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U. S. Bankruptcy Appellate Panel of the Tenth Circuit

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NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE RUSSELL T. HARPER, SHANNON C. HARPER, Debtors.	BAP No. NO-06-076
PATRICK J. MALLOY, III, TRUSTEE, Plaintiff – Appellee, v. WILSERV CREDIT UNION, Defendant – Appellant.	Bankr. No. 05-13352-R Adv. No. 05-01151-R Chapter 7 ORDER AND JUDGMENT*

Appeal from the United States Bankruptcy Court for the Northern District of Oklahoma

Before NUGENT, BROWN, and McNIFF, Bankruptcy Judges.

McNIFF, Bankruptcy Judge.

The parties did not request oral argument, and after examining the briefs and appellate record, the Court has determined unanimously that oral argument would not materially assist in the determination of this appeal. Fed. R. Bankr. P. 8012. The case is therefore ordered submitted without oral argument.

Willserv Credit Union ("Credit Union") timely appeals the Judgment entered June 7, 2006, and the Order Denying Motion for New Trial entered July

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

17, 2006, (collectively "Judgment") of the United States Bankruptcy Court for the Northern District of Oklahoma in favor of the Chapter 7 trustee, Patrick J. Malloy, III ("Trustee"), avoiding the Credit Union's lien against the Debtors' vehicle pursuant to 11 U.S.C. § 544. For the reasons stated, the bankruptcy court's Judgment is AFFIRMED.

I. Jurisdiction and Standard of Review

The Credit Union filed a timely Notice of Appeal from the Judgment and neither party has elected to have the appeal heard by the United States District Court for the Northern District of Oklahoma. Therefore, this Court has jurisdiction over the appeal. 28 U.S.C. § 158(a), (b)-(c); Fed. R. Bankr. P. Rule [Interim] 8001(a) & (e); Fed. R. Bankr. P. 8002(a); 10th Cir. BAP L.R. 8001-1.

The bankruptcy court's Judgment was entered on stipulated facts, and the issues presented in this appeal are questions of law. We review questions of law *de novo*. *Pierce v. Underwood*, 487 U.S. 552, 558 (1988).

II. Background

On September 1, 2001, Russell Harper and Shannon Harper ("Debtors") purchased a truck for $28,589.00 from a dealer who financed the purchase. The dealer assigned the purchase contract to a financing company. On October 5, 2001, the Muscogee (Creek) Nation ("Muscogee Nation") issued a certificate of title to the truck.

On October 18, 2001, the Debtors obtained a loan from the Credit Union in the amount of $28,611.93, paid directly to the Debtors. The Debtors used the loan proceeds from the Credit Union to pay off the loan with the financing company. The Debtors granted the Credit Union a security interest in the truck. On December 13, 2001, the Credit Union executed and filed a lien entry form with the Muscogee (Creek) Nation Tax Commission, and the Muscogee Nation recorded the Credit Union's lien on the certificate of title. The Credit Union did not file a lien entry form or a financing statement with the Oklahoma Tax

Commission.

At the time of the purchase and financing, the Debtors resided in Glenpool, Oklahoma. The Muscogee Nation certificate of title verified that the Debtors were enrolled members of the Muscogee (Creek) Nation. The parties stipulated that the Debtors did not live on Muscogee tribal lands, and that the "vehicle was registered under Title 36, section 3-103 of the Creek Nation Statutes, and the debtors and the vehicle met the requirements of that statute." *Joint Stipulation of Facts* at 2, ¶ 4 *in* Appellant's App. at 24.

On May 27, 2005, the Debtors filed a Chapter 7 petition for relief and listed the truck as an asset of the estate. The Trustee subsequently commenced an adversary proceeding against the Credit Union, alleging that the Credit Union's lien on the truck was avoidable under § 544 because it was not perfected under Oklahoma law on the date of the Debtors' petition.

On the basis of the stipulated facts, the bankruptcy court entered judgment for the Trustee, avoiding the Credit Union's lien under § 544(a). The bankruptcy court ruled that the certificate of title issued by the Muscogee Nation was not a "certificate of title" under the definition of the Oklahoma Uniform Commercial Code ("Oklahoma UCC") and, therefore, the Credit Union was required to file a financing statement in order to perfect its interest in the truck. Because the Credit Union failed to file a financing statement, the bankruptcy court held the lien was not perfected and was avoidable by the Trustee under § 544(a). The bankruptcy court denied the Credit Union's Motion for a New Trial, and this appeal followed.

III. Discussion

The Debtors resided in Oklahoma when these transactions occurred, and therefore Oklahoma law, specifically the Oklahoma UCC, is applicable to determine whether the Credit Union's lien was perfected. Okla. Stat. tit. 12A, § 1-9-301(1) (2007). To perfect a lien on a vehicle under the Oklahoma UCC, the lien must be recorded on a certificate of title, and a financing statement must be

filed. Okla. Stat. tit. 12A § 1-9-310(a) (2007); Okla. Stat. tit. 47 § 1110(A)(1) (2007).

At least two exceptions to the requirement to file a financing statement are found in the Oklahoma statutes. The Oklahoma UCC defines a certificate of title as "a certificate of title with respect to which a statute provides for the security interest in question to be indicated on the certificate as a condition or result of the security interest's obtaining priority over the rights of a lien creditor with respect to the collateral." Okla. Stat. tit. 12A § 1-9-102(a)(10) (2007). The local perfection and priority law of the jurisdiction issuing a certificate of title may apply if that jurisdiction's statutes comply with § 1-9-102(10). Okla. Stat. tit. 12A § 1-9-303(c) (2007).

Also, the filing of a financing statement is not necessary to perfect a security interest in property subject to, among other things:

> the law or procedure of a federally recognized Indian tribe, if the security interest is in a vehicle registered or to be registered by the federally recognized Indian tribe and if within thirty (30) days after the security interest attaches, it is noted on the face of a certificate of title issued by the Indian tribe or . . . the security interest is otherwise perfected under an applicable law or procedure of that tribe.

Okla. Stat. tit. 12A § 1-9-311(a)(4) (2007). The Credit Union does not dispute that the security interest was noted on the certificate of title more than thirty days after it attached. However, the Credit Union contends the Muscogee Nation certificate of title is valid, the Credit Union's lien falls into the exception of Okla. Stat. tit. 12A § 1-9-311(a)(4), and therefore, a financing statement is not required to be filed.

The Muscogee Nation enacted statutes governing the licensing and taxation of motor vehicles. An eligible vehicle is defined as "any personal vehicle . . . which is principally garaged within the political jurisdiction of the Muscogee (Creek) Nation and title to which is held by . . . any enrolled member of the Muscogee (Creek) Nation who resides within the political jurisdiction of the

Muscogee (Creek) Nation." Muscogee (Creek) Nation Code tit. 36 § 3-102(B) (2001).

Under Muscogee (Creek) Nation Code tit. 36 § 3-103(C) (2001), "[a]ny Muscogee (Creek) Nation citizen who resides within the political jurisdiction of the Muscogee (Creek) Nation and who holds title to an eligible vehicle shall have the option to apply for registration of said vehicle with the Muscogee (Creek) Nation Tax Commission . . . ." The Muscogee Nation certificate of title requirements state that "[n]otice of liens against said vehicle shall be placed upon said title upon request of the lending institution." Muscogee Creek Nation Code tit. 36 § 3-104(B) (2001).

The Credit Union has not provided the Court with any applicable Muscogee Nation law providing for the perfection or priority of a lien on a motor vehicle.[1] Therefore, the Credit Union, having failed to file a financing statement with the Oklahoma Tax Commission, has no perfected security interest in the truck.

The Credit Union raises four other arguments, all of which were properly rejected by the bankruptcy court. First, the Credit Union contends the certificate of title format provides for lien priority and satisfies the procedural law requirement. The Court disagrees. A form of title is not sufficient as, and does not take the place of, a procedure enacted to provide for perfection. Neither the certificate of title nor Muscogee Creek Nation Code tit. 36 § 3-104 addresses perfection.

Second, the Credit Union argues it is exempt from the filing requirement by a provision added to the Oklahoma Statutes, effective April 13, 2004. The new provision states, "[a] security interest in vehicles registered by a federally

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[1] The Court agrees with the bankruptcy court that Muscogee (Creek) Nation Code, tit. 24, statutes relating to lien procedures found in the Housing and Mortgage Foreclosure and Eviction Title, apply only to liens on interests in real estate and not to the creation of a lien on a motor vehicle.

recognized Indian tribe shall be deemed valid under Oklahoma law if validly perfected under the applicable tribal law and the lien is noted on the face of the tribal certificate of title." Okla. Stat. tit. 47, § 1110(G) (2007). The parties dispute whether this provision is retroactive to save the Credit Union's lien from avoidance.

Whether or not retroactive, the Credit Union's argument fails for the same reason that the other provisions do not save the lien. The Court is unaware of any Muscogee Nation tribal law dealing with perfection of vehicle liens, and therefore, the statute is inapplicable in this case.

Third, the Credit Union seeks to show perfection of its security interest under Oklahoma's provision providing for perfection upon attachment for, among other things, a purchase-money security interest. The provision in Okla. Stat. tit. 12A § 1-9-309(a)(2001) was applied to validate a lien on a certificate of title issued by the Cherokee Nation in the unpublished case of *Malloy v. Bank of Commerce (In re Dalton)*, 336 B.R. 600 (10th Cir. BAP 2005). However, in the instant case, the bankruptcy court concluded the Credit Union's security interest was not a purchase-money security interest. We see no error in this conclusion because the Debtors paid off the first lien on the truck with the loan proceeds, and the Credit Union is an entirely different creditor than the original lien holder.

Finally, the Court rejects the Credit Union's argument that it is entitled to statutory or equitable subrogation of the original lien holder's position. Under Oklahoma statute, one who has a lien inferior to another upon the same property has a right of subrogation to the benefits of the superior lien upon satisfying the superior claim. Okla. Stat. tit. 42 § 19(2) (2007). The Credit Union's argument fails as a matter of fact. The Credit Union did not have a lien position on the vehicle inferior to the prior lender. Moreover, there is no evidence in the record that the prior lender had a validly perfected security interest.

Nor is equitable subrogation applicable here. The doctrine applies when a

creditor has been unfairly deceived or defrauded, and may be applicable to protect a refinancing lender who is granted a defective mortgage. *Landis v. State ex rel Comm'rs of Land Office*, 66 P.2d 519, 521-522 (Okla. 1937). However, it is not applicable where a creditor fails to take an assignment of a prior lien voluntarily paid and discharged. *Sw. Title & Trust Co. v. Norman Lumber Co.*, 441 P.2d 430, 433 (Okla. 1968). Here, the Credit Union loaned the Debtors funds, the Debtors paid off the original lien, and the Credit Union failed to protect its security interest and position. No evidence in the record supports the implementation of an equitable remedy. Equitable subrogation is simply not applicable here.

IV. Conclusion

Finding no error, the Judgment of the bankruptcy court is AFFIRMED.