

UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

IN RE:

TERRY L. BAXTER, Chapter 7

Debtor. Bankruptcy No. 00-02090S DONALD H. MOLSTAD, trustee,
Plaintiff,

vs. Adversary No. 01-9060S

LEMARS BANK AND TRUST,

Defendant.

DECISION

The matter before the court is the trustee's complaint to avoid post-petition perfection of a purchase money security interest. Trial was held March 19, 2002 in Sioux City. Donald

H. Molstad appeared as attorney on his own behalf. A. Frank Baron appeared as attorney for LeMars Bank & Trust Co. (the bank's correct complete name and hereinafter "Bank"). This is a core proceeding under 28 U.S.C. § 157(b)(2)(O).

The trustee filed his complaint on April 9, 2001 alleging that debtor Terry Baxter had purchased a 2000 Harley Davidson motorcycle on July 26, 2000, and that title was transferred to Baxter and the Bank's lien notated on December 7, 2000, which was after the debtor filed bankruptcy. The trustee alleged that the perfection of Bank's security interest was an avoidable post-petition transfer under 11 U.S.C. § 549. Trustee contends that if perfection of Bank's lien is avoided, his rights as a hypothetical lien creditor under 11 U.S.C. § 544(a) defeat Bank's unperfected lien in the motorcycle. In his complaint the trustee also alleged that the perfection of Bank's lien was an avoidable preference, but he abandoned that theory at the beginning of the trial.

Findings of Fact

On July 26, 2000,¹ Terry L. Baxter purchased a Harley Davidson FXDWG motorcycle from Sioux City Harley Davidson (hereinafter "Dealer"). The cash price of the cycle was \$19,520.00. Baxter traded in his motorcycle, receiving an allowance of \$3,078.67.

Baxter executed a retail installment contract to pay the balance of the purchase price over time. As part of the installment contract, Baxter granted Dealer a security interest in the motorcycle. Baxter also signed an Agreement to Provide Property Insurance and an Application for Certificate of Title and/or Registration of Vehicle on the official form of the Iowa Department of Transportation. Baxter signed the paperwork on July 26 and took possession of the cycle that day. Also on July 26, Dealer's office manager, Zona Dixon,

Hereafter all references to dates in the Findings will be to the year 2000. executed an assignment of the contract to Bank, the lender that regularly purchased Dealer's consumer paper. The Application for Certificate of Title had already provided for the notation of a security interest held by Bank.

A day later, Dealer sent the paperwork to its business office in LeMars, where it was processed. Within a day or two, the contract was sent to Bank, and Bank paid Dealer.

When Baxter bought the cycle on July 26, Dealer did not have the title. Dealer had purchased the cycle in July from Anita Heitmann. She could not deliver title because she had purchased the cycle from a dealer in Arkansas on July 13, and she had not yet received transfer of title from her seller. Heitmann obtained a certificate of title in her name in Nebraska on August 15. She delivered the title to Dealer shortly thereafter, and Dealer obtained Iowa title in its name on August 17.

Unbeknownst to Dealer, Baxter filed his chapter 7 bankruptcy petition on August 17. Dealer completed the Iowa application for title on August 18 and shortly thereafter submitted it to Woodbury County. The application requested Bank's security interest be noted on the title. Before the county had completed processing the documents, Larry P. Fielder, an officer and shareholder of Dealer, was informed of Baxter's bankruptcy filing. Because of the filing and perhaps motivated by legal advice, Fielder directed office manager Zona Dixon to ask the county to return the application. Dixon asked for the return of the application on August 25. The county complied and returned the application, without the title having been issued.

Baxter scheduled the motorcycle as personal property having a value of

\$19,520.00. He scheduled Bank as having a secured claim of \$16,893.00 with the motorcycle as collateral. Baxter claimed his equity in the cycle, \$2,627.00, as exempt. No objections were filed to his claim. The order of discharge was entered in the case on November 30. The estate's interest in the motorcycle has not been abandoned.

After the discharge order entered, Dealer sent the application for title back to the county. It did so based on legal advice obtained by Fiedler. On December 7, the county issued a certificate of title to the cycle in Baxter's name with Bank's security interest noted on it.

Discussion and Conclusions of Law

The trustee contends that the post-petition perfection of Bank's security interest should be avoided as an unauthorized transfer under 11 U.S.C. § 549(a). He argues that if the perfection is avoided, then his rights as a hypothetical lien creditor under 11 U.S.C. § 544(a) are superior to Bank's unperfected lien, which he may then avoid.

The filing of a bankruptcy petition operates as a stay against a creditor taking any action to perfect a lien against property of the estate. 11 U.S.C. § 362(a)(4). However, the automatic stay does not prevent a creditor's act to perfect a security interest "to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) [of the Code] or to the extent that such act is accomplished within the period provided under section 547(e)(2)(A)." 11 U.S.C. § 362(b)(3). The reference to § 547(e)(2)(A) would permit a creditor to perfect an interest within ten days of the transfer of the security interest without prohibition by the automatic stay.

Section 546(b)(1) states that the rights and powers of a trustee under §§ 544 and 549 of the Code are subject to any generally applicable law that "permits perfection of an interest in property to be effective against an entity that acquires rights in such property before the date of perfection...." 11 U.S.C. § 546(b)(1)(A). Such "generally applicable law" includes Iowa Code § 554.9301(2). It states the following:

If the secured party files with respect to a purchase money security interest before or within twenty days after the debtor receives possession of the collateral, the secured party takes priority over the rights of ... a lien creditor which arise between the time the security interest attaches

and the time of filing.

Iowa Code § 554.9301(2) (2000). A chapter 7 bankruptcy trustee has the rights of a hypothetical judicial lien creditor as of the commencement of the case. 11 U.S.C. § 544(a) (1). In this case,

as of August 17, 2000, the trustee had the rights and powers of the holder of a judicial lien against the motorcycle. Under the Uniform Commercial Code, as adopted in Iowa, an unperfected security interest is subordinate to the rights of "a person who becomes a lien creditor before the security interest is perfected." Iowa Code § 554.9301(1) (b) (2000).

Baxter took possession of the cycle on July 26, 2000. Also on that date, Bank's security interest had attached to the cycle. Baxter had signed a security agreement describing the collateral, and Bank had given value. Also, Baxter had rights in the collateral--he had traded in his cycle as a downpayment; he had agreed to insure the cycle; he signed an installment contract and granted the lender a security interest in the bike. And he had taken possession. Baxter had some authority over the cycle. See

Iowa Code § 554.9203(1); Schultz v. Security National Bank, 583

N.W.2d 886, 889 (Iowa 1998). Bank had a purchase money security interest.

Bank failed to perfect its security interest within ten days of attachment, and within 20 days of Baxter's taking possession of the cycle. The trustee's rights and powers under § 544 of the Code were not subject to Bank's perfection of its security interest. Therefore § 362(b) (3) did not apply, and Bank was stayed from perfecting its lien after the filing of debtor's bankruptcy petition.

As the estate's interest in the motorcycle has not been abandoned, the perfection of Bank's lien violated the automatic stay. 11 U.S.C. § 362(a) (4). As a result, perfection of the lien was void. In re Prine, 222 B.R. 610, 612-13 (Bankr. N.D.

Iowa 1997). At the time of the bankruptcy filing, Bank's lien was unperfected. Its unperfected lien is subordinate to the trustee's rights and powers as a hypothetical lien creditor, and trustee may avoid its unperfected lien.

Trustee contends that the perfection should be avoided as an unauthorized transfer. There is some dispute over whether § 549 of the Code was intended to

deal with transfers by creditors as opposed to transfers by the debtor or trustee. See Brandt v. 440 Associates (In re Southeast Banking Corp.), 150 B.R. 833, 834

(Bankr. S.D. Fla. 1993) (holding that post-petition recordation by adjacent landholders of agreements imposing liens on property of the estate constituted unauthorized transfers under § 549(a)) and Schwartz v. United States (In re Schwartz), 954 F.2d 569, 573-75

(9th Cir. 1992) (section 549 applies to transfers of property of the estate which are not avoided by the automatic stay). I do not need to decide which view is correct. In the present case, the perfection of Bank's lien is void because it violated the automatic stay. It is not necessary to determine if the perfection of the security interest may also be avoided under § 549.

IT IS ORDERED that the perfection of the security interest of LeMars Bank & Trust Co. in the 2000 Harley Davidson motorcycle is void and that Bank's unperfected security interest is subordinate to the rights and powers of the trustee under 11 U.S.C. § 544(a).

IT IS FURTHER ORDERED that Bank's unperfected lien is avoided pursuant to 11 U.S.C. § 544(a). Judgment shall enter accordingly.

SO ORDERED THIS 28th DAY OF MARCH 2002.

William L. Edmonds, Bankruptcy Judge