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IT IS SO ORDERED.



Beth A. Buchanan

Beth A. Buchanan
United States Bankruptcy Judge

Dated: January 25, 2012

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

In Re:)
)
DESMOND WELLS, SR.) **Case No. 11-12838**
DEASA LASHAWNEE WELLS) **Chapter 13**
) **Judge Buchanan**
Debtors)

**ORDER OVERRULING OBJECTION TO CONFIRMATION
OF PROPOSED CHAPTER 13 PLAN AND AVOIDING LIEN**

This matter is before this Court on the Debtors’ proposed Chapter 13 plan [Docket Number 6] (the “Proposed Plan”) and creditor, Premier Auto Mart Inc.’s, (“Premier”), *Objection to Confirmation* [Docket Number 24]. The Proposed Plan seeks to treat an asserted secured claim related to the Debtors’ 2004 Dodge Durango (the “Durango”) as unsecured because the lien against the vehicle was noted on the certificate of title outside of the “30 day safe harbor.” See Proposed Plan, ¶30. The Proposed Plan further provides that the creditor shall release the lien on the title upon completion of the plan. *Id.* Premier objected to the Proposed Plan asserting that the lien against the Durango is valid and that the claim should be paid as a secured claim.

An evidentiary hearing was held on September 20, 2011 (the "Hearing").¹ Both Debtors testified at the Hearing, as did Greg Myers, President of Premier. The Chapter 13 Trustee was present at the Hearing. The Chapter 13 Trustee has recommended this case for confirmation but has not taken a position on the matter of avoidance of the lien against the Durango.

Following the Hearing, this Court entered an order requesting further briefing as to: (1) Premier's standing as a creditor in this case and (2) the legal authority on which the Debtors were relying to avoid the lien against the Durango and treat the claim as unsecured pursuant to the Proposed Plan. *See* Docket Number 43.

1. Proper Creditor—Premier or Guardian?

Premier filed a proof of claim in the amount of \$9,531, which Premier asserts is secured by a lien on the Durango (the "Premier Proof of Claim"). *See* Claim Number 13. The Retail Installment Contract and Security Agreement between the parties reflects that the Debtors granted Premier a security interest in the Durango. *See* Debtors Exhibit 4 and Premier Exhibit A. The copy of the certificate of title, however, identifies Guardian Finance ("Guardian") as the lienholder. *See* Debtors Exhibit 1 and Premier Exhibit B. Accordingly, the Debtors contend in their supplemental brief [Docket Number 45] that Guardian is the real party in interest in this case, and not Premier, because Guardian is lienholder on the certificate of title for the Durango. The Debtors likewise identify Guardian as the lienholder in their bankruptcy schedules and Proposed Plan.

While there was conflicting testimony on this subject at the Hearing by Premier's representative, Mr. Myers, Premier asserts in its supplemental brief [Docket Number 46] that

¹ As this Court advised the parties at the Hearing, an adversary proceeding is required to avoid a transfer of an interest of the debtor in property pursuant to 11 U.S.C. §547. *See* Bankruptcy Rule 7001(1). Premier affirmatively waived the adversary requirement at the Hearing and both parties agreed to proceed with the adjudication of this issue as a contested matter.

Premier is the party entitled to enforce the lien against the Durango. Specifically, Premier explains that Premier and Guardian are parties to a recourse program pursuant to which Premier assigns the purchase contract and security agreement to Guardian when Premier sells an automobile to a customer. If the assigned account becomes sixty days or more delinquent or if the customer subsequently files bankruptcy, Premier repurchases the loan from Guardian. Premier maintains that when the Debtors filed their bankruptcy petition Premier paid Guardian in full for the outstanding balance on the Durango loan and that the loan was reassigned to Premier.

This Court is persuaded that Premier is the proper creditor in this bankruptcy proceeding as relates to the Durango loan. As an exhibit to its supplemental brief, Premier filed a letter from Ms. April Storie, Manager of Guardian Finance Company, which states that Premier paid Guardian in full for two loans as a result of the Debtors' bankruptcy filing and that these loans were reassigned to Premier. *See Brief Regarding Creditor Premier Auto Mart Inc.'s Objection to Debtor's Chapter 13 Plan*, Exhibit A [Docket Number 46]. The contents of this letter are corroborated by Ms. Wells' testimony at the Hearing, where she stated that a representative of Guardian called her to advise her not to pay Guardian any funds for the Durango loan; rather, she was to tender payment to Premier. Mr. Myers, Premier's representative, also testified at the Hearing as to a buy-back program between Guardian and Premier and stated that Premier paid Guardian the full amount of the loan.

Premier is the only entity that filed a proof of claim for the Durango. Guardian clearly is aware of the Debtors' bankruptcy because Guardian filed a proof of claim for a 2004 Nissan. *See Claim Number 20.*² Yet, Guardian has not asserted any claim as relates to the Durango nor

² Premier asserts in its supplemental brief that Premier—not Guardian—is the proper creditor as relates to the Nissan loan and that Guardian should be required to withdraw its proof of claim. While this would appear to be the case based on the correspondence from Guardian (Docket Number 46, Exhibit A), no objection has been filed to this proof of claim, therefore, this Court is not called upon to address this matter at this time.

has Guardian objected to the proposed treatment of the Durango loan in the Debtors' Proposed Plan. Based on the foregoing, this Court finds that Premier is properly before this Court as a creditor of the Debtors.

2. Section 547(b) Claim

In their supplemental brief, the Debtors clarified that they are seeking to avoid the lien against the Durango pursuant to section 547(b) of the Bankruptcy Code³ as a preferential transfer because the lien was not perfected on or before thirty days after the Debtors received possession of the Durango.⁴

³ References to the "Bankruptcy Code" are to Title 11 of the United States Code, 11 U.S.C. § 101 *et seq.*, as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8.

⁴ The Debtors assert in their supplemental brief that they have derivative standing to avoid the lien against the Durango pursuant to Section 547 of the Bankruptcy Code based on the decision of the Bankruptcy Appellate Panel of the Sixth Circuit in *Countrywide Home Loans v. Dickson (In re Dickson)*, which held that a bankruptcy court may grant derivative standing to a chapter 13 debtor to pursue avoidance of a lien pursuant to Sections 544 and 547 of the Bankruptcy Code. *See Countrywide Home Loans v. Dickson (In re Dickson)*, 427 B.R. 399 (B.A.P. 6th Cir. 2010); *aff'd Dickson v. Countrywide Home Loans, Inc. (In re Dickson)*, 655 F.3d 858 (6th Cir. 2011) (holding that a chapter 13 debtor had direct standing to pursue the avoidance of an involuntary transfer and, therefore, not reaching the issue of whether a chapter 13 debtor has derivative standing to pursue avoidance actions); *see also, U.S. Bank Nat'l Ass'n v. Barbee (In re Barbee)*, 2011 Bankr. LEXIS 4751 (B.A.P. 6th Cir. Dec. 12, 2011) (endorsing the decision of the earlier panel in *In re Dickson* and likewise holding that a bankruptcy court may confer derivative standing on a chapter 13 debtor to avoid a creditor's lien pursuant to Section 544 of the Bankruptcy Code).

Derivative standing, however, is not an independent right, and must be authorized by the bankruptcy court. *See Hyundai Translead, Inc. v. Jackson Truck & Trailer Repair, Inc. (In re Trailer Source, Inc.)*, 555 F.3d 231 (6th Cir. 2009); *see also, In re Dickson*, 427 at 403-06 (holding that the bankruptcy court properly granted the debtor's motion *nunc pro tunc* for derivative standing); *In re Barbee*, 2011 Bankr. LEXIS at *5-11 (affirming order of bankruptcy court granting debtor's motion seeking derivative standing prior to initiating adversary proceeding to avoid lien). "[A] party moving for derivative standing must show that: (1) a demand was made on the trustee . . . to act, (2) the trustee . . . declined, (3) a colorable claim exists that would benefit the estate, and (4) the trustee's . . . inaction was an abuse of discretion." *In re Trailer Source, Inc.*, 555 F.3d at 244-45 (citing *Canadian Pacific Forest Products Limited v. J.D. Irving, Limited, et al. (In re Gibson Group, Inc.)*, 66 F.3d 1436, 1446 (6th Cir. 1995)).

As noted by the Bankruptcy Appellate Panel of the Sixth Circuit, granting derivative standing to a Chapter 13 debtor to pursue avoidance actions for the benefit of the estate is justified under the Sixth Circuit test for derivative standing in part because:

More so than a Chapter 7 trustee, a Chapter 13 trustee lacks the resources to pursue meritorious avoidance claims. . . . Unlike in a Chapter 7, the Chapter 13 trustee cannot sell estate assets to fund a "war chest" by which to pursue potentially expensive avoidance actions. Thus, the potential for the bankruptcy system to "break down" with respect to avoidance actions will perhaps be greater in the Chapter 13 context than in the Chapter 7 context.

Section 547(b) of the Bankruptcy Code allows a trustee to 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;
- (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 transfer of the security interest in the Durango to Premier meets all the elements of a preferential transfer under Section 547(b) of the Bankruptcy Code. The Debtors' granting of a security interest in the Durango is a "transfer of an interest of the debtor in property." *See, e.g., In re Knee*, 254 B.R. 710, 712 (Bankr. S.D. Ohio 2000) ("Federal Courts have consistently held that the grant of a security interest in a motor vehicle constitutes a § 547(b) transfer.").

In re Dickson, 427 B.R. at 405. This is particularly true in this case where the dollar amounts at issue may not warrant the Chapter 13 Trustee's efforts in pursuit of this potential recovery. That is not to say, however, that there is no benefit to the estate from pursuing a meritorious avoidance action. In this case, if the Debtors are successful in avoiding the lien against the Durango, the claim will be paid as an unsecured claim at 5% of the claim amount. If the lien is not avoided, the claim would be paid in full during the life of the Proposed Plan because the claim would otherwise qualify as a secured "910" claim. Therefore, the funds available to pay unsecured creditors increase as a result of avoiding the lien.

Based on the unique posture of this case, as evidenced by the parties' express agreement to dispense with the adjudication of this matter as an adversary proceeding, Premier's failure to object to the Debtors' assertion of derivative standing and the Chapter 13 Trustee's apparent acquiescence to the same based on her presence at the Hearing and lack of opposition to the Debtors proceeding in this manner, this Court grants the Debtors derivative standing to pursue avoidance of the lien against the Durango pursuant to Section 547 of the Bankruptcy Code.

Counsel is cautioned that this Court likely will not so liberally infer a request for derivative standing in the future and debtors would be well advised to file a motion and/or include a provision in their plan requesting and substantiating the basis for derivative standing.

The transfer was made on account of an antecedent debt—the car loan—within ninety days prior to the filing of the Debtors’ bankruptcy petition. The Debtors incurred a debt to Premier and granted Premier a security interest in the Durango on December 29, 2010 by signing the Retail Installment Contract and Security Agreement. While it would appear that the transfer of the security agreement in the Durango was contemporaneous with the debt and not “on account of an antecedent debt,” Section 547(e)(2)(B) of the Bankruptcy Code states that if the security interest is not perfected within 30 days after it is initially transferred then the transfer of the security interest does not occur until the date it is perfected for the purposes of Section 547 of the Bankruptcy Code. 11 U.S.C. §547(e)(2)(B). Here, the security interest was granted on December 29, 2010, but the lien was not noted on the certificate of title—and therefore was not perfected—until February 22, 2011, which is clearly more than 30 days after the security interest was granted (and within the 90 days prior to the Debtors’ bankruptcy filing on May 6, 2011). *See* Ohio Rev. Code § 4505.13 (governing perfection of security interests in motor vehicles under Ohio law). Accordingly, the transfer of the security interest in the Durango did not occur until February 22, 2011 pursuant to Section 547(e)(2)(B) of the Bankruptcy Code and is therefore “on account of an antecedent debt owed by the debtor” incurred on December 29, 2010.

The transfer was made while the Debtors were presumed to be insolvent, *see* 11 U.S.C. §547(f), was to or for the benefit of Premier and enabled Premier to receive a larger share of the estate than if the security interest had not been transferred and Premier was an unsecured creditor. *See In re Knee, 254 B.R. at 713-14* (finding preferential transfer on similar facts). Accordingly, the Debtors have established that the transfer of the security interest in the Durango is avoidable as a preferential transfer pursuant to Section 547(b) of the Bankruptcy Code.

Indeed, Premier does not challenge any of the elements of Debtors' *prima facie* case under Section 547(b) of the Bankruptcy Code. Rather, Premier relies on Section 547(c)(3) of the Bankruptcy Code as its defense to avoidance of the lien against the Durango. Section 547(c)(3) of the Bankruptcy Code provides that a trustee may not avoid a transfer:

- (3) that creates a security interest in property acquired by the debtor—
 - (A) to the extent such security interest secures new value that was—
 - (i) given at or after the signing of a security agreement that contains a description of such property as collateral;
 - (ii) given by or on behalf of the secured party under such agreement;
 - (iii) given to enable the debtor to acquire such property; and
 - (iv) in fact used by the debtor to acquire such property; and
 - (B) that is perfected on or before 30 days after the debtor receives possession of such property

11 U.S.C. § 547(c)(3).

a. When did the Debtors receive possession of the Durango?

As relates to Premier's Section 547(c)(3) defense, the issue in dispute between the parties is when the Debtors received possession of the Durango. The Debtors claim that they took possession of the vehicle on December 29, 2010, which would put the perfection of the lien outside the 30-day safe harbor of Section 547(c)(3)(B). Premier contends that the Debtors took possession of the vehicle on January 24, 2011, which not surprisingly would put the perfection of the lien squarely within the 30-day safe harbor of Section 547(c)(3)(B).

The Debtors and Mr. Myers testified that the down payment for the Durango was to be \$2,000. Mr. Myers testified that \$100 was paid on December 29, 2010, \$900 on December 30, 2010 and the remainder of the down payment was received on January 24, 2011. Mr. Myers testified that the Debtors would not have been able to take possession of the vehicle before the full \$2,000 was paid.

The Debtors, on the other hand, testified that an initial \$100 down payment was paid on December 21, 2010. Both Debtors testified that an additional \$900 was paid on December 29, 2010 and that they took possession of the Durango on this day. Ms. Wells testified that an additional \$180 was paid two weeks later with the remainder of the down payment paid two weeks after that.

There was substantial and credible testimony from both Debtors that they took possession of the vehicle on December 29, 2010. Both Debtors testified that Mr. Wells first saw the Durango on December 21, 2010, which is his birthday, and put \$100 down in order to “hold” the car. Both Debtors also testified that on December 29, 2010, Ms. Wells went to Premier, paid \$900, and took possession of the vehicle on that day pursuant to a “Spot Delivery Agreement” that Mr. Wells had previously signed. *See* Debtors Exhibit 4. Both Debtors testified that Mr. Wells was working on December 29th, which was why he could not pick up the Durango himself. While the Debtors did not present a copy of the executed “Spot Delivery Agreement,” the testimony and the evidence provided by the Debtors support their contention that the parties agreed that the Debtors were entitled to take possession of the Durango after payment of \$1,000 of the down payment.

The Debtors presented payment receipts from Premier that substantially corroborate their testimony. *See* Debtors’ Exhibit 5. The payment receipts reflect the following payments were made toward the \$2,000 down payment: \$100 on December 29, 2010; \$900 on December 30, 2010; \$180 on January 14, 2011; \$820 on January 28, 2011. While the dates on the receipts do not correspond precisely to the Debtors’ testimony, this Court notes that the receipts were generated from Premier’s records several months after the transactions occurred and may reflect timing issues between the date of receipt of payments and entry into Premier’s accounting

system. Regardless, the dates of the receipts more closely correspond to the Debtors' version of events than to that of Premier. Moreover, Premier did not produce any evidence to support their contention that the remainder of the down payment was paid on January 24, 2011.

The Debtors testified to the following events that took place after December 29, 2010, which further support the Debtors' contention that they took possession of the Durango on December 29, 2010:

1. On December 29, 2010, after Ms. Wells took delivery of the Durango, Mr. Wells drove the Durango to his mother's home to pick up a bicycle for their daughter's birthday.
2. On December 31, 2010, Mr. Wells testified that he drove the Durango to his New Year's Eve church service and that fellow church-goers complimented him on his new vehicle.
3. On January 9, 2011, the Durango broke down on the interstate – memorable to both Debtors because it was Ms. Wells' birthday. The Debtors testified that the Durango was towed to Premier and was fixed by Premier.⁵
4. On or about January 22, 2011, Ms. Wells was driving the Durango home from Children's Hospital and the Durango broke down again. This episode happened during an ice storm and Ms. Wells left the Durango on the interstate until she could get someone to tow it. The Debtors called AAA on January 31, 2011 to tow the Durango, but AAA would not tow the Durango because the temporary tag had expired. Premier ended up towing the Durango to their facility on February 1, 2011 for repairs.⁶

Finally, the Debtors presented a copy of the insurance policy the Debtors took on the Durango that lists the effective date of the policy as December 29, 2010 at 6:32 p.m. In addition, the Debtors presented a copy of the Temporary Tag Registration Application for the Durango that lists the purchase date of December 29, 2010.

To support its contention that the Debtors took possession of the Durango on January 24, 2011, Premier presented executed copies of the Retail Installment Contract and Security

⁵ Premier disavows any knowledge of this incident and Mr. Myers testified that Premier does not have any record of this repair. This Court did not find Mr. Myers' testimony to be credible on this account.

⁶ Premier does have a record of this repair.

Agreement, the Guardian Finance Consumer Credit Application, Retail Purchase Agreement, Disclosure of Credit Bureau, and Down Payment Agreement as evidence. *See* Premier Exhibits A, C, D, E, and F. Mr. Myers testified that he was not present when Mr. Wells executed these documents. The documents are all signed by Mr. Wells, who admitted that the signature on each of the documents was his signature. However, the type-written date on the documents—December 29, 2010—is crossed out and a hand-written date of January 24, 2011 is written in. Initials purporting to be Mr. Wells' initials are reflected next to the hand-written date of January 24, 2011. Mr. Wells testified that these initials are not his because the initials on the documents presented by Premier are too large to be his initialed signature. Mr. Wells testified that he is a nurse and that he routinely writes his initials on medical documents. In order for his initials to fit on the medical documents, Mr. Wells testified that he is in the habit of writing his initials much smaller than the initials reflected on the documents presented by Premier.

This Court credits the testimony of the Debtors and the supporting evidence provided and finds that the Debtors took possession of the Durango on December 29, 2010. Premier did not provide any credible evidence that the Debtors took possession of the Durango on January 24, 2011. Mr. Myers was not present when the documents were executed, and he cannot be certain that Mr. Wells did, in fact, initial the changed dates. Mr. Wells provided credible testimony that the initials on the documents provided by Premier are not his.

Perfection of the lien occurred well past the 30-day safe harbor provided by Section 547(c)(3) of the Bankruptcy Code. Accordingly, the lien may be avoided pursuant to Section 547(b) of the Bankruptcy Code. The avoided lien is preserved for the benefit of the estate pursuant to Section 551 of the Bankruptcy Code.

For the foregoing reasons, it is hereby ORDERED that:

- A. Premier's Objection to Confirmation is OVERRULED.
- B. The lien on the Debtors' Durango is AVOIDED pursuant to Section 547(b) of the Bankruptcy Code. Premier shall cause the lien against the certificate of title for the Durango to be released upon the Debtors' completion of the Proposed Plan and entry of discharge in this case.
- C. The Premier Proof of Claim shall be paid as an unsecured claim in accordance with the Proposed Plan.
- D. There being no other objections to confirmation, the Chapter 13 Trustee may tender an order confirming the Proposed Plan.

IT SO ORDERED.

Distribution list:
Default List
Joe Spring, Esq.

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