IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

IN RE:	)	
	)	
MICAH J. TUCKER,	)	**Case No. 00-12119**
LAURA D. TUCKER,	)	**Chapter 7**
	)	
Debtors.	)	
	)	
J. MICHAEL MORRIS, Trustee,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Adversary No. 00-5231**
	)	
BANK OF AMERICA, N.A.,	)	
MICAH J. TUCKER,	)	
and LAURA D. TUCKER,	)	
	)	
Defendants.	)	
	)	

MEMORANDUM OPINION

The matter comes before the Court on the Chapter 7 Trustee's Complaint To (1) Avoid And Recover Preferential Transfer; (2) Determine Rights; And (3) Recover Post-Petition Payments. The trustee seeks to avoid as preferential Bank of America's late-perfected security interest in the debtors' 1989 Oak Creek Mobile Home, and recover post-petition payments the debtors' made to Bank of America on the mobile home. The Chapter 7 trustee and Bank of America have submitted the matter on stipulations and briefs. After reviewing the stipulations, exhibits, and legal briefs, the Court concludes that Bank of America perfected its security interest in the 1989 Oak Creek Mobile Home within the preference period, and as such, its lien may be

avoided by the Chapter 7 trustee pursuant to 11 U.S.C. § 547(b)[1] and the lien preserved to the estate pursuant to § 551. The Court also concludes that pursuant to Morris v. Vulcan Chemical Credit Union (In re Rubia), 257 B.R. 324 (10th Cir. B.A.P. 2001), the trustee is not entitled to recover from Bank of America the post-petition payments voluntarily made by the Tuckers to Bank of America.

STIPULATED FACTS

On March 31, 2000, Micah and Laura Tucker, debtors, executed and delivered to Bank of America ("the Bank") a Security Agreement regarding a 1989 Oak Creek Mobile Home, VIN OCO3892690AB, and the Tuckers took possession of the mobile home at this time.[2] The Tuckers first scheduled payment under the promissory note was due on May 15, 2000.[3] The Bank did not file a Notice of Security Interest under KAN. STAT. ANN. § 8-135 and its security interest was not perfected until the Tuckers applied for a title on May 17, 2000, 47 days after the Tuckers signed the promissory note.[4] On June 7, 2000, the Tuckers filed their Chapter 7 bankruptcy petition, claiming the 1989 mobile home as exempt.[5] After filing their petition, the Tuckers made post-petition payments to the Bank to reduce the lien against the mobile home from June through September 2000.[6] Thereafter, the Tuckers made the payments to the trustee.[7] On April 19, 2001,

[1]All statutory references are to Title 11, United States Code, unless otherwise noted.

[2]Exhibit B.

[3]Exhibit B.

[4]Exhibit F.

[5]Exhibit C.

[6]Exhibit D.

[7]Exhibit E.

the Tuckers and the trustee resolved the adversary action as between them in favor of the trustee, and the Tuckers agreed to continue making the mobile home loan payments to the trustee during the pendency of the action.[8] The Bank and the trustee have stipulated that the Tuckers' unsecured creditors will not receive full payment on their claims.

ISSUES

The issues before the Court are (1) whether the Bank's perfection of its security agreement is an avoidable preference; (2) whether the Bank must turnover the post-petition payments collected from the debtors from June through September 2000; and, (3) whether the Chapter 7 trustee is entitled to fees and costs incurred in prosecuting this action.

ANALYSIS

The trustee asserts that a preferential transfer occurred when the Bank noted its lien on the mobile home's certificate of title 47 days after the Tuckers signed the promissory note.[9] The trustee may avoid a preferential transfer for the benefit of the estate. See § 547(b). Section 547(b) of the Bankruptcy Code provides:

> (b) Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property –
>
> (1) to or for the benefit of a creditor;
>
> (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
> (3) made while the debtor was insolvent;

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[8]Exhibit A.

[9]Kansas requires notation of a security interest on the certificate of title to a manufactured home or mobile home. See KAN. STAT. ANN. § 84-9-302(3). KAN. STAT. ANN. § 58-4204 prescribes the method by which a secured party notes its lien on a manufactured home's certificate of title, or executes a Notice of Security Interest delivered to the Division of Vehicles of the Department of Revenue.

> (4) made –
>
> > (A) on or within 90 days before the date of the filing of the petition;
> >
> > (5) that enables such creditor to receive more than such creditor would receive if–
> >
> > (A) the case were a case under chapter 7 of this title.

The trustee has the burden of proving the avoidability of a transfer under subsection (b), and the creditor against whom recovery or avoidance is sought has the burden of proving the nonavoidability of a transfer under subsection (c). See § 547(g).

The transfer in this case was a preferential transfer. § 547(b)(1). Section 101(54) includes within the definition of "transfer" the "retention of title as a security interest," therefore, a transfer of an interest of the debtors for the benefit of a creditor occurred when the Bank noted its lien on the mobile home's certificate of title on May 17, 1999.

Additionally, the transfer was made for or on account of an antecedent debt. § 547(b)(2). The promissory note was signed and the purchase money loaned on March 31, 2000, however, the Bank's lien was not noted on the mobile home's title until May 17, 2000, some 47 days later. Sections 547(c)(3) and 547(e)(2)(A) provide that if a creditor perfects its purchase money security interest within 20 days of the purchase money transfer, then perfection relates back to the date of the purchase money transfer and the transfer is not preferential. However, if perfection does not occur within 20 days, then the transfer is made at the time the purchase money security interest is perfected, and may be subject to an avoidance action by the trustee. § 547(e)(2)(B). Because the Bank did not perfect its purchase money lien within 20 days, the perfection and transfer occurred on May 17, 2000, and the transfer was for an antecedent debt incurred on March

31, 2000.

No one contests that the Tuckers were insolvent on May 17, 2000, the date of the transfer. § 547(b)(3). Although the Bank argues that it was completely unaware of the Tuckers' insolvency based on the financial information provided for the mobile home purchase, the argument does very little to rebut the presumption that the Tuckers were insolvent for the 90 days preceding the date of the filing of their petition. See § 547(f). Because the date of the transfer is May 17, 2001 per § 547(e)(2)(B), it occurred within the 90 days preceding the date of the Tuckers' bankruptcy case. § 547(b)(4).

Finally, the Bank's perfection of its lien enables it to receive more than it would as an unsecured creditor in this case. § 547(b)(5). If the transfer had not occurred, the Bank's only rights in the mobile home would be those of an unsecured creditor and the parties stipulated that the unsecured creditors would not receive full payment of their claims in this case. By virtue of the Bank's late perfection, it would receive more than it otherwise would have absent the transfer.

The Bank argues that even if the transfer is preferential, it was intended to be a contemporaneous exchange for value and was in fact a substantially contemporaneous exchange because the Bank perfected its lien within 47 days of the transaction. §547(c)(1).[10] The Bank relies on In re Lyon, 35 B.R. 759 (Bankr. D. Kan. 1982) and In re Dorholt, 224 F.3d 871 (8th Cir. 2000) in support of its position that the perfection was a substantially contemporaneous exchange. In Lyon, the creditor delayed 20 days in filing its non-purchase money security interest mortgage.

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[10]Section 547(c)(1) provides that the trustee may not avoid under this section a transfer to the extent that such transfer was–

(A) intended by the debtor and the creditor to or for whose benefit such transfer was made to be a contemporaneous exchange for new value given to the debtor; and

(B) in fact a substantially contemporaneous exchange.

The bankruptcy court held that notwithstanding the 20-day delay, the transfer was not preferential because the parties intended the transfer to be substantially contemporaneous, the transfer was in fact substantially contemporaneous, and the transfer was not the kind of preference § 547 was intended to discourage.[11] 35 B.R. at 762. In Dorholt, the creditor loaned money to a family printing business and received a non-purchase money lien in inventory, accounts receivable, fixtures and equipment, but the lien was not perfected by filing until sixteen days later. The Eighth Circuit affirmed the Bankruptcy Appellate Panel, holding that the ten-day time limit for perfection outlined in § 547(e)(2) is not applicable to § 547(c)(1) and thus, the perfection was substantially contemporaneous. While both of these cases are helpful, both are distinguishable from the present case since neither one deals with a purchase money security interest.

Further, the Bank's reliance on the §547(c)(1) exception is misplaced. While §547(c)(1) deals generally with security interests, § 547(c)(3) applies specifically to purchase money security interests. Section 547(c)(3) provides,

> (c) The trustee may not avoid under this section a transfer–
>
> (3) that creates a security interest in property acquired by the debtor–
>
> (A) to the extent such security interest secures new value that was–
>
> (i) given at or after the signing of a security agreement that contains a description of such property as collateral;
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> (ii) given by or on behalf of the secured party under such agreement;
>
> (iii) given to enable the debtor to acquire such property; and
>
> (iv) in fact used by the debtor to acquire such property; and

[11]The Court also notes that the Lyon court relied on In re Arnett, 13 B.R. 267 (Bankr. E.D. Tenn. 1981) which was subsequently reversed by the Sixth Circuit in Ray v. Security Mut. Fin. Corp. (In re Arnett), 731 F.2d 358 (6th Cir. 1984).

> (B) that is perfected on or before 20 days after the debtor receives possession of such property.

Many courts have concluded that purchase money security lenders may not seek alternative shelter for their preferential transfers under § 547(c)(1) when they do not meet the 20-day perfection requirement under § 547(c)(3). See Pongetti v. GMAC (In the Matter of Locklin), 101 F.3d 435, 443 (5th Cir. 1996); Wachovia Bank & Trust Co. v. Bringle (In re Holder), 892 F.2d 29, 31 (4th Cir. 1989); Union Bank & Trust Co., Erie v. Baker (In re Tressler), 771 F.2d 791, 794 (3rd Cir. 1985); Gower v. Ford Motor Credit Co. (In re Davis), 734 F.2d 604, 607 (11th Cir. 1984); Valley Bank v. Vance (In re Vance), 721 F.2d 259, 262 (9th Cir. 1983). One prominent bankruptcy commentator also notes that purchase money lenders have attempted to protect their security interests not perfected within 20 days using § 547(c)(1).

> "Creditors have often argued that the protections of the contemporaneous exchange exception could extend to creditors who fail to meet the 20-day, formerly 10-day, perfection rule under the enabling loan exception in section 547(c)(3). Enabling lenders who do not timely perfect their security interests have claimed that their loan to the debtor and the perfection of the security interest were nevertheless "substantially contemporaneous". Although earlier bankruptcy court decisions often permitted these creditors to utilize section 547(c)(1), the better rule holds that section 547(c)(1) is not available to creditors who fail to meet the time requirement of section 547(c)(3)."

5 Collier on Bankruptcy ¶ 547.04[1], pp. 547-43, 44 (15th rev. ed. 2000).

While neither the Tenth Circuit nor any federal court in this District has ruled on this issue, this Court is persuaded by the rationale and outcome of the circuit court cases and commentary cited above. Section 547(c)(3) is the relevant exception in this case since it specifically applies to enabling loans and the legislative history of § 547(c)(1) suggests that it was enacted "to ensure that purchases by check would not be avoided as preferential." Locklin, 101 F.3d at 443. Also, "the main policy behind the ten-day, [now 20-day] grace period [in § 547(c)(3)] was to create a

uniform perfection period for enabling loans," and if § 547(c)(1) is read as an alternative to § 547(c)(3), then § 547(c)(3) is "virtually meaningless" and the court must examine under § 547(c)(1) every enabling loan that does not qualify for protection under § 547(c)(3) Id. (citation omitted). Because the Bank did not perfect its enabling loan lien within 20 days as required under § 547(c)(3), it cannot alternatively protect its preferential lien under the substantially contemporaneous exception of § 547(c)(1). The trustee may avoid the Bank's lien on the 1989 mobile home and preserve the lien for the benefit of the estate under § 551.

The second issue presented here is whether the trustee may recover from the Bank the post-petition payments made by the Tuckers to the Bank after filing their petition. This is among the most troubling bankruptcy questions at issue in this Circuit today. In a 2-1 decision, this Circuit's Bankruptcy Appellate Panel has held that a trustee who avoids an unperfected security interest in a vehicle, thereby preserving the lien for the estate, may not recover payments made by the debtor post-petition from the secured party. See Morris v. Vulcan Chemical Credit Union (In re Rubia), 257 B.R. 325 (10th Cir. B.A.P. 2001).[12] The majority in Rubia attempts to address the ultimate disposition of post-petition payments by making it clear that the trustee may not recover the post-petition payments from the Bank, 257 B.R. at 328-329, n.5. "By avoiding and preserving the lien, the trustee simply steps into the [secured creditor's] shoes and succeeds to the [creditor's] rights with regard to the lien." C & C Co. v. Seattle First Nat'l Bank (In re Coal-X Ltd. "76"), 103 B.R. 276, 280 (D. Utah 1986), *aff'd in relevant part and rev'd in part*, 881 F.2d 865, 866 (10th Cir. 1989). Indeed, the majority explicitly maintains that the nature of the estate's new-found

[12]The B.A.P.'s decision in Rubia is known to this Court to be on appeal to the United States Court of Appeals for the Tenth Circuit. This Court awaits with some anticipation the guidance of the Circuit on this issue.

interest in the lien ". . . does not give the Trustee the right to collect VCCU's debt from the debtor post-petition." 257 B.R. at 327, citing In re Closson, 100 B.R. 345 (Bankr. S.D. Ohio 1989). The dissent notes, however, that by disabling the trustee from collecting payments on the obligation underlying the lien, the estate is effectively stripped of any ability to realize upon its claim. Arguing that the payments are indeed "proceeds" of the preserved lien (now property of the estate) and that the lien and the underlying obligation are "inextricably intertwined," the dissent concludes that the postpetition payments made by the debtors to the lender are indeed property of the estate. 257 B.R. at 330. The trustee's arguments here are identical to those in the Rubia dissent.

The Court need not address the trustee's arguments as to whether the payments to the Bank are property of the estate or proceeds because it is constrained to follow the majority's opinion in Rubia, that the trustee is not entitled to the post-petition payments made to the Bank as evidenced by the parties' rights. 257 B.R. at 327 ("While we question whether the Postpetition Payments are 'proceeds' we will not address this issue because a review of the rights of VCCU, the debtor, and the Trustee reveals that the Trustee is not entitled to the Postpetition Payments.") Instead, the Tuckers' debt to the Bank may be discharged and, if it is, *the Tuckers*, not the trustee, may or may not have a cause of action against the Bank for the post-petition payments made to the Bank on the discharged debt. 257 B.R. at 327. Thus, without reaching the issue of who is entitled to the debtors' payments going forward (which issue has been previously resolved and is not before the Court today), the Court denies the Trustee's complaint as regards the post-petition payments made by the debtors to the Bank.

Finally, the Court grants the trustee's request for $150.00 for costs associated with bringing this adversary proceeding. Federal Rule of Bankruptcy Procedure 7054, which incorporates Fed. R. Civ. P. 54, provides that in adversary proceedings, a [bankruptcy] court may

allow costs to the prevailing party except when a statute ... or these rules otherwise provides." "Unlike the principle that attorney's fees cannot be awarded, there is no bankruptcy law policy against the granting of costs to a prevailing party for expenses in litigating federal law questions in a bankruptcy proceeding." Renfrow v. Draper, 232 F.3d 688, 695 (9th Cir. 2000)(citation omitted). The bankruptcy court's awarding of costs to a prevailing party is discretionary, not mandatory. In re Hunter, 243 B.R. 824, 826-27 (Bankr. M.D. Fla. 1999). Here, the trustee is entitled to an award of costs for successfully asserting his preference claim and avoiding the Bank's lien for the benefit of the estate. See In re Ball, 257 B.R. 309, 316 (Bankr. D. Ariz. 2001).

A Judgment on Decision will issue this day.

IT IS SO ORDERED.

Dated this 29th day of November, 2001.

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ROBERT E. NUGENT, BANKRUPTCY JUDGE
UNITED STATES BANKRUPTCY COURT
DISTRICT OF KANSAS

CERTIFICATE OF SERVICE

The undersigned certifies that copies of the **Memorandum Opinion** were deposited in the United States mail, postage prepaid on this 29th day of November, 2001, to the following:

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