SO ORDERED.

SIGNED this 12 day of December, 2005.

ROBERT E. NUGENT
UNITED STATES CHIEF BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

IN RE:	)	
	)	
BRIAN E. WARE,	)	**Case No. 04-11368**
	)	**Chapter 7**
Debtor.	)	
	)	
SUNFLOWER BANK, N.A.	)	
	)	
Plaintiff,	)	
v.	)	**Adversary No. 04-5116**
	)	
BRIAN E. WARE and MANNHEIM AUTOMOTIVE FINANCIAL SERVICES, INC.,	)	
	)	
Defendants.	)	

ORDER DENYING CROSS MOTIONS FOR SUMMARY JUDGMENT

Sunflower Bank, N.A. ("Bank") and Mannheim Automotive Financial Services,

Inc.("MAFS") filed cross motions for summary judgment.[1] The Bank and MAFS are fighting over a 1997 Acura sold by Ultimate Autos, a used car dealer. MAFS provided floor plan financing to Ultimate Autos LLC, of which Brian E. Ware ("Ware") was a 50 percent owner. In July, 2002, the Bank made a purchase money loan to Ware for the purchase of a 1997 Acura from Ultimate Autos. After MAFS repossessed the vehicle and sold it, without giving the Bank notice of the sale, the Bank alleged that MAFS in fact converted the Acura in contravention of the Bank's rights under the Uniform Commercial Code.

Procedural Background

This adversary proceeding was originally commenced by the Bank against Ware to except his debt from discharge pursuant to 11 U.S.C. § 523(a)(2) in connection with the Bank's purchase money loan to Ware. The Bank later joined MAFS as a party defendant, alleging that MAFS had converted the Acura or had sold it in violation of the Bank's rights in the vehicle. Thereafter, the Bank and Ware reached a settlement of the Bank's claims against Ware and the Bank dismissed its action as to Ware.[2] This leaves only the controversy between the Bank and MAFS.

Jurisdiction

The Bank's claims against MAFS are core proceedings under to 28 U.S.C. § 157(b)(2)(B), (K) and (O), and this Court has jurisdiction pursuant to 28 U.S.C. § 157(b)(1) and § 1334(b).

Findings of Fact

The Court finds the following material facts from the parties' summary judgment papers to be uncontroverted. Pursuant to Rule 56(d), these facts are deemed established for the purpose of

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[1] Dkt. 53, 54, 62, 63, 67 and 68.

[2] Dkt. 64.

trial.

Ultimate Autos was a limited liability company owned 50 percent by debtor Ware and 50 percent by Will Crouch. Ultimate Autos operated a used car business in Wichita, Kansas. Ware was an owner, member and employee of Ultimate Autos at all times relevant. Ultimate Autos sold about 250 vehicles during the year 2002; Ware's purchase of the 1997 Acura was the only one made by a member or employee of Ultimate Autos. Ware primarily sold used cars, selected the car inventory for Ultimate Autos and prepared the cars for sale. Crouch handled the bookkeeping, banking and paperwork activities. Both had authority to withdraw funds from Ultimate Autos' bank account.

On May 8, 2002 Ware, as "owner" of Ultimate Autos, signed a Security Agreement granting MAFS a security interest in its vehicle inventory and its proceeds. Section 6 of the Security Agreement provided, "Borrower may exhibit and sell Vehicles and may use and sell other Collateral in the ordinary course of business solely at the address listed below." The agreement provided that Ultimate Autos would account to MAFS for the proceeds of any sold vehicles within 48 hours of sale. MAFS perfected its security interest in Ultimate Auto's vehicle inventory by filing a financing statement with the Kansas Secretary of State on May 16, 2002. In mid-July 2002, Ultimate Autos purchased a 1997 Acura with MAFS's floor plan funds, and placed the vehicle in its inventory.

On July 31, 2002, Ware applied for a $16,000 purchase money loan from the Bank, representing that he intended to acquire the Acura from Ultimate Autos. Ware disclosed to the Bank that he was a member and 50 percent owner of Ultimate Autos. The Bank loaned Ware the $16,000 which he in turn paid over to Ultimate Autos. Ware granted a purchase money security interest in the Acura to the Bank. Ware bought the vehicle for his personal use and drove the vehicle to and from work while it was in his possession. The Bank filed its Notice of Security Interest ("NOSI")

with the Kansas Department of Revenue, Division of Vehicles, on August 15, 2002.

When Ware purchased the vehicle and delivered the Bank's loan proceeds to Ultimate, he signed some, but not all, of the documents necessary to enable him to apply for a secured title. He did not register the Acura. According to Ware's affidavit, his partner Will Crouch was in charge of dealership paperwork. Ware relied on Crouch to complete the documentation of his purchase and to transfer to him a certificate of title. He filled out what Crouch gave him.

Ware took possession of the vehicle on or about July 31, 2002, but before he received a certificate of title or registered it, MAFS declared a default on its floor plan and repossessed the Acura on August 24, 2002. The repossession occurred at Ultimate Autos, where Ware had driven the car to work, but the Acura was not on the display lot. The car was subsequently sold at an automobile auction in Kansas City for $10,000 in November 2002. Prior to selling the Acura, MAFS conducted no search of the Kansas Division of Motor Vehicles records and did not notify the Bank. Notwithstanding the fact that he lost possession of the vehicle, Ware made a few loan repayments to the Bank. Ware was ultimately unable to complete his obligations and filed this chapter 7 bankruptcy on March 22, 2004. This adversary proceeding followed.

The Motions for Summary Judgment

MAFS moved for summary judgment on the basis of KAN. STAT. ANN. § 84-9-325(a) (2004 Supp.), asserting that because Ware was part owner of Ultimate Autos, he did not buy the Acura in the "ordinary course," and therefore, the sale was not authorized under the MAFS floor plan agreement. MAFS claims that it retained its lien on the vehicle and the Bank's security interest is subordinate to MAFS under the Uniform Commercial Code (UCC). According to MAFS, Ware was not a buyer in the ordinary course because he had knowledge of MAFS's security interest in the

vehicle and sold it to himself. Therefore, any security interest taken by the Bank would necessarily be subsequent in priority to that of MAFS.

The Bank argues in its cross-summary judgment motion that there is no need to reach the "buyer in the ordinary course" issue because Ultimate Autos' sale of the Acura to Ware was expressly authorized by the floor plan documents and therefore, under KAN. STAT. ANN. § 84-9-315(a) (2004 Supp.), Ware took free and clear of MAFS's lien. The Bank further contends that even if the Court examines the sale transaction to Ware, Ware was a buyer in the ordinary course as there is nothing in the record that supports a finding that Ware's purchase was in any way a sham. Further, the Bank argues that MAFS had no right to repossess the car and, even if it did, MAFS was duty-bound to notify the Bank of its intention to dispose of the vehicle under part 6 of Article Nine. In short, the Bank asserts that Ware took the vehicle free and clear of MAFS's floor plan lien and that MAFS's lien has been transferred to the proceeds of the vehicle leaving the Bank with priority to the vehicle.

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 fact and that the moving party is entitled to judgment as a matter of law.[3] Affidavits must be based upon personal knowledge and set forth facts that would be admissible in evidence; conclusory and self-serving affidavits are not sufficient.[4] When applying this standard, the Court

[3] Fed. R. Civ. P. 56 governs summary judgment and is made applicable to adversary proceedings by Fed. R. Bankr. P. 7056.

[4] *See Salguero v. City of Clovis*, 366 F.3d 1168, 1177 n. 4 (10th Cir. 2004), quoting *Murray v. City of Sapulpa*, 45 F.3d 1147, 1422 (10th Cir. 1995).

examines the factual record and reasonable inferences therefrom in the light most favorable to the party opposing summary judgment.[5] An issue of fact is "genuine" if there is sufficient evidence from which a rational trier of fact could resolve the issue either way and an issue of fact is "material" if under the substantive law it is essential to the proper disposition of the claim. The movant, bears the initial burden of making a prima facie demonstration of the absence of a genuine issue of material fact. If there are no genuine issues of material fact, the Court must then correctly apply the substantive law.[6]

Analysis

MAFS essentially contends that because Ware was an owner of Ultimate who knew about MAFS's lien and because MAFS did not receive the proceeds of the sale of the Acura, Ware was not a buyer in the ordinary course of business and, therefore, Ware took the vehicle subject to MAFS's unreleased lien. If MAFS retained its security interest, that lien would have priority over the Bank's lien. The Bank argues that Ware's purchase was authorized by the floor plan agreement and that, as a result, MAFS's lien transferred to the car's proceeds by operation of law, leaving the Acura free and clear.

KAN. STAT. ANN. § 84-9-320(a) provides that when a purchaser buys goods in the ordinary course of business, he takes free of any security interest created by the seller, even if he has knowledge of the lien. When that sale occurs, the security interest created by the seller is transferred from the goods sold to their proceeds by operation of KAN. STAT. ANN. § 84-9-315(a)(1)

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[5] *In re Elkins Welding & Const., Inc.*, 258 B.R. 216, 218 -219 (10th Cir. BAP 2001).

[6] *In re Shore*, 305 B.R. 559, 565 (Bankr. D. Kan. 2004), citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) and *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664 (10th Cir. 1998).

if the agreement between the seller and his financier authorizes the disposition of the property free and clear. In this case, MAFS's floor plan security agreement clearly authorizes the sale of cars in inventory and places strict conditions on the manner in which the proceeds are to be delivered to MAFS. The security agreement also extends to the proceeds of the cars. If Ware bought the car in the ordinary course, he took it free and clear of MAFS's lien which was transferred to the car's proceeds in the hands of Ultimate. Thus, this complaint turns on whether Ware's purchase was in the ordinary course of business.

KAN. STAT. ANN. § 84-1-201(9) (2004 Supp.) defines a buyer in the ordinary course of business as "a person that buys goods in good faith, without knowledge that the sale violates the rights of another person in the goods, and in the ordinary course from a person . . . ." If the sale comports with the usual or customary practices in the kind of business in which the seller is engaged, here the used car business, it is one in the ordinary course. MAFS asserts that because Ware knew of MAFS's security interest and was a part owner of Ultimate Autos, he essentially bought the vehicle knowing that its sale violated MAFS's rights.

The record in this case shows that while Ware was a member of the limited liability company and was liable under the floor plan documents, he acquired the Acura as his personal vehicle and drove it to and from work. After his purchase, the Acura was not offered for sale by Ultimate Autos. Ware made car payments to the Bank, even after MAFS took the car. All of this seems to satisfy the "good faith" element of being a buyer in the ordinary course.[7]

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[7] There was no contractual or legal barrier to Ware purchasing the car from Ultimate Autos solely by virtue of his ownership status in Ultimate Autos. The Court notes that nothing in the floor plan documents expressly prohibited a sale to Ware. In addition, the Kansas Revised Limited Liability Company Act expressly permits a limited liability company's members to transact business with the company. *See* KAN. STAT. ANN. § 17-7669 (2004 Supp.).

Whether the sale violated the rights of MAFS and whether it was made "in the ordinary course," comporting with the usual or customary practices in the kind of business in which the seller is engaged, remains unsettled. At the dealership, Will Crouch was in charge of paperwork. Internally, he had been delegated the responsibility to notify MAFS of the sale of a vehicle and to promptly transfer sales proceeds to MAFS. Crouch was also responsible for completing the paperwork with the vehicle's buyer. There is no evidence whether Crouch completed these duties to MAFS. There is likewise no uncontroverted evidence that Ware knew Crouch had failed to perform these duties. While Ware admitted that he did not register the vehicle after his purchase, this was because he had not yet received the certificate of title from the Division of Motor Vehicles. Nor is there any suggestion that MAFS ever received the proceeds of the Acura. Thus, the Court cannot find a predicate in the uncontroverted facts upon which it could conclude that the sale to Ware did or did not violate MAFS's rights or that it was done in a manner comporting with the usual practices or procedure of the used car business.

Admittedly, the facts in this case are not as egregious as those in *First Nat'l Bank and Trust Co. v. Ford Motor Credit Co,*[8] where the officers of a Ford dealership borrowed money from the Bank to acquire two new Lincolns at a time when the dealership was in financial distress. The officers did not drive the Lincolns; instead, the vehicles were kept on the new car lot and offered for sale by the dealership. The dealership insured both cars and neither officer applied for a certificate of title. Even the banker testified that he knew the vehicles would be kept by the dealership for only a brief time until they were sold. The Kansas Supreme Court had little difficulty concluding that these purchases were sham sales effected to violate the floor plan agreement. Even though Ware's

[8] 231 Kan. 431, 646 P.2d 1057 (1982).

conduct in this case bears little resemblance to the nefarious conduct of the dealership's officers in *First Nat'l*, there remains a genuine controversy of fact about the transaction that is material to the disposition of the parties' respective claims. That precludes summary judgment for either party as a matter of law.

Both motions for summary judgment must accordingly be DENIED. The Clerk shall set this matter for a two-hour evidentiary hearing as soon as the Court's docket permits.

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