**UNITED STATES BANKRUPTCY COURT**
**NORTHERN DISTRICT OF OHIO**
**EASTERN DIVISION**

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| IN RE: | ) | CHAPTER 7 |
| | ) | |
| D&H AUTO RENTAL, INC., | ) | CASE NO. 02-66069 |
| | ) | |
| Debtor. | ) | JUDGE RUSS KENDIG |
| LOREN N. WINGERT, | ) | |
| | ) | ADV. NO. 03-6039 |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | |
| | ) | **MEMORANDUM OF DECISION** |
| MANHEIM AUTOMOTIVE FINANCE SERVICE, et al., | ) | |
| | ) | |
| Defendants. | ) | |
| | ) | |
| IN RE: | ) | CHAPTER 7 |
| | ) | |
| D&H AUTO RENTAL, INC., | ) | CASE NO. 02-66069 |
| | ) | |
| Debtor. | ) | JUDGE RUSS KENDIG |
| JOHN M. BRIDEWESER and BETTY A. BRIDEWESER, | ) | ADV. NO. 03-6052 |
| | ) | |
| Plaintiffs, | ) | |
| | ) | |
| v. | ) | **MEMORANDUM OF DECISION** |
| | ) | |
| MANHEIM AUTOMOTIVE FINANCE SERVICE, et al., | ) | |
| | ) | |
| Defendants. | ) | |

Before the court are cross-motions for summary judgment, memoranda in support and replies filed in two adversary proceedings that were consolidated for decision in the interest of judicial economy. The court is asked to determine the interests of the parties in two motor vehicles. The following constitutes the court's findings of fact and conclusions of law pursuant

to Federal Rule of Bankruptcy Procedure 7052.

## JURISDICTION

The court has jurisdiction over these matters pursuant to 28 U.S.C. § 1334(e) [1] and the general order of reference entered in this district on July 16, 1984. These are core proceedings under 28 U.S.C. § 157(b)(2)(E).

## FACTS

D&H Auto Rental, Inc. (hereafter "D&H"), a used car business, entered into an agreement with defendant Manheim Automotive Financial Services, Inc. (hereafter "Manheim") whereby Manheim financed D&H's purchase of used automobiles. Manheim took security interests in the automobiles and acted to perfect those interests by filing a financing statement and by holding the titles and noting its security interests thereon. Under the agreement, upon D&H's sale of a vehicle, D&H was to turn over the sales proceeds to Manheim, and Manheim would release its security interest and turn over the title to D&H.

### I. Facts of the Wingert Case

Loren N. Wingert (hereafter individually "Wingert" and collectively with John M. Brideweser and Betty A. Brideweser "Plaintiffs") purchased a 2001 Ford Windstar Sport vehicle from D&H on August 22, 2002 for $13,350.00 plus tax and title fees. A total down payment of $3,500.63, including the value of a trade-in and a cash deposit, was made with the balance being paid through financing from defendant FirstMerit Bank, N.A. (hereafter "FirstMerit"). D&H did not turn the sales proceeds over to Manheim, and consequently, Manheim did not release its lien nor turn over the title to D&H. Wingert has never received the title to the vehicle, and Wingert requests that the court order the vehicle's title be transferred to Wingert subject to the lien of FirstMerit and free of the lien of Manheim.

### II. Facts of the Brideweser Case

John M. Brideweser and Betty A. Brideweser (hereafter individually "Brideweser" and collectively with "Wingert" "Plaintiffs") purchased a 2002 Buick LeSabre Custom vehicle[2] from D&H on August 16, 2002 for $17,550.00 plus tax and title fees. A down payment of $3,112.61,

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[1] For an in-depth discussion of the court's subject matter jurisdiction, see the memorandum of decision and accompanying order entered on July 11, 2003 in Wingert v. Manheim Auto. Fin. Serv., Inc. (In re D&H Auto Rental, Inc.), No. 03-6039 and Brideweser v. Manheim Auto. Fin. Serv., Inc. (In re D&H Auto Rental, Inc.), No. 03-6052.

[2] Wingert and Brideweser's vehicles will collectively be referred to as "the Vehicles."

the value of a trade-in, was made with the balance being paid through financing from FirstMerit. D&H did not turn the sales proceeds over to Manheim, and consequently, Manheim did not release its lien nor turn over the title to D&H. Brideweser has never received the title to the vehicle, and Brideweser requests that the court order the vehicle's title be transferred to Brideweser subject to the lien of FirstMerit and free of the lien of Manheim.

**ARGUMENTS**

FirstMerit joined with Plaintiffs (collectively "Movants") in filing a motion for summary judgment. Movants request summary judgment in their favor on Plaintiffs' claims, FirstMerit's crossclaim against Manheim and Manheim's crossclaim against FirstMerit, alleging that no genuine issue of material fact exists and that they are entitled to judgment as a matter of law for the following reasons. First, Movants argue that this matter involves the interplay between Ohio's version of Article 9 of the Uniform Commercial Code and the Certificate of Motor Vehicle Title Law. Movants argue that O.R.C. § 4505.13(A)(1) and (2), read together, state that O.R.C. Chapter 1309 provides the exclusive means for perfecting a security interest in titled motor vehicles held as inventory for sale by a dealer. Movants argue that in all other cases, a lien must be noted on a motor vehicle's title to perfect a security interest in that vehicle in compliance with O.R.C. § 4505.13(B). Manheim noted its lien on the titles to the Vehicles and filed a financing statement covering D&H's inventory, which included the Vehicles. Movants argue that because Manheim financed D&H's acquisition of its automobile inventory that under § 4505.13(A)(1) and (2), the liens noted on the Vehicles' titles are ineffective to perfect a security interest in D&H's inventory.

Second, Movants argue that O.R.C. §§ 1309.01 to 1309.50 control the outcome of this case. Movants argue that under § 1309.102(A)(48)(b), the vehicles that D&H offered for sale on its lot, which included the Vehicles, constituted inventory. Movants assert that under O.R.C. § 1301.01(I), Plaintiffs were "buyers in ordinary course of business." Consequently, Movants argue, Plaintiffs should receive title to the Vehicles free of Manheim's lien perfected via a financing statement unless Plaintiffs knew that the sale violated a specific term of an agreement between D&H and Manheim under § 1309.320(A). Movants argue that Plaintiffs did not have this knowledge.

Movants also argue that Manheim will rely on the case of Saturn of Kings Automall, Inc. v. Mike Albert Leasing, 92 Ohio St. 3d 513 (2001) in its defense. Movants argue that the case is not on point because it determined competing claims of ownership and title as opposed to competing liens. Moreover, Movants argue that the case analyzed the facts under Article 2 and not Article 9.

In response, Manheim admits that under Article 9 buyers in the ordinary course take free of a security interest perfected through the filing of an Article 9 financing statement, but Manheim maintains that they do not take title to vehicles free of liens perfected by notation on the certificates of title. Manheim argues that the Saturn of Kings Automall case stands for the

proposition that ownership in motor vehicles, including those contests between lienholders and alleged owners, is governed by O.R.C. § 4505.04, and, as such, interests noted on certificates of title to vehicles trump claims of ownership not based on certificates of title. Manheim argues that § 4505.04 provides that a person acquires ownership of a motor vehicle when the vehicle's certificate of title is issued to that person. Manheim asserts that because Plaintiffs never received the titles to the Vehicles they purchased from D&H, they have no ownership rights in the Vehicles to which FirstMerit's liens could attach.

Further, Manheim argues that Movants' reliance on § 4505.13 to defeat Manheim's security interests is misplaced. Manheim argues that § 4505.13(A)(2) provides that "floor-plan financing" and the Article 9 interests created in a dealer's inventory are valid under Ohio law and governed by the generally applicable Article 9 provisions to such security interests. However, Manheim argues that § 4505.13 does not trump the general rule that a security interest in a particular vehicle can and must be perfected through a notation of the lien on a certificate of title. Manheim asserts that public policy supports its argument. If not, Manheim argues, finance companies would be unable to protect their interests in motor vehicles held for sale by a dealer. Additionally, Manheim argues that FirstMerit could have protected its interest by searching the title records to ascertain whether liens existed on the Vehicles' titles. FirstMerit failed to do this, so Manheim argues that FirstMerit should bear the consequent loss.

Alternatively, Manheim argues that if the court is not inclined to grant summary judgment in its favor, then the court should defer ruling on the pending motions for summary judgment, pursuant to Federal Rule of Civil Procedure 56(f), incorporated through Federal Rule of Bankruptcy Procedure 7056, until outstanding discovery requests are responded to by FirstMerit. Manheim argues that the discovery requests include a request for information pertaining to the checks FirstMerit issued for the purchase and financing of the Vehicles. Manheim has requested information as to how the funds were applied, including whether those funds were applied to D&H's or D&H's principals' account or accounts with FirstMerit. Manheim argues that how those funds were applied is relevant to whether Plaintiffs qualify as buyers within the ordinary course of business. Manheim asserts that discovery reveals that there was at least one outstanding loan owed by D&H to FirstMerit at the time that FirstMerit supplied the purchase money to D&H for Plaintiffs, which was shortly before the bankruptcy petition was filed. Manheim argues that it believes these transactions were part of a scheme to pay down FirstMerit's loans owed by D&H and its principals to the detriment of other creditors. Therefore, Manheim argues that how the loan proceeds were applied is relevant to the existence of a scheme and whether Plaintiffs were buyers in the ordinary course.

In reply, FirstMerit[3] argues that how D&H applied the loan proceeds is immaterial to whether Plaintiffs were buyers in the ordinary course. FirstMerit admits that if the case involved rival claimants to title, then Manheim would prevail under Saturn of Kings Automall, however,

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[3] Plaintiffs did not join in the reply of FirstMerit.

FirstMerit argues that title is not at issue. FirstMerit argues that this case is, instead, a case between the creditor of a dealer and a buyer in the ordinary course of business. Additionally, FirstMerit argues that Manheim misreads § 4505.13. FirstMerit argues that unlike Manheim's interpretation, the two methods for perfecting a lien on a motor vehicle under § 4505.13 are mutually exclusive.

In response, Manheim argues that FirstMerit's argument assumes a buyer in the ordinary course obtains a certificate of title to the vehicle. Manheim argues that Plaintiffs failed to obtain any legal rights to the Vehicles superior to the rights of Manheim because they failed to obtain titles and ownership rights in the Vehicles.

## ANALYSIS

### I. Standard of review

The procedure for granting summary judgment is found in Federal Rule of Civil Procedure 56(c), made applicable to this proceeding through Federal Rule of Bankruptcy Procedure 7056, which provides in part that

> [j]udgment sought shall be rendered forthwith 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 a judgment as a matter of law.

Fed. R. Civ. P. 56(c).

The evidence must be viewed in the light most favorable to the nonmoving party. Adickes v. S.H. Kress & Co., 398 U.S. 144, 158-59 (1970). Summary judgment is not appropriate if a material dispute exists over the facts, "that is, if evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Summary judgment is appropriate, however, if the opposing party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). *See also* Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986).

The Sixth Circuit Court of Appeals has recognized that Liberty Lobby, Celotex, and Matsushita effected "a decided change in summary judgment practice," ushering in a "new era" in summary judgments. Street v. J.C. Bradford & Co., 886 F.2d 1472, 1476 (6th Cir. 1989). In responding to a proper motion for summary judgment, the nonmoving party "cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must 'present affirmative evidence in order to defeat a properly supported motion for summary judgment.'"

Street, 886 F.2d at 1479 (*quoting* Liberty Lobby, 477 U.S. at 257). The nonmoving party must introduce more than a scintilla of evidence to overcome the summary judgment motion. Street, 886 F.2d at 1479. It is also not sufficient for the nonmoving party merely to "show that there is some metaphysical doubt as to the material facts." Matsushita, 475 U.S. at 586. Moreover, "[t]he trial court no longer has the duty to search the entire record to establish that it is bereft of a genuine issue of material fact." Street, 886 F.2d at 1479-80. That is, the nonmoving party has an affirmative duty to direct the court's attention to those specific portions of the record upon which it seeks to rely to create a genuine issue of material fact.

This line of cases emphasizes the point that when one party moves for summary judgment, the nonmoving party must take affirmative steps to rebut the application of summary judgment. Courts have stated that:

> Under *Liberty Lobby* and *Celotex*, a party may move for summary judgment asserting that the opposing party will not be able to produce sufficient evidence at trial to withstand a directed verdict, and if the opposing party is thereafter unable to demonstrate that he can do so, summary judgment is appropriate. "In other words, the movant could challenge the opposing party to 'put up or shut up' on a critical issue [and] . . . if the respondent did not 'put up,' summary judgment was proper."

Fulson v. City of Columbus, 801 F. Supp. 1, 4 (S.D. Ohio 1992) (citations omitted) ( *quoting* Street, 886 F.2d at 1478).

## II. Article 9 of the Uniform Commercial Code Versus the Certificate of Motor Vehicle Title Law

### A. Revised Article 9

Revised Article 9 of the Uniform Commercial Code – Secured Transactions became effective as Chapter 1309 of the Ohio Revised Code on July 1, 2001. John C. Hantranft, Sr. & James H. Prior, Ohio Secured Transactions Under Revised Article 9 of the Uniform Commercial Code, at viii (2002). "The general rule . . . is that new 9 applies, even if a security interest was created or perfected earlier." Id. § 1.1.1, at 1-1 (*citing* O.R.C. § 1309.702). Accordingly, the court will apply Revised Article 9 (hereafter "Article 9") to the present dispute.

### B. Definitional terms under the Ohio Revised Code

#### 1. The Vehicles were "inventory" of D&H

The Vehicles D&H sold to Plaintiffs constituted its "inventory." Under Article 9, "goods" includes "all things that are movable when a security interest attaches." O.R.C. §

1309.102(A)(44)(a). "There are four types of goods: consumer goods, equipment, farm products and inventory." Hantranft & Prior, *supra*, § 2.4.2, at 2-11. "Inventory" is defined as "goods" which "[a]re held by a person for sale or lease or to be furnished under a contract of service." O.R.C. § 1309.102(A)(48)(b). The Vehicles were movable goods held by D&H for sale and accordingly constituted D&H's inventory.

**2. Plaintiffs were "buyers in ordinary course of business"**

The definition of "buyer in ordinary course of business " in Article 9 is derived from the definition set forth in O.R.C. § 1301.01. *See* Official Comment,[4] ¶ 3, to U.C.C. § 9-320 [O.R.C. § 1309.320] (*citing* definition of "buyer in ordinary course of business" in U.C.C. § 1-201 [O.R.C. § 1301.01]). A "buyer in ordinary course of business" is

> a person who 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 . . . in the business of selling goods of that kind. A person buys goods in the ordinary course if the sale to the person comports with the usual or customary practices in the kind of business in which the seller is engaged or with the seller's own usual or customary practices.

O.R.C. § 1301.01(I). "Good faith" is defined in Article 9 as "honesty in fact and the observance of reasonable commercial standards of fair dealing." O.R.C. § 1309.102(A)(43).

Plaintiffs bought the Vehicles in good faith from D&H, a seller of motor vehicles, without knowledge of Manheim's interests therein. Therefore, Plaintiffs were buyers in ordinary course under Article 9.

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[4]

> Am. Sub. S. B. No. 74 of the 124th General Assembly of Ohio, which was passed in June, [sic] 2001, and became effective July 1, 2001, did not adopt the Official Comments which accompany the Uniform Version of Revised Article 9. . . . Nonetheless, [the] comments remain useful in helping to explain the scope, intent and interplay of and between the provisions of new 9.

Hantranft & Prior, *supra*, at viii.

### C. Perfection under the Motor Vehicle Title Law

Section 4505.13(A)(1) of Ohio's Certificate of Motor Vehicle Title Law, O.R.C. § 4505 *et seq.*, provides that "Chapter 1309. [Article 9] . . . of the Revised Code *do[es] not permit or require* the deposit, filing, or other record of a security interest covering a motor vehicle, except as provided in division (A)(2) of this section." O.R.C. § 4505.13(A)(1) (emphasis added). Division (A)(2) of § 4505.13 provides in turn that

> Chapter 1309. of the Revised Code applies to a security interest in a motor vehicle held as inventory . . . for sale by a dealer. The security interest has priority over creditors of the dealer as provided in Chapter 1309. of the Revised Code without notation of the security interest on a certificate of title, without entry of a notation of the security interest into the automated title processing system if a physical certificate of title for the motor vehicle has not been issued, or without the retention of a manufacturer's or importer's certificate.

O.R.C. § 4505.13(A)(2). The two subsections, read together, mean that the only way a finance company can perfect a security interest in a dealer's inventory is to file an Article 9 financing statement with the Secretary of State. *Accord* Hantranft & Prior, *supra*, § 7.7, at 7-13; O.R.C. § 1309.311(A)(2) and (D).

### D. Perfection under Article 9

Section 1309.311 of the Ohio Revised Code provides, in pertinent part, that

> (A) [e]xcept as otherwise provided in division (D) of this section, the filing of a financing statement is not necessary or effective to perfect a security interest in property subject to:
>
> . . . .
>
> (2) Chapters 1547., 1548., *4505.*, 4519., and 5309. of the Revised Code;
>
> . . . .
>
> (D) *During any period in which collateral subject to a statute specified in division (A)(2) of this section is inventory held for sale or lease by a person or leased by that person as lessor and that person is in the business of selling goods of that kind, this section does not apply to a security interest in that collateral*

*created by that person.*

O.R.C. § 1309.311 (emphasis added). More pointedly, paragraph 4 of the Official Comment to U.C.C. § 9-311 [O.R.C. § 1309.311] states that:

> **4. Inventory Covered by Certificate of Title**
> Under subsection [(D) of O.R.C. § 1309.311] perfection of a security interest in the inventory of a person in the business of selling goods of that kind is governed by the normal perfection rules, even if the inventory is subject to a certificate-of-title statute. Compliance with a certificate-of-title statute is both unnecessary and ineffective to perfect a security interest in inventory to which this subsection applies. Thus, *a secured party who finances an automobile dealer that is in the business of selling and leasing its inventory of automobiles can perfect a security interest in all the automobiles by filing a financing statement but not by compliance with a certificate-of-title statute.*

Official Comment, ¶ 4, to U.C.C. § 9-311 [O.R.C. § 1309.311] (emphasis added). This is exactly on point with the scenario at issue.

Manheim argues that it doubly perfected its security interest, and doubly protected itself, by filing an Article 9 financing statement, by placing a lien on the titles to the Vehicles and by holding the titles to the Vehicles. However, Manheim's actions in placing a lien on the titles, in compliance with the Motor Vehicle Certificate of Title Law, and by holding the titles, are not in compliance with Article 9. Manheim's holding of titles and notation of liens on titles when it is acting as an inventory financier is in derogation of the law and of no effect.

## III. Buyers in the Ordinary Course Versus a Perfected Article 9 Security Interest

Article 9 provides, in pertinent part, that "a buyer in the ordinary course of business . . . takes free of a security interest created by the buyer's seller even if the security interest is perfected and the buyer knows of its existence." O.R.C. § 1309.320(A). The Official Comment is instructive.

> Subsection [(A)] provides that such a buyer takes free of a security interest, even though perfected, and even though the buyer knows the security interest exists. Reading the definition together with the rule of law results in the buyer's taking free if the buyer merely knows that a security interest covers the goods but taking subject if the buyer knows, in addition, that the sale violates a term in an agreement with the secured party.

Official Comment, ¶ 3, to U.C.C. § 9-320 [O.R.C. § 1309.320].

As previously discussed, Plaintiffs were buyers in the ordinary course who bought inventory, the Vehicles, from D&H, in which Manheim had perfected security interests via a financing statement. The legislature has made a conscious choice to allocate risk and provide for an exclusive method of perfecting security interests in automobiles. Consumers and those claiming rights through the consumers, such as the consumers' lenders, take free of the security interest of inventory lenders. This is necessary to insure the free flow of commerce as buyers would be inhibited from buying were the rules otherwise. The inventory lender is in the best position to monitor and manage its risk, particularly given the clear allocation of risk, its interest in *all* transactions of the seller and its superior knowledge and understanding. Any interpretation to the contrary is illogical and in clear contravention of the acts of the legislature. The case of Saturn of Kings Automall, Inc. v. Mike Albert Leasing, 92 Ohio St. 3d 513 (2001) is clearly inapplicable as O.R.C. § 4505.13(A)(1) and (2) provides the exclusive means of securing an interest in a car dealer's inventory. Manheim has produced no evidence to show that Plaintiffs knew that the sale of the Vehicles violated the financing agreement between Manheim and D&H, and accordingly, Plaintiffs take the Vehicles free of Manheim's security interest.

## CONCLUSION

Based on the foregoing, no issue of material fact exists, and Movants are entitled to judgment as a matter of law. Accordingly, Movants' motion for summary judgment is granted, and Manheim's cross-motion for summary judgment is denied. Orders consistent with this memorandum of decision shall enter forthwith in each case.

/s/ Russ Kendig

**RUSS KENDIG**
**U.S. BANKRUPTCY JUDGE**

MAR 10 2004

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