

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS**

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| IN RE: |) | |
| |) | |
| HOPE DANELLE THOLL, |) | Case No. 02-10599 |
| |) | Chapter 7 |
| |) | |
| Debtor. |) | |
| _____ |) | |
| |) | |
| J. MICHAEL MORRIS, Trustee, |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | Adversary No. 02-5158 |
| |) | |
| ADVANTEDGE QUALITY CARS, |) | |
| L.L.C, and HOPE D. THOLL, |) | |
| |) | |
| Defendants. |) | |
| _____ |) | |

MEMORANDUM OPINION AND SCHEDULING ORDER

This is the trustee’s complaint to avoid a preferential transfer under 11 U.S.C. § 547(b).¹ The trustee alleges that defendant Advantedge Quality Cars, LLC (Advantedge) failed to timely perfect its purchase money security interest in a 1996 Plymouth Voyager it sold to debtor Hope Danelle Tholl (Debtor). The dispute between the trustee and Advantedge centers upon when Advantedge should have submitted a Notice of Security Interest or an Application for Secured Title under KAN. STAT. ANN. § 8-135(c) (2001), which is made applicable by KAN. STAT. ANN. § 84-9-311(a)(2) (2001 Supp.).

¹ Subsequent statutory references are to the Bankruptcy Code, 11 U.S.C. §101, et seq. unless otherwise noted.

Jurisdiction

This is a core proceeding under 28 U.S.C. § 157(b)(2)(F). The Court has jurisdiction under 28 U.S.C. § 157(b)(1) and § 1334(b). The parties submitted this matter on stipulations and briefs.²

Facts

The parties' stipulated facts may be summarized as follows.³ Debtor bought the Voyager from Advantedge on December 5, 2001. She took possession that very day. At that time, Advantedge held a twice-endorsed certificate of title to the vehicle. The reverse side of a Kansas title certificate provides two spaces where title may be endorsed from one owner to another. Advantedge applied for its certificate of title on December 19, 2001 and the Kansas Department of Revenue issued a certificate of title in Advantedge's name on December 20, 2001. On December 21, 2001, Advantedge endorsed its certificate of title to Debtor. Advantedge did not file a Notice of Security Interest until January 8, 2002, within twenty days of the issuance of its certificate of title, but well outside twenty days after delivery of the vehicle. Debtor did not promptly title the vehicle in her name. Advantedge requested duplicate titles in October and again in November of 2002. Only in January of 2003 did Debtor succeed in titling the vehicle in her name. Debtor commenced her bankruptcy case on February 19, 2002. The vehicle is Debtor's exempt means of conveyance. The trustee seeks to avoid perfection of Advantedge's lien as a preferential transfer and to preserve the lien for the estate under § 551.

Analysis

² The Court notes that Advantedge submitted Defendant's Brief in Response to the Trustee's Reply Brief. *See* Dkt. 33. D. Kan. Rule 7.1(c), which applies to this Court, provides only for the filing of an opening brief, a response and a reply. Further briefs filed without leave of the Court will not be considered.

³ Dkt. 27.

At issue here is when Advantedge should have filed its Notice of Security Interest (NOSI) and, if the NOSI was not timely filed, whether its late filing is an avoidable preference under § 547(b). While the parties have not stipulated to the insolvency of the Debtor, the same is presumed and nothing in Advantedge's papers challenges that presumption.⁴ In order to succeed on his complaint, the Trustee must demonstrate by a preponderance of the evidence that a transfer of the Debtor's property (here, a security interest in the vehicle) was made (1) for the benefit of a creditor; (2) on account of an antecedent debt; (3) while the debtor was insolvent; (4) on or within 90 days before the date of filing; and (5) that enabled the creditor to receive more than it would have in a chapter 7 liquidation had this transfer not been made. However, the trustee may not avoid such a transfer where it created a purchase money security interest and where the security interest is perfected within twenty days after the debtor receives possession of the property sold.⁵

That there has been a transfer for the benefit of Advantedge on account of its antecedent debt is beyond doubt. The Court presumes the Debtor was insolvent at the time of the transfer. The only information available concerning the liquidation test in §547(b)(5) comes from an affidavit of the trustee concerning the likely outcome of a chapter 7 liquidation in the case. That affidavit reflects that if the transfer of the vehicle is not avoided, there will be less than \$50 in the estate to service about \$9,400 in unsecured claims. Advantedge makes no response to this affidavit. The Court, however, questions its sufficiency as evidence since this matter was to have been submitted on stipulations only.

The critical issue here is when Advantedge perfected its security interest in the Voyager. Advantedge asserts that it "perfected" when it finally obtained a title certificate on December 20,

⁴ See 11 U.S.C. § 547(f).

⁵ This is often referred to as the "safe harbor" provision. See 11 U.S.C. § 547(c)(3).

2001, not when it filed its NOSI on January 8, 2002. Perfection of a security interest in a titled motor vehicle is controlled by KAN. STAT. ANN. § 8-135(c) (2001). Revised Article Nine of the Kansas Uniform Commercial Code provides that compliance with the vehicle title law is the equivalent of filing a financing statement under the UCC.⁶

KAN. STAT. ANN. § 8-135(c)(5) (2001) expressly provides that “upon sale *and delivery* to the purchaser of every vehicle subject to a purchase money security interest . . . , the dealer or secured party may complete a notice of security interest and when so completed, the purchaser shall execute the notice” [Emphasis added.]. The secured party may then mail or deliver the NOSI to the Division of Vehicles within twenty days of the sale and delivery. The Division is required to maintain the NOSI of record pending the application by the buyer for a certificate of title at which time the security interest evidenced by the NOSI will be endorsed on the certificate. “The proper completion and *timely* mailing or delivery of a notice of security interest by a dealer or a secured party *shall* perfect a security interest in the vehicle described on the date of such mailing or delivery.” [Emphasis added.]⁷

Here, the parties stipulate that Debtor received delivery of the vehicle on December 5. That is the date the twenty days began to run. While Advantedge had a duty to deliver a certificate of title to Debtor within thirty days of December 5,⁸ the fact that it had no record title to the vehicle on December 5 did not prevent it from filing its NOSI timely. Had it done so, the Division would have held the NOSI until such time as Debtor applied for a title. The Court concludes from the plain

⁶ KAN. STAT. ANN. § 84-9-311(b) (2001 Supp.).

⁷ KAN. STAT. ANN. § 8-135(c)(5) (2001).

⁸ See KAN. STAT. ANN. § 8-135(c)(7) (2001).

language of each statute that the vehicle delivery date is the operative date from which the twenty day period described in both KAN. STAT. ANN. § 8-135(c)(5) and § 547(c)(3) begins to run. Thus, Advantedge's filing of a NOSI on January 8, 2002 is untimely, falling outside the twenty-day safe harbor.

The Court notes and dismisses Advantedge's argument that the permissive nature of the language in KAN. STAT. ANN. § 8-135(c)(5) somehow absolves it of the need to file in order to perfect its purchase money security interest in the vehicle. The "proper completion and timely filing" language quoted above makes it clear that a purchase money security interest in a vehicle is perfected only when the NOSI is timely filed. So, while Advantedge may choose not to perfect its security interest, timely filing is a necessary predicate to successful perfection and protection against lien creditors. Even if the permissive nature of the titling statute's language absolved Advantedge of the need to timely perfect, the twenty day rule in § 547(c)(3) would still apply. Advantedge would be unable to avail itself of the enabling loan defense because the transfer (*i.e.* perfection) took place well after the twenty days had run.

Advantedge's reliance on *In re Charles*⁹ is also misplaced. In that case, CIT leased four vehicles to the debtor. The vehicles remained titled in CIT, the lessor. The trustee argued that the leases were disguised financing sales and therefore, CIT had failed to adequately perfect its purchase money security interest in the vehicles by failing to file NOSIs with the Division of Vehicles. The trustee sought to avoid CIT's interests as unperfected, employing his hypothetical lien creditor powers under § 544. The bankruptcy court determined that the continual presence of CIT's name on the titles *as an owner* placed lien creditors on notice of CIT's interest. The Tenth Circuit Court of Appeals

⁹ *Morris v. The CIT Group/Equipment Financing (In re Charles)*, 323 F.3d 841 (10th Cir. 2003).

affirmed. In short, CIT had substantially complied with perfection requirements even though its name did not appear as lienholder on the title, because anyone reviewing the title would find evidence of CIT's interest.

In our case, the trustee seeks to avoid a preferential transfer on the basis that Advantedge's perfection of its security interest occurred outside the twenty-day period provided by the Kansas title statute and by § 547(c)(3). Unlike *Charles*, notice to third parties is not the issue. At issue here is whether a transfer took place within the reach-back period. It did. Advantedge contracted with the debtor to sell the vehicle but to retain a security interest in it. The perfection of that security interest is a transfer of an interest in the debtor's property which occurred during the ninety-day period. Had it occurred within the twenty day safe harbor provided by § 547(c)(3), the NOSI filing would not be avoidable. This transfer occurred after the safe harbor period expired and, if the liquidation element of § 547(b)(5) is met, is an avoidable preference.

In sum, four of the five preference elements are met by the Trustee per the stipulations. Remaining to be proven is the fifth element, that Advantedge would receive more on account of this transfer than it would in a chapter 7 liquidation had the transfer not occurred. Because there is no evidence in the stipulations that, together with the Court's file, form the record in this case, the Court cannot find that the Trustee's burden has been satisfied on this element. The best interest of the creditors and of judicial economy are best served by this Court granting the parties 10 days from issuance of this opinion in which to submit further stipulations of fact on the fifth element or to advise the Clerk whether they seek an evidentiary hearing. Upon the expiration of the 10 days, the Court will either convene an evidentiary hearing on the fifth element only or enter an appropriate judgment or order. No judgment shall enter at this time, but the facts as found and legal conclusions made herein shall control the future course of this adversary proceeding.

Dated this 17th day of February, 2004.

ROBERT E. NUGENT
CHIEF BANKRUPTCY JUDGE
UNITED STATES BANKRUPTCY COURT
DISTRICT OF KANSAS

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the **Memorandum Opinion** was deposited in the United States mail, postage prepaid on this 17th day of February, 2004, to the following:

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