SO ORDERED.

SIGNED this 22 day of September, 2005.

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

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

In Re: **LORI KATHLEEN ROBSON,** **DEBTOR.**	**CASE NO. 03-42560** **CHAPTER 7**
OAKWOOD MOBILE HOMES, INC., **PLAINTIFF,** **v.** **LORI KATHLEEN ROBSON, NOVASTAR MORTGAGE, AND MID-AMERICA BANK,** **DEFENDANTS.**	**ADV. NO. 04-7015**

MEMORANDUM OF DECISION
DENYING MOTIONS OF DEFENDANT ROBSON AND
PLAINTIFF OAKWOOD FOR SUMMARY JUDGMENT

This is an adversary proceeding to determine rights in a 2000 manufactured home in the possession of the Debtor. Plaintiff, Oakwood Mobile Homes, Inc. ("Oakwood"), is represented by Mark Jay Schultz, Gallas & Schultz. Defendant Lori Kathleen Robson, the Debtor in this Chapter 7 bankruptcy ("Debtor" or "Robson"), is represented by Jeremy D. Shull, Scott, Quinlan, Willard & Barnes, LLC. Defendant Novastar Mortgage ("Novastar") is represented by Steven L. Crouch and Bradley S. Anderson, South & Associates, PC.[1] There are no other appearances.

The Court has jurisdiction.[2] The parties have stipulated to the jurisdiction of the Court and consent to trial and entry of final order by the Bankruptcy Court.[3] There is no objection to venue.

Prepetition Debtor entered into a contract to purchase a manufactured home ("Home") from Oakwood. The Home was delivered and set up on real property owned by the Debtor. Debtor paid only the down payment, and Oakwood did not deliver the certificate of title or the Manufacturer's Certificate of Origin to Debtor. Oakwood claims ownership of the Home, or, in the alternative, that it has a security interest superior to the interest of Novastar. Novastar loaned the Debtor money secured by a mortgage on the property where the Home was installed and claims rights in the home based upon the mortgage on Debtor's real property. Debtor contends that she is the owner of the Home and Oakwood has no interest in the Home or, at most, an unperfected security interest.

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[1] Subsequent to the Court's taking this matter under advisement, Melinda J. Maune, Thomas J. Noonan, PC entered her appearance for Novastar and the motion by Bradley S. Anderson and Steven L. Crouch to withdraw was granted.

[2] 28 U.S.C.A. § 1334. Further, this is a core proceeding which the Bankruptcy Court may hear and determine as provided in 28 U.S.C.A. § 157 (b)(1) and (b)(2)(K).

[3] Pretrial Conference Order, doc 37.

For the reasons examined below, the Court rules as follows: (1) Oakwood is not the owner of the Home; (2) if Oakwood reserved title to the Home notwithstanding delivery of the Home to the Debtor, Oakwood has an unperfected security interest in the Home; (3) Novastar has an unperfected lien in the Home by virtue of its recorded mortgage on Debtor's real property to which the Home is attached; and (4) as to the priority of the unperfected liens of Oakwood (if there was an enforceable oral agreement to defer passage of title) and Novastar, the lien which attached first has priority.

Debtor filed a motion for summary judgment against the claims of Oakwood.[4] Oakwood responded and filed its own motion for summary judgment, contending that it is the owner of the manufactured home.[5] Defendant Novastar responded to the motion for summary judgment filed by Oakwood, asserting that it has an interest in the home due to a mortgage filed with the Douglas County Recorder of Deeds.[6] Debtor responded to motion of Oakwood,[7] Oakwood responded to the pleading of Novastar,[8] and Oakwood filed a reply to the Debtor's response.[9] A pretrial conference was held on

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[4] Defendant Lori Robson's Motion for Summary Judgment and Memorandum in the Support, doc. 24.

[5] Plaintiff Oakwood Mobile Homes, Inc.'s Response and Counter Motion for Summary Judgment Against Defendant Lori Kathleen Robson and Memorandum in Support, doc 29.

[6] Defendant Novastar Mortgage's Response to Oakwood Mobile Homes, Inc.'s Response and Motion for Summary Judgment, doc 31.

[7] Debtor/Defendant Lori Robson's Response to Plaintiff, Oakwood's Motion for Summary Judgment and Reply to Oakwood's Response, doc 33.

[8] Plaintiff Oakwood Mobile Homes, Inc.'s Reply to Novastar Mortgage's Response to Motion for Summary Judgment, doc 39.

[9] Plaintiff Oakwood Mobile Homes, Inc.'s Reply to Lori Robson's Response to Oakwood's Motion for Summary Judgment and Reply to Oakwood's Response, doc 40.

April 13, 2005, before the foregoing briefing was complete, and a Pretrial Conference Order filed on April 29, 2005.[10]

I. FACTS.

A review of the foregoing pleadings, including the stipulations included in the Pretrial Conference Order, show the following facts are uncontroverted:

1. On February 7, 2000, Debtor executed a Contract to Purchase and Deposit Agreement by which she agreed to purchase from Oakwood a 2000 Oakwood manufactured home ("Home").

2. The Home is a manufactured house as defined by the Kansas Manufactured Housing Act, K.S.A. 58–4202.[11]

3. The Contract to Purchase and Deposit Agreement between Debtor and Oakwood failed to provide a specific time by which Debtor was to have completed financing, or pay off the Home.

4. To obtain financing for the transaction, Debtor initially applied for financing through Mid-America Bank. On or about October 1, 1999, Debtor obtained a construction loan from Mid-America in the amount of $116,000. Mid-America Bank issued a loan disbursement check to Oakwood in the amount of $6,510, which was the required 10% down payment on the Home.

5. Debtor has not made any further payments to Oakwood for purchase of the Home.

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[10] Pretrial Conference Order, doc 37.

[11] All references to the Kansas Manufactured Housing Act, K.S.A. 58-4201 through 58-4212 shall be to the act as of February and May, 2000, when the sale in issue took place.

6. On or about February 7, 2000, Oakwood delivered, located and permanently affixed the Home upon a foundation which had been prepared by third parties at 579 East 850 Rd. in Lawrence, Kansas 66047. Debtor owned the land, subject to a mortgage to Mid-America Bank.

7. Contemporaneous with the delivery of the Home, or in proximity thereto, Debtor executed a "Vehicle Ownership Transfer Agreement" between herself and Oakwood, which delimited Oakwood's responsibility to assign the Certificate of Title or manufacturer's certificate/statement of origin ("MSO") in the seller's name or assign to the seller within 30 days of delivery.

8. On the same day, February 7, 2000, Debtor executed a Power of Attorney making Oakwood Attorney-in the-Fact to apply for a MSO/Certificate of Title.

9. In addition to the foregoing, Debtor also executed and delivered to Oakwood a "Title and Registration Manual Application" for the purpose of securing a Certificate of Title in her name. The document was executed February 7, 2000, and notarized by Don Loughmiller, an agent of Oakwood.

10. On February 7, 2000, Don Loughmiller executed a "Delivery/Setup–Sign-Off Form" essentially providing that Oakwood had delivered the Home to Debtor's property and that all delivery and set up requirements had been met.

11. All documents necessary to allow Oakwood to deliver the MSO/Certificate of Title were executed.

12. Oakwood did not transfer the MSO/Certificate of Title to Debtor and has possession of the MSO.

13. No application for title has ever been submitted to the Kansas Department of Revenue, nor any other agency authorized to issue a certificate of title with respect to the Home.

14. On May 31, 2001, the Mid-America Bank construction loan was paid in full by Novastar in the amount of $69,312.83.

15. On or about May 31, 2001, $32,025.02 was paid directly to Debtor at closing by Novastar as evidenced by the Settlement Statement.

16. Novastar obtained a mortgage covering 11 acres of Debtor's real estate located at 579 East 850 Rd. in Lawrence, Kansas 66047, including all fixtures attached thereto. This mortgage was recorded in book 714, page 1034 of the Douglas County Register of Deeds on May 30, 2001. The mortgage was intended to encumber the Home with the property.

17. Debtor has resided in the Home since its delivery, and continues to reside there at the present time. The real property, a total of 22 acres, and the Home were listed as Debtor's homestead exemption in her bankruptcy pleadings in case number 03–42560–7.

18. The Chapter 7 trustee has not asserted any interest in the Home, nor has the Trustee argued to avoid any liens in the Home pursuant to 11 U.S.C.A. § 544(a).

There is one material controverted fact. Oakwood contends that there was an oral agreement between it and Debtor that the sale was a "cash deal" requiring the balance to be paid immediately upon the delivery and prior to the transfer of title to the Home. Oakwood contends that it was agreed that Oakwood would retain the MSO/Certificate of Title until it received payment in full under the contract. Debtor controverts the existence of such an oral agreement and also contends that all enforceable terms of the sale are included in the written sale documents.

Debtor further argues that evidence of such an oral agreement is inadmissable pursuant to the Article 2 statute of frauds,[12] and the section of the Kansas Manufactured Housing Act which requires that contracts for the sale of a manufactured home be in writing.[13] The cited section of the Kansas Manufactured Housing Act has no applicability. It is applicable to a "manufactured home sales agreement,"[14] which is defined to be "a contract between the manufacturer of manufactured homes and a new manufactured home dealer, by which the dealer is entitled to purchase new manufactured homes from the manufacturer for resale within the state."[15] The oral agreement alleged in this case is between a dealer and a consumer retail purchaser. The Kansas Manufactured Housing Act did not require that it be in writing.

The Article 2 statute of frauds, K.S.A. 84-2-202, provides:

> Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented
> (a) by course of dealing or usage of trade . . . or course of performance . . .; and
> (b) evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

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[12] K.S.A. 84–2–202 (1996). Citations to article 2 in the text are to the version in effect February through May, 2000, when the sale in issue took place.

[13] K.S.A. 58-4209(a)(1994).

[14] *Id*.

[15] K.S.A. 58-4202(m)(1994).

At this stage of the proceedings, the Court cannot rule on whether an oral contract as alleged by Oakwood to delay passage of title can be considered as one of the terms of the agreement between Oakwood and Debtor. Before ruling, the Court will need to determine the precise terms of the oral agreement (if one existed), identify all of the writings regarding the transaction (about which there may be a dispute), determine whether the writings were intended by the parties as a final expression of their agreement, and ascertain whether the oral agreement is offered to contradict or explain or supplement the writings. The facts before the Court on summary judgment are not sufficient to make these determinations.[16] If Oakwood wishes to pursue claims premised upon an oral agreement deferring the passage of title, a trial will be necessary. Issues would include whether there was an oral agreement delaying the passage of title and the extent to which it can be considered in light of the restrictions of K.S.A. 84-2-202.

Notwithstanding the controversy about the existence and admissibility of an oral agreement, the uncontroverted facts are sufficient for the Court to rule whether Oakwood is the owner of the Home; whether Oakwood's security interest, if any, is perfected or unperfected; and what interest in the Home is held by Novastar based upon its recorded mortgage.

II. ANALYSIS.

A. Oakwood is not the Owner of the Home.

Oakwood contends, as the unpaid seller, that it is the owner of the Home, based upon the alleged oral agreement to retain title until paid in full. Both Debtor and Novastar argue against this

[16] *See Betaco, Inc. v. Cessna Aircraft Co.*, 32 F.3d 1126 (7th Cir. 1994) (holding under K.S.A. 84-2-202 the presence of a genuine issue of material fact as to whether parties intended purchase agreement to be fully integrated document precluded summary judgment on breach of warranty claim).

position. The Court examines Oakwood's claim of ownership assuming the existence and enforceability of the alleged oral agreement and determines that even under this assumption the Debtor, not Oakwood, is the owner of the Home.

As noted by the parties in their briefs, this Court recently addressed the rights of an unpaid seller of a manufactured home in *In re Knowles*[17] and held that the seller's attempt to retain title to a manufactured home notwithstanding delivery to the buyer gave rise to a security interest and did not delay passage of ownership. This result was required by Uniform Commercial Code (UCC), particularly K.S.A. 84-1-201(37), which provides in part, "The retention or reservation of title by a seller of goods notwithstanding shipment or delivery to the buyer . . . . is limited in effect to a reservation of a 'security interest'" and K.S.A. 84-2-401(1) which similarly states, "Any retention or reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest."

The facts in *Knowles* were nearly identical to this case. In *Knowles*, plaintiff Affordable Residential Communities ("ARC") had sold a manufactured home to debtor prepetition. The home had been delivered, located and affixed on property owned by the debtor. The debtor had not paid ARC for the home. However, unlike this case, debtor was not living in the home and was not claiming it as her homestead. Although the MSO had been delivered to a lender who had approved debtor's request for credit to purchase the home, that approval was rescinded, and the MSO was returned to the seller. As a result, ARC retained the MSO and no application had been made for the issuance of a certificate

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[17] *Affordable Residential Communities v. J. Michael Morris (In re Knowles)*, No. 01-13992-7, Adv. No. 02–05250 (Bankr. D. Kan., February 10, 2005).

of title. ARC presented three arguments in support of its position that it, not the debtor, was the owner of the home: (1) That debtor had rejected the home so title was revested by operation of law in the seller pursuant to K.S.A. 84-2-401(4); (2) that as an unpaid seller, it was the owner of the manufactured home by operation of K.S.A. 58–4204(c); concerning the titling of manufactured homes; (3) and that equity required rescission of the contract of sale. The Court rejected all three theories. As to the second, the court held that Kansas Manufactured Housing Act, although requiring title documents,[18] does not address the actual transfer of title or ownership and does not supercede the provisions of Article 2 of the UCC which do expressly address transfers of title in the sale of goods. Oakwood does not assert any of these theories.

Rather, Oakwood contends it is the owner because of an oral agreement with the Debtor that title would not pass and Debtor would not be entitled to a certificate of title until the purchase price was paid. This is similar to the theory which ARC raised in defense of the Chapter 7 Trustee's counterclaim against ARC asserting that ARC's interest was only an unperfected lien in the home subject to avoidance under 11 U.S.C. § 544(a). The Court agreed with the Trustee that ARC, as an unpaid seller, held only a security interest, rather than an ownership interest, in the manufactured home. This holding was based upon two statutes, K.S.A. 84-2-401 and K.S.A. 84-1-201(37), and the following terms of the contract whereby the seller attempted to delay the passage of title:

> 1. IF NOT A CASH TRANSACTION. If I do not complete the purchase as a cash transaction, I know before or at the time of delivery of the unit purchased, I will enter into a retail installment contract and sign a

[18] K.S.A. 58-4204(c).

> security agreement or other agreement as may be required to finance by purchase.
>
> 2. TITLE. Title to the unit purchased will remain in you until the agreed upon purchase price is paid in full in cash, or I have signed a retail installment contract and it has been accepted by a bank and finance company, at which time title passes to me even though the actual delivery of the unit purchased, may be at a later date.[19]

Oakwood argues that there are three reasons for a different outcome in this case: (1) Oakwood did not transfer, execute, or deliver the title to Debtor or any agent of Debtor, as did ARC; (2) there was a specific agreement and understanding between the parties that Oakwood would hold the MSO/Certificate of Title until it received payment in full; and (3) bankruptcy procedural differences because here the trustee is not asserting lien avoidance and the Debtor is living in the Home, which she claims as her homestead.

The distinction with respect to the MSO is irrelevant. Delivery and subsequent return of the MSO in *Knowles* was not a factor in the Court's finding that the seller was not the owner of the home. Because, as ruled in *Knowles*, Article 2 of the UCC controls transfer of title, not the Kansas Manufactured Housing Act, Oakwood's retention of the MSO does not result in Oakwood being owner of the Home.

The second factor also is not a distinction of consequence. Assuming for the moment that there was an oral agreement between Debtor and Oakwood that the seller would retain ownership until paid in full, this agreement was functionally equivalent to the title retention language in the *Knowles* contract,

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[19] *In re Knowles* at 15-16.

which is quoted above. The Court in *Knowles* held that this created a security interest pursuant to K.S.A. 84–2–401(2), as defined by K.S.A. 84-1-201(37). The later subsection provides in part that "the . . . reservation of title by a seller of goods notwithstanding . . . delivery . . . is limited to a reservation of a 'security interest.'" K.S.A. 84-2-401(2) provides:

> Unless otherwise explicitly agreed, title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, despite any reservation of security interest and even though a document of title is to be delivered at a different time or place;

The Kansas Comment, 1996 to K.S.A. 84–2–401 states in part: -

> 1. This section states the basic policy of Article 2 that title to goods is irrelevant to issues among the buyer, seller, and third parties. See also Official Comment to 84–2–101. The title rules under this section apply only when another provision of Article 2 specifically refers to "title." See, e.g., 84–2–312 (warranty of title). Many provisions of the UCC reflect the Code's de-emphasis of title . . ..
>
> 2. Subsection (1) states some general rules concerning the Code's concept of title. Title cannot pass until the goods have been identified to the contract (see 84–2–501). When the seller retains title to goods shipped or delivered, it has in effect retained only a security interest governed by Article 9. See 84–9–113. Subject to these limitations, the parties may provide for the passage of title, in any manner to which they explicitly agree.

The foregoing principles apply here. The reservation of title by the seller Oakwood, if any, does not affect the passage of title but was limited to a reservation of a security interest.[20] Assuming that

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[20] *See e.g, In re J. Adrian Sons, Inc.*, 205 B.R. 24 (Bankr. W.D.N.Y. 1997) (holding that any attempt by lessor to retain title, on the theory that the purchase option in original lease contemplated that title would not pass to debtor unless and until payment in full was received, only amounted to an unperfected security interest); *Carter v. Holland (In re Carraway)*, 65 B.R. 51 (Bankr. E.D.N.Car. 1986) (holding that despite the fact that the certificate of title reflected that the purported seller was the owner of a mobile home, the transaction was a conditional sale with retention of a security interest by the seller so that the buyer, not the seller, was the owner); *First National Bank of Elkart County v.*

Oakwood and Debtor agreed that title would not pass until Oakwood was paid in full, the result was that Oakwood retained a security interest, but the Debtor became the owner.

Finally, differences in the bankruptcy procedural postures of this case and *Knowles* are not material to the determination of Oakwood's interest. Although in *Knowles* it was the trustee's lien avoidance action which required the Court to consider whether the seller's interest was an unperfected lien, this procedural posture did not impact the outcome of the analysis which was governed by the UCC. The same legal principals apply here as in *Knowles*. Likewise the Debtor's claim that the Home is her homestead is irrelevant to determination of Oakwood's interest.

In further support of its contention of ownership, Oakwood relies upon two Kansas cases, *Home Bank & Trust Co. v. Cedar Bluff Cattle Feeders, Inc.*[21] and *Ed Bozarth Chevrolet, Inc. v. Black.*[22] Neither case requires this Court to reach a decision different from *Knowles*.

Cedar Bluff was a priority dispute between a bank and a feedlot, Cedar Bluff, which made a loan to its customer to enable him to purchase cattle. The bank's UCC-1 covering the buyer's livestock was filed on March 4, 1991, and Cedar Bluff filed its financing statement on March 23, 1993. When asserting a first priority lien in cattle sold by the feedlot, the feedlot contended that it had a purchase

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Smoker, 153 Ind. App. 71, 287 N.E.2d 788 (1972) (holding any agreement concerning passage of title, whether oral or written, is subject to Article 2 sales chapter provision limiting retention of title by the seller in goods delivered to the buyer to a reservation of a security interest); and *North Platte State Bank v. Production Credit Association of North Platte*, 189 Neb. 44, 200 N.W.2d 1 (1972) (holding that where the sale agreement did not contain an explicit reservation of title, once cows reached the buyer and came into his possession the seller had no enforceable security interest in them and no cause of action except for the agreed price)*; see also* 2 William D. Hawkland Uniform Commercial Code Series § 2–401:3 (2005) (collecting cases regarding the passing of title and reservation for security).

[21] 25 Kan. App. 2d 152, 959 P.2d 934 (1998).

[22] 32 Kan. App. 2d 874, 96 P.3d 272 (2003).

money security interest because it had filed its UCC-1 within 20 days of the borrower/purchaser's obtaining possession of the cattle. Although the cattle had been delivered to the buyer between February 9 and February 28, the seller contended that "possession" for purposes of starting the running of the period for filing a UCC-1 to obtain purchase money priority was delayed because the cattle were delivered on a sale on approval basis such that the 20 day window for filing a financing statement did not begin to run until one of three alternative dates in March, when the purchaser delivered the down payment, when interest began to accrue on the note, or when the borrower returned the loan documents to the seller. The trial court rejected this contention, and the Court of Appeals affirmed that the sale was not on approval. The appellate court therefore held that the 20 day period for perfection of a purchase money security interest began to run when the borrower obtained physical possession of the cattle which was more that days prior to the filing of the feedlot's UCC-1. When so holding, the court in dicta stated, "Under K.S.A. 84–2–401(2), absent an explicit agreement to the contrary, title passed to C.C. Cattle [the purchaser and borrower] at the time of delivery."[23] The case does not support Oakwood's position; it does not hold that if there is an agreement to delay transfer of title, title remains with the seller. Further, such a holding would be contrary to the clear language of Article 2 and case law.[24]

In *Ed Bozarth Chevrolet*, a car dealership brought a replevin action against a consumer buyer to recover a car which had been purchased under a spot delivery contract. Under that contract, the court found that when the vehicle was driven off the lot before financing was approved there was an understanding that vehicle would have to be returned if the financing was not approved. The Court of

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[23] 25 Kan. App. 2d at 158, 959 P.2d at 939.

[24] *See* text and authorities at note 20, above.

Appeals found no error in the trial court's granting of summary judgment to the dealer on his claim of replevin because there was not a completed sale of the vehicle. In this case, Oakwood is not contending that there was agreement that Debtor would have to return the Home if it were not paid for; in fact, such as agreement would be implausible since return of an installed manufactured home is clearly different from return of a motor vehicle. Here Oakwood is not attempting to replevin the Home. In any event, K.S.A. 84–2–401 was not addressed in *Ed Bozarth Chevrolet.*

For the foregoing reasons, the Court holds that, even assuming that there was an enforceable agreement that Oakwood would remain the owner of the Home until it was paid in full, such an agreement did not operate to retain ownership of the Home in the Oakwood. The Court further observes that if there was no oral agreement, Oakwood also did not retain ownership. As was held in *Knowles*, the Kansas Manufactured Housing Act, including K.S.A. 58-4204(c) which requires title documents in every sale of a manufactured home, does not address actual title transfer or ownership and does not supercede the provisions of Article 2, which do expressly address transfer of title. Under Article 2, title passed to the Debtor at the time and place in which Oakwood completed its performance with respect to physical delivery.[25] Oakwood's failure to deliver the title documents as required by the Kansas Manufactured Housing Act and its retention of the MSO did not delay the transfer of ownership. Therefore, given the uncontroverted facts, Debtor is entitled to judgment on her claim that Oakwood is not the owner of the Home.

B. If Oakwood has a Security Interest in the Home, it is Unperfected.

[25] K.S.A. 84-2-401(2)(1996).

As examined above, a seller's attempt to reserve title notwithstanding delivery of the goods to the buyer does not reserve ownership but does create a security interest. In this case, the oral agreement regarding reservation of title, if it existed, gave rise to a security interest in favor of Oakwood. On the other hand, if there was no such agreement, Oakwood is not a secured party, either perfected or unperfected.

Although the Court cannot rule on summary judgment whether Oakwood is a secured party, the uncontroverted facts are sufficient for it to rule on the question whether Oakwood's security interest, if it exists, is perfected or unperfected. Oakwood contends that if it is not the owner, it holds a perfected security interest, because it holds the MSO. Debtor and Novastar contend, on the other hand, that if Oakwood is a secured party, that security interest is unperfected because in Kansas the exclusive method of perfecting a security interest in a manufactured home is by notation of the certificate of title.

Chief Judge Nugent, in *In re Trible*,[26] recently held that in the Kansas in August of 2000 the exclusive means to perfect a security interest in a mobile home was by notation of the certificate of title. The decision is based on K.S.A. 58-4204, which provides that the certificate of title for a mobile home shall contain a statement of any liens, and K.S.A. 1999 Supp. 84–9–302(3)(d), which provides in relevant part that a security interest in a mobile home which requires indication on a certificate of title "[c]an be perfected only by presentation, for the purpose of such registration or such filing or such indication of the documents . . . to the public official appropriate under any such statute." Both of these statues also apply to manufactured homes and were in force in February 2000 when the sale to this Debtor occurred.

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[26] *Morris v. Citifinancial (In re Trible)*, 290 B.R. 838 (Bankr. D. Kan. 2003).

The exclusive means for Oakwood to perfect any lien it retained in the Home was through notation on the certificate of title. It is uncontroverted that the certificate of title for the Home was never issued, and Oakwood's lien was never noted there on. Possession of the MSO did not perfect Oakwood's interest, if any.[27] Therefore, if Oakwood has a lien on the manufactured Home because of the oral agreement regarding retention of title, that lien is unperfected.

C. Novastar has an Unperfected Security Interest in the Home Based upon its Recorded Mortgage.

Novastar asserts that it has an interest, but not a perfected lien,[28] in the Home because of its mortgage. It argues that the Kansas Manufactured Housing Act does not require notation on the certificate of title for the creation, as opposed to perfection, of a security interest. It further argues that Kansas law recognizes that a mortgage may constitute a security agreement.[29] Oakwood argues that the Debtor had no interest in the Home to which a security interest could attach and that there is no executed security agreement which reasonably describes the Home.

The Court finds that Novastar has an unperfected security interest in the Home. At the time of the mortgage on May 24, 2001, a security agreement was defined as "an agreement which creates or

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[27] *See Morris v. St. John National Bank (In re Haberman),* 2004 WL 2035341 (Bankr. D. Kan. 2004) (holding that possession of a vehicle title does not perfect a security interest.)

[28] In its memorandum Novastar states, "Novastar is not claiming to have a perfected interest in the manufactured home, merely an interest in the home due to the voluntary encumbrance granted to it by Robson, as evidenced by the mortgage and note." Doc. 31, at 3.

[29] Novastar cites *Prairie State Bank v. Superior Housing, Inc.*, 30 Kan. App.2d 273, 40 P.3d 336 (2002) in support of its position. *Prairie State Bank* concerned the priority of an inventory lien and a recorded mortgage on a modular home which had become a fixture. The issue of whether a mortgage can constitute a security agreement was not directly addressed.

provides for a security interest."[30] A security interest was defined as "an interest in personal property . . . which secures payment or performance of an obligation."[31] Article 9 applied "to any transaction (regardless of form) which is intended to create a security interest in personal property or fixtures . . .."[32] In this definition "substance rules over form." [33] Case law has recognized that a written mortgage may serve as a security agreement.[34] "The fact that the security agreement was contained in the mortgage instrument rather than in some other document does not affect its validity."[35] A security interest is enforceable against the debtor and third parties when the debtor has signed a security agreement which contains a description of the collateral, value has been given, and the debtor has rights in the collateral.[36]

The Novastar mortgage satisfies the requirements for a security agreement. It was signed by the Debtor, was for the purpose of securing the payment of a note, and granted an interest in the real property located at 579 E 850 Rd, Lawrence, "together with all improvements now or hereafter created on the property, and all easements, appurtenances, and all fixtures now or hereafter a part of the property." It is an uncontroverted fact that the mortgage was intended to encumber the mobile home with the property. In light of this fact, it cannot be questioned that the description of the collateral, which

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[30] K.S.A. 84-9-105(1)(l)(1996). This transaction occurred prior to July 1, 2001, the effective date of revised Article 9.

[31] K.S.A. 84-1-201(37)(1996).

[32] K.S.A. 84-9-102(1)(a)(1996).

[33] Kansas Comment, 1996 to K.S.A. 84-9-102.

[34] *E.g., Finch v. Beneficial New Mexico, Inc.*, 120 N.M. 658, 661, 905 P.2d 198, 201 (1995).

[35] *Cervantes v. General Electric Mortgage Co.(In re Cervantes)*, 67 B.R. 816, 819 (Bankr. E.D. Pa. 1986).

[36] K.S.A. 84-9-203(1)(1996).

included all improvements and fixtures at the Lawrence address, gave an adequate description of the collateral. Value was given when Novastar advanced funds to the Debtor. As examined above, Debtor, as the owner, had rights in the Home when the mortgage was granted. Novastar has an unperfected security interest in the Home which attached in May 2001.

D. IF BOTH NOVASTAR AND OAKWOOD HAVE UNPERFECTED SECURITY INTERESTS IN THE HOME, THE FIRST TO ATTACH HAS PRIORITY.

Novastar and Oakwood both claim that their interests in the Home have priority. Article 9 in effect before July 1, 2001 provided that "so long as security interests are unperfected, the first to attach has priority."[37] Novastar has an unperfected security interest in the Home which attached in May 2001. As examined above, if there was on enforceable oral agreement between Debtor and Oakwood to delay transfer of title to the Home to the Debtor until payment in full, Oakwood has an unperfected security interest in the Home, which most likely attached in February 2001, when the alleged agreement was made and the Home delivered. If there are conflicting liens in the Home, it appears that Oakwood would have priority, but this ruling must await trial on the issues related to the alleged agreement.[38]

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[37] K.S.A. 84-9-312(5)(b)(1996).

[38] Revised Article 9 provides that security interests which were unperfected on the effective date, July 1, 2001, remain enforceable for one year and after one year, if enforceable under revised 9-203. The Court notes, that although the parties have not provided the Court with their positions of this issue, following trial the Court is likely to find these conditions satisfied and hold that the unperfected liens, if they existed on July 1, 2001, will be found to be enforceable under revised Article 9. The applicable priority rule, first to attach, has not changed under revised Article 9. K.S.A.2004 Supp. 84-9-322(a)(3).

III. CONCLUSION.

For the foregoing reasons, the Court denies the motions of Defendant Robson and Plaintiff Oakwood for summary judgement and holds: (1) Oakwood is not the owner of the Home; (2) if Oakwood reserved title to the Home notwithstanding delivery of the Home to the Debtor, Oakwood has an unperfected security interest in the Home; (3) Novastar has an unperfected lien in the Home by virtue of its recorded mortgage on Debtor's real property to which the Home is attached; and (4) as to the priority of the unperfected liens of Oakwood (if there was an enforceable oral agreement to defer passage of title) and Novastar, the lien which attached first has priority.

IT IS SO ORDERED.

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