Security Agreement
Application for Title
and Registration

Michael Grassmueck, Inc. v. Virginia Carrick 96-6270-fra
In re Stephen Carrick 696-63153-fra7

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At the suggestion of his first attorney, the Debtor obtained a loan of $4,000 from his mother, the Defendant, and recorded her name as a lienholder against his car with the DMV. The Debtor thereafter filed bankruptcy. This transaction was suggested as a way of eliminating nonexempt equity in the vehicle. The Trustee filed this adversary proceeding to have the lien avoided as a preferential transfer. Summary judgment was granted to Plaintiff on an uncontested motion. Defendant then obtained the services of another attorney who filed a motion for reconsideration, contending that the transaction met the contemporaneous exchange exception to the preferential transfer provisions. The parties agreed that if the Application for Title and Registration, by which the Defendant was added as a lienholder against Debtor's car, constitutes a security agreement, then the contemporaneous exchange exception applies.

The bankruptcy court reviewed the law concerning requirements for a security agreement and determined that under Oregon law, the Application for Title and Registration, by itself, does not consitute a security agreement. Because the Defendant had no security interest in the Debtor's vehicle, the vehicle is subject to turnover, subject only to payment of the Debtor's exemption amount.

UNITED STATES BANKRUPTCY COURT

DISTRICT OF OREGON

IN RE STEPHEN CARRICK, Debtor.	)	Case No. 696-63153-fra7
MICHAEL GRASSMUECK, INC., TRUSTEE, Plaintiff, vs. VIRGINIA M. CARRICK, Defendant.	)	Adv. Proc. No. 96-6270-fra MEMORANDUM OPINION

This is a proceeding for the recovery of an alleged preferential transfer. Plaintiff filed a motion for summary judgment which was unanswered. After due consideration of Plaintiff's arguments, the court granted Plaintiff's motion for summary judgment. At about this time, the Defendant obtained the services of her present attorney who filed a motion to reconsider the court's order granting Plaintiff's motion for summary

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judgment. For the reasons that follow, Defendant's motion for reconsideration will be denied.

FACTS

Approximately two months prior to filing bankruptcy the Debtor, Stephen Carrick, received $4,000 from his mother, the Defendant. On May 5, 1996. the Debtor obtained an Application for Title and Registration, listed his mother as a lienholder against his 1990 Honda, signed it, and mailed the Application to the Department of Motor Vehicles (DMV). The Application was received by DMV on May 13. The record indicates that the loan was obtained in contemplation of bankruptcy and at the suggestion of Debtor's first attorney in order to eliminate Debtor's nonexempt equity in his Honda, which he possessed free and clear prior to this transaction. The Debtor filed bankruptcy under Chapter 7 on June 28, 1996.

The Trustee filed a complaint to avoid the transfer as preferential on the ground that the security interest was not perfected within ten days, thus eliminating the contemporaneous exchange exception of 11 U.S.C. § 547(c)(1). After the hearing on Defendant's motion for reconsideration, the parties agreed that if the Application for Title and Registration constitutes the granting of a security interest, then it was perfected within ten days and would qualify as a contemporaneous exchange.[1] If

[1] It should be noted that perfection of a non-purchase money security interest more than ten days after a transfer does not necessarily eliminate the contemporaneous exchange exception of § 547(c)(1). See In re Marino, 193 B.R. 907 (BAP 9th Cir.

however, the Application does not constitute the granting of a security interest, the Defendant would possess no legal security interest in the Debtor's vehicle, perfected or otherwise. The trustee would thus be free to take possession of the vehicle, subject to the Debtor's exemption.

DISCUSSION

ORS 803.102 states that, subject to a limited exception, "the rights and remedies of all persons in vehicles subject to security interests established under ORS 803.097 shall be determined by the provisions of the Uniform Commercial Code." ORS 803.097 states, inter alia, that "the exclusive means for perfecting a security interest in a vehicle is by application for notation of the security interest on the title in accordance with this section." Whether a security interest has been created in the first place, then, is to be determined with reference to the provisions of the Uniform Commercial Code.

ORS 79.2030 states that:

> (1) [A] security interest is not enforceable against the debtor or third parties with respect to the collateral and does not attach unless:
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> (a) The collateral is in the possession of the secured party pursuant to agreement, the collateral is investment property and the secured party has control pursuant to agreement, or the debtor has signed a security agreement which contains a description of the collateral [emphasis added]. . .;

1996)(facts and circumstances of case should be reviewed to determine whether perfection in such an instance is in fact a substantially contemporaneous exchange).

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(b) Value has been given; and

(c) The debtor has rights in the collateral.

ORS 79.1050(L) defines security agreement as "an agreement which creates or provides for a security interest."

The Defendant interprets ORS 79.2030 as saying that the requirements for a security agreement are that it 1) be in writing, 2) be signed by the debtor, and 3) contain a description of the collateral. Since the Application for Title and Registration meets those requirements, the Defendant concludes that it should qualify as a security agreement. Two cases are cited which so hold: Kreiger v. Hartig, 11 Wash.App. 898, 527 P.2d 483 (1974) and Clark v. Vaughn, 504 S.W. 2d 550 (Tex. Civ. App. 1973). However, ORS 79.2030 does not define what constitutes a security agreement, it merely states that the agreement, if it is to be valid, must be in writing, be signed by the debtor, and contain a description of the collateral. A piece of paper signed by someone with the words "1973 Toyota Corolla, Veh. ID# 123456" would certainly not constitute a security agreement. Clearly, something more is needed.

The Defendant also cites to In re Summit Creek Plywood, 27 B.R. 209 (Bankr. D. Or. 1982) as support for her proposition that the document which perfects a security interest can also create the security interest. In that case, the debtor prepared and signed a security agreement granting a security interest to a creditor in various items of business assets, but the list of

collateral did not include inventory. A financing statement[2] was prepared and filed in the correct place. Thereafter, the financing statement was amended by the debtor, referring to the original financing statement and adding inventory to the list of collateral. The court, citing to a First Circuit opinion, held that "a financing statement may constitute a security agreement if it appears that there was an intent on the part of the debtor to create a security interest in the lendor." The court found that "[t]he obvious purpose of filing the amendments to the filed financing statements, at least so far as the creditor was concerned, was to give notice and perfect a security interest in inventory."

The Plaintiff cites to an Oregon Supreme Court Case which differentiates between a security agreement and a financing statement:

> The security agreement is the evidence of the contract of the debtor and creditor. It is not the instrument that gives notice to the third party of the creditor's interest in the property. Notice is provided by the filing of a financing statement. The security agreement, like any other contract, must be sufficiently certain in its terms so as to evidence the agreement of the parties.

J.K. Gill Co. v. Fireside Realty, Inc., 262 Or. 486, 499 P.2d 813 (1972). The court in J.K. Gill quoted the official comments to the UCC that "'The formal requisites stated in ORS 79.2030 are

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[2] A UCC financing statement must provide the name and address of the debtor and the secured party, provide a description of the collateral, and be signed by the debtor. O.R.S. 79.4020(1).

not only conditions to the enforceability of a security interest against third parties. They are in the nature of a Statute of Frauds. * * *'." Id. at 488.

In Amex-Protein Development Corp. v. Plant Reclamation, 504 F.2d 1056 (9th Cir. 1974), the court held that a promissory note containing the line "This note is secured by a Security Interest in subject personal property as per invoices" was sufficient to create or provide for a security interest. The agreement, which also provided a description of collateral through incorporation by reference of invoices and through reference to a more specific description of collateral in the financing statement, was sufficient to comply with statutory requirements. The court read several documents together to find that a security interest was created or provided for. While the court did not require "granting" language to find that a security interest was validly created, it is significant that the financing statement was just one document the court used to determine that a security interest was provided for; the financing statement did not, by itself, provide the necessary evidence of a security interest.

In In re Ace Lumber Supply, Inc., 105 B.R. 964 (Bankr. D. Mont. 1989), the question was whether a UCC financing statement, by itself, constituted a valid security agreement. The court held that the "composite document rule" [basically, the holding in Amex-Protein] was available under Montana law, but that that rule does not allow only a financing statement signed by the debtor to satisfy the requirements of UCC 9-203(1). The court

quoted from a Kentucky opinion which described the test articulated by Wright & Summers in interpreting UCC 9-203 and UCC 9-105:

> Giving due consideration in tandem to § 9-203 and § 9-105 of the [Uniform Commercial] Code, Wright and Summers contend that the question of whether a security agreement is established calls for two independent inquiries which may be stated as follows: The court must first resolve, as a question of law, whether the language embodied in the writing objectively indicates that the parties may have intended to create or provide for a security agreement. If the language crosses the objective threshold [citations omitted], that is, if the writing evidences a possible secured transaction and thus satisfies the statute of frauds requirement, then the factfinder must inquire whether the parties actually intended to create a security interest. Parol evidence is admissible to inform the latter [citations omitted], but not the former, inquiry.

Ace Lumber at 967. The court concluded that one common thread found in every case it examined which found security agreements in a document or series of documents not denominated as such, was that an intent to create a security agreement must appear on the face of a written document or documents executed by the debtor. In finding that a financing statement does not necessarily evidence perfection of an existing security interest, it held that "the filing of a financing statement alone is not enough to create a security interest; 'it is but one step in the means by which the rights and priorities of a secured party are 'perfected.' " Id. at 968.

Summit Creek can be harmonized with the holdings of Ace Lumber and Amex Protein in that in Summit Creek there was a valid security agreement as well as a financing agreement. There was

written documentation of the debtor's intent to create a security interest. In reading both documents together, the amended financing statement containing inventory as collateral and the security agreement which did not contain inventory, the court could have validly concluded that there was written evidence of an intent to create or provide for a security interest in inventory. Parol evidence would then be available to determine if that was in fact the parties' intent.

In the instant case, the fact that the Debtor filled out an Application for Title and Registration naming the Defendant as a lienholder does not provide the written documentary evidence of an intent to create a present security interest in favor of the Defendant. The Application is not "sufficiently certain in its terms so as to evidence the agreement of the parties." J.K. Gill Co., 262 Or. 486 (1972).

CONCLUSION

The Application for Title and Registration is not, by itself, sufficient to create or provide for a security interest in a vehicle. The Defendant thus has no security interest in the vehicle and the Estate takes it subject only to the Debtor's exemption. An order shall be entered denying Defendant's motion for reconsideration of the court's ruling granting Plaintiff's motion for summary judgment.

FRANK R. ALLEY, III
Bankruptcy Judge