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SUPREME COURT OF VIRGINIA
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IN THE

Supreme Court

of

Virginia

AT RICHMOND

RECORD No. 740129

UNITED VIRGINIA BANK OF FAIRFAX,
a Virginia corporation,
Appellant,

v.

DICK HERRIMAN FORD, INC.,
a District of Columbia corporation,
Appellee.

APPENDIX TO BRIEF

JOHN H. RUST AND WAYNE F. CYRON
4009 Chain Bridge Road
P. O. Box 537
Fairfax, Virginia 22030
Counsel for Appellant

IN THE

SUPREME COURT OF VIRGINIA

AT RICHMOND

RECORD No. 740129

UNITED VIRGINIA BANK OF FAIRFAX,
a Virginia corporation,

Appellant,

versus

DICK HERRIMAN FORD, INC., a District
of Columbia corporation,

Appellee

APPENDIX TO BRIEF

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MOTION FOR JUDGMENT

To: Dick Herriman Ford, Inc.
c/o Richard A. Herriman
Registered Agent
8201 Leesburg Pike
McLean, Virginia 22101

The undersigned, United Virginia Bank of Fairfax, by Counsel, hereby moves the Circuit Court of Fairfax County, Virginia, for a judgment against you in the sum of Three Thousand Seven Hundred Seventy One and 98/100 Dollars ($3,771.98) with interest thereon from the date of judgment until paid, together with its costs incident to this proceeding, all of which is justly due by you to the undersigned by virtue of your breach of contract with the undersigned as set forth in the following facts and circumstances, to-wit:

1. Before and at the time of the facts and circumstances hereinafter set forth, you, Dick Herriman Ford, Inc. were engaged in the sale of automobiles, and maintained a car dealership at 8201 Leesburg Pike, McLean, Virginia.

2. On or about the 5th day of February, 1971, you agreed to sell and did sell to a person named Scott Burdette a new 1971 Ford Country Squire bearing the serial number 1E76S153617.

3. The purchaser aforesaid entered into an installment loan agreement in order to finance the purchase of said automobile with the United Virginia Bank of Fairfax, who issued its check in the amount of $2,943.56 jointly to Scott Burdette and Dick Herriman Ford, Inc., a copy of said check being attached hereto, marked

Exhibit "1", and expressly made a part hereof.

4. In your course of dealing and usage of trade, and by your endorsement and obtaining the proceeds of said check, you agreed to record a first lien on the application for title for said automobile in the amount of Four Thousand Five Hundred Twenty Five and 92/100 Dollars ($4,525.92) naming the United Virginia Bank of Fairfax as lienor, and, certified that said lien has been recorded in favor of the United Virginia Bank of Fairfax by your endorsement of said check.

5. Notwithstanding your agreement and duty as aforesaid, you failed to record said lien on the application for title for said automobile in favor of United Virginia Bank of Fairfax and the certificate of title for said automobile was issued free and clear and without the recordation of the lien, and/or you failed to file an application for title for said automobile, all to the great loss and damage to the United Virginia Bank of Fairfax.

6. The purchaser of said automobile has departed the State of Virginia and has removed said automobile herefrom and is now in default of said installment agreement, leaving a balance due and owing to the United Virginia Bank of Fairfax in the amount of Three Thousand Seven Hundred Seventy One and 98/100 Dollars ($3,771.98) unsecured by said automobile by virtue of your breach of your agreement, duty and certification.

WHEREFORE, the undersigned, the United Virginia Bank of Fairfax, asks for judgment against you in the amount of Three Thousand Seven Hundred Seventy One and 98/100 Dollars ($3,771.98) with interest thereon from the date of judgment until paid, to-

gether with its costs incident to this proceeding.

UNITED VIRGINIA BANK OF FAIRFAX,
a Virginia corporation

By: /s/ Wayne F. Cyron
Of Counsel

UNITED VIRGINIA BANK OF FAIRFAX 515 MAPLE AVENUE, EAST VIENNA, VIRGINIA 22180

TO Dick Herriman Ford, Inc.

ATTENTION TITLE CLERK

ATTACHED is our Auto Loan Check representing payment of the following described vehicle to be titled in the NAME OF Scott Burdette

MAKE	YEAR	MODEL	BODY STYLE	SERIAL NUMBER	NEW OR USEL
Ford	1971	Cty.Squire	S/W	1E76S153617	New

PLEASE RECORD A FIRST LIEN ON THE APPLICATION FOR TITLE AS FOLLOWS

AMOUNT OF LIEN	DATE OF LIEN	KIND OF LIEN	LIENOR
$4,525.92	2/5/71	Security Agreement	United Virginia Bank of Fairfax

United Virginia Bank of Fairfax

INSTALMENT LOAN DEPARTMENT

#1771

United Virginia Bank of Fairfax

68 594
514

February 5, 1971 ILD 1771

PAY TO THE ORDER OF Scott Burdette and Dick Herriman Ford, Inc. $ 2,943.56*

UNITED VIRGINIA BK. OF FAIRFAX $2943 dol's 56 cts DOLLARS

AUTO LOAN CHECK

AUTHORIZED SIGNATURE

⑆0514⑈0594⑆ 0⑈0000027⑈ ⑈0000294356⑈

Endorsement and obtaining the proceeds of this check, the payee certifies that a first lien has been recorded in favor of the United Virginia Bank of Fairfax on the application for title to the car purchased with the proceeds hereof.

Scott Burdette

FOR DEPOSIT ONLY
DICK HERRIMAN FORD, INC.

FEB 8 71 3 1 9505

ANSWER AND GROUNDS OF DEFENSE

Comes now Defendant, Dick Herriman Ford, Inc., and in response to the Motion for Judgment filed against it herein says:

ANSWER

Each of the following numbered paragraphs refers to the like-numbered paragraph of the said Motion for Judgment.

1. Admitted.

2. Admitted.

3. The second clause thereof is admitted, but the defendant is without direct knowledge of the allegations in the first clause thereof, and, therefore, the same is denied.

4. Denied.

5. Denied.

6. The defendant is without knowledge of the allegations of this paragraph, and, therefore, the same are denied.

GROUNDS OF DEFENSE

1. The negligence of the plaintiff was the sole or contributory proximate cause of any damage it may have suffered because of the defendant.

2. Plaintiff assumed all risks inherent to the course of action followed by it in dealing with the defendant.

3. If plaintiff has suffered any damages, it has failed to mitigate the same.

WHEREFORE, Defendant, Dick Herriman Ford, Inc., prays that it be dismissed from this cause, with prejudice and with its costs.

DICK HERRIMAN FORD, INC.

By: /s/ William S. Burroughs, Jr.
Counsel

MOTION TO SET ASIDE GRANT
OF MOTION TO STRIKE AND
ENTER JUDGMENT OR NEW TRIAL

Comes now the Plaintiff, United Virginia Bank of Fairfax, by Counsel, and moves the Court to set aside its grant of Defendant's motion to strike the Plaintiff's evidence and enter judgment in favor of the Plaintiff for at least the proceeds of the auto loan check, or, in the alternative:

1. Order a new trial on the issue of damages; or

2. Order such other and further relief as the Court shall deem proper.

As grounds for the requested relief, the Plaintiff states as follows:

1. That the granting by the Court of Defendant's motion to strike Plaintiff's evidence was plainly erroneous and contrary to the law and evidence of the case, since the Court found that there was a contract between the parties, that the Defendant had breached the contract, and that the Plaintiff had been damaged by said breach.

2. That the Plaintiff was entitled to recover at least the proceeds of the auto loan check issued to and received by the

Defendant since the Court found that the contract between the parties had been breached by the Defendant.

WHEREFORE, the Plaintiff, United Virginia Bank of Fairfax, prays that this Honorable Court set aside the grant of Defendant's motion to strike the Plaintiff's evidence and grant such other items of the alternative relief requested as it shall deem just and proper.

UNITED VIRGINIA BANK OF FAIRFAX,
a Virginia corporation

By: /s/ Wayne F. Cyron

FINAL ORDER

This case came on to be heard on the 20th day of June, 1973, upon the pleadings filed herein and the admissions of the defendant for trial before the Court without the intervention of a jury.

WHEREUPON, the plaintiff elected to proceed in contract and the defendant withdrew paragraphs 1 and 2 of its Grounds of Defense; and,

WHEREUPON, Counsel for the plaintiff presented an opening statement, and Counsel for the defendant reserved the right to do so at the conclusion of the plaintiff's evidence; and,

WHEREUPON, Counsel for the plaintiff presented evidence and rested, and Counsel for the defendant moved the Court to strike the said evidence, on the ground that a prima facia case in

support of the plaintiff's Motion for Judgment had not been presented to the Court, and said motion was argued by Counsel; and,

IT APPEARING TO THE COURT, that there was a contract between plaintiff and the defendant, that the defendant had breached said contract, that the plaintiff was damaged by said breach and that the defendant was liable for said breach and damages, but, that since the plaintiff failed to establish the value of the automobile at the time that its right to repossession accrued, the Court would not be able to assess the measure of damages.

UPON CONSIDERATION WHEREOF, it is ADJUDGED and ORDERED that the defendant's Motion to Strike be, and the same hereby is, granted, that the said evidence presented by the plaintiff be, and the same hereby is, struck, and that summary judgment, with prejudice, be and the same hereby is entered in favor of the defendant, and each party to pay its own costs, to which ruling the plaintiff, by Counsel, noted its exceptions.

It is further ADJUDGED and ORDERED that the Plaintiff's Motion to Set Aside Grant of Motion to Strike and enter Judgment or New Trial, be, and the same hereby is, denied, to which ruling the plaintiff, by Counsel, noted its exceptions.

ENTER:

Date: 10/12/73

/s/ Lewis D. Morris
Judge

SEEN: BUT NOT AGREED AS TO FORM OF ORDER

EMRICH & BURROUGHS

By: /s/ William S. Burroughs, Jr.
William S. Burroughs, Jr.
Counsel for Defendant

SEEN AND EXCEPTIONS NOTED:

JOHN H. RUST
Counsel for Plaintiff

By: /s/ Wayne F. Cyron
Wayne F. Cyron, of Counsel

NOTICE OF APPEAL AND
ASSIGNMENTS OF ERROR

To: W. Franklin Gooding, Clerk of the Circuit Court of Fairfax County, Virginia:

The Plaintiff, UNITED VIRGINIA BANK OF FAIRFAX, a Virginia corporation, by Counsel, hereby gives notice pursuant to Rule 5:6 of the Rules of the Supreme Court of Virginia, of its appeal from that certain final order entered in the above-styled suit on October 12, 1973, in which order the Court found that there was a contract between the Plaintiff and the Defendant; that the Defendant had breached said contract; that the Plaintiff was damaged by said breach; and that the Defendant was liable for said breach and damages, but granted Defendant's motion to strike the Plaintiff's evidence and denied Plaintiff's motion to set aside said grant and enter judgment or a new trial, on the grounds that since the Plaintiff failed to establish the value of the automobile at the time that its right to repossession

accrued, the Court would not be able to assess the measure of damages.

Further pursuant to the said Rule, the Plaintiff assigns the following errors:

1. The Court erred in granting summary judgment in favor of the Defendant on the grounds that such a grant is contrary to the law and evidence of the case.

2. The Court erred as a matter of law in granting the Defendant's motion to strike the Plaintiff's evidence after finding that the Plaintiff was damaged by the Defendant's breach of contract and that the Defendant was liable for said breach and damages.

3. The Court erred as a matter of law in granting the Defendant's motion to strike the Plaintiff's evidence on the grounds that such a grant is improper where the issue is the measure of damages and not whether the Plaintiff suffered damage.

4. The Court erred as a matter of law in granting the Defendant's motion to strike the Plaintiff's evidence on the grounds that such a grant is improper where the Court is not uncertain as to the cause of the damage but only uncertain as to the measure or extent of the damage.

5. The Court erred as a matter of law in granting the Defendant's motion to strike the Plaintiff's evidence because the Plaintiff failed to establish the value of the automobile at the time that the Plaintiff's right to repossession accrued on the grounds that the value of said automobile at said time

is irrelevant.

6. The Court erred as a matter of law in granting the Defendant's motion to strike the Plaintiff's evidence on the grounds that the Plaintiff was entitled to recover the full amount of its damages resulting from the Defendant's breach of contract.

7. The Court erred as a matter of law in granting the Defendant's motion to strike the Plaintiff's evidence on the grounds that the Plaintiff was entitled to recover at least the amount of the check paid to the Defendant in reliance upon the Defendant's certification that a first lien had been recorded in favor of the Plaintiff on the application for title to the vehicle purchased with the proceeds of said check.

Further pursuant to the said Rule, the Plaintiff, by Counsel, states that it will file a Statement of Facts in accordance with Rule 5:9 of the Rules of the Supreme Court of Virginia.

/s/ Wayne F. Cyron
Of Counsel for the Plaintiff,
United Virginia Bank of Fairfax

STATEMENT OF FACTS

Comes now the Plaintiff, United Virginia Bank of Fairfax, by Counsel, pursuant to Rule 5:9 of the Rules of the Supreme Court of Virginia, and files this its written statement of facts.

STATEMENT OF FACTS

On or about the 4th day of February, 1971, a person by the name of Scott Burdette made application to the Plaintiff, United Virginia Bank of Fairfax, (hereinafter referred to as "Bank") for an automobile loan in order to purchase a 1971 Ford Country Squire automobile bearing serial number 1E76S153617 from the Defendant, Dick Herriman Ford, Inc. One of the conditions of the loan was that a first lien would be recorded in favor of the Bank on the application for title to said vehicle to secure the payment of said loan and also to secure the payment of a prior existing indebtedness owed by the said Scott Burdette to the Bank.

The Bank approved the application for said loan and issued its Auto Loan Check No. ILD 1771, dated February 5, 1971, jointly payable to the order of Scott Burdette and Dick Herriman Ford, Inc., in the amount of Two Thousand Nine Hundred Forty Three and 56/100 Dollars ($2,943.56). Attached to the said check was a directive to the attention of the Title Clerk of the Defendant, to record a first lien in favor of the Bank on the application for title to the purchased vehicle in the amount of $4,535.92. The back of the check contained the following restrictive endorsement:

> By endorsement and obtaining the proceeds of this check, the payee certifies that a first lien has been recorded in favor of the United Virginia Bank of Fairfax on the application for title to the car purchased with the proceeds hereof.

The check was delivered by the Bank to Scott Burdette who then endorsed said check and delivered the same to the Defendant with the lien information attached thereto. Upon receipt of the check, the Defendant delivered the automobile to the said Scott Burdette, endorsed and deposited said check to its account and made application for title to the said vehicle.

The Bank had made several auto loans to persons who were purchasing automobiles from the Defendant prior to this time, and, had issued its checks jointly to the purchaser and the Defendant with the appropriate lien information attached. In all of the prior transactions, the Defendant had properly recorded the lien information on the applications for title to said vehicles and the titles were issued showing the first liens. The Defendant admitted that it considered this practice to be a course of its business and a usage of trade. The Defendant, however, failed to record the lien of the Bank on the application for title to the vehicle purchased by Scott Burdette, notwithstanding the fact that it had received the lien information and request, had certified to the Bank that the lien had been recorded by its endorsement of the check, and, notwithstanding the fact that this procedure was a course of its dealing and usage of trade. Moreover, the application for title to the said vehicle listed the owner as Cornelia H. Burdette rather than Scott Burdette and the State of Virginia, Department of Motor Vehicles issued the title to the said vehicle without recording the lien of the Bank thereon, and named the owner of said vehicle on the title thereto as Cornelia H. Burdette.

After several payments were made by Scott Burdette, there was a default, leaving an outstanding balance of Three Thousand Seven Hundred Seventy One and 98/100 Dollars ($3,771.98) due and payable. In an effort to resolve the matter and avoid a repossession of the security, the Bank attempted to contact Scott Burdette, but learned that Mr. Burdette had left the State of Virginia with said vehicle, and had moved to Baltimore, Maryland. It was at this time, that the Bank learned that its lien had not been recorded on the application for title. The Bank contacted the Defendant and was advised that the Defendant would take care of the matter. Several appointments were made by the Bank and the Defendant with Scott Burdette in an effort to obtain the title and have the lien recorded thereon, but none of these efforts were successful.

The Bank did not make any effort to repossess the vehicle because its lien had not been recorded by the Defendant, and because the vehicle had not been titled in the name of Scott Burdette. Accordingly, the Bank suffered a loss of $3,771.98.

Date: December 18, 1973 /s/ Lewis D. Morris
Judge

SEEN AND APPROVED:

JOHN H. RUST
4009 Chain Bridge Road
P. O. Box 537
Fairfax, Virginia 22030

By: /s/ Wayne F. Cyron

EMRICH & BURROUGHS

By: /s/ William S. Burroughs, Jr.
William S. Burroughs, Jr.
Counsel for Defendant

Respectfully submitted,

THE UNITED VIRGINIA BANK OF FAIRFAX,
a Virginia corporation

By: Wayne F. Cyron
Wayne F. Cyron, of Counsel

CERTIFICATE OF SERVICE

Counsel for the Appellant hereby certifies that on the 13th day of May, 1974, he mailed, postage prepaid, three copies of the foregoing Appendix to Brief to William S. Burroughs, Jr., Counsel for the Appellee at Court Square West, Suite 401, 1400 North Uhle Street, Arlington, Virginia 22201.

Wayne F. Cyron
Wayne F. Cyron

JOHN H. RUST and
WAYNE F. CYRON
Counsel for Appellant
4009 Chain Bridge Road
P. O. Box 537
Fairfax, Virginia 22030

By: Wayne F. Cyron
Wayne F. Cyron