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Case No. 99-CV-0326

NO \_\_\_\_\_

Dept. No. II

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SEP 20 2001

DOUGLAS COUNTY  
DISTRICT COURT CLERK

BARBARA REED  
CLERK  
*Barbara Reed*

IN THE NINTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
IN AND FOR THE COUNTY OF DOUGLAS

WFS FINANCIAL, INC., a California  
corporation, fka WESTERN FINANCIAL  
SAVINGS BANK, F.S.B.,

Plaintiff,

vs.

ORDER AND JUDGMENT

ROGER W. HOLCOMBE and  
DOES I through V,

Defendants.

Plaintiff, WFS Financial, Inc. (WFS) moves for summary  
judgment in the above-entitled action pursuant to NRCP 56 and  
requests that the Court find Defendant, Roger W. Holcombe, in  
breach of the contract that gives rise to this action and that  
the Plaintiff be entitled to a deficiency judgment as a matter  
of law. Defendant moves for judgment in his favor as a matter  
of law in that there remain no issues of material fact.

Mr. Holcombe purchased a used 1994 Ford Explorer from  
Capital Ford in Carson City, Nevada. On October 12, 1996, he  
executed a Vehicle Retail Installment Contract requiring 60  
Monthly payments of \$475.56, which contract was assigned to  
WFS. WFS claims that Mr. Holcombe fell into arrears in making

1 payments in that all payments did not meet the specified amount  
2 under the contract and some payments, viz. October 1999,  
3 December 1999, January 2000, February 2000, and March 2000,  
4 were not paid in their entirety. Consequently, Mr. Holcombe's  
5 Ford Explorer automobile was delivered into the possession of  
6 WFS by order of the Court and sold at auction for \$6,900.00.  
7 The resultant deficiency of \$3,169.25 is claimed by WFS  
8 pursuant to the terms of the aforementioned conditional sales  
9 contract. The contract also provides for the payment of  
10 interest on the deficiency amount at the rate of 15.88% per  
11 annum along with attorney's fees and costs.

12  
13 Mr. Holcombe has counterclaimed, alleging that he was  
14 current in his payments-despite the fact that some payments  
15 were less than agreed to in the retail installment contract--  
16 until he received notice of WFS's impending repossession of his  
17 vehicle. Mr. Holcombe maintains that he had a legitimate  
18 concern over how his overpayments were being credited to his  
19 account, for WFS had agreed to apply overpayments to the  
20 principal and not to the interest. Nevertheless, WFS continued  
21 to apply overpayments to the interest which would be adjusted  
22 upon payment of the final installment in conformity with the  
23 written contract. In response to Mr. Holcombe's attachment to  
24 his affidavit, exhibit A, which is a letter from WFS informing  
25 him that he has fallen behind in his payments in the amount of  
26 \$946.66, he adduces exhibit B, which appears to be  
27 correspondence from Mr. Holcombe's wife directing that such  
28

1 overpayments be applied to future principal payments. This  
2 correspondence notwithstanding, there is no evidence that WFS  
3 agreed orally or in writing to such an arrangement. Ultimately,  
4 Mr. Holcombe was apprized that his vehicle would be  
5 repossessed. It is his contention that such notice constituted  
6 an anticipatory breach of contract. Furthermore, he posits  
7 that said repossession was a breach of the covenant of good  
8 faith and fair dealing which now entitles him to unspecified  
9 damages.  
10

11 In weighing Plaintiff's Motion for Summary Judgment, the  
12 Court must review the record in a light most favorable to the  
13 non-moving party, i.e., the Defendant. In so doing, there must  
14 remain no material facts in dispute. That is, the non-moving  
15 party is entitled to have its evidence and reasonable  
16 inferences accepted as true. *Wiltsie v. Baby Grand Corp.*, 105  
17 Nev. 291 (1989). NJDCR 7 requires that factual contentions  
18 involved in any pretrial or post trial motion be "initially  
19 presented and heard upon affidavits, depositions, [or] answers  
20 to interrogatories."  
21

22 The Court accepts as true for purposes of this motion,  
23 therefore, that on October 12, 1996, defendant entered into a  
24 Vehicle Retail Installment Contract and Security Agreement for  
25 the purchase of a 1994 Ford Explorer, the terms of which  
26 required him to make 60 montly payments in the amount of  
27 \$475.56 due on the 12<sup>th</sup> of each month beginning on November 12,  
28 1996. The total amount financed was \$19,605.42. This

1 installment contract was assigned to WFS Financial. Prior to  
2 August 13, 1999, Mr. Holcombe exceeded the \$475.56 monthly  
3 amount on occasion; on other occasions he tendered less than  
4 the aforesaid amount. On August 13, 1999, WFS corresponded  
5 with Mr. Holcombe in order to inform him that he had fallen  
6 into arrears in making his monthly payments in accordance with  
7 the retail installment contract. Shortly afterwards, his wife  
8 responded, insisting that they were not behind in their  
9 payments. Mr. Holcombe believed that WFS had agreed to apply  
10 overpayments to the principal: he accompanied his first payment  
11 with a memo requesting that anything paid over the contract  
12 amount be applied to reduce the principal. He believed this to  
13 be true because someone at Capital Ford allegedly said it would  
14 not be a problem. See, Affidavit of Roger Holcombe.

15  
16 Unfortunately, there is no evidence that WFS ever agreed  
17 to this modification. The retail installment contract clearly  
18 provides that "...early payments will have the effect of  
19 reducing your final payment...." WFS served Mr. Holcombe  
20 notice that he was in default and afforded him the opportunity  
21 to make good on his delinquent account. Instead, Mr. Holcombe  
22 erroneously assumed that WFS was itself in breach of the  
23 contract by merely threatening to repossess its collateral.  
24 Subsequently, WFS exercised its right under the retail  
25 installment contract to take possession of the Ford Explorer.  
26

27 In *Kahle v. Kostiner*, 85 Nev. 355 (1985), the Supreme  
28 Court of Nevada clarified what constitutes anticipatory breach:

1 Seller argues that the jury should have been  
2 instructed that an anticipatory repudiation must be  
3 to the whole contract and the seller's refusal to  
4 pave the streets was only a partial breach. The  
5 instruction given provided: "You are instructed that  
6 to find an anticipatory repudiation of a contract the  
7 party so charged must have demonstrated a definite  
8 unequivocal and absolute intent not to perform a  
9 substantial portion of the contract. To justify the  
10 adverse party in treating the repudiation as an  
11 anticipatory breach the refusal to perform must be an  
12 unqualified repudiation of a substantial portion of  
13 the contract."

14 The instruction was proper. We affirm the doctrine  
15 that anticipatory repudiation applies when a  
16 substantial portion of the contract is repudiated.

17 *Id.* at 358. In delivering notice to Mr. Holcombe that he was  
18 in default and needed to make up his delinquent payments or  
19 suffer the repossession of his vehicle, WFS did not convey an  
20 unequivocal and absolute intent not to perform a substantial  
21 portion of the contract. On the contrary, WFS was adhering to  
22 the contract by exercising its rights therein. WFS had already  
23 lent the money necessary to purchase the vehicle to Mr.  
24 Holcombe. It was Mr. Holcombe's obligation under the contract  
25 to tender timely payments in the amount of \$475.56 per month.  
26 , WFS was merely attempting to collect the money owed under the  
27 contract or recover its security interest in the loan, once Mr.  
28 Holcombe failed to live up to his part of the bargain. Mr.  
Holcombe has cited no authority to the contrary. Therefore,  
good cause appearing,

IT IS HEREBY ORDERED that summary judgment be entered in  
favor of the Plaintiff, WFS, and against the Defendant, Roger  
Holcombe. Defendant was in breach of the contract at the time

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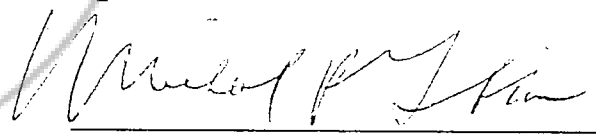
Plaintiff repossessed the collateral at issue. Accordingly,  
JUDGMENT IS HEREBY ENTERED in favor of the Plaintiff and  
against the Defendant for the deficiency due under the contract  
in the amount of \$3,169.25 as of March 28, 2000. The court  
will entertain further evidence on the reasonable value of the  
automobile and the amounts owed the Plaintiff, should the  
Defendant establish a need for a hearing.

IT IS FURTHER ORDERED that Plaintiff is entitled to an  
award of attorney's fees and costs pursuant to the terms of the  
contract. Plaintiff shall file a memorandum of costs and  
disbursement pursuant to NRS 18.020 and an application for fees  
pursuant to NRS 18.010.

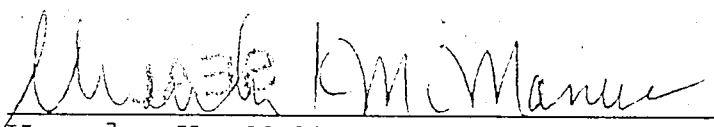
IT IS FURTHER ORDERED that the entire judgment shall  
accrue interest at the contract rate of 15.88 percent per annum  
until paid.

The Counterclaim is dismissed because it was contingent  
upon proof of Plaintiff's breach of contract.

DATED this 20 day of September, 2001.



MICHAEL P. GIBBONS  
DISTRICT JUDGE



Ursula K. McManus

Copies served by mail this 20 day of September, 2001; Robert  
C. Herman, Esq., 301 West Fourth Street, Carson City, NV 89703;  
Jeffrey A. Dickerson, Esq., 10100 Old Virginia Road, Reno, NV  
89511.

MICHAEL P. GIBBONS  
DISTRICT JUDGE  
DOUGLAS COUNTY  
P.O. BOX 218  
MINDEN, NV 89423

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COPY

**CERTIFIED COPY**

The document to which this certificate is attached is a full, true and correct copy of the original on file and of record in my office.

DATE: September 13, 2002  
Clerk of the 8th Judicial District Court  
of the State of Nevada, in and for the County of Douglas,

By [Signature] **SEAL** Deputy

REQUESTED BY  
Robert C Herman  
IN OFFICIAL RECORDS OF  
DOUGLAS CO., NEVADA

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LINDA SLATER  
RECORDER

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\$20 PAID DEPUTY

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