
In the United States Bankruptcy Court
for the
Southern District of Georgia
Savannah Division

In the matter of:)
)
JAMES STACY ROWE) Adversary Proceeding
(Chapter 7 Case 95-20483)) Number 96-2004
)
Debtor)
)
)
)
STEPHEN L. JACKSON,)
TRUSTEE)
)
Plaintiff)
)
)
)
v.)
)
BARNETT BANK OF SOUTHEAST)
GEORGIA, N.A.)
)
Defendant)

**ORDER ON TRUSTEE'S MOTION TO AVOID A
PREFERENTIAL TRANSFER**

In the above case, Stephen L. Jackson (hereinafter "Trustee"), instituted an

adversary proceeding to avoid the security interest of Defendant, Barnett Bank of Southeast Georgia (hereinafter "Defendant"), in property of the estate pursuant to 11 U.S.C. Section 547. Trustee prays for a determination avoiding the transfer of the security interest, requiring the turnover of title to the property, and awarding a judgment in amount equal to the value of the property in question for the benefit of the bankruptcy estate pursuant to 11 U.S.C. Section 551. Defendant responds that its security interest is valid and may not be avoided and requests a determination recognizing the validity of the interest. On May 2, 1995, this Court held an adversary trial. Pursuant to 28 U.S.C. Section 157(b)(2)(F), this matter is a core proceeding. Based on the parties' briefs, the evidence submitted during the hearing, and applicable authorities, I make the following Findings of Fact and Conclusions of Law pursuant to Bankruptcy Rule 7052.

FINDINGS OF FACT

The following facts are not in dispute. On or about May 25, 1995, Debtor, James Stacy Rowe (hereinafter "Debtor") purchased a 1994 Ford Tempo, manufacturer's serial number 2FAPP36X6RB104543 from Kings Colonial Ford (hereinafter "Dealer") under a conditional sales agreement that was assigned to Defendant, Barnett Bank. While purchasing the automobile, Debtor executed an MV-1 application for title which provided that Defendant would have a first priority security interest in the automobile. However, at the time of the sale, Ford Rent-A-Car (hereinafter "Ford") was the actual owner of the

vehicle and only had consigned it to Dealer for retail sale. The end result is that the Dealer did not "pay-off" Ford until June 19, 1995, receive title until shortly thereafter, and apply for title in the name of James Stacy Rowe until July 6, 1995. On August 8, 1995, the State of Georgia issued a Certificate of Title evidencing Debtor's ownership and Defendant's security interest. Debtor filed a voluntary petition under Chapter 7 on June 30, 1995.

Trustee asserts that the perfection of a security interest while Debtor was insolvent made on account of an antecedent debt to the Defendant during the ninety days before filing amounts to a preferential transfer that is avoidable pursuant to 11 U.S.C Section 547. Trustee notes that Defendant failed to perfect its security interest within the twenty days after the transfer and, therefore, does not qualify for the Section 547(c)(3) exception. Trustee prays for a determination avoiding the transfer, requiring turnover of the title, and granting judgment in amount of the value of the automobile for the benefit of the estate and its creditors.

Defendant, Barnett Bank, contends that its security interest is unavoidable under Section 547. Specifically, Defendant asserts that Debtor's transfer of a security interest was contingent upon Debtor acquiring full right, title, and interest in the subject vehicle. Because Debtor's agent, Dealer, did not receive clear title until at least June 19, 1995, Defendant contends that pursuant to O.C.G.A. Section 40-3-32(d) Debtor did not

acquire any interest in the property until after June 19, 1995, and, therefore, Defendant's security interest was filed in a timely manner on July 6, 1995, within the twenty days as permitted by Section 547(c)(3)(B).

CONCLUSIONS OF LAW

11 U.S.C. Section 547 provides, in pertinent part,

(b) . . . 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 filing of the petition

(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;

(c) The trustee may not avoid under this section a transfer--

(1) that creates a security interest in property acquired by the debtor---

(B) that is perfected on or before 20 days after the debtor receives possession of such property;

11 U.S.C. Section 547 permits a trustee to avoid transfers between a debtor and creditor within 90 days of the filing period that have the effect of allowing one creditor a greater recovery than it would normally receive under the bankruptcy disposition. The trustee has the burden of proving (1) a transfer (2) of debtor's property (3) to or for the benefit of a creditor (4) for or on account of an antecedent debt (5) made while the debtor was insolvent (6) within 90 days of the filing of bankruptcy (7) which enables a creditor to receive more than it would under Chapter 7 liquidation. With respect to the initial requirements of Section 547(a), I hold and the Defendant does not dispute that the Trustee has sustained its burden. The sole issue is whether the Defendant has a security interest that may not be avoided pursuant to the Section 547(c)(3) exception.

Section 547(c)(3) provides that a trustee may not avoid a security interest securing new value, given to enable the debtor to acquire such property, and perfected on or before 20 days after the debtor receives possession of such property. This provision is commonly referred to as the "enabling loan" exception. Here, the issue is whether or not the Defendant perfected its security interest within the twenty days as required by state law. *See In re Busenlehner*, 918 F.2d 928, 930 (11th Cir.1990) (holding that because state law

determines when a perfected security interest defeats a judicial lien, state law determines when perfection occurs); *contra In re Walker*, 77 F.3d 322 (9th Cir.1996) (holding that the Bankruptcy Code Sections 547(c)(3)(B) and (e)(2)(A) define when a transfer is perfected).

Again, Defendant contends that because Debtor did not receive rights in the property against third parties until at least June 19, 1995, its security interest was properly perfected on July 6, 1995, before the twenty-day requirement of O.C.G.A. Section 40-3-50(b) expired.¹ In support of its contention, Defendant cites O.C.G.A. Section 40-3-32(d) which in pertinent part states,

[e]xcept . . . as between the parties, a transfer by an owner is not effective until this Code section . . . (has) been complied with; and no purchaser or transferee shall acquire any right, title, or interest in the vehicle purchased by him unless and until he shall obtain from the transferor the certificate of title thereto, duly transferred in accordance with this Code section.

O.C.G.A. § 40-3-32(d). Defendant acknowledges that it may have been negligent for its agent not to have complied with state recording statutes; however, it contends that Dealer's failure to meet the recording requirements effectively delayed the transfer of ownership to

¹ O.C.G.A. § 40-3-50(b) defines when security interests in automobiles are perfected. O.C.G.A. § 40-3-50(b) states that if a Certificate of Title listing the security interest is filed within 20 days, the perfection of the security interest will relate back to the time of its creation.

the Debtor until at least June 19, 1995, and, therefore, the filing of the Certificate of Title on July 6, 1995, properly perfected the Defendant's interest within the requirements of O.C.G.A. Section 40-3-50(b). Thus, Defendant asserts that it holds an unavoidable security interest.

O.C.G.A. Section 40-3-32(d) does provide that a transfer is not effective against third parties until the transfer has been recorded. However, this provision is a recording statute. Although the statute states that no "transferee shall acquire any right, title, or interest in and to a vehicle purchased by him," until the certificate is filed, it must be interpreted in light of its purpose as a recording statute. Georgia case law supports this interpretation.

[T]he Certificate of Title Act is a recording statute . . . its purpose is to perfect and give notice of security interests, and . . . "this does not affect the creation of . . . [an] interest, which remains a matter of contract between the parties." It follows that a failure to comply with the act does not nullify the contract but merely has the effect of a loss of priority where the rights of third parties who complied with the Act have intervened.

Hallman v. State of Georgia, 141 Ga.App. 527, 528 (1977).

The Georgia Title Certificate Law does indeed provide a simple statutory method of proving ownership to motor vehicles but it is not exclusive The statute did not change the existing case law as to the manner in which ownership of chattels including automobiles could be proven. The certificate is not the title or ownership itself but only evidence of it.

Owensboro National Bank v. Jenkins, 173 Ga.App. 775, 778, 328 S.E.3d 399 (1985).

It is the substantive law of contract and not the Motor Vehicle Certificate of Title Act which creates and defines property interests in motor vehicles.

Bank South v. Zweig, 217 Ga.App. 77, 456 S.E.2d 257 (1995); *see also* State of Georgia v. Banks, 215 Ga.App. 828, 452 S.E.2d 533 (1994). Accordingly, I hold that O.C.G.A. Section 40-3-32(d) does not limit ownership rights of a purchaser but instead provides a method of establishing priorities among creditors with conflicting claims.

Therefore, the transfer of a security interest in Debtor's automobile to Defendant on account of an antecedent debt is avoidable pursuant to Section 547. *See In re Harley*, 41 B.R. 276 (Bankr.N.D.Ga. 1984) (holding that since the creditor did not perfect his interest until 47 days after truck was purchased, transfer of security interest in automobile was a preferential transfer that could be avoided pursuant to Section 547);

Matter of Blackburn, 90 B.R. 569 (Bankr.M.D.Ga. 1987) (holding that since the creditor did not perfect his interest until 24 days after truck was purchased, transfer of security interest in automobile was a preferential transfer that could be avoided pursuant to Section 547); *but see* In re Davis, 165 B.R. 327 (Bankr.N.D.Ga. 1994) (holding that trustee could not exercise his strong arm powers pursuant to Section 544(a)(1) to avoid unrecorded equitable interest in automobile).

O R D E R

Pursuant to the above mentioned reasons, IT IS THE ORDER OF THIS COURT that the security interest of Defendant is avoided and title to the subject vehicle is awarded to the Trustee.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This _____ day of August, 1996.