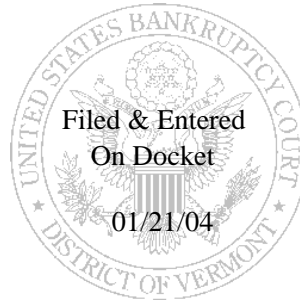


**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF VERMONT**

In re:

**Steve A. Salls and  
Marian L. Salls,  
Debtors.**



**Chapter 13 Case  
# 03-11202**

*Appearances:* *Kathleen A. Walls, Esq.  
Middlebury, VT  
Attorney for the Debtors*

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South Burlington, VT  
Attorney for Movant*

**MEMORANDUM OF DECISION**  
**SUSTAINING THE DEBTORS' OBJECTION TO BANKNORTH'S PROOF OF CLAIM and**  
**OVERRULING BANKNORTH'S OBJECTION TO CONFIRMATION**

Both objections before the Court focus on the question of whether a creditor who engaged in a secured transaction is entitled to treatment as a secured creditor in a subsequently filed bankruptcy case if the debtors no longer own the pledged collateral on the date they file for chapter 13 relief. This Court has jurisdiction over these contested matters pursuant to 28 U.S.C. §§ 157(b)(2)(K) & (L) and 1334.

**I. PROCEDURAL HISTORY**

On August 13, 2003, the Debtors filed a petition seeking relief under chapter 13, and filed a plan for repayment of their debts (the "Plan"), see docs. # 1 & 2. This Court set a hearing on the confirmation of the Plan for September 11, 2003, and continued the confirmation hearing to November 13, 2003, in order to address two non-relevant objections. In the interim, on September 26, 2003, Banknorth, N.A. ("Banknorth") filed an Objection to Confirmation of the Debtors' Plan ("the Objection"), see doc. #19, based upon the Debtors' failure to treat Banknorth's claim as a secured claim. On November 6, 2003, the Debtors filed a First Amended Plan to address the two other objections and also filed a Response to the Banknorth Objection, see doc #23. On November 13, 2003, the Court confirmed the Debtors' First Amended Plan subject to the resolution of the Banknorth Objection and set an evidentiary hearing for December 2, 2003, to address that Objection. On November 14, 2003, the Debtors filed an objection to the proof of claim filed by Banknorth ("Objection to Claim") which the Court directed be addressed at the December 2<sup>nd</sup> hearing. On November 24, 2003, the parties filed a Joint Pre-Trial Statement and on December 1, 2003, Banknorth filed its Opposition to the Debtors' Objection to Claim.

## II. FACTS

The parties' Joint Pretrial Statement sets forth the undisputed material facts as follows:<sup>1</sup>

On February 1, 2001, Debtor Steve A. Salls purchased a 2001 Suzuki LT-A500, Serial # JSAAM42A012100511 (hereafter "Collateral") from Land Air Honda Suzuki (hereafter "Land Air") in Essex Junction, Vermont. To finance the purchase, Debtor Steve A. Salls entered into a Retail and Installment Security Agreement (hereafter "Agreement1") with Land Air dated February 1, 2001. Agreement1 was assigned to First Vermont Bank, N.A. and granted an enforceable "security interest" that attached to the Collateral under Vermont Law. Evidence of First Vermont Bank, N.A.'s security interest was filed in the Vermont Secretary of State's Office on February 12, 2001, and said filing "perfected" this security interest in the Collateral under Vermont Law. Banknorth, N.A. is the successor in interest to First Vermont Bank, N.A. through merger effective January 1, 2002.

On or about March 27, 2002, Debtor Steve A. Salls and Eugene Raymond entered into an Agreement (hereafter "Agreement2") dated March 27, 2002 regarding the Collateral. Eugene Raymond agreed to take possession of the vehicle and assume monthly payments on the vehicle. Agreement2 required a \$200 payment upon signing and that \$194.00 monthly payments be made to Steve A. Salls on or before the 15<sup>th</sup> of each month beginning April 15, 2002. Agreement2 required Steve A. Salls to pay Banknorth, N.A. with the money received from Eugene Raymond. Agreement2 stated that "[s]hould the payment become delinquent (*sic*) 45 days or more the seller reserves the right to repossess the machine. Any money already paid at that time will be forfeit (*sic*)."

On or about September 5, 2002, Debtor Steve A. Salls entered into an Extension Agreement with Banknorth, N.A. (hereafter "Agreement3") dated September 5, 2002 regarding the Collateral. Banknorth, N.A. agreed that upon receipt of the April, 2002 payment, it would extend the May, June, July, August, and September, 2002 payments, with the next payment being due on October 18, 2002. Agreement3 changed the maturity date to July 18, 2005.

On or about March 5, 2003 Banknorth, N.A. commenced a replevin action in the Addison County Superior Court, State of Vermont, Docket No. 50-3-03 Ancv, by filing a Complaint against Steve A. Salls and Eugene Raymond. On April 23, 2003 after a Hearing in the Addison County Superior Court on Banknorth, N.A.'s Motion for an Order of Replevin, the Court entered an Order of Approval for a Writ of Replevin. The Court Clerk issued a Writ of Replevin on April 23, 2003 and it commanded any sheriff or constable in the state to replevy the Collateral taken and detained by "defendants, Steve A. Salls or Eugene Raymond." Sergeant

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<sup>1</sup> See Joint Pretrial Statement (doc. #30) (paragraph numbers removed for ease of reading).

Don Keeler, Jr. of the Addison County Sheriff's Office attempted to replevy the Collateral from both Steve A. Salls and Eugene Raymond. When confronted individually, each defendant, told Sergeant Keeler that the other had the Collateral. Sergeant Keeler searched Eugene Raymond's premises and family camp, and the premises of Steve A. Salls, but was unable to locate the Collateral and execute the Writ.

### **III. DISCUSSION**

#### ***A. Banknorth's Proof of Claim***

The Court's analysis must begin with Banknorth's proof of claim. It is well settled that the filing of a proper proof of claim constitutes *prima facie* evidence of the validity of the claim. See 11 U.S.C. § 502(a).<sup>2</sup> However, once an objecting party submits sufficient evidence to place the claimant's entitlement at issue, the burden of going forward with the evidence to sustain the claim shifts to the claimant. RUSSEL, BANKRUPTCY EVIDENCE MANUAL, 2001 Ed., § 301.52 (citing In re Harrison, 987 F.2d 677 (10<sup>th</sup> Cir. 1993)).

Here, Banknorth filed a proper proof of claim which enjoyed *prima facie* validity. See Case #03-11202 Claims Register, Claim #9. Pursuant to its proof of claim, Banknorth asserted it had a fully secured claim that was secured by the Collateral. However, the Debtors came forward at the evidentiary hearing with proof that they had no ownership interest in the Collateral on the date they filed their petition. Hence, they argued that Banknorth's claim was wholly unsecured under § 506(a). To support their position, the Debtors introduced both testimony about, and a copy of, Agreement<sup>2</sup> between Debtor Steve A. Salls and Eugene Raymond, dated March 27, 2002, whereby Debtor Steve A. Salls transferred his interest in the Collateral to Mr. Raymond. Thus, the burden of persuasion shifted to Banknorth to justify its proof of claim and its demand for treatment as a secured creditor. Section 506(a) sets forth the criteria for determining the secured status of a creditor:

- (a) An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, ***is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property***, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

§ 506(a) (emphasis added).

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<sup>2</sup> All reference to statutes herein refer to Title 11 of the United States Code (the "Bankruptcy Code"), unless otherwise indicated.

Banknorth argued that although Agreement2 purports to transfer ownership of the Collateral from Debtor Steve A. Salls to Eugene Raymond, the Debtors' ownership interest was actually reinstated prior to the date of the bankruptcy filing. As the Court understands their argument, because Agreement2 specifies that the seller reserves the right to repossess the Collateral, the Debtor allegedly regained ownership upon Mr. Raymond's default. The Court finds that Banknorth has failed to carry its burden of persuasion on this question of reverting ownership and, hence, on the secured status of its claim.

For Banknorth to meet its burden, it needed to demonstrate that the bankruptcy estate (or the Debtors) had an interest in the Collateral on the date of the Debtors' filing and that the value of the estate's interest was equal to or greater than Banknorth's claim. Pursuant to § 506(a), the existence of a secured claim is dependent entirely upon the estate having an interest in the subject collateral. As COLLIER, the preeminent treatise on bankruptcy, instructs:

If, for example, the collateral was transferred by the debtor prior to the commencement of the bankruptcy case, and the debtor retained no interest in the property or the transfer cannot be set aside, the estate will have no interest in the collateral, and hence, the creditor's interest in the estate's interest in the collateral will be nothing (even though the creditor's interest may continue in the property itself, albeit in someone else's hand).

LAWRENCE P. KING, 4 COLLIER ON BANKRUPTCY ¶ 506.03[5][a] (15th ed. rev. 2003) (citations omitted). Banknorth presented testimony from Josh Mazer (the manager of Land Air), Eugene Raymond, and Steve A. Salls to prove that Debtor Steve A. Salls had regained possession and ownership of the Collateral prior to the filing of this bankruptcy case.

The Court finds Mr. Mazur's testimony inconclusive as to who owned the Collateral in September 2002, when the Collateral was brought to Land Air for repairs. Although the purchase order for the subject repairs was in the name of Steve Salls and Mr. Mazur testified that he recalled Mr. Salls bringing the Collateral in to Land Air, Mr. Mazur also testified that he had no knowledge regarding the ownership of the Collateral.

Mr. Salls and Mr. Raymond gave conflicting testimony about the ownership of the Collateral, the transfer of the Collateral, and the circumstances surrounding the execution of Agreement2. Having had the opportunity to observe the witnesses and listen to their testimony, the Court finds Mr. Salls to be more credible. Hence, it credits Mr. Salls' testimony and rejects Mr. Raymond's testimony. Accordingly, the Court finds that Mr. Raymond did sign Agreement2, did take ownership of the Collateral, did agree to make the payments on the subject Banknorth debt, did default on his obligations under Agreement2, and did not return the Collateral to Debtor Steve A. Salls.

Thus, the record before the Court does not support Banknorth's position that the Debtors had an interest in the Collateral on the date of the Debtors' bankruptcy filing. Accordingly, this Court sustains the Debtors' Objection to Claim and, thus, holds that the Banknorth claim is unsecured.

***B. Banknorth's Objection to Confirmation***

Banknorth's Objection to Confirmation asserts three grounds. First, Banknorth argues that the Debtors' Plan has not been proposed in good faith as required under § 1325(a)(3), because the Debtors' petition and other filed documents state an invalid address for Banknorth, misrepresent Banknorth's status to be unsecured, and fail to list the Collateral or its transfer. The Court finds the bases for this objection to be without merit. Banknorth presented no evidence of the incorrect address or any intention by the Debtors to deprive Banknorth of due process thereby. Likewise, the Court finds no bad faith in the Debtors' omission of the Collateral from their listing of assets.

Second, Banknorth alleges that the Debtors' failure to provide the same treatment for Banknorth's claim as the Debtors do for two secured creditors to be a violation of §§ 1322(a)(3), 1322(b)(1), and 1322(b)(2). Since the Court finds that Banknorth does not hold a secured claim, it finds no violation of the Bankruptcy Code in the Debtors' categorization of the Banknorth claim as unsecured.

Finally, Banknorth insists that the Plan should not be confirmed because it does not provide: (1) for Banknorth to retain its lien securing its claim; (2) for Banknorth to receive the full value of its claim; or (3) for the surrender of Banknorth's Collateral as required under § 1325(a)(5)(B). Finding Banknorth does not hold a secured claim, the Court rejects this component of Banknorth's objection.


Accordingly, Banknorth's Objection to Confirmation is hereby overruled in its entirety.

**V. CONCLUSION**

Based on the record before it, and having considered the demeanor and credibility of the witnesses presented, the Court finds Banknorth's claim in this case is not secured. Therefore, the Court sustains the Debtors' Objection to Banknorth's proof of claim. Moreover, finding Banknorth's claim is unsecured, the Court also overrules Banknorth's Objection to Confirmation of the Debtors' Chapter 13 Plan.

This Memorandum of Decision constitutes the Court's findings of fact and conclusions of law.

January 20, 2004  
Rutland, Vermont

  
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Colleen A. Brown  
United States Bankruptcy Judge