

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

In the matter of: ) ) BILLY JACK CORBITT ) LINDA M. CORBITT ) (Chapter 7 Case <u>98-20823</u> ) ) ) <p style="text-align: center;"><i>Debtors</i></p> ) ) MARY JANE CARDWELL, ) CHAPTER 7 TRUSTEE ) ) <p style="text-align: center;"><i>Plaintiff</i></p> ) ) v. ) ) GREEN TREE FINANCIAL ) SERVICING CORPORATION ) ) <p style="text-align: center;"><i>Defendant</i></p> )	Adversary Proceeding  Number <u>98-2059</u>          <div style="border: 1px solid black; padding: 5px; display: inline-block;"> <p style="text-align: center; margin: 0;"><b>FILED</b></p> <p style="margin: 0;">at <u>3</u> O'clock &amp; <u>32</u> min. <u>P</u>M</p> <p style="margin: 0;">Date <u>3/1/99</u></p> <p style="margin: 0; font-size: small;">MARY C. BECTON, CLERK United States Bankruptcy Court Savannah, Georgia</p> </div>
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**MEMORANDUM AND ORDER**

Before the Court is the Chapter 7 Trustee's complaint to determine the extent and validity of Defendant Green Tree's lien in Debtors' mobile home. This Court has jurisdiction in this adversary proceeding by virtue of 28 U.S.C. § 157(b)(2)(K). A hearing was held on the matter on November 4, 1998, at which time the parties agreed to submit the matter for decision on brief. The briefs of the parties have been submitted to the Court and the issue joined for decision on December 9, 1998. Pursuant to Rule 7052 of the Federal Rules of

Bankruptcy Procedure, I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

The parties have stipulated to the facts as follows. On July 8, 1997, Debtors signed a Manufactured Home Retail Installment Contract and Security Agreement in order to purchase a 1997 Grand Manor mobile home. The contract was then assigned to Defendant Green Tree. Certificates of title were issued by the Department of Revenue for the State of Georgia on September 16, 1997.

Green Tree then lost or misplaced the certificates of title and applied for replacement certificates of title with the Department of Revenue. Those replacement certificates were issued on December 5, 1997, and show Green Tree's perfected security interest in the mobile home. The replacement titles bear the statement:

THIS IS A REPLACEMENT CERTIFICATE AND MAY BE  
SUBJECT TO THE RIGHTS OF A PERSON UNDER THE  
ORIGINAL CERTIFICATE.

On January 2, 1998, Green Tree located the original certificates. Unfortunately, an employee of Green Tree then signed the original titles and released Green Tree's lien on the titles, mailing them back to the Debtors. There was no gap period when Green Tree was not listed on either the original or the replacement title.

Debtors filed for protection under Chapter 7 of the Code on July 10, 1998. The Chapter 7 Trustee then filed this adversary proceeding on September 21, 1998, seeking to avoid the lien of Green Tree pursuant to her strong-arm powers.

Trustee contends that even absent a gap in perfection, the "subject to" language of the replacement title has the effect of releasing the lien on the replacement title when the original title lien was released.

#### CONCLUSIONS OF LAW

11 U.S.C. § 544(a) provides, in pertinent part:

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 or 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; [or]

(2) a creditor that extends credit to the debtor at the time of the 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>

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<sup>1</sup> Subsection (3) of Section 544 is inapplicable in this case, as it applies only to hypothetical bona fide purchasers of real property.

When a trustee asserts the rights of hypothetical lien creditor pursuant to Section 544, state law determines the rights and priorities of creditors in the subject property. In re Masvidal, 10 F.3d 761, 763 (11th Cir. 1993) (citing In re Clifford, 566 F.2d 1023, 1025 (5th Cir.1978)). Under Georgia law, the Motor Vehicle Certificate of Title Act "provides a method of establishing priorities among creditors with conflicting claims." See In re Rowe, Ch. 7 Case 95-20483, Adv. Pro. 96-2004, slip op. at 3 (Bankr. S.D.Ga. Aug, 1996) (Davis, J.).

The Certificate of Title Act "is a recording statute. Its purpose is to perfect and give notice of security interests." State v. Banks, 215 Ga.App. 828, 831, 452 S.E.2d 533, 535 (1994) (citing Hallman v. State, 141 Ga.App. 527, 528, 233 S.E.2d 839 (1977)). O.C.G.A. § 40-3-58 provides:

The method provided in this chapter [the Motor Vehicle Certificate of Title Act] of perfecting and giving notice of security interests and liens with respect to motor vehicles as to which certificates of title need be obtained under this chapter is exclusive, and such security interests and liens are exempt from the provisions of law which otherwise require or relate to the recording or filing of security interests or liens, claims of lien executions, and other like instruments with respect to such vehicles.

Thus, the defining issue in this case is whether a judicial lienholder could obtain a first priority lien over the security interest of Green Tree. If Green Tree remained perfected at all times by virtue of its replacement title even though the original title was mistakenly released, then its security interest is superior to the judicial lien of the Trustee.

### Perfection of Green Tree's Security Interest

Under Georgia law, a security interest in a vehicle is perfected and is valid against all subsequent security interests and lienholders by compliance with the Certificate of Title Act. O.C.G.A. § 40-3-50(a). To first perfect the security interest, the creditor must deliver any existing certificate of title, an application for a new certificate of title with the name and address of the creditor and the required fee to the commissioner or county tag agent. When the security interest is so perfected, "it shall constitute notice to everybody of the security interest of the holder." O.C.G.A. § 40-3-50(b).

When the original title was lost, Green Tree requested a replacement title. The Certificate of Title Act provides that where a certificate of title is lost, the owner shown in the tag agent's records may apply for a replacement title "upon furnishing information satisfactory to the commissioner." O.C.G.A. § 40-3-31. The replacement title contains, as it did in this case, the legend that it "may be subject to the rights of a person under the original certificate." O.C.G.A. § 40-3-31(1).<sup>2</sup> Green Tree complied with this requirement of the Code and remained perfected.

The issue central to this case arose at the time Green Tree released the lien on

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<sup>2</sup> O.C.G.A. § 40-3-31 also provides that if six months passes from the time a replacement title is issued without challenge to the record title of the owner, the commissioner may issue a certificate of title bearing only the legend "replacement title," without reference to rights under the original title. Although Green Tree could have applied for such a title, six months having passed from the date of issue in December, Green Tree did not.

the original certificate and mailed it back to the Debtor. Georgia law requires that:

a person recovering an original certificate of title for which a replacement has been issued shall promptly surrender the original certificate to the commissioner . . . . Where the owner . . . recovers the original certificate such owner . . . may surrender the original certificate together with the replacement title and if such owner . . . is otherwise entitled to a certificate the commissioner or county tag agent may issue such owner . . . a new certificate of title with no legend thereon.

O.C.G.A. § 40-3-31(3). Neither Green Tree nor the Debtor complied with this provision.

The failure to send the original title back to the commissioner did not, however, cause Green Tree's security interest to become unperfected. O.C.G.A. § 40-3-56 is the sole provision of the Act dealing with lien releases and it is not triggered by a creditor's failure to comply with Section 40-3-31. I therefore hold that the lien evidenced on the replacement title was not released by the erroneous cancellation noted on the original title.

#### Perfection of the Trustee's Judicial Lien

Under Georgia law, if Green Tree remained perfected, no judicial lienholder could obtain superior priority against the vehicle; thus, the Trustee cannot exercise her avoidance powers against Green Tree's security interest.

In order to perfect a judicial lien against a vehicle, the lienholder must also comply with the Certificate of Title Act. The lienholder must submit a title application, a notice of lien, and a fee to the person who has custody of the certificate of title "shown on such certificate of title." O.C.G.A. § 40-3-53(a). After receipt of the notice of the lien, the person holding the title must then forward the title and application to the tag agent in order that the commissioner may issue a new certificate of title reflecting the judicial lien. The judicial lien is perfected when the title and application are together received by the commissioner, who "shall enter the lien on the commissioner's . . . records" and "shall issue a new certificate of title." O.C.G.A. § 40-3-53(b).

The Trustee's hypothetical judicial lien is not absolute. It is still subject to liens of higher priority. Thus, this Court must determine what priority, if any, a judicial lien creditor could obtain on the vehicle in this case. The Georgia statute contemplates that a creditor seeking to enforce a judicial lien must search the records of the county tag agent or of the commissioner in order to obtain the address of the person holding the certificate of title on the vehicle. *See* O.C.G.A. § 40-3-53(a).

Moreover, the commissioner is directed to keep records of all certificates of title issued on a specific vehicle, O.C.G.A. § 40-3-23(b),<sup>3</sup> and to check these records against

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<sup>3</sup> O.C.G.A. § 40-3-23(b) provides:

The commissioner or the commissioner's duly authorized countytag agent shall maintain a record of

the vehicle identification number in an application for title, O.C.G.A. § 40-3-22(a). When an application is filed, the commissioner is directed to issue the certificate of title "when satisfied as to its genuineness and regularity and [when satisfied] that the applicant is entitled to the issuance of a certificate of title." O.C.G.A. § 40-3-23(a). In order for the commissioner to make such a determination, the application must contain the name of the owner, a description of the vehicle and its identification number, the date of purchase, and any further information reasonably required to enable the commissioner to determine "the existence or nonexistence of security interests in the vehicle and liens on the vehicle." O.C.G.A. § 40-3-21(a).

Thus, even though Green Tree released its lien on the original certificate of title, the hypothetical creditor seeking to impose a judicial lien against the car still would not have priority over Green Tree because of the existence of the replacement title in the records of the commissioner. Either through the creditor's check of the motor vehicle records or by the commissioner's check upon the creditor's application, a prior unreleased lien would be discovered or the creditor would have constructive notice of Green Tree's lien and of the replacement title, and would not obtain a first priority lien.

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all certificates of title issued:

- (1) Under a distinctive title number assigned to the vehicle;
- (2) Under the identifying number of the vehicle;
- (3) Alphabetically, under the name of the owner;
- (4) Under the vehicle tag registration number; and
- (5) In the discretion of the commissioner, in any other method the commissioner describes.

ORDER

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that Defendant's lien on the 1997 Grand Manor mobile home is duly perfected and is superior to the interests of the Chapter 7 Trustee. Judgment will be entered in favor of Defendant and the complaint shall be dismissed.



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Lamar W. Davis, Jr.  
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 25<sup>th</sup> day of February, 1999.