

**UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF COLORADO**

In re: ) ) DAVID RAY HARDCASTLE and ) DIANA LYNNE HARDCASTLE, ) Debtors. ) _____ ) ) DAVID RAY HARDCASTLE and ) DIANA LYNNE HARDCASTLE, ) Plaintiffs, ) ) v. ) ) WEAVER-BEATTY MOTOR COMPANY, ) Defendants. )	Bankruptcy Case No. 10-29370-SBB Chapter 13     Adversary Proceeding No. 10-01727-SBB
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**ORDER DENYING MOTION FOR LEAVE TO AMEND COMPLAINT (DOCKET #16)**

THIS MATTER comes before the Court on the Motion for Leave to Amend Complaint filed on December 12, 2010 (“Motion to Amend Complaint”), by the Plaintiffs, David Ray Hardcastle and Dianna Lynne Hardcastle (“Plaintiffs”)<sup>1</sup> and the Response thereto filed by the Defendant, Weaver-Beatty Motor Company d/b/a Empire Lakewood Nissan, Inc. (“Defendant”).<sup>2</sup> The Court, having reviewed the pleadings and the within case file, makes the following findings of fact, conclusions of law and Order.

**I. Summary**

Plaintiffs seek leave from this Court to add a claim to their Complaint. Specifically that, pursuant to 11 U.S.C. § 544(a)(3), the Plaintiffs, essentially in the shoes of the Chapter 13 Trustee, seek to avoid Defendant’s interest in a vehicle.

As set forth herein, the Motion to Amend Complaint to add the claim under 11 U.S.C. § 544(a)(3) must be denied because the Plaintiffs have *no* standing to bring an avoidance action under Section 544 and because a Chapter 13 Trustee’s status as a *bona fide* purchaser only grants the Chapter 13 Trustee rights in *real property*. The property at issue in this case, a vehicle, is *personal property*.

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<sup>1</sup> Docket #16.  
<sup>2</sup> Docket #17.

## II. Background

The Plaintiffs transacted to purchase<sup>3</sup> a Nissan Rogue from Defendant on July 22, 2010. The Plaintiffs filed their petition for Chapter 13 bankruptcy on July 30, 2010, *only eight days after the purchase of the Nissan Rogue*.

Due to the Plaintiffs' bankruptcy, the Plaintiffs' transaction was denied financing. Defendant contends that, due to the failure of financing, and under the purchase contract between Defendant and the Plaintiffs, it had the right to cancel the contract and demand return of the Nissan Rogue.

Defendant filed a Motion for Relief from Stay requesting that the Court grant relief from the automatic stay so that Defendant could cancel the contract and demand return of the Nissan Rogue or otherwise exercise its rights under state law. The Court granted this Motion on October 19, 2010.<sup>4</sup>

Defendant filed a replevin action in Jefferson County District Court. After an evidentiary hearing the, Jefferson County District Court ruled in favor of the Defendant and issued an Order that Defendant was entitled to possession of the Nissan Rogue. Pursuant to that Order, Defendant regained possession of the Nissan Rogue.

The within adversary proceeding was brought seeking eight claims for relief including:

- (a) First Claim for Relief - violation of the Colorado Consumer Protection Act ("CCPA"),
- (b) Second Claim for Relief - violation of the CCPA,
- (c) Third Claim for Relief - willful violation of the automatic stay,
- (d) Fourth Claim for Relief - violations of the Plaintiffs' privacy,
- (e) Fifth Claim for Relief - violation of the standards of care set out by the Gramm-Leach-Bliley Act, 15 U.S.C. Subchapter I, §§6801-6809,
- (f) Sixth Claim for Relief - contempt of court and violation of Federal District Court and Bankruptcy Court Orders and policies against disclosure of personal identifiers and sensitive data,
- (g) Seventh Claim for Relief - contempt of court and violation of Federal Rule of Bankruptcy Procedure 9037, failure to redact nonpublic information,
- (h) Eighth Claim for Relief - invasion of privacy and intentional or negligent infliction of emotional distress.

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<sup>3</sup> The Plaintiffs assert that they purchased the Nissan Rogue. The Defendants assert that they "attempted" to purchase the Nissan Rogue, but did not actually purchase it.

<sup>4</sup> Docket #35 in the underlying bankruptcy case, Case No. 10-29370-SBB. Plaintiffs have filed a Motion to Reconsider this Order (Docket #53 in Case No. 10-2970-SBB). But, no stay of enforcement of the Order was requested by Plaintiffs and no bond was requested to be posted. The Court will consider the Motion to Reconsider on February 1, 2011.

Upon motion by Defendant, the Fourth, Fifth, Sixth, Seventh and Eighth Claims for Relief were dismissed with prejudice by Court Order entered on November 9, 2010.<sup>5</sup> The First through Third Claims for Relief for alleged violations of the stay and the CCPA are still pending.

It would seem that the requested amendment to the Complaint, on the heels of this Court's determination with respect to the Fourth, Fifth, Sixth, Seventh, and Eighth Causes of Action, seems unfounded, not supported by any cited (or other) case law, and clearly and fundamentally inconsistent with Plaintiffs' purported statutory authority.

### **III. Discussion**

#### **A. This Court *May* Deny a Motion to Amend a Complaint When that Amendment Would be Futile**

Pursuant to FED.R.CIV.P. 15(a)(2), a court generally should freely give leave to amend when justice so requires. Nevertheless, where, as here, the requested amendment would be futile, the Court may deny the motion for leave to amend. A futile amendment is one where the movant could not prevail on the requested amendment even if all alleged facts were true.<sup>6</sup>

Under Section 544(a)(3), a trustee *only* may use its bona fide purchaser status to avoid transfers of real property.

In paragraph 8 of Plaintiffs' Motion to Amend Complaint, they allege "[t]he Chapter 13 Trustee, as a hypothetical bona fide purchaser pursuant to § 544(3) [sic] of the bankruptcy code, takes a perfected legal title of the property as of the date of the bankruptcy petition for value and without notice of any prior unrecorded lien."<sup>7</sup> As pled, it would appear, by the representation of counsel, that somehow Plaintiffs have implicitly been granted authority by the Chapter 13 Trustee to bring this amended claim for relief on her behalf. Plaintiffs' cite no statutory authority or case law precedent for their position.

11 U.S.C. § 544(a)(3) provides:

The trustee shall have, as of the commencement of the case,... the

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<sup>5</sup> Docket #6. The Court would note that this Court has seen almost verbatim Complaints containing the claims for relief dismissed in this case. In light of the fact that this Court has published on this topic previously it is quite troubling to see these rejected claims for relief brought anew in this action. *See Davis v. Eagle Legacy Credit Union (In re Davis)*, 430 B.R. 902 (Bankr. D.Colo. 2010).

<sup>6</sup> *See Gregory v. U.S.*, 942 F.2d 1498 (10th Cir. 1991), *cert. denied*, 504 U.S. 941, 119 L. Ed. 2d 202, 112 S. Ct. 2276 (1992).

<sup>7</sup> In spite of the typographical error, it would appear that the Plaintiffs are asserting their cause of action under 11 U.S.C. § 544(a)(3).

rights and powers of, or may avoid any transfer of property of the debtor of any obligation incurred by the debtor that is voidable by ... a bona fide purchaser of *real property*, . . . .”<sup>8</sup>

This section only applies to rights in real property. “The trustee has the rights of a bona fide purchaser of *real property*, but not of *personal property*.”<sup>9</sup>

The Nissan Rogue is *personal property*.<sup>10</sup> As such, Section 544(a)(3) does not apply and the trustee cannot claim bona fide purchaser status to avoid Defendant’s interest in the Rogue. Because the Chapter 13 Trustee would not have any avoidance power under the facts of the case, the Plaintiff’s additional claim is not valid and the requested amendment is futile.

**B. The Plaintiffs Do Not Have Standing to Bring an Avoidance Claim on *Behalf* of the Chapter 13 Trustee**

The Plaintiffs’ additional claim essentially alleges that the Chapter 13 Trustee has the right to take title to the Nissan Rogue under Section 544. Even if that were the case here, nothing in the record before this Court reflects that the Chapter 13 Trustee has assigned these ostensible rights to the Plaintiffs and/or authorized counsel for the Plaintiffs to act on behalf of the Chapter 13 Trustee.

The Chapter 13 Trustee, here, did not bring the avoidance action. Nevertheless, the Plaintiffs are attempting to exercise the Chapter 13 Trustee’s avoidance powers themselves. This claim has no merit and the requested amendment must be denied because it is settled law within the Tenth Circuit that Chapter 13 debtors do not have standing to bring avoidance actions under Section 544.

The Tenth Circuit Bankruptcy Appellate Panel addressed virtually the same issues in *Hansen v. Hansen (In re Hansen)*.<sup>11</sup> In *Hansen*, Plaintiffs’ requested amendment and found that a Chapter 13 debtor does not have standing for the following reasons:

[T]he clear and unambiguous language of § 544 confers avoidance

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<sup>8</sup> Emphasis added.

<sup>9</sup> 5 *Collier on Bankruptcy* ¶ 544.05, at 544-16 (Alan N. Resnick and Henry J. Sommer ed., 16th ed. Rev. 2010) (emphasis added). See, e.g., *Prior v. Farm Bureau Oil Co. (In re Prior)*, 176 B.R. 485, 494 (Bankr. S.D. Ill. 1995) (“It is settled that the trustee does not have the rights of a bona fide purchaser of personal property.”).

<sup>10</sup> *Meads v. People*, 78 P.3d 290, 299 (Colo. 2003) (“A motor vehicle is tangible personal property...”).

<sup>11</sup> 332 B.R. 8 (10th Cir. BAP 2005).

powers upon the *trustee*, not the *debtor*.<sup>12</sup>

Congress knew how to give debtors avoidance powers (as evidenced by § 522(h)); Congress could also have expressly given ‘debtors’ the avoiding powers of § 544, § 545, § 547, § 548, and § 549. Instead, Congress expressly conferred the avoiding powers on the trustee.<sup>13</sup>

[T]here is no justification for a Chapter 13 debtor to have avoidance powers because future income, not proceeds of an avoidance action, funds a debtor’s Chapter 13 plan. In addition, the debtor has no duty to maximize recovery for unsecured creditors. In short, the avoidance powers are not designed to protect the debtor. Instead, they benefit the unsecured creditors by enhancing the recovery of estate property.<sup>14</sup>

The Tenth Circuit Bankruptcy Appellate Panel in *Hansen* also rejected decisions from other jurisdictions where debtors were allowed to bring avoidance actions.<sup>15</sup> Thus, under *Hansen*, the Plaintiffs, here, are precluded from bringing any avoidance action under Section 544.<sup>13</sup>

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<sup>12</sup> *Id.*, at 12 (emphasis added).

<sup>13</sup> *Id.*, at 13.

<sup>14</sup> *Id.*

<sup>15</sup> *See id.*, at 14-16.

<sup>13</sup> It would appear that in the Tenth Circuit, the law on this issue is so certain and unqualified that Plaintiffs Motion is groundless and without support under FED.R.BANKR.P. 9011.

**IV. Conclusion and Order**

Based upon the above and foregoing, the amendment requested by the Plaintiffs is futile and frivolous because the Plaintiffs cannot prevail on their avoidance claim.

IT IS THEREFORE ORDERED that the Motion to Amend Complaint is DENIED.

Dated this 21st day of February, 2011.

BY THE COURT:



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Sidney B. Brooks,  
United States Bankruptcy Judge