2d at 873; ALA. CODE §§ 32-8-44 and 46. The titles must be turned over to the purchasers or their designees.

If Fusciotti or Dunn wanted to claim a perfected security interest in the vehicles, they would have needed to comply with ALA. CODE § 7-9-302(3)(b). *Crum*, 598 So. 2d at 872 n.4. It required Fusciotti and Dunn to file financing statements. They did not and their security interests in the automobiles were unperfected.

B. Mercury's Interest in the Vehicles of Marks and Gamble

Gamble and Marks are “buyers in the ordinary course of business” of the automobiles at issue. Their title at purchase was subject to no perfected security interest. Any interest Fuscioni and Dunn had was unperfected due to failure to comply with ALA. CODE § 7-9-302(b).

Genesis gained the right to have the certificates of title delivered to it when it took security interests in Marks' and Gamble's vehicles upon sale. ALA. CODE § 32-8-44(d). Genesis assigned all of its rights to Mercury upon sale of the contracts to it. *See*, ALA. CODE § 32-8-63.<sup>1</sup> Since the titles were never delivered to the purchasers or to Genesis or Mercury by Fuscioni and Dunn, what Mercury holds is unperfected security interests in Gamble's and Marks' vehicles at this time. ALA. CODE § 32-8-61. The security interests, although unperfected, since not listed on the certificates of title, did attach to the collateral. ALA. CODE § 7-9-203. The importance of attachment is in the determination of the priority of creditors' claims to collateral. Genesis, and as assignee, Mercury, could enforce against Marks and Gamble all rights against the collateral set forth in the agreement and under state law, including the right to repossession.

Fuscioni and Dunn allege that Mercury is not a good faith purchaser for value and that this lack of good faith affects its rights in the collateral or proceeds. The defendants allege Mercury was aware of Genesis' financial problems and continued to purchase installment sales contracts from Genesis. It is undisputed that Fuscioni informed Mercury, after the sale of the Cadillac to Marks, that he had not received payment for it. The defendants also suggest that

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<sup>1</sup>ALA. CODE § 7-9-63 states that the assigner of a lienholder remains liable for obligations as a lienholder until “the assignee is named as lienholder on the certificate [of title].” This may affect Genesis' relationship with Fuscioni and Dunn, but not the rights that Genesis acquired vis-à-vis Fuscioni and Dunn.

Mercury had knowledge of Genesis' failure to promptly pay for automobiles sold from its lot because of the prolonged delay in receiving certificates of title from the Alabama Department of Revenue.

Fusciotti and Dunn do not articulate the Code sections under which they believe Mercury's claim is defeated by its alleged lack of good faith. It would appear that they are asserting three possible grounds. One, Mercury is not a "buyer in the ordinary course of business" under ALA. CODE § 7-1-201(9) which requires a "person who in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party in the goods buys in ordinary course from a person in the business of selling goods of that kind." If Mercury is not a buyer in the ordinary course, then Mercury does not get the protection of ALA. CODE § 7-9-307(1). Two, Fusciotti and Dunn may be alleging that Mercury is not a good faith purchaser for value under ALA. CODE § 7-9-403. This section would apply if Gamble and Marks or Genesis only had voidable title to the vehicles or contracts respectively. Three, they may be alleging that Mercury did not act in good faith generally and that failure somehow taints the contracts.

There are two general good faith standards in the Uniform Commercial Code which relate to transactions covered by the Code. The general, subjective good faith standard which applies to all transactions requires "honesty in fact in the conduct or transaction covered." ALA. CODE § 7-1-201(19); *Stowers v. Mahon (In re Samuels & Co., Inc.)*, 526 F.2d 1238, 1243 (5th Cir.), *cert. denied*, 429 U.S. 834 (1976). Article 2 of the Code, §§ 7-2-101 through 725 incorporates a second objective good faith test which requires "observance of reasonable commercial standards of fair dealing in the trade" as well. ALA. CODE § 7-2-103(b); *In re Samuels & Co., Inc.*, 526 F.2d at 1243.



### C. Article 2 Good Faith Issues

Section 7-2-102 states that Article 2 applies to sales of “goods” except “sales of goods” intended to operate only as a security transaction.” What was sold to Mercury was an installment sales contract. That sale was for cash. There was no intent to create a security interest between Genesis and Mercury. The underlying transaction between Marks and Gamble and Genesis created a security interest resulting in chattel paper. The chattel paper was sold to Mercury. “Chattel paper” is a good under ALA. CODE § 7-2-105(1). Therefore, Article 2 would apply to the transaction as a sale of goods.

If Article 2 applies and if Genesis had only voidable title to the installment sales contracts, then Mercury would need to be a good faith purchaser to obtain good title to the contracts. ALA. CODE § 7-2-403(1). A voidable title arises when there is “delivery of possession of goods from a seller to a buyer, with the intent that the buyer become the owner of the goods.” *Ledbetter v. Darwin Dobbs Co., Inc.*, 473 So. 2d 197 (Ala. Civ. App. 1985). Marks and Gamble were owners of the vehicles and gave liens to Genesis through installment sales contracts. Genesis sold the contracts to Mercury and intended to pass ownership to Mercury. Therefore, Genesis had voidable title and, pursuant to ALA. CODE § 7-2-403(1), could transfer title to a good faith purchaser. Mercury meets the objective and subjective good faith standards required of sales under Article 2.

Mercury’s local manager investigated Fuscitti’s initial complaint and received from a Genesis employee what he believed was a sufficient explanation. When Fuscitti continued to complain, Mercury’s policy was changed to require current certificates of title before purchasing installment sales contracts from Genesis. Within three weeks of Fuscitti’s initial complaint, Genesis filed bankruptcy. The losses incurred by Fuscitti and Dunn were not the result of any

breach of obligation by Mercury. Mercury dealt with Genesis as it always had until it had sufficient proof of a problem to change its procedures. The Court finds no facts which indicate any improper conduct by Mercury or knowledge which taints Mercury at the time of these sales. Mercury had never had problems with Genesis in the past and inquired and received a reasonable explanation of the Fuscioni issue. Mercury's knowledge of Fuscioni's single nonpayment, standing alone, is not sufficient to prove bad faith. Therefore, Fuscioni and Dunn have no prior claim to the installment sales contracts under Article 2.

#### D. Article 9 Good Faith Trust Issues

Article 9 of the Alabama version of the Uniform Commercial Code does apply to the issues raised by this case. Section 7-9-102 states that Article 9 applies "to any sale of . . . chattel paper." "Chattel paper" is a writing or writings which evidence both a monetary obligation and a security interest in specific goods." ALA. CODE § 7-9-105(1)(b). The installment sales contracts are chattel paper. In Article 9, "goods" specifically excludes "chattel paper." ALA. CODE § 7-9-105(1)(h). Certain provisions are therefore not applicable to Mercury, e.g., § 7-9-307 entitled "Protection of Buyer of Goods."

ALA. CODE § 7-9-114 entitled "consignment" establishes a procedure for protection of a consigner in his consigned goods and in the identifiable cash proceeds of those goods. Neither Fuscioni nor Dunn proved that they had complied with the statute. Therefore, another party could gain a security interest in the cars and identifiable cash proceeds prior to the defendants. The security interest Mercury has was created by Genesis. The security interests attached when Marks and Gamble signed the security agreements, paid their down payments and took possession of the vehicles. ALA. CODE § 7-9-203(1). The installment sales contracts were sold

to Mercury. When Genesis sold the contracts to Mercury, the cash received became the “proceeds” of the contracts. ALA. CODE § 7-9-306(1).

Fusciotti and Dunn’s rights attach, if at all, to these proceeds of sale of the installment sales contracts. ALA. CODE § 7-9-306 states that rights in proceeds are available only to secured creditors (or consigners) with a perfected security interest. ALA. CODE § 7-9-306. Where a debtor has filed bankruptcy, rights in proceeds are even more circumscribed. ALA. CODE § 7-9-306(4). Fusciotti and Dunn have only unperfected rights in the Mercury payments to Genesis and therefore no direct rights to the money received by Genesis from Mercury.

When Mercury purchased the chattel paper from Genesis, it paid cash. The transaction did not create a security interest between them and did not implicate Article 9. Mercury, by purchase, received all of Genesis’ rights in the contracts. Even though Mercury’s lien is unperfected since it has not been noted on Gamble’s and Marks’ certificates of title, Fusciotti and Dunn have no right to the chattel paper superior to Mercury’s rights. ALA. CODE § 32-8-61(a).

Even if the Court assumes that Mercury and the defendants both have rights in the chattel paper, Fusciotti and Dunn lose. ALA. CODE § 7-9-312 establishes the procedures to be used to resolve priorities among conflicting security interests in the same collateral. Section 7-9-312(5)(b) states: “So long as conflicting security interests are unperfected, the first to attach has priority.” As discussed above, Mercury’s security interest attached at the time of sale of the vehicles to Gamble and Marks and the contracts were given in return. ALA. CODE § 7-9-203(1). Fusciotti and Dunn’s consignment or security interests never attached.

Even though their interests are unperfected, Fusciotti and Dunn still allege that Mercury’s bad faith allows them to assert the claims they would have made against Genesis against

Mercury, and thereby gain the installment sales contracts or their proceeds by gaining priority over Mercury's interest since § 7-1-201(19) requires honesty in fact in all transactions under the Alabama Commercial Code. As discussed above, the Court finds Mercury exhibited no bad faith on any level. The general bad faith claim under Article 9 fails for lack of proof as discussed above in I(B).

Mercury meets the requirements necessary to have a right to the installment sales contracts and their proceeds. Fuscioni and Dunn must relinquish the certificates of title to Mercury.

THEREFORE, IT IS ORDERED that:

1. Andrew's Imports, Inc. is to deliver the certificate of title on the 1988 Cadillac Eldorado to Mercury Finance Corporation of Alabama;
2. Michael Dunn d/b/a Dunn Motors is to deliver the certificate of title on the 1992 Mitsubishi Mirage to Mercury Finance Corporation of Alabama.

Dated: July 3, 1996

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MARGARET A. MAHONEY  
CHIEF BANKRUPTCY JUDGE