

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

FILED

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Date 11/24/98

MARY C. BECTON, CLERK  
United States Bankruptcy Court  
Savannah, Georgia JB

In the matter of: )  
)  
BRENT DAVID HURT )  
DEANA MICHELLE HURT )  
)  
Debtors )

Chapter 13 Case

Number 98-20195

MEMORANDUM AND ORDER

Debtors filed a petition for relief under Chapter 13 of the Bankruptcy Code on February 17, 1998. On April 1, 1998, Glynn Teachers Federal Credit Union ("Credit Union") filed an objection to confirmation on the grounds that the Debtors' plan significantly devalues its collateral. The Chapter 13 Trustee filed an objection to the claim of the Credit Union, alleging that the security interest was not properly perfected and therefore the claim should be reclassified to general unsecured status. A confirmation hearing was held on September 8, 1998, at which time the two objections were taken under advisement and confirmation continued until disposition of the motions.

FINDINGS OF FACT

The relevant facts are not in dispute among the parties. Debtors

purchased a 1996 Mazda 626 LX from a dealership and acquired financing for the purchase from the Credit Union. The check given to the dealer and the debtor contained a restrictive endorsement. Unfortunately, the dealership never provided the title for the vehicle to the Credit Union so that the Credit Union could record its lien on the title as required by state law. At some point, the Credit Union attempted to recover the title and was given a duplicate title, but was not given the original. The original was sent to the Debtors thirty days after they purchased the car without a notation of the lien holder. Debtors notified the Credit Union that they had received the title but never took the title to the lender to have the notation added.

#### CONCLUSIONS OF LAW

The Trustee argues that because the Credit Union did not perfect the lien on the car before the Debtors filed for bankruptcy protection, the Credit Union is not entitled to be treated as a secured creditor and must instead share pro rata with other unsecured creditors. The Trustee cites 11 U.S.C. § 544(a) as its authority, which provides:

(a) The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by

the debtor that is voidable by –

(1) a creditor that extends credit to the debtor at the time of the commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such a creditor exists;

(2) a creditor that extends credit to the debtor at the time of commencement of the case, and obtains, at such time and with respect to such credit, an execution against the debtor that is returned unsatisfied at such time, whether or not such a creditor exists.<sup>1</sup>

11 U.S.C. § 544. Ordinarily, a trustee acting as a judicial lienholder can avoid the lien of a secured creditor who has failed to perfect its security interest. Georgia law provides that:

[A]n unperfected security interest is subordinate to the rights of . . . a person who became a lien creditor before the security interest is perfected.

O.C.G.A. § 11-9-301(1)(b). Under Georgia law, therefore, the rights of the Credit Union in the collateral are inferior to those of the Trustee. The Credit Union's claim is therefore not entitled to be treated as secured.

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<sup>1</sup> The Trustee cannot rely on 11 U.S.C. § 544(a)(3) in this situation because that section gives the Trustee the rights and powers of a bona fide purchaser of *real property*, but not of chattels or personal property.

The Credit Union argues that the Debtor held the property in "trust" for the Credit Union even though the security interest was not perfected. Because no express trust agreement exists, a constructive trust must have existed in order for the Credit Union's position to succeed. An implied trust is either a resulting trust or a constructive trust. O.C.G.A. § 53-12-90 (1997). If it was simply the intent of the parties that the Debtors would transfer the car, but never did, a resulting trust exists. O.C.G.A. § 53-12-91. If the Debtors never intended for the Credit Union to hold joint title on the car, a constructive trust exists based on fraud. O.C.G.A. § 53-12-93. Even assuming that the Debtors acted fraudulently, a court could still find that the Credit Union waived its right to claim an equitable trust by subsequent ratification or long acquiescence. O.C.G.A. § 53-12-94.

The Credit Union cites several Georgia cases in support of its position. These cases are unpersuasive. While it is true that an equitable lien, or resulting trust, may be implied where it is "against equity that it should be retained by the person who holds it," Lee v. Lee, 260 Ga. 356, 357, 392 S.E.2d 870, 872 (1990), such a lien may not be imposed here. See In re Dukes, Ch. 13 Case 96-51131, slip op. (Bankr. S.D.Ga. Sept. 15, 1997) (Walker, J.). No case cited by the Credit Union attempts to impose a constructive trust or equitable lien upon a third party with a superior perfected security

interest, and indeed, this Court has not found such a case.

As against the Debtors, the Credit Union remained secured despite its failure to note that security interest on the title. When the Debtor filed for bankruptcy protection, however, the Credit Union was unperfected and thus subordinate to the Trustee. The exclusive means of perfecting a security interest in a car is provided in O.C.G.A. § 40-3-51, which requires the holder of the security interest to note the existence of the lien directly on the certificate of title within 90 days of the lien's creation. The legislature intended this procedure as a "consistent method of providing notice to purchasers and other potential secured creditors" that a security interest exists in the vehicle. Dukes, slip op. at 4.

The burden of perfecting its lien fell to the Credit Union, despite the error made by the dealership. Almost a year passed from the purchase of the car to the filing of the bankruptcy petition. Equity does not demand that a resulting trust be imposed where the creditor, although cognizant of its unperfected status, failed thereafter to take diligent steps to remedy the situation.

ORDER

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that the objection to confirmation of Glynn Teachers Federal Credit Union is overruled. The objection of the Trustee to the claim of Glynn Teachers Federal Credit Union is hereby sustained and the claim is reclassified as unsecured non-priority.



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Lamar W. Davis, Jr.  
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 23<sup>rd</sup> day of November, 1998.