In the United States Bankruptcy Court

for the Northern District of Iowa

Western Division

FRANCIS JOSEPH PALMERSHEIM *Debtor(s).*	Bankruptcy No. X89-01365S Chapter 7
DONALD H. MOLSTAD Trustee *Plaintiff(s)* vs. MATT J. PALMERSHEIM *Defendant(s)*	Adversary No. The note provided for periodic cash advances not to exceed

---

MEMORANDUM AND DECISION RE MOTIONS FOR SUMMARY JUDGMENT

The matters before the court are the motions for summary judgment by plaintiff Donald H. Molstad, trustee, and defendant Matt J. Palmersheim. The court heard oral arguments on July 25, 1990 in Sioux City, Iowa.

I.

Pursuant to F.R.C.P. 56, which is applied to bankruptcy adversary proceedings through Bankr. R. 7056, summary judgment may be granted only where there "is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Barker v. Sac Osage Elec. Co-op, Inc., 857 F.2d 486, 487-8 (8th Cir. 1988). The facts "must be viewed in the light most favorable to the party opposing the motion, with the court giving that party the benefit of all reasonable inferences to be drawn from the facts." Id. at 488. The parties before the court agree that as to the preference issue now before the court there is no genuine issue of material fact. However, the fact that each party in this case has moved for summary judgment does not mean the court must grant summary judgment as a matter of law for one side or the other. Mingus Constructors, Inc. v. U. S., 812 F.2d 1387, 1391 (Fed. Cir. 1987); Schwabenbauer v. Board of Educ. of City School Dist. of City of Orlean, 667 F.2d 305, 313 (2nd Cir. 1981). The following is a brief summary of the facts relevant to the motions for summary judgment.

On September 1, 1988, Francis J. Palmersheim (DEBTOR) signed a promissory note to his father Matt J. Palmersheim (PALMERSHEIM). The note provided for periodic cash advances not to exceed $10,000.00. On September 1, debtor received $3,950.00. The debtor provided a 1986 Olds Calais as collateral. Plaintiff's Exhibits A and B. This automobile was already subject to a first lien held by Siouxland Federal Credit Union (SIOUXLAND) in the amount of $1,857.27. The fair market value of the automobile was $4,725.00.

On September 6, 1988, a UCC-1 financing statement was submitted to the Dakota County Clerk's office in Nebraska along with the necessary filing fee in order to have the second lien recorded on the automobile's certificate of title. The title was in Siouxland's possession. The parties stipulate that the Palmersheims did everything they could do in order to properly perfect Palmersheim's second lien.

Palmersheim made the following subsequent advances to the

debtor pursuant to their secured loan agreement:

Date	Amount Loaned
3-13-89	$1,000
4-24-89	1,500
5-29-89	1,000
9-22-89	750

The debtor filed his chapter 7 bankruptcy petition on September 12, 1989 at 10:26 A.M. On the day the petition was filed, the debtor went to Siouxland seeking to reaffirm the first lien on his automobile. At this time, he learned that the second lien had not been recorded on the certificate of title. Debtor took the certificate of title to the Dakota County Clerk's office and had the second lien noted on the title on the same day. The parties are uncertain as to whether the Dakota County Clerk's office recorded the second lien on the certificate of title before or after the debtor's bankruptcy petition was filed.

Until September 12, 1989, both the debtor and Palmersheim believed the second lien had been recorded on the certificate of title. There is no evidence as to why the second lien was not recorded on the title. However, both parties stipulate that the omission was through no fault of the Palmersheims. Rather, the parties agree that the omission probably took place as a result of a mistake or oversight on the part of the Dakota County Clerk's office.

II.

The trustee argues that because Palmersheim's lien was not recorded on the certificate of title until September 12, 1989, the lien was not perfected pursuant to Neb. Rev. Stat. § 60-110 (1988) until that date. The trustee contends that this perfection on the day of bankruptcy was preferential under 11 U.S.C. § 547(b). The trustee seeks to avoid Palmersheim's lien solely pursuant to 11 U.S.C. § 547. However, during oral argument, the trustee added that if the lien was not noted on the certificate of title until after the debtor's bankruptcy was filed, the lien might be avoided pursuant to other provisions of the Code.

Palmersheim contends that because the failure to properly perfect the lien was entirely due to a ministerial mistake of the Dakota County Clerk's office, all the requirements of perfection were met on September 6, 1988, and the lien should be considered perfected as of that date. If so, the perfection of the lien would have taken place prior to the one-year insider preference period, and thus would not be preferential.

There are three prevailing schemes for using certificate of title statutes to perfect security interests in automobiles: the "indication," "delivery," and "dual" schedules. In re Farnham, 57 B.R. 241, 245 (Bankr. D. Vt. 1986).

> Presently, twenty-two states and the District of Columbia have enacted certificate of title systems that make the perfection event either the indication of the lien on the certificate of title or the issuance of a certificate of title after indication. Twenty-four states have certificate of title laws that make mere delivery of the appropriate papers and fees to the proper officer the act of perfection, even if the certificate of title is never noted or issued. . . . Finally, three states have "dual system" certificate of title perfection laws that require both the filing of a financing statement and the use of the certificate of title.

In re Farnham, 57 B.R. at 245 (quoting Note, Secured Transactions: Certificate of Title--Delivery or Notation? The Lender's Dilemma, 37 Okla. L.Rev. 618, 622 (1984)). The parties agree that Nebraska law applies in this case. Palmersheim argues that Nebraska is a "delivery" state, and therefore Palmersheim's lien was perfected by delivering the necessary documents with the court and paying the filing fee.

Perfection of liens on motor vehicles in Nebraska is governed by Neb. Rev. Stat. § 60-110 (1988) which states in pertinent part:

> Any mortgage, conveyance intended to operate as a security agreement as provided by article 9, Uniform Commercial Code . . . if such instrument is accompanied by delivery of such manufacturer's or importer's certificate and followed by actual and continued possession of the same by the holder of such instrument or, in the case of a certificate of title, if a notation of the same has been made by the county clerk or the Department of Motor Vehicles on the fact thereof, shall be valid as against the creditors of the debtor, whether armed with process or not, and subsequent purchasers, secured parties, and other lien holders or claimants but otherwise shall not be valid against them. . . . (A]ll liens, security agreements, and[encumbrances noted upon the certificate of title shall take priority according to the order of the time in which the same are noted thereon by the county clerk or the Department of Motor Vehicles.

Neb. Rev. Stat. 60-110 (emphasis added).

On its face, Neb. Rev. Stat. § 60-110 appears to require

notation of a lien on the certificate of title in order for the

lien to be protected. Moreover, the Nebraska Supreme Court has interpreted the statute as requiring a notation on the lien in order to be effective against third parties:

> An automobile mortgage lien, not shown in the title certificate, is not valid against a subsequent innocent purchaser of an automobile or holder of a mortgage lien shown in the certificate nor enforceable against the automobile in such purchaser's possession. An automobile mortgage lien, not shown in the chain of title of the automobile, does not prevail over the title to and lien on an automobile claimed by a subsequent purchaser and mortgagee without knowledge of the previous lien.

Securities Credit Corp. v. Pindell, 153 Neb. 298, 44 N.W.2d 501, 507 (1950). See also Bank of Keystone v. Kayton, 155 Neb. 79, 50

N.W.2d 511, 516 (1951); Alliance Loan & Investment Co. v. Morgan, 154 Neb. 745, 49 N.W.2d 593, 594-5 (1951).

Nebraska, therefore, requires both filing and notation in order for a lien on a motor vehicle to be perfected. As stated previously, Palmersheim contends that because the failure to note the certificate of title was through no fault of his, the lien should be deemed perfected as of the day Palmersheim presented the UCC-1 form to the Dakota County Clerk's office and paid the filing fee. The court finds that a material factual dispute exists as to the reason Palmersheim's lien was not noted on the certificate of title, and therefore the motions for summary judgment by both parties must be denied.

Neb. Rev. Stat. § 60-110 states as follows:

> [U)pon receipt of a lien instrument duly signed by the owner in a manner prescribed . . . together with the fee prescribed for notation of lien, (the county clerk] shall notify the first lienholder to deliver to the county clerk or the department, within fifteen days from the date of notice, the certificate of title to permit notation of such junior lien and, after such notation of lien, the county clerk or the department shall deliver the certificate of title to the first lienholder.

If the first lienholder fails to send the certificate of title to the county clerk, the clerk appears to have no further affirmative statutory duty to procure the title. Rather, the first lienholder may be held liable for damages resulting from a failure to permit the notation of the second lien on the certificate of title. Neb. Rev. Stat. § 60-110. Failure to note the lien on the certificate of title could have resulted from an error or omission on the part of the Dakota County Clerk's office, or it may be attributed to inaction on the part of Siouxland, the first lienholder. The court considers the identity of the responsible party relevant to the court's decision.

A second material factual dispute exists as well. Neither party presented evidence as to what time the debtor had the lien noted on the day of bankruptcy. The trustee seeks to avoid Palmersheim's lien as a preferential transfer pursuant to 11 U.S.C. § 547(b). However, if the lien was noted after 10:26 A.M. on September 12, 1989, the time debtor's bankruptcy

petition was filed, the lien might be invalid under other Code provisions. Therefore, the court finds the time of the notation of the lien on the date of bankruptcy relevant to its decision.

Because the court finds material factual issues exist, the

summary judgment motions of each party must be denied.

ORDER

IT IS ORDERED that plaintiff Donald H. Molstad's motion for

summary judgment is denied.

IT IS FURTHER ORDERED that defendant Matt J. Palmersheim's

motion for summary judgment is denied.

SO ORDERED THIS 10th DAY OF AUGUST, 1990.

William L. Edmonds
Chief Bankruptcy Judge