

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
ROOM 211
FEDERAL BUILDING AND U.S. POST OFFICE
225 SOUTH PIERRE STREET
PIERRE, SOUTH DAKOTA 57501

IRVIN N HOYT
CHIEF BANKRUPTCY JUDGE

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December 23, 1996

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Sioux Falls, South Dakota 57102-0898

Subject: *Trustee v. Home Federal Savings Bank*
(In re Mark J. and Susan X. Steinfurth),
Chapter 7; Bankr. No. 96-40221

Dear Trustee and Counsel:

The matter before the Court is the Chapter 7 Trustee's complaint regarding Home Federal Savings Bank's security interest in a vehicle. This is a core proceeding under 28 U.S.C. § 157(b)(2). This letter 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 the Bank did not have a perfected security interest in the vehicle on the petition date and that the Trustee takes a superior interest in it.

Stipulated facts. On November 30, 1995, Jerry and Bonnie Peterson sold a 1992 Dodge Caravan, the subject vehicle, to Jerry's Auto Sales. Chrysler Credit Corporation released its lien on the van. On February 21, 1996, Mark and Susan Steinfurth (Debtors) purchased the van from Jerry's Auto. Debtors financed the purchase through the Bank. On the date of purchase, Jerry's Auto noted the assignment of the van to Debtors on the back of the vehicle's certificate of title but filled in only Debtors' address, not their name. Jerry's Auto also noted the Bank's lien on the back of the certificate. Jerry's Auto mailed the certificate of title to Debtors and asked Debtors to take it to the county treasurer's office to pay the applicable taxes and to get the title reissued. On February 23, 1996, a representative of the Bank wrote Debtors a letter and also asked them to take the certificate of title to the county treasurer immediately and have the title transferred. Debtors either did not receive the certificate or they lost it before taking it to the county treasurer.

On April 1, 1996, Debtors filed a Chapter 7 petition. The South Dakota Secretary of State issued a duplicate certificate of title on April 12, 1996. The duplicate title still listed the Petersons as the owners. When Jerry's Auto received the duplicate

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certificate, they again noted the assignment to Debtors and the Bank's lien on the back and they forwarded the certificate to Debtors. Debtors presented the certificate to the county treasurer. The certificate of title was reissued by the Secretary of State on May 1, 1996, a month after Debtors' petition was filed. The reissued certificate listed Debtors as the owners and the Bank as the first lien holder.

Discussion. In his complaint, the Trustee¹ characterized this action as a preference, arguing that the Bank did not perfect its security interest in the van until May 1, 1996, well after Debtors' petition was filed. Section 547, which governs preference actions, is not applicable since it applies only to transfers made *before* the petition is filed. See 11 U.S.C. § 547(b)(4)(A) and (B). The parties' respective briefs, however, recognize that the more pointed issue is whether the Bank had a perfected security interest in the van on the date of Debtors' petition in order to defeat the Trustee's interest as a hypothetical lien creditor under 11 U.S.C. § 544 and S.D.C.L. § 57A-9-301. See generally *First National Bank of Denver v. Turley (In re Turley)*, 17 B.R. 99 (Bankr. D.S.D. 1981), *aff'd*, 705 F.2d 1024 (8th Cir. 1983). Based on S.D.C.L. § 32-3-41, the Court finds that the Bank did not have a perfected security interest on the petition date.

Perfection of a lien interest on a vehicle in South Dakota is governed by S.D.C.L. Ch. 32-3. Chapter 32 generally provides that a certificate of title is to be properly endorsed by the Secretary of State when a vehicle is sold or by the county register of deeds when a vehicle is encumbered. S.D.C.L. §§ 32-3-5, 32-3-25, 32-3-26, 32-3-28, and 32-3-38. For an encumbrance to be valid against other creditors, the encumbrance must be noted on the certificate of title by the Secretary of State or the county register of deeds. S.D.C.L. § 32-3-41; *Pokela v. Dakota United Methodist Federal Credit Union (In re Huyck)*, 167 B.R. 908, 910 (Bankr. D.S.D. 1994). Notation on the back of the certificate by the transferor is not sufficient as the statute requires the notation to be made on the "face" of the certificate of title by the Secretary of state or county register of deeds. S.D.C.L. § 32-3-41.

Here, the Bank's lien was not noted on the face of the certificate by the Secretary of State or the county register of deeds before Debtors filed their Chapter 7 petition. Therefore, the Bank's lien was not perfected on the day Debtors filed bankruptcy. *Turley*, 705 F.2d at 1026-27; *United National Bank v. Corsica Enterprises, Inc. (In re Corsica Enterprises, Inc.)*, 40

¹ A. Thomas Pokela was the case trustee when this action was commenced. In the interim, John S. Lovald was appointed his successor.

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B.R. 769 (Bankr. D.S.D. 1984). Under S.D.C.L. § 32-3-41 it does not matter who was responsible for getting the certificate properly endorsed and it does not matter that the unendorsed certificate was "lost" at some point. Consequently, the Bank's lien that was perfected post-petition is voidable, if not void,² as an act in contravention of the automatic stay of § 362 or it is voidable by the Trustee under §§ 544 and 549(a) as a post-petition perfection of a lien interest.³ *Gibson v. United States (In re Russell)*, 927 F.2d 413, 417-18 (8th Cir. 1991) (four elements of § 549); see also *Armstrong v. Dakota Bank and Trust Co. (In re Knudson)*, 943 F.2d 877, 878 (8th Cir. 1991) (under § 549(a)(2)(B), lack of court approval defeats a post-petition security interest); *Shanor v. Chappell & Barlow (In re Bellamah Community Development)*, 139 B.R. 29, 31 (Bankr. D.N.M. 1992) (cites therein) (there is no ordinary course defense to avoidance of post-petition transfers under § 549). The Bank has no defense under § 549(a)(2)(B) because its post-petition lien was not court approved. The vehicle is thus property of the estate subject only to any valid exemption Debtors may have claimed. 11 U.S.C. § 522(b)(2); S.D.C.L. § 45-35-4.

The Trustee is not stepping into the shoes of the debtor and, so is not encumbered with any equitable defenses that the Bank could raise against Debtors. See *In re Doyen*, 56 B.R. 632, 634 (Bankr. D.S.D. 1986) (notation of a lien is the exclusive method of perfection of lien on a vehicle; equitable lien would undermine statute). Further, the Bank cannot successfully argue that under S.D.C.L. § 32-3-10 Debtors did not have any legal or equitable

² Most circuit courts have concluded that an act in violation of the automatic stay is void. See, e.g., *Yorke v. Citibank, N.A. (In re BNT Terminals, Inc.)*, 125 B.R. 963, 971 (Bankr. N.D. Ill. 1990) (cites therein). Courts in this Circuit are split on whether such acts are void or voidable. *Riley v. United States*, 192 B.R. 727, 729 (E.D. Mo. 1995) (act in violation of stay is void); *In re Rhodes*, 147 B.R. 492, 494 (Bankr. W.D. Ark, 1992, *aff'd*, *Rhodes v. I.R.S. (In re Rhodes)*, 155 B.R. 491 (W.D. Ark. 1993); *Claussen v. Brookings County (In re Claussen)*, 118 B.R. 1009, 1014 (Bankr. D.S.D. 1990) (Ecker, J.); and *Rose v. Carlson (In re Rose)*, 113 B.R. 534, 537 (W.D. Mo. 1990). Compare *Snydergeneral Corp. v. Gibson (In re Gibson)*, 149 B.R. 562, 573 n.7 (Bankr. D. Minn. 1993) (acts in violation of stay are voidable but not void *per se*); and *Germer v. Farmers State Bank (In re Germer)*, 107 B.R. 217, 220 (Bankr. D. Neb. 1989).

³ The Court finds no merit in distinguishing between the two types of relief provided by the Code at this time. For a discussion of acts that are void as violations of the automatic stay and acts that are voidable as post-petition transfers of estate property see *Schwartz v. United States (In re Schwartz)*, 964 F.2d 549 (9th Cir. 1992).

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interest in the vehicle on the petition date. That section provides:

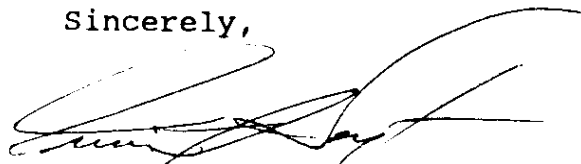
No person, except as provided in this chapter, obtaining or acquiring possession of a motor vehicle, trailer or semi trailer acquired any right, title, claim or interest in or to the motor vehicle . . . until he has been issued a certificate of title to the motor vehicle No waiver or estoppel may be operated in favor of such person against a person having possession of the certificate of title . . . for such motor vehicle. . . .

Section 32-3-10 has been previously considered by the South Dakota Supreme Court. In *Island v. Warkenthien*, 287 N.W.2d 487 (S.D. 1980), the court held that § 32-3-10 does not take precedence over South Dakota's Uniform Commercial Code provisions that a good faith purchaser is entitled to possession and a transfer of rights of ownership. Title statutes are not meant to prevent a court of equity from ordering that a title be transferred if the holder has bound himself to do so. *Id.* at 489 (quoting *Levin v. Nielsen*, 306 N.E.2d 173, 179 (Ohio 1973)).

Section 32-3-10 has the same effect here. While Debtors may not have held an endorsed certificate of title to the van on the petition date, they did have the equitable right to have the title transferred to them. That is the same right that the Trustee acquired as property of the estate under § 541. Section 32-3-10 does not restore ownership of the van to the Petersons under the facts presented nor does § 32-3-10 give the Bank an opportunity to perfect its security interest post-petition. The automatic stay prevents such post-petition perfection. See *In re Nasr*, 191 B.R. 689, 693 (Bankr. S.D. Ohio 1996) (post-petition lien is void as a violation of the automatic stay under § 362(a)(4)).

Trustee Lovald shall submit a proposed judgment in accordance with this letter decision that avoids the Bank's lien.

Sincerely,



Irvin N. Hoyt
Chief Bankruptcy Judge

INH:sh

CC: adversary file (docket original;
copies to parties in interest)

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

DEC 23 1996

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

Case: 96-04032 Form id: 122 Ntc Date: 12/23/96 Off: 4 Page : 1
Total notices mailed: 6

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