IN THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

IN RE:	**CHAPTER 7**
THAMES AUTOPLEX, INC.	**CASE NO. 05-00313EE**

AUTOMOTIVE FINANCE CORPORATION

VS. **ADVERSARY NO. 050009**

THAMES AUTOPLEX, INC., ET. AL.

TRUSTMARK NATIONAL BANK,
JERRY A. SANDIFER, DEBORAH SANDIFER,
JASON T. BELL, PATRICK FLOWERS
AND WOODROW W. CAIN **COUNTER-PLAINTIFFS**

VS.

AUTOMOTIVE FINANCE CORPORATION **COUNTER-DEFENDANTS**

Hon. Jeffrey K. Tyree — Attorney for Debtor
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Edward Ellington, Judge

FINDINGS OF FACT AND CONCLUSIONS OF

LAW ON THE *MOTION FOR SUMMARY JUDGMENT BY TRUSTMARK NATIONAL BANK, JERRY A. SANDIFER, DEBORAH SANDIFER, JASON T. BELL, PATRICK FLOWERS AND WOODROW W. CAIN*

THIS MATTER came before the Court on the *Motion for Summary Judgment by Trustmark National Bank, Jerry A. Sandifer, Deborah Sandifer, Jason T. Bell, Patrick Flowers and Woodrow W. Cain*, the *JP Morgan Chase Bank, N.A.'s Joinder in Motion for Summary Judgment,* the *Response to Motion for Summary Judgment* filed by Automotive Finance Corporation, the *Reply of Trustmark National Bank and Certain Consumers in Support of Their Motion for Summary Judgment* and *Joinder in Reply in Support of Motion for Summary Judgment* filed by JP Morgan Chase Bank, N.A. After considering the motion, joinder, the response, the replies and the briefs of the parties, the Court finds that the motion is well taken in part and should be granted in part.

FINDINGS OF FACT

Thames Autoplex, Inc. (Debtor) operated an automobile dealership in Vicksburg, Mississippi, under various trade names. The Debtor sold new and used automobiles. Throughout 2003 and part of 2004, Automotive Finance Corporation (AFC) provided floor plan financing to enable the Debtor to purchase its automobile inventory. Pursuant to its agreement with AFC, upon the sale of a vehicle, the Debtor would pay AFC for the vehicle and AFC would then release the Certificate of Title on the vehicle.

Trustmark National Bank (Trustmark) is in the business of purchasing chattel paper from automobile dealers throughout Mississippi. Trustmark and the Debtor[1] entered into a *Retail Dealer Agreement* in which Trustmark had the right to purchase motor vehicle retail installment contracts

[1]Trustmark entered into the agreement with The Merit Group, LLC dba River City Mitsubishi-Hyundai. For purposes of this opinion, the Court will refer to the agreement as being between the Debtor and Trustmark. The Merit Group is not a debtor nor a party to this action.

obtained by the Debtor through the sale of its automobile inventory. The Debtor offered and Trustmark subsequently purchased the motor vehicle retail installment contracts entered into between the Debtor and Jerry and Deborah Sandifer, Jason Bell, Patrick Flowers and Woodrow Cain.

Similar to Trustmark, JP Morgan Chase Bank, N.A. successor by merger to Bank One, N.A. (Chase) purchased motor vehicle retail installment contracts from the Debtor. The Debtor offered and Chase subsequently purchased the motor vehicle retail installment contracts entered into between the Debtor and Eugene and Joan Buglewicz, Stella Carrol, Aubrey J. Dearman, Johnny Dorsey, Virginia L. Jones, Ella M. and Lewis Wade, John Walton, Carolyn D. Williams and Robert Willis.

On January 24, 2005, AFC filed an involuntary Chapter 7 against Thames Autoplex, Inc. and River Autoplex, Inc.[2] On June 5, 2006, the Debtor converted to a voluntary Chapter 7.

On January 31, 2005, the above styled adversary proceeding was filed by AFC against various chattel paper purchasers and consumers. AFC's complaint and amended complaint alleged that the Debtor sold approximately 63 vehicles out-of-trust. AFC refused to turn over the Certificate of Titles (Titles) to these vehicles until AFC was shown that the purchasers were bona fide good faith purchasers. AFC now concedes that the consumers who purchased vehicles from the Debtor were in fact bona fide good faith purchasers, and AFC has delivered the Titles to these consumers. *Response to Motion for Summary Judgment*, ¶ 2, p. 2 (January 16, 2007).

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[2]AFC filed the involuntary against both corporations in the same petition. On June 5, 2006, an *Agreed Order Granting Motion to Sever and Converting Case to a Chapter 7 Proceeding* was entered by the Court in which River Autoplex, Inc. was severed into its own case and converted to a voluntary Chapter 7.

On March 25, 2005, the *Motion for Summary Judgment by Trustmark National Bank, Jerry A. Sandifer, Deborah Sandifer, Jason T. Bell, Patrick Flowers and Woodrow W. Cain* (Motion) was filed. Chase filed *JP Morgan Chase Bank, N.A.'s Joinder in Motion for Summary Judgment* on October 5, 2005.

Since AFC has conceded that the consumers were bona fide good faith purchasers, the remaining issues before the Court are:

1. Do Trustmark and Chase have priority over AFC in the chattel paper it purchased from the Debtor pursuant to Miss. Code Ann. § 75-9-330?

2. Are the consumers entitled to recover actual or punitive damages against AFC for its refusal to timely release the titles?

CONCLUSIONS OF LAW

I.

This Court has jurisdiction of the subject matter and of the parties to this proceeding pursuant to 28 U.S.C. § 1334 and 28 U.S.C. § 157

II.

A.

Rule 56 of the Federal Rules of Civil Procedure[3] provides that in order to grant a motion for summary judgment, the court must find that "[t]he pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

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[3]Federal Rule of Civil Procedure 56 is made applicable to bankruptcy proceedings pursuant to Federal Rule of Bankruptcy Procedure 7056.

In addition, when considering a motion for summary judgment, the court must view the pleadings and evidentiary material, and the reasonable inferences to be drawn therefrom, in the light most favorable to the non-moving party, and the motion should be granted only where there is no genuine issue of material fact. *Thatcher v. Brennan*, 657 F. Supp. 6, 7 (S.D. Miss. 1986), *aff'd*, 816 F.2d 675 (5th Cir. 1987)(citing *Walker v. U-Haul Co. of Miss.*, 734 F.2d 1068, 1070-71 (5th Cir. 1984)); *see also Matshushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88, 106 S.Ct. 1348, 1356-57, 89 L.Ed.2d 538, 553 (1986). Moreover, "an adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response, by affidavits or as otherwise provided by this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Bankr. P. 7056(e).

II.

As stated previously, the first issue before the Court is whether Trustmark and Chase[4] have priority over AFC in the chattel paper it purchased from Debtor.

Mississippi Code Annotated § 75-9-102(a)(11) defines chattel paper as "a record or records that evidence both a monetary obligation and a security interest in specific goods. . . ." Miss Code Ann. § 75-9-102(11) (1972). Section 75-9-330 provides for the priority of purchasers of chattel paper as follows:

> **§ 75-9-330. Priority of purchaser of chattel paper or instrument.**
>
> (a) A purchaser of chattel paper has priority over a security interest in the chattel paper which is claimed merely as proceeds of inventory subject to a security interest if:
>
> (1) In good faith and in the ordinary course of the

[4]Collectively, Trustmark.

> purchaser's business, the purchaser gives new value and takes possession of the chattel paper or obtains control of the chattel paper under Section 75-9-105; and
>
> (2) The chattel paper does not indicate that it has been assigned to an identified assignee other than the purchaser.

> (b) A purchaser of chattel paper has priority over a security interest in the chattel paper which is claimed other than merely as proceeds of inventory subject to a security interest if the purchaser gives new value and takes possession of the chattel paper or obtains control of the chattel paper under Section 75-9-105 in good faith, in the ordinary course of the purchaser's business, and without knowledge that the purchase violates the rights of the secured party.

Miss. Code Ann. § 75-9-330(a) & (b) (1972)[5].

AFC admits that if Trustmark "did, in good faith and in the ordinary course of their business give new value and take possession of the paper, then its interest does trump that of AFC." *Response to Motion for Summary Judgment*, ¶ 7, p. 4 (January 16, 2007). AFC further states that it "has no indication that Trustmark did not give new value and has no indication that Trustmark did not take possession of this paper" *Id.* at ¶ 8, however, AFC contends that Trustmark did not act in good faith.

Mississippi Code § 75-9-102(a)(43) defines good faith as "honesty in fact and the observance of reasonable commercial standards of fair dealing." Miss. Code Ann. § 75-9-102(a)(43) (1972).

Essentially, AFC contends that Trustmark lacked good faith because Trustmark failed to exercise "reasonable commercial standards of fair dealing" in its relationship with the Debtor. As evidence of this lack of fair dealing, AFC states that Trustmark's *Retail Dealer Agreement* (Dealer

[5]Miss. Code Ann. § 75-9-105 permits a creditor to obtain control of chattel paper through electronic means.

Agreement) with the Debtor gave Trustmark the right to demand that the Debtor purchase the chattel paper back from Trustmark if Trustmark's lien was not perfected within ten (10) days from the date of the transaction. When the Debtor failed to comply with the ten (10) day provision in the Dealer Agreement, AFC argues that the Debtor was in default and that Trustmark should have known that the Debtor was in default. AFC further asserts that Trustmark's failure to discover the defaults in a timely manner and act upon the defaults in a timely manner shows Trustmark did not act in "reasonable commercial standards of fair dealing," and consequently, AFC's lien should prime Trustmark's lien. "Entering into deals and obligations which clearly manifest breach of contract and without enforcing plain obligations and all the while ignoring a substantial risk for pecuniary loss can in no way be regarded as 'good faith'. . . .If Trustmark was either not acting in good faith or acting outside the boundaries of reasonable commercial standards, then AFC's interest in the chattel paper arising as proceeds is superior to that of Trustmark's." *Id.* ¶ 15, pp 7-8.

While AFC contends that Trustmark's actions in purchasing the chattel paper do not constitute good faith, AFC cites no authority to support its position nor does AFC cite any authority on what constitutes good faith or the lack thereof. AFC simply alleges that if Trustmark had enforced the ten (10) day perfection requirement in its Dealer Agreement, Trustmark would have discovered that the Debtor was selling vehicles out-of-trust and AFC would have been protected.

In the case of *Cenac v. Murry,* 609 So.2d 1257 (Miss. 1992), the Supreme Court of Mississippi defined good faith as follows:

> Good faith is the faithfulness of an agreed purpose between two parties, a purpose which is consistent with justified expectations of the other party. The breach of good faith is bad faith characterized by some conduct which violates standards of decency, fairness or

> reasonableness. Restatement (Second) of Contracts § 205, 100 (1979).

Cenac, 609 So.2d at 1272. *See also McDaniel v. Citizens Bank,* 937 So.2d 26, 29 (Miss. 2006); *Grand Housing, Inc. v. Bombardier Capital, Inc.,* 2005 WL 673267, at *4 (5th Cir. 2005).

In applying the *Cenac* definition of good faith to the case at bar, the Court finds that Trustmark acted in good faith in its relationship with the Debtor. The Court agrees with AFC that the Dealer Agreement between the Debtor and Trustmark gives Trustmark the right to demand that the Debtor repurchase a contract if Trustmark's lien was not perfected within ten (10) days from the purchase of the chattel paper. However, in his deposition, Billy Henderson, Dealer Services Underwriting Manager for Trustmark, testified that it was not unusual for it to take anywhere from four to eight weeks for Trustmark to get a Title from the Mississippi State Tax Commission (MSTC). *Deposition of Billy Henderson,* p. 49-50 (February 1, 2006). Mr. Henderson further testified that since all of the loan packets submitted to Trustmark contained title applications signed by the Debtor, Trustmark had no reason to suspect that the delay in obtaining a title from the MSTC was in any way anything other than the normal delay. Mr. Henderson also testified that during this same time frame, Trustmark obtained Titles from the MSTC on other vehicles for which Trustmark had purchased the chattel paper from the Debtor. *Id.* p. 87-8.

The Court further finds that in order to ensure that Trustmark, and any other chattel paper purchaser, had actual knowledge of its prior lien, AFC could have required the Debtor to place a written legend on the chattel paper pursuant to Miss. Code Ann. § 75-9-330(a)(2). However, AFC chose not to require the Debtor to do so. *Id.* If AFC had required that a written legend be placed on the chattel paper, AFC would have maintained its priority position on the vehicles.

Therefore, the Court finds that Trustmark was a good faith purchaser of the chattel paper and that no genuine issue of material fact exists and that the Trustmark is entitled to a judgment

declaring that its lien primes the lien of AFC pursuant to Miss. Code Ann. § 75-9-330(a) as a matter of law.

III.

A.

The next issue the Court must address is whether the consumers are entitled to recover actual or punitive damages against AFC for its refusal to timely release the titles to them.

In its *Response to Motion for Summary Judgment*, AFC now concedes that all of the consumers are bona fide good faith purchasers and are entitled to the Titles and/or Manufacturer's Statements of Origin. *Response to Motion for Summary Judgment*, ¶ 2, p. 2 (January 16, 2007). AFC has now delivered the Titles to all of the consumers.

Trustmark alleges that because AFC failed to timely turn over the Titles to the consumers once demand had been made upon it to turn the Titles over, the consumers lost their legislative tax credit and were forced to pay penalties when they purchased their automobile tag and are entitled to be reimbursed for the following amounts:

Jason Bell	$448.18
Jerry Sandifer	$354.02

AFC has not responded to nor disputed these claims for actual damages. Therefore, the Court finds that no genuine issue of material fact exists and that Mr. Bell and Mr. Sandifer are entitled to judgments for their actual damages as a matter of law.

B.

In its *Separate Answer, Defenses and Counterclaim of Trustmark National Bank, Jerry A. Sandifer, Deborah Sandifer, Jason T. Bell, Patrick Flowers and Woodrow W. Cain* (Counterclaim),

Trustmark requests that the Court award not only actual damages, but also attorney fees and punitive damages. In the *Reply of Trustmark National Bank and Certain Consumers in Support of Their Motion for Summary Judgment*, Trustmark simply asks that the Court grant punitive damages in favor of Mr. Bell and Mr. Sandifer in the amount of $4000 plus attorney fees. However, the Court finds that the record on punitive damages and attorney fees was not fully developed and that genuine issues of material fact exist. Therefore, summary judgment will be denied as to the issue of attorney fees and punitive damages.

CONCLUSION

Based on the foregoing, the Court finds that no genuine issue of material fact exists and that Trustmark and Chase are entitled to judgments declaring that their liens prime the lien of AFC pursuant to Miss. Code Ann. § 75-9-330(a) as a matter of law.

The Court further finds that no genuine issue of material fact exists as to the issue of actual damages and that Jason Bell should be awarded actual damages in the amount of $448.18 and that Jerry Sandifer should be awarded actual damages in the amount of $354.02.

The Court further finds that genuine issues of material fact exist as to the request for attorney fees and punitive damages, and therefore, summary judgment should be denied on the request for punitive damages and attorney fees.

A separate judgment consistent with this opinion will be entered in accordance with Rules 7054 and 9021 of the Federal Rules of Bankruptcy Procedure.

This the 4th day of May, 2007.

/S/ EDWARD ELLINGTON
EDWARD ELLINGTON
UNITED STATES BANKRUPTCY JUDGE