UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT

In re:

Douglas A. Yantz, Jr.,
Debtor.

Chapter 13 Case
 # 04-10370

Appearances: *Kathleen Walls, Esq.*
Middlebury, VT
Attorney for Debtor

Jane Osborne McKnight, Esq.
Shelburne, VT
Creditor Pro Se

ORDER ADDRESSING PERFECTION OF LIEN AND SETTING EVIDENTIARY HEARING ON OBJECTION TO CONFIRMATION

Attorney Jane Osborne McKnight asserts that a portion of the attorney's fees which the Debtor owes her is secured by a lien on a Polaris snowmobile owned by the Debtor. The Debtor disputes that Attorney McKnight has a valid lien on the snowmobile and insists that the full amount of Attorney McKnight's claim ($6,544) is unsecured..

The Court has considered the objection to claim filed by the Debtor, the arguments set forth at the May 13, 2004 hearing, as well as the supplemental objection to claim, response, reply and final objection filed by the parties. The Court notes the Debtor's objection to the Court's consideration of Attorney McKnight's supplemental memorandum of law (doc. #25) and finds that it prefers to decide this matter on the merits, that Attorney McKnight has set forth good cause for the timing of the filing, and in the interests of justice, it is appropriate to consider this filing a valid part of the record.

The parties are in dispute both about whether (1) Attorney McKnight has a valid security agreement which would create a security interest; and (2) if so, whether and how that security interest has been perfected. Attorney McKnight posits that the documents labeled Exhibits G and H to her Opposition to Objection to Claim constitute the "agreement" between the Debtor and her which creates the security interest. Alternatively, she argues that it is beyond question that there was a meeting of the minds, and this is sufficient to constitute an agreement to create a security interest. Unfortunately, Exhibit G is nothing more than a telephone message sheet written by her assistant which allegedly documents the Debtor's offer of the snowmobile as collateral to secure repayment of his debt to Attorney McKnight, and, as filed, is not legible. Exhibit H does little to elucidate this since it is a letter from Attorney McKnight to the Debtor purportedly confirming the "agreement", but the letter: (1) is not signed by the Debtor; (2) does not articulate that the Debtor is offering a security interest; (3) does not evince that Attorney McKnight is specifically accepting the offer of a security interest; (4) does not demonstrate that Attorney McKnoght is asserting her right to possession of the snowmobile and releasing it to the Debtor solely for the purpose of his liquidating it and

delivering the proceeds to her, as she asserts in her Opposition to the Objection to Claim. Specifically, the subject letter (Exhibit H) provides:

> I appreciate your offer on the Polaris and would encourage you to sell it immediately, though I could not possibly sell if for you. It is a question of time and my lack of expertise.

This is hardly enough to create an agreement, even if the Court were inclined to accept the very general definition of agreement urged by Attorney McKnight. Thus, the Court finds the record before it is insufficient for a determination as to whether there is any agreement between the parties; it must conduct an evidentiary hearing in order to determine if there was, indeed, a written agreement or meeting of the minds which would meet the legal requirements of a security agreement.

If the Court were to find that a valid security agreement exists and a valid security interest was created, it would still need to address whether that security interest was properly perfected. It can make a partial finding on that issue on the record before it. The Court finds that the security interest was not properly perfected under Vermont law, but may nonetheless be upheld on equitable grounds. Under Article 9 of the Vermont Uniform Commercial Code, all security interests must be perfected by a filing unless the transaction fits within a list of specified exceptions. See 9A V.S.A. § 9-310.

Attorney McKnight alleges that, even though security interests in snowmobiles are not listed in the designated exceptions to the general rule requiring filing, snowmobiles are excluded under a recent statutory enactment requiring them to be titled. She refers to 23 V.S.A. § 3823. In 2001, the Vermont legislature amended Title 23, dealing with motor vehicles, to add snowmobiles to the general definition of motor vehicles and to require that snowmobiles be titled. Pursuant to 23 V.S.A. § 3202, snowmobiles are now required to be registered, but pursuant to 23 V.S.A. § 3807, "No certificate of title need be obtained for . . . (2) . . . any snowmobile or all terrain vehicle of a model year prior to 2004;". Since the Parties acknowledge that the Polaris snowmobile in question is older than a 2004 model, it does not require registration and no title need be issued to its operator.

With this backdrop we turn to the critical statute for the instant inquiry :23 V.S.A. § 3823, which deals with the perfection of security interests in snowmobiles. It provides:

> (A) Unless excepted by section 3822 of this title, a security interest in a vessel, snowmobile or all-terrain vehicle **of a type for which a certificate of title is required** is not valid against creditors of th the owner or subsequent transferees or lienholders of the vessel, snowmobile or all-terrain vehicle unless perfected as provided in this chapter [i.e., by notation on the certificate of title].

23 V.S.A. § 3823(A) (emphasis added). Since it is clear that this provision does not require security interests in the subject snowmobile to be perfected via a notation on the certificate of title (since, as a pre-2004

snowmobile, no certificate of title is required), the general provision of 9A V.S.A. § 9-310 applies. Hence, the Court finds that in order for Attorney McKnight to have properly perfected her alleged security interest in the subject pre-2004 snowmobile, she needed to file a financing statement. She has acknowledged that she made no such filing. Accordingly, the Court finds that she has not complied with the state law requirements for perfection.

However, it is important to observe that there are some extenuating circumstances that may warrant consideration in the event the Court reaches the perfection issue. The Objection to Claim reflects that the Debtor testified at the meeting of creditors that he did not retain or sign any agreement retaining Attorney McKnight He subsequently constructively recanted that testimony and withdrew that portion of the objection to claim alleging no retention of counsel when Attorney McKnight filed a copy of the retainer agreement with his signature. See Exh C to Opposition to Objection to Claim (filed May 3, 2004). This sequence of events will likely be relevant in the Court's consideration of the totality of circumstances presented by this objection to claim, and, in particular, in its determination of the potential applicability of In re Howard Appliance Corp, 874 F.2d 88 (2d Cir. 1989) in ascertaining whether any security interest is properly perfected. If it applied Howard, the Court could impose a security interest on the snowmobile, notwithstanding Attorney McKnight's lack of proper perfection, if the Court found that the Debtor and Attorney McKnight had created a valid security agreement and the Debtor had engaged in misleading or fraudulent conduct bearing on perfection.

The Court does not want this issue to unreasonably delay confirmation of the plan. Therefore, it shall address the first issue, of whether there is a security agreement between the parties, at an evidentiary hearing to be held within thirty days. The outcome of that hearing will provide the basis for the Court's analysis of the perfection question, the allowance of this claim and the confirmation of the Debtor's chapter 13 plan.

Accordingly, IT IS HEREBY ORDERED that:

1. The confirmation hearing currently scheduled for **June 24, 2004, at 1:30 P.M.** will instead be a status hearing (on the same date and at the same time);
2. At the status hearing, the Debtor shall report on the filing of tax returns, the status of other objections to confirmation, and whether the amended plan resolves all outstanding objections, other than that of Attorney McKnight;
3. The evidentiary hearing to determine whether there was a security agreement, whether a security interest has been created, and the treatment of Attorney McKnight's claims shall be set for **July 8, 2004, from 11:00 A.M. to NOON**, in Burlington, Vermont (unless the parties present an alternative, mutually acceptable, date, time and/or place for the evidentiary hearing);

4. The Parties shall file a final Pre-Trial Statement **by July 1, 2004**, setting forth, *inter alia*, all witnesses to be called, a summary of each witness's testimony, any stipulation of facts, a list of exhibits to be introduced, and any evidentiary issues anticipated; and

5. The confirmation hearing shall be held on **July 8, 2004, at 1:30 P.M.**, in Burlington, Vermont.

June 22, 2004
Rutland, Vermont

Colleen A. Brown
United States Bankruptcy Judge