

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:)
))
STEVEN T. ENGSTROM and) CASE NO. BK02-42610
JAIME M. ENGSTROM,) CH. 7
))
Debtor(s).) FILING NO. 29, 34

MEMORANDUM

Hearing was held in Lincoln, Nebraska, on June 11, 2003, on the Motion to Avoid Lien of TierOne Bank filed by the Trustee, and the Objection of TierOne Bank. James A. Overcash appeared for TierOne Bank, and Rick D. Lange appeared as Chapter 7 Trustee. This memorandum contains findings of fact and conclusions of law required by Federal Rule of Bankruptcy Procedure 7052 and Federal Rule of Civil Procedure 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(F).

Mr. Engstrom and an entity in which he apparently has an interest purchased a vehicle on July 27, 2002. Mr. Engstrom in his individual capacity and in his capacity as an official of the related entity executed the appropriate documents to grant a security interest in the vehicle to the lender that financed the purchase, TierOne Bank. On that same day, July 27, 2002, the vehicle seller sent the appropriate paperwork to the Department of Motor Vehicles to obtain a title with the lien of TierOne Bank noted thereon. The lien was noted on the title by the Department of Motor Vehicles on August 23, 2002. On October 7, 2002, the Engstroms filed this Chapter 7 case.

The Chapter 7 Trustee has moved to avoid the lien of TierOne Bank on the interest of the debtor, Mr. Engstrom, in the vehicle. The position of the Trustee is that Mr. Engstrom transferred his interest in the property, by granting of a lien, on July 27, 2002. The notation of the lien occurred on August 23, 2002, more than twenty days after the transfer (or grant of security interest) occurred. The bankruptcy petition was filed less than ninety days later. Therefore, under 11 U.S.C. § 547, the transfer, or granting of the lien, was preferential and avoidable because TierOne did not perfect its interest on or before twenty days after the debtor received possession of the

property, as required by 11 U.S.C. § 547(c)(3)(B), an exception to the preferential transfer provisions. The Trustee relies upon Fidelity Financial Services, Inc. v. Fink, 522 U.S. 211, 118 S. Ct. 651 (1998).

In Fidelity v. Fink, the United States Supreme Court, affirming the Eighth Circuit Court of Appeals, held that the twenty-day perfection requirement of 11 U.S.C. § 547(c)(3)(B) was to be strictly construed, and the bank, which perfected its lien in accordance with Missouri law but more than twenty days after the debtor granted the security interest and took possession of the vehicle, lost its lien status.

In this case, TierOne Bank suggests that there is a state law exception to the rule articulated in Fidelity v. Fink when there is more than one co-owner of the vehicle and all of the co-owners consented to one of the co-owners encumbering not only its interest in the property, but the interest of all of the other co-owners.

Although the position of the bank is interesting, the state law concept of "consent" or "ratification" of one co-owner encumbering all of the other co-owners' interests does not and cannot override the statutory provisions of the Bankruptcy Code. The Code, at 11 U.S.C. § 101(54), defines a "transfer" as "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property, including retention of title as a security interest and foreclosure of the debtor's equity of redemption." Such a transfer may be avoided by the Trustee pursuant to 11 U.S.C. § 547(b) in a case such as this, unless the transaction fits into the exception referred to above at 11 U.S.C. § 547(c)(3)(B). The terms "consent" or "ratification" used by the bank are both, in the context of the Bankruptcy Code, "transfers" as defined in 11 U.S.C. § 101(54) and, therefore, cannot insulate the bank from the avoidance action being brought by the Trustee.

The motion of the Trustee is granted.

The motion is granted, even though procedurally the matter should have been brought before the court in the context of an adversary proceeding. The Bankruptcy Rules, at Rule 7001(2), provide that a proceeding to determine the validity, priority, or extent of a lien or other interest in property, other than a proceeding under Rule 4003(d), must be brought as an adversary

proceeding. However, since neither the Trustee, nor, more importantly, TierOne Bank, has raised the issue, and since both participated in the hearing on the motion without objection, the apparent requirement that this type of action be brought in the context of an adversary proceeding is deemed waived by both parties.

The Trustee is authorized to submit a proposed order containing the appropriate language to direct the state or county agencies to issue a new title free and clear of the lien of the bank.

Separate judgment to be filed.

DATED this 16th day of June, 2003.

BY THE COURT:

/s/Timothy J. Mahoney
Chief Judge

Notice given by the Court to:

John Rouse
James A. Overcash
*Rick D. Lange, Chapter 7 Trustee
United States Trustee

Movant (*) is responsible for giving notice of this order to all other parties not listed above if required by rule or statute.

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JUDGMENT

Hearing was held on June 11, 2003 on the Motion to Avoid Lien of TierOne Bank, filing no. 29, filed by the Trustee, and the Objection to Avoid Lien of TierOne Bank, filing no. 34, filed by TierOne Bank. Appearances: Rick D. Lange as the Chapter 7 Trustee, James A. Overcash for TierOne Bank.

IT IS ORDERED:

In accordance with the Memorandum entered this date, the Motion to Avoid Lien of TierOne Bank, filing no. 29, is granted.

DATED this 16th day of June, 2003.

BY THE COURT:

/s/Timothy J. Mahoney
Chief Judge

Notice given by the Court to:

John Rouse
James A. Overcash
*Rick D. Lange, Chapter 7 Trustee
United States Trustee

Movant (*) is responsible for giving notice of this order to all other parties not listed above if required by rule or statute.