

Preferences
11 U.S.C. § 547(c)(3)

Sticka v. Seattle First Nat. Bank 92-6162-fra
(In re Steven and Jane Roberts) 691-64298-fra7

5/12/95 FRA Unpublished

The debtors purchased an automobile from Emerald Chrysler Plymouth on 10/4/91 and on 10/10/91 Emerald assigned its security interest to Seafirst Bank. On 10/16/91, the Oregon Dept. of Motor Vehicles received the application for issuance of title and registration disclosing the security interest, the sole method for perfecting a security interest in a motor vehicle in Oregon.

The debtors filed their petition for relief under Chapter 7 on 12/4/91, less than 90 days from the date the car was purchased. The trustee filed a complaint to avoid the security interest as preferential and both sides filed motions for summary judgment. The bankruptcy court found in favor of Seafirst, holding that under Oregon law which allows 20 days to perfect a purchase money security interest, perfection related back to the day of transfer, thus satisfying the requirements of § 547(c)(3). The "ordinary course of business" defense was not addressed by the court. On appeal, the District Court (Hogan, J.) set aside the bankruptcy court's judgment based on the holding of the BAP in In re Loken, 175 B.R. 56 (Bankr. 9th Cir. 1994) and remanded for the court to hear and determine the "ordinary course of business" defense.

The bankruptcy court held on remand that pursuant to the 9th Circuit's opinion in Valley Bank v. Vance (In re Vance), 721 F.2d 259 (9th Cir. 1983), § 547(c)(3) is the only exception to avoidance applicable to transfers of purchase money security interests and the "ordinary course of business" exception cannot be used. Since the requirements of § 547(c)(3) were not met per Loken, judgment for the trustee/plaintiff.

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

IN RE)	
)	
STEVEN N. ROBERTS and)	Case No. 691-64298-fra7
JANE Y. ROBERTS,)	
)	
_____ Debtors.)	
)	
RONALD R. STICKA, Trustee,)	
)	
Plaintiff,)	
vs.)	Adversary No. 92-6162-fra
)	
SEATTLE FIRST NATIONAL BANK,)	
)	MEMORANDUM OPINION
_____ Defendant.)	

This is an action by the trustee to recover a preferential transfer of a security interest. 11 U.S.C. § 547. Defendant bank has asserted two defenses: (1) the transfer was perfected within the time allowed by 11 U.S.C. § 547(c)(3), and (2) the transfer was in the ordinary course of the parties' financial affairs and subject to the exception set out in 11 U.S.C. § 547(c)(2). On remand from the District Court, I find that the transfer is avoidable.

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I. BACKGROUND

The case was tried on cross motions for summary judgment, and the parties' stipulation of facts. The record presented established the following:

1. On October 4, 1991 Debtors purchased a new automobile from Emerald Chrysler Plymouth ("Emerald"). As part of the purchase they granted a security interest in the car to Emerald.

2. Emerald assigned its security interest to Seafirst Bank on October 10. At the same time, it submitted an application to the Oregon Department of Motor Vehicles for issuance of title and registration disclosing the security interest. This is the exclusive method of perfecting a security interest in a motor vehicle in Oregon. The application was received by the Division on October 16.

3. The sale was in the ordinary course of Emerald's business. It was further stipulated that Debtor would testify, subject to evidentiary rulings, that he had bought and sold cars several times in the past.

4. The Debtors filed their petition for relief under Chapter 7 of the Bankruptcy Code on December 4, 1991, less than 90 days from the date the car was bought. It is undisputed that they were insolvent at all material times.

1 This court found in favor of the Bank, holding that, since the
2 transfer was perfected within the 20 days permitted by Oregon law,
3 it related back to the date of the transfer, thus satisfying the
4 requirements of § 547(c)(3). The "ordinary course of business"
5 defense was not decided upon. The Trustee appealed to the District
6 Court. While the appeal was pending the 9th Circuit Bankruptcy
7 Appellate Panel ruled in In re Loken, 175 B.R. 56 (Bankr. 9th Cir.
8 1994), that perfection of a security interest must occur within 10
9 days, notwithstanding the 20 day period provided for under state
10 law. The District Court remanded the case to this court "for
11 consideration of the defendant's alternative ordinary course of
12 business argument and entry of a judgment consistent with the BAP
13 opinion in In re Loken."

14 II. ANALYSIS

15 A. § 547(c)(3)

16 This case is factually indistinguishable from Loken: a
17 security interest was transferred, and the transfer perfected more
18 than 10, but less than 20 days later. The Loken court held that a
19 transfer not perfected within 10 days is subject to avoidance.
20 Loken arose in Oregon, and the BAP's holding is binding on this
21 court. See In re Seldon, 121 B.R. 59, 62 (D. Ore. 1990).
22 Accordingly, the defense under § 547(c)(3) fails.¹

23 B. §547(c)(2)

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¹ Since this case was commenced before the effective date of
the 1994 reform act, the 20 day perfection period provided for in
the act is not available to Defendant.

1 Code § 547(c)(2) provides that the trustee may not avoid a
2 transfer

3 to the extent that such transfer was --

4 (A) in payment of a debt incurred by the debtor in
5 the ordinary course of business or financial affairs of
6 the debtor and the transferee; and

7 (B) made in the ordinary course of business or
8 financial affairs of the debtor and the transferee; and

9 (C) made according to ordinary business terms.

10 It is clear that the transaction was in the ordinary course of
11 Emerald's business, and the Bank's. While the record is less clear
12 as to the debtor, it can be assumed *arguendo* that it was in the
13 ordinary course of the debtor's affairs as well. However, even
14 with that assumption, the defense is not applicable here.

15 In Valley Bank v. Vance (In re Vance), 721 F.2d 259 (9th Cir.
16 1983), plaintiff bank sought relief from the automatic stay in
17 order to recover a utility trailer. The trustee countered that the
18 bank's security interest was avoidable. The Bankruptcy Court
19 agreed, in light of the fact that the security interest had not
20 been perfected within ten days. The court rejected the bank's
21 alternative defense that there had been a contemporaneous exchange
22 of value (see Code § 547(c)(1)), holding that § 547(c)(3) was the
23 only exception to avoidance applicable to transfers of purchase
24 money security interests.

25 The Court of Appeals agreed, holding that, having made
26 specific provision for purchase money security interests, the code
excluded application of the other available exceptions. 721 F.2d
at 261. The court reasoned that "applying section 547(c)(1) to

1 enabling loan transactions would make section 547(c)(3)
2 superfluous." 721 F.2d at 262 (citation omitted).

3 The same reasoning applies to Seafirst's effort to apply the
4 ordinary course exception in § 547(c)(2). The bank argues that
5 every sale of a car involving the retention of a purchase money
6 security interest is within the ordinary course and scope of its
7 (or the dealer's) business. Under that reasoning § 547(c)(2) would
8 operate to protect every transfer of a purchase money security
9 interest by a dealer to an ordinary consumer, rendering § 547(c)(3)
10 pointless.
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12 Literal application of the ordinary course exception, without
13 reference to the rest of § 547(c), would lead to a conclusion that
14 the transaction here is not subject to avoidance. So would
15 application of the contemporaneous exchange rule, since the
16 security interest was given, along with other value, in
17 consideration of the transfer of the car. However, Vance rejects
18 the notion that if a creditor can qualify under any exception, he
19 is protected to that extent. 721 F.2d at 262. Rather, the
20 creditor must qualify under the exception intended by the Congress
21 to apply to the situation at hand. In the case of the transfer of
22 a purchase money security interest, the only available exception is
23 satisfaction of the terms of § 547(c)(3).
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25 III. CONCLUSION
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1 The security interest is subject to avoidance under Code
2 § 547(b), and not subject to any exception under § 547(c).
3 Judgment is entered in favor of plaintiff trustee.

4 This Memorandum Opinion contains the Court's findings of fact
5 and conclusions of law and pursuant to Bankruptcy Rule 9014, which
6 incorporates Rule 7052, they will not be separately stated.
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10 FRANK R. ALLEY, III
11 Bankruptcy Judge
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