

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Southern Division

In re:) Bankr. No. 97-40908
)
ANTHONY L. LE PERA) Chapter 7
Soc. Sec. No. [REDACTED]-2962)
Debtor.)
JOHN S. LOVALD, TRUSTEE) Adv. No. 97-4060
Plaintiff,)
-vs-) MEMORANDUM OF DECISION
FIRST BANK OF SOUTH DAKOTA,) RE: VALIDITY OF BANK'S
NATIONAL ASSOCIATION and) LIEN ON VEHICLE
ANTHONY L. LE PERA)
Defendants.)

The matter before the Court is the Trustee's complaint to determine whether First Bank of South Dakota has a perfected security interest in a certain vehicle. This is a core proceeding under 28 U.S.C. § 157(b)(2). This Memorandum of Decision and subsequent judgment shall constitute the Court's findings and conclusions under F.R.Bankr.P. 7052. As set forth below, the Court concludes that First Bank did not have a perfected security interest on the subject vehicle on the petition date.

I.

The parties' Stipulated Facts filed February 20, 1998 are incorporated herein by reference.

II.

A bankruptcy court looks to state law to determine whether an agreement created a security interest in property. *Butner v. United States*, 440 U.S. 48, 54-57 (1979). In South Dakota, a security interest is not enforceable against the debtor or a third

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party unless (1) the secured party has possession of the collateral or the debtor has signed a security agreement that describes the collateral, (2) value has been given, and (3) the debtor has rights in the collateral. S.D.C.L. § 57A-9-203(1). Once those three events have happened, in any order, the security interest has "attached" and is enforceable against the debtor with respect to the subject collateral. S.D.C.L. § 57A-9-203(2).

For a security interest to be enforceable against third parties, it also must be perfected. S.D.C.L. §§ 57A-9-302 and 32-3-41 (1989). A security interest is perfected when it has attached and when all steps necessary for perfection have been taken. S.D.C.L. § 57A-9-303(a). If the required steps for perfection are taken before the security interest has attached, the security interest will be perfected at the same time it attaches. *Id.*

To perfect a security interest in a motor vehicle in this state, the creditor must have his lien noted on the motor vehicle title. S.D.C.L. §§ 57A-302(3)(b) and 32-3-41 (1989)¹.

III.

Without a signed security agreement for the November 14, 1996 consolidation loan that contained a description of the second

¹ Amendments to S.D.C.L. § 32-3-41 in 1998 are not applicable in this case since Debtor's petition was filed before the 1998 amendments became effective. The 1997 amendments are applicable but not relevant.

Viper, the Bank's security interest for that note never attached and thus was never perfected as to the second Viper. *Citizens Commercial & Savings Bank v. Elridge (In re Elridge)*, 10 B.R. 835, 838-40 (Bankr. E.D. Mich. 1981) (incorrect VIN number on security agreement fatal to creditor's security interest although lien noted on the title of correct vehicle); *GMAC v. Bolinger (In re Bolinger)*, 3 B.R. 186, 187-88 (Bankr. E.D. Mich. 1980) (error in vehicle description on security agreement fatal to creditor's security interest). The lien notation on the title to the second Viper would have prompted further inquiry. However, the inquirer would only have found the November 14, 1996 note and security agreement describing the first Viper and a November 20, 1996 paid loan verification covering the September 1995 purchase money loan for the second Viper but with the first Viper's VIN listed. Moreover, it is the November 14, 1996 security agreement that governs the extent of the Bank's security interest, not the title notation. S.D.C.L. § 57A-9-201; *GMAC v. First National Bank of Wayne (In re Ellingson Motors, Inc.)*, 139 B.R. 919, 922 (Bankr. D. Neb. 1991) (security interest limited to collateral described in the agreement itself); *In re Kelton Motors, Inc.*, 117 B.R. 87, 90 (Bankr. D. Vt. 1990) (distinguishing purpose of description in security agreement and purpose of description in financing statement); *Schechter v. Nelson (In re Nightway Transportation Co.)*, 96 B.R. 854, 857 (Bankr. N.D. Ill. 1989); see also *Jackson v.*

Miller (In re Miller), 93 B.R. 421, 424 (Bankr. W.D. Pa. 1988) (cites therein) (financing statement cannot enlarge security set forth in security agreement). The Bank's error was not simply a misplaced digit or letter in the VIN of the second Viper on the November 14, 1996 security agreement; the error was that the VIN for the first Viper was put on it. *In re Aragon Industries, Inc.*, 14 U.C.C. Rep. Serv. (CBC) 1218, 1220 (S.D. Fla. 1973); *City Bank & Trust Co. v. Warthen Service Co.*, 16 U.C.C. Rep. Serv. 1370, 1374 (Nev. 1975). There was no other information in the description on the November 14, 1996 security agreement that would indicate that the second Viper was the collateral nor was there any indication in the security agreement that the description was in error. *City Bank & Trust Co.*, 16 U.C.C. Rep. Serv. at 1374. All that was presented on the November 14, 1996 security agreement was the model, year, and the unique VIN of the *first* Viper. See *In re Juhasz*, 208 B.R. 32, 35 (Bankr. S.D. Tex. 1997). Since the Bank did not have a perfected security interest in Debtor's second Viper on the petition date, the vehicle comes into the bankruptcy estate free of any encumbrance by the Bank. S.D.C.L. § 57A-9-301(1)(b) and (3).

The note and security agreement executed in September 1995 when Debtor purchased the second Viper were not put in evidence. It is unknown whether that security agreement contained the correct VIN for the second Viper and therefore matched the lien notation on

the second Viper's title or whether it too incorrectly listed the first Viper's VIN, as did the November 20, 1996 PAID LOAN VERIFICATION for that September 1995 note. Regardless, the Court does not rely on the September 1995 security agreement because it was supplanted by the November 14, 1996 note and security agreement. The Court also does not rely on the PAID LOAN VERIFICATION for its conclusion that the Bank did not have a perfected security interest in the second Viper because the document, as put in evidence, is incomplete (attachment to which it refers was not provided).

Trustee Lovald shall prepare a judgment.

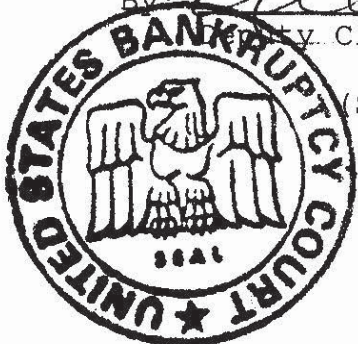
Dated this 23 day of June 1998.

BY THE COURT:

[Handwritten Signature]
Irvin N. Hoyt
Chief Bankruptcy Judge

ATTEST:
Charles L. Nail, Jr., Clerk

By: *[Handwritten Signature]*
Clerk



(SEAL)

NOTICE OF ENTRY
Under F.R. Bankr.P. 9022(a)
Entered

JUN 23 1998

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court
District of South Dakota

CERTIFICATE OF SERVICE

I hereby certify that a copy of this document was mailed, hand delivered, or faxed this date to those creditors and other parties in interest identified on the attached service list.

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court
District of South Dakota

By: *[Handwritten Signature]*
Date: 6-23-98

Case: 97-04060 Form id: 122 Ntc Date: 06/23/98 Off: 4 Page : 1
Total notices mailed: 4

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