

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE  
EASTERN DISTRICT OF TENNESSEE**

In re

Case No. 01-33789

DANNY LEE FARMER

Debtor

JOHN P. NEWTON, JR., TRUSTEE

Plaintiff

v.

Adv. Proc. No. 03-3045

SOVEREIGN BANK and  
INDEPENDENT BANK

Defendants

**MEMORANDUM**

**APPEARANCES:** JOHN P. NEWTON, JR., ESQ.  
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**RICHARD STAIR, JR.**  
**UNITED STATES BANKRUPTCY JUDGE**

This adversary proceeding is before the court upon the Complaint filed by the Plaintiff on March 19, 2003, seeking to avoid, pursuant to 11 U.S.C.A. § 547(b) (West 1993), a lien on a vehicle perfected within ninety days of the Debtor's bankruptcy filing, and seeking to preserve the value of the avoided lien for the benefit of the bankruptcy estate pursuant to 11 U.S.C.A. § 550 (West 1993 & Supp. 2003).<sup>1</sup>

The trial was held on December 2, 2003. The record before the court consists of the Stipulation of Undisputed Facts and Documents filed by the parties on November 21, 2003, eight stipulated exhibits, and the testimony of the Plaintiff.

This is a core proceeding. 28 U.S.C.A. § 157(b)(2)(F) (West 1993).

## I

On March 26, 2001, the Debtor entered into a Tennessee Simple Interest Installment Sales Contract and Security Agreement (the Contract) with Oak Ridge C-P-D-JE, Inc., a car dealership, for the purchase of a 1998 Chrysler Town & Country automobile (the Vehicle). Pursuant to the Contract, the Debtor granted a security interest in the Vehicle to Oak Ridge C-P-D-JE, Inc., who assigned, without recourse, all right, title, and interest in the Contract to Independent Bank. On April 17, 2001, Independent Bank submitted an Application for Certificate of Title and Registration to the Tennessee Department of Safety, noting the Debtor as the owner of the Vehicle

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<sup>1</sup> The Plaintiff's reference to § 550 in the context of preserving a lien avoided under § 547(b) is misplaced. See 11 U.S.C.A. § 551 (West 1993) ("Any transfer avoided under section . . . 547 . . . is preserved for the benefit of the estate but only with respect to property of the estate."); *In re Carpenter*, 266 B.R. 671 (Bankr. E.D. Tenn. 2001).

and listing Independent Bank as first lienholder. On the same date, April 17, 2001, the Tennessee Department of Safety issue a Certificate of Title reflecting the requested information and creating a properly-perfected security interest in the Vehicle for Independent Bank.

On June 7, 2001, Independent Bank released its lien noted on the April 17, 2001 title and, on the same day, filed an Application for Noting of Lien on Certificate of Title with the Tennessee Department of Safety, this time requesting that both Independent Bank and Sovereign Bank be shown as first lienholders on the Vehicle. The Tennessee Department of Safety issued a Certificate of Title evidencing both Independent Bank and Sovereign Bank as first lienholders on the Vehicle on July 10, 2001.<sup>2</sup>

On August 2, 2001, the Debtor filed the Voluntary Petition initiating his bankruptcy case under Chapter 7 of the Bankruptcy Code. Thereafter, on March 19, 2003, the Plaintiff timely filed this adversary proceeding, averring that the second action to perfect the lien on the Vehicle by the Defendants occurred more than twenty days after the Debtor acquired the Vehicle, but within ninety days of the Debtor's bankruptcy filing, and thus, should be avoided as a preferential transfer under 11 U.S.C.A. § 547(b).

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<sup>2</sup> The Stipulations filed by the parties stated that the second title was issued on July 17, 2001; however, the court takes judicial notice that the date appearing on the title itself is July 10, 2001.

## II

A Chapter 7 trustee may avoid certain "preferential" transfers made by a debtor to a creditor if all of the following requirements are satisfied:

(b) Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property—

(1) to or for the benefit of a creditor;

(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

(3) made while the debtor was insolvent;

(4) made—

(A) on or within 90 days before the date of the filing of the petition;  
or

(B) between ninety days and one year before the date of the filing of the petition, if the creditor at the time of such transfer was an insider; and

(5) that enables such creditor to receive more than such creditor would receive if—

(A) the case were a case under chapter 7 of this title;

(B) the transfer had not been made; and

(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

11 U.S.C.A. § 547(b); *see also Luper v. Columbia Gas of Ohio, Inc. (In re Carled, Inc.)*, 91 F.3d 811, 813 (6<sup>th</sup> Cir. 1996) (quoting *Union Bank v. Wolas*, 112 S. Ct. 527, 529-30 (1991)).

Additionally, subsection (e) provides, in material part:

(2) For the purposes of this section, except as provided in paragraph (3) of this subsection, a transfer is made—

(A) at the time such transfer takes effect between the transferor and the transferee, if such transfer is perfected at, or within 10 days after, such time . . . ; [or]

(B) at the time such transfer is perfected, if such transfer is perfected after 10 days[.]

. . . .

(3) For the purposes of this section, a transfer is not made until the debtor has acquired rights in the property transferred.

11 U.S.C.A. § 547(e) (West 1993 & Supp. 2003). The Plaintiff has the burden of establishing that every element of a preference has been satisfied. *See* 11 U.S.C.A. § 547(g) (West 1993).

The parties do not dispute that the lien was recorded for the benefit of the Defendants and that, at the time the Defendants filed the second Application for Noting of Lien on Certificate of Title on June 7, 2001, and at all times thereafter, the Debtor was insolvent. Additionally, the parties have stipulated that there are no other non-exempt assets of the estate, and there have been no defenses pursuant to 11 U.S.C.A. § 547(c) raised by the Defendants. Therefore, the remaining elements to be satisfied are whether a transfer of an interest in property of the Debtor occurred within ninety days before the Debtor filed his bankruptcy petition, and if so, whether the Defendants would receive more than they would under a “hypothetical Chapter 7 case” if allowed to retain their lien.

### III

The first question before the court is whether there was a transfer of an interest owned by the Debtor in property within ninety days of August 2, 2001, the date on which he filed his Chapter 7 bankruptcy case. Specifically, the Plaintiff argues that when Independent Bank released its lien on June 7, 2001, the chain of perfection was broken, the Vehicle was no longer properly perfected, and therefore, the Plaintiff may now avoid the Defendants' lien on the Vehicle because it was re-perfected more than twenty days after the Debtor acquired the Vehicle and within ninety days of the Debtor's bankruptcy filing. The Defendants contend that under Tennessee law, they re-perfected their lien on the Vehicle after Independent Bank released it on June 7, 2001, by filing the Application for Noting of Lien on Certificate of Title also on June 7, 2001, such that regardless of when the new Certificate of Title was issued, perfection related back to June 7, 2001, and the chain of perfection was not broken.

Under the Bankruptcy Code, "'transfer' means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property, including retention of title as a security interest and foreclosure of the debtor's equity of redemption." 11 U.S.C.A. § 101(54) (West 1993 & Supp. 2003). It is generally recognized that the creation of a lien constitutes a "transfer." *Hendon v. Gen. Motors Acceptance Corp. (In re B & B Utils., Inc.)*, 208 B.R. 417, 421 (Bankr. E.D. Tenn. 1997).

Issues such as the method for achieving perfection of a security interest and the time at which a security interest is perfected are matters of state law. *B & B Utils., Inc.*, 208 B.R. at 421.

In Tennessee, the perfection of a security interest in a motor vehicle is governed by title 55, chapter 3 of the Tennessee Code Annotated. Specifically, section 55-3-126, as it existed at all times material to this issue, provided, in pertinent part:

(a) A lien or security interest in a vehicle of the type for which a certificate is required shall be perfected and shall be valid against subsequent creditors of the owner, subsequent transferees, and the holders of security interest and liens on the vehicle by compliance with this chapter.

(b)(1) A security interest or lien is perfected by delivery to the division of motor vehicles<sup>[3]</sup> or the county clerk of the existing certificate of title, if any, title extension form, or manufacturer's statement of origin and an application for a certificate of title containing the name and address of the holder of a security interest or lien with vehicle description and the required fee.

(2) The security interest is perfected as of the time of its creation if the delivery is completed within twenty (20) days thereafter. Otherwise, a security interest is perfected as of the date of delivery to the county clerk or the division of motor vehicles.<sup>[4]</sup>

. . . .

(c) When the security interest is perfected as provided for in this section, it shall constitute notice of all liens and encumbrances against the vehicle described therein to creditors of the owner, to subsequent purchasers and encumbrances . . . .

(d) The method provided in this section and § 55-3-125 of obtaining a lien or encumbrance upon a motor vehicle, . . . subject to the provisions of chapters 1-6 of this title relative to the issuance of certificates of title, shall be exclusive except as to liens depending upon possession and the lien of the state for taxes[.]

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<sup>3</sup> The parties, in their Stipulation of Undisputed Facts and Documents, stipulate that the April 17, 2001 Application for Certificate of Title and Registration and the June 7, 2001 Application for Noting of Lien on Certificate of Title were filed with the Tennessee Department of Safety. The court takes judicial notice that the Tennessee Department of Safety includes the "division of motor vehicles" referenced in the statute.

<sup>4</sup> This statute has since been revised, and the twenty-day language has been deleted. *See* TENN. CODE ANN. § 55-1-126(b)(2) (Supp. 2002) ("The security interest is perfected as of the date of delivery to the county clerk or division of motor vehicles.").

TENN. CODE ANN. § 55-3-126 (1998).<sup>5</sup> In essence, under this statute,

Tennessee is still a notation state. That is, a security interest in a motor vehicle is not perfected until a notation of the lien is made on the certificate of title. When such notation is made, the date of perfection dates from the time of delivery [of the application] to the county clerk [or the Department of Motor Vehicles].

*Still v. First Tenn. Bank, N.A.*, 900 S.W.2d 282, 285 (Tenn. 1995).<sup>6</sup>

It is undisputed that the Debtor acquired the Vehicle on March 26, 2001, and on that date, he granted a security interest in the Vehicle, which was thereafter assigned to Independent Bank. Twenty-two days later, on April 17, 2001, Independent Bank filed an Application for Certificate of Title and Registration with the State of Tennessee, and pursuant thereto, a Certificate of Title was issued on April 17, 2001.

Additionally, the parties stipulated that Independent Bank released its original lien on June 7, 2001. It then applied for the new lien on the same date, although the Certificate of Title noting both Defendants as lienholders was not issued until July 10, 2001. Because the parties stipulated that the Application for Noting of Lien on Certificate of Title was filed by Independent Bank with the State of Tennessee on June 7, 2001, once the title was issued on July 10, 2001, pursuant to section 55-3-126(b)(2), perfection of the Defendants' lien related back to June 7, 2001.

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<sup>5</sup> The statute was amended in 2000, but these amendments were not effective until July 1, 2001.

<sup>6</sup> The *Still* decision answered a certified question from the United States Bankruptcy Court for the Eastern District of Tennessee, Southern Division, regarding whether section 55-3-137, enacted in 1991, effectively repealed section 55-3-126, as both statutes existed in 1995. *See Still*, 900 S.W.2d at 282-84. After the Tennessee Supreme Court decided *Still*, the Tennessee General Assembly revised section 55-3-126 and incorporated therein the text of subsection 137, which became effective on March 29, 1996. *See* TENN. CODE ANN. § 55-3-126 (1996) and notes. This amendment also added the option for delivery of applications to the Tennessee Department of Motor Vehicles, in addition to delivery of an application to the county clerk's office. *See* TENN. CODE ANN. § 55-3-126(b)(1) (1996).

The ninety-day "preference period" began on May 5, 2001. There is no dispute that if the security interest was perfected on the date it was created, March 26, 2001, the date that the Debtor acquired the Vehicle, the Trustee would not have any avoidance powers as to the lien. Additionally, the parties stipulated that the original perfection date of the lien by Independent Bank on April 17, 2001, falls outside the ninety days. Accordingly, if the lien had never been released on June 7, 2001, there would be no dispute. However, the date upon which Independent Bank released the lien, June 7, 2001, falls within the "preference period." Under § 547(e)(2)(1), the "transfer" of the Debtor's security interest in the Vehicle occurred on June 7, 2001, when Independent Bank released its lien during the ninety-day "preference period," regardless of when the Defendants re-perfected the lien in the eyes of the State of Tennessee. As such, the transfer occurred within ninety days of the date upon which the Debtor filed his bankruptcy petition.

Nevertheless, Tennessee Code Annotated section 55-3-126 allows for the relation back of perfection from the date that the State actually issued the Certificate of Title on July 10, 2001, to the date upon which the State of Tennessee received the Application for Noting of Lien on Certificate of Title, which the parties stipulated was June 7, 2001. As such, there was no break in perfection under Tennessee law. Therefore, the Defendants' lien may not be avoided as a preferential transfer,<sup>7</sup> and the Plaintiff's Complaint must be dismissed.<sup>8</sup>

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<sup>7</sup> Because the Plaintiff failed to satisfy all elements of a preference, the court need not address the § 547(b)(5) element.

<sup>8</sup> The Trustee testified that the Vehicle was sold for \$6,500.00. Pursuant to an Order entered in the Debtor's case on September 4, 2003, the Defendants' lien attached to the proceeds.

A judgment consistent with this Memorandum will be entered.

FILED: December 11, 2003

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.  
UNITED STATES BANKRUPTCY JUDGE

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**J U D G M E N T**

For the reasons stated in the Memorandum filed this date, it is ORDERED, ADJUDGED,  
and DECREED that the Plaintiff's Complaint filed March 19, 2003, is DISMISSED.

ENTER: December 11, 2003

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.  
UNITED STATES BANKRUPTCY JUDGE