

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE: : CASE NO. A03-81803-REB

PETER L. VOLLMER,

Debtor.

NEIL C. GORDON, Chapter 7 Trustee for the
Estate of Peter L. Vollmer,

Plaintiff,

v.

AMERICAN HONDA FINANCE CORP.,

Defendant.

ADVERSARY PROCEEDING
NO. 04-6490

CHAPTER 7

JUDGE BRIZENDINE

**ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT
AND GRANTING PLAINTIFF'S COUNTER-MOTION FOR SUMMARY JUDGMENT**

Before the Court are certain motions as follows: Defendant's motion for summary judgment and Plaintiff-Trustee's counter-motion for summary judgment. In the complaint, Trustee seeks a ruling that Defendant's security interest in a certain vehicle purchased by the Debtor is void as constituting a willful violation of the automatic stay to which there was no relation back of perfection, subjecting Defendant to a claim for recovery of said property and damages. See 11 U.S.C. §§ 105(a), 362(a), 362(b)(3), 362(h), 547(c)(3), and 547(e)(2). Thus, Defendant is the holder of an unsecured claim and any and all payments made in connection with said transaction are recoverable by turnover to the estate as unauthorized post-petition transfers. See 11 U.S.C. §§ 506(d), 549, and 542. Further, Trustee contends that the interest conveyed by Debtor to Defendant

is void and recoverable by turnover to the above-named estate as a voidable preferential transfer under Section 547(b). Trustee claims that the estate may recover the amounts of said avoidable pre-petition and post-petition transfers from Defendant under Sections 547, 549, and 550.

In response, Defendant argues that it holds a valid, duly perfected security interest under federal law and state law that is not subject to avoidance herein, and that Trustee should provide an accounting of all funds received from the Debtor for the use of the subject vehicle and remit same to Defendant. Based upon a review of the record and for the following reasons, the Court concludes that Defendant's motion should be denied and that Trustee's counter-motion should be granted.

Debtor initiated this Chapter 7 case through the filing of a bankruptcy petition on November 3, 2003. It is undisputed that the Debtor offered to purchase a certain Honda Accord from The Curry Corp. d/b/a Curry Honda on October 23, 2003, and that Debtor did on said date take possession of the vehicle in question subject to financing approval by Defendant and executed a retail installment sales contract along with other miscellaneous documents. Upon returning to Curry Honda on October 25, 2003, Debtor executed another buyer's order and retail installment sales contract. On November 3, 2003, Debtor filed a petition under Chapter 7 and on November 13, 2003, Curry Honda submitted a MV-1 Title Application to the DeKalb County motor vehicle division to perfect Defendant's security interest in the subject vehicle. The legal issue confronted herein concerns whether the buyer's order and retail installment sales contract executed by Debtor on October 23, 2003 conveyed the security interest in question to Defendant, or whether same occurred through the documentation executed on October 25, 2003. This date is material for purposes of determining whether perfection of same relates back under the law such that Defendant

held an unavoidable, perfected security interest at the time of commencement of this case, or whether same constituted a violation of the automatic stay as an unauthorized post-petition transfer or a voidable preferential transfer on account of an antecedent debt.

Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c), applicable herein through Fed. R. Bankr. P. 7056; *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 323-25, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991). In deciding whether the moving party has met this burden, all factual inferences reasonably drawn from the evidence presented must be viewed in the light most favorable to the party resisting summary judgment. The Court cannot weigh the evidence or choose between competing inferences. *See Allen v. Tyson Foods, Inc.*, 121 F.3d 642, 646 (11th Cir. 1997); *Raney v. Vinson Guard Serv., Inc.*, 120 F.3d 1192, 1196 (11th Cir. 1997).¹ Hence, the Court will address herein the legal significance of the above facts.

Defendant asserts as follows: (1) that its security interest is superior to the Trustee under federal and state law; (2) that its interest is protected under the affirmative defense of 11 U.S.C. § 547(c)(3); and (3) that perfection of same did not constitute a willful violation of the automatic stay under Section 362. Regarding Defendant’s first argument, Defendant contends that it holds

¹ Once the party moving for summary judgment has identified those materials demonstrating the absence of a genuine issue of material fact, the non-moving party cannot rest on mere denials or conclusory allegations, but must go beyond the pleadings and designate, through proper evidence, specific facts showing the existence of a genuine issue for trial. *See* Fed. R. Civ. P. 56(e); *see also Matsushita Elec. Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *Johnson v. Fleet Finance, Inc.*, 4 F.3d 946, 948-49 (11th Cir. 1993); *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112 (11th Cir. 1993).

a perfected security interest under state law that is not subject to avoidance herein, but is protected under the relation back provision of 11 U.S.C. § 546(b)(1). Defendant contends that the sale was consummated on or after October 25, 2003, when Debtor had possession of the vehicle *along with* ownership. Defendant's security interest would thus be timely perfected from that date forward by reason of the twenty-day relation back period in accordance with Georgia law prior to bankruptcy since the title documents were delivered on November 13, 2003. *See* O.C.G.A. § 40-3-50(b)(2).² Regardless of the time of attachment of Defendant's interest, the Court concludes that its legal argument that it holds a perfected, unavoidable security interest does not succeed under 11 U.S.C. § 546. Defendant fails to recognize that the limitations on the Trustee's various avoiding powers with respect to related-back perfection as recognized by Section 546 omit any reference to the voidable preference provisions of Section 547.³

In the complaint, Trustee contends, among other things, that Debtor's granting of a security interest to Defendant is avoidable as a preferential transfer under Section 547(b). Further, Trustee asserts that Defendant failed to deliver the necessary documentation to the DeKalb County, Georgia Tag and Title Office within twenty days of the initial delivery of possession on October 23, 2003,

² This subsection provides in pertinent part as follows:

(2) The security interest is perfected as of the time of its **creation** if the initial delivery of the application or notice to the commissioner or local tag agent is completed **within 20 days thereafter**, regardless of any subsequent rejection of the application or notice for errors; otherwise, as of the date of the delivery to the commissioner or local tag agent.

O.C.G.A. § 40-3-50(b)(2) (emphasis supplied).

³ As addressed hereafter, the Court also concludes that the transfer was not perfected within twenty days of its *creation* as required by the state law provision cited by Defendant.

thus precluding reliance upon the affirmative defense of Section 547(c).⁴ Before addressing Defendant's second argument under Section 547(c), the Court must determine whether Trustee has satisfied the requirements of Section 547(b).

Solely for purposes of analyzing this transaction under Section 547(b), the Court turns to the timing provisions of Section 547(e)(2) to determine when the transfer is deemed to have occurred between the parties.⁵ It is undisputed that Defendant failed to perfect its security within ten days of the time it became effective between the parties as provided in Section 547(e)(2)(A).⁶ Next, under Section 547(e)(2)(B), the transfer of the security interest would be deemed to have occurred at perfection. In accordance with Section 547(e)(2)(C), however, if a transfer is not

⁴ Defendant offers no serious challenge to the establishment of the elements of a preference under Section 547(b), focusing instead on various defenses.

⁵ Under Section 547(e)(2) and (e)(3), the question of what constitutes a *transfer* is a matter of federal law and is generally defined as occurring at the time of perfection. These provisions state as follows:

(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, **except** as provided in subsection (c)(3)(B);

(B) at the time such transfer is perfected, **if** such transfer is perfected **after** such 10 days; or

(C) immediately **before** the date of the filing of the petition, **if** such transfer is **not** perfected at the **later** of—

(i) the commencement of the case; or

(ii) 10 days after such transfer takes effect between the transferor and the transferee.

(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. § 547(e)(2), (3) (emphasis supplied).

⁶ As discussed hereafter, the transfer also did not occur within twenty days of the time of its taking effect. *See* 11 U.S.C. § 547(c)(3)(B).

perfected at the time of the bankruptcy filing, the transfer is deemed to have occurred “immediately before” said filing. Therefore, the transfer is legally considered to have been made on account of an antecedent debt within 90 days before bankruptcy under Section 547(b)(2) and (4) as the security interest was granted after Defendant had previously advanced value to Debtor in the form of the loan for the purchase of the vehicle.

In addition, under Section 547(e)(3), Debtor acquired rights in the property at issue on October 23, 2003 when the parties executed the purchase and sale documents and Debtor took possession. On that date, Debtor held sufficient rights in the property to grant a security interest. Under Georgia law, a security interest in a vehicle is deemed perfected on the date the security agreement is *signed* if the proper documents are delivered to the appropriate local tag agent within 20 days thereafter, which suggests October 23 is the operative date, not October 25, 2003. *See* O.C.G.A. § 40-3-50(b); *see also General Motors Acceptance Corp. v. Busenlehner (In re Busenlehner)*, 918 F.2d 928 (11th Cir. 1990), *reh'g denied*, 924 F.2d 1067 (1991), *cert. denied* sub nom. *Moister v. General Motors Acceptance Corp.*, 500 U.S. 949, 111 S.Ct. 2251, 114 L.Ed.2d 492 (1991).⁷ Thus, with regard to the status of Debtor’s rights in the vehicle on October 23, this Court concludes that possession joined with a contingent right of ownership, including a loaner as presented herein, is sufficient to create rights in the underlying property in favor of Debtor. *See Crawford v. Treasure Valley Fed. Credit Union (In re Tuttle)*, 2003 WL 22221330, at 4 (Bankr. D.Idaho 2003) (Myers, B.J.); *Westenhofer v. Chrysler Credit Corp. (In re Williams)*, 208 B.R.

⁷ Based on the subsequent holding in *Fidelity Fin. Serv. v. Fink*, 522 U.S. 211, 118 S.Ct. 651, 656, 139 L.Ed.2d 571 (1998), *Busenlehner* has been called into question to the extent it stands for the proposition that a longer state law relation back period supersedes the requirements of 11 U.S.C. § 547(c)(3).

882, 885 (Bankr. E.D.Ky. 1997). The fact that Debtor's rights may have been altered on October 25 does not change the analysis for purposes of 11 U.S.C. § 547(e)(3).

Having concluded based on the facts presented that the transfer at issue occurred within the 90 day period before bankruptcy for purposes of preference analysis and that it otherwise meets the remaining requirements of Section 547(b), the Court next addresses the affirmative defense of Section 547(c)(3) as raised by Defendant. Here, Defendant's interest is protected from avoidance if Defendant can show that the transfer comes within the 'enabling loan' exception of Section 547(c)(3). This provision states in pertinent part as follows:

- (c) The trustee may **not** avoid under this section 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 20 days after the debtor receives possession of such property....**

11 U.S.C. § 547(c)(3) (emphasis supplied).

Similar to the previous argument, Defendant contends that under the express language of this subsection, Debtor's 'receipt of possession' means *after* a security interest has been created in the underlying property, and this can only occur when the Debtor can grant an interest in the property, which date Defendant believes to be October 25. Upon taking possession on October 23, 2003, Debtor agreed that he had no rights to the vehicle as reflected in the Buyer's Information Statement and Declaration Form of Debtor (¶ 7 "Credit Approval"), a copy of which is attached to the complaint as Exhibit "B." Further, Defendant states that Debtor agreed that "the vehicle the

dealer is delivering to me/us shall be considered a loaner vehicle until financing is approved and that the sale will be consummated and the loaning of the vehicle will end upon said credit approval.”

Notwithstanding said argument, the Court concludes that October 23 is the operative date and that perfection should have thus occurred *before* November 13, 2003 to be protected under this defense. The Court rejects Defendant’s argument that the term “possession” in Section 547(c)(3) refers to an ownership interest of Debtor/purchaser acquired through Defendant’s financing of same and will not read such a restrictive construction into the language of the Bankruptcy Code as suggested by Defendant. As held in *Anderson v. Chrysler Credit Corp. (In re Brinkman)*, Civil Action No. 1:93-CV-1122-JOF (N.D.Ga. Oct. 30, 1995) (Forrester, J.), cited by Trustee, unless perfection occurs within twenty days of the debtor’s *receipt of possession* of the underlying property, the transfer does not come within the exception of Section 547(c)(3). *See also Hendon v. General Motors Acceptance Corp. (In re B&B Utilities, Inc.)*, 208 B.R. 417, 424 (Bankr. E.D.Tenn. 1997); *Logan v. Columbus Postal Employees Credit Union, Inc. (In re Trott)*, 91 B.R. 808, 811 (Bankr. S.D.Ohio 1989); compare *Anderson* at 4-6; *Crawforth* at 6. Here, continuous actual, physical possession of the vehicle by Debtor began on October 23, 2003 when he took delivery, which is more than twenty days from perfection of Defendant’s security interest therein. In sum, Trustee having established the elements of Section 547(b) and Defendant having failed to establish entitlement to an exception thereto, the Court concludes as a matter of law that the creation of the security interest granted to Defendant by Debtor, perfected beyond the statutory grace period, may be avoided by the Trustee as a preferential transfer.

In addition to the analysis of the subject transfer under Section 547, the Court further

concludes that same could also be properly analyzed as an unauthorized post-petition transfer under Sections 362 and/or 549(a). Moreover, as an unperfected lien same would be subject to avoidance by the Trustee under Section 544(a). As discussed above, although Section 544 is subject to Section 546(b), which recognizes state law 'relation back' provisions, Defendant has failed to establish that the transfer in issue occurred during the twenty period provided under state law. In any event, based on either of these avoidance theories for post-petition transfers, the Court concludes that Defendant's security interest in the subject vehicle may be set aside and recovered by the Trustee along with any payments thereon. *See* 11 U.S.C. §§ 544(a), 549(a).⁸

Even though this ruling may appear to be harsh in view of the purchase of the subject vehicle within days of the filing of the bankruptcy petition by Debtor herein, based upon this Court's understanding of the applicable law as reasoned above, the Court concludes on the record presented that there are no genuine issues of material fact and that Plaintiff-Trustee has demonstrated its entitlement to summary judgment herein as a matter of law and Defendant has failed to demonstrate same.

Accordingly, based on the foregoing reasoning, it is

ORDERED that Defendant's motion for summary judgment be, and hereby is, **denied**; and
it is

FURTHER ORDERED that Plaintiff-Trustee's counter-motion for summary judgment

⁸ Given the Court's legal conclusion herein, it is not necessary to address the issue of Defendant's alleged willful violation of the automatic stay, which in any event, is not amenable to summary disposition. Further, it is undisputed that the security interest was perfected following the commencement of the case, and since same constitutes a violation of the automatic stay under Section 362(a)(4) it would be deemed void. *See Borg-Warner Acceptance Corp. v. Hall*, 685 F.2d 1306, 1308 (11th Cir. 1982).

be, and hereby is, **granted**; and it is, therefore,

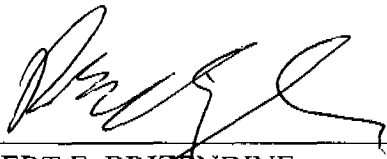
FURTHER ORDERED that the subject transfer of a security interest by Debtor to Defendant is **avoided** as a preferential transfer in accordance with 11 U.S.C. § 547(b), and also stands avoided under 11 U.S.C. § 544(a) and 11 U.S.C. § 549(a), and Plaintiff-Trustee is **authorized** to recover title to the vehicle in question, along with any and all installment payments made by Debtor, for the benefit of the above bankruptcy estate as provided under 11 U.S.C. § 550(a).

A separate judgment is entered contemporaneously herewith.

The Clerk is directed to serve a copy of this Order upon the Debtor, Debtor's counsel, the Chapter 7 Trustee, Plaintiff-Trustee's counsel, Defendant's counsel, and the U.S. Trustee.

IT IS SO ORDERED.

At Atlanta, Georgia this 6th day of July, 2005.



ROBERT E. BRIZENDINE
UNITED STATES BANKRUPTCY JUDGE