


SO ORDERED.

SIGNED this 2nd day of July, 2014.




Robert E. Nugent
United States Chief Bankruptcy Judge

DESIGNATED FOR ONLINE PUBLICATION ONLY

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

IN RE:

**MARK ROBERT KOLARIK,
KELLY LYNN KOLARIK,**

Debtors.

**Case No. 13-11985
Chapter 7**

J. MICHAEL MORRIS, Trustee,

Plaintiff,

vs.

Adv. No. 13-5196

**GREENPOINT CREDIT, LLC;
GREEN TREE SERVICING, LLC;
ROBERT E. ST. CLAIR and
R. ANNE ST. CLAIR;
MARK R. KOLARIK and
KELLY L. KOLARIK, and
BANK OF AMERICA, N.A.,**

Defendants.

**ORDER DENYING GREEN TREE SERVICING, LLC's
MOTION TO DISMISS (*Dkt. 19*)**

Green Tree Servicing moves for dismissal of the chapter 7 trustee's complaint under 11 U.S.C. § 544(a) to avoid and preserve an alleged unperfected lien of GreenPoint Credit, L.L.C. in a manufactured home that defendant sellers St. Clair sold to the debtors Kolarik in 2004 under an installment contract.¹ Green Tree's motion is brought under Fed. R. Civ. P. 12(b)(6), or alternatively, Fed. R. Civ. P. 12(c) as incorporated by Fed. R. Bankr. P. 7012(b).²

The Complaint

The trustee alleges that the Kolariks entered into a prepetition contract of purchase and sale with the St. Clairs in July 2004 for the purchase of a 1997 Skyline mobile home. The trustee further alleges that the mobile home is believed to be subject to a lien in favor of GreenPoint Credit, LLC that the St. Clairs gave to secure their purchase money loan from GreenPoint. Because that lien was not perfected on the date of the Kolariks' bankruptcy filing, July 31, 2013, he seeks to avoid it, exercising his strong-arm powers as a hypothetical lien creditor under § 544(a).

The Applicable Legal Standard

¹ Green Tree Servicing LLC appears by its attorney John F. Michaels. The chapter 7 trustee J. Michael Morris personally appears.

² When a party files a Rule 12(b)(6) motion to dismiss for failure to state a claim *after* having filed an answer to the complaint, as Green Tree has done in this case, the motion is treated as a motion for judgment on the pleadings under Rule 12(c). *Jacobsen v. Deseret Book Co.*, 287 F.3d 936, 941 n. 2 (10th Cir. 2002). The same legal standard applies to Rule 12(b)(6) and Rule 12(c) motions. *Atl. Richfield Co. v. Farm Credit Bank of Wichita*, 226 F.3d 1138, 1170 (10th Cir. 2000).

Motions to dismiss or for judgment on the pleadings under Rule 12 are ordinarily subject to the facial plausibility standard enunciated in the Supreme Court's *Twombly* and *Iqbal* decisions and are confined to the allegations contained in the complaint.³ But where the litigants have presented exhibits and materials outside the complaint in their motion papers, the Court may treat the motion as one for summary judgment.⁴ Here the parties each attached a Kansas Department of Revenue (KDR) motor vehicle title search on the subject mobile home to their papers.⁵ The trustee added a copy of the Contract of Purchase and Sale (the "Contract") between the St. Clairs and Kolariks.⁶ I therefore treat Green Tree's motion as one for summary judgment, requiring that I determine whether material facts remain in dispute and whether the undisputed facts entitle Green Tree to judgment as a matter of law on the trustee's complaint. Neither party challenges the authenticity of the documents attached to the motion papers.

Facts

Sometime before 2004, the St. Clairs purchased a manufactured home with purchase money borrowed from GreenPoint and granted GreenPoint a security interest in the home. In 2004, the Kolariks purchased the home from the St. Clairs for \$23,884 under the Contract.⁷ The Contract provides that the debtors were to pay

³ *Fisher v. Lynch*, 531 F. Supp. 2d 1253, 1260 (D. Kan. 2008); *Wagner Equip. Co. v. Wood*, 893 F. Supp. 2d 1157, 1159-60 (D. N.M. 2012).

⁴ Fed. R. Civ. P. 12(d).

⁵ Adv. Dkt. 35, p. 7 and 38, p. 13.

⁶ Adv. Dkt. 38, pp. 9-12

⁷ *Id.*

the St. Clairs' monthly loan payments (including insurance) to GreenPoint and annually try to assume the GreenPoint loan.⁸ The GreenPoint loan would remain in the St. Clairs' name. If the home were destroyed or damaged, the St. Clairs could elect to repair it or cancel the contract. If the debtors paid off or assumed the GreenPoint loan, the St. Clairs were obligated to pass title to them. All other duties were delegated to the buyers – pay the taxes and insurance and maintain the mobile home in good and clean condition. The debtors reside in the mobile home that is situated in a mobile home community on a rented lot. The Kolariks filed their chapter 7 bankruptcy petition on July 31, 2013. They claim the mobile home exempt as their homestead.

Both the trustee and Green Tree rely on a second document, a motor vehicle search report from the KDR on the mobile home.⁹ This document shows that title number N0056133 to the mobile home was issued March 11, 2004 and the St. Clairs are the title owners of record.¹⁰ No lien holder is shown on this report; instead, it states “Not Found.” While this report suggests that either no lien exists on the mobile home or that a lien may exist but be unperfected, the certificate of title is not in the summary judgment record and the Court cannot tell whether GreenPoint's lien is noted on it as Kansas law requires.¹¹

⁸ Adv. Dkt. 38, pp. 9-12.

⁹ Adv. Dkt. 35, Ex. A, p. 7 and Adv. Dkt. 38, p. 13.

¹⁰ *Id.* Although not entirely clear, it appears that this motor vehicle search report was generated or printed on September 3, 2013 from the KDR division of motor vehicles website.

¹¹ KAN. STAT. ANN. § 84-9-311(a)(2), (b) (2013 Supp.) and § 58-4204(g) (2013 Supp.).

Green Tree Servicing, LLC, the St. Clairs, and the trustee stipulate that Green Tree is the loan servicer for Bank of America, N.A. (BOA) which is the successor in interest to “BankAmerica Housing Services, a Division of Bank of America, FSB” and is the real party in interest.¹² Nothing in the stipulation or record establishes the relationship between BOA and GreenPoint Credit, or whether BOA is the successor to GreenPoint with respect to the mobile home loan and lien.¹³ The trustee amended his complaint on June 23, 2014 to add BOA as a party defendant but the substantive allegations of the original complaint remained unchanged.¹⁴ GreenPoint Credit has not answered or otherwise responded to the trustee’s complaint, and the trustee has not pursued GreenPoint’s default.¹⁵ As discussed below, Green Tree’s motion should be denied.

Analysis

Green Tree makes several arguments why the trustee’s claim must fail as a matter of law. First, Green Tree argues that because there was no “transfer” of property by the debtors (the lien being granted by the St. Clairs), there is nothing for the trustee to avoid.¹⁶ But, as the trustee correctly points out, the language of § 544(a) does not limit its reach to transfers by the debtor; rather, it grants the trustee the

¹² Adv. Dkt. 59.

¹³ GreenPoint Credit may have been acquired or absorbed by BOA at some point during the financial crisis of 2008, but the Court’s knowledge of this is off-record and cannot be relied on in deciding these motions.

¹⁴ Adv. Dkt. 67.

¹⁵ It appears to the Court that GreenPoint Credit, LLC has not been properly served with summons and the complaint. *See* Fed. R. Bankr. P. 7004(b)(3).

¹⁶ *See* Adv. Dkt. 19.

same “rights and powers” that a hypothetical judgment lien creditor, executing creditor, or bona fide purchaser would have as of the date of the debtors’ petition.¹⁷ Because § 544(a) is not limited in the way Green Tree claims, a trustee may avoid any unperfected lien that encumbers property of the estate without regard to whether the debtors granted it.¹⁸ Green Tree’s argument to the contrary must fail.

Second, Green Tree argues that the mobile home is not property of the estate.¹⁹ To reach this conclusion, Green Tree reasons that the Contract is an executory contract and that, because the Contract was neither assumed or rejected, it must be deemed rejected under § 365(d)(1). Once an executory contract is rejected, it is no longer property of the estate per § 365(p)(1).²⁰ Green Tree bases this argument on the fact that the debtors scheduled the Contract in Schedule G – Executory Contracts and Unexpired Leases and described the Contract as a “residential lease/rent to own.” The Contract says nothing about being a “residential lease/rent to own” agreement. It is not executory.

In this Circuit, the courts apply the Countryman test in determining whether

¹⁷ *In re Silver*, 303 B.R. 849, 863 (10th Cir. BAP 2004) (emphasizing the use of the disjunctive language “or” in § 544(a)). *See also, Morris v. Hicks, et al (In re Hicks)*, 491 F.3rd 1136, 1140 (10th Cir. 2007) (the rights of a bankruptcy trustee as a hypothetical lien creditor are determined under state law); KAN. STAT. ANN. § 84-9-317(a)(2) (2013 Supp.) (subordinating an unperfected security interest to the rights of a trustee who became a lien creditor as of the date of the petition).

¹⁸ *In re Sheets*, 277 B.R. 298, 307 (Bankr. N.D. Tex. 2002) (transfer is not a prerequisite to trustee exercising his strong-arm powers under § 544(a)).

¹⁹ Adv. Dkt. 35.

²⁰ Section 365(p)(1) speaks to rejected leases of personal property and does not address rejected executory contracts.

a contract is an executory contract.²¹ Under that test, if: (1) the contract has not been fully completed or performed; (2) future obligations and performance remain due from both parties to the contract; and (3) failure to perform those obligations would constitute a material breach, the contract is executory.²² Most courts conclude that installment land contracts or motor ~~retail~~ vehicle retail sales contracts (including those for mobile homes) are not executory if the only duty the seller retains is the duty to convey title when the buyer's payments are complete and the buyer is obligated from the beginning of the contract to pay taxes, insurance, and maintenance.²³

This Contract is not a lease nor is it a rent-to-own agreement. Rather, it documents the sale and purchase of the mobile home "as is" without any representations as to condition by the St. Clairs. The debtors were not only obligated to make the monthly loan payments to GreenPoint, they were also obligated to pay taxes on the mobile home, to insure it, and to maintain it. Apart from conveying title to the debtors upon completion of monthly payments, the St. Clairs had no other duties or obligations beyond retaining the right to elect to repair the home in the

²¹ The test is named for Professor Vern Countryman. *See Olah v. Baird (In re Baird)*, 567 F.3d 1207, 1211 (10th Cir. 2009)(adopting Countryman test of an executory contract).

²² *Id.*

²³ *Johnson v. Smith (In re Johnson)*, 501 F.3d 1163, 1174 (10th Cir. 2007) (Debtors' obligation to tender installment payments and the seller-dealer's obligation to release the lien when handing over the vehicle title are insufficient to classify the sales contract as executory.). *See also In re Drahn*, 405 B.R. 470, 475 (Bankr. D. Ia. 2009) (contract for sale of mobile home is not executory when the only remaining duty is the transfer of title after debtor has completed payments); *In re Martinez*, 476 B.R. 627, 632 n.2 (Bankr. D. N.M. 2012).

event of a total loss or cancel the Contract. That right will not ripen until a casualty loss is sustained on the mobile home. The Contract is not executory, and therefore not subject to assumption or rejection under § 365(d)(1). To the extent it is not exempt, the debtors' equitable interest in the mobile home is property of the estate.²⁴

The Contract here differs from the contract at issue in *In re Reasor* in which this Court concluded the contract was an executory one.²⁵ In that case the sellers retained legal title to the trailer but also remained obligated to maintain insurance coverage on the travel trailer that was being purchased by the debtors under an unsecured installment purchase agreement. It contained no provisions allocating responsibility for taxes, repairs and maintenance to either party. The sellers continuously insured the trailer during the 56-month term of the purchase agreement, even while the debtors were in default. In contrast here, all of the usual attributes of ownership were allocated to the Kolariks – responsibility for taxes, insurance, and maintenance of the mobile home; the ability to deduct any interest paid to GreenPoint; and possession. Upon the completion of the monthly payments or the successful assumption of the St. Clairs' GreenPoint loan, the St. Clairs were obligated to transfer title to the Kolariks. *Reasor* is distinguishable on its facts and the terms of the contract. This Contract is not executory.

²⁴ On this record the court is unable to determine the extent of the debtors' equitable interest in the mobile home and such determination remains for trial, as does a determination of the rights of the St. Clairs, GreenPoint, BOA, and Green Tree in the mobile home based upon a fully developed factual record.

²⁵ *In re Reasor*, 2014 WL 1647142 (Bankr. D. Kan. Apr. 23, 2014).

Next, Green Tree asserts that substantial compliance with Kansas certificate of title statutes suffices to perfect the lien in the mobile home and therefore, GreenPoint's (or BOA) lien is deemed perfected, defeating the trustee's avoidance action.²⁶ Green Tree cites the *Charles* case for authority suggesting that the KDR's motor vehicle search report that shows the St. Clairs as the owner of the mobile home is analogous to the certificate of title that the lender was relied on in *Charles*.²⁷ But the facts here are distinguishable and do not warrant an extension of the substantial compliance standard applied in *Charles*. In that case, the *creditor* was identified on *certificates of title* to trucks as the owner thereof, rather than the lienholder. The Tenth Circuit held that this met the substantial compliance standard for perfection because a search of the certificate of title records would give notice to potential secured creditors that the creditor was claiming an interest in the trucks.²⁸ Here, the document presented by Green Tree is only a KDR title search report.²⁹ It identifies the title holders as the St. Clairs (the actual owners), not as lienholders. There is no mention of either GreenPoint, BOA, or any other creditor in the search report. It cannot impart notice to anyone that either creditor was claiming an interest in the mobile home.³⁰ Green Tree's substantial compliance argument must fail on this

²⁶ Adv. Dkt. 35.

²⁷ *Morris v. The CIT Group/Equip. Financing, Inc. (In re Charles)*, 323 F.3d 841 (10th Cir. 2003).

²⁸ *Id.* at 845.

²⁹ Adv. Dkt. 35, Ex. A.

³⁰ *Cf. Morris v. 21st Mortgage Corp. (In re Jewell)*, 2006 WL 3512926 at *3 (Bankr. D. Kan. Dec. 4, 2006) (In distinguishing *In re Charles*, this Court noted: "One viewing a title that recited *someone other than the seller or borrower* as an "owner" would absolutely be placed

record and at this stage of the proceedings.

Finally, Green Tree claims that because GreenPoint did not extend credit to the debtors, its lien cannot be avoided under § 544(a)(1) and (2).³¹ As the trustee correctly notes, Green Tree misapprehends § 544. When exercising “strong-arm powers” under § 544(a), the trustee stands in the shoes of a *hypothetical* lien creditor; he is clothed with the rights and powers of a judicial lien creditor whether or not such a creditor actually exists.³² This argument is also without merit.

Conclusion

Based upon the pleadings and the limited record before the Court, Green Tree’s converted motion to dismiss or for judgment on the pleadings, treated as one for summary judgment, is DENIED for the reasons set forth above.³³

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on notice of the named party’s interest in the property.”).

³¹ Adv. Dkt. 35.

³² *In re Silver*, 303 B.R. 849, 863. *See also, Zilkha Energy Co. v. Leighton*, 920 F.2d 1520, 1523 (10th Cir. 1990) (Under § 544 the trustee may stand in the shoes of a hypothetical judgment lien creditor of the debtor; it is a legal fiction that permits the trustee to assume the guise of a creditor with a judgment against the debtor.); *In re Brouillette*, 389 B.R. 214, 218 (Bankr. D. Kan. 2008) (“Under § 544(a)(1), upon commencement of a bankruptcy case, the trustee has the *status* of a creditor with a judicial lien on all property on which a creditor could have obtained a judicial lien, whether or not such creditor actually exists,” quoting 5 Collier on Bankruptcy ¶ 544.05.).

³³ I note the lack of any evidence in the record that identifies which creditor (GreenPoint, BOA, or Green Tree) held a lien in the mobile home on the date of the Kolariks’ bankruptcy petition or whether that lien was properly perfected. Nor is there evidence sufficient to establish the relationship, if any, among GreenPoint, BOA and Green Tree, or what the Kolariks have paid under the Contract -- evidence that is essential for the Court to determine the interests and rights of the parties in the mobile home.