UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:	)	Case No.: 05-30534
	)	
Elizabeth R. McClelland,	)	Chapter 7
	)	
Debtor.	)	
	)	JUDGE MARY ANN WHIPPLE

MEMORANDUM OF DECISION AND
ORDER GRANTING MOTION FOR TURNOVER

Louis J. Yoppolo ("Trustee"), the trustee of the bankruptcy estate of Elizabeth R. McClelland ("Debtor"), is before the court on the Motion for Turnover that he filed in this case on February 16, 2005. The motion seeks an order directing Debtor to turn over to Trustee her 2000 Ford Escort automobile (the "Vehicle") and the certificate of title and keys thereto. After reviewing the motion and the response thereto and hearing the arguments of counsel, the court will grant Trustee's motion.

FACTUAL AND PROCEDURAL BACKGROUND

On January 27, 2005, Debtor filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code. Debtor's schedule of personal property listed the Vehicle, at a value of $4,000. She claimed $1,000 of that value as exempt under § 2329.66(A)(2) of the Ohio Revised Code. Her Schedule D indicates that Frank Ayers holds a security interest in the Vehicle and that the balance of the debt owed to Mr. Ayers is $4,514. The parties have stipulated that the debt is evidenced by a document (the "Note"), the text of which is as follows:

> Elizabeth McClelland
> 1652 North Cove Blvd
> Toledo, OH 43606
>
> 2000 Ford Escort
> VIN: 3FAKP1139YR124496

I agree by my signature below to repay Frank Ayers the amount of $5,000.00 plus 5% interest totaling $5250.00

This loan is for the purchase of the above named vehicle.

Terms: $146.00 per month beginning September 15, 2004, for 35 months, then $140.00 on the 36th month.

/s/
Elizabeth R. McClelland.

The Note bears a stamp indicating "LIEN RECORDED" on October 25, 2004, by the Clerk of the Lucas County Common Pleas Court. The parties also stipulated to the admission of a certificate of title to the Vehicle, which notes the lien in favor of Mr. Ayers and recites that the lien was created on October 25, 2004 (the same day the title was issued). The parties have further stipulated that there are no other documents evidencing the creation or perfection of the security interest.

Section 542(a) of the Bankruptcy Code provides:

> Except as provided in subsection (c) or (d) of this section, an entity, other than a custodian, in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease under section 363 of this title, or that the debtor may exempt under section 522 of this title, shall deliver to the trustee, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate.

Subsection (c) and (d), which deal with transfers made without actual notice or actual knowledge of the case and transfers by life insurance companies, respectively, are inapplicable, and Debtor is not a custodian. Moreover, Trustee may use, sell, or lease the estate's interest in the Vehicle under 11 U.S.C. § 363(b)(1). Accordingly, he is entitled to turnover so long as the Vehicle is not of inconsequential value or benefit to the estate.

Debtor asserts that the Vehicle has no value to the estate because it is fully encumbered by a valid, properly perfected security interest. "In the absence of any controlling federal law, 'property' and 'interests in property' are creatures of state law." *Barnhill v. Johnson*, 503 U.S. 393, 398 (1992) (citing, *inter alia*,

Butner v. United States, 440 U.S. 48, 54 (1979)). Accordingly, the court must turn to state law to analyze Debtor's position. The pertinent provision of Ohio law is § 9-203 of the Uniform Commercial Code:

> Except as otherwise provided in divisions (C) to (I) of this section, a security interest is enforceable against the debtor and third parties with respect to the collateral only if:
>
> (1) Value has been given;
>
> (2) The debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party; and
>
> (3) One of the following conditions is met:
>
> (a) The debtor has authenticated a security agreement that provides a description of the collateral and, if the security interest covers timber to be cut, a description of the land concerned;
>
> (b) The collateral is not a certificated security and is in the possession of the secured party under section 1309.313 of the Revised Code pursuant to the debtor's security agreement;
>
> (c) The collateral is a certificated security in registered form and the security certificate has been delivered to the secured party under section 1308.27 of the Revised Code pursuant to the debtor's security agreement; or
>
> (d) The collateral is deposit accounts, electronic chattel paper, investment property, or letter-of-credit rights, and the secured party has control under section 1309.104, 1309.105, 1309.106, or 1309.107 of the Revised Code pursuant to the debtor's security agreement.

O.R.C. § 1309.203(B). Debtor does not contend that Subsections (C)-(I) of the statute apply. The Note does indicate that Mr. Ayers gave Debtor value, and there is no dispute that Debtor had or obtained rights in the Vehicle. However, there is no proof of a security agreement, as required by each of the alternatives listed in § 9-203(3). *See* U.C.C. § 9-203, cmts. 1, 2.

There is no document designated as a security agreement. Nor does the Note qualify. "'Security agreement' means an agreement that creates or provides for a security interest." O.R.C. § 1309.102(73).

While the Note does mention that the purpose of the loan is to purchase the Vehicle, it does not demonstrate that Debtor, by signing the document, intended to grant Mr. Ayers a security interest therein. Nor does the certificate of title's notation of the lien create or provide for a security interest.[1]

Moreover, while the Ohio motor vehicle title laws govern the method of "perfection, the effect of perfection or nonperfection, and the priority of a security interest in goods covered by the certificate of title," O.R.C. §§ 1309.303, 1309.311(A)(2), (B), they do not supplant the UCC's basic requirement of a security agreement as a predicate to creation of a security interest. Indeed, the motor vehicle certificate of title law requires a security agreement before a lien may be noted on the title. *Id.* § 4505.13(B). There being no security agreement, the Vehicle is not encumbered by a valid, enforceable security interest and Trustee is entitled to turnover.

This case is indistinguishable from *Yoppolo v. Trombley (In re DeVincent)*, 238 B.R. 722 (Bankr. N.D. Ohio 1999), in which this court held that the prior version of UCC Article 9 required a security agreement before a security interest in a motor vehicle attached. Judge Speer first quoted former O.R.C. § 1309.22, which provided that "[a] security interest is perfected when it has attached and when all of the applicable steps required for perfection have been taken." *Id.* at 724. The court then quoted former O.R.C. § 1309.14, which required a security agreement for attachment to take place. *Id.* at 724-25. Judge Speer then stated that property rights are governed by state law, and held that former § 1309.14 required a security agreement (or possession), that value have been given, and that the debtor have rights in the property. *Id.* at 725. The court then held that the promissory note did not demonstrate an intent to create a security interest:

> It is axiomatic that in order to meet the requirement of O.R.C. § 1309.14(A)(1), the signed document constituting the purported security agreement must have been entered into with the intent to create a security interest. In making this determination, the language contained in the document must be the starting point. However, no specific words or

[1] Another reason the title certificate does not satisfy the security agreement requirement is that, under the facts of this case, a security agreement must be "authenticated" by the debtor's signature or symbol or process tantamount to her signature, O.R.C. §§ 1309.203(B)(3)(a), 1309.102(7), and the title does not contain Debtor's signature.

> formalized documents are necessarily required. Rather, the fact finder must only ascertain whether there was language in the instrument which would lead to the "logical conclusion that it was the intention of the parties that a security interest be created."
>
> In the present case, the promissory note executed by the Parties provides as follows:
>
> > Virginia M. DeVincent will purchase from Carmen M. Trombley a 1995 Dodge Neon, VIN IB3ES42C2SD359474, on August 17, 1998 for the sum of
>
> $3,500.00. Payable in monthly installments of $ 150.00, commencing on September 17, 1998. /s Virginia M. DeVincent & Carmen M. Trombley.
>
> > After closely,[sic] examining the foregoing language, this Court can find absolutely no indication that it was the intent of the Defendant and the Debtor to create a security interest. Thus, given the fact that Under [*sic*] Ohio law a promissory note, standing alone, does not grant to the holder of the note any actual interest in any specific piece of property, this Court cannot come to the logical conclusion that it was the intention of the Parties'[*sic*], vis-a-vis the promissory note, to create a security [*sic*] in the Debtor's vehicle.

Id. at 726 (citations omitted). Finally, Judge Speer held that the notation of a lien on a certificate of title does not satisfy the requirement of a security agreement, just as a financing statement with respect to non-titled goods does not satisfy the requirement. *Id.* at 726-27 (citing *Silver Creek Supply v. Powell*, 521 N.E.2d 828, 833-34 (Ohio Ct. App. 1987)).

The language of the Note is indistinguishable from the promissory note that Judge Speer found insufficient to create a security interest in *DeVincent*. Section 1309.203(B)(3)(a) requires "a security agreement that provides a description of the collateral." The language of the statute plainly requires something more than just a description of the collateral. The description of the Vehicle in the Note and the statement that the purpose of the loan is to purchase the Vehicle, either together or in isolation, are therefore insufficient to demonstrate an intent on Debtor's part to grant a security interest. The notation "LIEN RECORDED" was added by the title office, so it also fails to demonstrate *Debtor's* intent to grant a security interest to Mr. Ayers.

The revision of Ohio's UCC Article 9 in 2001 does not change this outcome. Former O.R.C § 1309.22 is substantially identical to § 1309.308(A) of the current code and the current § 1309.203(B)(3)

requires a security agreement just as did former § 1309.14. And there have been no pertinent substantive amendments to O.R.C. § 4505.13 since *DeVincent* was decided. Accordingly, *DeVincent* remains good law. For that reason and because the Note in this case is very similar to the promissory note in *DeVincent*, not granting the payee any interest in any specific piece of property, the outcome of this case must be the same

Because there has been no showing that there is a security agreement satisfying the requirements of O.R.C. § 1309.203(B)(3), the Vehicle is not of inconsequential value or benefit to Debtor's bankruptcy estate, even with Debtor's exemption rights, so Trustee is entitled to turnover.

THEREFORE, for the foregoing reasons,

IT IS ORDERED that Trustee's Motion for Turnover [Doc. #6] is granted, and that Debtor shall immediately surrender to Trustee the Vehicle and the certificate of title and keys thereto.

/s/ Mary Ann Whipple

Mary Ann Whipple
United States Bankruptcy Judge