UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF	)	
	)	
HARLAN GARBERS,	)	CASE NO. BK85-1933
	)	
DEBTOR	)	

MEMORANDUM OPINION

This matter came on for hearing on October 16, 1986, on the debtor's motion to avoid lien. Appearing on behalf of the debtors was John Hahn of Jeffrey, Hahn & Hemmerling, of Lincoln, Nebraska. Appearing on behalf of the creditor, Central Bank of Central City, Nebraska, was Richard Vanderheiden of Phares, Torpin, Vanderheiden and Mesner of Central City, Nebraska.

Findings of Fact

The debtor, Harlan Garbers, a farmer, filed a petition for relief under Chapter 11 of the Bankruptcy Code on August 26, 1985. The debtor later converted said petition to a Chapter 7 proceeding on July 14, 1986. On October 23, 1985, the debtor completed and signed his bankruptcy schedules. On Schedule B-4, Mr. Garbers claimed "automobiles, trucks, farm equipment and grain bins (6 months support)" in accordance with Nebraska Revised Statute §25-1556 (Reissue 1984). The creditor Central Bank (the "Bank") did not object to the exemption.

On October 25, 1985, the Bank filed a motion for relief from the stay as to some of the debtor's personal property. Attached to the motion for relief was a copy of a financing statement executed by the debtor and delivered to the Bank which financing statement granted the Bank a security interest in all equipment owned by the debtor. Also attached to the motion was a partial listing of the major pieces of equipment secured by the financing statement. Absent from the list was a 1972 Ford Model 800 truck, which truck is the subject matter of the debtor's motion to avoid lien.

On November 14, 1985, the debtor consented to relief from the stay, and on November 20, 1985, relief from the stay was granted. On November 21, 1985, the Bank filed an affidavit containing an appraisal of the debtor's farm equipment, which appraisal did list the 1972 Ford Model 800 truck. On February 27, 1986, the Bank notified the debtor of its intention to sell the truck, and on March 5th and again on March 20th, 1985, the debtor informed the

Bank of his belief that the Bank did not have a perfected security interest in the truck, and he demanded return of the truck to him.

On April 11, 1986, the Bank sold the said truck at a private sale with notice to the debtor for the sum of $8,505. The Nebraska Certificate of Title to the 1972 Ford Model 800 truck contained no reference to any lien or security interest of the Bank.

Issues

1. Did the Bank have a perfected security interest in the 1972 Ford Model 800 truck and thereby a lien which may not be avoided?

2. If the Bank's alleged lien may be avoided, may the debtor claim the proceeds from the truck as exempt under §25-1556 of the Nebraska Revised Statutes (Reissue 1984)?

Decision

The Bank did not comply with the requirements of §60-110 Nebraska Revised Statutes (Reissue 1984) for perfecting a security interest in a motor vehicle by noting the security interest on the Certificate of Title. Therefore, the Bank did not have a perfected security interest in the truck and its alleged lien may be avoided. The proceeds of the sale of the truck are the property of the bankruptcy estate and must be paid over to the trustee. An evidentiary hearing will be held to determine the amount of the proceeds which the debtor may claim as exempt under §25-1556 Nebraska Revised Statutes (Reissue 1984).

Conclusions of Law

Section 60-110 Nebraska Revised Statutes (Reissue 1984) states in part as follows:

> The provisions of Article 9, Uniform Commercial Code, shall never be construed to apply to or to permit or require the deposit, filing or other record whatsoever of a security agreement, conveyance intended to operate as a mortgage, trust receipt, conditional sales contract, or similar instrument, or any copy of the same covering a motor vehicle. Any mortgage, conveyance intended to operate as a security agreement as provided by Article 9, Uniform Commercial Code, trust receipt, conditional sales contract or other similar instrument covering a motor vehicle, if such instrument is accompanied by a delivery of such manufacturer's or importer's certificate and

> followed by actual and continued possession of same by the holder of said instrument or, in the case of a Certificate of Title, if a notation of same has been made by the County Clerk on the face thereof, shall be valid as against the creditors of the debtor, whether armed with process or not. . . . Subject to the foregoing, all liens, security agreements and encumbrances, noted upon a Certificate of Title, shall take priority according to the order of time in which the same are noted thereon by the County Clerk.

The existence of the financing statement covering all farm equipment and the debtor's consent to the lifting of the stay notwithstanding, the fact remains that the truck in question is a motor vehicle and that §60-110 requires that a security interest in a motor vehicle having a Certificate of Title be noted on that Certificate of Title in order to be perfected. The Bank's financing statement, whether it listed the truck or not, was not sufficient to perfect a security interest in the truck. In Cushman Sales & Service of Nebraska, Inc., vs. Muirhead, 201 Neb. 495, 268 N.W.2d 440 (1978), the Nebraska Supreme Court held that §60-110 Nebraska Revised Statutes, 1943, "eliminated the practice of filing and recording chattel mortgages on motor vehicles and substituted the recording of security interests upon the Certificate of Title itself (citation omitted)." Therefore, since the Bank's interest was unperfected, it could be avoided by the trustee in bankruptcy, a lien creditor from the date of the filing of the petition. The Bank was not entitled to sell the truck nor was it entitled to retain the proceeds from such a sale. Proceeds are considered a part of the bankruptcy estate until this Court can determine from an evidentiary hearing whether or not the debtor may claim the truck or its proceeds as exempt under §25-1556 Nebraska Revised Statutes (Reissue 1984).

Bank shall return the proceeds to the trustee pending final hearing.

Clerk's office shall schedule status hearing on the evidentiary issue.

DATED: January 9, 1987.

BY THE COURT:

Timothy J. Mahoney
U.S. Bankruptcy Judge

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