

**UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION**

IN RE:)	
)	
In re Kevin Leon Oliver,)	Case No 12-50219
)	
Debtor.)	
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**ORDER DENYING SUNTRUST BANK’S MOTION FOR RELIEF FROM STAY
AND MOTION FOR TURNOVER**

THIS MATTER came before the Court on April 4, 2012, after due and proper notice, for consideration of the Motion by SunTrust Bank for Relief from Stay regarding a 2010 Mazda and the Motion by SunTrust Bank for Turnover of Property. Rebecca Leigh appeared on behalf of SunTrust Bank, Robert McLaughlin appeared on behalf of the Debtor, and C. Edwin Allman, III appeared as Chapter 7 Trustee.

This Court has jurisdiction over this proceeding pursuant to 28 U.S.C. §§ 157 and 1334, and Local Rule 83.11 of the United States District Court for the Middle District of North Carolina. Having considered the motions, the objection filed by the Debtor, the objection filed by the Chapter 7 Trustee, and other matters of record in this case, the Court concludes the Suntrust Bank’s motions must be denied.

BACKGROUND

The Debtor filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code on February 16, 2012 (the “Petition Date”). C. Edwin Allman, III was appointed the Chapter 7 Trustee (the “Trustee”) in the case. SunTrust Bank (the "Creditor") is a creditor of the Debtor by virtue of a retail installment agreement dated June 10, 2009 for the purchase of a 2010 Mazda

(the "Vehicle") in the original amount of \$27,839.93. The Creditor perfected its security interest in the Vehicle by having its lien noted on the Vehicle's certificate of title. Approximately two years later, on August 3, 2011, the Creditor forwarded the certificate of title to the Debtor indicating that the lien had been satisfied in error. In an effort to correct this error, the Creditor requested and obtained a duplicate title from the North Carolina Department of Motor Vehicles with an issue date of November 23, 2011.

The Debtor defaulted on payments, and the Creditor repossessed the Vehicle shortly before the Debtor filed his bankruptcy petition. As of the Petition Date, an outstanding balance of \$19,024.40 remained due under the retail installment agreement, and the Vehicle had an estimated retail value of \$17,100.00. The Creditor seeks turnover of the Vehicle's certificate of title and relief from stay to exercise its available remedies.

DISCUSSION

The issue before the court is whether the Creditor has a valid perfected lien on the Vehicle or the Trustee has priority as a judicial lien creditor pursuant to § 544(a)(1).

The parties do not dispute that, initially, the Creditor properly perfected its security interest in the Vehicle by having its lien noted on the Vehicle's certificate of title pursuant to § 20-58 of the North Carolina Motor Vehicle Act. In North Carolina, Section 20-58 provides for the only method of perfection of a security interest in a vehicle specifically stating, "[e]xcept as provided in G.S. 20-58.8, a security interest in a vehicle of a type for which a certificate of title is required shall be perfected *only as hereinafter provided*." N.C. Gen. Stat. § 20-58(a) (emphasis added). The statute clearly and unambiguously indicates that the exclusive means of perfection of a security interest in a vehicle is set forth in that section or in § 20-58.8, which is

not applicable in this case.

Subsequently, and prematurely, the Creditor forwarded the certificate of title for the Vehicle to the Debtor with the notation that the lien had been satisfied. Pursuant to N.C. Gen. Stat. § 20-58.4, by executing the release in the space provided on the certificate and mailing the certificate to the owner of the Vehicle, the Creditor released its perfected security interest.

Several months later, the Creditor obtained a duplicate title from the North Carolina Division of Motor Vehicles, yet in doing so, the Creditor did not re-perfect its security interest. N.C. Gen. Stat. § 20-68 provides that a lienholder or owner may apply for a duplicate if a certificate of title is lost, stolen, mutilated, destroyed or becomes illegible. This section does not provide for a method of perfecting a security interest in a vehicle, and, as it plainly states, serves only to replace certificates that were lost, stolen, mutilated, destroyed or illegible, none of which was the case here. As stated previously, a security interest in a vehicle may only be perfected as provided in § 20-58. Furthermore, § 20-58(a)(2) provides in part:

An application for notation of a security interest may be signed by the secured party instead of the debtor when the application is accompanied by documentary evidence of the applicant's security interest in that motor vehicle signed by the debtor and by affidavit of the applicant stating the reason the debtor did not sign the application. In the event the certificate cannot be obtained for recordation of the security interest, when title remains in the name of the debtor, the Division shall cancel the certificate and issue a new certificate of title listing all the respective security interests.

N.C. Gen. Stat. § 20-58(a)(2). The statute clearly contemplates circumstances in which a creditor may be having difficulty contacting the debtor and does not have the debtor's signature on the application for notation of a security interest or possession of the certificate of title. By merely obtaining a duplicate certificate of title, as though the original was lost, stolen, mutilated,

destroyed or illegible, rather than submitting an application for notation of a security interest along with the appropriate affidavit pursuant to § 20-58, the Creditor failed to properly re-perfect its security interest. As a result, on the Petition Date, and the Creditor's security interest was unperfected.

Section 544(a)(1) of the Bankruptcy Code grants a bankruptcy trustee certain strong-arm powers including the right and power to avoid transfers that would have been voidable by a judicial lien creditor. 11 U.S.C. § 544. "The purpose of the trustee's strong arm powers is to cut off unperfected security interests and other undisclosed claims against the debtor's property as of the bankruptcy petition date." *In re Taylor-Ramsey Corp.*, 458 B.R. 270, 273 (Bankr. M.D.N.C. 2011) (citations omitted). The scope of those rights is determined by applicable state law. *In re Kitchen Equipment Co. of Virginia, Inc.*, 960 F.2d 1242, 1245 (4th Cir. 1992). In this case, the applicable state law is that of North Carolina, and in North Carolina a judicial lien creditor has priority over a creditor with an unperfected lien. *See* N.C. Gen. Stat. § 1-444.33. Consequently, while the debt and security agreement remained in effect as between the Creditor and the Debtor on the Petition Date, the Trustee intervened with the rights of a judicial lien creditor and, accordingly, has a priority interest in the Vehicle over the Creditor. *See In re Lortz*, 344 B.R. 579 (Bankr. C.D. Ill. 2006).¹

Based upon the foregoing, the Motion by SunTrust Bank for Relief from Stay and the

¹ The Creditor relies on *In re Thayer*, 360 B.R. 912 (Bankr. D. Minn. 2007) to argue that the Court should grant it equitable relief finding that the lien is still valid; however, that case is not applicable to the facts presented here. In *Thayer*, the court was presented with an adversary proceeding initiated by a lender against a debtor seeking a determination that it held a valid and enforceable mortgage in the wake of errors made following the debtor rescission of a refinance pursuant to the Truth In Lending Act. The trustee was not a party to the case.

Motion by SunTrust Bank for Turnover of Property are denied.

SO ORDERED.

Parties to be Served

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