

IT IS SO ORDERED.



Dated: July 05, 2007
04:37:22 PM

Honorable Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:	*	
	*	
MOUNTAIN CHEVROLET BUICK, INC.,	*	
	*	CASE NUMBER 06-40187
Debtor.	*	
	*	
*****	*	
	*	
MARK A. BEATRICE, Chapter 7,	*	
Trustee, et al.,	*	
	*	ADVERSARY NUMBER 06-4097
Plaintiffs,	*	
	*	
vs.	*	
	*	
GENERAL MOTORS ACCEPTANCE	*	
CORPORATION,	*	
	*	THE HONORABLE KAY WOODS
Defendant.	*	
	*	

M E M O R A N D U M O P I N I O N

This matter is before the Court upon Defendant/Counterclaim Plaintiff GMAC's Motion for Judgment on the Pleadings on the Counterclaim filed on behalf of Defendant/Counterclaim Plaintiff, General Motors Acceptance Corporation ("GMAC") on October 31, 2006 ("GMAC's Motion for Judgment"), and Limited Opposition of Plaintiff

Mark A. Beatrice to Motion for Judgment on the Pleadings of GMAC and Cross-Motion for Judgment on the Pleadings filed on behalf of Plaintiff/Counterclaim Defendant Mark Beatrice, the Chapter 7 Trustee ("Trustee"), on November 28, 2006 ("Trustee's Cross Motion").

With leave of Court, GMAC filed Defendant/Counterclaim Plaintiff GMAC's Reply in Support of Motion for Judgment on the Pleadings and Memorandum in Opposition to Plaintiff/Counterclaim Defendant Mark A. Beatrice, Chapter 7 Trustee's Cross Motion for Judgment on the Pleadings on January 5, 2007 ("GMAC's Reply"). Trustee filed Reply of Trustee in Support of his Cross-Motion for Judgment on the Pleadings and Memorandum in Opposition to GMAC [sic] Motion for Judgment on the Pleadings on January 19, 2007 ("Trustee's Reply").¹

This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334(b). Venue in this Court is proper pursuant to 28 U.S.C. §§ 1391(b), 1408, and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (K). The following constitutes the Court's findings of fact and conclusions of law pursuant to FED. R. BANKR. P. 7052.

¹On January 30, 2007, GMAC filed Defendant/Counterclaim Plaintiff GMAC's Motion for Oral Hearing on GMAC's Motion for Judgment on the Pleadings and Plaintiff/Counterclaim Defendant Mark A. Beatrice, Chapter 7 Trustee's Cross Motion for Judgment on the Pleadings ("Motion for Oral Hearing"). The Court scheduled a hearing on the Motion for Oral Hearing for March 8, 2007, At the hearing, GMAC withdrew the Motion for Oral Hearing.

In Trustee's First Cause of Action,² he seeks (i) a declaration that only he may recover preferential or fraudulent transfers pursuant to 11 U.S.C. §§ 547 and 548, and (ii) a determination of the extent of GMAC's security interest in any vehicles that he recovers pursuant to his Chapter 5 avoidance powers that Debtor Mountain Chevrolet Buick, Inc ("Debtor") transferred to third parties, who obtained title to the vehicles under Ohio Certificate of Motor Vehicle Title Law.

In its Counterclaim, GMAC requests a finding by this Court that GMAC has the first and best lien on Debtor's vehicles, trailers, and semi-trailers, as well as all proceeds from the sale of such property. In Section III.F. of its Motion for Judgment on the Pleadings, GMAC further asserts that its lien on the motor vehicles, trailers, and semi-trailers "remains attached to the property even if it is sold, exchanged, transferred or otherwise disposed." (GMAC's Mot. at 16).

In Trustee's Cross-Motion, Trustee writes, "Though not stated expressly, GMAC's contentions as to the proceeds and interest in accounts receivables and/or general intangibles might be construed to include a claimed interest in or lien upon any payments recovered by the Trustee pursuant to the Trustee's ability to recover as preferential or fraudulent transfers, cash payments to insiders in the year prior to Debtors's petition date, and cash

²Trustee asserts two causes of action in the Complaint. According to representations in Trustee's Cross Motion, his Second Cause of Action was resolved by the stipulated Order approving the sale of the good will and general intangibles of Debtor and providing for a carve out of \$20,000.00 for the bankruptcy estate, but otherwise transferring the liens of GMAC and Plaintiff Home Savings and Loan Company of Youngstown, Ohio ("Home Savings") to the proceeds of the sale pending a determination as to the priority of the competing liens. Trustee further represents that he intends to dismiss the Fourth Cause of Action.

payments to creditors in the ninety days prior to the petition date." (Trustee's Cross Mot. at 3.) As a consequence, Trustee also seeks a determination that any cash payments recovered pursuant to 11 U.S.C. §§ 547 and 548 will be recovered exclusively for the benefit of unsecured creditors.

I. Standard of Review

Judgment on the pleadings is governed by FED. R. CIV. P. 12(c), which is made applicable to this adversary proceeding pursuant to FED. R. BANKR. P. 7012. Rule 12(c) provides, in pertinent part:

After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings.

Judgment on the pleadings is proper when no material issue of fact exists and the party is entitled to judgment as a matter of law. *Paskvan v. Cleveland Civil Service Commission*, 946 F.2d 1233, 1235 (6th Cir. 1991).

In determining if a material issue of fact exists, the Court must construe the complaint in the light most favorable to the non-moving party, *Estill County Board of Education v. Zurich Insurance Co.*, 84 Fed. Appx. 516 (6th Cir. 2003), and take all well-pleaded material of the non-moving party as true. *United States v. Moriarty*, 8 F.3d 329, 332 (6th Cir. 1993) (quoting *Southern Ohio Bank v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 479 F.2d 478, 480 (6th Cir. 1973)). The Court is not required to accept "sweeping unwarranted averments of fact," *Official Committee of Unsecured Creditors v. Austin Financial Services, Inc. (In re KDI Holdings, Inc.)*, 277 B.R. 493, 502 (Bankr. S.D. N.Y. 1999) (quoting *Haynesworth v. Miller*, 820 F.2d 1245, 1254 (D.C. Cir. 1987)), or

"conclusions of law or unwarranted deduction." *In re KDI Holdings Inc.*, 277 B.R. at 502 (quoting *First Nationwide Bank v. Gelt Funding Corp.*, 27 F.3d 763, 771 (2d Cir. 1994)).

Finally, where the parties present matters outside the pleadings, the Court may exclude such matters or convert the Rule 12(c) motion to a motion for summary judgment. *Max Arnold & Sons, LLC v. W.L. Hailey & Company, Inc.*, 452 F.3d 494, 503 (6th Cir. 2006). However, a court may consider exhibits to a motion for judgment on the pleadings where the exhibits are incorporated by reference in the plaintiff's complaint and are central to the plaintiff's claim. *Weiner v. Klais & Co.*, 108 F.3d 86, 89 (6th Cir. 1997). Judgment on the pleadings may only be granted if the moving party is clearly entitled to judgment. *Southern Ohio Bank*, 479 F.2d at 480.

The procedure for granting summary judgment is found in FED. R. Civ. P. 56(c), made applicable to this proceeding through FED. R. BANKR. P. 7056, which provides in part that:

The judgment 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. BANKR. P. 7056(c). Summary judgment is proper if there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). A fact is material if it could affect the determination of the underlying action. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986);

Tennessee Department of Mental Health & Retardation v. Paul B., 88 F.3d 1466, 1472 (6th Cir. 1996). An issue of material fact is genuine if a rational fact-finder could find in favor of either party on the issue. *Anderson*, 477 U.S. at 248-49; *SPC Plastics Corp. v. Griffith (In re Structurlite Plastics Corp.)*, 224 B.R. 27 (B.A.P. 6th Cir. 1998). Thus, summary judgment is inappropriate "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248 (1986).

In a motion for summary judgment, the movant bears the initial burden to establish an absence of evidence to support the nonmoving party's case. *Celotex*, 477 U.S. at 322; *Gibson v. Gibson (In re Gibson)*, 219 B.R. 195, 198 (B.A.P. 6th Cir. 1998). The burden then shifts to the nonmoving party to demonstrate the existence of a genuine dispute. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 590 (1992). 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). However, 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 v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989) (quoting *Anderson*, 477 U.S. at 257). 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. *Street*, 886 F.2d at 1479.

II. Procedural Posture of Motions

Although both parties assert that they seek "judgment on the pleadings," each party goes beyond the pleadings in arguing for the requested relief. Although neither party supplied affidavits in connection with the motion and cross motion, the parties have attached documents that go beyond the allegations in the Complaint, Answer, and Counterclaim. As a consequence, the Court will treat GMAC's Motion for Judgment and Trustee's Cross Motion as cross motions for partial summary judgment. The standard for reviewing the motions - however described or treated - is whether one of the parties is entitled to judgment as a matter of law.

III. Facts

The following facts are undisputed and are taken from the Complaint, Trustee's Answer, and GMAC's Counterclaim, unless provided otherwise. Debtor operated an automobile dealership at 415 E. Sixth Street, East Liverpool in Columbiana County, Ohio. (Compl. ¶ 6.) On October 1, 2002, GMAC obtained Debtor's written authorization to file a U.C.C. Financing Statement naming GMAC as the secured party and Debtor as the debtor and describing the collateral as follows:

Motor vehicles, trailers, semi-trailers, and accessories, and the replacement parts for any of these; and general intangibles; contract rights, chattel paper, present and future accounts and assignments of accounts including, but not limited to, those arising out of the sale or lease thereof, including rents receivables under leases and rental agreements.

(Letter Authorizing GMAC to File Financing Statement (Countercl., Ex. B); see also Countercl. ¶ 4, Trustee's Answer ¶ 2).

On October 2, 2002, GMAC filed a U.C.C. Financing Statement with the Ohio Secretary of State, which identifies Debtor as the debtor and describes the collateral subject to the Financing Statement as follows:

Motor vehicles, trailers, semi-trailers, and accessories, and the replacement parts for any of these; and general intangibles; contract rights, chattel paper, present and future accounts and assignments of accounts including, but not limited to, those arising out of the sale or lease thereof, including rents receivables under leases and rental agreements.

(U.C.C. Financing Statement dated October 2, 2002 (Compl., Ex. C and Countercl., Ex. A); see also Countercl. ¶ 3, Trustee's Answer ¶ 2). On October 10, 2002, Debtor and GMAC executed a Wholesale Security Agreement which provides that, in exchange for GMAC's financing of vehicle inventory, Debtor would provide GMAC with a security interest in the vehicle inventory:

The collateral subject to this Wholesale Security Agreement is new vehicles held for sale or lease and used vehicles acquired from manufacturers or distributors and held for sale or lease, and all vehicles of like kinds or types now owned or hereafter acquired from manufacturers, distributors or sellers by way of replacement, substitution, addition or otherwise, and all additions and accessions thereto and all proceeds of such vehicles, including insurance proceeds.

(Wholesale Security Agreement dated October 10, 2002 (Compl., Ex. B and Countercl., Ex. C); see also Countercl. ¶ 5, Trustee Answer ¶ 40.

On or about January 19, 2006, GMAC filed a complaint in the Columbiana Court of Common Pleas alleging that Debtor and its principals transferred motor vehicles (prior to the Petition Date) from Debtor's inventory to insiders and creditors as a part of an overall scheme to convert GMAC's collateral ("State Court Action").

(First Amended Verified Complaint for Injunctive and Monetary Damages, Case No. 2006 CV 50, J. Tobin (GMAC's Reply, Ex. A)).

Debtor filed a voluntary petition pursuant to chapter 11 of the Bankruptcy Code on February 27, 2006 (the "Petition Date"). By Order dated July 6, 2006, this case was converted to case under chapter 7.

In a Memorandum Opinion and Order granting Trustee's Motion to Enforce Automatic Stay Regarding State Court Actions by GMAC to Pursue Claims Arising Out of Transfers Giving Rise to Claims for Preferential Transfer and Fraudulent Conveyances issued on June 27, 2007 in the main bankruptcy case, this Court held that (1) only Trustee has standing to pursue preferential and fraudulent conveyances actions on behalf of the estate, and (2) the State Court Action (as well as another case filed by GMAC against transferees of Debtor) are subject to the automatic stay pursuant to 11 U.S.C. § 362.

IV. Analysis

Having already addressed GMAC's lack of standing to assert fraudulent conveyance actions in state court, two issues remain before the Court: (i) Does GMAC, based upon its priority perfected security interest in Debtor's vehicle inventory, hold the first lien on any vehicles (or proceeds from the sale of such vehicles) recovered by Trustee pursuant to his Chapter 5 avoidance powers? and (ii) Does GMAC have a security interest in cash payments made by Debtor during the preference period based upon GMAC's priority

perfected security interest in Debtor's accounts receivable and general intangibles?³

The parties agree that whether GMAC's pre-petition security interest remains attached to avoidance recoveries is governed by the rule of law announced in *John Hancock Life Ins. Co. v. Jankowski (In re Hospitality Investment Corp.)*, 283 B.R. 451 (Bankr. E.D. Mich. 2002). In that case, the bankruptcy court held that "a pre-petition lien or security interest will attach to an avoidance recovery if, but only if, what is recovered is clearly identifiable as the collateral itself or as the proceeds of pre-petition collateral, and, if the creditor's security interest would be enforceable against the transferee outside of bankruptcy." *Id.* at 455 (quoting Young & Bohm, *Preferences and Fraudulent Transfers*, 787 PLI/Comm 751, 886 (1999)).⁴

A. Fraudulent and/or Preferential Transfers of Motor Vehicles

In Ohio, a security interest in a motor vehicle held as inventory for sale by a dealer continues in the collateral, unless the secured party authorizes the disposition of the property free and clear (OHIO REV. CODE ANN. § 1309.315(A)(1) (West 2007)), or a buyer purchases the property in the ordinary course of business. OHIO REV. CODE ANN. § 1309.320 (West 2007). A buyer in the ordinary

³The Court will assume for the purposes of this Memorandum Opinion and Order that GMAC's has the first and best lien on Debtor's vehicle inventory, accounts receivable, and general intangibles. The issue of priority between GMAC and Home Savings regarding non-vehicle inventory and general intangibles, among other things, remains to be determined.

⁴The *Hospitality Investment* Court recognized what it characterized as "a growing consensus among courts - particularly in the best reasoned opinions - that rejects both the simplistic view that a blanket prepetition security interest automatically attaches to any avoidance recovery, and the equally simplistic view that a prepetition security interest will never attach to avoidance recoveries." *Id.*

course of business ("BOCB") takes free of a security interest created by buyer's seller even if the security interest is perfected and the buyer knows of its existence. *Id.*

A BOCB is defined as one who buys goods "in good faith, without knowledge that the sale violates the rights of another person and in the ordinary course." OHIO REV. CODE ANN. § 1301.01(I) (West 2007). A BOCB buys goods in the ordinary course if the sale to the person comports with the seller's own usual or customary practices. *Id.* Reading this definition in conjunction with § 1309.320, a buyer takes free of the security interest if he or she merely knows that a security interest covers the goods; however, a buyer takes subject to such security interest if he or she knows, in addition, that the sale violates a term in an agreement with the secured party. See OHIO REV. CODE ANN. § 1309.320, Official Comment 3.

Finally, "[a] person who acquires goods in a transfer in bulk or as security for or in total or partial satisfaction of a money debt is not a buyer in the ordinary course of business." R.C. § 1301.01(I). The requirement that a BOCB not acquire goods in satisfaction of a pre-existing debt was explained in *United States v. Handy and Harman*, 750 F.2d 777 (9th Cir. 1984):

By incorporating the definition of buyer in ordinary course of business, § 9307(1) permits a buyer of inventory to take the inventory free of a security interest only if he gives some new value in exchange for the inventory. The inventory financier is protected because his security interest in the inventory will attach to the new value, which constitutes "proceeds" of the inventory. If the rule were otherwise, and a transferee of inventory who received the goods in satisfaction of a pre-existing debt were permitted to keep them free of security interests, the effect would be to enable an unsecured creditor - the transferee - to

bootstrap himself into priority over the secured creditor who looks to the inventory for security.

Id. at 782.

However, Trustee contends that, because Ohio is a Certificate of Title ("COT") state, ownership is ultimately determined based upon the COT. In other words, Trustee argues that receipt of a COT by a transferee cuts off GMAC's security interest in the motor vehicle in Ohio.

GMAC counters that, according to R.C. § 4505.13(A)(2), R.C. § 1309 applies to a security interest in a motor vehicle held as inventory for sale by a dealer, and that the security interest has priority over creditors of the dealer, including a trustee in bankruptcy, without notation of the security interest on the certificate of title. GMAC further asserts that the motor vehicles were converted by tortfeasors, "thereby establishing an independent basis for GMAC's continued, valid, perfected security interest in any proceeds." (GMAC's Reply at 2.)

Trustee's COT argument appears to conflate ownership with BOCB status. Simply because a transferee holds the COT on a motor vehicle does not make him or her a BOCB capable of extinguishing GMAC's security interest. Likewise, GMAC's reliance on § 4505.13(A)(2) is misplaced because that section governs motor vehicles held as inventory for sale by a dealer. When Debtor transferred the motor vehicles out of inventory to third parties, R.C. § 1309.320 became the operative section of the Code.

Therefore, in order to demonstrate that GMAC's security interest survives the transfer of the motor vehicles in this case, GMAC must show that (i) the motor vehicles at issue were clearly

identifiable as collateral, and (ii) the transferees were not BOCBs. There does not appear to be any disagreement or dispute that the motor vehicles at issue were part of GMAC's collateral. (Trustee's Cross Mot. at 3.) ("No factual dispute exists as to the facts giving rise to GMAC's security interest, but the Trustee disagrees with GMAC's legal conclusions arising therefrom in two important respects.") There are questions of fact, however, that preclude this Court from determining whether one, some, or all of the transferees were BOCBs.⁵ Accordingly, whether GMAC's security interest survives the transfer of the motor vehicles to third parties in this case is a fact-based determination. As a consequence, summary judgment is not appropriate in favor of either party on this issue.

B. Preferential Cash Transfers

"A transferee of money takes the money free of a security interest unless the transferee acts in collusion with the debtor in violating the rights of the secured party." OHIO REV. CODE ANN. § 1309.332(A) (West 2007). The same is true with respect to funds from a deposit account. OHIO REV. CODE ANN. § 1309.332(B) (West 2007).

In order to assert a lien on funds recovered in a preference action, GMAC would have to prove that the recovered funds are "the very same moneys paid by debtor to the preference transferee," that

⁵For instance, in the State Court Action, GMAC alleges that the various transferees "converted the vehicles, proceeds, and/or other assets over which GMAC holds a perfected security interest." (See generally First Amended Verified Complaint for Injunctive and Monetary Damages, Case No. 2006 CV 50, J. Tobin (GMAC's Reply, Ex. A)). In GMAC's Reply, GMAC asserts that "the insider/creditor defendants in the State Court Action received vehicles and/or proceeds from the sale of vehicles in total or partial satisfaction of outstanding debts owed to them by [Debtor]." (Trustee's Rep. at 14.) Although GMAC has provided argument regarding the relationships between Debtor and the transferees, neither GMAC or Trustee has provided evidence to establish those relationships.

is, the actual proceeds of Debtor's accounts receivables or general intangibles. *In re Southeast Railroad Contractors, Inc.*, 235 B.R. 619, 622 (Bankr. E.D. Tenn. 1996). Based upon what the *Southeast Railroad* Court summarized as "the fungibility of money and the attendant commingling problems," it is unlikely that GMAC can carry its burden of proof with respect to cash brought into the estate.

Furthermore, the Sixth Circuit has held that pre-petition statutory liens do not reattach by operation of law to proceeds recovered by a bankruptcy trustee in preference actions. *Frank v. Michigan State Unemployment Agency (In re Thompson Boat Company)*, 252 F.3d 852, 854 (6th Cir. 2001). The *Thompson Boat* Court reasoned that "[t]he Bankruptcy Code allows only trustee, not debtors, to initiate a preference action to avoid certain transfers, so proceeds recovered are property of the bankruptcy estate, not the debtor." *Id.*; *In re Southeast Railroad Contractors, Inc.*, 235 B.R. 619, 623 (Bankr. E.D. Tenn. 1996)("[P]reference actions are unique bankruptcy devices designed specially to increase the dividend for unsecured creditors and that therefore secured creditors, even those with rights in proceeds, can have no interest in a trustee's preference recovery.")

The foregoing rationale is consistent with the middle view adopted in *Hospitality Investment Corp.* and advanced by both GMAC and Trustee in their respective briefs: Where GMAC "has no independent claim to the property which is subject to the trustee's avoiding powers and could not recover it from the third party, [GMAC] cannot improve its position because of the trustee's exercise of his avoiding powers" *Hospitality Investment*

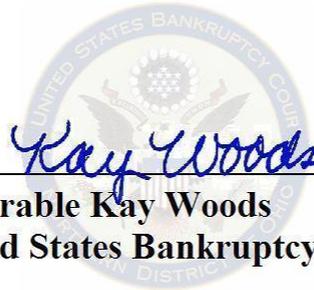
Corp., 283 B.R. at 455 (quoting *Preferences and Fraudulent Transfers*, 781 PLI/Comm at 886).

To the extent Trustee recovers cash payments as preferences, such recoveries will come back into the estate without being subject to GMAC's security interest or lien, unless GMAC can show that the funds are the actual proceeds from Debtor's accounts receivables and general intangibles. Accordingly, Trustee's Cross Motion on this issue will be granted.

An appropriate Order will follow.

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IT IS SO ORDERED.



Dated: July 05, 2007
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Honorable Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

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CASE NUMBER 06-40187

ADVERSARY NUMBER 06-4097

THE HONORABLE KAY WOODS

O R D E R

For the reasons set forth in the Court's Memorandum Opinion, this Court denies GMAC's Motion for Judgment on the Pleadings on the Counterclaim filed on behalf of Defendant/Counterclaim Plaintiff, General Motors Acceptance Corporation on October 31, 2006. The Limited Opposition of Plaintiff Mark A. Beatrice to

Motion for Judgment on the Pleadings of GMAC and Cross-Motion for Judgment on the Pleadings filed on behalf of Plaintiff/Counterclaim Defendant Mark Beatrice, the Chapter 7 Trustee on November 28, 2006, is granted in part, with respect to preferential recoveries of cash, and denied in part, with respect to the recovery of motor vehicles.

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