DIVISION ONE
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RUTH WILLINGHAM, ACTING CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STEPHANIE ENGRAM and ROY ENGRAM, Plaintiffs-Appellants,	)	1 CA-CV 08-0635
	)	DEPARTMENT A
v.	)	**MEMORANDUM DECISION**
JPMORGAN CHASE BANK, NATIONAL ASSOCIATION, Defendant-Appellee.	)	(Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV 2006-010127

The Honorable John A. Buttrick, Judge

REVERSED AND REMANDED

Choi & Fabian PLC — Mesa
By Hyung S. Choi
Veronika Fabian
Attorneys for Plaintiffs-Appellants

Quarles & Brady LLP — Phoenix
By Kevin D. Quigley
Lauren Elliott Stine
Nicole M. Goodwin
Attorneys for Defendant-Appellee

J O H N S E N, Judge

¶1 Stephanie and Roy Engram appeal the superior court's entry of summary judgment in favor of JPMorgan Chase Bank, N.A. ("Chase") on their claims for wrongful repossession and conversion and on Chase's claim for breach of contract. For the following reasons, we reverse and remand the judgment.

FACTS AND PROCEDURAL BACKGROUND

¶2 The Engrams bought a car in February 2005. The sales price, with tax, registration and fees, totaled $13,277. The Engrams made a cash down payment of $3,500; the dealer agreed to finance the remaining balance pursuant to a Motor Vehicle Retail Installment Sales Agreement and Purchase Money Security Agreement ("Security Agreement"). Under the Security Agreement, the Engrams promised to pay 60 monthly payments of $303.10.[1] The Engrams also promised in the Security Agreement to insure the car "for its full value against loss or damage."

¶3 The Security Agreement identified several events of default, as follows:

> Any one of the following shall constitute an Event of Default: (1) Your failure to pay when due any indebtedness secured hereby; (2) If any warranty, representation or statement made herein or furnished to us by you or on your behalf in connection with this Contract proves to have been false in any material respect when made or furnished;

[1] According to a disclosure on the first page of the Security Agreement, the total "amount financed" was $10,977; the "annual percentage rate" of the loan was 22 percent, and the payments due over time would total $18,186.00.

> (3) The commencement of any bankruptcy . . . ; (4) If the Vehicle is sold . . . ; (5) The occurrence of any adverse change in your financial condition deemed material by us, or if, in our judgment the Vehicle becomes unsatisfactory in character or value, or if we reasonably deem ourselves insecure; (6) If you default in performing any of your obligations, promises, covenants or agreements contained herein or in any other agreement, paper or document given by you to us.

The Security Agreement further described the rights and remedies of the creditor:

> Upon the happening of any of the foregoing Events of Default and at any time thereafter, we may, at our option, and without notice to you, declare all of your indebtedness to us to be immediately due and payable, and we shall have the rights, duties and remedies of a secured party, and you shall have the rights and duties of a debtor, under the Uniform Commercial Code as adopted in the State of Arizona, and without limitation thereto, we shall have the following specific rights: (a) To take immediate possession of the Vehicle without notice or resort to legal process . . . .

¶4 The dealer assigned the Security Agreement to Chase. The Engrams repeatedly were late with their monthly payments, but Chase accepted the late payments and assessed late charges and assessments. As of June 26, 2006, however, the Engrams were $908.50 past due. Chase intended to repossess the car and on July 7 talked to Ms. Engram about "hand[ing] [it] over" to the bank.

¶5 In support of the Engrams' motion for partial summary judgment, Ms. Engram averred that on July 5, she "spoke to someone in Collections at Chase who told me that if I made all of my past due payments, they would not repossess the vehicle." The morning of July 10, Ms. Engram went to a Chase branch and asked a teller how much was owing; the teller responded that the Engrams "needed to pay $908.50." Ms. Engram gave the teller $908.50 and asked the teller whether there was anything else she needed to do to avoid having the car repossessed. The teller responded that there was nothing else she needed to do to avoid repossession. Out of an abundance of caution, Ms. Engram asked another employee at the branch to check with "the main office" to see that the account was in order. That employee went into an office and returned to say "that he had confirmed with the main office that my account was in order." The payment receipt the teller gave Ms. Engram bears a time of 10:13 a.m.

¶6 Unfortunately, Chase's collection system did not post the payment immediately, and the Chase collections department did not learn of the payment until the following day. By then it was too late; Chase repossessed the Engrams' car at about midnight the evening of July 10, roughly 14 hours after it had accepted their payment of the full amount then due and, at least by her account, had assured Ms. Engram there was nothing more she needed to do to forestall repossession.

¶7 According to a log, the collector in charge of the account at Chase learned at 10:46 a.m. on July 11 that the Engrams' car had been repossessed even though they had brought their account current. Four minutes later, the collector contacted the Engrams' insurance company to find out whether insurance on the car was current. He was told the insurance had been canceled for nonpayment. Chase had not previously known that the Engrams' insurance had been cancelled. Under Chase's standard practices, it usually does not keep track of whether a borrower is in breach of his or her promise to maintain insurance; it verifies insurance coverage only when a vehicle has been repossessed and a customer seeks to redeem it. On July 13, a lawyer representing the Engrams wrote to Chase demanding the car be returned. Chase did not respond.

¶8 The Engrams filed suit on July 21, seeking damages from Chase for alleged conversion and violation of Arizona's commercial code, Arizona Revised Statutes ("A.R.S.") sections 47-9601 *et seq.* After Chase sold the car with no objection from the Engrams, it filed a counterclaim for breach of contract seeking recovery of the deficiency. On cross-motions for summary judgment, the superior court entered judgment in favor of Chase and awarded it $6,943.71 in damages plus attorney's fees of $30,000. The Engrams timely appealed.

¶9 We have jurisdiction pursuant to A.R.S. § 12-2101(B) (2003).

DISCUSSION

A. Standard of Review.

¶10 Summary judgment may be granted when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Ariz. R. Civ. P. 56(c); *see also Schwab v. Ames Constr.*, 207 Ariz. 56, 60, ¶ 15, 83 P.3d 56, 60 (App. 2004). We view the evidence in the light most favorable to the party against whom judgment was entered and determine *de novo* whether there are genuine issues of material fact and whether the trial court erred in applying the law. *Unique Equip. Co., Inc. v. TRW Vehicle Safety Sys., Inc.*, 197 Ariz. 50, 52, ¶ 5, 3 P.3d 970, 972 (App. 1999).

B. Wrongful Repossession.

¶11 Arizona law provides that after a default, a secured party may take possession of the collateral without judicial process if it does not breach the peace. A.R.S. § 47-9609 (2005). As relevant, the Security Agreement provided that a borrower's failure to make a payment when due and failure to maintain property insurance on the collateral both constituted events of default. The Engrams argue Chase wrongfully repossessed their car because they had cured the payment default that had triggered the repossession before the repossession took

place. Chase concedes that the Engrams' loan payments were current as of the time the car was repossessed but argues it was entitled to repossess the car because it reasonably believed the loan was insecure and because the Engrams were in breach for failure to maintain insurance.

1. Belief that repayment was insecure.

¶12 Although the July 10 payment was late, by accepting that payment Chase waived any right it might have had to repossess the car based on that breach. *See Miller v. Uhrick*, 146 Ariz. 413, 414, 706 P.2d 739, 740 (App. 1985) (acceptance of late payments waived creditor's right to invoke remedies in deed of trust unless creditor gave notice of her insistence on timely payment).

¶13 Nevertheless, Chase contends that it was entitled to accelerate the debt and repossess the car because, in the language of the Security Agreement, it "reasonably deem[ed]" itself "insecure." A lender's right to accelerate a debt based on insecurity, however, is limited by A.R.S. § 47-1309 (Supp. 2009), which in relevant part provides that an agreement

> providing that one party . . . may accelerate payment or performance . . . "at will" or when the party "deems itself insecure", or words of similar import, means that the party has power to do so only if that party in good faith believes that the prospect of payment or performance is impaired. The burden of establishing lack

> of good faith is on the party against which the power has been exercised.

Under the statute, therefore, Chase could accelerate and repossess based on insecurity only if it "in good faith believe[d] that the prospect of payment or performance [was] impaired." Under A.R.S. § 47-9102(A)(43) (Supp. 2009), "'[g]ood faith' means honesty in fact and the observance of reasonable commercial standards of fair dealing."

¶14 In support of its contention that it in good faith believed that "the prospect of payment or performance" by the Engrams was "impaired," Chase argues it thought the Engrams were hiding the car so it could not be repossessed. Chase offered no evidence, however, that prior to the repossession it believed the Engrams were hiding their car; its internal log does not reflect any concern that the Engrams were hiding the vehicle until July 11, the day after the repossession. By that time, of course, the Engrams had brought their loan current and (absent the very mistake that Chase made) would have had no reason to hide the car from repossession. Although the Engrams' payments had been repeatedly tardy, the fact that they had brought their loan current by paying more than $900 the morning of July 10 at least creates a question of fact about any assertion by Chase that after receiving that payment, it honestly and in good faith

believed that the prospect of further payments by the Engrams was impaired.

¶15 Chase also asserts its numerous earlier unsuccessful attempts to reach the Engrams by telephone contributed to its belief the collateral was insecure. Although Chase unsuccessfully attempted to telephone the Engrams repeatedly between March and June 2006, it did speak with Mr. or Ms. Engram on several occasions. Further, the record does not support Chase's argument that Ms. Engram breached an oral agreement to surrender the vehicle on July 7. Chase's account notes indicate that the collector advised Ms. Engram on July 7 that she needed to surrender the vehicle, but do not say that she agreed to do so.

¶16 Our review of the record reveals questions of material fact regarding whether Chase acted in good faith to repossess on the ground of insecurity. *See* A.R.S. § 47-9102(A)(43) (defining good faith as "honesty in fact"); *see also Clayton v. Crossroads Equip. Co.*, 655 P.2d 1125, 1129-30 (Utah 1982) (affirming judgment for borrower when creditor argued after the fact that it was insecure because borrower had removed collateral from the state). Accordingly, summary judgment should not have been entered in favor of Chase on this basis.

2. Existence of an event of default.

¶17 The record discloses both that Chase did not know of the Engrams' insurance default at the time it ordered the repossession and that it is not Chase's normal practice to repossess based on a borrower's failure to maintain insurance. Nevertheless, Chase argues the Engrams' failure to maintain property insurance on their car was an event of default under the Security Agreement that entitled it to repossess. Chase relies on A.R.S. § 47-9609(A)(1), which states that "[a]fter default, a secured party . . . [m]ay take possession of the collateral." It argues that § 47-9609 does not require the secured party to have knowledge of, or to base its decision on, any particular default; so long as there is a default, the secured party is entitled to seize the collateral.

¶18 In response, the Engrams argue that pursuant to A.R.S. § 47-1309, the insurance default entitled Chase to repossess only if the lack of insurance reasonably caused Chase to believe that its security was impaired. The Engrams also contend that a lender's decision to accelerate a debt upon an event of default is subject to A.R.S. § 47-1304 (Supp. 2009), which provides, "Every contract or duty within this title imposes an obligation of good faith in its performance and enforcement." They argue Chase's attempt to justify the repossession based on the lack of insurance is a breach of Chase's duty of good faith.

¶19 No Arizona case has addressed whether the good-faith provisions of the Uniform Commercial Code limit the right of a secured party to accelerate a debt and seize the collateral after an event of default, and other jurisdictions are split on the issue. In *Brown v. AVEMCO Inv. Corp.*, 603 F.2d 1367 (9th Cir. 1979), the issue was whether a lender acted within its authority in repossessing an airplane that secured a debt. The security agreement provided that the debt could be accelerated if the borrower sold the airplane without prior written consent of the lender. *Id.* at 1369. Without first obtaining consent, the borrower sold the airplane to a third party, which then tendered what it believed was the full amount owing under the note. *Id.* The lender refused the payment, accelerated the note and demanded a larger sum to pay off the loan. *Id.* When the new owner did not pay, the lender seized the airplane, then sold it for a profit. *Id.*

¶20 Applying Texas law, the Ninth Circuit Court of Appeals reversed a jury verdict in favor of the lender because the district court had failed to instruct the jury that the lender was entitled to accelerate the note only "if it in good faith believed that the prospect of payment or performance of the contract was impaired." *Id.* at 1370, 1373. Underlying the appeals court's decision was the principle that "[a]cceleration clauses are designed to protect the creditor from actions by the

debtor which jeopardize or impair the creditor's security. They are not to be used offensively, e.g., for the commercial advantage of the creditor." *Id.* at 1376. The court observed that acceleration does not occur automatically upon an event of default; the default merely permits the lender the option of accelerating, giving rise to potential abuse by the lender. *Id.* at 1378. Guided also in part by principles of equity, the court held the lender was not entitled to accelerate unless it reasonably and in good faith believed itself to be insecure. *Id.* at 1379. Nevertheless, in remanding for a new trial, the court contrasted the "due-on-lease" default that occurred in that case with "[a] breach in insurance provisions[, which] more clearly jeopardizes the security." *Id.* at 1380; *see Fulton v. Anchor Sav. Bank, FSB*, 452 S.E.2d 208, 215 (Ga. App. 1994) (lender could not defend repossession on an event of default it did not rely on in ordering the repossession).

¶21 By contrast, other cases have held that the insecurity provisions of the U.C.C. do not apply when a lender accelerates after an event of default. *See, e.g., Greenberg v. Serv. Bus. Forms Indus., Inc.*, 882 F.2d 1538, 1540 (10th Cir. 1989) (Oklahoma law); *Bowen v. Danna*, 637 S.W.2d 560, 564 (Ark. 1982) (good-faith requirement "is inapplicable where the right to accelerate is conditioned upon the occurrence of an event, such as a lapse of required insurance coverage, which is in the

complete control of the debtor"); *Don Anderson Enters., Inc. v. Entm't Enters., Inc.*, 589 S.W.2d 70, 73 (Mo. App. 1979); *Brummund v. First Nat'l Bank of Clovis*, 656 P.2d 884, 887 (N.M. 1983) (acceleration upon event of default that is within borrower's control is not limited by lender's good faith); *Matter of Sutton Invs., Inc.*, 266 S.E.2d 686, 690 (N.C. App. 1980).

¶22 We need not resolve the issue under Arizona law given the record in this case, which discloses evidence on which a jury could conclude that Chase three times assured Ms. Engram that if she and her husband brought the loan current, the bank would not repossess their car. The Engrams offered evidence that Chase made those assurances to Ms. Engram once on the phone on July 5 and then twice in the branch on July 10, when two bank employees told her separately that having paid the amount owing, she did not have to do anything else to forestall repossession. A jury hearing this evidence could conclude that having received Chase's assurances that if they brought their loan current, their car would not be repossessed, the Engrams acted in reliance on those assurances by paying the full amount outstanding as of July 10.

¶23 Under these circumstances, the jury could find that Chase was estopped or had waived its ability to repossess the car on July 10 for an event of default other than a failure to

pay. *See, e.g., Ariz. Title Guar. & Trust Co. v. Modern Homes, Inc.*, 84 Ariz. 399, 403, 330 P.2d 113, 115 (1958) ("When one has waived strict performance of the provisions of a contract as to when payments must be made, he thereby waives prior defaults and cannot forfeit for subsequent failure until the purchaser is notified of seller's intention to insist upon strict performance and given a reasonable opportunity to bring payments to date"); *Miller*, 146 Ariz. at 414, 706 P.2d at 740; *Mercedes-Benz Credit Corp. v. Morgan*, 850 S.W.2d 297, 299-300 (Ark. 1993) (lender that repeatedly accepts late payments waives right to insist on timely payment absent notice); *Cobb v. Midwest Recovery Bureau Co.*, 295 N.W.2d 232, 237 (Minn. 1980) (same); *Moe v. John Deere Co.*, 516 N.W.2d 332, 337-38 (S.D. 1994) (citing estoppel principles).

¶24 Accordingly, because material issues of fact prevent entry of summary judgment in Chase's favor on the Engrams' claims, we reverse the judgment and remand for further proceedings consistent with this decision.

C. Deficiency Judgment.

¶25 The superior court also entered summary judgment in Chase's favor on its claim for a deficiency judgment. *See* A.R.S. § 47-9615(D) (2005). The Engrams argue on appeal the court erred because Chase did not provide evidence that it

conducted the sale of the car in a commercially reasonable manner.

¶26 After default, a secured party may sell or otherwise dispose of the collateral as long as it does so in a commercially reasonable manner. A.R.S. § 47-9610(A) & (B) (2005). Every aspect of the disposition, including the method, manner, time, place and other terms must be commercially reasonable. A.R.S. § 47-9610(B). When suing on the deficiency, the secured party has the burden to show that the sale was conducted in a commercially reasonable manner. *Gulf Homes, Inc. v. Goubeaux*, 124 Ariz. 142, 145, 602 P.2d 810, 813 (1979).

¶27 In its motion for summary judgment on its deficiency claim, Chase reported that it sold the vehicle at auction for $5,900, leaving a $6,943.71 deficiency on the Engrams' loan. As evidence of the reasonableness of the sale, Chase offered only a letter it had sent to Ms. Engram advising her of the sale and setting forth its calculation of the deficiency amount. The Engrams argued the letter was inadmissible hearsay; even if the letter were admissible, however, it did not establish that the sale was commercially reasonable, as it contained no information regarding the method, manner, time, place and other terms of the sale.

¶28 Bcause Chase did not offer evidence to establish that it conducted the sale in a commercially reasonable manner, it

was not entitled to summary judgment on its deficiency claim. *See id.*

CONCLUSION

¶29 For the foregoing reasons, we reverse the judgment and remand to the superior court for further proceedings. In our discretion, we decline to award attorney's fees to either side, without prejudice to the prevailing side seeking fees it incurred in this appeal from the superior court at the conclusion of the litigation. We award the Engrams their costs upon their compliance with Arizona Rule of Civil Appellate Procedure 21.

/s/
DIANE M. JOHNSEN, Presiding Judge

CONCURRING:

/s/
MAURICE PORTLEY, Judge

/s/
DANIEL A. BARKER, Judge