SO ORDERED.

SIGNED this 10 day of February, 2006.

Dale L. Somers
Dale L. Somers
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

In Re:	
CHRISTOPHER LEE HABERMAN, **CATHERINE MAY HABERMAN,**	**CASE NO. 02-11974-7** **CHAPTER 7**
DEBTORS.	
J. MICHAEL MORRIS, Trustee,	
PLAINTIFF,	
v.	**ADV. NO. 02-5273**
ST. JOHN NATIONAL BANK, **CHRISTOPHER L. HABERMAN,** **CATHERINE M. HABERMAN,**	
DEFENDANTS.	

OPINION DETERMINING RIGHTS IN CERTAIN POSTPETITION PAYMENTS DEBTORS MADE IN ORDER TO KEEP THEIR CAR

This proceeding is once again before the Court for decision based on the parties' supplemental stipulations and briefs. The plaintiff-trustee appears as his own counsel. Defendant St. John National Bank appears by counsel Dale J. Paulsen. The defendant-debtors have not participated in this proceeding since their counsel, Don Riley, signed the original stipulations. The Court has reviewed the relevant materials and is now ready to rule.

When the Debtors filed for bankruptcy, the Bank had a lien on their car to secure a debt of over $3,000. The Debtors voluntarily gave this lien to the Bank. Soon after the Trustee commenced this proceeding seeking to avoid the Bank's lien, he sought and obtained an order declaring the bankruptcy estate had a contingent interest in any postpetition payments the Debtors might make on the debt secured by the car that would be superior to the Bank's interest if the lien avoidance action was successful. When that order was announced in December 2002, the Debtors owed $2,541.40 on the debt. They continued to make installment payments to the Bank, ultimately paying off the balance they owed. In an order entered in April 2004, the Court determined that the Bank's lien was unperfected and the Trustee could avoid it. In that order, the Court indicated that the Trustee's claim on behalf of the bankruptcy estate would probably be limited by the car's value on the day the Debtors filed for bankruptcy. The parties subsequently stipulated the car was worth $2,000 on the filing date. The Court is still convinced the Trustee's claim is limited by that value. Judgment will be entered requiring the Bank to turn the $2,000 over to the bankruptcy estate.

FACTS

Only the following stipulated facts are relevant to the issues remaining to be resolved.

When the Debtors filed their joint Chapter 7 bankruptcy petition on May 1, 2002, their car was worth only $2,000, but it secured a debt to the Bank of more than $3,000. Later that month, they signed an agreement to reaffirm their debt to the Bank for $3,237.50. This agreement was never filed with the Court. They made payments to the Bank that had reduced the debt to $2,541.40[1] by October 22, 2002, when the Trustee filed the complaint commencing this proceeding.

Two days after filing the complaint, the Trustee filed a motion asking the Court to order the Debtors to give the Trustee any payments that came due on their debt to the Bank, and to declare that any postpetition payments the Debtors had already made to the Bank or might make to it in the future would be property of the estate if the Trustee succeeded in avoiding the Bank's lien. At a hearing a month and a half later, on December 12, Chief Judge Nugent ruled the Debtors should continue to make their payments to the Bank, but if the Trustee succeeded in avoiding the lien on the car, the Bank would have to turn all the Debtors' postpetition payments over to the Trustee ("Contingent-Interest Declaration"). After that ruling, the Debtors paid the balance of the

[1]The stipulation between the Trustee and the Bank shows the Debtors made payments totaling $900 during this period, and the Bank applied $696.10 to principal and the rest to interest. The propriety of this allocation has not been questioned in this proceeding.

debt secured by the car.[2] On April 14, 2004, this Court ruled that, using his strong-arm power under § 544(a)(1) of the Bankruptcy Code, the Trustee was entitled to avoid the Bank's lien on the car ("Lien-Avoidance Order"). The car was worth $1,250 on that date.[3] Section 551 provides that such an avoided lien is automatically preserved for the benefit of the bankruptcy estate.

The Trustee now concedes that the Tenth Circuit Bankruptcy Appellate Panel's decision in *Morris v. Vulcan Chemical Credit Union (In re Rubia)*[4] precludes him from recovering the postpetition payments the Debtors made to the Bank before the Contingent-Interest Declaration was announced,[5] so this opinion will not address the estate's rights, if any, in those payments. Instead, the Court will consider only the estate's rights in the payments made after the Contingent-Interest Declaration was made.

DISCUSSION

1. The Rubia decision requires the Court to limit the Trustee's recovery to the value of the car as of the day the Debtors filed for bankruptcy.

In the Lien-Avoidance Order, the Court indicated that it read the decision in *Rubia* to mean that the lien preserved for the bankruptcy estate by § 551 was limited to the

---

[2]The Debtors paid not only the $2,541.40 in principal, but also $186.58 that the Bank credited to interest and $20 it credited to late fees. No one has complained about the application of part of the Debtors' payments to interest and late fees.

[3]The Trustee and the Bank have stipulated to this value.

[4]257 B.R. 324, 326-29 (10th Cir. BAP).

[5]*See* Trustee's Brief on Amount of Avoided Lien, dkt. # 46 at 6 n. 4 (filed May 2, 2005).

lesser of the amount the Debtors owed the Bank on the day they filed for bankruptcy or the value of the car on that day. The Trustee takes issue with the conclusion that *Rubia* is binding authority on this point.

In *Rubia*, a Chapter 7 trustee[6] had sued a creditor seeking to recover payments the debtor made after filing for bankruptcy but before the trustee obtained an agreed order avoiding the creditor's lien on the debtor's pickup truck as a preference.[7] Affirming the bankruptcy court, the *Rubia* court held that the trustee's lien rights in the debtor's truck gave the trustee no right to collect the debt the lien had secured before it was avoided, and therefore no right to recover any postpetition payments that had been made to the creditor.[8] In the Lien-Avoidance Order, this Court described *Rubia* this way: "The Tenth Circuit Bankruptcy Appellate Panel recently ruled that when a trustee avoids and preserves a creditor's lien, the trustee succeeds to the creditor's lien rights, but does not obtain any right to collect the creditor's claim from the debtor postpetition. From the collateral securing the lien, the trustee can recover the amount of the creditor's claim as of the day the debtor filed for bankruptcy, or the value of the collateral on that day, whichever is less."[9]

---

[6]The same trustee who is the plaintiff in this case.

[7]257 B.R. at 325-26.

[8]257 B.R. at 327-29.

[9]Lien-Avoidance Order, dkt. # 28, slip op. at 12 (footnotes omitted).

The Trustee argues that the first sentence of this Court's description of *Rubia* correctly stated the holding in the decision, but that while the second sentence correctly described additional statements made in the opinion, those remarks were dicta. He contends that the court's assertions about limitations on the *Rubia* trustee's rights under the avoided lien that were unrelated to the trustee's effort to recover the postpetition payments from the creditor were not necessary to the conclusion that the trustee could not recover the payments. The Trustee asserts that he succeeds to the position of the Bank and in essence becomes the Bank. The Court cannot agree.

Before its lien was avoided, the Bank's rights in the Debtors' car were determined by the note and security agreement the Debtors executed in favor of the Bank, as modified and controlled by the laws of Kansas, including its version of the Uniform Commercial Code, and the Bankruptcy Code. Without the lien, the Bank would simply have been the holder of a general unsecured claim against the Debtors to the extent of the debt they owed it on the day they filed for bankruptcy. The Bank could recover on that debt only to the extent of its proportionate share of any distribution the bankruptcy estate might make to general unsecured creditors. With a perfected lien, the Bank could insist that the Debtors take one of four actions: (1) surrender the car to the Bank; (2) redeem the car under § 722 by paying the Bank the car's value in a lump sum[10]; (3) execute a reaffirmation agreement with the Bank under § 524(c); or (4) if they were not in default

[10]*See* § 722 (debtor can redeem by paying amount of allowed secured claim); § 506(a) (allowed claim is secured to extent of value of collateral); *see also GMAC v. Bell (In re Bell)*, 700 F.2d 1053, 1055-57 (6th Cir. 1983) (redemption under § 722 requires lump-sum payment, not installment payments).

on the debt to the Bank when they filed for bankruptcy, simply continue making the payments called for under their original agreement with the Bank.[11] If the Debtors failed to act in one of these four ways, the Bank would have been entitled to obtain stay relief and to foreclose on its lien. Only the first two of the Debtors' options, or their failure to exercise any of the options, would have limited the Bank to recovering the value of the car. The Debtors could retain the car through installment payments only by choosing the third or fourth options. They might have been able to reduce the debt under the third option, but only to the extent the Bank agreed to the reduction. Under the fourth option, they would have had to pay the full amount they owed the Bank. The only other way the Debtors could have forced the Bank to accept installment payments for the car's petition-date value would have been through a Chapter 13 cram-down under § 1325(a)(5)(B), an option not available to them while their case remained a Chapter 7 liquidation.

Contrary to the Trustee's position, however, *Rubia* indicates that a trustee who avoids and preserves a lien does not succeed to all of the rights the secured creditor would have had if its lien could not have been avoided as unperfected. The Trustee does not step into the shoes of the creditor and become the creditor. Rather, the Trustee has only the rights bestowed by the Bankruptcy Code.

The Trustee avoided the Bank's lien under § 544(a)(1) of the Bankruptcy Code, which gave him the rights of a creditor with a judicial lien. Because the lien was an intangible interest in property that the Bank did not physically possess, there was nothing

[11]*See Lowry Federal Credit Union v. West*. 882 F.2d 1543, 1545-47 (10th Cir. 1989).

for the Trustee to recover from the Bank under § 550 of the Code, but the lien was automatically preserved by § 551 for the benefit of the estate. The Debtors owned the property subject to the lien (their car) when they filed for bankruptcy and claimed it as exempt, so their interest in the car became property of the estate under § 541(a). The Trustee's power to avoid the Bank's lien under § 544(a) was fixed "as of the commencement of the case." That provision authorized the Trustee to avoid the Bank's interest in the Debtors' car even though the Debtors exempted the car.[12] The Court believes it is helpful here, though, to view the Debtors' exemption of the car as removing from the bankruptcy estate only their interest in the car, and having no effect on the security interest. While debtors are given the right in some circumstances to exempt an interest in property after the trustee in their case avoids a prepetition transfer of it, this right is not available when the transfer the trustee avoids is a voluntarily-granted security interest.[13]

Section 551 preserves the transfer the Trustee avoided "for the benefit of the estate." The Trustee's rights under this provision are in the property and, at least to the extent of maintaining priorities among creditors, in the lien, but do not include any rights against the Debtors personally or against the Bank.[14] Section 551 does not give the

---

[12]*Putney v. Dalton (In re Dalton)*, 90 B.R. 519, 521 (Bankr. M.D. Fla. 1988); *see also Morris v. First Nat'l Bank (In re Taylor)*, 1998 WL 123027 at **2 (10th Cir. BAP 1998) (expressing similar holding in opinion designated in fn. * as having no precedential value, per 10th Cir. BAP Local Rule 8010-2 (1998)).

[13]*See* 11 U.S.C.A. § 522(g)(1)(A).

[14]*Rubia*, 257 B.R. at 327-29.

Trustee the ability to assert rights under the security agreement that granted the lien or under the note that had been secured by the lien. *Rubia* makes clear that the Trustee has no right to collect interest or fees provided for by the security agreement or note. As the avoided transfer is the one that created the lien in the car, the Trustee's rights are limited to an interest in the car itself.

This Court does not agree with the Trustee's contention that the portion of *Rubia* stating that the value of the collateral that was subject to the avoided lien limits the amount of his recovery is dicta. That portion of the opinion states the rationale that led the court to hold the trustee was not entitled to recover postpetition payments the debtors had made to the creditor whose lien was avoided. Moreover, even if it is dicta, this Court believes the statements are basically correct and properly recognize that the estate's interest in the avoided lien and the property securing the lien is only an in rem interest, and does not include any rights against the debtor personally or against the creditor.

2. The Court is not persuaded by the Trustee's other arguments.

a. The Contingent-Interest Declaration did not finally determine the Trustee's right to recover the Debtors' subsequent payments to the Bank.

The Trustee advances additional reasons why this Court should order that all payments made by the Debtors after the Contingent-Interest Declaration was entered should be paid to him. The Declaration was entered before the lien was avoided and specifically provided that the Debtors could pay the Bank, but that if the lien was avoided, all postpetition payments would be turned over to the Trustee. The amount of

money the Debtors paid to the Bank under the Declaration exceeded the car's value as of the petition date, but equaled the balance due the Bank at that time. This was not an order the parties agreed to, but instead was an interim order the Court intended would preserve the status quo, and not be a final order that could be appealed. Consequently, the Declaration could not preclude the Court from reaching a different conclusion now about the Trustee's right to recover payments from the Bank.

b. The Dewsnup decision has no affect here.

The Trustee also argues that under *Dewsnup v. Timm*,[15] the Debtors cannot reduce the amount of the avoided lien to the value of the collateral. The Court disagrees with the Trustee's reading of that decision. *Dewsnup* involved attempted lien-stripping on real property that a Chapter 7 trustee had abandoned, so it was no longer property of the estate. At the relevant time in this case, the Debtors' car was property of the estate. *Dewsnup* involved lien avoidance under § 506(d) rather than lien avoidance under § 544(a). Lien avoidance under § 506(d) is not relevant to the issues in this case. Furthermore, the Court does not perceive the question under consideration to involve the Debtors' rights in the car; the question instead is the extent to which the Trustee can recover money the Debtors paid to the Bank.

3. Although other valuation dates might be used under other circumstances, the Court believes the estate's interest in the Debtors' car here should be valued as of the date they filed for bankruptcy.

[15]502 U.S. 410 (1992).

By their conduct, the parties have agreed that part of the remedy in this case was to allow the Debtors to retain the car by making payments. Because the payments the Debtors have made are equal to the most that they could have been required to pay either the Bank or the Trustee to retain the car, the Court declines to decide the question whether, absent some agreement with the Debtors, the only way for the Trustee to recover on the avoided lien would have been to sell the car. However, because the Trustee would not be selling the priority position of the avoided lien, but instead directly realizing on the estate's interest in the car, the estate's interest must be valued as of some specific date. The question then becomes which valuation date is the appropriate one to use.

As *Rubia* held, the value of the avoided lien that is preserved by § 551 is the lesser of (1) the debt the lien secures, or (2) the value of the collateral as of the valuation date.[16] The parties have stipulated that the value of the car on the day the Debtors filed for bankruptcy was $2,000 and that its value at the time the Court issued its opinion avoiding the Bank's lien was $1,250. Both values are less than the Debtors owed the Bank on the car. The parties have not agreed what valuation date controls the Trustee's right to recover the Debtors' payments from the Bank.

The Court sees four possible valuation dates for a lien a trustee avoids: (a) the date the debtor filed for bankruptcy; (b) the date the trustee filed the lien avoidance action; (c) the date the Court declared the lien avoided; or (d) the date the trustee disposes of the collateral or obtains the debtor's agreement to pay some amount to keep the property.

[16]*Rubia*, 257 B.R. at 328.

The Bankruptcy Code provides some guidance in analyzing which of these dates should be used in this case.

For exempt property, § 522(a) provides that "'value' means fair market value as of the date of the filing of the petition or, with respect to property that becomes property of the estate after such date, as of the date such property becomes property of the estate." Since the Debtors exempted the car, this provision might control its valuation. Section 506(a), by contrast, provides that the value of a secured creditor's lien "shall be determined in light of the purpose of the valuation and of the proposed disposition or use" of the property subject to the lien. This same rationale could be used to determine the date of valuation. The Debtors' car became property of the estate on the date of filing while the Bank's lien did not become property of the estate until the transfer that created it was avoided.

Section 722 suggests still more dates that might be used for valuing property subject to a lien. It provides that a debtor may redeem exempt property from a creditor's lien by paying the creditor the amount of its "allowed secured claim," an amount that must be determined under § 506(a). For an undersecured creditor like the Bank in this case, the value of its allowed secured claim is the value of the collateral. Courts do not agree whether the valuation date for redemptions is the date of the bankruptcy petition or

the date of the redemption motion or hearing, although the latter view appears to be more widely accepted.[17]

In this case, after considering the various Code sections that might provide guidance about the date on which to value the interest in the car that the bankruptcy estate obtained as a result of avoiding the Bank's lien, the Court concludes the proper date is the date the Debtors filed their Chapter 7 petition. This is so because: (1) the property is exempt; (2) a debtor's interest in exempt property becomes property of the estate at the time of filing; (3) the property involved in this case is the type of property that depreciates; and (4) the Debtors had the use of the car without being required to provide adequate protection. The Debtors have paid the Bank $1,647.98 more than the value the Trustee and the Bank have agreed the car had at the time the Debtors filed for bankruptcy. The question whether the Debtors might have a remedy in this case based on having paid too much for the car is not presently before the Court.

CONCLUSION

The parties agree that the Debtors have paid their debt on the car in full, so the Trustee can no longer enforce the lien against the car and the Debtors own it free and clear. Instead, the Trustee is entitled to recover from the Bank $2,000 of the $2,747.98 the Debtors paid after the Contingent-Interest Declaration was announced. Once the

[17]*Compare In re Smith*, 313 B.R. 785, 794 (Bankr. N.D. Ind. 2004) (date of petition), *with In re Perez*, 318 B.R. 742, 748-49 (Bankr. M.D. Fla. 2005) (date of hearing for contested redemption); *In re Podnar*, 307 B.R. 667, 673 (Bankr. W.D. Mo. 2003) (date of motion if value agreed, date of hearing if not); *In re Lopez*, 224 B.R. 439, 444 (Bankr. C.D. Cal. 1998) (date of hearing on redemption motion).

Bank has turned that amount over to the Trustee, the Bank will have a general unsecured claim against the estate for the same amount.

The foregoing constitutes Findings of Fact and Conclusions of Law under Rule 7052 of the Federal Rules of Bankruptcy Procedure and Rule 52(a) of the Federal Rules of Civil Procedure. A judgment based on this ruling will be entered on a separate document as required by FRBP 9021 and FRCP 58.

# # #