



SO ORDERED.

SIGNED this 2nd day of May, 2013.

Dale L. Somers

Dale L. Somers
United States Bankruptcy Judge

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

In Re:

DEBORAH LYNN MURPHY,

DEBTOR.

**CASE NO. 12-20434
CHAPTER 7**

**MEMORANDUM OPINION DENYING DEBTOR'S MOTION
FOR DETERMINATION THAT CERTAIN PERSONAL PROPERTY
OWNED BY DEBTOR IS NOT SUBJECT TO ANY SECURITY INTEREST**

On September 21, 2012, the Court heard arguments on Debtor's Motion for Order Determining that Certain Personal Property Owned by the Debtor is not Subject to any Security Interest, or, in the Alternative, Granting Debtor's Request to Redeem Property (Motion).¹ Debtor appeared by Patrick E. Henderson. Capital One, the creditor claiming a security interest and opposing the Motion, appeared by Michael Berman. The Court issued an oral ruling from the bench finding that the personal property in issue is subject

¹ Dkt. 13.

to a security interest and stating that the Court would prepare a written order incorporating by reference the oral findings of fact and conclusions of law. Such an order was prepared and signed on September 24, 2012. It stated:

After hearing the statements of counsel and carefully considered (sic) the briefs of the parties, the Court, ruling from the bench, held that, under the terms of the Best Buy credit card agreement and the facts of this case, the security interest attached to the items purchased and was automatically perfected because the items are consumer goods under Article 9 of the Uniform Commercial Code. The Court stated on the record its Findings of Fact and Conclusions of Law, which are incorporated herein by this reference. If the Court's oral findings and rulings are transcribed, the Court orders that the draft transcription be submitted to the Court for the purpose of making technical corrections, including incorporation of correct names, punctuation, paragraphing, quotations, footnotes, and legal citations.²

This order was not a final order because, as stated in the order, the Court made no ruling on Debtor's alternative request to redeem personal property and the Motion remains pending for determination of that issue. Proceedings for an interlocutory appeal have not been initiated.

On April 8, 2013, Bankruptcy Judge Berger, sitting in Kansas City, signed a memorandum opinion and order in *In re Cunningham*, case no. 12-20662, ruling under facts indistinguishable from those before the Court in this case, that no security interest attached to consumer goods purchased using a Best Buy credit card. There are now conflicting decisions on this issue in the same division of the United States Bankruptcy

² Dkt. 25.

Court for the District of Kansas. I am filing this memorandum expressly stating the analysis and findings of fact and conclusions of law orally stated at the conclusion of arguments, supplemented by reference to *Cunningham*, as I believe the bar is best served by having the analysis that led to the oral ruling set out in a written opinion.

FINDINGS OF FACT.

On May 23, 2012, Debtor filed her motion asserting that four items of personal property are not subject to a purchase money security interest (PMSI) as claimed by creditor Capital One. The property is four items of electronics purchased from Best Buy using a Best Buy credit card. Debtor claims the value of the property is \$50.00, not \$1,613.30, the amount of Capital One's claim.³ According to Debtor, there is no PMSI because the description of the collateral in the alleged security agreement is not sufficiently specific. HSBC, the original holder of the debt, has sold its claim to Capital One. Capital One asserts that it has an automatically perfected PMSI under the terms of the Debtor's agreements with Best Buy and the value is approximately \$1,200.00, but if Debtor redeems she should be required to pay the balance of Capital One's claim in the approximate amount of \$1,613.00.⁴

The Best Buy credit Application, signed by Debtor, provides: "You grant the Bank a purchase money security interest in the goods purchased on your Account." It also provides: "you agree to the terms and conditions of the Cardholder Agreement and

³ Dkt. 13.

⁴ Dkt. 15.

Disclosure Statement which shall be sent to you with the Card.” That Cardholder Agreement includes a full paragraph about security, which includes the statement, “you grant us a purchase money security interest in the goods purchased with your Card” Capital One has provided copies of the sales receipts for the four items, but they do not incorporate the terms of the Application or the Cardholder Agreement. There is no security agreement provision on the receipts.

DISCUSSION.

The question is whether the security interest attached to the four items; if it attached, perfection was automatic since the goods are consumer goods. The condition for attachment which is in issue requires that the Debtor has authenticated a security agreement that provides a description of the collateral.⁵ The sufficiency of descriptions of collateral is addressed by K.S.A. 84-9-108 (2012 Supp.), which provides in part:

(a) Sufficiency of description. Except as otherwise provided in subsections (c), (d), and (e), a description of personal or real property is sufficient, whether or not it is specific, if it reasonably identifies what is described.

(b) Examples of reasonable identification. Except as otherwise provided in subsection (d), a description of collateral reasonably identifies the collateral if it identifies the collateral by:

- (1) Specific listing;
- (2) category;
- (3) except as otherwise provided in subsection (e), a type of collateral defined in the uniform commercial code;

⁵ K.S.A. 84-9-203(b)(3)(A) (2012 Supp.).

- (4) quantity;
- (5) computational or allocational formula or procedure; or
- (6) except as otherwise provided in subsection (c), any other method, if the identity of the collateral is objectively determinable.

...

(e) When description by type insufficient. A description only by type of collateral defined in the uniform commercial code is an insufficient description of:

- (1) A commercial tort claim; or
- (2) in a consumer transaction, consumer goods, a security entitlement, a securities account, or a commodity account.

Debtor contends that describing the collateral as “goods purchased on your Account” does not comply with K.S.A. 84-9-108. The argument is that since the sale was a consumer transaction, subsection (e)(2) applies and was violated because it prohibits description by type of collateral and, in the Debtor’s view, “goods purchased” is a type of collateral. Debtor contends that the security agreement must describe the specific goods purchased, such as TV or VCR.

Debtor's proposed construction of K.S.A. 84-9-108(e)(2) is not correct. The “description by type” not permitted for consumer goods is the “types” of collateral defined in the UCC, such as accounts, chattel paper, consumer goods, deposit accounts equipment, general intangibles, and so forth. “Goods purchased on your Account” is not a “type of collateral defined in the uniform commercial code.” The purpose of the collateral description in the security agreement is to define the security interest as between the parties; unlike a financing statement, the purpose of a security agreement is

not to give notice to third parties.⁶ The description “goods purchased on your Account” adequately defines the collateral between the Debtor and the holder of the account.

This case is nearly identical to *In re Ziluck*,⁷ which held debtors consumer goods purchased using a Radio Shack credit card were subject to security interests granted by the Radio Shack Account and Security Agreement signed by the debtor describing the collateral as “all merchandise charged to your Account.” The court rejected the debtor’s argument that the description of the collateral was insufficient, finding that it “reasonably identifies the property subject to the security interest - namely any property purchased with the subject credit card.” *Ziluck* is identified as correctly decided in Barkley Clark’s treatise on Article 9, which states, “it is always possible for the issuer [of a credit card] to retain a security interest in items purchased with the credit card, so long as the credit card application includes security agreement language.”⁸

Research conducted before the hearing revealed one case reaching a contrary result, *In re Shirel*.⁹ In that case, the Bankruptcy Judge held that the description of collateral as “all merchandise purchased with the credit card” in a credit card form from an appliance center was insufficient for a security interest to attach to a refrigerator

⁶ *Maxl Sales Co. v. Critiques, Inc.*, 796 F.2d 1293, 1298 (10th Cir. 1986).

⁷ 139 B.R. 44 (S.D. Fla. 1992).

⁸ Barkely Clark and Barbara Clark, *The Law of Secured Transactions under the Uniform Commercial Code* ¶ 12.02[1](A.S. Pratt 2012).

⁹ 251 B.R. 157 (Bankr. W.D. Okla. 2000).

purchased using the card. I believe he erroneously found the purpose of the security agreement was to give notice to third parties of the items which are subject to the security interest. Inquiry notice to third parties is the function of a financing statement, which is not required for a PMSI in consumer goods. When evaluating the sufficiency of the description, the *Shirel* court then focused only on the phrase “all merchandise,” ignoring the phrase “purchased with the credit card,” and found the phrase “all merchandise” imprecise. The *Ziluck* case was cited in a footnote as reaching a contrary result, but it was rejected since it was not decided under Oklahoma law or by the Tenth Circuit.

As stated above, the *Cunningham* decision also reaches a contrary result. Although the facts in *Cunningham* are indistinguishable from those in this case and the issue presented was identical, analysis focused upon construction of the three documents involved in each sale transaction, rather than on the UCC requirements for description of collateral. The Court concluded that “[a]n enforceable security agreement has never existed between these parties as to the” consumer goods purchased from Best Buy because “[t]he type of collateral referenced in the ‘goods purchased on your Account’ contained in the original Application is not sufficiently descriptive to allow attachment and enforceability under K.S.A. 84-9-108(e) and K.S.A. 84-9-203(b)(3)(A).” This Court respectfully disagrees. As discussed above, it is my conclusion that the description of the goods in the Application and the Cardholder Agreement is sufficient under K.S.A. 84-9-108(e) and the security interest therefore attached under K.S.A. 84-9-203(b)(3)(A).

CONCLUSION.

For the foregoing reasons, the Court denies the portion of Debtor's Motion seeking a determination that Capital One's security interest did not attach to the consumer goods purchased with Debtor's Best Buy credit card. The security interest granted in the Application attached when the goods were purchased using the Best Buy credit card and was automatically perfected.

The foregoing constitute Findings of Fact and Conclusions of Law under Rules 7052 and 9014(c) of the Federal Rules of Bankruptcy Procedure which make Rule 52(a) of the Federal Rules of Civil Procedure applicable to this matter.

IT IS SO ORDERED.

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