United States Bankruptcy Court
District of New Mexico

Document Verification

Case Title: **Debra Lovato v. General Motors Acceptance Corp.**
Case Number: **01-01211**
Nature of Suit:
Judge Code: **S**
Reference Number: **01-01211 - S**

Document Information					
Number:	15				
Description:	Findings of Fact and Conclusions of Law by Judge James S. Starzynski Re: [1-1] Complaint For Breach of Contract, Conversion, Fraud, Unfair Trade Practices and Collections - NOS 498 Other Action, Not Related .				
Size:	30 pages (47k)				
Date Received:	04/15/2003 03:01:10 PM	**Date Filed:**	04/15/2003	**Date Entered On Docket:**	04/15/2003

Court Digital Signature View History

62 72 ff b4 15 cf 45 db ab 3e 07 04 c4 63 4c 88 5d 8e 6a 84 6a f2 02 9f ea eb b3 6c 0c db 9a 9a ba 52 5d a0 1b 89 08 07 10 47 42 96 86 c6 71 b8 9b c0 be 6d 5b 06 54 31 bc ec df 13 f2 5a d6 dc 30 b9 83 a5 a9 e1 f6 ae 4d 1f d5 f5 6d 34 b6 ab ee 53 81 0f 94 8c b4 2f c2 41 14 2f 2f fc ca e0 b3 fc 60 fb 6d b6 56 da 59 e3 97 d5 58 0c e8 a8 fe 18 45 77 c7 26 db 51 78 f2 a4 00 85 af 4d 50

Filer Information	
Submitted By:	Mary B. Anderson
Comments:	Findings of Fact and Conclusions of Law and Memorandum Opinion in Support of Judgment

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re:
DEBRA LOVATO,
Debtor. No. 7-01-14692 SA

DEBRA LOVATO,
Plaintiff,
v. Adv. No. 01-1211 S

GMAC,
Defendant.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND MEMORANDUM OPINION IN SUPPORT OF JUDGMENT

This matter came before the Court for trial on the merits of Plaintiff's complaint for breach of contract, conversion, fraud, unfair trade practices, and collection. Plaintiff is represented by her attorney Jane Rocha de Gandera. Defendant is represented by its attorney Thomas R. Brooksbank. This is a core proceeding. 28 U.S.C. § 157(b)(2)(A).

At trial, Defendant moved to dismiss at the conclusion of Plaintiff's case. The Court made oral findings of fact and conclusions of law on the record and dismissed all claims except the breach of contract claim. Basically, Plaintiff seeks an order declaring that GMAC breached a contract with her by taking collection actions beyond the scope of a settlement agreement that provided for an installment payment of a judgment from her wages. In other words, Plaintiff seeks the benefits of the contract through a damage award and a return of money taken in excess of what would have been

collected had the contract been performed according to its explicit terms.

Findings of Fact

1. Plaintiff purchased a 1996 Pontiac from Baca Pontiac-Buick-GMC, Inc. ("Baca") on or about February 24, 1996, giving Baca a note calling for 35 monthly payments of $293.16 and a final payment of $8,939.72 on March 10, 1999. The note included interest at a rate of 8.8%.

2. Baca assigned the note to GMAC.

3. Plaintiff defaulted in her payments and GMAC repossessed the Pontiac and sold it pursuant to state law, leaving a deficiency due in the amount of $3,116.88, with interest accruing at the rate of 8.8% from April 29, 1999.

4. GMAC filed suit in state court to recover the deficiency plus its attorneys fees and costs of suit. GMAC obtained a default judgment in the state court on July 25, 2000. GMAC filed a transcript of judgment on the same date for $3,116.88 in damages, $122.00 in costs, and $500.00 in attorneys fees.

5. In August, 2000 GMAC began the process of garnishing Plaintiff's wages through her employer Valencia Counseling. Before this time there had been no communications between Plaintiff and GMAC or its attorney, therefore there is no history of prior dealing.

6. GMAC and Plaintiff agreed to a stipulation not to execute in exchange for monthly payments. GMAC agreed, through counsel, to release the writ of garnishment provided that Plaintiff sign the stipulation and return it and begin making monthly payments of $50.00 by October 15, 2000 until the debt was paid in full. There was no testimony that the parties discussed any alternatives to the garnishment of Plaintiff's wages. Therefore, at this time, the stipulation not to execute was essentially synonymous with a plan to make voluntary monthly payments.

7. October 15, 2000 passed without GMAC's attorney receiving either a payment or the signed stipulation.

8. On November 17, 2000 GMAC obtained a second writ of garnishment from the state court directed to Valencia Counseling.

9. Sometime in mid-November, 2000 Plaintiff made a payment of $50.00 to GMAC's attorney. The attorney held off serving the second writ of garnishment on the employer.

10. Plaintiff did not make the December $50.00 payment, so GMAC's counsel in January, 2001 resumed garnishment of the employer and also took steps to obtain a garnishment of Plaintiff's bank account.

11. In response to the garnishment of the employer, Plaintiff telephoned Mr. Brooksbank on or about January 25, 2001, asking to go back to the original agreement (i.e., the $50.00 per month agreement.) During this conversation Plaintiff told him that she was supporting four children and had a hard time paying her bills. Mr. Brooksbank said that he would not consider going back to the original agreement, but would agree to change the garnishment from a percentage of net pay to $50.00 per pay period. There was no discussion of alternative collection procedures such as garnishment of bank accounts. Plaintiff agreed to this proposal. Mr. Brooksbank then faxed a letter to Valencia Counseling on January 25, 2001 that stated:

> Please allow this letter to serve as an agreement between Plaintiff GENERAL MOTORS ACCEPTANCE CORP. and Debra Lovato to change the court ordered garnishment from 25% of the net pay each pay period, to $50.00 each pay period. The aforementioned agreement is effective from the date this letter is signed by the defendant. This is voluntary and shall continue until the debt is paid in full, or the debtor terminates employment. Please send all voluntary wage deductions to Brooksbank & Associates, PO Box 3479, Reno NV 89505.
>
> Please have Debra Lovato sign in the space provided below, as approval of this voluntary deduction, and do not hesitate to contact me should you have any questions regarding this matter.

This letter is a standard form document that Mr. Brooksbank uses to document a reduction in garnishments from 25% to a

fixed dollar amount. Plaintiff signed this letter and the employer faxed it back to Mr. Brooksbank. Mr. Brooksbank testified that Plaintiff had not asked him about other collection activities, and that, if she had, he would not have known offhand of the existence or status of other pending collection activities and he would have had to check into it. He testified that he assumed that any other collection activities in progress would continue. Plaintiff's understanding was that she would pay $50.00 per pay period until the debt was paid in full; she testified that she had no idea that GMAC would continue with other garnishments or attempt to seize her bank account. Neither party knew the assumptions of the other. Neither party intentionally concealed their assumptions. Neither party made a misrepresentation. Neither party had a duty to disclose their own intentions because the existence of other collectible assets was beyond contemplation of the parties. The Court finds that the parties agreed to satisfy the judgment through the series of $50.00 payments, and did not anticipate collection in any other way. The fax agreement accurately represents the entire agreement of the parties. The Court finds it reasonable that Plaintiff or any other reasonable person would assume that the entire agreement consisted of the

$50.00 withholdings, because up to that point there had been no discussions about or attempts at alternative collection methods.

12. The Court finds that the purpose of the fax agreement was to allow Plaintiff to pay her debt over time in a method that she could reasonably afford, given her other financial constraints such as supporting her children. In other words, the parties intended the fax agreement to substitute for or replace the statutory garnishment procedures. Based on the circumstances, the Court finds that Plaintiff reasonably relied on the fax agreement as allowing her to pay over time, and this reliance to her detriment was reasonably foreseeable by GMAC.

13. GMAC obtained a judgment on the writ of garnishment served on the employer on February 16, 2001 which directed the employer to pay GMAC only $100 per month.

14. Plaintiff's employer withheld $50.00 from each of the January 31, February 15, February 28, and March 15, and March 30, 2001 payrolls pursuant to the January 25, 2001 fax.

15. At the time of the fax agreement, neither the Plaintiff nor GMAC's attorney anticipated that Plaintiff would have any significant amount on deposit at a bank, and the parties shared no intent of what would happen in regard to that

possibility. The fax agreement made no mention of the parties' rights in the event that GMAC or its attorney discovered assets in a bank account belonging to Plaintiff.

16. On February 5, 2001, GMAC obtained a writ of garnishment from the state court directed to Ranchers Bank. Ranchers Bank filed its answer on February 28, 2001 stating that it held $4,202.50 in Plaintiff's checking account. This amount consisted primarily of Plaintiff's directly deposited federal income tax refund. Plaintiff first learned of the bank garnishment from a letter and documents sent to her from the bank which she received on or about March 1, 2001. On March 15, 2001 at 9:36 a.m. the state court entered a judgment on writ of garnishment on Ranchers Bank. Plaintiff filed a claim of exemption from garnishment in the collection suit on March 15, 2001 at 4:21 p.m.[1]; she claimed the bank account exempt "Because this is money to take care of children." Plaintiff did not request a hearing on her exemption claim. The Court specifically finds that Plaintiff intended to use the money in her bank account to support her children.

[1] New Mexico Civil Form 4-808 ("Notice of Right to Claim Exemptions (Garnishment)") requires a judgment debtor to complete and return the claim of exemptions form to the clerk of the court within ten days after service of the notice.

17. Plaintiff had not intentionally concealed the existence of her tax refund, and GMAC and its attorney had no knowledge that any amount would be in the bank account when it was garnished.

18. Plaintiff put on evidence of several overdraft fees and costs arising from insufficient funds checks that resulted after the bank account was garnished. She was also required to appear in state court to answer to a bad check action instigated by Wal-Mart. And she was forced ultimately to file bankruptcy, a course of action that she had been resisting, successfully, until struck by the consequences of the garnishment.

19. Plaintiff filed a chapter 7 petition on July 6, 2001.

20. Had the bank account not been seized: a) GMAC would have also received $50.00 wage payments twice in April, May and June, 2001; b) the chapter 7 filing would have stayed any further collection efforts after July 5, 2001; and c) during the 90 days immediately preceding the bankruptcy petition GMAC would have received less than $600.00, so no amount would have been recoverable by Plaintiff as a preference under 11 U.S.C. § 547(c)(8)[2].

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[2] Exemption would also be prohibited by 11 U.S.C. § 522(g)(1)(A) (Debtor may not exempt voluntarily transferred property.)

21. Neither side presented evidence of industry standards or generally common practices related to debt collection.

22. Plaintiff is legally and financially unsophisticated.

Conclusions of Law

EXISTENCE OF CONTRACT

The January 25, 2001 fax was an offer. See Restatement (Second) of Contracts § 24 (1981)("An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.") Plaintiff accepted the offer when she signed the faxed document and directed her employer to withhold monies from her paycheck.

"Consideration" is required to make mutual promises enforceable as a contract. Restatement (Second) of Contracts § 17 (1979). Plaintiff's promise to pay the debt in installments with interest was consideration. See Restatement (Second) of Contracts § 73 cmt. c, illus. 8 (1979):

> A owes B a matured liquidated debt bearing interest. Mutual promises to extend the debt for a year at a lower rate of interest are binding. By such an agreement A gives up the right to terminate the running of interest by paying the debt.

In this case, the parties also agreed to extend the debt (presumably at the judgment rate of interest). Their promises, i.e., GMAC's promise to collect over time and Plaintiff's

promise to pay over time, would be binding. Such an agreement is an accord and satisfaction, which "is a method of discharging a contractual obligation by substituting for such contract an agreement for the satisfaction thereof and performing the substituted agreement." National Old Line Insurance Company v. Brown, 107 N.M. 482, 484, 760 P.2d 775, 777 (1988). See also United States v. McCall, 235 F.3d 1211, 1215-16 (10th Cir. 2000)(oral promise to pay amount requested in letter from plaintiff created binding settlement agreement, which operated as an accord and satisfaction of the original suit)(applying New Mexico law).

The consequence of entering into an accord and satisfaction is that during the substituted performance, the debtor's original obligation to pay is suspended and cannot be enforced.[3] As a result, while Plaintiff was performing the

[3] "If the obligee is unwilling to give up its rights on the original duty until the obligor has actually performed the new promise, the obligee can make what is called an accord, rather than a substituted contract. An accord is a contract under which the obligee promises to accept a stated performance in satisfaction of the obligor's existing duty.... Not until performance, which is called satisfaction, however, is the original duty discharged. Discharge in this way is therefore said to be by accord and satisfaction. Until satisfaction by performance, the original duty is suspended and cannot be enforced by the obligee." 1 E. Allen Farnsworth, Farnsworth on Contracts (2nd Ed. 2001) § 4.24. (Emphasis in original.)

substituted agreement, Defendant was precluded from pursuing its original collection efforts.

Furthermore, in New Mexico by statute[4] every written contract is presumed to be supported by sufficient consideration unless the contract itself bears evidence of lack of consideration. Burt v. Horn, 97 N.M. 515, 517, 641 P.2d 546, 548 (Ct. App. 1982)(construing § 38-7-2 N.M.S.A. 1978). The fax agreement does not bear evidence of lack of consideration on its face. Compare O'Brien v. Quantius (In re Quantius' Will), 58 N.M. 807 at 822-23 and 823, 277 P.2d 306 at 316 (1954) (concurrence relies on § 20-208 N.M.S.A. 1941 [the previous codification of § 38-7-2 N.M.S.A. 1978], but it and the majority affirm on the basis of the considerable parol evidence about the status of the obligations between the parties). Therefore, the Court must presume there was adequate consideration. GMAC did not rebut the presumption of consideration.

Furthermore, the funds actually paid pursuant to the fax agreement would be sufficient consideration to make it enforceable. See Romero v. Earl, 111 N.M. 789, 791, 810 P.2d

[4] § 38-7-2 NMSA 1978 provides: "Every contract in writing hereafter made shall import a consideration in the same manner and as fully as sealed instruments have heretofore done."

808, 810 (1991)(citing Restatement (Second) of Contracts § 71 (1979)).

There is a line of New Mexico cases which stand for the "general rule that 'the promise to do what a person is already obligated by law or contract to do is not sufficient consideration for a promise made in return.'" Burt v. Horn, supra, 97 N.M. at 517, 641 P.2d at 548, citing Hale v. Brewster, 81 N.M. 342, 345, 467 P.2d 8 (1970); In re Quantius' Will, 58 N.M. 807, 277 P.2d 306 (1954); Munro v. City of Albuquerque, 48 N.M. 306, 150 P.2d 733 (1943). Accord, Ollman v. Huddleston, 41 N.M. 75, 78, 64 P.2d 97, 99 (1937). To put it most simply, Plaintiff owed GMAC the debt, GMAC was entitled to exercise the various collection rights given it by state statute, and the promise to pay the debt over time would appear to be a promise to do what the Plaintiff was already obligated to do. Nevertheless, an examination of those cases, shows that they are not applicable to the circumstances of this case.

In Burt v. Horn, the New Mexico Court of Appeals upheld the second contract as valid because settlement of the disputes which existed between the owner and contractor over the first contract, which disputes had led to the execution of the second contract, constituted consideration for the second contract. Id., 97 N.M. at 518, 641 P.2d at 549. In other cases, the

second contract has been held invalid as "an exaction akin to extortion." Pittsburgh Testing Laboratory v. Farnsworth & Chambers Co, Inc., 251 F.2d 77, 79 (10th Cir. 1958) (applying Oklahoma law). One of the examples cited by the Tenth Circuit is Ollman v. Huddleston, supra. In Ollman, homeowners and a builder agreed that the builder would build a new home for the owners while the owners continued to live in their old house. Part of the agreement required that, as part of the financing for the new house, the owners transfer the equity in the old house to the builder when the new house had been built or when the old house sold. The builder arranged for the sale of the old house, but then the owners refused to transfer the equity unless the builder executed a note to them for that equity. The builder was compelled to do so or to lose the sale. 41 N.M. at 79, 64 P.2d at 99. The New Mexico Supreme Court affirmed a judgment against the owners on the ground that there was no consideration for the note. "[The builder] cannot be deprived of [the] defense of want of consideration because [the owners] relied on a claim they knew was false;..." 41 N.M. at 80, 64 P.2d at 100.

In Hale v. Brewster, 81 N.M. 342, 344, 467 P.2d 8, 10 (1970), "[t]he question presented concerns the right and propriety of an attorney taking compensation for representation

of an indigent charged with a crime when he has been appointed by the court to represent the indigent and has been paid by the court for the services rendered." Citing the rule that promising to do what one is already obligated to do does not constitute consideration, the Supreme Court held that "if the note was given to [the attorney] as a fee for services, which he was already bound to perform by virtue of his appointment by the court, [the client] had a good and valid defense...." Id., 81 N.M. at 345, 467 P.2d at 11.

O'Brien v. Quantius (In re Quantius' Will), 58 N.M. 807, 277 P.2d 306 (1954) began when the father and mother of the plaintiff executed a separation agreement which provided, among other things, that the father would maintain an insurance policy on his life for the couple's daughter (plaintiff). Subsequently the parents divorced, and the separation agreement was largely incorporated into the divorce decree by the trial judge who merely approved the provisions and directed that they be carried out. Id., 58 N.M. at 814, 277 P.2d at 310. Then plaintiff was adopted first by her aunt and then again adopted ("reacquired", as it were) by her mother and her mother's new husband. Following the adoptions, which had the effect of cancelling any support obligation imposed by the divorce decree on the father (whether owed directly to the child or indirectly

through the child's mother), id., 58 N.M. at 818, 277 P.2d at 313, the father changed the beneficiary of the insurance policy.

On these facts, the majority focused on the effect of the separation agreement as a separate contract. It had been typed and signed prior to but in contemplation of the divorce action. Then the parties, after the divorce action began, supplemented the agreement with two handwritten paragraphs (also signed by the two parents) which included the insurance policy provisions. The majority held that the first (typewritten) part was a sufficient contract in itself, that the mother gave nothing and suffered nothing in the handwritten addition, and therefore there was no consideration that could make the two handwritten paragraphs binding. Id., 58 N.M. at 821-22, 277 P.2d at 315. The concurrence, citing § 20-208 N.M.S.A. 1941 (§ 38-7-2 NMSA 1978 as it was then codified), stated that the entire separation agreement carried a presumption of consideration and there was no evidence to overcome the presumption. The concurrence went on to join in the result but not the reasoning of the majority by arguing simply that there was no longer a binding divorce decree (or, for that matter, a binding support agreement) once the child was adopted by another party, and thus the provision in question could no

longer obligate the father. Id., 58 N.M. at 823-24, 277 P.2d at 316-17. Implicit in the concurrence is the suggestion that the majority opinion unnecessarily considered the consideration issue. The majority comment about considering that issue lends some support to the suggestion. Id., 58 N.M. at 819, 277 P.2d at 313-14 (despite the fact that the plaintiff no longer relied on the original divorce decree for her claim, the court discussed all the principles and points raised by the parties rather than decide the case on the "bare bones").

Finally, in Munro v. City of Albuquerque, 48 N.M. 306, 150 P.2d 733 (1943), reh. denied 1944, plaintiff had purchased city paving bonds, issued pursuant to a city ordinance, payment of which bonds was secured by the assessment revenues and the proceeds of the sales of the properties which were liened and foreclosed on for the paving. The assessment revenues were insufficient to pay the bonds, and the city and the plaintiff bondholder had failed to enforce the liens timely, so that foreclosure of the liens was barred. Plaintiff sued the city. The Supreme Court held that because the underlying state statute authorizing such bonds permitted payment of the bonds only from the assessment revenues and from the foreclosure proceeds, plaintiff could not sue the city. Id., 48 N.M. at 315-27, 150 P.2d at 738-46. Before deciding that issue, the

court noted that the ordinance, which had been passed pursuant to the statute, committed the city to collecting the assessments, which was no more than what the statute already provided. Thus the ordinance could not for that reason, among others, constitute a contract between the bondholder and the city. Id., 48 N.M. at 315, 150 P.2d at 738.

The theme of the first two cases, Hale and Ollman, is not so much the lack of consideration as it is some sort of overreaching or even extortion. In the instant case, there has been nothing of the sort. GMAC was under no compulsion whatever to agree to the payment schedule, nor under any illusion. Rather, it acted knowingly and voluntarily, and for that matter out of honorable motives, to permit Plaintiff to continue to provide for her children.

Similarly, in Quantius and Munro, the deciding issue was not the general rule of no consideration for a promise to do something already promised, but rather, in Quantius, the fact that Quantius was under no obligation at all once the first adoption took place, and in Munro, the fact that the statute limited the city's liability in any event. Thus neither of those cases actually turn on the cited rule.

In addition, none of the cases cited above which apply the "general rule" discuss the issue of at least one party's

justifiable reliance on the second agreement; indeed, it is clear from the facts of each of the four cases that none of the complaining parties was entitled to rely on the alleged promise. In this case, however, the evidence was clear that Plaintiff relied on the agreement with GMAC to ensure that she had sufficient funds to care for her family. GMAC's promise is enforceable without consideration because Plaintiff relied on it and made payments, and the reliance was foreseeable by GMAC. Smith v. Village of Ruidoso, 128 N.M. 470, 478, 994 P.2d 50, 58 (Ct. App. 1999) (forbearance will [only] serve as consideration where there is either an express agreement to forbear or where the circumstances otherwise suggest that a contract ought to be enforced by implying such an agreement, citing Spray v. City of Albuquerque, 94 N.M. 199, 2000-01, 608 P.2nd 511, 512-3 (1980)). See Romero v. Mervyn's, 109 N.M. 249, 252 n.1, 784 P.2d 992, 995 n. 1 (1989). See also Restatement (Second) of Contracts § 90 (1981)("A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.") The Court therefore finds that the parties entered into a valid and enforceable contract.

New Mexico favors settlement agreements and the courts will enforce them as contracts. Environmental Control, Inc. v. City of Santa Fe, 131 N.M. 450, 456, 38 P.3d 891, 897 (Ct. App. 2001) cert. denied 131 N.M. 564, 40 P.3d 1008 (2002); Ratzlaff v. Seven Bar Flying Service, Inc., 98 N.M. 159, 163, 646 P.2d 586, 590, cert. denied 98 N.M. 336, 648 P.2d 794 (1982). The settlement agreement in this case is a contract that should be enforced. The issue for the Court is to determine what are the contract's terms.

In Levenson v. Mobley, 106 N.M. 399, 744 P.2d 174 (1987) the New Mexico Supreme Court abandoned the four-corners approach to contract interpretation, holding that the parol evidence rule did not bar admission of evidence extrinsic to a written contract to determine the circumstances under which the parties contracted and the purpose of the contract. Id. at 403, 744 P.2d at 178. Then, in C.R. Anthony Company v. Loretto Mall Partners, 112 N.M. 504, 509, 817 P.2d 238, 243 (1991) the Supreme Court expressly overruled earlier New Mexico cases that prohibited a court's hearing evidence of the circumstances surrounding the making of a contract. See also Mark V, Inc. v. Mellekas, 114 N.M. 778, 781, 845 P.2d 1232, 1235 (1993)("The court may consider collateral evidence of the circumstances surrounding the execution of the agreement in determining

whether the language of the agreement is unclear.") The subsequent case of Memorial Medical Center, Inc. v. Tatsch Construction, Inc., 129 N.M. 677, 12 P.3d 431 (2000) has not appreciably changed the approach of those cases. Id., at 683.

The Court has considered the circumstances surrounding the making of the contract that is now before the Court. On one side is a sophisticated corporate creditor that, by law, could pursue various collection methods against the Debtor. On the other side is an unsophisticated judgment debtor who was attempting to make ends meet to support her children and who claimed that full garnishment of her paycheck would be a genuine hardship. Although under no duty to do so, GMAC acted in an honorable way and worked out a settlement agreement that seemed to work for both parties. As the settlement, the parties agreed to the treatment set out in the fax, i.e., to collect the judgment in a slower manner, while still allowing Plaintiff enough take-home pay to support herself and her children. The parties did not contemplate or decide what to do if the plaintiff were to receive a large tax refund.

The Court finds that the contract is not ambiguous. "A contract is ambiguous if the court determines it can reasonably and fairly be interpreted in different ways." Nearburg v. Yates Petroleum Corporation, 123 N.M. 526, 531, 943 P.2d 560,

565 cert. denied 123 N.M. 446, 942 P.2d 189 (1997)(citing Mark V, Inc., 114 N.M. at 781, 845 P.2d at 1235.)

> Ambiguity, as it has been used in this state, is best understood as a proxy for describing lack of clarity in the parties' expressions of mutual assent. The term, as it has been employed, incorporates a variety of conceptual problems including the distinctive notions of ambiguous syntax, ambiguous terms, vagueness, and general lack of clarity.

C.R. Anthony Company, 112 N.M. at 509 n.2, 817 P.2d at 243 n.2. Therefore, a prerequisite for a finding of ambiguity is a lack of clarity in an expression of mutual assent.

On the other hand, silence, by itself, in a contract generally does not create an ambiguity. Lyon Development Company v. Business Men's Assurance Company of America, 76 F.3d 1118, 1124 (10th Cir. 1996)(applying Missouri law); Wallace Industries Inc. v. Salt City Energy Venture L.P., 233 A.D.2d 543, 545, 649 N.Y.S.2d 531, 533 (Ct. App. 1996) (Silence in fully integrated contract does not cause ambiguity requiring extrinsic evidence.) But see Simmons v. Plummer, 120 N.M. 481, 484, 901 P.2d 1084, 1087 (Ct. App.) cert. denied 120 N.M. 213, 900 P.2d 962 (1995)(Without discussion or analysis, Court treats a contract that has an omitted term as ambiguous.)

> We agree that ambiguity is not the problem. If a written contract is silent on a matter, the question is not one of interpreting the language of the writing but rather one of determining the legal effect of the writing. Ambiguity results when the intention of the parties is expressed in language

> susceptible of more than one meaning, not when a contract is silent on a matter.

Embrey v. Royal Indemnity Company, 986 S.W.2d 729, 731 n.2 (Tx. Ct. App. 1999) aff'd. 22 S.W.3d 414 (Tx. 2000) (citations omitted). The problem in this case is not ambiguous language in the contract. The language of the contract presents the full agreement of the parties in clear and unambiguous terms. The problem is the lack of any language that would either permit or disallow garnishment of Plaintiff's bank account in addition to the wage withholdings. Furthermore, this lack of language is understandable given the fact that the parties in fact had no agreement beyond the terms specifically set out nor did they contemplate a need for this language at the time they entered the contract. The Court finds that the language, to the extent it is set out, cannot reasonably and fairly be interpreted in different ways and is therefore not ambiguous. Therefore, the task for the Court is to interpret the legal effect of the writing, applying the rules of contract interpretation that do not depend on extrinsic evidence. C.R. Anthony Company, 112 N.M. at 510 n.5, 817 P.2d at 244 n.5.

Applying the various rules for interpretation of contracts, the Court concludes that judgment should be entered for Plaintiff.

A. Construe contract as a whole to effectuate its purpose

Every part of a contract should be reasonably construed to carry out its primary purpose. Castle v. McKnight, 116 N.M. 595, 599, 866 P.2d 323, 327 (1993). The purpose of this contract was to allow Plaintiff to repay GMAC over time in a method that accommodated her budget and other financial responsibilities. Construing the contract to allow other collection activities against the debtor would deprive her of funds on which to live and therefore hinder the contract's overall purpose. Therefore, the contract should be construed to prohibit alternate collection remedies. See also id. at 599, 866 P.2d at 327 (1993):

> [R]easonableness in performance will be implied in fact by this Court in a contract dispute if a requirement of reasonableness in performance will achieve the apparent intent of the parties and the purposes of the contract, and so long as the parties do not expressly state a contrary intention.

B. Construe contract against drafter

Uncertainties in a contract are construed against the drafter. Montoya v. Villa Linda Mall, Ltd., 110 N.M. 128, 130, 793 P.2d 258, 260 (1990); Schultz & Lindsay Construction Co. v. New Mexico, 83 N.M. 534, 536, 494 P.2d 612, 614 (1972); Restatement (Second) of Contracts § 206 (1979). Applied to this case, if there were any doubt whether the contract allowed garnishment of the bank account, it would be resolved in favor of the Plaintiff. And, the Court finds that this is an

equitable result as well considering the relative positions and sophistication of the parties. GMAC was in the position to state that the agreement should not be construed to prevent other collection remedies.

C. Inclusion of one thing implies exclusion of others

Under this rule a Court assumes that when parties list a specific item they intend to exclude unlisted items, even when they are similar to those listed. See 2 E. Allen Farnsworth, Farnsworth on Contracts § 7.11 (2nd Ed. 2001) and cases cited in n.6. Although this rule is applicable to contracts, see id., New Mexico has no cases that apply this rule to contracts. Numerous New Mexico cases have applied this rule to statutory and constitutional construction however. See Cooper v. Albuquerque City Commission, 85 N.M. 786, 793, 518 P.2d 275, 282 (1974); Fancher v. Board of Com'rs of Grant County, 28 N.M. 179, 189-190, 210 P. 237, 241 (1922). Application of this rule to this case would suggest that, because one method of collection was specified (wage garnishment), alternate methods not specified (i.e., bank garnishment) would be prohibited.

If GMAC wanted the ability to garnish the bank account, that provision should have been set out expressly in the contract. Courts should not impose on the parties contractual rights and duties which they omitted from their contracts.

Doing so would be making a new contract for the parties, which a court should not do. Continental Potash, 115 N.M. at 704, 858 P.2d at 80.

D. Covenant of Good Faith and Fair Dealing

New Mexico follows the Restatement (Second) of Contracts under which every contract is deemed to contain an implied covenant of good faith and fair dealing. Cafeteria Operators, L.P. v. Coronado-Santa Fe Associates, L.P., 124 N.M. 440, 445, 952 P.2d 435, 440 (Ct. App.) cert. denied 124 N.M. 311, 950 P.2d 284 (1997). Under this covenant, a contract will not be interpreted to allow one party unbridled discretion to deprive the other of the benefits of the contract. Id. See also Bourgeous v. Horizon Healthcare Corporation, 117 N.M. 434, 438, 872 P.2d 852, 856 (1994)(same.) and Allsup's Convenience Stores, Inc. v. North River Insurance Company, 127 N.M. 1, 14, 976 P.2d 1, 14 (1998)(Court extends Bourgeous to find an affirmative duty to act in order to prevent denial of the other party's rights under a contract.)

> The implied covenant of good faith and fair dealing is the residual gap-filling default rule of contract law. It imposes limits upon one contracting party's ability to negatively impact the contract's value to the other contracting party. It determines when a party may no longer pursue his own self-interest but must instead engage in cooperative behavior by deferring to the other party's contractual interests.

> Because it is a gap-filling default rule, the covenant applies only when the propriety of the conduct is not resolved by the terms of the contract or by another default rule. That situation ordinarily arises (1) when the contract is silent or ambiguous about the permissibility of the conduct, or (2) when the conduct is undertaken pursuant to a grant of discretion and the scope of that discretion has not been designated.

Thomas A. Diamond and Howard Foss, Proposed Standards for Evaluating When the Covenant of Good Faith and Fair Dealing Has Been Violated: A Framework for Resolving the Mystery, 47 Hastings L.J. 585, 586 (1996)(Footnotes omitted.) See also Centronics Corporation v. Genicom Corporation, 132 N.H. 133, 143, 562 A.2d 187, 193 (1989):

> [The] cases illustrate a common rule: under an agreement that appears by word or silence to invest one party with a degree of discretion in performance sufficient to deprive another party of a substantial proportion of the agreement's value, the parties' intent to be bound by an enforceable contract raises an implied obligation of good faith to observe reasonable limits in exercising that discretion, consistent with the parties' purpose or purposes in contracting.

Applying the covenant of good faith and fair dealing to this contract, GMAC should not be allowed to unilaterally negate Plaintiff's benefits under the contract.

DAMAGES

In a breach of contract case or case for specific performance, the measure of damages is to place the parties in the same position they would have been in if the contract had

been performed according to its terms. McCoy v. Alsup, 94 N.M. 255, 262, 609 P.2d 337, 344 (Ct. App. 1980). In this case, the Plaintiff would have been garnished $300.00 additional dollars prior to the filing of the petition, but the bank account in the amount of $4,202.50 would not have been taken. Therefore, Plaintiff should be awarded $3,902.50.

In its answer GMAC raised the affirmative defense of setoff. However, that defense is unavailing as to the total award of damages; it would be inequitable to allow GMAC to keep the fruits of its contract violation which in effect accelerated the debt and apparently resulted in Plaintiff having to file her bankruptcy petition. See e.g., Gimbel v. International Mailing and Printing Co., Inc., 505 So.2d 631, 632 (Fla. Ct. App. 1987)(Setoff refused if injustice will result); Taylor v. Taylor, 180 Kan. 213, 218, 303 P.2d 133, 137 (1956)(Setoff discretionary.) Instead, taking the bankruptcy filing as a fact, the Court's damage award does take into account the additional collections which GMAC would have received.[5]

[5] It appears that had the garnishment not taken place, Plaintiff would not have filed a bankruptcy petition at all. Neither party addressed that possibility, and trying to account for that possibility would be largely speculation.

Plaintiff's request for other damages – the costs arising from the insufficient funds checks -- should be denied because they are consequential damages not foreseeable at the time the parties entered into their agreement and thus not within the contemplation of the parties at the time of contracting. Camino Real Mobile Home Park Partnership v. Wolfe, 119 N.M. 436, 446, 891 P.2d 1190, 1200 (1995). Although a garnishment of a household checking account could reasonably be expected to result in NSF check charges, the parties did not contemplate a garnishment on the checking account to begin with. Alternatively, it would be inequitable to charge GMAC with the consequential damages even if they were foreseeable, since GMAC did not intentionally obtain the checking account garnishment after entering the agreement. And even taking into account that GMAC did not return the funds after the garnishment, GMAC would or might not reasonably anticipate under the law that it was precluded from also collecting on the checking account.

With respect to interest and an interest rate on the amount to be recovered by Plaintiff,

> [a]n injured party is entitled to prejudgment interest as a matter of right when the amount due under the contract can be ascertained with reasonable certainty by a mathematical standard fixed in the contract or by established market prices. When the contractual debt owed is ascertainable by these means the legal annual interest rate, presently fifteen percent, applies. ... Prejudgment interest is meant

> to compensate a plaintiff for injuries resulting from the defendant's failure to pay and the loss of use and earning power of plaintiff's funds expended as a result of the defendant's breach.

Kueffer v. Kueffer, 110 N.M. 10, 12, 791 P.2d 461, 463 (1990)(citations omitted). GMAC's Transcript of Judgment (Exhibit D) bears interest at the rate of 8.8%. The Court finds that 8.8% would be a reasonable rate of interest on Plaintiff's judgment. Therefore, Plaintiff should be awarded interest on the amount of $3,902.50 from March 1, 2001 at the rate of 8.8%.

Conclusion

Plaintiff and GMAC reached an enforceable compromise agreement concerning the payment of the debt owed by Plaintiff, which did not include the right of GMAC to garnish the Plaintiff’s checking account. In consequence GMAC is liable to Plaintiff for the garnished funds. A judgment consistent with this opinion will issue.

Honorable James S. Starzynski
United States Bankruptcy Judge

I hereby certify that on April 15, 2003, a true and correct copy of the foregoing was either electronically transmitted, faxed, delivered, or mailed to the listed counsel and parties.

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