

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO**
Bankruptcy Judge Elizabeth E. Brown

In re:)	
)	
JAMIE CARL ESTERGAARD,)	Bankruptcy Case No. 05-12610 EEB
MICAELA SUE ESTERGAARD,)	Chapter 7
)	
Debtors.)	
_____)	
)	
DANIEL A. HEPNER, Chapter 7 trustee,)	
)	
Plaintiff,)	
)	
v.)	Adversary Proceeding No. 05-01386 EEB
)	
FORD MOTOR CREDIT COMPANY,)	
)	
Defendant.)	

ORDER

THIS MATTER comes before the Court on the Motion for Summary Judgment (“Motion”), filed by Defendant Ford Motor Credit Company (“Ford”), the Response thereto, filed by Plaintiff Daniel A. Hepner, Chapter 7 trustee (“Trustee”), Ford’s Supplemental Authority, and the Trustee’s Motion to Strike Supplemental Authority. Having reviewed these filings and being otherwise advised in the premises, the Court hereby FINDS and CONCLUDES as follows:

I. BACKGROUND

In the sole remaining claim in the Complaint, the Trustee seeks to avoid Ford’s lien on the vehicle of Jamie Carl Estergaard (the “Debtor”), under 11 U.S.C. § 544(a), claiming that Ford’s security interest was unperfected at the time of the filing of the petition. The Debtor purchased a car and took possession of it on January 31, 2005. On the same date, he executed a Credit Sale Contract, Security Agreement, Financing Statement and Disclosures, granting a security interest in the car to Ehrlich Motors, Inc. (the “Dealer”), who in turn assigned its rights to Ford. The Debtor filed bankruptcy on February 10, 2005, less than two weeks after purchasing the car. The Dealer presented the title application documents to the Clerk and Recorder of Weld County on February 15, 2005. The Clerk and Recorder noted Ford’s lien of record on March 7, 2005, and issued the certificate of title on May 20, 2005.

Since the Debtor filed bankruptcy before the Clerk and Recorder had noted Ford's lien of record, the Trustee asserts that Ford's lien was unperfected on the date of the petition. Ford argues that, since it performed all of the acts necessary to obtain a perfected lien in less than twenty days from the date that the Debtor took possession of the vehicle, the Court should find that its lien was perfected as of the petition date. Alternatively, it asserts that under these circumstances the Court should impose an equitable lien in its favor.

Fed. R. Civ. P. Rule 56(c), made applicable to bankruptcy proceedings by Bankruptcy Rule 7056, provides that summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In this case, the material facts relating to the perfection of Ford's lien and its equitable lien claim are undisputed and, therefore, summary judgment is appropriate on these issues.

II. DISCUSSION

A. Perfection of Security Interest in Motor Vehicles

Section 544(a)¹ allows the Trustee to avoid transfers of property of the Debtor, or any obligation incurred by the Debtor, that would have been avoidable on the date of the bankruptcy filing by a hypothetical judgment or execution lien creditor, who had extended credit to the Debtor. This broad power includes the ability of a trustee to avoid an unperfected lien on a motor vehicle. *Lewis v. Hare (In re Richards)*, 275 B.R. 586 (Bankr. D. Colo. 2002). Whether a creditor's security interest is unperfected is a question of state law. *Morris v. CIT Group/Equip. Fin., Inc. (In re Charles)*, 323 F.3d 841, 842-43 (10th Cir. 2003).

In the present case, we examine Colorado law in effect on the date of the bankruptcy filing to determine whether Ford's lien was unperfected. A security interest in a motor vehicle is perfected under Colorado law by filing and notation of the lien on the certificate of title. *Vance v. Casebolt*, 841 P.2d 394, 399 (Colo. Ct. App. 1992); *Gen. Motors Acceptance Corp. v. Martella (In re Martella)*, 22 B.R. 649, 651 (Bankr. D. Colo. 1982). The purpose behind requiring notation of a lien on the title is to make the title certificate itself conclusive "as to the rights of the parties with respect to the matter of notice of prior encumbrances." *Loye v. Denver U.S. Nat'l Bank*, 341 F.2d 402, 405 (10th Cir. 1965).

On the date of the Debtor's bankruptcy filing on February 10, 2005, the Colorado Certificate of Title Act ("CCTA") contained the following provisions regarding the perfection of security interests in motor vehicles:

¹All references herein to Section shall refer to Title 11, United States Code, unless otherwise expressly stated.

Any mortgage . . . intended by the parties to the mortgage . . . to encumber or create a lien on a motor vehicle, to be effective as a valid lien against the rights of third persons, purchasers for value without notice, mortgagees, or creditors of the owner, *shall be filed* for public record *and the fact of filing noted* on the owner's certificate of title . . . substantially in the manner provided in section 42-6-121; and the filing of such mortgage with the [Clerk and Recorder] and the notation by the [Clerk and Recorder] of that fact in the filing of the certificate of title . . . substantially in the manner provided in section 42-6-121 shall constitute notice to the world of each and every right of the person secured by such mortgage.

Colo. Rev. Stat. § 42-6-120(1) (2004) (amended 2005) (emphasis added).

The holder of any chattel mortgage on a motor vehicle desiring to secure the rights provided for in this part 1 and to have the existence of the mortgage and the fact of the filing of the mortgage for public record noted in the filing of the certificate of title to the encumbered motor vehicle shall present the signed original . . . mortgage . . . and the certificate of title . . . to the motor vehicle encumbered to the [Clerk and Recorder] in the county . . . in which the mortgagor of such motor vehicle resides Upon the receipt of said . . . mortgage . . . and certificate of title . . . the [Clerk and Recorder], if satisfied that the vehicle described in the mortgage is the same as that described in the certificate of title . . . shall file within the . . . motor vehicle database notice of such mortgage

Colo. Rev. Stat. § 42-6-121 (2004) (amended 2005).

Thus, in order for a vehicle lien to be effective against third parties, the Colorado legislature has required both that the lien be “filed” and the fact of filing “noted” on the certificate of title.

At first blush, it would appear that the acts of filing and notation could easily occur on different dates and yet the statute gives no indication as to whether the effective date of perfection is the filing date or the notation date. However, Colo. Rev. Stat. § 42-6-102(4.4) defines “filing” as “the creation of or addition to an electronic record maintained for a certificate of title by the director or [Clerk and Recorder].” Thus, “filing” does not refer to the act of the lien holder in presenting its paperwork to the Clerk and Recorder. It refers to the later act, by the Clerk and Recorder, after having verified that the vehicle described in the security agreement and in the title are the same vehicle, of entering the lien in the electronic database. *Hepner v. Americredit Fin. Servs., Inc. (In re Baker)*, 2005 WL 3827385 (Bankr. D. Colo. 2005).²

²The CCTA was amended in 2005, to be effective as of August 8, 2005. The amended version of this statute provides that the filing of the lien documents “with [the county Clerk and Recorder] substantially in the manner provided in section 42-6-121 shall constitute notice to the world Such notice shall be effective on the date *accepted* as noted on the certificate of title.” Colo. Rev. Stat. § 42-6-120(1) (2005) (emphasis added). This amendment does not affect the outcome of this case. Section

Under applicable state law, the “filing” and notation of Ford’s lien did not occur until March 7, 2005, almost one month after the bankruptcy filing.

B. Relation Back of Perfection

The lack of perfection on the filing date renders Ford’s lien avoidable under § 544(a), unless some statutory provision or other authority allows the lien’s perfection date to relate back in time. Section 546(b)(1)(A) provides that the avoidance powers of a trustee under § 544 are subject to “any generally applicable law that permits perfection of an interest in property to be effective against an entity that acquires rights in such property before the date of perfection.” As reflected in the legislative history, the purpose of this limitation is to “protect, in spite of the surprise intervention of a bankruptcy petition, those whom state law protects by allowing them to perfect their liens . . . as of an effective date that is earlier than the date of perfection.” S. Rep. No. 95-989, at 86 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5787, 5872; H.R. Rep. No. 95-595, at 371 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6327. Several states have statutes expressly allowing the date of perfection of a lien on a motor vehicle to relate back to the date the lien documents are presented to the proper state official or to the date of the creation of the lien. *See In re Baker*, 2005 WL 3827385, at *6 (noting that Georgia, Alabama, Connecticut, Florida, Louisiana, and New Hampshire have relation back provisions). Unfortunately for Ford, Colorado’s CCTA has no such provision.

Ford argues that the relation back provisions that govern purchase-money security interests under the Colorado Uniform Commercial Code also apply to liens on automobiles. It bases its argument on the interrelationship between Colo. Rev. Stat. §§ 4-9-317(e) and 4-9-311(b), which provide:

Except as otherwise provided in sections 4-9-320 and 4-9-321 [buyers in ordinary course], if a person files a financing statement with respect to a purchase-money security interest before or within twenty days after the debtor receives delivery of the collateral, the security interest takes priority over the rights of a . . . lien creditor which arise between the time the security interest attaches and the time of filing.

Colo. Rev. Stat. § 4-9-317(e) (2002).

Compliance with the requirements of a [certificate of title statute] for obtaining priority over the rights of a lien creditor is equivalent to the filing of a financing

544(a) grants the Trustee the rights that a judgment lien creditor would have “as of the commencement of the case.” This requires us to apply the law as it existed on the petition date. In addition, Ford did not present its documentation to the Clerk and Recorder until five days after the bankruptcy filing. Thus, under any interpretation of this statute, the lien remained unperfected on the filing date. The Court expresses no opinion herein on the significance or interpretation of the use of the term “date accepted” in the amended statute.

statement under this article. . . . [A] security interest in property subject to a [certificate of title statute] may be perfected *only* by compliance with those requirements

Colo. Rev. Stat. § 4-9-311(b) (2002) (emphasis added).

In its Motion, Ford asserts that it holds a purchase-money security interest in the subject car. Ford argues that it had “complied with the requirements” of the CCTA on February 15, 2005, when it delivered the title documents to the Clerk and Recorder. Furthermore, under Colo. Rev. Stat. § 4-9-311(b), its “compliance” was the equivalent of filing a financing statement to perfect its security interest. Since its “compliance” occurred on February 15, 2005, within twenty days of the date the Debtor took possession, Ford argues that Colo. Rev. Stat. § 4-9-317(e) allows its security interest to take priority over the Trustee’s interest as a hypothetical lien creditor.

We have found no reported decisions that address Ford’s novel argument. The Court, however, finds it unavailing. Section 42-6-120 of the Colorado Statutes expressly states that the provisions of the Uniform Commercial Code (“U.C.C.”) “relating to the filing . . . of chattel mortgages . . . *shall not be applicable to motor vehicles,*” and that “*to be effective as a valid lien against the rights of third persons,*” a lien on a motor vehicle must be electronically entered on the motor vehicles department’s data base and noted on the title. Colo. Rev. Stat. § 42-6-120(1) (2004) (amended 2005) (emphasis added). Ford does not address the plain language of this statute or the second sentence of Colo. Rev. Stat. § 4-9-311(b), which mandates reference to the CCTA alone in determining when a lien on a motor vehicle is perfected as against intervening rights of third parties.

Additionally, even if the Court were to somehow disregard this language and apply the U.C.C. relation back rules to motor vehicle liens, the U.C.C. requires compliance with the CCTA’s provisions “for obtaining priority over the rights of a lien creditor” in order to gain the perfected status, which is equivalent to the filing of a financing statement. Such “compliance” is only accomplished through completion of all the events necessary to perfect a lien under the certificate of title statute. Consequently, Ford had not complied with the CCTA’s requirements for obtaining priority over the rights of a lien creditor until March 7, 2005, when its lien was accepted and noted on the car’s title. This date falls outside the twenty-day relation back period of Colo. Rev. Stat. § 4-9-317(e).

C. Equitable Lien

Alternatively, Ford argues that it is unfair to divest it of its security interest when it did all that it could to perfect its lien within twenty days after the Debtor received possession of the car. Under such circumstances, Ford claims that the Court should impose an equitable lien to remedy this unjust result. Colorado law recognizes the equitable lien theory. *Leyden v. Citicorp Indus. Bank*, 782 P.2d 6, 9 (Colo. 1989).

Under Colorado law, an equitable lien may be created either by a written contract showing an intention to charge property with a debtor obligation or ““by a court of equity, out of general considerations of right and justice, as applied to the relations of the parties and the circumstances of their dealings.”” *Id.* (quoting *Valley State Bank v. Dean*, 47 P.2d 924, 927 (Colo. 1935)). An equitable lien is a personal right to have specific property applied to the payment of a particular debt. *Id.* at 10 nn.7, 8. It is a special form of constructive trust, but it does not arise unless there “is evidence that the parties intended to charge a particular property or fund as security for an obligation.” *Bachrach v. Salzman*, 981 P.2d 219, 222 (Colo. Ct. App. 1999).

The Court expresses no opinion as to Ford’s contention that “it did all it could do” to protect its lien position. It did not have to relinquish possession of the car before the perfection of its lien. Nevertheless, the circumstances of the present case may justify the imposition of an equitable lien in Ford’s favor. Fortunately, we do not have to reach this issue because, even if Ford were to successfully establish an equitable lien, the Trustee’s strong arm powers under § 544(a) would defeat it. In *In re Richards*, this Court has already analyzed the ability of a trustee to avoid an equitable lien asserted against a debtor’s car, where both parties intended that the loan would be secured by the vehicle, but where the secured party failed to perfect his lien by notation on the certificate of title prior to the debtor’s bankruptcy. In *Richards*, we held that, even if the circumstances of the case would merit the imposition of an equitable lien, the trustee’s powers under § 544 would enable the trustee to avoid such a lien, noting that the CCTA “operates as strictly as the real property recording statutes to cut off unrecorded interests, undoubtedly reflecting legislative intent to promote greater certainty in commercial transactions, by allowing parties to rely on the recording statutes.” *Richards*, 275 B.R. at 592.

Within the Tenth Circuit, some courts have recognized an exception to the superiority of the Trustee’s strong arm powers over an equitable lien claim in cases where state law placed control over the lien’s perfection into the hands of the debtor. In *Rushton v. Dean Evans Chrysler-Plymouth (In re Solar Energy Sales & Services, Inc.)*, 4 B.R. 364 (Bankr. D. Utah 1980), the court recognized that an equitable lien could be imposed when a creditor has done all it reasonably could do to perfect its lien, but was thwarted by the debtor’s lack of cooperation. The Tenth Circuit reached that result in *Commerce Bank v. Chambers (In re Littlejohn)*, 519 F.2d 356 (10th Cir. 1975). In *Littlejohn*, the Tenth Circuit, applying Kansas law, held that a secured party having done all it could to perfect its lien, should not be subject to the trustee’s avoidance powers when state law put control over the actual perfection of the lien in the hands of debtors who had the responsibility to apply for a new title showing the lien, but who failed to do so. However, the Kansas legislature subsequently amended its motor vehicle statutes to allow lenders to perfect their liens by filing a “notice of security interest” with the motor vehicle department to ensure perfection until the state had issued a new title. Following this amendment, the Tenth Circuit explicitly abandoned its ruling in *Littlejohn*. See *Lentz v. Bank of Independence (In re Kerr)*, 598 F.2d 1206 (10th Cir. 1979). Once the creditor was no longer solely dependent on the debtor’s actions to perfect its lien, the creditor was required to comply with the provisions of the new law and could not claim an equitable lien. *Id.*

In Colorado, the final act necessary to perfect a lien on a motor vehicle does not rest in the hands of a debtor, but in the hands of the county clerk and recorder. The Colorado legislature elected not to include either Kansas' notice filing provision or a relation back provision in the CCTA. Thus, the Trustee's avoidance powers trump any equitable lien claim of Ford.

D. Subsequent Transferee For Value Defense

Ford filed a "Supplemental Authority" after this matter had been fully briefed. The Supplemental Authority raises for the first time a defense based on § 550(b)(1). This statute provides that a trustee may not recover from "a transferee that takes for value, including satisfaction or securing of a present or antecedent debt, in good faith, and without knowledge of the voidability of the transfer avoided" Ford asserts that it took for value, in good faith, and without knowledge of the voidability of the transfer avoided, but without any affidavits or other admissible evidence to support these assertions, as required by Bankruptcy Rule 7056.

The Trustee filed a Motion to Strike the Supplemental Authority because it attempts to raise a new basis for summary judgment after the deadline for filing dispositive motions in this case. On June 20, 2005, the Court entered an Order setting forth the pre-trial deadlines and setting a trial date. It allowed parties to move to amend the deadlines only within 15 days following the date of the Order. This Order set a deadline of August 11, 2005, for filing dispositive motions. Ford filed the present motion before this deadline, but it did not raise any defense under § 550(b)(1). Ford did not file the Supplemental Authority until December 28, 2005, well after the October 2005 trial date. Thus, the Court finds the Trustee's Motion to Strike well-founded and will not allow Ford to pursue this issue on summary judgment.

Furthermore, § 550(b)(1) is an affirmative defense. It raises matters extraneous to the Trustee's prima facie case, and denies the Trustee's right to recover even if he were to establish all of the elements of his § 544(a) claim. Affirmative defenses "admit the allegations of the complaint but suggest some other reason why there is no right of recovery [or] concern allegations outside of the plaintiff's prima facie case that the defendant therefore cannot raise by a simple denial in the answer." 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1271, at 585 (3d ed. 2004). See also *In re Nat'l Lumber & Supply, Inc.*, 184 B.R. 74, 77-78 (9th Cir. BAP 1995) (§ 547(c) context); *Internal Revenue Serv. v. Nordic Village, Inc.* (*In re Nordic Village, Inc.*), 915 F.2d 1049, 1055 (6th Cir. 1990) (§ 550(b) is a defense), *rev'd on other grounds*, 503 U.S. 30 (1992); *Cassirer v. Sterling Nat'l Bank & Trust (In re Schick)*, 223 B.R. 661, 664-65 (Bankr. S.D.N.Y. 1998) (§ 550(b) is an affirmative defense). "It is a frequently stated proposition of virtually universal acceptance by the federal courts that failure to plead an affirmative defense . . . results in the waiver of that defense and its exclusion from the case" Wright & Miller, *supra*, § 1278; 10 *Collier on Bankruptcy* ¶ 7008.04 (Lawrence P. King ed., 15th ed. rev. 2006).

The Tenth Circuit has recently held that an affirmative defense may be raised in a post-answer motion "if the defense is raised in sufficient time that there is no prejudice to the

opposing party merely because of the delay.’” *Ahmad v. Furlong*, 435 F.3d 1196, 1201 (10th Cir. 2006) (quoting 2 James Wm. Moore et al., *Moore’s Federal Practice*, § 8.07[2] (3d ed. 1997)). However, “absence of prejudice to the opposing party is not the only proper consideration in determining whether to permit an amended answer; a motion to amend may also be denied on grounds such as ‘undue delay, bad faith or dilatory motive . . . , or repeated failure to cure deficiencies by amendments previously allowed.’” *Id.* at 1202 (quoting *Harris v. Secretary, U.S. Dep’t of Veterans Affairs*, 126 F.3d 339, 345 (D.C. Cir. 1997) (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962))). The parties should be prepared to address in further proceedings in this case whether Ford has waived this defense, whether the Trustee would suffer prejudice if the Court were to allow Ford to pursue this defense at this stage in the case, and whether there are other grounds that would prevent the Court from allowing Ford to amend its Answer.

As part of any analysis as to whether Ford should be allowed to amend its Answer or otherwise pursue this defense, the Court would expect to hear some initial showing as to the merits of the defense from Ford. Ford was the original lienholder noted on the certificate of title. Nothing in the facts presented to date demonstrate anything other than Ford as the initial transferee or the entity for whose benefit such transfer was made. *See Tidwell v. Chrysler Credit Corp. (In re Blackburn)*, 90 B.R. 569, 573 (Bankr. M.D. Ga. 1987); *Mann v. General Motors Acceptance Corp. (In re Harley)*, 41 B.R. 276, 281 (Bankr. N.D. Ga. 1984). The parties, however, have never presented the Court with the Credit Sale Contract, Security Agreement, Financing Statement and Disclosures, by which the Debtor granted a security interest in the car. Nor has the Court seen any documentation regarding the arrangement between the Dealer and Ford.

III. CONCLUSION

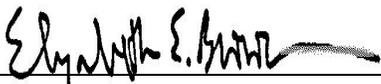
For the reasons stated, this Court grants the Trustee’s request to strike Ford’s Supplemental Authority and grants partial summary judgment in favor of the Trustee and against Ford, on the following issues:

- (A) finding the lien was unperfected on the date of the bankruptcy filing; and
- (B) finding that any equitable lien claim of Ford is avoidable by the Trustee.

Whether the Trustee may recover from Ford and, if so, what form of recovery is appropriate will be determined at a later date. The Court will issue a separate Order to set this matter for further proceedings.

DATED this 23rd day of March, 2006.

BY THE COURT:



Elizabeth E. Brown, Bankruptcy Judge

Counsel of record:

Virginia M. Dalton
1775 Sherman Street, Suite 2828
Denver, Colorado 80203
COUNSEL FOR PLAINTIFF

Roseanne M. Hall
1700 Broadway, Suite 1900
Denver, Colorado 80290
COUNSEL FOR DEFENDANT