

**UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF NORTH CAROLINA**

<b>IN RE:</b>	)	
	)	
<b>Jerry Williams</b>	)	<b>Case No. 01-50277</b>
	)	
<b>Debtor.</b>	)	
	)	

**MEMORANDUM OPINION**

This matter came on for hearing before the undersigned Bankruptcy Judge upon the Motion for Rehearing on Motion for Relief from Stay by Chrysler Financial Company, L.L.C. and Trustee's Request for Turnover. Appearing before the Court were Kiah T. Ford, IV counsel for Lake Norman Chrysler Plymouth Jeep ("Lake Norman Chrysler"), Matthew E. Roehm, counsel for Chrysler Financial Company, L.L.C. ("Chrysler Financial") and W. Joseph Burns, Chapter 7 Trustee.

The issue before the Court is whether Chrysler Financial properly perfected its security interest in a 2000 Dodge Ram within twenty days from the date that the Debtor received possession of the vehicle. For the reasons set forth herein, the Court finds that Chrysler Financial did not show by a preponderance of the evidence that it perfected its security interest in the vehicle within twenty days, that the lien of Chrysler Financial is preferential and that the Motion for Relief from Stay should be denied.

**BACKGROUND**

On December 23, 2000 the Debtor purchased a 2000 Dodge Ram Van from Lake Norman Dodge in Cornelius, North Carolina. The transaction was financed by Chrysler Financial. To secure the amount advanced by Chrysler Financial, the Debtor granted a security interest in the

vehicle to Chrysler Financial. A lien was noted on the title on January 17, 2001. The Debtor filed a voluntary petition for relief under Chapter 13 of the Bankruptcy Code on February 2, 2001. On April 4, 2001 Chrysler Financial filed a Motion for Relief from Automatic Stay regarding a 2000 Dodge Ram Van #2B6HB11Y8K112695 (the "vehicle"). The Debtor subsequently converted the case to a Chapter 7 on May 11, 2001. W. Joseph Burns, the Chapter 7 Trustee, filed an Objection to Chrysler Financial's motion for relief from stay on the basis that Chrysler Financial's lien on the vehicle appeared to be an invalid preference in violation of §547 of the Bankruptcy Code. The Trustee also requested turnover of the vehicle.

Chrysler Financial did not object to the denial of its motion for relief or to the turnover of the vehicle, as it appeared from the face of the title that the lien was perfected outside the twenty day period of §547. An Order denying Chrysler Financial's motion for relief from stay was entered on June 25, 2001 in which the Court found that the security interest was not perfected within the twenty day grace period of 11 U.S.C. § 547(c)(3)(B). No party appeared on behalf of Chrysler Financial at the hearing and they did not object to hearing the request for turnover by motion as opposed to an adversary proceeding. It is undisputed that in order for Chrysler to have a perfected security interest in accordance with N.C.G.S. § 20-58.2, all required acts must be completed no later than January 12, 2001.

Subsequently, Chrysler Financial contacted the dealership, Lake Norman Chrysler, regarding reimbursement for its loss. Lake Norman Chrysler indicated that the application for notation of the security interest had been delivered within 20 days of the date of the security agreement. The Declaration of Jennifer Patterson, New Car Title Clerk, was submitted which indicated that the application was delivered to the Division of Motor Vehicles (hereinafter referred to as the "DMV") on January 10, 2001. A motion for rehearing was filed on July 5,

2001 and was granted.

At the rehearing on the matter, Jennifer Patterson testified that she prepared the title work in this matter on January 9, 2001 and that as a general practice, the title work was delivered by a courier to the DMV within one or two days, but that it was possible that the title work was delivered at later than that date. Ms. Patterson provided no conclusive testimony regarding the date of delivery. Lake Norman admitted into evidence a log containing eleven new titles. The Debtors vehicle is the fourth entry on the log. The log is dated January 10, 2001. The Court finds it is more likely that this document was prepared on January 10, 2001 and was available for the courier to pickup early on the morning of January 11, 2001. Neither the DMV, Chrysler Financial nor Lake Norman Chrysler has record of the specific date of receipt of the title application. All deliveries to the DMV are made via courier. At the end of the hearing, Lake Norman Chrysler moved to be allowed to supplement the record with additional evidence. The Court granted the motion.

Lake Norman Chrysler further supplemented the evidence presented at the hearing by providing the declaration of James J. Davis, which indicates that Mr. Davis was the courier for Lake Norman Chrysler in January of 2001. On each day that the DMV was opened Mr. Davis obtained all new title applications from Lake Norman Chrysler in the morning and delivered those documents to the DMV around 9:00 a.m. In the declaration, Mr. Davis further stated that at the time of delivery, he usually received from the DMV a set of processed titled applications and an invoice for fees associated with those applications. Upon his return to the dealership he would deliver the processed title applications and the invoice to the new title clerk. It is clear from the supplemented evidence that even if the title was delivered to the dealership on January 11, 2001 no fees were delivered.

Based upon Mr. Davis' Declaration, once DMV processed the title applications, Mr. Davis would be given an invoice for the fees associated with those applications which he would then take back to the dealership. Fees were only paid to the DMV after the processed titled applications were returned to Lake Norman Chrysler. In this instance, the application on the vehicle was processed on January 17, 2001. Based on the Declarations presented, it was the standard practice of the dealership to remit fees only after the applications were processed by the DMV. No evidence of payment was presented.

In addition, Lake Norman Chrysler provided a declaration of Peggy Earle stating that she manages the office of the DMV where Lake Norman Chrysler regularly delivered its applications, that Mr. Davis regularly arrived around 9:00 am on days that the office was open, that the DMV computer system was down on the morning of January 11, the afternoon of January 12 and for several hours on January 16, 2001, and that the DMV was closed on Martin Luther King Day, January 15, 2001.

### **DISCUSSION**

A prepetition transfer by a debtor is avoidable as a preference if it results in the creditor receiving more than it would in a liquidation and is (1) made to or for the benefit of a creditor; (2) for or on account of an antecedent debt owed by the debtor before the transfer is made; (3) while the debtor is insolvent; (4) within 90 days before the date of the filing of the petition. 11 U.S.C. § 547(b). The creditor may prevent avoidance if it establishes that the security interest secures new value and was perfected on or before 20 days after the Debtor receives possession of the property. 11 U.S.C. § 547(c)(3). Once the elements of a preference pursuant to § 547(b) are established, a creditor must establish the necessary elements of any defense by a preponderance of the evidence. 11 U.S.C. § 547(g); J.P. Fyfe, Inc. of Florida v. Bradco Supply Corp., 891 F.2d

66, 70 (3<sup>rd</sup> Cir. 1989); In re Gateway Pacific Corp., 153 F.3d 915, 917 (8<sup>th</sup> Cir. 1998); Miller & Rhoads, Inc. Secured Creditors' Trust V. Robert Abbey, Inc., 153 B.R. 725, 727 (Bankr. E.D. Va. 1992).

The Trustee has moved to set aside Chrysler Financial's security interest in the 2001 Dodge Ram on the grounds that the lien is a voidable preference under 11 U.S.C. § 547(b). Section 547(c)(3)(B) prohibits the avoidance of a security interest for a loan used to acquire property if, the security interest is "perfected on or before 20 days after the debtor receives possession of such property." This is known as the "enabling loan" exception. The Trustee argues that the exception does not apply as Chrysler Financial failed to perfect its interest within the 20 day period. All parties agree that the last day to perfect the interest as an enabling loan was January 12, 2001.

As stated by the Supreme Court in Fidelity "A transfer of a security interest is "perfected" under § 547(c)(3)(B) on the date that the secured party has completed the steps necessary to perfect its interest, so that a creditor may invoke the enabling loan exception only by the satisfying of the state law perfection requirements within the 20 day period provided by the federal statute." Fidelity Financial Serv., Inc. v. Fink, 522 U.S. 211, 213-14, 118 S.Ct. 651, 652 (1998).

In North Carolina, perfection of liens on motor vehicles is governed by N.C.G.S. § 20-58.2, which provides:

If the application for notation of security interest *with the required fee* is delivered to the Division within 20 days after the due date of the security agreement, the security interest is perfected as of the date of the execution of the security agreement. Otherwise, the security interest is perfected as of the date of delivery

of the application to the division.<sup>1</sup>

(emphasis added). Under the statute, a security interest in a motor vehicle is perfected on one of two dates: (1) the date of execution of the security agreement, if the application and the fee are delivered within 20 days; or (2) the date of delivery of the title application to the DMV. See also Ferguson v. Morgan, 282 N.C. 83, 191 S.E.2d 817 (1972); Bank of Alamance v. Isley, 74 N.C. App. 489, 328 S.E.2d 867 (1985). Under either scenario, the application must be delivered to the DMV within 20 days in order for 11 U.S.C. § 547(c)(3)(B) to apply.<sup>2</sup> The only issue before the Court is whether Lake Norman Chrysler delivered the Debtor's title application to the DMV with the required fee on or before January 12, 2001.

In the present case, the Court finds that Lake Norman Chrysler has failed to meet its burden of proof regarding the exact date of perfection. These parties presented evidence regarding their standard practice for delivery, but this evidence was inconclusive as to the exact date of delivery of the particular application and the fee relevant to this matter. The Court finds that the testimony of the title clerk was credible and that, while the title clerk was informative regarding the standard procedure that she followed, she was unsure as to the exact date of delivery. In In re Horner, the court was faced with a similar situation in which it was unclear

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<sup>1</sup> "Division" is defined to mean "[t]he Division of Motor Vehicles acting directly or through its duly authorized officers and agents." N.C.G.S. § 20-4.01(6). This definition includes the Mooresville DMV office.

<sup>2</sup> The term "delivery" has been construed in other states with similar statutes to the North Carolina Statute as the date that the DMV actually receives the application and fee, not the date it is mailed. In re Jarvis, 242 B.R. 172 (Bankr. S.D. Ill. 1999); In re Horner, 248 B.R. 516, 518 (N.D.W.Va. 2000)(citing Barnes v. GMAC (In re Ross), 193 B.R. 902 (Bankr. W.D. Mo. 1996)). Further, a presumption of delivery is insufficient, some proof of actual receipt is necessary to demonstrate the delivery. In re Enos, 185 B.R. 388 (Bankr. D. Mass. 1995); Peoples National Bank of Rockland County v. Weiner, 129 A.D.2d 782, 514 N.Y.S.2d 772 (1987).

from the creditor's records when the DMV received the application and requisite fee. In re Horner, 248 B.R. 516 (Bankr. N.D.W.Va. 2000). In that case, however, the court was able to rely on records provided by the bank which showed the date the check payable to the DMV was negotiated and paid. Id. In this case, the movant presented no evidence of receipt of payment by the DMV.

N.C.G.S. § 20-58.2 requires delivery of both an application and a fee. The declaration of the courier indicates that he delivered the applications and later received an invoice. It is unclear from the evidence what day the fee was actually delivered, but the evidence presented by the movant indicates that the fee was delivered to the DMV no earlier than January 17, 2001. The Court is not willing to presume that the application and fee were delivered prior to January 12, 2001, and the Court cannot speculate as to what day the DMV finally received both the application and the fee. The movant has not demonstrated by a preponderance of the evidence that delivery of the application and fee was within the requisite twenty day period.

### **CONCLUSION**

The Court, having conducted a rehearing on the motion for relief from stay, in accordance with the foregoing findings of fact and conclusions of law, orders that Chrysler Financial's Motion for Relief from Stay is denied.

This the 27 day of August, 2001.

**CATHARINE R. CARRUTHERS**

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Catharine R. Carruthers  
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF NORTH CAROLINA

IN RE:

Jerry Williams

Debtor.

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Case No. 01-50277

ORDER

For the reasons set forth in the memorandum opinion entered contemporaneously  
herewith,

IT IS ORDERED AND ADJUDGED that Chrysler Financial's Motion for Relief from  
Stay is denied.

This the 27 day of August, 2001.

CATHARINE R. CARRUTHERS

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Catharine R. Carruthers  
United States Bankruptcy Judge