SO ORDERED.
SIGNED this 11th day of March, 2020

Suzanne H. Bauknight
UNITED STATES BANKRUPTCY JUDGE

THIS ORDER HAS BEEN ENTERED ON THE DOCKET. PLEASE SEE DOCKET FOR ENTRY DATE.

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

In re

ANDREA MARIE PATTERSON

Debtor

JOHN P. NEWTON, TRUSTEE

Plaintiff

v.

ALLY FINANCIAL, INC.

Defendant

Case No. 3:18-bk-33845-SHB
Chapter 7

Adv. Proc. No. 3:19-ap-3026-SHB

MEMORANDUM AND ORDER

Plaintiff filed the Complaint commencing this adversary proceeding on April 23, 2019 [Doc.1], seeking to avoid, pursuant to 11 U.S.C. § 547(b), the lien recorded by Defendant against Debtor's 2018 Honda Accord. Defendant filed a motion to dismiss under Rule 12(b)(6) of the

Federal Rules of Civil Procedure[1] on June 6, 2019, arguing that based on relevant state law, Plaintiff had failed to state a claim upon which relief could be granted. [Doc. 5.] In support, Defendant filed the Affidavits of Christina Peeler ("Peeler Affidavit") and Jay Yeager ("Yeager Affidavit') in support thereof. [Docs. 5-1, 5-2.] Plaintiff filed a reply in opposition, attaching his own affidavit in support ("Newton Affidavit"). [Docs. 7, 7-1.] Because both parties offered documents outside the pleadings relating to the motion to dismiss, the Court entered an Order on August 9, 2019 [Doc. 9], directing that, pursuant to Rule 12(d), the motion would be treated as if for summary judgment under Federal Rule of Civil Procedure 56,[2] and the parties were to supplement their arguments and provide statements of undisputed material facts as required by Rule 56(c).

Defendant filed its statement of undisputed material facts and a supplemental brief in support of its argument on August 22, 2019 [Docs. 11-13]. In response, on September 5, 2019, Plaintiff filed a supplemental response and brief [Docs. 15-16]. Plaintiff also filed his response to the statement of undisputed material facts, which included additional undisputed facts [Doc. 14], to which Defendant responded on September 11, 2019 [Doc. 17]. Now ripe for determination, the record before the Court includes all pleadings of record in this adversary proceeding, the attachments thereto, and all documents and facts of record in the underlying bankruptcy case.[3] *See* Fed. R. Evid. 201(a) (applicable in bankruptcy cases and adversary proceedings pursuant to Fed. R. Evid. 1101(a), (b) and Fed. R. Bankr. P. 9017). This is a core proceeding. 28 U.S.C. § 157(b)(2)(I).

[1] Rule 12 is applicable to adversary proceedings pursuant to Federal Rule of Bankruptcy Procedure 7012.

[2] Rule 56 is applicable to adversary proceedings pursuant to Federal Rule of Bankruptcy Procedure 7056.

[3] The motion to dismiss, as supplemented, is referred to herein as the "Motion."

In summary, Plaintiff asks the Court to enter a judgment avoiding Defendant's lien against the Accord as a preferential transfer pursuant to 11 U.S.C. § 547(b) to be preserved for the benefit of the estate pursuant to 11 U.S.C. § 551 because the transfer occurred within ninety days preceding Debtor's bankruptcy case and the lien was not perfected within thirty days after Debtor acquired the Accord. He also argues in response to Defendant's request for dismissal and summary judgment that "the primary disputed fact is the date of the delivery and/or receipt by the Anderson County Clerk's Office of the Application to note the lien on the title of [Debtor's] vehicle," and he seeks "discovery of the Clerk's business records and employees to determine the actual date of delivery." [Doc. 16 at p. 2.]

I. UNDISPUTED FACTS OF RECORD

On October 24, 2018, Debtor contracted with Honda of Cleveland ("Dealership") to purchase a 2018 Honda Accord ("Accord") for $16,365.87. [Doc. 1-2 at p. 7; Docs. 13, 14 at ¶ 1; Doc. 1-2.] Fifty-seven days later, on December 20, 2018, Debtor filed her Chapter 7 bankruptcy case,[4] in which Plaintiff was appointed and continues to serve as the Chapter 7 Trustee. [Doc. 1 at ¶¶ 6-7.] Although the parties do not agree as to any additional facts, the undisputed record includes (1) an Official Vehicle Registration Application reflecting an application date of November 27, 2018 [Doc. 1-1] (the "Application"), and (2) a Certificate of Title issued by the State of Tennessee on November 27, 2018, which reflects Defendant as First Lienholder and lists the Date of First Security Interest as October 24, 2018 [Doc. 1-2] (the "Title").

[4] Debtor received her discharge on September 9, 2019.

II. APPLICABLE LAW

A. Summary Judgment Standard

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). When deciding a motion for summary judgment, the court does not weigh the evidence to determine the truth of the matter asserted but simply determines whether a genuine issue for trial exists. *See Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 249 (1986). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id.* at 248.

Defendant, the moving party, bears the burden of proving, based on the record before the Court, that it is entitled to judgment as a matter of law because there is no genuine dispute concerning any material fact, such that the defenses alleged are factually unsupported. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). The burden then shifts to Plaintiff to prove that there are genuine disputes of material fact for trial; however, he may not rely solely on allegations or denials contained in the pleadings because reliance on a "mere scintilla of evidence in support of the nonmoving party will not be sufficient." *Nye v. CSX Transp., Inc*., 437 F.3d 556, 563 (6th Cir. 2006); *see also Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*,475 U.S. 574, 586 (1986). The facts and all resulting inferences are viewed in a light most favorable to Plaintiff as non-movant, with the Court to decide whether "the evidence presents a sufficient disagreement to require submission to a [fact-finder] or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 243. Nevertheless, when "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita*, 475 U.S. at 587 (citations omitted).

> When a defendant moves for summary judgment on the ground that the plaintiff lacks evidence of an essential element of the plaintiff's claim, as in the present case, Rule 56 requires the plaintiff to present evidence of evidentiary quality that demonstrates the existence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S. Ct. 2548, 2553, 91 L.Ed.2d 265 (1986); *Winskunas v. Birnbaum*, 23 F.3d 1264, 1267 (7th Cir. 1994). Examples of such evidence include admissible documents or attested testimony, such as that found in affidavits or depositions. *Winskunas*, 23 F.3d at 1267 (citations omitted). The proffered evidence need not be in admissible form, but its content must be admissible. *Celotex Corp*., 477 U.S. at 324, 106 S. Ct. at 2553; *Winskunas*, 23 F.3d at 1268. For instance, deposition testimony will assist a plaintiff in surviving a motion for summary judgment, even if the deposition itself is not admissible at trial, provided substituted oral testimony would be admissible and create a genuine issue of material fact.

Bailey v. Floyd Cty. Bd. of Educ. By & Through Towler, 106 F.3d 135, 145 (6th Cir. 1997)

B. Preferential Transfer Under 11 U.S.C. § 547(b)

The Complaint alleges that notation of Defendant's lien on the Title for the Accord on November 27, 2018, occurred within ninety days of the petition date and more than thirty days after Debtor acquired the vehicle on October 24, 2018, such that the transfer was preferential and avoidable under 11 U.S.C. § 547(b), which provides:

> (b) Except as provided in subsections (c) and (i) 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 such 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. § 547(b). Specifically, Plaintiff avers that the lien was on account of an antecedent debt, Debtor was insolvent at the time of the transfer or became insolvent as a result of the transfer, and the transfer allowed Defendant to receive more than it would have under a Chapter 7 bankruptcy case in which the transfer had not occurred. [Doc. 1.] He acknowledges the following exception provided by subsection (c), which provides that a trustee may not avoid a transfer:

> (3) that creates a security interest in property acquired by the debtor –
>
> (A) to the extent such security interest secures new value that was –
>
> (i) given at or after the signing of a security agreement that contains a description of such property as collateral;
>
> (ii) given by or on behalf of the secured party under such agreement;
>
> (iii) given to enable the debtor to acquire such property; and
>
> (iv) in fact used by the debtor to acquire such property; and
>
> (B) *that is perfected on or before 30 days after the debtor receives possession of such property*.

11 U.S.C. § 547(c)(3) (emphasis added). Plaintiff argues, however, that the exception does not apply here because Defendant did not perfect its security interest in the Accord within thirty days after Debtor took possession of the Accord on October 24, 2018.

In response, Defendant argues that because the title paperwork was delivered to the Clerk on November 20, 2018 – within thirty days after October 24, 2018 – its lien was timely perfected, as reflected on the Title.

C. Perfection Under Tennessee Law

State statute governs whether a security interest in a motor vehicle is perfected. Although it is the notation of a security interest on a certificate of title that provides third parties with constructive notice of a lien,[5] perfection itself is accomplished by delivery of perfection instruments rather than by notation:

> (b)(1) A security interest or lien is perfected by delivery to the department 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 date of delivery to the county clerk or the department.

Tenn. Code Ann. § 55-3-126 (b). Accordingly, the date that decides perfection – and whether Plaintiff's argument has merit – is the date that the Dealership delivered the title paperwork to the Clerk.

III. ANALYSIS

The Peeler Affidavit, executed by an employee of the Dealership, avers that Becky Hailey, the Dealership's title clerk, forwarded Debtor's title paperwork to the Anderson County Clerk (the "Clerk") in Oak Ridge via Federal Express. [Doc. 5-1 at ¶ 4.] Relying on an excerpt of a Federal Express bill and a receipt that, presumably, was printed from the Federal Express tracking system, Peeler asserts that the title registration package with a tracking number of

[5] "Constructive notice shall date from the time of first delivery of the request for the notation of the lien or encumbrance upon the certificate of title by the county clerk, as shown by its endorsements of the date of delivery on the document." Tenn. Code Ann. § 55-3-126(c).

773763233793 was delivered to the Clerk on November 20, 2018. [*Id.* at ¶¶ 4-5.] She also asserts that the package was not returned to the Dealership and the Dealership was not notified by the Clerk that the title paperwork was incomplete or rejected. [Doc. 5-1 at ¶¶ 1, 4-6.]

The record also includes the Yeager Affidavit, executed by the Anderson County Law Director. [Doc. 5-2.] Relying solely on the Federal Express bill excerpt and receipt, Yeager asserts that a Federal Express package sent from the Dealership was received on Tuesday, November 20, 2018, at 1:16 p.m. and signed for "C. Elliott." [Doc. 5-2 at ¶¶ 4, 6.] Yeager states that two employees of the Clerk's office "go by the name 'C. Elliott'" [and] both . . . were working on November 20, 2018." [*Id.* at ¶ 3.] Yeager also explains that the Clerk does not date-stamp such paperwork when it is received and generally makes a note in the Clerk's system if processing of title paperwork is rejected or delayed for any reason. [*Id.* at ¶¶ 5, 7.] No such notation exists relating to the title paperwork for the Accord. [*Id.* at ¶ 7.] Yeager explains that Tuesday, November 20, was two days before Thanksgiving, and the Clerk's office was closed on November 22 and 23. [*Id.* at ¶ 6.]

Yeager concludes:

> The "DATE TITLE ISSUED" of November 27, 2018 on the Title is not the date of titling paperwork and fees associated with the [Accord] were delivered to the Clerk's office. It is my belief, based on the Clerk's records, that the proper titling paperwork and fees associated with the Vehicle were delivered to the Clerk's office on November 20, 2018 but were not processed until Tuesday November 27, 2018.

[*Id.* at ¶ 9.] Notwithstanding this conclusion by Yeager, the record does not establish that the Federal Express records are part of the Clerk's records; nor would an invoice to the Dealership and a receipt obtained by the Dealership appear to be part of the Clerk's official or business records. Moreover, although the Yeager Affidavit asserts that paperwork is typically processed on the day it is received and that delays are usually explained in the Clerk's records, no

explanation is provided to explain an admitted delay of two business days to process the title paperwork allegedly received on November 20.[6]

In opposition to the Motion, Plaintiff disputes that the Dealership's title clerk forwarded the title paperwork to the Clerk on November 19, noting the lack of "supporting documentation other than [the] Fed Ex document, which is hearsay and it is unknown if the required documents for the [Debtor's] title were actually enclosed in such envelope." [Doc. 14 at ¶ 2.] Similarly, Plaintiff disputes that the Clerk's employee signed for the package because such assertion "is unsupported by a sworn record of the . . . Clerk employee that 'signed' or received an opened the envelope and the contents of the envelope" and such assertions in the Peeler and Yeager Affidavits are hearsay. [*Id.* at ¶ 3.] Plaintiff asserts that the official record of the Clerk's office is the Application, which reflects a date of November 27, 2018, as the "date of application." [*Id.* at ¶ 9.] Plaintiff notes that Defendant failed to offer into the Court record business records or testimony from individuals with knowledge that support Defendant's assertions. [*Id.* at ¶¶ 10-11.]

Although the Court agrees that delivery date rather than notation date is the effective date for perfection of a lien on a motor vehicle under Tennessee law, the record before the Court contains conflicting facts. Defendant's argument rises and falls on the excerpt of a Federal Express bill and the Federal Express receipt supplied with the two affidavits filed in support of the Motion.[7] But for the Federal Express documents, the County appears to have no

[6] Assuming the paperwork was received on the afternoon of November 20, the next day (November 21) and the Monday following Thanksgiving (November 26) passed before the paperwork was processed on Tuesday, November 27.

[7] Although Plaintiff objects to the Federal Express documents as hearsay [Doc. 14 at ¶ 2], the Court does not exclude the documents because Plaintiff's assertion does not rise to the level of an objection "that the material cited to support . . . a fact cannot be presented in a form that would be admissible in evidence." Fed. R. Civ. P. 56(c)(2).

documentation of the receipt date. The Application, however, is an official document, and it bears a date of November 27, 2018 as the "date of application." [Doc. 1-1.]

Defendant might produce admissible evidence at trial that the Application is always created from information received from an applicant (in this case the Dealership acting on behalf of Debtor) when the title paperwork is received and processed by the Clerk's office. At this stage of proceedings (i.e., summary judgment), however, it would be inappropriate for this Court to fill in the gap in the record by assuming such facts. *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889 (1990) ("It will not do to 'presume' the missing facts because without them the affidavits would not establish the injury that they generally allege."). Simply, the conflict between the date reflected on the official record – the Application – and Defendant's Federal Express documents, without an explanation of the conflict by a person with knowledge of the Clerk's processes, creates a genuine issue of material fact that precludes summary judgment in favor of Defendant.

Because there is a genuine dispute as to the material fact of whether the Dealership's application was delivered to the Anderson County Clerk on November 20, 2018, summary judgment is not appropriate.

IV. CONCLUSION

Without resolving the conflict between the dates on the Application and Title, the Court cannot ascertain whether § 547(c)(3) applies to preclude Plaintiff from avoiding Defendant's security interest in the Accord, which was irrefutably purchased by Debtor within the sixty days before she filed her bankruptcy case. Tennessee Code Annotated § 55-3.126(b) is clear: perfection occurred on the date that the Dealership delivered the application for Debtor's paperwork to the Clerk and not the date that the State of Tennessee issued the Certificate of Title.

The dispositive date, however, is in dispute because the Application and Title are dated November 27, 2018 (i.e., more than thirty days after Debtor took possession of the Accord), but Defendant asserts that it delivered the title paperwork to the County on November 20, 2018 (i.e., within thirty days of Debtor taking possession). Thus, the record before this Court precludes entry of summary judgment.

V. ORDER

Because there is a genuine dispute of material fact, and Defendant has not shown that it is entitled to judgment as a matter of law, the Court directs the following:

1. The Motion to Dismiss Complaint by Ally Bank for Failure to State a Claim Upon Which Relief Can Be Granted filed on June 6, 2019 [Doc. 5], as supplemented by the Supplemented Motion to Dismiss Complaint by Ally Bank for Failure to State a Claim Upon Which Relief Can Be Granted filed on August 22, 2019 [Doc. 11] pursuant to the Court's August 9, 2019 Order [Doc. 9], is DENIED.

2. Defendant shall file an answer to the Complaint [Doc. 1] no later than April 1, 2020.

3. Pursuant to Federal Rule of Civil Procedure 16(b), incorporated into Federal Rule of Bankruptcy Procedure 7016, a scheduling conference will be held in this adversary proceeding on April 16, 2020, at 1:30 p.m., in Bankruptcy Courtroom 1-C, First Floor, Howard H. Baker, Jr. United States Courthouse, Knoxville, Tennessee, for the purpose of preparing a scheduling order. During the conference, the Court will schedule this adversary proceeding for trial and will set dates for completing discovery, filing dispositive motions, submitting a pretrial order, and filing pretrial briefs. The Court may schedule a final pretrial conference to be held shortly before the trial date.

4. In accordance with Federal Rule of Civil Procedure 26(f), incorporated into Federal Rule of Bankruptcy Procedure 7026, as soon as practicable and in any event at least seven days before the scheduling conference, the parties shall meet to discuss the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, to make or arrange for the disclosures required by Federal Rule of Civil Procedure 26(a)(1), and to develop a proposed discovery plan. The plan shall indicate the parties' views and proposals concerning the matters set forth in Rule 26(f)(3)(A)-(F). The parties shall file with the Court at least three days prior to the scheduling conference a written report outlining the plan that is required by Rule 26(f). Although the attorneys of record and all unrepresented parties that have appeared in the proceeding are jointly responsible for arranging and being present or represented at the Rule 26(f) meeting, for attempting in good faith to agree to the proposed discovery plan, and for submitting to the Court a written report outlining the plan, Plaintiff shall have the primary responsibility for initially contacting the other parties upon receipt of this order to schedule the meeting. By agreement, the parties may conduct the Rule 26(f) meeting by telephone.

5. Counsel for Defendant, who resides outside the division, may appear at the scheduling conference by telephone if the Court is provided with written notice of the intention to so appear, together with a telephone number, at least five (5) days prior to the conference. The Court will place the call between 1:30 and 2:30 p.m. EDT on the scheduled date.

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