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UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT

Not For Publication

IN RE:	)	
	)	
PAUL AND BONNIE BOURBEAU,	)	**Case No. 99-10916**
	)	**Chapter 7**
Debtor.	)	

RAYMOND J. OBUCHOWSKI, TRUSTEE of the BANKRUPTCY ESTATE OF PAUL AND BONNIE BOURBEAU,	)	**ADVERSARY PROCEEDING No. 99-01074**
Plaintiff,	)	
v.	)	
CLAUDE AND JEANNE BOURBEAU AND PAUL AND BONNIE BOURBEAU,	)	
Defendants.	)	

APPEARANCES:

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MEMORANDUM OF DECISION ON MOTIONS FOR SUMMARY JUDGMENT

I. ISSUE

The parties have filed competing motions for summary judgment on the issues of (i) whether the defendants properly perfected their lien on the debtors' truck, insulating the lien from the plaintiff-trustee's 11 U.S.C. §§ 544, 547 and 549 avoiding powers; and/or (ii) whether assuming avoidance by the plaintiff-trustee, the defendants-debtors can exempt the truck under 11 U.S.C. § 522(g). After a review of the pleadings and the relevant statutory and case law, the Court holds that the lien may be avoided under § 544 because of a lack of timely pre-petition perfection or under §

549 as an inappropriate post petition transfer; and, further, that the debtors are not entitled to exempt the truck under § 522(g).

II. BACKGROUND

The parties have filed statements of undisputed facts, upon which the following factual recitation is based.

1. On July 1, 1999, Paul and Bonnie Borbeau (the "Debtors" or "Defendants-Debtors") filed for protection under chapter 7 of the Bankruptcy Code.

2. On or about July 19, 1999, Raymond Obuchowski (the "Plaintiff-Trustee" or "Trustee") was appointed as chapter 7 case trustee.

3. Claude and Jeanne Borbeau (the "Defendants-Lienors") are Paul Borbeau's parents.

4. On March 1, 1999, the Defendants-Lienors loaned the Defendants-Debtors $22,905 to purchase a 1999 Dodge Ram truck (the "Truck"); the loan was evidenced by a promissory note and security agreement of the same date, pursuant to which the Truck was to serve as collateral for the loan.

5. On March 2, 1999, the Debtors executed an application prepared by Handy Dodge Toyota to obtain a title to the Truck from the Vermont Agency of Transportation.

6. Apparently, the title application, prepared by Handy Dodge Toyota and signed by the Defendants-Debtors, did not list the Defendants-Lienors as "lienholder".

7. Handy Dodge Toyota forwarded the application to the Department of Motor Vehicles.

8. A Certificate of Title was issued to the Debtors on March 30, 1999 with no lienholders indicated thereon.

9. On April 1, 1999, the Debtors executed an Application for Filing Notice of Security Interest to reflect the lienholder status of the Defendants-Lienors. Handy Dodge Toyota issued a check on behalf of the Defendants-Debtors for payment of the filing fee on June 8, 1999.

10. The new application was date-stamped received by the Department of Motor Vehicles on July 14, 1999, 13 days after the Debtors commenced their chapter 7 case. According to the Trustee, a further inquiry to the Department of Motor Vehicles disclosed that title documents date-stamped July 14, 1999 were likely actually received on July 9, 1999.

11. On July 19, 1999, a corrective Certificate of Title was issued reflecting the lienholder status of the Defendants-Lienors.

On November 15, 1999, the Plaintiff-Trustee commenced the instant adversary proceeding. The Defendants' answer was filed in January, 2000, and the competing summary judgment motions were filed in May, 2000.

III. DISCUSSION

The Plaintiff-Trustee's affirmative position is straight-forward, namely, since Defendants-Lienors had not properly perfected their security interest before the bankruptcy filing, the Trustee as "hypothetical lien creditor" under § 544 can avoid the lien and/or can avoid the post-petition perfection as an unauthorized post-petition transfer under § 549. The Defendants argue for summary judgment in their favor on the grounds, essentially, that Handy Dodge Toyota is responsible for any errors and that the Defendants-Lienors had done all that was required of them under applicable law. Alternatively, the Defendants argue that if the Trustee is able to avoid the lien, that pursuant to § 522(g), the Defendants-Debtors can exempt the Truck. The parties do not dispute the applicable law; however, they do dispute its application.

In re Farnham, 57 B.R. 241 (Bankr. D.Vt. 1986) (Conrad, J.) specifically addressed the issues facing the Court in the instant case. Farnham analyzed the relevant statute, the Vermont Motor Vehicle Certificate of Title and Anti-Theft Act, which provides:

> (a) Unless excepted by section 2041 [not applicable here], a security interest in a vehicle of a type for which a certificate of title is required is not valid against creditors of the owner or subsequent transferees or lienholders of the vehicle unless perfected as provided in this subchapter.
>
> (b) A security interest is perfected by the *delivery* to the commissioner of the existing certificate of title, if any, an *application for a certificate of title containing the name and address of the lienholder and the date of his security agreement* and the required fee. It is perfected as of the time of its creation if *delivery* is completed within twenty days thereafter, otherwise as of the time of the *delivery*.

23 V.S.A. § 2042(a) and (b) (emphasis supplied). Farnham explained . . . "[t]he Act expressly states that compliance with § 2042 is the exclusive means of perfecting a security interest in a motor vehicle:

> The method provided in this subchapter of perfecting and giving notice of security interests subject to this subchapter is exclusive. Security interests subject to this subchapter are hereby exempted from the provisions of law which otherwise require or relate to the filing of instruments creating or evidencing security interests.

23 V.S.A. § 2047. The statute also requires that:

> (a) Each certificate of title issued by the commissioner shall contain:
>
> > (3) The *names and addresses of any lienholders*, in the order of priority as shown on the application or, if the application is based on a certificate of title, as shown on the certificate . . . .

23 V.S.A. § 2018(a)(3)[(emphasis supplied)]. The commissioner must mail the certificate of title to the first lienholder. 23 V.S.A. § 2019." Farnham, 57 B.R. at 244-45. The requirements are reiterated in another section of the statute as well:

> (B) If the application refers to a vehicle purchased from a dealer, *it shall contain the name and addresses of any lienholder holding a security interest* created or reserved at the time of the sale and the date of his security agreement and be signed by the dealer as well as the owner, and the dealer shall promptly mail or deliver the application to the commissioner.

23 V.S.A. § 2015(b)(emphasis supplied).

Accordingly, the statute makes abundantly clear that the critical path to perfection requires an application identifying the lienholder. That did not happen in the instant case until after the Debtors filed for bankruptcy protection, several months after the funds were loaned, lien documents were executed and the Truck was purchased. Although the dispute in Farnham concerned a clerical error at the Department of Motor Vehicles,[1] Farnham squarely addressed the issue before this Court where it states with respect to the lienholder in that case: "Had Harvester's application similarly

[1] According to Farnham, if an employee of the Department of Motor Vehicles makes an error in processing the application and/or issuing the title, the lienholder will be protected. In that regard, Farnham noted, "[u]nder Vermont law, '[t]he title application alone satisfies the requirement for perfection of a security interest in a motor vehicle.' General Motors Acceptance Corporation v. Lefevre, 38 B.R. 980, 983 (D.Vt. 1983), affirming 27 B.R. 40 (Bkrtcy. D.Vt.)." Id. at 245-46."

lacked information required by 23 V.S.A. § 2042(b) [(i.e., lienholder information)], as concededly it did not, Harvester too would not have been perfected." Id. at 246.

The Defendants' attempts to impute the error to Hand Dodge Toyota are of no avail in this Court. The Defendants-Lienors have cited no authority for the proposition that their alleged lack of involvement in the title application process insulates them from the error in the application. 23 V.S.A. §§ 2042(b) and 2015(b) are clear that the application for a certificate of title must contain the name and address of the lienholder and the date of the security agreement underlying the lien to be perfected. That was not done in this case until July 14, 1999, 13 days after the bankruptcy filing and more than 100 days from the execution of the incorrect application.

Thus, the Defendants-Lienors' security interest was not perfected at the time of the bankruptcy filing. A "hypothetical lien creditor" under § 544(a) may cut off security interests that are unperfected at the time of the bankruptcy filing.[2] Furthermore, and independent of § 544, the

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[2] § 544. Trustee as lien creditor and as successor to certain creditors and purchasers.

(a) The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by—

(1) a creditor that extends credit to the debtor at the time of the commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such a creditor exists;

(2) a creditor that extends credit to the debtor at the time of the commencement of the case, and obtains, at such time and with respect to such credit, an execution against the debtor that is returned unsatisfied at such time, whether or not such a creditor exists; or

(3) a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists.

(b) The trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of this title or that is not allowable only under section 502(e) of this title.

Trustee has the power under § 549 of the Bankruptcy Code to avoid unauthorized post-petition transfers.[3] The Defendants make no argument that any of the statutory exceptions contained in § 549(a) applies. The effect of either of these avoidance powers (§§ 544 or 549) is the same ----- the Defendants-Lienors do not hold a perfected security interest in the Truck.

The Defendants-Debtors' assertion that 11 U.S.C. § 522 (g) enables them to exempt the Truck after avoidance is incorrect. Subsection (g) of § 522 provides that a debtor may exempt property that has come back into the estate by virtue of the trustee's exercise of an avoiding power. However, the ability to exempt is limited to the following circumstances:

> (1) (A) such transfer was not a voluntary transfer of such property by the debtor; and
> (B) the debtor did not conceal such property; or
> (2) the debtor could have avoided such transfer under subsection (f)(2) of this section.

11 U.S.C. 522(g). Neither of these circumstances exist in the instant case.

First, subsection (1) does not apply, as the transfer from the Defendants-Debtors to the Defendants-Lienors *was* a voluntary transfer, as indicated by the note, security agreement and efforts to perfect the security interest. Second, subsection (2) does not apply as it refers to § 522(f)(2) [now § 522(f)(1)(B)], which pertains to "nonpossessory, nonpurchase-money" security interests. The security interest in the case at hand, however, is a purchase money security interest

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[3] § 549. Postpetition transactions.

(a) Except as provided in subsections (b) or (c) of this section, the trustee may avoid a transfer of property of the estate—

(1) that occurs after the commencement of the case; and

(2) (A) that is authorized only under section 303(f) or 542(c) of this title; or

(B) that is not authorized under this title or by the court.

(i.e., money loaned to purchase specific property which is pledged as collateral for such loan).

Summary judgment is appropriate only if there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). A fact is material when it affects the outcome of the suit under governing law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The Courts have found that there is a genuine dispute over a material fact when the "evidence supporting the claimed factual dispute [is] shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." Id. at 249 (quoting First National Bank of Arizona v. Cities Services Co., 391 U.S. 253, 288-89 (1968)). As there is no genuine dispute as to any material fact stated herein, summary judgment is appropriate in this matter.

IV. CONCLUSION

For the reasons stated above, the Plaintiff's motion for summary judgment is granted. This Court holds the Defendants-Lienors have no lien on the truck and that the Debtor is not entitled to claim the truck as exempt property. The Defendants' motion for summary judgment is denied.

Dated at Rutland, Vermont this 18th day of July, 2000.

/s/ Colleen A. Brown
Honorable Colleen A. Brown
United States Bankruptcy Judge