

SUN BANK, successor in interest to BUCKTAIL BANK & TRUST, Plaintiff	: IN THE COURT OF COMMON PLEAS OF : LYCOMING COUNTY, PENNSYLVANIA : : :
vs.	: NO. 01-00,432 : CIVIL ACTION : :
HEATHER R. FRYE-ENGLISH, Defendant	: PRELIMINARY OBJECTIONS

Date: September 11, 2001

OPINION and ORDER

Before the Court are Defendant’s Preliminary Objections, in the nature of a demurrer, to Plaintiff’s Complaint. The Preliminary Objections were filed on April 18, 2001, and a hearing and argument were held on June 18, 2001. The three issues before this Court are: Whether the Complaint should be dismissed due to Plaintiff’s failure to allege compliance with the Motor Vehicle Sales Finance Act (hereinafter the Act)? Whether the Complaint should be dismissed for failure to comply with Rule 1019(h)? Whether the Complaint should be dismissed for failure to allege any loss suffered by Plaintiff? For the reasons to be explained in this opinion, Defendant’s Preliminary Objection as to number one will be DENIED; number two will be SUSTAINED; and number three will be SUSTAINED.

Facts

This action was initiated by Complaint filed on or about March 20, 2001 seeking judgment against Defendant for sums owed pursuant to the Motor Vehicle Installment Sale Contract. Plaintiff’s Complaint filed March 20, 2001, alleges that on November 27, 1998, the Defendant, Heather R. Frye English, borrowed the sum of Fourteen Thousand Five Hundred Forty-Seven Dollars and 36/100 (\$14,547.36) from the Plaintiff in connection with Purchase

Money Financing for a 1997 Pontiac Grand Am automobile. Paragraph 5 of the Complaint states: “To secure repayment of sum due under the note, the Defendant gave the Plaintiff a security interest in the motor vehicle, as more fully reflected in the Certificate of Title, a true and correct copy of which is attached hereto.” To secure repayment of sums due under the note, Ms. English gave Sun Bank a security interest in the motor vehicle. Defendant has defaulted upon the repayment terms of the loan. Based upon Defendant’s default, Plaintiff repossessed the motor vehicle on December 27, 2000, and provided Defendant with written notice of the repossession, a true and correct copy of which is attached hereto.(?) The Complaint also asserted Ms. English did not redeem the motor vehicle after her default. Defendant has not redeemed the motor vehicle.

The Complaint has attached to it copies of the automobile Certificate of Title and a copy of the repossession notice. Defendant filed Preliminary Objections to Plaintiff’s Complaint on April 18, 2001. Defendant filed a brief in support of Preliminary Objections on May 31, 2001. Plaintiff filed a brief in opposition to Defendant’s brief on June 6, 2001.

Discussion

Defendant’s Preliminary Objections in the nature of a demurrer, requests this Court to dismiss Plaintiff’s Complaint under three separate issues. Defendant first contends that Plaintiff’s Complaint should be dismissed due to Plaintiff’s failure to allege the agreement between the parties was in writing as required with the Motor Vehicle Sales Finance Act.

The second and related preliminary objection is that Plaintiff’s Complaint should be dismissed for failure to comply with Rule 1019(h) Pa. R.C.P., for failure to attach any written Sales Contract.

In Plaintiff's Complaint, a "Notice of Repossession" was attached as an exhibit that makes reference to the notice being given, "pursuant to the Motor Vehicle Sales Finance Act of 1947." (Complaint Exhibit unnumbered.) Defendant argues that the Act (69 P.S. § 601 et. seq.) requires that every installment sales contract for the finance of a motor vehicle be in writing and since no writing is alleged or attached to the Complaint, the Complaint must be dismissed. Plaintiff argues it does not have to attach any writing since no writing is alleged.

Both parties cite *Delinger, Inc. v Agresta*, 714 A.2d 1048, 1051 (Pa. Super 1998) which states, "where the pleading does not specify whether the alleged contract was written or oral, the inference is that it was an oral contract." In *Delinger* the court concluded that Rule 1019(h) was not violated when appellant did not attach a copy of the alleged contract to the non-specific complaint. The lawful inference is that the agreement was an oral agreement, which obviously could not be attached to the complaint. *Id. at 1052*. This being true, Defendant asserts that Plaintiff's complaint should be dismissed because it does not comply with the Motor Vehicle Sales Act statutory requirement that the contract must be in writing. 69 P.S. §613(a). Plaintiff further argues the Complaint fails to conform to Pa. R.C.P. 1019(h) which states, "when any claim or defense is based upon an agreement, the pleading shall state specifically if the agreement is oral or written."

Defendant ingeniously argues, based upon *Delinger*, as there is allegation of the contract being written nor of it being oral, an oral contract must be presumed and therefore Rule 1019(h) does not apply. Defendant's live argument cannot save the Complaint in its present form.

The Complaint in paragraph 5 alleges the existence of a note. A note is a “. . . commercial paper(s). . . relating to the owing of a debt.” Webster’s New World Dictionary, p. 973 (1984). Hence, a written contract document is alleged and must be attached. The *Delinger* presumption does not apply. If a claim is based on a writing, the pleader shall attach the writing, but if the writing is not accessible, it is sufficient so to state, together with the reason, and to set forth the substance in writing.

The Complaint in paragraph 3 alleges the amount owed was borrowed in connection with “Purchase Money Financing for a 1967 Pontiac Grand Am automobile.” This paragraph either pleads a writing or the presumption of an oral contract for the purchase money automobile financing. If this pleading asserts a writing it must be attached. If it is silent as to being written or oral, as Plaintiff now contends, then the Motor Vehicle Sales Finance Act has been violated due to the contract being unwritten. It normally would therefore be legally insufficient and subject to demurrer.

However, the notes in Rule 1028 of the Pennsylvania Rules of Civil Procedure (hereinafter Pa.R.C.P.) state, “The defense of the bar of a statute of frauds or statute of limitations can be asserted only in a responsive pleading as new matter under Rule 1030.”

Therefore, Defendant’s first demurrer as to non-compliance with the Motor Vehicle Sales Finance Act will be denied, but the issue may be raised in Defendant’s pleading pursuant to the Pennsylvania Rules. The second demurrer will be sustained because the note was not attached nor did the Complaint state why it was not attached.

Defendant’s final preliminary objection is that Plaintiff has failed to allege any deficiency due by the defendant. Plaintiff’s complaint alleged that Defendant defaulted on an

agreement to finance the purchase of a motor vehicle and that plaintiff has repossessed the vehicle. Plaintiff has not yet sold the vehicle. Defendant argues therefore that no deficiency exists between the amount allegedly owed to Plaintiff and the proceeds from sale Plaintiff should have obtained from disposing of the automobile.

The applicable statute provides: “If the buyer does not redeem the repossessed motor vehicle within the said fifteen (15) day notice of redemption period, then the seller or holder shall not have the right to bring an action or proceeding against the buyer for a deficiency, unless there shall have been a public or private sale of the repossessed motor vehicle and collateral security.” 69 P.S. §626. 69 P.S. §627 states, if the proceeds of the resale are not sufficient to defray the expenses thereof, the seller or holder may recover the deficiency from the buyer.

It is this Court’s conclusion that Plaintiff cannot bring an action or proceeding against the buyer for a deficiency, as provided in 69 P.S. §626, unless there has been a public or private sale of the repossessed motor vehicle and collateral security. 69 P.S. §626(B). Once a sale is commenced, an action for a deficiency judgment can be instituted if the proceeds of the sale of the vehicle are insufficient to cover the balance due on the contract. 69 P.S. §627.

Plaintiff cannot retain the vehicle and sue for the balance due on the contract. Plaintiff must make an effort to sell the motor vehicle at a private or public sale and then bring an action for any deficiency that is not covered by the proceeds of the resale.

ORDER

For the foregoing reasons, Defendant's Preliminary Objection, Count I, whether the Complaint should be dismissed due to Plaintiff's failure to allege compliance with the Motor Vehicle Sales Finance Act, is hereby DENIED. Defendant's Preliminary Objection, Count II, whether the Complaint should be dismissed for failure to comply with Rule 1019(h), is hereby SUSTAINED. Defendant's Preliminary Objection, Count III, whether the Complaint should be dismissed for failure to allege any loss or the deficiency suffered by Plaintiff, is hereby SUSTAINED.

Plaintiff shall have a period of twenty days from notice of this Order in which to file an amended complaint.

BY THE COURT:

William S. Kieser, Judge

cc: William P. Carlucci, Esquire
Norman M. Lubin, Esquire
Judges
Suzanne R. Lovecchio, Law Clerk
Gary L. Weber, Esquire (Lycoming Reporter)