

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2005-090937

02/14/2008

HONORABLE JOSEPH KREAMER

CLERK OF THE COURT
T. Soto
Deputy

NATESSA TIDWELL, et al.

VERONIKA FABIAN

v.

CROWN TRUCK SALES & SALVAGE INC, et
al.

CROWN TRUCK SALES & SALVAGE
INC
NO ADDRESS ON RECORD

HYUNG S CHOI
MARK D. LONERGAN
NO ADDRESS ON RECORD
MR K'S MOTOR CARS INC
NO ADDRESS ON RECORD
MARK S SIFFERMAN
JOHN B. SULLIVAN
NO ADDRESS ON RECORD

MINUTE ENTRY

The Court has received and reviewed Plaintiffs Melanie and Juan Jaquez and Plaintiff Rodolfo Saucedá's Request for Entry of Judgment and Award of Attorneys' Fees, Defendant Onyx Acceptance Corporation's Opposition, and Plaintiffs' Reply thereto. This case involved interpretation and application of "Anti-Holder Language" in retail installment sales contracts originally between Plaintiffs and Scottsdale Truck Sales ("STS"). Plaintiffs alleged that STS failed to pay off a trade-in for the Jaquezes and failed to transfer title to a vehicle as it had promised Saucedá. STS assigned the retail installment sales contract to Onyx, a finance company. The claims in this case revolved around the question of whether Onyx was required to satisfy STS' obligations (STS is now bankrupt). After cross-motions for summary judgment

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were filed on the issue, Judge Abrams held that Onyx was liable for any claims that Plaintiffs could have asserted against STS.

This matter is now before the Court because Defendant Onyx subsequently accepted portions of Offers of Judgment served by the Plaintiffs. Specifically, Onyx accepted the offers as they pertained to the substantive portions of Plaintiffs' claims and Plaintiffs' claims for costs, but rejected the offers as they pertained to attorneys' fees. Pursuant to Rule 68(c)(3), Plaintiffs have now applied for their attorneys' fees.

Plaintiffs argue that they should be awarded their attorneys' fees pursuant to A.R.S. §12-341.01, and citing the factors set forth in *Associated Indemnity Corporation v. Warner*, 143 Ariz. 567, 694 P.2d 1181 (1985). There is no dispute that this matter arises pursuant to a contract. However, Defendant Onyx argues it should not be required to pay any attorneys' fees because (1) the terms of the retail installment sales contracts prohibit an award of attorneys' fees; (2) the limit on assignee liability found in the contracts and in the FTC "Holder Rule" prohibits an award; (3) A.R.S. § 12-341.01 is preempted by federal law; and (4) in any event the Court in its discretion should decline to award fees.

As to Defendant Onyx's first argument, Onyx cites a provision in the contracts which provides that only attorneys' fees incurred "to collect what you owe" are recoverable. However, the Court reads this language as a unilateral provision governing the circumstances under which Onyx, not the Plaintiffs, may seek fees. This provision does not relate to actions by the Plaintiffs and cannot reasonably be interpreted to preclude Plaintiffs from seeking their fees.

Second, Onyx argues that federally mandated language found in the contracts (as set forth in the FTC Holder Rule) precludes recovery. The Holder Rule (and thus the language of the contracts) states in part that "[r]ecover hereunder by the debtor shall not exceed amounts paid by the debtor hereunder." Onyx cites several cases holding that this provision prohibits an award of attorneys' fees because such an award would allow the recovery to exceed the amounts paid by the debtor. However, the Court believes that because recovery for attorneys' fees is sought pursuant to Arizona statutory law and not pursuant to the terms of the retail installment sales contracts, and because the claim for fees centers on the conduct of Onyx in this litigation and not STS, the Holder Rule should not be interpreted to limit attorneys' fees. Further, in the cases cited by Onyx, it appears that fees were sought in connection with the same statute that established the underlying liability of the seller. Here the statutory basis for fees is separate and distinct from the basis of liability.

Further, the Court does not find Onyx's third argument, that 12-341.01 is preempted by federal law, to be persuasive. The Court perceives of no "conflict" between 12-341.01 and the Holder Rule. The limitation in the Holder Rule applies to actions brought under the language of

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that Rule. As Plaintiffs point out, the FTC has specifically stated that the limitation on affirmative recovery does not eliminate the right of the consumer to seek other rights that the consumer may have under state law. (41 Fed. Reg. 20022, 20023). In the Court's view, one of the rights that a consumer may exercise is the right to seek fees pursuant to a state statute. There is thus no basis to conclude that promulgation of the Holder Rule "left no room" for state regulation on the issue of attorneys' fees, so as to preempt 12-341.01.

Finally, with respect to Onyx's fourth argument, that the Court should exercise its discretion and decline to award fees, the Court has weighed the factors set forth in *Associated Indemnity* and some of those factors do indeed tilt in favor of not awarding fees. First, this was an issue of first impression in Arizona, and it is difficult to characterize Onyx's position as "meritless." Further, it was STS, not Onyx, who committed the underlying wrongful acts giving rise to these claims. However, the Court has considered the other *Associated Indemnity* factors and finds that they balance in the Plaintiffs' favor. The Court has reviewed Plaintiffs' billing statements and finds that the fees charged were reasonable. Therefore,

IT IS ORDERED granting Plaintiffs' request for attorneys' fees

1. In the amount of \$22,962.50 for the Jaquez Plaintiffs; and
2. In the amount of \$15,250.00 for Plaintiff Saucedo.

Plaintiffs will submit proposed forms of Judgment reflecting the Order as set forth above.