



**SO ORDERED.**

**SIGNED this 22 day of June, 2005.**

ROBERT E. NUGENT  
UNITED STATES CHIEF BANKRUPTCY JUDGE

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

<b>IN RE:</b>	)	
	)	
<b>ELIZABETH ANNE OLSON,</b>	)	<b>Case No. 03-11367</b>
	)	<b>Chapter 7</b>
	)	
<b>Debtor.</b>	)	
_____	)	
	)	
<b>J. MICHAEL MORRIS, Trustee,</b>	)	
	)	
<b>Plaintiff,</b>	)	
	)	
<b>v.</b>	)	<b>Adversary No. 03-5195</b>
	)	
<b>ABN AMRO MORTGAGE GROUP, INC.;</b>	)	
<b>and ELIZABETH ANNE OLSON,</b>	)	
	)	
<b>Defendants.</b>	)	
_____	)	

**MEMORANDUM OPINION**

ABN Amro Mortgage Group, Inc. (“ABN”) seeks summary judgment on the trustee’s complaint

to avoid ABN's security interest in debtor's mobile or manufactured home as being unperfected. ABN asserts that the home is permanently set on a foundation on real property in which it claims a recorded mortgage interest and that, by virtue of that attachment, the home is no longer a mobile home, but an "improvement" to the real property to which the mortgage attaches. The trustee argues that the home remains either a mobile or manufactured home as those terms are defined in the Kansas Manufactured Housing Act ("KMHA"), KAN. STAT. ANN. § 58-4201 et seq. (1994 & 2003 Supp.), and that the home is secured to the real estate with tie down straps that are not permanent and therefore ABN's security interest therein is not perfected by the mortgage.

#### Jurisdiction

The trustee brought this action to avoid ABN's alleged unperfected security interest in a mobile or manufactured home pursuant to 11 U.S.C. § 544(a) and to preserve the lien for the benefit of the estate under 11 U.S.C. § 551. As such, it is a core proceeding over which the Court has jurisdiction under 28 U.S.C. § 157(b)(2)(K). The Court notes that the trustee's complaint against the debtor has been resolved with the entry of an Agreed Order on January 29, 2004<sup>1</sup> and that the remaining dispute lies between the trustee and ABN.

#### Summary Judgment Standards

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material

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<sup>1</sup> Dkt. 22.

fact and that the moving party is entitled to a judgment as a matter of law."<sup>2</sup> A factual dispute is "material" only if it "might affect the outcome of the suit under the governing law."<sup>3</sup> An issue of fact is genuine if the evidence is sufficient for a reasonable jury to return a verdict for the nonmoving party.<sup>4</sup> The moving party bears the initial burden of showing that there is an absence of any genuine issue of material fact.<sup>5</sup> Once the moving party meets its burden, the burden shifts to the nonmoving party to demonstrate that genuine issues remain for trial "as to those dispositive matters for which it carries the burden of proof."<sup>6</sup> The Court determines "whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one-sided that one party must prevail as a matter of law."<sup>7</sup> In making such a determination, the Court should not weigh the evidence or credibility of witnesses. The Court must construe the record liberally in favor of the party opposing the summary judgment.<sup>8</sup> If an inference can be deduced from the facts that would allow the nonmovant to prevail, summary judgment is inappropriate.<sup>9</sup>

### Findings of Fact

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<sup>2</sup> Fed. R. Civ. P. 56(c); accord Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Vitkus v. Beatrice Co., 11 F.3d 1535, 1538-39 (10th Cir. 1993).

<sup>3</sup> Anderson, 477 U.S. at 248.

<sup>4</sup> Id. at 248.

<sup>5</sup> Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); Hicks v. Watonga, 942 F.2d 737, 743 (10th Cir. 1991).

<sup>6</sup> Applied Genetics Int'l, Inc. v. First Affiliated Secs., Inc., 912 F.2d 1238, 1241 (10th Cir. 1990) (citing Celotex, 477 U.S. at 324).

<sup>7</sup> Anderson, 477 U.S. at 251-52.

<sup>8</sup> McKibben v. Chubb, 840 F.2d 1525, 1528 (10th Cir. 1988) (citation omitted).

<sup>9</sup> United States v. O'Block, 788 F.2d 1433, 1435 (10th Cir. 1986) (citation omitted).

Applying these standards to the case at bar, the Court concludes that while there remain few material factual disputes about the nature of the home, ABN is not entitled to judgment as a matter of law, nor is it likely to be, even after a trial. The following uncontroverted material facts are established by the summary judgment papers.<sup>10</sup>

On April 13, 2000, the debtor executed a mortgage in favor of ABN and it was filed of record with the Register of Deeds office of Lyon County, Kansas the next day.<sup>11</sup> The mortgage encumbers property having a common address of 1753 Road E, Lot 227, Emporia, Kansas (“the Property”). A dwelling is located on the Property and in debtor’s contract to purchase the Property, was described as a modular home. The appraisal prepared for ABN at the time of its loan to the debtor referred to the dwelling as a “Manufactured Home.”

On March 25, 2003 the debtor filed her chapter 7 bankruptcy. The debtor claims the Property exempt and the trustee does not object to the claim of exemption.

The County records show the original dwelling, without additions, is a 1974 24' x51' manufactured home. The original dwelling was built on a steel undercarriage or chassis and is secured by a hurricane tie down strap system. Prior to debtor’s purchase of the Property (in the late 1980's or early 1990's), a bedroom with a basement underneath (20 feet) was add on to the north end of the dwelling and a covered deck or porch was added on to the south end. Entry to the bedroom and the basement is made from inside the dwelling. The north bedroom addition is set on a permanent concrete foundation. A detached garage

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<sup>10</sup> The Court notes that in his response to ABN’s summary judgment motion, the trustee sets forth ten (10) additional statements of fact. ABN has not filed a reply and controverted these additional facts and they are deemed admitted by operation of D. Kan. Rule 56.1(b)(2).

<sup>11</sup> A copy of the mortgage has not been included in the record before the Court.

was built on the Property in 1974.<sup>12</sup> The dwelling is located in a mobile home park or subdivision. The dwelling is hooked up to water, sewer, electricity, gas, air conditioning, telephone and cable. It has self-contained plumbing and heating. Because the dwelling's original siding has been covered with another layer of siding, the plate bearing the Vehicle Identification Number ("VIN") cannot be located. Nor has a certificate of title for the original dwelling been produced.

The debtor identified the Property on her amended schedules as "land and modular home." The trustee's appraiser opined that the original 24' x 51' dwelling is a double-wide "mobile home" given its construction in 1974, prior to adoption of the federal standards for manufactured homes. ABN did not present a contrary opinion from its own expert. ABN's contention of fact that the original dwelling is not "transportable" is controverted. The Court notes that the trustee's appraiser stated in his appraisal report that the original dwelling is not currently mobile due to the addition but classified it as a double wide mobile home.<sup>13</sup> There are no uncontroverted facts set forth regarding the effort, possible damage, etc. that would be required to separate the original dwelling from the north bedroom addition or the covered deck.

#### Conclusions of Law

The parties agree that if the dwelling on the Property is either a mobile home or a manufactured home as defined by the Kansas Manufactured Housing Act ("KMHA"), KAN. STAT. ANN. § 58-4201 et seq. (1994 & 2004 Supp.), then the exclusive method of perfecting a security interest is by notation of the lien on the certificate of title. The parties further agree that the original dwelling was mounted on, and

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<sup>12</sup> The trustee makes no claim against the garage.

<sup>13</sup> See Toso Ex. 2, p. 1 attached to deposition of Raymond Toso which is attached as Ex. B to ABN's Memorandum in Support.

still sets on, a steel chassis or undercarriage and was therefore, presumably, “mobile” at some point in time. The trustee apparently seeks to avoid ABN’s lien only on the “original dwelling,” that portion of the dwelling minus the north and south additions thereto. ABN concedes that if the trustee establishes the dwelling as either a mobile home or a manufactured home, the trustee will prevail.<sup>14</sup> ABN argues that because the dwelling was not “transportable” at the time the mortgage was given, it is neither a mobile home nor a manufactured home and the KMHA does not apply.

The KMHA was originally enacted in 1991, long after the date the original dwelling in this case was manufactured (1974).<sup>15</sup> Under the KMHA, a manufactured home is a structure that is “transportable in one or more sections which, in the traveling mode, is 8 body feet or more in width or 40 body feet or more in length, or when erected on site, is 320 or more square feet, and which is built on a permanent chassis and designed to be used as a dwelling, with or without permanent foundation, when connected to the required utilities, and includes the plumbing, heating, air conditioning and electrical systems contained therein . . . .”<sup>16</sup> A manufactured home is also subject to the federal manufactured home construction and safety standards established in 42 U.S.C. § 5403.<sup>17</sup> A mobile home is similarly defined in the KMHA except that a mobile home must be 36 feet or more in length and is not subject to the federal manufactured home construction and safety standards.<sup>18</sup>

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<sup>14</sup> See ABN’s Memorandum in Support of its Motion for Summary Judgment, p. 5-6.

<sup>15</sup> Kansas Manufactured Housing Act, 1991 KAN. SESS. LAWS ch. 33, § 1 *et seq.*; KAN. STAT. ANN. § 58-4201 *et seq.* (1994 and Supp. 2004). The KMHA became effective July 1, 1991.

<sup>16</sup> KAN. STAT. ANN. § 58-4202(a)(1) (Supp. 2004) (Emphasis added.).

<sup>17</sup> KAN. STAT. ANN. § 58-4202(a)(2) (Supp. 2004).

<sup>18</sup> KAN. STAT. ANN. § 58-4202(b) (Supp. 2004).

ABN seizes upon the “transportable” requirement in the definitions but appears to concede that the other parts of the definition for a manufactured home or a mobile home are satisfied. The Court agrees with the trustee’s reading and interpretation of the statutory definitions of a mobile home or manufactured home as it pertains to the requirement that the home be “transportable.” The definition clearly permits a mobile home or manufactured home to be affixed to real estate with a permanent foundation. Under ABN’s argument, the home would lose its character as a mobile home or manufactured home the moment the structure was affixed to the real estate on a permanent foundation because it would no longer be “transportable.”<sup>19</sup> This anomaly is belied by the clear language of the statute. A more reasonable interpretation is that the “transportable” requirement is one that contemplates this attribute must be present when the home is initially constructed and distinguishes it from a “stick-built” home. After all, the KMHA is patterned after the federal act which deals primarily with construction and safety standards in manufactured housing. Thus, the Court concludes that the “transportable” requirement applies when the home is initially constructed and that the home does not lose its character as a manufactured home or mobile home when it is subsequently affixed to a permanent foundation or when permanent additions are made to the home.

The uncontroverted facts support a finding that the dwelling is either a manufactured or mobile home and is therefore covered by the KMHA. It is undisputed that the original dwelling (minus the north and south additions) is built on a chassis and designed to be used as a dwelling. The original dwelling is 24 feet wide and 51 feet long. It contains plumbing and heating systems and is hooked up to utilities. The

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<sup>19</sup> Here, ABN essentially argues that when the north and south additions were made to the original dwelling, it was no longer transportable and lost its status as a mobile home or a manufactured home. ABN cites to no case law or legal authority that would support its interpretation of the “transportable” requirement in the definitions.

trustee's appraiser concluded that it was a double-wide mobile home because it was manufactured in 1974 and not subject to the federal manufactured home construction and safety standards. ABN did not present a contrary expert opinion.

The KMHA, at § 58-4204, prescribes the requirements for titling and perfecting liens in manufactured homes and mobile homes. The provisions of § 58-4204 apply to any certificate of title issued prior to January 1, 2003 which indicates there is a lien on the mobile home or manufactured home.<sup>20</sup> The KMHA clearly contemplates the existence of a certificate of title for mobile homes and manufactured homes, even those built prior to enactment of the KMHA. In this case, no one has produced the certificate of title on the structure. ABN claims, without record support, that no certificate of title exists but the trustee points out that none of the parties have *possession* of a certificate of title. In any event, ABN does not claim that it perfected its security interest in the dwelling by noting its lien on the certificate of title and that is the salient fact.

As this Court has repeatedly stated, the exclusive method of perfecting a lien in a mobile home or manufactured home has long been by notation of the lien on the certificate of title. In Morris v. Citifinancial (In re Tribble)<sup>21</sup> this Court traced the pertinent legislative history and discussed the method of perfection in a manufactured home under Article 9 of the Uniform Commercial Code and prior to enactment of the KMHA. Prior to the KMHA, security interests in mobile homes were perfected in the same manner as

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<sup>20</sup> KAN. STAT. ANN. § 58-4204(b) (Supp. 2004). Electronic certificates of title are created for certificates of title issued on or after January 1, 2003. *See* § 58-4204a. The provisions of § 58-4204 generally apply to electronic certificates of title. *See* § 58-4204(b).

<sup>21</sup> 290 B.R. 838 (Bankr. D. Kan. 2003) (discussing method for perfecting security interest in mobile home in August of 2000).



security interests in vehicles (*i.e.* by notation of the lien on the certificate of title).<sup>22</sup> With the enactment of the KMHA, the titling requirements and perfection of security interests in mobile homes and manufactured homes were moved from the vehicle code to the KMHA:

. . . the legislative history of the relevant statutes demonstrates that since *Schroeder* was decided [in 1987], the statutory authority or source for titling and perfecting a security interest in a mobile home has been moved from Chapter 8, dealing with vehicles, to Chapter 58, dealing with manufactured housing. *The method of perfection, however, remains the same.* (Emphasis added).<sup>23</sup>

Nothing has changed since this Court decided Trible save the introduction of electronic titles.<sup>24</sup>

Section 58-4204(c) (Supp. 2004) of the KMHA provides:

Upon the transfer or sale of any manufactured home or mobile home by any person or dealer, the new owner thereof, within 30 days, inclusive of weekends and holidays, from the date of such transfer or sale, shall make application to the division for the issuance of a certificate of title evidencing the new owner's ownership of such manufactured home or mobile home. An application for certificate of title shall be made by the owner of the manufactured home or mobile home, . . . and it shall state all liens or encumbrances thereon . . .<sup>25</sup>

Similarly, where a person acquires a security interest in a mobile home or manufactured home for which an original certificate of title has already been issued, the secured party must obtain from the holder

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<sup>22</sup> Id. at 841. See Beneficial Finance Co. v. Schroeder, 12 Kan. App. 2d 150, 737 P.2d 52, rev. denied 241 Kan. 838 (1987) (At this time, vehicles were defined to include mobile home and manufactured home); KAN. STAT. ANN. § 8-135 (1986 Supp.)

<sup>23</sup> Trible, 290 B.R. at 843.

<sup>24</sup> Effective January 1, 2003, the KMHA adopted electronic certificate of titles for manufactured homes or mobile homes. On and after January 1, 2003 if a manufactured home or mobile home is subject to a lien, the Division of Vehicles creates an electronic certificate of title and *retains* the title electronically rather than delivering the certificate of title to the owner. See KAN. STAT. ANN. § 58-4204a(a) (Supp. 2004). The provisions of § 58-4204 dealing with paper certificate of titles, apply to electronic certificate of titles unless inconsistent with the electronic title section. See KAN. STAT. ANN. § 58-4204(b) (Supp. 2004). To perfect a lien in a manufactured home or mobile home, the lien is noted on the paper or electronic certificate of title. Here the subject home would not be subject to an electronic certificate of title since the home was manufactured and the lien created prior to 2003. See KAN. STAT. ANN. § 58-4204(i) (Supp. 2004).

<sup>25</sup> See also KAN. STAT. ANN. § 58-4202(d) (Supp. 2004) which provides that “The certificate of title shall contain a statement of any liens or encumbrances which the application discloses . . .”

and surrender the certificate of title and apply for a new mortgage title. The Division of Vehicles in the Department of Revenue then issues a new certificate of title showing the lien thereon.<sup>26</sup> There is no evidence in the summary judgment papers before the Court that this was done. ABN failed to comply with the perfection requirements of the KMHA.

ABN also argues that the dwelling was permanently affixed to the real estate at the time the debtor gave a mortgage on the Property and apparently argues that the dwelling therefore lost its character as personal property and was instead, a fixture and part of the real estate. ABN cites as support the uncontroverted fact that the dwelling has been taxed as real estate since 1974.<sup>27</sup> This argument must also fail under the KMHA. A similar argument was made in Trible. The Court concluded that the tax treatment of a mobile home or manufactured home is irrelevant and inapplicable to the method of perfection prescribed by statute.<sup>28</sup>

The KMHA states that a manufactured home or mobile home shall be considered to be personal property for purposes of titling and perfecting security interests therein.<sup>29</sup> However, the KMHA gives the owner of a mobile home or manufactured home the ability to treat it as an improvement to real property and explicitly provides a mechanism for the owner of a mobile home or manufactured home to have it treated as real property and subject to a lien as part of the real estate. Absent compliance with the statute, the home remains personal property, even if set on a permanent foundation.

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<sup>26</sup> KAN. STAT. ANN. § 58-4202(i) (Supp. 2004).

<sup>27</sup> See ABN Memorandum in Support, p. 4, Fact No. 23.

<sup>28</sup> Trible, 290 B.R. at 844, n. 8.

<sup>29</sup> KAN. STAT. ANN. § 58-4204(a) (Supp. 2004).

Section 58-4214 was enacted in 2002 and provides:

(a) Whenever a manufactured home or mobile home is permanently affixed to real property, by placement upon a permanent foundation of a type not removable intact from such real property, the manufactured home or mobile home shall be considered *for all purposes* an improvement to real property, *if the certificate of title which has been issued or is required to be issued for such manufactured home or mobile home pursuant to K.S.A. 58-4204, and amendments thereto, is eliminated pursuant to this section.* If the certificate of title has been eliminated pursuant to this section, the ownership of the manufactured home or mobile home shall be an incident of ownership of the real property where it is located under governing real property law. *If the certificate of title has been eliminated pursuant to this section, a separate security interest in the manufactured home or mobile home shall not exist, and the manufactured home or mobile home shall only be subject to a lien as part of the real property where it is located.* (Emphasis added.).

Subsection (b) of § 58-4214 sets forth the application procedure and requirements for the owner of the manufactured home or mobile home to eliminate the certificate of title.<sup>30</sup> It requires an affidavit containing specified information, the certificate of title, a release of security interest by all secured parties, and proof of payment of applicable fees and taxes. Once the owner submits the application to the Division of Vehicles and the application complies with the requirements of the statute, the Division of Vehicles will approve the application and transmit the approved application to the register of deeds office of the county where the home is affixed to the real estate for recording.<sup>31</sup> Upon the filing of the approved application, the certificate of title is deemed eliminated and shall thereafter be considered for all purposes, an improvement to real property and shall only be subject to a lien as part of the real property (*i.e.* a real estate mortgage).<sup>32</sup>

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<sup>30</sup> See KAN. REG. Vol. 24, No. 17 (April 28, 2005), to be codified at KAN. ADMIN. REG. § 92-51-29 (imposing \$10 fee to eliminate certificate of title for manufactured home or mobile home).

<sup>31</sup> KAN. STAT. ANN. § 58-4214(c) (Supp. 2004).

<sup>32</sup> Although a specific procedure for lost titles is not expressed in the KMHA or administrative regulations, the owner should apply for the issuance of a certificate of title with the Division of Vehicles. Section 58-4204(c) provides that upon the sale or transfer of any manufactured home or mobile home, the new owner is obligated to make application to the Division of Vehicles for the issuance of a certificate of title. The county treasurer is to ascertain whether the

Here, there is no evidence before the Court that the debtor, or a predecessor owner, made application to eliminate the certificate of title on the subject home or that there has been compliance with § 58-4214. In the absence of such a showing, the original dwelling remains personal property and subject to a certificate of title. The exclusive method of perfecting a security interest in the original dwelling is by notation of the lien on the certificate of title. Upholding ABN's argument would essentially render § 58-4214 superfluous. Unless ABN can show at trial that the certificate of title has been eliminated in accordance with § 58-4214, ABN's mortgage is insufficient to perfect its lien in the original dwelling.

ABN's motion for summary judgment is DENIED. The Court expresses no opinion on the amount of the lien on the original dwelling or the appropriate allocation of value between the real estate and the original dwelling as contemplated by In re Rubia.<sup>33</sup> This adversary proceeding will be set for evidentiary hearing as soon as the Court's calendar permits.

IT IS SO ORDERED.

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applicant is the lawful owner of the manufactured home or mobile home and entitled to have a certificate of title issued in their name. If so, the county treasurer notifies the Division of Vehicles which issues the appropriate certificate of title. *See also* KAN. STAT. ANN. § 8-139 (Supp. 2003) which provides for an owner of a motor vehicle to apply for a duplicate title where the certificate of title is lost.

<sup>33</sup> 257 B.R. 324 (10<sup>th</sup> Cir. BAP 2001), aff'd 23 Fed. Appx. 968, 2001 WL 1580933 (10<sup>th</sup> Cir. Dec. 12, 2001).