

UNITED STATES BANKRUPTCY COURT NORTHERN DISTRICT OF IOWA WESTERN  
DIVISION

IN RE:

DONNIN GALE CUSTER Chapter 7

Debtor. Bankruptcy No. 02-01575S

WIL L. FORKER, trustee Plaintiff

v. Adversary No. 02-9100S

AMERICAN HONDA FINANCE CORP.

Defendant.

ORDER RE COMPLAINT

On July 16, 2002, trustee Wil L. Forker filed a complaint to avoid the security interest of defendant American Honda Finance Corp. ("AHFC"). Final trial was held March 26, 2003 in Sioux City. Trustee Forker appeared on his own behalf. Rebecca A. Nelson appeared as attorney for defendant AHFC.

Findings of Fact

On April 25, 2002, debtor Donnin Custer, an Iowa resident, purchased a 1999 Honda CRV from Vern Eide Motorcars, Inc., a dealership in Sioux Falls, South Dakota. The purchase price of the vehicle was \$17,618. Custer traded in a 1992 Dodge Caravan for which he received an allowance of \$1,100. Exhibit I. The balance was financed through AHFC. Custer executed a retail installment contract which granted the dealership a security interest in the vehicle. Exhibit H. The contract contained a notice of assignment of the dealership's rights to AHFC.

Custer was unable to take immediate possession of the vehicle because of an insurance problem. The dealership delivered the vehicle to Custer in Sioux City the next day, April 26, 2002.

At the time of the sale to Custer, the vehicle was registered in the name of a California financial institution as lessor. See Exhibit J. The owner released its interest in the vehicle on May 6, 2002. Vern Eide Motorcars immediately made application for a South Dakota title in its name.

Exhibit K. The State of South Dakota issued the title May 10. Exhibit L. The

court takes judicial notice that this date was a Friday. The dealership received the title May 14.

Vern Eide Motorcars usually does not make application for the buyer's title if the buyer lives out-of-state or if the sales tax and registration fees are not being financed. The title clerk at the dealership prepared the reverse side of the South Dakota title, so that Custer could obtain an Iowa title showing the security interest to AHFC. The title clerk changed the date on the bill of sale to May 14. Exhibit M. This date was also shown as the date of sale on the reverse of the South Dakota title. Exhibit L. These changes were consistent with the dealership's practice whenever it sells a vehicle to which it does not already have title.

The title clerk then mailed the bill of sale and title to Custer with a memo instructing him to obtain an Iowa title.

The bill of sale and title were sent to Custer by certified mail, but not "return receipt requested." Custer received a notice from the post office that it was holding a certified letter for him. Although the postal service termed it a "second notice," Custer did not recall receiving a prior notice. He picked up the letter from the post office on or about May 22. Because of the taxes and fees that would be required to obtain the title, Custer waited until his next payday before going to the county office to make the application. The Iowa title noting AHFC's security interest was issued May 31, 2002.

Custer filed his Chapter 7 bankruptcy petition on May 9, 2002. He claimed an exemption in the vehicle to the extent of \$700. The trustee objected to the claim of exemption, and on September 4, 2002, the objection was sustained. The trustee has not abandoned the estate's interest in the vehicle.

### Discussion

The trustee's complaint asserts rights in the motor vehicle superior to those of AHFC on two grounds. He alleges that the untimely perfection of the security interest rendered it void as to the trustee by virtue of the "strong-arm" powers in 11 U.S.C. §

544(a). Alternatively, he contends that the security interest is avoidable under 11 U.S.C. § 547(b) as a preferential transfer.

The trustee may avoid as a preference any transfer of the debtor's interest in property for the benefit of a creditor on account of an antecedent debt, made while the debtor was insolvent, within 90 days before the date of the filing of the petition, and that would enable the creditor to receive more than the creditor would receive in a Chapter 7 case if the transfer had not been made. 11 U.S.C. § 547(b) (1)-(5).

Custer took possession of the vehicle on April 26, 2002. Iowa Code § 321.50 provides for the perfection of a security interest in a motor vehicle. Except as provided therein, however, Article 9 of the Uniform Commercial Code, Iowa Code Chapter 554, applies to any transaction intended to create a security interest in a motor vehicle. Iowa Code § 321.50(5). By April 26, AHFC had given value, Custer had rights in the collateral, and by signing the retail installment contract, he had authenticated a security agreement describing the collateral. The purchase-money security interest of AHFC had attached. Iowa Code § 554.9203(2) (2003).<sup>1</sup>

<sup>1</sup>All citations to Iowa Code Chapter 554, Article 9, are references to Iowa's adoption of the Uniform Commercial Code, Revised Article 9, added by Iowa Acts 2000 (78 G.A.) ch. 1149, effective July 1, 2001.

Custer filed his bankruptcy petition 13 days later, on May 9. Because AHFC had not yet perfected its security interest, the date of transfer for preference purposes was "immediately before the date of the filing of the petition." 11 U.S.C. § 547(e) (2) (C). Therefore, the transfer of a security interest to AHFC was on account of an antecedent debt. The trustee is entitled to the benefit of a presumption that Custer was insolvent in the 90 days prior to his bankruptcy filing. 11 U.S.C. § 547(f).

The preferential effect of a challenged transfer is a central element of a preference claim. See generally 5 Collier on Bankruptcy ¶ 547.03[7] (15th ed. rev. 2003). The trustee may prove this element by a variety of methods:

He may testify as to the assets, claims and costs of administration himself. If the claims bar date has passed and liquidation has been completed, total assets and timely claims may be placed into evidence. In some cases, the debtor's schedules may even be presented as evidence of the payment a creditor would likely receive in a chapter 7 liquidation.

Molstad v. Levich (In re Attrill), Adv. No. X89-0064S slip op. at 6 (Bankr. N.D. Iowa April 20, 1990) (citations omitted).

The trustee did not offer evidence on this element. Therefore, the court is unable to avoid AHFC's security interest as a preference, and it is unnecessary to address whether any of the exceptions in § 547(c) apply to the transfer.

As of the commencement of a bankruptcy case, the trustee has the rights and powers of a hypothetical judicial lien creditor. 11 U.S.C. § 544(a)(1). Iowa law supplies the substantive law governing the rights of the trustee as against a conflicting security interest. Branderhorst v. Central Iowa PCA (In re Branderhorst), 843 F.2d 311, 312-13 (8th Cir. 1988); see also Johnson v. First National Bank of Montevideo,

719 F.2d 270, 273 (8th Cir. 1983) (state law generally governs property rights).

At trial, the trustee abandoned his argument based on Iowa Code § 321.50(6). That subsection would have been relevant only if AHFC had held the Iowa certificate of title for 30 days without obtaining notation of its lien. Nevertheless, the court finds that the trustee has shown that AHFC's interest in the vehicle as of the date of Custer's petition was an unperfected lien which was subordinate to the trustee's rights under 11 U.S.C. § 544(a).

A lien creditor takes priority over the holder of an unperfected security interest. Iowa Code § 554.9317(1). An exception to this general rule exists for holders of a purchase-money security interest. If a purchase-money creditor perfects its security interest "within twenty days after the debtor receives delivery of the collateral, the security interest takes priority over the rights of a . . . lien creditor which arise between the time the security interest attaches" and the time of perfection. Iowa Code § 554.9317(5).

Custer received delivery of AHFC's collateral on April 26, 2002. If AHFC had perfected its security interest within 20 days, on or before May 16, its purchase-money security interest would have retained priority over intervening lien creditors.

Custer's bankruptcy filing on May 9 did not, in itself, destroy AHFC's

priority position in the vehicle. On the petition date, the trustee's powers under § 544(a) were subject to AHFC's rights to perfect its purchase-money security interest within the 20 days provided by Iowa Code § 554.9317(5). 11 U.S.C. § 546(b)(1). Timely perfection would have been effective against the trustee and would have related back to the date of attachment.

Moreover, perfection on or before May 16 would not have been a violation of the automatic stay. By reference to §§ 546(b) and 547(e)(2)(A), Bankruptcy Code § 362(b)(3) provides that perfection within 10 days of attachment or within the 20 days provided by Iowa Code § 554.9317(5) is not stayed by the filing of a bankruptcy petition. 11 U.S.C. § 362(b)(3).

Because the lien was not timely perfected, however, the trustee acquired rights in the vehicle superior to those of AHFC as of the date of Custer's petition. automatic stay, "applicable to all entities, of . . . any act to create, perfect, or enforce any lien against property of the estate." 11 U.S.C. § 362(a)(4) (emphasis added). On May 31, 2002, AHFC could not have applied for a certificate of title with a notation of its lien. Custer was similarly stayed from encumbering property of the estate. The perfection of AHFC's lien, an act in violation of the automatic stay, was void. Molstad v. LeMars Bank & Trust (In re Baxter), 2002 WL 485643 at \*3 (Bankr. N.D. Iowa March 28, 2002) (citing In re Prine, 222 B.R. 610, 612-13 (Bankr. N.D. Iowa 1997)). The unperfected lien of AHFC is subordinate to the trustee's rights and powers as a hypothetical lien creditor, and the trustee may avoid its unperfected lien.

IT IS ORDERED that the perfection of the security interest of American Honda Finance Corp. in the 1999 Honda CRV is void, and that its 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 American Honda Finance Corp.'s unperfected lien is avoided pursuant to 11 U.S.C. § 544(a). Judgment shall enter accordingly.

SO ORDERED THIS 4th DAY OF APRIL 2003.

William L. Edmonds, Bankruptcy Judge