

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE**

IN RE:

BYRON CRUMB,
Debtor

Case No. 95-29798-WHB
Chapter 13

BYRON CRUMB,
Plaintiff,

VS.

Adversary Proceeding No.
95-1247

CAR AND CREDIT AUTO SALES,
ANCRO FINANCE and WYNN OIL COMPANY,
Defendants.

**MEMORANDUM OPINION AND ORDER ON
MOTIONS FOR SUMMARY JUDGMENT**

The defendant Wynn Oil Company (“Wynn”) filed its motion for summary judgment, accompanied by a memorandum and affidavit, and the debtor responded with his motion to dismiss Wynn’s motion or in the alternative for summary judgment for the debtor. This opinion contains findings of fact and conclusion of law pursuant to FED. R. BANKR. P. 7052 and 7056.

The debtor’s complaint seeks monetary damages from three defendants for damages resulting from the purchase of an automobile that was allegedly the subject of a warranty issued by Wynn through its alleged agent, and the seller of the automobile, Car and Credit Auto Sales. Ancro Finance is alleged to have financed the purchase. This chapter 13 case was filed on September 14, 1995, and notwithstanding that this purchase was made prebankruptcy, the debtor’s complaint alleges that this is a core proceeding.

No certificates of service on the defendants have been filed, and the only defendant to make

an appearance is Wynn, which filed its motion to dismiss the complaint or in the alternative for summary judgment. That motion says that the debtor is not the proper plaintiff as he was not the contracting party on the purchase; that the seller was not an authorized agent of Wynn; that Wynn was not in privity of contract with the seller or with the purchaser; that the warranty contract, if valid, could not have become effective until May 5, 1995, or thirteen days after the debtor's claimed loss; and that as a matter of law the defendant Wynn is entitled to a judgment in its favor. Wynn's affidavit from its Claims Manager Steven Russakov states that the seller, Car and Credit Auto Sales, is not and has never been an authorized selling dealer or agent for Wynn with respect to Wynn's Product Warranty program. Wynn's Product Liability Contract form is attached to the affidavit, which further states that the contractual terms provide that Wynn is not obligated and the contract could not become effective until fifteen days from the date of purchase of the warranty. The Court has examined the contract form attached to the affidavit, and the contract does provide under **"Validation Of Warranty:** This Product Warranty will become effective fifteen (15) days from the date of purchase of this Product Warranty."

The debtor's motion says that he purchased this vehicle with his girlfriend, and he claims third party beneficiary status under TENN. CODE ANNOT. § 47-2-318. He also argues that the fifteen day limitation language is "not conspicuous" and "unconscionable" and he cites TENN. CODE ANNOT. §§ 47-2-316 and 47-2-302 as authority for the unenforceability of that contractual term. Then, asserting that there are genuine issues of fact that require litigation, the debtor moves for his own summary judgment. The debtor filed his own affidavit that asserts that the seller,. Car and Credit Auto Sales, had in its possession at the time of sale one of Wynn's preprinted warranty contract forms; that "[i]t appeared that the Seller had authority to sell him the warranty;" that after his loss he called Wynn and was placed on hold while Wynn set up a conference call with the seller;

that Wynn advised the debtor to call the seller and go over the warranty directly with the seller; that Wynn's telephone number is listed on the back of the contract; that his attorney then called Wynn and was told that Wynn would check on the repairs and that Wynn never said that the seller was not authorized as Wynn's agent; that the debtor bought the car with Shelia Davis and that both of their names appear on the title and finance agreement; that he and Shelia Davis live in the same household; and that he was never told about a fifteen day waiting period.

The only issue that the Court must address at this point is whether this is a core proceeding. That determination is important in that this Court, absent consent of all of the parties to this proceeding, may not enter final judgments in noncore proceedings; rather, this Court may only enter proposed findings of facts and conclusions of law in noncore proceedings. 28 U.S.C. § 157(c). Although the debtor alleges in his complaint that this is a core proceeding, the bankruptcy judge must make an independent determination on this issue. 28 U.S.C. § 157(b)(3). This is especially true where all of the parties have not appeared in the proceeding and none of the defendants have acknowledged the subject matter jurisdiction of this Court. Obviously, the legal issues in this proceeding are state law in origin, but that alone does not make this a noncore proceeding. 28 U.S.C. § 157(b)(3). The plaintiff failed to allege in his complaint when the purchase of the automobile occurred; however, attached to Wynn's memorandum is Exhibit A-2, which is a copy of the Conditional Sales and Security Agreement. That document shows a purchase of a 1990 Pontiac Firebird by "Shelia Davis & Or Byron Crumb" on April 20, 199_ and with payments to begin on May 20, 1995. As stated earlier, the debtor's chapter 13 petition was filed on September 14, 1995; thus, it is obvious that this purchase took place before the filing of the bankruptcy.

Therefore, this adversary proceeding involves a prebankruptcy contractual dispute, and at this point none of the defendants have consented to this Court's entry of a final judgment, subject to

appeal to the United States District Court. Barring such consent, the entry of a proposed order by this Court would burden the United States District Court with a proceeding for which otherwise there would be no subject matter jurisdiction. Of course, at this point, it is not clear that the federal courts have *in personam* jurisdiction over all of the defendants. As a dispute arising out of a prebankruptcy contract, this proceeding is not core. It is not a dispute that arose under title 11 nor did it arise in a case filed under title 11; rather, this dispute arose purely out of an alleged contract that came into existence prior to the bankruptcy case. *See Northern Pipeline Constr. Co. V. Marathon Pipe Line Co.*, 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982). It is this Court's conclusion that this dispute is not a core proceeding.

As a result, this Court will set a hearing for April 23, 1996, at 9:59 a.m., Courtroom 680, 200 Jefferson Avenue, Memphis, Tennessee, for the purpose of giving the parties an opportunity to advise the Court if each party to this proceeding consents to this Court entering a final judgment, subject to appeal to the United States District Court. At that hearing, plaintiff's counsel must also advise the Court of the status of service against the defendants other than Wynn. If all of the parties to this proceeding do not consent to this Court's subject matter jurisdiction and to entry of a final judgment, this Court will consider abstention from this proceeding in order to allow an appropriate state court to determine this dispute.

Pending the April 23, 1996 hearing, the Court will not enter an order on the pending summary judgment motions; however, the Court will observe that it would be inconsistent for the Court to enter summary judgment for the plaintiff when the plaintiff asserts that there is a genuine factual dispute.

IT IS THEREFORE ORDERED that a further hearing will be held on April 23, 1996 at 9:59 a.m. to determine if the plaintiff has obtained service against and intends to proceed against all

defendants named in this complaint and if all parties to this proceeding consent to this Court's entry of a final judgment subject to appeal.

SO ORDERED this 3d day of April, 1996.

WILLIAM HOUSTON BROWN
UNITED STATES BANKRUPTCY JUDGE

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