

UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF GEORGIA  
MACON DIVISION

In the Matter of:	:	Chapter 7
	:	
CHARLEY'S AUTOMOTIVE, INC.,	:	
	:	
Debtor	:	Case No. 02-50855 RFH
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	:	
J. COLEMAN TIDWELL, TRUSTEE,	:	
	:	
Plaintiff	:	
	:	
	:	
vs.	:	
	:	
	:	
FIRST COMMUNITY BANK OF	:	
GEORGIA,	:	
	:	
Defendant	:	Adversary Proceeding No. 02-5155

BEFORE

ROBERT F. HERSHNER, JR.  
CHIEF UNITED STATES BANKRUPTCY JUDGE

COUNSEL:

For Plaintiff	William M. Flatau 355 Cotton Avenue Macon, Georgia 31201
For Defendant	Rhonda M. Jones 843 Poplar Street Macon, Georgia 31201

## MEMORANDUM OPINION

First Community Bank of Georgia, Defendant, filed a motion for summary judgment on February 6, 2003. J. Coleman Tidwell, Trustee, Plaintiff, filed a motion for summary judgment on February 7, 2003. The Court, having considered the motions, the responses, the record, and the arguments of counsel, now publishes this memorandum opinion.

The undisputed material facts show that Charley's Auto Parts & Services, Inc. owned a 1988 Ford F450 wrecker, a 1999 International 4700 wrecker, and a 1992 Mazda pickup. Charley's Automotive, Inc., Debtor, purchased the wreckers and the pickup on July 3, 2000. Defendant financed the purchase. Charley's Auto Parts signed bills of sale dated July 3, 2000, on the wreckers in favor of Debtor. Charley's Auto Parts also signed as "Seller" on the reverse side of the certificates of title. The blocks for the buyer's name, signature, and address are blank. No lienholder is listed on the certificates of title. The certificates of title were delivered to Defendant. Defendant did not send the certificates of title to the state revenue commissioner or county tag agent. Defendant's security interest was never recorded on the certificates of title. There was no agreement between the seller, Charley's Auto Parts, and the buyer, Debtor, that the seller would retain any interest in the wreckers. Debtor was not in the business of selling vehicles to the public. Debtor had possession of the wreckers after July 3, 2000, and used the wreckers in

its business. Debtor paid the ad valorem taxes on the wreckers and claimed depreciation on its income tax returns.

Defendant also financed Debtor's purchase of the inventory and equipment of Charley's Auto Parts. Debtor signed a UCC-1 financing statement in favor of Defendant. The financing statement lists certain collateral, including the "wrecker fleet." The financing statement was recorded on July 5, 2000.

Defendant contends that it "renewed" Debtor's loan on December 11, 2001. Debtor signed a security agreement dated December 11, 2001, granting Defendant a security interest in certain collateral, including the wreckers.

Debtor filed a petition for relief under Chapter 7 of the Bankruptcy Code on February 26, 2002. Defendant had possession of the wreckers' certificates of title. Defendant's security interest was never recorded on the certificates of title. Plaintiff filed a complaint on September 23, 2002, to avoid Defendant's security interest in the wreckers and the pickup. Defendant concedes that it has no interest in the 1992 Mazda pickup.<sup>1</sup> Plaintiff has sold the wreckers and is holding the proceeds until further order of this Court.

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<sup>1</sup> Defendant's Response to Plaintiff's Motion for Summary Judgment, p. 1 (filed Feb. 25, 2003).

Defendant has liquidated its collateral. Defendant contends that Debtor's remaining obligation is \$8,975.15. Defendant contends that this obligation should be satisfied with a portion of the proceeds from Plaintiff's sale of the wreckers.

Plaintiff seeks to avoid Defendant's security interest in the wreckers under section 544(a)(1) of the Bankruptcy Code.<sup>2</sup> This section provides:

**§ 544. Trustee as lien creditor and as success to certain creditors and purchasers**

(a) The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by—

(1) a creditor that extends credit to the debtor at the time of the commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such a creditor exists;

11 U.S.C.A. § 544(a)(1) (West 1993).

A trustee in bankruptcy, under the "strong-arm" provisions of the Bankruptcy Code, has the rights and powers of a hypothetical judicial lien creditor

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<sup>2</sup> 11 U.S.C.A. § 544(a)(1) (West 1993).

under applicable state law. A trustee may avoid an unperfected security interest and relegate the debt to the status of a general unsecured claim. 5 Collier on Bankruptcy ¶ 544.05 (15th ed. rev. 2003); see 11 U.S.C.A. § 544(a)(1) (West 1993).

“The secured status of a creditor is determined as of the date of the filing of the bankruptcy petition.” Perkins v. Gilbert (In re Perkins), 169 B.R. 455, 458 (Bankr. M.D. Ga. 1994). Thus, Plaintiff may avoid Defendant’s security interest in the wreckers unless the security interest was properly perfected on the date that Debtor filed for bankruptcy relief.

“[T]he only way to perfect a security interest in any automobile since the enactment of the Uniform Commercial Code is by filing under the Motor Vehicle Certificate of Title Act. . . . A failure to perfect a security interest in a motor vehicle pursuant to the certificate of title act does not nullify the security interest, although the unsecured party may lose priority where the rights of third parties are concerned.” Freeman v. Bentley, 205 Ga. App. 409, 422 S.E.2d 435, 436 (1992). See also SunTrust Bank of Atlanta v. Atlanta Classic Cars, Inc., 249 Ga. App. 726, 549 S.E.2d 523 (2001).<sup>3</sup>

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<sup>3</sup> Compare In re Chappell, 224 B.R. 507 (Bankr. M.D. Ga. 1998) (Walker, J.) (security interest in certain older vehicles may be perfected by filing a financing statement or under certificate of title act) (decided under former O.C.G.A. § 11-9-302(3)(b)).

The filing of a financing statement is not necessary or effective to perfect a security interest in a vehicle which is subject to the certificate of title act. O.C.G.A. § 11-9-311(a)(2) (2002). See also former O.C.G.A. § 11-9-302(3)(b) (current version at § 11-9-311(a)(2) (2002) (financing statement not effective to perfect security interest in vehicle required to have certificate of title).

Debtor's wreckers were required to have certificates of title. O.C.G.A. §§ 40-3-4, -20 (2001).

The undisputed facts show that Defendant's security interest was not perfected under the certificate of title act. The Court is persuaded that Plaintiff may avoid Defendant's security interest under section 544(a)(1).

Defendant argues that the wreckers were not property of the bankruptcy estate because Debtor's name was never registered on the certificates of title. It is undisputed that Debtor purchased, took possession, and used the wreckers in its business. Debtor received bills of sale and paid ad valorem taxes on the wreckers.

A transfer of ownership from the seller to the buyer of a motor vehicle is effective despite the fact that the certificate of title registration requirements have not been complied with. State v. Banks, 215 Ga. App. 828, 452 S.E.2d 533 (1994); O.C.G.A. 40-3-32(d) (2001).

Property of the estate includes “all legal or equitable interests of the debtor in property as of the commencement of the case.” 11 U.S.C.A. § 541(a)(1) (West 1993).

The Court is persuaded that Debtor was the owner of the wreckers and that the wreckers became property of the bankruptcy estate.

Next, Defendant argues that it held a purchase money security interest in the wreckers. Defendant argues that a purchase money security interest has priority over subsequent lienholders. Defendant relies on O.C.G.A. § 11-9-324(a) (2002). That code section, however, states that “a perfected purchase money security interest in goods . . . has priority over a conflicting security interest in the same goods . . . .” Defendant’s security interest was never perfected as required by the certificate of title act and thus this section does not apply.

Finally, Defendant argues that a financing statement serves the same purpose as a certificate of title. Defendant filed a financing statement that lists as collateral the “wreck fleet.” Defendant argues that the financing statement put subsequent lienholders on notice of Defendant’s security interest.

Defendant relies upon Hopkins v. Kemp Motor Sales, Inc.,<sup>4</sup> in which the Georgia Court of Appeals stated, in part:

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<sup>4</sup> 139 Ga. App. 471, 228 S.E.2d 607 (1976).

Although the holder of a security interest may fail to comply with the provisions of the Motor Vehicle Certificate of Title Act relating to the perfection of a security interest, “[i]t is well settled under the recording statutes that *actual* notice of the prior lien to one who subsequently purchases or acquires a security interest is sufficient to preserve the priority of the lien, or of title.” *Franklin Finance Co. v. Strother Ford, Inc.*, 110 Ga. App. 365, 368(1), 138 S.E.2d 679, 681 (Emphasis supplied.)

228 S.E.2d at 609.

Section 544(a)(1) provides that Plaintiff has the rights and powers of a judicial lien creditor “without regard to any knowledge of the trustee or of any creditor . . . .” “[W]here the holder of a security interest has not taken the essential steps to perfect that security interest or where the recording is defective, the trustee does not have constructive notice.” 5 Collier on Bankruptcy ¶ 544.03 (15th ed. rev. 2003).

Under section 544(a)(1) of the Bankruptcy Code, Plaintiff statutorily has the rights and powers of a judicial lien creditor with no notice. The financing statement filed by Defendant was not effective to perfect Defendant’s security interest in the wreckers. Defendant failed to perfect its security interest as required by the Motor Vehicle Certificate of Title Act. Thus, Plaintiff does not have constructive notice of Defendant’s security interest. The Court is persuaded that Plaintiff may avoid Defendant’s unperfected security interest in the wreckers.



An order in accordance with this memorandum opinion will be entered  
this date.

DATED the 8th day of May, 2003.

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ROBERT F. HERSHNER, JR.  
Chief Judge  
United States Bankruptcy Court