

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

IN RE:)	
)	In Proceedings
LEWIS J. GILES)	Under Chapter 7
)	
)	No. BK 93-31063
Debtor(s).)	
)	
LAURA GRANDY, TRUSTEE,)	
)	
Plaintiff(s),)	
)	
vs.)	No. ADV 94-3040
)	
FIRST COMMUNITY CREDIT UNION,)	
)	
Defendant(s).)	

OPINION

Lewis J. Giles (hereafter, "debtor") entered into a security agreement with First Community Credit Union (hereafter, "defendant") on June 18, 1993, securing a loan of \$17,870.34 with a 1993 Ford Ranger. More than twenty-one days later, on September 7, 1993, defendant mailed the appropriate documents and fee to the Illinois Secretary of State's office to have its lien noted on the certificate of title for the vehicle. Debtor subsequently, on October 4, 1993, filed a petition for relief under chapter 13 of the Bankruptcy Code. On October 27, 1993, the State of Illinois issued a certificate of title to the vehicle on which the lien of defendant is noted.

Thereafter, debtor's bankruptcy case was converted to a case under chapter 7 of the Bankruptcy Code. The chapter 7 trustee (hereafter,

"plaintiff" or "trustee") then filed the instant adversary case seeking to avoid defendant's lien under 11 U.S.C. section 544(a)(1), and moved for entry of summary judgment.

The basis of the trustee's motion for summary judgment appears to be that, if a lien on a vehicle is not perfected within twenty-one days from its creation date, then it is perfected as of the date that the certificate of title bearing the lien notation is issued. Consequently, the trustee argues, defendant's lien was perfected post-petition, on October 27, 1993, and is invalid as against the trustee in bankruptcy. In response, defendant counters that Illinois law provides that a security interest in a vehicle which is not perfected within twenty-one days of its creation, is perfected upon delivery of the requisite documents and fee to the office of the Secretary of State. Accordingly, its lien was perfected pre-petition, on September 7, 1993, and is not avoidable by the trustee.

The parties have stipulated to, or there is no dispute as to, the facts set forth above, making disposition by summary judgment appropriate. The Court notes, however, that defendant has not filed a cross-motion for summary judgment. Nonetheless, "[s]ummary judgment for a non-moving party may be granted on the court's own motion if there is no genuine issue of material fact and the non-moving party is entitled to judgment as a matter of law." Stamatiou v. United States Gypsum Co., 400 F. Supp. 431, 440 n.7 (N.D. Ill. 1975), aff'd, 534 F. 2d 330 (7th Cir. 1976). Accord White v. Flemming, 374 F. Supp. 267, 270 (E. D. Wis. 1974), aff'd, 522 F. 2d 730 (7th Cir. 1975); 10A Charles A. Wright, Arthur R. Miller & Mary K. Kane, Federal Practice and Procedure: Civil 2d § 2720, at 29-35 (2d ed. 1983) ("the weight of

authority is that summary judgment may be rendered in favor of the opposing party even though he has made no formal cross-motion under rule 56").

In Illinois, the exclusive method of perfecting a security interest in a motor vehicle is by notation of the lien on the certificate of title to the vehicle in accordance with 625 ILCS 5/3-202. E.g., In re Keidel, 613 F. 2d 172, 173 (7th Cir. 1980). This statute provides, in pertinent part:

(b) A security interest is **perfected by the delivery** to the Secretary of State of the existing certificate of title, if any, an application for a certificate of title containing the name and address of the lienholder and the required fee. **It is perfected as of the time of its creation if the delivery is completed within 21 days thereafter, otherwise as of the time of the delivery.**

625 ILCS 5/3-202(b) (emphasis added).

It is clear from the express language of the statute that, unless delivery is completed within twenty-one days after creation of the security interest (which is not the case here), perfection dates from the time of delivery¹ of the application for the certificate of title,

¹ The term "delivery" is not defined in the Illinois Vehicle Code, 625 ILCS 5/1-100 et seq., and the Court has found no case authority explaining what constitutes "delivery" under 625 ILCS 5/3-202(b). However, the trustee has not disputed defendant's premise that delivery occurs upon the mailing, as well as upon the delivery in person, of the requisite documents and fee to the Secretary of State's office. This construction is supported by statutory language which provides that "[t]he lienholder shall immediately cause the certificate, application and the required fee **to be mailed or delivered** to the Secretary of State." 625 ILCS 5/3-203(b) (emphasis added). In any event, even if perfection were dated from the time of actual arrival, the Court takes judicial notice of the fact that an application mailed on September 7, 1993, would have arrived at the Secretary of State's office well before the bankruptcy filing on October 4, 1993.

and not from the date that the certificate of title is issued with the lien noted. E.g., In re Keidel, 613 F. 2d at 173. The trustee has failed to supply any authority to the contrary. Accordingly, defendant's lien was perfected on September 7, 1993, prior to the bankruptcy filing on October 4, 1993.

Since defendant's lien was perfected pre-petition, the trustee in bankruptcy, despite her "strong-arm" powers, cannot defeat defendant's lien. Section 544(a)(1) of the Bankruptcy Code vests the trustee, upon the commencement of the bankruptcy case, with the status of a hypothetical judicial lien creditor,² and the Illinois Vehicle Code spells out the rights of holders of security interests in motor

² 11 U.S.C. section 544(a)(1) 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

. . . .

11 U.S.C. § 544(a)(1).

vehicles vis-a-vis the trustee in bankruptcy standing in the shoes of a lienholder. In re Keidel, 613 F. 2d at 173. It provides, with certain exceptions not relevant here, that "a security interest in a vehicle of a type for which a certificate of title is required is not valid against subsequent transferees or lienholders of the vehicle unless perfected as provided in this Act." 625 ILCS 5/3-202(a). This is consistent with section 9-301 of the Illinois version of the Uniform Commercial Code (hereafter, "U.C.C.") which governs the priority of security interests in vehicles³ and states, in pertinent part, that "an unperfected security interest is subordinate to the rights of . . . a person who becomes a lien creditor before the security interest is perfected." 810 ILCS 5/9-301(1)(b).⁴

The corollary to section 9-301(1)(b) is that "a perfected security [interest] takes priority over the rights of one who becomes a lien creditor after the security interest is perfected." Peterson v. Ziegler, 350 N.E. 2d 356, 362 (Ill. App. Ct. 1976). Having determined that defendant's security interest was perfected prior to the commencement of the bankruptcy case, the Court finds that the trustee's rights, as a hypothetical judicial lienholder on the petition date, are subordinate to the rights of the holder of a perfected security

³ Although the means of perfection of security interests in vehicles is exclusively the province of the Illinois Vehicle Code, Article 9 of the U.C.C. controls the priority of security interests in automobiles. E.g., United States v. Rotherham, 836 F. 2d 359, 365 (7th Cir. 1988).

⁴ The trustee in bankruptcy is a "lien creditor" within the meaning of section 9-301(1)(b) as of the date that the bankruptcy petition is filed. 810 ILCS 5/9-301(3).

interest on that date. In re Keidel, 613 F. 2d at 173-74. Accordingly, the trustee may not avoid defendant's lien pursuant to 11 U.S.C. section 544(a)(1).⁵

See Order entered this date.

DATED: September 28, 1994

⁵ The Court will not determine whether the trustee may avoid the perfection of defendant's lien as a preferential transfer since the trustee has not properly brought that issue before the Court. As a result, the trustee's argument that defendant did not perfect its lien within ten days of the transfer is irrelevant to the issues which the Court decides today. See 11 U.S.C. § 547(e)(2).