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IT IS SO ORDERED.

Guy R. Humphrey
United States Bankruptcy Judge

Dated: March 10, 2009

UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

In re: BRADLEY R. EVERETTS RUBY J. EVERETTS, *Debtors*	Case No. 07-34986 Judge Humphrey Chapter 13

Decision Denying the Debtors' Amended Motion Objecting to the Allowance of Claim 8-1 of American General Financial Services, Inc.

This decision addresses whether American General Financial Services, Inc. (the "Creditor") holds a secured claim under circumstances in which the Creditor was granted a purchase money security interest in an "in ground pool kit" that was subsequently installed as part of an in-ground swimming pool on the Debtors' real property. For the reasons explained in this Decision, the court denies the Debtors' Amended Motion objecting to the Creditor's secured proof of claim, but without prejudice to the Debtors' pursuit of a

proceeding seeking to avoid the Creditor's lien, the merits of which the court is not opining upon at this time.

Procedural Background

The Debtors, Bradley and Ruby Everetts, filed a Chapter 13 petition on November 12, 2007 (Doc. 1). On January 2, 2008, the Creditor filed a secured proof of claim (8-1) in the amount of $9,777.56 and described the collateral as an "in ground pool kit." On March 6, 2008, the Debtors objected to the claim and sought to have it re-classified as a non-priority unsecured claim (Doc. 36). After a series of status reports and status conferences, the court issued an order setting a briefing schedule to resolve the issue (Doc. 72). On January 23, 2009, the Debtor filed an amended claim objection (Doc. 77) asserting that the Creditor's claim should be completely disallowed and American General filed a response (Doc. 79) on January 30, 2009. The parties reached stipulations on various facts[1] and filed memoranda (Docs. 80-84) and the court took this matter under advisement.[2]

Jurisdiction

This court has jurisdiction pursuant to 28 U.S.C. § 1334 and this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(B).

[1] The parties reached the stipulations in an untraditional manner. The Debtors filed a statement of facts (Doc. 78) and the Creditor stipulated to some, but not all, of those facts in a separate document (Doc. 79). Except where specifically noted, any reference to Document 78 in this decision is to a paragraph that the Creditor has agreed is a correct recitation of fact.

[2] After the court raised the issue during a telephonic status conference, the Creditor, through counsel, waived any right it may have had to require the Debtors to pursue the relief they are seeking through an adversary proceeding.

Findings of Fact

On September 7, 2007, the Debtors applied for credit with the Creditor to purchase an "in ground pool kit" from Hot Spot Pool & Spas ("Hot Spot") (Doc. 78, ¶ 1; Proof of Claim No. 8-1) for a total purchase price of $11,325.43, with $10,030.43 of that amount to be financed by the Creditor. The credit was ultimately approved and memorialized in a Retail Charge Agreement. The security agreement, which was included within the Retail Charge Agreement (Doc. 78, ¶ 2; Proof of Claim 8-1, p. 3), granted the Creditor a security interest in the goods purchased with the Debtors' credit account with the Creditor.[3] Subsequently, Hot Spot delivered and installed the "in ground pool kit" upon the Debtors' real property as part of an in-ground swimming pool (Doc. 78, ¶ 3). The Creditor did not record a mortgage, mechanic's lien, or fixture filing or take any other such action to file or record a lien against the Debtors' property prior to the Debtors' bankruptcy filing.

On November 12, 2007, the Debtors filed their joint Chapter 13 petition (Doc. 1). The Creditor was listed as a non-priority unsecured creditor in the amount of $9,777.56 on the Debtors' Schedule F (Doc. 1).

Analysis

American General is a Creditor

In their amended motion, the Debtors raised the issue of whether the claim at issue was assigned to the Creditor by Hot Spot. The court finds the claim was so assigned on

[3] No other language of the security agreement or of the Retail Charge Agreement was presented, briefed, or argued by either party in any filing and, therefore, the court is not opining on any other provision of the Retail Charge Agreement and no other language of the Retail Charge Agreement has been considered by the court or has otherwise had an impact on the court's decision.

September 10, 2007 by the "Seller's Assignment" section of the Retail Charge Agreement (Proof of Claim 8-1, p. 3). Furthermore, the Retail Charge Agreement is the Creditor's own document. Accordingly, the court finds that the Creditor is a "creditor" of the Debtors holding a prepetition claim against the Debtors. See generally 11 U.S.C. §§ 101(10)(A) (defining creditor as an entity holding a claim) and 101(5)(A) (a "claim" is a "right to payment").

American General is a Secured Creditor

When the Debtors purchased the "in ground pool kit" on credit from Hot Spot, the Creditor obtained a purchase money security interest ("PMSI"). The Debtors do not dispute that the purchase of the "in ground pool kit" constitutes a PMSI. *See* Ohio Revised Code (ORC) § 1309.103(B) defining "purchase money security interest."

In addition, the "in ground pool kit" constituted consumer goods. ORC § 1309.102(23) defines consumer goods as "goods that are used or bought for use primarily for personal, family, or household purposes." There appears to be no dispute that the pool kit was purchased for personal, family, or household purposes. *See also R. Bauer & Sons Roofing & Siding, Inc. v. Kinderman*, 613 N.E.2d 1083 (Ohio Ct. App. 1992) (contract for the replacement of roof, windows, and a door was a contract for the provision of consumer goods and services) and *Donnelly v. Mustang Pools, Inc.*, 374 N.Y.S.2d 967 (N.Y. App. Div. 1975) (contract for the construction of an in-ground swimming pool constituted a consumer transaction).

Due to the collateral in this case being subject to a PMSI in consumer goods, pursuant to ORC §§ 1309.309(A) and 1309.310(B)(2), the security interest in the goods was

automatically perfected upon the attachment of the security interest in the collateral.[4] The security interest attached upon the occurrence of the following three events: a) the delivery of the collateral, i.e. the pool kit, to the Debtors; b) the signing of the Retail Charge Agreement, which constituted the security agreement in this case; and c) the Creditor's supplying of consideration for the granting of the security interest, in this instance the Creditor's supplying of credit to the Debtors to purchase the pool kit. *See* ORC § 1309.203 and *Firestone Stores v. Henderson*, 269 N.E.2d 75, 77 (Ohio Mun. 1971) (Rice, J.). Accordingly, the Creditor had a perfected security interest in the pool kit, at least prior to the installation of the pool kit through construction of the swimming pool on the Debtors' real property.

American General's PMSI Remained Secured Following Installation of the Pool Kit

The crux of this dispute, however, is whether the Creditor remained secured once the "in ground pool kit" was installed as part of the in-ground swimming pool on the Debtors' real property. This section of the Decision will address that issue.

First, the court finds that the "in ground pool kit" became a fixture once it was installed as part of the swimming pool on the real property. Under Ohio law, a three part test exists to determine whether personal property has become a fixture: "1) actual annexation to the realty, or something appurtenant thereto; 2) appropriation to the use or purpose of that part of the realty with which it is connected; and 3) the intention of the

[4] ORC § 1309.309(A) states that "[t]he following security interests are perfected when they attach . . . [a] purchase money security interest in consumer goods . . . ." The exception of ORC § 1309.311 is not applicable to this decision. ORC § 1309.310(B)(2) states that "[t]he filing of a financing statement is not necessary to perfect a security interest . . . [t]hat is perfected under section 1309.309 of the Revised Code when it attaches[.]" See also *Hazlett v. Suburban Tractor Co. (In re Palmer)*, 365 B.R. 816 (Bankr. S.D. Ohio 2007) (creditor not required to file a financing statement to perfect a purchase money security interest).

party making the annexation, to make the article a permanent accession to the freehold." *Jarvis v. Wells Fargo FIn. (In re Jarvis)*, 310 B.R. 330, 335 (Bankr. N.D. Ohio 2004), *citing Teaff v. Hewitt*, 1 Ohio St. 511, 527 (1853). Under this test, the "in ground pool kit", once installed as part of the pool on the Debtors' real property, became a fixture. The Creditor has not contested this issue.

Second, ORC § 1309.334(A) provides that collateral securing a PMSI in consumer goods that become a fixture remain subject to the security interest of the Creditor if the collateral does not consist of "ordinary building materials." Thus, that section provides:

> A security interest under this chapter may be created in goods that are fixtures or **may continue in goods that become fixtures**. A security interest does not exist under this chapter in ordinary building materials incorporated into an improvement on land.

(emphasis added). *See also In re Ryan*, 360 B.R. 50, 52 (Bankr. W.D.N.Y. 2007) (security interest continued in bathtub that was "no simple bathtub" after it was installed in the debtors' residence) and Lary Lawrence, 11 Anderson U.C.C. § 9-334:5 (3d. ed. updated Feb. 2009) (pursuant to U.C.C. § 9-334 and Official Comment 3, security interest remains in goods which become fixtures, if the goods are not ordinary building materials). Accordingly, if the pool kit did not consist of "ordinary building materials", the Creditor's PMSI continued as a fixture PMSI once the pool kit was incorporated into the Debtors' swimming pool.

The only remaining issue then is whether the "in ground pool kit" constituted "ordinary building materials." The case law on this point appears to be very scant. However, as noted above, the court in *Ryan* found that the special bathtub involved in that case did not constitute "ordinary building materials." The court determines in this case that

the "in ground pool kit" does not constitute ordinary building materials. See U.C.C. § 9-334 and Official Comment 3.

Accordingly, based on the foregoing, the court finds that, on the petition date, the Creditor held a secured claim.

Avoidance of the Lien of the Creditor Is Not Appropriate at this Time Based Upon the Record Before the Court

It appears that the Debtors may be seeking to avoid the lien held by the Creditor. However, as will be explained, this argument and theory has not been raised at this point in a manner rendering it appropriate for determination by the court on the record presently before the court.

The Creditor never filed a fixture filing to perfect its lien as to competing encumbrancers. ORC § 1309.334(C)[5] generally subordinates a PMSI in a fixture to conflicting interests of an encumbrancer (i.e. another lien holder) or the owner of the real property who is not the debtor. However, subsections (D) through (H) provide exceptions to this general rule. As noted by the Debtors, ORC § 1309.334(D)[6] allows a secured creditor to obtain priority over prior liens on a parcel of real property if a fixture filing is completed prior

[5] ORC § 1309.334(C) states that "[i]n cases not governed by divisions (D) to (H) of this section, a security interest in fixtures is subordinate to a conflicting interest of an encumbrancer or owner of the related real property *other than the debtor*." (emphasis added).

[6] ORC § 1309.334(D) states that "[e]xcept as otherwise provided in division (H) of this section, a perfected security interest in fixtures has priority over a conflicting interest of an encumbrancer or owner of the real property if the debtor has an interest of record in or is in possession of the real property and:

(1) The security interest is a purchase money security interest;
(2) The interest of the encumbrancer or owner arises before the goods become fixtures; and
(3) The security interest is perfected by a fixture filing before the goods become fixtures or within twenty days thereafter."

to goods becoming a fixture or within 20 days after the goods become a fixture. The record is undisputed that the Creditor in this case never filed a fixture filing to perfect its security interest pursuant to ORC § 1309.334(D).

However, the Debtors consented to the subject fixture PMSI, thereby acceding priority to the fixture under state law as it relates to any interest which the Debtors may claim in the real property. ORC § 1309.334(F)(1)[7] provides that if the owner or encumbrancer with a conflicting interest in the real property consented to the security interest or disclaimed an interest in the goods as fixtures through an authenticated record, the PMSI creditor has priority as to the rights of that owner or encumbrancer in the PMSI fixture, even when the PMSI is not perfected through a fixture filing. This exception is logical because it allows a competing party for lien priority to consent to the interest of a creditor with a secured interest in a fixture. Under such circumstances, the statute determines that it is irrelevant if the security interest in the fixture is perfected. Thus, under Ohio law, whether it be viewed under ORC § 1309.334(C) or § 1309.334(F)(1), the Creditor's PMSI interest in the fixture is superior to any interest in that property that the Debtors may claim as owners of the real property because they consented to the security interest through the Retail Charge Agreement assigned to the Creditor, which clearly constitutes an "authenticated record."[8]

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[7] ORC § 1309.334(F) states that "[a] security interest in fixtures, whether or not perfected, has priority over the conflicting interest of an encumbrancer or owner of the real property if:
(1) The encumbrancer or owner has, in an authenticated record, consented to the security interest or disclaimed an interest in the goods as fixtures; or
(2) The debtor has a right to remove the goods as against the encumbrancer or owner."

[8] ORC § 1309.102(A)(7)(a) provides that "'authenticate' means to sign" and ORC § 1309.102(A)(69) provides, in relevant part, that "'record' . . . means information that is inscribed on a tangible medium or that is stored in an electronic or other medium . . . ."

Any argument as to whether the Debtors can step into the shoes of a hypothetical lien creditor under 11 U.S.C. § 544 to avoid or strip the Creditor's lien must be left for another day. The Debtors apparently seek to step into the shoes of a trustee as a hypothetical lien creditor to avoid the lien of the Creditor as an unperfected lien pursuant to 11 U.S.C. § 544. However, this argument, which is legally separate from whether the Creditor holds a secured claim, was not raised, at least not directly,[9] in the original or amended motion. It was directly raised only in the Debtors' memoranda filed on February 24, 2009 (Doc. 83). The court makes no comment on this theory, but in the interest of deciding all relevant issues on the merits, notes the Debtors may raise this theory of avoidance, or any other theory of avoiding the Creditor's lien, in a separate motion or other appropriate filing pursuant to Federal Rules of Bankruptcy Procedure and this court's Local Bankruptcy Rules.[10] However, the present claim objection is denied because, without the avoidance of the Creditor's lien, the Creditor presently holds an allowed secured claim.

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[9] The Debtors did indicate in their amended motion (Doc. 77) that "[t]he creditor therefore has an unperfected security interest and is totally unsecured", but a creditor with an unperfected security interest has a secured claim unless and until such security interest is avoided. Without the avoidance issue being raised in the Debtors' motion or amended motion, the Creditor could not have been expected to respond to that issue. The filings in this contested matter blur the crucial legal distinction between avoiding an unperfected lien and determining whether a claim should be allowed as secured or unsecured.

[10] See Footnote 2. The court also notes in paragraph 13 of the Debtors' statement of facts (Doc. 78) that the Debtors raised the issue that any lien of the Creditor was avoidable because the mortgage lien of "Wells Fargo Home Mortgage" was greater than the value of the Debtors' real property, but this argument was not raised in the Debtors' amended motion. The Creditor did not stipulate to paragraph 13 (Doc. 79). While the Creditor in this case did consent to this contested matter being pursued as a contested matter under Bankruptcy Rule 9014, as opposed to through an adversary proceeding under Bankruptcy Rule 7001 et seq., the court notes that lien avoidance issues are best suited for the adversary proceeding process. The court notes that such an avoidance proceeding may raise multiple issues requiring appropriate analysis, including, and not necessarily limited to: a) standing of the Debtors to pursue such a lien avoidance matter in the context of a Chapter 13 case; b) the theory or theories under which the Debtors are proceeding to avoid the Creditor's lien; c) valuation

Conclusion

For the foregoing reasons, the Debtors' Amended Motion Objecting to Allowance of Claim (Doc. 77) is **denied,** without prejudice to any avoidance action which the Debtors may pursue. An order consistent with this decision will be simultaneously entered by the court.

IT IS SO ORDERED.

c:

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issues as may be applicable; and d) the interplay between the strong-arm powers provided by 11 U.S.C. § 544 and the various provisions of ORC § 1309.334.