COURT OF COMMON PLEAS
FOR THE STATE OF DELAWARE
KENT COUNTY COURTHOUSE
38 THE GREEN
DOVER, DELAWARE 19901
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CHARLES W. WELCH, III
JUDGE

January 12, 2017

Charles S. Knothe, Esq.
14 The Commons
3516-14 Silverside Road
Wilmington, DE 19810

Mr. David Lowery
125 S. Main Street
Smyrna, DE 19977

RE: Credit Acceptance Corporation v. David Lowery
C.A. No.: CPU5-13-000221

Decision on Plaintiff's Motion for Summary Judgment

Dear Mr. Knothe and Mr. Lowery:

The plaintiff, Credit Acceptance Corporation, has filed the above-referenced civil debt action against the defendant, David Lowery, for money it alleges is owed to it for a default on a car loan. The plaintiff has filed a motion for summary judgment for judgment to be entered against the defendant for $15,134.87, plus interest, attorney's fees and court costs. The defendant opposes the plaintiff's motion on the grounds that the plaintiff has failed to mitigate its damages for this matter and is not entitled to the sum it alleges is due. After consideration of the plaintiff's motion, oral argument and all written submissions, the plaintiff's motion is granted. Judgment is entered for the plaintiff against the defendant.

FACTS[1]

The defendant co-signed a Retail Installment Contract ("Contract") as one of two buyers for the purchase of a 2006 Nissan Altima ("Vehicle"). Pursuant to the Contract, the buyers were obligated to make a monthly payment of $416.67 for 48 months. The Contract also provided that a security interest in the Vehicle was provided to the creditor-seller for the Contract. In the event of a default on the Contract by the buyers, the creditor-seller was entitled to repossess the Vehicle and sell it to offset the balance still owed to it. Specifically, the Contract provided that if the buyers defaulted, the creditor-seller "may take (repossess) the Vehicle" from the buyers. Under the Contract, the buyers were also liable to the creditor-seller for any deficiency balance due to it after the sale of the Vehicle. Additionally, the Contract entitled the creditor-seller to recover reasonable attorney's fees incurred for the collection of amounts due to it. The Contract's creditor-seller's rights were assigned to the plaintiff immediately in the Contract.

The buyers defaulted on the Contract on or about June 14, 2011, when a payment was not made. The balance due on the Contract was $15,134.87, as of December 10, 2012.

The plaintiff did not repossess the Vehicle in which it had a security interest when the buyers defaulted on the Contract in June of 2011. It has been the understanding of the plaintiff that a garage keeper's lien sale was conducted by a third party on the Vehicle. Evidence of a Justice of the Peace Court action to conduct such a lien sale was provided

[1] The Court has found the facts of this matter by a preponderance of the evidence, based on all of the evidence proffered in the motion and response thereto, and at the hearing for the motion.

to the Court, but, no evidence was introduced showing that the sale was actually conducted.

It is the position of the plaintiff that it is entitled to a judgment for the total balance due on the Contract against the defendant as a buyer on the Contract. The defendant admits that the buyers may have defaulted on the Contract. However, he contends that the plaintiff has failed to mitigate its damages by failing to repossess the Vehicle to offset amounts due to it.[2, 3] Therefore, it is his position that the plaintiff is not entitled to the sums that it alleges are due.

LEGAL STANDARD

For the plaintiff to prevail on its motion for summary judgment, it must prove, by a preponderance of the evidence, that there are no genuine issues as to any material fact and that it is entitled to a judgment as a matter of law.[4] In reviewing the record, the Court must view the facts and all reasonable inferences therefrom in the light most favorable to the non-moving party.[5]

DECISION

The issue before the Court is a simple one. Is a creditor entitled to recover the full balance due on a car loan where (1) the buyer bought the car and defaulted on the car loan (2) pursuant to a loan agreement that provides that the creditor "may" repossess the

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[2] In his written argument to the Court, the defendant does not actually use the phrase "failure to mitigate" damages. However, in essence, that is his contention.

[3] The plaintiff has alluded to the fact that it did not know the location of the Vehicle. Hence it could not repossess it after the June of 2011 default. However, at least thus far, it has provided little evidence in that regard.

[4] Ct. Com. Pl. Civ. R. 56(c). *See also Browning-Ferris, Inc. v. Rockford Enterprises, Inc.*, 642 A.2d 820, 823 (Del. Super. 1993).

[5] *Dunn v. Vaudry*, 2011 WL 4638266, at *4 (Del. Super. Sept. 30, 2011).

car and (3) the creditor has failed to pursue such a repossession? The Court concludes that the answer is yes.

Pursuant to 6 *Del. C.* § 9-601(a), a secured party "may reduce a claim to judgment, foreclose, or otherwise enforce the claim . . . by any available judicial procedure."[6] Section 9-601(b) further provides that the rights under subsection (a) are "cumulative and may be exercised simultaneously."[7] The U.S. Third Circuit Court of Appeals, pursuant to Pennsylvania's equivalent commercial statute, interpreted this language to mean that, "[a] secured party is not required to elect one remedy to the exclusion of another."[8] The Delaware Superior Court adopted this rationale in *Shultz v. Delaware Trust Co.*[9] In *Shultz*, the Court held that, "a secured party is permitted to pursue alternative remedies until the obligation is satisfied."[10] *Shultz* did not, however, explicitly adopt the Third Circuit's holding, based on Pennsylvania law, which acknowledged that a secured party may proceed against the debtor to collect the debt without first selling the secured collateral.[11]

Even without an explicit rule like Pennsylvania's, this Court finds that a secured party is not required to repossess and sell collateral before initiating a judicial action to satisfy a debt, unless provided otherwise in the parties' agreement. The Delaware Code and the Contract in this case simply do not require it. Rather, the plaintiff may pursue multiple remedies either individually or simultaneously. It has chosen to seek a judgment

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[6] 6 *Del. C.* § 9-601(a).
[7] 6 *Del. C.* § 9-601(b).
[8] *In re Adrian Research & Chem. Co.*, 269 F.2d 734 (3d Cir. 1959).
[9] *Shultz v. Delaware Trust Co., 360* A.2d 576, 579 (Del. Super. 1976).
[10] *Shultz,* 360 A.2d at 579 (citing *Foster v. Knutson*, 10 Wash. App. 175, 527 P.2d 1108, 15 U.C.C.Rep. 1127 (1974)).
[11] *See In re Adrian Research & Chem. Co.,* 269 F.2d 734 (3d Cir. 1959); *Shultz*, 360 A.2d 576 (Del. Super. 1976).

against one of the buyers in the Contract in a civil debt collection action. Given the law and evidence provided, it is entitled to such a judgment.

CONCLUSION

Based on the foregoing conclusions of the Court, which are based on the evidence and applicable law, the plaintiff's motion for summary judgment is GRANTED. Judgment for the plaintiff against the defendant is entered in the amount of $15,134.87, plus pre-judgment interest at the contract rate, reasonable attorney's fees, court costs and post-judgment interest at the legal rate.

IT IS SO ORDERED.

Charles W. Welch, III
Judge