

RENDERED: JULY 22, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000397-MR

QUALITY FORD AUTOMOBILE
SALES, INC.

APPELLANT

v. APPEAL FROM CALDWELL CIRCUIT COURT
HONORABLE CLARENCE A. WOODALL III, JUDGE
ACTION NO. 09-CI-00059

FORD MOTOR CREDIT COMPANY, LLC

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON, MOORE, AND STUMBO, JUDGES.

STUMBO, JUDGE: Quality Ford Automobile Sales, Inc. (hereinafter Quality Ford) appeals from a judgment granting Ford Motor Credit Company (hereinafter FMCC) a permanent injunction and granting it possession of collateral used to secure financing for Quality Ford's automobile dealership. Quality Ford argues

that there was no valid agreement between the parties and that FMCC was not entitled to the possession of collateral. We find no error in the judgment of the trial court and affirm.

FMCC is a credit company that provided financing to Quality Ford so it could acquire new and used cars to sell to the public. In return, Quality Ford made monthly interest payments to FMCC. It also gave FMCC a security interest in each of the cars it acquired. Quality Ford would then pay FMCC for its security interest from the proceeds of each car sold. FMCC would then release its security interest in the vehicle.

Quality Ford and FMCC began their business relationship in 1989. At its inception, Quality Ford signed a security agreement describing the above relationship between the parties and giving FMCC a security interest in the dealership assets. In 1997, Allyn Moore purchased the dealership, but Quality Ford has always remained a registered corporate entity.

In 2008, FMCC discovered discrepancies during an automobile inventory audit. Specifically, it found that Quality Ford had sold vehicles from its inventory without remitting any proceeds to FMCC. This action was a breach of the security agreement. FMCC did not cease doing business with Quality Ford at this time. FMCC worked with Quality Ford to secure payment and continue the business relationship. Payment in full was eventually made to FMCC.

After this incident, FMCC requested Quality Ford take certain steps to ensure these kinds of problems did not arise again. Quality Ford did not meet

FMCC requests. In February of 2009, FMCC conducted another audit and found that Quality Ford had again sold vehicles without remitting some of the proceeds to FMCC. Additionally, Quality Ford had ceased paying its monthly interest payments.

FMCC then brought suit on March 10, 2009. Accompanying the complaint was a motion seeking immediate possession of the collateral listed in the security agreement and a motion for a temporary restraining order to prevent Quality Ford from further dissipating the collateral. The temporary restraining order was granted and a hearing was set.

At the hearing, the trial judge expressed concern that giving FMCC possession of the collateral would destroy Quality Ford. With that in mind, the trial court denied the motion for possession of the collateral. The trial court wanted Quality Ford to have the opportunity to continue to sell cars and pay the debt it owed to FMCC and to find alternate financing. The trial court also dissolved the prior temporary restraining order and entered a new one. The new order required Quality Ford to obtain approval from FMCC before it transferred any collateral to a third party. It also permitted FMCC to have a representative on site who could monitor the sale of any collateral and have access to Quality Ford's bookkeeping and financial records. FMCC would also be allowed to monitor all payments that Quality Ford received incident to the disposition of any of FMCC's collateral. FMCC was also permitted to take possession of vehicle keys, titles, and statements of origin for each motor vehicle in which FMCC had an interest.

Quality Ford continued to have trouble meeting its contractual obligations to FMCC. FMCC eventually filed a motion for a final hearing and a request for a writ of possession. A final evidentiary hearing was held on January 21, 2010. At this hearing, FMCC presented evidence that Quality Ford failed to pay it money owed from the sale of three automobiles and had again not been paying the interest charges. At the conclusion of the hearing, the trial judge granted a permanent injunction and the writ of possession. On January 22 and 23, 2010, FMCC removed the motor vehicles located on Quality Ford's premises. This appeal followed.

Quality Ford's first argument is that there was no valid security agreement. It alleges that when Mr. Moore bought the company in 1997, FMCC should have executed a new security agreement. In essence, Quality Ford argues that because the ownership of the dealership changed, the previous contract did not apply. This argument is without merit.

The security agreement contract signed in 1989 was between FMCC and Quality Ford, not FMCC and Quality Ford's previous owner. This was a contract entered into by two corporations. At all relevant times, Quality Ford was a corporation. At no time did it cease to be so.

KRS 271B.3-020(1)(g) states:

(1) Unless its articles of incorporation provide otherwise, every corporation shall have perpetual duration and succession in its corporate name and shall have the same powers as an individual to do all things necessary or

convenient to carry out its business and affairs, including without limitation power to:

. . . .

(g) Make contracts and guarantees, incur liabilities, borrow money, issue its notes, bonds, and other obligations (which may be convertible into or include the option to purchase other securities of the corporation), and secure any of its obligations by mortgage or pledge of any of its property, franchises, or income

In the case at hand, the security agreement was executed by Quality Ford and never terminated. Furthermore, even after Mr. Moore became the owner of Quality Ford, the company continued to perform pursuant to the agreement. Mr. Moore and Quality Ford cannot now claim it was an unenforceable agreement. *See Louisville Transit Co. v. Louisville & N.R. Co.*, 253 S.W.2d 240 (Ky. 1952).

Quality Ford also argues, in the alternative, that even if there was a valid agreement, FMCC failed to perfect its title on the collateral. This argument is irrelevant to this case. A perfected security interest determines the priority of one security interest over another when there are multiple creditors. There are not multiple creditors in this case, only FMCC. Perfection does not determine the validity of a security interest where a creditor seeks enforcement of a security agreement against a debtor. “A security interest attaches to collateral when it becomes enforceable against the debtor with respect to the collateral, unless an agreement expressly postpones the time of attachment.” KRS 355.9-203(1).

When FMCC gave money to Quality Ford to buy new and used cars, a security interest attached.

Quality Ford also argues that even if there is a valid agreement, FMCC breached the implied covenant of good faith and failed to mitigate its losses. We will first note that these are affirmative defenses more applicable to a legal judgment. The case at hand is an equitable decision granting a permanent injunction and writ of possession.

“[I]njunctive relief is basically addressed to the sound discretion of the trial court.” *Maupin v. Stansbury*, 575 S.W.2d 695, 697-698 (Ky. App. 1978). There was no abuse of discretion in this case. We, therefore, affirm the trial court’s judgment.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT
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BRIEF AND ORAL ARGUMENT
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