

NOT FOR PUBLICATION IN WEST'S BANKRUPTCY REPORTER

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF COLUMBIA

In re )  
 )  
SHEBA REGINA ANN WILSON ) Case No. 03-1583  
GREENE and ) (Chapter 7)  
GERALD S. GREENE, )  
 )  
Debtors. )

DECISION RE MOTION TO AVOID LIEN

The debtors have filed a motion with this court requesting the avoidance of a lien held by First North American National Bank and Circuit City Stores, Inc. (D.E. No. 16, filed November 21, 2003). There are a number of issues with respect to the debtor's attempted lien avoidance that concern the court. The first and overriding issue is the lack of proper service of the motion.

I

First, this is in part an 11 U.S.C. § 522(f) avoidance action. Exemptions in general, including avoidance proceedings related to exemptions, are governed by F.R. Bankr. 4003. Rule 4003(d) requires that motions to avoid liens under § 522(f) be treated as contested matters under Rule 9014. Rule 9014(b) requires that service of contested matters be completed in a manner that complies with Rule 7004 requirements for service of a complaint and summons. Those

service requirements were not met because the debtors did not comply with F.R. Bankr. 7004(b), which requires service upon a corporation by mailing a copy of the paper to the attention of an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process. The debtors in this case did not serve an agent or officer of the corporation.

## II

The motion by the debtors has other flaws that it would behoove the debtors to address prior to re-serving the motion in accordance with Rule 7004(b). Namely, the debtors have not alleged with the required specificity the non-possessory, nonpurchase money security interest nature of the liens that they seek to avoid under 11 U.S.C. § 522(f). It is inferred from the motion submitted that the creditor's interest is non-possessory and that none of those items have been repossessed by the creditor. However, because the interest appear to have arisen from multiple purchases, it is unclear to what extent the interest no longer constitutes a purchase money security interest.

First, the debtors must acknowledge what is owed to the creditor on each purchase. While the goods *in toto* may no longer retain the character of collateral for purchase money

security interests (PMSIs), some of the goods may retain that character and the court is not able to make that determination based on the debtors' submission. Merely stating that the interest is a non-purchase money security interest is not sufficient for this court to make that determination.

The court recognizes that the debtors argue that the purchase money character of their lien was destroyed by the creditor's extending the liens to all items purchased by the credit card until the entire balance of the card was paid in full. However, the better rule is that assuming that an allocation of payments can be made, a set of cross-collateralized PMSIs retain that character as to a particular piece of collateral to the extent that the purchase amount has not been paid off. See *Pristas v. Landaus of Plymouth, Inc.* (*In re Pristas*), 742 F.2d 797, 800-01 (3d Cir. 1984).

In the District of Columbia, D.C. Code Ann. § 28-3805 (Debts secured by cross-collateral) specifies the manner of application of payments under a revolving charge account.<sup>1</sup>

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<sup>1</sup> D.C. Code Ann. § 28-3805 provides:

(a) If debts arising from two or more consumer credit sales other than sales pursuant to a revolving charge account (section 28-3701), are secured by cross-collateral, or consolidated into one debt payable on a single schedule of payments, and the debt is secured by security interests taken with respect to one or more of the sales, payments received by the seller after the taking of the cross-collateral or the consolidation are deemed, for the purpose of determining the amount of the debt secured by the various security interests, to have been first applied to the payment of the debts arising from the sales first made. To the extent debts are paid according to this section, security

Since D.C. Code Ann. § 28:9-103 paragraphs (e), (f), and (g) do not apply to consumer goods transactions, there is no conflict between the allocation rules of § 28-3805 and § 28:9-103. Application of payments in accordance with § 28-3805 may have preserved the purchase money character of the creditor's security interest as to some items, depending on which items' purchase prices have been paid off. See In re McAllister, 267 B.R. 614, 624 (Bankr. N.D. Iowa, 2001).<sup>2</sup>

To that end, the debtors must allege facts that allow the court to determine the extent of the purchases and payments. Namely, the debtors should chronologically list the purchases (by item, dates of purchase, and purchase price with tax and the applicable tax rate) and the payments made to the creditor on the account in question, also listed by date of payment. The debtors should also give the court a cohesive explanation

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interests in items of property terminate as the debts originally incurred with respect to each item are paid.

(b) Payment received by the seller upon a revolving charge are deemed, for the purpose of determining the amount of the debt secured by the various security interests, to have been applied first to the payment of credit service charges in the order of their entry to the account and then to the payment of debts in the order in which the entries to the account showing the debts were made.

(c) If the debts consolidated arose from two or more sales made on the same day, payments received by the seller are deemed, for the purpose of determining the amount of the debt secured by the various security interests, to have been applied first to the payment of the smallest debt.

<sup>2</sup>If these purchases took place outside the District of Columbia, the debtors should allege which state's law governs each lien and provide the parties' agreements so far as they bear on this question.

of how the payments ought to be allocated. If the District of Columbia law does not apply, the debtors should also include the credit agreement between the debtors and the creditor so that the court may determine if contract law governs the allocation of payments.

### III

Lastly, the court notes that the motion seeks relief beyond F.R. Bankr. P. 4003(d), which would require the initiation of an adversary proceeding under F.R. Bankr. P. part VII. Specifically, the motion alleges that the asserted lien is invalid under DC. Code Ann. § 28:9-320(b). That provision deals with purchases "from a person who used or bought the goods for use primarily for personal, family, or household purposes" [emphasis added] and not sales to a person for household use, and hence is of doubtful applicability. In any event, the debtors have not shown that the assertion of invalidity is in any way related to the administration of the estate or to any of the debtors' rights under the Bankruptcy Code. The trustee has filed a "Report of No Distribution" and if the debtors exempt the property or the trustee abandons it, their claim that the lien is invalid is simply a characteristic of the property exempted or abandoned, and the debtors can assert that invalidity outside of this bankruptcy

case. It is thus doubtful that subject matter jurisdiction exists as to the issue of invalidity of the lien. See Turner v. Ermiger (In re Turner), 724 F.2d 338 (2d Cir. 1983). The court's order follows.

Dated: February 27, 2004.

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S. Martin Teel, Jr.  
United States Bankruptcy Judge

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