

**TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN**

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**NO. 03-17-00161-CV**

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**Amplify Federal Credit Union, Appellant**

**v.**

**Jason Garcia, Appellee**

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**FROM THE COUNTY COURT AT LAW NO. 1 OF TRAVIS COUNTY  
NO. C-1-CV-15-004361, HONORABLE TODD T. WONG, JUDGE PRESIDING**

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**MEMORANDUM OPINION**

Amplify Federal Credit Union appeals from the trial court's judgment that it take nothing in its suit to recover the balance due on a motor vehicle installment sales contract. The trial court concluded that Amplify's claim against Jason Garcia for the balance due on the contract was barred by the statute of limitations. *See* Tex. Bus. & Com. Code § 2.725(a) (action for breach of any contract for sale must be commenced within four years after cause of action has accrued); Tex. Civ. Prac. & Rem. Code § 16.004(a)(3) (four-year limitations period for suit on debt). Amplify asserts that its claim is governed by the six-year limitations period applicable to actions on negotiable instruments. *See* Tex. Bus. & Com. Code § 3.118 (six-year limitations period for action on negotiable instrument). We will affirm.

## **FACTUAL AND PROCEDURAL BACKGROUND**

In December 2008, Garcia signed a “Motor Vehicle Installment Sales Contract Simple Finance Charge” pursuant to which he agreed to purchase a 2009 Dodge Ram 1500 truck from Mac Haik Dodge Chrysler Jeep. The sales contract sets out a description of the vehicle purchased as well as Garcia’s agreement to pay 84 monthly payments of \$742.50 for a total sale price of \$62,370. Mac Haik Dodge Chrysler Jeep assigned its interest in the sales contract to Amplify. In March 2010, Amplify notified Garcia that it had exercised its right to repossess the vehicle for nonpayment and was going to sell it at a private sale and apply the proceeds to the balance due on the sales contract. Shortly thereafter, Amplify notified Garcia that it had sold the vehicle and that the deficiency balance on the sales contract was \$20,711.88, which would continue to accrue interest charges in the amount of \$7.09 daily.

In May 2015, Amplify sued Garcia to recover \$35,562.66, the amount it alleged was due and owing under the sales contract. Amplify also sought to recover attorneys’ fees and pre- and post-judgment interest. Garcia filed a general denial and pleaded as an affirmative defense that Amplify’s claim was barred by the statute of limitations. Amplify and Garcia both moved for summary judgment. The trial court granted Amplify’s motion and rendered judgment in its favor. Garcia then filed a motion for new trial in which he argued that the trial court improperly rendered judgment on a claim barred by limitations. Amplify responded to the motion and, for the first time, argued that the sales contract was a negotiable instrument subject to a six-year statute of limitations. *See id.* After a hearing, the trial court granted Garcia’s motion for new trial and rendered a take-nothing judgment against Amplify. This appeal followed.

## DISCUSSION

In one issue, Amplify argues that the trial court erred in concluding that its claim was barred by a four-year statute of limitations. Amplify argues that the sales contract is a negotiable instrument subject to the six-year statute of limitations provided in section 3.118 of the Texas Business and Commerce Code. *See id.* To be subject to chapter three of the Texas Business and Commerce Code, an instrument must be “negotiable.” *See id.* § 3.102(a) (“This chapter applies to negotiable instruments.”). An instrument is negotiable if it is a written unconditional promise to pay a sum certain in money, upon demand or at a definite time, and is payable “to bearer” or “to order” at the time it is issued or first comes into possession of a holder. *Id.* § 3.104(a). Whether an instrument is negotiable is a question of law we review de novo. *See FFP Mktg. Co., Inc. v. Long Lane Master Trust IV*, 169 S.W.3d 402, 407 (Tex. App.—Fort Worth 2005, no pet.).

Except in the case of checks, to be negotiable, an instrument must contain words of negotiability. *See* Tex. Bus. & Com. Code § 3.104(a)(1), (c). Specifically, an instrument must be “payable to bearer or to order.” *Id.* § 3.104(a)(1). Uniform Commercial Code comment 2 explains:

Total exclusion from Article 3 of other promises or orders that are not payable to bearer or to order serves a useful purpose. It provides a simple device to clearly exclude a writing that does not fit the pattern of typical negotiable instruments and which is not intended to be a negotiable instrument. If a writing could be an instrument despite the absence of “to order” or “to bearer” language and a dispute arises with respect to the writing, it might be argued that the writing is a negotiable instrument because the other requirements of subsection [3.104(a)] are somehow met. Even if the argument is eventually found to be without merit it can be used as a litigation ploy. Words making a promise or order payable to bearer or to order are the most distinguishing feature of a negotiable instrument and such words are frequently referred to as ‘words of negotiability.’ Article 3 is not meant to apply to contracts for the sale of goods or services or the sale or lease of real property or similar writings that may contain a promise to pay money. The use of words of negotiability in such

contracts would be an aberration. Absence of the words precludes any argument that such contracts might be negotiable instruments.

*Id.* cmt. 2.<sup>1</sup>

Section 3.109 provides that an instrument is payable to bearer if it (1) states that it is payable to bearer or to the order of bearer or to anyone who is in possession of the promise or order; (2) does not state a payee; or (3) states that it is payable to or to the order of cash or is not to an identified person. *Id.* § 3.109(a). The sales contract at issue in this case does not state that it is payable to bearer or to the order of bearer or to anyone who is in possession of it. Nor does it state that it is payable to the order of cash. The sales contract identifies a payee, Mac Haik Dodge Chrysler Jeep, by stating that Garcia “agree[s] to pay us the Amount Financed, Finance Charge, and any other charges in this contract” and by defining “us” as “the Seller,” which was Mac Haik Dodge Chrysler Jeep. Thus, the sales contract is not an instrument “payable to bearer.”

A promise that is not payable to bearer is payable to order if it is payable (1) to the order of an identified person (i.e., “Pay to the order of J. Smith”) or (2) to an identified person or order (i.e., “Pay to J. Smith or order.”). *See id.* § 3.109(b). The sales contract at issue in this case does not state that it is payable “to the order” of an identified person or that it is payable to an identified person “or order.” Rather, it provides only that Garcia promises to pay Mac Haik Dodge Chrysler Jeep, the seller, the sales price for the vehicle set forth in the sales contract.<sup>2</sup> Although the

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<sup>1</sup> Although the Official UCC Comments following the code provisions are not law, they are persuasive authority concerning the interpretation of the statutory language. *Lockhart Sav. & Loan Ass’n v. RepublicBank Austin*, 720 S.W.2d 193, 195 (Tex. App.—Austin 1986, writ ref’d n.r.e.).

<sup>2</sup> The sales contract also provides that it may be “transferred by the Seller” and, in fact, Mac Haik Dodge Chrysler Jeep assigned its interest in the sales contract to Amplify.

sales price is payable to a specific payee, the sales contract lacks the words of negotiability “or order” required under Texas Business and Commerce Code section 3.109. Thus, the sales contract is not an instrument “payable to order.”

Because the sales contract is not payable to bearer or payable to order, it lacks an essential element to make it a negotiable instrument. *See Leavings v. Mills*, 175 S.W.3d 301, 311 (Tex. App.—Houston [1st Dist.] 2004, no pet.) (“The note consisting of the Leavings’ retail installment contract and completion certificate is not a negotiable instrument, however, since it is not made payable either ‘to bearer’ or ‘to order’ and, therefore, lacks an essential element of a negotiable instrument.”) (citing *Ralls-Tex Mills, Inc. v. Plains White Truck Co.*, 446 S.W.2d 917, 919 (Tex. Civ. App.—Amarillo 1969, writ ref’d n.r.e.); *General Motors Acceptance Corp. v. Matson*, 336 S.W.2d 628, 630 (Tex. Civ. App.—Austin 1960, no writ.)). The trial court properly concluded that the six-year statute of limitations applicable to actions on negotiable instruments did not apply to Amplify’s claim. We overrule Amplify’s sole appellate issue.

### CONCLUSION

Having overruled Amplify’s sole appellate issue, we affirm the trial court’s judgment.

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Scott K. Field, Justice

Before Justices Puryear, Field, and Bourland

Affirmed

Filed: December 19, 2017