UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1655

September Term, 2014

BOB SMITH AUTOMOTIVE GROUP, INC., et al.

v.

ALLY FINANCIAL INC., et al.

Woodward,
Friedman,
Wilner, Alan M.
(Retired, Specially Assigned),

JJ.

Opinion by Friedman, J.

Filed: July 6, 2016

The parties to this appeal were involved in a contractual relationship that was manifested in three written documents, one of which was a demand note. If the three written documents are considered to form a single, unified contractual relationship, an ambiguity in the payment term of one of the documents might make the entire contractual relationship ambiguous. On the other hand, if the three written documents are really separate contractual obligations, an ambiguity in one document won't infect the other contracts and make them ambiguous too. There is a rule of contract construction that states that multiple written documents created on the same day may be considered as part of a single contract. Here, however, we determine that the Circuit Court for Talbot County did not err in concluding that that rule was inapplicable and that there were separate contractual obligations made by the parties. We also reaffirm the holding of *Waller v. Maryland Nat'l Bank*, 95 Md. App. 197 (1993) that the implied covenant of good faith and fair dealing will not preclude the holder of an unambiguous demand note from demanding immediate payment.

BACKGROUND

Appellants are two car dealerships—Bob Smith Automotive Group, Inc. ("BSAG") and Giant GMC, Inc. ("Giant")—and their president, William Lee Denny (collectively, the "Dealerships"). The Dealerships brought suit against appellee Ally Financial ("Ally"), the successor-in-interest to General Motors Acceptance Corporation ("GMAC"), after GMAC, which had loaned the Dealerships $13 million dollars, seized and sold the Dealerships' entire inventory. Rather than reinvent, we provide excerpts from the excellent trial court opinion of

the Circuit Court for Talbot County (Jensen, J.) describing the relevant facts. First, Judge Jensen explained the procedural background and the parties' relationship:

> The Dealerships were forced to close their doors in February of 2009, after losing [their] life-blood – the ability to sell cars and trucks from [their] franchise partner General Motors Holding Company [hereafter GM]. This is the result of the demand for payment in full by [GMAC] in January of 2009 of all monies owed to GMAC – approximately $13 Million Dollars.
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> The Dealerships … filed a six count complaint … averring breach of contract and the implied covenant of good faith and fair dealing [and four other claims]. Having withstood a Motion for Summary Judgment filed by Ally, the case proceeded to trial … . At the close of all evidence … this Court granted judgment in Ally's favor on [three of the claims]. Additionally, [The Dealerships] withdrew their [sixth] claim … .
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> The Court held the matter[s of breach of contract and the implied covenant of good faith and fair dealing] *sub curia*. After consideration of the testimony, the numerous exhibits and having the benefit of excellent post-trial memorandum and for those reasons set forth herein, this Court returns a verdict for Ally … .
>
> FINDINGS OF FACT
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> * * *
>
> The Automotive Sales Industry 101
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> 4. … [I]t is important to grasp the business model of a car dealership and its relationship with the auto manufacturer. … In layman's terms, a car dealer, in business to sell cars and trucks to the consumer, acquires the right directly from a car manufacturer such as GM to sell its vehicles, thus becoming a franchised dealer for that particular manufacturer. The manufacturer has certain capitalization requirements that must

> be maintained by the dealer to assure that the franchise is solvent and operational.
>
> 5. The dealer is obligated to purchase cars and trucks from that manufacturer, a costly venture, requiring the dealer to front millions of dollars before the vehicles are sold to the consumer. The inventory of vehicles purchased and then offered for sale by the dealer is known in the industry as a "floor plan." How many vehicles the dealer can purchase from the manufacturer in any given year and of what "make" is tightly controlled by the manufacturer, influenced by many factors such as location of the dealer, financial stability of the dealer, its past performance and competition in the area.
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> 6. To have the money on hand needed to operate such a business requires substantial cash flow or liquidity. Discovering yet another means of making money, automobile manufacturers created affiliated financing companies "captive lenders" – through which a dealer could secure the needed funds, typically a line of credit at a rate of interest set by the financing entity, to purchase vehicles from the manufacturer and stock its floor plan. In the industry, this is called "floor plan lending." The goal of the dealership is to sell the vehicle – for more than the manufacturer's price, of course – as quickly as possible … to support its operating expenses, to reduce its debt load – the line of credit and finance charges owed to the lender – and to maximize profit. Notwithstanding other sources of income for a dealer such as sale of auto parts, operation of service departments and receiving commissions on the sale of automobile warranties, this relationship between the dealer and the lender is essential to the survival of a dealership. For the automobile manufacturer, having an affiliated captive lender insures that its franchised dealers have the means to buy the vehicles before any third party sale ever takes place.

Judge Jensen then explained the creation of the first dealership, BSAG, and the drafting of the three documents relevant to this appeal—the Promissory Note, the Loan Agreement, and the Wholesale Security Agreement (collectively, the "Initial Documents"):

Bob Smith Automotive Group is Born

> 7. … Denny obtained a loan from GM's captive lender and financing arm, GMAC. He also used GMAC to finance his floor plan.
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> 8. [In] 1993, Denny as president of BSAG, executed three documents, boilerplate in appearance and generated by GMAC, all referred to hereafter as the Initial Contract Documents. First was the Promissory Note. The note states that "ON DEMAND, for value received, [BSAG] … promises to pay to the order of GENERAL MOTORS ACCEPTANCE CORPORATION … the sum of $7 Million Dollars … with interest as specified in paragraph two (2) of the Loan Agreement dated June 29, 1993." … None of the terms of the loan were set forth in the note.
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> 9. The second document, entitled "Loan Agreement," identified GMAC as the secured party and characterized the $7 Million Dollar loan as a line of credit, evidenced by a "demand promissory note." … [T]he second paragraph of the Loan Agreement referenced yet another document – the security agreement or a mortgage – as containing the payment terms. Reference to this document was followed by a disclaimer that notwithstanding any payment terms in the security agreement, the on demand provisions of the promissory note were not modified.[1] The third paragraph obligated BSAG to use the line of credit to purchase the floor plan inventory only.
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> 10. The third document was the "Wholesale Security Agreement" [WSA], presumably the security agreement referenced in paragraph 2 of the Loan Agreement. … BSAG granted GMAC a secured interest in each GM vehicle purchased by BSAG. Reiterating that it had agreed to pay "upon demand" the funds advanced to it under the line of credit, BSAG also pledged to "faithfully and promptly remit to [GMAC] the amount … advanced" as "each vehicle is sold or leased." Notwithstanding the statement in the Loan Agreement

[1] The legibility of [the Loan Agreement], especially the third paragraph, is extremely poor.

> that the terms of payment were set out in the security agreement, there were no terms of payment delineated.
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> 11. At the time he executed these documents, Denny acknowledged in his testimony that he understood that GMAC could demand payment on the monies he owed on the line of credit at any time and without reason.

Judge Jensen's opinion then explained Denny and BSAG's purchase of a second dealership, Giant, using a loan from GMAC that was evidenced by three documents identical to the Initial Documents:

> The Creation of Giant GMC
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> * * *
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> 20. [In 2004,] BSAG secured financing … from GMAC … . Several documents were executed by Denny in his capacity as President of the newly created Giant GMC. He signed a demand promissory note, identical in form to the original [Promissory Note] signed in 1993, borrowing from GMAC $5 Million Dollars. … He also signed a [Loan] Agreement and a Wholesale Security Agreement, again identical to the 1993 [Initial Documents].

Judge Jensen's opinion explained that, almost immediately, GMAC became concerned because the Dealerships were not making payments on time and had inadequate operating cash. GMAC contacted the Dealerships about its concerns and requested a plan to address their substantial losses. The Dealerships' financial trouble continued and, in 2009, the Dealerships collapsed:

> The Collapse
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> 61. By early January 2009, … there was not enough cash to pay the operating expenses of the Dealerships. Denny was out of the office attempting to raise capital. The electric bill was overdue and phone and trash service were threatened with cut-off. Parts could

not be ordered as vendors were owed money and the health insurance plan for the employees was at risk for non-payment of the premiums.

* * *

65. The unraveling of the Dealerships accelerated … . [On January 8, 2009,] Denny e-mailed [a GMAC employee] to advise him of a returned check [in the amount of $82,000] from the day before but informed him that the amount would be covered by the end of the day. … Within the hour, [the GMAC employee] sent an e-mail advising Denny that … auditors were being dispatched to the Dealerships to monitor all sales and to take possession of all vehicle titles … . In addition to demanding that the Dealerships cover the Eighty-Two Thousand ($82,000.00) Dollars, [the GMAC employee] reminded Denny that GMAC was due close to Three Hundred Nineteen Thousand ($319,000.00) Dollars in "pipeline" transactions - vehicles sold for which GMAC had not yet received payment … . Finally, Denny was told the Dealerships could not sell any vehicle unless the buyer presented certified funds.

* * *

67. By the end of the day … , the auditors … had determined that … the two Dealerships were short Nineteen Thousand ($19,000.00) Dollars in monies owing from consummated sales and that Denny had not obtained … cash to inject into the Dealership.

68. On January 9th, [GMAC] sent to each Dealership, via hand-delivery, a letter entitled "Demand for Immediate Payment and Surrender of Collateral." … Making clear that GMAC was unwilling to make any loans to correct the problem, in bold and capital letters, [the letters] informed the Dealerships that:

DEMAND IS HEREBY MADE UPON YOU FOR IMMEDIATE PAYMENT OF ALL OBLIGATIONS …

69. [GMAC] gave the Dealerships a deadline of January 12th for the full payment of amounts owed and Denny was informed that failure to do so could result in the seizure by GMAC of any collateral in which it had a security interest.

* * *

> 74. On February 5th, using the [1993 and 2004 Promissory Notes], GMAC filed separate Notices of Confessed Judgment against BSAG, Giant and Denny, in both the Circuit Courts for Talbot County and Caroline County. The amount of the judgment was $13,945,583.62.

Judge Jensen's opinion then addressed the issues that were before her, both of which are relevant to this appeal:

> The issues can be distilled into two questions: Did the various contract documents between the parties permit GMAC to demand on January 9, 2009 full payment of all monies regardless of the existence of a default? If so, does Maryland recognize the implied duty of good faith and fair dealing as applying to demand notes?
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> **1. <u>Did GMAC breach its contractual obligation with the Dealerships on January 9, 2009 by demanding payment in full of all obligations owed?</u>**
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> … [T]he foundation of BSAG's lending relationship with GMAC is grounded in the Initial Contract Documents - the Promissory Note[ ], Loan Agreement and Wholesale Security Agreement and various amendments - all signed by Denny on behalf of BSAG on June 29, 1993. Similarly, Giant's lending relationship with GMAC is defined by the identical documents signed in 2004. What is at the heart of this dispute is whether GMAC's actions on January 9th were that of declaring a default under the terms of paragraph 3 of the Loan Agreement or whether GMAC was exercising its rights under the demand Promissory Note. Woven throughout this question is the unresolved issue of whether the parties intended the demand provisions of the Promissory Note to be qualified by the "faithfully and promptly" provisions found in the Wholesale Security Agreement as well as the default provisions in paragraph 3 of the Loan Agreement.

Judge Jensen's opinion explained that because, earlier in the litigation, Judge Broughton Earnest (who had since recused himself) had already found that the "faithfully and promptly"

payment provisions of the Wholesale Security Agreement were ambiguous, she would not revisit the issue of ambiguity. Judge Jensen explained that, because of the ambiguity, she would consider extrinsic evidence:

> [T]his Court, in order to construe the intent of the parties, will review the initial contract documents as well as the extrinsic evidence produced during trial.

After again explaining the context of the events leading up to January 9, Judge Jensen found that the January 9 letter was a demand letter, not a declaration of default:

> Against this back-drop [of extrinsic evidence], it is clear to this Court that the January 9th letter was a demand for payment. The letter itself is referenced as such:
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> > Re: Demand for Immediate Payment and Surrender of Collateral.
>
> That phrase is again repeated in bold letters in the body of [the letter[ ]:
>
> > **DEMAND IS HEREBY MADE UPON YOU FOR IMMEDIATE PAYMENT OF ALL OBLIGATIONS IN THE TOTAL AMOUNT OF ….**
>
> The term "Demand for Payment" is repeated again in the last paragraph … .

Judge Jensen then concluded that the Wholesale Security Agreement's ambiguity did not affect the Promissory Note because the documents represent two separate agreements:

2. <u>Was the demand under the Promissory Note predicated upon a default or otherwise qualified by the "faithfully and promptly" language?</u>

Standing by itself the plain meaning of the promissory note is evident - it is a demand note. "In Maryland, demand notes are payable on the date executed, without demand." *Boyd v. Bowen,* 145 Md. App. 635, 668 (2002). *See Calomiris v. Woods,* 353 Md. 425 (1998); *Jenkins v. Karlton,* 329 Md. 510 (1993). A demand note has no fixed maturity date and is payable immediately once a demand for payment is made. *Id. See Billingsly v. Kelly,* 261 Md. 116 (1971). Even Denny acknowledged he knew that GMAC could call for payment of the notes at any time. …

The demand nature of the Promissory Note was reiterated in both the Loan Agreement and the Wholesale Security Agreement. In the recitals portion of the Loan Agreement, the line of credit "is to be evidenced by a demand promissory note secured as provided herein." In Paragraph 2, the debtor - the Dealerships - affirm that it has "delivered to [GMAC] a demand promissory note," the interest rate on which was to be set by GMAC. Further, it is understood and agreed that any provision for installment therein shall not in any manner modify the demand promissory note ... . "Throughout the document, any time the note is referenced it is called a "demand promissory note." Similarly in the Wholesale Security Agreement, the language contained in the second paragraph states that: "We agree upon demand to pay to GMAC the amount it advances … ."

The Court also finds that the "faithfully and promptly" language does not in any way qualify the payment terms of the demand Promissory Note. First, the only document to which the demand Promissory Note references is the Loan Agreement and that is for the purpose of setting the interest rate. The Wholesale Security Agreement was the vehicle by which GMAC collateralized the loan, taking a security interest in all the vehicles purchased by the Dealerships from GM. As the very terms of the demand Promissory Note dictate that it is payable upon demand, whether one pays "faithfully and promptly" is of no consequence. In executing the Wholesale Security Agreement, the Dealerships

> acknowledged the demand nature of the Promissory Note. They promised to GMAC that once the vehicles in which GMAC had a security interest were sold, they would "faithfully and promptly" pay GMAC the money owed, thereby relieving GMAC of its security interest. To read that language as restricting GMAC's rights under the demand Promissory Note transforms the note into something altogether different. Similarly, if, as the Plaintiffs suggest, a default event outlined in the Loan Agreement must occur before demand can be made, the Promissory Note would be something other than what it clearly was intended to be on its face.

Finally, Judge Jensen found that the implied duty of good faith did not apply to the Promissory Note because it was a demand note, and therefore, that GMAC was within its rights to demand payment on January 9:

> Demand Notes and the Implied Duty of Good Faith
>
> Although reversed by the Court of Appeals on other grounds, the Court of Special Appeals in *Waller v. Maryland National Bank,* 95 Md. App. 197 (1993), *rev'd,* 332 Md. 375 (1993), concluded that the duty of good faith and fair dealing[ ] implied in the performance of contractual relationships cannot be applied to demand promissory notes. Affirming that the very character of demand notes are such that the note is "payable immediately, without demand, [t]he implied duty of good faith may not be used to extend or add to the obligations a party has accepted under a contract." 95 Md. App. at 213. … The Court noted that "the weight of authority in other jurisdictions holds that the good faith requirement does not apply to a lender's decision to call a demand note." … *Id.* at 217. Added to the list of jurisdictions that have declined to apply the doctrine of implied good faith and fair dealing is the State of Washington with the recent opinion of *GMAC v. Everett Chevrolet,* 317 P.3d 1074 (2014), Accordingly, this Court declines to recognize the implied duty of good faith and fair dealing[ ] to the demand notes executed by the Dealership.

> In conclusion, this Court finds that GMAC was within its contractual rights to demand payment of the Dealerships on January 9, 2009 and there was no breach of contract.

The Dealerships appealed Judge Jensen's decision.

DISCUSSION

The Dealerships argue: (1) that Judge Jensen should have found that the Initial Documents represented one contract, that the Promissory Note was ambiguous, and that extrinsic evidence was necessary to interpret the Promissory Note; and (2) that Judge Jensen erred by concluding that the Promissory Note was a demand note without an implied obligation of good faith and fair dealing. We determine that Judge Jensen did not err in either conclusion.

I. Separate Contractual Obligations

For the Dealerships to prevail in this appeal, they must demonstrate three steps: (1) that the three Initial Documents together make up one contract, so that (2) an ambiguity in one of the documents becomes an ambiguity in the entire contract and, as a result, (3) Judge Jensen should have considered extrinsic evidence, which (they argue) showed that the Initial Documents don't fully reflect the relationship between the parties as it actually functioned in practice.

The Dealerships argue that step (1) is accomplished by a standard rule of contract interpretation. According to the Dealerships, the Promissory Note, the Loan Agreement, and the Wholesale Security Agreement are really one contract that must be read together.

And on this point the Dealerships are correct—there is a general rule exactly to that effect. As the Mississippi Supreme Court put it:

> [I]n the absence of anything to indicate a contrary intention, instruments executed at the same time, by the same contracting parties for the same purpose, and in the course of the same transaction will be considered and construed together, since they are, in the eyes of the law, one contract or instrument.

Gilchrist Tractor Co. v. Stribling, 192 So. 2d 409, 417 (Miss. 1966*); see also Dakota Gasification co. v. Natural Gas Pipeline Co.*, 964 F.2d 732, 734-35 (8th Cir. 1992) ("Thus, as a rule of law [multiple contracts] 'should be read together as they represent successive steps which were taken to accomplish a single purpose.' This rule of interpretation applies even though the parties executing the contracts differ, as long as 'the several contracts were known to all the parties and were delivered at the same time to accomplish an agreed purpose.'") (internal citations omitted); 2 E. Allan Farnsworth, *Farnsworth on Contracts* 296-97 (3d ed.); *Contract Law: Analyzing and Drafting* 413 (Karen F. Botterud ed.) ("If different instruments are executed by the same parties and in the course of the same transaction, the instruments are to be read and construed together (assuming the intention of the parties was to have the instruments collectively be their agreement)."); Restatement (Second) of Contracts §202(2) ("[A]ll writings that are part of the same transaction are interpreted together."). Moreover, while there are no Maryland cases that make this point, that is no real obstacle, as this is a fundamental rule of contract interpretation.

We do not disagree with the Dealerships that there is a rule of contract interpretation that holds that documents executed between the same parties, at the same time, on the same

or similar topic, are generally to be construed together. Judge Jensen understood this general rule. She also knew that there are, necessarily, exceptions. Thus, for example, the quotation from the Mississippi Supreme Court, above, begins with the exception: "[I]n the absence of anything to indicate a contrary intention…" *Gilchrist Tractor Co*., 192 So. 2d. at 417. In the case we are considering, Judge Jensen determined that there *was* a "contrary intention" and the Initial Documents were not to be "considered and construed together." Because we hold, as Judge Jensen found, that the Promissory Note and Wholesale Security Agreement concerned separate and independent promises, with separate and independent payment terms, we hold that she did not abuse her discretion in treating them as separate contracts.

Ordinarily, having found against the Dealerships on step (1), there would be no need to proceed to steps (2) and (3). In this circumstance, we pause to make observations about both of the subsequent steps.

As to step (2), as described above, Judge Earnest found an ambiguity in the payment term of the Wholesale Security Agreement. Judge Jensen declined to reconsider that decision and took as given that the payment term of the Wholesale Security Agreement was ambiguous. No party has challenged that finding in this Court. Because we have affirmed Judge Jensen's finding (at step (1)) that the Initial Documents do not merge into one contract, we express no opinion (at step (2)), whether, if they had merged into a single contract, an ambiguity in the payment term of the Wholesale Security Agreement would somehow infect the payment term of the demand Promissory Note. Instead, we are inclined

to observe that these are separate payment terms, calling for separate payments, on separate events and this reinforces our view that—despite being between the same parties and being executed at the same time—these are separate contractual obligations.

As to step (3)—which was the purpose of the entire exercise—we confess to being confused. If the purpose was to force Judge Jensen to consider extrinsic evidence, the irony is that she did, in fact, consider extrinsic evidence. She wrote that she considered it, stating that: "this Court, in order to construe the intent of the parties, will review the initial contract documents *as well as the extrinsic evidence produced during trial*." Furthermore, Judge Jensen specifically relied on it when she explained that the January 9 letter was a demand letter, and not a notice of default, based on the "back-drop" of the interactions between GMAC and the Dealerships from 2005-2009. Then, in explaining her finding that the Promissory Note is a demand note, Judge Jensen cited Denny's testimony: "Even Denny acknowledged he knew that GMAC could call for payment of the note[ ] at any time." Thus, it appears to us that Judge Jensen clearly considered extrinsic evidence when arguably she need not have. Nobody has, however, challenged that decision. Therefore, we affirm.

II. Duty of Good Faith and Fair Dealing

The Dealerships next argue that the trial court erred in concluding that GMAC was not subject to an implied duty of good faith and fair dealing in its exercise of its demand rights. The Dealerships argue that the ambiguity in the Initial Documents imposed the duty on GMAC. Ally, the successor-in-interest to GMAC, responds that the trial court did not

err in finding that GMAC was not subject to the implied duty because the duty is inapplicable to the exercise of a demand note. We hold that the trial court was correct to find that the duty to act in good faith did not preclude GMAC from exercising its clear right under the Promissory Note to demand immediate payment.

"Maryland law implies a duty of good faith and fair dealing in certain contracts." *Waller v. Maryland Nat'l Bank*, 95 Md. App. 197, 211 (1993).[2] This duty "obligates a lender to exercise good faith in performing its contractual obligations." *Id.* at 211-12. The implied duty of good faith and fair dealing, however, does not preclude the holder of an unambiguous demand note from demanding immediate payment. *Id.* at 217.

The trial court correctly explained this principle:

> [T]he Court of Special Appeals in *Waller v. Maryland National Bank*, 95 Md. App 197 (1993), concluded that the duty of good faith and fair dealing[ ] implied in the performance of contractual relationships cannot be applied to demand promissory notes. Affirming that the very character of demand notes are such that the note is "payable immediately, without demand, [t]he implied duty of good faith may not be used to extend or add to the obligations a party has accepted under a contract." 95 Md. App. at 213. … The Court noted that "the weight of authority in other jurisdictions holds that the good faith requirement does not apply to a lender's decision to call a demand note." [citations omitted] *Id*. at 217. … Accordingly, this Court declines to recognize the implied duty of good faith

[2] The Court of Appeals vacated our opinion *Waller v. Maryland Nat'l Bank*, 95 Md. App. 197 (1993) on the grounds that there was not a final judgment from the trial court. *Waller v. Maryland Nat'l Bank*, 332 Md. 375 (1993). Therefore, while we are not bound by *stare decisis* to follow our decision in *Waller*, we adopt its reasoning and its conclusion that the duty of good faith and fair dealing does not preclude the holder of an unambiguous demand note from demanding immediate payment.

> and fair dealing[ ] to the demand [Promissory Notes] executed by the Dealership[s].

The trial court correctly found that the Promissory Note was an unambiguous demand note. In Maryland, the implied duty of good faith and fair dealing does not preclude the holder of such a note from demanding immediate payment. *Waller*, 95 Md. App. at 217. Thus, the trial court also did not err in concluding that GMAC was not subject to the implied duty of good faith and fair dealing when it made demand.

JUDGMENT OF THE CIRCUIT COURT FOR TALBOT COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.