

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION



In re: ) Case No. 10-13836  
)  
NAKIA SCOTT, ) Chapter 7  
)  
Debtor. ) Judge Pat E. Morgenstern-Clarren  
\_\_\_\_\_)  
)  
LAUREN A. HELBLING, TRUSTEE, ) Adversary Proceeding No. 10-1234  
)  
Plaintiff, )  
)  
v. )  
)  
AUTO SITE INC., ) **MEMORANDUM OF OPINION**  
)  
Defendant. )

Prepetition, debtor Nakia Scott purchased a vehicle from the defendant Auto Site, Inc.<sup>1</sup> and granted a lien which was noted on the vehicle title within the 90-day preference period. The chapter 7 trustee filed this adversary proceeding seeking to avoid the lien as a preferential transfer under 11 U.S.C. § 547. The parties submitted this matter for decision on stipulated facts and briefs.<sup>2</sup> The plaintiff trustee filed a brief in support of her position; the defendant did not.<sup>3</sup> For the reasons stated below, the court finds that the trustee is entitled to judgment on the complaint.

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<sup>1</sup> The defendant's name appears as Autosite in the stipulations and various pleadings; however, this spelling is used in the defendant's answer and appears on the bill of sale and title.

<sup>2</sup> Docket 11.

<sup>3</sup> Docket 14.

## **I. JURISDICTION**

Jurisdiction exists under 28 U.S.C. § 1334 and General Order No. 84 entered by the United States District Court for the Northern District of Ohio. This is a core proceeding under 28 U.S.C. § 157(b)(2)(F).

## **II. FACTS**

The parties stipulated to these facts:<sup>4</sup>

1. On April 23, 2010[,] the debtor filed a voluntary petition . . . under chapter 7 of the Bankruptcy Code[.]
2. The debtor owns a 2009 Dodge Charger which she listed in her petition.
3. The defendant Autosite, Inc. asserts an interest in the 2009 Dodge [the vehicle] by virtue of a lien noted on the certificate of title.
4. Autosite, Inc. has a “bill of sale contract security agreement and disclosure statement” which names the 2009 Dodge Charger and which was signed by the debtor on January 29, 2010.
5. The Ohio title to the vehicle was issued by Cuyahoga County on April 3, 2010 and reflects the lien of Autosite, Inc.

## **III. DISCUSSION**

The trustee claims that the defendant’s lien is a preferential transfer that is avoidable under Bankruptcy Code § 547. That section provides:

- (b) Except as provided in subsections (c) and (i) of this section, the trustee may avoid any transfer of an interest of the debtor in property—
- (1) to or for the benefit of a creditor;
  - (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

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<sup>4</sup> Docket 15.

- (3) made while the debtor was insolvent;
- (4) made –
  - (A) on or within 90 days before the date of the filing of the petition; or
  - (B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and
- (5) that enables such creditor to receive more than such creditor would receive if –
  - (A) the case were a case under chapter 7 of this title;
  - (B) the transfer had not been made; and
  - (C) such creditor received payment of such debt to the extent provided by the provisions of this title.

11 U.S.C. § 547(b). The trustee has the burden of proof.<sup>5</sup> 11 U.S.C. § 547(g). The debtor “is presumed to have been insolvent on and during the 90 days immediately preceding the date of the filing of the petition.” 11 U.S.C. § 547(f).

The creation of a lien is a transfer under § 547. 11 U.S.C. § 101(54)(A). For these purposes, the transfer is made-

- (A) at the time such transfer takes effect between the transferor and the transferee, if such transfer is perfected at, or within 30 days after, such time, except as provided in subsection (c)(3)(B);
- (B) at the time such transfer is perfected, if such transfer is perfected after such 30 days; or

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<sup>5</sup> The defendant bears the burden of proving the nonavoidability of a transfer under subsection (c) of § 547. 11 U.S.C. § 547(g). While the defendant’s answer asserted that the transfer at issue was not avoidable under § 547(c)(2), that defense fails because the stipulations do not provide a factual basis for it.

(C) immediately before the date of the filing of the petition, if such transfer is not perfected at the later of—

- (i) the commencement of the case; or
- (ii) 30 days after such transfer takes effect between the transferor and the transferee.

11 U.S.C. § 547(e)(2). However, a “transfer is not made until the debtor has acquired rights in the property transferred.” 11 U.S.C. § 547(e)(3).

When a transfer involves property other than real property, the transfer “is perfected when a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of the transferee.” 11 U.S.C. § 547(e)(1)(B). In Ohio, Ohio Revised Code § 4505.13 governs the perfection of a security interest in a motor vehicle. Under that statute, a security interest in a motor vehicle may be perfected in one of two ways: “1) by notation of the lien on the vehicle’s certificate of title, and 2) by the clerk’s entering the notation into the automatic title processing system if no physical certificate of title has yet been entered.” *Rhiel v. Wells Fargo Fin. Acceptance (In re Fields)*, 351 B.R. 887, 890 (Bankr. S.D. Ohio 2006). After a lien is noted, it “is valid as against the creditors of the debtor, whether armed with process or not, and against subsequent purchasers, secured parties, and other lienholders or claimants.” OHIO REV. CODE § 4505.13(B).

On January 29, 2010, the debtor incurred a debt to the defendant for the purchase of the vehicle, acquired an interest in the vehicle, and transferred an interest in the vehicle to the defendant by granting the lien. 11 U.S.C. § 547(b)(1). The lien became effective against the debtor’s creditors when it was noted on the title issued on April 3, 2010. As that perfection was more than 30 days after the transfer took effect between the debtor and defendant, the transfer

was made on April 3, 2010 for preference purposes. 11 U.S.C. § 547(e)(1)(B) and (e)(2)(B). The transfer was, therefore, made within 90 days of the debtor's April 23, 2010 bankruptcy filing and was made on account of the antecedent January 29, 2010 debt. 11 U.S.C. § 547(b)(2) and (b)(4)(A). The debtor is presumed to have been insolvent when the transfer was made. 11 U.S.C. § 547(b)(3).

The remaining issue is whether the transfer had the requisite preferential effect. Under § 547(b)(5), the transfer must “enable[] a creditor to receive more than it would receive if the case were a Chapter 7 case and the transfer had not been made.” *Still v. Rossville Bank (In re Chattanooga Wholesale Antiques, Inc.)*, 930 F.2d 458, 464 (6th Cir. 1991). Although the stipulations do not address this element, it is apparent from filings made in the chapter 7 case that:<sup>6</sup> (1) this adversary proceeding to avoid the lien is the only estate asset;<sup>7</sup> (2) the general unsecured claims filed total \$21,803.04;<sup>8</sup> and (3) the defendant filed a secured claim for \$22,030.00.<sup>9</sup> If the transfer remains valid, the defendant receives the value of the vehicle.<sup>10</sup> On the other hand, if the transfer had not been made, the defendant would be treated as an unsecured creditor and would share with the other unsecured creditors in a pro rata distribution of the value

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<sup>6</sup> The court takes judicial notice of these facts. FED. R. EVID. 201(b). As the defendant has not been given prior notice, it may request an opportunity to be heard on this issue on or before December 27, 2010. FED. R. EVID. 201(e).

<sup>7</sup> See trustee's initial report, case no. 10-13816, docket 8.

<sup>8</sup> See claims register, case no. 10-13836.

<sup>9</sup> *Id.*

<sup>10</sup> Although a correct valuation is not required for purposes of this decision, both the trustee and the debtor have claimed a value of \$12,700.00. See debtor's schedule D and trustee's initial report, docket 1 and docket 8.

of the estate. At most, the value of the estate is the value of the vehicle,<sup>11</sup> less any administrative expenses. Consequently, the requirements of § 547(b)(5) are satisfied.

#### **IV. CONCLUSION**

For the reasons stated, the plaintiff trustee is entitled to a judgment avoiding the defendant's lien on the debtor's vehicle as a preferential transfer under 11 U.S.C. § 547. A separate judgment will be entered in accordance with this decision.



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Pat E. Morgenstern-Clarren  
United States Bankruptcy Judge

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<sup>11</sup> Although the trustee is seeking to avoid the lien, her intentions as to the vehicle are unclear.

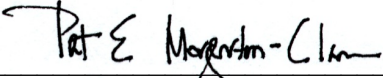
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AUTO SITE INC., ) **JUDGMENT**  
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Defendant. )

For the reasons stated in the memorandum of opinion entered this same date, the plaintiff trustee is granted judgment on the complaint and the defendant Auto Site Inc.'s lien on debtor's 2009 Dodge Charger is avoided as a preferential transfer under 11 U.S.C. § 547.

IT IS SO ORDERED.

  
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Pat E. Morgenstern-Clarren  
United States Bankruptcy Judge